

FEB 29 2008

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

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. CC-07-1305-MoDMk
)	
DOROTHY POEHLMAN,)	Bk. No. RS 07-10460-MJ
)	
Debtor.)	
_____)	
ARMANDO CARRILLO,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
UNITED STATES TRUSTEE; SANDRA)	
L. BENDON, Trustee; DOROTHY)	
POEHLMAN,)	
)	
Appellees.)	
_____)	

Argued by Telephone Conference
and Submitted on February 21, 2008

Filed - February 29, 2008

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

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN, and MARKELL, Bankruptcy Judges.

¹This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 The United States Trustee ("UST") moved for the disgorgement
2 of fees, imposition of fines and an injunction against a
3 bankruptcy petition preparer, alleging that he had violated 11
4 U.S.C. § 110² by offering legal advice to the debtor. The
5 bankruptcy court granted the motion and the petition preparer
6 appealed. We conclude that the procedure was tainted by a lack
7 of due process and basic fairness to the petition preparer and
8 therefore REVERSE.

9 **I. FACTS**

10 Appellant Armando Carrillo ("Appellant") is a bankruptcy
11 petition preparer within the meaning of section 110. Until the
12 UST filed the motion underlying this appeal, it had never taken
13 any action against Appellant in the twelve years that he has
14 prepared bankruptcy petitions.

15 Debtor Dorothy Poehlman ("Debtor") retained Appellant to
16 prepare her petition, schedules and statement of financial
17 affairs for a \$200.00 fee. In December 2006, Debtor executed an
18 acknowledgment that the staff of Appellant's company, Public
19 Documents Plus ("PDP"), are not attorneys and do not give legal
20 advice and that PDP would be typing and completing documents
21 according to Debtor's instructions. Debtor acknowledged that she
22 was to "thoroughly review" the documents presented to PDP for
23 typing and that she would be responsible for making any
24 corrections.

25 _____
26 ²Unless otherwise indicated, all chapter, section and rule
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
revised by The Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.

1 On January 20, 2007, Debtor executed a Statement Regarding
2 Assistance of Non-Attorney With Respect to the Filing of
3 Bankruptcy Case, declaring under penalty of perjury that she had
4 paid PDP \$200.00 and that she had received assistance from a non-
5 attorney in connection with the filing of her case. In addition,
6 Appellant executed a Disclosure of Compensation of Bankruptcy
7 Petition Preparer acknowledging his receipt of \$200.00 for
8 document preparation services. Appellant further executed a
9 Declaration of Non-Attorney Bankruptcy Petition Preparer
10 containing his social security number.

11 Both Debtor and Appellant executed a Notice to Debtor by
12 Non-Attorney Bankruptcy Petition Preparer acknowledging that
13 Appellant is not an attorney and may not practice law or give
14 legal advice, including advice about whether to file a petition,
15 what chapter would be appropriate, and whether debts would be
16 discharged. Appellant and Debtor also signed a certification
17 that Appellant had delivered to Debtor a Notice of Available
18 Chapters on a form promulgated by the United States Bankruptcy
19 Court for the Central District of California. This form explains
20 the differences in the chapters, briefly explains the
21 availability of discharge in each chapter, and touches on issues
22 pertaining to exemptions and eligibility.

23 After PDP prepared the petition and other documents, Debtor
24 reviewed them for accuracy, signed them, and on January 31, 2007,
25 personally delivered the papers to the bankruptcy court for
26 filing and paid the filing fee directly to the court.

27 On March 6, 2007, at her section 341 meeting, Debtor
28 executed another declaration, which was presented to her in the

1 form of a questionnaire. In this questionnaire, she stated that
2 she had given Appellant \$299.00 in cash for her filing fee, that
3 she was not given her petition and schedules before they were
4 filed, that she did not sign her own name to the petition and
5 schedules and that she was directed to say that she had no
6 assistance in preparing her documents. She further checked a box
7 indicating that she had been informed that an attorney would
8 review the bankruptcy papers before they were filed with the
9 court. She also checked a response indicating that she had been
10 directed to put false information on her bankruptcy documents,
11 but did not fill in the blank describing the purported false
12 information.

