



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

www.palmbeachbar.org

October 2006

Mark your calendar for upcoming Membership Meetings

North County Section Membership Luncheon

October 11, 11:45 am - 1:00 pm
Guest Speaker: Carl Domino
Abacoa Golf Club

Young Lawyers Section "Lunch with the Legends" Featuring Sid Stubbs

October 19, 11:45 a.m. - 1:00 p.m.,
Bar Association Office

Bench Bar Conference

October 27, 12 - 5:30 p.m.
PB County Convention Center
Guest Speaker: FL Supreme Court Justice Barbara Pariente

Young Lawyers Section "Lunch with the Legends" Featuring Skip Smith

November 8, 11:45 a.m. - 1:00 p.m.,
Bar Association Office

Annual Bar, NCS and YLS Holiday Party

December 7, 5:30 p.m.
BallenIsles Country Club

Membership Luncheon with guest speaker U.S. Supreme Court Justice Samuel Alito

January 26, 11:45 a.m.
Cohen Pavilion at the Kravis Center

Membership Luncheon with guest speaker U.S. Supreme Court Clerk William Suter

February 13, 11:45 a.m.
Crowne Plaza Hotel

Joint Membership Luncheon with South County Bar with guest speaker Florida Bar President Hank Cox

March 20, 11:45 a.m.
Delray Beach Country Club

Annual Law Week Judicial Reception

April 25, 5:30 p.m.
The Harriet at City Place

Annual Law Day Luncheon

May 4 (tentative date) 11:45 a.m.



Young Lawyers Eric Severson, Jennifer Kypreos, Allison Kapner, Stefanie Shelley, Jason Guari, Theo Kypreos and Cash Eaton recently spent a morning distributing school supplies to nearly 300 students and 20 teachers at Palm Beach Public School, which is considered Title 1, which means most of the children come from low-income families or are at risk of failing.

Many thanks to Allison Kapner for doing another great job organizing the Back To School project.

Bench Bar Conference scheduled for October 27 at Convention Center

This year's Bench Bar Conference has been scheduled for **Friday, October 27** at the Palm Beach County Convention Center. The Bench Bar Conference is an opportunity for attorneys and judges to meet informally in a roundtable atmosphere to discuss issues of concern to both the Bench and Bar. A morning session will be dedicated to legal assistants, judicial assistants and legal secretaries. This session has proven to be valuable to staff, so please be sure that you register them. A general luncheon, with guest speaker FL Supreme Court Justice Barbara Pariente, will be held at 12 noon followed by the afternoon breakout session for attorneys and judges.

Important Clerk's Office Notice!

From September 30, 2006 through October 9, 2006, in compliance with an Administrative Order, the Palm Beach County Clerk & Comptroller's office will suspend case initiation and document processing with the exception of essential and emergency filings. Official records, jury service and collection of monies will not be affected. The suspension of the Clerk's civil and criminal court activities is necessary in order to convert to a new Criminal Justice Information System (CJIS). During this conversion, the Clerk & Comptroller's office will be operating at limited capacity during normal business hours. Court users are encouraged to limit their activity during this time to allow for a smooth transition.

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THE
BULLETIN

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The mission of the Palm Beach County Bar Association is to serve its members, foster professionalism and enhance the public's understanding and awareness of the legal system.

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
West Palm Beach, FL 33406



Joe Ackerman and Penny Martin,
event co-chairs

Happy Hour set for October 12

The Special Needs of Children Committee invites you to their Annual Happy Hour on Thursday, October 12 at E.R. Bradley's from 5:30 to 7:00. The cost is just \$15 and includes one drink, plus appetizers. Please let us know you will be attending by registering on-line at www.palmbeachbar.org. Proceeds from the evening will benefit local programs for National Adoption Day.

Judicial Candidate Forum a "Sell Out"

In an effort to help the judicial candidates reach the electorate; as well as provide a valuable community service to the voters of Palm Beach County, the Bar Association recently hosted a Judicial Candidate Forum & Luncheon at the Crowne Plaza Hotel in West Palm Beach. All of the candidates running for the 15th circuit seat, and two county court seats, participated in the program.



Liz Quirantes from WPEC News 12 moderated the program, which was well attended by more than 200 guests. Pictured with Liz is **Manny Farach, president** and **Meenu Sasser, president-elect**.



Candidates running for the circuit court seat were first to answer questions. Pictured from left to right: **Jerry Beer, David French, Ken Lemoine** and incumbent Judge **Art Wroble**.



Judge Jack Cook and Michael Walsh



Judge James Martz, Judge Laura Johnson, Jay White and Judge Jonathan Gerber



Cindy Crawford and Curtis Witters

President's Message



Independence

By Manuel Farach,
President

Long before he became the second President of the United States, John Adams was a struggling young lawyer in Boston. He faced the same pressures faced by many young lawyers today: trying to learn the art of practicing law while attracting enough clients to support his family. Early in his career he was asked to defend the British soldiers involved in the 1770 Boston Massacre, the incident in which five Bostonians were killed by British troops and which helped fuel the American Revolution. Adams was hesitant; he was always sensitive to criticism and especially sensitive to public desipal.

Despite knowing the consequences of his doing so, Adams undertook the defense of the soldiers and managed to

earn acquittals for all but two (with only minor charges being proven against the two). Boston scorned him, he lost half his practice, and he and his family received threats of violence. Looking back later in life, Adams called his representation of the soldiers "one of the most gallant, generous, manly and disinterested actions of my whole life, and one of the best pieces of service I ever rendered my country."

Our system of justice is based on the premise that a lawyer needs to be independent in order to render the best advice. This function is so important it is codified in our Rules of Professional Conduct. But independence does not stop there; the lawyer's duty is also to be independent from the client, and to in effect, protect the client from himself. This duty is most clearly seen by those who represent Death Row inmates who are demanding to be executed, but extends to all aspects of practicing law, from family law to real estate closings. It is this independence from our own

clients that we all too often fail to exercise in today's practice. Stop to consider how much harm could have been avoided if Enron's lawyers had instructed the Board of Directors to stop what they were doing. The demands of clients for us to abandon our traditional gatekeeper role are rampant, and once we compromise our independence, we compromise our independent judgment. Yet we do so - without fully appreciating the harm it causes - because we believe our duty to zealously represent our clients trumps our duty to be independent from our clients.

