Federal Law Appellate Update

A survey of recent cases discussing issues of procedural significance to appellate practitioners as well as a discussion of recent amendments to the Federal Rules of Appellate Procedure.

by Steven L. Brannock¹ and Sarah Pellenbarg²

Amicus – Discovery Denied
Ever consider prying into the affairs of amici? At least one court says it’s none of the opposing party’s business.


Have you ever been convinced that the amicus curiae seeking to file a brief was more closely associated with the opposing party than revealed by the motion? Apparen-
CHAIR’S MESSAGE

we had tried to organize a similar conference, but at that time we received very little response from the DCA judges. So this conference marks a significant step forward for our Section. I have named three members of the Section to serve as the steering committee: John Crabtree, Harvey Sepler and Celene Humphries. I want to stress that participation at the conference will not be open to every member of the Section. There will be limited participation in order to better facilitate discussion. In the long run it will surely benefit the entire Section. Over time, any interested Section member should have an opportunity to participate at a conference. The first conference will be held in conjunction with the Annual Meeting of The Florida Bar. Details will be forthcoming.

The second event this year is only tentative at this point, but it seems very likely it will occur. As many of you know, there has been a Supreme Court committee looking at the workloads and jurisdiction of the district courts of appeal. Three members from our Section served on that committee. The committee’s report has now been filed with the Supreme Court. The main recommendation of the committee is that the court should appoint a special committee every eight years to explore whether there is a need for more DCAs. This analysis would, among other things, include whether the DCAs should have divisions and whether the boundaries of the DCAs should be redrawn. Part of that process requires outreach to the legal community and the public at large. As I write this, nothing is final, but it appears that the next committee appointed to look into this matter will want to have a facilitated discussion on all issues with the Appellate Section. We will set aside a time on Friday at the retreat for this talk. This promises to be a very good meeting and more details will follow.

As some of you know, the Section donated money to offset the cost of the Florida court system hosting the national mid-year meeting of the Chief Justices Conference recently in Amelia Island, Florida. Chief Justice Barbara Pariente hosted this conference. It was originally scheduled to take place in New Orleans, but because of the difficulties they are having there, Justice Pariente agreed to move the conference to Florida. I attended on behalf of the Section. Chief Justice Pariente graciously thanked the Section for its participation many times at the conference.

Due to our upcoming retreat, there will be one extra meeting this year. The retreat presents a great opportunity for everyone to actually participate in deciding the future of the Section, and I would strongly urge everyone to attend. As past attendees will tell you, the retreats are an excellent opportunity to really meet and get to know Section members. I hear there will be a Friday night “jam” session involving the many talented musicians we have in the Section. You will not want to miss that!

Once again, we always have room for people who want to help. If you are interested, please do hesitate to contact me.

Should the Appellate Section’s Leadership Track be Changed?

by Susan W. Fox, Chair-Elect

It takes about 10 years of intense work to become Chair of the Appellate Practice Section. I calculate my estimate of 10 years by assuming three years at the committee level, two as Editor of The Record or CLE Chair, then five years in the officer track. I became Chair-Elect a little faster than this because I came on the Executive Council as Editor of The Record, and then advanced into the officer group because of a vacancy created by Raoul Cantero’s appointment to the Supreme Court of Florida.

In my opinion, there are several problems with this long track. It makes our Executive Council and officer group too stagnant. New people sometimes find it hard to get involved and then perceive a steep mountain to climb before they have any opportunity for leadership. This may dampen motivation to get involved.

The upper ranks of the track are also problematic. By the time one becomes Chair, the desire has often peaked and burned out. Ten years is a long time to maintain an intense level of dedication to a bar organization. I hope I can say (without hurting our founder’s feelings) that the current track appears to have been structured to allow each of the founders a chance to be Chair. This has served its purpose.

At a Section retreat three years ago, I proposed that the current office of Vice-Chair be eliminated, or that Secretary and Treasurer be combined, or possibly both, in order to reduce the length of the track. The hardest working positions in the Section are editor of The Record and CLE Chair. The Website Chair can be an intense position as well. I believe a workable solution might be to elevate these positions to vice chair status and treat them as the feeder positions for the officer track.

The problem with a change like this is, of course, ousting people who are in the track and who have worked very hard to achieve their positions. Therefore, I offered at the 2003 retreat, to have my position eliminated to make this possible. A leadership committee has been studying this proposal for three years and will bring it to a head at our Section retreat on May 12-14 at Hutchinson Island Marriott Beach Resort & Marina. To make this change, the bylaws will have to be amended.

Please give some thought to this important issue and bring your ideas to the retreat. Remember, the ultimate goal is to promote the health of the Section and of appellate practice generally. This requires a balance between maintaining stable leadership and encouraging fresh blood with new ideas. If you are unable to attend the retreat, please feel free to email me at susanfox@flappeal.com and I will pass your comments on to the working group.
Appealability – Class Certification

Appeal fails because the death knell did not sound. Chamberlain v. Ford Motor Co., 402 F.3d 952 (9th Cir. 2005).

This recent decision out of the Ninth Circuit contains a discussion of the facts in play in determining whether to permit an immediate appeal of a class certification decision. The court notes that the rule permitting appeal has dual purposes. First, an appeal should be permitted when class certification or the denial of class certification is effectively a ruling on the merits; that is, because of the ruling the defendant will face enormous liability and will have little choice but to settle, or the ruling makes it impossible for the plaintiff to further litigate the case. Second, an appeal should be permitted when the appeal raises important unsettled legal issues and the district court has committed manifest error. According to the court, such appeals should be “rare.” In this case, the court found no unsettled issue and noted that the death knell did not sound for either party. Review denied.

Appealability – Class Certification Under Fair Labor Standards Act

Court takes an old-fashioned approach. The new standards of section 23(f) do not apply. Baldridge v. SBC Communications, Inc., 404 F.3d 930 (5th Cir. 2005).

The district court certified a case for collective action under 29 U.S.C. section 216(b), which is part of the Fair Labor Standards Act (FLSA). Unlike class certifications in civil decisions which are now governed by rule 23(f), Fed. R. Civ. P., there is no statutory provision for interlocutory review of cases certified under FLSA. The court looked to cases decided before rule 23(f) to rule that FLSA certifications are not immediately appealable because such orders are subject to revision at any time. Absent legislative action, the court declined to consider the policy concerns behind rule 23(f).

Appealability – section 1292(b) Certifications

Certification is unlikely if your side is not winning your issue in some court, somewhere. Caraballo-Seda v. Municipality of Hormigueros, 395 F.3d 7 (1st Cir. 2005).

The trial court denied a motion to dismiss holding that the Workforce Investment Act (WIA) did not foreclose §1983 claims under the WIA. Defendants sought an immediate appeal on issue of whether WIA expressly or implicitly foreclosed §1983 suits. The First Circuit declined to hear the appeal. Since the only two other district courts in Puerto Rico had reached the same conclusion as the court below, the court found no substantial ground for a difference of opinion, as required to justify appellate review.

