

APRIL 2021



# The SideBar

Newsletter of the Martin County Bar Association

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**BARBARA KIBBEY WAGNER**

*MEMBER SPOTLIGHT*

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### THE SIDE BAR NEWSLETTER

Published monthly, excluding June & July, by the Martin County Bar Association as a service to its membership.

If you have an article, opinion, news or other information for publication in the *SideBar*, please call (772) 220-8018 or email information to: [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com)

The due date for all advertisements, articles and announcements is the 1<sup>st</sup> of the month preceding publication.

## Zoom with Us on April 16, 2021

On Friday, April 16, 2021, the Executive Board of the Martin County Bar Association (MCBA) will welcome Andrea Andrus, Principal, Andrus Communications as the guest speaker at our monthly CLE virtual meeting.

After over a decade of working in the marketing, public relations and advertising industry for large corporations, Andrea founded Andrus Communications in 2015 so she would have the opportunity to help small to mid-size companies compete with the big guys.

A Florida native, Andrea received her Bachelor's Degree in Interpersonal Communications from the University of Central Florida and Master's Degree in Mass Communications and Journalism from the University of South Florida.

Andrea received the prestigious recognition from the Houston Business Journal as a 40 Under 40 honoree for the class of 2019.

In her free time, Andrea enjoys spending as much time as possible outdoors, living a healthy and active life with her husband and dogs. Andrea currently serves on the Board of Directors for **PAW & ORDER: Friends of the Harris County Animal Cruelty Taskforce** as the Marketing Director and on the Executive Board for **Motivating & Empowering Women to Excel**. Andrea is also a lecturer at the University of Houston Bauer School of Business **Small Business Development Center**.

We look forward to an insightful and engaging program with another great turnout. To receive Zoom details, please RSVP by email to: [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com) by Tuesday, April 13, 2021. Zoom details will be sent on April 15, 2021 to all who RSVP.

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*Many of the professional head shot photos and candid photos appearing in this issue have been provided courtesy of: **Legal Consulting Services, Inc.***

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## Message From the President

Martin County Bar President - Barbara Kibbey Wagner, Esq.

Over the last few years, I have noticed a trend of “cancel culture” and the uptick in the public’s interest in court cases.

A few decades ago, we binge-watched the O.J. Simpson trial, rapt with attention. The Elian Gonzalez case was another one that garnered national coverage. However, back then there was no such thing as “social media”, but instead we relied on print and television to deliver us the news. Now, we are given instant, minute-by-minute updates on cases via Twitter, Facebook and Instagram, as well as the Internet.

While on the one hand, I too benefit from 24/7 information and entertainment on these cases and issues, I feel that we as a culture are walking a very fine and dangerous line. I find the biggest issue to be with social media “influencers” and even just ordinary users, making bold opinions or disseminating rumors on complex legal issues without any personal knowledge or involvement.

Take, for example, the conservatorship of Britney Spears. For at least a year, the issue snowballed from a few commenters on Twitter and Instagram, to now masses protesting out in Los Angeles and the New York Times releasing a documentary raising the issue with the conservatorship. Hypothetically, I, as a fan of Britney, may believe that the Courts should view her father, Jamie Spears’s role with extreme scrutiny and possibly replace him. But I may also realize that the entirety of my opinion is based upon what I’ve seen in the media. I have no personal knowledge of the case, and I have not seen the legal documents as the matter is sealed. To give an opinion as an attorney would be irresponsible.

Kim Kardashian, as well, has stumped, and been successful, for prison reform and clemency. While she may be using her platform for a good cause, and may have all the knowledge on those specific individuals, is she sending a message to the masses that

we should all voice our opinions on cases we know very little about?

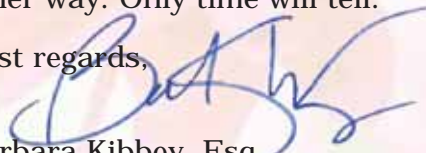
A prime example of when the public “mob” mentality is dangerous: the Duke Lacrosse players’ cases. Multiple players were falsely made out to be rapist villains by the media and the public. Then DNA

and other evidence exonerated them completely, revealing that the prosecutor was actually guilty of egregious misconduct and withholding the exculpatory DNA. However, it seems the public lynching has only gotten worse with social media.

I find this monstrous trend extremely troublesome. The possible repercussions for our clients, the Judiciary, as well as a tainting of our jury pools can be permanent. If a member of the Judiciary makes a ruling or hands down a sentence that someone deems unfair, their decision can be misconstrued and disbursed throughout social media, and even vilified to the point that the judge receives death threats. For our clients, “trial by social media” can cost them their liberty if a juror is influenced. And we may never know what a juror has seen or heard if they are not honest during jury selection.

As attorneys and members of the Judiciary what can and should we be doing to combat potential miscarriages of justice from social media? Perhaps, like with all trends, the proverbial balance will begin to swing the other way. Only time will tell.

Best regards,



Barbara Kibbey, Esq.



Barbara Kibbey Wagner  
2020-2021 President



## NEED HELP?

If you are feeling isolated, worried about your practice, your family, your employees, reach out - to a friend, a spouse, a colleague OR call the Florida Bar Helpline at 833-FL1-WELL

### The Florida Bar Helpline

Bar members will be able to dial the helpline (833-351-9355 or "833-FL1-WELL") and speak with a mental-health professional who can provide crisis intervention and a referral for up to three free visits with a locally based, licensed mental-health professional.



Florida Bar Mental Health Helpline

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# In Memoriam

## Lisa Ann Compagno

We pause to remember fellow attorney and friend Lisa Ann Compagno, 43, who passed away January 7, 2021.

