UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re: The Disciplinary Proceeding of KELLY S. JOHNSON.	Case No.: 13-mp-00132 **MEMORANDUM DECISION SUSPENDING KELLY S. JOHNSON FROM PRACTICING LAW IN THIS COURT, AND IMPOSING ADDITIONAL SANCTIONS** Date: April 28, 2014 Time: 10:00 a.m. Place: Courtroom 1639 Edward R. Roybal Federal Building and Courthouse 255 E. Temple Street Los Angeles, CA 90012

This disciplinary proceeding arises from the Chapter 7 case of Jeffery Reynold Wood ("Wood") (Case No. 8:12-bk-19450-TA, the "Main Case"), who was represented by Kelly S. Johnson, Esq. ("Johnson"). Bankruptcy Judge Theodor Albert sanctioned Johnson in that case, and also referred Johnson to this disciplinary panel with a recommendation that he be prohibited from practicing in any case before this bankruptcy court. Briefs and evidence have been submitted by Johnson, Wood, and the Office of the United States Trustee (the "US Trustee").

At a continued hearing at the above time and place, this panel took the matter under submission. We now hold that Johnson be suspended from the practice of law in

this court for a period of not less than two years, as further detailed at the end of this memorandum decision.

I. BACKGROUND

We recite the facts as found by Judge Albert (Main Case doc. 138, the "Findings"), as supplemented by the undisputed facts and our own findings on the record before us. We find that all of the following facts have been established by clear and convincing evidence and we adopt them as our own.

A. Proceedings Before Judge Albert

Wood filed his voluntary chapter 7 petition on August 7, 2012 (the "Petition Date"). Johnson advised Wood, both pre- and postpetition, in connection with his debts and how to preserve the equity that he had in his homestead.

On or about May 25, 2012, before the Petition Date, Wood sold his residence for approximately $680,000 and received proceeds of approximately $113,836.09. Main Case doc. 19 (Statement of Financial Affairs, item 10), doc. 32 Ex. A (closing statement); Findings ¶¶ 2 & B. After the Petition Date, the chapter 7 trustee (the "Trustee") communicated to Wood and Johnson that he intended to seek turnover of the proceeds from the sale of his home, unless such proceeds were reinvested within six months of sale. *See* Cal. Code Civ. Proc. ("CCP") §§ 704.710(c), 704.720(b) & 704.730 (incorporated by 11 U.S.C. §§ 522(b)(2) and CCP §§ 703.010(a), 703.130); *In re Jacobson*, 676 F.3d 1193, 1198-1200 (9th Cir. 2012).

Wood attempted to reinvest the proceeds in a homestead. Johnson appears to have been trying to assist him in that endeavor. No such reinvestment was made, however, and the six month period expired on or about November 25, 2012. Findings ¶¶ 4 & B; Johnson Brief (Disciplinary Proceeding doc. 40) at 3:13-22.

Meanwhile, Johnson had filed on Wood's behalf an amended bankruptcy Schedule C list of exemptions for Wood (Main Case doc. 30) and a motion (Main Case doc. 32) to compel the Trustee to abandon any interest that the bankruptcy estate might have in Wood's bank accounts, some of which contained the proceeds of his

homestead, arguing that those accounts were of inconsequential value because they were exempt. Although the motion was filed before the six month period expired, it anticipated that the proceeds would not be reinvested before that deadline, and therefore it argued that for equitable reasons the proceeds should be treated as exempt. The Trustee responded by filing an opposition (Main Case doc. 37) and a motion for turnover of the accounts (Main Case doc. 40).

Judge Albert heard both motions on January 8, 2013 and denied the abandonment motion while granting the turnover motion. On January 16, 2013 a turnover order (the "Turnover Order") was entered, directing Wood immediately to turn over to the Trustee $96,682.00 which represented the balance of the homestead proceeds that apparently still remained under Wood's control. Main Case doc. 61. The Turnover Order was served on both Wood and Johnson (Main Case doc. 63) as were the other orders mentioned below.

On February 20, 2013 – well beyond the 14 day period after January 16, 2013 in which to file either an appeal of the Turnover Order or a motion to extend the time to appeal (per Fed. R. Bankr. P. 8002) – Johnson filed on Wood's behalf a motion to extend the time to appeal. Main Case doc. 65. That motion was denied (Main Case doc. 90, 121), and an appeal of that denial was dismissed for lack of diligent prosecution. Main Case doc. 155, 164, 167.