Appealability – Collateral Orders

Sorry, you’ve got to pay the filing fee. At least for now. In re Diet Drugs Products Liability Litigation, 418 F.3d 372 (3d Cir. 2005).

The district court issued a pretrial order severing several plaintiffs from a multi-district action. Plaintiffs disputed the district court’s determination that 28 U.S.C. §1914 required the payment of a filing fee for every severed and amended complaint and tried an immediate appeal under the collateral order doctrine. The appellate court found that the filing fee order failed to satisfy the collateral order test because the sums involved could be recovered at the conclusion of the litigation. Thus, the matter was not effectively unreviewable on appeal from the final judgment as required by the doctrine. Similarly, extraordinary relief by a writ of mandamus was not warranted because the issue could not heard in the plenary appeal.

Appealability – Collateral Orders

Discretionary Stay reviewable under collateral order doctrine. Lockyer v. Mirant Corp., 398 F.3d 1098 (9th Cir. 2005).

The attorney general sued defendants in federal district court, seeking to require defendants to divest their ownership interest in three power plants. Defendants subsequently filed voluntary petitions to reorganize under Chapter 11. The district court declined to rule whether the attorney general’s suit was exempt from the automatic stay provision under 11 U.S.C. §362(b)(4) but granted defendants’ request for a discretionary stay. The appellate court permitted immediate review under the collateral order doctrine because the correctness of the stay decision would be unreviewable on appeal.

Appealability – Collateral Orders

The district court’s open mind doomed the right to immediate appeal. Competitive Technologies, Inc. v. Fujitsu Ltd., 393 F.3d 1376 (Fed. Cir. 2005).

The district court entered an interlocutory order, declining to dismiss various counterclaims. The defendants argued sovereign immunity. Defendants then took an appeal arguing the collateral order doctrine. In this case, the sovereign immunity issue was not appealable under the continued next page
collateral order doctrine because the district court left the issue open for reconsideration. As a result, there was no immediately appealable order regarding sovereign immunity.

**Appealability – Dismissals Without Prejudice**

Dismissals without prejudice are final and appealable.

*Municipality of San Juan v. Corporacion Para El Fomento Economico De La Ciudad Capital*, 415 F.3d 145 (1st Cir. 2005).

The appellate court affirmed an order of the district court compelling arbitration and dismissing the case without prejudice. The court held that: 1) dismissals without prejudice are final and appealable and to say otherwise is “plainly without merit,” under *Green Tree Fin. Corp-Alabama v. Randolph*, 531 U.S. 79 86-87 (2000). Specifically, the First Circuit stated: “A district court’s order directing arbitration and dismissing all of the claims before it is ‘final’ within the meaning of 9 U.S.C.S. §16(a)(3) and therefore appealable. The United States Court of Appeals for the First Circuit agrees with the reasoning of the United States Court of Appeals for the Third Circuit, the Ninth Circuit, and the Eleventh Circuit, that have rejected distinctions between dismissals with and without prejudice. Both types of dismissal are equivalent with respect to the United States Supreme Court’s rationale in *Green Tree* - that the arbitration order plainly disposed of the entire case on the merits and left no part of it pending before the court.” Id. at 148.

**Appealability – Final Order – Sanctions are Collateral**

Appeal can proceed while sanctions are litigated.

*Jackson v. Cintas Corp.*, 425 F.3d 1313 (11th Cir. 2005).

The district court granted a motion to compel arbitration but retained jurisdiction to award sanctions based on alleged discovery violations. The arbitrability decision was appealable pursuant to 9 U.S.C. §16(a)(3) of the Federal Arbitration Act. The court decided that the order compelling arbitration was final despite a reservation of jurisdiction. The existence of a collateral question does not prevent finality, and the sanctions decision was determined to be collateral.

**Appealability – Motion to Reconsider Injunction**

Appealable because the reconsideration raised a new matter not raised in the first injunction order. The reconsideration motion, in substance, is characterized as a motion to modify the injunction.

*Cred Suisse First Boston v. Grunwald*, 400 F.3d 1119 (9th Cir. 2005).

The district court entered an order enjoining an employee from arbitrating claims against his former employer before the American Arbitration Association. The employee later asked the court to reconsider its injunction raising new matters based on events subsequent to the later injunction. The motion to reconsider was filed outside of the ten day limit of rule 59(e), Fed. R. Civ. P. The district court considered the issue but denied the motion, and the employee appealed. The Ninth Circuit held that the appeal was timely. The motion should be treated not as a rule 59(e) as motion to reconsider, but instead, a motion to modify the injunction because it raised new matters that were not (and could not have been) the subject of the original injunction proceedings. The denial of such a motion, when properly characterized, is an appealable interlocutory order.

**Appealability – Time for Appeal – Amended Judgments**

If the judgment is amended, you better file a new notice of appeal if you don’t like the amendment. Be careful about reliance on rule 4(a)(4)(B)(i).

*Sorensen v. City of New York*, 413 F.3d 292 (2d Cir. 2005).

In this case the appellant filed a notice of appeal from a judgment that was partially in her favor and partially adverse. The notice was filed while post-trial motions were pending. Subsequently, the district court vacated that portion of the award that was in her favor. The issue was whether the previously filed notice of appeal was effective to review the later-entered amended judgment. Unfortunately for appellant, it was not, and her appeal was dismissed. Although rule 4(a)(4)(B)(i) could be read to suggest that the premature notice covered subsequent dispositions, it did not if the party wished to appeal from the later disposition. The court cited the Advisory Notes on the Federal Rules of Appellate Procedure which state that if a notice of appeal is filed after a judgment is entered but before a post-trial motion is decided and the judgment is thereupon altered, the notice of appeal to preserve appellate review was timely filed. As the TCMP called into question the correctness of the district court’s order, the appellate court found that the TCMP was properly treated as a motion to reconsider under rule 60, Fed. R. Civ. P. The fact that the investors asked the district court to modify its ruling under rule 23(c)(1)(C) had no bearing on the time limit in rule 23(f). As the district court concluded that the investors failed to identify any reason why its order was incorrect and merely reaffirmed its prior ruling, the district court’s order should not be treated as an order granting or denying class action certification. The petition to appeal must be filed within 10 days from the original ruling on class certification, not from subsequent reconsideration or other motions seeking to modify the original order. Otherwise, according to the court, it would be too easy to circumvent the 10-day deadline in the rule.
Appealability – Timing of Contempt Appeals

Generally speaking, attorneys’ fees are not appealable until after the trial court sets entitlement and amount. But there may be an important exception. The Sixth Circuit found an appeal filed 30 days after an order entered establishing the amount of an award of attorneys’ fees, but more than a year after the party was found to be in contempt of a court order, was untimely. Even if a ruling of contempt is pursuant to a statute mandating an award of attorneys’ fees, an appeal of a contempt order must be made within 30 days of the finding of contempt, even if attorneys’ fees have not yet been awarded.

