



American Board of Criminal Lawyers

THE ROUNDTABLE



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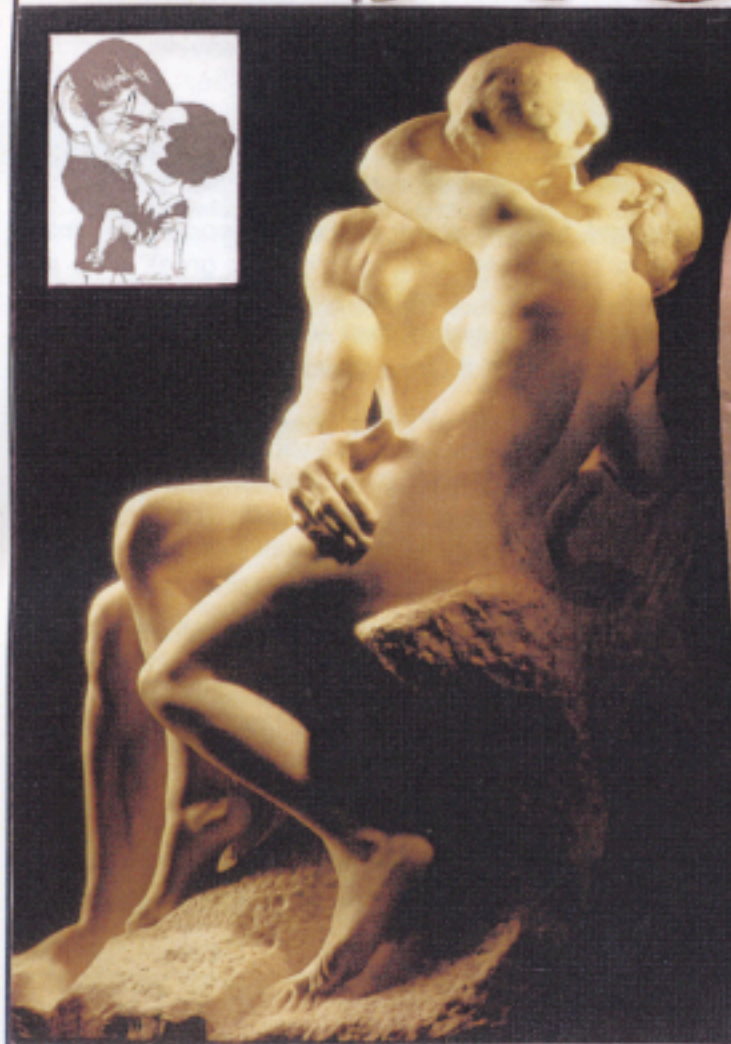
To Cupid's Arrow

Here's to Cupid's arrow,
May it never swerve nor snap,
Till every maid, in the race for love,
Has made at least one lap.



To Love's Limit

Here's to the love that I
hold for thee,
May it day by day grow stronger,
May it last as long as
your love for me—
And not one second
longer!



TIDBITS

We are proud to announce that our colleague **Bruce Lyons** was honored in Ft. Lauderdale on Feb.5 as the recipient of the Harry Gulkin Award for outstanding criminal lawyer by the Broward County Association of Criminal Defense Lawyers.

Every year, the BACDL honors a member of the bar who embodies integrity, gentility, and is a lawyer of the highest quality. Everyone looks to this lawyer not only as a mentor, but also as a friend. The person who is honored with the award raises the standard, and the bar is made better because that person is a member.

Congratulations to **David Chesnoff** on behalf of Defendant Wai Seng Phua and attorneys Tom Goldstein and Richard Schonfeld on behalf of Defendant Darren Phua. They just won a significant victory for their clients.

The Magistrate today issued an order suppressing evidence on behalf of their clients in a case in the Federal District Court in Nevada. The case drew national attention due to the extremes to which the government went to gain access to their clients hotel suite without a warrant.

The agents arranged to have the internet access disabled in the suite. Then when a technician was summoned to repair it, agents went in with him posing as computer repair people. They then used their observations to get a warrant. And to further exacerbate the heavy handedness, the affidavit did not inform the issuing Magistrate about the ruse.

