

AUG 26 2005

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	CC-04-1618-MoBMa
7	RAY FERRY,)	Bk. No.	SV 00-19655 AG
8	Debtor.)		
9	_____)		
10	FREUND & BRACKEY LLP; THOMAS)		
11	A. BRACKEY II,)		
12	Appellants,)		
13	v.)	<u>MEMORANDUM</u> ¹	
14	FORREST J. ACKERMAN,)		
15	Appellee.)		
16	_____)		

Argued and Submitted on June 22, 2005
at Pasadena, California

Filed - August 26, 2005

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

Honorable Arthur M. Greenwald, Bankruptcy Judge, Presiding.

Before: MONTALI, BRANDT and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 A law firm and an attorney appeal from an order imposing
2 sanctions against them pursuant to the bankruptcy court's
3 inherent powers. The bankruptcy court concluded that the
4 appellants had made untruthful representations to the court,
5 basing its conclusion on inconsistent state court testimony by
6 one appellant and an inconsistent agreement executed by
7 appellants. We AFFIRM.

8
9 **I.**
FACTS

10 Appellee Forrest J. Ackerman ("Ackerman") sued debtor Ray
11 Ferry ("Debtor") in state court on twenty-one causes of action,
12 and Debtor filed a cross-complaint against Ackerman on five
13 causes of action, including "Damages for Libel Per Se, Damages
14 for Slander Per Se, Damages for Fraud and Deceit, Damages for
15 Breach of Oral Contract, and Declaratory Relief." Appellants
16 Freund & Brackey LLP (the "Law Firm") and Thomas A. Brackey II
17 ("Brackey") (collectively, "Appellants") represented Debtor in
18 the state court action.

19 In 1999, the state court struck Debtor's cross-complaint as
20 a sanction for discovery abuse by Debtor. A jury trial commenced
21 on April 15, 2000; the jury returned a verdict against Debtor in
22 the total amount of \$724,500.00 (\$382,500.00 in compensatory
23 damages and \$342,000.00 in punitive damages).

24 A few days after the jury trial ended, the Law Firm entered
25 into a letter agreement (the "May 18 Agreement") with Debtor
26 wherein the firm stated it would pursue an appeal and Debtor
27 agreed to "forego any financial interest in its outcome." The
28 May 18 Agreement noted that Debtor could not afford to pursue an

1 appeal and required Debtor "to cooperate fully in [Law Firm's]
2 efforts to pursue this matter."

3 On July 7, 2000, the state court entered an amended judgment
4 in favor of Ackerman and against Debtor in the amount of
5 \$475,499.00 (including punitive damages) plus attorneys' fees in
6 the amount of \$30,000.00 and costs in the amount of \$12,710.22.
7 The Law Firm filed a notice of appeal identifying Debtor as
8 appellant with respect to both the order striking his cross-
9 complaint and the judgment against him.

10 On October 26, 2000, Debtor filed his chapter 7 petition.²
11 In February 2001, Brackey testified before the state court that
12 Debtor had "assigned over his appellate rights to us, so we're
13 pursuing it [the appeal of the state court judgment] on our own"
14 and that "my firm will pursue the appeal on its own as its own,
15 but we're not going to be representing [Debtor] . . . any
16 further."

17 On March 19, 2001, Debtor (through his bankruptcy counsel,
18 Michael J. Berger ("Berger")) filed a motion for relief from stay
19 to pursue the appeal of the state court judgment. In the context
20 of the evidentiary hearing on Ackerman's request for sanctions
21 against Appellants, Berger testified that he would not have filed
22 this motion for relief from stay if he had known that Debtor had
23 transferred his appeal rights, and that he understood that the
24 appellate rights belonged to Debtor.

25 In June 2001, Weintraub & Aver LLP filed a motion for relief
26

27
28 ² Debtor's discharge was subsequently denied pursuant to
section 727(a) (2) (A), (4) (A) and (5).

