Briefcase

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OCBA Celebrates Law Day 2018

With a crowd of almost 400 attorneys and judges, the Oklahoma County Bar Association began the celebration of Law Day 2018 at the annual Law Day Luncheon on May 1. Tables were decorated with stuffed dogs, rhinos, dinosaurs and whales, all of which were donated to the Oklahoma City Police Department. President David Cheek recognized several of the special groups in attendance including the students from the Douglass High School Moot Court Team and their coaches, as well as the Central Oklahoma Association of Legal Assistant's Law Day Essay winner, Shovandah Toliver. Young Lawyers Division Chair Cody J. Cooper presented the Liberty Bell Award to OCU law student Aimee Majoue for her work in the OCU Street Law program and the Homelessness Task Force. The Northeast Oklahoma City Community & Cultural Center, founded by Lori Combs, was this year's recipient of the Howard K. Berry, Sr. Award. Presented by OCBF President Jeff Trevillion, this honor includes a $10,000 cash award. Journal Record associate publisher and editor, Ted Strueli, announced this year's Leadership in Law Award Recipients: Judy Hamilton Morse, Judge Trevor Pemberton, David Riggs, Robert Sheets and Monica Ybarra. These award winners have demonstrated strong community involvement while continuing in their practice of law. Former Oklahoma County District Judge Nancy Coats-Ashley was this year's winner of the prestigious Journal Record Award. Judge Coats was recognized for the many firsts

See LAW DAY, PAGE 17

OU LAW Dean Joe Harroz was the featured speaker at this year's Law Day Luncheon on May 1.

Past Presidents of the OCBA were honored at a reception on April 25. Twenty-four of the surviving thirty-five attorneys and judges were present.

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OKLAHOMA COUNTY BAR ASSOCIATION MISSION STATEMENT

Volunteer lawyers and judges dedicated to serving the judicial system, their profession, and their community in order to foster the highest ideals of the legal profession, to better the quality of life in Oklahoma County, and to promote justice for all.

From the President

Lawyers for Learning Committee

By David Cheek

This month I want to showcase the Lawyers for Learning Committee. This is one of the largest committees in the OCBA. It does not spend a lot of time talking about what to do, but does spend a lot of collective time actively engaging with the community in a positive way. This Committee is not highly publicized and warrants some recognition.

The "official" roster has 69 members. Of these members, four are sitting judges in either the state or federal systems. Jake Krattiger of Gable Gotwals and Celeste England co-chair the committee. I am told that other non-roster members also volunteer, so you can see the scope of the OCBA involvement is substantial.

For the 2017-18 school year, the OCBA Lawyers for Learning Committee has been reading with students in pre-K through third grade at Adams, Buchanan, Hillcrest, and Lee Elementary Schools.

The forum for each "reading" is based on student's needs. The older and more advanced students read to the members, who help with the occasional unknown or difficult word. The younger or more remedial, students benefit from the members reading to them and helping them sound out words. Each reading session is approximately an hour in length. While multiple sessions in a day are available, most participants only have one session a day.

This program has grown over the years. The OCBA initially partnered with the Lee and Adams schools several years ago. Buchanan and Hillcrest are newer school partners that either expressed an interest in having the Committee come into their school, or had an attorney reach out to them and establish a relationship. The feedback we have received from teachers and principals has been overwhelmingly positive. There is no question that the Lawyers for Learning Committee is having a positive impact and improving the English reading abilities of schoolchildren in our city.

Many of the students who participate come from English as second language (ESL) households, so there is not much opportunity to get help with reading at home. The Committee wants to improve English reading skills of students in this age group to ensure they have the ability to pass the state-mandated reading tests that all schoolchildren are required to take in 3rd grade.

The Committee has always actively recruited new members to increase the number of children it can serve. In the current climate, it is more important than ever that members of the OCBA do what they can to chip in and support our local public schools. This school year is rapidly coming to an end, but the Lawyers for Learning Committee will pick back up and begin reading again in September for the 2018-19 school year. The Committee and our partner schools have always been flexible when it comes to arranging reading schedules, and they encourage all OCBA members to consider whether they can commit to reading with a student weekly, bi-weekly, monthly, or as part of a rotating group. Because each session is a finite time commitment, it is quite flexible and can be worked into even the busiest schedules. The Committee's ultimate goal is to improve the reading abilities of as many children as possible. The best way to increase that number is to grow the Committee's membership.

To say this is a great example of hands on interaction with a community in need, and a sincere commitment to improving the public education generally while putting the legal community's best foot forward, is a gross understatement. It is this type of commitment that makes a difference and should make all of us be proud of the organization we have elected to join. It should also be a reason for non-members to get involved and hopefully decide to join our association.

At the conclusion of the Law Day luncheon, I shared my grandfather's advice of "go forth and do good" with the attendees. This Committee's work is a good example of what he was saying. My personal thanks to Jake, Celeste and their Committee for making a difference.

Quote of the MONTH

Fear prophets and those prepared to die for the truth, for as a rule they make many others die with them, often before them, at times instead of them.

—Umberto Eco, philosopher and novelist (1932-2016)

Stump Roscoe

STUMP ROSCOE
BY
Roscoe X. Pound

Dear Roscoe: *Does a statement by opposing counsel that he intends to call a lawyer as a witness per se disqualify her? How much weight must he throw behind the assertion? B.G., OKC*

Dear B.G.: *It seems to me like, if that was the case, no one would ever get any work done. Half the Bar would be busily working on disqualifying the other half. It sorta reminds me of one of those games you give kids to play in the car. You know, like the one where you have to leap pegs to clear the board.*

Attorney disqualification is a necessary, albeit drastic, measure to protect and preserve the integrity of the attorney-client relationship. Therefore, it should never be imposed unless clearly required by the circumstances. According to my handy copy of the Model Rules, Rule of Professional Conduct 3.7 sets out the basics:

> *(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:*
>
> *(1) the testimony relates to an uncontested issue;*
>
> *(2) the testimony relates to the nature and value of legal services rendered in the case; or*
>
> *(3) disqualification of the lawyer would work substantial hardship on the client.*

The usual Rule of Thumb is that the opposing party must establish three things: (1) that the attorney's testimony is material to the determination of the issues being litigated; (2) that the evidence is unobtainable elsewhere; and (3) that the testimony is or may be prejudicial to the testifying attorney's client. Id. This demonstration is necessary to prevent Rule 3.7 from being used as a sword or a tactical measure to hinder the other party's case, and it strikes a reasonable balance between the potential for abuse and those instances in which the attorney's testimony may be truly necessary to the opposing party's case.

This places an evidentiary burden on the party seeking to call, and thereby disqualify, his forensic opponent. I'm not saying such an event can never arise, but a situation in which an evidentiary hearing would not be required does not come readily to mind.

Dear Roscoe: *How much cover does a search warrant give to officers executing it? Client and her two kids were visiting her sister in Urbana. One night a SWAT team blasts open the door, places everyone in cuffs, and generally goes about ransacking the place. Client's younger daughter, age three, is hysterical but the police wouldn't let client comfort her. Client's brother-in-law repeatedly asks to see the warrant, but they never produce it. Turns out they were searching for a fugitive and a cache of drugs. The guy had moved out about 19 months before my client's sister moved in. Since the "client" in question is also my secretary, a prompt response would be appreciated. D.D., OKC.*

Dear D.D.: *Wow. I'm a big fan of the police, but, like everyone else, they screw up. Sometimes big time. Assuming I've got the facts straight, a couple of things jump out.*

First, one primary purpose of a search warrant is to demonstrate officers have judicial authorization to search. See Camara v. Mun. Court, 387 U.S. 523, 530–33 (1967). This purpose goes unserved if the officers withhold presentation of the warrant despite repeated requests to see it. The decision to withhold the search warrant, therefore, is "a relevant factor in determining the reasonableness of a search." Baranski v. Fifteen Unknown Agents of Bureau of No. 17-1281 Greer, et al. v. City of Highland Park, Mich., et al. \Alcohol, Tobacco & Firearms, 452 F.3d 433, 443 (6th Cir. 2006).

Second, without a no-knock warrant, officers executing a search warrant must knock and announce that they are seeking entry into a home and then wait a reasonable amount of time before entering. United States v. Spikes, 158 F.3d 913, 925–26 (6th Cir. 1998). Although the potential presence of drugs "lessens the length of time law enforcement must ordinarily wait outside before entering a residence," it does not justify abandonment of the knock-and-announce rule. Id. at 926. Furthermore, "[n]ighttime searches have long been recognized as more intrusive than searches conducted during the day." Yanez-Marquez v. Lynch, 789 F.3d 434, 465 (4th Cir. 2015) (citing Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971)). Indeed, it is "difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home." Jones v. United States, 357 U.S. 493, 498 (1958)

Finally, the right to be free from unreasonable searches and seizures is clearly established, Graham v. Connor, 490 U.S. 386, 392–93 (1989), and the reasonableness of a search or seizure is evaluated based on a totality of the circumstances, Ohio v. Robinette, 519 U.S. 33, 39 (1996). "To satisfy the Reasonableness Clause, officers not only must obtain a valid warrant but they also must conduct the search in a reasonable manner." Baranski, 452 F.3d at 445.

I'd say it's time to dig up a decent civil rights lawyer. I'm sure the Land of Lincoln has plenty

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Billy lived just outside Mars. We pulled into the drive a pleasant ranch home, one story but still quite large.. As we parked, a young man emerged from the house. He wore an expensive suit with a tie knotted in a perfect Windsor. He also looked like he spent a decent amount of time in the gym. This both surprised and somewhat impressed me. When I think of computer geniuses, I naturally think of geeky looking character like Chips or even Bill Gates. I did not expect the Mahogany Row look. Then, as he came nearer, offering firm handshakes as Bressler introduced us, I noticed a slightly reddened egg-shaped patch on his forehead, the sign of someone spending a great deal of time in a backwards baseball cap. Geekiness confirmed.

He led us into a well-appointed home office, free of the tech clutter usually found in haunts of the similarly engaged. We made some preliminary small talk before getting down to cases. He described himself as a prodigy, pontificated a bit about life as a college senior at age 16, and boasted with no small sincerity about buying this house for the single mother who raised him. Orenstein then suggested we address the matter at hand.

"Let's talk about Wraakhonds," he said.

Hurl paused and his smile flickered. "Wraakhonds? I don't believe I—"

"We got a long drive ahead of us," Buddy continued. "Don't make us go through the unnecessary."

"Gentlemen, I'm afraid –"

"You oughta be," I said. I handed him copies from the folder Chips had prepared. As he read it, the color from his face."

"Who could do this?" Hurl asked.

"Friendly neighborhood hacker back in Jersey," I replied. "If it's any consolation, it took him a few days. That's a record."

Hurl put the papers down. He sat nodding his head as if in response to a pep talk only he could hear. "I haven't broken the law. You see, gentlemen, I have made myself a scholar of the US Communications Decency Act, which shields the owners of websites like me from prosecution for material posted by third parties."

"Right," I said. "It protects the sewer pipe from being charged with the sewage flowing through it. But, the CDA also provides an interactive computer service loses its immunity if it also functions as an "information content provider" for the portion of the statement or publication at issue. Here's where we got you by the short hairs, IMOH. You see these documents also show that you maintain discussion and creative control over all matters subject to posting. And, in addition, look what happens when someone presses the "Help" button. It's a how-to site providing "creative consultant" services for an additional fee."

Hult shrugged. "Pretty weak."

"You want to roll the dice, kid? Okay. But I believe in full disclosure. So let's talk about Clarendon."

