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Attorney Sanctions

In re Mervin and Jean Novak

698-65692-fra7

2/25/99

FRA

Unpublished

The U.S. Trustee filed a motion seeking to impose sanctions on Debtors' attorneys for failure to ensure the accuracy of the Debtors' Chapter 7 petition. The Debtors had filed a prior bankruptcy petition which was dismissed on June 10, 1997, approximately seven weeks after the petition date. The present case was filed on September 25, 1998 by the same attorneys who filed the earlier case.

The Debtors' schedules in the present case failed to disclose the existence of the prior case. The attorneys, while acknowledging the oversight, argued that the blame lay with the Debtors for failure to indicate the previous bankruptcy on the intake questionnaire. It was the firm's practice to rely solely on the questionnaire and no check was made of the firm's records, nor did the firm check for potential conflicts of interest.

At the hearing on the UST's motion, the court received evidence from the UST concerning another instance before Judge Radcliffe in which this firm had failed to indicate a previous bankruptcy and the court discussed instances in which similar problems were created by this firm in other cases before the court.

The court imposed a monetary sanction under FRBP 9011 of \$750 plus costs and a reasonable attorney fee for the U.S. Trustee. Additionally, the firm was ordered to establish an appropriate method for cross-checking their records to reveal past contacts and to submit their system to the Loss Prevention Department of the PLF of the Oregon State Bar for approval. Alternatively, the firm may establish and employ any system approved by the PLF.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re: ) Bankruptcy Case No.  
          ) 698-65692-fra7  
MERVIN D. NOVAK and )  
JEAN P. NOVAK, ) MEMORANDUM OPINION  
                                  ) )  
                                  ) Debtors. )

The United States Trustee has filed a motion seeking to impose sanctions on Debtors' attorneys for failure to ensure the accuracy of a key part of the Debtors' Chapter 7 petition. The motion is well taken, and sanctions shall be imposed.

This case was commenced on September 25, 1998. The Debtors had previously filed a petition for relief on April 18, 1997. The prior case was dismissed on June 10, 1997. In each case the Debtors were represented by the law firm of Olsen, Olsen & Morgan (hereinafter "Attorneys"). In this case Mr. Rex Daines, a member or associate of the Olsen firm, is listed as attorney of record. Bankruptcy petitions require disclosure of cases previously filed by the debtor. In the instant case the Debtors' schedules failed to disclose the 1997 bankruptcy. The Attorneys acknowledge that this

1 was an oversight, but lay the blame on the clients for failing to  
2 indicate the previous bankruptcy on an intake questionnaire.

3 Mr. Eric Olsen testified that it is the firm's practice to  
4 rely solely on these questionnaires. When new cases are commenced  
5 there is no reference to the firm's records<sup>1</sup> to ascertain whether  
6 any previous work was done for this client. Moreover, Mr. Olsen  
7 testified that the firm does not conduct checks for potential  
8 conflicts of interest. His reasoning for foregoing these checks was  
9 that the firm limited its practice to debtors.

10 The U.S. Trustee put into evidence a letter from Judge Albert  
11 E. Radcliffe of this Court dated August 7, 1998 to assist the  
12 Assistant U.S. Trustee Paul Garrick. The letter pointed out that  
13 Mr. Lars Olsen, of the subject law firm, had filed a petition for a  
14 client about three weeks after a previous case had been dismissed,  
15 and that the latter petition had failed to disclose the prior case.  
16 In response to that letter the firm wrote to Judge Radcliffe  
17 advising that his letter was "a subject of a recent staff meeting."  
18 Having stated that their office "takes every effort to ensure that  
19 bankruptcy petitions are accurate", the reasonable inference is that  
20 steps had been taken to prevent this sort of oversight in the  
21 future.

22 While these matters were being presented the Court reminded  
23 the Attorneys of an even earlier case before this Court in which the  
24 firm had been found to violate Rule 9011 for filing inconsistent

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25 <sup>1</sup> The records consist of ordinary paper files, a computer data base, and  
26 some sort of file card or paper based file for clients prior to 1995.

1 factual affidavits in two back-to-back cases for the same client.  
2 The Court found in that case<sup>2</sup> that counsel's failure to check its  
3 own files before filing the affidavit in the second case was a  
4 violation of BR 9011's requirement that factual assertions in papers  
5 filed with the court be supported by reasonable inquiry by the  
6 signer.

7 Fed.R.Bankr.P. 9011 provides, in part:

8 (a) Signature. Every petition, pleading, written  
9 motion, and other paper, except a list, schedule, or  
10 statement, or amendments thereto, shall be signed by  
11 at least one attorney of record in the attorney's  
12 individual name. A party who is not represented by an  
13 attorney shall sign all papers. Each paper shall state  
14 the signer's address and telephone number, if any. An  
15 unsigned paper shall be stricken unless omission of  
16 the error is corrected promptly after being called to  
17 the attention of the attorney or party.

