

AUG 16 2007

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NOT FOR PUBLICATION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-07-1027-MoDMc
	)		
SOO HYUN CHA and BO YOUNG CHA,	)	Bk. No.	SV-05-20625-GM
	)		
Debtors.	)	Adv. No.	SV-06-01081-GM
	)		
ANDREW E. SMYTH,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
	)		
SOO HYUN CHA,	)		
	)		
Appellee.	)		
	)		

Argued and Submitted on July 26, 2007  
at Pasadena, California

Filed - August 16, 2007

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Before: MONTALI, DUNN and McMANUS,<sup>2</sup> Bankruptcy Judges.

<sup>1</sup>This 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.

<sup>2</sup>Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 The bankruptcy court imposed sanctions against an attorney  
2 pursuant to its inherent powers. The attorney appealed. While  
3 we understand the bankruptcy court's frustration with sloppy  
4 lawyering, we REVERSE and REMAND because the attorney was denied  
5 due process and because the court did not make an explicit  
6 finding of bad faith.

7 **I. FACTS**

8 On January 10, 2007, the bankruptcy court entered a  
9 memorandum decision explaining why it was imposing sanctions  
10 against appellant Andrew E. Smyth ("Smyth"). For the purposes of  
11 this appeal, Smyth did not dispute the court's recitation of  
12 facts underlying the imposition of sanctions and adopted them in  
13 his opening brief. Accordingly, we accept and incorporate the  
14 bankruptcy court's timeline of activities and conduct leading to  
15 its sanctions award.

16 On January 27, 2006, Smyth (acting on behalf of his client  
17 Jeonghwan Koh ("Koh")) filed an adversary complaint against  
18 appellee Soo Hyun Cha ("Debtor") pursuant to 11 U.S.C. §§ 727 and  
19 523(a).<sup>3</sup> Smyth mailed a copy of the complaint to Debtor and  
20 Debtor's counsel, Mark Jessee ("Jessee"), but did not include a  
21 copy of the summons. A summons was issued on February 1 but was  
22 mailed to Debtor on February 17 without a copy of the complaint,  
23 even though Rule 7004(e) requires the summons and complaint to be  
24

---

25 <sup>3</sup>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 1001-9036, as  
28 enacted and promulgated prior to the effective date of The  
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 deposited in the mail within ten days of the issuance of the  
2 summons.

3 On February 21, Smyth filed an amended complaint adding co-  
4 debtor Bo Young Cha ("Spouse") as a defendant; Smyth did not  
5 obtain a summons for the first amended complaint. Smyth mailed a  
6 copy of the first amended complaint (without a summons) to Debtor  
7 and Jessee on February 23 although the proof of service appended  
8 to the amended complaint showed a mailing date of February 8  
9 (thirteen days prior to the actual filing date).

10 On March 9, Smyth mailed a proof of service alleging that  
11 the summons and complaint were served on February 17. On March  
12 13, Smyth filed a request for entry of default alleging that the  
13 first amended complaint was served by mail on February 1; the  
14 court returned the request to Smyth on March 16 because it did  
15 not contain a Return of Service for the summons. On March 13,  
16 Smyth also filed a proof of service of an amended alias summons,  
17 although the alias summons appended to the proof of service was  
18 not issued by the bankruptcy court and did not contain pertinent  
19 information such as the status conference date.

20 On March 28, Smyth filed a second request for default with  
21 respect to the initial complaint filed on January 27, claiming  
22 mail service on the latter date. The proof of service alleges  
23 service on both Debtor and Spouse, although Spouse was not a  
24 defendant in the initial complaint. On March 29, Smyth filed a  
25 motion for default judgment alleging the same service.

26 At a hearing on the motion for default judgment, the  
27 bankruptcy court indicated that it would grant a judgment under  
28 sections 523 and 727 against Debtor, but not against Spouse (for

1 lack of evidence). The next day (May 25), the court entered the  
2 default judgment against Debtor and an order dismissing Spouse  
3 from the adversary proceeding.

