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The Briefs

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Boyles v. Mid-Florida Television Corp.,

467 So. 2d 282 (Fla. 1985)

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Hamlet v. Hamlet,

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Marriott International, Inc. v. Perez-Melendez,

855 So. 2d 624 (Fla. 5th DCA 2003)

Affirmed million dollar personal injury verdict based on the "two issue rule".

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Restored a physician's medical license.

Layeni v. Layeni,

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Reversed denial of wife's interest in medical accounts receivable.

GEICO v. Krawzak,

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Required disclosure of uninsured motorist insurance carrier as a party defendant.

Pixton v. Scotsman,

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Reversed dismissal of negligence action for failure to comply with RCP 1.070(j).

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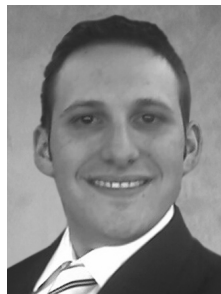
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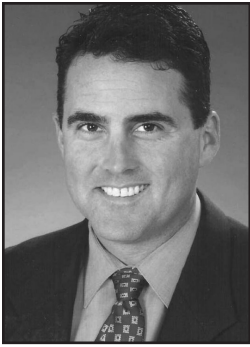
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Deadline for January Edition: 12/1/2006
The deadline for each edition will be the first day of each month. If that day falls on a weekend or holiday, the deadline will be the last working day prior.

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A Christmas Story

Thomas P. Wert

The following story is very loosely based upon something that actually happened several years ago to two OCBA lawyers. The names have been changed to ... etc., etc. etc.¹ I wish I could say this tale is a cross between *A Christmas Carol* and *It's a Wonderful Life*, but it's really just something nice that happened around Christmas time. For some reason, people do nice things with more frequency during the Holiday Season. Even the legal system is not immune. My wish is that we will all try a little harder to spread that good cheer throughout the rest of the coming year. In the meantime, here's the story and happy holidays everybody.

It was one of the most satisfying days of their 45 years of marriage, the day Joe Lazano and his endearing wife, Roseanne, sold the home in which they had raised their two boys and headed South for their long overdue retirement. When the sales contract had been signed, Joe had proclaimed: "Rosie, with the proceeds, we've got just enough to buy that lot near Disney World for our dream house." Joe's pension from the postal service would cover the couple's ongoing living expenses, with a little left over for trips back North to visit the grandkids. Joe looked forward to morning rounds of golf and afternoon naps, while Roseanne was elated to finally be able to waste away the days with her best friend and lifelong love, Joe.

When they arrived in Orlando, Joe decided to save on the construction of the new house by managing things himself. He dealt directly with the various construction trades and, soon, the Lazanos' dream began to take shape. A month short of completion, the unexpected occurred. Joe suddenly became very sick and had to be hospitalized. Roseanne was by Joe's side from the minute he fell ill until he was released from the hospital six weeks later. Joe's prognosis was for a full recovery, but he would need to undergo extensive and expensive rehabilitation. The Lazanos' part of the medical expenses came from the only source available: the construction fund. Meanwhile, the Lazanos' dream house sat.

Bills from the roofer, the drywall contractor, the window supplier and others had piled up while Joe was hospitalized. The window supplier began calling for payment about the time Joe came home. Joe was still too weak to deal with such things so Roseanne met with the window man herself. He sympathized with the Lazanos' situation, but claimed he needed to be paid right away because he had his own bills to pay. Roseanne said she understood and paid him in full.

It was then that the Lazanos realized they were in dire

straits. Medical bills and soaring construction costs had eaten away at their nest egg. The construction account was depleted. When the roofer, the drywall contractor and others demanded payment, Roseanne asked them for some time to work things out. But truly, she had no answers and Joe was still too sick to help.

Several months passed. Joe remained bed-ridden. He had just started to feel like himself again, when the Lazanos were served with the first lien foreclosure complaint. Joe reviewed the papers and made several unsuccessful calls looking for alternative funding to pay off the liens. "We'll figure something out, Rosie," he said. Meanwhile, Roseanne convinced Joe that they needed to hire a lawyer. The Lazanos didn't have any money left to retain counsel, so Roseanne ended up at Legal Aid.

Through Legal Aid, the Lazanos retained an Orlando attorney named David to defend the case. David reviewed the file and told Mrs. Lazano things didn't look promising. The Lazanos had no real defenses. The best way to deal with the liens would be to pay them off as soon as possible. The other option was bankruptcy and, even then, they might lose the house. Roseanne went home that day in tears with very little hope of protecting all they had worked so hard for.

About the time the leaves were starting to change colors back home, Roseanne received a notice of hearing for a motion for summary judgment from the roofing contractor. The hearing was set for December 23rd. David called the roofer's lawyer, Nick, to try to buy some time. Nick said his client understood the Lazanos' situation but needed to be paid immediately. Since there was no conceivable end in sight, his client would not agree to postpone the hearing.

Things seemed hopeless. But, the day before the hearing, Roseanne received an answer to her prayers. Her son in Pennsylvania had figured a way out of this mess. He had just received approval for a second mortgage on his house and with the proceeds, his parents could pay off the liens and save the Florida house. However, the lender would not be able to close the loan for three to four weeks.

David contacted Nick, who called his client to seek approval for a one-month continuance. When Nick called David back, the word wasn't good: "I'm sorry David but my client won't agree to postpone the hearing. He says he likes the house and might want to keep it by paying off

Continued on page 4

¹The story is told in the context of Christmas because that is how it actually happened. There was no intention to ignore or exclude the other winter holidays, i.e., Peace on Earth and Goodwill to All.

the other liens after the sale.” David retorted, “But, those poor people’s life savings are tied up in that house. Are you going to make that sweet old couple file bankruptcy to try save everything they have ever worked for?” Nick sighed, “I don’t think my client is giving me any other choice. I am really sorry. I’ll see you at the hearing.” David called Roseanne and Joe and told them there wasn’t much they could do to stop the summary judgment. Hopefully, the second mortgage would come through before the foreclosure sale in a month; otherwise, bankruptcy appeared to be the Lazanos’ only other alternative.

Two days before Christmas, David went to the hearing prepared to beg for mercy. Just as the judge called up the matter, Nick hurriedly walked into the courtroom and spoke, “Your Honor, I represent the plaintiff. I am advised that the defendants have, through a third party, secured financing which may allow them to satisfy my client’s claim in about a month. We have not been able to determine the likelihood of that payoff but, frankly, the way things have been going for these folks, my client doubts it will ever happen. ... Nevertheless, it being the holidays and all, my client is willing to wait a month for the relief it is seeking. We suggest that the court postpone this matter until that time.” David’s jaw nearly hit the table. After several questions, the

judge entered an order allowing the Lazanos 45 days to pay off the roofer’s lien before a judgment would be entered.

As they left the courthouse, David asked, “What was that all about?” Nick responded, “I woke up this morning feeling like a total jerk. I was not going let myself be part of putting those poor folks through a foreclosure if there was reasonable hope for them to pay the debt, ... not two days before Christmas. So, I called my client and I told him that if he wanted to do that to them, he could find himself another lawyer. I came here prepared to get him his judgment and then withdraw, but he called me back on my cell phone as I pulled up to the courthouse and told me to give ‘em a month.” Nick smiled, “So, tell your clients ‘Merry Christmas’ and I hope they get that second mortgage.” David gushed, “You got it. Thanks Nick, and Merry Christmas to you too.”

The Lazanos’ son would end up closing the second mortgage in Pennsylvania so Roseanne and Joe could finish their dream house in Florida. They live there today playing golf, taking naps and otherwise wasting their days and, every Holiday Season, they tell anybody who will listen the story of two lawyers who gave them one of the happiest Christmases ever.

Thomas P. Wert is a partner with Roetzel & Andress, LPA. He has been a member of the OCBA since 1993.

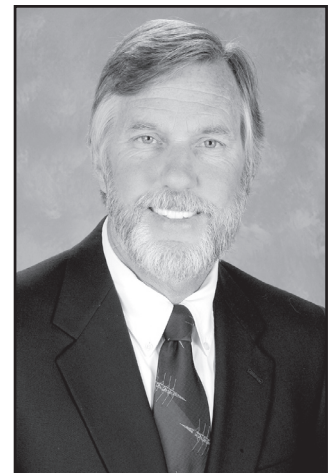
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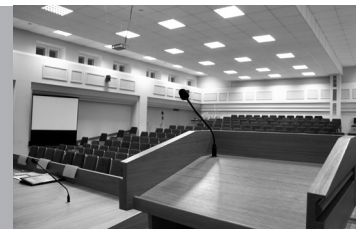
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OCBA Luncheon Speaker



January 11, 2007



Florida Supreme Court Justice Barbara J. Pariente

Justice Pariente was born in New York City, attended public schools there and in New Jersey, and graduated with highest honors from Boston University. She attended George Washington University Law School, where she graduated fifth in her class. She moved to Fort Lauderdale in 1973 for a two-year judicial clerkship with U.S. District Court Judge Norman C. Roettger, Jr.

After completing her clerkship, Justice Pariente settled in West Palm Beach, where she joined the law firm of Cone, Wagner and Nugent and became a partner in 1977.

In 1983, she formed the law firm of Pariente & Silber, P.A. She became a Board Certified Civil Trial Lawyer by the Florida Bar and The National Board of Trial Advocacy, and was awarded an AV rating by *Martindale-Hubbell*. During her eighteen years in private practice, Justice Pariente served on the Fifteenth Judicial Circuit Grievance Committee, the Florida Bar Civil Rules Committee, and the Fifteenth Judicial Circuit Nominating Commission. She was a founding member and master of the Palm Beach County Chapter of the American Inns of Court and served as a member of the Board of Directors of the Legal Aid Society of Palm Beach County.

In September 1993, Justice Pariente was appointed to the Fourth District Court of Appeal, where she served until her appointment as the seventy-seventh Justice of the Florida Supreme Court in 1997. On the Supreme Court, she worked to improve methods for handling cases involving families and children in the courts, and served as Chair of Court's Steering Committee on Families and Children. From 2000-2002, she was a member of the Florida Bar's Commission on the Legal Needs of Children. In 1999, she served on the Governor's Advisory Committee on Character Education, where she focused on promoting civic education.

Justice Pariente has also actively supported programs, such as Florida's drug courts, that promote successful alternatives to incarceration and has served as the liaison to the Supreme Court's Task Force on Treatment-Based Drug Courts. She speaks throughout the state on professionalism, the unified family court, juvenile justice and crime prevention and remains involved as a mentor to school-age children.

Among many honors and recognitions, Justice Pariente is a recipient of the 2006 Florida Chapter of American Academy of Matrimonial Lawyers' Jurist of the Year Award, the 2005 Florida Association of School Social Workers' Lifetime achievement Award, the 2005 Florida Bar Public Interest Law Section's Hugh S. Glickstein Child Advocate of the Year Award, the 2004 William M. Hoeveler Judicial Professionalism Award of the Florida Bar's Committee on Professionalism, and the 2001 Florida Association of Women Lawyers' Award in recognition of lifelong dedication to the success of women lawyers in the legal profession.

Justice Pariente is widely published and has most recently co-authored an article in the *Florida Bar Journal* entitled "Teaching Them a Lesson," 77 Fla. B.J. 6 (June 2003), which concerns the experience of girls in the juvenile justice system.

Justice Pariente is married to the Honorable Frederick A. Hazouri, judge of the Fourth District Court of Appeal. They have three grown children and seven grandchildren, all of whom live in Florida.

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Professionalism Committee

Passing the Buck . . .

