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ORDERED PUBLISHED

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-08-1233-DJuMk
)		
RALBERT RALLINGTON)	Bk. No.	03-44829
BROOKS-HAMILTON,)		
)		
Debtor.)		
_____)		
)		
DAVID A. SMYTH,)		
)		
Appellant.)		
)		
_____)		

O P I N I O N

Submitted Without Oral Argument
on October 31, 2008

Filed - January 21, 2009

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

Honorable Leslie J. Tchaikovsky, Bankruptcy Judge, Presiding

Before: DUNN, JURY and MARKELL, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:

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3 The appellant, David Smyth, previously appealed the
4 bankruptcy court's orders imposing a monetary sanction and a six-
5 month suspension from practice before the bankruptcy courts of
6 the Northern District of California.¹ The Panel affirmed the
7 bankruptcy court's orders in a published opinion, Smyth v. City
8 of Oakland (In re Brooks-Hamilton), 329 B.R. 270 (9th Cir. BAP
9 2005). On further appeal, the Ninth Circuit affirmed in part,
10 reversed in part and remanded to the bankruptcy court for further
11 proceedings. Smyth v. City of Oakland (In re Brooks-Hamilton),
12 271 Fed. Appx. 654 (9th Cir. 2008).

13 On remand, the bankruptcy court reduced the monetary
14 sanction, but reimposed the six-month suspension sanction,
15 determining that the circumstances still warranted it.

16 Smyth comes before the Panel once more to appeal the
17 bankruptcy court's order reimposing the six-month suspension
18 sanction. Because the Panel's prior decisions, Price v. Lehtinen
19 (In re Lehtinen), 332 B.R. 404 (9th Cir. BAP 2005), and Peugeot
20 v. United States Trustee (In re Crayton), 192 B.R. 970 (9th Cir.
21 BAP 1996), require consideration of the American Bar Association
22 ("ABA") standards in determining the appropriate sanction, which
23 the bankruptcy court did not address, we VACATE in part and
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25 ¹ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
28 enacted and promulgated prior to October 17, 2005, the effective
date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 REMAND, with a strong recommendation to the bankruptcy court that
2 it refer the matter to the Standing Committee on Professional
3 Conduct of the Northern District of California ("Standing
4 Committee").

5
6 **I. FACTS²**

7 Smyth was the attorney for the debtor, Ralbert Rallington
8 Brooks-Hamilton, in his bankruptcy case. On behalf of the
9 debtor, Smyth filed a chapter 13 petition on August 21, 2003.³

10 The schedules listed the City of Oakland ("Oakland") as a
11 secured creditor with undisputed claims in the aggregate amount
12 of \$603,000.⁴ The debtor's chapter 13 plan provided that
13 Oakland's claims would be paid by April 1, 2004, through a sale
14 or refinance of the debtor's real property.⁵ Oakland did not
15 object to the plan; the plan was confirmed.

16 Oakland subsequently filed a proof of claim, asserting a
17 secured claim in the amount of \$983,146.51. On behalf of the
18

19 ² Although Smyth I and the bankruptcy court's memorandum
20 decisions already have set forth the facts in substantial detail,
21 we recount those facts pertinent to the present appeal.

22 ³ The bankruptcy court later converted the case from chapter
23 13 to chapter 7.

24 ⁴ Oakland's claims arose from loans to the debtor totaling
25 \$500,000. (Oakland made the loans to the debtor under a federal
26 program designed to encourage the establishment of businesses in
economically depressed urban areas.) As security, the debtor
gave Oakland liens on his residence, a warehouse and certain
business personal property.

27 ⁵ In papers filed with the bankruptcy court shortly before
28 confirmation of the plan, the debtor stated that he had a buyer
for the warehouse and that he would sell it to pay off all of his
creditors. Statement of Changed Circumstances, 1:21-22;
Declaration to Support Step Payments Proposed, 1:21-23.

1 debtor, Smyth filed an objection to Oakland's claim, contending
2 that it could not be paid, as the confirmed plan did not provide
3 for payment of secured claims, and that it could not be paid as
4 an unsecured claim, because Oakland had not filed an unsecured
5 claim.

6 The bankruptcy court learned of the objection at a hearing
7 on March 18, 2004, in a related adversary proceeding (adv. proc.
8 no. 03-4837). After reviewing the plan and listening to Smyth's
9 explanations regarding the plan and the objection, the bankruptcy
10 court informed Smyth that it intended to enter an order to show
11 cause why sanctions should not be imposed on him, as it
12 considered the bankruptcy case to be an abusive filing and
13 Smyth's conduct in the bankruptcy case to be "horrifying."⁶

14 True to its word, the bankruptcy court issued an order to
15 show cause why Smyth should not be sanctioned ("OSC"). The
16 bankruptcy court advised Smyth that it was considering imposing
17 sanctions against him, including permanent disbarment, though it
18 did not state the legal bases for the possible sanctions. The
19 bankruptcy court later specified, in an order continuing the
20 hearing on the OSC, that it would impose sanctions under Rule
21 9011(b), § 105 or its inherent authority to sanction, should it
22 deem sanctions appropriate ("Continuance Order"). Meanwhile, in
23 the adversary proceeding, Oakland filed a motion to impose
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26 ⁶ At the March 18, 2004 hearing, the attorney for Oakland
27 informed the bankruptcy court that no hearing had been set on the
28 objection to Oakland's claim. Tr. of March 18, 2004 Hr'g, 29:19-
23. The bankruptcy court stated that Smyth could set the
objection for hearing at the same time as the hearing on the
order to show cause, if he chose to do so. Tr. of March 18, 2004
Hr'g, 30:2-3.

1 monetary sanctions under Rule 9011(b) against Smyth ("Rule 9011
2 Motion").⁷

3 After the hearing on the OSC, the bankruptcy court issued a
4 memorandum decision ("First Memorandum Decision"), holding that
5 Smyth violated Rule 9011(b)(1) and (b)(2) by filing and
6 presenting the objection.⁸ The bankruptcy court found that the
7 contentions made by Smyth in the objection were frivolous and
8 implausible. The bankruptcy court determined that the plan did
9 not need to refer to Oakland's claim as secured in order for it
10 to be paid through the plan as secured. Oakland had a right to
11 payment on its claim because it timely filed its proof of claim,
12 and the plan provided for its payment. Moreover, the bankruptcy
13 court found that Oakland did not need to file a proof of
14 unsecured claim because it had filed a proof of claim, asserting
15 that all of its claims were secured. As the bankruptcy court
16 reasoned:

17 A creditor must be able to rely on a proof of claim
18 asserting secured status to preserve its underlying
19 monetary claim in the event its security interest is

20 ⁷ Oakland had moved for sanctions against both the debtor
21 and Smyth, but the bankruptcy court determined that it would be
22 unfair to sanction the debtor for claims that Smyth asserted as
23 attorney in the debtor's behalf. Tr. of July 7, 2004 Hr'g,
45:10-17.