4 On May 30, Debtor filed a motion to set aside the default  
5 judgment setting forth the errors in service, including the  
6 failure to serve a summons within ten days of issuance. Smyth  
7 filed an opposition to the motion to set aside the default;  
8 according to the bankruptcy court, "it is clear from the  
9 opposition that Smyth never reviewed the documents to see whether  
10 a summons was issued and served on the First Amended Complaint or  
11 whether he had properly served the original complaint."

12 The court issued a tentative ruling granting the motion to  
13 set aside the default judgment, stating "In all, [Smyth] did a  
14 horrendous job of service and of paper management. I do not find  
15 this to be an intentional act to "sneak up" on defendant. But it  
16 is gross negligence. And the fact that [Smyth] would actually  
17 continue to assert that he has a right to a default judgment is  
18 incomprehensible." (Emphasis added). The court adopted its  
19 tentative ruling at a hearing on June 21 and entered the order  
20 granting the motion to set aside default on the same date.

21 On June 28, Smyth filed a request for the court to issue an  
22 alias summons. The alias summons was issued by the court on June  
23 29 and mailed with the original complaint to Debtor on July 7,  
24 2006. On August 4, Debtor filed a motion to dismiss the  
25 complaint, noting inter alia that the summons was attached to the  
26 original complaint which was superseded by the first amended  
27 complaint.

1 On August 15, Smyth filed a response to the motion to  
2 dismiss and a second amended complaint.<sup>4</sup> In the response and  
3 accompanying declarations, he claimed that his secretary served  
4 the alias summons with the first amended complaint but  
5 accidentally attached the original complaint to the alias summons  
6 and proof of service filed with the court on July 11, even though  
7 Debtor stated that the original complaint was mailed with the  
8 summons.

9 On August 30, the court held a hearing on Debtor's motion to  
10 dismiss the first amended complaint but Smyth did not appear. In  
11 its tentative ruling, the court stated "I am appalled by Mr.  
12 Smyth's mishandling of the rather simple procedural aspects of  
13 this case. Once again he did an improper service. This is  
14 obviously not meant to ambush the defendant, but there is no  
15 excuse for this continued violation of the service rules."

16 (Emphasis added.)

17 At the hearing on the motion to dismiss, the court sua  
18 sponte raised the possibility of awarding attorneys' fees to  
19 Debtor. No notice of such sanctions was given to Smyth in the  
20 tentative ruling or before the court's imposition of the fee  
21 award. Debtor's own counsel was "caught [] off guard" by the  
22 court's suggestion. On September 5,<sup>5</sup> the court entered an order  
23

---

24 <sup>4</sup>The second amended complaint named Spouse as a defendant,  
25 even though the court had entered an order dismissing her as a  
26 defendant.

27 <sup>5</sup>This order was filed on September 1, although it was  
28 entered and served on September 5. In his motion for  
reconsideration, Smyth referred to this order as the "August 30  
order" although August 30 was the date of the hearing and not the  
order.

1 directing Koh to file a third amended complaint by a certain date  
2 to avoid dismissal and ordering Smyth to pay Debtor's attorneys'  
3 fees (with the amount to be fixed at a later date).<sup>6</sup> The order  
4 incorporated its tentative ruling.

5 On September 6, Smyth filed a Motion for Rehearing to Modify  
6 Order of August 30, 2006, to Remove Provision that [Smyth] Pay  
7 Attorney Fees to [Debtor's] Counsel; and to Grant Extra Time to  
8 File Fourth Amended Complaint" (the "motion for  
9 reconsideration"). Smyth noted that the court had not made a  
10 "bad faith" finding in support of its award of sanctions and that  
11 the court did not provide adequate notice of its intent to impose  
12 sanctions. Smyth also filed supplemental points and authorities  
13 in support of his motion for reconsideration arguing that the  
14 service of the complaint was not defective, while Debtor opposed  
15 the motion for reconsideration.

16 On October 4, the court issued a tentative ruling stating  
17 that "the lack of warning about possible sanctions does not  
18 require that Mr. Smythe [sic] get another opportunity to explain  
19 his incompetence to the court" in light of his failure to attend  
20 the hearing on Debtor's motion to dismiss. The tentative ruling  
21 refers to Smyth's "incompetence," "half-truths," "procedural  
22 tragedy" and "blunders," but it does not explicitly state that  
23 Smyth acted in bad faith.

