

MAR 21 2006

NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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

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In re:)	BAP No.	AZ-04-1569-MoSB
)		
WHITE MOUNTAIN COMMUNITIES)	Bk. No.	00-06189-PHX-RTB
HOSPITAL, INC.,)		
)		
Debtor.)		
_____)		
DAVID WILLIAMS, M.D.,)		
)		
Appellant,)		
)		
v.)		
)		
McDERMOTT & TRAYNER, P.C.,)		
)		
Appellee.)		
_____)		

M E M O R A N D U M¹

Argued and Submitted on January 20, 2006
at Phoenix, Arizona

Filed - March 21, 2006

Appeal from the United States Bankruptcy Court
for the District of Arizona

Hon. Redfield T. Baum, Sr., Chief Bankruptcy Judge, Presiding.

Before: MONTALI, SMITH and BRANDT, Bankruptcy Judges.

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 A law firm with knowledge of the debtor's bankruptcy
2 performed work for the debtor without obtaining court approval of
3 its employment as special counsel. In addition, the law firm was
4 paid for its postpetition services even though it did not file a
5 fee application or obtain court approval of the fees and payment.
6 After the debtor's general bankruptcy counsel sent a letter
7 demanding that the law firm refund the postpetition payments, the
8 law firm filed an application for nunc pro tunc approval of its
9 employment as special counsel. The law firm also filed a fee
10 application seeking retroactive approval of the fees paid and fees
11 remaining unpaid.

12 The debtor and a creditor opposed the nunc pro tunc
13 employment application and the fee application. The debtor and
14 the law firm eventually reached a stipulation whereby the law firm
15 agreed to waive its prepetition claim of \$38,381.05 and the unpaid
16 \$1,553.53 of its postpetition claim, and to refund to the estate
17 \$7,500 from the \$28,632.50 it received from the debtor
18 postpetition. In exchange, the debtor agreed to withdraw its
19 objection to the law firm's nunc pro tunc employment application
20 and to allow the law firm to retain \$21,132.50 of the payments it
21 received postpetition.

22 The creditor did not withdraw its objection to the law firm's
23 fees and employment. Moreover, the creditor opposed the
24 stipulation between the debtor and the law firm. Over the
25 creditor's objection, the court entered an order approving the
26 stipulation, authorizing the nunc pro tunc employment of the law
27 firm, allowing the law firm's fees in the amount of \$21,132.50,
28 and permitting the law firm to retain the postpetition payments in

1 that amount. The creditor appealed and we AFFIRM.

2
3 **I.**
FACTS

4 Appellee McDermott & Trayner, P.C. ("McDermott") is a law
5 firm based in California that provided legal advice to debtor
6 White Mountain Communities Hospital, Inc. ("Debtor") on hospital
7 regulatory and health care law matters. In 1999, Debtor's former
8 chief executive officer, David Wanger ("Wanger") requested that
9 McDermott represent Debtor. McDermott did so and as of the
10 petition date of June 9, 2000, Debtor owed McDermott \$38,530.35
11 for prepetition services.² At one point, McDermott was appointed
12 as a member of the inactive creditors' committee in Debtor's case.

13 McDermott ceased working for Debtor when the petition was
14 filed, but in December Wanger requested it to represent Debtor on
15 some urgent health care regulatory issues affecting the hospital's
16 license and Medicare certification. McDermott performed the work,
17 but did not obtain court approval of its employment as special
18 counsel. McDermott charged Debtor \$27,950 in fees and \$2,236.03
19 in costs for this postpetition work and was paid \$28,632.50 by
20 Debtor without court permission.³

21 At a hearing in February 2004 on estimation of Wanger's
22 claim, Debtor's counsel questioned Wanger about his postpetition
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24
25 ²In footnote 4 of his Opening Brief, the appellant states
26 that McDermott filed its proof of claim on the petition date.
This is incorrect. The claims register states that the claim date
was June 29, 2000. It shows the petition date as June 9, 2000.

27 ³Counsel for McDermott noted that McDermott sent monthly
28 bills to Debtor for these services and was paid monthly, in the
ordinary course of business.

