

# BROWARD COUNTY BAR ASSOCIATION BARRISTER

FEBRUARY 2014

**Diana I. Castrillon, Esq.**  
**BCBA Workers' Compensation 2014 Event Chairperson**  
**See Page 8 for Event Information**



SERVING THE CITIZENS AND LEGAL COMMUNITY OF BROWARD COUNTY SINCE 1925

## DEBTOR & CREDITOR RIGHTS

- Corporate Financial Restructuring
- Bankruptcy and Insolvency
- Commercial Loan Restructuring and Foreclosure Litigation

Rice Pugatch Robinson & Schiller, P.A.

### Experience. Creativity. Results.

Rice Pugatch Robinson & Schiller, P.A. provides its clients with a sophisticated commercial legal practice by offering practical litigation and transactional solutions to the complicated legal problems encountered in today's marketplace. The firm offers its clients representation in matters of creditor rights, bankruptcy, insolvency, business reorganizations, commercial litigation, real estate, commercial transactions, as well as trusts, estates and guardianships.

[www.rprslaw.com](http://www.rprslaw.com)

101 N.E. Third Avenue, Suite 1800, Ft. Lauderdale, FL 33301

954-462-8000 ● 305-379-3121

"The hiring of a lawyer is an important decision that should not be based solely upon advertisement. Before you decide, ask us to send you free written information about our qualifications and experience."

## BROWARD COUNTY BAR ASSOCIATION

### *Recognizes 100% Membership Club*

\*\*For firms with 5 attorneys or more\*\*

Berman, Kean & Riguera, P.A.  
Billing, Cochran, Lyles, Mauro & Ramsey, P.A.  
Brinkley Morgan  
Broad & Cassel  
Bunnell & Woulfe, P.A.  
Catri, Holton, Kessler & Kessler P.A.  
Chimpoulis, Hunter & Lynn, P.A.  
Coast to Coast Legal Aid of South Florida  
Cole, Scott, and Kissane  
Colodny, Fass, Talenfeld, Karlinsky, Abate & Webb  
Cooney Trybus Kwavnick Peets, PLC  
Doumar, Allsworth, Laystrom, Voigt, Wachs, Adair, & Bosack, LLP  
Fazio, DiSalvo, Cannon, Abers, Podrecca, Fazio & Carroll  
Ferencik, Libanoff, Brandt, Bustamante, & Goldstein, P.A.  
Fowler White Boggs, P.A.  
Fowler, White, Burnett, P.A.  
Gladstone & Weissman, P.A.  
Goldstein Law Group  
Gray Robinson, P.A.  
Green, Murphy & Murphy, P.A.  
Haliczer, Pettis & Schwamm, P.A.  
Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A.  
Keller Landsberg  
Kelley Uustal  
Kim Vaughan Lerner LLP  
Kirschbaum, Birnbaum, Lippman & Gregoire, PLLC  
Law Firm of Gary M. Singer, P.A.  
Law Offices of Sheldon J. Schlesinger, P.A.  
Legal Aid Service of Broward County  
MacLean & Ema  
May, Meacham & Davell, P.A.  
McIntosh, Sawran & Cartaya, P.A.  
Moody, Jones, Ingino & Morehead, P.A.  
Panza, Maurer, & Maynard, P.A.  
Phillips Cantor Shalek & Rubin, P.A.  
Rogers, Morris & Ziegler, LLP  
Walton, Lantaff, Schroeder & Carson, LLP  
Wicker, Smith, O'Hara, McCoy and Ford, P.A.



# **CRIMINAL DEFENSE, DUI, TRAFFIC All Federal And State Courts 150+ YEARS COMBINED EXPERIENCE**



**A+**

**Rated A+  
by The Better  
Business Bureau**

**Attorney  
John Musca**

Selected Super Lawyers® 2012  
Mutual Referrals?  
Email: [john@muscalaw.com](mailto:john@muscalaw.com)

**MUSCA LAW**  
**954 302-5391**

**521 S. ANDREWS AVE. SUITE 11  
FT LAUDERDALE, FL 33301**

## Staff Box

### PUBLISHER

Broward County Bar Association  
954.764.8040

### PUBLICATIONS & PUBLICITY COMMITTEE

Edwina V. Kessler, Co-chairperson  
Laura Varela, Co-chairperson

### EXECUTIVE EDITOR

Braulio N. Rosa  
braulio@browardbar.org

### LAYOUT AND PRINTING

Park Row Printing

### MEDIA MANAGER

Bonnie H. Ross  
bonnie@browardbar.org  
954.817.7032

### CONTRIBUTING WRITERS

Diana I. Castrillon  
Rick Ellsley  
Nancy Little Hoffman

### BILLING INQUIRIES

954.764.8040 Ext. 201

The Barrister is published monthly by the Broward County Bar Association. All editorial, advertising and photos may be submitted for consideration through email to: [braulio@browardbar.org](mailto:braulio@browardbar.org) We reserve the right to reject any ad for any reason.

We make every effort to ensure the accuracy of the information published, but cannot be held responsible for any consequences arising from omissions or errors. Opinions expressed by our writers and advertisers are not necessarily opinions shared by the BCBA or the Barrister.

### ON THE COVER:

Diana I. Castrillon, Esq. is the BCBA Workers' Compensation Section Chair and Chairperson of the February 28, 2014 Workers' Compensation Event taking place at the Riverside Hotel in Fort Lauderdale.