His head jerked up, staring daggers but saying nothing. "I thought that was pretty clever myself. The Clarendon Code helped restore the monarchy and Anglicanism to England after the Cromwell years. And you offer restoration to your victims, offering removal of the offending material for a price. Clear and done. Never offered Sandy Kearny that opportunity, though. I wonder why."

"No way she could pay his price," Buddy put in.

"Perhaps," I said. "Captain Bressler, if my count is correct, extortion is illegal in Pennsylvania."

"Yes sir, theft by extortion to be exact. I'm also hearing theft by deception."

"That's right," I said. "And those may be predicate acts under this State's RICO statute, right?"

"You're correct again, Mr. Pound."

"And as byproduct of those crimes, he may have to forfeit things acquired with the proceeds of those acts, such as this house. Correct?"

"You're batting a thousand sir."

It was my turn to stare Hurl down. "Gee, what would your mom say about all that?"

And The Court Said

An Olio of Court Thinking

And the Court Said . . .

An Olio of Court Thinking

by Jim Croy

May 21, 1918
One Hundred Years Ago

[Excerpted from *De Hasque v. Atchison T. & S. F. Ry. Co.*, 1918 OK 292, 173 P. 73.]

This action was brought by plaintiff, in the district court of Oklahoma county, for mandamus to compel defendant to accept a shipment of wine tendered by plaintiff at Oklahoma City to be delivered to the Reverend John Van Gastel, a Catholic priest at Guthrie, Oklahoma, and to compel the railway company to accept like shipments, transport and deliver the same, whenever tendered, both intrastate and interstate. The action was brought by plaintiff on behalf of all members of the Roman Catholic faith alleging that he is a Roman Catholic priest, and chancellor to the Catholic diocese of Oklahoma, and secretary to the Right Reverend Theopile Meerschaert, Roman Catholic bishop of Oklahoma. He alleges a part of his duties under the bishop to be that of providing to the 105 Catholic priests and their congregations within the state of Oklahoma sufficient altar wine for conducting the religious service of the Roman Catholic Church known as the Sacrifice of the Mass.

It appears from the agreed statement of facts that the package tendered was marked "For Sacramental Purposes," and contained pure, fermented, unadulterated juice of the grape, commonly known as altar wine, manufactured and prepared in the particular manner prescribed by the church, and to be used for the sole purpose of conducting the religious service of that church known as the Sacrifice of the Mass, and that this wine is capable of being used as a beverage, and can be drunk in sufficient quantities to produce intoxication.

It appears further from the stipulation that the practice of the Sacrifice of the Mass within the territorial limits now comprising the state of Oklahoma, and the use of this fermented altar wine, has been observed by the clergy of the Roman Catholic Church in the celebration of the Sacrifice of this Mass continuously since the time of Coronado, in the year 1540, and was a practice observed within this territory at the date of the treaty between the United States of America and the Republic of France (Act April 30, 1803, 8 Stat, 200, art. 4), by which the territory of Louisiana was ceded to the United States of America. And it appears that the diocese of Oklahoma consists of the priesthood of about 105 in number, and in excess of 42,000 members, more than 100 churches, numerous parochial schools, hospitals, convents, seminaries, and various charitable and eleemosynary and educational institutions owned, controlled, and operated, both for gain and charitable purposes, by the priesthood and Sisters of Charity, and members of the Roman Catholic Churches. There is observed and conducted within these institutions this religious ceremony and service known as the Sacrifice of the Mass, and that for such service the especially prepared and fermented altar wine is required as a necessary part of the worship.

It is stipulated to be the faith and belief of all Catholics that the use of the fermented wine is a necessary part of this service in commemoration of the Last Supper, at which time Christ gave wine to the Apostles, saying, "Drink ye of this, for this is my Blood of the New Testament, which shall be shed for many unto the remission of sins." And commanded the Apostles also, "This do for a commemoration of me."

It is also stipulated that this sacrifice, according to the Roman Catholic faith, is not one of praise and prayer merely, but is an external sensible act, signifying the most profound homage to God, and is to all Catholics the supreme act of worship and adoration; of all acts the most acceptable to God; that any law prohibiting the Sacrifice of the Mass does, in effect, prohibit all Catholics within the state of Oklahoma from worshiping God according to their faith and belief.

The shipment was refused by the defendant or the reason, as claimed, to do so would be in violation of chapter 186, Sess. Laws 1917, commonly referred to as the "Bone-Dry Law." Section 1 of this act reads: "It shall be unlawful for any person in this state to receive directly or indirectly any liquors, the sale of which are prohibited by the laws of this state, from a common or other carrier."

The question presented is whether the laws of this state prohibiting the sale of intoxicating liquors include such altar wine.

The trial court, in refusing plaintiff relief, held the general language found in section 46, art. 25, of the Constitution to include such wine. That section reads:

> "The manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within this state, or any part thereof, is prohibited for a period of twenty-one years from the date of the admission of this state into the Union. * * * Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind including beer, ale, and wine, contrary to the provisions of this section, * * * or who shall ship or in any way convey such liquors from one place within this state to another place therein, * * * shall be," etc.

Counsel for defendant urge with much force that the general terms "intoxicating liquor of any kind, including beer, ale, and wine," as used in the Constitution, include such wine as may be used for sacramental purposes. To give weight to this argument it is pointed out that under the provisions of the Constitution and Enabling Act lawful purchases might be made for medicinal, industrial, and scientific purposes, under certain regulations. It is urged that because sacramental wine was not excepted from the general terms, it must be held to be included, invoking the rule announced in Lewis' Sutherland, Statutory Construction, 705:

> "Where the Legislature has made no exceptions, the courts of justice can make none, as this would be legislative."

* * *

The cardinal rule of constitutional and statutory construction is to arrive at the intention of the legislative body. . . . It must be conceded that any fermented and intoxicating wines fall within the general terms of the Constitution. But from the early days of jurisprudence it has been held a thing may be within the letter of the law and yet not within the law, because not within its spirit, nor within the intention of its makers. In the case of Stradling v. Morgan, 2 Eliz, (First Plowden) 205, it was said:

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the law in some appearances, and those statutes which comprehend all things in the letter they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to read to some persons only, which expositions have already been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the act. * * * So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

A guide to the meaning of the section of the Constitution is found in the evil which it was designed to remedy; and therefore this court may properly consider the situation as it existed and as it was pressed upon the attention of the members of the Constitutional Convention. It is a matter of common knowledge that prior to the passage of the Enabling Act the use of intoxicating liquors among the Indians was the fruitful source of much crime. The Congress of the United States, recognizing this situation and to suppress this traffic, enacted stringent laws against the sale and importation of intoxicating liquor of every kind in the Indian country. . ., and, in order that this traffic might not be resumed on the coming of statehood, the Enabling Act required the inhibition found in section 46, art. 25. That these provisions might extend and be applied throughout the entire state, the section was submitted to the people, and on its adoption became a part of our constitutional law. All this legislation had but one purpose, to conserve the morals and guarantee the safety of the public by suppressing the use and traffic of intoxicating liquors and prevention of kindred and resulting evils. We do not believe that the members of Congress and the Constitutional Convention, in framing this section, had in mind the sacred use of wine in the sacramental service in connection with the suppression of this evil.

General terms of the statutes or the Constitution must be construed in the light of their common ordinary usage and meaning. While it appears the altar wine in question is intoxicating, if drunk in sufficient quantities, yet it can hardly be said, it seems to us, that the term, "intoxicating liquors." as commonly used in prohibition statutes, includes such wine when used in divine worship. The object and purpose of prohibition statutes is to prevent the intemperate use of intoxicating liquors with the attending and consequential evils. The use of wine in this sacred service forms no part of this evil.

* * *

[We] call attention to the provisions of section 3 of the Enabling Act, which required our Constitutional Convention to provide in the Constitution that perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested, in person or property, on account of his or her mode of religious worship. And this provision appears as section 2, art. 1, of the Constitution. In the Constitutions of the various states we find the constant recognition of religious obligations. We find language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence is essential to the well-being of the community. The preamble to our own Constitution is:

> "Invoking the guidance of Almighty God, in order to secure and perpetuate the blessing of liberty; to secure just and rightful government; to promote our mutual welfare and happiness, we, the people of the state of Oklahoma, do ordain and establish this Constitution."

The happiness of any people, and the good order and preservation of any government, must essentially depend upon piety, religion, and morality. These cannot be generally diffused throughout a community, except by the institution of the public worship of God and of public instruction in piety and religion. We should not impute to the framers of our Constitution, and to the members of Congress who enacted the Enabling Act, the intention to prevent or interfere with public worship under the general terms to suppress the liquor traffic.

* * *

Suppose in our Constitutional Convention some member had offered a section which in express terms declared against the use of wine in sacramental services by any church within this state, and that the transportation and use of such wine, solely for such purpose, would subject the members of that church to prosecution and punishment; can it he believed it would have received a minute of approving thought or a single vote?

We have here a case where there was presented a definite evil, intoxication and intemperance incident to the ordinary use and traffic in intoxicating liquors, in view of which the members of the Constitutional Convention used general terms with the purpose of reaching all phases of that evil. The general language used is broad enough, in its literal interpretation, to cover such fermented wine used for sacramental purposes, which the whole history and life of this nation affirms could not have been intentionally legislated against. In the ordinary transactions of life we find everywhere a clear and positive recognition of the importance and necessity of public worship, and the fostering in every way possible of religious institutions. The custom of opening sessions of deliberate bodies and most conventions with prayer; our laws requiring observance of the Sabbath; the general cessation of all secular business, the closing of courts and Legislatures, and other similar public assemblies on the Sabbath; the various churches and church organizations, which abound in every city, town, and community; the multitude of charitable organizations existing all over the country under Christian auspices; the missionary societies and associations which receive general support in aiming to establish the Christian religion in every quarter of the globe--these, and many other matters which might be noticed, are emblems of Christianity, and emphasize that "man's chief and highest end is to glorify God, and fully to enjoy Him forever." That he may do so intelligently and according to the dictates of his own conscience is the primary purpose of all Christian civilization. The general terms used in the prohibition section of the Constitution should not be construed to prevent religious worship, and in that manner defeat the very purpose of the act, which was to conserve morality and religion by preventing intemperance and intoxication.

The well-known rule of contemporaneous construction applies here. The aid of contemporaneous construction may be invoked when the language of the statute is doubtful and cannot be made plain by the help of any other part of the same statute. Under such circumstances the court may consider the construction put upon the act when it first came into operation. Upon examination of the various acts of the Legislature since statehood, we find that sacramental wines were expressly excepted from the provisions of the act of 1907-8 (Laws 1907-1908, c. 69) and in each succeeding act. From this it appears the Legislature construed the provisions of the Constitution not to include wine for sacramental purposes. The exception found in the act of 1907-8 is: "The provisions of this act shall not apply to * * * the use of wine for sacramental purposes in religious bodies."

The language in the act of 1910-11 (Laws 1910-11, c. 70) is: "The provisions of this act shall not apply to that (liquors) for sacramental purposes."

In the case of Board of County Commissioners v. Alexander, 58 Okla. 128, 159 P. 311, it was held that when apparent that a strict interpretation of a particular statute, construed alone, would defeat the intention of the Legislature, as shown by other legislative enactments, which relate to the same subject, and which have been enacted in pursuance of, and according to general purposes in accomplishing a particular result, such construction should not be adopted. The section of the Constitution and the acts of the Legislature, so far as they deal with the prohibition question, were enacted in pursuance of and according to the general purpose of suppressing the evils incident to the liquor traffic, and to prevent the intemperate use of intoxicating liquors. In the case just referred to, in the opinion by the present Chief Justice, it was said:

> "It is a cardinal rule in the construction of statutes that the intention of the Legislature, when ascertained, must govern, and that to ascertain the intent all the various provisions of legislative enactments upon the particular subject should be construed together and given effect as a whole. * * * When the language of a statute is dubious, the court, in construing it, will consider the reason and intent of the law to discover its scope and true meaning. * * * Subsequent legislative enactments may be considered as an aid in the interpretation of the prior legislation upon the same subject."