—The Honorable Stan Strickland



I had started to do this article for *The Briefs* two or three different times. The topics ranged from courtroom decorum and civility, to professional aspirational goals. Try as I might, I couldn't find any literary traction, and my words seemed lifeless. Then, last week I learned that Buck O'Neil had died at age 94. If you don't know who Buck O'Neil was, there is no need to be ashamed. You would have to be a serious baseball fan, or to be more precise, a baseball historian to know anything about Buck. He became popular (relatively) after he appeared in Ken Burns' 1994 television documentary "Baseball." A good portion of Burns' documentary dealt with the old Negro leagues of the 1930's and '40's. O'Neil was one of the stars of the Negro leagues of that era, and was one of the few remaining survivors at the time of the documentary. For those of you unfamiliar with the Negro leagues, black baseball players were generally barred from Major League baseball until Jackie Robinson broke the color barrier in 1947. Since blacks could not break into Major League baseball, they started their own leagues filled with some of the best players you never heard of. There were players like Josh Gibson, Cool Papa Bell, Judy Johnson, Ray "Double Duty" Dandridge, and one of my favorite players of all time, Satchel Paige.

Eventually, Satchel did make it to Major League baseball, at the age of 42. He was 15 years past his prime, and still good enough to compete with Major League players. And this was before trainers, supplements, and pharmaceutical intervention. Jackie Robinson paved the road for today's black athletes. Buck O'Neil and Satchel Paige paved the way for Jackie Robinson.

But back to Buck. John Jordan (Buck O'Neil) spent a lifetime of being denied. According to his obituary in the *New York Times*, he was born in the small town of Carrabelle, Florida in 1911. He moved to Sarasota, and by the age of 12 was playing semipro baseball. He was barred from Sarasota High School because of his race, and eventually enrolled at Edward Waters College in Jacksonville where he earned his high school diploma, and completed two years of college. O'Neil left school to play pro baseball, and in 1938 he made his debut with the Kansas City Monarchs of the Negro American League. He led the league in batting twice, and after returning from service in the Navy, he played in three East-West Allstar games. He became a player/manager for the Monarchs for several years until hired as a scout by the Chicago Cubs in 1953.

During his youth Buck was probably as good a first baseman as anybody playing in Major League baseball. Better than most. Even so, he never had an opportunity to

don a Major League uniform, and play in front of standing room only crowds in New York City and Chicago. Try and imagine yourself in a similar position. How would you feel if you had graduated from law school, and were as good a lawyer as anybody in the state, or in the country? Then try and imagine being told that you would not be able to practice law, but that you could only be a paralegal or clerk. Next try and imagine being told that this was not a status that you could change, no matter how hard you worked. Imagine being told "that's just the way it is." Finally, imagine life dealing you those cards for no reason other than the color of your skin. How angry would you be? How bitter would you be? How empty would you feel?

For any of you who witnessed Ken Burns' documentary, or had the pleasure of hearing Buck O'Neil speak in his later years, you know that he felt no emptiness or bitterness. You couldn't knock the smile off Buck O'Neil's face. His discussions about the old Negro leagues, and life in general, reflected his love for the game of baseball, as well as life. He felt as though he were blessed to have been able to play against some of the best players in the world, despite the fact that nobody else had ever heard of the players that he competed against in the old Negro leagues. At least publicly, he never regretted the fact that he was unable to play in the Major Leagues with white contemporaries. In fact, his autobiography was entitled *I Was Right On Time*. Buck truly believed, with every ounce of his being, that he was blessed. I would give anything to be more like Buck.

Once his career was over as a player, Buck became a coach and a scout. Through that position he brought other black stars into Major League baseball such as Ernie Banks and Lou Brock. He pushed to give other black athletes the chance that he never had. His effort was a labor of love, and he did it with a smile on his face for 94 years. He knew there was nothing he could do to change what had happened to him, but he made every effort to make sure that future black athletes would have an opportunity that he never had. The *New York Times* obituary quoted from Buck's autobiography: "Waste no tears for me." "I didn't come along too early." "I was right on time." "You see, I don't have a bitter story." "I truly believe I have been blessed."

I honestly get misty-eyed when I speak about Buck O'Neil. I would give anything to be as good a man as Buck. I feel small when I think of him. When I do think of him, I ask myself the following questions:

What have I done lately to help someone other than myself?

Continued on page 8

Have I changed anyone else's life for the better?

Am I concentrating on living, or making a living?

Am I so wrapped up in my own daily plight that I cannot see the suffering and needs of others?

We all want to be good lawyers. What is far more important than that, however, is being good, honest, and decent men and women. If we accomplish that then everything else will fall into place.

Sometime back OCBA member Tad Yates incorporated some famous quotations from *Bartlett's Familiar Quotations*. His excellent article listed wide-ranging quotations from Confucius to Cicero. Two of my favorite quotations, however, come from the old Negro leaguers. In his memoir, Buck wrote, "Nowadays, whenever us Negro leaguers put on the old uniforms for autograph signings and such, you can just see the years peel away. I've seen them lose 50 years in just a few hours. Baseball is better than sex. It is better than music, although I do believe jazz comes in a close second. It does fill you up."

But my absolute favorite quotation, perhaps of all time, comes from Satchel Paige who gave this opinion in 1953 on how to stay young: "Avoid fried meats which angry up the blood. If your stomach disputes you, lie down and pacify it with cool thoughts. Keep the juices flowing by jangling

around gently as you move. Go very light on the vices, such as carrying on in society. The social ramble ain't restful. Avoid running at all times. Don't look back. Something might be gaining on you."

We all have so much, yet we never seem grateful. We have the world at our fingertips, but we always seem to be angry, as if we are constantly wronged. That stands in stark contrast to these great men who never got their due, but maintained a sense of happiness, dignity, and humanity in spite of it all. I wish there was a way for the good Lord to bless me for just one day with Buck's temperament, and Satchel's personality. I don't know that it would make me a better judge, but to be swallowed-up by that level of happiness and contentment, even if only for one day, would last a lifetime.

Buck O'Neil was always living proof to me that good guys do finish first. When I think of him now I realize that there is absolutely nothing more important than being decent men and women. If we manage to accomplish that, our legal careers will never suffer.

The Honorable Stan Strickland, Ninth Judicial Circuit Court, has been a member of the OCBA since 1986.

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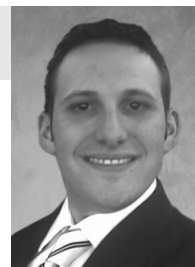
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Business Law Committee

BAPCPA Constitutional Issues: A Survey of the New Bankruptcy Code After Year One

—Ilan A. Nieuchowicz*



Immediately after the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”),¹ legal scholars and attorneys began dissecting the new law and discovered several potential constitutional issues the judiciary will likely need to address.² A year has passed since BAPCPA’s enactment³ and during this time the judiciary has had occasion to address some of the constitutional issues created by the new law.⁴ This article provides a survey of the courts’ positions on these constitutional issues and concludes with a brief outline of other potential legal challenges the courts may be asked to address.

The principle constitutional issues presented to the courts thus far have involved First Amendment challenges to 11 U.S.C. §§ 526, 527, and 528,⁵ the contention being that these provisions interfere with attorney-client speech by imposing restrictions on protected speech and compelling other forms of speech.⁶ While courts addressing these First Amendment challenges have implemented similar analytical processes, differences in statutory interpretations have led to disparate results. This article will review the courts’ analyses and explore their various conclusions relating to the constitutional issues presented by BAPCPA.

Is an Attorney a “Debt Relief Agency”?

A threshold question that the courts have been called upon to address prior to determining the constitutionality

of provisions 11 U.S.C §§ 526, 527, and 528 is whether an attorney falls within the definition of a “debt relief agency.”⁷ Each of these statutory provisions restrict or compel the speech of a “debt relief agency.”⁸ Consequently, the constitutionality of these provisions will depend largely on what individuals and entities are encompassed within the phrase “debt relief agency.”⁹

The analysis must begin with a review of several interlinked definitional provisions. Section 101(12A) defines a “debt relief agency” as “any person who provides any bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110...”¹⁰ The definition continues in Subsections A thru E to exclude certain persons and entities.¹¹ Attorneys are not specifically mentioned within these exclusions.¹² The terms “bankruptcy assistance” and “assisted person” are separately defined in § 101.¹³

The applicability of § 101(12A) would seem to turn upon who is being assisted.¹⁴ Section 101(3) defines an “assisted person” as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.”¹⁵ Section 101(4) defines “attorney” as “attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law.”¹⁶ Section 101(4) “makes no reference to debt relief agencies.”¹⁷ Similarly, the statutory definition of a “debt

Continued on page 10

¹ Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

² See *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 67-8 (Bankr. M.D. Ga. 2006), citing HON. WILLIAM HOUSTON BROWN AND LAWRENCE R. AHERN, III, 2005 BANKRUPTCY REFORM LEGISLATION WITH ANALYSIS, 58 (Thomson/West 2005); Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 571, 576 (2005); Coastal Bankruptcy Law Institute Seminar Materials (September 23, 2005) at Tab 4, pg. 2; Hon. Keith M. Lundin, *Ten Principles of BAPCPA: Not What was Advertised*, 24 AM. BANKR. INST. J. 1, 69 (Sept. 2005); Samuel Gerdano, *25 Changes to Personal Bankruptcy Law*, at ¶ 19, <http://www.abiworld.net/bankbill/changes.html>.

³ Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005) (BAPCPA was enacted on April 20, 2005 and became generally effective on October 17, 2005. A few provisions became effective upon enactment.).

⁴ See *Geisenberger v. Gonzales*, 346 B.R. 678 (Bankr. E.D. Pa. 2006); *In the Matter of McCartney*, 336 B.R. 588 (Bankr. M.D. Ga. 2006); *Hersh v. United States*, 347 B.R. 19 (Bankr. N.D. Tex. 2006); *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 (Bankr. D. Or. Aug. 11, 2006).

⁵ *Supra* at note 3.

⁶ 11 U.S.C. § 526(c) (creating civil liability for violation of one of the enumerated duties imposed upon a “debt relief agency”).

⁷ See 11 U.S.C. §§ 101(12A), 526, 527, 528; see also *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 66, 67; *Hersh v. United States*, 347 B.R. at 22-3; *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503.

⁸ See 11 U.S.C. §§ 101(12A), 526, 527, 528.

⁹ See 11 U.S.C. § 101(12A).

¹⁰ *Id.*

¹¹ 11 U.S.C. § 101(12A).

The term “debt relief agency” means any person who provides any

bankruptcy assistance to an assisted person in return for the payment of money or other valuable consideration, or who is a bankruptcy petition preparer under section 110, but does not include—(A) any person who is an officer, director, employee, or agent of a person who provides such assistance or of the bankruptcy petition preparer; (B) a nonprofit organization that is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986; (C) a creditor of such assisted person, to the extent that the creditor is assisting such assisted person to restructure any debt owed by such assisted person to the creditor; (D) a depository institution (as defined in section 3 of the Federal Deposit Insurance Act) or any Federal credit union or State credit union (as those terms are defined in section 101 of the Federal Credit Union Act), or any affiliate or subsidiary of such depository institution or credit union; or (E) an author, publisher, distributor, or seller of works subject to copyright protection under title 17, when acting in such capacity.

¹² *Id.*

¹³ 11 U.S.C. §§ 101(3), (4A).

The term “bankruptcy assistance” means any goods or services sold or otherwise provided to an assisted person with the express or implied purpose of providing information, advice, counsel, document preparation, or filing, or attendance at a creditors’ meeting or appearing in a case or proceeding on behalf of another or providing legal representation with respect to a case or proceeding under this title.

¹⁴ 11 U.S.C. § 101(12A).

¹⁵ *Id.*

¹⁶ 11 U.S.C. § 101(3).

