

STATE BAR OF TEXAS
BANKRUPTCY LAW SECTION
NEWSLETTER

Spring 2007

Vol. 5, No. 2

**Texas Bankruptcy Section Holds
Bankruptcy Moot Court Competition
For The 2007 Elliott Cup**

By
Chris Mott, Gordon & Mott P.C.

The Bankruptcy Law Section of the State Bar of Texas sponsored the Second Annual Elliott Cup competition on March 2-3, 2007 at the federal courthouse in Houston, Texas. The Elliott Cup, named in honor of the late Joseph C. Elliott, former Chief U.S. Bankruptcy Judge for the Western District of Texas, was created in 2006 to provide an opportunity for teams from Texas law schools and other invited law schools to refine and bolster their moot court skills prior to the Annual Conrad B. Duberstein Bankruptcy Moot Court Competition. Each school competing in the Elliott Cup must be registered to compete in the Duberstein competition, which was held in March 2007 at St. John's University School of Law in New York City. The Duberstein competition is co-sponsored by the American Bankruptcy Institute.

The University of Houston Law Center, Southern Methodist University School of Law, South Texas College of Law, Texas Tech University School of Law, University of Texas School of Law, and Louisiana State University Law Center each sent teams to participate in the 2007 Elliott Cup event. Over 25 experienced Texas bankruptcy lawyers gave up a Saturday and served as judges for the first two preliminary rounds. The final round participants had the opportunity to argue before the Honorable Karen K. Brown (Southern District of Texas), the Honorable Leif Clark (Western District of Texas), and the Honorable H. DeWayne Hale (Northern District of Texas).

One of the teams from the University of Houston Law Center, Kameron Averitt and John-Thomas Foster, took home the 2007 Elliott Cup, a traveling trophy. The University of Houston team is coached by Don Russell, Michelle Slaughter, and Jim Lawrence.

The second place team was from the Southern Methodist University School of Law, and consisted of Cindy Roberts and James Hunnicutt, coached by K.D. Shull. The Best Advocate award went to Kameron Averitt.

Each of the participating schools fielded teams of outstanding competitors and oralists. The high level of competency was reflected by the very close scores for all rounds. Following completion of arguments, the Elliott Cup judges provided constructive feedback to each participating team. One of the participants commented that the "Elliott Cup was a superb preparation for the Duberstein. The judges were well-prepared and

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provided good feedback to help in preparation for the Duberstein . . . The participating teams were outstanding competitors. . . The Elliott Cup is a great idea, and its execution was absolutely first class.”

The University of Houston Law Center served as the host school for this year’s Elliott Cup event, and the Houston office of Haynes & Boone LLP hosted a welcoming reception for all participants on the Friday night of the Elliott Cup event. A team dinner sponsored by the Bankruptcy Law Section was held on Saturday night for all teams following the event.

Several of the law school teams and students from Texas that participated in this year’s Elliott Cup found success at the Duberstein National Competition. Sara M. Patterson of the South Texas College of Law team won the Best Advocate Award, and a University of Texas School of Law team won an Outstanding Brief Award. Teams from the Southern Methodist University School of Law, The University of Texas School of Law, and the South Texas College School of Law all advanced to the Octo-Final Round, and a team from the South Texas College of Law advanced to the Quarter Final Round.

Congratulations to each of these law school teams for their fine showing at the 2007 Duberstein National Competition and to all law school teams participating in the 2007 Elliott Cup.

Chris Mott of the El Paso firm of Gordon & Mott P.C. serves as Chair of the Elliott Cup on behalf of the Bankruptcy Law Section. Chris would be glad to assist any other state or region which would like to explore a similar preparatory event for the Duberstein competition. He can be reached at cmott@gordonmottpc.com.

* * * * *



Left to Right: Don Russell (coach), Kameron Averitt, John-Thomas Foster and Michelle Slaughter (coach)

**2007 BANKRUPTCY SECTION OF THE STATE BAR OF TEXAS
BENCH/BAR CONFERENCE**

June 6-8, 2007

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<http://www.texasbar.com/bankruptcy/Brochure2007updated.pdf>

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CALL FOR ARTICLES

The **STATE BAR OF TEXAS BANKRUPTCY LAW SECTION** is dedicated to providing Texas practitioners, judges, and academics with comprehensive, reliable, and practical coverage of the evolving field of bankruptcy law. We are currently reviewing articles for upcoming publications. We welcome your submissions for potential publication. In addition, please send us any information regarding upcoming bankruptcy-related meetings and/or CLE events for inclusion in the newsletter calendar, as well as any items for our "Troop Movements" section.