Another rule of construction, under which we arrive at the conclusion that prevention of the use of wine in the sacramental service was not intended, is the construction pieced upon a statute by officials charged with the duty of enforcing the statute, either at or near the time of the enactment, and is a just medium for judicial interpretation.

* * *

We conclude that the use of wine for sacramental purposes in divine worship is no part of the evil of intemperance, the suppression of which is the object and purpose of the prohibition law of this state, and therefore the general term "intoxicating liquors," as used in section 46, art. 25, of the Constitution, does not include wine when used solely for that purpose.

May 26, 1943
Seventy-Five Years Ago

[Excerpted from *Balding v State*,1943 OK CR 66, 138 P.2d 132.]

The defendant, T. C. Balding, was charged by the information in the district, court, of Caddo county with the crime of rape in the first degree, was tried, convicted and sentenced to serve 15 years in the State Penitentiary, and has appealed.

The defendant at the time of the alleged offense was a teacher in the eighth grade at the Bridgeport school and also director of the band. The prosecutrix was 13 years old at the time of the alleged assault and one of the pupils in certain classes taught by the defendant. The alleged act, according to the prosecutrix, occurred between 2 and 3 o'clock p.m. on January 24, 1941, in a room adjacent to the superintendent's office in the Bridgeport school building.

One of the assignments of error is that the evidence of the state is wholly insufficient to sustain the judgment of conviction.

We shall not undertake to give a review of the evidence for the reason that on account of error in the proceedings, which will be hereinafter discussed, it is necessary that this case be reversed for a new trial. It is sufficient for us to state that although the evidence of the defendant, if believed by a jury, shows that it was wholly impossible for the defendant to have committed the crime at the time and place related by the prosecutrix, yet the testimony of the prosecutrix is coupled with enough circumstances that the issue became one for the determination of a jury under proper instructions. We shall not substitute our judgment for that of a jury, who heard the testimony and was able to observe the demeanor of the witnesses and were in a better position to judge as to their truthfulness than the members of this court.

It is next insisted that the court, erred in admitting in evidence an alleged confession of defendant made on the 29th day of January, 1941, while locked in the basement of the school building in the presence of H. A. Simmons, superintendent of schools, and the three members of the school board, one of which was the deputy sheriff; the said alleged confession being the result of and procured by force and violence; and further erred in admitting in evidence a statement dictated by the said H. A. Simmons on the same date about two hours after the assault made upon the defendant in the basement, of the school building, which said alleged confession was given as a result of threats and promises of reward.

At the time this case was set for oral argument, the Assistant Attorney General who appeared on behalf of the state, stated in open court that he was of the opinion that the court committed reversible error in admitting in evidence these two alleged confessions, and that this court should, for that reason, reverse and remand the case for a new trial. No further appearance has been made by the state in this cause and no brief was filed in opposition to the very excellent brief presented on behalf of the defendant.

There is little dispute as to the facts surrounding the giving of the two alleged confessions. The school board members, the superintendent, and the defendant all testified concerning the occurrences at the time the first alleged confession was given. The defendant was taken to the basement of the school building by the superintendent. There he was confronted by the three school board members, one of whom was the local deputy sheriff.

The superintendent, a much larger man than defendant, accused defendant of raping the Peck girl five days previous to that time. The defendant first denied the accusation. The superintendent stated "You did too", to which the defendant replied "I did not." After the second denial the superintendent struck the defendant a hard blow on the side of the head with his fist, breaking the skin and knocking the defendant back against the wall. After this blow was struck he again accused the defendant and the defendant again denied the charge. The superintendent then struck him another severe blow just above the ear, again breaking the skin and causing his ear to bleed. After this blow was struck the superintendent again stated: "You know you did it"', to which the defendant replied "Yes."

Immediately after the giving of this alleged confession the defendant was loaded into the car of the superintendent and brought to the State Capitol allegedly for the purpose of having his certificate to teach school revoked. When the defendant first entered the superintendent's car, the superintendent had told him that the father of the little girl was collecting a mob, and that he, the superintendent, wanted to get him away as quickly as possible. After arriving at Oklahoma City the superintendent dictated and the defendant wrote a statement addressed to the State Board of Education in which the defendant said he was guilty of the crime of rape and was asking that his certificate to teach school be revoked.

According to the testimony of the defendant the superintendent said that he would send him to the penitentiary if he did not sign the statement, but that if he would sign the statement it would be used only for the purpose of getting his license to teach revoked and that nothing further would be done about the case if the defendant would leave the town of Bridgeport. No one was present when the statement was written except defendant, the superintendent and the deputy sheriff. It is undisputed that after the defendant signed the written statement at Oklahoma City he was released and returned home, took his wife and baby and left Bridgeport for the town of Walters, where he was arrested

See OLIO, PAGE 18

The Barbeque Lawyer

By Jim Croy

In the recent past, the news airwaves have been consumed by, and filled with, the concept of attorney-client privilege. Only occasionally have the reporters taken time out from their orations to consider the nature of the privilege. Of course, as lawyers, we have a broader understanding of the privilege. And, realizing that by the time these few lines are reduced to ink on newsprint the interest in the subject will have been replaced with something newer and shinier, I thought it might be interesting to have a cursory discussion of the privilege.

It seems apparent that in order to have an attorney-client privileged communication there must be two things present: an attorney-client relationship, and a privileged communication. Fortunately, the Oklahoma Supreme Court agrees with that analysis. In 1987 the Court stated, "[i]n order to establish the privilege, it must be shown that the status occupied by the parties was that of attorney and client and that their communications were of a confidential nature."[1]

In the recent controversy, the news commentator identified as the attorney's "third" client denied the existence of an attorney-client relationship, stating that he had only consulted the attorney at a barbeque, and then only about real estate, and he did not pay the attorney. This demonstrates the error in the commentator's thinking on three aspects. First, he lives in New York, and there is no real barbeque in New York. Whatever that watery stuff that reeks of vinegar that they serve in that part of the country might be, it is definitely not barbeque.

Second, the nature of the relationship between attorney and commentator is not defined by either the length of the relationship, or by the location of the consultation. There is no "barbeque exception." Whether an attorney-client relationship exists is more dependent on the *nature* of the relationship than it is on location or duration. As stated by the Oklahoma Supreme Court,

> A fiduciary relationship exists between two persons when one of them is under a duty to act or give advice for the benefit of another upon matters within the scope of that relation. One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. The duty is based on the status of the parties and it arises from a relationship of trust and confidence. The lawyer-client relationship is a fiduciary relationship.2

What the attorney owes the client is the utmost candor and fairness, because the client is entitled to bestow his highest trust and confidence in the attorney.[3] So, standing on the patio during the cook-out, when the commentator poses a legal question concerning real estate law to the attorney, he is entitled to trust the attorney and have confidence in his advice. He is *entitled* to, but he is not *bound* to bestow that trust. While the attorney is required to give his best legal advice, the commentator can think, *Wow, what a doofus. I wouldn't let this guy buy me a Snickers bar.* [4]

Third, the lack of a retainer is not determinative of the existence of an attorney-client relationship. In the interest of full disclosure, the commentator later stated that he might have given the attorney $10 one time. And we all know what a person is called who accepts $10 for his legal advice: a general practitioner. With respect to the retainer issue, the Supreme Court ruled some twenty years ago that a retainer is not necessary to establish the attorney-client relationship.[5] If it were otherwise, then public defenders and pro bono lawyers would not have an attorney-client relationship with those whom they represent.

To put it succinctly, if a lawyer is wondering whether he has an attorney-client relation with Joe Blow, the answer is this: If the existence of such a relationship operates to the detriment of the lawyer, then he probably has an attorney-client relationship.

So, if the relationship hurdle has been overcome, we need to determine what the privilege attaches to. In two somewhat ancient cases, the Oklahoma Supreme Court stated that the communication must have been confidential *in the eyes of the client* and not necessarily in the mind of the attorney.[6] Also, in more than one instance, the Supreme Court has cited a Hawaii case on the issue of the attorney client privilege. In that case, the Hawaii court stated:

> The attorney-client privilege authorizes a client to refuse to disclose and to prevent others from disclosing certain communications between attorney and client. To invoke the privilege, the party asserting it must establish that the communication occurred in the manner as follows: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.7

This analysis raises a rather interesting problem for the lawyer. As lawyers, we are all aware that as a general rule, a communication made in the presence of, or previously disclosed to, third parties is not confidential. However, if a client and attorney have a two-party communication, we must somehow determine that it was not made in confidence in order to disclose it to someone else. Otherwise, it would seem that attorneys must assert the privilege on behalf of the client, since only then can the client waive the privilege. In the context of litigation in which an attorney is being compelled to reveal communications with his client, the trial judge makes the determination of whether those communications are subject to the privilege.[8]

To fog the issue just a little more, there is some authority for the proposition that the attorney can urge the privilege on behalf of a dead client.[9] This is also reflected in 12 O.S. §2502(C):

> The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.10

While the lawyer is able to invoke the privilege on behalf of his client, there is no provision, either in statute or in common law, for the lawyer to be able to waive or discontinue the privilege on his client's behalf. So it seems that the lawyer can use her independent legal expertise to invoke the privilege, but once she has done so, that same legal expertise cannot be used to abandon the application of the privilege if the attorney later comes to the believe that it was improperly invoked.

So, by way of an absolutely outlandish hypothetical example, let's say that a client reveals to a lawyer that the client has had an affair with, say, an adult movie star and has paid her $130,000 not to disclose the affair. When asked about the affair by the press, the lawyer invokes the client's attorney-client privilege with regard to that discussion. Then the client dies. After the client's death there comes to light the existence of a payment of $130,000 by the client, but now the story is that he paid the money to stop her from revealing that they had been married in Mexico and had three children together. The question is this: Even though the lawyer knows in his heart of hearts that the client would have waived the privilege in order to counter the more salacious story of the marriage and family, must he still assert the dead client's privilege?

And, one might ask, does it matter if the client's original disclosure of the affair and the payment took place at a barbeque in New York?

(Endnotes)

1. *Chandler v. Denton,* 1987 OK 38, 741 P.2d 855, citing *Sapp v. Wong*, 62 Hawaii 34, 609 P.2d 137, 140 [1980].
2. *Graves v. Johnson,* 359 P.3d 1151, 2015 OK CIV APP 81. (Citations omitted.)
3. *State Ex Rel. Oklahoma Bar Association v. Hatcher,* 1969 OK 42, 452 P.2d 150,
4. Interestingly enough, in dicta the Court has stated that "an attorney-client relationship can be established by a reasonable subjective belief of the client." *State ex rel. Oklahoma Bar Association v. Helton,* 2017 OK 31, 394 P.3d 227
5. *State ex rel. Oklahoma Bar Ass'n v. Green,* 1997 OK 39, 936 P.2d 947.
6. *Howsley v. Clark,* 1934 OK 93, 29 P.2d 947; *Joy v. Litchfield*, 1941 OK 166, 113 P.2d 974.
7. *Sapp v. Wong,* 62 Haw. 34, 609 P.2d 137. Your correspondent has heard of an unpublished treatise written by Jason Wight entitled, *The Hawaiian Language and Miscommunications between Attorneys and Clients,* which differs with the reasoning in *Wong.* Your correspondent stands ready and willing to go to Hawaii at OCBA expense to verify the difference between Wight and *Wong.*
8. *Chandler v. Dento, supra.*
9. *Browning v. State,* 2006 OK CR 8, 134 P.3d 816.
10. *12 OS 2502 sets out the attorney-client privilege.*

Are Bitcoins Valuable?

