

AUG 07 2006

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OF THE NINTH CIRCUIT**

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

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In re:)	BAP No.	EC-05-1131-BuMoPa
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LARRY TEVIS and NANCY TEVIS,)	Bk. No.	04-26357-B-13J
)		
Debtors.)		
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LARRY TEVIS; NANCY TEVIS,)		
)		
Appellants,)		
)		
v.)	AMENDED	
)	O P I N I O N	
WILKE, FLEURY, HOFFELT, GOULD)		
& BIRNEY, LLP,)		
)		
Appellee.)		
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Argued and Submitted on March 24, 2006
at Sacramento, California

Filed - June 29, 2006
Amended - August 7, 2006

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Jane Dickson McKeag, Bankruptcy Judge, Presiding.

Before: BUFFORD,¹ MONTALI and PAPPAS, Bankruptcy Judges.²

¹ Hon. Samuel L. Bufford, Bankruptcy Judge for the Central District of California, sitting by designation.

² This Panel issued its initial opinion on this appeal on June 29, 2006. Appellants filed a motion for reconsideration on
(continued...)

1 BUFFORD, Bankruptcy Judge:

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I. INTRODUCTION

4 Appellants Larry and Nancy Tevis ("the Tevises"), appearing *pro*
5 *se*, appeal the bankruptcy court's decision ("Memorandum Decision")
6 granting attorneys fees and expenses to Wilke, Fleury, Hoffelt,
7 Gould & Birney, LLP ("Wilke Fleury") for its services as counsel to
8 the former chapter 7³ trustee. The Tevises make two main contentions
9 in support of their appeal. First, the Tevises dispute that Wilke
10 Fleury satisfied the disinterestedness requirement to qualify it to
11 receive compensation from the estate. Second, the Tevises claim
12 that the bankruptcy court erred in awarding attorneys fees to Wilke
13 Fleury.

14 Because the bankruptcy court failed to make sufficient findings
15 in its Memorandum Decision regarding the Tevises' contacts with
16 Wilke Fleury prior to the commencement of their bankruptcy case, and
17 whether such contacts established grounds for disqualifying Wilke

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²(...continued)

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³ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as in force prior to the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23 ("BAPCPA"). See id. § 1501 (providing that BAPCPA applies (with exceptions not relevant herein) only to cases filed on or after its effective date).

1 Fleury as disinterested counsel for the chapter 7 trustee under
2 § 327(a), we REVERSE AND REMAND the bankruptcy court's award of fees
3 and expenses to the firm.

4 We AFFIRM in all other respects.

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II. RELEVANT FACTS

7 Prior to the filing of their bankruptcy petition, the Tevises
8 were embroiled in state court litigation relating to the purchase,
9 construction, and installation of a double-wide modular home on
10 their property in Rescue, California. While that litigation was
11 pending, the Tevises brought legal malpractice lawsuits against
12 several attorneys who at some point represented them in connection
13 with the modular home litigation. The Tevises' various former
14 attorneys asserted attorney's liens and filed suit against the
15 Tevises for fees incurred during their respective representation
16 periods. According to the Declaration of Nancy Tevis, the Tevises
17 contacted Wilke Fleury during their search for representation in the
18 modular home and malpractice litigation.

19 The Tevises filed for bankruptcy relief under chapter 7 on June
20 21, 2004. They then removed the modular home litigation to the
21 bankruptcy court. The chapter 7 trustee, Michael F. Burkart, with
22 court authorization, employed Wilke Fleury as counsel. With
23 counsel's assistance, the trustee settled all litigation and claims
24 among the chapter 7 estate, the parties involved in the purchase and
25 installation of the modular home, and the Tevises' former counsel.
26 Despite the Tevises' objections, the bankruptcy court approved the

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1 settlements.⁴

2 The Tevises subsequently converted their bankruptcy case to a
3 case under chapter 13 on December 1, 2004. After the conversion,
4 Wilke Fleury filed its motion for final allowance of administrative
5 expense for fees and costs as counsel to the former chapter 7
6 trustee. In opposing the motion, the Tevises argued that, because
7 of Wilke Fleury's prior consultations with the Tevises regarding the
8 pending state court actions, the firm was not a "disinterested
9 person" as defined by § 101(14)(E), it had a direct relationship and
10 connection with them related to the pending litigation, and that,
11 consequently, compensation should be disallowed. In a declaration
12 in support of the motion for fees and costs, the firm stated that it
13 had no record of any contact with the Tevises prior to the
14 bankruptcy case and that it was unaware of any confidential
15 information that anyone from Wilke Fleury learned from the Tevises
16 prior to its employment as counsel to the chapter 7 trustee.

17 In a Memorandum Decision entered on March 25, 2005, the
18 bankruptcy court overruled the Tevises' objections and approved
19 Wilke Fleury's fees and expenses for its services to the chapter 7
20 trustee. The court made three findings in support of its decision:
21 (a) that the record did not support the contention that Wilke Fleury
22 was not a disinterested person,⁵ (b) that the fees requested were

24 ⁴ Although the Tevises took an appeal from the approval of
25 the settlements, that appeal was subsequently dismissed.

26 ⁵ The bankruptcy court found that the contact between Nancy
27 Tevis and the Wilke Fleury firm "would not make the firm a
28 disinterested person" (emphasis added). We believe that the court
intended to find, "such contact would not prevent the firm from
being a disinterested person." For the purposes of this decision,
(continued...)

