Sanctions Table

Prepared by U.S. Bankruptcy Judge Neil W. Bason, Central District of California[1]

NOTES: (1) Limited authorization to use this table. Judge Bason and his law clerks have prepared this table for their own use and they occasionally revise it, but without necessarily engaging in exhaustive research on any given topic. Readers are authorized to use this table as an aid, not a substitute, for their own research (*e.g.*, Shepardize all cites). This table may not be reproduced without written permission from Judge Bason.
(2) Attorney discipline: Consider ABA standards.[2] (3) Sanctions generally: Address jurisdiction and authority,[3] provide detailed notice and generally a hearing,[4] protect attorney-client privilege,[5] consider whether alleged wrongdoer requires protections akin to criminal proceedings,[6] and for multiple wrongdoers consider joint and several liability or allocation of sanctions among them.[7]

Authority[8]	*Prerequisites*	*Compen-satory $*[9]	*Sanctions $ (a) Pay to party (b) Pay to court*	*Atty Fees*	*Other/Notes (for serious sanctions, consider referral to disciplinary panel)*[10]
9011(c)(1)(A) Motion[11]	(1) 21 day chance to withdraw/correct[12], (2) objectively unreason-able conduct,[13] (3) motion not combined with other requests[14]	Yes as warranted for effective deterrence[15]	(a) Yes (b) Yes	Yes	"Directives of a non-monetary nature"[16] Which includes (1) vexatious litigant order,[17] (2) suspension/disbarment,[18] (3) bench warrant?? (4) evidentiary sanctions??[19]
9011(c)(1)(B) on court's initiative[20]	OSC describing specific conduct issued prior to withdrawal or settlement of issue; "akin to contempt"?[21]	No[22]	(a) No[23] (b) Yes	No[24]	(same?)
Inherent power[25]	(1) Notice (& opp. for hrg?)[26] (2) explicit *(or implied?[27])* finding of bad faith or willful misconduct;[28] (3) clear & convincing evid?[29]	Yes	(a) Yes,[30] (b) Yes,[31] but no "serious" sanctions (>$5k, 1989 dollars?)[32]	Yes[33]	Same?? (1) Vexatious litigant?? (2) Suspension/disbarment[34] (3) Bench warrant (body detention)?? Note: "technical" or "inadvertent" violations will not support sanctions under inherent power[35]

Authority[8]	*Prerequisites*	*Compen-satory $*[9]	*Sanctions $ (a) Pay to party (b) Pay to court*	*Atty Fees*	*Other/Notes (for serious sanctions, consider referral to disciplinary panel)*[10]
Contempt-Civil § 105(a) (compensatory, or coercive *i.e.* sanctions must cease upon compliance)[36]	(1) Specific & definite order (incl. automatic orders *e.g.* stay); [37] (2) notice & opp. for hearing; (3) clear & convincing evid;[38] (4) enforce via contested matter not AP[39]	Yes, limited to "actual damages" (including atty fees seeking compliance with order)[40]	(a) Yes??[41] (b) Yes, but no serious sanctions …[42]	Yes[43]	Same?? (1) Vexatious litigant, (2) suspension/disbarment, (3) bench warrant (body detention), (4) fines or incarceration until compliance.[44] Notes: (a) "failure to take all reasonable steps within the party's power to comply" is sanctionable;[45] (b) intent is irrelevant and good faith is not a defense, unless coupled with reasonable interpretation of order;[46] (c) inability to comply with the order is a defense, but "self-induced inability is not a defense,"[47] (d) "technical" or "inadvertent" violations will not support contempt finding[48]
Contempt-Crim. (punitive)	N/A				
28 U.S.C. § 1927	N/A[49]				
Removal 28 U.S.C. §1447(c)	Must be tied to specific removal, by virtue of the language "incurred as a result of the removal."[50]	Yes[51]	(a) No (b) No	Yes[52]	
362(k) [formerly 362(h)]	Individual[53] injured by willful[54] violation	Yes	(a) Yes (b) No??	Yes[55]	Emotional distress damages ok[56]; punitive damages ok.[57]

Authority[8]	*Prerequisites*	*Compen-satory $*[9]	*Sanctions $* *(a) Pay to party* *(b) Pay to court*	*Atty Fees*	*Other/Notes* *(for serious sanctions, consider referral to disciplinary panel)*[10]
7037, Discovery Sanctions					Evidentiary presumptions[58]; exclusion of witness[59]; terminating sanctions[60]
7041 (FRCP 41(b)), Dismissal for lack of prosecution[61]	Limited to extreme circumstances; requires showing of unreasonable delay				Trial court must weigh 5 factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits[;] and (5) the availability of less drastic sanctions."[62]

Authority[8]	*Prerequisites*	*Compen-satory $*[9]	*Sanctions $ (a) Pay to party (b) Pay to court*	*Atty Fees*	*Other/Notes (for serious sanctions, consider referral to disciplinary panel)*[10]
All Writs Act[63] 28 U.S.C. §1651	(1) Notice & opp for hrg; (2) adequate record for review; (3) for vexatious litigant order: substantive findings as to the frivolous or harassing nature of the actions; (4) narrowly tailored to fit the specific vice at issue				Vexatious Litigant (filing injunctions)
LBR[64] 1001-1(f)	Non-compliance with LBR, FRCP, FRBP or any court order				LBR authorizes “imposition of sanctions”
LBR[65] 2090-2	Cause to believe counsel engaged in unprofessional conduct				(1) civil or criminal contempt (2) “other appropriate sanctions” (3) referral to disciplinary authority for state or jurisdiction in which counsel is licensed to practice (4) refer matter per Local Civil Rule 83-3 or General Order 96-05
LBR[66] 9020-1 Contempt	Filed motion per 9013-1 with proposed OSC, showing cause via (1) written explanation and (2) appearance at hearing				Civil contempt and sanctions

Enforcement/Referrals/Reporting/Settlement

Agency/Court	*Method of Referral/Report*	*Possible agency actions*
The State Bar of California	Complete and submit Discipline Referral Form to: The State Bar of California Office of the Chief Trial Counsel Intake Department 845 South Figueroa Street Los Angeles, CA 90017-2515	If State Bar determines probable misconduct is present, action is referred to State Bar Court, which may (1) issue public or private reprovals, (2) recommend the California Supreme Court disbar or suspend attorneys, or (3) temporarily remove attorneys from practice of law where they present a substantial threat of harm to clients/public. Costs may be imposed per Cal. Bus. & Prof. Code 6086.10.[67]
U.S. District Court, Standing Committee on Discipline, for criminal/punitive contempt[68]	Submit complaint in writing to the USDC Standing Committee on Discipline, c/o Clerk of Court	Per Local Civil Rule 83-3.1.3, possible penalties include: (1) disbarment; (2) suspension not to exceed three years; (3) public or private reproval; (4) monetary penalties (may incl. order to pay costs of proceedings); (5) and/or acceptance of resignation.
U.S. Attorney's Office	Court may submit Criminal Referral Notification Statement to: Administrative Office of the United States Courts, Bankruptcy Judges Division One Columbus Circle, N.E. Washington, DC 20544 With a copy to: Patti Brundige Supervisory Paralegal Specialist United States Trustee 915 Wilshire Blvd., Suite 1850 Los Angeles, CA 90017	
American Bar Association, Center for Professional Responsibility	Submit disciplinary orders to the National Lawyer Regulatory Data Bank: National Lawyer Regulatory Data Bank Center For Professional Responsibility American Bar Association 321 North Clark Street Chicago, IL 60610	N/A – database, "central repository of information to facilitate reciprocal discipline and to help prevent the admission of lawyers who have been disbarred or suspended elsewhere." [69]

