

[The 2005 Bankruptcy Amendments: New Traps Emerge for the Casual Practitioner](#)

Reasons why you should avoid taking bankruptcy cases.

[You Mean They Die? Estate Planning Professionals as Grief and Loss Workers](#)

Just what exactly is therapeutic jurisprudence?

[Using an Independent Contractor in Your Legal Practices](#)

It may make sense to delegate.

[General Practice/Solo Committee 101 Series](#)

Help the Young Lawyers Division compile useful information for beginning lawyers.

[The Balancing Act](#)

Our quarterly column on maintaining your sanity.

[Division News](#)

*“Be who you are and say what you feel, because those who mind don't matter and those who matter don't mind.”*

–Dr. Seuss

## Practice Tip

When you are preparing a witness to testify, there are certain things you can and can't encourage the witness to do. What are they?



### Legal Trivia

Who was the first woman ever admitted to any state bar in the United States?



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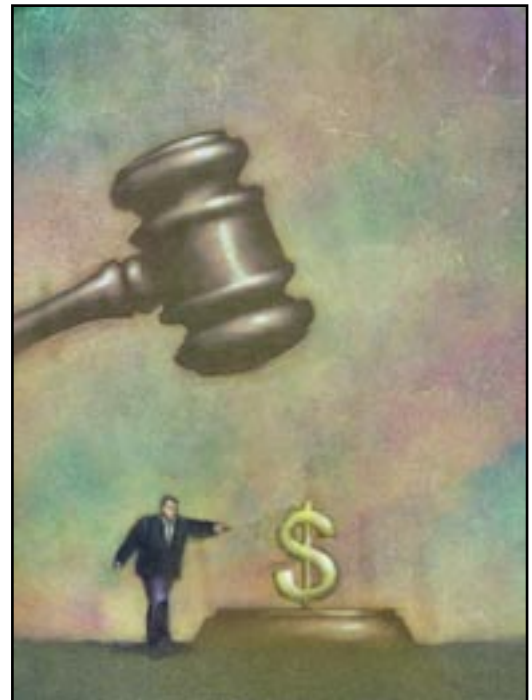
NewLawyer



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## The 2005 Bankruptcy Amendments: New Traps Emerge for the Casual Practitioner

By Hugh Ray, III



Bankruptcy, like neurosurgery, is not for the dilettante. That is true now more than ever. The Bankruptcy Abuse Prevention and Consumer Protection Act, most provisions of which went into effect October 17, 2005, will keep most general practitioners out of the area. Here is a list of some of the reasons you, as a general practitioner, may wish to reconsider ever filing a bankruptcy case again.

### Consumer Bankruptcy Traps

1. All lawyers who help people file consumer bankruptcies (even a handful) are now "debt relief agencies" and must state on all advertisements, web pages, and (possibly) letterhead

that "We are a debt relief agency. We help people file for bankruptcy under the United States Bankruptcy Code." Imagine the effect on your solo practice if you had to put that disclaimer on every e-mail and advertisement!

2. The new law institutes means testing and mandatory credit counseling for all consumer cases. This requires knowledge of a new and undeveloped area of the bankruptcy code. What is "income"? What counts as a "family" or "dependant"? If your client runs to you the day before foreclosure, it may be too late to get credit counseling, but without it your client will have the case dismissed, and refileing will not necessarily stop foreclosure. If your client fails the means-test, you are forced to file a Chapter 13, which usually requires a plan of reorganization that pays all nonessential income to creditors for five years. A client only gets one free chance at the automatic stay, so if it is not done right and the case is dismissed, the client is significantly prejudiced.

3. Personal liability is now imposed on all lawyers who file consumer cases if they fail to a) give specific statutory warnings to their clients in writing before filing the case or b) fail to independently investigate the debtor's claims of assets and liabilities. Independent investigation means that the debtor's counsel cannot trust the client's own sworn statement of assets and liabilities. However, general practitioners often lack the facilities to run asset searches, credit reports, and other investigations of their clients.