Lisa graduated Florida Atlantic University, summa cum laude, and then New York Law school, cum laude, and was the managing editor of their law review. Her early career was spent as an immigration attorney for the Department of Justice and later, as an Assistant Chief Counsel at the Department of Homeland Security.



In 2011, Lisa paused her legal career to join her family's business, Palm Tree Auto Sales in Stuart, Florida. She was an active volunteer with the Stuart/Martin County Chamber of Commerce, Hobe Sound Chamber of Commerce, LEADERShip Martin County, in addition to her philanthropic and fundraising efforts on behalf of several local charities, schools and sports organizations. Lisa was a board member of the Florida Sheriffs Youth Ranches and a Past-President of the Florida Independent Automobile Dealers Association (FIADA).

Remembered for her smile, warmth, and compassion for others, Lisa leaves behind her mother, Lucille, her brothers, John and Anthony, and a great number of nieces, cousins, and friends.

If you would like to make a donation in Lisa's name, the family has suggested Treasure Coast Humane Society, or the Florida Sheriffs Youth Ranches, two organizations that Lisa was passionate about.

*"And in the end, it's not the years in your life that count. It's the life in your years." – Abraham Lincoln*

# Judicial Relations Committee

Jessica Van Valkenburgh - Chair



2020-2021 JRC Committee Members – Chief Judge Lawrence Mirman, Judge Elizabeth Metzger, Judge William Roby, Gene Zweben and Kathryn McHale

19th Circuit's Judiciary. Moving forward, the JRC will be planning, implementing and coordinating certain programs designed and focused on improving relationships and overall communications between the Bench and Bar.

Our Purpose: The purpose the MCBA's Judicial Relations Committee (JRC) is primarily to serve as a liaison between the Martin County Bar Association and the

Please look for our Judicial Speaker Series schedule TBD!

If you are interested in the JRC please contact Jessica VanValkenburgh, Esquire, at [jmv@mccarthysummers.com](mailto:jmv@mccarthysummers.com)

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Visit the MCBA website at [www.martincountybar.org](http://www.martincountybar.org) for upcoming events, committee meetings and more!



find us online



## Member Spotlight

# Judge James W. McCann

### Education:

Undergrad? University of Miami-1975

Law School? Nova University Law School- 1978

### How long have you been practicing law?

Over 42 years (including serving as a Circuit Judge in the 19<sup>th</sup> Judicial Circuit for over 16 years (Jan. 1, 2005-February 28, 2021); and before that (2001-Dec. 2004) as a Child Support Enforcement Hearing Officer).

### Why did you want to be an attorney?

This is a nation of laws; and I believed that it would be an honorable profession to practice law.

### What do you like most about it?

Having the exclusive privilege, as a member of the Bar, to represent individuals, governments and corporations before the Court.

### What don't you like?

Legal advertising; although, it is apparent that it has become a necessity for even good lawyers (to advertise) to compete for business. In the early days of my career, the good lawyers earned their market share by being good lawyers and word of mouth; which travelled far and fast enough. Now you can run a tacky T.V. commercial and get hired to represent someone who needs competent representation; even if the advertising lawyer has never tried a case. Having presided over more than 250 jury trials, I can tell you that potential jurors are mostly negatively affected by lawyer advertising; and, unfortunately, hold those negative views against all lawyers, whether they advertise or not. Fortunately, there are some very professional and informative



TV commercials by very competent lawyers and law firms who will do an excellent job for the clients they represent. In the name of free speech, I have no issue with the latter category of advertising by lawyers and law firms that have the best interest of their client as their focus and ethical obligation.

### What are the biggest changes you have seen through the years?

Apart from legal advertising, the massive number of new lawyers that start practicing law with no mentoring or guidance. I don't know whether that should be considered courageous or oblivious; but we all need mentoring and guidance from someone who has competently and ethically done this before. Getting a law degree is just the beginning.

### How do you define success?

Completing a legal career with a reputation of being honest, competent and professional with your peers and the Court.

### Who Inspires you?

My late mother and father who had virtually nothing; and gave everything to their children; my five brothers and sisters; the late Senator John McCain (a true American Patriot), my Uncle Pat McEvoy (who came from Ireland on the Queen Elizabeth, was immediately drafted

Continued On Next Page . .

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and deployed by the U.S. Army to Korea, and still works full-time at Home Depot at the age of 92); and my two daughters.

**Who has been the most influential person in your career?**

John F. Romano, Esq. West Palm Beach, FL., when, he invited me; and David Roth invited the, now, Florida Supreme Court Justice, Jorge Labarga, to join the Cone, Wagner, Nugent, Johnson, Roth & Romano Law Firm in April, 1987, both of our careers changed forever (Jorge Labarga's more so than mine, of course). Jorge Labarga and I have had a lasting friendship ever since. Although that law firm is no longer in existence, it produced 1 County Judge, 14 Circuit Judges, 4 Fourth District Court of Appeal Judges and 2 Florida Supreme Court Justices. I will be forever grateful to John.

**If you could choose anyone as a mentor, who would you choose?**

Daniel T.K. Hurley, Senior Judge, U.S. District Court, Southern District of Florida.

**What is the best piece of advice you have ever received?**

Tell the truth.

**What advice would you give to someone looking to become an attorney?**

If you want to do this for money, you are doing it for the wrong reason. Pick something else to do.

**If you weren't an attorney, what would you be doing?**

Piloting aircraft or helicopters.

**If you could switch places with someone for a day, who would it be?**

The F.B.I. Director (I would learn as much as I could about what is really important to know in 24 hours).

