



# Hon. Ortrie D. Smith

## Senior U.S. District Judge, Western District of Missouri

by Steven Wolfe



Steven Wolfe graduated from the University of Missouri–Kansas City (UMKC) School of Law in 1990 and clerked for Hon. Ortrie Smith from 1995-2015. Prior to that, he clerked for Hon. Floyd R. Gibson, then a judge on the Eighth Circuit Court of Appeals. He has been clerking for Hon. Beth Phillips, chief judge for the Western District of Missouri since 2015. Wolfe has also been an adjunct professor at the UMKC School of Law since 2005, where he has taught classes on class actions and federal jurisdiction.

**N**orth Law Publishers, Inc. operates a website called “The Robing Room,” where people are invited to anonymously rate federal judges. Evaluators must state how they came into contact with the judge (e.g., as a litigant, prosecutor, or civil defense attorney) and may rate the judge in a variety of areas on a scale from 1-10. Evaluators may also provide written comments. As one might suspect in a profession where decisions satisfy one party at the expense of the other, glean any value from the site’s contents is a hazardous endeavor. Nonetheless, on a lark, one day I looked at Judge Ortrie Smith’s “rating” and took note of one comment that has stuck with me. It was left by a civil litigator in private practice and said simply: “If I had an important decision that affected my life or family, I’d trust Judge Smith to make it.”<sup>1</sup>

Given the numerous decisions that a trial judge must make that directly affect the lives of individuals, I cannot imagine higher praise packed into a single sentence.

Judge Smith was born in 1946 in Jonesboro, Ark., and lived in Trumann, Ark.<sup>2</sup> At age seven, he got his first job—delivering *The Jonesboro Sun* from his bicycle. He then worked continuously until his formal retirement from the bench in August 2020. Judge Smith attributed his work ethic to his father, who was drafted into the Army the day before the attack on Pearl Harbor in December 1941. He served as a medic and saw action in France, Belgium, and Germany, including at the Battle of the Bulge, and was honored with the Silver Star, Bronze Star, and Purple Heart for his service. He had worked in the cotton fields before being drafted, but upon returning from the war, he worked in a local factory and then began working for an insurance company.

The judge’s family moved to Hannibal, Mo., in 1959 after his father received a promotion.<sup>3</sup> Two years later, his father received another promotion, the family moved to Kansas City, Mo., and Judge Smith began attending Raytown High School.<sup>4</sup> During his junior year, he met his future wife, Kris, and resolved to get good grades to impress her. He was also on the football team and garnered recruiting interest from



several universities.<sup>5</sup> He eventually opted to attend the University of Missouri, where, as he has frequently stated, he was hit by some of the finest football players in the country. He stopped playing in the spring of his junior year, however. Realizing that he was heading for a major in history and a minor in English, Judge Smith returned to a passing thought he’d had in high school—he should go to law school.<sup>6</sup>

Judge Smith attended law school at the University of Missouri—Kansas City, where he finished in the top 10 percent of his class. During his third year, he worked for Professor Jim Jeans, who was then collaborating with Ralph Nader on legislation and other product liability issues. Judge Smith worked on proposed legislation for Professor Jeans and also assisted him in drafting a new County Charter for Jackson County, Mo.<sup>7</sup> He had several job offers upon graduating in 1971, including one from John “Jack” Danforth, who was then the Missouri attorney general and who would later be a U.S. Senator and (briefly) the U.S. Ambassador to the United Nations. But Judge Smith rejected that offer and many others in favor of the Ewing Law Firm in Nevada, Mo., because of its reputation. He also wanted to live in a small town, which he thought would be a better place to raise a family.<sup>8</sup>

The Ewing Law Firm's primary client was Farm & Home Savings Association, but the firm also represented other financial institutions, insurance companies, a local college, and, occasionally, individual clients. Judge Smith's initial work focused on real estate development, insurance defense, and claims adjustment. At the time, there was no public defender's office in the county, so he also accepted criminal appointments. That aspect of his work included three homicide cases, and he was also appointed as a special prosecutor in a homicide case.