13 Debtor also checked boxes indicating that Appellant had
14 given her legal advice:

15 The preparer who assisted me explained to me
16 **(select all that apply):**

- 17 whether or not to file a bankruptcy petition.
- 18 the difference between bankruptcy cases under Chapter
19 7, 11, 12, or 13.
- 20 whether my debts will be discharged.
- 21 whether I will be able to retain my home, car, or other
22 property after filing bankruptcy.
- 23 any tax consequences from filing bankruptcy.
- 24 whether I should repay any of my debts to a creditor
25 after filing bankruptcy.
- 26 whether I should enter into a reaffirmation agreement
27 with a creditor to reaffirm a debt.
- 28 how any property interest I own should be characterized
as either real or personal property.
- how my debts should be characterized as either
priority, secured or unsecured debts.
- any bankruptcy procedures and rights I may have as a
debtor in bankruptcy.

26 After receiving Debtor's responses to the questionnaire,
27 Michael S. Smith ("Smith"), a paralegal specialist for the UST,
28 contacted Debtor. Debtor recanted her responses that she had not

1 been given her documents before they were filed, that Appellant
2 had directed her to say that she had received no assistance, and
3 that she had paid the filing fee to Appellant.³ She further
4 recanted her responses indicating that Appellant had advised her
5 about her ability to retain her property, the tax consequences of
6 filing bankruptcy, whether to repay or reaffirm debts, how to
7 characterize her property interests and debts, and about other
8 bankruptcy procedures and rights. Nonetheless, Smith's
9 declaration indicates that "on two occasions during that
10 discussion, the Debtor confirmed that [Appellant] explained 1)
11 whether or not to file a bankruptcy petition, 2) the difference
12 between bankruptcy cases under chapter[s] 7, 11, 12 or 13, and 3)
13 whether her debts would be discharged." He did not note that
14 Appellant and Debtor had signed a disclosure form promulgated by
15 the bankruptcy court that discusses at least the latter two
16 items.

17 Smith revised Debtor's declaration/questionnaire to reflect
18 the items recanted by Debtor in her conversation with him.
19 Debtor did not sign this revised copy. The UST thereafter filed
20 a Motion Under 11 U.S.C. § 110 for Disgorgement of Fees, Fines,
21 and/or an Injunction Against Bankruptcy Petition Preparer. The
22

23
24 ³Even if Debtor had not recanted these responses, the
25 declarations and acknowledgments filed with the petition were
26 clearly inconsistent with her responses to the questionnaire.
27 Those documents reflected that she had retained Appellant, a non-
28 attorney, to assist her. She acknowledged that Appellant could
not render legal advice. She did sign her name to the petition
and other documents, and she declared that she had reviewed them
before filing. She also paid the filing fee directly to the
court.

1 UST alleged that Appellant "offered legal advice to the debtor or
2 a potential debtor," relying on Smith's declaration that Debtor
3 had not recanted her responses that Appellant had advised her
4 whether to file, about the differences between the various
5 chapters, and whether her debts would be discharged. The UST did
6 not allege that it had ever previously sought an order against
7 Appellant under section 110, that any such order had ever been
8 entered against Appellant, or that any other debtors had alleged
9 or responded that Appellant had provided them with legal advice.
10 Instead, the UST relied solely on Smith's characterization of his
11 phone conversation with Debtor in alleging that Appellant had
12 rendered improper legal advice.

13 Upon receiving the motion against him, Appellant contacted
14 Debtor. After conferring with Debtor, Appellant prepared a
15 revised questionnaire/declaration which Debtor executed under
16 penalty of perjury (on April 22, 2007) "[w]ithout pressure and
17 without being placed under duress." Appellant also prepared and
18 faxed another declaration to Debtor based on his conversation
19 with her.

