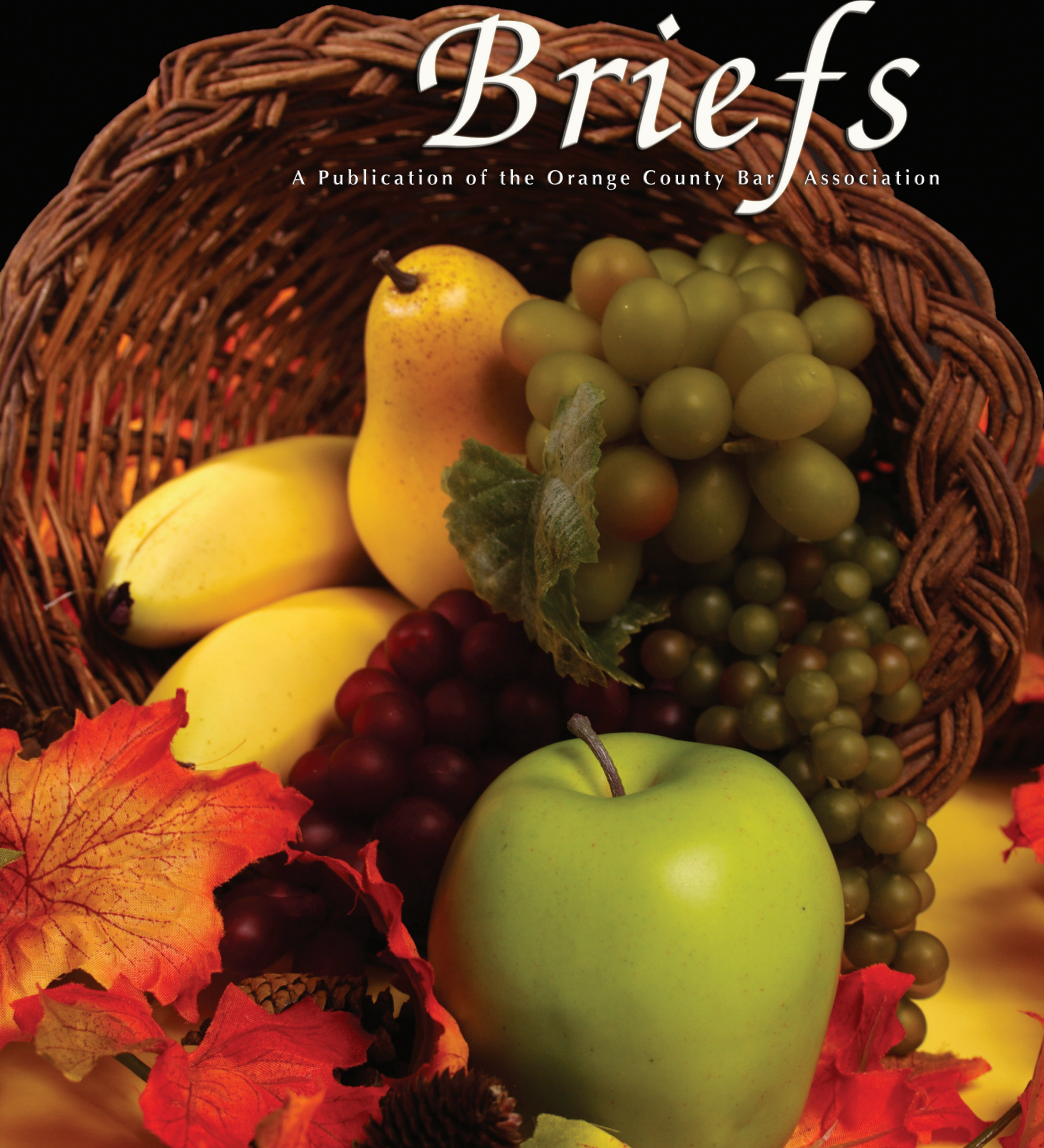




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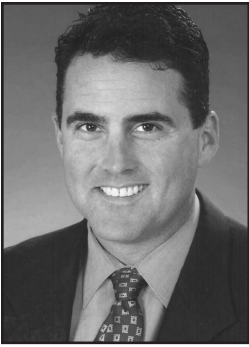
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Out of the Mouths of . . . Judges?

—Thomas P. Wert

So, I am standing in front of 60 eighth graders at Stonewall Jackson Middle School and a petite 13-year old raises her hand and shouts, "Give him the death penalty!" One of her friends follows up with, "The electric chair is too good for him!" A third chimes in, "Definitely, the chair. He needs to pay." Feeling a little like a modern day Pontius Pilate, I ask, "Would your decision be different if you knew he is a model citizen, has a wife and four kids and makes \$500,000 per year, which he could use to pay restitution to the victims?" A vocal minority continue to call for capital punishment, but most of the angry mob mentality subsides and the discussion progresses through the workings of our justice system.

The foregoing dialogue occurred last month when I participated in a program spearheaded by Judge James Hauser called *You Be The Judge*. The debate began after we asked the eighth graders to pass judgment on a hypothetical defendant who pled no contest to vehicular manslaughter and driving under the influence in the aftermath of a two-car collision resulting in two deaths and severe injuries to two others. Three eye witnesses claim the defendant was speeding and weaving in and out of traffic, several times on the wrong side of the road. After the accident, he was seen leaning against his car in a seemingly intoxicated state. He had a blood alcohol level of .07%.

What sentence would you recommend for the Defendant? At first blush, most of the students agreed on nothing short of lethal injection. However, when asked to review the Defendant's probation report,¹ they found out the guy was not Charlie Manson and the calls for death row subsided. By the time the discussion ended, the kids had learned a different version of the Three Rs: Retribution, Restitution and Rehabilitation. They asked great questions and had some relatively sophisticated answers. I had the pleasure of watching Judge Hauser make a presentation on *You Be The Judge* to a room full of Orange County Public School teachers this summer and they were very eager to implement the program in their classes.

You may not be surprised that our youth are very interested in how the wheels of justice turn, but, until recently, I was unaware that they get very little exposure to the subject in school. Apparently, things like felonies, misdemeanors, double jeopardy and unreasonable search and seizure are not on the FCAT or anywhere else in the public school curriculum. Florida Supreme Court Justice

R. Fred Lewis recently addressed this issue with bar leaders throughout the State:

It is an important responsibility of the legal system to share our experience and knowledge with the next generation. I want students to have access to this institution and to fully understand that government institutions belong to them. I am eager to help prepare students for their responsibilities as citizens and nourish their interest and inquisitiveness, and I invite you to join me in carrying out this mission.

Justice Lewis is reaching out to our youth through an effort entitled *Justice Teaching*, a State-wide program designed to pair a legal professional (judge, lawyer or other law-related professional) with every elementary, middle and high school in Florida. The plan is that these professionals will make themselves available to the schools for classroom visits, teacher conferences, in-service training and other law-related education. *Justice Teaching* aims to promote an understanding of Florida's laws and justice system, develop critical thinking and problem solving skills and demonstrate the effective interaction of our courts.

Programs like *You Be The Judge* and *Justice Teaching* can help fill a void in the current school curriculum and educate our kids about the American legal system. These projects are also an excellent opportunity for lawyers like us to volunteer our expertise for the good of the community. To that end, the Orange County Bar Association Foundation has decided to coordinate volunteers from the OCBA for both of these programs. In the coming months, we will be asking you to help out with that effort. I can tell you from personal experience that the time commitment will be minimal, but the rewards will be great. Please consider participating in one of these programs. If you would like to volunteer, please call or e-mail me at (407) 896-2224 / twert@ralaw.com.

