

The background of the cover is a photograph of four surgeons in an operating room. They are wearing green scrubs, masks, and hairnets, focused on a surgical procedure. Large overhead surgical lights illuminate the scene. The title 'Oklahoma Bar JOURNAL' is overlaid on the top half of the image.

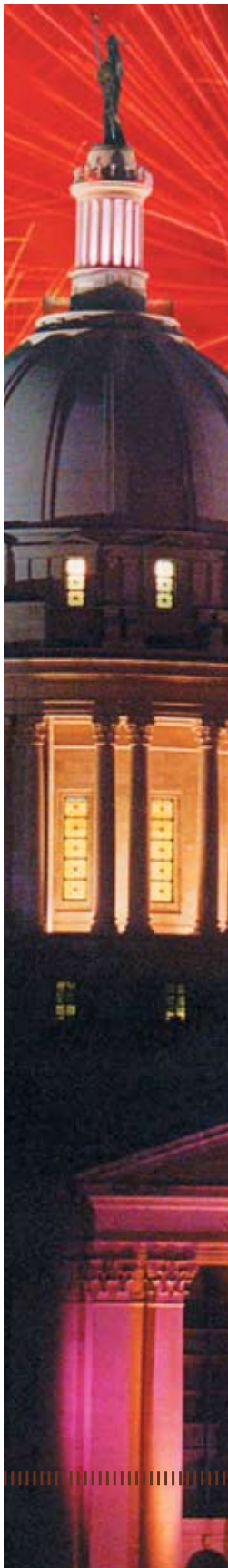
Oklahoma Bar JOURNAL

Volume 78 ♦ No. 21 ♦ August 4, 2007

Health Law

ALSO INSIDE

- Bar Center Building Renovations Begin
- Recent Events Photo Highlights



Calendar of Events

OBA CLE Seminars

AUG. 31 – TULSA

Appellate Practice: Things You Always Wanted to Know But Were Afraid to Ask
6 hrs. of MCLE credit, including 1 hr. of ethics; Crowne Plaza Hotel, 100 E. 2nd St.

SEPT. 6 – TULSA

How to Find the Courthouse: A Framework for Young Lawyers
Co-sponsored with the OBA Young Lawyers Division; 6 hrs. of MCLE credit, including 1 hr. of ethics; Crowne Plaza Hotel, 100 E. 2nd St.

SEPT. 7 – OKC

How to Find the Courthouse: A Framework for Young Lawyers
Co-sponsored with the OBA Young Lawyers Division; 6 hrs. of MCLE credit, including 1 hr. of ethics; Oklahoma Bar Center, 1901 N. Lincoln Blvd.

SEPT. 14 – TULSA

Back to Basics - Updated Family Law from A - Z
Co-sponsored with the OBA Family Law Section; 6 hrs. of MCLE credit, including 2 hrs. of ethics; Crowne Plaza Hotel, 100 E. 2nd St.

SEPT. 21 – OKC

Back to Basics - Updated Family Law from A - Z
Co-sponsored with the OBA Family Law Section; 6 hrs. of MCLE credit, including 2 hrs. of ethics; Oklahoma Bar Center, 1901 N. Lincoln Blvd.

SEPT. 21 – TULSA

The Trial of an Employment Case
6 hrs. of MCLE credit, including 0 hrs. of ethics; Crowne Plaza Hotel, 100 E. 2nd St.

SEPT. 26 – OKC

The New Lawyer Experience: Hit the Ground Running
Co-sponsored with the OBA Management Assistance Program; This course is not eligible for mandatory CLE credit. This is an informational course.; Oklahoma Bar Center, 1901 N. Lincoln Blvd.

SEPT. 27 – OKC

Powerhouse Communication Tools for Today's Women Lawyers: The 2007 Women in Law Conference
Co-sponsored with the OBA Women in Law Committee; 6 hrs. of MCLE credit, including .5 hrs. of ethics; The Skirvin Hotel, One Park Ave.

SEPT. 27 – OKC

The Women Lawyers Club
Co-sponsored with the OBA Women in Law Committee, the OBA Litigation Section and Periakto Productions; 3 hrs. of MCLE credit, including 0 hrs. of ethics; The Skirvin Hotel, One Park Ave.

SEPT. 28 – TULSA

The New Lawyer Experience: Hit the Ground Running
Co-sponsored with the OBA Management Assistance Program; This course is not eligible for mandatory CLE credit. This is an informational course.; Crowne Plaza Hotel, 100 E. 2nd St.

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times at
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August & September

Discovery and Discovery Plans
- Comparison of the Relevant
Rules
by Ed Abel

The Ten Most Important
Employment Cases of the Last
Year
by Jim Priest

Effective Client Communication
in the 21st Century Law Office
by Jim Calloway

When a Judge Should Recuse
and When a Lawyer Should
Ask for Recusal
by Judge Noma Gurich

The Ten Most Frequently
Asked Ethics Questions and the
Answers
by Gina Hendryx

Oil and Gas: Surface v. Mineral
Use
by Eric R. King

How to Recognize a Bad Faith
Case - Plaintiff's Perspective
by Simone Gosnell Fulmer

How to Evaluate a Bad Faith
Case from the Defense
Perspective
by Brandon S. Nichols

HIPAA Rules All Lawyers
Should Know
by Teresa Meinders Burkett

Branching Out in Business: An
Overview of the Oklahoma LLC
by Armand Paliotta

Fundamentals of a Personal
Injury Claim
by Greg A. Farrar

Employment Law and Work-Life
Balance
by Alex B. Long

Conflict of the Security
Interests: Can One Protected
Purchaser Cut Off Another
Protected Purchaser?
by Keith Pearson

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According to www.soundfinancialplan.com, from the MDRT

- Almost 30 percent of the people between ages 35 and 65 will experience a disability that lasts at least 90 days.
- One out of seven people between the ages of 35 and 65 can expect to be disabled for five years or longer.



According to the 2005 AHIP "Guide to Individual Disability Income Insurance"

- At age 40, with an annual salary of \$50,000, the individual who suffers a long term disability can face the loss of over \$1,000,000 in future earnings over an expected 20 years and would also be unable to continue building a desired retirement nest egg.

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"Income Program & Participation"*

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HEALTH LAW

EDITOR: MARTHA RUPP CARTER

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RENOVATIONS BEGIN



So Much to Do and So Little Time to Do It

By Stephen Beam

I don't know about you, but to me the first half of this year has just flown by. Just because the *Oklahoma Bar Journal* hasn't been published lately, doesn't mean the Oklahoma Bar Association hasn't been busy. I want to let you know a few of the things that have been going on these past few months, and a few things that will take place in the next few months.

I am excited to announce that Ben Stein will be coming to the Annual Meeting in November. Mr. Stein will be our featured speaker at the annual luncheon on Nov. 8. The plenary session on Thursday morning is called "Wrongful Convictions: Isolated Events or System Failures?" Tulsa attorney Alan Smallwood will moderate a panel discussion featuring Innocence Project Policy Director Stephen Saloom, Mark Barrett, Oklahoma County District Attorney David Prater, Dennis Fritz and Christy Shepherd. Melissa DeLacerda, Myra Kaufman and Debra Charles have worked tirelessly this entire year to make this meeting a success. I think you will be pleased by the new additions to the Annual Meeting format.

The 10th Annual Solo and Small Firm Conference in June was a huge success. Roger Reneau and Chris Henthorn head the committee that puts on this conference and deserve a great deal of the credit. The conference featured law office management guru Jay Foonberg. He is one of the best speakers we have ever had at the conference. About 200 lawyers and 400 people total, including families, attended this conference. These attendance figures set new records.

Linda Thomas and the Leadership Conference Task Force have almost completed planning for this August event. We received more than 250 nominees for the conference, and we identified 55 new leaders who will receive leadership training. Featured speakers are Mike Turpin and Lt. Gov. Jari Askins. This should be a wonderful event and infuse the OBA with new leadership talent for years to come.

My January President's Message focused on the mental health issues we are having. I am pleased to announce the program started by the OBA received the 2007 Mental Health Innovation Award from The Mental Health Association of Central Oklahoma as the outstanding program of its kind. The South Carolina Bar Association has implemented a similar program

based on what we are doing. Other professional groups have shown an interest in our program, as well. I know our efforts in this area have saved lives.

The American Bar Association is presenting us with an award for our outstanding Law School for Legislators program at the ABA Annual Meeting in San Francisco in August.

**The OBA
has been
very busy
indeed.**

The Board of Governors will receive reports from the Advertising Task Force headed by Jack Dawson, Mentoring Task Force led by John Parsley, Communications Task Force of Melissa DeLacerda and the State Legal Referral Service Task Force chaired by Ditmar Caudle at the August meeting. You will learn more about the reports of those task forces and their recommendations over the next few months.

The Young Lawyers Division program, Wills for Heroes, has gotten off the ground in a big way. I want to thank Gable Gotwals for donating laptops and printers for use in this important project. Training sessions are underway, and the first will signing has taken place at the Yukon Fire Department. The goal of this program is to provide wills free of charge for all law enforcement personnel and firefighters.

As you can see, the OBA has been very busy indeed. There are more surprises in store for the rest of this year. Please make plans to attend the OBA Annual Meeting in Oklahoma City on Nov. 7 - 9. I promise you it will be the best Annual Meeting ever.



President Beam
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AUGUST

- 8 **State Legal Referral Service Task Force Meeting**; 1 p.m.; Oklahoma
Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact:
Dietmar Caudle (580) 248-0202
- 10 **OBA Family Law Section Meeting**; 3 p.m.; Oklahoma Bar Center,
Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 15 **OBA Women in Law Committee Meeting**; 12 p.m.; Oklahoma Bar
Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Elizabeth
Joyner (918) 573-1143
- 16 **OBA Bench and Bar Committee Meeting**; 12 p.m.; Oklahoma Bar
Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack
Brown (918) 581-8211
- OBA Work/Life Balance Committee Meeting**; 12 p.m.; Oklahoma Bar
Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- OBA Government and Administrative Law Section Meeting**;
1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kevin Nelson
(405) 620-0547
- 22 **OBA Diversity Committee Meeting**; 3 p.m.; Oklahoma Bar Center,
Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Linda
Samuel-Jaha (405) 290-7030
- 23 **OBA Legal Intern Committee Meeting**; 3 p.m.; Oklahoma Bar
Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686
- 23-24 **OBA Leadership Conference**; Sheraton Hotel, One North Broadway,
Oklahoma City; Contact: Linda Thomas (918) 337-0947
- 24 **OBA Board of Governors Meeting**; Sheraton Hotel, One North
Broadway, Oklahoma City; Contact: John Morris Williams (405) 416-7000

SEPTEMBER

- 3 **Labor Day** (State Holiday)
- 7 **OBA Awards Committee Meeting**; 11 a.m.; Supreme Court
Courtroom, State Capitol; Contact: Gary Clark (405) 385-5146
- Oklahoma Trial Judges Association Meeting**; 12 p.m.; Oklahoma Bar
Center, Oklahoma City; Contact: Judge Barbara Swinton
(405) 713-7109
- 11 **OBA Bar Center Facilities Committee Meeting**; 9 a.m.; Oklahoma
Bar Center, Oklahoma City; Contact: Bill Conger (405) 521-5845

For more events go to www.okbar.org/news/calendar.htm

The Oklahoma Bar Association's official Web site: **www.okbar.org**

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Walking Your Client through an Advance Directive for Health Care

By Catheryn Koss

High profile disputes over providing or withdrawing life-sustaining treatment have raised awareness of end-of-life issues among law practitioners and the general public. In response, many Oklahoma attorneys are now making advance directives for health care a regular part of the basic estate planning or other legal services they offer clients.

WHO SHOULD COMPLETE AN ADVANCE DIRECTIVE?

Every adult (18 years or older) who has the capacity to execute an advance directive should complete one. Even if your client already has an advance directive, it should be updated using the new form enacted into law¹ in May 2006. While advance directives executed prior to the 2006 changes are still valid,² the new form gives the declarant more options and applies to a broader range of medical situations³.

ADDRESSING CLIENTS' CONCERNS

Clients are often reticent about completing advance directive forms. While no one can or should be forced to execute an advance directive, the following information may address some clients' concerns and encourage them to complete the form.

Explain to your client that an advance directive becomes operative only when he or she is incapable, according to the attending physician and another physician, of making or communicating informed decisions regarding the administration of life-sustaining treatment.⁴ In such a situation, the advance directive gives

the client the power to control what medical treatment he or she will receive and who will represent and advocate for the client with regard to medical care. It will never be used to override the client's own wishes as long as he or she has capacity.⁵

The client should also know that he or she can revoke an advance directive at any time. While a person must be "of sound mind" to execute an advance directive,⁶ revocation is possible regardless of mental capacity.⁷ Revocation is effective once an attending health care provider is informed of the revocation by either the declarant or a witness to the revocation.⁸

Even if the patient declines life sustaining treatment, he or she will still receive medication and treatment to alleviate pain.⁹ The patient will also be provided with food and water orally if medically possible.¹⁰

Finally, a client should understand that an incompetent patient is presumed to have directed health care providers to administer life-sustaining artificial hydration and nutrition.¹¹ This presumption applies even if the

patient is terminally ill or in a permanent vegetative state. Executing an advance directive overcomes this presumption and allows the declarant to decide for him or herself. (I have seen several reluctant people change their minds about filling out advance directives based on the thought of politicians making the decision for them.)

HELPING YOUR CLIENT DECIDE WHETHER OR NOT TO RECEIVE LIFE-SUSTAINING TREATMENT

The first section of the advance directive form allows the declarant to elect or decline life-sustaining treatment in advance if he or she is ever faced with any of the following medical conditions:

- ♦ A **terminal condition**, meaning one that is incurable and irreversible. A patient's attending physician and another physician must certify that, even if medically treated, the condition will cause death within six months.
- ♦ A **persistently unconscious state**, meaning the patient has no awareness of self or surroundings. The patient cannot feel hunger, thirst or pain, can only make involuntary movements, and will never regain consciousness.



- ♦ An **end-stage condition**, meaning an untreatable condition such as Alzheimer's disease that causes severe and permanent deterioration resulting in incompetency and complete physical dependency.

For each condition, the declarant can elect to have all life-sustaining treatment administered, decline all life-sustaining treatment or elect only artificial nutrition and hydration. Life-sustaining treatment is medical treatment administered for the purpose of prolonging life. Examples include dialysis (removal of waste products from the blood) and medical ventilation (use of an artificial breathing machine). Life-sustaining treatment does not include pain management or comfort care. Artificial nutrition and hydration is treatment administered when a patient is no longer able to eat or drink by mouth. Sometimes referred to as "tube feeding," artificial nutrition and hydration is an invasive medical procedure that can cause serious side effects including infection, cramps, bloating and pneumonia.

Deciding whether to receive life-sustaining treatment ultimately involves reflecting on what makes life worth living. Each person's values and wishes are unique; there is no "right" answer. When discussing these issues with your client, you may want to ask whether he or she would want life-sustaining treatment in the following situations:

- ♦ If he or she could no longer communicate or recognize loved ones?
- ♦ If he or she were bedridden and required 24-hour care?
- ♦ If he or she were in severe pain and discomfort most of the time?

One advantage of the new advance directive form is that information regarding quality of life may be included in the "Other" section to

“Deciding whether to receive life-sustaining treatment ultimately involves reflecting on what makes life worth living.”

inform health care providers and health care proxies of the declarant's unique definition of what makes life worth living. What clients may want to include in this section is discussed in more detail below.

WRITING SPECIFIC INSTRUCTIONS

The advance directive form provides space where the declarant may include specific instructions such as:

- ♦ **Pain Management:** The declarant can authorize the administration of pain medication without regard to risk of addiction or side effects that may hasten death.
- ♦ **Religious Preferences:** Clients may want to include specific instructions in accordance with their faiths. For example, a Jehovah's Witness may refuse all blood transfusions. Language tailored to different beliefs can be found on numerous religious Web sites.
- ♦ **Pregnancy:** If a woman is pregnant, she will be provided with life-sustaining treatment, including artificially administered hydration and nutrition, unless she specifies in her own words that such treatment is to be withheld or withdrawn even if pregnant.¹²
- ♦ **Particular Procedures:** The declarant can authorize or refuse particular medical procedures or treatments such as surgery, antibiotics or dialysis.
- ♦ **Other Circumstances:** The declarant may be able to give the health care proxy broader authority to make decisions about life-sustaining treatment in situations not addressed elsewhere in the form by including language such as, "I authorize my health care proxy to elect to withhold or withdraw life-sustaining treatment, including artificial hydration and nutrition, if he/she determines that any possible benefit of such treatment would be substantially outweighed by the likely detrimental side effects."

CHOOSING A HEALTH CARE PROXY

The second section of the advance directive form allows the declarant to designate a health care proxy and alternate health care proxy who will make medical decisions if the declarant is incapacitated. The new advance directive form allows the health care proxy to make all medi-

cal decisions for an incapacitated patient, not just decisions about life-sustaining treatment.

Some considerations to discuss with your client when selecting a health care proxy include:

- ♦ Is this person at least 18 years old and competent?
- ♦ Is the person willing to serve as a health care proxy?
- ♦ Will the person be available if needed?
- ♦ Does the person understand the declarant's values and wishes and will he or she be emotionally able to carry them out?
- ♦ Is this someone the declarant trusts absolutely?
- ♦ Will the person be able to ask questions of healthcare providers and advocate for the declarant?

If one of the health care proxies is around the same age as or older than the declarant, you should suggest that the other proxy be significantly younger in case the older health care proxy predeceases the declarant. Although some clients may wish to do so, generally it is not a good idea to name the declarant's minister/religious advisor, doctor or attorney unless that person is also a close friend or family member.

Sometimes clients may choose a health care proxy based on what they think others would want. For example, a client may say, "I think my son knows me better, but I should choose my daughter because I don't want to hurt her feelings." Encourage your clients to base their decisions on what is best for them, not on what others may think or want.

ANATOMICAL GIFTS

The third section of the advance directive form gives the declarant the option to donate his or her entire body or designated body parts. If your client wished to donate his or her body to a medical school or research facility, arrangements for such a donation should be made ahead of time. Generally, a person cannot be both an organ donor and donate his or her body to science.

There are thousands of people on organ transplant waiting lists. Each donor will be evaluated for suitability when the time comes, and there is no set age limit. Some medical

conditions will likely make a potential donor ineligible, including HIV/AIDS, active cancer or systemic infection.

Organ and tissue donation will only occur after death, defined as either the point at which all circulation and breathing functions have permanently stopped or when all brain function, including the brain stem, have permanently stopped. Being an organ donor will in no way affect the medical care a patient receives while alive. The patient's survivors will never be billed for the costs associated with organ donation. An organ donor can still have an open casket and be buried. If relevant, a client should check with his or her physician to determine whether a direction to donate organs would be compatible with a wish to die at home rather than in a medical facility.

MAKING SURE YOUR CLIENT'S WISHES ARE KNOWN AND HONORED

Once a client completes an advance directive, he or she should keep a copy in an easily accessible place. EMS personnel are trained to look for documents on refrigerators and in glove compartments. Copies should also be given to your client's primary care physician and to each named health care proxy. You, as the attorney, should also keep a copy in the client's file.

Other documentation that may be useful include a list of everyone who has a copy of the advance directive and a card to be carried in a purse or wallet indicating that the patient has an advance directive, where it can be found and the contact information for his or her primary care physician and health care proxies.

CONCLUSION

Completing the advance directive form is only the first step. Encourage your clients to discuss their wishes and instructions with their physicians and loved ones. Addressing these issues early, although sometimes difficult, can prevent conflict among family members and give the decision-makers peace of mind in the event of a medical crisis.

Pre-printed advance directive forms can be ordered at no cost from the Oklahoma Department of Human Services, fax number (405) 962-1740. Forms can also be downloaded from

the Web sites of several organizations, including the Oklahoma Bar Association,¹³ Senior Law Resource Center,¹⁴ and Oklahoma Palliative Care Resource Center¹⁵ (English, Spanish and Vietnamese forms available).

The Oklahoma Palliative Care Resource Center,¹⁶ an excellent online source for Oklahoma-specific information about end-of-life issues, also provides links to articles, organizations and pertinent Oklahoma law.

More information, including a written exercise designed to help a person make end-of-life decisions, can also be found on the Incapacity and End-of-Life Planning section of the Oklahoma Senior Law Resource Center's Web site.¹⁷

1. 63 O.S. § 3101.4 (2006)

2. 2006 OK AG 32 (2006)

3. The Living Will section of the old form (63 O.S. §3101.4 (2004), *superseded*) only applied to patients who were either terminally ill or persistently unconscious. The Living Will section of the current form applies to those two situations as well as to patients who have an "end-state condition." 63 O.S. § 3101.4 (2006)

4. 63 O.S. § 3101.5(A) (2006)

5. 63 O.S. § 3101.8(A) (2006)

6. 63 O.S. § 3101.4(A) (2006)

7. 63 O.S. § 3101.6(A) (2006)

8. *Id.*

9. 63 O.S. § 3101.8(B) (2006)

10. *Id.*

11. 63 O.S. § 3080.3 (2006)

12. 63 O.S. § 3101.8(C) (2006)

13. www.okbar.org/public/brochures/AdvDirective2006.pdf
(Home page www.okbar.org)

14. www.charityadvantage.com/Senior_Law_Resource_CenterGEYIDZ/AdvanceDirectiveforHealthCare.doc
(Home page www.OklahomaSeniorLaw.org)

15. <http://okpalliative.nursing.ouhsc.edu/>

16. *Id.*

17. http://charityadvantage.com/Senior_Law_Resource_Center-GEYIDZ/IncapacityandEndofLif.asp

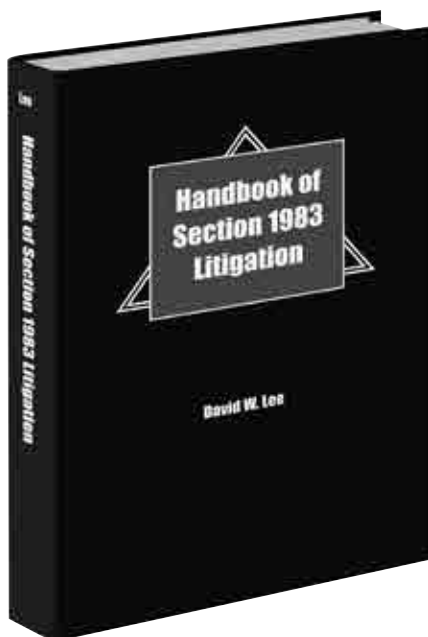
ABOUT THE AUTHOR



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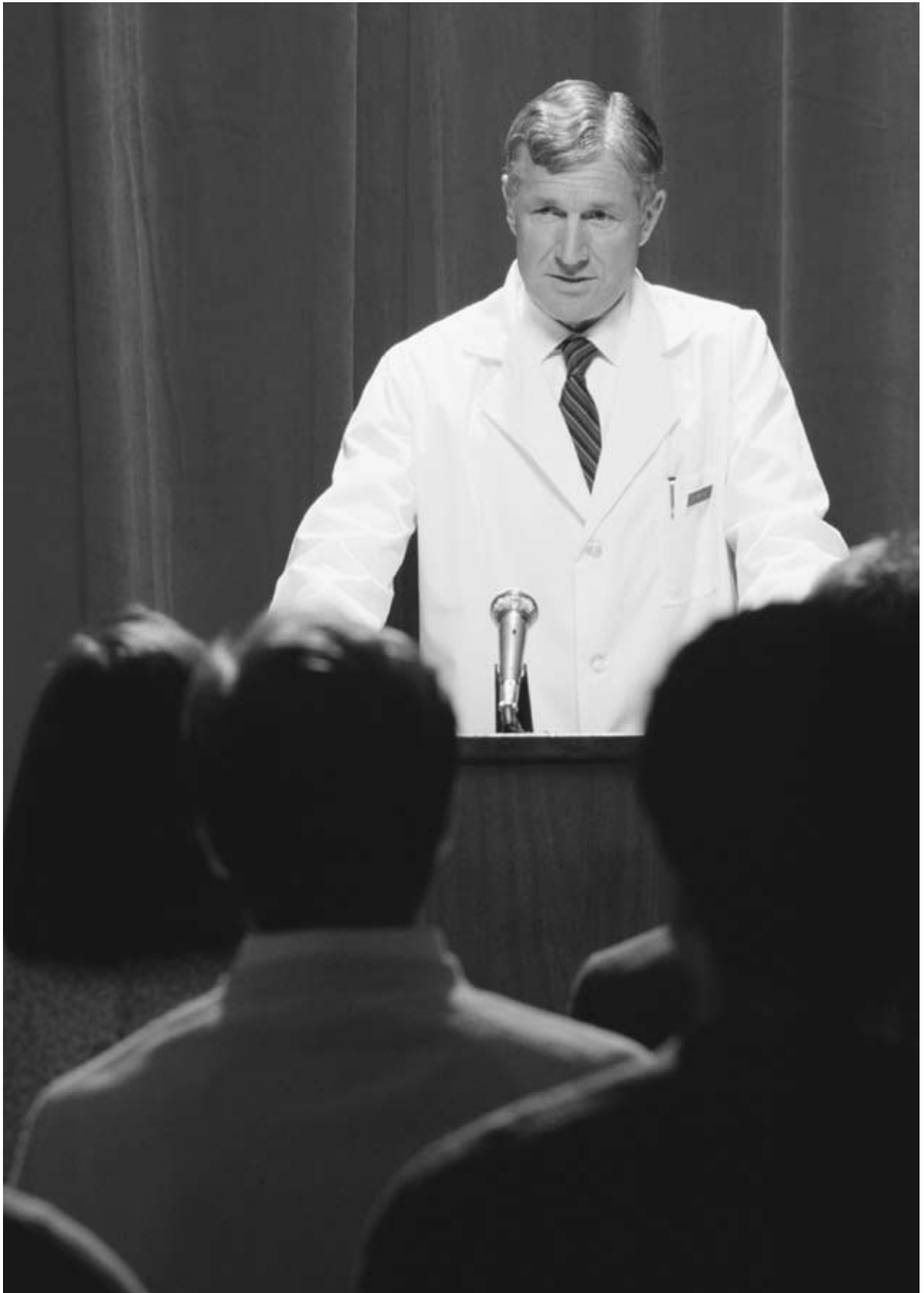
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The Hydration and Nutrition for Incompetent Patients Act: Oklahoma's 'Feeding Tube Forever' Law

By Retired Judge Janice P. Dreiling

Oklahoma law regarding health care and advance directives cannot be fully understood unless the law is read within the context of the "Hydration and Nutrition for Incompetent Patients Act,"¹ hereinafter referred to as "HNA."

HNA is the elephant in the room in any discussion of "end-of-life" care in Oklahoma. There is no case law to date that interprets HNA. And, there are no similar statutes in the other 49 states.

THE "PRESUMPTION" OF THE OKLAHOMA HYDRATION AND NUTRITION FOR INCOMPETENT PATIENTS ACT

Originally enacted in 1987, HNA is relatively short, barely filling four pages in the Oklahoma Statutes Annotated. The crux of the HNA is the following presumption: "It shall be presumed that every incompetent patient has directed his health care providers to provide him with hydration and nutrition to a degree that is sufficient to sustain life."²

This "presumption" makes every Oklahoman a potential Terri Schiavo.³

There have been no substantive amendments since HNA was passed into law 20 years ago.

Nutrition is defined as "sustenance administered by way of the gastrointestinal tract." Hydration is not otherwise defined.⁴

The purpose of this paper is to present the HNA by analyzing the above presumption and its exceptions, the terms and definitions necessary to understand HNA, the 2006 Oklahoma Advance Directive Act's treatment of artificially administered nutrition and hydration, some related statutes and current facts about feeding tubes.

WHAT ARE THE EXCEPTIONS? WHEN IS THE PRESUMPTION INAPPLICABLE?

In plain English, HNA requires a "feeding tube forever" for every Oklahoman who does not meet one of the following five statutory exceptions.

Exception 1) "The attending physician of the incompetent patient knows that the patient, when competent, decided on the basis of information sufficient to constitute informed consent that artificially administered hydration or artificially administered nutrition should be withheld or withdrawn from him."⁵

Exception 2) "A court finds by clear and convincing evidence that the patient, when competent, decided on the basis of information sufficient to constitute informed consent that artificially administered hydration or artificial-

“ If you are a minor or an otherwise incompetent adult, there is no way to ensure against becoming a Terri Schiavo. ”



ly administered nutrition should be withheld or withdrawn.”⁶

Exception 3) An advance directive has been executed pursuant to the Oklahoma Natural Death Act, the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, or the Oklahoma Advance Directive Act *specifically authorizing the withholding or withdrawal of nutrition and/or hydration*.⁷ (emphasis added)

Exception 4) “In the reasonable medical judgment of the incompetent patient’s attending physician and a second consulting physician, artificially administered hydration or artificially administered nutrition will itself cause severe, intractable, and long-lasting pain to the incompetent patient or such nutrition or hydration is not medically possible.”⁸

Exception 5) “In the reasonable medical judgment of the incompetent patient’s attending physician and a second consulting physician: (a) the incompetent patient is chronically and irreversibly incompetent, (b) the incompetent patient is in the final stage of a terminal illness or injury, and (c) the death of the incompetent patient is imminent.”⁹

As long as HNA is the law in Oklahoma, the only way a competent adult can ensure against the possibility of being a Terri Schiavo is to execute an advance directive specifically authorizing the withholding or withdrawal of artificial hydration and nutrition under certain circumstances.

If you are a minor or an otherwise incompetent adult, there is no way to ensure against becoming a Terri Schiavo. Only a competent person 18 years of age or older may execute an advance directive.¹⁰

HNA makes it necessary for an adult, while competent, to take affirmative action in order

for exceptions one and three to overcome the presumption.

Exception one contemplates a relationship between an adult patient and his/her physician during which there has been at least a memorable conversation in which the patient clearly communicated to the physician his/her intention that artificial hydration and nutrition “sufficient to sustain life” not be administered under certain circumstances after the patient can no longer communicate. In other words, the patient has communicated his/her intention not to have a feeding tube.

Exception three allows for the presumption to be overcome if and only if the patient has executed an advance directive that specifically authorizes the withholding or withdrawal of nutrition and/or hydration. An advance directive form executed pursuant to any of the three Oklahoma acts providing for an advance directive is enough, assuming the advance directive addresses the withholding or withdrawal of nutrition and/or hydration in specific and separate words.¹¹ It is not enough for an advance directive to use the words “life-sustaining treatment” if artificial hydration and nutrition are not separately addressed.

