



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

January 2005



The Lawyers for Literacy committee recently collected new books for children between the ages of 3 & 10. Thanks to the committee, hundreds of needy children received new stories to read this holiday. Committee members pictured from left to right: Melynda Melear, Ty Bongard, Georgina Jimenez-Orosa, Molly Williams, Mark Greenberg, Jackie Grady and Phil DiComo.

Nominating petitions available for Board of Directors

The annual election of officers and directors for the Palm Beach County Bar will take place in April. Persons seeking to run for a position on the Board of Directors will need to obtain a nominating petition and must be a member in good standing of the Palm Beach County Bar Association. The nominating petition must be signed by no fewer than 20 members in good standing of the Association. Petitions for President-elect will be available on December 15 and will be due back in the office by 5 p.m. on January 14. Petitions for director-at-large seats will be available on December 30 and will be due back in the Bar office by 5 p.m. on January 31. Petitions may be obtained by calling the Bar office at 687-2800 or by sending an e-mail requesting it at PBurns@palmbeachbar.org. For any of the positions, it is the candidate's responsibility to verify ahead of time through the Bar office that the members that are signing the petitions are members in good standing, otherwise, the petition will be deemed invalid.

Contributions sought for 2005 law week judicial reception

The Law Week Committee is beginning its efforts to raise contributions from law firms to underwrite the cost of the annual judicial reception honoring the local judiciary to be held on April 20, 2005. Sponsors will be recognized on the invitation, in the Bar Bulletin and on a sign at the reception.

Those interested in making contributions should send a check no later than March 1 to the Palm Beach County Bar Association, ATT: Patience Burns, 1601 Belvedere Road, Ste. 302E, WPB, FL 33406. Sponsorships have been set as follows: \$200 for firms with 1-2 attorneys; \$300 for firms with 3-10 attorneys; and \$500 for firms with 11 or more attorneys.

Investiture Ceremonies Scheduled for New Judges

Robing ceremonies for new judges will be as follows. All Bar members are cordially invited to attend:

Martin Colin	January 28, 4:00 p.m.	Courtroom 11A
Amy Smith	February 4, 4:00 p.m.	Courtroom 11A
Mark Eissey	February 18, 4:00 p.m.	Courtroom 11A

Also, there will be a swearing-in ceremony for newly-elected Clerk of the Court Sharon Bock on February 11 at 4:00 p.m. in Courtroom 11A.



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Is This One Of The Happiest Days Of Your Life?

By Stanley D. Klett, Jr.

Seldom have I heard this question asked of someone. You may be surprised to find the question was asked by a Judge in a courtroom, at the Palm Beach County Main Courthouse. You may even be startled to hear that the answer was an emotional, sincere, and emphatic "YES." What circumstance could possibly result in this unlikely scenario? Perhaps you would think that it was an accused criminal that was found not guilty, or a plaintiff that just recovered a substantial award, or maybe even a wedding ceremony. You would be mistaken. This question was asked by Judge Moses Baker to the new adoptive parents that had welcomed into their lives, their families and their future, a child or sometimes more than one.

The circumstance was National Adoption Day which occurred on Saturday, November 20, 2004. From its humble beginning in 2000, it has grown from an event in 8 jurisdictions to events that are staged in all 50 states. On this special day in November over 31 adoptions were completed in Palm Beach County alone.

In the United States, there are 126,000 children in foster care who need permanent, stable, loving families, and many of the children have waited years to be adopted. On November 20, 2004 I watched how volunteer lawyers, foster care professionals, child advocates and local Judges came together to give so many children such homes. Thanks to the superlative efforts of Penny Martin, Esquire, the Chairperson for National Adoption Day and to Joe Ackerman, Esquire, Chair of the Special Needs of Children Committee, it was a day to be remembered and cherished by many. Through their mail appeal alone they were able to raise over \$3,800 (I am sure that donations are still being accepted). By their selfless efforts and the dedication of their own time and energy there were stuffed animals, together with food, drink, and entertainment for all the children and families.

More importantly, there were caring, families willing to give of themselves and share their lives. There were also four important people there that devoted this Saturday to put these families legally together for all time. Judge Moses Baker, Judge Ronald Alvarez, Judge Roger Colton and Judge Peter Blanc all played an integral part of an intimate moment.

I watched while Judge Baker carefully explained the commitments and obligations to these adoptive parents while thanking them and rejoicing with them at the same time. But after the formal questions were done and before the adoption was final he asked his own special question that showed that not only was he the Judge, but that he cared. "Is this one of the happiest days of your life?"

I also was able to take in an adoption that was done by Judge Alvarez. It involved the adoption of two teenage girls

Continued on page 18

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The mission of the PBCBA is to foster professionalism, serve its members, and enhance public access to the legal system through education and service.

LETTERS TO THE EDITOR

The Palm Beach County Bar Association Bulletin welcomes your comments on topics relating to the law, the legal profession, the Palm Beach County Bar Association or the Bar Bulletin. Letters must be signed, but names will be withheld upon request. The editor reserves right to condense.



Send letters to:
EDITOR Bar Bulletin
Palm Beach County Bar Association
1601 Belvedere Road, #302E
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Director's Comments



Service

By Manny Farach

For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more.

I am in my office on a beautiful Saturday morning writing this Director's Comment, contemplating this quotation and the public perception of lawyers.

While I am here, our President is attending the National Adoption Day program organized by Penny Martin and her dedicated staff. One of our representatives to the Board of Governors is just returning from Tampa, where he drove late Thursday night after mediating a case all day Thursday and then attending the directors' meeting of our local bar association. Why did he drive four hours late into the evening after an already full day? Because one of the Florida Bar committees on which he serves met in Tampa early Friday morning.

