Tampa Bay Bankruptcy Bar Association

The Cramdown

Winter 2016

The Newsletter of the Tampa Bay Bankruptcy Bar Association

Editor-in-Chief, Lori V. Vaughan, Trenam Law

PRESIDENT'S MESSAGE

by Adam Lawton Alpert
Bush Ross, P.A.

The weather has started to cool down and hopefully it stays that way as we look forward to the Holiday season. This is also a busy time as an Association. We just completed another successful and informative View From the Bench reception and seminar. This event is always a great opportunity to catch up with colleagues across the Middle District and to hear the latest case developments and practice pointers from our excellent panel of judges.

On December 3rd, we will have our annual Holiday Party at Spain Restaurant in Downtown Tampa. In keeping with our past tradition, we will be asking that all attendees bring an unwrapped gift so we can make donation to children served by the Salesian Youth Center in Tampa.

In addition to signing up for a time slot for the Association's Pro Bono/Pro Se Clinic, please consider taking on a case or an adversary proceeding pro bono as we know there are many in the community who are deserving of legal services but simply do not have the financial means to afford counsel and are not comfortable representing themselves pro se. Please contact Jake Blanchard or Brad deBeaubien to inquire about pro bono opportunities.

We have many other great programs lined up for 2015/2016. Kathleen DiSanto and Patrick Mosely have excellent and informative CLE presentations scheduled for our monthly CLE lunches. We'll skip the December lunch in light of the Holiday party and we'll pick back up on January 12, 2016 with a CLE on the changing Federal Rules regarding discovery. Our monthly consumer lunches continue to be a huge success, with the judges and other speakers providing invaluable insights and practice tips for handling cases effectively and efficiently. Stephanie Lieb has excellent topics and presenters lined up for the year and our next consumer lunch will be January 5, 2016 on the 5th Floor of the Courthouse.

Please remember to renew your membership. As we have transitioned to an online renewal process, you will not be receiving renewal forms in the mail. Please go the Association's website, www.tbbba.com, to renew online. If you have any questions about the renewal process or registering for events online, please feel free to contact Noel Boeke or Timothy Sierra.

The collegiality of our members is what makes this Association great and I look forward to seeing all of you at our upcoming events.

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The *Cramdown* can be accessed via the Internet at www.flmb.uscourts.gov and www.TBBBA.com

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The Paradigm Shift - Civil

by: Joryn Jenkins,
Joryn Jenkins & Associates

Remember the old medieval means of settling disputes? Each side nominated a champion and the champions battled to the death, first donning their armor and their shields, then repairing to the fields or the lists where they engaged with swords and battleaxes, cudgels and bludgeons.

Eventually, we advanced into an arguably more mature society, in which we still wage war, and still by nominating champions. But our champions now are lawyers, and we made a paradigm shift from battling with battleaxes and bludgeons to warring with words and weapons of paper, via dollars and discovery, in courtrooms and conference rooms, until our victors emerge.

It is now time to take another step forward in the evolution of conflict settlement, to identify a new process and new champions to represent us and to help us fight our battles. That new process is called "collaborative dispute resolution." Collaborative professionals are still aligned attorneys, but they are also neutral professionals, both facilitators and financials, as well as others who might be necessary to the particular people involved in the specific dispute in question.

Because the collaborative process requires attorneys to focus on the interests and goals of their clients, rather than on their positions, attorneys must make a paradigm shift from how they would typically think and act as adversarial trial counsel. Their clients pledge to be transparent, so counsel can't play the "hide the discovery" games in which trial attorneys often engage. With a single specialist for any particular issue, "the battle of the experts" no longer has a role. And the clients actually speak to each other, making it impossible for any one lawyer to "stir the pot."

Rather than working to destroy the "opposing party," the goal becomes to work as a team to satisfy the most important interests of both clients.

This shift challenges a seasoned litigator who steps into the role of a collaborative team member. Litigated bankruptcy cases are treated like other civil cases, without considering that the two parties may need to maintain a working relationship with each other after the bankruptcy. The adversarial court system extinguishes any opportunity for the goodwill and cooperation necessary to continuing business relationships.

Collaborative practice replaces the evidence and procedural rules with protocols. The two (or more) individuals have a say in the process because it is their process. The attorney must be comfortable with relinquishing that control to the client. The lawyer helps her client to identify and articulate her interests, to brainstorm options to meet those interests, to evaluate those options, and to focus on the probable risks and rewards.

Collaborative professionals belong to practice groups that meet regularly to educate and confer, and often work together on collaborative teams. They are friends, much like the members of TBBBA, which makes it easier for the team to negotiate a positive resolution. They meet before and after full team conferences to discuss the best way to keep the clients moving forward. Their energy focuses on being positive and efficient, rather than on being destructive and damaging.

Because collaborative lawyers are required to withdraw if their clients choose to litigate, they concentrate on successfully resolving the case. Working together, they encourage their clients to remain open-minded and creative.

During team meetings, an attorney may speak directly with the person who is not her client. Rather than acting oppositionally, she will try to put the other side at ease by hearing his viewpoints and empathizing with his perspectives.

While the team may discuss "the law" and what could happen if a client throws in the towel and goes to court, that is just one factor that the clients evaluate when negotiating. The attorneys try to direct them about the best choices for their families, their businesses, their employees, their suppliers, their customers, and their other relationships, regardless of "the law," assuming that the lawyers can even say what that is, and what a judge might rule.

Adjusting to this paradigm shift may be uncomfortable at first. Still, there are some of us who take to this like a duck to water. I have a reputation in this town (I think) for being a hard-bitten (some may use a different word) trial attorney who drives a hard bargain for her clients. But collaborative practice offers a far more rewarding and positive process for resolving disputes. And I am convinced; it is so much more satisfying when you go home at night, knowing that you've created kindness and engendered goodwill for your clients instead of inflicting pain and destroying any hope of a relationship going forward.

Give this some thought and contact me if you are interested in joining the new Florida Civil Collaborative Practice Group; it's not just for divorce anymore!

The Human Side of Bankruptcy©

by Bill Maloney CPA, CTP, CVA

Oh no, it's happening again. My Owner CEO client is sobbing. This time she stands up and asks me if she can give me a hug. Of course I say yes. This makes almost 10 times this has happened. My teddy bear side wants to give her a big hug, my "take no prisoners" warrior side wants to shake her and tell her to toughen up, you're in for the fight of your life. Those of us in the distressed bankruptcy arena representing debtors know the drill all too well. Most of these clients are at the end of their rope, hurting, and lonely.

I thought by now, I was used to this, but every time it happens, it feels like the first time.

