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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NV-13-1294-PaJuH1
)	
JODY MARIE CUOMO,)	Bankr. No. 10-14813
)	
Debtor.)	Adv. Proc. 12-01124
)	
ANTHONY J. DELUCA, Esq.)	
)	
Appellant,)	
)	
v.)	MEMORANDUM ¹
)	
JODY MARIE CUOMO,)	
)	
Appellee.)	
)	

Argued and Submitted on September 18, 2014
at Las Vegas, Nevada

Filed - October 21, 2014

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: Christopher Burke argued for appellant Anthony J. DeLuca; Dennis M. Prince of Prince & Keating LLP argued for appellee Judy Marie Cuomo.

Before: PAPPAS, JURY and HOULE,² Bankruptcy Judges.

¹ 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.

² The Honorable Mark D. Houle, Bankruptcy Judge for the Central District of California, sitting by designation.

1 Attorney Anthony J. DeLuca ("DeLuca") appeals an order of
2 the bankruptcy court imposing sanctions against him and ordering
3 a partial disgorgement of fees he received. We AFFIRM.

4 **FACTS**

5 **A. The Three Bankruptcy Cases**

6 On November 15, 2006, chapter 7³ debtor Jodie Marie Cuomo
7 ("Cuomo") borrowed \$96,000, at 6 percent annual interest, from
8 Patricia Ritchie ("Ritchie") as a personal loan (the "Ritchie
9 Debt"). Although Cuomo acknowledges the debt, she never made any
10 payments on the Ritchie Debt.

11 Cuomo filed a chapter 7 petition on April 27, 2009. Bankr.
12 09-16409-BAM (the "First Case"). Ritchie was listed on a
13 creditor list attached to the petition, but with no address. The
14 First Case was dismissed on June 18, 2009, because Cuomo failed
15 to file schedules. § 521(I).

16 Cuomo filed a second chapter 7 petition on July 9, 2009.
17 Bankr. 09-22203-BAM (the "Second Case"). In an amended
18 Schedule F, and the list of Cuomo's creditors filed in the Second
19 Case, Cuomo listed a personal loan she had received from Ritchie
20 of "\$100,000"; this debt comprised 17.9 percent of Cuomo's total
21 listed unsecured nonpriority claims. The Second Case was
22 dismissed on October 27, 2009, this time because Cuomo had
23 apparently failed to comply with prebankruptcy credit counseling
24

25
26 ³ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
28 Rule references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9037, and all Civil Rule references are to the Federal
Rules of Civil Procedure 1-86.

1 requirements. § 109(h).⁴

2 Represented by DeLuca, Cuomo filed a third chapter 7
3 petition (the "Third Case") on March 23, 2010. The Ritchie Debt
4 was not listed in the mailing matrix or schedules originally
5 filed in connection with the Third Case. After the trustee filed
6 a no asset report, discharge was granted on July 1, 2010, and the
7 Third Case closed on July 16, 2010.

8 Ritchie assigned the Ritchie Debt to George Kelly ("Kelly")
9 in October 2011. Kelly promptly sued Cuomo for breach of
10 contract in Nevada state court to collect the Ritchie Debt (the
11 "State Court Action").

12 On April 12, 2012, DeLuca filed a "Motion to Reopen
13 Chapter 7 Case Combined with Motion for Order to Show Cause Why
14 Sanctions Should Not be Imposed against Gregory Kelly" (the
15 "Reopen Motion") in the Third Case. Then, on April 29, 2012,
16 DeLuca assisted Cuomo in filing an amended Schedule F (the
17 "Amended Schedule F") which indicated that she had an unsecured
18 debt for a \$96,000 personal loan from Ritchie; this debt
19 comprised over half of the total unsecured nonpriority claims
20 listed in Amended Schedule F.

21 The bankruptcy court heard the parties on the Reopen Motion
22 on May 10, 2012. Kelly appeared pro se and Cuomo was represented
23
24
25

26 ⁴ Two attorneys from the "Nevada Law Group," not DeLuca,
27 represented Cuomo in the First Case and Second Case. The
28 bankruptcy court later sanctioned the two attorneys under Civil
Rule 11/Rule 9011 and ordered them to disgorge their fees.

1 by G. Layne Nordstrom of the Nordstrom Law Office.⁵ The court
2 granted the motion to reopen the bankruptcy case, and ruled that
3 Kelly had violated the discharge injunction. However, the court
4 also decided that Kelly had acted in good faith in pursuing the
5 State Court Action, and so declined to sanction him:

6 What I'm going to do is I'm not going to order
7 sanctions because you proceeded in good faith. But at
8 the same time, I can't let stand the actions that you
9 have already obtained. You need to come into this
10 court . . . and get a determination that the debt is
11 nondischargeable on a going-forward basis. . . . And
12 I'll open the case. I'll leave the case open for you
13 to - I'll give you 30 days to do that.

14 Hr'g Tr. 8:5-12, May 10, 2012.

15 **B. The Adversary Proceeding**

16 Kelly commenced an adversary proceeding against Cuomo on
17 June 15, 2012. In the complaint, Kelly sought an exception to
18 discharge for the Ritchie Debt pursuant to § 523(a)(2)(A), and
19 denial of discharge pursuant to §§ 727(a)(2)(A), (a)(2)(B),
20 (a)(3), (a)(4)(A), and (a)(5).

21 DeLuca alleges that Cuomo declined his offer to represent
22 her in the adversary proceeding; on June 28, 2012, he sent Cuomo
23 a letter confirming he was not representing her in the action,
24 reminding her of the first court appearance date, and
25 recommending she seek other counsel.

26 Cuomo, acting pro se, filed an answer to the Kelly complaint
27 on October 24, 2012, generally denying all of its allegations.
28 Then, on January 9, 2013, Cuomo filed a motion for summary
29 judgment. Briefs and supplemental briefs were filed by both

⁵ Nordstrom was an appearance counsel for DeLuca.

