

# The **BROWARD** **BARRISTER**

MAY, 1982  
Volume 11  
Number 5

PUBLISHED BY THE BROWARD COUNTY BAR ASSOCIATION

Executive Offices: 733 Northeast Third Avenue, 305/764-8040, Fort Lauderdale, Florida 33304

## ANNUAL MEETING — POLYNESIAN LUAU Thursday, May 20, 1982

MOOSE LODGE  
1201 N.E. 7th Avenue  
Fort Lauderdale, Florida

Cocktails: 7:30 P.M. — Dinner: 8:30 P.M. — Price: \$20/person  
(For details see attached flyer)

**RESERVATIONS ARE NECESSARY. PLEASE CALL 764-8040.**

Reservations made and not cancelled by 12:00 Noon on May 19, 1982 must be paid.

### **BROWARD LAWYERS CARE**

The needs of indigent residents in Broward County continues to increase while federal funding for our legal aid programs has been cut by 25 percent. YOU can be part of the solution to this problem by volunteering a very small portion of your time and expertise through the Broward Lawyers Care project. Whether or not thousands of poor people will gain access to our justice system depends on how you and all lawyers in Broward County respond to this challenge. We are asking for a limited commitment. Volunteers will be asked to accept no more than two to three cases per year. The more volunteers, the fewer cases any one attorney will have to accept.

Volunteers will be asked to handle only civil cases in domestic relations, landlord-tenant and consumer areas. If you wish to volunteer but prefer not to handle cases in one of these three areas, you may specifically designate your area of expertise and request that only cases in that area be assigned to you.

Legal Aid will screen all applicants to determine eligibility and to take in initial information which will be needed throughout the course of representation. This information along with **in forma pauperis** forms will be provided to the volunteer. All cases will be assigned on a rotating basis. A network of resource attorneys will be available to assist you if needed with the cases to which you are assigned. You will have at your disposal some of Broward's most experienced attorneys to help you provide the best possible representation on the cases you receive. Necessary litigation cost will be paid by the Broward Lawyers Care project. Malpractice insurance coverage will be provided to all volunteers

on cases handled under this program at no cost to the participating attorney.

Your judges and your elected Bar leaders are 100 percent behind this project. The success of BROWARD LAWYERS CARE depends on you. If you would like further information about the project or if you would like to volunteer, please call Broward County Bar Association, 764-8040.

#### VOLUNTEER TODAY.

Linda Conahan  
Chairman, Pro Bono  
Coordinating Committee

— BCBA ————— BCBA —

### **PRESIDENT'S MESSAGE**

As I pen my final President's Message, I am pleased to say that the record of the Administration of your Bar Association for the 1981-1982 year is one of solid achievement.

The most important area of achievement is in the Courts. We were successful in obtaining four additional Judges — two Circuit and two County, additional positions for the clerk's office and implementation of the uniform motion calendar in a majority of the civil divisions. In addition, communication among the Judges has been facilitated by the luncheon conferences of civil and criminal Judges funded through the Broward Bar Foundation.

Our meeting programs have been outstanding, but the attendance disappointing. Our most important achievement in this area is closer and more cordial relations with other voluntary Bar groups and The Florida Bar.

Public relations has shown significant improvement. The Barrister is greatly en-

hanced by Martha Snedaker's editorship, Ben Weaver and his committee did an outstanding job in creating "Legal Forum" and developing twenty-six half hour television programs for Selkirk Cable's Public Interest channel. LAW DAY under the chairmanship of George Allen was the best ever with a number of events including a repeat of the LAW DAY march originated last year.

The most significant project of the Bar in this community is **Broward Lawyer's Care**. This project involves volunteer lawyers providing free legal services to poor persons who legal aid cannot serve because of budgetary and other limitations.

This program in conjunction with the Supreme Court's Interest on Trust Accounts Program provide the answer of professionally responsible lawyers to provide legal services to the poor and to improve the administration of Justice. These programs fall back on the individual ethical responsibility of each lawyer to act for the public good. We seem to have ignored this responsibility in the past ten years of Government funding of such programs.

Now, Government funding is reduced and may evaporate completely. These programs must have your support to fulfill our professional obligations in the coming years.

If you are not now participating, I urge you to do so and to continue to do so — both in Broward Lawyer's Care and Interest on Trust Accounts.