Exception two anticipates litigation and permits a finding by a court that would overcome the presumption. Obviously, the adult patient, while competent, had to have communicated with at least someone that he/she would not want a feeding tube under certain circumstances.

Exception four contemplates two physicians concluding that the administration of artificial hydration and nutrition is not medically possible or would cause long-lasting pain. An example would be a patient who is extensively and severely burned.

Finally, exception five requires two physicians to conclude and agree that the incompetent patient cannot regain competency, and the patient is in the "final stage" of a terminal illness or injury, and that death is "imminent."¹²

To summarize, HNA's presumption can only be overcome if the patient has executed an advance directive specifically authorizing withdrawal or withholding of a feeding tube OR if the patient has successfully communicated his/her wishes to withdraw or withhold to a physician willing to honor those wishes OR a court finds by clear and convincing evidence the patient expressed such wishes to others OR administration of the feeding tube is medically impossible (or will cause severe permanent pain) OR the patient cannot regain competency and death is imminent.

To the extent an adult has neither executed an advance directive specifically authorizing withdrawal or withholding of the feeding tube nor communicated such wishes to a physician or to others, the legal presumption is "feeding tube forever" unless the feeding tube is medically impossible OR death is imminent.

If the presumption and its exceptions were not abundantly clear as to HNA's statutory intent, 63 O.S. 3080.5(C) (the last section of HNA) expands and underscores HNA's intent by the following statement: "No guardian, public or private agency, court, or any other person shall have the authority to make a decision on behalf of an incompetent patient to withhold or withdraw hydration or nutrition from said patient except in the circumstances and under the conditions specifically provided for in Section 3080.4 of this title" (that being the section covering the above five exceptions).

Current literature regarding advance directives estimates that 80 percent of the adult population does not have an advance directive.¹³ If such estimates are accurate and HNA is enforced by health care providers, one can only imagine the staggering number of Oklahomans who are potentially impacted.

WHO IS AN "INCOMPETENT PATIENT?"

HNA's "presumption" includes "every incompetent patient." 63 O.S. 3080.2(4) defines "incompetent patient" as "any person who is a minor, or has been declared incompetent to make decisions affecting medical treatment or care, or in the reasonable judgment of the

attending physician, is unable to make decisions affecting medical treatment or other health care services."

The above definition includes all persons under 18 years of age and all adults under general guardianship. It would likely include some adults under limited guardianship as well as certain adults who have been adjudicated an "adult in need of protective services." And, it includes any adult found by his/her attending physician to be unable to make medical or health care decisions.

It is noteworthy that 63 O.S. 3080.2(4)(c) allows an adult patient's attending physician alone to decide if and when the patient is unable to make medical or health care decisions. Thus, the attending physician alone determines whether the patient is an "incompetent patient" pursuant to HNA. The attending physician alone determines whether the patient is subject to the presumption of HNA.

In contrast, the Advance Directive Act requires the attending physician and another physician to determine the patient is no longer able to make decisions regarding medical treatment. If two physicians make that decision, the patient becomes a "qualified patient" whose advance directive would then go into effect.¹⁴

WHO/WHAT IS A "HEALTH CARE PROVIDER" UNDER OKLAHOMA LAW?

HNA's "presumption" directs "health care providers" to provide incompetent patients with "hydration and nutrition to a degree that is sufficient to sustain life." But, HNA contains no definition of "health care provider."

The 2006 Advance Directive Act defines "health care provider" as follows: "a person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession."¹⁵

Oklahoma's Do-Not-Resuscitate Act, enacted in 1997, defines "health care provider" as "any physician, dentist, nurse, paramedic, psychologist, or other person providing medical, dental, nursing, psychological, hospice, or other health care services of *any kind* (emphasis added)."¹⁶

Clearly, a "health care provider" under Oklahoma law includes a wide range of professionals and other persons who are employed by

businesses and health care agencies for the purpose of providing medical care and treatment. Among these are nursing home administrators and their employees.

THE 2006 ADVANCE DIRECTIVE ACT AND ARTIFICIALLY ADMINISTERED NUTRITION AND HYDRATION

Artificially administered nutrition and hydration were recognized by the U.S. Supreme Court as a form of medical treatment in *Cruzan v. Director, Missouri Department of Health* in 1990.¹⁷ The language in the 2006 Oklahoma Advance Directive Act includes artificially administered nutrition and hydration as a life-sustaining treatment. Specifically, the prescribed advance directive form in the 2006 act repeatedly uses the language “life-sustaining treatment, including artificially administered nutrition and hydration.”

The Oklahoma Advance Directive Act renamed and amended the previous Oklahoma Rights of the Terminally Ill and Persistently Unconscious Act. Curiously, one of the amendments eliminated the definition of “life-sustaining treatment.” Prior to the Advance Directive Act’s effective date in May 2006, the older act defined “life-sustaining treatment” as follows: “Any medical procedure or intervention, including but not limited to the artificial administration of nutrition and hydration if the declarant has specifically authorized the withholding and withdrawal of artificially administered nutrition and hydration, that when administered to a qualified patient, will serve only to prolong the process of dying or to maintain the patient in a condition of persistent unconsciousness.”

The writers of the Oklahoma Advance Directive Act deleted the definition in its entirety. Therefore, under current law, “life-sustaining treatment” has no definition. At a recent seminar the explanation was offered by one of the writers that by not defining the term, the concept could more easily include new medical technologies not presently known. In that the old definition used the words “any medical procedure or intervention,” that explanation is difficult to understand.

OTHER RELATED STATUTES

There are other statutes which relate to HNA which raise questions.

In the Guardianship and Conservatorship Act, 30 O.S. 3-119 limits the powers of a guardian. It states “no guardian shall have the power to consent on behalf of the ward to the withholding or withdrawal of life-sustaining procedures as defined by the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act from the ward.” There are three exceptions to that prohibition. The first requires a guardian to obtain “specific authorization of the court having jurisdiction over the guardianship proceedings” in order for the guardian to authorize withdrawal or withholding of life-sustaining treatment. The guardian is required to make application to the court for a separate order “only at such time when the ward is in need of life-sustaining treatment.” The second exception allows a guardian to enforce the advance directive of the ward, if the ward had executed an advance directive while competent. The third allows a guardian to enforce a do-not-resuscitate order.

“The guardian is required to make application to the court for a separate order...”



Section 3-119 needs to be amended to recognize the 2006 Oklahoma Advance Directive Act and the fact that the definition of “life-sustaining procedures” no longer exists.

Nevertheless, absent an advance directive or a DNR order, the present law still prohibits a guardian from consenting on behalf of the ward to the withholding or withdrawal of life-sustaining procedures without going back to court at the time the ward is in need of life-sustaining procedures. Having presided over the probate docket in Washington County for over 20 years, I do not recall a guardianship case in which a private guardian made application to the court for an order authorizing the withholding or withdrawal of life-sustaining treatment for the

ward. I am confident that life-sustaining treatment, including artificial hydration and nutrition, was withdrawn or withheld in some of those cases at one time or another. But, there was no rush to the courthouse for permission.

The only cases in which I was asked to approve withholding or withdrawal of life-sustaining treatment, including artificially administered hydration and nutrition, were adult protective services cases in which the Department of Human Services was the guardian or in deprived child cases in which DHS had legal custody of the child.

Another statute that raises questions is found in the "Protective Services for the Elderly and for Incapacitated Adults Act,"¹⁸ otherwise known as the Adult Protective Services Act. It states: "*Under no circumstances shall the court authorize the Department (Department of Human Services), pursuant to this subsection, to consent or deny consent to a Do-Not-Resuscitate order or the withdrawal of hydration or nutrition or other life-sustaining treatment although the court retains jurisdiction to hear such matters under applicable law (emphasis added).*"

A lot could be said about the wording of the above section of the Adult Protective Services Act. I will limit my comments to three. One, by the use of "withdrawal" and not "withholding," does the statute contemplate that a court may authorize withholding life-sustaining treatment, including a feeding tube, but may not authorize withdrawal once the feeding tube is in place? Two, the statute is in direct conflict with existing statutory language in both the Advance Directive Act and the Do-Not-Resuscitate Act. "Under no circumstances" tells me that even if the adult involved has a previously executed valid advance directive or "DNR order" that the court cannot honor it. Three, I respectfully suggest the language is in violation of the separation of powers.

THE USE OF FEEDING TUBES

According to a June 1, 2006, article in *Geriatrics*, feeding tubes (percutaneous endoscopic gastrostomy tubes, commonly referred to as PEG tubes) are being placed in patients with increasing frequency. In 1989, 15,000 patients in the U.S. were on PEG tubes; in 2000, there were more than 216,000 patients on PEG tubes. According to the article, approximately 30 percent of all PEG tubes are placed in dementia

patients. And, as many as 10 percent of institutionalized older patients are being tube fed.¹⁹

SUMMARY

To ensure against a "feeding tube forever" in the future, a competent adult in Oklahoma has to execute an advance directive specifically authorizing the withholding or withdrawal of artificially administered hydration and nutrition. Without such an advance directive, unless one of the other four exceptions to the HNA's presumption applies, Oklahoma law today requires a feeding tube to sustain every incompetent patient until the patient's death.

1. 63 O.S. 3080.1 – 3080.5.

2. 63 O.S. 3080.3.

3. Florida woman who was in a persistent vegetative state for over a decade and whose feeding tube was ultimately removed after special legislation in Congress required her case be reviewed in federal court. She died in 2005.

4. 63 O.S. 3080.2.

5. 63 O.S. 3080.4(A)(1).

6. 63 O.S. 3080.4(A)(2).

7. 63 O.S. 3080.4(A)(3)(4)(5).

8. 63 O.S. 3080.4(A)(6).

9. 63 O.S. 3080.4(A)(7).

10. 63 O.S. 3101.4(A).

11. The Oklahoma Advance Directive Act (63 O.S. 3101.1 et seq) became effective in May 2006, amending and renaming the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act which was enacted in 1992 and which repealed the Oklahoma Natural Death Act. All three acts provide for advance directives. Advance directive forms prescribed by both of the older acts are still valid but limited to their terms.

12. *Merriam-Webster's Collegiate Dictionary*, 11th Edition, defines "imminent" as "ready to take place."

13. "Enough: The Failure of the Living Will," *Hastings Center Report*, March-April 2004, Angela Fagerlin and Carol E. Schneider.

14. 63 O.S. 3101.3(10).

15. 63 O.S. 3101.3(5).

16. 63 O.S. 3131.3(8).

17. 110 S.Ct. 2841.

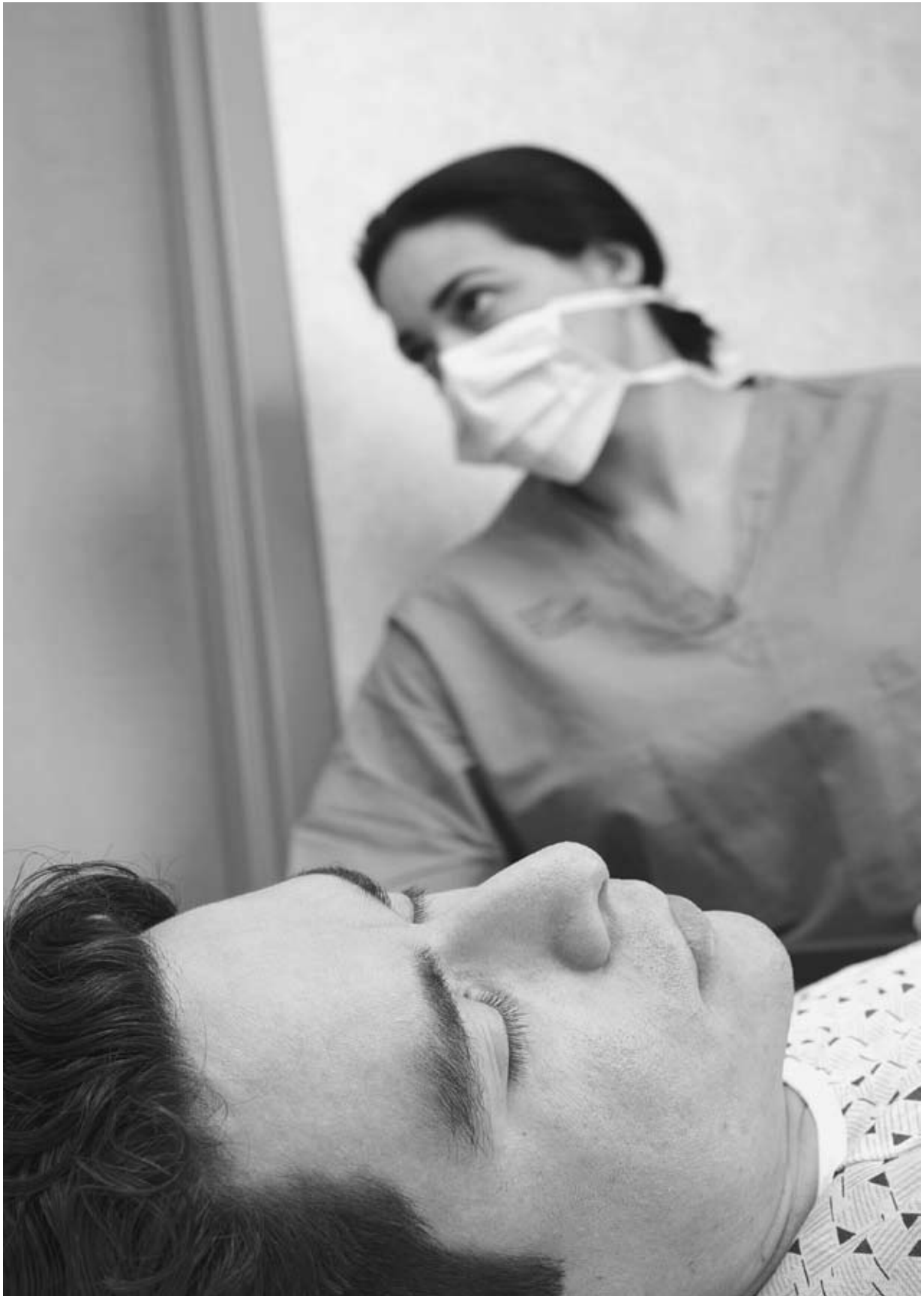
18. 43A O.S. 10-108(A)(2).

19. "To Peg or Not to Peg," *Geriatrics*, June 1, 2006, by Frank A. Cervo, MD, Leslie Bryan, MD, and Sharon Farber, MD.

ABOUT THE AUTHOR



Janice Parks Dreiling was associate district judge, Washington County, 1983 to 2003, when she became district judge for the 11th Judicial District. She was presiding judge for the Northeastern Administrative District and chairman of the Assembly of Presiding Judges in 2005 and 2006. A graduate of Kansas State University and the University of Tulsa, Dreiling was past-president of the Oklahoma Judicial Conference and a member of the attorney general's 2004 Advisory Committee on End-of-Life Care.



The Paradox of ‘Emergency Preparedness’: Can We Be Prepared for a Public Health Emergency?

By Martha Rupp Carter

An “emergency” is sudden, urgent, usually unexpected and requires immediate action.¹ As such, preparing for one seems at least somewhat unlikely. The traumas of Toronto’s SARS epidemic, 9/11 and Hurricane Katrina cumulatively increased public awareness about how important public health preparedness is.

Public health experts predict another global outbreak of a flu strain for which we have no immunity and no vaccine is inevitable in the near future. “Bird flu,” or avian H5N1 influenza, is feared as this next pandemic.² The six months needed to develop a vaccine once an outbreak begins³ is certainly basis for alarm. Because a quick and ready vaccination fix will not be available, implementation and enforcement of public health measures are needed to endure and prevail. Who will implement those measures and manage such an emergency?

According to Health and Human Services Secretary Mike Leavitt, “When it comes down to managing the public health in a pandemic situation, it will be up to local public health authorities.”⁴ An examination of Oklahoma’s public health structure and powers is thus in order to understand the framework for preparedness.

THE FRAMEWORK: OKLAHOMA’S PUBLIC HEALTH STRUCTURE

The Oklahoma State Commissioner of Health is responsible for general supervision of Okla-

homans’ health and is the executive officer of the State Department of Health.⁵ The commissioner coordinates the State Department of Health’s activities with the federal government and other states and may accept and use their grants of money, personnel and property for public health and control of disease.⁶

Oklahoma’s local level includes county boards of health, county health departments, county superintendents of health, district departments of health, cooperative departments of health, governing boards of cities or incorporated towns, city-county boards of health and city-county departments of health.

The office of county superintendent of health is created for each county that does not maintain a county department of health and participate in maintenance of a district department of health.⁷ The commissioner appoints county superintendents who serve at the commissioner’s pleasure.⁸

A county board of health, comprising five appointed members, is created in each county.⁹ Among other duties, a county board of health

must establish and maintain a county department of health if in the best interests of the county.¹⁰ Funding for a health department may be provided from the county general fund and proceeds of a levy under the Oklahoma Constitution at Article X, Section 9a.¹¹ There are 69 county health departments in Oklahoma.¹² A county health department, or any district or cooperative department of health, is to operate under the direction of a medical director. The commissioner appoints and supervises medical directors.¹³

The governing board of every Oklahoma city and town is empowered to serve ex-officio as the board of health for the municipality. They can appoint and fix the duties and compensation of a health officer and other personnel to enforce public health ordinances.¹⁴ The governing boards may adopt public health ordinances and rules not inconsistent with State Board of Health rules, and, they may also enforce laws and rules required by the commissioner.¹⁵

Oklahoma counties and cities of sufficient populations may jointly create a city-county board of health,¹⁶ and, pursuant to an agreement, a city-county health department; they are authorized to provide for the department's operation and selection of a director.¹⁷ There are two city-county health departments, the Tulsa City-County Health Department and the Oklahoma City-County Health Department.

Under the supervision of its director, a city-county health department is to enforce and administer all municipal and county ordinances, rules and regulations, state laws, and State Board of Health rules and regulations.¹⁸ The director of a city-county health department is to direct and supervise all public health activities in the county, except for incorporated cities and towns not in an agreement to operate their health department.¹⁹

A city-county board of health is to recommend ordinances, rules and regulations on public health preservation and promotion to the governing board of any city or town in its jurisdiction and to the board of county commissioners of the county within which it exists. The board is to assist in the formulation and adoption of uniform health ordinances, rules and regulations within its jurisdiction.²⁰

GENERAL PUBLIC HEALTH DUTIES AND POWERS

The matters on which the State Board of Health is authorized to adopt rules and regulations are illustrative and include: recommended immunization procedures; quarantine measures; exclusion of children from school; regulation of public meetings and gatherings in epidemic situations; regulation of vectors; control of vehicles capable of transmitting a communicable disease; detection and diagnosis of communicable disease; carriers of disease; disposal of infected body wastes and other materials; fumigation, cleaning and sterilization, and disinfection; and other necessary measures to prevent and control communicable disease.²¹

The commissioner's statutory duties include:

- 1) control, suppress, prevent the occurrence or spread of communicable, contagious or infectious disease;
- 2) segregate and isolate persons having or suspected of having such disease;
- 3) designate places of quarantine or isolation;
- 4) abate any nuisance injurious to public health;
- 5) investigate and study causes of disease and epidemics, mortality and the effects of localities, employment, conditions and circumstances on the public health;
- 6) investigate conditions of health, sanitation and safety of schools, prisons, public institutions, mines, public conveyances, camps, places of group abode, and all buildings and places of public resort, and recommend, prescribe and enforce health, sanitation and safety measures; and
- 7) advise state and local governments on health, sanitation and safety.²²

The commissioner is authorized to hold hearings, issue orders, and has right of access to any premises for public health purposes.²³ The commissioner can conduct investigations, and inquiries.²⁴ The commissioner is empowered to issue subpoenas for witness attendance and production of books and records; a contempt proceeding may be filed in district court against any person who disobeys.²⁵ The public health code empowers the district judge to punish offenders for contempt.

“...must exclude from private or public schools persons with communicable disease until the period of isolation or quarantine has expired, or, until the local health official permits.”



The commissioner can revoke, cancel or suspend for one year the public health code license or permit of any holder violating the code or any State Board of Health rule or standard.²⁶

The county superintendent's powers and duties, performed under the commissioner's supervision, include:

- 1) abolish nuisances that are inimical to public health;
- 2) isolate persons infected with dangerous, communicable, infectious or contagious diseases;
- 3) control, suppress or prevent the occurrence or spread of such diseases;
- 4) enforce emergency health regulations of the county board of health;
- 5) enforce the Oklahoma Public Health Code and State Board of Health rules and regulations applicable to the officer's county; and
- 6) perform other duties and functions required by the commissioner.²⁷

The medical director of a county health department and the director of a city-county health department are endowed with the powers, authority and duties conferred on county superintendents.²⁸

Oklahoma's municipalities may enact and enforce ordinances, rules and regulations for public health not inconsistent with state law.²⁹ Municipalities may establish and regulate hospitals. And, they may make regulations to prevent the introduction of contagious diseases into the municipality and enforce quarantine laws within five miles of municipal limits.³⁰

Oklahoma's governor, the commander-in-chief of the state militia, is authorized to call out the militia for purposes including protecting the public health.³¹

VIOLATING LOCAL HEALTH OFFICER ORDER CARRIES CRIMINAL PENALTY

When a local health officer determines or suspects that a person has a communicable disease, he may impose a quarantine.³² Any person detained in quarantine who leaves the quarantine grounds or willfully violates any quarantine law or regulation commits a misdemeanor offense.³³

It is also a misdemeanor crime to be affected with any contagious disease and expose others in any public place or thoroughfare except in a necessary removal in a manner not dangerous to the public health.³⁴ A local health officer can cause a person infected with a communicable disease to be removed to a hospital or similar place unless the person is sick in his own place of residence or cannot be moved without danger to his life.³⁵ No one can remove a person with a communicable disease from the place where the person is sick to any other place except in accordance with State Board of Health rules and regulations.³⁶

Parents, guardians and teachers must exclude from private or public schools persons with communicable disease until the period of isolation or quarantine has expired, or, until the local health official permits.³⁷

The State Board of Health is authorized to adopt rules for quarantine, isolation, impounding, immunization and disposal of animals to prevent and control zoonotic disease.³⁸ The commissioner can order quarantine, isolation, impounding, immunization or disposal of any animal determined to be the source of zoonotic disease.³⁹ Violating an order is a misdemeanor offense.⁴⁰ District courts may grant injunctive relief to compel compliance with the commissioner's order.⁴¹

Willfully failing or refusing to comply with an order of the commissioner, the State Board of Health or a local health officer, or, violating the terms and conditions of a quarantine or embargo are misdemeanor offenses.⁴² A person who does an act for which a license or permit is required under the public health code without the license or permit commits a misdemeanor offense.⁴³

District courts are authorized to grant injunctive relief to prevent a violation or to compel compliance with any provision of the public health code or any rule or order issued pursuant to the code.⁴⁴ In specified circumstances, the State Health Department has the authority to assess a penalty of \$10,000 per day of non-compliance with an order.⁴⁵

SPECIALIZED EMERGENCY MANAGEMENT STATUTES

Catastrophic Health Emergency Powers Act

Oklahoma's Catastrophic Health Emergency Powers Act (CHEPA)⁴⁶ is activated upon the occurrence of a "catastrophic health emergency"⁴⁷ as declared by the Oklahoma governor in an executive order.⁴⁸ "Catastrophic health emergency" means in part an imminent threat of an illness or health condition caused by a nuclear attack, bioterrorism or a chemical attack.⁴⁹ That definition combined with the definition of "bioterrorism"⁵⁰ allows CHEPA to operate for criminal conduct rather than naturally occurring events or disasters.

However, effective Nov. 1, 2007, CHEPA will apply to a pandemic occurrence as well as due to expansion of the definition of "catastrophic health emergency" to cover "the appearance of a novel or previously controlled or eradicated agent or biological toxin."⁵¹

CHEPA charges the "public health authority," the State Commissioner of Health or local health department⁵² with investigating illness or health conditions that may cause a catastrophic health emergency, identifying exposed individuals, as well as closing, evacuating and decontaminating any facility reasonably believed to endanger public health.⁵³ The public health authority's orders accordingly are immediately enforceable by the "public safety authority" (the Commissioner of Public Safety or any local government agency acting for public safety).⁵⁴

In addition to other responsibilities,⁵⁵ the public health authority may adopt and enforce measures for collection, storage, handling, destruction, treatment, transportation and disposal of contaminated waste. The public health authority may require any business or facility authorized to deal with contaminated waste under Oklahoma laws, and any landfill business, to accept contaminated waste or provide services or the use of the business, facility or property as a condition of licensure, authorization or the ability to continue doing business in the state.⁵⁶ The "use" of the business, facility or property may include transferring its management or supervision to the public health authority for a period of time not to exceed the termination of the declaration of the state of the catastrophic health emergency.⁵⁷

CHEPA authorizes the public health authority to adopt and enforce measures for embalming, burial, cremation, interment, disinterment, transportation and disposal of human remains.⁵⁸ The public health authority is empowered to take possession or control of any human remains and to order disposal of human remains of a person who has died of a transmissible disease through burial or cremation within 24 hours of death.⁵⁹

CHEPA authorizes the public health authority to purchase and distribute anti-toxins, serums, vaccines, immunizing agents, antibiotics and other pharmaceutical agents or medical supplies to prepare for or control a catastrophic health emergency.⁶⁰ If the emergency results in a shortage of these items, whether or not purchased, the public health authority may control, restrict, and regulate by rationing and using quotas, prohibitions on shipments, allocation or other means, the use, sale, dispensing, distribution or transportation of the items during the emergency.⁶¹

The public health authority possesses emergency powers on licensing and appointment of health personnel during the catastrophic health emergency. The authority may require in-state health care providers⁶² to assist in treating or examining individuals as a condition of licensure, authorization or the ability to continue to function as a health care provider in Oklahoma.⁶³ The authority may appoint and prescribe duties of out-of-state emergency health care providers to respond during the declared state of emergency.⁶⁴ The authority may waive licensing requirements, permits or fees required by

“CHEPA does not pre-empt other laws or rules that preserve to a greater degree the powers of the public health authority.”

the state and applicable rules or orders to allow providers to practice in Oklahoma.⁶⁵

These are serious and significant powers for serious times.

However, CHEPA provides: “The rights of the people to liberty, bodily integrity, and privacy must be respected to the fullest extent possible consistent with maintaining and preserving the health and security of the public during a catastrophic health emergency.”⁶⁶

The governor is afforded expanded powers during a state of catastrophic health emergency. For example, the governor may suspend regulatory statutes on conducting state business, or orders or rules of any state agency, if compliance would prevent or delay action (including emergency purchases) by the public health authority. The governor may use all available resources of the government and its political subdivisions to respond. The governor may mobilize the National Guard, provide aid to and seek aid from other states under an interstate emergency compact, and, may seek aid from the federal government.⁶⁷

Subject to not exceeding \$50 million in the fiscal year, the governor may transfer money from any fund available to the governor in the State Treasury when: 1) no appropriation is available to meet the emergency; or, 2) an appropriation is insufficient to meet the emergency; or, 3) available federal monies require the use of state or other public monies.⁶⁸

CHEPA does not pre-empt other laws or rules that preserve to a greater degree the powers of the public health authority.⁶⁹ Some might argue that the broader powers in the public health code empower a public health authority to a greater degree than CHEPA’s more specific provisions. During a catastrophic health emergency, in the event of a conflict between CHEPA and other state or local laws



or rules concerning public health powers, the provisions of CHEPA will apply.⁷⁰

The governor or the state Legislature may terminate the declaration of a state of catastrophic health emergency.⁷¹

OKLAHOMA EMERGENCY MANAGEMENT ACT OF 2003

The purposes of the Oklahoma Emergency Management Act of 2003 (EMA) are many. EMA creates the Oklahoma Department of Emergency Management and authorizes the creation of local organizations for emergency management⁷² in counties and incorporated municipalities. EMA forces emergency planning through provisions mandating a state emergency operations plan and assuring that all state agencies and entities have written plans and procedures. In addition to conferring emergency powers on the governor and executive heads or governing bodies of political subdivisions, it provides for rendering mutual aid among political subdivisions, with other states and the federal government to perform emergency management functions and hazard mitigation.⁷³

EMA covers both man-made disasters⁷⁴ and natural disasters.⁷⁵ “Emergency management” means preparation for and coordination of all emergency functions to prevent, minimize and repair injury and damage from natural or man-made disasters declared by the governor.⁷⁶

Either the governor or the Legislature in a concurrent resolution may proclaim the existence of an emergency or its termination under EMA.⁷⁷ The governor has powers and duties under the EMA outside of an emergency⁷⁸ and additional emergency powers to exercise during the emergency.⁷⁹

EMA allows political subdivisions in which disasters occur to declare a local emergency and to enter into contracts and incur obliga-

tions to combat such disaster.⁸⁰ Such a political subdivision is specifically authorized to exercise these powers "without regard to time-consuming procedures and formalities prescribed by law (excepting mandatory constitutional requirements) pertaining to the performance of public work, entering into contracts, the incurring of obligations, the employment of temporary workers, the rental of equipment, the purchase of supplies and materials, and the appropriation and expenditure of public funds."⁸¹

In collaboration with other public and private agencies within the state, the director of each local organization for emergency management may develop mutual aid arrangements for reciprocal emergency management aid.⁸² Each local organization for emergency management has the duty to render assistance in accordance with the provisions of the mutual aid arrangements.⁸³ Any municipal fireman or policeman engaged in emergency management activities while complying with EMA is considered as serving in his or her regular line of duty and entitled to applicable pension fund benefits.⁸⁴

Requirements for a license to practice any professional, mechanical or other skill shall not apply to authorized emergency management workers with licenses from states rendering mutual aid during an emergency.⁸⁵

The state of Oklahoma, its political subdivisions, officers or employees, and volunteers are not civilly liable for loss or injury to any person's company, corporation or other legal entity as a result of action during the emergency.⁸⁶ Persons who own or control real estate and voluntarily, without compensation permit use to shelter persons during an emergency or exercise are not civilly liable for negligently causing death or injury.⁸⁷

The Oklahoma Department of Emergency Management may request the attorney general to bring civil action against those who violate or fail to comply with an order, refuse to admit authorized representatives, refuse to permit inspection, and refuse to furnish requested information or reports.⁸⁸ Willful violation of the Oklahoma Department of Emergency Management's rules, regulations or orders is a misdemeanor offense⁸⁹

THE OKLAHOMA INTRASTATE MUTUAL AID COMPACT

The Oklahoma Intrastate Mutual Aid Compact⁹⁰ affords a system of intrastate mutual aid between participating in-state jurisdictions.⁹¹ The intrastate mutual aid is for use to prevent, respond to and recover from any disaster resulting in a formal state of emergency in a participating jurisdiction.⁹² "Emergency" means any occasion or instance for which assistance is needed to supplement local efforts and capabilities to save lives, to protect property and public health and safety, or to lessen or avert the threat of catastrophe.⁹³ The compact provides for planning requirements⁹⁴ and cooperation of participating jurisdictions to conduct disaster-related exercises, testing or other training activities outside of declared emergencies.⁹⁵

The compact's provisions cover "jurisdictions," defined to mean "any county, city, town or municipal corporation of the State of Oklahoma represented by an elected governing body" and Sovereign Tribal Nations in Oklahoma.⁹⁶ All jurisdictions are automatically deemed a part of the statewide mutual aid system under the compact,⁹⁷ but can, upon the governing body's enactment of a resolution, elect not to participate or later withdraw. Providing the requested assistance, and its withdrawal, is in the sole discretion of the aiding jurisdiction.⁹⁸ Jurisdictions rendering aid may withhold resources as necessary to provide reasonable protection for their jurisdictions.⁹⁹

Under its specific terms, the compact does not affect any other agreement to which a jurisdiction may be a party or enter.¹⁰⁰

The compact does not dictate how a jurisdiction needing assistance declares an emergency. However, the compact's provisions apply only when requests¹⁰¹ are made by and to the authorized representatives of the respective jurisdictions.¹⁰² The compact allows no immunity, rights or privileges for any responding individual who is not requested and/or authorized to respond by a participating jurisdiction.¹⁰³ In this regard, officers or employees of a jurisdiction rendering aid under the compact are considered within the scope of employment of the requesting jurisdiction for tort liability and immunity purposes. No jurisdiction or its officers or employees rendering aid in another jurisdiction pursuant to the compact are liable for any act or omission in "good faith" while

so engaged, or, on account of the maintenance or use of any equipment or supplies.¹⁰⁴ "Good faith" does not include willful misconduct, gross negligence or recklessness.¹⁰⁵

Each jurisdiction is required to provide for compensation and death benefits to its own officers and employees injured or killed while rendering assistance pursuant to the compact in the same manner and on the same terms as if the injury or death were sustained within its own jurisdiction.¹⁰⁶ No immunity is provided under the compact to private individuals or entities although the compact refers to an "emergency responder" as coming from the public or private sector,¹⁰⁷ and, to the best use of "assets both public and private."¹⁰⁸

Under the compact, receiving jurisdictions are to reimburse the responding jurisdiction for any loss, damage, expense or cost incurred in operating equipment or providing services for the request.¹⁰⁹ Compensation expenses are not deemed reimbursable under these provisions.¹¹⁰ The compact permits the aiding jurisdiction to wholly or partially assume such loss, damage, expense or other cost or to loan equipment or donate services to the receiving jurisdiction without charge or cost.¹¹¹ The jurisdictions are authorized to enter into agreement establishing a different allocation of cost.¹¹²

IMMUNITY FROM LIABILITY

A variety of statutory provisions may afford immunity from liability to private persons who assist the state and its local governments in managing emergencies. Immunities afforded under specialized emergency provisions have been discussed. These grants of immunity from liability are of the utmost importance to facilitate necessary public-private cooperation and partnership.

