2016 – 2017 ELECTION RESULTS ANNOUNCED

The OCBA Nominations & Election Committee, chaired by President-Elect Barbara Swinton, announces the results of this year’s election:

David Cheek  
President-Elect

Sheila Stinson  
Vice President

Bradley Davenport  
Law Library Trustee

2019 Directors

Luke Abel  
David Dobson  
Bob Jackson  
Justin Meek  
Kristie Scivally  
Judge Roger Stuart  
Richard Rose

Richard Rose will serve a two-year term as 2018 Director to replace a vacancy.

Young Lawyers Division Announces Officers for 2016-17

The Young Lawyers Division of the OCBA has elected officers for the upcoming year. This busy group is beginning the Harvest Food Drive to raise funds for the Regional Food Bank of Oklahoma. They have just finished building a Reading Room at Adams Elementary School. In October they have committed to assisting in sorting coats with the Coats For Kids Program at the Foundation for Oklahoma City Public Schools.

Officers are:

Meredith Herald  
Chair

Cody Cooper  
Chair-Elect

Ben Grubb  
Vice Chair

Curtis Thomas  
Past Chair

Amber Martin  
Secretary

Bob Jackson  
Treasurer

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From the President

By Angela Ailles Bahm

This is my last Briefcase article and I have to admit, I am simultaneously elated and sad. I think back on the call from Judge Bryan Dixon asking if I would consider working my way into this position. Frankly, I was so honored by the offer, I accepted the opportunity without really knowing what was in store.

I have thoroughly enjoyed getting to know more lawyers and gaining a broader understanding of all the wonderful ways you touch our communities. And, I have also been maddened, saddened, and frustrated. Through this experience, I have found in myself a passion and a voice which I was not aware of before, and for that I am eternally grateful.

I urge you to find your voice.

I hope I have given you some tools to use to monitor our Legislature. Use them to express your voice. Frankly, it seems there is little accountability attendant with being a legislator. Generally, it seems folks just do not think they really have a voice. But, I cannot tell you how many times I have been told that if a legislator gets 5 calls on an issue, it’s a big deal – it gets their attention. The People (that means you) need to pay attention to what they are doing and voice their opinion. As I have said before, I am a staunch believer in the democratic process. The voices we are hearing now are loud and clear, and polar opposites. Don’t be part of the “silent majority.” Sound off – let “them” hear your voice!

I am looking forward to our State elections in November. Remember that the runoff elections are on August 23. I would add that our very own OCBA member, Collin Walke, found his voice - he won his primary election and is up for House District 87 (Go Collin!). Another vocal attorney and House District 82 Representative, Kevin Calvey (who has been prevalent in a number of president’s columns over the last couple of years), is also in a contested race to retain his seat. Let’s get out the vote!

And, if you are looking for a place or a way to find your voice (perhaps somewhere other than in politics), join an OCBA committee. There are so many opportunities to learn, teach, share, network …the verbs go on and on include “talk.”

I want to extend my sincerest thanks to the OCBA staff, Debbie Gorden, Pam Bennett, and Connie Resar. It is no small task keeping everything and everybody moving in the right direction. (What is the joke? Managing lawyers is like herding cats.) The OCBA staff do it with supreme organization and professionalism. They are simply a dynamite trio and we are lucky to have them.

Thank you to the Board of Directors, chairs of committees and committee members! Without you and your willingness to volunteer your time, energy and your voice, there would be no Oklahoma County Bar Association. Again, my deepest appreciation for this opportunity. My phone number is still available if you have any suggestions for the betterment of the OCBA, 405-475-9707. I’d love to hear your voice.
Tribute to Judge Donald Deason

Very Respectfully Submitted By Shanda McKenney

The song I most associate with Judge Deason is, “I Fought The Law” (you know you just sang that in your head). This is why:

The ink was barely dry on my Legal Intern License when I trotted down the breezeway between the 5th floors connecting the County Building and Courthouse toward my first, flying solo, preliminary hearing before Judge Deason. He had been on the bench less than a year and criminal defense attorneys were still fairly suspect of his DA training, honed by the legendary Bob Macy, who was still the sitting DA at the time.

I don’t remember the exact charges my client faced, but there was more than one charge of “distribution of a controlled dangerous substance,” which was sold, each separate time, to an undercover cop. I had little that my client had, in fact, sold drugs to an undercover cop, but I could not understand why in the world they let him do it 3-4 times before arresting him, other than to stack unnecessary charges so as to keep in prison that much longer. So, my argument in demurrer to the State’s (substantial) evidence, was that the officers had a duty to arrest my client following the first sale of drugs and had, in fact, abrogated that duty and endangered the public by permitting the additional sale of drugs to occur under their noses and, ostensibly, at their encouragement.

Judge Deason, to his credit, did not laugh me out of his courtroom at that moment. Instead, he got that twinkle in his eye, and that patented smirk on his face, and proceeded to use the Socratic Method to force me to support my argument with “legal authority.” Unfortunately for my client, in the moment, the best I could do was a sort of “equitable estoppel,” common law theory that ultimately did not hold enough water to get the demurrer granted. However, that repartee commanded enough of Judge Deason’s attention to cause him to recall it more than 5 years later at an Inn of Court Welcome Picnic at the Harn Homestead.

I have never heard a cross word about Judge Deason: not from clients, defense attorneys, prosecutors, or staff. This is rare in our business, but Judge Deason was rare. We need to carry on Judge Deason’s legacy and embrace within ourselves his remarkable qualities: Love more, fight less; Look for the good in another rather than the bad; do everything with grace, humor and intelligent commentary and had a very understated way of letting you know that he was going to have the final say in the matter - the buck stopped with him.

Oklahoma County has suffered a great loss to both its Justice System and its general population. Judge Deason was smart, and quite fair, and a good judge. But most of all, he was a good human being who truly cared about people, in addition to enforcing and applying the law. He fully understood that making hard decisions was going to leave some people unhappy, but he possessed a unique temperament which convinced most litigants that they had each won something, even if it was only the respect, sympathy and understanding of the Court.

I was unable to attend Judge Deason’s funeral services, but I did make it to the visitation, to pay my respects. It was there that I bumped into Judge Bass, another of my favorite judges from my days at the Public Defender’s office, who had covered some of Judge Deason’s docket just prior to his passing. Judge Bass gave me a hug and said, simply, “It’s sad, isn’t it?” And I said, “Yes. Yes, it is.” And it is.

Judge Deason kept the following prayer under the glass on his desk in his chambers and regularly consulted it before taking the bench:

“May God bless you with comfort at easy answers, half-truths, and superficial relationships, so that you may live deep within your heart.

May God bless you with anger at injustice, oppression, and exploitation of people, so that you may work for justice, freedom, and peace.

May God bless you with tears to shed for those who suffer from pain, rejection, starvation, and war, so that you may reach out your hand to comfort them and to turn their pain into joy.

May God bless you with enough foolishness to believe that you can make a difference in this world, so that you can do what others claim cannot be done.”

HONORING THE HONORABLE JUDGE DONALD L. DEASON

By Joi McClendon

Not many times in life does one have the blessing to cross paths with a truly amazing person. I think that every member of the Oklahoma County Bar Association and a great number of other people were a part of such a blessing. Judge Don Deason was the best of the best. It is with a heavy heart that I am writing this, but such a man as Judge Deason needs to be celebrated and remembered.

My first encounter with Judge Deason was as a baby lawyer litigating a family law case in front of him. It was a strange, volatile case with all the crazy fixings a divorce/custody case could have. I was fortunate enough to have a wonderful lawyer as opposing counsel and both she and Judge Deason guided me through the process with both advice and a great deal of patience. Judge Deason loved to bring that case up in conversation over the years. I knew then as a young lawyer that Judge Deason not only cared about the law, but also cared about the people: litigants and lawyers. He never failed to temper justice with mercy.