Appealability – Sanctions – Appeal Must Wait Until Amount Determined
Appeal later, not now. No appeal until the sanctions issue is fully resolved. Roth v. Green, 123 Fed. Appx. 871 (10th Cir. 2005).

Plaintiff’s section 1983 actions were dismissed and the district court determined that sanctions were appropriate under rule 11, Fed. R. Civ. P. The Tenth Circuit dismissed the sanctions appeal determining that such appeals must await the district court’s determination of the amount of the sanctions award. The court, however, had jurisdiction to consider the appeal on the merits of the underlying section 1983 action, because sanctions awards are considered collateral to the judgment.

Appealability – reopening the time to file notices of appeal
Fourteen days means fourteen days. Bowles v. Russell, 432 F.3d 668 (6th Cir. 2005).

Federal district courts may, under certain circumstances, reopen the time for filing a notice of appeal for a period of 14 days when the potential appellant did not receive notice of entry of judgment. FRAP 4(a)(6). The Sixth Circuit has ruled that the “Unique Circumstances” doctrine does not apply to lengthen the 14-day period granted by rule 4(a)(6). In Bowles, appellant did not receive notice of the district court’s ruling, and therefore missed the time for filing an appeal. When appellant informed the district court of this situation, the district court set a date 17 days into the future for filing a notice of appeal. Appellant, relying on the district court order, filed his appeal 16 days after the extension was granted. The Sixth Circuit dismissed the appeal for lack of jurisdiction.

Attorneys Fees – Timing of Motion
Breathe a little easier, the 14-day deadline to file for fees is tolled by post-trial motions. Bailey v. County of Riverside, 414 F.3d 1023 (9th Cir. 2005).

Rule 54, Fed. R. Civ. P., requires that a motion for attorneys’ fees be filed “no later than 14 days after entry of judgment.” Aligning itself with the Second and Eleventh Circuits, the Ninth Circuit held that the time to file a fee motion is tolled pending the outcome of motions for judgment as a matter of law under rule 50 and for a new trial under rule 59. See Weyant v. Okst, 198 F.3d 311 (2d Cir. 1999); Members First Fed. Credit Union v. Members First Credit Union of Fla., 244 F.3d 806, 807 (11th Cir. 2001). The court’s analysis would seem to suggest the same result would occur for any “tolling” motion under rule 4.

Bond – Amount Can Include Attorneys Fees
The amount of the bond can include attorneys fees if the district court deems the appeal frivolous. Young v. New Process Steel, LP, 419 F.3d 1201 (11th Cir. 2005).

The jury returned a verdict in favor of the employer in this discrimination case and a final judgment was entered in the employer’s favor. The employees filed a notice of appeal and the district court required the employees to post a cost bond, the majority of which was designed to cover the employer’s anticipated attorneys’ fees on appeal. There was nothing in the

continued next page
district court’s order that indicated that the employees’ appeal would be frivolous. The Eleventh Circuit held that the bond can include anticipated attorneys’ fees, but only if the district court determines that the appeal is likely to be frivolous, unreasonable, or without foundation. To allow the bond amount to routinely include attorneys’ fees might prevent good faith appeals.

Briefing – Fact Statements Should Observe the Clear Error Standard
You ignore the court’s fact finding and tell your own story at your peril.
Carnes Co. v. Stone Creek Mechanical, Inc., 412 F.3d 845 (7th Cir. 2005).

The district court ruled for the plaintiff after a bench trial and issued findings of fact and conclusions of law. On appeal, the appellant’s statement of facts in its brief strayed largely from the district court’s order, telling a very different story than the district court’s factual findings. Criticizing counsel, the Seventh Circuit held that this approach was improper as an impermissible “attempt to retry the case on appeal.” Findings of fact are reviewed only for clear error under rule 52(a), Fed. R. Civ. P.

Certification under rule 54(b) – Not Designed for Overlapping Claims
Jurisdiction for an immediate appeal cannot be created by certifying claims that are not, in fact, separate. The district court erroneously put “two carts before one horse.”
Lottie v. West American Ins. Co., 408 F.3d 935 (7th Cir. 2005).

Lottie sued an insurer which had denied two property fire claims, for breach of contract, bad faith and racial discrimination. The district court granted the insurer’s motion for partial summary judgment on the bad faith and discrimination claims, and certified these claims for immediate appeal under rule 54(b). The Seventh Circuit dismissed the appeal holding that the district court should never have granted rule 54(b) certification. Rule 54(b) certifications should be an exception to the norm of “one appeal per case.” Here it did not apply because the cases were not truly separate and distinct. If the claims are so overlapping that the appellate court is likely to have to cover the same ground in separate appeals, the case should not be certified. The bad faith and breach of contract claims were too related to be divided into two separate appeals.

Jurisdiction – District Court’s Power to Modify Supervised Release
District Court keeps its power pending appeal.
United States v. D’Amario, 412 F.3d 253 (1st Cir. 2005) held on an emergency motion that a district court has jurisdiction to modify conditions of supervised release once the defendant files a notice of appeal (and community confinement is okay). The court noted that there was very little case law on the topic, but that common sense dictated that if “an appeal were to divest the district court of authority to supervise the conditions of the convicted defendant’s release, then there would be no such supervision at all. This cannot be the intention of Congress.” Id. at 254.

Jurisdiction – Diversity Fails
Court finds a way to preserve its jurisdiction, even though diversity was apparently lost.

This is a case where the appellate court obviously wanted very badly to affirm summary judgment in favor of the defendant and worked hard to do so. In a case stemming from lost luggage, the plaintiff, a citizen of Massachusetts, climbed on top of a large pile of luggage to collect his suitcase, falling and injuring himself. Plaintiff sued U.S. Airways in Massachusetts state court. U.S. Airways is a Delaware corporation and removed the case to federal court. U.S. Airways then sued a skycap, a citizen of Massachusetts like the plaintiff, which destroyed diversity. Overlooking that diversity had been destroyed by the defendant’s action, the district court entered summary judgment in the defendant’s favor and the plaintiff appealed. The First Circuit discovered the jurisdictional problem during oral argument. Although the plaintiff

Moving? Need to update your address?

The Florida Bar’s website (www.FLABAR.org) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically), but addresses are processed timely. The address form can be found on the website under “Member Services,” then “Index.”
requested that the case be remanded to state court, the First Circuit figured out a way to decide the case. The court concluded that it had the power to dismiss the skycap because he was a dispensable party and the dismissal would prejudice no one but the skycap. The First Circuit dismissed any prejudice to the skycap by dismissing the third party complaint, with prejudice. Then, on the merits, the court concluded that the danger of which the plaintiff complained was “open and obvious” and therefore U.S. Airways under Massachusetts law didn’t have a duty to warn the plaintiff. The decision resulted in a victory for the defendant in a case where the district court did not have jurisdiction at the time it issued the final order.

Jurisdiction – Power to Vacate a Remand

Resolving a logical impossibility. Connolly v. H.D. Goodall Hospital, Inc., 427 F.3d 127 (1st Cir. 2005).