I am grateful for the opportunity to have served you and the Administration of Justice in this past year.

Russell E. Carlisle,  
President

Broward County Bar Association  
733 N.E. Third Avenue  
Fort Lauderdale, Florida 33304  
764-8040

**OFFICERS**

Russell E. Carlisle . . . . . *President*  
Hugh T. Maloney . . . . . *Pres.-Elect*  
Angeline G. Weir . . . . . *Sec.-Treas.*  
Norma Howard . . . . . *Executive Dir.*  
Martha Snedaker . . . . . *Editor*

**PILOT PROGRAM —  
MOTION CALENDARS**

Pilot Program Civil Division Judges Barbara Bridge, Gene Fischer, Eugene S. Garrett, Henry Latimer, J. Cail Lee, Paul M. Marko, III, W. Herbert Moriarty, Estella M. Moriarty, Mark E. Polen, George W. Tedder, Jr., and Linda L. Vitale will attend the Circuit Judges Conference May 17-21, 1982, and will not have Motion Calendars during that time. Judge Robert L. Andrews will attend the conference on May 17-18, 1982, and will not have Motion Calendars on those days.

Judge J. Cail Lee will be on vacation May 24, 1982 through June 4, 1982 and August 16, 1982 through August 20, 1982. His Motion Calendar will be suspended during this time.

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**NOTICE**

Broward Community College's Legal Assistance Program offers specialized law courses for legal secretaries and future legal assistants. These courses are taught by attorneys or experts in the particular areas of study. The program has been carefully developed to meet the educational needs of personnel in local law firms.

Along with business law, business communications and business mathematics, students in BCC's 63 semester hours credit program study: Introduction to Legal Assisting, Law Library, Procedures for Real Estate Title Closing, Human Relations in Business and Industry, Domestic Relation Law, Probate Practice, Constitutional Law, Criminal Evidence in Court Procedures, Torts Liability and Claims, Income Tax Regulations and Introduction to Risk and Insurance.

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**SUMMER DRESS CODE**

It shall be the policy of the Courts from April 19, 1982, through October 4, 1982, that attorneys, the public, and employees attending Court need not wear neckties, coats, or jackets. Their manner of dress, however, shall comport with acceptable business attire.

**PROBATE & TRUST  
LAW SECTION SEMINAR  
March 26, 1982**

The Florida Bar has approved this course under the Florida Designation Plan for credit in the areas and for the hours indicated below:

General Practice . . . . . 4 Hours  
Taxation . . . . . 4 Hours  
Wills, Estates and Estate Planning . 4 Hours

The maximum total credit that one lawyer may obtain from this course is 4 hours.

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**RUSSELL CARLISLE  
WINS FLORIDA BAR  
ACCLAIM FOR LEGAL  
SERVICES TO THE POOR**

The Florida Bar President's Pro Bono Service Award for voluntary Commitments in making free legal services available to the poor was presented to Russell E. Carlisle, current President of the Broward County Bar Association, for his public service leadership and advocacy in making legal services available to the poor.

Carlisle was the founding president and first director of the Legal Aid Society of Broward County. He served as chairman of The Florida Bar Legal Services Committee for two years, and has been a member of the board of directors of Florida Legal Services, Inc., since 1975. He argued the first Interest on Trust Accounts case on behalf of Florida Legal Services, Inc., and as President of the Broward County Bar, established its first Pro Bono Program.

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# YOUNG LAWYERS SECTION NEWS

## FAERBER'S FAREWELL

This is the last opportunity that I have to write a column as President of the Broward County Young Lawyers. I debated whether I should write an article thanking all of those who helped with this year's programs or if I should write a column regurgitating all of this year's accomplishments.

Instead, I decided to write about the future. I think that the incoming President, Bob McFann, will do an excellent job in carrying on a tradition of excellence in the Young Lawyers Section which was established several years ago. In all seriousness, I am very proud of the fine programs which were conducted this year which benefited both the local Bar and the community. In particular, I am optimistic that the Young Lawyers Section Bar/Bench Conference which is scheduled for June 12, 1982 at the Bahia Mar and the Young Lawyers Section/United Way Run will receive awards from The Florida Bar and the American Bar Association. I think it is even of greater significance that these are only two of more than a dozen programs which are conducted by your local Young Lawyers Section.

