

DECEMBER 2021



The SideBar

NEWSLETTER OF THE MARTIN COUNTY BAR ASSOCIATION

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MCBA PRESIDENT
ADAM SCHWARTZ

MEMBER SPOTLIGHT
HONORABLE GARY L. SWEET

ARTICLE
EXCEPTIONALITY BASED ON
PERSISTENCE IN AN UNREASONABLE
LITIGATION POSITION

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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

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

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William R. Scott - 1955 – 1958
Evans Cray, Jr. - 1958 – 1959
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(Subsequently Elected to Bench) 1960
Thomas H. Thurlow - 1960 – 1961
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William F. Cray - 1965 – 1966
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Thomas H. Thurlow, Jr. - 1967 – 1968
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Richard J. Dungey - 1979 – 1980
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John H. Fenniman - 1983 – 1984
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W. Thomas Wackeen - 1986 – 1987
Thomas E. Warner - 1987 – 1988
Douglas Sands - 1988 – 1989
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(First Female MCBA President)
George F. Bovie, III - 1990 – 1991
Stephen C. Page - 1991 – 1992
Jane L. Cornett - 1992 – 1993
Walter G. Woods - 1993 – 1994
Richard Kibbey - 1994 – 1995
Lee David - 1995 – 1996
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Frederick G. Sundheim - 1997 – 1998
Hon. William L. Roby - 1998 – 1999
Hon. Barbara W. Bronis - 1999 – 2000
Sheila D. Biehl - 2000 – 2001
Deborah B. Beard - 2001 – 2002
Jack M. Sobel - 2002 – 2003
Hon. Darren Steele - 2003 – 2004
Edwin E. "Ted" Mortell - 2004 – 2005
Richard H. Levenstein - 2005 – 2006
Portia B. Scott - 2006 – 2007
Hon. Alan Orantes Forst - 2007 – 2008
Linda L. Weiksnar - 2008 – 2009
Scott W. Konopka - 2009 – 2010
Preethi Sekharan - 2010 – 2011
Shaun T. Plymale - 2011 – 2012
Gregory S. Weiss - 2012 – 2013
George W. Bush, Jr. - 2013 – 2014
Hon. Jennifer Alcorta Waters - 2014 – 2015
Chad H. Hastings - 2015 - 2016
Mark Miller - 2016 - 2017
Elizabeth R. Hunter - 2017 - 2018
Barbara A. Kreitz-Cook - 2018 - 2019
Jason D. Berger - 2019 - 2020
Barbara Kibbey Wagner - 2020 - 2021

Message From the President

Martin County Bar President - Adam G. Schwartz, Esq.

Dear Members,

We hope you all had a thankful November filled with turkey, pie, and the law. Our theme this year is "Gratefulness" and our Thanksgiving Holiday is a great time to remind ourselves to be grateful for both the good and the bad. We often learn and grow from the bad. Every mistake is a chance to turn a stumbling block into a steppingstone.

We hope you enjoyed our November luncheon speaker, The Honorable Robert Luck. Federal Judge Luck sits on the 11th Circuit Court of Appeal. He is a former Florida Supreme Court Justice and served on the 11th Circuit Bench in Miami-Dade and at the 3rd District Court of Appeal. I am proud he represents the State of Florida on the 11th Circuit Court of Appeal.

Thank you to those who participated in the tri-County softball tournament. Martin County defeated St. Lucie County and Indian River County Bar Associations and took the 2021 title with a 2-0 record. It was a great event, and we look forward to continuing to support our members and the community.

Thank you to all who joined the Martin County Bar Association in Gainesville for the Second Annual Tom Warner Tailgate on November 13, 2021. It was a great event with over 100 members and their families in attendance. Thank you to Jason Berger and Scott Konopka for spearheading this event, and to all the sponsors and members who

worked hard to make this event a success.

We look forward to welcoming Mr. Edwin Bell, Director of Racial Justice, Equity, and Inclusion at the National Center for State Courts in Washington D.C. at our December luncheon on December 17, 2021. Mr. Bell will discuss the fascinating and important ways court systems and administration of court systems can be address to provide a more inclusive experience for all people who use or interact with the Court's systems.



Adam Schwartz
2021-2022 President

Have a Happy and Healthy Holiday. Be Safe.

"We can always find something to be thankful for, no matter what may be the burden of our wants, or the special subject of our petitions." Albert Barnes

Yours Truly,

Adam Schwartz
2021-2022 MCBA President

*Happy Holidays from the
Martin County Bar Association*

**Are you looking for Year-Round Marketing Exposure for your Firm?
Consider an Annual Sponsorship!**

Opportunity for Year-Round marketing exposure with Martin County Bar Association’s Membership!

The Annual Sponsorship Program provides your firm continuous, repeatable marketing presence and networking opportunities with MCBA’s membership through:

- Greater exposure on-line; in-print; and during monthly meetings
- Person-to-person networking
- Increased recognition
- Building more meaningful relationships with colleagues

Benefits include visibility on MCBA’s website, inclusion on member email blasts, signage at Bar events, advertising in the SideBar and complimentary tickets to the Fall Reception and Annual Installation Dinner.

There are sponsorship packages for law firms and businesses of all types, sizes and marketing budgets.

Visit the Sponsor page of the MCBA website or contact Robyn O’Heron at martincountybarassociation@msn.com for details.



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jason@jasonbergerlaw.com
 Phone: 772-403-5880
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Law Office of Jason D. Berger
 Working to do right by you and your family!

Please Join Us!

The Martin County Bar Association (MCBA) will welcome Edwin Bell, MBA, ICM Fellow, Director of Racial Justice, Equity & Inclusion – National Center for State Courts as the guest speaker at our monthly luncheon meeting on Friday, December 17, 2021 at Monarch Country Club. Networking begins at 11:30 a.m. and Lunch will be served promptly at noon.

Edwin Bell, a long-time deputy court administrator with the DeKalb County (Georgia) Superior Court, is NCSC’s first director of Racial Justice, Equity and Inclusion. His job is to help state court leaders nationwide achieve those things – racial justice, equity and inclusion – for court users. He works and lives just outside Atlanta with his wife, a dentist, and their 13-year-old daughter and 11-year-old son.



Edwin Bell, MBA

Edwin was born in Pasadena, Calif., and raised in Compton, in Los Angeles County. His father and uncles owned three Shell stations (in the Los Angeles area), and his mother was a schoolteacher. After eighth grade, Edwin’s family moved to Wichita, Kansas, his mother’s hometown. During high school, he was pulled over every day. Seven days a week. The police wanted to search his vehicle every time they saw him. That’s when he realized he wanted a career that allows him to make a positive difference in the lives of people who depend on the courts for justice.

The National Center for State Courts is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts.

All of NCSC’s services — research, information services, education, consulting — are focused on helping courts plan, make decisions, and implement improvements that save time and money, while ensuring judicial administration that supports fair and impartial decision-making.

NCSC is the organization courts turn to for authoritative knowledge and information, because its efforts are directed by collaborative work with the Conference of Chief Justices, the Conference of State Court Administrators, and other associations of judicial leaders.

We anticipate an insightful and engaging program and are looking forward to seeing everyone in-person. The lunch is free to MCBA members and Judges. Guests are welcome to attend and pay the \$30 guest fee at the door (cash or check only).

RSVP IS REQUIRED on or before 5:00 p.m. **FRIDAY, December 10, 2021** by calling 772-220-8018 or emailing martincountybarassociation@msn.com.

**In order to expedite gate access for everyone,
please be sure to RSVP by the deadline.**

Social Committee



Jeanette Lugo
Co-Chair

The MCBA's Second Bi-monthly Networking Happy Hour at **Charlie's Bar and Grill** on Thursday, November 4, 2021 was a huge success! It was a wonderful time amongst attorneys, judges, and support staff all from our wonderful legal community here on the Treasure Coast. Stay tuned for details regarding our next happy hour!



Brandon Woodward
Co-Chair



Member Spotlight

Judge Gary L. Sweet

Education: Undergrad?

University of Texas at Austin

Law School? Nova University

How long have you been practicing law? 42 years (last 17 as a judge). Passed the Bar in 1978.

Why did you want to be an attorney? I deemed the profession to be challenging, rewarding and actually beneficial to an ordered society.

What do you like most about it? Getting positive results and having a satisfied client.

What don't you like? Nitpicking, petty arguments regarding discovery that typically are a complete waste of time.