My last memorable encounter with Judge Deason was this spring. I had been talking to the Judge in the elevator. As we exited on the eighth floor, I collapsed. Judge Deason, even in an hand brace, saved me from hitting my head on the ground. I was unconscious for a couple of minutes, but when I opened my eyes, Judge Deason was right next to me. Clearly I was disoriented and scared (not to mention embarrassed), but seeing him and hearing his steady voice calmed me. Judge Deason called my office to let them know what happened as well as called the other judges I was to appear before. As we exited on the eighth floor, I collapsed.

“We shouldn’t have to wait until one of us passes from this life to come together. We should do this daily.”
—Judge Donald L. Deason

Deason called my office to let them know what happened as well as called the other judges I was to appear before. After that, Judge Deason never failed to ask how I was feeling. That was the kind of person he was.

I have never heard a cross word about Judge Deason: not from clients, defense attorneys, prosecutors, or staff. This is rare in our business, but Judge Deason was rare. We need to carry on Judge Deason’s legacy and embrace within ourselves his remarkable qualities: Love more, fight less; Look for the good in another rather than the bad; do everything with grace, honesty and integrity; respect the law and the people involved in the law; Smile every opportunity you get; Laugh often; be generous with your time and goodwill; speak kindly to others; never forget we are fortunate to be a part of such a great and wonderful family, our courthouse family. As Mr. Prater said at Judge Deason’s funeral and as Judge Deason stated previously, we shouldn’t have to wait until one of us passes from this life to come together. We should do this daily.

No matter our positions in our field, we are all united in our love for the law. We are united in our love and respect for Judge Don Deason as well as our grief for the loss of a great man, loving father and husband, a caring friend and the best judge to have graced our courthouse.

Take the opportunity today, tomorrow and always to carry on Judge Deason’s legacy. Keep Chris Deason in your prayers as well as Paul Deason, Kimberly and Karen. We have all suffered a great loss, but look at what we have each gained just in knowing Judge Don Deason.
August 8, 1916
One Hundred Years Ago

This is a suit by Tom Hall against the Chicago, Rock Island & Pacific Railway Company, upon three causes of action, the third of which only is involved in this appeal. That count of the petition setting up said third cause of action alleges the residence and employment of plaintiff as section foreman by the defendant railway company until August 7, 1912, at which time it is alleged, he was discharged. It is then alleged:

“That although duly requested by plaintiff of some person in the offices of the defendant at McAlester, Okla., whose name is to this plaintiff unknown, on or about the 10th day of August, 1912, the said defendant company has failed and refused, and still fails and refuses, to issue to this plaintiff, its employe discharged as aforesaid, any letter, setting forth the nature of the said plaintiff’s service to the said corporation, and the duration thereof, and truly stating the cause for which the said plaintiff was discharged from said employment, though in duty bound so to do, under the laws of the state of Oklahoma.”

Then follow general allegations of damages and prayer for judgment. In answer to said count, the defendant pleads: First, a general denial; second, that a service letter was issued and delivered to plaintiff on August 7, 1912, and setting out a copy thereof. Upon the trial, the plaintiff testified in regard to the request for a service letter, as follows:

“Q. Well, did you resign from the service, or were you dismissed from the service? A. I resigned. Q. You resigned from the service? A. I resigned on the 2d day of August. Q. You may state whether after you terminated your services with the railroad you requested a letter from the railroad company known as a ‘service letter.’ “Mr. Roberts: Object to that, if the court please, as not being definite enough to bring it within the allegations of the petition; the allegations are specific in the petition, and would like to have it restricted to the allegations.

“The Court: Objection overruled. “Mr. Roberts: To which ruling the defendant excepts.

“A. Yes, sir, I requested a service letter. Q. Did you get it? A. No, sir. Q. Did you ever get a service letter? A. I received one one year after the time I requested it.”

The plaintiff also testified, in substance, that after he had ceased to be in the employ of the plaintiff in error, he was unable to again get work at his occupation of section foreman, and was compelled to take up the work of coal mining. At the close of the trial, plaintiff in error requested an instruction in these words:

“(6) Requested by defendant. You are instructed that before a recovery can be had on the third cause of action as stated in plaintiff’s petition as amended, he must show a demand on the superintendent, or some managing officer, for said service letter, furnishing a sheet of paper without water mark, or waiving such right to furnish such paper, and a failure to furnish such service letter within a reasonable time thereafter, and pecuniary damages resulting to him from such failure—which, after refused, and, in lieu thereof, the court gave instruction No. 10, as follows:

“(10) If you find from a preponderance of the evidence in this case that, upon leaving the employment of the defendant company the plaintiff herein, Tom Hall, went to the office of defendant company in McAlester, Okla., and demanded of the superintendent of the railroad company known as a ‘service letter.’

The testimony of the plaintiff, and the brief of plaintiff in error is found in section 3769, Rev. Laws 1910, as follows:

“Whenever any employe of any public service corporation or of a contractor, who works for such corporation, doing business in this state, shall be discharged or voluntarily quits the service of such employe, it shall be the duty of the superintendent or manager, or such contractor, upon request made by such employe to issue to such employe a letter setting forth the nature of the service rendered by such employe to such corporation or contractor, and the duration thereof, and truly stating the cause for which such employe was discharged from or quit such service; and, if any such superintendent, manager or contractor shall fail or refuse to issue such letter to such employe, when so requested, or shall willfully or negligently refuse or fail to state the facts correctly, such superintendent, manager or contractor shall be deemed to have committed a misdemeanor and upon conviction thereof shall be punished by a fine of not less than one hundred dollars and not more than five hundred dollars, and by imprisonment in the county jail for a period of not less than one month and not exceeding one year. Provided, that such letter shall be written, in its entirety, upon a plain sheet of white paper to be selected by such employe. No printed blank shall be used, and if such letter be written upon a typewriter, it shall be signed with pen and black ink and immediately beneath such signature shall be affixed the official stamp, or seal, of said superintendent, manager or other officer of such corporation or contractor, in an upright position. There shall be no figures, words or letters used, upon such piece of paper, except such as are plainly essential, either in the date line, address, the body of the letter or the signature and seal or stamp thereon, and no such letter shall have any picture, imprint, character, design, device, impression or mark, either in the body thereof or upon the face or back thereof, and any person of whom such letter is required who fails to comply with the foregoing requirements shall be liable to the penalties above prescribed.”

The brief of plaintiff in error is directed mainly to the question of the constitutionality of section 3769, it being insisted that this section is in contravention of the Fourteenth Amendment to the federal Constitution, and also in contravention of section 22, art. 2, Constitution of this state. On principle, the argument against the constitutionality of this act does not appeal to us, but, as we view the record, a decision of this case will not require a determination of that question.

The testimony of the plaintiff, above quoted, is the only testimony in any manner touching upon a request for a service letter. The act requiring the issuance of such service letter, it will be observed, designates the particular officer by whom it shall be issued, and specifies that it shall be issued on request of the employee entitled thereto. The allegation of the petition as to the request is that a request was made upon some person in the office of the defendant, at McAlester, Okla., whose name is to the plaintiff unknown. The testimony of plaintiff below is that he demanded a service letter of the railroad company. There is no evidence as to the form of the request made nor the person upon whom it was made, nor the capacity, if any, in which such person was employed, and no evidence that such request had ever been brought to the knowledge of the superintendent or manager or person authorized by the statute to issue such service letter. Under the evidence here relied upon the request might have been made upon any subordinate employe, an office boy, or janitor, and the fact that such request had been made but has not been brought to the knowledge of the person authorized to issue a service letter. It is true that the court, in instruction No. 10, instructed the jury that they must find that the request

And The Court Said

An Olio of Court Thinking

August 2016
was made upon the superintendent, manager, or some one in such office, having authority to issue such letter for the superintendent or manager, but there is no evidence whatever upon which the jury could have made such finding.