Failing to remain independent from our clients creates a slippery slope for lawyers, especially young lawyers. The client who pushes the lawyer to relinquish their independence and wins soon recognizes that the lawyer is more committed to the client than the public and uses that information to the lawyer's disadvantage. An unscrupulous client may then use the force and power of the lawyer to accomplish what may be

Continued on page 13



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Board of Directors Meeting Attendance

	July Retreat	Aug
Farach	x	x
Sasser	x	x
Poulton	x	x
Suskauer	x	
Murray	x	x
Bowden		x
Schuler	x	x
Napoleone	x	x
Pineiro	x	x
Pressly	x	x
Isaacs	x	

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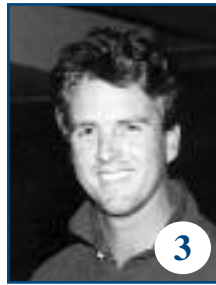
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Who are they?

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

Answers on page 16



Thank you to 100% Club Members

The Palm Beach County Bar Association has created a "100 Club". The 100% Club is a special category of membership that demonstrates a commitment to the legal profession and our community from law firms, law departments and legal organizations with more than three attorneys who enroll 100% of their attorneys as members of the Palm Beach County Bar Association. The 100 Club listing will be published quarterly in the newsletter as well as posted on our website.

Show your firm's support in the Palm Beach County Bar by becoming a member of the 100% Club. It's easy! If you think your firm is eligible, fax a copy of your firm's letterhead and a contact name to (561) 687-9007, Attn: Nancy Reidler and we'll let you know!

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Minutes of the Junior Bar Section November 1963

Of the 153rd regular meeting of the Junior Bar Section of the Palm Beach County Bar Association held in November 1963, there were 33 members and guests present.

The minutes of the previous meeting were read and approved. The President thereupon recognized Judge White and Judge Hewitt two times each to be on the safe side.

Bill Pruitt introduced two guests, Hayas Wood and Joe Caplan, both former friends of Mr. Pruitt, as are many members of this association. Bill Pruitt proposed Don Beverly for membership in this association, the proposal was seconded and all members present voted "I" to accept Mr. Beverly as a member subject to payment of dues.

Gavin Letts introduced his close friend, Mr. Carro as a guest.

Sy Burdick was given the opportunity to say a few words and declined to do so, which omission is worthy of note in and of itself.

The Vice President introduced the speaker, Marshall Criser, who spoke at great length on the unconstitutional installment land sales contract act.

There being no further business to come before the association, the meeting thereupon adjourned.

Respectfully submitted,

Edward D. Lewis
Secretary

Is There A Hybrid Car In Your Future?

By Bard Rockenbach, Chairman, Technology Committee

For about two years now, hybrid cars have been all the rage. By rage I don't mean that everybody is buying a hybrid like it was an Apple iPod. I mean that they have been all the rage for people who want to talk about buying one. When last tallied in 2004, there were 243 million registered passenger vehicles in the United States. By contrast, only 205,749 hybrids were sold in the United States in 2005, 88,000 in 2004 and 47,525 in 2003. That means that out of 243 million vehicles, only 320,000 or so are gasoline-electric hybrid vehicles or only 1/10 of one percent of the vehicles in the United States. They may be the hottest vehicle on the market today, but it will take a very long time for that to mean anything.

One of the reasons for the seeming contradiction is that everyone likes to dream about great gas mileage but, when the rubber hits the road, they would rather have a vehicle that satisfies other requirements, such as style, appearance, passenger capacity and power. The original hybrids – the Toyota Prius and Honda Insight – were strange looking curvy cars that made a statement. I would venture to say that most of the people who bought them wanted everyone to know that they were driving a car that was good for the environment. They didn't have much power, less than 100 hp, and the Insight was only a two passenger vehicle. But now that everyone who wanted to make a statement has purchased a hybrid, the market is making hybrid vehicles that look more like current gasoline-only vehicles for the rest of the consumers.

There are currently 14 hybrid models being sold in the United States. While the old standby hybrids (Honda Insight and Toyota Prius) are still available (the Honda Insight is scheduled to be discontinued this month), the market has expanded to include luxury cars from Lexus, pickup trucks from Chevrolet and GMC, and SUVs from Ford/Mercury and Toyota. By 2008 you should also find hybrid vehicles from Mercedes Benz and BMW, which are being developed by them in a joint effort with General Motors. The styling of these and current hybrid vehicles is reminiscent of gasoline-only vehicles, and the trend seems to be

to make a small insignia in the model name to be the only indication of the vehicle's hybrid heart. In fact, if you aren't careful, you might not even notice they are hybrids.

Unfortunately that is also somewhat true when it comes to gas mileage. Although the Toyota Prius and the Honda Insight boast an EPA estimated 60 miles per gallon, tests by Consumer Reports and Edmunds.com have revealed that their true gas mileage is between 35-44 miles per gallon. That is still better than gasoline-only vehicles, but it is nowhere near the EPA estimates. (As a general rule, you should discount EPA estimate miles per gallon by about 33% on any vehicle.) Newer hybrid models don't even bother to claim incredible gas mileage. Of the 14 current models, most brag about getting only 20-30 miles per gallon. The Lexus RX 400h (a midsize SUV) is a standout at 30 mpg and 268 hp, as is the Toyota Camry with a claim

of nearly 40 mpg. The Toyota Highlander is a seven passenger SUV with 268 hp and an EPA estimate of 28 city/33 hwy mpg. (For comparison, the gasoline Toyota Highlander only has 215 hp, gets an EPA estimated 19/25 mpg and costs \$5,000 less.) Otherwise, the mileage estimates are hardly amazing. They are better than current gas models, but not so much better that you would run to the store to buy one.

