

DEC 17 2013

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

NOT FOR PUBLICATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	EC-12-1648-KiPaJu
	)		
RAJ KAMAL CORPORATION,	)	Bk. No.	11-36184
	)		
Debtor.	)		
<hr/>			
RAJ KAMAL CORPORATION;	)		
C. ANTHONY HUGHES,	)		
	)		
Appellants,	)		
	)		
v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>	
	)		
ALAN S. FUKUSHIMA, Chapter 7	)		
Trustee; UNITED STATES	)		
TRUSTEE,	)		
	)		
Appellees.	)		
<hr/>			

Argued and Submitted on October 18, 2013,  
at Sacramento, California

Filed - December 17, 2013

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

Honorable Robert S. Bardwil, Bankruptcy Judge, Presiding

Appearances: Appellant C. Anthony Hughes, Esq. argued for  
himself; Appellees did not appear.<sup>2</sup>

Before: KIRSCHER, PAPPAS and JURY, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> On April 17, 2013, the Clerk entered a Conditional Order of Waiver directing that the appellees' brief be filed by May 1, 2013. Appellees did not file a brief. Accordingly, they waived their right to file a brief and appear at oral argument.

1 Attorney C. Anthony Hughes ("Hughes") appeals the bankruptcy  
2 court's order denying compensation for services rendered and  
3 requiring disgorgement of all funds Hughes received in connection  
4 with the debtor's case. We AFFIRM.

5 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

6 Raj Kamal Corporation ("RJC") filed a chapter 11 bankruptcy  
7 case on June 30, 2011.<sup>3</sup> The case was later converted to  
8 chapter 7. While in chapter 11, RJC filed an application to  
9 employ Hughes as counsel on August 3, 2011. In his supporting  
10 declaration, Hughes stated that he was a disinterested person in  
11 accordance with § 101(14).<sup>4</sup> Neither the application nor Hughes's  
12 declaration contained disclosure required by Rule 2014 regarding  
13 his connections to the respective attorneys or accountants for the  
14 debtor, creditors, or any other party in interest. The bankruptcy  
15 court approved the application to employ Hughes on August 15,  
16 2011.

17 In conjunction with Hughes's application, RJC filed an  
18 application to employ Donald Smith ("Smith") as its accountant.  
19 RJC required Smith's services "to prepare tax returns, monthly  
20

---

21 <sup>3</sup> Unless specified otherwise, all chapter and section  
22 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
23 all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037.

24 <sup>4</sup> The term "disinterested person" means a person that –  
25 (A) is not a creditor, an equity security holder, or an insider;  
26 (B) is not and was not, within 2 years before the date of the  
27 filing of the petition, a director, officer, or employee of the  
debtor; and (C) does not have an interest materially adverse to  
28 the interest of the estate or any class of creditors or equity  
security holders, by reason of any direct or indirect relationship  
to, connection with, or interest in, the debtor, or for any other  
reason. Section 101(14).

1 operating reports, the disclosure statement, and to assist with  
2 other business accounting as needed." In the application, RJC  
3 represented that Smith had no prior connections to the debtor or  
4 its respective attorneys. However, in his supporting declaration,  
5 Smith made no similar disclosures. The bankruptcy court approved  
6 the application to employ Smith on August 15, 2011.

7 In the interim, Hughes filed several motions and stipulations  
8 for the use of cash collateral to pay certain creditors as well as  
9 a proposed chapter 11 plan.

10 On June 21, 2012, Smith filed his first and final application  
11 for compensation for his accounting services during the chapter 11  
12 case.<sup>5</sup> The bankruptcy court continued the hearing on Smith's fee  
13 application after independently learning of two other cases in  
14 which both Hughes and Smith were employed by debtors in their  
15 professional capacity.<sup>6</sup> In response to the bankruptcy court's  
16 tentative ruling on July 25, 2012, Smith filed a supplemental  
17 declaration on August 3, 2012, attempting to withdraw his fee  
18 application after learning from the trustee it was unlikely funds  
19 would be available to meet his request. On August 15, 2012, the  
20 bankruptcy court did not treat Smith's fee application as  
21 withdrawn but, instead, again continued the fee application  
22

---

23 <sup>5</sup> Hughes did not include a number of documents in his  
24 excerpts of record relevant to this appeal. We therefore  
25 exercised our discretion to review independently these imaged  
26 documents from the bankruptcy court's electronic docket. See  
O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d  
955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan Mortg. Co.  
(In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

27 <sup>6</sup> The cases noted by the bankruptcy court at that time were  
28 In re Sundance Self Storage El Dorado LP (case no. 10-36676) and  
In re W. Coast Real Estate & Mortg. Inc. (case no. 12-30686).

