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2 UNITED STATES COURT OF APPEALS  
3  
4 FOR THE SECOND CIRCUIT  
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7  
8 August Term, 2011  
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10 (Submitted: February 7, 2012 Decided: February 14, 2012)

11  
12 Docket No. 11-1233  
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15 RICHARD WARE LEVITT, ESQ.,

16  
17 *Plaintiff-Appellee,*

18  
19 -v.-

20  
21 DAVID H. BROOKS,

22  
23 *Defendant-Appellant.*  
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26  
27 Before:

28 PARKER, WESLEY, LOHIER, *Circuit Judges.*  
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30 Appeal from a judgment of the United States District  
31 Court for the Eastern District of New York (Seybert, J.),  
32 entered on March 15, 2011, granting Plaintiff-Appellee's  
33 motion to compel Defendant-Appellant's payment of  
34 outstanding legal fees owed to Plaintiff-Appellee for  
35 representation he provided to Defendant-Appellant in a  
36 federal criminal proceeding.

37  
38 AFFIRMED.  
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1                   ANDREW J. GOODMAN, Garvey Schubert Barer, New  
2                                   York, NY, *for Plaintiff-Appellant*

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4                   DEAN M. SOLOMON (Richard Ware Levitt, *on the*  
5                                   *brief*), Levitt & Kaizer, New York, NY., *for*  
6                                   *Defendant-Appellant.*

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10                   PER CURIAM:

11                   Appellant David H. Brooks appeals from a judgment of  
12                   the district court granting Richard Ware Levitt's motion to  
13                   compel outstanding attorneys' fees owed to Levitt by Brooks  
14                   in connection with Levitt's representation of Brooks in a  
15                   federal criminal proceeding. We hold that ancillary  
16                   jurisdiction existed over the fee dispute and that the  
17                   district court did not abuse its discretion in exercising  
18                   that jurisdiction. We also hold that Brooks forfeited many  
19                   of the issues he raises on appeal by not raising them below,  
20                   and we find no merit in his arguments based on the  
21                   Constitution. We therefore affirm the district court's  
22                   March 15, 2011 judgment.

23                                   **Background**

24                   This appeal arises out of Brooks's retention of Levitt  
25                   to represent him in connection with charges of securities  
26                   fraud, insider trading, and other criminal offenses. These  
27                   charges resulted in an eight-month jury trial, after which

1 Brooks was found guilty. According to Levitt, at some point  
2 prior to the close of trial, Brooks stopped paying Levitt's  
3 bills. Eventually, Brooks owed Levitt \$224,956.16.

4 In September 2010, subsequent to the jury verdict,  
5 Brooks moved for the release of certain restrained assets  
6 that the government contended were subject to forfeiture.  
7 In support of that motion, Brooks asserted that he had  
8 "depleted all funds available to pay for his ongoing  
9 defense," that given the unexpected length of his trial, he  
10 had "outstanding bills of approximately \$1.5 million," and  
11 that he anticipated significant costs for the post-trial  
12 forfeiture hearing and other proceedings. In an attached  
13 schedule of outstanding invoices, Brooks acknowledged that  
14 he owed Levitt \$265,000. Levitt submitted an affidavit  
15 alleging that when he informed Brooks that he would move to  
16 withdraw if Brooks did not pay the outstanding fee, Brooks  
17 became "belligerent," and "hissed or spit at [Levitt] and  
18 screamed" a vulgar remark. The district court denied  
19 Brooks's motion.

20 Brooks failed to pay Levitt the money and hired two  
21 attorneys to assist in his post-trial defense. As a result,  
22 Levitt moved: (1) to withdraw as counsel, and (2) for a

1 court order remitting to Levitt, from forfeited bail funds,  
2 \$224,956.16 to satisfy the unpaid fees. Levitt also asked  
3 for an accounting of how the bail funds previously released  
4 to Brooks for litigation expenses were expended; or,  
5 alternatively, that funds seized by the government for  
6 forfeiture be released to him to satisfy his unpaid fees.  
7 As a final alternative, Levitt asked that the district court  
8 exercise its ancillary jurisdiction and enter an order  
9 compelling Brooks to pay Levitt.