Another of our representatives to the Board of Governors is finishing up his work for the alumni association of his alma mater. Yet another just replied to my e-mail of this morning; she is at her desk on a sunny Saturday morning even though she will soon join the bench. Justice Harry Lee Anstead served in this nation's intelligence service in Washington, D.C., former Judge Downey served as a ball turret gunner in a B-24 during World War II, John Burns served as a Marine in both World War II and the Korean Conflict, Brian Joslyn served in Vietnam and Gary Beard just returned from a year-long tour of duty in Iraq. There are many more examples I could cite of attorneys doing public service, my only limitation being that I could not fit all of them into this space. But how much of this does the public know?

Most of society sees our profession as it is portrayed in the popular media, and the public focuses more on the courtroom antics in "My Cousin Vinny" or the length of Ally McBeal's skirt than the good works of a William Holland. This flawed focus, unfortunately, defines our profession. Society needs to know that more than any other profession, attorneys are dedicated to public service. Think of our pro bono publico requirements. Re-read the Rules of Professional Conduct and recall these words: "A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service." I suspect no profession other than ours actually demands public service of its members, and that no other profession actually gives as much.

Our Bar can and does update the local media with information about the good works and the public service of our members, but can only do so much. You should inform the Bar the next time you volunteer for a project, or when you rouse your community to action so that the Bar can inform the public. The Bar and the public need to know that a contributing member of society is giving back, and that the person is also a member of the Florida Bar. The issue of public perception of attorneys is crucial to our profession, and silence is not golden in this arena.

I think of those who have given so much, how most likely no one will know of their contributions, and it concerns me. Our profession has given us a great deal, and many of us have given back. It's time we let the public know when give back.



Do we have your email address?

Is your current email address on file with the Palm Beach County Bar Association? If not, please be sure to send it to pburns@palmbeachbar.org. We send out a weekly eNewsletter with updated legal news and information about upcoming events and seminars. Bar members were sent emails after the hurricanes to

keep them up-to-date on courthouse and clerk's offices closings and we also post information about judicial openings and any other critical information that comes from the Chief Judge's office. Don't be left out, send your email address in today.

GREG COLEMAN

FOR THE FLORIDA BAR BOARD OF GOVERNORS

WHY GREG COLEMAN?

- **President** of the Palm Beach County Bar Association (2002-2003)
- **Member** of the Board of Governors for the Florida Bar as President of the Young Lawyers Division (1999-2000)
- **President** of the Palm Beach County Bar Association Young Lawyers Division (1996-1997)
- **Appointed** to the House of Delegates for the American Bar Association

WHY GREG COLEMAN?

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"Much is at stake for the legal profession today and our Board of Governors needs the kind of leadership that can find solutions and offer aggressive advocacy for the legal community."

- Greg Coleman

Historical Committee

Who are they?

In continuing with a project started by last year's Historical Committee, we will continue to run old photos of some of our members. Can you guess who they are?

Answers on page 12



Minutes Of The Meeting Of The 187th Regular Meeting of the Junior Bar Section Of The Palm Beach County Bar Association Held September 2, 1966 At The Holiday Inn

A Capacity crowd of 50 members, guests, and curiosity seekers came to see and hear the featured attraction, Harry Johnston II.

President Campbell set a warm tone to the meeting when he told how he had "missed" Ed Lewis the past two meetings.

After the touching oo's and ah's of sympathy subsided, President Campbell

proceeded to instruct the group in the whys and wherefores of certain proposed changes in the by-laws. This came as a minor surprise to most of the members who were unaware that the organization had any by-laws.

Norma Kapner's suggestion that a by-law revision committee be appointed was blithely ignored.

The best guess is that elections will be

held at the next meeting and that the single office of Secretary-Treasurer will be split in two separate offices. In order to establish the October elections as envisioned under the proposed by-law change, President Campbell announced that he would cut short his term as president thereby assuring acceptance of the proposal.

The introduction by Ray Royce of Mrs. Johnston's son, Harry, must be described as "classic". It might also be described by some as nasty, caustic, vicious and invidious.

Vice President Royce closed his introduction by very grandly yet very sincerely presenting our speaker to his audience. The speaker arose humbly to address the group and the entire group arose quietly and left the room.

When the meeting was finally brought to order, Harry Johnston proceeded to give one of the finest and most informative talks received by the Junior Bar.

There being no further business to come before the meeting, it was adjourned.

Respectfully submitted
Peter Van Andel

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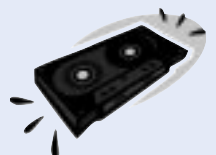


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Distinguishing an Adversary Proceeding From a Contested Matter

By: Marc P. Barmat Furr and Cohen, P.A.

Lawyers who ‘dabble’ in bankruptcy may not have a complete understanding regarding the differences between adversary proceedings and contested matters. This article distinguishes adversary proceedings from contested matters and identifies the relevant Bankruptcy Code sections regarding these two bankruptcy litigation procedures. The Bankruptcy Rules distinguish between different types of litigated matters and divide them into contested matters and adversary proceedings. In order to determine whether a matter is required to be brought as an adversary proceeding or as a contested matter, you should refer to Bankruptcy Rules 7001 and 9014.

An adversary proceeding is initiated by the filing of a complaint that requires service, an answer and a pretrial hearing. On the other hand, a contested matter is initiated by the filing a motion, which may or may not require a response, and typically involves a specially set evidentiary hearing. Unlike in a contested matter, the complaint in an adversary proceeding must state whether the proceeding is core or non-core and, if non-core, that the pleader does or does

not consent to entry of final orders or judgment by the bankruptcy judge. The responsive pleading must admit or deny that the proceeding is core or non-core and, if non-core, must state that the party does or does not consent to the entry of final orders or judgment by the bankruptcy judge. See, Bankruptcy Rule 7008(a) and 7012 (b). Also, unlike in a contested matter, when instituting an adversary proceeding, a filing fee must be paid to the United States Courts. The United States Bankruptcy Court for the Southern District of Florida has a filing fee of \$150.00.

The following ten categories are designated as adversary proceedings under Bankruptcy Rule 7001:

(1) A proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 or the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 403(d);

(3) a proceeding to obtain approval under § 363(h) for the sale of both the

interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. § 1452.