1 reasonable, and (c) that the services were necessary and benefitted
2 the creditors of the estate.

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4 **III. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
6 §§ 1334 and 157(b)(1) (West 2006). This Panel has jurisdiction
7 under 28 U.S.C. § 158(b)(1) (West 2006).

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9 **IV. STANDARD OF REVIEW**

10 Findings of fact are reviewed on appeal for clear error. See,
11 e.g., Moldo v. Ash (In re Thomas), 428 F.3d 1266, 1268 (9th Cir.
12 2005). A bankruptcy court's decisions regarding the employment and
13 qualification of professionals are reviewed for abuse of discretion.
14 See, e.g., COM-1 Info, Inc. v. Wolkowitz (In re Maximus Computers,
15 Inc.), 278 B.R. 189, 194 (9th Cir. BAP 2002). A bankruptcy court's
16 award of attorney fees will not be disturbed unless the bankruptcy
17 court abused its discretion or erroneously applied the law. Leichty
18 v. Neary (In re Strand), 375 F.3d 854, 857 (9th Cir. 2004).

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20 **V. ISSUES PRESENTED**

21 The Tevises state the issues presented in this appeal as
22 follows:

- 23 (1) Hon. Bankruptcy Judge Jane McKeag failed to acknowledge the
24 Narrative Declaration with exhibits of LARRY and NANCY TEVIS;
25 (2) The Tevises' Narrative Declaration with exhibits clearly
26 demonstrates bad faith, fraud, and the presentation of
erroneous, misleading and fabricated facts to the court by
Wilke Fleury, Paul Cass, and others;

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28 ⁵(...continued)
we treat this revision as the bankruptcy court's finding.

- 1 (3) There are no true facts in Judge McKeag's ruling;
2 (4) The Court (and Appellees) failed to comply with Appellant's
3 (5) As a result of which the Tevises were denied a meaningful
4 hearing on the merits.

5 It is difficult to determine from this statement, in light of the
6 trial court's decision and the supporting briefs, what issues the
7 Tevises are attempting to bring before the Panel. It is also
8 difficult to know for sure what legal arguments the Tevises are
9 trying to make on appeal, because their briefs are unfocused, with
10 little reference to legal arguments and no citations to the record
11 (except for general references to voluminous documents).

12 Looking beyond the statement of issues, it appears that the
13 Tevises make four arguments on appeal. First, they claim that Wilke
14 Fleury was not disinterested, and thus was disqualified from
15 representing the trustee or being paid for such representation.
16 Second, they appear to contend that the bankruptcy court abused its
17 discretion in its award of fees and costs to Wilke Fleury.⁶ Third,
18 they make unspecified due process claims. Finally, they contend
19 that the bankruptcy court erroneously found their Narrative
20 Declaration to be irrelevant.

21 VI. DISCUSSION

22 A. Citations to the Record

23 The Tevises' briefs are entirely deficient in making reference
24 to the evidentiary record. The briefs must make specific references
25 to the relevant portions of the record. See FED. R. BANKR. P.
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27 ⁶ We find no argument that the bankruptcy court erroneously
28 applied the law in awarding attorneys fees, except on the issue of
disinterestedness.

1 8010(a)(1)(E);⁷ Dela Rosa v. Scottsdale Mem'l Health Sys., Inc., 136
2 F.3d 1241, 1242 (9th Cir. 1998); Mitchel v. Gen. Elec. Co., 689 F.2d
3 877, 878-79 (9th Cir. 1982). Opposing parties and the court are not
4 obliged to search the entire record, unaided, for error. Mitchel,
5 689 F.2d at 879.

6 An appellate court may dismiss an appeal for failure to provide
7 adequate citations of the record to permit review. See id.; see
8 also N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th
9 Cir. 1997) ("By and large, we have been tolerant of minor breaches
10 of one rule or another. Perhaps we are too tolerant sometimes. But
11 there are times when our patience runs out. Then we strike an
12 appellant's briefs and dismiss the appeal."); Everett v. Perez (In
13 re Perez), 30 F.3d 1209, 1217 n.12 (9th Cir. 1994) ("[T]he parties
14 must comply with our rules sufficiently to enable us (and the BAP)
15 to examine those materials that bear on their arguments.").
16 However, we have held that pro se appellants may be accorded some
17 leeway. See, e.g., Arnold v. Gill (In re Arnold), 252 B.R. 778, 781
18 n.2 (9th Cir. BAP 2000).

19 Adequate citation to the record includes the specification of
20 each page and the line(s) therein on which the party relies on
21 appeal. Such references are wholly missing in the Tevises' briefs.

23 ⁷ Rule 8010 provides in relevant part:

24 (a) Form of briefs

[T]he form of brief shall be as follows:

25 (1) Brief of the appellant. The brief of the
26 appellant shall contain

. . .
27 (E) An argument. The argument . . . shall contain
the contentions of the appellant with respect to
28 the issues presented, and the reasons therefor,
with citations to the . . . record relied on.

1 As Wilke Fleury points out, this deficiency makes it nearly
2 impossible to locate the portions of the record where the Tevises
3 claim the bankruptcy court erred and to find the evidence (if any)
4 supporting their appeal.