1 Kelly and Cuomo. Kelly did not appear at the summary judgment
2 hearing on February 26, 2013. The bankruptcy court entered a
3 partial summary judgment in favor of Cuomo on April 1, 2013,
4 dismissing the § 727 denial of discharge claims, but directing
5 that a trial proceed on the § 523(a)(2)(A) exception to discharge
6 fraud claim.

7 In the summary judgment motion, Cuomo alleged that she had
8 informed DeLuca about the existence of the Ritchie Debt before
9 filing the Third Case, and that he had given her a copy of a
10 pre-filing Schedule F to review which listed the Ritchie Debt.
11 Based on these allegations, on March 11, 2013, the bankruptcy
12 court issued its "Order to Show Cause Why Attorney Anthony J.
13 DeLuca Should Not Be Sanctioned for Failing to List a Known Debt
14 on Debtor's Bankruptcy Schedules and Failing to Represent Debtor
15 in this Adversary Proceeding" (the "Initial OSC"). The Initial
16 OSC ordered DeLuca to explain whether:

17 (1) he performed competently by failing to list the
18 Ritchie Debt in the Third Petition in light of Cuomo's
19 allegation that he was previously aware of the debt and
20 of the Second [Case's] scheduling of the debt; (2) he
21 had charged for his services to reopen the case and
22 amend the schedules and, if so, why he had not filed a
23 supplemental Rule 2016(b) statement of compensation;
24 (3) any additional fees were reasonable in the amount;
25 and (4) nonrepresentation in the adversary proceeding
26 was reasonable and whether Cuomo had given informed
27 consent to representation only in the main bankruptcy
28 case.

24 The Initial OSC also informed DeLuca that the bankruptcy court
25 harbored concerns about his compliance with Nev. R. Prof'l
26 Conduct ("Nev. R.") 1.1 (failure to meet threshold level of skill
27 and thoroughness), Nev. R. 1.2 (limitation on services must be
28 reasonable and with consent), Nev. R. 1.5 (fees must be

1 reasonable), and Rule 2016(b) (requiring disclosure of
2 compensation paid to a debtor's attorney). The court set a
3 hearing on the Initial OSC for April 2, 2013.

4 DeLuca filed a response to the Initial OSC on March 25,
5 2013, arguing that he had provided Cuomo with a copy of her
6 current credit report and, before she signed the Schedule F that
7 he prepared and filed in the Third Case, Cuomo had reviewed it
8 for accuracy. DeLuca denied that he provided to Cuomo for her
9 review any Prefiling Schedule F that included the Ritchie Debt,
10 and he accused his former client of seeking to mislead the
11 bankruptcy court. Finally, DeLuca represented that he was not
12 compensated for any of the post-discharge legal services he
13 provided to Cuomo and, thus, there was no need to amend his
14 otherwise accurate Rule 2016(b) disclosure filed in the Third
15 Case.

16 On March 27, 2013, the bankruptcy court amended the OSC (the
17 "Amended OSC"). In addition to the directions in the Initial
18 OSC, the court now required that DeLuca also be prepared to
19 explain at the hearing why he did not list the Ritchie Debt in
20 the Original Schedule F, although it had been previously listed
21 in the Schedule F filed in the Second Case. In addition to the
22 Nevada Rules and Rule 2016(b), the Amended OSC warned that
23 DeLuca's performance may also have violated § 707(b)(4)(C)(I)
24 (requiring that a debtor's attorney "perform a reasonable
25 investigation into the circumstances that gave rise to the
26 petition").

27 DeLuca filed a response to the Amended OSC on March 29,
28 2013. DeLuca argued that he should not be required to review the

1 schedules in Cuomo's previous bankruptcy cases, especially in
2 light of the poor quality of those previous petitions and
3 schedules. Additionally, DeLuca suggested that the bankruptcy
4 court was targeting him for sanctions and was ignoring evidence
5 that Cuomo was perpetrating a fraud on the court by alleging the
6 existence of the Prefiling Schedule F.

7 At the hearing on April 2, DeLuca and Cuomo appeared. When
8 asked by the bankruptcy court if he intended to offer evidence or
9 other arguments, DeLuca indicated that he would rely on his
10 submitted papers, but would answer any questions from the
11 bankruptcy court. When Cuomo asked to be put under oath to
12 testify, the court explained to her that, if she testified, she
13 would be subject to cross-examination. The court instead
14 permitted Cuomo to read a statement into the record, not under
15 oath. DeLuca responded to the statement. The court took the
16 matter under submission.⁶

17 On June 20, 2013, the bankruptcy court filed its "Opinion
18

19 ⁶ Before the bankruptcy court reached a decision on the
20 Amended OSC, in an unrelated proceeding, on April 9, 2013, the
21 same bankruptcy judge entered an "Opinion Sanctioning Attorney
22 Anthony J. DeLuca for Failing to Represent Wayne A. Seare in This
23 Adversary Proceeding [12-1108-BAM]" (the "Seare Opinion").
24 Dignity Health v. Seare (In re Seare), 493 B.R. 158 (Bank. D.
25 Nev. 2013), aff'd, DeLuca v. Seare (In re Seare), 515 B.R. 599
26 (9th Cir. BAP 2014). Based on bias against him which he alleged
27 was evident from comments made in the Seare Opinion, DeLuca filed
28 a motion in the Cuomo adversary proceeding to recuse the
bankruptcy judge. Judge Markell referred the recusal motion to
the Chief Judge of the Nevada Bankruptcy Court. Chief Judge
Nakagawa heard the motion on May 29, 2013, and entered an order
and eleven-page memorandum denying the recusal motion on June 3,
2013.

1 Sanctioning Attorney Anthony J. DeLuca for Failing to Schedule a
2 Known Debt and Granting His Motion to Withdraw as Counsel for
3 Jody Marie Cuomo" (the "Sanction Opinion"). The court began the
4 Sanction Opinion with several factual findings.