If you are interested in submitting an article to be considered for publication or to calendar an event, please either e-mail your submission to **dgetten@velaw.com** or mail it to the following address:

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Please format your submission in Microsoft Word. Citations should conform to the most recent version of the Bluebook, the Texas Rules of Form, and the Manual on Usage, Style & Editing.

Should you have any questions, please visit our website at **http://txbankruptcylawsection.com**. We look forward to reviewing your submissions for potential publication in the next STATE BAR OF TEXAS BANKRUPTCY LAW SECTION NEWSLETTER.

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SBOT International Bankruptcy Seminar: London

From the Office of
Janna Countryman



The State Bar of Texas Bankruptcy Law Section International Bankruptcy Seminar - London 2007 was a smashing success.

On the day of arrival, several people had high tea at the Savoy in order to revive themselves sufficiently to participate in the program the next morning. The Honorable Brenda Rhoades (Eastern District of Texas) did an excellent job moderating the three day CLE program, which included a tour to the Royal Courts of Justice.

Baker & McKenzie, the former law firm of Judge H. DeWayne Hale (Northern District of Texas), hosted our group's visit to the Royal Courts of Justice. Baker & McKenzie graciously arranged our fascinating tour of the RCJ, which included a talk by Barry Isaacs on the British legal system. At every step of the way, we were treated to proper British hospitality.

After our tour of the Royal Courts of Justice, we were given a tour of the Temple Church by Rev. Robin Griffith-Jones, the Master of the Temple. Hugh Ray, III also arranged for several people to have lunch at the Middle Temple Hall at the Inns of Court, which we understand was a wonderful experience.

Our adventures in London stretched well beyond learning more about the effect of BAPCPA on bankruptcy filings, of course. There were trips to the London Silver Vaults, Portobello Market, Leeds Castle, Canterbury, Dover, Stonehenge and Greenwich. Many of our group took advantage of the theater, world class shopping, and the fine restaurants.

There was also at least one trip to the Ritz Club to give everyone a feel for how debtors can max out their credit cards and have nothing to show for it other than a red wine stain on a Hermès tie and some great memories.

While the Ritz Club adventure did not qualify for CLE, most of the participants will agree

that it was a valuable educational supplement to actual seminar. Tim Webb became a member of the Ritz Club so that he could conduct further study. Unfortunately, St. Clair Newbern, III refused to attend the Ritz Club foray because he is constantly mistaken for James Bond, and he is too cranky to deal with the paparazzi.

Everyone had a wonderful time. The International Bankruptcy Seminars have been a big success because of the small groups and the intimate format. There is an opportunity for discussion and an exchange of ideas and philosophies. Next year, our planned destination will be Barcelona, Spain. As soon as we have all the details, notice will be sent to the entire Bankruptcy Law Section, so be on the lookout for it. Until then, cheerio!



* * * * *

Editor's Note: Judge Stacey Jernigan's column on her views from the bench will appear in our next issue. In its place, we have seized the opportunity to run the following article on our very own Judge Barbara Houser, which appeared in Bankruptcy Law 360 last month. We found it to be an inspiring piece about one of our finest role models in the practice of bankruptcy here in Texas, or anywhere else.

Outstanding Women: Judge Barbara Houser¹

**By
Anne Urda**

Friday, April 13, 2007 --- U.S. Bankruptcy Judge Barbara Houser may not have always known that she wanted to be a lawyer, but her mother could have told you from an early age that law school was exactly where her daughter was going to end up.

"My mother would tell you that it was because I loved to argue as a kid," she said. "I was one of those kids who really liked school but nothing really stood out over any other class until debating in high school."

After tapping into that passion in high school and college, law school seemed like the next logical step, according to Houser.

Her legal career has spanned nearly three decades, with Houser gladly donning a variety of bankruptcy caps over the past 30 years.

From private advocate to well-known speaker to judge, Houser has relished the chance to prove her chops in an area that was largely male-dominated when she first started.