Meanwhile Wood had not turned over the funds as directed in the Turnover Order. On March 19, 2013 Judge Albert issued an order to show cause why Wood should not be held in contempt. Main Case doc. 77 (the "Wood OSC").

The Wood OSC came on for hearing on May 7, 2013. Johnson appeared for Wood, who was not present. Finding ¶¶ 10 & B. Judge Albert then issued an order (Main Case doc. 111) finding Wood in contempt of court for refusing to comply with the Turnover Order, imposing sanctions of $1,000.00 per day on Wood so long as he continued not to comply, and setting a further hearing for May 21, 2013.

At the continued hearing substitute counsel appeared for Wood and, at her

request, the hearing was further continued. Finding ¶¶ 11 & B. On May 28, 2014, Wood appeared and stated that he (Wood) had not complied with the Turnover Order and the Wood OSC (1) based on (alleged) advice from Johnson and (2) because he no longer had the money – except for approximately $30,000 which he was turning over to the Trustee. Wood informed Judge Albert for the first time that part of the reason he no longer had the money is that he had lent some of the funds to Johnson. Finding ¶¶ 12 & B; *see also* Transcripts 5/28/13 & 6/25/13 (Disciplinary Proceeding doc. 11) Ex. A at 11:7-14:11 and Ex. B at 19:20-20:7 & 23:24-25:8.

In the Findings, Judge Albert wrote:

> It must be noted that at no time during any of the previous several hearings where turnover, exemption and contempt were being considered did Mr. Johnson ever inform the court that some of the monies in question had actually been borrowed from [Wood] by him and were therefore impossible to turn over (unless and until Mr. Johnson paid them back). [Findings ¶¶ 12 & B]

Judge Albert issued an order for Johnson to show cause why he should not be sanctioned, held in civil contempt, and referred to this panel for further discipline (Main Case doc. 129, the "Johnson OSC"). (Judge Albert also sanctioned Wood, but those sanctions are not at issue in this disciplinary proceeding.)

After a hearing on the Johnson OSC on June 25, 2013, Judge Albert found:

> At the June 25 hearing, Mr. Johnson appeared and admitted that he had indeed borrowed the money, but attempted to explain that these [transfers from Wood to Johnson] might also be characterized in the nature of payment on account of fees earned representing [Wood] in certain ongoing domestic matters and in connection with a failed real estate transaction .... [Findings ¶¶ 12 & B; *see also* Transcript 6/25/13 (Disciplinary Proceeding doc. 11, Ex. B) at 28:25-33:9.]

Judge Albert thereafter issued an order (Main Case doc. 139), supported by findings of fact and conclusions of law (Main Case doc. 138), sanctioning Johnson in the amount of $15,000, holding him in civil contempt, and referring him to this panel. We are informed that Johnson has not paid the $15,000 sanctions but that he has now repaid $22,500 in funds that Wood had transferred to him – Johnson states that he no longer had the funds that he received from Wood and instead he used funds borrowed

from his relatives to replenish the bankruptcy estate.

The Findings state that Johnson "failed to act competently in performance of his legal services within the meaning of Cal. Rules of Professional Conduct Rule 3-310." Findings ¶ D. The Findings also state as follows (augmented with our own headings and supplemental findings in brackets):

- [Borrowing.] He [Johnson] unlawfully and without order of the court borrowed from [Wood], his client at the time, the sum of $22,500 post-petition from monies he specifically knew were property of the estate [Findings ¶ C, 1st bullet point.] [The parties to this disciplinary proceeding agree that in fact some of the $22,500 amount was transferred prepetition, but it is undisputed that another portion was transferred postpetition without order of the court.]
- [Impairing turnover.] By borrowing these monies [Johnson] rendered [Wood] unable to respond to contemporaneous turnover demands from the Trustee thus endangering not only the lawful recovery by creditors but also his client's discharge [Findings ¶ C, 2d bullet point.]
- [Business with clients.] He did not advise the debtor regarding the questions of the terms and/or propriety of the loan, or to seek alternative counsel [or state in writing the terms of any loan or any business agreements for services] as is required at a minimum by the rules of ethics governing all lawyers admitted in California [Findings ¶ C, 3d bullet point, citing Cal. Rules of Professional Conduct, Rule 3-300.]
- [Not revealing facts.] When the Trustee demanded turnover, and certainly when motions for turnover and eventually OSCs re contempt were later brought, [Johnson] failed to inform either the Trustee or the court that *he* had borrowed a portion of the subject funds rendering his client incapable (at least in part) of complying. This amounted to a deliberate deception and obfuscation, not only against his client's interest but also in violation of his duties as an officer of this court [Findings ¶ C, 4th bullet point, emphasis in original.]
- * * *
- [Actions not excusable.] These actions are not excusable either by reason of Mr. Johnson's own financial pressures or by any mistaken belief in some argument regarding exempt status of the subject funds or against the clear holding in Jacobson. [Findings ¶ C, 6th bullet point.]

