

SEP 13 2005

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

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

In re:) BAP No. CC-05-1023-BKMo
)
 JOHN DOUGLAS SMITH,) Bk. No. LA-95-29929-SB
)
 Debtor.)
 _____)
)
 C. DOUGLAS WIKLE, INC., A)
 Professional Corporation,)
)
 Appellant,)
)
 v.) **M E M O R A N D U M**¹
)
 PETER C. ANDERSON, Chapter 7)
 Trustee; UNITED STATES)
 TRUSTEE; PETER KENNEDY;)
 ARMAND BOUZAGLOU; KIRIT GALA;)
 CARY PRESANT; JOHN SEVILLA;)
 CHARLES WISEMAN,)
)
 Appellees.)
 _____)

Submitted without oral argument on July 29, 2005

Filed - September 13, 2005

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding

Before: BRANDT, KLEIN, AND MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Counsel for chapter 11² debtor in possession filed his fifth fee
2 application. Following a protracted history, including an appeal to the
3 district court, which vacated and remanded, the bankruptcy court held
4 that the application failed to satisfy the requirements for a final
5 application under § 330. The court allowed the fees awarded in previous
6 interim orders, but, finding the application insufficient, disallowed
7 the fees requested in the fifth application. We AFFIRM.

8
9 **I. FACTS**

10 A. Background

11 John Douglas Smith ("debtor") filed an emergency chapter 11
12 petition on 7 August 1995. The filing was precipitated by a \$6 million
13 state court judgment awarded three days prior to Peter Kennedy, Armand
14 Bouzaglou, Kirit Gala, Cary Presant, John Sevilla and Charles Wiseman
15 (collectively, the "Kennedy Creditors").³

16 After a contested hearing, the bankruptcy court entered an order on
17 7 December 1995 granting the § 327(a) application to appoint C. Douglas
18 Wikle, Inc. ("Wikle") as debtor's counsel. The appointment order
19 directed: a "post-petition retainer received by Applicant in the sum of
20 \$25,000 as earned-when-paid and non-refundable, [may be] paid from a
21 post-petition loan to Debtor" and "the proposed post-petition retainer
22 in the sum of \$100,000.00 may be funded by the Debtor from his post-
23 petition compensation[.]"

24 _____
25 ² Unless otherwise indicated, all chapter and section
26 references are to the United States Bankruptcy Code, 11 U.S.C. et seq
and all Rule references are to the Bankruptcy Rules, 1001 et seq.

27 ³ Kennedy v. Wilshire Oncology Medical Group Inc., et al.,
28 Superior Court of California, County of Los Angeles, BC 068069. The
judgment, entered jointly and severally against debtor and co-
defendant Dr. Robert McKenna, was reduced on appeal to \$4.2 million.

1 A number of issues were litigated over the next 20 months,
 2 including a contentious exemption claim which was determined on appeal
 3 (In re Smith, 235 F.3d 472 (9th Cir. 2000)), an avoidance action, and a
 4 failed plan confirmation.⁴ On 27 April 1997, the bankruptcy court
 5 entered an order converting the case to chapter 7, and appointed
 6 appellee Peter C. Anderson as chapter 7 trustee ("Trustee"). Wikle was
 7 not employed by the Trustee. Per the Trustee's 7 March 2002 Final
 8 Report, liquidation realized receipts of \$733,793.00 for the estate;
 9 after disbursements, assuming Wikle's final application for fees of
 10 \$148,915 was granted, \$3,571.44 would be available for general unsecured
 11 creditors.

12 B. Fee Applications

13 Wikle filed five fee applications, summarized below:

Application	Fees Requested	Fee Award & Award Date	Expenses Requested	Expenses Awarded	Total Allowed
First	42,300.00	42,300.00 (31 Jan 1996)	629.79	192.60	42,492.60
Second	68,985.00	41,220.00 (17 June 1996)	1290.45	1237.95	42,457.95
Third	50,242.50	47,000.00 (16 Dec 1996)	863.71	863.71	47,863.71
Fourth	92,935.00	0.00 (deferred - Apr 1997; disallowed - (3 Jan 2005)	1612.64	0.00	0.00
Fifth	148,915.00	0.00 (3 Jan 2005)	3094.04	0.00	0.00
Total	254,462.50	130,520.00	7490.63	2394.26	132,914.96

27 ⁴ The proposed liquidating plan was apparently unconfirmable
 28 due to debtor's inability to settle the Kennedy Creditors' claims,
 which was a condition to confirmation.