This statute is highly penal in its character, and, in order to fix a liability, should be strictly complied with by the person seeking its benefits. The duty laid upon the superintendent, manager, or contractor is not to issue the search warrant, but to issue the service letter upon the request of the employe. Unless requested, the duty to issue such service letter does not arise, and, since before such duty is incumbent upon the superintendent, manager, or contractor a request must be made, then, obviously such request must be made upon the person or officer upon whom the duty devolves. The manner in which the request should be made not being specified by the statute, we believe the same might be made orally or in writing, served personally or by mail. As the petition alleges no request as contemplated by the law, and as the proof shows none such to have been made, such allegation and proof are insufficient to meet the requirements of the law.

June 10, 1941
Seventy-Five Years Ago
[Excerpted from Powell v. Durant Milling Co., 1941 OK 211, 136 P.2d 904.]

The defendant, Marvin Sparks, was charged in the common pleas court of Oklahoma county with the unlawful possession of intoxicating liquor; a jury was waived; defendant was tried, found guilty, and sentenced to serve 30 days in the county jail and to pay a fine of $50, and he has appealed to this court.

The defendant, since the filing of the appeal, has joined the armed forces of this nation, and by agreement this cause was submitted upon the record, oral arg. We will consider the only contention submitted upon the record, oral arg. and by agreement this cause was joined the armed forces of this nation, since the filing of the appeal, has

The defendant was charged with the possession of 1,700 pints of whisky. At the beginning of the trial, the defendant filed a motion to suppress the evidence secured under the search warrant for the reason said search warrant described a “one story frame house and out buildings, being the second house south of East Reno avenue on the east side of State Street,” but that the officer executing the search warrant had searched “the third house south of East Reno avenue,” and that the defendant lived in the third house south of East Reno avenue, and that since the search warrant did not properly describe the premises where the defendant was living, that the evidence obtained under said search warrant should be suppressed.

At the close of the hearing on the motion to suppress the evidence, the court sustained the motion as to the whisky which was procured in the house where the defendant lived for the reason that the search warrant did not describe that house.

The trial proceeded upon the evidence pertaining to the whisky obtained by the officers in a vacant house, adjacent to the lot upon which the defendant’s house was situated, and in which vacant house the officers found approximately 1,700 pints of whisky. In the trial of the case, the testimony of the officers with reference to the procuring of this whisky in the vacant house was not objected to and in no way was the legality of the search challenged.

On the motion to suppress the evidence the defendant swore that he had purchased two carloads of whisky of assorted brands and had placed them in the vacant house, next door to his home. He swore that he did not rent this house and did not have possession of it, but that the whisky was his, and that he had bought it for the purpose of selling it to anyone who wanted to buy it.

The officers testified that after searching the defendant’s house and finding some whisky, they went out on the back porch and noticed a trail leading to the vacant house, and that they walked over to the vacant house; the door was open and they saw several hundred pints of whisky in case lots on the floor. The defendant, when questioned by the officers concerning the house next door before they proceeded over there, told the officers that the house was unoccupied, and that no one lived there. After finding the whisky, the officers again questioned the defendant, and he admitted that the whisky belonged to him.

The defendant offered no evidence.

The house in which the whisky, upon which the conviction was sustained, was found, was not a part of the defendant’s residence, and, according to his own testimony, did not belong to him, was not rented by him, and was not in his possession at the time the whisky was found; and under the uniform holdings of this court, he was not in a position to complain of the admission of this evidence.

* * *

Under the record, the evidence was properly admitted, and we find no errors committed by the court in the trial of this case.

The punishment received by the defendant was very light, considering the exceedingly large number of bottles of whisky found by the officers. Defendant is fortunate that he did not receive the maximum penalty instead of the minimum penalty provided by

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The Old News has been published fairly consistently in the OCBA Briefcase for about ten years now, an homage to former Oklahoma City Associate Municipal Judge and OCBA leader, Edward B. Dycus. When he passed away his widow found his collection of old OCBA news letters. From that collection we have republished excerpts.

Our earliest article was from December, 1969. Last month’s article was our most recent, from December, 1973. The Editorial Staff in December, 1973 consisted of Ken Webster, Ed Dycus, Ralph Sewell, Eric Groves, George Davis, Kurt Ockershauser, Jon Masters, and Ed Kelsay (photographer).

Way back in December, 1973 – when our current supply of old news letters end- I learned that I was going to be allowed to stay in law school another term (we were on the quarterly system then at OCU Law School). I wasn’t involved with the county bar yet. In fact, I still didn’t know a real live lawyer. The dream of being a lawyer was still an eternity of law school classes plus a bar exam away. I didn’t know there was a county bar, and I didn’t know what members of such an organization might do.

However, when, by some stroke of luck, I did become a lawyer, I remember reading the names of the lawyers and judges who were movers and shakers in the local bar. I recall how they appeared as giants in the profession. I never believed that I could aspire to be as professional as those men and women who led the OCBA. They were the real lawyers, with real clients, practicing real law, and making really important decisions about liberty and justice.

Then, in the flash of an eye, forty years went by. I can proudly say that as I read the OCBA news during those forty years about the OCBA and OBA leaders, my opinions did not change. They were indeed giants of the profession and they did make very real and very important decisions on an ongoing basis about liberty and justice. Our current OCBA and OBA leaders are made of the same strong, professional material, and truly do lead the way for us to appreciate our professional responsibilities and to value our place in the judicial system, and the place of the judicial system in our state and nation. I believe that lawyers who participate in professional, civic and religious groups and associations are truly leaders in our community, state and nation.

I see the new slate of directors and officers and know that the Oklahoma County Bar, our state, and our country are in good hands.

It is insufficient praise, but wherever those who led the way may be today, let me give you all a collective “thank you.”

Excerpts from OCBA News:
December, 1973, Part 5

Final Old News: Back To The Future!

By Judge Geary L. Walke

By Bill Gorden

The President’s Book of Secrets

David Priess, Public Affairs, 2016, Hardcover, 384 Pages, $22.25

Do not get too excited about the title to this interesting book. At the beginning, one hopes to discover secrets told the Presidents by the intelligence community: Was there “stove-pipe” intelligence during the George W. Bush era? What about Iran-Contra” Or Somalia? That is not what this book is about.

The book is about the President’s Daily Brief, or the PDB. It is the story of how the PDB came to be, how each President changed the process of how he would receive the top secret and other background information, and the work of intelligence purveyors, primarily CIA personnel, to produce that document, pretty much every day. The modern version starts with President Johnson, and many morphs later, continues today. Technology has changed a lot of the process, but the creation of the document and its ingestion are the key. Some Presidents, such as Bill Clinton, wanted a wider clearance for more people on his staff. Others were much tighter in who got to see the PDB.

Some Presidents wanted personal briefers to help explain, others just wanted to read the book, still others wanted the info sifted through the advisers they personally trusted. Each day, the PDB was hand delivered, and hand picked up, and returned to the CIA. The story here is the flow of information, how it is and was created and disseminated and still kept confidential.

There are sub-stories to be gleaned here, such as that conferences in the last eighteen months or so of the Reagan administration really centered on three White House and Cabinet aides, concentrating hard to keep as much as possible to keep what was in the book “off the President’s desk.” The looming diagnosis of Alzheimer’s is left unsaid, but it is in the book to see.

The current controversy in this election cycle over whether candidates should be briefed on intelligence after nomination but before election is not apt here. Traditionally, the intelligence briefing given candidates is not the PDB. The only exception was in 2000, when the election dragged through the courts for weeks. Since Mr. Gore was receiving the PDB as Vice President, after some pause Mr. Bush was allowed the same preparation. That event is not expected to arise again.

This is an interesting primer as to how the tasks of governance, particularly protecting the country, are handled, and also gives an understanding of how government, under both parties, evolves. Many purveyors of the intelligence material, many clients appear at different stages, once as an understudy or aide, later as a Cabinet minister or even a President. This in itself develops a real feel for the ongoing story of this Republic.

