

# THE Oklahoma Bar JOURNAL

Volume 78 ♦ No. 9 ♦ March 10, 2007

## FOURTH AMENDMENT Search & Seizure



### ALSO INSIDE

- Fastcase Training Sessions
- Solo and Small Firm Conference
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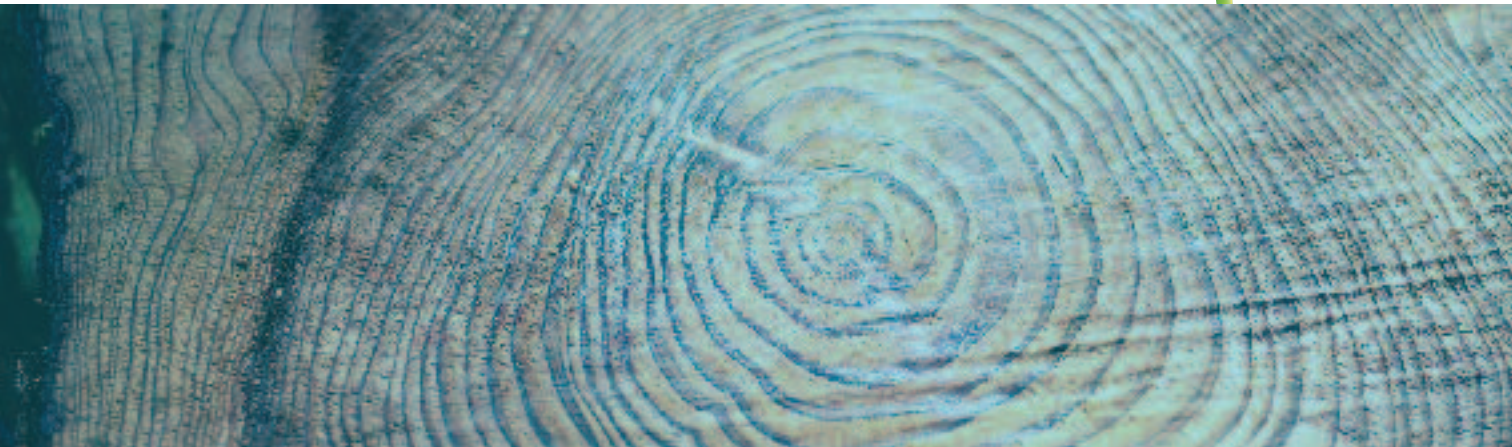


