

MAY 15 2017

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

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

5	In re:)	BAP No.	CC-15-1429-FCTa
6	CAREY A. ROESSLER-LOBERT,)	Bk. No.	9:15-bk-11174-PC
7	Debtor.)	Adv. Pro.	9:15-ap-01065-PC
8	_____)		
9	MARY LEE, in her capacity as)		
10	Personal Representative of)		
11	the Estate of Juliana March,)		
12	Appellant,)		
13	v.)	OPINION	
14	CAREY A. ROESSLER-LOBERT;)		
15	JERRY NAMBA,)		
16	Appellees.*)		
17	_____)		

Argued and Submitted on February 23, 2017
at Pasadena, California

Filed - May 15, 2017

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

Honorable Peter H. Carroll, Bankruptcy Judge, Presiding

Appearances: Seymour I. Amster argued on behalf of Appellant
Mary Lee.

Before: FARIS, CLEMENT,** and TAYLOR, Bankruptcy Judges.

* Appellees did not file an answering brief or otherwise
make an appearance in this appeal.

** The Honorable Fredrick E. Clement, United States
Bankruptcy Judge for the Eastern District of California, sitting
by designation.

1 FARIS, Bankruptcy Judge:
2

3 **INTRODUCTION**

4 Appellant Mary Lee, in her capacity as personal
5 representative of the Estate of Juliana March, appeals from the
6 bankruptcy court's order dismissing her adversary complaint
7 against chapter 7¹ debtor Carey A. Roessler-Lobert. Although the
8 bankruptcy court was understandably frustrated with Ms. Lee's
9 attorney's misrepresentations and noncompliance with the
10 applicable court order and rules, it abused its discretion in
11 dismissing the complaint at the initial status and scheduling
12 conference. Accordingly, we REVERSE the dismissal order and
13 REMAND this case to the bankruptcy court.

14 **FACTUAL BACKGROUND**

15 On June 2, 2015, Ms. Roessler-Lobert, proceeding pro se,
16 filed a chapter 7 petition in the United States Bankruptcy Court
17 for the Central District of California. On September 3, Ms. Lee,
18 though her attorney, Seymour I. Amster, timely filed an adversary
19 complaint to determine dischargeability.²

20 That same day, the bankruptcy court promptly issued the
21 summons required by Rule 7004 via CM/ECF. The summons set a
22 status and scheduling conference for November 5, 2015 and
23

24 ¹ Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
26 all "Rule" references are to the Federal Rules of Bankruptcy
27 Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

28 ² The complaint, the substance of which is not directly
relevant to this appeal, asserted a single claim for relief that
alleged that the debtor fraudulently transferred about \$78,000
from a bank account belonging to Ms. Lee's deceased daughter.

1 required Ms. Roessler-Lobert to respond to the adversary
2 complaint by October 5, 2015.

3 The court simultaneously issued a scheduling conference
4 order regarding the Civil Rule 26(f) meeting, initial
5 disclosures, and Civil Rule 16(b) status conference. The
6 scheduling conference order directed the plaintiff to serve a
7 copy of the scheduling conference order with the summons. It
8 also directed the parties to meet and confer at least twenty-one
9 days prior to the November 5 status conference; discuss the
10 nature of their claims and defenses, arrange for initial
11 disclosures, discuss discovery issues, and propose a discovery
12 plan; make initial disclosures; consider alternative dispute
13 resolution; and file a joint status report no later than seven
14 days before the status conference. According to the notice of
15 electronic filing, the bankruptcy court e-mailed CM/ECF
16 notification of the scheduling conference order to Mr. Amster's
17 e-mail address on record with the court and mailed a hard copy to
18 his address in Granada Hills, California, which was listed on the
19 complaint.

20 Mr. Amster failed to timely serve Ms. Roessler-Lobert with
21 the summons and scheduling conference order. At some point, he
22 logged into his CM/ECF account and retrieved the summons and
23 scheduling conference order. He attempted service on
24 Ms. Roessler-Lobert on October 17, and she received the documents
25 on October 20 - fifteen days after her deadline to respond to the
26 complaint and only sixteen days before the status conference.
27 Mr. Amster did not file a proof of service of the summons with
28 the court.

1 On November 1, four days before the status conference,
2 Mr. Amster called Ms. Roessler-Lobert and asked her to agree that
3 they had met and conferred ahead of the status conference.
4 According to Ms. Roessler-Lobert, the call lasted about eight
5 minutes and "he said that he was just going to go ahead and file
6 a unilateral statement. . . . [B]asically it was just about as
7 far as whether or not to meet and confer and just say that I
8 have." At approximately 8:15 pm the night before the conference,
9 Mr. Amster filed a unilateral status report on behalf of Ms. Lee.

10 Mr. Amster did not appear at the November 5 status
11 conference; instead, attorney Laura Dewey made a special
12 appearance in his place. Ms. Dewey represented to the court that
13 Mr. Amster was involved in a death penalty trial. She stated
14 that Ms. Roessler-Lobert had not answered the complaint and
15 requested that the court continue the status conference.