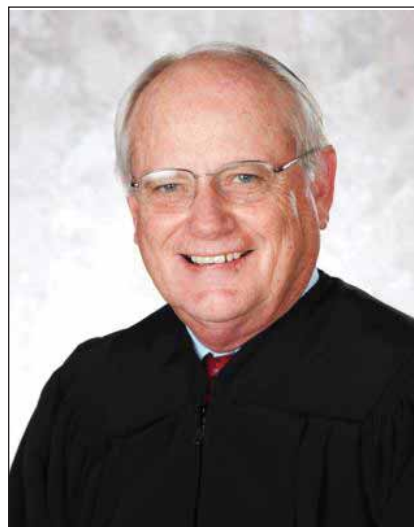
What are the biggest changes you have seen through the years? Obviously technology has sped things up. The proliferation of massive notebooks containing information that simply cannot be read, analyzed, and absorbed.

How do you define success? Enjoying the day-to-day; having satisfied, grateful clients, and prospering.

Who inspires you? People who are encouraging, uplifting, and are generous with sincere compliments.

Who has been the most influential person in your career? My father. One of seven kids in rural West Texas. Only one to graduate from college. Went on to graduate from the University of Texas law school. Had a successful 35-year career as an FBI agent. Displayed courage and valor in response to armed interrogators, who were part of the Castro regime, upon his arrest in Havana Cuba in 1960.

If you could choose anyone as a mentor, who would you choose? 4-Star Navy Admiral, William McRaven. Led the Bin Laden operation. I admire his achievements and decency. It helps that he's a fellow Longhorn.



What is the best piece of advice you have ever received? Don't let the old man in. Get busy living or get busy dying.

What advice would you give to someone looking to become an attorney? Familiarize yourself with what lawyers actually do day-to-day. It may not match your perception.

If you weren't an attorney, what would you be doing? Probably a business owner of some sort.

If you could switch places with someone for a day, who would it be? A Blue Angels pilot.

What's on your bucket list? Seeing my three grandchildren achieve success. Taking a photo safari in South Africa, Australia, New Zealand, and British Isles.

If you could visit anywhere in the world, where would you go? South Africa, Australia, New Zealand, British Isles.

If you could have dinner with any person, alive, dead or fictional, who would it be and where would you go? Jack Nicklaus. I've always admired not only his talent, but also his success as a spouse, father, and grandfather. Also his philanthropy. Dinner would be at Augusta National.

What is something (a fun fact) that many people might be surprised to learn about you? I wish I could play the drums. I took lessons for a year as a kid, but stopped. I regret it now.

ALTERNATIVE DISPUTE RESOLUTION

Elizabeth Hunter - Chair

Changes to the Operating Procedures Governing the Certification of Mediators



Elizabeth Hunter
Chair

If you are a mediator or are interested in becoming a mediator, then please make sure to review the Operating Procedures Governing the Certification of Mediators that became effective on November 1, 2021 which revise the certification and renewal process.

attend 50% of continuing mediator education (CME) in a live format and mentorship CME has increased to a maximum of eight hours, instead of four. You may access a copy of the Operating Procedures and learn more by visiting <https://www.flcourts.org/Resources-Services/Alternative-Dispute-Resolution>.

Please feel free to email **ehunter@sheilabiehl.com** if you have any questions or comments regarding the MCBA ADR Committee. Thanks!

For example, under the new procedures, mediators are no longer required to

19th Circuit Judicial Nominating Commission

The MCBA will continue to post updates on the 19th Circuit JNC Commission meetings and deadlines for appointments to fill judicial vacancies as they become available at www.martincountybar.org. For more information, email martincountybarassociation@msn.com

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The MCBA / Sobel Cup Golf Tournament is back!

benefitting the MCBA Scholarship Fund

Saturday, May 7, 2022

Lost Lake Golf Club

8:30 a.m. Shotgun

Scramble Format

Awards for Top 3 Foursomes

Download entry form at
martincountybar.org

Each Entry Includes:

- Greens Fees
- Cart
- Range Balls
- Breakfast
- Lunch and Awards
- 2 beverages on course
- Hole-in-One Chances
- Gift Bag

Entry Fee:

Individual Player - \$150

Foursome - \$500

Lunch only \$35

MCBA
Golf

Sponsorships Available

Gold Sponsor* - \$1,500 **SOLD**

Luncheon Sponsor* - \$750 **SOLD**

Cart Sponsor* - \$500 **SOLD**

Beverage Cart Sponsor* - \$500

Breakfast Sponsor* - \$300

Gift Bag Sponsor* - \$300

Hole-in-One Sponsor (4) - \$250 each - **3 available**

Individual Hole Sponsor (18) - \$200 each - **17 available**

*single sponsorship available at this level

Interested in a Sponsorship?

Contact Robyn O'Heron

772-382-9076 or

martincountybarassociation@msn.com



2022 MCBA Golf Tournament / Sobel Cup To benefit the MCBA Scholarship Fund



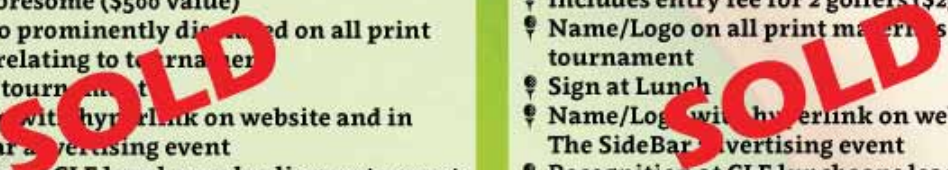
Sponsorship Opportunities

Gold Sponsor \$1500

- 1 Available
- Includes Foresome (\$500 value)
- Name/Logo prominently displayed on all print materials relating to tournament
- Signage at tournament
- Name/Logo with hyperlink on website and in The SideBar advertising event
- Recognition at CLE luncheons leading up to event
- Full page ad in 1 issue of The SideBar

Luncheon Sponsor \$750

- 1 Available
- Includes entry fee for 2 golfers (\$250 value)
- Name/Logo on all print materials relating to tournament
- Sign at Luncheon
- Name/Logo with hyperlink on website and in The SideBar advertising event
- Recognition at CLE luncheons leading up to event
- 1/2 page ad in 1 issue of The SideBar

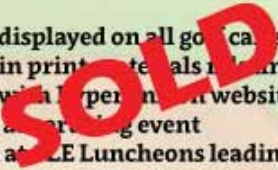


Cart Sponsor \$500

- 1 Available
- Name/Logo displayed on all golf carts used for event
- Name/Logo in print materials relating to tournament
- Name/Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE Luncheons leading up to event
- 1/4 page ad in 1 issue of The SideBar

Scorecard Sponsor \$500

- 1 Available
- Name/Logo displayed on all scorecards used for event
- Name/Logo in print materials relating to tournament
- Name/Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE Luncheons leading up to event
- 1/4 page ad in 1 issue of The SideBar



Beverage Cart Sponsor \$500

- 1 Available
- Name/Logo displayed on beverage cart used for event
- Name/Logo in print materials relating to tournament
- Name/Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE Luncheons leading up to event
- 1/4 page ad in 1 issue of The SideBar

Breakfast Sponsor \$300

- 1 Available
- Signage at Breakfast
- Name/Logo in all print materials relating to tournament
- Name / Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE luncheons leading up to event
- Business Card size ad in 1 edition of The SideBar

Gift Bag Sponsor \$300

- 1 Available
- Logo on each gift bag
- Name/Logo in all print materials relating to tournament
- Name/Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE luncheons
- Business Card size ad in 1 edition of The SideBar

Hole-in-One Sponsor \$250

- 3 Available
- Signage at specified hole
- Name/Logo in all print materials relating to event
- Name/Logo with hyperlink on website, in The SideBar advertising event
- Recognition at CLE luncheons

Hole Sponsor - \$200 per hole

- 17 Available
- Signage at tee box
- Name in all print materials relating to tournament
- Name on MCBA Website

Bankruptcy Committee

Jon Martin - Chair

TAX CONSIDERATIONS FOR TROUBLED SMALL BUSINESS OWNERS

IRS problems drive a large number of Bankruptcy filings, and debtors find that a bankruptcy court can be a good friend when dealing with the IRS. One of the most useful strategies for satisfying the “Means Test” of Small Business Owners besides health care costs, involves the maximum use of taxes.

Many owners run into tax problems when they reduce their withholding or tax deposits to increase take-home pay or cash flow to help pay off credit card or other unsecured debt. This is exactly opposite of how to maximise the benefit of a bankruptcy.

Taxes affect the Bankruptcy “Means Test” in two ways. While some taxes can be dischargeable in Bankruptcy, others are not, and paying these through the Bankruptcy can go a long way towards getting them paid and satisfying the income restrictions created for individuals by the Means Test at the same time.

