

APR 02 2007

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OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

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

6	In re:)	BAP No.	CC-06-1300-DMoPa
7	MANORAMA SHARMA,)	Bk. No.	SA 01-15803-JR
8	Debtor.)	Adv. No.	SA 02-01962-JR
9	_____)		
10	RASHIDA JAFFER,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	MANORAMA SHARMA,)		
14	Appellee.)		
	_____)		

Argued and Submitted on March 22, 2007
at Pasadena, California

Filed - April 2, 2007

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

Honorable John E. Ryan, Bankruptcy Judge, Presiding.

Before: DUNN, MONTALI and PAPPAS, 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 Frustrated by the repeated failures of plaintiff/appellant
2 to comply with the Local Rules,² the bankruptcy court dismissed
3 her adversary proceeding. We AFFIRM.

4
5 **I. FACTS**

6 In 1996 Manorama Sharma ("Dr. Sharma") hired Rashida Jaffer
7 ("Ms. Jaffer"), an attorney who has been in practice for more
8 than twenty years, to represent her in litigation in state court
9 ("Prepetition Litigation"). Judgment was entered against Dr.
10 Sharma, who thereafter filed a legal malpractice claim against
11 Ms. Jaffer ("Malpractice Litigation"). Ms. Jaffer filed a
12 counterclaim for breach of contract³ and fraud ("Counterclaim").
13 On July 2, 2001, on the eve of trial of the Counterclaim in the
14 Malpractice Litigation, Dr. Sharma filed for bankruptcy
15 protection.

16 On October 18, 2002,⁴ Ms. Jaffer filed an adversary
17 proceeding ("Adversary Proceeding"), seeking to have the debt for

18
19 ²Unless otherwise indicated, all chapter and section
20 references are to the Bankruptcy Code, §§ 101-1330, as enacted
21 and promulgated prior to October 17, 2005, the effective date of
22 most of the provisions of the Bankruptcy Abuse Prevention and
23 Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23.
24 All "Rule" or "FRBP" references are to the Federal Rules of
25 Bankruptcy Procedure. All "Local Rules" references are to the
26 Local Bankruptcy Rules, Central District of California. All "9th
27 Cir. BAP Rule" references are to the Rules of the United States
28 Bankruptcy Appellate Panel of the Ninth Circuit. All "FRAP"
references are to the Federal Rules of Appellate Procedure.

³Dr. Sharma did not pay Ms. Jaffer's fees in an amount of at
least \$20,000, and possibly as much as \$50,000.

⁴Dr. Sharma's bankruptcy case was initiated under chapter 7
on July 2, 2001, converted to chapter 11, and finally reconverted
to chapter 7. The timeliness of the Adversary Proceeding under
Rules 4004(a) and 4007(c) is not contested.

1 her unpaid attorneys fees held nondischargeable pursuant to
2 §§ 523(a) (2) (A) and (a) (6), and seeking a denial of Dr. Sharma's
3 discharge pursuant to §§ 727(a) (4) (A), (a) (5) and (a) (6) (A). On
4 June 20, 2006, i.e., three years, eight months later, the
5 bankruptcy court dismissed the Adversary Proceeding with
6 prejudice as a sanction for Ms. Jaffer's repeated disregard of
7 the Local Rules.

8
9 A. Prosecution of the Adversary Proceeding Between October 18,
10 2002, and February 14, 2006

11 The record reflects the following chronology in the
12 prosecution of the Adversary Proceeding as relevant to this
13 appeal:

14 On October 18, 2002, Ms. Jaffer filed the Adversary
15 Proceeding. Ms. Jaffer's initial pleading ultimately was
16 finalized in the form of her Third Amended Complaint filed May
17 10, 2004.

