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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	NC-10-1297-PaJuH
)		
KAREN V. KAYNE,)	Bk. No.	09-12470
)		
Debtor.)		
_____)		
GREGORY B. ORTON,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
TIMOTHY W. HOFFMAN, Chapter 7)		
Trustee,)		
)		
Appellee.)		
_____)		

Argued and submitted on June 16, 2011
at San Francisco, California

Filed - July 1, 2011

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Alan Jaroslovsky, Chief Bankruptcy Judge, Presiding

Appearances: Gregory B. Orton argued pro se. Jean Barnier of
MacConaghy & Barnier, PLC, argued for appellee.

Before: PAPPAS, JURY and HOLLOWELL, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

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3 Gregory B. Orton ("Orton"), attorney for chapter 7¹ debtor
4 Karen V. Kayne ("Van Kayne")², appeals the order of the bankruptcy
5 court imposing monetary sanctions of \$20,000 on him pursuant to
6 Rule 9011 and § 707(b)(4)(D). Because Orton knowingly failed to
7 exercise due diligence as a debtor's attorney in this case, we
8 AFFIRM.

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FACTS

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On August 3, 2009, Van Kayne filed a petition for relief under chapter 7, along with the required Schedules and Statement of Financial Affairs ("SOFA"). The petition was "electronically" signed by Orton as her attorney: "/s/ Gregory B. Orton." Directly below Orton's signature, the following certification appears: "In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect."

Paragraph 4 of Van Kayne's SOFA discloses that, at the time of her bankruptcy filing, she was a party to a lawsuit, Van Kayne

¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

² Debtor's bankruptcy petition and the bankruptcy docket indicate that her name is "Karen V. Kayne." Appellant's notice of appeal, the state court lawsuit and many statements in the transcripts refer to debtor's last name as "Van Kayne." For ease of reference, the Panel uses "Van Kayne" in this decision.

1 v. Santa Rosa Executive Ctr., pending in the Sonoma County
2 Superior Court. The nature of that proceeding is described as an
3 "Action on promissory note" (the "Note"). There is no other
4 information about this action in the SOFA. In addition, no
5 potential recovery from the action was listed in Debtor's schedule
6 B, and no payments from the Note were listed in Debtor's income on
7 schedule I.

8 Van Kayne and Orton attended the § 341 meeting of creditors
9 on September 3, 2009, at which Timothy W. Hoffman, the chapter 7
10 trustee ("Trustee"), questioned Van Kayne about the lawsuit and
11 Note. Regarding the Note, Trustee asked Van Kayne, "Is that
12 listed in your Schedule of Assets?" § 341 Hr'g Tr. 7:24-25 (Sept.
13 3, 2009). Before Van Kayne could reply, Orton interjected, "No, I
14 don't think it is, because I was under the impression that it is
15 essentially uncollectible." Id. at 8:1-3. Trustee continued his
16 questioning of Van Kayne:

17 TRUSTEE: When was the last time you received a payment
18 on the Note?

19 VAN KAYNE: He did make a payment last month.

20 TRUSTEE: And you say you're getting a thousand what a
21 month?

22 VAN KAYNE: 1,225 a month.

23 TRUSTEE: And, according to your calculations, if he pays
24 you regularly through December, it'll all be satisfied
25 in full?

26 VAN KAYNE: Yes, he's - he's a little bit behind, but I
27 think he will catch up.

28 TRUSTEE: Well, how much is he going to have to pay [in
December] to pay this thing off? . . .

VAN KAYNE: I think it's about 7,000.

TRUSTEE: I'll leave it to you whether you want to amend

1 the Schedules, but it sounds like an asset to me.

2 Id. at 9:3-23.

3 Orton told Trustee that he was surprised that payments were
4 being made on the Note. Id. at 10:2. Trustee then observed that
5 the \$7,000 balance supposedly due on the Note would likely be
6 exempt under the California wildcard exemption if claimed and left
7 it to Orton and Van Kayne's discretion whether to amend the
8 schedules to list and exempt the payments on the Note. Id. at
9 10:9-12.

10 Van Kayne and Orton never amended any of the schedules.
11 Trustee filed a report on September 9, 2009, stating that the
12 bankruptcy case had no assets to administer. Van Kayne was
13 granted a discharge, and the bankruptcy case was closed, on
14 December 7, 2009.

15 A month later, Trustee was contacted by an attorney for the
16 maker of the Note, informing him that the true payoff of the Note
17 due in December was \$61,250. Acting on this information, the
18 United States Trustee moved to reopen the case, supporting the
19 motion with the declaration of Trustee that Van Kayne had
20 misrepresented the payoff value on the Note as \$7,000 at the
21 meeting of creditors, and had failed to list payments on the Note
22 in the SOFA and in the calculation of the means test. The
23 bankruptcy court granted the motion and reopened the case on
24 February 9, 2010. Trustee was reappointed.