Agency/Court	Method of Referral/Report	Possible agency actions
Settlement (by private parties, as distinguished from settlements as part of disciplinary proceedings)	N/A	California law and rules limit the ability of a settlement between private parties to restrict a professional's practice.[70]

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[1] Judge Bason gratefully acknowledges the assistance of his present and former law clerks and externs in preparing this table, including especially his former law clerk Angella Yates, Esq.

[2] Attorney discipline - ABA standards recommended but not mandatory. The BAP has held that the ABA standards are persuasive but it is no longer reversible error not to follow them provided that (1) the disciplinary proceeding is fair, (2) the evidence supports the findings, and (3) the penalty imposed was reasonable. *In re Nguyen*, 447 B.R. 268 (9th Cir. BAP 2011) (en banc reconsideration of *In re Crayton*, 192 B.R. 970 (9th Cir. BAP 1996)). *See In re Brooks-Hamilton*, 400 B.R. 238, 252-53 (9th Cir. BAP 2009) (under ABA standards, "the bankruptcy court should consider: (1) whether the duty violated was to a client, the public, the legal system or the profession; (2) whether the lawyer acted intentionally, knowingly or negligently; (3) whether the lawyer's misconduct caused a serious or potentially serious injury; and (4) whether aggravating factors or mitigating circumstances exist."). *See also In re Lehtinen*, 564 F.3d 1052, 1062 (9th Cir. 2009) ("In the federal system there is no uniform procedure for disciplinary proceedings. The individual judicial districts are free to define the rules to be followed and the grounds for punishment.") (citation and internal quotation marks omitted), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017); *In re Larry's Apt., LLC,* 249 F.3d 832, 838-39 (9th Cir. 2001) (federal, not State, sanctions rules apply in bankruptcy cases). Note that, although State sanctions rules are not binding (*id.*), they can be persuasive authority; and California has revised its ethics rules (effective 11/1/18) to be closer to the ABA Model Rules.

[3] Jurisdiction, and *Stern v. Marshall*, 131 S.Ct. 2594 (2011). In general, if a bankruptcy case is dismissed without reserving jurisdiction on a given issue, the bankruptcy court might not have post-dismissal jurisdiction. *See generally In re Lawson,* 156 B.R. 43 (9th Cir. BAP 1993). But reserving jurisdiction probably works. *See id. and In re Eighty South Lake, Inc.,* 81 B.R. 580 (9th Cir. BAP 1987). *See also* L.B.R. 1017-2 (Cent. Dist. Cal.) ("Notwithstanding any dismissal, the court retains jurisdiction regarding all issues involving sanctions ….").

As for *Stern v. Marshall* issues, Judge Bason has held that sanctions proceedings are constitutionally "core" for purposes of the bankruptcy court's authority to enter a final judgment or order in such proceedings. *See Rubye Taylor*, et al. *v. James B. Nutter & Company*, et al., 2:15-ap-01183-NB, dkt. 131, pp. 11:14-14:2, *rev'd on other grounds* (9th Cir. BAP CC-16-1376-KuLTa, 8/9/17, unpublished). *See also In re David*, 487 B.R. 843, 867 (Bankr. S.D.Tex. 2013) (holding sanctions proceedings were constitutionally "core" without analysis); *and see generally In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D.Cal. 2016) (examination of *Stern* policies applied in various contexts).

[4] Notice and a hearing. "When an attorney is subject to discipline, he or she has a right to notice and an opportunity to be heard." *In re Nguyen,* 447 B.R. 268, 278 (9th Cir. BAP 2011) (citations omitted). *But see In re Icenhower,* 755 F.3d 1130, 1139 (9th Cir. 2014) ("If the alleged contemnor does not raise a question of fact through affidavits, and does not seek the opportunity to present its defense through live testimony, a court does not violate that party's due process rights by holding it in contempt solely based on affidavits.") (citations omitted).

[5] Attorney-client privilege: For the "crime-fraud exception" see *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996); *In re Grand Jury Subpoena*, 31 F.3d 826, 830 (9th Cir. 1994) (*in camera* review authorized based on "reasonable belief" that such review may lead to evidence that the exception applies"). *See also In re Icenhower,* 755 F.3d 1130, 1141 (9th Cir. 2014) (invoking "advice of counsel" defense waived attorney-client privilege in context of crime-fraud exception).

[6] Criminal due process if sanctions might be punitive? At least one court has required special procedures. *See In re Winslow*, 131 B.R. 171, 173, *later proceedings*, 132 B.R. 1020 (D. Colo. 1991) (even without criminal contempt, if civil contempt could result in incarceration, the subject should be informed of right to counsel and right to have counsel appointed if indigent).

[7] Allocation of sanctions/joint and several liability. As between wrongdoing counsel and client, allocate according to their relative culpability. *In re Rainbow Magazine, Inc.,* 136 B.R. 545, 554 (9th Cir. BAP 1992) (allocation between client and counsel in context of bad faith bankruptcy filing), *sanctions aff'd after remand,* 77 F.3d 278 (9th Cir. 1996); *BAP decision superseded on other grounds as noted by In re Lapin,* 226 B.R. 637, 641 (9th Cir. BAP 1998) (sanctions against non-party can be awarded under court's inherent powers).

[8] Authority - court should notify the person charged of the *precise* authority for sanctions. *See In re DeVille*, 361 F.3d 539, 548-50 & n.4 (9th Cir. 2004) (bankruptcy court's notice was sufficient, despite not specifically identifying its inherent authority as one ground for sanctions, in the particular circumstances, but

"[w]e do not expect … that the result reached here will be often justified in future cases where the sanctioned party was not explicitly informed beforehand of the precise ground for the imposition of sanctions"). *See also In re Pham*, 2017 WL 5148452, *9 (9th Cir. BAP Nov. 6, 2017) (reversing sanctions award because party "had no notice that this conduct was a basis for the sanctions being sought").