The nature of Judge Smith's practice changed in the first half of the 1980s; he began doing more personal injury and domestic relations work, including private placement adoptions. He described adoption work as "terrifying" because of the risk of the birth mother changing her mind at the last moment, but also said it was rewarding and gratifying when the placement was successful. To this day, he remains in touch with some of the parents and children involved in his cases.

The firm's managing partner, Lynn Ewing, encouraged the younger attorneys to be involved in public service and expected them to join a civic club. Judge Smith exceeded those expectations. He joined the Optimist Club, was involved with the Community Council for the Performing Arts, served on the Red Cross Board, was a member of the Nevada School Board, and was active in his church. As he explains, he was trying to do his part to make Nevada the kind of place he would feel good about raising a family. He was also very active in the bar, serving on the Missouri Bar Board of Governors for 15 years and as president of the Missouri Bar in 1991-1992.

Judge Smith had some interest in becoming a state judge when a vacancy opened in the late 1970s, but he was not selected by the governor. His interest in a judgeship receded but was resurrected when Bill Clinton was elected president in 1992, and to that end, Judge Smith contacted his friend Congressman Ike Skelton. The two met in the mid-1970s, when Congressman Skelton was running for his first term as representative and asked Judge Smith to help him; Judge Smith worked on each of Congressman Skelton's campaigns until the early 1990s. Because there were no Democratic senators in Missouri at the time, the White House would look to the Democratic representatives (including Congressman Skelton) to suggest potential nominees. There were two vacancies on the court and three Democratic representatives in the Western District, however, and the three representatives could not agree on two nominees, which slowed the process considerably. Eventually—in June 1995—Judge Smith was nominated for one of the vacancies. His hearing was in early August 1995, and the Senate voted to confirm his nomination two weeks after that. The following month, he was in the courthouse in Kansas City, Mo.

Judge Smith actively endeavored to ensure that being a federal judge did not change his outlook. He frequently asked his clerks if something he was going to do seemed "too federal judge-y." He took to heart the words of

Judge Diana Murphy, then a judge on the Eighth Circuit Court of Appeals, who advised (in his words) that "judges, like whales, tend to get harpooned when they spout off at the surface." And as a further show of his efforts to remain "grounded" (as he would phrase it), he kept a copy of his first reversal nearby.<sup>9</sup> The Court of Appeals conveniently arranged it so that the two-word sentence "We reverse" appeared at the very end of the first page of the slip opinion. The slip opinion, with that sentence highlighted, sat in a frame on his desk from the time it was issued until he stepped down from the bench.

He also strongly believed that civility was essential, not just to life in general but in particular to the administration of justice. To that end, he attached a copy of the "Principles of Civility" adopted by the Kansas City Metropolitan Bar Association to the initial standard Order issued in his civil cases. The initial Order advised—in all uppercase letters—that he expected the attorneys to adhere to those principles. He believed that if lawyers knew from the outset that he expected them to behave when interacting, they would be encouraged to do so. He also believed that client expectations were sometimes the source of strife between lawyers and that it would be helpful for lawyers if they could point their clients to something setting forth his expectations. And, on those occasions when his point seemed to have been lost, Judge Smith issued an Order directing the parties to re-review that Order; in some instances, he even required signed confirmation from the client that they had read it too.

Often, a district judge's work is of greater interest to the parties than to anyone else, but Judge Smith handled several cases that drew public interest. He presided over two trials in which female firefighters and employees in the Kansas City Fire Department prevailed on their claims of harassment and discrimination.<sup>10</sup> His ruling that federal law preempted Missouri statutes designed to regulate the administration of the Affordable Care Act was (substantially) affirmed.<sup>11</sup> He ruled that Faye Copeland, the oldest woman to receive a death sentence in the United States, was entitled to a writ of habeas corpus setting aside the sentence because of the prosecutor's improper arguments during closing.<sup>12</sup>