5 According the Tevises' some leeway on their argument that Wilke
6 Fleury failed the disinterestedness test, we address that issue in
7 detail. As appears infra, our consideration of the other issues
8 that they attempt to raise is more substantially hindered by their
9 failure to provide specific citations to the record.

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B. Disinterestedness

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1. Statutory Requirements

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the court may deny allowance of compensation for services
and reimbursement of expenses of a professional . . . if,
at any time during such professional person's employment

⁸ Sensing an argument on these grounds, Wilke Fleury
addresses this issue in its brief.

1 . . . such professional person is not a disinterested
2 person, or represents or holds an interest adverse to the
3 interest of the estate with respect to the matter on which
4 such professional person is employed.

5 Section 327(a) requires the application of a two-pronged test
6 for the employment of professional persons. A debtor in possession
7 or trustee may employ attorneys with court approval only if (1) they
8 do not hold or represent an interest adverse to the estate, and (2)
9 they are disinterested persons. See, e.g., Rome v. Braunstein, 19
10 F.3d 54, 58 (1st Cir. 1994) ("Although . . . 'interest adverse' is
11 not defined, the companion requirement - that appointees be
12 'disinterested' - is defined These statutory requirements
13 - disinterestedness and no interests adverse to the estate - serve
14 the important policy of ensuring that all professionals appointed
15 pursuant to section 327(a) tender undivided loyalty and provide
16 untainted advice and assistance in furtherance of their fiduciary
17 responsibilities." (internal citations omitted)); McCutchen, Doyle,
18 Brown & Enerson v. Official Comm. of Unsecured Creditors (In re
19 Weibel, Inc.), 176 B.R. 209, 212 (9th Cir. BAP 1994); First
20 Interstate Bank, N.A. v. CIC Inv. Corp. (In re CIC Inv. Corp.), 175
21 B.R. 52, 54 (9th Cir. BAP 1994); In re Guard Force Mgmt., Inc., 185
22 B.R. 656, 661 (Bankr. D. Mass. 1995) (stating that "to be eligible
23 for employment in a bankruptcy case, an attorney must fulfill two
24 statutory requirements: he cannot hold or represent an interest
25 adverse to the estate, and he must be a disinterested person").

26 There is substantial overlap between the two prongs of this
27 test. While the Tevises argue only the disinterested requirement,
28 this concept includes a prohibition on representing conflicting
interests. Accordingly, we consider both prongs of this

1 requirement. Mehdipour v. Marcus & Millichap (In re Mehdi-pour), 202
2 B.R. 474, 478 (9th Cir. BAP 1996) ("Any professional who the court
3 determines to hold or represent an interest adverse to the estate or
4 who is not disinterested is not an officer of the estate during the
5 time of conflict and must be denied compensation for services
6 performed during the conflict pursuant to § 330.") (emphasis added).

7 The definition of "disinterested person" is provided in
8 § 101(14)(E) (now § 101(14)(C)) which states, in relevant part, that
9 a "disinterested person" means a person that:

10 does not have an interest materially adverse to the
11 interest of the estate or of any class of creditors . . .
12 by reason of any direct or indirect relationship to,
13 connection with, or interest in, the debtor . . . or for
14 any other reason.

15 The term "adverse interest" is not defined in the Bankruptcy
16 Code. The reported cases have defined what it means to hold an
17 adverse interest as follows: (1) to possess or assert any economic
18 interest that would tend to lessen the value of the bankrupt estate
19 or that would create either an actual or potential dispute in which
20 the estate is a rival claimant; or (2) to possess a predisposition
21 under circumstances that render such a bias against the estate.
22 See, e.g., Bank Brussels Lambert v. Coan (In re AroChem Corp.), 176
23 F.3d 610, 623 (2d Cir. 1999); Kravit, Gass & Weber, S.C. v. Michel
24 (In re Crivello), 134 F.3d 831, 835 (7th Cir. 1998); Electro-Wire
25 Prods., Inc. v. Sirote & Permutt (In re Prince), 40 F.3d 356, 361
26 (11th Cir. 1994); In re Roberts, 46 B.R. 815, 826-27 (Bankr. D.
27 Utah 1985), aff'd in relevant part, 75 B.R. 402 (D. Utah 1987).

28 To represent an adverse interest means to serve as an attorney
for an entity holding such an adverse interest. In re Star
Broadcasting, Inc., 81 B.R. 835, 838 (Bankr. D.N.J. 1988); Roberts,

1 46 B.R. at 827.

2 For the purposes of disinterestedness, a lawyer has an interest
3 materially adverse to the interest of the estate if the lawyer
4 either holds or represents such an interest. See, e.g., Prince, 40
5 F.3d at 360-61; Star Broadcasting, 81 B.R. at 838; Roberts, 46 B.R.
6 at 827.

7

8 **2. California State Law**

9 Pursuant to local rule of the Eastern District of California,
10 the professional obligations of attorneys appearing in federal court
11 are governed by California law. What constitutes material adversity
12 for a lawyer is defined by neither bankruptcy law nor other federal
13 law. District Court General Rule 83-180(e), incorporated by
14 reference in Local Rule 1001-1(c) of the bankruptcy court, provides
15 in relevant part:

16 Every member of the Bar of this Court . . . shall become
17 familiar with and comply with the standards of
18 professional conduct required of members of the State Bar
19 of California and contained in the State Bar Act, the
20 Rules of Professional Conduct of the State Bar of
California and decisions of any Court applicable thereto,
which are hereby adopted as standards of professional
conduct in this Court.