**What's on your bucket list?**

Learning to fly helicopters; a date with Nina Agdal (if I am not married; although comments like this will result in me being single real soon!); meet Pope Francis; learn to speak Spanish; a Porsche 911; at least 2 weeks in Tahiti; catching a trophy Permit on a fly rod; and taking a small vessel cruise with my wife down the Danube River from Germany to the Black Sea.

**If you could visit anywhere in the world, where would you go?**

Italy

**If you could have dinner with any person, alive, dead or fictional, who would it be and where would you go?**

My mother and father; at the best Italian Restaurant or Steakhouse in New York City.

**What is something (a fun fact) that many people don't know about you**

I know most of the Victoria Secret Angels by name (although none of them know me).

*It has been an honor and privilege to be able to serve as a Circuit Judge here in the 19<sup>th</sup> Judicial Circuit. It has been a distinct pleasure and a joy to have actually known and been a friend to so many of you for so many years. I am truly a very fortunate man. Thank you.*

James W. (Jim) McCann

## 19<sup>th</sup> Circuit Judicial Nominating Commission

The MCBA will continue to post updates on the 19<sup>th</sup> Circuit JNC Commission meetings and deadlines for appointments to fill judicial vacancies as they become available at [www.martincountybar.org](http://www.martincountybar.org)

For more information, email [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com)



# Diversity Committee

Erika Powers - Co-Chair  
Ricky Armand - Co-Chair

## CELEBRATING & EMBRACING DIVERSITY



Erika Powers  
Co-Chair

Can you believe we have already made it through the first quarter of 2021? The month of April is filled with interesting celebrations/holidays - some serious and some fun. There's April Fool's Day, National Burrito Day, Autism Awareness Day, Good Friday & Easter, World Health Day, National Scrabble Day, Tax Day, Earth Day, World Book Day, National Siblings Day, National Pet Day, National Great Poetry Reading Day, and International Jazz Day, to name a few.

April is not only a reminder of how diverse we are, but also how much we have in common. How many of us love pets or love the environment? How many of us are enjoying a good book right now? How many of us will participate in an Easter egg hunt, attend a church service that weekend, or do both? How many of us love the arts, poetry, and Jazz? How many of us frequently play Scrabble? Despite being attorneys, how many of us secretly (or openly) love numbers? Be honest for this next one: how many of us are pranksters at heart?



Ricky Armand  
Co-Chair

Whether you recognize or celebrate any of these days or not, we as a Bar Association embrace the diversity within our community. The Martin County Bar Association and the Treasure Coast not only consists of a diverse group of races, religions, and cultures, but also of values, ideas, and interests. It is important for us to understand and educate others regarding the diversity around us, whether in the courtroom, in the workplace, or in the community. With some healthy dialogue, we may be surprised about how much we actually have in common too.

We look forward to pushing through another quarter with an open mind to learn about, embrace, and enhance the diversity in our community.

For more information contact Erika Powers, Esq. at [epowers@jgormanlaw.com](mailto:epowers@jgormanlaw.com) or Ricky Armand, Esq. at [ra@williegary.com](mailto:ra@williegary.com).

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# Bankruptcy Committee

Jon Martin - Co-Chair

Nick Bangos - Co-Chair

## A Fresh Start from Covid-19



Bankruptcies are filed to relieve financial distress. Given the Covid-19 situation of the last year, there's plenty of financial stress to go around. Most people have heard of the bankruptcy "fresh start" but few understand what that really means.

The Bankruptcy Court provides a financial life preserver which allows financial recovery. At the end, the filer has an order of discharge for most or all debts that caused the problem; or at least a modification of them so that a reasonable payment schedule can be maintained.

Reduced payment schedules are spread over a period 3-5 years. Any unpaid amount still owed is discharged at the end.

In many instances there is no repayment schedule, the filer retains all exempt assets, usually including their homestead, normal household goods, most automobiles as long as there is a payment schedule they can maintain, and life goes on little changed except for the fact unsustainable and overwhelming debt payments have been eliminated.

Small businesses and their owners have a new tool to help them address their financial problems under Subchapter V of Chapter 11 under the bankruptcy code, and it is the new game in town.

The process is faster and cheaper than regular Chapter 11. The business continues to survive and operate; employees retain their jobs; the owner retains and operates the business; taxes continue to be paid and it is more beneficial to creditors who receive a greater recovery than they would if the business closed.

NEED MORE INFORMATION? The time to plan is NOW. Contact your bankruptcy committee members familiar with Subchapter V or contact committee co-chairs Nick Bangos 305-915-1605 (cell) [nick@npppa.com](mailto:nick@npppa.com) (email) or contact Jon Martin, at 772-834-5021 (cell) [jlm@jonmartinlaw.com](mailto:jlm@jonmartinlaw.com)



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# Solo & Small Firm Committee

## The Job of an Inventory Attorney

### A difficult but required task for FL lawyers

In order to protect the clients of an attorney who unexpectedly dies or otherwise becomes unable to practice, the Rules Regulating the Florida Bar provide that members who practice in-state must designate an inventory attorney. Rule 1-3.8 requires every member to designate an inventory attorney and the best and easiest way to designate an inventory attorney is to do it online at [Floridabar.org](http://Floridabar.org). An employee of a governmental entity is not required to make such designation.

What do inventory attorneys do? Inventory attorneys take possession of the files of a member who dies, disappears, is disbarred or suspended, becomes delinquent, or suffers involuntary leave of absence due to military service, and no other responsible person capable of conducting the member's affairs is known. The first step is to notify all clients that their lawyer is no longer able to represent them. The inventory attorney

also may give the file to a client who finds substitute counsel on their own; may make referrals to substitute counsel with the agreement of the client; or may accept representation of the client but is not required to do so. Designated inventory attorneys will be contacted when the need arises and will be asked to serve. Because circumstances change, the designated inventory attorney is not obligated to serve. Inventory attorneys are not directly compensated but may receive reimbursement for actual costs incurred while carrying out the duties of an inventory attorney.