The tactic was the subject of a New York Times editorial very critical of the governments' over reaching. But the Judge suppressed the evidence, not based on the ruse entry and the disabling of the internet service, but on the fact that when the agents entered they went into areas of the suite the Defendants never consented to allow them to enter to fix the service.

The decision by Mag. Peggy Leen is in case 2:14-cr-00249-APG-PAL. It should result in dismissal of the case. The defense briefs are excellent and provide an in depth analysis of "ruse" tactics.

Ian Friedman reports: After years of hard work our good friend **Mark DeVan** today was able to get a conviction overturned for a man on death row for nearly 30 years. His client will now get a fair shake at trial should it be tried again.

Randi McGinn's new book, Changing Laws, Saving Lives: How to Take on Corporate Giants and Win, is one of the most compelling books Trial Guides has ever released. Through the story of one of her biggest cases, one of the country's leading trial lawyers gives you practice tips about how to create positive social change, get better settlements for your client, and win at trial. Lawyers throughout the country are learning new ways to investigate, negotiate, and try their cases.

Dee Wampler just published another book. It's titled Defending Yourself Against Cops in Missouri and other strange places (2015). I have not had time to read it cover to cover but see that it is timely and full of pictures and dandy quotes. **Joe Beeler**

IN MEMORIAM

Harold J. Bender, 70, of Southport, NC, passed away suddenly on Sunday, March 24, 2013 at New Hanover Regional Medical Center in Wilmington.

Known affectionately as "Head" to his friends and family, Mr. Bender was born September 16, 1942 in Winston – Salem, the son of the late Dr. John R. and Louise Zimmerman Bender. He earned his law degree from UNC Chapel Hill in 1969. After beginning his career in Statesville, Mr. Bender worked several years at the Department of Justice, ultimately serving as the United States Attorney for the Western District of North Carolina. Following his tenure as a federal prosecutor, Mr. Bender began a long and distinguished career as a Board Certified criminal defense attorney in Charlotte. He practiced extensively, in the federal courts of the United States, most notably in the Western District of North Carolina, the Fourth Circuit Court of Appeals and the Supreme Court of the United States. Head's formal accomplishments included membership in the Association of Trial Lawyers of America and recognition as a Master in the Bobbitt Inn of Court. He was a mentor to a generation of younger lawyers who learned how to practice law by following his example. He was a passionate advocate for his clients and took seriously his vow to defend even those accused of terrible crimes, saying simply "in order for the system to work for the best of us, its got to work for the worst of us. The system requires that lawyers sometimes take on unpopular causes and do the absolute best we can."

Beyond his law practice, Harold worked for many years on the weekends, and took great pride and pleasure, as a football referee in the Southern Conference, earning that league's Silver Whistle Award, given to its best referee.

Head retired to Southport in 2010, where he maintained a small law practice and continued to enjoy mentoring young Brunswick County lawyers. He was a volunteer and coach with The First Tee of Brunswick County and an active member of the Men's Golf Association at St. James.

Surviving are his loving wife Nita Robertson; a daughter Currin Bender of Syracuse, NY; two step sons Ford Robertson and wife Ashley of Raleigh, and Bradley Robertson and wife Niki of Bristol, TN; two brothers Bob Bender and wife Ruth of High Point, and Ralph Bender and wife Sherrie of Houston, TX; and five grandchildren whom he adored and who loved him dearly, Margaret Robertson, Abigail Robertson, Ella Robertson, Grady Robertson, and Catherine Robertson.

A memorial service was held on March 28, 2013.

Grant of Relief Can Be Defended With Claim That Failed in District Court

A habeas corpus petitioner who was awarded relief in the district court on several grounds and is responding to the state's appeal isn't required to file a cross-appeal or obtain a certificate of appealability to advance a different argument on which he lost in the district court, the U.S. Supreme Court held Jan. 14 (Jennings v. Stephens, 2015 BL 8025, U.S., No. 13-7211, 1/14/15).

"A prevailing party seeks to enforce not a district court's reasoning, but the court's judgment," the court said.