You also get to deduct future tax liabilities from income. Without careful attention to determining the REAL amount of taxes that are going to be due, you may end up showing more disposable income than you actually have. Considering that it only takes one dollar (\$1.00) of above average income to run afoul of the Means Test, this can have a significant impact.

An in-depth discussion of how the “Means Test” works is beyond the scope of this article but suffice it to say that it is a critical part of any Bankruptcy filing. The real message here is to appreciate the importance of getting it right when putting together a petition for Bankruptcy.

One of the most telling signs that you are shortchanging yourself on the “Means Test” is if you regularly owe substantial sums at tax time; OR, if you consistently get large refunds. If you end up owing substantial sums each year, your disposable income looks greater than it really is as shown on your pay stubs.



Moreover, not only do you need to deduct 1/12th of that amount each month to reduce net income, if you are filing mid-year you are already another 6 months behind in the current year and need to adjust for that as well.

The opposite is true of course if you consistently get large refunds. You then run the risk of the Trustee intercepting it and your supposed “safety net” or “Real Estate tax payment “ or “other” IRS refund uses disappear.

Careful thought also needs to be given to the likelihood that your tax situation will change going forward. Future taxes can be affected by the loss of a mortgage interest deduction, growing self -employment income, the loss of a deduction by virtue of a child leaving the nest and so on.

The bottom line is that the “Means Test” makes “do it yourself Bankruptcy” high risk for all but the very simplest of cases. Get professional help.

Need more information? Contact Jon L. Martin, Chair - Martin County Bankruptcy Committee. jlm@jonmartinlaw.com or 772 419 0057.

Judicial Relations Committee

Jessica VanValkenburgh - Chair



2021-2022 JRC Committee Members – Judge Lawrence Mirman, Judge Elizabeth Metzger, Judge William Roby, Gene Zweben and Kathryn McHale

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 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.

Upcoming JRC Meetings:

JRC Judicial Speaker Series 2021 - 2022

<u>Dates</u>	<u>Speakers</u>
January 11, 2022	Judge Jennifer Alcorta Waters
February 8, 2022	Judge Charles Schwab
March 8, 2022	TBD
April 12, 2022	TBD
May 3, 2022	Judge Darren Steele

All JRC Judicial Speaker Series meetings will be held from 11:45 a.m. to 1:00 p.m. at McCarthy, Summers, Wood, Norman, Melby & Schultz, P.A., 2400 SE Federal Highway, Fourth Floor, Stuart, Florida 34994, (772) 286-1700. RSVP required at least two (2) days prior to each meeting to: jmv@mccarthysummers.com. Space is limited. Lunch will be provided. Meetings are free for current MCBA members and \$10.00 for all others. Cash or checks made payable to the MCBA accepted.

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

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”



Employment Law

David Miklas, Esq. – representing employers only

Updates on COVID vaccine mandates and exemptions:

At the end of October, the EEOC updated a *Technical Assistance Q & A addressing COVID and employees and provided the following guidance:*

Do employees who have a religious objection to receiving a COVID-19 vaccination need to tell their employer? Yes, employees must tell their employer if they are requesting an exception to a COVID-19 vaccination requirement because of a conflict between that requirement and their sincerely held religious beliefs, practices, or observances (hereafter called “religious beliefs”). Under Title VII, this is called a request for a “religious accommodation” or a “reasonable accommodation”... As a best practice, an employer should provide employees and applicants with information about whom to contact, and the procedures (if any) to use, to request a religious accommodation.

Does an employer have to accept an employee’s assertion of a religious objection to a COVID-19 vaccination at face value?

Generally, under Title VII, an employer should assume that a request for religious accommodation is based on sincerely held religious beliefs. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, the employer would be justified in making a limited factual inquiry and seeking additional supporting information. An employee who fails to cooperate with an employer’s reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation... The employer may ask for an explanation of how the employee’s religious belief conflicts with the employer’s COVID-19 vaccination requirement. Although prior inconsistent conduct is relevant to the question of sincerity, an individual’s beliefs – or degree of adherence – may change over time and, therefore, an employee’s newly adopted or inconsistently observed practices may nevertheless be sincerely held. An employer

should not assume that an employee is insincere simply because some of the employee’s practices deviate from the commonly followed tenets of the employee’s religion, or because the employee adheres to some common practices but not others. No one factor or consideration is determinative, and employers should evaluate religious objections on an individual basis.

When an employee’s objection to a COVID-19 vaccination requirement is not religious in nature, or is not sincerely held, Title VII does not require the employer to provide an exception to the vaccination requirement as a religious accommodation.

How does an employer show that it would be an “undue hardship” to accommodate an employee’s request for religious accommodation?

Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment... Courts have found Title VII undue hardship where, for example, the religious accommodation would impair workplace safety, diminish efficiency in other jobs, or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work... An employer will need to assess undue hardship by considering the particular facts of each situation and will need to demonstrate how much cost or disruption the employee’s proposed accommodation would involve. An employer cannot rely on speculative hardships when faced with an employee’s religious objection but, rather, should rely on objective information. Certain common and relevant considerations during the COVID-19 pandemic include, for example, whether the employee requesting a religious accommodation to a COVID-19 vaccination requirement works



David Miklas
Chair

Continued On Next Page . . .

outdoors or indoors, works in a solitary or group work setting, or has close contact with other employees or members of the public (especially medically vulnerable individuals). Another relevant consideration is the number of employees who are seeking a similar accommodation (i.e.,

the cumulative cost or burden on the employer).

Businesses should use experienced counsel to assist navigating these complicated COVID-related employment issues.



SouthState



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MCBA Small and Solo Practice Committee

Coffee & Conversation

Wednesday, December 15th 8:30am-9:30am
Coffee Bar Blue Door - 38 SE Osceola St, Stuart

Join your fellow Solo & Small Firm Members to meet
and celebrate the holidays.

RSVP by Dec. 12th to Kathy McHale – Kathy@KMChalelaw.com
Donation requested for gift cards for Safe Space-
let's make someone's holiday special!



Kathy McHale
Chair

Young Lawyers Division

YLD is calling ALL volunteers!

YLD received a pre-pandemic Florida Bar grant so that it could coordinate a beach clean-up project with the Florida Oceanographic Society here in Martin County. We are covering four locations for this community service project: Stuart Beach, Stuart Causeway, Jensen Beach, and Jensen Causeway. With the grant money received, we are purchasing/donating supplies that the Florida Oceanographic Society can continue to use in future clean-ups. Please register at the links below to participate in one of the clean-ups. If you have any questions, please contact Jeanette Lugo (jlugo@wmrfla.com).

Thanks to those who participated in the November Clean-Ups on November 22, 2021 and November 29, 2021

December 9, 2021 Beach Cleanup at 1:30 pm: <https://www.floridaocean.org/jensen-beach-cleanup-12-9-21-private>

December 13, 2021 Beach Cleanup at 1:30 pm: <https://www.floridaocean.org/jensen-beach-causeway-cleanup-12-13-21-private>



Jeanette Lugo
Chair

Foreclosure Committee

Dorothy Dlugolecki - Chair



Dorothy Dlugolecki
Chair

Bayview Loan Servicing v. Brown - motion to dismiss

The 2nd DCA reversed an order dismissing the foreclosure complaint because the trial court went outside of the four corners of the complaint in its ruling. This was Bayview's second foreclosure action against the same parties. There was a prior foreclosure filed in 2013 that was dismissed with prejudice. Defendants moved to dismiss this second foreclosure based on collateral estoppel and referenced the 2013 foreclosure because the trial court took judicial notice of the prior foreclosure when defendants moved for sanctions earlier in the case. The 2nd found the defendants did not properly request judicial notice of the prior foreclosure action when moving to dismiss the complaint and plaintiff did not stipulate, but opposed, taking judicial notice.

Asgard Fund v. MM80 Oceanside Holdings - delivery of note

The 3rd DCA reversed the final judgment against the lender and also reversed an order denying the borrower's motion to amend. In this case, the original notes were not delivered to the lender and the trial court found the notes were unenforceable. The 3rd evaluated the undisputed facts - there was testimony that the borrower intended to deliver the notes to the lender and Fla. Stat. § 673.1051 regarding delivery and issuance of an instrument. The 3rd reversed the trial court's ruling finding that an unissued instrument is not automatically unenforceable and nondelivery was not raised as affirmative defense. The 3rd briefly addressed the trial court's denial of the borrower's motion for leave to amend by citing case law that the trial court abuses discretion by denying such motion if there is no prejudice, abuse, or futility in the amendment.