Take the time to make sure that you have designated your inventory attorney.



Kathy McHale  
Chair

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# The Florida Bar Updates / Board of Governors' Report

GREG WEISS - 19TH CIRCUIT BOG REPRESENTATIVE



Keep updated on Florida Bar initiatives and Board of Governors information, meeting minutes and reports by visiting the website regularly!

A direct link can be found at The Florida Bar's home page ([www.floridabar.org](http://www.floridabar.org)) by clicking the "About The Bar"



Greg Weiss  
19<sup>th</sup> Circuit BOG Rep



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# ADMIRALTY LAW



## HOW A 1981 5<sup>th</sup> CIRCUIT CASE, BONNER v PRITCHARD, STILL AFFECTS RECENT 11<sup>th</sup> CIRCUIT CASES IN MARITIME LAW

*Joanne M. Foster, Florida Board Certified, Admiralty and Maritime Law  
Admiralty Committee Chair*

In maritime law there are questions regarding marine insurance policies that are adjudicated according to well-established, entrenched principles and precedents of maritime law. Many of them come from the 5<sup>th</sup> Circuit Court of Appeals. Bonner v Pritchard, heard en banc, was the first case heard by the newly formed 11<sup>th</sup> Circuit Court of Appeals, and adopts as binding precedent the established precedents of the old Fifth Circuit.

The case of Reliable Marine Towing & Salvage, LLC, v Thomas and State Farm Fire and Casualty Company, 789 Fed Appx. 805, (11<sup>th</sup> Cir. 2019), is a fairly routine example of maritime law and marine insurance. Reliable Marine Towing was called to provide rescue services to Thomas' boat after it partially sank during a storm. Thomas filed a claim with State Farm Insurance who promptly paid Thomas the full amount allowed under the policy Coverage A, \$6,750.00, along with an additional five percent, \$337.50, plus \$500 for "emergency services" from a separate portion of the policy. That was the total payment available under the policy for Thomas' loss. Unfortunately, Thomas did not pay Reliable Marine's invoice of \$3,109.84. Two weeks after the incident Reliable sent an invoice to State Farm. The invoice did not include an assignment of benefits from Thomas to Reliable. Nor was there any authority in the invoice that established State Farm's obligation to pay. State Farm denied Reliable's invoice and the instant suit ensued.

Reliable Marine contended in the suit that even though State Farm had already paid the maximum coverage limit under the policy, full payment of the towing service is required under both Florida law and the terms of the insurance policy. Reliable attempted to argue that Gov't Employees Ins. Co. v. Macedo, 228 So.3d 1111 (Fla. 2017) requires insurance companies to reimburse expenses it

requires the insured to incur. The Court found the holding in Macedo was based on an ambiguity in the policy which doesn't apply here. Under Florida law if an insurance contract is unambiguous, the plain language controls. Id at 1113.



Reliable also claimed they were owed payment under the State Farm policy's "sue and labor clause". "Under a sue and labor clause the insured is required 'to sue, labor and travel for, in and about the defense, safeguard, and recover of the boat.'" Reliance Ins. Co. v. The Escapade, 280 F.2d 482, 484 (5<sup>th</sup> Cir 1960). In citing Reliance Ins. Co., the 11th Circuit added a note: "In Bonner v City of Prichard, 661 F.2d 1206, 1209 (11<sup>th</sup> Cir. 1981) (en banc) we adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981." The precedent is particularly important in maintaining the stability and predictability of maritime law.

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# Appellate Committee

Donna Eng - Co-Chair  
Carri Leininger - Co-Chair

## Zoom: Covid's Silver Lining

Submitted by Donna Eng, Esq



You may recall that the Florida Supreme Court enacts the rules for the practice of law in the State of Florida. The Florida Bar has several rules committees that assist the Court in that function. A benefit of serving on the Florida Bar Appellate Court Rules Committee ("ACRC"), or any rules committee, is that you get to learn the process of how rules are made and amended.

the Subcommittee reports their recommendation back to the Chair of the ACRC, and that recommendation will be presented at the next ACRC meeting for a vote by the full Committee. The ACRC Chair then provides a report to the Florida Supreme Court, at which time the Court begins its consideration.



Generally, the work of the ACRC starts with a "referral," which is a request presented to the ACRC to consider amending the rules or drafting a new rule to address a particular situation. For example, referrals can be made by a member of the bar, a clerk of court, or even be contained in a court opinion. After the Chair of the ACRC receives the referral, the Chair sends the referral to the appropriate Subcommittee to work on the referral. On the ACRC, all of the heavy lifting is done at the Subcommittee level.

The Court may publish the proposed rule with or without changes, and provide a time for public comment. The Court may also hold oral argument on any proposed rule changes. Although the Court used to announce appellate rule changes every three years, it now announces appellate rule changes every year.

The Subcommittee chair is tasked with setting meetings of the Subcommittee to meet and discuss the referral and to further decide the approach to take with regard to the referral. Sometimes, after preliminary discussions, the Subcommittee will decide that no action needs to be taken on the referral. In that case, the Subcommittee chair simply reports back to the Chair of the ACRC that the Subcommittee decided that no action should be taken, and that decision will then be addressed by the whole ACRC at the next ACRC meeting for a vote of the entire Committee.