"There were only a handful of women bankruptcy practitioners when I first started in the field but I don't know if I felt that was a problem," she said. "My dad instilled in me a pretty strong work ethic and told me that I could accomplish anything I wanted as long as I worked hard. I viewed it as an opportunity."

But Judge Houser would be the first to admit that her entrée into the world of bankruptcy was "sheer dumb luck."

¹ Originally printed on April 13, 2007 in Bankruptcy Law 360. Reprinted with permission of Portfolio Media, Inc.

The Bankruptcy Code came out in 1978 and that happened to be the year that I started in practice," she said.

Houser began her career as an associate at Locke Liddell, a "blue blood" law firm based in Houston, Texas.

Though she initially thought she wanted to be a trial lawyer, Houser soon found herself gravitating more and more to the bankruptcy attorneys.

"They were getting in the courtroom more than a trial lawyer. It was the best of all possible practice areas," she said. "You need to be a really terrific lawyer to be a really terrific bankruptcy lawyer."

For the next decade, Houser honed her skills at Locke Liddell, eventually catching the attention of bankruptcy boutique Sheinfeld, Maley and Kay.

"Mickey Sheinfeld approached me and asked me if I would move and head up the Dallas office," she said. "After much agony, I decided that it was an offer I couldn't refuse."

The move turned out to be a critical turning point in Houser's career, launching her to the forefront of the bankruptcy field.

"Sheinfeld gave me more of a national platform," she said. "At Locke Liddell, bankruptcy was a relatively small practice area in an otherwise large, full-service law firm but this firm was really known for its bankruptcy expertise. That was the focal point of the firm."

But it was not her work at the bankruptcy boutique alone that helped raise her profile in the field, according to Houser.

"Once I was with Sheinfeld, the senior partners and I started speaking on a national speaking circuit involving continuing legal education programs around the country," she said. "That fed off itself. We got invited to do other programs and soon we were regularly speaking around the country."

The routine speaking engagements helped give her more of a national profile that she might otherwise have had, helping to pave the way for her ascension to judge.

"In 1994, I became eligible for membership in the American College of Bankruptcy, in 1996, was invited to join the National Bankruptcy

conference and in 2000, I was sworn in as a U.S. Bankruptcy Judge,” said Houser.

Though she spent most of her career as a successful bankruptcy litigator, Judge Houser knew throughout that she eventually wanted to go behind the bench.

“It was always a question of when would I as opposed to would I,” she said. “A vacancy happened to arise, and I was fortunate enough to be selected.”

Houser is savoring her time as a judge, enjoying the more academic side of the field while drawing on her vast experience as an advocate.

“I think if I had taken the bench any earlier, it might have been a harder transition,” she said. “My years in practice are very helpful to me now because they give me insight into complex cases that I might otherwise not have had.”

Though being a bankruptcy judge presents its own challenges, Houser does not long for her days as a firm attorney.

“Truthfully, I don’t miss it but the reason why I don’t is that I was incredibly focused on my career for the period of time that I practiced,” she said. “I felt that as a lawyer, I had done most of the things that I had wanted to do.”

As her last case, Houser tackled the large, complicated Dow Corning bankruptcy and was able to push through a successful plan of confirmation and leave on a high note.

“I was satisfied with my accomplishments,” she said. “I wanted to give back to the bankruptcy profession as a judge, and I always thought it would be something that I would really enjoy.”

In addition her current role, Houser also teaches a basic bankruptcy class at SMU law school, where she encourages her students to find a mentor.

“A mentor makes a really big difference and is one of the most important things a young lawyer can find,” she said.

Looking back on her experience, Houser points to two mentors in particular that helped guide her own legal path.

“There weren’t many women in the law when I first started, but Harriet Miers was a young partner at Locke when I first joined the firm,” she

recalled.

Miers, a former White House counsel, gained notoriety in 2005 when President George W. Bush nominated her to replace Justice Sandra Day O’Conner on the U.S. Supreme Court, only to withdraw her nomination a short time later amid criticism from conservatives.

“She was a female attorney that I looked up to greatly when I first started to practice,” said Houser. “She was extremely well-liked, president of the Dallas Bar Association, and had the respect of all the male partners of the firm.”

Houser remembered that she would often visit with Miers, who always made a point to be accessible to the younger associates.