1 from stay identifying Law Firm as the movant ("Brackey MRS"). In
2 the Brackey MRS, the Law Firm sought to have the stay annulled
3 nunc pro tunc to the petition date, inasmuch as Law Firm had
4 filed in the state court appeal an amended designation of record
5 and a petition for a reporter's transcript after the petition
6 date but before the court granted Debtor's motion for relief from
7 stay. Ackerman opposed the Brackey MRS, arguing, inter alia,
8 that Law Firm did not have standing to file the motion.

9 On June 15, 2001, Ackerman filed a supplemental memorandum
10 with the bankruptcy court with respect to his motion seeking
11 invalidation by the bankruptcy court of an order entered by the
12 state appellate court granting Debtor's petition for preparation
13 of a transcript. In this supplemental memorandum, Ackerman
14 refers to Brackey's February 2001 testimony before the state
15 court and states that "according to evidence newly discovered
16 since the filing of Ackerman's original moving papers . . .
17 [D]ebtor no longer owns the appeal actions."

18 In response to Ackerman's supplemental memorandum, Law Firm
19 filed its own supplemental memorandum and declarations; in his
20 declaration, Brackey testified that the Law Firm "is prosecuting
21 the appeal without charge because [Debtor] cannot afford to pay
22 the attorneys' fees to pursue the appeal" and that the Law Firm
23 "has not received an assignment or transfer of the appeal from"
24 Debtor. He then stated: "That is what I meant when I testified
25 under oath at a hearing in state court on February 28, 2001, that
26 '[Debtor has] assigned over his appellate rights to us, so we're
27 pursuing it on our own.'" Appellants did not mention the May 18
28 Agreement in this supplemental memorandum or the supplemental

1 declarations. The bankruptcy court eventually granted the
2 Brackey MRS and Law Firm proceeded with prosecution of the state
3 court appeal.

4 On May 2, 2002, the state appellate court sua sponte raised
5 the issue of whether Debtor had standing to prosecute the appeal.
6 After the parties submitted letter briefs, the state appellate
7 court entered an order requiring Debtor to obtain, prior to oral
8 argument, an order from the bankruptcy court allowing him to
9 proceed with the appeal.

10 On June 14, 2002, Raymond Aver ("Aver") filed on behalf of
11 Law Firm (not Debtor) a "Motion for Order Authorizing Freund &
12 Brackey LLP to Continue Prosecution of Appeal on Debtor's Behalf"
13 (the "Appeal Authorization Motion").³

14 On June 26, 2002, David K. Gottlieb ("Trustee"), the chapter
15 7 trustee of Debtor's estate, filed an opposition to the Appeal
16 Authorization Motion, arguing that Law Firm did not have standing
17 to bring the motion and that the Law Firm had been unlawfully
18 prosecuting Debtor's counterclaims through the state court
19 appeal. Ackerman filed his opposition to the Appeal
20 Authorization Motion on the same date. In their response,
21

22 ³ On the same date, the state appellate court dismissed the
23 appeal because -- as Appellants surmised themselves on page 10 of
24 their response filed on July 15, 2002, with the state appellate
25 court -- it concluded "either that [Law Firm] was pursuing the
26 appeal by itself rather than on behalf of and at the instruction
27 of [Debtor] and without permission from the Bankruptcy Court, or
28 that [Law Firm] was not acting on behalf of [Debtor] in seeking a
further order from the Bankruptcy Court." The state appellate
court also entered an order to show cause why sanctions should
not be imposed against Appellants for a frivolous appeal. The
state appellate court eventually vacated the order to show cause
and reinstated the appeal.

1 Appellants failed to disclose the existence of the May 18

2 Agreement and Brackey instead filed a declaration stating:

3 3. [Law Firm] represents [Debtor] in connection with
4 his appeal from the State Court judgment . . .

5 4. I testified at a hearing before the Superior Court
6 of the State of California on February 28, 2000 [sic].
7 My testimony related, in part, to the Ferry Appeal.
8 During a portion of my testimony, I attempted to
9 summarize the agreement reached between [Law Firm and
10 Debtor]. In summary, [Debtor] agreed, as a condition
11 of [Law Firm's] further representation in connection
12 with the Ferry Appeal, that [Debtor] would not hold
13 [Law Firm] responsible in any manner for anything
14 having to do with the Ferry Appeal (i.e., for any
15 actions taken by [Law Firm] or any inaction with the
16 Ferry Appeal).

