Ethics Panel: Candor, Conflicts (of Interest) and Collisions with Rule 9011 (Bad-Faith Filings)

CONCURRENT SESSION

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United States District Court,
E.D. Pennsylvania.

Sharon EAGAN, an incompetent, by Eugene KEITH, her guardian, Plaintiffs,
v.
Barbara JACKSON, Cooperative For American Relief Everywhere, a/k/a C.A.R.E., John Doe (name being fictitious) and ABC CORP. (name being fictitious), Defendants.

Civ. A. No. 92–533.
June 13, 1994.

Guardian filed motion for approval of settlement agreement and counsel fees in personal injury suit by incompetent ward. The District Court, Eduardo C. Robreno, J., held that: (1) New Jersey law applied; (2) settlement agreement was fair and reasonable; (3) guardian breached fiduciary duty of loyalty by placing himself in compromised position in connection with agreeing to accept portion of contingent fee from law firm representing the estate, and thus forfeited any compensation, including referral fee, in connection with the litigation; and (4) revocation of attorney's pro hac vice admission is appropriate for breach of duty of candor in silent acquiescence in guardian's statement to the court concerning fairness of settlement and endorsement of request for enhanced attorney fee.

Settlement approved and fees determined.

West Headnotes

[1] Mental Health 257A 181

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak181 k. Measure and Amount in General. Most Cited Cases

To the extent that guardian performed legal work, this did not benefit ward's estate, for purposes of fee determination, where estate had already contracted with law firm to do the legal work for a set contingent fee.

[2] Compromise and Settlement 89 2

89 Compromise and Settlement
89I In General
89k1 Nature and Requisites
89k2 k. In General. Most Cited Cases

Normally, parties to civil dispute can reach money settlement among themselves, bringing case to an end without court's approval or intervention. Fed.Rules Civ.Proc.Rule 41(a)(1), 28 U.S.C.A.

[3] Compromise and Settlement 89 4.5

89 Compromise and Settlement
89I In General
89k1 Nature and Requisites
89k4.5 k. Representatives and Fiduciaries. Most Cited Cases

Rule of Civil Procedure requiring court to appoint guardian ad litem or make such other orders as deemed proper for protection of infant or incompetent person did not provide basis for court's jurisdiction to approve settlement agreement in personal injury suit brought on behalf of ward; rather, appropriate sources of court's authority to approve the settlement were state law that the court was to apply as well as the court's inherent duty to protect the interests of minors and incompetents that come before it. Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[4] Mental Health 257A 471

257A Mental Health
257AV Actions
257Ak471 k. In General. Most Cited Cases

When called on to adjudicate claim brought on behalf of incompetent, court must treat incompetent as its ward, and must insure that she is treated fairly and justly.

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[5] Federal Courts 170B 433

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other Particular Matters. Most Cited Cases

Court rule of New Jersey, the state in which incompetent's estate was administered, as well as civil procedure rule in Pennsylvania, the state in which federal district court was situated, compelling judicial approval of compromise of an incompetent's claim, though both were "procedural" rules, were binding on the federal court in diversity case since they affected the substantive rights of the litigants. N.J.R. 4:44–3; Pa.Rules Civ.Proc., Rule 2064, 42 Pa.C.S.A.

[6] Federal Courts 170B 373

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk373 k. Substance or Procedure; Determinativeness. Most Cited Cases

State procedural rule is deemed substantive and thus binding on federal court in diversity action where application of rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum state or where application of rule would have so important effect on the fortunes of one or both of the litigants that failure to enforce it would be likely to cause plaintiff to choose the federal court.

[7] Federal Courts 170B 373

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk373 k. Substance or Procedure; Determinativeness. Most Cited Cases

Federal Courts 170B 409.1

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk409 Conflict of Laws
170Bk409.1 k. In General. Most Cited Cases

Federal court acting in diversity case is required to apply the same substantive law as would be applied by state court of its forum, including choice of law rules.

[8] Action 13 17

13 Action
13II Nature and Form
13k17 k. What Law Governs. Most Cited Cases

Under Pennsylvania choice of law rules, court must apply flexible rule which permits analysis of the policies and interests underlying the particular issue before the court, and analysis entails hybrid approach that combines the approaches of both the Restatement of Conflicts (Second) relating to contacts establishing significant relationships, and "interest analysis."

[9] Action 13 17

13 Action
13II Nature and Form
13k17 k. What Law Governs. Most Cited Cases

For purposes of choice of law analysis, "false conflict" exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law, in which case court must apply the law of the state whose interests would be harmed if its law were not applied.

[10] Compromise and Settlement 89 2

89 Compromise and Settlement
89I In General
89k1 Nature and Requisites
89k2 k. In General. Most Cited Cases

Choice of law analysis with respect to whether court should apply to proposed settlement of incompetent's personal injury suit rule of New Jersey, in which incompetent's estate was administered, or rule of Pennsylvania, in which court was situated, presented a false conflict requiring that court apply New Jersey law, where the essential difference between the two rules was that New Jersey required reviewing court to make factual findings con-

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cerning fiscal stability of any provider of structured settlement, while Pennsylvania did not, as requiring court to make such findings would not impinge upon Pennsylvania's interests, while not applying the standard would fail to promote New Jersey's interest in insuring that structured settlements will actually be paid. N.J.R. 4:44–3; Pa.Rules Civ.Proc., Rule 2064, 42 Pa.C.S.A.

[11] Mental Health 257A 251

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak239 Liabilities Of, and Claims Against, Estate
257Ak251 k. Counsel Fees and Costs. Most Cited Cases

New Jersey rather than Pennsylvania law applied to federal court's review of fees requested by counsel with respect to settlement of incompetent's claim, though court was sitting in Pennsylvania, where fee agreement was entered into in New Jersey between New Jersey client, injured in Guatemala, and a New Jersey-licensed lawyer, and New Jersey had comprehensive set of rules addressing issue of contingent fee agreements, including cap on fees earned in actions settled on behalf of infants and incompetents. Pa.Rules Civ.Proc., Rule 2064(b); Pa.Rules of Prof.Conduct, Rules 1.5, 1.8(j)(2), 42 Pa.C.S.A.; N.J.R. 1:21–7, 1:21–7(c, f), 4:44–3.

[12] Mental Health 257A 179

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak179 k. Authority, Duties, and Liability of Guardians in General. Most Cited Cases

Guardian may not place himself or herself in position where his or her interests conflict with those of ward, and duty of loyalty operates as a prophylactic, irrespective of good or bad faith on the part of the guardian. N.J.S.A. 3B:14–36.

[13] Mental Health 257A 179

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak179 k. Authority, Duties, and Liability of Guardians in General. Most Cited Cases

Mental Health 257A 181

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak181 k. Measure and Amount in General. Most Cited Cases

Guardian may not profit from fiduciary relationship existing between guardian and ward; only recompense guardian receives as a matter of course is commission upon accounting to the court, though compensation for other services, including legal, may be requested from the court. N.J.S.A. 3B:18–1 to 3B:18–33.

[14] Mental Health 257A 181

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak181 k. Measure and Amount in General. Most Cited Cases

Principle of New Jersey law allowing guardian to recover for attorney fees where recovery is from party other than the estate did not apply to case in which law firm representing the estate had agreed to pay a referral fee to the guardian, since the law firm's fee itself was deducted from the estate's recovery.

[15] Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In General. Most Cited Cases

Guardian breached fiduciary duty of loyalty by placing himself in compromised position by agreeing to ac-

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cept referral fee offered by law firm for the incompetent's estate, thereby creating interest in guardian of maximizing firm's overall fee, of which he would receive one third, especially in light of New Jersey court rule whereby attorney cannot receive contingent fee on portion of recovery exceeding one million dollars without making application to the court, and in light of guardian's endorsing law firm's petition for enhanced fee. N.J.R. 1:21–7(c)(4), (f).

[16] Mental Health 257A 233

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak231 Expenditures
257Ak233 k. Services; Litigation Expenses. Most Cited Cases

Though recommendation by guardian as to appropriateness of attorney fee upon settlement of ward's personal injury claim was not controlling, it was factor that court could reasonably rely upon.

[17] Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In General. Most Cited Cases

Conclusion that guardian breached fiduciary duty of loyalty through placing himself in a compromised position by agreeing to accept referral fee from estate's law firm, thereby creating interest in maximizing firm's fee, was not avoided on grounds that result obtained in litigation was favorable for the ward's estate, that by planning to be compensated from fee that would otherwise go to law firm, guardian was not seeking compensation from estate for work that he performed as guardian, and that he could have retained himself as attorney for the estate and thus received all of the attorney fee; first two considerations were relevant in determining quantum of harm but not to determine whether conflict existed, and to the extent that guardian had little experience in personal injury cases, he was duty bound to seek competent counsel.

[18] Mental Health 257A 133

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak133 k. Appearance and Representation by Attorney; Guardian Ad Litem. Most Cited Cases

When conflict of interest exists between guardian and ward, court is required to determine whether appointment of guardian ad litem is necessary to protect the interests of the ward, even if incompetent already has a general representative, and where conflict of interest becomes apparent early in the litigation, appointment of guardian ad litem would be the customary and appropriate course. Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[19] Mental Health 257A 486

257A Mental Health
257AV Actions
257Ak485 Guardian Ad Litem or Next Friend
257Ak486 k. Propriety of Representation. Most Cited Cases

Court would not appoint guardian ad litem for ward upon finding conflict of interest between guardian and incompetent when proposed settlement agreement as to ward's personal injury claim was presented to the court, where case had been in litigation over two years and ward was in need of money from the settlement and where the court, through its stewardship of the case, had gained familiarity with the law and facts of the case sufficient to allow it to render informed judgment as to the weaknesses and likelihood of success of the underlying action and thus judge the fairness of the proposed settlement. Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[20] Compromise and Settlement 89 61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases

Settlement of ward's personal injury claim for $1.2 million was fair and reasonable under New Jersey law in

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case in which, as result of injuries sustained in automobile accident, ward suffered significant cognitive sequelae and some difficulty with physical activities, but greater recovery was by no means certain in light of open question concerning what law applied to accident occurring in Guatemala and effect of that determination on the recovery, and where trial of the case might not come to pass for many more months, and ward could ill afford to wait in light of need for funds to meet mounting expenses. N.J.R. 4:44–3.

[21] Mental Health 257A 233

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak231 Expenditures
257Ak233 k. Services; Litigation Expenses. Most Cited Cases

Initial attempt to obtain court approval of proposed attorney fee for incompetent's attorney in connection with proposed settlement of incompetent's personal injury suit was inadequate, where it was forwarded to court by defense counsel at apparent request of incompetent's attorney and proposed form of order merely recited an amount which purported to be in accordance with New Jersey Court Rule, but there was no explanation as to how law firm had arrived at the figure and no application, as required by New Jersey rule, for enhanced fee based upon the portion of settlement exceeding one million dollars. N.J.R. 1:21–7(c, f).

[22] Estoppel 156 68(2)

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k68 Claim or Position in Judicial Proceedings
156k68(2) k. Claim Inconsistent with Previous Claim or Position in General. Most Cited Cases

In determination of fee for law firm representing incompetent in personal injury suit, in connection with proposed settlement, law firm was estopped from changing its position as to proper computation of fee under New Jersey rules, to detriment of the estate, where, in its previous calculations under its own fee agreement as well as representations to the court, it had adopted construction less favorable to itself. N.J.R. 1:21–7(c)(5).

[23] Attorney and Client 45 123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

Rule that when term of contract is ambiguous, court must construe the term against party who prepared the contract applies with even greater force to agreement between attorney and client.

[24] Mental Health 257A 251

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(B) Property and Management of Mentally Disordered Person's Estate
257Ak239 Liabilities Of, and Claims Against, Estate
257Ak251 k. Counsel Fees and Costs. Most Cited Cases

Law firm representing ward in personal injury suit was not entitled, upon settlement, to enhanced fee under New Jersey Court Rule requiring application to court for recovery of contingent fee upon amount of settlement in excess of one million dollars, where case was resolved without trial and without much discovery or motion practice, the hours spent on the case were not inordinate and activities of counsel were fairly typical of multijurisdictional tort case. N.J.R. 1:21–7(e, f); N.J.RPC 1.5(a).

[25] Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In General. Most Cited Cases

Guardian's referral fee from law firm representing incompetent's estate in personal injury suit would be forfeited to the estate as result of breach of duty of loyalty to the

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estate, where guardian placed himself in conflict of interest position by agreeing to accept portion of fee earned by lawyer he was under duty to supervise, rendered opinion as to fairness of settlement agreement and requested fee while failing to inform court that he was in position to receive portion of the fee, and endorsed law firm's application for enhanced fee.

[26] Mental Health 257A 179

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak179 k. Authority, Duties, and Liability of Guardians in General. Most Cited Cases

Guardian, whether acting as lawyer, guardian, or both, had obligation during course of proceedings on proposed settlement of incompetent's personal injury suit to inform court of his compromised position as result of agreement to accept portion of fees earned by estate's lawyer.

[27] Fraud 184 7

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In General. Most Cited Cases

Fiduciary who profits from a position must disgorge to estate any benefits that are actually received.

[28] Mental Health 257A 180.1

257A Mental Health
257AIII Guardianship and Property of Estate
257AIII(A) Guardianship in General
257Ak180 Compensation of Guardian or Committee
257Ak180.1 k. In General. Most Cited Cases

Guardian who has breached duty of loyalty to incompetent's estate will not be permitted to recover fees for any services performed in connection with ward's personal injury litigation, whether performed as lawyer or as guardian. N.J.S.A. 3B:18–6.

[29] Federal Courts 170B 47.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk47.1 k. In General. Most Cited Cases

Federal court, in approving settlement of incompetent's personal injury action, would defer to state court with overall superintendency over the estate on issue of what portion of maximum appropriate fee, if any, should be awarded to estate's attorneys, in light of conduct, possibly inimical to interests of justice, occurring prior to filing of the lawsuit and in the course of retention of New Jersey lawyer to represent New Jersey guardian on behalf of incompetent domiciled in New Jersey, calling for application of New Jersey court rules.

[30] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Attorney for incompetent's estate breaches duty of candor toward court from which approval of settlement agreement and fees is sought, by silent acquiescence in guardian's statement to court concerning fairness of settlement and endorsement of request for enhanced attorney fee at time attorney knows of guardian's compromised position by reason of guardian's agreement to accept portion of attorney's fee.

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[31] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Proceedings for approval of settlement of incompetent's personal injury suit and, in particular, fee request of attorneys for the estate, were "ex parte" within meaning of Pennsylvania Rule of Professional Conduct providing that, in ex parte proceeding, lawyer shall inform tribunal of all material facts known to lawyer which will enable tribunal to make informed decision, though defendants were technically parties to the proceeding, where they had no adversarial interest in opposing the fee request. Pa.Rules of Prof.Conduct, Rule 3.3(d), 42 Pa.C.S.A.

[32] Attorney and Client 45 32(14)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(14) k. Candor, and Disclosure to Opponent or Court. Most Cited Cases

Even beyond requirements of Pennsylvania Rule of Professional Conduct that lawyer in ex parte proceeding shall inform tribunal of all material facts known to lawyer which will enable tribunal to make informed decision, attorney, as officer of the court, has overarching duty of candor to the court. Pa.Rules of Prof.Conduct, Rule 3.3(d), 42 Pa.C.S.A.

[33] Attorney and Client 45 42

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k42 k. Deception of Court or Obstruction of Administration of Justice. Most Cited Cases

Appropriate course of action for breach of duty of candor to court by attorney for incompetent's estate, in connection with fee application, given counsel's pro hac vice status, is to revoke the pro hac vice admission and refer matter to court in state in which attorney is admitted, while referral to disciplinary board of state in which federal court was sitting would be unwarranted. Pa.Rules of Prof.Conduct, Rule 3.3(d), 42 Pa.C.S.A.

[34] Attorney and Client 45 48

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k48 k. Notice and Preliminary Proceedings. Most Cited Cases

Attorney and Client 45 54

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k54 k. Trial or Hearing. Most Cited Cases

Order to show cause and subsequent hearing satisfied procedural requirements for revocation of attorney's pro hac vice admission, though order did not specify such revocation as envisioned course of action, where it did provide attorney with notice of conduct troubling the court and intimated that a harsher sanction than revocation was possible, and attorney was given opportunity to be heard.

***769** Sheldon Bross, Bross, Strickland, Cary & Grossman, P.A., Newark, NJ, for plaintiff.

Richard A. Kraemer, Marshall, Dennehey, Warner, Coleman and Goggin, John F. Kent, Marks, Kent & O'Neill, P.C., Philadelphia, PA, Edwin R. Matthews, Cuyler, Burk & Matthews, Florham Park, NJ, for defendants.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

Presently before the Court is plaintiff Sharon Eagan's Motion for Approval of the Settlement Agreement and Counsel Fees, filed on her behalf by Eugene Keith, her brother and court-appointed guardian, as well as a Rule to Show Cause issued by the Court. Though approval of the

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settlement in this case at first appeared to be a relatively uncomplicated exercise, with the plaintiff represented by experienced trial counsel, and with an able guardian in the person of her brother, a licensed, practicing attorney, this case proved once again that things are not always what they seem. The Court will approve the settlement reached by the parties to this action, but not in the form originally proposed, and not without first examining the lapses of both counsel for Plaintiff and the guardian and enforcing the Rule to Show Cause. The Court concludes that: 1) the guardian breached his fiduciary duty of loyalty and, therefore, has forfeited any compensation to which he was entitled under the referral fee agreement between him and counsel for plaintiff, and 2) counsel for the plaintiff breached his duty of candor to the Court and, therefore, his *pro hac vice* admission***770** will be revoked. The Court will set the maximum appropriate amount of legal fees to which counsel for plaintiff is entitled under New Jersey law and pursuant to the contingency fee agreement between the estate and counsel, but will refer the matter to the New Jersey court with general superintendency over the administration of the estate of Sharon Eagan to consider whether counsel's conduct in: 1) initially entering into an oral contingent fee agreement, 2) promising to pay the guardian a referral fee, and 3) appearing before the New Jersey court and undertaking the representation of the estate in this litigation without disclosing to that court the existence of the referral fee agreement, breached the New Jersey Court Rules and/or the New Jersey Rules of Professional Conduct and, if so, to determine in light of counsel's conduct what fee, if any, counsel should receive in this case, up to the maximum allowed as an appropriate fee by this Court, and whether counsel should be referred to the New Jersey Supreme Court Office of Attorney Ethics. Mr. Keith shall also be referred to the New Jersey court for substantially the same reasons, i.e., his conduct as an attorney prior to the institution of this case.

I. BACKGROUND

Sharon Eagan was seriously injured in a motor vehicle accident that occurred in Guatemala City, Guatemala, on September 6, 1990.[FN1] The motor vehicle was owned by defendant Cooperative for American Relief Everywhere ("C.A.R.E."), a New York corporation with its principal place of business in New York, and operated by defendant Barbara Jackson, allegedly a citizen of Pennsylvania. [FN2] Ms. Eagan suffered severe trauma to her head, resulting in significant cognitive sequelae and some difficulty with physical activities. Her brother, Eugene Keith, traveled to Guatemala to care for her, and accompanied her back to New Jersey, where she and Mr. Keith resided at the time. In New Jersey, Mr. Keith arranged for her medical care and handled her affairs, in consultation with their mother and their brother. Mr. Keith, an attorney licensed by the states of New Jersey and Colorado with over thirty years in practice, had previously represented Ms. Eagan in various legal matters, including motor vehicle cases, landlord-tenant matters, and tax questions. Based on these episodic representations, Mr. Keith believed after Ms. Eagan's accident that he was authorized to act initially as her attorney even prior to formal court appointment of a guardian.

FN1. For purposes of ruling in the matter *sub judice* only, the Court accepts the version of the historical facts as represented by Mr. Keith, the guardian, and Mr. Sheldon Bross, plaintiff's counsel, in their affidavits and correspondence submitted to the Court, and in their statements and representations to the Court during the hearings held on October 28, 1993, and February 15, 1994. Defendants have taken no position in this matter, except to say that they believe the settlement proposed is fair and reasonable and should be approved by the Court.

FN2. In her motion to dismiss for lack of personal jurisdiction, Ms. Jackson filed an unsworn affidavit stating that she was a resident of Malaysia, and anticipated future residence in Australia, her husband's place of birth and citizenship. *See* Def.'s Supp. Br. in Support of Mot. to Dismiss exhibit A at 1–2. The issue of her amenability to this Court's jurisdiction was never resolved, since the settlement of the case negotiated by the plaintiff and defendant C.A.R.E. rendered it moot. Her status is relevant in deciding the instant motion only to the extent that it is indicative of the level of uncertainty and complexity present in the personal injury action brought on Ms. Eagan's behalf.

In November or December of 1990, Mr. Keith met with Sheldon Bross, a lawyer licensed to practice in New Jersey and a member of the firm of the New Jersey law firm of Bross, Strickland, Cary & Grossman, P.A. ("Bross, Strickland"), whose practice concentrated in personal injury litigation and who had been an acquaintance of Mr. Keith's for over thirty years since they had attended law school together. Though it is unclear in what capacity Mr. Keith was acting, i.e., lawyer, guardian, or family member, the result of this initial meeting was that Mr. Bross was orally "retained" to represent Ms. Eagan's

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interests in connection with the personal injury action arising from the events in Guatemala.[FN3] Mr. Bross and Mr. Eagan agreed ***771** that Mr. Bross would be recompensed on a contingency basis, based upon the permissible fee percentages authorized by New Jersey Court Rule 1:21–7. [FN4] No written fee agreement was executed by Mr. Bross or Mr. Eagan at that time. *See id.* 1:21–7(g) (requiring a signed fee agreement when the maximum fee percentages outlined in the Rule are used); N.J.R.Prof.Conduct 1.5(c) (requiring that a contingent fee agreement be in writing) [hereinafter N.J.R.P.C.].

> FN3. Though it is not clear what legal authority Mr. Eagan had to retain Mr. Bross, the Court will assume for purposes of this proceeding that Mr. Eagan was acting as a "de facto" guardian at this point. *See* Pa.R.Prof.Conduct 1.14 cmt. ("If [a client with a disability] has no guardian or legal representative, the lawyer often must act as de facto guardian."); N.J.R.Prof.Conduct 1.14 cmt. (same); *see also Miske v. Habay,* 1 N.J. 368, 63 A.2d 883, 885 (1949) (holding that de facto guardians are "accountable in Chancery as constructive trustees, subject to all the duties and liabilities of a guardian duly appointed"); *In re Estate of Rosini,* 426 Pa. 220, 232 A.2d 191, 192 (1967) (holding that a guardian acting under an invalid decree of incompetency was to be treated as a de facto guardian). Regardless of the authority at that point, Mr. Keith apparently adopted the prior agreement by memorializing it after he was legally appointed guardian of Sharon Eagan. As discussed *infra,* the propriety of this approach is left to the discretion of our sister court in New Jersey.

> FN4. The rule is reprinted in pertinent part in note 19 *infra.*

Shortly after the oral agreement retaining Mr. Bross was entered into, Mr. Keith received an unsolicited letter from Bross, Strickland, signed by Mr. Bross and dated January 2, 1991, informing Mr. Keith that as a result of having referred the case to Bross, Strickland, he was to receive a referral fee:

> Dear Mr. Keith:
>
> Thank you for the referral of [Sharon Eagan]. As certified civil trial attorneys, we are permitted to forward a one-third referral fee to you upon conclusion of this matter. If at any time you would like to know the status of the case, or have any questions, please feel free to call.
>
> Again, thank you for your kind referral.
>
> Very truly yours,
>
> BROSS, STRICKLAND,
>
> CARY & GROSSMAN, P.A.
>
> /s/ Sheldon Bross

Response of Sheldon Bross and Bross, Strickland to the Court's Order to Show Cause exhibit 4 [hereinafter "Bross Response"].[FN5] While both Mr. Keith and Mr. Bross have certified that there was no discussion of a referral fee at their initial meeting, both acknowledge that the initial meeting was in the manner of a referral. *See* Bross Response exhibit 1, ¶ 5 (Affidavit of Eugene Keith) (the "Third Keith Aff.") ("When I initially referred the case to Mr. Bross there was no discussion of a referral fee."); Bross Response exhibit 2, ¶ 7 (Affidavit of Sheldon Bross) (the "Second Bross Aff.") ("As a Certified Civil Trial Attorney, I am authorized to pay a 33 1/3 % referral fee when a case is referred to me by an attorney. Mr. Keith did not ask for a referral fee."). In short, the result of the initial meeting and subsequent letter between Mr. Bross and Mr. Keith was that Mr. Bross was to receive the fee percentages allowed under New Jersey Court Rule, and Mr. Keith, the referring attorney and apparent de facto guardian, would receive one-third of the fees earned by Mr. Bross.