Upcoming Events & Seminars

AUGUST 18, 2016
Striking Out Hunger Bowling Tournament
6 p.m., Heritage Lanes

SEPTEMBER 16, 2016
Annual Dinner Dance
6:30 p.m., Skirvin Hotel Grand Ballroom

FEBRUARY 10-15, 2017
Annual Ski Trip Seminar
Santa Fe, New Mexico
Happy August, Judge Walke. It’s me your pal Rae, a/k/a Areyna Darqueness, the Queen of dark and mystic bootlyiciousness. I’d like to say Mr. P. was off doing his Shark Week fishin’ thing again this year, only I can’t cause that wouldn’t be true. He’s actually over in The City meeting with some Cheeses from the world of law enforcement about this Albanian thing. I just hope no one brought in Interpol on account of Mr. P. still holds a grudge against them on account of what happened way back in the ’90’s, which, as we all know, is why Mr. P. still goes ta wear sunglasses even inside. Anyway, I hope they get it worked out because this extra security stuff is getting’ to be a real drag. You know they even tried to hit his son Natty (who hates it when I call him that but probably loves me like most guys so he doesn’t say nothing. ‘Course I’m loyal as a duck to my personal cougar cub Chips, but Natty, I’m sure, is kinda waiting in the wings in the event of fortuitous tragedy. Such is the life of the modern Goth Glammer Gal (which is, of course, a most un-Gothic turn of phrase.

Anyway, the first missal in the old mail bag – now you wanna talk coincidences, is from a guy with the same initials as you. So, Mr. G.W., referring to last month’s issue about finance companies) (Oh, I forgot to close the parentheses in the paragraph above so there). Anyway, as I was saying, O! G.W. asks: What about a suit (class action?) for nuisance? Well, first thing I’ll say, G., is that I agree with you that filing a lawsuit is way classier than, say, duking it out at the dealership. That said, let’s look at the effeminacy of your remedy.

A nuisance, as a matter of statutory construction, is unlawfully doing an act, or omitting to perform a duty and annoys the comfort, safety, or health of another. So far so good. But let’s look at it from the respective of the other guy. Does the dealership or lender have a duty to pick up the car? This is not a far gone conclusion since, as Mr. P. pointed out last month no law specifically requires it. Another potential floor in the opinion would be a counterclaim. Aha, you say. The debt has been discharged in bankruptcy so there won’t be any counterclaim. Fair point, so minus well. The beauty of this coarser action is that debatement of the nuisance is a matter within a perve’s view of equity, which I guess means the trail judge can do about anything that the gets the parties off his docket. So, G.W., that’s a good idea on your part, but let’s hope it doesn’t result in hundreds of plaintiffs besieging Judge Walke for equitable relief.

Dear Roscoe: Am I reading Ocasio right? Can a bunch of guys get together and agree to circulate money and favors between themselves and still be guilty of extortion? M.O., OKC, OK

Dear M.O.: I get your point. Were those guys really extorting or just jacking each other off? Oops. Sorry. I meant just masticating themselves. You know, I’ve always thought of conspiracy as a funny thing. I mean people see them everywhere, ya know? And the problem is that with so many people crying wolf, it’s hard to be taking seriously. For example, using the same digestive processes as Sherlock Holmes, I proved that the singer Paul Simon was engaged in a massive drug conspiracy during the Sixties. Now, with Paul coming from Newark and all, I don’t like to cast dispersions on a Jersey boy, but the evidence is overwhelming. 1) He never tells us actually what he is doing with Julio down by the school yard; 2) In Scarborough Fair he asks someone to remember him to Juan who lives there. Clearly, he’s involved with some South American drug cartel. Need more proof? In his first solo album, the runaway singles track was El Condom Passer – surely you know how most drugs are smuggled into the country. The final nail in the coffin – what label did he record under – Columbia of course! I explained this all to Mr. Pound and Father Auggie one day. They were speechless, and I think I saw tears in their eyes. I think I made them proud.

OK. So Ocasio v. United States was a 5-3 decision of the new mini-SCOTUS. The nuts of the story is this: Some Baltimore cops agreed with the owners of a local auto-body shop to steer owners of cars damaged in accidents to the body shop in return for kickbacks paid by the body shop owners to the officers. So, in Federalleye they committed extortion because they “affected commerce” by “obtaining property from another” (the body shop owners), “under color of official right” (that is, by virtue of their official positions as first responders to traffic accidents). The body shop owners were charged with conspiracy. Ocasio, one of the po-po argued that, since the property here belonged to the body shop owners themselves, they did not agree to obtain property “from another” but only from themselves. Hence, says Ocasio they couldn’t conspire to commit that crime.

“Au contraire,” says Jersey boy Sam Alito. There’s nothing new here, just “longstanding principles of conspiracy law.” Readers Digest virgin: The officers plainly agreed to obtain property “from another,” and the body shop owners “agree[d] to help” him commit this crime. Thus they all shared “a common criminal objective.” For this “very simple reason,” the argument that the body shop owners were not agreeing to take property from others “fails.” If you want my opinion, I think the most interesting thing about this case was the pairing: Sotomayor and Roberts joined in the dissent (like that happens a lot) and Breyer and Kegan sided with the prosecution. Must have been hard on Sotomayor to have her buddy Kegan on the other side for a change. I sorta imagine her like that kid Matteo in the Youtube video: “Lenie, Lenie, Listen homita. I don’t want to argue with you honey.”

So that’s the legal news across the nation. It’s 0 Bra:30 and I need to kick back. I started today with a hella hot mess when one of our clients went to the wrong courthouse for her formal arraignment and the right court revoked her. It all worked out in the end, and the court gave her a pity recall. It’s kinda like the Lucy chick in that Beatles song about when “the girl with colitis goes by.” I mean the Beatles were all into love and peace and whatnot back then so they probably felt really sorry for her.

I’m outta here,

–Areyna Darqueness
Diva of Darkest Dreams
Lew Tait

By: Rex Travis

Albert Lewis “Lew” Tait died July 31 from injuries from a bicycling accident. He was 66.

Lew was a partner at the firm Fenton, Fenton, Smith, Reneau & Moon. He did almost exclusively insurance defense work throughout his 36-year legal career. He was born in 1950, the son of a career army officer, at Fort Campbell, Kentucky. He grew up at various army posts around the world, ending up at Fort Still. Lew followed his father in going into the army and serving as an officer in the field artillery.

He graduated from the OU College of Law in 1980. He leaves surviving him a wife, Kathryn, and two children, Nicholas and Amber, both of whom are lawyers. He also leaves two step-sons and three grandchildren.

Lew was known for a combination of great competency as a lawyer and a great collegiality with other lawyers, including those on the other side of lawsuits. I am a plaintiff’s lawyer and belong to the Oklahoma Association of Justice, an association of plaintiff’s lawyers. We have a “list serve” on which we post messages of common interest, many relating to defense lawyers. These are not uniformly complimentary.

However, as word of Lew’s death spread, there were quickly 25 posts about him, all expressing great professional and personal admiration for him. There were no negative comments. Some typical comments were: “. . . an honest gentleman and professional who guided me through my own case when I was lost”; “. . . hoping I was as professional and courteous as he was, I have really good memories of Lew Tait.”; “What a tragedy and loss to the Bar. A pleasant and professional attorney.”; “An absolute gentleman, old school.”; “Lew was a class act.”; “Lew was always first class and a pleasure to deal with. A true gentleman.”; “Lew was a good attorney and a great guy. He will be sorely missed as his sort of gentlemanly character seems harder and harder to find.; Lew was a gentleman. I wish there were more lawyers like him.”

As I said, these are the guys who were against him in lawsuits. We can all only wish and hope that we would be remembered so well!

E. Melvin Porter

By: Rex Travis

Long-time attorney E. Melvin Porter died July 26 at the age of 86. Melvin was much loved and respected and will be missed.

He was born in Mississippi but at a young age his family moved to Oklahoma, where he graduated from high school in Okmulgee. He enlisted and served in the army during the Korean War from 1948 to 1952. He then went to Tennessee State University, where he got a degree in political science.

After graduating from college, Melvin became one of the two first black students admitted to law school at Vanderbilt University. He graduated and passed the Oklahoma Bar examination in 1960. He remained a member until his death, a career of 56 years.

