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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	NV-13-1196-KiTaJu
	)		
WAYNE A. SEARE and MARINETTE	)	Bk. No.	2:12-bk-12173-MKN
TEDOCO,	)		
	)	Adv. No.	2:12-ap-01108-MKN
Debtors.	)		
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ANTHONY J. DeLUCA,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
WAYNE A. SEARE,	)		
	)		
Appellee.	)		
	)		

Argued and Submitted on January 24, 2014,  
at Las Vegas, Nevada

Filed - August 25, 2014

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Appearances: Christopher Burke, Esq. argued for appellant,  
Anthony J. DeLuca; Appellee Wayne A. Seare argued  
pro se.

Before: KIRSCHER, TAYLOR and JURY, Bankruptcy Judges.

Opinion by Judge Kirscher  
Concurrence by Judge Jury

1 KIRSCHER, Bankruptcy Judge:

2

3 Appellant Anthony J. DeLuca ("DeLuca") was the bankruptcy  
4 attorney for chapter 7<sup>1</sup> debtors Wayne A. Seare ("Seare") and his  
5 wife Marinette Tedoco ("Tedoco") (collectively, "Debtors").  
6 DeLuca appeals an order from the bankruptcy court sanctioning him  
7 for conduct related to his handling of Debtors' case. We AFFIRM.

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## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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### A. Prepetition events

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#### 1. The district court lawsuit and judgment against Seare

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In December 2010, Seare sued his former employer St. Rose Dominican Health Foundation ("St. Rose") for employment discrimination, alleging that he had been the victim of sexual harassment by a female co-worker and that he was wrongfully terminated in retaliation for his reporting the harassment. The co-worker's harassment of Seare allegedly included sending him sexually explicit emails. After an investigation of the matter by St. Rose, Seare was terminated.

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While the lawsuit was pending in the United States District Court for the District of Nevada ("district court"), Seare admitted to his attorney that he had "embellished" the explicit emails to bolster his harassment claims. Seare's attorney disclosed the misconduct to the district court in a motion to withdraw. Ultimately, on October 24, 2011, the district court ordered sanctions against Seare, dismissed his lawsuit against

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<sup>1</sup> Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 St. Rose with prejudice, and ordered him to pay St. Rose's  
2 attorney's fees ("Sanctions Order"). The district court found  
3 that Seare had committed "fraud upon the court" by knowingly  
4 providing false information, allowing his attorney to file an  
5 amended complaint based upon that false information and  
6 instituting and conducting litigation in bad faith.

7 A judgment was entered on October 25, 2011, in favor of  
8 St. Rose for its attorney's fees of \$67,430.58 ("Judgment"). The  
9 one-page Judgment did not mention "fraud" or provide any factual  
10 or legal bases for supporting the Judgment. Thereafter, St. Rose  
11 obtained a Writ of Garnishment and served it on Seare's current  
12 employer. The garnishment of Seare's wages prompted Debtors to  
13 seek counsel about whether to file bankruptcy.

## 14 **2. Debtors retain bankruptcy attorney DeLuca**

15 Some of the facts surrounding Debtors' meeting with DeLuca  
16 are disputed, but other facts are not. DeLuca contends that  
17 certain facts asserted by Tedoco and relied upon by the bankruptcy  
18 court were not admissible, which we address below.

19 Debtors consulted with DeLuca, a bankruptcy attorney of  
20 eleven years, at his office on February 13, 2012, at around 5:00  
21 p.m. This meeting was Debtors' only in-person contact with  
22 DeLuca, but DeLuca testified that he spoke with them at least once  
23 by phone thereafter.

24 During an evidentiary hearing, Seare testified that Debtors  
25 gave DeLuca a copy of the "order" and the Writ of Garnishment and  
26 that DeLuca "thumbed through them." Seare had also asserted in a  
27 pre-hearing brief that Debtors gave DeLuca two documents at their  
28 initial consultation - a copy of the Order for Wage Garnishment

1 and the Sanctions Order. Tedoco also asserted that Debtors gave  
2 DeLuca copies of the Order for Wage Garnishment and the "Wage  
3 Sanctions." DeLuca had no independent recollection of meeting  
4 Debtors or of reviewing the Sanctions Order or Judgment. He did,  
5 however, concede that his firm knew about the Judgment and Order  
6 for Wage Garnishment at the time the bankruptcy petition was  
7 filed.

8 Debtors claimed DeLuca reviewed the district court papers and  
9 told them that the debt referred to in the Order for Wage  
10 Garnishment and Judgment was dischargeable. Seare claimed in a  
11 pre-hearing brief that during the consultation, Tedoco told DeLuca  
12 that the St. Rose debt and Order for Wage Garnishment were not  
13 from medical expenses. Rather, the debt was based on the  
14 Sanctions Order for attorney's fees, which was imposed because  
15 Seare submitted embellished emails to the district court in his  
16 lawsuit against St. Rose. Seare also testified that he told  
17 DeLuca about his embellished emails. According to Seare, DeLuca  
18 affirmatively told Debtors that the St. Rose debt referenced in  
19 the Order for Wage Garnishment was dischargeable, even though it  
20 was incurred through fraud. However, Seare contradicted himself  
21 when he testified that "fraud" was never discussed during the  
22 consultation. Seare testified that DeLuca did not discuss with  
23 Debtors about what sort of debts might not be dischargeable or  
24 that an adversary proceeding might be filed against him.

25 After the brief consultation with DeLuca, Debtors were placed  
26 in a room to read, initial and sign the 19-page retainer agreement  
27 ("Retainer Agreement") under which they hired DeLuca. Tedoco  
28 claimed that DeLuca's staff periodically checked to see if they

1 had completed the documents, but that no one sat with them to  
2 explain any part of the Retainer Agreement. DeLuca testified that  
3 standard protocol in his office required a paralegal to sit with a  
4 client and explain every paragraph of the retainer agreement to  
5 make sure the client understood it. However, he did not know and  
6 had no record of which paralegal met with Debtors because he did  
7 not keep such records.

8 Debtors executed the Retainer Agreement, initialing every  
9 paragraph and signing every page, and paid DeLuca a \$200 down  
10 payment.<sup>2</sup> At the bottom of each page (right above Debtors'  
11 signatures) is the statement: "I have read, understand, and agree  
12 to this page and its contents." On the last page (right above  
13 Debtors' signatures) is the statement: "I have read and received  
14 the foregoing NINETEEN (19) pages and I understand and agree to  
15 its terms and conditions." In addition, DeLuca provided Debtors  
16 with a 19-page document entitled "Frequently Asked Questions"  
17 ("FAQ"). DeLuca did not sign the Retainer Agreement, which is  
18 evidently the same agreement signed by all clients, with only a  
19 few differences in fees depending on whether the case is filed  
20 under chapter 7 or 13. His stamped signature is, however, on the  
21 first page of the Retainer Agreement, which is a form letter  
22 thanking clients for their business. This letter also states that  
23 while "some advisories (in the retainer agreement) may not appear  
24 to apply to you at this time, we do need you to sign that you  
25 understand or that you agree that you have been advised on each

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27 <sup>2</sup> DeLuca's flat fee to file a chapter 7 case was \$1,999,  
28 which included the \$306 filing fee and the credit report fee of \$35.

1 topic.”

2 The Retainer Agreement separates basic services from those  
3 services requiring additional fees. For matters beyond the “basic  
4 services,” DeLuca’s billing rate was \$495.00 per hour (or perhaps  
5 \$395.00, as the relevant paragraph refers to both figures).

6 The Retainer Agreement provides:

7 BASIC SERVICES: Services to be performed by DeLuca &  
8 Associates include:

- 9 a. Analysis of debtor’s financial situation and  
10 assistance in determining whether to file a petition  
11 under . . . Chapter 7 or chapter 13. . . .  
12 b. Review, preparation and filing of the petition,  
13 schedules, statement of affairs, and other documents  
14 required by the bankruptcy court;  
15 c. Representation at the meeting of creditors.  
16 d. Reasonable in person and telephonic consultation with  
17 the client . . . .

18 ADDITIONAL FEES: There are circumstances which may  
19 require additional fees.

20 Additional attorney fees will be charged for additional  
21 services including but not limited to: [1] Addressing  
22 allegations of fraud or non-dischargeability; . . .  
23 [13] . . . Adversary Proceedings . . . .

24 For the additional fees, the Retainer Agreement does not explain  
25 the relationship between items [1] and [13].

26 The Retainer Agreement also includes a “fraud” disclaimer:

27 “DEBTS THAT DO NOT GO AWAY: Non-dischargeable debts (debts that  
28 you must re-pay), or debts not affected by client’s bankruptcy,  
include but are not limited to the following: debts incurred  
through fraud . . . .” Seare testified that he signed the  
Retainer Agreement despite reviewing and understanding the fraud  
disclaimer because DeLuca had told him that the St. Rose debt was  
dischargeable. The FAQ also explains that debts incurred through  
fraud are nondischargeable. Seare said that he did not read the

1 FAQ because Debtors had already asked DeLuca questions during the  
2 consultation. Seare testified that based on the Retainer  
3 Agreement, he understood that DeLuca would not be representing him  
4 against allegations of fraud. Seare also testified that adversary  
5 proceedings were not discussed at the consultation and at that  
6 time he did not know what an adversary proceeding was.

7 The Retainer Agreement also includes a request for copies of  
8 "ALL LAWSUITS you have been involved in within the last two (2)  
9 years . . . ." DeLuca claimed Debtors never provided sufficient  
10 documentation relating to the district court lawsuit as required.

11 Finally, the Retainer Agreement explains the length of  
12 DeLuca's representation of a client: "I understand that following  
13 the discharge of my bankruptcy DeLuca & Associates' representation  
14 is concluded by operation of law. I understand that DeLuca &  
15 Associates is no longer obligated to represent me in any capacity  
16 with regard to my bankruptcy filing after the discharge order is  
17 entered. I understand that any work requested following discharge  
18 of the bankruptcy will be an additional fee."

19 **B. Postpetition events**

20 **1. The bankruptcy case is filed.**

21 DeLuca filed Debtors' chapter 7 bankruptcy petition on  
22 February 29, 2012. The St. Rose debt was listed as a  
23 "garnishment" on Schedule F in the amount of \$67,431.00. The  
24 Judgment underlying the St. Rose debt was listed in Debtors'  
25 Statement of Financial Affairs and indicated that the nature of  
26 the proceeding was a "collection." The Disclosure of Compensation  
27 of Attorney for Debtors stated that Debtors agreed to exclude  
28 "representation . . . in any dischargeability actions" or "any

1 other adversary proceedings" from the flat fee.