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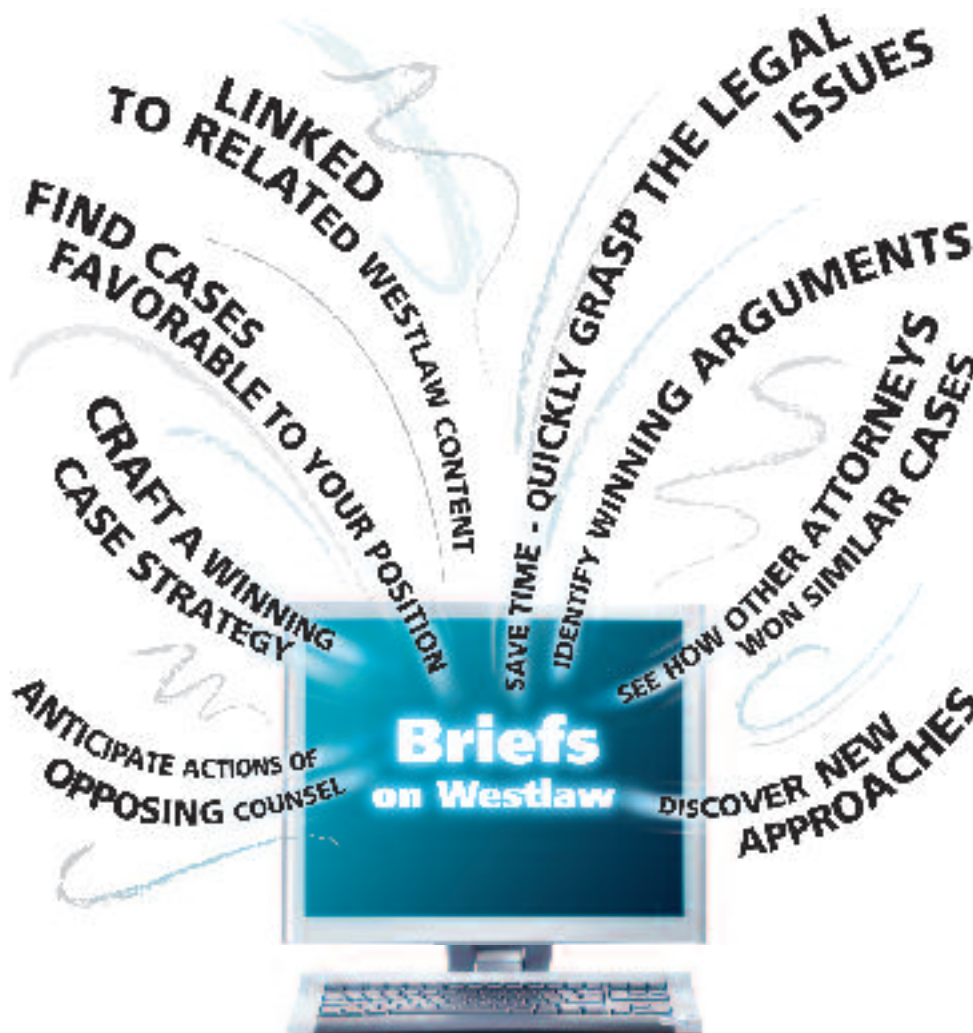
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## OBA CLE Seminars

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**Get Caught in the Swarm: Evening with the Hornets**

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Mar. 27 — Oklahoma City

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Apr. 5 — Oklahoma City

**Something Old, Something New: Changes in Workers' Compensation Law Day 1**

6 hrs. of MCLE credit, including 1 hr. of ethics  
Oklahoma Bar Center, 1901 N. Lincoln Blvd.

Apr. 6 — Oklahoma City

**Something Old, Something New: Changes in Workers' Compensation Law Day 2**

6 hrs. of MCLE credit, including 0 hrs. of ethics  
Oklahoma Bar Center, 1901 N. Lincoln Blvd.

Apr. 12 — Tulsa

**Social Security Disability - Stop Doing That, Start Doing This**

6 hrs. of MCLE credit, including 1 hr. of ethics  
Crowne Plaza Hotel, 100 E. 2nd St.

Apr. 13 — Oklahoma City

**Social Security Disability - Stop Doing That, Start Doing This**

6 hrs. of MCLE credit, including 1 hr. of ethics  
Oklahoma Bar Center, 1901 N. Lincoln Blvd.

Apr. 13 — Tulsa

**Nursing Home Negligence in Oklahoma: Advanced Topics for Plaintiffs and Defendants**

6 hrs. of MCLE credit, including 1 hr. of ethics  
Crowne Plaza Hotel, 100 E. 2nd St.

Apr. 19 — Oklahoma City

**Primer on Modern Payment Systems**

6.5 hrs. of MCLE credit,  
including .5 hrs. of ethics  
Oklahoma Bar Center, 1901 N. Lincoln Blvd.

Apr. 20 — Oklahoma City

**Nursing Home Negligence in Oklahoma: Advanced Topics for Plaintiffs and Defendants**

6 hrs. of MCLE credit, including 1 hr. of ethics  
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**March/April**

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- An Anonymous OBA Member



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## THEME:

FOURTH AMENDMENT  
SEARCH & SEIZURE  
EDITOR: JAMES STUART

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## Guess Who's a Lifetime Member of the American Bar Association?