In this case, the district court attempted to vacate a remand to the state court and the appellate court was presented with this interesting question of logic: assuming the district court had the power to vacate the remand, did the court’s actions render non-final its remand order and convert the present proceedings into an unauthorized interlocutory appeal?

The court held that it had jurisdiction regardless of whether the remand was proper. If the district court lacked the power to vacate its remand, there is no jurisdictional problem because no live claims remain pending in federal court. But if the court had the power to vacate the remand, the court held that the court’s actions render non-final its remand order and convert the present proceedings into an unauthorized interlocutory appeal.

The court stated that it had jurisdiction regardless of whether the remand was proper. If the district court lacked the power to vacate its remand, there is no jurisdictional problem because no live claims remain pending in federal court. But if the court had the power to vacate the remand, the court held that the court’s actions render non-final its remand order and convert the present proceedings into an unauthorized interlocutory appeal.

Opinions – Refusal to Review an Incomprehensible Opinion

Appellate court refuses to review an incomprehensible opinion issued by an immigration law judge. You can relate, right? Recinos De Leon v. Gonzales, 400 F.3d 1185 (9th Cir. 2005).

Petitioner sought review of an order denying an asylum application. The opinion under review was so incomprehensible that the Ninth Circuit granted the petition and remanded for further proceedings. The Ninth Circuit concluded that it could not “substantively review [the opinion] without violating basic principles of judicial review.”

Preservation – Arguments in a Footnote


The only argument against the grant of summary judgment to one of the parties is contained in a footnote in the government’s brief. According to the court, an argument contained only in a footnote does not preserve an issue for review. Rather, under Rule 28, Fed. R. Civ. P., an appellant’s brief must include a statement of the issues presented for review, and an argument with respect to each issue. A statement in a footnote does not constitute argument with respect to an issue. Nor did the government save the argument by raising it in its reply brief. This argument was too late.

Preservation – Issue Not Raised

Don’t hold back until the reply. McCarthy v. S.E.C., 406 F.3d 179 (2nd Cir. 2005).

Arguments not raised in an appellant’s opening brief, but only in his reply brief, are not properly preserved before an appellate court. According to the court: “We think it reasonable to hold appellate counsel to a standard that obliges a lawyer to include his most cogent arguments in his opening brief, upon pain of otherwise finding them waived.” Id. at 186. It does not matter that the issues were raised in the district court. An appellate court may overlook this briefing failure in a case of manifest injustice, but the court declined to do so in this case.

Another recent case emphasized the same point. In Pointdujour v. Mount Sinai Hosp., 121 Fed. Appx. 895 (2nd Cir. 2005), the Second Circuit refused to consider an argument raised for the first time in reply brief, even though appellant was pro se.

Preservation – Issue Not Raised

It pays to be optimistic. Raise an issue even if it appears doomed, your luck may change! United States v. Pipkins, 412 F.3d 1251 (11th Cir. 2005).

Defendants challenged the constitutionality of their sentences in light of Booker. The Eleventh Circuit held that the issue had been waived, because it was not raised until rehearing. Issues must be raised in the initial brief to be preserved. The defendants argued that they did not raise the issue originally because it was foreclosed by Eleventh Circuit precedent at the time – precedent that was later
overruled. According to the court, the fact that the argument was a loser at the time of the briefs was no excuse. If a defendant wishes to benefit from a later change in the law, the issue needed to be raised in the briefs to be preserved. In other words, defendant should have raised the issue and argued that the court’s precedent was wrongly decided.

Preservation – Federal Question
If you want to get to the United States Supreme Court, raise a federal question! Howell v. Mississippi, 543 U.S. 440 (2005).

The inmate contended that the Mississippi courts erred by refusing to require a jury instruction about a lesser included offense in his capital case. In arguing the issue before the Mississippi Supreme Court, the inmate cited three state cases about lesser-included-offense instructions but did not cite any federal cases or specifically argue any federal rights. The United States Supreme Court later dismissed certiorari, determin-
Scope of Review – Arbitration Appeals
Scope of appeal limited to the issue of arbitrability. As an interesting aside, the court held that a company-wide e-mail could not establish an agreement to submit dispute to arbitration.


A company-wide e-mail announced a new dispute resolution policy, which was accessed by links in the e-mail and required discrimination claims to be submitted to arbitration. The employee’s ADA claim alleged that the employer terminated him because of sleep apnea. The court had jurisdiction to review the order denying the motion to compel arbitration under the Federal Arbitration Act. However, while reviewing that decision, the court had no power to review an order granting the employee’s motion to strike an affirmative defense. The court’s review under the act is limited to whether the dispute was arbitrable. On the merits, the court affirmed the denial of the employer’s motion to stay and to compel arbitration. Enforcement of the arbitration policy was not appropriate because the e-mail did not provide minimally sufficient notice to a reasonably prudent person that the e-mail was a contractual waiver of the employee’s right to access a judicial forum. The court held that the mass e-mail, which did not require an affirmative response but requested the recipient to review the materials, was not a traditional means for conveying contractually binding terms of employment and did not state directly that the policy contained a mandatory arbitration agreement that would become the employee’s exclusive remedy for all claims.

Vacatur – Appellate Court Declines
Stuck with the result – Appellate court declines to vacate earlier decision, even after the case becomes moot.

United States v. City of Detroit, 401 F.3d 448 (6th Cir. 2005).

The Corps wanted to conduct environmental reviews before allowing the city to use the facility in connection with a dredging project. It appealed after the district court issued the injunction. A panel of the court vacated the injunction. After a rehearing en banc, the full court held that the district court had the authority to issue the injunction under the All Writs Act, 28 U.S.C. §1651. It remanded the case for further consideration. The Corps appealed again after the district court reissued the injunction. The Corps moved to dismiss the appeal as moot after appellees declared that they did not need to use the facility. The city objected to the extent that the Corps also sought vacatur of the prior en banc decision and the district court’s original injunction. The court agreed that no live controversy existed with regard to both the pending appeal and the second injunction order. The law-of-the-case doctrine and 6th Cir. R. 206(c) barred the court from reviewing or vacating the en banc decision or the district court’s first injunction order.

Waiver of Appeal – Was it Knowing?
Make sure you summarize agreements accurately or risk an appeal otherwise waived.

United States v. Murdock, 398 F.3d 491 (6th Cir. 2005).

A criminal defendant signed a written plea agreement plainly waiving his right to appeal. During the plea colloquy the prosecutor summarized the agreement’s terms, but omitted the waiver. Defense counsel did not object, and agreed with the accuracy of the summary. The defendant later said that he was not aware of the waiver and that the prosecutor’s summary represented his understanding of the agreement. The defendant later appealed and the government moved to dismiss the appeal alleging waiver. Court of Appeals refused to dismiss determining that the failure to fully advise the defendant of the appellate waiver was plain error under United States v. Vonn, 535 U.S. 55, 59 (2002), requiring not just an error under rule 11(b)(1)(N).

Waiver of Appeal – Waiver Includes Booker Issues
Stuck with the result, Part II – waiver of right to appeal includes Booker Issues.