¹ The Defendant was honorably discharged from the United States Air Force in 1988 and has worked continuously since that time as an engineer at Disney World. He supports his four children who are all under the age of 18. He has no prior criminal record and is an elder in his church. The night of the accident, he had attended a business meeting, after which he drank two beers. His family physician testified the Defendant had been taking medication for a cold on the night of the accident. The medication may have caused an exaggerated reaction to the body when it was mixed with alcohol.

Thomas P. Wert is a partner with Roetzel & Andress, LPA. He has been a member of the OCBA since 1993.

***S.C. Read, Inc. v. Seminole County
School Board,***

31 Fla. L. Weekly D1900a (Fla. 5th DCA 2006)
Dismissed sunshine law challenge
to school rezoning plan.

***Florida Emergency Physicians-Kang &
Associates, M.D., P.A. v. Parker,***

800 So. 2d 631 (Fla. 5th DCA 2001)
Protected liability on multi-million
dollar medical malpractice action.

Miller v. Jacobs & Goodman,

699 So. 2d 729 (Fla. 5th DCA 1997)
Declared liquidated damages clause
of attorney employment agreement
void and unenforceable.

Wenzel v. Boyles Galvanizing Co.,

920 F. 2d 779 (11th Cir. 1991)
Affirmed a \$2.75 million dollar
personal injury award.

Boyles v. Mid-Florida Television Corp.,

467 So. 2d 282 (Fla. 1985)
Reversed the dismissal of a libel action
against an Orlando television station.

Whigham v. Shands Teaching Hospital,

613 So. 2d 110 (Fla. 1st DCA 1993)
Reinstated multi-million dollar medical
malpractice action against blood bank.

Petry v. Pettry,

768 So. 2d 8 (Fla. 5th DCA 2000)
Reversed conversion of rehabilitative
alimony to perantent alimony.

Caiazza v. Tuff Realty Corp.,

805 So. 2d 29 (Fla. 5th DCA 2001)
Protected ownership of two
multi-million dollar Florida
corporations.

Owen v. Owen

867 So. 2d 1222 (Fla. 5th DCA 2004)
Reversed imputation of income with
directions to reduce by 50%.

Pixton v. Scotsman,

924 So. 2d 37 (Fla. 5th DCA 2006)
Reversed dismissal of negligence action
for failure to comply with RCP 1.070(j).

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November 30, 2006

U.S. Senator Mel Martinez

A Washington Update

Mel Martinez came to Florida from his native Cuba at age 15 as a part of “Operation Peter Pan,” a humanitarian program led by the Catholic Church that helped more than 14,000 Cuban children escape Communist Cuba. He lived with foster families for four years until he and his family were reunited in Orlando.

Mel graduated from Bishop Moore High School in Orlando and then received his undergraduate and law degrees from Florida State University. Upon graduating from Law School, Mel returned to Orlando, the community that adopted him years earlier, and went to work with a private law firm.

Eager to give back to the community that had provided opportunities for him, Mel became involved in various youth, business and civic organizations. He served on numerous Boards including: Chairman of the Orlando Housing Authority, Chairman of the Orlando Utilities Commission, Vice Chairman of Catholic Charities and many others. He even shared his love of baseball by coaching Little League. In 1998, Mel was elected to serve as Mayor of Orange County. He quickly earned a reputation as a bold leader, a tax-cutter, and a champion of law enforcement and education.

President George W. Bush nominated Mel to serve in his Cabinet as the nation’s twelfth Secretary of Housing and Urban Development (HUD). After serving three years as the HUD Secretary, Mel returned to Florida to seek the Republican nomination for the United States Senate. He was elected to the United States Senate on November 2, 2004, and is the first Cuban-American ever elected to the U.S Senate.

Mel and his wife of 34 years, Kitty, have three children and two grandchildren, and are active members of St. James Cathedral Parish in Orlando.

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To ensure proper luncheon count, RSVPs are requested no later than 48 hours in advance. Those reserving less than 24 hours in advance will not be guaranteed a name badge. If you have made a reservation and find that you are unable to attend, please notify us as soon as possible via e-mail. We appreciate your effort to keep us up-to-date on your reservation status.



Professionalism Committee

Who Was Bill Trickel?

Ronald H. Roby



The William Trickel, Jr. Professionalism Committee Award is annually given to a member of the Orange County Bar Association who best epitomizes the dedication to the legal profession which Bill Trickel exemplified.

But, who was this man Bill Trickel anyway? And, why is it befitting that this award is named after him?

To begin with, Bill Trickel was a nice guy!

He had this big beautiful smile and a huge heart!

The standard definition of a “professional” is the litany of activities in which they are involved and Bill had such a resumé. From Clearwater High School where he graduated in 1956, to the University of Florida, where he was a member of Florida Blue Key, an honorary leadership organization, to the Executive Council of the Orange County Bar and its presidency, Bill was always active.

He was instrumental in the development of the Orange County Bar Association’s Bar Center and served the Ninth Circuit as one of its representatives on the Board of Governors of the Florida Bar. Bill narrowly lost his presidential election for the Florida Bar.

The Health Care Section of the Florida Bar was his responsibility. That Section also honors him annually with an award to a member of the Section who epitomizes dedication to the Section and to the Bar.

In his role as a lawyer, Bill represented Florida Hospital. Florida Hospital likewise recognizes and honors him with an annual award to a member who exhibits the kind of dedication and devotion to health care in Central Florida.

Bill served tirelessly for his profession, giving countless hours of his time to organizations such as Legal Aid. He was dedicated to the profession and proud to be a lawyer.

To quote his law partner, Dick Leigh, Bill had “the ability to take on twice as much as anyone else and accomplish tasks with seeming ease.”

How do we end this tribute? With the best accolade that can be bestowed!

Bill Trickel was a nice guy and I was, and am, proud to have called him “friend!”

Ronald H. Roby, Esq., Roby Law Firm, has been a member of the OCBA since 1967.



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Criminal Law Committee

Update: Impact of Recent Supreme Court Case on Crawford

— Roger B. Handberg¹



Introduction

In March, I wrote an article about the interpretation that Florida courts have given to the United States Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). In that case, the Supreme Court altered the standards that apply to the admission of hearsay statements offered against a defendant in a criminal case. In particular, the Supreme Court overruled one of its prior precedents, *Ohio v. Roberts*, 448 U.S. 56 (1980), and held that a defendant's right of confrontation requires an opportunity to cross-examine the witness who made the out-of-court statement unless that witness is unavailable and the defendant had a prior opportunity to cross-examine that witness.

In *Crawford*, the Supreme Court noted that this holding was limited to what it called "testimonial" statements. One of the issues that the Supreme Court "le[ft] for another day" was what it meant by "testimonial." *Id.* at 68. In my March article, I summarized several recent cases decided by Florida appellate courts that have addressed that issue. Recently, the Supreme Court issued a consolidated opinion in two cases that provides guidance as to what constitutes a "testimonial" statement. Those cases are *Davis v. Washington*, 126 S. Ct. 2266 (2006), and *Hammon v. Indiana*, 126 S. Ct. 2266 (2006).

The Facts of *Davis* and *Hammon*

The fact patterns presented in both cases are ones that are often found in criminal cases. In *Davis*, a female victim called 911 to report a domestic disturbance as it was taking place. *Id.* at 2271. In that telephone call, the victim explained that a former boyfriend had come to her home and was assaulting her. *Id.* During the call, the 911 operator asked the female victim questions about the identity of her assailant and his current whereabouts, among other things. *Id.* Based on this incident, the former boyfriend was charged with a felony violation of a domestic no-contact order. *Id.* The victim, however, failed to appear at trial to testify. *Id.* In her absence, the trial court admitted into evidence a recording on the 911 call. *Id.* The Washington Supreme Court affirmed the conviction on the ground that the 911 call was not testimonial. *Id.*

In *Hammon*, the police received a call about a domestic disturbance that occurred at the home of the defendant and his wife. *Id.* at 2272. When they arrived, the police received permission from the wife to enter the house. *Id.* At that point, the police observed glass on the ground near a broken gas heating unit. *Id.* In response to police questioning, the wife provided oral statements that detailed how the defendant had hit her and shoved her into the broken glass from the gas heating unit, and she also completed an affidavit

with that information. *Id.* The defendant was charged with domestic battery and a violation of probation. *Id.* As in *Davis*, however, the victim in *Hammon* did not appear to testify at trial. Despite that fact, the trial court admitted into evidence, over the defendant's objection, the victim's affidavit as a "present sense impression" and the victim's oral statements as "excited utterances." *Id.* The Indiana Supreme Court affirmed the defendant's conviction. *Id.* at 2273.