Examples of contested matters include dismissal or conversion of a bankruptcy case under Rule 1017(d); objections to confirmation of a plan under Rule 3020(b)(1); relief from the

Continued on page 20

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Join us in supporting and endorsing Lisa Small, immediate Past President of the Palm Beach County Bar Association, for Florida Bar Board of Governors Seat # 4 because she has the Experience, Character, Dedication, Proven Leadership and Broad Based Support to be a strong and effective representative for us on the Board of Governors.

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(List in progress - current as of December 1, 2004---EMAIL or FAX your endorsements and support to smallaw@aol.com or 561.835.0547)

North County Section plans 2nd Annual BBQ Save the Date!

The North County Section will host their Second Annual BBQ Dinner on Friday, February 25 at the Bonnette Hunt Club in Palm Beach Gardens. Invitations will be mailed shortly or you can register on line today at www.palmbeachbar.org.

A special thank you to Comerica Private Bank for their continued support of this event.



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Third Annual Outstanding Jurist of the Year Award sponsored by the North County Section

Judge Lupo was honored in 2003. Judge Colbath received the award in 2004. Who will win the North County Section's *Third Annual Outstanding Jurist of the Year Award* for 2005?

Please let us know in writing who you think deserves to be honored for their contribution to our community. Letters of recommendation should be sent to the Bar Office no later than April 1. Or, email your nomination to lpoirier@palmbeachbar.org.

The winner will be announced during the section's annual dinner at Ruth's Chris Steak House in May.

Judges should meet the following criteria: The judge should be one with an excellent reputation for sound judicial decisions and an unblemished record of integrity as a lawyer and judge; is generally recognized by Bar members as highly qualified; and is active in Bar related activities. He or she should be respectful of the law and understanding of cases. Who is eligible? Any judge who currently presides over cases in Palm Beach County will be eligible to win the award.



Professionalism Council Report

by Darryl Kogan, Esquire

The Palm Beach County Bar Association has adopted Standards of Professional Courtesy, to educate attorneys unfamiliar with the customary practices in Palm Beach County. Those Standards were endorsed by the judges of the Fifteenth Judicial Circuit.

Chief Judge Edward H. Fine on April 8, 2003 signed Professionalism Administrative Order No. 2.039-4/03 regarding conduct inconsistent with ideals or standards of professionalism. By that administrative order there was established the Fifteenth Judicial Circuit Professionalism Council. The Council is composed of four members of the Bar and/or retired judges selected by the Chief Judge, the President of the Palm Beach County Bar Association and a representative of the Florida Bar Board of Governors for the Fifteenth Judicial Circuit. The purpose of the Council is to meet with attorneys who have conducted themselves in a manner inconsistent with the ideals or standards in order to discuss such conduct and counsel attorneys to avoid future conduct inconsistent with the ideals or standards.

The present members of the Bar on the Fifteenth Judicial Circuit Professionalism Council are Alfred A. Lasorte, Jr., Esquire, Chairman, Elsa Waite, Esquire, Meenu Sasser, Esquire, and Darryl Kogan, Esquire.

A meeting of the Professionalism Council was convened on November 4, 2004, at which time also in attendance was Stanley Klett, Esquire, President of the Palm Beach County Bar Association, and Chief Judge Edward H. Fine. The following matters were found to be inconsistent with certain of the Ideals and Goals of Professionalism published by the Florida Bar and/or The Palm Beach County Bar Association Standards of Professional Courtesy:

1. A lawyer failed to respond to numerous written and verbal inquiries from opposing counsel, leading opposing counsel to simply not know what the lawyer was doing or intending to do relative to the underlying action.

a. Ideal 3 provides that “[a] lawyer’s word should be his or her bond. The lawyer should not knowingly misstate, distort or improperly exaggerate any fact or opinion and should not improperly permit the lawyer’s silence or inaction to mislead anyone.” See also Palm Beach County Bar Association Standard Section IV, paragraph 1 (“Attorneys... shall not mislead by inaction or silence.”).

b. Goal 6.10 provides “[a] lawyer should respond promptly to inquiries and communications from clients and others.”

c. Palm Beach County Bar Association Standard Section V, paragraph 1 provides in relevant part “[a]ttorneys... should refrain from actions which cause unnecessary expense or delay.”

2. A lawyer failed to attend several hearings which directly resulted in the delayed resolution of the underlying action, including a hearing set by order of the court in the underlying action at which the attorney was required to show cause why they had not previously appeared before that court. The attorney failed to contact the court or opposing counsel prior to any of the scheduled hearings in the underlying action.

a. Ideal 4 provides “[a] lawyer should always conduct himself or herself to assure the just, speedy, and inexpensive determination of every action and resolution of every controversy.”

b. Goal 4.11 provides “[a] lawyer should appear at a hearing before a court or other tribunal fully prepared to submit the matter at issue to the court or tribunal for adjudication.”

c. Goal 6.6 provides “[a] lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.” See also Palm Beach County Bar Association Standards Section I, Paragraph 3 (“Attorney should notify opposing counsel, the court, and others affected, of scheduling conflicts as soon as they become apparent.”)

d. Goal 6.9 provides “[a] lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.”

e. Palm Beach County Bar Association Standard Section V, paragraph 1 provides in relevant part “[a]ttorneys... should refrain from actions which cause unnecessary expense or delay.”

3. A lawyer prepared a draft order, but failed to provide a copy to opposing counsel prior to submitting the draft order to the court in the underlying action. Instead, the lawyer sent a copy of the proposed order to opposing counsel simultaneously with providing the order to the Court in the underlying action. The opposing counsel was deprived of an opportunity to review the proposed order.

a. Palm Beach County Bar Association Standard Section IV, paragraph 3 provides “[a]ttorneys should draft proposed orders promptly and the orders should fairly and adequately represent the ruling of the court. Attorneys should promptly provide, either orally or in writing, proposed orders to opposing counsel for approval. Opposing counsel should then promptly communicate any objections...” See also Ideal 2.6 of the Ideals and Goals of Professionalism of the Florida Bar.

