

MAY 07 2012

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

1 In re:) BAP No. AZ-11-1434-MkPaD
2)
3 ANGELO ANTHONY ROMANO and) Bk. No. 09-23446
4 SHARON MARIE ROMANO,)
5 Debtors.)
6 _____)
7)
8 RICHARDSON & RICHARDSON, P.C.,)
9 Appellant,)
10 v.) **MEMORANDUM***
11)
12 ANGELO ANTHONY ROMANO;)
13 SHARON MARIE ROMANO,)
14 Appellees.)
15 _____)

Submitted Without Oral Argument
On May 2, 2012**

Filed - May 7, 2012

Appeal From The United States Bankruptcy Court
for the District of Arizona

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

20 _____
21 Appearances: William Richardson of Richardson & Richardson,
22 P.C. on brief for Appellant; Appellees Angelo
23 Romano and Sharon Romano, pro se, on brief.
24 _____

*This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

**On March 6, 2012, the Panel unanimously determined that
oral argument was unnecessary and ordered that this appeal would
be taken under submission on the briefs and on the record on
appeal.

1 Before: MARKELL, PAPPAS and DUNN, Bankruptcy Judges.

2
3 **INTRODUCTION**

4 Richardson & Richardson, P.C. ("Richardson")¹ appeals both
5 the bankruptcy court's order on Richardson's second and final fee
6 application and the bankruptcy court's order denying Richardson's
7 motion under Rule 9023² made with respect to the court's order on
8 fees.

9 We AFFIRM.

10 **FACTS**

11 Angelo and Sharon Romano ("Romanos") owned and operated a
12 trucking business. The Romanos borrowed money from a hard money
13 lender, West Fourth Avenue, LLC ("Fourth Avenue"), and in
14 exchange gave Fourth Avenue a deed of trust on the real property
15 they used in operating their trucking business. The trucking
16 business began experiencing financial difficulties, and the
17 Romanos advised Fourth Avenue that they would not be able to
18 repay the loan on its due date. The Romanos and Fourth Avenue
19 engaged in loan modification negotiations, but those negotiations
20

21 ¹While the law firm is the nominal appellant herein, William
22 Richardson acted on behalf of the Richardson law firm in all
23 matters relevant to this appeal. Accordingly, all references in
24 this memorandum to Richardson apply both to the law firm and to
25 William Richardson. For ease of reference, this Panel will refer
to Richardson herein as "he" or "him" and in the possessive as
"his".

26 ²Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
28 all Rule references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037. All Civil Rule references are to the
Federal Rules of Civil Procedure.

1 broke down, and Fourth Avenue commenced foreclosure proceedings.
2 The Romanos thereafter filed their chapter 11 bankruptcy case on
3 September 22, 2009.

4 The Romanos hired Richardson to file their bankruptcy case,
5 to represent them in that case, and to sue Fourth Avenue for
6 lender liability. The bankruptcy court entered an order
7 approving Richardson's employment on October 2, 2009.³

8 Richardson filed his first fee application in February 2011.
9 The first fee application sought roughly \$44,000 in fees and
10 \$1,000 in costs. Richardson also filed a certificate of no
11 objection, and by order entered March 15, 2011, the court granted
12 the fees on an interim basis. Soon thereafter, Richardson filed

13
14 ³As part of his employment application, Richardson included
15 as an exhibit a copy of a fee agreement between himself and the
16 Romanos, which the parties all signed in September 2009. Among
17 other terms, the fee agreement required the Romanos to pay \$5,000
18 as an earned upon receipt flat fee retainer, which would cover
19 Richardson's preparation of the petition, schedules, statement of
20 financial affairs, and his initial meetings with the United
21 States Trustee and the first meeting of creditors. But in
22 addition to the initial \$5,000 payment, the fee agreement
23 required payment of "an additional \$30,000 in unencumbered funds
24 as a condition of our representation." Nothing in the record
25 indicates that the Romanos ever paid this \$30,000; indeed, Ms.
26 Romano testified that she thought that the \$30,000 amount, when
27 combined with the \$5,000 actually paid, was Richardson's estimate
28 of total fees.

While this fee agreement term does not directly affect our
analysis or the resolution of this appeal, we nonetheless note
that the term did not specify and left completely open when and
from what source the Romanos were expected to pay the additional
\$30,000 - a significant issue considering that the Romanos were
about to become Chapter 11 debtors and that all of their property
and future income would become property of the estate. § 1115.
This confusion causes us to question the wisdom and propriety of
such payment terms. As shown by these facts, they have the
potential to engender confusion, disputes and adverse interests,
especially when the timing and source of payment is unspecified.

1 a motion to withdraw as counsel for the Romanos, and the
2 bankruptcy court granted the withdrawal motion on April 7, 2011.
3 The Romanos did not file an objection to either the first fee
4 application or to the withdrawal motion.

5 In April 2011, Richardson filed his second and final fee
6 application seeking roughly \$8,000 more in fees and \$250 more in
7 costs. By this time, the Romanos already had paid Richardson
8 \$21,339. That amount consisted of \$6,339 paid prepetition and
9 \$15,000 paid postpetition.⁴

10 The Romanos filed an objection to Richardson's second and
11 final fee application. In addition to their complaints about
12 specific categories of services, discussed below, the Romanos
13 generally complained that Richardson did not adequately
14 communicate with them regarding the services for which he was
15 billing them. As the Romanos put it on the first page of their
16 objection:

17 Initially, [Richardson] sent his first bill seven
18 months after the appointment of counsel. In the 18
19 months with Richardson . . . 3 bills were received.
20 The first bill, May 2010, I had objections to some
21 fees, which were discussed with [Richardson], [but] we
22 never received a revised statement in which
23 [Richardson] said he removed my disputed fees. The
24 second and third billing billed, February and March
25 2011, there was a disagreement with some fees[;] these
26 have not been [previously] noted because we have parted
27 ways, and haven't had the opportunity to address them
28 without objecting to his fees through the courts. I
had requested bills and updates numerous times. We
have paid in payments over the 18 months, \$15,500,
without knowing what we were paying for. We paid
because [Richardson] always threatened us with his
withdrawal unless he received payment.