For example, under the Oklahoma Good Samaritan Act, persons who are licensed to treat human ailments, disease, pain and injury who, without a prior contractual relationship; under emergency circumstances that may lead to probable death or serious bodily injury; in good faith; voluntarily and without compensation; provide emergency care to an injured person or one in need of immediate medical aid, shall not be liable for damages for any acts or omissions except for committing gross negligence or willful or wanton wrongs in rendering care.¹¹³

And, any person, not just licensed professionals, who: without a prior contractual relationship; in good faith; provides emergency care of artificial respiration, restoration of breathing, preventing loss of blood, aiding heart action or circulation of blood; to a victim of an accident or emergency; shall not be liable for any civil damages as a result of acts or omissions.¹¹⁴

Under similar conditions, persons licensed to perform surgery or dentistry who provide emergency care requiring an operation or other form of surgery upon the victim of an accidental act are not liable for civil damages or subject to criminal prosecution for nonconsent.¹¹⁵ Qualified persons who meet specified conditions and render emergency care or treatment outside of a medical facility by use of an automated external defibrillator are immune from civil liability for personal injury.¹¹⁶

Donors who meet requirements and make good faith donations of food to a charitable organization or nonprofit corporation are not liable for damages in any civil suit or subject to criminal prosecution for any injury resulting from the nature, age, condition or packaging of the donated food.¹¹⁷

A licensed architect or professional engineer who meets



“Donors who meet requirements and make good faith donations of food to a charitable organization or nonprofit corporation are not liable for damages in any civil suit or subject to criminal prosecution...”

requirements and provides, upon request or with approval, architectural, structural, electrical, mechanical or other design professional services related to a national, state or local emergency caused by a natural disaster or catastrophic event is not liable for personal injury, wrongful death, property damage or other loss in performance of services for any publicly or privately owned structure, building, facility, project, utility equipment, machine process, piping or other system.¹¹⁸

Pursuant to the Volunteer Medical Professional Services Immunity Act, any person meeting requirements and participating in a medical reserve corps and assisting with emergency management, emergency operations or hazard mitigation in response to any emergency, man-made disaster, or natural disaster or participating in public health initiatives endorsed by a city, county or state health department in Oklahoma is not liable for civil damages.¹¹⁹ Volunteer medical professionals who meet requirements are immune from civil liability in providing volunteer medical professional services at a free clinic.¹²⁰

LESSONS LEARNED FROM TORONTO'S SARS EPIDEMIC

The 2003 Toronto SARS epidemic lasted almost 14 weeks, March through June, 2003 in two phases of seven weeks each. The first phase began after a traveler from southeast Asia introduced SARS. The second began when the epidemic was almost under control and an undetectable SARS "superspreader" with no symptoms visited a Toronto hospital. The SARS epidemic was successfully brought under control using a combination of "old-fashioned" public health control measures without a SARS vaccine or rapid diagnostic test. These control measures included: public information about hygiene; use of masks, gloves, gowns and similar airborne infectious disease control measures; strict isolation of diagnosed SARS patients; quarantine measures for about 30,000 persons believed to have been exposed to SARS; closure of facilities where SARS transmission was occurring; and, international travel advisories.¹²¹

The numbers tell the story. There were 44 deaths; over 13,000 people were isolated; over 23,000 contacts were investigated; hotline calls amounted to 300,000 with a peak of 47,567 in one day. The most amazing number of all is 27; the Canadian public health authority used only

27 written orders directing persons to act.¹²² The voluntary compliance of the Toronto population in the SARS epidemic was incredible.

The economic aspects of the SARS epidemic¹²³ drove a partnership between government and business in Toronto. The business community became directly involved in the resolution of the public health situation. The key lesson of SARS: "Voluntary compliance is the cornerstone of any emergency response; legal powers are ineffective in the absence of voluntary compliance."¹²⁴

CONCLUSION

Laws that form Oklahoma's public health structure include specialized emergency management enactments. These specialized laws run the gamut of coverage from natural to man-made catastrophes, disasters and emergencies. Oklahoma has attempted through its legal framework to be prepared. The fear is that despite the concerted planning, training and governmental coordination prescribed and facilitated by the laws, those efforts alone will not be enough to contend with an unknown catastrophe. Oklahoma's public health entities are better equipped for the future because they have the opportunity to learn from the Toronto SARS epidemic as well as emergencies within this nation.

The primary learning from SARS is that the fullest cooperation of private sector entities and individuals is a necessity if a pandemic flu, or similar health crisis, impacts Oklahoma. The state and its local governmental entities cannot manage a significant emergency without that cooperation and support. Absent compliance and cooperation, the ability of any public health system to vaccinate or otherwise assist large numbers of people will grind to a halt. Planning successfully for a pandemic requires planning for and enlisting cooperation from public and private entities.

To that end, it is prudent to consider all efforts designed to enlist cooperation. This includes continued legislative efforts to immunize cooperating persons and other entities from liabilities for acts and omissions during participation in an emergency.

1. Webster's Encyclopedic Unabridged Dictionary of the English Language, 1996, Random House Value Publishing, Inc.

2. www.pandemicflu.gov/general/index.html; www.health.ok.gov/program/cdd/flu/avian.html.

3. CNN.com – Leavitt: States will ration bird flu vaccine – June 6, 2006 at www.cnn.com/2006/HEALTH/conditions/06/06/bird.flu.test.ap/index.html.

4. CNN.com – Leavitt: States will ration bird flu vaccine – June 6, 2006 at www.cnn.com/2006/HEALTH/conditions/06/06/bird.flu.test.ap/index.html.

5. Okla. Stat. tit. 63, § 1-106(b)(1), (2) (2001).

6. Okla. Stat. tit. 63, §§ 1-106(b) (11) and (12) (2001).

7. Okla. Stat. tit. 63 §1-203(a) (2001).

8. Okla. Stat. tit. 63, § 1-204 (2001).

9. Okla. Stat. tit. 63, § 1-201 (2001).

10. Okla. Stat. tit. 63, § 1-202(b), (c), (e), and (f) (2001).

11. Okla. Stat. tit. 63, § 1-205(a) (2001).

12. www.health.state.ok.us/program/index.html.

13. Okla. Stat. tit. 63, § 1-205 (d) (2001).

14. Okla. Stat. tit. 63, § 1-209 (2001).

15. Okla. Stat. tit. 63, § 1-209 (2001).

16. Okla. Stat. tit. 63, § 1-210 (2001).

17. Okla. Stat. tit. 63, § 1-214 A (2001).

18. Okla. Stat. tit. 63, §§ 1-214 D. and 1-215 (2001).

19. 63 Okla. Stat. tit. 63, § 1-215 (2001).

20. Okla. Stat. tit. 63, § 1-210 (2001).

21. Okla. Stat. tit. 63, § 1-502 (2001).

22. Okla. Stat. tit. 63, §1-106 (B)(1) (2001).

23. Okla. Stat. tit. 63, § 1-106(B)(4) (2001).

24. Okla. Stat. tit. 63, § 1-106(B)(5) (2001).

25. Okla. Stat. tit. 63, § 1-106(B)(7) (2001).

26. Okla. Stat. tit. 63, § 1-106 (B)(10) (2001).

27. Okla. Stat. tit. 63, § 1-204 (2001).

28. Okla. Stat. tit. 63, § 1-215 (2001).

29. Okla. Stat. tit. 11, § 120A (Supp. 2005).

30. Okla. Stat. tit. 11, § 120A (Supp. 2005).

31. Okla. Const. art. VI, § 6.

32. Okla. Stat. tit. 63, § 1-504 (2001).

33. Okla. Stat. tit. 21, § 1195 (2001).

34. Okla. Stat. tit. 63, § 1199 (2001).

35. Okla. Stat. tit. 63, § 1-505 (2001).

36. Okla. Stat. tit. 63, § 1-506 (2001).

37. Okla. Stat. tit. 63, § 1-507 (2001).

38. Okla. Stat. tit. 63, § 1-508 A.1 (2001).

39. Okla. Stat. tit. 63, § 1-508 B. 1 (2001).

40. Okla. Stat. tit. 63, § 1-508 C (2001).

41. Okla. Stat. tit. 63, § 1-508 D (2001). Public officers and employees acting within the scope of their authority to control zoonotic disease are not liable for damages. Okla. Stat. tit. 63, § 1-508 B.2 (2001).

42. Okla. Stat. tit. 63, § 1-1701 A. 1 (2001).

43. Okla. Stat. tit. 63, § 1-1701 A. 4 (2001).

44. Okla. Stat. tit. 63, § 1-1701 B.1 (2001). “Code” includes the Public Health Code and statutes codified in Title 59 for regulation of professions, occupations for which the State Health Department issues licenses. Okla. Stat. tit. 63, § 1-1701 B. 3 (2001).

45. Okla. Stat. tit. 63, § 1-1701.1A (2001).

46. Okla. Stat. tit. 63, § 6101 (2001), et seq.

47. Okla. Stat. tit. 63, § 6102 11 (2001).

48. Okla. Stat. tit. 63, §§ 63, 6401, 6402 (2001).

49. Okla. Stat. tit. 63, § 6104 2 (2001).

50. Okla. Stat. tit. 63, § 6104 1 (2001). “Bioterrorism” means “the intentional use of any microorganism, virus, infectious substance, or biological product that may be engineered as a result of biotechnology, or any naturally occurring or bioengineered component of any such microorganism, virus, infectious substance, or biological product, to cause death , disease, or other biological malfunction in a human, an animal, a plant, or another living organism in order to influence the conduct of government or to intimidate or coerce a civilian population.”

51. 2007 Okla. Sess. Laws, c. 473, to be codified at 63 O.S. § 6104, Senate Bill 399.

52. Okla. Stat. tit. 63, § 6104 11. (2001).

53. Okla. Stat. tit. 63, § 6302 (2001). To the extent practicable consistent with protection of public health, prior to destruction of property under CHEPA, the public health authority shall institute appropriate civil proceedings. Okla. Stat. tit. 63, § 6504 (2001).

54. Okla. Stat. tit. 63, § 6104 12 (2001); Okla. Stat. tit. 63, § 6302 C (2001).

55. Okla. Stat. tit. 63, §§ 6403, 6601, and 6701 (2001).

56. Okla. Stat. tit. 63, § 6501 (2001).

57. Okla. Stat. tit. 63, § 6501 B (2001).

58. Okla. Stat. tit. 63, § 6502 A. 1 (2001).

59. Okla. Stat. tit. 63, § 6502 A. 2. and 3 (2001).

60. Okla. Stat. tit. 63, §6503 A (2001).

61. Okla. Stat. tit. 63, §6503 B (2001).

62. “Health care provider” means any person or entity who provides health care services, including without limitation, physicians, pharmacists, dentists, physician assistants, nurse practitioners, registered and other nurses, paramedics, emergency medical or laboratory technicians, and ambulance and emergency medical workers. Okla. Stat. tit. 63, § 6104A. 6. (2001).

63. Okla. Stat. tit. 63, § 6602 (2001).

64. Okla. Stat. tit. 63, § 6602 2. (2001).

65. Okla. Stat. tit. 63, § 6602 2. b (2001).

66. Okla. Stat. tit. 63, § 6102 9 (2001).

67. Okla. Stat. tit. 63, § 6403 (2001).

68. Okla. Stat. tit. 63, § 6802 A.,C., and D. 2 (2001).

69. Okla. Stat. tit. 63, §§ 6803, 6104 11 (2001).

70. Okla. Stat. tit. 63, § 6804 B (2001).

71. Okla. Stat. tit. 63, § 6403 (2001).

72. A “local organization for emergency management” means an organization created by state or local authority pursuant to the EMA to perform local emergency management functions. Okla. Stat. tit. 63, § 683.3 6. (2001). Qualified emergency management directors are required for all counties; municipalities must also have directors, or, create agreements with counties for emergency management. Okla. Stat. tit. 63, § 683.11 (2001).

73. Okla. Stat. tit. 63, § 683.2 (2001).

74. Man-made disasters are caused by acts of man, including terrorism, chemical spills or releases, and power shortages, that require assistance from outside the local political subdivisions. Okla. Stat. tit. 63, § 683.3 7. (2001).

75. Natural disasters means any natural catastrophe, such as tornados, flood waters, or drought, which reaches sufficient severity to warrant hazard mitigation or use of resources of other entities. Okla. Stat. tit. 63, § 683.3 8. (2001).

76. Okla. Stat. tit. 63, § 683.3 1 (2001).

77. Okla. Stat. tit. 63, § 683.9 (2001).

78. Okla. Stat. tit. 63, § 683.8 (2001).

79. Okla. Stat. tit. 63, § 683.9 (2001).

80. Okla. Stat. tit. 63, § 683.11 F. (2001).

81. Okla. Stat. tit. 63, § 683.11 F. (2001).

82. Okla. Stat. tit. 63, § 683.12 A. (2001).

83. Okla. Stat. tit. 63, § 683.12 A. (2001).

84. Okla. Stat. tit. 63, § 683.13 A. (2001).

85. Okla. Stat. tit. 63, § 683.13 C. (2001). “Emergency management worker ” includes any full or part-time paid, volunteer, or auxiliary employee of this or other states, territories, possession or the District of Columbia, or the federal government, or any neighboring country or any political subdivision thereof, or of any agency or organization, performing emergency management services under state supervision at any place in this state.

86. Okla. Stat. tit. 63, § 683.14 B. (2001), excepting gross, willful, wanton negligence.

87. Okla. Stat. tit. 63, § 683.14 B. (2001), excepting gross, willful, wanton negligence.

88. Okla. Stat. tit. 63, § 683.23 A. (2001).

89. Okla. Stat. tit. 63, § 683.23 C. (2001).

90. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.1, et seq.

91. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2. A.

92. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2 C.

93. 2006 Okla. Sess. Laws, c. 199, to be codified at 63 O.S. § 695.2 B.2.

94. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.4.

95. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2 C.

96. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2 B.1.

97. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2 D.

98. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.4 D.

99. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.5.

100. 2006 Okla. Sess. Laws, c. 199, to be codified at 63 O.S. § 695.2 D.

101. Information to be included in the requests for aid include a description of the emergency service function needed (such as fire service, law enforcement, emergency medical, mass care, health and medical services, and search and rescue); the amount and type of personnel, equipment, materials and supplies needed and an estimate of time for which they will be needed; and, the specific place and time for staging the response. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.4 B.

102. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.4 B.

103. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2
- C.
104. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.7.
105. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.7.
106. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.8.
107. 2006 Okla. Sess. Laws, c. 199, to be codified at 63 O.S. § 695.2
- B.3.
108. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.2
- C.
109. 2006 Okla. Sess. Laws, c. 199, to be codified at 63 O.S. § 695.9.
110. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.9.
111. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.9.
112. 2006 Okla. Sess. Laws, c.199, to be codified at 63 O.S. § 695.9.
113. Okla. Stat. tit. 76, § 5(a)(1) (2001).
114. Okla. Stat. tit. 76, § (a)(2) (2001).
115. Okla. Stat. tit. 76, § 5(a)(3) (2001).
116. Okla. Stat. tit. 76, § 5A A. (2001).
117. Okla. Stat. tit. 76, § 5.6 (2001).
118. Okla. Stat. tit. 76, § 5.8 (2001).
119. Okla. Stat. tit. 76, § 32 (Supp. 2005).
120. Okla. Stat. tit. 76, § 32 B. (Supp. 2005).
121. "The Public/Private Response to Sudden Disease Outbreak" June 30, 2006 Final Report prepared for the Alfred P. Sloan Foundation by Gene Matthews, JD, Director of the CDC Foundation Institute of Public Health. A \$45,000 grant to the Alfred P. Sloan Foundation resulted in a meeting in Toronto March 2 and 3, 2006, to comprehensively examine with key legal and business experts in the U.S. and Canada the public health and economic lessons learned from the SARS outbreak.
122. International Municipal Lawyers Association 2006 Annual Conference, Sept. 17-20, 2006, Portland, Oregon; Work Session V. Managing Critical New Public Health Concerns, presentation "Planning for a Pandemic: Lessons Learned from SARS," by Anna Kinastowski, City Solicitor, City of Toronto.

123. Twelve thousand people lost jobs; nine city-wide conventions cancelled in the summer of 2003; the cost to the Toronto economy for 2003 alone was over \$1 billion. "The Public/Private Response to Sudden Disease Outbreak" June 30, 2006 Final Report prepared for the Alfred P. Sloan Foundation by Gene Matthews, JD, Director of the CDC Foundation Institute of Public Health

124. International Municipal Lawyers Association 2006 Annual Conference, Sept. 17-20, 2006, Portland, Oregon; Work Session V. Managing Critical New Public Health Concerns, presentation "Planning for a Pandemic: Lessons Learned from SARS," by Anna Kinastowski, City Solicitor, City of Toronto.

ABOUT THE AUTHOR



Martha Rupp Carter graduated from OSU with a B.A., honors in English, and obtained her J.D. from OU. Following five years of private practice with Sonberg and Waddel, she served in the City of Tulsa legal department for 19 years. She was appointed as Tulsa's city attorney, serving four years in this position. In June 2004, she was selected as the Tulsa City-County Health Department's general counsel.

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CRIMINAL DEFENSE IN THE DEATH BELT III

Presented By:

OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

&

THE OFFICE OF THE OKLAHOMA COUNTY PUBLIC DEFENDER

Thursday, August 23, 2007 & Friday, August 24, 2007

The Oklahoma City Marriott Hotel, NW Expressway

14 hours CLE (including 1 Ethics)

Thursday Morning:

- 8:00 – 8:15** **Welcome & Introductory Remarks.** David Ogle, President, Oklahoma Criminal Defense Lawyers Association
- 8:15 – 9:05** **Handling the High Profile Case.** David Smith, Esq.
- 9:05 – 9:55** **Addressing Prosecutorial Misconduct at Trial.** Gary James, Esq.
- 9:55 – 10:10** **break**
- 10:10 -11:00** **Ethical Obligations When You Believe the State is Withholding Evidence.** David Autry, Esq.
- 11:00 – 11:30** **Devolving Standards of Decency: Death Penalty for Non-Homicide Sex Offenses.** Cindy Viol, Esq.
- 11:30 – 12:00** **Faith Based Interventions in the Death Penalty Process.** Jim Fowler, Vicki Werneke, Esq. and Rev. Mendle Adams
- 12:00 – 1:00** **break**

Thursday Afternoon:

- 1:00 – 1:50** **Appellate Update.** Janet Chesley, Esq.
- 1:50 – 2:40** **When is it Best to Use/Not Use a Mental Health Expert?** Richard Burr, Esq.
- 2:40 – 2:55** **break**
- 2:55 – 3:45** **Representation of Foreign Nationals.** Danalynn Recer, Esq.
- 3:45 – 5:05** **The Colorado Method of Jury Selection- Introduction.** David Lane, Esq.
- 5:05** **SOCIAL GATHERING ---- LOCATION TO BE ANNOUNCED**

Friday:

- 9:30 a.m. – 2:00 p.m.** **The Colorado Method of Jury Selection (cont'd).** David Lane, Esq.

-----REGISTRATION-----

COST: \$125 OCDLA MEMBER \$160 NON-MEMBER \$100 PUBLIC DEFENDER

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PO Box 2272, Oklahoma City, OK 73101-2272. Fax: 405-239-2595.
Questions? Contact Brandon Pointer, 405-232-5959.



HIPAA Rules All Lawyers Should Know

By Teresa Meinders Burkett

Lawyers in many areas of practice have probably encountered the term “HIPAA” in some context by now. All too often, it seems that HIPAA is offered as a routine excuse to require some action or to refuse some request by people who never may have opened the HIPAA regulations. For that reason, a brief explanation of HIPAA, its purposes and how it actually impacts the practice of law may be useful.

WHAT IS “HIPAA” AND WHY WAS IT PASSED?

HIPAA is the acronym for the Health Insurance Portability and Accountability Act. Congress passed HIPAA in 1996, in part, to facilitate continued insurance coverage of individuals who move between employers that provide health insurance. If an employee can provide a “certificate of creditable coverage” to a new employer, showing evidence that the employee participated in the health insurance benefit plan of a prior employer, the employee must be allowed to participate in the new employer’s insurance plan without a waiting period for a prior medical condition. HIPAA also contains new provisions to combat fraud and abuse in health care. The employment law and health care compliance aspects of HIPAA would merit another article. The purpose of this explanation is to provide context to the regulations issued under HIPAA that impact the legal system’s interface with health care providers.

Administrative standards that simplify electronic billing for health care providers is another important purpose accomplished by the passage of HIPAA. These new standards require individuals’ health information to be

stored and transmitted electronically. One goal was to speed and simplify the billing process for health care providers, as well as private and governmental payors for health services. The process eventually developed was based somewhat on the advances in the banking industry that increased efficiency in electronic processing of checks, use of ATM machines and other financial operations.¹

Individuals learned that the proposed electronic submission of health claims would necessitate the electronic maintenance of health information, dramatically increasing the risks to the security and privacy of that information. Privacy advocates lobbied Congress to protect the privacy and confidentiality of this information as health care providers moved sensitive health information to computer systems. The result was the HIPAA administrative simplification provisions, including the Privacy Rule and Security Rule, comprehensive regulations first issued as proposed rules in December 2000. The Department of Health and Human Services expected the Privacy Rule to provide “all Americans with a basic level of protection” for their personal medical information, allowing the states to set more stringent protections if they preferred.² The compliance date for the

new privacy rules, issued in final form in 2001, was April 14, 2003.

Enforcement

HIPAA is enforced by the Department of Health and Human Services Office of Civil Rights (OCR). There is a broad range of penalties that may be assessed against a covered entity that improperly uses or discloses protected health information or "PHI." In the worst case, a covered entity who sells PHI for its own benefit may be fined up to \$250,000 and jailed for up to 10 years.³ As of June 5, 2006, the OCR had received thousands of complaints under HIPAA but had not imposed a single civil fine and had prosecuted two criminal cases against employees of covered entities who accessed and used patient information for personal gain. Of the 19,420 complaints received by OCR as of June 2006, most involved the improper disclosure of information, disclosure of more information by providers than should have been revealed and failure to give patients access to their own information. Those who may be held criminally responsible for violations of HIPAA include those entities covered by the HIPAA regulations, as well as their directors, officers and employees under principles of corporate criminal liability.⁴

There is no private right of action under HIPAA to redress any improper disclosures. However, individuals would possibly have a claim under a state breach of privacy theory against anyone who improperly used or disclosed the individual's health information.

Terms Used in HIPAA

The HIPAA privacy rule introduced a new set of terms that are now uniformly applied in discussions of medical records and health information. The term "medical record" has been supplanted by the more specific terms

"protected health information" and "designated record set." PHI is generally defined as all individually identifiable health information created, received, maintained or transmitted by a health care provider or health plan with respect to an individual's past, present or future physical or mental health care. PHI may be in paper, electronic, video or any other format. A "designated record set" is the collection of health care and billing records used to make decisions about the provision of or payment for an individual's health care.

“ There is no private right of action under HIPAA to redress any improper disclosures. ”



Prior to HIPAA, lawyers and health care providers frequently referred to the "release" of medical records. Patients or clients were asked to sign a "consent" form typically called a Consent for Release of Medical Records. The terms "release" and "consent" are out of style in health information circles today. Instead of "consenting" to the disclosure of a medical record, individuals now must "authorize" a disclosure. Consent and authorization were given different meanings in the original privacy rule and HIPAA now requires individuals to "authorize" the use or disclosure of their PHI. "Release" is also a term seldom used now in the context of medical information. The privacy rule governs both the "use" and "disclosure" of PHI rather than its release. PHI is "used" when it is shared or relied on within the entity that created or maintains it and it is "disclosed" when it is shared with third parties outside the entity's workforce.⁵ A health care provider cannot use or disclose PHI except as permitted by the privacy rule.

A health care provider typically may use PHI for treatment, payment or its own health care operations without a patient's authorization. However, disclosures usually are permitted only with the patient's authorization or when specific provisions of the privacy rule are met. Importantly, the only disclosures of PHI that are mandatory are disclosures to the individual who is the subject of the PHI and disclosures to the HIPAA enforcement branch of the federal government.⁶ All other disclosures by a covered entity are permissive.

When a proposed disclosure is permissive rather than mandated by law, covered entities often require their own policies to be followed or their own forms to be used before requests for permissive disclosures will be honored. These requirements are imposed because the covered entity, and not the person requesting disclosure, is subject to penalty if a disclosure is made without complying with HIPAA.

Entities That Must Comply with HIPAA

Covered entities that must comply with HIPAA include health care providers, health plans and clearinghouses. A health care provider is an individual or organization that provides care, services or supplies related to the health of an individual or with respect to the physical or mental condition or functional status of that person.⁷ To be covered by HIPAA, a health care provider must transmit health information electronically. Now that Medicare and the vast majority of third-party payors require claims for health services to be submitted electronically, almost all health care providers are covered entities under HIPAA.

A health plan is "an individual or group plan that provides, or pays the cost of medical care."⁸ This definition includes both governmental and private health insurers. Companies that self-insure their employee health benefit plans are the plan sponsors and have to comply with many parts of HIPAA. This is because the distinction between a self insured plan and the plan sponsor is largely fictional. Employers that fully insure the health plans they offer have minimal HIPAA compliance obligation.

A health care clearinghouse is an entity that receives electronic health information from providers, converts the data to a standardized format and forwards the data to an insurance company. This is the middleman that sends

claims for payment to insurers after receiving the claim from the health care provider.⁹

Those who provide services to covered entities must also comply with HIPAA through the terms of a business associate agreement. A business associate is a third party performing services or functions, involving the use or disclosure of PHI, on behalf of the covered entity. Examples of business associates include law firms, accounting firms and other professionals who provide services to a covered entity and who require access to PHI to perform their work. Importantly, business associates are not subject to penalties imposed by the government, but may be liable to the covered entity for whom they provide services.

A written business associate agreement between the covered entity and business associate must be in place prior to the disclosure of any PHI by the covered entity. An attorney or law firm providing legal representation to a covered entity may be a business associate of the covered entity. An example of a typical law firm business associate agreement is available online. A law firm business associate agreement is unique in that its terms attempt to preserve the attorney client privilege in the event records of the law firm or the covered entity are requested by the Office of Civil Rights or by a court order.

There are other individuals or entities who are not covered entities or business associates but who are affected by HIPAA. Congress did not include employers, schools or insurers other than health insurers within the definition of a covered entity, even though such entities frequently deal with medical information. Nevertheless, these entities are often impacted by HIPAA, especially when interacting with covered entities. For example, workers compensation insurers are not covered entities. However, they often need to receive PHI from health care providers who are bound to comply with HIPAA. In order to receive the information they need to perform their services, case managers and others involved in the workers compensation system must use mechanisms authorized by the privacy rule. For example, an individual who is being treated for a work-related injury is typically asked to sign an authorization to allow his PHI to be shared with a nurse case manager for the employer's insurance company.

Employers typically are not covered entities, but if PHI of an employee is needed to evaluate an FMLA leave request or to develop accommodations to comply with the Americans With Disabilities Act, the employee will have to sign an authorization form to allow the employer access to his or her health information. Once an employer receives PHI based on an employee's authorization, the information is no longer considered PHI and it is no longer protected under HIPAA. While other laws require employers to maintain medical information separate from other information in a personnel file, the employer has no obligations with respect to that information under HIPAA.