[9] Compensatory not punitive = "but for" causation. *See GoodyearTire & Rubber Co. v. Hager,* 137 S.Ct. 1178 (2017) (rejecting award of all attorney fees, including prior to when sanctionable conduct occurred); *and see also* discussion of Civil Contempt v. Criminal Contempt below. *But see Crossfit, Inc. v. Nat'l Strength & Conditioning Ass'n*, 2017 WL 4700070 at *3-4 (S.D. Cal. Oct. 19, 2017) (declining to extend *Goodyear* "but-for" test to all sanctions and limited the causal link to sanctions involving attorney's fees).

[10] Referral to disciplinary panel discretionary, but strongly urged by BAP. "Although the Panel's prior decisions do not require that the bankruptcy court refer the matter to the [disciplinary panel], we *strongly* urge the bankruptcy court to do so, … [so that] the bankruptcy court will avoid the awkward responsibility for serving as 'prosecutor and arbiter in the investigation, prosecution and discipline' of [the attorney]." *In re Brooks-Hamilton*, 400 B.R. 238, 253 (9th Cir. BAP 2009); *see also In re Crayton*, 192 B.R. 970, 978 (9th Cir. BAP 1996). The Ninth Circuit has rejected an argument that a lack of referral to a standing committee was reversible error (when the local rules made such referrals discretionary). *In re Lehtinen*, 564 F.3d 1052, 1062 (9th Cir. 2009), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017). For Bankr. C.D. Cal. disciplinary panel procedures, *see* (FifthAmended) General Order 96-05.

[11] 9011 – same standards as Rule 11 (FRCP). Because the "pertinent language of these rules [Rule 9011 FRBP and Rule 11 FRCP] is virtually identical, authorities analyzing Rule 11 are applicable to the Rule 9011 analysis." *In re Rainbow Magazine, Inc.,* 136 B.R. 545 (9th Cir. BAP 1992), *aff'd after remand,* 77 F.3d 278 (9th Cir. 1996); *BAP decision superseded on other grounds as noted by In re Lapin,* 226 B.R. 637, 641 (9th Cir. BAP 1998). *See also In re Silberkraus,* 336 F.3d 864, 870 (9th Cir. 2003) (describing nature of certifications, and examining sliding scale of frivolousness and improper purpose: "where the more compelling the showing as to one element, the less decisive need be the showing as to the other") (quoting *In re Marsch,* 36 F.3d at 830). A filing is frivolous if it is "both baseless and made without a reasonable and competent inquiry." *Townsend v. Holman Consulting Corp.,* 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc).

[12] 9011 (motion) – 21-day "safe harbor" and exception for petition. No "safe harbor" (21-day opportunity to withdraw/correct) if the conduct at issue is the filing of a bankruptcy petition in violation of F.R.B.P. 9011(b). F.R.B.P. 9011(c)(1)(A) (2014). Rule 11 (Fed. R. Civ. P.) contemplates service of a "filing-ready motion" 21 days prior to filing the actual motion with the court in order to trigger the safe harbor period. *Truesdell v. S. Cal. Permanente Med. Grp.,* 293 F.3d 1146, 1151 (9th Cir. 2002).

[13] 9011 (motion) – objectively unreasonable conduct. "'The imposition of Rule 11 sanctions…requires only a showing of objectively unreasonable conduct.'" *In re DeVille*, 361 F.3d 539, 548 (9th Cir. 2004) (*quoting Fellheimer, Eichen & Braverman v. Charter Technologies,* 57 F.3d 1215, 1225 (3d Cir.1995))

[14] 9011 (motion) – cannot be combined with other requests. Correspondence does not substitute for a formal motion. *Barber v. Miller,* 146 F.3d 707, 710 (9th Cir. 1998). *See also Radcliffe v. Rainbow Construction Co.,* 254 F.3d 772 (9th Cir. 2001); *Roth v. Green,* 466 F.3d 1179, 1192 (10th Cir. 2006) ("[T]he Advisory Committee's Notes clearly suggest that warning letters . . . are supplemental to, and cannot be deemed an adequate substitute for, the service of the motion itself.").

[15] 9011 (motion) - no monetary sanctions against parties represented by counsel for 9011(b)(2) violation. Monetary sanctions may be ordered against the represented party's counsel, but not against the party him/her/itself. *See* F.R.B.P. 9011(c)(2)(A) (2014) ("Monetary sanctions may not be awarded against a represented party for violation of [F.R.B.P. 9011](b)(2).")

[16] 9011 (motion or OSC) - nonmonetary directives authorized. *See* F.R.B.P. 9011(c)(2) (2014) ("[T]he sanction [under F.R.B.P. 9011] may consist of, or include, directives of a nonmonetary nature….").

[17] 9011 (motion or OSC) -vexatious litigants. In a discussion of "available sanctions" under F.R.B.P. 9011, "[c]ourts have ordered non-monetary sanctions including enjoining litigants…from bringing similar suits without leave of the court." *In re Upland Partners*, 2006 WL 980583 at *9 (Bankr. D. Hawai'i, Mar. 15, 2006) (imposing filing injunction on litigant). *See also Fariello v. Campbell*, 860 F.Supp. 54, 71 (E.D.N.Y. 1994) (imposing pre-filing review sanction on vexatious pro se litigant pursuant to F.R.C.P. 11).

VEXATIOUS LITIGANTS GENERALLY *See generally In re Stanwyck,* 450 B.R. 181, 200-08 (Bankr. C.D. Cal. 2011) (Carroll, C.J.). *In re Fillbach,* 223 F.3d 1089, 1090 (9th Cir. 2000) (discretion to dismiss action for failure to comply with vexatious litigant pre-filing order). *See* also *In re Rainbow Magazine, Inc.,* 77 F.3d 278, 284 (9th Cir. 1996) ("[B]ankruptcy courts have the inherent power to sanction vexatious conduct presented before the court.").

(A) Extreme remedy. *See Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1057 (9th Cir. 2007) (*citing De Long v. Hennessey, et al.*, 912 F.2d 1144, 1147 (9th Cir. 1990) ("[P]re-filing orders are an extreme remedy that should rarely be used.")). Before imposing sanctions, court must:

(1) give litigants notice and "an opportunity to oppose the order before it [is] entered"; (2) compile an adequate record for appellate review, including "a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed"; (3) make

substantive findings of frivolousness or harassment; and (4) tailor the order narrowly so as "to closely fit the specific vice encountered." [*Ringgold-Lockhart v. Cty. of L.A.*, 761 F.3d 1057, 1062 (9th Cir. 2014) (citation and internal quotation marks omitted).]