27 ⁴The Romanos assert that they paid \$15,500 postpetition, but
28 the \$500 discrepancy is not material to our analysis and
resolution of this appeal.

1 Fee Objection (April 20, 2011) at p. 1 (emphasis added). The
2 Romanos also generally questioned the effectiveness of
3 Richardson's representation. Even though they had filed a
4 chapter 11 bankruptcy case, they pointed out that their
5 bankruptcy case had functioned more like a chapter 7 case, in
6 that they had lost by repossession or foreclosure a number of
7 items of personal and real property as a result of following
8 Richardson's advice and utilizing his services.⁵

9 The Romanos filed an amended objection in May 2011. In the
10 amended objection, the Romanos emphasized that they did not file
11 an objection to Richardson's first fee application because
12 Richardson did not make clear to them that such an objection was
13 necessary to contest his fees.

14 Richardson filed a reply in response to the Romanos'
15 objection. Richardson asserted that he had explained to the

16

17 ⁵The Romanos listed the following items of property as lost
18 to foreclosure or repossession during their bankruptcy case:

19 Building on one acre of land[;]
20 Residential Rental Property on half an acre[;]
21 One acre of vacant land[;]
22 Boat[;]
23 Jet skies [sic][;]
24 Ford Truck[;]
25 Still pending the **possible loss [of] our home[.]**

26 Fee Objection (April 20, 2011) at p. 5 (emphasis in original).
27 On this record, it is impossible for this Panel to tell with
28 certainty whether Richardson's advice and services limited or
delayed the loss of the Romanos' personal and business property,
or whether the Romanos would have lost the subject property
regardless of Richardson's advice and services. The bankruptcy
court did not make any findings on these issues. In any event,
our analysis and resolution of this appeal does not turn on these
issues.

1 Romanos how the fee application process worked, so the Romanos
2 should not be allowed to attack fees requested and approved as
3 part of his first interim fee application by way of their
4 objection to his second and final fee application.⁶ Richardson
5 further claimed: (1) that many of the Romanos' objections were
6 not specific enough to be sustained, and (2) his fees should not
7 be disallowed solely because the Romanos had sustained some
8 losses in their bankruptcy case.

9 The Romanos' objection also disputed specific categories of
10 services. The categories challenged and the amounts Richardson
11 sought for each challenged category were as follows:

12	Conversions	\$ 300.00
	Equilease	\$ 360.00
13	American General (jet ski)	\$ 590.00
	Citizens (Ford F-150)	\$ 277.50
14	Litton Loan (primary home)	\$ 4,520.00
	West 4th Ave., LLC (business property)	\$18,055.00
15	US Trustee meeting	\$ 1,890.00
	Burglary	\$ 90.00
16		
	<hr/>	
	Total	\$24,052.50

17
18 Order Re Attorneys Fees (July 28, 2011) p. 2. As to each
19 disputed category, the parties stated their respective
20 positions.⁷

21
22 ⁶Richardson has not pressed this argument on appeal, so it
23 has been waived. In any event, fees approved as part of an
24 interim fee award are subject to the bankruptcy court's further
25 consideration when it reviews the applicant's final fee
application. See Leichty v. Neary (In re Strand), 375 F.3d 854,
858 (9th Cir. 2004).

26 ⁷Except for the ruling on Richardson's services relating to
27 the "Litton Loan," Richardson has not challenged on appeal the
28 bankruptcy court's findings on specific billing categories.
Nonetheless, we recount the parties' respective positions

(continued...)

1 **Conversions (missed deadlines).**

2 The United States Trustee twice sought to convert the
3 Romanos' bankruptcy case from chapter 11 to chapter 7, once on
4 January 26, 2010 and again on February 16, 2010. According to
5 the Romanos, the United States Trustee advocated for conversion
6 because Richardson missed deadlines for filing a proposed
7 chapter 11 plan on behalf of the Romanos. Thus the Romanos
8 asserted that Richardson should not receive compensation for
9 responding to the United States Trustee's conversion efforts. In
10 response, Richardson contended: (1) the United States Trustee
11 over-reacted to the missed filing deadlines, and (2) the Romanos
12 caused him to miss the filing deadlines because they did not
13 provide him with sufficient information to file a plan.

14 **Equilease, American General and Citizens Bank.**

15 Each of the above-referenced asset-based lenders
16 successfully obtained relief from stay and repossessed personal
17 property belonging to the Romanos or their trucking company. The
18 Romanos claimed that Richardson gave them bad advice regarding
19 the asset-based lenders. According to the Romanos, Richardson
20 advised them that these lenders would not likely repossess the
21 various items of personal property so long as the Romanos kept
22 current on their payments. As it turned out, the lenders did
23 repossess the personal property. Richardson contended that he
24 was not at fault for the lenders' actions. Further, he suggested

25
26 ⁷(...continued)
27 regarding each disputed category because it sheds light on the
28 attorney-client relationship, the circumstances surrounding
Richardson's representation of the Romanos and the extent and
nature of communications between Richardson and his clients.

1 that he might have advised the Romanos differently if he had
2 known certain additional facts concerning the collateral, which
3 the Romanos did not disclose. For instance, according to
4 Richardson, the collateral securing Equilease's loan (a "wheel
5 loader") actually was not owned by the Romanos but rather was
6 owned by their trucking business (which did not file bankruptcy).
7 Consequently, the automatic stay did not apply to enjoin
8 Equilease from repossessing the wheel loader. Richardson claimed
9 that the Romanos never told him that the wheel loader was
10 property of the trucking business but rather led Richardson to
11 believe that they personally owned the wheel loader.

12 **Litton Loan.**

13 Litton serviced the loan secured by a deed of trust on the
14 Romanos' home. The Romanos complained that Richardson
15 incorrectly advised them before they filed bankruptcy that they
16 would be able to continue working with Litton on a loan
17 modification after they filed bankruptcy, but that was not the
18 case. After the Romanos filed bankruptcy, Litton canceled the
19 loan modification, and the Romanos ended up having to make
20 adequate protection payments of over \$6,000 per month in the
21 hopes that a new loan modification could be negotiated.
22 According to the Romanos, Richardson thereafter failed to follow
23 through on loan modification negotiations he commenced with
24 Litton, and ultimately the Romanos needed to pursue the loan
25 modification negotiations themselves.