18 On January 14, 2005, Dr. Sharma filed a motion to compel Ms.
19 Jaffer to respond to discovery requests and to appear for her
20 deposition. The bankruptcy court

21 determined that [Ms. Jaffer] refused to appear for her
22 deposition without a legal justification in violation
23 of the [Local] Rules. Moreover, the court determined
24 that [Ms. Jaffer] was unwilling to participate in the
25 preparation of the written stipulation that [Dr.
26 Sharma] was required to file with the motion to compel.
27 As a result the court granted [Dr. Sharma's] motion to
28 compel, awarded [Dr. Sharma] \$3,000 for costs incurred
in connection with bringing the motion to compel, and
warned [Ms. Jaffer] that any further failure to comply
with the court's order[s] or the Local Rules would
result in severe sanctions.

Memorandum Decision at 3, Jun. 21, 2006.

1 The Adversary Proceeding was dismissed June 8, 2005, after
2 Ms. Jaffer failed both to appear at the June 7, 2005, joint
3 status conference ("June 7 Status Conference"), and to submit a
4 joint status report fourteen days in advance as required by Local
5 Rule 7016-1. The bankruptcy court granted Ms. Jaffer's motion
6 for reconsideration on September 14, 2005, on the basis that Ms.
7 Jaffer was hospitalized at the time of the June 7 Status
8 Conference. In reopening the Adversary Proceeding, the
9 bankruptcy court set a joint status conference to be held October
10 18, 2005 ("October 18 Status Conference").

11 Ms. Jaffer arrived late at and therefore missed the October
12 18 Status Conference. She again filed neither a joint nor a
13 unilateral status report as required by Local Rule 7016-1(a)(2).
14 Because opposing counsel was still in the courtroom when Ms.
15 Jaffer did arrive, the bankruptcy judge recalled the case and
16 "instructed [Ms. Jaffer] that any failure to be on time in the
17 future would result in sanctions." Memorandum Decision at 4,
18 Jun. 21, 2006. The record of the October 18 Status Conference
19 contains the following dialog between the bankruptcy judge and
20 Ms. Jaffer:

21 THE COURT: Ms. Jaffer, you - you were late again.

22 MS. JAFFER: Your Honor, for a few minutes I was -

23 THE COURT: No, you're late. About every hearing
24 that I have you've been late to.

25 MS. JAFFER: No.

26 . . .

27 MS. JAFFER Your Honor, I came - I came here at -
 just a few minutes -

28 THE COURT: You were late.

1 MS. JAFFER: Okay. Fine.

2 . . .

3 THE COURT: [To Ms. Jaffer after giving the
4 continued status conference date] So
5 mark that down and put down a big
6 asterisk "Be on time," all right,
7 because I'm going to - if it happens
8 again, if you fail to appear - this has
9 happened before. I know it has.

7 MS. JAFFER: No, your Honor.

8 THE COURT: Yes, it has. Don't tell me it hasn't.
9 If it happens again, . . . I'm going to
10 impose appropriate sanctions, okay?

10 . . .

11 THE COURT: Ms. Jaffer, listen to me very carefully
12 and don't argue with me. You have been
13 late before. You were late here today,
14 and I'm not going to put up with it any
15 longer. So you are on notice.

14 Transcript of Hearing (Oct. 18, 2005), pp. 2:16-4:13.

15 Ms. Jaffer again failed to file a joint or unilateral status
16 report fourteen days before the January 3, 2006, joint status
17 conference ("January 3 Status Conference"). At the January 3
18 Status Conference, the bankruptcy court set the matter for a pre-
19 trial conference on February 14, 2006 ("February 14 Pre-Trial
20 Conference"), and explicitly instructed both parties to "comply
21 with the procedures of the Local Rules for drafting and
22 submitting a joint pre-trial order."

23 When Ms. Jaffer failed to comply with the Local Rules for
24 submitting a joint pre-trial order at the February 14 Pre-Trial
25 Conference, the bankruptcy court set one last pre-trial
26 conference for April 11, 2006 ("April 11 Pre-Trial Conference"),
27 and warned Ms. Jaffer that failure to comply with the Local Rules
28 by the time of the April 11 Pre-Trial Conference would result in

1 dismissal of the Adversary Proceeding with prejudice.

