

APRIL 2022



# The SideBar

Newsletter of the Martin County Bar Association

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## THE SIDE BAR NEWSLETTER

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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.

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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 enjoyed our March luncheon speaker, Fourth District Court of Appeals Chief Judge Burton Conner. We appreciate Chief Judge Conner joining us in person for an informative discussion of current Appellate Court activities.

Please join us on April 15, 2022, for our luncheon. Our speaker will be Federal District Court Judge Aileen M. Cannon. Judge Cannon sits in Fort Pierce and was appointed by President Trump on May 21, 2020, and confirmed by a U.S. Senate vote of 56-21 on November 12, 2020. We hope you can join us to welcome Judge Cannon.

We had a great turnout and a fantastic time at the Judicial Reception. Thank you to the hard work of Jessica VanValkenburgh, Robyn O’Heron, Brandon Woodward, and Jeanette Lugo in making the Reception such a success. We had well over 100 attendees. We are grateful for the time together.

Congratulations to Jason Berger, winner of the 2020 George W. Bush Jr. Professionalism Award and Judge Steven J. Levin for winning the 2021 George W. Bush, Jr. Professionalism Award. We are proud of you.

The MCBA will hold the annual banquet on May 13, 2022, so please hold the date. We are hopeful to host a great event. The theme for this year’s annual banquet will be: History of the MCBA, honoring its prior leadership and its early lawyers. More details to follow. We hope you will join us this year to celebrate our history and our past leaders and you!

The MCBA board looks forward to continuing to serve the membership in 2022.

“The real gift of gratitude is that the more grateful you are, the more present you become.” – Robert Holden

Yours Truly,



Adam Schwartz  
2021-2022 MCBA President



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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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# Please Join Us!

The Martin County Bar Association (MCBA) will welcome Federal District Court **Judge Aileen M. Cannon** as the guest speaker at our monthly luncheon meeting on **Friday April 15, 2022** at Monarch Country Club. Networking begins at 11:30 a.m. and lunch will be served promptly at noon.

Judge Cannon will present “More Sobriety and Less Ego in Legal Writing” where she will cover some examples of legal writing and some concrete tips and thoughts on how to increase clarity, civility, and credibility in legal writing. 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).



**Judge  
Aileen M. Cannon**

**RSVP IS REQUIRED** on or before 5:00 p.m. FRIDAY, April 8, 2022 by calling 772-220-8018 or emailing [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com).

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

**The MCBA Executive Board Invites You!**

Rockin' Like it's 1955  
A Celebration of the MCBA and its Founding  
Friday, May 13, 2022  
6:30 p.m.  
Mariner Sands Country Club  
Join us for a Rockin' good time

The poster features a large, glowing marquee sign with a red border and yellow lights. The text is centered on a white background within the sign. Below the sign, a man in a white suit and a woman in a patterned dress are dancing on a black and white checkered floor. A red classic convertible is on the left, and a yellow classic sedan is on the right. A small logo is in the top right corner of the sign.

# Judicial Relations Committee

Jessica VanValkenburgh - Chair



**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 19<sup>th</sup> 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

#### Dates

May 3, 2022

#### Speakers

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](mailto: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. Please look out for an update on location as the meeting may be changed to Zoom.

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

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## Member Spotlight

### HON. EDMOND ALONZO

**Education: Undergrad?** The Florida State University

**Law School?** The University of Florida

**How long have you been practicing law?** 26 years

**Why did you want to be an attorney?** With a law degree, you can work in any discipline and in any business, including your own.

**What do you like most about it?** Winning. Not necessarily defeating an opponent, but knowing you put in the fight, and the work paid off.

**What don't you like?** Unpleasant or unprofessional law offices

**What are the biggest changes you have seen through the years?** One word - Covid

**How do you define success?** Not regretting yesterday, not dreading today, and not overly worried about tomorrow

**Who Inspires you?** George W. Bush and Barack Obama, and Antonin Scalia and Ruther Bader Ginsburg. Extraordinarily successful antagonists at their jobs, with equally successful families and friendships.

**Who has been the most influential person in your career?** My boss at the bank where I got my first real job, A. Castner.

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

**What is the best piece of advice you have ever received?** Honesty is the best policy and at work, mandatory.

**What advice would you give to someone looking to become an attorney?** You will be relieved by the cases you don't take. If it



sounds like a bad idea, it is.

**If you weren't an attorney, what would you be doing?** Probably losing money in a casino or the restaurant business.

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

**What's on your bucket list?** More travel. I've only been to about 30 states and two continents.

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

**If you could have dinner with any person, alive, dead or fictional, who would it be and where would you go?** Samuel Clemens at a hole in the wall restaurant in NOLA.

**What is something that not many people know about you and might be surprised to learn?** According to some old records we found, the first Alonzo in my family to immigrate to the US came around the Louisiana Purchase and had "barber" listed as his occupation. That probably doesn't count as fun, but my mirror tells me that it is, at least, ironic.



