

FEBRUARY 2023



The SideBar

NEWSLETTER OF THE MARTIN COUNTY BAR ASSOCIATION



FEATURED ARTICLES:

PRESIDENT'S MESSAGE:

MCBA PRESIDENT, JEFFREY FRIEDMAN

FOCUS ON MENTAL HEALTH:

*WHEN YOUR FRIENDS DO NOT UNDERSTAND
YOUR MENTAL HEALTH SITUATION*

*DID WARHOL TRANSFORM PRINCE?
AN ARTICLE WITH READER SURVEY*



In This Issue

President's Message (Pg. 3)
New Members (Pg. 3)
CLE Monthly Meeting (Pg. 5, 32)
Employment Opportunity (Pg. 6)
When Your Friends Do Not Understand Your
Mental Health Situation (Pg. 10)
2023 Judicial Nominating Commission
Nominations (Pg. 14)
December Luncheon (Pg. 18)
Annual Banquet (Pg. 19)
MCWLA (Pg. 22)
Did Warhol Transform Prince? (Pg. 25)
Florida Bar Help Line (Pg. 28)
Florida Free Legal (Pg. 29)
Online Resources (Pg. 29)
Links, Jobs & Legislation (Pg. 30)
February Calendar (Pg.31)

Law/Bar Related Committee Reports:

5K Run to the Courthouse (Pg. 16)
Admiralty (Pg. 11)
Bankruptcy (Pg. 17)
Employment (Pg. 13)
Florida BOG (Pg. 4)
Foreclosure (Pg. 9)
Gator Tailgate – Basketball (Pg. 12)
Golf Tournament (Pg. 7)
Legal Resources (Pg. 28)
Paralegal (Pg. 21)
Real Property (Pg. 23)
Tennis (Pg. 21)
Trial Lawyers (Pg. 21)
Wills, Trusts & Estate (Pg. 15)

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THE SIDE BAR NEWSLETTER

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Message From the President

Martin County Bar President - Jeffrey M. Friedman, Esq.

Dear Members:

We hope you enjoyed our January meet and greet with our local judges. Thank you to all of the judges that attended. We appreciate you taking the time out of your day to speak with us and let us know how we can help the legal process move more effectively.

This month's luncheon speaker will be Edwin T. Bell, Director of Racial Justice, Equity and Inclusion. Mr. Bell will be providing us with an update from his prior presentation, Blueprint for Racial Justice and discuss current diversity issues. It is fitting that Mr. Bell will be speaking to us in February, when we celebrate Black History Month. February was first recognized as Black History Month by President Gerald Ford in 1976.

Now for some February trivia. In 1964, The Beatles made their first American television appearance on the "Ed Sullivan Show." On February 2, 1848, United States and Mexico signed a treaty ending the war. The U.S. paid Mexico \$15 million in

exchange for California, Nevada, Utah, Arizona, New Mexico, Colorado, Wyoming, and Texas. February is also when we celebrate Groundhog Day. February is also when we celebrate Groundhog Day (yes, I meant to type it twice). Last, but not least, don't forget Valentine's Day!!

We look forward to seeing everyone at the luncheon.

Sincerely,



Jeffrey M. Friedman
2022-2023 MCBA President



Jeffrey M. Friedman
2022-2023 President

Welcome New & Returning Members

Returning: **Audra R. Creech**
Gunster, Yoakley & Stewart, P.A.
Stuart, FL
Emory University School of Law, 2015

New: **George E. Clause, II**
The Clause Law Group
Stuart, FL
Vermont Law School, 2020



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) by clicking the "About The Bar"

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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Please Join Us!

Join us on Friday, February 17, 2023

On Friday, February 17, 2023, the Executive Board of the Martin County Bar Association invites its members, and guests to join us for our monthly CLE luncheon meeting at Monarch Golf Club in Palm City. **Networking begins at 11:30 a.m. and lunch will be served promptly at noon.**

We are excited to welcome back **Edwin Bell**, Director of Racial Justice, Equity & Inclusion National Center for State Courts. We invited Mr. Bell to return to update us on the highlights of 2022 and some initiatives his organization is working on.

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 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 look forward to an insightful and engaging program with another great turnout.

RSVP IS REQUIRED on or before 5:00 p.m. **FRIDAY, February, 10, 2023** by calling 772-220-8018 or emailing martincountybarassociation@msn.com. There is no charge for paid MCBA members. Guests are welcome; a \$35 guest fee may be paid at the luncheon (cash or check only).

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



Edwin Bell

Employment Opportunity

We are a firm that contracts with the State of Florida to handle child support hearings in the 9th, 18th and 19th circuits. We have been doing this work for well over 30 years. We are looking for someone to handle our dockets in St Lucie, Martin, Okeechobee and Indian River. This is a great opportunity for a sole practitioner to supplement their income or for an attorney who is only interested in part-time work. It would be 3 full days in court per week but no work outside of that except simple prep for court. Bar admission required. Please no recent graduates looking for full-time work.