16 Ms. Roessler-Lobert explained to the court that she had
17 only received the summons on October 20 and that Mr. Amster had
18 called her four days prior and asked her to agree that they had
19 met and conferred. The court noted that, in addition to the
20 tardy service of the summons and the late meet-and-confer,
21 Ms. Lee had not filed a status report³ or a proof of service of
22 the summons. In response, Ms. Dewey said that Mr. Amster has
23 "been stuck in this very long-standing death penalty case and has
24 simply fallen behind in his administrative work in his practice."

25 The court dismissed the case for want of prosecution,
26 failure to file a status report that Local Bankruptcy Rule

27
28 ³ Because Mr. Amster had filed the unilateral status report
at 8:15 pm the previous night, the court had not seen or reviewed
the status report before the status conference the next morning.

1 ("LBR") 7016-1 requires, and violation of the scheduling
2 conference order. It entered an order ("Dismissal Order")
3 dismissing the adversary proceeding the same day.

4 Ms. Lee filed a timely motion to set aside or reconsider the
5 Dismissal Order ("Motion for Reconsideration"). Mr. Amster, on
6 behalf of Ms. Lee, argued that he did not receive a copy of the
7 summons or scheduling conference order because the court
8 mistakenly sent the hard copy to an old address. (This was a
9 false statement.) He logged into CM/ECF at an unspecified date
10 and found the summons, then served the summons, complaint, and
11 scheduling conference order on Ms. Roessler-Lobert on October 17.

12 He said that he called Ms. Roessler-Lobert on November 1 to
13 obtain her support in creating a joint status report. He said
14 that she did not understand what she was supposed to do, so he
15 told her that he would file a unilateral status report.

16 Mr. Amster explained that he was unable to personally attend
17 the November 5 status conference because he was involved in the
18 so-called "Grim Sleeper" death penalty case and "was devoting a
19 significant amount of his time to that matter which caused the
20 delays in this matter."

21 Mr. Amster again did not show up for the hearing on the
22 Motion for Reconsideration. Rather, attorney William C. Beall
23 appeared on behalf of Ms. Lee. Mr. Beall argued that the court
24 should reconsider the Dismissal Order based on Mr. Amster's
25 neglect. He represented that "the hard copy summons [went] to
26 the wrong address, so [Mr. Amster] didn't see it, and then he
27 eventually did go into ECF and got it." He repeatedly reminded
28 the court that Mr. Amster was "involved in a multiple murder

1 death penalty case down south. He got himself in too deep in
2 this case. He wasn't able to give it the attention that it
3 deserved, and so now, however, he is."⁴

4 The court was unsympathetic. It said that the court
5 routinely issues the summons and scheduling conference order in
6 every adversary proceeding. The scheduling conference order
7 requires the plaintiff to contact the defendant and arrange a
8 Civil Rule 26(f) meeting no later than twenty-one days prior to
9 the status conference. It also stated that the local bankruptcy
10 rules require the plaintiff to file a status report fourteen
11 days⁵ prior to the status conference and to appear at the status
12 conference.

13 The court rejected Mr. Amster's excuse for not timely
14 serving the summons. It said that the court had e-mailed notice
15 of the issuance of the summons to Mr. Amster's e-mail address of
16 record on September 3, and nothing "indicates that he even
17 bothered to check his e-mail for the summons that he asked for
18 from the Court." The court also rejected Mr. Amster's attempt to
19 blame the court for mailing the documents to an incorrect
20 address: "He claims in his defense in his motion for

21
22 ⁴ Ms. Lee also argued that, under Rule 7004, the court
23 should have reissued the summons. Mr. Beall contended at the
24 hearing that Ms. Lee had 120 days to serve the summons on
25 Ms. Roessler-Lobert: "the Court did not have discretion to
26 dismiss this case based on failure of service until that 120 days
has passed." Ms. Lee's counsel briefly mentioned this argument
at the oral argument but omitted it from her briefs. Therefore,
Ms. Lee did not preserve this argument on appeal.

27 ⁵ The court said that, although the local bankruptcy rule
28 requires parties to file the status report fourteen days before
the status conference, the court allows parties to file the
report seven days prior to the status conference.

1 reconsideration - that the Court sent the summons by regular mail
2 to an incorrect address. That's not what happened. The Court
3 didn't send a summons to an incorrect address. The Court sent
4 the summons to him electronically with an ECF notice, just like
5 the Court's supposed to, the day the summons was issued." The
6 court noted that Mr. Amster had neglected to pay attention to
7 this case and inquire after the summons for over a month.

8 The court also discussed Mr. Amster's failure to comply with
9 Civil Rule 26(f). It said that he only contacted Ms. Roessler-
10 Lobert a few days before the status conference; he did not file a
11 status report until the night before the status conference; and
12 he tried to convince Ms. Roessler-Lobert to agree that the short
13 telephone call satisfied the meet-and-confer requirement. The
14 court stated that "[t]hat's not what the order envisioned."