“While Harriet wasn’t a mentor in my practice area, she was a woman attorney that I looked up to and tried to follow in her footsteps to some extent,” she said.

But Houser also credits Mickey Sheinfeld as a guiding force in her bankruptcy career, calling him a “wonderful man and a great mentor.”

Houser is ready to take on the mentor role herself, encouraging young law students to think about pursuing a career in bankruptcy.

“I’ll confess to being completely prejudiced but I find it to be the most intellectually challenging and stimulating field of law,” she said. Houser also preaches the importance of becoming involved in professional associations and credits her time spent with such organizations as critical to her career.

“I treasure my involvement with most of those organizations- it caused people to become aware of me as a practitioner and as a lawyer,” she said.

“Anything younger lawyers can do to come to the attention of more experienced lawyers is a good thing. Your career will just grow exponentially.”

Ultimately, though, the best advice she has for lawyers just starting out or those students thinking about a career in bankruptcy is to put your heart into the field and to work hard.

“Show clients that you care and are there for the right reasons,” she said. “I always found that the harder I worked, the luckier I seemed to get.”

**Recovery of Attorneys Fees in
Bankruptcy:
Travelers Casualty & Surety Co. of
America v.
Pacific Gas & Electric Co.
By Ellen Klein and Neil Ferrari²**

In a recent, unanimous opinion delivered by Justice Alito in *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 127 S.Ct. 1199 (2007), the United States Supreme Court permitted the recovery of post-petition attorney's fees on an unsecured, pre-petition contract where such fees would have been recoverable outside of bankruptcy. In reaching its decision, the Court rejected the rule frequently applied by lower courts that restricted the recovery of fees incurred in litigating bankruptcy issues. At the same time, however, the Court left open related issues, which were raised by the reorganized debtor for the first time on appeal.

Pacific Gas and Electric Company ("PG&E") filed a voluntary Chapter 11 petition in the Northern District of California in April 2001. Before the bankruptcy filing, Travelers Casualty & Surety Company ("Travelers") had issued PG&E a surety bond to guarantee PG&E's payment of state workers' compensation benefits. The agreements under which the bonds were issued contained a provision for Travelers to recover its attorney's fees in connection with its commitment to provide the necessary bonds. Travelers included this provision in part because it wanted protection in the event PG&E defaulted on its bond obligations and Travelers was forced to assert its claim in the bankruptcy case. After filing for bankruptcy protection, however, PG&E resisted paying Travelers' attorney's fees. As a consequence, Travelers objected to the plan and disclosure statement on the basis that PG&E had failed to provide for payment of the fees. The objection was resolved when the bankruptcy court allowed the insertion of language into the chapter

² The authors, Ellen Klein and Neil Ferrari, are both second year law student at Southern Methodist University Dedman School of Law and both serve as externs for the Honorable H. DeWayne "Cooter" Hale, United States Bankruptcy Judge, Northern District of Texas.

11 plan that reflected a stipulation entered by the parties that preserved Travelers' rights in connection with this issue.

The parties ultimately agreed that Travelers could assert a general unsecured claim for its attorney's fees. However, when Travelers amended its claims to add the attorney's fees, PG&E objected based upon the Ninth Circuit's decision in *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991), which held that attorney's fees were not recoverable for litigating bankruptcy issues. The bankruptcy court sustained the objection, disallowing Travelers' claim for its fees on that basis. The district court and the Ninth Circuit affirmed.

The Supreme Court unanimously reversed the lower courts' judgment and held that the Ninth Circuit's *Fobian* rule is not supported by the Bankruptcy Code. The issue before the Court was "whether the Bankruptcy Code disallows contract-based claims for attorney's fees based solely on the fact that the fees at issue were incurred litigating issues of bankruptcy law." 127 S.Ct. at 1204. The Court found that the Code does not.

Ordinarily, under the American rule, a prevailing party in litigation is not allowed to collect attorney's fees from the loser. However, this general rule can be overcome by specific statutory provisions or by an "enforceable contract."