1 1. First through Fourth Interim Fee Applications

2 Wikle filed four interim fee applications covering the period
3 August 1995 to February 1997. The bankruptcy court allowed the majority
4 of the fees requested in the first three applications but disallowed
5 certain fees and expenses on the ground that the services at issue were
6 not compensable from the estate (not at issue in this appeal). The
7 estate paid Wikle all allowed fees and expenses.

8 The fourth interim application was "deferred until funds in the
9 Debtor's account is sufficient," but was later incorporated into the
10 fifth fee application.

11 2. Fifth (Second Amended) Fee Application

12 Wikle filed his original Fifth Fee Application on 14 January 2002.
13 After hearing on 29 May 2002, the bankruptcy court denied the
14 application without prejudice.⁵ He filed the Fifth (Second Amended) Fee
15 Application on 6 June 2002, which was comprised of two components:
16 first, a renewal of the fourth interim fee application; second, an
17 application for additional fees and costs incurred from 12 February 1997
18 to 2001.

19 After a contested hearing, and considering objections of the
20 Kennedy Creditors, the Trustee and the U.S. Trustee, the bankruptcy
21 court granted Wikle an administrative expense claim of \$130,520 in fees
22 and costs of \$2294.26 (as previously granted on an interim basis) but
23 denied his request as to all additional fees and costs.

24
25 ⁵ Kennedy Creditors argue that the record is deficient because
26 the original Fifth Fee application and the 29 May 2002 hearing
27 transcript contain findings which are necessary to determination of
28 this appeal, and are not in the record. While these may have been
helpful, they are not essential for our review of this appeal.
Appellant filed, shortly before argument, a motion for procedural
order attaching a copy of the transcript, but not requesting any
relief. Accordingly, the motion will be stricken.

1 Wikle appealed that order to the U.S. District Court for the
2 Central District of California, Case No. CV-02-6115-DDP. More than a
3 year later, the District Court, finding the record inadequate, vacated
4 the order and remanded for findings:

5 Based on the record before the Court, there is no
6 evidence that the bankruptcy court applied the standard set
7 forth in 11 U.S.C. § 330(a). The appellee contends that the
8 bankruptcy court's more detailed factual findings are
9 contained in the court's oral ruling denying the original
10 fifth and final fee application. . . . Neither party, however,
11 has designated the transcript from this hearing for the Court.
12 . . . The bankruptcy court, however, did not specifically
13 adopt these findings in denying the subject of this appeal,
14 the second amended, fifth and final fee application. . . .

15

16 The bankruptcy court's order of June 25, 2002 is hereby
17 vacated, and the case is remanded to the bankruptcy court to
18 make the required findings under 11 U.S.C. § 330(a).

19 Order Remanding for Further Proceedings, at 3-4, 20 August 2003.

20 The bankruptcy court conducted a hearing on 14 July 2004, eleven
21 months after remand.⁶ The Kennedy Creditors, Trustee and U.S. Trustee
22 filed renewed objections, arguing insufficient detail and improper
23 billing judgment. The bankruptcy court ordered:

24 [T]hat Wikle submit a comprehensive fee application under
25 § 330, and especially that he address the issues that the
26 Ninth Circuit has found decisive in Strand [375 F.3d 854, 860
27 (9th Cir. 2004)]. If the court's mathematical calculations
28 [set forth previously] are incorrect, Wikle is directed to
provide accurate calculations. Additionally, Wikle is ordered
to account for fee payments that he received directly from the
debtor, and to inform the court as to the status of the
remainder of the funds received as a retainer. The court
finds that it is not able to respond to the remand from the
district court until Wikle provides the required information.

27 ⁶ Wikle moved in District Court on 3 March 2004 for an order
28 to enforce the mandate, arguing that his appellate rights were being
obstructed. The District Court denied the motion, and the Court of
Appeals later denied Wikle's petition for a writ of mandamus.