24 ⁸ In the First Memorandum Decision, the bankruptcy court
25 stated that it had advised Smyth that it might base its sanctions
26 on Rule 9011, § 105 or 28 U.S.C. § 1927. Memorandum of Decision
27 re: Order to Show Cause re: Rule 9011 Sanction ("First Memorandum
28 Decision"), 4:14-16. Neither the OSC nor the Continuance Order
cited 28 U.S.C. § 1927 as possible statutory authority for
sanctioning Smyth. The bankruptcy court ultimately determined
that it would impose sanctions under Rule 9011 only. First
Memorandum Decision, 4:16-18.

1 avoided. Otherwise, it would have to file multiple
2 claims or plead in the alternative in every case on the
3 chance that a debtor might challenge its lien.

4 First Memorandum Decision, 8:16-20. Because no reasonable
5 attorney would make such baseless contentions, the bankruptcy
6 court concluded, Smyth filed the objection for an improper
7 purpose.

8 The bankruptcy court decided to suspend Smyth from practice
9 before the bankruptcy courts of the Northern District of
10 California for six months, though he could continue to appear in
11 cases in which he already was attorney of record. Although it
12 initially warned Smyth in the OSC that it was considering
13 disbarment as a sanction, the bankruptcy court ultimately decided
14 to suspend Smyth as a less severe sanction.

15 Concurrently with its First Memorandum Decision, the
16 bankruptcy court issued an order suspending Smyth from practice
17 ("First Suspension Order"). At the same time, pursuant to
18 Oakland's Rule 9011 Motion, the bankruptcy court imposed a
19 \$10,671 monetary sanction against Smyth ("Monetary Sanction
20 Order") on the grounds that he asserted frivolous claims in the
21 adversary proceeding complaint and filed the adversary proceeding
22 complaint for an improper purpose.

23 Smyth appealed the First Suspension Order and the Monetary
24 Sanction Order, both of which the Panel affirmed in Smyth I.

25 On further appeal, the Ninth Circuit reversed in part the
26 Monetary Sanction Order, determining that two of the three claims
27 in the adversary proceeding complaint were not frivolous. Smyth,
28 271 Fed. Appx. at 657-60. The Ninth Circuit remanded the
29 Monetary Sanction Order to the bankruptcy court for a

1 redetermination as to whether Smyth filed the one frivolous claim
2 for an improper purpose and for a redetermination of the amount
3 of the monetary sanction, given that only one claim in the
4 adversary proceeding complaint was frivolous. Id. at 660.

5 As to the First Suspension Order, the Ninth Circuit held
6 that the bankruptcy court neither abused its discretion in
7 determining that Smyth's assertions in the objection were
8 frivolous nor in deciding to impose the sanction against him.⁹
9 Id. at 660-61. The Ninth Circuit vacated and remanded the First
10 Suspension Order, however, as it had been based, in part, on the
11 imposition of the Monetary Sanction Order. Id. at 660.

12 On remand, without holding a hearing or seeking further
13 briefing or additional evidence from Smyth, the bankruptcy court
14 reduced the amount of the monetary sanction, but reimposed the
15 six-month suspension sanction. Memorandum of Decision re:
16 Sanctions on Remand ("Second Memorandum Decision"), 4:5-10.
17 Reconsidering the issues presented in the case, and taking into
18 account the reduced monetary sanction, the bankruptcy court
19 stated in the Second Memorandum Decision that it remained
20 convinced that the six-month suspension sanction was appropriate
21 under the circumstances. Second Memorandum Decision, 4:7-15.

22 On September 2, 2008, the bankruptcy court entered its order
23 suspending Smyth from practice before the bankruptcy courts of
24 the Northern District of California for six months, but allowing
25

26 ⁹ The Ninth Circuit declined to consider "any claims of
27 error as to the type of sanction the bankruptcy court imposed,
28 including whether the bankruptcy court had the authority to
suspend Smyth from practice before the entire bankruptcy court."
Smyth, 271 Fed. Appx. at 661 n.10.

1 him to continue to appear in cases in which he already was
2 attorney of record ("Second Suspension Order"). Second
3 Memorandum Decision, 4:19-21; Second Suspension Order, 1:18-20.

4 Smyth appeals.¹⁰

6 II. JURISDICTION

7 Before we can address the merits of this appeal, the Panel
8 must determine whether the bankruptcy court had jurisdiction to
9 adjudicate the suspension sanction and to issue the Second
10 Suspension Order and whether we, in turn, have jurisdiction to
11 review the Second Suspension Order on appeal.

12 Relying on Sheridan v. Michels (In re Sheridan), 362 F.3d 96
13 (1st Cir. 2004), Smyth argues that the bankruptcy court lacked
14 jurisdiction to adjudicate the suspension sanction because such a
15 determination is not a core proceeding. Accordingly, Smyth
16 claims the bankruptcy court had no authority to issue the Second
17 Suspension Order.

18 Contrary to Smyth's contentions, the bankruptcy court did
19 have jurisdiction to adjudicate the suspension sanction. Because

20 _____
21 ¹⁰ Smyth filed an ex parte motion for a stay pending appeal
22 of the Second Suspension Order. In support of his motion for a
23 stay pending appeal, Smyth cited Crayton and Lehtinen. Smyth
24 argued that he would prevail on the merits because, in light of
25 the Panel's holdings in Crayton and Lehtinen, the Panel would
26 remand the Second Suspension Order to the bankruptcy court. The
27 bankruptcy court denied the motion for stay pending appeal,
28 believing that the appeal was so unlikely to prevail that the
stay would be inappropriate. The bankruptcy court did grant a
30-day stay, however, to provide Smyth an opportunity to move for
a stay pending appeal with the Panel.

Smyth obtained an order granting stay pending appeal of the
Second Suspension Order from the Panel. The Panel also expedited
the present appeal.

1 Smyth's objection to Oakland's claim constituted a core
2 proceeding under 28 U.S.C. § 157(b)(2)(A), the OSC itself, which
3 was set to address Smyth's frivolous assertions in the objection,
4 constituted a core proceeding. See Lehtinen, 332 B.R. at 410-11
5 (stating, in dictum, that, as acts on which attorney's suspension
6 were based occurred in the course of his representing the debtor
7 in matters central to administration of debtor's case,
8 disciplinary proceeding fell within ambit of 28 U.S.C.
9 § 157(b)(2)(A)).¹¹ See also Polo Bldg. Group, Inc. v. Rakita (In
10 re Shubov), 253 B.R. 540, 543 (9th Cir. BAP 2000). Accord
11 Chicago Bank of Commerce v. Amalgamated Trust & Savings Bank (In
12 re Memorial Estates, Inc.), 116 B.R. 108, 111 (N.D. Ill. 1990);
13 Fed. Sav. & Loan Ins. Corp. v. Sutherlin, 109 B.R. 700, 703 (E.D.
14 La. 1989); In re Emergency Beacon Corp., 52 B.R. 979, 987
15 (S.D.N.Y. 1985).

16 Moreover, as we discuss below, the bankruptcy court had
17 authority to impose the suspension sanction under Rule 9011,
18 § 105(a) and its inherent authority.

