

**I. Rule 11 Liability in the Attorney Disciplinary Context.**

**A. Introduction.**

- Amended Federal Rule of Bankruptcy Procedure 9011 & the “safe harbor” provision: Fed. R. Bankr. Pro. 9011 was substantially revised in 1997 to:
  - (a) require that 9011 sanctions be sought "separately from other motions,"
  - (b) give the offending party 21 days after receiving a copy of the motion for sanctions to correct the problem before a motion could be filed with the court,
  - (c) limit sanctions to “what is sufficient to deter repetition” and
  - (d) impose liability on a law firm for violations by its partners, associates, and employees.”
- Many recent cases discuss the “safe harbor” provisions of amended Fed. R. Bankr. Pro. 9011 - *BE SURE TO COMPLY WITH THE 21 DAY GRACE PERIOD BEFORE FILING A MOTION WITH THE COURT*. Otherwise, you tie their hands and they are left with limited options even if the behavior is sanctionable.
- Examples: *In re Nicholas Christakis*, 291 B.R. 9 (Bankr.D.Mass. 2003): Judge Boroff was unable to grant creditor’s motion for Rule 9011 sanctions against debtor due to creditor’s failure to comply with “safe harbor” requirement of Rule 9011, but issued it’s own show cause order upon finding that debtor had misrepresented facts to the court.
- *In re: Kenneth Marsella, (Goldberg v. Marsella)*, United States Bankruptcy Court for the District of Rhode Island slip opinion AP No. 02-1078: Judge Votolato was unable to grant debtor’s motion for Rule 9011 sanctions due to failure to comply with “safe harbor” requirement of Rule 9011.
- Rule 9011 sanctions could not be imposed on Chapter 7 debtors' attorney for his omission and undervaluation of assets on debtors' bankruptcy schedules where United States Trustee, movant, had not given attorney a prior opportunity to correct schedules in accordance with "safe harbor" provision of Rule. *In re Engel*, 246 B.R. 784 (Bkrtcy.M.D.Pa. 2000).

**B. Other relevant statutory provisions:**

**11 U.S.C. § 105(a):**

This statutory section provides that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title....” Many courts have used § 105(a) as a basis for holding that bankruptcy courts have both statutory and inherent authority to deny attorneys and others the privilege of practicing before that bar.

**Fed.R.Bankr.Pro. 9020:**

Provides the framework for the bankruptcy court to issue contempt orders for conduct which occurs either before it or in a case outside its hearing. ,

**C. Recent Cases.**

- Judge Kenner imposed Rule 9011 sanctions of \$3,000 to compensate trustee and creditors' counsel upon a chapter 13 debtor's attorney who clearly should have known that unsecured debt to two creditors alone was such as to make him ineligible for Chapter 13 relief. In re Robert J. Pettey, 288 B.R. 14 (Bankr.D.Mass. 2003).
  
- Judge Bucki recently ruled that monthly financial reports that Chapter 11 debtor-corporation was statutorily obligated to file were "statements" specifically excepted from certification requirements of Bankruptcy Rule 9011, which debtor's attorney was not required to sign, and which would not provide basis for imposition of sanctions against attorney. In re World Parts, 291 B.R. 248 (Bankr.W.D.N.Y. 2003).
  
- 5<sup>th</sup> Circuit upheld Bankruptcy Court order imposing \$25,000 in sanction on attorney for his conduct during the bankruptcy case which included:
  - calling other attorneys, including an Assistant United States Attorney,
    - (1) a "stooge";
    - (2) a "puppet";
    - (3) a "weak pussyfooting 'deadhead' " who "had been 'dead' mentally for ten yrs"
    - (4) "various incompetents";
    - (5) "inept";
    - (6) "clunks";
    - (7) "falling all over themselves, and wasting endless hours";
    - (8) "a bunch of starving slobs"; and
  - (6) an "underling who graduated from a 29th-tier law school."
  - He called the chairman of First City a "hayseed" and a "washed-up has been," and he also called other First City directors "scoundrels."
  - He asserted that Vinson & Elkins was using First City as a "private piggybank."
  - He described an executive compensation plan approved by the bankruptcy court as a "bribe."

In The Matter of First City Bancorporation of Texas Inc., 282 F.3d 864 (5<sup>th</sup> Cir. 2002).
  
- A \$10,000 fine plus disgorgement of fees was ordered where a debtor filed a Chapter 13 petition less than 24 hours before a state court summary judgment hearing. Four days later, it was voluntarily dismissed, but the bankruptcy court issued a "show cause" order and imposed sanctions under 9011 on the debtor's counsel for filing the bankruptcy whether as a litigation tactic. In re Smith, 257 B.R. 344 (Bankr. N.D. Ala. 2001).
  
- A bankruptcy court imposed sanctions in the sum of \$25,000 against an attorney for engaging in behavior that the court characterized as "egregious, obnoxious, and insulting." The attorney appealed, arguing to the Fifth Circuit "that his deplorable and wholly unprofessional conduct helps him recover more money for his clients," "serves him

well in settlement negotiations," and is "therefore appropriate." Krim v. First City Bancorporation (In re First City Bancorporation), 282 F.3d 864 (5<sup>th</sup> Cir. 2002).

- Rule 9011 sanctions have also been awarded against an involuntary petitioning creditor's attorney for a bad faith filing of bankruptcy case, because § 303(I) did not have a provision for sanctioning attorney. In re Hutton Valley Farms, 251 B.R. 522 (Bankr.W.D.Mo. 2000).
- Rule 9011 sanctions were upheld on appeal for oversecured creditor's misrepresentations regarding fee arrangements with counsel regarding agreement whereby counsel's services would be billed at lesser rate if fees were not passed on to debtor. In re 1095 Commonwealth Corp., 236 B.R. 530 (D.Mass 1999).

**D. Other Methods Used to Discipline Attorneys in Bankruptcy Cases.**

The First Circuit Bankruptcy Appellate Panel recently upheld the bankruptcy court's authority to directly discipline attorneys who appear before it in In re Disciplinary Proceedings, 282 B.R. 79 (B.A.P. 1st Cir. 2002). In upholding rulings by Judge Deasy suspending an attorney and directing him to pay special counsel's fees, the BAP held that bankruptcy courts have both inherent and statutory authority to conduct disciplinary proceedings and to impose sanctions including suspension of the right to practice before it and ordering the payment of attorney fees incurred by special counsel in her investigation of attorney's conduct.

the United States Constitution.” *Id.* at 11. Citing *Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328, the First Circuit ruled that the patient had no standing “to assert a Contract Clause claim, as he holds no contractual relationship with [the insurer].” *Mercado-Boneta*, 125 F.3d at 12 n. 5.

Allied would distinguish *Mercado-Boneta* on the ground that there “is no evidence that the Puerto Rican statute treated the third party plaintiff as a party to the contract for purposes of the statute.” Defendant’s Reply Brief, at 3–4. Likewise, however, there is “no evidence” here that the Maine Legislature treated Allied as a party to the 1998 CBA. What is crystal clear, however, is that the Legislature imposed statutory liability on parent corporations of covered establishments. But only as a party to the collective bargaining contract would Allied be provided protection from intervening state law under the Contract Clause of the U.S. (or Maine) Constitution.<sup>14</sup>

#### Conclusion

Because Allied is without standing to raise the Contract Clause of the United States Constitution as a defense to its statutory liability under the Maine Severance Pay Statute, 26 M.R.S.A. § 625-B (West 1988 & Supp.2002), and because the district court has mandated application of the Severance Pay Statute as it existed after the 1999 amendments, Allied’s motion for summary judgment, based on its Contract Clause argument, is DENIED.<sup>15</sup>



14. Today’s determination leaves it unnecessary to consider the question whether, if Allied had standing, the Contract Clause would operate in its favor.

#### In re Robert J. PETTEY, Debtor.

No. 02-14043-CJK.

United States Bankruptcy Court,  
D. Massachusetts.

Jan. 21, 2003.

On motion to dismiss Chapter 13 case and on order to show cause why sanctions should not be imposed on debtor and his attorney, the Bankruptcy Court, Carol J. Kenner, J., held that: (1) order dismissing Chapter 13 case filed by debtor whose unsecured debt to two creditors alone was such as to make him ineligible for Chapter 13 relief would be dismissed with prejudice to debtor’s ability to discharge, in any subsequent bankruptcy case, his debts to these two creditors; (2) Rule 9011 sanctions would be imposed on Chapter 13 debtor’s attorney, for filing petition on behalf of debtor whose unsecured debt clearly rendered him ineligible for Chapter 13 relief.

So ordered.

#### 1. Bankruptcy ⇄ 3716.30(8)

Order dismissing Chapter 13 case filed by debtor whose unsecured debt to two creditors alone was such as to make him ineligible for Chapter 13 relief would be dismissed with prejudice to debtor’s ability to discharge, in any subsequent bankruptcy case, his debts to these two creditors, for whom he had provided an

15. I will leave for discussion by the parties Judge Carter’s observation regarding the potential that the third-shift Plaintiffs’ claims might be revived by today’s ruling. See Memorandum of Decision and Order (Carter, J.) at 15, n. 10.

incorrect mailing address and thus deprived them of opportunity to participate in case, as well as his debt to another creditor, his ex-wife, whom he intentionally omitted from bankruptcy schedules despite being well aware of his debt to her and having opportunity to disclose her claim at numerous places in schedules. Bankr. Code, 11 U.S.C.A. § 349(a).

## 2. Bankruptcy ⇌3022

Quid pro quo for bankruptcy relief, especially grant of discharge, is full and accurate disclosure of debtor's financial affairs, especially when such disclosure affects right of creditor to participate in case.

## 3. Bankruptcy ⇌2322, 3022

Debtor has independent obligation to verify the information in his schedules, even though they are prepared by attorney.

## 4. Bankruptcy ⇌2187, 2235

Most appropriate sanction, for Chapter 13 debtor's violation of Bankruptcy Rule 9011 in connection with numerous omissions and inaccuracies on his bankruptcy schedules, was order barring debtor from filing for bankruptcy for period of three years following entry of order dismissing case; monetary sanction was not likely to be effective, as such a sanction would compete with substantial, nondischargeable debt that debtor owed. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

## 5. Bankruptcy ⇌2187

Rule 9011 sanctions must be limited to that which is sufficient to deter repetition of debtor's offending conduct or comparable conduct by others similarly situated. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

## 6. Bankruptcy ⇌2187

Rule 9011 sanctions may include directives of nonmonetary nature. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

## 7. Bankruptcy ⇌2187

No Rule 9011 sanctions would be imposed on Chapter 13 debtor's attorney in connection with numerous inaccuracies and omissions upon debtor's bankruptcy schedules, where attorney had either relied on information provided by debtor and was not aware of unscheduled obligation (in case of debtor's \$40,000 obligation to ex-spouse) or, in copying information from schedules which he had filed in connection with debtor's earlier bankruptcy case, had inadvertently used mailing address which was no longer current. Fed.Rules Bankr. Proc.Rule 9011, 11 U.S.C.A.

## 8. Bankruptcy ⇌2187

Rule 9011 sanctions would be imposed on Chapter 13 debtor's attorney, for filing petition on behalf of debtor whose unsecured debt clearly rendered him ineligible for Chapter 13 relief, where attorney failed to present any nonfrivolous argument in support of debtor's eligibility for such relief; sanctions would be assessed in amount of \$3,000 for attorney fees incurred by creditor and trustee as result of attorney's conduct. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

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Gary Cruickshank, Boston, MA, for Debtor.

Mark Itzkowitz, Boston, MA, for Belanger Creditors.

Doreen B. Solomon, Milton, MA, Chapter 13 Trustee.

Eric K. Bradford, Boston, MA, for United States Trustee.

Christopher Marshall, United States Trustee.

**MEMORANDUM OF DECISION ON  
MOTIONS TO DISMISS AND ON  
ORDER TO SHOW CAUSE WHY  
SANCTIONS SHOULD NOT BE EN-  
TERED AGAINST DEBTOR ROB-  
ERT J. PETTEY AND ATTORNEY  
JOSEPH CZERWONKA**

CAROL J. KENNER, Bankruptcy Judge.

The Debtor's conduct in this case constitutes an egregious abuse of the Bankruptcy Code. Either intentionally or with reckless indifference to the rights of his creditors in bankruptcy, the Debtor omitted information from his bankruptcy schedules, statement of financial affairs, and creditor matrix and thereby excluded certain judgment creditors—two nieces to whom he owes a principal balance of \$500,000 for child sexual abuse—and his former spouse from the bankruptcy process, in derogation of their substantive and procedural rights in Chapter 13.

This case is before the Court on two motions to dismiss the case and on the Court's own order to show cause, issued October 18, 2002, as to why sanctions should not enter against Debtor Robert J. Pettey and his former attorney in this case, Joseph Czerwonka. The Debtor initially opposed dismissal of the case but now consents to dismissal with prejudice. After a hearing on the motion and the order to show cause at which Attorney Czerwonka testified in explanation of his conduct and the Debtor offered no defense,<sup>1</sup> the Court now enters the following findings and rulings and, on the basis thereof, will (1) dismiss this case with prej-

udice to refile for a time and with prejudice to the later discharge in bankruptcy of his debts to Elinore Davey and to the Belanger creditors; (2) sanction the Debtor for violation of FED. R. BANKR. P. 9011(b) by ordering him to pay the fees incurred in this case by the Chapter 13 Trustee and by counsel to the Belanger creditors; (3) sanction Attorney Czerwonka for violation of FED. R. BANKR. P. 9011(b) by ordering him to pay \$2,000 to the William Belanger, as he is Father and Next Friend of Christina Belanger and Melissa Belanger, and \$1,000 to the Chapter 13 Trustee, and (4) otherwise discharge the order to show cause against Attorney Czerwonka without further consequence.

***Facts and Procedural History***

The Debtor, Robert J. Pettey, filed a petition for relief under Chapter 13 of the Bankruptcy Code on June 3, 2002, thereby commencing this bankruptcy case. This was his second bankruptcy filing. In his first case (No. 92-18993-CJK), he received a Chapter 7 discharge, but the Court also determined that his obligation to William Belanger, as he is Father and Next Friend of Christina Belanger and Melissa Belanger ("the Belanger creditors"), in the principal amount of \$750,000 was excepted from discharge by operation of 11 U.S.C. § 523(a)(6) as a debt for willful and malicious injury, and this determination was sustained by the District Court on appeal. *Pettey v. Belanger ex rel. Belanger*, 232 B.R. 543 (D.Mass.1999). The debt is based on an agreed judgment for sexual assault and battery against his minor nieces, the Belangers. (The Debtor also pled guilty to criminal charges for the underlying actions and was sentenced to

say nothing.

1. The Debtor elected under his Fifth Amendment privilege against self-incrimination to

and served time in prison for his offenses.<sup>2</sup> ) By the time of his second bankruptcy filing, the Belanger creditors had succeeded in liquidating the Debtor's non-controlling interests in two closely-held corporations for a total of \$250,000 and applying this sum to their claim, leaving the Debtor obligated to them for at least \$500,000.<sup>3</sup> At the time of the second case, the Debtor also remained obligated to his former wife, Elinore Davey, under a Probate Court order for support obligations in the amount of \$40,000.

Shortly after he filed the petition commencing this case, the Debtor also filed his bankruptcy schedules, his statement of financial affairs, his numbered listing of creditors, and his mailing matrix, all signed by the Debtor under the pains and penalties of perjury. These documents were inaccurate and misleading in several respects. First, though the Debtor clearly knew of his obligation to Elinore Davey when he filed these documents (whether the obligation had by then been reduced to a contempt judgment or not), nowhere in them did he list her as a creditor or disclose the existence of her claim. Second, throughout these documents, he consistently listed the address of the Belanger creditors (c/o their attorney, Mark Itzkowitz) incorrectly, using an address from which Itzkowitz had long-since relocated. Third, in the Statement of Financial Affairs, the Debtor failed to disclose, in part 4 of the Statement, certain suits to which he was a party within one year immediately preceding the filing of his bankruptcy petition, including (i) No. 92-DO886-DV1 in Bristol County Probate and Family

Court, in which he is a defendant; (ii) Civil Action No 91-02654 in Bristol County Superior Court, in which he is a defendant; (iii) Civil Action No. 95-01582C in Bristol County Superior Court, in which he is a defendant; and (iv) Civil Action No. 01-1934 in Norfolk County Superior Court, in which he is a defendant. Fourth, in part 17a of the Statement of Financial Affairs, the Debtor failed to disclose the name of Bruce Hague, an accountant who, within six years immediately preceding the filing of Debtor's bankruptcy case, kept or supervised the keeping of books of account and records of the Debtor. In addition, the Debtor signed and filed a Chapter 13 Plan and then an Amended Chapter 13 Plan in which, despite knowledge of his obligation to Elinore Davey, he failed to make provision for her claim, including by failing to include the amount of her claim in the total of unsecured claims on which the plans proposed to pay a dividend. (The Court confirmed the Amended Plan but later vacated the confirmation order upon learning that neither Ms. Davey nor the Belanger creditors had been given notice of the plans.)

For these failures by the Debtor and others by his attorney, Joseph Czerwonka, the Court, on October 18, 2002, issued an order to show cause why sanctions should not enter against them for violations of FED. R. BANKR. P. 9011(b). The order is detailed; without reiterating its content, I include it herein by reference and append a copy to this Memorandum. The Order expressly ordered the Debtor to show cause why the order dismissing this case should not expressly bar the dis-

2. The Belanger creditors allege that the sentence was reduced because the Debtor agreed to pay damages in the civil action against him, and that the Debtor filed this bankruptcy case (and his earlier case) precisely to hinder enforcement of the agreement with which he

purchased lenience. These allegations have not been adjudicated.

3. The Belanger creditors also contend that, in addition to the principal, they are entitled to substantial interest on the debt. I need not address the issue.

charge, in a later case under the Bankruptcy Code, of the debts presently owing to the Belanger creditors and to Elinore Davey, the cause being that

1. he signed under penalty of perjury and filed in this case the schedules of creditors, the numbered listing of creditors, and the list of creditors (mailing matrix) while omitting from such documents the name and address of creditor Elinore M. Davey and her claim in the amount of \$40,000; and
2. he signed under penalty of perjury and filed in this case the schedules of creditors, the numbered listing of creditors, and the list of creditors (mailing matrix) and incorrectly listed in each of these the address of Attorney Mark Itzkowitz, for creditor William Belanger, as he is Father and Next Friend of Christina Belanger and Melissa Belanger.

Because the amount of his unsecured debt to the Belanger creditors alone exceeded the Chapter 13 eligibility limit for noncontingent, liquidated, unsecured debts of \$290,525, see 11 U.S.C. § 109(e), the Chapter 13 Trustee moved to dismiss the case. The Belanger creditors joined in the Chapter 13 Trustee's motion to dismiss and moved separately for dismissal on the basis of bad faith by the Debtor in his conduct of the case and in the filing of his Amended Chapter 13 plan.

The Court conducted an evidentiary hearing on the two motions to dismiss and the Order to Show Cause on December 11, 2002. The Debtor offered no opposition to the motions to dismiss and in fact consented to dismissal. In doing so, he expressly understood that dismissal of the case would forever bar the discharge in any later bankruptcy case of the Belanger and Davey obligations. He did not otherwise consent to the sanctions contemplated by

the order to show cause, but he also offered no evidence or argument as to why the contemplated sanctions should not enter. The Chapter 13 Trustee, Doreen Solomon, and counsel for the Belanger Creditors both attempted to elicit testimony from the Debtor, but, in response to every question they posed, he invoked the Fifth Amendment privilege against self-incrimination. Only Mr. Czerwonka offered testimony—his own and that of his secretary—and his evidence concerned his own conduct, not the Debtor's.

### *Dismissal*

Section 109(e) of the Bankruptcy Codes states that “only an individual with regular income that owes, on the date of the petition, noncontingent, liquidated, unsecured debts of less than \$290,525 . . . may be a debtor under chapter 13 of this title.” 11 U.S.C. § 109(e). The Debtor does not dispute that the Belanger creditors have, to date, recovered only \$250,000 on a judgment debt in the principal amount of \$750,000. He does not dispute that the balance of the obligation is, except for \$5,000 thereof, unsecured. And he does not dispute that the obligation is noncontingent and liquidated. Therefore, the Belanger debt alone far exceeds the eligibility limit.

Though he no longer advances this argument, the Debtor initially responded to the Trustee's motion to dismiss with the argument that the assets liquidated in satisfaction of the debt had a value far in excess of the \$250,000 for which they were liquidated, and that he should be given credit for the full value of the assets, which would substantially reduce the balance due and bring his total noncontingent, liquidated, unsecured debts below the eligibility limit. The Debtor has not offered any evidence to substantiate his position as to the value

of the assets;<sup>4</sup> much less has he articulated a theory on which the relief he seeks (reduction of the amount deemed owing) could be granted. The Debtor bears the burden of proving that he is entitled to a greater credit than the amount that the Belanger creditors realized for the assets, but he has offered no proof on the issue. I conclude that Mr. Pettey is ineligible to be a debtor under Chapter 13 and therefore that his case must be dismissed.

***Dismissal as Barring Future Discharge***

[1] “*Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed.*” 11 U.S.C. § 349(a) (emphasis added). The emphasized language expressly recognizes that the court may, for cause, order that the dismissal of a bankruptcy case will bar the discharge in a later bankruptcy case of debts that were dischargeable in the case dismissed. The Court finds that such cause exists here with respect to the Debtor’s obligations to the Belanger Creditors and to Elinore Davey.

[2] With respect to the obligation to Elinore Davey, the cause is Debtor’s abuse of the bankruptcy process with respect to her and her claim. Despite his knowledge of her claim, he did not list her on the matrix. The matrix functions as a mailing

list by which the Court is able to notify creditors of the filing of a case in which they have an interest and of their rights in the case. His failure to include her on the list had the effect of denying her due process with respect to this case. Nor did he list her on the schedules of creditors. And he omitted from his statement of financial affairs any mention of the state court proceedings pending between them. The omission of Ms. Davey and her claim occurs in several places where the Debtor was obliged to disclose them. I cannot believe that such repeated omissions with respect to this one creditor, all still unexplained, can have been unintentional. At the very least, they demonstrate an attitude of reckless indifference to the accuracy of the schedules and to the rights of this creditor in bankruptcy. The quid pro quo for bankruptcy relief, especially a discharge, is full and accurate disclosure of one’s financial affairs, especially where such disclosure affects the right of a creditor to participate in the case. The Debtor’s cavalier disregard of that obligation with respect to this debt is cause to except it from discharge in future bankruptcy cases (if it is not already excepted from discharge<sup>5</sup>).

[3] With respect to the Belanger creditors, the cause is more complex.<sup>6</sup> First,

4. On October 28, 2002, Mr. Pettey filed an affidavit in this case that set forth his own averments in support of this argument. But, at the evidentiary hearing on the motions to dismiss, he did not cite the affidavit in opposition to the motion. Moreover, where, in reliance on the privilege against self-incrimination, the Debtor refused to answer questions by opposing counsel concerning the subject matter of the affidavit, the affidavit cannot, consistently with due process, be accepted as evidence, and accordingly I have not treated it as evidence.

5. On December 6, 2002, the Debtor filed a Notice of Amendment to Schedules and State-

ment of Financial Affairs that, among other things, amended Schedule E, the schedule of priority claims, by listing the debt to Elinore Davey in the approximate amount of \$40,000 and stating that the debt is for child support. Debts for child support are excepted from discharge in every chapter under which a discharge might be obtained. See 11 U.S.C. §§ 523(a)(5), 727(b), 1141(d)(2), 1228(a)(2) and (c)(2), and 1328(a)(2) and (c)(2).