The "Primary Purpose" Test

The issue in both cases was whether the statements that were made were "testimonial." The Supreme Court held that the statements to the 911 operator in *Davis* were nontestimonial, while the statements in *Hammon* were testimonial. In reaching those results, the Supreme Court set forth the following principles:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-74 (emphasis added).

With respect to the statements in *Davis*, the Supreme Court identified four reasons why those statements were "nontestimonial." First, the Supreme Court noted that the female victim "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events.'" *Id.* at 2276 (emphasis original) (citation omitted). Second, the Supreme Court found that the victim's call was made during an "ongoing emergency" and was "plainly a call for help against bona fide physical threat." *Id.* Third, the Supreme Court concluded that "the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past." *Id.* (emphasis original). Fourth, the Supreme Court found that the lack of "formality" in the questioning demonstrated that the purpose of the questioning was to provide the police with the information necessary to respond to the emergency. *Id.*

By contrast, the Supreme Court found that the

Continued on page 8



The OCBA Celebrates the Judicial Career of The Honorable Winifred J. Sharp, Fifth District Court of Appeal, 1979-2006

On September 8, 2006, 225 colleagues, friends and family members gathered at the Ivanhoe Plaza Hotel to honor the judicial career of Judge Winifred J. Sharp. Judges Charles Harris and Jacqueline Griffin, who worked with Judge Sharp for many years on the Fifth District Court of Appeal, shared some of the lighter moments on the Court. Florida Supreme Court Justice Barbara Pariente highlighted a few of the most significant decisions of Judge Sharp and gracefully articulated the amazing role Judge

Sharp played in the jurisprudence of the State of Florida. Additionally, the OCBA, FAWL and CFAWL paid tribute to Judge Sharp and presented her with gifts in appreciation for the role model she has been for members of the Orange County Bar and female lawyers across the State. The evening concluded with a cocktail reception.



*Judge Sharp with her husband, attorney Joel Sharp
(center back), and her family*



*Florida Supreme Court Justice Barbara J. Pariente
and Judge Sharp*

Update: Impact of Recent Supreme Court Case on Crawford Continued from page 7

circumstances surrounding the interrogation of the wife in *Hammon* supported the conclusion that “the interrogation was part of an investigation into possibly criminal past conduct. . . .” *Id.* at 2278. In particular, the Supreme Court emphasized that “[t]here was no emergency in progress” or any “immediate threat” to the wife. *Id.* Instead, when “[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime. . . .” *Id.* As a result, the statements obtained in response to that interrogation was “inherently testimonial” for the reason that “[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination.” *Id.*

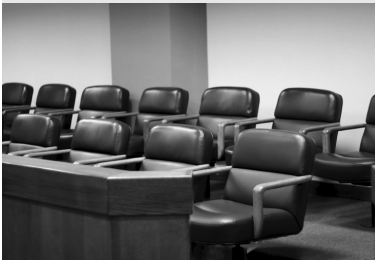
As it did in *Crawford*, the Supreme Court noted in *Davis* and *Hammon* that it was not “attempting to produce an exhaustive classification of all conceivable statements – or even all conceivable statements in response to police interrogation – as either testimonial or nontestimonial. . . .” *Id.* at 2273. In addition, the Supreme Court recognized that the “primary purpose” of an interrogation can change as it is being conducted. For example, the Supreme Court stated that

it “could be readily maintained” that the victim’s statements given to the 911 operator “after the operator gained the information needed to address the exigency of the moment” were testimonial. *Id.* at 2277. To address a situation where a statement contains portions that are nontestimonial and testimonial, the Supreme Court recommended that a court “should redact or exclude the portions of any statement that have become testimonial. . . .” *Id.*

Conclusion

For any criminal trial attorney who is attempting to determine whether a statement is “testimonial” or “nontestimonial” for purposes of the Sixth Amendment, the Supreme Court’s opinion in *Davis* and *Hammon* is a must read. That opinion provides the most extensive formulation that the Supreme Court has provided to date as to what constitutes a “testimonial” statement.

¹ Handberg is an Assistant United States Attorney with the Orlando office of the United States Attorney’s Office. The views expressed in this article are solely his own and do not reflect any position, policy, or opinion of the United States Attorney’s Office or the United States Department of Justice. He has been a member of the OCBA since 2003.



ABA Commission on the American Jury

Peremptory Challenges and a Representative Cross Section of the Community

— ABA Commission on the American Jury

The Supreme Court has long held that the Sixth Amendment's guarantee of trial by an impartial jury in criminal cases and the Fourteenth Amendment's equal protection clause entitle the defendant to a jury drawn from a representative cross section of the community. This guarantee has also been extended to the Seventh Amendment's right to jury trial in civil cases.

The jury that ultimately emerges from the pool of prospective jurors is shaped by a number of factors. Among the most controversial of these factors is the elimination of potential jurors through the exercise of peremptory challenges. Although the peremptory challenge has been long considered a key tool of litigants seeking to secure a fair and impartial jury, it has also been used as a tool to exclude individuals from jury service on the basis of race or gender. Accordingly, it has become the focus of an ongoing effort to balance the rights of litigants with the need to maintain public confidence in the neutrality and integrity of our justice system.

Peremptory Challenges and the *Batson* Decision

The traditional justification of peremptory challenges was described by the Supreme Court in *Swain v. Alabama*, 380 U.S. 202 (1965).

The function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that "to perform its high function in the best way 'justice must satisfy the appearance of justice,'"...Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostilities through examination and challenge for cause.

As the right to jury service expanded in the United States, first to racial minorities and then to women, peremptory challenges also provided an opportunity to exclude potential jurors on the basis of their race or gender. In 1985, the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79, attempted to limit racially motivated exercises of the peremptory challenge. The *Batson* decision identified three harms - to the defendant, the excluded juror, and the community - resulting from racially based exclusions of jurors.

Basing its decision on the equal protection clause of the Fourteenth Amendment, the Court ruled that "purposeful racial discrimination in selection of the venire violates a

defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." It also addressed the harms to the excluded juror and the community. "In view of the heterogeneous population of our Nation," the Court wrote, "public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race."

Extending *Batson*

In cases subsequent to *Batson*, the Court ruled, first, in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), that private litigants in a civil case were held to *Batson*'s prohibition of race-based peremptory challenges, and then, in *Georgia v. McCollum*, 505 U.S. 42 (1992), that criminal defendants were also prohibited from using race-based peremptory challenges.

With *McCollum* in particular, the Court intensified its focus on the harms that race-based peremptory challenges cause to excluded jurors, who are subjected to racial discrimination in *voir dire*, and to the community, whose confidence in the justice system might be eroded by racial discrimination. But in a concurring opinion, Justice Thomas expressed the view that the *McCollum* decision represented a departure from the principles of the Court's decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880), which invalidated a state law prohibiting blacks from serving on juries, and from the Court's traditional focus on the rights of criminal defendants. "Our departure from *Strauder* has two negative consequences," Justice Thomas wrote.