I was getting used to my owners crying, I was not prepared for what happened last fall. One of my clients committed suicide, shot her brains out after getting drunk one night. I was the last one to talk to her before she killed herself.

I know it wasn't my fault. I also think I understand in some strange way how the pain of living can be worse than the pain of dying. Her death continues to haunt me.

As a CRO, my clients expect me to save their company, restore it to its former glory, and slaughter the creditors they have come to hate over time. A tall order. I'm always sure to tell them there are no guarantees, and that I am not a wizard or a magician. Somehow they do not hear my words. All I promise is to do my best, stand with them, and escort them on their journey. I invite my clients to call me anytime 7/24, promising that I will always answer or call back right away as long as I am awake. I used to also tell them that nobody was going to die, and that someday when this is over, they will eventually wake up one morning and smell fresh air. I ask them to call me when that happens, I've had three calls. I don't tell my clients this anymore.

I often wonder why lawyers and other professionals work in bankruptcyland. There are so many other career paths for these professionals that pay well, provide career and personal growth and job satisfaction. When you walk down the halls of a large law firm, and pass the litigation, corporate, health care, and real estate people, who compared to bankruptcy lawyers, lead a charmed life, it seems to remind me about the dark secret.

I did not grow up in bankruptcyland. In fact, prior to getting involved in bankruptcy and distressed companies, I had a 25 year career with successful, normal large and midsized companies. I don't ever recall any senior executive crying at staff meetings or board meetings. I helped take a company through bankruptcy in the late 90's and became smitten with the amazing world of bankruptcy. Then I became a distressed company advisor.

The typical bankruptcy comes with a lot of pain. First the owner and their family. Most of my CEO's do not share the condition of the business with their spouse or family, which seems to eventually cause complications. I guess the shame and embarrassment of failure, coupled with the desire to avoid the conversation and conflict, causes their silence. Then there are the employees. They are typically smart people. They are aware of the slow sinking of the ship, many times not wanting to talk about it, not sure what to do about it, and hoping against hope things will get better. When we start to have our discussions with employees about filing bankruptcy, I always provide something in writing so when they get home and say to a spouse or loved one, "the company filed bankruptcy today, but they said it should be ok" they have some ammunition to avoid a fatal encounter. The spouse or loved one usually grills them relentlessly and they are unarmed with satisfactory answers.

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The Human Side of Bankruptcy

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Most of the bankruptcy lawyers I have dealt with in my journey (44 cases) seem to have developed a hard shell to help them deal with the emotional issues that come with the terrain. I wonder if that is part of how bankruptcy professionals develop in their careers.

When a case is "over", former clients complain to me that their lawyers never return their phone calls. In my world, if someone takes the time and effort to call me, they deserve a call back. So when my former client says "Bill, thanks so much for taking my call", as if the act is so rare and appreciated, it is a pathetic reminder of how most cases seem to end.

Another common sore spot for clients, is when the issue of personal representation comes up after they are pursued by creditors under a personal guarantee. I would say in almost all my cases, bankruptcy lawyers don't handle this well. Maybe it's an issue they don't want to talk about, especially early in the case, but the client outrage is universal. What do you mean %&$#@% can't represent me, I hired them, they are my lawyer. The concept of "the bankrupt estate" is lost on client principals.

Bankruptcy lawyers seem to find retreat in their emotional shell when the need arises. It seems to be a natural reflex and I don't think most are aware that they act this way. Oddly, most bankruptcy lawyers that I know who read this, will deny this behavior, and insist they are very sensitive.

There is no shortage of pain to go around in the bankruptcy process. Once successful people lose everything, employees and creditors have pain and suffering. The human toll is great. As difficult as it is for the professionals that practice in this area, I often wonder how judges can do what they do. We have an outstanding bankruptcy bench in our district, we all get a chance to see what they do day after day on the bench listening to the endless "parade of horribles" making decisions that affect lives in a serious and grave way.

I wonder what the dinner table conversation is like in their house. Maybe the bankruptcy bar should offer their members group counseling.
I know I could use it.

Adversary Complaint or Motion: How to Prosecute Contempt Proceedings in Bankruptcy

by: Lewis M. Killian, Jr.,
Berger Singerman LLP

All too often, after a debtor receives his or her discharge in bankruptcy and after the case has been closed, a creditor whose debt has been discharged does something which may appear to constitute an effort to collect that debt. This may range from the sending of an informational account statement by the mortgagee on a home surrendered in the bankruptcy, filing a proof of claim in a subsequent bankruptcy case, to filing of a lawsuit to collect the discharged debt.

The standard response to such creditor action is for the former debtor to initially move under Section 350(b) of the Bankruptcy Code to reopen a closed case based on a violation of the terms of his or her discharge. Under the miscellaneous Fee Schedule issued pursuant to 28 U.S.C. 1930, the court may not collect a fee for the reopening of the case.

The procedural rub comes once the case has been reopened. It has been common for many debtors' attorneys to file an adversary proceeding against the creditor seeking damages for violation of the discharge injunction. Some, on the other hand, file a motion for contempt and the matter proceeds as a contested matter under the provisions of Bankruptcy Rules 9014 and 9020. While the issue of the proper form of action has not garnered a great deal of attention, as a bankruptcy judge for 26 years, it got my attention every time I reviewed my report of pending adversary proceedings and saw a substantial number of actions for discharge violations. While the vast majority of these cases settled, due to the procedures to be followed in adversary proceedings, they took much more time (and attorney's fees) to reach conclusion than in motion practice.

While some courts, notably the Second Circuit in *Kalikow v. Solow (In re Kalikow)*, 602 F.3d 82 (2d Cir. 2010) have held that it is permissible to bring an enforcement action by motion, until recently, only the Ninth Circuit in *Barrientos v. Wells Fargo Bank, N.A.* 633 F3d 1186 (9th Cir. 2011) has mandated parties to proceed by motion. Those courts in Florida which have addressed the issue directly have, in essence, said "no harm, no foul" in allowing discharge violations to be prosecuted via adversary proceedings instead of by motion. Thus, in *In Re Wynne*, 422 B.R. 763 (Bankr. M.D. Fla. 2010), the court denied the defendant's motion to dismiss an adversary complaint for a discharge violation holding that as long as the debtor alleged the essential elements of contempt, the matter could proceed.

Likewise, in *Atkinson v, Green Tree Servicing LLC (In Re Atkinson)*, Adv. No. 12-05025-KKS, (Bankr. N.D. Fla. December 18, 2012), the court denied the defendants' motion to dismiss the adversary proceeding on the ground that relief could only be sought by motion. The court acknowledged that action could have been initiated by motion, but that in an adversary proceeding, parties receive due process and are provided procedural safeguards that may not be provided under motion practice.