1 retention of McDermott absent court approval.⁴ In May 2004, the
2 bankruptcy court approved confirmation of Debtor's plan of
3 reorganization, but conditioned confirmation on Debtor pursuing
4 "recovery of the attorney's fees improperly paid to [McDermott]."
5 Debtor then sent a demand letter to McDermott for turnover of fees
6 paid postpetition.

7 After receiving Debtor's demand letter, McDermott filed an
8 application to appoint itself as special counsel nunc pro tunc
9 (the "Employment Application"). McDermott claimed that its
10 members were unfamiliar with bankruptcy procedure and law and the
11 need to obtain court approval of their postpetition employment and
12 payment. It further contended that Wanger had hired them on an
13 urgent basis because Debtor could not obtain the needed services
14 from Arizona counsel. McDermott also filed an application for
15 compensation seeking retroactive approval of the \$28,632.50
16 already paid and approval of the unpaid balance of \$1,553.53 (the
17 "Fee Application").

18 Debtor filed an objection to the Employment Application and
19 the Fee Application, arguing that (1) McDermott was not
20 disinterested because it had not unconditionally waived its
21 prepetition claim of \$38,381.05, (2) that Debtor had retained and
22 obtained approval of Arizona counsel to represent it in matters
23 concerning healthcare law and regulatory matters, (3) that

24
25 ⁴After this hearing, the court entered a minute entry
26 criticizing Wanger for retaining McDermott postpetition and
27 causing Debtor to pay McDermott for its postpetition services
28 without obtaining court approval. "The retention and payment of
McDermott by the debtor violated various provisions of the
Bankruptcy Code, including but not limited to Section 327, 330 and
549. Wanger knew or should have known that the retention and
payment of McDermott violated the requirements of the Code."

1 McDermott had not satisfactorily demonstrated lack of knowledge of
2 bankruptcy law to justify their failure to obtain court approval
3 of their employment and fees, (4) that the costs charged by
4 McDermott reflected a percentage of fees paid instead of actual
5 costs incurred, (5) that the bill for services included charges
6 for bankruptcy work in which McDermott purportedly had no
7 experience or knowledge, (6) that the time increments were in
8 quarter-hours, which does not reflect reasonable or actual time on
9 tasks, and (7) that some of the work performed by McDermott was
10 duplicative of work performed by other counsel for Debtor.

11 Appellant David L. Williams, M.D. ("Williams), a creditor and
12 former employee of Debtor, also objected to the Employment
13 Application and to the fees and claim of McDermott.⁵ Williams'
14 primary objection was that the members of McDermott were not
15 licensed to practice law in Arizona and thus the firm was
16 representing Debtor "illegally." Williams also noted that
17 McDermott had not demonstrated sufficient cause for nunc pro tunc
18 employment.

19 McDermott filed replies to both objections. In the reply to
20 Williams' objection, McDermott argued that it had consulted the
21 Arizona state bar prior to commencing work for Debtor to insure
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26 ⁵The objection was entitled "Objection to Nunc Pro Tunc
27 Application of McDermott Trayner [sic] Attorneys and Counter
28 Motion Objecting to Claim of McDermott, Trayner Attorneys." The
substance is essentially an objection to the Employment
Application, the Fee Application, and the proof of claim of
McDermott seeking prepetition fees.

1 that its representation of Debtor did not violate Arizona law.⁶
2 It also argued that hospital regulatory work was federal in nature
3 and thus Arizona's regulations against the practice of law by
4 attorneys not admitted in Arizona were preempted.

5 The reply to Debtor's objection focused primarily on Debtor's
6 contentions that McDermott's fees and expenses were not actual and
7 necessary and were not reasonable. McDermott also described the
8 urgent basis of its postpetition work for Debtor, including
9 responses to complaints by Williams to regulatory agencies.