4. New rules of bankruptcy procedure have been published in every jurisdiction to implement the new bankruptcy amendments. They require filings of payment advices, previous three years' tax returns at the meeting of creditors, and so forth. These rules (and the local rules) impose deadlines for the affirmative duties of bankruptcy counsel. Accordingly, it is easy to miss a deadline.

## **Business Bankruptcy Traps**

1. One new trap appears for all business bankruptcies. If your business's debt is below \$2 million (or the unsecured creditors' committee is "not sufficiently active") the case becomes a "Small Business Chapter 11." Small business Chapter 11 cases are subject to strict reporting requirements on a monthly basis. These new reporting requirements are tougher than the statutory requirements imposed on large businesses. Frankly, the small business Chapter 11 is daunting for experienced bankruptcy counsel and requires significant lawyer time.

2. A solo practitioner cannot represent most debtors in Chapter 11 without finding the same traps that apply to consumers in Chapter 13. The Chapter 11 case requires virtually all disposable income to be paid to the creditors. That means the individual debtor cannot maintain his lifestyle, even if he has significant income. No more Mike Tyson Chapter 11's.

## **Conclusion**

Congress has taken a specialized area of the law and made it even more obtuse. Previously, small firm practitioners could assist companies in small Chapter 7 or Chapter 13 bankruptcies. Now, unless they are willing to change their entire practice to accommodate a few bankruptcy cases, the cases need to be referred to a specialist.

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## General Practice/Solo Committee 101 Series

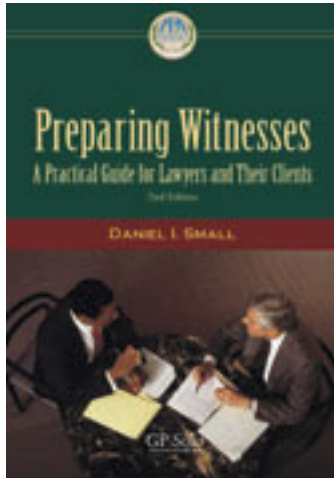
The Young Lawyers Division is focusing its member-service project (The 101 Series) this year on providing short articles or checklists on how-to topics for young lawyers. In accordance with that theme the General Practice/Solo Committee will make several such written publications available on the GPSSF Division website. These will be basic checklists to assist young lawyers who are general or solo practitioners and will provide practical tips on how to open, manage, and make their practices successful. Below is a list of sample topics. If you are interested in submitting a checklist of 15-25 points for one of the topics below, please contact the Electronic Publications Team Leader at [mbutler@nblaw.org](mailto:mbutler@nblaw.org).

1. GP/Solo 101: Malpractice Insurance-What to Do and Not to Do
2. GP/Solo 101: Trust Accounting Basics
3. GP/Solo 101: Choosing the Best Entity for Your Firm
4. GP/Solo 101: Options for Structuring Your Partnership
5. GP/Solo 101: How to Select the Best Software to Manage Your Firm
6. GP/Solo 101: The Importance of a Marketing Plan
7. GP/Solo 101: Marketing with Weblogs
8. GP/Solo 101: Referral Based Marketing
9. GP/Solo 101: Advertising Based Marketing
10. GP/Solo 101: Building a Website-Nonstop Marketing
11. GP/Solo 101: Business Planning-Accountability Based on Your Marketing Plan
12. GP/Solo 101: The Value of Joint Venturing
13. GP/Solo 101: The Art of Case Selection
14. GP/Solo 101: Who, What, When, Where, and Why of Staffing Your Office
15. GP/Solo 101: Setting Up the Telephones and other Technical Infrastructure
16. GP/Solo 101: Tax Pitfalls to Avoid
17. GP/Solo 101: Retainer Agreements and Fee Schedules
18. GP/Solo 101: Client Relations and Management