Although there was no statutory basis for the recovery of PG&E's attorney's fees, the Court held that, under the current Bankruptcy Code, an enforceable contract allocating attorney's fees is allowable in bankruptcy except where the Code expressly provides otherwise. Under section 501(a), a claim is allowed unless a party in interest objects. However, even if there is an objection, the court "shall" allow the claim unless the claim implicates one of the nine exceptions listed in section 502(b). After examining the claims in question, the Court found that Travelers' claim for attorney's fees did not fall within the scope of any of the exceptions of sections 502(b)(2)-502(b)(9). Thus, the claim must be allowed.

The bankruptcy court had rejected Travelers' claim based on the *Fobian* rule, which had held "attorney fees are not recoverable in bankruptcy" for litigating issues "peculiar to federal bankruptcy

law.” 127 S.Ct. at 1205. The Supreme Court found no support for this rule anywhere in the Code. The Court reiterated “that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.” *Id.* at 1206.

The reorganized debtor had also raised several issues on appeal that had not been raised in the lower courts. These issues, which were not considered by the Supreme Court in its opinion, turn on alternative interpretations of the applicable provisions of the Bankruptcy Code. Because they were not reached, there is still some question as to whether the Court would find them persuasive. PG&E contended that section “506(b) categorically disallows unsecured claims for contractual attorney’s fees” except to the extent that the creditor is oversecured. *Id.* at 1207. PG&E had also argued that Congress did not intend to allow unsecured creditors to collect attorney’s fees because of the structure and purpose of the Code. *See id.*

At some future date, the Supreme Court may revisit this issue. For the present, however, a creditor’s contract providing for attorney’s fees will be enforced in a bankruptcy case, except where the Bankruptcy Code provides otherwise.

Marrama:
The Right to Convert Is Not Absolute

By Ellen Klein and Neil Ferrari

The Supreme Court, in a 5-4 opinion delivered by Justice Stevens, held that a debtor does not have an absolute right to convert a Chapter 7 case to a Chapter 13. *Marrama v. Citizens Bank of Massachusetts*, 127 S.Ct. 1105 (2007). In so holding, the Court’s majority used 11 U.S.C. § 105 as a basis for avoiding the seemingly strict language of the Code allowing such a right. Whether the Court will recognize the potentially sweeping implications of this interpretation of section 105 remains to be seen.

Robert Marrama filed a petition under Chapter 7 of the Bankruptcy Code. In his pleadings, he substantially misrepresented the value of his house. He also represented that he had not transferred any property other than in the ordinary course of business during the year preceding his

filing. In fact, however, Marrama had transferred property to a newly created trust to protect it from creditors within the year before filing.

The Chapter 7 trustee uncovered the truth regarding these misrepresentations and sought to recover the house for the debtor’s estate. At that point, the debtor moved to convert the case from Chapter 7 to Chapter 13. Both the Chapter 7 trustee and a creditor objected, contending the motion was filed in bad faith and constituted an abuse of the bankruptcy process. The bankruptcy judge denied Marrama’s request, based on a finding of bad faith on the part of the debtor in concealing his assets. This judgment was affirmed by the Bankruptcy Appellate Panel for the First Circuit, and then later affirmed by the Court of Appeals for the First Circuit.

The Supreme Court affirmed. The five-justice majority held that Marrama forfeited his right to convert his case to Chapter 13 under a “bad faith” exception to the conversion right created by section 706(a). *See* 127 S.Ct. at 1112. The Court found this exception in section 707(d), which provides that a case may not be converted to another chapter if the debtor may not be a debtor under that chapter. The majority found Marrama was disqualified as a Chapter 13 debtor under section 1307(c), which provides that a judge may dismiss a Chapter 13 proceeding or convert it to a Chapter 7 proceeding “for cause,” which has been held to include bad faith. *See id.* The majority reasoned that a bankruptcy court’s ruling that an individual’s Chapter 13 case should be dismissed or converted to Chapter 7 because of pre-petition bad-faith conduct, including fraud, is equivalent to ruling the individual does not qualify as a debtor under Chapter 13. Additionally, and perhaps importantly for future Bankruptcy Code construction, the Court explained that a bankruptcy judge’s broad authority, described in section 105(a), to take any action necessary “to prevent an abuse of process” includes denying a motion to convert that “merely postpones the allowance of equivalent relief and may provide the debtor with an opportunity to take action prejudicial to creditors.” *Id.* at 1112.