By Stephen Beam

I attended the American Bar Association Midyear Meeting in Miami, Fla., last month. Thank you for sending me. I attended the Oklahoma delegates dinner with many longtime active ABA lawyers such as our State Delegate Jimmy Goodman, ABA Past President Bill Paul, ABA Governor Jim Sturdivant, LPM Section Delegate Mark Robertson, OBA President-Elect Bill Conger and former GP/Solo Division Chair Dwight Smith. Only one of those in attendance is a lifetime member of the ABA. I bet you can't guess which one. Wrong, wrong and wrong. The only lifetime ABA member in attendance at the Oklahoma delegates dinner was me, the sole practitioner from Weatherford.

I know most of you are not ABA members. I know some of you were once members and quit over some political or social stance taken by the ABA. I have been a member of the ABA since law school. I have been an active member of the ABA for about the last 12 years.

There was a time when the ABA cared little about rural lawyers in general and solo and small firm lawyers in particular. Those times have changed.

Many state bar associations have highly successful solo and small firm conferences. The OBA's Solo and Small Firm Conference is in its 10th year. This year's conference will be held at Tanglewood Resort at Lake Texoma on June 21 – 23 and includes midyear meetings of the Young Lawyers Division and OBA Estate Planning, Probate and Trust Section. This is generally considered to be the second most successful solo and small firm conference in the nation. Many of these state bar-sponsored solo and small firm conferences have more attendance than state bar annual meetings. That is true in many states, but Oklahoma enjoys high attendance both at its Solo and Small Firm Conference and Annual Meeting.

The ABA has taken note of the successful state bar solo and small firm conferences. The ABA has taken notice that when a conference is carefully planned with an eye toward what solo and small firm lawyers really need and want, they respond enthusiastically — and they attend. The ABA, through the GP/Solo Division, held a 2006 National Solo and Small Firm Conference.

Thomson West has even created its own solo division. The purpose of this division is to create products for sole practitioners.

This is an exciting time for the solo and small firm

lawyer. The ABA is really starting to understand that the association needs to make serious changes if it truly wants to attract solo and small firm lawyers. The GP/Solo Division is the portal to the ABA for solo and small firm lawyers. The division is working on several exciting projects to assist solos in their daily lives.

The division is partnering with the ABA Standing Committee on Membership to do a survey of solos to find out what they really want. The ABA is actually going to ask solos what they want and need rather than assuming it already knows.

The GP/Solo Division will then begin the process of developing a Solo Center to address the needs of sole practitioners. None of this will happen overnight, but it is a beginning, at least.

Bill Conger is a member of the ABA GP/Solo Division because of its publications. Bill told me he uses them as tools for teaching his law students at OCU.

The OBA clearly "gets it" and intends to serve the needs of solo and small firm lawyers. The ABA is "getting it" too. If you have never been an ABA member, I am asking you to give the ABA a chance. If you were an ABA member and quit, I am asking you to give the ABA another chance. Join a section or division that fits your practice setting or specialty. I am a longtime member of the GP/Solo Division. It has wonderful publications and has been extremely helpful in my practice. The contacts I have made through the ABA are invaluable.

I am proud to be a lifetime member of the ABA.