5 First, the bankruptcy court discussed the dispute between
6 Cuomo and DeLuca concerning the alleged Prefiling Schedule F.
7 Cuomo argued that DeLuca's staff gave her a copy of the Prefiling
8 Schedule F that included the Ritchie Debt, which Cuomo argued was
9 evidence that she had provided information to him about that debt
10 before DeLuca filed the petition in the Third Case. The court
11 found that the Prefiling Schedule F was actually a copy of the
12 Amended Schedule F that was filed postpetition:

13 This does not necessarily mean, however, that Cuomo
14 acted in bad faith by asserting otherwise. The court
15 believes that she entered DeLuca's office in November
16 2012 and asked for a copy of the prefiling draft [of
17 Schedule F] and that the secretary gave her the then-
18 current [Amended Schedule F]. In other words, Cuomo
19 believed this document to be what she purported it to
20 be based on the response from DeLuca's office staff.
21 That being said, the court does not believe that
22 DeLuca, or his staff, acted in bad faith either by
23 giving her the [Amended Schedule F]. It was likely the
24 document most readily available, and possibly DeLuca
25 did not have a copy of the [Prefiling Schedule F]
26 available.

27 Sanction Opinion at 12.

28 The other factual issue examined by the bankruptcy court
concerned the degree of personal attention that DeLuca gave to
Cuomo's representation. In its decision, based on the
uncontradicted statements of Cuomo, "the court finds that DeLuca
never personally met with Cuomo, or even talked with her over the
phone, during the course of representation." Sanction Opinion at

1 13.⁷

2 The bankruptcy court began its legal analysis in the
3 Sanction Opinion by rejecting DeLuca's suggestion that the
4 bankruptcy judge was targeting DeLuca for sanctions, relying on
5 Chief Judge Nakagawa's denial of DeLuca's motion to recuse in the
6 adversary proceeding.⁸

7 The bankruptcy court then determined that DeLuca had
8 violated Nev. R. 1.1 because he had a duty to review the previous
9 bankruptcy petitions and schedules that Cuomo had filed in her
10 First Case and Second Case. The court reasoned:

11 Had he done so, he would have discovered that the
12 [Ritchie Debt] was still owing and would have scheduled
13 it (assuming with little doubt that Cuomo would have
14 agreed to schedule it). She thus would have benefitted
15 from Rule 4007's deadline for dischargeability
16 complaints and she may not be embroiled in this
17 adversary proceeding.

18 Sanctions Opinion at 21.

19 As to DeLuca's possible violation of Nev. R. 1.2(c)
20 (limitation on services must be reasonable and with consent), the
21 bankruptcy court distinguished the Third Case from the factual
22 situation in another recent case involving DeLuca and the
23 bankruptcy judge, In re Seare, where DeLuca had purported to
24 exclude representation of the debtor in adversary proceedings
25 from his flat fee and completely refused to provide the extra
26 services. 493 B.R. at 190. In this case, the court noted,

27 ⁷ DeLuca has not challenged this factual finding in this
28 appeal.

⁸ In this appeal, DuLuca has not continued his argument
that the bankruptcy court was biased.

1 DeLuca had offered to represent Cuomo in the adversary
2 proceeding, but she declined his continued services because they
3 were unaffordable. On this record, the bankruptcy court found
4 that DeLuca did not violate Nev. R. 1.2(c). Sanction Opinion at
5 21-22.

6 Since DeLuca did not charge or receive any fees for
7 post-discharge work, the bankruptcy court also ruled that DeLuca
8 did not violate Nev. R. 1.5 or Rule 2016(b). Sanction Opinion at
9 22.

10 Finally, the bankruptcy court ruled that DeLuca had not
11 performed a meaningful independent investigation into the
12 circumstances giving rise to Cuomo's bankruptcy petition and had
13 violated § 707(b)(4)(C)(I):

14 He only reviewed past filings to determine her
15 eligibility without any review of her past schedules.
16 He relied solely on the information she provided about
17 her creditors. Broadly put, the circumstance that
18 drove her to bankruptcy was total debt of approximately
19 \$160,000 [], only about \$60,000 of which appeared on
20 the Third Petition. Had he performed a reasonable
21 investigation by reviewing the prior petition, he would
22 have discovered that about one-third of her debt did
23 not appear on the Third Petition. . . . Cuomo did
24 everything that DeLuca told her to do. She reviewed
25 the draft petitions in good faith and unfortunately
26 failed to spot the omitted Ritchie Debt. As under
27 Nevada Rule 1.1, DeLuca nonetheless had the affirmative
28 duty under Section 707(b)(4)(C) to go beyond the
information provided by Cuomo and, at the very least,
to ask why the Ritchie Debt was omitted. For these
reasons, DeLuca violated Section 707(b)(4)(C).

Sanction Opinion at 24.

As a sanction for DeLuca's violation of Nev. R. 1.1 and
§ 707(b)(4)(C), pursuant to its inherent authority under
§ 105(a), and under § 329(b) and § 526(c), the bankruptcy court
ordered DeLuca to disgorge \$851.00 of the total fees he received

1 from Cuomo of \$1,499. The court justified this amount by
2 reasoning that the disgorgement was 56.8 percent of his flat fee,
3 which reflected that the Ritchie Debt of \$96,000 was 56.8 percent
4 of her total scheduled unsecured nonpriority debt of \$168,958.
5 Sanction Opinion at 32.⁹

6 DeLuca attempted to appeal the Sanction Opinion on June 24,
7 2013; however, the Panel remanded the matter to the bankruptcy
8 court on July 12, 2013, for entry of an order effectuating the
9 Sanction Opinion. An "Order on Proceeding to Show Cause Why
10 Attorney Anthony J. DeLuca Should Not Be Sanctioned for Failing
11 to List a Known Debt on Debtor's Bankruptcy Schedules and Failing
12 to Represent Debtor in this Adversary Proceeding" was entered on
13 July 17, 2013. DeLuca filed a timely appeal.¹⁰

14 **JURISDICTION**

15 The bankruptcy court had jurisdiction under 28 U.S.C.
16 §§ 1334 and 157(b) (2) (A). The Panel has jurisdiction under
17 28 U.S.C. § 158.