As a result, you will not find much of a long term economic justification for buying a hybrid. The current estimate from Edmunds.com is that you can expect it to take three years of driving a hybrid to recoup the price differential paid for a hybrid. I generally keep a vehicle for three years anyway, so at that rate I would never recoup my investment. The industry is hoping that economies of scale will help as more hybrids are manufactured, and that the price

Continued on page 14

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For more information, please visit the Palm Beach County ALA Chapter's web-site (www.pbcala.org) or call Mary Aguiar 561-659-5646





Witness Tampering in Medical Malpractice Cases

by Ted Babbitt

It is no secret that doctors don't like to be sued. In an effort to avoid that, they recognize that the key to a medical malpractice victory for the plaintiff is the testimony of a competent expert witness. The Florida Medical Association, along with many other state and national physician groups, have instituted procedures designed to punish physicians who testify on behalf of plaintiffs in medical malpractice actions. In the case of Fullerton v. Florida Medical Assoc., Inc., 31 Fla. L. Weekly D1852 (Fla. 1st DCA 2006), the appellate court found that there was potential liability against such an association when they go too far.

Dr. Fullerton appeared as an expert witness in a medical malpractice case in Florida. Subsequent to his appearance, the defendant physicians sent a letter to the FMA complaining that Dr. Fullerton's testimony was below reasonable professional standards, supported a frivolous lawsuit and requested that the FMA issue an opinion to that effect and report its findings to the Board of Medicine. Dr. Fullerton filed a complaint against both the doctors and the FMA alleging the statements were defamatory and that the FMA's expert witness committee was designed simply to intimidate persons appearing as an expert witness on behalf of plaintiffs in medical malpractice cases.

The defendants were successful in convincing the trial judge to dismiss the claims based upon the statutory immunity privilege in both state and federal law that is

granted to physician peer review groups. The Florida peer review statute, 766.101(3)(a), precludes suit against any member of a duly appointed medical review committee unless the plaintiff can show intentional fraud.

In reversing the trial court, the District Court reviewed the law of witness immunity as it relates to Dr. Fullerton's testimony in the malpractice case. At Page D1853, the Court states:

"By virtue of this immunity, defamatory statements made in the course of judicial proceedings by parties, witnesses and counsel are absolutely privileged, no matter how false or malicious those statements might be, provided the statements are relevant to the subject of the inquiry.' The consequence of the rule is that '[t]orts such as perjury, libel, slander, and other actions based on statements made in connection with a judicial proceeding are not actionable."

In discussing the Federal law, the Court reviewed the Congressional findings supporting the enactment of that law pointing out that the Federal law was designed to improve the quality of medical care and prevent treatment by incompetent physicians.

The issue which proved to be the turning point which resulted in a reversal and a reinstatement of the claim against both the FMA and the physicians was that the immunity statutes protected committees who were evaluating the treatment rendered by physicians and was not designed to permit those committees to evaluate the testimony of witnesses. At Page 1853, the Court held:

"We find no clear legislative expression that the testimonial privilege long accorded to witnesses was intended to be modified by the language of section 766.101, which was expressly created for the purpose of evaluating and improving the quality of health care

Continued on page 16

Circuit Court Report CIVIL DIVISIONS • July 2006

DIVISION	JURY TRIALS	NON-JURY TRIALS	MOTIONS	CASES PENDING
A	12/06	12/06	10/06	1300
B	12/06	12/06	08/06	1247
D	06/07	01/07	10/06	1498
E	10/06	10/06	10/06	1505
F	10/06	10/06	08/06	1175
G	05/07	05/07	09/06	1053
H	04/07	04/07	09/06	1345
I	11/06	11/06	11/06	1240
J	12/06	12/06	10/06	1371
N	12/06	12/06	11/06	1434
O	01/07	01/07	09/06	1485

All Civil Division Judges schedule their own Jury and Non-Jury Trials.
Pending cases as of 08/01/06

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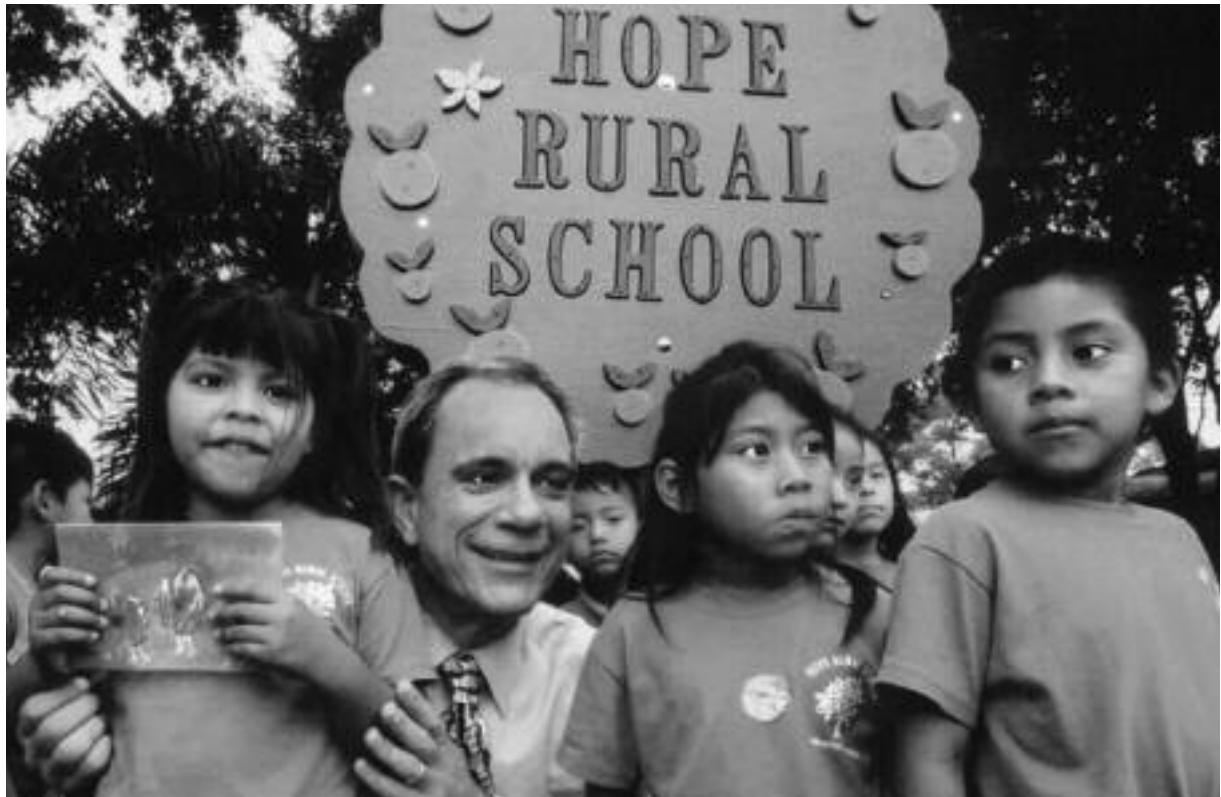
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"The YLS Yarn"