However, if the Subcommittee decides that the referral warrants further evaluation and that an amendment to the rules may be necessary, the Subcommittee Chair and the Subcommittee will decide the approach to take and how to divide the work. It is then up to the individual members of the Subcommittee to perform their assigned tasks and report back to the Subcommittee. The Subcommittee may need to meet several times to come to an agreement on proposed language for a rule amendment. Once that agreement is reached,



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# MARTIN COUNTY BAR ASSOCIATION RACE TO THE COURTHOUSE



APRIL 17, 2021



## There is still time to sign up!



Join us for this incredible race that **raises money for the Legal Aid Society of Martin County and the Martin County Bar Association Scholarship Program.**

All runners currently registered will have their registrations automatically transferred to the new date. Registration is still open, so sign up now. We are hoping you all can join us and look forward to another great race!



Go to: <https://runsignup.com/Race/FL/Stuart/TheRacetotheCourthouse5k> to register

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## Tennis Tournament



We are hopeful to bring the MCBA Tennis Tournament back in 2021. Please check future SideBar issues for further details on the tournament in 2021. If any questions, please contact Ray Robison (772-287-4444 or robison@foxmccluskey.com). Thank you to everyone that has expressed interest in playing, as well as our sponsors, SEACOAST BANK and ESQUIRE DEPOSITION SERVICES



# Employment Law

## Current status of Independent Contractors in the workplace

*Submitted by: David Miklas, Esq. – representing employers only*



The news has been filled with stories about the gig economy and independent contractors. Some states have made it almost impossible to have a worker be an independent contractor. At the end of the Trump administration the U.S. Department of Labor (DOL) proposed an independent contractor (IC) test and even issued an Opinion letter using this new test. However, as soon as President Biden took office, he froze the rule, and his new DOL delayed the effective date until May 2021, likely killing this new rule.



Therefore, because the “new” IC rule is likely to never be implemented, Treasure Coast employers are confused about what are the requirements in order to have a worker be classified as an independent contractor.

This is an important question because an independent contractor is not an “employee” for purposes of the Fair Labor Standards Act (FLSA)’s overtime and minimum wage protections. To determine whether an individual falls into the category of covered “employee” or exempted “independent contractor,” courts look to the “economic reality” of the relationship between the worker and the company and whether that relationship demonstrates dependence.

As recently as February 2021, a Florida federal court (Lange v. Tampa Food & Hosp., Inc., No. 8:19-cv-34-CEH-CPT, 2021 U.S. Dist. LEXIS 32199, at \*20 (M.D. Fla. Feb. 22, 2021) explained that the Eleventh Circuit Court of Appeals has identified six factors that guide courts in applying the economic reality test:

- (1) the nature and degree of the worker’s control as to the manner in which the work is to be performed;
- (2) the worker’s opportunity for profit or loss depending upon his managerial skill;
- (3) the worker’s investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the working relationship;
- (6) the extent to which the service rendered is an integral part of the business’s business.

However, the overarching focus of the inquiry is economic dependence. This means that the final and determinative question must be whether the total of the testing establishes the worker is so dependent upon the business with which he is connected that he comes within the protection of the FLSA or is sufficiently independent to lie outside its ambit.

Many businesses incorrectly classify workers as independent contractors, when they really are employees. This misclassification creates significant liability for employers. Therefore, it is recommended that businesses that THINK they are using independent contractors, should have an experienced employment attorney audit the actual duties performed to ensure that the worker is properly classified. A common error that employers make is to pay an “independent contractor” an hourly wage or even a salary and issue a W-2.

# Martin County Women Lawyers Association

Submitted by Elizabeth Hunter



Thank you to our Membership Director, Kathy McHale, for organizing a wonderful membership drive on the beach! We enjoyed beach yoga and breakfast goodies, and had an opportunity to see each other in person. What a treat! If you are interested in joining Martin County Women Lawyers Association, now is a great time to do so. If you are a new member who joins between March 1 and June 30, then you will receive a "bonus period" and your membership will be good through June 30, 2022. Please see [www.fawl.org](http://www.fawl.org) for more information, or feel free to reach out to Kathy McHale at [kathy@kmchalelaw.com](mailto:kathy@kmchalelaw.com).

Our next CLE zoom meeting will be held at noon on Tuesday, April 13, 2021 by Melissa "Lisa" Clasen, Carrie Lavargna, and Margaret "Peggy" Wood presenting "An Estate Planning Forum Featuring Some 'Hot' and Some 'Not-So-Hot' Estate Planning Topics." We will also be hosting a diversity presentation on April 23, 2021 from 2:00pm-4:00pm at Talk:House (on the patio), thanks to a Florida Bar grant. The presentation entitled, "Immigration, Diversity, & Inclusion - Square Pegs for Round Holes," will include a discussion by panelists Zorelly Torres-Sanchez, Angelina Castro, and Agnieszka Marshall, Licensed Clinical Psychologist, of Tykes & Teens. Please RSVP to [fawlmartin@gmail.com](mailto:fawlmartin@gmail.com)

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## Real Estate and Commercial Litigation Update

### Florida Real Property and Business Litigation Report

Manuel Farach

Tyson Waters



Manny Farach  
Co-Chair

**Tsao v. Captiva MVP Restaurant Partners, LLC**, Case No. 18-14959 (11th Cir. 2021).

In order to have Article III standing, a claimant with hypothetical harm must be subject to harm which is “certainly impending” or there is a “substantial risk” of such harm, and if not, the claimant

cannot impose harm on himself to create standing.

**Gulfcoast Spine Institute, LLC v. Walker**, Case No. 2d19-4220 (Fla. 2d DCA 2021).

A party may not obtain confidential trade secrets and business information of a third party by claiming the prices charged by the third party, which prices are the subject of damages in the main trial, were excessive.