2 Ms. Jaffer, if you detect some frustration on my part I
3 am frustrated . . . [w]ith you. Over and over and over
4 during this process in connection with this adversary
5 proceeding you have failed to follow the local rules
6 . . . [Y]ou've got more excuses for failing to comply
7 with the requirements than anybody else I have ever had
8 before me. You are an attorney . . . Now listen you
9 didn't follow the rules here and I'm going to give you
10 one more chance to do it . . . One more chance and I'm
11 going to make it very clear on the record here that you
12 have been given opportunities to do what you were
supposed to do through this proceeding but you have
failed in a number of occasions to do that, and I have
given you second chance, third chance to carry out your
responsibilities. I am today giving you one last
chance . . . I am going to continue this pre-trial
conference out far enough for you to meet and confer 28
days prior to the continued pre-trial conference and to
comply with the Local Rules. I will hold you strictly
to complying with those requirements. If you do not, I
am going to dismiss this complaint with prejudice.

13 Transcript of Hearing (Feb. 14, 2006), pp. 5:13-7:4.

14 The bankruptcy court formalized its warning in its March 13,
15 2006 Order Re: Continued Pretrial Conference ("March 13 Order").

16 The March 13 Order stated:

17 The Court having considered plaintiff's failures to
18 comply with Local Bankruptcy Rule 7016-1 including her
19 failure to timely prepare a proposed joint pre-trial
20 order, and having considered the arguments of counsel
and for good cause, the Court hereby makes the
following order:

21 . . . IT IS . . . ORDERED that full compliance with Local
22 Bankruptcy Rule 7016-1 is required. If plaintiff fails
23 to prepare a proposed joint pretrial order, defendant
24 shall file a unilateral pretrial order 14 days prior to
the Pretrial Conference.

25 IT IS FURTHER ORDERED that any failure of plaintiff to
26 fully comply with the requirements of Local Bankruptcy
27 Rule 7016-1 will result in the Court dismissing this
28 action with prejudice.

26 //

27 //

28 //

1 B. Prosecution of the Adversary Proceeding After February 14,
2 2006

3 Ultimately, the "joint" pre-trial order Ms. Jaffer filed
4 fourteen days prior to the April 11 Pre-Trial Conference was not
5 in compliance with Local Rule 7016-1.

6 As summarized by the bankruptcy court:

7 Local Rule 7016-1(b)(1) requires that the parties meet
8 and confer at least 28 days before the date set for the
9 pre-trial conference. Bankr. C.D. Cal. 7016-1(b)(1).
10 The plaintiff is then required to sign a proposed pre-
11 trial order and serve it on all parties by no later
12 than the fifth court day prior to the last day for
13 filing the proposed pre-trial order. Id. 7016-1(c).
14 Within three days of receipt of the plaintiff's
15 proposed pre-trial order, the opposing party must take
16 certain action depending on whether that party agrees
17 or disagrees with the proposed order. Id. 7016-1(d).
18 If the party disagrees with the proposed pre-trial
19 order he or she must immediately meet with the
20 plaintiff "in a good faith effort to achieve a joint
21 proposed order. . . ." Id.

22 Memorandum Decision at 9, n.7, Jun. 21, 2006.

23 The bankruptcy court found that although Ms. Jaffer did meet
24 and confer timely as required by Local Rule 7016-1(b)(1), and did
25 timely serve her proposed pre-trial order ("Proposed Pre-Trial
26 Order") on Dr. Sharma within the time provided by Local Rule
27 7016-1(c), her compliance with the Local Rule ended there.

28 Upon receipt of the Proposed Pre-Trial Order, Dr. Sharma's
counsel, D. Edward Hays ("Mr. Hays"), initiated communications in
an effort to achieve a joint pre-trial order. Of particular
relevance to this appeal is Mr. Hays' insistence that Ms. Jaffer
provide him copies of her exhibits. By telephone communication
on March 15, 2006 ("March 15 Communication"), Mr. Hays explained
to Ms. Jaffer that the pre-trial order must include a provision
that "all exhibits have been exchanged. . . ." He also explained

1 that he could not prepare his trial exhibit list without
2 reviewing the exact documents Ms. Jaffer would be using at trial.
3 During the March 15 Communication, Ms. Jaffer agreed to provide a
4 tabbed set of copies of all documents identified as exhibits no
5 later than the morning of Monday, March 20, 2006.⁵ Ms. Jaffer
6 also agreed that Dr. Sharma's three business day response
7 deadline under Local Rule 7016-1 would commence upon receipt of
8 the exhibits from Ms. Jaffer. The exhibits, in envelopes
9 postmarked Monday, March 20, 2006, and Tuesday March 21, 2006,
10 finally were received by Mr. Hays on Thursday, March 23, 2006.