17 5. The purpose of the agreement was to avoid any
18 claims by [Debtor] that [Law Firm] had taken
19 inappropriate action or had failed to take certain
20 action, including any claims for malpractice or the
21 like.

22 6. I did not mean to infer [sic] from my testimony
23 that the appeal was being pursued by [Law Firm] for
24 [Law Firm's] benefit. Rather, the appeal is being
25 pursued solely for [Debtor's] benefit, but [Debtor] has
26 agreed that [Law Firm] may pursue the appeal on its own
27 without any oversight by [Debtor].

28 This testimony, of course, is inconsistent with the May 18
Agreement's provision that Debtor would forego any interest in
the financial outcome of the appeal.⁴

⁴ Brackey also filed a declaration with the state appellate
court on July 15, 2002, stating:

13. By my testimony of February 28, 2000 [sic], I did
not intend to convey that [Law Firm], or any other
entity, had acquired [Debtor's] right to pursue this
appeal. To the best of my knowledge the cause of
action is, and always has been, the property of
[Debtor]. It has never been the property of [Law Firm]
or any affiliated entity. The only interests advanced
by this appeal are those of [Debtor]. In my prior
testimony, I was making reference to a written

(continued...)

1 On August 19, 2002, the bankruptcy court entered an order
2 (the "No Standing Order") denying the Appeal Authorization
3 Motion.⁵ The court, without the benefit of seeing the May 18
4 Agreement, ruled that neither Debtor nor Law Firm had standing to
5 prosecute the state court appeal. The state appellate court
6 thereafter dismissed the appeal (for the second time), but
7 reinstated it after Law Firm obtained a stay of the No Standing
8 Order from the United States District Court. The state appellate
9 court eventually affirmed the state court judgment in all
10 respects.

11 On July 6, 2001, Trustee filed a complaint against the Law
12 Firm to recover preferential and fraudulent transfers (including
13 the transfer of a trademark) and to recover damages for breach of
14 fiduciary duty and dual representation (the "Brackey AP").
15 Trustee sought damages in the amount of \$500,000 for the
16 fraudulent and preferential transfer claims and \$750,000 for the
17 other causes of action.

18
19 ⁴(...continued)
20 agreement between [Law Firm] and [Debtor] in which
21 [Debtor] absolves [Law Firm] of the responsibility to
22 continue prosecution of the appeal without compensation
23 in the event it becomes unable or unwilling to do so.
24 In the event the appeal is successful, neither [Law
25 Firm], nor any affiliated entity, stand to gain.

26 Again, Appellants did not produce for the state appellate court
27 the "written agreement" (i.e., the May 18 Agreement) that
28 contained a term (i.e., Debtor's foregoing of any financial
recovery from the appeal) that was inconsistent with the
foregoing characterization of the agreement.

⁵ The order indicates that Debtor filed his own motion to
authorize Law Firm to prosecute his state court appeal. Debtor's
motion is not in the excerpts of the record provided to us.

1 In the course of the Brackey AP, Trustee requested
2 Appellants to produce documents; Appellants refused to produce
3 many documents, including the May 18 Agreement, on the grounds of
4 attorney-client privilege. Trustee filed a motion to compel and
5 the bankruptcy court entered an order compelling production on
6 August 19, 2002, holding that "the Requested Documents were
7 subject to neither the Attorney-Client Privilege nor the Attorney
8 Work-Product Privilege as there is at least reasonable cause to
9 conclude that they were created in furtherance of an unlawful
10 scheme to defraud creditors of the Estate" Nearly five
11 months after entry of the order compelling production, Appellants
12 finally produced the May 18 Agreement and other documents as
13 required by the order.

14 After receipt of the May 18 Agreement, Trustee filed a
15 motion requesting sanctions against Appellants for concealing the
16 agreement from the court and parties, for filing false
17 declarations with the court, and for multiplying costs of
18 litigation. Thereafter, counsel for Ackerman filed a similar
19 motion for sanctions ("Ackerman Sanctions Motion"), also arguing
20 that Appellants had lied to the court and had caused unnecessary
21 duplication of proceedings.