1 Wikle is given 30 days, until October 25, 2004 to make
2 this submission. The trustee and any other party in interest
3 is given 15 days thereafter, to November 9, 2004, for any
4 additional response. Until that time, the matter is no longer
5 under submission.⁷

6 Findings and Order on Wikle Fee Applications, at 9, 29 September 2004.

7 Wikle timely filed a Memorandum re Proceedings on Remand, attaching
8 three charts purporting to organize time and dollar charges for
9 compensation per period. The Kennedy Creditors objected both to form
10 and substance: that even with the memorandum, Wikle's application was
11 ambiguous and insufficient (i.e., that it remained unclear whether
12 additional sums requested were a duplication of fees paid or additional
13 fees; failed to account for all time; failed to incorporate fees from
14 other sources including payments directly from debtor; that some
15 services were attempts to increase exemptions and not beneficial to the
16 estate; that there was excessive billing and lack of billing judgment;
17 that no confirmable chapter 11 plan was proposed, and the impropriety of
18 the chapter 11 filing). None sought disgorgement of previously awarded
19 fees nor included any statement of what compensation might be
20 reasonable.

21 Without further hearing, the bankruptcy court issued a memorandum
22 concluding that Wikle had "failed and refused" to file a final fee
23 application conforming to § 330, describing the deficiencies in some
24 detail, and denying all additional fees:

25 [T]he court has not been able to make the findings required by
26 § 330(a)(3) and Strand [375 F.3d 854, 860 (9th Cir. 2004)].
27 Wikle has never put before the court an application specifying
28 (1) the amount of time spent on the various categories or

26 ⁷ Wikle appealed the 29 September 2004 order to us, CC-04-
27 1518, which we dismissed for lack of jurisdiction as it was not a
28 final order. In re Four Seas Center, Ltd., 754 F.2d 1416, 1419 (9th
Cir. 1985) (interim fee awards are interlocutory and are not
considered final judgments).

1 services rendered in the entire case, (2) how the services
2 were necessary or beneficial to the estate, (3) whether the
3 fees are reasonable, taking into consideration the factors set
4 forth in § 330(a)(3), and especially the failure to confirm a
plan of reorganization and the trustee's realization of
approximately \$350,000 in the case, and (4) whether and how
counsel exercised billing judgment with respect to fees.

5 The applicant has the burden of showing that he has
6 earned the fees requested. The court finds that Wikle has
7 altogether failed to carry his burden of showing that he is
entitled to fees at all in this case. In these circumstances,
the court would be justified in denying fees.

8 However, in the exercise of its discretion the court
9 hereby makes a final allowance of fees in the amount
10 previously awarded in this case. The court finds that Wikle
has shown no entitlement to any further fees in this case.
Accordingly, any fees beyond those already awarded are denied.

11 Final Order on Wikle Fee Applications, at 8-9, 3 January 2005.

12 Wikle appealed the aspects of the order disallowing compensation,
13 seeking reversal and remand to comply with the District Court's mandate.
14 No cross appeal was filed.

15 Wikle moved to submit the appeal without oral argument, and as
16 appellee did not object, we granted that motion on 22 July.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and
20 § 157(a) and (b)(2)(A). We do under 28 U.S.C. § 158(c).

22 **III. ISSUES**

23 1. Whether the bankruptcy court complied with the District Court's
24 mandate on remand; and

25 2. Whether the bankruptcy court abused its discretion in denying
26 the Fifth (Second Amended) Application.

1 **IV. STANDARD OF REVIEW**

2 A. A lower court's compliance with an appellate court's mandate
3 on remand is reviewed de novo. U.S. v. Kellington, 217 F.3d 1084, 1092
4 (9th Cir. 2000).

5 B. We review a bankruptcy court's award of compensation under the
6 abuse of discretion standard. In re Triple Star Welding, Inc., 324 B.R.
7 778, 788 (9th Cir. BAP 2005); In re Riverside-Linden Inv. Co., 925 F.2d
8 320, 322 (9th Cir. 1991). This standard requires us to consider if the
9 bankruptcy court adequately articulated reasons for its findings.
10 Ferland v. Conrad Credit Corp., 244 F.3d 1145, 1148 (9th Cir. 2001). A
11 court abuses its discretion if it bases its ruling on either an
12 erroneous view of the law or a clearly erroneous assessment of the
13 evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

14 C. Conclusions of law and questions of statutory interpretation,
15 including construction of the Code, are reviewed de novo, and findings
16 of fact are reviewed for clear error. Rule 8013; In re Mednet, 251
17 B.R. 103, 106 (9th Cir. BAP 2000). A factual finding is clearly
18 erroneous if the appellate court, after reviewing the record, has a firm
19 and definite conviction that a mistake has been committed. Anderson v.
20 Bessemer City, 470 U.S. 564, 573 (1985).

21
22 **V. DISCUSSION**

23 A. Standing

24 Wikle has not questioned appellees' standing, but we have an
25 independent obligation to consider whether the Kennedy Creditors may
26 properly defend this appeal.