15 Ultimately, the court denied the Motion for Reconsideration.
16 It clarified that the basis for dismissal was not merely the
17 failure to serve the summons timely, but also the failure to
18 comply with LBR 7016-1, Civil Rule 26, and the scheduling
19 conference order. The court stated that, contrary to Mr.
20 Amster's representations, the summons and scheduling conference
21 order were sent to Mr. Amster's e-mail address of record,⁶ and
22 the scheduling conference order was also mailed to the Granada
23 Hills address on record. The court concluded:

24
25
26 ⁶ Mr. Amster admits on appeal that he had not updated his
27 contact information with the court. He says that "[h]e was not
28 aware that the summons had been sent electronically to an old
e-mail address he had. . . . Of course upon realizing this he
updated all of his accounts with correct addresses so this
problem would never happen again."

1 Counsel failed to check his e-mail for notice that
2 the summons had been issued; failed to timely serve the
3 summons, order, and complaint on the defendant; failed
4 to file a proof of service of the summons with the
5 Court; failed to initiate the Rule 26(f) conference, as
6 ordered by the Court; and failed to timely file a
7 status report. These omissions involve a complete lack
8 of diligence in following the rules of this Court,
9 which are unambiguous.

10 The court issued its order ("Reconsideration Order") denying
11 the Motion for Reconsideration. Ms. Lee timely appealed from the
12 Dismissal Order and the Reconsideration Order.

13 JURISDICTION

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
15 §§ 1334 and 157(b) (1). We have jurisdiction under 28 U.S.C.
16 § 158.

17 ISSUE

18 Whether the bankruptcy court erred in dismissing Ms. Lee's
19 adversary complaint.

20 STANDARD OF REVIEW

21 We review for abuse of discretion the bankruptcy court's
22 dismissal of a complaint for failure to comply with the rules or
23 court order. See Schmidt v. Herrmann, 614 F.2d 1221, 1224 (9th
24 Cir. 1980). Similarly, the bankruptcy court's dismissal of an
25 adversary proceeding based upon a plaintiff's failure to
26 prosecute is reviewed for an abuse of discretion. See Al-Torki
27 v. Kaempfen, 78 F.3d 1381, 1384 (9th Cir. 1996); Moneymaker v.
28 CoBen (In re Eisen), 31 F.3d 1447, 1451 (9th Cir. 1994).

We also review for abuse of discretion the bankruptcy
court's denial of a motion for reconsideration. See First Ave.
W. Bldg., LLC v. James (In re Onecast Media, Inc.), 439 F.3d 558,
561 (9th Cir. 2006).

1 We apply a two-part test to determine whether the bankruptcy
2 court abused its discretion. United States v. Hinkson, 585 F.3d
3 1247, 1261-62 (9th Cir. 2009) (en banc). First, we consider de
4 novo whether the bankruptcy court applied the correct legal
5 standard to the relief requested. Id. Then, we review the
6 bankruptcy court's factual findings for clear error. Id. at
7 1262. We must affirm the bankruptcy court's factual findings
8 unless we conclude that they are illogical, implausible, or
9 without support in inferences that may be drawn from the facts in
10 the record. Id.

11 "[W]e will overturn a dismissal sanction only if we have a
12 definite and firm conviction that it was clearly outside the
13 acceptable range of sanctions." Malone v. U.S. Postal Serv., 833
14 F.2d 128, 130 (9th Cir. 1987) (citation omitted).

15 DISCUSSION

16 **A. The bankruptcy court abused its discretion in dismissing the** 17 **adversary complaint at the initial status and scheduling** 18 **conference.**

19 Ms. Lee argues that the court abused its discretion in
20 dismissing her adversary complaint. Although we disapprove of
21 Mr. Amster's conduct and do not condone his misrepresentations or
22 his negligence, we agree that the dismissal was an unduly harsh
23 sanction.

24 The bankruptcy court identified three legal bases for the
25 dismissal: Mr. Amster's failure to prosecute the adversary
26 proceeding; his violation of the scheduling conference order; and
27 his violation of the applicable local rule.

28 Neither the Ninth Circuit nor this Panel has ever
articulated a single, unified standard for the imposition of

1 terminating sanctions. Rather, the Ninth Circuit and this Panel
2 have stated slightly different standards, depending on the
3 authority on which the sanction is based.⁷ Therefore, we must
4 separately analyze each of the three legal bases which the
5 bankruptcy court employed.

6 **1. Failure to prosecute**

7 Civil Rule 41(b), made applicable in bankruptcy pursuant to
8 Rule 7041, provides that, “[i]f the plaintiff fails to
9 prosecute . . . , a defendant may move to dismiss the action or
10 any claim against it.” Civil Rule 41(b). Although the rule only
11 authorizes a party to file a motion to dismiss, it is well
12 settled that the court has “the inherent power sua sponte to
13 dismiss a case for lack of prosecution.” Henderson v. Duncan,
14 779 F.2d 1421, 1423 (9th Cir. 1986).

15 The Ninth Circuit stated the applicable standard in
16 Henderson. The court began by emphasizing that “[d]ismissal is a
17 harsh penalty and is to be imposed only in extreme
18 circumstances,” and that “[a] dismissal for lack of prosecution
19 must be supported by a showing of unreasonable delay.” Id. The
20 court held that, in determining whether to dismiss a case for
21 lack of prosecution, the trial court must weigh several factors:

22
23 ⁷ It is not clear why the standard should vary depending on
24 the asserted legal basis for the sanction. In many cases (such
25 as this one), the same conduct can invoke multiple bases for the
26 imposition of sanctions; for example, Mr. Amster’s failure to
27 file a timely unilateral status report violated a local rule and
28 a court order and also arguably constituted a failure to
discuss in the text, the differences between the standards are
smaller than they appear to be at first glance.