6. In his earlier Chapter 7 case, this Court determined, after a trial, that the Belanger debt was excepted from discharge under 11 U.S.C. § 523(a)(6). That determination would be preclusive in any subsequent case

the Debtor failed to list the Belanger creditors (on the matrix and in the schedules of creditors) at their attorney's correct address. The Debtor knew the correct address (and had recently been summoned for a deposition at that address) but offered no excuse or explanation for his use of the wrong address. His attorney, Mr. Czerwonka, testified that the wrong address was an oversight, caused by his (Czerwonka's) using schedules from the Debtor's 1996 case as a template from which to prepare the schedules in this case. But Mr. Czerwonka's oversight does not exculpate the Debtor because the Debtor had an independent obligation to verify the information in the schedules. He has offered no testimony that he attempted to do so. In view of the number of inaccuracies in the statement and schedules, the Debtor cannot have reviewed the information with any care.

This in itself is an abuse of bankruptcy process, but the abuse becomes more egregious when viewed in context. The Belanger obligation is by far the Debtor's largest, and the Debtor filed this Chapter 13 petition precisely to obtain a discharge of that debt: his chapter 13 plans proposed to pay two percent of that debt over five years, at the end of which time he would receive a discharge of the balance. But, in view of the size of his debt to the Belangers, the Debtor was not eligible for relief

under Chapter 7 or under Chapter 11. 11 U.S.C. § 523(a)(6), § 727(b), and § 1141(d)(2). Therefore, the Debtor's obligation is already incapable of being discharged in a subsequent case under Chapter 7 or 11. The debt could possibly be subject to discharge in a case under Chapter 13 (I make no ruling at this time on the Belangers' arguments to the contrary), but the Debtor would first have to reduce his total noncontingent, liquidated, unsecured debts to below the eligibility limit in order to qualify for any relief under Chapter 13, and that in turn would necessitate substantial pay down of the Belanger debt, which alone far exceeds the

under Chapter 13 (the only chapter under which he could possibly obtain a discharge of that debt), at least not without a judicial determination that the Belangers should be deemed to have received more than they actually received for the assets they liquidated in satisfaction of the debt. Nonetheless, the Debtor has commenced no proceeding in this case (or elsewhere) for a determination of any lesser balance due, and his Chapter 13 plans (the original and the amended) quantified the unsecured claim at the full principal balance (after deduction of the \$5000 secured portion) of \$495,000. And now, in response to the Trustee's motion to dismiss and the Court's order to show cause, Debtor has offered no evidence whatsoever and articulated no theory on which the relief he seeks (reduction of the amount deemed owing) could be granted. Moreover, although the Belanger debt is mostly unsecured (the Debtor himself listed the secured portion as only \$5,000 of the \$500,000 owing<sup>7</sup>), he did not list it on his schedule of nonpriority unsecured creditors,<sup>8</sup> thereby camouflaging an unsecured obligation that, on its face, would raise a red flag as to his eligibility for Chapter 13 relief.

This is not the first time that the Debtor has filed a Chapter 13 petition that he was ineligible to file. The Debtor commenced

eligibility limit. Consequently, the possible dischargeability of the Belanger debt in bankruptcy is already very limited.

7. The insignificance of the secured portion is highlighted by the fact that the Debtor made no provision for it in his proposed Chapter 13 plans.
8. He did list the debt on his schedule of secured debts, stating that \$500,000 obligation was secured to the extent of \$5,000, but he did not list the balance of the debt on the separate schedule of nonpriority unsecured debts.

his 1996 bankruptcy case in Chapter 13 but then converted to Chapter 11 only after the Chapter 13 Trustee and the Belangers had moved to dismiss the case on the basis of ineligibility for Chapter 13 relief. In that earlier case, too, he failed to list the Belanger debt among his unsecured debts.

Nor is this a case of an innocent debtor's being unfairly tarred for the tactics of his counsel. The Debtor bore independent responsibility for the accuracy of his schedules and matrix; at the very least, he controlled (by his responsibility for the accuracy of the matrix) whether the Belangers would get a fair opportunity to participate in this case and to contest what he must have known, in light of his previous case, was (to put it most charitably) a claim to eligibility for Chapter 13 relief that they might reasonably want to contest. In light of the established nondischargeability of the Belanger obligation in Chapters 7 and 11, the reasons for that nondischargeability, and the amount of his obligation to them, the Debtor was obligated, in seeking relief under Chapter 13, to do so with the most scrupulous good faith and fairness toward the Belangers. Instead, he has abused Chapter 13 and, in his dealings with the Belangers in this case, acted in bad faith and shown only contempt for them, their substantive rights, and their rights to notice and due process. This is cause to deny him the benefit of a discharge with respect to the Belanger obligation in any future case he may file under the Bankruptcy Code.

***Further Sanctions under Rule 9011 Against Debtor***

[4] The Court finds that, by his numerous omissions in the schedules, statement of financial affairs, matrix, and numbered listing of creditors (the omissions identified in numbered items 2, 3, 6, 7, and 8 of the order to show cause), the Debtor has re-

peatedly violated FED. R. BANKR. P. 9011(b)(3) in that he has made factual representations without factual support and without having made a reasonable effort to verify the accuracy of his representations. Further, by his failure to make provision for the claim of Elinore Davey in his Chapter 13 Plan and Amended Chapter 13 Plan, he has violated FED. R. BANKR. P. 9011(b)(3) by omitting the amount of her claim from the total of unsecured claims; and he has violated Rule 9011(b)(1) by filing a plan that, for failure to make provision for her claim, he knew should not be confirmed. In all these matters, he has shown a reckless disregard for the truth and for the rights of his creditors in bankruptcy.

[5, 6] For these violations, Rule 9011(b) permits the Court to impose an appropriate sanction on the Debtor. FED. R. BANKR. P. 9011(b). The sanction shall be limited "to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." FED. R. BANKR. P. 9011(b)(2). And it may include directives of a nonmonetary nature. *Id.*

In this instance, a monetary sanction (such as an award of fees) might have no deterrent effect, as further monetary obligations would only compete with existing obligations that are long overdue. The Court instead will bar the Debtor from a further bankruptcy filing under any Chapter of the Bankruptcy Code for a period of three years from the date of this order. This sanction reflects the nature of the offense it addresses and is more likely than any monetary alternative to deter.

***Sanctions under Rule 9011 Against Attorney Joseph Czerwonka***

[7] The Court's order to show cause listed six possible causes for sanctions against Attorney Czerwonka. Three arise from his failure to disclose or deal with the

claim of Elinore Davey. Mr. Czerwonka testified that, at the time that he filed the documents in question, he had no knowledge of the existence of a debt to Ms. Davey. In view of this testimony and of the lack of contradictory evidence in the record, the Court will not enter sanctions on for items 3, 4, and 5 of the order to show cause.

Item 10 concerned Attorney Czerwonka's signing and filing his certificate of service with respect to the Amended Chapter 13 Plan and the Motion to Approve the Amended Plan. The certificate indicated that he had by mail served the Plan and Motion on the Chapter 13 Trustee and on Attorney Mark Itzkowitz on August 8, 2002, but postmarks on the mailings to the Trustee and Attorney Itzkowitz bear a date after September 10, 2002, such that it appears that Mr. Czerwonka did not mail the documents to the Trustee and Mr. Itzkowitz until approximately one month after he filed the certificate of service. At the hearing, Attorney Czerwonka and his secretary, Colleen Oliver, testified that the envelopes in question were deposited in a mailbox on the date set forth in the certificate of service, and that they could not explain the later postmark. In view of their testimony and of the fact that the postmark on both envelopes is an unusual one, I will give Mr. Czerwonka the benefit of the doubt as to this item.

Item 9 concerned Attorney Czerwonka's incorrectly listing the address of Attorney Mark Itzkowitz, as counsel to the Belanger creditors, on the mailing matrix that Czerwonka filed in the case. Czerwonka testified that this was an oversight, caused by his use of the schedules that his office had prepared for the Debtor's 1996 case as a template for preparing the schedules for the present case. He testified that, although he knew that Itzkowitz had moved to a new address, he had simply failed to

notice that the address in the old schedules did not reflect the new address. Mr. Czerwonka thus attributes the matter to simple negligence, and, again, I will give Mr. Czerwonka the benefit of the doubt.

[8] Item 1 concerned Mr. Czerwonka's having filed a petition under Chapter 13 despite the Debtor's apparent ineligibility under 11 U.S.C. § 109(e) to be a debtor under Chapter 13 because his noncontingent, unliquidated, unsecured debts exceed the limit of \$290,525. The Court ordered Mr. Czerwonka to show cause why this was not a violation of Rule 9011(b)(1), (2), and (3). Czerwonka testified at the hearing that, when he filed the petition, he was aware that the Debtor's unsecured debt exceeded the eligibility limit, largely because the principal balance owing to the Belangers was \$500,000. Czerwonka added that, because the Belangers had liquidated the Debtor's assets for less than their fair market value, the Debtor was entitled to a credit not for the amount received (\$250,000) but for their much-higher fair market value, which would reduce Debtor's total noncontingent, unliquidated, unsecured debts to below the eligibility limit. This is precisely the same argument that Czerwonka advanced in the response he filed (on August 23, 2002) to the Chapter 13 Trustee's motion to dismiss the case for ineligibility. Neither in the case nor in response to the order to show cause has Czerwonka offered any authority for the proposition that a debtor should be given credit for the fair market value of the assets liquidated; nor has he offered evidence that the amount actually received was anything other than fair market value. In short, he has offered nothing to support his position. Moreover, he did not argue that the sales process was flawed or subject to fraud or collusion. He merely argued that, if the sale price had been higher, the Belangers would have received

more money, and the debt owed by his clients would be lower.

The Court knows of no authority for the proposition that, when a judgment creditor liquidates the judgment debtor's property in satisfaction of the judgment debt, the debtor must be given credit for the fair market value of the property if such value is higher than the price obtained. Courts scrutinizing foreclosure sales will ask whether the sale *process* was conducted fairly, in good faith, or in conformity to applicable statutory requirements or standards, but inadequacy of the sale price alone is not cause, either in the Bankruptcy Code or in Massachusetts law, to invalidate a foreclosure sale or to justify a higher credit than the price actually received.<sup>9</sup> Czerwonka's argument is based entirely on the disparity between the price received and the supposed fair market value of the property, not on the *manner* in which the sale was conducted.

Czerwonka did not indicate whether he had researched this issue before he filed the Debtor's Chapter 13 petition. Nor did he offer an explanation or justification for his believing (if he so believed) that his argument satisfied Rule 9011(b)(2)'s requirement of being "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. BANKR. P. 9011(b)(2). Moreover, although Czerwonka was aware that,

absent a determination that a larger credit was due, the Belanger debt alone would render the Debtor ineligible for Chapter 13 relief, he did not initiate a proceeding for a determination that the Debtor was entitled to a greater credit. Also, when the Trustee and later the Court and the Belangers raised the issue of the Debtor's eligibility for Chapter 13 relief, the Debtor ultimately chose not to litigate the issue; he consented to dismissal instead. All of this indicates that, in filing the Debtor's Chapter 13 petition, Czerwonka was *not* aware of a nonfrivolous basis for the Debtor's eligibility, and that no such basis existed. I conclude that Czerwonka's argument for eligibility did not satisfy the standard in Rule 9011(b)(2) and therefore that he signed and filed the petition in violation of that standard.

As a sanction, this Court will order Czerwonka to pay \$2,000 to William Belanger, as he is Father and Next Friend of Christina Belanger and Melissa Belanger, for the attorney's fees incurred by their counsel in contending with this case, and \$1,000 to the Chapter 13 Trustee for the cost to her and her office of contending with this case.

### **Conclusion**

For the reasons set forth above, the Court will (1) allow the motions of the Chapter 13 Trustee and the Belanger creditors to dismiss, (2) dismiss the pres-

9. See, for example, *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (the price obtained at a properly-conducted foreclosure sale of real property under state law is "reasonably equivalent value" for purposes of the fraudulent conveyance analysis in 11 U.S.C. § 548, as long as the requirements of state foreclosure law have been met); *National Loan Investors v. LaPointe*, 253 B.R. 496, 499-500 (1st Cir. BAP 2000) (duty of a mortgagee foreclosing on real estate in Massachusetts is governed primarily by adherence to the statutory publi-

cation and notice requirements; mortgagee must also act in good faith and use reasonable diligence in conducting the sale); G.L. c. 106, § 9-610(b) ("Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable;" Official Comment 10 states: "While not itself sufficient to establish a violation of this Part, a low price suggests that a court should scrutinize carefully all aspects of a disposition to ensure that each aspect was commercially reasonable.").

ent Chapter 13 case with prejudice to the later discharge in bankruptcy of the Debtor's existing obligations to the Belanger creditors and to Elinore Davey, (3) as a sanction for the Debtor's violation of FED. R. BANKR. P. 9011(b), provide that such dismissal will be with prejudice to the Debtor's filing another petition under the Bankruptcy Code for a period of three years from the date of this order, (4) as a sanction for Attorney Czerwonka's violation of FED. R. BANKR. P. 9011(b), order Attorney Czerwonka to pay \$2,000 to the William Belanger, as he is Father and Next Friend of Christina Belanger and Melissa Belanger, and \$1,000 to the Chapter 13 Trustee, and (5) otherwise discharge the order to show cause against Attorney Czerwonka without further consequence.



**In re STANWICH FINANCIAL  
SERVICES CORP.,  
Debtor.**

**Official Committee of Unsecured  
Creditors, Plaintiff,**

v.

**Jonathan H. Pardee, Carol P. Havican,  
Individually and as Trustee of the  
Jonathan H. Pardee Charitable Re-  
mainder Trust, Ogden H. Sutro, Vir-  
ginia S. Morse, Individually and as Co-  
Trustee of the Dunbar Heeler Trust,  
Peter M. Dodge, Individually and as  
Co-Trustee of the Dunbar Wheeler**

**Trust, Bear, Stearns & Co., Inc., First  
Union Capital Markets Corporation,  
Hinckley, Allen & Snyder, LLP, Cam-  
eron & Mittleman, LLP, Scott A. Jun-  
kin, PC, Robinson-Humphrey Co.,  
LLC, Defendants.**

**Bankruptcy No. 01-50831.  
Adversary No. 02-05023.**

United States Bankruptcy Court,  
D. Connecticut.

Dec. 27, 2002.

Unsecured creditors' committee, pur-  
suant to stipulation with Chapter 11 debt-  
or, brought strong-arm avoidance proceed-  
ing. On challenge to committee's standing,  
the Bankruptcy Court, Alan H. W. Shiff,  
Chief Judge, held that committee had de-  
rivative standing to commence and prose-  
cute strong-arm avoidance proceeding on  
behalf of Chapter 11 estate.

So ordered.

### 1. Bankruptcy ¶2702.1

Unsecured creditors' committee had  
derivative standing to commence and prose-  
cute strong-arm avoidance proceeding on  
behalf of Chapter 11 estate, notwithstand-  
ing that strong-arm statute referred only  
to "trustee's" strong-arm powers. Bankr.  
Code, 11 U.S.C.A. § 544.

### 2. Bankruptcy ¶2701

Core objectives of bankruptcy cannot  
be achieved if those who would otherwise  
be exposed to transfer avoidance actions  
are insulated from liability by the reluc-  
tance or inability of debtor-in-possession to  
commence and prosecute such actions.  
Bankr.Code, 11 U.S.C.A. §§ 544, 547, 548,  
549.

**In re DISCIPLINARY  
PROCEEDINGS.**

**William C. Sheridan,  
Defendant/Appellant,**

v.

**Nancy H. Michels, Plaintiff/Appellee.**

**BAP Nos. NH 01-076, NH 02-005.  
Adversary No. 00-1140-JMD.**

United States Bankruptcy Appellate Panel  
of the First Circuit.

Aug. 16, 2002.

In disciplinary proceedings against attorney that practiced before it, the United States Bankruptcy Court for the District of New Hampshire, J. Michael Deasy, J., entered order suspending attorney and directing him to pay special counsel's fee, and attorney appealed. The Bankruptcy Appellate Panel held that: (1) bankruptcy Court had both inherent and statutory authority to conduct disciplinary proceedings to determine whether conduct of attorney appearing before it measured up to applicable standards and, upon finding disciplinary violations, to impose appropriate sanctions; (2) court's power to sanction professional misconduct by attorneys appearing before it included power to impose monetary sanctions, including payment of attorney fees incurred by special counsel in her investigation of attorney's conduct; (3) order suspending attorney from practicing before bankruptcy court for period of one year was not abuse of discretion; and (4) award of \$30,000.00 in fees to special counsel was likewise not abuse of discretion.

Affirmed.

**1. Bankruptcy  $\S$ 3782, 3786**

Bankruptcy Appellate Panel (BAP) reviews bankruptcy court's factual findings for clear error and its conclusions of law de novo. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

**2. Bankruptcy  $\S$ 3782**

Bankruptcy court's conclusions as to its own subject matter jurisdiction are legal conclusions, which are reviewed de novo.

**3. Bankruptcy  $\S$ 3784**

Bankruptcy court orders imposing sanctions are reviewed for abuse of discretion.

**4. Bankruptcy  $\S$ 3784**

Appellate courts accord substantial respect to bankruptcy court's informed discretion upon fee issues and will disturb such a fee award only for mistake of law or abuse of discretion.

**5. Bankruptcy  $\S$ 3784**

"Abuse of discretion" occurs when a material factor deserving significant weight is ignored, when improper factor is relied upon, or when all proper and no improper factors are assessed, but lower court makes serious mistake in weighing them.

See publication Words and Phrases for other judicial constructions and definitions.

**6. Attorney and Client  $\S$ 36(2), 58**

**Bankruptcy  $\S$ 2124.1**

Bankruptcy court had both inherent and statutory authority to conduct disciplinary proceedings to determine whether conduct of attorney appearing before it measured up to applicable standards and, upon finding disciplinary violations, to impose appropriate sanctions, including suspension for definite one-year term. Bankr.Code, 11 U.S.C.A.  $\S$  105(a).

**7. Attorney and Client** ⇨3, 36(2)

Federal court has inherent power to control admission to its bar and to discipline attorneys who appear before it.

**8. Federal Civil Procedure** ⇨1951

Pursuant to its inherent power to manage its affairs, federal court is vested with power to require that those who appear before it submit to and follow its rules and mandates.

**9. Bankruptcy** ⇨2122, 2124.1

Bankruptcy court is unit of district court, authorized to exercise authority with respect to bankruptcy matters. 28 U.S.C.A. § 151.

**10. Attorney and Client** ⇨36(2), 58**Bankruptcy** ⇨2124.1

As federal court, bankruptcy court has inherent power to sanction, by suspension or disbarment, any attorney who appears before it.

**11. Attorney and Client** ⇨36(2)**Bankruptcy** ⇨2124.1

Bankruptcy court not only has authority to discipline attorney for misconduct; it also has responsibility to take action in order to protect integrity of court, its bar and public from such misconduct.

**12. Attorney and Client** ⇨36(2)**Bankruptcy** ⇨2126

Bankruptcy statute authorizing court to enter "necessary or appropriate" orders empowers bankruptcy court to sanction and otherwise discipline attorneys who appear before it, since incompetent attorneys frustrate the Bankruptcy Code's purpose of prompt administration of estate and equitable distribution of assets. Bankr.Code, 11 U.S.C.A. § 105(a).

**13. Bankruptcy** ⇨2187

Bankruptcy court's power to sanction professional misconduct by attorneys ap-

pearing before it included power to impose monetary sanctions, including payment of attorney fees incurred by special counsel in her investigation of attorney's conduct.

**14. Attorney and Client** ⇨58

Finding of "bad faith" was not necessary prerequisite to bankruptcy court's exercise of its authority to discipline attorney who practiced before it, by imposing definite, one-year suspension for attorney's neglect of legal matters entrusted to him, failure to segregate client funds, and other professional misconduct.

**15. Attorney and Client** ⇨58

Order suspending attorney from practicing before bankruptcy court for period of one year based upon his 88 instances of professional misconduct, inter alia, in failing to properly attend to matters entrusted to him and failing to segregate client funds, was not abuse of bankruptcy court's discretion.

**16. Bankruptcy** ⇨2187, 3784

Bankruptcy courts have considerable discretion in determining type and severity of sanctions, and imposition of sanctions is generally reviewed only for abuse of discretion.

**17. Bankruptcy** ⇨2187, 3784

Sanctioning court necessarily abuses its discretion when it bases its ruling upon erroneous view of the law or on clearly erroneous assessment of evidence; however, absent such mistakes, choice and severity of the sanction imposed is matter reserved for sanctioning court's discretion.

**18. Bankruptcy** ⇨3784

Upon appeal from sanctions order of bankruptcy court, reviewing court's inquiry is not whether it would have employed same measures, but whether bankruptcy court's actions can be legally justified in light of circumstances presented.

**19. Bankruptcy**  $\S$ 3784

Unless bankruptcy court has acted unreasonably or contrary to law, its sanctions orders will be affirmed.

**20. Bankruptcy**  $\S$ 2187

Bankruptcy attorney's stipulations and admissions provided sufficient record evidence to support findings of multiple instances of professional misconduct, and thus support sanctions order against him.

**21. Attorney and Client**  $\S$ 53(2)

Finding that attorney's own actions and inactions, rather than his inability to reach his clients, were predominant cause of his 88 separate instances of disciplinary violations, inter alia, in failing to properly attend to matters entrusted to him was supported clearly and convincingly by evidence presented in disciplinary proceeding before bankruptcy court; other than his own representations, attorney presented no evidence to support this "difficult clients" defense.

**22. Attorney and Client**  $\S$ 32(13)

Attorney's duty of confidentiality did not attach to non-communication with client, and did not prevent attorney from disclosing his inability to contact his clients.

**23. Bankruptcy**  $\S$ 3770

Attorney waived any claim that order suspending him from practice before bankruptcy court based upon his 88 separate instances of disciplinary violations, inter alia, in failing to properly attend to legal matters entrusted to him, violated his rights under the Rehabilitation or Americans with Disabilities Acts, on theory that his disciplinary violations were result of alleged dopamine deficiency, where attorney did not raise issue until his motion for reconsideration. Americans with Disabilities Act,  $\S$  2 et seq., 42 U.S.C.A.  $\S$  12101 et seq.; Rehabilitation Act of 1973,  $\S$  2 et

seq., as amended, 29 U.S.C.A.  $\S$  701 et seq.

**24. Civil Rights**  $\S$ 107(1)

Neither the Rehabilitation Act nor the Americans with Disabilities Act is applicable to federal court such as bankruptcy court. Americans with Disabilities Act,  $\S$  2 et seq., 42 U.S.C.A.  $\S$  12101 et seq.; Rehabilitation Act of 1973,  $\S$  2 et seq., as amended, 29 U.S.C.A.  $\S$  701 et seq.

**25. Bankruptcy**  $\S$ 3192

Award of \$30,000.00 in fees to special counsel for her work in uncovering 88 instances of professional misconduct by bankruptcy attorney, and in pursuing disciplinary sanctions against him, was not abuse of bankruptcy court's discretion; because attorney's professional career was at stake, special counsel was obliged to conduct a thorough and comprehensive investigation into his professional conduct.

**26. Bankruptcy**  $\S$ 3194

While calculation of lodestar is useful, and often mandatory, starting point when customary agreed-upon fee is based on hourly charge, it is not sole benchmark for measuring reasonableness of any and all attorney fees, regardless of the mode and measure.

**27. Bankruptcy**  $\S$ 3194

Cornerstones in lodestar analysis are the reasonableness of the hours spent and hourly rate sought.

**28. Bankruptcy**  $\S$ 3195

When determining, for purposes of lodestar fee analysis, how many hours were reasonable, bankruptcy court must review counsel's work to see whether counsel substantially exceeded the bounds of reasonable effort, and disallow hours which are duplicative, unproductive, excessive or otherwise unnecessary; court is also expected to consider factors such as type of

work performed, who performed it, and expertise required.

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William C. Sheridan, Londonderry, NH,  
pro se.

Nancy H. Michels, Carole A. Mansur,  
Londonderry, NH, on brief for appellee.

Before HAINES, ROSENTHAL, &  
KORNREICH, U.S. Bankruptcy Appellate  
Panel Judges.