**This is an exciting time for the solo and small firm lawyer.**



*Stephen Beam*

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## MARCH

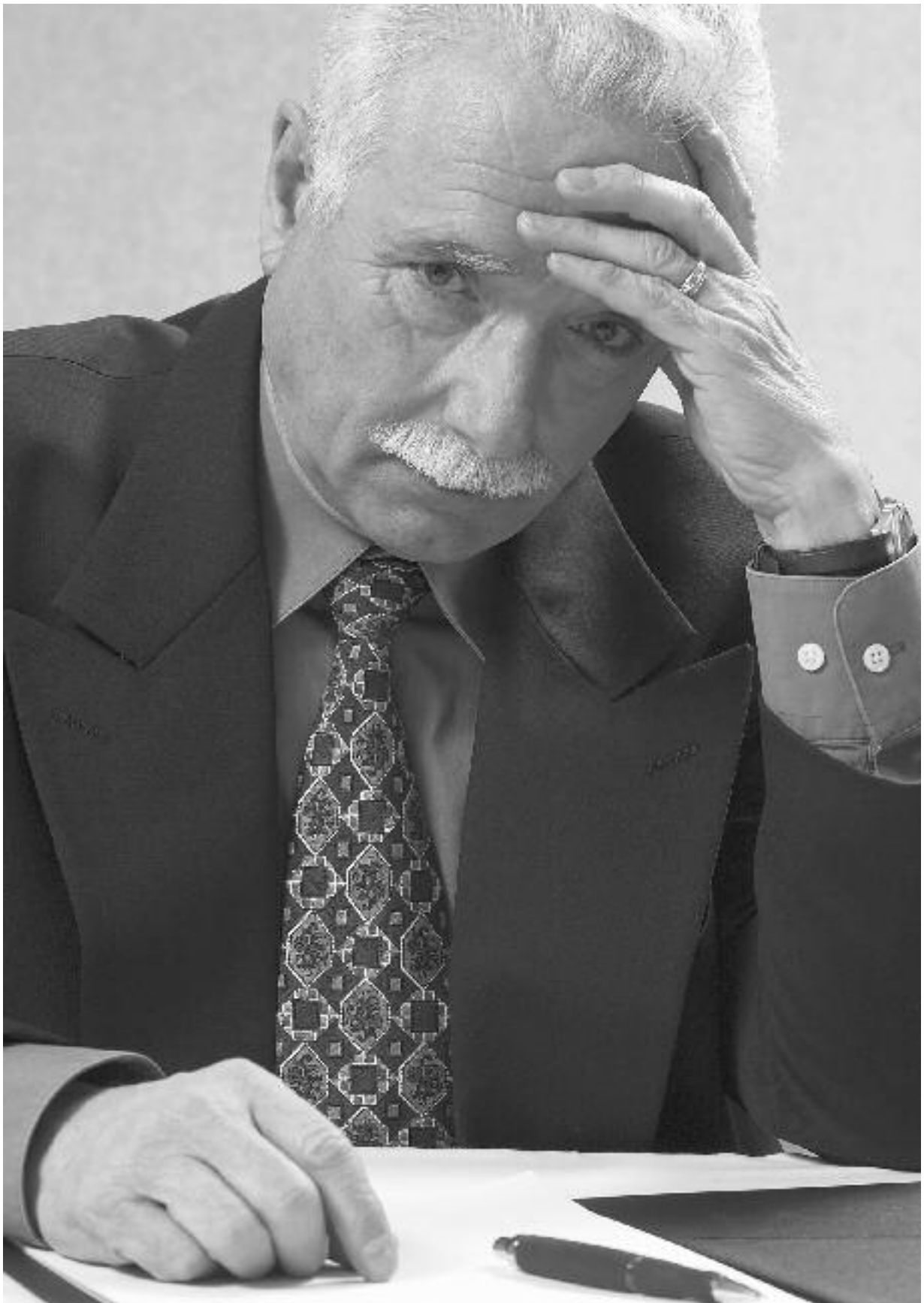
- 13 **OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Conger (405) 521-5845
- 15 **OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- OBA Law Day Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Giovanni Perry (405) 601-2222
- OBA Volunteer Night at OETA;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Melissa Brown (405) 416-7017
- 18 **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
- 17 **OBA Title Examination Standards Committee Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 840-2470
- 21 **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
- 27 **OBA Day at the Capitol;** State Capitol, Oklahoma City
- 29 **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
- OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: H. Terrell Monks (405) 733-8686
- 30 **OBA Board of Governors Meeting;** Oklahoma Bar Center, 9:30 a.m.; Oklahoma City; Contact: John Morris Williams (405) 416-7000
- OBA Access to Justice Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675

For more events go to [www.okbar.org/news/calendar.htm](http://www.okbar.org/news/calendar.htm)