1 hearing and requested that Smith file a declaration "setting forth  
2 the nature and extent of any and all past and current connections"  
3 with Hughes. Smith filed the required supplemental declaration on  
4 August 24, 2012, in which he disclosed that Hughes was his  
5 bankruptcy attorney in 2010 in his personal chapter 13 case (case  
6 no. 10-38537). Smith also disclosed two additional instances,  
7 previously unknown to the bankruptcy court, in which he and Hughes  
8 had both been employed by the same debtor. The bankruptcy court  
9 approved Smith's first and final application for compensation on  
10 September 27, 2012.

11 Hughes initially filed an application for compensation in the  
12 RJC case on July 3, 2012. It was denied for procedural reasons on  
13 July 25, 2012. On August 3, 2012, Hughes submitted another  
14 application for compensation, which he later amended on August 28,  
15 2012. The bankruptcy court denied that application on  
16 September 12, 2012, again for procedural reasons. On October 24,  
17 2012, Hughes submitted the instant application for compensation  
18 (the "Final Fee Application"), requesting attorney's fees of  
19 \$29,450 and expenses of \$110.17.

20 On November 6, 2012, in another case where Hughes was  
21 debtor's counsel, In re Sundance Self Storage-El Dorado LP,  
22 482 B.R. 613 (Bankr. E.D. Cal. 2012)(the "Sundance case"), the  
23 same bankruptcy court denied Hughes's fee application because of  
24 his failure to disclose his connections with Smith. Prior to this  
25 ruling, the bankruptcy court had held a hearing on August 29,  
26 2012, during which the court informed Hughes that it had learned  
27 of his representation of Smith in Smith's chapter 13 case. During  
28 that hearing, the court stressed to Hughes the importance for

1 employed professionals to make full disclosure to the bankruptcy  
2 court.

3 Two months after the August 29 hearing in the Sundance case,  
4 Hughes filed the Final Fee Application on October 24, 2012. On  
5 October 30, 2012, Hughes filed an "amended prayer" to the Final  
6 Fee Application, stating that he was not requesting payment in  
7 excess of funds available from the trustee. Notably, he did not  
8 disclose any prior or ongoing relationship with Smith.

9 On November 9, 2012, after the bankruptcy court denied  
10 Hughes's fee application in the Sundance case for failure to make  
11 proper disclosures under Rule 2014, Hughes filed a motion to  
12 continue the hearing on the Final Fee Application, which the  
13 bankruptcy court granted. In the interim, Hughes filed no  
14 additional documents related to the Final Fee Application.

15 A hearing on the Final Fee Application was held on  
16 December 12, 2012, at which no appearances were made. The court  
17 denied the Final Fee Application and ordered Hughes to disgorge to  
18 the chapter 7 trustee all compensation he had received, including  
19 a retainer of \$10,736. In its related minute order, the  
20 bankruptcy court explained that it denied the Final Fee  
21 Application for two reasons: (1) because Hughes had failed to  
22 provide sufficient disclosure of the nature, extent, and value of  
23 the professional services provided by Hughes's legal assistants;  
24 and (2) because Hughes had failed to disclose the nature and  
25 extent of his connections with Smith as required by Rule 2014.  
26 This timely appeal followed.

## 27 II. JURISDICTION

28 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334

1 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158(b).