### OPINION

PER CURIAM.

#### INTRODUCTION

This matter comes before us on consolidated appeals from two orders of the United States Bankruptcy Court for the District of New Hampshire (the “Bankruptcy Court”). The first (the “Suspension Order”) suspended the Appellant, William C. Sheridan (“Sheridan”), from practicing law before the Bankruptcy Court for a period of one (1) year. The second (the “Fee Order”) awarded fees and costs incurred by special counsel, Nancy H. Michels (“Special Counsel”), in investigating and prosecuting the disciplinary action. The Bankruptcy Court entered the Suspension Order after trial, having found that Sheridan had committed at least eighty-eight (88) violations of New Hampshire Rules of Professional Conduct (“NHRPC”) 1.1 and 1.15 while serving as counsel for various debtors in bankruptcy cases. Sheridan argues, among other things, that the Bankruptcy Court did not have jurisdiction to commence a disciplin-

ary investigation against him or to suspend him from practice. As to the Fee Order, Sheridan argues that Special Counsel’s fees and expenses were unreasonable, that the Bankruptcy Court lacked authority to make the award, and that it could not properly condition his reinstatement on payment (or, more accurately, reimbursement) of the award.

For the reasons set forth below, we affirm.

#### BACKGROUND

On June 21, 2000, the Bankruptcy Court, through Chief Judge Vaughn, appointed Special Counsel to investigate Sheridan’s possible violation of NHRPC Rules 1.1 and 1.15. As a result of her investigation, on September 20, 2000, she submitted a report to Judge Vaughn recommending that a disciplinary proceeding be initiated. Judge Vaughn granted Special Counsel leave to institute the proceeding. On October 30, 2000, she filed an adversary proceeding complaint requesting that Sheridan be disciplined. Prior to trial, the parties entered into a stipulation in which Sheridan admitted many of the complaint’s factual allegations.

##### A. *The Suspension Order.*

On October 12, 2001, several months following trial, the Bankruptcy Court issued its order suspending Sheridan from practicing before the Bankruptcy Court for a period of one (1) year. The Bankruptcy Court found that during a twenty (20) month period between January 13, 1999 and September 29, 2000, Sheridan committed at least eighty-eight (88) violations of NHRPC. 1.1 and 1.15.<sup>1</sup> *See Mi-*

1. Rules 1.1 and 1.15 of NHRPC provide as follows:

Rule 1.1. COMPETENCE

(a) A lawyer shall provide competent representation to a client.

(b) Legal competence requires at a minimum:

*chels v. Sheridan*, 2001 WL 1757058, \*23, 2001 Bankr.LEXIS 1383, \*69 (Bankr. D.N.H.2001). The violations included (i) failure to file certificates of service for Chapter 13 plans, (ii) failure to file answers to motions to dismiss or convert, (iii) failure to timely file documents, (iv) failure to properly review and advise a client regarding a reaffirmation agreement, (v) failure to pay proper attention to details, (vi) failure to segregate clients' property from his own, (vii) failure to keep proper records, and (viii) failure to notify the client and deliver to the client property that the client was entitled to receive. These violations involved thirty (30) clients in thirty-three (33) separate cases, plus at least five (5) additional infractions committed during the course of the disciplinary proceeding.<sup>2</sup> The Bankruptcy Court found that Sheridan had demonstrated a continuing unwillingness or inability to competently provide services to his clients and meet his profes-

sional obligations. *Id.* at \*23. The Bankruptcy Court also noted Sheridan had admitted allegations which "at best show a repeated pattern of conduct involving inattention to and neglect in handling client matters." *Id.* at \*23. Accordingly, the Bankruptcy Court determined it was necessary to impose sanctions.

In fixing the appropriate sanctions, the Bankruptcy Court concluded that, due to Sheridan's pattern of repeated violations of his obligation to handle client matters competently as required by NHRPC 1.1, he had demonstrated that he was not currently fit to practice law in the Bankruptcy Court, and that he was not immediately capable of improving his conduct. *Id.* Accordingly, in order to protect the public and the administration of justice, the Bankruptcy Court suspended Sheridan from practicing law before it for a period

- (1) specific knowledge about the fields of law in which the lawyer practices;
- (2) performance of the techniques of practice with skill;
- (3) identification of areas beyond the lawyer's competence and bringing those areas to the client's attention;
- (4) proper preparation; and
- (5) attention to details and schedules necessary to assure that the matter undertaken is completed with no avoidable harm to the client's interest.

(c) In the performance of client service, a lawyer shall at a minimum:

- (1) gather sufficient facts regarding the client's problem from the client, and from other relevant sources;
- (2) formulate the material issues raised, determine applicable law and identify alternative legal responses;
- (3) develop a strategy, in collaboration with the client, for solving the legal problems of the client; and
- (4) undertake actions on the client's behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation.

#### Rule 1.15. SAFEKEEPING PROPERTY.

(a)(1) Property of clients or third persons which a lawyer is holding in the lawyer's possession in connection with a representation shall be held separate from the lawyer's own property. Funds shall be deposited in one or more clearly designated trust accounts in accordance with the provisions of the New Hampshire Supreme Court Rules. All other property shall be identified as property of the client, promptly upon receipt, and safeguarded.

2. In her complaint, Special Counsel alleged that in thirty-four (34) separate bankruptcy cases, many with multiple violations, Sheridan failed to properly represent his clients. The Bankruptcy Court reviewed the record on a case by case basis and determined that in *thirty-three (33)* separate cases, Sheridan had committed at least eighty-eight (88) violations of NHRPC 1.1 and 1.15 in his dealings with his clients. The Bankruptcy Court also examined the record of the disciplinary proceeding and found that Sheridan had committed at least five infractions in the disciplinary proceeding alone.

of one (1) year.<sup>3</sup>

The Bankruptcy Court also ordered that prior to Sheridan's reinstatement, application for which could not be made any sooner than after six (6) months, Sheridan would be required to establish that (i) he is a member in good standing of the bar of the United States District Court for the District of New Hampshire (the "District Court"), (ii) he will be able to competently represent the interests of his clients before the Bankruptcy Court, and (iii) he has reimbursed the government for the cost of the proceedings by paying to the Clerk of the District Court the amount of fees and expenses awarded to Special Counsel. *Id.* at \*24. The Bankruptcy Court authorized Special Counsel to submit an application seeking payment of fees and expenses earned and incurred in the course of her service.

Subsequently, Sheridan filed three separate motions for reconsideration, primarily arguing that the Bankruptcy Court did not have jurisdiction to hear the matter and that the Suspension Order violated the Rehabilitation Act and the Americans with Disabilities Act because the Bankruptcy Court premised its finding of professional misconduct on conduct arising out of Sheridan's alleged disability. The Bankruptcy Court denied each of the three motions.

**3. The Bankruptcy Court held as follows:**

In order to protect the public and the administration of justice, the Court finds that it must suspend Attorney Sheridan from the practice of law in this Court for such period of time as is necessary for him to effectuate such changes in his professional life as will enable him to competently perform services as an attorney practicing before this Court. . . . This period of suspension shall be for one year from the date of this opinion.

*Id.* at \*24.

**B. Fee Order.**

Consistent with the Bankruptcy Court's directions, Special Counsel filed her Final Application For Approval Of Fees Pursuant To Court Order (the "Fee Application"), seeking \$30,377.50 in fees and expenses for work performed by her and others in her firm in connection with the disciplinary proceeding. Appended was a detailed statement setting forth the services rendered and the hours spent on the case. On November 29, 2001, the day of the hearing on the Fee Application, Sheridan filed a late objection,<sup>4</sup> arguing, among other things, that the Bankruptcy Court lacked jurisdiction to enter a fee award and that Special Counsel's fees were unreasonable.

On December 27, 2001, the Bankruptcy Court entered the Fee Order. It rejected Sheridan's jurisdictional argument, noting that Sheridan was rehashing the same arguments as he had previously raised in opposition to the Suspension Order. It concluded that Special Counsel's fees were reasonable, awarding her fees and expenses totaling \$30,377.50.<sup>5</sup>

On January 8, 2002, the Bankruptcy Court entered a supplemental order directing the Clerk to pay the approved fees to Special Counsel as follows: two payments in the amount of \$10,125.83 each, payable on or before March 1, 2002 and

**4. The deadline for objecting to the Fee Application was November 9, 2001. Therefore, Sheridan's objection was not timely. The Bankruptcy Court did, however, consider the objection, permitting Sheridan to argue at the hearing and granting Special Counsel additional time to respond.**

**5. The Bankruptcy Court also rejected Sheridan's contentions that Special Counsel's actions were somehow improper because she was under the direction or control of the Assistant United States Trustee. At the November 29, 2001 hearing, Sheridan admitted that he could not substantiate those claims.**

June 1, 2002 and a final payment in the amount of \$10,125.84 payable on or before September 1, 2002.

Subsequently, Sheridan moved for reconsideration of the Fee Order, arguing that the Bankruptcy Court did not have the power to compensate Special Counsel out of court funds. The Bankruptcy Court denied the motion, concluding that Sheridan had presented no authority for the proposition that the Bankruptcy Court could not award such fees and order their payment, nor had he demonstrated that the Bankruptcy Court had made a manifest error of law in connection with the fee issues.

#### **ISSUES ON APPEAL**

Sheridan asserts, among other things, that the Bankruptcy Court was without jurisdiction to commence a disciplinary investigation or to suspend him from practicing before it as a result of that investigation. In addition, he argues that the fees and expenses awarded to Special Counsel in connection with the disciplinary proceeding were unreasonable, that the Bankruptcy Court did not have authority to award Special Counsel her fees and expenses, and that the Bankruptcy Court could not properly condition Sheridan's reinstatement upon payment of the fees and expenses awarded to Special Counsel.

#### **APPELLATE JURISDICTION AND STANDARD OF REVIEW**

[1,2] The Bankruptcy Appellate Panel has appellate jurisdiction over final bankruptcy court orders pursuant to 28 U.S.C. § 158. The clearly erroneous standard applies to review of factual findings; *de novo* review to conclusions of law. *See, e.g., Prebor v. Collins (In re I Don't Trust)*, 143 F.3d 1, 3 (1st Cir.1998); *Brandt v. Repco Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.)*, 132 F.3d 104, 107 (1st

Cir.1997); *TI Fed. Credit Union v. Del-Bonis*, 72 F.3d 921, 928 (1st Cir.1995). Subject matter jurisdiction is a legal issue and, thus, is reviewed *de novo*. *See Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 110 (1st Cir.1994) (question of lower court's jurisdiction presents pure question of law subject to *de novo* review); *Balzotti v. RAD Investments*, 273 B.R. 327 (D.N.H. 2002) (*de novo* review of bankruptcy court's jurisdictional rulings).

[3-5] Orders imposing sanctions are reviewed for abuse of discretion. *Peugeot v. United States Trustee (In re Crayton)*, 192 B.R. 970 (9th Cir. BAP 1996). Appellate courts accord substantial respect to the trial court's informed discretion on fee issues and will disturb such a fee award only for mistake of law or abuse of discretion. *Coutin v. Young & Rubicam Puerto Rico, Inc.*, 124 F.3d 331 (1st Cir.1997). An abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed, but the court makes a serious mistake in weighing them." *Foster v. Mydas Assocs., Inc.*, 943 F.2d 139, 143 (1st Cir.1991) (internal quotation marks and citation omitted).

#### **DISCUSSION**

##### **I. Jurisdiction.**

##### **A. Jurisdiction to Suspend Sheridan.**

[6] The Bankruptcy Court concluded that it had jurisdiction to suspend Sheridan for violations of the applicable rules of professional conduct based upon a federal court's inherent authority to discipline attorneys who appear before it, and pursuant to its Administrative Order 2090-2, adopted pursuant to the authority granted by the District Court to promulgate rules of practice and procedure. We agree that the Bankruptcy Court had jurisdiction to

suspend Sheridan from practicing before it.

**(1) Inherent Authority.**

[7, 8] A federal court has the inherent power to control admission to its bar and to discipline attorneys who appear before it. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (citing *Ex Parte Burr*, 22 U.S. (9 Wheat) 529, 6 L.Ed. 152 (1824)), *reh'g denied*, 501 U.S. 1269, 112 S.Ct. 12, 115 L.Ed.2d 1097 (1991). This inherent power is necessary for federal courts to manage their affairs and to achieve orderly and expeditious disposition of cases. *Id.* Pursuant to its inherent power to manage its affairs, a federal court is vested with the power to require that those who appear before it submit to and follow its rules and mandates. *Id.*

[9–11] A bankruptcy court is a unit of the district court, authorized to exercise authority with respect to bankruptcy matters. 28 U.S.C. § 151. As a federal court, a bankruptcy court has the inherent power to sanction, by suspension or disbarment, any attorney who appears before it. *See generally* *Peugeot*, 192 B.R. at 970; *see also* *Cunningham v. Ayers (In re Johnson)*, 921 F.2d 585, 586 (5th Cir.1991) (recognizing that bankruptcy judges may discipline lawyers in the context of both contempt and disciplinary proceedings).

The bankruptcy court has the inherent and statutory power and authority to suspend or remove any attorney from the roll of attorneys allowed to practice before it. Disbarment proceedings are not for the purpose of punishment, but rather to seek to determine the fitness of an official of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice.

*In re Derryberry*, 72 B.R. 874, 881 (Bankr. N.D.Ohio 1987) (internal quotation marks and citations omitted). Moreover, a bankruptcy court not only has the authority to discipline an attorney for misconduct, but it also has the *responsibility* to take action in order to protect the integrity of the court, its bar and the public from such misconduct. *Id.* (emphasis added).

**(2) Section 105(a).**

[12] In addition, § 105(a) of the Bankruptcy Code provides that a bankruptcy court may issue any order, process or judgment that is “necessary or appropriate to carry out the provisions of this title.” 11 U.S.C. § 105(a). Section 105(a) empowers a bankruptcy court to sanction and otherwise discipline attorneys who appear before it, given that incompetent attorneys frustrate the Bankruptcy Code’s purpose of prompt administration of the estate and equitable distribution of assets. *Peugeot*, 192 B.R. at 976. Many courts have used § 105(a) as a basis for holding that bankruptcy courts have both statutory and inherent authority to deny attorneys and others the privilege of practicing before that bar. *See, e.g., Johnson*, 921 F.2d at 586; *In re MPM Enters., Inc.*, 231 B.R. 500, 504 (E.D.N.Y.1999); *In re Gunn*, 171 B.R. 517, 518 (Bankr.E.D.Pa.1994); *see also* *Wright v. United States (In re Placid Oil Co.)*, 158 B.R. 404, 411 (N.D.Tex.1993); *In re Kelton Motors, Inc.*, 109 B.R. 641, 649 (Bankr.D.Vt.1989).

The United States Court of Appeals for the First Circuit has recognized a bankruptcy court’s power to regulate disruptive conduct through § 105(a). In *United States v. Mourad*, 289 F.3d 174 (1st Cir. 2002), the court of appeals affirmed the defendant’s criminal contempt conviction. That conviction rested on a district court’s determination that Mourad, a dissatisfied party in a bankruptcy case, had willfully violated a bankruptcy court order banning

him from the courtroom floor of the O'Neill Federal Building in Boston. He challenged his conviction on the ground that the bankruptcy court's order was "transparently invalid," thus enabling him to challenge the order's validity as a defense in a criminal contempt proceeding. *Id.* at 177-78. Rejecting the defense, the court of appeals commented:

The Bankruptcy Code grants the bankruptcy court broad authority to:

*issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title . . . shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.*

11 U.S.C. § 105(a). The purpose of the bankruptcy court's order excluding the appellant from the eleventh floor of the O'Neill building was to prevent the disruption of judicial proceedings that was threatened by Mourad's behavior. Given that more drastic orders have been upheld under the bankruptcy court's § 105 powers to protect the orderly administration of justice, Chief Judge Kenner's order seems to fall well within the bankruptcy court's general authority, particularly since the appellant was still able to make filings and inquiries with the court by mail or telephone. . . .

*Id.* at 178 (emphasis added).

The court of appeals observed that bankruptcy courts must have the ability to enter such orders as are necessary to assure that they can carry out "efficiently and effectively the duties assigned to them

by Congress" and to "maintain control of their courtrooms and of their dockets." *Id.* at 179 (quoting *In re Volpert*, 110 F.3d 494, 500 (7th Cir.1997)).

Although Sheridan challenges the Bankruptcy Court's Suspension Order on direct appeal here, distinguishing this case from Mourad's "transparent invalidity" analysis, we conclude that Mourad, coupled with the persuasive authorities cited above, firmly establishes that the bankruptcy court had the power to suspend him from practice for a definite period. Whether seen as an exercise of inherent power, or of the statutory power provided by § 105(a), effectively regulating the conduct of bankruptcy attorneys, and imposing appropriate sanctions where required, goes to the heart of the bankruptcy court's business. It is an elementary component of the bankruptcy court's power to effectively and efficiently discharge its statutory function, to maintain control of its courtroom, and, in the course, to protect the public.

### (3) Administrative Order 2090-2.

Pursuant to Rule 77.4 of the Local Rules for the United States District Court for the District of New Hampshire (the "District Court Local Rules"), the District Court has delegated to the Bankruptcy Court the authority to make such rules of practice and procedure as it deems necessary, including the promulgation of rules governing the admission and eligibility of attorneys to practice in the Bankruptcy Court.<sup>6</sup> Pursuant to the authority granted by the District Court, the Bankruptcy Court has adopted Administrative Order 2090-2 (the "Administrative Order" or

6. The allocation of responsibility between district courts and bankruptcy courts for regulating attorney conduct is a matter of local concern and varies from district to district.

Compare N.H. District Court Local Rule 77.4 with Massachusetts District Court Local Rule 205 and Massachusetts Local Bankruptcy Rule 2090-2.

“AO 2090–2”),<sup>7</sup> entitled “Disciplinary Rules and Procedures.” Disciplinary Rule 5 of the Administrative Order provides that acts or omissions by a lawyer which violate the Standards for Professional Conduct adopted by the Bankruptcy Court<sup>8</sup> shall constitute misconduct and be a grounds for discipline, and that any attorney who has been found to have engaged in such misconduct may be disbarred, suspended from practice before the Bankruptcy Court, or subject to such other disciplinary action as the circumstances warrant. AO 2090–2, DR–5(a) and (b). Furthermore, Disciplinary Rule 6 of the Administrative Order sets forth the procedure to be followed by the Bankruptcy Court when allegations of misconduct warranting attorney discipline comes to its attention. AO 2090–2, DR–6.<sup>9</sup>

The Administrative Order provided the Bankruptcy Court a procedural mechanism by which to regulate attorney conduct and to discipline attorneys. The Bankruptcy Court complied with the procedures set forth in the Administrative Order, operated within the parameters of the District Court’s delegations to it, and followed a

fair procedural model in exercising its powers.<sup>10</sup>

#### (4) Inherent Power, § 105(a), and Subject Matter Jurisdiction.

The gravamen of Sheridan’s argument regarding subject matter jurisdiction evidences his fundamental misapprehension of the nature of a bankruptcy court’s inherent and statutory power as they relate to matters within its statutory charge. Noting that the disciplinary proceeding against him was initiated as a “stand alone” action, he argues that it did not “arise under title 11,” “arise in a case under title 11,” or “relate to” a pending bankruptcy case. *See In re Parque Forestal, Inc.*, 949 F.2d 504, 509–11 (1st Cir. 1991) (discussing bankruptcy court jurisdiction) (*citing Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir.1984)), *reh’g denied, In re Parque Forestal, Inc., Appeal of Oriental Fed. Sav. Bank*, 949 F.2d 504 (1st Cir.1992). As a consequence, he contends that the action was without the court’s limited statutory jurisdiction. *See* 28

7. Local Bankruptcy Rule 9029–2 authorizes the Bankruptcy Court to adopt administrative orders for the conduct and disposition of proceedings before it. Administrative Order 2090–2 is included as Appendix A to this opinion.

8. The Standards for Professional Conduct adopted by the Bankruptcy Court are the Rules of Professional Conduct as adopted by the New Hampshire Supreme Court. *See* AO 2090–2, DR–1. The New Hampshire Supreme Court has adopted the NHRPC.

9. Disciplinary Rule 6 provides, in relevant part:

When misconduct or allegations of misconduct which, if substantiated, would warrant discipline of an attorney admitted or permitted to practice before this court shall come to the attention of this court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by

these rules, the judge may follow . . . the following procedure[ ]: . . .

appoint one or more members of the bar of this court to act as special counsel to investigate the matter, to prosecute the matter in formal disciplinary proceeding under these rules, to make such other recommendation as may be appropriate, or to perform any other functions required by the court in its order of appointment.

AO 2090–2, DR–6.

10. Sheridan complains that AO 2090–2 was not adopted by the Bankruptcy Court until October 6, 2000, several months after Special Counsel’s appointment (but several months before she filed her complaint). The criticism is beside the point. At oral argument, Sheridan conceded that the substantive rules of conduct governing his performance as an attorney were in place during the period of his misconduct and he can point to no unfairness in the process the Bankruptcy Court employed.

U.S.C. § 157(a), (b) and (c); *see also In re Parque Forestal, Inc.*, 949 F.2d at 509–11.

In the opacity of his vision, Sheridan fails to see that a bankruptcy court's inherent power and its § 105(a) powers are fundamental complements to their statutory charge. Without them the bankruptcy judge would be as a sailor without canvas, a fisherman with neither net nor pole. Invocation of these powers is appropriate when their exercise is within the framework of a district court's delegation and necessary to execute the bankruptcy court's statutory charge. As such, it is unquestionably within the bankruptcy court's subject matter jurisdiction.

#### (5) Summing Up.

We conclude that the Bankruptcy Court possessed inherent and statutory authority to conduct disciplinary proceedings to determine whether Sheridan's conduct measured up to applicable standards. We further conclude that the Bankruptcy Court followed fair procedures in making that determination and that, having reached its conclusion, it had the power to enter the Suspension Order.

#### B. Jurisdiction to Order Payment of Special Counsel's Fees and Expenses.

[13] Sheridan argues that the Bankruptcy Court did not have the authority to award the payment of Special Counsel's fees and expenses from court coffers. In addition, he argues that it was without power to condition his reinstatement on, *inter alia*, his reimbursement of those fees and expenses.

As to the first point, Sheridan lacks standing. He can point to no way that the

Bankruptcy Court's order for Special Counsel fees to be paid by the Clerk of the District Court aggrieves him personally. *See Spenlinhauer v. O'Donnell*, 261 F.3d 113, 117–18 (1st Cir.2001) (explaining standing requirement); *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1142 n. 9 (1st Cir.1992) (generally, appellant has standing only where challenged order directly and adversely affects appellant's pecuniary interest); *see also* 15 James Wm. Moore, *MOORE'S FEDERAL PRACTICE* § 24.03[2][d], ¶ 101.50 (3d ed. 1998) ("The 'prudential principles' of standing require that a plaintiff establish that he or she is the proper proponent of the asserted right, that the right asserted belongs to the claimant rather than a third party, and that the grievances asserted are not conjectural or generalized").

As to the second point, we have already concluded that a bankruptcy court has the power to sanction professional misconduct by attorneys who appear before it. That power extends to the imposition of monetary sanctions, including payment of attorneys' fees. *See Peugeot, supra*, 192 B.R. at 981 (affirming order disbaring attorney from practicing before it and ordering attorney to disgorge all fees paid by debtor); *see also Chambers, supra*, 501 U.S. 32, 111 S.Ct. 2123 (affirming attorneys' fees and expenses as sanction for bad faith conduct).

The Bankruptcy Court had authority to award fees to Special Counsel and to order Sheridan to reimburse the Clerk of the District Court for the amount of any fees and expenses awarded to Special Counsel in connection with the disciplinary proceeding prior to his reinstatement.<sup>11</sup>

11. The required reimbursement was but one of several conditions imposed on Sheridan's reinstatement. It remains to be seen wheth-

er, should he satisfy all others but be unable to make the payment, the reimbursement requirement alone would bar his reinstatement.