10 Brooks opposed Levitt's motion. He did not, however,  
11 contest the amount he owed Levitt. Instead, he argued that  
12 Levitt's motion to compel payment was premature and  
13 prejudicial to his interests. He asserted the following  
14 arguments as defenses: (1) Brooks was not attempting to  
15 evade his obligation to Levitt and had "acknowledged his  
16 debt to Levitt before th[e district c]ourt, and made every  
17 attempt to satisfy it;" (2) Levitt should not be permitted  
18 to "jump the line" over Brooks's other legal creditors who  
19 provided services in connection with his case, or those  
20 attorneys and staff who were currently working in  
21 anticipation of (or would work on) Brooks's upcoming  
22 forfeiture proceedings, sentencing, and appeal; and (3)

1 Levitt's conduct, in revealing the vulgar remark, violated  
2 Rule 1.6 of the New York Rules of Professional Conduct  
3 concerning the confidentiality of information. In March  
4 2011, the district court directed the district clerk to open  
5 a new civil docket number concerning the fee dispute.  
6 Shortly thereafter, pursuant to its ancillary jurisdiction,  
7 the district court granted Levitt's motion to compel  
8 payment.

### 9 **Discussion**

10 On appeal, Brooks argues that: (1) the district court  
11 erred by exercising ancillary jurisdiction over the fee  
12 dispute; (2) the district court failed to abide by the  
13 Federal Rules of Civil Procedure; (3) the lack of any  
14 evidentiary hearing or trial violated his due process  
15 rights; and (4) he was deprived of his right to a jury  
16 trial. We find that the district court's exercise of  
17 ancillary jurisdiction was proper, that Brooks waived his  
18 claims regarding the Federal Rules of Civil Procedure by not  
19 raising those issues below, and that his Due Process and  
20 jury trial claims are without merit.

1    **I.    The District Court’s Exercise of Ancillary**  
2           **Jurisdiction<sup>1</sup>**

3           In this case, ancillary jurisdiction existed and the  
4    district court did not abuse its discretion in exercising  
5    that jurisdiction to resolve the fee dispute between Brooks  
6    and Levitt.  “It is well settled that a federal court may,  
7    in its discretion, exercise ancillary jurisdiction to hear  
8    fee disputes . . . between litigants and their attorneys  
9    when the dispute relates to the main action.”  *Chesley v.*  
10   *Union Carbide Corp.*, 927 F.2d 60, 64 (2d Cir. 1991)  
11   (internal quotation marks and alteration omitted).  
12   Ancillary jurisdiction over fee disputes is equally  
13   available in criminal and civil cases.  *Garcia v. Teitler*,  
14   443 F.3d 202, 207 (2d Cir. 2006).

15           In *Garcia*, we explained that “[a]t its heart, ancillary  
16   jurisdiction is aimed at enabling a court to administer  
17   justice within the scope of its jurisdiction” and that  
18   “[w]ithout the power to deal with issues ancillary or  
19   incidental to the main action, courts would be unable to

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<sup>1</sup>We review questions of a court’s subject-matter jurisdiction *de novo*.  See *Bank Of India v. Trendi Sportswear, Inc.*, 239 F.3d 428, 436 (2d Cir. 2000).  Once we determine that ancillary jurisdiction exists, we review a district court’s exercise of that jurisdiction for abuse of discretion.  See *Joseph Brenner Assocs., Inc. v. Starmaker Entm’t, Inc.*, 82 F.3d 55, 58 (2d Cir. 1996).