B. Proceedings Before This Panel

1. Requests to defer ruling

The hearing in this disciplinary proceeding has been continued a number of times, at Johnson's request, from the initially scheduled date of October 17, 2013 through a final continuance to April 28, 2014. *See* Disciplinary Proceedings doc. 12-27, 46. In his brief on the merits, Johnson attempts yet again to defer part or all of this proceeding:

> [T]o the extent that these funds may have been an improper loan or for fees [that] is an issue that is currently being investigated by the State Bar of California [allegedly in response to complaints by the purchaser of Wood's house]. ... It is hereby requested that this tribunal sever, remove and/or stay any further proceedings and/or rulings on this particular issue and claim because it is within the regulatory powers of the State Bar. Otherwise, [Johnson] is being subjected to double jeopardy as this is a matter squarely within the jurisdiction of another governing body (CA State Bar) and not this Disciplinary Panel. [Johnson Brief (Disciplinary Proceeding doc. 40) at 15:15-16:5 (emphasis omitted).]

We rejected these arguments at the hearing on April 28, 2014. There is no "double jeopardy" in either the criminal sense (this is not a criminal proceeding) or more colloquially.

This disciplinary proceeding addresses only Johnson's practice before this federal bankruptcy court. The State Bar of California addresses attorneys' practice before the California courts, as well as interactions with members of the public who are not before this panel, such as the purchaser of Wood's home. Although the two tribunals might consider overlapping facts, they serve different purposes and Johnson has not shown any basis for us to abstain or otherwise defer our ruling.

2. Belated proffer of unspecified documentation

Johnson obtained the above-referenced continuances of this disciplinary proceeding by asserting, among other things, that he required time to review and submit emails that would show mitigating circumstances. Normally any emails between Wood and Johnson would be excluded by the attorney-client privilege, but as this panel has ruled (Disciplinary Proceeding doc. 35, 36) the attorney-client privilege has been waived as to relevant portions of those emails, if any.

Johnson's long-deferred submission of evidence in this disciplinary proceeding turns out not to include any emails. *See* Disciplinary Proceeding doc. 41-45. Johnson's brief on the merits vaguely alludes to additional evidence that "can be documented." Johnson Brief (Disciplinary Proceeding doc. 40) at 14:1.

At the hearing on April 28, 2014 Johnson alleged that he had brought with him some additional emails that allegedly were somehow relevant. He never stated with

any specificity then or any other time what those emails show. We rejected that proffer as untimely and unpersuasive.

3. The parties' attempts to reduce or expand Judge Albert's sanctions or the issues before us

Johnson's declaration states, with respect to the $15,000 in sanctions ordered by Judge Albert, "such ruling should be stricken or reduced ...." Johnson Decl. (Disciplinary Proceeding doc. 41) at 10:6. This is a disciplinary proceeding not an appeal. In fact, Judge Albert's findings of fact and conclusions of law have not been appealed and are now final and binding. For this reason, and because the written record and transcripts of prior testimony are sufficient, we ruled at the hearing on April 28, 2014 that it was unnecessary to conduct any further evidentiary hearings. As noted above we have adopted as our own various findings by Judge Albert that have become final, based on the record before us.

Wood's papers also imply that he may be seeking to alter the scope of the issues before us. For example, Wood's declaration alleges that he made multiple requests to Johnson for information about his professional liability insurance carrier (if any), which apparently were unanswered. Wood Decl. (Disciplinary Proceeding doc. 53) ¶ 28. The record before us is not sufficiently developed on such additional issues, and Wood did not raise them in sufficient time nor with sufficient particularity for Johnson to have an adequate opportunity to respond. Accordingly, we decline the invitation to expand our inquiry into such other areas. This panel has a narrow role to determine solely the attorney disciplinary matter referred by Judge Albert. We may not determine issues of law or fact for purposes of the Wood bankruptcy case itself or determine matters best left to the State Bar.