18 **ISSUES**

19 Whether the bankruptcy court violated DeLuca's due process
20 rights.

21 Whether the bankruptcy court abused its discretion in
22

23 ⁹ The Sanction Opinion and subsequent order also granted
24 DeLuca's request to withdraw as counsel to Cuomo.

25 ¹⁰ In their appellate briefs, the parties note that, after
26 the filing of this appeal, DeLuca asked the bankruptcy court to
27 seal the Sanction Opinion. The bankruptcy court denied DeLuca's
28 motion on July 1, 2013. DeLuca did not amend the notice of
appeal to include this denial, nor has he argued that the order
denying the sealing was improper.

1 imposing sanctions on DeLuca.

2 **STANDARDS OF REVIEW**

3 Whether procedures used by the bankruptcy court violated an
4 individual's due process rights is a mixed question of law and
5 fact that we review de novo. Willborn v. Gallagher
6 (In re Willburn), 205 B.R. 202, 206 (9th Cir. BAP 1997) (citing
7 Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990)).

8 A bankruptcy court's decision to impose sanctions is
9 reviewed for abuse of discretion. In re Nguyen, 447 B.R. 268,
10 276 (9th Cir. BAP 2011) (en banc); accord Chambers v. NASCO,
11 Inc., 501 U.S. 32, 55 (1991). The bankruptcy court's choice of
12 sanctions is also reviewed for abuse of discretion. U.S. Dist.
13 Ct. for E.D. Wash. v. Sandlin, 12 F.3d 861, 865 (9th Cir. 1993).

14 A sanction order directing disgorgement of an attorney's fees is
15 reviewed for abuse of discretion. Hale v. U.S. Tr.
16 (In re Basham), 298 B.R. 926, 930 (9th Cir. BAP 1997), aff'd,
17 152 F.3d 924 (9th Cir. 1998). A bankruptcy court abuses its
18 discretion if it applies an incorrect legal standard, misapplies
19 the correct legal standard, or if its factual findings are
20 illogical, implausible or without support from evidence in the
21 record. TrafficSchool.com v. Edriver Inc., 653 F.3d 820, 832
22 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247,
23 1262 (9th Cir. 2009) (en banc)).

24 **DISCUSSION**

25 The bankruptcy court determined that DeLuca violated Nev.
26 R. 1.1 and § 707(b)(4)(C), and it sanctioned him. We find no
27 abuse of discretion in the court's decisions.

1 I.

2 **The bankruptcy court did not violate DeLuca's due process rights.**

3 The bulk of DeLuca's arguments in this appeal concern his
4 contention that the bankruptcy court did not treat him fairly,
5 and violated his right to due process, in the sanction
6 proceedings. In particular, DeLuca suggests three ways in which
7 his due process rights were abused: (1) the bankruptcy court
8 provided insufficient notice to DeLuca concerning the basis for
9 the possible sanctions and did not allow him adequate time to
10 prepare a response; (2) the court did not hold an evidentiary
11 hearing; and (3) the court did not consider expert testimony
12 before finding that DeLuca had breached his duties to Cuomo.

13 **A. Notice.** As to the fairness of the notice given to him,
14 DeLuca argues that:

15 To satisfy due process, a bankruptcy court must
16 determine that the party to be sanctioned was provided
17 sufficient notice of the potential sanctions under
18 § 105(a). [Deville v. Cardinale (]In re Deville[)],
19 280 B.R. 483, 497-97 (9th Cir. BAP 2004) ("Generally,
20 the bankruptcy court's power to sanction attorneys must
21 specify the authority for the sanction, as well as the
22 sanctionable conduct."). Id. at 496.

23 Deluca Op. Br. at 12.

24 Sanctions for an attorney's unprofessional conduct implicate
25 a court's inherent powers. Jackson v. United States, 881 F.2d
26 707, 711 (9th Cir. 1988) ("[A]ll courts possess an inherent power
27 to prevent unprofessional conduct by those attorneys who are
28 practicing before them. This authority extends to any
unprofessional conduct[.]"); accord In re Snyder, 472 U.S. 634,
645 n.6 (1985) (noting that the state code of professional
responsibility did not by its own terms apply to attorney

1 sanctions in the federal courts, but that federal courts in
2 exercising their inherent power under the standards imposed by
3 federal law may charge attorneys with the knowledge of, and
4 conformity to, the state codes).

5 The decision in In re Deville stands for precisely the
6 opposite position suggested by DeLuca. In Deville, the
7 bankruptcy court issued two orders to show cause to an attorney
8 as to why he should not be sanctioned for removing an action to
9 the bankruptcy court to harass a plaintiff and cause unnecessary
10 delay and expenses in state court proceedings. Both orders
11 described the alleged objectionable conduct. But on appeal of
12 the sanctions order, the sanctioned attorney argued that "notice
13 was deficient because the bankruptcy court . . . did not
14 specifically state that it was also considering exercising its
15 inherent authority." Id. at 497.

16 The BAP in Deville reasoned that the bankruptcy court had
17 described the objectionable conduct and "the Appellants were also
18 given the opportunity to respond in writing, and to appear and
19 testify at a hearing. This notice satisfied due process, and
20 placed Appellants on notice that the court's inherent authority
21 was implicated." Id.

22 Similar to the Panel's reasoning in Deville, we conclude
23 that the bankruptcy court was not required to explicitly inform
24 DeLuca that it was preparing to sanction him under the court's
25 inherent powers. The title to the two show cause orders warned
26 DeLuca that the bankruptcy court was considering the imposition
27 of sanctions against him. The bankruptcy court clearly
28 identified the objectionable behavior in both OSCs as

1 unprofessional behavior in violation of, among other rules, Nev.
2 R. 1.1 and § 707(b) (4) (C), violations properly addressed by the
3 court's inherent powers. Snyder, 472 U.S. at 645 n.6 (1985).
4 Like the Deville case, the bankruptcy court directed DeLuca to
5 respond to the OSCs and to include any "admissible evidence" to
6 be presented at the hearing. DeLuca responded to both the OSCs,
7 attached evidence, and appeared at the hearing. We conclude the
8 notice given to DeLuca concerning the sanctions proceedings
9 satisfied due process requirements.