## inside this issue

**5 Letter from the President**  
*Alan S. Fishman*

**7 Young Lawyers' Section Letter from the President**  
*Marissa J. Pullano*

**9 The Rise and "Phal" of the Workers' Compensation System**  
*Diana I. Castrillon*

**14 Independent Contractor**  
*Rick Ellsley*

**17 Recent Developments in The Law**  
*Nancy Little Hoffman*

**20 Calendar of Events**



For information on upcoming events, please check out:  
[www.browardbar.org/calendar/](http://www.browardbar.org/calendar/)



## 2013 - 2014 BCBA Officers

Alan S. Fishman - President  
John G. Jordan - President Elect  
Robin S. Moselle - Treasurer  
Charles A. Morehead, III - Secretary  
Deborah FitzGerald - Past President  
Braulio N. Rosa - Executive Director

### BOARD OF DIRECTORS

#### NORTHEAST

Michael Kean  
Thomas Oates  
Jerome R. Siegel

#### NORTHWEST

Gary Landau

#### WEST

Donald E. Fucik  
Gary M. Singer  
Russell M. Thompson

#### CENTRAL

Michael A. Fischler  
Jeffrey Harris  
Jose Izquierdo  
Edwina V. Kessler  
Jay Kim  
Michael Leader  
Steve Lubell

#### SOUTHWEST

Kenneth P. Hasssett

#### SOUTHEAST

Anita Paoli  
Jeffrey Solomon  
Laura Varela

### JUDICIAL REPRESENTATIVE

The Honorable Jeffrey R. Levenson

### EXECUTIVE DIRECTOR

Braulio N. Rosa

### Broward County Bar Association

1051 SE 3rd Avenue  
Fort Lauderdale, FL 33316  
954.764.8040

## letter from the president



*Alan S. Fishman*

In the past few weeks, we have again been reminded that events which happen in people's personal lives become newsworthy when they happen to those in the public spotlight. This is particularly so when public occurrences happen in the lives of judges. Most of the public has little knowledge about our judiciary other than what they read in the newspaper or see on television news. Unless a person has interacted personally with a judge outside the courtroom, has been a juror, has had a problem resolved in court, or is a lawyer who appears in court, it is unlikely that he or she

would have contact with a judge. As a result, his or her knowledge about judges comes from these public sources. This exposure is usually negative since negative events are more newsworthy than positive ones.

As attorneys our knowledge of our judges and their characters are very different. We know that there are ninety people who go to our courthouses every day, put on their robes, and work very hard to make sure that the citizens of Broward County receive justice in many different ways. We know that our judges are dedicated, caring, conscientious people. Outside the courtroom, most of them are involved in the community, their houses of worship, and charities.

We all receive calls from our friends and relatives before every judicial election asking our opinion about the candidates. We have a responsibility to use the respect those around us give us for our knowledge of the legal world to educate them not just about which judge to vote for but, even more so, to provide them with an understanding about how our court system and its judges provide the orderly resolution to the problems and disputes critical to the very existence of our democracy.

The next time someone asks you or you overhear someone speaking about a negative incident, use it as an opportunity to describe the positive things you see every day in the courthouse. When you are at a party, talk about something interesting and positive you saw in court. Ask to give a speech to your religious community or the civic organizations to which you attend about ways you participate in the legal system and the good things that our judges do in their courtrooms.

Our courts and judges are not without flaws, but we have the responsibility and the opportunity to influence the public awareness of the overwhelmingly greater positive attributes of our judicial system and its judges as individuals.

**B**





**Mark Anderson**  
Fort Myers



**Darren Farfante**  
Tampa



**Kendra Gaugush**  
Tampa



**Sarah Lahlou-Amine**  
Tampa



**Marilyn Miller**  
Fort Myers



**David Potter**  
Fort Myers



**Sean Sullivan**  
Fort Lauderdale

Fowler White Boggs would like to congratulate

**Mark Anderson, Darren Farfante, Kendra Gaugush,  
Sarah Lahlou-Amine, Marilyn Miller, David Potter & Sean Sullivan**

for achieving the rating of AV Preeminent® from LexisNexis Martindale-Hubbell®

**They join a total of 55 attorneys at Fowler White Boggs with the rating of AV Preeminent®**

The AV Preeminent® rating is the highest possible rating given by LexisNexis Martindale-Hubbell® Peer Review for a lawyer and is established wholly on a peer-review basis.

LexisNexis Martindale-Hubbell® conducts peer review ratings throughout the country in an effort to identify and recognize lawyers with the highest legal ability and ethical standards. To qualify as AV Preeminent®, a lawyer's expertise, experience, integrity and overall professional excellence must be rated at the highest level by lawyers and members of the judiciary.



(954) 703-3900 • [www.fowlerwhite.com](http://www.fowlerwhite.com)

Commercial Litigation | Corporate | Economic Development & Real Estate | Employment | Government | Immigration | Wealth Preservation  
Tampa | Fort Myers | Tallahassee | Jacksonville | Fort Lauderdale  
Adele L. Stone, Fort Lauderdale Office Managing Shareholder

## Exclusive Bar Members Incentive Program

*Turn your daily commute  
into a guilty pleasure...*



# ALPINE JAGUAR

**Philip Franchina**  
General Sales Manager  
[pfranchina@alpinejaguar.com](mailto:pfranchina@alpinejaguar.com)

West Cypress Creek Road  
6606 North Andrews Avenue • Fort Lauderdale, Florida 33309  
Ph: 954.598.7900 • [www.alpinejaguar.com](http://www.alpinejaguar.com)

**Damian Polgar**  
Executive Direct Sales  
Cell: 954.609.6621  
Direct: 954.202.8304  
TF: 800.493.0851  
[dpolgar@alpinejaguar.com](mailto:dpolgar@alpinejaguar.com)

## 2013-2014 BCBA Young Lawyers' Section

### OFFICERS

Marissa Pullano - President  
Liza Smoker Faw - President Elect  
Tobi Lebowitz - Treasurer  
Jeffrey M. Wank - Secretary  
Meghan Clary - Past President

### BOARD OF DIRECTORS

Jamie D. Alman  
Lauren M. Alperstein  
Todd L. Baker  
Eric S. Rosen  
Sara M. Sandler  
Jonathan H. Stief  
Lindsay M. Timari  
Anthony H. Quackenbush  
Cherie Smith Valbrun  
Drew Vogt  
Kelly M. Vogt  
Stacy R. Weissman

### JUDICIAL REPRESENTATIVES

The Honorable Stacy Ross  
The Honorable Cynthia Imperato

## Florida Bar Board of Governors 17th Judicial Circuit

Walter G. "Skip" Campbell  
954.763.8181

Lorna E. Brown-Burton  
954.463.8322

Jay Cohen  
954.763.6939

Adam Glenn Rabinowitz  
954.764.7060

Diana Santa Maria  
954.434.1077

**Broward County Bar Association**  
1051 SE 3rd Avenue  
Fort Lauderdale, FL 33316  
954.764.8040

## letter from the young lawyers' president

### Marissa J. Pullano, President

The Broward County Bar Association Young Lawyers Section is grateful for the support of our judiciary throughout the year, especially their continuous support of our quarterly "Breakfast with the Judiciary" event. We would like to congratulate Judges Stacy Ross and Giuseppina Miranda who were recently robed in the Seventeenth Judicial Circuit. We would also like to thank the Judges who attended our January 31st Breakfast.