Patient Protections Under HIPAA that Affect Lawyers

Authorizations

Covered entities typically require an authorization form signed by a patient or the patient's "personal representative" before PHI will be disclosed.¹⁰ A HIPAA compliant authorization form is available online. This form includes the core elements of a valid authorization under the HIPAA privacy rule, as well as requirements unique to Oklahoma law such as the AIDS statement and notice of rights.¹¹ The Oklahoma Legislature passed a requirement in 2003 that any plaintiff in a medical malpractice action must sign a HIPAA complaint authorization upon the defendant's request that permits access to all medical records of the plaintiff for the five-year period prior to the incident that is at issue in the lawsuit.¹² Failure to provide a requested authorization will result in a dismissal of the case. Since this provision applies to malpractice actions, the need to seek a court order or issue a subpoena to obtain a litigant's PHI will arise in other kinds of personal injury litigation.

Core elements of a valid authorization include: a) a clear description of the information to be disclosed; b) the name or identifying characteristics of the person or entity authorized to make the disclosure; c) the name or specific identifying characteristics of the person(s) or entities who are entitled to receive the information; a description of each purpose of the disclosure or a statement that disclosure is made "at the request of the individual"; d) an expiration date or an expiration event that relates to the individual or the purpose for the disclosure, such as "at the conclusion of

the patient's litigation arising out of a motor vehicle accident that occurred on June 1, 2005, including all appeals"; e) signature of the individual and the date. If the individual's personal representative signs the form, the basis for that representative's authority must be described, such as the individual's guardian or health care proxy.¹³ Oklahoma law does not permit an individual's spouse or other family member to authorize disclosures of information unless the family member has been affirmatively appointed as guardian, power of attorney or other legally accepted status.

In addition to the core elements, a valid authorization must include statements that the individual may revoke the authorization, that the information disclosed may be subject to redisclosure by the recipient, that the individual may inspect any information before it is released, and that unless the purpose of the authorization is to determine payment of a claim for benefits, the provision treatment or payment for care provided will not be conditioned upon the individual signing the authorization.¹⁴

Court Orders

If a covered entity is provided a copy of an order requiring disclosure of PHI issued by a court with jurisdiction, the covered entity may comply with the order.¹⁵ A copy of a standard order authorizing disclosure of protected health information used by several judges in Tulsa County is available online.

Subpoenas

While a subpoena may be used to obtain PHI from a covered entity, there are specific rules under HIPAA that must be adhered to or disclosure of the information is likely to be delayed. The quickest way to receive PHI from a health care provider is to provide a HIPAA compliant authorization form from the patient or a signed court order. If a subpoena is accompanied by either of these documents, the PHI can be released as soon as the information requested can be reproduced.

A subpoena without an authorization or court order requires a fairly complicated process to be followed before a covered entity will be able to comply, especially if the PHI sought relates to a third party in a litigation matter. First, the attorney issuing a subpoena must give a detailed notice to the individual whose PHI is requested that the information is being

sought. That notice must describe the litigation or proceeding in which the PHI is requested in sufficient detail for the individual to raise an objection to the production.¹⁶ For example, the notice should advise the individual what information is requested, the identity of the health care providers who will receive a subpoena, the issues in dispute in the litigation and how and when to file an objection. A sample form that meets these requirements is available online. If the PHI sought is that of a party to the litigation, the notice of intent to issue a subpoena may be sent to the litigant's counsel of record who presumably can advise his or her client that the information is sought and why. This is typically carried out by letter or a form of notice prepared by the attorney who issued the subpoena.

After the notice is sent, the subpoenas are served, and the time to file any objections has passed, the attorney issuing the subpoena must give the covered entities from whom information is sought "a written statement and accompanying documentation" demonstrating that a HIPAA-complaint notice of intent to issue the subpoena was sent to the individual whose PHI is sought, the

“The attorney issuing the subpoena for PHI may prefer to obtain a ‘qualified protective order’...”



time for filing objections has passed, and either no objections were filed or any objections filed have been resolved and the information sought is compliant with the court's ruling.¹⁷ A sample assurance of compliance with HIPAA that meets these requirements is available online. Once again, if the PHI sought is that of one of the litigants, this assurance of compliance is often included in a letter from counsel.

Qualified Protective Orders

The attorney issuing the subpoena for PHI may prefer to obtain a "qualified protective order" described at 45 C.F.R. § 164.5 12(e)(l)(v) rather than give the notice and assurance described above. However, such an order requires a court order or stipulation by the litigants that the parties will use the PHI only in the instant proceeding and that the PHI and all copies will be destroyed or returned to the covered entity at the end of the litigation. Because a qualified protective order requires cooperation of the litigants or a special court order, most attorneys could just as easily get an authorization signed by the patient or a standard court order authorizing the disclosure of PHI. If the

parties cannot agree on a signed authorization or court order for disclosure, the subpoena issued after sending the notice followed by a written assurance of compliance seems to be the course preferred by many Oklahoma lawyers.

Special HIPAA Issues that Arise in Litigation

Sharing PHI with Counsel for Co-Defendants

Unless some agreement is in place with the plaintiff, co-defendants who are both covered entities may not share PHI of the plaintiff produced in discovery. However, in some cases, there may be a working relationship between the co-defendants called an "organized health care arrangement" where both defendants provide health care services in an integrated setting, like a hospital.¹⁸ For example, a hospital and a member of its medical staff typically both have access to a patient's PHI. Parties within an organized health care arrangement typically may share PHI of their mutual patients. Others may not have such a relationship or agree-

ment, and require additional steps to secure the PHI in compliance with HIPAA.

Counsel for each defendant may individually subpoena PHI, or may seek an order from the court allowing disclosure between the attorneys for the co-defendants. If the plaintiff has signed an authorization granting access to his/her PHI to both defendants, attorneys may share and discuss the PHI without violating HIPAA.

Sharing PHI with Expert Witnesses

An attorney working on behalf of a covered entity (with a valid business associate agreement in place) may hire an expert witness on behalf of the covered entity.¹⁹ Prior to the disclosure of PHI to the expert witness, the attorney and the expert must enter into a written agreement whereby the expert agrees to be bound by all of the restrictions and requirements found in the business associate agreement between the covered entity and the attorney.

Although the list of experts to whom PHI is disclosed is generally considered to be attorney work product during the litigation, it is advisable to keep an accounting in your client records of the experts to whom you have disclosed an individual's PHI. This will assist counsel in complying with the terms of a typical business associate agreement.

PHI in Pleadings

In order to include PHI in pleadings, the patient or his personal representative initially must sign an authorization granting access to the PHI, or the court must issue an order granting access. Including PHI in pleadings without one of these documents violates HIPAA and could cause a covered entity's attorney to be in violation of the law firm business associate agreement.

When the litigation concludes, counsel representing covered entities will have an obligation to return all medical records used in the case to the covered entity pursuant to the lawyers' business associate agreement or to destroy the records and send confirmation of that destruction to the covered entity client for the client's records.²⁰ Lawyers who do not represent covered entities do not need to return or destroy PHI received in litigation unless there is some agreement otherwise.

CONCLUSION

While this article examined the most common intersections of litigation and HIPAA, other areas of law and business affected by HIPAA include guardianships, mental health proceedings, financial institutions and insurance matters. If PHI must be accessed in a given legal matter, attorneys involved may wish to refer to the HIPAA privacy rule for guidance. All of the privacy rule regulations, as well as briefs and cites to cases involving various HIPAA issues can be found at www.lawyersandhipaa.com.

1. See, 65 Fed.Reg. 50,312 (August 17, 2000).
2. 65 Fed.Reg. 82,462-4.
3. 2 USC ' 1320d-6
4. Memorandum of the United States Department of Justice dated June 1, 2005.
5. 45 C.F.R. ' 164.501.
6. 45 C.F.R. ' 164.502(a)(2).
7. 45 C.F.R. ' 160.103.
8. 45 C.F.R. ' 160.103.
9. 45 C.F.R. ' 160.103.
10. 45 C.F.R. ' 164.508(a).
11. 63 Okla. Stat. ' 1-502.2.
12. 63 Okla. Stat. ' 1-1708.
13. 45 C.F.R. ' 164.508(c)(1).
14. 45 C.F.R. ' 164.508(c)(2).
15. 45 C.F.R. ' 164.512(e).
16. 45 C.F.R. ' 164.512(e)(l)(ii).
17. 45 C.F.R. ' 164.512(e)(l)(iii).
18. 45 C.F.R. ' 160.103.
19. 45 C.F.R. ' 164.504(d)(2)(ii)(D).
20. 45 C.F.R. ' 164.512(e)(l)(v)(B).

Forms discussed in this article are available online at: 1) <http://my.okbar.org> – Bar Journal Forms – Health Law or 2) www.oba-net.org – File Library – Health Law Forms.

ABOUT THE AUTHOR



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Blanket Medical Releases and Client Privacy: The Dangers of Releasing HIPAA into the Wild

By John M. Dunn and Daniel W. Crunkleton

It all starts innocently enough – a request for production you’ve seen a hundred times before. It reads something to the effect of *please execute and return the enclosed medical releases*. This could be a typical request anytime your client is claiming medical and/or mental damages. You don’t think too much about it, though – after all, *medical records are confidential by their very nature aren’t they?* Besides, hasn’t any privacy interest been waived by making a medical question an element of the case? Those releases, however, are nothing more than blank checks that permit the doctor to release all medical records to opposing counsel.

The next thing you know, you’re in depositions where seemingly irrelevant (yet embarrassing) medical history is brought up. You try objecting, to prevent opposing counsel from grilling your client about the time 30 years ago when she was 12 years old and had to be hospitalized following a suicide attempt. *Where are you going with this?* you demand to know. Opposing counsel smugly responds, *“You’re claiming emotional distress, I’m entitled to explore this matter.”* The problem is, you have no idea where this information came from, whether it is correct or whether there may be more.

Now you’re in trial in front of a jury. All of a sudden, opposing counsel is using this seemingly irrelevant evidence at trial to transform your client from being the victim of a physical injury into a hypersensitive hypochondriac who has never seen a day without suffering emotional distress. When all is said and done, your client’s medical history, not the actions of the defendant or your own legal arguments have taken center stage, and

your chances of recovery are diminished. Little did you know, when you permitted your client to sign that innocent looking little medical waiver, that you had sown the seed for your client’s ultimate embarrassment and given opposing counsel free range to divert the attention to your client’s (perhaps embarrassing) medical history.

One of the hazards to releasing information protected by HIPAA is the implication that a complete waiver of one’s medical privacy has been waived. Blindly executing such a blanket release exposes all of the information that may be contained in your client’s medical history to ex parte scrutiny by opposing counsel. While it is true that executing such a release relieves you of some of the burdens often associated with document production, as will be discussed below, the hazards of such a release - or even a more limited release, may outweigh any benefit. Additionally, alternative methods for producing medical documents which will both fulfill a party’s obligation of production during discovery, while simulta-

neously protecting a client's medical privacy should always be considered.

HIPAA: OVERVIEW AND SCOPE

Barring any written release, medical records are confidential¹. The Health Insurance Portability and Accountability Act (HIPAA)² is a federal law that guarantees this medical privacy, while at the same time, providing a mechanism for obtaining relevant information needed by third parties. The codification of HIPAA has its origins in doctor-patient privilege, codified in Oklahoma at 12 O.S.2001 § 2503(B)(3) and thereby incorporated into the federal system by Federal Rule of Evidence 501. Like other privileges, though, medical privacy is not absolute and may be considered waived (at least partially) upon the initiation of a lawsuit in which one's mental or medical condition is an element of the claim or defense.³ However, too often a plaintiff's attorney will blindly execute a blanket HIPAA release when requested to do so by opposing counsel, not realizing the effect either on his lawsuit or on his client's privacy.

Specifically, HIPAA prevents the disclosure of medical records from certain "covered entities."⁴ Under HIPAA, there are three entities which are prevented from disclosing medical information without permission: health plans, healthcare providers and healthcare clearing houses.⁵ HIPAA then permits the release of protected medical information only under specific circumstances: judicial order or patient release (a so-called "HIPAA release"). When a judicial order is used, it must specifically require a covered entity to release a specific piece of information.⁶ The second possibility is a patient release. Under federal regulations, such a release must meet the following elements:⁷

- 1) The release must be voluntarily given.
- 2) It must specifically describe the information to be disclosed.
- 3) It must provide the subject of the disclosure.
- 4) It must provide name of the person making the disclosure.
- 5) It must give the purpose of the disclosure.
- 6) The expiration of the release must be specific; and
- 7) It must have the signature and date of the person making the release.

Additionally, the HIPAA release may be subject to re-disclosure to third parties,⁸ under the theory that once a release has been executed, any privacy interest has been waived.⁹ Such a possibility is important to plaintiffs in litigation because an opposing counsel is not a "covered entity" under 45 C.F.R. §§ 160.103 or 164.501. In other words, once a blanket HIPAA release has been properly executed and delivered to the opposing party, that party is legally able to share this information to third parties without further notice to the disclosing party.

THE LEGAL EFFECT OF PLACING MEDICAL OR PSYCHOLOGICAL HEALTH AT ISSUE

Although it is true that when a party puts his mental or medical health at issue, it becomes a proper subject of discovery, it is not true that blanket releases are mandatory¹⁰ and plaintiffs should be cautious before executing them. The Oklahoma Supreme Court said in *Nitzel v. Jackson*¹¹ (and several times since¹²), that there is no requirement that a blanket release be given because the privacy interest has only been waived "to the extent of the condition claimed to have been caused by the negligence of the tortfeasor."^{13, 14} It is important to note that the *Nitzel* court did not say that a defendant in a personal injury case is entitled to a medical release; only that the plaintiff in such a case has waived privilege as it relates to the harms caused by the tortfeasor. In other words, the defendant is not entitled to a "fishing expedition" just because a suit has been initiated. A defendant is only entitled to the information concerning the injury claimed. By refusing to execute a blanket release, opposing counsel could attempt either to secure a court order or to narrow the scope of request. Even if the scope is sufficiently narrowed, plaintiff can escape the risks of medical release, by providing the requested documents. If defendant believes other documents exist, it can request the court to enter an order releasing that information.

Recently, however, the Oklahoma Supreme Court limited these options even further. In *Holmes v. Nightengale*,¹⁵ the court ruled that an order which "permit[s], rather than mandating [a release] ... does not contravene HIPAA's confidentiality requirement."¹⁶ In other words, Oklahoma state law does not overrule the federal HIPAA requirements, even when a claimant's medical condition is in issue. Any court order must *require* the release of a specific document

“Attorneys should be wary of advising their clients to sign a blanket HIPAA release...”



and does not authorize a blanket release nor does it merely *allow* for the release. Therefore, under Oklahoma law, the trial court appears to be without authority to force a party to sign a waiver of any kind.^{17, 18} Furthermore, since HIPAA releases must be voluntary under federal law anyway,¹⁹ it seems unlikely that a waiver obtained at the point of a gavel would be considered “voluntary” and would therefore be ineffective.

OBTAINING DOCUMENTS WITH OR WITHOUT A RELEASE

There are three traditional methods of obtaining documents, namely a request for production, an informal, *ex parte* request of a third party and subpoena *dues tecum*. In the case of a request for production, the party seeking the document asks for it from the opposing party. That party can produce the documents that it feels is responsive to the request and object to further production. In the case of a subpoena, the party seeking to compel a third party to produce the documents must provide notice to the parties involved in the litigation. Those parties then have the opportunity to object or challenge. Further, once the documents are received, the receiving party must disclose the receipt of those documents to the opposing counsel. The third method exactly describes the use of a HIPAA release – an informal letter addressed to a covered entity requesting the documents and the patient’s release. When confronted with those two items, the entity will normally simply provide the requested information without further inquiry. However, there is no statutory or case law requirement that a party receiving information from an informal request must disclose it to the opposite party. Moreover, a party need not rely on the discovery process for the release of medical documents, however, compliance with this kind of request cannot be compelled by the court.²⁰ Therefore, it would seem that this puts the disclosing party in the position of not know-

ing which documents have been disclosed. The receiving party becomes the “gate keeper,” by being able to determine which documents are or are not relevant to the present case.

CONCLUSIONS

Attorneys should be wary of advising their clients to sign a blanket HIPAA release, and should only do so in very specific circumstances. Neither federal nor Oklahoma law require that they be executed, and the Oklahoma Supreme Court has specifically held that trial courts do not have the authority to order one. The filing of a suit in which a medical condition is at issue only requires the disclosure of that information that is relevant to the case. If a blanket HIPAA release is granted, it in essence waives doctor-client privilege and opens the floodgate of potentially embarrassing information to be introduced into the case, explored in depositions and potentially argued at trial. Even if it is ultimately held to be irrelevant by the court, the fact that it is even mentioned is – at minimum – distracting to a jury and – at most – potentially damaging to your possibility of recovery.

It is true that blanket HIPAA releases could be more convenient to a busy attorney. Indeed, once the blanket release is delivered, the opposing counsel could get any desired document himself. As a result, if an opposing counsel were to seek a motion to compel discovery, there would be little room for arguing that the claimant has been less than forthcoming – the blanket HIPAA release is the most access to documents that could possibly be given. However, attorneys should also be sensitive to the privacy interests of their clients. A client may, in fact, have episodes in their past that they would prefer to forget about – or at least not want to see entered into the public record. As such, an attorney in this situation should make certain that these facts – if indeed irrelevant – are given the degree of protection that the law allows.

1. 12 O.S. § 2503 (physicians and psychotherapists), 43A O.S. §1-109 (mental health), 59 O.S. § 1261.6 (social workers).
2. 42 U.S.C. § 1320d et seq.
3. 76 O.S.2001 § 19(B). See also 12 O.S. § 2503(D)(3).
4. Covered Entity Chart, Dept. of Health & Human Services, available at www.cms.hhs.gov/HIPAAGenInfo/Downloads/CoveredEntitycharts.pdf.
5. 45 C.F.R. 160.103(B)(3).
6. *Holmes v. Nightengale*, 2007 OK 15, ¶ 2, ___P.3d__.
7. 45 C.F.R. § 164.508.
8. 45 C.F.R. § 164.508(c)(2)(iii)
9. *Robinson v. Lane*, 1971 OK 9 at ¶ 11, 480 P.2d 620 specifically stated this in the case of testimony ("In our opinion, when a litigant testifies concerning a particular ailment and its treatment, he has removed the reasons for the [doctor-patient] privilege. By his own conduct, he had made known to a jury and the public the ailment or disability he is suffering.") (*emphasis added*).
10. *Higginbotham v. Jackson*, 1994 OK 8, ¶ 0, 869 P.2d 319. ("There is no statutory discovery method contained in the Oklahoma Discovery Code that requires a plaintiff in a personal injury lawsuit to execute in favor of the defendant a general medical authorization entitling defendant to obtain all of plaintiff's medical records.")
11. 1994 OK 49, 879 P.2d 1222.
12. E.g., *Ellis v. Gurich*, 2003 OK 47, 73 P.3d 860 and *Brown v. Blevins*, 1998 OK 104, 986 P.2d 1218.
13. *Nitzel* at ¶ 1, 879 P.2d at 1223. Also, *Brown* at ¶ 1, 968 P.2d at 1218.
14. *Ellis v. Gurich*, 2003 OK 47, ¶ 2(1), 73 P.3d 860: "... the filing of a wrongful death action is not ipso facto a waiver of the psychotherapist-patient privilege held by Plaintiff pursuant to 12 O.S.2001 § 2503."
15. *Holmes v. Nightengale*, 2007 OK 15, ___P.3d__.
16. *Holmes* at ¶ 2, ___P.3d at __.
17. *Johnson v. Dist. Ct. Okla. County*, 1987 OK 47 at ¶ 5, 738 P.2d 151 at 153: "The respondent district's order compelling discovery by ex parte communication was in excess of its authority..."
18. *Seaberg v. Lockard*, 1990 OK 40, ¶ 3, 800 P.2d 230. ("Although the law sanctions *voluntary ex parte communications with physicians and other*

health providers where no legal privilege is deemed to exist, judicial authority may not be exercised to facilitate or impede such informal communications.) (*emphasis in original*).

19. *Supra* note.

20. *Johnson* at ¶ 5.

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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Justice of the Supreme Court District One

This vacancy will be created by the retirement of the Honorable Robert E. Lavender, effective August 1, 2007.

[To be appointed to the office of Justice of the Supreme Court, an individual must have been a qualified elector of the judicial district applicable, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must have been a licensed attorney, practicing law within the State of Oklahoma, or serving as a judge of a court of record in Oklahoma, or both, for five years preceding his/her appointment.]

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address no later than 5:00 p.m., Friday, August 10, 2007. If applications are mailed, they must be postmarked by midnight, August 10, 2007.

P. L. Pat Phelps, Chairman
Oklahoma Judicial Nominating Commission

OBA/CLE and OBA/MAP present

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About David L. Masters:

A general practitioner in Montrose, Colorado, his practice focuses on real estate and business matters, transactions, and litigation. He received his J.D. from the University of Montana in 1986. David writes and speaks frequently on the use of information technology in the practice of law. His publications include *The Lawyers's Guide to Adobe Acrobat*, American Bar Association, Law Practice Management Section (2004) along with, numerous articles and presentations on the use of information technology in the practice of law.

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Stark for Beginners: An Introduction to the Federal Physician Self-Referral Law

By Patricia A. Rogers

A lawyer who advises a physician about almost any aspect of his or her medical practice must have a general understanding of the Stark law. Put simply, the Stark law restricts a physician's referrals of Medicare and Medicaid patients for certain health care services if the physician has a financial relationship with the entity furnishing the health care services.¹ Nine times out of 10 when a lawyer discusses a transaction with a physician, the physician will inquire, "What about Stark?" Physicians may not know its intricacies, but they know that the Stark law affects how they practice medicine, where they can refer patients and if they can own interests in, or receive compensation from, health care entities.

Although a myriad of other federal and state laws potentially apply to a physician's financial relationship with a health care entity, including the federal anti-kickback statute,² the Oklahoma anti-kickback law,³ the Oklahoma Medicaid Program Integrity Act⁴ and requirements under Oklahoma law related to a physician's disclosure of ownership interests,⁵ the starting point for a lawyer's analysis should be the Stark law. Unlike the federal and state "anti-kickback" laws, which require the government to establish the requisite intent to prove a violation, the Stark law is generally a strict liability statute.⁶ If an arrangement falls within the scope of the Stark law the arrangement must satisfy an applicable exception, or the physician's referrals of Medicare beneficiaries and Medicaid recipients are prohibited.

The penalties for violations of the Stark law can be severe. The government may impose civil monetary penalties of up to \$15,000 per claim plus three times the amount of the improper payment for a claim that a person knew or should have known was improper and may require exclusion of the physician and entity from participation in federal health care programs.⁷ Additionally, the Stark law prohibits circumvention schemes. The federal government can impose civil monetary penalties of up to \$100,000 for such a scheme or arrangement and can exclude the parties from participation in federal health care programs.⁸

The federal government has relied on violations of the Stark law as the basis for liability under the False Claims Act under a false implied certification theory.⁹ The OIG's Work Plan for FY 2007, with respect to physician

practices, focuses on physician billing and arrangements with ancillary service providers for such services as pathology, echocardiography, physical and occupational therapy, and advanced imaging services (MRI, CT and PET).¹⁰ In short, the federal government continues to scrutinize physicians' financial incentives for referring Medicare, Medicaid and other federal health care program patients to certain health care entities.

The purpose of this article is to provide a framework for analyzing typical physician arrangements under the Stark law. The article also focuses on applying the in-office ancillary services exception, the exception that physicians rely upon to refer Medicare and Medicaid patients and bill for lab, x-ray, physical therapy and other services provided within their practice. The article is necessarily limited in scope and does not provide an exhaustive review of all provisions of the Stark law and regulations.¹¹

DOES THE STARK LAW APPLY?

The Stark law prohibits a physician from referring a Medicare beneficiary or Medicaid recipient to an entity for the furnishing of "designated health services" if the physician (or an immediate family member of the physician) has a financial relationship with the entity, unless an exception applies. An entity that furnishes designated health services to a Medicare beneficiary or Medicaid recipient pursuant to a prohibited referral cannot submit claims for reimbursement for those services and must refund all amounts collected. Hence, the Stark law establishes a referral prohibition, a billing prohibition and a refund obligation.

To determine whether the Stark law applies, five questions should be considered in the following order:

1) Is a physician referring patients? The Stark law defines "physician" to include more than medical doctors and doctors of osteopathy. A "physician" means a doctor of medicine, doctor of osteopathy, doctor of dental surgery (or dental medicine), a doctor of podiatric medicine, a doctor of optometry or a chiropractor. Accordingly, any of these health care professionals are subject to the Stark law's prohibitions.

2) Is the physician referring Medicare or Medicaid patients? The Stark law applies only to a physician's referrals of Medicare beneficiaries, including individuals who have Medicare as secondary coverage, and Medicaid recipients.¹² The Stark law does not apply to a physician's referrals for other types of federal health care program patients, such as TRICARE, Indian Health Service, Veterans Administration, Railroad Retirement Board, Public Health Services and other federally-funded health programs.

3) Is the physician referring Medicare or Medicaid patients for designated health services? The Stark law applies if a physician is referring Medicare beneficiaries or Medicaid recipients to an entity for the following 10 categories of designated health services, commonly referred to as "DHS": a) clinical laboratory services; b) physical therapy, occupational therapy and speech-language pathology services; c) radiology and certain other imaging services (including ultrasound, MRI, CT and PET); d) radiation therapy services and supplies; e) durable medical equipment and supplies; f) parenteral and enteral nutrients, equipment and supplies; g) prosthetics, orthotics and prosthetic devices and supplies; h) home health services; i) outpatient prescription drugs payable by Medicare Part B; and j) inpatient and outpatient hospital services.¹³

“...the Stark law establishes a referral prohibition, a billing prohibition and a refund obligation.”



The Stark regulations provide definitions of each of the 10 categories of DHS, and the definitions should be reviewed carefully. Many of the definitions for DHS refer to a list of procedure codes published by the Centers for Medicare and Medicaid Services (“CMS”) every calendar year — the List of CPT/HCPCS Codes Used To Describe Certain Designated Health Service Categories Under Section 1877 of the Social Security Act.¹⁴ If a physician refers a Medicare or Medicaid patient for a procedure that appears on the List of CPT/HCPCS Codes, the physician’s referral is prohibited unless an exception applies. Other definitions for DHS, such as the definition for durable medical equipment and supplies, refer to sections of the Social Security Act or the Code of Federal Regulations. Thus, determining whether a particular service is a DHS may require additional research beyond the Stark law.

4) Does the physician’s interaction with the patient constitute a referral?

The Stark law defines a “referral” as a physician’s request or order for DHS (such as an order for laboratory tests or x-rays), a physician’s certification of need for DHS (as in the case of home health services) or a physician’s request for DHS pursuant to establishing a plan of care (such as that required for physical therapy or occupational therapy services). A “referral” includes a physician’s request for a consultation by another physician and DHS ordered or performed by that other physician. A referral may be written, oral or electronic.

However, CMS acknowledges that certain types of physicians do not “refer” patients, but usually provide services to patients referred to them. Thus, certain requests or orders by pathologists, radiologists and radiation oncologists do not constitute referrals.¹⁵ Additionally, if the physician personally performs or provides DHS himself, no referral has occurred.

For example, if a physician administers an outpatient prescription drug or furnishes an item of durable medical equipment to a patient, there is no referral. However, if the physician’s employees provide the DHS rather than the physician, a referral has been made.¹⁶

What if the physician directs a physician assistant or nurse practitioner — a non-physician — to refer the patient for a DHS? What if the physician controls referrals made within his or her practice? In both circumstances, the referrals are imputed to the physician.¹⁷ According to CMS, a physician who directs or steers a patient to a particular provider for DHS has made a referral. For example, according to CMS, if a physician writes a prescription for physical therapy that could be filled by many different providers and recommends that the patient go to a particular physical therapy facility, this steering by the physician constitutes a referral to that entity.¹⁸

5) Does the physician have one or more financial relationships with the entity furnishing DHS?



The referral of a patient for DHS does not in itself trigger application of the Stark law. The physician must have a financial relationship with the entity furnishing the DHS. A financial relationship is either a) a direct or indirect ownership or investment interest (an “ownership interest”) in any entity that furnishes DHS, or b) a compensation arrangement with a DHS entity. A physician may have a financial arrangement with a DHS entity even though the financial relationship is entirely unrelated to the furnishing of DHS. A hospital is a DHS entity because it provides inpatient and outpatient hospital services. A physician practice that furnishes lab, x-ray or any other type of DHS is a DHS entity. A home health agency, a durable medical equipment supplier and a physical therapy center are all DHS entities.

“ The Stark regulations provide definitions of each of the 10 categories of DHS, and the definitions should be reviewed carefully. ”

An **ownership or investment interest** may be direct or indirect and may be through equity, debt, or other means and includes an interest in an entity that holds an interest in a DHS entity.¹⁹ For example, a physician who holds a membership interest in a limited liability company that owns and operates an MRI facility has an ownership interest in a DHS entity. However, a physician who is a member of a not-for-profit, tax-exempt organization or who makes a contribution to the organization does not have an ownership interest in the entity because the earnings of such an organization cannot inure to the benefit of the physician. CMS has stated that “ownership” relates to a pecuniary incentive of equity owners to enhance their investment interests.²⁰

A **compensation arrangement** is any arrangement involving remuneration, direct or indirect, between a physician (or a member of the physician’s immediate family) and the DHS entity.²¹ “Remuneration” is any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind. A compensation arrangement includes space and equipment leases; arrangements between a physician and a DHS entity in which the physician provides professional services, medical director services or management services; a physician recruitment arrangement between a hospital and a physician; an “under arrangements” contractual joint venture between a physician (or physician group) and a hospital; and any other type of arrangement involving remuneration between a physician and DHS entity.

IF THE STARK LAW APPLIES, IS AN EXCEPTION AVAILABLE FOR EACH FINANCIAL RELATIONSHIP, AND ARE ALL CONDITIONS OF THE APPLICABLE EXCEPTION SATISFIED?

The Stark law establishes three categories of exceptions: exceptions applicable to both ownership interests and compensation arrangements;²² exceptions applicable only to ownership interests²³ and exceptions applicable only to compensation arrangements.²⁴ The Stark law establishes a limited number of statutory exceptions and authorizes the Department of Health and Human Services to create regulatory exceptions that pose no risk of fraud or abuse. An analysis for finding the appropriate exception is as follows:

1) Is the physician referring patients to his or her own practice?