10 A variation on DeLuca's notice argument is that the
11 bankruptcy court gave him insufficient time to consider whether
12 he should be subject to sanctions for violating
13 § 707(b) (4) (C) (i). DeLuca is apparently not arguing that the
14 bankruptcy court failed to notify him that sanctions would be
15 considered under the Bankruptcy Code, rather than the
16 professional rules or Bankruptcy Rules. Instead, DeLuca's
17 objection is simply that the Amended OSC containing the court's
18 direction that he be prepared to address § 707(b) (4) (C) was given
19 to him only six days before the hearing on the OSCs.¹¹

20 "The fundamental question related to due process is whether
21 Appellants received any type of notice that was reasonably
22 calculated under all the circumstances to apprise them of the
23 pendency of the action and afford them an opportunity to present
24 their objections." Mullane v. Central Hanover Bank & Trust Co.,

26 ¹¹ At the hearing before the Panel, counsel for DeLuca
27 conceded that DeLuca had adequate knowledge of the nature of the
28 court's concerns, but only objected to the lack of time to
respond.

1 339 U.S. 306, 314 (1950). In applying Mullane in this circuit,
2 the Ninth Circuit has consistently held that one cannot establish
3 a violation of his due process rights without first establishing
4 that he was prejudiced by the alleged denial of due process.
5 When a party offers no evidence of prejudice, any deficiency in
6 providing due process to that party is harmless. Rosson v.
7 Fitzgerald (In re Rosson), 545 F.3d 764, 776 (9th Cir. 2008);
8 City Equities Anaheim, Ltd. v. Lincoln Plaza Dev. Corp.
9 (In re City Equities Anaheim, Ltd.), 22 F.3d 954, 959 (9th Cir.
10 1994).

11 Beyond complaining that he had only six days to prepare his
12 response to the additional § 707(b)(4)(C) charge, DeLuca has
13 shown no prejudice. Indeed, DeLuca fails to acknowledge that he
14 had sufficient time to address the Amended OSC in an eight-page
15 response, plus fourteen pages of exhibits. Further, at the
16 hearing on the OSCs, DeLuca replied to the bankruptcy court's
17 offer to make a statement with the comment, "I have nothing
18 further to submit other than what's been pled through the
19 pleadings." Hr'g Tr. 3:13-15, April 2, 2013. Notably, neither
20 in his responsive papers nor at the bankruptcy court hearing did
21 DeLuca suggest that he had insufficient time to address
22 § 707(b)(4)(C)(I), nor did he request more time to consider the
23 issue. We conclude that DeLuca was not prejudiced by the six-day
24 notice of the Amended OSC.

25 **B. Evidentiary hearing.** DeLuca cites to three cases to
26 support his position that the bankruptcy court was required to
27 hold an evidentiary hearing in these sanctions proceedings:
28 Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 484

1 (3d Cir. 1979); Bonhiver v. Rotenberg, Schwartzman Richards,
2 461 F.2d 925 (7th Cir. 1972); and Royal Ins. Co. Of Am. v. Miles
3 & Stockbridge, PC, 138 F.Supp.2d 695, 700 (D. Md. 2001). But
4 none of these cases deal with sanctions; they are all legal
5 malpractice cases.

6 Here, as she clearly indicated to the bankruptcy court,
7 Cuomo was not asserting a legal malpractice claim against DeLuca:
8 "It was no one's intent to get Mr. DeLuca in trouble with the
9 court, merely to defend myself in the case Mr. Kelly filed
10 concerning Pat Richie." Hr'g Tr. 17:18-20. In addition, the
11 OSCs issued by the bankruptcy court described the nature of the
12 sanctions proceedings and the specific sanctions the court might
13 impose. Simply put, this was not a malpractice action; it was
14 initiated by the bankruptcy court solely to determine, based on
15 DeLuca's conduct in this case, whether he should be sanctioned
16 under the bankruptcy court's inherent powers and the Bankruptcy
17 Code.

18 The Ninth Circuit has unambiguously ruled that evidentiary
19 proceedings are not required in sanctions proceedings, and
20 whether to require such a hearing is a matter committed to the
21 discretion of the trial court.

22 When necessary, the district court may hold an
23 evidentiary hearing on a motion for sanctions." Wyle
24 v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 592 (9th
25 Cir. 1983). Hence, the district court has the
discretion, but is not required, to hold an evidentiary
hearing prior to imposing sanctions on a party.

26 Lambright v. Ryan, 698 F.3d 803, 825-26 (9th Cir. 2012). The
27 Lambright court went beyond this general principle to rule that a
28 party's due process rights in a sanction proceeding do not

1 require an evidentiary hearing.

2 Indeed, in cases in which the sanctioned party argued
3 that it was deprived of due process because the
4 district court failed to conduct an evidentiary hearing
5 . . . we have held that "[t]he opportunity to brief the
6 issue fully satisfies due process requirements." Pac.
7 Harbor Capital, Inc. v. Carnival Air Lines, Inc.,
8 210 F.3d 1112, 1118 (9th Cir. 2000).

9 Lambright, 698 F.3d at 825-26; see also, Molski v. Evergreen
10 Dynasty Corp., 500 F.3d 1047, 1058-59 (9th Cir. 2007) ("in a case
11 involving sanctions levied against an attorney, . . . an
12 opportunity to be heard does not require an oral or evidentiary
13 hearing on the issue, instead . . . the opportunity to brief the
14 issue fully satisfies due process requirements").

15 Finally, as discussed earlier, DeLuca never requested an
16 evidentiary hearing. At the hearing on April 2, 2013, the court
17 informed the parties how it wished to proceed:

18 THE COURT: I'm open to the way to conduct this, but
19 the best way I would think would be to have you respond
20 with anything beyond what you have in writing and then
21 to the extent that either Ms. Cuomo or Mr. Kelly wants
22 to say anything, they may, and then I'll have you have
23 a reply.

24 DELUCA: I have nothing further to submit other than
25 what's been pled through the pleadings, but I'll
26 reserve the right to reply.