**Hunter v. Catalano**, Case No. 2D19-2981 (Fla. 2d DCA 2021).

The pre-suit mediation requirements of Florida Statute section 720.311(2)(a) apply only to disputes between homeowners and associations and does not apply to disputes between parcel owners or association members.

**Hendel v. Internet Escrow Services, Inc.**, Case No. 3D19-2148 (Fla. 3d DCA 2021).

Claims for fraud in the inducement and for declaratory judgment generally do not overcome the mandatory forum selection clause contained in an internet clickwrap agreement.

**F.H. Paschen v. B&B Site Development, Inc.**, Case No. 4D19-3839 (Fla. 4th DCA 2021).

The dispute resolution portions of a construction contract, including the provisions that a third party such as an architect has the authority to determine

performance under the contract, cannot override the clear terms of the contract.

**Boca Center At Military, LLC v. City of Boca Raton**, Case No. 4D19-2736 (Fla. 4th DCA 2021).

A proposed or speculative land use is not sufficient to bring a property within the dictate of the Bert J. Harris Jr. Private Property Rights Protection Act, Florida Statutes section 70.001.



Tyson Waters  
Co-Chair

**In Re: Amendments To The Florida Rules Of Appellate Procedure—2020 Regular-Cycle Report**, Case No. SC20-216 (Fla. 2021).

Substantial changes to the Florida Rules of Appellate Procedure, including a new subdivision (Public Availability of Written Opinions) that requires courts publish written opinions not covered by Florida Rule of Judicial Administration 2.420, a requirement that a Notice of Appeal indicate when a motion tolling rendition is pending in the trial court, a change that trial court clerks submit the record on appeal within 60 days, a change that orders disposing of motions for rehearing are not reviewable separate and apart from a review of a final order, changes that notice be provided to the Attorney General in cases where the constitutionality of a state statute or constitutional provision is challenged, that an attorney of record for a party in an appeal or original proceeding shall be the attorney of record unless at the time of appearance, the attorney files a notice specifically limiting the attorney's appearance only to a particular matter or portion of the proceeding in which the attorney appears, and a new role setting forth limited representation.

Continued On Next Page . . .

**Dodd Chiropractic Clinic, P.A. v. USAA Casualty Insurance Company**, Case No. 1D21-0220 (Fla. 1st DCA 2021).

The amendments to Florida Statute 26.012 took jurisdiction away from circuit courts to hear extraordinary writs as well as appeals.

**Commissioner Joe Carollo v. Platinum Advisors, LLC**, No. 3D20-576 (Fla. 3d DCA 2021). Unless undertaken in bad faith or with malicious purpose and so long as he does not participate in the process or the vote, an elected official may comment on a land use application of a former client.

**CFLB Management, LLC v. Diamond Blue International, Inc.**, Case No. 3D20-1034 (Fla. 3d DCA 2016).

Upon reversal of a merits judgment, Florida Rule of Civil Procedure 1.540(b)(5) provides the trial court with jurisdiction to revisit a fees judgment based on the reversed judgment.

**Krol v. FCA US, LLC**, Case No. SC19-952 (Fla. 2021).

The Federal Trade Commission's "single document rule," promulgated under the MagnusonMoss Warranty Act, does not require the disclosure of a binding arbitration agreement.

**Salazar v. Gomez**, Case No. 3D19-1448 (Fla. 3d DCA 2021).

A claim of fraud upon the court cannot be made upon issues that were argued to and decided adversely by a jury.

**Valencia v. PennyMac Holdings, LLC**, Case No. 3D20-1727 (Fla. 3d DCA 2021).

Certiorari does not lie from a court order prohibiting a litigant from "disseminating, publishing, distributing, or using the records (written, audio, and visual) of [opposing party's corporate] representative outside of this litigation" unless petitioner can show irreparable harm.

**Samara Tenet Florida Physician Services, LLC**, Case No. 3D21-0240 (Fla. 3d DCA 2021).

Motions for rehearing are not authorized for non-final orders, and accordingly, do not toll rendition

nor the time for filing an appeal.

**Reynolds v. Behrman Capital IV L.P.**, Case No. 19-13537 (11th Cir. 2021).

The Doctrine of Derivative Jurisdiction prevents the post-removal use of Bankruptcy Rule 7004(d) to establish personal jurisdiction over the defendants in removed cases in which the state court lacked personal jurisdiction over the defendants.

**SVI Trust v. Williams Walk Condominium Association, Inc.**, Case No. 1D18-3729 (Fla. 1st DCA 2021).

A trial court may not enter summary judgment for foreclosure of an condominium assessment lien when there is disputed testimony as to whether a representative of the condominium association fraudulently induced the owner to purchase the units by misrepresenting that there were no outstanding assessments on the unit.

**5F, LLC v. Hawthorne**, Case No. 2D19-2574 (Fla. 2d DCA 2021).

Riparian owners have a common law right to construct a dock over privately owned submerged land adjacent to their upland property and out to navigable water without the consent of the owner of the submerged land.

**The School Board of Miami-Dade County, Florida v. The City of Miami Beach, Florida**, Case No. 3D20-1128 (Fla. 3d DCA 2021).

A school board is immune under sovereign immunity from being forced to pay municipal stormwater drainage fees.

**Massey Services, Inc. v. Sanders**, Case No. 5D19-3116 (Fla. 5th DCA 2021).

Responding to inquiries from co-workers and his soon-to-be-former employer as to where he was going to be employed does not constitute "solicitation" in violation of Florida Statute section 542.335.