> FN5. A referral fee of this type is specifically allowed by New Jersey Court Rule 1:39–6(d), which allowed a certified trial attorney to divide a fee for legal services with a referring lawyer regardless of the referring lawyer's level of participation in the prosecution of the case referred. It is uncontested that Mr. Bross is a certified civil trial attorney. *See* Bross Response exhibit 2, ¶ 4 (Affidavit of Sheldon Bross).

In October of 1991, nearly a year after the initial Bross–Keith meeting, and as required under New Jersey law, an application for guardianship was filed by Mr. Bross in the Chancery Division of the Superior Court of New Jersey, seeking to have Mr. Keith appointed as Ms. Eagan's guardian. *See* Third Keith Aff. ¶¶ 6–7 (describing

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Mr. Bross's involvement in the guardianship application process); Second Bross Aff. ¶ 8 (same). The court appointed Joseph Bottitta, Esq., to represent Ms. Eagan in the incompetency proceedings as guardian ad litem. On October 29, 1991, after a hearing at which Mr. Keith did not personally appear, the New Jersey Superior Court declared Sharon Eagan to be an incompetent, and appointed Mr. Keith as guardian of her person and property. The court retained jurisdiction over the estate, ordering that Mr. Keith apply for a bond, ***772** with notice to Mr. Bottitta, upon an increase or decrease of the estate's assets. *See* Bross Response exhibit 5 (Judgment for Appointment of Guardian entered by the New Jersey Superior Court). Neither Mr. Keith nor Mr. Bross, who represented Mr. Keith at the hearing, disclosed to the New Jersey court or to Mr. Bottitta the pre-existing referral fee arrangement. Both Messrs. Bross and Keith have explained that at the time, they thought there was no need to make a disclosure of their referral fee arrangements because they assumed that the New Jersey court would review any fees at the conclusion of the litigation before the disbursal of any funds, and that the arrangement could be disclosed at that time. *See* Second Bross Aff. ¶ 8; Third Keith Aff. ¶ 8; *see also id.* ¶ 7 ("The guardian ad litem, then appointed by the New Jersey Superior Court, never raised any issues regarding my compensation."). On November 25, 1991, Mr. Keith signed a written contingent fee agreement memorializing the initial oral agreement retaining Bross, Strickland to represent Sharon Eagan in the current personal injury action. *See* Bross Response exhibit 3.

[1] The instant case was filed in this Court in January of 1992. Over the ensuing twenty months, Mr. Bross dutifully pursued the litigation, eventually spending approximately 300 hours on the litigation. Mr. Keith also performed legal tasks on behalf of the estate.[FN6] After some discovery was taken, a settlement in the amount of $1.2 million was reached between Mr. Keith and C.A.R.E. in the summer of 1993. Mr. Bross has now submitted to the Court as an uncontested matter the instant motion, seeking approval of the settlement agreement and the planned disbursement of the $1.2 million lump sum.[FN7]

FN6. Mr. Keith initially averred that he spent 110 hours working on behalf of the estate. *See* Third Keith Aff. ¶ 11. At the February 15, 1994, hearing, however, Mr. Keith stated that he had probably spent 200 hours on the case. *See* Tr. of Hrg. on 2/15/94, at 35. Since it is unclear whether the 200 hour figure referred to Mr. Keith's services as a guardian as well as his services as a lawyer, the Court will accept the averred 110 hour figure as the correct estimate of the time expended on this case by Mr. Keith as a lawyer. Even this figure, however, is suspect, given Mr. Keith's description of his services related to this lawsuit, many of which strike the Court as being more appropriately characterized as acting as a client rather than as a lawyer. *See* Third Keith Aff. ¶ 12 ("I gathered information and [medical] reports on my sister from numerous sources ... and furnished them to Mr. Bross's office. I arranged for and attended medical examinations of Sharon required by Defendants ... I attended depositions in Philadelphia and had a meeting with Mr. Bross prior thereto.... I attended the settlement hearing before this Court on October 28, 1993 and a meeting with Mr. Bross the day before in Newark, New Jersey.").

Regardless of the actual figure, to the extent that Mr. Keith performed legal work, this arrangement did not benefit the estate since it had already contracted Bross, Strickland to do the legal work for a set contingent fee. Therefore, to the extent that Mr. Keith performed any legal work in this case, it inured to the benefit of Bross, Strickland by relieving them of the duty to perform work they had contracted to do.

FN7. After speaking by telephone with the judge presiding over the estate, and upon the judge's advice, *see* Second Bross Aff. ¶ 15 ("Judge Margolis indicated that the approval of the settlement of the litigation and of my fee should be submitted to Judge Robreno...."), Mr. Bross made the submission by letter, dated August 9, 1993, sent by counsel for the defendant on plaintiff's counsel's behalf. By letter of August 18, 1993, the Court returned the proposed settlement to defense counsel, noting that a request for approval must be made by motion. *See* Letter from R. Michael Mori to the Court of 9/17/93, at 3–4 (copy of the Court's letter of Aug. 18, 1993). The submission by letter is discussed further *infra.*

As outlined in the certification of Robert R. Cary, Esq., a member of Bross, Strickland, the agreement reached by the parties specified the following disbursements:

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$ 600,000	Purchase of an annuity ($3,333.72 per mo. for 30 years certain and life)
$ 16,482	Litigation Disbursements
$ 253,403.60	Attorney's fees [8]
$ 330,114.40	Medical Bills, remainder to the estate
TOTAL $1,200,000.00	

FN8. Mr. Cary's certification listed the requested attorney's fees as $253,403.60, as did subsequent representations, *see, e.g.,* Letter Br. of 11/18/93, at 5 ("The counsel fees totalled $253,403.60."). The form of order accompanying the motion for approval, however, listed the amount sought as $253,703.60. Since the use of the lower figure results in an additional $300 to the estate, the Court will assume that the lower figure was the correct one, and will add the $300 to the amount requested for medical bills.

***773** *See* Certification of Robert Cary ¶ 8. The application for approval also contained as exhibits the annuity contract, the release and settlement agreement, an itemization of Mr. Bross's work, a copy of a medical bill, and a copy of the contingency fee agreement between Mr. Keith and Bross, Strickland. Also submitted was an affidavit sworn by Mr. Keith (the "First Keith Aff."), which averred that "there is a significant possibility of a recovery less than the amount of settlement," First Keith Aff. ¶ 7, and that in his opinion it was "in the best interest of Sharon Eagan to settle this matter for the sum of $1.2 MILLION DOLLARS," *id.* ¶ 8.

A hearing on the merits of the proposed settlement was held on October 28, 1993. In attendance were Messrs. Bross and Keith, as well as Mr. R. Michael Mori, Esq., from Mr. Bross's office. Defendant C.A.R.E. received notice of the hearing but chose not to be present.[FN9] At the hearing, the Court discussed with counsel the apparent discrepancy between the fee requested and the fee calculations produced by using the percentages contained in the fee agreement. *See* Tr. of Hrg. on 10/28/93, at 7–16. Mr. Mori described the method used by Bross, Strickland in reaching the figure of $253,403.60, and represented that the fee petition was in essence a request for a fee on that portion of the net settlement exceeding $1 million, *see id.* at 14, a request that the Court must rule on under the New Jersey rules governing the contingent fee agreement entered into between Mr. Keith and Bross, Strickland, *see* N.J.Ct.R. 1:21–7(f). Counsel proposed to supplement the record with a memorandum on the proper method of calculating the fees under the contingent fee agreement and New Jersey law, as well as information on any outstanding medical bills and on the financial stability of The Prudential Insurance Company of America, the proposed annuity provider.[FN10] *See id.* at 6, 29–30.

FN9. Because, as discussed in footnote one, *supra,* defendant takes no position on these issues other than to urge the Court to approve the settlement agreement, they have not made any submissions or arguments to the Court.

FN10. The information on The Prudential was requested to conform with New Jersey law on structured settlements in cases involving an incompetent, which requires that there be a factual finding as to the fiscal stability of a structured-settlement provider. *See* N.J.Ct.R. 4:44–3; *Ramos by Ramos v. Ramos,* 227 N.J.Super. 336, 547 A.2d 342, 343 (Law Div.1988).

The Court also questioned Mr. Keith under oath concerning his sister's condition and her prognosis, the status of the New Jersey court's order appointing him guardian, and the situation regarding the unpaid medical bills. *See id.* at 20–27. During the discussion, the Court, believing Mr. Keith's role in the litigation to be no more than that of Ms. Eagan's disinterested guardian, sought his opinion as to the terms of the proposed settlement agreement:

THE COURT: Mr. Keith, do you want to say anything about any of the items which have been requested here and do you have any views or do you think they are fair and reasonable?

Mr. KEITH: Yes. I think they're fair and reasonable.

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Id. at 25. At no point during the hearing was the financial interest Mr. Keith held in Bross, Strickland's fee disclosed to the Court.

Bross, Strickland filed a letter brief on November 19, 1993, addressing the issues raised during the hearing. As a follow up to the hearing and the letter brief, the Court sent Mr. Bross, with a copy to defense counsel, a letter on December 1, 1993:

> Dear Mr. Bross:
>
> The Court requires one final item before it can issue its ruling on the proposed settlement in the above matter. Please file a certification with the Clerk describing what, if any, referral fees are to be paid from the attorney's fees that your law firm will receive as part of the settlement.
>
> Very truly yours,
>
> /s/ Eduardo C. Robreno

This prompted both Mr. Bross and Mr. Keith to file affidavits (respectively, the "First Bross Aff." and the "Second Keith Aff."), discussing for the first time the interest Mr. Keith held in Bross, Strickland's fee in this case. Mr. Bross averred that the case had been referred to him by Mr. Keith on January***774** 2, 1991, and that he had agreed to pay him a one-third referral fee, as is his prerogative under New Jersey law. *See* First Bross Aff. ¶¶ 3–4. He also averred that Mr. Keith had "agreed to serve as [Ms. Eagan's] guardian in this case without compensation in light of the referral fee he would eventually receive," *id.* ¶ 6, that Mr. Keith had been actively involved in the case and had not asked for reimbursement for travel expenses or for his expended time, *see id.* ¶ 7, and that he and Mr. Keith had concluded that their agreement would ultimately benefit Ms. Eagan, reasoning that "[h]ad Mr. Keith requested a fee and costs as the guardian, those monies would have to be paid from Sharon Eagan's settlement monies and would constitute an amount over and above the counsel fees," *id.* ¶ 8.

Mr. Keith averred, *inter alia,* that he was the lawfully appointed guardian of Sharon Eagan, *see* Second Keith Aff. ¶ 3, that he had decided that a settlement in the amount of $1.2 million was in Ms. Eagan's best interests, *see id.* ¶ 6, and that he was "very satisfied with Mr. Bross's representation ... and the results obtained," *id.* ¶ 8. He requested that the Court approve the settlement as well as the attorney's fees. *See id.* ¶ 9.

In response to the revelation of Mr. Keith's theretofore undisclosed interest in Bross, Strickland's fee, and concerned that the previous representations made to the Court might have been tainted by the now disclosed financial arrangements of Bross, Strickland and Messrs. Bross and Keith *inter se,* the Court issued a Rule on Mr. Bross, Mr. Keith, and Bross, Strickland, to show cause why: 1) the fees claimed by Bross, Strickland, should not be reduced to the quantum meruit values of the services rendered; 2) Mr. Keith should not be denied any recovery from his fee agreement with Mr. Bross; and 3) this matter should not be referred to the New Jersey Superior Court presiding over Sharon Eagan's estate and the New Jersey Supreme Court Office of Attorney Ethics. The Rule raised the issue of the validity of the referral fee arrangement between Mr. Keith and Bross, Strickland and the propriety of Mr. Keith's representation of the estate in this litigation, as well as the issue of whether Mr. Bross and/or Mr. Keith had violated the duty of candor to this Court. *See* Pa.R.Prof.Conduct 3.3 (Candor Toward the Tribunal) [hereinafter Pa.R.P.C.].

Mr. Bross and Bross, Strickland filed a response to the Court's Rule to Show Cause, opposing the referral of the matter to the Office of Attorney Ethics and any reduction in the firm's fee or in Mr. Keith's referral fee. No objection was made to referring the matter to the court presiding over Ms. Eagan's estate. A hearing on the Rule was held on February 15, 1994, with Mr. Bross and Bross, Strickland represented by counsel, and with Mr. Keith representing himself.

The issues the Court must decide are whether the proposed settlement is fair and reasonable, what attorney's fee is appropriate in this case, whether Mr. Keith and Bross, Strickland, respectively, are entitled to any portion thereof, and whether the conduct of Messrs. Bross and Keith, respectively, requires that the matter be referred to the appropriate disciplinary bodies and to the New Jersey Superior Court presiding over the estate and/or otherwise requires disciplinary sanction by this Court. The case is properly before the Court pursuant to its diversity jurisdiction. *See* 28 U.S.C. § 1332(a).

II. DISCUSSION

A. *The Court's jurisdiction to approve the settlement agreement*

1. *The Source of the Court's Authority*

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[2][3] As a threshold matter, the Court must determine whether it has the authority to grant plaintiff [FN11] the requested relief, approval of the settlement. Normally, parties to a civil dispute can reach a money settlement among themselves, bringing a case to an end without a court's approval or intervention. *See* Fed.R.Civ.P. 41(a)(1); *see, e.g.,* ***775***In re Masters Mates & Pilots Pension Plan & IRAP Litig.,* 957 F.2d 1020, 1025 (2d Cir.1992) ; *Gardiner v. A.H. Robins Co.,* 747 F.2d 1180, 1188–89 (8th Cir.1984). In making his motion, plaintiff relied on the provisions of Federal Rule of Civil Procedure 17(c), which requires, *inter alia,* that this Court appoint a guardian ad litem or "make such other order as it deems proper for the protection of the infant or incompetent person." [FN12] Fed.R.Civ.P. 17(c); *see Gardner by Gardner v. Parson,* 874 F.2d 131, 138 (3d Cir.1989) (holding that the Rule empowers a court to appoint a guardian ad litem where the interests of the incompetent and the general representative conflict). Plaintiff reads the language of 17(c) as granting this Court broad license to issue an order intended to protect Ms. Eagan's interests, including an order approving the proposed settlement. *See* Pl.'s Mem. of Law in Support of Mot. to Approve Settlement at 10–11 [hereinafter Pl.'s Mem. in Support].

FN11. For the remainder of the opinion, references to the "plaintiff" will be to Mr. Keith unless otherwise stated.

FN12. The full text of Rule 17(c) reads as follows:

> (c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Though the Court at first accepted this broad reading of 17(c), upon reflection it appears that this interpretation is incorrect, the thrust of Rule 17 being the acquisition of a proper representative for an incompetent. [FN13] *See* 6A Charles A. Wright et al., *Federal Practice and Procedure: Civil 2d* § 1571, at 511 (2d ed. 1990) [hereinafter *Federal Practice and Procedure*] (noting that the objectives of the Rule are "to afford an infant or incompetent person a representative in federal court and to provide the district judge with authority to make certain that disabled persons are adequately protected"); *see also* 3A James W. Moore & Jo D. Lucas, *Moore's Federal Practice* ¶ 17.26 at 17–219 (1993) ("Rule 17(c) deals only with the protection of incompetents in their status as parties, and gives no general powers over their persons or property."). Instead, the more certain sources for the Court's authority to approve the settlement of the case is the state law that this Court must apply, as well as the Court's inherent duty to protect the interests of minors and incompetents that come before it.

FN13. "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat'l Bank & Trust Co.,* 335 U.S. 595, 600, 69 S.Ct. 290, 293, 93 L.Ed. 259 (1949) (Frankfurter, J., dissenting).

[4] As stated by the Ninth Circuit, in discussing the scope of a guardian ad litem's authority to compromise a minor's claim:

> It is an ancient precept of Anglo–American jurisprudence that infant and other incompetent parties are wards of any court called upon to measure and weigh their interests. The guardian ad litem is but an officer of the court. While the infant sues or is defended by a guardian ad litem or next friend, every step in the proceeding occurs under the aegis of the court.
>
> As an officer of the court, the guardian ad litem traditionally lacks any personal authority whatsoever to prejudice the substantial rights of the minor litigant.... Indeed, from the time of the early courts of chancery a guardian ad litem has been unable to bind a minor litigant to a settlement agreement absent an independent investigation by the court and a concurring decision that the compromise fairly promotes the interests of the minor, who, as we repeat, is a ward of the court.

Dacanay v. Mendoza, 573 F.2d 1075, 1079 (9th Cir.1978) (citations omitted) (emphasis added); *accord Garrick v. Weaver,* 888 F.2d 687, 693 (10th Cir.1989) (noting that a court has "a general duty ... to protect the interests of infants and incompetents in cases before the

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court"); *Dean v. Holiday Inns, Inc.,* 860 F.2d 670, 673 (6th Cir.1988); *see also Bunting v. Bunting,* 87 N.J.Eq. 20, 99 A. 840, 841 (Ch.1917) ("It is the duty of the court to protect the interest of an infant party to litigation, and to exercise a general supervision over the conduct of the next friend or guardian ad litem."); ***776***Turner v. Andrews,* 143 Fla. 88, 196 So. 449, 450 (Fla.1940) ("Courts are charged under the law with the duty and obligation of caring for infants and incompetents upon the theory that they are wards of the court."). Called on to adjudicate a claim brought on behalf of an incompetent, this Court must treat the incompetent as its ward, and must ensure that she is treated fairly and justly.

[5][6] Judicial approval of the compromise of an incompetent's claim is also compelled by statute in New Jersey, the state in which Ms. Eagan's estate is administered, *see* N.J.Ct.R. 4:44–3; *Ramos,* 547 A.2d at 343, and Pennsylvania, the state in which the Court is situated, *see* Pa.R.Civ.P. 2064. Though both of these are "procedural" rules, they are binding on this Court, since they affect the substantive rights of the litigants—by their operation, the authority to compromise an incompetent's claim is vested in the court, rather than in the incompetent's guardian.[FN14] Therefore, the Court must apply these rules under the precepts established in *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), requiring the application of substantive state law in diversity actions. *See also Sosenke v. Norwood,* Civ.A. No. 91–2623, 1993 WL 512824 (E.D.Pa. Dec. 6, 1993) (applying Pennsylvania Rule of Civil Procedure 2039, compromise of a minor's claims, in reviewing a proposed settlement of a diversity action).

FN14. As outlined in *Hanna v. Plumer,* a procedural rule is deemed substantive, and thus binding on this Court, when

> application of the rule would make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum State, or whether application of the rule would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court.
>
> *Hanna,* 380 U.S. 460, 468 n. 9, 85 S.Ct. 1136, 1142, 14 L.Ed.2d 8 (1965). The Third Circuit has identified this as the proper inquiry to be made in determining whether a state procedural rule is to be applied by a federal court sitting in diversity. *See Simmons v. City of Philadelphia,* 947 F.2d 1042, 1085 (3d Cir.1991), *cert. denied,* 503 U.S. 985, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992); *Fauber v. KEM Transp. & Equip. Co.,* 876 F.2d 327, 331 (3d Cir.1989).
>
> Not applying the rules requiring Court oversight of the compromise of an incompetent's claim would trigger both prongs of the *Hanna* principle. An unscrupulous guardian would be prompted to bring an incompetent's claim in federal court, thereby evading the state court's judicial oversight of any settlement and depriving the incompetent of that protection.
>
> Plaintiff argues that the state rules do not apply in the instant case because "court approval is a safeguard procedure for matters involving an incompetent person, rather than outcome determinative." *See* Pl.'s Mem. in Support at 10. He further states that no forum shopping was engaged in here, since the forum was chosen for jurisdictional reasons and approval law is similar in both Pennsylvania and New Jersey. *See id.* Though it may be true that approval of settlements is not outcome determinative, different provisions regarding such authority can result in forum shopping. Comparing the law of states mischaracterizes the problem, since the forum shopping that *Hanna* seeks to prevent is that between *state* and *federal* courts, not between those of two states. As already stated, a corrupt guardian could seek solace in the lack of explicit authority in the Federal Rules of Civil Procedure for court approval of settlements were this Court not to apply the state procedural rules allowing such review.

2. *The Standard for Approval*

[7][8] A related question is what standard the Court must apply in reviewing the proposed settlement. A federal court sitting in a diversity case is required to apply the same substantive law as would be applied by a state court of its forum, i.e., the Commonwealth of Pennsylvania, *see Erie,* 304 U.S. at 78, 58 S.Ct. at 822, including the choice of law rules, *see Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487, 496–97, 61 S.Ct. 1020, 1021–22, 85 L.Ed. 1477 (1941); *Blumenfeld Dev. Corp. v. Carnival*

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Cruise Lines, Inc., 669 F.Supp. 1297, 1321 (E.D.Pa.1987). Under Pennsylvania law, in choosing the appropriate law, the Court must apply a "flexible rule which permits analysis of the policies and interests underlying the particular issue before the court." *Griffith v. United Air Lines, Inc.,* 416 Pa. 1, 203 A.2d 796, 805 (1964); *see also Carrick v. Zurich–American Ins. Group,* 14 F.3d 907, 909 (3d Cir.1994) (citing *Griffith* as the controlling precedent). As described by the Third Circuit Court of Appeals, the choice of law analysis entails "a hybrid approach that 'combines the approaches of both Restatement II (contacts establishing significant relationships) and "interest analysis" (qualitative appraisal of the relevant States' policies with respect to ***777** the controversy).' " *Lacey v. Cessna Aircraft Co.,* 932 F.2d 170, 187 (3d Cir.1991) (quoting *Melville v. American Home Assurance Co.,* 584 F.2d 1306, 1311 (3d Cir.1978)). The present issue, approval of the settlement, presents a choice between the law of Pennsylvania, where the suit was filed and where Barbara Jackson allegedly resides, and the law of New Jersey, where the incompetent is domiciled,[FN15] where the estate is being administered, and where the contingent fee and referral agreements were entered into.[FN16]

FN15. Though Ms. Eagan currently resides in Colorado, Mr. Keith represented that she is still a domiciliary of New Jersey. *See* Pl.'s Mem. in Support at 8.

FN16. Guatemalan law would have been a possible choice regarding the tort claim in this case. As to the approval of the settlement, however, it is clear that there are no appreciable Guatemalan interests involved.

[9][10] Before engaging in this analysis, however, the Court must consider whether the case presents a so-called "false conflict" between the law of the two states. "A false conflict exists if only one jurisdiction's governmental interests would be impaired by the application of the other jurisdiction's law. In such a situation, the court must apply the law of the state whose interests would be harmed if its laws were not applied." *Id.* (citing *Cipolla v. Shaposka,* 439 Pa. 563, 267 A.2d 854, 855 (1970) and *Kuchinic v. McCrory,* 422 Pa. 620, 222 A.2d 897, 899–900 (1966)); *see also Zygmuntowicz v. Hospitality Invs., Inc.,* 828 F.Supp. 346, 349–50 (E.D.Pa.1993) (applying the *Lacey* false conflict analysis). A review of the applicable New Jersey and Pennsylvania law demonstrates that the instant situation presents such a false conflict, requiring that the Court apply New Jersey law.

Both New Jersey and Pennsylvania require that a court review any proposed settlement of an incompetent's claim to confirm that the settlement is fair and reasonable. *See* N.J.Ct.R. 4:44–3; Pa.R.Civ.P. 2064; [FN17] *cf. Bauer by Bauer v. Griffin,* 108 N.J.Super. 414, 261 A.2d 667, 669 (App.Div.) (*per curiam*) (denying infant plaintiff's motion to vacate judgment where the lower court had approved a settlement), *certif. denied,* 56 N.J. 245, 265 A.2d 701 (1970). Both rules seek to protect the interests of an incompetent plaintiff by guaranteeing that a court will review the actions taken by the incompetent's representative. The essential difference between the two is that New Jersey requires that a reviewing court make factual findings concerning the fiscal stability of any provider of a structured settlement. *See* N.J.Ct.R. 4:44–3. Although requiring the Court to make findings concerning the fiscal stability of a structured-settlement provider would not impinge on Pennsylvania's interests as expressed in Rule 2064, not applying the standard would, on the other hand, fail to promote New Jersey's interest in ensuring that there is a reasonable probability that ***778** structured settlements will actually be paid in the future. Thus, the two rules present a false conflict that the Court will resolve by applying New Jersey's rule. Doing so will not prejudice Pennsylvania's interest in protecting incompetent plaintiffs, while failure to do so would prejudice New Jersey's interest in ensuring the reliability of structured settlements. *See Lacey,* 932 F.2d at 187.

