

The Last WORD

By Edward J. Walters, Jr.

IPSE DIXIT: SO, WHO DO YOU TRUST?

So back in the 1990s, Johnny deGravelles — now Federal Judge John deGravelles — is trying a case in Baton Rouge in front of 19th JDC Judge Kay Bates, who is now happily retired.

Johnny had gotten the court reporter to type up the testimony so that he could blow up portions of it in his closing argument. His opponent, Frank Gremillion, objected and argued that because depositions can't be taken into the jury room, and since the trial transcript is not available to the jury during deliberations, he shouldn't be allowed to use it during closing. His response was: "First, that this is not going into the jury room, it is argument, and, second, would you rather me tell the jury what I think the witness said or tell them what — verbatim — he actually said?"

Judge Bates takes a break to think about it.

She goes into her chambers and quietly calls someone she trusts who really knows a lot about evidence, or she thought he did. He was, after all, Professor George Pugh's research assistant for many, many years.

She asks about this thorny evidentiary question. She, of course, doesn't tell him who the lawyers are.

His response was that Professor Pugh addresses this very issue in his evidentiary course. He says, "Wigmore says no because, like the 'Golden Rule,' the jury, which must rely on its own memory, will tend to be misled by the belief that the typed testimony is superior to their own memory. Says Wigmore, the same recitation out of the advocate's mouth does not suffer that same risk. Plus, if one side introduces



some testimony, the other side will introduce some more, and ultimately the whole trial will be submitted TWICE to the jury."

She gets this opinion and goes back to court. We now peek into the courtroom where the following ensues (or something like it):

Judge Bates: OK, we are back on the record. I spoke to someone whose judgment I trust on evidentiary issues, and he told me that this transcript is inadmissible, so, objection sustained, I will keep it out.

deGravelles: Your Honor, respectfully, who did you call who gave you this obviously erroneous opinion?

Judge Bates: Frank Holthaus.

deGravelles: Frank Holthaus? FRANK HOLTHAUS?!??? MY LAW PARTNER FRANK HOLTHAUS?!?!?!?!???

In spite of the above, they remained partners for a very long time — until Johnny took the bench — and remain very good friends to this day. I'm sure they rarely speak about this evidentiary issue, since one of them is clearly wrong.

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