A physician will presumably always have a compensation arrangement with his or her own practice and will often also have an ownership interest. The exceptions for both *ownership interests and compensation arrangements* would be applicable in these circumstances.

If a physician is referring patients to another physician in his or her practice for DHS that are professional services (such as a physician’s interpretation of an MRI, CT or PET scan), the *physician services exception* may be available.²⁵ If a physician is referring patients to his or her practice for ancillary services (lab, x-ray, MRI, physical therapy, etc.) that he or she does not personally perform, the *in-office ancillary like services exception* may be available, which is discussed in detail below.²⁶ Additionally, if a physician is employed by a hospital, medical school or faculty practice plan that is part of an academic medical center, the *academic medical center exception* may be available.²⁷ All three of these exceptions apply to a physician’s ownership interest and compensation arrangement with a DHS entity.

2) Is the financial arrangement with a DHS entity other than the physician’s practice?

If a physician has a financial arrangement with another entity, and the financial arrangement constitutes an *ownership interest*, the financial arrangement must satisfy one of the following exceptions: publicly-traded securities, mutual funds, rural providers or hospitals.²⁸ As is evident, the Stark law provides very few exceptions applicable to a physician’s ownership interest in a DHS entity (other than his or her medical practice). As a practical matter, this restricts a physician’s referrals of Medicare and Medicaid patients to joint ventures providing DHS. However, the rural provider exception may be considered when analyzing a physician’s proposed arrangement with a DHS entity located outside of Oklahoma’s three metropolitan statistical areas.²⁹

If the financial arrangement with a separate entity constitutes a *compensation arrangement*, the Stark law provides 23 different exceptions applicable to compensation arrangements.³⁰ Generally, if a physician has a typical compensation arrangement with a DHS entity — such as employment, medical director, income guaranty, space lease, equipment lease — Stark has

an available exception. If a physician is providing items or services to a DHS entity and receiving compensation in return, at least three exceptions may be available: *bona fide employment exception*, *personal services arrangements exception* and the *fair market value* ("FMV") *compensation exception*. The FMV compensation exception requires, among other things, that the arrangement is set forth in a written agreement signed by the parties, the compensation is consistent with FMV and not determined in a manner that takes into account the volume or value of referrals or other business generated by the physician, and the arrangement is commercially reasonable. The FMV compensation exception is considered an all-purpose exception, potentially applicable to any arrangement involving a physician's provision items or services to a DHS entity.

In some cases, however, only one exception is clearly applicable to a particular compensation arrangement. For example, if a DHS entity and physician have an office rental arrangement, the only applicable exception is the exception for rental of office space. The FMV compensation exception does not apply — the physician is not providing items or services to the DHS entity. If a hospital pays recruitment incentives for the purpose of inducing a physician to relocate to the hospital's service area, the only applicable exception is the *physician recruitment exception*. Neither the FMV compensation exception nor the personal services arrangement exception apply — the hospital is not paying the physician for "physician services" (required by the personal service arrangements exception) or for "providing items or services" (required by the FMV compensation exception). Most exceptions require that compensation be consistent with "fair market value"³¹ and "set in advance."³² Each is a defined term under the Stark law. Accordingly, the conditions of an exception should be carefully evaluated to determine whether the exception truly applies to a proposed arrangement and whether the conditions of the exception can be satisfied.

THE IN-OFFICE ANCILLARY SERVICES EXCEPTION

Medical practices commonly provide lab, x-ray, MRI, CT, physical therapy and other types of DHS to their patients. Physicians in practices cannot refer Medicare or Medicaid patients or bill for these "in-office ancillary services"

unless the conditions of the in-office ancillary services exception (or another applicable exception) are satisfied. CMS developed the in-office ancillary services exception to apply to those services that are legitimately part of a medical practice and ancillary to a physician's professional services.

Physicians who practice independently or as part of a group may avail themselves of the in-office ancillary exception. This exception uses the term "referring physician" which means the physician who refers the patient for DHS — usually, the patient's attending or treating physician. As described below, with respect to physicians who practice in a group, the requirements of the exception are much easier to satisfy if the group qualifies as a "group practice" under the Stark law.³³ Thus, as a preliminary matter, the physician group should be analyzed to determine whether it qualifies as a group practice. If it does not qualify as a group practice, each element of the in-office ancillary services exception must be satisfied with respect to the individual referring physician. Another word of caution: as with other Stark exceptions, the in-office ancillary services exception includes many defined terms. *A member of a group practice* means something different than a *physician in a group practice*.³⁴

The Stark prohibitions on referrals and payment do not apply to in-office ancillary services that satisfy the following three conditions:

1) **Furnishing of Services.** The services must be furnished personally by one of the following individuals:

- The referring physician;
- A physician who is a member of the same group practice as the referring physician; or
- An individual who is supervised by the referring physician or, if the referring physician is in a group practice, by another physician in the group practice, provided the supervision complies with all other applicable Medicare payment and coverage rules for the services.³⁵

2) **Building.** The DHS must be furnished in the *same building* or a *centralized building*. The *same building* means a structure or a combination of structures that have a single street address assigned by U.S. Postal Service and does not include a mobile vehicle,

van or trailer parked at the building. In addition to having the same street address, "same building" also means that all of the conditions of *one* of the following provisions are satisfied:

- **Full-time Office in the Building.** a) The referring physician or his or her group practice has an office that is open for medical services at least 35 hours per week, and b) the referring physician or one or more members of the referring physician's group practice regularly provides physician services to patients in the office at least 30 hours per week. The 30 hours must include some physician services that are unrelated to DHS.

- **Part-time Office in the Building.** a) The patient receiving DHS usually receives physician services from the referring physician or members of the referring physician's group practice, b) the referring physician or referring physician's group practice owns or rents an office in the building that is normally open for at least eight hours per week, and c) the referring physician regularly furnishes physician services in the office at least six hours per week. The six hours per week must include some physician services that are unrelated to DHS.

- **Physician Present in Building for Referral or Services.** a) The referring physician is present and orders DHS during a patient visit on the premises or the referring physician or a member of his or her group practice is present while the DHS is provided to the patient, b) the referring physician or his or her group practice rents or owns an office that is normally open to patients for medical services at least eight hours per week, and c) the referring physician or one or more members of the referring physician's group practice regularly furnishes physician services to patients in the office at



“ The six hours per week must include some physician services that are unrelated to DHS. ”

least six hours per week. The six hours per week must include some physician services that are unrelated to DHS.

With respect to a referring physician in a group practice, if the DHS are not provided in the "same building," there is one more possibility — a *centralized building*. A "centralized building" is a building used by the group practice for a) some or all of the group practice's clinical laboratory services, or b) some or all of its DHS other than clinical laboratory. In addition, "centralized building" means that all or part of the building is owned or leased on a full-time basis (*i.e.*, 24 hours per day, seven days per week, for a term of not less than six months) by a group practice and is used exclusively by the group practice. This means that time share leasing arrangements do not qualify as a "centralized building." A group practice may have more than one "centralized building." The option of relying on a centralized building to satisfy the building requirement is only available to group practices.

Due to concerns regarding questionable arrangements involving "pod" laboratories, which may technically comply with the current definition of a centralized building, CMS has proposed a limitation on the definition of centralized building that would in most circumstances require a) the space to be a minimum of 350 square feet, and b) the group practice to permanently store 90 percent of the equipment in the space.³⁶ However, as of this date, CMS has not finalized the rule and has indicated that further study is needed.³⁷

3) **Billing.** The services must be billed by one of the following:

- The physician performing or supervising the service;
- The group practice of which the performing or supervising physician is a member under a billing number assigned to the group;
- The group practice if the supervising physician is a "physician in the group practice"

under a billing number assigned to the group practice;

- An entity that is wholly owned by the performing or supervising physician or by that physician's group practice under the entity's own billing number or under a billing number assigned to the physician or group practice; or
- An independent third party billing company acting as an agent of the physician, group practice or entity described in the four preceding options under a billing number assigned to such physician, group practice or entity.

The billing arrangement must also comply with applicable Medicare requirements. A group practice may have and bill under more than one billing number, subject to any applicable Medicare program restrictions.

If each of the three foregoing conditions — furnishing of services, building and billing — is satisfied, the referring physician may refer and bill for DHS provided to Medicare beneficiaries and Medicaid recipients.

In summary, the task of evaluating an arrangement or transaction under the Stark law may appear daunting, but many of the typical financial arrangements involving physicians can be analyzed in a step-by-step fashion using the framework outlined here. Lawyers should routinely advise their physician and other healthcare clients about the sanctions and penalties related to non-compliance. Once they understand the risks, most healthcare clients will eagerly structure arrangements and transactions to comply with the Stark law.

1. Social Security Act § 1877 codified at 42 U.S.C. § 1395nn and implementing regulations at 42 C.F.R. §§ 411.350-361. The "Stark law" will be used in this Article to refer to both the statute and the regulations.

2. Social Security Act § 1128(B)(b) codified at 42 U.S.C. § 1320a-7b(b).

3. 63 Okla. Stat. § 1-742.

4. 36 Okla. Stat. § 6055 (disclosure of ownership interests in hospitals and ambulatory surgery centers); 56 Okla. Stat. §§ 1001-1008 (disclosure of ownership interests in testing centers and laboratories); 85 Okla. Stat. § 201 (disclosure of ownership interests in healthcare facilities).

5. 59 Okla. Stat. § 725.4.

6. The Stark law's prohibition against circumvention schemes, see endnote 8, includes an intent element.

7. 42 U.S.C. § 1395nn(g)(3).

8. 42 U.S.C. § 1395nn(g)(4). A circumvention scheme is an arrangement or scheme, such as a cross-referral arrangement, whereby the physician or entity knows or should know that a principal purpose of assuring referrals by the physician to a particular entity, which if the physician directly made referrals to the entity, would constitute a violation of the Stark law.

9. See e.g., *United States v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899 (5th Cir., 1997); *United States v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 28 (D.D.C., 2003); *United States v. Diabetes Treatment Ctrs of America, Inc.*, 238 F. Supp. 2d 258 (D.D.C. 2002). The U.S. Court of Appeals for the 10th Circuit has recognized the implied certification

theory as the basis for FCA liability, but thus far not in the context of a violation of the Stark law. See *United States v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000) (upholding the validity of a FCA claim based on a false implied certification of compliance in a case involving a government contract for photography services).

10. Department of Health and Human Services, Office of Inspector General Work Plan for Fiscal Year 2007 available at <http://oig.hhs.gov/publications/workplan.html>.

11. On July 12, 2007, the Centers for Medicare & Medicaid Services published proposed revisions to the Stark regulations and requested public comment on other provisions. Except where footnoted, the proposed revisions, if adopted, would not affect the contents of this Article. 72 Fed. Reg. 38122 (July 12, 2007).

12. The Stark law expressly applies to referrals of Medicare beneficiaries. However, Section 1903(s) of the Social Security Act, codified at 42 U.S.C. § 1396b(s), extends certain provisions of the referral prohibition to the Medicaid program. Specifically, Section 1903(s) prohibits the federal government from funding a State's expenditures for designated health services furnished to a Medicaid recipient pursuant to a referral that would result in denial of payment under the Medicare program if Medicare covered the services to the same extent and under the same conditions as the state's Medicaid plan. Since the application of the Stark law to referrals of Medicare recipients remains somewhat unclear, our firm's practice group takes a conservative position by concluding that the Stark law applies to referrals of both Medicare beneficiaries and Medicaid recipients.

13. 42 C.F.R. § 411.351 (definition of designated health services).

14. Available at www.cms.hhs.gov/PhysicianSelfReferral/11_List_of_Codes.asp#TopOfPage.

15. 42 C.F.R. § 411.351 (definition of *referral*).

16. *Id.*

17. 42 C.F.R. § 411.353(a).

18. 66 Fed. Reg. 856, 873 (Jan. 4, 2001).

19. 42 C.F.R. § 411.354(b). The proposed revisions to the Stark regulations published by CMS on July 12, 2007 would provide that ownership and investment interests do not include an interest in a retirement plan offered by a DHS Entity to a physician or immediate family member as a result of the physician's or immediate family member's employment with the DHS Entity. 72 Fed. Reg. 38122, 38183 (July 12, 2007).

20. 63 Fed. Reg. 1659, 1707 (Jan. 9, 1998).

21. 42 C.F.R. § 411.354(c).

22. 42 C.F.R. § 411.355.

23. 42 C.F.R. § 411.356.

24. 42 C.F.R. § 411.357.

25. 42 C.F.R. § 411.357(a).

26. 42 C.F.R. § 411.355(b).

27. 42 C.F.R. § 411.355(e).

28. 42 C.F.R. § 411.356. On July 25, 2007, the U.S. House of Representatives introduced legislation that, if enacted, would omit the exception for physician ownership in a hospital unless the hospital is currently Medicare-certified and satisfies the other grandfathering conditions within an 18-month period, including a requirement for maximum aggregate physician ownership of 40%, maximum individual physician ownership of 2% and no expansion in beds or operating rooms. H.R. 3162, 110th Cong., § 651 (2007).

29. Under the rural provider exception, an ownership interest in a rural provider does not constitute a financial relationship. A "rural provider" is a DHS entity that furnishes substantially all (not less than 75 percent) of DHS to residents of a rural area. A "rural" area is an area that is not an urban area. An "urban" area is an area within the Metropolitan Statistical Area ("MSA") or New England County Metropolitan Area. According to the Office of Management and Budget, as of Dec. 5, 2005, Oklahoma had three MSAs: Lawton, Oklahoma City and Tulsa. Additionally, the Fort Smith-Arkansas MSA includes the Oklahoma counties of LeFlore and Sequoyah.

30. 42 C.F.R. § 411.357.

31. 42 C.F.R. § 411.351 (definition of *fair market value*). Fair market value means different things, depending on whether compensation relates to services or a lease of space or equipment. The Stark law provides a safe harbor for determining an hourly payment for physician services. Satisfying the safe harbor is not mandatory, but provides assurance that the compensation would be considered fair market value by the government.

32. "Set in advance" means that the aggregate compensation is set forth in an agreement between the parties before the furnishing of items or services for which the compensation is to be paid. "Set in advance" compensation may be a time-based or a per unit of service based amount (commonly referred to as "per click") or a specific formula for calculating the compensation. A formula for calculating compensation must be described in sufficient detail so that it can be

objectively verified, and the formula may not be changed during the term of the agreement in any matter that reflects the volume or value of referrals or other business generated by the referring physician. 42 C.F.R. § 411.354(d). The proposed revisions to the Stark regulations published on July 12, 2007, if adopted, would provide that space and equipment leases may not include unit-of-service based payments to a physician lessor for services rendered by an entity lessee to patients who are referred by a physician lessor to the entity. 72 Fed. Reg. 38122, 38183 (July 12, 2007). The proposed revisions, if adopted, would also limit the use of percentage compensation arrangements. *Id.* at 38184.

33. A "group practice" is a physician practice that satisfies all of the following conditions: 1) the group practice consists of a single legal entity operating primarily for the purpose of being a physician group practice; 2) the group practice has at least two physicians who are members of the group (whether as employees or owners); 3) each physician who is a member of the group furnishes substantially the full range of patient care services that the physician routinely furnishes through the joint use of shared office space, facilities, equipment and personnel; 4) substantially all of the patient care services of the physicians who are members of the group (at least 75 percent of the total patient care services of the group practice members) are furnished through the group and billed under a billing number assigned to the group, and the amounts received must be treated as receipts of the group; 5) the overhead expenses of, and income from, the practice is distributed according to methods that are determined before the receipt of payment for the services giving rise to the overhead expense or producing the income; 6) the group is a unified business having both of the following features: a) centralized decision-making by a body representative of the group practice that maintains effective control over the group's assets and liabilities (including budgets, compensation and salaries); and b) consolidated billing, accounting and financial reporting; 7) no physician who is a member of the group practice directly or indirectly receives compensation based on the volume or value of referrals by the physician, except as specifically permitted under the Stark law regulations (the regulations permit certain productivity bonuses and profit shares); and 8) members of the group personally conduct no less than 75 percent of the physician-patient encounters of the group practice. 42 C.F.R. § 411.352.

34. A "member of the group practice" means a direct or indirect physician owner of a group practice (such as a shareholder), a physician employee of the group practice (including a physician employed by his or her individual professional corporation that has an equity interest in the group practice), a locum tenens physician or an on-call physician while the physician is providing on-call services for members of the group practice. A "physician in a group practice" means a member of the group practice, as well as an independent contractor physician during the time the independent contractor physician is furnishing patient care services for the group practice under a contractual arrangement with the group practice to provide services to the group practice's patients in the group practice's facilities. Thus, a group practice may bill for the services of an independent contractor physician provided the physician furnishes those services on the premises of the group practice's offices, but not for services provided off-site. 42 C.F.R. § 411.351.

35. Medicare regulations provide that all diagnostic x-ray and other diagnostic tests payable under the physician fee schedule must be furnished under a specific level of physician supervision: general, direct or personal. The required level of physician supervision must be provided throughout the procedure. All procedures require at least the "general supervision" of a physician with the exception of diagnostic mammography procedures which are regulated by the Food and Drug Administration. General supervision means that the procedure is furnished under the physician's overall direction and control, but the physician's presence is not required during the performance of the procedure. Direct supervision means the physician must be present in the office suite and immediately able to furnish assistance and direction throughout the performance of the procedure. Personal supervision means a physician must be in attendance in the room during the performance of the procedure. All levels of supervision also require that the supervising physician be responsible for the training of non-physician personnel performing the test and maintenance of the equipment. 42 C.F.R. § 410.32.

36. On Aug. 22, 2006, the Centers for Medicare and Medicaid Services ("CMS") proposed a revision to the definition of "centralized building" under the Stark regulations. CMS stated that certain types of suspect leasing arrangements involving pathology services have triggered the proposed amendment. Specifically, CMS described "pod" or "condo" laboratory arrangements in which an entity leases space in a medical office building and then subdivides the space into separate areas or cubicles. Each cubicle is equipped with microscope and other minimal laboratory equipment. The entity subleases the cubicles to physician practice. According to CMS, in one common arrangement, the entity hires a histologist who performs the technical component (preparing a slide), and makes arrangements for a pathologist to read the slide and supervise the "lab." Each physician practice pays the pathologist a fee for every slide reviewed and pays the entity a management fee (for the use of the pod lab and the histologist). Each practice bills Medicare for the entire pathology service, usually at a mark-up from what it paid to the pathologist and the entity. CMS has determined that such arrangements may generate medically unnecessary biopsies and involve referrals that would otherwise be prohibited under the Stark law. 71 Fed. Reg. 48981, 49055 (Aug. 26, 2006).

CMS has proposed to add the following provisions to the definition of "centralized building":

(1) A *centralized building* **does not** include space that is owned or leased by a group practice if that space is less than 350 square feet, provided that this minimum square footage requirement does not apply if up to three group practices a) own or lease space in the same building, and b) share the same "physician in the group practice."

(2) A *centralized building* **does not** include space owned or leased by a group practice if equipment needed to perform substantially all (at least 90 percent) of the designated health services furnished in the space in a calendar year is not permanently located in that space.

37. 71 Fed. Reg. 69623, 69688 (Dec. 1, 2006). In the proposed revisions to the Stark regulations published on July 12, 2007, CMS declined to issue a specific proposal to amend the in-office ancillary services exception. However, CMS addressed its concern with "turn-key" operations, including in-office laboratories, that are being marketed to physicians and has solicited comments regarding whether changes are necessary to limit "abusive relationships." 72 Fed. Reg. 38122, 38181 (July 12, 2007).

ABOUT THE AUTHOR



Patricia Rogers is an attorney with McAfee & Taft in Oklahoma City. Her practice includes advising clients on compliance with Medicare fraud and abuse statutes, Stark, HIPAA and EMTALA, assisting hospitals and ASCs with state licensure, CONs and Medicare certification; and advising hospitals and physicians on forming joint ventures. Ms. Rogers earned a master's degree in health policy and management from John Hopkins University and worked in the healthcare industry before embarking on her legal career.

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- Groups must include at least 1 OBA member
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Name of act: _____

Your Name: _____

OBA #: _____

E-mail address: _____

If group, names of other performers:

_____ OBA # (if applicable) _____

_____ OBA # (if applicable) _____

_____ OBA # (if applicable) _____

_____ OBA # (if applicable) _____

Questions: E-mail idol@okbar.org



When Silence is Deadly: The Importance of the Credentialing Process

By Margaret J. Lowery

Physician and surgeon Michael Swango is thought to have been one of the most prolific serial killers¹ in U.S. history, having murdered between 30 and 60 patients and colleagues during his medical career. One of the disputed allegations is whether the medical community contributed to his ability to move as a physician killer from hospital to hospital without detection under what some call a “code of silence.” As a result of such cases, hospitals are now required to credential their physicians and allied health professionals.

“Credentialing” refers to a systematic process of screening and evaluating qualifications and other credentials before a practitioner’s initial appointment and reappointment to the medical staff at a facility. It includes licensure, required education, relevant training and experience, current competence, continuing education and health status, all of which must be completed at initial appointment and then every two years.² Most states, including Oklahoma, have enacted a standardized credentialing form dictating what information must be gathered by hospitals during appointment and reappointment.³

While most litigants focus on the practitioner’s act of medical malpractice in litigation, credentialing is often an overlooked area of negligence. This is due to a combination of reasons. One reason is the strong presumption that the process is subject to the “peer review” privilege,⁴ and the other reason is most attorneys prosecuting such claims are unfamiliar with the process.

Negligent credentialing occurs when an institution negligently grants privileges or credentials to a member of the medical staff or other

allied health professional. Every hospital owes a duty to use reasonable care in the screening of physician applicants to the medical staff. This ensures that medical staff appointees possess satisfactory qualifications to provide care and treatment to patients in accordance with their designated privileges.⁵ For a hospital to permit a physician on its staff whom it knows or should know is unqualified or negligent, breaches the hospital’s duty of due care to its patients.⁶ One way of determining physician competence in surgery is to require that the physician perform a specified number of such procedures each year. If a doctor fails to perform that number, he or she may not be granted privileges at reappointment.

In addition to requiring a minimum number of procedures, hospitals are also required to periodically review the quality of medical care and treatment provided by medical staff members. The purpose of the review is to identify physicians who are providing inadequate or improper care and treatment, thus permitting a timely corrective response.⁷ As part of the review, the hospital’s medical staff may incur a duty to supervise under certain circumstances.



“ The physician was allegedly impaired on pain medication during the procedure. ”

For example, when a member of the medical staff knows, or reasonably should know, that a patient is receiving improper or inadequate care, an obligation to properly respond to this situation is incurred.⁸ A hospital also has a duty to report loss of privileges, medical malpractice payments or significant clinical events.⁹ While a litigant to malpractice litigation may not query the National Practitioner Data Bank for reports made on a physician, it may discover whether a hospital properly queried the data bank before granting the physician privileges.

Recently, courts have construed an affirmative duty on hospitals to truthfully and affirmatively disclose all problems experienced by medical staff during a physician's tenure.¹⁰ The failure to accurately report problems with a physician to a facility which is inquiring during the credentialing process resulted in a judgment against the facility for fraud and misrepresentation. In *Kadlec Medical Center v. Lakeview Anesthesia Associates*¹¹ the court held that the healthcare provider's duty not to disclose inaccurate, incomplete information was a matter of *public safety*.

The physician in *Kadlec*, Dr. Berry, was terminated by the anesthesia group after he was found sleeping in a chair and having failed to respond to numerous pages over a 24-hour period. Dr. Berry was also suspected of diverting the pain killer Demerol. The anesthesia group terminated his employment that day and his privileges were allowed to lapse at Lakeview Regional Medical Center. After Dr. Berry's privileges expired, he secured employment at Kadlec on a *locum tenens* basis through an agency. Before Dr. Berry started practicing medicine at the facility, Kadlec sent a letter to Lakeview Regional requesting, among other things, 1) "evidence of current competence to perform the privileges requested" and 2) "a candid evaluation of [Dr. Berry's] training, continuing clinical performance, skill,

and judgment, interpersonal skills and ability to perform the privileges requested."¹² When requested by Kadlec to provide the credentialing information, Lakeview provided only dates of service, with a notation that other information was not available "due to the large volume of inquiries received in this office." That statement was not true, because Lakeview responded to other inquiries for other physicians. Lakeview also did not answer any of the questions on the questionnaire, quipping that it was "part of its standard business practice." About a year later, Dr. Berry was the anesthesiologist during a tubal ligation surgery which resulted in significant brain damage to a patient. The physician was allegedly impaired on pain medication during the procedure. The family of the injured patient sued and settled for \$7.5 million. In an effort to recover their losses, Kadlec sued Lakeview for fraud and misrepresentation during the credentialing process. Kadlec successfully obtained a \$4.1 million dollar verdict.

While no Oklahoma decision has addressed facts identical to those of the *Kadlec* decision, other jurisdictions have held that a hospital has a duty to report a physician to the National Practitioner Data Bank if the physician's privileges were allowed to lapse while the physician is under investigation or peer review. The courts have construed that the lapse of medical staff privileges amounts to a "surrender" of privileges for purposes of mandatory data bank reporting.¹³ Nor, is the hospital completely immune from claims by the physician whose privileges were revoked or suspended. In order for a physician to have qualified immunity, the physician must demonstrate compliance with the statutory conditions of the Professional Review Bodies — Protection from Liability Act.¹⁴ Credentialing is an important function by both the medical staff and hospitals which ensures quality of medical care and to protect patients from physicians whose credentials do not meet acceptable standards of care. The

court in *Kadlec* was correct that proper credentialing is a matter of public safety, for no hospital or medical staff should silently allow a “Dr. Swango” to move from facility to facility murdering patients. As Lakeview discovered, “silence in credentialing is now golden.”

1. He was accused of fatally poisoned at least 30 (and up to 60) of his patients and colleagues resulting in a sentence of life imprisonment without the possibility of parole.

2. The Health Care Quality Improvement Act of 1986, as amended 42 USC §11101.

3. 363 O.S. §1-106.2

4. 63 O.S. §1-1709. In *Funderburk v. Peterson*, 1999 OK 37, the court held that “materials tending to show facts that were known or knowable about the physician’s level of skills are discoverable.”

5. Both the Health Care Quality Improvement Act and Medical Staff Bylaws Rules and Regulations generally define this duty.

6. *Stubhart v. Perry Memorial Hospital Transit Authority*, 1995 OK 10.

7. *Id.*

8. *Id.*

9. Reports are made to the National Practitioner Data Bank pursuant to the Health Care Quality Improvement Act of 1986.

10. 225 ILCS 60/23(A); 42 USCA §§11133(a)(1)(A), (a)(1)(B).

11. *Kadlec Medical Center v Lakeview Anesthesia*, 2005 WL 1309153 (E.D.La.).

12. *Kadlec Medical Center v Lakeview Anesthesia*, 2005 WL 1309153 (E.D.La.).

13. In *Diaz v Provena Hospitals*, 352 Ill App 3d 1165, 817 N.E.2d 206, 288 Ill Dec 81 (Ill.2d 2004) a physician was “under investigation” by

hospital when she allowed her medical staff privileges at the hospital to lapse. The lapse was considered an element under Health Care Quality Improvement Act (HCQIA) which required the health care entity to make a report to the National Practitioner Data Bank.

14. 76 O.S. 2001 §25. See also, *Smith v. Deaconess Hospital*, 2007 OK 45.)

ABOUT THE AUTHOR




OBA member Margaret Lowery is general counsel for Memorial Hospital in Belleville, Ill. Her practice is primarily concentrated in health care litigation as well as management of the hospital system’s self insurance and captive insurance program.

She is admitted to practice in Illinois as well as before the U.S. Supreme Court and the U.S. District Courts for the Northern District of Oklahoma and the Southern District of Illinois. She received her B.A. from SMU and her J.D. from TU.

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Bar Center Renovations Begin

Project Description.

Complete remodeling of original Oklahoma Bar Center building built in 1961-1962, which includes the basement and two floors. Asbestos encapsulated around pipes in the basement will be removed.

Extent of Project.

Total renovation involving removal of an elevator and central stairwell, reconfiguration of all offices and relocation of board room. The OBA president will have a small conference room with a view of the State Capitol instead of an office. Current and future technology needs are part of the design concept for the new space.



Square Footage. 15,933 sq. ft.

Architects. K & W Architects, Oklahoma City

OBA Departments Moved to Modular Space.

Administration, Ethics Counsel, Executive Director, Information Services, Management Assistance Program, Mandatory Continuing Legal Education and Public Information, plus the Oklahoma Bar Foundation.

Changes During the Interim.

Less parking spaces in the OBA lot. Old Lincoln Boulevard entrance closed. Access to employees in modular space is through the main entrance on 18th Street. Phone and fax numbers remain the same.

Project Oversight:

OBA Bar Center Facilities Committee and Executive Director.

Date Project Began.

July 27, 2007

Projected Completion Date.

May 1, 2008 (maybe sooner since it's interior work - keep your fingers crossed).

More photos are available at www.okbar.org.



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Sovereignty Symposium XX

Oklahoma City • May 30 & 31, 2007



Lt. Gov. Jari Askins with members of the Vietnam Era Veterans Intertribal Association color guard.



Supreme Court Chief Justice James Winchester (left) and keynote speaker Dr. Mark Plotkin lead the opening ceremony processional.



Ponca Nation Chairman Dan Jones talks with Dr. Mark Plotkin.



Justice Rudolph Hargrave



Faye Hadley, Justice Tom Colbert, Frank Marley III and Terri Calloway lead the Native Peoples and the Media panel.

Bill Anoatubby, John A. Barrett, Stephen Beam, John Morris Williams and Drew Edmondson at the O'Connor ceremony.



Jean Barnes and retired Justice Don Barnes



Thompson Williams greets retired Justice O'Connor and Judge Henry.



Judge Robert Henry and retired Justice O'Connor honor the flag.



Retired U.S. Supreme Court Justice Sandra Day O'Connor and Oklahoma Sen. Richard Lerblance.



Suzuki violinists perform at the reception.



Leading a session on international law are (from left) Giovanna Gismondi, Lindsay Robertson, Justice Marian Opala, Taiawagi Helton and Margaret Stephenson.



Judge Noma Gurich and her husband John Miley dance at the anniversary gala.



OBA Solo & Small Firm Conference

June 21-23, 2007 • Tanglewood Resort at Lake Texoma

OBA President
Stephen Beam
with Melissa
DeLacerda and
Vice President
Jack Dawson.



