

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

Dr. Richard Cordero

Appellant and creditor

APPELLANT'S BRIEF

v.

05-cv-6190L

David DeLano and Mary Ann DeLano

Respondents and debtors in bankruptcy

(Excerpts from Dr. Cordero's brief; full brief at

http://Judicial-Discipline-Reform.org/docs/Stat_Facts_DisCt_21dec5.pdf)

Dr. Richard Cordero, appellant and creditor, states under penalty of perjury the following:

...

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C. Issues Presented and Standard of Appellate Review

2. The issues presented herein are all legal and thus, should be reviewed de novo, *In re Bell*, 225 F.3d 203, 209 (2d Cir. 2000).

- a. Whether the judge's bias and disregard for the law, the rules, and the facts so infect the proceedings that due process of law was denied and his orders were unlawful;
- b. Whether the DeLanos' motion to disallow Dr. Cordero's claim was an artifice to prevent him

Dr Cordero's brief of 12/21/5 in *DeLano* in District Court, WDNY, on appeal from Bkr Ct, WBNY Pst:1231; 1257

- from proving their fraud and was granted to protect a bankruptcy fraud scheme;
- c. Whether District Court Local Rule 5.1(h) on asserting a claim under RICO, 18 U.S.C. §1961 et seq., is void as inconsistent with notice pleading and the enabling provisions of FRCivP;
 - d. Whether 28 U.S.C. §158(b) allowing judges, circuits, and parties to choose whether to establish or resort to bankruptcy appellate panels impairs due process, provides for forum shopping, and denies equal protection so that it is unconstitutional.

D. Statement of the Case

1. Nature of the case

- 3. This is an appeal from the disallowance by U.S. Bankruptcy Judge John C. Ninfo, II, WBNY, of a creditor's claim in the voluntary bankruptcy case filed jointly by Mr. David and Mrs. Mary Ann DeLano (the DeLanos) under 11 U.S.C. Chapter 13 (hereinafter *DeLano*; references to §# are to Title 11 unless the context requires otherwise).

2. Course of the Proceedings

- 4. The DeLanos filed their bankruptcy petition on January 27, 2004 (*In re David DeLano and Mary Ann DeLano*, docket no. 04-20280; Designated Items in the Record, pages 27-60=D:27-60). They listed 21 creditors, 19 as unsecured in Schedule F, where they included Dr. Richard Cordero (references to Schedules (Sch:) and other petition parts are to D:27/...; here D:27/Sch:F). He filed his proof of claim on May 19, 2004 (D:142-146). Up to then they had treated, and for months thereafter continued to treat, him as a creditor. On July 9, 2004, he filed a statement showing on the basis of even the few documents that they had produced at his instigation (D165-188) that they had committed bankruptcy fraud, particularly concealment of assets, and requesting the documents that they had failed to produce (D:196§§IV-V; 207, 208) Only then did they come up with the idea of a motion to disallow his claim as a means to get rid

of him before he could prove their fraud. Filed on July 22 (D:218), it was heard on August 25. After manipulating the request for documents (D:234§§II & IV) and disregarding the motion's defects of untimeliness, laches, and bad faith (D:253§§V & VI) and the presumption of validity in favor of the claim (D:256§VII), Judge Ninfo ordered that Dr. Cordero take discovery of Mr. DeLano until December 15, 2004, in the case that gave rise to his claim, namely, *Pfuntner v. Gordon et al.*, docket no. 02-2230, WBNY (*Pfuntner*; Addendum to the Designated Items, page 534/after entry 13, *infra*=Add:534/after entry 13), and that the parties introduce their evidence at an evidentiary hearing (D:278¶¶3 & 4).

5. It was held on March 1, 2005, when Judge Ninfo abandoned his duty impartially to take in evidence and behaved as Chief Advocate for Mr. DeLano while the latter was the only witness examined and Dr. Cordero the only one to introduce evidence. Although Mr. DeLano made consistent admissions against self-interest, the Judge arbitrarily disregarded them in order to reach at the hearing the predetermined decision of disallowance. His written decision of April 4 (D:3) was followed by this appeal on April 11, 2005 (D:1).