20 Debtor declared that she had incorrectly completed the
21 questionnaire at the section 341 meeting, stating "I was very
22 nervous, misunderstood some of the questions, and put some
23 [check] marks where they were not suppose[d] to be or I placed
24 them in the wrong places." She identified specific examples of
25 her incorrect answers, including those where she had checked that
26 she had paid Appellant the filing fee, that Appellant had
27 directed her to place false information in her petition and
28 schedules, and that Appellant had advised her that an attorney

1 would review her documents.

2 More specifically, Debtor stated that "at no time did
3 [Appellant] advise me, recommend or suggest under which Chapter
4 (7, 11, 12 or 13)" to file as she had already decided the chapter
5 under which she was going to file when she initially contacted
6 Appellant. Debtor further clarified that "[a]t no time did
7 [Appellant] make any statement to me as to which debts or if any
8 my debts [sic] will be discharged. I saw no need to ask him
9 therefore it was never discussed."

10 Debtor also stated that when Smith called her, she was
11 nervous and "did not understand the reason for the questions."
12 According to Debtor, Smith "used certain terminology that I
13 failed to understand exactly what he was asking [sic] which
14 caused me to make a "Yes" response where a "No" response should
15 have been made. I did not have a copy of the questionnaire in my
16 presence at the time of the inquiry that I could review at the
17 same time the Trustee's agent asked me the question."

18 Appellant also filed a declaration stating that he had not
19 provided legal advice to Debtor and noting that many of Debtor's
20 responses to the questionnaire were inconsistent with the
21 declarations and acknowledgments that she executed and filed with
22 the bankruptcy court. For example, Debtor responded that
23 Appellant had directed her to say that she had no assistance in
24 the preparation of her documents even though her Statement
25 Regarding Assistance of Non-Attorney With Respect to the Filing
26 of Bankruptcy Case reflected that she had paid Appellant \$200.00
27 and that she had received assistance from a non-attorney in
28 connection with the filing of her case.

1 On May 22, 2007, the bankruptcy court held the initial
2 hearing on the UST's section 110 motion. Even though Appellant
3 requested that he be allowed to testify, the court refused
4 because Debtor was not present. Similarly, Smith, who was in the
5 courtroom, did not testify, even though counsel for the UST
6 stated that its motion was "based on a conversation between the
7 paralegal [Smith] and [Debtor]." The court authorized the UST
8 to subpoena Debtor and threaten her "that the U.S. Trustee is
9 entitled to bring a motion to revoke her discharge or something,
10 whatever language you want to put in there."

11 At the continued hearing on July 10, 2007, counsel for the
12 UST made several erroneous or misleading statements. First,
13 counsel incorrectly stated that Debtor had executed four separate
14 differing declarations under penalty of perjury, including in
15 that number the worksheet prepared by Smith and never seen or
16 executed by Debtor. Debtor executed only two questionnaires (at
17 the creditor's meeting on March 6 and again on April 22). Debtor
18 did execute a separate declaration attached to Appellant's
19 opposition to the motion, but that declaration is entirely
20 consistent with the questionnaire executed on April 22.

21 Second, counsel for the UST incorrectly stated that "I
22 presented [Smith] last time this motion was on calendar" and that
23 he "testified to the nature and extent that the U.S. Trustee goes
24 to assure that these things are accurate before these motions are
25 brought[.]" Smith did not testify at the initial hearing. If he
26 did testify the day of the initial hearing, he did so in the
27 context of a different motion and without giving Appellant an
28 opportunity for cross-examination.