Without being asked to do so, the Eleventh Circuit, put this issue to rest in *Green Point Credit LLC v. McLean (In Re McLean)*, Case No. 14-14002, 2015 WL 4480920, at *1 (11th Cir. July 23, 2015), in considering an appeal of a judgment awarding sanctions in an adversary proceeding for violation

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of the discharge injunction. After discussing jurisdictional issues and the proper measure of the sanctions which the court could impose, the court remanded the case for further proceedings to revisit the sanctions award.

After concluding that the case should be remanded, the court stated "We conclude with an observation that the form of the instant action was improper and should be modified on remand." Id. at *9. The court went on to discuss the difference between adversary proceedings under Bankruptcy Rule 7001 and contested matters noting that the differences do bear on the rights of the litigants. Contested matters under Rule 9014 are subject to less elaborate procedures than are adversary proceedings and the burden of proof for a finding of civil contempt is clear and convincing evidence as opposed to the preponderance of the evidence standard typical in civil actions. Although the form of action was defective, the court noted that the defect was not jurisdictional. On remand, the court directed the district court to instruct the bankruptcy court to convert the adversary proceedings to a contested matter.

Any confusion which may have existed regarding how to proceed has now been cleared up by the Eleventh Circuit's instructions in *McLean*. While contempt actions should proceed by motion, this does not mean that the protocol safeguards provided in the rules governing adversary proceedings are absent. Rule 9014 directs that unless otherwise ordered by the Court, many of the rules for adversary proceedings under Part VII also apply in contested matters, and the court may direct that one or more of the other rules shall apply. Thus, without losing any of the protections of the adversary rules, the use of the more streamlined procedures will result in speedier and less expensive resolutions of discharge violations; and happier clients on both sides.

Bankruptcy Care Arithmetic: How to "Count" Creditors In An Involuntary Case

by: Linda Zhou,
Buchanan Ingersoll & Rooney PC

The Bankruptcy Code offers several advantages for the creditors of financially distressed individuals and corporations, including federal court supervision of a possibly untrustworthy debtor and mitigation of the risk of potential or ongoing fraudulent transfers. It is therefore not surprising that creditors may consider filing an involuntary bankruptcy petition against those from whom they are owed money. Section 303 of the Bankruptcy Code establishes the process and requirements for filing an involuntary petition. One of the preliminary determinations is the number of creditors who hold claims against the alleged debtor.

Specifically, pursuant to Section 303(b), the number of petitioning creditors required to commence an involuntary case depends on the number of "holder[s] of a claim against [the alleged debtor] that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount." The general rule is that an involuntary case may be commenced by three or more holders of such claims. If, however, there are fewer than twelve "such holders," excluding insiders of the alleged debtor and transferees of voidable transfers, then an involuntary case may be commenced by only one "such holder."

Not surprisingly, the statutory language of Section 303(b) has generated a plethora of case law concerning the types of creditors which constitute "holders" of claims against the alleged debtor, and therefore the number of petitioning individuals and/or entities needed to commence an involuntary bankruptcy case. This article describes a few common types of creditors an alleged debtor is likely to possess at the time of an involuntarily bankruptcy filing. It discuses whether such creditors are counted toward the "numerosity requirement" as the "holders" of claims against the alleged debtor under Section 303(b).

Small Recurring Creditors

In the Eleventh Circuit, small, recurring debts on which the alleged debtor stays current are not counted when determining whether an alleged debtor possesses twelve or more creditors under 11 U.S.C. § 303(b).[1] Examples of such debts include utility bills, car insurance payments, rent, groceries, and other typical household expenses.

The rationale is that such small creditors are practically secured, as their bills must be paid monthly before further necessities can be obtained. It was therefore not the intent of Congress to allow these types of recurring bills to defeat the use of bankruptcy by a large creditor should these small creditors refuse to join in an involuntary petition.

Interestingly, other courts around the country hold the other way, finding that small recurring creditors are to be counted as part of the alleged debtor's number of creditors under 11 U.S.C. § 303(b), reasoning that nothing in the Bankruptcy Code supports a contrary result.[2]

De *Minimus* Claims

De *minimus* claims are also excluded from the creditor count. While these types of creditors are often also excluded by virtue of being both small and recurring creditors, at least a few cases suggest that creditors who are owed *de minimus* amounts are to be excluded, regardless of whether they are small, recurring creditors.[3]

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1 *Denham v. Shellman Grain Elevator, Inc.*, 444 F.2d 1376 (5th Cir. 1971); *Isbell v. DM Records, Inc.*, 529 B.R. 793 (S.D. Fla. 2015); *In re Atwood*, 124 B.R. 402 (S.D. Ga. 1991); *In re Smith*, 243 B.R. 169 (Bankr. N.D. Ga. 1999); *In re Smith*, 123 B.R. 423 (Bankr. M.D. Fla. 1990). (Note: *In Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions the former Fifth Circuit handed down prior to the close of the business day on September 30, 1981.)
2 See, e.g., In re Rassi, 701 F.2d 627 (7th Cir. 1983); In re Okamoto, 491 F.2d 496 (9th Cir. 1974); Theis v. Luther, 151 F.2d 397 (8th Cir. 1945); In re Elsa Designs, Ltd., 155 B.R. 859 (Bankr. S.D.N.Y. 1993); In re Hoover, 32 B.R. 842 (Bankr. W.D. Okla. 1983).

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Recipients of Voidable Transfers

Section 303(b)(2) specifically excludes from the numerosity requirement "any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title." Thus, creditors who were paid by the debtor post-petition for debts incurred prepetition are excluded from the creditor count. Such creditors constitute recipients of a post-petition preference under Section 549(b).[4]

The reasoning is that the "gap period," or the period between when the involuntary petition is filed and the order of relief is entered, is commonly used by a petitioning creditor to solicit other petitioning creditors. The alleged debtor's paying off other creditors during the gap period defeats any incentive the other creditors may have to join the petition. In fact, it gives such creditors something to lose—a voidable transfer—should the bankruptcy case proceed. As a result, creditors who are paid post-petition for their prepetition claims are typically not counted.

The Alleged Debtor's Attorneys

Section 303(b)(2) explicitly excludes from the creditor count employees and insiders of the alleged debtor. The term "insider" is conveniently defined in Section 101(31) of the Bankruptcy Code. One particular type of creditor, however, is often the focus of a petitioning creditor's attention: the alleged debtor's own attorneys. At least some cases suggest that currently-engaged attorneys, representing the alleged debtor in either the involuntary bankruptcy case or in a pending state court action, are not to be counted by virtue of their status as insiders of the alleged debtor; former attorneys whose representation had ceased, however, should be counted.[5] The rationale is that former attorneys most likely would not be called upon to take a position adverse to that of the alleged debtor during the involuntary proceeding, and should be free to pursue the collection of their attorneys' fees against the alleged debtor, just as any other creditor.