II. JURISDICTION

We have jurisdiction under 28 U.S.C. § 157(b)(1) and (b)(2)(A). This panel has been duly constituted and operates under applicable decisions in this circuit and pursuant to General Order 96-05. *See In re Nguyen*, 447 B.R. 268, 275 (9th Cir. BAP

2011); *In re Brooks-Hamilton*, 400 B.R. 238, 246 (9th Cir. BAP 2009) (holding that "Bankruptcy courts [] possess the inherent authority to suspend or disbar attorneys, as implicitly recognized by Congress in enacting § 105(a)" and encouraging use of disciplinary panels).

III. GOVERNING LAW AND RULES

"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." *In re Lehtinen*, 564 F.3d 1052, 1062 (9th Cir. 2009) (citation omitted). Federal courts generally apply the ethics principles that have been developed both on a national and a local level.

National rules include the standards articulated by the American Bar Association, which the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") has encouraged us to use. Those standards include: (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. *Brooks-Hamilton*, 400 B.R. at 252-53. We have considered all of these standards.

Other national sources of authority include Federal Rule of Bankruptcy Procedure 9011 and the decisions interpreting that rule, as well as decisions regarding the bankruptcy courts' civil contempt power and related authority. *See* 11 U.S.C. § 105(a); 28 U.S.C. §1651 (All Writs Act); *Lehtinen*, 564 F.3d 1052 (civil contempt powers in bankruptcy case); *In re GTI Capital Holdings, LLC*, 420 B.R. 1, 11 (Bankr. D. Ariz. 2009) (applying All Writs Act in bankruptcy case).

On the local level, this court has adopted specific rules for various sanctions. *See, e.g.*, Local Civil Rule 83-3.1.3. Those local rules also make it explicit that attorneys practicing before this court must comply with the applicable California Rules of Professional Conduct (the "CA Rules"). *See* L.B.R. 2090-2(a); Local Civil Rule 83-3.1.2.

In addition to national and local rules, the bankruptcy courts have inherent power to sanction attorneys. *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)).

Among the sanctions that may be imposed are suspension or disbarment. *See Lehtinen*, 564 F.3d 1052 (citing civil contempt power and, alternatively, inherent powers); *Nguyen*, 447 B.R. 268, 281 (citing *Lehtinen* and, *inter alia,* 11 U.S.C. § 105(a) and Fed. R. Bankr. P. 9011); *In re Crayton*, 192 B.R. 970, 976 (9th Cir. BAP 1996) (citing similar authority and 11 U.S.C. § 327); *In re Computer Dynamics, Inc.*, 253 B.R. 693, 699 (E.D. Va. 2000) (citing civil contempt power).

IV. DISCUSSION

A. Johnson's transactions with Wood

In this disciplinary proceeding Johnson attempts to reargue that the transfers of $22,500 to him from Wood could be characterized as payments for past services, or retainers for future services, rather than loans. He describes the work as follows:

> ongoing and separate legal matters involving three Bankruptcy cases, family law proceedings involving claims of abuse and child custody, two separate Unlawful Detainer Proceedings, several preliminary hearings involving the criminal trespass charges [by the purchaser of Wood's home], and hours and hours of phone calls and emails .... I would estimate that I expended at least $15,000 - $20,000 if not up to $25,000 during that time frame .... [Johnson Decl. (Disciplinary Proceeding doc. 41) at 16:25-17:21.]

We are not persuaded. First, Judge Albert found that the transactions were loans, and as noted above those findings are final and binding.

Second, Johnson provides no evidence to support his allegations – *e.g.,* daily time records, billing statements, or other documents to establish the dollar value of past services or future anticipated services as of the time of each transfer. In addition, although Johnson vaguely asserts that up to $25,000 could be viewed as payments for

services – which would be more than the aggregate amount of the transfers – we also must consider Wood's contrary allegation that the "the figures [Johnson is] asserting are absurd." Wood Decl. (Disciplinary Proceeding doc. 53) at 11:9. Moreover, the hearing before Judge Albert on June 25, 2013 Johnson admitted, "At the times when the moneys were paid it was a loan but thereafter services were provided ...." Transcript 6/25/13 (Disciplinary Proceeding doc. 11) Ex. B at 30:7-9 (emphasis added). Therefore assuming for the sake of discussion that Judge Albert's Findings were not binding (which they are) we find based on the record before us that at least some of the transfers of funds were loans.