---

24  
25 <sup>6</sup>The order provided that "Mr. Smyth is ordered to pay  
26 defense counsel Mr. Jesse [sic] a reasonable fee, within thirty  
27 days of entry of this order, for the legal expenses Mr. Jesse  
28 [sic] incurred, on behalf of his client, to draft, serve, and  
prosecute both a motion to set aside default and a motion to  
strike answer." Jesse was to provide to Smyth information on  
the costs and fees associated with those two motions within one  
week of the order.

1           The court held a hearing on the motion for reconsideration  
2 on October 4, 2006. On January 10, 2007, no doubt frustrated  
3 with a woeful example of carelessness by Smyth and perhaps  
4 desiring to put an end to such conduct, the court entered a  
5 memorandum decision indicating that it was not only imposing  
6 monetary sanctions against Smyth, but was also requiring Smyth to  
7 file a declaration of legal validity of and with all pleadings  
8 filed for a two-year period. The court did not provide advance  
9 notice of the possibility of this additional sanction before  
10 issuing the memorandum decision. In the memorandum decision, the  
11 court referred to the "gross negligence" of Smyth but did not  
12 make an explicit finding of bad faith.

13           On January 10, the court entered an order consistent with  
14 its memorandum decision; the order imposed monetary sanctions in  
15 favor of Debtor in the amount of \$5,525.00 (representing Debtor's  
16 counsel's reasonable attorneys' fees)<sup>7</sup> against Smyth and  
17 additionally required Smyth to submit a declaration of compliance  
18 with rules and laws when filing papers with the court over a two-  
19 year period. Smyth filed a timely notice of appeal on January  
20  
21

---

22           <sup>7</sup>Jessee sought \$12,200 in fees and \$262.07 in costs as  
23 sanctions. The court stated in its memorandum decision that it  
24 did "not find Mr. Jessee completely innocent in this matter" and  
25 that "Mr. Jessee had an obligation to call Mr. Smyth before  
26 filing the motion to dismiss and advise him of the issues." The  
27 court therefore did not award fees for work done "from 5/25/06  
28 through 5/31/06 as a simple call to ask that default be vacated  
may have well resolved the matter." The court similarly adjusted  
fees relating to the second motion to dismiss. In the end, the  
court awarded only \$5,525 in fees plus \$119.92 in costs. Jessee  
did not cross-appeal.

1 17, 2007.<sup>8</sup>

2 **II. ISSUES**

3 Did the bankruptcy court err in imposing sanctions against  
4 Smyth?

5 (a) Did the court provide sufficient notice of its intent to  
6 impose sanctions to satisfy due process concerns?

7 (b) Did the court make the requisite finding of bad faith?

8 **III. STANDARD OF REVIEW**

9 We review an award of sanctions and the terms of a  
10 disciplinary order for abuse of discretion. Price v. Lehtinen  
11 (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP 2005). Whether  
12 due process has been accorded is a question of law that we review  
13 de novo. Id.; see also Miller v. Cardinale (In re DeVille), 280  
14 B.R. 483, 492 (9th Cir. BAP 2002), aff'd, 361 F.3d 539 (9th Cir.  
15 2003) ("Whether [sanctioned] Appellant's due process rights were  
16 violated is a question of law, which we review de novo.").

17 **IV. JURISDICTION**

18 A. Core vs. Non-Core Nature of Sanctions

19 Smyth argues that the bankruptcy court lacked jurisdiction  
20 to enter a final order requiring him to file a declaration (with  
21 all papers he files with that court for a two-year period)  
22 certifying compliance with applicable laws and rules. Citing  
23 Sheridan v. Michels (In re Sheridan), 362 F.3d 96 (1st Cir.  
24 2004), Smyth contends that the imposition of sanctions was not a  
25 core matter under 28 U.S.C. § 157.

26 \_\_\_\_\_  
27 <sup>8</sup>On January 26, 2007, we granted Smyth's motion for a stay  
28 pending appeal upon deposit of \$7,000 into the registry of the  
bankruptcy court.