Melvin did not find the society in Oklahoma at that time or the practice of law easy for a black lawyer. He almost immediately became active in the civil rights movement, along with such pioneers in the movement as Clara Luper and, somewhat later, Vicki Miles-LaGrange. He was soon elected President of the National Association of Colored People where he not only represented people arrested in sit-ins and demonstrations, he participated and was sometimes arrested himself.

The time when Melvin started his practice in Oklahoma City was an active time for the civil rights movement. By July of 1962, more than 171 restaurants in the Oklahoma City area who previously did not serve people of color were integrated. Melvin ran unsuccessfully for the state House but ran successfully for the state Senate in 1964. He became the first black Senator in the state and served in the senate 22 years. At that point, he was succeeded by Vicki Miles-LaGrange, who became the first black woman elected to the Senate.

Melvin was far from a figure-head senator. He authored and introduced the legislation which became the Oklahoma Anti-Discrimination Act, based on the 1964 federal Civil Rights Act. He also authored the legislation which repealed the miscegenation statutes which forbade interracial marriage. This legislation originated after he represented an inter-racial couple who were unable to marry because of the statute.

Melvin was not quite through with politics when he left the Senate. He later served as Oklahoma County Assessor. He was the first black person to do so. He also worked for a time in the Court Clerk’s office.

Melvin leaves surviving him 7 children, one of whom, Joel “Joey” Porter, is a lawyer. He also leaves 17 grandchildren and 26 great-grandchildren. His loss marks the end of an era in civil rights in Oklahoma!
By Miles Pringle

July was a weird and tiring month in the 2016 presidential election. Many strong feelings and concerns have been evoked; however, instead writing an article analyzing the state and future of our country, I’d rather step back and cool off for a minute. At the beginning of August Jon Favreau, a former speech writer for Robert Gibbs, former White House Press Secretary, in which Gibbs asked him “If Trump were trying to lose, would he be doing anything different”? That got me thinking about how we got here, and I imagined reading an article somewhat like this:

In a shocking turn of events, Russian hacked emails of Secretary Hillary Clinton, published by WikiLeaks, show that Clinton and Donald Trump have been coordinating their campaigns since before Trump announced his candidacy. We now know that in a June 21, 2015 email Clinton said to Trump: “Donald, thanks again for helping with the campaign. I can’t wait to hear what you come up with! You’ll pull the Republicans so far right they’ll be completely unelectable in the general. Let us know if we can help. Hopefully you can get in and out quickly!” Trump replied saying, “you’re welcome Hill, I love coming up with these tweets! My kids and I try to see Scott Baio. Tell Chachi he was great!”

Apparently, New Jersey Governor Chris Christie is in on the scheme as well. Shortly before Christie endorsed Donald Trump, Trump sent an email to Clinton informing her of developments and that “[Gov. Christie] has loved Obama since [hurricane] Sandy and is happy to help in any way he can.” Clinton responded that she was delighted to have his help, but suggested that Christie take some acting lessons to “look like he means it” and not “look like a prisoner standing behind [Trump].” It does not appear that Governor Mike Pence has been informed of the plot.

In an unanticipated turn of events, despite his best efforts to the contrary, Mr. Trump actually won the Republican Primary and is the party nominee for President of the United States. The conspiracy between the Clintons and Trump appears to have only intensified since both locked up the nomination. In an email a week before the Republican National Convention, President Bill Clinton wrote an email to Trump stating: “Donald, I saw the convention agenda you sent and it looks a little boring. We’ve been talking, and we think that it should be crazy. We’re thinking Communist Party meeting under Stalin crazy. There should be as few prominent Republicans speaking as possible, replace them with some c-list actors who want to be on the Apprentice, and give your kids prime time spots like you’re setting up a dynasty. Make sure the rhetoric is really inflammatory and outrageous. Plant some people in the audience to yell crazy chants like ‘lock her up’. Maybe Christie can even use his prosecutorial skills and put on a show trial.”

We have not confirmed whether Trump took any of President Clinton’s suggestions. In another leaked email, Senator John McCain stated he “would be happy not to attend the convention” and that he “would speak to Mitt [Romney] about doing the same.” It is uncertain the depth of McCain’s knowledge or involvement in the Clinton-Trump scheme.

The WikiLeaks leaks end during the Republican Convention. The last email released was from President Bill Clinton to Trump and Christie saying, “just saw Scott Baio. Tell Chachi he was great!” Sources do say that the candidates are still coordinating their campaigns. One source said, “well they’ve got to be, right? Since the convention Trump has picked a fight with parents of a fallen soldier, refused to endorse fellow Republicans, acted unaware that Russia invaded Ukraine, kicked a baby out of his rally, and (insert crazy thing since I turned in this article here to the Briefcase).” Neither the Trump nor the Clinton campaign would comment on this story, because neither was asked for one.
Selection of Supreme Court Judges In Canada

By Geary Walke

I hope you noticed it. Canada has just changed the way it selects its judges for the Canadian Supreme Court. Canada’s news found in The Globe and Mail, reported this in early August (all information contained herein is attributed to The Globe and Mail). No longer will it be the government in power (or the party in power as we would say here in the states). No longer will it be a partisan affair, an affair of political power.

Instead, according to Prime Minister Justin Trudeau, they will adopt a system not unlike the system used in Oklahoma. The old way, the purely political way, was determined to be “opaque, outdated, and in need of an overhaul.” The new process is said to be “open, transparent and will set a higher standard for accountability.” The previous “secretive, back-room process” will no longer be used in Canada. Thankfully, that process was eliminated in Oklahoma in the 1968 court reform process.

Like Oklahoma and the United States, their supreme court has nine members. Justice Steven Taylor has recently announcing his impending retirement, which will trigger the Oklahoma process for application scrutiny by the Judicial Nominating Commission and appointment by the governor. In Canada, the application process is open to any Canadian lawyer or judge who fits the criteria. The applications from now on will be made through the Office of the Commissioner for Federal Judicial Affairs.

Canada’s new commission will be chaired by the former prime minister, and then have seven members, four of which are to be designated by organizations such as the Canadian Judicial Council, the Canadian Bar Association, the Federation of Law Societies and the Council of Canadian Law Deans. In addition there will be three “prominent” Canadians appointed by the Minister of Justice, who are expected to be from beyond the legal community. Politics aren’t removed from the process, but there is a substantial degree of accountability that didn’t previously exist.

Canada’s Parliament will have some opportunity to question, converse with or otherwise interact with the nominee prior to an appointment to the Supreme Court. When the nominee is publicly announced (prior to appointment) the members of parliament will have a week to prepare for a meeting and hearing, and the commission will explain why this nominee was selected.

The most important aspect is that the questionnaire that all applicants must answer and certain answers provided to the questionnaire by the Prime Minister’s eventual nominee, will be made public. I am unable to determine a timeline of when that information might be made public. Obviously, such information would not be expected to include certain private information such as finances, medical history, taxes, etc...

We can reflect on Canada’s recent reform and be thankful our legislative leaders, and the people of Oklahoma, wisely provided for an objective basis for judicial selection decades ago. And, fortunately, we can be leaders in other areas. Perhaps Canadian Supreme Court Judges will follow the lead of Oklahoma and adopt black robes, rather than the ermine collared red robes, with cute little white ribbons. Not that there’s anything wrong with that...

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Lawyer advertising that use phrases such as “Super Lawyers™”, “Rising Stars™”, “Best Lawyers™”, “Best Law Firms™”, “America’s Leading Lawyers™”, “Top Ranked™” or other similar phrases, just took a hit, and in of all places, New Jersey. It seems that the number of complaints by other lawyers about those advertising such laurels and accomplishments not being worthy of such titles resulted in a May 4, 2016 Notice to the Bar from the New Jersey Supreme Court Committee on Attorney Advertising. These coveted badges, icons and logos appear on letter head, business cards and websites. It seems like a day does not pass without receipt of an email offering me the opportunity to be named the “Best Premises Liability Lawyer in Oklahoma” on someone’s list. However, a drawback has been that I can never figure out whether the price quoted was in euros, pounds, sterling or some other monetary denomination I was unfamiliar with and whether the publisher of this accolade was indeed going to publish it in the United States at all. I have even had similar discussions with lawyers who are under the misconceived notion that they are the only lawyer that is receiving such emails.