20 ¹¹ In Lehtinen, the Panel agreed with the dissent's
21 reasoning in Sheridan that a disciplinary proceeding, addressing
22 misconduct that occurred during a core proceeding, itself

23 We observe that the majority in Sheridan acknowledged that
24 an attorney disciplinary proceeding taking place during a pending
25 bankruptcy case may constitute a core proceeding. Sheridan, 362
26 F.3d at 107, 111.

27 We also determine that Sheridan is distinguishable from this
28 appeal. Unlike Sheridan, which involved a disciplinary
proceeding for an attorney's misconduct that occurred over the
course of numerous previously closed bankruptcy cases, the
present appeal involves sanctions imposed for conduct that
occurred during the debtor's bankruptcy case, which was still
open at the time the bankruptcy court set the hearing on the OSC.

1 support of a disciplinary order for clear error." Sandlin, 12
2 F.3d at 864. We must accept the bankruptcy court's findings of
3 fact unless we have a definite and firm conviction that a mistake
4 has been committed. Latman v. Burdette, 366 F.3d 774, 781 (9th
5 Cir. 2004).

6 We review de novo questions involving due process. See
7 Sandlin, 12 F.3d at 865 ("Legal and constitutional questions are
8 reviewed de novo.").

9 10 **V. DISCUSSION**

11 In this appeal, Smyth advances arguments not presented
12 before the bankruptcy court, at least at the time it decided to
13 reimpose the suspension sanction. The bankruptcy court did not
14 have an opportunity to consider these arguments, as it neither
15 held a hearing nor sought additional briefing or evidence.

16 Although the Panel generally declines to consider arguments
17 not raised before the bankruptcy court, O'Rourke v. Seaboard Sur.
18 Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989),
19 we deem it appropriate to consider these arguments here. See
20 Pizza of Hawii, Inc. v. Shakey's Inc. (In re Pizza of Hawaii,
21 Inc.), 761 F.2d 1374, 1379 (9th Cir. 1985) (reviewing court has
22 discretion to consider issues presented by record on appeal even
23 if not raised before bankruptcy court).

24 Smyth challenges the Second Suspension Order on two grounds.
25 He first asserts that the bankruptcy court had no authority to
26 suspend him from practice. He next contends that the bankruptcy
27 court did not consider the relevant factors, as set forth in
28 Crayton, to determine the appropriate sanction.

1 We address each of these arguments in turn.

2
3 A. Authority to suspend an attorney from practice before the
4 bankruptcy courts of the district

5 Smyth claims that the bankruptcy court had no authority to
6 suspend him from practice before all of the bankruptcy courts of
7 the district. He asserts that the bankruptcy court has limited
8 jurisdiction under 28 U.S.C. § 157: it is authorized only to
9 administer bankruptcy cases and exercise control in its own
10 courtroom; the bankruptcy court's jurisdiction does not extend to
11 admitting attorneys to the bar. Because the authority to
12 discipline attorneys springs from the authority to admit them to
13 the bar, Smyth reasons, the bankruptcy court could not suspend
14 him from practicing in future bankruptcy cases before other
15 bankruptcy courts of the district.

16 As part of his argument, Smyth summarily dismisses inherent
17 authority and § 105 as empowering a bankruptcy court to impose a
18 suspension sanction. He maintains that, though a district court
19 possesses the inherent power to control admission to its bar and
20 discipline attorneys before it, bankruptcy courts lack such
21 inherent authority because they have limited subject matter
22 jurisdiction, which does not include the authority to admit
23 attorneys. He further asserts that § 105 does not empower
24 bankruptcy courts to suspend attorneys because § 105 only grants
25 bankruptcy courts the power to implement provisions of the
26 Bankruptcy Code, which does not include a provision authorizing
27 them to prohibit attorneys from participating in future
28 bankruptcy cases.

1 We reject Smyth's arguments. Simply because bankruptcy
2 courts have limited subject matter jurisdiction under § 157 does
3 not mean that they lack the authority to run their courtrooms and
4 to supervise the attorneys appearing before them. See Chambers
5 v. NASCO, Inc., 501 U.S. 32, 43, 47 (1991). As we discuss below,
6 the bankruptcy court had ample authority to suspend Smyth from
7 practice before the bankruptcy courts of the district.

8
9 1. Inherent authority

10 Federal courts are vested with inherent powers to manage
11 their cases and courtrooms and to maintain the integrity of the
12 judicial system. Chambers, 501 U.S. at 43-45. Further, federal
13 courts possess the inherent authority to suspend attorneys. In
14 re Snyder, 472 U.S. 634, 643 (1985). Bankruptcy courts also
15 possess the inherent authority to suspend or disbar attorneys, as
16 implicitly recognized by Congress in enacting § 105(a).
17 Lehtinen, 332 B.R. at 412-13; Crayton, 192 B.R. at 975
18 (bankruptcy court has "the express and inherent authority to
19 regulate the attorneys who practice before it"). See also
20 Chambers, 501 U.S. at 47; Caldwell v. Unified Capital Corp. (In
21 re Rainbow Magazine), 77 F.3d 279, 284 (9th Cir. 1996).

22 The bankruptcy court's authority to suspend an attorney
23 springs not only from its inherent powers to manage its cases and
24 courtroom, see Chambers, 501 U.S. at 43, but also from the
25 attorney's role as an officer of the court. Snyder, 472 U.S. at
26 643. See also 1 Collier on Bankruptcy ¶ 8.07[1] (Alan N. Resnick
27 & Henry J. Sommer, eds., 15th ed. rev. 2008) ("[P]rofessionals are
28 subject to the court's inherent power to maintain order in their

1 courts, punish improper behavior, control admission to the bar
2 and discipline attorneys.”). Such authority is “necessary to
3 maintain the respectability and harmony of the bar, as well as to
4 protect the public.” Gadda v. Ashcroft, 377 F.3d 934, 948 (9th
5 Cir. 2004) (citations omitted).

6 The Ninth Circuit recently determined that a bankruptcy
7 court did not abuse its discretion in sanctioning an attorney
8 under its inherent authority for his repeated incompetent and
9 irresponsible representation of clients before the court. Hale
10 v. United States Trustee, 509 F.3d 1139, 1148 (9th Cir. 2007).

11 In Hale, the attorney prepared the debtors’ petition and
12 schedules but provided no other legal services. The attorney did
13 not inform the debtors that he would not represent them at the
14 § 341(a) meeting or otherwise represent them in “the normal,
15 ordinary and fundamental aspects of their case.” Id. at 1144.
16 Moreover, the attorney did not obtain the debtors’ informed
17 consent to the purported limitations on his legal representation.
18 Id. The bankruptcy court imposed both monetary and nonmonetary
19 sanctions against the attorney, which consisted of a \$2,000
20 sanction to “encourage him to change his conduct [and] serve as a
21 deterrent to others” and certain restrictions on his practice.
22 Id. at 1144-45.

23 The Ninth Circuit affirmed the bankruptcy court, determining
24 that the bankruptcy court had inherent authority to sanction
25 misconduct by attorneys appearing before it. Id. at 1148 (citing
26 Caldwell, 77 F.3d at 284). The Ninth Circuit recognized that the
27 bankruptcy court had ordered the sanctions to counter the
28 attorney’s incompetent and irresponsible legal representation.