11 The exhibits were not tabbed and did not correspond to the
12 list of exhibits designated by Ms. Jaffer; in addition, many of
13 the documents were missing pages.⁶ Mr. Hays spent more than an

14
15 ⁵Ms. Jaffer contends that she did not agree:

16 I called [Mr. Hays] at about 11:30 a.m. but he kept on
17 talking till almost 11:50 when I told him I have to run
18 - go for a meeting at noon. I was late for the
19 meeting. It was for the first time that he insisted
20 that I send him all the exhibits and even tab them
21 . . . He started typing a e-mail to me and asked me to
22 sign it "Agreed" which I did not. Since I was in a
23 great hurry, I just kept saying yes, O K. I told him I
24 will send the Exhibits by Monday, March 20, 2006.

25 Supplemental Declaration of Rashida Jaffer (Apr. 21, 2006), p. 2.

26 ⁶This Panel has fared no better in receiving a record from
27 Ms. Jaffer. On December 22, 2006, the BAP Clerk entered his
28 "Clerk's Order Re Brief Deficiency" ("Deficiency Order") advising
29 (1) that the Clerk did not receive a motion allegedly sent by Ms.
30 Jaffer seeking to dispense with the preparation and filing of the
31 appendix and (2) that the BAP relies on the appendix supplied by
32 the parties rather than on the record of the bankruptcy court.
33 The Deficiency Order pointed out that Ms. Jaffer's brief quoted
34 from a portion of a transcript without providing a copy of that
35 transcript as part of her excerpts of record. The Deficiency
36 (continued...)

1 hour on the telephone with Ms. Jaffer on March 23, 2006 ("March
2 23 Communication"), trying to sort out the exhibits and match
3 them to the exhibit list. During the March 23 Communication, Mr.
4 Hays determined not only that many documents were still missing
5 and not produced, but that several documents had been produced
6 that were not designated on Ms. Jaffer's exhibit list. Ms.
7 Jaffer agreed to fax the missing documents to Mr. Hays by noon on
8 Friday, March 24, 2006. Despite sending multiple faxes to Mr.
9 Hays on March 24, 2006, Ms. Jaffer still did not provide all of
10 the missing documents. To confirm what he had received, Mr. Hays
11 then made copies of all documents he had received from Ms. Jaffer
12 and sent them overnight to her.

13 Mr. Hays proceeded to work over the weekend to prepare Dr.
14 Sharma's proposed revisions to the joint pre-trial order, which
15 was due on Tuesday, March 28, 2007. On Monday, March 27, 2006,
16 one business day after receiving the last of Ms. Jaffer's
17 exhibits, Mr. Hays sent an executed revised joint pre-trial order
18 by messenger to Ms. Jaffer, together with all of the documents on
19 Dr. Sharma's trial exhibit list. Ms. Jaffer received the

20
21 _____
22 ⁶(...continued)

23 Order required Ms. Jaffer to file and serve her excerpts of
24 record in support of her opening brief within fourteen days. Ms.
25 Jaffer then filed two volumes of her "Appendix," on January 11,
26 2007. Her Table of Contents for the appendices was not filed
27 until January 29, 2007. Significantly, the Table of Contents
28 does not correspond, either by document number or document name,
to Ms. Jaffer's actual appendices, and her page number references
in the Table of Contents are meaningless because she failed to
number the pages in her appendices. Ms. Jaffer's Supplemental
Appendix filed February 28, 2007, contains two documents, neither
of which is tabbed or numbered, while the Table of Contents for
the Supplemental Appendix identifies only one additional
document.