21 Accordingly, we must look to California state law to determine the
22 applicable professional responsibility rules for Wilke Fleury.
23 Accord In re Wheatfield Business Park, LLC, 286 B.R. 412, 419
24 (Bankr. C.D. Cal. 2002); Wilson v. Cumis Ins. Soc., Inc. (In re
25 Wilson), 250 B.R. 686, 689 (Bankr. E.D. Ark. 2000); In re Jaeger,
26 213 B.R. 578, 583 (Bankr. C.D. Cal. 1997).

27 The relevant California rule on conflicts of interest for
28 attorneys is stated in Rule 3-310(E) of the California Rules of

1 Professional Conduct, which provides:

2 A member shall not, without the informed written consent
3 of the client or former client, accept employment adverse
4 to the client or former client where, by reason of the
5 representation of the client or former client, the member
6 has obtained confidential information material to the
7 employment.

8 The purpose of this rule is to assure that counsel devote
9 undivided loyalty to the client. See MODEL RULES OF PROF'L CONDUCT R.
10 1.7 cmt. (2004). Conflicting loyalties produce inadequate
11 representation, which threatens the interests of the debtor, the
12 trustee and the creditors, and compromises the ability of court to
13 mete out justice. The unsanctioned representation of conflicting
14 interests is one of the most serious sins that a lawyer can commit.
15 "The paramount concern must be to preserve public trust in the
16 scrupulous administration of justice and the integrity of the bar."
17 San Francisco v. Cobra Solutions, Inc., 135 P.3d 20, 43 Cal. Rptr.
18 3d 771, 776 (2006) (quoting People ex rel. Dep't of Corps. vs.
19 Speedee Oil Change Sys., Inc., 980 P.2d 371, 378 (Cal. 1999)).⁹

20 We turn to the Tevises' briefs to understand in what respect
21 they contend that Wilke Fleury fails the disinterestedness test.

22 **a. Tevis Briefs**

23 The only reference to the disinterestedness issue in the
24 Tevises' opening brief appears at page 20, where the brief states:

25 Wilke Fleury was NOT a disinterested party. Their Motions
26 and Oppositions are in bad faith, they have committed
27 constructive fraud, perjury, and inflicted intentional

28 ⁹ In most circumstances, California law permits a client to
give informed written consent to waive a conflict of interest.
See Cobra Solutions, 43 Cal. Rptr. 3d at 776. No such waiver was
given in this case.

1 emotional distress, by presenting to the Court erroneous,
2 misleading and fabricated facts. It is apparent that they
3 did not check or use any facts in the Court Records. They
4 told the Court that they saved money for the Estate and
5 for the Creditors by making the Agreement/Compromises.

6 Between Burkart and Wilke Fleury, they were paid the
7 money, they stated would go to the creditors.

8 They became interested parties when they committed
9 fraud and perjury for the purposes of being awarded money.
10 Their actions were adverse to the Estate.

11 The Tevises give no citation to any evidence in the record
12 supporting any of these charges. Such blanket statements, without
13 citation to any supporting evidence whatsoever, are insufficient to
14 establish that the bankruptcy court abused its discretion in
15 concluding that Wilke Fleury was a disinterested person. More
16 important, even if true, none of these contentions has any relevance
17 to whether Wilke Fleury was disinterested.

18 The Tevises' reply brief makes a quite different claim on the
19 subject of Wilke Fleury's disinterestedness. The Tevises state:

20 The Tevises contacted Wilke Fleury previously regarding
21 this case. As discussed in Debtor's Opposition to Final
22 Allowance (Excerpt of Record Exhibit B and B1), due to
23 their consultations with the debtors, Wilke Fleury were
24 not Disinterested Persons as defined by 11 U.S.C., Section
25 101(14)(E). Wilke Fleury acknowledged this issue, only by
26 denying contact. We have proven both outgoing and
27 incoming phone calls by Excepts [sic] of the Record B2.

28 At oral argument, Wilke Fleury conceded that, if Wilke Fleury
had served as lawyers for the Tevises, a conflict of interest would
have disqualified the firm from representing the chapter 7 trustee
in the Tevises' bankruptcy case.

b. Standard Where Argument is not Raised in Opening Brief

Ordinarily, an appellate court will not consider a matter on
appeal that is not specifically and distinctly argued in appellant's

1 opening brief. See, e.g., Affordable Housing Dev. Corp. v. Fresno,
2 433 F.3d 1182, 1193 (9th Cir. 2006); Price v. Lehtinen (In re
3 Lehtinen), 332 B.R. 404, 410 (9th Cir. BAP 2005). However, there
4 are three main exceptions to this rule. First, an appellate court
5 will review an issue not present in an opening brief for "good cause
6 shown," or "if a failure to do so would result in manifest
7 injustice." Koerner v. Grigas, 328 F.3d 1039, 1048 (9th Cir. 2003)
8 (citation omitted); Alcaraz v. INS, 384 F.3d 1150, 1161 (9th Cir.
9 2004) (manifest injustice); United States v. Loya, 807 F.2d 1483,
10 1487 (9th Cir. 1987). Second, an appellate court has "discretion to
11 review an issue not raised by appellant . . . when it is raised in
12 the appellee's brief." Affordable Housing, 433 F.3d at 1193;
13 Koerner, 328 F.3d at 1048; Boldt v. Crake (In re Riverside-Linden
14 Inv. Co.), 945 F.2d 320, 324 (9th Cir. 1991). Third, an appellate
15 court may review an issue "if the failure to raise the issue
16 properly did not prejudice the defense of the opposing party.
17 Koerner, 328 F.3d at 1049; Alcaraz, 384 F.3d at 1161.