In the district court, the petitioner advanced three bases for a finding that he received ineffective assistance of counsel at his capital sentencing in violation of the Sixth Amendment. The petitioner based two of those arguments on a failure to make reasonable inquiry into mitigating evidence under Wiggins v. Smith, 539 U.S. 510, 73 CrL 365 (2003). The third involved an inadequate closing argument claim under Smith v. Spisak, 558 U.S. 139, 86 CrL 428 (2010). The district court granted relief on the Wiggins claims and denied relief on the Spisak claim.

The state appealed, and the U.S. Court of Appeals for the Fifth Circuit reversed, holding that the petitioner could not raise his Spisak claim in the absence of a notice of appeal concerning that specific claim. It also said the petitioner needed to obtain a certificate of appealability before he could raise arguments in opposition to the state's appeal concerning grounds for relief not adopted by the district court.

Under United States v. American Ry. Express Co., 265 U.S. 425 (1924), an appellee who doesn't take a cross-appeal may "urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court," and may not "attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary," the court said.

Defense of Judgment. In an opinion by Justice Antonin Scalia, the court held that the courts requiring a notice of appeal and a COA got it wrong.

"A prevailing party seeks to enforce not a district court's reasoning, but the court's judgment."

JUSTICE ANTONIN SCALIA

The court characterized the rationale underlying the Fifth Circuit's holding and the government's position as

"contrary to the manner in which courts ordinarily behave. Courts reduce their opinions and verdicts to judgments precisely to define the rights and liabilities of the parties." It added that "this court, like all federal appellate courts, does not review lower courts' opinions, but their judgments." Thus, "a rule that contravenes this structure, that makes the opinion part of the judgment, is peculiar—especially when it is applied to impose extrajudgment obligations on a sovereign State."

The court pointed out that the grant of relief entitled the petitioner "to either release, resentencing, or commutation of his sentence. Any potential claim that would have entitled Jennings to a new sentencing proceeding could have been advanced to 'urge . . . support' of the judgment within the meaning of American Railway." Any one of the petitioner's ineffective-assistance claims, if successful, would produce the same result as any other, it said. Similarly, the judgment entitled the state to either retain the petitioner in custody pending resentencing or to commute his sentence, and a different theory of ineffective assistance would not change that.

The court rejected the suggestion that its holding will open the floodgates to frivolous appellate defenses in habeas cases. It noted that this holding would apply only to a petitioner who has already won relief at the district court level, and said such a person would have little or no motive to divert attention from a meritorious defense of the judgment by throwing in a frivolous one.

The court distinguished a situation in which a district court explicitly imposes, or a petitioner seeks, conditions governing the details of the retrial.

Dissenting, Justice Clarence Thomas, joined by Justices Anthony M. Kennedy and Samuel A. Alito Jr., said because "a prisoner who obtains a conditional-release order allowing the State to resentence him in a new proceeding is entitled, if the State elects that option, to a new sentencing proceeding free of the specific constitutional violation identified by the district court," his "attempt to add additional errors is an attempt to modify or expand his rights under the judgment."

He further accused the majority of confusing "a judgment granting a conditional-release order with an ordinary civil judgment." He said it also interprets the law of civil judgments in such a way as to "do damage well beyond the habeas context in which this case arises."

He was also unconvinced that a petitioner who has prevailed in the district court would necessarily refrain from advancing on appeal every claim he can think of, no matter how frivolous.

Potential Effects. Counsel for the petitioner, Randolph L. Schaffer Jr., Houston, in an 14 e-mail to Bloomberg BNA praised the court for adopting "a common-sense approach to a knotty procedural problem that, at the end of the day, will make it a little easier for lawyers and pro se prisoners to navigate the treacherous waters of federal habeas litigation." He added that "any decision that keeps a Death Row inmate viable 1/13, in my opinion, is a good decision."

