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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-12-1499-PaKuD
	)	
JON MICHAEL DRISCOLL and	)	Bk. No. 09-08577-RTB
CHRISTINE QUIGLEY DRISCOLL,	)	
	)	
Debtors.	)	
_____	)	
	)	
ELLETT LAW OFFICES, PC;	)	
RONALD J. ELLETT,	)	
	)	
Appellants.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
_____	)	

Argued and Submitted on January 23, 2014  
at Tempe, Arizona

Filed - February 6, 2014

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

Honorable Redfield T. Baum, Sr., Bankruptcy Judge, Presiding<sup>2</sup>

Appearances: Ronald J. Ellett appeared for himself and for  
appellant Ellett Law Offices, P.C.

Before: PAPPAS, KURTZ and DUNN, 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> Judge Baum entered the order we review on appeal. Due to his retirement from full-time service, the Honorable Eddward Ballinger Jr. is now the presiding judge in the bankruptcy case.

1 Appellants Ellett Law Offices, P.C., and attorney Ronald J.  
2 Ellett (collectively, "Ellett"), appeal the order of the  
3 bankruptcy court granting Ellett's Amended First Application for  
4 Attorney's Fees in the reduced amount of \$1,750.00, rather than  
5 the \$5,000 requested. We VACATE the bankruptcy court's order and  
6 REMAND this matter for further proceedings.

7 **FACTS**

8 Debtors Jon and Christine Driscoll filed a petition for  
9 relief under chapter 13<sup>3</sup> on April 27, 2009; they were represented  
10 by Ellett. Debtors' Schedule D listed four secured claims  
11 totaling \$639,882.78, and their Schedule F listed thirty-one  
12 unsecured claims totaling \$328,669.22. Jon Driscoll is a  
13 mortgage broker, and Christine Driscoll is a crisis counselor.

14 Debtors timely filed a chapter 13 plan on May 8, 2009. In  
15 paragraph 1, addressing administrative expenses, the plan  
16 recites:

17 Attorney Fees: Debtors' attorney was paid \$1274.00  
18 prepetition. Further, Debtors' attorney shall be paid  
19 an additional \$3,726.00 as a minimum fee for this  
20 pending case prior to commencement of payments on any  
21 claim listed hereafter. The services rendered for this  
22 minimum fee include up to the first 7.6 hours of all  
23 consultations, telephone conversations and  
24 correspondences with debtors necessary to confirm  
25 debtors' initial Chapter 13 Plan, appearances necessary  
26 for confirmation of Debtors' initial Chapter 13 Plan,  
27 mailing and costs thereof of all necessary notices to  
28 confirm Debtors' initial Chapter 13 Plan and  
preparation and lodging of the order to confirm  
Debtors' initial Chapter 13 Plan. Additional fees may

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3 Unless otherwise indicated, all chapter and section  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
"Rule" references are to the Federal Rules of Bankruptcy  
Procedure. All "Civil Rule" references are to the Federal Rules  
of Civil Procedure.

1 be charged by hourly fee pursuant to an executed  
2 bankruptcy fee agreement.

3 Chapter 13 Plan and Application for Payment of Administrative  
4 Expenses at 1-2 (emphasis added).

5 A stipulated order confirming Debtors' plan, submitted by  
6 Debtors, the chapter 13 trustee, and the principal secured  
7 creditor, modified this attorney fee provision, which order was  
8 entered by the bankruptcy court on January 14, 2010:

9 Attorney's Fees: Debtor's attorney was paid \$1274.00  
10 prepetition. Further, Debtor's attorney shall be paid  
11 an additional \$3,726.00 as a fee prior to the  
12 commencement of any payments on any claim listed  
13 hereinafter. This award is for the first 8.1 hours of  
14 counsel's time in this case. This award is without  
15 prejudice to a future award based upon time in excess  
16 of 8.1 hours and a proper application for an additional  
17 award of fees.

18 Stipulated Order, at 2 (emphasis added). Ellett admits that he  
19 has received \$5,000, in his words, "under the [bankruptcy  
20 court's] no look procedure." Amended First Application for  
21 Attorney's Fees at ¶ 10 (the "Fee Application").