### C. Bad Faith.

[14] Sheridan argues that even if bankruptcy courts can discipline attorneys, they may not do so absent a finding of bad faith conduct. This argument must fail. In *Peugeot, supra*, the Bankruptcy Appellate Panel for the Ninth Circuit held that, in certain circumstances, a bankruptcy court can discipline attorneys practicing before it without a showing of “bad faith.” 192 B.R. at 977. The *Peugeot* panel distinguished between those cases in which the bankruptcy court used its powers to vindicate its judicial authority, and those cases in which the bankruptcy court was concerned with injury to the public and an attorney’s ethical duties to his client. *Id.* Where the bankruptcy court is exercising its power to protect the public from unqualified practitioners, a “bad faith” showing is not necessary. *Id.* Other appellate courts have confirmed the power of a bankruptcy court to sanction attorneys not only for bad faith, but also for willfulness or fault by the offending party, or for recklessness. *Id.* (citations omitted).

In the present case, the Bankruptcy Court specifically stated that it was suspending Sheridan “[i]n order to protect the public and the administration of justice.” *Michels v. Sheridan*, 2001 WL 1757058, \*24, 2001 Bankr.LEXIS 1383, \*71 (Bankr. D.N.H.2001). Moreover, it seems plain from a record of eighty-eight (88) infractions that recklessness, or at least some measure of fault, was patent. It was not an abuse of discretion for the Bankruptcy Court to suspend Sheridan from practicing before it for a defined, limited period.

### II. Type and Severity of Sanctions.

[15] Sheridan argues that even if sanctions were warranted, the Bankruptcy

Court “should rely upon the other sanctions at its disposal” before suspending him from practice. He asserts that, “since the Bankruptcy Court had other options, it was its duty to first articulate why those other options were not ‘up to task.’” He has, however, failed to cite any case law, rule or other authority to support his contention that the Bankruptcy Court must rely upon sanctions other than suspension in a case such as his.

[16–19] Bankruptcy courts have considerable discretion when determining the type and severity of sanctions. *See Whitney Bros. Co. v. Sprafkin*, 60 F.3d 8, 12 (1st Cir.1995); *Kale v. Combined Ins. Co. of America*, 861 F.2d 746, 758 (1st Cir. 1988). The imposition of sanctions is generally reviewed only for abuse of discretion. *See Chambers, supra*, 501 U.S. at 55, 111 S.Ct. 2123. In this context, a sanctioning court necessarily abuses its discretion when it “base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990). However, absent such mistakes, the choice and severity of the sanction imposed is a matter reserved to the sanctioning court’s discretion. It is far better situated to evaluate the evidence presented and to apply the appropriate legal standards. *See Whitney Bros., supra*, 60 F.3d at 12; *Kale, supra*, 861 F.2d at 758. Thus, the reviewing court’s inquiry is not whether it would have employed the same measures, but whether the bankruptcy court’s actions can be legally justified in light of the circumstances presented. *Id.*<sup>12</sup> Unless the

12. Even if there were a specific rule on point, use of inherent powers instead of statutory authority does not require reversal. *See Chambers*, 501 U.S. at 51, 111 S.Ct. 2123

(noting if, in the court’s view, a statute or rule does not sufficiently address the conduct, a court may rely on its inherent power); *In re Rimsat, Ltd.*, 212 F.3d 1039, 1046 (7th Cir.

sanctioning court has acted unreasonably or contrary to law, sanctions will be affirmed. *In re Rimsat, Ltd., supra*, 212 F.3d at 1046. By no stretch did the Bankruptcy Court act unreasonably in imposing the sanctions it did here.

### III. Standard and Burden of Proof.

[20] Sheridan was not permanently disbarred by the court below. He was only suspended for a term—a less Draconian sanction. It has been held, however, that a bankruptcy court has inherent power to disbar an attorney, providing its ruling is supported by clear and convincing evidence. *See Wright v. United States (In re Placid Oil Co.)*, 158 B.R. 404, 413 (N.D.Tex.1993).<sup>13</sup>

Neither party before us takes issue with the “clear and convincing” standard. Therefore, we may assume, without deciding, that it is the proper burden of proof in matters of this ilk. Sheridan asserts that the Bankruptcy Court failed properly to apply the burden of proof, arguing that it drew “inferences against [him] without requisite admissible evidence.” We disagree.

The District Court delegated to the Bankruptcy Court the authority to adopt rules of practice, including the rules governing attorney admission and eligibility to practice before it. *See* District Court Local Rule 77.4. To be eligible to practice in the Bankruptcy Court, attorneys must be admitted to the District Court bar. *Id.*

2000) (“[A] sanctioning court is not required to apply available statutes and procedural rules in a piecemeal fashion where only a broader source of authority is adequate”).

13. Clear and convincing evidence, in this context, is:

[T]hat weight of proof “which produces in the minds of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to

And members of the District Court bar must adhere to the New Hampshire Rules of Professional Conduct. *See* District Court Local Rule 83.5. The record contains clear and convincing evidence supporting the Bankruptcy Court’s finding that Sheridan committed at least eighty-eight (88) violations of the New Hampshire Rules of Professional Conduct. How he can argue otherwise is mystifying, given that he stipulated to or admitted a multitude of the facts underlying the Bankruptcy Court’s findings. Without more, those stipulations and admissions would provide sufficient record evidence to support findings of multiple instances of professional misconduct.

### IV. “Difficult Clients” Defense.

[21] At trial, Sheridan argued in defense that his clients were difficult to contact, were uncooperative or simply disappeared during the pendency of their cases. He complained that his defalcations could not, therefore, be held against him. He also argued attorney client privilege had prevented him from disclosing that he could not reach his clients or that they had disappeared. Other than his own representations, Sheridan presented no evidence to support this defense.

[22] Moreover, as the Bankruptcy Court observed, his claim that disclosing his inability to contact his clients would breach client confidentiality has no merit.

enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts” of the case. [The appellate] court may not disturb the bankruptcy court’s findings unless they are clearly erroneous. It makes this determination in the context of the clear and convincing evidence standard.

*Placid Oil, supra*, 158 B.R. at 413 (citations omitted).

An attorney's duty of confidentiality does not attach to non-communication with a client. *See Michels v. Sheridan*, 2001 WL 1757058, \*22, 2001 Bankr.LEXIS 1383, \*64-65 (Bankr.D.N.H.2001).<sup>14</sup> Sheridan has presented to us no case law or other authority to convince this Panel otherwise. The Bankruptcy Court's finding that Sheridan's own actions and inactions, rather than his inability to reach his clients, were the predominant cause of his defalcations, is supported clearly and convincingly in the record. The Bankruptcy Court properly rejected Sheridan's "difficult clients" defense.

#### V. The Rehabilitation Act and/or the Americans with Disabilities Act.

[23] Sheridan represents that he is disabled due to a "dopamine deficiency." Thus, he contends that the Suspension Order violates the Rehabilitation Act and/or the Americans with Disabilities Act. Although Sheridan did not identify the specific statutes, we assume he is referring to 29 U.S.C. § 794 (the "Rehabilitation Act") and 42 U.S.C.S. §§ 12131, *et seq.* (the "Americans with Disabilities Act" or "ADA").

14. NHRPC 1.6 provides, in pertinent part, as follows:

##### 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)....

15. Even if we were to consider them, Sheridan's argument that the Bankruptcy Court violated his rights under the Rehabilitation Act and/or the ADA would fail. Neither § 504 of the Rehabilitation Act nor the ADA is applicable to a federal court such as the Bankruptcy Court. *See Melton v. Freeland*, 1997 WL 382054, 1997 U.S. Dist. LEXIS 3801

Sheridan did not raise these issues before the Bankruptcy Court, except to make a passing reference to his alleged disability. Moreover, he produced no documentary or testimonial evidence to support his claim of disability or its effects. The first time Sheridan meaningfully raised the issue was in one of his motions for reconsideration of the Suspension Order.

[24] Since Sheridan did not raise the issue until his motion for reconsideration, he has waived it. *See FDIC v. Shearson-American Express, Inc.*, 996 F.2d 493, 503 n. 13 (1st Cir.1993) (concluding that issue of sanctions would not be considered on appeal since creditor waited until motion for reconsideration to raise issue), *cert. denied*, 510 U.S. 1111, 114 S.Ct. 1054, 127 L.Ed.2d 375 (1994); *see also In re Rimsat, Ltd.*, 212 F.3d 1039, 1048 (7th Cir.2000) (arguments raised for the first time in a motion to reconsider are not preserved for appeal); *Patriot Portfolio, LLC v. Weinstein (In re Weinstein)*, 164 F.3d 677 (1st Cir.), *cert. denied*, 527 U.S. 1036, 119 S.Ct. 2394, 144 L.Ed.2d 794 (1999) (appellant did not preserve issue for appeal by raising it for the first time in motion for reconsideration). We need not consider these contentions now.<sup>15</sup>

(M.D.N.C.1997); *Turgeon v. Brock*, 1994 WL 803506, 1994 U.S. Dist. LEXIS 18427 (D.N.H. 1994). Federal courts are not subject to Title II of the ADA since "public entities" to which the statute applies are defined only as state and local governments, and any department, agency, special purpose district or other instrumentality of a state or local government. Although judicial branches of state and local governments are encompassed by this definition, federal courts do not fall within the definition. *Turgeon*, 1994 WL 803506, 1994 U.S. Dist. LEXIS 18427; *Melton*, 1997 WL 382054, 1997 U.S. Dist. LEXIS 3801. Federal courts are not subject to the Rehabilitation Act since federal courts are not encompassed in the definition of "program or activity" to which the statute applies. *Melton*, 1997 WL 382054, 1997 U.S. Dist. LEXIS 3801.

## VI. Special Counsel's Fees and Expenses.

[25] Sheridan argues that the Bankruptcy Court's award of fees to Special Counsel was an abuse of discretion because the Bankruptcy Court failed to apply the lodestar analysis and because the fees requested were not reasonable because the work performed was outside any "case and controversy" before the Bankruptcy Court. The latter point is but a restatement of the arguments we have considered and rejected above. We will not revisit them here.

Awards of compensation for professional services in bankruptcy proceedings are guided by § 330(a) of the Bankruptcy Code, which authorizes compensation for "actual, necessary services rendered by the . . . attorney." 11 U.S.C. § 330(a). Courts in the First Circuit embrace the lodestar approach to fee computations both within and without the bankruptcy context. *Boston & Maine Corp. v. Moore* (*In re Boston & Maine Corp.*), 776 F.2d 2, 6 (1st Cir.1985). See *In re Spillane*, 884 F.2d 642 (1st Cir.1989); *Furtado v. Bishop*, 635 F.2d 915 (1st Cir.1980); *In re Casco Bay Lines, Inc.*, 25 B.R. 747 (1st Cir. BAP 1982); *In re Thomas, Inc.*, 43 B.R. 510 (Bankr.D.Mass.1984); *In re Malden Mills, Inc.*, 42 B.R. 476 (Bankr.D.Mass.1984).

[26] Under the lodestar analysis, the court first establishes a threshold point of reference or the "lodestar," which is the number of hours reasonably spent by each attorney multiplied by his reasonable hourly rate. *Boston & Maine Corp.*, 776 F.2d at 6. This lodestar can then be adjusted up or down based on consideration of some or

all of the following twelve factors: (1) time and labor required; (2) the novelty and difficulty of the questions presented by the case; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time pressures imposed by the client or the circumstances, (8) the amount involved and results obtained as a result of the attorneys' services; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; (12) awards in similar cases. *In re Public Serv. Co. of New Hampshire*, 160 B.R. 404, 413 (Bankr.D.N.H.1993) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). "While calculation of the lodestar is a useful, and often mandatory, starting point when the customary agreed-upon fee is based on an hourly charge, it is not the sole benchmark for measuring the reasonableness of any and all attorney fees, regardless of the 'mode and measure.'" *Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 894-95 (1st Cir.1985).

[27, 28] The cornerstones in the lodestar analysis are the reasonableness of the hours spent and the hourly rate sought. See *In re Spillane*, 884 F.2d at 647 (*citing In re Casco Bay Lines, Inc.*, 25 B.R. 747, 758 (1st Cir. BAP 1982)). In determining how many hours were reasonable, the court must review the work to see "whether counsel substantially exceeded the

In addition, even if the Rehabilitation Act and/or the ADA applied to the Bankruptcy Court, Sheridan's statements about his alleged disability are completely unsupported. He has produced no evidence to support his claim of disability or its effects. Recovery under both the Rehabilitation Act and the

ADA require a plaintiff to establish he is disabled. See *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 525 (7th Cir.1996) (Americans with Disabilities Act); *Zingher v. Vermont Div. Of Vocational Rehab.*, 30 F.Supp.2d 446, 453 (D.Vt.1997), *aff'd*, 165 F.3d 1015 (2d Cir. 1999) (Rehabilitation Act).

bounds of reasonable effort,” and disallow hours that were “duplicative, unproductive, excessive, or otherwise unnecessary.” *Id.* (citations omitted). The court is also expected to consider factors such as the type of work performed, who performed it, and the expertise required. *Id.*

Sheridan argues that the Bankruptcy Court failed to employ the lodestar approach and that Special Counsel’s fees were not reasonable under the lodestar approach. He characterizes the Fee Order as “virtually devoid of any analysis of the [twelve lodestar] factors whatsoever.” Since the Bankruptcy Court did not provide a detailed analysis of each of the lodestar factors, Sheridan contends that its decision to award fees to Special Counsel constituted an abuse of discretion.

As set forth above, this Panel must review the Fee Order for abuse of discretion. *See Contin*, 124 F.3d 331.

The test for determining whether a bankruptcy court’s findings and conclusions are sufficiently detailed to pass muster is whether they permit the reviewing court to ascertain whether the bankruptcy court’s order rests on a clearly erroneous perception of the facts or on a misapprehension of the law . . . . In the context of decisions regarding attorneys’ fees, it is sufficient if the order is “specific enough to allow meaningful review . . . .” The order need not exhaustively discuss all of the factors customarily considered in making such an award. Nor is the court required to provide a detailed accounting of the calculations on which the award is based. All that is required is a clear indication that the court adequately considered and reasonably applied those factors that are relevant to the case under consideration.

*In re Pontarelli*, 250 B.R. 160, 161 (Bankr. D.R.I.2000) (citation omitted).

Although the Fee Order does not contain a detailed discussion of the specific lodestar factors, the Bankruptcy Court did review a detailed billing invoice setting forth the services rendered and the corresponding time spent on the case was attached to Special Counsel’s Fee Application. It did not discuss each time entry contained in the statement, nor did it explicitly discuss each of the lodestar factors, but it did analyze the reasonableness of the fees by examining the categories of work performed and the reasonableness of the time expended on them. For example, the Bankruptcy Court found that the forty hours of “post-Complaint” investigation, where Special Counsel attended hearings and reviewed pleadings filed by Sheridan after disciplinary proceedings had commenced were both necessary and reasonable. Because one of Sheridan’s defenses was that his past problems had been rectified, it was necessary and reasonable for Special Counsel to observe and determine whether Sheridan’s past problems had, in fact, been resolved.

The court also found that the time Special Counsel spent conducting factual research was both reasonable and necessary, despite the fact that Sheridan eventually stipulated to substantially all of her factual allegations. Special Counsel had a duty to conduct a thorough investigation to determine what allegations, if any, could properly be made in her complaint. It was not unreasonable for her to review over a years’ worth of cases to develop a clear understanding of Sheridan’s professional conduct.

Sheridan argues, however, that the Bankruptcy Court should have adjusted the fee downward from approximately \$30,000 to between \$2,500 and \$5,000, because the case was not difficult, the skill required to perform the services was not great, the awards in similar cases are low-

er and the understandability of the case was simple. In support of his argument, Sheridan identifies 42.6 hours of time which he claims were spent on unnecessary work. Even if this Panel were to agree that the 42.6 hours of work identified by Sheridan were unnecessary or unreasonable, that would only require a \$6,816 reduction in fees (42.6 hours × \$160/hour), from \$30,000 to \$23,184, rather than a \$25,000 reduction to \$5,000 as suggested by Sheridan. Moreover, as Special Counsel points out, Sheridan's professional career was at stake in this case and Special Counsel had a duty to conduct a thorough and comprehensive investigation into Sheridan's professional conduct. On the record before us, we cannot conclude that the Bankruptcy Court abused its discretion in entering the Fee Order.

### **CONCLUSION**

For the reasons set forth above, the Bankruptcy Court's Suspension Order and Fee Order are hereby **AFFIRMED** in their entirety.

### **APPENDIX A**

**AO 2090-2**

#### ***Disciplinary Rules and Procedures***

(Adopted pursuant to Order dated  
February 2, 2001)

The following disciplinary rules and procedures shall apply in all matters before this court.

#### **1. Conferred Disciplinary Jurisdiction.**

Any attorney admitted or permitted to practice before this court shall be deemed to have conferred disciplinary jurisdiction upon this court for any alleged attorney misconduct arising during the course of a case pending before this court in which that attorney has participated in any way.

### **APPENDIX A—Continued**

#### **2. Promulgation of Disciplinary Rules.**

The court, in furtherance of its inherent authority and responsibility to supervise the conduct of attorneys who are admitted or permitted to practice before it, promulgates the Disciplinary Rules as outlined below.

#### **3. Disciplinary Rules.**

##### **DR-1 Standards for Professional Conduct.**

The Standards for Professional Conduct adopted by this court are the Rules of Professional Conduct as adopted by the New Hampshire Supreme Court, as the same may from time to time be amended by that court, and any standards of conduct set forth in these rules. Attorneys who are admitted or permitted to practice before this court shall comply with the Standards for Professional Conduct, and the court expects attorneys to be thoroughly familiar with such standards before appearing in any matter.

##### **DR-2 Attorneys Convicted of Crimes.**

(a) Upon the filing with this court of a certified copy of a judgment of conviction demonstrating that any attorney admitted to practice before the court has been convicted in any court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the court shall enter an order immediately suspending that attorney, whether the conviction resulted from a plea of guilty or nolo contendere, or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served upon the attorney as

*APPENDIX A*—Continued

provided in DR-9 of these rules. Upon good cause shown, the court may set aside such order when it appears in the interest of justice to do so.

(b) The term “serious crime” shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file or filing false income tax returns, deceit, bribery, extortion, misappropriation, theft or an attempt to or a conspiracy or solicitation of another to commit a “serious crime.”

(c) A certified copy of a judgment of conviction of an attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based upon the conviction.

(d) Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the court shall, in addition to suspending that attorney in accordance with the provisions of this rule, refer the matter to special counsel (i) for the institution of a disciplinary proceeding before one or more judges of the court in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded; or (ii) a recommendation as to whether the imposition of final discipline should be stayed pending the outcome of a disciplinary proceeding in another court and pending the issuance of an order to show cause pursuant to DR-3(b)(2).

*APPENDIX A*—Continued

(e) Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a “serious crime,” the court may refer the matter to special counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the court provided, however, that the court may in its discretion make no reference with respect to convictions for minor offenses.

(f) An attorney suspended under the provisions of this rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

(§ (d) amended 2/2/01)

**DR-3 Discipline Imposed By Other Courts.**

(a) Any attorney admitted to practice before this court shall, upon being subjected to public discipline by any other court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth or possession of the United States, promptly inform the clerk of this court of such action.

(b) Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that any attorney admitted to practice before this court has been disciplined by another court, this court shall forthwith issue a notice directed to the attorney containing:

(1) a copy of the judgment or order from the other court; and

*APPENDIX A*—Continued

(2) an order to show cause directing that the attorney inform this court within thirty (30) days after service of that order upon the attorney, personally or by mail, of any claim by the attorney predicated upon the grounds set forth in paragraph (d) hereof that the imposition of the identical discipline by the court would be unwarranted and the reasons therefor.

(c) In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this court shall be deferred until such stay expires.

(d) Upon the expiration of thirty (30) days from the service of the notice issued pursuant to the provisions of DR-3(b)(2) above, this court shall impose the identical discipline unless the respondent-attorney demonstrates, or this court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

(1) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) that the imposition of the same discipline by this court would result in grave injustice; or

(4) that the misconduct established is deemed by this court to warrant substantially different discipline.

Where this court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

(e) In all other respects, a final adjudication in another court that an attorney has

*APPENDIX A*—Continued

been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in this court.

(f) This court may at any stage appoint special counsel to prosecute the disciplinary proceedings.

**DR-4 Disbarment on Consent or Resignation in Other Courts.**

(a) Any attorney admitted to practice before this court who shall be disbarred on consent or resign from the bar of any other court of the United States or the District of Columbia or from the bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this court and be stricken from the roll of attorneys admitted to practice before this court.

(b) Any attorney admitted to practice before this court shall, upon being disbarred on consent or resigning from the bar of any other court of the United States or the District of Columbia or from the bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, promptly inform the clerk of this court of such disbarment on consent or resignation.

**DR-5 Misconduct.**

(a) For misconduct defined in these rules, and for good cause shown, and after notice and opportunity to be heard, any lawyer admitted or permitted to practice before this court may be disbarred, suspended from practice before this court, or subjected to such other public or private disciplin-

*APPENDIX A*—Continued

ary actions as the circumstances may warrant.

(b) Acts or omissions by a lawyer admitted or permitted to practice before this court, individually or in concert with any other person or persons, which violate the Standards for Professional Conduct adopted by this court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

**DR-6 Disciplinary Proceedings.**

(a) When misconduct or allegations of misconduct which, if substantiated, would warrant discipline of an attorney admitted or permitted to practice before this court shall come to the attention of this court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these rules, the judge may follow either or both of the following procedures:

(1) refer the matter to any appropriate disciplinary agency with jurisdiction over said attorney with a request that the agency report its actions to the court provided, however, that in addressing any misconduct matter the court may consider such agency's actions but shall not be bound thereby;

(2) appoint one or more members of the bar of this court to act as special counsel to investigate the matter, to prosecute the matter in formal disciplinary proceeding under these rules, to make such other recommendation as may be appropriate, or to perform any other functions required by the court in its order of appointment.

(b) Should special counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or

*APPENDIX A*—Continued

because there is another proceeding pending against the respondent-attorney, the disposition of which in the judgment of counsel should be awaited before further action by this court is considered, or for any other valid reason, counsel shall file with the court a recommendation for disposition of the matter, setting for the reasons therefore.

(c) To initiate formal disciplinary proceedings, special counsel shall, upon a showing of probable cause, obtain leave of this court to institute a disciplinary proceeding by filing a complaint against the respondent-attorney setting forth the allegations of misconduct. If leave of the court is obtained, the complaint and summons shall be promptly served as provided in DR-9.

(d) The respondent-attorney shall file an answer to the complaint within thirty (30) days after service. If any issue of fact is raised in the answer or if the respondent-attorney wishes to be heard in mitigation, this court shall set the matter for prompt hearing before one or more judges of this court provided, however, that if the disciplinary proceeding is predicated upon the complaint of a judge of this court, the hearing shall be conducted by another judge of this court, or, if no judge is eligible to serve, the hearing shall be before a judge of the District Court appointed by the Chief Judge of the District Court.

**DR-7 Disbarment on Consent While Under Disciplinary Investigation or Prosecution.**

(a) Any attorney admitted to practice before this court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment but only by delivering to this court an affidavit stating that the attorney desires to consent to disbarment and that:

*APPENDIX A*—Continued

(1) the attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implications of so consenting;

(2) the attorney is aware that there is a presently pending investigation or proceeding involving allegations that there exist grounds for the attorney's discipline, the nature of which the attorney shall specifically set forth;

(3) the attorney acknowledges that the material facts so alleged are true; and

(4) the attorney so consents because the attorney knows that if charges were predicated upon the matters under investigation or if the proceedings were prosecuted, the attorney could not successfully defend himself.

(b) Upon receipt of the required affidavit, this court shall enter an order disbarring the attorney.

(c) The Order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provisions of this rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this court.