2 At the § 341(a) meeting of creditors on March 30, 2012,  
3 St. Rose informed Debtors and counsel that it intended to enforce  
4 its rights under the Judgment through a nondischargeability  
5 action.

6 **2. The adversary proceeding is filed.**

7 St. Rose filed an adversary complaint against Seare, seeking  
8 to except its debt from discharge under § 523(a)(4) and (a)(6).  
9 The summons and complaint were served on Seare on or about June 5,  
10 2012. DeLuca apparently received electronic notice of the  
11 complaint the day it was filed.

12 Debtors received a discharge on May 30, 2012. Approximately  
13 \$137,430 in unsecured debt was discharged, or 62% of Debtors'  
14 unsecured, nonpriority claims.

15 On June 4, 2012, DeLuca sent Debtors an email informing them  
16 of their discharge and that, as of the discharge date, their case  
17 was completed. The email is a "form" message and did not mention  
18 any particulars of Debtors' case or the recently-filed adversary  
19 proceeding by St. Rose. It stated, "[W]e are very happy to inform  
20 you that you can now move forward with a fresh start on life, free  
21 from the stress of excessive debt. Now you can place your  
22 financial situation back on the right track."

23 Debtors replied to the June 4 email later that day, thanking  
24 DeLuca for his help with their bankruptcy and inquiring whether  
25 the St. Rose "Judgement [sic] Order" had been discharged, since  
26 St. Rose had indicated at the § 341(a) meeting that it was  
27 pursuing the adversary proceeding against them. They closed the  
28 email by asking DeLuca to "[p]lease let us know what we need to



1 do.”

2 DeLuca’s office responded to Debtors’ email on June 5, 2012.  
3 The response reminded Debtors of St. Rose’s expressed intent at  
4 the § 341(a) meeting to pursue legal action for the Judgment. The  
5 response also stated that on April 16, 2012, about six weeks prior  
6 to the filing of the adversary complaint, DeLuca received from  
7 counsel for St. Rose a “fax cover letter . . . with an attached  
8 Stipulation and Order regarding the discharge-ability [sic] of  
9 subject debt in question as to Mr. Seare [sic] only,” and that his  
10 office had promptly responded to the letter advising counsel that  
11 DeLuca “would not sign off on any Stipulation regarding the  
12 discharge-ability [sic] of any debt listed in the schedules.”  
13 DeLuca never consulted with Seare before rejecting the proposed  
14 stipulation and order. It is unknown whether DeLuca informed  
15 St. Rose that he was not representing Seare in the adversary  
16 proceeding. The response went on to explain that DeLuca had  
17 performed all of the duties for which he was contracted, and that  
18 he would not be representing Seare in the St. Rose adversary  
19 proceeding. DeLuca’s office referred Seare to another attorney.

20 Debtors replied to the June 5 email on June 6, 2012. They  
21 admitted that DeLuca was hired only to “do our bankruptcy,” but  
22 were very upset and frustrated that the proposed stipulation and  
23 order were never sent to them or that DeLuca’s office, “at the  
24 very least,” had not made them aware it. Debtors requested copies  
25 of the referenced documents between St. Rose and DeLuca’s office.  
26 In closing, Debtors stated: “Not informing your clients of very  
27 important documents and failing to return phone calls are  
28 unacceptable and unprofessional customer service.”

1           On June 6, 2012, DeLuca personally sent a letter to Debtors  
2 informing them that he would not be representing them in the  
3 adversary proceeding and referring them to another attorney.  
4 Seare later claimed that he and Tedoco found it disturbing that  
5 DeLuca advertises a "full service" bankruptcy firm, yet he was  
6 requesting that Debtors hire another attorney. Seare testified  
7 that he tried to retain other law firms to represent him; one  
8 declined, one said they did not handle such matters and another  
9 said it would be very expensive.

10           In his pro se answer to the St. Rose complaint, Seare argued  
11 that the debt was dischargeable "due to hardship on the dependents  
12 of debtor." Seare admitted to having embellished the emails in  
13 the district court case, but stated that other evidence existed to  
14 support his position. Seare alternatively requested that the debt  
15 be "modified" to a feasible payment plan. Notably, Seare  
16 complained that his district court attorney had "thrown [him]  
17 under the bus" when he informed the court of Seare's manufacturing  
18 of the emails and that this same attorney had also "failed to  
19 forward settlement information" regarding St. Rose.

20           On August 2, 2012, the bankruptcy court held a scheduling  
21 conference. DeLuca did not appear for Seare. Seare told the  
22 court that DeLuca had told Debtors that he did not represent  
23 clients in adversary proceedings. Counsel for St. Rose stated  
24 that he had informed DeLuca shortly after Debtors filed their  
25 petition of his client's intent to file a nondischargeability  
26 action.

27           **3. The court issues the order to show cause.**

28           On August 3, 2012, the bankruptcy court issued its "Order to

1 Show Cause Why This Court Should Not Sanction Anthony J. DeLuca  
2 for Failing to Represent Debtor in the . . . Adversary Proceeding"  
3 ("OSC"). The court was concerned that DeLuca had violated certain  
4 provisions of the Nevada Rules of Professional Conduct ("NRPC"),  
5 specifically, NRPC 1.2(c), NRPC 1.1 and NRPC 1.5.

6 DeLuca was ordered to show his compliance with NRPC 1.2(c),  
7 particularly, whether not representing Seare in the adversary  
8 proceeding was reasonable and whether he had obtained Debtors'  
9 informed consent for such limitation. DeLuca also had to produce  
10 a copy of his June 6 letter to Debtors. The OSC provided that if  
11 the court found DeLuca had violated any of these rules, it could:  
12 (1) impose monetary sanctions, including requiring DeLuca to pay  
13 for Debtors' representation in the adversary proceeding;  
14 (2) impose nonmonetary sanctions, such as requiring DeLuca to  
15 represent Debtors; (3) order disgorgement of his fees; or  
16 (4) refer the matter to the Nevada State Bar.

17 In response to the OSC, DeLuca explained that Debtors had  
18 mentioned a judgment from "medical debts" during the consultation,  
19 but they failed to mention the significant detail that the debt  
20 was ordered by the district court as a result of Seare's  
21 manufacturing of evidence, lying to his attorney and then allowing  
22 his attorney to submit an amended complaint containing false  
23 information to the court. Had these details about the fraudulent  
24 nature of the debt, of which Debtors were well aware at the time  
25 of the consultation, been brought to DeLuca's attention, DeLuca  
26 claimed he would have declined to represent them, citing to his  
27 "Tell the Truth" section of his retainer agreements. In short,  
28 DeLuca contended that he undertook the representation of Debtors

1 based on incomplete, inaccurate or intentionally omitted  
2 information regarding the fraudulent nature of a significant  
3 portion of their debts. DeLuca argued that he was entitled to  
4 accept representation of debtors based on full disclosure,  
5 particularly when it related to substantive issues such as a large  
6 debt incurred as a result of manufacturing evidence and committing  
7 fraud upon the court.

8 DeLuca also noted that his retainer agreements specifically  
9 exclude adversary proceedings as part of the services he provides  
10 for the basic fee. Further, his office had immediately advised  
11 Debtors via the June 5 email and his June 6 letter that he would  
12 not be representing Seare in the adversary proceeding and that  
13 they should seek alternative counsel. Attached to DeLuca's  
14 response were portions of an unsigned retainer agreement, copies  
15 of the emails between his office and Debtors and a copy of his  
16 June 6 letter.

17 **a. The initial OSC hearing**

18 The bankruptcy court held an initial hearing on the OSC on  
19 September 13, 2012. DeLuca, Seare and Tedoco appeared. The court  
20 noted that DeLuca's brief did not substantively address the  
21 specific provisions of the NRPC raised in the OSC, namely, whether  
22 DeLuca obtained informed consent from Debtors to limit his  
23 representation and whether limiting his representation was  
24 reasonable under these circumstances. In response, DeLuca said  
25 that the Retainer Agreement excluded adversary proceedings and  
26 that it was reasonable to not represent debtors because they were  
27 not forthcoming about the fraudulent nature of the St. Rose debt,  
28 saying only that it was a debt to a hospital. DeLuca further

1 argued that it was reasonable for any competent attorney to assume  
2 that a debt to a hospital was for medical services, which are  
3 dischargeable, and not a debt relating to fraud for manufacturing  
4 evidence and that it would be reasonable for a client to tell the  
5 attorney about it. DeLuca conceded that he knew the Judgment  
6 existed, but contended that it would be incumbent upon the client  
7 to inform the attorney about the details of it. DeLuca also  
8 conceded that had he reviewed the Sanctions Order and Judgment, it  
9 would have been obvious the St. Rose debt was based on fraud.

10       Based on DeLuca's responses, the bankruptcy court expressed  
11 concern that he may have also violated two sections of the Code:  
12 §§ 707(b) (4) and 526(a). For that reason, the court ordered  
13 additional briefing and set an evidentiary hearing, during which  
14 either party could call witnesses. DeLuca offered to return  
15 Debtors' fee, but the court found this offer potentially  
16 insufficient as Debtors were now embroiled in a  
17 nondischargeability action and the court questioned the benefit of  
18 their discharge.

19       On September 20, 2012, the bankruptcy court entered an order  
20 setting the evidentiary hearing and confirming its instructions  
21 that DeLuca be prepared to address his compliance with the  
22 aforementioned provisions of the NRPC, as well as his compliance  
23 with §§ 707(b) (4) (C) and 526(a) (1) - (3).

24                   **b.    The OSC evidentiary hearing**

25       In response to the bankruptcy court's concern about his  
26 compliance with NRPC 1.2(c) and NRPC 1.5, DeLuca contended in his  
27 supplemental brief that Debtors had consented to the limited scope  
28 of representation and that limiting his representation was

1 reasonable under the circumstances. To show Debtors' consent,  
2 DeLuca argued that Debtors had signed the pages of the Retainer  
3 Agreement where it explained the scope of services covered under  
4 "Basic Services" and "Additional Fees." Debtors had also signed  
5 the last page, which stated they had read the Retainer Agreement  
6 and agreed to its terms and conditions. DeLuca contended that  
7 Debtors were clearly advised of what services would be covered  
8 under the \$1,999 flat fee and what services would require  
9 additional fees because it was his office's protocol for a  
10 paralegal to review a retainer agreement line by line with each  
11 client. Debtors had also initialed the paragraph and signed the  
12 corresponding page setting forth the Length of Representation,  
13 which stated that DeLuca was no longer obligated to represent them  
14 after entry of the discharge order.