#### 22 Significant Events in the Bankruptcy Case

23 There were no adversary proceedings or contested hearings  
24 conducted in the bankruptcy case. In addition to generally  
25 assisting them in filing their bankruptcy case, and obtaining  
26 confirmation of Debtors' plan, Ellett's activities focused on  
27 three matters: valuing and stripping the lien of the second  
28 mortgage holder on Debtors' home; defending a motion for relief  
from stay from the first mortgage holder; and a post-confirmation  
modification of the plan.

In particular, through Ellett, Debtors filed a motion for  
"Determination of Value of Claim Secured by Lien and Debtors'

1 Objection to Proof of Claim" of Wells Fargo Bank's second  
2 mortgage on their residence on October 7, 2009. Debtors argued  
3 that the value of Wells Fargo's secured claim was zero, insofar  
4 as the value of the first lien of U.S. Bank was greater than the  
5 value of the property. Wells Fargo did not contest the motion,  
6 and the bankruptcy court granted the motion on January 1, 2010.

7 U.S. Bank filed a motion for relief from the automatic stay  
8 to foreclose the lien on its first position Deed of Trust on  
9 June 28, 2010. Debtors did not contest the relief from stay  
10 motion. The bankruptcy court granted stay relief to the lender  
11 on July 22, 2010.

12 In light of the grant of stay relief, Debtors then filed a  
13 motion to modify the confirmed chapter 13 plan because of their  
14 decision to surrender their residence. In a one-page motion,  
15 Debtors proposed to reduce the number of monthly payments from  
16 sixty to thirty-six, and to reduce the amount of the monthly  
17 payments to the chapter 13 trustee, because they no longer needed  
18 to service the mortgage. No party objected to the motion and the  
19 bankruptcy court approved the plan modification on December 6,  
20 2011.

#### 21 The Fee Application

22 On February 27, 2012, Ellett filed the Fee Application.  
23 Ellett provided an hourly billing record in the Fee Application  
24 indicating he had provided services with a value of \$16,467.00.  
25 Two paragraphs of the Fee Application are noteworthy:

26 9. The confirmation order approved \$3,750 under the  
27 "no-look fee" procedure but also provided that the  
28 initial fee award was without prejudice to an  
additional fee award based on a detailed fee  
application showing additional work performed in the

1 case.

2 10. The amount of the total attorney's fees incurred  
3 in connection with this case is \$16,467.00 (of this  
4 amount, \$5,000 was previously approved and paid under  
5 the no-look procedure). This leaves a balance of  
6 \$11,457.00. There are insufficient funds to pay these  
7 fees. Counsel is voluntarily writing his fees down by  
8 \$6,467.00. The balance to be paid is therefore  
9 \$5,000.00.

10 Although there were no objections to the Fee Application,  
11 the bankruptcy court contacted Ellett and instructed him to  
12 schedule it for a hearing. Ellett filed a notice setting the  
13 hearing for August 7, 2012. He also filed a supplement in  
14 support of the Fee Application which contained argument and  
15 affidavits supporting his requested hourly rate of compensation,  
16 \$495.

17 A transcript for the short hearing on the Fee Application is  
18 included in the record. The substance of that hearing consisted  
19 of an extremely brief colloquy among the bankruptcy court, Ellett  
20 and Trustee's counsel:

21 MR. ELLETT: I filed -- I was surprised [the Fee  
22 Application] was set for hearing. I'm not certain why,  
23 but I filed a supplement that points out. I'm going to  
24 be awarded less than [\$]325 an hour because I'm writing  
25 off \$6,000 in that case because there's not enough  
26 money to pay me. My clients can't afford to pay me, so  
27 to the extent the hearing is about my hourly rate, I  
28 don't think that applies in this case because I'm  
already writing off \$6,000 -- over 6,000 in fees.

THE COURT: So, what will your total fee be in that  
case?

MR. ELLETT: A total fee would be [\$]10,000 out of 16,  
over [\$]16,000 that was billed. Five has been approved  
already. I'm asking for additional five.

THE COURT: All right. Anything from the Trustee?

[TRUSTEE'S COUNSEL]: No, Your Honor.