¹⁷ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 66, 67; see also 11 U.S.C. § 101(4);

relief agency” makes no specific reference to attorneys; still, the term “debt relief agency” could be construed to encompass attorneys.¹⁸ To determine whether an attorney is a “debt relief agency,” courts have analyzed the statutory provisions by their plain meaning.¹⁹ Nonetheless, these jurisdictions have arrived at different conclusions.²⁰

Attorneys Are Not Debt Relief Agencies

Relying upon the rules of statutory interpretation, which require a statute be read giving unambiguous words their plain meaning, the United States Bankruptcy Court for the Southern District of Georgia determined that “attorneys” are not “debt relief agencies.”²¹ The court, concerned about attorneys’ preoccupation with evaluating the potential new risks and liabilities imposed upon them by BAPCPA, set out to proactively clarify the definition of a “debt relief agency” by ruling on its own motion under the authority of §§ 526(c) and 105 of the Bankruptcy Code.²² The court acknowledged that although the statutory definition of a “debt relief agency” seemed broad enough to include bankruptcy preparers and attorneys, additional language was used within the definition to expressly include a “bankruptcy preparer.” The court determined that if Congress intended attorneys to be “debt relief agencies,” Congress would have added clear and unequivocal language to that effect.²³ Based on the forgoing determinations, the court concluded that “attorneys . . . admitted to the Bar of [the Bankruptcy] Court...are not covered by the provisions . . . regulating debt relief agencies, including without limitation §§ 101(12A), (4A), 526, 527, 528, and are excused from compliance with any of those requirements or provisions”²⁴

Some Attorneys Are Debt Relief Agencies

The Bankruptcy Courts for the Northern District of Texas and the District of Oregon reached the opposite conclusion and have held that certain attorneys are indeed debt relief agencies.²⁵ The courts based their conclusions

on the plain meaning and legislative history of BAPCPA.²⁶

A “debt relief agency” is “any person who provides any bankruptcy assistance to an assisted person”²⁷ “[B]ankruptcy assistance” includes “legal representation.”²⁸ Relying on the principle that only attorneys are authorized to provide legal advice, the courts construed §§ 101(12A) and 101(4A) to support the conclusion that attorneys are debt relief agencies.²⁹

The Bankruptcy Court for the Northern District of Texas found additional support for its holding in the five exceptions in the definition “debt relief agency” definition of § 101(12A).³⁰ The court explained that “if Congress had wanted attorneys excluded from the term ‘debt relief agency’ . . . it surely would have taken the opportunity to exclude them from what otherwise they are so plainly within.”³¹ Both courts referenced legislative history as added support for their conclusion attorneys are debt relief agencies.³²

The courts, however, found that not *all* attorneys are necessarily debt relief agencies.³³ BAPCPA expressly states that those who aid an “assisted person” are considered a “debt relief agency.”³⁴ An “assisted person” is defined by BAPCPA as “any person whose debts consist primarily of consumer debts and the value of whose nonexempt property is less than \$150,000.”³⁵ Accordingly, only attorneys representing individuals who are “assisted persons” pursuant to § 101(3) are debt relief agencies.³⁶ These courts, having found that attorneys fall within the classification of “debt relief agencies,” were then able to consider the constitutionality of the BAPCPA provisions which govern these entities.³⁷

Does an Attorney Have Standing to Bring a First Amendment Claim?

A court must first consider the jurisdictional question of standing before reaching the merits of a case. The courts appear to be split on the issue of whether an attorney has standing to challenge BAPCPA on First Amendment grounds. While some courts have strictly adhered to the “case

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¹⁸ See 11 U.S.C. § 101(12A), *supra* at n. 9.

¹⁹ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 67; *Hersh*, 347 B.R. at 22-3; *Olsen*, No. 05-6365-HO, 2006 WL 2345503.

²⁰ Compare *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 67 (attorneys are not debt relief agencies), with *Hersh*, 347 B.R. at 22-3 (bankruptcy attorneys are debt relief agencies), and *Olsen*, No. 05-6365-HO, 2006 WL 2345503 (legislative history provides a strong indication attorneys are debt relief agencies).

²¹ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 68; 11 U.S.C. § 101(12A) (The statute fails to expressly reference attorneys).

²² *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 68, n. 1 (“Section 526(c)(5) authorizes the Court on its own motion to enjoin violations of the debt relief agency provisions or impose civil penalties on the violator. If the Court has that broad jurisdiction to both initiate a disciplinary action and punish a violation, it must of necessity have jurisdiction on its own motion to conclude that certain types of persons or certain types of activity are not covered at all, since the first step in enforcing the provision is to determine whom is encompassed within its grasp.”) (emphasis added); see also 11 U.S.C. §§ 526(c), 105.

²³ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 70-1 (“[T]he 2005 Act is silent as to whether it is intended to pre-empt or curtail other state interests in regulating and disciplining attorneys’ conduct. Attorneys’ admission and discipline stating that an expansive interpretation of Federal law to usurp state regulation of the practice of law via ambiguous provisions of [BAPCPA] . . . could

possibly violate the Tenth Amendment to the Constitution”).

²⁴ *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. at 71.

²⁵ *Supra* at n. 13.

²⁶ *Hersh v. United States*, 347 B.R. at 22-3; *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 at 2.

²⁷ 11 U.S.C. § 101(12A).

²⁸ 11 U.S.C. § 101(4A).

²⁹ *Hersh*, 347 B.R. at 22-3; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 2; 11 U.S.C. §§ 101(12A), 101(4A).

³⁰ *Hersh*, 347 B.R. at 23; 11 U.S.C. § 101(12A).

³¹ *Hersh*, 347 B.R. at 23.

³² *Hersh*, 347 B.R. at 23 (“[L]egislative history clearly indicates that Congress had attorneys in mind with this statute; the House Report on BAPCPA mentions ‘attorney’ 164 times.”) (citing H.R. Rep. 109-31, reprinted in 2005 U.S.C.C.A.N. 88); *Olsen v. Gonzales*, No. 05-6365-HO, 2006 WL 2345503 at 3 (Senator Feingold proposed an amendment to BAPCPA to exclude attorneys from the definition of debt relief agencies; however, the Senate did not address Senator Feingold’s proposal, citing 151 CONG. REC. S2306-02, 2316-17 (2005)).

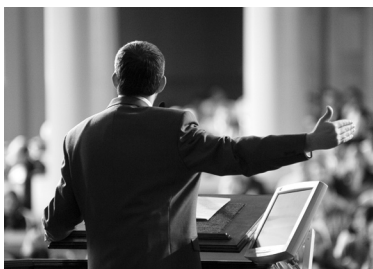
³³ *Hersh*, 347 B.R. at 23; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3.

³⁴ 11 U.S.C. § 101(12A).

³⁵ 11 U.S.C. § 101(3).

³⁶ 11 U.S.C. §§ 101(3), 101(12A).

³⁷ See *Hersh*, 347 B.R. at 23; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3.



Presentation Skills for Lawyers

“I’ve Never Been Convicted of a Felony” Using Vocal Emphasis to Bring Your Message to Life

— Elliott Wilcox



Your words can take on different meanings depending on how you emphasize them. In this article, you’ll learn how to take full advantage of the power of your voice to emphasize words, fill them with meaning, and help your audience understand the message you want to convey.

Imagine for one moment that you’re reading through a court transcript when you encounter the following phrase: **“I’ve never been convicted of a felony.”**

What message do you think the witness intended? If you’re like most readers, you probably think that the witness intended the literal message: He has never been convicted of, or even accused of, committing a felony.

But that may not necessarily be what the witness intended. Without changing the order of the words, how many different meanings can you assign to that phrase? Using only slight changes in your voice, that single phrase could have up to six different meanings, depending on which word is emphasized.

1. **“I’ve never been convicted of a felony.”** The other executives were convicted. My family members were convicted. Even my lawyer took a fall. But not me.
2. **“I’ve never been convicted of a felony.”** I completely deny your allegations. It’s never happened, not once in my entire life. I’ve never even been charged with a crime. Anyone who says different is a liar.
3. **“I’ve never been convicted of a felony.”** I’m *about* to be. I’ll be convicted tomorrow morning at 9:30 A.M., in courtroom 9-D, but up until this point, my record is still untarnished.
4. **“I’ve never been convicted of a felony.”** Oh sure, I’ve been arrested, indicted, and brought to trial on numerous occasions. But somehow (*wink wink, nudge nudge*) the jury has never returned with a “Guilty” verdict.
5. **“I’ve never been convicted of a felony.”** When I’m convicted, they usually come in multiples of eight. For example, the last time I was convicted, the jury found me guilty of 56 separate offenses. Before that, 24 felony

convictions in a *single* sitting. But never a single felony...

6. **“I’ve never been convicted of a felony.”** Misdemeanors? Oh, sure - hundreds, probably, *thousands* of those. But I’m proud to tell you that none of my convictions are for felony offenses.

That single phrase takes on a variety of meanings when spoken aloud. By emphasizing different words, you breathe life and vibrancy into your words. Depending on where you place your emphasis, you completely change the meaning of the phrase.

If you want to develop that vocal skill so you can bring words to life, emphasize important phrases, and help your audience understand what you mean, you need to master the skill of vocal emphasis. Here’s how:

Start by asking a friend to listen as you say the phrase, “I’ve never been convicted of a felony.” Before you say the phrase aloud, you need to pick one of its six different meanings, but don’t tell your listener which meaning you intend to convey. Next, repeat the phrase aloud, doing your best to emphasize the meaning without over exaggerating the emphasis or making it sound forced.

After you’ve repeated the phrase, ask your friend to tell you what message he thought you were trying to get across. Did he get it right? If he did, then you’re properly emphasizing your words to convey meaning to your audience. Continue to work your way through the other variations, until you’ve completed all six iterations. If your listener didn’t understand what message you were trying to convey, you need to keep practicing until you get it right before moving onto the next variation.

Your voice adds flavor and texture to your word choices. Don’t neglect the power of emphasizing words to help your audience understand your message. Practice the skill of vocal emphasis until you master it, and you’ll never be misunderstood again.

Elliott Wilcox is the editor of Trial Tips Newsletter. To collect your free special report, “How to Become the Best Trial Lawyer in Your Courthouse - The Top Ten Tips for Trial Lawyers,” send an email with the subject line “OCBA” to FreeTips@TrialTheater.com