=====  
If you wish to receive the expanded, weekly version of the Report, sign up at <https://www.mcglinchey.com/publication-subscription>

# IMMIGRATION COMMITTEE

Chair: Angelina Castro

## Immigration Forward in 2021

Submitted By Antonietta Brancaccio



Angelina Castro  
Co-Chair

Five days after taking office, President Biden signed executive orders and announced his plan to reverse many of the previous administration most restrictive and punitive immigration policies. Here is a summary of the most significant Executive Orders:

### 1. Regional Migration/Border Processing EO:

Directs the creation of strategies to address root causes of migration from Central America and expand opportunities for legal migration, while taking steps to restore the U.S. asylum system by rescinding numerous Trump Administration policies;

**2. Refugee Policy EO (tentative):** Establishes the principles that will guide the Administration’s implementation of the U.S. Refugee Admission Program (USRAP) and directs a series of actions to enhance USRAP’s capacity to fairly, efficiently, and securely process refugee applications;

**3. Family Reunification Task Force EO:** Creates a task force to reunify families separated by the Trump Administration’s Immigration policies;

**4. Legal Immigration EO:** Directs immediate review of the Public Charge Rule and other actions to remove barriers and restore trust in the legal immigration system, including improving the naturalization process.<sup>1</sup>

The immigrant community is by definition diverse and will be impacted in different ways. Some changes, many of which have already been announced, include<sup>2</sup>:

- Protection for Dreamers and their families;

- Rescission of the “Muslim bans”;
- An immediate review of Temporary Protected Status (TPS) for vulnerable populations who cannot find safety in their countries that have been plagued by violence or disaster;
- Restoration of sensible enforcement priorities;
- Measures to ensure that Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) personnel abide by professional standards and are held accountable for inhumane treatment;
- Revitalization of the Task Force on New Americans to boost our economy by prioritizing integration, promoting immigrant entrepreneurship, increasing access to language instruction, and promoting civil engagement;
- Creation of a roadmap to status, permanent residence and citizenship for the nearly 11 million people who have been living in and strengthening our country for many years;
- A path to legalization for agricultural workers who have worked for years on U.S. farms and continue to work in agriculture.<sup>3</sup>
- Other actions that will impact immigrants in the U.S. relate to intervention on COVID-19, equity, climate, health care access, Buy American policies, and economic relief.<sup>4</sup>

### Immigration Committee Updates:

- The American Immigration Council’s Celebrate America Creative Writing Contest for 2021 forges on with an extension for 5<sup>th</sup> grade student submissions through April 15<sup>th</sup>. Please send students’ poems, stories and

Continued On Next Page . . .

Here are the executive actions Biden will take this week | TheHill

AILA Doc. No. 21012531 | Dated January 23, 2021

AILA Doc. No. 21012531 | Dated January 23, 2021

Here are the executive actions Biden will take this week | TheHill

Continued From Previous Page . . .

essays directly to **ACastro@ACLawSolutions.com**.

- The Immigration Committee's partnership with the Boys and Girls Club Indiantown Community Garden continues to strengthen despite the pandemic. The committee raised funds donated for seed, fertilizer and other materials. Volunteer efforts from our members have helped to grow the garden which now helps 40 families as they tend to their spring harvests.
- Three Indiantown families receiving pro bono assistance through AC Law, P.A. may soon receive immigration benefits and protections pursuant to President Biden's recent proposals and changes in immigration priorities. One young child, who has waited for nearly 3.5 years following an unlawful family separation may soon see her mother again with the help of numerous journalists and a team of attorneys across the state and country who

have provided coordinated representations since December 2017.

- The Committee welcomes the new administration's initiative to end the use of the terms "alien" and "illegal alien" from the statute and immigration communications. These terms are misleading, legally inaccurate and presume both criminality and premature conclusions of law. The effort to remove this terminology will promote equity, inclusivity and humanity rather than the division and hostility these designations have garnered in the past. Alternative designations will include "noncitizen," "undocumented person," and "foreign national."





# Legal Resources / CLE

CLE seminars are available free of charge to all MCBA members through the Clerk of Court Office - Official Records Division at the Martin County Courthouse (1<sup>st</sup> Floor). Non-members may rent them for a fee. If you have new seminar suggestions, please e-mail [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com) for consideration.

The Law library has relocated to the first floor reference area of the main branch of our Martin County library system, The Blake Library at 2351 SE Monterey Road in Stuart, with expanded hours of access to library patrons. Legal research assistance will continue to be offered Monday through Thursday (Noon to 4:00 p.m.); Blake Library hours are Monday - Thursday (10 a.m. to 8 p.m.) with all other days open 10 a.m. to 5:30 p.m. except for Sunday (closed).

## Current CLE Seminars Available Include the Following:

- **MCBA Monthly Lunch Meeting** - October 18, 2019. Valid through 4/30/2021. Topic: Overview of the Public Defender and State Attorney Offices, Credits: 2.0 General, 2.0 Technology
- **Parenting Plans from Start to Finish.** Valid through 8/21/2021. Credits: Marital and Family Law 7.5 hours; Professional Responsibility 1.0 credit hour; Ethics 1.0 credit hour; Technology 1.0 credit hour.
- **MCBA Monthly Lunch Meeting** - February 21, 2020. Valid through 8/31/2021. Topic: Diversity and Juvenile Justice; **Credits:** 2.0 General, 2.0 Bias Elimination; **Certification Credits:** 2.0 Juvenile Law
- **MCBA Monthly Lunch Meeting (Virtual) - August 21, 2020.** Valid through 1/31/2022. Speaker: FL Supreme Court Justice Jorge Labarga. Topic: The Role of the Judicial Branch during time of societal division. Credits: 1.0 General
- **MCBA Monthly Meeting (Virtual) - September 18, 2020.** Valid through 3/31/2021. Speaker: Giles Kibbe, SVP and General Counsel Houston Astros and Crane Companies. 1.0 General CLE Credit
- **2020 Survey of Florida Law** (2 copies) - Valid through 11/30/2021. **Credits:** 13.5 General; 3.0 Ethics; 2.0 Mental Illness; 1.0 Professionalism; 3.0 Technology. **Certification Credits:** 1.0 City, County and Local Government; 1.0 Civil Trial; 1.0 Condominium and Planned Development Law; 2.0 Elder Law; 1.0 Labor and Employment Law; 1.5 Marital and Family Law; 1.0 Real Estate; 1.0 State/Fed Govt & Admin Practice; 1.0 Tax Law; 4.0 Wills, Trusts & Estates.
- **MCBA Monthly Meeting (Virtual) - November 12, 2020.** Valid Through 4/30/2022. Speaker: Congressman Brian Mast, Journalist Ed Killer. Topic: The St. Lucie River & Estuary. 1.0 General CLE Credit.