I also want to thank Chief Judge Peter Weinstein, who gave the annual "State of the Circuit Address" at our January luncheon at the Tower Club. We appreciate your informative presentation Judge Weinstein, and as always, thank you for your assistance in helping our circuit grow and advance.

Our next luncheon will be on February 14th and it is our Black History Month Luncheon featuring Florida Bar President, Eugene K. Pettis. Mr. Pettis is the first African American to serve as the President of the Florida Bar, and he will be sharing his story and speaking about raising the bar. YLS will be co-hosting this luncheon with the T.J. Reddick Bar Association and the Caribbean Bar Association. The luncheon will begin at noon at the Tower Club, and the cost to attend is \$25 per person with prepayment or \$30 at the door. You may RSVP to the Broward Bar at 954-764-8040 or visit [www.browardbar.org](http://www.browardbar.org) and click on the upcoming events calendar. You do not want to miss this event, so please RSVP early!

We have several exciting events and initiatives happening in the Month of March so please stay tuned to our listserve emails and announcements. As a preview, on March 13th, the Young Lawyers Section will be hosting a happy hour with NEXT, the Legal Aid Society of Broward County's Young Professionals Group. Location is to be determined, but please mark your calendars. We will also host former Judge Mark Purdy at the Tower Club on March 20th for our March Luncheon on the informative topic of recovery of Attorneys Fees and Costs. CLE credit is available for this luncheon.

Finally, in March the Young Lawyers Section will launch our Broward Young Lawyers for Literacy Project which is in collaboration with the School Board of Broward County and spear headed by Judge Robert F. Diaz and Cherine Smith Valbrun, Esq., Pro Bono Committee Chair of the Young Lawyers Section. This program will connect the Broward Young Lawyers for Literacy with early childhood programs in three local elementary schools (Martin Luther King Elementary, Riverland Elementary, and Stephen Foster Elementary) and two local early childhood centers (Lauderdale Manors Early Learning and Resource Center and Salvation Army Adult Education Program). Volunteers will be assigned as guest readers in the Pre-K and Kindergarten classrooms and through a partnership with Broward's Reading is Fundamental ("RIF") campaign, all students in the volunteers' classes will be provided an age-appropriate book of their choice to take home and keep after the guest reading experience. The commitment is 2 hours per month from March through May. If you are interested in participating in the Broward Young Lawyers for Literacy Project, please contact me by February 28, 2014 at [marissa.pullano@brinkleymorgan.com](mailto:marissa.pullano@brinkleymorgan.com) or 954-522-2200. We would be grateful for our Section and the community's support as we support the literacy incentives of Broward County Public Schools. Through the implementation of this project, we hope to serve over 500 children throughout Broward County. Please join us in this worthwhile endeavor.

Lastly, since May is just around the corner, it is not too early to calendar one upcoming major YLS event. We will host our annual Judicial Reception on Thursday, May 15th from 5:30 p.m. to 7:30 p.m. at the New River Center Rotunda. For information on sponsoring and/or attending this event, please visit our website [www.browardbar.org/yls](http://www.browardbar.org/yls) or contact me directly.

As always, if anyone has any questions about joining YLS or to learn more information about YLS and our events, please feel free to call me at 954-522-2200 or email me at [marissa.pullano@brinkleymorgan.com](mailto:marissa.pullano@brinkleymorgan.com). You can also find a calendar of our events on the Broward County Bar Association web site at [www.browardbar.org/yls](http://www.browardbar.org/yls). **B**

We're excited to become  
the exclusive sponsor of  
the Broward Bar.



**THE EPPY GROUP**  
EXPERIENCE AN **EPIPHANY**


954-689-9476

Follow Us



[theeppygroup.com](http://theeppygroup.com)

**Scott J. Brook, P.A.**



954.757.5551

A caring Coral Springs law firm dedicated to helping with the challenges of divorce, child custody, wills, and other aspects of family law, elder law, and workers' compensation. Serving Coral Springs, Greater Fort Lauderdale, and Broward County.

**Congratulations**  
**Judge Stacy Ross**  
**&**  
**Judge Guiseppina Miranda**  
**from the**  
**Family Law Firm of**  
**Scott J. Brook, P.A.**

## Workers' Compensation 2014

Updates and Strategies for the  
Workers' Compensation Practitioner

**Location:** Riverside Hotel – Fort Lauderdale

**Registration Fee:** \$75 for BCBA Members; \$90 for Non-Members

**Key Note Speaker:** Eugene Pettis, Florida Bar President

**Topics:** Application of Daubert to Workers Compensation matters, Points of Discussion on Medical Issues (constitutionality of EMAs, ex parte conferences, NCMs, etc.), overview on vocational rehabilitation, case law update, and Q&A with the Broward JCCs.

*Lunch will be provided; A complimentary cocktail reception will follow  
CLE will be available as well as board certification credits.*

**Sponsorship Opportunities Available**

**Register TODAY! Contact Us.**

**[www.browardbar.org](http://www.browardbar.org) • [bonnie@browardbar.org](mailto:bonnie@browardbar.org)**



# The Rise and “Phal” of the Workers’ Compensation System

By: Diana I. Castrillon, Esq.

In February 2013, a three-judge panel of the First District Court of Appeals, in the case of *Westphal v. City of St. Petersburg*, 2013 WL 718653 (Fla. 1st DCA 2013) ruled that a portion of the Florida Workers’ Compensation statute was unconstitutional. Specifically, the Court held:

“... that section 440.15(2)(a), Florida Statutes, is unconstitutional as applied to the extent that it limits entitlement to temporary total disability benefits to 104 weeks, and we revive the repealed portion of the statute to allow for entitlement temporary total disability benefits in an amount not to exceed 260 weeks.”

This was a monumental ruling in Florida where the words “unconstitutional” and “Worker’s Compensation” had not met in many, many years.