25 Trustee then filed a motion to compel Van Kayne to turn over
26 the Note and payments received on the Note postpetition. The
27 motion was served on both Van Kayne and Orton. No opposition to
28 Trustee's motion was filed by Van Kayne. The bankruptcy court

1 conducted a hearing on the motion on February 26, 2010, where
2 Trustee was represented by counsel, but neither Van Kayne nor
3 Orton appeared. The bankruptcy court granted Trustee's motion and
4 entered its order compelling turnover of property of the estate on
5 March 8, 2010. The order directed Van Kayne to turn over to
6 Trustee the Note and \$6,250 in payments she had received on the
7 Note postpetition.

8 Meanwhile, Trustee conducted a Rule 2004 examination of Van
9 Kayne on March 3, 2010. Orton was present for the first part of
10 the examination. While Orton was present, and under questioning
11 by Trustee's attorney, Van Kayne admitted that she had received at
12 least \$1,250 per month in payments on the Note for the six months
13 preceding her filing of bankruptcy, that she continued to receive
14 payments postpetition which were current, that the payments were
15 not listed in her schedules, and that the Note was not listed on
16 her schedule B. Additionally, Van Kayne testified, while Orton
17 was still in the room, that she had given a binder of all the
18 documents relating to her bankruptcy filing to Orton before the
19 petition was filed, which included a copy of a settlement
20 agreement between her and the maker of the Note detailing the
21 terms of the Note and listing the payments that had been made on
22 the Note. Orton did not challenge these assertions. Remarkably,
23 immediately following this testimony, and though it had not
24 concluded, Orton left the Rule 2004 examination because he had
25 another appointment.

26 Following Orton's departure, Trustee's lawyer continued the
27 examination of Van Kayne about the Note and payments:

28 BARNIER [Trustee's counsel]: Did you verbally tell Mr. Orton

1 that you were receiving cash payments on this promissory
note?

2 VAN KAYNE: They were not cash. They were by check.

3 BARNIER: By check. Did you tell him you were receiving
4 payments?

5 VAN KAYNE: Yes.

6 BARNIER: Do you remember when you told him that?

7 VAN KAYNE: When I asked him to collect the money from
[the Note maker].

8 BARNIER: And that was prior to the filing of the
9 bankruptcy?

10 VAN KAYNE: Yes.

11 Van Kayne Dep. 29:9-20 (March 3, 2010).

12 As it turns out, the Note and payments under the Note were
13 apparently the subject of a settlement agreement that had been
14 negotiated between Van Kayne and the Note maker as part of the
15 state court proceedings. At the Rule 2004 examination, Van Kayne
16 was asked if she had provided a copy of the settlement agreement
17 to Orton before the petition was filed. She replied, "yes." Id.
18 at 39:21. She also testified that Orton had looked at the
19 settlement agreement in her presence. Id. at 39:23. Van Kayne
20 testified that she and Orton discussed the need to disclose the
21 Note and agreement in the bankruptcy schedules:

22 VAN KAYNE: We had a lengthy discussion about the
23 confidentiality of this agreement. And [Orton] said
24 that disclosing the court case on the bankruptcy filing
25 would suffice, and that it is the due diligence of the
bankruptcy trustee to investigate the matter, to pull
the file and to find out the specifics of the
confidential agreement.

26 Id. at 37:17-23.

27 On April 4, 2010, Trustee filed an adversary complaint
28 against Van Kayne to revoke her bankruptcy discharge under

1 § 727(d). No response to the complaint was filed, and the Clerk
2 entered a default against Van Kayne on May 18, 2010. Trustee
3 moved for default judgment on May 26, 2010, which was also
4 unopposed. The bankruptcy court entered a default judgment on May
5 27, 2010, revoking Van Kayne's discharge.

6 In addition, on April 7, 2010, Trustee filed a motion for
7 sanctions against Orton under § 707(b)(4)(C) and (D), Rule 9011,
8 and N.D. Cal. Local R. 11-6.³ In this motion, Trustee alleged
9 that Van Kayne and Orton had conspired to defraud Trustee and Van
10 Kayne's creditors. Specifically, Trustee alleged that, in
11 preparing the bankruptcy petition and schedules, Orton was aware
12 that the payoff of the Note was \$61,250, and that it was not
13 scheduled or adequately disclosed. Trustee argued that Orton was
14 also aware of \$42,500 in payments Van Kayne had received on the
15 Note in 2009, and that these were not disclosed in the bankruptcy
16 schedules. Trustee also alleged that one week after the
17 bankruptcy case was closed, Van Kayne filed an action against the
18 Note maker in state court to enforce the settlement agreement and
19 recover \$61,250, and that, although Van Kayne appeared pro se in
20 the state court, the motion papers had been prepared by Orton.

21 The bankruptcy court held its first hearing on the sanctions
22 motion on May 7, 2010. The court cautioned Orton that the
23 allegations against him could potentially result in criminal
24 charges and suggested that he retain counsel. The court ordered

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26 ³ N.D. Cal Local R. 11-6 authorizes the judge to refer
27 matters of unprofessional conduct to disciplinary authorities,
28 including the state bar. Although the bankruptcy judge did order
that Orton be reported to the State Bar of California, that order
is not before us in this appeal.

1 that the hearing be continued, and that Orton file a response to
2 the sanctions motion within ten days.