27 Hr'g Tr. 3:9-16.

28 In short, DeLuca not only did not request an evidentiary
hearing, he was given the opportunity by the court to expand on
his pleadings, but rested on those pleadings.

DeLuca challenges in this appeal the court's finding that he
never communicated personally or by telephone, alleging that the
only source for that information was the statement read into the
record at the hearing by Cuomo: "This despite the fact that I've

1 never even talked to Mr. DeLuca personally [] nor have I ever
2 seen him[.]” Hr’g Tr. 18:6-8. Since this was not an evidentiary
3 hearing, and Cuomo’s statement was not under oath, DeLuca
4 suggests that the court could not base its finding that DeLuca
5 never met with his client on that statement.

6 Under the terms of the hearing set up by the court and
7 agreed to by DeLuca, Cuomo could present further argument and
8 DeLuca explicitly “reserve[d] the right to reply.” Hr’g
9 Tr. 3:16. DeLuca made an extended reply to Cuomo’s statement,
10 countering in detail her allegations regarding the Prefiling
11 Schedule F, but was conspicuously silent regarding her statement
12 that he had no personal contact with her. Under these
13 circumstances, it was certainly within his knowledge and without
14 the need for preparation to state on the record if he had such
15 personal contacts.

16 The bankruptcy court did not abuse its discretion when it
17 did not conduct an evidentiary hearing in this sanctions
18 proceeding.

19 **C. Expert testimony.** DeLuca also argues that expert
20 testimony was required for the bankruptcy court to measure the
21 propriety of his actions. The cases he cites for this
22 proposition, again, concern claims for legal malpractice, not
23 sanctions.

24 The principal case relied upon by DeLuca, Fishow v. Simpson,
25 55 Md. App. 312 (Md. Ct. App. 1983), concerned a malpractice
26 claim where the lawyer “allegedly failed to adequately
27 investigate, ascertain and present to the court medical evidence”
28 regarding drug interactions and psychiatric conditions. Id. at

1 545. While, considered in context, we can well understand the
2 appellate court's ruling that, "under the facts of this case,"
3 expert testimony involving drug and psychiatric issues would be
4 beyond the common knowledge of a trial judge or jury such that
5 expert testimony would be required before the fact-finder could
6 decide whether the lawyer misperformed. But we do not consider
7 such abstruse subjects here.

8 The proper standard of diligence to be observed by a
9 debtor's attorney in representing his client in preparing the
10 schedules in a fairly simple bankruptcy case is a matter clearly
11 within the knowledge of an experienced bankruptcy judge such as
12 the one presiding in this case. It must be remembered that
13 bankruptcy judges only deal with bankruptcy cases. As a result,
14 bankruptcy judges have special expertise in bankruptcy law in
15 general, and in particular, in evaluating the services performed
16 by the bankruptcy attorneys appearing in their courts, sometimes
17 on a daily basis. United States v. Camino Real Landscape Contr.,
18 Inc. (In re Camino Real Landscape Contr., Inc.), 882 F.2d 1503,
19 1508 (9th Cir. 1987) (relying on the expertise of the bankruptcy
20 court and its "almost daily" experience in bankruptcy-related
21 matters).

22 Where the trier of fact is reasonably well equipped to
23 interpret the facts without enlightenment from experts, expert
24 testimony is superfluous. Boleman Law Firm, PC v. U.S. Tr.,
25 355 B.R. 548, 555 (E.D. Va. 2007). This is such a case. It was
26 not an abuse of discretion for the bankruptcy court to not
27 consider expert testimony concerning whether DeLuca acted
28 appropriately in representing Cuomo.

1 We conclude that the bankruptcy court did not violate the
2 due process rights of DeLuca.

3 **II.**

4 **The bankruptcy court did not abuse its
5 discretion in sanctioning DeLuca.**

6 "Bankruptcy courts have the inherent authority to regulate
7 the practice of attorneys who appear before them." In re Nguyen,
8 447 B.R. at 280 (citing Chambers v. NASCO, Inc., 501 U.S. at
9 43-45); Caldwell v. Unified Capital Corp. (In re Rainbow
10 Magazine, Inc.), 77 F.3d 278, 284-85 (9th Cir. 1996)).

11 Bankruptcy courts have express authority under the Code and the
12 Rules, and under its inherent authority, to sanction attorneys.
13 Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir.
14 2009). The bankruptcy court has "wide discretion in determining
15 the amount of a sanctions award." Orton v. Hoffman
16 (In re Kayne), 453 B.R. 372, 386 (9th Cir. BAP 2011).

17 All attorneys practicing in the district and bankruptcy
18 courts of the District of Nevada are subject to the Nevada Rules
19 of Professional Conduct:

20 An attorney admitted to practice pursuant to any of
21 these Rules shall adhere to the standards of conduct
22 prescribed by the Model Rules of Professional Conduct
23 as adopted and amended from time to time by the Supreme
24 Court of Nevada, except as such may be modified by this
25 Court. Any attorney who violates these standards of
conduct may be disbarred, suspended from practice
before this Court for a definitive time, reprimanded or
subjected to such other discipline as the Court deems
proper. This subsection does not restrict the Court's
contempt power.

26 Nev. Dist. Ct. Local R. IA 10-7, made applicable by Nev. Bankr.
27 Ct. Local R. 1001.

28 The Nevada Rules of Professional Conduct are based on, and

1 generally identical to, the ABA Model Rules of Prof'l Conduct
2 ("ABA Model Rule[s]"). Courts may consult the ABA Model Rules
3 and the official comments "for guidance to construe the Nevada
4 Rules of Professional Conduct." Nev. Sup. Ct. R. 150; Edwards v.
5 360 Communs., 189 F.R.D. 433, 434-45 (D. Nev. 1999).

6 The bankruptcy court sanctioned DeLuca under its inherent
7 powers because it determined that DeLuca violated Nev. R. 1.1.
8 Under that rule, which is identical to the corresponding ABA
9 Model Rule, "[a] lawyer shall provide competent representation to
10 a client. Competent representation requires the legal knowledge,
11 skill, thoroughness and preparation reasonably necessary for the
12 representation." Nev. R. 1.1.