10 On August 18, 2004, the bankruptcy court held a hearing on
11 the Fee Application and the Employment Application. The court
12 noted that it needed to examine McDermott's papers in more detail
13 to determine if it satisfied the requirements of nunc pro tunc
14 employment set forth in Okamoto v. THC Fin'l Corp. (In re THC
15 Fin'l Corp.), 837 F.2d 389 (9th Cir. 1988). The court also
16 overruled Williams' objection that McDermott had engaged in the
17 unauthorized practice of law. The court gave McDermott an
18 opportunity to file supplemental papers to demonstrate that it
19 satisfied the THC factors for nunc pro tunc employment, gave
20 Williams an opportunity to file a response to any supplemental
21 pleadings by McDermott, and stated that it would take the matter
22 under advisement without further hearing upon receipt of the
23 supplemental papers and response.

24 After the hearing, McDermott filed supplemental documents (a
25

26 ⁶The state bar representative did not outright state that the
27 law of Arizona permitted such representation; rather, she
28 indicated that the state bar and the Arizona Supreme Court were
not enforcing compliance with the rules against the unauthorized
practice of law.

1 second affidavit of John A. McDermott) in support of its nunc pro
2 tunc employment. Thereafter, Debtor and McDermott reached a
3 settlement resolving Debtor's objections to the Fee Application
4 and the Employment Application. They filed a stipulation (the
5 "Stipulation") in which McDermott agreed to disgorge \$7,500.00 of
6 the postpetition fees it had been paid, to waive its postpetition
7 claim of \$1,553.53 and to waive its prepetition claim of
8 \$38,530.35. In exchange, Debtor withdrew its objection to the Fee
9 Application and the Employment Application. The record is unclear
10 whether notice of this Stipulation was served on all creditors.⁷

11 Williams filed an objection to the Stipulation; he did not
12 raise or analyze the factors for approval of compromises in the
13 Ninth Circuit and he did not argue that the procedure that the
14 court fixed at the prior hearing was being abandoned. McDermott
15 filed a reply. Subsequently, on November 8, 2004, the bankruptcy
16 court entered its order approving the Stipulation, overruling
17 Williams' objections to the Employment Application and the Fee
18 Application, appointing McDermott as special counsel nunc pro
19 tunc, and allowing McDermott to retain \$21,132.50 in payments that
20 it received postpetition. The record contains no findings of fact
21 and conclusions of law to support this order, other than the
22 conclusion by the court at the August 18 hearing that Williams'
23 arguments regarding McDermott's alleged unauthorized practice of
24 law were unavailing.

25 _____
26 ⁷The record contains only the Stipulation (without any proof
27 of service), Williams' objection to it, McDermott's reply to the
28 objection, and the order. In its letter statement in support of
McDermott on appeal, Debtor refers to its motion to approve the
compromise. That motion is not a part of the excerpts of record.

1 Williams filed a timely notice of appeal on November 12,
2 2004. During the pendency of the appeal, the panel denied
3 Williams' motion to certify to the Arizona Supreme Court the issue
4 of whether McDermott had engaged in the unauthorized practice of
5 law. It also granted a motion by Debtor to file a letter
6 statement in support of McDermott's arguments and factual
7 statements. The panel also denied requests by McDermott to
8 supplement the record and to file a sur-reply brief.

9
10 **II.**
ISSUES

11 1. Did the bankruptcy court err in authorizing the *nunc pro*
12 *tunc* employment of McDermott?

13 2. Did the bankruptcy court err in approving the
14 Stipulation?

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16 **III.**
STANDARD OF REVIEW

17 A bankruptcy court's entry of an order approving the *nunc pro*
18 *tunc* employment of an estate professional is reviewed for an abuse
19 of discretion. *Atkins v. Wain, Samuel & Co. (In re Atkins)*, 69
20 F.3d 970, 973 (9th Cir. 1995). Similarly, we review a bankruptcy
21 court's award of fees to professionals for abuse of discretion.
22 *Mehdipour v. Marcus & Millichap (In re Mehdi-pour)*, 202 B.R. 474,
23 478 (9th Cir. BAP 1996), *aff'd*, 139 F.3d 1303 (9th Cir. 1998).