However, the powerful language of that original *Westphal* decision would quickly be replaced with an *en banc* decision from a strongly divided First District Court of Appeals, in an 18-page majority opinion, followed by 58-pages worth of heated dissents. This *en banc* decision came out on September 23, 2013. In the September ruling, the First DCA receded from the February 2013 opinion and reaffirmed the validity of the Florida Workers’ Compensation law. The *en banc* decision further stated that the 104 week cap on Temporary Total Disability benefit is constitutionally sound – a complete contradiction to their earlier holding.

In reaching this sharply contrasting opinion, the Court even receded from an earlier *en banc* ruling in 2011 in the matter of *Matrix Employee Leasing, Inc. v. Hadley*, and ruled that, at the expiration of 104 weeks of Temporary Total Disability benefits, a claimant is eligible



to receive Permanent Total Disability Benefits as a so-called “temporary PTD benefit.”

The original *Westphal* decision had such rich and powerful language, that it provided for summary challenges to the constitutionality of many aspects of the Florida Workers’ Compensation system. Judge Wetherell, in his dissent to the original opinion, stated that the ruling “could have led to the incremental dismantling of the entire workers compensation system.”

However, despite the differing opinions, the *en banc* Court in *Westphal* did certify a question to the Florida Supreme Court as a “matter of great public importance.” Specifically, they certified the following question:

“Is a worker who is totally disabled as a result of the work place accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?”

Based on this question, on October 8, 2013, the Claimant filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida followed by the City of St. Petersburg filing a Cross

Notice of Invoke Jurisdiction on October 21, 2013. On December 9, 2013, the Supreme Court accepted jurisdiction and designated the case as “high profile.” Technically, the question that was certified to the Supreme Court did not go to the constitutionality of the statute; however, the Supreme Court can still consider constitutional issues. It is highly likely that the Claimant will argue against the constitutionality of the statute as applied in the hope that the Court will put back some of the language from the initial February 2013 panel decision in *Westphal*. However, it is impossible to gauge whether the Supreme Court will give any consideration to the constitutional issues. With oral arguments scheduled and briefs being submitted, Workers’ Compensation practitioners await action from the Supreme Court.

The Workers Compensation Section of the Broward County Bar Association will be holding its annual educational seminar where the status of this case will be discussed. In addition, a complete case law update, discussion with the local Judges of Compensation Claims, and other practical matters will be covered. Stay up-to-date on the latest Workers Compensation issues, on Friday, February 28, 2014, starting at 11:30 am at the Riverside Hotel in Fort Lauderdale. For more information and to register, visit [www.browardbar.org](http://www.browardbar.org). **B**



Ms. Castrillon handles cases in the areas of Workers’ Compensation and Personal Injury Protection. She obtained her undergraduate degree from the University of Florida, and her J.D. from Nova Southeastern University in 2001. Diana is AV-rated by Martindale Hubbell. She is the current chair of the Workers Compensation section of the Broward County Bar Association and the Educational Chair for the Florida Worker’s Advocates.

## Upchurch Watson White & Max *announces its new Broward County office*



**Royal Palm II at Southpointe, Suite 410**

**900 South Pine Island Road, Plantation**

***One of four offices now serving South Florida***

**MEDIATION | ARBITRATION | E-DISCOVERY | SPECIAL MASTERS**

Solely Focused on Conflict Resolution in Florida, Alabama and Nationwide

CALL: 800-863-1462 | READ MORE & SCHEDULE: [WWW.UWW-ADR.COM](http://WWW.UWW-ADR.COM)



[linkedin.com/company/upchurch-watson-white-&-max](https://www.linkedin.com/company/upchurch-watson-white-&-max)



[www.facebook.com/UWWMMediation](https://www.facebook.com/UWWMMediation)



[@UWWMMediation](https://twitter.com/UWWMMediation)

## THE BROWARD COUNTY BAR ASSOCIATION

*thanks its Annual Sponsors*

Alpine Jaguar

The Arias Law Group

Boss Certified Realtime Reporting

Broad & Cassel Attorneys at Law

Ellsley Sobol Attorneys at Law

The Eppy Group

Fiske and Company

Florida Mutual Lawyers Insurance Company

Florida Power and Light

Lexis Nexis

Sabadell Bank

**Three executive offices** available with secretarial stations for lease in prestigious, high end Plantation location. Furnished and unfurnished available. Five conference rooms. Free Parking – Easy drive to Courthouse. Call Mary Krevalin @ 954-474-8000.



**Bonnie Ross**  
**BCBA Media Manager**  
**[bonnie@browardbar.org](mailto:bonnie@browardbar.org) • (954) 817-7032**



# 2014 JUDICIAL ROBINING PHOTOS



# FOR MODERN TIMES, A CLASSIC BANK.<sup>TM</sup>

formoderntimes.com

**Sabadell<sup>SM</sup>** 

Frank Wagner  
(954) 768-5972

Bruce Hecker  
(954) 768-5971

COMMERCIAL BANKING | INTERNATIONAL BANKING | PRIVATE BANKING | WEALTH MANAGEMENT

Sabadell<sup>SM</sup> is a service mark of Banco de Sabadell, S.A. used by Sabadell United Bank, N.A., a subsidiary of Banco de Sabadell, S.A., and by Banco Sabadell, Miami Branch, a Florida International branch of Banco de Sabadell, S.A. Sabadell United Bank, N.A., is a member FDIC and an Equal Housing Lender. Deposits at Banco Sabadell, Miami Branch are not FDIC-insured. Advisory services include advice on non-deposit investment products which are NOT FDIC-INSURED - MAY LOSE VALUE - NOT BANK GUARANTEED. © 2012 Banco de Sabadell, S.A. All rights reserved.



**We're changing Florida's  
energy today to create a better  
tomorrow for all of us.**

[www.FPL.com](http://www.FPL.com)

CHANGING THE CURRENT...  **FPL**

[www.ExquisiteCatering.com](http://www.ExquisiteCatering.com)

*Exquisite  
Catering  
By Robert*

Exquisite Catering offers a wide variety of catering services to meet all your event needs. No event is too big or too small.



SERVING MIAMI-DADE & BROWARD COUNTIES

**305-622-FOOD (3663)**

***Exquisite Events Every Time!***



## **Coral Springs Office Space First Month Rent FREE**

University Drive across from "The Walk". Two professionally decorated window offices (11x14 and 10x14) with available workstations. Shared reception area, kitchen and conference room. Will rent individually. Starting at \$800/month.