13 The bankruptcy court also sanctioned DeLuca under
14 § 707(b)(4)(C). This Code provision, added by BAPCPA in 2005,
15 provides that: "The signature of an attorney on a [Chapter 7]
16 petition . . . shall constitute a certification that the attorney
17 has . . . performed a reasonable investigation into the
18 circumstances that gave rise to the petition." In applying this
19 provision, the bankruptcy court acknowledged this Panel's
20 decision holding that, "[t]he "reasonable investigation" under
21 this section is indistinct from the "reasonable inquiry" under
22 Rule 9011, and Rule 9011 case law is applicable. In re Kayne,
23 453 B.R. at 381.

24 In reviewing attorney disciplinary sanctions, we determine
25 whether (1) the disciplinary proceeding was fair, (2) the
26 evidence supports the findings, and (3) the penalty imposed was
27 reasonable. In re Nguyen, 447 B.R. at 276. As discussed in the
28 preceding section, we find that the proceeding was fair and did

1 not violate DeLuca's due process rights. We examine the second
2 and third In re Nguyen factors below.

3 **A. The evidence supported the sanctions.** The bankruptcy
4 court's Sanction Opinion sets forth a discussion of the case law
5 regarding the meaning and effect of Nev. R. 1.1. and
6 § 707(b)(4)(C), and then explains their application to the facts
7 of this case. The bankruptcy court's analysis is sound.

8 Under Nev. R. 1.1, the central factual inquiry is whether a
9 lawyer provides competent representation to the client. Cudzey
10 v. State, 747 P.2d. 233, 236 (Nev. 1987). There is no precise
11 definition of "competence" under either Nevada or federal law,
12 but relevant factors include the lawyer's training, experience
13 and preparation. ABA Model R. 1.1 cmt. 5 ("Competent handling of
14 a legal matter includes inquiry into and analysis of the factual
15 and legal elements of the problem, and use of methods and
16 procedures meeting the standards of competent practitioners.");
17 Cudzey, 747 P.2d. at 236.

18 A debtor is duty-bound to file accurate lists of creditors
19 and schedules of assets and liabilities. § 521(a)(1)(A), (B);
20 Rule 1007(b)(1)(A). The bankruptcy schedules play a critical
21 role in providing the information necessary for the commencement
22 and administration of a bankruptcy case. In particular,
23 Schedule F lists all of the debtor's nonpriority unsecured
24 creditors, and those names are then generally included in the
25 list of creditors submitted by the debtor to the clerk so that
26 those creditors can be notified about the commencement of, and
27 other important information about, the debtor's bankruptcy case.
28 Understandably, then, in satisfying the debtor's duties, a

1 debtor's attorney "bears a significant degree of responsibility
2 in assuring to the best of his or her ability that the schedules
3 are complete and accurate before they are filed." U.S. Tr. v.
4 Lynn (In re Bellows-Fairchild), 322 B.R. 675, 680 (Bankr. D. Ore.
5 2005). As one leading treatise on bankruptcy law succinctly
6 notes:

7 In the preparation of the schedules nothing should be
8 taken for granted. The attorney should carefully
9 investigate the affairs of the debtor and make certain
10 that the attorney has all the information needed to
prepare full and complete schedules, for it is the duty
of the debtor to present intelligible and true
schedules.

11 4 COLLIER ON BANKRUPTCY ¶521.03[3] (Alan N. Resnick & Henry J.
12 Sommer eds., 16th ed. 2014).

13 The bankruptcy court determined that the Retainer Agreement
14 between Cuomo and DeLuca "went too far" in transferring all
15 responsibility for the accuracy of information to Cuomo. An
16 attorney cannot by contract limit the scope of his duties.
17 In re McKain, 325 B.R. 843, 849 (Bankr. D. Neb. 2005) ("a
18 debtor's attorney bears a significant degree of responsibility in
19 assuring to the best of his or her ability that the schedules are
20 complete and accurate before they are filed."); see also
21 Restatement (Second) of Contracts § 193 (1981).

22 DeLuca does not challenge the bankruptcy court's fact
23 finding that he knew of the Second Case filed by Cuomo in 2009.
24 Nor can he. DeLuca's Client Interview Sheet, signed by Cuomo,
25 indicates that Cuomo informed his staff she had a previous
26 bankruptcy that had been dismissed. Further, DeLuca does not
27 take issue with the bankruptcy court's finding that he reviewed
28 the Second Case. Indeed, DeLuca admits he examined the earlier

1 filing, but only to determine if Cuomo was eligible to file yet
2 another bankruptcy petition, and that it was not his practice to
3 review the schedules of prior bankruptcies. Hr'g Tr. 4:22-25,
4 April 2, 2013.

5 The bankruptcy court determined that DeLuca had the duty to
6 review the Second Case with Cuomo, and that had he diligently
7 done so, he would have discovered the existence of the Ritchie
8 Debt. As the court noted, even if Cuomo had not given him a
9 petition and schedules from the earlier bankruptcy, they were
10 readily available through the court's PACER system of electronic
11 records. Sanction Opinion at 18. As the bankruptcy court
12 summarized, "DeLuca's arguments are to no avail. The marginal
13 expense of cross-checking prior schedules is far outweighed by
14 the duty to provide competent representation by thoroughly
15 investigating the facts." Sanction Opinion at 20.

16 Likewise, the bankruptcy court could properly disregard
17 DeLuca's argument that he could not rely on schedules prepared in
18 the earlier bankruptcy cases because the attorneys in those cases
19 had been sanctioned for incompetence. First, the bankruptcy
20 court observed that DeLuca's position was inherently
21 contradictory. DeLuca stated that he never reviewed prior
22 bankruptcy schedules, so it would not matter who prepared them.
23 Secondly, at the time DeLuca filed the Third Case, he was not
24 aware of the misfeasance of Cuomo's previous attorneys.
25 Sanctions Opinion at 21.