United States v. Rubbo, 396 F.3d 1330 (11th Cir. 2005).

Defendant’s plea agreement waived her right to appeal, unless the sentence exceeded the maximum permitted by statute. In the meantime, the United States Supreme Court decided United States v. Booker, 543 U.S. 220 (2005). Defendant then appealed her sentence attacking several of the judge’s enhancements of her sentence. She contended that the enhancements exceeded the “statutory maximum as defined in Blakely v. Washington, 542 U.S. 296 (2004). “The court dismissed the appeal because her sentence did not exceed the maximum permitted by statute. The court held that the “statutory maximum” used in those evolving Supreme Court cases was not the same as “the maximum permitted by statute” for purposes of the appeal waiver. Because the sentence did not exceed the maximum sentence allowed by law, the sentence did not fit within the exception to her waiver of

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the right to appeal.

Endnotes

1 Steven L. Brannock coordinates appellate work in Holland & Knight’s central Florida offices. Board Certified in appellate practice by the Florida Bar, his experience includes litigating appellate matters in all five Florida district courts of appeal, the Florida Supreme Court, five federal circuit courts of appeal, and the United States Supreme Court. He has handled appeals in numerous subject areas including antitrust law, admiralty law, commercial disputes, constitutional law, criminal law, death penalty litigation, family law, First Amendment law, franchise law, intellectual property, insurance law, international law, maritime law, medical malpractice, personal injury, product liability and securities law. Mr. Brannock is active in the Appellate section of the Florida Bar serving as its Vice Chair. He is also Secretary of the Florida Appellate Rules Committee and served as immediate past chair of the Civil Rules Subcommittee of the Rules Committee. Mr. Brannock is an adjunct professor of appellate practice and procedure at Stetson Law School. He is also a frequent lecturer on appellate topics. Mr. Brannock is the author of two chapters on Florida appellate jurisdiction and procedure contained in the American Inns of Court four-volume Guide to Florida Trial and Appeal. Mr. Brannock earned his B.A., with high honors and Phi Beta Kappa, in 1976 from the University of Florida. He earned his J.D., with high honors, in 1980 from the University of Florida College of Law, where he was a member of the Order of the Coif.

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New Appellate Rules/Amendments: Effective December 1, 2005:

- Appellate Rule 4 (Appeal as of Right — When Taken) (clarifies the conditions for reopening the time to appeal a district court’s judgment or order)
- Appellate Rule 26 (Computing and Extending Time) and Appellate Rule 45 (Clerk’s Duties) (replaces the phrase “Presidents’ Day” with “Washington’s Birthday” to conform to statute)
- Appellate Rule 27 (Motions) (a motion, a response to a motion, and a reply to a response to a motion must comply with typeface and type-style requirements of Appellate Rule 32)
- Appellate Rule 28.1 (Cross-Appeals) (consolidates provisions regarding briefing in cross-appeals and adds several new provisions dealing with cross-appeals).
- Appellate Rule 35 (En Banc Determination) (adopts “case majority” approach, in which disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc)

Stetson University College of Law in cooperation with the First District Court of Appeal is pleased to present its sixth appellate practice seminar, honoring the late Chief Judge E. Earle Zehmer. The program is designed to provide crucial information for attorneys statewide who will appear before the First District Court of Appeal. The seminar will be held on May 5, 2006 at the Hyatt Regency Riverfront in Jacksonville, Florida, and the program faculty will include several judges from the First DCA, Judge Gerald Bard Tjoflat from the U.S. Court of Appeals for the 11th Circuit, prominent appellate attorneys and Stetson law faculty. Anyone interested in attending the seminar or in sponsoring seminar events, including a networking reception, can locate more information from Stetson’s Web site at www.law.stetson.edu/cle or by calling Stetson’s Office for CLE at 813-228-0226.
Thoughts on On-line Access and High Profile Cases

by Matthew J. Conigliaro

Florida’s state court system has been a national leader in utilizing the Internet to offer judicial information to the public. Before many states’ courts had started even basic websites, our Supreme Court had already developed a top-notch site, providing access to a wealth of information, opinions, and both live and archived video feeds. Today, the amount of information available on Florida courts’ websites is remarkable, and it continues to grow.

The appellate community and the general public surely appreciate the on-line accessibility of Florida’s judiciary. Members of the media can monitor court decisions without having to visit the courts to collect written copies of decisions. Attorneys can watch for noteworthy decisions without having to wait for media reports or opinion summaries. Parties can observe their own cases’ progress. The public can hear about an interesting decision, obtain a copy of the opinion, and in some instances review the briefs and other filings from the case.

General access to court materials is a matter of significant importance. Each year, the public grows more accustomed to the instantaneous availability of information over the Internet. With that growth, however, has come an important development: an increasing expectation that noteworthy events—including litigation in our court system—can be thoroughly explored on-line. People expect the details to be there at the click of a mouse.

Florida’s court system is currently grappling with on-line access to court records. A moratorium on on-line publication is temporarily in place while the Supreme Court considers the work and recommendations of the Committee on Privacy and Court Records. A notable exception to the moratorium concerns “high profile cases” — cases that the chief judge of the jurisdiction designates as being of significant public interest. Records from such cases may be placed on-line once they have been inspected to ensure that no confidential information will be released.

The public’s demand for access to information is greatest with respect to high profile cases. The court system’s reaction to that demand may involve more than whether the public perceives the judiciary as a friendly branch of government. It may impact the court system’s credibility as an institution of justice.

In a way that may not have been possible prior to the proliferation of the Internet, the public today seems to approach a high profile case with a sense that the court’s decision, and its underlying materials, can and should be freely available for on-line review. In a world where on-line access is immediate and comprehensive, a lack of such access may not only disappoint but also raise considerable doubts about the court system’s integrity.

By comparison, ready access to court materials promotes the judiciary’s credibility and increases the public’s trust in its judicial officials.

I base these views on my experience with my personal website, wherein I discuss recent appellate decisions. When the Terri Schiavo cases attracted state-wide, then national, and then international attention, I received well over 5000 e-mails concerning the saga, many from people who wanted to read for themselves the many orders, briefs, motions, and other documents primarily at issue. They found news reports to be confusing and wanted to see for themselves what had happened. The interest level was striking, as was the prevalent expectation that pertinent materials regarding the dispute be on-line. Part of my response was to make available on my site an orderly set of links to many documents from the various Schiavo cases.

My experiences involving that case and others lead me to make an additional observation and a suggestion: While much of the reported commentary concerning the Schiavo saga involved persons who were unhappy with the courts’ decisions, I had the fortune of observing a much more positive public reaction. Hundreds of thousands of people accessed my website to learn more about the Schiavo cases, and I received hundreds of e-mails expressing people’s gratitude for helping them review the court materials and better understand the events at issue. To my surprise, many admitted that while they could not follow some of the legal discussion, they were greatly comforted by being able to see that intelligent people had spent time considering the parties’ arguments before reaching their decisions.