If any judge or attorney observes conduct on the part of another attorney which is inconsistent with the ideals or standards of professionalism, or standards of professional courtesy, they may refer the matter to the Professionalism Committee of the Palm Beach County Bar. If the Professionalism Committee determines the matter should proceed to the Council, the attorney involved will be invited to meet with the Council on a date and time specified.

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Walter C. Jones IV Named Pro Bono Attorney Of The Month



The Fifteenth Circuit Pro Bono Committee is pleased to announce this month's Pro Bono Attorney of the Month, **WALTER C. JONES IV.** Casey, a Board Certified Civil Trial Lawyer, is President, Owner and Partner in the firm Freeman, Maynor and Jones, LLC located in Palm Beach Gardens. Casey is being honored for his representation of an elderly woman who was the victim of fraud. The client

took in a boarder to help defray expenses. Subsequently it was discovered that the client's home was contaminated with asbestos and required clean up. The boarder agreed to coordinate the work while the client moved into a nursing home. While in the nursing home the boarder had the client sign a Power of Attorney. The house was eventually quit claimed to the boarder and foreclosed upon while the client was in the nursing home. After two years the case ended with the client selling her interest in the house and receiving a monetary settlement. Casey expended more than 200 hours over the course of the case. For his relentless pursuit of justice on behalf of his client, Walter C. Jones IV is recognized as Pro Bono Attorney of the Month.

The Blood Bank Committee wishes to acknowledge the following who donated recently:

Wellise Charles, Shirley D. Devin, Roberta T. Dunlap, Angela J. Eckman, Edward A. Garrison, Keith A. Grose, Steven A. Harris, Novik I. Hier, Jack P. Hill, Frank A. Kreidler, Robin G. Kriberney, Jennifer L. Manke, Linda M. Miller, Margaret A. O'Keefe, Robert W. Pitcher, Susan S. Slater, Ryan B. Smith and Walter A. Stein.

The Committee requests that all attorneys who donate blood do so for the benefit of the accounts of the Bar Association. For attorneys in the West Palm Beach-Boynton Beach vicinity, the account number is PBBA. For attorneys in the north county area, the north county account number is PBBG.



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Monthly Board Meeting Attendance

	July	Aug	Sept.	Oct.	Nov.
	Retreat				
Klett	x	x	x	x	x
Leopold	x	x	x	x	x
Farach	x	x	x	x	x
Suskauer	x	x	x	x	x
Murray	x	x	x	x	
Whitfield	x	x	x	x	
Schuler	x		x	x	x
Sasser	x	x	x	x	x
Kramer	x	x	x	x	x
Poulton	x	x	x	x	x
Coates	x	x	x	x	x

Mock Trial Scripts Needed for Law Week

The Law Week Committee has established its first "Mock Trial Script Writing Contest."

If you enjoy creative writing, we could use your help! Create a Mock Trial appropriate for either elementary, middle or high school students to use. Scripts should be submitted to the Bar Office no later than March 1st. The winner of the contest will receive a complimentary ticket to attend the annual Law Week Luncheon in May. For additional information, please call Chairperson Kim Rommel-Enright at 655-8944.

Photo Answers:

1. Linda Albritton
2. Chet Brewer
3. Mitch Beers
4. Andy Helgesen
5. Judge Edward Fine

FAWL Hosts Event for Legal Aid Society

FAWL recently hosted an event at Barnes and Noble at City Place where over 100 people purchased over 150 books and gifts for Legal Aid to use during their silent auction at their upcoming Pro Bono Recognition Evening. In addition, over \$1,000 was raised for Legal Aid's Children's Fund. The fund provides medicine, clothing and school supplies to the disadvantaged children in our community.

A continental breakfast and luncheon was provided courtesy of Cabinet Creations LLC, Jumby Bay Island Grill, Elisha D. Roy P.A., John F. Schutz P.L. and the Suskauer Law Firm.

**Meenu Sasser,
Bob Bertisch and
Cindy Spall.**



**Attending the
event were
Melinda Gamot,
Tom Sasser and
Nicole Gamot.**

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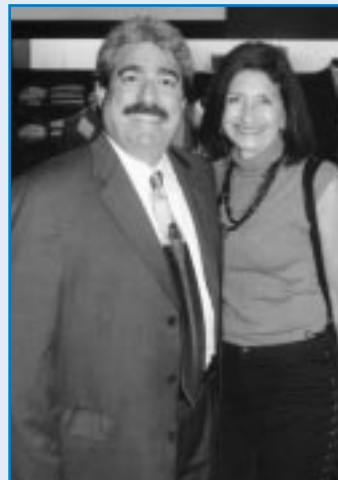
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Young Professional Friends of Legal Aid Host Brooks Brothers Event

In October, 130 young professional friends of Legal Aid partied and shopped at Brooks Brothers at the Gardens Mall. The event raised over \$2,500 which will go towards funding Legal Aid's three children's programs: The Foster Children's, Juvenile Advocacy and Educational Advocacy Projects. Hosts for the evening were Hampton Beebe, Flynn Bertisch, Mariano Garcia, Hampton Keen, Scott Murray, David Prather, Cater Randolph, Heath Randolph and Scott Suskauer.



Bob and Bernadette Shalhoub



Michelle and Scott Suskauer

**Register for Bar Events Online at
www.palmbeachbar.org**

Welcome New Members!

The following represents each new member's name, hometown, law school, and date of admission to the Florida Bar and law firm association.

BEAU BOWIN, Melbourne; University of Florida; 2004; Associate in the law firm of Steel, Hector, & Davis, LLP in West Palm Beach.



ERIN DEADY, Palm Beach County; Nova Southeastern University; 2000; Associate in the firm of Lewis, Longman, & Walker, P.A. in West Palm Beach.