1 “(1) the public’s interest in expeditious resolution of
2 litigation; (2) the court’s need to manage its docket; (3) the
3 risk of prejudice to the defendants; (4) the public policy
4 favoring disposition of cases on their merits[;] and (5) the
5 availability of less drastic sanctions.” Id. No showing of bad
6 faith “is required under the court’s inherent power to dismiss
7 for lack of prosecution under Fed. R. Civ. P. 41(b).” Id. at
8 1425.⁸ Ideally, the bankruptcy court should make explicit
9 findings concerning these factors, but such findings are not
10 required.⁹ In the absence of such findings, the appellate court
11 must review the record independently to determine whether the
12 dismissal was an abuse of discretion. Id. at 1424.

14 ⁸ The violator’s mental state is relevant, however. As we
15 shall see, the court must consider any excuse for the violation
16 when determining whether delay was unreasonable and when
17 evaluating the prejudice to the defendant. Further, in most of
18 the cases where the Ninth Circuit upheld a dismissal for failure
19 to prosecute, the court noted that the failure was “willful,”
20 Anderson v. Air West, Inc., 542 F.2d 522, 525 (9th Cir. 1976);
21 see also Malone, 833 F.2d at 130 (dismissal for failure to comply
22 with a court order was appropriate due to “the flagrant
23 disobedience by plaintiff’s counsel, her bad faith and her
24 repeated failure to comply in any respect with the Court’s
25 pretrial order”), or the violations were so egregious that they
26 could not have been the product of simple negligence, In re
27 Eisen, 31 F.3d at 1454 (four year delay in prosecution without
28 adequate excuse); Henderson, 779 F.2d at 1423 (failure to submit
pretrial order despite four extensions and warnings).

24 ⁹ At the initial status and scheduling conference, the
25 bankruptcy court did not make any explicit findings, other than
26 to state that Ms. Lee did not timely serve the summons, file a
27 status report, or file a proof of service of the summons. At the
28 subsequent hearing on the Motion for Reconsideration, the
bankruptcy court focused primarily on Mr. Amster’s claim of
excusable neglect; but the relevant analysis requires more than
just an examination of how far a dilatory party’s actions fell
below an acceptable standard of conduct.

1 The first factor, the public interest in the prompt
2 resolution of litigation, ordinarily weighs in favor of
3 dismissal. See Yourish v. Cal. Amplifier, 191 F.3d 983, 990 (9th
4 Cir. 1999). But not any delay will justify dismissal; rather,
5 the deficient conduct must result in **unreasonable** delay.
6 Henderson, 779 F.2d at 1423; In re Eisen, 31 F.3d at 1451. "A
7 reviewing court will give deference to the district court to
8 decide what is unreasonable 'because it is in the best position
9 to determine what period of delay can be endured before its
10 docket becomes unmanageable.'" In re Eisen, 31 F.3d at 1451
11 (quoting Henderson, 779 F.2d at 1423); see Henderson, 779 F.2d at
12 1424 (stating that even a "seemingly short delay" with a pattern
13 of dilatory actions could warrant dismissal).

14 In this case, Mr. Amster's conduct was undoubtedly dilatory,
15 but it only created a relatively short delay; a continuance of
16 about a month would have given Mr. Amster enough time to correct
17 his errors and get the case back on track.¹⁰ Instead, the
18 bankruptcy court dismissed the adversary proceeding at virtually
19 the first opportunity (the initial status and scheduling
20 conference). The first factor is neutral.

21 The second factor is the court's docket-management needs.
22

23 ¹⁰ Mr. Amster argues that the bankruptcy court should have
24 granted a continuance, but the reason he offers is specious. Mr.
25 Amster argues on appeal that, because the court did not set "this
26 matter for a further hearing[,] appellant['s attorney] missed the
27 opportunity to apologize to the judge and let him know it was not
28 his intention to get him upset, purposefully ignore the rules, or
be frivolous in handling this matter." He ignores the fact that
he could have apologized to the court at the initial scheduling
conference or at the hearing on the Motion for Reconsideration,
had he bothered to attend either.

1 We defer to the trial court's decision on this issue because
2 trial-level "judges are best situated to decide when delay in a
3 particular case interferes with docket management and the public
4 interest." Yourish, 191 F.3d at 990 (quoting Ash v. Cvetkov, 739
5 F.2d 493, 496 (9th Cir. 1984)). In the present case, Mr. Amster
6 failed to serve Ms. Roessler-Lobert with the complaint, summons,
7 and scheduling conference order in a timely fashion, and he filed
8 his unilateral status report so late that the court could not
9 review it before the status conference. As a result, the status
10 conference was unproductive and a waste of the court's time and
11 resources. Accordingly, the second factor favors dismissal, but
12 not strongly, because a relatively short continuance could have
13 solved the problem.