15 As for reasonability, DeLuca made several arguments. First,  
16 Debtors had indicated they could not afford to pay DeLuca the  
17 additional fees for litigation services. Therefore, argued  
18 DeLuca, he was not required to work without compensation, citing  
19 the Thirteenth Amendment. DeLuca next argued that it was  
20 reasonable and within his discretion to not represent Seare  
21 because Seare had a history of lying to his own attorneys and  
22 manipulating them into pursuing judicial claims. DeLuca asserted  
23 that once he learned of the full breadth of Seare's unscrupulous  
24 conduct, he determined that representing Seare was a liability to  
25 him and his firm, so he did not wish to represent him.

26 Next, DeLuca argued that the adversary proceeding was legally  
27 indefensible because Seare had committed fraud, so representing  
28 him in litigation would have been futile. However, DeLuca claimed

1 that after the initial OSC hearing, he did try to procure a  
2 settlement with St. Rose on Seare's behalf. According to DeLuca,  
3 St. Rose was receptive and willing to reduce its claim to \$23,000,  
4 with a nominal down payment and monthly payments of \$300.00.<sup>3</sup>  
5 DeLuca advised Debtors of the offer, but they wished to pursue  
6 their own settlement directly with St. Rose. Lastly, DeLuca  
7 argued that Seare was not prejudiced by the nonrepresentation  
8 because DeLuca had advised him immediately after the adversary  
9 complaint had been filed that he was unable to represent him.  
10 Thus, Seare had months to find substitute counsel, yet he chose to  
11 represent himself.

12 As for his compliance with § 707(b)(4)(C), DeLuca argued that  
13 he performed due diligence in light of the limited information  
14 Debtors provided and their urgency to file bankruptcy to stop the  
15 garnishment. Despite the Retainer Agreement's request for all  
16 documentation from lawsuits within the last two years, DeLuca  
17 contended that Debtors provided only copies of a letter from  
18 St. Rose indicating its intent to file a notice of name change and  
19 the Writ of Execution, which indicated the amount of the Judgment  
20 but did not disclose the nature of the award. In any event,  
21 argued DeLuca, Seare knew he had committed fraud and the Retainer  
22 Agreement expressly stated that debts incurred by fraud "do not go  
23 away." The FAQ given to Debtors provided the same information.  
24 Therefore, argued DeLuca, Seare was fully aware prior to filing  
25 that debts incurred through fraud were nondischargeable. DeLuca

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26  
27 <sup>3</sup> The bankruptcy court admonished DeLuca for attempting to  
28 disclose settlement terms on the record. However, it did allow  
him to question Seare about it on a limited basis and Seare  
testified that the settlement offer amount was less than \$67,000.

1 disavowed ever telling Debtors that fraud debts were  
2 dischargeable.

3       Lastly, DeLuca argued that even though the St. Rose debt was  
4 nondischargeable, Debtors benefitted immensely from the bankruptcy  
5 filing. Their total unsecured debt was approximately \$220,000,  
6 and they eliminated about \$137,000 of it, excluding the \$67,000  
7 Judgment and \$15,000 in student loans. Further, Seare's credit  
8 score had increased by over 100 points since the filing, which  
9 Seare even conceded was a benefit. Thus, argued DeLuca, the  
10 benefits clearly exceeded the \$1,999 they paid. Moreover, the  
11 filing temporarily stopped the garnishment; Debtors now had an  
12 opportunity to settle with St. Rose. DeLuca did not address the  
13 court's concern regarding his potential violation of § 526(a).

14       The OSC evidentiary hearing was held on October 23, 2012.  
15 Seare and DeLuca testified. The bankruptcy court admitted all of  
16 DeLuca's exhibits and announced that the matter would be deemed  
17 submitted once the transcripts from the two OSC hearings were  
18 placed on the record. The OSC hearing transcripts were filed on  
19 October 30, 2012. Tedoco filed a "Supplemental Hearing Brief" on  
20 December 4, 2012, requesting that the bankruptcy court "make it  
21 part of the record." It provided most of the same information  
22 already testified to by Seare, namely, what was said or not said  
23 about the St. Rose debt at the consultation. The only new and  
24 potentially relevant information it provided was that when making  
25 calls to DeLuca's office asking to speak to him personally,  
26 Debtors were continually passed off to other staff members, who  
27 also would not return their calls without Debtors leaving multiple  
28 messages. Tedoco also claimed again that no staff member ever sat



1 down with them to review the specifics of the Retainer Agreement.

2 **4. The opinion and order for sanctions**

3 The bankruptcy court issued its opinion and order sanctioning  
4 DeLuca on April 9, 2013 ("Sanctions Opinion").<sup>4</sup> Dignity Health v.  
5 Seare (In re Seare), 493 B.R. 158 (Bankr. D. Nev. 2013). The  
6 court held that DeLuca had violated ethical rules NRPC 1.1, 1.2,  
7 1.5, and 1.4. and certain sections of the Code – §§ 526(a)(1) and  
8 (3), 528(a)(1) and (2), and 707(b)(4)(C).

9 **a. The bankruptcy court's findings and conclusions**

10 To the bankruptcy court, this case presented the legal issue  
11 of when consumer bankruptcy attorneys may limit the scope of their  
12 representation, a practice referred to as "unbundling." In re  
13 Seare, 493 B.R. at 176. While acknowledging that unbundling is  
14 permissible in Nevada, and that an attorney can charge additional  
15 fees for adversary proceedings, the court noted that it had to be

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16  
17 <sup>4</sup> After entry of the Sanctions Opinion, the bankruptcy court  
18 granted DeLuca's requests to temporarily stay, until determined by  
19 this Panel, publication of the Sanctions Opinion and the  
20 requirement that for the next two years DeLuca provide a copy of  
21 the Sanctions Opinion to future adversary clients whose case he  
22 declines. We address the latter issue later in this Memorandum.

23 As to the first issue, DeLuca disputes the bankruptcy court's  
24 decision to publish the Sanctions Opinion, contending that it  
25 impermissibly went beyond its own list of what potential sanctions  
26 DeLuca faced. DeLuca argues that due to his lack of a prior  
27 disciplinary record and the court's finding that he did not act  
28 knowingly, and because he tried to represent Seare in a  
settlement, publication of the Sanctions Opinion is too severe.  
He requests that we make the stay permanent or, at minimum, that  
his name be deleted from the Sanctions Opinion, citing In re  
Martinez, 393 B.R. 27, 30 n.1 (Bankr. D. Nev. 2008), a case where  
the same bankruptcy judge did not publish the subject attorney's  
name.

Unfortunately, during our review of this appeal, we  
discovered that the Sanctions Opinion has been published.  
Therefore, we are unable to provide this relief given prior  
publication. Further, deleting DeLuca's name from it, presuming  
we could even order such a remedy, would be ineffective.

1 done in a manner consistent with the rules of ethics and  
2 professional responsibility binding on all attorneys. Id. In the  
3 court's view, DeLuca had not complied with the applicable rules in  
4 this case; his boilerplate retainer agreement did not override  
5 such mandatory rules. Id.

6 The court set forth several preliminary findings of fact to  
7 support its decision to sanction DeLuca. It found that the issue  
8 of Seare's fraud was not overtly discussed during the consultation  
9 and that DeLuca never affirmatively represented to Debtors that  
10 the St. Rose debt was dischargeable. Id. at 180. It found that  
11 DeLuca simply "thumbed through" the district court documents  
12 without paying them much heed and that he did not represent either  
13 way whether the debt was dischargeable. Id. The court also found  
14 that DeLuca did not explain anything about adversary proceedings  
15 during the consultation – what they are, whether one was likely in  
16 this case, or what the potential consequences would be. Id. at  
17 180-81. DeLuca's cursory review of the district court documents  
18 would not have led him to conclude that an adversary proceeding  
19 was likely in Debtors' case. Id. at 180. In sum, the court found  
20 that DeLuca failed to carefully review the district court  
21 documents or inquire about the nature of the Judgment during the  
22 consultation, as had he known the debt was for fraud, he would  
23 have told Debtors that St. Rose would likely seek to have it found  
24 nondischargeable in an adversary proceeding. Id. at 180-81. The  
25 court found that DeLuca moved quickly and did not pay sufficient  
26 attention to Debtors' individual goals and needs and that his  
27 boilerplate forms and standardized approach, which may work for  
28 most clients, failed to work for clients like Seare and Tedoco,

1 whose circumstances do not fit the mold of the prototypical  
2 consumer debtor. Id. at 181.

3 **1. DeLuca violated NRPC 1.1.**<sup>5</sup>

4 The bankruptcy court held that DeLuca had violated his duty  
5 of competence under NRPC 1.1 by deciding to unbundle adversary  
6 proceedings in Debtors' case. In re Seare, 493 B.R. at 192.  
7 Specifically, the court found that as a result of a lack of  
8 communication at the initial consultation DeLuca failed in his  
9 primary duty – ascertaining Debtors' objectives and defining the  
10 goals of the representation. Id. at 190.

11 Debtors' primary goal was to permanently stop the  
12 garnishment, and once DeLuca was aware of a garnishment connected  
13 to a prior judgment, he, as the bankruptcy expert, had an  
14 affirmative duty to investigate. Id. at 190-91. It was not  
15 Debtors' burden to reach the legal conclusion that fraud, as  
16 defined in the Code, included the fraudulent act Seare committed  
17 in the district court. Id. at 190. The court found that DeLuca  
18 either did not understand Debtors' primary objective or he  
19 negligently assumed the St. Rose debt was dischargeable and thus  
20 Debtors' objective would be met. Id. at 191. Either way, he did  
21 not exercise the legal knowledge, skill and thoroughness  
22 reasonably necessary for the representation. Id. The court found  
23 that Debtors could have reasonably anticipated the St. Rose debt  
24 would be discharged and that the garnishment would permanently  
25 cease. Id. But, they did not likely expect that an adversary

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27 <sup>5</sup> NRPC 1.1 provides: "A lawyer shall provide competent  
28 representation to a client. Competent representation requires the  
legal knowledge, skill, thoroughness and preparation reasonably  
necessary for the representation."