1 Id. at 1148-49. The Ninth Circuit "agree[d] with the bankruptcy
2 court that it should 'not [have to] countenance Hale's exclusion
3 of critical and necessary services, or endorse the pretense of
4 adequately advised and informed consent in [the attorney's]
5 bankruptcy cases.'" Id. at 1148. Here, as in Hale, the
6 bankruptcy court had (and exercised its) inherent authority to
7 impose the district-wide suspension sanction against Smyth for
8 his continued incompetence and unprofessional conduct.

9 The record indicates that the bankruptcy court had been
10 concerned for some time with instances of Smyth's incompetence
11 and/or unprofessional conduct, as demonstrated by his filing of
12 the frivolous objection to Oakland's claim. At the March 18,
13 2004 hearing, the bankruptcy court told Smyth that it was
14 "frankly horrified by [his] conduct in the case." Tr. of March
15 18, 2004 Hr'g, 29:11-12. The bankruptcy court also stated in the
16 OSC that it considered Smyth's conduct "in connection with [the
17 bankruptcy] case to be reprehensible." Order to Show Cause re:
18 Apparent Bad Faith Filing, 4:5-6. It further stated that "it
19 [was] apparent [to the bankruptcy court] that [Smyth had] not
20 improved his standard of practice in response to the imposition
21 of [previous] lesser sanctions." Order to Show Cause re:
22 Apparent Bad Faith Filing, 4:21-23.

23 In the First Memorandum Decision, the bankruptcy court found
24 that Smyth's contentions in the objection were frivolous,
25 implausible and ridiculous, and no reasonable attorney would have
26 made them. The bankruptcy court concluded that, despite a
27 previous sanction requiring Smyth to complete forty hours of
28 continuing legal education, it had been "insufficient to deter

1 [his] continued unprofessional conduct" and "appear[ed] to have
2 done little good." First Memorandum Decision, 10:5-6, 15-16. We
3 infer from these statements that the bankruptcy court was
4 concerned with the harm Smyth's continued incompetence and
5 unprofessional conduct, as evidenced by his filing of the
6 frivolous objection, could inflict on parties appearing before
7 the bankruptcy court.

8 Because of the potential for harm Smyth posed to the public
9 and to bankruptcy administration in the Northern District of
10 California, the bankruptcy court had inherent authority to impose
11 a district-wide suspension against him. Merely to suspend Smyth
12 from one bankruptcy courtroom but not from other bankruptcy
13 courtrooms in the district would not have protected the public
14 adequately. Moreover, the bankruptcy court wished to deter Smyth
15 from making frivolous claims and engaging in other incompetent
16 and unprofessional conduct in the future. A suspension
17 restricted to one courtroom only would vitiate the deterrence
18 purpose of the sanction.

19
20 2. Section 105(a) authority

21 Section 105(a) provides additional authority for the
22 bankruptcy court to suspend Smyth from practice. Section 105(a)
23 provides:

24 The court may issue any order, process, or judgment
25 that is necessary or appropriate to carry out the
26 provisions of this title. No provision of this title
27 providing for the raising of an issue by a party in
28 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.

1 In Crayton, the Panel noted that § 105(a) "arguably empowers
2 a bankruptcy court to discipline attorneys who appear before it,
3 given that incompetent attorneys frustrate the [Bankruptcy
4 Code's] purpose of prompt administration of the estate and
5 equitable distribution of assets." 192 B.R. at 976 n.6. See
6 also 1 Collier on Bankruptcy ¶ 8.07[1] ("Authority to sanction
7 professionals is found directly in the Bankruptcy Code");
8 2 Collier on Bankruptcy ¶ 105.04[7] (Bankruptcy courts also have
9 authority under § 105(a) "to regulate those who appear before it,
10 and what they say and do during that representation."); 2 Collier
11 on Bankruptcy ¶ 105.04 ("Courts have used these provisions of
12 section 105 . . . to regulate the practice of lawyers.").

13 Here, the bankruptcy court found that Smyth advanced his
14 contentions in the objection for an improper purpose. The
15 bankruptcy court plainly was distressed by Smyth's conduct in the
16 case, characterizing it as "horrifying" and "reprehensible." The
17 bankruptcy court had authority under § 105(a) to suspend Smyth
18 from practice before the bankruptcy courts of the district as a
19 means to deter him from his continued incompetence and
20 unprofessional conduct, to the detriment of bankruptcy
21 administration in the Northern District of California.

22 23 3. Rule 9011 authority

24 The bankruptcy court undoubtedly had authority under Rule
25 9011 to impose the suspension sanction against Smyth.¹² Rule

26 _____
27 ¹² Smyth does not question that the bankruptcy court
28 properly initiated the Rule 9011 proceeding against him. The
record plainly shows that the bankruptcy court followed the
(continued...)

1 9011 empowers [bankruptcy] courts to impose sanctions upon the
2 signers of paper where a) the paper is 'frivolous,' or b) the
3 paper is filed for an 'improper purpose.'" Grantham Bros., 922
4 F.2d at 1441 (emphasis added). In fact, the bankruptcy court is
5 required to impose sanctions on the signer of a paper if he or
6 she files a frivolous paper or files a paper for an improper
7 purpose. Townsend v. Holman Consulting Corp., 929 F.2d 1358,
8 1362 (9th Cir. 1991) ("Our cases have established that sanctions
9 must be imposed on the signer of a paper if either a) the paper
10 is filed for an improper purpose, or b) the paper is
11 'frivolous.'" (emphasis added); Business Guides, Inc. v.
12 Chromatic Commc'ns Enters., Inc., 892 F.2d 802, 809 (9th Cir.
13 1982) ("[T]he rule clearly authorizes, indeed requires, a judge to
14 sanction a represented party for violations.") (emphasis added).
15 Accord Marsch v. Marsch (In re Marsch), 36 F.3d 825, 829 (9th
16 Cir. 1994) ("Bankruptcy Rule 9011 . . . calls for the imposition
17 of sanctions on litigants and attorneys who file pleadings and
18 papers in violation of the rule's requirements.").

19 Under Rule 9011(c), if the court determines that an attorney
20 has filed a frivolous paper or has filed a paper for an improper
21 purpose as set forth under Rule 9011(b)(1) or (b)(2), the
22 bankruptcy court may impose an appropriate sanction.¹³ The

23 _____
24 ¹²(...continued)
25 procedures outlined in Rule 9011. The bankruptcy court issued
26 the OSC and Continuance Order, which detailed Smyth's misconduct
27 and the legal bases under which the bankruptcy court intended to
proceed. The bankruptcy court also allowed Smyth an opportunity
to respond to the OSC and held a hearing on the OSC.

28 ¹³ Rule 9011(c) specifically provides: "If, after notice and
(continued...)"