Grier Pressly, YLS President

The Young Lawyers Section has grown considerably since its inception in the 1950's. Today the YLS has over 550 members, sponsors events nearly every month of the year, and is widely recognized as one of the best and most active sections in Florida. However, despite its growth in size and stature, the YLS has never developed a formal mission statement. As the "Big Bar" has recently revised its mission statement, it is an opportune time for the YLS to implement a mission statement of its own. The executive committee of the YLS approved the following mission statement at its August meeting:

The mission of the Young Lawyers Section is to foster collegiality among its members, to develop leaders in the profession, to promote the ideal of service to community and profession, and to support the vision and programs of the Palm Beach County Bar Association.

This mission statement will guide the YLS as it continues to serve its membership, the legal community and the community at large.

Please take note that the next "Lunch with the Legends" is scheduled for October 19 at noon at the Bar office and will feature Sidney Stubbs, Jr. Esq. of Jones, Foster, Johnston & Stubbs. Lunch will be provided. Please contact the Bar office at 687-2800 to register or you may also register on the Bar website (www.palmbeachbar.org). The cost is \$10 and attendance is limited to members of the YLS.

The YLS "Lunch with the Legends" series will continue in November with D. Culver (Skip) Smith III, Esq. of D. Culver Smith III, P.A. November 8, noon-1:00 (PBCBA office).

Please contact the Bar office at 687-2800 or www.palmbeachbar.org to register.

If you are not a member of the YLS, and wish to become one, please contact that Bar office at 687-2800. If you would like to become more involved with the YLS, or have questions about any of our events or projects, please contact me at 659-4040.

YLS August Happy Hour



Andy Severson, Manny Farach and Brian Bull



Julie Ferguson, Ginny Neal and Mark Pateman



David Yarema and Jamie Crowley

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Congratulations to the Winners of our 4th Annual Spelling Bee!



Fourth Annual Spelling Bee a great success!

It's not easy spelling words like *Res Ipsa Loquitur* and *imprescriptibility*, especially when you have colleagues watching and listening to every letter that you say. But, these were the type of words that were taken out of Black's Law Dictionary for our Fourth Annual Spelling Bee, which was recently held at the President Country Club in West Palm Beach for more than 150 members.

Out of 12 spellers, the top three winners were Art Pumpian, Eddie Shipe, and Claire Dumas. Manny Farach placed fourth and served as the team's alternate. Art, Eddie and Claire represented the Bar Association's Team in the Palm Beach County Literacy Coalition's Great Grown Up Spelling Bee, which was held last month at the Boynton Beach Mall. (at the time of this printing, the competition had not taken place. We'll let you know how the team did in next month's Bulletin.)

Thanks to our sponsors from Regent Bank, The President Country Club, and a grant from The Florida Bar Foundation, one hundred percent of the \$4,000 raised will be used to buy books for school aged children through our Lawyers for Literacy Committee, chaired by Cindy Spall.

Thank you to all of our spellers (winners in bold):



Back row: Al Zucaro, Bob Bertisch, Denise Nieman, Steve Harris, **Claire Dumas**, and Grier Pressly.

Front row: **Art Pumpian**, Lisa Small, Word Master Chandra Bill, **Eddie Shipe**, Lawyers for Literacy Chairperson Cindy Spall, Scott Zappolo, Angela Miller, Kyle Silverman and Manny Farach.



Judge Jonathan Gerber, Dawn Wynn and Bradley Harper

Members enjoyed the cocktail reception while watching the bee



Word "judges" Cheryl Crowley (left) and Darlene Kostrub (far right) Executive Director of the Palm Beach County Literacy Coalition get help gonging the misspelled words from Christina Wood, coordinator of the *Wood Memorial Book Drive*; attorney Phil DiComo, and Palm Beach Post writer Thom Smith.



Julia Jennison, Tara Duh and Erin Deady



Tricia Duthiers, Glory Ross and Kelly Humke



Grier Pressly and Kristy Pressly



Tracy Mitchell, Stan Klett, Judge Martin Colin and Rosemarie Guerini



Immediate Past President Ted Leopold with President Manny Farach and Siobhan Shea.

Can a Residence Held by a Revocable Trust be Validly Claimed as Homestead Exempt?

by Marc P. Barmat, Esquire

Whether a Debtor can validly claim a residence as exempt when the residence is titled in the name of a revocable trust is often litigated in bankruptcy court. Although the issue has not been decided by either the Eleventh Circuit Court of Appeals nor the Florida Supreme Court, the most recent opinion on the issue sets forth a well reasoned analysis which holds that a Debtor can claim a residence as exempt under Florida's homestead exemption, even though title to the property is held by a revocable trust.

In *In re Alexander*, – B.R. –, 2006 WL 2055881 (Bankr. M.D. Fla.), the issue before the Bankruptcy Court for the Middle District of Florida was whether homestead property titled in the name of a revocable trust can qualify for Florida's homestead exemption when the Debtor's interest in the property is as trustee and primary beneficiary. Florida's homestead exemption is found in article X, section 4, of the Florida Constitution, which provides in pertinent part as follows: "There shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon... the following property owned by a natural person: (1) a homestead..." Fla. Const. art. X, § 4.