The takeaway is that before filing an involuntary bankruptcy petition, creditors should carefully analyze which of the alleged debtor's creditors do or do not count toward the numerosity requirement, as this analysis will determine whether a single petitioning creditor should find at least two other creditors to join in the involuntary petition. Such diligence and forethought may prevent a lengthy battle in bankruptcy court and, perhaps more importantly, an award of sanctions against a petitioning creditor should the involuntary case ultimately be dismissed.

3 Denham v. Shellman Grain Elevator, Inc., 444 F.2d 1376 (5th Cir. 1971) (excluding from the creditor count claims of $5.00 to $25.00); In re CorrLine Int'l, LLC, 516 B.R. 106 (Bankr. S.D. Tex. 2014) (finding that $275.00 should be the threshold amount for de minimus claims; creditors owed less than $275 are de minimus and should not be counted); In re Green, 2007 Bankr. LEXIS 1296 (Bankr. W.D. Tex. Apr. 9, 2007) (court refused to count a debt in the amount of $24.50 on the round that it was a de minimus claim); In re Smith, 123 B.R. 423 (Bankr. M.D. Fla. 1990) ("This Court is therefore satisfied that de minimis debts owed by the Debtor on the date of filing are not to be considered in determining the number of creditors needed to join in an involuntary petition against the Debtor under § 303(b).").

4 In re Atwood, 124 B.R. 402 (S.D. Ga. 1991); In re Stewart, 2015 Bankr. LEXIS 856 (Bankr. S.D. Ala. Mar. 18, 2015) (court refused to count prepetition creditors who were paid during the gap period because "these payments would constitute voidable transfers"); In re CorrLine Int'l, LLC, 516 B.R. 106 (Bankr. S.D. Tex. 2014); In re Evans, 1997 Bankr. LEXIS 1073 (Bankr. E.D. Va. June 6, 1997); In re Skye Marketing Corp., 11 B.R. 891 (Bankr. E.D.N.Y 1981).

5 See In re Smith, 415 B.R. 222 (Bankr. N.D. Tex. 2009) (noting that although the general rule is that attorneys are not automatically considered to be insiders under the Bankruptcy Code, the court refused to count two law firms who were currently representing the debtor in the involuntary bankruptcy proceeding because they were considered insiders); In re Green, 2007 Bankr. LEXIS 1296 (Bankr. W.D. Tex. Apr. 9, 2007) (debtor's former bankruptcy attorney in her prior Chapter 7 proceeding was counted); In re Rimell, 111 B.R. 250 (Bankr. E.D. Mo. Feb. 5, 1990) (holding that definition of "insider" includes an attorney who is currently defending the client in an involuntary bankruptcy petition).

Eleventh Circuit Upholds Use of Bar Orders in *Seaside Engineering*, Rendering Bar Orders Permissible in Settling Claims and Reorganization Plans

by: Steven R. Wirth and Sunny S. Sidhu, Akerman LLP

Introduction

In *Seaside Engineering & Surveying, Inc.*, 780 F.3d 1070 (11th Cir. 2015), the Eleventh Circuit Court of Appeals (the "Court of Appeals") expressly held, in line with the majority of Circuits, that Bar Orders are permissible under Section 105(a) of the Bankruptcy Code. The Court of Appeals' decision, when read in combination with its prior decision in *Munford v. Munford (In re Munford)*, 97 F.3d 449 (11th Cir. 1996), indicates that Bar Orders are permitted both with regard to settling claims and also with regard to furthering a debtor's reorganization pursuant to a chapter 11 plan. The *Seaside* decision sets forth a detailed set of factors and considerations for bankruptcy courts to use in evaluating Bar Orders and provides parties with a number of valuable lessons as to when such Bar Orders will or will not be permissible.

Background on Bar Orders

The Federal Circuit Courts of Appeal have split on whether releases, or injunctions against, claims against non-debtor parties through a bankruptcy proceeding – frequently referred to as "Bar Orders" – are permissible. As acknowledged by the Court of Appeals, the Fifth, Ninth, and Tenth Circuits[1] prohibit Bar Orders on the ground that Section 524(e) of the Bankruptcy Code does not permit such releases.[2] The majority rule, however, is in favor of permitting Bar Orders, as the Second, Third, Fourth, Sixth, Seventh (and now Eleventh) Circuits have all held that Bar Orders are permitted, while the First and DC Circuits have indicated approval of such view.[3] The view in favor of Bar Orders generally finds that Section 105(a) of the Bankruptcy Code[4] permits for such orders.

Even prior to *Seaside*, the Eleventh Circuit had indicated approval of the majority view. *See Munford*, 97 F.3d 449. In *Munford*, the Court of Appeals upheld a Bar Order in connection with a settlement of various claims for breach of fiduciary duty, finding that such Bar Orders were permitted where they are "integral to settlement in an adversary proceeding." *See Id*. at 455. The Eleventh Circuit also required that courts evaluate whether the settlement is "fair and equitable" by considering "the interrelatedness of the claims that the bar order precludes, the likelihood of nonsettling defendants to prevail on the barred claim, the complexity of the litigation, and the likelihood of depletion of the resources of the settling defendants." *Id*.[5]

In *Munford*, after suing several defendants for breach of fiduciary duty, the debtor settled with one of the defendants; however, the defendant refused to settle unless the bankruptcy court entered an order enjoining all of the other defendants from pursuing any contribution or indemnity claims against the settling defendant. *See Id*. at 452. The bankruptcy court entered the order, and the Court of Appeals upheld entry of the order, finding that the settling defendant would not have entered into the settlement without the Bar Order and therefore the Bar Order was integral to settling the adversary proceeding at hand. *See Id*. at 455.

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1 See, e.g., In re Vitro S.A.B. DE C.V., 701 F.3d 1031 (5th Cir. 2012); In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995); In re Western Real Estate Fund, Inc., 922 F.2d 592 (10th Cir. 1990).

2 Section 524(e) of the Bankruptcy Code provides that "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

3 See, e.g., In re Drexel Burnham Lambert Group, Inc., 960 F.2d 285 (2d Cir.1992); In re Continental Airlines, 203 F.3d 203 (3d Cir.2000); In re A.H. Robins Co., Inc., 880 F.2d 694 (4th Cir.1989); In re Dow Corning Corp., 280 F.3d 648 (6th Cir.2002); In re Airadigm Communications, Inc., 519 F.3d 640 (7th Cir. 2008); In re Monarch Life Ins. Co., 65 F.3d 973 (1st Cir.1995); In re AOV Industries, 792 F.2d 1140 (D.C.Cir.1986).