1 proceeding would be filed, especially since DeLuca did not explain  
2 what an adversary proceeding was or the connection between  
3 nondischargeable debts and adversary proceedings. Id. In the  
4 court's view, Debtors moved forward and filed a bankruptcy case  
5 they might not have otherwise filed had they known it was nearly  
6 certain to lead to an adversary proceeding. Alternatively, if  
7 given adequate legal counsel, they may have sought an attorney who  
8 had a different fee structure concerning adversary proceedings.  
9 Id.

10       The court found that DeLuca, without understanding Debtors'  
11 goals for his representation, could not determine which legal  
12 services were reasonably necessary to attain those goals or  
13 explain to Debtors the challenges they were likely to face in  
14 trying to achieve those goals by filing for bankruptcy. Id. In  
15 the absence of such guidance, the court found that DeLuca had a  
16 duty to offer the services reasonably necessary to achieve  
17 permanent cessation of the wage garnishment. Id. at 191-92.  
18 Because an adversary proceeding was a near certainty in light of  
19 what DeLuca should have known at the time of the initial  
20 consultation – that the Judgment was based on fraud – representing  
21 Debtors at an adversary proceeding was not only reasonably  
22 necessary to achieve their goal of stopping the garnishment, but  
23 likely the only way to stop it. Id. at 192. Consequently,  
24 DeLuca's decision to unbundle his representation in any adversary  
25 proceedings in Debtors' case violated the duty of competence under  
26 NRPC 1.1. Id.

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1                                   **2. DeLuca violated NRPC 1.2(c).**<sup>6</sup>

2           The bankruptcy court held that DeLuca violated NRPC 1.2(c)  
3 because unbundling the service of adversary proceedings was not  
4 reasonable in light of Debtors' circumstances. In re Seare, 493  
5 B.R. at 196. Although the court did not find fault with DeLuca  
6 using pre-prepared forms that limit the scope of services included  
7 in a flat fee, it did find that deciding to unbundle services  
8 reasonably necessary to achieve a client's objectives before even  
9 meeting the client was unreasonable and violated NRPC 1.2(c). Id.  
10 at 194. Here, it appeared that his decision to unbundle adversary  
11 services was made before he ever met Debtors. Alternatively, even  
12 if DeLuca's decision to unbundle such services was made during  
13 Debtors' initial consultation, that decision was also unreasonable  
14 and violated the rule because an adversary proceeding was a near  
15 certainty. Id. The court found DeLuca should have known, and  
16 would have known had he cursorily investigated the nature of the  
17 Judgment, that representing Seare in an adversary proceeding was  
18 reasonably necessary to achieve Debtors' reasonably anticipated  
19 result – a discharge of the St. Rose debt. Id. at 194-95.  
20 Debtors' expectation of a complete discharge was reasonable  
21 because DeLuca did not inform them otherwise and they are not  
22 bankruptcy experts. Id. at 195.

23           The court also faulted DeLuca for not communicating his  
24 intent not to represent Seare in the adversary proceeding until  
25 after the complaint had been filed, knowing that an adversary  
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27           <sup>6</sup> NRPC 1.2 provides: "A lawyer may limit the scope of the  
28 representation if the limitation is reasonable under the  
circumstances and the client gives informed consent."

1 proceeding was the only way Seare could possibly discharge the  
2 St. Rose debt. Unbundling such service at that point in time was  
3 “patently unreasonable” and violated NRPC 1.2(c). Id. at 196.

4 Lastly, the unbundling was DeLuca’s idea, which the court  
5 found ran contrary to the ABA’s guidance that unbundling should be  
6 client-driven. Id.

7 The bankruptcy court held that DeLuca had further violated  
8 NRPC 1.2(c) because he did not obtain Debtors’ informed consent in  
9 limiting the scope of his representation. Id. at 203. First, the  
10 court found that DeLuca did not comply with the rule by adequately  
11 communicating the material risks of unbundling adversary  
12 proceedings, either in general or in Debtors’ case, or the  
13 available alternatives to such unbundling. Id. His failure to  
14 properly understand their goals and details of their situation –  
15 i.e., the nature of the Judgment – rendered adequate communication  
16 impossible. Id. at 204. The Retainer Agreement, which the court  
17 found to be DeLuca’s primary communication with Debtors, did not  
18 constitute adequate communication. The Retainer Agreement’s  
19 “fraud” disclaimer and statements that the flat fee does not  
20 include representation for nondischargeability allegations and  
21 adversary proceedings, which were in different sections, did not  
22 communicate the material risks of proceeding without  
23 representation in adversary proceedings, or even that DeLuca may  
24 decide not to represent Debtors in an adversary proceeding. Id.  
25 Thus, reasoned the court, prospective clients are left to connect  
26 the dots – that a debt incurred through fraud is raised in a claim  
27 of nondischargeability that is litigated in an adversary  
28 proceeding. Id. Hence, without adequate information upon which

1 to base a decision, the court found that obtaining Debtors' valid  
2 consent was impossible. Id. at 203.

3       The means of consent here – initialing and signing DeLuca's  
4 contract of adhesion – did not sufficiently demonstrate that  
5 Debtors understood what services were unbundled, or their  
6 particular circumstance, or the seriousness of proceeding without  
7 representation in adversary proceedings. Id. at 203-05. Without  
8 any explanation to Debtors about the risks of unbundling services,  
9 the court found that Debtors could not have known that the bundle  
10 of services in the flat fee was unlikely to meet their objectives.  
11 Id. at 205. DeLuca neither explained the risks of going it alone  
12 in adversary proceedings nor what particular risks Debtors faced,  
13 or that they could seek counsel who structured his or her services  
14 differently. Id. DeLuca did not communicate the high likelihood  
15 of Debtors having to represent themselves pro se or find another  
16 attorney, which the court found would have been evident had he  
17 reviewed the Judgment. Id. Without DeLuca ever explaining  
18 adversary proceedings to Debtors, they could have reasonably  
19 agreed to exclude them, assuming that such proceedings were  
20 unlikely to occur. However, the court doubted whether Debtors  
21 actually made that decision, since DeLuca never explained what an  
22 adversary proceeding was. Id.

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1                                   **3. DeLuca violated NRPC 1.5.**<sup>7</sup>

2           The bankruptcy court held that DeLuca violated NRPC 1.5(b)  
3 because he did not sufficiently explain the scope of services  
4 covered under the flat fee and the scope of services available for  
5 additional fees, as the rule requires. In re Seare, 493 B.R. at  
6 206. The problem with DeLuca's Retainer Agreement was three-fold.  
7 First, the listed services were in legal jargon as opposed to  
8 plain English. Id. Seare understood that adversary proceedings  
9 were excluded, but did not know what they were. He also knew that  
10 "nondischargeability allegations" were excluded, but similarly he  
11 might not have known what they were. Id.

12           Second, Debtors were not aware of the likelihood that they  
13 would need to pay for additional services. Id. at 206. Because  
14 an adversary proceeding was reasonably foreseeable at the time  
15 Debtors agreed to the fee structure and DeLuca did not explain  
16 this eventuality to them, the court found that DeLuca improperly  
17 unbundled the adversary proceeding from the flat fee. Id. at 206-  
18 07. He unfairly placed them in the position of having to bargain  
19 for additional legal services in the midst of an adversary  
20 proceeding. Id. at 207.

21           Third, DeLuca violated NRPC 1.5(b) by changing the basis of  
22 his fees without advance warning to Debtors. Id. The Retainer  
23 Agreement did not state that DeLuca may decide not to represent

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25           <sup>7</sup> NRPC 1.5(b) provides: "The scope of the representation and  
26 the basis or rate of the fee and expenses for which the client  
27 will be responsible shall be communicated to the client,  
28 preferably in writing, before or within a reasonable time after  
commencing the representation, except when the lawyer will charge  
a regularly represented client on the same basis or rate. Any  
changes in the basis or rate of the fee or expenses shall also be  
communicated to the client."



1 Debtors in adversary proceedings, only that such services would  
2 incur additional fees. The court found that Debtors agreed to pay  
3 about \$2,000 for an attorney that, for the additional fees, would  
4 handle nondischargeability claims and adversary proceedings, and  
5 part of the basis for the \$2,000 fee was the availability of  
6 services if needed. Id. By deciding later not to represent  
7 Debtors at all, DeLuca essentially changed the basis of his fees.  
8 The court further found that because Debtors did not understand  
9 adversary proceedings, the likelihood of one being filed against  
10 them, and what it would cost them, they could not have known that  
11 the approximately \$2,000 they agreed to pay did not include the  
12 scope of services reasonably necessary to achieve their goal. Id.  
13 Thus, reasoned the court, their choice to pay it could not be  
14 considered voluntary. Id.

15 **4. DeLuca violated NRPC 1.4.<sup>8</sup>**

16 The bankruptcy court held that DeLuca violated NRPC 1.4 by  
17 failing to properly communicate with Debtors. In re Seare, 493  
18 B.R. at 208. Specifically, DeLuca violated NRPC 1.4(a)(2) by  
19 failing to reasonably consult Debtors about the means to achieve  
20 their objectives. Id. He also violated NRPC 1.4(a)(3) by failing  
21 to forward the proposed stipulation and order DeLuca received  
22 before St. Rose filed its complaint. Id. Finally, DeLuca

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23 <sup>8</sup> NRPC 1.4 provides, in relevant part:

24 (a) A lawyer shall:

- 25 . . . .  
26 (2) Reasonably consult with the client about the means  
27 by which the client's objectives are to be accomplished;  
28 (3) Keep the client reasonably informed about the status  
of the matter;  
(4) Promptly comply with reasonable requests for  
information[.]

1 violated NRPC 1.4(a)(4) by failing to timely respond to Debtors'  
2 requests for information. Id. Although the court generally  
3 questioned Debtors' credibility, it did find convincing Tedoco's  
4 claims about DeLuca's and his staff's failure to return phone  
5 calls and to keep them informed of their case. Id. The court  
6 also found independently that DeLuca's own records evidenced his  
7 office's inattention to detail and poor client communication. He  
8 failed to log which paralegal reviewed the retainer agreement with  
9 each prospective client, he twice incorrectly filed his OSC briefs  
10 in the main case and he failed to serve copies of his OSC briefs  
11 on Debtors until after the OSC evidentiary hearing, even though he  
12 was ordered to serve them immediately after the initial OSC  
13 hearing. Id.