26 The Romanos further complained that Richardson advised them
27 that the Litton Loan could be crammed down in bankruptcy, which
28 ultimately turned out to be wrong. Richardson countered that it

1 was not his fault the court rejected his cramdown theory.
2 Further, Richardson insisted that he did what he could to
3 negotiate a loan modification but that ultimately the parties
4 mutually agreed that the Romanos should directly handle the
5 negotiations.

6 **Burglary.**

7 The Romanos' trucking business was burglarized during the
8 bankruptcy case. The Romanos claimed that the burglary had no
9 relevance to their bankruptcy case, so Richardson should not have
10 charged them for any services in relation thereto. However,
11 Richardson countered that the burglary had the potential to
12 impact the Romanos' income and therefore their ability to propose
13 a confirmable plan. Accordingly, Richardson asserted that he was
14 entitled to be compensated for the time he spent considering the
15 potential impact of the burglary on the Romanos' bankruptcy case.

16 **Reporting requirements.**

17 The bankruptcy court ordered Richardson to meet with the
18 United States Trustee to discuss whether the Romanos' operating
19 reports complied with United States Trustee guidelines. The
20 Romanos claimed that the fees associated with this meeting
21 charged by Richardson should not be compensated because:
22 (1) Richardson gave the Romanos the wrong forms to fill out; and
23 (2) Richardson initially agreed that the Romanos could meet with
24 the United States Trustee by themselves, without Richardson
25 attending, because the Romanos had been filling out the reports
26 without Richardson's involvement or assistance, but that
27 Richardson ended up attending notwithstanding his prior agreement
28 that he would not attend. On the other hand, Richardson

1 contended that he felt compelled to attend the meeting because
2 the court had specifically directed him to attend.

3 **Dispute with Fourth Avenue.**

4 By far the largest and most important category of services
5 challenged (over \$18,000 of services) related to the dispute
6 between the Romanos and Fourth Avenue. Indeed, the dispute with
7 Fourth Avenue was both the impetus for and focal point of the
8 Romanos' bankruptcy case. The Romanos claimed that Richardson's
9 negotiations with Fourth Avenue were ineffective. According to
10 the Romanos, Richardson negotiated for a loan modification that
11 the Romanos could not afford to pay, even though they had told
12 Richardson that they could not afford to pay it. The Romanos
13 further claimed that Richardson pressed them to settle with
14 Fourth Avenue even though they wanted to litigate their claims
15 against Fourth Avenue. On the other hand, Richardson asserted
16 that the negotiations with Fourth Avenue failed because the
17 Romanos made inconsistent and unreasonable demands. According to
18 Richardson, at times the Romanos indicated that the most
19 important aspect of their dispute with Fourth Avenue was to
20 ensure that they could retain the real property on which they
21 operated their trucking business. Fourth Avenue's loan was
22 secured by a deed of trust on that property. At other times, the
23 Romanos indicated that their priority was to vindicate their
24 rights as against the alleged misconduct of Fourth Avenue and its
25 principal.

26 **The bankruptcy court's rulings.**

27 After holding an evidentiary hearing at which both
28 Richardson and Ms. Romano testified, the bankruptcy court issued

1 its order on Richardson's second and final fee application. The
2 bankruptcy court generally agreed with Richardson regarding the
3 reasonableness of his fees concerning the Fourth Avenue dispute,
4 the burglary and the asset-based lenders. However, as to the
5 other disputed categories of services, the bankruptcy court found
6 some or all of Richardson's fees to be unreasonable. In
7 particular, with respect to the Litton Loan, the bankruptcy court
8 noted that Richardson's cramdown theory was both wrong and
9 ineffectively presented. According to the bankruptcy court, even
10 if Richardson had properly presented his cramdown theory (which
11 he did not), it was settled law in the Ninth Circuit that home
12 loans cannot be modified in chapter 11, citing First Fed. Bank of
13 Cal. v. Weinstein (In re Weinstein), 227 B.R. 284, 290 n.4 (9th
14 Cir. BAP 1998).

15 Citing its independent duty to investigate the
16 reasonableness of the compensation requested, the bankruptcy
17 court voiced its own concerns with Richardson's fee applications.
18 The bankruptcy court expressed two independent concerns. The
19 court questioned both Richardson's billing practices and his
20 candor with the court. Concerning billing practices, the
21 bankruptcy court criticized Richardson for not sending the
22 Romanos monthly billing statements, and concluded that the
23 Romanos could not have meaningfully authorized Richardson's
24 services without such bills being sent:

25 Mr. Richardson testified that, as a sole practitioner,
26 it is his standard operating procedure not to send
27 monthly bills, but when requested to give clients a
28 running billing total verbally. The Court concludes
that this is a bad operating procedure. If the client
doesn't know how much they are being billed and for
what services, how can they approve the fees? Beyond

1 the lack of approval, Mr. Richardson's policy is
2 indicative of his unreasonable billing judgment which
3 led directly to many of the problems here. If the
4 Debtors had an ongoing knowledge of the time and
5 expense of handling their case, perhaps they would have
6 seen a need to settle or understood the added expense
7 of pursuing the West 4th Avenue matter. Instead, they
8 were left blind as to how much time and money the
9 matter was truly costing them. Based on his lack of
10 communication, the Court concludes that much of
11 Mr. Richardson's services were not authorized by his
12 client and Mr. Richardson exercised unreasonable
13 billing judgment, thus justifying a . . . reduction in
14 fees.

15 Order Re Attorneys Fees (July 28, 2011) p. 9.

16 As for Richardson's lack of candor, the bankruptcy court
17 found that Richardson had misled the court. According to the
18 court, Richardson made deceptive statements regarding the
19 Romanos' opportunity to object to his fee applications and
20 regarding billing statements being sent to the Romanos for review
21 and approval before Richardson filed his fee applications. In
22 essence, the bankruptcy court determined that Richardson had
23 misled the court into wrongly believing that Richardson had given
24 the Romanos a meaningful opportunity to review and question
25 Richardson's billings before he filed his fee applications.