(B) Factors. In *De Long*, the Ninth Circuit set out the four factors in the above table (*see* All Writs Act) for district courts to examine before entering pre-filing orders. *See De Long v. Hennessey, et al.*, 912 F.2d 1144 (9th Cir. 1990). The Ninth Circuit has also held that the factors set forth by the Second Circuit in *Safir v. U.S. Lines, Inc.*, 792 F.2d 19 (2d Cir. 1986) "provide[] a helpful framework for applying the [third and fourth] factors" set forth in *De Long*. *Molski v. Evergreen Dynasty Corp.*, 400 F.3d 1047, 1058 (9th Cir. 2007). The five *Safir* factors are as follows:

(1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing?; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused needless expense to other parties or has posed an unnecessary burden on the courts and their personnel; and (5) whether other sanctions would be adequate to protect the courts and other parties. *Safir*,792 F.2d at 24.

An "inordinate" number of frivolous filings is required, but those filings can arise in a single bankruptcy case, and can be "frivolous" even if some parts of them have merit; and although the bankruptcy court must use pre-filing order only as a "last resort," dismissal of the bankruptcy case sometimes is not effective because it is exactly what the debtor wants; denial of discharge is ineffective if the discharge has already been denied on other grounds; and wasting estate's limited resources can establish the necessity of a pre-filing order. *In re Koshkalda,* __ B.R. __ (9th Cir. BAP 12/7/2020).

"An adequate record for review should include a listing of all the cases and motions that led the district court to conclude that a vexatious litigant order was needed." Ringgold-Lockhart, 761 F.3d at 1063 (citing De Long, 912 F.2d at 1147).

(C) Only *pro se* parties? The U.S. District Court for the Central District of California has held that "a represented party ordinarily is incapable of being declared a vexatious litigant," finding the rationale of CCP § 391(b) (vexatious litigant statute limited to unrepresented parties) instructive in interpreting the All Writs Act (28 U.S.C. § 1651(a)). *Doran v. Vicorp Restaurants, Inc.*, 407 F.Supp.2d 1115, 1118 (C.D. Cal. 2005) ("Attorneys…are bound by rules of ethics and…rely on their reputation in the community to sustain their careers. Attorneys therefore are much less likely to file frivolous claims, even[] absent the threat of their clients being declared vexatious litigants."). *But see, Matter of Hartford Textile Corp.*, 681 F.2d 895, 896 (2d Cir. 1982) (enjoining individual and her attorney from filing certain papers in the U.S. Bankruptcy Court, SDNY; SDNY; and the U.S. Court of Appeals for the Second Circuit where the case had "an almost unparalleled history of frivolous and repetitious claims, motions, petitions, demands, and appeals….").

[18] 9011 (motion or OSC) – suspension or disbarment. The BAP has held that "[b]ankruptcy courts…have express authority under the Code and the Rules to sanction attorneys, including disbarment or suspension from practice." *In re Nguyen,* 447 B.R. 268, 281 (9th Cir. BAP 2011) (*citing* F.R.B.P. 9011, 11 U.S.C. § 105(a), and Bankr. N.D. Cal.'s LBR 1001-2).

[19] 9011 (motion or OSC) evientiary sanctions. See discovery sanctions below.

[20] 9011 – same standards as Rule 11 (FRCP). See first "9011" endnote above.

[21] 9011 (OSC) mens rea. When the court initiates sanctions under Rule 9011, the conduct must be "akin to contempt" which requires "more than ignorance or negligence on the part of [the attorney]." *In re Nakhuda,* 544 B.R. 886, 902 (9th Cir. BAP 2016).

[22] 9011 (OSC) - compensatory damages not available. *See* F.R.B.P. 9011(c)(1)(B) & (c)(2); *Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998) (*quoting* Fed. R. Civ. P. 11, Adv. Comm. Notes, 1993 Amend. ("[A] monetary sanction imposed after a court-initiated show cause order [is] limited to a penalty payable to the court.")).

[23] 9011 (OSC) – sanctions only payable to court, not party. *Id.*

[24] 9011 (OSC) – attorney fees not available. *Id.*; *see also In re Loyd*, 304 B.R 372, 374 (9th Cir. BAP 2003).

[25] ***INHERENT POWER V. CIVIL CONTEMPT (§ 105(a))***

(A) Differences. "Civil contempt authority allows a court to remedy a violation of a specific order (including 'automatic' orders, such as the automatic stay or discharge injunction). The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." In addition, "[b]efore imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct" which "consists of something more egregious than mere negligence or recklessness." *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) (emphasis added, citations and internal quotation marks omitted). This has been stated more broadly as requiring either bad faith, conduct tantamount to bad faith, or recklessness with an "additional factor such as frivolousness, harassment, or an improper purpose." *Fink v. Gomez,* 239 F.3d 989, 994 (9th Cir. 2001) (emphasis added). *See also In re DeVille,* 280 B.R. 483, 495 (9th Cir. BAP 2002) ("a court may sanction pursuant to its inherent authority even when the same conduct may also be punished under another sanctioning statute or rule.") (string citation omitted), *aff'd,* 361 F.3d 539 (9th Cir. 2004).

(B) Congress vested bankruptcy courts with inherent powers. *See In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("bankruptcy courts, like district courts, also possess [the] inherent power" to sanction "bad faith" or "willful misconduct" because "the very creation of the court" establishes such inherent power "unless Congress intentionally restricts those powers," and Congress' intent is confirmed by § 105(a)). *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) (citations omitted). *See generally Chambers v. NASCO, Inc.,* 501 U.S. 32 (1991) (extensive discussion of federal courts' inherent powers, with extensive dissents).

(C) Constitutional limits? In view of *Stern v. Marshall*, it is not entirely settled whether the bankruptcy court has any "inherent" sanctioning powers, nor whether §105(a) includes sanctioning powers, nor whether any such powers apply in parallel with statutory provisions that provide for other remedies.

[26] Inherent power – adequate notice. "[W]hen using the inherent sanction power, due process is accorded as long as the sanctionee is 'provided with sufficient, advance notice of exactly which conduct was alleged to be sanctionable, and [was] furthermore aware that [he] stood accused of having acted in bad faith.'" *In re Lehtinen*, 564 F.3d 1052, 1060 (9th Cir. 2009) (*quoting In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004)), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017).

[27] Inherent power – *implied* finding of bad faith *might* be sufficient. *In re Lehtinen*, 564 F.3d 1052, 1061 (9th Cir. 2009) (implied finding was sufficient), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017).

[28] Inherent power – bad faith /willful misconduct. *See In re De Jesus Gomez*, 592 B.R. 698, 708 (B.A.P. 9th Cir. 2018) (affirming sanctions where "this recklessness [of the conduct] appears coupled with frivouslous arguments and actions."). *See In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009) (*quoting In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003) ("Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct."), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017); *In re DeVille*, 280 B.R. 483, 495 (9th Cir. BAP 2002) (*quoting Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-6 (1991)) ("To impose inherent power sanctions, a court must find that a party acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'"), *aff'd*, 361 F.3d 539 (9th Cir. 2004).