19. GP/Solo 101: Maintaining Balance Between Your Professional and Personal Life
20. GP/Solo 101: How to Buy or Sell a Practice
21. GP/Solo 101: Maximizing Collections-Good Billing Practices
22. GP/Solo 101: Maximizing Collections-Good Business Practices
23. GP/Solo 101: The Makeup of a Good Employee File
24. GP/Solo 101: Using Bar Association Resources to Maximize Efficiency

## **Publication Conventions**

All checklists submitted must be in Microsoft Word format, Times New Roman 12 pt. font, with 1-inch margins on each side. The title of the piece is centered on the first page in bold and all caps. The authorship information is given centered and double-spaced under the title, with "by" on a single line and the author's name on a second line. The author's biographical information is footnoted at the author's name. The footnote should give the author's firm or entity affiliation, city, state, the author's area(s) of practice, and a brief description of the author's ABA and local bar involvement. Bullet points must be indented half an inch, with first line of the text indented 1/4 inch after the bullet. The text after each bullet point must be justified. The first sentence of the bullet point is bolded. Samples are under the "Litigation 101" link on the committee's website listed above.



## Ethical Witness Preparation

When you are preparing a witness to testify, there are certain things you can and can't encourage the witness to do. In preparing a witness to testify, a lawyer is permitted to invite the witness to provide truthful testimony that is favorable to the lawyer's client, as long as the lawyer does not encourage the witness to deviate from the truth. Both the witness and the lawyer share a responsibility for ensuring the truth of the witness's testimony. This means that the witness should never testify to something he or she does not believe to be true. Additionally, as a lawyer, you should never permit the witness to testify to what you, as the lawyer, believe to be false.

The Restatement of the Law Governing Lawyers provides that as long as it does not elicit false or misleading testimony, preparation consistent with a lawyer's duties to a client and to the court may include:

1. Discussing the role of the witness and effective courtroom demeanor
2. Discussing the witness's recollection and probable testimony
3. Revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection of events in that light
4. Discussing the applicability of law to the events at issue
5. Reviewing the factual context into which the witness's observations or opinions will fit
6. Reviewing documents or other physical evidence that may be introduced
7. Discussing probable lines of hostile cross examination that the witness should be prepared to meet
8. Rehearsing the witness's testimony and suggesting choice of words

From *Preparing Witnesses: A Practical Guide for Lawyers and Their Clients*, Second Edition

by Daniel I. Small

## Using an Independent Contractor in Your Legal Practice

By Ellen Rappaport Tanowitz



Every business is cyclical, and law is no different. For me, personally, it is either feast or famine. This can leave a solo practitioner or a small firm in a bind. You don't want to hire an associate only to have him or her sit around when times are quiet. On the other hand, when business is hopping, it can sometimes be overwhelming to get all the work done. So what to do? You don't want to turn work away, since you never know when that famine is going to hit. One alternative might be to use independent contractors-both lawyers and paralegals-to help you when things get very busy at your firm. In the interest of full disclosure, I do independent contract work for a number of lawyers in the Boston area. It helps me keep my plate full, and I still learn things from the lawyers that I do work for.

What is an independent contractor? An independent contractor is an individual who works for you on a project-by-project basis for you as you need the help. For example, you recently left your big firm for a solo life and have a trial coming up. You need someone to help you with trial preparations. An independent contract lawyer could write your jury instructions or do findings of facts and rulings of law. Or you find that you have an opposition to a summary judgment and discovery responses due in two pretty large cases due in two weeks, and one of your best clients calls to inform you he's been named as a reach and apply defendant in a suit, the opposition is due in three days, and the hearing is in seven. What do you do? Dump something to the independent contractor to focus on the emergency.