**Contact Mark Abzug, Esq.**

**(954) 753-1003 • [mabzug@coralspringslaw.com](mailto:mabzug@coralspringslaw.com)**



## We thank our 2014 Judicial Robing Ceremonies Event Sponsors

### Event Sponsor

CONRAD & SCHERER  
ATTORNEYS AT LAW

### Gold Sponsors

Berger Singerman  
Cole, Scott & Kissane, P.A.  
Greenberg Traurig, PA  
Haliczer Pettis & Schwamm, P.A.  
NSU Shepard Broad Law Center  
Scott J. Brook P.A.

### Silver Sponsors

Shutts & Bowen LLP  
Waldman Trigoboff Hildebrandt Marx & Calnan, P.A.

### Dessert Reception Sponsor

Broward County Women Lawyers' Association



Judges Giuseppina Miranda and Stacy Ross being sworn in by Judge Sharon Zeller at the 2014 Judicial Robing Ceremonies hosted by the BCBA.

*Berger Singerman  
proudly supports*

## The Broward County Bar Association

**BERGER SINGERMAN**  
FLORIDA'S BUSINESS LAW FIRM

BOCA RATON 561-241-9500 | FORT LAUDERDALE 954-525-9900

MIAMI 305-755-9500 | TALLAHASSEE 850-561-3010

[WWW.BERGERSINGERMAN.COM](http://WWW.BERGERSINGERMAN.COM)

No need to object!

More rare than a diamond.

6.67Ct Tanzanite gold and diamond pendant exclusive at Carroll's Jewelers.

**CARROLL'S**  
Jewelers

915 E Las Olas Blvd Fort Lauderdale, FL 33301  
[www.Carrollsjewelers.com](http://www.Carrollsjewelers.com)  
954.463.3711

# Independent Contractor – Is He or She Legally “Independent”... or even a “Contractor”?

By: Rick Ellsley  
Ellsley Sobol, P.L.

A large and powerful corporation makes a financial decision to use a third party to provide services that it owes your client pursuant to a contract. Using a third party, non-employee is a widespread practice of most corporations and this one is no different. Your client has no idea that the services it will receive are not from an actual employee of the corporation but from a guy that the corporation paid money to in order to provide the promised services to your client. The third party is negligent and that negligence results in your client suffering a traumatic brain injury. Pretty scary, huh? It gets worse.

You send a notice of representation in which you provide some basic facts regarding the corporation's liability and your client's injuries. In response, you receive a letter from the corporation's lawyer which asserts that the guy who negligently brain injured your client was never an employee, but just an *independent contractor*, and of course, the guy has *no liability insurance coverage*. The letter attaches a copy of the 2 page agreement between the corporation and the guy who did the work. The phrase “*independent contractor*” is mentioned 10 times in the agreement.

In drafting your complaint against the corporation and the bad actor, you should thoroughly review **Florida Standard Jury Instruction 402.9** and the case law related to it. Fla. Std. Jury Inst 402.9 provides a good start in determining the law regarding negligent selection, hiring, and retention of an independent contractor and also details the legal requirements to prove that the bad actor was either an actual agent or an apparent agent of the corporation for which the corporation is then vicariously liable.

**Florida Standard Jury Instruction 402.9** reads in relevant part as follows:

*a. Agency*

(1) *Employment, including independent contractor and exceptions:*

....

**A person is, however, responsible for the**



**negligence of an independent contractor if [the independent contractor is an [actual] [or] [apparent] agent of that person], [the employer did not exercise due care in the [selection] [or] [retention] of the independent contractor] [or] [the employer undertook to perform the services resulting in injury to (claimant).] \***

\*The bracketed language contained in the last two paragraphs is only to be used when there is a claim of independent contractor status. See *Carlisle v. Carnival Corp.*, 864 So.2d 1 (Fla. 3d DCA 2003); *Villazon v. Prudential Health Care Plan, Inc.*, 843 So.2d 842 (Fla. 2003). If an exception to the independent contractor status is claimed, then the applicable portions of the following provisions should also be given.

**[(Name) is an agent if (defendant) authorized [him] [her] to act on (defendant's) behalf.] [(Name) is an apparent agent if, by words or conduct, (defendant) caused or allowed (claimant) to believe that (name) was an agent of and had authority to act for (defendant).] A person is responsible for the negligence of [his][her] independent contractor if, at the time and place of the incident, the independent contractor was an [agent] [or] [apparent agent] of the employer and was acting within the scope of his or her [apparent] authority.\***

\*If the court determines that issues on both *actual agency* and *apparent agency* should be submitted to the jury, both bracketed sec-

tions should be used with appropriate transitional language.

**[In [hiring] [or] [retaining] another to perform services, the employer must exercise due care to assure that the person is competent to perform the services. A person is responsible for the negligence of [his] [her] independent contractor if, in [hiring] [or] [retaining] the independent contractor, the employer failed to exercise due care.]**

*Insigna v. LaBella* 543 So.2d 209 (Fla 1989); *F.S. 766.110*

**[When a [person] [facility] undertakes to perform services, [he] [she] [it] cannot transfer the obligation to perform those services to an independent contractor and remains responsible for the negligence of [his] [her] [independent contractor].]**

.....

(2) *Agency without claim of independent contractor:*

**whether (name) is an agent of (defendant). [(name) is an agent of (defendant) if (defendant) authorized [him] [her] to act on (defendant's) behalf.] [(name) is an apparent agent if, by words or conduct, (defendant) caused or allowed (claimant) to believe that (name) was an agent of and had authority to act for (defendant).] A person is responsible for the negligence of an [agent] [or] [apparent agent] if at the time and place of the incident complained of the [agent] [or] [apparent agent] is acting within the scope of [his] [her] [apparent] authority.**

NOTE ON USE FOR 402.9a(2)

*Roessler v. Novak*, 858 So.2d 1158 (Fla. 2d DCA 2003); *Orlando Regional Medical Center v. Chmielewski*, 573 So.2d 876 (Fla. 5th DCA 1990). If the court determines that issues on both actual agency and apparent agency should be submitted to the jury, both bracketed sections should be used with appropriate transitional language.

The good news? The criteria for proving that an active tortfeasor was either an in-



dependent contractor who was negligently selected, hired, or retained or that he or she was an actual agent or apparent agent are logical and based on common sense.