By Miles Pringle

Yes, because people have agreed to use them; however, bitcoins are rarely used in everyday legitimate transactions. Most of the value in bitcoins comes from pure speculation as investors trade in bitcoins and bitcoin futures as an investment tool. How valuable are bitcoins? On April 18, 2018, the value of one bitcoin was approximately $8,000, more than a 650% increase from around $1,200 dollars a year earlier; although that is less than half its high of $19,000+ on December 16-17, 2017.

The volatility of bitcoins, and the fact that few vendors accept them and that many banks/governments have banned them to some extent, render bitcoins useless for everyday transactions. It is hard to buy groceries when the money in your e-wallet varies dramatically from the time you walk into the store to the time you get to the checkout line. Also, even if bitcoins were accepted by the grocery store, you couldn't pay with an actual bitcoin coin (can you make change for my $8,000 coin?). What is being accepted by a few vendors is a fractional interest in a bitcoin, e.g. .0001%. Thus, there is an entire secondary market of instruments evidencing interests in bitcoin.

So, what is a bitcoin actually? It is a unique set of data ("a chain of digital signatures"[1]) that interacts with and is transferred via a public ledger, referred to as the "blockchain." As explained in the original white paper outlining bitcoins, a coin is transferred by the owner "digitally signing a hash of the previous transaction and the public key of the next owner and adding these to the end of the coin."[2] The purpose of the currency, at least as stated in the original white paper, is to address internet-based commerce's reliance on "financial institutions serving as trusted third parties to process electronic payments." The key difference is that the blockchain serves to document the transfer of currency rather than a bank and a payment processor.

How are bitcoins created? By "mining" them, which "involves compiling recent transactions into blocks and trying to solve a computationally difficult puzzle."[3] The person who solves the puzzle first gets the newly created bitcoin. Importantly, the reward for mining is reduced over time which will "result in a total release of bitcoin that approaches 21 million." Said again, there is an artificial limit on the number of bitcoins which has no relation to the value of bitcoins.

The fact that there is a limit on the amount of bitcoins means that they can never replace government backed currencies. As we are well aware, the supply of money typically grows over time. If it grows too much, there is inflation which may destroy the economy. If it grows to little or shrinks, it can no longer can serve as a viable means of transaction and may well destroy an economy. "Deflation slows economic growth. As prices fall, people put off purchases. They hope they can get a better deal later. … Massive deflation helped turn the 1929 recession into the Great Depression. As unemployment rose, demand for goods and services fell."[4]

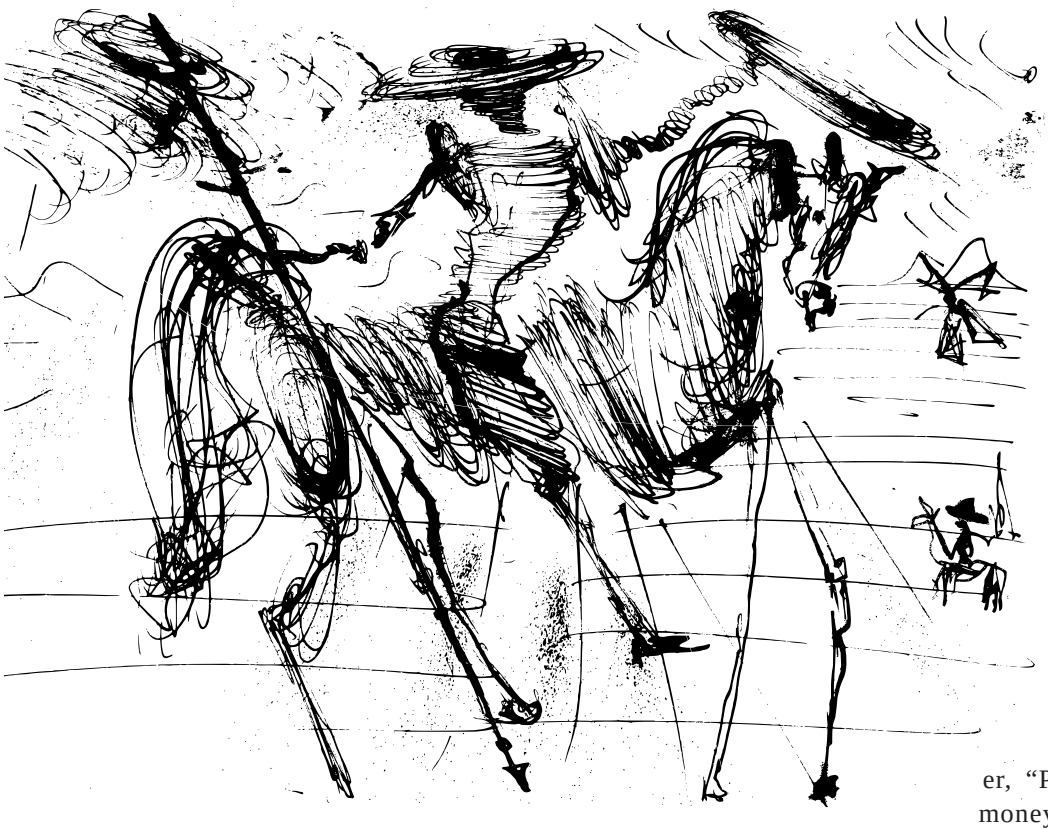
The explanation as to why bitcoins are capped appears to be that the limit approximates naturally occurring commodities like gold. However, even when our economy was tied to the gold standard, it never strictly limited the amount of currency in circulation. Congress continually changed the ratio of dollars to gold in order to meet the need for more currency (e.g. $1 = 2o.z. to $1 = 1o.z.). Even in ancient times, when gold was literally the currency, kings and emperors would mix gold with other metals in order to lower the amount of gold in individual coins so that they could have more coins in circulation. Market forces have always driven the amount of currency in the economy. Thus, bitcoins are more analogous to a commodity than a currency.

While the blockchain tracks the movement of bitcoins, everyday purchases using interests in bitcoins are tracked in secondary markets. For example, you can purchase your interest in a bitcoin on a bitcoin exchange, such as Coinbase, a California based company which raised more than $200 million dollars from large investors such as BBVA, USAA, and the New York Stock Exchange. Your Coinbase account can be used to make online purchases through Shopify, a Canadian based payment processor traded on the New York Stock Exchange with 2017 revenue of more than $580 million.

See BITCOIN, PAGE 13

(Endnotes)

1. Satoshi Nakamoto, "Bitcoin: A Peer-to-Peer Electronic Cash System", published October 31, 2008, available at https://bitcoin.org/bitcoin.pdf (last accessed April 18, 2018).
2. Id; Also, "Hash" is "a mathematical process that takes input data of any size, performs an operation on it, and returns output data of a fixed size… A common use of this kind of hash function is to store passwords." See Faife, Corin, "Bitcoin Hash Functions Explained", published February 19, 2017, available at https://www.coindesk.com/bitcoin-hash-functions-explained/ (last accessed April 18, 2017).
3. Investopedia, "Bitcoin Mining", available at https://www.investopedia.com/terms/b/bitcoin-mining.asp (last accessed April 19, 2018).
4. Amadeo, Kimberly, "Deflation, Its Causes and Why It's Bad: Deflation Threatens You More Than Inflation", The Balance, updated April 11, 2018, available at https://www.thebalance.com/what-is-deflation-definition-causes-and-why-it-s-bad-3306169 (last accessed April 19, 2018).
5. Illing, Sean, "Why Bitcoin is bullshit, explained by an expert: It turns out cryptocurrencies and blockchains have a few problems", Vox, published April 11, 2018, available at https://www.vox.com/conversations/2018/4/11/17206018/bitcoin-blockchain-cryptocurrency-weaver (last accessed April 19, 2018).
6. Detrixhe, John, "Coinbase's customer complaints more than doubled in January", Quartz, published March 05, 2018, available at https://qz.com/1220367/coinbases-customer-complaints-more-than-doubled-in-january/ (last accessed April 19, 2018).
7. Popper, Nathaniel, "There Is Nothing Virtual About Bitcoin's Energy Appetite", The New York Times, published January 21, 2018, available at https://www.nytimes.com/2018/01/21/technology/bitcoin-mining-energy-consumption.html (lasted accessed April 19, 2018).
8. Hern, Alex, "Bitcoin's energy usage is huge – we can't afford to ignore it", The Guardian, published January 17, 2018, available at https://www.theguardian.com/technology/2018/jan/17/bitcoin-electricity-usage-huge-climate-cryptocurrency (last accessed April 19, 2016).



Cato's Letters: No. 16

Don't Be Misled by Party Leaders

By Geary Walke

Cato's Letter No. 16 begins with a reference to Sancho Panza, the humorous and ironic sidekick for Don Quixote in the 1605 novel by Miguel de Cervantes. We know at once that Cato is well read. When Sancho reaches the promised (is)land and becomes a ruler, Sancho will sell all of his subjects. Cato asserts this as the "only reasonable desire of the leaders of all parties; for no man will be at the expense and fatigue of body and conscience, which is necessary to lead a faction, only to be disturbed and annoyed by them."

It reminds me of what an older lawyer told me when I was much younger: "The practice of law would be a wonderful experience, if it wasn't for the clients."

Cato acknowledges that no one should serve a party unless he can get a good job out of it. Every patriot observed in public transactions has for the "alpha and omega of all their actions: They all professed to have in view **only the public good**; yet everyone showed he only meant his own (good)." And all the while the mob, the leading noble crowd, fight and fiercely contend for their leaders "as if their happiness or misery depended upon" . . .the "persons who robbed and betrayed them. Thus the highwayman said to the traveler, "Pray, Sir, leave your watch and money in my hands, or else, by G--, you will be robbed."

No beating makes a fool any wiser, and no experience makes the bulk of mankind any wiser either. Most will be "caught over and over again by the same baits and stale strategems. No sooner is a party betrayed by one head, but they rail at him, and set up another. When this has served them in the same manner, they choose a third and put full confidence in every one of them successively, though the leaders all make same use of the credulity of the party's mob."

. . . "I would advise anyone who is contented to be sold, that he receive the money himself, and take good care of himself, regardless of what comes of his neighbors." "Whatever bargains are struck among **the betrayers of their country**, we must find the money, and pay both sides. How wise and advantageous would it then be for us, not to interest ourselves in the agreements or squabbles of ambitious men, who are **building their fortunes upon our ruin**?"

"This letter of advice is not intended for those who share already in the public spoils, or who, like jackals, hunt down the lion's prey, that they may have the picking of the bones, when their masters are glutted. But I would persuade the poor, the injured, the distressed people, to be no longer the dupes of hypocrites and traitors. But very few can share in the wages of iniquity, and all the rest must suffer; **the people's interest is the public interest**."

"Whatever these betrayers of their country get, the people must lose" . . . "for such conspiracies and extortions cannot be successfully carried on without destroying or injuring trade, perverting justice, corrupting the guardians of the public liberty, and the almost total **dissolution of the principles of government**."

The advantages that are produced from public misfortune cannot be distributed between many; therefore few should desire them. I see how desperate men and criminals can always try to profit from any situation. I see how those who aim at tyranny can be interested in the loss of public liberty: restraint of the press, or destroying Christianity. There are reasons why ambitious men should, whether right or wrong, grasp at immense wealth, high honors and exorbitant power. "But, that the gentry, the body of the people in a free nation, should become tools and instruments of knaves and pick-pockets, list themselves in their quarrels and fight their battles, often at great expense, by violating good neighbors, near relations and private friendship; that men of great estates and quality, for small and trifling consideration-sometimes none at all-should **promote wild, villainous projects to the ruin of themselves and country**, by risking their own titles to their lives, estates and liberties, is so stupendous that it must be thought impossible, but for the daily experience that convinces us that is more than a mere possibility."