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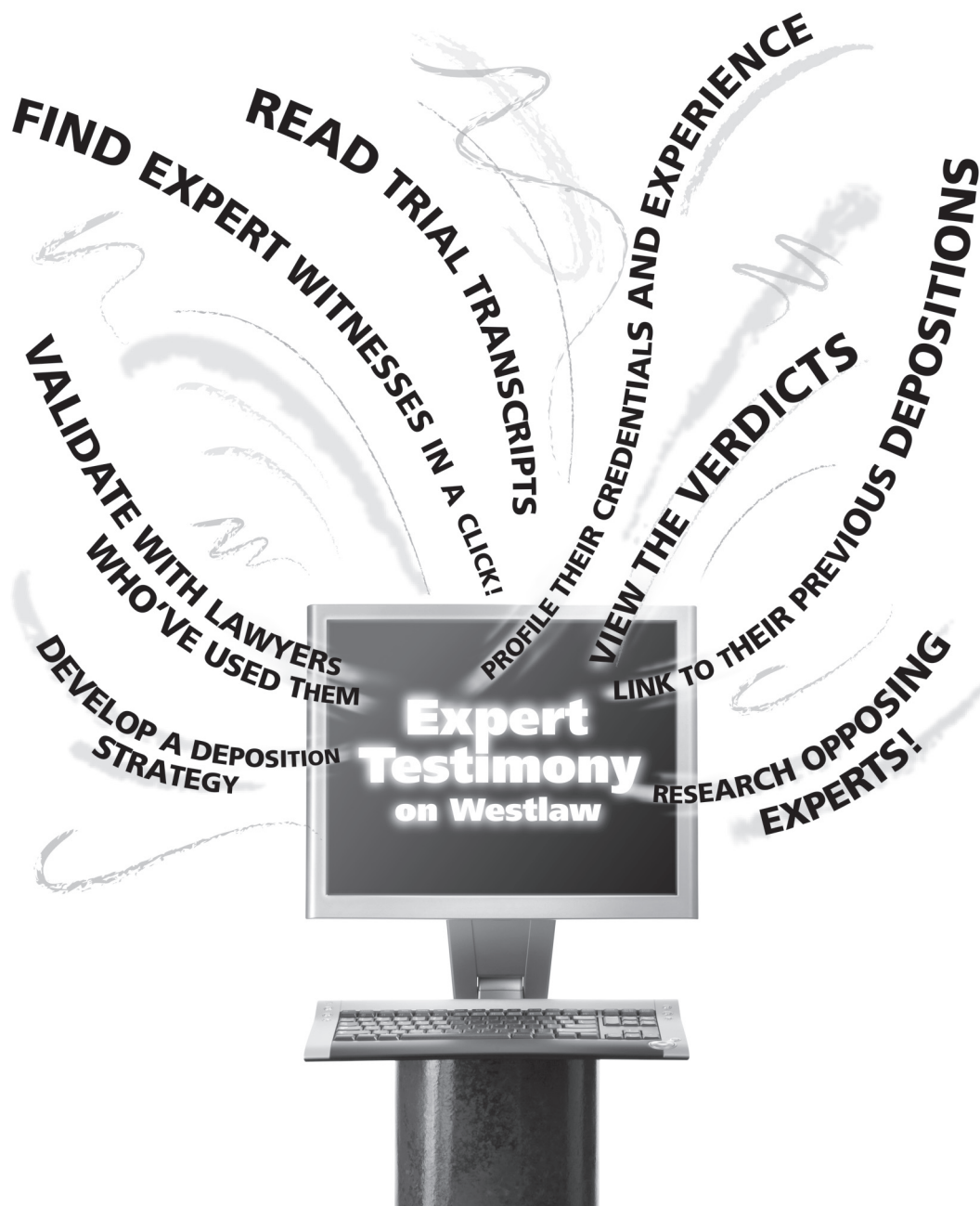
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Clerk of Courts News

Orange County Opens Goldenrod Office

Lydia Gardner



Orange County Clerk of Courts Lydia Gardner officiated at the opening of a new County Clerk's Office on Goldenrod on Thursday, November 2, 2006. The office, which will accept traffic and court fines and issue marriage licenses, fulfills a campaign promise to offer more convenient service for this growing area of the county. Recognizing that the Goldenrod Clerk's Office, at Pinar Plaza, is in the heart of a large Hispanic community, bilingual clerks will be available.

"Our goal is to make doing business with our office as convenient as possible," says Gardner. "It's far easier for most people to do that in their own neighborhood or near their workplace than to drive downtown to the courthouse. Quality customer service is our focus, and this is one more way we can make things easier for our community."

Orange County Commissioner Mildred Fernandez, who attended the opening ceremony, represents District 3, which includes the new Goldenrod office. "Our citizens," she says, "deserve convenient services and we welcome the addition."

The opening of the Goldenrod Clerk's Office comes on the heels of Gardner's announcement of a 24-hour, 7-days-a-week payment center at the new jail on John Young Parkway. That office opened in late June and accepts traffic and court fines and issues marriage licenses, in addition to processing bonds. The Orange County Clerk of Courts also has offices in Apopka, Ocoee and Winter Park, which take passport applications in addition to accepting traffic and court fines and issuing marriage licenses.

In other recent community outreach efforts, the Orange County Clerk's Office has partnered with Amscot to allow customers to pay traffic and court fines at all local Amscot locations. The partnership with Amscot, which will charge \$1 to process payments to the Orange County Clerk of Courts, is another way to make doing business more convenient for customers.

Other Orange County Clerk of Courts services include:

1. **myorangeclerk.com:** Traffic fines can now be paid online. You can also use myorangeclerk.com to request extensions and opt to attend traffic school.
2. **407-836-2000:** Customers can now conveniently call one number for information, rather than dialing into individual divisions. An expanded Call Center will better assist customers with their questions.
3. **Payment Center:** Conveniently located outside the Public Defender's building in front of the courthouse, the payment center allows customers to pay traffic and court fines without having to enter the main facility.
4. **Kiosks:** Customers in the Traffic Division and at the Goldenrod, Winter Park, Apopka and Ocoee Clerk's Offices now take a number for service, allowing them to avoid standing in line.

For a list of Orange County Clerk's Office locations and hours of operation, please visit www.myorangeclerk.com.

Submitted by the Orange County Clerk of Courts Office.

Ninth Judicial Circuit Court Scheduling 2007

The following court closing dates will be observed in 2007:

New Year's Day
Monday, January 1, 2007

Martin Luther King, Jr. Birthday
Monday, January 15, 2007

Good Friday
Friday, April 6, 2007

Memorial Day (observed)
Monday, May 28, 2007

Independence Day
Wednesday, July 4, 2007

Labor Day
Monday, September 3, 2007

Rosh Hashanah
Thursday, September 13, 2007

Veterans Day Holiday (observed)
Monday, November 12, 2007

Thanksgiving Day
Thursday, November 22, 2007

Friday after Thanksgiving
Friday, November 23, 2007

Christmas Eve
Monday, December 24, 2007

Christmas Day
Tuesday, December 25, 2007

Court Observances of Special Circumstances:

Upon their request, no trials or hearings will be scheduled which involve parties or attorneys wishing to observe their religious holidays.

Upon the request of any attorney planning to attend the Florida Bar convention, no trials or hearings involving the attorney will be scheduled during the convention.

The annual meeting dates of the Florida Conference of Circuit Judges and the Florida Conference of County Judges will be announced at a later date.



Rainmaking 101

Potential Referral Source Interview Lesson 6

Mark Powers



“What frustrates you about dealing with attorneys?” Imagine asking this question of a potential referral source. Perhaps this is someone you met over the holidays at a party. First, he’ll grin – look to see if you are serious – and then he’ll tell you everything he doesn’t like about dealing with attorneys (even if he himself is an attorney). If you think this is a bad way to direct a conversation, read on. This type of interview question is one of the most powerful and strategic ways to cultivate a new business relationship and open the door to new referrals.

Keep in mind that second only to talking about ourselves, we humans love to give our opinions. Most individuals that you ask questions will be flattered that you asked. To test this for yourself, go out and interview three to five people who fall into this category. Most of us know approximately 150 people by name in our community. If you are well networked, or have lived in your area a long time, you might know more than 500. So look at the people with whom you are already acquainted. They may serve on the same boards as you. They may coach your daughter’s soccer team. They may go to church with you or play tennis with you on weekends.

Once you’ve identified them, think about what these people do for a living and ask yourself if they are in a position to refer you clients. If they are, try saying something like: “Gary, I’ve sat next to you on this board for a year now and I don’t really know what you do - why don’t we get together for lunch sometime?”

Or, perhaps you are at a service club meeting with someone whom you know casually, and admire the way she handles club business. In this case the conversation might start something like this: “Joan, I’ve watched how you’ve handled your committee – you obviously have pretty good business judgment. I’m always in the process of enhancing my practice and would appreciate your opinion. Could I buy you lunch and pick your brain?” These are just two examples; the idea is to create an opportunity to meet someone one-on-one and get to know him or her better.

A one-on-one lunch, or even breakfast date, gives you that chance. The interview is not to be done when the relationship is still “cold,” meaning that you have to know the person you are talking to a lot better before launching into it. Only when the right degree of warmth is reached will you feel comfortable launching into the interview. So spend time learning about the potential referral source, his family, his history, and most importantly, his business. When the time is right, try to make the interview questions sound spontaneous and like a natural outgrowth of the conversation.

To lead into the interview, you might ask a question such as, “Have you worked with many attorneys?” or make

an observation such as, “I imagine you’ve worked with many attorneys over the years.” (You *do not* want to start the person on a long, detailed recital about the attorneys with whom he has worked and what he does or doesn’t like about them. You aren’t looking for negative gossip about your colleagues and should avoid this perception by not letting your potential referral source name people). To make it sound natural, use your own words when you ask the following questions:

1. What are your frustrations when dealing with lawyers, *in general*?
2. Why do these things frustrate you?
3. Tell me what lawyers have done in the past that made you decide never to go back to them – or refer people to them. (Again, no names.)
4. If you were to get outstanding service from a lawyer, how would you describe it?

If you listen, your potential referral source will tell you what type of lawyer he enjoys working with and what type he does not. In this conversation, he will reveal the expectations he has about working with an attorney. And when he opens up to you in this process, he will start seeing you as an ally. Someone who understands. He will tell you things he is not revealing to any other attorney. Why? Because no other attorney in your community is asking these questions.

At the appropriate moment, mention to your lunch companion that you’d be interested in “building a business relationship with him in the future,” and see what he says. Quite often, his response to this will be positive. If it is, pursue the idea. In most cases, if he is in a position to send clients to you, you are in a position to reciprocate. Mention that you will be on the lookout for referrals for him. In fact, there is nothing like sending a client to a new potential referral source to get the business relationship off to a strong start.

Take the time now to figure out who in your universe might have great potential to send clients. We’ve outlined a process you can use to begin cultivating a relationship with potential referral sources that is road-tested and very powerful. But don’t take our word for it. Try it for yourself. We think you’ll be delighted at the results.

Mark Powers is the President of Atticus, Inc. and a regular contributor to The Briefs. Mark co-authored “The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners” and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.



International Law Committee

Six Good Reasons to Form an Offshore Limited Liability Company

David L. Fleming

Few attorneys and financial advisors fully appreciate the benefits that can be provided to their wealthy and business clients by the formation of an offshore limited liability company. This article sets forth the six benefits that I have found to be the most common.

Access to Foreign Investments

While there are an abundance of investment opportunities in the U.S.A., they are not necessarily the best investments for every investor. There are many investment choices only available outside the U.S.A., but they cannot be accessed directly by U.S. Investors.¹ Some of the top mutual fund managers in the world have formed investment funds outside the U.S.A. that are not available to the U.S. investor. Many of these foreign funds are even managed by U.S. fund managers.

The following chart was provided by the leading investment performance reporting service:

World Markets Total Returns		1w%	1m%	3m%	6m%	YTD%	1y%	3y%
UK	MSCI United Kingdom Ndtr_D	-1.4	1.9	5.7	1.5	7.3	12.8	52.5
Euro-zone	MSCI EUROPE ex UK NDTR_D	-0.7	4.3	8.3	0.4	7.7	17.9	61.1
North America	MCSI North America Ndtr_D	0.5	4.6	4.3	-5.3	-3.1	4.6	17.2
Japan	MSCI Japan NDTR_D	-4.5	0.1	0.8	-9.0	-9.1	13.8	36.6
Asia	MSCI AC Asia Pacific NDTR_D	-3.6	0.9	2.6	-6.4	-5.1	13.8	45.2
Latin America	MSCI EM Latin America NDTR_D	-3.5	-0.3	14.4	-6.3	4.4	25.0	149.3
Emerging Europe	MSCI EM Eastern Europe NDTR_D	-5.4	-5.4	12.7	1.8	13.9	31.3	140.5
World	MSCI World Free Ndtr_D	-0.7	3.6	4.8	-3.7	-0.5	9.1	31.7
Finance	MSCI Wrld/Fins NDTR_D	-0.1	4.2	5.5	-2.3	2.5	18.1	45.4
Healthcare	MSCI Wrld/Health Care NDTR_D	0.9	4.9	7.0	-3.1	-0.6	5.6	15.4
Natural Resources	MSCI Wrld/MtIs NDTR_D	-5.3	0.1	3.8	-2.7	1.5	20.0	58.7
Fixed Income	Lehman Brothers Sterling Aggregate	-3.0	1.4	0.8	0.3	-0.2	2.5	16.4

Reported by Morningstar as of September 13, 2006

As this chart shows, phenomenal opportunities are available in global markets, that can be accessed directly by U.S. investors who own an offshore company through which to make foreign investments, without having to purchase ADRs.