You can submit a resume by email to: hernancastro@cfl.rr.com

Or by mail to:

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1535 Cogswell Street Suite A-5
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I am also happy to speak with anyone interested who would like to make inquiries about the position. Just email me with your number and I will get back with you

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MCBA Sobel Cup

GOLF TOURNAMENT

Supporting the MCBA Scholarship Fund

SATURDAY, MAY 13, 2023

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Hobe Sound, FL
8:30 a.m. Shotgun
Scramble Format



\$150 per golfer or
\$500 per foursome
Includes: Breakfast,
Lunch & Awards

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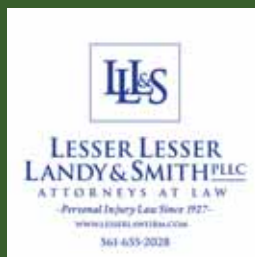
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Breakfast Sponsor



Hole Sponsors

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MCBA Sobel Cup Golf Tournament

Benefitting the MCBA Scholarship Fund

Sponsorship Opportunities



Gold Sponsor - \$1500

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- Includes Foursome (\$500 value)
- Logo in all print advertising and social media posts relating to tournament
- Signage at tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Full-page ad in 1 issue of The SideBar

Luncheon Sponsor - \$750

1 Available

- Includes entry fee - 2 golfers (\$250 value)
- Logo in all print advertising and social media posts relating to tournament
- Signage and Recognition at Lunch
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Half-page ad in 1 issue of The SideBar

Cart Sponsor - \$500

1 Available

- Logo displayed on all golf carts used for event
- Logo in all print advertising and social media posts relating to tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Quarter-page ad in 1 issue of The SideBar

Scorecard Sponsor - \$500

1 Available

- Logo displayed on all scorecard used for event
- Logo in all print advertising and social media posts relating to tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Quarter-page ad in 1 issue of The SideBar

Beverage Cart Sponsor - \$500

1 Available

- Logo displayed on beverage cart used for event
- Logo in all print advertising and social media posts relating to tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Quarter-page ad in 1 issue of The SideBar

Breakfast Sponsor - \$300

1 Available

- Signage and Recognition at Breakfast
- Logo in all print advertising and social media posts relating to tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Business Card size ad in 1 issue of The SideBar

Gift Bag Sponsor - \$300

1 Available

- Logo on each gift bag
- Logo in all print advertising and social media posts relating to tournament
- Logo with hyperlink on MCBA website
- Recognition at Luncheons leading up to event
- Business Card size ad in 1 issue of The SideBar

Hole Sponsor - \$200 per hole

One sponsor per hole

- Signage at tee box
- Listing in all print advertising and social media posts relating to tournament
- Listing on MCBA website

Only 16 Remaining

To Sponsor or for Information contact: Robyn O'Heron at
martincountybarassociation@msn.com or 772-382-9076

Foreclosure Committee


Isaacs v. Federal National Mortgage Association – waiver of spousal joinder for homestead

In this case, the Isaacs purchased property as husband and wife and later separated, but never divorced. The husband executed a quit claim deed conveying his interest to his wife and purchased another home where he declared a homestead exemption. The wife took out a mortgage on the property that was executed by the wife and husband. The wife passed away and the property was found to be her homestead and descended to the husband in probate. Fannie Mae filed to foreclose the mortgage and the husband contested by disputing his signature on the mortgage and alleging his joinder was required even though he abandoned the property. Fannie Mae conceded the signature was a forgery, but the trial court granted partial summary judgment finding the husband waived the joinder requirement by abandoning the property before the mortgage. The 3rd DCA reversed the final judgment based on the constitutional revisions to homestead and the restraint on alienation. Originally, the restraint on alienation only applied if the


owner was the spouse that was the head of the family. The 1985 amendment to the Florida Constitution redefined homestead and courts found the restraint on alienation applied to any spouse. Under the revised definition and interpretation of homestead alienation, abandonment of the homestead property by a non-owner spouse cannot be a waiver of the spousal joinder requirement. The 3rd DCA agreed with the husband that his signature was required on the mortgage regardless of him abandoning the homestead.



Dorothy Dlugolecki
Chair



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With our focus on mental health this year, we hope that you find the next two articles helpful and useful to you or someone you know that may be struggling.

When Your Friends Do Not Understand Your Mental Health Situation

By: Stan Popovich

Do you struggle with your mental health and have a difficult time in getting the people you know to be more understanding?

In some cases, your colleagues might give you a hard time regarding your anxieties and depression.

As a result, here are seven suggestions on how to deal with the people you know regarding your mental health issues.

- 1. Listen to the professionals and not your friends:** Your peers may mean well, but when it comes down to it, the professionals are aware of your circumstances more than anyone. A counselor knows what you are going through and can help you deal with your problems. When you have questions about your mental health, consult with a therapist.
- 2. Don't argue with others:** It is important that you do not get into arguments with those who are giving you a rough time. Your number one priority is to get relief from your anxieties. It is not your job to worry about how others may view your circumstances. Your health is more important than what other people may think.
- 3. Your goal is to get better:** Concentrate on how you can face your fears and anxieties. Don't waste your time arguing with your colleagues who are giving you a difficult time. This isn't a public relations event where you need to get approval from everyone. This is your life and you are the one suffering. Your main focus is to get better.
- 4. Tell your friends to learn about your situation:** Explain to your peers that the best way for them to help you is to learn about your mental health issues. They could talk to a counselor, read some good books, or join a support group to better understand your situation. If your friends won't make an effort, then stay away from them because they will only make things worse.
- 5. Distance yourself from those who give you a difficult time:** Distance yourself from those who won't make an effort to help understand what you are going through. You need to surround yourself with positive and supportive people. If you have problems or issues with a particular person, you can always ask a counselor for advice.
- 6. You are not alone:** It can be very frustrating to manage your fear related issues when the people you know are on your case. Remember, you are not alone. There are millions of people around the world who struggle with their fears, anxieties, and depression. The key is to find those people who can relate to you through various organizations in your area.
- 7. Join a local mental health support group:** There are many mental health awareness support groups in your area. Many hospitals, churches, and counselors in your area will be able to provide you with a list of these organizations. These groups will be aware of your situation and can give you additional advice regarding your problems.