1 effectively dispose of the principal case nor do complete  
2 justice in the premises." *Id.* at 208 (internal quotation  
3 marks omitted). Although *Garcia* dealt with a fee dispute  
4 following an attorney's withdrawal after a *Curcio* hearing,  
5 *Garcia* should not be viewed as limited to just that  
6 situation. Rather, we held that "[i]n order to guarantee a  
7 defendant's right to choose his own counsel where, as here,  
8 his criminal case is ongoing, and to avoid the possibility  
9 of defendants becoming indigent and requiring the  
10 appointment of counsel, a district court must be able to  
11 exercise ancillary jurisdiction to resolve a fee dispute."  
12 *Id.* at 209; see also *Novinger v. E.I. DuPont de Nemours &*  
13 *Co., Inc.*, 809 F.2d 212, 217 (3d Cir. 1987). In *Novinger*,  
14 the Third Circuit explained that even though attorneys' fees  
15 arrangements are primarily a matter of state law, "the  
16 federal forum has a vital interest in those arrangements  
17 because they bear directly upon the ability of the court to  
18 dispose of cases before it in a fair manner." *Novinger*, 802  
19 F.2d at 217.

20 Under *Garcia*, ancillary jurisdiction existed over the  
21 fee dispute between Levitt and Brooks. *Stein v. KPMG, LLP*,  
22 486 F.3d 753 (2d Cir. 2007), on which Appellant relies, is

1 not to the contrary. *Stein* distinguished *Garcia* on the  
2 basis that *Stein* involved a contract dispute between  
3 defendants and their non-party former employer. *Id.* at 760-  
4 61. In *Stein*, we emphasized the fact that the fee dispute  
5 involved a non-party and explained that:

6 While we do not exclude the possibility of a  
7 legitimate ancillary proceeding involving a nonparty  
8 to the primary litigation, we believe that the  
9 requisite compelling circumstances will be rare, as  
10 the need for such a proceeding generally will be far  
11 less pressing than in cases involving parties  
12 already before the court.

13  
14 *Id.* at 761. Here, the parties to the fee dispute are both  
15 involved in the underlying action. This case, therefore,  
16 differs from *Stein* and is closer to *Garcia*. Specifically,  
17 Brooks put his legal fees in controversy by moving for  
18 release of restrained assets for the purpose of paying his  
19 legal bills. And the underlying proceedings remained  
20 ongoing (albeit post-trial), making defendant's legal fees  
21 relevant to the district court's management of its case,  
22 specifically its responsibility to ensure defendant does not  
23 become indigent and that he has representation throughout  
24 the proceedings. Like *Garcia*, ancillary jurisdiction was  
25 appropriate because it "enable[d the] court to function  
26 successfully, that is, to manage its proceedings, vindicate



1 its authority, and effectuate its decrees." *Id.* at 760  
2 (internal quotation marks omitted).

3 Brooks claims that even if ancillary jurisdiction was  
4 available, the district court abused its discretion in  
5 deciding the fee dispute. We disagree. We have held that  
6 several non-exhaustive factors can weigh in favor of  
7 exercising ancillary jurisdiction. These include: (1)  
8 familiarity with the subject matter of the suit, especially  
9 with the amount and quality of work performed by the  
10 attorneys; (2) a court's responsibility to protect officers  
11 of the court in such matters as fee disputes; (3) the  
12 convenience of the parties; and (4) judicial economy.  
13 *Cluett, Peabody & Co., Inc. v. CPC Acquisition Co., Inc.*,  
14 863 F.2d 251, 256 (2d Cir. 1988). All of these factors were  
15 present here and weighed in favor of the court's exercise of  
16 ancillary jurisdiction. Having presided over the criminal  
17 proceedings, the district court was undoubtedly the most  
18 familiar with the subject matter and the amount and quality  
19 of work performed by Levitt. Thus, the court's deciding the  
20 fee dispute promoted judicial economy.<sup>2</sup> The court's

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<sup>2</sup>Brooks's assertion that judicial economy weighed against exercising ancillary jurisdiction because Levitt had commenced a proceeding in state court against Brooks's brother as a guarantor of legal fees is unpersuasive. The district court's resolution of the dispute between Levitt and Brooks did not resolve any issues of liability relating to Brooks's brother, and no

1 responsibility to officers of the court was also implicated.  
2 Moreover, before the court, Brooks acknowledged his debt to  
3 Levitt while contesting that it should be paid from funds  
4 held by the government.