18 In this case we find that all three exceptions arguably apply.
19 The second exception clearly applies, because Wilke Fleury's
20 appellee brief addresses whether the firm satisfied the
21 disinterestedness requirement in light of Nancy Tevis' prepetition
22 contact with the firm seeking representation. The third exception
23 also applies, because it is a more general rule encompassing the
24 second exception. Having addressed the prepetition contact in its
25 brief, Wilke Fleury's defense is not prejudiced by the failure of
26 appellants' opening brief to argue the issue. As to the first
27 exception, it is possible that manifest injustice may result if we
28 do not address this issue. Finally, the leeway accorded a pro se

1 appellant counsels in favor of applying a recognized exception for
2 this issue. See, e.g., In re Arnold, 252 B.R. at 781 n.2.

3 Accordingly, we turn to an examination of whether the
4 bankruptcy court properly found that Wilke Fleury was disinterested.

5

6 **c. Concurrent Representation**

7 Two ethical duties are entwined in any attorney-client
8 relationship. The first is the attorney's duty of confidentiality,
9 which fosters full and open communication between client and
10 counsel, based on the client's understanding that the attorney is
11 statutorily obligated¹⁰ to maintain the client's confidences. See,
12 e.g., Cobra Solutions, 43 Cal. Rptr. 3d at 776; SpeeDee Oil, 980
13 P.2d at 378. The second is the attorney's duty of undivided loyalty
14 to the client. See, e.g., Cobra Solutions, 43 Cal. Rptr. 3d at 776;
15 Flatt v. Superior Court, 885 P.2d 950, 953 (Cal. 1994). These
16 ethical duties are mandated by Rules 3-310(C) & (E) of the
17 California Rules of Professional Conduct.¹¹

18 If the Tevises had been current clients of Wilke Fleury at the

19

20 ¹⁰ See CAL. BUS. & PROF. CODE § 6068(e) (West 2006).

21

21 ¹¹ Rule 3-310(C) of the California Rules of Professional
22 Conduct provides:

23

23 A member shall not, without informed written consent of each
24 client:

25

24 (1) Accept representation of more than one client in a matter
25 in which the interests of the clients potentially conflict;

26

or

27

25 (2) Accept or continue representation of more than one client
26 in a matter in which the interests of the clients actually
27 conflict; or

28

27 (3) Represent a client in a matter and at the same time in a
28 separate matter accept as a client a person or entity whose
interest in the first matter is adverse to the client in the
first matter.

1 same time that it was counsel for the trustee, it clearly would have
2 failed the "hold or represent" requirement of § 327(a). See, e.g.,
3 Cobra Solutions, 43 Cal. Rptr. 3d at 776 ("An attorney who seeks to
4 simultaneously represent clients with directly adverse interests in
5 the same litigation will be automatically disqualified."); SpeedDee
6 Oil, 980 P.2d at 379 ("[I]f an attorney - or more likely a law firm
7 - simultaneously represents clients who have conflicting interests,
8 a more stringent per se rule of disqualification applies. With few
9 exceptions, disqualification follows automatically, regardless of
10 whether the simultaneous representations have anything in common or
11 present any risk that confidences obtained in one matter would be
12 used in the other."); Flatt, 885 P.2d at 955 (even though the
13 simultaneous representations may have nothing in common, and there
14 is no risk that confidences from one client may be used against that
15 client, disqualification is virtually automatic).

16

17 **d. Successive Representation**

18 The test is quite different with respect to successive
19 representation. If the Tevises had been prior clients of Wilke
20 Fleury, but this representation had terminated before it began to
21 represent the trustee, it would fail the "hold or represent"
22 requirement only if there was a "substantial relationship" between
23 the subject matter of that representation and the representation of
24 the trustee. See, e.g., Cobra Solutions, 43 Cal. Rptr. 3d at 776-
25 77; Flatt, 885 P.2d at 954 (as to a former client, "the governing
26 test requires that the client demonstrate a 'substantial
27 relationship' between the subjects of the antecedent and current
28 representations."). If the subject of the prior representation is

1 such as to make it likely that the attorney received confidential
2 information that is relevant and material to the present
3 representation, the two representations are substantially related.
4 Cobra Solutions, 43 Cal. Rptr. 3d at 776-77. If there is a
5 substantial relationship between the former and the current
6 representation, the court will conclusively presume that the
7 attorney possesses confidential information adverse to the former
8 client. Id. (“[T]he attorney is presumed to possess confidential
9 information if the subject of the prior representation put the
10 attorney in a position in which confidences material to the current
11 representation would normally have been imparted to counsel.”);
12 Henriksen v. Great Am. Sav. & Loan, 14 Cal. Rptr. 2d 184, 186 (Ct.
13 App. 1992). This presumption arises because the duty to preserve
14 client confidences survives the termination of the attorney’s
15 representation. Cobra Solutions, 43 Cal. Rptr. 3d at 776. When a
16 substantial relationship between the two representations is shown,
17 the attorney is automatically disqualified in the second
18 representation. Id. at 777.