In addition, talk to a professional who can help relieve your depression and anxieties. They will be able to provide you with suggestions and insights on how to deal with your current problem.

Stan Popovich is the author of the popular managing fear book, "A Layman's Guide to Managing Fear". For more information about Stan's book and to get some more free mental health advice, please visit Stan's website at <http://www.managingfear.com>. Reprinted with permission.

Admiralty Committee

Barbara A. Kreitz Cook

Florida Bar Board Certified Admiralty & Maritime Law
MCBA Admiralty Committee Chair



Barbara A. Kreitz Cook
Chair

IF IT'S SALVAGE ... HOW MUCH WILL IT COST?

Salvage fees are based on the post-salvage pre-repaired market value of the vessel salvaged, the extent of services rendered, and are awarded by a court or by agreement with the vessel owner or insurer thereafter. When a salvor saves property from marine peril, the salvor has a maritime lien against the property saved. *The SABINE*, 101 U.S. 384, 386, 25 L.Ed. 982 (1879). The salvor may then bring an *in rem* action against the vessel in federal court, with the ultimate goal of obtaining a salvage award. It is a well-settled admiralty law that salvage claims are a covered loss under the vessel's insurance. Courts have correctly pointed out that the true beneficiary of the salvor's services is the insurer, not the vessel owner. Therefore, the insurer is required not only to provide a defense but to pay any award to the salvor. See also *Peters v. Warren Insurance Co.*, 39 U.S. (14 Pet.) 99, 100, 10 L.Ed. 371 (1840).

It has long been established that any party receiving a direct pecuniary benefit as a result of a salvor's services is liable to pay a salvage award. This includes the hull insurer. Hull insurers not only are required to pay salvage claims and provide a defense to the insured, but may be sued directly themselves for the amount of the salvage award, and such actions are not barred by statutory prohibitions of direct actions against insurers under insurance policies. See, e.g., *Cresci v. The Yacht, "Billfisher"* 874 F.2d 1550 (11th Cir. 1989); *Absolute Marine Towing & Salvage, Inc. v. S/V Iniki*, 2010 WL 555333 (M.D. Fla. 2010). The insurer can be sued in state court. Joining the hull insurer in a court action for determination of the salvage award can also increase the amount of the salvage award significantly. This is because the value of the vessel, as to a hull insurer, is calculated much more easily. If the vessel was at risk of becoming an actual or constructive total loss, the benefit

bestowed on the insurer is the insured value of the vessel under the policy (because that is what the insurer would have had to pay), less the actual cost of repairs. If the vessel was not at risk of loss, the measure of benefit to the insurer is what the cost of repairs would have been but for the actions of the salvors, less the actual cost of repairs. Many times, the insured value far exceeds the market value. The cost of yacht repairs is also usually a high figure.



Salvage awards range from 5-10% of the value of the vessel for simple salvage, and on up in consideration of the effort expended by the salvor. Although there is no precise formula for calculating salvage awards, computation of a salvage award traditionally has followed the long-standing guidance provided by the United States Supreme Court more than a century ago. In *The Blackwall*, 77 U.S. (10 Wall.) 1, 19 L.Ed. 870 (1870), Justice Clifford set out the six factors to be considered in determining the amount of a salvage award. The Second Circuit has arranged these factors in descending order of importance as follows:

- 1)the degree of danger from which the ship was rescued;
- 2)the post-casualty value of the property saved;
- 3)the risk incurred in saving the property from impending peril;
- 4)the promptitude, skill, and energy displayed in rendering the service and salvaging the property;
- 5)the value of the property employed by the salvors and the danger to which it was exposed;
- 6)the costs in terms of labor and materials expended by the salvors in rendering the salvage service.

Join fellow MCBA members and friends as the University of Florida Gators take on Vanderbilt University in Basketball!

Saturday, February 11, 2023
3:30 p.m. Game Time

A limited number of discounted game tickets have been reserved.
The first 50 – 75 buyers will get the opportunity for a postgame group photo on the court.

To purchase tickets Go to: <https://offer.fevo.com/mens-basketball-vs-vanderbilt-tphe17r-a6c05bc?fevoUri=mens-basketball-vs-vanderbilt-tphe17r-a6c05bc%2F>

Why not make a weekend of it?

There is plenty of other things happening on campus, including a UF Women’s gymnastics meet on Friday night.

A block of rooms have been reserved at the Best Wester Gateway Grand Hotel

To reserve a room at the group rate, you must call the hotel directly at 352-331-3336 and mention Group UF-Vanderbilt Basketball Game

Deadline to reserve a room at the group rate is January 23, 2023.

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Employment Law

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Three real-world employment law examples:

Example #1:

Let's say a manufacturing company is located in an industrial part of town. You know, a roofing company and a fence company are nearby. Well, this area is not heavily traveled, especially at night. It can be spooky. Especially for women. That is what the female owner is thinking. So, she decides to only hire women for the day shift, but she rejects a female applicant for a vacant position on the night shift.

Is this okay? I mean, it is a female company president making the decision, and it is to protect women.

Well, according to the U.S. Equal Employment Opportunity Commission ("EEOC"), this is sex discrimination and it violates federal law.

In fact, this really just happened in Tavares, Florida and the company settled a lawsuit brought by the EEOC for \$50,000. Title VII of the Civil Rights Act of 1964 prohibits employers from considering sex when making hiring decisions.