18 (b) Representations to the Court. By presenting to the  
19 court (whether by signing, filing, submitting, or later  
20 advocating) a petition, pleading, written motion, or other  
21 paper, an attorney or unrepresented party is certifying that  
22 to the best of the person's knowledge, information, and  
23 belief, formed after an inquiry reasonable under the  
24 circumstances-

25 \* \* \*

26 (3) the allegations and other factual  
contentions have evidentiary support after a  
reasonable opportunity for further investigation  
or discovery;...

Bankruptcy petitions require disclosure of prior cases  
involving the same debtor. This information has a direct bearing on  
many issues, including whether the debtor is entitled to a  
discharge, and whether the case might be subject to dismissal. The

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<sup>2</sup> In re Dahm, Case No. 698-61616-fra7.

1 execution and presentation of a petition which fails to disclose a  
2 prior case is a material breach of counsel's duty to submit accurate  
3 documents. When the undisclosed case was handled by the same firm  
4 the breach requires sanction. The information is, or should be,  
5 readily available, and there is simply no excuse on this record for  
6 failing to check. The excuse that the attorneys rely on the  
7 debtor's questionnaires is inadequate under these circumstances.  
8 The Attorneys runs a high volume practice.<sup>3</sup> Multiple or serial  
9 filings are commonplace. Attorneys have a duty under Fed.R.Bankr.P.  
10 9011 to review their records to ensure that the petitions they  
11 prepare and sign disclose prior bankruptcy filings by the client.  
12 Given the two factors noted, and the importance of the information,  
13 the duty is particularly important in this context.

14 The Rule contains the following provisions regarding  
15 sanctions:

16 (2) Nature of Sanction; Limitations. A sanction  
17 imposed for violation of this rule shall be limited to  
18 what is sufficient to deter repetition of such conduct  
19 or comparable conduct by others similarly situated.  
20 Subject to the limitations in subparagraphs (A) and  
21 (B), the sanction may consist of, or include,  
22 directives of a nonmonetary nature, an order to pay a  
23 penalty into court, or, if imposed on motion and  
24 warranted for effective deterrence, an order directing  
25 payment to the movant of some or all of the reasonable  
26 attorneys' fees and other expenses incurred as a  
direct result of the violation.

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25 <sup>3</sup> It was testified that the firm filed about 2,000 cases a year. Later,  
26 the estimate was pared back to 1,500 cases. Even the lower figure would amount  
to 8.4% of the total number of cases filed in the District of Oregon in 1998.

1           An appropriate sanction in this case must be fashioned with  
2 two goals in mind: Deterrence of future misconduct, and direction of  
3 the offending attorneys toward practices which will better protect  
4 the court and the public from future misconduct. In light of  
5 previous admonitions, a simple reprimand will not suffice. A fine  
6 should be imposed, in an amount reasonably necessary to reflect the  
7 seriousness of the offending conduct, and to vindicate the authority  
8 of the Court.

9           The Court is of the opinion that a fine will not by itself  
10 cause the necessary changes in the attorney's practices. It is also  
11 appropriate to take affirmative actions to correct the problems set  
12 out in this opinion.

13           Accordingly, an order will be entered providing as follows:

14           1. The firm of Olsen, Olsen and Morgan, and attorney Rex  
15 Daines will pay a monetary penalty in the sum of \$750.00. Payment,  
16 in the form of a check payable to the United States Treasury, shall  
17 be delivered to the clerk within 14 days of the date this opinion is  
18 docketed.

19           2. The firm of Olsen, Olsen and Morgan, and attorney Rex  
20 Daines shall reimburse the Office of the United States Attorney for  
21 its reasonable attorneys fees incurred in this matter.

22           3. The firm shall establish and thereafter employ an  
23 appropriate method for cross checking each new case or client with  
24 the firm's records in order to reveal past contacts, including the  
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1 preparation and/or filing of bankruptcy petitions.<sup>4</sup> The system  
2 shall be submitted to the Loss Prevention Department of the  
3 Professional Liability Fund of the Oregon State Bar for its review  
4 and approval. Alternatively, the firm may establish and employ any  
5 system recommended by the Professional Liability Fund. An affidavit  
6 attesting under penalty of perjury that the firm has complied with  
7 this provision shall be submitted within 60 days of the date of this  
8 order. The affidavit shall describe the system established pursuant  
9 to this order.

10 This Memorandum contains the Court's findings of fact and  
11 conclusions of law, which will not be separately stated. Counsel  
12 for the UST shall submit a form of order consistent with this  
13 memorandum, together with a Bill of Costs setting out the UST's  
14 reasonable attorneys fees and costs incurred in connection with this  
15 matter.

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18 FRANK R. ALLEY, III  
19 Bankruptcy Judge  
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25 <sup>4</sup> It bears noting that, if a prior file is discovered, the  
26 attorneys will have a duty to review the file's contents and inquire  
as to any discrepancy between that information and the information  
provided by the debtor in connection with the second case.