27 It is undisputed that the Kennedy Creditors, who hold 95% of the
28 non-priority claims are "creditors" as defined in § 101(10). They are

1 pecuniarily affected by the order on appeal: because the estate assets
2 were insufficient to make a full distribution to general unsecured
3 claimants, payment from estate funds of Wikle's administrative claim
4 would diminish distributions to unsecured creditors. In re Roderick
5 Timber Co., 185 B.R. 601, 604 n.2 (9th Cir. BAP 1995) (citing Matter of
6 Fondiller, 707 F.2d 441, 442 (9th Cir. 1983)).

7 The Kennedy Creditors have standing to defend this appeal.
8

9 B. Compliance with District Court Remand

10 Since Smith did not elect to appeal to the district court,
11 28 U.S.C. § 158(c)(1) and Rule 8001(e), we are in the odd position of
12 reviewing the bankruptcy court's compliance with another court's remand.

13 Wikle contends the bankruptcy court did not comply with the
14 District Court's remand. The "rule of mandate" was set forth in
15 Kellington, 217 F.3d at 1092-93: "although lower courts are obliged to
16 execute the terms of a mandate, they are free as to 'anything not
17 foreclosed by the mandate,' and, under certain circumstances . . . may
18 deviate from the mandate . . . if it is not counter to the spirit of the
19 circuit court's decision." (citations omitted).

20 The manner in which the bankruptcy court exercised its discretion
21 was clarified after the remand, and was entirely consistent with the
22 mandate. The Findings and Order of 29 September 2004 specified what the
23 court needed in order to make required § 330(a) findings. After Wikle
24 filed his Response, the bankruptcy court elaborated its findings on the
25 inadequacy of the application and outlined with specificity its basis
26 for disallowing further fees and costs in its 3 January 2005 Final
27 Order, the merits of which we consider below.

28 We find no failure to comply with the District Court's mandate.

1 C. Final Fee Application

2 The gravamen of this appeal is whether the Fifth (Second Amended)
3 Fee Application was sufficiently complete for the bankruptcy court to
4 evaluate the appropriate criteria.

5 It is the applicant's burden to submit sufficiently detailed
6 records of the time spent and services provided, and lack of detail in
7 the fee application warrants denial. In re Travel Headquarters, Inc.,
8 140 B.R. 260, 261-62 (9th Cir. BAP 1992). Rule 2016(a)⁸ sets forth the
9 requirements for final fee applications:

10 An entity seeking interim or final compensation for services,
11 or reimbursement of necessary expenses, from the estate shall
12 file an application setting forth a detailed statement of (1)
13 the services rendered, time expended and expenses incurred,
14 and (2) the amounts requested. An application for
15 compensation shall include a statement as to what payments
16 have theretofore been made or promised to the applicant for
17 services rendered or to be rendered in any capacity whatsoever
18 in connection with the case, the source of the compensation so
19 paid or promised, whether any compensation previously received
20 has been shared and whether an agreement or understanding
21 exists between the applicant and any other entity for the
22 sharing of compensation received or to be received for
23 services rendered in or in connection with the case, and the
24 particulars of any sharing of compensation or agreement or
25 understanding therefor, except that details of any agreement
26 by the applicant for the sharing of compensation as a member
27 or regular associate of a firm of lawyers or accountants shall
28 not be required. The requirements of this subdivision shall
apply to an application for compensation for services rendered
by an attorney or accountant even though the application is
filed by a creditor or other entity.

22 The bankruptcy court must consider the nature, extent, and value of
23 professional services, taking into account all relevant factors,
24 including time spent, rate charged, necessity, benefit to the estate and
25

27 ⁸ As well, Central District of California Local Bankruptcy
28 Rule 2016-1 imposes more criteria for applications. The U.S. Trustee
Guidelines for fee applications complement the local rules.

1 reasonably. § 330(a)(3)(A);⁹ Strand, 375 F.3d at 860. "As the fact
2 finder, the bankruptcy court must evaluate the sufficiency of the
3 evidence provided by the professional in support of the application for
4 compensation." In re CIC Inv. Corp., 192 B.R. 549, 554 (9th Cir. BAP
5 1996) (citing Roderick Timber, 185 B.R. at 605).