**DR-8 Reinstatement.**

(a) After disbarment or suspension. An attorney suspended for three (3) months or less shall be automatically reinstated at the end of the period of suspension upon the filing with the court of an affidavit of compliance with the provisions of this order. An attorney suspended for more than three (3) months or disbarred may not resume practice until reinstated by order of this court.

(b) Time of application following disbarment. A person who has been disbarred after hearing or by consent may not apply

*APPENDIX A*—Continued

for reinstatement until the expiration of at least five (5) years from the effective date of the disbarment. A lawyer who has been suspended for more than six (6) months may not apply for reinstatement until six (6) months before the period of suspension has expired.

(c) Hearing on application. Petitions for reinstatement by a disbarred or suspended attorney under this rule shall be filed with the Chief Judge of the court. Upon receipt of the petition, the Chief Judge shall refer the petition to counsel and assign the matter for hearing before a judge of this court provided, however, that if the disciplinary proceeding was predicated upon the complaint of a judge of this court, the hearing shall be conducted before another judge of this court or, if there is no judge of this court eligible to serve, before a judge of the District Court appointed by the Chief Judge of the District Court. Within thirty (30) days after referral, the judge assigned to the matter shall schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that petitioner has the moral qualifications, competency, and learning in the law required for admission to practice law before this court and that petitioner's resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administrations of justice or subversive of the public interest.

(d) Duty of special counsel. In all proceedings upon a petition for reinstatement, cross-examination of the witness of the respondent-attorney and the submission of evidence, if any, in opposition to the petition shall be conducted by counsel.

(e) Deposit for costs of proceeding. Petitions for reinstatement under this rule shall be accompanied by an advance cost deposit in an amount to be set from time

*APPENDIX A*—Continued

to time by the court to cover anticipated costs of the reinstatement proceeding.

(f) Conditions of reinstatement. If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate him or her, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further, that if the petitioner has been suspended or disbarred for five (5) years or more, reinstatement may be conditioned, in the discretion of the judge before whom the matter is heard, upon the furnishing of proof of competency and learning in the law, which proof may include certification by the bar examiners of a state or other jurisdictions of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

(g) Successive petitions. No petition for reinstatement under this rule shall be filed within one (1) year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

**DR-9 Service of Complaint, Papers and Other Notices.**

Upon the filing of a complaint instituting a disciplinary proceeding, the clerk shall forthwith issue a summons and deliver the summons and a copy of the complaint in the matter provided in Fed.R.Bankr.P. 7004. The summons shall direct the respondent-attorney to serve an answer within thirty (30) days after service. An order of suspension shall be served in the

*APPENDIX A*—Continued

same manner as a summons and complaint instituting a disciplinary proceeding. Service of any other papers or notices required by these rules shall be deemed to have been made if such paper or notice is addressed to the respondent-attorney at the attorney's last known address or to counsel or the respondent's attorney at the address indicated in the most recent pleading or other document filed by them in the course of any proceeding.

**DR-10 Duties of the Clerk.**

(a) Upon being informed that an attorney admitted to practice before this court has been convicted of any crime, the clerk of this court shall determine whether the clerk of court in which such conviction occurred has forwarded a certificate of such conviction to this court. If a certificate has not been so forwarded, the clerk of this court shall promptly obtain a certificate and file it with this court.

(b) Upon being informed that an attorney admitted to practice before this court has been subjected to discipline by another court, the clerk of this court shall determine whether a certified or exemplified copy of the disciplinary judgment or order has been filed with this court, and, if not, the clerk shall promptly obtain a certified or exemplified copy of the disciplinary judgment or order and file it with this court.

(c) Whenever it appears that any person convicted of any crime or disbarred or suspended or censured or disbarred on consent by this court is admitted to practice law in any other jurisdiction or before any other court, the clerk of this court shall, within ten (10) days of that conviction, disbarment, suspension, censure, or disbarment on consent, transmit to the other court a certificate of the conviction or a certified exemplified copy of the judgment or order of disbarment suspension, censure, or disbarment on consent, as well

**APPENDIX A**—Continued

as the last known office and residence of the defendant or respondent.

(d) The clerk of this court shall, likewise, promptly notify the National Lawyer Regulatory Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney admitted to practice before this court.

(§ (d) amended 2/2/01).

**DR-11 Public Access and Confidentiality.**

(a) Publicly Available Records. All filings, orders, and proceedings involving allegations of misconduct by an attorney shall be public, except:

(1) When the court, on its own initiative or in response to a motion for protective order, orders that such matters shall not be made public. While a motion for protective order is pending, the motion and any objection to the motion will be filed under seal.

(2) Any filing, proceeding, or order issued pursuant to DR-6 prior to the initiation of formal disciplinary proceedings under DR-6(c).

(b) Respondent's Request. The respondent attorney may request that the court make any matter public that would not otherwise be public under this rule.

(Prior rule stricken and replaced on 2/2/01)

**DR-12 Jurisdiction.**

Nothing contained in these rules shall be construed to deny to this court such powers as are necessary for the court to maintain control over proceedings conducted before it.

**In re Deborah A.L. BONARRIGO and Michael J. Bonarrigo, Debtors.**

**In re Laurie Ann Nelson, Debtor.**

**Joseph T. Hannigan, Jr.; U-File Discount Document Centers of America, Inc.; U-File Discount Document Centers of Kingston; and Cynthia Hales, d/b/a U-File Discount Document Centers of Westfield, Appellants,**

v.

**J. Christopher Marshall, United States Trustee, Appellee.**

**No. CIV.A. 01-11262-GAO.**

United States District Court,  
D. Massachusetts.

July 18, 2002.

United States Trustee (UST) filed complaint against bankruptcy petition preparers, alleging violations of the Bankruptcy Code and of an agreed order filed in a prior case forbidding use of the word "legal" in petition preparers' title and in any of their advertisements. Following trial, the Bankruptcy Court, William C. Hillman, Chief Judge, entered judgment ordering petition preparers to pay a \$500 fine, to disgorge \$339 each to debtors, and to cease acting as petition preparers in any jurisdiction in the Commonwealth of Massachusetts. Petition preparers appealed. The District Court, O'Toole, J., held that: (1) ample evidence supported the bankruptcy court's finding that, under Massachusetts law, petition preparers engaged in the unauthorized practice of law; (2) the record supported the bankruptcy court's finding that petition preparers violated the agreed order; (3) petition preparers were properly fined \$500 for violating the Code



made until the debtor has acquired right in the property transferred.

The debtor acquired no interest in his wages until he earned them. (Footnote omitted.)

Therefore, this Court disagrees with the reasoning in *Coppie*.

Similarly, other courts have generally not adopted the reasoning of *Coppie*, *Conner* or *Riddervold*.

[T]he majority of bankruptcy courts across the country hold that garnishment payments collected within the ninety-day "window" of § 547, pursuant to a wage execution levied prior to the preference period, constitute voidable preferences. Essentially, these courts hold that the language of § 547(e)(3) means that debtors cannot transfer their wages until they are earned, at which point the debtor acquires a right in those wages.

*In re Mays*, 256 B.R.555, at 560 (Bankr. D.N.J.2000) (citations and footnote omitted). See also *Wade v. Midwest Acceptance Corporation (In re Wade)*, 219 B.R. 815, 821 (8th Cir. BAP 1998):

The Code prevents a transfer which might otherwise have been considered to have occurred when a continuing lien is created from actually being effective for preference analysis "until the debtor has acquired rights in the property transferred." 11 U.S.C. § 547(e)(3). Where wages are involved this means that no transfer occurs until the wages are earned. And, thus, if future wages are subject to a garnishment lien arising outside the ninety day preference period, but are earned within that ninety day period, the lien does not attach until the wages are earned.

For these reasons, the Court would rule that payments of wages within the 90 days before the petition pursuant to a writ of garnishment served outside the 90 days would be preferential, assuming the other

requirements of § 547 are met. Mercury concedes that two of the payments were made within ninety days of the filing of the petition. Memorandum in Opposition to Complaint to Avoid Preference and to Compel Turnover of Garnished Funds, at 2. Doc. 9. But because there is no evidence actually before the Court about the dates of the first two payments, nor about the effect of the distribution pursuant to 11 U.S.C. § 547(b)(5), the Court is unable to dispose of this matter at this time. The Court will set a pretrial conference by separate order.



**In the Matter of John Q.  
SMITH<sup>1</sup>, Debtor.**

**No. 00-00000-JAC-13.**

United States Bankruptcy Court,  
N.D. Alabama,  
Northern Division.

Jan. 17, 2001.

Show cause hearing was held to determine why sanctions should not be imposed on Chapter 13 debtor's counsel, for allegedly filing bankruptcy petition solely as litigation tactic. The Bankruptcy Court, Jack Caddell, J., held that court would use its authority, under Bankruptcy Rule 9011 and/or under statute authorizing it to enter any "necessary or appropriate" orders, to require Chapter 13 debtor's attorney to disgorge fee and to pay \$10,000.00 fine for filing bankruptcy petition only as abusive litigation tactic, in order to prevent state court from entering judgment in favor of bank on complaint to which debtor admit-

1. Pursuant to a settlement agreement approved by the Court, the names of the debtor

and debtor's counsel have been changed for publication purposes.

tedly had no viable defenses, while debtor effectuated transfer of his only assets.

So ordered.

### 1. Bankruptcy ⇌2187

By placing his signature on bankruptcy petition, schedules and statements, debtor subjects himself to tenor of Bankruptcy Rule 9011. Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

### 2. Bankruptcy ⇌2187

Debtor's counsel, like debtor, is subject to standards of Bankruptcy Rule 9011. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

### 3. Bankruptcy ⇌2187

Safe harbor provision of Bankruptcy Rule 9011, which prohibits party from filing motion for Rule 9011 sanctions unless the violating party fails to withdraw or correct challenged paper within 21 days of service, does not apply when challenged paper is bankruptcy petition itself, the filing of which has immediate, serious consequences. Fed.Rules Bankr.Proc.Rule 9011(c)(1)(A), 11 U.S.C.A.

### 4. Bankruptcy ⇌2391

Purpose of automatic stay is to give debtor breathing room, not to serve as abusive litigation tactic. Bankr.Code, 11 U.S.C.A. § 362(a).

### 5. Bankruptcy ⇌2126, 2187

Bankruptcy court would use its authority, under Bankruptcy Rule 9011 and/or under statute authorizing it to enter any "necessary or appropriate" orders, to require Chapter 13 debtor's attorney to disgorge fee and to pay \$10,000.00 fine for filing bankruptcy petition only as abusive

2. FED. R. BANKR. P. 9011(c)(1)(B) provides as follows:

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

litigation tactic, in order to prevent state court from entering judgment in favor of bank on complaint to which debtor admittedly had no viable defenses, while debtor effectuated transfer of his only assets. Bankr.Code, 11 U.S.C.A. § 105(a); Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

### 6. Bankruptcy ⇌2187

Debtor's counsel has duty to investigate factual contentions claimed by debtor in his bankruptcy petition and schedules.

### 7. Bankruptcy ⇌2187

By signing bankruptcy petition and presenting it to court, debtor's counsel certifies that factual contentions claimed therein are supported by evidence and are submitted for legitimate purpose. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

### 8. Bankruptcy ⇌2126, 2187

Bankruptcy statute authorizing court to enter necessary or appropriate orders provides court with power to protect integrity of bankruptcy system and to impose appropriate remedies for any failure on part of debtor's counsel to make reasonable inquiry under the circumstances. Bankr.Code, 11 U.S.C.A. § 105(a).

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## MEMORANDUM OPINION

JACK CADDELL, Bankruptcy Judge.

By order entered September 26, 2000, the Court required debtor and debtor's counsel to show cause why the filing of debtor's petition did not violate Bankruptcy Rule 9011(b) as having been filed for an improper purpose and why the filing was not an abuse of process under Title 11, § 105(a).<sup>2</sup> The order set forth the stan-

Title 11 § 105(a) provides that:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appro-

dards for imposing sanctions and the Court's concerns as to whether sanctions should be imposed for what appeared to be flagrant misconduct. The order provided notice to debtor's counsel that possible sanctions included: (1) directives of a non-monetary nature including the suspension of the practice of law before the Bankruptcy Court for the Northern District of Alabama, Northern Division for a period of up to 60 months; (2) an order to pay a penalty into court; or (3) an order directing payment to the injured parties of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of any violations. On the date set for hearing, the Court approved a settlement agreement pursuant to which debtor's counsel was required to immediately refund to the estate attorney's fees in the amount of \$2,800.00 which he had received and to pay as sanctions \$10,000.00 to the estate for distribution to creditors. It was further agreed that the Chapter 13 estate would remain open for the trustee to pursue certain avoidance actions.

#### I FINDINGS OF FACT

On May 3, 2000, SunTrust Bank (hereinafter "the bank") filed a complaint against the debtor in the Circuit Court of Lauderdale County, Alabama seeking damages in the amount of \$54,150.89 on two unsecured promissory notes. The bank filed a motion for summary judgment in the state court action and the same was set on August 15, 2000. The debtor did not file any response to the motion for summary judgment, but on August 14, 2000, filed for relief under Chapter 13 of the Bankruptcy Code. The automatic stay under § 362 was immediately entered and the state court action was stayed. The hearing on the motion for summary judgment was continued generally.

Four days after the Chapter 13 petition was filed, the debtor filed a "Notice of Dismissal" of the case under Title 11, § 1307(b). The Court, pursuant to Bank-

ruptcy Rule 1017(f)(2), set the "Notice of Dismissal" for hearing on September 28, 2000.

Prior to the hearing on debtor's voluntary dismissal, the bank filed an objection to dismissal and a motion to convert the case to Chapter 7. The bank alleged as follows:

1. On October 22, 1999 the debtor's mother died intestate in Lauderdale County, Alabama, and the debtor and his brother filed for letters of administration of the estate in Lauderdale County, Alabama which said letters were granted in the Probate Court of Lauderdale County, Alabama.
2. The property of the probate estate consisted of, among other things, a house and 2.3 acres located in Lauderdale County, Alabama, the contents thereof and a 1988 Dodge Van.
3. Due to the death of his mother, under the laws of intestacy of the State of Alabama, the said debtor became the owner of an undivided  $\frac{1}{2}$  interest in his mother's real estate.
4. The debtor's petition for relief under the Bankruptcy Code is dated July 21, 2000; however, it was not filed until August 14, 2000 at 1:15 which was twenty-three hours and fifteen minutes prior to the date and time on which the bank would have been entitled to a judgment in its state court action.
5. On August 31, 2000, the debtor conveyed his undivided  $\frac{1}{2}$  interest in all or a portion of his mother's real estate to a third party. The total purchase price of the real estate was \$48,200.
6. On August 31, 2000, the debtor transferred a substantial portion of the proceeds from the sale to his brother.

appropriate to enforce or implement court orders

or rules, or to prevent an abuse of process.

7. The above stated conveyance and transfer were made at a time when the debtor's bankruptcy case was, and is at this date, still pending.
8. Due to the timing of the date of the petition, the filing of the petition and the date set for the hearing on the Bank's motion for summary judgment, the debtor invoked the protection of the bankruptcy court to enable him to convey assets which otherwise would have been subject to SunTrust's judgment lien.

In the debtor's response to the bank's motion to convert the debtor by counsel asserted that the case, pursuant to Title 11, § 1307(e) could not be converted because the debtor was a farmer. It was further asserted by both debtor and counsel that even though they were aware that under Alabama laws of intestacy, that the property vested in the debtor and his brother, that they some how believed that the property was in the name of the probate estate. They further alleged that under Alabama law, in the case of insolvency of the probate estate, that the property was subject to divestment. However, there was neither any indication of, nor was the probate estate insolvent. It was further admitted that the debtor had no defense to the bank's motion for summary judgment, but that the bankruptcy was filed to protect all of the debtor's unsecured creditors.

However, the primary debts scheduled by the debtor in his bankruptcy petition were owed to the bank. The debtor listed no secured creditors and the total debt listed to unsecured creditors was in the sum of \$81,221.56 of which \$59,000 was owed to the bank. There was only a total of four unsecured creditors listed, of which the bank was one.

The debtor in his statement of affairs listed his occupation as being a farmer. He projected monthly income in the

amount of \$1,650.00 from his farming operations, expenses in the amount of \$794.13, and excess income in the amount of \$855.87.

No where in the debtor's petition, schedules, or statement of affairs was it shown that the debtor was a co-administrator of his mother's estate in an action presently pending in the Probate Court for Lauderdale, County or that a proceeding was presently scheduled in that action whereby all of his mother's property was to be sold at public auction on August 31, 2000. No where in the petition did the debtor show that he owned any real property as part of his bankruptcy estate. In Schedule B, entitled "Personal Property," he listed a "one-half interest in the Estate" of his mother and listed the current market value of same as "unknown." In Schedule C, entitled "Property Claimed as Exempt," the debtor claimed the one-half interest in his mother's estate as exempt, but left the space entitled "Value of Claimed Exemption" blank.<sup>3</sup> Counsel for debtor argued the value was left blank because neither he nor the debtor knew the amount of the debtor's interest in his mother's estate. It is undisputed, however, that the debtor and his brother were co-administrators of their mother's estate and, pursuant to Alabama law, had filed an inventory of the property of the estate and posted a bond in twice the value of the property. This inventory had been done by the debtor in the pending administration and filed in the same under debtor's oath. Debtor failed to fully and honestly disclose this information in his petition, schedules and statement of affairs.

The petition did reveal, however, that counsel for debtor had been paid the sum of \$2,800.00 in advance for services in connection with the bankruptcy. Debtor's counsel is a regular practicing bankruptcy attorney in our court. The ordinary fee

3. He cited ALA. CODE § 6-10-6 (Alabama's Code section allowing personal property ex-

emption) as entitling him to said exemption.

for filing a Chapter 13 of this size is in the amount of \$1,000.00. In addition to representing the debtor in bankruptcy, counsel also represented the debtor in the state court action.

After reviewing the objection filed by the bank and the debtor's petition and schedules, the Court issued the order to show cause and described therein the specific conduct that appeared to violate Rule 9011(b) and § 105(a) of the Code.<sup>4</sup> The order provided that if the matters set forth in the bank's objection were true, then it appeared that the debtor may have invoked the protection of the bankruptcy court to enable him to convey assets which otherwise would have been subject to the bank's judgment and to dispose of the property without accounting to his creditors. It appeared that debtor's counsel may have either known or after an inquiry reasonable under the circumstances should have known about the debtor's ownership interest in the property and apparently assisted the debtor in his endeavor to thwart or delay the bank in its litigation against the debtor in manipulation of the Bankruptcy Code so that the debtor could divest himself of assets, or that the attorney counseled and assisted the debtor in invoking the automatic stay to harass or to

4. The procedure for imposing Rule 9011 sanctions on the court's own initiative is described in FED. R. BANKR. PROC. 9011(c) which states:

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable

cause unnecessary delay or needless increase in the cost of litigation to the bank.

On September 26, 2000, counsel for the debtor filed a pleading entitled "Debtor's Response to Objection To Motion to Dismiss Chapter 13." Debtor's counsel filed the response on the same day that the Court entered the rule to show cause, but prior to receiving notice of same. The response reads in part as follows:

1. Debtor filed for relief under Chapter 13 of the Bankruptcy Code on August 14, 2000. Debtor is a farmer who lives in Lauderdale County, Alabama.
2. On August 18, 2000 the Debtor filed a Notice of Dismissal of his Chapter 13. The debtor seeks to dismiss this case in order to deal with anticipated debts from the debtor's current farming operations so as to be able to obtain the best "fresh start" possible.
3. At the time that the debtor filed this case there was pending action in the Probate Court for Lauderdale County, Alabama to administer the property of the estate of the debtor's mother. The debtor is a co-adminis-

conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions, may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

trator of this Estate along with his brother. Debtor along with his brother are the surviving heirs of their mother.

4. The probate estate consisted in part of certain real property located Florence, Alabama. This real property was sold at auction as part of the administration of the probate estate on August 31, 2000 for the sum of \$48,200.00.
5. At closing, the closing attorney paid \$18,557.20 in settlement charges which included paying off two mortgages owed by the debtor's deceased mother in the amount of \$13,385.20, settlement charges, and the lawful claims which were filed against the probate estate. The balance of these proceeds, \$17,748.10, was divided by the closing attorney between the debtor and his brother. Presumably, as part of the administration of the deceased's estate and to reflect the debtor's receipt of advancements, these proceeds were divided so that the debtor received \$2,181.45 and his brother received \$15,566.65.

\* \* \* \* \*

8. Section 1307(b) gives the debtor an absolute right to dismiss his Chapter 13 petition. *Barbieri v. RAJ Acquisition Corp. (In re Barbieri)*, 199 F.3d 616 (2nd Cir.1999). This statute provides in pertinent part, that "[o]n request of the Debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter." . . .
9. The debtor's absolute right to dismiss his petition is bolstered by § 301 of the Bankruptcy Code which provides that Chapter 13 is purely voluntary and may not be commenced involuntarily under § 303(a). For this reason alone, the Court cannot grant the request of Sun-

Trust to keep the debtor in Chapter 13. Such a result would allow a creditor to effectuate an involuntary Chapter 13 without the need to comply with all of the requirements of § 303. *Barbieri*, 199 F.3d at 620.

\* \* \* \* \*

12. Because the debtor has an absolute right to dismiss his case, this Court should not convert the case to one under Chapter 7 of the Bankruptcy Code. *Beatty v. Traub (In re Beatty)*, 162 B.R. 853, 856 (9th Cir. BAP 1994). . . . Furthermore, the *Barbieri*, court found that to grant a creditor's motion to convert in the face of the debtor's pending motion to dismiss a Chapter 13 would allow the creditor to effectuate an involuntary petition without complying with the requirements of § 303(a) of the Bankruptcy Code. "Such result flies in the face of the voluntary nature of [Chapter 13] and circumvents the standards for an involuntary liquidation set forth in § 303." 199 F.3d at 620 (citations omitted).
13. Finally, § 1307(e) provides that a court may not convert a case under Chapter 13 to one under Chapter 7 if the debtor is a farmer, unless the debtor requests such conversion. In this case the debtor is a farmer as defined under the Bankruptcy Code. The debtor does not request that this case be converted, instead the debtor seeks to dismiss this action. Accordingly, the Court may not convert this case to one under Chapter 7."

Counsel for debtor further argued that this case was not filed for an improper or unnecessary purpose and that it was not an abuse of process to have filed the case because the debtor filed bankruptcy to "to treat all unsecured creditors" the same, i.e., so that all the creditors would share, rather than the bank getting it all. The

debtor explained the dismissal of his case only four days after it was filed, stating that he realized that because of the drought [which had been going on for months] that his farming effort was futile. The sad reality is, however, that the creditors got nothing—apparently the brother got most of it. After the mortgages and settlement charges were paid, \$17,748.10 remained to be divided between debtor and his brother as the only surviving heirs. Instead, the debtor's brother received \$15,566.65 and the debtor only received \$2,181.45. (If this accounting is believed, the debtor paid his attorney \$2,800.00 to net himself \$2,181.00.) Despite the debtor's argument that he filed bankruptcy to treat all unsecured creditors the same nothing could be further from the truth.

On October 16, 2000, the bankruptcy administrator filed a motion to determine the reasonableness of the attorney's fee paid to debtor's counsel and requested a disgorgement of the fee. The bankruptcy administrator argued that the fee exceeded the usual and customary fee which would be awarded to counsel for representation of a Chapter 13 debtor in a similar size case. The motion further alleged that it appeared that the case was filed for an improper purpose and that any fee should be forfeited. In counsel's written response to the rule to show cause, counsel admits that the \$2,800.00 fee exceeded the usual and customary fee, but represented that such amount was charged because the case was originally prepared as a Chapter 12 case. After the fee was paid, counsel stated that he became aware that Chapter 12 law lapsed on July 1, 2000.