Example #2:

You might think that Florida is the Wild West, and nothing like Cali or NY. However, Florida now has one municipality that bans private employers from asking an applicant about their criminal record before they offer the applicant a job. This extends to private employers if they have at least fifteen employees. See Gainesville City Ordinance No. 2022-617.

Now that this is happening in Gainesville, you can expect that other cities and counties may very well follow the lead.

Example #3

I have never actually seen an employer label business records as "fake" but I know some businesses create and maintain fake records.

Of course, this is illegal. Sometimes it is referred to as "cooking the books."

The U.S. Department of Labor (DOL) just announced that they caught a business that did not pay employees overtime wages.

Well, that is not too unusual. However, what caught my attention is that the business also kept false pay records in an attempt to hide the wage theft.

Now the DOL is making the business pay a whopping \$1.6 million.

Don't think the DOL will fall for your fake records. Business lawyers should not allow the president or owner of the business to have a separate set of records that get turned over to the government if there is an investigation.



David Miklas
Chair

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DEADLINE EXTENDED: 2023 JUDICIAL NOMINATING COMMISSION NOMINATIONS TO BE MADE

The Florida Bar has the opportunity to nominate three lawyers for each of the 27 Judicial Nominating Commissions to the Governor for his appointment. Each appointee will serve a four-year term, commencing July 1, 2023. Applicants must be members of The Florida Bar engaged in the practice of law and **a resident of the territorial jurisdiction** served by the commission to which the member is applying. Commissioners are not eligible for state judicial office for vacancies filled by the JNC on which they sit for two years following completion of their term.

Applications must be submitted no later than 5:30 p.m., Friday, February 24, 2023. Resumes will not be accepted in lieu of an application. Screening committees of the Board of Governors will review all JNC applications. The Executive Committee will then make recommendations to the Board of Governors.

Persons interested in applying for any of these vacancies may download the JNC Application for Appointment from the Bar website. If you require assistance, please call Bar headquarters at 850-561-5757 or email Kristen Wilson.



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Wills, Trusts & Estates

Lisa Clasen- Chair

Have You Read Your Will Lately? Do you have One?

As we enter the second month of what I am sure is going to be great year, are we still working on those resolutions? Maybe taking steps to achieve those goals we set for ourselves? Or are we just flipping the calendar and trying to get used to writing 2023 instead of 2022? An often-overlooked resolution or goal is a review of financial and estate planning documents. Assuming you have an estate plan in place, do you know where the original documents are located? Do you remember who you appointed to do what tasks for you? Do those persons remain healthy, available and trustworthy? Circumstances change and life events mandate a periodic review of any plans you have in place, and if you do not have a documented plan, perhaps 2023 will be the year you set this goal for yourself.

Everyone over the age of 18 needs a Durable Power of Attorney and a Designation of Health Care Surrogate. These documents provide much-needed and much-appreciated guidance for your loved ones to make important decisions for you if you are unable to do so yourself. You have the opportunity to protect your loved ones from the personal struggle that comes with such decision-making. In a critical situation, these documents may prevent an expensive and intrusive court-supervised guardianship proceeding. If you have these documents, read them again to remind yourself of those persons you named to act for you and make changes if necessary.

Do you have a Last Will and Testament or a Trust? If so, do you remember what they say, who will handle your estate or trust, who will receive your assets? Have circumstances changed for any of your beneficiaries (i.e. marriage, divorce, illness)? Do you have a favorite charity? You may remember charities in your Will or Trust.



You do not need to be wealthy to make a gift to your favorite charity. There is no such thing as a small gift to a charity.

If you are reading this, you are probably an attorney. If you do not usually practice in estate planning, please talk to one of your friends and colleagues; they will be happy to help. And it doesn't matter whether you have one hundred dollars or one million dollars, everyone needs a Will. And parents, if you have minor children, a Trust is invaluable for the care and well-being of your children if you are unable to provide that care for any reason.

Even if you are not a resolution maker or goal setter, consider making 2023 the year you become proactive in planning for your and your family's future well-being. Review your documents, review your beneficiary designations, create a plan.

Family and Circuit Civil Mediator

 A professional headshot of F. Shields McManus, a man with glasses and a goatee, wearing a suit and a yellow tie.

F. Shields McManus
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MARTIN COUNTY BAR ASSOCIATION RACE TO THE COURTHOUSE



6th Annual Race to the Courthouse 5k is April 22, 2023

We are excited to announce that the 6th Annual Race to the Courthouse 5k Run/Walk will be held on Saturday, April 22, 2023 and are looking forward to another great race. This race benefits the Legal Aid Society of Martin County and the Martin County Bar Association Scholarship Fund.

Please come out and run or walk with us around beautiful downtown Stuart...everyone is welcome!

We will also be having our competition for fastest law firm and largest law firm (so recruit away!). We will also have an award to the fastest male and female judges. If you are interested in sponsoring, volunteering, or helping out with the race committee, please email Gene Zweben at gene@zwebenlawgroup.com.

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Bankruptcy Committee

Thomas Zeichman – Chair

Reflecting on Financial Health after Month 1 of 2023 and Staying Current on Insolvency Issues

During the first month of the year many individuals and businesses assess where they are financially. Was 2022 a strong year? It may be surprising; however, in certain instances business owners (particularly investors or non-operating owners) do not review the financials until the end of the year or until the accountants generate K1s. For some the day-to-day operations are all consuming and there simply are not enough hours in the day to evaluate overall financial health in real time.