14 The third factor, the risk of prejudice to the defendant,
15 requires that "we examine whether the plaintiff's actions impair
16 the defendant's ability to go to trial or threaten to interfere
17 with the rightful decision of the case." In re Eisen, 31 F.3d at
18 1453 (quoting Malone, 833 F.2d at 131). The court must consider
19 not just the prejudice to the defendant, but also the
20 reasonableness of any excuse for the delay:

21 In summary, where a plaintiff has come forth with an
22 excuse for his delay that is **anything but frivolous**,
23 the burden of production shifts to the defendant to
24 show at least some actual prejudice. If he does so,
25 the plaintiff must then persuade the court that such
26 claims of prejudice are either illusory or relatively
27 insignificant when compared to the force of his excuse.
28 At that point, the court must exercise its discretion
by weighing the relevant factors - time, excuse, and
prejudice.

27 Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275,
28 1281 (9th Cir. 1980) (emphasis added).

1 In this case, Mr. Amster attempted to excuse his conduct by
2 pointing out that the death penalty case consumed his time. We
3 recognize that even the most conscientious attorneys sometimes
4 struggle to manage a heavy caseload. But an attorney has an
5 obligation to handle each individual case with reasonable
6 diligence; if the pressure of the death penalty case prevented
7 Mr. Amster from competently representing Ms. Lee, he should not
8 have undertaken her representation or should have referred her to
9 substitute counsel. But we cannot say that an excuse based on a
10 demonstrated and serious workload problem is frivolous. Thus,
11 the burden shifted to Ms. Roessler-Lobert to show actual
12 prejudice.

13 The bankruptcy court was properly concerned that the late
14 service impaired Ms. Roessler-Lobert's ability to answer the
15 complaint and meaningfully participate in the status conference.
16 However, we cannot say that Ms. Roessler-Lobert's rights were
17 irrevocably harmed. The court could have reset the applicable
18 deadlines to allow Ms. Roessler-Lobert to file her answer and
19 allow the parties to conduct a proper Civil Rule 26(f) meeting.

20 As the bankruptcy court noted, Mr. Amster's inattention
21 forced Ms. Roessler-Lobert to appear at two hearings. However,
22 we have stated that the fact that "a defendant is impacted by the
23 mere existence of pending litigation against them is not
24 prejudice as contemplated by this factor." Taylor v. Singh (In
25 re Singh), BAP No. CC-15-1126-TaFC, 2016 WL 770195, at *9 (9th
26 Cir. BAP Feb. 26, 2016). Ms. Roessler-Lobert's attendance at two
27 brief hearings was not so prejudicial or burdensome so as to
28 warrant a terminating sanction. Moreover, aside from appearing

1 at the two hearings, Ms. Roessler-Lobert did not make any serious
2 effort to comply with the scheduling conference order or
3 applicable rules; although she is unrepresented, she is not
4 completely blameless.¹¹ Further, nothing in the record indicates
5 that Ms. Roessler-Lobert will be prejudiced due to the loss of
6 evidence or the loss of memory by a witness. Nealey, 662 F.2d at
7 1281.

8 Accordingly, the third factor weighs against dismissal.

9 The fourth factor, the public policy in favor of disposition
10 of the case on the merits, "normally weighs strongly against
11 dismissal." Gleason v. World Sav. Bank, FSB, Case No.
12 12-cv-03598-JST, 2013 WL 3927799, at *2 (N.D. Cal. July 26,
13 2013). But "this factor 'lends little support' to a party whose
14 responsibility it is to move a case toward disposition on the
15 merits but whose conduct impedes progress in that direction." In
16 re Phenylpropanolamine (PPA) Prods. Liab. Litig., 460 F.3d 1217,
17 1228 (9th Cir. 2006). We cannot say that the tardy service and
18 inadequate status report created such a great delay as to trump
19 the presumption in favor of resolution on the merits. As such,
20 this factor weighs against dismissal.

21 Fifth, we consider whether the bankruptcy court adequately
22 considered and employed less drastic sanctions. "The [trial]
23 court need not exhaust every sanction short of dismissal before

24
25 ¹¹ As Judge Fletcher stated in his dissent in Henderson,
26 the defendant was not prejudiced by the plaintiff's tardy and
27 incomplete submission of the draft pretrial order, where the
28 defendant also did not expend sufficient effort to complete the
order and was equally culpable. 779 F.2d at 1425 (Fletcher, J.,
dissenting). The majority agreed that "no specific showing of
prejudice to defendants is made[,]" but stated that the lack of
prejudice was not determinative. Id. at 1425.

1 finally dismissing a case, but must explore possible and
2 meaningful alternatives.” Henderson, 779 F.2d at 1424. An
3 explicit discussion of alternatives is not mandatory, especially
4 if the court actually tried alternatives or warned the plaintiff
5 before ultimately dismissing the case. In re Eisen, 31 F.3d at
6 1454-55.

7 The bankruptcy court did not explicitly discuss or consider
8 alternative sanctions. Given that it was still early in the
9 proceedings, the court could have employed other sanctions, such
10 as monetary or disciplinary sanctions against Mr. Amster.
11 Accordingly, the court did not properly consider alternative and
12 less drastic sanctions. This factor weighs against dismissal.