I found that point of view refreshing. It demonstrates how the public places tremendous trust in the judiciary. Many people want to examine case materials simply to gain a better understanding of a case’s facts and to confirm that the judiciary is indeed giving thorough consideration to the matters before it. They understand that the law is complex and that there are multiple sides to every story, and they trust the courts to reach the correct legal decision. To be sure, some critics of a court’s decision will find nothing in the underlying case materials but fodder for additional complaints, but even those persons can appreciate the benefit of easy access.

My experiences also suggest a benefit in aggregating case materials from multiple courts. The Supreme Court’s website does a superb job of collecting documents regarding high profile cases, but that information is limited to materials concerning the high court’s involvement with the matter. Materials filed in a lower court can be obtained, if at all, only from the lower court’s website, which means someone searching for them must navigate the Internet to trace a case’s documents through multiple courts. Many attorneys might not be up to that challenge. For non-lawyers, continued next page
the task may often be too much to ask.

In this light, perhaps Florida cases that reach a certain level of public interest will someday be collected at a single court-run Internet site that offers access to important documents from each case’s history. That way, those wishing to learn more about the case could examine its materials from one location, without having to master the appellate system to find items from the circuit, district, and supreme courts. The public would be better informed, and the judiciary would appear as a more unified branch of government.

By any standard, the Florida judiciary remains a leader in the effort to provide public access to court materials. In high profile cases, such access benefits many and makes our court system responsive to the public’s increasing curiosity and expectations.

The courts’ work in this important area is greatly appreciated, and all who use the courts’ sites no doubt look forward to continuing innovation in the future.

Endnotes
1. Matt Conigliaro is a shareholder with Carlton Fields, P.A., in St. Petersburg, Florida. He is board certified in appellate practice by The Florida Bar, is a member of the Appellate Practice Section’s Executive Council, and authors the web log “Abstract Appeal,” available on-line at www.abstractappeal.com.

Don’t Miss the 2006 Appellate Practice Section Retreat!

May 12 - 14, Hutchinson Island Marriott Beach Resort & Marina

by Susan W. Fox, Chair-Elect

Make plans now to attend the Appellate Practice Section’s Triennial Retreat!

On Friday, the retreat will feature a substantive workshop on proposals to expand or realign Florida’s district courts of appeal and a banquet followed by an informal jam session featuring the many talents of appellate lawyers (and perhaps a few judges); on Saturday, working retreat sessions discussing the betterment of the section and appellate practice generally, will be followed by a casual dinner; and on Sunday there will be an informal breakfast and officers’ meeting. The Hutchinson Island Marriott was chosen as a central location to enable all of Florida’s appellate lawyers to attend and bring their families to enjoy the beach and recreational facilities.

The retreat will kick off with a workshop on district court of appeal realignment and expansion. The Section was honored to be asked to weigh in on this issue and therefore will hold a meaningful workshop to provide a detailed report. Section Chair Tom Hall will act as moderator of the discussion, and will appoint representatives from each affected district to discuss their specialized concerns. Moreover, the Section hopes to have involvement of the official committee appointed by the Supreme Court to study the matter.

Friday evening, the Section’s social events will begin with a reception at 6 p.m. Dinner will follow at 7 p.m., capped by a keynote speech. After dinner, an informal music jam will convene. Believe it or not, we have quite a few musicians in the Section!

On Saturday, starting at 9 a.m., the work of the retreat will begin in earnest. We will briefly review the Section’s mission statement, history, goals originating out of past retreats, and where we stand on implementing those goals. This review will be followed by an open discussion of top priorities of the Section, after which we will divide into smaller groups to discuss and agree on old and new initiatives to improve the Section in particular or appellate practice in general.

Saturday evening will afford opportunities for casual gathering and an open house in the Chair’s suite. Sunday morning will conclude the retreat with an informal breakfast and officers’ meeting.

All members of the Section are invited and encouraged to attend. The retreat is an ideal opportunity to become involved in the Section. Several current officers and executive council members first became active with the Section by attending a retreat and then volunteering to assist in one of the implementation projects that arose out of ideas at the retreat.

The hotel is currently accepting reservations at the group rate and will continue to do so through April 19, 2006. Hotel reservations can be made by calling (800) 775-5936. A Section reservation can be made by returning the form on page 18, or by contacting the Section Administrator, Austin Newberry at anewberry@flabar.org.
Demystifying the Appellate Certification Process

by Angela C. Flowers

Have you ever thought about becoming board certified in appellate practice but did not follow through for one reason or another? If so, you are not alone. Many appellate practitioners report that they consider the prospect of accumulating the required continuing legal education hours, preparing the application, and studying for the examination to be daunting. While the process is time consuming on a number of levels, board certification is worth the effort. It is hoped that this article will demystify the process and encourage you to pursue certification.

Why become board certified?

Certification is the highest level of recognition given by The Florida Bar for competency and experience within an area of law. Appellate certification identifies you as a lawyer who engages in appellate practice and who possesses the special knowledge, skills, and proficiency to be identified to the public as certified in appellate practice. Only certified lawyers are permitted to identify themselves as “Florida Bar Board Certified” or as specialists.

What are the technical requirements for certification in appellate practice?

The standards are set forth in rule 6.13 of the Rules Regulating The Florida Bar. You must be a member of the Florida Bar in good standing. Further, you must demonstrate substantial involvement in appellate practice, receive positive peer review from lawyers involved in appellate practice and judges before whom you have appeared on appellate matters within the last two years, complete 45 hours of approved continuing legal education in the field of appellate practice in the three years immediately preceding the application, and pass an examination designed to demonstrate sufficient knowledge, proficiency and experience in appellate practice to justify the representation of special competence to the legal profession and public.

Substantial involvement in appellate practice includes at least five years of the actual practice of law, at least 30 percent of which has been spent in substantial and direct participation in appellate practice. Three years of this practice shall be immediately preceding the application, with limited exceptions for appellate judges, the clerk of an appellate court, career attorneys or staff attorneys for an appellate court. The five years of appellate practice must include brief writing, motion practice, oral arguments, and extraordinary writs sufficient to demonstrate special competence as an appellate lawyer. Substantial involvement also must include sole or primary responsibility in at least 25 appellate actions for the filing of principal briefs in appeals, or the filing of petitions or responses in extraordinary writ cases. Finally, substantial involvement includes sole or primary responsibility in at least five appellate oral arguments, a requirement that may be waived for good cause shown.

How does one begin preparation for the certification process?