1 THE COURT: All right. I'll take them both under  
2 advisement.

3 MR. ELLETT: Thank you.

4 (Proceedings Concluded)

5 Hr'g Tr. 1:15-21, August 7, 2012.

6 On September 12, 2012, the bankruptcy court entered a Minute  
7 Entry/Order (the "Fee Order"). After a short discussion of the  
8 amount sought by Ellett for fees and a review of Ellett's  
9 services, the order provided that "the court has carefully  
10 reviewed the time records and entire record and concludes that  
11 Ellett's billings are excessive for the work performed." In  
12 arriving at this conclusion, the court focused on three items:  
13 (1) the lien strip of the second deed of trust; (2) the stay  
14 relief motion; and (3) the modified plan.

15 The bankruptcy court indicated that its website procedures  
16 page informed attorneys and parties that the court ordinarily  
17 allows \$500 for uncontested proceedings to avoid a junior  
18 mortgage lien, and that this "\$500 fee is based on the premise  
19 that an uncontested lien avoidance is legally simple and often  
20 done with form pleading with no required hearing." The court  
21 reviewed the Fee Application, and noted that Ellett had billed  
22 \$3,811.50 for services in connection with the motion to strip the  
23 mortgage lien. The court concluded "that such amount for a  
24 simple lien avoidance is grossly inflated and well out of the  
25 range (\$500-1500) of what is typically charged by bankruptcy  
26 practitioners in this district for similar work." The court  
27 allowed \$750.00.

28 As to Ellett's time spent reviewing the stay relief motion,

1 the bankruptcy court determined that such services were  
2 ordinarily assumed to be included in the no look fee. The court  
3 noted that Ellett's work on the modified plan was also minimal  
4 because it was uncontested, and the motion to modify the plan was  
5 a single page which addressed no difficult legal issues.  
6 Ellett's hourly billing for the stay relief and modified plan was  
7 \$1,485.00. The bankruptcy court concluded that reasonable  
8 compensation for all these services was \$1,000, which together  
9 with the \$750 allowed for the mortgage lien avoidance, amounted  
10 to a total of \$1,750 in compensation, in addition to the \$5,000  
11 no look fee, for a grand total of \$6,750. Instead of the \$10,000  
12 Ellett had requested, this reduced amount of compensation was  
13 approved.

14 Without seeking reconsideration, Ellett filed a timely  
15 appeal of the Fee Order on September 26, 2012.

#### 16 JURISDICTION

17 The bankruptcy court had jurisdiction under 28 U.S.C.  
18 §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
19 § 158.

#### 20 ISSUE

21 Whether the bankruptcy abused its discretion in granting  
22 Ellett's fee application in a reduced amount.

#### 23 STANDARD OF REVIEW

24 The bankruptcy court's award of attorney's fees is reviewed  
25 for abuse of discretion. Smith v. Hale (In re Smith), 317 F.3d  
26 918, 923 (9th Cir. 2002); Label & Opera v. U.S. Tr. (In re Auto  
27 Parts Club), 211 B.R. 29, 32 (9th Cir. BAP 1997). We review the  
28 legal premises a bankruptcy court employs in determining the

1 reasonableness of attorney's fees de novo. Ferrand v. Conrad  
2 Credit Corp., 244 F.3d 1145, 1147 (9th Cir. 2001).

3 A bankruptcy court abuses its discretion if it applies an  
4 incorrect legal standard, or misapplies the correct legal  
5 standard, or if its factual findings are illogical, implausible  
6 or without support from evidence in the record. United States v.  
7 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009)(en banc).

### 8 DISCUSSION

9 Section 330(a)(4)(B) provides that:

10 In a chapter 12 or 13 case in which the debtor is an  
11 individual, the court may allow reasonable compensation  
12 to the debtor's attorney for representing the interests  
13 of the debtor in connection with the bankruptcy case  
based on a consideration of the benefit and necessity  
of such services to the debtor and the other factors in  
this section.