After making this assessment, a business owner who is in trouble may need to understand their options. Those options can range from asset sales, bankruptcy, or assignments for the benefit of creditors. Or business owners should be aware that certain transfers, such as owner distributions or sales of assets, may be scrutinized should

they need to file for bankruptcy later in the year. This can be particularly true for business owners who may occasionally pay personal obligations from the business account.

If there are topical issues you would like the Bankruptcy Committee to cover, please let us know. Or if your practice area would like to collaborate on a presentation, then we are excited to partner for CLEs.

Want to join or engage with the Bankruptcy Committee (or if you have any questions or suggestions) please contact Thomas Zeichman at tzeichman@bmulaw.com




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December CLE Luncheon



David Miklas, Robert Goldman



F. Shields McManus, Hon. Michael McNicholas, Hon. Brett Waronicki



Helen McGeech, Barb Cook



John Wiederhold, Jeanette Lugo, Hon. Bret Waronicki



R. Wayne Richter



Linda Hake, Maryann Diaz



David Blum, F. Shields McManus



Lisa Clusen, Mary Gilmour



Jason Berger, Valerie Costello



Laurel Hopper, Hon. Kathleen Roberts



Jane Cornell, J. Henry Cartwright, Michel Donnelly



R. Wayne Richter, Jenny Fields, Marlin County Property Appraiser



Abby Zanyad, Glorcella Hall



Jack Sobel, Robyn O'Heron



The MCBA Executive Board
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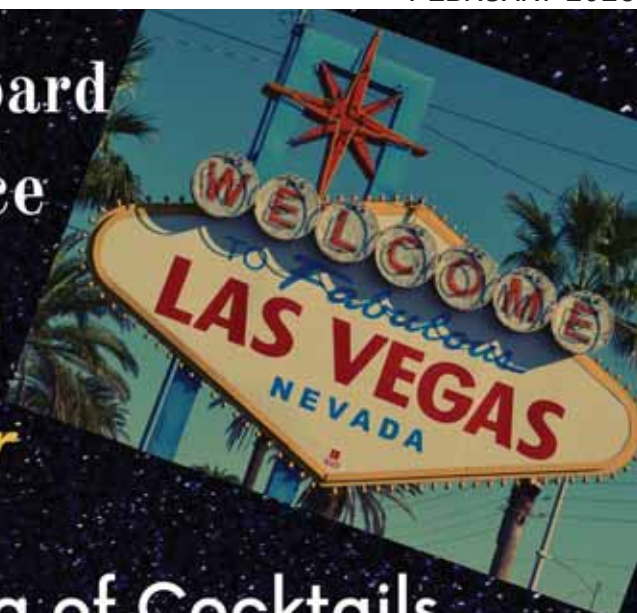
Saturday, May 20, 2023

6:30 p.m.

Willoughby Golf Club



Invitations to be mailed soon.



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Trial Lawyers

Paul Parton – Chair

NEW JURISDICTIONAL THRESHOLDS FOR CIVIL COURTS

All trial lawyers should remember that as of January 1, 2023, the new jurisdictional thresholds for Florida courts are as follows:

- ▶ Small claims courts will remain the same and hear cases with disputes up to \$8,000;
- ▶ County civil courts will hear cases in which the dispute amounts range from \$8,000 to \$50,000; and
- ▶ Circuit courts will hear cases with dispute amounts greater than \$50,000.



Paul Parton
Chair

NEW SIXTH DISTRICT COURT OF APPEAL

Chapter 2022-163, Laws of Florida (House Bill 7027, 2022 Reg. Sess.), established the Sixth District Court of Appeal and further realigned the boundaries of the First, Second, and Fifth DCAs. The new law took effect on January 1, 2023 and provides that the Sixth DCA consists of the 9th, 10th, and 20th Judicial Circuits with its headquarters in the 10th Judicial Circuit, Lakeland, Polk County. For now, the Fourth DCA remains unchanged and will continue to consist of the 15th, 17th, and 19th Judicial Circuits with its headquarters in Palm Beach County.

Tennis Committee

Ray Robison – Chair

We look forward to having the MCBA Tennis Tournament again in early 2023. Please check future SideBar issues for further details on the tournament.

If any questions, please contact Ray Robison (772-287-4444 or robison@foxmccluskey.com).

Thank you for everyone that has expressed interest in playing, as well as our sponsor, SEACOAST BANK.



Ray Robison
Chair

Paralegal Committee

Pamela Lewis – Chair

Be sure to join us on March 22, 2023, to hear attorney Donna Krusbe speak regarding Legal Research and legislative history. The meeting will begin at 5:30 at Mrachek Law, 1000 SE Monterey Commons Blvd., Suite 306, Stuart, Florida. RSVP by 03/17/23. Be sure to RSVP early because I may have to limit the number of participants if it gets too large. It will be on a first come first serve. I really look forward to seeing you all!

Pam Lewis, Paralegal Committee Chair MCBA



Pamela Lewis
Chair

Martin County Women Lawyers Association

Abby Spears: MCWLA President 2022 - 23



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.