22 Appellants reached a settlement with Trustee, but chose to
23 litigate Ackerman's Sanctions Motion. Appellants contended that
24 (1) Brackey's declarations contained no false statements, (2) no
25 unnecessary pleadings were filed by the Law Firm, (3) that the
26 request was improperly brought under the bankruptcy court's
27
28

1 inherent powers pursuant to 11 U.S.C. § 105,⁶ (4) that Ackerman
2 had failed to comply with the safe harbor provisions of Rule
3 9011, (5) that Ackerman improperly sought to recover fees
4 unrelated to the bankruptcy (or even to the sanctionable
5 conduct), and (6) that Ackerman had not demonstrated the
6 reasonableness of the fees of Ackerman's counsel.

7 Eventually, in March 2004, the bankruptcy court conducted a
8 four day evidentiary hearing on the Ackerman Sanctions Motion.
9 On September 14, 2004, the bankruptcy court entered a lengthy
10 decision and findings of fact and conclusions of law in support
11 of its imposition of sanctions against Appellants. The court
12 quoted the language of the May 18 Agreement, a contemporaneous
13 memorialization of the agreement between Debtor and Law Firm, and
14 gave "substantial weight" to Brackey's February 2001 state court
15 testimony, particularly when Brackey acknowledged the
16 truthfulness of that testimony when he testified before the
17 bankruptcy court.⁷ The court gave "little if any, weight" to
18 Brackey's declaration dated June 1, 2003, and his testimony in
19 March 2004 "wherein he attempted to explain away his truthful
20 statements of February 28, 2001[,] made under oath before the
21 State court."

22
23 ⁶ Unless otherwise indicated, all section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

25 ⁷ During the bankruptcy court hearing, Brackey was asked
26 "when you testified in state court that you had executed an
27 agreement whereby [Debtor] assigned his rights to the appeal to
28 your firm, you were testifying truthfully, weren't you?" Brackey
responded: "Yes, I was." See page 184 of the March 15, 2004,
transcript.

1 imposition of sanctions under its inherent authority and under
2 Rule 9011); Caldwell v. Unified Capital Corp. (In re Rainbow
3 Magazine), 77 F.3d 278, 283 (9th Cir. 1996) (same); Duff v.
4 United States Trustee (In re California Fidelity, Inc.), 198 B.R.
5 567, 571 (9th Cir. BAP 1996). In addition, the amount of a
6 trial court's award of sanctions is reviewed for abuse of
7 discretion. B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1106
8 (9th Cir. 2002); Hewitt v. City of Stanton, 798 F.2d 1230, 1233
9 (9th Cir. 1986).

10 Under the abuse of discretion standard, we must have a
11 definite and firm conviction that the bankruptcy court committed
12 a clear error of judgment before reversal is proper. AT&T
13 Universal Card Servs. v. Black (In re Black), 222 B.R. 896, 899
14 (9th Cir. BAP 1998).

15 Findings of fact are reviewed for clear error. Neben &
16 Starrett, Inc. v. Chartwell Fin'l Corp. (In re Park-Helena
17 Corp.), 63 F.3d 877, 880 (9th Cir. 1995). Review under the
18 clearly erroneous standard is "significantly deferential,
19 requiring a 'definite and firm conviction that a mistake has been
20 committed.'" Granite State Ins. Co. v. Smart Modular Techs.,
21 Inc., 76 F.3d 1023, 1028 (9th Cir. 1996) (quoting Concrete Pipe &
22 Products of Cal., Inc. v. Constr. Laborers Pension Trust, 508
23 U.S. 602, 623 (1993)).