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## In the Shadow of the Fourth Amendment:

### Dependence of Art. 2, Sec. 30 on Supreme Court Law

By Barry Derryberry

**T**he Oklahoma Constitution contains a search and seizure provision that is “almost an exact copy”<sup>1</sup> of the Fourth Amendment. Over two decades ago, in *Turner v. City of Lawton*, the Oklahoma Supreme Court held that the Oklahoma Constitution’s Article II, Section 30 provides “broader” rights than the Fourth Amendment.<sup>2</sup> However, the Oklahoma Court of Criminal Appeals (“OCCA”) has long held that the substance of the two provisions is “identical.”<sup>3</sup>

To the OCCA, *Turner* is “persuasive authority” which fails to persuade.<sup>4</sup> Thus, the Oklahoma Constitution, “the supreme law and final authority for everything which is done in pursuance of its provisions[,]”<sup>5</sup> has two different meanings, as construed by Oklahoma’s two courts of last resort in civil and criminal spheres.

A 1999 ruling by the OCCA may foreshadow a breakthrough in this constitutional standoff. In *Dennis v. State*, the court reversed 93 years of precedent by finding that Oklahoma’s analog to the Fifth Amendment Self-Incrimination Clause has an independent meaning that provides more protection than the federal constitution.<sup>6</sup> *Dennis* breathed vitality into the OCCA’s 1913 declaration that “[i]t is our right and duty to construe the Constitution and laws of this state, when not in conflict with federal authority, independently of the decisions of

any other court.”<sup>7</sup> If the OCCA remains committed to this near century-old pledge, the days of Article II, Section 30’s utter dependence on law molded in Washington, D.C., may be numbered.

#### **TURNER v. CITY OF LAWTON**

*Turner* presented the issue whether unconstitutionally obtained evidence could be used in a civil proceeding to terminate *Turner*’s employment as a firefighter. The Oklahoma Supreme Court considered federal cases that found the exclusionary rule to be inapplicable in the specific civil proceedings involved in each case. Under federal law, the exclusionary rule is a rule of evidence, where the Supreme Court weighs the cost and benefit of the rule in order to determine whether to exclude evidence in a given type of proceeding.<sup>8</sup> The *Turner* court deemed the federal cases “factually



and conceptually distinguishable" from Turner's circumstances.<sup>9</sup>

Turning to state precedent, the court determined that an exclusionary rule, based on Art. II, Sec. 30, had been recognized by the Oklahoma Supreme Court and OCCA some 40 years before the U.S. Supreme Court obligated the states to enforce it in 1961.<sup>10</sup> According to *Turner*, in 1954 the OCCA adopted the federal rationale for the exclusionary rule, applied it to Art. II, Sec. 30, and "held that the exclusion of evidence acquired by an unconstitutional search or seizure was not merely a rule of procedure, but rather a fundamental right under the Oklahoma Constitution — independent of either the Fourth or Fourteenth Amendments of the United States Constitution."<sup>11</sup> Oklahoma's rule requires suppression of evidence seized pursuant to an unlawful search, "without consideration of whether the proceeding is civil or criminal in nature."<sup>12</sup>

The *Turner* court concluded that it was not required to follow federal cases in which the exclusionary rule, as a rule of evidence, is inconsistently enforced, because the cases were "too restrictive for application" under Oklahoma's fundamental exclusionary rule.<sup>13</sup> The court deemed itself "unfettered in its enforcement of the Oklahoma exclusionary rule."<sup>14</sup> According to the Oklahoma Supreme Court:

The citizens of Oklahoma possess a double-barrelled source of protection which safeguards their homes from unauthorized and unwarranted intrusions — the Fourth Amendment and art. 2, §30. This dual safeguard flows directly from the United States Supreme Court's explicit acknowledgement of the right of state courts, as the final interpreters of state law to impose higher standards on searches and seizures than those required by the federal constitution, even if the state constitutional provision is similar to the Fourth Amendment.<sup>15</sup>