Third, Johnson's argument completely misses the point. Regardless of whether the transferred funds were loans or something else, at least some of those transfers were made at a time when Johnson knew that the funds were property of the bankruptcy estate and that Wood, as a chapter 7 debtor, did not own those funds, should not be transferring them, and would have to return them, absent an unprecedented expansion of California exemption law.

It is undisputed that the following three transfers occurred:

(a) $12,500, prepetition on July 2, 2012,

(b) $5,000, postpetition on October 11, 2012, the day of the meeting of creditors at which the Trustee raised the six month reinvestment issue, and

(c) $5,000 postpetition on November 29, 2012, just prior to the hearing on the abandonment and turnover motions. *See* Transcript 6/25/13 (Disciplinary Proceeding doc. 11) Ex. B at 24:13-16, 24:20-25, 25:1-2), *and* Wood Response (Disciplinary Proceeding doc. 53) at 2:9-14.

By the time Johnson cashed the second check (let alone the third check) he already knew that the Trustee was not going to ignore the exemption issues. *See* Johnson Decl. (Disciplinary Proceeding doc. 41) at 3:17-22 (Trustee raised exemption issues at 10/11/12 meeting of creditors). In addition, Johnson knew that accepting the funds was a violation of the Bankruptcy Code because, even supposing that somehow

the funds could be made exempt (for which there was no precedent), the bankruptcy estate had at the very least a disputed interest in the funds. Johnson therefore knew that Wood, as a chapter 7 debtor, had no authority to transfer those funds absent a court order. In addition, having received the funds but knowing that the transfers were unauthorized and that the funds were property in which the estate had a (disputed) interest, Johnson knew that he had a duty under the Bankruptcy Code to return those funds, or to replenish them if they already had been spent, or at the very least seek guidance from the bankruptcy court. *See generally* 11 U.S.C. §§ 363(b), 541, 542, 543, 549.

Johnson argues that, in not repaying the funds he had received, he was actually protecting the bankruptcy estate because, if he had repaid Wood, then Wood was unlikely to turn the funds over to the Trustee but instead would spend them on "computers, day trade account [sic], rent, deposit for a home in the San Fernando Valley to rent for the adult film industry, etc." Johnson Brief (Disciplinary Proceeding doc. 43) at 7:9-14. This is nonsense. First, Johnson does not explain why he would have repaid the funds to Wood rather than the Trustee as directed in the Turnover Order. Second, the issue is not just lack of repayment but accepting the transfers in the first place, in knowing violation of the Bankruptcy Code, and then concealing the facts from the Trustee and the bankruptcy court.

Johnson never once informed the Trustee or the court of the relevant facts despite filing numerous papers, having numerous communications with the Trustee, and making numerous appearances before the bankruptcy court at hearings on the abandonment motion, the turnover motion, the Turnover Order, and the Wood OSC. Johnson's nondisclosures continued even after Wood was subject to daily fines and the Wood OSC, despite the fact that Wood could not possibly turn over a substantial portion of the non-exempt funds because Wood had transferred them to Johnson. Ultimately, the facts were revealed by Wood himself, not by Johnson.

We agree with Judge Albert's Findings that "[t]his amounted to a deliberate

deception and obfuscation, not only against his client's interest but also in violation of his duties as an officer of this court." Findings (Main Case doc. 138) ¶ C, 4th bullet point. To name just a few of the ethical rules violated by Johnson: California Business and Professions Code § 6068 provides that it is the "duty of an attorney" to employ "those means only as are consistent with truth, and never to seek to mislead the judge or any judicial official by an artifice or false statement of fact and law." *See also* Model Rules of Prof'l Responsibility 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal[.]") CA Rule 3-300 provides that a member of the bar "shall not enter into a business transaction with a client; or knowingly acquire [any] pecuniary interest adverse to a client," absent full disclosure in writing, advice to seek independent counsel, and written consent of the client. *See also* Model Rules of Prof'l Responsibility 1.8 and related comments. CA Rule 3-110 provides that a member of the bar "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence," meaning that the attorney must "apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service." *See also* Model Rules of Prof'l Responsibility 1.1 ("A lawyer shall provide competent representation to a client.").

We conclude that Johnson willfully and in bad faith violated the Bankruptcy Code and the above-referenced ethical rules in receiving the funds from Wood, not immediately repaying or replenishing those funds, and engaging in deliberate deception and obfuscation before the bankruptcy court. This conduct alone is sufficient to suspend Johnson from appearing before this court.