24 25 **IV. DISCUSSION**

26 A. The Bankruptcy Court Did Not Abuse Its Discretion In 27 Concluding That Appellants' Conduct Was Sanctionable

28 In Chambers v. NASCO, 501 U.S. 32, 35 (1991), the Supreme

1 Court upheld the authority of a trial court to exercise its
2 inherent power to sanction a litigant for bad-faith conduct; see
3 also Deville, 361 F.3d at 548-49 (bankruptcy courts possess the
4 inherent power to sanction described in Chambers). "In this
5 regard, if a court finds 'that fraud has been practiced upon it,
6 or that the very temple of justice has been defiled,' it may
7 assess attorney's fees against the responsible party." Chambers,
8 501 U.S. at 46, quoting Universal Oil Prods. Co. v. Root Ref.
9 Co., 328 U.S. 575, 580 (1946). Therefore, an attorney's actions
10 in testifying untruthfully can, in and of itself, constitute
11 sanctionable bad faith conduct. A further finding of vexatious
12 or unnecessary pleadings or motions is not required.⁸

13 Appellants argue on appeal that the bankruptcy court abused
14 its discretion in sanctioning them because they had not engaged
15 in bad faith conduct. In particular, they contend that the
16 record does not support the bankruptcy court's conclusion that
17 Brackey had been untruthful in his declarations. We disagree.
18 The May 18 Agreement provided that Debtor would forego any
19 financial interest in the outcome of the appeal⁹ and Brackey

21 ⁸ Appellants' argument that they did not file unnecessary
22 pleadings is thus irrelevant as long as sufficient evidence
exists that they were duplicitous with the bankruptcy court.

23 ⁹ The sentence indicating that the Debtor had agreed to
24 forego any financial interest in the appeal is grammatically and
25 stylistically awkward: "Accordingly, you [Debtor] hereby relieve
26 us [the Law Firm] of any responsibility whatsoever associated
27 with the prosecution, or defense, of any appeal to this matter
and to forego any financial interest in its outcome." The
infinitive phrase "to forego any financial interest in [the
28 appeal's] outcome" is dangling; it appears to be the object of
the verb "agree" but that word is not in the sentence.

(continued...)

1 testified in 2001 that Debtor assigned over his appellate rights
2 to the Law Firm and that the Law Firm was pursuing the appeal "on
3 its own as its own" but would not be representing Debtor as a
4 client. Sufficient evidence exists in the record to support the
5 court's finding that Law Firm did indeed intend to receive an
6 assignment of Debtor's rights in the appeal and that Brackey was
7 dissembling when he attempted to explain away his 2001 testimony
8 and the May 18 Agreement.

9 Citing Arizona v. California, 460 U.S. 605 (1983),
10 Appellants argue for the first time on appeal that when the
11 bankruptcy court entered the No Standing Order and held that the
12 appeal belonged to Trustee, it determined as law of the case
13 that no assignment occurred. There is no express finding by the
14 bankruptcy court in the No Standing Order with respect to the
15 assignment or non-assignment of Debtor's appeal rights to the Law
16 Firm, although the court's determination that Trustee held the
17

18 ⁹(...continued)

19 Alternatively, the drafter simply failed to use parallel
20 structure in the sentence; he should have deleted the "to" and
21 made "relieve" and "forego" parallel verbs.

22 After a four-day trial, the bankruptcy court entered a
23 finding that Debtor assigned his financial interests in the
24 outcome of the appeal to the Law Firm. Its interpretation of the
25 sentence gives the clause a reasonable, lawful and effective
26 meaning, even if the court necessarily had to supply the word
27 "agree" or delete the word "to" to make the sentence clear.
28 Heidlebaugh v. Miller, 126 Cal. App. 2d 35, 38, 271 P.2d 557
(Cal. Ct. App. 1954) ("If necessary to carry out the intention of
a contract, words may be transposed, rejected, or supplied, to
make its meaning more clear.").

Appellants argue that the bankruptcy court's finding that
the May 18 Agreement was an assignment was "simply erroneous."
Appellants' Opening Brief at 15. They do not even assert, much
less show, that the finding was clearly erroneous.

1 appeal rights necessarily assumes that Debtor possessed such
2 rights as of the petition date. The bankruptcy court, however,
3 did not have the benefit of the May 18 Agreement when it denied
4 the Appeal Authorization Motion; that agreement placed Brackey's
5 2001 testimony in proper context. The No Standing Order
6 disposing of that motion was entered on the same day as the order
7 granting the Trustee's motion to compel, which (five months
8 later) resulted in the Law Firm's production of the May 18
9 Agreement.