3 Orton responded to the sanctions motion, albeit not until
4 June 1, 2010. In his response, Orton argued that he had listed
5 the lawsuit in the SOFA, and thus there was no conspiracy to
6 conceal this asset from Trustee. Orton also argued that, since
7 the lawsuit was listed in the SOFA, it had been abandoned by
8 Trustee when the case was closed under § 554(c).

9 Trustee replied, detailing the elements of § 707(b)(4)(C) and
10 (D) and Rule 9011 to demonstrate how Orton's behavior fell within
11 the scope of those provisions.

12 On June 23, 2010, Orton responded to Trustee's submissions
13 and declarations. In the response, Orton refers to himself in the
14 third person, and notes that:

15 Orton has filed a large volume of Chapter 7 petitions in
16 the last five years and expects to achieve a certain
17 "comfort level" with the facts and circumstances of the
18 particular case, and the credibility of the debtor
19 and/or other resource providing the information he uses
20 to draft the petition. Orton would prefer to say that
21 he had achieved that level of comfort with the Karen Van
22 Kayne case before he filed the petition, but he cannot
23 make that claim. There were inconsistencies in the
24 debtor's statements to Orton, and it was more difficult
25 to get certain information regarding debtor's income
26 than circumstances would warrant. Debtor's employment
27 history was "sketchy" and her statements regarding a
28 pending lawsuit in Sonoma Superior Court left enough
gaps that Orton was compelled to review the court file.

Orton Response at 2.

Van Kayne eventually provided what Orton incorrectly
determined to be adequate information for him to file
the petition.

Id.

Orton should have declined to file Karen Van Kayne's
case. . . . Orton was intimidated by Van Kayne's strong
presence and demanding posture.

1 Id. at 3.

2 Attorney Orton did investigate the facts before filing
3 [Van] Kayne's Chapter 7 petition. Orton asked many
4 questions, but should not have been satisfied with the
5 paucity of answers he received.

5 Id.

6 Orton concedes that he should not have filed this case,
7 and, that when he believed he had been lied to by his
8 client he should have diligently sought to amend the
9 petition with facts, either obtained from a subsequent
10 investigation, or from debtor, or withdrawn from
11 representation.

10 Id. at 3-4.

11 The bankruptcy court conducted its second hearing on the
12 sanctions motion on June 11, 2010. Trustee was represented by
13 counsel and Orton appeared pro se. After hearing from both
14 parties, the court indicated that it was inclined to award
15 sanctions, but requested documentation of expenses from Trustee.
16 The court allowed Orton time to respond to Trustee's requests
17 before the next hearing.

18 The bankruptcy court held the final hearing on the Trustee's
19 motion for sanctions on June 25, 2010. Trustee was represented by
20 counsel and Orton appeared pro se. At the hearing, the bankruptcy
21 court expressed its dismay about whether it should treat the
22 matter as a "criminal conspiracy or merely really bad lawyering."
23 Tr. Hr'g 2:11-12 (June 25, 2010). Orton repeated the statements
24 from his submissions: "This is a case I shouldn't have filed. And
25 I probably should have gotten out of it when I found that the
26 information I thought was accurate wasn't accurate. And I didn't.
27 So I blew it on two counts." Tr. Hr'g 2:15-19. The court then
28 commented: "But the worst thing you did was right after the case

1 was closed, you drafted the pleadings that the debtor used in
2 state court to try to get the money. That's where things look
3 really bad for you." Tr. Hr'g 3:9-12. Orton replied, "I guess I
4 should not have drafted the motion." Tr. Hr'g 4:8-9. Orton again
5 offered as justification that he believed Trustee had abandoned
6 the asset when the bankruptcy case was closed, and that he thought
7 he could draft the motion to be filed by Van Kayne in state court
8 and not report the asset to Trustee.

9 After taking the issues under submission, the bankruptcy
10 court entered a detailed Memorandum on Motion for Sanctions on
11 July 12, 2010 ("Memorandum"). In it, the court observed that, "if
12 everything [Trustee] has alleged is true, Orton's conduct was
13 criminal." Memorandum at 2. However, the court indicated that
14 its only concern in the decision was whether Orton's conduct
15 justified civil sanctions. The court ruled:

16 There is no question that Orton violated Rule 9011(b) of
17 the Federal Rules of Bankruptcy Procedure and
18 § 707(b)(4)(D) of the Bankruptcy Code, Orton
19 knew of the existence of the Note because [Van] Kayne
20 had told him about it and he had reviewed the state
21 court file. He knew that the schedules, which he
22 prepared, represented that [Van] Kayne had no liquidated
debts owing her, no contingent or unliquidated claims
against anyone, and no negotiable or non-negotiable
instruments These statements were patently
false, and Orton knew it. The identification of the
underlying state court lawsuit in the statement of
affairs in no way excuses the lies in the schedules.

23 Id. at 2-3. The bankruptcy court rejected Orton's argument that
24 the Note had been abandoned by Trustee, citing the case law
25 explaining that § 554(c) requires that property be properly
26 scheduled to be abandoned upon case closing and finding that, in
27 this case, the Note and payments had not been scheduled.