Putting all practical concerns about how to spend your marketing dollars aside, and there are many ways to do that, there is the ever-present ABA Model Rule 7.1 to govern our choices:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The ABA Eye On Ethics, July 2016 blog article deals with the issue of LinkedIn and what a lawyer should do when a client, former client, friend, family member or competitor rates you for a skill which you in fact do not have. This should be cause for concern for all of us to go review the reviews we receive. I readily admit I do not practice in certain areas of law and would be shocked if someone gave me a high rating for those skills on any website. However, in this article we are dealing with the issues of the super and the not so super.

The business of lawyer advertising has trended upward exponentially with the use of the internet. Consequently, we should not be surprised that many of the selection businesses for honors and accolades are owned by the same company that wants to market and build your website, blogs, electronic newsletters. Some may recall these companies started out in lawyer advertising by selling law firms and lawyers top placement on web searches and quick response buttons.

I must confess that I trumpet my honors and accolades on my web page and pay the piper to do so. A quick web site search of Oklahoma law firms in all types of practices, small and large alike, reveals that everyone else seems to be doing the same thing. Here is the rub, what do the public consumers of professional services believe when they see this advertising portrayed as an honor? In order to protect against misrepresentation, we fall back on ABA Model Rule 7.1. The Oklahoma corollary contains the same language. Interestingly, New Jersey’s version of the rule contains an official comment requiring:

As a preliminary matter, a lawyer who seeks to advertise the receipt of an award, honor, or accolade that compares the lawyer’s services to other lawyers’ services must first ascertain where the organization conferring the award has made “inquiry into attorney’s fitness. The rating or certifying methodology must have included inquiry into the lawyer’s qualifications and considered those qualifications in selecting the lawyer for inclusion.” This inquiry into the lawyer’s fitness must be more rigorous than a simple tally of the lawyer’s years of practice and lack of disciplinary history. Pursuant to Rule of Professional Conduct 7.1(a) (3)(ii), the basis for the comparison must be substantiated,
What My Latino Clients Have Taught Me

By Teresa Rendon

My entire legal career of twenty-eight years, except for five years working at O.U., has been spent working at Legal Aid Services of Oklahoma, Inc. where the majority of my clients have been Latinos. This was no accident. I was a Spanish major in college and a bilingual teacher at Oklahoma City Schools, so the transition from teacher to lawyer in terms of population served was pretty seamless. At first my practice related to housing, wages, working conditions and immigration. The second half of my career has been in family law.

The following observations are solely based on my experience and not meant to paint a very large and varied ethnic group with the tiny brush of my understanding. The following are a few things I have learned from over two decades of representing Latino clients.

Abandonment

Certain conversations come up over and over when clients speak about the goals for their family law cases. One is about abandono de hogar (abandonment of the home). There are variations, but typically a Latina who had been a victim of domestic violence would relate details of her tumultuous, painful and dangerous relationship with her husband. Sometimes these beatings, beratings and aggressions would occur in front of the couple’s children. There was a point in which the client could no longer bear it. She would consult her family and friends who would often advise to stay in the hell-hole of a home she was inhabiting. There were two very different reasons for this advice. One was the “Stand by Your Man” attitude that no matter what, the wife and mother was responsible for keeping the family together. It was a source of deep family shame to do otherwise. Another reason for this attitude was the belief that if a wife abandoned her home, she would lose custody of her children. Clearly this idea was brought with clients from south of the border, because abandonment in this state is one of the many grounds of divorce, but is not used to determine custody which is based on the best interests of the children, not who left the house first.

Common Law Marriage

The concept of common law marriage comes as a shock to first generation Latino immigrants who come from countries whose law is code-based with no traces of English common law. Our Oklahoma Constitution adopted English common law, and in spite of our Legislature’s attempts to abolish common law marriage, it is still with us. The idea that you can just live with someone and wind up legally married is shocking to many Latino immigrants. Of course, there are other elements of common law marriage besides just cohabitation, but that is the element that people hear about the most. In fact, after they settle down about the notion of common

See Latino Clients, Page 19
The statute.

July 12, 1966
Fifty Years Ago
[Excerpted from Ware v. Graham, 1966 OK CR 113, 417 P.2d 936.]

This is an original proceeding in which petitioner requests this Court to issue a writ of prohibition to prohibit the district court of Tulsa County from trying petitioner a second time for the crime of murder; and for the issuance of a writ of mandamus requiring respondents to accept an alleged verdict of “guilty for first degree manslaughter”, and for said court to pronounce sentence on petitioner.

This Court assumed jurisdiction of this matter and heard oral arguments on July 13, 1966. At the conclusion thereof an evidentiary hearing was ordered to be conducted by the Hon. Raymond W. Graham, district judge. Insofar as petitioner alleges certain actions to have occurred between the court and the foreman at the evidentiary hearing was directed to inquire into matters contained in the petition filed herein.

The Honorable District Judge conducted said hearing on July 22, 1966. A second hearing for further oral argument was set in this Court to be had on July 26, 1966, after the transcript of the district court hearing was made available. The transcript of the district court hearing was represented by Curtis Lawson, of Tulsa, Oklahoma, and the respondents were represented by Ted Flanagan, assistant county attorney for Tulsa County.

Petitioner alleges that he was tried in Tulsa County district court on December 16, 1965, for the crime of murder. That after both sides rested their case, the jury was properly charged, and the case was submitted to the jury. The jury deliberated for a considerable length of time, and was returned to the court room about 10:45 P.M. The foreman announced that the jury was deadlocked. The court proceeded to inquire of the foreman concerning the cause of the deadlock. The court then proceeded to poll the jury individually by asking, “Do you feel that there is any possibility of reaching a verdict?” Each member of the jury indicated that they could not, and that further deliberation would be futile.

Thereafter the following transpired between the court and the foreman:

“The Court: Now, I would state to the jury that if the deadlock is a result of the amount of punishment that the defendant may receive, that that matter may be left to the discretion of the Court and that the Court assess the punishment, but if your deadlock concerns guilt or innocence, of course, that could never be resolved by anyone but you, and I would ask the foreman of the jury at this time, is the deadlock concerning guilt or innocence, or is it concerning the amount of punishment that the defendant would receive?

“The Foreman: The great difference is between guilt —

“The Court: Guilt and innocence?

“The Foreman: And not the sentence. We have explored a number of ways, every way it could be.

“The Court: Well, the Court has no alternative but to declare the mistrial and release the jury from further service. Thank you for your attention during the trial. You are now excused to report back at the regular time tomorrow.”

Petitioner contends that immediately after the judge declared the mistrial, and while all the members of the jury, the prosecutor and defendant were still in the court room, some of the members of the jury stated to the court that the jury had reached a verdict of manslaughter, but was deadlocked on the punishment to be given the defendant. Petitioner’s counsel then moved the court to reconvene the trial, accept the jury’s verdict of guilty on a manslaughter charge, and to assess the punishment therefor.

The court having already discharged the jury, refused to reverse his order declaring the mistrial. Thereafter, petitioner filed his action in this Court asking for an alternative writ.

Seven of the jurors appeared at the evidentiary hearing and gave their individual impressions of what transpired. The transcript of the proceedings reveals that initially several jurors felt the defendant was guilty of murder; two felt he should be acquitted; and the remainder of the jurors thought the defendant was guilty of manslaughter. After the first indication was made known, without taking a written poll, the jury continued to discuss the matter. It is also evident, that no poll was ever taken concerning what crime the defendant might be guilty of. The jury did, however, take a vote concerning their responsibility to fix punishment, and it was agreed that it was their responsibility and should not be left to the judge. From that point on, the jury continued to discuss different amounts of punishment, which might be assessed.