MELISSA DUNCAN, Miami; University of Florida; 2004; Associated with Legal Aid of Palm Beach County in West Palm Beach.



HARLAN M. GLADSTEIN, Chicago; University of Miami; 1986; Associate in the law offices of Mark M. Carroll in Plantation.



P.A. in West Palm Beach.

ERICAN LIVINGSTON, Wyoming; Nova Southeastern University; 2004; Associate in the law firm of Lewis, Longman, & Walker,



MARIA S. MELIUS, Virginia; Nova Southeastern University; 2004; Sole Practitioner in Boynton Beach.



THOMAS F. MULLIN, Hollywood; Nova Southeastern University; 2004; Associate in the law firm of Lewis, Longman, & Walker, P.A. in West Palm Beach.

JANNA SATZ NUGENT, Alaska; Florida State University; 2003; Associate in the law firm of Greenberg Traurig, P.A. in West Palm Beach.



MATTHEW T. RAMENDA, Hartford; Vanderbilt University Law School; 2004; Associate in the law firm of Jones, Foster, Johnston, & Stubbs, P.A.

in West Palm Beach.

G. ELLIS SUMMERS, JR., Tennessee; University of Richmond; 2004; Associate in the law firm of Gunster, Yoakley, & Stewart, P.A. in West Palm Beach.

ERICA S. GROSSMAN, New York; Nova Southeastern University; 2003; Associate in the law firm of Romaguera, Baker, Dawson, Bringardner, & Dias, P.A. in Palm Beach Gardens.

LARA MICHELLE LAVOIE, Miami; Florida State University; 2002; Associate in the law firm of Walton, Lantaff, Schroeder, & Carson, LLP in West Palm Beach.

AMY CARYN RUSSELL, Virginia; University of Miami; 2001; Associate in the law firm of Romaguera, Baker, Dawson, Bringardner, & Dias, P.A. in Palm Beach Gardens.

ELIJAH STIERS, Alabama; University of Florida; 2004; Associate in the law firm of Wicker Smith in West Palm Beach.

CYRUS K. TOUFANIAN, Ohio; DePaul University; 2004; Associate in the law firm of Wicker Smith in West Palm Beach.

IRMA L. SALGADO, Nicaragua; University of Miami; 2004; Associate in the law firm of Holland & Knight in West Palm Beach.

ANDREW A. IACOBELLI, Canada; Michigan State University; 2004; Associate in the law firm of Bobo, Ciotoli, Bocchino, & Newman, P.A. in North Palm Beach.






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Identifying the Client—The First Line of Defense

By D. Culver “Skip” Smith III

Member of the Palm Beach County Bar Association Professionalism Committee
and Chairman of The Florida Bar Professional Ethics Committee

Abundant authority exists for the proposition that absent exceptional circumstances, a lawyer owes a fiduciary duty or duty of care only to the lawyer’s client. In addition, the avoidance of conflicts of interest is of paramount concern, lest they lead to disqualification, disgorgement of fees, or disciplinary action. Accordingly, confirming the identity of the client at the outset of the representation is critical.

A lawyer-client relationship is essentially consensual, thus identifying the client typically causes no difficulty. No particular contract or formality is necessary to create the relationship, however, *Eggers v. Eggers*, 776 So. 2d 1096, 1099 (Fla. 5th DCA 2001), and the payment of a fee is not required, *Florida Bar v. King*, 664 So. 2d 925, 927 (Fla. 1995). The test in Florida for determining the existence of a lawyer-client relationship absent a formal retainer hinges on the putative client’s reasonable belief that he or she “is consulting a lawyer in that capacity with the intention of seeking professional legal advice” and his or her “manifested intention” to do so. *Florida Bar v. Beach*, 675 So. 2d 106, 109 (Fla. 1996); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); cf. *Dean v. Dean*, 607 So. 2d 494, 497 (Fla. 4th DCA 1992) (privilege issue). Although the cases state the test in terms of the putative client’s “subjective belief,” they also state that this “subjective belief” must be reasonable. See, e.g., *Beach*, 675 So. 2d at 109; *Bartholomew*, 611 So. 2d at 86. Thus, the test ultimately is an objective one.

The requirement of “manifested intention” means that the intent must have been manifested to the lawyer, so that the lawyer has reason to know of the putative client’s intent. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1281-83 (11th Cir. 2004) (applying Florida law). Thus, a lawyer-client relationship is not created by the receipt of some incidental benefit of the lawyer’s service, such as when the lawyer represents a coparty or a relative. See, e.g., *Eggers*, 776 So. 2d at 1099 (holding that son did not have lawyer-client relationship with mother’s lawyer based on lawyer’s incidental advice to him). In addition, a lawyer may answer a general question about the law without a lawyer-client relationship arising. See *ibid.*; *Bartholomew*, 611 So. 2d at 86-87 (holding that general discussions on golf course were insufficient); see also *Restatement (Third) of Law Governing Lawyers* § 14 cmt. c.

Traps for the careless lawyer often arise with organizational or fiduciary clients. A lawyer rendering professional services to a corporation does not thereby undertake fiduciary duties or a duty of care to the corporation’s officers, directors, or shareholders, so long as the lawyer does not render services for their direct personal benefit. *Salit v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 742 So. 2d 381, 389 (Fla. 4th DCA 1999); see also *JLF Enters. v. Malinski*, 800 So. 2d 334, 336 (Fla. 4th DCA 2001). Failing to confirm the representation solely of the corporate client,

however, can lead to unintended consequences. See, e.g., *United States v. Walters*, 913 F.2d 388 (7th Cir. 1990) (holding that in circumstances presented, corporate officers retained counsel in individual capacities); *Rosman v. Shapiro*, 653 F. Supp. 1441 (S.D.N.Y. 1987) (holding that 50% shareholder in closely held corporation may reasonably rely on lawyer’s apparent willingness to provide legal services for shareholder in addition to corporation, thus impliedly creating lawyer-client relationship); *Meyer v. Mulligan*, 889 P.2d 509 (Wyo. 1995) (finding question of fact whether husband and wife, incorporators of corporation to own motel, were co-clients with standing to sue corporation’s lawyer for malpractice).