"I have often seen honest Tories foolishly defending knavish Tories, and untainted Whigs protecting corrupt Whigs, even in instances where they acted against the principles of all Whigs; and by that means depreciated Whiggism itself, and gave the stupid herd occasion to believe that they had no principles at all, but were only a factious combination for preferment and power."

"It is high time, at last, for the bubbles of all parties, for Whigs and Tories, for High Church and Low Church, to come to a clarification and no longer suffer themselves to be bought and sold by their drivers. Let them cease to be calves and sheep and they will not be used like calves and sheep. If they can be persuaded now and then to confer notes they will find that for the most part the differences between them are not material, that they take only different measures to attain the same ends, that they have but one common interest, which is the interest of their country. That the country should be freed from oppression and that oppressors be punished. The oppressors practice will always be to form parties, and blow up factions to mutual animosities that they may find protection in those animosities."

Let us not be misled. "Let us learn to value an honest man of another party more than a knave of our own." **Let the only issue be: "who shall be most ready to spew out their own rogues?** Answer that and all other differences will soon be at an end. Indeed, there had been no such thing as party now in

See CATO'S LETTER: NO. 16, PAGE 14

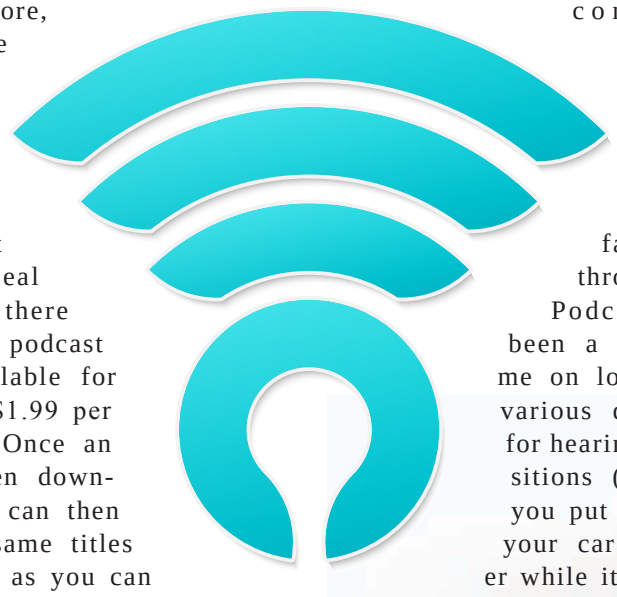
21st Century Entertainment

By Shanda McKenney

For those who actually read the *Briefcase* last month, you may have noticed an article toward the back describing several "podcasts" that are worth looking into. Some of our readers undoubtedly experienced confusion as to what a "podcast" is, and/or how you might access them. Podcasts are like radio shows such as "The Shadow," or "Little Orphan Annie" from days gone by, and are also comparable to "books on tape." However, unlike radio programs or cassette tapes and DVDs, podcasts go wherever you go, because they are on your cell phone, tablet, or other mobile device. There are a myriad of topics and shows available, on demand, at the touch of a finger. Allow me to explain.

If you have an iPhone, you have a podcast app built into your phone - you just have to touch the icon. From there, it will likely take you directly to a lengthy list of the most popular podcasts. However, it is also searchable if you have a particular topic in mind, want to look up a favorite series from NPR, or are looking for some shallow listening material as pure entertainment.

If you are an Android user, you will probably have to download a podcast app from Play Store, but there are a variety of free options available (with ads). If you don't want to deal with ads, there are reliable podcast players available for as little as $1.99 per download. Once an app has been downloaded, you can then search the same titles and subjects as you can on an iPhone.

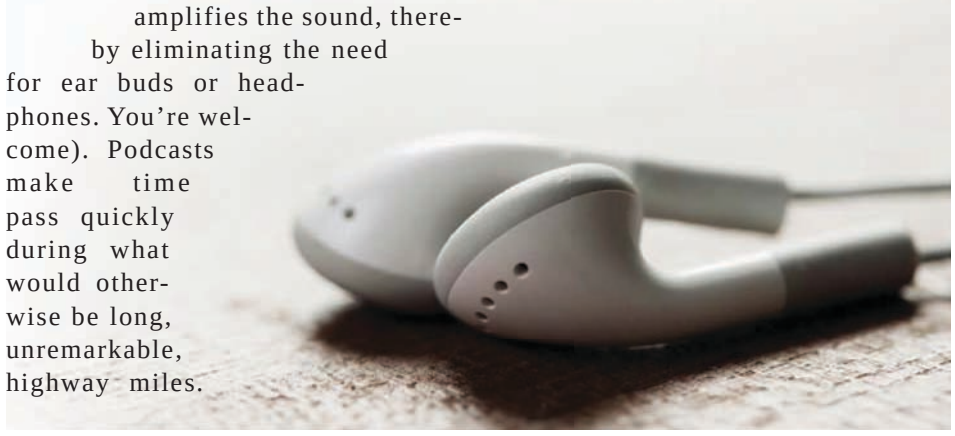


If you have a Microsoft cellphone, you are on your own.

Once you've accessed a podcast app, search random words that interest you. Politics, crime, rugby, comedy, historical fiction - pick your poison. Don't be afraid to try different titles or topics - the great thing about the digital world is that you can always delete things you download, if it doesn't ultimately suit your taste. Most podcasts are free to download, commercials are usually infrequent and brief, and you have the ability to fast forward through them.

Podcasts have been a lifesaver for me on long drives to various distant lands for hearings and depositions (pro tip - if you put the phone in your car's cup holder while it's playing, it amplifies the sound, thereby eliminating the need for ear buds or headphones. You're welcome). Podcasts make time pass quickly during what would otherwise be long, unremarkable, highway miles. They also fill the gaps in areas where radio stations are few and far between. Because podcasts are downloadable, you do not need a cellular signal to listen to them, you only need a charged phone or tablet.

Several of my favorite podcasts were profiled in last month's article. Since then, I have added "Serial" to my list, and I am truly addicted. Season 1 of that podcast is largely responsible for winning a criminal defendant a new trial. In my humble opinion, there is no higher use of the digital world than reinforcing the rule of law. When consumed wisely, podcasts will educate you, can add to your practice area, and broaden your world views, in general. Now go forth and download!



Law Day 2018 Highlights

OCBF President Jeff Trevillion presented the Howard K. Berry, Sr. Award to Northeast OKC Community & Cultural Center President and Founder Lori Combs.

David High answers the phones at Ask A Lawyer 2018.

OCU School of Law Dean Lee Peoples accepted the Liberty Bell for Aimee Majoue from YLD Chair Cody Cooper.

Law Day Committee Chair Amber Martin introduced featured speaker OU College of Law Dean Joe Harroz.

Bobby Don Gifford assists at this year's Ask A Lawyer program

President David Cheek hosted the luncheon.

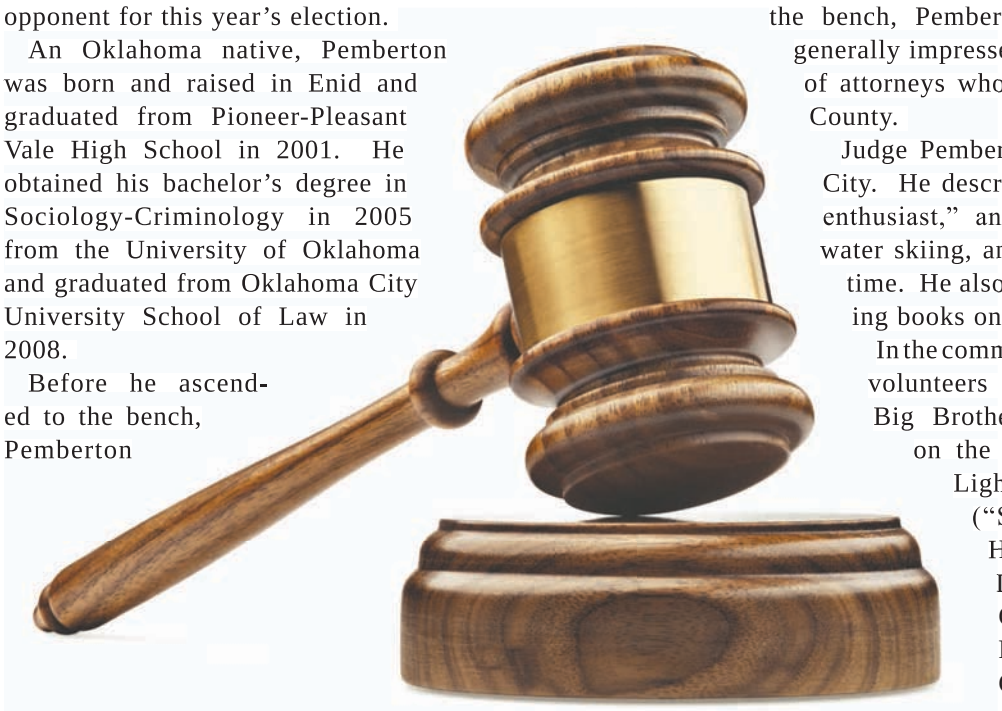
Former District Judge Nancy Coats-Ashley was presented the Journal Record Award by Ted Strueli, associate publisher and editor.

Pemberton appointed District Judge

By Scott Jones

Trevor Pemberton was sworn in as an Oklahoma County District Judge on January 17, 2018. Pemberton was appointed by Governor Mary Fallin to complete the term of retired District Judge, Roger Stuart. Pemberton had been serving as a Special Judge in Oklahoma County, overseeing a domestic docket, since May of 2017.

Pemberton did not just assume the Office 13 vacancy that was created by Judge Stuart's retirement - he also assumed Judge Stuart's former civil docket. Although his term ends this year, Pemberton's tenure will extend to another term, as he did not draw an opponent for this year's election.



An Oklahoma native, Pemberton was born and raised in Enid and graduated from Pioneer-Pleasant Vale High School in 2001. He obtained his bachelor's degree in Sociology-Criminology in 2005 from the University of Oklahoma and graduated from Oklahoma City University School of Law in 2008.

Before he ascended to the bench, Pemberton was in private practice. He practiced civil litigation and family law at Mulinix, Ogden, Hall, Andrews, and Ludlum ("Mulinix Ogden") from 2009 to 2015, before moving across the hall to Hall and Ludlum, where he worked until 2016. He practiced construction law at Hayes, Magrini, and Gatewood from 2016 until he became a judge in 2017.

Pemberton said he expects attorneys practicing in his courtroom to be prepared and have everything timely filed. He also expects counsel to be professional and respect other attorneys. He dislikes attorneys "talking over each other." Since assuming the bench, Pemberton said he has been generally impressed with the high caliber of attorneys who practice in Oklahoma County.

Judge Pemberton lives in Oklahoma City. He describes himself as a "lake enthusiast," and enjoys wakesurfing, water skiing, and bicycling in his free time. He also has an interest in reading books on the Christian religion.

In the community, Judge Pemberton volunteers as a Big Brother for Big Brothers/Big Sisters and is on the board of the Salt and Light Leadership Training ("SALLT") program. He is a member of the Downtown Exchange Club, a Master of the Robert J. Turner Inn of Court, and serves on the professionalism committee of the Oklahoma Bar Association. He is a member of Bridgeway Church.