B. Johnson's advice, or lack of advice, about turning over the funds

At oral argument on April 28, 2014, we asked Johnson about precisely what he did or did not communicate to Wood about his turnover obligations. Johnson was evasive.

We are not persuaded by Johnson's attempts to minimize his role in the lack of turnover by Wood. Johnson's own declaration in this disciplinary proceeding shows that

Johnson did not convey the required message to his client – that the funds must be turned over until a higher court should reverse the order. Johnson declares:

> I never informed Mr. Wood that he could deplete assets of the Estate, but rather he was required to and did spend Estate funds on a monthly basis due to his limited monthly disability income of $1,800 approx.[ ] In addition, I did not ever expressly tell the Debtor [Wood] that he did not have to comply with the Court's January 26, 2013 Turnover Order. [Johnson Decl. (Disciplinary Proceeding doc. 41) at ¶¶ 11-12, emphasis added).]

A chapter 7 debtor has no right to spend "Estate funds" that do not belong to him. Regardless of any unfortunate disability or lack of income, and no matter how genuine the need for the funds, Wood had no more right to spend non-exempt funds than he would have to steal money from a third party. Johnson's failure to explicitly explain the requirements of the turnover order was clearly wrong, yet he continued to justify it in this disciplinary proceeding.

We recognize that under CA Rule 3-210 a member of the bar "shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid." (Emphasis added.) First, Johnson has not argued this issue. Second, he has not ever asserted that the exemption provisions of California law and the Bankruptcy Code were "invalid," nor that the turnover requirements were "invalid" – only that an equitable exception should apply. Third, even if Johnson had asserted such invalidity, we are persuaded that any such assertion would not be "in good faith." Johnson was concealing Wood's turnover obligations, in part, to conceal his own apparent errors and omissions, not out of any good faith conviction that the exemption laws or turnover obligations were invalid.

Johnson also alleges that he has an excuse for not telling Wood that he was required to turn over the proceeds from the sale of his home because of a fear of violence. Johnson states, "I was concerned if Mr. Wood was required to turn over all of the proceeds from the sale of his home, ... he could potentially have become violent and could harm someone involved in the process that could cause him to lose everything" and "Mr. Wood has an extensive gun collection." Johnson Brief

(Disciplinary Proceeding doc. 40) at 8:21-28. *See also id.* at 9-12 (additional reasons why Johnson allegedly feared that Would could become violent).

We recognize that an attorney is in a difficult situation when dealing with a client who (allegedly) might react violently to his legal obligations. Whether or not Wood actually was going to be violent, Johnson's fear of violence appears to have been sincere.

Nevertheless, Johnson's response was improper: he could not simply disregard the turnover obligations under the Bankruptcy Code and the court's orders, and avoid advising Wood about those obligations. If Johnson genuinely believed that Wood was likely to engage in violent, criminal acts that posed a serious danger to others' lives and safety, then he could have advised the Trustee and the court of his concerns and obtained guidance on how to proceed. CA Rule 3-100 provides that, with certain limitations:

> (B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

Alternatively, a typical solution is to seek to withdraw as counsel. CA Rule 3-700(B) provides, "A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, ... [if] (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act[.]"

Johnson did neither of these things. His concern for violence has been considered in deciding any sanction here, but the approach he used in dealing with this situation was unethical for at least the following reasons.

He failed to advise Wood to comply with the turnover requirements and Turnover Order. *See* 11 U.S.C. 542. Depending on whether Wood or Johnson is to be believed, Johnson either advised the violation of a ruling of a tribunal, or his actions and failure to explicitly explain the ruling assisted in the violation of the ruling. Johnson violated his

duty to employ "those means only as are consistent with truth." California Business and Professions Code § 6068. In addition, Johnson violated CA Rule 3-110, which provides that a member of the bar "shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence," meaning that the attorney must "apply the diligence, learning and skill, and mental, emotional, and physical ability reasonably necessary for the performance of such service." Based on the foregoing, we hold that Johnson willfully and in bad faith violated the Bankruptcy Code and the ethical rules.

This panel does not exonerate Wood or address Judge Albert's findings in any way concerning Wood's actions. Clearly, this was a difficult attorney client relationship, and the difficult situation Johnson was in has been taken into consideration. Johnson's advice to Wood, or lack of advice, still constitutes an alternative reason to suspend Johnson from appearing before this court. Bankruptcy counsel will often have a client in a difficult situation, so counsel must be even more careful in such situations to maintain an objective distance from the client and comply with legal and ethical rules.

