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## "Off the Record"

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## BAR ASSOCIATION NOTES

BAR EXAMINATION.—At the examination held at Charleston by the Board of Law Examiners, on the ninth and tenth of March, the following twelve applicants successfully passed all requirements:

Joseph M. Corman	Charleston
Richard Renick Dickson	Hinton
Ralph Waldo Hartley	Dunbar
Everett Hughes	Charleston
Edwin Graves Hundley	Huntington
J. M. Jordan	Williamson
Robert A. Kendall	Morgantown
Roderick G. Merrick	Charleston
John R. Murphy	Williamson
Raymond Frederick Musgrave	Point Pleasant
Walter H. E. Scott	Charleston
McKinley Trent	Huntington

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“OFF THE RECORD”\*

L. E. SCHRADER\*\*

The words, “Off the Record,” are usually addressed to the shorthand reporter, and are intended to mean that what is about to be said, is not to be embodied in his notes of the trial or proceedings.

An attorney who is not certain of his next move, may desire to indicate his views to the opposing counsel, or to the Court, before proceeding along some new line.

He therefore suggests to the reporter, that what he is about to say, is offered merely as a possible move or solution, and is not as yet, intended to be part of the officially recorded proceedings.

He may say: “Mr. Reporter, don’t take this until we see about it,” but however worded, an order to stop writing, is understood by court reporters to mean, “Off the Record.”

Now, the person who makes the trial record is more con-

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\* Paper read before a recent Luncheon Meeting of the Ohio County Bar Association.

\*\* Official Reporter at the State Senate and Reporter in the First Judicial Circuit.

cerned with these "Off the Record" proceedings than either the Court or the counsel, for the reason that what occurs during such intervals of non-recording, frequently develops later, into data of the utmost importance, and indeed many cases have been ended by negotiations made "Off the Record."

The more important aspect of the matter however, and by far the most perplexing one to the conscientious reporter, is, that during this "Off the Record" colloquy, an entirely satisfactory solution to some problem may be reached, and then, without any indication to the reporter as to when he may begin to note the remarks, counsel may turn to a witness with the question, "Is that so?" And the witness will answer; and while the trial is evidently "on" again, the record will contain no slightest intimation of what it is all about nor of when and how it was resumed.

Surely at such a time the attentive but puzzled reporter may be forgiven if his thoughts revert to the extremely uncertain movements of the famous "Finnegan."

The mental anguish suffered at times by reporters, through the use of these three mild-sounding words, "Off the Record," seems to be unobserved by the average attorney, who is seldom discourteous to the court reporter.

Consider, for a moment, what a rambling, disconnected, illogical trial record would result, if the shorthand reporter were to follow literally the instructions in these cases, and lay down his pen! Who would advise him of the time when he should resume writing? Have you ever heard the expression, "You may resume writing, Mr. Reporter"?

On hearing the magic and imperative words, "Off the Record," the reporter becomes as it were, automatically the sole judge of what point is, and what is not, the one where the attorney is once more talking "on" the record.

If lawyers notice that, after they have indicated that their remarks are to be "Off the Record," the reporter is still writing, they should understand that it is not a flagrant disregard of the request, but rather an effort to preserve for the record, any remarks that may prove to be of importance later, and incidentally to protect himself from possible charge of carelessness, or an irretrievable error of judg-

ment in his professional work, in the fine quality of which, it is conceivable that he takes a just pride.

We will suppose that the proceedings, "Off the Record," develop into a heated and bitter argument, ending in unpleasantness, or even in blows; in most cases the result is caused by some misunderstanding, which certainly could have been explained, and probably would have been avoided entirely, had the parties to the discussion known that it was being recorded in cold type.

Our statute says, in Paragraph 2, of Chapter 114-B:

"It shall be the duty of the reporter to take full shorthand notes of the testimony and proceedings in which his services may be required, \* \* \* \*"

If in the development of the trial, the very matter excluded from the record becomes of consequence as bearing on a point of objection, exception, and appeal, where is the reporter to look, for his authority for his omission? How avoid this compulsory violation of the statutes that require him to take "full" notes of "the testimony and proceedings"?