There is one case that stands out from the rest: *United States vs. Robert Courtney*. Robert Courtney was a pharmacist. At the time, many chemotherapy treatments were in powder form and had to be compounded into a solution so they could be administered intravenously. Those medications were quite expensive, costing hundreds (and in some cases thousands) of dollars per dose. Over the course of approximately 10 years Courtney diluted the medication, thereby cutting his costs and garnering more profit for himself—and providing sub- or nontherapeutic medication to his cancer patients. Once the full scope of his crime was discovered, it was believed that he had delivered more than 98,000 diluted prescriptions to more than 4,200 patients. Courtney eventually pleaded guilty to tampering, misbranding,

and adulterating drugs. In exchange for Courtney's help identifying his victims (so they could be notified), the government agreed to a binding plea agreement pursuant to which Courtney would be sentenced to 17½ to 30 years.

The sentencing hearing was one of the most emotional events imaginable. It seemed as if every patient—or, in many instances, patients' survivors—wanted to attend. Attendance in the courtroom was limited to four members of the press and Courtney's few supporters, with the balance of the space allocated to the victims. The proceedings were broadcast in another room that was large enough to accommodate everyone else who wanted to observe.

Many of the victims wrote letters, and Judge Smith—as was his custom—read every single one. But a significant number of patients and family members wanted to deliver their victim impact statements in court. The U.S. Attorney's Office organized and pared down the number of individuals who spoke, but even with those efforts, the sentencing hearing lasted nearly three hours. I do not recall a sentencing hearing with so many victims and victim impact statements. And these were particularly gut-wrenching: people who had lost loved ones, people who never got better, people who survived—all had to wonder how much time had been lost and how much quality of life had been diminished because of Courtney's actions. There were plenty of tears; many speakers brought pictures of their loved ones. The anguish and despair were palpable.

The case garnered not just national but also international attention.<sup>13</sup> Many articles about the sentencing quoted the following passage from Judge Smith:

Mr. Courtney ... I don't think any human can understand or comprehend why a person would do what you did. Your crimes are a shock to the conscience of a nation, the conscience of a community, and the conscience of this court. You alone have changed the way a nation thinks: the way a nation thinks about pharmacists, the way a nation thinks about prescription medication, the way a nation thinks about those institutions that we trusted blindly.

He concluded by stating, "Your crimes are a shock to the civilized conscience.... They are beyond understanding." Judge Smith then sentenced Courtney to the maximum sentence permitted by the plea agreement: 30 years.<sup>14</sup>

It is somewhat ironic that the case that might be most commonly associated with Judge Smith was a criminal case, given that he found sentencing to be the most demanding part of the job. He would often say that "sentencing is hard, and it should be. Every

war the United States has fought has been about freedom, and taking away a person's freedom should never be an easy task."

The anonymous civil litigator who would entrust decisions about his own life to Judge Smith recognized the qualities that marked his judicial career: a blend of pragmatism, fairness, compassion, and wisdom. And that litigator is not alone: I and many others who have been privileged to know him sought (and continue to seek) his advice on personal and professional matters. I, for one, cannot think of a single instance in which he steered me wrong.

Judge Smith recently retired after 25 years on the bench (and, as he is proud to mention, nearly 70 continuous years of working). His impact on the legal profession, the Western District of Missouri, and those who knew him will endure. ☺

## Endnotes

<sup>1</sup>Comment #9300 to *Hon. Ortrie D. Smith*, THE ROBIN ROOM (Oct. 12, 2009), <http://www.therobingroom.com/Judge.aspx?ID=1354> (last visited Aug. 5, 2020). And, to prove the hazardous nature of these ratings, two others—one from a prosecutor and one from a criminal defense attorney—were left on consecutive days, suggesting they were left by adversaries in the same case. Both complained about Judge Smith's application of Rule 404(b) of the Federal Rules of Evidence—proving that if a judge can't make everyone happy, he should strive to make everyone equally unhappy.

<sup>2</sup>The primary sources of information in this article are (1) the author's memories of conversations and experiences with Judge Smith and (2) the rough draft of an oral history of Judge Smith taken in 2019.

<sup>3</sup>For those who may not know (or who have forgotten), Hannibal was "the boyhood home of Mark Twain [and] is famously known as the setting for Tom Sawyer and Huckleberry Finn." VISIT HANNIBAL—HANNIBAL, MISSOURI, <https://www.visithannibal.com/> (last visited Aug. 5, 2020).