14 A professional seeking compensation under § 330 has the  
15 burden of proving that the amount requested is reasonable. Law  
16 Offices of David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R.  
17 392, 402 (9th Cir. BAP 2003) ("Eliapo I"), rev'd. in part on  
18 other grounds, 468 F.3d 592 (9th Cir. 2006) ("Eliapo II"). The  
19 bankruptcy court has an independent duty to review fee  
20 applications of professionals for reasonableness. Eliapo I,  
21 298 B.R. at 404-05; Mayer, Glassman & Gaines v. Washam  
22 (In re Hanson), 172 B.R. 67, 74 (9th Cir. BAP 1994). This duty  
23 arises even where, as here, there are no objections to the  
24 professional's application by the trustee, debtor or creditors.  
25 In re Dorsett, 297 B.R. 620, 624 (Bankr. E.D. Cal. 2003).

26 Although Ellett raises several arguments in his brief to  
27 support his position that the bankruptcy court erred in deciding  
28 that the amount of compensation he requested in the Fee

1 Application for the services performed as Debtors' counsel in  
2 this case was excessive, we need not consider those arguments.  
3 This is because we agree with Ellett that, under the facts of  
4 this case, the bankruptcy court failed to afford Ellett a  
5 meaningful opportunity to be heard and defend his fee request  
6 and, therefore, the bankruptcy court's order awarding reduced  
7 fees must be vacated. As in many other districts, Arizona rules  
8 provide that a chapter 13 debtor's attorney may receive a  
9 presumptively reasonable fee of up to \$5,000 for his or her  
10 services without the submission of a detailed fee application - a  
11 so-called "no look" fee. Bankr. D. Ariz. Local R. 2083-11(a) &  
12 (b)(2009, later modified). But counsel requesting approval for  
13 compensation in addition to the no look fee must justify the  
14 reasonableness of the amount requested in such an application.  
15 See In re Allen, 2012 Bankr. LEXIS 314, at \*2 (Bankr. D. Ariz.  
16 January 25, 2012) (awarding a no look fee of \$4,500 plus \$500 for  
17 "reasonable and fair" services in an adversary proceeding not  
18 included in the no look fee rules).

19 Although the bankruptcy court is required under the Code to  
20 limit a chapter 13 debtor's attorney's compensation to only such  
21 amounts as are "reasonable" as provided in § 330(a)(4)(B), where  
22 the bankruptcy court may have objections to a fee application  
23 that might result in a reduction in the amount awarded, in  
24 Eliapo II the Ninth Circuit has instructed courts to provide a  
25 procedure whereby the applicant has a meaningful opportunity to  
26 respond to the court's concerns. Eliapo II, 468 F.3d at 603. In  
27 Eliapo II, the Ninth Circuit examined implications of no look  
28 fees and additional services in chapter 13 cases. An attorney

1 submitted a one-page fee application under the no look guidelines  
2 in effect in the Northern District of California. The bankruptcy  
3 court approved the first application without a hearing. The  
4 attorney then submitted a second, supplementary application that  
5 included both fees allowed under the no look guidelines and  
6 additional fees. The bankruptcy court first scheduled a hearing  
7 on the second application, but then took the fee request under  
8 submission without a hearing when no objection was filed. The  
9 court ruled on the second application without a hearing, allowing  
10 some fees that were approved under the no look guidelines, but  
11 disallowing other fees because the court felt that "extraordinary  
12 circumstances" were required before the court would allow an  
13 attorney to exceed the guidelines. Id. at 595.

14 On appeal, the Ninth Circuit held in Eliapo II that a  
15 debtor's attorney is entitled to "notice and a hearing," as that  
16 term is defined in § 102(1),<sup>4</sup> before the bankruptcy court may  
17 award counsel a reduced fee. 468 F.3d at 601. Specifically, the  
18 Ninth Circuit concluded that:

19 The essential point is that the court should give  
20 counsel a meaningful opportunity to be heard. [citing  
21 to Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833, 856 (3d  
22 Cir. 1994)]. The bankruptcy court should "apprise the  
23 [fee] applicant of the particular questions and  
objections it harbors" and should give the applicant  
"an opportunity to rebut or contest the court's  
conclusions." Id. at 846-47; see also In re Spillane,

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24 <sup>4</sup> § 102. Rules of construction

25 In this title--

26 (1) "after notice and a hearing", or a similar phrase--

27 (A) means after such notice as is appropriate in the  
28 particular circumstances, and such opportunity for a  
hearing as is appropriate in the particular  
circumstances[.]