FN17. The New Jersey rule reads in pertinent part as follows:

> All proceedings to enter a judgment to consummate a settlement in matters involving infants and incompetents shall be heard by the court without a jury. The court shall determine whether the settlement is fair and reasonable as to its amount and terms. In the case of a structured settlement providing for deferral of all or part of the proceeds thereof, the court shall also satisfy itself, based on the financial security of the obligor or surety and such other relevant facts as may be adduced, of the reasonable certainty that all future payments will be made as proposed by the settlement.... The court, on the request of the claimant or the claimant's attorney or on its own motion, may approve the expenses incident to the litigation, including attorney's fees....

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> N.J.Ct.R. 4:44–3. The Pennsylvania rule reads in pertinent part as follows:
>
> (a) No action to which an incompetent is a party shall be compromised, settled, or discontinued except after approval by the court pursuant to a petition presented by any party in interest.
>
> (b) When a compromise or settlement has been approved by the court ..., the court, upon petition by the guardian or the guardian ad litem or any party to the action, shall make an order approving or disapproving any agreement entered into by the guardian or the guardian ad litem for the payment of counsel fees and other expenses out of the fund created by the compromise, settlement or judgment; or the court may make such order as it deems proper fixing counsel fees and other proper expenses. The balance of the fund shall be paid to the guardian of the estate of the incompetent qualified to receive the fund, if he has one or one is to be appointed....
>
> Pa.R.Civ.P. 2064.

[11] The other issue that must be resolved is the law the Court must apply in examining the request for fees made by plaintiff's counsel. Both New Jersey and Pennsylvania permit the Court to review the fees requested by counsel who has reached a settlement of an incompetent's claim, *see* N.J.Ct.R. 4:44–3 (allowing reviewing court to examine counsel's fees where, as here, a request is made for court approval of requested fees); Pa.R.Civ.P. 2064(b) (same), and the importance of such scrutiny cannot be understated. Resolution of this issue will also necessarily involve interpretation of the contingent fee agreement entered into between Mr. Keith, on behalf of the estate, and Bross, Strickland. While contingent fee agreements in Pennsylvania are subject to the general requirements of the rules of professional conduct, *see* Pa.R.P.C. 1.8(j)(2) (allowing a lawyer in a civil case to enter into an agreement for a "reasonable contingent fee"); *id.* R. 1.5 (stating general rules on fee agreements), New Jersey has a comprehensive set of rules addressing the issue of contingent fee agreements. [FN18] Court Rule 1:21–7 establishes fairly strict requirements for contingent fee agreements, including a sliding cap on fees, a limit on fees to the first $1 million recovered (barring application to the court), and a 25% cap on fees earned in actions settled on the behalf of infants and incompetents. *See* N.J.Ct.R. 1:21–7(c), (f).[FN19] The structure evinces a strong interest on the part of New Jersey in regulating the fees that are charged by the attorneys practicing law within its confines, and in regulating the contracts by which they set those fees. *See Bernick v. Frost,* 210 N.J.Super. 397, 510 A.2d 56, 60–61 (App.Div.), *certif. denied,* 105 N.J. 511, 523 A.2d 158 (1986). As recently addressed by the District Court of New Jersey, in determining whether to interpret a contingency fee agreement under Pennsylvania law or New Jersey law,

> FN18. Rules regulating attorneys' fees are considered substantive. *See Elder v. Metropolitan Freight Carriers, Inc.,* 543 F.2d 513, 521 n. 5 (3d Cir.1976) (Hunter, J., dissenting) (citing 1A *Moore's Federal Practice* ¶ 0.310 n. 25t (Supp.1975)).
>
> FN19. The pertinent portion of the rule reads as follows:
>
> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> (1) 33 1/3 % on the first $250,000 recovered;
>
> (2) 25% on the next $250,000 recovered;
>
> (3) 20% on the next $500,000 recovered; and
>
> (4) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and
>
> (5) where the amount recovered is for the benefit of a client who was an infant or incompetent when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.
>
> (d) The permissible fee provided for in paragraph (c) shall be computed on the net sum re-

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> covered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client....
>
> ....
>
> (f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances....
>
> N.J.Ct.R. 1:21–7.

New Jersey has a strong interest in regulating the economic relationship between New Jersey attorneys and their clients in tort cases.... Although Pennsylvania has an interest equal to New Jersey's in protecting its citizens from the overreaching of attorneys in contingent fee cases, Pennsylvania's interest does not apply where the client involved is a New Jersey citizen injured in New Jersey who negotiated his contingent fee contract in New Jersey with a New Jersey-licensed attorney. ***779***Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett, Ltd.,* 847 F.Supp. 1244, 1249 (D.N.J.1994) ; *see also Elder v. Metropolitan Freight Carriers, Inc.,* 543 F.2d 513, 519 (3d Cir.1976) ("In the exercise of its paramount concern with its courts, New Jersey is free to provide that no party may be required to pay an excessive contingent fee to utilize its legal processes."). In the instant case, no Pennsylvania interest would be harmed by applying New Jersey law in interpreting a fee agreement entered into in New Jersey between a New Jersey client, injured in Guatemala, and a New Jersey-licensed lawyer. In contrast, the strong interest New Jersey has in regulating the attorney-client relationship, as expressed in Court Rule 1:21–7, would be stymied if Pennsylvania law is applied. The Court will therefore interpret the contingent fee agreement under New Jersey law.[FN20]

> FN20. To the extent that principles of fiduciary law are applicable and necessary to the Court's analysis, the law of New Jersey, where the estate is being administered, will be applied.

B. *The Court Will Approve the Settlement Agreement*

[12] It is beyond peradventure that a guardian may not place himself or herself in a position where his or her interests conflict with those of the ward. As the New Jersey Supreme Court held in analyzing the similar fiduciary relationship that exists between a trustee and a beneficiary, "the most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty and he is not permitted to place himself in a position where it would be for his own benefit to violate that duty." *In re Koretzky's Estate,* 8 N.J. 506, 86 A.2d 238, 249 (1951); *see also* IIA Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 170 (4th ed. 1987). The duty of loyalty operates as a prophylactic, irrespective of good or bad faith on the part of the guardian. *See* N.J.Stat.Ann. 3B:14–36 (West 1983) (rendering any undisclosed transaction affected by a substantial conflict of interest voidable); *Magruder v. Drury,* 235 U.S. 106, 119, 35 S.Ct. 77, 82, 59 L.Ed. 151 (1914) ("The intention is to provide against any possible selfish interest exercising an influence which can interfere with the faithful discharge of the duty which is owing in a fiduciary capacity."); *Fulton Nat'l Bank v. Tate,* 363 F.2d 562, 572 (5th Cir.1966) ("It is unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed.... [T]he fiduciary is punished for allowing himself to be placed in a position of conflicting interests in order to discourage such conduct in the future."); *In re Kline,* 142 N.J.Eq. 20, 59 A.2d 14, 14 (1948) (*per curiam*). Faithful adherence to the duty is required to keep a trustee from ever being in a position where his loyalties might be divided:

> "Reasons behind the establishment of the loyalty rule by equity are that it is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. Consciously or unconsciously he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the trustee personally, selfishness is apt to lead him to give himself an advantage. If permitted to represent antagonistic interests the trustee is placed under temptation and is apt in many cases to yield to the natural prompting to give himself the benefit of all doubts."

Gilliam v. Edwards, 492 F.Supp. 1255, 1263 (D.N.J.1980) (interpreting duty of loyalty in an ERISA case) (quoting G. Bogert, *Trusts and Trustees* § 543, at 475–76 (2d ed. 1960)).

[13][14] It is also clear that a guardian may not profit from the fiduciary relationship existing between him and his ward. *See In re Koretzky's Estate,* 86 A.2d at 249; *Sil-*

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verstein v. Last, 156 N.J.Super. 145, 383 A.2d 718, 723 (App.Div.1978). The only recompense a guardian receives as a matter of course is a commission upon an accounting to the court, though compensation for other services, including legal, may be requested from the court. *See* N.J.Stat.Ann. §§ 3B:18–1 to –33 (West 1983 & Supp.1993) (providing for fiduciaries' compensation); ***780***In re Flynn's Estate,* 132 N.J.Eq. 85, 26 A.2d 794, 795 (Prerog.Ct.1942).[FN21]

> FN21. Bross, Strickland argues that New Jersey law allows a guardian to recover for attorney's fees where the recovery is from a party other than the estate, citing to *Burr v. Contenti,* 102 N.J.Eq. 41, 139 A. 801 (Ch.1927). The instant situation, however, is not *Burr.* In that case, the trustee sought to foreclose on a mortgage held by the trust, and sought to bill his legal fees to the sale. *See id.,* 139 A. at 801–02. The court held that if the foreclosure sale of the mortgaged property resulted in proceeds greater than the remaining balance on the mortgage, then the trustee could recover his fee from that surplus, since doing so would not deplete the recovery to the trust, which was only entitled to the outstanding amount on the mortgage and no more. *See id.* at 802. In the instant case, the source of Mr. Keith's fee is the estate, since Bross, Strickland's fee itself is deducted from the estate's recovery. Ms. Eagan's recovery is limited only by the amount of money Bross, Strickland and Mr. Keith take for themselves.

[15] In the instant case, the Court concludes that Mr. Keith breached his fiduciary duty of loyalty by placing himself in a compromised position.[FN22] As the guardian of Ms. Eagan's estate, his interest was in maximizing the funds recoverable by the estate as a result of this litigation, net of all costs including attorneys' fees. As a lawyer receiving a referral fee from Bross, Strickland, Mr. Keith's position was compromised, since his interest was in maximizing the firm's overall fee, of which he would receive one-third. Clearly, Mr. Keith's duty to superintend the litigation, including his willingness to terminate Bross, Strickland's representation if it proved to be inadequate, was compromised by this arrangement.

> FN22. The following analysis is by necessity limited to Mr. Keith's representation of Ms. Eagan in the instant litigation. The Court expresses no view as to the adequacy or propriety of Mr. Keith's actions as Ms. Eagan's guardian outside of this litigation, a matter over which the New Jersey court administering the estate has jurisdiction. *See* N.J.Stat.Ann. § 3B:12–36 (West 1983); Bross Response exhibit 5 (order of the New Jersey Superior Court retaining jurisdiction over the Ms. Eagan's estate).

This conflict was enhanced by operation of Court Rule 1:21–7(c). Under New Jersey law, an attorney litigating a tort claim cannot receive a contingent fee on the portion of a recovery that exceeds $1 million without making application to the court. *See id.* 1:21–7(c)(4), (f). As a result, viewed from the attorney's financial perspective, once the $1 million threshold has been reached, an attorney may not claim a larger fee unless he can show to the Court that the fee must be increased to be "reasonable ... in light of all the circumstances." N.J.Ct.R. 1:21–7(f). This perspective is at odds with that of the client, who may prefer the prospect of a larger recovery, particularly one unburdened by any contingent fee, even if trial, with its accompanying risks, may be required.

Mr. Keith breached his duty of loyalty to the estate of the incompetent in yet a third manner by endorsing Bross, Strickland's petition for an *enhanced* fee. Again, the enhancement meant a higher fee for Bross, Strickland and, in turn, for Mr. Keith, and a reduced recovery for the estate. As noted above, Mr. Keith's financial interest in Mr. Bross's fee remained undisclosed until Mr. Bross and Mr. Keith responded to the Court's letter of December 1, 1993. Thus his unqualified endorsement of the Bross, Strickland application for an enhanced fee was made in this Court at a time that his interest in the Bross, Strickland fee remained undisclosed. The Court was depending upon Mr. Keith to render an honest, impartial, and uncompromised opinion as to the reasonableness of the proposed settlement. Given the burden of the undisclosed conflict under which he was operating, Mr. Keith was not at liberty to do so.

[16] Bross, Strickland strenuously asserts that there is no conflict between the interests of a lawyer working on a contingency basis and of his client. Based on this, they argue that Mr. Keith's interest in maximizing the estate was the same whether he was acting as the guardian or as the lawyer. *See, e.g., Romano by Romano v. Lubin,* 365 Pa.Super. 627, 530 A.2d 487, 488–89 (1987), *appeal granted and discontinued,* 518 Pa. 620, 541 A.2d 747 (1988). *But see Dean,* 860 F.2d at 673 ("The interest of an attorney seeking to be awarded a fee from the settlement

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proceeds effectuated for a minor must always, by the nature of the relationship and the dependency of the minor, be in tension."). Even if this is so in the garden variety contingent fee case, the argument has no ***781** merit under the facts of this case. For example, in the ordinary case, a client may terminate the engagement of a lawyer and substitute counsel without suffering an economic loss.[FN23] In this case, however, terminating Mr. Bross would have been detrimental to Mr. Keith's personal interests, since he stood to recover a portion of Bross, Strickland's fee and presumably would not have recovered such a fee from just any lawyer brought in as substitute counsel. Furthermore, the contingency fee agreement itself is a further source of conflict. The interests of the lawyer and the client run parallel to each other under a flat percentage contingent fee agreement, with the lawyer receiving as a fee a constant proportion of the recovery awarded his client. To put simply, the more the client gets, the more the lawyer gets. In contrast, under the contingency fee agreement in this case, after a recovery crosses the million dollar level, the lawyer continues to work without having a settled expectation of a concomitant increase in fee. The only fee on that portion of the recovery in excess of $1 million to which the lawyer may aspire is one wholly discretionary upon an application to the Court, *see* N.J.Ct.R. 1:21–7(f), and, if granted, the enhanced fee comes directly from the pockets of the client. Therefore, when Mr. Keith endorsed Bross, Strickland's application for fees on the amount of the recovery in excess of $1 million dollars, he recommended the shifting of a portion of the estate's recovery to Bross, Strickland's fee, one-third of which would eventually went its way to his own wallet.[FN24]

FN23. Although the terminated lawyer would be entitled to quantum meruit recovery for any work performed, that recovery would usually come from the substitute lawyer's fee and would not impact the client's recovery. *See. e.g., Buckelew v. Grossbard,* 189 N.J.Super. 584, 461 A.2d 590, 591 (Law Div.), *aff'd per curiam,* 192 N.J.Super. 188, 469 A.2d 518 (App.Div.1983).

FN24. Though the recommendation by the guardian as to the appropriateness of the fee was not controlling, *see, e.g., Murphy by Murphy v. Mooresville Mills,* 132 N.J.Super. 197, 333 A.2d 273, 275 (App.Div.), *certif. denied,* 68 N.J. 156, 343 A.2d 444 (1975), it was a factor that the Court could reasonably rely upon. It is self-evident that a fee application that is uncontested by the person appointed to protect the interests of the incompetent, that is in fact endorsed by said person, will be more favorably received by the Court than one that is contested.

[17] Mr. Keith makes three other arguments in his favor: 1) that the result obtained in the litigation was favorable for the estate; 2) that by planning to be compensated from the fee that would otherwise go to Bross, Strickland, he was not seeking compensation from the estate for the work he has performed as guardian; and 3) that he could have retained himself instead of seeking out Mr. Bross and thereby could have received *all* of the attorney's fee. It is, of course, of no moment that a fair result under the circumstances appears to have been obtained or that Ms. Eagan's estate will allegedly benefit by Mr. Keith taking his compensation from Mr. Bross's fee rather than from the estate. Both of these are relevant considerations in determining the quantum of harm that may have resulted to the estate, but they do not determine whether a conflict existed. The duty of loyalty is a prophylactic one, and operates regardless of the results obtained, or of the good intentions of the parties. In the case of a fiduciary, the pursuit of honorable ends does not justify the use of maleficent means.[FN25]

FN25. In any event, payment of a one-third referral fee to Mr. Keith would be immensely generous. One-third of the fee requested, $253,403.60, amounts to just over $84,000. Mr. Keith has represented to this Court that he has expended between 110 and 200 hours in providing legal services in connection with this case. *See* Third Keith Aff. ¶ 11; Tr. of Hrg. on 2/15/94, at 35 (statement of Mr. Keith) (suggesting that he had spent approximately 200 hours on the case, without explaining the breakdown of that time). Based on these numbers, Mr. Keith would be getting compensated at an hourly rate ranging from approximately $420 to $760. This is in contrast to the compensation paid to the guardian ad litem appointed to represent Ms. Eagan at her incompetency hearing before the New Jersey court in 1991, who was compensated at a rate of $175 per hour. *See id.* at 29.

Mr. Keith claims that his retention of Bross, Strickland and Mr. Bross, who are admittedly well-skilled in personal injury litigation, in lieu of retaining himself, is evidence of his lack of self-interest. In essence, Mr. Keith claims that he could have retained himself and kept the entire fee. To the ***782** extent that Mr. Keith had little

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experience in personal injury cases, *see* Tr. of Hrg. on 2/15/94, at 25, he was poorly suited to represent Ms. Eagan in this case and as a guardian was duty bound to seek competent counsel. In other words, it is of little consolation to the estate that Mr. Keith *could* have breached his duty in at least one other respect but chose not to do so.

[18][19] Having found that a conflict between the interests of the guardian and the incompetent existed during the course of Mr. Keith's watch over his sister's estate, the Court must determine whether the appointment of a guardian ad litem is necessary to protect the interests of Ms. Eagan in the current litigation. *See* Fed.R.Civ.P. 17(c); *Gardner by Gardner,* 874 F.2d at 138–40; 6A *Federal Practice and Procedure, supra,* § 1570. When a conflict of interest exists, the Court is required to make such an intervention, even if the incompetent, as in this case, already has a general representative. *See Ad Hoc Comm. of Concerned Teachers v. Greenburgh No. 11 Union Free Sch. Dist.,* 873 F.2d 25, 30–31 (2d Cir.1989); *Hoffert v. General Motors Corp.,* 656 F.2d 161, 164 (5th Cir.1981), *cert. denied sub nom. Cochrane & Bresnahan v. Smith,* 456 U.S. 961, 102 S.Ct. 2037, 72 L.Ed.2d 485 (1982). The appointing of a guardian ad litem in such a situation has been specifically sanctioned by the Third Circuit in *Gardner by Gardner,* 874 F.2d at 138–39. Where a conflict of interest becomes apparent early in the litigation, appointment of a guardian ad litem would be the customary and appropriate course. *See, e.g., Hoffert,* 656 F.2d at 162 (lower court appointed guardian ad litem two months after suit was filed). In this case, the Court is concerned that Mr. Keith's conflict of interest may have tainted his recommendation of the settlement, as well as his superintendency of Mr. Bross's activities.

If time and money were not constraints, this Court would be disposed to appoint a guardian ad litem to assess the fairness of the proposed settlement and to examine the prosecution of the case to ensure that nothing was done to Ms. Eagan's detriment. The Court will not do so for two reasons. First, the present case has been in litigation for over two years, and, as attested to by Mr. Keith, Ms. Eagan is in need of the money from this settlement:

> [I]t's three and a half years approximately since she was injured in September of 1990. She's gotten very limited therapy because there's just no money there, other than the social security disability of $681 a month. She's been evaluated and tested and insurance she had at the time paid for that. They've been advised continually and as recently as a couple [of] months ago that she needs these therapies now. There's a—she can't wait forever because of the brain damage and the memory problems. She needs it now.

Tr. of Hrg. on 2/15/94, at 32. Second, the Court, through its stewardship of this case, has gained familiarity with the law and facts of the case sufficient to allow it to render an informed judgment as to the weaknesses and the likelihood of success of Ms. Eagan's underlying action. Though the independent views of a guardian ad litem would be valuable, the Court concludes that having followed the vicissitudes of this litigation since shortly after its inception,[FN26] the Court is equipped to judge so unattended the fairness of the proposed settlement.[FN27] Under the circumstances***783** of this case, the Court will proceed to consider the merits of the settlement agreement in its present posture and will not appoint a guardian ad litem.

> FN26. The case was filed in January of 1992 and was transferred to the Court's calendar in September of that same year.

> FN27. While the information before the Court may not be perfect, the Court finds that a decision should be made at this point in time. As Judge Stapleton of our Third Circuit has written in regards to the decisionmaking process:
>
> > Because of time and expense constraints and because experience teaches that human beings make mistakes in technique, perception, logic, communication and a myriad of other areas, no decision maker can have one hundred percent confidence in the information before him or her at any given point in time. Each decision therefore necessarily reflects a judgment of the decision maker that under all the circumstances it is more desirable to make a decision based on the currently available information than to wait for more complete data or more confirmation of the existing data.
>
> *Fisher Bros. Sales, Inc. v. United States,* No. 93–1182, slip op. at 20, 1994 WL 54992, at *10 (3d Cir. Feb. 25, 1994) (Stapleton, J., dissenting), *vacated and withdrawn,* 17 F.3d 657 (1994) (setting case for rehearing in banc).

The Court must evaluate the merits of the proposed settlement to determine whether they are fair and reasonable. *See* N.J.Ct.R. 4:44–3. As previously discussed, Mr.

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Keith proposes to settle the case in exchange for a $1.2 million payment from C.A.R.E. The requested allocation of this amount is as follows: $600,000 to structure an annuity, provided by The Prudential Insurance Company of America, producing a monthly payment of $3,333.72 for 30 years certain and life; $16,482 to reimburse Bross, Strickland for disbursements made during the course of the litigation, as documented in exhibit B attached to the proposed form of order; $253,403.60 in attorney's fees to Bross, Strickland; and $330,114.40 to reimburse John Hancock Insurance Company for medical expenses paid on behalf of Ms. Eagan and to pay any outstanding medical bills to the extent deemed proper by Mr. Keith, with the remainder accruing to the estate.

[20] Borrowing from the standards used in evaluating settlement proposals in class actions, *see Girsh v. Jepson,* 521 F.2d 153, 156–57 (3d Cir.1975), the Court finds that the proposed settlement of $1.2 million dollars is fair and reasonable. Having become familiar with the litigation, the Court agrees that a recovery greater than what was agreed to by the guardian was by no means certain. There were open questions concerning what law applied and the effect of that determination on the recovery. *See* Second Bross Aff. ¶ 13 (asserting that under Guatemalan law there would be a reduced or no recovery). Assertion of personal jurisdiction over Barbara Jackson was also uncertain. As a practical matter, trial of the case might not come to pass for many more months, time that Ms. Eagan can ill afford to wait. And given her delicate state, and the need for funds to meet her mounting expenses, a settlement in hand is better than the perhaps illusory prospect of a greater recovery after trial. Therefore, the Court reiterates its conclusion that the $1.2 million dollar settlement is fair and reasonable.

The Court also finds that the proposed disposition of the $1.2 million, sans the attorney's fee, an issue taken up *infra,* is fair and reasonable. The annuity will provide her with approximately $40,000 a year in tax-free income, and the Court is satisfied, given the financial soundness of the issuer of the annuity,[FN28] that there is a reasonable certainty that the annuity payments will be made. *See* N.J.Ct.R. 4:44–3. The amount allocated to medical expenses is sufficient to pay outstanding claims.[FN29] And the expenses proffered by Bross, Strickland are reasonable for litigation of this type. The Court therefore approves the disbursement of the $1.2 million dollar settlement in the following manner: $600,000 for the annuity, $16,482 in litigation expenses, and $330,114.40 for medical bills.[FN30] As discussed below, however, the Court does not approve the fee request made by Mr. Bross and, derivatively, by Mr. Keith.

FN28. The Prudential Insurance Company of America is rated A÷÷XV by A.M. Best and AA+ by Standard and Poors. *See* Letter Br. of 11/18/93 exhibit B (letter from Daniel Raymond).