26 Based on the Romanos' objections, the absence of meaningful
27 authorization of Richardson's services, Richardson's unreasonable
28 billing practices, and his lack of candor, the bankruptcy court
29 limited Richardson's fee award to the amount the Romanos already
30 had paid -- \$21,339 -- thereby disallowing \$31,352 of the total
31 \$52,991 Richardson had requested in fees and costs.⁸

32 ⁸Of the amount disallowed, less than \$6,000 can be
33 attributed directly to the Romanos' objections to specific
34 (continued...)

1 Richardson thereafter filed under Rule 9023⁹ a motion for
2 rehearing or, alternately, to alter or amend the judgment or for
3 new trial ("Rule 9023 Motion"). According to Richardson, the
4 bankruptcy court's decision based on its independent concerns
5 denied him due process. Richardson claimed that, because the
6 court's independent concerns were raised for the first time at
7 the June 8, 2011 evidentiary hearing, the bankruptcy court should
8 have given him an opportunity to present additional argument and
9 evidence, this time specifically addressing the court's concerns
10 regarding authorization of services, billing judgment and candor.

11 In addition, Richardson disagreed with the bankruptcy
12 court's finding that the Romanos did not authorize his services.
13 As Richardson put it, Ms. Romano never explicitly testified that
14 his services were unauthorized. According to Richardson, he
15 could present substantial additional evidence regarding his
16 routine written and oral communications with the Romanos that
17 would demonstrate that they were fully aware of his activities on
18 their behalf and therefore that they had implicitly authorized
19 his services.

20 Richardson also challenged the bankruptcy court's
21 determination that he should have prepared and delivered to the

22 _____
23 ⁸(...continued)
24 categories of services. The Romanos objected to categories in
25 which Richardson was seeking in aggregate \$24,000 in fees.
26 However, the court overruled the Romanos' objections in
27 categories totaling over \$18,000 in fees. Put another way, the
28 court disallowed over \$25,000 in fees based on its own
independent concerns.

⁹Rule 9023 incorporates by reference Civil Rule 59 and makes
it applicable in bankruptcy cases.

1 Romanos regular billing statements. Richardson asserted that
2 billing statements are necessarily historical and therefore had
3 no perceptible bearing on authorization of his future services.

4 Richardson also disagreed with the bankruptcy court's
5 conclusion that he did not exercise reasonable billing judgment.
6 Richardson contended that no statute, rule or guideline
7 specifically requires regular billing statements, and that the
8 frequency of billing statements is beyond the scope of the
9 billing judgment inquiry. As Richardson explained, the inquiry
10 into the fee applicant's billing judgment usually centers on
11 whether and how the applicant exercises his or her discretion to
12 charge for services that are excessive, redundant, unnecessary or
13 otherwise of questionable benefit to the estate.¹⁰

14 Richardson also disputed the bankruptcy court's finding that
15 he had misled the court. In essence, Richardson contended that,
16 when considered within the context of all the relevant facts, the
17 following statement made in his first fee application was not
18 misleading: "Applicant has forwarded copies of the attached
19 billing statement to the debtors for their consideration and
20 approval. The debtors have not objected to the fee requested."
21 According to Richardson, the three days between the date he sent
22 his February 2011 billing statement to the Romanos and the date
23 he filed his fee application should have been sufficient for the
24 Romanos to let him know if they had any sort of problem with his
25 fees. Richardson based this belief on one prior experience he

26
27 ¹⁰Richardson also claimed that, whenever the Romanos
28 inquired, he would orally advise them of the then-current amount
of total fees incurred.

1 had with the Romanos. According to Richardson, the one prior
2 time he sent the Romanos a billing statement, in May 2010, the
3 Romanos responded with their questions and concerns within hours.
4 Accordingly, Richardson explained, it was reasonable for him to
5 expect that the Romanos would do so again in response to his
6 February 2011 billing statement.¹¹

7 Richardson similarly claimed that there was nothing
8 misleading about his statement in his second fee application:
9 "Applicant has forwarded copies of the attached billing statement
10 to the debtors for their consideration and approval." The
11 bankruptcy court concluded that this statement also was deceptive
12 because, once again, the Romanos had no real opportunity to
13 consider or approve Richardson's requested fees before he filed
14 his second fee application.

15 Richardson admitted in his Rule 9023 Motion that, in light
16 of the deterioration of his relationship with the Romanos and his
17 subsequent withdrawal as counsel, he had expected the Romanos to
18

19 ¹¹Richardson also pointed out that he was required to file a
20 separate "notice of no objection" in support of each of his fee
21 applications. Richardson claims that this notice necessarily
22 prevented him from taking unfair advantage of the short time
23 between his sending the February 2011 billing statement to the
24 Romanos and his filing of his first fee application. This Panel
25 disagrees with the underlying assumption implicit in this
26 argument: that the United States Trustee guideline requiring the
27 application to include a statement regarding whether the client
28 has reviewed and approved the applicant's fees is redundant of
the separate notice of no objection requirement. The two
requirements serve different purposes. The former focuses on
whether the client has had a meaningful opportunity to review and
approve the fees billed, whereas the latter focuses on whether
any party in interest has submitted an objection to the fee
application.

1 object to the fees requested in his second and final fee
2 application. Yet his Rule 9023 Motion made no attempt to explain
3 or justify why his second fee application spoke in terms of
4 sending the application to the Romanos for consideration and
5 approval, instead of simply stating the fact that the applicant
6 did not expect the debtors to approve the fees in light of the
7 deterioration of the attorney-client relationship.

8 Finally, Richardson challenged the bankruptcy court's
9 disallowance of his fees relating to the Litton Loan. Richardson
10 argued that the fees related to his cramdown theory only
11 consisted of one billing entry, so if the court was dissatisfied
12 with his cramdown theory, it simply should have disallowed that
13 single entry.

14 The bankruptcy court entered an order on September 14, 2011,
15 denying Richardson's Rule 9023 Motion. The bankruptcy court
16 rejected the argument that Richardson was denied due process. In
17 essence, the court determined that its dispositive concerns were
18 fundamental to and subsumed within the basic review a bankruptcy
19 court must undertake with respect to any fee application filed.
20 As a consequence, Richardson's claim that he was caught by
21 surprise was unfounded.