24 The bankruptcy court's decision to approve a compromise is
25 likewise reviewed for abuse of discretion. *Martin v. Kane (In re*
26 *A & C Properties)*, 784 F.2d 1377, 1380 (9th Cir. 1986), *cert.*
27 *denied sub nom. Martin v. Robinson*, 479 U.S. 854 (1986). As noted
28 by the Ninth Circuit in *A & C Properties*:

1 The law favors compromise and not litigation for its own
2 sake (citation omitted), and as long as the bankruptcy
3 court amply considered the reasonableness of the
4 compromise, the court's decision must be affirmed
5 (citation omitted).

6 Id. at 1381. "Approving a proposed compromise is an exercise of
7 discretion that should not be overturned except in cases of abuse
8 leading to a result that is neither in the best interests of the
9 estate nor fair and equitable for the creditors." CAM/RPC
10 Electronics v. Robertson (In re MGS Marketing), 111 B.R. 264, 266-
11 67 (9th Cir. BAP 1990).

12 Under the abuse of discretion standard, we cannot reverse the
13 bankruptcy court's ruling unless we have a definite and firm
14 conviction that the court committed a clear error of judgment in
15 the conclusion it reached upon a weighing of the relevant factors.
16 Marx v. Loral Corp., 87 F.3d 1049, 1054 (9th Cir. 1996).

17 **IV.** 18 **DISCUSSION**

19 **A. Nunc Pro Tunc Employment**

20 In the Ninth Circuit, nunc pro tunc approval of employment of
21 professionals for the estate and a retroactive award of fees for
22 services rendered without court approval is limited to
23 "exceptional circumstances where an applicant can show both a
24 satisfactory explanation for the failure to receive prior judicial
25 approval and that he or she has benefited the bankruptcy estate in
26 some significant manner." THC, 837 F.2d at 392; see also Atkins,
27 69 F.3d at 975-76; In re Gutterman, 239 B.R. 828, 830 (Bankr. N.D.
28 Cal. 1999). Thus, in order to obtain court approval of its nunc
pro tunc employment, McDermott was required not only to
demonstrate that it qualified for employment under 11 U.S.C.

1 § 327(e)⁸ but also to explain satisfactorily its failure to apply
2 for earlier court approval and to show that its services
3 benefitted the estate. Atkins, 69 F.3d at 975-76.

4 Here, McDermott satisfactorily explained its failure to apply
5 for court approval of its employment prior to commencing
6 postpetition work for Debtor. McDermott does not perform
7 bankruptcy work; according to Mr. McDermott's second affidavit,
8 the firm had never served as counsel to a client who was in
9 bankruptcy prior to this case. It had never served as general or
10 special counsel in any bankruptcy case. It performs highly
11 specialized work in the health care regulatory field and its
12 members are not familiar with bankruptcy practice and procedure.

13 Having represented Debtor on similar matters prepetition (in
14 particular, responding to complaints by Williams to various
15 regulatory agencies that Debtor had violated certain Medicare
16 statutes and regulations), it agreed to represent Debtor
17 postpetition in responding to further allegations by Williams of
18 wrongdoing. In doing so, it billed Debtor on a monthly basis and
19 was paid on a monthly basis. McDermott communicated with Debtor's
20 general bankruptcy counsel, who -- despite its knowledge that
21 McDermott was performing services benefitting Debtor -- never
22 instructed McDermott of the necessity of obtaining court approval
23 of its employment. Under such circumstances, McDermott has
24 justified its failure to seek prior court approval of its
25 employment. Id.

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27 ⁸Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

1 McDermott has also demonstrated that the work it performed
2 postpetition benefitted the estate. As noted in Mr. McDermott's
3 second affidavit, if Williams had prevailed in his continuing
4 allegations against Debtor to the regulatory agencies, Debtor's
5 licenses could have been revoked and Medicare could have suspended
6 Debtor's authorization to treat patients covered by Medicare. By
7 successfully defending against Williams' allegations (with which
8 McDermott was already familiar from its prepetition work),
9 McDermott benefitted the estate. In addition to performing this
10 work, McDermott assisted Debtor in completing regulatory surveys
11 and subpoena responses, thereby enabling Debtor to maintain its
12 license and Medicare reimbursement. Id.