Keynote speaker
Jay Foonberg



The 10th annual conference set attendance-breaking records.



Board member Deb Reheard became
part of the magician's act.



SSF Conference Planning Committee Vice Chair Chris
Henthorn (left) and Chair Roger Reneau (center) are
recognized for their leadership by President Stephen Beam.



The winning team of the
Friday golf scramble.

2008 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 7, 2007

OFFICERS

President-Elect

Current: J. William Conger, Oklahoma City
Mr. Conger automatically becomes OBA president
Jan. 1, 2008

(One-year term: 2008)

Nominee: Jon K. Parsley, Guymon

Vice President

Current: Jack S. Dawson, Oklahoma City
(One-year term: 2008)

Nominee:

BOARD OF GOVERNORS

Supreme Court Judicial District Two

Current: Michael W. Hogan, McAlester
Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer, LeFlore, Marshall, McCurtain, McIntosh, Pittsburg, Pushmataha and Sequoyah counties
(Three-year term: 2008-2010)

Nominee: Jerry L. McCombs, Idabel

Supreme Court Judicial District Eight

Current: R. Victor Kennemer III, Wewoka
Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole counties
(Three-year term: 2008-2010)

Nominee:

Supreme Court Judicial District Nine

Current: Dietmar K. Caudle, Lawton
Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties
(Three-year term: 2008-2010)

**Nominees: W. Mark Hixson, Yukon
O. Christopher Meyers II, Lawton**

Member-At-Large

Current: Robert B. Sartin, Tulsa
(Three-year term: 2008-2010)

Nominee: Jack L. Brown, Tulsa

Vacant positions will be filled at the OBA Annual Meeting Nov. 7 - 9. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2007.

Summary of Nominations Rules

Not less than 60 days prior to the Annual Meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the Executive Director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such Judicial District, or one or more County Bar Associations within the Judicial District may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the Annual Meeting, 50 or more voting members of the OBA from any or all Judicial Districts shall file with the Executive Director, a signed petition nominating a candidate to the office of Member-At-Large on the Board of Governors, or three or more County Bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the Annual Meeting, 50 or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect or Vice President or three or more County Bar Associations may file appropriate resolutions nominating a candidate for the office.

In addition to the above methods, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure. Bylaws are printed in the OBA 2007 Reference Guide (OBJ Vol. 78, No. 4 January 27, 2007) and election information appears on pages 251-253.

OBA Nominating Petitions

(See Article II and Article III of the OBA Bylaws)

BOARD OF GOVERNORS

SUPREME COURT JUDICIAL DISTRICT TWO

JERRY L. McCOMBS, IDABEL

Petitions have been filed nominating Jerry L. McCombs for election of the Board of Governors representing Supreme Court Judicial District 2 of the Oklahoma Bar Association for a three-year term beginning January 1, 2008.

A total of 44 signatures appear on the petitions.

County Bar Resolutions Endorsing Nominee:

Choctaw, McCurtain, LeFlore and
Pushmataha County

BOARD OF GOVERNORS

MEMBER-AT-LARGE

JACK L. BROWN, TULSA

Petitions have been filed nominating Jack L. Brown for election of the Board of Governors representing Members at Large of the Oklahoma Bar Association for a three-year term beginning January 1, 2008.

A total of 143 signatures appear on the petitions.



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Time Flies - Even When You're in a Modular Office

By John Morris Williams

While I was cooking out yesterday it dawned on me that it was the 4th of July. (Yes, I wrote this article a month ago, while moving to our temporary quarters was looming.) Of course, I knew it was Independence Day. What I was really thinking was "where has half of this year gone?" I have heard when you get older time flies. It really does.

For more than four years we have been in the planning process for the major remodel we are about to begin. Demolition of the interior space of the bar center's east building began on July 27, 2007. While clearing out some old files we are moving, I found an article that stated the OBA occupied the original structure on July 27, 1962. Exactly 45 years to the day, we began the process of a major remodel. As I think back about where I was on July 27, 1962, I can't remember the details, but I was 4 years old. Down on the ranch the news did not get to me that my future professional association had just occupied a brand new building on Lincoln Boulevard. Looking back over the last



45 years, at times it seems to have moved pretty quickly but the last four years have really been what seems like the blink of an eye.

My worry is that the next year may not move so quickly during our remodel. We are working really hard not to lower member service. However, moving 20 people to modular offices in the west parking lot does not seem to me to be something that will enhance member service. The best I can hope for is that we will not be down long. Please be patient with us during this time.

We chose to use the modular space so that we could keep all the operations in one location. Because of our open stairwells in the original building, the abatement of asbestos requires that all persons in the affected area be vacated. Thus, we are not able to do the work in increments.

My experience with construction is that everything takes longer and costs more than expected. Our goal is to have us on schedule and under budget. I have no reason for my optimism other than the fact we are about

to wade off into deep water, and I see no other choice but to make it to the other side safely. In the meantime I will be out back in a modular office pacing and worrying about all this.

Other than some parking spaces being taken up by the units, we hope our members will not be too inconvenienced. The Lincoln street exit will be closed. Everyone will need to enter through the south entrance and check in with the receptionist. If you need to see one of us refugees, we will come meet you at the front desk. For safety purposes we would appreciate that no one venture out to the temporary offices unattended.

Having admitted all my fears, it really is an exciting time at the OBA. I hope a year from now that we have an updated space that will not only enhance member service but one that you enjoy coming to. Please be mindful of the disruption this has caused for our staff and be appreciative of the positive spirit they demonstrate. It is my prayer that this time will pass quickly for them, too, as they work in temporary quarters.

P.S. We are now moved into modular space, and it is not bad at all. In fact, some of us actually are enjoying the new digs!



To contact Executive
Director Williams,
e-mail him at johnnw@okbar.org

Oklahoma Bar Journal Editorial Calendar

2007

- September
Bar Convention
Editor: Carol Manning
- October
Education Law
Editor: D. Renée Hildebrant
renee.hildebrant@oscn.net
Deadline: May 1, 2007
- November
Diversion Programs
Editor: Judge Lori Walkley
lori.walkley@oscn.net
Deadline: Aug. 1, 2007
- December
Ethics & Professional Responsibility
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2007

*If you would like
to write an article
on these topics,
contact the editor.*

2008

- January
Meet Your OBA
Editor: Carol Manning
- February
Real Estate Law
Editor: John Munkacsy
johnmunk@sbcglobal.net
Deadline: Oct. 1, 2007
- March
Pretrial Litigation
Editor: Julia Rieman
rieman@enidlaw.com
Deadline: Jan. 1, 2008
- April
Law Day
Editor: Carol Manning
- May
Work/Life Balance
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Jan. 1, 2008
- August
Insurance Law
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Deadline: May 1, 2008
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Deadline: May 1, 2008
- November
Technology/Practice Management
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2008
- December
Ethics & Professional Responsibility
Editor: Martha Rupp Carter
mcarter@tulsa-health.org
Deadline: Aug. 1, 2008

Closing Files, Destroying Files and Making Money

By Jim Calloway, Director, OBA Management Assistance Program

When I was a young lawyer starting my own practice, a more experienced lawyer asked me if I was making any money. I responded that I had opened five new files the previous week. "Son," he replied, "you don't make money opening files. You make money closing files." So hopefully readers will understand that they, too, are making money when they properly close old client files.

How to close client files and manage closed client files is a subject of frequent inquiry to the OBA Management Assistance Program. This month we will deal with the closing and destruction of physical paper client files, even as many law offices are continuing to make the transition to rely more on digital client files then paper client files.

I must note that most law offices should be at least considering their transition to files that are primarily digital files. The costs, in both time and money, of doing in the same old way are going to continue to increase.

This article is being completed from my new office location in the OBA temporary housing module. Having the "opportunity" to go through every single item that had been stored over the

last 10 years was an interesting experience, to say the least. This reinforced my belief that lawyers are going to have to switch from a primary paper-based file system to a digitally-based file system in the very near future. Growing your practice need not mean a growing number of storage cabinets. In the "good old days," a lawyer might be able to store an entire year's worth of closed files in a few banker's boxes. Now a single client matter might take up numerous banker's boxes. This means that no longer can the lawyer treat destruction of the old client files as something "that my executor can worry about."

So let's concentrate on closing paper files and making good decisions about their ultimate destruction. No matter where you are headed in terms of digital client files in the future, most every lawyer who has had a law practice for very long at all now has a collection of closed paper client files.

HOW LONG MUST A LAWYER RETAIN CLOSED CLIENT FILES?

The most commonly asked question about this topic is "how long am I required to retain closed client files?"

While I would like to be able to give a clear-cut answer to this question, the correct answer is that in Oklahoma there is no specific "controlling legal authority" on this issue. OBA General Counsel Dan Murdock has written on several occasions that in the absence of specific controlling legal authority, he looks to Oklahoma Rules of Professional Conduct Rule 1.15 that requires that trust account records must be maintained for a minimum of five years after termination of the representation. So it would seem that a similar rule should apply to closed client files. This always seemed like a logical conclusion to me.

This line of reasoning has been around for a while. In January 2000, Oklahoma City attorney Mark A. Robertson and I wrote "Case Closed!!! Now What Do I Do with the File?" where we adopted the same idea. <http://tinyurl.com/36fvrk> A form file closing letter was included with the article and is still available online.

I now often tell lawyers that it may be better to use a six-year rule so that nobody gets confused. Most lawyers store their closed files by calendar year. So it may appear that the files you closed in the

year 2000 are ripe for destruction in 2005. But in reality the file that you closed Dec. 31, 2000, should not be destroyed until at least Jan. 1, 2006. So it may be easier to refer to it as a six-year rule.

Of course there are always exceptions to this rule. We will discuss those in a moment. As noted in the previously cited article, several OBA-NET members indicated in an online discussion that they thought 10 years was a better time frame. Since that article was written, the Missouri Supreme Court has adopted a 10 year "safe harbor" file destruction rule.

BEGIN AT THE BEGINNING

Some of the most important aspects of law firm file closing and file destruction policies and implementation occur well in advance of the time to do those tasks.

There are many items that should be included in the attorney retainer agreement or the initial documents that are provided to the client at the beginning of representation. A very important one is the firm's file destruction policy. It should be an office practice to notify the client in writing of the law firm's file destruction policy at the beginning of the representation.

One does not want to wait until years after the representation has concluded, when the client may have moved and left no forwarding address, to attempt to notify clients about file destruction.

PREPARING A CLIENT FILE FOR DESTRUCTION

When a file is closed, all of the decisions about file destruction and actions that need to be taken should be



“ Although the law firm should have a clear written policy on file destruction, it is still up to a lawyer within the firm to make the final call... ”

done at that time. The client should receive a file closing letter that outlines several matters. (See previously cited article.) Among those matters should be a restatement of the file destruction policy that was originally communicated to the client.

Preparation for all aspects of file destruction must take place at the time that the file is closed. One of the biggest mistakes in closing files that law firms fail to do is prepare for the ultimate file destruction right at the time when everything is fresh on

people's minds and the client is available.

All documents or other material that need to be returned to the client should be returned at the time the file is closed. The firm should have policies about when photocopies should be made or receipts are to be signed by the client.

But you do not want to review the file five years later and find that there are important originals that must be returned to the client. This is why a lawyer, or at the very least an experienced legal assistant, must review the file when it is closed.

Although the law firm should have a clear written policy on file destruction, it is still up to a lawyer within the firm to make the final call on whether any particular client file falls within the policy or is "an exception to the rule." A clear exception would be for files that have tasks or implications extending past the five-year period. The best example is a friendly suit involving a minor plaintiff. If a distribution of proceeds is due to a minor plaintiff upon reaching majority in 10 years, the law firm would certainly not want to destroy the file after five years, even if the firm was not going to be involved further. In those cases the best practice is to retain the file until at least two years after the minor plaintiff reaches majority and some will opt for five-year retention after the age of majority.

A lawyer might decide, as a general rule, to retain probate files that affected the title to real property for a longer period. Wills and estate plans might be another situation where the

files should be kept for an extended period. One would hate to receive a subpoena to testify in a will contest proceeding a few months after you have destroyed the file and any notes that one might have taken. Even though we believe it has become a business necessity to implement a file destruction policy, I certainly still recognize that there may be files that fall into the "keep forever during my lifetime" category. (I'll leave it to the experts to opine over whether and how long an estate planning file might need to be retained after the lawyer's death.)

Adoption files are another special case. Title 10, Section 7508-1.1 provides:

"All records of any adoption finalized in this state shall be maintained for twenty-two (22) years by the child-placing agency, entity, organization or person arranging or facilitating the adoption.

Other special situations might include a particularly difficult client, a very hotly contested matter or where an opposing party has had a history of making untrue statements about the lawyer's conduct.

The final aspect of file closing is for someone to sign and date that they have reviewed the file and indicate the appropriate file destruction date. This can, and probably should, be done on the outside of the file, although many firms prefer to also keep a log that is retained after the files had been destroyed.

The nice thing about going through this process when the file is closed is that there is little additional work that needs to be done when it is time to destroy the files.

Generally speaking, they can just be destroyed. In my view, there is no need for an additional notice to the client five or six or 10 years later after they have been notified several times of the policy and had their entire set of original or needed documents given to them.

CLOSED FILE STORAGE

When I was in private practice, it was generally the practice to keep the previous years closed files stored in the office. It seemed that there was a fairly frequent need to examine those files. Afterwards we utilized an off-site storage facility.

Closed files should be stored in such a way that they are available for retrieval prior to destruction and the intended destruction date is either the box in which the file is stored or the file itself. In fact, there are now commercial services that for a flat fee will hold your files for the designated amount of time and then securely destroy them as scheduled. Until the files are destroyed, you're free to have access to them.

Closed client files should be kept in a secure location. It should go without saying that most of these files will contain confidential client communication that the lawyer has a duty to protect.

An index should be maintained of the box where each closed file is stored. This index likely needs to be retained for a very long time, even after the files have been destroyed. It can be very helpful when a former client comes in and is incorrect about the year in which they were represented.

Some thought needs to be given to the location of files

that are the exception to the standard office policy.

The most simple solution is just to store them with the other files that were closed that year until it is time to destroy the rest of the files. The potential problem with that approach is that someone may fail to go and remove them before the rest of the files are destroyed. If you're going to operate this way, then I suggest that you make liberal use of a highlighter or perhaps even use a colored paper wrapper to make it clear which file or files in a particular box are not to be destroyed with the rest. I also think it would be a prudent practice to write on the outside of the box that there were files contained there that should be removed before the others are destroyed.

The other method is to store the files with a different destruction date separately. Then it would probably make sense to place a blank file folder with the client name on the tab in the place where the file normally would have been, which indicates where that particular file is located.

Either method works and, as you can see, either method has its potential for problems. But with attention to detail, the process can be made easy and painless.

I hope you have benefited from this discussion of closing and destruction of client files. Closing files really is about making money. Properly closing files is also about not building up a future liability of time debt that will have to be paid off at some point – whether by you or your heirs.

ORPC Changes at a Glance

By Gina Hendryx, OBA Ethics Counsel

Amendments to the Oklahoma Rules of Professional Conduct as approved by the Oklahoma Supreme Court will become effective Jan. 1, 2008. These changes were prompted by extensive updates to the ABA's Model Rules of Professional Conduct. The current Oklahoma rules are based substantially on the ABA Model Rules and the adopted amendments reflect these updates as well as current Oklahoma modifications.

The following is a brief summary of a few of the rule changes.

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

Language from the model rule was added to permit a lawyer to take action on behalf of the client that is impliedly authorized to carry out the representation. A lawyer may also limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Rule 1.4 Communication

This amended rule clarifies and specifies a lawyer's duty to communicate with

the client. The lawyer shall promptly inform the client of any decision or circumstance which requires the client's informed consent and shall reasonably consult with the client about the means by which the client's objectives are to be accomplished. Comment [4] states that when a client makes a reasonable request for information, prompt compliance is required from the lawyer. However, if a prompt response is not feasible, the lawyer or a member of the lawyer's staff shall acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Rule 1.5 Fees

A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount of expenses. The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the

lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. The contingent fee agreement shall be in writing and signed by the client. The contingent fee agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party.

This rule permits division of a legal fee between lawyers who are not in the same firm. The division may be made if it is in proportion to the services performed by each lawyer or if each lawyer assumes joint responsibility for the representation. The client must agree to the arrangement and the agreement must be confirmed in writing. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.

Rule 1.6 Confidentiality of Information

There will be significant changes to this rule as of Jan. 1. Rule 1.6 governs the disclosure by a lawyer of



This amended rule clarifies and specifies a lawyer's duty to communicate with the client.



information relating to the representation of a client. The new amendments permit an attorney to disclose information in certain circumstances to prevent reasonably certain death or substantial bodily harm, to prevent the client from committing a crime or a fraud that is reasonably certain to result in substantial injury to the financial or property interests of another in furtherance of which the client has used the lawyer's services. The rule will also permit disclosure of confidential information so that the lawyer may obtain advice on the lawyer's compliance with the Rules of Professional Conduct.

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.7 prohibits representing a client if the repre-

sentation involves a concurrent conflict of interest with limited exceptions. A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client. If the representation meets one of the exceptions, each affected client must give informed consent, confirmed in writing to the representation.

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Amendments to Rule 1.8 include language in (c) clarifying who are "related persons" for the purpose of preparing instruments giving the lawyer or a person related to the lawyer a substantial gift. Rule 1.8 will permit a lawyer to pay court costs and litigation expenses on behalf of an indigent client. Rule

1.8(j) adds language that expressly prohibits sexual relations between a lawyer and a client unless: (1) a consensual sexual relationship existed between them when the client-lawyer relationship commenced and (2) the relationship does not result in a violation of Rule 1.7(a)(2).

The full text of these and all the amendments can be found at www.okbar.org/ethics/ORPC. Further information on additional rule amendments will be summarized in the October and December *Oklahoma Bar Journal* theme issues.

Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact Ms. Hendryx at ginah@okbar.org or (405) 416-7083; (800) 522-8065.

Effective September 15, 2007 electronic case filing shall be mandatory for all attorneys in the U. S. District Court for the Eastern District of Oklahoma. Section IV(B) of the Court's Administrative Guide sets out the exceptions to the required procedure for electronic filing. To sign up for electronic filing in the Eastern District, complete the registration form located on the CM/ECF page of our web site located at www.oked.uscourts.gov. To obtain a login, attorneys must attend a CM/ECF training course in the Eastern District of Oklahoma or provide proof of such training from another Court. Attorneys and their staff can sign up for training classes through our automated class scheduler on the CM/ECF web page. Questions regarding mandatory attorney filings should be sent to Registration_OKED@oked.uscourts.gov.

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July Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center on Friday, July 20, 2007.

REPORT OF THE PRESIDENT

President Beam reported he attended the Solo and Small Firm Conference, Oklahoma Bar Foundation meeting, PACE reception hosted by the OBA LRE Department, State Bar of New Mexico annual meeting at the Inn of the Mountain Gods, OBA Annual Meeting Task Force meeting and Custer County Bar Association meeting. He met with a YLD representative about the Wills for Heroes program, spoke at the PACE dinner and worked on the executive director's evaluation.

REPORT OF THE VICE PRESIDENT

Vice President Dawson reported he attended the Solo and Small Firm Conference and presented one of the CLE sessions. He worked on Mentor Task Force, Advertising Task Force and Bar Center Facilities Committee business.

REPORT OF THE PRESIDENT-ELECT

President-Elect Conger reported he attended the Solo and Small Firm Conference, June board meeting, OBF Trustee meeting and a meeting with Executive Director Williams and the architect. He also chaired the Bar Center Facilities Committee meeting.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the PACE dinner and reception, monthly staff celebration, directors meeting to plan the relocation, Bar Center Facilities Committee meeting and a meeting with the architect and the decorator. He also spoke to the PACE participants at their opening session. His efforts have been focused on details involved in orchestrating the move of bar employees to the modular space.

BOARD MEMBER REPORTS

Governor Bates reported she attended the Solo and Small Firm Conference, June board meeting, OBA State Legal Referral Service Task Force meeting and OBA Work, Life Balance Committee meeting. She made calls to Canadian, Comanche, Pittsburg, Pottawatomie and Seminole bar associations encouraging them to submit OBA award nominations. She assisted the Oklahoma County Bar Association in its awards work. **Governor Caudle** reported he attended the May Board of Governors dinner and reception with the Creek County Bar Association, May board meeting and Comanche County Bar Association CLE and bar luncheon. He chaired the

State Legal Referral Service Task Force Meeting at the Bar Center. He was not present at the June meeting because he represented the OBA at the State Bar of Texas annual meeting in San Antonio. **Governor Christensen** reported she attended the Solo and Small Firm Conference, June board meeting, OBA Bar Center Facilities Committee meeting, OBA Bench and Bar Committee meeting, Bench and Bar subcommittee meeting regarding revision of the Model Code of Judicial Conduct and OBA Audit Committee meeting. She also participated in OBA Women in Law Committee discussions regarding the annual Women in Law Conference to be held at the Skirvin Hotel on Sept. 27, 2007. **Governor Dirickson** reported she attended the Solo and Small Firm Conference, June board meeting and Custer County Bar Association luncheon. She participated in phone discussions with the Lawyers Helping Lawyers chairperson concerning the proposed CLE for the annual convention. **Governor Farris** reported he attended the Solo and Small Firm Conference, June board meeting, two OBA Legal Intern Committee meetings, Tulsa County Bar Foundation meeting and OBA Audit Committee meeting. **Governor Hermanson** reported he attended the Solo and Small

Firm Conference and June Board of Governors meeting. He presented one of the CLE seminars at the conference. He announced that he has been appointed to the ABA Tech Show 2008 Track Advisory Board for the solo and small firm track. **Governor Hogan** reported he attended a Pittsburg County Bar Association meeting. **Governor Kennemer** reported he attended the Solo and Small Firm Conference, June Board of Governors meeting, Seminole/Hughes counties bar luncheon with CLE program by Asst. U.S. Attorney Joe Wilson of the Northern District and monthly task force meeting to create a Uniform Residential Sales Contract--OKC/OREC.

Governor Reheard reported she attended the Solo and Small Firm Conference and June board meeting. **Governor Souter** reported he attended the Solo and Small Firm Conference and June board meeting. At the conference he took part in the golf tournament that involved both board members and conference participants. **Governor Stockwell** reported she attended the Solo and Small Firm Conference, June board meeting, Cleveland County Bar Association executive committee meeting and CCBA Bench and Bar Committee meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Camp reported he attended the Solo and Small Firm Conference and June Board of Governors meeting. He participated in the YLD bus trip, Wills for Heroes publicity planning conference, meeting with the ABA/YLD district representative, meeting with Loyed Gill regarding the New

Attorney Experience seminars and OBA/YLD Seniors Committee planning teleconference. He also chaired the June YLD Board of Directors meeting and conducted an e-mail vote regarding the amendment of Art. 3.3 in the YLD Bylaws and the filling of two board vacancies (District 8 and at-large seats).

REPORT OF THE SUPREME COURT LIAISON

Justice Taylor reported work at the Supreme Court continues. He said Justice Lavender will be honored in a retirement ceremony in the Supreme Court Courtroom at 2 p.m. on July 24 with a reception following. He said the Judicial Nominating Commission's work has begun to fill the position. He said Justice Lavender will be missed. He has been a great contributor to the court.

LAW STUDENT DIVISION LIAISON

LSD Chair Pappy reported she attended the Solo and Small Firm Conference and June board meeting. She worked with Jennifer Beale with Beale Professional Services to offer health and life insurance plans to law students and recent graduates, met with a representative from Yukon National Bank to prepare a debt management seminar, brochure and video for law students, coordinated a project with the Young Lawyers Division to allow law student division members to assist on the latest update of the elder care law handbook. She prepared a slideshow/video about the division as a marketing tool for the upcoming orientation days at OU, TU and OCU. She reported Information Services Director Loomis cre-

ated online registration for new members that allows new member enrollment to take place at the division booth at the orientations. She is currently working on a public service announcement campaign to remind law students that their "Facebook," "YouTube," "Friendster" and "MySpace" pages are all easily accessible by potential employers and potential clients. The PSA is designed to warn students to be cautious of the pictures and language they and their friends post on their online Web pages.

REPORT OF THE GENERAL COUNSEL

General Counsel Murdock shared a status report of the Professional Responsibility Commission and OBA disciplinary matters. He reported he participated in a CLE for Lawyers for Working Oklahomans, spoke to the OU law school class of Kent Meyers, participated in a program for Chinese students at the OCU law school explaining attorney regulation in Oklahoma and assisted in moving OBA items to storage and moving staff to modular offices. He attended two OBA director meetings, monthly OBA staff celebration and reception for PACE program participants.

BAR CENTER RENOVATIONS

Executive Director Williams reported the move has been made to modular space. He said about 1,000 boxes and several hundred feet of shelving had been moved with employees assisting. He said the IS Department used almost 5,000 feet of cable to hook up the phone and computer system. Servers were moved on a weekend so they were not down during busi-

ness hours. President-Elect Conger reviewed the sample board of materials recommended for interior building renovation. He explained the Bar Center Facilities Committee is recommending a traditional design. The current board room tables will be donated to Oklahoma Legal Aid Services offices. The foundation consulted a used furniture seller, who did not have any interest in purchasing the old furniture. The board authorized staff to dispose of used OBA furniture. Executive Director Williams reported the renovation contract is not finalized, and it would be his intent to provide a bonus provision to encourage prompt completion.

OUT-OF-STATE STAFF TRAVEL

Executive Director Williams reviewed policy on travel and said General Counsel Murdock is interested in traveling to a lawyer assistance conference in Halifax that may offer information that would benefit the Lawyers Helping Lawyers Committee. The board approved funding to allow General Council Murdock to attend the Halifax conference and to attend his usual National Organization of Bar Counsel meeting in San Francisco if he chooses to go to both. The board approved funding to send LHL Committee Chair Tom Riesen to the Halifax conference.

REVIEW OF THE 2006 AUDIT

As Audit Committee Chairperson, Governor Farris reviewed highlights of the audit that found no problems. He said the committee is charged with reviewing internal financial

controls and will schedule more frequent meetings with bar management. The board voted to accept the report. Governor Farris reported the committee recommends changing audit partners and staying with the same firm. The board approved the committee's recommendation.

REQUEST FOR AN ADDITIONAL DELEGATE TO THE ABA HOUSE OF DELEGATES

Executive Director Williams reported under the ABA structure that Oklahoma qualifies for another seat in the House of Delegates. A method to select the representative to fill a two-year term and funding would be needed. It was noted that executing the documents requesting the additional delegate does not require the OBA to fill the position. February 2008 would be the first meeting Oklahoma would be able to send another delegate. The board authorized documents to be filled requesting the additional delegate.

EXPENDITURES FOR VICE PRESIDENT TRAVEL

The board authorized expenditures for Vice President Dawson and his spouse to travel to the ABA Annual Meeting in San Francisco in August 2007. The expense will be within the vice president's budget.

BUDGET COMMITTEE APPOINTMENTS

The board appointed as Budget Committee members Luke Gaither, Henryetta; Brett Willis, Oklahoma City; Deborah Reheard, Eufaula; Jon K. Parsley, Guymon; Patrick O'Conner, Tulsa; Brian T. Hermanson, Ponca City;

Donna Dirickson, Weatherford; Christopher L. Camp, Tulsa; and Kimberly Warren, Tecumseh. President-Elect Conger will serve as Budget Committee chairperson.

STATE BAR OF TEXAS MEETING REPORT

Governor Caudle shared highlights of the events at the meeting in San Antonio.

SOLO AND SMALL FIRM CONFERENCE

President Beam shared highlights of the successful conference at Tanglewood Resort that broke previous attendance records.

OBA LEADERSHIP CONFERENCE

President Beam encouraged all board members to attend the conference August 23 & 24, 2007, at the Sheraton Hotel in Oklahoma City. Fifty-five lawyers were selected to attend the conference designed to develop future bar leaders.

EXECUTIVE SESSION

The board went into executive session to discuss the executive director's evaluation.

NEXT MEETING

The board will meet in Oklahoma City on Friday, August 24, 2007, at the Sheraton Hotel in Oklahoma City at 12:30 p.m. following the Leadership Conference luncheon.

Summaries of the May and June board meetings can be found at www.okbar.org/obj/boardactions

Message from the OBF Fellows Chairperson

By Roger R. Scott

Dear Friends,

It has been my privilege to serve as chairperson of the Oklahoma Bar Foundation Fellows program for the past two years. Your foundation has enjoyed unprecedented growth in recent years. OBF is continually improving our grant process, and we are proud of our progress. New organizations were funded last year, and more initiatives will be funded this year through the availability of added grant funding. Your OBF Grants and Awards Committee is hard at work evaluating and interviewing prospective candidates for the 2007 grant year.

We need your help! I ask that you join the OBF Fellows program today and invite others to become Fellows. Fellow membership is an easy and painless opportunity to become even more involved in helping to make a difference in the lives of others while enhancing the image of our legal profession. I can't think of a good reason for not being an OBF Fellow!

Becoming a Fellow is a simple request that every attorney should do. Please don't delay joining the Fellows any longer and join today. Legal needs in Oklahoma are greater than ever, and you can help with the work of your foundation. **When you join the Fellows program you don't just belong to the foundation – it belongs to you!**

- **Legal Services** – OBF awards financial sup-

port that helps make legal assistance in civil proceedings possible for the most vulnerable citizens of our state, poorer Oklahomans and the elderly. Support for Legal Aid Services of Oklahoma (LASO) and Oklahoma Indian Legal Services (OILS) is one of the essential aspects of our mission. Last year \$280,000 was given not only for legal representation and advice, but for educational programs that will help citizens find solutions and aid in the prevention of future problems. **More than \$3.7 million has been given** over the past 20 years to support these programs.

- **Senior Services** – The 2000 U.S. Census reported 429,566 Oklahomans were 65 years of age and older. By 2015, the over age 65 population is predicted to

increase by 37 percent and will likely double by 2030. OBF funded new programs during 2006 that will provide added services beyond what legal aid providers are able to serve. Last year **OBF awarded \$38,000 to help promote new initiatives**, Senior Law Resource Center and the Oklahoma Court Appointed Advocates for Vulnerable Adults program.

- **Children's Legal Service Programs** – OBF funded newer programs that provide special children's advocacy and pro bono legal services, in addition to the many children being served through legal aid providers. During 2006 \$38,000 was awarded to Oklahoma Court Appointed Special Advocates, Tulsa Lawyers for Children and the Mayes County Youth

Court programs. **More than \$160,000 has been given** over the years to provide specialized volunteer training and to expand attorney pro bono services.