1 884 F.2d 642, 646-47 (1st Cir. 1989) (holding that  
2 cross-examination is not required in hearing on fee  
3 application). Depending on the circumstances, the  
4 hearing requirement may be satisfied without oral  
5 presentation of evidence and without oral argument.  
6 That is, the "hearing" requirement may, in appropriate  
7 circumstances, be satisfied by written submission. All  
8 that is required is that the applicant be given "a  
9 reasonable opportunity to present legal argument and/or  
10 evidence to clarify or supplement his Application."  
11 [Citing Nelson v. Mickelson (In re Pflughaar), 215 B.R.  
12 394, 397 (8th Cir. BAP 1997)]; see also Busy Beaver,  
13 19 F.3d at 846.

14 Id. at 603.

15 In this case, Ellett filed and served the Fee Application,  
16 and no objections were filed. After a time, the bankruptcy court  
17 requested that Ellett set the Fee Application for a hearing. At  
18 the time he filed the notice of the hearing, he also filed a  
19 supplement providing information to support his hourly billing  
20 rate, and to remind the bankruptcy court that his fee request was  
21 a significantly reduced one as compared to the amounts reflected  
22 in the hourly billing records in the Fee Application. However,  
23 before and during the hearing, the bankruptcy court gave Ellett  
24 no insight, indeed no real clue, about the nature of its  
25 concerns, other than inquiring with him at the hearing about what  
26 the "total" amount of fees requested was to be. At no time did  
27 the bankruptcy court indicate that, as opposed to focusing on  
28 Ellett's hourly rate reflected in the billing records, and as  
discussed in Ellett's submissions in the supplement, it might be  
more generally concerned with the reasonableness of the total  
fees Ellett had requested and, in particular, with the nature and  
amount of services he provided as compared to those reasonably  
required to represent Debtors in their case.

Eliapo II makes clear that the bankruptcy court enjoys

1 significant latitude in prescribing the type of proceedings used  
2 to consider fee applications like Ellett's:

3 We emphasize that the notice-and-a-hearing definition  
4 in § 102(1) is flexible and sensitive to context.  
5 Chapter 13 fee applications are typically rather  
6 simple, even in cases where fees beyond the presumptive  
7 no-look fees are sought. So long as fair notice and  
8 opportunity to be heard are afforded, the bankruptcy  
9 court has considerable freedom to fashion procedures  
10 for notice and a hearing that are "appropriate in the  
11 particular circumstances." 11 U.S.C. § 102(1)(A).

12 468 F.3d at 602.

13 In this case, the bankruptcy court had an independent duty  
14 to determine whether Ellett's requested compensation was  
15 reasonable. Moreover, the total amount Ellett was requesting for  
16 representing Debtors, the time he spent performing services on  
17 relatively routine, uncontested tasks, and the apparently  
18 artificial \$495 per hour rate he used in his application to  
19 measure the value of those services in this simple chapter 13  
20 case, were all factors which, we believe, justified the  
21 bankruptcy court's decision to scrutinize Ellett's application  
22 closely. However, as instructed by the Ninth Circuit in  
23 Eliapo II, Ellett was entitled to advance notice about the  
24 bankruptcy court's concerns with his fee request so that he  
25 could, in a meaningful and timely fashion, respond to those  
26 concerns and defend that request. The approach taken here by the  
27 bankruptcy court did not satisfy that standard and, therefore,  
28 the Fee Order must be vacated and this matter remanded for  
further proceedings in the bankruptcy court.

#### 29 CONCLUSION

30 The bankruptcy court's Fee Order is VACATED and this matter  
31 is REMANDED for further proceedings consistent with this

1 memorandum.<sup>5</sup>

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<sup>5</sup> We emphasize that this outcome is dictated solely as a result of our concerns with the procedure employed by the court. We express no opinion about the bankruptcy court's conclusion that the amount Ellett requested in the Fee Application was excessive in relation to the services he provided to Debtors, a topic the bankruptcy court is free to again examine after appropriate notice and a hearing on remand.