# RACE TO THE COURTHOUSE



APRIL 16, 2022



## Mark Your Calendars - New Date

April 16, 2022

**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 16, 2022 at Memorial Park. Last year was a great race with an amazing turnout, 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](http://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](mailto: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!

## We would like to thank the following sponsors for their support

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# The MCBA / Sobel Cup Golf Tournament

benefitting the MCBA Scholarship Fund

## New Location: Monarch Country Club

Saturday, May 7, 2022

8:30 a.m. Shotgun  
Scramble Format  
Awards for Top 3 Foursomes

Space is Limited

Entries must be received no later  
than April 15, 2022

Entry Fee:

Individual Player - \$150  
Foursome - \$500  
Lunch only \$35

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# Paralegal Committee



## FINALLY A LIVE MEETING!

Join us on April 20, 2022, to hear attorney Jason Berger speak. Jason will give us an Overview of Professionalism and Ethics. The meeting will be held live and via Zoom. Only the first 12 RSVPs can attend in-person and the rest can join via Zoom. Please join us at 5:30 at Mrachek Law, 1000 SE Monterey Commons Blvd., Suite 306, Stuart, Florida. RSVP by 04/01/21.

Be sure to RSVP early due to the limit on in-person attendees. I really look forward to seeing you!

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# bankruptcy committee

## UCC 9 Sale vs Sub Chapter V (PART 3)

Returning to the original concept in Part 1 of this Article, “No Small Business wants to file Bankruptcy for himself or his business,” it’s understandable that these entities and their owners are willing to grasp at any straw that they are persuaded with alternatives to avoid bankruptcy.

Thus, any marketing message that tends to make such a promise to a beleaguered business owner is received with desperation and hopes of salvation for not only their livelihood, but also their lifestyle, family and home.

Many times, however, the promised alternative is not all it is purported to be, and seldom provides the level of protections to the owner personally that bankruptcy does. This is because small business owners personally guarantee the loans for security and operating the business.

Utilizing a UCC Sale process largely focuses on an agreed workout of the business debts such that the Guarantors (i.e. Owners) can continue to help pay the business debt. While this may well save the business, it does not relieve the Owner-Guarantor except for any compromise negotiated, based on Owner’s assets.

The same does not have to hold true under a Sub Chapter V Bankruptcy that is properly planned to address the Owner-Guarantors’ liability in the business loans. This is because an Owner-Guarantor usually qualifies under Sub Chapter V and gets the same advantages as the business itself.

These advantages include;

1. Elimination of quarterly Trustee fees,
2. No mandatory requirement of a creditors committee,
3. No mandatory requirement to file a disclosure statement,
4. Ability to confirm a Plan even if all classes reject the Plan,
5. Ability to pay administrative expenses over time under the Plan,
6. Elimination of the “Absolute Priority Rule” allowing Owners to retain ownership,
7. Exclusive right to file a Plan (which cannot be terminated meaning no creditor battles)



Jon L. Martin  
Chair

Since the costs of a UCC Sale and Sub Chapter V are comparable, Small Business Owners owe it to themselves to maximize the benefits available under the new Sub Chapter V rules.

NEED MORE INFORMATION? DISCUSSIONS  
WELCOME!

Jon L. Martin, Chair 772 419 0057 or [jlm@jonlmartinlaw.com](mailto:jlm@jonlmartinlaw.com)



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# 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 via Zoom on April 19th from 12-1 pm** (networking 11:45 am-noon) for our **CLE with Sarah Baker, AVP and Financial Sales Manager at First Citizens Bank** on *“How to Protect your Operating and IOTA Accounts from Fraud: The Scams, Red Flags and Best Practices that you should be aware of and why you should be having a conversation with your banker.”* RSVP to [fawlmartin@gmail.com](mailto:fawlmartin@gmail.com)

## **Please join us for our Second Annual Yoga on the Beach Membership Drive!**



Members and prospective members can enjoy a guided yoga class on the beach Saturday May 7<sup>th</sup>, with time to meet and greet with other existing members and prospective members (details to follow).

*RSVP to [fawlmartin@gmail.com](mailto:fawlmartin@gmail.com)*

*To join or renew your membership, visit [www.fawl.org](http://www.fawl.org). Contact our Membership Director, Davina Tala, at [dt@talalegal.com](mailto:dt@talalegal.com) with any membership questions.*

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# Employment Law

*David Miklas, Esq. – representing employers only*

## Non-Compete Combined with an Employment Agreement?

Here is a recent example that I encountered where a Treasure Coast business lawyer attempted to draft an employment agreement which contained non-compete language. Some business lawyers draft restrictive covenants such as noncompetition agreements. This is also something that some employment lawyers, like myself, do.