2 **III. ISSUE**

3 Did the bankruptcy court abuse its discretion when it denied  
4 the Final Fee Application and ordered disgorgement?

5 **IV. STANDARDS OF REVIEW**

6 We review the bankruptcy court's award or denial of  
7 attorney's fees for an abuse of discretion. Feder v. Lazar  
8 (In re Lazar), 83 F.3d 306, 308 (9th Cir. 1996). A bankruptcy  
9 court's disgorgement order directed to a debtor's attorney is  
10 reviewed for abuse of discretion. Hale v. U.S. Tr. (In re Byrne),  
11 208 B.R. 926, 930 (9th Cir. BAP 1997), aff'd, 152 F.3d 924 (9th  
12 Cir. 1998). A bankruptcy court abuses its discretion if it  
13 applies the wrong legal standard or its factual findings are  
14 illogical, implausible or without support in the record.  
15 TrafficSchool.com v. Edriver Inc., 653 F.3d 820, 832 (9th Cir.  
16 2011).

17 **V. DISCUSSION**

18 Hughes contends that the bankruptcy court applied the wrong  
19 legal standard by failing to consider attorney-client privilege  
20 and privacy rights under California law in requiring disclosure of  
21 his relationship to Smith. Further, Hughes argues the court erred  
22 in determining that he was not a disinterested person under  
23 § 101(14). Finally, Hughes argues the bankruptcy court erred by  
24 denying all requested fees and costs and requiring disgorgement of  
25 any funds received.

26 **A. The bankruptcy court was not required to consider attorney-**  
27 **client privilege and California privacy laws regarding the**  
28 **Final Fee Application.**

Hughes argues that the bankruptcy court did not conduct any

1 inquiry into whether the attorney-client privilege or California  
2 privacy laws precluded Hughes from disclosing his relationship  
3 with Smith. Hughes further argues that the holder of the  
4 privilege under California law is the client and not the attorney,  
5 and Smith never waived that privilege.

6 We fail to see where Hughes raised this argument before the  
7 bankruptcy court. Generally, the Panel cannot consider arguments  
8 that were not raised or briefed before the bankruptcy court. Katz  
9 v. Pike (In re Pike), 243 B.R. 66, 69 (9th Cir. BAP 1999)(citing  
10 Whittaker Corp. V. Execuair Corp., 953 F.2d 510, 515 (9th Cir.  
11 1992)). However, we have the discretion to consider an argument  
12 raised for the first time on appeal if the "issue presented is  
13 purely one of law and either does not depend on the factual record  
14 developed below, or the pertinent record has been fully  
15 developed." Id. (quoting Boker v. C.I.R., 760 F.2d 1039, 1042  
16 (9th Cir. 1985)). Because the issue Hughes presents is such a  
17 matter, we exercise our discretion to consider it.

18 Privileges in California are created and governed by statute.  
19 See CAL. EVID. CODE §§ 950-962. In California, the attorney-client  
20 privilege applies to communications between client and counsel  
21 that are presumed to have been made in confidence and are broadly  
22 protected against discovery. Confidential communication includes  
23 "a legal opinion formed and the advice given by the lawyer in the  
24 course of that [attorney-client] relationship." CAL. EVID. CODE  
25 § 952. The privilege applies not only to communications made in  
26 anticipation of litigation but also to legal advice when no  
27 litigation is threatened. The client holds the privilege in  
28 accordance with the Evidence Code. See CAL. EVID. CODE § 954.

1 Hughes has not cited, and we could not locate, any relevant  
2 authority supporting his contention that the attorney-client  
3 privilege or California privacy laws "trump" the disclosures  
4 required by estate professionals under § 327 and Rule 2014. In  
5 any event, we are not persuaded that either the attorney-client  
6 privilege or California privacy laws are a means of excusing  
7 disclosure under § 327 and Rule 2014.

8 Bankruptcy petitions are public documents and not subject to  
9 the attorney-client privilege. See William E. Schrambling  
10 Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir.  
11 1991)(holding that information contained in Notice of Federal Tax  
12 Lien and bankruptcy petition was no longer confidential so  
13 disclosure did not violate I.R.C. § 6103). The filing of a  
14 bankruptcy petition, which is a matter of public record, does not  
15 qualify as a "confidential communication" to which the attorney-  
16 client privilege would even apply. Further, as a matter of public  
17 record, the information contained therein is no longer private.