<sup>4</sup>One of Judge Smith's proudest honors was his induction as an inaugural member of Raytown High School's Hall of Fame. RAYTOWN QUALITY SCHOOLS, ALUMNI HALL OF FAME / MEET THE CLASS OF 2005, <https://www.raytownschools.org/Page/1490> (last visited Aug. 5, 2020).

<sup>5</sup>One was the University of Kansas. On his visit to the school, Judge Smith's player-host was future NFL Hall of Famer Gale Sayers.

<sup>6</sup>There was not a long history of lawyers in Judge Smith's family. His great grandfather, Kirby Smith, had been a Justice of the Peace in Bay, Ark.—a position that did not require any particular education, much less a law degree. Kirby Smith had a single "law book"—a copy of the Arkansas General Assembly's session laws from 1927—that, according to Judge Smith, his great grandfather kept on his

desk to delude people into thinking he knew something about the law. That book sat on the corner of Judge Smith's desk for his entire tenure as a judge; he often said that he kept it there for the same reason as did his great grandfather.

<sup>7</sup>At the time of his death, Professor Jeans was teaching at the Liberty University School of Law. The depth of Judge Smith's appreciation for Professor Jeans is best demonstrated by the memoriam he wrote for the law school. Ortrrie D. Smith, *In Memoriam: Professor James W. Jeans, Sr., Man of Encouragement*, 2 LIBERTY U. L. REV. 1, 61 (2007), [https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1012&context=lu\\_law\\_review](https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1012&context=lu_law_review).

<sup>8</sup>Judge Smith and Kris have four daughters. There is **nothing** in the world (except his grandchildren) that makes Judge Smith prouder than his daughters, and there will likely be some cross words directed by him to the author for "relegating" them to a footnote. But as I have tried to tell him before, the best stuff is in the footnotes.

<sup>9</sup>*United States v. Clarke*, 110 F.3d 612 (8th Cir. 1997).

<sup>10</sup>See *Kline v. City of Kansas City, Mo., Fire Dep't*, 175 F.3d 660 (8th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000); *Widow v. City of Kansas City, Mo.*, 442 F.3d 661 (8th Cir. 2006).

<sup>11</sup>See *St. Louis Effort for AIDS v. Huff*, 996 F. Supp. 2d 798 (W.D. Mo. 2014), *aff'd in part*, 782 F.3d 1016 (8th Cir. 2015).

<sup>12</sup>See *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000), *cert. denied*, 532 U.S. 1024 (2001). Faye Copeland and her husband, Ray, were both convicted of five murders that were part of a modern-day cattle rustling scheme. Ray recruited homeless men to bid on cattle at auctions; he opened checking accounts in their names and provided them with checks to pay for the cattle. Ray sold the cattle before the checks bounced, and the homeless men were killed to prevent further investigation of the fraud. The Copelands' crimes have been chronicled in various articles and documentaries, including on the TV series *Wicked Attraction*. "WICKED ATTRACTION" MURDER AT TWILIGHT (TV EPISODE 2008)—IMDB, <https://www.imdb.com/title/tt1316393/> (last visited Aug. 7, 2020).

<sup>13</sup>Courtney's case was profiled by the television show *American Greed*. "AMERICAN GREED" DILUTED TRUST: ROBERT

COURTNEY (TV EPISODE 2008) — IMDB, <https://www.imdb.com/title/tt1501775/> (last visited Aug. 7, 2020).

<sup>14</sup>While the 30-year sentence was permitted by the plea agreement, it was actually above the top of the guideline range. The sentencing took place in 2002, approximately two years before the Supreme Court decided the sentencing guidelines were not mandatory, *see United States v. Booker*, 543 U.S. 220 (2005), so a detailed analysis explaining the legal basis for the departure was required. Instead of providing that analysis in open court, Judge Smith reduced it to writing. *United States v. Courtney*, 240 F. Supp. 2d 1052 (W.D. Mo. 2002) (subsequent history omitted).