28 Deciding that monetary sanctions were appropriate, the

1 bankruptcy court noted that it had evidence from Trustee's counsel
2 showing \$16,500 in attorney fees and \$592.75 in expenses had been
3 incurred by Trustee related to reopening the case and the
4 sanctions motion. Trustee also submitted his time records
5 requesting \$3,850 in fees relating to the sanctions motion. The
6 court ruled that, had Orton properly scheduled the Note and
7 payments, none of these expenses would have been necessary.
8 Considering all these factors, and "the egregious nature of the
9 conduct to which Orton admits," the bankruptcy court determined
10 that a \$20,000 sanction was appropriate "both to make the
11 [bankruptcy] estate whole and to deter future misconduct." Id. at
12 3-4.

13 On July 19, 2010, the bankruptcy court entered its Order for
14 Sanctions Against Debtor's Counsel, ordering Orton to pay \$20,000
15 to Trustee. Orton filed a timely appeal.

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JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
19 and 157(b) (2) (A), (D) and (O). The Panel has jurisdiction under
20 28 U.S.C. § 158.

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ISSUES

- 23 1. Whether the bankruptcy court abused its discretion in finding
24 that Orton violated § 707(b) (4) (D) and Rule 9011, and
25 imposing monetary sanctions against him.
- 26 2. Whether the bankruptcy court abused its discretion in
27 determining that \$20,000.00 was an appropriate sanction.

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1 instruments These statements were patently
2 false, and Orton knew it.

3 Memorandum at 2-3. These fact findings are well-supported in the
4 record, and the bankruptcy court did not abuse its discretion in
5 concluding that Orton had violated Rule 9011(b) and
6 § 707(b) (4) (D).

7 Rule 9011(b) and (c) provide, in relevant part,

8 **Rule 9011. Signing of Papers; Representations to the**
9 **Court; Sanctions; Verification and Copies of Papers**

10 (b) Representations to the court. By presenting to the
11 court (whether by signing, filing, submitting, or later
12 advocating) a petition, pleading, written motion, or
13 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, . . .

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

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

19 (c) Sanctions. If, after notice and a reasonable
20 opportunity to respond, the court determines that
21 subdivision (b) has been violated, the court may,
22 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.

23 Rule 9011 is the bankruptcy counterpart of Civil Rule 11.
24 Civil Rule 11 precedents are appropriately considered in
25 interpreting Rule 9011. Marsch v. Marsch (In re Marsch), 36 F.3d
26 825, 829 (9th Cir. 1994).

27 In this case, the bankruptcy court found that Van Kayne's
28 schedules and SOFA, prepared by Orton, contained "patently false"

1 statements, and that Orton knew that they were incorrect when he
2 prepared them. Historically, there has been some question whether
3 bankruptcy schedules and SOFAs fell within the scope of Rule 9011
4 sanctions because Rule 9011(a) seemingly excludes the schedules
5 and SOFA. See In re Trudell, 424 B.R. 786, 791 (Bankr. W.D. Mich.
6 2010); 10 COLLIER ON BANKRUPTCY ¶ 707.05[2] (Alan N. Resnick & Henry
7 J. Sommer, 16th ed., 2010); cf. Caldwell v. Unified Capital Corp.
8 (In re Rainbow Magazine, Inc.), 77 F.3d 278, 283 (9th Cir. 1996)
9 (concealing assets in SOFA is a false statement sanctionable under
10 Rule 9011). This question, however, appears to have been
11 definitively settled by Congress' enactment of the comprehensive
12 amendments to the Code in 2005, commonly known as BAPCPA. As our
13 sister panel discussed in Lafayette v. Collins (In re Withrow),
14 405 B.R. 505 (1st Cir. BAP 2009), under BAPCPA,

15 a debtor's attorney has a duty, equivalent to that under
16 [Fed. R. Bankr. P.] 9011, to perform a reasonable
17 investigation into the circumstances giving rise to the
18 documents before filing them in a Chapter 7 case. For
19 example, under new § 707(b)(4)(C),⁴ attorneys are
20 subject to an automatic certification of
21 meritoriousness, based upon a reasonable investigation,
22 as to any "petition, pleading, or written motion" signed

21 ⁴ (C) The signature of an attorney on a petition,
22 pleading, or written motion shall constitute a
23 certification that the attorney has--
24 (i) performed a reasonable investigation into the
25 circumstances that gave rise to the petition,
26 pleading, or written motion; and
27 (ii) determined that the petition, pleading, or
28 written motion--
(I) is well grounded in fact; and
(II) is warranted by existing law or a good
faith argument for the extension,
modification, or reversal of existing law and
does not constitute an abuse under paragraph
(1).

1 by them. Furthermore, under new § 707(b)(4)(D),^[5] an
2 attorney's signature on a client's bankruptcy petition
3 is deemed a representation that "the attorney has no
knowledge after an inquiry that the information in the
schedules filed with such petition is incorrect."