Partnerships present special problems for identifying a lawyer’s client, especially in jurisdictions that subscribe to the common-law aggregate theory of partnership rather than the entity theory of partnership. Florida subscribed to the common-law aggregate theory until 1995, when the Florida Legislature enacted the Florida Revised Uniform Partnership Act. The Act provides that “[a] partnership is an entity distinct from its partners,” Fla. Stat. § 620.8201(1) (2003), and applies to all general partnerships, regardless of when formed, *id.* § 620.9901(2). Thus, in Florida a lawyer who represents the general-partnership entity does not thereby represent the individual general partners. *Chaiken v. Lewis*, 754 So. 2d 118, 118 (Fla. 3d DCA 2000). Likewise, a lawyer who undertakes to further the interests of a limited partnership at the request of or pursuant to a contract with a general partner of the limited partnership normally does not thereby enter into a lawyer-client relationship with the limited partners themselves. *Amsler v. American Home Assurance Co.*, 348 So. 2d 68, 71 (Fla. 4th DCA 1977), *disapproved on other grounds, Goldome Sav. Bank v. Wulsin*, 530 So. 2d 291 (Fla. 1988); *accord Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994) (applying Mississippi law); *Quintel Corp. v. Citibank*, 589 F. Supp. 1235 (S.D.N.Y. 1984); *Rose v. Summers, Compton, Wells & Hamburg, P.C.*, 887 S.W.2d 683 (Mo. Ct. App. 1994).

The concept of registered limited-liability partnerships does not affect the identity of a lawyer’s client. A registered limited-liability partnership simply is a partnership that has registered as such; it is not itself a separate form of business entity. See Fla. Stat. § 620.8201(2) (2003) (“A limited liability partnership continues to be the same entity that existed before the filing of a statement of qualification under s. 620.9001.”); see also Stuart R. Cohn & Stuart D. Ames, *Florida Business Laws Annotated* 226 (2003–2004 ed.) (“The LLP is not itself a form of enterprise.”).

Unincorporated associations present unique client-identification problems. The issue is whether the client is the association apart from its members or each of the association

Continued on page 16

“Identifying The Client”

(continued from page 15)

members individually. *See, e.g., United States v. American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 608, 614 (W.D. Pa. 1967) (holding in privilege case that each individual member of unincorporated association was client of association’s lawyer); *Schwartz v. Broadcast Music*, 16 F.R.D. 31, 32-33 (S.D.N.Y. 1954) (same); *Franklin v. Callum*, 804 A.2d 444, 448 (N.H. 2002) (same); *cf. Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978) (not reaching question whether trade association or each of its 7,850 members was lawyer’s client). The answer may depend upon the size and complexity of the organization. *Restatement* § 96 cmt. c; *cf. R. Reg. Fla. Bar 4-1.13 cmt. para. [1]* (stating that the ethical duties of a lawyer representing an organization “apply equally to unincorporated associations”).

A lawyer’s representation of a fiduciary such as a personal representative or trustee does not automatically create a lawyer-client relationship with the estate or trust beneficiaries, even if the lawyer is paid with estate or trust funds. *First Union Nat’l Bank v. Turney*, 824 So. 2d 172, 185-86 (Fla. 1st DCA 2001) (holding that trust beneficiary could not obtain trustee’s lawyer-client and work-product information in adversary proceeding between beneficiary and trustee); *First Union Nat’l Bank v. Whitener*, 715 So. 2d 979, 982 (Fla. 5th DCA 1998) (similar); *Barnett Banks Trust Co. v. Compson*, 629 So. 2d 849, 851 (Fla. 2d DCA 1993) (similar); *In re Estate of Gory*, 570 So. 2d 1381, 1383 (Fla. 4th DCA 1990) (reversing disqualification of personal representative’s lawyer on motion by beneficiary); *see also R. Reg. Fla. Bar 4-1.7 cmt. para. [12]*. This is true notwithstanding that the lawyer may have fiduciary duties to the beneficiaries as the fiduciary’s lawyer. *Estate of Gory*, 570 So. 2d at 1383. *But cf. Restatement* § 51(4) (stating that a lawyer representing an estate or trust fiduciary may be liable to the estate or trust beneficiaries for negligent failure to protect them from the client’s fiduciary breach).

A different rule applies under the statutory scheme of the Employee Retirement Income Security Act of 1974 (ERISA). A lawyer advising an ERISA fiduciary represents the trust’s beneficiaries,



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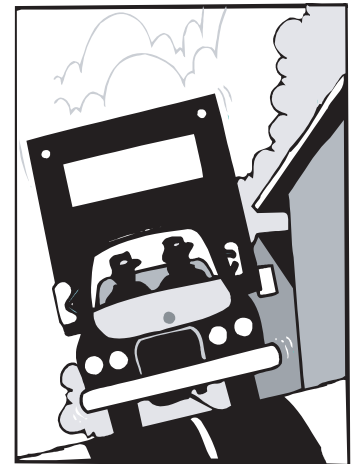
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not the fiduciary personally. *Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494, 496-97 (D. Conn. 1985); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co.*, 543 F. Supp. 906, 908-10 (D.D.C. 1982).

Thus, when the possibility of misunderstanding exists, the lawyer at the outset of the representation should explain to the client – and confirm in the engagement letter or otherwise – precisely what person or entity he or she represents, what affiliated persons and entities he or she does not represent, and the resulting limitations on expectations of loyalty, confidential communications, and the like. For example, when representing a close corporation in which the shareholders and directors are the same persons, the lawyer should point out that representation of the corporation does not constitute representation of the shareholders personally and that any communications between the lawyer and any of the shareholder-directors may be disclosed to the other shareholder-directors. Only by taking such steps can the lawyer ensure that he or she does not unwittingly undertake fiduciary duties or a duty of care to a unintended parties.