4 Section 105(a) of the Bankruptcy Code states in relevant part that "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code.

5 For these propositions, the Court of Appeals cited In re U.S. Oil & Gas Litig., 967 F.2d 489, 493-96 (11th Cir. 1992).

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The Court of Appeals' decision in *Munford* was limited to the context of settlement of adversary proceedings as it found the Bar Order permissible under Section 105(a) of the Bankruptcy Code when read together with Federal Rule of Bankruptcy Procedure 7016.[6] *See Id*. at 455. The Court of Appeals noted that public policy strongly favored pretrial settlement of litigation, that litigation costs were particularly burdensome on bankruptcy estates, and that Bar Orders played an "integral role in facilitating settlement" because defendants would not settle unless they were assured that they would be protected against efforts of other parties to shift their losses to the settling defendants through litigation against the settling defendants. *See Id*.

Court of Appeals' Holding in Seaside

While bankruptcy courts within the Eleventh Circuit and Florida have entered Bar Orders on numerous occasions since the Court of Appeals' decision in *Munford*, including Bar Orders outside of the adversary proceeding context, the Court of Appeals had never formally ruled on whether Bar Orders were permitted outside of such context.[8] The Court of Appeals resolved this issue in Seaside where it expressly aligned with the majority view and found that under Section 105(a) of the Bankruptcy Code, Bar Orders may be issued at least in "those unusual cases in which such an order is necessary for the success of the reorganization [and where] such an order is fair and equitable under all the facts and circumstances." *Seaside*, 780 F.3d at 1078.

In doing so, the Court of Appeals endorsed the factor test provided by the Sixth Circuit Court of Appeals in *In re Dow Corning Corporation*, 280 F.3d 648, 658 (6th Cir. 2000): whether "(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor; (4) The impacted class, or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions." *Seaside*, 780 F.3d at 1079 (citing *Dow Corning*, 280 F.3d at 658).

The Court of Appeals noted, however, that these factors were nonexclusive, and that bankruptcy courts should have the discretion to determine which factors are relevant in each case. *See Seaside*, 780 F.3d at 1079. It also stated that Bar Orders should only be used "cautiously and infrequently" and "only where essential, fair, and equitable." *Id*.[9]

Court of Appeals' Application in Seaside

Unlike *Munford* (which resolved litigation), *Seaside* dealt with a Bar Order that was included in the debtor's proposed reorganization plan. *See Id*. at 1076. Essentially, the Bar Order provided that no claim holder, interest holder, or party in interest could pursue any claims against the debtor, reorganized debtor, or any of its officers or directors for matters arising out of the bankruptcy case or the plan, other that claims based on fraud, gross negligence, or willful misconduct. *See Id*. The reorganized debtor was to be managed by several engineers who were the principal shareholders of the debtor, which was in the civil engineering business. *See Id*. at 1074-75.

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6 Federal Rule of Bankruptcy Procedure 7016 incorporates Federal Rule of Civil Procedure 16, which at the time stated that courts could take appropriate action with regard to "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." See Munford, 97 F.3d at 454-55.

7 See, e.g., In re Superior Home & Investments, LLC, 521 Fed. Appx. 895 (11th Cir. 2013); In re Fundamental Long Term Care, Inc., 492 B.R. 571 (Bankr. M.D. Fla. 2013); In re Rothstein Rosenfeldt Adler, P.A., 2010 WL 3743885 (Bankr. S.D. Fla. Sept. 22, 2010); In re S&I Investments, 421 B.R. 569 (Bankr. S.D. Fla. 2009); In re Van Diepen, P.A., 236 F. Appx. 498 (11th Cir. 2007).

8 See, e.g., In re J.C. Householder Land Trust #1, 501 B.R. 441 (Bankr. M.D. Fla. 2013); In re Safety Harbor, 456 B.R. 703 (Bankr. M.D. Fla. 2011); see also S&I Investments, 421 B.R. 569 (ordering that any Chapter 11 plan confirmed in the case would contain the provisions of a Bar Order that was approved with regard to a settlement).

9 The Court of Appeal relied on the Fourth Circuit Court of Appeal's decision in Behrmann v. National Heritage Foundation, 663 F.3d 704 (4th Cir. 2011) for these considerations.

Eleventh Circuit Upholds Use of Bar Orders

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The Court of Appeals upheld the proposed Bar Order. *See Id*. at 1079. In doing so, the Court of Appeals found that the Bar Order complied with the factor test previously discussed. *See id*. at 1079-1081 (applying the factor test). Several of the Court's findings are notable. First, the Court found a sufficient "identity of interests" between the debtor and the releasees, noting that the releasees consisted of the engineers and other former principals of the debtor and that the reorganized debtor's business was "completely dependent upon the skilled labor of the releasees, its professional surveyors and engineers…." *Id*. at 1079. The Court found that without the Bar Order, these releasees would have been defendants to further litigation that would have resulted in them "expend[ing] their time in defense of litigation as opposed to focusing on their professional duties for the reorganized entity." *Id*. at 1080.

The Court noted that it was applying the "identity of interest" factor "flexibly," noting further that the factor would even have been met in *Munford*, even though the identity of interest there was closer between the settling defendants and non-settling defendants than between the settling defendants and the debtor in *Seaside*, because the assets of the debtor would have been depleted without a Bar Order. *Id*. at 1080 and n. 9. The Court of Appeals also found that the second factor, contribution of substantial assets to the reorganization, was met through the services and labor that the releasees were providing, which were the "life blood of the reorganized debtor." *Id*. at 1080. For similar reasons, the Court found that the third factor – the essentialness of the Bar Order for reorganization – was met. Therefore, the Court of Appeals gave significant weight to the fact that the proposed releasees were providing services that were critical to the operation of the reorganized debtor's business.

The Court did find that some other factors were not met, such as the fourth factor – whether the impacted class voted in favor of the proposed plan – but it noted that all other classes had voted in favor of the plan unanimously. *See Id*. at 1080. The Court also generally considered whether the Bar Order was "fair and equitable," noting in that the case was a "death struggle" where a disproportionate amount of time had been spent for a debtor that was worth only $960,000. *Id*. at 1081. The Court also noted that the bankruptcy court had prohibited the debtor from litigating against a party whose claims would be limited by the Bar Order, thereby preventing an "asymmetrical benefit" for the debtor. *Id*. at 1081. It additionally noted that the Bar Order was "narrowly limited in scope" as it was only limited to claims arising out of the Chapter 11 case and contained an exception for claims based on fraud, gross negligence, or willful misconduct. *Id*.