1 sanction "is limited to what is sufficient to deter repetition of
2 such conduct." Rule 9011(c)(2). The sanction may consist of
3 "directives of a nonmonetary nature." Id. As we recognized in
4 Smyth I, although the "suspension of an attorney from the
5 practice of law is a serious sanction," the bankruptcy court may
6 impose such a sanction for violations of Rule 9011. 329 B.R. at
7 287 (citing to Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1197
8 (9th Cir. 1999)).

9 The bankruptcy court possessed authority under Rule 9011 to
10 suspend Smyth from practice before the bankruptcy courts of the
11 district. The bankruptcy court expressly found - and the Ninth
12 Circuit agreed - that Smyth's assertions in the objection were
13 frivolous. The bankruptcy court also determined that Smyth had
14 filed the objection for an improper purpose, as no reasonable
15 attorney would make such implausible and ridiculous contentions.
16 Recalling that prior sanctions had not deterred Smyth from
17 engaging in unprofessional and incompetent conduct, but
18 recognizing that disbarment would be too severe a sanction, the
19 bankruptcy court decided to suspend him for six months. In
20 making its decision, the bankruptcy court believed that a
21 district-wide suspension sanction, limited in duration, would
22 deter him sufficiently from filing such a frivolous objection
23 again.

24 The bankruptcy court unquestionably had authority under Rule

25 _____
26 ¹³(...continued)
27 a reasonable opportunity to respond, the court determines that
28 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 9011 to impose a district-wide suspension sanction against Smyth.
2 The question remains, however, as to whether the six-month
3 suspension was an appropriate (i.e., reasonable) sanction under
4 the circumstances.

5
6 B. Review of the bankruptcy court's imposition of the
7 suspension sanction under the Crayton criteria

8 We stress that the Ninth Circuit determined that the
9 bankruptcy court did not abuse its discretion in deciding to
10 impose a sanction against Smyth for his frivolous objection.
11 Smyth does not appear to contest this.

12 Rather, Smyth claims that the bankruptcy court abused its
13 discretion in reimposing the suspension sanction because it did
14 not consider the factors set forth in Crayton (and followed and
15 applied in Lehtinen) to determine its appropriateness. Because
16 the Panel is bound by its prior decisions absent a change in law
17 or a contrary decision from a higher court, Ball v. Payco-General
18 Am. Credits (In re Ball), 185 B.R. 595, 597 (9th Cir. BAP 1995),
19 we must apply the criteria set forth in Crayton.¹⁴ Based on our
20 review of the record, we agree with Smyth that the bankruptcy
21 court erred in not explicitly considering the relevant factors to
22 determine the appropriate sanction.

23 As noted by Smyth, the Panel confronted this issue in both
24 Crayton and Lehtinen, where the bankruptcy court suspended the

25 _____
26 ¹⁴ We all share the concerns raised by Judge Markell in his
27 concurrence as to the application of this precedent in this case,
28 but without a change in the law, through legislative enactment or
a determination by a higher court, or changes in the
rules/procedures governing this Panel, we are bound by our prior
decisions.

1 attorney from practice for his misconduct.¹⁵ Under Crayton, the
2 Panel established three criteria for reviewing attorney
3 disciplinary proceedings: (1) was the disciplinary proceeding
4 fair? (2) does the evidence support the findings below? (3) was
5 the penalty imposed reasonable? Crayton, 192 B.R. at 978. The
6 Panel subsequently applied these criteria in Lehtinen, 332 B.R.
7 at 414-17, and we recognize their continuing application here.

8
9 1. Fairness of the disciplinary proceeding

10 When an attorney is subject to discipline, he or she has a
11 right to notice and an opportunity to be heard. Crayton, 192
12 B.R. at 978. The attorney must receive prior notice of "the
13 particular alleged misconduct and of the particular disciplinary
14

15 ¹⁵ In Crayton, the bankruptcy court suspended the attorney
16 from practice because he neither sought nor obtained employment
17 as attorney for the chapter 11 debtor. Crayton, 192 B.R. at 974.
18 The bankruptcy court accused the attorney of incompetence and
19 prohibited the attorney from practicing in chapter 11 cases. Id.

20 In Lehtinen, the bankruptcy court suspended the attorney
21 from practice because he sought employment as both the debtor's
22 bankruptcy attorney and real estate broker without disclosing the
23 potential conflict of interest. Lehtinen, 332 B.R. at 409-10.
24 Additionally, the bankruptcy court found that the attorney sent a
25 substitute attorney to the debtor's § 341(a) meeting without
26 obtaining the debtor's consent and failed to appear at the
27 debtor's chapter 13 confirmation hearing. Id.

28 The Panel vacated and remanded the orders imposing the
suspension sanctions in both cases on the grounds that the
bankruptcy court did not consider the relevant factors to
determine whether suspension was an appropriate sanction.
Crayton, 192 B.R. at 981; Lehtinen, 332 B.R. at 417. (In
Crayton, the Panel also vacated the order imposing the suspension
sanction on the grounds that the bankruptcy court did not provide
the attorney with notice of its intent to prohibit him from
representing debtors in chapter 7 and chapter 13 cases and did
not take any evidence as to his fitness to practice in such
cases. Id. at 979).

1 authority under which the court is planning to proceed.'"
2 Lehtinen, 332 B.R. at 414 (quoting Miller v. Cardinale (In re
3 DeVille), 361 F.3d 539, 548 (9th Cir. 2004)).

4 Here, Smyth received adequate notice of his alleged
5 misconduct in the OSC and the Continuance Order. The OSC
6 identified as misconduct Smyth's design of the plan, which the
7 bankruptcy court at the time believed was an attempt "to lull
8 [Oakland] into believing" that the debtor would no longer contest
9 its secured claims and would pay its secured claims in the near
10 future.¹⁶ Order to Show Cause re: Apparent Bad Faith Filing,
11 4:6-9. The OSC also indicated that the bankruptcy court
12 considered the objection to Oakland's claim filed by Smyth to be
13 "patently frivolous." Order to Show Cause re: Apparent Bad Faith
14 Filing, 3:10-11. The Continuance Order accused Smyth of filing
15 documents that were "intentionally misleading and without basis
16 in fact or law." Order Continuing Order to Show Cause Hearing,
17 1:17.

18 Smyth also received notice of his alleged misconduct at the
19 March 18, 2004 hearing in the adversary proceeding. At the
20 hearing, the bankruptcy court warned Smyth "not to file [such] a
21 plan . . . again. If [he knew] a claim [was] disputed, [he must]
22 put it in the plan. Let people know. This [was] not a place to
23 trap people." Tr. of March 18, 2004 Hr'g, 23:21-24. The
24 bankruptcy court further told Smyth that it "was frankly

25
26 ¹⁶ At the May 5, 2004 hearing, the bankruptcy court found
27 that the debtor did not intend to avoid Oakland's lien through
28 the plan at the time he submitted it. Tr. of May 5, 2004 Hr'g,
26:9-10. The bankruptcy court thus ultimately concluded that the
debtor did not submit the plan with the intent to mislead
Oakland. Tr. of May 5, 2004 Hr'g, 26:10-12.

1 horrified by [his] conduct . . . in this case" and that it would
2 set the OSC. Tr. of March 18, 2004 Hr'g, 29:11-12.