First, it produces a serious misordering of our priorities. In *Strauder*, we put the rights of defendants foremost. Today's decision, while protecting jurors, leaves defendants with less means of protecting themselves. Unless jurors actually admit prejudice during voir dire, defendants generally must allow them to sit and run the risk that racial animus will affect the verdict.... In effect, we have exalted the right of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death....

Second, our departure from *Strauder* has taken us down a slope of inquiry that had no clear stopping point. Today, we decide only that white defendants may not strike black veniremen on the basis of race. Eventually, we will have to decide whether black defendants may strike white veniremen.... Next will come the question whether defendants may exercise peremptories on the basis of sex.... The consequences for defendants or our decision and of these future cases remain to be seen. But whatever the benefits were

Continued on page 20

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Presentation Skills for Lawyers

How to Communicate When Your Witness Doesn't Speak English (21 Tips for Working with Court Interpreters)

Elliott Wilcox



“¿Cómo está usted?”
“Comment allez-vous?”
“Come sta?”
“Wie geht es Ihnen?”
“How are you?”

Sooner or later, it's going to happen. You're going to have a great witness, someone who saw the entire incident and completely corroborates your client's story. There's only one problem...

You can't understand anything they say.

What do you do? Not call them? Of course not. What you'll do is call upon the services of a court interpreter to translate for your witness. Here are twenty-one tips to improve your results when working with an interpreter.

WHAT TO DO BEFORE YOU GO TO COURT:

1. Let the interpreter speak with the witness before trial.

A witness from the Bronx in New York City speaks differently than a witness from southern Alabama. The same is true with speakers of foreign languages. Give the interpreter an opportunity to familiarize themselves with your witness's regional dialect, unique vocabulary, and any differences in pronunciation. This is also a good time to discuss any limitations in education or language.

2. Use a qualified interpreter. Don't use a friend, relative, or office worker for any serious court events. It gives the appearance of a conflict of interest.

3. Make sure the witness understands the interpreter's role. The interpreter's role is to translate everything that is said. The interpreter shouldn't add anything, omit anything, or summarize anything. Your witness needs to understand that he shouldn't say anything to the interpreter that he doesn't want repeated aloud in court.

4. Give the interpreter some context. What is the case about? Who are the parties? When did it happen? It's easier for the interpreter to properly translate if they have a little background information.

5. Create a vocabulary list. Will your witness be mentioning nicknames, street slang, speaking in “Spanglish,” repeating numbers (amounts of money, account numbers, phone numbers), or referring to unusual terms? Let the interpreter know in advance to minimize any risk of confusion. Are there any words which need to be specifically translated? In some languages, there may be numerous words to describe a single article or action (for example: slap, hit, smack, punch, thump, batter, knock, rap, bang, strike). If you need a particular phrase used, make sure you tell the interpreter in advance.

6. Craft your questions with extra care. When you say,

“Did you go to the store,” do you mean “you, yourself,” or “you and the people you were with”? Eliminate double negatives or other “legalisms” that are more likely to be misunderstood.

7. Introducing translations into evidence. If you're introducing a translated document into evidence, prepare with the interpreter before court. Don't ask for an on-sight translation. The more legal or technical terms contained in the document, the greater the need for preparation.

WHAT TO DO WHILE YOU'RE IN COURT:

8. Speak directly to the witness, not to the interpreter. If you say, “Ask him who else was at the meeting,” the interpreter won't translate, “Who else was at the meeting?” The interpreter will translate the equivalent of, “Ask him who else was at the meeting.” The interpreter's role is to translate *everything* you say. Just pretend like the witness speaks English and speak directly to them.

9. Make sure the interpreter gets frequent breaks. It's not easy to listen intently, speak non-stop, and keep your brain performing at an optimum level for extended periods of time. Give it a try. Watch the evening news for an hour, and simply repeat everything that is said. Don't translate it into another language - just repeat what they're saying. How do you feel 10 minutes later? 30 minutes? An hour? It's not easy to perform real-time translation, so make sure you switch interpreters every 1/2 hour or so.

10. Speak loudly and clearly. Interpreters can't translate what they can't hear. Speaking with clarity is always important, but especially so when working with an interpreter. To ensure the interpreters hear everything that is said, position them where they can see and hear both you and the speaker.

11. Don't let two or three people talk at the same time. It's difficult enough to perform real-time translation for *one* person. Trying to translate what two or three people are saying at the same time is almost impossible. To avoid the problem, don't interrupt the witness, compete with the opposing lawyer, or talk while the judge is talking.

12. Tell your witness not to interrupt. Sometimes, the witness speaks enough English to understand some of the attorney's questions, but, due to the seriousness of the case, still requests the services of an interpreter to feel comfortable. Tell your witness that, even if they understand the question, they must not interrupt the interpreter. Tell the witness to wait for the interpreter to finish the translation, and to answer in their *native* language.

13. Don't interrupt. If you speak a second language, you may understand your witness's responses *before* the interpreter's translation is complete. Even though *you* understand, don't

Continued on page 12

interrupt, because the judge and jurors still need to hear the translation before they understand what was said. Don't interrupt. Wait until the interpreter has finished translating the witness's response before you pose your next question.

14. Watch your pacing. You can expect that the interpreter will be efficient at around 150-200 words per minute. At rates faster than that, the interpreter may not be able to keep up, and will interrupt the flow of your presentation.

15. Be patient. Understand that the interpreter is translating thoughts and ideas, not just converting individual words from one language to another. Sometimes it takes longer to say something in another language than it does in English. Be patient, and give the interpreter a chance to translate.

16. Pause. Both you and your witness should pause to provide the interpreter an opportunity to catch up. However, make sure that you speak in logical, meaningful phrases. Unless you pause intelligently, it won't help. Don't pause every 10-15 words – pause at the end of a logical thought.

17. Let the interpreter signal to you when you need to pause. Tell the interpreter to raise their hands if they need you to pause, or use a "slow down" motion if you're speaking too fast.

18. Let your witness present himself to the jury. Tell the witness to speak directly to the jury, the judge, or to the attorney and speak in a loud, clear voice. Just like any other witness, jurors will still read your witness's body language.

19. Ask shorter questions and get shorter answers. The longer your witness's responses, the greater the chances

that some of the details will be lost in the translation. It's obviously more difficult to remember a response that fills two pages of courtroom transcript than a reply that fills a single paragraph. Shorter questions will lead to shorter answers, allowing the interpreter to fully translate everything that is said without risk of omission or error. Give the interpreter permission to tell you or your witness to pause when your questions or answers grow too cumbersome for translation.

20. The interpreter won't repeat or clarify non-verbal responses. If your witness says, "It was about this big" and holds his hands 6" apart, you need to describe for the record what the witness indicated. Some non-verbal actions have culture-specific meaning. If necessary, you should ask the witness what the non-verbal response means.

21. What to do about mistakes. Using an interpreter increases the risks of misunderstanding and miscommunication. If you think the witness has answered incorrectly, or that the witness didn't understand the interpreter, your best solution is to immediately follow up by rephrasing the question.

Working with interpreters can be a rewarding experience. With their assistance, thoughts and ideas that would otherwise be trapped can be released and persuasively communicated. Prepare in advance, know what to expect, and your (translated) presentation will be a success.

Elliott Wilcox publishes Trial Tips Newsletter, a free weekly ezine for trial lawyers that reveals proven techniques to help you persuade jurors and win more trials. Sign up today for your free trial advocacy tips at www.TrialTheater.com.

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Special Message to Members

A High Price for Freedom

Elizabeth F. McCausland



Over one year ago, on September 8, 2006, my Mother, Thuong N. "Cuc" Foshee was detained by the Vietnamese government while visiting family members in Vietnam and has been held in a detention center in Ho Chi Minh City ever since. To date my Mother has been denied the opportunity to see an attorney, has been denied bail, has been denied adequate medical and dental care, and had her prescription medication withheld for her blood pressure and thyroid condition for over seven months. As I am told, she has been living in an extremely small jail cell where she sleeps on the floor, and she gets two meals a day consisting of rice and vegetables.