The reason I'm bringing this to light is because a client of mine had me review one of these documents that was created by a business lawyer. The business lawyer is actually a very well respected lawyer in the community. The problem is that the document gave the employee many more rights than they normally would have under Florida law. I don't have a problem with that if that's what the business owner wants. In this case the document required the business to provide the employee with a 30-day notice before termination. Normally that is not required, and normally most businesses do not follow this practice. In my case, the business never provides this notice.

Because the employment agreement included the non-competition language in it, instead of having the non-compete agreement in a stand-alone document, the practical result is a terrible situation for the business. This is because if the employer terminates an employee without giving the 30-day notice and that employee immediately opens up a competing business across the street, there would be significant problems with the business enforcing its non-compete agreement. This is highlighted in part because the non-compete agreement was not a standalone document. The specific issue is that if the business terminates an employee without providing 30-day notice, the business effectively would breach the agreement. Because if the business is found to have committed a prior material breach of the agreement (by not providing 30-day notice), it may be unable to enforce the non-compete part of it. This is very different than the traditional "blue penciling" that takes place by a Court if a restrictive covenant is drafted with a too broad geographic or temporal

scope.

I immediately resolved this problem for my clients by providing the client with two separate documents: 1) a much improved employment agreement, and 2) a stand-alone non competition and non solicitation agreement.

In general I have no issue with business lawyers drafting restrictive covenants. Some of them do it very well. The issue that I see is when they try to dabble in employment agreements. That often does not end well for the business.



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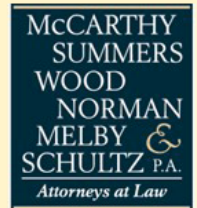


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# Foreclosure Committee

Dorothy Dlugolecki - Chair



Dorothy Dlugolecki  
Chair

## Terra Mar v. Wilmington Savings Fund Society - Bankruptcy and SOL

In this case, the owner purchased the property at a homeowner's association foreclosure sale and alleged the foreclosure was barred by the statute of limitations running from when the mortgagor surrendered the property in a bankruptcy proceeding. The 1<sup>st</sup> DCA rejected this argument and relied on case law from the Florida Supreme Court, 2<sup>nd</sup> DCA, and 4<sup>th</sup> DCA that mortgages are installment contracts and there is no statute of limitations issue where there is a continuous non-payment default.

## Santiago v. Wilmington Trust - Constructive Service

In this case, the borrower was served via publication after the process server was unable to personally serve this party was subsequently defaulted. After final judgment was entered, the borrower moved to quash service of process, vacate his default, set aside the final judgment, and vacate the certificate of sale and title which was denied by the trial court. The 5<sup>th</sup> DCA reversed and remanded finding that the bank failed to conduct a diligent search and inquiry to locate the borrower when representatives were in communication via phone and email with the borrower during the same time period.



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## Bank of America v. Rodriguez - motion to vacate final judgment based on extrinsic fraud

In this case, the borrower filed an independent action more than 1 year after to vacate the final judgment of foreclosure in another case based on extrinsic fraud. The trial court denied Bank of America's motion to dismiss based on subject matter jurisdiction and litigation privilege and Bank of America petitioned for a writ of prohibition or certiorari to quash the order. The 3<sup>rd</sup> DCA granted the petition, quashed the order, and remanded for proceedings consistent with the opinion. The borrower defended against the foreclosure for years and eventually stipulated to a final judgment in favor of Plaintiff with a 90-day sale date. The court found no allegations or proof of extrinsic fraud preventing the borrower from defending her case. The borrower's allegations of fraudulent correspondence and statements by the bank constituted intrinsic fraud because the issues could have been tried and the requirements of Rule 1.540 would apply to the motion to vacate - relief must be sought within 1 year of the judgment.

## Save the Date



**MCBA**

# Annual Banquet

# Friday, May 13, 2022

Details to Follow



## George W. Bush, Jr. Professionalism Award Recipients Announced at Judicial Reception

The 2020 and 2021 George W. Bush, Jr. MCBA Professionalism Award recipients were presented during the March 10, 2022 Judicial Reception and will have their names added to the plaque hanging in the Martin County Courthouse.

During the presentation, Beth Alcalde thanked everyone for nominating strong and deserving candidates for this award. She then invited Greg Weiss to present his nomination for the 6<sup>th</sup> Annual Award (2020), **Jason Berger**. In a twist of fate, Jason then presented his nomination for the 7<sup>th</sup> Annual Award (2021), **Hon. Steven Levin**.



The Professionalism Award recognizes an attorney who has demonstrated or promoted outstanding professionalism in Martin County as defined by exemplary ethical conduct, character and integrity, respect for the legal system and all of its participants, commitment to maintaining the highest levels of professional competence, courtesy and civility, and commitment to serving clients, the community and public good.

Winners of the award are nominated by their peers and selected by the Professionalism Committee. Requests for nominations will be coming soon with the next recipient being announced at the upcoming Fall Judicial Reception in October.