In conclusion, I do not think that any of these programs would have been as successful as they were if it had not been for

the active participation of the officers, members of the Executive Committee, and the members of the Section, all of whom deserve the credit for these fine programs.

Jesse S. Faerber, President  
Young Lawyers Section

— BCBA ————— BCBA —

## THE YOUNG LAWYERS SECTION LUNCHEON

The May meeting of the Young Lawyers Section of the Broward County Bar Association will be held on Thursday, May 27, 1982, at 12:00 Noon at:

RIVERSIDE HOTEL  
620 E. Las Olas Boulevard  
Fort Lauderdale, Florida

The May meeting traditionally honors our local judiciary and all members of the judiciary are cordially invited to attend. The guest speaker will be Bruno L. DiGiulian, Esq. who will speak on the topic "Real Property Law Update".

Cost of the luncheon is \$7.00. You may mail your check payable to "YOUNG LAWYERS SECTION" to E. Steven Lauer, Post Office Box 9027, Fort Lauderdale, Florida 33310, or bring it to the luncheon.

RESERVATIONS ARE A MUST!!

## WELCOME NEW MEMBERS

**NAOMI BEHAR**, a native of New York City, N.Y., received her undergraduate degree from Fordham University and her law degree from University of Miami. She is associated with Krathen & Sperry in Ft. Lauderdale.

**FRANK W. GODDARD**, a native of Bellaire, Ohio, received his undergraduate degree from Florida State University and his law degree from Stetson. He is associated with Dingwall, Morgan & Olsen in Ft. Lauderdale.

**NORMAN ELLIOT KENT**, a native of Brooklyn, N.Y., received his undergraduate and law degrees from Hofstra University. He is a sole practitioner in Ft. Lauderdale.

**BARBARA McCAULEY**, a native of New York City, N.Y., received her undergraduate degree from Florida International University and her law degree from University of Miami. She is associated with McClure & Gay in Ft. Lauderdale.

**STEPHEN J. RILEY**, a native of Camden, N.J., received his undergraduate degree from Miami University, Oxford Ohio and his law degree from Nova University. He is associated with Lanza, Sevier & Womack in Ft. Lauderdale.

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## BROWARD COUNTY BAR ASSOCIATION ELECTION RESULTS

The following have been elected to office for the year June 1, 1982 — May 31, 1983:

President . . . . . Hugh T. Maloney  
President-Elect . . . . . Angeline G. Weir  
Secretary-Treasurer . . . . . Terrence Russell

### Executive Committee:

#### North

John R. Gillespie, Jr.  
Daniel D. Peschio, Jr.  
Peter A Portley

#### Central

W. George Allen  
Rex H. Conrad  
Dale R. Sanders  
Roger H. Staley  
Kenneth R. Mikos  
James O. "Russ" Murphy, Jr. *Runoff Election*

#### South

J. David Bogenschutz  
James H. Walden  
Jack F. Weins

#### West

Charles M. Daniels  
Jesse S. Faerber

## HONOR ROLL — INTEREST ON TRUST ACCOUNTS 17TH JUDICIAL CIRCUIT — BROWARD COUNTY

The following firms are participating in the Interest on Trust Accounts program:

Becker, Poliakoff & Streitfeld . . . . .	Fort Lauderdale
Brinkley, McNerney & Morgan . . . . .	Fort Lauderdale
Carlisle & LeCates . . . . .	Fort Lauderdale
Lewis H. Cohen, P.A. . . . .	Hollywood
William G. Crawford, Jr., P.A. . . . .	Fort Lauderdale
Philip A. Digati . . . . .	Fort Lauderdale
Paul L. Driver, Jr. . . . .	Fort Lauderdale
William M. Erwin . . . . .	Fort Lauderdale
Fiore & Bloomgarden . . . . .	Fort Lauderdale
J. Peter Friedrich . . . . .	Fort Lauderdale
Holland & Knight . . . . .	Fort Lauderdale
Legal Aid Service of Broward County . . . . .	Fort Lauderdale
George Ollinger . . . . .	Fort Lauderdale
Salter, Yeslow & Burnstein . . . . .	Hollywood
Moody & Jones . . . . .	Fort Lauderdale
D. June Owen . . . . .	Fort Lauderdale
Alvin Lester Sitomer . . . . .	Fort Lauderdale
Stephen Joel Sitomer . . . . .	Fort Lauderdale
Shaffner & Shaffner . . . . .	Fort Lauderdale
Marvin Lessne . . . . .	Tamarac
Martha Snedaker . . . . .	Pompano Beach
Yablin & Schwind . . . . .	Hollywood
Robert Arlen . . . . .	Pompano Beach
Stuart Stein . . . . .	Fort Lauderdale
Michael Christensen . . . . .	Fort Lauderdale