1 We disagree. First, Sheridan is distinguishable. The  
2 sanctions imposed in Sheridan arose out of an omnibus proceeding  
3 involving multiple bankruptcy cases and not out of one particular  
4 bankruptcy case, as here.<sup>9</sup> Furthermore, as we noted in Lehtinen,  
5 we adopt the “ably and reasonably articulated” dissent in  
6 Sheridan. Lehtinen, 332 B.R. at 411. The dissent in Sheridan  
7 concluded:

8 Finally, I disagree with the majority’s conclusion that  
9 the proceeding against [the attorney] was non-core. In  
10 my view, the only interpretation of [28 U.S.C. §] 157  
11 that is consistent with the purposes of the federal  
12 bankruptcy laws and Congress’s intent in the 1984  
13 bankruptcy amendments is that the disciplinary  
14 proceeding against [the attorney], which arose out of  
15 misconduct occurring in indisputably core proceedings,  
16 constituted a core proceeding.

17 Sheridan, 362 F.3d at 121 (Lynch, J., dissenting). Because  
18 Smyth’s actions took place in the course of his representation of  
19 a plaintiff in a core adversary proceeding under 28 U.S.C.  
20 § 157(b) (2) (I) and (J), the disciplinary sanctions fit

---

21 <sup>9</sup>In Sheridan, the First Circuit reversed the suspension of  
22 an attorney from practice before a bankruptcy court. The First  
23 Circuit held that where a disciplinary proceeding is omnibus in  
24 nature, does not arise in the context of an open bankruptcy case,  
25 is predicated upon ethical rule violations proscribed by state  
26 law and has only a remote or overly speculative effect upon  
27 closed bankruptcy cases, a bankruptcy judge has only non-core  
28 jurisdiction.

29 The dissent in Sheridan addressed and disputed each of the  
30 grounds asserted by the majority in support of its reversal, but  
31 in particular noted that the bankruptcy court’s “imposition of  
32 sanctions on Sheridan did in fact ‘concern[ ] the administration  
33 of the estate’ in each of the underlying bankruptcy cases within  
34 the meaning of [28 U.S.C. §] 157(b) (2) (A). That section  
35 conspicuously does not require that the proceeding in question  
36 contemporaneously affect the ongoing administration of the  
37 estate; the matter must simply ‘concern[ ]’ the administration of  
38 the estate.” Sheridan, 362 F.3d at 128 (Lynch, J., dissenting).

1 "comfortably within the ambit of a core proceeding." Lehtinen,  
2 332 B.R. at 411.

3 B. Leave to Proceed With Interlocutory Appeal

4 In his opening brief, Debtor notes that the sanctions order  
5 is interlocutory in nature, citing Cunningham v. Hamilton County,  
6 527 U.S. 198, 200 (1999) (holding that order imposing sanctions  
7 on attorney for her discovery abuses was not "final"). See also  
8 Stanley v. Woodford, 449 F.3d 1060, 1062 (9th Cir. 2006) (extends  
9 Cunningham to sanction orders imposed pursuant to court's  
10 inherent powers and overrules prior conflicting cases applying  
11 the collateral order doctrine). Debtor also concedes, however,  
12 that we may grant leave to file an interlocutory appeal.

13 Even though the order does not appear to be final, we can  
14 grant leave to appeal pursuant to Rule 8003(c). Under 28 U.S.C.  
15 § 158(a)(3), an appellant must obtain leave of court to appeal an  
16 interlocutory order. Smyth did not do so. Nonetheless, if an  
17 order is interlocutory, and no motion for leave to appeal has  
18 been filed, we can consider a timely notice of appeal to be a  
19 motion for leave. See Fed. R. Bankr.P. 8003(c); Pfeiffer v.  
20 Couch (In re Xebec), 147 B.R. 518, 522 (9th Cir. BAP 1992). We  
21 do so here.