18 Even if Hughes were correct and the attorney-client privilege  
19 or California privacy laws were applicable to fee applications,  
20 both were waived by Smith – first when he filed his chapter 13  
21 petition on July 28, 2010, disclosing Hughes as his attorney, and  
22 again when he filed his supplemental declaration in support of his  
23 first and final fee application on August 24, 2012, which  
24 disclosed his relationship with Hughes. As a result, Hughes was  
25 free to disclose his relationship with Smith in his Final Fee  
26 Application filed on October 24, 2012. Therefore, we see no basis  
27 for why he could not do so.

28



1 **B. The bankruptcy court based its decision not on Hughes's**  
2 **disinterested status, but on his failure to disclose the**  
3 **nature and extent of his connections with Smith.**

4 Hughes argues that the bankruptcy court improperly determined  
5 that he was not a "disinterested" person as defined in § 101(14)  
6 in deciding to deny his Final Fee Application.<sup>7</sup> Hughes contends  
7 that any prior representation of, or relationship with, Smith had  
8 no relation to Hughes's employment in this case. Therefore,  
9 Hughes believes he had no connection to Smith that required  
10 disclosure. Unfortunately for Hughes, this case is not about his  
11 disinterested status as to RJC, but rather his failure to comply  
12 with the disclosure requirements of Rule 2014.

13 Rule 2014(a) establishes the procedure for the employment of  
14 attorneys and other professionals. It requires the professional  
15 to file an application disclosing, "to the best of the applicant's  
16 knowledge, all of the person's connections with the debtor,  
17 creditors, any other party in interest, their respective attorneys  
18 and accountants, the United States trustee, or any person employed  
19 in the office of the United States trustee." Rule 2014(a). "This  
20 rule assists the court in ensuring that the attorney has no  
21 conflicts of interest and is disinterested, as required by  
22 11 U.S.C. § 327(a)." Neben & Starrett, Inc. v. Chartwell Fin.  
23 Corp. (In re Park-Helena Corp.), 63 F.3d 877, 881 (9th Cir. 1995).

24 The disclosure requirements of Rule 2014 are strictly  
25 applied. Id. "[T]he [professional] has the duty to disclose all

---

26 <sup>7</sup> Hughes's brief is unclear with respect to whether he is  
27 arguing that the bankruptcy court improperly determined that he or  
28 Smith was not disinterested. Because Hughes has no standing to  
raise an argument for Smith, and Smith's fees were approved, we  
only reviewed the issue as to Hughes.

1 relevant information to the court, and may not exercise any  
2 discretion to withhold information." Kun v. Mansdorf  
3 (In re Woodcraft Studios, Inc.), 464 B.R. 1, 8 (N.D. Cal.  
4 2011)(citing In re Park-Helena, 63 F.3d at 880, 882; In re Coastal  
5 Equities, Inc., 39 B.R. 304, 308 (Bankr. S.D. Cal. 1984)("It is  
6 the duty of the attorney to reveal all connections.")(citing  
7 In re Haldeman Pipe & Supply Co., 417 F.2d 1302, 1304 (9th Cir.  
8 1969); In re Arlan's Dep't Stores, Inc., 615 F.2d 925, 932 (2d  
9 Cir. 1979)); In re Plaza Hotel Corp., 111 B.R. 882, 883 (Bankr.  
10 E.D. Cal. 1990)("The duty is one of complete disclosure of all  
11 facts."), aff'd, 123 B.R. 466 (9th Cir. BAP 1990)).

12       The duty of professionals is to disclose all  
13 connections with the debtor, debtor-in-possession,  
14 insiders, creditors, and parties in interest. . . .  
15 They cannot pick and choose which connections are  
irrelevant or trivial. . . . No matter how old the  
connection, no matter how trivial it appears, the  
professional seeking employment must disclose it.

16 In re Park-Helena Corp., 63 F.3d at 882 (quoting In re EWC, Inc.,  
17 138 B.R. 276, 280-81)(Bankr. W.D. Okla. 1992)(other citations  
18 omitted). "The duty to disclose is a continuing obligation as to  
19 which the risk of defective disclosure always lies with the  
20 discloser." In re Kobra Props., 406 B.R. 396, 402 (Bankr. E.D.  
21 Cal. 2009)(citing In re Park-Helena Corp., 63 F.3d at 880-81;  
22 cf Official Comm. of Unsecured Creditors v. Michelson  
23 (In re Michelson), 141 B.R. 715, 719-20 (Bankr. E.D. Cal. 1992)).