# HOW NOT TO BE A WITNESS AGAINST YOUR OWN CLIENT

by Bruce M. Lyons

*(This article will be presented in two parts. The first part discusses general principles, and the second, to be published in the June BARRISTER, will discuss specific applications.)*

## INTRODUCTION

Two sets of rules govern disclosure of information — whether volunteered or coerced — by a lawyer concerning his or her client. One is the law of evidentiary privilege, the other a rule of client-lawyer confidentiality. Both sets of rules have been established to encourage full disclosure by clients to attorneys of the facts and circumstances relative to effective representation.

The law of evidentiary privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise is required to produce evidence concerning a client. The principal evidentiary privilege is the attorney-client privilege, which permits the client, or the attorney on behalf of the client, to prevent disclosure of matters communicated in confidence by the client to the lawyer in the course of a professional relationship. Another evidentiary privilege recognized in most jurisdictions is the conditional privilege covering attorney work-product or the preparation of trial materials.

Although having a basis similar to the evidentiary privilege, the client-attorney confidentiality rule applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence or prepared for litigation, but also to all information concerning the client, whatever the source.

## ELEMENTS

The burden of proving the privilege is on the one asserting it. *U.S. vs. Tratner*, 511 F.2d 248 (7th Cir. 1975). For the attorney to assert the privilege, it must be established that he or she is an attorney in good standing. The attorney need not be licensed to practice in the court where the privilege is being asserted. *Garrison vs. General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963).

Second, the attorney must establish that the communication sought to be protected by the privilege was made by a client seeking legal advice. Generally, if one is seeking legal advice, he is a client, even if there is no formal fee arrangement. Since the privilege is narrowly construed, the range of activities included in "legal advice" is narrow. The communication must be regarding legal advice. The privilege cannot be asserted where the attorney was acting as a

business manager or personal advisor for other than legal matters.

Third, the communication must be testimonial and made with the expectation of confidentiality. The mere possession of a client's documents does not protect them from disclosure. If the information sought could be reached through process or court order while in the client's possession, it cannot be shielded by transferring possession to an attorney. *Jamil vs. U.S.*, 623 F.2d 122, 126 (2nd Cir. 1980); *Fisher v. U.S.*, 425 U.S. 391 (1976).

If third persons, neither "clients" nor "attorneys," are present at the communication, there is no expectation of confidentiality and the privilege does not attach. The privilege does not extend to law students or unlicensed practitioners, unless the client reasonably believes them to be lawyers. However, the privilege does extend to agents and clerical personnel of the attorney who helped to provide legal services. *Himmelfarb v. U.S.*, 175 F.2d 924, 939 (9th Cir. 1949), cert. denied 338 U.S. 860 (1949).

In a common situation of co-defendants, each having separate counsel, the privilege becomes an expanded one. In the team defense strategy where the attorney for one defendant turns over privileged documents to the attorney of a co-defendant for use in preparing motions on substantially the same cause, the recipient attorney is restrained by the privilege from disclosing the communication. *Continental Oil Co. vs. U.S.*, 330 F.2d 347, 350 (9th Cir. 1964). Similarly, if in the preparation of a case a defendant makes admissions to his attorney and to the attorney for a co-defendant which influences the course of the representation in the team defense concept, the information is privileged as to both attorneys. *Hunydee vs. U.S.*, 355 F.2d 183, 185 (9th Cir. 1965).