1 Counsel for the UST also stated that "I -- I don't know how
2 we're supposed to get a handle on these things. The Debtors say
3 whatever they -- whomever's standing in front of them tells them
4 to say."⁴ Counsel for the UST then commenced her direct
5 examination of Debtor, her only live witness, largely utilizing
6 leading questions. Debtor testified that she had filled out the
7 questionnaire at the section 341 meeting "very quickly" and she
8 "was nervous" when completing it. She also testified that she
9 was on her cell phone in her automobile when she was conversing
10 with Smith: "not a very great place for me to be . . . doing
11 this." Responding to counsel's leading questions, Debtor
12 testified that Appellant had prepared the questionnaire that she
13 executed on April 22, 2007, and that he had prepared her April 24
14 declaration explaining and correcting her inconsistent responses
15 to the questionnaire.

16 Appellant then commenced his cross examination of Debtor,
17 the witness upon whom the UST relied in prosecuting its section
18 110 motion. Appellant asked Debtor if he had influenced her
19 responses or if he had given her advice about the appropriate
20 chapter for her or about the dischargeable nature of her debts.
21 Debtor's responses to these questions were consistent with her
22 April declaration and amended questionnaire.

23 When Debtor finished testifying and Appellant began his
24 response, the bankruptcy court abruptly stopped him without

26 ⁴This bold and unsubstantiated statement was not made under
27 penalty of perjury. While perhaps we should give counsel the
28 benefit of doubt and call it nothing more than tenacious
rhetoric, the court's ruling (discussed later) unfortunately
appears to be based, in part, on this loose statement.

1 giving him an opportunity to argue or to testify. Instead, the
2 court announced its ruling stating that "every question that was
3 asked by [Appellant] was leading."⁵ The court observed that
4 Debtor was "going to say whatever was put into her mouth by
5 [Appellant]"⁶ and thus disregarded her testimony. The court
6 stated that "I have to go on what the Debtor originally did under
7 no influence, which is to say that she was given improper legal
8 advice by [Appellant]." The bankruptcy court therefore granted
9 the UST's motion, ordered Appellant to disgorge his \$200 fee and
10 to pay a \$500 fine, and enjoined Appellant from engaging in the
11 unauthorized practice of law.

12 On July 31, 2007, the court entered its order granting the
13 motion, ordering disgorgement, imposing the fine, and enjoining
14 Appellant from engaging in the unauthorized practice of law.
15 Appellant filed a timely notice of appeal on August 10, 2007.

16 **II. ISSUE**

17 Did the bankruptcy court err in granting the UST's motion
18 for the disgorgement of Appellant's fees, imposition of a fine,
19 and issuance of an injunction pursuant to section 110?

20 **III. STANDARD OF REVIEW**

21 We review the imposition of discretionary penalties for
22 violations of section 110 for abuse of discretion. Frankfort
23 Dig. Servs., Ltd. v. Neary (In re Reynoso), 315 B.R. 544, 550
24 (9th Cir. BAP 2004), aff'd, 477 F.3d 1117 (9th Cir. 2007). A
25 bankruptcy court "necessarily abuses its discretion if it bases
26

27 ⁵Counsel for the UST had not objected to any question asked
by the Appellant.

28 ⁶See supra footnote 4.

1 its decision on an erroneous view of the law or clearly erroneous
2 factual findings." Id. A factual finding is clearly erroneous
3 "if the appellate court, after reviewing the record, has a firm
4 and definite conviction that a mistake has been committed." Id.
5 at 549, citing Anderson v. Bessemer City, 470 U.S. 564, 573
6 (1985).

7 "An abuse of discretion is a plain error, discretion
8 exercised to an end not justified by the evidence, a judgment
9 that is clearly against the logic and effect of the facts as are
10 found.'" Rabkin v. Ore. Health Sciences Univ., 350 F.3d 967, 977
11 (9th Cir. 2003), quoting Int'l Jensen, Inc. v. Metrosound U.S.A.,
12 Inc., 4 F.3d 819, 822 (9th Cir. 1993) (internal quotations and
13 citation omitted).