22 The court also rejected Richardson's contentions regarding
23 his candor. According to the court, it had reviewed the record
24 and had found no manifest error justifying relief under Civil
25 Rule 59.

26 Finally, the bankruptcy court clarified that it had based
27 its fee application ruling on alternate grounds. On the one
28 hand, it had disallowed Richardson's fees under the standard

1 criteria for reviewing the reasonableness and allowability of
2 fees under § 330(a)(3). On the other hand, as an alternate
3 ground, the court had disallowed the fees "as a sanction for the
4 conduct described."

5 Richardson timely appealed the bankruptcy court's order on
6 his second and final fee application and its denial of his
7 Rule 9023 Motion.

8 **JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **ISSUES**

13 1. Did the bankruptcy court abuse its discretion when it
14 disallowed \$31,352 of the \$52,991 Richardson requested in fees
15 and costs?

16 2. Did the bankruptcy court deprive Richardson of due
17 process by not holding a second evidentiary hearing on
18 Richardson's second and final fee application?

19 3. Did the bankruptcy court abuse its discretion by
20 disallowing Richardson's fees as a sanction?

21 4. Did the bankruptcy court err when it ruled on the
22 reasonableness of Richardson's fees specifically related to the
23 Litton Loan?

24 5. Did the bankruptcy court abuse its discretion when it
25 denied Richardson's Rule 9023 Motion?

26 **STANDARDS OF REVIEW**

27 "We will not disturb a bankruptcy court's award of
28 attorneys' fees unless the bankruptcy court abused its discretion

1 or erroneously applied the law." In re Strand, 375 F.3d at 857
2 (citations and internal quotation marks omitted). Under the
3 abuse of discretion standard of review, we first "determine de
4 novo whether the [bankruptcy] court identified the correct legal
5 rule to apply to the relief requested." United States v.
6 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). And if
7 the bankruptcy court identified the correct legal rule, we then
8 determine under the clearly erroneous standard whether its
9 factual findings and its application of the facts to the relevant
10 law were: "(1) illogical, (2) implausible, or (3) without support
11 in inferences that may be drawn from the facts in the record."
12 Id. (internal quotation marks omitted).

13 Orders denying motions to alter or amend a judgment and
14 motions for new trial also are reviewed for abuse of discretion.
15 First Ave. W. Bldg., LLC v. James (In re OneCast Media, Inc.),
16 439 F.3d 558, 561 (9th Cir. 2006); Far Out Productions, Inc. v.
17 Oskar, 247 F.3d 986, 992 (9th Cir. 2001); Clinton v. Deutsche
18 Bank Nat'l Trust Co. (In re Clinton), 449 B.R. 79, 82 (9th Cir.
19 BAP 2011).

20 Whether notice given in any particular instance was
21 sufficient to satisfy due process concerns is a mixed question of
22 fact and law that this Panel reviews de novo. See Berry v. U.S.
23 Trustee (In re Sustaita), 438 B.R. 198, 207 (9th Cir. BAP 2010)
24 (citing Demos v. Brown (In re Graves), 279 B.R. 266, 270 (9th
25 Cir. BAP 2002)).

26 DISCUSSION

27 **Disallowance of fees.**

28 Richardson has not challenged on appeal the bankruptcy

1 court's statement of the applicable legal standard governing fee
2 applications. Moreover, we agree with the bankruptcy court's
3 statement of the relevant law. Citing Garcia v. U.S. Trustee
4 (In re Garcia), 335 B.R. 717, 724 (9th Cir. BAP 2005), the
5 bankruptcy court identified the following factors it needed to
6 consider when determining the reasonableness of the fees
7 Richardson requested:

- 8 (a) Were the services authorized?
- 9 (b) Were the services necessary or beneficial to the
10 administration of the estate at the time they were
11 rendered?
- 12 (c) Are the services adequately documented?
- 13 (d) Are the fees [requested] reasonable, taking into
14 consideration the factors set forth in section
15 330(a)(3)?
- 16 (e) In making the determination, the court must
17 consider whether the professional exercised reasonable
18 billing judgment.

19 Id. (citing Roberts, Sheridan & Kotel, P.C. v. Bergen Brunswick
20 Drug Co. (In re Mednet), 251 B.R. 103, 108 (9th Cir. BAP 2000),
21 and In re Strand, 375 F.3d at 860).

22 Because the bankruptcy court identified the correct law to
23 apply, we next consider whether the bankruptcy court's findings
24 of fact, and its application of those findings to the relevant
25 law, were clearly erroneous. See Hinkson, 585 F.3d at 1262.
26 Richardson, as the applicant, had the burden of proof to
27 establish that his fees were reasonable. See Law Offices of
28 David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 402
(9th Cir. BAP 2003), rev'd in part on other grounds, 468 F.3d 592
(9th Cir. 2006); see also Hensley v. Eckerhart, 461 U.S. 424, 437
(1983) ("Fee applicant bears the burden of establishing
entitlement to an award and documenting the appropriate hours
expended and hourly rates.").

1 Richardson contends on appeal that the bankruptcy court
2 improperly imposed a requirement of regular billing statements,
3 which are not required by statute, case law or United States
4 Trustee guideline. According to Richardson, the bankruptcy
5 court's imposition of this improper requirement directly led to
6 its findings that the Romanos did not authorize his services and
7 that Richardson's billing practices (and hence his billing
8 judgement) were unreasonable.

9 This Panel agrees with Richardson that the bankruptcy court
10 focused on his failure to prepare and deliver to the Romanos
11 regular billing statements. But we disagree with Richardson's
12 characterization of the court's ruling as imposing an absolute
13 requirement on bankruptcy counsel to present debtors with regular
14 billing statements if they want to receive compensation for their
15 services. Based on our review of the record, this would not be a
16 fair reading of the bankruptcy court's ruling. Indeed, if the
17 bankruptcy court had imposed such a requirement, this Panel would
18 have expected the bankruptcy court to deny all of Richardson's
19 fees. But that was not what the bankruptcy court did.