When the foreman of the jury testified, he was most positive when he said, “I will say positively we never reached a verdict of any kind”. The other jurors who testified indicated that notwithstanding the fact that no ballot was taken on the specific question of guilt or innocence, they felt that it was generally agreed the defendant was guilty of manslaughter, if they could agree on the amount of punishment to be given the defendant. The record is quite clear, however, that the jurors did not at any time agree on the amount of punishment the defendant should receive.

The record is not clear concerning who was present in the court room when the matter was made known to the court. The foreman stated that he thought he had left the court room. The prosecutor stated that he had left the court room when the discussion was had; and, while he was waiting for the elevator, he saw several of the jurors waiting for the same elevator. None of the jurors who testified could state with certainty that all the jurors were present in the court room, when the matter came up.

The third paragraph of the syllabus in Harrell v. State, 43 Okl.Ct. 278, 278 P. 404, recites: “Where the jury has returned its verdict which has been received by the court, and the jury has been discharged, and has left the presence of the court and mingled with the public, the court is without power to recall the members of the jury and to require or permit them to amend the verdict.”

In the instant case, no verdict was returned by the jury. It seems logical to conclude that wherein the court lacks power to recall a jury to amend a faulty verdict, then the court likewise lacks the power to recall a jury which returned no verdict at all.

Title 22 Okl.St.Ann. § 896 provides in part: “* * * [T]he jury cannot be discharged after the cause is submitted to them * * * unless at the expiration of such time as the court deems proper, it satisfactorily appear that there is no reasonable probability that the jury can agree.”

21 Am.Jur.2d, “Criminal Law”, § 204, p. 252, recites: “Whether the circumstances are such as to justify the conclusion that the jury will be unable to agree on a verdict is to be determined by the exercise of sound judicial discretion. The conclusion of the court is not open to collateral attack.”

Title 22 Okl.St.Ann. § 919 provides: “If the jury render a verdict not in form, the court may, with proper instructions as to the law, direct them to reconsider it, and it cannot be recorded until it be entered in some form from which it can be clearly understood what is the intent of the jury.” (Emphasis added)

The record is quite clear that the jury did not convey its intent to the court. The court made more than a reasonable effort to determine what the jury’s intention was, but was unable to determine such intention.

After having carefully considered the record before this Court, we are of the opinion that the trial judge clearly acted within his judicial discretion when he declared the mistrial and discharged the jury. Petitioner’s allegations are not sustained by the evidence contained in the record.

We are also of the opinion that when the trial judge reaches the conclusion, after having made sufficient inquiry whether or not the
jury can reach a verdict, that the jury cannot reach a verdict in the cause, he is justified in declaring a mistrial and discharging the jury. Further, when the court declares a mistrial and discharges the jury, their functions as jurors cease, and they cannot be recalled.

August 2, 1991

Twenty-Five Years Ago


R.R.P., the sixteen-year-old appellant, was charged as an adult with the crime of Shooting With Intent to Kill in Oklahoma County District Court Case No. CRF-90-4944. Prior to preliminary hearing, appellant filed a motion for certification as a child, see 10 O.S.Supp. 1989 § 1104.2(C), and a motion for funds to hire a psychiatric or psychological expert. The Honorable Sidney Brown, Associate District Judge, denied appellant’s motion for expert funds. Following preliminary hearing, at which appellant’s “reverse certification” motion was heard, the court denied appellant’s motion and bound him over for trial. This appeal was automatically assigned to the Accelerated Docket of this Court pursuant to 22 O.S.Supp. 1990, Ch. 18 , App., Rules of the Court of Criminal Appeals, Rule 11.2(a)(4), and oral argument was conducted on July 25, 1991. At the conclusion of oral argument, the parties were informed of this Court’s decision.

Appellant argues on appeal, inter alia, that the trial court erred in denying his motion for funds to hire a psychiatric or psychological expert. In said motion before the trial court, appellant asserted that an expert was necessary for the purposes of examining and evaluating appellant and testifying on his behalf at the reverse certification hearing. Without deciding whether such expert assistance is required under Section 1104.2(C), we agree with appellant that this cause must be reversed.

In its detailed Order Denying Funds for Psychological Evaluation, the district court stated in no uncertain terms that psychiatric/psychological assistance was necessary both for the adequate preparation and presentation of appellant’s motion and for an informed decision on the part of the court. Among other things, the court found that appellant’s mental status and condition were “significant factors” in the court’s decision whether to certify him as a child, “that both the amount and purpose of the funds requested are reasonable and necessary”, that the lack of such assistance will cause appellant to suffer “substantial prejudice and will undermine the legitimacy [815 P.2d 1201] and reliability of the Court’s decision”, and that “the Court will not be able to properly individualize those decisions which it must make concerning [appellant’s] certification” without expert testimony. (O.R. 13-15). Although the court specifically held that appellant’s “application for funds should be sustained”, it denied the same “solely by reason of the fact that the Oklahoma County District Court fund is without sufficient means to pay for the funds requested...” (O.R. 15).

On the basis of the foregoing, we can reach no conclusion other than this case must be reversed. The district court stated that it would be unable to properly consider appellant’s certification motion without expert testimony and was then constrained to make a decision without such assistance. We empathize with the trial court’s predicament regarding the apparent unavailability of funds. However, under the facts presented in the instant record, we must conclude that the trial court erred in ruling on appellant’s motion without the benefit of expert assistance which the court had previously determined was essential.

Jack Herndon, Roasting A Nonagenerian

By Geary Walke

Jack Herndon, member of the bar since, oh, let’s say, before dirt, became a nonagenarian recently. He celebrated his birthday with friends and family. He has been a fixture at the courthouse and I doubt any lawyer over 30 has failed to have a case with him. And once you have, you understand the phrase: baptism by fire.

Jack is one of a kind, thankfully. He’s a lawyer and judge in Garfield County for many years, and from time to time Jack would travel with him from courthouse to courthouse all over the northwestern part of Oklahoma.

He’s always had a smile on his face, just before he tags you with a left hook. For an unknown reason, Jack has referred to me for forty years as “Walkingstick.” Even after I became a judge. Never in front of others, but quietly, “Good morning, Judge Walkingstick.” Now, I was much leaner in my younger days, but I don’t think that was the basis for his nickname for me. Whether you know it or not, Jack has a nickname for you. Each of you.

He hasn’t changed in the forty years I have known him. I’m not sure, but I think he’s had that wooden briefcase at least that long. He hasn’t gained any weight, he hasn’t lost any hair, his hair was never darker, his eyeglass prescription is the same, and I’m pretty sure he hasn’t had to buy new shoes. What is it with getting older and shoes? I used to go through a pair of shoes in months as a kid. Then, as a young adult it took me about six months to wear out a pair. Ultimately, I can wear a pair of shoes for decades – which explains why Jack and I are never fashion models. Sorry, Jack, but it needed to be said.

Jack has practiced in Midwest City since Air Depot Blvd. was a gravel road leading to Tinker Air Force Base. He’s made the news many times, but not always gladly. He’s represented more people than can be counted, and he has a big heart. . . . Yes, I said it: Jack has a heart! No, really. Happy birthday, Jack. Admit it, this is much better than an obituary by Rex Travis!

“Good morning, Judge Walkingstick.”
Overview of the October 2015 US Supreme Court Term
A Constitutional Crisis in the Making?