How are they paid? Most independent contractors work on an hourly basis. Rates vary, but most of the time they charge approximately one-half of their "rack rate" or the rate they would charge if they were doing it directly for a client. Every state except Maryland lets lawyers mark up the hourly rate for independent contractor work, so it's a win-win for everyone. The independent contractor gets to make a decent rate, and you get to make money off of the contractor. You don't have to pay the independent contractor when you don't have work for them, so you avoid having associates twiddling their thumbs. On the other hand, most contract lawyers require you to pay them even if the client stiffes you on the bill.

What about research, malpractice, and other practical issues? Every contract lawyer is different. I have my own clients in addition to the contract work, so I have always carried my own malpractice insurance. Sometimes a lawyer can add you on to their policy for little or no cost. As for research tools, some lawyers may already have computer-assisted legal research and can lend the contract lawyer a password. Also, make it clear what you will and will not be reimbursing the contract attorney for. Copies? Postage? The most important thing is to make it clear so that both you and the independent contractor understand the parameters.

Who decides to do this kind of work? There are many different types of lawyers who choose to do independent contracting work. Some are people who want to work part-time due to family or other commitments; some are other solos who are looking to boost business until they have enough clients of their own. Some are young attorneys hoping to gain experience.

An independent contractor can be a great way to bridge the gap when you have a heavy workload without taking on the responsibility of paying another person in your office.

## Legal Trivia

Who was the first woman ever admitted to any state bar in the United States?

**Answer:**

Belle Mansfield, 1869, Iowa



## The Balancing Act

By Ellen Rappaport Tanowitz



As a working mother, most days I feel more like a gymnast living on the balance beam than a lawyer-I'm a solo practitioner, mom to three young kids, wife-and there are many days when I wonder why I try to do it all and whether it is all worth it.

Then there are days like last Friday when the answer was an unequivocal yes. My client, an LLC, was recently sued as a reach and apply defendant in federal court. The plaintiff, represented by one of the largest firms in the city, was seeking injunctive relief against the defendant (represented by someone old enough to be my dad) to prevent him from dissipating assets. My client ended up in this mess because the defendant owns a one-third interest in the LLC. A reach and apply motion is difficult to defeat because the standards in Massachusetts are virtually identical to a real estate attachment: If the plaintiff can show a reasonable likelihood of success on the merits and lack of sufficient security to

satisfy a judgment, it wins the motion.

I scrambled to prepare my opposition. I worked late-we ate out-my husband put the kids to bed. I got an opposition together in two days. The day before the hearing the plaintiff and defendant each called me to tell me that they'd worked out an agreement on the preliminary injunction and that my client should agree to the reach and apply pursuant to the statutory language. I declined. My client very much wanted to be heard. I had at least one decent argument, and although I feared a scolding from the chief judge of the district who drew the case for being uncooperative, I figured I had nothing to lose.

I arrived at court to find a representative from the plaintiff, plus two of its attorneys, two attorneys for the defendant and me. While we waited for the judge, my stomach did its usual flip-flops, and I reviewed my arguments one more time. And then court was in session and it was my turn. I made my argument and I won. No reach and apply for my client.

I went home to relieve my sitter who had relieved my husband who had come home from work to watch two of our kids, since I don't usually work Fridays. We played with Play-Doh, and I walked to pick up my seven year old from school. On the walk home that Friday afternoon, I thought to myself, yes, it is all worth it-at least today.

## You Mean They Die? Estate Planning Professionals as Grief and Loss Workers

By Charles A. Jonas



I'm old enough to remember watching television westerns in the 1950s, with their scenes of dusty streets and crinoline-clad women, children in tow, walking beneath the wooden shingle that read "Malcolm Mudslinger, Attorney and Counselor at Law (Widows and Orphans our Specialty)." At the time, I paid attention because daddy was a lawyer. Now I reflect on that shingle from the perspective of a solo practitioner whose work consists primarily of drafting wills and trusts, powers of attorney, and the probate court pleadings that go with the territory.