22 Granting leave to appeal is left to the discretion of the  
23 panel. Roderick v. Levy (In re Roderick Timber Co.), 185 B.R.  
24 601, 604 (9th Cir. BAP 1995). Leave to appeal is appropriate  
25 here because Smyth, who was not a party in the adversary  
26 proceeding, is affected by ongoing disciplinary sanctions which  
27 have a two-year limitation; it is feasible that this time period  
28 may expire well before any appellate review (if any) of the final

1 disposition of the adversary proceeding. If that sanction was  
2 imposed in error, it may escape appellate review by becoming  
3 moot. Therefore, we grant leave to appeal.

#### 4 V. DISCUSSION

5 The bankruptcy court did not impose its sanctions pursuant  
6 to Rule 9011,<sup>10</sup> but pursuant to its inherent powers under section  
7 105.<sup>11</sup> "A court must, of course, exercise caution in invoking  
8 its inherent power, and it must comply with the mandates of due  
9 process, both in determining that the requisite bad faith exists  
10 and in assessing fees." Chambers v. NASCO, 501 U.S. 32, 50  
11 (1991).

---

13  
14 <sup>10</sup>If the bankruptcy court had relied on Rule 9011 in  
imposing its fee-shifting sanctions, it would have erred:

15 It is clear that attorneys' fees and expenses incurred  
16 as a result of violating Bankruptcy Rule 9011 can be  
17 shifted only at the motion of one of the parties, and  
18 only after the rule-offending party has been given the  
benefit of the Rule's 21-day safe harbor. Fed. R.  
19 Bankr. P. 9011(c)(1)(A) and (c)(2) (2001); see Barber  
v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998) (so  
20 interpreting the same language in Fed. R. Civ. P. 11).

21 Markus v. Gschwend (In re Markus), 313 F.3d 1146, 1151 (9th Cir.  
2002) (emphasis added). Debtor did not file a motion for  
22 sanctions, so the court could not order payment of attorneys'  
fees pursuant to Rule 9011. Id.; see also DeVille, 361 F.3d at  
23 545-46 (under Rule 11, "the court may not shift attorneys' fees  
and costs on its own motion").

24  
25 <sup>11</sup>At oral argument, Smyth incorrectly stated that the  
26 bankruptcy court imposed sanctions pursuant to 28 U.S.C. § 1927.  
The bankruptcy court, however, specifically and correctly noted  
27 that section 1927 did not apply as the bankruptcy court was not a  
court of the United States as defined by 28 U.S.C. § 451, citing  
Perroton v. Gray (In re Perroton), 958 F.2d 889 (9th Cir. 1992).  
28 Instead, the court invoked its inherent powers to sanction Smyth.

1 **A. Due Process**

2 Here, the bankruptcy court did not inform Smyth that it was  
3 contemplating sanctions before entering the order imposing them.  
4 In fact, the court initiated the discussion of monetary sanctions  
5 at a hearing on a motion to dismiss the first amended complaint  
6 where Smyth was not present and then incorporated the monetary  
7 sanctions in an order resolving that motion. Smyth had no notice  
8 of the monetary sanctions until he received that order.  
9 Furthermore, the sanctions governing the filing of future  
10 pleadings was not imposed until after Smyth filed his motion for  
11 reconsideration of the monetary sanctions. No prior notice was  
12 provided.

13 The Ninth Circuit Court of Appeals has held that procedural  
14 due process "guarantees [an] attorney a 'hearing, if requested'  
15 before sanctions may be imposed." Kirshner v. Uniden Corp. of  
16 America, 842 F.2d 1074, 1082 (9th Cir. 1988) (emphasis added),  
17 citing Miranda v. S. Pac. Transp. Co., 710 F.2d 516, 523 (9th  
18 Cir. 1983); see also Weissman v. Quail Lodge, Inc., 179 F.3d  
19 1194, 1195 (9th Cir. 1999) (trial court abused its discretion in  
20 imposing sanctions and filing restrictions on attorney without  
21 prior notice);<sup>12</sup> Cole v. U.S. Dist. Court of Idaho, 366 F.3d 813,  
22

23 <sup>12</sup>Like the bankruptcy court here, the trial court in  
24 Weissman imposed sanctions in the context of a hearing on another  
25 matter where the sanctioned attorney failed to appear. The Ninth  
26 Circuit observed that his non-attendance did not excuse the lack  
27 of notice:

26 The fact that [the attorney] did not attend the hearing  
27 at which the district court addressed his objections to  
28 the proposed settlement does not alter the conclusion

(continued...)