4 Id. at 511-12 (footnotes and citations omitted). Moreover, BAPCPA
5 contained a "Sense of Congress" provision instructing that
6 § 707(b)(4)(C) and (D) be read together, with Rule 9011, and that
7 subsection (C)'s requirement of a reasonable investigation also
8 applies to subsection (D)'s verification of information in the
9 schedules.⁶ Given the requirements of the Rule and Code, we are
10 therefore confident in concluding that a debtor's attorney, who
11 fails to conduct any sort of reasonable investigation into facts
12 underlying schedules and SOFAs, may be sanctioned under Rule 9011
13 and § 707(b)(4)(D). See In re Withrow, 405 B.R. at 512.

14 The Ninth Circuit has held that the standard to determine the

15
16 ⁵ (D) The signature of an attorney on the petition shall
17 constitute a certification that the attorney has no
18 knowledge after an inquiry that the information in the
schedules filed with such petition is incorrect.

19 ⁶ This statement provides that:

20 It is the sense of Congress that rule 9011 of the
21 Federal Rules of Bankruptcy Procedure (11 U.S.C. App.)
22 should be modified to include a requirement that all
23 documents (including schedules), signed and unsigned,
24 submitted to the court or to a trustee by debtors who
represent themselves and debtors who are represented by
attorneys be submitted only after the debtors or the
debtors' attorneys have made reasonable inquiry to
verify that the information contained in such documents
is -

- 25 (1) well grounded in fact; and
26 (2) warranted by existing law or a good
27 faith argument for the extension,
28 modification, or reversal of existing
law.

28 Pub. L. 109-8 § 319 (2005) (reprinted in E-2 COLLIER ON BANKRUPTCY
App. Pt. Sec. 319 (2005)).

1 reasonableness of an attorney's inquiry as to facts contained in
2 signed documents submitted to a court is an objective one. In
3 considering sanctions under Rule 9011, the trial court must
4 measure the attorney's conduct "objectively against a
5 reasonableness standard, which consists of a competent attorney
6 admitted to practice before the involved court." Smyth v. City of
7 Oakland (In re Brooks-Hamilton), 329 B.R. 270, 283 (9th Cir. BAP
8 2005) (quoting In re Grantham Bros., 922 F.2d 1438, 1441 (9th Cir.
9 1991)), aff'd in part and rev'd in part on other grounds, 271 F.
10 App'x 654, 656 (9th Cir. 2008).

11 In applying these standards to this case, the bankruptcy
12 court began its third hearing on the sanctions motion with the
13 observation that it was having difficulty determining if Orton's
14 conduct was criminal or just "bad lawyering." In its Memorandum,
15 the court noted that it was not making a determination of the
16 criminal issues and referred those questions to the U.S. Attorney
17 and the California State Bar. However, the bankruptcy court did
18 make a finding that Orton's conduct was not what it expected of a
19 competent attorney admitted to practice before the court. After
20 hearing Trustee's comments that Orton's arguments were meritless,
21 and that he had conducted himself in inappropriate ways, the
22 bankruptcy court agreed: "I certainly agree with [Trustee's
23 counsel] completely as to the proper role of a debtor's counsel.
24 And it does not appear to me that you [Orton] came close to acting
25 properly." Tr. Hr'g 8:18-20 (June 25, 2010). We agree with the

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1 bankruptcy court.⁷

2 During the course of these proceedings, Orton has admitted
3 that he did not conduct a reasonable inquiry into the facts
4 surrounding the Note and payments. In his response to Trustee's
5 motion filed June 23, 2010, Orton stated that, "Attorney Orton did
6 investigate the facts before filing Van Kayne's Chapter 7
7 petition. Orton asked many questions, but should not have been
8 satisfied with the paucity of answers he received." Orton
9 Response June 23, 2010 at 3. The record shows that, after two
10 months of almost daily visits from Van Kayne, Orton finally agreed
11 to file the bankruptcy petition and schedules, even though Van
12 Kayne "provided what Orton incorrectly determined to be adequate
13 information for him to file the petition." Id. at 2. By his own
14 admission, what little inquiry Orton undertook in this case
15 resulted in a paucity of answers and inadequate information for
16 him to file the petition, schedules and SOFA.

17 By his own admissions, Orton confesses to a failure to
18 conduct a reasonable investigation into the facts presented in the
19 schedules and thus concedes that he violated Rule 9011(b) and
20 § 707(b)(4)(D). Our inquiry could, therefore, stop here and we
21 could confidently conclude that the bankruptcy court did not err
22 in ruling that Orton "violated Rule 9011(b) of the Federal Rules

23
24 ⁷ One example of inappropriate behavior occurred at the Rule
25 2004 examination. After his client admitted to receiving payments
26 on the Note which were not disclosed in her schedules, Orton left
27 the examination "for another appointment." As the bankruptcy
28 court observed, he was not present to protect his client from
invasion of the attorney-client privilege. Although Orton's
dereliction allowed facts to emerge which might otherwise have
remained hidden, we must agree with the bankruptcy court that it
has to rely on competent counsel performing in appropriate ways,
and that Orton never came "close to acting properly."

1 of Bankruptcy Procedure and § 707(b)(4)(D) of the Bankruptcy
2 Code.” Memorandum at 2.