Judge Trevor Pemberton

Pemberton's courtroom is in Room 821 of the Oklahoma County Courthouse (formerly occupied by Judge Dixon). His chambers are in Room 819. The telephone number for his chambers is (405) 713-1451. His staff includes Melissa Dull (bailiff), Shalese Blue (clerk), and Marla Hill (court reporter).

Old News

Excerpts from *OCBA News*:
December 1978, Part 3

SPECIAL JUDGE McFALL SET TO RETIRE

Retyped and Republished By Geary L. Walke*

Special Judge Byron E. McFall has announced his retirement from his appointive position effective December 31, 1978. He expressed his intention to retire in a letter dated November 1, 1978, to Presiding Administrative Judge Homer Smith of the Seventh Judicial District comprised of Oklahoma and Canadian Counties. Copies of the letter were furnished to Mr. Bob Martin, Court Administrator and Mr. Marvin Emerson, Administrative Director of the Courts in Oklahoma.

Judge McFall was born in Lawton, Oklahoma, January 17, 1908, but moved to Oklahoma City at the age of five. He attended elementary schools in Oklahoma City, graduating from Oklahoma High School (now Central High) in 1925. He followed a career in music which allowed him to be self-supporting during his high school and college years. He enrolled in the University of Oklahoma at Norman in 1925, receiving his B.A. Degree in Government in 1929 and graduating from O.U. College of Law with an LL.B. Degree in 1931.

Thereafter, he was in the private practice of law in Oklahoma City until February 23, 1942, when he entered upon a career as a Special Agent of the Federal Bureau of Investigation. He retired from the FBI on January 17, 1964 after almost twenty-two years of service, to become Assistant Commissioner of Public Safety in Oklahoma under Robert R. Lester, serving under Governors Henry Bellmon and Dewey Bartlett until February 13, 1969.

Judge McFall was appointed as one of the original Special Judges in Oklahoma County as a part of court reorganization in Oklahoma and was the first Special Judge to become a Vice President of the Judicial Conference of Oklahoma, composed of all Judges in the state.

Judge McFall is a member of the Oklahoma County and Oklahoma State Bar Associations, as well as the American and Federal Bar Associations, Society of Former Special Agents of the FBI, Inc., Oklahoma Sheriffs and Peace Officers Association, American Judicature Society, American Federation of Musicians, Local Number 375, Lions International and Downtown Lions Club, and Lodge Number 1785 Loyal Order of Moose. He is a life member of Delta Upsilon Fraternity, Life Member of the University of Oklahoma Alumni Association, and a member of the O.U. College of Law Association. He is a lifelong Methodist and has held memberships in United Methodist churches in Oklahoma and Alabama.

**I tried a jury trial before Judge McFall in the courtroom at the southwest corner of the third floor where Judge Richard Ogden now presides. I report this for no more reason than it occurred to me as I was retyping this article, and I can, so I did. The case stood for the proposition that a cheap paint job on a car is worth what you pay for it.*

BITCOIN from PAGE 7

I hope you find the irony here as humorous as I do. Bitcoin was created to circumvent the banks and other payment processors for internet transactions. In order to do that you need an account with an investment bank and a merchant account with a third-party processor. Neither the investment bank, nor the processor are subject to the examinations and compliance scheme for depository banks. Also, your bitcoin account is not insured up to $250,000 by the FDIC.

Another problem with bitcoin is its relation to unlawful behavior. We are well aware that bitcoin is often the currency of choice for criminals like hackers, drug dealers and human traffickers. Additionally, cryptocurrencies like bitcoin are inundated with fraud schemes banned decades ago in more traditional exchanges. Nicholas Weaver, a researcher at the International Computer Science Institute at UC Berkeley, points out that "bitcoin exchanges are unregulated entities that allow all sorts of things that are outright frauds. For example, in a regular stock exchange, you're not allowed to trade with yourself because that's price manipulation. But that's a regular occurrence on these cryptocurrency exchanges."[5]

Coinbase, referenced above, is not without its complaints. In January of this year there were almost 900 complaints regarding Coinbase made to the Consumer Financial Protection Bureau. "More than 400 complaints were categorized as 'money was not available when promised,' a fairly fundamental issue for any financial account."[6]

There are other real-world concerns with bitcoin, such as it takes a lot of energy to mine for bitcoins and maintain the blockchain. The algorithm used to mine is so complex that computers must guess parts of the equation. The rationale for the complexity is that no one can dominate the mining process, but the power needed to create each bitcoin requires as much electricity as the average American household burns through in two years.[7] All told, the energy consumed by the entire bitcoin network is "estimated to be higher than that of the Republic of Ireland… That's commensurate with CO2 emissions of 20 megatonnes – or roughly 1M transatlantic flights."[8]

So yes, bitcoins are valuable today. You may want to invest in some if you are willing to navigate a highly volatile and fraud-swamped market. Will bitcoin become the currency of the future? No. Will another cryptocurrency become more widespread? Probably. Will any cryptocurrency replace government-backed currencies? Not anytime soon.

Events & Seminars

JUNE 15, 2018
Annual Awards Luncheon
12 Noon, Jim Thorpe Room
4040 N. Lincoln Blvd.

JULY 16, 2018
OCBA Annual Golf Tournament
Gaillardia Golf Club

AUGUST 16, 2018
YLD "Striking Out Hunger" Bowling Tournament
6 p.m., Heritage Lanes

SEPTEMBER 28, 2018
Raising The Bar 2018
Gaylord Pickens Museum

PODCASTS OF THE MONTH

By Ryan L. Dean and Kyle Prince

Last month, we provided you with the "Top 10 Podcasts You've Never Even Heard Of." It has come to our attention some of you have never heard of podcasts…period.

What is a podcast?

The term "podcast" is a combination of "iPod" and "broadcast." A podcast is an audio file that can be played at your convenience on different portable devices, the most common of which are an iPod, iPhone or Android.

How do I listen to a podcast?

To listen to the podcast, you need an electronic device such as an iPhone, iPod, iPad, Android phone, laptop or desktop with access to the internet. Most of these devices will have built in apps which will allow you to download and play the podcast. For example, iPhones come with the Apple Podcasts app and Androids come with Google Play.

Where do I find podcasts?

Podcasts of all varieties can be found on apps such as Google Play, iTunes, Spotify, iHeartRadio and SoundCloud. Again, most devices will include an app (like Google Play or the Apple Podcast app) which allow you to search and play podcasts.

Why should I listen to a podcast?

There are any number of reasons to listen to a podcast. For example, they are convenient because they can be listened to at any time. Also, there are podcasts on a variety of topics, which are available at your fingertips and are not available on the radio.

So, now that you've been introduced to the world of podcasts, we'd like to set forth our "Podcasts of the Month" in what we hope will become a monthly feature. This month's topic: Oklahoma Sports.

1. Oklahoma State Cowboy Insider

Oklahoma State Cowboy Insider brings you in depth analysis into Oklahoma State athletics including interviews and guest analysis on all things Cowboy. The podcast is hosted by "The Voice of the Cowboys" Dave Hunziker.

2. SoonerScoop Podcasts

An in depth look at Oklahoma Sooner sports; including analysis and tons of recruiting information. The podcast is hosted by soonerscoop.com's Carey Murdock, Josh McCuistion and Edward Radosevich

3. Thunder Buddies

Weekly discussions of Oklahoma City Thunder basketball brought to you by the sports staff at the Daily Oklahoman.

CATO'S LETTER: NO. 16 from PAGE 8

England, if we had not been betrayed by those whom we trusted."

Because of the villainy and knavish designs of leaders this nation has lost several glorious opportunities of rescuing the constitution and settling it upon a firm and solid basis. Let's not lose the present favorable offer: "**to learn from our misfortunes** and accept our calamities as an opportunity thrown into our laps by indulgent providence to save ourselves, and not again foolishly and ungratefully reject and spurn at the intimations and invitations of heaven to preserve our prince and country."

Machiavelli tells us that no government will long subsist except by returning to its first principles. This can never be done while men live at ease and in luxury. For those men cannot be persuaded to see distant dangers of which they feel no part. **Reformation is only possible when misfortune and evils are close at hand to frighten us.** Then men will want remedies and their minds will be prepared to receive them, to hear reasons, and to accept measures proposed by wise men for the security of all.

This informs us what is necessary to save a state that is threatened. Again Machiavelli tells us that a tyranny cannot be established but by destroying Brutus, but a free government is not preserved by destroying Brutus' sons.

Therefore, let us make a great resolve for this occasion. "Let us exert a spirit worthy of Britons, worthy of freemen who deserve liberty." Let us do it while we have the opportunity, while resentments boil high, while we set aside lesser animosities and when most men are sick of party and party-leaders. And let us, by all proper methods punish the enemies of all mankind.

"**Let neither private acquaintance, personal alliance, or party combination stand between us and our duty to our country.** Let all those who have a common interest in public safety join in common measures to defend the public safety. Let us pursue to disgrace, destruction and even death, those who have brought this ruin upon us" regardless of how great they are or how many. Let us stamp and deeply engrave in characters legible to all Europe and to all posterity what vengeance is due to crimes which have no less objects in view than the ruin of nations and destruction of millions. They have made many bold, desperate and wicked attempts to destroy us. **Let us strike one honest and bold stroke to destroy them**."

"Though the designs of the conspirators should be laid as deep as the center, though they should raise hell itself in their quarrel and should fetch legions of votaries from thence to avow their proceeding; **yet let us not leave the pursuit till we have their skins and estates**. We know by past experience that there are those among us who will be glad to quit the chase when our villains, like beavers, drop what they are usually hunted for. But the nation is now too much provoked and too much injured to suffer themselves to be again so betrayed."

We have heaven to direct us, a glorious King to lead us, and a wise and faithful Parliament to assist and protect us. Whilst we have such a King and such a Parliament, every worthy Briton cries out aloud:

Manus haec inimica tyrannis
Ense petit placidam, sub libertate quietem
Seek with a sword the quiet peace of liberty!

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Bar Observer

Crowe & Dunlevy names four new directors

Crowe & Dunlevy recently announced the promotion of four attorneys to director positions in Oklahoma and in Texas. **Kari Hoffhines**, **Allen L. Hutson** and **Mary P. Snyder** will continue to provide legal counsel to the firm's clients across diverse industries in Oklahoma City, as will **Christopher M. Staine** from the firm's Dallas office.

Hoffhines is a member of the firm's Banking & Financial Institutions, Bankruptcy & Creditor's Rights, Real Estate and Wind & Renewable Energy Practice Groups. Her practice incorporates a broad range of commercial real estate transactions, including acquisitions and sales, secured financing, office, retail and agricultural leasing and land use and development, as well as representation of banks and other financial institutions in loan workouts, debt restructurings and regulatory matters. She graduated with honors from Oklahoma City University School of Law and received her bachelor's degree in business administration from the University of Central Oklahoma. She serves on the board of the Oklahoma City Commercial Real Estate Council and is an active member of the Oklahoma City chapter of CREW Network, Inc.

Hutson serves as a member of the firm's Labor & Employment and Litigation & Trial Practice Groups where he advises clients on a wide range of employment matters. He represents employers in a number of state and federal administrative agencies, such as the U.S. Equal Employment Opportunity Commission and the Oklahoma Employment Security Commission. Another distinguished Oklahoma City University School of Law graduate, Hutson received his bachelor's degree in agribusiness from Oklahoma State University. He is a member of the Leadership Oklahoma City LOYAL Class XIII and received recognition as an Oklahoma Rising Star by Super Lawyers magazine.*

As a member of the Labor & Employment Practice Group, Snyder has focused her practice on business immigration compliance, human resource policy and practice and representing clients in court regarding litigation under the Fair Labor Standards Act, Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, the National Labor Relations Act, as well as other state and federal employment-related laws. She received her Juris Doctor from Harvard Law School cum laude and holds a bachelor's degree in Spanish, with high honors, from Portland State University in Portland, Oregon.