3 Smyth further received notice of the authorities on which
4 the bankruptcy court intended to base its sanctions. The OSC
5 stated that the bankruptcy court was considering imposing
6 "serious sanctions" against Smyth, including permanent
7 disbarment. Order to Show Cause re: Apparent Bad Faith Filing,
8 4:3-5, 5:7-9. Additionally, the Continuance Order specified Rule
9 9011, § 105 and/or the bankruptcy court's inherent authority to
10 sanction bad faith conduct. Order Continuing Order to Show Cause
11 Hearing, 1:21-25.

12 Based on the record before us, we conclude that the
13 bankruptcy court afforded Smyth due process.

14
15 2. Evidentiary support

16 The bankruptcy court found that Smyth violated Rule 9011(b)
17 by signing and presenting papers containing frivolous assertions
18 and by presenting them for an improper purpose. The record
19 supports the bankruptcy court's findings.

20 To impose a sanction against Smyth under Rule 9011(b), the
21 bankruptcy court must find that he filed papers that are
22 frivolous or for an improper purpose.¹⁷ Marsch, 36 F.3d at 829

23
24 ¹⁷ Rule 9011 provides, in relevant part:

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

(continued...)

1 (internal quotations omitted). A frivolous paper is one that "is
2 both baseless and made without a reasonable and competent
3 inquiry." Townsend, 929 F.2d at 1362. That is, it is neither
4 "well-grounded in fact and warranted by existing law [nor] a good
5 faith argument for the extension, modification, or reversal of
6 existing law." Marsch, 36 F.3d at 829 (internal quotations
7 omitted). An attorney files a paper for an improper purpose if
8 he or she files it "to harass or to cause unnecessary delay or
9 needless increase in the cost of litigation." Id. (internal
10 quotations omitted). While frivolousness and improper purpose
11 are not completely separate considerations, as they often will
12 overlap, "bankruptcy courts must consider both frivolousness and
13 improper purpose on a sliding scale, where the more compelling
14 the showing as to one element, the less decisive need be the
15 showing as to the other." Id. at 830 (emphasis in original).

16 The bankruptcy court found that the contentions made by
17 Smyth in the objection were frivolous and implausible. Because
18 no reasonable attorney would make such baseless contentions, the
19 bankruptcy court concluded, Smyth filed the objection for an
20 improper purpose. The Ninth Circuit agreed with the bankruptcy

21
22 ¹⁷(...continued)
circumstances, -

- 23 (1) it is not being presented for any
24 improper purpose, such as to harass or to
25 cause unnecessary delay or needless increase
in the cost of litigation;
26 (2) the claims, defenses, and other legal
27 contentions therein are warranted by existing
law or by a nonfrivolous argument for the
28 extension, modification, or reversal of
existing law or the establishment of new law;
. . . .

1 court's findings as to the frivolousness of Smyth's assertions in
2 the objection. Smyth, 271 Fed. Appx. at 660-61.

3 The confirmed plan provided that "[t]he debtor will pay off
4 all debts to the City of Oakland by 4/1/4 [sic], through sale or
5 refinance of his real property." The confirmed plan made no
6 mention as to whether Oakland had a secured or unsecured claim.
7 As the Panel explained in Smyth I, the confirmed plan
8 "specifically provided for payment of [Oakland's] claim, without
9 designating it as secured or unsecured. Therefore, when
10 [Oakland] filed its secured claim, that claim could be paid in
11 accordance with the plan." 329 B.R. at 288. The debtor's
12 original schedules also had listed Oakland's claim as secured.
13 The record supports the bankruptcy court's findings.

14
15 3. Reasonableness of the sanction

16 The Panel has adopted ABA standards as the means for
17 determining reasonable sanctions. Crayton, 192 B.R. at 980;
18 Lehtinen, 332 B.R. at 416.¹⁸ The ABA standards, the Panel has
19 asserted, "promote the thorough, rational consideration of
20 relevant factors, and help to achieve consistency when imposing
21 attorney discipline." Crayton, 192 B.R. at 980; Lehtinen, 332
22 B.R. at 416 (quoting Crayton). The Panel has determined that
23 "[f]ailure to consider such factors constitutes an abuse of

24
25 ¹⁸ For the reasons stated by Judge Markell in his
26 concurrence, we all have serious questions as to the
27 appropriateness of requiring explicit consideration of the ABA
28 standards in determining the reasonableness of the suspension
sanction imposed by the bankruptcy court. However, as further
discussed herein, this Panel stated its reasons for requiring
consideration of the ABA standards in Crayton and Lehtinen, and
this Panel is bound by its prior decisions.

1 discretion.” Crayton, 192 B.R. at 980; Lehtinen, 332 B.R. at 417
2 (citing Crayton).

3 To determine an appropriate sanction, the bankruptcy court
4 should consider: (1) whether the duty violated was to a client,
5 the public, the legal system or the profession; (2) whether the
6 lawyer acted intentionally, knowingly or negligently; (3) whether
7 the lawyer’s misconduct caused a serious or potentially serious
8 injury; and (4) whether aggravating factors or mitigating
9 circumstances exist. Crayton, 192 B.R. at 980.

10 Aggravating factors include considerations that justify an
11 increase in the degree of discipline imposed, such as a prior
12 disciplinary offense, multiple offenses, a pattern of misconduct,
13 and refusal to acknowledge the wrongful nature of the conduct.
14 Id. at 981. Mitigating circumstances include considerations
15 which justify a reduction in the degree of discipline, such as
16 the absence of a prior disciplinary record, personal or emotional
17 problems, inexperience in the practice of law, or a timely good
18 faith effort to make restitution or to rectify the consequences
19 of the misconduct. Id.

20 As we mentioned earlier, the Ninth Circuit held that the
21 bankruptcy court did not abuse its discretion in deciding to
22 impose sanctions based on its determination that Smyth’s
23 assertions in the objection were frivolous. Smyth, 271 Fed.
24 Appx. at 660-61. We nonetheless vacate in part the Second
25 Suspension Order and remand to the bankruptcy court for further
26 findings, as it did not explicitly consider the relevant ABA
27 standards to determine the appropriate sanction, as required
28 under Crayton and Lehtinen.

1 The bankruptcy court did not elaborate its reasons for
2 reimposing the suspension sanction in the Second Memorandum
3 Decision. Rather, the bankruptcy court simply stated that it
4 reaffirmed its conclusion that suspension was the most
5 appropriate sanction. From this statement, we infer that the
6 bankruptcy court relied on the reasoning it set forth in the
7 First Memorandum Decision.

8 Reviewing the First Memorandum Decision, the bankruptcy
9 court may have considered aggravating factors in its
10 determination, though it did not explicitly identify them as
11 such. When deciding to impose the six-month suspension as a
12 sanction against Smyth, the bankruptcy court appeared to have
13 considered two factors: prior disciplinary offenses and a pattern
14 of misconduct. Specifically, it highlighted Smyth's "lengthy
15 history of disciplinary problems" and referenced an earlier
16 sanction imposed against him by another bankruptcy court in the
17 district, that required him to complete forty hours of continuing
18 legal education. First Memorandum Decision, 9:13-14, 9:25-26,
19 10:1.