Friedman v. Deutsche Bank - evidence

The 5th DCA reversed and remanded a final judgment because the amount of interest and attorneys' fees were not supported by the evidence before the court at the non-jury trial. In this case, the final judgment had an amount of interest due that was different from the amount in the transaction history admitted into evidence, and an amount in attorneys' fees when the fee affidavits were not admitted into evidence. Deutsche Bank conceded error and the only issue in this case were the remand instructions. The 5th remanded for the trial court to adjust the amount of interest due based on a review of the existing evidence and to strike the amount of attorneys' fees in the final judgment.



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MCBA wins 19th Circuit Bar Association Softball Tournament!

After a year hiatus, a team representing the MCBA participated in the 19th Circuit Bar Association Annual Softball Tournament. Team members included: Jeff Friedman, Stephen Isherwood, Judge Michael McNicholas, , Robyn O’Heron, Paul Parton, Stephen Pinnicoli, Adam Schwartz, Jessica VanValkenburgh, Tyson Waters, Matthew Worsham and Gene Zweben.

Home plate umpire Chief Judge Schwab called balls and strikes accurately and no one accused him of needing glasses. Field umpire, Senior Judge Pegg did a fantastic job on the close calls at first base and the pop flies to the outfield.

With no team activities or practice prior to the first game, the day could have gone horribly wrong. Up first, was the team from Indian River Bar Association. The MCBA quickly got out in front and never looked back. The final score was MCBA 14 to IRCBA 9!

The next game featured Indian River playing St. Lucie County. This gave the MCBA team a needed break to cool off with waters and “mom-inspired”

orange slices. A lot of stretching was required to stay loose for the next game as well as some duct tape to hold together long-unused shoes!

Game three pitted the MCBA against St. Lucie County Bar Association. Again, the MCBA got out to an early lead and never looked back. Final score was 15 – 4 in favor of the MCBA.

A delicious lunch from Dales BBQ, in Ft. Pierce followed the games. A huge thank you to Lillian Ewen for coordinating the tournament and the food. Her efforts are much appreciated.

It was a beautiful October sunny day, with great camaraderie, a lot of laughs, a few pulled hamstrings and rumor has it, a lot of sore muscles Saturday evening and Sunday. All in all, a great day of fun. Thank you to all who volunteered to play!

For more photos, visit the MCBA Facebook page to check out the video photo montage.



2nd Annual Tom Warner Gator Tailgate

The Second Annual Martin County Bar Association Tom Warner Tailgate was a great time had by all. We appreciate all our members and families joining us for some fun festivities in Gainesville. Special thank you to Judge Martha Warner and her family, along with our sponsors for making this event possible. See you next year! Go Gators!



The tailgate is made possible by the generous sponsorships of:



Noteable Dates December 2021

Thursday, December 9, 2021
YLD Beach Clean-Up
1:30 p.m. Jensen Beach

Friday, December 10, 2021
MCWLA Charcuterie Workshop
6:00 pm
See page 25 for more information

Friday, December 10, 2021
RSVP Deadline for MCBA Monthly CLE Meeting

Monday, December 13, 2021
YLD Beach Clean-Up
1:30 p.m. Jensen Beach Causeway

Wednesday, December 15, 2021
Small & Solo Firm Coffee & Conversation
8:30 – 9:30 a.m. @ Coffee Bar Blue Door
RSVP by December 12 to:
Kathy McHale: Kathy@KMcHalelaw.com
Donation of gift cards for Safe Space Requested

Friday, December 17, 2021
MCBA Monthly CLE Meeting
11:30 a.m. – 1:00 p.m. @ Monarch Country Club
RSVP by December 10, 2021 to:
martincountybarassociation@msn.com

Tuesday, December 21, 2021
MCWLA CLE Luncheon
11:45 – 1:00 p.m. @ Maneros
Please e-mail fawlmartin@gmail.com to RSVP

Thursday, December 23, 2021
Courthouse Closed – Christmas Eve (Observed)

Friday, December 24, 2021
Courthouse Closed – Christmas (Observed)

Friday, December 31, 2021
Courthouse Closed – New Year's Day (Observed)

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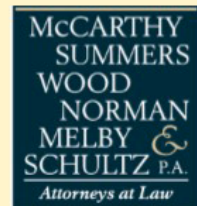
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Real Estate and Commercial Litigation Update

Florida Real Property and Business Litigation Report

Manuel Farach



Dekalb Event Center, Inc. v. City of Chamblee, Case No. 20-10659 (11th Cir. 2021).

A liquor license is a vested property right but its application, e.g., hours of operation, may be changed by government.

Gold-Fogel v. Fogel, Case No. 20-14310 (11th Cir. 2021).

The Colorado River Doctrine (federal courts have discretion to not accept federal litigation when it is identical to state court litigation) is not to be applied mechanically and includes a non-exclusive list of factors the federal court may review.

Hunstein v. Preferred Collection and Management Services, Inc., Case No. 19-14434 (11th Cir. 2021).

It is a violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692c(b), for a creditor to send debtor's information to third parties (including debt collection vendors) for purposes of collecting a debt.

In Re: Amendments to Florida Rules of Civil Procedure 1.280 And 1.340, Case No. SC21-120 (Fla. 2021).

Florida Rule of Civil Procedure 1.280 is amended to require litigants - when responding to requests for production, written deposition questions, interrogatories, and requests for admissions - to state the deposition question, interrogatory, or discovery request followed by the answer, objection, or other response.

Levy v. Levy, Case No. SC20-1195 (Fla. 2021).

Florida Statute section 57.105(7) is applicable only where the attorney's fees provision is unilateral, i.e., provides for an award of attorney's fees to only one party to the contract.

In Re: Amendment To Rules Regulating The Florida Bar-Rule 3-7.18, Case No. SC21-653 (Fla. 2021). The Board of Governors of the Florida Bar may review allegations of misconduct referred by members of the judiciary that do not result in finding of probable cause or filing of a formal complaint.

Pena v. Rincon, Case Nos. 3D19-2225, and 3D19-2308 (Fla. 3d DCA 2021).

A handwritten agreement between non-lawyer business partners is effective and the commercial properties owned by the partnership may be partitioned.

BREA 3-2 LLC v. Hagshama Florida 8 Sarasota, LLC, Case Nos. 3D20-1154, and 3D20-1197 (Fla. 3d DCA 2021).

An agreement to arbitrate any disputes "under the Agreement" is a narrow arbitration provision and does not encompass indirect claims such, as in this case, usury, declaratory relief, and injunctive relief.

Carus v. VRMTG Asset Trust, Case No. 3D20-1355 (Fla. 3d DCA 2021).

A trial conducted over electronic means is acceptable under the circumstances as due process is flexible and calls for as much procedural protections as the situation demands.

Associated Energy Group, LLC v. Costa, Case No. 3D20-1633 (Fla. 3d DCA 2021).

The two-dismissal rule applies only to dismissal of an entire action or controversy as to all defendants; it does not apply to a dismissal of any claim or cause of action against one or more, but less than all, of the defendants named in the complaint, and accordingly, does not apply to guarantors who were dismissed twice when the action remained pending after the second dismissal of the guarantors.

Continued On Next Page . . .

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Phillips v. Pritchett Trucking, Inc., Case No. 1D20-2068 (Fla. 1st DCA 2021).

The Clerk of Court is required by Florida Statute section 28.222(3) to “record . . . instruments presented to him or her for recording, upon payment of the service charges prescribed by law” and upon failure to do so, may be compelled by mandamus to record as date of presentment of the instrument and give priority irrespective of Florida Statute section 695.11.

Akuwudike v. McKenzie, Case No. 3D20-1364 (Fla. 3d DCA 2021).

Other than jurisdiction specifically retained, a trial court loses jurisdiction of a case after rendition of the final judgment and expiration of the time allotted for altering, modifying or vacating the judgment, and as a result, cannot conduct case management conferences nor “dismiss” a case.

Barak v. ACS International Projects, Ltd., Case No. 3D20-0670 (Fla. 3d DCA 2021),

Article 4A (Electronic Funds Transfers) of the Uniform Commercial Code only allocates responsibility as to “parties” to the funds transfer, i.e., a term narrowly defined as including only the originator, sender, beneficiary, and enabling financial institutions, and does not allocate responsibility as to underlying parties laying claim to the funds.

First Equitable Realty III, Ltd. v. Grandview Palace Condominium Association, Inc., Case No. 3D20-1807 (Fla. 3d DCA 2021).

An amendment to a condominium declaration giving a developer the right to reject further amendments which are, in the sole opinion of the developer, harmful to the sale of further units is enforceable.