Global Trade Opportunities

It's become a cliché to say, "The world is getting smaller," but clichés become clichés because they are abundantly true. If a U.S. company wants to do business outside the U.S., there will be occasions when it will need to have some financial assets outside the U.S. International treaties and agreements provide some protection for U.S. companies doing business abroad, but establishing relationships offshore with international financial institutions and service providers will often be more valuable, particularly when dealing with concerns in countries that are not parties to such treaties and agreements or tend to ignore them. There are, of course,

also opportunities for international tax planning by using a company resident in a low tax jurisdiction as the base for doing international business. These jurisdictions also often provide an excellent labor pool at a much lower cost and a way to avoid customs, duties, and other direct taxes. Because LLCs are not corporations, if the proper election is made, they do not attract U.S. controlled foreign corporation, foreign personal holding company, and passive foreign investment company reporting and penalties.²

Safer Banks & Insurance Companies

To suggest that foreign banks are safer than U.S. banks is considered heresy by some, but many of the leading international (non U.S.) banks and insurance companies are far more conservative and less susceptible to failure than their U.S. counterparts – because they don't have the illusion of government-backed insurance to protect their depositors. The U.S. banking system is far more leveraged than many foreign

banking systems because of the federal insurance programs. While depositors will be protected in the event of a few isolated failures, there is a much greater risk that the efforts of U.S. banks to attract deposits with high interest rates based on speculative investing could cause the entire system to collapse.

It would be prudent for a conservative investor to have some funds outside the U.S. banking system. Formation of an offshore LLC will facilitate the establishment of offshore banking relationships.

Access to Offshore Life Insurance

The asset protection benefits of variable life insurance policies issued by foreign carriers, include: (1) protection of the separate segregated accounts in the event the insurance carrier becomes insolvent; (2) protection to the policyholder against claims of creditors;³ (3) a 1% excise tax as opposed to federal and state tax on company earnings, which are higher;

Continued on page 20



Frank Angones, President-Elect Designate of the Florida Bar, spoke to 250 members and guests about lawyers' impact on American history at October's OCBA Luncheon.



YLS Scholarship Committee members presented YLS's annual scholarship to University High School graduate Delfin Fuentes at October's Luncheon. Pictured (left to right) are R. Gavin Mackinnon, Molly Young, Lisa Geiger, award recipient Mr. Fuentes, and YLS President Wiley Boston.



The Goldenrod Clerk of Courts Office opened to great fanfare on November 2nd. Pictured (left to right) are Alice Felton, Goldenrod Branch Supervisor; Howard N. Tipton, Chief Administrative Officer for the Clerk's Office; Mildred Fernandez, Orange County Commissioner for District 3; Lydia Gardner, Clerk of Courts for Orange County; Karl Goodwin, Assistant Administrative Officer for the Clerk's Office; and Pam Trampe, Winter Park and Goldenrod Manager.

The holiday season is here, and whether you are celebrating Hanukkah, Christmas, Kwanzaa, Naksi, Sinterklaas, or maybe a birthday, anniversary, or even celebrating for no reason at all, there is plenty to enjoy this time of year! December truly is one of those months that seems to stir up memories. Maybe we all have different traditions, but I'll bet many of us are sharing some of the same fond memories about this time of year... perhaps it brings back thoughts of when you were young and December meant great things like days off from school, holiday parties, cookies, gifts, school chorus concerts, family gatherings, or maybe seeing your friends at the mall or getting in snowball fights (or, if you grew up in the lazy South, sitting by the pool gloating as you thought of those schmucks up North shoveling their driveways). Anyway, it's nice to remind ourselves that even though we all may be celebrating for different reasons, there really are many things we have in common. Of course, while some of us are sitting around reminiscing and pondering childhood memories, OCBA members are continuing to keep busy with their many accomplishments and activities to report! So, here's what's up....

Congratulations to **Mark Lang** with Mark Lang & Associates, who accomplished a personal goal by becoming an Ironman at the Great Floridian *Ironman* Triathlon race on October 21, 2006! **Jennifer C. Frank** has been named a partner at Wendy L. Aikin, P.A. **Robert L. Case** with Stovash, Case & Tingley, P.A. was selected to serve as the President-Elect of the Board of Directors for MischeLee Puppets. MischeLee Puppets is a not-for-profit organization that, through puppetry arts, provides youths with tools to meet life's challenges and motivates them to make meaningful contributions to society.

Akerman Senterfitt shareholder **Cecilia Bonifay** has been added to the board of the Valencia Foundation. The Valencia Foundation supports scholarships, teaching chairs and other programs at Valencia Community College. **Lou Conti**, a partner at Holland & Knight, was appointed as an Adjunct Professor of Law at the University of Florida Levin College of Law in Gainesville, where he will co-teach "Business Documents Drafting." **Greg Johansen**, also a partner with Holland and Knight, has been admitted to the California Bar.

Frank Ioppolo, Jr. with Greenberg Traurig LLP was appointed as Chairman of the Board of Directors for both the Seminole County Regional Chamber of Commerce and the Seminole Community College Foundation. Carlton Fields attorney **Johanna Wills Clark** was recently elected to the Board of Directors of the Historical Society of Central Florida, the official not-for-profit entity that supports and promotes the Orange County Regional History Center.

Faster than a speeding bullet, more powerful than a locomotive and able to leap tall buildings in a single bound, our very own OCBA President **Thomas P. Wert** has shown once again that our fearless leader seems to possess powers and abilities far beyond those of mortal men! On October 22, 2006, **Wert** competed in the LaSalle Bank Chicago Marathon (26.2 miles) and, despite frigid conditions (windy and 35 degrees) and a severely strained leg muscle (incurred four nights before

Kristyne Kennedy

the race while attempting to ride a **mechanical bull!!**), the Man of Steel finished the race in just 3 hours, 41 minutes! Clearly there is no mountain too high for this daredevil!! There is just no telling what is next for **Wert** as he continues to fight his neverending battle for truth, justice, and the American way, so stay tuned!

Through a grant awarded by the Children's Home Society of Florida (CHS), employees of the office of Orange/Osceola **Public Defender Bob Wesley** will be mentoring children of incarcerated parents as part of the CHS **Mentors Opening Doors Enriching Lives** (MODEL) program. MODEL is a one-on-one community-based program for children who have a parent incarcerated in prison. Each child is matched with a mentor whose purpose is to help the child perform better in school, improve family relationships and become better equipped to avoid situations that may negatively influence the child's chances of success. Created in 1902, CHS provides children and families with a unique spectrum of social services, including foster care, adoption, child abuse prevention, emergency shelters, group homes, case management, and treatment for developmentally disabled children. For more information, contact Nicole Thompson at nicole@pecorapr.com or (407) 644-2636.

Plan to attend **Paul C. Perkins Bar's Las Vegas Night Extravaganza** on **December 14, 2006**. Las Vegas Night is PCPBar's premier fundraiser event where PCPBar raises money for scholarships for local minority law students. For more information, contact **Terryl Blackmon Walker** at terryl_b_walker@progressive.com. The OCBA Young Lawyers' Section's **Habitat for Humanity** project is scheduled for Saturday, **December 16, 2006**, when OCBA young lawyers will be gathering to help the City of Orlando build a house for a low income individual. Contact **Shane Fischer** at sfischer@boginmunns.com or (407) 578-9696 to volunteer or for more information.

If you missed out on the OCBA's Happy Hour and Poker Tournament last month, don't worry - the OCBA Social Committee is planning many more great events to come. Next up, plan to unwind after the busy holidays with a glass of wine at the OCBA's **Winter Wine & Cheese Party** on Thursday, **January 25, 2007**. This very popular event is sure to be another sell-out, so RSVP early! If you would like more information about OCBA social events, sponsorship opportunities or participating on the Social Committee, contact me at kennedyk@jacksonlewis.com.

Until next month, whether you are lighting the Menorah or kinara candles, plugging in the tree, singing carols or reciting the *Brachot*, remember to enjoy and appreciate every minute of it. Be sure to keep sending any interesting news or updates to me at kennedyk@jacksonlewis.com or fax (407) 246-8441, and have a safe and happy new year!

Kristyne E. Kennedy is an associate with Jackson Lewis LLP. She has been a member of the OCBA since 2001.



Michael Manglardi of Attorneys Trial Group co-presented "The Dos & Don'ts of Hanging Your Own Shingle" at the Hispanic Bar Association's seminar, "Path to Your Own Practice." Nearly 100 attorneys attended the October 2nd seminar.



The Legal Aid Society Board of Trustees and staff hosted a potluck luncheon for about 25 volunteers at the OCBA center in November. The volunteers donated more than 3,500 hours to the LAS and the community during 2006. Their support is invaluable to the success of many LAS programs.



The OCBA Texas Hold 'em Poker Tournament drew a crowd of about 75 attorneys and their friends to Slingapour's on November 15th to try their luck and win big for the OCBA Foundation. Event organizers, including Woody Rodriguez and Kristyne Kennedy, were pleased with the enthusiastic turnout!



Hospice of the Comforter Honors Orange County Attorney

Jill Schwartz was recently honored by Hospice of the Comforter for her outstanding efforts in helping to build the only stand-alone, non-profit residential facility for end-of-life care in Central Florida. Hospice House, a 35,000 square foot facility, will provide a state-of-the-art, home-like setting for terminally ill patients who require a high level of care outside of their own home.

In 2005, Ms. Schwartz founded the Bohemian Ball, which has helped to generate 1.2 million dollars for the new building project. The annual event has twice been rated one of the top charity events of the year.

Hospice of the Comforter is the only non-profit hospice in Central Florida, providing services to over 400 people per day. Groundbreaking for the new in-patient facility recently took place in Altamonte Springs. Hospice has announced that the main Atrium of the building will be named in honor of Jill S. Schwartz & Associates, P.A.

Through her appointment to the Board of Directors of the organization and her continued philanthropic work, Ms. Schwartz hopes to help further the compassionate mission of Hospice of the Comforter in Central Florida.

Jill Schwartz, Jack Cadden, Board of Directors, and Robert G. Wilson, President/CEO/Chaplain for Hospice of the Comforter turned the first shovel at the groundbreaking ceremony for Hospice House in Altamonte Springs.

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YLS on the Move!

Happy Holidays!

Judi Garabo

As usual, the holiday season is upon us far sooner than anyone expected it would be. This year it seemed like the Christmas decorations were fighting for shelf space with Halloween costumes in all the stores, and, once again, I seem to have gone from “Hey, what happened to summer?” to “It’s too late to send out my holiday cards!” in the blink of an eye. This is the time of year when holiday parties are booked back-to-back and it’s virtually impossible to schedule a deposition or a hearing. It seems like every year, there’s always too much to do, too many people to see, and too many places to be all at once. In the grand scheme of things, that’s a delightful problem to have - “too many” friends and family and not enough time to enjoy all of them. If you’re multi-traditional, like me, then you have Christmas and Hanukkah practically running together again this year, and December turns into one month-long celebration of holiday cheer.

As we’re nearing the end of the year, it’s a good time to look back and reflect on the past year to see what all the YLS has done. This year has found us at all the usual places - back at the Winter Park Farmers’ Market for another Evening with the Judiciary, at the Orlando Museum of Art for the Summer Law Clerk Reception, at Great Oaks Village on more than one occasion, picking up a hammer for Habitat for Humanity, and golfing at Orange County National. This summer brought zero hurricanes (thank goodness!) and not one but *two* pub crawls, and we hosted more monthly happy hours than ever before. We bestowed a scholarship and we sponsored a host of charitable endeavors. We have a lot to be proud of this year!

While we’re reflecting, I would like to point out that the goals of the Young Lawyers Section are not all social in nature. The YLS is designed to foster a more collegial atmosphere among young lawyers, and to provide opportunities for professional growth and development. With the help of

Orange County **Judge Mike Murphy**, we’ve introduced a monthly Judicial Report to keep young lawyers apprised of developments with the local bench. I know I’ve spotted more judges at our luncheons lately and I think we can all thank Judge Murphy for spreading the word.