19 Former clients have an overwhelming interest in preserving the
20 confidentiality of information they imparted to counsel during a
21 prior representation. “That interest is imperiled when counsel
22 later undertakes representation of an adversary in a matter
23 substantially related to counsel’s prior representation of the
24 former client.” Id. at 780.

25 Where one attorney is disqualified for a conflict of interest,
26 the entire firm is disqualified (with exceptions not relevant in
27 this case). See, e.g., SpeeDee Oil, 980 P.2d at 374; Flatt, 885
28 P.2d at 954; Henriksen, 14 Cal. Rptr. 2d at 187-88 (rejecting

1 ethical wall solution to conflict of interest problem). In
2 California, vicarious disqualification is based on case law.¹² Cobra
3 Solutions, 43 Cal. Rptr. 3d at 777.

4 Protection of the confidentiality of client information is the
5 chief fiduciary duty at issue in a law firm's successive
6 representation of clients with potentially adverse interests.
7 Flatt, 885 P.2d at 954; Pound v. DeMera DeMera Cameron, 36 Cal.
8 Rptr. 3d 922, 926 (Ct. App. 2005). Whether and to what extent the
9 attorney acquired confidential information in the prior
10 representation is of primary importance, and is not necessarily
11 determined by the amount of time involved. SpeeDee Oil, 980 P.2d at
12 380. "An attorney represents a client - for purposes of a conflict
13 of interest analysis - when the attorney knowingly obtains material
14 confidential information from the client and renders legal advice or
15 services as a result." Id.

16
17 **e. Preliminary Consultation, but No Actual Engagement**

18 In this case, the parties agree that Wilke Fleury never
19 represented the debtors at all. However, this is not the end of the
20 story under California law.

21 Even though the debtors did not retain the firm, California law
22 may disqualify the firm from representing an opposing party under
23 appropriate circumstances. Under California law, the mere
24 consultation with a prospective client may create a disqualifying

25
26 ¹² With the exception of a few provisions, California has not
27 followed the vast majority of states in adopting the Model Rules
28 of Professional Conduct promulgated by the American Bar
Association. See MODEL RULES OF PROF'L CONDUCT (2004). In those
states, vicarious disqualification is governed by Rule 1.10. See
id. R. 1.10.

1 conflict of interest for a lawyer, especially where confidential
2 information was disclosed. The leading case is SpeedDee Oil, where
3 the California Supreme Court stated, “[t]he fiduciary relationship
4 existing between lawyer and client extends to preliminary
5 consultations by a prospective client with a view to retention of
6 the lawyer, although actual employment does not result.” Id. at 379
7 (quoting Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d
8 1311, 1319 (7th Cir. 1978)). “The primary concern,” the court
9 stated in SpeedDee Oil, “is whether and to what extent the attorney
10 acquired confidential information.” Id. at 380. The Supreme Court
11 mandated disqualification of the law firm at issue, because the
12 attorney had received “substantial amounts of material confidential
13 information.” Id. at 381.

14 The evidence before the bankruptcy court is in dispute as to
15 whether the Tevises sought legal representation from Wilke Fleury.
16 Nancy Tevis’ handwritten notes, which are in the record, support the
17 conclusion that she contacted Wilke Fleury, which declined the
18 representation. Wilke Fleury denies any contact with the Tevises.

19 The bankruptcy court found that, “[e]ven if the Debtors had
20 contacted Wilke Fleury regarding possibly retaining the firm, such
21 contact would not [disqualify] the firm [as] a disinterested
22 person.” We find that the record does not support this conclusion.

23 Under California law, the possession of relevant confidential
24 information is conclusively presumed if two conditions are met.
25 First, there must be a substantial relationship between the
26 representation of the former client and the subsequent
27 representation. Second, it must appear by virtue of the nature of
28 the former representation or the relationship of the attorney to the

1 former client that confidential information material to the current
2 dispute would normally have been imparted to the attorney. See,
3 e.g., Zimmerman v. Zimmerman (In re Marriage of Zimmerman), 20 Cal.
4 Rptr. 2d 132, 136 (Ct. App. 1993). The substantial relationship
5 between Nancy Tevis' legal problem when she claims that she called
6 Wilke Fleury and the subsequent bankruptcy case is not disputed.

7 Thus the determinative issue is whether the nature of the
8 contact, based on the evidence in the record, is such that the firm
9 would have normally received confidential information. There is no
10 evidence in the record that either of the Tevises actually spoke
11 with any attorney at the firm. There is no evidence in the record
12 that either of them received any legal advice from anyone at the
13 firm.

14 The disqualification analysis is not, however, limited to
15 situations in which a prospective client discloses confidential
16 information to an attorney. A communication with a nonlawyer
17 employee of a law firm can also give rise to a disqualifying
18 conflict of interest, especially where confidential information is
19 disclosed. See, e.g., Widger v. Owens-Corning Fiberglas Corp. (In
20 re Complex Asbestos Litigation), 283 Cal. Rptr. 732, 745 (Ct. App.
21 1991) ("[Nonlawyer] personnel are widely used by lawyers to assist
22 in rendering legal services. Paralegals, investigators, and
23 secretaries must have ready access to client confidences in order to
24 assist their attorney employers." (internal citations omitted)).