3. Disposition in the Court Below

6. Judge Ninfo held that Dr. Cordero had not proved his claim in *Pfuntner* against Mr. DeLano and had no standing to further participate in *DeLano*; and restated his denial to stay his decision. (D:20)

4. Statement of Facts

7. Mr. David DeLano is not an average debtor: He has worked in financing for 7 years and at two banks as an officer for 32 years: 39 years managing money!...and counting, for he is still working for a large bank, namely, Manufacturers & Traders Trust Bank (M&T), as a manager in credit administration (Transcript page 15, line 17 to page 16, line 15=Tr:15/17-16/15). As such, he qualifies as an expert in how to assess creditworthiness and remain solvent to be able to repay

bank loans. What is more, Mr. DeLano works precisely in the area of bankruptcies, collecting money from delinquent commercial borrowers and even liquidating their companies (Tr:17.14-19). Actually, he was in charge of the defaulted loan to Premier Van Lines, a storage company that filed for bankruptcy, *In re Premier Van Lines*, dkt. 01-20692 (*Premier*), and gave rise to *Pfundner* (Add:891/fn.1); both cases were brought before Judge Ninfo. Thus, Mr. DeLano is a member of a class of people who should know better than to go bankrupt and that, because of their experience with borrowers that use or abuse the bankruptcy system, know bankruptcy officers and how to petition them rightfully or wrongfully but successfully for bankruptcy relief.

8. For her part, Mrs. Mary Ann DeLano was a specialist in business Xerox machines, and as such a person trained to think methodically so as to ask pointed questions of customers and guide them through a series of systematic steps to solve their technical problems with Xerox machines.

9. Hence, the DeLanos are professionals with expertise in borrowing, dealing with bankruptcies, and learning and applying technical instructions. They must be held to a high standard of responsibility. Their bankruptcy petition warranted close scrutiny, particularly since it makes no sense that:

- a. they earned \$291,470 in just the 2001-2003 fiscal years (D:27/Statement of Financial Affairs and D:186-188);
- b. but they declared having only \$535 in cash or in bank accounts (D:27/Sch:B); yet, they and their attorney, Christopher Werner, Esq., know they can afford to pay \$18,005 in legal fees for over a year's maneuvering to avoid producing the documents requested by Dr. Cordero to find the whereabouts of their \$291,470 (Add:872-875; 942), not to mention other funds;
- c. indeed, they spread over 18 credit cards a whopping debt of \$98,092 (D:27/Sch:F), although the average credit card debt of Americans is \$6,000;
- d. despite all that borrowing, they declared household goods worth only \$2,910

(D:27/Sch:B...that's all they pretend to have accumulated throughout their combined worklives!, although they earned over a 100 times that amount, \$291,470, in only the three years of 2001-03...unbelievable!;

e. moreover, they strung mortgages since 1975 to pay for the same home in which they still live:

Mortgages referred to in the incomplete documents produced by the DeLanos to Trustee Reiber	Exhibit page #	Amounts of the mortgages
1) took out a mortgage for \$26,000 in 1975;	D:342	\$26,000
2) another for \$7,467 in 1977;	D:343	7,467
3) still another for \$59,000 in 1988; as well as	D:346	59,000
4) an overdraft from ONONDAGA Bank for \$59,000 and	D:346	59,000
5) owed \$59,000 to M&T in 1988;	D:176	59,000
6) another mortgage for \$29,800 in 1990;	D:348	29,800
7) even another one for \$46,920 in 1993; and	D:349	46,920
8) yet another for \$95,000 in 1999.	D:350-54	95,000
	Total	\$382,187.00

10. Yet today, 30 years later, they still owe \$77,084 and have equity of merely \$21,415 (D:27/Sch:A...*Mindboggling!* (Add:1058¶54)

11. Although the DeLanos have received over \$670,000, as shown by even the few documents that they have reluctantly produced at Dr. Cordero's instigation, the officers that have a statutory duty to investigate evidence of bankruptcy fraud or report it for investigation have not only disregarded such duty, but have also refused even to require them to produce any statements of their bank and debit card accounts, which can show the flow of their receipts and payments.