## II CONCLUSIONS OF LAW

This case has required the Court to review its sanctioning powers under Bankruptcy Rule 9011 as well as the Court's statutory power to impose sanctions under § 105(a).<sup>5</sup> Rule 9011 provides as follows:

5. See the case of *In re Collins*, 250 B.R. 645, 655–56 (Bankr.N.D.Ill.2000) for an excellent

### (a) Signature

Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by a least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

### (b) Representations to the Court

By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed **after an inquiry reasonable under the circumstances,—**

(1) it is not being presented for any **improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;** [emphasis added]

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

discussion of a courts sanctioning powers.

(4) the denials of factual contentions are warranted on the evidence of, if specifically so identified, are reasonably based on a lack of information or belief.

Section 105(a) states:

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, **or to prevent an abuse of process.** [emphasis added].

[1, 2] By placing his signature on the petition, schedules and statements, the debtor subjects himself to the tenor of Rule 9011(a) and (b). There is some uncertainty in the law as to whether Rule 9011(a) applies to debtor's counsel with reference to the representations made in debtor's statements and schedules because its language expressly excepts "a list, schedule, or statement, or amendments thereto." This Court has previously found that found that Rule 9011(b) as amended in 1997 clearly subjects debtor's counsel to the standards set forth in Rule 9011. In the case of *In re Kelley*, 255 B.R. 783 (Bankr.N.D.Ala.2000), the Court recognized that the argument could be made that because schedules and statements were omitted from the language of Rule 9011(a) that counsel may not be responsible for inaccuracies or misstatements in same. The Court found that by signing the bankruptcy petition and presenting the entire bankruptcy package to the Court, counsel subjected himself to the "limits, scope, and bounds of Rule 9011" because of the language found in paragraph (b) of

Rule 9011 which uses the terms "whether by submitting, filing, or later advocating."<sup>6</sup> In *Kelley*, the debtor had obtained a judgment for a personal injury against a third party. The debtor scheduled the judgment as exempt in the amount of \$1 and stated that its value was "unknown." With a few simple questions the debtor's attorney could have easily ascertained the true value of the judgment, which was in fact several thousand dollars. The Court warned debtor's counsel that his failure to investigate the true value of the judgment was sanctionable under Rule 9011(b).

[3, 4] Section 362(a) of the Bankruptcy Code provides that a bankruptcy petition operates as a stay to all collection efforts, all foreclosure actions, and any other actions against the debtor that are not specifically excepted from the stay by subsection (b) of § 362. Rule 9011(c)(1)(A) includes a safe harbor provision that prohibits a party from filing a motion for Rule 9011 sanctions unless the violating party does not withdraw or correct the challenged paper under subsection (b) within 21 days of service.<sup>7</sup> The safe harbor provision contained in Rule 9011(c)(1)(A) does not apply to the filing of a bankruptcy petition.<sup>8</sup> The petition is excluded from the safe harbor provision of Rule 9011 because its filing has immediate serious consequences.<sup>9</sup> The invocation of the automatic stay is perhaps one of the most powerful safeguards in all the law. With the filing of a single piece of paper, the law imposes a broad sweeping and powerful injunction which carries with it great implications and provides for sanctions for its violation. The purpose of the automatic stay is to give the debtor breathing room. The automatic stay is not to be used as an abusive litigation tactic.

6. See the recent article, James Shepard, *Zealous Advocacy or Sanctionable Gamesmanship*, NORTON BANKR. L. ADVISOR, Dec. 2000, at 6.

7. FED. R. BANKR. PROC. 9011(c)(1)(A).

8. FED. R. BANKR. PROC. 9011(c)(1)(A).

9. *In re Collins*, 250 B.R. 645 (Bankr.N.D.Ill. 2000).

The case of *In re Robinson*, 198 B.R. 1017 (Bankr.N.D.Ga.1996), contained informative language where the automatic stay was involved as a litigation tactic instead of for a proper purpose. That case stated:

Filing even a skeletal petition secures the protection of the automatic stay of 11 U.S.C. § 326(a) for both the honest and the abusive debtor. The automatic stay serves to protect the honest debtor in desperate financial circumstances from creditor action and to provide a much-needed “breathing spell” to marshal resources and prepare to deal with creditors in a fair and orderly manner. The abusive debtor also obtains protection of the automatic stay but employs it to delay or thwart creditor action while refusing to fulfill the duties imposed by the Bankruptcy Code. The uses of the automatic stay as both a shield and a weapon are well-known to debtors’ attorneys and to some debtors.

....

Using the automatic stay and the filing of the petition as a shield to buy time to negotiate a loan refinancing abuses the bankruptcy system. The harm which devolves is not limited to the affected creditor. By example and word of mouth, the “technique” spreads until it is no longer perceived by the Bar or by debtors as an abuse but as a permissible manipulation of the system. In the meantime, respect for the bankruptcy system, including attorneys who wish to assist honest debtors, deteriorates. When public respect for any part of the legal system falters, it harms everyone involved in the system.<sup>10</sup>

Courts have also imposed Rule 9011 sanctions where the bankruptcy filing is motivated by the desire to delay a creditor from enforcing its rights in another court. In the case of *In re Collins*, 250 B.R. 645 (Bankr.N.D.Ill.2000), the debtor was involved in protracted litigation with another

party, and when it appeared that the debtor had lost all hope of winning his case, he filed Chapter 7 bankruptcy. Although the debtor was worth millions of dollars and enjoyed a fabulous income as an insurance salesman, all his property was exempt except for about \$75,000 which he proposed to pay to his adversary and discharge the balance of a \$525,000 judgment against him. The *Collins* court, in dismissing the case for substantial abuse under § 707(a) observed:

Rule 11 creates duties to one’s adversary and to the legal system, just as tort law creates duties to one’s client. The duty to one’s adversary is to avoid needless legal costs and delay. The duty to the legal system (that is, to litigants in other cases) is to avoid clogging the courts with paper that wastes judicial time and thus defers the disposition of other cases or, by leaving judges less time to resolve each case, or increases the rate of error. Rule 11 allows judges to husband their scarce energy for the claims of litigants with serious disputes needing resolution.<sup>11</sup>

[5] In the instant case it appears that the debtor filed his petition in order to stop the state court from entering judgment in favor of the bank on a complaint to which the debtor admittedly had no viable defenses while the debtor effectuated the transfer of his only assets. The invocation of the automatic stay was used as a litigation tactic to stay the state court action, before the same could proceed to judgment. The Court has a nagging skepticism about counsel’s defenses and explanations of what appears to be a deliberate plan to thwart the bank long enough for the debtor to dispose of his only assets. The circumstantial evidence is overwhelming. The bankruptcy filing just 23 hours in advance of the summary judgment setting; the dismissal just four days later (supposedly because the debtor realized

10. *In re Robinson*, 198 B.R. at 1024.

11. *In re Collins*, 250 B.R. at 660–61 (quoting *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 932 (7th Cir.1989)).

that the drought which had been going on for several months was detrimental to his farming operation); the fact that a Chapter 13 was filed at all since debtor had no secured debts and nothing to reorganize; the fact that a Chapter 13 could be dismissed at will and could not be converted to a Chapter 7 because the debtor was a farmer; the alleged fact that debtor and debtor's counsel did not know the value of the mother's estate, even though an accounting and inventory had been filed on the debtor's oath in the probate court; the alleged ignorance of debtor's counsel of Alabama law on real estate and intestacy law; the failure to disclose in the bankruptcy petition that an auction had been scheduled and was pending when the bankruptcy petition was filed; the fact that property was sold and debtor's brother got most of the profit; the debtor only realized \$2,100.00 from the sale of his assets he inherited from his mother, but he paid his counsel \$2,800.00 to file the bankruptcy petition. It is obvious that the automatic stay was invoked as a sword or a litigation tactic in the state court action instead of as a shield to give the debtor time to reorganize his affairs while treating his creditors fairly pursuant to the Bankruptcy Code. It is obvious that debtor's counsel was engaging in gamesmanship with the bank.

[6, 7] Debtor's counsel had a duty to investigate the factual contentions claimed by debtor in his bankruptcy petition and schedules. By signing the petition and presenting the bankruptcy to the Court, counsel was certifying that the factual contentions claimed therein were supported by the evidence and were submitted for a legitimate purpose. They were not.

[8] The Court further finds that it has the power under Title 11, § 105(a) to impose sanctions. Section 105(a) sets forth as follows:

(a) The court may issue any order, process, or judgment that is necessary or

appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, **or to prevent an abuse of process.** [emphasis added].

providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, **or to prevent an abuse of process.** [emphasis added].

Section 105(a) provides the Court with the power to protect the integrity of the bankruptcy system and to impose appropriate remedies for failure to make a reasonable inquiry under the appropriate circumstances such as involved in this case.<sup>12</sup> The vast majority of attorneys who practice before this Court have unquestionable integrity. Abuses like those here give bankruptcy a bad name when bankruptcy can least afford negative publicity. This Court will not tolerate this type of abuse.

The Court accepts the debtor's counsel's offer of settlement in this case—\$10,000.00 payment of a sanction and refund of attorney's fees in the sum of \$2,800.00 sum of which are to be paid into the Chapter 13 estate for the benefit of creditors. The debtor has further agreed to keep Chapter 13 open so the Chapter 13 trustee may pursue avoidance actions. Lastly, the Court warns debtor's counsel that he has come very close to more draconian action. Any further sanctionable conduct by him will result in his suspension of practice before this Court.<sup>13</sup>



12. *In re Kelley*, 255 B.R. 783 (Bankr.N.D.Ala. 2000).

13. *In re Computer Dynamics, Inc.*, 253 B.R. 693, 698 (E.D.Va.2000)(stating that bankrupt-

**ORDER**

In re Gerald Wayne HICKS, Debtor.

Gerald Wayne Hicks, Appellant,

v.

United States of America, Appellee.

No. 8:99-CV-1013-T-25F.

Bankruptcy No. 97-16513-8B3.

United States District Court,  
M.D. Florida,  
Tampa Division.

Oct. 16, 2000.

Chapter 13 debtor objected to federal tax claim, as not properly crediting him with sums collected pursuant to prepetition tax levy. The Bankruptcy Court granted federal government's motion for summary judgment, and debtor appealed. The District Court, Adams, J., held that material fact question precluded entry of summary judgment.

Vacated and reversed; matter remanded.

**Bankruptcy** ⇐2164.1

**Federal Civil Procedure** ⇐2486

Material question of fact, as to whether notice of tax levy previously issued to third party obligated to Chapter 13 debtor was based upon debtor's or some other taxpayer's delinquent taxes, precluded entry of summary judgment on debtor's objection to federal tax claim, as not properly crediting him with sums collected pursuant to this levy.

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Gerald Wayne Hicks, Brandon, FL, pro se.

Patricia A. Willing, U.S. Attorney's Office, Tampa, FL, John A. Galotto, Tammie R. Adams, U.S. Dept. of Justice, Tax Division, Washington, DC, for United States.

ADAMS, District Judge.

This is an appeal of the bankruptcy court's Order granting summary judgment on March 5, 1999. From the record herein, and Briefs of the parties, the Court finds the following:

Gerald W. Hicks ("Debtor") filed a voluntary petition in bankruptcy under Chapter 13 on October 7, 1997. The United States of America ("United States") filed a Proof of Claim on January 12, 1998, listing assessed federal tax liabilities and accrued interest totaling \$40,338.97. The Debtor filed an Objection to Claim on June 3, 1998, and renewed Objection on August 10, 1998. The objections raised several issues but, the issue pertinent to this appeal was stated as follows:

That on or about October 18, 1995, the IRS received monies owed to Hicks in the amount of \$8,487.04, from Centex-Great Southwest Corporation, pursuant to a *Notice of Tax Levy*, however Hicks has never received a Notice of Seizure required by 26 U.S.C. § 6335(a), or credit for this amount against any alleged, outstanding IRS debt. The claim of the IRS as stated in the proof of claim should be reduced, to reflect such credit due Hicks.

The United States filed a Motion for Summary Judgment on October 27, 1998, to which the Debtor responded orally at the hearing on said motion. The motion requested summary judgment on the issues raised in the Debtor's objection and renewed objection and was granted by the Bankruptcy Court on March 5, 1999. The order granting summary judgment simply stated that it was being granted for "the reasons stated orally and recorded in open court." (Bkr. Dkt. 57) Neither party submitted a transcript as a part of the record on this appeal. Therefore, the reasons for granting the motion are unknown.

cy courts "possess 'the inherent authority to

disbar or suspend lawyers from practice'").

Court. Any error in calculating trustee compensation has to be attributed to the complexity of the case and the diverse nature of the assets. I will, therefore, deny the motions for sanctions.

An Order in accordance with this Memorandum Opinion will be entered this date.



**In re HUTTON VALLEY  
FARMS, Debtor.**

**No. 00-60720.**

United States Bankruptcy Court,  
W.D. Missouri,  
Southern Division.

July 6, 2000.

Following dismissal, as “bad faith” filing, of Chapter 7 petition filed on behalf of newly formed corporate debtor, order to show cause was entered why debtor’s attorney should not be sanctioned under Bankruptcy Rule 9011 for filing petition. The Bankruptcy Court, Arthur B. Federman, Chief Judge, held that: (1) debtor’s attorney was liable for Rule 9011 sanctions for filing bankruptcy case in name of corporate debtor that was newly formed on eve of petition, and that, as result of its shareholders’ failure to complete a transfer of their assets and liabilities; and (2) appropriate sanction was amount of additional fees and expenses incurred by mortgagee as result of this “bad faith” filing.

Sanction imposed.

**1. Bankruptcy ⇌2187**

Chapter 7 debtor’s attorney was liable for Rule 9011 sanctions for filing bankruptcy case in name of corporate debtor that was newly formed on eve of petition,

and that, as result of its shareholders’ failure to complete a transfer of their assets and liabilities, owned no property and had no debts, where sole purpose served by petition was to halt foreclosure sale of property owned by shareholders, who were themselves barred from seeking bankruptcy relief for period of 180 days; petition was in bad faith and not warranted by existing law or by nonfrivolous argument for extension or modification of existing law. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

**2. Bankruptcy ⇌2187**

Attorney’s alleged unfamiliarity with bankruptcy decisions dealing with “new debtor syndrome,” in which cases filed on behalf of newly formed debtors are routinely dismissed as “bad faith” filings, was no defense to order to show cause why attorney should not be liable for Rule 9011 sanctions for filing Chapter 7 petition on behalf of newly formed corporation, solely in attempt to halt foreclosure sale; under Rule 9011, attorney is under an obligation, before filing paper with court, to make reasonable inquiry that his actions are warranted by existing law and are not for any improper purpose. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

**3. Bankruptcy ⇌2187**

Appropriate Rule 9011 sanction against attorney to Chapter 7 debtor, for his conduct in filing petition on behalf of newly formed debtor solely to stall mortgage foreclosure sale on property owned by debtor’s shareholders, was amount of additional fees and expenses incurred by mortgagee as result of the “bad faith” filing; since mortgagee would have incurred costs of foreclosure sale even if no petition had been filed, court would not allow any fees or expenses that were directly related to foreclosure sale itself and not to bankruptcy petition. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

Brian K. Asberry, Neale, Newman, Bradshaw & Freeman, Springfield, MO, for Bank of Houston.

Stephen W. Daniels, Rolla, MO, for debtor.

*ORDER IMPOSING RULE  
9011 SANCTIONS*

ARTHUR B. FEDERMAN, Chief Judge.

On April 28, 2000, this Chapter 7 bankruptcy case was filed. Debtor Hutton Valley Farms was identified as a general partnership. Velma and Ralph Hood were identified as the general partners. Mr. and Mrs. Hood had previously filed a Chapter 13 petition on August 25, 1999, in order to stop a foreclosure sale as to real estate in which the Bank of Houston held a First Deed of Trust. On February 15, 2000, before this Court ruled on a motion to lift the automatic stay filed by the Bank of Houston, the Hoods voluntarily dismissed their Chapter 13 case. The Bank of Houston again scheduled a foreclosure sale for this same real estate for May 1, 2000. On April 27, 2000, Stephen W. Daniels, counsel for the Hoods in their Chapter 13 case, informed the Bank of Houston that the Hoods had transferred their interest in the real estate to a partnership named Hutton Valley Farms, and that he was preparing to file a bankruptcy petition on behalf of Hutton Valley Farms. On that same date, counsel for the Bank of Houston filed a motion to dismiss and a motion for sanctions, and petitioned this Court for an emergency hearing on same. On April 28, 2000, this Court held an emergency hearing at which Mr. Daniels failed to appear. At that hearing, this Court ordered that the scheduled foreclosure sale be conducted as scheduled on May 1, 2000; that the deeds and paperwork be completed, but that no deed be recorded, that no party make any attempt to convey the subject property in any form prior to the foreclosure sale; and that the motion to dismiss and the motion for sanctions would be heard on May 17, 2000. On May 17, 2000, this Court took up the motion to

dismiss. After testimony by both Mr. and Mrs. Hood and a representative from the Bank of Houston, I granted the motion to dismiss the case as a bad faith filing.

In conjunction with the motion dismissing the case as a bad faith filing, this Court issued an Order to Show Cause (the OTSC) why Mr. Daniels should not be sanctioned in an amount not to exceed the fees, costs, and expenses incurred by the Bank of Houston as a result of the bad faith filing. Pursuant to Rule 9011 of the Federal Rules of Bankruptcy Procedure, this Court granted Mr. Daniels 21 days from the date of the OTSC to demonstrate why he should not be sanctioned in said amount for his violation of Rule 9011(b)(2).

Rule 9011(b) provides that when an attorney signs a document filed with the Court, such attorney certifies that to the best of his knowledge, information, and belief the document is not being presented for an improper purpose, that the claims contained therein are warranted by existing law or that there is a nonfrivolous argument for the extension or modification of that existing law, and that the allegations have some evidentiary support.<sup>1</sup> Rule 9011 also provides that the Court, on its own initiative, may enter an order describing the conduct that purportedly fails to comply with the requirements of Rule 9011(b), and directing the attorney to show cause why it has not violated subsection (b).<sup>2</sup>

[1] This Court found at the hearing on May 17, 2000, that Mr. Daniels signed a bankruptcy petition and filed a Chapter 7 bankruptcy case in the name of a debtor that owned no assets and had no liabilities. The assets and liabilities listed in the bankruptcy schedules were those of Mr. and Mrs. Hood, not Hutton Valley Farms. The debtor was purportedly formed just prior to the filing in order to hold the real estate subject to the Bank of Houston's lien, yet no record of a transfer of the real

1. Fed.R.Bankr.P. 9011(b).

2. *Id.* at 9011(c)(2).

estate was recorded. The debtor was formed, and the case was filed, for the sole purpose of stopping the foreclosure sale, since section 109(g) of the Bankruptcy Code specifically forbade another filing by Mr. and Mrs. Hood for 180 days from the date of the voluntary dismissal of their Chapter 13 case.<sup>3</sup>

[2] Mr. Daniels was ordered to show cause, on or before June 16, 2000, why he should not be sanctioned in the amount of the fees and other expenses incurred by the Bank of Houston as a result of the bad faith filing. In his response to the OTSC, Mr. Daniels waived his right to a hearing and consented to this Court making a ruling based upon his written response.<sup>4</sup> In that Response Mr. Daniels argued that he believed the Hoods had transferred all of their assets and liabilities to Hutton Valley Farms, and that it was their intent to do so, despite the fact that no deed was executed or recorded. Additionally, Mr. Daniels stated that he was not familiar with a line of cases that hold that, if a debtor transfers all of its assets to another entity and then puts that entity into bankruptcy, unless there is an attempt to treat the new entity as a separate business as a practical matter, the filing is meant to frustrate creditors and abuse the bankruptcy system.<sup>5</sup> This phenomenon is known as the "new debtor syndrome" and such cases are routinely dismissed as a bad faith filing.<sup>6</sup> Mr. Daniel's claim that he was not familiar with this line of cases is not a defense to the OTSC. Rule 9011 specifically requires an attorney to make a reasonable inquiry that the action to be filed is warranted by existing law, and that such action is not for any improper purpose.<sup>7</sup>

3. 11 U.S.C. § 109(g).

4. Doc. # 17 (Response to Order to Show Cause Why Sanctions Should Not Be Imposed).

5. *Grunewaldt v. Mutual Life Ins. Co. of New York (In re Coones Ranch, Inc.)*, 7 F.3d 740, 743 (8th Cir.1993)

Mr. Daniels also argues that the bankruptcy filing was intended to maximize the return to all creditors, as the Chapter 7 trustee would obtain a better price for the real estate than the Bank of Houston. If that were the case, he should have counseled the Hoods to convert the prior case to Chapter 7, or contest the motion for relief from stay filed by the Bank of Houston in that case. By dismissing that case, and then filing a Chapter 7 case under a different name on the eve of the foreclosure, he simply delayed the process more than two months, and caused the Bank of Houston to expend additional funds to obtain the relief to which it would have been entitled.

[3] Mr. Daniels has not demonstrated that he could have had, or should have had, a reasonable belief that this second bankruptcy filing was for a proper purpose. Moreover, the Eighth Circuit recently upheld an award of sanctions severally against a debtor's attorney.<sup>8</sup> I find that Mr. Daniels has violated Rule 9011, and that sanctions are appropriate. I further find that the appropriate amount of the sanctions is the additional fees and expenses incurred by the Bank of Houston as a result of the bad faith filing. The Bank of Houston would have incurred the costs of the foreclosure sale even if this case had not been filed, thus, I will not allow any fees or expenses that are directly related to the foreclosure sale and not to the bankruptcy filing.

Counsel for the Bank of Houston was ordered to submit an itemized account of attorney's fees, costs, and expenses related to the bad faith filing. As instructed, counsel submitted an itemized account of the Bank of Houston's out of pocket ex-

6. *See Meadowbrook Investors' Group v. Thirtieth Place, Inc. (In re Thirtieth Place, Inc.)*, 30 B.R. 503, 505-06 (9th Cir. BAP 1983).

7. Fed.R.Bankr.P. 9011(b)(1) and (2).

8. *Wei v. Fink (In re Graven)*, 186 F.3d 871, 872-73 (8th Cir.1999), *cert. denied*, June 20, 2000.

penses incurred since April 24, 2000.<sup>9</sup> The total fees and costs incurred by the Bank of Houston in connection with the foreclosure sale, the bankruptcy filing, the trustee's fees, and the updated title work was \$6,543.10. Of that amount the Bank of Houston claims it incurred \$4,184.00 in fees and \$2,359.10 in disbursements. Having carefully reviewed the fees and disbursements, I find that the following fees would have been incurred by the Bank of Houston in conducting the foreclosure sale, even if Mr. Daniels had not filed this second bankruptcy petition:

Telephone conference with Cora Wade regarding payoff on loans:	\$ 64.00
Attend foreclosure sale in West Plains: 2 hours:	320.00
Telephone conference regarding foreclosure sale and correspondence to be mailed: ½ hour	80.00
Telephone conference with Cora regarding status of file and Strategy for obtaining deficiency: ½ hour	53.33
Receipt and review correspondence from Jo Beth Prewitt regarding foreclosure and tractor: .30 hours	48.00
Discussion of Farm Credit cooperation with liquidation action; Correspondence with Eddie Smith regarding same: .30 hours	48.00

The total reduction in fees totals \$613.33, leaving sanctionable fees in the amount of \$3,570.67. In addition, the disbursements will be reduced by the following amounts:

Trustee's Fee	\$1,080.00
Updated Title Work	190.00
Affidavit of Publication	787.00

The total reduction in disbursements totals \$2,057.00, leaving sanctionable expenses in the amount of \$302.10. After these deductions I find that Mr. Daniels will be assessed Rule 9011 sanctions in the total amount of \$3,872.77 for his violation of Rule 9011(b)(1) and (2) of the Federal Rules of Bankruptcy Procedure.

The reduction in the sanctionable amount above does not prevent the Bank of Houston from assessing those same fees and expenses against its collateral if the Deed of Trust so provides.