An attorney in the firm's recently opened Dallas office, Staine is a member of the firm's Bankruptcy & Creditor's Rights, Energy, Environment & Natural Resources and Litigation & Trial Practice Groups. He is also active in the firm's diversity and recruiting committees. He earned his Juris Doctor from the University of Oklahoma College of Law where he was awarded the Joel Jankowsky Award, honoring the overall outstanding student in the 2010 graduating class, and also completed his undergraduate studies from OU. He was selected to join The National Black Lawyers – Top 100 Lawyers and has received recognition by Best Lawyers and Super Lawyers magazine as an Oklahoma Rising Star.*

Crowe & Dunlevy attorney completes new entertainment law guidebooks

Crowe & Dunlevy attorney and Entertainment Practice Group Chair **Jay Shanker** is co-author and editor of two new volumes on entertainment industry dealmaking and intellectual property law issues for transactions and business. "The Essential Guide to Entertainment Law: Dealmaking" and "The Essential Guide to Entertainment Law: Intellectual Property," scheduled for publication by Juris Publishers in May, will serve as comprehensive guides for both experienced lawyers and those seeking to develop practices in the fields of film, television, music, theater, book publishing, digital games, industry taxation and talent representation, along with nonlawyers on the business, finance and creative sides of the entertainment industry.

The "Dealmaking" volume was edited by Shanker and former American Bar Association Sports and Entertainment Law Section Chair Kirk Schroder, with substantial contributions from 15 additional attorney collaborators from across the nation.

"'The Essential Guide to Entertainment Law: Dealmaking' provides a foundation for understanding the essential elements of contracting for rights, financing and services in key sectors of the contemporary global entertainment industry," Shanker said. "Additionally, 'The Essential Guide to Entertainment Law: Intellectual Property,' which I've authored with Paul Supnik and Jonathan Reichman, offers a broad overview of intellectual property law issues, including copyright, trademark, rights of privacy and publicity and unfair competition law applicable to every aspect of entertainment industry dealmaking."

Additional information regarding the project, including the 85 illustrative contractual forms that accompany the "Dealmaking" volume, and how to order either or both volumes (with a prepublication discount of 10 percent from the list price), can be found at www.eg2el.com.

A director in Crowe & Dunlevy's Oklahoma City office and member of the firm's Entertainment and Intellectual Property Practice Groups, Shanker is a veteran entertainment industry attorney whose practice encompasses all aspects of entertainment and new media law. His legal experience extends to the development, production and distribution of television and motion picture programming, recorded music projects, live stage and events, book publishing, interactive media and fine arts representation.

Shanker is also co-author of "Entertainment Law & Business," contributing co-author of "Entertainment and Media Law Client Strategies," contributing editor for "Entertainment Industry Contracts" and co-editor of "Law and the Television of the '80s."

He has been recognized in *The Best Lawyers in America* publication for entertainment law – motion pictures and television and entertainment law – music since 2013, and one of only 440 lawyers worldwide to be selected for inclusion in the *Who's Who Legal – Sports and Entertainment 2015* publication.* He received his Juris Doctor from New York University School of Law and bachelor's degree from Yale University.

Oklahoma City Chapter of the Association of Legal Administrators Announces 2018-2019 Board of Directors

The Oklahoma City Chapter of the of Association of Legal Administrators (ALA OKC) proudly announces the election of its 2018-2019 Board of Directors: Trent Corken, President, Hall Estill Hardwick Gable Golden & Nelson; Cathy Collins, President-Elect, Andrews Davis; Suzy Klepac, Secretary, Kirk & Chaney; Danita Jones, Treasurer, Chubbuck Duncan & Robey; and, Rebecca Adams, Immediate Past President, Durbin Larimore & Bialick.

Crowe & Dunlevy attorney named to American Academy of Appellate Lawyers

Crowe & Dunlevy attorney **Harvey D. Ellis Jr.** was recently selected for membership in the prestigious American Academy of Appellate Lawyers (AAAL). The academy recognizes attorneys who meet their commitment to advancing the administration of justice and promoting the highest standards of professionalism and advocacy in appellate courts. Ellis was inducted in a ceremony April 13 in New Orleans.

A graduate of the University of Oklahoma College of Law, Ellis serves seven of Crowe & Dunlevy's focus areas, including the Administrative & Regulatory, Antitrust, Appellate, Energy, Environment & Natural Resources, Initiative Petitions, Litigation & Trial and Product Liability Practice Groups. He has participated as counsel in cases resulting in more than 40 published state appellate opinions and more than 25 published federal appellate opinions. In addition to his civil litigation practice, he has co-authored two major Oklahoma procedural treatises as well as many other legal articles. He also heads the firm's Ethics Committee.

Ellis has been selected for inclusion in Best Lawyers, Super Lawyers in the Appellate practice area and was ranked in Chambers USA Band 3 in 2017.* He is a member of the American Bar Association, the Oklahoma Bar Association and the Local Rules Committee for the United States District Court for the Western District of Oklahoma. In the past, he was appointed as a member of the Oklahoma Supreme Court Committee and has served on the Oklahoma Bar Association Civil Procedure Committee.

The AAAL is a national association founded in 1990 whose stated purpose is to advance the administration of justice and promote the highest standards of professionalism and advocacy in appellate courts. Membership is by invitation only.

Riggs, Abney, Neal, Turpen, Orbison & Lewis announce new associate

Riggs, Abney, Neal, Turpen, Orbison & Lewis is proud to announce that **A. Grant Schwabe**

has joined the firm's litigation practice group in its Tulsa office. Grant brings over a decade of legal experience representing fortune 500 companies involved in all types of litigation to his clients. Grant's practice focuses on commercial litigation, banking and financial services litigation, real estate litigation, oil and gas disputes, labor and employment actions and various other complexities. Riggs Abney welcomes Grant to the firm.

James A. Jennings, III And J. Derrick Teague Admitted To American College Of Trial Lawyers

James A. Jennings, III and **J. Derrick Teague** of the Oklahoma City law firm Jennings Teague, P.C. have become Fellows of the American College of Trial Lawyers, one of the premier legal associations in North America.

The induction ceremony at which Jennings and Teague became Fellows took place before an audience of 700 persons during the recent Induction Ceremony at the 2018 Spring Meeting of the College in Phoenix, Arizona. The meeting had a total attendance of 850.

Founded in 1950, the College is composed of the best of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only and only after careful investigation, to those experienced trial lawyers of diverse backgrounds, who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Lawyers must have a minimum of fifteen years trial experience before they can be considered for Fellowship.

Membership in the College cannot exceed one percent of the total lawyer population of any state or province. There are currently approximately 5,800 members in the United States and Canada, including active Fellows, Emeritus Fellows, Judicial Fellows (those who ascended to the bench after their induction) and Honorary Fellows. The College maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings. The College is thus able to speak with a balanced voice on important issues affecting the legal profession and the administration of justice.

Jennings is a partner at the law firm of Jennings Teague and has been practicing law in Oklahoma for 44 years. Teague is also a partner at Jennings Teague. He has been practicing law in Oklahoma for 24 years.

Two Ogletree Deakins Attorneys Ranked in Chambers USA

Ogletree Deakins is pleased to announce that two attorneys from the firm's Oklahoma City office have been included in the 2018 edition of *Chambers USA,* an annual ranking of the top U.S.-based law firms and lawyers in an extensive range of practice areas. Those from the Oklahoma City office include: **Sam Fulkerson** and **Vic Albert**. In total, the firm's offices in 26 states and the District of Columbia, as well as 86 of the firm's attorneys, have been included in the 2018 edition.

Chambers USA is widely used by firms and businesses for referral purposes, and many utilize the rankings and profiles of firms to find appropriate legal counsel. The guide reflects a law firm's high level of performance in key areas including technical legal ability, professional conduct, client service, commercial astuteness, diligence, commitment, and other various qualities stated as most valued by the client.

Mike Turpen named to University of Tulsa College of Law Hall of Fame

Michael C. Turpen, partner at Riggs Abney and former Oklahoma Attorney General, has been inducted into the prestigious TU College of Law Hall of Fame.

This honor is bestowed annually to a small number of alumni and friends for their distinguished contributions to the legal profession and tireless support of the College of Law. The Hall of Fame is presented each spring at the TU Law Alumni Gala which will be on Saturday, May 12.

Turpen is a TU graduate, earning a Bachelor of Science in History and a Juris Doctor degree. He served as Muskogee County District Attorney from 1977 to 1982, before being elected Attorney General for the state of Oklahoma in 1982. Since 1987, Mike has been a partner in the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis in Oklahoma City, Oklahoma.

Also being honored at the event is 1982 University of Tulsa College of Law graduate, Williams Stuart Price. The University of Tulsa is also home to the Price and Turpen Courtroom.

For more information on the TU College of Law Hall of Fame event, visit https://law.utulsa.edu/gala or contact Elizabeth Burden at (918) 631-2462.

LAW DAY from PAGE 1

she accomplished during her legal career as well as her role in establishing the mental health court in Oklahoma County. Featured speaker Joe Harroz, Dean of the University of Oklahoma College of Law, spoke on the importance of Separation of Powers. He encouraged the room of attorneys and judges to rededicate themselves to protecting the U.S. Constitution and the state constitution.

Once again, Oklahoma County attorneys did a wonderful job of volunteering at the Ask A Lawyer Program on May 3. Each of the six shifts were covered by twenty or more attorneys. This great community service effort provided legal advice to many who might otherwise have had nowhere to turn. Generous hospitality was provided by the Oklahoma County Bar Auxiliary, keeping the volunteers happy and well-fed.

The Oklahoma County Law Library, in partnership with the Metropolitan Library System, held "Lawyers in the Library" on Tuesday, May 8 from 5:30 – 7 p.m. This one-on-one legal advice was provided by attorney volunteers in the Friends Event Room at the downtown library.

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the next afternoon. The superintendent admitted when testifying concerning this last transaction that he threatened the defendant with the penitentiary if he did not sign the confession, but that he did not threaten him with physical violence at that time.

The defendant was arrested in the evening of the following day after his return from Oklahoma City. The county health doctor testified that he was called to the jail to examine the defendant shortly after he was incarcerated and found the defendant suffering from a contusion, or bruise on the side of his head and complaining of severe headaches. That he prescribed hot applications for the injury.

After hearing the evidence concerning, the two alleged confessions, the trial court admitted them evidence, but instructed the jury that if they should find from the evidence that the statements were involuntarily made that they should disregard them.

Where the competency of a confession is challenged on the ground that, if made, it was not voluntary, its admissibility is primarily a question for the court. In the absence of the jury, the court should hear the evidence offered respecting the facts and circumstances attending such alleged confession, and the burden is on the defendant to show that it was procured by such means or under such circumstances as to render it inadmissible, unless the evidence on the part of the state tends to show that fact. If it is held competent, and proof of the same admissible, the defendant is entitled to have the evidence in regard to the facts and circumstances under which it was made to the jury, not that the jury given anew may pass upon its competency or admissibility, but for the purpose of enabling them to judge what weight and value should be given to it as evidence, and the jury may disregard it if they are not satisfied that it was voluntarily made. . . .

If there had been a dispute in the testimony of the defendant and the other parties who heard the alleged confession as to the occurrences just preceding the giving of the statement, there would have been some ground for the action of the court in admitting the confession in evidence and then allowing all of the facts and circumstances surrounding such alleged confession to go to the jury for such weight as evidence as they might see fit to give it. However, here all the witnesses admit that the defendant was taken to a locked room in the basement of the school building by his superior and was there struck until he allegedly confessed his guilt.