FN29. John Hancock has made the estate an offer of $225,419.93, which is 75% of the amount paid in medical expenses by the company on behalf of Ms. Eagan, to settle their claim on the estate. An additional $106,575 is being requested by the Head Injury Center at Hillcrest, another of Ms. Eagan's medical providers. Assuming that this entire amount was sought by the Head Injury Center, it would only be entitled to 75% of it, since it would have to pay a pro-rata share of the attorney's fee, *see Hedgebeth by Meek v. Medford,* 74 N.J. 360, 378 A.2d 226, 229–30 (1977), which is capped at 25%, *see* N.J.Ct.R. 1:21–7(c)(5). Therefore, given the outstanding medical bills, the worst-case scenario is that the estate will have to pay approximately $305,000 in medical bills. Any monies not paid out in medical expenses would revert to the estate.

FN30. In setting forth an allocation for medical expenses, the Court passes no judgment as to the propriety of paying any of the medical bills now pending. Mr. Keith, as the duly appointed guardian of Ms. Eagan's estate, is free to exercise his discretion as to what medical bills should or should not be paid, so long as his actions are consistent with the terms of this memorandum and with the requirements of the New Jersey Superior Court, which has jurisdiction over Ms. Eagan's estate.

***784** C. *The Request for Legal Fees*

As part of the motion for approval of the proposed settlement, plaintiff has made a request for approval of attorney's fees in the amount of $253,403.60. [FN31] The Court's inquiry is twofold—it must determine: 1) what the maximum appropriate fee is; and 2) how much of the maximum appropriate fee should be paid to Bross, Strickland and Mr. Keith in light of their respective missteps in this litigation. In doing so, the Court will recognize and enforce the terms of the contingent fee agreement between the estate, by Mr. Keith, and Bross, Strickland, by

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Mr. Bross. The Court will also recognize and enforce the referral fee agreement entered into by Bross, Strickland and Mr. Keith. After determining the amounts Bross, Strickland and Mr. Keith are entitled to receive under the contingent fee and referral fee agreements, the Court will determine, in the case of Mr. Keith, whether his breach of duty warrants the forfeiture of his fee, and in the case of Mr. Bross and Bross, Strickland, whether a sanction is appropriate, and if so, the nature of the sanction.

FN31. As previously discussed, *see supra* note 8, there was a discrepancy in the figures submitted by the plaintiff in regards to the requested fee, with the fee listed at times as $253,*4*03.60 and at others as $253,703.60. The Court will use the lower of the two figures in this discussion, and where quoting from a source that indicates the higher figure, the Court will indicate the correct number by including brackets.

1. *Determining the Maximum Appropriate Fee*

The determination of the maximum appropriate fee must begin with an understanding of applicable New Jersey law. New Jersey exercises strict control over the contingent fees charged by its attorneys in the prosecution of tort cases. The limits established by the applicable Court Rule allow an attorney to collect 33 1/3 % on the first $250,000 recovered; 25% on the next $250,000 recovered; and 20% on the next $500,000 recovered.[FN32] *See* N.J.Ct.R. 1:21–7(c)(1)–(3). This produces a fee of $245,833.33 on a net recovery of $1 million.[FN33] If an attorney wishes to collect a fee on that portion of a net recovery that is in excess of $1 million because the attorney considers the fee allowed under the provisions to be unreasonable, then an application must be made to the Court,[FN34] which makes a determination of "a reasonable fee in light of all the circumstances." N.J.Ct.R. 1:21–7(f); *see, e.g., Iskander by Iskander v. Columbia Cement Co.,* 192 N.J.Super. 114, 469 A.2d 103 (Law Div.1983), *aff'd,* 197 N.J.Super. 169, 484 A.2d 353 (App.Div.1984); *Merendino v. FMC Corp.,* 181 N.J.Super. 503, 438 A.2d 365 (Law Div.1981).

FN32. All computations are made on the net recovery, which is the gross sum recovered less the disbursements made in conducting the litigation. *See* N.J.Ct.R. 1:21–7(d).

FN33. (33.33% x $250,000) + (25% x $250,000) + (20% x $500,000) = $83,333.33 + $62,500 + $100,000 = $245,833.33.

FN34. In New Jersey the application is made to the Assignment Judge, who acts as the chief judicial officer of the vicinage in which she sits. *See* N.J.Ct.R. 1:33–4. Since there is no Assignment Judge as contemplated in the rule in this Court, the undersigned will rule on the current application under 1:21–7(f). *See, e.g., Donaghy v. Napoleon,* 543 F.Supp. 112, 113–15 (D.N.J.1982) (applying rule 1:21–7 and approving a request for fees in excess of the percentage limits set forth in the rule).

The fee amount generated by applying the percentages set forth in the rule is modified, however, by subparagraph (c)(5), which provides for a lower fee when a matter involving an incompetent is settled:

> [W]here the amount recovered is for the benefit of a client who was an infant or incompetent when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.

N.J.Ct.R. 1:21–7(c)(5). This subparagraph acts as a cap on the fees calculated under subparagraphs one through three when, as in the instant case, the attorney represents a minor or an incompetent and the case is settled before trial.

[21] Plaintiff's first attempt to obtain court approval of the proposed attorney's fee was plainly inadequate. Forwarded to the Court by *defense counsel* at the apparent request of Mr. Bross, this summary request for approval of settlement consisted of a ***785** proposed form of order, an affidavit sworn by Mr. Keith, and two exhibits, one a letter discussing the proposed annuity, the other a list of the expenses incurred by Bross, Strickland.[FN35] The portion of the proposed form of order concerning attorney's fees read *in toto* as follows:

FN35. Though the submission made by letter was not filed of record, the items contained in the submission were all resubmitted in identical form when plaintiff made a formal motion for approval of the settlement. All references to the items submitted by letter will be to the identical items submitted by motion.

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awarded a total fee of $253,[4]03.60 for services rendered on behalf of SHARON EAGAN, in accordance with New Jersey Court Rule 1:21–7(c).
Proposed Form of Order at 2. No application under 1:21–7(f) for an enhanced fee was made, nor was there any explanation of how Bross, Strickland had arrived at the $253,403.60 figure for attorney's fees. Without a fee application, the request for $253,403.60 in fees was clearly in error, and the statement that the fee requested was "in accordance" with the applicable rule was at best misleading and at worst an outright misrepresentation. The effect of the error was compounded by the fact that the fee application was not subject to the adversarial crucible, given that the defendants had no interest in the manner the $1.2 million it had agreed to pay was distributed.

A. 25% of the first $500,000.00;

B. 20% of the next $500,000.00;

C. 15.5% of the next $250,000.00.

The net recovery is the total recovery ($1,200,000.00) less expenses ($16,482.00), which is $1,183,518.00. 25% of the first $500,000.00 is $125,000.00; 20% of the next $500,000 is $100,000.00; and 15.5% of the remaining $183.518 is $28,403.60. Accordingly, the counsel fees are $253,403.60.

Certification of Robert Cary ¶ 12. No mention was made in the certification, nor in the accompanying memorandum of law, of Rule 1:21–7(f) and its requirements.

At the October 1993 hearing, the Court engaged Mr. Bross and Mr. Mori in a colloquy concerning the proper application of 1:21–7(c)(5). The question presented was how the 25% cap interacted with the percentage limits contained in the fee agreement, limits which are identical to the maximum limits in 1:21–7(c)(1) through (c)(3). The method implicitly proposed by Mr. Cary in his calculations applied a 25% cap to each prong of the calculation. Thus, the fee on the first $250,000 of the recovery would be limited to 25%, rather than the otherwise permissible 33 1/3 %. Under this formulation, the fee on the first $1 million of the net recovery would be $225,000. This formulation was seconded by Mr. Mori at the hearing, *see* Tr. of Hrg. on 10/28/93, at 13–14, and was described by Mr. Bross as the standard method of calculating a fee in New Jersey when a party is an incompetent, *see id.* at 15.

The alternative method, the one posited by the Court at the hearing as the correct interpretation, was to apply the agreed-to percentages, i.e., 33 1/3 %, 25%, and 20%, to determine the fee, which is then subject to a decrease if the fee exceeds 25% of the net recovery. *See id.* at 12–14. Thus, the fee would be calculated using the percentages in the agreement, including the 33 1/3 % on the first $250,000, and then reduced to 25% of the net recovery if necessary. Under this method, the fee on the first $1 million of the net recovery would be $245,833.33, roughly $21,000 more than under the method suggested by counsel. *See supra* note 33. To assist the Court in interpreting the rule, counsel was asked to brief the issue in a supplemental response. *See* Tr. of Hrg. on 10/28/93, at 27. At the hearing, it was also ***786** established that counsel's application was in fact an application under Rule 1:21–7(f), *see id.* at 10–11, and the Court indicated it would construe it as such, *see id.* at 27.

Dissatisfied with the request for approval, and unguided as to the methodology used in arriving at the requested figure, the Court asked that a formal motion be filed, explaining, *inter alia,* the calculation of the fee request. *See* Letter from R. Michael Mori to the Court of 9/17/93, at 3–4 (copy of the Court's letter of Aug. 18, 1993). In response, the same proposed form of order and affidavit were filed. In addition, a certification was filed by Mr. Bross's partner, Mr. Cary, outlining the procedure used in reaching the figure:

The contingent fee arrangement was calculated as follows:

In their letter brief filed as a supplemental response after the hearing, Bross, Strickland reversed field, now agreeing that the Court's interpretation was the correct one:

The Court expressed that the construction of *R.* 1:21–7(c)(5) allowed for a maximum [fee] of 25% of the recovery, although the limitations set forth in *R.* 1:21–7(c)(1), (2) and (3) are to be applied. After a review of New Jersey case law, the Court's interpretation of *R.* 1:21–7(c)(5) is correct.

Letter Br. of 11/18/93, at 5 (citations omitted). This apparent concession resulted in an increase of approxi-

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mately $21,000 in the non-discretionary aspect of counsel's fee.[FN36] In support of its change of heart, Bross, Strickland relied on *McCombs v. New Jersey State Police,* 242 N.J.Super. 261, 576 A.2d 349 (Law Div.1990). This case, however, *had absolutely nothing to do with the interpretation of the rule,* and does not support Bross, Strickland's position. *McCombs* dealt with a request by counsel to receive a contingent fee greater than 25%, where the plaintiffs were infants and where the guardian ad litem opposed the request. *See id.,* 576 A.2d at 350. Rejecting the attorney's argument, the *McCombs* court held that the 25% limitation applied to wrongful death actions on behalf of infant plaintiffs, *see id.,* that settling the case after a jury was selected did not avoid the 25% limitation, *see id.* at 351, and that the difficulty of the case and the opinion of the parties as to the quality of the lawyer's services were irrelevant in determining whether the 25% limitation applied, *see id.* There is absolutely no discussion in the opinion of how the 25% limitation relates to the limitations specified in the remainder of the rule. Also significant in assessing counsel's dealings with the Court was counsel's failure to cite three reported opinions by Assignment Judge Simpson of the New Jersey Superior Court that state, albeit in *dicta,* that the proper method of calculating a fee where Rule 1:21–7(c)(5) applies is as initially proposed by counsel, the 25% cap being applied to each portion of the settlement amount. *See Bambi v. Dr. O,* 196 N.J.Super. 349, 482 A.2d 536, 538 (Law Div.1984); *A by J v. D,* 196 N.J.Super. 340, 482 A.2d 531, 534 (Law Div.1984), *overruled on other grounds by Kingman v. Finnerty,* 198 N.J.Super. 14, 486 A.2d 342, 344 (App.Div.1985); *Merendino,* 438 A.2d at 367 (applying former Rule 1:21–7(c)(7), the equivalent of 1:21–7(c)(5)); *cf.* Pa.R.P.C. 3.3(a)(3) (requiring a lawyer to disclose to the court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

> FN36. Using the method originally adopted by the Court results in a fee application under 1:21–7(f) of only $7,570.27 ($253,403.60–$245,833.33). Under the method originally pressed by Bross, Strickland, the application is for $28,403.60 ($253,403.60–$225,000).

The Court concludes, however, that it need not decide which of the two constructions of Rule 1:21–7(c)(5) is the proper one, since the contingent fee agreement itself, which was drafted by Bross, Strickland, indicates the method to be used in calculating the fee, application of which does not result in an amount that exceeds the permissible limits under either construction of 1:21–7(c)(5). The agreement between Bross, Strickland and the estate incorporated the requirements of the rule as follows:

> [22][23] The legal fees will be reduced to 25% of the net recovery if this matter is settled without trial.
>
> Bross Response exhibit 3 at 2. During the October hearing, Mr. Bross explained that the manner of applying 1:21–7(c)(5), *the manner reflected in the retainer agreement itself,* was to reduce the 33 1/3 % that would otherwise be applied to the first $250,000 recovered. *See* Tr. of Hrg. on 10/28/93, at 8–9, 12–13. This in fact was the method used by Bross, Strickland in calculating the requested fee. *See* Certification of Robert Cary ¶ 12. These representations evince an intent on the part of Bross, Strickland that the 25% limitation is to be applied to each portion of the recovery. Moreover, as a matter of equity, Bross, Strickland is estopped from changing its position to the detriment of the estate, which would be the effect of not applying the 25% ***787** limitation to each portion of the recovery. Therefore, based on Bross, Strickland's own written fee agreement, as well as its initial representations to the Court, the Court holds that the 25% limitation shall be applied to each portion of the recovery.[FN37] Applying the percentages provided in the fee agreement, the Court finds that the appropriate fee under the contingent fee agreement and New Jersey Court Rule 1:21–7(c) is $225,000, representing 25% of the first $250,000, 25% of the next $250,000, and 20% of the next $500,000.
>
> > FN37. Even as a matter of contract interpretation this result would follow. The contract term in this case is, on its face, susceptible of two equally plausible interpretations—the reduction can be imposed *before* or *after* the percentages outlined in the contingent fee agreement are applied—thereby making it ambiguous. *See In re Barclay Indus., Inc.,* 736 F.2d 75, 79 (3d Cir.1984) ("To be unambiguous a contract must be capable of only one reasonable reading."). Where a term is ambiguous, the court must construe the term against the party who has prepared the contract. *See Moses v. Edward H. Ellis, Inc.,* 4 N.J. 315, 72 A.2d 856, 860 (1950). This rule applies with even greater force to an agreement between an attorney and a client, and such agreements "should be liberally construed in favor of the client." *Jersey Land & Dev. Corp. v. United States,* 342 F.Supp. 48, 54 (D.N.J.1972). Construing the term in favor of Ms. Eagan would require max-

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imizing the recovery to the estate—the 25% limitation would be applied to each portion of the recovery.

[24] Bross, Strickland has also made application for a fee enhancement. Initially, it asked for roughly $28,000 extra, representing 15.5% of the net recovery in excess of $1 million, i.e., 15.5% of $183,518. *See* Certification of Robert Cary ¶ 12. Subsequently, under the assumption that under the contingent fee agreement it was entitled to an unenhanced fee of $245,833.33, it requested only $7,570.27. In any event, the Court concludes that, examining the facts of the litigation in light of the factors established in Rule of Professional Conduct 1.5(a),[FN38] Bross, Strickland is not entitled to an enhanced fee of any kind. *See* N.J.Ct.R. 1:21–7(e) (requiring that contingency fees conform with RPC 1.5(a)); *see, e.g., Iskander by Iskander v. Columbia Cement Co.,* 197 N.J.Super. 169, 484 A.2d 353, 354–55 (App.Div.1984) (*per curiam*) (affirming lower court's use of the factors listed in RPC 1.5(a)). Bross, Strickland argues that the difficulty of the case, the efforts, skill, and ability of Mr. Bross, and the results obtained all favor the granting of an enhanced fee. The Court does not agree. As a preliminary procedural matter, "[t]he claim of inadequacy must ... be thoroughly substantial and documented and cannot rest merely on the claim of a successful result in a generally difficult type of litigation without showing of the particular difficulty of the specific litigation in question." Sylvia B. Pressler, *Current N.J. Court Rules,* Comment R. 1:21–7(f) (1993). This Bross, Strickland did not do. Though there was an apparent jurisdictional problem regarding defendant Jackson, jurisdiction over the deep-pocket defendant, C.A.R.E., was not an issue. The case was resolved without trial and without much discovery or motion practice. *Cf. Iskander,* 469 A.2d at 108 (matter was resolved after an 18–day trial). Moreover, the hours spent by Mr. Bross on this matter, approximately 300, *see* Second Bross Aff. ¶ 16, were not inordinate over the course of over one-and-a-half years of litigation. *Cf. A by J,* 482 A.2d at 534 (approving enhanced fee application where counsel had spent over 2600 hours on the litigation). And the activities listed by counsel as being indicative of the superlative effort expended on the prosecution of this case strike the Court as being ***788** fairly typical of any multi-jurisdictional tort case. *See, e.g.,* Second Bross Aff. ¶ 10 (retaining Guatemalan attorney); *id.* ¶ 11 (traveling to Guatemala with two Spanish-speaking attorneys to conduct depositions); *id.* ¶ 12 (researching jurisdictional issues). As a substantive matter, the Court questions counsel's assertion that Guatemalan law might have been applicable, and that, if such had been the case, there would have been no recovery. *See id.* ¶ 13. In fact, as a matter of choice-of-law analysis, the greater the likelihood that an injured plaintiff would not recover under Guatemalan law, the lesser the likelihood that a Pennsylvania court would choose to apply Guatemalan rather than New Jersey law, it appearing that the interests of New Jersey in compensating an injured domiciliary outweigh the interests of Guatemala in a lawsuit between two foreign parties litigated in a foreign forum. *See Lacey,* 932 F.2d at 187. Even assuming that Guatemalan law was applicable to this case, it is not even clear that the assertions made concerning the difficulties of recovery are a correct statement of Guatemalan law. *See, e.g., Guatemala Law Digest, in* Martindale–Hubbell, *International Law Digests* at GUA–3 (1992) (stating that Guatemalan law generally allows some recovery for personal injury). The application pursuant to New Jersey Court Rule 1:21–7(f) is therefore denied. The Court concludes that $225,000 is the maximum appropriate fee in this case.

FN38. New Jersey Rule of Professional Conduct 1.5(a) reads as follows:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

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(8) whether the fee is fixed or contingent.

2. *Apportioning the Maximum Appropriate Fee*

The Court must now decide what portion of the maximum appropriate fee, if any, should be paid to Mr. Keith and to Bross, Strickland, respectively. The pivotal issue at this juncture is whether the parties, by their conduct, have forfeited the fees to which they would be entitled under the contingent fee and referral fee agreements. The Court will separately examine the conduct of Mr. Keith and Mr. Bross in light of all the circumstances surrounding the litigation.

a. *Mr. Keith's Fee*

[25][26] As to Mr. Keith, the examination is uncomplicated. Under the referral fee agreement, Bross, Strickland agreed to pay him and he agreed to accept a one-third referral fee. While the Court will enforce this agreement, the Court concludes that Mr. Keith's referral fee will be forfeited to the estate as a result of his breach of his duty of loyalty to the estate. As discussed above, Mr. Keith breached this duty by placing himself in a conflict of interest position throughout the instant litigation by agreeing to accept a portion of the fee earned by the lawyer he was duty bound to supervise. The breach was compounded by Mr. Keith's rendering of an opinion as to the fairness of the settlement agreement and the requested fee while failing to inform the Court that he was in a position to receive a portion of the fee.[FN39] A further breach was occasioned by Mr. Keith's endorsement of Bross, Strickland's application for an enhanced fee, an enhancement that would have resulted in the diversion of funds from the estate to Mr. Keith's own pocket. The words of Justice Cardozo, then a member of the New York Court of Appeals, concerning a fiduciary's duty remain just as apt today as when they were written more than sixty years ago:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. ***789** Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.
>
> *Meinhard v. Salmon,* 249 N.Y. 458, 164 N.E. 545, 546 (1928) (citation omitted). This rule of ancient vintage, grounded on the crucible of human experience, will not be disregarded by this Court either.

[27][28] A fiduciary who profits from his position must disgorge to the estate any benefits that are actually received. *See Rothenberg v. Franklin Washington Trust Co.,* 133 N.J.Eq. 261, 31 A.2d 831, 832 (1943); *Silverstein,* 383 A.2d at 723; IIA Scott & Fratcher, *supra,* § 170.22. Although application of this rule may seem harsh, only the certainty that forfeiture of the ill-gotten gains will follow detection of the breach will serve the prophylactic purpose of the rule. Therefore, Mr. Keith's portion of the legal fees, $75,000, which represent the fruits of his breach of duty, and which Bross, Strickland had agreed to pay him under the referral fee agreement, will be forfeited to the estate.[FN40] Given his misconduct, he will not be permitted to recover for *any* services he may have performed in connection with this litigation.[FN41] Furthermore, for the same reasons as discussed *infra* in regards to Mr. Bross, he will be referred to the New Jersey Superior Court for possible referral to the New Jersey Supreme Court Office of Attorney Ethics.

FN39. At the February hearing, counsel for Bross, Strickland asserted that the Court's question concerning any referral fee agreements had been answered candidly, and had been answered before the matter concluded. *See* Tr. of Hrg. on 2/15/94, at 19. This, however, is insufficient. Is it this Court's burden, in exercising its authority to protect the rights of an incompetent, to ask every possible question during the course of an *ex parte* hearing on a motion to approve settlement? Mr. Keith, whether acting as lawyer, guardian, or both, had an obligation during the course of these proceedings to inform the Court of his compromised position.

FN40. The Court rejects the contention of Bross, Strickland's counsel that the effect of this decision is the payment of a referral fee by Bross, Strickland to the estate. *See* Tr. of Hrg. on 2/15/94, at 38. The $75,000 referral fee is considered paid to Mr. Keith, and subsequently forfeited to the estate. Bross, Strickland's fee in this case, as set by the Court, is $150,000. There is no penalty being applied since Bross, Strickland

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could not have anticipated receiving any more than this amount, barring a successful application under 1:21–7(f), given its agreement to pay Mr. Keith a referral fee, an agreement it presumably entered into in the good-faith belief that it would be legitimate. If the New Jersey Superior Court were to eventually reject the referral agreement, Bross, Strickland would be unjustly enriched.

FN41. Although a guardian who performs legal services for an estate is entitled to petition for compensation, *see* N.J.Stat.Ann. § 3B:18–6 (West 1983), it would be inequitable to allow a guardian who has breached his duty of loyalty to recover, whether for work performed as a lawyer or as a guardian.

b. *Bross, Strickland's Fee*

[29] Bross, Strickland, in the person of Mr. Bross, stands on a slightly different footing than does Mr. Keith. While the Court will recognize and enforce for purposes of this settlement the terms of the contingent fee and referral fee agreements, and will not examine Mr. Bross's role in helping to navigate the appointment of Mr. Keith by the New Jersey Superior Court as the guardian of the estate, the Court does not validate the conduct either. Though the Court could well conclude that these actions and agreements were inimical to the interests of justice, because they occurred in New Jersey prior to the filing of the instant law suit and in the course of the retention of a New Jersey lawyer to represent a New Jersey guardian who was to act on behalf of an incompetent domiciled in New Jersey, and because they call upon the application of New Jersey Court Rules, the Court will defer to the New Jersey Superior Court with overall superintendency over the estate on the issue of what portion of the maximum appropriate fee, if any, should be awarded to Bross, Strickland. Bross, Strickland, in fact, has agreed that the New Jersey court is the proper forum for the resolution of this issue. *See* Bross Response at 14–15.

[30] The Court does sit in judgment on Mr. Bross's activities in this Court, specifically, his silent acquiescence to Mr. Keith's statement to the Court concerning the fairness of the settlement, and to Mr. Keith's endorsement of the request for an enhanced fee, at the time Mr. Bross *knew* of Mr. Keith's compromised position. Though the Court does not find that Mr. Bross violated any fiduciary duty to the estate, *but see* IV Scott & Fratcher, *supra,* § 326.4 (discussing an attorney's liability to a beneficiary for colluding with a trustee in a breach of fiduciary duty), the Court concludes that Mr. Bross's conduct constituted a breach of his duty of candor towards this tribunal.