10 The law of the case does not prevent the reconsideration of
11 matters already decided when new evidence, such as the May 18
12 Agreement, has surfaced. Jenkins v. County of Riverside, 398
13 F.3d 1093, 1094 (9th Cir. 2005) ("The law of the case doctrine is
14 not an absolute bar to reconsideration of matters previously
15 decided. The doctrine merely expresses the practice of courts
16 generally to refuse to reopen what has been decided, not a limit
17 to their power. Thus, the court may reconsider previously
18 decided questions in cases in which there has been an intervening
19 change of controlling authority, new evidence has surfaced, or
20 the previous disposition was clearly erroneous and would work a
21 manifest injustice.") (internal quotation marks and citations
22 omitted) (emphasis added); see also Arizona v. California, 460
23 U.S. at 619 n.8 ("it is not improper for a court to depart from a
24 prior holding if convinced that it is clearly erroneous and would
25 work a manifest injustice").

26 Here, the doctrine of "law of the case" was not applicable
27 because of intervening circumstances: the involuntary production
28 of pertinent evidence (the May 18 Agreement). Appellants

1 therefore cannot rely on the No Standing Order, which was based
2 at least in part on their untruthful declarations and issued
3 without the benefit of highly relevant evidence, as proof that
4 the declarations were truthful.

5 Pointing to the testimony of Debtor's bankruptcy counsel
6 (Berger and Charles Shamesh), Appellants further argue that the
7 actions of Debtor in filing his own motion for relief from stay
8 in order to prosecute the appeals indicates that no assignment
9 occurred. We disagree. The testimony of Berger and Shamesh
10 simply demonstrates that had they known about an assignment, they
11 would not have filed the motion for relief from stay. It does
12 not mean that no assignment occurred. More importantly, Berger
13 also testified that Debtor had lied to him and that he had never
14 seen the May 18 Agreement.

15 Appellants also attempt to defuse the May 18 Agreement by
16 arguing that "[t]o the extent it states that [Debtor] would
17 forego any financial interest in the outcome of the appeal, this
18 was simply a statement to ensure that [Debtor], to the extent he
19 was successful on appeal, would not make any claim for the costs
20 on appeal that had been advanced by [Law Firm]." We reject this
21 argument as bordering on the frivolous.

22 In another implausible argument, Appellants contend for the
23 first time on appeal (in an astonishing contradiction of their
24 prior positions and testimony before the bankruptcy court) that
25 the May 18 Agreement does not even apply to the state court
26 judgment being appealed. Yet, as discussed in more detail in
27 note 10 infra, Brackey admitted before the bankruptcy court that
28 the agreement to which he referred in his 2001 state court

1 testimony about appellate arrangements with Debtor was in fact
2 the May 18 Agreement.¹⁰

3 Finally, Appellants argue that Brackey did not lie in his
4 declarations because Debtor's appellate rights were not
5 assignable under California law. California Civil Code section
6 954 provides that "[a] thing in action [defined in Civil Code
7 section 953 as "a right to recover money or other personal
8 property by a judicial proceeding"], arising out of the violation
9 of a right of property, or out of an obligation may be
10 transferred by the owner." The only exception to this general
11 rule of assignability is for purely personal torts, i.e., "those
12 involving wrongs done to the person, reputation or feelings of
13

14 ¹⁰ Appellants' contention that the May 18 Agreement does not
15 apply to the state court judgment is inconsistent with
16 Appellants' own opposition (at pages 6 and 7) before the
17 bankruptcy court, wherein they acknowledge that the agreement
18 pertained to the state court judgment. It is also inconsistent
19 with Brackey's declaration to the state court acknowledging that
20 a written agreement had been entered with Debtor regarding the
21 handling of the appeal of the judgment. Most importantly, it is
22 inconsistent with Brackey's own testimony before the bankruptcy
23 court, in which he acknowledged that the agreement to which he
24 referred in his state court testimony was the May 18 Agreement.
25 See pages 181-183 of the March 15, 2004, transcript. In
26 addition, the record is devoid of any contentions by the
27 Appellants to the bankruptcy court that the May 18 Agreement did
28 not apply to the state court appeal.