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Daubert And Frye – Where Does Florida Stand?

By Ted Babbitt

This is not the first time this writer has commented upon cases involving judicial review of expert testimony and the applicable test in Florida. Revisiting that issue is appropriate in light of the emergence of Vioxx and similar litigation, which will undoubtedly test the qualifications of experts in various areas. The Supreme Court of Florida analyzed the responsibility of the Court in conducting a hearing challenging an expert's ability to testify in scientific matters in the case of Castillo v. E.I. Du Pont De Nemours & Co., 854 So. 2d 1264 (Fla. 2003).

That case was brought against the manufacturer of Benlate by the mother of a child born with severely underdeveloped eyes. The mother was in the vicinity of a farm and was soaked with a sprayed substance in her 7th week of her pregnancy. The evidence indicated that that substance was in all probability Benlate, an agricultural fungicide manufactured by DuPont.

After a multi-million verdict against DuPont, the Third District reversed primarily on the basis of error in the admission of the scientific evidence presented by the Plaintiff. The Supreme Court reversed the Third District and reinstated the verdict objecting to the analysis of the District Court under Frye v. United States, 293 F.1013 (D.C. Cir. 1923).

The testimony in question related to the conclusion of the plaintiff's expert based upon animal studies, in-vitro tests and differential diagnosis with respect to the cause of the birth defect. The District Court had reversed based in part on both the underlying science of the expert testimony and on the expert's ultimate conclusion. The Supreme Court found this to be error.

The Supreme Court explained that Frye, supra, on which Florida Courts rely, requires only that scientific principals underlying the evidence from which the expert's conclusion is reached are based upon methods generally accepted in the scientific community. See Hadden v. State, 690 So. 2d 573, 576 (Fla. 1997). The question of whether that test has been satisfied is determined by a de novo review of the appellate court. That de novo review examines the expert testimony presented, scientific and legal writings available to the appellate court and any prior judicial opinions. See Flanagan v. State, 586 So. 2d 1085, 1112 (Fla. 1st DCA 1991) approved 625 So.2d 827 (Fla. 1993).

Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) is a United States Supreme Court opinion, which Florida does not follow. That opinion interpreted a Federal Rule of Evidence and not the United States Constitution and is, therefore, not binding upon Florida Courts. Daubert went beyond Frye and required that a Court assess not only the evidence used by the expert in coming to the expert's conclusion but the validity of the conclusion itself.

The Florida Supreme Court found that the Third District erroneously adopted the reasoning of Daubert by challenging the expert's ultimate conclusion. At Page 1276, the Court found:

By considering the extrapolation of the data from the admittedly acceptable experiments, the Third District went beyond the requirements of Frye, which assesses only the validity of the underlying science. Frye does not require the court to assess the application of the expert's raw data in reaching his or her conclusion.

We therefore conclude that the Third District erroneously assessed the Castillos' expert testimony under Frye by considering not just the underlying science, but the

Continued on page 18

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“Daubert And Frye”

(continued from page 17)

application of the data generated from that science in reaching the expert’s ultimate conclusion.

The issue of causation in cases such as Vioxx litigation will be decided based primarily upon differential diagnosis. That is because there is no single “marker” to establish that Vioxx causes heart attacks, strokes or blood clots. Differential diagnosis was a major issue in the Castillo v. Du Pont case, supra. In that case, the Supreme Court found as a matter of law that differential diagnosis is a valid method to be utilized by experts in determining causation. At 1270, the Court held:

Differential diagnosis is “a term used ‘to describe a process whereby medical doctors experienced in diagnostic techniques provide testimony countering other possible causes . . . of the injuries at issue.’” Berry v. CSX Transportation, Inc., 709 So. 2d 552, 562 n. 9 (Fla. 1st DCA 1998) (quoting Hines v. Consolidated Rail Corp., 926 F. 2d 262, 270 n. 6 (3d Cir. 1991). “It is

well-settled that an expert’s use of differential diagnosis to arrive at a specific causation opinion is a methodology that is generally accepted in the relevant scientific community.” United States Sugar Corp. v. Henson, 787 So. 2d 3, 19 (Fla. 1st DCA 2001) (citing Berry, 709 So. 2d at 571)).

The application of Frye, supra, and Daubert, supra, have probably utilized more Court time than any other legal test. In Florida, Frye and not Daubert applies. If an expert’s opinion is based upon evidence which is generally accepted in the scientific community, the conclusion reached therefrom is not preliminarily tested by judicial review in Florida and is up to the jury to evaluate.

NOTE: BECAUSE A NUMBER OF PEOPLE HAVE REQUESTED COPIES OF PAST ARTICLES, A COMPILATION OF THESE ARTICLES IS NOW AVAILABLE TO MEMBERS OF THE PALM BEACH COUNTY BAR ASSOCIATION, FREE OF CHARGE, BY CALLING (561) 684-2500.

“Is This One Of The Happiest Days Of Your Life?”

(continued from page 3)

that was so touching that I can not find the words to describe the emotion in the room. The new mother and the girls hugged and were weeping with joy, as was another person that could not hold back the tears, Judge Alvarez. As I was speaking to the bailiff I learned that this as a very difficult case ending in success. He told me that it was days like this that we was happy and proud to be in the Courtroom and be a part of the legal system. Later I spoke with Judge Alvarez and learned more about the case. What made the case so hard was the love that was on all sides but that termination of parental rights was necessary. The girls overcame adversity and are doing well, in a loving home, with a positive future.

On that day I was very proud of our profession but I was even more proud of the adoptive parents that could answer Judge Baker with a heartfelt “yes.” They are giving so much of themselves and hopefully will be rewarded with love. By contributing our time, effort, or money, we can all share in the happiest day of these people’s lives.