C. Competence

1. Unwillingness to address problems

The foregoing discussion shows how Johnson still either does not recognize, or refuses to address squarely, the ethical, legal, and practical problems with his acts and omissions. Unless and until he changes that approach, he cannot correct his problems and therefore he will not be competent to represent clients in bankruptcy matters.

2. Untimeliness

Another issue that should be apparent from the foregoing discussion is Johnson's pattern of missing deadlines. He missed the 14 day deadline to file either a notice of appeal or a motion to extend the time to file an appeal from the denial of his abandonment motion and from the Turnover Order. Fed. R. Bankr. P. 8002. When he belatedly filed a motion to extend the time to appeal, and that motion was denied, he filed a notice of appeal from that denial but that appeal was denied for lack of timely prosecution.

We recognize that Johnson might have abandoned the appeal because he recognized that it lacked merit. In this disciplinary proceeding, however, Johnson states, "I understand now the Appeal was dismissed because I had e-filed some appeal papers in the wrong case." Johnson Brief (Disciplinary Proceeding doc. 40) at 8:11-13; Johnson Decl. (doc. 41) at 9:19-24 & Ex. G, H, I. Johnson offers no reason why, if that were true, it could not have been persuasively argued to the BAP.

In this disciplinary proceeding we have granted Johnson repeated extensions of deadlines and yet almost all of the papers that he has filed have been late. That behavior culminated in his belated attempt to introduce emails at the hearing before this panel on April 28, 2014, long after his papers were due.

We recognize that Johnson may be impeded by unfortunate personal and financial issues, including the loss of his mother. Those things are relevant to mitigation which we address below. The fact remains, however, that Johnson's pattern of untimeliness is prejudicial to his clients and shows a lack of competence.

3. The decision to file a bankruptcy petition

Based on the record and our questions at the hearing on April 28, 2014, the sole purpose of filing Wood's voluntary bankruptcy petition was to gain a few days or weeks after the sale of the house before the new owner could move in. That appears to be a very small benefit, especially compared to the risk resulting from the appointment of a chapter 7 trustee who was charged with investigating the bona fides of exemptions.

On the other hand, perhaps in Wood's particular circumstances this was either necessary or at least a defensible choice to gain a short additional time to move out of the home, and perhaps creditors would have been just as likely to challenge Wood's asserted exemptions outside of bankruptcy. The record before us is not sufficiently developed on these issues, and so we do not base our decision on them.

4. The six month homestead reinvestment limitation

Johnson does not dispute that he failed to advise Wood prepetition about the six month limitation on reinvestment of homestead proceeds, and by the time Wood

learned of that limitation only about three months were left. We recognize that the record is not fully developed about what harm that omission might have caused: among other things, Wood might have been just as capable (or incapable) of reinvesting the proceeds in three months as in six (assuming without deciding that such reinvestment would have preserved the homestead exemption). Nevertheless, at the very least, Johnson failed to advise Wood competently as to his homestead exemption.

D. Mitigation

Johnson alleges a number of mitigating facts. He has been facing financial and personal challenges. He declares, "[I have] rededicated myself after the tragic loss of my Mother in late October 2013 and have taken significant steps to reduce my expenses and have relocated my Law Offices." Johnson Decl. (Disciplinary Proceeding doc. 41) at 21:2-5. He asserts that he cares deeply for his clients, that he can handle simple bankruptcy matters competently, that he has been seeking advice from other members of the bar, and that without him, and other attorneys who are willing to take on small and difficult cases, the public might not be able to find or afford legal counsel.

Johnson also alleges that he felt threatened by Wood. Although Johnson did not produce (appropriately redacted) copies of the allegedly threatening emails, Wood did not deny that he made at least some of the threatening statements that Johnson attributes to him. Combined with Johnson's personal and financial troubles, and perhaps Johnson's guilt over his failure properly to advise Wood regarding the homestead exemption, the situation may have clouded Johnson's judgment.

On the other hand, Johnson's statements about rededicating himself to his clients and seeking advice in future are undermined by the fact that he claimed to have sought advice from other counsel in Wood's bankruptcy case, and yet even now he continues to be unable or unwilling to recognize his problems. In addition, although his financial and personal pressures are certainly unfortunate, Johnson's response to those pressures was to attempt to deceive the bankruptcy court, the Trustee, and his client and violate the Bankruptcy Code and the ethical rules. Rather than helping clients who

cannot afford other counsel, we must conclude on the present record that Johnson is likely, if he is permitted to continue practicing before this court, to harm other clients and undermine the proper administration of bankruptcy cases.