20 Rather, the court was concerned about the extent and quality
21 of Richardson's communication with the Romanos and whether the
22 Romanos had adequate information on an ongoing basis regarding
23 the cost of services Richardson already had performed to enable
24 them to give informed consent to Richardson's further services.
25 By not providing the Romanos with regular billing statements,
26 Richardson assumed the risk that he would fail to prove by other
27 means that the Romanos gave informed consent for him to render
28 further services.

1 Richardson also contends that the Romanos implicitly
2 authorized his services by not questioning the services at the
3 time he performed them. Richardson points out that, because he
4 regularly communicated with them regarding their case, the
5 Romanos generally were aware of his services but that they
6 generally did not question the services as he performed them.

7 But in so arguing, Richardson demonstrates that he has
8 missed the key point of the bankruptcy court's authorization
9 finding: that any such authorization (implicit or otherwise) was
10 meaningless unless it was based on adequate information.

11 The bankruptcy court found on the evidence presented that
12 the Romanos did not have adequate information regarding the cost
13 of services previously rendered to authorize further services.
14 Based on the same reasoning, the bankruptcy court also found that
15 both Richardson's billing practices and his billing judgment were
16 unreasonable, because under the circumstances of this case,
17 Richardson's billing practices did not provide the Romanos with
18 adequate information regarding the cost of services he was
19 performing on an ongoing basis.

20 While Richardson disagrees with these findings, the record
21 contains sufficient evidence to support them. It is undisputed
22 that, during the eighteen months he represented the Romanos,
23 Richardson only prepared and delivered three billing statements,
24 the first in May 2010, the second just before he filed his first
25 fee application in February 2011, and the third just before he
26 filed his second and final fee application in April 2011. In
27 addition, the Romanos' objection and Ms. Romano's testimony
28 reflected that the Romanos (who were relatively unsophisticated

1 consumers of legal services) had requested additional billing
2 statements from Richardson and had complained to him that they
3 did not know what services they were paying for. On these facts,
4 this Panel cannot say that the bankruptcy court's authorization
5 finding and billing judgment finding were clearly erroneous. In
6 other words, in the parlance of Hinkson, we cannot say that the
7 bankruptcy court's findings were "(1) illogical, (2) implausible,
8 or (3) without support in inferences that may be drawn from the
9 facts in the record." Hinkson, 585 F.3d at 1262.

10 In disallowing a portion of Richardson's fees, the
11 bankruptcy court also took into account the misleading nature of
12 some of Richardson's statements in his first and second fee
13 application. The misleading statement from the first fee
14 application was:

15 Applicant has forwarded copies of the attached billing
16 statement to the debtors for their consideration and
17 approval. The debtors have not objected to the fee
18 requested.

18 And the misleading statement from the second fee application was:

19 Applicant has forwarded copies of the attached billing
20 statement to the debtors for their consideration and
21 approval.

21 Richardson has admitted that he made these two statements on
22 account of the provision in the United States Trustee Guidelines
23 ("Guidelines") directing fee applicants to include a statement in
24 the fee application regarding "Whether the person on whose behalf
25 the applicant is employed has been given the opportunity to
26 review the application and whether that person has approved the
27 requested amount." 28 C.F.R. pt. 58, app. A, at ¶(b)(1)(v)
28 (emphasis added).

1 In addition, Richardson has not challenged on appeal the
2 court's findings regarding the time elapsed between his sending
3 to the Romanos his billing statements and the filing of his fee
4 applications. As the court found, Richardson sent the Romanos
5 his February 2011 billing statement on February 14, 2011, and
6 filed his first fee application three days later, on February 17,
7 2011. The court further found that Richardson sent his April
8 2011 billing statement to the Romanos on April 4, 2011, and filed
9 his second and final fee application on that same day, less than
10 40 minutes later.

11 Richardson has offered various arguments on appeal why the
12 bankruptcy court should not have construed his Guideline-related
13 statements as misleading. With respect to the first fee
14 application, he claimed that Ms. Romano responded almost
15 immediately to his May 2010 billing statement, so it was
16 reasonable for him to conclude that three days was enough time
17 for the Romanos to let him know whether they objected to his
18 February 2011 billing statement. In addition, he represented
19 that he orally told Ms. Romano that he needed a prompt response
20 from her on the February 2011 billing statement, as he intended
21 to file a fee application in the near future.

22 As for the second fee application, he claims that he
23 expected the Romanos to object because of the deterioration of
24 his professional relationship with the Romanos. Accordingly, he
25 asserted, it was unnecessary or futile for him to wait for a
26 response from them.

27 As to both fee applications, Richardson claims he altered
28 the Guideline's standard language so as to avoid stating an

1 outright falsehood to the court.

2 But Richardson's arguments largely miss the point. The
3 focus of the Guideline (on which Richardson based his statements)
4 is the client's opportunity to review and approve the fees
5 requested. When it read Richardson's statements, the bankruptcy
6 court construed them to mean that Richardson, in both instances,
7 had given the Romanos a meaningful opportunity to review both
8 billing statements before he filed his fee applications. The
9 court's construction of the statements was reasonable in light of
10 the focus of the Guideline. However, the court later learned
11 that Richardson gave the Romanos roughly two days to review the
12 February 2011 billing statement - covering roughly seventeen
13 months of services - and virtually no time at all to review the
14 second billing statement.

15 We perceive no error in the bankruptcy court's construction
16 of Richardson's statements or its determination, under the facts
17 presented, that Richardson did not give the Romanos a meaningful
18 opportunity to review his billing statements before he filed his
19 fee applications. Indeed, if Richardson had been striving for
20 candor with the bankruptcy court regarding the Romanos'
21 opportunity to review his billing statements, he easily could
22 have stated precisely how much time he gave the Romanos to
23 respond. Furthermore, a completely candid statement from
24 Richardson likely would have advised the court, especially with
25 respect to the second fee application, that he expected the
26 Romanos to object to the fees requested (as Richardson later
27 admitted) in light of the breakdown of the attorney-client
28 relationship. Instead, he offered statements that attempted to

1 sound as much like the literal wording of the Guideline without
2 addressing the spirit of the Guideline - to advise the court
3 regarding the client's opportunity to review and approve his
4 fees.