At this point you might be asking what my Mother has done to deserve this treatment. Well- she has yet to be charged with any crime. Her only "crime" is that she is an advocate for democracy in Vietnam, the country of her birth where many of her family members still reside. She simply wants her family to enjoy the freedoms that we, as Americans, enjoy: the Freedom of Speech, Freedom of Religion, Freedom of Assembly, etc. Her voice is a threat to the Vietnamese government and thus, she is considered a terrorist. More simply put, the Vietnamese government is prosecuting my Mother for her words and actions **while in the United States**. They have been unable to find a single illegal act committed by my Mother while she was in Vietnam. Yet, the Vietnamese government has taken away all of her rights and may still prosecute her as a terrorist of Vietnam.

My Mother came to the United States after marrying my Father, who served in the Special Forces. She became a U.S. citizen shortly thereafter and has been a model citizen ever since. She is a commercial landscaper who devotes countless hours to charity and her community. In the last presidential election my Mother registered more than 2,000 Vietnamese Americans in Florida to vote. She believed in

the democratic process and cherished her right to actively participate in the process.

The United States is on the verge of approving Permanent Normal Trade Relations with Vietnam, which will grant Vietnam the right to free trade with the U.S. This measure is to be voted on by our government the first week of November and is expected to pass with flying colors. But as a civilized nation, we have to demand that our government act on our behalf and refuse to trade with a government that will not recognize any of the basic human rights of our citizens. The only power we have to protect our citizens, including my Mother and other U.S. citizens who are being held and treated in the same manner for the same type of "crime," is to continue the threat of refusing to have trade relations with Vietnam. Besides, do we really want to send American Citizens to Vietnam to do business when they can be held and treated in this manner?

So before you do anything else today, please let your Senators and Representatives who are in favor of supporting free trade with Vietnam know that human rights are important, and ask them vote "NO" when this matter comes to a vote. I ask that you also sign the petition, and ask others to sign the petition, which is being sent to Congress asking that they refrain from approving permanent trade with Vietnam until Americans such as my Mom are released. The link to the petition is: <http://www.petitionspot.com/petitions/FreeCuc>. In essence, do whatever you can to spread the word. Do not allow other governments to needlessly infringe on the rights of our citizens.

And if you want updated information on my Mother, you can go to: <http://freecucfoshee.blogspot.com>. Thank you for your signature and your support.

Elizabeth F. McCausland, a partner with Cooney, Mattson, Lance, et al., has been a member of the OCBA since 1998.

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HEAR SAY



John E. Fisher and Kimberly E. Lorenz, both of Fisher, Rushmer, et al., and the Hon. G. Kendall Sharp, U.S. District Court Middle District of Florida, were among the 225 family members and guests who gathered to recognize Judge Winifred J. Sharp at her retirement celebration on September 8, 2006.



The Central Florida Association of Women Lawyers welcomed 25 new members at its New Member Reception on October 5, 2006, at Harvey's Bistro in downtown Orlando. More than 115 members and guests attended. Pictured are CFAWL's Suzanne Meehle, Membership Co-chair; Leslie Sainz, Treasurer-Elect; and member Christine Arendas.



The OCBA Young Lawyers Section and Barry University School of Law sponsored the Fall Oath Administration on September 26, 2006, at the Orange County Regional History Center. More than 60 new attorneys took the Oath, which was administered by the Hon. William C. Gridley and other members of the judiciary. A reception was held for family and friends in the History Center's atrium.

Ah, November . . . what a great month! The temperatures are starting to cool off somewhat, as are the overzealous football fans (okay, yes, some fans are quieting down more than others ... whatever!). Holidays are right around the corner, but just far enough away that we are still having happy thoughts (but not yet stress) about family gatherings, shopping and holiday parties. The kids are buying the whole "you'd better watch out, you'd better not cry..." routine for now, and are trying to be good for goodness sake. We're ambitiously planning to get a head start on holiday cards and shopping (yeah, let me know how that works out)... and, of course, in November we celebrate the birthdays of some of the greatest people on the planet (*go Scorpios!!*)!! Yes, November in Florida always feels so refreshing to me - we can finally open up the windows, let in some fresh air and say goodbye to the stifling heat of summer! So... enjoy the weather, get out those turkey basters and leather boots, and let me tell you what your fellow OCBA members have been up to. So, here's what's up...

Richards H. Ford with Wicker, Smith, O'Hara, McCoy, Graham & Ford, P.A. was appointed to the Fellows of the American Bar Foundation in recognition of his career accomplishments, adherence to the highest principles of the legal profession and dedication of the community. Membership in the Fellows is limited to one-third of one percent of lawyers licensed to practice in each jurisdiction.

Rumberger, Kirk & Caldwell founding partner **William L. "Bud" Kirk** was recently inducted into the American College of Trial Lawyers (ACTL) during the organization's 2006 Annual Conference in London, England. The induction ceremony took place before an audience of more than 1,000 people. Founded in 1950, the ACTL is composed of 5,500 lawyers throughout the United States and Canada. Only a select number of qualified trial lawyers are invited to join. Candidates are carefully investigated to ensure that they have mastered the art of advocacy, as well as exercised the highest standards of ethical conduct and professionalism.

Congratulations to **Elizabeth** ("we-are-fam-i-l-y!") **Lanham Patrie** and **Patrick Howell**, who were both named partners in the law firm of Taylor & Carls, P.A. **Kay L. Wolf** with Ford & Harrison is serving as Vice Chair of the Center for Women's Philanthropy (CWP) Advisory Board. Jackson Lewis LLP partner **Susan McKenna**, also a member of the CWP Advisory Board, has been named Chair of CWP's Venture Philanthropists. The Center for Women's Philanthropy is affiliated with the Community Foundation of Central Florida.

The Orlando Chapter of the Federal Bar Association and chapter President, **Gary Wilson** of Jill S. Schwartz & Associates, P.A. recently received recognition at the Federal Bar's National Convention. The chapter was awarded the "Chapter Activity Presidential Achievement Award" (in recognition of its chapter activities in the areas of Administration, Membership Outreach and Programming) and the "Chapter Activity Presidential Citation Award" (in recognition of the Annual Middle District of Florida Congressional Breakfast).

Melissa Vickers, Felony Lead Attorney with the Orange/Osceola Public Defender's Office, was recently board certified in

Kristyne Kennedy

criminal trial practice by the Florida Bar. Currently, only five percent of Florida's lawyers are board certified. Vickers is one of only twelve attorneys who earned criminal trial certification in the most recent designations. Currently, five attorneys in the Orange/Osceola Public Defender's Office are board certified.

Congratulations to **Lidiana Rivera** of deBeaubien, Knight, Simmons, Mantzaris & Neal, LLP, who was the winner of the Westlaw Quiz Contest held at the September Happy Hour! Rivera will be receiving a \$500 gift card to Best Buy. Four entries listed the correct answers, which were A, B, D, B, C. Many thanks again to our sponsor, Westlaw, and to everyone who participated!