	Officer's name and title	Statutory duty to investigate	Request for documents	Response...if any
1.	George Reiber, Standing Chpt. 13 Trustee	11 U.S.C. §§1302(b)(1) and. 704(4) & (7)	D:66§IV D:113¶6 D:492, cf. D:477-491	D:74, cf. D:83§A D:120, cf. D:124 and 193§§I-III none none

			Add:683	
2.	Kathleen Dunivin Schmitt, Assistant U.S. Trustee	28 U.S.C. §586(a)(3)(C) & (F)	D:63§§I & III D:470, cf. D:461 D:471 D:475§c Add:685	D:70, cf. D:84§IV none none none none
3.	Deirdre A. Martini, U.S. Trustee for Region 2	28 U.S.C. §586(b)	D:104, cf. D:90§VII; D:137; Add:682	none D:139 , cf. D:141; D:154-157, cf. D:158; none
4.	Bkr. Judge John C. Ninfo, II	11 U.S.C. §1325 and 18 U.S.C. §3057(a) (Add:630)	D:198§V and D:199¶31; 207-210, 217; D:320§II D:370§C Add:1051§II Add:1133§§I & II	D:220, cf. D:232§§I & V D:327 D:3 Add:1065, cf. Add:1066; 1094 Add:1125
5.	District Judge David G. Larimer	18 U.S.C. §3057(a) (Add:630)	Add:885¶15, 900§§3 & B, Add:908§d, 951, 979§III Add:1098§I	Add:1021 Add:1155

12. What has motivated them to protect the DeLanos by sparing them production of incriminating documents? (D:458§V) This questions is particularly appropriate because all of them have been informed of the incident at the beginning of case that not only to a reasonable person, but all the more so to one charged with the duty to prevent bankruptcy fraud, would have shown that the DeLanos had committed fraud and needed protection from exposure: The meeting of the DeLano's creditors, held pursuant to §341 on March 8, 2004, was attended only by Dr. Cordero. Yet, Trustee Reiber's attorney, James W. Weidman, Esq., unjustifiably asked Dr. Cordero whether and, if so, how much he knew about the DeLanos' having committed fraud, and when Dr. Cordero would not reveal what he knew, Mr. Weidman, with the Trustee's approval, rather than let the DeLanos be examined under oath, as §343 requires, while officially being recorded on tape, put an end to the meeting after Dr. Cordero had asked only two questions! (D:79§§I-III; Add:889§II)

13. Far from any of those officers investigating this cover up, they attempted or condoned the subsequent attempt to limit Dr. Cordero's examination of the DeLanos at an adjourned meeting

of creditors to one hour (D:70), which they knew to be unlawful since §341 provides for a series of meetings for the very broad scope of examination set forth under FRBkrP 2004(b) (D:283). Upon realizing how broadly Dr. Cordero would examine the DeLanos, the officers attempted or condoned the attempt to prevent the examination by not holding the §341 meeting at all! (D:296), 299§II) They also tried to put it off until after the evidentiary hearing (§4 above), when Dr. Cordero's claim would be disallowed and he would be stripped of standing to even call for a meeting. (D:301, 302) They were acting in coordination to evade their duty!

14. An appeal to Trustee Martini was never replied to (D:307). On the contrary, Trustee Reiber reiterated his decision not to hold the meeting. (D:311, 316) Dr. Cordero analyzed the law in a motion for Judge Ninfo to declare that he had not prohibited and could not prohibit its holding. (D:321§III & ¶30.c) The Judge denied it while displaying again his unwillingness and inability to argue the law. (D:328¶4) Another appeal to Trustee Martini went by without response. (D:330)
15. Eventually Trustee Reiber agreed to hold a §341 meeting, but gave no explanation for his reversal in his letter to Dr. Cordero of December 30, 2004 (D:333). However, on December 15, Judge Ninfo had set the date for the evidentiary hearing of the DeLanos' motion to disallow Dr. Cordero's claim (§4 above) for March 1, 2005 (D:332). Now such meeting came in handy.
16. Indeed, the Judge had gone along with that motion without regard for the analysis by Dr. Cordero showing that it was an artifice to get rid of him and his requests for documents that could prove the DeLanos' fraud. (D:240§IV, 253§V). The Judge required him to take discovery of Mr. DeLano in the case that had given rise to the claim (D:272/2nd¶, 278¶3), which he wrongly identified as Att. Werner had done in his cursory motion as "Adversary Proceeding in Premier Van Lines (01-20692)" (D:218) Had either read Dr. Cordero's proof of claim (D:144), they could have realized that the claim against Mr. DeLano arose in *Pfuntner v. Trustee Gordon et al.*, no. 02-2230, not in *Premier*. They had decided to eliminate him regardless of his proof, which