5 This Panel cannot conclude under these circumstances that
6 the bankruptcy court's finding that Richardson made misleading
7 statements was clearly erroneous. Nor did the court err in
8 taking into account the misleading statements when it determined
9 the reasonableness of Richardson's fees. In our view, the
10 statements and Richardson's efforts to give his clients a
11 reasonable opportunity to review and approve the fees requested
12 go directly to the nature and extent of his billing judgment, one
13 of the factors this Panel identified in Garcia and Mednet as
14 pertinent to the determination of the reasonableness of fees
15 requested under § 330(a).

16 **Due Process.**

17 Richardson complains that he did not have advance notice of
18 the bankruptcy court's concerns, so he could not adequately
19 address them at the June 8, 2011 evidentiary hearing.

20 Section 330(a)(1) authorizes the bankruptcy court after
21 notice and a hearing to grant compensation to estate
22 professionals. What constitutes adequate notice and opportunity
23 for hearing is a flexible concept that depends upon the
24 circumstances of the particular case. Tennant v. Rojas (In re
25 Tennant), 318 B.R. 860, 870-71 (9th Cir. BAP 2004). As the
26 Supreme Court has explained:

27 An elementary and fundamental requirement of due
28 process in any proceeding which is to be accorded
finality is notice reasonably calculated, under all the

1 circumstances, to apprise interested parties of the
2 pendency of the action and to afford them an
3 opportunity to present their objections. The notice
4 must be of such nature as reasonably to convey the
5 required information and it must afford a reasonable
6 time for those interested to make their appearance.

7 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
8 (1950)(citations omitted); see also Mathews v. Eldridge, 424 U.S.
9 319, 333 (1976) (the "fundamental requirement of due process is
10 the opportunity to be heard at a meaningful time and in a
11 meaningful manner."); Memphis Light, Gas & Water Div. v. Craft,
12 436 U.S. 1, 14 (1978) ("[t]he purpose of notice under the Due
13 Process Clause is to apprise the affected individual of, and
14 permit adequate preparation for, an impending hearing.").

15 In this case, the court conducted a full evidentiary hearing
16 to decide whether and to what extent Richardson's fee application
17 should be granted. As with hearings on most fee applications,
18 the ultimate question to be answered was the reasonableness of
19 the fees requested. Richardson has conceded that he had the
20 burden of proof to establish the reasonableness of his fees, and
21 that Garcia and Mednet set forth the relevant factors for the
22 court to consider. Yet citing In re Eliapo, 468 F.3d at 602-03,
23 he claims that due process required the court to give him advance
24 notice of the specific concerns it had regarding the
25 reasonableness of his fees. According to Richardson, the
26 bankruptcy court should have let him know in advance of the
27 June 8, 2011 evidentiary hearing that, in the court's view,
28 Richardson had not adequately established through his papers and
testimony that the Romanos had authorized his services and that
he had exercised reasonable billing judgment.

1 But Richardson's argument makes no sense. In essence,
2 Richardson contends that the bankruptcy court was required to let
3 him know in advance of the evidentiary hearing whether he had
4 presented sufficient evidence to prevail and, if not, on which
5 reasonableness factors his presentation was insufficient. Put
6 another way, Richardson claims that the bankruptcy court should
7 have given him advance notice of the reasoning behind its ruling
8 so that he could counter that reasoning with additional evidence.
9 We know of no authority construing the requirements of due
10 process so broadly, nor has Richardson pointed us to any.

11 Furthermore, Richardson cannot deny that, in advance of the
12 June 8, 2011 hearing, the Romanos had objected to his fee
13 application, in part, because they claimed he had not given them
14 adequate information regarding the costs of the services he was
15 rendering. As previously stated, the Romanos complained on the
16 first page of their opposition filed on April 20, 2011 that they
17 had paid over \$15,000 to Richardson over the course of his
18 eighteen months representing them "without knowing what we were
19 paying for" even though they "had requested bills and updates
20 numerous times." Fee Objection (April 20, 2011) at p. 1.

21 In short, the adequacy of the information Richardson gave
22 the Romanos regarding his fees - the precise question on which
23 the court ultimately focused in rendering its authorization
24 finding and its billing judgment finding - was raised by the
25 Romanos well before the June 8, 2011 evidentiary hearing. Thus,
26 in hindsight, Richardson's failure to address that question more
27 thoroughly may have turned out to be a tactical error on his
28 part, but it was not the result of a failure of due process.

1 Eliapo does not help Richardson's argument. In Eliapo, the
2 bankruptcy court denied some of the fees sought by chapter 13
3 debtor's counsel even though no one objected to the fees and the
4 bankruptcy court held no hearing at all on the reasonableness of
5 the fees. In re Eliapo, 468 F.3d at 595. Eliapo held that the
6 bankruptcy court there should have given some advance notice and
7 some opportunity for hearing before it sua sponte disallowed some
8 of the fees requested by the debtor's counsel. Id. at 602. At
9 the same time, Eliapo emphasized that the bankruptcy court had
10 broad discretion in deciding what amount of notice and what form
11 of hearing was sufficient under the particular circumstances
12 presented.

13 We emphasize that the notice-and-hearing definition in
14 § 102(1) is flexible and sensitive to context. . . . So
15 long as fair notice and an opportunity to be heard are
16 afforded, the bankruptcy court has considerable freedom
to fashion procedures for notice and a hearing that are
"appropriate in the particular circumstances."

17 Id. at 603 (quoting 11 U.S.C. § 102(1)(A)).

18 In this case, as set forth above, the Romanos raised in
19 their objection filed on April 20, 2011, the adequacy of the
20 information Richardson had given them regarding his fees - the
21 precise question on which the bankruptcy court focused when it
22 made its authorization finding and its billing judgment finding.
23 Under these circumstances, we simply cannot say that the
24 bankruptcy court violated Richardson's due process rights by not
25 setting a second evidentiary hearing after holding a full
26 evidentiary hearing on June 8, 2011.

27 Richardson also claims that he should have been given a
28 second evidentiary hearing so that he could present evidence

1 showing that his statements to the court regarding the Romanos'
2 opportunity to review and approve his fees were not misleading.