# Cheers



Best of luck to **Adam G. Schwartz** on the opening of his new firm, Atlas-Solomon in Stuart. May this new chapter bring you continued success!

Congratulations to **Chad Hastings** for 15 years with Lesser, Lesser, Landy & Smith. Wishing you many more successful years ahead.



## Martin County Bar Association Welcomes New Members

**Raleigh Peterson Watson**  
**Miller Watson PLLC**  
**Tequesta, FL**  
**University of Miami School of Law, 2011**

We appreciate all of our new 2021 - 2022 Members.  
You are encouraged to get involved and help to make the MCBA the best it can be  
in providing you with the resources and opportunities necessary  
for your continued success!

# Judicial Reception

After a two-year hiatus, the MCBA Annual “Fall” Reception was held March 10, 2022 at Willoughby Country Club.

Over 100 of our Judiciary, MCBA members and guests came out for the event which is hosted by the Judicial Relations Committee. The event began with a cocktail hour and hors oeuvres followed by a short program including opening remarks by Jessica VanValkenburgh, recognition of the Judiciary of the 19<sup>th</sup> Circuit, New 2021-22 MCBA Members an acknowledgment of Burton C. Conner, the first Judge from the 19<sup>th</sup> Judicial Circuit Judge to become 4th DCA Chief Judge. Judge Conner then administered the Attorney’s Oath of Admission.

One of the highlights of the event was the presentation of the 2020 and 2021 George W. Bush, Jr. Professionalism Award recipients.

We are so appreciative of our generous Sponsors, without whom these events would not be possible. **Visit MCBA website for more photos**





*Judicial Reception Photos - March 10, 2022*



# 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 outstanding speakers:

4/14/2022: Save The Date! MCBA Trial Lawyers Committee Virtual CLE Meeting April 14, 2022 at 12:00 pm via Zoom. We have secured Florida Bar President-Elect Gary Lesser to be our guest speaker.

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

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



Preethi Sekharan  
Chair



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# Appellate Committee

Co-Chair: Cari Leininger

Co-Chair: Donna Eng

## Can you file a proposal for settlement (“PFS”) during an appeal?

By Carri Leininger and Jayme Sellards



Carri Leininger  
Co-Chair

No. First, Fla. R. Civ. P. 1.442 provides that no PFS shall be served “later than 45 days before the trial date ... or the first day of the docket on which the case is set for trial, whichever is earlier.” Thus, filing a PFS after a final judgment violates the rule. Second, case law interpreting Florida Statute §768.79 states that the statute

“does not contain any language which would indicate that the legislature contemplated its use during appeals,” and that it should not be used purely as a mechanism to recover appellate attorney’s fees.

Offers of judgment, now called proposals for settlement, were taken from federal practice. *Trawick’s Florida Practice and Procedure*, §25:17. They are an attempt to expedite disposition of litigation in actions for damages. *Id.* See also Fla. Stat. § 768.79(1). Rule 1.442 contains provisions for all procedural aspects of all Florida laws authorizing offers, demands or proposals for settlement. *Id.*

With regard to the timing of a PFS, the Florida Rules of Civil Procedure state, in relevant part: “[n]o proposal shall be served later than 45 days before the date set for trial or the first day of the docket on which the case is set for trial, whichever is earlier.” Fl. R. Civ. P. 1.442(b). As such, filing a PFS after a final judgment at trial would certainly violate the time for filing in the rule. Thus, the filing of a PFS during an appeal of a final judgment is not permitted under Fla. R. Civ. P. 1.442.

In addition to Rule 1.442, case law indicates that filing a PFS after final judgment is not allowed. See *Glanzberg v. Kauffman*, 771 So. 2d 60 (Fla. 4<sup>th</sup> DCA 2000). The court stated that §768.79 should not be used purely as a mechanism to recover appellate attorney’s fees. The Fourth DCA noted that the “spirit of the offer of judgment

statute is to encourage litigants to resolve cases early to avoid incurring substantial amounts of court costs and attorney’s fees.” To allow the statute to become a mechanism for appellate attorney’s fees, would “encourage litigants to serve offers of judgment or settlement after trial has concluded, which in turn would adulterate the spirit of section §768.79.”



Donna Eng  
Co-Chair

Furthermore, the court highlighted that the statute “does not contain any language which would indicate that the legislature contemplated its use during appeals.” For instance, the statute does not mention “appellants” or “appellees” to utilize its provisions, only “plaintiffs” and “defendants.” *Id.*; See also, *Auto-Owners Ins. Co. v. Southeast Floating Docks, Inc.*, 2009 WL 3418258 (M.D. Fla Oct. 20, 2009) (holding that a PFS filed during an appeal is not timely).

So the next time your client asks excitedly, “Hey, can we file a PFS during the appeal, tell them you have good news and bad news: the good news is that the law is clear on this issue, the bad news is that the answer is ‘No’ ”.