I also reflect on it from the perspective of working as a marriage and family therapist intern and bereavement counselor at a local hospice. The longer I do that work (three years now), the more I realize that I do my law clients, and myself, a disservice if, at the very least, I do not consider their experience of grief in the context of their legal needs.

Mr. Mudslinger did not include "counselor" on his sign by mistake. Up until about 10 years ago, the California Business and Professions Code, which governs the practice of marriage and family therapy, did not require a lawyer to be separately licensed as a marriage and family therapist in order to provide the counseling services governed by the statute. The legislators responsible for that certainly did not go to the law school that I attended.

I used to think that one of the most challenging parts of my day was getting a petition past the probate examiners onto the pregrant list, but it turns out I was wrong. The most challenging, and rewarding, part of my work comes from the recognition that I, and all of us in related fields-trust officers, financial advisers, accountants, professional fiduciaries, mediators, life insurance brokers-sometimes meet with our clients at a time of loss, or anticipated loss. "What brings you in?" I ask. "Well, Fred and I were thinking, if something happens to us, we ought to have a plan . . ." "You mean, a plan for when you die?" I do not state it so bluntly, but that is the truth. Estate planning professionals, and family law, workers compensation, personal injury, and tenants' rights attorneys, work on a daily basis with people experiencing the storm and drama of loss. We work with clients over years and across generations, through every loss imaginable, we become trusted family retainers, to whom clients and families look for support. Yet it was not until 2004 that the California Continuing Education of the Bar even acknowledged it might be important for estate planners to know something about grief by inserting eight pages in its volume California Decedent Estate Practice.

Our clients do not come to us for grief work, yet they may be grieving a loss or anticipating one. If we have some awareness and understanding of these issues, we are more resourceful for our clients. If we specifically acknowledge the emotional reality of a situation, our client may be better able to deal with the legal issues. Just what is grief? Most of us think we understand it the way we do pornography: We can't define it, but we know it when we see it. But do we really know it? A client whose mother died told me "I wasn't expecting it. Mom seemed fine. Kind of weak, and she was fading. But I wasn't ready. I wish she'd come back and do it again. I know what to expect now." Grief is not a linear process, nor is it time-limited. We cycle back through earlier stages of grief. Some losses are forever. Anniversaries, for example, can trigger renewal of grief reactions. Like tides, emotions will rise in us again, often triggered by another, more recent loss.

Where does grief come from? Why do we grieve? Human beings are mammals, and mammals bond and form emotional connections that span time and space. Grief is the process of emotional detachment in response to a loss of that bond, and it is not limited to feelings following death of a loved one. The constant in all our lives is not stability, but change, the endless cycle of loss and renewal. Grief is the bridge between them.

There are recognizable stages to grief, although not everyone agrees on just how many. Sometimes it can seem like a 12 Step program. (Certainly Step One is the same: Admitted

we were powerless). They vary in duration and intensity depending on the relationship. They can be prolonged or put on hold by a difficult probate process or litigation. So let's look at the cast of characters.

First on the stage of grief are the actors Shock and Denial, with their complementary lines: "I really don't feel a thing" and "Well, that's because nothing really happened!" Like shock following a physical wound, shock after a loss protects us from the emotionally unimaginable. But it cannot last.

Waiting eagerly in the wings are the apparently dysfunctional siblings Anger, Guilt, Sadness, Depression, Relief, and Fear. "Apparently" only on the surface, because all those emotions can be present for a grieving client, and they can all be part of a healthy grief process. If a child has cared for a sick parent through years of dementia, go ahead and ask "I wonder if it was a relief when your dad died?" There are no wrong feelings in connection with grief. The point is not to feel better, it is to feel, and that is better. Unacknowledged grief often provides the emotional subtext to conflicts among families. My probate litigator colleagues tell me it is always present in their cases.