The bad news? Predictably, the process of establishing these factors to survive a Motion for Directed Verdict is a highly fact specific inquiry where one size does not fit all. However, the silver lining for victims is that most Florida appellate decisions require that the issue of agency is one for a jury.

Regarding negligent selection, hiring, and retention of an independent contractor, if you review *Suarez v. Gonzalez*, 820 So.2d 342, 344 (Fla. 4th DCA 2002), you will see that the Fourth District Court of Appeal provides an informative foundational analysis of Florida law on this issue. The Court notes that the law developed largely from *McCall v. Alabama Bruno's Inc.* 647 So.2d 175, 177 (Fla. 1st DCA 1994), Restatement (Second) of Torts §409, §411 (1965) and Prosser and Keeton §71, 5th ed. (1984). The issue centers around what acts by the employer constitute "the exercise of reasonable care."

Importantly, there are a few themes that emerge when determining the level of diligence required by the employer in selecting,

hiring, or retaining an independent contractor. First, "the amount of care which should be required is proportionate to the danger involved in failing to use it" Restatement § 411, cmt. c. This means that where there is a risk of harm to others if the work is not skillfully performed, the employer must exercise a high level of care to confirm that the person being hired for the job is duly qualified to do the job properly and without danger to others.

Second, the "extent of the employer's knowledge and experience in the field of work to be done" is critical. Restatement §411, cmt. c. For example, a homeowner with a plumbing problem is not generally required to spend weeks investigating the licensed plumber that he/she hires to fix leaking pipes. In contrast, a national company that has expertise in cargo transport that sub-contracts with truckers for interstate freight services needs to make sure that any driver it contracts with to haul cargo across the country is truly competent to safely perform the job.

Finally, the third factor looks to the relationship between the parties to see if there is any common law or statutory law imposing a higher duty on the employer, such as a non-delegable duty. In *Suarez*, the case centered

upon whether a landlord's daughter-in-law was negligent in selecting an independent contractor (who she first met when she saw him driving down the street with some cabinets in his van) to hang a kitchen cabinet that later fell from the wall and struck and paralyzed the tenant. *Id* at 344. The Court held that the landlord-tenant relationship imposes a nondelegable duty of care upon a landlord who undertakes to make repairs or improvements for the benefit of the tenant. *Id* at 346.

Overall, if the corporation chooses to pay someone else to do what it promised for pay to do for someone else, that corporation is well-advised to select and hire a person who clearly has the requisite training and experience to safely and adequately perform the services.

For a discussion of the case law regarding actual agency and apparent agency, please look for my article in the March edition of the Barrister. **B**



**Rick Ellsley** is a Board Certified Civil Trial Lawyer and the Co-Chair of the Trial Lawyers Section of the BCBA. He may be reached at [ellsley@ellsleysobol.com](mailto:ellsley@ellsleysobol.com).

# Ellsley Sobol

## Attorneys at Law

Proud Annual Sponsor of the Broward County Bar Association

**Wishing everyone a healthy and prosperous 2014**



**(954) 888-7720    [www.gotinjured.com](http://www.gotinjured.com)<sup>®</sup>**

# Boss

CERTIFIED REALTIME REPORTING, INC



BROWARD  
(954) 467-6867

DADE  
(305) 446-4022

[www.BossReporting.com](http://www.BossReporting.com)

**Haliczer Pettis & Schwamm**  
Your Trusted Source For Legal Matters ATTORNEYS AT LAW

CONGRATULATES  
THE HONORABLE

**Stacy Ross  
&  
Giuseppina Miranda**

The Partners and Attorneys of Haliczer Pettis & Schwamm recognize the appointments of The Honorable Stacy Ross to the Broward Circuit Court and The Honorable Giuseppina Miranda to county court judge.

We salute your achievements and wish both of you success in your new positions.



COMMERCIAL LITIGATION • PERSONAL INJURY AND WRONGFUL DEATH • INSURANCE COVERAGE • EMPLOYMENT LAW  
MEDICAL MALPRACTICE • HEALTH CARE LAW • WORKERS' COMPENSATION  
PROFESSIONAL LIABILITY • APPELLATE PRACTICE • CIVIL RIGHTS  
OFFICES IN FORT LAUDERDALE AND ORLANDO  
[www.HPSLEGAL.COM](http://www.HPSLEGAL.COM)  
(954) 525-9922

**FLORIDA** MIAMI • FORT LAUDERDALE

## CYNTHIA J. DIENSTAG

CYNTHIA J. DIENSTAG is the principal of Cynthia J. Dienstag, P.A., with offices in Miami-Dade and Broward counties.

She has focused her practice on marital and family law related matters since 1989. Ms. Dienstag is a Florida Supreme Court Certified Family Mediator, listed among Who's Who in American Law, 1998-99 edition and Who's Who of American Women 2006-2007 edition; chosen by Florida Trend Magazine as one of the Florida Legal Elite every year since 2006, and Florida's Super Lawyers 2007 with the Miami Herald, frequent lecturer for the National Business Institute on complex areas of Marital and Family law.

She earned her A.A. degree from Florida State University, her B.S. degree from Florida International University and her J.D. degree from the University of Miami School of Law. Memberships: Honorary Society of First Family Law Inns of Court, Broward and Miami-Dade County Bar Family Law Sections (former chair), Family Law Section of Florida Bar, admitted to the Supreme Court of the United States, and Vice-President Biscayne Bay Kiwanis. Appearances: Court TV Live Radio, Fox "The Live Desk", "The O'Reilly Factor", and "Catherine Crier Live". Honor: Woman of the Year 2012 Nominee for The Leukemia and Lymphoma Society, and Martindale-Hubbell AV Preeminent Rating.