26 We agree with the bankruptcy court that DeLuca violated Nev.
27 R. 1.1 by his failure to competently investigate and take
28 reasonable steps to assure that all of his client's creditors

1 were listed on the Original Schedule F.

2 The bankruptcy court also determined that DeLuca violated
3 § 707(b)(4)(C), observing that other courts interpreting that
4 Code provision have rejected an attorney's attempt to "blame the
5 client" for mistakes. For example, in Withrow v. Collins
6 (In re Withrow), 405 B.R. 505, 523 (1st Cir. BAP 2009), the panel
7 rejected the attorney's argument that he failed to schedule
8 closed bank accounts because of the debtor's poor health and
9 faulty memory. See also In re Garrard, 2013 Bankr. LEXIS 3140,
10 at * 17-18 (Bankr. N.D. Ala. August 5, 2013) ("The Debtors'
11 attorney would exonerate himself from any responsibility by
12 shifting the blame to his client who, according to the attorney,
13 furnished the inaccurate information in the first place: 'ANY and
14 ALL information contained in both petitions were [sic] provided
15 by the debtors.' The Court is skeptical that [the debtor] was
16 the exclusive source of the misinformation, but even if he were,
17 that would not excuse the attorney's failure to inquire
18 further.").

19 The bankruptcy court also found that Cuomo did everything
20 that DeLuca asked her to do. She reviewed the draft petition and
21 schedules in good faith and, unfortunately, failed to spot the
22 omitted Ritchie Debt. But even so, it was DeLuca, not Cuomo, who
23 was charged with the statutory duty under § 707(b)(4)(C)(1) to
24 conduct a reasonable inquiry into Cuomo's financial affairs.
25 Because DeLuca was aware that Cuomo had filed a prior bankruptcy
26 case and schedules, he should have appreciated the need to review
27 the prior filings and to compare the information therein to that
28 he proposed to submit in Cuomo's Third Case for consistency and

1 completeness. That he did not do so contributed to the failure
2 to list the Ritchie Debt in Cuomo's Third Case and to all of the
3 consequences flowing from that omission.

4 **B. The sanction was reasonable.** This Panel consults the
5 ABA Standards for Imposing Lawyer Sanctions (the "ABA Standards")
6 for determining the reasonableness of sanctions. In re Nguyen,
7 447 B.R. at 277. The ABA Standards require consideration of four
8 factors in determining the propriety of an attorney sanction:
9 (1) the duties violated, whether owed to a client, the public,
10 the legal system, or the profession; (2) the lawyer's mental
11 state, whether he acted intentionally, knowingly, or negligently;
12 (3) the seriousness of the actual or potential injury caused by
13 the lawyer's misconduct; and (4) the existence of aggravating or
14 mitigating circumstances. ABA Standards 9; In re Nguyen,
15 447 B.R. at 277.

16 The bankruptcy court addressed each of these four factors.

17 As to Factor 1, the duties violated, the bankruptcy court
18 found that DeLuca harmed the public by practicing in a manner
19 that erodes the public's trust in attorneys; that his conduct
20 harmed the legal profession because his practice of deliberately
21 ignoring his clients' prior bankruptcy schedules reflects poorly
22 on the legal profession and engenders distrust and the perception
23 that attorneys are inattentive to clients' particular
24 circumstances; and that his conduct harmed the legal system by
25 forcing the court to spend its limited resources on this
26 sanctions matter. Sanction Opinion at 27-28.

27 As to Factor 2, the lawyer's mental state, the bankruptcy
28 court found that DeLuca's conduct was "reckless, or at least

1 undertaken with conscious indifference." It also found that
2 DeLuca only reviews prior petitions to determine if a client is
3 eligible to file for bankruptcy and therefore knows or should
4 know that he is turning a blind eye to potentially relevant
5 information in prior schedules. Sanction Opinion at 28-29.

6 As to Factor 3, the seriousness of the injury DeLuca caused,
7 the bankruptcy court observed that Cuomo was now embroiled in an
8 adversary proceeding that very well could have been avoided;
9 although the adversary proceeding may have occurred in any event,
10 DeLuca's actions increased the probability that it would occur.
11 Sanction Opinion at 30-31.

12 As to Factor 4, aggravating or mitigating circumstances, the
13 bankruptcy court determined that DeLuca justified his ignoring
14 the information in prior schedules by citing the cost to his
15 practice. In the court's words, such a "regularized practice can
16 only be characterized as selfish and a violation of the fiduciary
17 duty to place clients' needs first." Sanction Opinion at 32.
18 The court found that DeLuca refused to admit his mistakes; he
19 blamed Cuomo for not being sufficiently forthcoming; and,
20 finally, as an experienced consumer bankruptcy practitioner, he
21 should understand that information in prior schedules is always
22 relevant to properly understand a clients' circumstances and may
23 have relevance for the relief available to a client and the risks
24 that a client may face by taking or failing to take certain
25 actions. Sanction Opinion at 31-32.

26 On this record, having considered the appropriate factors,
27 the bankruptcy court could have imposed more drastic sanctions on
28 DeLuca. His lack of a reasonable inquiry into Cuomo's financial

1 affairs arguably caused an injury or prejudice not only to his
2 client, but to the public (which relies upon the accuracy of
3 bankruptcy filings), and to the legal system (which is burdened
4 by the additional legal procedures stemming from the omission of
5 the Ritchie Debt). ABA Standards 24. Instead, the bankruptcy
6 court opted for an extremely modest monetary sanction: requiring
7 DeLuca to disgorge \$851 of his \$1,499 fee. The bankruptcy court
8 has "wide discretion in determining the amount of a sanctions
9 award." In re Kayne, 453 B.R. at 386. Given the nature and
10 seriousness of DeLuca's transgressions, the bankruptcy court's
11 sanction of \$851 is reasonable.

12 **CONCLUSION**

13 Because the disciplinary proceeding was fair, the evidence
14 supports the findings made, and the penalty imposed was
15 reasonable, we conclude that the bankruptcy court did not abuse
16 its discretion in sanctioning DeLuca \$851. We AFFIRM the
17 bankruptcy court's order imposing the disgorgement sanction.
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