Next up are the more mature members of the cast, Acceptance and Reframing. Acceptance comes with time and with making friends with those difficult emotions. It comes down to saying a simple "yes" to one's experience, to forgiving oneself for perceived failures, and to opening the door to the question "what now?" Although a loved one is no longer physically in a client's life, that person is emotionally and psychologically present. Reframing is the recognition that, though a person has died, the relationship will continue. It is simply time to write another chapter to the story. "How will I know this person in the future, how will she be part of my life? What rituals and reminders will help me to remember him?" In this way, individuals and families link past, present, and future.

Last to appear, at least in this four-act version of the drama, is Renewal. Who am I now that you are gone? What roles have I lost, what new ones open for me? How do I weave this story of our relationships into the fabric of my life? My client, Susie, came to me about four years ago, at age 46, dying of an unusual form of cancer. She had two children, five-year-old twins. I helped her tell the story, in her documents, of her values and what she wanted for her children. I listened to her. She has not died yet. She called me recently, glee in her voice. "I sold one of my paintings!" she told me. The artistic expression she had given up was renewed in her, and enriched.

"Yes, yes, yes," we say, "but I'm an attorney, I deal with facts and taxes, judges and juries, Lexis and Nexis, and getting that next client in the door. Who has time for feelings? Isn't that therapy?" Good question. I did not have time, either, to ask a client about her feelings about the death of her husband and the pending sale of her home of 40 years. Instead, I was all business. Petition this, probate that, inventory the other. Get down to business, that

was my job.

Today, I do not sell my probate services to the surviving widow of hospice patient whom I am counseling, nor tell a taciturn widower seated in my law office that the fact that he has not left the house in the six weeks since his wife died may be a sign of grief. I did ask a widower client how long he was married. "Sixty-five years," he replied. "Gosh, that's a long time," I said. "Not long enough," and tears slid down his cheeks. Then what do we say? Too often, it is something like "Well, she was 86" or "Gosh, but it's been eight months since she died" or "Maybe you will meet someone else." That is the emotional equivalent of salt in an open wound. Instead, can we learn to simply say to him "That must be so hard," and thus become a witness another's experience of loss? In our offering and accepting of support to and from others, we participate in a healing process.

Therapeutic jurisprudence is the study of law as a therapeutic agent. It recognizes that the law, lawyering, courts, and judges have an impact on our client's emotional life and on her psychological health. Therapeutic jurisprudence seeks to humanize the law by addressing not only the traditional aspects of lawyering, but also the emotional and psychological impact of law and the legal process on our clients. It regards the law as producing behaviors and consequences. It asks us to look at those not just as a means to a desired legal end, but also as either therapeutic (emotionally supportive and validating) or antitherapeutic (emotionally hurtful). As long as justice and due process are respected, as long as the estate gets probated, we should do what we can to limit the antitherapeutic impact of our actions. This allows us to look at the law in a richer way, and to bring this awareness into the day-to-day practice of law, with our estate planning, probate, conservatorship, and family law clients. In all of those practice areas, loss is a common theme. Our most effective tool for helping is our willingness to listen.

My operational definition of listening used to be "waiting to interrupt." Then, in my counseling program, I learned that it was a better idea to use my ears and mouth proportionately. I found the lesson repeated in John MacDonald's *Nightmare in Pink* (1964, New York: Fawcett Crest).

There is only one way to make people talk more than they care to. Listen. Listen with hungry earnest attention to every word. In the intensity of your attention, make little nods of agreement, little sounds of approval. You can't fake it. You have to really listen. In a posture of gratitude. And it is such a rare and startling experience for them, such a boon to ego, such a gratification of self, to find a genuine listener, that they want to prolong the experience. And the only way to do that is to keep talking. A good listener is far more rare than an adequate lover.

Ask about the family story, and listen. Ask about other experiences they may have had

with loss, and listen. People who are dying are particularly open to and need connection, to tell the story. This is the most powerful experience of their life, so what do we do? Turn away or listen?