3 But the bankruptcy court went beyond the basic finding and
4 ruled that Orton’s conduct was “egregious.” Id. at 3. Orton not
5 only did not conduct a reasonable inquiry into whether the
6 schedules were well grounded in fact, but he had “knowledge . . .
7 that the information in the schedules filed with such petition
8 [was] incorrect.” § 707(b)(4)(D). The bankruptcy court had
9 evidence from Van Kayne’s Rule 2004 examination from which it
10 could find that Van Kayne had given Orton a copy of the settlement
11 agreement which provided that the December payoff on the Note was
12 approximately \$61,250, and other documents showing that she had
13 received payments on the Note each month during the year before
14 filing the petition. Van Kayne testified that Orton read that
15 material in her presence. Orton has not seriously challenged
16 those assertions, and furthermore, admits that he also examined
17 the records of the state court action before the bankruptcy case
18 was filed, one of which was a minute entry by the superior court
19 judge noting that monthly payments on the Note were being received
20 by Van Kayne.

21 Thus, on this record, the bankruptcy court could properly
22 conclude that Orton violated both Rule 9011(b) and § 707(b)(4)(D)
23 in an egregious manner. Besides conducting a self-admittedly
24 inadequate inquiry into the facts, by drafting and filing
25 schedules for Van Kayne that omitted the value of the Note as an
26 asset, or any information about the payments she was receiving as
27 income, Orton helped render those schedules false. The bankruptcy
28 court found that Orton was aware of this critical information, but

1 failed to include it in the bankruptcy filings, a finding that is
2 not clearly erroneous. Because Orton knew that these incomplete
3 pleadings were not well-grounded in fact, he violated his duties
4 under the Rules and Code.

5 In the bankruptcy court and this appeal, Orton has claimed
6 that his listing of the state court lawsuit in Van Kayne's SOFA
7 was sufficient information for Trustee to perform his duties,
8 thereby excusing his duty to otherwise list the Note or payments
9 in Van Kayne's bankruptcy filings. Orton relies on In re
10 Atkinson, 62 B.R. 678 (Bankr. D. Nev. 1986). According to Orton,
11 in Atkinson, the bankruptcy court determined that simply listing
12 the lawsuit, the court where the legal action was pending, and the
13 value of the suit as unknown, was sufficient information. Id. at
14 679-80. Orton points out that this was precisely the sort of
15 information he provided in Van Kayne's SOFA about the Note and
16 state action.

17 Orton overlooks several important distinctions between the
18 facts in Atkinson and the circumstances in this appeal. First,
19 the debtor in Atkinson listed the lawsuit as an asset on schedule
20 B with the notation "unknown value." Id. at 679. In contrast,
21 Orton did not list the lawsuit on Van Kayne's schedule B, and made
22 no reference to its possible value. In this appeal, there was
23 evidence that Orton knew the payoff value of the Note was \$61,250
24 at the time he filed the petition and schedules.

25 Finally, and perhaps most importantly, the Atkinson court
26 ruled that the bare bones listing of the lawsuit "was sufficient
27 to enable the trustee (and any interested creditors) to examine
28 the debtor at the § 341 meeting regarding the litigation. The

1 trustee did in fact question the debtor about the case, and there
2 is no evidence that the debtor was less than candid." Id. at 679-
3 80. In this appeal, while the bare bones information in Van
4 Kayne's SOFA prompted Trustee to inquire about the lawsuit, it was
5 the first time he became aware of the existence of a balance due
6 on the Note and payments. But unlike the debtor in Atkinson, and
7 in Orton's presence at the § 341 meeting, Van Kayne seemingly lied
8 to Trustee about the facts. The false information provided by Van
9 Kayne that the December payoff value of the Note was \$7,000,
10 rather than its true value of \$61,250, prompted Trustee to
11 conclude that the Note was an asset but likely of no value to the
12 estate because a purported value of \$7,000 for the Note could be
13 exempted.

14 In our view, Atkinson should be read for the proposition that
15 a bare bones listing of a lawsuit, accompanied by examination of a
16 credible debtor regarding that lawsuit, and the absence of
17 evidence to suggest that any information was deliberately
18 concealed by the debtor, was sufficient disclosure of the facts of
19 that lawsuit. Here, on the other hand, the bankruptcy court found
20 that Van Kayne lied and deliberately concealed the value of the
21 Note, and Trustee, acting on that misrepresentation, chose not to
22 pursue the Note. The bankruptcy court also found that Orton was
23 aware of the existence of the Note and payments, but did not list
24 those facts in Van Kayne's schedules. Given these remarkable
25 facts, Atkinson does not excuse Orton's cavalier approach to
26 adequate disclosure in this case.