13 Weighing all of the relevant factors, we conclude that
14 dismissing the adversary complaint for failure to prosecute at
15 the initial status and scheduling conference was error. All of
16 the Ninth Circuit decisions upholding a dismissal for failure to
17 prosecute involve far more egregious circumstances than this
18 case. See, e.g., id. at 1451 (dismissal was appropriate where,
19 among other things, the plaintiff “had taken no action to
20 prosecute in four years,” the plaintiff’s only excuse was the
21 inability of his contingent fee counsel to finance the costs of
22 litigation, and the delay inflicted actual prejudice on the
23 defendant); Henderson, 779 F.2d at 1424 (dismissal was
24 appropriate where the plaintiff missed four deadlines to submit a
25 pretrial order despite the trial court’s attempt to solve the
26 problem by holding a status conference and establishing a
27 discovery schedule); Anderson, 542 F.2d at 525 (affirming a
28 dismissal for want of prosecution where the plaintiff willfully

1 failed to serve the complaint for a year without a reasonable
2 explanation). Dismissal of this case for want of prosecution at
3 the initial status and scheduling conference was inconsistent
4 with the Ninth Circuit's precedent.

5 **2. Violation of scheduling conference order**

6 The scheduling conference order essentially required the
7 parties to comply with the rules applicable to the scheduling
8 conference and the early stages of the litigation, including
9 Civil Rule 26, LBR 7026-1, and LBR 7016-1. Mr. Amster violated
10 this order in multiple ways.

11 First, he failed to conduct a Civil Rule 26(f) meet-and-
12 confer with Ms. Roessler-Lobert at least twenty-one days prior to
13 the status conference. Instead, he called her four days before
14 the status conference. Although the scheduling conference order
15 set out specific topics for the parties to discuss and required
16 that their discussion "be substantive and meaningful," the call
17 lasted only eight minutes, and Mr. Amster merely tried to get Ms.
18 Roessler-Lobert to agree that their conversation satisfied the
19 Civil Rule 26(f) requirements.

20 Second, he tardily filed the unilateral status report. The
21 scheduling conference order requires that a party file a
22 unilateral status report seven days before the status conference.
23 Instead, Mr. Amster filed the status report at 8:15 pm the night
24 before the status conference, so that the court did not even have
25 a chance to review it before the status conference the following
26 morning.

27 Third, to compound these violations, Mr. Amster repeatedly
28 attempted to blame the court for his failure to serve the summons

1 and scheduling conference order, insisting that the court had
2 sent the summons to his old address in Van Nuys, California. In
3 fact, the court had sent notice of the summons and scheduling
4 conference order via CM/ECF to his e-mail address on file with
5 the court and mailed a hard copy of the order to his address in
6 Granada Hills. It is understandable that the bankruptcy court
7 was frustrated with Mr. Amster's conduct.

8 Two of the Civil Rules permit a court to impose sanctions
9 for violation of a pretrial order.

10 Civil Rule 16(f), which applies to bankruptcy proceedings by
11 virtue of Rule 7016, provides:

12 On motion or on its own, the court may issue any just
13 orders, including those authorized by Rule
14 37(b) (2) (A) (ii)-(vii), if a party or its attorney:

15 (A) fails to appear at a scheduling or other
16 pretrial conference;

17 (B) is substantially unprepared to participate -
18 or does not participate in good faith - in the
19 conference; or

20 (C) fails to obey a scheduling or other pretrial
21 order.

22 Rule 16(f) (1). Civil Rule 37, made applicable to bankruptcy
23 proceedings though Rule 7037, authorizes the following court
24 actions: prohibiting the disobedient party from supporting or
25 opposing designated claims or defenses, or from introducing
26 designated matters in evidence; striking pleadings in whole or in
27 part; staying further proceedings until the order is obeyed;
28 dismissing the action or proceeding in whole or in part;
rendering a default judgment against the disobedient party; or
treating as contempt of court the failure to obey any order
except an order to submit to a physical or mental examination.

1 Civil Rule 37(b) (2) (A) .

2 Similarly, Civil Rule 41(b), which concerns dismissal of
3 adversary proceedings, states that, “[i]f the plaintiff fails
4 to . . . comply with these rules or a court order, a defendant
5 may move to dismiss the action or any claim against it.” Civil
6 Rule 41(b) .

7 “The standards governing dismissal for failure to obey a
8 court order are basically the same under” Civil Rules 16 and
9 41(b). Malone, 833 F.2d at 130. Further, that standard is
10 mostly the same as the standard governing dismissals for failure
11 to prosecute, with a few adjustments. Both employ the same five-
12 factor test. Compare Malone, 833 F.2d at 130 (dismissal for
13 violation of order), with Henderson, 779 F.2d at 1423 (dismissal
14 for want of prosecution). The primary difference is that
15 dismissal for want of prosecution requires a finding of
16 unreasonable delay in addition to consideration of the five
17 factors; in a case of dismissal for violation of an order, delay
18 does not occupy the same central role (but it is relevant to an
19 evaluation of prejudice) .