***790** [31] Rule 3.3(d) of the Pennsylvania Rules of Professional Conduct provides as follows:

> In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

There is no doubt that the instant proceedings were *ex parte* in that, though the defendants were technically parties to them, they had no adversarial interest in opposing Bross, Strickland's fee request. Candor to the Court, though desirable under any circumstance, is mandated in *ex parte* proceedings, where the Court is deprived of the benefits of the "dialectic of the adversary system." 1 Geoffrey C. Hazard & W. William Hodes, *The Law of Lawyering* § 3.3:501, at 619 (2d ed. 1993). Under Rule 3.3(d), a lawyer engaged in an *ex parte* hearing must "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." Pa.R.P.C. 3.3(d); *cf. Fitzhugh v. Committee on Professional Conduct,* 308 Ark. 313, 823 S.W.2d 896 (1992) (discussing similar provision); *In re Norton,* 128 N.J. 520, 608 A.2d 328 (1992) (*per curiam*) (same); *see also* Local R.Civ.P. 14 (Rule VIII) (stating that an attorney appearing *pro hac vice* submits to the rules of this Court, which include by incorporation the Pennsylvania Rules of Professional Conduct).

[32] Even beyond the requirements of Rule 3.3(d), an attorney, as an officer of the Court, has an overarching duty of candor to the Court. *See Malautea v. Suzuki Motor Co.,* 987 F.2d 1536, 1546 (11th Cir.1993); *Beam v. IPCO Corp.,* 838 F.2d 242, 249 (7th Cir.1988); *United States v. Associated Convalescent Enters., Inc.,* 766 F.2d 1342, 1346 (9th Cir.1985); *Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc.,* 108 F.R.D. 96, 104 (D.N.J.1985); *Virzi v. Grand Trunk Warehouse & Cold Storage Co.,* 571 F.Supp. 507, 512 (E.D.Mich.1983). As recently described by the Fourth Circuit Court of Appeals, this duty is founded on the preservation of the integrity of the judicial process:

> Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system's process which is designed for the

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> purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process....
>
> While no one would want to disagree with these generalities about the obvious, it is important to reaffirm, on a general basis, the principle that lawyers, who serve as officers of the court, have the first line task of assuring the integrity of the process.... The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end. It is without note, therefore, that we recognize that the lawyer's duties to maintain the confidences of a client and advocate vigorously are trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.

United States v. Shaffer Equip. Co., 11 F.3d 450, 457–58 (4th Cir.1993).

Given the *ex parte* nature of the hearing, the Court holds that Mr. Bross's silence was inexcusable. The Court was led to believe, if only tacitly, that it was being assisted in its decisionmaking by a disinterested guardian, when Mr. Bross *knew* that such was not the case. The Court concludes that Mr. Bross, while under a duty to do so, failed to speak the unvarnished truth.

The breach of the duty of candor was further aggravated by counsel's discombobulated performance in presenting the fee application to the Court. Counsel failed to file initially a formal motion for approval; misrepresented that the fee requested was in accordance with the New Jersey rules; failed to cite to relevant New Jersey case law on ***791** the interpretation of New Jersey Court Rule 1:21–7(c)(5); and miscited *McCombs v. New Jersey State Police. See supra* at 784–86. Though these missteps in isolation could be overlooked, viewed as links in a chain, they leave the Court with the clear and distinct impression that Mr. Bross did not play fair with the Court. Given the late hour in the litigation, all that the Court can do is note the infractions and take the appropriate measures. *See Webb v. E.I. Du Pont de Nemours & Co.,* 811 F.Supp. 158, 160 (D.Del.1992).

Bross, Strickland argues that Mr. Bross's failure to disclose Mr. Keith's financial interest was not a violation of Rule 3.3(d) because the interest was not a material fact, i.e., because it was not " 'important enough to affect the outcome of a case.' " Bross Response at 33 (quoting *Webster's New World Dictionary* 874 (2d College ed. 1980)). The Court will not trivialize the violation. If the conflict created by Mr. Keith's financial interest had been disclosed at an earlier point, the Court would have considered appointing a guardian ad litem to conduct this litigation. *See* Fed.R.Civ.P. 17(c); *see, e.g., Gardner by Gardner,* 874 F.2d at 138; *Ad Hoc Comm. of Concerned Teachers,* 873 F.2d at 30–31; *Hoffert,* 656 F.2d at 164. Counsel cannot change the materiality of a fact by failing to disclose it until the last minute, thereby attempting to render it immaterial in the face of competing concerns, e.g., Ms. Eagan's need for money. Counsel had an obligation to disclose the conflict early on in the litigation, maybe even at the inception, at a point when the Court could have made a timely analysis under Rule 17(c) of the propriety of Mr. Keith's representation of the estate in this case.

[33] The Court concludes that under the circumstances, the most appropriate course of action is to revoke Mr. Bross's *pro hac vice* admission. Though the Court finds that his conduct rose to a level that may be considered a breach of the Rules of Professional Conduct, it is not this Court's function to adjudge whether or not Mr. Bross's conduct should result in some manner of professional discipline. That determination is properly reserved to the appropriate disciplinary body. *See, e.g., Greenfield v. U.S. Healthcare, Inc.,* Civ.A. No. 92–6345, 1993 WL 106453, at *2 (E.D.Pa. Apr. 6, 1993) ("[T]he inquiry, adjudication, and determination of allegations of ethical misconduct are matters for the Disciplinary Board of the Supreme Court of Pennsylvania."). In this case, given that this matter is being referred to the New Jersey Superior Court for further proceedings, and given counsel's *pro hac vice* status, the Court finds that referral to the Disciplinary Board of the Supreme Court of Pennsylvania is unwarranted. That said, the Court is not without recourse to require adherence to the Court's disciplinary rules from attorneys appearing *pro hac vice.* "At a minimum, a violation of any disciplinary standard applicable to members of the bar of the court would justify revocation of *pro hac vice* status." *Johnson v. Trueblood,* 629 F.2d 302, 304 (3d Cir.1980) (*per curiam*).

[34] The Third Circuit requires that before this Court

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revokes a *pro hac vice* admission, counsel must be provided with "notice of the conduct placing his or her *pro hac vice* status at risk, notice of the standard the ... court will apply in deciding whether to revoke that status, an opportunity to respond, and written reasons for any revocation." *Taberer v. Armstrong World Indus., Inc.,* 954 F.2d 888, 910 (3d Cir.1992); *see Johnson,* 629 F.2d at 303–04 (establishing the supervisory rule). Though the Court's Order to Show Cause did not specify revocation of *pro hac vice* status as an envisioned course of action, the Order did provide Mr. Bross with notice of the conduct troubling the Court, specifically, that his breach of the duty of candor was at issue, and did in fact intimate that a harsher sanction than what is proposed here was possible, i.e., referral to the New Jersey Supreme Court Office of Attorney Ethics and reduction of the contingent fee to quantum meruit. Mr. Bross was given an opportunity to be heard and to present evidence at a hearing, where he was represented by distinguished Pennsylvania counsel. The Court finds that the Order to Show Cause and the subsequent hearing satisfied the procedural requirements under the supervisory rule established in *Johnson,* and, for the reasons heretofore stated, will revoke the *pro hac vice* admission granted to Mr. Bross on March 18, 1992.

To sum up, Mr. Keith is entitled to $75,000 under the referral fee agreement, but due to ***792** his breach of the duty of loyalty, the fee is forfeited to the estate. Bross, Strickland is entitled to a fee up to a maximum of $150,000, subject to approval by the New Jersey court. Mr. Bross's *pro hac vice* admission is revoked.

III. CONCLUSION

Ms. Eagan has suffered greatly from her injuries. The settlement of this case cannot truly recompense her, nor can it restore her to her former self. Though Messrs. Bross and Keith have reached a settlement that, under the circumstances, the Court has concluded is fair and reasonable, the Court is greatly troubled by their conduct in this case. "The court has the right to rely upon the integrity of its officers. The legal profession is a confidential one, with a double duty upon its members, viz., utmost good faith toward both client and court." *In re Wolk,* 82 N.J. 326, 413 A.2d 317, 319 (1980) (*per curiam*). Though the Court has no reason to doubt that Messrs. Bross and Keith are recognized as upright and respectable members of the bar, their conduct in this case falls below the level of professionalism the Court is entitled to expect from those licensed to practice before it. Mr. Bross helped put Mr. Keith in a compromised position, a position that Mr. Keith readily accepted, and both of them omitted that fact when they appeared before the Court to make what was essentially a joint fee petition. Mr. Keith shall receive no fee for his tainted efforts, and while the Court has determined the maximum appropriate fee that Bross, Strickland may collect, the actual fee will ultimately depend upon the New Jersey Superior Court's judgment of the propriety of their efforts. This determination is consistent with the avowed intention of Messrs. Bross and Keith that "Sharon's welfare [is] of primary importance." Second Bross Aff. ¶ 14. In conclusion, the Court finds:

1. Settlement of the case by payment to the estate of $1.2 million is fair and reasonable;

2. Under the contingency fee agreement the maximum appropriate legal fee (the "Appropriate Fee") in this case is $225,000. Under the circumstances of this case, this amount is permissible under New Jersey Court Rules;

3. Bross, Strickland is entitled to receive up to $150,000 as an appropriate fee. Whether Bross, Strickland and Mr. Bross's conduct in initially entering into an oral contingent fee agreement, promising to pay Mr. Keith a one-third referral fee, and appearing as counsel in the incompetency proceedings, and thereafter undertaking the representation of the estate in this litigation, without disclosing to the New Jersey Superior Court the existence of a referral fee agreement with Mr. Keith, violated the New Jersey Court Rules and/or the New Jersey Rules of Professional Conduct or other applicable New Jersey statutes or rules, shall be referred to the New Jersey Superior Court with general superintendency upon the administration of the estate. The New Jersey Superior Court shall determine what portion, if any, of the $150,000 shall be forfeited to the estate, or otherwise approved for payment to Bross, Strickland;

4. Mr. Bross's conduct during the course of the litigation breached his duty of candor to the tribunal. Mr. Bross's *pro hac vice* admission will therefore be revoked;

5. Under the referral fee agreement, Mr. Keith is entitled to $75,000, or one-third of the appropriate fee. Mr. Keith's conduct during the litigation in this Court breached his fiduciary duty to the estate. Mr. Keith shall therefore forfeit to the estate the referral fee he agreed to accept from Bross, Strickland (amounting to one-third of the Appropriate Fee). Mr. Keith shall also be referred to the New Jersey Superior Court for the same reasons as Bross, Strickland and Mr. Bross, i.e., actions taken as an attorney prior to the institution of the instant case; and

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6. The recovery shall be allocated as follows:

	$ 600,000	Purchase of an annuity from Prudential Insurance Company of America
	$ 16,482	Litigation Expenses, payable to Bross, Strickland
	$ 150,000	Attorney's fees, payable to Bross, Strickland, subject to approval by the N.J. Superior Court
	$ 0	Referral fee payable to Eugene Keith
	$ 330,114.40	Medical Bills
	$ 103,703.60	Remainder to the estate of Sharon Eagan
TOTAL	$1,200,000.00	

An appropriate order shall be entered.

***793** *ORDER*

AND NOW, this 13th day of June, 1994, for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that:

1. Settlement of the case by payment to the estate of $1.2 million is approved;

2. The appropriate legal fee in this case is $225,000;

3. Mr. Eugene Keith is entitled to $75,000. This amount is forfeited to the estate of Sharon Eagan;

4. Bross, Strickland, Cary & Grossman, P.A., is entitled to receive up to $150,000. No monies shall be disbursed, however, without the permission of the New Jersey Superior Court with general superintendency upon the administration of the estate;

5. The *pro hac vice* admission of Mr. Sheldon Bross, Esq., counsel for the estate in this litigation, is revoked;

6. The Clerk of the Court shall send a copy of this Order and accompanying Memorandum to the clerk of the New Jersey Superior Court in Essex County, New Jersey, with a request that it be filed of record in the case captioned *In the Matter of the Guardianship of Sharon Eagan,* Essex County Surrogate's Court Docket No. 13,447–Y. The Clerk shall also send a copy to the chambers of the Honorable Harry Margolis, Presiding Judge of the Chancery Division, Essex County, New Jersey, and a copy to Mr. Joseph Bottitta, Esq.;

7. The $1.2 million recovery shall be allocated and distribution shall be made as follows:

	$ 600,000	Purchase of an annuity from Prudential Insurance Company of America
	$ 16,482	Litigation Expenses, payable to Bross, Strickland, Cary & Grossman, P.A.
	$ 150,000	Attorney's fees, payable to Bross, Strickland, subject to approval by the N.J. Superior Court
	$ 0	Referral fee payable to Eugene Keith
	$ 330,114.40	Medical Bills
	$ 103,703.60	Remainder to the estate of Sharon Eagan
TOTAL	$1,200,000.00	

8. The case shall be marked **CLOSED.**

AND IT IS SO ORDERED.

E.D.Pa.,1994.
Eagan by Keith v. Jackson

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H

United States Bankruptcy Court,
W.D. Pennsylvania.
In re Sharon Diane HILL, Debtor,
Roberta A. DeAngelis, Acting United States Trustee for Region 3, Movant,
v.
Countrywide Home Loans, Inc., Goldbeck, McCafferty and McKeever, and Attorney Leslie Puida, Respondents.

No. 01–22574 JAD.
Nov. 24, 2010.

Background: Order to show cause was issued against residential mortgage lender and its attorneys as to why sanctions should not be imposed for their alleged misconduct in failing to properly credit payments received under Chapter 13 debtor's cure-and-maintenance plan, in attempting to collect what they should have realized was a highly doubtful deficiency, and in engaging in allegedly deceptive conduct in settlement negotiations with debtor's attorney and in their representations to the bankruptcy court. After the court determined that sufficient cause existed to sanction law firm and attorney, 437 B.R. 503, hearing was held regarding what sanctions would be appropriate.

Holdings: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that:
(1) public reprimand was an appropriate sanction for firm, and
(2) public reprimand also was an appropriate sanction for attorney who lied to the court.

So ordered.

West Headnotes

[1] Attorney and Client 45 59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In general. Most Cited Cases

Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Public reprimand was appropriate sanction for law firm that represented residential mortgage lender, where firm was found to have made a false statement in a motion to quash notices of Rule 2004 examinations and to have failed to promptly notify Chapter 13 debtor's attorney of the fact that change-in-payment letters were never sent, while engaging in settlement negotiations with that attorney, and to have deliberately or at least recklessly misrepresented to the bankruptcy court that the firm had apprised debtor's attorney of the fact that the letters were never mailed; monetary sanction was not warranted, given magnitude of financial loss which the firm already had experienced in the form of attorneys fees and lost client revenue and the fact that a further monetary sanction was unlikely to have any significant deterrent effect, and honesty and truthfulness were matters of character that could not be taught through mandatory continuing legal education (CLE) or ethical training. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

[2] Attorney and Client 45 59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In general. Most Cited Cases

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Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Public reprimand was appropriate sanction for attorney for law firm that represented residential mortgage lender, where bankruptcy court found that attorney had lied to the court and had not subsequently accepted responsibility for doing so; attorney had already, in a sense, been suspended from practice in the bankruptcy court, as firm had taken her off assignment to any cases filed in the district and it seemed highly unlikely that that would change anytime soon, monetary sanction was inappropriate as attorney already had suffered a significant financial detriment as a result of the matter, and mandatory continuing legal education (CLE) training, mediation, and the like were of no use, given that honesty and truthfulness were matters of character that could not be taught. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

***648** Donald R. Calaiaro, Calaiaro & Corbett, P.C., Kenneth Steidl, Steidl & Steinberg, Robert O. Lampl, Pittsburgh, PA, for Debtor.

MEMORANDUM ORDER

THOMAS P. AGRESTI, Chief Judge.

On October 5, 2010, the Court entered a *Memorandum Opinion and Order,* Document No. 562 [FN1], which found that sufficient cause existed to sanction Respondents Goldbeck, McCafferty and McKeever ("GMM") and Attorney Leslie A. Puida ("Puida") as to Items 6 and 7 of the *Rule to Show Cause* ("Rule"), Document No. 465, issued on July 29, 2009. Those two Items provided:

> FN1. Reported at *In re Hill,* 437 B.R. 503 (Bankr.W.D.Pa., October 5, 2010).

> (6) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, failed to disclose to the debtor's attorney that three Payment Change Letters had never actually been sent, all in an improper attempt to collect on questionable debt while attempting to resolve a matter that was pending before this Court.
>
> (7) Goldbeck McCafferty and McKeever and Leslie Puida intentionally, or with reckless disregard and/or indifference to the applicable facts, made inaccurate oral statements in response to the Court's inquiry regarding when Leslie Puida told the Debtor's attorney that the three Payment Change Letters were not what they purported to be, but instead were memoranda created years after the event.

The Court did not actually decide what sanctions would be imposed in the *Memorandum Opinion and Order,* instead deferring that decision until after a hearing scheduled for November 22, 2010 to allow GMM and Puida an opportunity to present evidence of mitigation or other pertinent evidence going to an appropriate sanction. Prior to the hearing, at the request of counsel for GMM and Puida, the Court also convened a telephonic status conference, and entered a related order, to provide further guidance as to expectations for the hearing.

The hearing went forward as scheduled and GMM and Puida called three witnesses and submitted a number of exhibits. Attorney Robert Bernstein was called as an expert and opined on the practices and procedures currently being followed at GMM, some of them implemented as a direct result of the *Hill* matter. The Court found Atty. Bernstein to be a credible***649** witness and was gratified to hear that GMM does seem to have taken a number of steps that should result in improved operations and responsiveness to legitimate debtor concerns in cases being handled by the firm. Of course, Atty. Bernstein's testimony went only to "after-the-fact" matters. He had no personal knowledge or other insights as to the events underlying the *Rule.*

Attorney Michael McKeever, one of the principal shareholders of GMM also testified. McKeever confirmed much of the testimony of Mr. Bernstein concerning changes which have been implemented by GMM in response to the *Hill* matter, including an increased reliance on the presence of its own attorneys in the Western District as opposed to the use of local counsel. He apologized to the Court and the

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other interested parties and testified that GMM has been damaged by this whole matter in a number of ways. On a strictly monetary level, the firm has incurred out-of-pocket attorney and expert fees approaching $400,000 which will not be reimbursed by insurance coverage. McKeever also testified that two large clients have suspended referrals to the firm as a result of this matter, although the extent of that "loss" is somewhat unclear because it does not apply to cases already in the pipeline, and no information was provided as to how long the suspension will last.[FN2]

> FN2. It is perhaps worth noting that Respondent Countrywide Home Loans, Inc., now under the umbrella of Bank of America, is *not* one of the clients that has suspended referrals to GMM.

McKeever also described the damage to GMM's professional reputation, which he said has been significant. He stated that the firm has "self-reported" to the Pennsylvania Disciplinary Board, although the extent of that reporting was left somewhat unclear. The firm has also notified its clients as to "what happened" in this matter although the specific content and description of the notice being communicated was not identified. While still commendable, the mitigatory value of this action was somewhat tempered by the fact that it was only undertaken after a client made inquiries with the firm indicating that it was aware of this matter.[FN3] McKeever testified that the firm is committed to efforts to restore its reputation and improve its internal processes.

> FN3. McKeever testified that the issue of "client notification" was under discussion at the time this inquiry came into the office.

The final witness presented was Puida who testified emotionally as to the effect this matter has had on her individually. From an economic standpoint, GMM has reduced her compensation significantly as a result of the findings in the *Memorandum Opinion and Order*. This has hit her especially hard since she is the breadwinner for her family. She is now under an "action plan" at the firm designed to improve her professional and case management skills, including the documentation of all "substantive" communications in the cases she is handling. Puida testified that she is committed to being more aware of what is going on in her cases and better prepared to respond to any issues which might arise in the hearings she attends.

Although the evidence presented by GMM and Puida at the hearing was helpful as far as it went, it really did not go the core of the *Rule, i.e.,* a finding that Puida, and by extension GMM, had not been honest with this Court. In closing remarks at the sanction hearing counsel for the United States Trustee noted that the evidence had been focused on competence rather than character. The Court largely agrees ***650** with that sentiment. No matter how extensive the procedures and checklists and forms that a high volume law firm like GMM may implement, they are not a substitute for the character of the individual persons who are supposed to be abiding by them. The Court was disappointed by the lack of any evidence to show a recognition by GMM, generally, of the need for its attorneys to employ a policy of absolute candor in dealing with this and other courts.

The Court was also disappointed by the apparent lack of recognition of this need by Puida. When asked what was the most important lesson she had learned from this entire matter, she replied that she needed to do a better job of documenting her communications. When asked point blank by counsel for the UST whether she wanted to now "change her story" about what had really happened between her and Attorney Ken Steidl, and despite being given assurances by the Court that she could invoke her Fifth Amendment protections if she wished without any consequence in this proceeding or as to the sanction ultimately imposed, Puida again insisted that she had informed Mr. Steidl about the letters and simply failed to document it.

The Court finds this lack of acceptance of responsibility, troubling. Its prior finding that Puida lied was not made lightly, nor in the end was it a close call—the Court would have made the same finding even if the applicable evidentiary standard had been clear and convincing rather than merely a preponderance. Furthermore, this was not a "shades of gray" type situation—either Mr. Steidl or Puida was lying and the Court found it to be Puida. The evidence that Puida lied was considerable. For Puida to thus continue to fall back on a "lack of documentation" as her only "sin" does give the Court some pause as to whether she truly appreciates the gravity of the situation. [FN4]

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FN4. The Court made clear in a prior order that the hearing on sanctions was not intended to be a retrial of the findings previously made. However, knowing that she was going to continue to refuse to acknowledge that she lied about what she had told Mr. Steidl, Puida should have been prepared to offer something in support thereof more than just her bare assertions, which have already been heard and rejected by the Court. In that regard, it is worth noting that the Court commented both at trial and in the *Memorandum Opinion and Order* about its surprise that no telephone billing records had been introduced to bolster Puida's contentions about her conversations with Mr. Steidl. See 437 B.R. at 535 n. 7. Assuming such billing records actually tend to support Puida, yet had been overlooked as evidence for trial, it seemed natural to attempt their introduction at this stage, if they in fact existed, as mitigation evidence in support of her obviously hollow contention that she did not lie to the Court, but no effort was made in that regard.

Having said all of the above, the Court is left with deciding appropriate sanctions to be imposed against GMM and Puida. The UST filed a helpful *Preliminary Recommendation Regarding Sanctions,* Document No. 575, and her counsel further expounded on those recommendations at the close of the hearing. The UST suggests that Puida should be suspended from practicing before this Court for a period of a year and that GMM should be required to pay a monetary sanction of $50,000.[FN5] The UST also raised a number of other possible sanctions for the Court's consideration, including the imposition of a CLE requirement, public reprimand or censure, or the requirement to perform *pro bono* client representation or mediation services.

FN5. Counsel for the UST candidly admitted that his suggestion of $50,000 as a monetary sanction was in effect an arbitrary number, not based on any sort of calculation or formula.

***651** [1] Turning first to GMM, the Court will not impose a monetary sanction as suggested by the UST. Given the magnitude of the financial loss which GMM has already experienced in the form of attorney fees and lost client revenue as a result of this matter, a further monetary sanction near the amount suggested by the UST is unlikely to have any significant further deterrent effect on GMM. If the Court were to impose a sanction in a much higher amount, it could jeopardize the continued operation of GMM, possibly threatening the livelihoods of innocent employees who had nothing to do with the violations addressed in the *Rule.* The Court also rules out any requirement for mandatory CLE or ethical training. As indicated at the hearing, the essence of the *Rule* is a lack of honesty. The Court does not believe it is necessary to undertake training in order to know that dishonesty is wrong despite the potential consequences of telling the truth. Honesty and truthfulness are matters of character that cannot be taught, if at all, in a few hours of CLE training. As for a *pro bono* requirement for client representation, that is something the attorneys in the firm should already be doing voluntarily, *Pa. R.P.C. 6.1,* so the Court does not find it to be an appropriate sanction for this matter. Finally, the firm will need to restore its professional reputation before it can effectively function as a mediator, ruling out any sanction requiring that it act as a *pro bono* mediator.

The Court therefore finds that the purpose behind the *Rule* will be best served by having the *Memorandum Opinion and Order,* together with this *Order,* serve as a public reprimand of GMM. In addition, GMM will be required to serve a copy of the *Memorandum Opinion and Order,* and this *Order,* on the Disciplinary Board of the Supreme Court of Pennsylvania.

[2] As for Puida, the UST's primary suggestion of a suspension is rejected. Puida has already, in a sense, been suspended from practice in this Court. The firm has taken her off assignment to any cases filed in this District, and it seems highly unlikely that is going to change anytime soon. Were the Court to order a suspension of Puida, it would thus add very little to the current reality, at the expense of burdening the District Court with a request for a suspension, and possibly jeopardizing other GMM personnel in unintended ways. The other suggestions related to CLE training, mediation and the like are rejected for reasons similar to those stated above in the discussion as to GMM. The Court did consider a monetary sanction against Puida, however that is rejected as well.