13 Having satisfied the two prongs for demonstrating
14 "exceptional circumstances" justifying nunc pro tunc employment,
15 McDermott was also required to show that it is qualified for
16 employment as special counsel under section 327(e). Williams
17 contends that McDermott could not do so because (1) McDermott was
18 not "disinterested" because it was a prepetition creditor of
19 Debtor; (2) McDermott did not have standing to seek its own
20 employment as special counsel; and (3) McDermott was not
21 authorized to render services to Debtor because none of its
22 members was licensed to practice law in Arizona. Williams'
23 arguments are not persuasive.

24 First, section 327(e) does not require special counsel to be
25 "disinterested;" rather, an attorney who represents a debtor-in-
26 possession or trustee as special counsel merely must hold or
27 represent no interest adverse to the estate "with respect to the
28 matter on which such attorney is to be employed." 11 U.S.C.

1 § 327(e) (emphasis added). Holding a prepetition claim does not
2 disqualify an attorney from being special counsel. In re Albert,
3 206 B.R. 636, 642 n.7 (Bankr. D. Mass. 1997) (“Although the Court
4 has found that [attorney] holds a prepetition claim, he may still
5 be employed [as special counsel]. The disinterestedness
6 requirement contained in § 327(a) is not applicable to [special
7 counsel]. Instead, pursuant to § 327(c) and (e), the court need
8 only determine whether [attorney] holds an interest adverse to the
9 estate.”). Here, McDermott does not appear to hold any or
10 represent any interest adverse to the estate with respect to the
11 matters for which it was retained. The fact that McDermott held a
12 prepetition claim against Debtor is irrelevant.⁹

13 Secondly, as the Ninth Circuit held in Atkins, a professional
14 may seek nunc pro tunc employment under section 327 even over the
15 objections of the trustee or debtor-in-possession. Atkins, 69
16 F.3d at 978. Thus, it is not a requirement that the debtor-in-
17 possession file the application.

18 Finally, while McDermott may or may not have been authorized
19 to practice law in Arizona, we need not decide that issue because
20 the bankruptcy court has the power to approve out-of-state counsel
21 to represent and advise a debtor. As the Ninth Circuit noted in
22 Brown v. Smith (In re Poole), 222 F.3d 618, 620-21 (9th Cir.
23 2000), federal courts have the power to control the admission and
24 discipline of attorneys that appear before it, notwithstanding
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26 _____
27 ⁹Even if holding a prepetition claim against Debtor were
28 grounds for disqualification, McDermott’s agreement to waive the
claim resolved the issue.

1 contrary state law regulations governing the practice of law.¹⁰
2 Id. at 620. Similarly, the bankruptcy court has the authority to
3 approve out-of-state attorneys as special counsel for a debtor,
4 even if that attorney is not licensed or otherwise authorized to
5 practice law in the state where the bankruptcy court sits, and
6 even if the attorney does not actually appear before the
7 bankruptcy court but renders services to the estate elsewhere.

8 We therefore are not persuaded by Williams' arguments that
9 the court erred in granting the Employment Application because
10 McDermott was not authorized to practice law under Arizona state
11 rules and regulations. If Williams believes that -- outside the
12 context of the bankruptcy case -- McDermott engaged in the
13 unauthorized practice of law, he should pursue his complaint with
14 the appropriate Arizona courts or agencies responsible for the
15 enforcement of attorney disciplinary rules.

16 B. Approval of Settlement

17 "The bankruptcy court has great latitude in approving
18 compromise agreements." Woodson v. Fireman's Fund Ins. Co. (In re
19 Woodson), 839 F.2d 610, 619 (9th Cir. 1987). The court's
20 discretion, however, is not unlimited; the compromise must be
21 "fair and equitable" and "reasonable." Id.; A & C Properties, 784

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23 ¹⁰In Poole, the Ninth Circuit affirmed a bankruptcy court's
24 denial of a trustee's motion to disgorge fees of a debtor's
25 attorney, holding that a bankruptcy attorney admitted to practice
26 before a federal district court is entitled to receive
27 compensation even though he was not admitted to practice by the
28 state bar where the federal court sat. In so holding, the Ninth
Circuit stated that "[a]dmission to practice law before a state's
courts and admission to practice before the federal courts in that
state are separate, independent privileges. 'The two judicial
systems of courts, the state judiciatures and the federal
judiciary, have autonomous control over the conduct of their
officers'" Id. at 620 (citations omitted).