Another benefit to getting involved with the Young Lawyers Section, particularly for those of us who litigate, is that it helps to promote a more friendly and cooperative practice. The legal community is not a very large one, and you’re bound to start seeing the same faces over and over. If you’ve met opposing counsel at one of our monthly happy hours, or if you know someone who went to law school with them, or if you have served on a committee together, it’s more likely that you will be able to resolve your clients’ differences amicably and with less conflict. The Young Lawyers Section is also a breeding ground for future bar and community leaders as well. Many YLS leaders have gone on to hold leadership positions in the “Big Bar” as well as on the bench and throughout the community.

If you’re in the business of making resolutions, and who among us isn’t, make it a resolution to get more involved with Young Lawyers in 2007.

We have one upcoming event in December: **Habitat for Humanity on Saturday, December 16, 2006** – email **Shane Fischer** at sfischer@boginmunns.com for more details. We don’t have a monthly luncheon in December, since the holiday parties are upon us and it’s virtually impossible to schedule anything. We will, however, be planning some sort of informal get-together for the holidays, so please watch your email for more information. If you’re not getting our periodic email blasts, please send an email to OCBAYLS@gmail.com and I’ll add you to the distribution list. Happy Holidays, and best wishes for a wonderful 2007!

Judith A. Garabo is an associate with the firm of Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.

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(4) worldwide investments; and (5) holding in currencies other than just the U.S. dollar. These companies invest in the same global markets that are mentioned in item 1 above and have historically provided much higher returns within their policies.⁴ Because a company that wants to do business with U.S. residents has to comply with the laws of each and every state in which it does business, most do not bother or do so only very selectively. An offshore LLC can easily purchase and own a policy on the life of its U.S. resident owner, and so long as the policy complies with Tax Code's "at risk" requirement, all earnings within the policy will be tax deferred, just as with a policy issued by a domestic company.

The U.S. Litigation Epidemic

One of the major reasons for the flight of huge amounts of assets outside the U.S. is the runaway litigation and the huge awards that are being granted by U.S. juries and judges. One often-stated statistic claims that the U.S. has more than 90% of the lawyers in the world and less than 10% of the world population. Whatever the numbers may be, we are the only country in the world that permits lawyers to work on a contingent fee basis and to collect huge fees from punitive damage awards.

A number of offshore jurisdictions, such as Nevis and Anguilla, have limited liability company statutes that are modeled after the Delaware statute. They provide "charging order" protection against claims made by creditors of members. In addition, these jurisdictions will not enforce a judgment entered by a foreign court. Thus, a claimant will have to incur the expense of obtaining a judgment in the company's resident jurisdiction and then at best end up with a charging order. Moreover, these jurisdictions have relatively short look-back periods for fraudulent transfers, usually two years. These features of local law make the formation of an offshore LLC a powerful tool for asset protection without the expense of forming an offshore asset protection trust. To avoid the possibility of duress being placed on a member-manager, reputable service providers in these jurisdictions will act as manager upon request or in the event of duress. Again, these service providers can ignore an order issued from any court other than a court in their home jurisdiction.

Alternative to Offshore Financial Trust

Whether and offshore trust is formed for asset protection (asset protection trust or "APT") or as an estate planning tool (offshore financial trust or "OFT"), they are expensive to form and maintain. The offshore LLC will usually provide most of the same benefits as these trust structures, at a much lower cost, and may even serve to simplify planning. For example, real estate is often problematic, because it tends to attract both transfer tax and estate tax in the country in which it is located. Purchasing real estate through an LLC converts the real estate from real property to personal property, in the sense that it is now represented by shares in the LLC.⁵ Thus, the real estate converted to shares is now foreign-owned personal property for income and estate tax purposes, making it much more portable and easier to deal with for the planner.⁶ Moreover, all offshore trusts created by U.S. citizens are considered grantor trusts for U.S. tax purposes, regardless of the beneficiary designations and whether or not they are irrevocable. This

means, at the very least, additional reporting or constraints on the creator in order to avoid grantor trust treatment. In fact, some offshore trust structures can attract CFC, foreign personal holding company ("FPHC"), or personal/passive foreign investment company ("PFIC") treatment mentioned hereinabove. These problems can be eliminated through the use of a foreign LLC that holds offshore assets. By electing sole proprietor treatment, an individual owner simply reports any income on his or her own personal tax return. There are many cases in which it will still be advisable to also use an APT or an OFT, but it can be seen that even when they are necessary, the offshore LLC can become a valuable component.

Conclusion

These are six good reasons that wealthy individuals and business owners would be well served by the formation of an offshore LLC. When one considers the tax flexibility of an LLC, its asset protection features and the added benefits when it is formed offshore, it hardly makes sense to use the more expensive alternatives. Most importantly, all reputable offshore company formation providers will not, due to anti-money laundering concerns, deal directly with an individual client. They view attorneys, accountants, and other financial professionals as gatekeepers who they can trust to screen the clients who will use their services. Thus, it is incumbent upon all such professionals to justify that trust by preventing their clients from using offshore companies for wrongful purposes. With that caveat, the offshore LLC is a valuable tool that should not be overlooked.

¹ To invest in foreign companies and mutual funds, U.S. investors must purchase an SEC compliant security called an American Depositary Share ("ADS"). An ADS is a U.S. dollar denominated form of equity ownership in a non-U.S. company. It represents the foreign shares of the company held on deposit by a custodian bank in the company's home country and carries the corporate and economic rights of the foreign shares, subject to the terms specified on the American Depositary Receipt ("ADR"). An ADR is a physical certificate evidencing ownership in one or several ADSs. The terms ADR and ADS are often used interchangeably. Anyone who knows the many legal and administrative steps required to create an ADR can appreciate how the cost of those steps greatly devalues the underlying stock, when compared to a direct purchase of the stock.

² Unfortunately, many practitioners and advisors do not appreciate this distinction and allow their clients to use company forms, such as international business company and foreign foundation, that are classified as a corporation under the Tax Code and Treasury Regulations, thus unwittingly exposing the client to controlled foreign corporation ("CFC") treatment of the foreign company.

³ Under the laws of countries such as Liechtenstein, the insurance company is even prohibited from complying with a surrender request made by the policy owner, if the carrier believes that the request is the result of duress, i.e. an order from a U.S. court.

⁴ For example, just this week I reviewed a proposal received by a 50-year-old man from a Cayman Islands company for issuance of a U.S. compliant variable life policy. I was surprised to see that a \$1,000,000.00 death benefit was provided for payment of a \$250,000.00 lump sum premium, with an initial cash surrender value of \$239,000.00. After the first year, the cash surrender value was over the initial premium with the same death benefit. This is the sort of performance that is simply unheard of for policies issued by U.S. carriers.

⁵ Because U.S. tax laws impose withholding tax on the sale of real estate by a foreign resident, including an LLC, it is usually best to make real estate investments through a domestic LLC that is owned by the offshore LLC. The Foreign Investment Real Property Tax Act ("FIRPTA") applies only to a real estate corporation that is controlled by a foreign resident. Thus, unless and until FIRPTA is amended, ownership of real estate by a domestic LLC that is owned by a foreign LLC does not require withholding. Thus, the foreign/domestic LLC combination is also an effective tool for use by foreign investors who wish to invest in U.S. real estate.

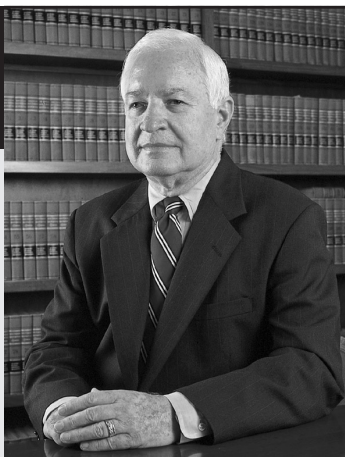
⁶ Estate planners know, for example, that placing an appreciating asset in a closely held company is advantageous for valuation purposes.

David L. Fleming is the Senior Wealthcare Consultant in the Orlando office of WealthCare International. He has been a member of the OCBA since 2006.

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and controversy” requirement necessary for standing, others have taken a more liberal interpretation of the requirement in light of the First Amendment issues presented.³⁸

No Standing...Skirting the Issue of Constitutionality

Article III of the United States Constitution limits the jurisdiction of the courts to those matters that meet the “case and controversy” requirement.³⁹ To satisfy this prerequisite the “litigant must have suffered an actual injury that can be redressed by a favorable judicial decision.”⁴⁰ The United States Bankruptcy Courts for the Eastern District of Pennsylvania⁴¹ and Middle District of Georgia⁴² have strictly adhered to the “case and controversy” requirement and have dismissed cases involving constitutional challenges to BAPCPA. Dismissal was appropriate because the courts found that the attorneys bringing suit had not suffered actual injuries and that no entity had taken action against them to enforce the provisions of BAPCPA.⁴³ As a consequence of the dismissals, the constitutional validity of the challenged BAPCPA provisions have not been addressed and remains an unresolved issue in these states.

Attorneys Have Standing to Challenge BAPCPA

Other courts have found attorneys have standing to bring First Amendment claims even where actual injuries are absent.⁴⁴ In *Hersh v. U.S.*, an attorney filed suit against the Attorney General of the United States and the State of Texas challenging the constitutionality of § 526(a)(4) of the Bankruptcy Code on the basis the statute restricts attorney-client speech by prohibiting an attorney from providing certain forms of counseling to the client.⁴⁵ The defendant filed a motion to dismiss for lack of standing on the basis that no action had been taken against the attorney to enforce the provision.⁴⁶ The Bankruptcy Court for the Northern District of Texas found that mere allegations an attorney’s speech was simultaneously stifled and compelled by the provisions of BAPCPA were sufficient to provide standing on questions concerning First Amendment speech.⁴⁷ Similarly, the *Olsen v. Gonzales* opinion issued by the United States Bankruptcy Court for the District of Oregon held that allegations of a chilling effect against speech provide a sufficient base for standing on First Amendment issues.⁴⁸

Are Sections 526, 527, and 528 of BAPCPA Constitutional Under the First Amendment?

The Bankruptcy Courts for the Northern District of Texas and the District of Oregon are among the few courts that have addressed the First Amendment issues surrounding §§ 526, 527, and 528.⁴⁹ Having found the attorney plaintiffs had standing and were debt relief agencies the courts could then consider the constitutionality of the BAPCPA provisions.

Section 526 Unconstitutionally Restricts Speech

The First Amendment to the Constitution of the United States states, in part, “Congress shall make no law ... abridging the freedom of speech...”⁵¹ The courts addressed the constitutionality of two Subsections within Section 526, specifically §§ 526(a)(1) and 526(a)(4).⁵²

The question presented to the Bankruptcy Court for the District of Oregon was whether § 526(a)(1) unconstitutionally chilled speech by subjecting attorneys to sanctions for failing to perform services which later became ill-advised or unethical.⁵³ Section 526(a)(1) provides:

(a) A debt relief agency shall not - (1) fail to perform any service that such agency informed an assisted person or prospective assisted person it would provide in connection with a case or proceeding under [the Bankruptcy Code].⁵⁴

The Oregon Bankruptcy Court found the plaintiff attorney’s challenge was subject to failure if the statute could be construed in such a manner that would not infringe upon the Constitution.⁵⁵ The court determined that § 526(a)(1) was in line with the purposes of BAPCPA, “limiting unethical conduct and increasing responsibility and integrity.”⁵⁶ The court also recognized that attorneys could “couch their promises in conditional language [instead of] abstain[ing] from speech.”⁵⁷ The court held § 526(a)(1) was not unconstitutional, and dismissed the claim.⁵⁸

Section 526(a)(4) has also been challenged as a violation of the First Amendment on the basis it prevents attorneys from properly advising their clients.⁵⁹ Section 526(a)(4) provides:

(a) A debt relief agency shall not - (4) advise an

Continued on page 23

³⁸ Compare *Geisenberger*, 346 B.R. 678 (case dismissed for lack of standing), and *In the Matter of McCartney*, 336 B.R. 588 (same), with *Hersh*, 347 B.R. at 23-5 (allegations of chilled-speech satisfies standing requirement), and *Olsen*, No. 05-6365-HO, 2006 WL 2345503.