Only the client can waive the privilege. A client's use of documentation to refresh his recollection during testifying constitutes a waiver of the privilege only as to the particular documents utilized. *Marshall vs. United States Postal Service*, 88 F.R.D. 348 (D.D.C. 1980). However, where, through mistake or inadvertence, documents are produced, the privilege cannot be invoked retroactively. Once there has been a breach of the privilege, future objections are untimely. *In re: Grand Jury Investigation of Ocean Transp.*, 604 F.2d, 672, 673 (D.C. Cir. 1979), cert. denied 100 S.Ct. 229).

## THE PRIVILEGE — ITS APPLICATION

The attorney-client privilege does not apply to questions pertaining to the client's whereabouts, personal characteristics, contacts with the attorney, obtainment of fees and conversations with third parties. Additionally, the attorney subpoenaed before the grand jury is not entitled to a pre-

liminary judicial screening of the prosecutor's line of inquiry.

As a general rule, the attorney-client privilege does not protect the name of the attorney's client or the fee arrangement where the government shows a "legitimate need" for disclosure. *In re: Michaelson*, 511 F.2d 882, 889 (9th Cir.) cert. denied, 421 U.S. 978 (1975). An exception to the general rule occurs where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought. *United States vs. Hodge and Zwerg*, 548 F.2d 1347, 1353 (9th Cir. 1977). For the government to prevail it must make a prima facie showing that the attorney was retained in order to promote some illegal activity. *Baird vs. Koerner*, 279 F.2d 623 (9th Cir. 1960). Efforts to comply with this prima facie showing by use of an affidavit of an Assistant United States Attorney setting forth the fact that the attorney representing two men who pled guilty had his fees paid by another and was obstructing justice, did not meet this test. See *In re: Grand Jury Proceedings, United States vs. Lawson*, 600 F.2d 215 (9th Cir. 1979).

Where the government fails to challenge the assertion that the fee payor is in fact a client of the attorney, the privilege has been sufficiently established for purposes of non-disclosure. See *In re: Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975).

However, the I.R.S. and grand juries have required lawyers to disclose the amount of fees paid by suspect clients. *United States vs. Hodgson*, 492 F.2d 1175 (10th Cir. 1974); *In re: Application of Doe*, 464 F.Supp. 757 (1979); see also *In re: Haddad*, 527 F.2d 537 (6th Cir. 1975).

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## ESTATE AND GIFT TAX ASPECTS OF THE ECONOMIC RECOVERY TAX ACT OF 1982

(Note: This article is the second in a series on the Estate and Gift Tax Aspects of the Economic Recovery Act of 1981 (ERTA) which will be presented by the Probate and Trust Law Section of the Broward County Bar Association. This article was prepared by Frank T. Pilotte on behalf of W. Lawrence Larche, Chairman.)

### ELECTIVE ESTATE TAX DEFERRAL

Due to the Economic Recovery Tax Act of 1981 (ERTA) Section 6166 is now the only section of the Internal Revenue Code which may be elected by the executor of an estate to obtain deferral of Federal estate taxes. Section 6166A has been repealed. Of course, the executor may still request an extension of time to pay tax for reasonable cause under Section 6161.

In order to obtain deferral a decedent's estate must not only own an interest in a closely-held business, but the value of the interest must be 35% or more of the value of the decedent's adjusted gross estate. The adjusted gross estate is the gross estate less allowable deductions under Sections 2053 and 2054. If a decedent owns interests in two or more closely-held businesses, these interests may be aggregated in order to meet the 35% qualification percentage if there is included in the decedent's gross estate 20% or more of the total value of each business. In order to meet this 20% test interests owned by the decedent and the surviving spouse as community property or as joint tenants, tenants by the entirety, or tenants in common are treated for purposes of this Section as having been owned by the decedent and included in determining the value of the decedent's gross estate.

A closely-held business interest may be a sole proprietorship, a partnership interest,

or stock in a corporation. In order to qualify each closely-held business must be engaged in carrying on an active trade or business. Additionally, for a partnership 20% or more of its total capital interest must be included in the decedent's gross estate or the partnership must have fifteen or fewer partners. Similarly for stock, the corporation must have fifteen or fewer shareholders or 20% or more in value of its voting stock must be included in the decedent's gross estate.

There are nonelective attribution rules which are intended to facilitate the qualification of an interest in a partnership or a corporation as a closely-held business interest. There is also an elective attribution rule for purposes of the 20% test for closely-held stock interests. However, if this rule is used, the five year interest only deferral period and the 4% interest rate are forfeited.