For all of these reasons, although there are some mitigating facts, they are insufficient to overcome the clear conclusions that Johnson willfully and in bad faith (A) orchestrated a loan or transfer from Wood of funds that he knew should not have been transferred out of the bankruptcy estate, failed to return those funds or to replenish the bankruptcy estate, obfuscated those facts, and deceived the Trustee and the court, (B) did not explicitly advise Wood to turn over the proceeds of his homestead in compliance with the Bankruptcy Code and, subsequently, the Turnover Order, and (C) exhibited incompetence in his refusal or inability to address forthrightly what he had done, in missing the appeal deadline and other untimeliness, and in his bad advice on the exemption issues . Therefore, we hold that Johnson must be suspended from practicing in the bankruptcy court in this district.

E. Sanctions

Based on the foregoing, this panel has determined that the following sanctions are appropriate. A discipline order incorporating these sanctions will be issued concurrent with this memorandum decision.

1. Suspension. Effective immediately, Johnson is suspended from the practice of law in all divisions of this United States Bankruptcy Court for the Central District of California. Johnson must arrange for other counsel to take over his pending cases and is directed to file substitutions of counsel no later than June 30, 2014. If Johnson is unable to locate substitute counsel, then he is directed to seek guidance from the presiding judge in the applicable case, after providing that judge with a copy of this memorandum decision.

2. Opportunity for reinstatement. After not less than two years, Johnson may apply to the Chief Bankruptcy Judge of this court for reinstatement in accordance with the provisions of General Order 96-05 (attached to the initial Notice of this panel's

proceeding, Disciplinary Proceeding doc. 7). This panel recommends that, at a minimum, Johnson be required to provide evidence of the following as a precondition to any such application:

(a) CLE. Continuing legal education provided by an accredited provider for not less than (i) two hours of ethics, (ii) two hours on substance abuse, and (iii) 10 hours of bankruptcy.

(b) Bankruptcy course. Completion of a bankruptcy course, of not less than one full semester in duration, at an accredited law school within this district.

(c) Mentoring. Active membership in at least one reputable local organization of bankruptcy professionals that provides opportunities for mentoring and education, such as the Orange County Bankruptcy Forum ("OCBF"), the Central District of California Bankruptcy Attorneys' Association ("CDCBAA"), or the Inns of Court. Active membership should include regular attendance at meetings or seminars, and signing up for and participating in any "listserve" or comparable opportunities for asking questions and viewing others' questions.

(d) U.S. Trustee. Notice to the Office of the United States Trustee of his successful completion of the aforementioned, and satisfying that office of his having achieved a satisfactory level of competence and proclivity to practicing consumer bankruptcy law ethically and competently.

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3. Reporting to California Bar. Pursuant to General Order 96-5 (at 5:20-21), the Clerk of this court is requested and directed to transmit a copy of this memorandum decision to the State Bar of California.

Dated: 5/13/14

Maureen A. Tighe, Presiding
United States Bankruptcy Judge

Dated: 5/13/14

Richard M. Neiter
United States Bankruptcy Judge

Dated: 5/13/14

Neil W. Bason
United States Bankruptcy Judge

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

21041 Burbank Blvd, Woodland Hills, CA 91367

A true and correct copy of the foregoing document entitled (*specify*): Memorandum Decision Suspending Kelly S. Johnson From Practicing Law In This Court, And Imposing Additional Sanctions

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 05/13/2014, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Frank Cadigan frank.cadigan@usdoj.gov
Kelly S Johnson ksjesq@aol.com
Rika Kido rkido@shbllp.com, avernon@shbllp.com
Ron Maroko ron.maroko@usdoj.gov
United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. **SERVED BY UNITED STATES MAIL**:
On (*date*) 05/13/2014, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Kelly S. Johnson
LAW OFFICES OF KELLY S. JOHNSON
23 Corporate Plaza, Suite 150
Newport Beach, CA 92660

Jeffery Reynold Wood
21520-G Yorba Linda Blvd #535
Yorba Linda, CA 92887

☐ Service information continued on attached page

3. **SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

05/13/2014 Emma Gonzalez
Date *Printed Name*

Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.