Implications

The Court of Appeals' decision in *Seaside* makes clear that Bar Orders are permissible under Section 105(a) in the Eleventh Circuit. While the Court in *Seaside* indicated that Bar Orders should be granted only in limited circumstances, it appears clear that such Bar Orders will be permitted in the reorganization context where the non-debtors who benefit from the Bar Order provide critical services for the debtor. Such Bar Orders are more likely to be upheld where they are narrowly crafted, limited to claims arising out of the bankruptcy case itself and contain exceptions for claims based on fraud, gross negligence, or willful misconduct. Moreover, *Seaside*, when read together with *Munford*, indicates that Bar Orders are likely to be granted where the Bar Order is necessary to obtain a settlement with a defendant, especially where lack of settlement is likely to deplete the assets of the debtor and the claims to be enjoined are related to the claims being settled.[10]

10 Seaside has yet to be expressly cited by any other court, so the door remains open as to how bankruptcy courts in the Eleventh Circuit will apply the factor test as articulated by the Court of Appeals. However, because the Court of Appeals borrowed the factor test from the Sixth and Fourth Circuit Courts of Appeal, prior case law citing the tests may be informative in gauging how bankruptcy courts will apply the Seaside decision.

People on the Go

Scott Lilly Joins Florida Health Law Center
Scott R. Lilly is now a partner with Florida Health Law Center in its Tampa Office. Scott is a trial lawyer focusing in the areas of healthcare litigation, healthcare contract litigation, healthcare fraud and abuse litigation, real property litigation, commercial litigation, creditors' rights and bankruptcy litigation.

Jodi Cooke Joins Stichter Reidel
Jodi Daniel Cooke joined Stichter, Riedel, Blain & Postler P.A. on September 1, 2015, in the firm's newly-opened Pensacola office. Ms. Cooke regularly represents debtors, committees, creditors, trustees, purchasers, fiduciaries, and other parties in bankruptcy cases, assignments for the benefit of creditors, receiverships, and out-of-court workouts. She has been particularly active in fiduciary representation in state and federal courts, and also handles civil litigation matters, principally in connection with debtor-creditor disputes. She is certified by the Florida Supreme Court to mediate circuit civil cases in Florida state courts and is approved by the Bankruptcy Court for the Northern District of Florida to mediate mortgage modification disputes. She is licensed to practice law in Florida, Alabama, and Texas.

Robbie Colton is Named President of HCBF
Trenam Law is pleased to announce that Roberta ("Robbie") Colton has been named President of the Hillsborough County Bar Foundation (HCBF). The HCBF has been established since 1996 and serves as a charitable entity of the Hillsborough County Bar Association (HCBA). The mission of the HCBF is to "promote projects and programs" that provide legal assistance to the poor, disabled and disadvantaged in our community. Robbie has served on the Board of Trustees since 2001. Robbie is a shareholder of the firm and is a member of the Bankruptcy, Creditors' Rights & Insolvency Practice Group. She has served in various leadership roles within the firm and is currently a member of the firm's Executive Board. Robbie is based in the Tampa office.

Meet Kathy Deetz: New Deputy-In-Charge for the Tampa Division
Kathy Deetz, Deputy-In-Charge for Orlando, has also also been named Deputy-In-Charge for Tampa. A few facts about Kathy:

Tampa office hours: Time to be split between the Tampa and Orlando offices.
I plan to be in the Tampa office 2-3 days a week.

Years with the clerk's office: 27 years, which includes time in the Northern and Eastern District Bankruptcy Courts in California.

Family: Husband and 2 daughters. My oldest daughter, Faith is a Junior at FGCU in Ft. Myers.

Hobbies: Running

Congratulations to Amanda Chazal now known as Amanda Smith!
Congratulations to Stichter, Riedel, Blain & Postler, P.A. attorney Amanda Chazal on her nuptials to Matt Smith which took place on October 3 in Sarasota, Florida, at Bay Preserve at Osprey. Amanda Chazal Smith's email address starting the first of the new year will be asmith@srbp.com.

New hire? Promotion? Birth announcement? Share with your colleagues in the next edition by emailing these personal and career updates to Lori Vaughan at lvaughan@trenam.com

The New Administrative Rule on Electronic Exhibits: Getting Rid of The MonsterMash of Paper

by: Becky Ferrel-Anton,
Stichter, Reidel, Blain & Postler, P.A.

Effective August 3, 2015, in the Middle District, a lot less paper is going to be wasted in the Bankruptcy Court during the course on an evidentiary hearing or trial. For cases in which all parties are represented by counsel, exhibits must now be exchanged by the parties and submitted to the Bankruptcy Court electronically. *Administrative Order FLMB-2015-5, Amended Administrative Order Supplementing Local Rule 9070-1 to Provide for the Submission of Exhibits in Electronically Stored Format* **("Admin. Order FLMB-2015-5")**. Admin. Order FLMB-2015-5 does not apply in cases in which one of the parties is pro se.

Admin. Order FLMB-2015-5 requires that each exhibit submitted electronically be numbered commencing with Arabic numeral 1 and preceded by an 8 1/2 x 11" Exhibit Cover Sheet. This is consistent with Appendix B to Local Rule 9070-1. Each separate exhibit, together with its cover sheet, shall then be electronically stored in an individual PDF file with a unique identification name and number. An example of this would be "Debtor's Exhibit 1." The individual PDF files should be contained in a single folder.

A separate Exhibit List must be prepared in the form required by Appendix A to Local Rule 9070-1. Each exhibit is to be listed in numerical order and include the case caption, identity of the party submitting the exhibits and columns with the headings "Exhibit Number," "Document Description," "Date Identified," "Date Admitted," and "With or Without Objection." The columns "Date Identified" and "Date Admitted" are to be left blank to be completed by the courtroom deputy. Two copies of the Exhibit List shall be provided to the courtroom deputy in paper form before the start of the hearing or trial. After the hearing or trial, the deputy is responsible for filing a completed Exhibit List on the case or adversary proceeding docket.

The exhibit list and all exhibits shall be filed electronically using the CM/ECF System's Electronically Stored Exhibit Upload by the time set forth in Admin Order Prescribing Procedures for Adversary Proceedings, FLMB-2014-10, for the exchange of exhibits. The CM/ECF filing shall effectuate a party's delivery of exhibits to an opposing party, obviating the need to deliver a set of paper exhibits.

Exhibits filed electronically constitute the official exhibits for the purpose of the hearing or trial. However, if exhibits are to be used during the examination of a witness, at the commencement of the examination, that party shall still provide paper copies of those exhibits to the Court, the witness and other parties. These paper exhibits (unless removed from the courtroom by a party) will be disposed of following the trial or hearing by the courtroom deputy.