The dissenting justices³ accused the majority of

³ Justice Alito wrote the dissent and was joined by Chief Justice Roberts and Justices Scalia and Thomas.

ignoring the plain meaning of the conversion provision of the Bankruptcy Code. The dissent acknowledged that in situations of obvious fraud, the bankruptcy court faces a real problem: a debtor is attempting to abuse the system. However, according to the dissent, only two restrictions apply to Chapter 7 debtor's right of conversion. 127 S.Ct. 1113. First, a debtor may not convert if the case has already been converted under section 1112, 1208, or 1307. *See id.* Second, the debtor "must meet the conditions that are needed in order to 'be a debtor under such chapter.'" *Id.* Nothing in section 706 or in the entire Code suggests that a judge has discretion to limit a debtor's power under section 706(a). And, no provision of the Code justifies a denial of conversion based on "bad faith," according to the dissenting justices. *See id.* at 1113-14.

The dissent also pointed out that the majority should have read section 706(d) in conjunction with section 109(e). There are two requirements under section 109(e) for an individual to be a debtor under that section. Neither requirement deals with "cause" or "bad faith." Instead, the majority of the Court read 706(d) along with 1307(c). However, 1307(c) applies when a Chapter 13 case is already filed and does not deal with what requirements a debtor must satisfy before conversion.

Although the issue before the Court was narrow, this decision could have great implications in future bankruptcy litigation. Whether the Court has now retreated from the "plain meaning" rule, and whether bankruptcy courts are now more empowered under 11 U.S.C. § 105, are open questions.

TROOP MOVEMENTS

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2007 Bankruptcy Law Section Annual Meeting Bastrop, Texas -- June 6-8

As you may not know, under our current by-laws, we are required to hold our Section's annual meeting in conjunction with the Annual Meeting of the State Bar of Texas, which will be held this year in San Antonio the week of June 18. However, we have received a special dispensation from the State Bar to hold our meeting in conjunction with our Section's bi-annual Bench/Bar Conference, which will take place June 6 through 8, at Lost Pines Resort in Bastrop. Holding the meeting "off campus" rather than at the SBOT State Bar's Annual Meeting itself means that you don't have to register for the Annual Meeting or hunt through an entire convention hall to find the right meeting room (remember last year?).

We have a number of important items on our agenda for this year's meeting, so please make the effort to attend. In addition to electing new officers and council members, we will be voting to approve amendments to our by-laws. These amendments include membership in the Section by non-attorneys and revisions to the process for future amendments to the by-laws, as well as an amendment to allow us to have our annual meeting not in conjunction with the State Bar's Annual Meeting without any special permission.

So, come on over to Lost Pines on June 6-8, and exercise your right to vote. It's patriotic, it's good for the Section, and it's a lot of fun.

We hope to see you then.

Elizabeth Guffy

2007 BANKRUPTCY LAW SECTION CALENDAR OF EVENTS

Bankruptcy Law Section of the State Bar of Texas Bench/Bar Conference 2007

- June 6-8, 2007 – Hyatt Lost Pines Resort
- Bastrop, Texas
- Course Directors – Michelle A. Mendez and Tony Davis
- Judge H. DeWayne Hale – Chair of Planning Committee

Dallas

June 6, 2007 - Dallas Bar Association Bankruptcy Section Monthly Meeting – Belo Mansion. Drinks 5:00-5:30. Featuring Sandy Esserman on mass torts in bankruptcy. CLE 5:30 – 6:30.

June 27, 2007 - Ethics program: Bill Rochelle (a/k/a William J. Rochelle III, brother of Buzz, son of William Jr.) will present an ethics program on the book "Eat What You Kill"

August 1, 2007 - Dallas Bar Association Bankruptcy Section Monthly Meeting – Belo Mansion. Drinks 5:00-5:30. CLE 5:30 – 6:30.

Fort Worth – Tarrant County

Bankruptcy Section - monthly CLE luncheon meetings on the third Monday of each month to its members. The CLE topics are on current interest in bankruptcy law.

Contact - Marilyn Garner at 817/462-4075 or marilyndgarner@flashwave.com. Meetings are normally held at the Ft. Worth Petroleum Club.

San Antonio

September 6-7, 2007 - Advanced Consumer Bankruptcy Course, San Antonio, Texas
Regular meeting 4th Tuesday of every month