If the estate contains a qualifying closely-held business interest, then by making an election under Section 6166 the executor may defer the portion of the estate tax attributable to the inclusion in the decedent's gross estate of the interest in the closely-held business. The deferred tax may be paid in ten annual installments with the first such installment due the fifth year after the original due date for the estate tax return.

Prior to the time for the payment of the first installment the executor must pay only the interest on the deferred tax. The interest rate on the estate tax attributable to the first \$1 million in value of closely-held business interests, as reduced by the applicable credits, is four percent. The interest rate on the remaining portion of the deferred tax is the normal statutory rate as determined under Section 6621 which is presently 20%. The amount of tax which may be deferred is calculated by multiplying the net federal estate tax by a fraction, the numerator of which is the value of the decedent's closely-held business interest included in the gross

estate and the denominator of which is the value of the gross estate less the amounts allowable as a deduction under Sections 2053 or 2054.

There are two different circumstances which will cause the acceleration of the entire amount of the estate tax which has been deferred: (1) an excessive withdrawal from or disposition of the closely-held business interest, or (2) the failure to make a payment of principal or interest. If a combination of dispositions and withdrawals exceeds or equals in the aggregate 50% of the value of the decedent's interest in a business, then all the deferred estate taxes are due. There are exceptions to the disposition rule involving withdrawals pursuant to redemptions under Section 303. Also, transfers pursuant to the terms of decedent's Will, intestacy laws or an intervivos trust of the decedent are not considered as dispositions. Likewise, transfers by reason of death among family members of a decedent are excepted.

Failure to pay any installment or interest when due will result in the entire unpaid portion of the tax becoming due and payable. However, if the late payment is made within six months of the original due date for the payment, then acceleration will not occur, but the 4% interest rate is lost for purposes of determining the interest due with the installment and a penalty of 5% per month is added to the payment. A discretionary extension of time to make a late payment pursuant to Section 6161 is available in order to avoid acceleration.

The ERTA amendments have enlarged the applicability of Section 6166 but have also lessened the benefits of its use by increasing the unified credit. The Section, however, continues to be a useful tool for the estate administrator.

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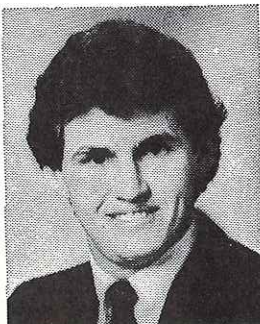


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## CALENDAR OF EVENTS

Date	Group	Event	Time & Place	Reservation
5/8/82	General Masters	General Masters First Annual Family Picnic	T-Y Park Sheridan Street & I-95 Pavilion #5 Hollywood — 11:00 A.M. —	765-8109
5/11/82 & 6/8/82	North Broward Bar Association	Monthly Meeting	Flaming Pit Restaurant 1150 N. Federal Highway Fort Lauderdale — 12:00 Noon —	Donald A Wich, Jr. 941-4920
5/14/82	Broward County Christian Lawyers Association	Monthly Meeting	Williamson Restaurant 1401 S. Federal Highway Fort Lauderdale — 12:00 Noon —	W. Lawrence Larche 764-7777
5/19/82	South Broward Bar Association	Combined Meeting with South Broward Board of Realtors	Emerald Hills Country Club 4100 N. Hills Drive Hollywood — 6:30 P.M. —	Jerald C. Cantor 981-2300
5/20/82	BCBA	Annual Meeting	Moose Lodge 1201 N.E. 7th Avenue Fort Lauderdale — 7:30 P.M. —	BCBA 764-8040
5/27/82	Young Lawyers Section	Monthly Luncheon honoring the judiciary	Riverside Hotel 620 E. Las Olas Boulevard Fort Lauderdale — 12:00 Noon —	Charlotte 565-0501
6/10/82 thru 6/12/82	American Bar Association Standing Committee on Professional Discipline and the National Center for Professional Responsibility	Eighth Annual Workshop on Lawyers' Professional Responsibility	Hyatt Regency Chicago 151 East Wacker Drive Chicago, Illinois 60606 Registration fee: \$200 Student Registration fee: \$150	National Center for Professional Responsibility American Bar Assn. 77 S. Wacker Drive Chicago, Illinois 60606

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