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She has already suffered a significant financial detriment as a result of this matter, and the Court is concerned that any further monetary sanction would be unnecessarily punitive and could harm her family.

The Court therefore concludes that, as with GMM, the purposes behind the *Rule* will best be served as to Puida by having the *Memorandum Opinion and Order,* together with this *Order,* serve as a public reprimand of her. Puida will be required to serve a copy of the *Memorandum Opinion and Order,* and this *Order,* on the Disciplinary Board of the Supreme Court of Pennsylvania, as well as on the American Bankruptcy Institute in connection with her effort to be certified as a bankruptcy specialist by that organization.

AND NOW, this ***24th*** day of ***November, 2010,*** for the reasons stated above and on the record at the time of the hearing, it is ***ORDERED, ADJUDGED and DECREED*** that:

(1) The *Memorandum Opinion and Order* of October 5, 2010, together with this *Order,* are intended to serve as a public reprimand of Respondents Goldbeck, McCafferty and McKeever ("GMM") and Attorney Leslie A. Puida ("Puida") for the ***652** misconduct as described in Items 6 and 7 of the *Rule to Show Cause,* Document No. 465, issued on July 29, 2009.

(2) ***On or before December 3, 2010,*** GMM shall serve a copy of this *Order,* together with the *Memorandum Opinion and Order* of October 5, 2010, on the Disciplinary Board of the Supreme Court of Pennsylvania, and shall file a certificate of service to that effect with the Court within three days of doing so.

(3) ***On or before December 3, 2010,*** Puida shall serve a copy of this *Order,* together with the *Memorandum Opinion and Order* of October 5, 2010, on the Disciplinary Board of the Supreme Court of Pennsylvania and the American Bankruptcy Institute, and shall file a certificate of service to that effect with the Court within three days of doing so.

(4) ***On or before December 3, 2010,*** Counsel for Respondents GMM and Puida shall electronically file copies of the exhibits that were introduced at the hearing, those being Exhibits 1 through 18 and 22 though 35.

Bkrtcy.W.D.Pa.,2010.
In re Hill
439 B.R. 647

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655 F.3d 274, 66 Collier Bankr.Cas.2d 147, Bankr. L. Rep. P 82,062
(Cite as: 655 F.3d 274)

H

United States Court of Appeals,
Third Circuit.
In re Niles C. TAYLOR; Angela J. Taylor, Debtors.
Roberta A. Deangelis, Acting United States Trustee,
Appellant.

No. 10–2154.
Argued March 22, 2011.
Opinion Filed: Aug. 24, 2011.

Background: In a Chapter 13 bankruptcy proceeding, the United States Bankruptcy Court for the Eastern District of Pennsylvania, Diane Weiss Sigmund, J., 407 B.R. 618, 2009 WL 1885888, sua sponte imposed sanctions on mortgage lender and lender's attorneys. Attorneys appealed. The United States District Court for the Eastern District of Pennsylvania, John P. Fullam, J., 2010 WL 624909, reversed the order for sanctions. Trustee appealed.

Holdings: The Court of Appeals, Fuentes, Circuit Judge, held that:
(1) statements in lender's motion for relief from stay that debtors had failed to make regular payments on their mortgage since the filing of their bankruptcy petition, were misleading, as would support sanctions against lender's attorney;
(2) attorneys failed to make reasonable inquiry prior to making misleading statements to bankruptcy court in their motion for relief from stay, as would support sanctions;
(3) bankruptcy court order was sufficient to provide attorneys with particularized notice of the specific conduct alleged to be sanctionable;
(4) sanctions extended to law firm, but not to sole shareholder; and
(5) District Court lacked jurisdiction to reverse sanctions against lender.

Affirmed in part, reversed in part, and vacated in part.

West Headnotes

[1] Bankruptcy 51 2393

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(B) Automatic Stay
51k2393 k. Notice to creditors; commencement. Most Cited Cases

Bankruptcy 51 2394.1

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(B) Automatic Stay
51k2394 Proceedings, Acts, or Persons Affected
51k2394.1 k. In general. Most Cited Cases

Bankruptcy 51 2397(2)

51 Bankruptcy
51IV Effect of Bankruptcy Relief; Injunction and Stay
51IV(B) Automatic Stay
51k2394 Proceedings, Acts, or Persons Affected
51k2397 Mortgages or Liens
51k2397(2) k. Foreclosure proceedings. Most Cited Cases

Ordinarily, the filing of a bankruptcy petition imposes an automatic stay on all debt collection activities, including foreclosures.

[2] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

In determining whether a party has violated the

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federal rule of bankruptcy requiring that parties making representations to the bankruptcy court reasonably believe them to be supported by the evidence, the court need not find that a party who makes a false representation to the court acted in bad faith. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

[3] Federal Civil Procedure 170A 2769

170A Federal Civil Procedure
170AXX Sanctions
170AXX(B) Grounds for Imposition
170Ak2767 Unwarranted, Groundless or Frivolous Papers or Claims
170Ak2769 k. Reasonableness or bad faith in general; objective or subjective standard. Most Cited Cases

The imposition of Rule 11 sanctions requires a showing of objectively unreasonable conduct. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[4] Bankruptcy 51 3784

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3784 k. Discretion. Most Cited Cases

The Court of Appeals applies an abuse of discretion standard in reviewing the decision of the bankruptcy court to impose sanctions. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[5] Bankruptcy 51 3787

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3787 k. Particular cases and issues. Most Cited Cases

The Court of Appeals reviews the bankruptcy court's factual findings, in connection with the imposition of sanctions, for clear error. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[6] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Even assuming that the statements in mortgage lender's motion for relief from stay that the Chapter 13 debtors had failed to make regular payments on their mortgage since the filing of their bankruptcy petition were literally true, they were misleading, as would support sanctions against lender's attorney; the motion failed to indicate that partial mortgage payments had been made and the failure of debtors to make the remainder of the payments was due to a bona fide dispute over the amount of the payment, not simple default. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[7] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Attorneys for mortgage lender failed to make reasonable inquiry prior to making false or misleading statements to the bankruptcy court in their motion for relief from stay, as to Chapter 13 debtors' purported failure to make mortgage payments, alleged lack of equity in the home, and amount owed on the mortgage loan, supporting sanctions against attorneys; attorneys had no direct contact with lender, they relied solely on information in computer database run by third-party vendor for information on the mortgage loan, which provided no information as to the debtors' equity, and after debtors submitted documentation indicating that they had made at least partial mortgage payments, attorneys should have contacted the lender directly for clarification, since that documentation put attorneys on notice that the matter was not as simple as it appeared in database, and attorneys did not know exactly where the information in the database originated. Fed.Rules

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Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[8] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

A bankruptcy court should consider the reasonableness of an attorney's inquiry prior to the making of misleading or false representations to the court under all the material circumstances, in determining whether sanctions are warranted. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[9] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

While the federal rule of bankruptcy, requiring that attorneys making representations to the bankruptcy court reasonably believe them to be supported by the evidence, does not recognize a "pure heart and empty head" defense, a lawyer need not routinely assume the duplicity or gross incompetence of her client in order to meet the requirements of the rule. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

[10] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Constitutional Law 92 4478

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)25 Other Particular Issues and Applications
92k4478 k. Bankruptcy. Most Cited Cases

Due process in the imposition of sanctions for violation of federal rule of bankruptcy, requiring that parties making representations to the bankruptcy court reasonably believe them to be supported by the evidence, requires particularized notice. U.S.C.A. Const.Amend. 5; Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

[11] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Bankruptcy court order which identified the pressing of a motion for relief from the automatic stay on admissions that were known to be untrue, and the signing and filing of pleadings without knowledge or inquiry regarding the matters pled, as the conduct the court wished to investigate was sufficient to provide attorneys for mortgage lender with particularized notice of the specific conduct that was alleged to be sanctionable, as required prior to hearing on sanctions against attorneys. U.S.C.A. Const.Amend. 5; Fed.Rules Bankr.Proc.Rule 9011(c)(1)(B), 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[12] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Sanctions for mortgage lender's attorneys' failure to make reasonable inquiry prior to making false or

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misleading statements to the bankruptcy court in their motion for relief from stay, as to Chapter 13 debtors' purported failure to make mortgage payments, alleged lack of equity in the home, and amount owed on the mortgage loan, would extend to attorneys' law firm, but not to sole shareholder of firm; the misrepresentations arose from system put in place by law firm, which emphasized high-volume, high-speed processing of mortgage foreclosures, but the shareholder was not personally involved in such matters. Fed.Rules Bankr.Proc.Rule 9011(c)(1)(B), 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

[13] Bankruptcy 51 3771

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3771 k. Right of review and persons entitled; parties; waiver or estoppel. Most Cited Cases

Bankruptcy 51 3789.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3789 Determination and Disposition; Additional Findings
51k3789.1 k. In general. Most Cited Cases

The mere fact that a party may wind up with a judgment against one party that is not logically consistent with an unappealed judgment against another is not alone sufficient to justify taking away the unappealed judgment in favor of a party not before the court.

[14] Bankruptcy 51 3771

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3771 k. Right of review and persons entitled; parties; waiver or estoppel. Most Cited Cases

Bankruptcy 51 3789.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3789 Determination and Disposition; Additional Findings
51k3789.1 k. In general. Most Cited Cases

Where the disposition as to one appealing party is inextricably intertwined with the interests of a non-appealing party, it may be impossible to grant appellate relief to the appealing party without granting relief to the other.

[15] Bankruptcy 51 3771

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3771 k. Right of review and persons entitled; parties; waiver or estoppel. Most Cited Cases

Bankruptcy 51 3788

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3788 k. Harmless error. Most Cited Cases

District court lacked jurisdiction to reverse bankruptcy court's order for sanctions against mortgage lender, where only law firm and attorneys representing lender appealed the sanctions order, and non-appealing lender's interests were not inextricably intertwined with that of attorneys and law firm, since it was entirely possible for lender to comply with sanctions ordered against it, without affecting the interests of the attorneys and law firm.

[16] Federal Civil Procedure 170A 2753

170A Federal Civil Procedure
170AXX Sanctions
170AXX(A) In General
170Ak2751 Constitutional, Statutory or Regulatory Provisions
170Ak2753 k. Purpose. Most Cited Cases

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The prime goal of Rule 11 sanctions should be deterrence of repetition of improper conduct. Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

***277** Frederic J. Baker, Esq., Robert J. Schneider, Esq., George M. Conway, Esq., United States Department of Justice, Office of the United States Trustee, Philadelphia, PA, Ramona Elliott, Esq., P. Matthew Sutko, Esq., John P. Sheahan, Esq. (argued), United States Department of Justice, Executive Office for United States Trustees, Washington, DC, for Appellant.

Jonathan J. Bart, Esq. (argued), Wilentz Goldman & Spitzer, P.A., Philadelphia, PA, for Appellees.

Before: FUENTES, SMITH and VAN ANTWERPEN, Circuit Judges.

OPINION

FUENTES, Circuit Judge.

The United States Trustee, Region 3 ("Trustee"), appeals the reversal by the District Court of sanctions originally imposed in the bankruptcy court on attorneys Mark J. Udren and Lorraine Doyle, the Udren Law Firm, and HSBC for violations of Federal Rule of Bankruptcy Procedure 9011. For the reasons given below, we will reverse the District Court and affirm the bankruptcy court's imposition of sanctions with respect to Lorraine Doyle, the Udren Law Firm, and HSBC.[FN1] However, we will affirm the District Court's reversal of the bankruptcy court's sanctions with respect to Mark J. Udren.

FN1. Although HSBC was sanctioned by the bankruptcy court, it did not participate in this appeal.

I.

A. Background

This case is an unfortunate example of the ways in which overreliance on computerized processes in a high-volume practice, as well as a failure on the part of clients and lawyers alike to take responsibility for accurate knowledge of a case, can lead to attorney misconduct before a court. It arises from the bankruptcy proceeding of Mr. and Ms. Niles C. and Angela J. Taylor. The Taylors filed for a Chapter 13 bankruptcy in September 2007. In the Taylors' bankruptcy petition, they listed the bank HSBC, which held the mortgage on their house, as a creditor. In turn, HSBC filed a proof of claim in October 2007 with the bankruptcy court.

We are primarily concerned with two pleadings that HSBC's attorneys filed in ***278** the bankruptcy court—(1) the request for relief from the automatic stay which would have permitted HSBC to pursue foreclosure proceedings despite the Taylors' bankruptcy filing and (2) the response to the Taylors' objection to HSBC's proof of claim. We are also concerned with the attorneys' conduct in court in connection with those pleadings. We draw our facts from the findings of the bankruptcy court.

1. The proof of claim (Moss Codilis law firm)

To preserve its interest in a debtor's estate in a personal bankruptcy case, a creditor must file with the court a proof of claim, which includes a statement of the claim and of its amount and supporting documentation. *Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004); Fed. R. Bank. P. 3001; Official Bankruptcy Form 10. In October 2007, HSBC filed such a proof of claim with respect to the Taylors' mortgage. To do so, it used the law firm Moss Codilis.[FN2] Moss retrieved the information on which the claim was based from HSBC's computerized mortgage servicing database. No employee of HSBC reviewed the claim before filing.

FN2. Moss Codilis is not involved in the present appeal. However, it is worth noting that the firm has come under serious judicial criticism for its lax practices in bankruptcy proceedings. "In total, [the court knows] of 23 instances in which [Moss Codilis] has violated [court rules] in this District alone." *In re Greco,* 405 B.R. 393, 394 (Bankr.S.D.Fla.2009); *see also In re Waring,* 401 B.R. 906 (Bankr.N.D.Ohio 2009).

This proof of claim contained several errors: the amount of the Taylors' monthly payment was incorrectly stated, the wrong mortgage note was attached, and the value of the home was understated by about $100,000. It is not clear whether the errors originated in HSBC's database or whether they were introduced in Moss Codilis's filing.[FN3]

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FN3. HSBC ultimately corrected these errors in an amended court filing.

2. The motion for relief from stay

At the time of the bankruptcy proceeding, the Taylors were also involved in a payment dispute with HSBC. HSBC believed the Taylors' home to be in a flood zone and had obtained "forced insurance" for the property, the cost of which (approximately $180/month) it passed on to the Taylors. The Taylors disputed HSBC's position and continued to pay their regular mortgage payment, without the additional insurance costs.[FN4] HSBC failed to acknowledge that the Taylors were making their regular payments and instead treated each payment as a partial payment, so that, in its records, the Taylors were becoming more delinquent each month.

FN4. This dispute has now been resolved in favor of the Taylors. (App. 199.)

[1] Ordinarily, the filing of a bankruptcy petition imposes an automatic stay on all debt collection activities, including foreclosures. *McCartney v. Integra Nat'l Bank North,* 106 F.3d 506, 509 (3d Cir.1997). However, pursuant to 11 U.S.C. § 362(d)(1), a secured creditor may file for relief from the stay "for cause, including the lack of adequate protection of an interest in property" of the creditor, in order to permit it to commence or continue foreclosure proceedings. Because of the Taylors' withheld insurance payments, HSBC's records indicated that they were delinquent. Thus, in January 2008, HSBC retained the Udren Firm to seek relief from the stay.

Mr. Udren is the only partner of the Udren Firm; Ms. Doyle, who appeared for the Udren Firm in the Taylors' case, is a managing attorney at the firm, with twenty-seven years of experience. HSBC does ***279** not deign to communicate directly with the firms it employs in its high-volume foreclosure work; rather, it uses a computerized system called NewTrak (provided by a third party, LPS) to assign individual firms discrete assignments and provide the limited data the system deems relevant to each assignment.[FN5] The firms are selected and the instructions generated without any direct human involvement. The firms so chosen generally do not have the capacity to check the data (such as the amount of mortgage payment or time in arrears) provided to them by NewTrak and are not expected to communicate with other firms that may have done related work on the matter. Although it is technically possible for a firm hired through NewTrak to contact HSBC to discuss the matter on which it has been retained, it is clear from the record that this was discouraged and that some attorneys, including at least one Udren Firm attorney, did not believe it to be permitted.

FN5. LPS is also not involved in the present appeal, as the bankruptcy court found that it had not engaged in wrongdoing in this case. However, both the accuracy of its data and the ethics of its practices have been repeatedly called into question elsewhere. *See, e.g., In re Wilson,* 2011 WL 1337240 at *9 (Bankr.E.D.La. Apr. 7, 2011) (imposing sanctions after finding that LPS had issued "sham" affidavits and perpetrated fraud on the court); *In re Thorne,* 2011 WL 2470114 (Bankr.N.D.Miss. June 16, 2011); *In re Doble,* 2011 WL 1465559 (Bankr.S.D.Cal. Apr. 14, 2011).

In the Taylors' case, NewTrak provided the Udren Firm with only the loan number, the Taylors' name and address, payment amounts, late fees, and amounts past due. It did not provide any correspondence with the Taylors concerning the flood insurance dispute.

In January 2008, Doyle filed the motion for relief from the stay. This motion was prepared by non-attorney employees of the Udren Firm, relying exclusively on the information provided by NewTrak. The motion said that the debtor "has failed to discharge arrearages on said mortgage or has failed to make the current monthly payments on said mortgage since" the filing of the bankruptcy petition. (App. 65.) It identified "the failure to make ... post-petition monthly payments" as stretching from November 1, 2007 to January 15, 2008, with an "amount per month" of $1455 (a monthly payment higher than that identified on the proof of claim filed earlier in the case by the Moss firm) and a total in arrears of $4367. (App. 66.) (It did note a "suspense balance" of $1040, which it subtracted from the ultimate total sought from the Taylors, but with no further explanation.) It stated that the Taylors had "inconsequential or no equity" in the property.[FN6] *Id.* The motion never mentioned the flood insurance dispute.

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FN6. The U.S. Trustee now points out that the motion also claimed that the Taylors were not making payments to other creditors under their bankruptcy plan and argues that this claim was false as well. Since the bankruptcy court did not make any findings with respect to this issue, we will not consider it.

Doyle did nothing to verify the information in the motion for relief from stay besides check it against "screen prints" of the NewTrak information. She did not even access NewTrak herself. In effect, she simply proofread the document. It does not appear that NewTrak provided the Udren Firm with any information concerning the Taylors' equity in their home, so Doyle could not have verified her statement in the motion concerning the lack of equity in any way, even against a "screen print."

At the same time as it filed for relief from the stay, the Udren Firm also served the Taylors with a set of requests for admission (pursuant to Federal Rule of Bankruptcy Procedure 7036, incorporating ***280** Federal Rule of Civil Procedure 36) ("RFAs"). The RFAs sought formal and binding admissions that the Taylors had made *no* mortgage payments from November 2007 to January 2008 and that they had no equity in their home.

In February 2008, the Taylors filed a response to the motion for relief from stay, denying that they had failed to make payments and attaching copies of six checks tendered to HSBC during the relevant period. Four of them had already been cashed by HSBC.[FN7]

FN7. It is not clear from the briefing whether the last two checks, for February and March 2008, had actually been submitted to HSBC at the time the motion was filed; appellees deny that they were. However, appellees do not dispute that checks for October and November 2007 and January 2008 had been cashed.

3. The claim objection and the response to the claim objection

In March 2008, the Taylors also filed an objection to HSBC's proof of claim. The objection stated that HSBC had misstated the payment due on the mortgage and pointed out the dispute over the flood insurance. However, the Taylors did *not* respond to HSBC's RFAs. Unless a party responds properly to a request for admission within 30 days, the "matter is [deemed] admitted." Fed.R.Civ.P. 36(a)(3).

In the same month, Doyle filed a response to the objection to the proof of claim. The response did not discuss the flood insurance issue at all. However, it stated that "[a]ll figures contained in the proof of claim accurately reflect actual sums expended ... by Mortgagee ... and/or charges to which Mortgagee is contractually entitled and which the Debtors are contractually obligated to pay." (App. 91.) This was indisputably incorrect, because the proof of claim listed an inaccurate monthly mortgage payment (which was also a different figure from the payment listed in Doyle's own motion for relief from stay).

4. The claim hearings

In May 2008, the bankruptcy court held a hearing on both the motion for relief and the claim objection. HSBC was represented at the hearing by a junior associate at the Udren Firm, Mr. Fitzgibbon. At that hearing, Fitzgibbon ultimately admitted that, at the time the motion for relief from the stay was filed, HSBC had received a mortgage payment for November 2007, even though both the motion for stay and the response to the Taylors' objection to the proof of claim stated otherwise.[FN8] Despite this, Fitzgibbon urged the court to grant the relief from stay, because the Taylors had not responded to HSBC's RFAs (which included the "admission" that the Taylors had not made payments from November 2007 to January 2008). It appears from the record that Fitzgibbon initially sought to have the RFAs admitted as evidence even though he knew they contained falsehoods. (App. 101–102.) [FN9]

FN8. Appellees concede that, by the time the May hearing was held, HSBC had received all of the relevant checks.

FN9. Appellees now claim that "[i]t is clear from the record, that Mr. Fitzgibbon honestly disclosed to the Court that these checks had just been received by [the] Udren [Firm] and that the only issue was that of flood insurance." (App'ee Br. 16.) However, this disclosure did not occur until *after* Fitzgibbon had attempted to enter the RFAs, which made contrary claims, as evidence, and debtor's counsel raised the issue. As the

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> bankruptcy court described it, "[Fitzgibbon] *first* argued that I should rule in HSBC's favor ... *On probing by the court,* he acknowledged that as of the date of the continued hearing, he had learned that [the Taylors] had made every payment." (App. 196, emphasis added.) In a Rule 9011/11 proceeding such as the present one, one would expect the challenged parties to be scrupulously careful in their representations to the court.

***281** The bankruptcy court denied the request to enter the RFAs as evidence, noting that the firm "closed their eyes to the fact that there was evidence that ... conflicted with the very admissions that they asked me [to deem admitted]. They ... had that evidence [that the assertions in its motion were not accurate] in [their] possession and [they] went ahead like [they] never saw it." (App. 108–109.) The court noted:

> Maybe they have somebody there churning out these motions that doesn't talk to the people that—you know, you never see the records, do you? Somebody sends it to you that sent it from somebody else.

(App. 109.) "I really find this motion to be in questionable good faith," the court concluded. (App. 112.)

After the hearing, the bankruptcy court directed the Udren Firm to obtain an accounting from HSBC of the Taylors' prepetition payments so that the arrearage on the mortgage could be determined correctly. At the next hearing, in June 2008, Fitzgibbon stated that he could not obtain an accounting from HSBC, though he had repeatedly placed requests via NewTrak. He told the court that he was literally unable to contact HSBC—his firm's client—directly to verify information which his firm had already represented to the court that it believed to be true.

At the end of the June 2008 hearing, the court told Fitzgibbon: "I'm issuing an order to show cause on your firm, too, for filing these things ... without having any knowledge. And filing answers ... without any knowledge." (App. 119.) Thereafter, the court entered an order *sua sponte* dated June 9, 2008, directing Fitzgibbon, Doyle, Udren, and others to appear and give testimony concerning the possibility of sanctions.

5. The sanctions hearings

The order stated that the purpose of the hearing included "to investigate the practices employed in this case by HSBC and its attorneys and agents and consider whether sanctions should issue against HSBC, its attorneys and agents." (App. 96–98.) Among those practices were "pressing a relief motion on admissions that were known to be untrue, and signing and filing pleadings without knowledge or inquiry regarding the matters pled therein." *Id.* The order noted that "[t]he details are identified on the record of the hearings which are incorporated herein." *Id.* In ordering Doyle to appear, the order noted that "the motion for relief, the admissions and the reply to the objection were prepared over Doyle's name and signature." *Id.* However, this order was not formally identified as "an order to show cause."

The bankruptcy court held four hearings over several days, making in-depth inquiries into the communications between HSBC and its lawyers in this case, as well as the general capabilities and limitations of a system like NewTrak. Ultimately, it found that the following had violated Rule 9011: Fitzgibbon, for pressing the motion for relief based on claims he knew to be untrue; Doyle, for failing to make reasonable inquiry concerning the representations she made in the motion for relief from stay and the response to the claim objection; Udren and the Udren Firm itself, for the conduct of its attorneys; and HSBC, for practices which caused the failure to adhere to Rule 9011.