27 Orton also cites Atkinson to support his failure to amend the
28 bankruptcy schedules after some, but not all, of the true facts

1 about the Note and payments emerged, and his preparation of a
2 pleading within weeks of Van Kayne's discharge for her use in
3 attempting to recover the \$61,250 balance on the Note. Orton's
4 argument here is that Trustee, without knowing the truth, somehow
5 abandoned the lawsuit and the Note by operation of law pursuant to
6 § 554(c) by allowing the bankruptcy case to be closed.⁸
7 Thankfully, the bankruptcy system does not countenance such
8 gamesmanship, and the bankruptcy court appropriately disposed of
9 this near-frivolous argument:

10 This court does not know if Orton actually believes his
11 meritless argument that the Note was abandoned back to
12 [Van] Kayne by operation of law pursuant to § 554(c) of
13 the Bankruptcy Code. In order for that section to
14 apply, property must be properly scheduled so that the
15 trustee can make a knowing and intelligent decision as
16 to whether to administer it. The note at issue here was
17 never scheduled at all. . . . Mentioning an asset in
18 the statement of affairs is not the same as scheduling
19 it. In re Fossey, 119 B.R. 268, 272 (D. Utah 1990); In
20 re Winburn, 167 B.R. 673, 676 (Bankr. N.D. Fla. 1993);
21 In re McCoy, 139 B.R. 430, 431 (Bankr. S.D. Ohio 1991)
22 ("The word 'scheduled' in [§] 554(c) has a specific
23 meaning and refers only to assets listed in a debtor's
24 schedule of assets and liabilities."); In re Medley, 29
25 B.R. 84, 86-87 (Bankr. M.D. Tenn. 1983).

26 Memorandum at 3 n.2. As the bankruptcy court acknowledged, its
27 ruling is consistent with the Panel's case law. Pace v. Battley
28 (In re Pace), 146 B.R. 562, 565 (9th Cir. BAP 1992) (holding that
in order for an asset to be abandoned by operation of law, the
exact asset must be properly scheduled). Orton's act of listing

⁸ Section 554(c) provides:

Unless the court orders otherwise, any
property scheduled under section 521(a)(1) of
this title not otherwise administered at the
time of the closing of a case is abandoned to
the debtor and administered for purposes of
section 350 of this title.

1 the lawsuit in Van Kayne's SOFA did not result in the Note, and
2 its value, being abandoned when the bankruptcy case was closed.

3 In sum, Rule 9011, now enhanced by the BAPCPA additions to
4 the Code, evinces a policy that a debtor's attorney exercise
5 independent diligence and care in ensuring that there is
6 evidentiary support for the information contained in his client's
7 bankruptcy schedules. In re Dean, 401 B.R. 917, 924 (Bankr. D.
8 Idaho 2008). Fairly read, in this case, Van Kayne's schedules
9 were rendered just plain false by failing to list the Note as an
10 asset, and by failing to list her receipt of payments on the Note
11 as income. As the bankruptcy court found, Orton's conduct in this
12 case fell dismally short of the standard set by the Rules and
13 Code. We therefore conclude that the bankruptcy court did not
14 abuse its discretion in determining that Orton violated
15 § 707(b)(4)(D) and Rule 9011(b).

17 II.

18 The bankruptcy court did not abuse its discretion in 19 fixing the amount of sanctions at \$20,000.00.

20 In assessing an award of sanctions, we examine whether the
21 proceedings were fair, the evidence supports the award, and
22 whether the award is reasonable in amount. In re Nguyen, 447 B.R.
23 at 276.

24 We have no doubt that these proceedings were fair. Orton
25 received the sanctions motion that detailed Trustee's specific
26 arguments under Rule 9011, § 707(b)(4)(C) and (D), and N.D. Cal.
27 Local R. 11-6 why sanctions were appropriate. Orton was given
28 ample opportunity to respond to the motion, and Orton and Trustee

1 exchanged several responsive pleadings concerning the motion. The
2 bankruptcy court conducted three hearings on the sanctions motion.

3 At the first hearing, the court stopped the proceeding,
4 warned Orton of the possibly serious consequences stemming from
5 Trustee's arguments, and sua sponte continued the first hearing
6 with a strong admonition to Orton to obtain counsel.

7 At the second hearing, after hearing from the parties, the
8 bankruptcy court indicated its inclination to award sanctions, but
9 continued the hearing again, so that Trustee and his attorney
10 could submit documentation of the fees and expenses incurred in
11 reopening the case and prosecuting the sanctions motion, providing
12 Orton an opportunity to respond to Trustee's requested fees and
13 expenses, as well as to allow a final review in the third hearing.
14 The bankruptcy court considered the amount requested by Trustee as
15 a sanction at the third hearing. In other words, Orton had a full
16 and fair opportunity to present his positions and to challenge the
17 amount of any sanctions requested.

18 The evidence also supports that the sanctions award made by
19 the Court was reasonable. The bankruptcy court assessed monetary
20 sanctions of \$20,000 against Orton under § 707(b)(4)(B), which
21 provides:

22 (B) If the court finds that the attorney for the debtor
23 violated rule 9011 of the Federal Rules of Bankruptcy
24 Procedure, the court, on its own initiative or on the
25 motion of a party in interest, in accordance with such
26 procedures, may order-

27 (i) the assessment of an appropriate civil
28 penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the
trustee, the United States trustee (or the bankruptcy
administrator, if any).

1 Although § 707(b)(4)(B)(i) authorizes the assessment of a "civil
2 penalty," it provides no guidance on how the amount of such
3 sanction should be fixed. Since a Rule 9011 violation is an
4 inherent requirement for imposition of a sanction under this Code
5 provision, we turn to Rule 9011(c)(2) and the case law for
6 guidance. The rule states:

7 A sanction imposed for violation of this rule shall be
8 limited to what is sufficient to deter repetition of
9 such conduct or comparable conduct by others similarly
10 situated. . . . [T]he sanction may . . . include . . .
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.