14 Evidentiary rulings at trial are reviewed for abuse of
15 discretion. See United States v. Merino-Balderrama, 146 F.3d
16 758, 761 (9th Cir. 1998). Such rulings will be reversed only if
17 the error more likely than not affected the verdict. See United
18 States v. Pang, 362 F.3d 1187, 1192 (9th Cir. 2004); Miller v.
19 Fairchild Indus., Inc., 885 F.2d 498, 513 (9th Cir. 1989).

20 **IV. JURISDICTION**

21 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
22 §§ 1334 and 157(b) (1). We have jurisdiction under 28 U.S.C.
23 § 158(a) (1), (b) (1) and (c).

24 **V. DISCUSSION**

25 Section 110(e) (2) (A) expressly prohibits bankruptcy petition
26 preparers such as Appellant from offering legal advice to a
27 debtor or potential debtor. Section 110(e) (2) (B) provides that
28 "legal advice" includes advising a debtor

1 (I) whether (I) to file a petition under this title; or
2 (II) commencing a case under chapter 7, 11, 12, or 13
3 is appropriate; (ii) whether the debtor's debts will be
4 discharged in a case under this title; (iii) whether
5 the debtor will be able to retain the debtor's home,
6 car, or other property after commencing a case under
7 this title; (iv) concerning (I) the tax consequences of
8 a case brought under this title; or (II) the
9 dischargeability of tax claims; (v) whether the debtor
10 may or should repay debts to a creditor or enter into a
11 reaffirmation agreement with a creditor to reaffirm a
12 debt; (vi) concerning how to characterize the nature of
13 the debtor's interests in property or the debtor's
14 debts; or (vii) concerning bankruptcy procedures and
15 rights.

9 11 U.S.C. § 110(c); In re Bernales, 345 B.R. 206, 214 (Bankr.
10 C.D. Cal. 2006).

11 Here, based on the recanted responses of Debtor to the
12 questionnaire, the bankruptcy court found that Appellant
13 improperly offered Debtor legal advice. While we show great
14 deference to a court's findings, particularly with respect to
15 credibility determinations, we believe firmly and definitely that
16 the bankruptcy court committed a clear error of judgment in the
17 conclusion that it reached.⁷ The bankruptcy court incorrectly
18

19 ⁷The Supreme Court has held that notwithstanding the great
20 deference given to a trial court's findings, particularly with
21 respect to credibility, an appellate court may nevertheless find
22 clear error when documents and other objective evidence
23 contradict the witness' story or the findings:

24 This is not to suggest that the trial judge may insulate
25 [her] findings from review by denominating them credibility
26 determinations, for factors other than demeanor and
27 inflection go into the decision whether or not to believe a
28 witness. Documents or objective evidence may contradict the
witness' story; or the story itself may be so internally
inconsistent or implausible on its face that a reasonable
factfinder would not credit it. Where such factors are
present, the court of appeals may well find clear error even
in a finding purportedly based on a credibility
determination.

Anderson, 470 U.S. at 575.

1 dismissed all of Appellant's questions on cross-examination as
2 leading, denied Appellant an opportunity to argue or testify on
3 his own behalf after he had specifically requested to do so at
4 the initial hearing, placed inordinate weight on hearsay
5 contained in the written declaration of a witness who was not
6 available for cross-examination, may have been misled by
7 inaccurate statements of counsel for the UST, and incorrectly
8 held that Debtor provided no evidence "other than the words that
9 were put in her mouth by [Appellant]." Furthermore, the court
10 erred in issuing an injunction in the absence of an adversary
11 proceeding.

12 A. The Court Clearly Erred in Adopting Debtor's Initial
13 Responses to the Questionnaire

14 The bankruptcy court's findings and conclusions center on
15 one determination: that Debtor's recantation of her responses to
16 the questionnaire was due to the influence of Appellant, and thus
17 that her original responses were accurate. The record simply
18 does not support this finding or conclusion. Not only did Debtor
19 recant most of her responses during her conversation with Smith
20 well before Appellant was even aware of her responses to the
21 questionnaire, but she also executed declarations and
22 certifications at the time she signed her petition which were
23 contrary to her initial responses to the questionnaire.

