NOT FOR PUBLICATION

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

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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.

Counsel for chapter 11[2] debtor in possession filed his fifth fee application. Following a protracted history, including an appeal to the district court, which vacated and remanded, the bankruptcy court held that the application failed to satisfy the requirements for a final application under § 330. The court allowed the fees awarded in previous interim orders, but, finding the application insufficient, disallowed the fees requested in the fifth application. We AFFIRM.

I. FACTS

A. Background

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

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

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[2] Unless otherwise indicated, all chapter and section 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.

[3] Kennedy v. Wilshire Oncology Medical Group Inc., et al., 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.

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

B. Fee Applications

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**

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

1. First through Fourth Interim Fee Applications

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

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

2. Fifth (Second Amended) Fee Application

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

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

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[5] Kennedy Creditors argue that the record is deficient because the original Fifth Fee application and the 29 May 2002 hearing transcript contain findings which are necessary to determination of 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.

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

> Based on the record before the Court, there is no evidence that the bankruptcy court applied the standard set forth in 11 U.S.C. § 330(a). The appellee contends that the bankruptcy court's more detailed factual findings are contained in the court's oral ruling denying the original fifth and final fee application. . . . Neither party, however, has designated the transcript from this hearing for the Court. . . . The bankruptcy court, however, did not specifically adopt these findings in denying the subject of this appeal, the second amended, fifth and final fee application. . . .
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> . . . .
>
> The bankruptcy court's order of June 25, 2002 is hereby vacated, and the case is remanded to the bankruptcy court to make the required findings under 11 U.S.C. § 330(a).

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

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

> [T]hat Wikle submit a comprehensive fee application under § 330, and especially that he address the issues that the Ninth Circuit has found decisive in Strand [375 F.3d 854, 860 (9th Cir. 2004)]. If the court's mathematical calculations [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.

[6] Wikle moved in District Court on 3 March 2004 for an order 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.

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

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

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

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

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

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[7] Wikle appealed the 29 September 2004 order to us, CC-04-1518, which we dismissed for lack of jurisdiction as it was not a 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).

> services rendered in the entire case, (2) how the services were necessary or beneficial to the estate, (3) whether the fees are reasonable, taking into consideration the factors set 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.
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> The applicant has the burden of showing that he has earned the fees requested. The court finds that Wikle has 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.
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> However, in the exercise of its discretion the court hereby makes a final allowance of fees in the amount 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.

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

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

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

II. JURISDICTION

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

III. ISSUES

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

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

IV. STANDARD OF REVIEW

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

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

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

V. DISCUSSION

A. Standing

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

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

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

The Kennedy Creditors have standing to defend this appeal.

B. Compliance with District Court Remand

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

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

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

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

C. Final Fee Application

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

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

> An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall 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.

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

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

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

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

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

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

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[9] We need not comprehensively review the law on interim fee 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.

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

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

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

D. Due Process

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

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

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

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

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

VI. CONCLUSION

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

We AFFIRM.