9. See Letter dated June 6, 2000.

Based on the above and foregoing, the Clerk of Court shall enter judgment in favor of the Bank of Houston, and against Stephen W. Daniels, in the amount of \$3,872.77.

IT IS SO ORDERED.



**In re Tammy L. JANC, Debtor.**

**Tammy L. Janc, Plaintiff,**

**v.**

**Coordinating Board for Higher Education, Missouri Western State College, and U.S. Department of Education, Defendants.**

**Bankruptcy No. 99-40221-W-7.**

**Adversary No. 99-4198-1.**

United States Bankruptcy Court,  
W.D. Missouri,  
Western Division.

Aug. 8, 2000.

Debtor brought adversary proceeding for determination as to dischargeability of her student loan debt. On state agency's motions to dismiss and for entry of summary judgment based on its Eleventh Amendment immunity, the Bankruptcy Court, Jerry Venters, J., held that: (1) by granting state agency authority to adopt regulations regarding the procedures to be followed in event of borrower's default on state-guaranteed student loan, Missouri legislature did not waive agency's Eleventh Amendment immunity from suit in federal court; (2) by participating in student loan program, state agency did not thereby waive its Eleventh Amendment immunity; and (3) bankruptcy court's jur-

Therefore, the harm caused by the discharge of the claim to Ms. Hastings and Debtor's two minor children would be far greater than any benefit to Mr. Konick.

### CONCLUSION

The record before us shows that the bankruptcy court thoughtfully and thoroughly reviewed the evidence and, having considered the financial difficulties of both Mr. Konick and Ms. Hastings, properly held the claim nondischargeable. Accordingly, we AFFIRM the bankruptcy court's decision in all aspects. Costs to Appellee.

**SO ORDERED.**



**In re 1095 COMMONWEALTH  
CORPORATION and Bahig  
F. Bishay, Debtors.**

**1095 Commonwealth Corporation and  
Bahig F. Bishay, Appellants,**

v.

**Citizens Bank of Massachusetts,  
Appellee/Cross-Appellant.**

**No. CIV. A. 97-10383-GAO.**

United States District Court,  
D. Massachusetts.

July 27, 1999.

Bank, in its capacity as oversecured creditor, moved for approval of interest, reasonable attorney fees, costs and other charges as addition to its oversecured claim. The Bankruptcy Court, Carol J. Kenner, Chief Judge, 204 B.R. 284, held that bank had fraudulently overstated amount of its legal expenses by failing to disclose two-tiered fee arrangement with its attorneys, and allowed attorney fees but only as offset by Rule 9011 sanctions

awarded to debtor. Both sides appealed. The District Court, O'Toole, J., held that: (1) bankruptcy court's decision not to completely deny award of attorney fees to oversecured creditor as part of its oversecured claim, despite creditor's and its attorneys' nondisclosures and affirmative misrepresentations regarding existence of two-tiered fee arrangement, was not abuse of discretion; (2) oversecured creditor was not denied due process in connection with one-day notice that it received, on its application for award of attorney fees as part of its oversecured claim, that debtor would be seeking sanctions; (3) finding that Rule 9011 sanctions were warranted was not abuse of discretion; and (4) award of Rule 9011 sanctions in amount of \$142,520.82 would be approved.

Affirmed as modified.

#### 1. Bankruptcy ⇌3782, 3786

District court reviewing a bankruptcy court's decision applies "clear error" standard to findings of fact and reviews conclusions of law de novo. Fed.Rules Bankr. Proc.Rule 8013, 11 U.S.C.A.

#### 2. Bankruptcy ⇌3786

Finding of fact by bankruptcy court is "clearly erroneous" when reviewing court is left with definite and firm conviction that mistake has been made. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

#### 3. Bankruptcy ⇌3784

All aspects of bankruptcy court's determination on request for Rule 9011 sanctions are reviewed for abuse of discretion. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 4. Bankruptcy ⇌3784, 3786

For an appellate court reviewing factual findings, "abuse of discretion" standard is indistinguishable from "clear error" standard.

**5. Bankruptcy**  $\S$ 3784

Since decision about whether litigant's, or lawyer's, actions merit the imposition of sanctions is heavily dependent upon trial court's firsthand knowledge of case and its nuances, appellate review is deferential.

**6. Bankruptcy**  $\S$ 2853.20(1)

Oversecured creditor may recover attorney fees and costs from debtor if (1) creditor has allowed secured claim; (2) creditor is oversecured; (3) underlying agreement between creditor and debtor provides for payment of fees and costs; and (4) the fees and costs requested are reasonable. Bankr.Code, 11 U.S.C.A. § 506(b).

**7. Bankruptcy**  $\S$ 2853.20(1)

Bankruptcy court's decision not to completely deny award of attorney fees to oversecured creditor as part of its oversecured claim, despite creditor's and its attorneys' nondisclosures and affirmative misrepresentations regarding existence of dual fee arrangement between creditor and attorneys whereby attorneys' services would be billed at lesser hourly rate if fees were not passed on to debtor, was not abuse of discretion, where creditor satisfied each statutory requirement for award of fees, including existence of fee provision in its contract with debtor, and debtor's intransigence in underlying debt collection action had contributed to creditor's costs. Bankr.Code, 11 U.S.C.A. § 506(b).

**8. Bankruptcy**  $\S$ 2853.20(1)

Fees and expenses may be awarded to oversecured creditor as long as creditor satisfies statutory prerequisites for such an award. Bankr.Code, 11 U.S.C.A. § 506(b).

**9. Bankruptcy**  $\S$ 2853.20(3)

Federal law alone governs enforcement of attorney fee provisions in connection with oversecured claims in bankruptcy, without regard to potentially contrary state law. Bankr.Code, 11 U.S.C.A. § 506(b).

**10. Bankruptcy**  $\S$ 2853.20(4), 3784

Amount of award of attorney fees is to be determined by trial court, the role of appellate court being to review for errors of law or abuse of discretion.

**11. Bankruptcy**  $\S$ 3770

District court would not entertain, for first time on appeal, oversecured creditor's objection that it did not receive sufficient notice that debtor would be seeking Rule 9011 sanctions for misrepresentations that creditor allegedly made in connection with its fee application, where creditor did not make any such objection at time Rule 9011 issue was considered by bankruptcy court, but waited until after it had lost on Rule 9011 issue to object to lack of notice on appeal to district court. Bankr.Code, 11 U.S.C.A. § 506(b); Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

**12. Bankruptcy**  $\S$ 2131**Constitutional Law**  $\S$ 306(4)

Oversecured creditor was not denied due process in connection with one-day notice that it received, on its application for award of attorney fees as part of its oversecured claim, that debtor would be seeking Rule 9011 sanctions for misrepresentations that creditor allegedly made in connection with fee application process, where same facts underlying debtor's request for Rule 9011 sanctions also formed basis of debtor's objection to creditor's fee application, of which creditor had ample notice and ample opportunity to respond thereto. U.S.C.A. Const.Amends. 5, 14; Bankr.Code, 11 U.S.C.A. § 506(b); Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

**13. Constitutional Law**  $\S$ 251.5, 251.6

Due process requires, at bottom, notice and some opportunity to respond; precise form of procedural protection required will vary with circumstances of case. U.S.C.A. Const.Amends. 5, 14.

**14. Bankruptcy**  $\S$ 2187

Finding that Rule 9011 sanctions were warranted for oversecured creditor's inten-

tional misrepresentations or reckless misstatements, in connection with its application for award of attorney fees as part of its oversecured claim, as to its knowledge of fee arrangements between creditor and its counsel and as to existence of dual fee arrangement between creditor and counsel whereby counsel's services would be billed at lesser rate if fees were not passed on to debtor, was not abuse of bankruptcy court's discretion. Bankr.Code, 11 U.S.C.A. § 506(b); Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

#### 15. Bankruptcy ⇌2187

Statements which are intentionally false or made with reckless disregard for their truth may warrant award of Rule 9011 sanctions, regardless of whether level of falsehood in proceeding can be characterized as thoroughgoing. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 16. Bankruptcy ⇌2187

Rule 9011 sanction must be appropriate. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 17. Bankruptcy ⇌3784

In reviewing appropriateness of Rule 9011 sanction, appellate court should defer, within broad limits, to bankruptcy court's exercise of its informed discretion, yet still be careful not merely to rubber stamp the decision below. Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

#### 18. Bankruptcy ⇌2187

As long as the sanction selected is appropriate, Bankruptcy Rule 9011 places virtually no limits on judicial creativity. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 19. Bankruptcy ⇌2187

Rule 9011 sanctions serve dual purposes of deterrence and compensation. Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 20. Bankruptcy ⇌2187

Reasonable costs incurred as result of sanctionable conduct may appropriately form basis of Rule 9011 sanction. Fed. Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

#### 21. Bankruptcy ⇌2187

Award of Rule 9011 sanctions in amount of \$142,520.82, which was equivalent to attorney fees and expenses that Chapter 11 debtor incurred in opposing oversecured creditor's request for attorney fees as addition to its oversecured claim, was not abuse of bankruptcy court's discretion, following determination by court that creditor had violated its obligations under Rule 9011 by intentionally misrepresenting or reckless misstating, in connection with its application for attorney fees, that it had no dual fee arrangement with its counsel whereby counsel's services would be billed at lesser rate if fees were not passed on to debtor. Bankr.Code, 11 U.S.C.A. § 506(b); Fed.Rules Bankr.Proc. Rule 9011, 11 U.S.C.A.

#### 22. Bankruptcy ⇌2187

While bankruptcy court, in making award of Rule 9011 sanctions based on reasonable attorney fees incurred by opposing party in responding to sanctionable conduct, was not required to apply factors enumerated in bankruptcy statute governing award of professional fees, it was not an abuse of discretion for bankruptcy court to utilize these guidelines in determining the reasonableness of its sanctions award. Bankr.Code, 11 U.S.C.A. § 330; Fed.Rules Bankr.Proc.Rule 9011, 11 U.S.C.A.

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#### MEMORANDUM AND ORDER

O'TOOLE, District Judge.

The parties cross-appeal from two decisions of the United States Bankruptcy Court for the District of Massachusetts. The first decision, issued January 21, 1997, granted in part and denied in part a motion by creditor Citizens Bank of Massachusetts ("Citizens") for the allowance of

fees and expenses against debtors Bahig F. Bishay and 1095 Commonwealth Avenue Corp., of which Bishay was the sole shareholder (collectively "Bishay"). This first decision allowed Citizens attorneys' fees and expenses in the amount of \$204,936.07, but also determined that a portion of a fee arrangement between Citizens and its attorneys was unenforceable. The bankruptcy court further found that Citizens' failure to disclose fully the terms of its fee arrangement, coupled with other misrepresentations in its motion papers, warranted the imposition of sanctions pursuant to Rule 9011, Federal Rules of Bankruptcy Procedure. The second decision, issued August 6, 1997, established the amount of the Rule 9011 sanction.

Both parties have appealed from the first decision on several grounds, while Citizens objects to the second decision. For the reasons set forth below, with the exception of one minor mathematical error discussed at the end of this opinion, the bankruptcy court's decisions are AFFIRMED in their entirety.

### I. Background

In 1995, Bishay filed voluntary petitions for himself and the corporation under Chapter 11 of the United States Bankruptcy Code. At the time of the filings, Bishay owed Citizens approximately \$1.6 million. Citizens held a security interest in assets, the value of which exceeded the outstanding indebtedness. After proceedings not relevant here, Citizens filed creditor plans of reorganization in both Chapter 11 cases. The bankruptcy court confirmed the Citizens' plans on April 23, 1996.

On May 23, 1996, Citizens filed a motion pursuant to § 506(b) of the Bankruptcy Code, 11 U.S.C. § 506(b), seeking unpaid interest, attorneys' fees and costs of collection from the appellants. In support of the motion, Citizens filed the affidavit of Richard M. Barry, a Citizens' Vice President responsible for the administration of

the bank's loans to Bishay. In the affidavit, Barry swore that Citizens "incurred out-of-pocket costs of collection, including attorneys' fees," in the amount of \$274,137.59, \$262,419.40 of which were legal fees and expenses "incurred" by Citizens and paid to the law firm of Brown, Rudnick, Freed and Gesmer, P.C. ("Brown Rudnick"). Barry Aff. at 3, Ex. 1. Attached to the Barry affidavit were Brown Rudnick invoices detailing the attorney hours expended and applying the standard hourly billing rate for the attorney hours worked. *Id.*, Ex. 1.<sup>1</sup>

Bishay initially opposed the § 506(b) motion on the grounds that the requested fees were excessive and were improperly documented. However, after discovery revealed that there were two previously undisclosed and potentially applicable fee arrangements between Citizens and Brown Rudnick, Bishay filed a supplemental opposition to the § 506(b) motion, claiming that Citizens had employed a "dual billing practice" regarding the fees. Referring to the newly discovered fee agreements, Bishay asserted that Citizens had agreed to pay Brown Rudnick a "blended" rate of \$195 per hour for all attorney work on the Bishay matters, regardless of the normal (and usually higher) hourly rates Brown Rudnick attorneys would otherwise charge, with an important proviso. In the event that Bishay should ultimately be responsible to Citizens for the fees, Brown Rudnick would charge Citizens the standard, generally higher hourly attorney rates. In effect, the higher fees would only be charged if Citizens was not going to pay the fees. Bishay argued to the bankruptcy court that Citizens' failure to disclose the existence of this arrangement in its § 506(b) fee motion warranted a denial of all requested fees and expenses.

The bankruptcy court conducted a preliminary hearing on the § 506(b) motion on

1. Citizens' motion itself stated that "[t]he retention agreement between Citizens and its counsel provides that Citizens will pay

[Brown Rudnick's] normal hourly rate for all work performed." Citizens' 506(b) Mot. at 6.

July 10, 1996. Brown Rudnick attorney Steven J. Mastrovich, the lead attorney for an attempted pre-bankruptcy workout and the one who personally negotiated the Citizens/Brown Rudnick fee arrangements, at first testified that a blended billing arrangement did exist, but that it was not applicable to the Bishay matters. When he was confronted with evidence that tended to contradict this testimony, however, he disavowed knowledge about whether the fee arrangement applied. Following Mastrovich's testimony, the bankruptcy court determined that a full evidentiary hearing was necessary.

Just before the evidentiary hearing began, Bishay raised the argument that Citizens' and Brown Rudnick's deception warranted the imposition of sanctions under Fed. R. Bankr.P. 9011(a), and that issue also was considered by the court at the hearing. Citizens did not object that it had received insufficient notice of the motion for Rule 9011 sanctions.

Following the hearing, Chief Judge Kenner issued a comprehensive opinion in which she found that "both by what they actually stated and by what they omitted, the Citizens' [506(b) fee] motion and Barry's supporting affidavit misrepresented the underlying agreement between Citizens and [Brown Rudnick] and the extent of Citizens' liability thereunder." Op., Jan. 21, 1997, at 14. Specifically, the bankruptcy court determined that the fee arrangement was "by force of logic, unenforceable" against Bishay unless the lower blended rate of \$195 per hour was utilized. *Id.* at 11. Moreover, the court found that Citizens' failure to disclose the arrangement rendered Barry's affirmative representations that it had retained Brown Rudnick at the normal rates to be "false and quite misleading." *Id.* at 13. The court concluded that, despite his assertions in his affidavit to the contrary, Barry did not have personal knowledge of the invoices, fees incurred, or governing fee agreement between the parties. Further, since Citizens did not actually incur fees in the

amount stated, and Barry did not properly check the affidavit to ensure that it contained accurate fee information, the court found that the statements pertaining to the fees incurred were made in reckless disregard for their truth.

The court also found Mastrovich's testimony "not credible." *Id.* at 21 n. 14. Chief Judge Kenner determined that Mastrovich, as the billing attorney, knew "without question" that the blended fee arrangement was applicable to the Bishay workouts, but had "deliberately concealed" its applicability from his fellow attorney, William Baldiga, and ultimately from Bishay and the court. *Id.* at 21. The bankruptcy court found Baldiga's assertions that he was unaware of the existence of the fee arrangement to be plausible, despite the fact that he had access to documents which tended to prove otherwise. Lastly, the court concluded that Citizens failed properly to "research and accurately represent to the Court" the extent of the bank's liability for attorneys' fees. *Id.* at 23-24.

As a result, the court imposed a sanction against Citizens under the authority of Bankruptcy Rule 9011 in an amount equal to the reasonable attorneys' fees and expenses that Bishay incurred in bringing to light the dual-rate agreement between Citizens and Brown Rudnick. Although the court made explicit findings that there had been misrepresentations, it concluded that a denial of all fees would be unwarranted, due in large part to what it assessed was the candid testimony of Baldiga and the "intransigence" of Bishay in the underlying debt collection litigation. *Id.* at 28-29.

In its second decision, issued August 6, 1997, the court quantified the reasonable attorneys' fees and expenses incurred, finding after full briefing and argument that the appropriate amount of the sanction should be \$142,520.82, which was to be set off against the attorneys' fees calculated at the blended rate.

**II. Standard of Review**

[1,2] A district court reviewing a bankruptcy court's decision applies "the clearly erroneous standard to findings of fact and de novo review to conclusions of law." *In re Winthrop Old Farm Nurseries*, 50 F.3d 72, 73 (1st Cir.1995) (internal quotations omitted) (quoting *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir.1994)). "A finding of fact is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been made." *Mitchell v. United States*, 141 F.3d 8, 17 (1st Cir. 1998).

[3-5] All aspects of the bankruptcy court's Rule 9011 determination are subject to an abuse of discretion standard. *See In re Coones Ranch*, 7 F.3d 740, 743 (8th Cir.1993), *relying upon Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (reviewing Rule 11 determinations); *Navarro-Ayala v. Nunez*, 968 F.2d 1421, 1425 (1st Cir.1992) (applying an abuse of discretion standard to a Rule 11 determination). For an appellate court reviewing factual findings, the abuse of discretion standard is "indistinguishable" from the clearly erroneous standard. *Cooter & Gell*, 496 U.S. at 401, 110 S.Ct. 2447. Since "the decision about whether a litigant's (or lawyer's) actions merit the imposition of sanctions is heavily dependent upon the district court's firsthand knowledge of the case and its nuances, appellate review is deferential." *Navarro-Ayala*, 968 F.2d at 1425.

2. Section 506(b) provides: "To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose." 11 U.S.C. § 506(b).

3. Most of the cases relied upon by the appellants deal with 11 U.S.C. §§ 327-30. A bankrupt estate's trustee may appoint attorneys for

**III. Analysis****A. Bishay's Appeal: The Allowance of the § 506(b) Motion**

[6] Section 506(b) of the Bankruptcy Code<sup>2</sup> allows a creditor to recover attorneys' fees and costs from a debtor if: (1) the creditor has an allowed secured claim; (2) the creditor is oversecured; (3) the underlying agreement between the creditor and the debtor provides for the payment of fees and costs; and (4) the fees and costs requested are reasonable. *See, e.g., In re West Electronics, Inc.*, 158 B.R. 37, 40 (Bankr.D.N.J.1993); *In re Wire Cloth Prods.*, 130 B.R. 798, 814 (Bankr. N.D.Ill.1991). The bankruptcy court implicitly found that Citizens had satisfied these prerequisites, and allowed in part Citizens' request for fees.

[7,8] Bishay first disputes the allowance of *any* fees, arguing that both bankruptcy and nonbankruptcy law require a full denial of the request. Both contentions are incorrect. With respect to bankruptcy law, Bishay points to nothing in the Bankruptcy Code that mandates the complete denial of fees in these circumstances. The bankruptcy cases Bishay cites are also unpersuasive, most of them dealing with Bankruptcy Code provisions unrelated to § 506(b). Fees and expenses may be awarded under § 506(b) so long as the moving party satisfies the statutory prerequisites. *See In re Kord Enters. II*, 139 F.3d 684, 688 (9th Cir.1998) ("An oversecured creditor need only satisfy the explicit requirements of § 506(b) to obtain attorneys' fees.")<sup>3</sup>

the purposes of legal assistance, provided that the attorneys do not hold interests adverse to those of the estate. *See* 11 U.S.C. § 327(a). Section 330 vests a bankruptcy court with the discretion to award reasonable compensation to such attorneys for the services they render. *See* 11 U.S.C. § 330(a)(1)(A). Pursuant to § 328, however, the bankruptcy court may deny all such compensation if the attorney is found to be "not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which [the attorney] is employed." 11

[9] The assertion that state law requires a complete fee denial of a fee request under § 506(b) is likewise without merit. The weight of authority is that only federal law governs the enforcement of attorneys' fees provisions in connection with secured claims in bankruptcy, without regard to potentially contrary state law. See, e.g., *In re Kord Enters. II*, 139 F.3d at 688–89 (finding that an “analysis of § 506(b) and relevant case law . . . confirms that § 506(b) preempts state law”); *In re Schriock Constr.*, 104 F.3d 200, 201–02 (8th Cir.1997) (concluding that “the plain language of section 506(b) expressly provides for the award of attorney’s fees in bankruptcy proceedings, without reference to contrary state law”); *In re Hudson Shipbuilders*, 794 F.2d 1051, 1056 (5th Cir. 1986) (holding that “Congress intended that federal law should govern the enforcement of attorneys’ fees provisions, notwithstanding contrary state law”); *Unsecured Creditors’ Comm. v. Walter E. Heller & Co. Southeast*, 768 F.2d 580, 585 (4th Cir. 1985) (allowing for the enforcement of § 506(b) fee agreements notwithstanding contrary state law); but see *In re Morse Tool*, 87 B.R. 745, 748–49 (Bankr.D.Mass. 1988) (applying state law to a § 506(b) request for attorneys’ fees). In any event, the record indicates that Bishay failed to raise in the bankruptcy court the only even remotely viable state law argument it raises on this appeal—willful breach of contract by Citizens.<sup>4</sup> “If any principle is settled in this circuit, it is that, absent the most extraordinary circumstances, legal theories not raised squarely in the lower court cannot be broached for the first time

U.S.C. § 328(c). The First Circuit has chosen not to adopt a “per se or brightline rule invariably requiring denial of all compensation under section 328(c),” instead leaving the matter of fees to the discretion of the bankruptcy court. *Rome v. Braunstein*, 19 F.3d 54, 62 (1st Cir.1994). Thus, even if the statutory sections cited by Bishay were applicable, there would be no requirement of a full denial of requested fees.

4. Bishay’s other arguments—that agency and consumer protection laws mandate a full de-

on appeal.” *Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir.1992).

[10] Bishay also claims that certain allowed § 506(b) fees were not “reasonable” under federal law.<sup>5</sup> It is bedrock that “the amount of an award of attorneys’ fees is to be determined by the [trial] court,” the role of an appellate court being “to review for errors of law or abuse of discretion.” *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94, 102 (1st Cir.1988). The bankruptcy court, much more familiar with the facts and circumstances of the underlying fee request and dispute, extensively addressed each of the reasonableness issues currently raised by Bishay. There is no evident abuse of discretion by the bankruptcy court in its analyses or conclusions regarding the reasonableness of the awarded fees, and accordingly no basis for disturbing those findings.

#### B. Citizens’ Appeal—The Rule 9011 Sanction

At the time of the January 21, 1997, decision, Fed. R. Bankr.P. 9011 provided that an attorney’s or party’s signature on a bankruptcy court paper “constitutes a certificate that . . . to the best of the attorney’s or party’s knowledge, information, and belief formed after reasonable inquiry it is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” Fed. R. Bankr.P. 9011(a) (prior to 1997 amendment).<sup>6</sup> The rule fur-

nial of any fee—are unsupported and meritless.

5. Specifically, they argue that the bankruptcy court should have stricken all of Mastrovich’s fees as a result of both his intentional deception and his allegedly deficient timekeeping records, and also that it should have denied an \$11,175.00 appraisal fee.