By Kieran D. Maye, Jr. ¹

The October 2015 term of the U.S. Supreme Court began on the first Monday in October. The term seemed teed up in favor of conservatives, with major victories expected in controversial cases. That all changed on February 13, 2016, when Justice Scalia died unexpectedly on a ranch in Texas. Thereafter things changed dramatically in favor of the liberals. The so-called left of the Court delivered victories in Fisher v University of Texas, on affirmative action and Whole Women’s Health v Hellerstedt, on abortion, just to name two. All in all the Court decided 63 cases with full-signed opinions, 13 per curiam opinions, and 4 ties. Vote tallies were as follows:

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<tr>
<td>5-4</td>
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</tr>
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1. Kerry Maye is an Adjunct Professor of Law at Oklahoma City University School of Law.
2. The statistics and some of the charts presented herein are produced by SCOTUSblog.com and are reproduced pursuant to the Creative Commons License granted for non-commercial uses. The full October 2015 Term Stat Pack can be found here: http://www.scotusblog.com/2016/06/final-october-term-2015-stat-pack/

VOTING PATTERNS

The chart below shows the frequency with which each of the Justices agreed with each other. The normal percentage of agreement is between 70% and 90%. The outliers, in the 90’s reflect a very high frequency of agreement and are highlighted in red. The lows in the 60’s are highlighted in blue. This data shows us that Justice Thomas has staked out the far right of the Court and Justice Sotomayor has done so on the left.
People are always interested in hot button cases that are decided by 5 – 4 votes. This term there were only four cases decided on 5 – 4 votes, or the equivalent. In those cases, Justice Kennedy continued to be the deciding vote in many cases, certainly those that were otherwise ideologically divided. Often the other justices align themselves in somewhat predictable groups, and Justice Kennedy then casts the deciding vote.

The so-called 5 – 4 cases were in fact not really 5 – 4. But it is probably safe to assume that if Justice Scalia had voted in those cases, they would have been 5 – 4 votes. Those cases were the following:
- Williams v Pennsylvania (5 -3)
- Nabisco v The European Community (4 – 3)
- Breyer recused
- Fisher v University of Texas (4 – 3)
- Kagan recused
- Whole Woman’s Health v Hellerstedt (5 – 3)
Similarly, the Court avoided the anticipated avalanche of 4 – 4 ties. There were only four ties and in only two of those cases did Justice Scalia’s absence likely change the outcome. The four cases are:

FRIEDRICH V CALIFORNIA TEACHERS ASSOCIATION: This is a case about the mandatory payment of union dues by non-union members. The requirement was challenged on First Amendment grounds. The 9th Circuit upheld the requirement. The Supreme Court split 4 – 4 resulted in the 9th circuit being affirmed. The outcome of this case was definitely affected by the death of Justice Scalia, who would have voted to reverse.

HAWKINS V COMMUNITY BANK OF RAYMORE: This case deals with a claim by wives of borrowers from a bank who were required to sign guarantees of their husbands’ business debt. The lower court held that the spouses were not “applicants” and therefore could not sue for unfair lending practices. This case was also affirmed by an equally divided Court. Justice Scalia would have voted to affirm. Therefore his absence did not change the outcome of this case.

THE EFFECT OF THE VACANCY

While the Court avoided 5 – 4 cases and there were only four ties, the effect of the vacancy was still substantial. The Court decided cases on narrower grounds, and avoided controversial issues. Some may think that is a good thing, and perhaps they are right. But the Court cannot continue avoiding difficult issues.

The nomination of Judge Garland has now been pending for over 150 days. That is the longest pending nomination in over 50 years. The longest pending nomination in recent history was the nomination of Justice Thomas. His nomination took 99 days, from nomination to confirmation. The nominations of the last four justices, spanning two administrations averaged 75 days. Of course Judge Garland is nowhere near confirmation, since the leadership of the Senate has steadfastly refused to consider the nomination. While the length of this vacancy is long in recent history, it does not even approach any records. According to the Drew DeSilver of the Pew Research Center, the longest vacancy in history was 841 days. Lest President Obama feel to put upon by the Senate, he might reflect on the plight of President John Tyler in 1844. Justice Henry Baldwin died in April, 1844. However, due to the dysfunctional relationship between President Tyler and his own Whig party, the Senate refused to consider any of President Tyler’s nominations. It also took President Tyler 437 days and six attempts to fill the vacancy created by Justice Smith Thompson’s death in 1843.

While it might surprise some to know that the Supreme Court originally had only six members, we all know that deliberative bodies, whether courts or boards of directors, do not function well with even numbers. And the Supreme Court vacancies are likely to continue. Justice Ginsburg is 83. Justice Kennedy is 79, and Justice Breyer is 77. Thus the outcome of the next presidential election could result in a dramatic shift in the Court.

THE TIES

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS: This case dealt with the extent a tribal court could assert civil jurisdiction over non-tribal members. The lower court held that the tribal court did have jurisdiction over the non-tribal member where that party had established a long term business relationship with the tribe. The vote at the Supreme Court resulted in an affirmance. Justice Scalia would likely have voted to reverse. So this tie did change the outcome.

UNITED STATES V TEXAS: This is the immigration case that everyone has heard about. Justice Scalia certainly would have voted to affirm the 5th Circuit, therefore the outcome of this case was not changed by Justice Scalia’s death.

THE TIES

HAWKINS V COMMUNITY BANK OF RAYMORE: This case deals with a claim by wives of borrowers from a bank who were required to sign guarantees of their husbands’ business debt. The lower court held that the spouses were not “applicants” and therefore could not sue for unfair lending practices. This case was also affirmed by an equally divided Court. Justice Scalia would have voted to affirm. Therefore his absence did not change the outcome of this case.

A POTENTIAL CONSTITUTIONAL CRISIS?

Here is one final and perhaps troubling thought. I recently read an article in the NY Times predicting an Electoral College tie in the November Presidential election. If that happens, the next president will be decided by the House of Representatives. Can you just imagine the litigation that would follow? And that litigation would undoubtedly end up before the Supreme Court, a court currently composed of eight justices. And what if there is a 4 – 4 tie? Can anyone say “Constitutional Crisis?” Just a thought.


fit have the best odds of all, but this study offers hope to those who are not presently healthy, whether from hypertension, body weight, heart issues, or even cancer.

By the way, each 1 Met Level increase in the level of cardiorespiratory fitness corresponded to an adjusted risk reduction in both healthy and unhealthy populations (20% and 18%, respectively).

So, fit is good, fitter is better, and fittest is best! CONSISTENT with all my earlier articles!

I have explained in earlier articles how one determines one’s Met Level. For purposes of this study, "moderate" Met Levels were defined to be 10.2, and "high" Met Levels were defined as 12.9.

So, if you have a cardiorespiratory Met Level of 10.2 or, better, 12.9, you can rest assured that your risk of sudden cardiac death is drastically reduced... whether you are healthy or unhealthy.

If you have not determined your Met Level, many of the treadmills in the market place show the Met Level at which you are exercising. If it shows, say, that you are exercising (for an extended time) at a 7 Met Level, you have the ability to achieve a much higher maximum Met Level, as used in this study.

Take home message? If you are not “as healthy” as you could be, whether you are hypertensive, or overweight, or have cancer, or have heart issues, (or all the above), you can drastically improve your odds against sudden cardiac death.....by merely MOVING, even if only slightly, or shortly, or infrequently. But especially if....as time goes by.....you move more intensely, and longer, and more frequently.

I promise: those already fit will be proud of (and cheering for) you! And I the loudest!

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IEQUATEABLE DIVISION OF MARITAL PROPERTY

Some of my clients assume that equitable division marital property means equal division rather than fair division. I would expect that there are English-speaking clients that would need this explained, too. After all, “equitable” and “equal” look very similar even though their meanings are quite distinct. I recently had a client who had gotten the marital home in the marital property division. Months after the final decree, she called me up quite distraught. She thought the decree stated that she only got half a house because the property was to be “equitably divided.”

If you have never had a Latino client, you would be amazed at the number of people many often bring with them on the first visit. It is not uncommon for my clients to show up with five or more people, their children, their comadre (godparent), their neighbor who is driving them, their mother and maybe a grown sibling. Their support network seems much wider than my clients of other race or ethnicity. I often have to see how I can winnow down the number of people coming into my office. First of all, it is because the children don’t need to hear Mama talking trash about Papa. Secondly, the grownup with the potential client tends to want to butt in and speak for the client when I really need to hear first from her. Thirdly, even if all these people were needed right off the bat, my office is just not ample enough to accommodate such a crowd.

My legal practice has been enriched by the experiences I have had with my clients. I believe that they have taught me the value of a strong support network and that they come with cultural practices and beliefs which color the way they view the world. Knowing this helps me to clearly explain the law to them.
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