even by the time of the evidentiary hearing they neither had read nor had a copy of! (§73 below)

17. To facilitate disallowance, both the DeLanos (D:314) and Judge Ninfo (D:327¶1) unlawfully denied *every single document* that Dr. Cordero requested (D:287§§A & C). However, he did not take discovery of any other *Pfuntner* party. So ‘they had no clue what he could possibly do at the evidentiary hearing’ (Tr:122/16-122/11). Hence, to find out in advance, the so-called meeting of creditors was set for and held on February 1, 2005. It was not intended for Dr. Cordero to examine the DeLanos, but rather for them to depose him! The facts prove it.
18. That is why Trustee Reiber allowed Att. Werner to micromanage the meeting. (D:464/4th & 5th¶¶) He allowed him to refuse to produce documents; even those few that the Trustee got the Attorney to agree to produce, he allowed him to produce them late, only after Dr. Cordero had reminded the Trustee that they were past due (D:341). Even then Att. Werner attempted to avoid production (D:473 & 477); produced incomplete documents (D:342); or only because of Dr. Cordero’s insistence, produced objectively useless documents (D:477-491) until the Trustee just stopped answering Dr. Cordero’s requests (D:492) and then the Judge disallowed the claim.
19. As for Trustee Schmitt, she attempted to avoid producing copies of the tapes of the February 1 meeting of creditors despite Dr. Cordero’s request (D:474), sending instead tapes of a different meeting (D:476). Likewise, although Trustee Reiber wrote that “At the request of Dr. Cordero, I will have court reporter [sic] available as well as having a tape recording made of the meeting” (D:333), when Dr. Cordero requested him a copy, Trustee Reiber denied it and told him to buy it from the reporter, preposterously alleging that the latter owns the copyright to it. But what the reporter produced is work for hire and Dr. Cordero was the reason why the Trustee hired a reporter.
20. That meeting of creditors was never intended to function as stated in the 1978 Legislative Report for §343: “The purpose of the examination is to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge”.

Rather, it was an opportunity for the DeLanos and the trustees to pump information out of Dr. Cordero. It was another abuse of process, a coordinated charade! (Add:966§B)

21. Judge Larimer supported that charade by protecting Trustees Schmitt and Reiber from having to produce any tapes or transcripts of those meetings of creditors on March 8, 2004, and February 1, 2005. To that end, he dispatched Dr. Cordero's requests that he order their production (Add:885¶15, 907, 980§§a & b), if only "for the proper determination of this appeal", let alone "appellant's right of appeal" (Add:951 1001§III), with a lazy and conclusory "These motions are wholly without merit and they are denied in their entirety" (Add:1022).
22. What is more, Judge Larimer also repeatedly maneuvered to deprive Dr. Cordero of the transcript of the evidentiary hearing on March 1, 2005, where his colleague, Judge Ninfo, disallowed his claim in *DeLano*: He manipulated orders scheduling Dr. Cordero to file his appellant's brief by a date by which the Judge knew the transcript would not be ready for Dr. Cordero to use it in writing his brief or make it part of the record. The Judge did so although he still had no jurisdiction to issue orders in the case because the record consisted then only of Dr. Cordero's notice of appeal and designation of items so that it was incomplete under FRBkrP 8006 and 8007(b), and consequently, its transfer from Judge Ninfo's court to him had been unlawful. (Add:692, cf. 695; 831, cf. 836; 839).
23. When the orders manipulating brief-filing dates failed due to Dr. Cordero's objections to keep the transcript from him, it was for Bankruptcy Court Reporter Mary Dianetti to refuse to agree to certify that her transcript of her own stenographic recording of the evidentiary hearing would be complete, accurate, and free from tampering influence (Add:867, 869). Although Dr. Cordero complained about the unreliability resulting from such refusal and requested that Reporter Dianetti be referred for investigation to the Judicial Conference of the United States under 28 U.S.C. §753 (Add:911), Judge Larimer just disregarded Dr. Cordero's factual and legal analysis

and issued another lazy “The motion is in all respects denied” (Add:991).