JD’s Asphalt Engineering Corp. v. Arch Insurance Company, No. 3D20-0407 (Fla. 3d DCA 2021).

Upon proper proof, a surety may enforce a contractual provision that all change orders in a construction contract be in writing and approved.

Shechter v. R.V. Sales of Broward, Inc., Case No. 3D20-1413 (Fla. 3d DCA 2021).

A trial court cannot enter summary judgment when no parties have moved for that relief.

Lam v. Univision Communications, Inc., Case No. 3D19-2204 (Fla. 3d DCA 2021),

Florida Statute section 768.295 (2021), Florida’s anti-SLAPP statute, does not shift the standard on a motion to dismiss standard to one where the burden is on plaintiff to prove its complaint has merit.

Florida Woman Care LLC v. Nguyen, Case No. 4D21-1554 (Fla. 4th DCA 2021).

Defendants who did not sign an agreement containing an arbitration provision may compel arbitration if the Plaintiff sues them on the agreement containing the arbitration provision.

Soundbar, LLC v. BYM Commercial, Case No. 5D21-176 (Fla. 5th DCA 2021).

A trial court hearing a Motion to Determine Rent under Florida Statute section 82.232 (2020) is limited to considering only the issue of the amount of rent due and whether the amount has been paid, and cannot consider any other issues such as the proper lease in place, force majeure, and other defaults.

Bayview Loan Servicing, LLC v. Brown, Case No. 2D20-1824 (Fla. 2d DCA 2021).

A trial court may not take judicial notice of matters outside the pleading when ruling on a motion to dismiss absent extraordinary circumstances.

Berggren v. North Miami Bagels, Inc., Case No. 3D19-2491 (Fla. 3d DCA 2021).

Florida Rule of General Practice and Judicial Administration 2.516(b)(2) requires service on unrepresented parties be made by “mailing [a document] to the party . . . at their last known address” and is “complete upon mailing”; Rule 2.516 does not require a party to include a certificate of service when mailing a document to an unrepresented party.

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Stuart, FL

Matthew R. Naparstek

Florida State College of Law, 2006
Felice, Ehrlich & Naparstek
Stuart, FL

Amy Shenstone

Nova Southeastern University - Shepard Broad College of Law, 2011
Shenstone Disability Group
Port St. Lucie, FL

Brian P. Sullivan

Nova Southeastern University - Shepard Broad College of Law, 2008
Searcy Denney Scarola Barnhart & Shipley, P.A.
West Palm Beach, FL

Around Town

On Friday, November 19, 2021 the Criminal Law Committee, chaired by **Whitney Duteau** and Diversity Committee, chaired by **Paul Bernard** hosted a joint Meet and Greet at Lush Lounge in downtown Stuart. A special thank you to **Jeff T. Gorman Law Offices** for sponsoring the event!



MCBA'S CONSTITUTION WEEK 2021

Judge Alan Forst, Constitution Week 2021-22 Co-Chair and Past MCBA President
Adam Schwartz, Constitution Week 2021-22 Co-Chair and Current MCBA President



Hon. Alan O. Forst

Martin County Elementary, Middle and High School students, from Port Salerno to Indiantown to Jensen Beach received a visit in mid-September as the Martin County Bar Association sent volunteers (lawyers and judges) to discuss the United States Constitution and celebrate Constitution Week 2021. We've been doing this since 2005 and our volunteers once again received a warm welcome from students, faculty and administrators.



Adam Schwartz
Chair

First, a warm congratulatory (but social distanced) hug to our faculty: **President Adam Schwartz, Christen Spake, Christine Moreno, Kathy McHale, Jessica Van Valkenburgh, Gloretha Hall, Aaron Clemens (spent the day at Indiantown Middle School), Michael Donnelly, Marc Teplitz, Judge Jeffrey Hendriks, Judge Alan Forst, Judge Kathy Roberts, Judge Jennifer Waters, Judge Darren Steele, and special guest Commissioner Doug Smith.**



Christen related that the students at Anderson "were respectful, engaged participants . . . and had an impressive knowledge of the Founding Fathers and Separation of Powers." Judge Roberts exclaimed that "it was so nice to be back in person!" She spoke to a large group of fifth graders "who were engaged and wonderful."

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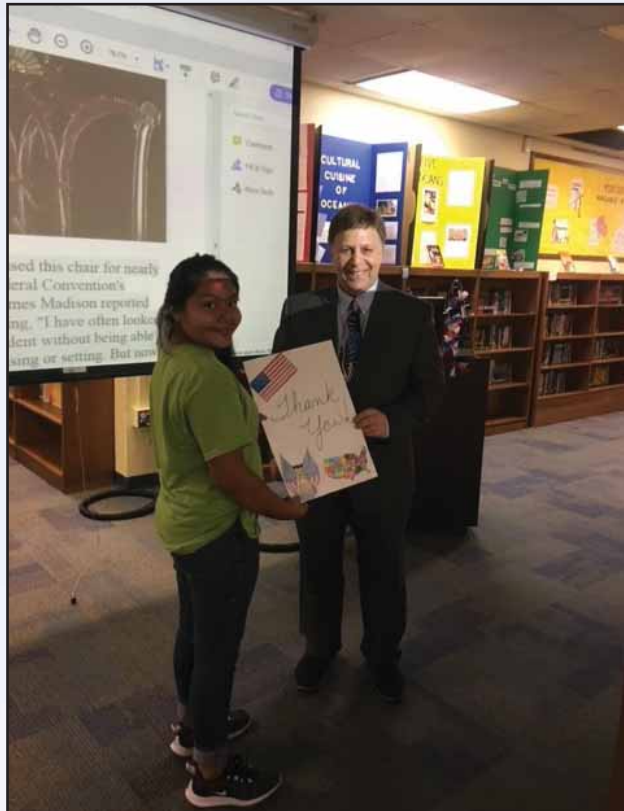


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The new Superintendent of The School Board of Martin County, Dr. John Millay, observed Judges Steele and Waters in action at Palm City Elementary, and sent me a nice letter to “share [his] profound appreciation with the members of the Martin County Bar Association for their time and effort in serving as guest speakers.”

The committee plans to continue—both during future Constitution Weeks, as well as during the school year. This partnership of local bar association, local judiciary, and local school administration

(Superintendent Millay and Dr. Mark Malham, the Coordinator of Social Studies and Special Projects) works well together and anticipates presenting civics education programs during the school year. **Additional volunteers are welcome!**



Rocker: He introduced Judge Forst, urged the students to raise the roof, roof, and ultimately approved of Judge Forst's presentation, giving it two paws up.



I know no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of Constitutional power. Thomas Jefferson

Martin County Women Lawyers Association

Elizabeth Hunter: MCWLA President 2021 - 22



The **Martin County Women Lawyers Association** is your local chapter of Florida Association for Women Lawyers (FAWL). The mission of FAWL is:

To actively promote gender equality and the leadership roles of FAWL's members in the legal profession, judiciary and community at large. To achieve these goals, FAWL will uphold the highest standard of integrity, honor and courtesy in the legal profession, promote reform in law, and facilitate administration of justice.

PLEASE JOIN US for our next CLE luncheon on **Tuesday, December 21st from 12-1 pm** (networking from 11:45 am to noon) in-person at Manero's Restaurant in Palm City. We will be joined by **Judge Metzger, Judge Roberts, Judge Waters, and Judge White**. Lunch is provided at no cost to MCWLA members. Please e-mail fawlmartin@gmail.com to RSVP.

We have a great new event scheduled for **Friday, December 10th at 6 pm. A Charcuterie Workshop (with Wine!)**. Pick a board, and pick a location (in your home or join us at the Marshall Residence in Palm City). Small Boards (\$20 members/\$35 non-members) and Medium Boards (\$50 members/\$65 non-members) available. *Tutorial and boards provided by Good Grazin'*. Contact Niki Marshall to RSVP and with any questions. Marshall.Law.FL@gmail.com

Thank you to everyone who joined us in October for our CLE with **Gloria Seidule** and **Dr. Leticia Lopes**. Attorney Seidule spoke about how to hold organizations accountable for the safety of children in their care. **Dr. Lopes**, who is a clinical psychologist, discussed recognizing the signs of abuse in children and how to best utilize members of her field in holding abusers accountable. In November, we hosted a Zoom CLE by **Rebecca Bandy, Director of the Henry Latimer Center for Professionalism at the Florida Bar**. We will recap this event in next month's SideBar.

Save the dates for our upcoming CLEs in 2022: 1/18; 2/15; 3/15; 4/19; and 5/17.

To join or renew your membership, visit www.fawl.org. Contact our Membership Director, Davina Tala, at dt@talalegal.com with any membership questions.