14 **5. DeLuca violated § 707(b)(4)(C).<sup>9</sup>**

15 The bankruptcy court reasoned that, as with DeLuca's ethical  
16 violations, his violation of § 707(b)(4)(C) flowed from his  
17 failure to investigate the nature of the Judgment. In re Seare,  
18 493 B.R. at 211. The court disagreed that DeLuca performed due  
19 diligence in this case, finding that he had taken no steps to  
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21 <sup>9</sup> Section 707(b)(4)(C) provides:

22 The signature of an attorney on a petition, pleading, or  
23 written motion shall constitute a certification that the  
attorney has—

24 (i) performed a reasonable investigation into the  
circumstances that gave rise to the petition, pleading,  
25 or written motion; and

(ii) determined that the petition, pleading, or written  
26 motion—

(I) is well grounded in fact; and

27 (II) is warranted by existing law or a good faith  
argument for the extension, modification, or  
28 reversal of existing law and does not constitute an  
abuse under paragraph (1).

1 investigate independently or verify the circumstances underlying  
2 the Order of Wage Garnishment, which fell far short of the  
3 "reasonable investigation" requirement of § 707(b)(4)(C). Id. at  
4 211-213. Debtors told DeLuca of the circumstances giving rise to  
5 the petition – the wage garnishment – and gave him documents from  
6 the district court case. Id. at 211. DeLuca demonstrated his  
7 awareness of the action by listing it in Debtors' SOFA, including  
8 the case name and number. Id. DeLuca's reasonable next step  
9 should have been to investigate the Judgment supporting the  
10 garnishment, which could have been accomplished by asking  
11 questions or reviewing the district court's electronic docket.  
12 Id. The fact that the Judgment led to a garnishment was a  
13 sufficient "red flag" for further inquiry. Id. at 212. Instead,  
14 the court found that DeLuca merely flipped through the documents  
15 and assumed that since the debt was owed to a hospital, it must be  
16 for medical bills and was thus dischargeable. Id. at 211-12. His  
17 office also never obtained any further documents from Debtors,  
18 which may have revealed information they failed to provide. Id.  
19 at 212. Blaming his clients for that failure was inappropriate  
20 because Debtors were not bankruptcy experts. Id.

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**6. DeLuca violated §§ 526(a)<sup>10</sup> and 528(a).<sup>11</sup>**

First, the bankruptcy court found that DeLuca was required to comply with §§ 526 and 528(a) based on his role as a bankruptcy attorney and "debt relief agency," Debtors' role as "assisted persons," and the nature of Debtors' debts. In re Seare, 493 B.R. at 214. Through analysis similar to that utilized in connection with NRPC 1.4, the court found that DeLuca violated § 526(a) by failing to accurately explain that he would not represent Debtors in an adversary proceeding and the risks Debtors could face in bankruptcy. Id. at 215. Although the Retainer Agreement states

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<sup>10</sup> Section 526(a) provides, in relevant part:

- (a) A debt relief agency shall not-
  - (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under this title;
  - . . . .
  - (3) misrepresent to any assisted person or prospective assisted person, directly or indirectly, affirmatively or by material omission, with respect to-
    - (A) the services that such agency will provide to such person; or
    - (B) the benefits and risks that may result if such person becomes a debtor in a case under this title.

<sup>11</sup> Section 528(a) provides, in relevant part:

- (a) A debt relief agency shall-
  - (1) not later than 5 business days after the first date on which such agency provides any bankruptcy assistance services to an assisted person, but prior to such assisted person's petition under this title being filed, execute a written contract with such assisted person that explains clearly and conspicuously-
    - (A) the services such agency will provide to such assisted person; and
    - (B) the fees or charges for such services, and the terms of payment;
  - (2) provide the assisted person with a copy of the fully executed and completed contract.

1 that representation for nondischargeability allegations and  
2 adversary proceedings would result in additional fees, DeLuca  
3 flatly refused to provide these services once the complaint was  
4 filed. Thus, he violated § 526(a)(1) by failing to perform a  
5 service he informed Debtors he would provide in connection with  
6 their bankruptcy case. Id.

7 The court rejected DeLuca's argument that because Debtors  
8 could not afford the additional services anyway, it was immaterial  
9 whether or not he was willing to perform them. This argument  
10 improperly benefitted from hindsight. Id. The court found that  
11 at the time DeLuca refused to perform the additional services, no  
12 evidence existed that he ever offered these services to Debtors  
13 and that Debtors refused them for lack of funds. Id. DeLuca  
14 offered no evidence indicating he consulted at all with Debtors  
15 before sending them the June 6 letter of nonrepresentation. Id.  
16 At minimum, based on the Retainer Agreement, the court found that  
17 DeLuca was obligated to at least quote Seare a price for the  
18 adversary representation. Id.

19 The court found that DeLuca had also violated § 526(a)(3)  
20 because he misrepresented, by omission, the risks associated with  
21 an adversary proceeding that Debtors were nearly certain to face  
22 if they filed for bankruptcy. Id. Because stopping the  
23 garnishment was Debtors' primary goal, DeLuca's failure to address  
24 the risks of a related adversary proceeding was a material  
25 omission. Id.

26 DeLuca was also found to have violated § 528(a) for the same  
27 reasons he had violated NRPC 1.5. Id. While he partially  
28 complied with § 528(a)(1) by providing a written contract on the

1 same day as the consultation, DeLuca had violated § 528(a)(2)  
2 because he failed to provide a "fully executed and completed  
3 contract"; he never signed the Retainer Agreement. Id. Further,  
4 the court found that DeLuca also violated § 528(a)(1) because the  
5 Retainer Agreement did not "clearly and conspicuously" explain the  
6 scope of services and fees. Id. Specifically, DeLuca excluded  
7 services using technical terms like "nondischargeability  
8 allegations" and "adversary proceedings," which a layperson would  
9 not likely understand. Further, the standard form contract did  
10 not relate these services to a client's particular case, and,  
11 without clarification from DeLuca about which additional services  
12 were likely to be needed, Debtors had no way of knowing which  
13 exclusions were likely to apply and what the chances were of  
14 facing increased legal fees. Id. at 215-16.

15 **b. The sanctions imposed**

16 After carefully reviewing the range of available sanctions,  
17 the bankruptcy court ordered the following: (1) that DeLuca  
18 disgorge the \$1,999 fee paid by Debtors; (2) that the Sanctions  
19 Opinion be published to deter such conduct by other attorneys in  
20 the future; (3) that DeLuca complete some Continuing Legal  
21 Education credits; and (4) that for the next two years DeLuca  
22 provide a copy of the Sanctions Opinion to every client who is  
23 sued in an adversary proceeding, but only if DeLuca declines to  
24 represent them in that adversary proceeding for any reason. Id.  
25 at 224-27. The court declined to impose any further monetary  
26 sanctions beyond disgorgement, despite the authority to do so,  
27 because of DeLuca's good standing and his efforts to mitigate the  
28 situation by offering to refund the fee and represent Seare in

1 negotiations with St. Rose. Id. at 226. DeLuca timely appealed.

2 **5. The result of adversary proceeding**

3 On January 2, 2013, St. Rose filed a Confession of Judgment,  
4 in which Seare authorized a nondischargeable judgment against him  
5 for \$67,430.58.

6 **II. JURISDICTION**

7 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
8 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

9 **III. ISSUES**

10 Did the bankruptcy court abuse its discretion in sanctioning  
11 DeLuca and imposing the types of sanctions that it did?

12 **IV. STANDARDS OF REVIEW**

13 “We review all aspects of an award of sanctions for an abuse  
14 of discretion.” Orton v. Hoffman (In re Kayne), 453 B.R. 372, 380  
15 (9th Cir. BAP 2011) (citing Price v. Lehtinen (In re Lehtinen),  
16 332 B.R. 404, 411 (9th Cir. BAP 2005), aff’d, 564 F.3d 1052 (9th  
17 Cir. 2009)); In re Nguyen, 447 B.R. 268, 276 (9th Cir. BAP 2011)  
18 (en banc)). The bankruptcy court’s choices of sanctions are also  
19 reviewed for abuse of discretion. U.S. Dist. Ct. for E.D. Wash.  
20 v. Sandlin, 12 F.3d 861, 865 (9th Cir. 1993). A bankruptcy court  
21 abuses its discretion if it applies the wrong legal standard or  
22 its factual findings are illogical, implausible or without support  
23 in the record. TrafficSchool.com v. Edriver Inc., 653 F.3d 820,  
24 832 (9th Cir. 2011).

25 With respect to sanctions, a bankruptcy court’s factual  
26 findings are reviewed for clear error and given great deference.  
27 Primus Auto. Fin. Servs., Inc. v. Batarse, 115 F.3d 644, 649 (9th  
28 Cir. 1997). A factual finding is clearly erroneous if it is

1 illogical, implausible or without support in the record. Retz v.  
2 Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010).

3 Whether an appellant's due process rights were violated is a  
4 question of law we review de novo. Miller v. Cardinale (In re  
5 DeVille), 280 B.R. 483, 492 (9th Cir. BAP 2002), aff'd, 361 F.3d  
6 539 (9th Cir. 2004).

## 7 V. DISCUSSION

### 8 A. The bankruptcy court's power to sanction attorneys

9 "Bankruptcy courts have the inherent authority to regulate  
10 the practice of attorneys who appear before them." In re Nguyen,  
11 447 B.R. at 280 (citing Chambers v. NASCO, Inc., 501 U.S. 32, 43-  
12 45 (1991); Caldwell v. Unified Capital Corp. (In re Rainbow  
13 Magazine, Inc.), 77 F.3d 278, 284-85 (9th Cir. 1996)).