Appellants support their newly-asserted argument by noting
that the May 18 Agreement refers to an appeal of the "Ackerman v.
Ferry" matter and not to the "Ferry v. Ackerman" matter. This
ignores (1) the timing of the May 18 letter, which was executed
within eight days after conclusion of the state court trial and
negative jury verdict in the pertinent state court action (Action
Number 039960) and (2) the fact that the state court appeal
involved counterclaims filed by Debtor against Ackerman, so the
reference line of the letter is consistent with an agreement that
Debtor had assigned any recovery from the successful
reinstatement of those counterclaims on appeal.

1 the injured party." McLaughlin v. Nat'l Union Fire Ins. Co., 23
2 Cal. App. 4th 1132, 1146 (Cal. Ct. App. 1994); Reichert v.
3 General Ins. Co., 68 Cal. 2d 822, 834 (1968). Therefore, while
4 Debtor's counterclaims for libel and slander were not assignable
5 as a matter of California law, his counterclaims for fraud and
6 breach of oral contract were. Thus, California law would have
7 permitted assignment of at least some of his appellate rights.
8 In any event, the bankruptcy court did not err in concluding that
9 Appellants and Debtor intended that an assignment occur.¹¹

10 The record supports the bankruptcy court's conclusion that
11 Brackey and Law Firm were not being honest when they filed
12 declarations denying the existence of an assignment of Debtor's
13 appellate rights to Law Firm. We therefore conclude that the
14 bankruptcy court did not abuse its discretion in determining that
15 Appellants had engaged in bad faith conduct by filing misleading
16 and false declarations.

17 B. The Bankruptcy Court Properly Exercised Its Inherent Powers
18 In Sanctioning Appellants

19 Appellants further argue that the bankruptcy court erred in
20 invoking its inherent powers to sanction them because Rule 9011
21 was available as an alternate means of sanctioning. Appellants'
22

23 ¹¹ Ironically, Appellants' argument that the appellate
24 rights were not assignable may provide an explanation for
25 Appellants' motivations in denying the existence of an assignment
26 in pleadings and declarations. If the libel and slander causes
27 of action were not assignable as a matter of law, Appellants
28 would not want the state appellate court to uphold the dismissal
of those causes of action based on their lack of standing. It
does not appear to be accidental that the May 18 Agreement was
disclosed only after the state appellate court entered its
decision affirming the state court judgment.

1 argument is baseless. The Supreme Court specifically held in
2 Chambers that a federal court is not “forbidden to sanction bad-
3 faith conduct by means of the inherent power simply because that
4 conduct could also be sanctioned under the statute or the Rules.
5 . . . [I]f in the informed discretion of the court, neither the
6 statute nor the Rules are up to the task [of sanctioning bad-
7 faith litigation conduct], the court may safely rely on its
8 inherent power.” Chambers, 501 U.S. at 50.

9 The Ninth Circuit has held that even when the unavailability
10 of other statutes and rules for sanctioning is due to the
11 movant’s failure to comply with such rules (such as the “safe
12 harbor” provisions of Rule 9011), the bankruptcy court may rely
13 on its inherent powers to sanction bad faith conduct. DeVille,
14 361 F.3d at 545-46 and 550-51. As noted by the Ninth Circuit in
15 DeVille: “In discussing the foundation of a federal court’s
16 inherent power, the Supreme Court has emphatically rejected the
17 notion that the advent of 28 U.S.C. § 1927 and the sanctioning
18 provisions in the Federal Rules of Civil Procedure displaced the
19 inherent power to impose sanctions for bad faith conduct.” Id.
20 at 551.

21 In light of these controlling authorities, the bankruptcy
22 court did not err in exercising its inherent powers to impose
23 sanctions in order to preserve the integrity of the judicial
24 process. It did not have to resort to other remedies in order to
25 vindicate its judicial authority.