1 documents after 6:30 Monday evening. On the afternoon of March
2 28, Mr. Hays attempted to follow up and discuss with Ms. Jaffer
3 any issues with his proposed revisions to the joint pre-trial
4 order, but he was unable to reach Ms. Jaffer. Mr. Hays left Ms.
5 Jaffer a voice mail message which she returned the following day,
6 March 29, at which time Mr. Hays learned that Ms. Jaffer had
7 substituted pages and made other changes to the document bearing
8 his signature and filed it with the bankruptcy court without
9 obtaining Mr. Hays' consent to the changes.

10 At the April 11 Pre-Trial Conference the bankruptcy court
11 continued the pre-trial conference to May 1, 2006, and set an
12 evidentiary hearing ("May 1 Evidentiary Hearing") to determine
13 whether the Adversary Proceeding should be dismissed. On June
14 21, 2006, the bankruptcy court entered its Memorandum Decision,
15 in which the court found:

16 [T]his court's repeated warnings and imposition of
17 lesser sanctions have not been effective in securing
18 [Ms. Jaffer's] compliance with the Local Rules and the
19 court's orders. Plaintiff is an attorney and she
20 should know the importance of following the Local Rules
21 and the court's orders. It is inexplicable why she has
22 not taken her responsibilities in prosecuting the
23 Adversary Proceeding more seriously. [Ms. Jaffer] has
24 frustrated this court's attempts to get this matter to
25 trial. She has prejudiced [Dr. Sharma] by stringing
26 the Adversary Proceeding out beyond what is reasonable
27 or necessary to resolve this matter by her ongoing
28 failures to comply. Additionally, [Dr. Sharma] has had
to incur significant additional costs to address [Ms.
Jaffer's] failures to carry out her responsibilities.
As a result, the court determines that it is
appropriate and necessary to dismiss the Complaint.

On August 4, 2006, the bankruptcy court denied Ms. Jaffer's
motion for reconsideration,⁷ and this appeal ensued.

⁷The Panel did not review the motion for reconsideration,
entitled "Motion for Reconsideration and To Alter and Amend
(continued...)

1
2 **II. JURISDICTION**

3 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
4 §§ 1334 and 157(b) (1) and (b) (2) (I) and (J). We have
5 jurisdiction pursuant to 28 U.S.C. § 158.
6

7 **III. ISSUE**

8 Whether the bankruptcy court abused its discretion in
9 dismissing the Adversary Proceeding with prejudice.
10

11 **IV. STANDARD OF REVIEW**

12 The trial court's dismissal of an action for plaintiff's
13 failure to prosecute under Fed. R. Civ. P. 41(b) is reviewed for
14

15 ⁷(...continued)
16 Findings of Facts and Law." While Ms. Jaffer's Table of Contents
17 reflects that the motion for reconsideration is found at Tab 5 in
18 Volume 1 of her Appendix, in fact Tab 5 is the two-page order
19 entered by the bankruptcy court on April 13, 2006, continuing the
20 pre-trial conference and setting the May 1 Evidentiary Hearing.
21 In an effort to locate the motion for reconsideration, we
22 reviewed the first page of each Tab in Volume 1 of Ms. Jaffer's
23 Appendix. While the Table of Contents identifies twenty-six tabs
24 in Volume 1, Volume 1 consists of only nineteen. It does not
25 appear Ms. Jaffer included the motion for reconsideration. As
26 stated in the Deficiency Order, which specifically referred Ms.
27 Jaffer to the explanatory notes of 9th Cir. BAP Rule 8009(b)-1:
28

The parties are further referred to FRBP 8010(a) (1) (D)
and (a) (2) which address the related problem created by
appellants who do not make explicit references to the
parts of the record that support their factual
allegations and arguments. Opposing parties and the
court are not obliged to search the entire record
unaided for error. See Dela Rosa v. Scottsdale
Memorial Health Systems, Inc., 136 F.3d 1241 (9th Cir.
1998); Syncom Capital Corp. v. Wage, 924 F.2d 167, 169
(9th Cir. 1991); FRAP Rule 10(b) (2).