Are you still just kicking yourself because you missed out on the OCBA's last happy hour and heard what a fabulous time everyone had? Never fear, because the OCBA Social Committee is busy planning many more fun events! Next up: **ANOTHER HAPPY HOUR** on ****NOVEMBER 15, 2006**** (*Note this date change -- originally scheduled for November 16!!*) at Slingapour's on Wall Street. Don't get left out of this one, because not only is this going to be another huge **Happy Hour** held along with the OCBA's annual charity **Texas Hold 'Em Poker Tournament**, but we will also be celebrating special birthdays and welcoming many local celebrity guests who are planning to play in the tournament. Portions of the proceeds from the event will be donated to the OCBA Foundation, Inc. Among the celebrity guests who are planning to attend are Orlando Mayor **Buddy Dyer**; 105.9 radio personality **Drew Garabo** (brother of **Judi** "know-when-to-hold-'em" **Garabo**) and others. Be sure to submit your registration as soon as possible as space is limited! The admission is \$25 to play in the tournament or \$5 to attend the happy hour only. Admission can also be purchased through sponsorship packages ranging in price from \$150 - \$500. Don't worry if you don't know how to play poker (seriously, take it from me - the only thing I can say about poker is I "... know when to walk away, and [I] know when to run..." (oh yeah, and I also know I'm not supposed to count my money when I'm sitting at the table). Admission price includes great food, drinks and fun! If you have any questions or would like additional information about the event, contact event co-chairs **Woody** ("Superstar!") **Rodriguez** at dwrodriguez@aol.com or **Steve Jacobs** at sjacobs@dbksmn.com. Also mark your calendars for other upcoming Social Committee events, including the **Winter Wine & Cheese Party** on **January 25, 2007**. If you would like more information about these events, sponsorship opportunities or participating on the Social Committee, contact me at kennedyk@jacksonlewis.com.

Until next time, breathe in the fresh air, clear your mind, and be sure to brush up on your poker skills! Whether you're up or down, feeling mystified or almost terrified, on your own or all alone, hypnotized or paralyzed ... it's ok to be a gambler, just *don't be nobody's fool*. And, as always, if you know something, send any interesting news, gossip or information to me at kennedyk@jacksonlewis.com or fax 407-246-8441.

Kristyne E. Kennedy is an associate with Jackson Lewis LLP. She has been a member of the OCBA since 2001.



Children at Great Oaks Village were treated to ice cream and games for their participation in the YLS's annual Fun Day Olympics. On hand were YLS president Wiley Boston, and Terry Blackmon Walker, Chris Walker, Lori Nazry, Meaghan Hemmings, Andrea White, Nicole Smith, Lyneda Shorter and Aramis Donell.



The OCBA's Young Lawyers are more than young at heart! Steven Klein (standing tall at the front of the line) and Lori Nazry (second from right and pulling with all her might), don't have any trouble putting some muscle into their fun. More than 70 kids and staff at Great Oaks Village enjoyed the event on October 7, 2006.



Every year, the Orange County Courthouse and the OCBA Citizens Dispute and Family Law Mediation program get together to heighten awareness of the mediation services available in the community by distributing literature and generally having a good time. This year, a '50s-style party complete with music, poodle skirts and popcorn, drew lots of interest.



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YLS on the Move!

Giving Thanks...

Judi Garabo

It seems like everyone starts to think about giving thanks this time of year, and with the weather a little more tolerable and a proliferation of fun fall-oriented activities, it's hard not to find something for which to be thankful. I'm thankful that the YLS calendar has slowed to a snail's pace, because after the whirlwind summer we've had, it's time for a little breather.

Under the heading of "Old News," on October 7th, YLS Board Member **LaShawnda Jackson** made good on her promise to the kids who reside at Great Oaks Village (GOV) and threw an ice cream party for them. Back when the YLS hosted the annual Great Oaks Fun Day, LaShawnda promised that all the kids who participated in the GOV Olympics would get an ice cream party, and on October 7th, she made it happen! YLS President **Wiley Boston**, along with other YLS members **Terryl Blackmon Walker**, **Chris Walker**, **Lori Nazry**, **Meaghan Hemmings**, **Andrea White**, **Nicole Smith**, **Lyneda Shorter** and **Aramis Donell** entertained more than 70 kids and staff at Great Oaks with ice cream for everyone.

Since we're so slow this time of year, I can use a little of this space to plug the OCBA Social Committee's **Second Annual Texas Hold -'Em Poker Tournament on November 15, 2006, at Slingapour's** in Wall Street Plaza. If you're a poker fan or you just like to watch, please come out to raise funds for the OCBA Foundation, which is the charitable arm of the OCBA and helps to fund projects such as Teen Court. Last year's tournament featured several local celebrities, including some radio mouthpiece who happens to share my last name. That would be my brother, O-Rock 105.9's Drew Garabo, host of the "Morning After" show. I used to think that having a child who made a living as a radio talk-show host was pretty difficult for my parents

to explain to people, but now I'm convinced that it pales in comparison to admitting that their other child is a lawyer. I'm not sure which of us got the short end of the stick there, but one could reasonably assume that the gift of gab runs in the family! Drew will be making a return appearance at the Poker Tournament this year, and he will be joined by last year's guests Tony Pipitone and Mayor Buddy Dyer. Other celebrities who have tentatively committed to appearing are WKMG's Todd Jurkowski (who has the dubious honor of having been named "TV's Hunkiest Hunk" by another morning radio program) and the *Orlando Sentinel's* George Diaz. If last year is to be any indication, the competition is fierce and the chips fall where they may. Wednesday, November 15th at Slingapour's - contact event chairs **Woody Rodriguez** (dwrodriguez@mgfirm.com) or **Steve Jacobs** (sjacobs@dbksmn.com) for tickets, sponsorship information or general advice on how to know when to hold 'em and know when to fold 'em, know when to walk away and know when to run, or why you never count your money when you're sittin' at the table (there'll be time enough for countin' when the dealin's done).

In November, we will have our **Monthly Luncheon on Thursday, November 16th** at the Citrus Club beginning at 11:45 a.m. RSVP to OCBAYLS@gmail.com before Monday, November 13th and pay \$18; \$20 for late RSVPs and \$10 for solo practitioners and government attorneys.

As always, please direct any inquiries to me at OCBAYLS@gmail.com or garaboj@gtlaw.com.

Since it's still football season... and hope springs eternal...

GO 'NOLES!!!!

Judith A. Garabo is an associate with the firm of Greenberg Traurig, P.A. She has been a member of the OCBA since 1999.

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OCBA Legal Aid News

Pro Bono Spotlight – Michael Morris

Legal Aid Society of the OCBA



Most of us, as we entered adulthood, relied on the support of our families for guidance and mentoring, and perhaps some financial help. Youth “aging out” of foster care often don’t have this natural support system. However, they are entitled to services and supports intended to prepare them for independence, and many remain eligible for independent living services after emancipation. Receiving these services in a timely and meaningful way can literally mean the difference between pursuing a college education and becoming homeless. Michael Morris, an attorney who serves as a *pro bono* Guardian *ad Litem* (GAL) for teenagers living in foster care, makes sure the teens on his caseload receive those services.

A graduate of Loyola Law School, Michael began practicing locally in February 1995. He first learned about the challenges faced by youth in foster care while practicing as an attorney for the Department of Children and Families (DCF) in Orange County. In 2000, upon leaving DCF for private practice, Michael became a *pro bono* GAL for neglected, abandoned and abused children. Explaining his commitment to *pro bono* work, Michael says, “As lawyers, we’ve been given a special place in society, and we need to give back to the community at large.”

Now a solo practitioner with a primary practice in family

law, Michael continues to devote significant amounts of time serving as a Guardian *ad Litem*. In recent years, he has primarily served as a GAL for teenagers. When the Guardian *ad Litem* Program began its Transitions Project, focusing on the needs teenagers between the ages of 16 and 18 who are living in foster care and will “age out” of the system with no real support, Michael agreed to participate. As a Transitions GAL, he specializes in independent living for teenagers and continues to serve teens in this capacity until they reach the age of 19, providing additional support during that critical first year of adulthood.

Michael spends most of his time as a GAL ensuring the youth are in the best possible placement and then advising the teens on the decisions they must make as they reach adulthood. As Michael explains, “Foster care doesn’t do a good job of preparing teens for what life will be like after foster care, and a good GAL can make a real difference.” Michael makes that difference for foster youth every day.