If additional exhibits that were not uploaded via CM/ECF prior to a trial or hearing are introduced into evidence during the course of proceeding, a party must file a complete set of such additional exhibits via CM/ECF with the title "[Party's Name] Additional Exhibits" within seven days following the conclusion of the proceeding.

In compliance with Local Rule 1001-3, social security numbers, names of minor children, dates of birth and financial account numbers (other than the last four digits) must be redacted from all exhibits submitted to the Bankruptcy Court, whether in paper or electronic format.

Admin Order FLMB-2015-5 also includes procedures for use of exhibits submitted in paper format. At the beginning of an evidentiary hearing or trial, two copies of the Exhibit List and the exhibits to be introduced into evidence in paper format shall be delivered to the courtroom deputy. Original exhibits shall not be stapled or permanently bound. Additional copies of the exhibits, which

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Electronic Exhibits

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may be stapled or placed in binders or folders, shall be provided for use by witnesses, to opposing counsel, and the judge. Parties should confirm the preferred procedure for preparing exhibit binders with the assigned judge's chambers. Any exhibits introduced at an evidentiary hearing or trial that are not pre-marked shall be tendered to and marked by the courtroom deputy as they are presented in evidence.

Objects other than paper documents to be introduced into evidence shall be photographed, accompanied by an Exhibit Cover Sheet, and listed on the Exhibit List. Paper documents which are larger than 8 1/2 x 11" shall be listed on the Exhibit List and accompanied by an additional copy reduced to 8 1/2 x 11". Exhibits Cover Sheets must be attached to both the original physical exhibit and the photograph or reduced copy of the exhibit ("substitutes"), using the same exhibit number for the original and the substitute. Unless the Court orders otherwise, at the conclusion of the trial or hearing, if the Clerk has custody of substitutes, the Clerk will return the corresponding original exhibit to counsel. If an appeal is taken, only substitutes will be included in the record on appeal.

The Clerk may dispose of any unclaimed paper exhibits unless the Clerk is notified by a party that it intends to reclaim that party's exhibits within 30 days after the later of the entry of an order or judgment concluding the matter or proceeding, the entry of an order determining any post-judgment motions if no appeal is pending, or if a notice of appeal is filed, the filing of the mandate. Parties shall bear all costs associated with reclaiming exhibits.

New Local Rules Effective July 1, 2015

by: Megan Murray,
Trenam Law

L.R.1001-2 Case Management and Electronic Filing System – CM/ECF
New section (c) of the rule requires Electronic Filing Users to convert papers maintained in electronic format from the word processing original to Portable Document Format (PDF). This does not apply to papers originally in paper form, such as client records or exhibits. In addition, section (d) reduces the time during which Electronic Filing Users must retain paper copies bearing original signature from four years to two years.

L.R. 1009-1 Amendments to Lists & Schedules
Amended section (e) requires that the Notice of Deadline to File Proof of Claim, if any, be served upon newly added creditors in amended Schedules D, E and F.

L.R. 1073-1 Assignment of Cases
This amendment clarifies that a successive case filed by or against a debtor will be assigned to the judge assigned to the previously filed case unless the successive case is filed in a different Division. In that event, the case will not be reassigned to the Division of the previous case, but parties in interest may move for a transfer of venue to the original venue and assigned judge. The amendment also clarifies that the Chief Judge shall designate the judge to whom the Clerk shall assign Fort Myers cases.

L.R. 1074-1 Corporations and Other Non-Individual Persons
This amendment incorporates the Court's current practice permitting agents, such as employees or principals, of non-individual persons (e.g., corporations, limited liability companies, etc.) to attend meetings of creditors and, with the Court's permission, other hearings on objections to claims and other limited matters.

L.R. 2015-1 Trustee Expenditures
The amendment in section (c) authorizes Chapter 7 trustees to pay any unpaid filing fees from available funds in cases where the debtor is either not required to pay a filing fee or has failed to do so.

L.R. 2016-1 Compensation of Professionals
This amendment provides that when fee applications are served using the negative notice procedures of Local Rule 2002-4, the negative notice legend and the title of the application shall be located on the first page of the application, and the Chapter 11 Fee Application Summary [previously titled the Chapter 11 Fee Application Cover Page] shall be the second page of the application.

L.R. 2092-1 Appearances by Law Students
This amendment eliminates the requirement that qualified law students comply with applicable requirements promulgated by the Supreme Court of Florida and the Florida Bar. This amendment also clarifies that, in addition to the requirement that the supervising lawyer or a lawyer with the same law firm as the supervising lawyer review all papers prepared by the qualified law student, the papers shall be filed using that lawyer's CM/ECF User ID.

L.R. 3018-1 Ballots – Voting on Plans
The amendment to section (d) prescribes a form of ballot tabulation available on the Court's website and specifies that the ballot tabulation shall be filed with the Court two days prior to the confirmation hearing.

L.R. 3071-1 Applications for Administrative Expenses
The amendment to section (b) specifies that applications for administrative expenses in Chapter 11, 12, and 13 cases must be filed before the later of 21 days in advance of the confirmation hearing, or with respect expenses arising after the original deadline, 21 days in advance of a continued confirmation hearing, and 30 days after the last event giving rise to the claim.

L.R. 4008-1 Reaffirmation Agreements
This new rule incorporates procedures adopted by the Court as set forth in the memorandum to counsel from Chief Judge Jennemann dated August 27,

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New Local Rules

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2014 (available under Emailed Blast Notifications on the Court's website).

L.R. 9004-2 Caption – Papers, General
This amendment is primarily stylistic, but Section (b) clarifies that motions filed with the Court shall request only one form of relief unless the request seeks alternative forms of relief under the same provision of the Bankruptcy Code or Federal Rules of Bankruptcy Procedure.

L.R. 9011-4 Signatures
The amendment to section (a) requires attorneys to include their telephone number in their signature block and eliminates the requirement that they include their fax number.

L.R. 9013-1 Proof of Service
This new rule substantially replaces abrogated Local Rules 7005-1 (Proof of Service – Adversary Proceedings) and 9014-1 (Service and Proof of Service – Contested Matters).

L.R. 9016-1 Subpoenas before Trial
This new rule requires subpoenas before trial to be filed with the Court in addition to being served on each party to the adversary proceeding or contested matter.

L.R. 9027-1 Removal/Remand
This amendment requires the removing party, in addition to filing the state court record with the notice of removal, to also file the operative pleadings, etc. as separate docket entries.

L.R. 9072-1 Orders – Proposed
This amendment includes section (b)(1) and refers to the "Accompanying Orders" list posted on the Court's website.