5 Brooks asserts that Levitt's alleged violation of New  
6 York's Rules of Professional Conduct made the district  
7 court's exercise of ancillary jurisdiction an abuse of  
8 discretion. We see no basis for such an argument.  
9 Furthermore, we disagree with Brooks's contention that  
10 Levitt violated the Rules of Professional conduct. See  
11 *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980). In  
12 *Priest* the New York Court of Appeals held that "[a]  
13 communication concerning the fee to be paid has no direct  
14 relevance to the legal advice to be given. It is a  
15 collateral matter which, unlike communications which relate  
16 to the subject matter of the attorney's professional  
17 employment, is not privileged." *Id.* Although Rule 6.1 of  
18 the Rules of Professional Conduct protects information  
19 broader than the attorney-client privilege, it only goes so  
20 far as to protect "information gained during or relating to  
21 the representation of a client," N.Y. Rules of Prof'l

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judicial economy would have been gained by the court refusing to resolve the fee dispute before it.

1 Conduct R. 1.6(a), and Brooks's remark contained no material  
2 *information* beyond the use of profanity directed at counsel.  
3 We find no merit in Brooks's claim that ancillary  
4 jurisdiction was improper, and we therefore affirm.

## 5 **II. Application of the Federal Rules of Civil Procedure**

6 Brooks contends that the district court failed to  
7 comply with the Federal Rules of Civil Procedure in the  
8 civil action because: (1) the court did not require the  
9 filing of a complaint and service of process, (2) the  
10 absence of any pleadings deprived Brooks of his ability to  
11 assert affirmative defenses and counterclaims, and (3) the  
12 court did not permit discovery. Brooks failed to raise any  
13 of these arguments in opposition to Levitt's motion (which  
14 expressly invoked the district court's ancillary  
15 jurisdiction) or alert the district court to any potential  
16 issues that warranted the need for discovery. Thus, they  
17 are forfeited. *See Bogle-Assegai v. Connecticut*, 470 F.3d  
18 498, 504 (2d Cir. 2006).

19 To the extent Brooks asserts that the district court  
20 "never had jurisdiction" over the fee dispute because there  
21 was no filing and service of a complaint, this argument is  
22 also forfeited because it relates to personal jurisdiction,

1 a waiveable defect, and Brooks failed to raise the issue  
2 below. See *Credit Lyonnais Secs. (USA), Inc. v. Alcantara*,  
3 183 F.3d 151, 154 (2d Cir. 1999); see also *Miss. Pub. Corp.*  
4 *v. Murphree*, 326 U.S. 438, 444-45 (1946); *In re DES Litig.*,  
5 7 F.3d 20, 24 (2d Cir. 1993).

### 6 **III. Constitutional Arguments**

7 Brooks's argument that the district court violated his  
8 due process rights is also without merit. He was not denied  
9 a sufficient opportunity to be heard, and in fact filed  
10 three responsive memoranda to Levitt's motion, none of which  
11 requested (let alone established any need for) a hearing or  
12 trial. See *United States v. Santiago*, 495 F.3d 27, 29-30  
13 (2d Cir. 2007); cf. *Rein v. Socialist People's Libyan Arab*  
14 *Jamahiriya*, 568 F.3d 345, 354 (2d Cir. 2009); *In re Thirteen*  
15 *Appeals Arising Out of San Juan Dupont Plaza Hotel Fire*  
16 *Litig.*, 56 F.3d 295, 303 (1st Cir. 1995). Furthermore,  
17 Brooks failed to contest the amount owed to Levitt or raise  
18 any contested factual issues below. Thus, there were no  
19 facts to be tried; his asserted right to a jury trial was  
20 not implicated.

1 **Conclusion**

2 The district court's judgment of March 15, 2011,  
3 granting Plaintiff-Appellee's motion to compel Defendant-  
4 Appellant payment of outstanding legal fees owed to  
5 Plaintiff-Appellee is hereby AFFIRMED.