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The Bar, YLS and NCS recently held its annual holiday party at BallenIsles where over \$19,000 was raised to purchase gifts for underprivileged children. A special thank you to our sponsors: Braman Motorcars; Brooks Brothers; Esquire Deposition Services; Lamn Krielow Dytrych & Company, CPA; Legal Search Solutions; LexisNexis; Regent Bank and USLEC.



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“Distinguishing an Adversary Proceeding From a Contested Matter”

(continued from page 8)

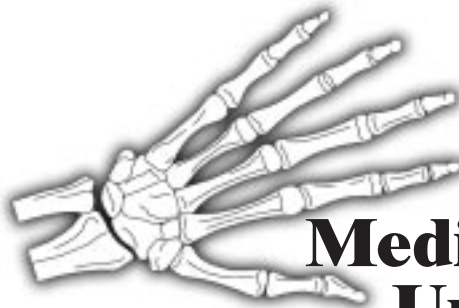
automatic stay under Rule 4001(a); use of cash collateral under Rule 4001(b); obtaining credit under Rule 4001(c); avoidance of a lien under § 552(f) of the Bankruptcy Code; and, assumption, rejection or assignment of executory contracts.

These are the main distinguishing characteristics between adversary proceedings and contested matters. Be careful not to confuse the two, as this could lead to the striking or dismissal of the litigated matter and therefore create unnecessary attorney’s fees and costs. As a further bit of advice, always refer to the Local Rules of the United States Bankruptcy Court for the Southern District of Florida any additional requirements in this district.



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The Palm Beach County Bar Association’s Mentor Program is designed to provide members with a quick and simple way to obtain advice, ideas, suggestions, or general information from an attorney that is more experienced in a particular area of law. The mentors provide a ten-to-fifteen-minute telephone consultation with a fellow attorney, at no fee. Any member of the Palm Beach County Bar, whether newly admitted or an experienced practitioner, can use the program. Call the Bar office at 687-2800, if you need a Mentor.



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GREGORY TENDRICH: Former Vice President and in-house counsel to national and regional NYSE & NASD brokerage firms, is available to accept referrals, provide consultation or assist in all securities investor related litigation and arbitrations involving stock broker misconduct, fraud, misrepresentation, churning and suitability. Call 561-733-5113 or email 10drich@bellsouth.net.

MARK R. HANSON: All admiralty and maritime matters, including personal injury actions, boating accidents, cruise line injuries and insurance claims. 240 Tenth Street, West Palm Beach, FL 33401, (561) 833-7828. Mrhlaw@msn.com.

THOMAS R. BAKER, III:

Establishment and maintenance of guardianships for property of minors as a result of personal injury settlements, including approval of settlements. 250 South Central Blvd., Ste. 203, Jupiter, FL 33458; (561) 744-0802.

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HEARSAY

Donna R. Slebodnik, Esq. formerly with the Law Office of Frank G. Cibula, Jr. (deceased) has relocated her office to 20 Surf Rd., Ocean Ridge, FL. 33435. Her office phone # is 561-278-1476, and facsimile # is 561-278-1397.



Guy Quattlebaum, Esq. a Partner of Arnstein & Lehr LLP, has been named the 2005 Chairman of the Leadership Council for the Cystic Fibrosis Foundation for Palm

Beach County.



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Bulletin Board



Robert E. Gordon has been appointed to the Board of Directors for the Brain Injury Association of America, the McLean, Virginia-based organization dedicated to brain injury prevention, research, education and advocacy. Mr. Gordon is a member of the law firm of Gordon & Doner, P.A., which practices in the areas of personal injury and wrongful death, medical negligence, products liability, nursing home neglect and securities litigation.

Powers, McNalis & Torres is proud to announce, **Steven C. Teebagy**, has become a partner in the firm and will continue his practice in the areas of personal injury, fraud investigation, fraud defense, general first party defense and commercial litigation at 1601 Belvedere Road, Ste. 500 S., W. Palm Beach, Florida 33406, (561) 588-3000 / Fax (561) 588-3705 / www.powersmcnalis.com.

The law firm of Fowler White Boggs Banker has named **Barry N. Heisler** a shareholder. Barry Heisler is in the firm's Health Care Practice Group where he concentrates his practice in the areas of professional negligence, commercial law, health care law, administrative agency practice, and trial practice.

Mark R. Osherow, P.A. is pleased to announce that **David I. Shiner** has become a partner in the firm and the firm name has changed to Osherow, Shiner & Associates, P.A. The firm continues to focus its practice in the areas of commercial and business litigation, personal injury, professional liability, insurance claims and real estate disputes.

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YLS Executive Committee Meeting
 Bar Association Office

Tuesday, January 11, 12:00 noon
South Palm Beach County
Bar Luncheon
 Maggiano's in Boca Raton
 Contact Melissa Kelly, (561) 482-3838

Friday, January 14, 8:00 a.m.
ADR Committee Meeting
 Bar Association Office

Monday, January 17
COURT HOLIDAY

Wednesday, January 19 –
Friday, January 21
The Florida Bar Midyear Meeting
 Hyatt Regency Miami

Wednesday, January 19, 6:00 p.m.
FAWL Judicial Reception
 The Breakers Hotel
 Contact: Ellen Malasky
 (561) 691-7321

Thursday, January 20, 12 noon
Lawyers for Literacy
Committee Meeting
 Bar Association Office

Friday, January 21, 12 noon
Federal Bar Association Meeting
 The Colony Hotel
 Contact jw1@steel Hector.com

Friday, January 21, 12 noon
Malcolm Cunningham
Bar Assn. Meeting
 Law Library in Main Courthouse
 Contact: Lisa Quarrie (561) 832-3300

Thursday, January 27, 5:00 p.m.
Board of Directors Meeting
 Bar Association Office

Friday, January 28, 8:00 a.m.
PBCBA Real Estate Seminar
 Bar Association Office

Friday, January 28, 4:00 p.m.
Investiture Ceremony
for Martin Colin
 Courtroom 11A



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