WHEN RAKOFF SPEAKS, PEOPLE LISTEN

January 29, 2015

U.S. judge quits commission to protest Justice Department forensic science policy

January 30, 2015

Judge Rakoff returns to forensic panel after Justice Department backs off decision

Let's hear it for our ABCL authors! (Posted by James K. Jenkins)
Book Review: How Can You Represent Those People? By Amy L. Austin
How Can You Represent Those People?
Abbe Smith & Monroe H. Freedman, Editors
Palgrave Macmillan (2013)

Defense attorneys may find themselves asking where this book has been all their lives. Masterfully compiled and edited by **Abbe Smith** and **Monroe H. Freedman**, *How Can You Represent Those People?* is a provocative collection of essays from a wide-ranging group of lawyers that seek to answer the ultimate "cocktail party question."

As wryly noted in the too-brief Preface, "the question" — which pertains to the defense of the guilty, or at least those who might appear so — is "[p]osed by the genuinely perplexed as well as the hardened heckler." What follows are 15 separate answers, diverse in their approach, occasionally contradictory, yet unified in their brilliance.

The book wisely gives Barbara Babcock the first word. Her essay looks to the past when, in 1983, she first published "Defending the Guilty" in the *Cleveland State Law Review*. Containing, as it does, her ordered list of various responses (The Constitutionalist's Answer, The Civil Libertarian's Answer, The Legal Positivist's Answer, etc.), the piece neatly grounds and familiarizes the reader with an array of arguments, many of which reappear to varying degree within the other essays. Babcock sets the stage with her list, but it is the description of her early career at the Public Defender Service in Washington, D.C., that pulls in the reader. In one of her more poignant observations, she writes, "Often I felt alone, standing between the client and powerful pneumatic forces that threatened to sweep us both away."

That sort of insight — both instructive and remarkably confessional — is a hallmark of *How Can You Represent Those People?* Befitting the valuable work being done, each essayist is eager to share his or her story and the stories of clients in order to provide answers, and the results are revelatory. As one would expect, however, these are not easy stories to hear. The refrain of "those people" is inserted throughout a catalog of miseries, from childhood abuse, racial discrimination, and disenfranchisement to impossible living conditions, and from myriad legal injustices to the insidious machinery of mass incarceration.

Indeed, racial issues are a prevalent theme throughout the book. In a particularly sobering essay, Vida B. Johnson writes that "I do this work because the criminalization of the black community has replaced the Jim Crow segregation of my grandfather's time." Monroe H. Freedman's contribution contains a potent line regarding the O.J. Simpson trial: "Although the defense did indeed play the race card, the state of California dealt it, by knowingly employing and promoting an outspoken racist on the police force and by showcasing him as a principal witness for the prosecution." Freedman continues, arriving at the important conclusion (his "answer," in part) that "vigorous criminal defense has led to the improvement of law enforcement and prosecution."

Elsewhere, perspectives on a wide range of answers to "the question" abound: Tucker Carrington's thoughtful and, at times, humorous essay unfolds like a short story, complete with a denouement that places it among the best of its kind. Contributions by heavyweights such as Alan M. Dershowitz, Michael E. Tigar, and Paul Butler provide plenty of fodder for argument as each gives his own compelling answer. David A. Singleton's piece on "Representing Sex Offenders" is a highlight, as is Abbe Smith's essay that asks, simply, "How Can You *Not* Defend Those People?"

The emotional centerpieces of the book, however, are two essays: "Ruminations on Us and Them" by Joseph Margulies and "Wrecking Life: When the State Seeks to Kill" by William R. Montross, Jr. and Meghan Shapiro. In the first, Margulies offers a stunning account of the brutal treatment of Mamdouh Habib and, separately, Abu Zubaydah, in the immediate aftermath of 9/11. To elaborate further would rob the essay of its power, but suffice it to say that if it were to magically end up on every required reading list in the country, America would be the better for it. Montross and Shapiro's essay on capital attorneys' efforts to excavate painful back stories in an effort to save their clients' lives is absolutely heartbreaking. "It is our occupational hazard," the authors write, "the mining and recounting of horrors."

These essays and many others in *How Can You Represent Those People?* will stay with readers for quite some time. The concept for the book may have had its origins with a certain question asked (repeatedly) by laypersons, but the passionate answers and inspirational stories contained within somehow seem more, in the end, for *us*.