25 Nancy Tevis states in her declaration that in one telephone
26 call she spoke with Larry Hartmann. Apparently, Mr. Hartmann was
27 the office manager for Wilke Fleury, and may have performed
28 screening of possible clients. In her declaration, Nancy Tevis

1 stated that she recalled "explaining our situation" to Mr. Hartmann
2 and "fully explaining our cases" to someone at the firm. Nancy
3 Tevis' handwritten notes include Mr. Hartmann's name, adjacent to
4 the firm's name and phone number.

5 Thus, it is possible that during one of Nancy Tevis' phone
6 calls to Wilke Fleury, prior to the Tevises' bankruptcy case, she
7 disclosed confidential information regarding the pending modular
8 home and malpractice litigation to Mr. Hartmann. The excerpts of
9 the record that were before us on appeal, however, did not include
10 any testimony by Mr. Hartmann or other evidence regarding any
11 communications he had with the Tevises.¹³

12 A professional employed pursuant to § 327 has a "duty to make
13 full, candid and complete disclosure of all facts concerning his
14 transactions with the debtor. Professionals must disclose all
15 connections with the debtor . . . no matter how irrelevant or
16 trivial those connections may seem." Movitz v. Baker (In re Triple
17 Star Welding, Inc.), 324 B.R. 778, 789 (9th Cir. BAP 2005) (quoting
18 Mehdipour, 202 B.R. at 480). Employment is a prerequisite to
19 compensation, and until proper disclosure has been made, the court
20 cannot know whether the professional was validly employed. Triple
21 Star Welding, 324 B.R. at 789; see CIC Inv. Corp., 175 B.R. at 55-56
22 (§ 327(a) "clearly states that the court cannot approve the
23 employment of a person who is not disinterested").

24
25 ¹³ In motions for reconsideration filed after we issued our
26 original opinion, each party has submitted the declaration of Mr.
27 Hartmann, which was part of the record before the bankruptcy
28 judge. Our review of the declaration does not alter our
determination that remand is required in this case to determine
whether Nancy Tevis' calls impact Wilke Fleury's
disinterestedness.

1 Wilke Fleury had the burden to show its disinterestedness, and
2 it failed to do so. Because there was inadequate evidence upon
3 which the bankruptcy court could decide that confidential
4 information was not disclosed during prior contacts between the
5 Tevises and Wilke Fleury, the court could not properly decide the
6 disinterestedness issue. We must remand for a further determination
7 of this issue.

8 9 **C. Fees and Costs**

10 We now turn to the bankruptcy court's decision on the award of
11 fees and costs to Wilke Fleury.

12 13 **1. Findings Supporting Fee Award**

14 Section 330(a)(1) provides that, after notice and a hearing,
15 the court may award to counsel for the trustee reasonable
16 compensation for actual, necessary services rendered and
17 reimbursement for actual and necessary expenses. In determining the
18 reasonableness of the compensation to be awarded, § 330(a)(3)
19 provides:

20 the court shall consider the nature, the extent, and the
21 value of such services, taking into account all relevant
factors, including --

- 22 (A) the time spent on such services;
- 23 (B) the rates charged for such services;
- 24 (C) whether the services were necessary to the
administration of, or beneficial at the time at
25 which the service was rendered toward the
26 completion of, a case under this title;
- 27 (D) whether the services were performed within a
reasonable amount of time commensurate with the
28 complexity, importance, and nature of the
problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on
the customary compensation charged by comparably
skilled practitioners in cases other than cases
under this title.

1 In its Memorandum Decision, the bankruptcy court found that
2 Wilke Fleury's fee request was reasonable and that its application
3 for fees complied with the requirements of § 330(a). The court
4 acknowledged Wilke Fleury's efforts in coordinating the resolution
5 of five lawsuits involving over ten different parties and stated
6 that the conversion of appellants' chapter 7 case to one under
7 chapter 13 appeared to have resulted from the successful
8 administration of the chapter 7 case.

9 The Memorandum Decision also notes that the trustee's fees had
10 already been determined to be reasonable, and that Wilke Fleury's
11 representation of the former chapter 7 trustee "was essential to the
12 approval of the compromise that is now funding the Debtors' chapter
13 13 plan." With respect to billing rates, the court stated that
14 Wilke Fleury billed its attorney at a reduced hourly rate, did not
15 bill for twelve hours of billable paralegal time, and further
16 discounted its total fee request by ten percent. In addition, Wilke
17 Fleury assisted the chapter 13 trustee subsequent to conversion, at
18 no additional charge.

19 The Tevises' opening brief challenges the bankruptcy court's
20 fee award. However, their brief misses the mark. The Tevises
21 devote several pages of their brief to a discussion of their modular
22 home litigation and the legal representation that they received in
23 that litigation from other lawyers. And, another full page of the
24 brief amounts to complaints about the actions of the trustee in this
25 case. None of these matters are before us in this appeal.

26 The entire remainder of the opening brief is devoted to a
27 discussion of seventeen cited "errors of the bankruptcy court." The
28 format of this discussion is to quote a statement of the bankruptcy

1 court and then to present the Tevises' own "rebuttal."