1 821 (9th Cir. 2004) ("It is axiomatic that procedural due process  
2 requires notice of the grounds for, and possible types of,  
3 sanctions.") (emphasis added).

4 In holding that the imposition of a \$250 sanction  
5 constituted the taking "of a significant property interest" and  
6 required advance notice and a hearing, the Ninth Circuit stated  
7 that "[a]bsent extraordinary circumstances, procedural due  
8 process requires notice and hearing before any governmental  
9 deprivation of a significant property interest." Miranda, 710  
10 F.2d at 522 (emphasis added). As noted by the Ninth Circuit in  
11 Tom Growney Equip., Inc. v. Shelley Irrigation Dev., Inc., 834  
12 F.2d 833, 835 (9th Cir. 1987):

13 In considering the imposition of a penalty upon  
14 attorneys, the Supreme Court has cautioned that like  
15 "other sanctions, attorney's fees certainly should not  
16 be assessed lightly or without fair notice and an  
17 opportunity for a hearing on the record." Roadway  
18 Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct.  
19 2455, 2464, 65 L.Ed.2d 488 (1980).

20 We have required notice and an opportunity to be heard  
21 in sanctioning attorneys pursuant to authority other  
22 than Rule 11. See T.W. Elec. Service, Inc. v. Pacific  
23 Electric Contractors, 809 F.2d 626, 638 (9th Cir. 1987)

---

24 <sup>12</sup>(...continued)

25 that the district court did not provide him with notice  
26 or an opportunity to be heard on the issue of the  
27 sanctions. At the hearing at which he did not appear,  
28 [the attorney] had notice and an opportunity to be  
heard only on the merits of his objections, and not on  
the propriety of restricting his right to file  
objections to future settlement agreements.

29 Weissman, 179 F.3d at 1195 n.4. Therefore the bankruptcy court's  
30 finding in its October 4 tentative ruling that Smyth's failure to  
31 attend the hearing on the motion to dismiss the complaint somehow  
32 obviated the necessity for advance notice of sanctions is  
33 incorrect.

1 ("Notice and a hearing should precede imposition of a  
2 sanction under [28 U.S.C.] § 1927"); F.T.C. v. Alaska  
3 Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986)  
4 ("Due process further requires that parties subject to  
5 sanctions have sufficient opportunity to demonstrate  
6 that their conduct was not 'undertaken recklessly or  
7 wilfully'" (quoting Toombs v. Leone, 777 F.2d 465, 472  
8 (9th Cir. 1985)); Miranda, [710 F2d at 522] (due  
9 process requires opportunity to prepare defense and  
10 explain questionable conduct at a hearing); United  
11 States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983)  
12 (same).

13 In Tom Growney, the trial court sua sponte issued monetary  
14 sanctions against an attorney even though there was "no hint in  
15 the record that [the attorney] had any notice sanctions were  
16 being considered." Id. at 834. As in the case here, the  
17 attorney filed a motion for reconsideration of the sanctions,  
18 after which the trial court issued a memorandum decision  
19 explaining the basis of its sanctions. Id. at 835. The Ninth  
20 Circuit reversed and vacated the award of sanctions, explicitly  
21 stating that the subsequent hearing on the motion for  
22 reconsideration did not give the attorney sufficient opportunity  
23 to oppose the sanctions before their imposition and therefore did  
24 not satisfy due process requirements. Id. at 836. We likewise  
25 hold that the hearing on Smyth's motion for reconsideration does  
26 not cure the due process deficiencies arising from the absence of  
27 prior notice of the sanctions.

28 In DeVille, the bankruptcy court issued an order to show  
cause why sanctions should not be imposed which detailed the  
conduct which was the basis for sanctions imposed after the  
notice (i.e., the order to show cause) was given. The Ninth  
Circuit held that the sanctioned attorney and party were  
"provided with sufficient, advance notice of exactly which

1 conduct was alleged to be sanctionable and, furthermore . . .  
2 [were] aware that [they] stood accused of acting in bad faith.”  
3 DeVille, 361 F.3d at 549. In other words, advance notice of the  
4 nature of the conduct and the accusation of bad faith is  
5 requisite to the imposition of sanctions under the court’s  
6 inherent power. That was not provided here. While the  
7 bankruptcy court may have had sufficient justification for  
8 sanctioning Smyth, it unfortunately did not provide him with the  
9 prior notice required by due process. We therefore must REVERSE  
10 and REMAND for proper notice and opportunity for hearing.