[29] Inherent power – clear and convincing evidence. Appellate courts review the calculation of attorneys fees (as award of sanctions) for an abuse of discretion. *Goodyear Tire & Rubber Co. v. Haegar*, 137 S. Ct. 1178, 1184 (2017).

[30] Inherent power – sanctions payable to party or to court. *Mark Industries, Ltd. v. Sea Captain's Choice, Inc.*, 50 F.3d 730, 733 (9th Cir. 1995) (upholding, though limiting, order of monetary sanctions payable to court under court's inherent authority)

[31] Inherent power – sanctions payable to court, and punitive sanctions. "This Court has made clear that [fee-shifting], when imposed pursuant to civil procedures, must be compensatory rather than punitive in nature." *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017) (citing *Mineworkers v. Bagwell*, 512 U.S. 821, 826–30 (1994) (extensive discussion of when a sanction is punitive and what procedural protections may be required, such as proof beyond a reasonable doubt, at least when not addressing "petty, direct contempts" in the presence of the court.)). "[T]he inherent sanction authority 'does not authorize *significant* punitive damages.'" *In re Lehtinen*, 564 F.3d 1052, 1059 (9th Cir. 2009) (emphasis added) (*quoting In re Dyer*, 322 F.3d 1178, 1197 (9th Cir. 2003)), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017). Dyer uses the terms "serious" and "significant" punitive sanctions interchangeably, and distinguishes them from "relatively mild" punitive sanctions.

[32] **CIVIL CONTEMPT (compensatory or coercive) v. CRIMINAL CONTEMPT (punitive).**

(A) Distinction: "When the petitioners carry the keys of their prison in their own pockets, the action is essentially a civil remedy." *Shillitani v. United States*, 384 U.S. 364, 368 (1966). The Ninth Circuit has "explained the difference between civil sanctions and criminal sanctions: Civil penalties must either be compensatory or designed to coerce compliance. In contrast, a flat unconditional fine totaling even as little as $50 could be criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance, and the fine is not compensatory. This is so regardless of whether the noncompensatory fine is payable to the court or to the complainant [although] [w]hether the fine is payable to the complainant may … be one relevant factor in determining whether the fine is compensatory or punitive." *In re Dyer*, 322 F.3d 1178, 1192 (9th Cir. 2003) (citations and internal quotation marks omitted). "Where the fine is not compensatory, it is civil only if the contemnor is able to avoid paying the amount imposed by performing the act required by the court's order." *In re Count Liberty, LLC*, 370 B.R. 259, 274-5 (Bankr. C.D. Cal. 2007). "A sanctioning court must determine which fees were incurred because of, and solely because of, the misconduct at issue (however serious, or concurrent with a lawyer's work, it might have been)." *Goodyear Tire & Rubber Co. v. Haegar*, 137 S. Ct. 1178, 1189 (2017).

(B) "Serious" v. "relatively mild" sanctions. Bankruptcy court may not impose "serious" punitive sanctions, although "relatively mild non-compensatory fines may be necessary under some circumstances." *In re Dyer*, 322 F.3d 1178, 1193 & n.16 (9th Cir. 2003) (citations omitted) ("As we did in *Hanshaw,* [244 F.3d 1128, 1140 n. 10 (9th Cir. 2001)] we leave for another day the development of a precise definition of the term 'serious' punitive

(criminal) sanctions") (but note that *Dyer* summarizes one case as "implying that any fine above $5,000 would be serious, but declining to reach the question," and *Dyer* cites another case as affirming a "non-compensatory fine of $250 on an attorney in order to vindicate local rules.")). *See also Hanshaw,* 244 F.3d 1128, 1139 n.10 (referring to $5,000 in "1989 dollars" as implicit cutoff for "serious" sanctions, but implying that contemnor's ability to pay sanction may bear on whether the sanction is "serious") (citations omitted).

[33] Inherent power – attorney fees. "The court, when using its inherent sanctioning authority (and civil procedures), to establish a causal link—between the litigant's misbehavior and legal fees paid by the opposing party. That kind of causal connection . . . is appropriately framed as a but-for-test; The complaining party . . . may recover 'only the portion of his fees that he would not have paid but for' the misconduct." *Goodyear Tire & Rubber Co. v. Haegar*, 137 S. Ct. 1178, 1186-87 (2017). See *In re DeVille*, 361 F.3d 539 (9th Cir. 2004) (upholding bankruptcy court's use of inherent power to support sanction of attorney's fees and costs). See discussion of FEES ON FEES below.

[34] Inherent power – suspension/disbarment. *See In re Lehtinen*, 564 F.3d 1052 (9th Cir. 2009), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017); *In re Crayton*, 192 B.R. 970, 976 (9th Cir. BAP 1996).

[35] Inherent power – "technical" or "inadvertent" violations are "not enough to support a sanction award under the inherent authority." *In re Dyer*, 322 F.3d 1178, 1197-98 (9th Cir. 2003) (citation omitted) (creditor and his counsel "announced in [their] letter, in advance, their intent to record the deed [of trust]" and it is "hard to believe" that they would have done so "had they realized that doing so would violate a court order" so their violation of the automatic stay (which is the equivalent of a court order) was inadvertent, although their subsequent failure and refusal to cure that violation was willful).

[36] Civil contempt § 105(a) – generally. See endnote *Inherent Powers v. Civil Contempt (§105(a))*, *supra*. *See also In re Zilog,* 450 F.3d 996, 1008 n.12 (9th Cir. 2006) (noting that contempt orders for violations of either the discharge injunction or the automatic stay are governed by the same standards).

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. [11 U.S.C. § 105(a)]

[37] Civil contempt (§ 105(a)) – "specific and definite order" required. *In re Dyer*, 322 F.3d 1178, 1190 (9th Cir. 2003) (citation omitted); *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009), *abrogated on other grounds, as stated in In re Gugliuzza*, 852 F.3d 887, 898 (9th Cir. 2017).

[38] Civil contempt (§ 105(a)) – clear and convincing evidence required. *FTC v. Affordable Media, LLC,* 179 F.3d 1228, 1239 (9th Cir. 1999).

[39] Civil contempt (§ 105(a)) – enforce via Contested Matter not Adversary Proceeding: Civil contempt must be sought by contested matter rather than an adversary proceeding. See *Barrientos v. Wells Fargo Bank, N.A.*, 633 F.3d 1186, 1190-91 (9th Cir. 2011). For example, a bankruptcy court may dismiss a complaint seeking contempt sanctions for violation of the discharge injunction. *Id*. at 1188. If an adversary proceeding has already occurred then the error may be harmless (no need to redo as contested matter). *Nash v. Clark Cnty. Dist. Atty's. Office (In re Nash)*, 464 B.R. 874, 879 (9th Cir. BAP 2012).