UPCOMING EVENTS:

"Women, Wealth & Well Being"
with Jennifer Taboada, VP BlackRock

Thursday February 23, 2023 AT BERRY FRESH CAFÉ (Stuart)

11:45 a.m. networking

12:00 p.m. presentation

RSVP to fawlmartin@gmail.com

SAVE THE DATE:

- | | |
|---------------|---|
| April 1, 2023 | Family Friendly Membership Drive and Picnic |
| May 6, 2023 | Yoga on the Beach |
| April 2023 | Judicial Assistant Appreciation Luncheon |



MCWLA Members Elizabeth Hunter, Oliveann Lancy and Niki Marshall pose for a photo



Guest enjoy a smile at the MCWLA Holiday Social

HOLIDAY SOCIAL WAS A HIT

Members and guest gathered on the patio at Colab restaurant on December 8, 2022, for a wonderful night of visiting. Gift cards were collected for local children in need.

BECOME A MEMBER OF MCWLA TODAY! 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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Real Estate and Commercial Litigation Update

Florida Real Property and Business Litigation Report

Manuel Farach

MGFB Properties, Inc. Viacom Inc., Case No. 21-13458 (11th Cir. 2022).

The Eleventh Circuit reaffirms its adoption of the *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), test for balancing trademark and First Amendment rights, and declines to adopt an exception for titles of artistic works.

In Re: Certification of Need For Additional Judges, Case No. SC22-1621 (Fla. 2022).

The Florida Supreme Court certifies no need for additional judges and certifies excess capacity in the First District Court of Appeal, the Second District Court of Appeal, and Brevard County Court, all excess capacity to be addressed through attrition and not through statutory reduction of judges in those courts.

Utah Power Systems, LLC v. Big Dog II, LLC, Case No. 1D20-3084 (Fla. 1st DCA 2022).

A landlord that does not exercise dominion and control over a third party's personal property left at the leased premises when the former tenant vacated the premises is not liable to the owner of the personalty for conversion.

Tuscan River Estate, LLC v. U.S. Bank Trust National Association, Case No. 1D22-0054 (Fla. 1st DCA 2022).

A foreign limited liability company LLC that is not transacting business or operating or conducting a business venture in the state can only be served under Florida Statute section 48.062.

Freeman v. Berrien, Case No. 2D21-1885 (Fla. 2d DCA 2022).

The dictates of the Florida Trust Code, Florida Statutes Chapter 736, cannot be applied to a land trust under the Florida Land Trust Act, Florida Statute section 689.01.

Conservancy of Southwest Florida, Inc. v. Collier v. County, Case No. 2D21-2094 (Fla. 2d DCA 2022).

Traffic impact and fiscal neutrality of a proposed real estate project relate to use, density, or intensity of use and are thus within the scope of Florida Statute Section 163.3215(3); conflict

certified with *Imhoff v. Walton County*, 328 So. 3d 32 (Fla. 1st DCA 2021).

Gulf Coast Commercial, LLC v. KOS Corp., Case No. 2D22-464 (Fla. 2d DCA 2022).

A trial court cannot alter the status quo by entering a temporary injunction that is in the nature of a final injunction on the claims in the complaint.

Concert Plantation, LLC v. Doors, Case Nos. 2D21-3895 and 2D22-17 (Fla. 2d DCA 2022).

In a class action seeking refunds of equity memberships in a golf club, the club's position that no members were entitled to a refund at the time of their resignation – regardless of their position on the waiting list – the issues of liability are common and predominate.

Management Properties, LLC v. Town of Redington Shores, Case No. 2D22-372 (Fla. 2d DCA 2022).

A municipal ordinance requiring owners of short-term vacation rental properties to inform renters of local laws and ordinances is constitutional but that portion requiring owners to inform the town of violations is compelled speech and violates the holding of *Lauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 650 (1985).

Dziegielewski v. Scalero, Case No. 5D22-157 (Fla. 5th DCA 2022).

A seller cannot rely on matters disclosed in a contract, i.e., the number of parking spaces appurtenant to a condominium unit, when there were continued misrepresentations surrounding the matter.

Henry v. Aim Industries, LLC, Case No. 2D22-330 (Fla. 2d DCA 2022).

While a transcript of a hearing to discharge lis pendens is not always necessary for appellate review, it is required when the order on the motion to discharge does not set



Manuel Farach
Chair

forth detailed facts and the appellate argument to be reviewed concerns what occurred at the hearing.

Isaacs v. Federal National Mortgage Association, Case No. 3D20-0604 (Fla. 3d DCA 2022).

A non-owner spouse’s abandonment of the homestead property does not waive the homestead requirement for spousal joinder to devise or alienate the homestead.

Pascal v. Broward Water Consultants, Inc., Case No. 3D21-727 (Fla. 3d DCA 2022).

Prior case law regarding summary judgment proceedings still applies to hearings conducted before the adoption of amendments to Florida Rule of Civil Procedure 1.510.

First Call 24/7, Inc. v. Rios, Case No. 3D22-648 (Fla. 3d DCA 2022).

A dismissal for failure to prosecute entered while the automatic stay under the Bankruptcy Code was in effect is void.

Yacht Assist, Inc. v. CRP LMC PROP Co., Case No. 4D22-523 (Fla. 4th DCA 2022).

A trial court commits error when it permits counsel to withdraw without staying the case to allow retention of new counsel, immediately conducts a case management conference, and dismisses the case of plaintiff whose counsel was permitted to withdraw.

Solomon v. Shands Teaching Hospital and Clinics, Inc., Case No. 1D21-2523 (Fla. 1st DCA 2022).

Shand Teaching Hospital, being controlled by an instrumentality of the State of Florida, i.e., the University of Florida system, is exempt from ad valorem taxation.

Commons v. Spracklen, Case No. 2D20-2081 (Fla. 2d DCA 2022).