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Appellate Committee

Co-Chair: Cari Leininger

Co-Chair: Donna Eng

Stays in Federal Court Pending Appeal: Is a bond the only way?



Cari Leininger
Co-Chair

Now that the Florida Supreme Court has scrapped the three-year cycle for rules changes, changes to the rules can, and do, happen often. You can monitor for rules changes quickly by checking the Florida Supreme Court website, www.floridasupremecourt.org, to review new opinions every week. If you don't have time to do that, you should, at a

minimum, be sure to research the rule you're working with on Westlaw to make sure the rule has not been amended, or to see if an amendment is pending.

Here are a few rules opinions you may want to review if you have not done so already:

In re Amendment to Florida Rule of Appellate Procedure 9.020, Case No. 21-253 (September 2, 2021): the Court amended rule 9.020(h)(1)(a) to include motions for remittitur and additur to the list of motions that will toll rendition of final orders. The rule became effective on October 1, 2021.

In re Amendment to Florida Rule of Civil Procedure 1.280, Case No. SC21-929 (corrected opinion, August 26, 2021): the Court announced a new subsection for rule 1.280, subsection (h), to codify the "apex doctrine," used by many courts to determine whether to permit depositions of high ranking corporate and government officials. The deadline for public comments is November 9, 2021.

In re Amendments to Florida Rules of Civil Procedure 1.280 and 1.340, Case No. SC21-120 (October 7, 2021): the Court announced that pursuant to new rule 1.280(i), titled "Form of Responses to Written Discovery Requests," when responding to requests for production, written deposition questions, interrogatories, and requests for admissions, litigants are required to state the deposition question, interrogatory, or discovery request followed by the answer,

objection, or other response. The Court also amended rules 1.280 and 1.340 to reflect the updated name for the Rules of Judicial Administration: the Rules of General Practice and Judicial Administration. See also *In re Amends. to Fla. Rules of Jud. Admin.*, 2020 Regular-Cycle Report, 310 So. 3d 374 (Fla. 2021). The new rules become effective on October 15, 2021, at 12:01 a.m.



Donna Eng
Co-Chair

In re Amendment to Rules Regulating the Florida Bar, Rule 3-7.18, Case No. 21-653 (October 21, 2021): The Court created new rule 3-7.18, titled "Disposition of Inquiries or Complaints Referred to the Bar by Members of the Judiciary." The new rule establishes a process by which the Florida Bar Board of Governors and the Court will review and approve the disposition of referrals regarding lawyer misconduct from members of the judiciary that do not result in a finding of probable cause or the filing of a formal complaint if a finding of probable cause is not required. The text of the new rule is contained in the opinion, and becomes effective on December 20, 2021, at 12:01 a.m.

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Tennis Committee

Chair: Ray Robison



Ray Robison
Chair

We look forward to having the MCBA Tennis Tournament again in early 2022. Please check future SideBar issues for further details on the tournament. If any questions, please contact Ray Robison (772-287-4444 or robison@foxmcccluskey.com). Thank you for everyone that has expressed interest in playing.



MARTIN COUNTY BAR ASSOCIATION RACE TO THE COURTHOUSE



APRIL 9, 2022



Mark Your Calendars

The Race to the Courthouse 5k Run/Walk is back again for 2022.



Gene Zweben
Co-Chair

The Race to the Courthouse 5k Run/Walk is back again for 2022. It will be held on Saturday, April 9, 2022 at Memorial Park. Last year was a great race with an amazing turn out, and we expect this year to be even better. All proceeds go to the Legal Aid Society of Martin County and the Martin County Bar Association Scholarship Program. **You can register at www.runsignup.com** and search for The Race to the Courthouse 5k. We are also looking for sponsors, so please reach out to out to **gene@zwebenlawgroup.com** if you are interested. Looking forward to seeing you all there!

The run/walk is open to EVERYONE in our community, not just law firms.

Last year we raised over \$5000 for Martin County Legal Aid Society and the MCBA Scholarship Program. Let's see if we can do better this year!

TRIAL LAWYERS

Please join the Trial Lawyers Committee for its monthly meetings the second Thursday of the month at 12:00pm via ZOOM, featuring a number of excellent and valued speakers:

1/13/2022: We are very excited to be holding another Joint Virtual CLE Meeting with the MCBA's Family Law Committee on January 13, 2022 at 12:00 pm via Zoom. The Guest Speaker will be Dr. Letitia Lopes, and the topic will be: Attorney Mental Health and Coping Strategies. RSVP to mkostick@gunster.com.



2/10/2022: Our Virtual CLE Meeting this month will be held on February 10, 2022 at 12:00 pm via Zoom. The Guest Speaker will be the Honorable Gary Sweet of Florida 19th Judicial Circuit, sharing his thoughts from the Bench and addressing current trial practice in the wake of the pandemic. RSVP to mkostick@gunster.com.

3/10/2022: Our Virtual CLE Meeting this month will be held on March 10, 2022 at 12:00 pm via Zoom. The Guest Speaker will be Chris Wilson of Phipps Reporting and the topic will be: Best Practices for using Zoom effectively at Trials. RSVP to mkostick@gunster.com.

4/14/2022: Save The Date! MCBA Trial Lawyers Committee Virtual CLE Meeting April 14, 2022 at 12:00 pm via Zoom.

5/12/2022: Save The Date! MCBA Trial Lawyers Committee Virtual CLE Meeting May 12, 2022 at 12:00 pm via Zoom.

All attendees must RSVP with their name/email address to Mary Kostick at mkostick@gunster.com if they wish to receive CLE credit for attending the meetings. Email blasts containing the specific ZOOM information for each meeting will be sent to those who RSVP before each session. Any questions, please contact Preethi Sekharan at psekharan@gunster.com.

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.

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Exceptionality Based on Persistence in an Unreasonable Litigation Position:**Energy Heating, LLC v. Heat On-The-Fly, LLC**

by

Gerard E. Reinhardt
Reinhardt IP, PA

Cite as "Gerard E. Reinhardt, Exceptionality Based on Persistence in an Unreasonable Litigation Position: Energy Heating, LLC v. Heat On-The-Fly, LLC, The SideBar, Newsletter of the Martin County Bar Association, Dec. 2021"

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Introduction

The U.S. Court of Appeals for the Federal Circuit¹ ("the Federal Circuit") issued a decision in *Energy Heating, LLC v. Heat On-The-Fly, LLC*ⁱ on October 14, 2021. This is a patent case that illustrates the application of several key aspects of patent law, and offers cautionary lessons to any practitioners whose clients may include inventors, patentees or accused patent infringers, as well as to general litigators.

Background

Heat-on-the Fly, LLC ("HOTF") is the owner of U.S. Patent No. 8,171,993ⁱⁱⁱ ("the '993"). Energy Heating LLC and Rocky Mountain Oilfield Services, LLC (collectively "Energy") provide water heating services for water used during the hydraulic fracturing process ("fracking.")

Ransom Mark Hefley ("Hefley") was a founder and part owner of HOTF, and is the sole inventor named on the '993. The '993 is directed to methods, systems and an apparatus for heating water on demand or inline during the fracking process instead of using preheated water in large standing tanks. Hefley filed with the U.S. Patent & Trademark Office ("the USPTO") the earliest provisional application^{iv} to which the '993 claims priority on September 18, 2009. Prior to the critical date of the '993 (one year before the earliest priority date), HOTF sold sixty-one heat-on-the-fly systems for a total of \$1.8 million. During prosecution of the nonprovisional patent, HOTF failed to disclose the prior sales to the USPTO, in violation of its duty of disclosure^v. The USPTO granted the '993 on May 8, 2012.

Litigation

Energy filed a petition under the Declaratory Judgment Act^{vi} in January 2013, seeking a declaratory judgment that the '993 patent was, *inter alia*, unenforceable for inequitable conduct^{vii}. Energy's theory of inequitable conduct was based on HOTF's intentional failure to disclose the pre-

critical date sales to the USPTO in violation of its duty of disclosure, and that but for that failure, the USPTO would not have granted the '993 due to invalidity under the statutory bars of 35 USC 102.^{viii} In response, HOTF counterclaimed for infringement of the '993, inducement to infringe, and contributory infringement against Energy.