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## Admiralty

## ATTORNEY'S FEES IN MARITIME CLAIMS

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



Joanne Foster  
Chair

Sunfari Experiences, LLC, v. Certain Underwriters at Lloyd's 21 U.S. Dist. LEXIS 149330 (SDFL August 2021)

The law in the Eleventh Circuit regarding attorneys' fees in maritime disputes is clear. The prevailing party in an admiralty case is not entitled to recover attorneys fees as a matter of course. But exceptions to

the rule exist when (1) they are provided by the statute governing the claim, (2) the non-prevailing party acted in bad faith during the course of the litigation, or (3) there is a contract providing for indemnification of attorneys' fees. Sunfari Experiences, LLC, v Certain Underwriters at Lloyd's, 21 U.S. Dist. LEXIS 149330 [\*5] (SDFL August 2021)

The facts of this matter are undisputed. Sunfari owns a 55' Sea Ray motor yacht which it operates primarily in the US and British Virgin Islands. The Vessel was insured under a Lloyds' policy. In preparation for Hurricane Irma, Sunfari had the vessel hauled and dry-secured at Virgin Gorda Yacht Harbour. When Irma passed over Virgin Gorda, the vessel was damaged. A dispute arose over the scope of damages and Sunfari also alleged it was entitled to attorneys' fees under three alternative theories: general maritime bad faith; Florida statute 627.428; or Title 5, Virgin Islands Code, Section 541.

The Eleventh Circuit regularly holds "[t]here exists no specific and controlling federal law relating to attorneys fees in maritime insurance litigation." All Underwriters v Weisberg, 222 F.3d 1309, 1312 (11<sup>th</sup> Cir 2000). E.g., Weisburg, 222 F.3d at 1313; RMI Holdings v. Aspen Am. Ins., No. 20-14525, 2021 U.S. App. LEXIS 20926, 2021 WL 2980528, at \*2 (11<sup>th</sup> Cir. July 15, 2021) ("[B]ecause this case arises under maritime insurance law, and no established federal maritime policy exists as to awards of attorneys' fees in maritime insurance

disputes, state law applies."). Therefore, the Court must apply either the laws of Florida or of the United States Virgin Islands.

The issue then became which laws apply, Florida or the United States Virgin Islands. To make this determination the Court considered the fact-intensive test outlined in Section 188 of the Restatement (Second) Conflict of Laws. The five-factor test includes, "(a) the place of contracting; (b) the place of negotiation; (c) the place of performance; (d) the locus of the subject matter of the contract; and the domicile of the parties.

Applying the test here, the Court determined the laws of the Virgin Island apply. The policy was made by Underwriters in London and accepted by Sunfari which maintains its office in the Virgin Islands, delivery and issuance of the policy occurred in the Virgin Islands. The locus of the subject matter is the Virgin Islands. And the parties are domiciled in London and the Virgin Islands.

Having determined Virgin Islands law applied to the matter of attorneys' fees, the Court stated, "[t]he U.S. District Court of the U.S. Virgin Islands has applied the American Rule - the principle that each party should bear its own attorneys' fees- in marine insurance claims because such claims exist under federal admiralty law. Sunfari at [\*11].

A demand for attorneys' fees in maritime claims is always looked at from the standpoint that attorneys' fees don't exist in admiralty. Unless the practitioner can state a specific statute or contractual clause as the basis for attorneys' fees, each party is on the hook for paying its own attorneys.

#### UPDATE ON SOUTHEAST ADMIRALTY LAW INSTITUTE ANNUAL CONFERENCE

This year's conference will be held June 23rd -25th, 2022, at the Omni Louisville Hotel, Louisville, KY. Check [seali.com](http://seali.com) for more information.



# Martin County Bar Association Monthly Luncheon March 11, 2022 Monarch Country Club



## Real Estate and Commercial Litigation Update

### Florida Real Property and Business Litigation Report

Manuel Farach



Manuel Farach  
Chair

**Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.**, Case No. 20-915 (2022).

The safe harbor of 17 U.S.C. §411 (certificate of registration is valid, even though it contains inaccurate information, as long as the copyright holder lacked “knowledge that it was inaccurate”) does not distinguish between mistakes of law and mistakes of fact and

a mistake of law is entitled to the safe harbor protection of the statute.

**Southern Coal Corporation v. Drummond Coal Sales, Inc.**, Case No. 20-14560 (11th Cir. 2022).

A party does not have to win all contested issues in order to be considered the prevailing party for purposes of an attorney’s fees provision.

**MidAmerica C2L Incorporated v. Siemens Energy Inc.**, Case No. 20-11266 (11th Cir. 2022).

The Eleventh Circuit applies the Independent Tort Doctrine to fraudulent inducement claims and further states that no Florida case recognizes rescission based on lack of consideration.