A prima facie case for an attorney’s charging lien is set forth by alleging a contract between the attorney and client, an understanding that payment will come from recovery, an attempt to avoid payment or a dispute over the amount of the fee, and timely notice; a co-counsel withholding a portion of joint settlement funds satisfies the third element of the claim.

Iemma v. Heichberger, Case No. 4D21-3149 (Fla. 4th DCA 2022).

An affidavit alleging facts constituting equitable estoppel, i.e., that the lender and borrower agreed to not sue borrower on a defaulted promissory note, is sufficient to defeat a statute of limitations argument for summary judgment by the borrower.

Vessels v. Dr. Terrazzo of Florida, LLC, Case No. 5D22-879 (Fla. 4th DCA 2022).

On the job training must be “specialized” or “extraordinary” in order in order to qualify as a “legitimate business interest” capable of sustaining an employment restrictive covenant.

Casto v. First Coast Cardiovascular Institute, P.A., Case No. 1D21-3506 (Fla. 1st DCA 2022).

A settlement agreement which reserves the right to attorney’s fees controls over a proposal for settlement that may not be effective.

James v. Highland Lakes Owners Association, Inc., Case No. 1D22-0526 (Fla. 1st DCA 2022).

A trial court cannot use “equitable grounds” to award attorney’s fees to a third-party purchaser in litigation arising from a contested foreclosure sale.

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Did Warhol Transform Prince? A Reader Survey on Copyright Fair Use

By
Gerard E. Reinhardt
Reinhardt IP, PA

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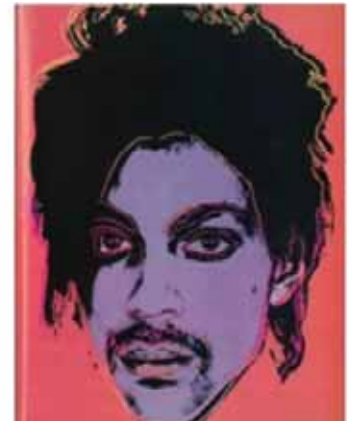
How close is too close?

That question can arise in a number of situations, including shaving, hatchet throwing competitions and war games. It often arises in the context of Intellectual Property disputes. For example, in patent matters, the proximity of the claimed subject to prior art and to an accused device arises in questions of obviousness and infringement under the doctrine of equivalence, respectively. In cases of trademark infringement, the inquiry addresses whether the accused mark is so close to the challenging mark as to have caused the likelihood of confusion in consumers regarding the source of the goods or services. In the context of copyright law, the issue can arise when an artist uses a copyrighted work as an artist's reference for his¹ own work. A case pending before the US Supreme Court starkly illustrates the issues and ironies that can arise when a graphic artist uses a photograph whose copyright is owned by another as an artist's reference. The battle is not a mundane question regarding the facts (what was done), but rather the more ethereal inquiry into how the courts should analyze the facts in view of the law.

Factual Background

In 1981 Lynne Goldsmith, a noted photographer of numerous rock, jazz and R&B performers, took a series of black-and-white studio portrait photographs of the then-emerging rock star known as Prince. Then in 1984, Conde Nast paid a \$400 fee for a license to use one of the photographs ("the Goldsmith photograph") as an artist's reference, and commissioned Andy Warhol to create a full color illustration based on the licensed photograph for an article titled "Purple Fame", which was ultimately published in the November 1984 issue

of Vanity Fair magazine (which was owned by Conde Nast).



The Goldsmith Prince Photograph and Warhol's Purple Fame Image

Based on the photograph, and without taking a further license from Goldsmith, Warhol then created the "Prince Series" comprising sixteen distinct works including the one used in the Vanity Fair magazine article. Twelve of the works are silkscreen paintings, two are screen prints on paper and two are drawings. The Andy Warhol Foundation for the Visual Arts, Inc ("AWF") acquired ownership rights of the Prince Series from the Warhol estate after Warhol died in 1987

Warhol's Prince Series

After Prince died in 2016, Vanity Fair published an online copy of its 1984 "Purple Fame" article, and subsequently issued a commemorative magazine titled "The Genius of Prince" with one of the images from Warhol's Prince Series. Without taking a license from Goldsmith, AWF proceeded to make each of the Prince Series works available for magazines, newspapers and for other merchandizing purposes

¹ In the avoidance of giving any reason for social dyspepsia, and without sacrificing clarity or focus, pronoun genders are used in an alternating pattern.



Goldsmith first learned that Warhol created the Prince illustration for *Vanity Fair* after Prince's death in 2016. She advised AWF that she believed the *Condé Nast* magazine cover infringed one of her Prince photograph copyrights, and subsequently filed a copyright registration application for the Goldsmith Prince Photograph as an unpublished work. AWF filed in the Southern District of New York a request for a declaratory judgment declaring that none of the sixteen works in the Prince Series infringes the copyright of the Goldsmith Prince Photograph, claiming that the Prince Series works are not substantially similar to the Goldsmith Prince Photograph and, in any event, the Prince Series works are protected by the fair use doctrine. Goldsmith counterclaimed for summary judgment denying AWF's request for a declaratory judgment and holding that the Prince Series works infringe the copyright of the Goldsmith Prince Photograph.

Copyright Law

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, and works of authorship include pictorial and graphic works. 17 USC §102(a). Within the bundle of rights included in a copyright

grant are protections of derivative works. 17 USC §103. A derivative work is a work based upon one or more preexisting works. 17 USC §101.

Copyright infringement generally occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner. 17 USC §§ 106, 501.