1 an abuse of discretion. Al-Torki v. Kaempfen, 78 F.3d 1381, 1384
2 (9th Cir. 1996); Moneymaker v. CoBEN (In re Eisen), 31 F.3d 1447,
3 1451 (9th Cir. 1994).

4 5 **V. DISCUSSION**

6 A. The Bankruptcy Court's Analysis of the Factors to Consider 7 Prior to Dismissing the Adversary Proceeding With Prejudice

8 "Rule 41 F.R. Civ. P. applies in adversary proceedings,
9" Rule 7041. Fed. R. Civ. P. 41(b) provides:

10 For failure of the plaintiff to prosecute or to comply
11 with these rules or any order of court, a defendant may
12 move for dismissal of an action or of any claim against
13 the defendant. Unless the court in its order for
14 dismissal otherwise specifies, a dismissal under this
15 subdivision and any dismissal not provided for in this
16 rule, other than a dismissal for lack of jurisdiction,
17 for improper venue, or for failure to join a party
18 under Rule 19, operates as an adjudication upon the
19 merits.

20 In addition to a motion by a defendant, a trial court, here,
21 the bankruptcy court, has the inherent power to dismiss for
22 failure to comply with a rule or order of the court. In re C.S.
23 Crawford & Co., 423 F.2d 1322, 1325 (9th Cir. 1970). We note
24 that an involuntary dismissal sua sponte requires that there has
25 been notice giving a warning that dismissal is imminent. Oliva
26 v. Sullivan, 958 F.2d 272, 274 (9th Cir. 1992). The bankruptcy
27 court's March 13 Order provided such notice.

28 In dismissing a case for failure to comply with a court
order, the bankruptcy court must consider:

(1) the public's interest in expeditious resolution of
litigation; (2) the court's need to manage its docket;
(3) the risk of prejudice to the defendants; (4) the
public policy favoring disposition of cases on their
merits; and (5) the availability of less drastic
sanctions.

1 Malone v. U.S. Postal Service, 833 F.2d 128, 130 (9th Cir. 1987).

2 The bankruptcy court held that the first two Malone factors,
3 public interest in expeditious resolution of litigation and the
4 court's interest in docket control, supported dismissal of the
5 case where during the three and one-half years the Adversary
6 Proceeding was pending,

7 [Ms. Jaffer's] repeated failure to comply with the
8 Local Rules has needlessly delayed the resolution of
9 this matter. Specifically, the court has on multiple
10 occasions continued status and pre-trial conferences to
11 provide [Ms. Jaffer] with "second chances" to comply
12 with the Local Rules.

13 With respect to the third Malone factor, the bankruptcy
14 court held that "Ms. Jaffer's repeated and inexcusable disregard
15 for the Local Rules has impaired Defendant's ability to go to
16 trial and obtain a decision in this case," and prejudiced
17 Dr. Sharma, "especially . . . in light of [Dr. Sharma's] good
18 faith efforts, through her counsel, to comply with the Local
19 Rules."

20 Finally, when dismissing under Fed. R. Civ. P. 41(b), a
21 court is required to consider less drastic measures. Malone,
22 833 F.2d at 131-32; Henderson v. Duncan, 779 F.2d 1421, 1424 (9th
23 Cir. 1986). In Henderson, the court of appeals held that the
24 trial court need not exhaust every sanction short of dismissal
25 before finally dismissing a case, but must explore possible and
26 meaningful alternatives. Id., citing Nevijel v. N. Coast Life
27 Ins. Co., 651 F.2d 671, 674 (9th Cir. 1981).

28 In evaluating whether the bankruptcy court considered
alternatives to dismissal, the reviewing court should consider
the following factors:

1 (1) Did the court explicitly discuss the feasibility
2 of less drastic sanctions and explain why alternative
3 sanctions would be inadequate? (2) Did the court
4 implement alternative methods of sanctioning or curing
5 the malfeasance before ordering dismissal? (3) Did
6 the court warn plaintiff of the possibility of
7 dismissal before actually ordering dismissal?