**CYNTHIA J. DIENSTAG, P.A.**  
**MARITAL & FAMILY LAW**

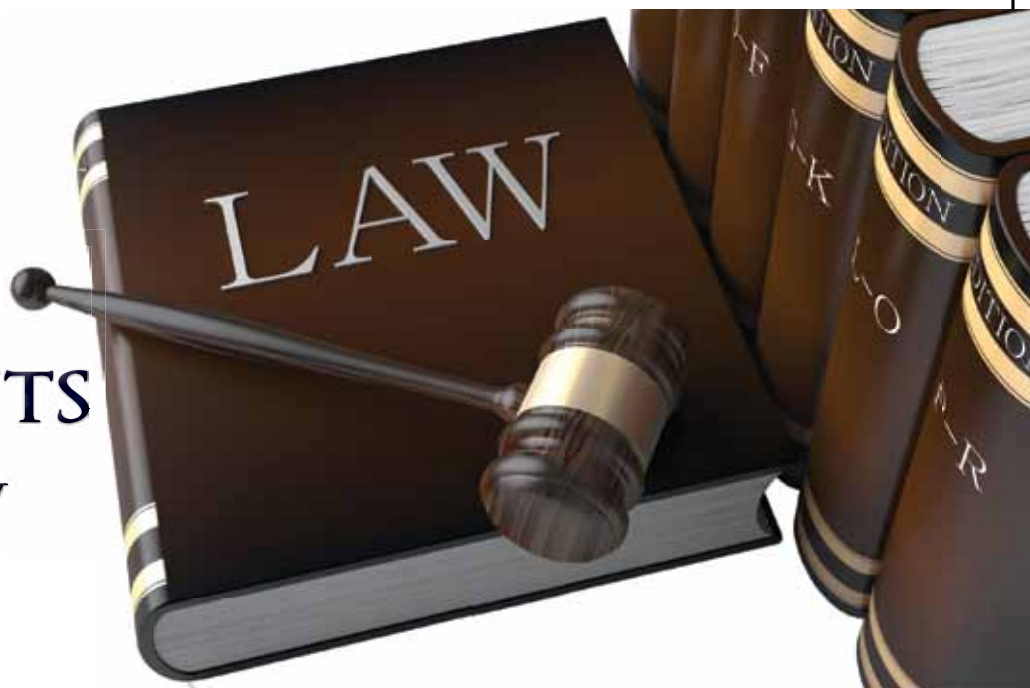
[www.southfloridafamilyattorney.com](http://www.southfloridafamilyattorney.com)

326 N.E. 26th Terrace  
Miami, FL 33137  
p: 305.250.4680, f: 305.285.0688

1995 East Oakland Park Boulevard,  
Suite #300, Fort Lauderdale, FL 33306  
p: 954.318.3824



# RECENT DEVELOPMENTS IN THE LAW



*By Nancy Little Hoffman*

## **SUPREME COURT AMENDS RULES AND PROCEDURES TO IMPLEMENT UNIFIED FAMILY COURT.**

In support of its goal to implement a unified family court in Florida, the Supreme Court has amended Rule 2.545(d) [Case Management; Related Cases] and has adopted five new Family Law Rules of Procedure. These deal with the coordination of related family cases and hearings; the assignment of one judge to hear all cases involving the same family; permitting joint hearings or trials in such cases; preserving confidentiality; allowing access by parties and the judiciary; and filing copies of orders in related family cases. In re Amendments to the Florida Rules of Judicial Administration and Family Law Rules of Procedure, 39 Fla. L. Weekly S25 (Fla. Jan. 16, 2014).

## **SUPREME COURT CANNOT CONSIDER "UNELABORATED" DISTRICT COURT DISMISSALS OR PER CURIAM AFFIRMANCES.**

The Supreme Court declined to consider a per curiam decision which dismissed a petition seeking to invoke the DCA's all writs jurisdiction. The Court explained that it has no discretionary jurisdiction in such cases, where the DCA decision

contained no opinion and simply cited a case which had not been overturned and was not pending before the Court. It went on to reiterate its lack of jurisdiction to review "unelaborated" per curiam affirmances or denials which cite only statutes or rules and contain no discussion of the facts of the case. In the future, petitions seeking review of such decisions will be dismissed by the court clerk. *Wells v. State*, 39 Fla. L. Weekly S29 (Jan. 16, 2014).

## **FOURTH DISTRICT CERTIFIES TO SUPREME COURT QUESTION REGARDING WAIVER OF PROPERTY INTEREST IN PRENUPTIAL AGREEMENT**

As part of a lengthy opinion addressing several issues surrounding the impact of a prenuptial agreement in a marital dissolution case, the Fourth District certified the following question to the Supreme Court as a question of great public importance:

Where a prenuptial agreement provides that neither spouse will ever claim any interest in the other's property, states that each spouse shall be the sole owner of property purchased or acquired in his or her name, and contains language purporting to waive and release all rights and claims that a spouse may be entitled

to as a result of the marriage, do such provisions serve to waive a spouse's right to any share of assets titled in the other spouse's name, even if those assets were acquired during marriage due to the parties' marital efforts or appreciated in value during the marriage due to the parties' marital efforts?

The Fourth District held that the language in the agreement was sufficiently broad to waive the wife's claim to such property, but acknowledged that its opinion conflicted with opinions from the Second and Third Districts.

*Hahamovitch v. Hahamovitch*, 39 Fla. L. Weekly D102 (Fla. 4th DCA Jan. 8, 2014). **B**



*Nancy Little Hoffmann is a Board-Certified Appellate Lawyer practicing in the Fort Lauderdale area since 1974. She may be contacted at 954-771-0606 or by e-mail at [NLHappeals@aol.com](mailto:NLHappeals@aol.com). For more information, see [Nancy LittleHoffmann.com](http://NancyLittleHoffmann.com).*

## Broward County Bar Association Recognizes Ray Ferrero, Jr.

At its January 14, 2014, Board of Director's meeting, the BCBA Board of Directors recognized Ray Ferrero, Jr. for his extraordinary leadership and commitment to the legal community in Broward County and in the State of Florida. The BCBA Board of Directors commends Ray Ferrero, Jr. for his outstanding leadership and congratulates our partner Florida Lawyers Mutual Insurance Company on its 25<sup>th</sup> Anniversary.



*BCBA President Elect John Jordan, BCBA Past President Deborah FitzGerald, Ray Ferrero, Jr., and BCBA President Alan Fishman.*



*BCBA Executive Director Braulio Rosa surprises Mr. Ferrero with a cake to celebrate his birthday on January 17th.*

### Fourth District Court of Appeal of The State of Florida

An open session of the Court will be held on  
Thursday, February 27, 2014 • 1:30pm  
at

Broward County Courthouse  
201 S.E. Sixth Street  
Courtroom 416  
Fort Lauderdale, FL 33301

**4th DCA Judiciary Reception**  
5:30pm—7:30pm

**Reception Location:** Riverside Hotel on Las Olas

**Reception Fee:** \$25 BCBA Members; \$35 Non-Members;  
No Fee for BCBA Judiciary Members.

*Sponsorship Opportunities Available*

**Register TODAY! Contact Us.**

**[www.browardbar.org](http://www.browardbar.org) • [bonnie@browardbar.org](mailto:bonnie@browardbar.org)**

### COLE, SCOTT & KISSANE, P.A.



Congratulates

*Judge Ross and Miranda*

on their installation as Judges in the 17<sup>th</sup> Judicial Circuit.