2 For the most part, the rebuttal consists of statements by the
3 Tevises with no reference to the record whatever. Insofar as we can
4 tell, this rebuttal is either based on evidence that the bankruptcy
5 court did not find persuasive, or on new evidence that was never
6 presented to the bankruptcy court. Where the Tevises do make
7 references to the record, every reference is to an entire document,
8 and none gives either a page or a line number where the supporting
9 evidence may be found. The excerpts of record that the Tevises
10 submitted are 1181 pages long. For the reasons stated supra, we
11 decline to make our own search of this record to see whether the
12 record supports the "rebuttal" statements of the Tevises.

13 The Tevises claim in their reply brief that the bankruptcy
14 court either erred in basing its Memorandum Decision on false
15 information provided by biased parties or not reviewing the
16 "appropriate court documents." Specifically, the Tevises make two
17 arguments: first, that the court failed to consider their Narrative
18 Declaration and exhibits filed in support thereof in deciding to
19 award fees and costs to Wilke Fleury and, second, that by repeating
20 allegedly fabricated information presented by Wilke Fleury, the
21 court ruled that the Tevises' evidence was irrelevant.

22 The Tevises make no claim that Wilke Fleury did not actually
23 perform the services or incur the expenses described in the
24 Memorandum Decision or its fee application. The briefs filed by the
25 Tevises are unfocused, one-sided diatribes on everything that they
26 think went wrong in the bankruptcy case and in their prior
27 litigations. We cannot discern any showing that the bankruptcy
28 court abused its discretion in finding that the services were

1 necessary, that they benefitted the estate, or that they were
2 reasonable.

3 Even if we were to make our own search of the record to find
4 evidence to support the "rebuttal" statements, and were to find
5 evidence supporting each of the rebuttals, this would not give us
6 grounds to reverse the decision of the bankruptcy court. We cannot
7 set aside the bankruptcy court's attorneys fees award unless we are
8 persuaded that the court abused its discretion. We are not
9 empowered to make our own judgment of these issues. Furthermore, it
10 is the bankruptcy judge, and not this Panel, that determines the
11 credibility of the evidence.

12

13 **D. Tevises' Other Objections**

14 We turn now to the remaining issues that the Tevises raise,
15 which concern their Narrative Declaration and their due process
16 rights.

17

18 **1. The Narrative Declaration**

19 It is the bankruptcy court's responsibility to evaluate the
20 evidence presented. Although the Memorandum Decision does not
21 specifically mention the Tevises' Narrative Declaration, there is no
22 indication in the record that the court ignored the declaration in
23 reaching its decision to grant Wilke Fleury's motion for fees and
24 costs. Whether the Narrative Declaration "clearly demonstrates bad
25 faith" or anything else is for the bankruptcy court to determine.
26 If the contention is that the Memorandum Decision does not make an
27 explicit reference to the "Narrative Declaration," this is not
28 reversible error. The trial court has an obligation to consider all

1 of the evidence properly presented, and to give it the weight that
2 it deserves. The court has no obligation to mention all of the
3 evidence that it has considered. The bankruptcy court clearly did
4 not rule that the Tevises' evidence was irrelevant.

5 Furthermore, whether the bankruptcy court considered the
6 Tevises' Narrative Declaration is not an appealable issue. Only the
7 decision itself may be appealed. If the bankruptcy court had found
8 that the declarations were not properly before the court, or that
9 they were irrelevant, then we could review that decision. However,
10 the bankruptcy court made no such findings.

11

12 **2. Due Process Rights**

13 In the fourth and fifth questions on appeal, the Tevises
14 contend that they were denied the right to procedural and
15 substantive due process, and that they were denied a meaningful
16 hearing on the merits. However, they fail to point out in what
17 respect they were denied the full measure of their due process
18 rights. Indeed, both their opening brief and their reply brief
19 ignore these issues altogether after articulating them in the
20 statement of issues on appeal.

21 The bankruptcy court held a hearing on the merits of the fee
22 application of Wilke Fleury. The Tevises were present at the
23 hearing, and argued their position. They fail to point out any due
24 process shortcomings of this hearing.

25 Likewise, the Tevises make no argument that they were not given
26 a full and fair opportunity to present all of the evidence to the
27 court that they considered relevant to the allowance of fees for the
28 trustee's counsel. They contend only that the trial judge "failed

1 to acknowledge" their "Narrative Declaration." The Tevises fail to
2 explain what such acknowledgment means, how the trial record falls
3 short on this issue, or what legal obligation the court did not
4 satisfy.

5 We conclude that the Tevises were given the full measure of due
6 process rights, both procedural and substantive, to which they were
7 entitled.

8
9

VII. CONCLUSION

10 For the foregoing reasons, we REVERSE AND REMAND the bankruptcy
11 court's finding as to the firm's disinterestedness and its
12 entitlement to compensation. The bankruptcy court did not
13 adequately consider whether confidential information was disclosed
14 during the Tevises' contacts with Wilke Fleury personnel prior to
15 the filing of their bankruptcy petition and whether such prior
16 contacts were sufficient to disqualify the firm as attorney for the
17 Trustee under § 327(a). If Wilke Fleury shows its
18 disinterestedness, it should be awarded the fees and costs as found
19 by the bankruptcy court. If not, the bankruptcy court should issue
20 an appropriate order consistent with this opinion.

21 We AFFIRM the decision of the bankruptcy court in all other
22 respects, including that compensation and expenses sought by Wilke
23 Fleury were reasonable in amount.

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