Photographs are generally considered creative works that merit copyright protection. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884); The protectible, original elements of a photograph include "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any other variant involved." *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992). But "aspects of [a photograph] that necessarily flow" from the photograph's idea or the photographer's "choice of a given concept" are not protectible. *Bill Diodato Photography, LLC v. Kate Spade, LLC*, 388 F. Supp. 2d 382, 392 (S.D.N.Y. 2005).

To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991). The copying of the second element must be unlawful based on the existence of a "substantial similarity" between the allegedly infringing works and the protectible elements of the copyrighted work. See *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996, 1002 (2d Cir. 1995).

"Fair use" is a statutory exception to copyright infringement. 17 U.S.C. § 107. The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work. *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 560-61 (1985). Courts often apply the term "transformative" to accused works that meet their ideals of fair use.

The Southern District of New York found that the Prince works were transformative and within the fair use defense, and hence dismissed Goldsmith’s infringement claim. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382 F. Supp. 3d 312, 316 (S.D.N.Y. 2019). On appeal, the Second Circuit reversed and remanded for further proceedings on remedies. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 2021 (2d Cir. N.Y., Mar. 26, 2021). AWF filed a petition for certiorari, which was granted. Oral arguments were held before the US Supreme Court in October 2022. For a review of the analyses employed by the district and appellate courts, see the full review article on my website at <https://reinhardtIP.com/>.

Practice Tips

Advise your artist clients, as follows:

If using an artist’s reference as the basis for a secondary work (in this case the Goldsmith photograph), either create the artist reference yourself, or commission another to do so under a work-for-contract. This will secure the copyright of the original work to your client.

Short of this, obtain a broad license to use the original artist reference materials from the owner of the copyright of the original work.

In the absence of a copyright or license, add sufficient elements to the secondary work to push it over the line from derivative to fair use. Merely removing some elements found in the original and amplifying others may not be sufficient. In this case, the Second Circuit found that the loud colors that Warhol applied were insufficient to achieve this goal. Although the Second Circuit denied setting a bright line rule, it is safer if the original work is not immediately identifiable in the secondary work. Merely adding sufficient elements to allow identification of the secondary work as being that of your client may be insufficient.

As these can be somewhat esoteric questions, it may be advisable to confer with counsel experienced in copyright matters.

Reader Survey

In recognition of the gaping disparities in the decisions of the well-informed district and appellate courts here, I thought it would be interesting to poll the readers of this article on their conclusions regarding the fair use issue raised.

(A) Are Warhol’s works “derivative works” within the scope of Goldsmith’s copyright on the photo (opening AWF to potential liability for damages to Goldsmith)?

or,

(B) Are Warhol’s works sufficiently “transformative” to come within the “fair use” defense (in which case Goldsmith takes naught)?

or,

(C) Among the Warhol works, are the black-and-white works derivative works, and the brightly colored works fair uses?

Transmit your answer to me at the email address below, with comments if you choose. Insert “Warhol Survey Result” in the title line. I will report results of this very unscientific poll in a future article, and perhaps (without attribution) in an amicus curiae brief.

Gerard@ReinhardtIP.com
Call or text: 772-972-2228



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- 1. Have Current Fla Bar CLE Programs to Donate; or**
- 2. Want to Inquire into available discounts and special offers for administrative programs; or**
- 3. Would like to join our Legal Resources Committee, please email: Christine Moreno at Moreno4Law@Gmail.Com; or Call Christine at (772) 485-6767.**

Thank you everyone for all your support to our Martin County Bar.
Best Wishes to all for a Happy, Healthy and Prosperous New Year.

Christine Moreno

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.

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



19th Judicial Circuit Court of Florida

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

www.circuit19.org

Emergency Hotline / Info: 772.742.9229

Visit

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

19th 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

Click on link at the bottom of the page.

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
<h1>February 2023</h1>						
5	6	7	8	9	10	11
			1 SideBar Articles Due	2	3	4
12	13	14 Valentine's Day MCBA Officers' Meeting	15	16	17 MCBA Luncheon @ Monarch CC (11:30 am)	18
19	20 President's Day	21	22 Ash Wednesday	23 MCWLA Luncheon 11:45 am @ Berry Fresh	24	25
26	27	28			SAVE THE DATES: March 24, 2023: MCBA Monthly Luncheon April 22, 2023: Race to the Courthouse 5K May 13, 2023: MCBA Sobel Cup Golf Tournament May 20, 2023: MCBA Annual Installation Banquet See martincountybar.org for full 2022-23 Calendar including committee meetings, holiday a& Courthouse closings	



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

Please join us for MCBA's CLE Monthly Meeting, Friday, February 17, 2023

- When: Friday, February 17, 2023
11:30 a.m. networking; 12:00 p.m. lunch
- Where: Monarch Country Club
1801 SW Monarch Club Drive, Palm City
- Menu: Minestrone Soup; Black & Blue Chicken Salad: Blackened Chicken, Tomato Wedges, Walnuts and Red Onion on Mixed Greens, Blue Cheese Crumbles (on the side) and Dressing; rolls with Butter; Italian Lemon Cake
- Speaker: Edwin Bell, Director of Racial Justice, Equity & Inclusion
National Center for State Courts
- CLE: 1.0 General CLE; 1.0 Bias Elimination CLE

RSVP to: martincountybarassociation@msn.com
No later than Friday, February 10, 2023

PLEASE BE SURE TO RSVP TO EXPEDITE ACCESS AT THE GATE

*There is no charge for paid MCBA members. Guests are welcome;
a \$35 guest fee may be paid at the luncheon (cash or check only).*