TELEPHONE (954) 473-1112

FACSIMILE (954) 474-7979

[WWW.CSKLEGAL.COM](http://WWW.CSKLEGAL.COM)

MIAMI - WEST PALM BEACH - TAMPA - KEY WEST - FT. LAUDERDALE EAST - FT. LAUDERDALE WEST  
NAPLES - JACKSONVILLE - ORLANDO - PENSACOLA - BONITA SPRINGS



Nova Southeastern University

Shepard Broad Law Center

## Congratulates

**The Honorable Giuseppina Miranda ('99)**

and

**The Honorable Stacy Ross ('87)**

The NSU Law Center proudly congratulates our  
alumni in celebrating this milestone.



**GT** GreenbergTraurig

1750 ATTORNEYS | 36 LOCATIONS WORLDWIDE \*

Congratulations to **The Honorable Circuit Court Judge Stacy Ross** and **The Honorable County Court Judge Giuseppina Miranda**.

We are proud to support the **Broward County Bar Association** and its 2014 Robing Ceremony.

**WILLIAM R. CLAYTON** | SHAREHOLDER

401 EAST LAS OLAS BOULEVARD | SUITE 2000  
FORT LAUDERDALE, FL 33301 | 954.765.0500

GREENBERG TRAURIG, P.A. | ATTORNEYS AT LAW | [WWW.GTLAW.COM](http://WWW.GTLAW.COM)

Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ©2014 Greenberg Traurig, LLP. Attorneys at Law. All rights reserved. \*These numbers are subject to fluctuation.

22721

The Law Firm of Conrad & Scherer congratulates

**Stacy Ross & Giuseppina Miranda**

on their appointments to the Bench of the 17th Judicial Circuit and County Courts in and for Broward County

We wish them both a distinguished career and thank them for their commitment to serve our community.



#### FORT LAUDERDALE, FL

633 South Federal Highway  
Eighth Floor  
Fort Lauderdale, Florida 33301  
Phone: (954) 462-5500  
Fax: (954) 463-9244

#### WASHINGTON, D.C.

1156 15th Street NW  
Suite 502  
Washington, D.C. 20005  
Phone: (202) 543-4001  
Fax: (866) 803-1125

#### QUITO, ECUADOR

República El Salvador E10-16 e Irlanda  
Edificio Torre XXI PH - W  
Quito, Ecuador  
Phone: +(593) 2-246-8829  
Fax: (954) 622-0461

[www.conradscherer.com](http://www.conradscherer.com)

## February

## calendar of events

- 11 North Broward Section Luncheon**  
**12:00 pm**  
**Venue:** Champps Americana in Fort Lauderdale  
**Cost:** \$20 Members/\$25 Non-members  
**Contact:** Tom Oates at 954.942.6500, ext. 3
- 12 CLE - Impact of Owner Bankruptcy on Associations Collection Rights**  
**12:00 pm - 1:30 pm**  
**Venue:** BCBA Conference Center  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register For Event:** <https://www.browardbar.org/cle-impact-of-owner-bankruptcy-on-associations-collection-rights-february-12-2014/>
- 13 Paralegal Law Tech Seminar**  
**6:00pm - 7:30pm**  
**Venue:** BCBA Conference Center  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register For Event:** <http://www.browardbar.org/law-tech-certification-program/>
- 14 YLS Luncheon**  
**12:00 pm - 1:30pm**  
**Topic:** 8th Annual Raising the Bar - Pioneers in the Legal Profession Luncheon  
**Speaker:** Eugene Pettis, Florida Bar President  
**Venue:** Tower Club  
**Cost:** \$25 prior to Feb. 7th; \$30 at the door  
**Register for Event:** <http://www.browardbar.org/yls02142014>
- 18 Bench and Bar Committee Meeting**  
**12:00pm - 1:30pm**  
**Venue:** BCBA Conference Center  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**RSVP For Meeting:** <http://www.browardbar.org/calendar/>
- 20 West Broward Section CLE Luncheon with Judge Edward Merrigan**  
**12:00 pm - 1:30 pm**  
**Topic:** Broward County Veterans Court  
**Registration Fees:** \$25 Advance Registration; \$30 Walk-in Registration; No Charge for BCBA Judiciary Members  
**Venue:** American Social on Las Olas - Fort Lauderdale  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register For Event:** <http://www.browardbar.org/event-registration/?ee=57>
- 20 "Bar at the Bar" Networking Event**  
**5:30 pm - 7:30pm**  
**Address:** 721 East Las Olas Blvd - Fort Lauderdale  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618
- 26 CLE - Recent Changes in Ethics Rules at the Patent Trademark Office**  
**12:00 - 1:30pm**  
**Speaker:** Allen F. Bennett  
**Venue:** BCBA Conference Center  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register For Event:** <http://www.browardbar.org/event-registration/?ee=53>
- 27 4th DCA Judicial Reception**  
**5:30pm - 7:30pm**  
**Description:** The 4th DCA will hear oral arguments at the Broward County Courthouse. The Reception will follow. Advance RSVP is required.  
**Venue:** Riverside Hotel on Las Olas - Fort Lauderdale  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register for Event:** <http://www.browardbar.org/calendar/>
- 28 Workers Compensation 2014**  
**11:00 am - 5:00pm**  
followed by a Cocktail Reception  
**Key Note Speaker:** Eugene Pettis, Florida Bar President  
**Registration Fee:** \$75 for BCBA Members; \$90 for Non-Members  
**Venue:** Riverside Hotel on Las Olas - Fort Lauderdale  
**Contact:** Bonnie Ross  
**Contact Info:** [bonnie@browardbar.org](mailto:bonnie@browardbar.org) or 954.863.3618  
**Register For Event:** <https://www.browardbar.org/1142-2/>