The district court held a bench trial on inequitable conduct during which HOTF contended that the pre-critical date sales did not trigger the duty to disclose them to the USPTO during prosecution because they constituted experimental uses^{ix}, and that on that basis there was no inequitable conduct. The court found that the pre-critical date uses of the invention were neither experimental nor conducted in secret, but rather were pursuant to sales for revenue.^x Based on the foregoing, the court granted a declaratory judgment against HOTF on the issue of inequitable conduct,^{xi} but denied Energy's motion for a finding of exceptionality^{xii} and an award of attorneys' fees and costs under § 285 without further explanation.^{xiii} The court also found \$750,000 in actual damages based on a state unfair trade practices statute based on HOTF's contention that the patent was valid and enforceable made during telephone conversation threatening an Energy customer with patent litigation.

On appeal, the Federal Circuit affirmed the judgment that the '993 patent is unenforceable due to inequitable conduct,^{xiv} but vacated the district court's denial of attorneys' fees under § 285 for want of a detailed justification, and remanded the issue to the district court for reconsideration.^{xv}

On remand, the district court reversed its position, finding that the case was exceptional and awarding attorneys' fees and costs of \$5,312,307.^{xvi} The holding of exceptionality was based on the findings that "this case stands out from others with

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respect to the substantive strength of HOTF's litigation position" and that "HOTF litigated the case in an unreasonable manner by persisting in its positions." The district court also cited the very large number of pre-critical date sales that HOTF failed to disclose to the USPTO (61), and the substantial revenue derived from those sales (\$1.8 million, which undermined HOTF's contention of experimental use) for its finding of exceptionality.

Holding

On appeal, the Federal Circuit affirmed, stating that a finding of litigation misconduct is not necessary to find a case exceptional. "[A]s a general matter, many forms of misconduct can support a district court's exceptional case finding ..." The Federal Circuit found that the district court properly considered the totality of the circumstances, including the manner of HOTF's litigation, finding that "HOTF litigated the case in an unreasonable manner by persisting in its positions [the contention that the 61 pre-critical date sales were all experimental uses, which did not trigger the duty of disclosure]." ^{xvii} This result is striking in the absence of any of the usual allegations of litigation misconduct, e.g., discovery abuse, dilatory or harassing tactics, subornation of perjury.

In summary, HOTF wound up not only losing its patent, but also paying out a total of about \$6.25 million in attorneys' fees, costs and damages (as well as their own attorneys' fees and costs) by attempting to enforce a patent based on a flawed legal contention. Contrast this with the \$1.8 million in revenue that HOTF gained from the 61 sales of the invention from 2006 to 2012.

Practice Tips

This case provides a variety of abject lessons. When counseling inventors, patentees or accused patent infringers, your advice should include the following:

1. Inventors should file a patent application (provisional or nonprovisional) with the USPTO before the first offer for sale, sale or public use. Failing that, file within one year of the first offer, sale or public use. If HOTF had conformed to this simple rule, the results of this case would have been very different.

2. To preserve the experimental use exception to the statutory bar defenses, inventors should conduct any pre-filing experiments in-house or with an independent contractor or other third party under a duty of nondisclosure and confidentiality, and maintain lab notebooks documenting the conditions and results of the use. HOTF failed to comply with any of these indicia of experimental use, and thus was subject to the statutory bar and inequitable conduct defenses.

3. Prior to filing, disclose any pre-filing offers for sale, sales or public uses, as well as all relevant prior art under 35 USC §102, to the attorney prosecuting the patent application. Upon receipt of such information, he/she will evaluate it, and if required, should timely disclose it to the USPTO. Had HOTF conformed to this requirement, the '993 would likely not have been granted – on the whole a better outcome for all involved in this case.

4. Consult with counsel before communicating any threat of litigation to a potential accused infringer. HOTF made a verbal threat of litigation, which provided Energy with the basis to bring a Declaratory Judgment action, and thus gain the advantages of a plaintiff regarding choice of venue, timing and other procedural matters. The allegation that HOTF also verbally communicated that the '993 was valid and enforceable could have been the basis of an award of treble damages had Energy pleaded appropriately.

Practitioners should consider the following suggestions:

5. Consult with a competent patent attorney to conduct a thorough scrub down of any patent under consideration for enforcement. Decline to enforce any patent that bears significant risks of inequitable conduct. If the client wants to initiate a dialogue with a potential infringer in the hope of avoiding litigation, draft a Cease and Desist letter worded to minimize the chances of success of a declaratory judgment action by the recipient. Be prepared to file a Complaint in short order thereafter if a satisfactory result is not obtained. Be mindful that under FRCP 11^{xviii}, "[b]y presenting to the court a

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pleading, written motion, or other paper... an attorney... certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law..."

6. Reconsider maintaining a failing position in litigation. Had HOTF withdrawn its infringement claims as discovery showed the strength of Energy's inequitable conduct defense, it likely would have avoided the holding of exceptionality and the award of \$5.5 million in attorneys' fees and costs. Indeed, Rule 11 may encompass a duty to withdraw a baseless pleading.^{xix}

A more complete review of this case entitled "Experimental, Exceptional and Expensive: Litigation Lessons from *Energy Heating, LLC v. Heat On-The-Fly, LLC*" is available at ReinhardtIP.com under "Publications."

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- **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.
- **40th Annual Legislative & Case Law Update** - Valid through 2/28/2022. **Credits:** 8.0 General; 1.0 Ethics; 0.55 Technology. **Certification Credits:** 8.0 Development Law; 8.0 Real Estate; 8.0 Tax Law; 8.0 Wills, Trusts 7 Estates.
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- **19th Circuit Voluntary Bar Coalition Town Hall** - Valid through 9/30/2022. **Credits:** 1.0 General.
- **Jury Trials in a New Age** - Valid through 1/31/2022. **Credits:** 1.0 General. **Certification Credits:** 1.0 Appellate Practice; 1.0 Civil Trial; 1.0 Criminal Appellate Law; 1.0 Criminal Trial Law; 1.0 Juvenile Law.
- **MCBA Monthly Meeting (Virtual)** - Valid Through 10/31/2022. Speaker: Andrea Andrus, Principal; Andrus Communications. Topic: Marketing & Advertising for Lawyers. **Credits:** 1.0 General Credit.

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Justice Major B. Harding American Inns of Court 2021 - 2022 Meeting Dates

January 12, 2022	5:30 p.m.	Regular dinner meeting
February 9, 2022	5:30 p.m.	Regular dinner meeting
March 9, 2022	5:30 p.m.	Regular dinner meeting
April 13, 2022	5:30 p.m.	Regular dinner meeting
May 11, 2022	5:30 p.m.	Regular dinner meeting

Alternate dates, if necessary

June 1, 2022 5:30 p.m.

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Footnotes referenced in Exceptionality Based on Persistence in an Unreasonable Litigation Position: Energy Heating, LLC v. Heat On-The-Fly, LL

ⁱ The Federal Circuit (a court of twelve judges that sits in panels of three, and is based in Washington, D.C.) has sole jurisdiction over appeals of patent cases from district courts under 28 USC §1295(a)(1). A writ of certiorari may be properly filed upon issuance of a final judgment from the Federal Circuit. As a specialized court of appeals, and one from which certiorari is relatively infrequently taken, the Federal Circuit jurisprudence is widely considered to be authoritative in matters of patent law.

ⁱⁱ 2021 U.S. App. Lexis 30690, _ F 4th _ 2021 WL4782688.

ⁱⁱⁱ The '993 includes 99 claims. As an example, Claim 76 recites the following:

An oil well hydraulic fracturing system, comprising: a) a transportable heating apparatus that heats water to a temperature of at least 40 degrees F. (4.4 degrees C.); b) a source of cool or cold water at about ambient temperature; c) a mixer having an inlet, an outlet and a mixer bore that extends between the inlet and the outlet; d) a first lateral fitting on the mixer that enables heated water to enter the mixer bore; e) a second lateral fitting on the mixer that enables removal of water from the mixer bore upstream of the first lateral fitting and wherein at least one of the lateral fittings has a wall portion that extends into the mixer bore; f) a first flowline that transmits heated water between the heater and the first lateral fitting; g) a second flowline that transmits water between the second lateral fitting and the heater, the second flowline being upstream of the first lateral fitting; and h) a mixing tank that is receptive of a flow of a mix of cool or cold and heated water from the bore of the mixer, said tank enabling a proppant to be mixed with the mix of cool or cold and heated water that is discharged from the mixer outlet.

^{iv} U.S. Provisional No. 61/276,950.

^v The filing of a patent application with the USPTO triggers a duty of disclosure and a duty of candor to the USPTO. "Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section... [N]o patent will be granted on an application in connection with which fraud on the Office was practiced or attempted or the duty of disclosure was violated through bad faith or intentional misconduct.." 37 CFR 1.56, *Duty to disclose information material to patentability*. The duties endure from the filing date until the patent application is granted.