George Bernard Shaw wrote that "Life does not cease to be funny when people die any more than it ceases to be serious when people laugh." Humor helps us to acknowledge and endure what otherwise seems unendurable. Grief and loss are bound at the hip with joy and connection. Paul Rudnick knew that when he wrote his recent New Yorker article *My Living Will*: His living will included 22 items. Number 14 was "I do not wish to be kept alive by any machine with a "popcorn" setting." Number 15: I would like to die at home, surrounded by my . . . attorneys." So learn to help. It is good for business.

### **Additional resources and references:**

*American Bar Association Tool Kit for Health Care Advance Planning*. American Bar Association Commission on Legal Problems of the Elderly. [www.abanet.org/elderly](http://www.abanet.org/elderly)

On Our Own Terms - Moyers on Dying [www.pbs.org/onourown/terms](http://www.pbs.org/onourown/terms)

*Practicing Therapeutic Jurisprudence: Law as a Helping Profession*. Wexler, D, Winick, B., and Stolle, D., Eds. Carolina Academic Press, 2000. Information on Therapeutic Jurisprudence: [www.therapeuticjurisprudence.org](http://www.therapeuticjurisprudence.org)

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## Division News

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### Fall Meeting Recap

We've just returned from the Division's 2006 Fall Meeting in Milwaukee, Wisconsin, at the Pfister Hotel, where we hosted numerous programs and events including the National Solo and Small Firm Conference and the Difference Maker Awards Dinner. A special thank you to our Division sponsors:

- Thomson West: A primary sponsor of the General Practice, Solo and Small Firm Division
- National Arbitration Forum
- Minnesota Lawyers Mutual
- Workshare

and our meeting sponsors:

- ABA Retirement Funds
- EPS, Inc.
- Strategic Settlements
- Green Point Legal Services
- Tabs3

[Read about the highlights of our Fall Meeting.](#)

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Miami, FL

February 7-13, 2007

GP|Solo's headquarters will be the Hyatt Regency Miami.

[Visit the ABA Midyear Meeting site](#) for more information, to register and book your lodging.

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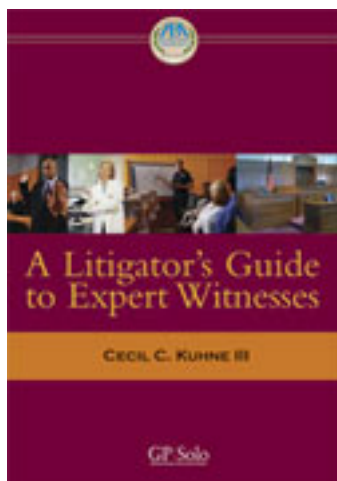
## Solosez Threads



[Solosez](#) is an email discussion list for solo and small firm lawyers that has grown to be by far the ABA's busiest list.

For a taste of what Solosez has to offer, check out the [popular threads](#) on Solosez's website. Last month's threads were:

- Timeliness—Give Me Some Advice!
  - Third Party Acting as Gatekeeper for Potential Client
  - Sticker Shock Over Yellow Page Ad Costs
  - Mac Users Only
  - How Long Must I Send Statements?
  - Unauthorized Practice
- 



## New Books

## [A Litigator's Guide to Expert Witnesses](#)

The admission of expert witness testimony remains one of the most contentious, critical, and interesting aspects of the modern-day litigation process. This book examines the role of the expert witness, focusing on taking depositions, expert qualifications, admissibility of testimony, attorney-client privilege, Daubert, rules of discovery and evidence, selecting and presenting experts, and direct examination of experts.

Price: \$84.95

**GP|Solo member: \$68.95**

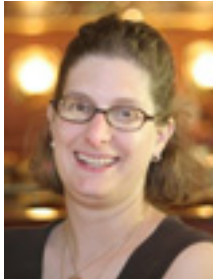
Find out about other GP|Solo books at [our bookstore](#).

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