14 "Bankruptcy courts also have express authority under the Code and  
15 the Rules to sanction attorneys, including disbarment or  
16 suspension from practice." Id. at 281 (citing In re Lehtinen, 564  
17 F.3d at 1058, 1062; § 105(a)). "The bankruptcy court has wide  
18 discretion in determining the amount of a sanctions award." In re  
19 Kayne, 453 B.R. at 386 (internal quotation marks and citation  
20 omitted). The Local Rules for the District Court of the District  
21 of Nevada also grant considerable leeway in fashioning sanctions  
22 for violations of the NRPC. Local Rule IA 10-7(a) provides that  
23 "[a]ny attorney who violates these standards of conduct may be  
24 disbarred, suspended from practice before this Court for a  
25 definitive time, reprimanded or subjected to such other discipline



1 as the court deems proper.”<sup>12</sup>

2 In reviewing attorney disciplinary sanctions, we determine  
3 whether (1) the disciplinary proceeding was fair, (2) the evidence  
4 supports the findings, and (3) the penalty imposed was reasonable.  
5 In re Nguyen, 447 B.R. at 276.

6 **B. The bankruptcy court did not abuse its discretion when it**  
7 **sanctioned DeLuca and imposed the sanctions that it did.**

8 DeLuca raises several arguments on appeal, most of which  
9 pertain to the bankruptcy court’s findings of fact or his dispute  
10 with some of the sanctions imposed. We address each of his  
11 arguments in turn.

12 We begin with the bankruptcy court’s consideration of  
13 Tedoco’s late-filed brief after the matter had been taken under  
14 submission. The court stated at the OSC evidentiary hearing that  
15 once the transcripts from the two OSC hearings were recorded on  
16 the docket, the matter would stand submitted. The transcripts  
17 were recorded on October 30, 2012. Presumably, evidence closed on  
18 that date. Tedoco’s brief was filed on December 4, 2012. Citing  
19 to no authority, DeLuca argues that the bankruptcy court committed  
20 reversible error by considering Tedoco’s late-filed brief and  
21 relying on the inadmissible facts contained therein for much of  
22 its decision.

23 Reopening of a case after the close of evidence rests in the  
24 discretion of the trial court. Mo. Pac. Ry. Co. v. Oleson, 213 F.  
25 329, 331-32 (8th Cir. 1914); United States v. Hugh, 236 F. App’x

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27 <sup>12</sup> Part IA of the Local Rules of Practice for the U.S.  
28 District Court for the District of Nevada apply in all bankruptcy  
cases and proceedings in the U.S. Bankruptcy Court for the  
District of Nevada. See Local Rule IA 2-1.

1 796, 802 (3d Cir. June 14, 2007) (Ambro, J., dissenting) (“there  
2 is no iron-bound, copper-fastened, double-riveted rule against the  
3 admission of evidence after both parties have rested upon their  
4 proof”) (quoting United States v. Blankenship, 775 F.2d 735, 741  
5 (6th Cir. 1985) and citing Oleson). Therefore, it was within the  
6 bankruptcy court’s discretion to consider Tedoco’s late-filed  
7 brief.

8       However, we agree with DeLuca that Tedoco’s brief consisted  
9 only of argument, not admissible evidence. As such, the  
10 bankruptcy court erred in considering it. United States v.  
11 Moreland, 622 F.3d 1147, 1162 (9th Cir. 2010) (argument is not  
12 evidence); Hurley v. Student Loan Acquisition Auth. of Ariz. (In  
13 re Hurley), 258 B.R. 15, 23 (Bankr. D. Mont. 2001). Nonetheless,  
14 much of what Tedoco asserted had already been established by  
15 Seare, either by his testimony at the OSC evidentiary hearing or  
16 in documentary evidence the parties submitted. Therefore, it was  
17 harmless error for the bankruptcy court to consider any facts  
18 asserted in the brief because they were already before the court  
19 through competent evidence. Lillie v. United States, 953 F.2d  
20 1188, 1192 (10th Cir. 1992) (admission of improper evidence of a  
21 fact in issue is harmless when the judgment is supported by  
22 sufficient competent evidence). The few facts the court should  
23 not have considered, however, as we discuss more fully below, are  
24 insufficient to establish reversible error.

25       **1. DeLuca’s arguments regarding the violations of the NRPC**  
26       **a. NRPC 1.1 and NRPC 1.2**

27       DeLuca first takes issue with the bankruptcy court’s findings  
28 under NRPC 1.1 that his unbundling of adversary proceedings was

1 unreasonable in this case because it failed to achieve Debtors'  
2 reasonably anticipated result – i.e., discharge of the St. Rose  
3 debt. DeLuca contends that three problems exist with this  
4 finding: (1) it assumes the debt was dischargeable; (2) the  
5 bankruptcy court made comments during the initial OSC hearing with  
6 Seare present that led Seare to testify at the evidentiary hearing  
7 that dischargeability and adversary proceedings were not explained  
8 to him by DeLuca; and (3) it fails to recognize that because  
9 St. Rose did not include Tedoco in the adversary proceeding and  
10 she received a discharge, the debt is uncollectible against Seare  
11 under the community discharge, so DeLuca did in fact achieve  
12 Debtors' reasonably anticipated result.

13       Any bankruptcy professional would recognize the obstacles a  
14 debtor faces in trying to achieve the discharge of a debt based on  
15 fraud. However, the bankruptcy court found that Debtors could  
16 have reasonably anticipated the St. Rose debt would be discharged  
17 and that the garnishment would permanently cease, based on  
18 DeLuca's failure to investigate the Judgment and inform his  
19 clients of the inevitable adversary proceeding. It further found  
20 it impossible for DeLuca to provide adequate counsel as a result  
21 of his erroneous assumption that the Judgment arose from unpaid  
22 medical bills. We see no clear error in that finding.

23       As for comments made by the bankruptcy court at the initial  
24 OSC hearing, it is true that Seare testified at the later  
25 evidentiary hearing that he did not know what adversary  
26 proceedings were and that DeLuca never discussed them. However,  
27 this was not the only evidence showing that DeLuca failed to  
28 explain the meaning of dischargeable versus nondischargeable

1 debts, the meaning of adversary proceedings or the connection  
2 between them. It was reasonable for the court to infer that this  
3 discussion never occurred with Debtors because, by DeLuca's own  
4 admission, he was not aware that the Judgment was based on fraud.  
5 Also, Seare testified that the issue of fraud never came up at the  
6 consultation. If it had, one would expect DeLuca to have  
7 explained nondischargeable debts and adversary proceedings. More  
8 importantly, DeLuca never affirmatively testified that he did  
9 explain these matters to Debtors and no record exists that any  
10 member of DeLuca's staff did either. Although it was his office's  
11 protocol to have a staff member go through every page of his  
12 retainer agreement with clients, DeLuca could not establish that  
13 it occurred in this case. Tedoco claimed that no one went through  
14 the Retainer Agreement with Debtors, but this was an inadmissible  
15 fact the bankruptcy court should not have considered.

16 As for his third argument that the St. Rose debt is  
17 uncollectible due to the community discharge, DeLuca admits he did  
18 not raise this issue before the bankruptcy court. As such, we are  
19 not required to consider it for the first time on appeal.  
20 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d  
21 955, 957 (9th Cir. 1989); Concrete Equip. Co. v. Fox (In re Vigil  
22 Bros. Constr., Inc.), 193 B.R. 513, 520 (9th Cir. BAP 1996). In  
23 any event, when considering whether the community discharge under  
24 § 524(a)(3) applies, the bankruptcy court must first determine  
25 whether the debt is a community debt under state law. The court  
26 must then determine the scope of the discharge. Arcadia Farms  
27 Ltd. v. Rollinson (In re Rollinson), 322 B.R. 879, 881 (Bankr. D.  
28 Ariz. 2005) ("Once a debt has been determined to be a community

1 debt pursuant to state law, the second issue is the scope of the  
2 discharge.”). Neither of those determinations have been made  
3 here. Further, “when the debtor has incurred a nondischargeable  
4 debt or is not entitled to a discharge, or the debtor’s spouse  
5 would have been denied a discharge or had a debt declared  
6 nondischargeable in a hypothetical bankruptcy case commenced on  
7 the same day as that of the debtor, the nondischargeable debt of  
8 either spouse will survive against after-acquired community  
9 property.” 4 COLLIER ON BANKRUPTCY ¶ 524.02[3][a] (Alan N. Resnick &  
10 Henry J. Sommer eds., 16th ed. 2013). Therefore, Debtor was not  
11 entitled to a community discharge of a debt he could not himself  
12 discharge. Even if DeLuca’s argument has merit, which we do not  
13 believe it does, we find it improper that he rely on subsequent  
14 events beyond his control to try to negate his prior shortcomings  
15 in complying with the rules of ethics.

16 DeLuca next takes issue with the bankruptcy court’s finding  
17 that he failed to obtain Debtors’ informed consent to unbundle  
18 adversary proceedings. DeLuca rests his arguments on the  
19 disclosures in the Retainer Agreement and FAQ about the  
20 nondischargeability of fraud debts and Seare’s admission that he  
21 did not read the FAQ. DeLuca contends the court erred in finding  
22 that Seare did not give informed consent, after Seare had admitted  
23 he made no effort to read any of the documents he signed and  
24 failed to ask any questions. In other words, argues DeLuca, a  
25 client cannot argue that disclosures are insufficient and consent  
26 invalid when he makes no effort to read, review and question  
27 critical documents. The bankruptcy court considered and rejected  
28 this argument. It found that the Retainer Agreement’s “fraud”

1 disclaimer and its disconnected "legal jargon" statements about  
2 what was or was not included in the flat fee left prospective  
3 clients to "connect the dots" that a debt incurred through fraud  
4 is raised in a claim of nondischargeability, which is litigated in  
5 an adversary proceeding, and that it was something that requires  
6 additional fees for representation. The court also found it  
7 improper for DeLuca to put the onus on layperson debtors to make  
8 these conclusions. We see no clear error here.

9 DeLuca also quibbles with the bankruptcy court's  
10 characterization of Debtors' goal as one to "permanently" stop the  
11 wage garnishment, when Seare testified that his desire was "to get  
12 the wage garnishment stopped." DeLuca argues that the court added  
13 the word "permanently," which it inferred from Tedoco's late-filed  
14 brief – a brief it should not have considered. Although Tedoco  
15 used the word "permanently" in her brief, Seare also testified at  
16 the evidentiary hearing that the sole reason for filing bankruptcy  
17 was to "get rid of" the garnishment and that the temporary  
18 cessation of it was not the benefit they were seeking. Further,  
19 DeLuca's argument defies logic. Of course Debtors wanted the  
20 garnishment to disappear forever, not just for a few months.