11 **B. Finding of Bad Faith**

12 “Invocation of a federal court’s inherent power to sanction  
13 requires a finding of bad faith.” DeVille, 361 F.3d at 548,  
14 citing Chambers, 501 U.S. at 49. Such a finding must be  
15 “explicit.” Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178,  
16 1196 (9th Cir. 2003) (“Before imposing sanctions under its  
17 inherent sanctioning authority, a court must make an explicit  
18 finding of bad faith or willful misconduct. . . . With regard to  
19 the inherent sanction authority, bad faith or willful misconduct  
20 consists of something more egregious than mere negligence or  
21 recklessness”). While a finding of bad faith may be warranted  
22 where an attorney “knowingly or recklessly raises a frivolous  
23 argument,”<sup>13</sup> the “bad faith requirement sets a high threshold”

---

24  
25 <sup>13</sup>As noted by the Ninth Circuit in Fink v. Gomez, 239 F.3d  
26 989, 993-94 (9th Cir. 2001):

27 [M]ere recklessness, without more, does not justify  
28 sanctions under a court’s inherent power. But the  
cases discussed above make clear that sanctions are

(continued...)

1 and the Ninth Circuit "insist[s] on the finding of bad faith."  
2 Primus Auto. Fin'l Servs. v. Batarse, 115 F.3d 644, 649 (9th Cir.  
3 1997) (reversing and remanding where district court did not make  
4 explicit finding of bad faith, even though the court labeled the  
5 attorneys' arguments "frivolous" and their conduct as  
6 "outrageous," "inexcusable," and appall[ing]").

7 In its memorandum decision, the bankruptcy court did not  
8 make an explicit finding that Smyth acted in bad faith, but  
9 instead referred to his "gross negligence." While the conduct by  
10 Smyth described in the memorandum decision may indeed constitute  
11 bad faith, the bankruptcy court is the fact finder who must  
12 determine -- explicitly -- bad faith. This is particularly true  
13 when the court's own tentative (and adopted) rulings, which are  
14 the only findings pre-dating the initial imposition of sanctions,  
15 indicate that Smyth did not mean "to ambush" Debtor and that his  
16 conduct was not an "intentional act." We therefore remand for  
17 an explicit determination of whether Smyth acted in bad faith.  
18 Primus, 115 F.3d at 649.

---

19  
20 <sup>13</sup>(...continued)

21 available if the court specifically finds bad faith or  
22 conduct tantamount to bad faith. Sanctions are  
23 available for a variety of types of willful actions,  
24 including recklessness when combined with an additional  
25 factor such as frivolousness, harassment, or an  
26 improper purpose. Therefore, we hold that an  
27 attorney's reckless misstatements of law and fact, when  
28 coupled with an improper purpose, such as an attempt to  
influence or manipulate proceedings in one case in  
order to gain tactical advantage in another case, are  
sanctionable under a court's inherent power. We take  
no position on whether these conditions are present in  
this case or whether sanctions should be imposed, a  
determination that rests in the sound discretion of the  
district court.



1 **VI. CONCLUSION**

2 We are sympathetic with the bankruptcy court's concerns  
3 about Smyth's poor handling of the underlying adversary  
4 proceeding. At oral argument before us, Smyth acknowledged that  
5 a successful appeal could lead to a remand and more sanctions.  
6 Still, he pleaded for, and we agree that he is entitled to, fair  
7 warning about what confronts him. We express no opinion as to  
8 how the court should deal with his conduct, other than to note  
9 that due process is essential and an explicit finding of bad  
10 faith is necessary when sanctions are imposed pursuant to the  
11 court's inherent powers. Accordingly, and for the foregoing  
12 reasons, we REVERSE and REMAND.