* * *

Involuntary confessions are rejected for two reasons. The first is that to secure a confession from a defendant either through threats or promises violates the constitutional provision protecting a person against being forced to give evidence which will tend to incriminate him (Constitution, article 2, sec. 21) ; secondly, because they are testimonially unreliable and untrustworthy.

* * *

It is our conclusion that both of these alleged confessions were involuntarily made and should not have been received in evidence. The proof is not so strong as to the involuntary character of the second confession, but it was made within two hours after the first confession was made and while the defendant admittedly was still bleeding from the wound in his ear. It is apparent from the testimony of the superintendent that when the defendant was holding the written statement in his hand and before he signed and delivered it to the superintendent, in response to the inquiry of the defendant, "How do I know you are not going to use this to try to send me to the penitentiary?", the superintendent replied "You can tear it up if you want to, but if you do, we will send you to the penitentiary." It is apparent also that the superintendent promised that the statement would be used for no other purpose than to get his license to teach revoked, and that as quickly as it was signed he would be released. These circumstances, coupled with the closeness in time to the first alleged confession which was undisputedly obtained by force, and further considered with the fact that the representative of the state, upon whom rests the burden of presenting the views of the prosecution, has stated in open court to us that in his opinion the confession was inadmissible, are sufficient to require us to, sustain this contention of defendant.

April 30, 1968
Fifty Years Ago

[Excerpted from *Sadberry v. Wilson*, 1968 OK 61, 441 P.2d 381.]

Involved herein is an appeal from a judgment entered upon a jury verdict of guilty in a civil action under 10 O.S.Supp. 1965 § 71 , for bastardy.

Complainant, a 21 years old orphan reared by foster parents, was a university student in Fayetteville, Arkansas, maintaining herself by employment as a nurse's aide in a local hospital at the time of conception. Defendant, a 39 year old married man, initiated the meretricious relationship upon meeting plaintiff, while his wife was a patient in the hospital. Upon very short acquaintance the parties inaugurated a regular, intimate relationship which culminated in complainant's pregnancy. Defendant was advised of complainant's pregnancy and subsequent birth of the child on March 12, 1963, in Springdale, Arkansas.

Following the child's birth complainant was working in Tulsa to support herself and child. Defendant got in touch with her and the interrupted intimacy was resumed. Defendant came regularly from Fayetteville to Tulsa on weekends, paid small sums for monthly support and made purchases for the child. Defendant received a divorce in April, 1963, and married complainant in Huntsville, Arkansas, on May 29, 1964. Defendant's employer transferred him to Mt. Pleasant, Texas, where the parties established a home and maintained their child. On July 28, 1964, the parties filed a petition for adoption in the County Court of Titus County, Texas. Therein they alleged marriage, birth of a child before marriage of which parties were natural parents, which child had been maintained in the parents' home since marriage.

The parties separated in September 1964, and as a result the adoption was not completed. Complainant and her child eventually established residence in Muskogee County, where a divorce action was filed December 11, 1964, and a decree of divorce granted January 26, 1965. The petition alleged, and the trial court found, no children had been born of this union.

Complaint was made and information filed in the County Court August 10, 1966, charging defendant with bastardy. After preliminary motions and pleas to the jurisdiction had been overruled, the case was tried to a jury on May 10, 1967, and a verdict of "guilty" returned against defendant. After hearing evidence concerning the minor's needs, the court ordered defendant to pay $100.00 monthly from date of birth [March 12, 1963] to May 10, 1967, and $150.00 monthly thereafter until majority, death or emancipation. Additionally defendant was required to pay $187.00 doctor bills for prenatal care and confinement, but was credited with $380.00 prior child support payments.

Defendant's attack upon the propriety of such judgment is made under four propositions. The conclusion reached in disposition of the case obviates need for separate consideration of questions urged and argument tendered in support of these contentions.

The cause was tried upon the information issued upon complaint made and signed by complainant. Upon trial complainant's evidence unequivocally established circumstances of conception and subsequent birth of the child as alleged. By his own testimony defendant attempted to deny paternity, by discrediting complainant, and by inference establish the possible paternity of some other, unnamed person.

However, the undisputed evidence showed defendant acknowledged paternity, furnished support money, married complainant, took the child into the home established by the parties, and filed an adoption proceeding wherein he made written acknowledgment this was his natural child. Thus, it appears upon the face of the record that defendant had performed every act required under our statutes to legitimate this child and acknowledge his paternity.

A child born before wedlock is legitimated by subsequent marriage of the parties. . . . A child born out of wedlock may be legitimized by (1) establishment of illegitimacy, (2) paternity, (3) public acknowledgment of the child during minority, (4) if married, reception into the husband's family with wife's consent given with knowledge of illegitimacy, (5) and treatment of the child as legitimate. . .

Much of our decisional law relating to legitimation of children born out of wedlock has involved problems concerning inheritance from, or by, illegitimate children. See 84 O.S. 1961 § 215 . In considering such matters we have stated that legitimacy is a status or social condition, as to which the capacity to inherit is only a single incident. The law favors legitimation of children born out of wedlock. In construing the statute, section 55, supra, we have pointed out requirements which make it possible to legitimize a child by performance of the conditions and requirements above enumerated. And, when a child has been legitimated by discharge of statutory requirements the child is legitimate for all purposes. . . .

The infant's status as the legitimate child of complaint and defendant was fixed by the parent's marriage subsequent to birth. The child is legitimate. The judgment of the trial court, based upon the jury verdict, clearly was erroneous as a matter of law.

May 11, 1993
Twenty-Five Years Ago

[Excerpted from *Jones v. Oklahoma Merit Protection Com'n*, 1993 OK CIV APP 96, 860 P.2d 804.]

Eugene Jones, Jr. (Jones) had been employed by the Oklahoma Department of Human Services (DHS) since 1977 in a custodial position. In October, 1987, he was terminated from his employment for failing to report for work for more than three working days (October 20, 21, 22, 25, and 26, 1987) without prior authorization. He was deemed to have abandoned and resigned his position. On October 27, 1987, he attempted to report for work but was informed of his termination. DHS sent him a letter dated October 23, 1987, confirming his termination. The letter stated that DHS relied on Rule 5.6.4.2 of the Oklahoma Merit Rules for Employment (Rules) which provides:

> 5.6.4.2 ABANDONMENT OF POSITION
>
> A permanent employee who is absent from duty for 3 working days without prior authorization shall be deemed to have abandoned and resigned his or her position effective at the beginning of the first day of unauthorized absence. The separation of the employee will be reported as a resignation by abandonment of position. If may not be appealed unless an employee shows good cause to the Merit Protection Commission within 15 calendar days after failure to report to work, that such action was in fact a discharge under Rule 5.6.2.1. The Executive Director of the Merit Protection Commission may extend this 15 calendar day limit if an employee demonstrates that he or she was unaware of unauthorized failure to report for duty as scheduled.

The letter did not contain a notice to Jones regarding appeal rights because he "resigned" and was not discharged. He was not afforded a hearing prior to his termination.

In December, 1987, Jones filed

an appeal with the Oklahoma Merit Protection Commission. In that appeal. he alleged he had complied with DHS policy for reporting absence and illness, and had not intended to abandon his position. He stated it was his understanding of DHS policy that when an employee had been absent for three days, that employee was to bring a doctor's statement in order to return to work. He also stated he had called his employer on the first day of his illness, and he tried to obtain a doctor's statement on a Friday after three days absence, but his doctor was out of town. He did obtain a doctor's statement the following Monday and attempted to return to work on Tuesday. When he attempted to return to work, his supervisor refused to accept the doctor's statement and told him that he had been terminated.

In March, 1988, the Commission notified Jones that his appeal would not be heard because he had failed to file his appeal within 15 days of his termination, pursuant to Rule 5.6.4.2 and 74 O.S. 1991 § 841.13 , which sets out a fifteen day jurisdictional time limit. DHS relied on the date of the termination letter, and the fact that Jones had applied for unemployment benefits in November to show that he was aware of his discharge more than fifteen days before he filed his appeal with the Commission. Jones then filed his petition to reconsider the dismissal of his appeal. After a hearing, the petition to reconsider was denied. He appealed to the District Court.

In April, 1990, the Court ordered the matter remanded to the Commission for further findings of fact. In June, 1990, the Commission entered an order which included those findings. The Commission concluded that Jones knew of his employment termination for abandonment of his position more than fifteen days prior to his appeal and that reliance upon Rule 5.6.4.2 was proper in dismissing the appeal.

In October, 1991, the trial court reviewed the Commission's decision and held that Rule 5.6.4.2 is invalid. The Court relied on 75 O.S. 1991 § 306 which states in pertinent part:

> A. The validity or applicability of a rule may be determined in an action for declaratory Judgment in the district court of the county of the residence of the person seeking relief or, at the option of such person, in the county wherein the rule is sought to be applied, if it is alleged the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.
>
> * * *
>
> D. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

The Court held that the Commission had "mechanically defined actions that may in fact, be a discharge from employment as a resignation." The Court further held that to do so and preclude the employee from an appeal did not accord the employee his or her due process rights enumerated under the Oklahoma Personnel Act, 74 O.S. 1991 § 840.1 et seq.

DHS appeals, contending the Court committed reversible error in ruling that Rule 5.6.4.2 is an invalid administrative rule because it ruled on an issue broader than that raised on appeal and it was an issue not properly before the court. DHS cites Ricks Exploration v. Oklahoma Water Resources Board, 695 P.2d 498 (Okl. 1984) as authority. 1 DHS contends that Ricks does not allow the Court to enter a declaratory ruling on the invalidity of Rule 5.6.4.2: (1) because Jones did not request such a ruling and, (2) because Jones did not raise the validity of Rule 5.6.4.2 before the DHS.

However, a review of the record shows that Jones did request the Court to enter an order finding the application of the rule regarding "15 day abandonment rule" to be unconstitutional as violative of Jones due process rights. Specifically, Jones stated that he was entitled to a pre-termination hearing as a public employee as a matter of law. Jones also made these same contentions in his first appeal to the District Court. While Jones has not specifically named Rule 5.6.4.2, he has by his pleading put the parties on notice of his challenge to the validity of the rule. The substance of the pleading will control over the strict form of the pleading. The pleading constitutes a short and plain statement of the claim as required by 12 O.S. 1991 § 2008 (A) of the Pleading Code and a request for declaratory relief as required by 12 O.S. 1991 § 1651 .

* * *

Rule 5.6.4.2 places an employee that has been terminated for abandonment in a category that is separate from all other employees covered by the Oklahoma Merit Rules for Employment. It precludes an employee deemed to have abandoned his position from a pre-termination hearing and does not require that the employee be given notice of any appeal rights. Under the Rules, each employee (other than those "deemed" to have abandoned or resigned their position), is entitled to: (1) a written statement of the specific acts that caused the discharge; (2) an explanation of the agency's evidence; and, (3) an opportunity to present reasons why the proposed discharge is improper and should not take place. See Rule 5.4.4, Oklahoma Merit Rules of Employment; and, Wolfenbarger v. Hennessee, 520 P.2d 809 (Okla. 1974). Those employees may not be discharged until they have had notice and the opportunity to respond. See Rule 5.6.2.1. An employee arbitrarily considered to have "resigned" under Rule 5.6.42 is denied his or her right to notice and an opportunity to be heard. This is an impermissible denial of that employee's right to equal protection of law and due process. The trial court's judgment that Rule 5.4.6.2 is invalid and remanding the case to the Commission with directions to conduct a proceeding in accordance with its rules relating to discharge, is affirmed.