21 DeLuca alternatively argues that even if Debtors' goal was  
22 permanent cessation of the garnishment, the garnishment was  
23 stopped as of the date of the OSC evidentiary hearing, so DeLuca  
24 did fulfill his duty of competence by achieving the goal of  
25 "stopping the garnishment." For the reasons already discussed and  
26 given by the bankruptcy court, we need not address this meritless  
27 argument.

28 Lastly, DeLuca argues that the bankruptcy court "improperly

1 put itself in Debtors' place" and went outside the record when it  
2 found that Debtors may have chosen not to file bankruptcy or may  
3 have sought an attorney with a different fee structure, had they  
4 known about the dischargeability concerns related to the St. Rose  
5 debt. We disagree. This inference was reasonable for the court  
6 to make in light of this record. Plus, this fact alone does not  
7 change the conclusion that DeLuca violated his duty of competence.  
8 Despite DeLuca's contentions, whether the St. Rose debt was  
9 actually dischargeable is not the point. The point is: What is  
10 the nature of the debt; what relief may the creditor seek against  
11 Debtors; and what will Debtors need to do to defend against the  
12 claim? Debtors needed DeLuca to inform them sufficiently of the  
13 risks associated with the St. Rose debt before they could properly  
14 provide informed consent to allow DeLuca to unbundle services.  
15 DeLuca failed to advise them about the debt or its risks because  
16 he did not perform even a minimal investigation, which would have  
17 revealed that the Judgment arose from fraud. Without that  
18 knowledge, it was impossible for DeLuca to determine Debtors'  
19 circumstances and advise them as to what sort of representation  
20 would be needed to achieve their goal of eliminating the St. Rose  
21 debt and the garnishment.

22 We conclude the bankruptcy court did not err in determining  
23 DeLuca violated NRPC 1.1 and 1.2(c).

24 **b. NRPC 1.4 and NRPC 1.5**

25 DeLuca next argues that the bankruptcy court erred in  
26 determining he violated NRPC 1.5 because he did not sufficiently  
27 explain the scope of services covered under the flat fee and the  
28 scope of services available for additional fees. DeLuca points to

1 Seare's testimony that he understood DeLuca would not be  
2 representing him in any allegations of fraud. Again, DeLuca  
3 misses the point. Seare may have understood that defending fraud  
4 allegations would require an additional fee or that adversary  
5 proceedings or nondischargeability allegations were excluded from  
6 the flat fee, but the Retainer Agreement – the only communication  
7 to Debtors explaining the scope of DeLuca's services and/or for  
8 what fees – failed to make the connection between these issues.  
9 Accordingly, we perceive no error with the bankruptcy court's  
10 decision that DeLuca violated NRPC 1.5.

11 Finally, DeLuca contends the bankruptcy court erred in  
12 determining that he violated NRPC 1.4 by failing to properly  
13 communicate with Debtors. DeLuca first asserts a due process  
14 concern over whether he received sufficient notice that the  
15 bankruptcy court was considering sanctioning him under this rule.  
16 DeLuca correctly notes that any potential violations of NRPC 1.4  
17 were not raised in the OSC, or in the order setting the  
18 evidentiary hearing, or at either hearing. Therefore, he argues  
19 that sanctioning him under this rule violated his due process  
20 rights and should be reversed. "When an attorney is subject to  
21 discipline, he or she has a right to notice and an opportunity to  
22 be heard." In re Nguyen, 447 B.R. at 278 (citing In re Ruffalo,  
23 390 U.S. 544, 551-52 (1968); In re Lehtinen, 564 F.3d at 1060)).  
24 To satisfy the requirements of due process in this context, "the  
25 attorney must receive prior notice of the 'the particular alleged  
26 misconduct and of the particular disciplinary authority under  
27 which the court is planning to proceed' along with an opportunity  
28 to respond." Id. (quoting In re DeVille, 361 F.3d at 548). The



1 rule, however, is not absolute. In re Deville, 361 F.3d at 548.

2 Here, the OSC notified DeLuca of his alleged misconduct and  
3 that the bankruptcy court was considering disciplining him under  
4 NRPC 1.1, 1.2 and 1.5. Absent from this is any reference to  
5 NRPC 1.4. Despite the court's omission of NRPC 1.4 in the OSC or  
6 in the order setting the evidentiary hearing, we conclude that  
7 DeLuca was not deprived of due process. DeLuca had notice of the  
8 conduct potentially subjecting him to discipline under several  
9 provisions of the NRPC and under sections of the bankruptcy code,  
10 which interrelatedly address similar, if not, identical  
11 requirements imposed under the general rubric of professional  
12 conduct. If the attorney has been sufficiently informed of the  
13 alleged misconduct, the Ninth Circuit has upheld sanctions even  
14 when a bankruptcy court, in advance of a disciplinary proceeding,  
15 stated that Rule 9011 was the basis for discipline, yet it  
16 proceeded to impose sanctions under its inherent authority. See  
17 In re DeVille, 361 F.3d at 550. Even if the court improperly  
18 considered NRPC 1.4, it committed harmless error as the elements  
19 of this rule are also generally included in the provisions that  
20 were identified by the court in its orders, i.e., NRPC 1.4,  
21 § 526(a) and § 528(a) involve what services and means are  
22 necessary to accomplish the client's objectives. The bankruptcy  
23 court informed DeLuca through orders and at the hearings of the  
24 conduct that would be the subject of any discipline.

25 Nonetheless, we must address a second issue. Many of the  
26 facts asserted in Tedoco's brief were used extensively in the  
27 bankruptcy court's decision to find that DeLuca had violated  
28 NRPC 1.4. Again, these "facts" should not have been considered.

1 However, other admissible facts in the record support the court's  
2 decision to find that DeLuca violated NRPC 1.4, namely, DeLuca's  
3 failure to inform Debtors of the St. Rose fax containing the  
4 proposed stipulation and order about the Judgment. Also in  
5 evidence was Debtors' email to DeLuca's office that his failure to  
6 return phone calls was unacceptable and unprofessional customer  
7 service. Finally, the court found independently that DeLuca's own  
8 records indicated his office's inattention to detail and poor  
9 client communication. He fails to log which paralegal reviewed  
10 the retainer agreement with each prospective client. As such, we  
11 see no error in the bankruptcy court's decision that DeLuca  
12 violated NRPC 1.4.

13 **2. DeLuca's arguments regarding the violations of**  
14 **§§ 707(b)(4)(C), 526(a)(1) and (3), and**  
**528(a)(1) and (2)**

15 DeLuca also raises a due process concern with respect to the  
16 bankruptcy court's decision to sanction him under these various  
17 sections of the Code. DeLuca contends that the court only  
18 "orally" added §§ 707(b)(4) and 526(a), both of which have four  
19 subparts each, at the initial OSC hearing and failed to specify  
20 which subpart(s) DeLuca potentially violated. Thus, because he  
21 was not provided adequate written notice of these alleged  
22 violations, nor the potential sanctions associated with them,  
23 DeLuca contends they should all be stricken. While it is true  
24 that the court orally added these Code sections at the initial OSC  
25 hearing out of concern for some of DeLuca's answers, this was not  
26 the only notice DeLuca received about them.

27 In the order entered on September 20, 2012, and setting the  
28 evidentiary hearing, the bankruptcy court specifically set forth

1 which subpart(s) of each section were at issue, citing them right  
2 in the order. Notably, DeLuca failed to include this order in his  
3 excerpts of record. Given his failure to include the order,  
4 DeLuca's contention on appeal that he did not receive written  
5 notice of the Code sections at issue is sanctionable.

6 DeLuca asserts that even if we conclude he received adequate  
7 notice, he nonetheless complied with each section. As for  
8 § 707(b)(4)(C), DeLuca argues that the "reasonable investigation"  
9 requirement goes more to the omission of assets or debts, not  
10 whether a debt is dischargeable. While it is true that much of  
11 the case law on this issue has concerned an attorney's omission of  
12 assets in bankruptcy schedules, DeLuca has not cited any authority  
13 establishing that this section could not be applied in the way the  
14 bankruptcy court did here. Bottom line, DeLuca did not perform a  
15 "reasonable investigation into the circumstances that gave rise to  
16 the petition." § 707(b)(4)(C). Accordingly, we see no error.

17 DeLuca also contends that he complied with § 526(a)(1) and  
18 (3). Although his argument is somewhat unclear, DeLuca apparently  
19 argues that he did not violate § 526(a)(1) because the Retainer  
20 Agreement stated only that he would not represent Debtors in an  
21 adversary proceeding without additional fees, not that he would  
22 not represent them in one at all, as the bankruptcy court found.  
23 DeLuca says he decided to not represent Debtors after the full  
24 scope of Seare's actions became known. First, the bankruptcy  
25 court did not find that the Retainer Agreement said DeLuca would  
26 never represent Debtors in an adversary proceeding. In fact, it  
27 found just the opposite, which led to DeLuca's problem. The  
28 Retainer Agreement stated that representation for

1 nondischargeability allegations and adversary proceedings was  
2 available for an additional fee, but DeLuca flatly refused to  
3 provide these services once the complaint was filed. Hence, the  
4 court found he violated § 526(a)(1) for his failure to perform a  
5 service he informed Debtors that he would provide in connection  
6 with their bankruptcy case.

7 As for § 526(a)(3), DeLuca contends that because the St. Rose  
8 complaint did not include Tedoco and she received a community  
9 discharge, and thus the debt is ultimately uncollectible against  
10 Seare, the bankruptcy court erred in determining that he violated  
11 § 526(a)(3). For the same reasons stated above, we reject this  
12 argument. In any event, the record supports the bankruptcy  
13 court's decision. DeLuca failed to comply with § 526(a)(3)  
14 because he did not inform Debtors about the risks associated with  
15 an adversary proceeding they were nearly certain to face once they  
16 filed for bankruptcy.

17 Lastly, DeLuca contends that he received even less due  
18 process regarding any violations of § 528 because it was never  
19 mentioned prior to the bankruptcy court's decision. We agree that  
20 § 528 was not mentioned anywhere prior to the entry of the court's  
21 Sanctions Opinion. However, as a bankruptcy attorney, DeLuca knew  
22 he had not signed the Retainer Agreement as required by § 528.  
23 Further, as noted by the bankruptcy court, DeLuca satisfied the  
24 qualifying factors imposed by § 528 and was required by statute to  
25 comply with its requirements. As § 528 mandates compliance, we  
26 find no error.