The court emphatically announced its departure from Supreme Court law, saying, "The Okla. Const. art. 2, §30 constitutes a *bona fide*, separate, adequate and independent grounds upon which we rest our finding that the illegal search prohibition pertains equally to civil and criminal proceedings."<sup>16</sup>

*Turner*, whose analysis is far more comprehensive and compelling than this synopsis reveals, has not been evaluated in a scholarly

form by the OCCA. In *Richardson v. State*, *Turner* was dismissed as persuasive authority in a footnote.<sup>17</sup>

### DENNIS v. STATE

In *Dennis*, the OCCA relied on an independent construction of the Oklahoma Constitution to set a standard higher than that established by the Supreme Court's 1986 *Moran v. Burbine* decision.<sup>18</sup> *Moran* held that a suspect's Fifth Amendment right was not violated by failure of officers to inform him of his attorney's attempt to contact him during custodial interrogation at the police station because the attorney's effort was extraneous to the issue of whether the suspect's waiver of Fifth Amendment rights was voluntary. Just two years earlier in *Lewis v. State*, the OCCA found a Fifth Amendment waiver involuntary in similar circumstances.<sup>19</sup>

The *Dennis* court was faced with choosing between its own ruling in *Lewis* or the Supreme Court's ruling in *Moran*. The court looked at what other state courts had done about *Moran*. Thirteen states had followed *Moran* in lockstep.<sup>20</sup> Eight states had recognized expanded rights under their state constitutions. Two other states, Texas and Connecticut, assessed the role of their state constitutions on a case-by-case basis. *Dennis* ultimately adopted Texas' approach, which examines the totality of circumstances to determine voluntariness of a Fifth Amendment rights waiver.<sup>21</sup> Recognizing a right and duty to construe the Oklahoma Constitution independently from federal authority, the court observed, "Our independent interpretation of Oklahoma constitutional provisions is not circumscribed by United States Supreme Court interpretation of similar federal provisions."<sup>22</sup>

The *Dennis* court appeared to view *Lewis* as consistent with the totality of circumstances approach, and stood by the "principled reasoning" in *Lewis*.<sup>23</sup> Notwithstanding the incompatibility between *Lewis* and *Moran*, the court pointed out that *Lewis* was not in conflict with any federal authority because *Lewis* was based on state constitutional law, and federal cases were based on federal law, not state law.<sup>24</sup> To the OCCA, *Lewis* was independent state law before *Moran* became the federal standard, and *Moran* could not change state law precedent.<sup>25</sup>

*Dennis* bodes well for Art. II, Sec. 30's prospects for independence, since there is no



“Oklahoma Constitutional prohibition is broader in scope than its federal counterpart...”

”

principled reason to conclude that independence should be allotted to one constitutional right, yet be withheld from another. Moreover, *Dennis*' observation of a duty to construe the Oklahoma Constitution independently of the decisions of other courts, which dovetails with *Turner*'s stance, speaks of the whole constitution, and thus incorporates Art. II, Sec. 30.

#### THE TEXT OF ART. II, SEC. 30

OCCA decisions have repeatedly characterized the text of Art. II, Sec. 30 as “almost identical” to or “almost an exact copy” of the Fourth Amendment, which has furnished the primary rationale why the substance of both provisions is the same.<sup>26</sup> However, in *Turner* the Oklahoma Supreme Court perceived “small, but significant differences between the language of the Fourth Amendment and art. 2, §30.”<sup>27</sup> In particular, “[t]he Oklahoma Constitutional prohibition is broader in scope than its federal counterpart, forbidding any unreasonable search or seizure and requiring that the place to be searched be described with greater particularity than does the federal constitution.”<sup>28</sup> Whereas the Fourth Amendment requires a warrant to be predicated on probable cause “particularly describing” that which is to be searched or seized, Oklahoma’s provision requires probable cause “describing as particularly as may be” the object of the warrant.<sup>29</sup> The special emphasis the Oklahoma Constitution places on the particularity of description appears to be a substantive variance from the Fourth Amendment. This variance would appear to negate the OCCA’s conclusion that the substance of both provisions is identical. It would also indicate an area where the OCCA might recognize that broader protection is established by Oklahoma law.