[40] Civil contempt (§ 105(a)) – limits on compensatory damages. "A compensatory fine must be limited to actual damages incurred as a result of the violation. Actual loss includes attorneys fees and costs incurred in securing compliance with the order." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) (internal citations omitted). Consequential damages: can be awarded. *In re Costa,* 172 B.R. 954, 964-65 (Bankr. E.D. Cal. 1994). Causation: According to one 4th Circuit decision, damages are recoverable to extent that the court finds that the contumacious behavior "significantly contributed to the [harm] and that such a result was forseeable." *In re General Motors Corp.,* 110 F.3d 1003, 1018 (4th Cir. 1997).

[41] Civil contempt (§ 105(a)) – sanctions payable to party. "[A] fine may be payable to the complainant as compensation for damages caused by the contemnor's noncompliance." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007). But sanctions are within the bankruptcy court's "discretion." *In re Bennett,* 298 F.3d 1059, 1069-70 (9th Cir. 2002).

[42] Civil contempt (§ 105(a)) – sanctions payable to court. "[A] fine that would be payable to the court is…remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." *In re Count Liberty, LLC*, 370 B.R. 259, 273 n.37 (Bankr. C.D. Cal. 2007) (citation and internal quotation marks omitted).

[43] Civil contempt (§ 105(a)) – attorney fees. "We emphasize that attorneys' fees are an appropriate component of a civil contempt award." *In re Dyer*, 322 F.3d 1178, 1195 (9th Cir. 2003); *see also In re Count Liberty, LLC,* 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) ("Actual loss includes attorneys fees and costs incurred in securing compliance with the order."). See discussion of FEES ON FEES below.

[44] Civil contempt (§ 105(a)) – remedies.

(A) Disbarment / Suspension. *See In re Computer Dynamics, Inc.*, 253 B.R. 693, 699 (E.D. Va. 2000) ("Pursuant to the civil contempt power, bankruptcy courts can suspend an attorney from the practice of law and condition reinstatement on compliance with a court order.").

(B) Vexatious litigant. *In re Stanwyck,* 450 B.R. 181, 200 (Bankr. C.D. Cal. 2011) (Carroll, C.J.).

(C) Bench warrant / incarceration. "Incarceration is an appropriate coercive sanction for civil contempt so long as the contemnor can avoid the sentence imposed on him, or purge himself of it, by complying with the terms of the original order. When the petitioners carry 'the keys of their prison in their own pockets,' the action is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *In re Count Liberty, LLC*, 370 B.R. 259, 274 (Bankr. C.D. Cal. 2007) (internal citations and some internal quotation marks omitted). *See also* AOUSC memo (6/01) re Bankruptcy Court's authority to issue bench warrants (body detention requests) to U.S. Marshal.

[45] Civil contempt (§ 105(a)) – "failure to take all reasonable steps within the party's power to comply" is sanctionable. *Reno Air Racing Assn. Inc. v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006).

[46] Civil contempt (§ 105(a)) – subjective intent is irrelevant, and good faith is not a defense (unless coupled with reasonable interpretation of order). "Because civil contempt serves a remedial purpose, it matters not with what intent the defendant did the prohibited act." *In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003) (citation and internal quotation marks omitted); *In re Count Liberty, LLC*, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007) (citing cases). *Cf. In re Dyer*, 322 F.3d 1178, 1191 (9th Cir. 2003) (for violation of the automatic stay, "willfulness" is required but it has a particularized meaning "in this context," namely it "does not require a specific intent to violate the automatic stay [but] [r]ather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional") (citations and internal quotations omitted). *Compare In re Taggart,* 139 S.Ct. 1795_ (2019) (discharge injunction warrants contempt sanctions if there is "no fair ground of doubt" as to whether the inunction barred the creditor's conduct – *i.e.,* "no objectively reasonable basis for concluding that the creditor's conduct might be lawful" – so "subjective good faith" is not a defense) (expressly declining to address whether similar principles apply to violations of the automatic stay under § 362(h), which serves different purposes and has different statutory language).

[47] Civil contempt (§ 105(a)) – inability to comply. Inability to comply with the courts order is a defense, but the burden is on the contemnor to show "categorically and in detail" how compliance is "impossible." *FTC v. Affordable Media*, 179 F.3d 1228, 1241 (9th Cir. 1999). A "self-induced inability [to comply with the court's order] is not a defense." *United States v. Asay*, 614 F.2d 655, 660 (9th Cir. 1980). It is not enough to show "substantial," "diligent," or "good faith" efforts to comply (as opposed to making *all* reasonable efforts to comply). *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529-30 (11th Cir. 1992) (citations omitted). Caveat: If a coercive sanction "has lost all coercive effect" then it "becomes criminal [contempt]." *SEC v. Elmas Trading Corp.*, 824 F.2d 732, 733 (9th Cir. 1987).

[48] Civil contempt (§ 105(a)) – "technical" or "inadvertent" violations will not support a finding of contempt. *In re Count Liberty, LLC*, 370 B.R. 259, 275 (Bankr. C.D. Cal. 2007) (citing cases).

[49] 28 U.S.C. § 1927 – N/A because bankruptcy court is not a "court of the United States." *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004) (quoting with approval the BAP's summary that "28 U.S.C. § 1927 does not suffice because the Ninth Circuit does not regard a bankruptcy court as a 'court of the United States.'") (citations omitted).

[50] Removal – generally. *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004).

[51] Removal - costs and expenses of remand. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c) (2011).

[52] Removal- attorney fees. *In re DeVille*, 361 F.3d 539, 546 (9th Cir. 2004) ("28 U.S.C. § 1447(c) allows a court discretion to grant attorneys' fees and costs for an improper removal."). Wide discretion to grant attorneys' fees and costs for an improper removal: generally they may be awarded only when the removing party lacked an objectively reasonable basis for seeking removal, but bad faith need not be shown. *Billington v. Winograde (In re Hotel Mt. Lassen, Inc.)*, 207 B.R. 935, 943 (Bankr. E.D. Cal. 1997) (citing *Moore v. Permanente Med. Group, Inc.*, 981 F.2d 443, 447 (9th Cir. 1992)); *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 141 (2005). See discussion of FEES ON FEES below.

[53] Stay violations – only "individual" can recover sanctions under § 362(k). A bankruptcy trustee is not an "individual" entitled to an award of sanctions under 11 U.S.C. § 362(k) (formerly § 362(h)), nor is a corporation. *In re Pace*, 67 F.3d 187, 192 (9th Cir.1995); *In re Goodman,* 991 F.2d 613, 618-20 (9th Cir. 1993). But non-individuals can seek contempt sanctions for violation of the automatic stay. *See In re Goodman*, 991 F.2d 613, 620-21 (9th Cir. 1993). *But see In re Heaton*, 697 F. App'x 524, 525 (9th Cir. 2017) ("creditors and lienholders lack independent standing to appeal an adverse decision regarding a violation of the automatic stay").