- **Domestic Violence and Victim Programs** – The Domestic Violence Division of Oklahoma Indian Legal Services and SANE of Southwest Oklahoma received funding to assist in special legal service areas. More than \$150,000 has been awarded by the foundation for victims' education and assistance programs since 1986.

grants have also enabled hundreds of Oklahoma lawyers to find new ways to get involved in the community, balance their professional responsibilities with the rest of their life and help all those involved in the Oklahoma legal system to bring their highest ideals to the practice of law. Scores of law students have been helped through scholarship programs and the foundation is pleased to announce the new Oklahoma Bar Foundation Fellows' Law Student Scholarship Program this year. During 2006 \$97,000 was awarded for

vehicle where members of the Oklahoma bar, other foundation partners and concerned Oklahoma citizens can make a difference through philanthropy.

Fellows are the backbone of the Oklahoma Bar Foundation and are very important to the work of the foundation. Fellows represent a distinguished group of attorneys who embody the highest traditions and ideals of our legal profession. Without the ongoing leadership and financial contributions from Fellows, many public service efforts might not be possible. Every attorney should be a Fellow.

Trustees look forward to working with you and those you refer for Fellowship. We know you take pride in the work that is being done on behalf of Oklahoma attorneys for the betterment of our great state and our profession and want to become a supporting member of the OBF team!

Sincerely,



Roger R. Scott
Chair, OBF Fellows
Program

Growth of OBF Grant Awards



*More can be accomplished each year
with your help as a Fellow!*

- **Legal Education** – OBF has supported law-related education programs for thousands of Oklahoma school children and the general public for many years. These

education and more than \$1.8 million has been awarded for legal education since 1986.

- **Philanthropic Voice** – Your bar foundation has become a clear

“ Every attorney should be a Fellow. ”

OBF

FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

Name: _____
(name, as it should appear on your OBF Fellow Plaque) County _____

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

Phone: _____ Fax: _____ E-Mail Address: _____

☐ I want to be an OBF Fellow **now** – Bill Me Later!

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

☐ *New Lawyer 1st Year*, \$25 enclosed & bill as stated

☐ *New Lawyer within 3 Years*, \$50 enclosed & bill as stated

☐ I want to be recognized as a **Sustaining Fellow** & will continue my annual gift of **at least \$100** – (initial pledge should be complete)

☐ I want to be recognized at the leadership level of **Benefactor Fellow** & will annually contribute **at least \$300** – (initial pledge should be complete)

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Many thanks for your support & generosity!

Disabled Children Need Volunteer Representation

By *Laura Ort-Presley*

Supplemental Security Income, (hereinafter referred to as SSI), is an effective part of the Federal safety net in reducing poverty among disabled children. The National Survey of SSI Children and Families was conducted to assess the role of the SSI program in providing assistance to low-income children with disabilities and their families.¹ Survey results showed that most children receiving SSI lived in a family headed by a single mother, and less than one in three lived with both parents. Approximately half lived in a household with at least one other disabled individual. Approximately 70 percent were enrolled in special education. SSI support was found to be the most important source of family income, with earnings a close second at approximately 40 percent of the family's income. The survey found that 54 percent of those children who received SSI payments lived in families above the poverty threshold, when all annual income was considered. This is notable since the federal SSI program guarantees an income level below the poverty line.²

The survey supplemented the Social Security Administration's records regarding the disability diagnoses and sever-



ity of impairments of children receiving SSI. The survey indicates that there are wide variations in severity, reflected in reports of the presence or absence of six functional limitations, perceived overall health status and perceived impact of disability. The survey revealed that physical disabilities were most common among children ages 0 to 5, and mental impairments were most common among children ages 6 to 17. About 36 percent of children reportedly had disabilities that affected their abilities to do things "a great deal," and 21 percent had disabilities that affected their abilities to do things "very little" or with "no impact." All chil-

dren receiving SSI payments are covered by some form of health insurance. Medicaid is the most common source, but substantial variation was reported in utilization. The findings show however, that SSI payments are not used to cover medical expenses for the majority of children.³

The president signed into law P.L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act, which substantially changed the definition of disability for children under the SSI program.⁴ Approximately 264,000 notices of redetermination were sent, and 60,000 age 18 redetermination notices were sent out in November and December 1996. It was estimated that 135,000 children would lose their SSI payments under the new definition, and due to age 18 redeterminations. The administration's records show that by July 1999 nearly 104,000 children had been found no longer eligible for SSI. The total estimated savings from the new SSI provisions were estimated at more than \$8 billion through the year 2002.⁵

The Congressional Budget Office (CBO) estimated that 22 percent of eligible disabled children under the old

law would become ineligible under the new statute, between 1996 to 2002. The extent of the financial impact on the states and the families of these lesser disabled children has not been tracked. It is clear that the impact will fall to the individual states and the families of these children to provide for the care of these lesser disabled children. It is estimated that, as a piece of the federal domestic budget excluding defense and international affairs, spending on children will decline under current law from 15.4 percent in 2006 to 13.1 percent in 2017. Interestingly, spending on children declined from 20.1 percent in 1960 to 15.4 percent in 2006, although the aggregate amount grew from \$53 billion in 1960 to \$333 billion in 2006 at the value of the dollar today.⁶ Children benefited from 20.1 percent of federal domestic spending in 1960, 14.7 percent of the increase in spending between 1960 and 2006, and will receive only 5.6 percent of the increase in spending on the domestic budget between 2006 and 2017.⁷

“Kids’ Share 2007: How Children Fare in the Federal Budget” tracks federal spending from 1960 to 2006 and utilized current policy and some assumptions to project activity through 2017, by taking a look at more than 100 major programs aimed at improving children’s lives through income security, health care, social services, food and nutritional aid, housing, education, training, and tax credits and exemptions for their families.⁸

Supplemental Security Income has become an

important part of the federal safety net for children. As part of a growing trend in decreased allocation of increasing federal budgets due to increased gross domestic product, SSI for children was reformed due to shifting political policy which deemed that lesser disabled children would no longer receive this form of income, shifting the costs associated with these children to their families, local communities and the states. Many children remain eligible for SSI. Many of these children who would otherwise be found disabled upon appeal, go unrepresented in their claims for benefits and must rely on the representation of their parent or guardian if their claim is appealed before an administrative law judge.

“...I encourage members of the OBA to volunteer to represent these children...”

As members of the profession whose oath of office it is to uphold the laws of our state and the federal government, I encourage members of the Oklahoma Bar Association to volunteer to represent these children in their claims for SSI payments. Members of the bar who wish to fill this need may do so by contacting their local bar association officers,

the state’s legal aid offices and the local Social Security offices in their area as some will maintain lists of volunteer representatives.

This article was written by Laura Ort-Presley in her private capacity. No official support or endorsement by the Social Security Administration or the United States is intended or should be inferred.

1. *A profile of Children with Disabilities Receiving SSI: Highlights from the National Survey of SSI Children and Families*, by Kalman Rupp, Paul S. Davies, Chad Newcomb, Howard Iams, Carrie Becker, Shanti Mulpuru, Stephen Ressler, Kathleen Romig, and Baylor Miller; Social Security Bulletin, Vol. 66, No. 2, 2005/2006.

2. Id. The survey breaks down the assets of the families of children receiving SSI: some children lived in households well below the poverty threshold and other lived in households well over 200 percent of the poverty threshold; one-third lived in families owning a home; two-thirds lived in families owning at least one car; about 40 percent lived in families with no liquid assets; and less than 4 percent lived with adults who owned stocks, mutual funds, CDs or savings bonds.

3. Id. The use of supportive therapies also varied widely, with physical, occupational and speech therapy the most commonly used therapies. In this dominant service category, only 11 percent reported having unmet service needs, while more than one-third had unmet needs for mental health counseling and three-quarters had unmet needs for respite care.

4. *The Effect of Welfare Reform on SSA’s Disability Programs: Design of Policy Evaluation and Early Evidence*, by Paul Davies, Howard Iams and Kalman Rupp, Social Security Bulletin, Vol. 63, No. 1, 2000. Under the act, the individualized functional assessment and all reference to maladaptive behavior in the Listing of Impairments, was eliminated. A new disability definition for children was added, defining disability as “a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations.” Additionally, individuals eligible for SSI as children are to be reassessed for eligibility against the adult disability criteria upon reaching age 18.

5. *Supplemental Security Income for Children with Disabilities, Part of the Federal Safety Net*, by Pamela J. Loprest, No. A-10 in Series, “Issues and Options for States,” July 1, 1997, Urban Institute Publications: www.urban.org/url.cfm?ID=307041

6. *Federal Resources for Children Challenged by Automatic Growth in Adult Entitlement Programs*, by The Urban Institute, March 15, 2007; www.urban.org/url.cfm?ID=901056

7. Id.

8. Id.

YLD HOSTS RECEPTIONS HONORING NEW BAR ADMITTEES

In late April 93 new attorneys were sworn in as new lawyers at the House of Representatives chamber at the State Capitol. Following opening remarks by Chief Justice James R. Winchester and OBA President Stephen Beam, OBA/YLD Chairman Christopher Camp briefly spoke, urging honorees to become active in the YLD and other OBA committees and sections.

He told the new members, "Your bar involvement will prove every bit as beneficial to your professional development as anything else in your career. It will allow you to cultivate one-on-one personal relationships with judges, bar leaders and fellow attorneys. It will reinforce that you can be adversarial without being enemies and train you to practice with civility."

Immediately after the swearing-in ceremony, the YLD held a reception in the Capitol rotunda for the new admittees and their family and friends in attendance. YLD Director Amber Peckio Garrett and former OBA Law Student Division Chair LeAnne McGill were present to greet the newest OBA members, answer questions and promote involvement in the bar.

The following Thursday, the YLD hosted a less formal reception and happy hour

in the private loft of Kampai Lounge, located in Tulsa's Brookside district. Over drinks and hors d'oeuvres, Chair Chris Camp and YLD Director Roy Tucker welcomed the new admittees and distributed information regarding the YLD's 10 public service and eight member service committees. The event was well-attended by attorneys, both new and not-so-new, including U.S. District Court Judge Ronald A. White, Sean Hanlon (law clerk for U.S. Magistrate Judge Sam A. Joyner), Penina Chiu (Fred Dorwart Lawyers and former law clerk for Judge Edward C. Prado of the U.S. Court of Appeals for the Fifth Circuit), Leah Carpenter (Gable & Gotwals), Eric Schelin (Dorwart) and new admittees Geoffrey Beeson, Jessica Carriger, Simon Harwood, and Tracy Smith. Thanks to everyone who turned out to honor our new admittees. Special thanks go to Sarah Barry (Gable) and Jasen Corns (Jenks Law) for coordinating the event, as well as to John Weaver (Oklahoma Tax Commission), who organized and hosted the Oklahoma City reception at Bricktown Brewery on May 17.

YLD DIRECTORS APPOINTED TO ABA LEADERSHIP POSITIONS

The YLD extends its congratulations to Director Doris Gruntmeir on her appointment as American Bar Association YLD District Representative for Okla-

homa and Arkansas. As the district representative, Ms. Gruntmeir will represent both states before the ABA/YLD, which has more than 300 state and local affiliates including the Young Lawyer Divisions for the Oklahoma, Tulsa County and Oklahoma County bar associations. She will attend all meetings of the ABA/YLD Council, the general executive and administrative authority over the division.

The YLD also applauds Director Roy Tucker for being appointed Vice Chair of the ABA/YLD General Practice, Solo and Small Firm Committee for 2007-2008. This committee provides an avenue for young lawyers to gather and share ideas about how to market, manage and master a general or solo practice by offering opportunities to organize and speak at seminars and author articles and publications. In his role as vice chair, Mr. Tucker will be responsible for assisting the chair in operating and managing the 169-member committee, as well as helping to draft and implement the committee's plan of action. He assumed his duties after participating in an orientation in May.

YLD DIRECTOR FOSTERS DEMOCRACY IN FORMER COMMUNIST BLOC

YLD Director Randy Grau traveled to the Czech Republic to represent Okla-



At the Tulsa reception for new lawyers are (from left) Roy Tucker, Tracy Smith, Simon Harwood, Jessica Carriger, Sean Hanlon, Penina Chiu, Sarah Barry, Chris Camp and D.J. Slaughter.

homa as part of Civitas, an international program teaching individuals how to be involved in their local government.

"It was an honor to represent my country and my state," Mr. Grau said. "Seeing the Czech Republic struggle with the growing pains of democracy made me appreciate my homeland even more."

Grau, who serves as a deputy Oklahoma County commissioner, served as part of a delegation along with three other lawyers from Michigan and Colorado. The OBA Law-related Education Department selected him to represent Oklahoma because of his involvement in government and law-related activities. He is the YLD's representative to the OBA Law-related Education

Committee. He was a former candidate for the Oklahoma House of Representatives before joining the administration of Commissioner Ray Vaughn in March 2007.

The conference took place in the Czech capitol of Prague. Mr. Grau participated in round table discussions with Czech senators, political scientists and legal professionals regarding democracy and the rule of law. He also met with Ambassador Richard W. Graber at the U.S. Embassy.

Disaster Assistance

**VOLUNTEERS
Needed**

YLD SEEKS VOLUNTEER ATTORNEYS TO ASSIST WITH DISASTER LEGAL SERVICES

Due to recent flooding, FEMA has made a federal disaster declaration for five Oklahoma counties. FEMA has set up Disaster Recovery Centers (DRC) in Miami (Ottawa County), Bartlesville (Washington County), South Coffeyville (Nowata County) and Shawnee (Pottawatomie County). Plans are to set up a DRC in Comanche County, and others may follow. The centers are staffed Monday through Saturday from 8 a.m. to 6 p.m. and provide individuals assistance relating to a number of issues.

Many of the individuals affected by the recent flooding are in need of legal services. The YLD has a long-standing agreement with FEMA to provide volunteer legal services in the event of a disaster. The most anticipated needs at this time are related to insurance claims, counseling, landlord/tenant issues, environmental issues and other legal issues arising from the conditions related to the recent flooding.

If you are able to volunteer your services, please send your name and contact information to Dana Shelburne at danas@okbar.org or (405) 416-7007 in the OBA's Office of General Counsel. The OBA will maintain a list of volunteers and will refer individuals to volunteer attorneys as calls are received. Volunteer attorneys who are faced with difficult legal issues are encouraged to contact FEMA attorney Patricia Trask, who is willing to help on difficult issues.

She may be reached at (405) 869-3983.

YLD BOARD AMENDS BYLAWS

Article 3.1 of the YLD bylaws provides that the board is composed of the chairperson, chairperson-elect, past-chairperson, 20 voting members and ex-officio members. The 20 voting members are one from each nine judicial districts, plus two for Districts 3 and 6 each and seven at-large (two of which are non-District 3 and 6, i.e. rural).

Article 3.3 provided that all (non-chair track) directors are elected for two-year terms as follows:

Even years – Districts 1, 3, 5, 6, 7, and 9 and 3 at-large

Odd years – Districts 2, 3, 4, 6, 8 and 2 at-large

As it stood, Article 3.3 only addressed the elections of 16 of the 20 voting seats. It did not address when elections for the extra seat from Districts 3 and 6 or the two additional at-large seats were to be held (nor did it address the at-large rural). It appears the intent was to have the extra seat from District 3 and the two additional at-large seats elected in odd years, with the extra seat from District 6 to be elected in even years (based on recent practice and handbook provisions). This would result in an even number of voting seats being elected in both even and odd years (10 and 10).

Accordingly, the YLD board of directors voted to amend Article 3.3 of the bylaws to read:

3.3 Election and Terms of Directors. Directors shall

be elected for a two (2) year term by the membership of the Division pursuant to the election procedures set forth in these Bylaws. In even numbered years, one (1) Director shall be elected from Judicial District Nos. 1, 3, 5, 7 and 9, two (2) Directors shall be elected from District 6, and three (3) additional Directors shall be elected at-large (one of which is an at-large Rural seat). In odd numbered years, one (1) Director shall be elected from Judicial District Nos. 2, 4, 6 and 8, two (2) Directors shall be elected from District 3, and four (4) additional Directors shall be elected at-large (one of which is an at-large Rural seat). Any vacancy on the Board of Directors shall be filled by interim appointment by a majority vote of the Board of Directors for the balance of the term vacated.



Calendar

September

3 Labor Day (State Holiday)

7 OBA Awards Committee Meeting; 11 a.m.; Supreme Court Courtroom, State Capitol; Contact: Gary Clark (405) 385-5146

Oklahoma Trial Judges Association Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judge Barbara Swinton (405) 713-7109

11 OBA Bar Center Facilities Committee Meeting; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bill Conger (405) 521-5845

OBA Member Services Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Debra Charles (405) 286-6836

12 State Legal Referral Service Task Force Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dietmar Caudle (580) 248-0202

OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Steven Dobbs (405) 235-7600

cont'd on next page



August

8 State Legal Referral Service Task Force Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Dietmar Caudle (580) 248-0202

10 OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342

15 OBA Women in Law Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Elizabeth Joyner (918) 573-1143

16 OBA Bench and Bar Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211

OBA Work/Life Balance Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280

OBA Government and Administrative Law Section Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kevin Nelson (405) 620-0547

22 OBA Diversity Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Linda Samuel-Jaha (405) 290-7030

23 OBA Legal Intern Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: H. Terrell Monks (405) 733-8686

23-24 OBA Leadership Conference; Sheraton Hotel, One North Broadway, Oklahoma City; Contact: Linda Thomas (918) 337-0947

24 OBA Board of Governors Meeting; Sheraton Hotel, One North Broadway, Oklahoma City; Contact: John Morris Williams (405) 416-7000



sept. cont'd.

- 14 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 17 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Larry Yadon (918) 595-6607 or Barry Davis (405) 607-8757
- 19 OBA Clients' Security Fund Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Micheal Salem (405) 366-1234
Ginsburg Inn of Court; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Julie Bates (405) 691-5080
- 20 OBF Trustees Meeting;** 12 p.m.; Oklahoma History Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
OBA Work/Life Balance Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- 21 OBA Board of Governors Meeting;** Eufaula; Contact: John Morris Williams (405) 416-7000
- 26 OBA Diversity Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Linda Samuel-Jaha (405) 290-7030
- 27 2007 OBA Women in Law Conference;** Skirvin Hotel, Oklahoma City; Contact: (405) 416-7006
New Attorney Admission Ceremony; OCU – 9 a.m.; OU – 10 a.m.; TU – 11 a.m.; House of Representatives, State Capitol; Contact: Board of Bar Examiners (405) 416-7075



October

- 5 Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judge Barbara Swinton (405) 713-7109
- 9 OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bill Conger (405) 521-5845
- 10 State Legal Referral Service Task Force Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dietmar Caudle (580) 248-0202
OBA Professionalism Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Steven Dobbs (405) 235-7600
- 12 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 17 OBA Diversity Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Linda Samuel-Jaha (405) 290-7030
Ginsburg Inn of Court; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Julie Bates (405) 691-5080
- 18 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- 19 OBA Board of Governors Meeting;** Custer County; Contact: John Morris Williams (405) 416-7000
- 23 Death Oral Argument, Wade Greely Lay – D-2005-1081;** 10 a.m.; Court of Criminal Appeals Courtroom

This master calendar of events has been prepared by the Office of the Chief Justice in cooperation with the Oklahoma Bar Association to advise the judiciary and the bar of events of special importance. The calendar is readily accessible at www.oscn.net or www.okbar.org.



Justice Lavender Retires

After 42 years on the Oklahoma Supreme Court, Justice Robert Lavender has stepped down from his position on the bench. His retirement took effect Aug. 1.

Justice Lavender, who recently turned 81 years old, was appointed by former Gov. Henry Bellmon. He served as chief justice from 1979 to 1980.

He was in private practice in Tulsa and Claremore before being appointed as a justice. He also was city attorney of Tulsa and Catoosa. He is a graduate of the University of Tulsa law school and a veteran of World War II.

The Judicial Nominating Commission is seeking applicants to fill the District One vacancy.



President Beam Recognized

Melissa DeLacerda admires OBA President Stephen Beam's award plaque, which was presented to him by the American Bar Association's General Practice, Solo and Small Firm Division at its spring meeting in Washington, D.C. Beam was given the award for one of his bar journal president's messages, in which he explained why he is a lifetime ABA member.



Bar Association Honored with Mental Health Award

OBA President Stephen Beam and OBA Executive Director John Morris Williams recently accepted the 2007 Mental Health Innovation Award from the Mental Health Association of Central Oklahoma at a luncheon in Oklahoma City. Shirley Cox, legal services developer at the Oklahoma Department of Human Services, presented the award. The award recognized the OBA's program created to address an increasing number of lawyer suicides. The program provides all bar members up to six hours of free crisis counseling and is available 24 hours a day.



Teresa Rendon

Diversity Committee Presents Bar Bri Scholarships

The OBA Diversity Committee recently awarded three law school graduates scholarships to cover the cost of attending a seven-week long bar exam review course. Pictured are (from left) OBA Diversity Committee Chair Linda Samuel-Jaha, OCU graduate Cree Hammond and OBA Diversity Committee member Teresa Rendon. Other recipients are OU graduate Jamar Osborne and TU graduate Robert Betts.



Robert Betts



Jamar Osborne



Beale Professional Services Relocates

Beale Professional Services, an OBA partner in long-term insurance programs, has relocated to 4111 N. Lincoln Blvd. in Oklahoma City. The company has added staff over the years and outgrew its location near I-44 and Pennsylvania Avenue.

The new Lincoln Boulevard location offers more office and meeting space, more parking for staff and clients and is centrally located near I-44 and I-235.

Since 1955 Beale has offered insurance programs through its partnership with the OBA. For more information, call (405) 521-1600, (800) 530-4863 or visit www.bealepro.com.



Portrait of Legal Pioneer Revealed at Capitol

A portrait of Ada Lois Sipuel Fisher, the first African American to enter and graduate from the OU College of Law, was unveiled at the State Capitol on June 19, often referred to as "Juneteenth."

The portrait, created by Norman artist Mitsuno Reedy, portrays the first African American woman attorney in Oklahoma.

Ms. Fisher's son, Bruce Fisher of Oklahoma City, spoke during the presentation. He said his mother's three-year struggle challenging segregation changed the path of history in Oklahoma and the United States.

"Her landmark case led the way for a ruling by the United States Supreme Court that opened the door for higher education opportunities to African American students in Oklahoma," Mr. Fisher said.



Midwest City Lawyer Chosen for ABA Committee

Joe Crosthwait, a solo practitioner from Midwest City, has been appointed to a one-year term on the American Bar Association Standing Committee on Law and National Security Advisory Committee.

Mr. Crosthwait's term will begin at the end of the ABA's Annual Meeting this month.

The committee conducts studies, sponsors programs and conferences, and administers working groups on law and national security-related issues. The committee's activities assist policymakers, educate lawyers, the media and the public, and enable the committee to make recommendations to the ABA.

Mr. Crosthwait served as OBA president in 2000, was on the Executive Council of National Conference of Bar Presidents and has been a member of several ABA committees, including its House of Delegates.



Oklahoma City Attorney Receives Law Day Award

Bill Burkett (third from left) received the Journal Record Law Day Award at the Oklahoma County Law Day Luncheon in May. He is pictured with his daughter, U.S. Magistrate Judge Bana Roberts (left), David High and Julie Bates.



OBA President Stephen Beam visits with Edmond teachers Beth Evans and Julia Cook at the PACE Institute. Ms. Evans is also an OBA member.

PACE Institute Attracts Teachers from across Oklahoma

Oklahoma educators attended the 18th annual PACE Institute, funded by a grant from the Oklahoma Bar Foundation and administered by the OBA's Law-related Education program. The institute was held July 8-12 in Midwest City. This year's theme was "Oklahoma Centennial: A State of Many Nations." During the week, participants examined the various aspects of the Oklahoma judicial system, Native American courts, citizenship education and public policy. Larry Gerston, professor of political science at San Jose State University, served as keynote speaker for the institute's opening reception. He encouraged the teachers to be proud of the impact they have on their students. Participants also met with OBA President Stephen Beam.

OBA Member Reinstatements

The following members of the OBA suspended for noncompliance with the Rules for Mandatory Continuing Legal Education have complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

William Lee Ford
OBA No. 14951
204 W. Rose Dr.
Midwest City, OK 73110

Robert Joseph Hauge
OBA No. 20007
309 E. Dewey
Sapulpa, OK 74066-4031

John Edward Hembera Jr.
OBA No. 17977
P.O. Box 721291
Norman, OK 73070

Terry A. Simonson
OBA No. 13529
1515 E. 71st, #309
Tulsa, OK 74136

The following members of the OBA suspended for nonpayment of dues have complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Robert Allen Benningfield
OBA No. 716
426 S. Cherokee Ave.
P.O. Box 490
Catoosa, OK 74015

William Andrew Stack
OBA No. 18606
9123 Spinning Leaf Cove
Austin, TX 78735

John Edward Hembera Jr.
OBA No. 17977
P.O. Box 721291
Norman, OK 73070

Luwalhati Admana Johnson
OBA No. 20254
P.O. Box 778
Tontitown, AR 72770

Lynne Christine Zaccaria
OBA No. 18886
1600 Eagle Dr.
Edmond, OK 73034

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Sept. 3 for Labor Day.



OBA Member Resignations

The following OBA members have resigned as members of the association and notice is hereby given of such resignation:

Ian Steedman
OBA No. 14597
5213 NW 109 Street
Oklahoma City, OK 73162

Jeffrey Alan Fleischhauer
OBA No. 12058
P.O. Box 75
Roanoke, VA 24002-0075

Kudos

Gov. Brad Henry proclaimed July 1 as "J. Duke Logan Day" to honor **J. Duke Logan** of Vinita, who recently retired as counsel after 12 years of service to the Council on Judicial Complaints. The proclamation praised Mr. Logan's "invaluable counsel and advice for the members of the Council, helping ensure the public respect and reputation of our judiciary."

Gov. Brad Henry has appointed **Mike Voorhees** to the Oklahoma City Community College Board of Regents for a seven-year term. Mr. Voorhees, who practices in south Oklahoma City, is an alumnus of the college.

J. Denny Moffett has been elected president of the Teton County, Wyo., Bar Association. Mr. Moffett practices in Jackson, Wyo., as well as in Tulsa.

Chuck Hoskin Jr. of Vinita was recently elected to a six-year term on the Cherokee Nation Council representing Craig and Nowata Counties. Mr. Hoskin is resident officer of the National Labor Relations Board's Tulsa Resident Office.

Matthew Paque, an environmental attorney supervisor at the Oklahoma Department of Environmental Quality, has been selected to serve as a vice chair of

the Air Quality Committee of the ABA Section of the Environment, Energy and Resources.

Tulsa attorney **John D. Russell** and Oklahoma City attorneys **Terry W. Tippens** and **Eric S. Eissenstat** were recently inducted into the Litigation Counsel of America at the counsel's Spring Conference and Induction of Fellows in New York. The counsel is a trial lawyer honorary society composed of less than one-half of 1 percent of American lawyers.

Oklahoma State Sen. **Glenn Coffee** recently became a commissioner for the National Conference of Commissioners on Uniform State Laws. This organization, which first met in 1892, drafts and promotes the enactment of uniform laws designed to solve problems common to every state. The 300 commissioners, all lawyers, study and review state laws to determine which areas of law should be uniform throughout the nation.

A documentary film "The Trials of Law School," directed and produced by OBA member and filmmaker **Porter Heath Morgan** will premiere at the 20th Annual Dallas Video Festival. The film will screen Saturday, Aug. 4 at noon in the Kalita Humphries Theater. The film follows eight first-year law students as they try to juggle studies, family and relationships. Filmed primarily at the OU College of Law, the student's stories are

contrasted with insight from more than 25 acclaimed law professors and legal scholars from around the country.

Brad Klepper has been elected president of Rebuilding Together OKC for the 2007 – 2008 term. Mr. Klepper has volunteered and provided pro bono architectural and legal counsel to the organization since 1993. The organization's mission is to rebuild lives and neighborhoods by making homes safe, secure and weather-proof for low-income senior citizens in the Oklahoma City metropolitan area. He is a licensed architect whose legal practice is concentrated on construction law and intellectual property-related matters.

On The Move

Gov. Brad Henry recently appointed two-term Oklahoma County Commissioner **Jim Roth** to the Oklahoma Corporation Commission. Mr. Roth succeeds Denise Bode. A native of Prairie Village, Kan., he received his B.A. degree at Kansas State University in 1991. Three years later, he earned a law degree at OCU School of Law.

Cheryl Clayton of Norman has joined the board of directors of First State Bank. Ms. Clayton has practiced law in Noble since 1976. She has a bachelor's

degree in business finance from Kansas State University and a Juris Doctor from the University of Oklahoma. She has practiced law in Noble since 1976 and was Cleveland County Bar Association's first woman president.

James Matthew Branum announces the formation of his private practice. The firm works in the area of G.I. rights/military law with a particular emphasis on Army discharges and court-martial defense. He earned a bachelor's degree from the Institute of Christian Studies in Austin, Texas in 2000 and graduated from OCU School of Law in 2005. He is also of counsel with the bankruptcy firm of Branum Law Offices in Newcastle. He can be reached at 502 N.E. 16th, Oklahoma City, 73104, (405) 476-5620 (Oklahoma City), (580) 215-4049 (Lawton/Ft. Sill), www.girightslawyer.com.

Virginia (DeCarlo) Sanders, formerly of Idabel, announces she has joined the Oklahoma Indigent Defense System, Capital Trial Division, in Norman. She may be reached at P.O. Box 926, Norman, 73070-0926, (405) 801-2692.

Shelly L. Dalrymple has accepted a position with Pangea3 in its Mumbai (Bombay) offices as vice president-legal services (India). The company provides legal outsourcing services in India to clients in the U.S., Europe and Japan. Ms. Dalrymple obtained her J.D. from George Washington University in 1992. She most recently practiced as a partner with EldridgeCooperSteichen & Leach PLLC in Tulsa, where she focused on products liability class actions and employment

law. She may be reached by e-mail at shelly.dalrymple@pangea3.com.

Sharon C. Jett has become a shareholder at Higier Lautin PC in Dallas. Her primary practice is in the areas of asset-based and other collateralized lending, bank operations, real estate, mortgage lending, bank loan workouts and collections, and general business transactions. Ms. Jett, who is also a CPA, may be reached at Higier Lautin PC, 15851 Dallas Parkway, Suite 1001, Addison, Texas 75001; (972) 716-1888; fax: (972) 716-1899; email: sjett@higierlautin.com.