In *Alexander*, the Chapter 7 trustee and a creditor objected to the Debtor's claimed homestead exemption because the real property in question was not in the name of a "natural person." Despite the Chapter 7 trustee and creditor's arguments, the Court overruled the objection to exemptions. In support of the Court's holding that a Debtor can claim a residence as exempt under Florida's homestead exemption, even though title to the property was held by a revocable trust, the Court relied upon cases such as *Southern Walls, Inc. v. Stilwell Corp.*, 810 So.2d 566 (Fla. 5th DCA 2002) which recognized that the Florida Constitution did not define "owned" and does not designate how title to homestead property is to be held. *Id.* at 569-570. The Court also relied upon a Third District Court of Appeals case which held that legal title does not need

to be in an individual's name in order to qualify for Florida's homestead exemption. *Callava v. Feinberg*, 864 So.2d 429, 431 (Fla. 3d DCA 2004). In further support of the Court's ruling, the Court cited a Fourth District Court of Appeals case which found that a residence held in a revocable trust was owned by a "natural person" for purposes of Florida's homestead exemption. *Engelke v. Estate of Engelke*, 921 So.2d 693, 696 (Fla. 4th DCA 2006). The court noted that even though a revocable trust held title to the property, the individual's "interest in his residence as beneficiary of his own revocable trust would entitle him to constitutional homestead protections." *Id.*

The Court recognized and declined to follow conflicting Florida case law cited by the trustee and the creditor which supports the argument that legal title to homestead property must be in

the name of a "natural person." See, *In re Bosonetto*, 271 B.R. 403 (Bankr.M.D.Fla.2001) (A debtor cannot claim Florida homestead exemption in residential property that the debtor owned, not in her individual capacity, but as trustee of a trust.)

Whether a residence owned by a revocable trust can validly be claimed as an exempt homestead is still an open issue and until there is a definitive ruling on the appellate level, the result is largely dependent upon which Court you are before. However, the more recent cases strongly support the position that a residence held by a revocable trust can validly be claimed as an exempt homestead.

Submitted by Marc P. Barmat, Furr and Cohen, P.A.,
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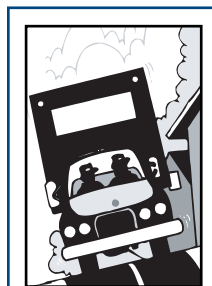
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Total Number of Hours: 1967.11

**Manuel Farach Recognized as
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, **MANUEL "MANNY" FARACH**. Manny, a partner in the law firm of Rutherford, Mulhall P.A. in West Palm Beach, focuses his practice in business and real estate litigation in which he is Board Certified. At the request of Legal Aid, Manny represented an elderly Spanish speaking man who was taken advantage of regarding ownership of his home. The client was sued for Breach of Contract and Specific Performance by a real estate investment company alleging that he entered into a contract to sell his home. In response, the client, who does not speak English, claimed that he was fraudulently induced into the agreement, which was written in English. He claimed that the representative of the real estate investment company assured him that he was only signing a right of first refusal should he ever decide to sell his home some time in the future. It was revealed through discovery that the purported agreement was a FARBAR real estate contract that provided for a "\$10.00" down payment on an \$80,000.00 purchase; that title be verified in one day and, that "seller cannot refuse closing." A few days after the agreement was signed, a representative of the real estate investment company contacted the client to inform him that he had to sell his property. When the client refused to sell, a lawsuit was filed. After extensive discovery, the matter was set for trial. Pursuant to Court Order, the parties participated in mediation and the case was resolved to the benefit of the client. Manny and his associate Tracy Mitchell with the assistance of Mariano Garcia expended over 100 hours representing this client.

If not for the hard work of Manny and Tracy, the client would have been severely damaged. For his commitment to the poor and disadvantaged, Manny Farach is recognized as Pro Bono Attorney of the Month.



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Investigators Gone Wild: Who Pays the Tab in a “Blame the Lawyers” World?

by D. Culver “Skip” Smith III

On behalf of the Professionalism Committee

The recent federal indictment of “P.I. to the Stars” Anthony Pellicano of Los Angeles for illegal wiretapping has many L.A. lawyers who employed his services nervously checking their professional-liability policies. The names on Pellicano’s client list have become as much an obsession in Tinsel Town as Madam Heidi Fleiss’s little black book. Whether Pellicano holds to his pronounced “no rat” policy remains to be seen, and the fallout for the lawyers on his client list may be significant.

But Pellicano is an independent contractor, right? So what’s the problem? As we lawyers are prone to say, “It depends.” It depends on the degree of the lawyer’s (a) failure to take reasonable steps to control, (b) disregard of, (c) ratification of, or (d) outright direction of Pellicano’s activities. Let’s see: ignore, disregard, ratify, direct. That about covers all the possibilities, unless Pellicano simply disregarded express instructions by his lawyer-principal to use no illegal or deceitful means. But how often does a lawyer give an independent private investigator express instructions about the *means* to be used to achieve the objective? After all, the investigator is the one skilled in investigative techniques, right?

As usual, it’s not that simple. A lawyer “with direct supervisory authority” over a nonlawyer “employed or retained by or associated with” the lawyer is ethically obligated “to make reasonable efforts to ensure that the conduct of the person is compatible with the professional obligations of the lawyer.” R. Reg. Fla. Bar 4-5.3(b)(2) (2006) [hereinafter “Florida Bar Rules”]. If the lawyer orders or, with specific knowledge of it, ratifies conduct of the nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by the lawyer, the lawyer is ethically responsible for the conduct itself. Fla. Bar R.