³⁹ U.S. Const. Art. III, § 2.

⁴⁰ *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 70 (1983).

⁴¹ *Geisenberger*, 346 B.R. at 678 (Attorney failed to establish injury and court dismissed case for lack of standing.).

⁴² *In the Matter of McCartney*, 336 B.R. at 588 (Attorney for Chapter 7 debtors moved the court for a determination that attorneys practicing before the bankruptcy court were not “debt relief agencies” under BAPCPA. Motion was dismissed for lack of a “case and controversy” the court could rule over.).

⁴³ See generally *Geisenberger*, 346 B.R. 678; *In re McCartney*, 336 B.R. at 588.

⁴⁴ See *Hersh*, 347 B.R. at 19; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 2-4.

⁴⁵ See *Hersh*, 347 B.R. at 22.

⁴⁶ *Id.*

⁴⁷ *Id.* at 22 n. 3.

⁴⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 3-5 (distinguishing the standing standard for First Amendment issues from the traditional case and controversy requirement of Article III).

⁴⁹ *Hersh*, 347 B.R. at 23-5; *Olsen*, No. 05-6365-HO, 2006 WL 2345503, at 6-7; 11 U.S.C. §§ 526, 527, 528.

⁵¹ U.S. Const. amend. I

⁵² *Hersh*, 347 B.R. at 23-5; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7.

⁵³ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7.

⁵⁴ 11 U.S.C. § 526(a)(1).

⁵⁵ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7; 11 U.S.C. § 526(a)(1).

⁵⁹ *Hersh*, 347 B.R. at 23-5; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7; 11 U.S.C. § 526(a)(4).

assisted person or prospective assisted person to incur more debt in contemplation of such person filing a case under this title or to pay an attorney or bankruptcy petition preparer fee or charge for services performed as part of preparing for or representing a debtor in a case under this title.⁶⁰

Prior to conducting its analysis of the statute, the court had to determine which legal standard to apply. “Traditionally, courts subject content-based restrictions on speech to strict scrutiny.”⁶¹ However, the “Government propose[d] that § 526(a)(4) [was] an ethical regulation . . . subject to a lesser standard outlined in *Gentile v. State Bar of Nevada*.”⁶²

In *Gentile*, the United States Supreme Court held regulation of speech is constitutional if: (1) the regulation serves a legitimate state interest and (2) the limitations imposed are “narrow and necessary.”⁶³ Strict scrutiny “requires the regulation of speech to be (1) narrowly tailored to promote (2) a compelling government interest.”⁶⁴ Both *Hersh* and *Olsen* used the lower standard of the *Gentile* constitutional balancing test and found § 526(a)(4) over-inclusive and facially unconstitutional.⁶⁵ Consequently, a strict scrutiny analysis was unnecessary.⁶⁶

Although Congress’ purpose in enacting BAPCPA was to “remedy abuse of the bankruptcy system,”⁶⁷ provision “526(a)(4) prevents lawyers from advising clients to take actions that are lawful . . . under BAPCPA.”⁶⁸ The courts point out that incurring “additional debt in contemplation of bankruptcy does not necessarily constitute abuse,” because acquiring more debt may at times be the most “prudent” option for an individual contemplating bankruptcy.⁷⁰ Accordingly, § 526(a)(4) prevents attorneys from offering their clients the most appropriate counseling.⁷¹ The courts that have considered the constitutionality of § 526(a)(4) have found it unconstitutional because it fails to meet the “narrow and necessary” standard set out by *Gentile*.⁷²

Section 527 Does Not Unconstitutionally Compel Speech

Section 527 of BAPCPA requires a “debt relief agency” to

provide “assisted persons” with written notice and disclosure of specific information concerning bankruptcy.⁷⁴ First Amendment rights “include[] both the right to speak freely and the right to refrain from speaking at all.”⁷⁵ Attorneys have claimed that the compelled speech imposed upon them as debt relief agencies under § 527 is unconstitutional.⁷⁶ The courts that have considered this constitutional issue have acknowledged “section 527 advances a sufficiently compelling government interest and does not unduly burden either the attorney-client relationship or the ability of a client to seek bankruptcy.”⁷⁷ The government has a valid concern in guaranteeing that a client is informed of specific information relevant to the bankruptcy process prior to filing a petition for bankruptcy.⁷⁸

In *Hersh*, the plaintiff attorney argued that the disclosures required by § 527 provide false or misleading information; however, the court dismissed this argument. The Bankruptcy Court for the Northern District of Texas explained that § 527 is flexible, allowing attorneys to modify the required disclosures so long as the content remains “substantially similar.”⁷⁹ “Given [the government’s] significant interest [and the statute’s inherent flexibility, courts have held that] the compelled speech of section 527 is a reasonable burden” and have dismissed claims of unconstitutionality.⁸⁰

Section 528 Does Not Unconstitutionally Compel Speech

Section 528 requires attorneys to make certain disclosures in advertisements such as, “We are a debt relief agency,” or “We help people file for bankruptcy relief under the Bankruptcy Code.”⁸¹ In *Olsen*, the attorney plaintiff brought a constitutional challenge to § 528 claiming the statute unconstitutionally compels untrue, ill-advised and misleading speech.⁸² Plaintiff argued that not all attorneys help people file for bankruptcy relief.⁸³ The plaintiff contended that although he “advise[d] clients to file bankruptcy” and counseled clients on issues of dischargability, he had not represented clients in bankruptcy matters nor had he filed petitions for bankruptcy relief.

Continued on page 24

⁶⁰ 11 U.S.C. § 526(a)(4).

⁶¹ *Hersh*, 347 B.R. at 24 (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030); see also *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 6-7.

⁶² *Id.*

⁶³ *Hersh*, 347 B.R. at 24, quoting *Gentile v. State Bar of Nev.*, 501 U.S. at 1075 (1991).

⁶⁴ *Hersh*, 347 B.R. at 23, 24; citing *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000).

⁶⁵ *Hersh*, 347 B.R. at 24; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7 (finding section 526(a)(4) also to be under-inclusive because non-profits, which are excluded from the definition of a “debt relief agency,” can still get advice that would attribute to the abuse Congress intended to address with the statute).

⁶⁶ *Hersh*, 347 B.R. at 24, citing *Gentile*, 501 U.S. at 1030 (implementing a test to determine whether regulation of attorney statements to the press violated the First Amendment).

⁶⁷ *Hersh*, 347 B.R. at 24; see also 151 CONG. REC. H2063-01, 2066 (2005).

⁶⁸ *Id.*

⁷⁰ *Hersh*, 347 B.R. at 24 (justified reasons for acquiring additional debt prior to bankruptcy may include “(1) refinancing at a lower rate to reduce payments and forestall or prevent entering into bankruptcy, or (2) taking on secured debt such as loan on an automobile that would survive bankruptcy and also enable the debtor to

continue to get to work and make payments.”).

⁷¹ *Id.* at 24; see also 11 U.S.C. § 526(a)(4).

⁷² *Hersh*, 347 B.R. at 24, citing *Gentile*, 501 U.S. at 1030; see also 11 U.S.C. § 526(a)(4).

⁷⁴ 11 U.S.C. § 527.

⁷⁵ *Wooley v. Maryland*, 430 U.S. 705 (1977).

⁷⁶ See *Hersh*, 347 B.R. at 25-7; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7-9.

⁷⁷ *Hersh*, 347 B.R. at 27; see also *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 7-9.

⁷⁸ *Hersh*, 347 B.R. at 27, quoting H.R. Rep. 109-31, reprinted in 2005 U.S.C.C.A.N. 88, 91 (“The amount of debt discharged by bankruptcy in a given year can be tens of billions of dollars.... As among consumer creditors, attorneys, and their debtor clients, the consumer debtor is often at an informational disadvantage. Thus, the government interest is significant.”)

⁷⁹ 11 U.S.C. § 527(b).

⁸⁰ *Hersh*, 347 B.R. at 27; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 8.

⁸¹ 11 U.S.C. § 528(b)(2)(B).

⁸² *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9-11.

⁸³ *Hersh*, 347 B.R. at 27 n. 12; *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9-11.

Including the clauses mandated by § 528 would cause him to make untrue statements to his clients.⁸⁴

The Bankruptcy Court for the District of Oregon analyzed § 528 using the *Central Hudson* four-prong intermediate scrutiny commercial speech test and found that § 528 did *not* violate the Constitution.⁸⁶ The court found that each element of the test was met, acknowledging that the speech compelled was neither unlawful nor misleading,⁸⁷ that the government had a substantial interest in compelling the speech, and that the statute was narrowly drawn to advance the interest.⁸⁸ Like § 527, § 528 allows a “debt relief agency” to modify the language so long as it remains “substantially similar.”⁸⁹ The statute is flexible allowing an attorney to modify the language as well as include supplemental material to fulfill the disclosure requirement while avoiding untrue statements and misrepresentations.⁹⁰

Other Potential Constitutional Issues

Scholars have identified the following additional constitutional issues the courts may be called upon to consider:⁹¹

- Do the penalties prescribed by BAPCPA for violations

⁸⁴ *Hersh*, 347 B.R. at 27; 11 U.S.C. § 528(b)(2)(B).

⁸⁶ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 9, citing *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) (laying out the *Central Hudson* intermediate scrutiny four-prong test).

⁸⁷ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 10; see also 11 U.S.C. § 528(b)(2)(B) (allowing for a “substantially similar statement” in lieu of the express language quoted in the statute).

⁸⁸ *Olsen*, No. 05-6365-HO, 2006 WL 2345503 at 10, citing 151 CONG. REC. H2063-01, 2066 (2005) (“[L]egislative history indicates that section 528 is intended to ‘[p]revent deceptive and fraudulent advertising practices by debt relief agencies....’”).

⁸⁹ See 11 U.S.C. §§ 527(b), 528(b)(2)(B).

⁹⁰ *Hersh*, 347 B.R. at 27 n. 12; *Olsen*, No. 05-6365-HO, 2006 WL 2345503, at 9-11.

⁹¹ See Erwin Chemerinsky, *Constitutional Issues Posed in the Bankruptcy Abuse*

of §§ 526, 527, and 528 violate the Tenth Amendment or Separation of Powers?⁹²

- Does the means test of § 707(b) violate the principles of Equal Protection?⁹³
- Does the compelled disclosure of tax returns imposed by § 521 violate privacy rights?⁹⁴
- Does the imposition of time limits on the courts pursuant to §§ 1112(b) and 521(a)(2) violate the principles of Separation of Powers and Due Process?⁹⁵

Summary

This article has outlined some of the First Amendment constitutional issues related to BAPCPA. To date, only a handful of courts have considered the constitutional implications of the new bankruptcy code. The few courts that have addressed these issues have employed deferring analytical approaches and interpretations, which have resulted in varying conclusions of law. This lack of uniformity has left the legal community pondering the scope and ramification of BAPCPA. At this point, it is impossible to predict how other courts will interpret these and other constitutional issues stemming from BAPCPA.

Prevention and Consumer Protection Act of 2005, 79 AM. BANKR. L.J. 571 (2005).

⁹² *Id.* at 580-82.

⁹³ *Id.* at 590-96.

⁹⁴ *Id.* at 596-99.

⁹⁵ *Id.* at 599-602.

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Financial Planning

The Case for Financial Planning



Andrew C. Orr, CFP®, CLU, ChFC, AIF®

"If you could create a perfect world, what would it be?"