26 C. The Bankruptcy Court Did Not Err In Holding That Ackerman
27 Had Standing To Request Sanctions

28 Appellants argue that Ackerman did not have standing to

1 request sanctions for their conduct and, even if he did, he
2 waived the right to request such sanctions by failing to seek
3 them earlier. We disagree. First, Appellants'
4 misrepresentations to the bankruptcy court affected not only the
5 court, but the other litigants involved in the contested matters.
6 Here, Ackerman was necessarily affected by motions pertaining to
7 the state court appeal, including Law Firm's Appeal Authority
8 Motion and the Brackey MRS. Appellants' obfuscation of the
9 status of Debtor's standing to pursue the appeal resulted in
10 Ackerman pursuing positions and filing pleadings regarding such
11 standing without the benefit of material facts. And the fact
12 that Ackerman may have been put on notice of the potential
13 assignment as early as 2001 is irrelevant when Brackey continued
14 to file declarations denying the existence of the assignment,
15 particularly when the most important document (the May 18
16 Agreement) was not even produced until 2003.

17 D. The Bankruptcy Court Did Not Abuse Its Discretion In
18 Deciding the Amount of Sanctions

19 On page 30 of their Opening Brief, Appellants state that
20 "[i]t is well settled that attorney's fees incurred in making a
21 Rule 11 motion are not allowable as sanctions under that rule,"
22 citing Pan-Pacific v. Pacific Union, 987 F.2d 594, 597 (9th Cir.
23 1993). Surprisingly, Appellants fail to note in their brief that
24 Rule 11 was amended in 1993 to specifically allow a trial court
25 to include in sanctions the costs associated with sanctions
26 proceedings and that the Ninth Circuit has subsequently held that
27 Pan-Pacific has been superseded by the amended Rule 11. Margolis
28 v. Ryan, 140 F.3d 850, 854-55 (9th Cir. 1996) ("This court has

1 previously noted that the plain text of Rule 11 supercedes the
2 former rule in this Circuit disallowing Rule 11 motion-related
3 fees and costs.”) (emphasis added); Buster v. Greisen, 104 F.3d
4 1186, 1190 n.5 (9th Cir. 1997), cert. denied, 522 U.S. 981
5 (1997). Because it relies on law that is no longer good (and has
6 not been good for more than ten years), Appellants’ argument that
7 the bankruptcy court erred in awarding costs and fees associated
8 with the prosecution of the sanctions motion is not well-taken.

9 Appellants also argue that because the bankruptcy court did
10 not specify how the sanctions were calculated, the court abused
11 its discretion in determining the reasonableness of the fees of
12 Ackerman’s counsel and thus the reasonableness of the sanctions.
13 In particular, Appellants are concerned that the bankruptcy court
14 failed to take into account various billing discrepancies and
15 improper time entries by Ackerman’s counsel.

16 As noted by the bankruptcy court in its memorandum decision
17 regarding Appellants’ motion for reconsideration, it did take
18 into account the time sheets submitted by Ackerman’s counsel as
19 well as testimony before the court. “In arriving at the sum of
20 \$29,166.50, the court focused on those entries that identified
21 with [Appellants’] bad faith conduct, as well as the prosecution
22 of Ackerman’s current Sanctions Motion.” In addition, it did
23 reduce the requested fees/sanctions from \$70,000 to \$29,166.50,
24 taking into account the errors and mistakes by Ackerman’s
25 counsel:

26 As more particularly set forth in their March 30, 2004
27 testimony before this court, Ackerman’s counsel did
28 point out certain mistakes and errors in computing the
amount Ackerman had requested. These mistakes and
errors, however, were taken into consideration by the

1 court in determining the amount of sanctions imposed
2 against [Appellants]. The court finds that the
3 contents of the time sheets, minus the errors and
4 mistakes, as well as Ackerman's counsel's testimony
before the court, constitute credible evidence which
supports the amount of sanctions imposed against
[Appellants].

5 The bankruptcy court thus did consider the discrepancies and
6 other purported billing improprieties identified by Appellants
7 when fixing the amount of sanctions. Consequently, it did not
8 abuse its discretion in awarding the amount it did.¹²

9
10 **V.
CONCLUSION**

11 In light of the foregoing, we AFFIRM.
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25 ¹² Appellants have not pinpointed any specific errors by the
26 bankruptcy court in making the award. To the contrary, when we
27 asked at oral argument whether Appellants could identify those
28 amounts which should be deducted from the award (because of
discrepancies or because the fees were unrelated to the
sanctionable conduct), counsel for Appellants simply replied "All
of it."