27 **3. DeLuca's arguments about the sanctions imposed**

28 DeLuca argues that the sanctions imposed upon him were too

1 severe. Specifically, he argues that the bankruptcy court  
2 impermissibly went far beyond the list in its OSC of potential  
3 sanctions DeLuca faced. The orders specifically provided that  
4 monetary and nonmonetary sanctions may be considered and imposed.  
5 Keeping in mind that bankruptcy judges have broad discretion in  
6 determining the type of sanctions to impose, the court imposed  
7 sanctions encompassed within the general designation of monetary  
8 and nonmonetary sanctions expressly stated in the OSC. The court  
9 did not impermissibly exceed the described sanctions. We further  
10 conclude that the sanctions were fair, supported by the evidence  
11 and reasonable. See In re Nguyen, 447 B.R. at 276.

12 DeLuca argues that ordering him to provide a copy of the  
13 Sanctions Opinion to potential adversary clients whose case he  
14 declines for the next two years is excessive and violates his  
15 commercial free speech. Leaving aside momentarily the "excessive"  
16 argument, DeLuca has not cited a case holding that ordering a  
17 sanctioned attorney to provide prospective clients with the  
18 court's decision sanctioning the attorney violates his or her free  
19 speech. In any event, this sanction was of particular importance  
20 to the bankruptcy court as a means to protect future debtors by  
21 ensuring they are properly informed of the risks of unbundling,  
22 and to promote a systematic change in DeLuca's practice, which the  
23 court characterized as a "mill" practice. The court also saw this  
24 sanction as a means of informing the bar that being disciplined  
25 for unethical conduct has repercussions beyond just paying a fine  
26 and moving on. We find it difficult to disagree with this  
27 reasoning. Accordingly, we do not conclude that this sanction was  
28 excessive.



1 was not applied in this case. For the foregoing reasons, we  
2 AFFIRM.

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Concurrence begins on next page.

1 JURY, Bankruptcy Judge, Concurring:

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3 I write separately to highlight what this disposition, and  
4 the lengthy published opinion of the bankruptcy court in In re  
5 Seare, 493 B.R. 158, hold and what they do not hold. Importantly,  
6 they do not hold that unbundling representation of a debtor in a  
7 nondischargeability adversary proceeding from general  
8 representation of that debtor in a bankruptcy case is prohibited.  
9 What they do say is that an attorney who wishes to limit her or  
10 his scope of bankruptcy representation should be mindful of the  
11 ethical minefield he or she must navigate.

12 I agree with the majority that the bankruptcy judge here did  
13 not abuse his discretion in concluding that DeLuca violated  
14 numerous sections of the Nevada Rules of Professional Conduct  
15 (NRPC) and also failed to comply with certain requirements of the  
16 Bankruptcy Code when he unbundled representation of Seare in the  
17 St. Rose adversary. The factual findings amply support the  
18 conclusion that Deluca stumbled in that ethical minefield.  
19 However, unbundling representation of a consumer debtor in an  
20 adversary proceeding is neither prohibited by state ethical  
21 standards nor by the Bankruptcy Code. If done correctly,  
22 unbundling may be key to competent consumer bankruptcy attorneys  
23 providing much needed representation to debtors at an affordable  
24 price. Without the ability to unbundle adversaries, the flat fee  
25 which a consumer attorney would need to charge for basic  
26 bankruptcy representation might become prohibitive and exacerbate  
27 the already existing problem of pro se filings.

28 To be sure, the bankruptcy judge here did not suggest that



1 unbundling was never appropriate. Indeed, in his opinion he  
2 describes the background and general acceptance of limited scope  
3 representation by the American Bar Association (ABA), which has  
4 provided for limited scope in its Model Rules, the American  
5 Bankruptcy Institute (ABI), and by most states in their ethical  
6 rules which monitor the performance of lawyers. Seare, 493 B.R.  
7 at 183. Despite recognizing this broad acceptance, however, the  
8 bankruptcy judge found that DeLuca fell woefully short of  
9 complying with the ethical standards which surround unbundling and  
10 therefore sanctioned him for this shortcoming. The judge found  
11 that unbundling the adversary proceeding in the representation of  
12 Seare based on the unique facts of this case was not possible to  
13 achieve the reasonably anticipated result of the client.  
14 Therefore, I believe it is useful to focus on why this unbundling  
15 failed and how a consumer bankruptcy lawyer might avoid the  
16 pitfalls which brought down DeLuca.

17 As highlighted by the bankruptcy judge, both the NRPC and the  
18 ABA Model Rules state that an attorney may "limit the scope of  
19 representation if the limitation is reasonable under the  
20 circumstances and the client gives informed consent."  
21 NRPC 1.2(c); ABA Model Rule 1.2. It was the implementation of  
22 this rule from the initial intake interview that tripped DeLuca up  
23 because he did not properly define the goal of the representation  
24 of Seare: to permanently stop the garnishment on the St. Rose  
25 judgment. The failure to recognize this goal was caused by the  
26 circumstances described by the bankruptcy judge and the majority  
27 and need not be repeated here. In a nutshell, the communication  
28 between Seare and DeLuca did not cause DeLuca to recognize that

1 the St. Rose judgment was likely nondischargeable as based on  
2 fraud<sup>14</sup>; therefore, his representation would not stop the  
3 garnishment *permanently* unless he defended and won or settled the  
4 adversary proceeding. By not making the necessary reasonable  
5 inquiry about the judgment, DeLuca's attempt to unbundle did not  
6 achieve the goal of limited scope: to provide a bundle of services  
7 reasonably necessary to achieve the client's reasonably  
8 anticipated result. In re Seare, 493 B.R. at 188.

9 All the other ethical and statutory violations found by the  
10 bankruptcy judge flowed from this initial deficiency in the  
11 limited scope representation. DeLuca failed to perform  
12 competently because he did not identify the goal and provide  
13 services to accomplish the goal - i.e. representing Seare in the  
14 adversary proceeding, causing the violation of NRPC 1.1. The  
15 unbundled services he promised for the agreed flat fee was not a  
16 reasonable limited scope, causing the NRPC 1.2 error. He did not  
17 obtain informed consent because he relied on a boilerplate  
18 Retainer Agreement with legal jargon which, although it described  
19 fraud as nondischargeable and that representation in an adversary  
20 was not included in the flat fee, did not connect the dots such  
21 that Seare was made aware of the risk of accepting such limited  
22 scope representation and why it would not achieve his desired  
23 result, being free of the St. Rose garnishment. Just Seare  
24 initialing every page of the Retainer Agreement did not provide  
25 the particularized communication necessary for informed consent.

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27 <sup>14</sup> It is ironic to me that although every reference to this  
28 judgment as being nondischargeable talks about fraud, the grounds  
under which St. Rose sought nondischargeability were §§ 523(a)(4)  
and (6), not fraud.

1 The other violations of the NRPC are similarly tied to failure to  
2 identify the goal and provide the services necessary to achieve  
3 it.

4 The Bankruptcy Code violations are founded on the same  
5 deficiencies: DeLuca's failure to investigate the St. Rose  
6 judgment to determine its nondischargeable nature caused the  
7 § 707(b)(4)(c) violation; the failure to get informed consent  
8 regarding nonrepresentation in the adversary resulted in the  
9 § 526(a)(1) violation (when DeLuca refused to represent Seare at  
10 all in the adversary, even for a further fee); and DeLuca violated  
11 § 526(a)(3) when he did not fully explain the limitation on the  
12 services which the flat fee would buy.<sup>15</sup>

13 The bankruptcy judge chose to publish his opinion as part of  
14 the sanctions of DeLuca "to deter such conduct by all attorneys."<sup>16</sup>  
15 I summarize here my suggestions for such attorneys to avoid  
16 violating ethical rules and the Bankruptcy Code when they limit  
17 the scope of representation of consumer debtors:

18 1. At the initial intake interview with the debtor, identify  
19 fully and completely the debtor's goals. Almost by definition,  
20 the attorney therefore cannot have a predetermined business  
21 practice that excepts representation in adversary proceedings from  
22 the services the attorney will render unless the attorney and  
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25 <sup>15</sup> The violation of § 528 is based on the failure of DeLuca to  
26 sign the Retainer Agreement and is not related to the unbundling  
27 issue.

27 <sup>16</sup> In joining the majority, I also endorse their view that the  
28 bankruptcy judge followed the proper procedures and had the  
29 authority to impose the sanctions ordered, in accordance with In  
re Nguyen, 447 B.R. 268 (9th Cir. BAP 2011) (en banc).

1 debtor identify that exception before deciding to commence  
2 representation. As noted by the bankruptcy judge, the decision to  
3 unbundle must be driven by the debtor's needs, not the attorneys.

4 2. The attorney may not rely solely on the debtor's input to  
5 help him or her ascertain the debtor's goal. Both the ethical  
6 rules and the Code require the attorney to conduct a reasonable  
7 investigation of the debtor's assets and liabilities. If the  
8 attorney learns that a judgment has been taken against the debtor,  
9 the attorney must make reasonable inquiry into the nature of the  
10 judgment in order to determine whether it might be subject to  
11 nondischargeability.

12 3. If, after ascertaining the debtor's goals, the attorney  
13 believes that limited scope representation is consistent with  
14 those goals, the attorney must then fully explain to the debtor  
15 the consequences and inherent risks which might arise if an  
16 adversary is filed against the debtor and the attorney has not  
17 included representation in that proceeding in the unbundled  
18 services. Informed consent is just that: informed. The debtor  
19 must understand the "legal jargon" and the practical effect on him  
20 or her of the limited scope representation before the consent is  
21 informed.

22 4. The attorney must customize the retainer agreement to the  
23 goals of debtor. That is not to say that much of the agreement  
24 cannot be boilerplate, but boilerplate without the attorney's  
25 active role in its preparation will be insufficient for limited  
26 scope representation. Just having the debtor read and initial the  
27 agreement does not assure the debtor is giving informed consent.

28 5. After describing to the debtor the risks of limited scope

1 representation, the attorney must give the debtor the opportunity  
2 to "shop elsewhere" for an attorney who will provide full  
3 representation before entering into the contractual relationship  
4 with the debtor for the limited scope.

5         6. The attorney should document as fully as possible all the  
6 steps taken to comply with these requirements.

7         Following these suggestions should go a long way to allowing  
8 consumer bankruptcy attorneys to unbundle adversary proceeding  
9 representation without violating ethical rules.

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