There is another angle to be considered. In the absence of the consent of the opposing counsel, it may not be fair to ask the reporter to omit from the notes something which the opposing counsel may especially desire to have in the record.

Cyc. says:

"The appellate court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record."

In reasonable probability, the record here referred to is the record as a whole, and the statement of the limitation imposed upon the appellate court in its consideration of points involved in its decision, calls indirectly for a complete record of every case appealed, which necessarily would include a full report of the trial record.

When an attorney desires to say something "Off the Record," an excellent method of handling the situation would be that which is followed by the Interstate Commerce Commission. In presenting before the Commission something not intended for the record, the attorney rises,

and moves for a recess, which is instantly granted, and counsel may then confab to their hearts' content. When proceedings are resumed, the reporter is notified, and the record remains full, true, and complete.

Counsel may rest assured that their requests are always noted. If some matter, taken by the reporter on his own judgment, after the request has been made, proves later, as anticipated, to be of no importance, and if the Court and opposing counsel do not object to the deletion, it can readily be omitted from the transcript.

As a side-light on the title of this article, even though it be a divergence from its real purpose, let me cite a few more or less interesting incidents, "Off the Record."

In a felony case, the defendant was absent from the room while a witness was sworn. The reporter had made a note of the fact that the sheriff had accompanied the defendant from the court-room. In connection with the motion for a new trial, this absence of the defendant was set up by affidavit, and a new trial was awarded.

In this instance, the reporter had made a note of an incident which ordinarily would not be a part of his transcript, but which in this case proved to be very material.

During a recent week, the time of the Court and a jury, as well as that of counsel, witnesses, and court attaches, was occupied for an entire day in a trial involving the theft of four typewriter ribbons worth three dollars. The prosecuting witness was represented by able special counsel, as was the defendant. Now ordinarily such a case would have been disposed of readily, by the imposition of the minimum fine. In this instance, however, the defendant insisted upon a trial. Why? The record does not disclose the reason.

An actress sues a millionaire for \$50,000, for breach of promise. Why? The record does not afford an answer.

With a map before him, counsel will say: "How much is in this?" The witness answers: "400 acres." In what? The record does not disclose.

On the other hand, it happens that in the stress of a trial, statements creep in that certainly should be "Off the Record." For instance:

"This defendant is indicted for the crime of transporting

liquor by the grand jury."

Or:

"Did you testify that a street-car was standing on your cross-examination?"

Or, again:

"You know where this boy is living with his wife, and renting it."

Still diverging:

In a collision case, it became important to establish the position of every member of the train crew. Counsel put one of the brakemen on the stand, to impart this information, expecting him to tell the jury that the conductor was in his caboose, going over tissue copies of the waybills; that the rear brakeman was ejecting a tramp from the gondola car; that the fireman was building up his fire; that the engineer was on the ground, oiling up his engine and that he, the witness, was on the track ahead, turning the switch.

How do you suppose he enlightened that jury? With a swiftness of articulation that blurred the words, and passed over the heads of most of those in the court-room, and in American-English railroad parlance that was the only language which he could understand or speak, he described the activities of each of his companions as follows:

"The con was in the kitchen, flopping the tissue. The hind shack was hoisting a hobo out of his cradle. The diamond thrower was cracking the black stones. The tallow dip was on the dirt greasing the pig, and I was up in front, bending the rails."

A foreign-born member of the legal profession, in one of the large cities, inflated by boundless self-conceit and aggressive assurance, propounded, to a witness in a collision case this question:

"The plaintiff's automobile, it is marked "a"; the defendant's automobile, she is "b." Now, pay attention, Mr. Witness! Answer my question by yes or no. How far was the "a" from the "b," when the two cars collided?"

Now having gone sufficiently far afield, let us return to the record.

Who is to be the judge of what is to be "on" and what "off" the record?

In reference to decisions as to the selection or rejection of material presented in "Off the Record" intervals of court, I am today inclined to agree with the colored man who was sentenced to jail. While being led away, he made a remark in an undertone. The Court, under the impression that the prisoner had made a disrespectful comment, ordered him brought back to the bench.

"Look here, Rastas," said the judge, "Were you swearing at this Court?"

"No, your Honor," replied the defendant; "I was pray-in'; all I said was, 'God am de judge.' "

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