24. Dr. Cordero pointed out in a motion for reconsideration how suspicious it was that although Reporter Dianetti could lose her job if referred to the Conference, particularly since this was the second time that she and Judge Larimer had tried to prevent him from obtaining a transcript, which they did in *Pfuntner* (Add:1011§A), she was so sure that the Judge would not refer her that she did not even bother to file an objection to the motion (Add:1001§§III & V, cf. 1034¶¶10-12). Again with no discussion of Dr. Cordero’s factual and legal arguments, the Judge simply forced him to request the transcript from Reporter Dianetti and pay for it lest his appeal be dismissed. (Add:1020, cf. 1025, 1027)
25. Even after Dr. Cordero complied (Add:1031) and the transcript was prepared and filed by Reporter Dianetti and transmitted “forthwith” from the Bankruptcy Court to the District Court, the latter failed to file it as required under FRBkrP 8007(b), thus making it necessary for Dr. Cordero to move the Court to comply with its duty to docket it, enter the appeal, and schedule the appellant’s brief (Add:1081). Judge Larimer rescheduled the filing date by his order of November 21, where he wrote that “It now appears that the record on appeal is complete, and no further action pursuant to Fed.R.Bankr.P. 8007 is required” (Add:1093). Thereby he unwittingly admitted that the record was incomplete when he issued his order of April 22 (Add:692) -7 *months earlier!* at a time when there was not even an arrangement for the Reporter to begin preparing her transcript, let alone file it (Add:681, cf. 686-696, 831-845)- requiring Dr. Cordero to file his appellant’s brief by May 12. Judge Larimer had willfully violated FRBkrP 8007 to deprive Dr. Cordero of the transcript.
26. By not referring Reporter Dianetti to the Judicial Conference, Judge Larimer was protecting not only her, but also himself from review that would have revealed the quality of their work: In her transcript everybody appears speaking Pidgin English, babbling in broken sentences, uttering

barbarisms, and sputtering so much solecistic fragments in each line that to recompose them into the whole of a meaningful statement is toil. As a result, the participants at the hearing, though professionals, come across in the transcript as a bunch of speech impaired illiterates. Her transcript can hardly be representative of the standard of competency to which the Conference holds reporters. Therefore, if the Conference had reviewed such an objectively inferior reproduction of a court proceeding as Reporter Dianetti’s transcript is, it would have called into question why nevertheless Judges Larimer and Ninfo customarily, and thus knowingly, accept work of such disturbing quality as the record on which they determine the rights, property claims, and maybe even the liberty of litigants...or do they pay no attention to any transcript?, for their own orders show that they rarely cite and never analyze the law or the rules, and never discuss the motions on which they rule, which points to their not even reading them. (¶36.a below)

E. The Argument(summary)

1. The transcript shows how Judge Ninfo, likely expecting it not to be available to Dr. Cordero before he would have to file his brief pursuant to an order from Judge Larimer manipulating its filing date, conducted a blatantly biased, arbitrary, and unlawful proceeding so that the motion to disallow his claim could be granted as needed by them, the DeLanos, and the trustees to eliminate Dr. Cordero before he could expose a bankruptcy fraud scheme1266
 - a. Judge Ninfo confronted Dr. Cordero at the evidentiary hearing with a lawyers directory stating that a Richard Cordero worked as an associate at a law firm specializing in litigation; Dr. Cordero stated under oath that he was not that person and had never practiced law; but the Judge assumed that he had lied and, without obtaining more evidence, in his decision on appeal portrayed him as a liar and a perjurer so as to destroy his credibility, whereby the Judge manifested his bias against and libeled Dr. Cordero, who proves here that he told the truth.....1269
 - b. Judge Ninfo shows his bias by inconsistently criticizing Dr. Cordero for acting as “a typical pro se” litigant lacking legal representation and for being “an experienced attorney” who was able to confuse Mr. DeLano.....1280