**Wildes v. BitConnect International, PLC**, Case No. 20-11675 (11th Cir. 2022).

The prohibition in Section 12 of the Securities Act of 1933 for soliciting the purchase of unregistered securities applies to mass-market as well as individual appeals.

**In Re: Amendments to Rule Regulating The Florida Bar 4-5.5**, Case No. SC21-1379 (Fla. 2022).

Florida Rule Rule of Professional Conduct 4-5.5 is amended to read:

[A] lawyer licensed in another United States jurisdiction does not have a regular presence in Florida for the practice of law when the lawyer works remotely while physically located in Florida for an extended period of time if the lawyer works exclusively on non-Florida matters, and neither the lawyer nor any firm

employing the lawyer hold out to the public as having a Florida presence.

**Agency for Health Care Administration v. Ybor Medical Injury & Accident Clinic, Inc.**, Case No. SC20-1814 (Fla. 2022).

Florida Statute section 120.68(3) (party is entitled to a presumptive stay upon the appeal of an agency decision that “has the effect of suspending or revoking a license”) does not apply to an agency decision to administratively withdraw an incomplete application for a license renewal.

**RAV Bahamas Ltd. v. Marlin Three, LLC**, Case No. 3D21-976 (Fla. 3d DCA 2022).

The equitable claim of a pure bill of discovery lies only in the absence of a legal remedy and only to determine the identity of a proper party defendant or the appropriate legal theory for relief; it is not available to obtain a preview of discovery obtainable once suit is filed.

**Handte v. Monroe County**, Case No. 3D21-1527 (Fla. 3d DCA 2022).

Non-conforming real property is not exempted from subsequently enacted lawful regulations generally applicable to similarly situated properties.

**Trident Asset Management, LLC 2050 v. Condotel Inn Condominium Association, Inc.**, Case No. 5D20-2130 (Fla. 5th DCA 2022).

The one percent safe harbor provision of Florida Statute section 718.116(1)(b) applies to the total original mortgage debt, not as applied to each condominium unit.

**Palafox, LLC v. Diaz**, Case No. 1D20-3415 (Fla. 1st DCA 2022).

Florida Statute section 120.569(2)(e) (sanctions imposed for filing frivolous pleadings filed in administrative proceedings) does not have a timeliness requirement.



**Balm Road Investment, LLC v. Hillsborough County Board Of County Commissioners**, Case No. 2D21-1033 (Fla. 2d DCA 2022).

Notwithstanding the proposed development meets all legal and administrative requirements, the narrow scope of second-tier review requires affirmance of a trial court (i.e., first tier review) order denying certiorari relief to landowner seeking reversal of county commission decision denying an application for development

**Coast Pump & Supply Co., Inc. v. Mathis**, Case No. 2D21-1142 (Fla. 2d DCA 2022).

A Notice of Appearance is not a “pleading” for purposes of contesting jurisdiction under Florida Rule of Civil Procedure 1.140(b) (lack of personal jurisdiction must be raised in first pleading otherwise the defense is waived).

**BPI Sports, LLC v. Florida Supplement LLC**, Case No. 3D21-736 (Fla. 3d DCA 2022).

A term defined in the covenants portion of a contract controls over a conflicting definition contained in the recitals portion of the contract.

**Aquino de Oliveira v. Sim**, Case No. 3D21-1255 (Fla. 3d DCA 2022).

Clerk’s defaults are not independently appealable.

**Boca Raton Community Redevelopment Agency v. Crocker Downtown Development Associates**, Case No. 4D21-873 (Fla. 4th DCA 2022).

Unless an agreement by the parties requires otherwise, the fair market value of property encumbered by the lease must be computed as unencumbered by the lease.

**Vickery v. City of Pensacola**, Case No. 1D19-4344 (Fla. 1st DCA 2022).

Florida Statute section 163.045(1) authorizes residential property owners to remove trees from their property without interference from local government if the owners obtain documentation from an International Society of Arboriculture (ISA)-certified arborist or Florida-licensed landscape architect indicating that the trees present a danger to persons or property.

**Terra Mar Property Management, LLC Wilmington Savings Fund Society, FBS**, Case No. 1D21-1484 (Fla. 1st DCA 2022).

The First District agrees with the Second and

Fourth District Courts of Appeal and holds that failure to pay a mortgage is a continuing default and that a lender is not barred from foreclosing on a mortgage even if the original borrower gave up all rights in the real property during bankruptcy proceedings and the lender did not initiate foreclosure within five years from that time.

**Selman v. Progressive American Insurance Company**, Case No. 3D21-0299 (Fla. 3d DCA 2022).

A trial court exceeds its jurisdiction when it enters relief beyond that set forth in a settlement agreement, even if the court adopted the settlement agreement and retained jurisdiction to enforce its terms.

**8425 Biscayne LLC v. Pinnacle Towers LLC**, Case No. 3D21-0486 (Fla. 3d DCA 2022).

A restrictive covenant is different from an easement because a restrictive covenant limits what a landowner may do with their property.