20 Nonetheless, based on our review of the First Memorandum
21 Decision and Second Memorandum Decision, though the bankruptcy
22 court appears to have considered at least one of the ABA
23 standards, it did not address all of them to determine the
24 appropriate sanction. Because it did not consider all of the ABA
25 standards as required under Crayton, we must conclude that the
26 bankruptcy court abused its discretion. We therefore remand to
27 the bankruptcy court to determine the appropriate sanction under
28 the ABA standards.

1 MARKELL, Bankruptcy Judge, concurring:

2
3 I reluctantly concur. My reluctance stems not from a
4 disagreement with the majority over its analysis of the case; I
5 cannot fault that. It does not derive from concerns over the
6 scope or import of the majority's words; those also are beyond
7 any serious objection.

8 Instead, my reluctance comes from discomfort with our long-
9 established rule that, unless changed by a higher court or
10 Congress, we must follow our own precedent, regardless of how
11 flawed it may be. Concannon v. Imperial Cap. Bank (In re
12 Concannon), 338 B.R. 90, 95 (9th Cir. BAP 2006); Salomon N. Am.
13 v. Knupfer (In re Wind N' Wave), 328 B.R. 176, 181 (9th Cir. BAP
14 2005); Ball v. Payco-Gen. Am. Credits (In re Ball), 185 B.R. 595,
15 597 (9th Cir. BAP 1995).

16 Adherence to that rule decides this case. Taken together,
17 Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 416-17 (9th
18 Cir. BAP 2005) and Peugeot v. United States Trustee (In re
19 Crayton), 192 B.R. 970, 980 (9th Cir. BAP 1996) require a
20 bankruptcy court to expressly and overtly consider the American
21 Bar Association standards for attorney sanctions.²⁰ There is no
22 doubt that the bankruptcy court did not cite the ABA standards in
23 its decision. Our prior precedent thus requires reversal.

24 But blindly applying Lehtinen and Crayton to the facts of
25

26 ²⁰ The ABA standards are more formally cited as JOINT COMMITTEE
27 ON PROFESSIONAL SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS. They
28 were originally adopted in 1986 and amended in 1992, and the
current version bears a copyright date of 2005. The standards
can be found at:
http://www.abanet.org/cpr/regulation/standards_sanctions.pdf.

1 this case leads, I believe, to a result that should offend those
2 who care about how courts operate, or who wish courts to operate
3 rationally. My belief rests on two arguments.

4 First, Lehtinen and Crayton are discordant with the agreed
5 standard of review. As the majority correctly states, we review
6 all aspects of a bankruptcy court's decision to impose Rule 9011
7 sanctions for abuse of discretion. Valley Nat'l Bank v. Needler
8 (In re Grantham Bros.), 922 F.2d 1438, 1441 (9th Cir. 1991).

9 This means that a bankruptcy court's decision that conduct is
10 sanctionable is not disturbed unless discretion was abused. More
11 importantly, however, and as also recognized by the majority,
12 this high level of review also applies to the bankruptcy court's
13 choice of sanction. U.S. Dist. Ct. for E.D. Wash. v. Sandlin, 12
14 F.3d 861, 865 (9th Cir. 1993). See also Chambers v. NASCO, Inc.,
15 501 U.S. 32, 44-45 (1991) (in discussing a court's discretionary
16 use of its inherent powers, stating that "[a] primary aspect of
17 that discretion is the ability to fashion an appropriate sanction
18 for conduct which abuses the judicial process.").

19 As a consequence, there can be no quibble that we must give
20 great deference to the bankruptcy court's decision that specified
21 conduct is sanctionable, as well as to its decision as to what
22 corrective action to take. And that is how it should be.

23 Bankruptcy judges, along with all other federal judges, possess
24 the inherent power to run the type of courtroom that they believe
25 best serves justice, see Chambers, 501 U.S. at 43-44, and that
26 power historically has included the power to suspend attorneys
27 from practice. E.g., Ex parte Burr, 22 U.S. (9 Wheat.) 529, 531
28 (1824).

1 Despite this standard of review, Lehtinen and Crayton
2 require that bankruptcy courts mechanically recite and consult
3 the ABA standards. We do not give the bankruptcy court the
4 benefit of the doubt that it consulted but did not mention the
5 standards, nor do we undertake a review of the sanctions imposed
6 to see if we independently conclude that the sanction is within
7 those standards. Such a formulaic review is the antithesis of a
8 review based upon the abuse of discretion standard.

9 Our position also leads to further unnecessary delay. Once
10 we detect that the ABA standards have not been cited, we simply
11 stop our analysis and send the matter back. Given the deference
12 we admit is due to the bankruptcy court, however, a good case can
13 be made that we should affirm, regardless of whether the court
14 slavishly intoned that the applicable standards were consulted,
15 at least if we can determine that the sanction imposed is
16 consistent with the ABA standards. And if we don't believe that
17 the sanction is consistent with the ABA standards, we should
18 reverse, thereby resolving the issue once and for all. But for
19 Mr. Smyth, those determinations are for another day; sending the
20 case back in its current status resolves nothing. The upshot of
21 this dithering is that while we say we apply the abuse of
22 discretion standard, we act inconsistently with its purpose and
23 rationale.

24 My second argument builds on these points: adherence to
25 Lehtinen and Crayton requires us knowingly to apply precedent
26 that, while binding, doesn't fit the facts or the context of this
27 appeal. Put another way, Crayton and Lehtinen require, in my
28 view, the use of standards ill-adapted to federal bankruptcy

1 proceedings.

2 This point is made by the subject matter of this appeal. It
3 involves the imposition of sanctions under federal Rule 9011 and
4 Section 105 of the federal Bankruptcy Code. By contrast, the ABA
5 standards were drafted primarily for use in nonbankruptcy civil
6 litigation under the ABA's Model Rules of Professional Conduct.
7 ABA standards ¶ 1.3.²¹

8 The ABA Model Rules, however, appear not to apply in this
9 case. Attorneys in the Northern District of California must
10 "comply with the standards of professional conduct required of
11 members of the State Bar of California." N.D. CAL. LOCAL CIV. R.
12 11-4(a), incorporated by N.D. CAL. LOCAL BANKR. R. 1001-2(a).
13 While these state rules are similar to the ABA Model Rules, they
14 differ in several respects.²² This calls into doubt the wisdom
15 of requiring consultation with the ABA standards in all cases,
16 without consideration of the scope of the standards in the first
17 instance.

18 Further, review and revision of these standards are not in
19 the hands of either Congress or the courts. In addition, there

21 ²¹ It is true that the standards expressly indicate that
22 they also may be applied to ascertain appropriate sanctions for
23 violations of "applicable standards under the laws of the
24 jurisdiction where the proceeding is brought." ABA standards
25 § 1.3. But the bulk of the citations in the standards are to the
26 ABA's own rules, not to any variations adopted by individual
27 jurisdictions.