c.	Judge Ninfo misleads his appellate peers by pretending that Dr. Cordero abused his “experience” to “confuse” Mr. DeLano at the evidentiary hearing while the Judge withholds the fact that Mr. DeLano was accompanied by Att. Werner, who ‘has been in this business” for 28 years and has appeared before him in more than 525 cases.....	1281
d.	Judge Ninfo shows his bias toward Mr. DeLano by dismissing as “confused” and withholding from his appellate peers Mr. DeLano’s “most interesting statements”, which he made against legal interest and which support Dr. Cordero’s claim against him, whereby the Judge misleads his peers with an unbalanced, incomplete account of the evidentiary hearing	1281
e.	Neither Mr. DeLano nor Att. Werner bothered to read the complaint or the proof of claim containing the claim that they had moved to disallow and in the middle of the hearing asked Dr. Cordero to lend them a copy!.....	1288
f.	Judge Ninfo looked on in complicit silence while Atts. Werner and Beyma signaled answers to Mr. DeLano during his examination under oath.....	1289
g.	Judge Ninfo misleads his peers by pretending that there was a “Trial”, yet what he ordered and held was just an evidentiary hearing.....	1290
h.	Judge Ninfo shows blatant bias and bad faith in criticizing Dr. Cordero for not filing a “Pretrial Memorandum of Law”, a type of paper not even mentioned in the rules, never required of him, and not filed by Att. Werner, who also filed no memorandum of law to support his motion to disallow	1292
i.	Judge Ninfo pretends to provide legal authority, without discussing it, for his decision, which on the contrary shows that with disregard for the law he disallowed the claim	1293
j.	Judge Ninfo has shown such bias against Dr. Cordero and in favor of the local parties as to require the nullification of his decisions and his disqualification under 28 U.S.C. §455(a), which the Supreme Court has stated calls only for the appearance, not the reality, of bias and prejudice	1299
2.	Local Rule 5.1(h) suspiciously singles out RICO claims by requiring exceedingly detailed facts just to file them, thus violating notice pleading under FRCivP	1301
3.	Section 158 of title 28 U.S.C. provides for bankruptcy appellate review by judges of unequal degree of impartiality in violation of the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution and is unconstitutional	1303

F. Conclusion and Relief Sought

122. Judge Larimer has shown himself willing to disregard the rule of law and the facts as well as unable to analyze and apply the law. Moreover, he has a conflict of interest because if he orders the production of the documents necessary for the proper determination of the issues in *DeLano* and *Pfuntner*, he also risks the finding of the whereabouts of at least two thirds of a million dollars and thereby the exposure of a bankruptcy fraud scheme and of the colleagues and others supporting it. Indeed, he has already given the appearance of partiality and of misusing his judicial power in his and the schemers' interest rather than using it in the interest of justice.

123. Therefore, Dr. Cordero respectfully requests that:

- a) All of Judge Ninfo's decisions in *DeLano* and *Pfuntner* be declared null and void; and ;
- b) Judge Ninfo be disqualified from both cases;
- c) the disallowed claim of Dr. Cordero in *DeLano* be reinstated;
- d) the proposed order attached hereto be issued, which concerns, inter alia, document production; withdrawal from the Bankruptcy Court, WBNY, and transfer to the District Court, NDNY, of *DeLano* and *Pfuntner*; removal of Trustee Reiber and appointment of a successor; production of a report on the DeLanos' financial affairs; referral of Reporter Dianetti for investigation under 28 U.S.C. §753 to the Judicial Conference as requested in Dr. Cordero's motions of July 18 and September 20, 2005, to the District Court in the instant appeal (docket entries 13 and 19 (Add:911) and 993)); and the report under 18 U.S.C. §3057(a) (Add:630) of *DeLano* and *Pfuntner* to U.S. Attorney General Alberto Gonzales;
- e) District Court Local Rule 5.1(h) be stricken down;
- f) 28 U.S.C. §158(b) be held unconstitutional.

Dated: December 21, 2005
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