Because of his inexperience, the court did not sanction Fitzgibbon. However, it required Doyle to take 3 CLE credits in professional responsibility; Udren himself to be trained in the use of NewTrak and to ***282** spend a day observing his employees handling NewTrak; and both Doyle and Udren to conduct a training session for the firm's relevant lawyers in the requirements of Rule 9011 and procedures for escalating inquiries on NewTrak. The court also required HSBC to send a copy of its opinion to all the law firms it uses in bankruptcy proceedings, along with a letter explaining that direct contact with HSBC concerning matters relating to HSBC's case was permissible.[FN10]

FN10. Taylor's counsel was also ultimately

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sanctioned and removed from the case. Counsel did not perform competently, as is evidenced by the Taylors' failure to contest HSBC's RFAs. She also made a number of inaccurate statements in *her* representations to the court. However, it is clear that her conduct did not induce the misrepresentations by HSBC or its attorneys. As the bankruptcy court correctly noted, "the process employed by a mortgagee and its counsel must be fair and transparent without regard to the quality of debtor's counsel since many debtors are unrepresented and cannot rely on counsel to protect them." (App. 214.)

B. The District Court's Decision

Udren, Doyle, and the Udren Firm (but not HSBC) appealed the sanctions order to the District Court, which ultimately overturned the order. The District Court's decision was based on three considerations: that the confusion in the case was attributable at least as much to the actions of Taylor's counsel as to Doyle, Udren, and the Udren Firm; that the bankruptcy court seemed more concerned with "sending a message" to the bar concerning the use of computerized systems than with the conduct in the particular case; and that, since Udren himself did not sign any of the filings containing misrepresentations, he could not be sanctioned under Rule 9011. Although HSBC had not appealed, the District Court overturned the order with respect to HSBC, as well.

The United States trustee then appealed the District Court's decision to this court.[FN11]

FN11. The bankruptcy court had jurisdiction under 28 U.S.C. § 157(a). The District Court had jurisdiction under 28 U.S.C. § 158(a)(1), except as discussed below. We have jurisdiction under 28 U.S.C. § 158(d).

II.

[2][3][4][5] Rule 9011 of the Federal Rules of Bankruptcy Procedure, the equivalent of Rule 11 of the Federal Rules of Civil Procedure, requires that parties making representations to the court certify that "the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support." Fed. R. Bank. P. 9011(b)(3).[FN12] A party must reach this conclusion based on "inquiry reasonable under the circumstances." Fed. R. Bank. P. 9011(b). The concern of Rule 9011 is not the truth or falsity of the representation in itself, but rather whether the party making the representation reasonably believed it at the time to have evidentiary support. In determining whether a party has violated Rule 9011, the court need not find that a party who makes a false representation to the court acted in bad faith. "The imposition of Rule 11 sanctions ... requires only a showing of objectively unreasonable conduct." *Fellheimer, Eichen & Braverman, P.C. v. Charter Tech., Inc.*, 57 F.3d 1215, 1225 (3d Cir.1995). We apply an abuse of discretion standard in reviewing the decision of the bankruptcy court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). However, we review its factual findings for clear error. ***283***Stern v. Marshall*, —— U.S. ——, 131 S.Ct. 2594, 2627, 180 L.Ed.2d 475 (2011) (Breyer, J., dissenting).

FN12. "[C]ases decided pursuant to [Fed.R.Civ.P. 11] apply to Rule 9011." *In re Gioioso*, 979 F.2d 956, 960 (3d Cir.1992).

In this opinion, we focus on several statements by appellees: (1) in the motion for relief from stay, the statements suggesting that the Taylors had failed to make payments on their mortgage since the filing of their bankruptcy petition and the identification of the months in which and the amount by which they were supposedly delinquent; (2) in the motion for relief from stay, the statement that the Taylors had no or inconsequential equity in the property; (3) in the response to the claim objection, the statement that the figures in the proof of claim were accurate; and, (4) at the first hearing, the attempt to have the requests for admission concerning the lack of mortgage payments deemed admitted. As discussed above, all of these statements involved false or misleading representations to the court.[FN13]

FN13. Appellees expend great energy in questioning the factual findings of the bankruptcy court, but we, like the District Court before us, see no error.

A. Alleged literal truth

As an initial matter, the appellees' insistence that Doyle's and Fitzgibbon's statements were "literally true" should not exculpate them from Rule 9011 sanctions. First, it should be noted that several of

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these claims were not, in fact, accurate. There was no literal truth to the statement in the request for relief from stay that the Taylors had no equity in their home. Doyle admitted that she made that statement simply as "part of the form pleading," and "acknowledged having no knowledge of the value of the property and having made no inquiry on this subject." (App. 215.) Similarly, the statement in the claim objection response that the figures in the original proof of claim were correct was false.

Just as importantly, appellees cite no authority, and we are aware of none, which permits statements under Rule 9011 that are literally true but actually misleading. If the reasonably foreseeable effect of Doyle's or Fitzgibbon's representations to the bankruptcy court was to mislead the court, they cannot be said to have complied with Rule 9011. *See Williamson v. Recovery Ltd. P'ship,* 542 F.3d 43, 51 (2d Cir.2008) (a party violates Rule 11 "by making false, *misleading,* improper, or frivolous representations to the court") (emphasis added).

[6] In particular, even assuming that Doyle's and Fitzgibbon's statements as to the payments made by the Taylors *were* literally accurate, they were misleading. In attempting to evaluate whether HSBC was justified in seeking a relief from the stay on foreclosure, the court needed to know that at least partial payments had been made and that the failure to make some of the rest of the payments was due to a bona fide dispute over the amount due, not simple default. Instead, the court was told only that the Taylors had "failed to make regular mortgage payments" from November 1, 2007 to January 15, 2008, with a mysterious notation concerning a "suspense balance" following. (App. 214–15.) A court could only reasonably interpret this to mean that the Taylors simply had not made payments for the period specified. As the bankruptcy court found, "[f]or at best a $540 dispute, the Udren Firm mechanically prosecuted a motion averring a $4,367[ ] post-petition obligation, the aim of which was to allow HSBC to foreclose on [the Taylors'] house." (App. 215.) Therefore, Doyle's and Fitzgibbon's statements in question were either false or misleading.

B. Reasonable inquiry

[7] We must, therefore, determine the reasonableness of the appellees' inquiry ***284** before they made their false representations. Reasonableness has been defined as "an objective knowledge or belief at the time of the filing of a challenged paper that the claim was well-grounded in law and fact." *Ford Motor Co. v. Summit Motor Prods., Inc.,* 930 F.2d 277, 289 (3d Cir.1991) (internal quotations omitted). The requirement of reasonable inquiry protects not merely the court and adverse parties, but also the client. The client is not expected to know the technical details of the law and ought to be able to rely on his attorney to elicit from him the information necessary to handle his case in the most effective, yet legally appropriate, manner.

[8] In determining reasonableness, we have sometimes looked at several factors: "the amount of time available to the signer for conducting the factual and legal investigation; the necessity for reliance on a client for the underlying factual information; the plausibility of the legal position advocated; ... whether the case was referred to the signer by another member of the Bar ... [; and] the complexity of the legal and factual issues implicated." *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 95 (3d Cir.1988). However, it does not appear that the court must work mechanically through these factors when it considers whether to impose sanctions. Rather, it should consider the reasonableness of the inquiry under all the material circumstances. "[T]he applicable standard is one of reasonableness under the circumstances." *Bus. Guides, Inc. v. Chromatic Commc'ns Ents., Inc.,* 498 U.S. 533, 551, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991); *accord Garr v. U.S. Healthcare, Inc.,* 22 F.3d 1274, 1279 (3d Cir.1994).

[9] Central to this case, then, is the degree to which an attorney may reasonably rely on representations from her client. An attorney certainly "is not always foreclosed from relying on information from other persons." *Garr,* 22 F.3d at 1278. In making statements to the court, lawyers constantly and appropriately rely on information provided by their clients, especially when the facts are contained in a client's computerized records. It is difficult to imagine how attorneys might function were they required to conduct an independent investigation of every factual representation made by a client before it could be included in a court filing. While Rule 9011 "does not recognize a 'pure heart and empty head' defense," *In re Cendant Corp. Derivative Action Litig.,* 96 F.Supp.2d 403, 405 (D.N.J.2000), a lawyer need not routinely assume the duplicity or gross incompetence

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of her client in order to meet the requirements of Rule 9011. It is therefore usually reasonable for a lawyer to rely on information provided by a client, especially where that information is superficially plausible and the client provides its own records which appear to confirm the information.

However, Doyle's behavior was unreasonable, both as a matter of her general practice and in ways specific to this case. First, reasonable reliance on a client's representations assumes a reasonable attempt at eliciting them by the attorney. That is, an attorney must, in her independent professional judgment, make a reasonable effort to determine what facts are likely to be relevant to a particular court filing and to seek those facts from the client. She cannot simply settle for the information her client determines in advance—by means of an automated system, no less—that she should be provided with.

Yet that is precisely what happened here. "[I]t appears," the bankruptcy court observed, "that Doyle, the manager of the Udren Firm bankruptcy department, had no relationship with the client, HSBC." (App. 202.) By working solely with NewTrak, a system which no one at the Udren ***285** Firm seems to have understood, much less had any influence over, Doyle permitted HSBC to define—perilously narrowly—the information she had about the Taylors' matter. That HSBC was not providing her with adequate information through NewTrak should have been evident to Doyle from the face of the NewTrak file. She did not have any information concerning the Taylors' equity in the home, though she made a statement specifically denying that they had any.

More generally, a reasonable attorney would not file a motion for relief from stay for cause without inquiring of the client whether it had any information relevant to the alleged cause, that is, the debtor's failure to make payments. Had Doyle made even that most minimal of inquiries, HSBC presumably would have provided her with the information in its files concerning the flood insurance dispute, and Doyle could have included that information in her motion for relief from stay—or, perhaps, advised the client that seeking such a motion would be inappropriate under the circumstances.

With respect to the Taylors' case in particular, Doyle ignored clear warning signs as to the accuracy of the data that she did receive. In responding to the motion for relief from stay, the Taylors submitted documentation indicating that they had already made at least partial payments for some of the months in question. In objecting to the proof of claim, the Taylors pointed out the inaccuracy of the mortgage payment listed and explained the circumstances surrounding the flood insurance dispute. Although Doyle certainly was not obliged to accept the Taylors' claims at face value, they indisputably put her on notice that the matter was not as simple as it might have appeared from the NewTrak file. At that point, any reasonable attorney would have sought clarification and further documentation from her client, in order to correct any prior inadvertent misstatements to the court and to avoid any further errors. Instead, Doyle mechanically affirmed facts (the monthly mortgage payment) that *her own prior filing* with the court had already contradicted.

Doyle's reliance on HSBC was particularly problematic because she was not, in fact, relying directly on HSBC. Instead, she relied on a computer system run by a third-party vendor. She did not know where the data provided by NewTrak came from. She had no capacity to check the data against the original documents if any of it seemed implausible. And she effectively could not question the data with HSBC. In her relationship with HSBC, Doyle essentially abdicated her professional judgment to a black box.

None of the other factors discussed in the *Mary Ann Pensiero* case which are applicable here affect our analysis of the reasonableness of appellees' actions. This was not a matter of extreme complexity, nor of extraordinary deadline pressure. Although the initial data the Udren Firm received was not, in itself, wildly implausible, it was facially inadequate. In short, then, we find that Doyle's inquiry before making her representations to the bankruptcy court was unreasonable.

In making this finding, we, of course, do not mean to suggest that the use of computerized databases is inherently inappropriate. However, the NewTrak system, as it was being used at the time of this case, permits parties at every level of the filing process to disclaim responsibility for inaccuracies. HSBC has handed off responsibility to a third-party maintainer, LPS, which, judging from the results in this case, has not generated particularly accurate rec-

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ords. LPS apparently regards itself as a mere conduit of information. Appellees, the attorneys and final link in the ***286** chain of transmission of this information to the court, claim reliance on NewTrak's records. Who, precisely, can be held accountable if HSBC's records are inadequately maintained, LPS transfers those records inaccurately into NewTrak, or a law firm relies on the NewTrak data without further investigation, thus leading to material misrepresentations to the court? It cannot be that all the parties involved can insulate themselves from responsibility by the use of such a system. In the end, we must hold responsible the attorneys who have certified to the court that the representations they are making are "well-grounded in law and fact."

C. Notice

[10] Doyle, Udren, and the Udren Firm also argue on appeal that they had insufficient notice that they were in danger of sanctions.[FN14] Rule 9011 directs that a court "[o]n its own initiative ... may enter an order describing the specific conduct that appears to violate [the rule] and directing an attorney ... to show cause why it has not violated [the rule]." Fed. R. Bank. P. 9011(c)(1)(B). Due process in the imposition of Rule 9011 sanctions requires "particularized notice." *Jones v. Pittsburgh Nat'l Corp.,* 899 F.2d 1350, 1357 (3d Cir.1990). The meaning of "particularized notice" has not been rigorously defined in this circuit. In *Fellheimer,* we noted that this requirement was met where the sanctioned party "was provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable." *Fellheimer,* 57 F.3d at 1225. In *Simmerman v. Corino,* 27 F.3d 58, 64 (3d Cir.1994), we held that "the party sought to be sanctioned is entitled to particularized notice including, at a minimum, 1) the fact that Rule 11 sanctions are under consideration, 2) the reasons why sanctions are under consideration...."

> FN14. Any claim regarding a due process right to notification of the *form* of sanctions being considered has been waived by appellees, as it was not raised in their papers, either here or in the district court. *United States v. Pelullo,* 399 F.3d 197, 222 (3d Cir.2005).

[11] The bankruptcy court's June order was clearly in substance an order to show cause, even if it was not specifically captioned as such. The more difficult question is whether the court adequately described "the specific conduct that appear[ed] to violate" Rule 9011, so as to give sufficient notice of "exactly which conduct was alleged to be sanctionable." As mentioned above, the court's June order identified "pressing a relief motion on admissions that were known to be untrue, and signing and filing pleadings without knowledge or inquiry regarding the matters pled therein" as the conduct the court wished to investigate. (App. 119) The judge also told Fitzgibbon, "I'm issuing an order to show cause on your firm, too, for filing these things ... without having any knowledge. And filing answers ... without any knowledge." *Id.* The June order also made specific reference to "the motion for relief, the admissions and the reply to the objection."

In these particular circumstances, the notice given to appellees was sufficient to put them on notice as to which aspects of their conduct were considered sanctionable. At that point in the case, the Udren Firm lawyers had only filed three substantive papers with the court—totaling six (substantive) pages—and the court found *all* of them problematic. Appellees' claim that they believed that the only issue at the time of the hearing was Fitzgibbon's inability to contact HSBC is simply not plausible in light of the language of the June order and the bankruptcy court's statements at the hearing, which were incorporated by reference into the June order. In a case in which more extensive ***287** docket activity had taken place, the bankruptcy court's order might not have been sufficient to inform appellees as to which of their filings were sanctionable, but, given the unusual circumstances here, it was. *But see Martens v. Thomann,* 273 F.3d 159, 178 (2d Cir.2001) (requiring specific identification of individual challenged statements to uphold imposition of sanctions).

D. The Udren Firm and Udren's individual liability

[12] We also find that it was appropriate to extend sanctions to the Udren Firm itself. Rule 11 explicitly allows the imposition of sanctions against law firms. *Fellheimer,* 57 F.3d 1215 at 1223 n. 5. In this instance, the bankruptcy court found that the misrepresentations in the case arose not simply from the irresponsibility of individual attorneys, but from the system put in place at the Udren Firm, which emphasized high-volume, high-speed processing of foreclosures to such an extent that it led to violations of Rule

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9011.

However, we do not find that responsibility for these failures extends specifically to Udren, whose involvement in this matter was limited to his role as sole shareholder of the firm.

E. The District Court's reversal of sanctions against HSBC

[13][14] Ordinarily, of course, a party which does not appeal a decision by a district court cannot receive relief with respect to that decision. "[T]he mere fact that a [party] may wind up with a judgment against one [party] that is not logically consistent with an unappealed judgment against another is not alone sufficient to justify taking away the unappealed judgment in favor of a party not before the court." *Repola v. Morbark Indus., Inc.,* 980 F.2d 938, 942 (3d Cir.1992). However, "where the disposition as to one party is inextricably intertwined with the interests of a non-appealing party," it may be "impossible to grant relief to one party without granting relief to the other." *United States v. Tabor Court Realty Corp.,* 943 F.2d 335, 344 (3d Cir.1991). In *Tabor Court Realty,* a contract dispute, the assignee of a property had failed to appeal a decision, while the assignor had (and had ultimately prevailed). Given that the dispute was over the disposition of the property, it was impossible to grant relief to the assignor without also granting relief to the assignee.

[15] In this instance, whether the lawyers at the Udren Firm violated Rule 9011 is a question analytically distinct from whether HSBC was responsible for any violations of Rule 9011. A court might find that HSBC was responsible for violations, whereas, say, Udren himself was not. It was entirely possible for HSBC to comply with the sanctions ordered (a letter to its firms informing them that they are permitted to consult with HSBC) without affecting the interests of the lawyers at the Udren Firm. Therefore, the interests of the lawyers at the Udren Firm and HSBC were not "inextricably intertwined," and the District Court lacked jurisdiction to reverse the sanctions against HSBC.

F. Alternative basis for the District Court's decision

[16] In reversing the bankruptcy court's decision, the District Court focused on that court's apparent attention to the broader problems of high-volume bankruptcy practice in imposing sanctions. It is true that the bankruptcy judge noted that appellees were not the first attorneys to run into these sorts of difficulties in her court. But she nonetheless made individualized findings of wrong-doing after four days of hearings and issued sanctions thoughtfully chosen to prevent the recurrence of problems at the Udren Firm ***288** based on what she had learned of practices there. Insofar as she considered the effect of the sanctions on the future conduct of other attorneys appearing before her, such considerations were permissible. After all, "the prime goal [of Rule 11 sanctions] should be deterrence of repetition of improper conduct." *Waltz v. County of Lycoming,* 974 F.2d 387, 390 (3d Cir.1992).

G. Conclusion

We appreciate that the use of technology can save both litigants and attorneys time and money, and we do not, of course, mean to suggest that the use of databases or even certain automated communications between counsel and client are presumptively unreasonable. However, Rule 11 requires more than a rubber-stamping of the results of an automated process by a person who happens to be a lawyer. Where a lawyer systematically fails to take any responsibility for seeking adequate information from her client, makes representations without any factual basis because they are included in a "form pleading" she has been trained to fill out, and ignores obvious indications that her information may be incorrect, she cannot be said to have made reasonable inquiry. Therefore, we find that the bankruptcy court did not abuse its discretion in imposing sanctions on Doyle or the Udren Firm itself. However, it did abuse its discretion in imposing sanctions on Udren individually.

III.

For the foregoing reasons, we will reverse the District Court with respect to Doyle and the Udren Firm, affirming the bankruptcy court's imposition of sanctions. With respect to HSBC, as discussed previously, the District Court lacked jurisdiction to reverse the sanctions, as do we; therefore, we vacate the District Court's order with respect to that party, leaving the sanctions imposed by the bankruptcy court in place. We will affirm the District Court with respect to Udren individually, reversing the bankruptcy's court imposition of sanctions.

C.A.3 (Pa.),2011.

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655 F.3d 274, 66 Collier Bankr.Cas.2d 147, Bankr. L. Rep. P 82,062
(Cite as: 655 F.3d 274)

In re Taylor
655 F.3d 274, 66 Collier Bankr.Cas.2d 147, Bankr. L. Rep. P 82,062

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464 B.R. 231, 66 Collier Bankr.Cas.2d 1568
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H

United States Bankruptcy Court,
W.D. Pennsylvania.
In re Michael Anthony WEISEL and Lori Sue Weisel, Debtors.
Michael Anthony Weisel and Lori Sue Weisel, Movants
v.
Allegheny Power, et al., Respondents.

No. 06–25304–TPA.
Jan. 9, 2012.

Background: Chapter 13 debtors' attorney filed final fee application, seeking award of an additional $11,080 in fees and $318.40 in expense reimbursement. Trustee objected.

Holdings: The Bankruptcy Court, Thomas P. Agresti, Chief Judge, held that:
(1) by failing to enter into written fee agreement with Chapter 13 debtors, in violation of procedural rule of bankruptcy court, debtors' attorney forfeited his right to seek any fees beyond those stated in the Rule 2016 Statement, and
(2) while misrepresentations that attorney made to bankruptcy court were such as to permit total denial of all compensation, including disgorgement of fee payments already received, bankruptcy court would limit itself simply to denying any additional compensation.

Granted in part and denied in part.

West Headnotes

[1] Bankruptcy 51 3168

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)2 Professional Persons in General
51k3166 Procedure
51k3168 k. Objections. Most Cited Cases

On professional fee application, bankruptcy court is free to sua sponte raise issues as to appropriateness of fee being sought. 11 U.S.C.A. § 330.

[2] Bankruptcy 51 3181

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3180 Items and Services Compensable
51k3181 k. In general. Most Cited Cases

Legal fees for appeal which Chapter 13 debtors initially did not want to pursue, but which their attorney convinced them to authorize by promising to pursue appeal at no cost to debtors, would be stricken from attorney's final fee application, which, inexplicably, included substantial amount of time relating to appeal; attorney would be held to promise that he had made to debtors. 11 U.S.C.A. § 330.

[3] Bankruptcy 51 3192

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3191 Amount
51k3192 k. In general. Most Cited Cases

Bankruptcy 51 3200

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3191 Amount
51k3200 k. Effect of contract; prior compensation. Most Cited Cases

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By failing to enter into written fee agreement with Chapter 13 debtors, in violation of procedural rule of bankruptcy court, debtors' attorney forfeited his right to seek any fees beyond those stated in the Rule 2016 Statement that he filed along with petition.

[4] Bankruptcy 51 3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases

Bankruptcy 51 3178

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3178 k. Misconduct. Most Cited Cases

Debtor's counsel has duty of candor and forthrightness to bankruptcy court, and when misrepresentations are discovered, there must be consequences, one of which may include denial of fee application.

[5] Bankruptcy 51 3178

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3178 k. Misconduct. Most Cited Cases

Same authority which permits bankruptcy court to deny fees due to misconduct of counsel also allows for disgorgement of fees already received.

[6] Bankruptcy 51 3178

51 Bankruptcy
51IX Administration
51IX(E) Compensation of Officers and Others
51IX(E)3 Attorneys
51k3178 k. Misconduct. Most Cited Cases

While misrepresentations that Chapter 13 debtors' attorney made to bankruptcy court, in falsely representing that he was unable to produce certain documents relating to his fee because employee in his office, who did not have her baby until months later, was on maternity leave, in at least recklessly misrepresenting that he had a written fee agreement with debtors, in deceitfully including in fee application substantial fees for appeal that he had promised to pursue at no cost to debtors, and in misrepresenting his reason for pursuing appeal, which seemed to have been motivated solely by his desire to litigate novel issue, were such as to permit total denial of all compensation, including disgorgement of fee payments already received, bankruptcy court would limit itself simply to denying any additional compensation, where compensation already paid was for work done prior to counsel's misrepresentations and was within limits of “no look” fee, and where debtors had unquestionably benefited from attorney's work.

[7] Bankruptcy 51 2187

51 Bankruptcy
51II Courts; Proceedings in General
51II(C) Costs and Fees
51k2182 Grounds and Circumstances
51k2187 k. Frivolity or bad faith; sanctions. Most Cited Cases

Lack of candor by Chapter 13 debtors' attorney to bankruptcy court, in falsely representing that he was unable to produce certain documents relating to his fee because employee in his office, who did not have her baby until months later, was on maternity leave, in at least recklessly misrepresenting that he had a written fee agreement with debtors, in deceitfully including in fee application substantial fees for appeal that he had promised to pursue at no cost to debtors, and in misrepresenting his reason for pursuing appeal, when considered along with attorney's history of other misconduct in past, was such as to require additional sanction, beyond mere denial of his application for an additional $11,080 in fees, in nature of order directing attorney to serve copy of bankruptcy court's opinion on the Disciplinary Board of the Supreme Court of Pennsylvania so that body could determine whether any further sanction should be pursued.