Philip L. Watson has joined the Oklahoma City firm of Hammons, Gowens and Associates as an associate. Mr. Watson is a 1994 graduate of the OCU School of Law. His practice will concentrate on Social Security disability law.

Eldridge Cooper Steichen & Leach announces the appointments of **Jessica L. Dickerson** and **Antonio L. Jeffrey** to the position of associate attorney. Ms. Dickerson's primary focus is in the areas of products liability, employment law and civil litigation. She graduated magna cum laude with a B.A. in journalism from OU. She received her J.D. from the TU College of Law, graduating valedictorian of her class. Mr. Jeffrey's primary focus is in the areas of products liability and civil litigation. He received his B.A. from Howard University, Washington D.C.; M.B.A. from the University of Phoenix; master of public administration from OU; and J.D. from the TU College of Law.

Conner & Winters has hired **Robin F. Fields** as a partner. Ms. Fields is a trial attorney who focuses her practice on complex litigation with a special emphasis on energy and environmental law. She may be reached at (405) 272-5711.

Robert J. Westbrook announces the relocation of his office to 609 Castle Ridge Road, Austin, Texas 78746. Mr. Westbrook is a 1981 graduate of the TU College of Law. His practice focuses on oil and gas, and commercial litigation. Mr. Westbrook may be reached at (512) 329-5477. His mailing address remains P. O. Box 26713, Austin, TX 78755-0713.

Crowe & Dunlevy named recently **Charles Goodwin**, **Courtney Warmington**, **Kayci Hughes** and **Susan Huntsman** directors of the firm.

Mr. Goodwin is a trial lawyer who focuses his practice in the areas of securities litigation, complex commercial litigation, and state and federal appeals. He is a graduate of OU, having received degrees in economics and letters (with an emphasis in classical literature) in 1994, and a J.D. in 1997. Prior to joining the firm, he served as a law clerk for federal judges Claire Eagan, Lee West and Vicki Miles-LaGrange.

Ms. Warmington focuses her practice in the area of labor and employment. She earned a B.A. from OSU in 1995 and a J.D. from OCU School of Law in 1999.

Ms. Hughes' practice focuses on commercial litigation. She earned a B.A. from OU in 1996 and a J.D. from the OU College of Law in 1999.

Ms. Huntsman focuses her practice in the areas of commercial litigation and arbitration. She earned a B.A. from the University of Arkansas in 1996 and a J.D. from Harvard Law School in 1999.

Gov. Brad Henry has appointed **Natalie Shirley** as executive director of the state Department of Commerce. Ms. Shirley previously served on the governor's cabinet as secretary of Commerce and Tourism. She is former president and chief executive officer of ICI Mutual Insurance Group in Washington, D.C. She graduated from OSU in 1979 and earned a law degree from OU in 1982.

Kirsten Ingrid Bernhardt announces the opening of her law office in Tulsa. A 1986 graduate of the OU College of Law, Ms. Bernhardt will concentrate her practice on criminal law and family law matters. Her office is in the Beacon Building, 406 S. Boulder Ave., Suite 411, Tulsa, 74103, (918) 582-0982; e-mail: Kirsten@tulsafamilylawyer.com.

Conner & Winters LLP announces that **Paige N. Shelton** has joined the firm's Tulsa office as an associate. Ms. Shelton will work primarily in the business and commercial litigation practice areas within the firm. She earned her B.A. degree from Vanderbilt University with a double major in mathematics and economics in 1997 and her law degree, with highest honors, from TU in 2004.

GableGotwals announces that **David B. McKinney** has joined the firm as a shareholder in the Tulsa office. Mr. McKinney has

represented individuals and large corporations for the past 32 years in a broad array of corporate and commercial matters. He also practices in the health law area representing physicians and health organizations, and he currently chairs the OBA Health Law Section. Mr. McKinney received his J.D. from Columbia University School of Law and a B.A. in physics from Rice University.

Goolsby, Olson & Proctor announces **Bryan E. Stanton** has joined the firm as an associate in its Oklahoma City office. Mr. Stanton earned his J.D. from TU College of Law in 2001. His practice will focus on insurance law, litigation and personal injury. He can be reached at the firm located at 701 N. Broadway Ave, Suite 400, Oklahoma City, 73102; (405) 524-2400; bstanton@goplaw.com.

Shelton Voorhees Law Group announces the addition of **Ginger K. Maxted** to the firm. Ms. Maxted received her J.D. from St. Louis University School of Law in May 2003. Her practice will concentrate in civil litigation, with an emphasis on insurance and real estate litigation. Shelton Voorhees Law Group is located in the Bank of Oklahoma Building at 7701 S. Western Ave., Suite 201, Oklahoma City. Ms. Maxted may be reached at gmaxted@sheltonlawOK.com.

Moura A.J. Robertson of the Robertson Law Firm PLLC and **Melissa F. Cornell** of Wagner & Cornell LLP announce they have joined each other in the practice of law under the firm name of Robertson Cornell. Their offices are located at

320 S. Boston, Suite 1118, Tulsa, 74103-4700. Ms. Robertson and Ms. Cornell are both graduates of the TU College of Law and will continue to practice in the area of family law, including divorce litigation and collaborative divorce process. The firm's Web address is www.tulsadivorce.com.

Bryant Law Firm PLLC announces **Robert J. Carlson** has joined the firm as an associate, having previously practiced in both Oklahoma City and Tulsa. Mr. Carlson received his J.D. from the TU College of Law in 2001 and also holds a M.S. in economics from OSU. He concentrates his practice in complex business litigation and may be reached at (918) 587-4200 or at rcarlson@bryantlaw.com.

Dale Cazes has joined Arthur J. Gallagher Risk Management Services Inc. as an account executive and producer. Mr. Cazes will concentrate in providing property and casualty insurance and risk management services to members of the legal, accounting and engineering professions, clients involved in the real estate, hospitality and healthcare industries, as well as clients involved in mergers and acquisitions. Prior to joining Gallagher, Mr. Cazes was an attorney for Phillips McFall McCaffrey McVay & Murrill PC and Green Brown & Stark PC, both in Oklahoma City. He holds an LL.M. in taxation from the SMU School of Law and a J.D. from OCU School of Law.

Adam E. Miller has joined the U.S. Department of Justice, Office of the U.S. Trustee in the Kansas City, Mo., field office as a trial attorney through the

2006-07 Attorney General's Honor Program. He recently received his LL.M. degree in banking and financial law from the Morin Center for Banking and Financial Law at the Boston University School of Law. He is a 2006 graduate, summa cum laude, of the OCU School of Law.

Daniel P. Lennington recently joined the Oklahoma attorney general's Environmental Protection Unit as an assistant attorney general. Mr. Lennington graduated from the Valparaiso University School of Law in 2001. He was previously employed by Warner, Norcross and Judd LLP in Grand Rapids, Mich., where he concentrated in environmental litigation.

Jeremiah Streck recently joined the attorney general's Consumer Protection Unit. Mr. Streck earned his J.D. from TU in 2006. He previously served as general counsel for Wilbanks Securities Inc. in Oklahoma City.

Emma Arnett has been named a state's attorney in the Tulsa West Child Support Enforcement office. Ms. Arnett received her undergraduate degree from Kalamazoo College and her J.D. from the TU College of Law. She also earned a certificate in victim's assistance through the Center on Violence and Victims Studies at Washburn University. Prior to joining the Tulsa West office, she was engaged in private practice in Tulsa. The Tulsa West CSE office is located at 440 S. Houston, Suite 401, Tulsa, 74127-8927.

The law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson PC announces the addition of **Margaret M.**

Clarke as a shareholder in its Tulsa office. Ms. Clarke concentrates in the areas of medical malpractice defense, professional liability, bad faith defense and civil trial practice. Her other areas of practice include healthcare, insured claims and products liability. She received a B.A. from OU and her J.D. from OCU School of Law.

Hartzog Conger Cason & Neville is pleased to announce that **Christa Richardson** has joined the firm. Ms. Richardson previously was an associate at Bryan Cave LLP in Kansas City. She will focus her practice in business transactions and real estate. She received her J.D. with honors from the OU College of Law.

McAfee & Taft has expanded its litigation practice group with the recent addition of trial lawyers **Vickie J. Buchanan** and **Rodney K. Hunsinger II**. Ms. Buchanan's practice encompasses a wide range of business-related litigation in state and federal courts and in commercial arbitration. Previously, she was a director with another large civil practice law firm in Oklahoma City. She graduated summa cum laude from NSU in 1996 and went on to graduate with distinction from the OU College of Law in 1999. Mr. Hunsinger's experience has focused on business and commercial litigation. He graduated magna cum laude from NSU with a bachelor's degree in accounting in 1999, became a CPA in 2002 and graduated with distinction from the OU College of Law in 2003. He previously worked as a litigation associate with another large civil practice law firm in Oklahoma City.

At The Podium

Jay Adkisson has given several recent presentations. In May, he gave the following presentations: "Understanding Captive Insurance Companies" at the 5th Offshore Alert Financial Due Diligence Conference in Miami; "Asset Protection: 10 Things You Must Know" at the Michigan bar's 20th Annual Michigan Tax Conference in Detroit; "Asset Protection for the OB/GYN" at the American College of Obstetricians and Gynecologists in San Diego; and "Busting Asset Protection Schemes" at the U.S. Attorneys' Office of Legal Education's Criminal Asset Recovery Summit in Columbia, S.C. Mr. Adkisson will make the following presentations in July and August: "Understanding Charging Orders" for the Orange County Bar Association in Irvine, Calif.; "Captive Insurance Strategies" at the Best Practices of America 2007 Symposium in San Diego; "Understanding Elder Scams" at the New York State Bar Association Elder Law Section Annual Meeting in Stowe, Vt.; and "Asset Protection -- 10 Things You Must Know" at the Texas Society of Certified Public Accountants annual meeting in San Antonio.

Jo Anne Deaton recently made a presentation to the Eastern Oklahoma Medical Group Management Association on "Employment Law Fundamentals for Managers and Supervisors." The presentation was given at the

association's recent monthly meeting.

Graydon Dean Luthey Jr. recently spoke to the Tulsa chapter of the Oklahoma Society of CPAs. With approximately 60 people in attendance, he addressed liabilities of directors of business and non-profit corporations.

Vic Albert recently spoke at the Oklahoma Alliance for Civil Rights annual meeting. Mr. Albert instructed in the program titled "Developing and Administering the Interactive Process Required under the ADA and FMLA." The Oklahoma Alliance for Civil Rights is an organization comprised of individuals in the private and public sectors who administer human resources and employee development for private companies and state agencies.

Carrie Palmer Hoisington recently addressed the Trial Attorneys of America on the topic of litigation readiness in the age of e-discovery during the group's annual meeting in Chicago. Ms. Hoisington also organized and moderated the panel discussion focusing on ways attorneys can assist their clients in preparing for e-discovery requirements in advance of litigation.

Christopher S. Thrutchley taught on fulfilling legal and ethical duties in preserving and producing electronically stored information at the Oklahoma Association of Defense Counsel's June conference

at Horseshoe Bay, Texas. In May, he taught Oklahoma human resources leaders on their strategic role in identifying and preserving digital evidence for internal investigations, agency proceedings, and litigation and on effectively using document retention and technology use policies.

Several Oklahoma assistant attorneys general gave recent presentations. **William O'Brien** spoke to the Engineering Club of Oklahoma City about the Oklahoma Department of Veterans Affairs and the programs it offers to Oklahoma's veterans. **Brinda White** spoke at the Ninth Annual Oklahoma Labor/Management Conference in Oklahoma City about the Public Employee Relations Board and her role as its legal counsel. **Preston Draper** and **Jay Schneiderjan** recently presented a CLE program to the Cleveland County District Attorneys Office, together presenting information about recent developments regarding the criminal appeals process, victim impact statements and the clemency process. **Julie Bays** spoke in July at the Shawnee Senior Center about consumer fraud and the elderly.

Matthew Paque, an environmental attorney supervisor at the Oklahoma Department of Environmental Quality, recently presented an environmental enforcement case study at the 10th Annual EPA Air Inspectors Workshop in Galveston, Texas. The case

study followed a complex air quality enforcement action from initiation to resolution.

Gayle L. Barrett, Adam W. Childers, H. Leonard Court, Jeremy Tubb, Courtney K. Warmington and Madalene A.B. Witterholt will discuss topics such as blogging, workers' compensation, the Family and Medical Leave Act, wage and hour law and how to avoid claims of retaliation by employees and workplace misconduct at an upcoming seminar titled "What You Need to Know: Recent Developments in Employment Law." The seminar will take place from 9 a.m. to 4 p.m. Aug. 9 at the Ardmore Convention Center.

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items (**e-mail strongly preferred**) in writing to:

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Articles for the Sept. 1 issue must be received by Aug. 13

Douglas A. Carter of Chickasha died May 15. He was born March 12, 1950, in Syracuse, N.Y. He attended the State University of New York, went on to earn a B.A. in history from Western Kentucky and earned his J.D. from OU. He was stationed in Germany while serving in the U.S. Army. He served as an attorney for the Social Security Administration in the Office of Hearings and Appeals. He was a member of the National Organization of Social Security Claimants Representatives and the National Bar Association. Memorial donations may be made to Legal Aid of Western Oklahoma; Epworth United Methodist Church, Chickasha; Multiple Sclerosis Society, Oklahoma Chapter; or Legal Aid Services of Oklahoma.

Walter D. Hart of Pauls Valley died March 18. He was born in Pauls Valley Oct. 3, 1916, and lived there most of his life. He attended Classen High School in Oklahoma City and Virginia Military Institute. He earned a B.A. from OU in 1938 and a law degree in 1941. **He served during World War II, attaining the position of company commander of B Company – 602 Tank Destroyer Battalion. He served in the European Theater, participating in the first liberation of a Nazi Concentration Camp at Ohrdurf, Germany. He was awarded numerous medals including the Silver Star,**

Bronze Star and Purple Heart. He was also awarded the Croix de Guerre with Silver Star from the French government. He returned to Pauls Valley and practiced law until his retirement. He was active in volunteerism and community involvement, and was a past president of the Garvin County Bar Association. Among his survivors is his son, OBA member Walter Dean Hart Jr.

Mickey James of Oklahoma City died May 11. He was born Feb. 1, 1940, in Norman and graduated from Northwest Classen High School in 1958. He earned an undergraduate degree from OCU in 1962 and a J.D. from the OCU School of Law in 1966. He began practicing as a trial lawyer with Clarence P. Green and became a partner in the Green and James law firm in 1969, where he focused in civil litigation. He served on the Oklahoma County Bar Association's Fee Grievance and Ethics Committee for nearly a decade. He tried the only case before the Court on the Judiciary where he represented Judge Gar Graham. He was a certified scuba diver and small aircraft pilot with private, instrument and commercial ratings. Memorial contributions may be made to Shriners Children's Hospital in Shreveport, La.

John P. Kerr of Tulsa died June 14. He was born

in a log cabin in Cherokee County on March 4, 1947. **He served in the U.S Navy Medical Corps during World War II.** He was a graduate of NSU, worked several years form Amoco Oil, then graduated from TU College of Law and became an attorney when he was 43. His hobbies included square dancing, bridge and traveling. He was also a 33rd Degree Mason. Memorial donations may be made to Clarehouse Hospice of Tulsa.

Jeffrey G. Levinson of Tulsa died June 27. He was born in Tulsa Aug. 28, 1957. He earned an undergraduate degree from Brown University in 1979 and a J.D. from Vanderbilt Law School in 1982. He practiced commercial and real estate law in Tulsa for many years, and was also a member of the Florida Bar Association. He chaired the community relations committee of the Jewish Federation of Tulsa from 1991-1996. He also served on the board of directors of the Jewish Federation as well as the Tulsa Metropolitan Ministry. He was also a devoted sports fan, particularly of baseball. Memorial donations may be made to the American Cancer Society or the M.D. Anderson Hospital in Houston.

Retired District Judge J. Kenneth Love died June 15. He was born Oct. 24, 1927, in Tishomingo and attended Tishomingo and Purcell

schools. He graduated from the high school at Oklahoma Military Academy in 1945. **He was a U.S. Army paratrooper from 1946-1947 and served in the Korean War from 1950-1951.** He received his bachelor's degree in business from ECU in 1952, worked for Conoco, then earned a J.D. from OU in 1967. He practiced in Moore until 1972, where he also served as municipal attorney, then was appointed as special district judge for Cleveland County. He graduated from the National Judicial College in Reno, Nev., elected associate district judge for McClain County in 1979 and elected district judge for McClain, Garvin and Cleveland counties in 1982, where he served until his retirement in 1993. He was also a licensed pilot and played the clarinet.

Ralph Doak McKinney of Santa Fe, N.M. died May 13. He was born July 16, 1911, in Duncan. He graduated from Marlow High School, then went on to attend the Stanton Preparatory School in Cornwall, N.Y. before entering the U.S. Military Academy in West Point. **He served a three-year tour of duty in the Phillippines, then served in World War II primarily with First Cavalry Division. He was awarded the Bronze Star and Purple Heart medals. He retired from the Army in 1956.** He graduated from the Stetson University College of Law in 1960 and practiced law actively until 1966. He divided his time between homes in Marlow and Santa Fe after his retirement.

Herbert J. Mesigh of Oklahoma City died April 19. He was born Jan. 25, 1926, in Azusa, Calif., and graduated high school in Atchison, Kan. **He joined the U.S. Navy at age 17, serving from 1943-1946 in the South Pacific.** He returned to the states, earning an undergraduate degree from the University of Kansas and later a degree in business administration from TU. He earned a J.D. from OCU and served in private practice for several years. He also served as assistant district attorney and was appointed municipal judge in 1982. He served in that capacity until his retirement in 2003. His hobbies included golf, bridge and dance. Memorial donations may be made to Our Lord's Lutheran Church Endowment Fund.

Charles Nesbitt of Oklahoma City died July 5. He was born Aug. 30, 1921, in Miami. He attended Central High School in Tulsa and graduated from OU with a B.S. in government in 1942. **Immediately after graduation, he reported for service in the Army, serving as a tank gunnery specialist in Bavaria during World War II. He retired from the Army Reserves as major in 1950.** He earned his J.D. from Yale University in 1947. He practiced oil and gas law in Oklahoma City, retiring in 2001. He served as Oklahoma attorney general from 1962-66, chaired the Oklahoma Corporation Commission from 1968-75 and served as Oklahoma secretary of energy from 1991-95. Memorial contributions may be made to St. Paul's Cathedral in Oklahoma City.

Steven Lawrence Sessinghaus of Tulsa died June 26. He was born in Tulsa on Aug. 28, 1957, and grew up in Oklahoma, Arizona, California and Nevada. He graduated from OU with a B.A. in philosophy in 1979 and earned his J.D. from TU in 1982. He worked for Shepard's in Colorado Springs and was a former candidate for Tulsa County District Attorney. He practiced in the areas of bankruptcy, appellate and civil litigation, and constitutional law in Skiatook and Tulsa. Memorial donations may be made to the American Cancer Society.

Terence (Terry) W. Smith of Tulsa died June 24. He was born July 12, 1941, in Tulsa and earned an undergraduate degree and law degree from TU. He served in the Army JAG Corps during the Vietnam War. He retired after many years as a Department of Defense attorney. Memorial contributions may be made to St. Francis Hospice or to the children's ministry of Asbury United Methodist Church.

Harold C. Stuart of Tulsa died June 25. He was born July 4, 1912, in Oklahoma City and attended Classen High School. He earned his bachelor's and law degrees from the University of Virginia, where he won two NCAA boxing championships, and completed post graduate at the American Management School in New York City and at the Harvard Business School. **He served as an officer in the Army Air Corps during World War II and later as an assistant secretary of the Air Force.** He

was a partner in the Tulsa firm Doerner and Stuart and principal in Southwestern Sales Corp. (now First Stuart Corp.). Memorial contributions may be made to Up with Trees or to Stuart Park at the Gilcrease Museum.

Paul D. Sullivan of Duncan died June 19. He was born Jan. 21, 1918, in Norman. He attended Duncan High School and OU. **He was commissioned a second lieutenant in the Army after graduation, serving during World War II as a battery commander in Europe, including participation in the Battle of the Bulge. He remained in the Army Reserve until 1978, attaining the rank of colonel in the JAG Corps.** He began practicing law in Duncan in 1947 with a family firm now called Leach, Sullivan, Sullivan & Watkins. Among his survivors are his sons, OBA members Michael P. Sullivan and Kent P. Sullivan, both of who have joined the family's firm. He was active in Duncan civic and community service, a member of the ABA and past president of the Stephens County Bar Association. Memorial donations may be made to the Memorial Fund for Duncan First Christian Church, Chisholm Trail Hospice or Special Olympics.

Raymond E. Theimer of Edmond died May 30. He was born April 22, 1931, and graduated from Northeast High School in Oklahoma City. **He served in the Army after high school.** He completed a business degree at OU and then earned an L.L.B. from the OU College of Law. He worked in the County Attorney's Office before beginning his private practice, and he was also the founder and operator of two petroleum companies. He loved music and played several instruments. He also enjoyed cooking and flying his plane. Memorial donations may be made to diabetes research at the Oklahoma Medical Research Foundation.

Richard Lynn Thompson of Langley died May 8. He was born May 18, 1962, and attended Clerendon High School in Texas and Texas Tech University. He graduated from the TU College of Law in 1989. He was a partner in the Harris, McMahon, Peters, Thompson and Stall. He was a member of the Tulsa County Bar Association, Fellowship of Christian Athletes and also enjoyed yachting and golf. Memorial donations may be made to the Hali Project, 4515 Cornell, Amarillo, Texas, 79109.



Alice Louise "Lou" Earhart of Oklahoma City died July 14. She was born Aug. 18, 1921, in Oklahoma City, graduating from Classen High School in 1940. Ms. Earhart worked more than 20 years as OBA receptionist, making many friends in the legal profession. She was honored by the Oklahoma House of Representatives when she promoted an initiative to encourage "random acts of kindness." She will be remembered for her positive attitude, friendly nature and love of life. One of her most notable relationships was with former OU Football Coach Barry Switzer. She kept an autographed picture of coach Switzer by her side at all times, and Coach Switzer often called her to visit and stay in touch. She also counted as a dear friend Oklahoma County Commissioner Ray Vaughn, whom she met through her service to the OBA.

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- First offer dynamics – when to make it and when to wait
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About Martin E. Latz:

ABC News' This Week anchor George Stephanopoulos has called Marty Latz “one of the most accomplished and persuasive negotiators I know.” The founder of Latz Negotiation Institute, Latz has taught over 40,000 lawyers and business professionals to more effectively negotiate. A Harvard Law honors graduate, Latz is the author of Gain the Edge! Negotiating to Get What You Want and has appeared as a negotiation expert on CBS' The Early Show and such national business shows as Your Money and First Business. For more visit www.NegotiationInstitute.com.

Register online at www.legalspan.com/okbar.telephone.asp

Gain the Edge!®
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DATE: December 5, 2007

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And make no mistake – no matter how much you have negotiated, you can still learn. Adding that one new tactic may be the difference between winning and walking away empty-handed. In this third of three teleseminars, national negotiation expert Martin Latz will help make YOU a more effective negotiator by focusing on his final Golden Rule of Negotiation Control the Agenda and on Situation Specific Strategies to use when you care about a relationship with your counterpart.

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- Competitive techniques versus problem-solving strategies
- Personality styles’ impact on negotiations

About Martin E. Latz:

ABC News’ This Week anchor George Stephanopoulos has called Marty Latz “one of the most accomplished and persuasive negotiators I know.” The founder of Latz Negotiation Institute, Latz has taught over 40,000 lawyers and business professionals to more effectively negotiate. A Harvard Law honors graduate, Latz is the author of Gain the Edge! Negotiating to Get What You Want and has appeared as a negotiation expert on CBS’ The Early Show and such national business shows as Your Money and First Business. For more visit www.NegotiationInstitute.com.

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NORTHWEST ARKANSAS LAW FIRM seeks tax associate. LLM and accounting background preferred. Practice areas include estate planning, taxation, real estate and business representation. Mail, fax or email cover letter, resume, and salary requirements to Erma Palm, Harrington, Miller, Neihouse & Kieklak, P.A., 5507 Walsh Lane, Suite 102, Rogers, AR 72758 Fax (479) 271-7247 Email: epalm@arkansaslaw.com

TITLE EXAMINATION ATTORNEY position available. Commercial and Residential examination experience required. Underwriting experience a plus. Please mail, fax or email resume to: Stewart Abstract & Title of Oklahoma, 701 N. Broadway, Suite 300, Oklahoma City, OK 73102. Attn: Gerri Heidebrecht. Gerri. Heidebrecht@stewart.com (405) 232-6764 phone, (405) 232-5741 fax

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ESTABLISHED FIRM wants experienced associate in oil and gas and general practice; and an associate experienced in general business and estate planning. Salary based upon experience. Also, space to share with established attorney in north OKC. E-mail to golf4me9@aol.com.

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AV RATED OKC FIRM NEAR DOWNTOWN seeks associate for estate and transactional position. Emphasis on estate planning, business planning, contracts and tax disputes. Strong writing skills and academic background required. All replies confidential. Send resume and writing sample to: Box "P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SMALL DOWNTOWN FIRM seeks legal assistant experienced in personal injury cases. Knowledge of medical terminology helpful but not essential. Salary commensurate with experience and performance. Please fax resume to (405) 228-3211 or call 232-8585.

THE LAW FIRM OF HOLDEN CARR & SKEENS seeks a research and writing attorney with 3-5 years experience to fill an immediate position in their Tulsa office. Primary practice areas are insurance defense and general civil litigation. Salary is commensurate with experience. All applications will be kept in the strictest confidence. To inquire, please contact MikeCarr@HoldenOklahoma.com.

EDMOND BUSINESS AND LITIGATION FIRM needing a full time assistant to perform light legal assistant work, filings, errands, and file organization. Applicants must be personable, well organized, and willing to work hard. Send resumes to Mike Rubenstein at 1503 E. 19th, Edmond, OK 73013 or mruenstein@oklawpartners.com.

DOWNTOWN TULSA AV-rated law Firm seeks associate to work in the Firm's Business Law Section. Duties will include labor and employment law, general corporate transactions and real estate. Candidates should have up to three years experience in some or all of these areas, excellent academic record and the ability to handle multiple tasks. Salary commensurate with experience. Send replies to Box "S," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

EDMOND BUSINESS AND LITIGATION FIRM seeking an attorney with 5+ years experience with litigation in employment and business/transaction areas. Good salary and benefits for a self-starter who is looking to establish a long term relationship. Applicants must be organized, with good writing and research skills, and personable. Send resume and writing sample to Mike Rubenstein at RUBENSTEIN, BRYAN, McCORMICK & PITTS, 1503 E. 19TH, Edmond, OK 73013 or mruenstein@oklawpartners.com.

AV RATED HOLDENVILLE ATTORNEY seeking associate with 0-5 years experience. General practice. Emphasis on title, oil and gas, estates and probate. Fax resume to: (405) 379-5446 or email to harold@heathlawoffice.com

OKC FIRM seeks attorney with 3-5 years litigation experience, preferably in the area of employment law. Must have strong writing skills. Email resume to Jana Leonard at leonardjb@leonardlaw.net.

POSITIONS AVAILABLE

GROWING NW OKC LAW FIRM handling diverse civil litigation, medical malpractice and securities arbitration cases, seeks an attorney with 0 – 5 years experience for immediate position. Candidates must be self-motivated with excellent research/writing skills. Responsibilities include research, brief writing, discovery, depositions and court appearances. Compensation package commensurate with experience. Send resume, writing sample and salary requirements to dpeters@woskaswim.com or fax to (405) 285-9350.

ABOWITZ, TIMBERLAKE & DAHNKE, P.C., an AV rated downtown OKC law firm, is seeking a motivated lawyer with at least three years experience in civil trial practice. Applicant should be energetic, write well, and be willing to devote the time and effort necessary to provide the best legal services to our clients. Send Resume to P.O. Box 1937, Oklahoma City, OK 73101.

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Do You Hear That Sucking Sound?

By Margaret Travis



That's
my house,
sucking the
life right
out of me.

Recently, the dishwasher went out. I don't know what's wrong with it. My guess is it's just old. My husband said he loaded it, started it and went back in a little later to a huge puddle of water in our kitchen floor.

This summer the handle to the microwave broke. My husband put a cabinet handle on the microwave. Classy, I know, but it works pretty well. It has also put off the horrible task of going to look at appliances. You know the process, going to the library to see what *Consumer Reports* says about the various microwaves, then traveling all over town to look at every single microwave in our price range. Then debating the relative merits of the store that

has a lower sales tax vs. the store that will install and deliver for free.

You see, my husband and I can't just go buy a damned microwave. It somehow always turns into a Project, capital P. Sort of like the cabinet handle he put on the microwave. It wasn't on the cabinet when we bought it but for some reason when we went to install them they didn't work. I put the bag of handles on the back counter thinking, stupidly I know, that I would take them back to that mega super store we bought them from. But it took us FOREVER to pick handles that we could agree upon. We went to Lowe's, Ace and two Home Depots in town. The thought of going and looking at EVERY SINGLE CABINET.

HANDLE. at Home Depot again made me want to poke forks in my eyes.

It also requires we find a babysitter - or someplace to dump the kids. They simply do not have the patience for it. Someone would probably end up screaming and throwing themselves on the floor and crying. I couldn't guarantee it would be one of the children.

Then my daughter decided she needed a handle for some project at school. And then my son decided he needed one, or eight. And then I got up in the middle of the night to go to the bathroom and stepped on one which promptly went into the trash. Suddenly I have a receipt dated a year ago for 10 cabinet handles and three drawer pulls (yeah, we've got no cabinet space in my kitchen), and I have one drawer pull and two handles.

But the broken down dishwasher may motivate me. To begin that awful process of replacing an appliance. Because Oh My God it will turn into a nightmare before it's over.

My husband will have to find the CR

magazine that last studied dishwashers like they were studying the atomic bomb. And then we'll have to decide on the features that mean the most to us. Pot scrubbing is probably good. China washing probably not so much. And then we'll have to locate the places that have the dishwashers with those features in our town or any surrounding hamlets within a reasonable driving distance. Well, you get the idea. I'm looking around my house now and beginning to wonder, "What else can go wrong?" Cause I simply cannot buy two major appliances in one year. And that handle on the microwave is beginning to look awful shaky.

Ms. Travis practices in Oklahoma City.

If you have a possible article for The Back Page, e-mail it to carolm@okbar.org. For more details see www.okbar.org/obj/back.htm.