[54] Stay violations – willfulness. Unclear state law (about when title to property passed) was insufficient to establish lack of willfulness, because creditor knew of bankruptcy case and did not seek relief from automatic stay. *In re Ozenne,* 337 B.R. 214, 220-21 (9th Cir. BAP 2006) ("Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay. … Likewise, whether [the alleged contemnor] believed in good faith that it had a right to the Property is irrelevant: No specific intent is required; a good faith belief that the stay is not being violated is not relevant to whether the act was 'willful' or whether compensation

must be awarded, nor is good faith reliance on the advice of counsel a defense; nor is reliance on a state court's determination.") (citations and most internal quotation marks omitted). A collection company that knew of the automatic stay, but whose computer mistakenly sends a collection notice, has engaged in "willfull" violation of the automatic stay. *In re Campion,* 294 B.R. 313 (9th Cir. BAP 2003). *But see In re McHenry,* 179 B.R. 165, 168-69 (9th Cir. BAP 1995) ("technical" violation of stay did not warrant actual or punitive damages). There is an affirmative duty to "take corrective action" to remedy stay violations, even when the violation was a State Court's order contravening the automatic stay. *Sternberg v. Johnston*, 595 F.3d 937, 944-45 (9th Cir. 2010), *as amended, overruled on other grounds, In re Schwartz-Tallard*, 803 F.3d 1095, 1100 (9th Cir. 2015) (en banc).

[55] Stay violations – attorney fees and **FEES ON FEES**. Debtors have a duty to mitigate attorney fees incurred in response to stay violations. *In re Roman,* 283 B.R. 1, 11-13 (9th Cir. BAP 1992). As for fees on fees, previously the 9th Circuit had held that such awards are not authorized under § 362(k) [formerly § 362(h)]. *See Sternberg v. Johnston*, 595 F.3d 937, 1122 n. 3 (9th Cir. 2010) (as amended on denial of petition for rehearing) (fees can be awarded for bringing about an end to stay violation, but not for pursuing a damages award, but leaving open whether such fees could be awarded under the bankruptcy court's "inherent civil contempt authority"). That has now been overruled en banc: fees on fees can be awarded as part of damages under § 362(k) (*In re Schwartz-Tallard*, 803 F.3d 1095 (9th Cir. 2015) (en banc)) even if the debtor is the prevailing appellant rather than the appellee. *In re Easley,* 910 F.3d 1286 (9th Cir. 2018).

Note: As for fees on fees other than under § 362(k), they have been held to be permissible under § 303(i)(1) but generally not permissible under the court's inherent power, pursuant to the "American Rule" (*In re S. Cal. Sunbelt Developers, Inc.,* 608 F.3d 456, 464 (9th Cir. 2010)), but "a common-law exception to the rule permits fee awards in litigation brought to remedy willful violations of court orders." *In re Schwartz-Tallard*, 803 F.3d 1095, 1098 (9th Cir. 2015) (en banc) (citing *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 717-18 (1967)). Beyond willful violations of "court orders," an award of fees on fees might be permissible under the court's inherent powers if the fee litigation itself involves a party acting "in bad faith, vexatiously, wantonly, or for oppressive reasons." *In re DeVille,* 361 F.3d 539, 544 (9th Cir. 2004) (citations and internal quotation marks omitted). *See also In re Wallace,* 490 B.R. 898, 907-08 (9th Cir. BAP 2013) (unlike ordinary money judgment, which cannot be enforced by contempt, a contempt order may be enforced by second contempt order awarding attorney fees plus $500/day for every day first contempt sanctions were not paid). That said, the court's inherent powers are subject to various constraints, and obtaining an award of fees on fees is very difficult. *See Rubye Taylor*, et al. *v. James B. Nutter & Company*, et al., 2:15-ap-01183-NB, dkt. 133, pp. 2:18-3:16 (awarding fees on fees for conduct found to be in bad faith), *reversed* (9th Cir. BAP CC-16-1376-KuLTa, 8/9/17, unpublished) (holding that delay in dismissing adversary proceeding, although found to be solely to increase adversary's litigation costs and to hinder post-foreclosure remedies, was insufficient basis for fees on fees under court's inherent powers); *see also In re Cohen*, 2:13-bk-26483-NB, dkt. 1373, PDF pp. 9-10.

_______More generally, "absent specific language or indication to the contrary, a statute permitting an award of 'damages' is not a fee-shifting statute, and does not permit an award of fees for obtaining the 'damages,'" and under that standard the courts cannot award fees on fees under Appellate Rule 38 but may under 28 U.S.C. § 1927 and Rule 11. *Blixseth v. Yellowstone Mt. Club, LLC,* 854 F.3d 626, 630-32 (9th Cir. 2017).

The following pre-*Schwartz-Tallard* case law also may be informative as to the interaction between § 362(k) and other sanctions/fee shifting authority. *See In re H. Granados Comm., Inc.,* 503 B.R. 726, 734-35 (9th Cir. BAP 2013) (fees incurred in pursuing damages can be awarded under § 105(a), distinguishing *Sternberg*); *compare In re Roman*, 283 B.R. 1 (9th Cir. BAP 2002) (relief is not permissible under § 105(a) to the extent that 362(k) provides a remedy).

It remains to be determined whether the Supreme Court's decision in *Baker Botts L.L.P. et al., v. Asarco LLC,* 135 S.Ct. 2158, 192 L.Ed.2d 208 (2015), will alter the legal analysis of fee shifting, including fees on fees *But see generally Warren v. Dill (In re Warren)*, 532 B.R. 655, 658 (Bankr. D.S.C. 2015) (attorney fees and costs are explicitly authorized by § 362(k), and therefore not limited by *Asarco*); *Mantiply v. Horne (In re Horne)*, 2016 U.S. Dist. LEXIS 134031, at *5 n.5 (S.D. Ala. Sep. 28, 2016) (same).

[56] Stay violations – emotional distress damages. *See In re Dawson*, 390 F.3d 1139, 1148-49 (9th Cir. 2004) (to support emotional distress damages debtor must show "clear evidence" of "significant harm" caused by stay violation, as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process; but stay violation need not be "egregious" and corroborating evidence is not necessarily required, and non-experts may testify to manifestations of mental anguish). *See also In re Hunsaker,* 902 F.3d 963 (9th Cir. 2018) (sovereign immunity did not bar award of emotional distress damages against IRS).