28 ²² A leading treatise states that because "the [California]
rules of discipline follow the format of neither the Code or the
Model Rules, but borrow considerable substance from each," and
are layered with "significant statutory regulation . . . [this
makes] it even more difficult properly to characterize the
situation there." 1 GEOFFREY C. HAZARD, JR., W. WILLIAM HODES & PETER
R. JARVIS, THE LAW OF LAWYERING § 1.15, at p. 1-26 n.1 (3d ed. 2008).

1 is no showing that the ABA considered bankruptcy's distinctive
2 context when drafting the standards. Given this, it strikes me
3 as incongruous to require that, before a bankruptcy court can
4 impose sanctions under a federal rule, it must recite that it
5 considered standards developed primarily for nonfederal courts by
6 unelected and nonjudicial parties. This is especially troubling
7 when some districts, such as the Northern District of California,
8 have procedures already in place to consider the propriety of
9 suspending an attorney from practice, and those procedures do not
10 require consideration of the ABA standards. N.D. CAL. LOCAL CIV.
11 R. 11-6, incorporated by N.D. CAL. LOCAL BANKR. R. 1001-2(a).²³

13 ²³ The relevant text of the N.D. Cal. Local Rule on
14 discipline follows:

15 11-6. Discipline.

16 (a) General. In the event that a Judge has cause
17 to believe that an attorney has engaged in
18 unprofessional conduct, the Judge may do any or all of
the following:

19 (1) Initiate proceedings for civil or
20 criminal contempt under Title 18 of the
21 United States Code and Rule 42 of the Federal
Rules of Criminal Procedure;

22 (2) Impose other appropriate sanctions;

23 (3) Refer the matter to the appropriate
24 disciplinary authority of the state or
25 jurisdiction in which the attorney is
licensed to practice;

26 (4) Refer the matter to the Court's
27 Standing Committee on Professional Conduct;
or

28 (5) Refer the matter to the Chief Judge

(continued...)

1 The main problem, of course, is our rigid view that we
2 cannot change or alter our prior precedent, even if we think it
3 dead wrong. Although adherence to precedent is a venerable
4 ideal,²⁴ experience shows that it is unwise to enshrine precedent
5 and never reconsider it.²⁵ I submit that this is a case in which

6
7 ²³ (...continued)

8 for her or him to consider whether to issue
9 an order to show cause under Civ. L.R. 11-7.

10

11 (c) Standing Committee on Professional Conduct.

12 The Court will appoint as Special Masters for
13 Disciplinary Proceedings pending before the Court, a
14 Standing Committee on Professional Conduct consisting
15 of seven members of the bar and designate one of the
16 members to serve as Chair of the Committee. The members
17 of the Committee shall continue in office for a period
18 of 4 years. Members shall serve staggered terms, with
19 four of the first appointees serving for 2 years and
20 three members serving for 4 years.

21 (d) Discipline Oversight Committee. The Chief
22 Judge shall appoint three (3) or more Judges to a
23 Discipline Oversight Committee which shall oversee the
24 administration of this Local Rule.

25 ²⁴ "For the habit of lightly changing the laws is an evil,
26 and, when the advantage is small some errors both of lawgivers
27 and rules had better be left; the citizen will not gain so much
28 by making the change as he will lose by the habit of
29 disobedience." ARISTOTLE, POLITICS, BOOK II, CH. 8, reprinted in THE
30 BASIC WORKS OF ARISTOTLE 1164 (Richard McKeon ed., 1941). The text
31 can also be found on-line at
32 <http://classics.mit.edu/Aristotle/politics.2.two.html>.

33 ²⁵ The English House of Lords once held such a view, but
34 jettisoned it after it proved unworkable and unjust. Starting
35 roughly in 1898, the House of Lords declared itself absolutely
36 bound by its prior precedents, and without the ability to decline
37 to follow an admittedly applicable precedent. See London St.
38 Tramways Co. v. London County Council, [1898] A.C. 375, 381
(H.L.) (appeal taken from Eng.) (U.K.). See also Beamish v.

(continued...)

1 we should take the opportunity to reform or reject Crayton and
2 Lehtinen's troublesome and potentially irrelevant holdings.

3 But the odd composition of this court²⁶ and the lack of any
4 procedure, such as an en banc rule, to reconsider our prior
5 decisions effectively ensconce our precedents as if they were
6 infallible.²⁷ This itself is wrong - as John Maynard Keynes once

7
8 ²⁵ (...continued)

9 Beamish, (1861) 9 H.L.C. 274, 11 Eng. Rep. 735 (H.L.) (appeal
10 taken from Ir.) (U.K.). In 1966, the House of Lords changed its
11 mind, and did so by way of a simple statement, unconnected with
12 any pending case. Practice Statement (Judicial Precedent),
13 [1966] 1 W.L.R. 1234, 1234 (H.L.) (stating that "too rigid
adherence to precedent may lead to injustice in a particular
case" and asserting ability to "depart from a previous decision
when it appears right to do so.").

14 ²⁶ By statute, we are a "bankruptcy appellate panel
15 service," a phrase that does not contain the word "court." 28
16 U.S.C. § 158(b)(1). But the six judges who are appointed to this
17 service assuredly are a court for purposes of considering the
18 wisdom of prior precedent. The relevant statute requires this
19 service to be staffed by "bankruptcy judges of the districts in
the circuit who are appointed by the judicial council" and then
gives those judges - that is, the entire panel - the power "to
hear and determine, with the consent of all the parties,
appeals" Id.

20 The power to hear such appeals and then to enter binding
21 judgments vests in us judicial power. That power is the essence
22 of being a court. Indeed, if we did not have any judicial power
or were not a court, our collective adoption of court-developed
rules, such as the rule that we cannot overturn prior precedent,
would have no recognized rationale.

23 For a good recent examination of the constitutional status
24 of bankruptcy judges, see Tuan Samahon, Are Bankruptcy Judges
25 Unconstitutional? An Appointments Clause Challenge, 60 HASTINGS
L.J. 233 (2008).

26 ²⁷ I obviously refer only to precedents of this court; we do
27 not have the power or authority to ignore binding Ninth Circuit
28 or Supreme Court precedent. Hart v. Massanari, 266 F.3d 1155,
1170 (9th Cir. 2001) ("A district judge may not respectfully (or
disrespectfully) disagree with his learned colleagues on his own

(continued...)

1 remarked, "When the facts change, I change my mind. What do you
2 do, sir?"²⁸

3 But as we have bound ourselves to follow such a procedure, I
4 cannot fault the majority when it faithfully implements it. I
5 thus concur.

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23 ²⁷ (...continued)
24 court of appeals who have ruled on a controlling legal issue, or
25 with Supreme Court Justices writing for a majority of the Court.
26 . . . Binding authority must be followed unless and until
overruled by a body competent to do so." See also IRS v.
Osborne (In re Osborne), 76 F.3d 306, 309 (9th Cir. 1996).

27 ²⁸ This remark reportedly was in response to criticism that
28 he had changed his mind on monetary policy during the Depression.
ALFRED L. MALABRE, LOST PROPHETS: AN INSIDER'S HISTORY OF THE MODERN
ECONOMISTS 220 (1994).