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***232** David A. Colecchia, Greensburg, PA, for Debtors.

Richard Bedford, for Ch. 13 Trustee.

233 *MEMORANDUM OPINION

Related to Doc. No. 124

THOMAS P. AGRESTI, Chief Judge.

This is a Chapter 13 case that was filed on October 25, 2006. Presently before the Court for decision is the ***Final Fee Petition for Main Case 06–25304*** ("Fee Application") filed on August 4, 2011 at Doc. No. 124 by Counsel for the Debtors, David Colecchia ("Colecchia").[FN1] The *Fee Application* indicates that Colecchia has already received payments totaling $2,500 from the Debtors, partly from a pre-petition retainer that they paid him directly, and partly through plan payments made during the course of the case. Colecchia seeks an additional $11,080 in fees and $318.40 in expense reimbursement. The total amount of legal fees being sought is therefore $13,580. The Chapter 13 Trustee filed an *Objection* to the *Fee Application* on the grounds that it was untimely and excessive. See Doc. No. 129.

> FN1. This Court's jurisdiction to decide this matter pursuant to *28 U.S.C. § 1334* was not at issue. This is a core proceeding pursuant to *28 U.S.C. § 157(b)(2)(A)*.

A preliminary hearing on the *Fee Application* was held on August 31, 2011. The Court then issued an Order requiring the Parties to submit briefs. An evidentiary hearing on the matter was held on November 2, 2011. During the evidentiary hearing, Colecchia testified and made repeated assertions in argument that a written fee agreement actually existed between he and the Debtors even though no document was ever offered into evidence. At the conclusion of the evidentiary hearing the Court indicated that it would take the matter under advisement and issue a ruling.

Two days after the evidentiary hearing, Colecchia filed a *Motion to Withdraw Final Fee Petition for Case 06–25304* ("Motion to Withdraw") at Doc. No. 142. Despite the assertions to the contrary that Colecchia had made at the evidentiary hearing, in the *Motion to Withdraw* he stated that after the conclusion of the evidentiary hearing he searched the Debtors' file but was unable to find any fee agreement between them. As a result, he claimed that he was bound by the *Rule 2016(b) Statement* he previously filed and therefore not entitled to any additional fees beyond what he had already received. The Chapter 13 Trustee filed a timely *Response* opposing the *Motion to Withdraw* at Doc. No 146.

On November 21, 2011, the Court issued an Order, Doc. No. 161, ("November 21st Order"), explaining that it was necessary to hold a hearing on the *Motion to Withdraw* to allow Colecchia an opportunity to address a number of "concerns" the Court identified in the *November 21st Order* regarding the truthfulness of some of his testimony at the evidentiary hearing. The hearing on the *Motion to Withdraw* was held on December 12, 2011. The next day the Court entered an Order denying the *Motion.* See Doc. No. 165. The reasons for that denial are explained in this *Memorandum Opinion* which represents the Court's findings of fact and conclusions of law as to the *Fee Application.*

Denial of the Fee Application

[1] The *Fee Application* must be substantially denied for a number of reasons, although Colecchia will be permitted to retain the monies he has already received. In making this decision, the Court was not restricted only to a consideration of the items raised by the Chapter 13 Trustee in her *Objection.* In matters such as the present case, the Court is also free to *sua sponte* raise issues as to the appropriateness of the fee being sought. *See, In re Busy Beaver Bldg. Centers, Inc.,* 19 F.3d 833, 840 *et seq.* (3d Cir.1994). In that ***234** regard, the Court made its own concerns known to Colecchia both at the November 2, 2011 evidentiary hearing itself and in the *November 21st Order.* Although given an opportunity to address those concerns at the December 12th hearing, Colecchia failed to do so to the Court's satisfaction.

[2] As a starting point for the Court's decision in this regard, all fees related to the appeal taken by the Debtors in the adversary proceeding of *Weisel v. Dominion Peoples Gas Company,* Adv. No. 08–2195 must clearly be removed from any consideration, and in fact, were already stricken by oral order of the Court issued during the evidentiary hearing. The reason for this is derived from the testimony of the Debtor Husband given at the evidentiary hearing to the effect that he initially informed Colecchia that he

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did not wish to pursue an appeal because of the expense involved. He further testified that he was persuaded to change his mind and agree to the appeal only after Colecchia informed him that the appeal had important legal implications "beyond this case" and would be done at no cost to the Debtors. At the hearing, Colecchia acknowledged that he had indeed made just such a promise to the Debtors, yet inexplicably, he included a substantial amount of time related to the appeal in the *Fee Application.* Colecchia will be held to his promise. Per the Court's review, $5,215 in fees are related to the appeal,[FN2] thus the amount of additional requested fees is preliminarily reduced to a total of $5,865.

FN2. None of the expenses in the *Fee Application* appear to be related to the appeal.

[3] The remaining amount of fees must be denied *in toto* for two alternative reasons, either of which would be sufficient in and of itself to justify the denial. First, as indicated above, Colecchia has admitted, albeit belatedly, that he cannot produce a written fee agreement between he and the Debtors. He is thus in violation of the Court's *Chapter 13 Procedure # 3,* which stated in relevant part, and at relevant time, that:

> Counsel shall enter into a written fee agreement, which may provide for future fees in the event of future complications. To the extent those fees exceed $2500 total, the attorney must file a fee application.

Chapter 3 Procedure # 3 at ¶ 6. The $2,500 figure referred to in the above quote (a figure that has been periodically changed by the Court over the years [FN3]) represents the "no look" fee, the maximum amount that Chapter 13 attorneys are permitted to be paid without being subject to the scrutiny of the fee application process. By failing to enter into a written fee agreement with the Debtors, Colecchia has therefore forfeited his right to seek any fees beyond those stated in the *Rule 2016 Statement* he filed along with the petition.[FN4]

FN3. Since this case was filed the no-look fee in the Western District was increased to $3,100.

FN4. Were this a case of a "lost" fee agreement, the result might be different. However, as noted in the *November 21st Order,* the Debtor Husband initially testified that there was no written fee agreement. He only relented and stated that he had perhaps been wrong about that under sharp questioning by Colecchia, who had also repeatedly asserted at the evidentiary hearing that such an agreement existed. The subsequent acknowledgment by Colecchia in the *Motion to Withdraw* that he cannot produce a fee agreement leaves him with no credibility on the issue. The Court must therefore conclude that the Debtor Husband's initial testimony was correct.

The second reason for a denial of the remaining fees at issue is the misconduct engaged in by Colecchia with respect to the *Fee Application.* That misconduct will be described more fully below in the next ***235** section of this *Memorandum Opinion* but for the moment it will suffice to say that it involved dishonest representations made to the Court.

[4] Counsel, of course, has a duty of candor and forthrightness to the Court. When misrepresentations are discovered there must be consequences, and in this instance the Court finds that an appropriate consequence is a denial of the *Fee Application. See, e.g., In re Park–Helena Corp.,* 63 F.3d 877, 882 (9th Cir.1995) (denial of all fees as sanction for attorney nondisclosure was not an abuse of discretion); *In re Parklex Assocs., Inc.,* 435 B.R. 195, 209–10 (Bankr.S.D.N.Y.2010) (compensation may be denied when attorney misrepresents facts and deceives the court, citing 3 *Collier on Bankruptcy* ¶ 329.04[1][b]); *In re Teknek, L.L.C.,* 394 B.R. 884 (Bankr.N.D.Ill.2008) (compensation may be denied when attorney misrepresents facts in order to deceive court).

[5][6] The Court actually considered going beyond a denial of the *Fee Application* and requiring Colecchia to disgorge the $2,500 in attorney fee payments he has already received. Such an action would be warranted under the facts of this case. The same authority which permits a bankruptcy court to deny fees due to the misconduct of counsel also allows for the disgorgement of fees already received. *See, e.g., In re Dental Profile, Inc.,* 446 B.R. 885 (Bankr.N.D.Ill.2011) (misrepresentation of key facts

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to court provided grounds for order of disgorgement). However, after giving the matter a good deal of thought, the Court concludes that Colecchia will be permitted to retain those fees previously received.

Given that the Court has found Colecchia to have made dishonest representations, it is a fair question to ask why he should be permitted any fees in this case. Several reasons persuade the Court to take this approach. First, unquestionably, the Debtors in this Chapter 13 proceeding have benefitted to some extent by legitimate services provided by Colecchia. Second, the fees previously received by Colecchia were within the limits of the *2016 Statement,* which the Court is willing to view as a surrogate fee agreement limiting compensation to the then in effect no-look fee. Third, Colecchia performed services and received the fees in question before any of the misrepresentations were made and as far as the Court can discern, none of the misrepresentations related to those fees. Although in these circumstances, the Court would be justified in denying all fees, an argument exists that it might be unnecessarily harsh to require disgorgement of previously paid fees in light of the benefit received and substantial fees already denied. Therefore, the Court will not take that step at this time. For similar reasons, the relatively modest expenses sought in the *Fee Application* will be allowed. [FN5]

FN5. The Court's disposition of the *Fee Application* on the grounds indicated renders it unnecessary to consider in any further detail the grounds of timeliness and excessiveness/overlawyering raised by the Chapter 13 Trustee in her *Objection.* The Court will note that the Trustee made good arguments in support of her position on those points.

Misrepresentations by Counsel

[7] The relatively straightforward disposition of the *Fee Application* does not end the matter. The Court finds that the misrepresentations that were made to it by Colecchia require a judicial response that goes further than the mere denial of a fee. The question of just what this response should be is a vexing one that the Court would much prefer to avoid but in good conscience cannot do so. Given the sensitive nature of the subject, the Court will ***236** first very specifically set forth its findings as to the misrepresentations by Colecchia [FN6] and then turn to a discussion of the remedy that will be imposed.

FN6. Although it perhaps should not be necessary to do so, the Court here briefly notes the sources of the duty imposed on counsel appearing before it to be truthful. That duty may be found in such sources as *Fed.R.Bankr.P. 9011(b)* (representations to the court), *Pa.R. Prof. Cond. 3.3(a)(1)* (lawyer shall not knowingly make a false statement of material fact to the court) and *18 U.S.C. § 157(3)* (false representations in bankruptcy proceedings). *See also, e.g., Mon River Towing, Inc. v. Salvage Co.,* 2010 WL 1337693 *33, f.n. 3 (W.D.Pa.2010).

The first misrepresentation relates to Colecchia's assertion, under oath at the evidentiary hearing, that he was unable to calculate the amount of fees that had actually been incurred to date at the time he was preparing and submitting an Amended Plan for the Debtors in December 2009. According to the *Fee Application* over $13,000 in fees had actually been incurred by then, but Colecchia submitted a figure of only $4,500 for anticipated legal fees in the then-pending Amended Plan. Colecchia testified that the actual figure could not be determined and listed in the Amended Plan because the employee at his office who handled billing records was "out on maternity leave" at the time. See *Transcript of 11/2/11 hearing at p. 25, l. 22 et seq.* (hereinafter "Tr. at ____").

In the *November 21st Order* the Court set forth facts of record indicating that the employee in question did not have a child until May 2010 or later, and thus would not have been out on maternity leave when the Amended Plan was prepared and submitted. The Court also noted that the Debtor Husband had testified that Colecchia gave him a "ballpark figure" of fees incurred to date when the Amended Plan was prepared which total was remarkably close to the actual figure listed in the *Fee Application.* This line of testimony, which was credible, clearly demonstrated to the Court that Colecchia was in fact able to reasonably determine the incurred amount of fees for purposes of insertion in the Amended Plan he filed in December 2009.

Colecchia was thus put on notice going into the December 12, 2011 hearing on the *Motion to Withdraw* that the Court did not believe his assertion

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about the employee being out on maternity leave thereby allegedly causing him an inability to calculate fees. It would have been an easy matter for him to prove that the assertion was true by presenting the testimony of the employee, or submitting records to show she was out on leave at the time in question. He failed to provide any evidence in that regard and the Court concludes that was because he could not do so since the representation was false.

The second misrepresentation relates to whether Colecchia had entered into a written fee agreement with the Debtors. The details of that misrepresentation are set forth above, and in the *November 21st Order,* and need not be reiterated here. Frankly, the Court is not certain whether Colecchia's repeated assertions at the evidentiary hearing that he had a written fee agreement with the Debtors were deliberate misrepresentations, or merely reckless ones he made "on the fly" without really knowing them to be true or false. Even if the Court gives him the benefit of the doubt and assumes the latter, Colecchia's conduct is still not acceptable. As Comment 3 to *Pa.R.Prof. Cond. 3.3* states in pertinent part:

> ... an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion to ***237** be true or believes it to be true on the basis of a reasonably diligent inquiry.

See also, e.g., In re Taylor, 655 F.3d 274 (3d Cir.2011) (to satisfy duty under Fed.R.Bankr.P. 9011 attorney must make inquiry reasonable under the circumstances; Rule 9011 does not recognize a "pure heart and empty held defense"). The assertions which Colecchia made about the existence of a fee agreement were absolute, and not accompanied by any qualifiers such as "I think" or "I believe." See *Tr. at p. 47, l. 10–21, p. 58, l. 10–11, 17–21; p. 61, l. 25* through *p. 62, l. 2; p. 63, l. 8–13.* The Court was therefore entitled to conclude that Colecchia was speaking after having made a reasonably diligent inquiry, which he clearly had not done. The Court thus views his statements as to the existence of a fee agreement as misrepresentations, whether done intentionally or "only" with reckless indifference to the truth or falsity.

The third area of misrepresentation relates to Colecchia's attempt to be compensated by the Debtors for time spent on the appeal. As noted above, the Debtor Husband testified at the evidentiary hearing that Colecchia represented to him that there was a "novel legal issue" involved and he would pursue an appeal without charge to the Debtors. *Tr. at p. 46, l. 16* through *p. 47, l. 6.* Colecchia admitted that he informed the Debtor Husband that he "would take the case up without further fee." *Tr. at p. 62, l. 5.* He also testified under oath that the *Fee Application* "removes most, if not all, of the money related to the appeal." *Tr. at p. 8, l. 17–18.* Despite all that, the *Fee Application* does in fact contain extensive time entries related to the appeal, now stricken, totaling $5,215.

The existence of this billable time in the *Fee Application* in direct contravention of Colecchia's agreement with the Debtors that he would not charge for it, has never been explained away by Colecchia despite his being given an opportunity to do so. The Court does not find it credible that the time was somehow inadvertently, but innocently, included in the *Fee Application.*

In her *Objection* to the *Fee Application,* filed on August 19, 2011 at Doc. No. 129, more than two months prior to the evidentiary hearing, the Trustee expressly pointed out that the *Fee Application* was seeking fees for substantial time related to the appeal. *Id.* at ¶ 18. The Trustee's attorney also noted the inclusion of appeal-related time at the initial argument on the *Fee Application,* commenting that there would be sufficient funds on hand to pay Colecchia if that time and the time related to briefing in this Court were removed. *Audio of 8/31/11 hearing at 10:47:25, et seq.* Colecchia thus clearly had notice well before the evidentiary hearing that such time was included, yet he failed to take any action to rectify the matter until he was confronted with the Debtor Husband's testimony at the evidentiary hearing. In fact, but for the testimony of the Debtor Husband at the evidentiary hearing, to the effect that Colecchia had agreed to undertake the appeal without charge, the Court likely would never have known of that circumstance.

In the *November 21st Order,* the Court advised Colecchia of the following:

> Even though the appeal-related fees have been stricken, the Court finds it very troubling that they

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were included in the *Fee Application* in the first place when Colecchia admits he had promised his clients they would not be charged for an appeal. An explanation will be required, and if the contention is that inclusion of the appeal-related fees was merely inadvertent, a further explanation will be required as to why no action was taken to remove them from the *Fee* ****238*** *Application* prior to the evidentiary hearing.

See Doc. No. 161 at p. 6. Despite once again being given an opportunity to do so, Colecchia has provided no explanation for the inclusion of the appeal-related time in his *Fee Application,* or the failure to seek to remove it until after the Debtor Husband's testimony at the evidentiary hearing. The Court can only conclude that he has no explanation and that the inclusion of the time was a deliberate misrepresentation by him intended to deceive the Court and obtain payment for time for which he knew he was not entitled.

The fourth misrepresentation by Colecchia concerned the reason why he took an appeal to the District Court in the matter of *Weisel v. Dominion Peoples Gas Company,* Adv. No. 08–2195, from this Court's grant of summary judgment to Dominion. Colecchia testified under oath at the evidentiary hearing that there was a "dual objective" in taking the appeal, both to litigate an issue of legal importance under *11 U.S.C. § 366* and to get the Debtors' natural gas turned on. *Tr. at p. 19, l. 24 through p. 25, l. 6.* However, the Court pointed out in the *November 21st Order* that the Debtor Husband had confirmed the Court's own understanding that in fact the gas had been turned on very early in the adversary proceeding and thereafter, was never turned off. *Tr. at p. 42, l. 23 through p. 44, l. 6.* That was in accordance with the agreement that had previously been reached between the Parties confirming that the gas would flow and the Debtor would pay any arrears due in installments. At the December 12th hearing on the *Motion to Withdraw* Colecchia had an opportunity to show how, under these circumstances, there could have been a "dual objective" as he had testified. Again he failed to do so. The Court therefore finds that Colecchia made yet another misrepresentation when he said concern about restoring the Debtors' gas service played part in the decision to take the appeal. The Court finds that the only reason the appeal was taken was in furtherance of Colecchia's own desire to "make new law" on what he considered to be an important legal issue, even though an appeal was senseless from his clients' standpoint.[FN7]

FN7. On the appeal the District Court sustained this Court's grant of summary judgment for Dominion, so Colecchia lost the appeal. Nevertheless, in a further indication that the appeal was taken for his own self-aggrandizement rather than out of concern for the protection of his clients' interests, he boasts of that loss as having established the "National Standard" for post-petition termination of utility service. *See Brief in Support of Counsel Fee Application,* Doc. No. 140 at p. 3. The Court does not view Counsel's desire to make a name for himself as a justifiable reason to take an appeal when there is absolutely no client interest to be served in doing so.

Having found that Colecchia made numerous misrepresentations to this Court, the question then becomes what to do about it. That question must, of necessity, be addressed in the overall context of the Court's prior experiences with Colecchia.

Were he a "first-time offender," the Court would be inclined to let matters rest with the denial of the fee and a stern warning against any further misconduct. However, Colecchia is decidedly not a first-time offender. A list of cases in which Colecchia has been sanctioned for various reasons in this Court, primarily for failure to comply with Orders in some respect, includes *In re Rosemarie M. Fike,* Case No. 05–32446 (Doc. Nos. 48, 53) (repeated failures to attend court proceedings), *In re Lee R. Eygabroad and Kristina K. Eygabroad,* Case No. 06–24260 (Doc. No. 191) (repeated failures to comply with scheduling orders), *In re William M. Morrison,* Case No. 06–23520 (Doc. Nos. 38, ****239*** 77) (repeated failures to comply with court orders through intentional disregard or reckless indifference; finding of willful bad faith), *In re Jeffrey L. Turmo and Sherri L. Turmo,* Case No. 05–25581, *Turmo v. LaSalle Bank,* Adv. No. 06–2394 (Doc. No. 82) (repeated failures to comply with court orders constituting willful bad faith), and within the present case itself, *Weisel v. Dominion Peoples Gas Company,* Adv. No. 08–2195 (Doc. No. 72) (repeated failures to comply with court orders constituting willful bad faith). To

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be fair, most of his prior infractions have generally not involved the sort of blatant dishonesty that was evident here, although in at least one other case he was sanctioned pursuant to *Fed.R.Bankr.P. 9011(c)* for making a misrepresentation. *See, In re Scott G. Critchfield and Tracy M. Critchfield,* Case No. 03–35715, *Critchfield v. Equifirst,* Adv. No. 04–2517 (Doc. No. 192).[FN8] Additionally, in *In re Chester C. Grabowski and Elaine M. Grabowski,* Case No. 05–35105–TPA (Doc. No. 191), the Court found that Colecchia had made false statements concerning the purported waiver of a Chapter 7 discharge, although he was not sanctioned for that representation.

FN8. In *Critchfield,* Colecchia filed a motion to extend the discovery deadline and alleged that necessary depositions had not yet been completed due to the difficulty in coordinating them with the schedules of all parties' counsel, thereby clearly implying that he had made efforts to schedule the depositions. The numerous defendants filed responses in which they denied that Colecchia had ever made any attempt to schedule the depositions. At a hearing on the motion to extend, Colecchia made a statement to the Court that the scheduling of depositions was a "Herculean task" given the number of attorneys involved—again clearly implying he had actually attempted to schedule the depositions. The Court issued a rule to show cause against Colecchia directing him to explain these apparent misrepresentations. Colecchia retained counsel to represent him, who responded to the rule to show cause by essentially conceding that misrepresentations had been made but they were "hyperbole" and were not done with the "intent to foster or continue frivolous litigation." The Court ultimately sanctioned Colecchia pursuant to *Fed.R.Bankr.P. 9011(c)*, giving him the benefit of the doubt, finding that while there may have been no intent to mislead, there was no factual basis for the representations at issue.

In addition to the above, Colecchia also has a history with some of the other judges of this Court which is pertinent to the matter at hand. For instance, in *In re Rebecca R. Black,* Case No. 03–21890 (Doc. No. 119), under facts eerily similar to those here, the Hon. Jeffery A. Deller issued an order denying a motion wherein Colecchia was seeking to amend a plan with only a few months left to completion in order to add substantial attorney fees that he had known about for several years. And in the recent case of *In re Lillian P. Iannini,* Case No. 09–22081 (Doc. No. 144), the Hon. Judith K. Fitzgerald substantially reduced a Chapter 13 fee Application filed by Colecchia, finding, *inter alia,* that his efforts to keep the Debtor in possession of her residence "when she had no legal or equitable right to be there was not based on any reasonable basis in law or in fact or any principled argument to change the law."

Balanced against all of these past transgressions of Colecchia are some positive qualities that he possesses, which the Court has observed on occasion. At times he appears to have genuine compassion for his clients and zealously advocates on their behalf. He also appears to take seriously his obligation to stay current on the law and is not reluctant to assert a novel legal position. While the Court obviously does not always agree with the arguments advanced by Colecchia, and while in no event can it countenance the presentation of a novel argument solely as a means of gratifying an attorney's ego (as appears to have ***240** been the case in the *Weisel v. Dominion* appeal), in the right case it is refreshing to interact with an attorney who is creative and willing to look at new approaches to a problem rather than just practice "cookie-cutter" law. Colecchia appears to be intelligent and obviously has some legal ability.

Admirable as some of these traits may be, however, they cannot be viewed in a vacuum or excuse a failure to meet basic standards of the legal profession, such as honesty and candor in dealings with the Court. The Court has employed fines, remonstrations, admonitions, and other tactics over the years in an effort to get Colecchia to "see the light" but they have had no demonstrable effect. His latest misconduct is the most serious yet. The Court therefore finds that it must try a new approach.

Colecchia will be required to serve a copy of this *Memorandum Opinion* and related materials on the Disciplinary Board of the Supreme Court of Pennsylvania so that body can determine whether any further sanction should be pursued.

An appropriate Order will follow.

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(Cite as: 464 B.R. 231)

ORDER

AND NOW, this ***9th*** day of ***January, 2012,*** for the reasons stated in the accompanying *Memorandum Opinion,* it is ***ORDERED, ADJUDGED and DECREED*** that,

(1) The ***Final Fee Petition for Main Case 06–25304*** ("Fee Application") filed on August 4, 2011 at Doc. No. 124 by Counsel for the Debtors, David Colecchia ("Colecchia") is ***GRANTED in part,*** in that Colecchia is allowed a reimbursement of expenses in the amount of $318.40, to be paid from funds being held by the Chapter 13 Trustee but in all other respects the *Fee Application* is ***DENIED.***

(2) ***On or before January 19, 2012,*** Colecchia shall serve a copy of this *Order,* the accompanying *Memorandum Opinion,* the November 21, 2011 *Order* (Doc. No. 161) and the transcript of the November 2, 2011 evidentiary hearing (Doc. No. 158) on the Disciplinary Board of the Supreme Court of Pennsylvania, and shall file a Certificate of Service to that effect with the Court, including a copy of the cover letter accompanying the submission, within three days of doing so but ***no later than January 22, 2012.***

Bkrtcy.W.D.Pa.,2012.
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