3 However, Richardson cannot establish a violation of his due
4 process rights without first establishing that he was prejudiced
5 by the alleged denial of due process. When an appellant offers
6 no evidence of prejudice, any deficiency in providing due process
7 to the appellant is harmless. Rosson v. Fitzgerald (In re
8 Rosson), 545 F.3d 764, 776 (9th Cir. 2008); City Equities
9 Anaheim, Ltd. v. Lincoln Plaza Dev. Corp. (In re City Equities
10 Anaheim, Ltd.), 22 F.3d 954, 959 (9th Cir. 1994). See also
11 People of State of Ill. ex rel. Hartigan v. Peters, 871 F.2d
12 1336, 1340 (7th Cir. 1989) ("As other courts have suggested, one
13 circumstance we may consider in evaluating the sufficiency of
14 notice is whether the alleged inadequacies in the notice
15 prejudiced the appellant."); United Food & Commercial Workers
16 Union v. Alpha Beta Co., 736 F.2d 1371, 1382 (9th Cir. 1984)
17 (summons which specified incorrect amount of time for filing
18 answer did not require dismissal of lawsuit absent showing of
19 prejudice).

20 Here, Richardson claims that, if given the opportunity, he
21 could have shown that the statements he made in his fee
22 applications regarding the Romanos' opportunity to review and
23 approve his fees were not actually misleading. But we already
24 have discussed above Richardson's explanations and arguments, and
25 none of them would have altered the undisputed dispositive facts
26 that led the bankruptcy court to find Richardson's statements
27 misleading. Consequently, because Richardson has not and cannot
28 establish any prejudice, his due process argument necessarily

1 fails.¹²

2 **Fees related to the Litton Loan.**

3 The bankruptcy court found that "much" of the fees
4 Richardson incurred with respect to the Litton Loan were
5 unnecessary and hence unreasonable. The court particularly noted
6 that Richardson had presented a cramdown theory that had been
7 discredited in the Ninth Circuit, and that he had presented this
8 theory in an ineffective manner. At the same time, the court
9 found that the fees Richardson incurred negotiating with Litton
10 were "not unnecessary."

11 On appeal, Richardson has argued that because a tiny
12 fraction of the fees in this category actually were attributable
13 to his cramdown theory and most of the fees in this category
14 actually were attributable to his negotiations with Litton, "the
15 court abused its discretion in denying all fees associated with
16 the Litton matter." Appellant's Opening Brief (Dec. 6, 2011) at
17 pp. 21-22.

18 However, in making this argument, Richardson
19 mischaracterizes the bankruptcy court's ruling. Contrary to
20 Richardson's argument, the bankruptcy court never ruled that it
21 was disallowing a specific amount of fees attributable to the
22 Litton Loan. Rather, the bankruptcy court exercised its
23 discretion to determine, based on all of its findings, that it

24
25 ¹²As set forth above, the bankruptcy court alternately
26 disallowed Richardson's fees as a sanction. In light of our
27 upholding the bankruptcy court's disallowance of Richardson's
28 fees based on their unreasonableness and our rejection of
Richardson's due process argument, we do not need to review the
bankruptcy court's alternate ground for disallowing Richardson's
fees.

1 was appropriate to limit Richardson's total fee award to the
2 amount the Romanos already had paid him.

3 Richardson points us to nothing in the record from which we
4 could conclude that the bankruptcy court only took into account
5 its finding regarding Richardson's cramdown theory and ignored
6 its finding regarding Richardson's negotiations with Litton.

7 Moreover, Richardson did not challenge either in the
8 bankruptcy court or on appeal the bankruptcy court's calculation
9 of the dollar amount of his fee award, so he has waived that
10 issue. See Golden v. Chicago Title Ins. Co. (In re Choo),
11 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v. Crowder
12 (In re Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd,
13 205 F.3d 1350 (table) (9th Cir. 1999).

14 The Ninth Circuit Court of Appeals has held that trial
15 courts may rely upon their own expertise in determining the
16 reasonableness of fees and that trial courts are entitled to
17 deference in making an expert assessment of the necessity of
18 services provided. See Ingram v. Oroudjian, 647 F.3d 925, 927-28
19 (9th Cir. 2011).

20 Put another way, under the abuse of discretion standard,
21 unless an appellant demonstrates that the bankruptcy court's
22 reasonableness determination was illogical, implausible or
23 without support in inferences that may be drawn from facts in the
24 record, we cannot and will not overturn the bankruptcy court's
25 expert assessment of the necessity and reasonableness of the
26 appellant's fees. Here, Richardson's reference to the court's
27 statement regarding his cramdown theory does not by itself
28 demonstrate any of the above-referenced criteria that would

1 permit us to overturn the court's reasonableness finding.
2 Richardson has not pointed us to any other grounds for
3 overturning this finding, so we will not disturb it.

4 **Rule 9023 Motion.**

5 In order to obtain relief under Rule 9023, Richardson needed
6 to demonstrate: "(1) manifest error of fact; (2) manifest error
7 of law; or (3) newly discovered evidence." Hansen v. Moore
8 (In re Hansen), 368 B.R. 868, 878 (9th Cir. BAP 2007).

9 Richardson's Rule 9023 argument raises the same points he
10 already raised in support of his other arguments on appeal. In
11 particular, he has asserted in support of his Rule 9023 argument:
12 (1) that the Romanos had adequate information regarding the cost
13 of his services on an ongoing basis, and (2) that no statute,
14 rule, case law or Guideline required him to give the Romanos
15 regular billing statements as a prerequisite to his claiming
16 compensation under § 330(a).

17 This Panel has considered and rejected these same assertions
18 in addressing Richardson's claim that the bankruptcy court
19 erroneously disallowed his fees on reasonableness grounds. For
20 the same reasons we rejected these assertions, they also are
21 insufficient to establish that the bankruptcy court abused its
22 discretion in denying Richardson's Rule 9023 Motion.

23 **CONCLUSION**

24 For the reasons set forth above, we AFFIRM the bankruptcy
25 court's order on Richardson's second and final fee application
26 and its order denying Richardson's Rule 9023 Motion.