**Ridard v. Massa Investment Group, LLC**, Case Nos. 3D21-1238, 3D21-1239, and 3D21-1240 (Fla. 3d DCA 2022).

The third-party beneficiary doctrine enables a non-contracting party to enforce a contract against a contracting party—not the other way around and not against an agent for a disclosed principal.

**DHBH Atlantic L.L.C. v. City of Delray Beach**, Case No. 4D21-852 (Fla. 4th DCA 2022).

Two separate owners—holding separate legal title – cannot make a combined claim under the Bert J. Harris Act for their unified interest in platted property.

**Soboh v. Hamzeh**, Case No. 2D21-407 (Fla. 2d DCA 2022).

Service on an individual not operating as a sole proprietor must be made at the individual’s abode.

**New Horizons Condominium Master Association, Inc. v. Harding**, Case No. 3D20-1471 (Fla. 3d DCA 2022).

The Business Judgment Rule is a rule of substantive law and need not be pleaded as an affirmative defense in order to be invoked as a defense.



# Immigration Committee

Chair - Angela Castro

## Moving Forward in 2022 – by Angelina Castro

Under the Biden Administration, immigration policies and the practice of law in this arena have once again taken many new turns. The U.S. Citizenship and Immigration Services mission statement has reverted back to a more traditional, service-centered approach and less focused on enforcement. It now reads: “USCIS upholds America’s promise as a nation of welcome and possibility with fairness, integrity, and respect for all we serve.” The president has stated that the nation must uphold its history of welcoming newcomers and providing the opportunities that has made our nation strong in its diversity and ability to recruit talent from around the world.

On March 4, 2022, MCFAWL hosted a presentation about diversity and inclusion which included a Part II update on immigration law from Angelina Castro and Zorelly Torres-Sanchez. Some of the topics discussed included the Biden Administration’s changes to refugee admissions, which stagnated between 2019 and 2021. Admission numbers were capped at 15,000 despite historic averages of 95,000 per year. With an all-time high of some 80 million displaced persons worldwide in 2022 (including 26 million identified as refugees), the U.S. raised its refugee admissions cap to 125,000. Last year during “Operation Allies Welcome,” the U.S. evacuated and resettled more than 76,000 Afghans following the largest airlift and evacuation effort in our country’s history. Many of those who came to the U.S. were given priority status with special temporary visas or entered the country as parolees in temporary status. Efforts are now underway to recruit volunteer attorneys to assist Afghans seeking asylum or other forms of relief before their status expires or they are subject to deportation. On March 3, the Department of Homeland Security announced relief for some 30,000 Ukrainians in the U.S. by conferring Temporary Protected Status (“TPS”) to those who have been in the country since March 1, 2022. Over one million Ukrainians fled their country within a week after Russia launched its invasion on February 24.

Near the end of the Trump presidency, Venezuelans were also considered for TPS. While

welcoming these protections, President Biden also rescinded a number of his predecessor’s policies restricting traditional legal immigration paths within the first six months of his term. By eliminating the Muslim, Refugee, Asylum and COVID-19 Bans, the Public Charge Rule, the Fee Rule, Immigration Judge Quotas, the Asylum Cooperative Agreements with Guatemala, El Salvador and Honduras, the ICE Rule allowing the deportation of victims of violent crimes, and the exclusion of victims of domestic and gang violence, the new administration restored legal access and avenues for relief to thousands of families, businesses and vulnerable groups. With the goal of creating a more humane and inclusive immigration system, President Biden has sought to appoint diverse personnel to agency posts and the immigration bench, restored opportunities for integration and naturalization, restarted the Central American Minors Program, offered full TPS to Venezuelans and Haitians living in the U.S. in 2021, provided legal access to justice and education in detention and processing centers, worked toward increasing transparency on case processing times, and reopened public engagement forums between the agencies, courts and the immigration bar.

In 2017, USCIS Director Lee Francis Cissna advised agency employees that their main mission was to answer to the American people, promote security and ensure that those seeking status were eligible for them. The drastic changes in policies and perspectives had immediate and devastating consequences for countless families and businesses. Today in 2022, we have enjoyed a return to some normalcy and stability, and we remain encouraged by the guidance of now Director Ur M. Jaddou’s vision for the agency to maintain the U.S. as “a welcoming nation that embraces people from across the world who seek family reunification, employment or professional opportunities, and humanitarian protection.”



# 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"

## 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)

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

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## **2021 – 2022 MCBA 100% Club\***

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## Save the Date

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

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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# 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 (1st 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).