1 F.2d at 1381. In determining the fairness and reasonableness of a
2 proposed settlement, the court must consider:

3 (a) The probability of success in the litigation; (b)
4 the difficulties, if any to be encountered in the matter
5 of collection; (c) the complexity of the litigation
6 involved, and the expense, inconvenience and delay
necessarily attending it; (d) the paramount interest of
the creditors and a proper deference to their reasonable
views in the premise.

7 A & C Properties, 784 F.2d at 1381. While creditors' objections
8 to a compromise must be afforded due deference, such objections
9 are not controlling. Id. "The opposition of the creditors of the
10 estate to approval of a compromise may be considered by the court,
11 but is not controlling and will not prevent approval of the
12 compromise where it is evident that the litigation would be
13 unsuccessful and costly." Official Unsecured Creditors' Comm. v.
14 Beverly Almont Co. (In re The General Store of Beverly Hills), 11
15 B.R. 539, 541 (9th Cir. BAP 1981).

16 The court may give weight to the opinions of the trustee, the
17 parties and their attorneys. A & C Properties, 784 F.2d at 1384.
18 "Rather than conducting a detailed evaluation of the merits of the
19 state court action," the bankruptcy court's function is "to
20 examine the proposed settlement to determine if it falls below the
21 lowest point in the range of reasonableness." In re Hydronic
22 Enterprise, Inc., 58 B.R. 363, 366 (Bankr. D. R.I. 1986).

23 In this case, the court approved the compromise without
24 making findings setting forth how the Stipulation satisfied A & C
25 Properties and Woodson. While the record would have been much
26 clearer had the bankruptcy court identified, analyzed, and
27 announced how it weighed each of the A & C Properties factors, we
28 will not overturn the approval of the compromise merely because

1 the court did not explicate its consideration of the factors.
2 Rather, "where the record supports approval of the compromise, the
3 bankruptcy court should be affirmed." A & C Properties, 784 F.2d
4 at 1383. Here, the record supports approval of the Stipulation.

5 With respect to the first factor, the probability of Debtor
6 succeeding in its battle against McDermott was not particularly
7 significant (particularly given the analysis above that nunc pro
8 tunc employment was not error and that McDermott was not
9 disqualified for holding an unsecured prepetition claim). In
10 fact, the settlement resulted in McDermott waiving its prepetition
11 fees even though the law did not require such a waiver.
12 Additionally, the settlement resulted in McDermott disgorging a
13 quarter of the fees it received and waiving the balance of its
14 postpetition fees. Inasmuch as McDermott justified its nunc pro
15 tunc employment (as discussed above), the estate may well have
16 recovered more than it would have had the Employment Application
17 and Fee Application been decided on the merits, thereby satisfying
18 the second, third and fourth factors of A & C Properties.

19 In his reply brief, Williams implies that the court erred
20 procedurally when it signed the Stipulation. He contends that
21 McDermott did not supplement its applications (as directed by the
22 court) to show that it satisfied the THC requirements for nunc pro
23 tunc employment and that the court therefore erred in granting the
24 "backdoor" Stipulation. Williams is wrong. McDermott did file a
25 supplemental pleading (the second affidavit of John A. McDermott)
26 in response to the court's directive. The Stipulation was reached
27 after that supplemental response was filed. Williams was given an
28 opportunity to, and did, object to the Stipulation. McDermott

1 responded to the objection and the court thereafter approved the
2 Stipulation. Williams was given multiple opportunities to air his
3 substantive objections to the Fee Application, the Employment
4 Application and the Stipulation. The court, having an intimate
5 knowledge of this bankruptcy case as well as the merits and nature
6 of this dispute, approved the Stipulation. Williams was not
7 deprived of any due process, and in fact did not specifically
8 object to the procedure. Any objection he may now have regarding
9 the process is waived.

10
11 **V.**
CONCLUSION

12 For the foregoing reasons, we AFFIRM.
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