8 Malone, 833 F.2d at 132.

9 The answer to each of these questions is clear from both the
10 Memorandum Decision and the record on appeal. The bankruptcy
11 court addressed these factors directly:

12 [T]his court has considered and implemented less
13 drastic alternatives. First, the court has awarded
14 [Dr. Sharma] \$3,000 in costs for [Ms. Jaffer's]
15 unjustified failure to comply with the Local Rules
16 regarding discovery. Second, the court has repeatedly
17 voiced its displeasure with [Ms. Jaffer's] conduct and
18 warned [Ms. Jaffer] that failure to comply with the
19 Local Rules would result in sanctions, including a
20 warning on February 14, 2006 that she had one last
21 chance to comply with the Local Rules or risk
22 dismissal.

23 Put simply, this court's repeated warnings and
24 imposition of lesser sanctions have not been effective
25 in securing [Ms. Jaffer's] compliance with the Local
26 Rules and the court's orders.

27 B. The Bankruptcy Court Did Not Abuse Its Discretion in
28 Dismissing the Adversary Proceeding

1 The record supports the findings of the bankruptcy court on
2 each of the factors identified in Malone. Factors (1), (2), (3)
3 and (5) tip strongly in favor of dismissal. In particular, it is
4 untenable that Dr. Sharma's right to a determination of her
5 entitlement to a discharge was held hostage to Ms. Jaffer's lack
6 of diligence and/or understanding in prosecuting the Adversary
7 Proceeding. Under the circumstances of this Adversary
8 Proceeding, the policy preference that disputes be resolved on
9 the merits, factor (4) under Malone, is outweighed. We cannot

1 find that the bankruptcy court abused its discretion in
2 dismissing the Adversary Proceeding with prejudice.

3
4 C. Ms. Jaffer's Issues on Appeal

5 In this appeal, Ms. Jaffer focuses not on her own conduct,
6 which led to the dismissal of the Adversary Proceeding, but on
7 that of Dr. Sharma and her counsel, Mr. Hays. In particular, in
8 her opening brief she contends that Mr. Hays:

9 (i) . . . failed to meet and confer with her for almost
10 15 days after [she] requested it; (ii) removed [her]
11 name on the caption page and put his own; (iii)
12 completely changed [her] [Proposed Pre-Trial Order] and
13 deleted many portions of it; (iv) failed to return [the
14 Proposed Pre-Trial Order] within three (3) days, but
15 after 15 days at 6:30 p.m., the day before it was due
16 to be filed; (v) did not exchange an Exhibit List nor
17 give [her] any Exhibits prior to the pretrial Order,
18 and; did not exchange a witness List[.]

19 It is clear from the record, that any delay in Mr. Hays'
20 response to the Proposed Pretrial Order was the direct result of
21 Ms. Jaffer failing to provide documents both as required and as
22 promised. Ms. Jaffer herself agreed that Mr. Hays would have
23 three business days from the date he received her documents to
24 respond. She alone was in control of the timing of her
25 production of the documents. If, as Ms. Jaffer asserts, she was
26 prejudiced by, in her view, Mr. Hays' delay in responding to the
27 Proposed Pretrial Order, her procedural remedy was set forth in
28 Local Rule 7016-1(e) (1):

If the plaintiff has complied with paragraph (c) above
and does not receive a timely response from the other
parties, it shall file and serve its unilateral pre-
trial order at least 14 days before the trial or pre-
trial conference, if one is ordered. At the same time,
plaintiff shall file and serve a declaration asserting
the failure of the other parties to respond.

1 Ms. Jaffer obviously was familiar with Local Rule 7016-
2 1(e) (1), as evidenced by her invocation of that Local Rule on
3 February 3, 2006, when she filed, albeit late, her "Declaration
4 of Rashida Jaffer Re Filing of Unilateral Pre-Trial Order."
5 Further, her opening brief reflects that she clearly understands
6 the function of a pre-trial conference and a pre-trial order:

7 The purpose of a pretrial conference is to simplify
8 issues, amend pleadings where necessary and to avoid
9 unnecessary proof of facts at trial. . . . It is not
10 to invade the trial function of resolving those issues.
11 The primary purpose is to eliminate surprise and
12 unfairness to the other side. . . . Attorneys at
13 pretrial Conference must make full and fair disclosure
14 of their views as to what the real issues at trial will
15 be.