Ideally, you would begin preparations to become certified soon after entering the practice of law. The sooner you begin to focus your practice and build connections with other appellate attorneys and judges who will be asked to provide peer review, the better. At a minimum, you should be focused on the application process for the five years preceding the filing of the application. In order to familiarize yourself with the information you will be asked to provide, you should obtain a copy of the certification application at www.floridabar.org/certification. Please note that the application is modified slightly from year to year, so you will need to obtain the most recent version when it comes time to submit your official application. Begin to compile the requested information for each of the appeals you handle. You will be asked to recite the style of the case, the names of the judges who heard the case, the amount of time you spent preparing the appeal, the date of oral argument, if any, and the names of opposing counsel. It is much easier to record this information at the time you are working on the case. Also, keep in mind that your 45 hours of specialized continuing legal education must be completed within the three years immediately preceding submission of the application. Under the current cycle, appellate certification applications are accepted between July 1 and August 31 of each year preceding the examination in March of the following year. The review of the applications to determine eligibility takes several months from the time the application is submitted. Typically you will receive notification of the committee’s decision regarding your eligibility by the end of January preceding the March examination. Questions regarding certification hours, etc., can be directed to the Bar Staff Liaison, Carol Vaught at cevaught@flabar.org or by calling her at (850) 561-5738.

How should you prepare for the examination?

The drafting of the examination is a time-consuming task for the Appellate Certification Committee. Each year, the committee provides applicants with Examination Specifications and a list of recommended study guides. In addition, applicants are expected continued next page
to be familiar with controlling case law addressing appellate practice issues. Be prepared to be tested on the subject matters identified in the Exam Specifications under the heading “Examination Content.” The structure of the exam has varied over the years. For the past few years, the exam has consisted of a combination of multiple choice, short essay and long essay questions. In regard to the long essays, there are usually combinations of mandatory and optional questions. The all-day exam is scheduled for three hours in the morning and three hours in the afternoon.

Ultimately, the best way to prepare for the examination is to study the materials listed as study guides in the context of the examination content identified in the Examination Specifications. You will observe that, logically, certain topics lend themselves to multiple choice questions and others can only be adequately tested by short or long essay. Over the years, post-examination surveys indicate that the individuals who passed the examination studied for between 50 to 100 hours. However, each individual is different and may require more or less time.

There are currently 146 board certified appellate attorneys in Florida. By contrast, there are over 1400 members of the Appellate Practice Section. While certification may not be for everyone, there is certainly room for a greater number of Section members to be designated as appellate specialists. Strongly consider becoming board certified both for the public recognition and personal satisfaction it will bring.

Angela Flowers is a partner with the law firm of Kubicki Draper, which has offices throughout the state of Florida. She has been board certified in appellate practice since 1994.

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For further information, contact Austin Newberry, Appellate Practice Section Administrator, 850-561-5624 or anewberry@flabar.org

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A Simple Stabbing’s Effect on Admitting Child-Victim Hearsay in Florida Criminal Trials

by Lucretia A. Pitts

On August 5, 1999, when Michael Crawford stabbed Kenneth Lee, no one would have guessed that the criminal case would result in the most significant change in admitting hearsay statements in American courts in the last 20 years. In short, Crawford rejected the longstanding principle that hearsay statements can be admitted upon a determination that the statement is trustworthy and reliable. This rejection is a blow to various hearsay rules that are founded on the principle. In particular, Florida founded its child-victim hearsay exception on the principle of trustworthiness and reliability. Therefore, in the wake of Crawford, a Florida court has reasonably inquired whether the child-victim hearsay exception is viable any longer.

The Protection of a Constitutional Right: Crawford

But first, it all began back in Lee’s apartment in Washington in 1999 when Crawford stabbed Lee. When the police arrived, Crawford confessed that he and Lee got into a fight and Lee was stabbed. Crawford could not recall if Lee had anything in his hand when Lee was stabbed. Sylvia, Crawford’s wife, gave a statement where she corroborated that Lee and Crawford got into a fight, but Sylvia did not see anything in Lee’s hands after he was stabbed. At Crawford’s assault and attempted murder trial, he claimed self-defense. Sylvia claimed marital privilege and would not testify. The State sought to introduce Sylvia’s tape-recorded statement to the police as evidence under the hearsay exception rules. Crawford argued that the statement’s admittance would violate his constitutional right to confront witnesses against him.

At the time of trial, the trial court confidently relied upon Ohio v. Roberts as the law of the land for the past twenty years. Roberts provided that an unavailable witness’s out-of-court statement is not barred by a defendant’s confrontation rights if the statement bears an adequate indicia of reliability. Reliable evidence fell within either a firmly rooted hearsay exception or bore particular guarantees of trustworthiness. The Crawford trial court admitted the statement by determining that the statement was trustworthy. Crawford was convicted of the charges. The case proceeded to the United States Supreme Court on the issue of whether admissibility of the wife’s statement violated Crawford’s confrontation rights. The U.S. Supreme Court determined that there was a violation.

But the Supreme Court did not make its decision lightly. The Court’s opinion went through an expansive history of the Confrontation Clause and the American lawmakers’ original meaning within the Clause. Based on the historical review of the Clause, the Court determined that there might be two historical principles within the meaning of the Clause. The first principle was a concern for using ex parte examinations that would be considered testimonial as evidence against a defendant. The Court recognized the general definition of testimonial, meaning “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Based on this dictionary definition, the Court further recognized examples of testimonial evidence, such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [or] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

The second historical principle was that “the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” Although the Court recognized that there are always exceptions to the rules, such as the hearsay exceptions, the Court determined that the Sixth Amendment left no room for courts to create any “open-ended exceptions” to the necessity of prior opportunity for cross-examination in criminal cases.

The Court went as far as to state that its prior cases’ results have all been consistent with the holding that “testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” But the Court’s prior rationales had departed from the two historical principles of the Founders. In particular, Roberts departed from the principles by being too broad and not considering if the hearsay was ex parte testimony and by being too narrow by admitting ex parte testimonial evidence because it was reliable. The Court stated that “[t]he Roberts test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one.” For Roberts’ overbreadth and narrowness, the Court proposed to apply the Confrontation Clause to all testimonial statements and leave the hearsay rule to the others and absolutely exclude all testimonial statements absent a prior opportunity for cross-examination. The Court left any efforts to define testimonial evi-

continued next page
The Protection of Child-Victims: §90.03(23)

In reliance on Roberts’ principle of trustworthiness and reliability, the Florida legislature in 1985 implemented the child-victim hearsay exception to admit the statements of unavailable child victims at trial. The legislature engrafted the principle within the language of the exception by stating that “unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness [a child’s out-of-court statement is admissible]” and that “the time, content, and circumstance of the statement provides sufficient safeguards of reliability.” The legislature provided several factors in the exception to balance a defendant’s rights against the concerns for child victims. In particular, the exception limits the application of the rule to child victims rather than a broader application to child witnesses. The exception is limited to children with a physical, mental, emotional or developmental age of eleven or less. The application is limited to the statements describing the child abuse or neglect, sexual or otherwise.

The legislature imposed the principles of trustworthiness and reliability by requiring prior notice of the statement and that the trial courts conduct a hearing outside the presence of the jury to make specific findings. During the hearing, various factors can be used to either support or disprove that the statement is reliable. The exception sets forth some factors, such as, “the mental and physical age and maturity of the child, the nature and duration of the abuse and offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate.” If the child is unavailable to testify, there must be other corroborative evidence of the abuse or offense. The child-victim is unavailable if the court makes a finding “that the child’s participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1).”