If the drafters of Art. II, Sec. 30 intended the provision to be interpreted identical to the Fourth Amendment, wouldn’t they use identical language? By varying the language, a risk should have been evident to the drafters that an appellate court might be spurred to divert from the Supreme Court’s views. Even if the drafters considered the textual differences to be minor, by writing a different provision they may have been sending a message to the courts that Art. II, Sec. 30 has its own identity. As noted by Judge Parks, addressing Oklahoma’s Self-Incrimination Clause:

[It] is illogical to suggest that the twentieth-century drafters of article II, section 21, who chose to use different language than that afforded by the eighteenth-century federal fifth amendment, meant to protect exactly the same rights to the same extent. If that was the intent, any language other than the federal language would be dangerous. A different, more protective intent would seem to be evidenced in the Oklahoma constitution.<sup>30</sup>

Indiana, New Jersey and Texas are examples of states that have constitutional provisions identical or similar to the Fourth Amendment, with independent force of law.<sup>31</sup> The Texas Court of Criminal Appeals has observed that the effect of neglecting independent analysis of the state constitution would be to render it moot.<sup>32</sup>

OCCA case law spanning decades does not view Art. II, Sec. 30 as moot. In a 1927 case, the court said that Art. II, Sec. 30 “is a pledge of the faith of the state government that the people of the state, all alike, shall be secure in their persons, houses, papers and effects against unreasonable search and seizure.”<sup>33</sup> In a 1935 case,

the court said that Art. II, Sec. 30's "protection reaches all alike, and the duty of giving to it force and effect is obligatory upon all intrusted with the enforcement of the laws."<sup>34</sup> In 1951, the court said in reference to Art. II, Sec. 30: "The framers of our Constitution justified this enactment, no doubt, because they were bound to have been conscious of the sacredness and sanctity of the home... In any event, it is the sworn duty of the members of this court to uphold the Constitution, and this means that we must conscientiously apply the law to the facts developed in a particular case, and evidence obtained in violation of this constitutional provision must be rejected."<sup>35</sup> Indeed, these cases appear to view Art. II, Sec. 30 as having vitality independent of any other law.

As for the case which sired Oklahoma's doctrine that Art. II, Sec. 30's substance is identical to the Fourth Amendment, *De Graff v. State*, a reading of the case does not bear out an intent to bind Art. II, Sec. 30 to the Supreme Court's rulings for perpetuity.<sup>36</sup> The 1909 Court of Criminal Appeals was charged with interpreting a newly coined state constitution. Lacking its own precedent, the court understandably observed that, "[w]hen the provision of our Constitution with reference to the issuance of warrants of arrest was practically copied from the constitution of the United States by our constitutional convention, the construction which had been placed upon this provision by the United States courts, as well as by our territorial Supreme Court was well known, and we are therefore bound to believe that said provision was adopted subject to this construction."<sup>37</sup> The court's conclusion that the state drafters tacitly adopted existing construction of the Fourth Amendment stops short of designating the U.S. Supreme Court as the future decipherer of the Oklahoma Constitution. And *De Graff's* view that the substance of the Fourth Amendment and Art. II, Sec. 30 is the same does not imply that what federal courts conclude about substance dictates what state courts must conclude about substance.

## CONCLUSION

Between 1970 and 1984, more than 250 published state decisions ruled that the constitutional floors set by the Supreme Court are insufficient to serve the more stringent requirements of state constitutions.<sup>38</sup> Texas has used its own constitution to curb search of containers in inventory searches, resurrect pretext

doctrine and set the burden of proof for voluntariness of consent at clear and convincing evidence.<sup>39</sup> Given *Dennis'* affinity for the Texas approach to independent state constitutionality, the Lone Star State's jurisprudence might be used to free Art. II, Sec. 30 from the yoke of federal law.