24 Appellant did not influence or force Debtor to recant her clearly
25 inaccurate responses in her phone conversation with Smith.

26 Debtor's initial response to the questionnaire was replete with
27 errors clearly inconsistent with prior representations by the

28 Debtor. Therefore, the court's decision to adopt those responses

1 as "what Debtor originally did under no influence" was clear
2 error.

3 The UST's motion was also based on the hearsay written
4 testimony of Smith who did not testify in any hearing relating to
5 Appellant, notwithstanding the UST's representations to the
6 contrary. Smith acknowledged in his declaration that in his
7 phone conversation with Debtor, she had recanted many of her
8 responses to the initial questionnaire and that he had therefore
9 modified her questionnaire (although Debtor never saw or swore to
10 the modified version). In his written declaration, Smith stated
11 that Debtor confirmed to him that Appellant advised her whether
12 to file a petition, about the differences between the chapters,
13 and whether her debts would be discharged. Under Federal Rule of
14 Evidence 801, Smith's testimony constitutes multiple hearsay
15 (written declaration about conversations with the debtor, who was
16 not a party-opponent). Even though the UST indicated that Smith
17 had testified at the first hearing about the procedures the UST
18 uses to ensure the accuracy of its motions, Smith did not testify
19 at that hearing. In fact, he never testified and Appellant was
20 not able to cross-examine him given the abruptness of the court's
21 ruling.

22 Cross-examination of Smith would have been particularly
23 appropriate, in light of (1) Debtor's testimony (during the UST's
24 direct examination) that she was on a cell phone in her
25 automobile when she spoke to Smith, (2) Debtor's April 24
26 declaration that she did not understand Smith's questions to her
27 and that she did not have a copy of the questionnaire in front of
28 her when conversing with Smith, and (3) Debtor's execution of a

1 certification (filed with her petition) that she had received a
2 form (required by the court) from Appellant that explained the
3 differences in the chapters and described briefly the
4 availability of discharge.

5 Both Debtor and Appellant filed declarations swearing that
6 Appellant did not offer legal advice and that Debtor's initial
7 responses were wrong. Even if the court disregarded that
8 testimony, it should have given Appellant an opportunity to
9 cross-examine Smith to determine exactly how Appellant
10 purportedly conveyed legal advice to Debtor. In other words, did
11 Debtor tell Smith that Appellant did anything beyond providing
12 the form required by the court?

13 In addition to making the misleading representation that
14 Smith had testified at a prior hearing on the motion, counsel for
15 the UST also inaccurately stated that Debtor had furnished four
16 different declarations about whether Appellant had provided legal
17 advice. Debtor executed only two responses to the questionnaire,
18 and the second version of the declaration was entirely consistent
19 with her April 24 declaration. The UST (and thus the court)
20 placed too much weight on the fact that Appellant drafted these
21 documents, given Debtor's testimony that she -- without coercion
22 by Appellant -- executed the documents to correct her inaccurate
23 initial responses and given that the UST's own purported
24 correction of the questionnaire was not reviewed or signed by
25 Debtor.

26 Here, the only evidence to support any finding that
27 Appellant offered Debtor improper legal advice is Debtor's
28 recanted response and the UST's hearsay declaration that Debtor

1 told Smith that Appellant offered such advice. Both Debtor and
2 Appellant testified that Appellant did not offer such advice.
3 Tellingly, the UST offered no corroborating testimony from any
4 other debtor to show that Appellant provides such legal advice.⁸
5 Debtor's initial response to the questionnaire was replete with
6 errors, was inconsistent with documents filed with the petition,
7 and was disavowed by Debtor. For the UST and the court to rely
8 on it in concluding that Appellant provided improper legal advice
9 is clear error.