4-5.3(b)(3)(A). This is ethical version of vicarious liability. Unlike vicarious liability for torts, however, it may extend to the acts of independent contractors such as private investigators. In the case of private investigators, this potentially invokes several ethical prohibitions. Consider:

- Florida Bar Rule 4-4.1 prohibits a lawyer from making “a false statement of material fact or law to a third person.” Florida Bar Rule 4-8.4(c) prohibits a lawyer from engaging in conduct that “involves fraud, misrepresentation, or deceit.” You tell Marlowe, your investigator, that you need information about your client’s spouse’s finances. Marlowe calls an employer of your client’s spouse and poses as the spouse’s banker to obtain financial information. Oops. Deceit, right? Stand by for the “inquiry” letter from the Florida Bar.
- You send Marlowe into your client’s competitor’s showroom to pose as a prospective customer and engage a salesman in conversation to find out what the competitor is selling or not selling and why or why not. Oops. Deceit? Definitely, but is it deceit about a “material” fact? Probably not, given that the salesman could have had the same conversation with any prospective customer. Nonetheless, after the adversary figures out what happened, stand by for the “inquiry” letter from the Florida Bar.

In addition to professional discipline, civil liability for damages is a threat. Lawyers have been sued by nonclients for invasion of privacy arising out of the activities of the lawyers’ independent-contractor investigators. The problem for the pure-hearted, empty-headed lawyer (“I did not authorize and never would have authorized Marlowe to use those tactics”) is the fraud

Continued on page 18



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Independence...

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improper goals, and even the honest client begins to believe that because the lawyer, an officer of the court, is permitting him to take certain actions then those actions must not be bad as might be believed. Either way, society suffers. And the lawyer is no better off as she becomes wed to the representation, both financially and morally, and loses her objectivity.

Some accounting firms have claimed they owe no duty of independence from their clients unless they are “attesting” to the veracity of certain financial statements made to the public. Lawyers are different, however, in that they are always officers of the court and always have a responsibility to the public. Paramount among the lawyer’s duties is to advise and direct the client without any compromise whatsoever to the lawyer’s judgment. Independence is the soul of this duty, without which the lawyer cannot properly perform his obligations. Exercising our independence is sometimes hard and never fun, but is our professional duty. And as John Adams learned, it can be an exceptionally rewarding obligation to fulfill.

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.

ALIETE-MARIE CHARLES – Vermont; University of North Carolina at Chapel Hill, 1992; Partner with Joseph & Charles, LLC., in West Palm Beach.

SARA COEN-GIOVANELLI – Dominican Republic; St. Thomas University, 2004; Associate in Weiss, Alden & Polo, P.A.

ARYE P. CORBETT – Boston, Mass.; Stetson University College of Law, 2004; Associate with the Public Defender Office in West Palm Beach.

JEFFREY W. COX – Kenmore, NY; University of Miami, 2005; Associate in Alley, Maass, Rogers & Lindsay, P.A. in Palm Beach.

RICHARD J. DEWITT, III – Miami, FL; Nova Southeastern, 2004; Associate with Brigham Moore LLP in West Palm Beach.

BRETT ROSS FRANKEL – Toledo, OH; University of Toledo College of Law, 2004; Associate in Charouhis & Wright in Lake Worth.

THOMAS J. GRUSECK – Pittsburgh, PA; University of Florida, 1995; Associate in Gaunt, Pratt, Radford & Methe, P.A. in West Palm Beach.

SHARI L. HYMAN – Nova Southeastern University, 1993; Solo Practitioner in West Palm Beach.

JULIA L. JENNISON – Wichita, Kansas; University of Miami, 2004; Associate in Lewis, Longman & Walker, P.A. in West Palm Beach.

MICHAEL KELTON – Deland, Florida; Stetson College of Law, 2005; Associated with Bobo, Ciotoli, Bocchino, Newman & Corsini, P.A., North Palm Beach, FL.

ANTHONY PADILLA – San Francisco, CA; Golden Gate University, 1998; Sole Practitioner in West Palm Beach.

ZOE PANARITES – New York Law School, 1994; Associated with Christine D. Hanley & Associates, P.A. in West Palm Beach.

NICHOLAS W. ROMANELLO – New York, NY; St. Thomas University, 1993; Partner in Health Care District of Palm Beach County in West Palm Beach.

ERIC R. SEVERSON – St. Paul, MN; Thomas M. Cooley Law School, 2006; Associated with Alley, Maass, Rogers & Lindsay, PA in Palm Beach.

MICHAEL G. TAYLOR – Kingston, Jamaica; Stanford Law School, 1992; Associated with Holland & Knight LLP in West Palm Beach.

WILLIAM B. WONG – New Brunswick, NJ; Hofstra University, 2001; Sole Practitioner in West Palm Beach.

VENUS A. ZILIERIS – Toronto, Canada; Nova Southeastern, 2004; Schwarzberg Spector Duke Schulz & Rogers in West Palm Beach.



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Hybrid Car...

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differential will come down to \$2,500 for the hybrid over the gasoline alternative. Currently, the price difference is two - three times that. The hybrid manufacturers are also counting on tax incentives to help make hybrids more competitive.

If the price of gas continues to rise, then it will make better economic sense to purchase a hybrid. At \$5.00 per gallon a hybrid vehicle might even start paying for itself immediately. Until then, hybrids will have to compete with better looking and more powerful gasoline vehicles which cost less initially. People are generally shortsighted when it comes to spending money, and they rarely elect to spend more than they have to just to do something good for the environment. Hybrid technology will have to improve so that the overall power of the vehicle is increased, not just the gas mileage, and the style and design of hybrids will need to sacrifice nothing to achieve fuel efficiency. There is no doubt that the industry is working to overcome these difficulties. However, you will need to wait several more years if you want a car that looks like the one you are driving now but gets better gas mileage.

Email me. bdr@flappellatlaw.com



Never Stop Marketing!

by Mark Powers

“Never stop marketing!” Those were my words to Marsha (not her real name), an attorney whom I was coaching. Her question was, “When can I let up on the marketing?” Marsha had been following the golden rule for marketing a law practice which is: *Three personal marketing contacts each week, and at least twenty good referral sources, to maintain a financially successful practice.* And her practice was growing! She billed more revenue last year than any year prior, but she was getting very busy with clients, training a new paralegal, having to make time for her marketing efforts, and doing all the “stuff” of a law practice. She had more business than she could handle and wanted to back off the marketing.