Can There Be Harmony Between the Two?

At a first glance, it seems as if Crawford destroyed the foundation of the child-victim hearsay exception by its determination that the principle of trustworthiness and reliability is an insufficient standard to admit hearsay evidence. But after a closer view, Crawford may cause some initial confusion and necessity for defining case law for the Confrontation Clause and the child-victim hearsay exception, but the two can and do co-exist in the judicial system. A child-victim hearsay statement is any out-of-court statement by a qualifying child-victim describing the abuse, which is offered in evidence to prove the truth of the matter asserted. As explained in Crawford, the Confrontation Clause excludes testimonial hearsay statements where the declarant is unavailable and the defendant has not had the opportunity for cross-examination. Therefore, non-testimonial statements are not subject to Crawford. But there lies the first difficulty in the aftermath of Crawford and in the co-existence of the child-victim hearsay rule and the Confrontation Clause – what is a testimonial statement?
Crawford stopped short of defining testimonial evidence; therefore, there remains this undefined line between testimonial evidence that falls under the Confrontation Clause and the hearsay rule (but the Confrontation Clause trumps the hearsay rule) and non-testimonial evidence that falls under the hearsay rule only. Although no specific definition was given, the guidance given by the Court is that statements reasonably expected to be used prosecutorially or statements given under the circumstance that an objective witness would reasonably believe would be available for use at trial are testimonial. Based on this “definition,” the Florida courts have determined that child-victim statements to members of the Child Protection Team and child-victim statements to police officers are testimonial and excludable if the child-victim is unavailable to testify and the defendant did not have the opportunity for cross-examination. Whereas, child-victim statements to family members or guardians are not testimonial and are admissible as long as the statement satisfies the substantive, i.e., trustworthiness and reliability, and procedural requirements of section 90.803(23). When a trial court “generally opined that any statement made by a child victim during the time frame that a criminal investigation is ongoing is testimonial in nature,” an appellate court rejected the general dividing line (among other things asserted by the trial court) and the Herrera-Vega and Pankow cases support that the division is not in the timing of the statement. But the dividing line remains to be established by the Florida courts.

The determination of whether a hearsay statement is testimonial is just the first hurdle in the Confrontation Clause and the child-victim hearsay exception co-existence. The next hurdle was found in the realization that both the Clause and the exception require that the declarant should be unavailable and the Florida courts were faced with the next difficulty of whether testimonial and non-testimonial evidence would require the same standard of unavailability. Although only one court has addressed the issue, the court determined that the standard of unavailability that was specifically designed for child-victims in the hearsay exception does not satisfy the unavailability requirement of the Confrontation Clause. The court reasoned that the right of the defendant to confront the testimony of live witnesses in court “would cease to have the certainty and categorical effect that Crawford holds it was designed to have” if a witness, even a child-victim, is unavailable “merely because of subjective mental anguish and emotional scarring from [the]testimony.” Crawford and the Confrontation Clause require “more stringent standards for determining when a witness is unavailable,” but those stringent standards are left to be clarified on another day.

Similar to the Confrontation Clause and the child-hearsay exception divergence in the standard of the declarant’s unavailability, both go a different route in their final standards of justifying the admissibility of the statement. As stated above, the foundation for the admissibility of child-victim hearsay statements have in the determination that the statement is trustworthy and reliable and this determination of trustworthiness and reliability involves the context and circumstance of the statement and the evaluation of the child-victim. After Crawford, this standard of trustworthiness and reliability will be limited to non-testimonial statements. As for the Confrontation Clause, Crawford clearly states that the standard for justifying the admissibility of the testimonial statement must include that the declarant has had a prior opportunity for cross-examination. After Crawford, which did not clearly state what would satisfy the opportunity to cross-examine, Florida courts are conflicted over whether a pre-trial deposition of the child-victim satisfies Crawford’s prior opportunity to cross-examine. The satisfaction of a prior opportunity for cross-examination is yet another standard that must be further clarified in future cases.

Conclusion
After Crawford, there is a great deal to be defined for the proper application of the Confrontation Clause. But as for the viability of hearsay rules in the wake of Crawford, the child-victim hearsay rule is an example that there is still life in the hearsay exception rules but that life has a new limited application.
Appellate Practice
Section Retreat
May 12 – 14, 2006
Hutchison Island Marriott Resort
555 N.E. Ocean Blvd., Stuart, Florida 34996

(Hotel rooms are available for a group rate of $149.00 per night. In order to ensure rate and availability, reservations should be made by April 14, 2006 by calling Marriott Reservations at 800-775-5936. You must mention The Florida Bar Appellate Practice Section Retreat.)

May 12, 2006
3:00 p.m. - 5:00 p.m.  DCA Realignment/Expansion Roundtable
6:00 p.m. Reception
7:00 p.m. Dinner - Justice R. Fred Lewis, Featured Speaker
(Included in registration fee.
Guests: $65.00 Appellate Practice Section Members, $75.00 non-members)
9:00 p.m. Jam Session/Dessert Reception

May 13, 2006
9:00 a.m. Retreat Working Sessions
12:00 noon Lunch (Included in registration fee)
1:00 p.m. Retreat Working Sessions, Cont.
3:30 p.m. Adjourn
Evening on your own

May 14, 2006
8:30 a.m. Breakfast / Officer’s Meeting
The Florida Bar, c/o Austin Newberry,
651 E. Jefferson Street, Tallahassee, FL 32399-2300
Appellate Practice
Section Awards

Adkins Award
The James C. Adkins Award shall be presented to a member of The Florida Bar who has made significant contributions to the field of appellate practice in Florida. The selection of each year’s recipient shall be made by a committee appointed by the chair of the Appellate Practice Section of The Florida Bar. The committee shall accept nominations from any individual and may also nominate candidates on its own. Among the factors the committee shall consider in evaluating nominations are (1) the extent and nature of experience in the field of appellate practice, either as a practitioner, a member of the judiciary, or both; (2) service to the Appellate Practice Section of The Florida Bar; (3) other service to The Florida Bar in matters relating to appellate practice; (4) other professional activities relating to the field of appellate practice; (5) publications relating to the field of appellate practice; (6) any other factors that the committee deems appropriate. The committee shall give such weight to each of these factors as it deems appropriate.

Pro Bono Award
The award is to be given to a member of the Appellate Practice Section who has devoted significant pro bono efforts in appellate matters. The appellate pro bono matter may involve civil, criminal or family law. The committee shall accept nominations from any individual and may also nominate candidates on its own.

Presentation of Awards
Both awards are traditionally presented at the Appellate Practice Section Dessert Reception at The Florida Bar’s Annual Meeting.

Nominations
Nominations, in the form of a letter explaining the nominee’s qualifications based on the above criteria, must be received by Austin Newberry at The Florida Bar no later than Friday, May 5, 2006. U.S. Mail, facsimile and email are all acceptable.

Austin Newberry
The Florida Bar
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