Don't be surprised if, on your first visit to a financial planner, that is the first question you are asked. You come to the meeting loaded with documents and balance sheets, prepared to discuss your finances...and find that the planner wants to know about *you* as well as your money – who you are and what your goals and dreams are. After fifteen minutes of conversation about you, you begin to relax, warm to the subject, expand on it...and soon discover you are even beginning to really like your financial planner.

Today's financial planning is all grown up. While it was once about taking the steps to amass money for retirement and college funding, planning today is a lot more. At its core, it is about effectively managing resources so that you can lead a happier, more fulfilling life. So, one of the very first steps in a financial planning relationship is helping you define your life goals. Do you want to have more time to volunteer, start a new career, take a dream vacation, or create a perfect world?

Recently, when a college professor was asked to think about how he would create a perfect world, he realized he really wanted to live on a farm, far from where he was teaching. The more he talked about it, the more excited he got, and the more that he, his wife and his financial planner realized that, with the proper planning, it was a dream he could make a reality. Others, faced with the same question, talk about being able to help people in need, send aid to countries, write a book, or look into a new religion.

Once your financial plan is in place, you will meet regularly with your financial planner to reassess your goals and strategies, especially as life circumstances change. Could you do all this on your own, using a financial planning or investment software program? Not unless your program is also an intuitive talking robot! These programs cannot effectively come up with those kinds of questions – let alone provide the right answers.

Financial planners excel at seeing the whole – and can help coordinate the full financial planning process. They make sure the various parts to your plan are working in harmony and not against each other. If you opt to take a shotgun approach to planning your finances, you may discover that one advisor's strategy to save income taxes undermines another advisor's investment strategy. You can get investment advice from a computer (though usually not well tailored to your individual needs), but a financial planner can help you find ways to free up additional money for investing.

It also is the financial planner who might discover that your computer-designed investment plan could be seriously undermining your financial security by not considering all facets of your financial affairs. For example, it may ignore potential risks of not having adequate life or disability insurance or health care coverage.

A financial plan motivates. The busier you are, the more

you can benefit from motivation like this. There's nothing like having a comprehensive plan to provide the impetus to take the actions you've been procrastinating about. For example, a recent retirement study by TIAA-CREF Institute found that people who planned more thoroughly for their retirement experienced fewer financial "surprises" when they actually retired. Who needs surprises?

Financial planners provide checks and balances. Beyond the financial plan and the motivation to take action, the financial planner can provide an objective perspective. Planners can filter out the financial "noise" that so often clouds judgment. This independent perspective is especially critical when a family is under stress such as from a job loss, divorce, or a major market decline.

Ideally, it's better to create a financial plan before a crisis occurs. One of the greatest benefits of financial planning is its ability to prepare you to better handle the inevitable financial roadblocks thrown up in life that can detour you from achieving your life goals.

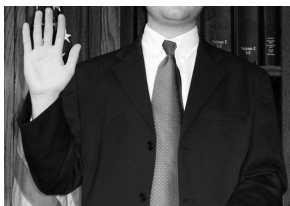
Will your financial planner try to sell you something? Not if he or she is an independent, fee-only planner, one who does not accept commissions and is free to recommend the best products for *you*. There is no conflict of interest; fee-only planners are paid exclusively for giving you advice. They sit on your side of the table. They help you wade through the myriad financial products that exist out there, many of which you don't need. Think of a fee-only planner as *your* representative, not some sales organization's representative.

What services might be included in your financial plan?

- Life Planning (merging your money with a satisfying life)
- Asset management (your total investment picture)
- Disability and risk management (protecting you from catastrophe)
- Tax planning and management (improving your wealth-building efficiency)
- Cash management (pulling it all together)
- Debt management (reducing unnecessary expenses)
- Estate planning (helping you transfer your lifetime assets to your heirs)
- Charitable (or social capital) planning, to help you give back to the community

It is true that the best financial plans have the most time built in to accomplish goals. But beginning to plan for the future is not reserved just for the young. If you have procrastinated, consider starting now. Strategies for achieving your financial and life goals await you.

Andrew C. Orr, CFP®, CLU, ChFC, AIF®, is an independent, fee-only financial planner located in Orlando. He is President of ORRGROUP, a registered investment adviser and financial life planning firm providing comprehensive financial management services to individuals and businesses. For more info, visit: www.orrgroup.com.



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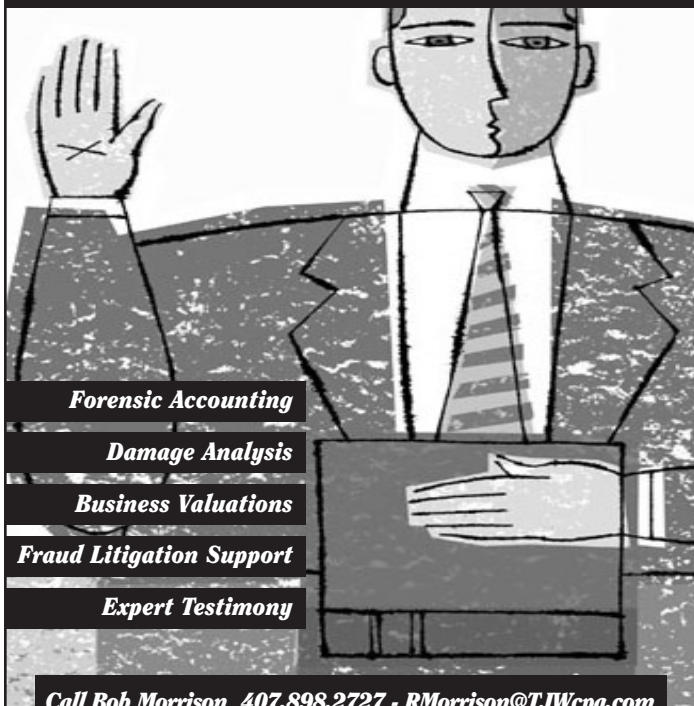
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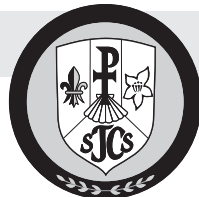
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Bradley M. Saxton, Esq., Winderweede, Haines, Ward & Woodman, P.A., recently moderated a panel on "Commercial Issues Under the New Bankruptcy Reform Act," and a panel on "Consumer Issues Under the New Bankruptcy Reform Act," at the Central Florida Bankruptcy Law Association's annual seminar on October 6, 2006. Mr. Saxton is a past President of the Central Florida Bankruptcy Law Association and presently chairs the Florida Bar's Business Law Section Bankruptcy/UCC Committee.

News to Note

The Public Defender's Annual Clothing Drive will take place on **Saturday, December 9th** at the Orange County Courthouse. Professional clothing is collected to share with litigants appearing in court proceedings in the Ninth Circuit who are incapable of providing their own appropriate attire. Drop offs of your donations will be handled in the circular drive between 9:00 a.m. - 1:00 p.m., and receipts will be provided to acknowledge your charitable contribution. If this date is not convenient for you, or if you have donations at other times of the year, please call the office at 407-836-4806 to arrange a drop off. The Public Defender's Office and staff thank you in advance for your donations at the holiday time and throughout the year.

Business Law Seminar - Hold the Date - The Business Law Committee will host an all-day Business Litigation Seminar on **February 21, 2006**, at the OCBA Center. Look for details to be published soon!

Mentoring Opportunity - Children's Home Society of Florida (CHS) has been providing services designed to build and strengthen families throughout the state of Florida for over 100 years. We are excited to announce a new program at CHS called MODEL Mentoring! The CHS MODEL Mentoring Program is a one-to-one community-based mentoring program for children who have a parent incarcerated in a federal or state prison. Each youth is matched with a mentor who can provide guidance and support to help each child develop to their fullest potential. Mentors must be at least 21 years of age, complete an application, interview and background screening, attend an orientation session, and commit 1 hour per week to their child for one year. Youth ages 4-15, who reside in Osceola, Orange or Seminole Counties, and have at least one parent that is incarcerated at the time of referral, are eligible for this exciting new program. If you are interested in becoming a Mentor, please contact Children's Home Society, MODEL Mentoring Volunteer Coordinators: Tisa Zimmerman at (407) 897-1031 or Amanda Choos at (407) 897-1005. Remember, only one hour a week can make a change to last a lifetime!



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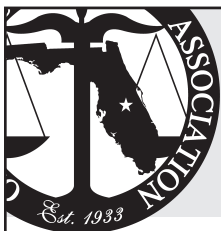
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2006-07

December - January Calendar

OCBA Luncheon • January 11, 2007

The Honorable Barbara J. Pariente
Florida Supreme Court

RSVP by January 9th to reservations@ocbanet.org

December

- 1 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club
- 5 Criminal Law Committee**
12:00 p.m. • Bar Center
- OALSS Meeting**
5:30 p.m. • Bar Center
- 7 Elder Law Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- CFAWL Holiday Party**
6:00 p.m. • Home of Keersten & Greg Martinez
- 8 Workers' Compensation Committee**
11:45 a.m. • Bar Center
- 12 Executive Council Meeting**
5:30 p.m. • Roetzel & Andress, LPA
- 13 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- 14 Legal Aid Society Executive**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law**
12:00 p.m. • Bar Center
- Paul C. Perkins Bar Association Las Vegas Night**
6:00 p.m. • Bar Center
- 18 Paralegal Christmas Party**
6:00 p.m. • Bar Center
- 19 Legal Aid Society Board**
11:45 a.m. • 100 E. Robinson St. (Upstairs)
- Professionalism Committee**
12:15 p.m. • Bar Center
- 21 Young Lawyers Section Luncheon**
11:45 a.m. • Citrus Club
- Paul C. Perkins Bar General Meeting**
12:00 p.m. • Bar Center
- Hispanic Bar Association**
5:30 p.m. • TBA
- 22 Labor & Employment Committee**
12:00 p.m. • Bar Center
- 25-1 Bar Closed for the Holidays**
- 27 Business Law Committee**
12:00 p.m. • Baker Hostetler, SunTrust Bank Bldg.
- CFACDL**
11:45 a.m. • Sorosis Club
- January**
- 2 Criminal Law Committee**
12:00 p.m. • Bar Center
- 4 Elder Law Committee**
12:00 p.m. • Bar Center
- Federal Judicial Relations Committee**
12:00 p.m. • Judge Conway's Chambers
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 5 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club
- 8 Central Florida Family Law Inn of Court**
5:30 p.m. • Adair's in College Park
- 9 Executive Council Meeting**
11:30 a.m. • Bar Center
- OALSS**
5:30 p.m. • Bar Center
- 10 Estate Guardianship & Trust**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Orange County Courthouse
21st Floor Conference Room
- 11 Legal Aid Society Executive**
8:00 a.m. • 100 E. Robinson St.
- OCBA Luncheon**
The Honorable Barbara J. Pariente
11:30 a.m. • Downtown Marriott
- Real Property Law Committee**
12:00 p.m. • Bar Center
- 12 Workers' Compensation Law**
11:45 a.m. • Bar Center
- 16 Legal Aid Society Board Meeting**
11:45 a.m. • 100 E. Robinson St.
- Professionalism Committee**
12:15 p.m. • Bar Center
- Inn of Court**
5:30 p.m. • Dubsdread
- 18 Young Lawyers Luncheon**
11:45 a.m. • Citrus Club
- Hispanic Bar Association**
5:30 p.m. • TBA
- Paul C. Perkins Bar General Meeting**
6:00 p.m. • FAMU College of Law
- Health Law Committee**
6:00 p.m. • GrayRobinson
- 19 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave., #2310
- 22 Tort Law Seminar**
1:00 -5:00 p.m. • Bar Center
- 23 Young Lawyers Board Meeting**
5:30 p.m. • Bar Center
- 24 CFACDL**
11:45 a.m. • Sorosis Club

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