20 There may also be a difference with respect to the
21 violator’s mental state. In a failure to prosecute case, the
22 Ninth Circuit has expressly stated that dismissal does not
23 require a finding of bad faith (although, as we have seen, the
24 violator’s mental state is relevant to some of the five factors).
25 Henderson, 779 F.2d at 1425. In the leading case on dismissals
26 for violations of court orders, Malone, the district court
27 dismissed the plaintiff’s case because she expressly refused to
28 comply with an order requiring her to submit a list of her direct

1 examination questions. (The district court entered this order
2 because the "confused and inefficient" presentation by
3 plaintiff's counsel at the first trial had resulted in a
4 mistrial.) The district court found that the violation was
5 "flagrant," "deliberate and willful," and that the plaintiff had
6 acted in "bad faith." Malone, 833 F.2d at 130. The Ninth
7 Circuit itself characterized the violation as "intentional and
8 unjustified." Id. at 131. Thus, there is some reason to think
9 that, in order to justify a dismissal for violation of a court
10 order, a degree of fault beyond sheer negligence is required (or
11 at least relevant).

12 As we have explained, the five-factor test does not justify
13 a dismissal of Ms. Lee's case for failure to prosecute. For the
14 same reasons, the same test also does not justify a dismissal for
15 failure to comply with the scheduling conference order. The
16 record does not support any finding of fault beyond simple
17 negligence. Although Mr. Amster's shoddy performance richly
18 deserved some sanction, dismissal was not warranted.

19 **3. Failure to comply with local rule**

20 LBR 7016-1(a) imposes specific requirements concerning the
21 status and scheduling conference. Among other things, it
22 requires the parties to file a joint status report (in a
23 prescribed form) at least fourteen days before the status
24 conference. If any party fails to cooperate in preparing a joint
25 status report, each party must file a unilateral status report
26 (also in a prescribed form) at least seven days before the status
27
28

1 conference.¹²

2 Mr. Amster did not comply with this rule. He made no
3 serious effort to prepare a joint status report or engage
4 Ms. Roessler-Lobert in the preparation of such a report. He
5 filed a unilateral status report so tardily that the bankruptcy
6 court could not review it before the status conference.

7 LBR 7016-1(f) authorizes sanctions for noncompliance,
8 including “[a]n award of non-monetary sanctions against the party
9 at fault including entry of judgment of dismissal” LBR
10 7016-1(f)(4). Subsection (g) also provides that if a party’s
11 counsel fails to “complete the necessary preparations” for the
12 status conference, “the proceeding may be dismissed.” LBR 7016-
13 1(g).

14 A terminating sanction for noncompliance with a local rule
15 is appropriate only if three criteria are met.

16 First, the noncompliance must involve an enhanced degree of
17 fault, such as willfulness, bad faith, recklessness, or gross
18 negligence, as compared to mere negligence or oversight. See
19 R & R Sails, Inc. v. Ins. Co. of Pa., 673 F.3d 1240, 1247 (9th
20 Cir. 2012) (“sanction [for discovery rule violation] amounted to
21 dismissal of a claim, [so] the district court was required to
22 consider whether the claimed noncompliance involved willfulness,
23 fault, or bad faith . . . and also to consider the availability
24 of lesser sanctions”); Zambrano v. City of Tustin, 885 F.2d 1473,
25 1480 (9th Cir. 1989) (requiring a finding of recklessness,
26 repeated disregard of court rules, gross negligence, or willful

27
28 ¹² LBR 7016-1 implements Civil Rule 16 (made applicable in
bankruptcy proceedings through Rule 7016).

1 misconduct when issuing sanctions for violation of local rules);
2 In re Singh, 2016 WL 770195, at *5 (overturning dismissal for
3 violation of local rules where counsel was not grossly negligent
4 or reckless).

5 Although it is clear that Mr. Amster did not comply with LBR
6 7016-1 and was negligent, arrogant, and disrespectful in handling
7 Ms. Lee's case, we do not discern any greater fault, such as
8 willfulness, bad faith, recklessness, or gross negligence that
9 would warrant dismissal. See R & R Sails, Inc., 673 F.3d at
10 1247. He admittedly neglected her case in favor of a high-
11 profile criminal case, but this deficient conduct does not rise
12 to the level of bad faith warranting dismissal.

13 Second, the sanction must pass muster under the five-factor
14 test of Henderson and Malone. As we have explained, the
15 dismissal of Ms. Lee's adversary proceeding does not withstand
16 scrutiny under that test.

17 Third, the court must consider whether the punishment is
18 proportionate to the offense. Zambrano, 885 F.2d at 1480 ("any
19 sanction imposed must be proportionate to the offense and
20 commensurate with principles of restraint and dignity inherent in
21 judicial power. This last principle includes a responsibility to
22 consider the usefulness of more moderate penalties before
23 imposing a monetary sanction."). To determine whether a sanction
24 is proportionate, the court must consider the relative
25 culpability of the party and her counsel. See In re Singh, 2016
26 WL 770195 at *7; see also Zambrano, 885 F.2d at 1475 n.4 ("minor
27 problems created by counsel should not be visited upon the
28

1 litigants").¹³

2 The Dismissal Order was out of proportion to Mr. Amster's
3 deficient conduct. Further, it is reasonable to assume that Ms.
4 Lee was not culpable at all; it was early in the case and there
5 was no evidence of notice of delay and noncompliance through
6 documents in the record, significant passage of time without case
7 progress, or any other indication of dilatoriness that would
8 alarm Ms. Lee. Thus, the Dismissal Order was disproportionately
9 harsh and unfairly punished Ms. Lee.