The Legal Aid Society of the Orange County Bar Association thanks you, Michael, for your commitment to *pro bono* work!

Submitted by the Legal Aid Society of the OCBA.

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Rainmaking

Rainmaking 101

Listening and Speaking – Lesson 5

Mark Powers



Listening and speaking – actions that we normally think of as automatic and commonplace – take on new dimensions when we realize they are the very essence of “word-of-mouth” marketing. Whether the conversation is work related, involves another professional or happens in a social situation, what you say and how you say it helps others see you as trustworthy. And being considered trustworthy is key to your professional success. Fortunately, there are various techniques to turn everyday conversations into conversations that will build trust, deepen rapport and communicate key messages.

If you’ve been following these columns and are taking the recommended actions, you’ve already determined not only who your prospective clients are, but also who influences them. This completes the “Who To Talk To” part of the process. But now that you know who to talk to, what do you say? How do you take ordinary conversation and make it work for you in the context of marketing? And how do you do it without sounding like you are reciting something from a script?

The conversational strategies we teach are simple: each serves a specific purpose and has a desired outcome. Conversation left to chance yields unpredictable results; words in specific combinations have power. Just like shouting, “Help, the building is burning!” will elicit a predictable response, so can words used for marketing purposes. These conversational strategies have been road tested by hundreds of attorneys, and they work.

Over the years, we’ve put together the following list of the most important conversational strategies for marketing: the art of asking questions; the Interview; Storytelling (the stealth bomber of marketing); the Laser talk; the active use of acknowledgment; educating and upgrading conversations and powerful introductions. For now, we’ll start with the easiest strategy and a strategy that is adaptable to almost any setting, be it a new client meeting or a party down the street. It is the art of asking questions and your conversation won’t sound canned because you improvise the script as you go.

Trust Is Key

In order for clients to hire you and to refer other clients to your firm they must trust you. Trust is developed and earned over time, but the process starts with the way you communicate. Let’s take the initial client interview. Clients will decide whether or not to trust you based largely on how you communicate with them. Most clients have no real ability to judge the quality of your legal work - all but the most sophisticated clients have no experience in this area. But most clients are very experienced in interacting with

other human beings and will bring all of that experience to bear in deciding whether or not you are trustworthy. The old adage, “They don’t care how much you know, until they know how much you care,” addresses this issue. In order for a client to feel cared for, they have to tell their story and they have to feel you are interested in them. If you care and are interested you’ll ask a lot of questions about them – and their matter.

How does the art of asking questions apply to social situations and, for that matter, marketing in general? As a general rule, no matter whom you meet, or where you are, people love to talk about themselves. Make it a point to ask questions of a personal nature, but don’t be overly intrusive. According to studies focused on the length of time that it takes to develop rapport, it takes about 12 minutes of conversation for a person to warm up to you and begin to trust you. Engaging someone in a conversation about himself or herself is an easy way to begin building trust. Avoid cross-examining them and try to remember that almost everyone has an interesting story beneath whatever exterior façade they present to the world.

Acceptable questions include those about peoples’ lives: what is important to them and why. Find out if they are married, whether they have children and what their children’s names and ages are. Find out about their hobbies or interests. Are they into sports? Where did they go to college? What type of work do they do? Do they own their own business - what inspired them to be an entrepreneur? Be curious without overstepping the bounds of good manners. You will be able to judge how open they are by the amount of self-disclosure they allow. If they give grudging, one-word answers to your questions, they probably aren’t immediately trusting and it will take longer to get to know them. If they give you long, detailed answers, it’s an indication that they are beginning to feel trust for you. As you ask these questions and listen to the answers, try to do only 20 to 30 percent of the talking. Allow the person you are getting to know to dominate the conversation. Focus your attention on them exclusively.

The simplest technique for turning a normal conversation into a strategic one is to ask questions. Questions are a powerful tool for building rapport and trust. They help you learn about and form relationships with others. The information you receive and the commonalities you discover will form the foundation for the relationship that is built, **one conversation at a time**, over a long period. Work on finding out what you have in common with each individual and remember the Rule Of Seven: After about seven encounters with someone they begin to accept you as

Continued on page 22

that this Court perceived in a criminal defendant's having members of his class on the jury ... they have evaporated.

In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court reached the question of gender-based peremptory challenges and extended *Batson*'s reasoning to them. Although the petitioner in *J.E.B.* was a man objecting to the empanelment of an all-female jury in a paternity and child support case, much of the *J.E.B.* opinion focused on the history of prohibition of women on juries. In the exclusion of all males from the *J.E.B.* petitioner's trial jury, the Court saw the operation of the "same stereotypes that justified the wholesale exclusion of women from juries and the ballot box."

In a concurring opinion, Justice O'Connor expressed reservations about the Court's extension of *Batson*. She noted that, with the *J.E.B.* decision, the Court makes

...the peremptory challenge less discretionary and more like a challenge for cause. We also increase the possibility that biased jurors will be allowed onto the jury, because sometimes a lawyer will be unable to provide an acceptable gender-neutral explanation even though the lawyer is in fact correct that the juror is unsympathetic. Similarly, in jurisdictions where lawyers exercise their strikes in open court, lawyers may be deterred from using their peremptories, out of the fear that if they are unable to justify the strike the court will seat a juror who knows that the striking party thought him unfit. Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.

How Far Should *Batson* Go?

Should *Batson* prohibitions extend to ethnicity? In *Hernandez v. New York*, 500 U.S. 351 (1991), the Court implied that *Batson* could apply to peremptory challenges excluding Latino jurors. In *Rico v. Leftridge-Byrd*, 340 F.3d 178 (2003), a case alleging improper exclusion of Italian Americans, the Third Circuit suggested that an extension of *Batson* to ethnicities should depend on whether an ethnic group constituted a "cognizable group that has been or is currently subjected to discriminatory treatment."

Peremptories based on religious beliefs have also been the subject of dispute. In *U.S. v. Stafford*, 136 F.3d 1109 (1998), the Seventh Circuit said:

It is necessary to distinguish among religious affiliation, a religion's general tenets, and a specific religious belief. It would be improper and perhaps unconstitutional to strike a juror on the basis of his being a Catholic, a Jew, a Muslim, etc. It would be proper to strike him on the basis of a belief that would prevent him from basing his decision on the evidence and instructions, even if the belief had a religious backing.

And in *U.S. v. DeJesus*, 347 F.3d 500 (2003), the Third Circuit held that "even assuming that the exercise of a peremptory strike on the basis of religious affiliation is

unconstitutional, the exercise of a strike based on religious beliefs is not."

Conclusion

Just this year, the Supreme Court decided *Miller-El v. Dretke*, No. 03-9659 (2005). In *Miller-El*, prosecutors in Dallas, Texas, had struck 10 of 11 qualified black venire members during jury selection in a capital murder trial. Declaring that "the very integrity of the courts is jeopardized when a prosecutor's discrimination 'invites cynicism respecting the jury's neutrality,'" the Court granted petitioner Miller-El's request for habeas relief and ordered a new trial.

Some commentators have argued that the peremptory challenge should be abolished altogether. The Court has never recognized a constitutional right to the peremptory challenge, while the Sixth Amendment "fair cross-section" and the Fourteenth Amendment equal protection concerns have a firmer constitutional grounding. In England, where both trial by jury and the peremptory challenge originated, use of the peremptory was abolished in 1988.