[57] Stay violations – punitive damages. Movant must show "reckless or callous disregard of the law or rights of others." *In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989). But a "monetary penalty" may not be imposed under § 362(k) unless the stay-violator has received "effective notice," which may include for example receipt of such notice by a specified person, pursuant to § 342(g)(2).

[58] Discovery Sanctions – evidentiary presumptions. *See Hoffman v. Construction Protective Services, Inc.,* 541 F.3d 1175, 1180 (9th Cir. 2008) (court should explore alternatives to evidentiary sanctions that would preclude the entire cause of action, but in proper circumstances that is permissible); *In re Singh* (9th Cir.

BAP 2/26/16, unreported) (reversing terminating sanctions – dismissal for lack of prosecution due to failure to file status report). In *Hoffman* the Ninth Circuit also held, "we reject the notion that the [trial] court was required to make a finding of willfulness or bad faith" to exclude the evidence. *Id.* Subsequent decisions make the parameters of this holding somewhat unclear. *Compare R&R Sails v. Ins. Co. of Pa.,* 673 F.3d 1240, 1247-48 (9th Cir. 2012) ("because the sanction amounted to dismissal of a claim, the district court was required to consider whether the claimed noncompliance involved willfulness, fault, or bad faith, … and also to consider the availability of lesser sanctions") (citations omitted), *with Toyrrific, LLC v. Karapetian,* 606 F. App'x 365, 366 n.1 (9th Cir. 2015) ("We note that there is some tension in our law over the requirement that, before a sanction amounting to dismissal of a claim can be issued, the district court must consider whether the claimed 'noncompliance involved willfulness, fault, or bad faith' and must also consider 'the availability of lesser sanctions.'") (citations omitted).

[59] Discovery sanctions – exclusion of witness. *See Ortega v. O'Connor,* 50 F.3d 778, 779 (9th Cir. 1995).

[60] Discovery sanctions – terminating sanctions. See "Failure to Prosecute; Dismissal" below.

[61] Failure to Prosecute; Dismissal – extreme circumstances, unreasonable delay. "Dismissal is a harsh penalty and is to be imposed only in extreme circumstances. . . . A dismissal for lack of prosecution must be supported by a showing of unreasonable delay." *Henderson v. Duncan,* 779 F.2d 1421, 1423 (9th Cir. 1986) (citations omitted).

[62] Failure to Prosecute; Dismissal – 5-factor balancing test; *Dreith v. Nu Image, Inc.,* 648 F.3d 779 (9th Cir. 2011). *In re Roessler-Lobert,* 567 B.R. 560, 568 (9th Cir. BAP 2017) (footnote and citations omitted). No showing of bad faith is required but in most cases the failure to prosecute was "willful." *Roessler-Lobert*, 567 B.R. at 568 & n. 8. "Ideally, the bankruptcy court should make explicit findings concerning these factors, but such findings are not required." *Id.; see also Henderson v. Duncan,* 779 F.2d 1421, 1424 (9th Cir. 1986). Relief from default judgment requires application of the "*Falk* factors." *See Falk v. Allen,* 739 F.2d 461, 463 (9th Cir. 1984) (per curiam). United States v. Aguilar, 782 F.3d 1101, 1105 (9th Cir. 2015). The *Falk* factors are: "(1) whether [the party seeking to set aside the default] engaged in culpable conduct that led to the default; (2) whether [it] had [no] meritorious defense; or (3) whether reopening the default judgment would prejudice the other party." *Falk,* 739 F.2d 461, 463 (citation and internal quotation marks omitted; alternations in original).

[63] All Writs Act – applicability to bankruptcy courts. The All Writs Act applies to "[t]he Supreme Court and all courts established by Act of Congress." 28 U.S.C. § 1651(a). "Bankruptcy courts, being courts established by Act of Congress, 'have the power to regulate vexatious litigation pursuant to 11 U.S.C. § 105 and 28 U.S.C. § 1651.'" *Goodman v. Cal. Portland Cement Co. (In re GTI Capital Holdings, LLC)*, 420 B.R. 1, 11 (Bankr. D. Ariz. 2009) (*quoting Lakusta v. Evans (In re Lakusta)*, 2007 WL 2255230, at *3 (N.D. Cal. 2007)); *see also In re Yan*, 2013 WL 6801085, at *5 (Bankr. N.D. Cal. Dec. 23, 2013).

[64] Local Rules. "Local bankruptcy rules may not 'enlarge, abridge, or modify a substantive right.'" *In re Pham,* 536 B.R. 424, 432 (9th Cir. BAP 2015) (citations omitted) (reversing sanctions assessed under local rules). *See also In re Jaeger,* 213 B.R. 578 (Bankr. C.D. Cal. 1997) (noting that LR 102(5), now LBR 2090-2, provides that the applicable standards of professional conduct are as set forth in District Court Local Civil Rule 83-3, which in turn refers to the applicable standards in the State Bar Act and the Rules of Professional Conduct).

[65] Local Rules. See immediately preceding endnote re limits of local rules.

[66] Local Rules. See immediately preceding endnote re limits of local rules.

[67] Reporting of sanctions to State Bar. Although judicial sanctions must be reported to the State Bar (except sanctions for failure to make discovery or monetary sanctions of less than $1,000), it is the attorney's responsibility to report that to the State Bar, not the court's.

[68] Refer to District Court for criminal contempt: "We do not preclude the possibility that a bankruptcy court could initiate criminal contempt proceedings by referring alleged contempt to the district court. Nor do we address whether the district court could refer those proceedings back to the bankruptcy court if the parties so consented. See 28 U.S.C. § 157(3) (authorizing the bankruptcy court to hold a jury trial only 'if specifically designated to exercise such jurisdiction by the district court and with the express consent of all the parties')." *In re Dyer*, 322 F.3d 1178, 1194 n.17 (9th Cir. 2003) (additional citations to articles discussing constitutional issues omitted).

[69] ABA – Nationwide database. *See* http://www.americanbar.org/groups/professional_responsibility/services/databank.html. (Possible overlap in reporting where matter also referred to California State Bar – State Bar rep was unable to confirm whether disciplinary reports go to databank, awaiting call back from ABA.)

[70] Settlements disbarring/restricting attorneys. California law and rules limit the ability of a settlement between private parties to restrict a professional's practice. *See* Cal. B&P Code 16600 and Rule 1-500 (parties cannot limit professional's practice). *Compare, e.g.,* B&P Code 6075, 6092.5(i), 6093, 6100 (disciplinary proceedings, and settlement thereof, can limit attorneys' practice). *See also In re J.T. Thorpe Inc.,* 870 F.3d 1121 (9th Cir. 2017) (vacating and remanding for consideration whether federal public policy regarding asbestos trusts supersedes California law, thereby permitting enforcement of private parties' agreement that attorney would discontinue asbestos practice).