About the Reviewer: Amy L. Austin is a criminal defense attorney in Richmond, VA

The 15 Biggest Body Language Mistakes To Watch Out For by Bernard Marr July 07, 2014

Until we get to know someone, our brain relies on snap judgements to try to categorize the person, predict what they will do, and anticipate how we should react. You may have heard that you only have a few seconds to make a first impression, but the truth is, your brain has made up its mind (so to speak) about a person within milliseconds of meeting them.

According to research done by a Princeton University psychologist, it's an evolutionary survival mechanism. Your brain decides from the information it has—in other words, how you look—whether you are trustworthy, threatening, competent, likeable and many other traits.

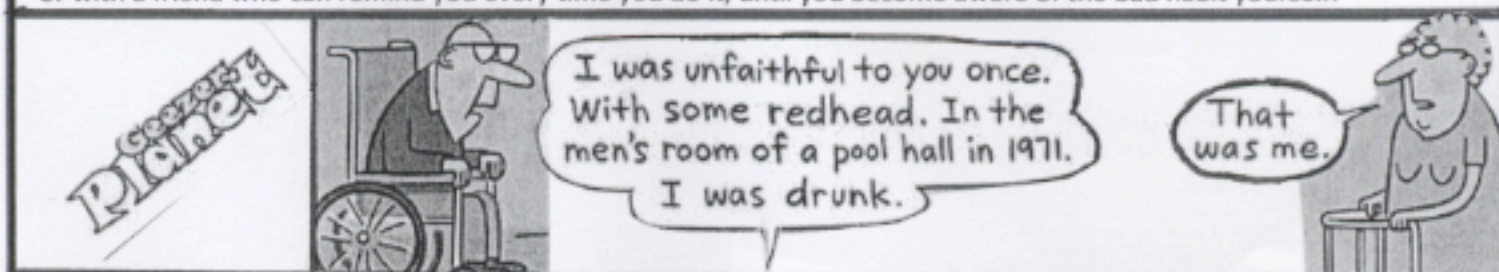
One way we can “hack” this split-second judgement is to be aware of our body language, especially in important situations. Whether you're applying for a job, asking for a raise, or meeting with a new client, tweaking or just being mindful of our body language can influence the other person's perception of us and the outcome of the situation.

15 Body language blunders to watch out for:

1. Leaning Back too much — you come off lazy or arrogant.
2. Leaning forward — can seem aggressive. Aim for a neutral posture.
3. Breaking eye contact too soon — can make you seem untrustworthy or overly nervous. Hold eye contact a hair longer, especially during a handshake.
4. Nodding too much — can make you look like a bobble head doll! Even if you agree with what's being said, nod once and then try to remain still.
5. Chopping or pointing with your hands — feels aggressive.
6. Crossing your arms — makes you look defensive, especially when you're answering questions. Try to keep your arms at your sides.
7. Fidgeting — instantly telegraphs how nervous you are. Avoid it at all costs.
8. Holding your hands behind your back (or firmly in your pockets) — can look rigid and stiff. Aim for a natural, hands at your sides posture.
9. Looking up or looking around — is a natural cue that someone is lying or not being themselves. Try to hold steady eye contact.
10. Staring — can be interpreted as aggressive. There's a fine line between holding someone's gaze and staring them down.
11. Failing to smile — can make people uncomfortable, and wonder if you really want to be there. Go for a genuine smile especially when meeting someone for the first time.
12. Stepping back when you're asking for a decision — conveys fear or uncertainty. Stand your ground, or even take a slight step forward with conviction.
13. Steepling your fingers or holding palms up — looks like a begging position and conveys weakness.
14. Standing with hands on hips — is an aggressive posture, like a bird or a dog puffing themselves up to look bigger.
15. Checking your phone or watch — says you want to be somewhere else. Plus, it's just bad manners.

So, what should you do? Aim for good posture in a neutral position, whether sitting or standing. Stand with your arms at your sides, and sit with them at your sides or with your hands in your lap. Pay attention so that you naturally hold eye contact, smile, and be yourself.

If you discover you have a particular problem with one or two of the gestures on the list, practice by yourself with a mirror or with a friend who can remind you every time you do it, until you become aware of the bad habit yourself.



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Future Meetings

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The RoundTable

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