^{vi} Under the *Declaratory Judgment Act*, 28 USC § 2201, "[i]n a case of actual controversy," an interested party may file a pleading in US district court to obtain a declaration of rights and legal relations "whether or not such further relief is or could be sought. Any such declaration shall have the force and effect of a trial judgment or decree and shall be reviewable as such." A threat by a patentee of an enforcement action against an accused infringer has commonly been accepted as providing the basis for finding a "case or controversy," and thus declaratory judgment jurisdiction, under the statute.

^{vii} Inequitable conduct is an equitable defense to a claim of patent infringement in which the accused patentee is alleged to have failed to meet the duty of disclosure or the duty of candor during prosecution of the patent application in question before the USPTO. To prevail on inequitable conduct based on a failure to observe the duty of disclosure, the accused infringer must prove by clear and convincing evidence that the applicant knew of the reference or prior commercial sale, knew that it was material, and made a deliberate decision to withhold it. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1290 (Fed. Cir. 2011) (en banc). A judicial finding of inequitable conduct results in the patent being held unenforceable.

^{viii} A patent is invalid under the on-sale bar of 35 USC 102(b) if, before the critical date, the invention was both (1) the subject of a commercial sale or offer for sale and (2) ready for patenting. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67, 119 S. Ct. 304, 142 L. Ed. 2d 261 (1998); see also *The Medicines Co. v. Hospira, Inc.*, 881 F.3d 1347, 1351 (Fed. Cir. 2018). The critical date of a patent for purposes of applying a statutory bar is that date that is one year before the earliest claimed priority date.

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^{ix} Experimental use is an exception to the statutory bars of 35 102(b). If a prior commercial sale was a bona fide experiment to (1) test the claimed features or (2) determine if the invention would work for its intended use, the sale will not serve as a bar. *Clock Spring, L.P. v. Wrapmaster, Inc.*, 560 F.3d 1317, 1327 (Fed. Cir. 2009).

The well established indicia of experimental usage are set forth in *Allen Engineering Corp. v. Bartell Industries, Inc.*, 299 F.3d 1336 (Fed. Cir. 2002). These objective factors include (1) the necessity for public testing, (2) the amount of control over the experiment retained by the inventor, (3) the nature of the invention, (4) the length of the test period, (5) whether payment was made, (6) whether there was a secrecy obligation, (7) whether records of the experiment were kept, (8) who conducted the experiment, (9) the degree of commercial exploitation during testing, (10) whether the invention reasonably requires evaluation under actual conditions of use, (11) whether testing was systematically performed, (12) whether the inventor continually monitored the invention during testing, and (13) the nature of contacts made with potential customers. *Id.* at 1353 (citing *EZ Dock v. Schafer Sys., Inc.*, 276 F.3d 1347, 1357 (Fed. Cir. 2002) (Linn, J., concurring)). The district court observed that the experimentation must be related to the limitations of a claim in the as-yet-to-be-filed patent application, and still more prospective granted patent. *Energy Heating 2016 US Dist. Lexus 193994; WL 10837799.*

^x The court found that Hefley made no attempt to enter into confidentiality agreements with others involved in the jobs in which he used his system for heating water on the fly; nor did he make any attempt to hide the system he was using to heat water. Furthermore, Hefley's claim that the prior uses were experimental was belied by his conduct in conducting the heating. Hefley kept no notebooks, drawings, plans or explanations of the outcomes. He expressed no preliminary hypotheses prior to the heating and recorded no conclusions confirming or rejecting the hypotheses. The absence of contemporaneous records, explanations, or confirmation by uninterested parties demonstrated that the prior uses were not experimentation. Hefley presented no evidence to satisfactorily explain or justify his knowing failure to disclose the prior uses to the United States Patent Office.

^{xi} *Energy Heating, LLC v. Heat On-The-Fly, LLC*, No. 4:13-cv-10, 2016 U.S. Dist. LEXIS 193994, 2016 WL 10837799, at *4 (D.N.D. Jan. 14, 2016) (“*Inequitable Conduct Op.*”).

^{xii} Under 35 USC § 285, a “court in exceptional cases may award reasonable attorney fees to the prevailing party.” An “exceptional” case under § 285 is “one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014). The party seeking fees must prove that the case is exceptional by a preponderance of the evidence, and the district court makes the exceptional-case determination on a case-by-case basis considering the totality of the circumstances. *Id.* at 554, 557-58. Prevailing on a claim of inequitable conduct often makes a case exceptional. *Therasense*, at 1289.

^{xiii} *Energy Heating, LLC v. Heat On-The-Fly, LLC*, No. 4:13-cv-10, 2016 U.S. Dist. LEXIS 194012, 2016 WL 10837794 (D.N.D. Mar. 16, 2016) (“*Attorneys’ Fees Op.*”).

^{xiv} *Energy Heating*, 889 F.3d at 1296.

^{xv} *Id.* at 1307-08.

^{xvi} *Energy Heating v. Co. Heat*, 2020 U.S. Dist. LEXIS 255551, 2020 WL 9848847 (D.N.D., June 15, 2020).

^{xvii} 2021 U.S. App. Lexis 30690, _ F 4th _ 2021 WL4782688.

^{xviii} Fed. R. Civ. P. 11.

^{xix} See, e.g., Julia K. Cowles, Rule 11 of the Federal Rules of Civil Procedure and the Duty to Withdraw a Baseless Pleading, 56 Fordham L. Rev. 697 (1988).

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



City of Stuart Ordinances

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www.cityofstuart.us

Click on link at the bottom of the page.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>December 2021</h1>						
<p>SAVE THE DATES:</p> <ul style="list-style-type: none"> March 10, 2022: Judicial Reception @Willoughby CC April 9, 2022: 5K Race to the Courthouse May 7, 2022: Golf Tournament @ Lost lake Golf Club May 20, 2022: Annual Installation Dinner <p>See www.martincountybar.org for full 2018-19 calendar including committee meetings, holidays & courthouse closings.</p>						
5	6 Hanukkah Ends	7	8	9 YLD Beach Clean-up 1:30 p.m. @ Jensen Beach	10 RSVP DEADLINE FOR 12/17 LUNCH MCWLA Charcuterie Workshop@ 6 p.m.	11
12	13 YLD Beach Clean-up 1:30 p.m. @ Jensen Beach Causeway	14 MCBA Officers' Meeting (noon)	15 Small & Solo Coffee & Conversation 8:30 a.m. @ Coffee Bar Blue Door	16	17 MCBA CLE Luncheon @ Monarch CC (11:30am)	18
19	20	21 MCWLA CLE Meeting 11:45 @ Manero's	22	23 Courthouse Closed Christmas Eve (observed)	24 Courthouse Closed Christmas (observed)	25
26	27	28	29	30	31 Courthouse Closed New Year's Eve (observed)	

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>January 2022</h1>						
2	3 SideBar Articles Due	4	5	6	7	8
9	10	11 JRC Speaker Series @ McCarthy Summers (11:45 a.m.)	12	13 Trial Lawyers Committee Mtg. 12 p.m. Zoom	14 RSVP DEADLINE FOR 9/21 LUNCH	15
16	17 Courthouse Closed Martin Luther King, Jr. Day	18 MCBA Officers' Meeting	19	20	21 MCBA Luncheon @ Monarch, CC (11:30 a.m.) Rebecca White Investiture	22
23	24	25	26	27	28	29
30	31	<p>SAVE THE DATES: See www.martincountybar.org for full 2021-22 calendar March 10, 2022: Judicial Reception, Willoughby Country Club April 9, 2022: 5K Race to the Courthouse May 7, 2022: Golf Tournament @ Lost Lake Golf Club May 20, 2021: Annual Installation Party</p>				
						1 HAPPY NEW YEAR!



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Please join us for MCBA's CLE Monthly Meeting, Friday, December 17, 2021

- When: Friday, December 17, 2021
11:30 a.m. networking; 12:00 p.m. lunch
- Where: Monarch Country Club
1801 SW Monarch Club Drive, Palm City
- Menu: Caesar Salad, Rolls with Butter, Sliced Herbed Roasted Pork Loin with Mushroom Gravy, Herb Roasted Potatoes, Honey Glazed Carrots. and Apple Pie.
- Speaker: Edwin Bell, MBA, ICM Fellow, Director of Racial Justice, Equity & Inclusion – National Center for State Courts.
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No later than Friday, December 10, 2021

PLEASE BE SURE TO RSVP TO EXPEDITE ACCESS AT THE GATE

There is no charge for paid MCBA members. Guests are welcome; a \$30 guest fee may be paid at the luncheon (cash or check only).