The materials are located in the office of the Martin County Clerk and Comptroller, Official Records Division, 100 SE Ocean Blvd., 1<sup>st</sup> Floor. Office hours are 8:00 am - 5:00 pm, Monday through Friday. If you have any specific questions regarding these instructions, please contact the Official Records Division at 772-288-5553.

## ONLINE RESOURCES OFFERED BY THE MCBA

Notice: Your clients and the public at large can now access online courses directly through the MCBA website. They are fast, convenient, and inexpensive - available 24 hours a day, 7 days a week. All instructions are included online and programs can be started/stopped, picking up where you left off, as many times as you like. **Help the MCBA promote this community service while generating income to support local initiatives!**

Florida Online Traffic School Courses:

- Basic Driver Improvement 4-hour course (Traffic Ticket - TCAC)
- First-time Driver 4-hour course
- Advanced Driver Improvement 12-hour course (ADI / Judge-ordered class)
- Florida Mature Driver Program 6-hour course

All traffic courses are approved by the Florida Department of Highway Safety & Motor Vehicles and sponsored by the American Safety Council.

Parent Education and Family Stabilization Online Course:

This 4-hour course is required by Florida law for concerned parties seeking to obtain a final judgment of dissolution of marriage in Florida when minor children are involved. The course is approved by the Department of Children & Families and provided by a division of the University of Continuing Education.

The courses are provided via the American Safety Council which is the leading source for online driver education, workplace safety training, continuing education, online business and security solutions, and more!



## Florida Free Legal Answers Program

Did you know that The Florida Bar provides free virtual legal information through its cooperative effort with the American Bar Association to low-income Floridians via the Florida Free Legal Answers Program?

Members of the public can go to: <https://florida.freelegalanswers.org/> to sign up and answer a few questions to see if they qualify to use the service.

Florida lawyers may enroll to join the effort by visiting <https://florida.freelegalanswers.org/> clicking on "Volunteer Attorney Registration" and agreeing to the attorney agreement.





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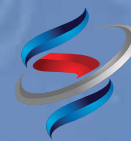
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### Mark your Calendars!

#### **Justice Major B. Harding American Inns of Court 2021 Meeting Dates**

**April 14, 2021**

**May 12, 2021**

**June 2, 2021\*\***

\*\*To be used as an alternative date if necessary



# Links, Jobs and Legislation

19<sup>th</sup> Judicial Circuit Court of Florida

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Visit

**[www.martincountybar.org](http://www.martincountybar.org)**

for resources, links, events and member contact & practice area information.



## Florida Bar Appointments / Vacancies

For applications and complete details, visit: **[www.floridabar.org](http://www.floridabar.org)**

## 19<sup>th</sup> Circuit Appointments / Vacancies

For applications and complete details, visit: **<http://www.circuit19.org/careers.html>**

## Track Legal Legislation

For more detailed information on specific legislation being tracked by the Bar, visit the Legislation Committee's webpage on the Bar website at this link:

**<http://www.floridabar.org/cmdocs/bd160.nsf/WDOCS>**



## Martin County Ordinances

All Martin County ordinances may be found on the County website:

**<https://www.martin.fl.us>**

Click on Departments, County Attorney, County Code & Ordinances.

See ordinance list on right side of web page (ex: Ordinances 800-849).



## City of Stuart Ordinances

All City of Stuart ordinances may be found on the City website:

**[www.cityofstuart.us](http://www.cityofstuart.us)**

Click on link at the bottom of the page.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>April 2021</h1>						
<p><b>SAVE THE DATES:</b></p> <p>See <a href="http://www.martincountybar.org">www.martincountybar.org</a> for full 2020-21 calendar for including committee meetings, holidays &amp; courthouse closings.</p>						
4 Easter	5	6	7	8	9	10
11	12	13 RSVP DEADLINE FOR 4/16 General Meeting MCBA Officers' Meeting MCWL Meeting @ 12 noon	14 Inns of Court	15	16 MCBA Monthly Meeting @ Noon	17 Race to the Courthouse 5K
18	19	20	21	22 Earth Day	23 MCWL Diversity Program @ 2:00 p.m. Talk House	24
25	26	27	28	29	30	



MARTIN COUNTY BAR ASSOCIATION  
PO Box 2197  
STUART, FL 34995-2197

## Please join us for MCBA's CLE Monthly Meeting, Friday, April 16 2021

When: **Friday, April 16, 2021**  
**12:00 Noon**

Where: Zoom

Speaker: Andrea Andrus, Principal Andrus Communications

Topic: Effective and Professional Marketing for Lawyers using Technology and Advertising while complying with Bar Rules

CLE: CLE credit has been applied for

**Please RSVP to: [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com)  
No later than Tuesday, April 14, 2021**

Zoom call details will be sent no later than April 14, 2021  
to members who RSVP.