In a concurrence to the Court's *Miller-El* decision, Justice Breyer questioned whether the peremptory challenge should still play a role in our justice system:

I recognize that peremptory challenges have a long historical pedigree. They may help to reassure a party of the fairness of the jury. But long ago, Blackstone recognized the peremptory challenge as an "arbitrary and capricious species of [a] challenge."... If used to express stereotypical judgments about race, gender, religion, or national origin, peremptory challenges betray the jury's democratic origins and undermine its representative function...The "scientific" use of peremptory challenges may also contribute to public cynicism about the fairness of the jury system and its role in American government ... And, of course, the right to a jury free of discriminatory taint is constitutionally protected - the right to use peremptory challenges is not.

Justice Goldberg, dissenting in *Swain v. Alabama*, ... wrote, "were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former." ... This case suggests the need to confront that choice. In light of the considerations I have mentioned, I believe it necessary to reconsider *Batson*'s test and the peremptory challenge system as a whole.

Despite some calls for its abolition, the peremptory challenge remains a vital part of jury selection in the United States. However, it will remain subject to close scrutiny by litigants, their lawyers, and the courts.

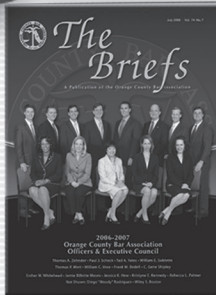
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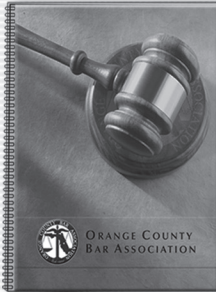
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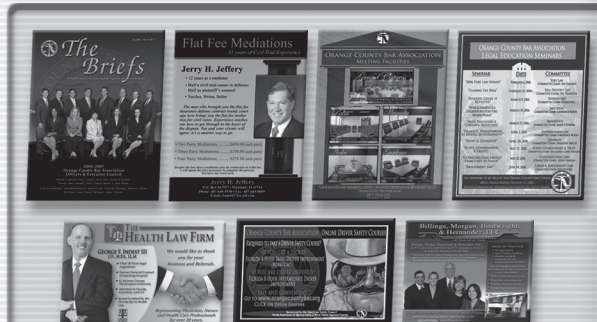
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Rainmaking – Lesson 5 *Continued from page 19*

part of their world. Engaging people by asking questions can help you bridge the gap in the early stages of a relationship so that it can grow into something more substantial.

Use the art of asking questions when you take a referral source out to lunch, talk to a colleague in the courthouse or meet a prospective influencer at a social function. It is a no-fail technique for building what we call, “know, like and trust.”

In Lesson 6

We will continue to explore the strategic conversations that will support you in developing your business. Next up: The Interview.

Mark Powers is the President of Atticus, Inc. and a regular contributor to The Briefs. Mark co-authored “The Making of a Rainmaker: An Ethical Approach to Marketing for Solo and Small Firm Practitioners” and founded Rainmakers™, a simple process for attorneys at all levels to stay focused on marketing, creating fresh ideas, and on-going accountability to marketing. To learn more about Atticus or Rainmakers™, please visit the Atticus website at www.atticusonline.com or contact the Atticus office at 352-383-0490.



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- Solo and Small Firm Committee

The International Law Committee has been reorganized and is seeking interested members. Kim Radcliffe, Law Offices of Kim Radcliffe, asks that members interested in becoming involved contact her at dkimradcliffe@aol.com or 407-649-9192. The first meeting is scheduled for Wednesday, November 15, 2006, Noon, at the OCBA center. Lunch will be provided!

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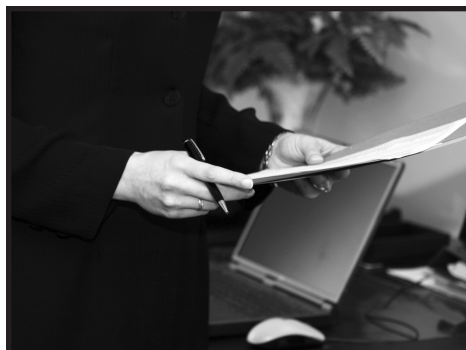
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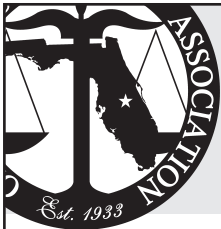
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2006

November - December Calendar

OCBA Luncheon • November 30, 2006

U.S. Senator Mel Martinez

RSVP by November 28th to reservations@ocbanet.org

November

- 2 Elder Law Committee**
12:00 p.m. • Bar Center
- Federal Judicial Relations Committee**
12:00 p.m. • Judge Conway's Chambers
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- 3 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club
- 7 Criminal Law Committee**
12:00 p.m. • Bar Center
- OCALSS**
5:30 p.m. • Bar Center
- 8 Estate Guardianship & Trust**
12:00 p.m. • Bar Center
- Family Law Executive Board Committee**
12:00 p.m. • Bar Center
- Judicial Relations Committee**
12:15 p.m. • Orange County Courthouse, 21st Floor, Conference Room
- 9 Legal Aid Society Executive**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law Committee**
12:00 p.m. • Bar Center
- 10 Workers' Compensation Law**
11:45 a.m. • Bar Center
- 13 Central Florida Family Law American Inn of Court (CFFLAIOC)**
5:30 p.m. • Adair's in College Park
- 14 Executive Council Meeting**
11:30 a.m. • Bar Center

- 15 International Law Committee**
12:00 p.m. • Bar Center
- OCBA Texas Hold 'Em Poker Tournament**
5:00 p.m. • Slingapour's at Wall Street Cantina
- 16 Young Lawyers Section Luncheon**
11:45 a.m. • Citrus Club
- Hispanic Bar Association**
5:30 p.m. • TBA
- Paul C. Perkins Bar General Meeting**
6:00 p.m. • FAMU College of Law
- 17 Family Law Committee**
8:00 a.m. • 425 N. Orange Ave., Room 2310
- 21 Legal Aid Society Board Meeting**
11:45 a.m. • 100 E. Robinson St.
- Professionalism Committee**
12:15 p.m. • Bar Center
- Inn of Court**
5:30 p.m. • Dubsdread
- 22 CFACDL**
11:45 a.m. • Sorosis Club
- Federalist Society**
12:00 p.m. • Bar Center
- 23-24 BAR CLOSED - THANKSGIVING**
- 27 CFAWL Board Meeting**
12:00 p.m. • Bar Center
- 29 Business Law Committee**
12:00 p.m. • Baker Hostetler, SunTrust Bank Bldg.
- YLS Board Meeting**
5:30 p.m. • Teleconference
- 30 OCBA Luncheon**
U.S. Senator Mel Martinez
A Washington Update
11:30 a.m. • Downtown Marriott

December

- 1 Diversity Committee**
8:00 a.m. • Bar Center
- CFAWL Bar Luncheon**
11:30 a.m. • Citrus Club
- 5 Criminal Law Committee**
12:00 p.m. • Bar Center
- OCALSS Meeting**
5:30 p.m. • Bar Center
- 7 Elder Law Committee**
12:00 p.m. • Bar Center
- OCBA Paralegal Committee**
5:30 p.m. • Bar Center
- CFAWL Holiday Party**
6:00 p.m. • Home of Keersten & Greg Martinez
- 8 Workers' Compensation Committee**
11:45 a.m. • Bar Center
- 12 Executive Council Meeting**
11:30 a.m. • Bar Center
- 13 Estate Guardianship & Trust Committee**
12:00 p.m. • Bar Center
- 14 Legal Aid Society Executive**
8:00 a.m. • 100 E. Robinson St.
- Real Property Law**
12:00 p.m. • Bar Center
- 19 Legal Aid Society Board**
11:45 a.m. • 100 E. Robinson St. (Upstairs)
- Professionalism Committee**
12:15 p.m. • Bar Center
- 21 Young Lawyers Section Luncheon**
11:45 a.m. • Citrus Club
- Paul C. Perkins Bar General Meeting**
12:00 p.m. • Bar Center



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