Christine Moreno  
Chair

Current CLE Seminars Available Include the Following:

- **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. **Credits:** 1.0 General
- **How the Ethical Lawyer Can Avoid Technology Traps** - Valid through 5/31/2022. **Credits:** 1.0 General; 1.0 Ethics; 1.0 Technology.
- **Civil Trial Update & Board Certification Review 2021** - Valid through 8/31/2022. **Credits:** 15.0 General; 2.0 Ethics; 1.0 Technology. **Certification Credits:** 15.0 Appellate Practice; 15.0 Business Litigation; 15.0 Civil Trial; 15.0 Criminal Appellate Law; 15.0 Criminal Trial Law; 15.0 Juvenile Law.
- **9<sup>th</sup> Circuit Voluntary Bar Coalition Town Hall** - Valid through 9/30/2022. **Credits:** 1.0 General.
- **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.
- **2021 Survey of Florida Law (2 copies)** - Valid through 12/31/2022. **Credits:** 14.5 General; 3.5 Ethics; 0.5 Bias Elimination; 1.5 Professionalism; 3.0 Technology. **Certification Credits:** 5 Appellate Practice; 2.5 Business Litigation; 2.0 City, County and Local Government; 3.5 Civil Trial; 1.0 Condominium and Planned Development Law; 2.5 Criminal Appellate; 2.5 Criminal Law; 2.0 Elder Law; 1.0 Health Law; 1.0 Intellectual Property; 2.5 Juvenile Law; 1.0 Labor & Employment Law; 3.0 marital & Family Law; 2.0 Real Estate Law; 2.0 State & Federal Gov't & Administrative Practice; 1.0 Tax Law; 2.0 Wills, Trusts & Estates.
- **MCBA Monthly Meeting** - November 19, 2021. Valid through 5/31/2023. Speaker: Judge Robert J. Luck, U.S. Court of Appeals, 11<sup>th</sup> Judicial Circuit. Topic: Martin County's Legal Impact on State and Federal Law - Part 2. **Credits:** 0.5 General. Includes speaker notes.
- **MCBA Monthly Meeting** - December 17, 2021. Valid through 6/30/2023. Speaker: Edwin Bell, Director of Racial Justice, Equity & Inclusion National Center for State Courts. Topic: Blueprint for Racial Equality. **Credits:** 1.0 General; 1.0 Bias Elimination.
- **MCBA Monthly Meeting** - January 21, 2022. Valid through 7/31/2023. Speaker: Ambassador Tatiana Gfoeller-Volkoff; Topic: Afghan Women: Where are They Now? **Credits:** 1.0 General;
- **MCBA Monthly Meeting** - February 25, 2022. Valid through 2/28/2023; Speaker: Michael Tanner, Esq. Florida Bar President. **Credits:** 1.0 General; 1.0 Professionalism.

# 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.





# Links, Jobs and Legislation

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

Court administration, judicial assignments, programs, job opportunities and other resources:

[www.circuit19.org](http://www.circuit19.org)

Emergency Hotline / Info: 772.742.9229

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 2022</h1>						
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
Easter	24	25	26	27	28	29
30	31					

1

SideBar Articles Due

April Fools Day

RSVP DEADLINE FOR  
4/15/22 LUNCH

15  
**Courthouse Closed**

MCBA Luncheon @  
**Monarch CC**  
(11:30am)

**Good Friday**  
**Passover Begins**

Past President's  
Breakfast (invitation only)

Passover Ends

RSVP DEADLINE FOR  
5/6/22 LUNCH

**SAVE THE DATE:**

- May 7, 2022: MCBA Sobel Cup Golf Tournament @ Lost Lake Golf Club
- May 20, 2022: Annual Banquet

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>May 2022</h1>						
1	2	3 JRC Speaker Series @ McCarthy Summers 11:45 a.m.  MCBA Officers' Meeting	4	5  Cinco de Mayo	6  MCBA Luncheon @ <b>Monarch CC</b> (11:30am)	7 MCBA/Sobel Cup Golf Tournament @ Monarch GC  MCWLA Yoga on the Beach
8	9 COLUMBUS DAY	10	11	12 Trial Lawyers Comm. Meeting via Zoom @ Noon	13 <b>MCBA Annual Banquet</b> @ Mariner Sands 6:30 p.m.	14
Mother's Day	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30 <b>Courthouse Closed</b>  Memorial Day	31	<b>Happy Summer!</b> See You August 19 <sup>th</sup> for the First CLE Luncheon of the 2022-23 Bar Year.		





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

## **Please join us for MCBA's CLE Monthly Meeting, Friday, April 15, 2022**

- When: Friday, April 15, 2022  
11:30 a.m. networking; 12:00 p.m. lunch
- Where: Monarch Country Club  
1801 SW Monarch Club Drive, Palm City
- Menu: House Salad with Dressing Selections; Vegetarian Lasagna, Garlic Bread,  
Cheesecake with Berry Drizzle
- Speaker: Honorable Aileen M. Cannon, United States District Court Southern District of  
Florida
- CLE: Pending

RSVP to: [martincountybarassociation@msn.com](mailto:martincountybarassociation@msn.com)  
No later than Friday, April 8, 2022

**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).