Changes to the following local rules were primarily stylistic:
L.R. 2090-1 Attorneys -- Admission to Practice
L.R. 4003-2 Lien Avoidance
L.R. 5005-1 Filing Papers – Requirements
L.R. 5011-1 Withdrawal of Reference
L.R. 5072-1 Courtroom Decorum
L.R. 7033-1 Interrogatories to Parties
L.R. 7055-2 Judgments by Default
L.R. 8001-1 Notice of Appeal
L.R. 8003-1 Notice of Appeal
L.R. 8007-1 Completion of Record – Appeal
L.R. 8009-1 Completion of Record – Appeal
L.R. 9001-1 Definitions

The following Local Rules were abrogated because they have been superseded by current CM/ECF practice or incorporated by newly promulgated or amended rules:
L.R. 1002-1 Filing of the Petition
L.R. 1019-1 Conversion - Procedure Following Chapter 11 Confirmation
L.R. 5003-1 Electronic Documents - Entry of
L.R. 5003-2 Court Orders - Entry of
L.R. 5005-2 Filing of Petition and Other Papers
L.R. 5005-3 Filing Papers - Size of Papers
L.R. 7005-1 Proof of Service – Adversary Proceedings and Contested Matters
L.R. 7005-3 Service by Electronic Means Under Rule 5(b)(2)(E)
L.R. 9014-1 Service and Proof of Service - Contested Matters
L.R. 9033-1 Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings
L.R. 9036-1 Notice by Electronic Transmission; Service by Facsimile
L.R. 9070-2 Attachments - Electronic Submission of Exhibits

Reflections From A Bankruptcy Court Intern

by: Morgan Constable

Five things that have surprised me most:

1. People will pour their hearts out to you in open court. When financial well-being or professional interests are at stake, people will reveal their most private details in order to plead their case. This goes for attorneys and clients alike. It's important to bring some empathy to the table when dealing with people whose resources and livelihood are at stake.

2. Attorneys and judges are continuously learning. One of the most valuable things I learned is that attorneys and judges are constantly facing legal challenges and learning from them along the way. No one comes into the practice equipped with the knowledge it takes to handle every situation flawlessly.

3. Making mistakes are okay, failing to exercise due diligence is not. Although it is okay to not know what to do or how to apply the rules in a given circumstance, it is important to always exercise good faith. It is obvious when someone doesn't prepare for court. It's a little embarrassing.

4. Asking questions is encouraged. It is your duty to ask a question if you do not know the answer to a legal issue before you act on behalf of your client. It's comforting to see firsthand how the legal community can be so supportive among one another. The practice of law can be daunting and making a poorly influenced move doesn't come without mild to severe consequences. Luckily, there are plenty of resources to entertain when treading unfamiliar legal territory. Hillsborough County is full of educational seminars and "brown bags" where legal minds can come together and answer hard questions.

5. The legal community is a community of service first and foremost. This theme was ever present throughout my externship. I saw, in several courtrooms, situations where a party was too financially pressed to pay for legal counsel. Often times, judges reminded these parties of all of the resources available and granted continuances where possible in order for these individuals seek an attorney at an affordable rate or for free. Judges also encourage pro bono work to practicing attorneys in court when appropriate. I saw so many examples of incredible integrity.

January Luncheon

TBBBA

Tampa Bay Bankruptcy Bar Association

Consumer Luncheon Series

Don't Get Caught in a Quagmire!
Preparing a Consumer Case for Filing

Presented by: Cynthia Burnette, J. Steven Wilkes, & Nicole Peair

January 5, 2016 at Noon
5th Floor Training Room of the
Sam M. Gibbons United States Courthouse
Lunch will be provided

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September Happy Hour

Sitting as the Trier of Fact

by: John Emmanuel,
Buchanan Ingersoll & Rooney PC

I recently received a Summons to appear for jury duty. Much to my surprise, I was selected to serve on a jury in a criminal case. The defendant was charged with two counts, namely battery and drug possession.

At trial, the State called the alleged victim, a relative of the victim, and two police officers. The defendant waived his Fifth Amendment rights and testified in his own defense. Both the alleged victim and the defendant testified that the other started the physical altercation.

While I have tried numerous cases before a jury, it was eye opening to be sitting inside the jury box. While the case I sat on was a criminal trial, many of the lessons learned apply to civil cases, including both jury and non-jury civil trials.

When the jury retired to deliberate, I was selected to serve as the jury foreperson. The members of the jury took their duties very seriously and the deliberations were very collaborative.
Below are my "take aways" from my jury service. Because the deliberations of a jury are privileged, I will only comment below on my impressions as opposed to the comments and impressions of my fellow jurors.

1. Drop weak claims before trial. The possession count was weak because the State never had the substance tested by a laboratory. The State Attorney asked the jurors to use their common sense and life experiences to conclude it was in fact cannabis. This count appeared to me to be an "add on". Bringing this questionable possession claim with the battery claim diluted the State's presentation of evidence on the battery claim and was a distraction. If one of your claims is weak, you should consider dropping it prior to trial so that you do not detract from your stronger claims.

2. Burden of proof plays a large role. The burden of proof is a very significant factor when weighing the evidence. If you have a direct conflict in the evidence and neither witness is more credible then the other, the Plaintiff is going to lose. While the burden of proof is of course much lower in a civil case than a criminal case, it is still a very strong factor in favor of the defense.

3. Do not over promise in your opening. The defense attorney promised that the evidence would show certain things during the trial that never materialized. The State Attorney appropriately pointed out those shortcomings in his closing. Do not promise something in an opening that you cannot deliver on!

4. Exaggerated testimony affects credibility. One of the key witnesses for the State appeared to exaggerate and embellish her testimony about the altercation. Her exaggeration on some points, not corroborated by other witnesses, called her credibility into question as to the rest of her testimony. The exaggerations were totally unnecessary to establish a battery claim and backfired. Warn your witnesses not to "gild the lily" as Judge Paskay used to say.

5. Beware of ambiguous exhibits. The State put numerous photos into evidence. However, several of the photos could be interpreted to show different things. Exhibits that are subject to more than one interpretation are dangerous. Have someone unconnected to your case review your exhibits to point out how the other side may use your exhibits against you.

6. Closing should be succinct. Both side's closing arguments were too lengthy, especially coming after a long day of testimony. Closing arguments should generally be short and succinct. Use your closing argument to point out inconsistencies in the other side's case and to show why the other side's arguments are contradicted by common sense.
The verdict? Not guilty on both counts.


Happy Holidays
from the
Tampa Bay Bankruptcy
Bar Association
Adam Alpert, President
Kelley Petry, Vice President
Scott Stichter, Secretary
Suzy Tate, Treasurer

The Cramdown
PO Box 1438
Tampa, FL 33601