6 The bankruptcy court concluded in its Final Order that Wikle's
7 Memorandum re Proceedings on Remand failed to remedy the deficiencies
8 identified in the court's prior Findings and Order. There remained:

- 9 1. no disclosure of fees received from non-estate sources (Wikle
10 received fees of \$53,765 from exempt assets, plus a \$10,000
11 retainer);¹⁰
- 12 2. no summary of all amounts sought, and the actual total was not
13 discernable;
- 14 3. no identification of charges for each service rendered; and
- 15 4. no summary of total fees and expenses requested.

16 The charts attached to the Memorandum attempted to address the
17 court's directive to summarize the time spent on various categories, but
18 they are confusing and vague, and the court is treated to a narrative of
19 appellees' perversity. Necessity, reasonableness, and billing judgment
20 are essentially unaddressed. Even read together with the Fifth (Second
21 Amended) Fee Application, Wikle's Memorandum failed to address most of
22 the Strand questions.

23
24
25 ⁹ We need not comprehensively review the law on interim fee
26 awards. Interim awards under § 331 are interlocutory, are subject to
the court's final examination, and do not restrict the bankruptcy
court to craft a final award under § 330. Strand, 375 F.3d at 858.

27 ¹⁰ But, as noted in the Findings and Order at p.8, this factor
28 is covered by Wikle's employment order. This deficiency was clearly
not a factor in the court's ultimate determination.

1 We note that included in this application was a request for fees of
2 \$9035 incurred post-conversion for preparing the fee application. Prior
3 to Lamie v. U.S. Trustee, 540 U.S. 526 (2004), the Ninth Circuit law was
4 that compensating professionals for time to prepare a fee application
5 was not inappropriate. See In re Nucorp Energy, Inc., 764 F.2d 655,
6 662-63 (9th Cir. 1985). The bankruptcy court, reading Lamie strictly,
7 determined that "in a chapter 7 case the estate cannot be charged for
8 work by counsel for the debtor unless counsel was employed by the
9 trustee pursuant to § 327." Final Order on Wikle Fee Application at 7,
10 3 January 2005. Wikle argues this is an absurd construction of
11 § 330(a), not required by Lamie. But we need not and do not resolve
12 this issue: the fee award is discretionary, and we may affirm
13 disallowance of this component of the application on the basis of
14 inadequacy of the entire application. As noted by the Ninth Circuit in
15 In re Smith, 317 F.3d 918, 929 (9th Cir. 2002), fee awards are
16 discretionary, and all, part, or none of the request may be rewarded.

17 The bankruptcy court, entirely within its discretion, identified
18 the deficiencies and provided an opportunity to address them. Wikle did
19 not. We find no abuse of discretion.

20
21 D. Due Process

22 Wikle asserts, without citing to authority, that the denial of a
23 fee award is a sanction, and a violation of constitutional due process.
24 His arguments that he has "made a prima facie case" and that "the
25 evidence is uncontradicted" miss the point: those are not the
26 standards, nor are they factually correct.

27 Once an objection is filed, a fee application is a "contested
28 matter," requiring reasonable notice and an opportunity to be heard.

1 Rule 9014(a). Even if no objection is filed, the court may disallow
2 fees sua sponte: "the court may, on its own motion . . . award
3 compensation that is less than the amount of compensation that is
4 requested." § 330(a)(2); In re Lewis, 113 F.3d 1040, 1045-46 (9th Cir.
5 1997) (affirming order granting portion of the fees requested).

6 The Third Circuit in In re Busy Beaver Bldg. Centers, Inc., 19 F.3d
7 833 (3rd Cir. 1994), addressed procedural due process in the context of
8 a sua sponte objection to fees. It held that, once the applicant has
9 met the threshold requirements of good faith, then if the court decides
10 provisionally that the information in the application is not reliable or
11 is too vague, the court may identify particular reasons why the
12 application is deficient and give the applicant an opportunity to submit
13 a more-detailed description of services, and be allowed a meaningful
14 hearing. Id. at 845-47. See also Stanley B. Bernstein, Collier
15 Compensation, Employment and Appointment of Trustees and Professionals
16 in Bankruptcy Cases, ¶ 4.09 (Matthew Bender 2004).

17 We agree with Busy Beaver, and the bankruptcy court here complied.
18 Its 29 September 2004 Findings and Order specified the deficiencies in
19 Wikle's application, and allowed him the opportunity to supplement or
20 correct it. At least three hearings were devoted to this application.
21 There was no due process violation.

22 23 **VI. CONCLUSION**

24 The bankruptcy court complied with the District Court's order on
25 remand, did not abuse its discretion, nor did it violate due process.

26 We AFFIRM.
27
28