24       Hughes clearly had a connection to Smith as his chapter 13  
25 bankruptcy attorney, as well as through Smith's employment as an  
26 accountant for RJC and other debtors for which Hughes was counsel.  
27 Hughes particularly knew disclosure was of great importance to the  
28 bankruptcy court when he filed his Final Fee Application based on

1 the court's previous admonishment for his failure to disclose his  
2 connections to Smith at the August 29, 2012 hearing in the  
3 Sundance case. Hughes was further aware of the necessity of  
4 disclosure under Rule 2014 when his fee application in the  
5 Sundance case was denied on November 9, 2012, which was one month  
6 before the hearing on the Final Fee Application.

7 Hughes's failure to disclose his connections to Smith did not  
8 allow the bankruptcy court to ensure that no conflicts of interest  
9 existed. Despite the ongoing duty to disclose and the bankruptcy  
10 court's previous denial of fees in the Sundance case for the same  
11 violation, Hughes still failed to disclose his connections with  
12 Smith to the bankruptcy court. Even after his initial failure to  
13 disclose the nature and extent of his relationship to Smith in his  
14 employment application, the better course of action for Hughes  
15 would have been to file an amended declaration in support of his  
16 Final Fee Application disclosing his connections with Smith.

17 **C. The bankruptcy court did not abuse its discretion when it**  
18 **denied the Final Fee Application and ordered disgorgement.**

19 Hughes contends that to deny all fees and expenses and to  
20 require disgorgement of any funds received by him is too harsh a  
21 result. Specifically, he contends that a balancing test should be  
22 applied where the penalty for a disclosure failure is in  
23 proportion to the gravity of the breach. Again, we fail to see  
24 where Hughes raised this argument before the bankruptcy court. In  
25 any event, what Hughes asserts is not the law of this circuit.

26 "Disclosure that later turns out to be incomplete can be  
27 remedied by denial of fees." In re Kobra Props., 406 B.R. at 402  
28 (citing In re Park-Helena Corp., 63 F.3d at 880-81). "Even a

1 negligent or inadvertent failure to disclose fully relevant  
2 information may result in a denial of all requested fees."  
3 In re Park-Helena Corp., 63 F.3d at 882 (citations omitted).

4         Although Hughes acknowledged at oral argument that negligent  
5 or inadvertent disclosure may result in denial of all  
6 compensation, he contends that when the nondisclosure was not  
7 intentional, some fees should be allowed based on benefit to the  
8 estate. While Hughes's argument is not completely without logic,  
9 we are bound by Ninth Circuit law and are unable to entertain it.  
10 See Barnes-Wallace v. City of San Diego, 704 F.3d 1067, 1077 (9th  
11 Cir. 2012)(we are bound by the law of the Ninth Circuit).

12         Even if we could entertain Hughes's argument, however, it  
13 would not help him in this case. As a bankruptcy attorney, Hughes  
14 is aware of the requirements of Rule 2014. Further, Hughes was on  
15 notice of the bankruptcy court's need for disclosure regarding his  
16 relationship with Smith based on its prior admonishment in the  
17 Sundance case, and when Smith was ordered to file a supplemental  
18 declaration in support of his fee application on August 15, 2012,  
19 "setting forth the nature and extent of any and all past and  
20 current connections" with Hughes. Yet, despite this, Hughes never  
21 submitted a supplemental declaration in support of his Final Fee  
22 Application making the proper disclosures.

23         Accordingly, while it may be a harsh result that we as  
24 individual bankruptcy judges might have determined differently,  
25 the bankruptcy court was within its discretion in denying the  
26 Final Fee Application and ordering disgorgement of all fees

27  
28

1 received.<sup>8</sup>

2 **VI. CONCLUSION**

3 For the foregoing reasons, we AFFIRM.  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

---

25 <sup>8</sup> We are also unable to grant Hughes's request at oral  
26 argument to award him at least RJC's filing fee, which he paid.  
27 Based on our review of the record, he never asked the bankruptcy  
28 court for this relief, although he may still be able to do so.  
Further, as an appellate court, we cannot play the role of "fact  
finder" and parse out those amounts of his requested fees and/or  
expenses we think may be awardable.