But I was resolute with her “Never stop marketing!” Why? Because once you build marketing momentum, you don’t want to back off. If you stop cultivating your referral sources, when your case load dips and you need new clients, you have to work exponentially harder to get the referral moving again. The key is to continue your marketing efforts, at least three per week, whether it’s a breakfast, lunch or dinner with a referral, or a speaking event. Even just picking up the phone and connecting with a referral source is sometimes enough to keep the pump primed.

That being said, one of the most important variables in building a successful law practice is intelligent client selection. What do I mean by intelligent client selection? It is knowing that you cannot work with every client that approaches your firm, that you have limits and boundaries, and that your staff will burnout if you continue to try and help everyone. Providing that you are not talking about pro bono work, intelligent client selection looks at the ability to pay the bill; the client’s attitude; how it fits into your practice areas; and it recognizes that a jerk as an opposing counsel can effect the fee. Intelligent client selection also recognizes that you don’t barter the retainer.

So herein lies the rub. Marsha cannot be selective about the clients she accepts into the practice if she doesn’t have enough prospects from which to choose. Meaning consistent marketing is a key to a healthy and successful law practice. Marsha must

always be marketing and becoming more selective with the clients she accepts.

So, what does Marsha do? Actually the solution is quite simple, not to mention profitable. The solution is to keep marketing and limit the number of clients that she accepts into the practice. Marsha needs to become even more selective than she was before. This in fact, for lack of a better term, “chokes” the front end or the client intake process. How does Marsha choke the client intake process without stopping the marketing efforts? She should raise her consultation, retainer and hourly fees. A small increase in hourly fees will have a significant impact on revenues and, in the process, weed out clients that are not a good fit for your practice. This may sound harsh, but the good news is that there are no shortages of attorneys in your community to work with clients you are unable to accept, and you will have more time and more resources to help the clients you do accept.

So, if the golden rule for a sustainable and financially healthy law practice is three referral marketing contacts per week and twenty good referral sources, what does this mean to you? If you have not been marketing, start now. Referral marketing is the primary form of marketing that I advocate for law practices. It is simple,

inexpensive, and effective. And, when done properly, builds trust and memorable moments with your referral network.

If you are uncomfortable with marketing, get yourself trained, get a coach, join a marketing roundtable, just do something. Marketing is essential for your success and it must be focused on every week. Maintaining a consistent routine and practicing good marketing habits will serve you well.

Successful marketing is less about finesse and more about showing up. It is about persistence. It is about putting one foot in front of the next and taking action... even when you don’t want to. Do something, do it today.

Mark Powers is the President of Atticus, Inc., and has been coaching attorneys for over 15 years. Mark co-authored “The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners” and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.

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Witness Tampering...

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rendered by providers of health service. The term 'render' is defined, among other things, as doing a service for another. *Merriam-Webster's Collegiate Dictionary* 990 (10th ed. 1998). A physician who renders a medical service is ordinarily considered to be providing medical care to his or her patient. . . .

Based upon our examination of all pertinent provisions of the statute, we agree with appellant that it fails to immunize the FMA from liability when that body acts to evaluate the testimony of a medical expert given in a medical-malpractice action."

This opinion was rendered notwithstanding the dicta contained within Austin v. American Association of Neurological Surgeons, 253 F. 3d 967 (7th Cir. 2001) in which the Federal Circuit Court of Appeals approved a decision of a federal trial judge granting a summary judgment against a neurosurgeon suspended from membership by the American Association of Neurological Surgeons because of his willingness to testify as an expert witness for the plaintiff in medical malpractice cases. The Fourth District's opinion in Fullerton guts the attempt of the Florida Medical Association to immunize physicians in medical malpractice cases by disciplining physicians who dare to testify against its members.

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.

Photo Answers:

From Page 4

1. Judge Walter N. Colbath, Jr.
2. Michael Gelfand
3. Robert Wilkins
4. Robert Scott
5. Daniel Downey

News re: Unified Family Court

On January 19, 2006 the 15th Judicial Circuit implemented a Unified Family Court. All Domestic Relation case types (includes DOR and Domestic Violence), Juvenile Dependency, Juvenile Delinquency and Mental Health cases are screened at the time of filing for cross-over cases. In the event a cross-over case is located the Court will issue an Order Identifying Unified Family Court Case. In the Order the Court will delineate if the cases are being transferred into UFC or simply linked. If the cases are in fact transferred, you will receive an Order Scheduling Mandatory Status Conference. All parties will be notified of this Status Conference. Furthermore, if the cases are linked, all cases will travel together and the Court will have full knowledge of the status of each case.

If you should have any questions, please contact Nicole Saunders, Operations Manager for Unified Family Court.

Probate Attorneys and Paralegals: Request for Comments

The Probate Technology Committee of the 15th Judicial Circuit is studying the use of online filing and case management.

The Committee is interested in your thoughts and comments on the permissive or mandatory use of technology to file probate matters online.

In other words, what do you think about having the ability, or being required, to file all estate documents online – by email?

Your thoughts and impressions are important. Please email them to: John Pankauski, Esquire of the Pankauski Law Firm P.L.L.C. at info@panklaw.com.

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KEVAN BOYLES: Contributing Fellow – National Network of Estate Planning Attorneys. Probate; Guardianship (Minors); Special Needs and Protective Trusts; Estate Planning (Financial Retirement, Business Succession, Charitable, Medical, Disability, Legacy and Gift); Estate and Gift Tax Returns. 350 Royal Palm Way, Ste. 405, Palm Beach, FL 33480; (561) 833-2472.

CHRISTOPHER HOPKINS: Appellate counsel for appeals in state and federal courts. Mr. Hopkins focuses on state appeals, particularly personal injury and malpractice. Cole, Scott & Kissane, P.A., 1645 Palm Beach Lakes Blvd., 2nd Floor, WPB, FL 33401; Email: Hopkins@csklegal.com.