10 Accordingly, the bankruptcy court erred in dismissing Ms.
11 Lee's case as a sanction for Mr. Amster's failure to comply with
12 the court rules.¹⁴

13
14 ¹³ The Ninth Circuit's decisions on dismissals for failure
15 to prosecute and for violation of court orders do not require a
16 separate analysis of proportionality. This difference is more
17 apparent than real, because the issue of proportionality is
largely subsumed in the fifth factor under Malone and Henderson -
the availability of less drastic sanctions.

18 ¹⁴ In appropriate circumstances, the bankruptcy court may
19 dismiss an adversary complaint as a sanction for the attorney's
20 failure to comply with pretrial orders and rules, including LBR
21 7026-1. In Glade Energy PTY Ltd. v. Rodriguez (In re Rodriguez),
22 BAP No. CC-13-1256-DKiTa, 2013 WL 6697839 (9th Cir. BAP Dec. 19,
23 2013), the attorney for the plaintiff failed to cooperate in
24 coordinating the Civil Rule 26 meeting and creating the joint
status report, despite multiple attempts by the debtor's counsel
to elicit the attorney's assistance. The bankruptcy court
dismissed the complaint with prejudice, and the BAP subsequently
affirmed.

25 However, Rodriguez is not binding on us and is readily
26 distinguishable from this case in three key ways. First, the BAP
27 determined that "the bankruptcy court clearly considered the
28 adequacy of less drastic sanctions." 2013 WL 6697839 at *8. It
noted that "the problem of missed deadlines had become
systemic[,]" and the plaintiff's counsel ignored the debtor's
attempts to comply with the rules, partly due to "difficulty

(continued...)

1 **B. We need not address the Reconsideration Order.**

2 In light of our decision above reversing the Dismissal
3 Order, we need not determine whether the bankruptcy court erred
4 in denying the Motion for Reconsideration.

5 **CONCLUSION**

6 Mr. Amster surely deserved some sanction, and possibly a
7 serious one; he even conceded at oral argument that sanctions
8 were "absolutely" warranted. Such sanctions might include, but
9 are not limited to, compensatory or appropriately coercive
10 monetary sanctions,¹⁵ see LBR 7016-1(f)(3) (sanctions for
11 noncompliance may include an "award of monetary sanctions
12 including attorneys' fees against the party at fault and/or
13 counsel, payable to the party not at fault"), referral of Mr.
14 Amster to a disciplinary committee, see United States Bankruptcy
15

16 ¹⁴ (...continued)
17 understanding, in effect, what all the fuss was about." Id. As
18 a result, the bankruptcy court determined that "a sanction
19 stronger than a monetary sanction was warranted in this case."
20 Id. Second, the BAP found that the failure to prosecute
21 prejudiced the debtor because the plaintiff's non-responsiveness
22 made it difficult for the debtor to understand and defend against
23 the complaint. Id. at *9. Prejudice was clear where the
24 defendant actively defended the case, notwithstanding the
25 plaintiff's failure to appropriately participate, and had filed a
26 dispositive substantive motion which prematurely exposed
27 litigation strategy. Id. Third, the misrepresentation in
28 Rodriguez was much more substantial as it attempted to excuse the
plaintiff's non-compliance by casting unwarranted aspersions on
the defendant's counsel. Id. at *4.

25 ¹⁵ The Ninth Circuit has made clear that bankruptcy courts
26 may not impose "serious punitive sanctions" and that "[c]ivil
27 penalties must either be compensatory or designed to coerce
28 compliance." Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178,
1192, 1195 (9th Cir. 2003) (citing F.J. Hanshaw Enters., Inc. v.
Emerald River Dev., Inc., 244 F.3d 1128, 1137-38 (9th Cir.
2001)).

1 Court for the Central District of California Fourth Amended
2 General Order 96-05 (allowing bankruptcy judges to refer
3 attorneys to a disciplinary committee), attorney suspension or
4 disbarment, see In re Brooks-Hamilton, 400 B.R. 238, 246 (9th
5 Cir. BAP 2009) ("Bankruptcy courts also possess the inherent
6 authority to suspend or disbar attorneys, as implicitly
7 recognized by Congress in enacting § 105(a)."), referral of Mr.
8 Amster to the state bar, see Buechel v. Billingslea, No.
9 14CV2179-GPC NLS, 2015 WL 3874443, at *5 (S.D. Cal. June 23,
10 2015) (sanction of referring attorney to the state bar "fall[s]
11 within the Bankruptcy Court's inherent power"), or a finding of
12 contempt, see Civil Rule 37(b)(2)(A)(vii) (sanctions may include
13 "treating as contempt of court the failure to obey any order").

14 But Mr. Amster's conduct did not justify the dismissal of
15 the adversary proceeding at the initial status and scheduling
16 conference. Therefore, we REVERSE the Dismissal Order and REMAND
17 this case to the bankruptcy court for further proceedings,
18 including the consideration of alternative sanctions.