16 [Local] Rule 7016-1 provides for implementing pretrial
17 procedures in order to lessen the cost of litigation
18 and expedite the disposition of cases . . . If counsel
19 are unable to agree, pretrial order representing view
20 of both sides should be submitted. . . .

21 Despite her familiarity with Local Rule 7016-1(e) (1) and her
22 understanding of the function of pretrial conferences and
23 pretrial orders, rather than comply with the Local Rules to
24 provide the bankruptcy court with a true picture of the status of
25 the dispute as of March 28, 2006, e.g., by filing a unilateral
26 status report and a declaration asserting that Mr. Hays failed to
27 respond, Ms. Jaffer misled the bankruptcy court by filing a
28 document she titled "PreTrial Order," a document she created by
replacing pages of the document Mr. Hays had sent her, to which
she attached, without consultation with Mr. Hays, the signature
page from Mr. Hays' document. Above the signatures is a
representation which is to be made by both parties when signing:
"The foregoing admissions have been made by the parties, and the
parties have specified the foregoing issues of fact and law

1 remaining to be litigated." In light of this provision, Ms.
2 Jaffer's signature on the "PreTrial Order," and her filing the
3 altered document with Mr. Hays' signature, clearly, as
4 characterized by Mr. Hays, constituted a fraud upon the court.

5 Remarkably, Ms. Jaffer insisted to the bankruptcy court that
6 the changes were minor. In her opening statement at the May 1
7 Evidentiary Hearing, Ms. Jaffer states:

8 Only one page I really changed. Everything else was
9 the same almost in my old order as well as in the new
10 order, your Honor. If he had the right to change my
11 order, I should change his order too. So I change the
12 first two pages and I added those two pages to his
13 order and I gave it to the Court right away your
14 Honor. . . .

15 The next day immediately I called [Mr. Hays]. I called
16 him the next day and told him that yes I filed the
17 order the way I had prepared it to some extent and the
18 way [he] had prepared it. The pages are like his. I
19 just changed the first few pages, your Honor. The
20 first three pages I changed. That's all I changed and
21 the other two pages I change. Nothing else.

22 Transcript of Hearing (May 1, 2006), pp. 14:14-15:9.

23 Mr. Hays prepared a red-lined copy highlighting the changes
24 between the revised joint pre-trial order he sent Ms. Jaffer and
25 the "PreTrial Order" Ms. Jaffer filed with the bankruptcy court.
26 It tells a much different story.

27 Finally, it appears that Ms. Jaffer contends that the
28 bankruptcy court should not have considered the following facts
in its determination whether dismissal of the Adversary
Proceeding was appropriate:

- The order entered against Ms. Jaffer in 2003 on the
motion to compel, including the award of sanctions
- Ms. Jaffer's failure to appear at the June 7 Status
Conference

1 • Ms. Jaffer's failure to appear timely at the October 18
2 Status Conference

3 • Ms. Jaffer's failure to file a joint status conference
4 report for the January 3 Status Conference

5 Contrary to Ms. Jaffer's position, and as discussed above, these
6 events from the prior history of the Adversary Proceeding are
7 precisely the type of facts that the bankruptcy court was
8 required to consider in its analysis under Malone.

9
10 **VI. CONCLUSION**

11 The bankruptcy court exhibited commendable patience with an
12 experienced attorney who was unable or unwilling to prosecute her
13 adversary proceeding against Dr. Sharma with diligence. The
14 bankruptcy court gave her fair and ample warnings about the
15 likely consequence of her repeated shortcomings. The bankruptcy
16 court's findings are well supported by the record. The
17 bankruptcy court correctly weighed the Malone factors.
18 Consequently, the bankruptcy court did not abuse its discretion
19 in dismissing the Adversary Proceeding with prejudice. We
20 AFFIRM.