RICHARD HUIJBER: Former Immigration Attorney-Advisor to the Miami Immigration Court and the Board of Immigration Appeals. Mr. Hujber has 10 years experience, exclusively in immigration law. He and his staff speak Spanish, Hungarian, and Portuguese fluently. The office accepts ALL types of immigration matters. 980 N. Federal Hwy. Suite 306, Boca Raton, Florida, 33432. Tel: (561) 417-VISA (8472); Fax: (561) 417-2575; Richardhujber@yahoo.com.

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LAW OFFICES- Space available for lease in prime Boca Raton location- receptionist, phones, Internet access, and conference room. Contact Ellyn at 561-392-5606.

OFFICE SPACE TO SHARE:

Immediate occupancy for solo attorney w/ secretarial, conference room, facsimile, copier, telephone, covered parking. In Forum. Call (561) 684-8900.

DOWNTOWN WPB: Space for 1 attorney and secretary. Use of conference room, library, phones system, DSL line, copier, etc. Furnished or unfurnished. Please call 683-4000.

OFFICE SPACE, EAST BOCA

RATON: Downtown private office, furnished conference rm, secretarial area, waiting rm, and complete office equipment-share with established law practice. Call Art D'Almeida P.A. @ 561-368-4674. 105 East Palmetto Park.

WPB OFFICE TO SUBLET: Approx. 1,000 sf. Great location for professional. I-95 & Palm Beach Lakes Blvd. One room ideal for conference room. Schematic upon request. Ground floor. Great parking. 561-687-7700. Affordable.

BEAUTIFULLY FURNISHED Jupiter Executive-type offices available. Full amenities including central receptionist, secretary spaces, private offices, 3 conference rooms, kitchen, document assembly area, phone system available, internet. Please call 561-743-2002.

OFFICE SPACE AVAILABLE for lawyer, plus an assistant in a clean, comfortable office in the Village area. Minutes from the courthouse. Use of conference room, kitchen, fax, copier and phone system included. Please call 683-8333 for more info.

LAKE WORTH- Office space available in a well established Law Firm for an attorney and secretary- includes receptionist conf. room/copier/DSL line/phone system. US1 & Lucerne area. Possible referrals. Harvey, Waddell, Monahan & Layton. Call Dan at 561-585-4640.

HEARSAY

Richard B. Comiter, Esq., founding partner of the law firm of Comiter, Singer & Baseman, LLP has been selected as a 2006 Florida Super Lawyer by *Law & Politics*.

Jones, Foster, Johnston & Stubbs, P.A. announces that they have merged with Jupiter's Berrocal & Wilkins, P.A., and will continue to practice under the name Jones, Foster, Johnston & Stubbs with West Palm Beach and Jupiter offices. With this merger, Jones Foster has added two shareholders, **Carlos Berrocal** and **Robert Wilkins**, and two associates, **Jane Hunston** and **Erin Lockhart**.

Patricia A. Leonard, a shareholder at the law firm of Beasley Hauser Kramer Leonard & Galardi, P.A., has been named one of Florida's "Legal Elite" for 2006 by *Florida Trend* magazine.

Investigators Gone Wild...

from page 13

exclusion in his or her professional-liability insurance policy. All policies contain some sort of exclusion for claims arising in whole or part out of any "dishonest, fraudulent, criminal, or malicious act committed by or at the direction of the insured." Yes, this requires foreknowledge on the part of the lawyer. But even if the lawyer did not directly authorize the conduct in question, how will a "I don't want to know how you're going to do it" mentality play to a jury?

The answer? Carefully screen the pool of investigators you consider hiring, and require the investigator that you hire to sign a statement acknowledging your policies concerning such investigations.¹

¹For a sample statement, send an email to the author at "dcs@dcsmithlaw.com."

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CALENDAR

October 2006

Monday, October 2
Court Holiday – Yom Kippur

Friday, October 6, 12:00 noon
**Quality of Life
Committee Meeting**

Monday, October 9, 8:00am
**Court Holiday –
Columbus Day**

Monday, October 9, 8:00 am
Legal Aid Golf Tournament
BallenIsles Country Club
Call 655-8944 x 279

Monday, October 9, 11:00 am
New Attorney Swear-In

Tuesday, October 10, 12:00 noon
**Young Lawyers Section
Board Meeting**
Bar Association Office

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

Wednesday, October 11, 11:45 am
**North County Section
Luncheon**

Speaker: Carl Domino
Abacoa Golf Club

Thursday, October 12, 5:00 pm
**Special Needs of Children
Committee Happy Hour**
E.R. Bradley's

Friday, October 13, 8:30 am
ADR Committee Meeting
Bar Association Office

Friday, October 13, 12:00 noon
SOLO Luncheon
Bar Association Office

Tuesday, October 17, 12:00 noon
Historical Committee Meeting
Bar Association Office

Wednesday, October 18,
12:00 noon
FAWL Luncheon
Contact Kim Daniel at
fawl@adelphia.net

Thursday, October 19, 12:00 noon
**Young Lawyers Section
Lunch w/Legends**
**Guest Speaker: Sidney A.
Stubbs, Jr.**
Bar Association Office

Thursday, October 19, 5:30 pm
Board of Directors Meeting
Bar Association Office

Friday, October 20, 12:00 noon
Federal Bar Luncheon
Contact Debi Mackey
838-4100

Friday, October 20, 12:00 noon
**Cunningham Bar Assn.
Meeting**
Law Library
Contact Bradley Harper
832-6814

Wednesday, October 25, 5:00 pm
Legal Aid Board Meeting
Bar Association Office

Thursday, October 26, 6:00 pm
**Palm Beach County Trial
Lawyers Dinner Meeting**
Contact (561) 999-9490

Friday, October 27
Bench Bar Conference
Convention Center

Saturday, October 29
Daylight Savings Time
Move Clocks Back One Hour



PALM BEACH COUNTY BAR ASSOCIATION

BULLETIN

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