10 The court also erred in disregarding the testimony of Debtor
11 because the questions asked by Appellant were leading. Federal
12 Rule of Evidence 611(c) provides that when a party calls a
13 witness "identified with an adverse party," interrogation may be
14 by leading question. Fed. R. Evid. 611(c). Debtor was the
15 primary witness for the UST; its case against Appellant rested
16 almost entirely on her initial responses to the questionnaire.
17 In fact, the UST examined Debtor on direct, often using leading
18 questions. Appellant called Debtor on cross-examination.
19 "Ordinarily leading questions should be permitted on cross-
20 examination." Fed. R. Evid. 611(c). Inasmuch as Debtor was a
21

22 ⁸We are disturbed by the UST's decision to prosecute this
23 motion given that the only evidence offered was Debtor's clearly
24 erroneous initial response to the questionnaire and the hearsay
25 testimony of one of its employees. We are concerned about the
26 UST's incorrect characterizations of the record (about the number
27 of differing declarations from Debtor and about the purported
28 oral testimony of Smith at a prior hearing). We are further
disturbed that the UST chose not to defend its actions and motion
on appeal, instead forcing Appellant to incur the cost of
appealing a decision on a motion that did not appear to be
supported by adequate evidence and forcing us to search in vain
for some justification for the UST's conduct in this matter.

1 witness identified with the UST and was being cross-examined by
2 Appellant, Appellant was not prohibited from asking leading
3 questions. That Debtor's testimony on cross-examination was
4 solicited by leading questions should not affect its
5 admissibility, but only its probative value or weight. To the
6 extent the court disregarded all of Debtor's cross-examination
7 testimony in light of Appellant's leading questions, it erred.

8 Finally, Appellant was denied a chance to tell his side of
9 the story, being cut-off in mid-sentence by the court's ruling,
10 before he could even ask to be heard, as he had requested at the
11 prior hearing.⁹

12 B. The Court Erred in Issuing the Injunction Absent An
13 Adversary Proceeding

14 Even if the bankruptcy court had not erred in finding that
15 Appellant had offered improper legal advice to Debtor, it erred
16 in issuing an injunction against Appellant in the absence of an
17 adversary proceeding. Section 110(j)(1) permits the UST to bring
18 a civil action to enjoin a bankruptcy petition preparer from
19 engaging in conduct in violation of section 110, such as the
20 unauthorized practice of law. That civil action, however, must
21 be in the form of an adversary proceeding. Demos v. Brown (In re
22 Graves), 279 B.R. 266, 273 (9th Cir. BAP 2002); In re Nieves, 290
23 B.R. 370, 380 (Bankr. C.D. Cal. 2003). Even though the
24

25
26 ⁹After counsel for the UST indicated that she had no further
27 questions for Debtor, Appellant stated "Your Honor, you know I've
28 been doing this --." At that point, the court interjected:
"Okay. I'm going to rule on this one. Every question that was
asked by [Appellant] was leading." Appellant was given no
further opportunity to speak.

1 injunction prohibits only activity that is already prohibited by
2 law, it exposes Appellant to contempt in the event of a future
3 violation. Thus, any error in its issuance is not harmless, and
4 we must reverse.

5 **VI. CONCLUSION**

6 We are mindful of the duty of the UST and the bankruptcy
7 court to police unscrupulous bankruptcy petition preparers and to
8 protect innocent and helpless debtors who may be easy prey for
9 them. But we are equally mindful of the even more important need
10 to afford all litigants with a level playing field and equal and
11 adequate process of law. Here we regret that the intensity and
12 fervor in performing the former functions ran roughshod over the
13 latter obligations. We are left with a firm and definite
14 conviction that the bankruptcy court abused its discretion when
15 it punished and enjoined Appellant. For the foregoing reasons,
16 therefore, we REVERSE.