11 The bankruptcy court has "wide discretion" in determining the
12 amount of a sanctions award. Kowalski-Schmidt v. Forsch (In re
13 Giordano), 212 B.R. 617, 622 (9th Cir. BAP 1997). Although the
14 court may award all reasonable fees and costs claimed by Trustee,
15 it also has the discretion to set the sanction at a lower amount
16 where sufficient to get the offender's attention and deter future
17 abuses. Stewart v. Am. Int'l Oil & Gas Co., 845 F.2d 196, 201-02
18 (9th Cir. 1988).

19 Here, the bankruptcy court carefully considered the amount of
20 Trustee's damages resulting from Orton's conduct. The court
21 reasoned that, had the Note been properly disclosed, Trustee could
22 have administered it without the expenses involved in reopening
23 the closed bankruptcy case or the costs incurred in the discharge
24 revocation action against Van Kayne. Of course, if the schedules
25 had been accurate, Trustee would have had no occasion to pursue
26 the present sanctions motion. As the bankruptcy court observed
27 "[c]onsidering all of these factors, and the egregious nature of
28 the conduct to which Orton admits, the court feels that sanctions

1 of \$20,000 are appropriate, both to make the estate whole and to
2 deter future misconduct.” Memorandum at 3-4.

3 We have carefully examined the attorney fee and expense
4 requests made by Trustee and his counsel and conclude that the
5 bankruptcy court could find them all to be reasonable. The amount
6 eventually awarded by the bankruptcy court as a sanction against
7 Orton, \$20,000, was slightly less than the amount requested by
8 Trustee, \$20,977.75. Moreover, the bankruptcy court provided
9 Orton with time to challenge the amount of the award in the
10 bankruptcy court, but he failed to do so. Instead, in this
11 appeal, he argues for the first time that it was an abuse of
12 discretion for the bankruptcy court not to take into consideration
13 his ability to pay.

14 Orton failed to raise the issue of his ability to pay in the
15 bankruptcy court. “[A]n issue will generally be deemed waived on
16 appeal if the argument was not ‘raised sufficiently for the trial
17 court to rule on it.’” In re Mercury Interactive Corp. Sec.
18 Litig., 618 F.3d 988, 992 (9th Cir. 2010) (quoting Whittaker Corp.
19 v. Execuair Corp., 953 F.2d 510, 515 (9th Cir. 1992)). Because he
20 did not make it to the bankruptcy court, Orton’s argument has been
21 waived.

22 Even were we to entertain Orton’s contention for the first
23 time on appeal, we would reject it. For support, Orton cites to
24 Jackson v. The Law Firm of O’Hara, Ruberg, Osborne & Taylor, 875
25 F.2d 1224, 1230 (6th Cir. 1989) (“Failure to consider ability to
26 pay is . . . an abuse of discretion.”). But while Jackson may
27 establish the rule in the Sixth Circuit, we are bound to apply the
28 precedents of the Ninth Circuit. In Christian v. Mattel, Inc.,

1 286 F.3d 1118 (9th Cir. 2002), our Court of Appeals instructed
2 that:

3 The Advisory Committee's notes concerning the amendments
4 indicate that an attorney's financial wherewithal is
5 only one of several factors that a district court may
6 consider in deciding the amount of sanctions. See Fed.
7 R. Civ. P. 11, advisory committee notes, 1993
8 Amendments, Subdivisions (b) and (c). Here, [the
9 offending attorney] had an opportunity to present
10 specific financial information to the district court,
11 but merely argued conclusorily that the sanctions would
12 be "ruinous." The district court acknowledged this
13 argument. Nothing in Rule 11 mandates a specific
14 weighing of this factor, however.

15 Id. at 1125 n.4 (emphasis added). The bankruptcy court could have
16 considered, but was not mandated to address, Orton's financial
17 circumstances in fixing the amount of the sanction in this case.
18 Moreover, Orton presented no information to the bankruptcy court,
19 or even in this appeal, regarding his inability to pay a \$20,000
20 sanction. His argument on this point is therefore purely
21 conclusory.

22 We conclude that the proceedings in the bankruptcy court were
23 fair, the evidence solidly supported the bankruptcy court's
24 findings, conclusions and sanctions award, and the amount of that
25 award, \$20,000, was reasonable. The bankruptcy court did not
26 abuse its discretion in awarding a sanction of \$20,000 against
27 Orton.

28 **CONCLUSION**

Under the Rules and Code, a debtor's attorney is duty-bound
to reasonably investigate the circumstances surrounding a
bankruptcy case, and to ensure that the information included in
bankruptcy schedules is well grounded in fact. Van Kayne's

1 filings were, by omission of critical information, rendered
2 patently false, something Orton knew at the time the schedules
3 were filed, and a deficiency which he has never acted to correct.
4 Because his conduct falls far below that expected of competent
5 debtor's counsel, we AFFIRM the bankruptcy court sanctions order.

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