6. In 1997, after the date of the proceedings below, Congress amended Rule 9011 to conform to the 1993 changes made to Fed. R.Civ.P. 11. See Fed. R. Bankr.P. 9011 advi-

ther provided that if any document were signed and submitted in violation of the rule, “the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney’s fee.” *Id.*

1. *The Appropriateness of the Rule 9011 Sanction*

Chief Judge Kenner focused on two persons who had signed papers submitted to the court: Barry, who signed his affidavit as a “representative of Citizens,” and Brown Rudnick attorney Kelly McEnaney, who signed the § 506(b) fee motion. *Op.*, Jan. 21, 1997, at 27. Having found that both documents misrepresented the terms of the Citizens/Brown Rudnick fee agreement, and further that Barry had misrepresented “the extent of his knowledge of the agreement and of the fees incurred,” Chief Judge Kenner concluded that “both documents were signed and filed in violation of the rule,” requiring the imposition of an appropriate sanction. *Id.*

[11] Citizens’ first objection is it was denied due process by the manner in which the bankruptcy court entertained the sanction issue because Citizens had not received “fair notice” of the motion and a “reasonable opportunity to contest and explain” the alleged Rule 9011 violations. Citizens learned that Bishay intended to seek sanctions on October 23, 1996, the day before the bankruptcy court’s evidentiary hearing began. The evidentiary hearing concluded on October 29, 1996. Citizens did not make any objection at the time that it had been given inadequate notice or an inadequate opportunity to present its side of the issue. These objections were made only after Bishay prevailed on the motion. The objection will

sory committee’s notes. The current Rule 9011 is therefore virtually identical to the

not be entertained for the first time on appeal. *See Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 397 (1st Cir.1990) (rejecting a Rule 11 due process argument for a party’s failure to raise it below); *Superline Transp. Co.*, 953 F.2d at 21.

[12, 13] Moreover, even if timely objection had been made, Citizens was not denied due process. The requirements of due process in this context require “[a]t bottom, . . . notice and some opportunity to respond.” *Simmerman v. Corino*, 27 F.3d 58, 64 (3d Cir.1994). “The precise form of procedural protection required will, of course, vary with the circumstances of the case.” *Id.* Here, Citizens knew well in advance of the hearing that the primary issue under consideration was its alleged improper conduct in its fee motion submission. Even though it may have learned only shortly before the hearing that Bishay sought sanctions, Citizens had ample notice of the issues that formed the basis for the request. The bankruptcy court conducted a two-day evidentiary hearing that allowed Citizens more than ample opportunity to contest not only the basis for the sanction, but also the appropriateness of the court’s imposing one.

[14, 15] Citizens next argues that a sanction is not called for under Rule 9011 unless the signed submissions at issue were found to be “devoid of any factual foundation.” Citizens’ Br., May 12, 1997, at 25. It is not clear what Citizens means by this. If by “devoid of any factual foundation” it means only that for a submission to be sanctionable, the court must find that it contained statements that were factually false, the argument is both unexceptionable and irrelevant. The bankruptcy court found that the submissions contained false statements of fact, and its findings were, on the record, not clearly erroneous. As a matter of fact, they were rather clearly correct. If, on the other hand, Citizens

current Rule 11.

means to argue that a little falsity is not enough and that to warrant sanctions the falsehood must be thoroughgoing, the argument is preposterous. A primary purpose of the Barry affidavit was to inform the bankruptcy court about the fees Citizens had incurred in working out the Bishay loans. The bankruptcy court determined that Barry had not given it accurate information. It found that he made his statements in reckless disregard for their truth, and that he had intentionally misrepresented his knowledge of the applicable fee invoices. The court further found that the intentional nondisclosure of the fee agreement was the equivalent of fraud.<sup>7</sup> On these factual findings, the bankruptcy court was amply justified in concluding that sanctions were appropriate under Rule 9011. See *Cooter & Gell*, 496 U.S. at 393, 110 S.Ct. 2447.<sup>8</sup>

Citizens also contends, unpersuasively, that the factual findings of the bankruptcy court were clearly erroneous. There is more than enough evidence in the record to support the factual conclusions, especially as they pertain to Barry and Mastrovich. This Court is not left with a “firm conviction that a mistake has been made,” see *Mitchell*, 141 F.3d at 17, but rather quite the contrary. Chief Judge Kenner had the opportunity to observe firsthand the courtroom testimony and demeanor of the witnesses. She was closely familiar with the facts and issues of the case. Appropriate deference to her perceptions combined with a review of the appellate record leaves this Court satisfied that her findings cannot be held to have been clearly erroneous. No sufficient reason exists to overturn the bankruptcy court’s decision

7. Chief Judge Kenner described Citizens’ efforts as “an attempt to couch in legitimacy what is in essence the illegitimate practice of billing the borrower for more than the lender is liable. Where this is done without disclosure of the underlying agreement, and the nondisclosure is intentional, I cannot distinguish it from fraud.” Op., Jan. 21, 1997, at 14.

to impose a sanction on Citizens pursuant to Rule 9011.

## 2. *The Choice of Sanction*

[16–18] A sanction imposed under Rule 9011 must be “appropriate.” Fed. R. Bankr.P. 9011(a). In reviewing the appropriateness of a sanction, an appellate court should “defer, within broad limits, to the [lower] court’s exercise of its informed discretion,” yet still “be careful not merely to rubber stamp” the decision below. *Navarro–Ayala*, 968 F.2d at 1426 (internal quotations omitted) (quoting *Velazquez–Rivera v. Sea–Land Service, Inc.*, 920 F.2d 1072, 1075 (1st Cir.1990)). “So long as the sanction selected is ‘appropriate,’ [the rules] place virtually no limits on judicial creativity.” *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 394 (1st Cir.1990).

[19, 20] As with sanctions under Fed. R.Civ.P. 11, Rule 9011 sanctions “serve dual purposes of deterrence and compensation.” See *Anderson*, 900 F.2d at 394; see also *Navarro–Ayala*, 968 F.2d at 1426 (“The imposition of a Rule 11 sanction usually serves two main purposes: deterrence and compensation.”). With respect to the goal of compensation, the First Circuit has stated:

[The sanction] . . . should not compensate the opposing party, or even a court-appointed master, for any and all costs and expenses incurred in response to the sanctionable conduct. Rather, compensation, as such, *should be awarded only for the fair value of response costs reasonably incurred.*

*Navarro–Ayala*, 968 F.2d at 1427 (emphasis added).

Thus, “reasonable” costs incurred as a result of the sanctionable conduct may ap-

8. Citizens’ challenges pertaining to other alleged legal errors are likewise unavailing. It is true that the bankruptcy court took into account the conduct of persons who did not themselves sign any filed papers, but if that was an error it was harmless. The court’s findings regarding Barry’s affidavit are more than sufficient to support the imposition of Rule 9011 sanctions against Citizens.

propriately form the basis of a Rule 9011 sanction.<sup>9</sup>

[21] Here, the bankruptcy court imposed a sanction of \$142,520.82, an amount equal to the attorneys' fees and expenses Bishay incurred in opposing Citizens' § 506(b) fee motion. Op., Aug. 6, 1997, at 13. Chief Judge Kenner concluded that the "misrepresentations, the nature of the underlying agreement, and the preliminary evidence on the matter created an appearance of wrongdoing that fully justified [appellant's] discovery efforts and the hearing on this complex of issues." 204 B.R. 284, 300 (1997). She expressly considered Citizens' specific, detailed challenges<sup>10</sup> to the attorney hours expended, concluding that Bishay's voluntary reduction of its request to meet those objections was more than adequate to adjust for any overstatement in the original amount claimed. In ascertaining what was "reasonable," Judge Kenner looked to the time spent on the services, whether the services, when rendered, were beneficial towards the completion of the case, whether the time spent was commensurate with the importance of the task, and whether the services were reasonably likely to benefit the estate. Application of these guidelines led her to conclude that "the fees requested [were] neither excessive nor unnecessary," and that Bishay's "strategy and efforts were proportional to the importance and difficulty of this matter." Op., Aug. 6, 1997, at 13. In light of this detailed analysis and the deference due to the bankrupt-

cy court's factual determinations, this Court cannot say that the sanction imposed was an abuse of discretion.

[22] A few of minor points remain. Citizens objects that the bankruptcy court looked to 11 U.S.C. § 330 to aid in determining what amount could be considered reasonable for attorneys' fees. Section 330 lists factors to be used in determining the reasonableness of fees in a different context.<sup>11</sup> Thus, while the bankruptcy court was not required to apply the factors enumerated in § 330, it was not an abuse of discretion to utilize those guidelines in determining the reasonableness of the sanctions in this context.

Citizens also argues that the bankruptcy court failed to consider whether Bishay properly mitigated the fees it had to pay to contest the § 506(b) motion. However, the August 6, 1997, decision setting the amount of the sanctions explicitly addressed the appropriateness of the legal work undertaken and found the legal efforts to be necessary and not excessive. Further, as Bishay has correctly pointed out, any obligation to mitigate the amount of the fees would not require Bishay to overlook or minimize Citizens' fraudulent conduct. Simply because Bishay vigorously contested what Citizens claimed does not mean that Bishay's incurrence of fees was excessive. Bishay was fully justified in its efforts to expose and challenge Citizens' deception. This Court sees no abuse

9. This conclusion derives directly from Rule 9011 itself, which states that an appropriate sanction "may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee." Fed. R. Bankr.P. 9011(a) (prior to 1997 amendment); *see also Silva v. Witschen*, 19 F.3d 725, 731 n. 11 (1st Cir. 1994) (finding the argument that attorneys' fees are not allowable under Rule 11 to be in direct contradiction with the rule). It also dispenses with Citizens' least severe sanction and fee-shifting arguments.

10. Such challenges included assertions of "lumping," duplication of efforts, double bill-

ing for intraoffice conferences, and charging for noncompensable tasks.

11. As mentioned, § 330 vests a bankruptcy court with discretion to provide "reasonable compensation" to attorneys appointed by a trustee on behalf of a bankrupt's estate. *See* 11 U.S.C. § 330(a)(1)(A); *see also supra* note 3. Section 330(a)(3) lists factors that the bankruptcy judge is to look to in ascertaining the reasonableness of the compensation. After Judge Kenner determined that the appropriate sanction would be to order Citizens to pay a portion Bishay's attorneys' fees incurred in litigating the § 506(b) motion, she used these factors to ensure the "reasonableness" of the fees requested.

of discretion in the bankruptcy court's analyses.<sup>12</sup>

There remains one final matter to resolve. Citizens points out a mathematical error that the bankruptcy court apparently made in calculating the proper value of the services provided by Brown Rudnick for Citizens. Bishay disputes neither the fact nor the amount of the computational error. Accordingly, \$5,612.50 will be added to the amount allowed to Citizens for attorneys' fees and expenses, bringing the total allowed to \$210,548.57. The amount of the sanction imposed, \$142,520.82, will be subtracted from that amount. In all other respects, the decisions of the bankruptcy court are AFFIRMED.

It is SO ORDERED.



**In re Marcelino BARBOSA and  
Mariana Barbosa, Debtors.**

**Bankruptcy No. 96-17709-JNF.**

United States Bankruptcy Court,  
D. Massachusetts.

July 30, 1999.

Chapter 13 trustee moved to modify debtors' confirmed plan to compel debtors to increase distribution to unsecured creditors following their sale of investment property at price significantly in excess of value placed on it in bankruptcy case. The Bankruptcy Court, Joan N. Feeney, J., held that: (1) Chapter 13 plan may be

12. Citizens also argues that the bankruptcy court erroneously justified the Rule 9011 sanction on Bishay's pursuit of "punitive damages." Citizens misapprehends what the court did. Bishay argued that the gravity of Citizens' misrepresentations warranted a full denial of the § 506(b) motion as an appropriate sanction. The court rejected that argu-

modified without threshold showing of change in financial circumstances; (2) 60-month plan under which debtors agreed to pay sum of \$1,486.00 per month to trustee for period of 59 months with final balloon payment of \$6,686.76 in 60th month, with resulting dividend of 10% to unsecured creditors, was not a "percentage plan," but a "pot plan"; (3) modified plan had to be proposed in "good faith" and to satisfy "best interests" test, as determined on its effective date; and (4) any modification of debtors' plan, in order to permit debtors to reduce time for payment while retaining sales proceeds attributable to appreciation of their property, would not satisfy "best interests" or "liquidation value" test.

Trustee's motion granted.

### 1. Bankruptcy ⇐3713

Chapter 13 plan may be modified without threshold showing of change in financial circumstances. Bankr.Code, 11 U.S.C.A. § 1329.

### 2. Bankruptcy ⇐3713

While Chapter 13 plan may be modified without threshold showing of change in financial circumstances, motions to modify cannot be used to circumvent the appeals process for those creditors who have failed to object to confirmation, or whose objections to confirmation have been overruled. Bankr.Code, 11 U.S.C.A. § 1329.

### 3. Bankruptcy ⇐3713

As practical matter, parties requesting modifications of Chapter 13 plans must advance legitimate reason for doing so, and must strictly conform to three limited circumstances for which modification is authorized. Bankr.Code, 11 U.S.C.A. § 1329.

ment but also reckoned that, in order to appreciate the "reasonableness" of the fees sought by Bishay as a sanction, it would be appropriate to factor in not only the actual benefit produced, but also what further relief—not ultimately granted—that Bishay was justified in pursuing. This judgment was not an abuse of discretion.

§ 2255's requirements for successive petitions. The inability to meet these requirements, however, does not render § 2255 inadequate or ineffective. *Jeffers*, 253 F.3d at 829. Therefore, as he cannot make use of the savings clause, the district court properly construed Henderson's petition as a § 2255 motion. *See Tolliver v. Dobre*, 211 F.3d 876, 877-78 (5th Cir.2000) (per curiam).

Because this petition represents a successive § 2255 motion, Henderson must obtain certification or leave of this court to proceed with a successive petition pursuant to §§ 2255 and 2244. He does not even contend that he meets the requirements that would allow a successive petition. Accordingly, we affirm the district court's transfer of this case to our court for certification, and because we deny leave to file a successive petition, Henderson's petition is DENIED.



**In The Matter Of: FIRST CITY  
BANCORPORATION OF  
TEXAS INC., Debtor.**

**Jerry Krim; Harold L. Harris, Individually and as Trustee of Mazel Inc. Profit Sharing Plan; Group of Securities Litigation Claimants; Harvey Greenfield, Appellants,**

v.

**First City Bancorporation of  
Texas Inc., Appellee.**

**No. 01-10491.**

United States Court of Appeals,  
Fifth Circuit.

March 5, 2002.

Order was entered by the United States Bankruptcy Court for the Northern

District of Texas imposing sanctions on attorney for his conduct before court. Attorney appealed. The District Court, Joe Kendall, J., 1997 WL 53115, remanded for further consideration in light of intervening Fifth Circuit precedent. On remand, the Bankruptcy Court again imposed sanctions, and attorney again appealed. The District Court, Sam A. Lindsay, J., 270 B.R. 807, affirmed. Attorney appealed. The Court of Appeals held that bankruptcy court did not abuse its discretion in determining that obnoxious and abusive behavior of attorney warranted \$25,000 sanction.

Affirmed.

**1. Bankruptcy** ⇄3782, 3786

Federal court of appeals reviews the bankruptcy court's findings of fact under the clearly erroneous standard and decides issues of law de novo.

**2. Bankruptcy** ⇄2187

Bankruptcy court's imposition of sanctions on an attorney is discretionary.

**3. Bankruptcy** ⇄3784

Federal court of appeals reviews the exercise of bankruptcy court's power to impose sanctions on an attorney for abuse of discretion.

**4. Bankruptcy** ⇄2187

Bankruptcy court abuses its discretion in imposing sanctions on an attorney when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

**5. Bankruptcy** ⇄2187

Bankruptcy court should exercise restraint when considering using its inherent power to impose sanctions on attorneys.

**6. Bankruptcy** ¶2187

Bankruptcy court did not abuse its discretion in determining that obnoxious and abusive behavior of attorney in referring to opposing counsel as “incompetent,” or as “underling” who graduated from 29th-tier law school, warranted \$25,000 sanction; court repeatedly urged attorney not to engage in personal attacks, but attorney did not respond to either oral or written warnings by the court.

**7. Bankruptcy** ¶2187

Sanctions imposed by the bankruptcy court must be chosen to employ the least possible power to the end proposed; in other words, the court must use the least restrictive sanction necessary to deter the inappropriate behavior.

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Harvey Kay Greenfield (argued), The Law Firm of Harvey Greenfield, New York City, for Appellants.

Kenneth Edwin Carroll (argued), Stanton Todd Barton, Carrington, Coleman, Sloman & Blumenthal, Dallas, TX, for Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, SMITH and BENAVIDES, Circuit Judges.

**PER CURIAM:**

After listening to the oral arguments of the parties and closely examining the record, we conclude that the sanctioned lawyer in this case, Harvey Greenfield, was appropriately sanctioned by the bankruptcy court. His attitude and remarks toward opposing attorneys, opposing parties, and the bankruptcy court were—to understate his conduct—obnoxious. Although incivility in and of itself is call for concern, what is most disconcerting here is the rationale Greenfield gives for his behavior.

Greenfield asserts that his deplorable and wholly unprofessional conduct helps him recover more money for his clients. Unremorsefully and brazenly, Greenfield contends that his egregious behavior serves him well in settlement negotiations and is therefore appropriate. Because we find that the bankruptcy court did not abuse its discretion when it issued sanctions in this case, we affirm the district court’s judgment affirming the bankruptcy court’s sanction order.

**I**

In 1990, Jerry Krim, Harold L. Harris, and several other claimants filed a class action lawsuit against First City Bancorporation of Texas Inc. (“First City”), its officers and directors, and Donaldson, Lufkin & Jenrette Securities Corporation. Greenfield represented the plaintiff class. In 1992, the parties reached a \$20 million dollar settlement. The settlement, however, was set aside when federal regulators seized control of First City’s assets. First City then filed a bankruptcy petition under Chapter 11. Greenfield pursued the claims of the plaintiff class in bankruptcy, reaching a settlement agreement with First City for over \$10 million in cash and stock. First City incorporated this settlement agreement into its Joint Plan for Reorganization.

First City then filed a motion to sanction Greenfield, based in part on his conduct during a July 13, 1995 deposition when Greenfield deposed A. Robert Abboud, a director of First City and a claimant in bankruptcy for indemnification of legal expenses. Abboud was represented by Hyman Schaffer.

One day before the deposition, the bankruptcy judge conducted a telephone conference with Schaffer, Greenfield, and Kenneth Carroll (counsel for First City Liquidating Trust). During this hearing,

the bankruptcy court directed the parties to restrict the deposition to issues pertinent to Abboud's indemnification claim. The bankruptcy court also denied Greenfield's motion for leave to refer to a confidential report compiled by Baker & Botts for the audit committee at First City. Finally, the bankruptcy court urged Greenfield not to engage in personal attacks during the deposition.

At the deposition, in apparent defiance of the bankruptcy court's order, Greenfield used the Baker & Botts report in the questioning of Abboud. Also during the deposition, the parties continued to disagree about the proper scope of the deposition inquiry. So, they again went to bankruptcy court to clarify the exact issues to be covered at the deposition. At this second telephone hearing, the bankruptcy court once more cautioned Greenfield to refrain from personal attacks.

Despite these multiple warnings, during the deposition Greenfield stated that "I am going to have Mr. Abboud indicted." He also accused Schaffer of having been fired from Sullivan and Cromwell.

Greenfield's obnoxious behavior, however, was not limited to Abboud's deposition. Some of the other statements made by Greenfield during the bankruptcy proceeding—noted by both the district court and the bankruptcy court—are the following:

- He characterized other attorneys, including an Assistant United States Attorney, as (1) a "stooge"; (2) a "puppet"; (3) a "weak pussyfooting 'deadhead'" who "had been 'dead' mentally for ten years"; (4) "various incompetents"; (5) "inept"; (6) "clunks"; (7) "falling all over themselves, and wasting endless hours"; (8) "a bunch of starving slob"; and (6) an "underling who graduated from a 29th-tier law school."
- He called the chairman of First City a "hayseed" and a "washed-up has been,"

and he also called other First City directors "scoundrels."

- He referred to one law firm, Carrington, Coleman, Sloman & Blumenthal, L.L.P. as "stooges" of another law firm, Vinson & Elkins, L.L.P.
- He referred to the work of other attorneys as "garbage" that demonstrated "legal incompetence" while involving "ludicrous additional time and expense."
- He asserted that Vinson & Elkins was using First City as a "private piggy-bank."
- He described an executive compensation plan approved by the bankruptcy court as a "bribe."

The bankruptcy court found that Greenfield's "egregious, obnoxious, and insulting behavior . . . constituted an unwarranted imposition upon and an affront to [the bankruptcy court] and the parties and practitioners who have appeared in this bankruptcy that should not have to be endured in the future." Accordingly, the bankruptcy court imposed a monetary sanction of \$22,500 and barred Greenfield from practicing in the bankruptcy courts of the Northern District of Texas unless he first obtained written permission from the court.

Greenfield appealed the sanction order to the district court. Meanwhile, in an unrelated appeal that involved sanctions against Greenfield for not conducting a reasonable inquiry into the facts before filing a pleading, we reversed the sanctions. *Krim v. BancTexas Group, Inc.*, 99 F.3d 775 (5th Cir.1996). In the light of this decision, the district court remanded the case to the bankruptcy court for reconsideration.

On remand, the bankruptcy court removed the sanction that barred Greenfield from practicing in the Northern District's bankruptcy courts but maintained the

monetary penalty. In addition, the court increased the penalty by \$2,500 “in light of the other findings and conclusions and because Mr. Greenfield filed a motion seeking to have this Court lift all sanctions against him . . . and therefore caused counsel for First City Liquidating Trust, A. Robert Abboud, and Mr. Schaffer to devote time in appearing and responding to that motion . . . .”

Greenfield appealed to the district court, which affirmed. Greenfield now appeals the district court’s decision.

## II

[1–5] We review the bankruptcy court’s findings of fact under the clearly erroneous standard and decide issues of law de novo. *Henderson v. Belknap (In re Henderson)*, 18 F.3d 1305, 1307 (5th Cir. 1994), cert. denied, 513 U.S. 1014, 115 S.Ct. 573, 130 L.Ed.2d 490 (1994). The imposition of sanctions is discretionary—thus, we review the exercise of this power for abuse of discretion. *Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 613 (5th Cir.1997). “A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Chaves v. M/V Medina Star*, 47 F.3d 153, 156 (5th Cir.1995). A court, however, should exercise restraint when considering using its inherent power to impose sanctions. *Id.*

[6] In the instant case, the bankruptcy court assessed sanctions pursuant to (1) Rule 9011 of the Federal Bankruptcy Rules of Procedure and (2) its inherent authority to police practitioners before it.

Greenfield does not dispute the factual basis of the bankruptcy court’s sanction order. He thus concedes that he made the myriad rude and insulting comments outlined above. Greenfield defends his comments in two ways. First, he argues that the statements he made were, for the most part, correct. We find this argument ut-

terly meritless. Greenfield was never engaged in stating plain facts—he was engaged in hurling gratuitous and hyperbolic insults. Second, Greenfield argues that the actions of both the court and the opposing attorneys caused his abusive conduct. Obviously, any error on the part of the court or motive on the part of opposing attorneys in filing the sanction motion did not give Greenfield carte blanche to launch personal attacks and to defy the court’s directive to cease his wholly unprofessional conduct.

[7] The only cognizable argument Greenfield makes is that the sanction imposed was unduly harsh. Sanctions must be chosen to employ “the least possible power to the end proposed.” *Spallone v. United States*, 493 U.S. 265, 280, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990)(quoting *Anderson v. Dunn*, 6 Wheat. 204, 231, 5 L.Ed. 242 (1821)). In other words, the sanctioning court must use the least restrictive sanction necessary to deter the inappropriate behavior. Here, the bankruptcy court repeatedly urged Greenfield not to engage in personal attacks. He did not respond to either the oral or the written warnings of the bankruptcy court. We therefore hold that the bankruptcy court did not abuse its discretion by imposing a sanction of \$25,000. Accordingly, the district court judgment affirming the bankruptcy court is

AFFIRMED.