The underpinnings of Oklahoma's "lock-step" approach to interpretation of Art. II, Sec. 30, are questionable in light of *Turner v. City of Lawton* and the actual holding of *DeGraff*. The New Jersey Supreme Court has said that: "For most of our country's history, the primary source of protection of individual rights has been state constitutions, not the federal Bill of Rights... The genius of federalism is that the fundamental rights of citizens are protected not only by the United States Constitution but also by the laws of each of the states."<sup>40</sup> Hopefully, an enterprising attorney will present the Court of Criminal Appeals with a case that prompts examination of this important issue with due thoroughness.

1. *DeGraff v. State*, 2 Okla.Crim. 519, 103 P. 538, 541 (1909)

2. 1986 OK 51, 733 P.2d 375, 380 (Okla.1986)

3. *Sloan v. Sprouse*, 1998 OK CR 56, 968 P.2d 1254, 1258, quoting *DeGraff*, 103 P. at 541

4. *Richardson v. State*, 841 P.2d 603, 605, n. 4 (Okla.Cr. 1992)

5. *Turner*, 733 P.2d at 379

6. 1999 OK CR 23, 990 P.2d 277

7. 990 P.2d at 286, quoting *Scribner v. State*, 9 Okla.Crim. 465, 132 P. 933, 938 (1913)

8. *Id.*

9. 733 P.2d at 379

10. *Id.* at 378

11. *Id.* (footnote omitted), discussing *Simmons v. State*, 277 P.2d 196, 198 (Okla.Cr. 1954)

12. *Id.* at 380-81

13. *Id.* at 380

14. *Id.*

15. *Id.* at 381

16. *Id.* (Emphasis original) (footnote omitted)

17. See n. 4 *supra*.

*Richardson* appears to agree with *Turner's* conclusion that Art. II, Sec. 30, may have independent clout. In reference to Art. II, Sec. 30, *Richardson* said: "We will continue, when deemed appropriate, to interpret our state constitution as providing more expansive individual liberties than those conferred by the United States Constitution." 841 P.2d at 605 However, only two judges joined the opinion. Judge Lumpkin's special concurrence fully embraced the rule that Art. II, Sec. 30 locksteps with the Fourth Amendment. *Id.* at 606 Further, *Richardson's* outcome was that it followed Supreme Court law and overturned state precedent incompatible with the federal precedent. *Id.* at 604-05

18. 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)

19. 1984 OK CR 93, 695 P.2d 528

20. *Id.* at 282

21. *Id.* at 284

22. *Id.* at 285-86

23. *Id.* at 286

24. *Id.*

25. *Id.*

26. *Dale v. State*, 2002 OK CR 1, 38 P.3d 910, 913 (Lumpkin, P.J., dissent (citing cases)); see also n. 3, *supra* and *State v. McNeal*, 6 P.3d 1055, 1057 (Okla.Cr. 2000)

27. 733 P.2d at 380

28. *Id.*

29. U.S.Const. amend. IV provides:



The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Okla.Const. Art. II, Sec. 30 provides:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches or seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized.

30. *Harris v. State*, 1989 OK CR 15, 773 P.2d 1273, 1280 (Parks, V.P.J., dissenting; quoting M. Miller, Oklahoma's Constitutional Right Against Self-Incrimination and the Introduction Into Evidence of the Refusal to Take a Sobriety Test, 37 Okla.L.Rev. 245, 252 (1984))

31. *Mitchell v. State*, 745 N.E.2d 775, 786 (Ind. 2001); *State v. Hempele*, 576 A.2d 793, 799 (N.J. 1990); *Heitman v. State*, 815 S.W.2d 681, 685 (Tex.Crim.App. 1991)

32. *Heitman*, 815 S.W.2d at 688

33. *Dibrell v. State* 36 Okla.Crim. 177, 253 P. 108 (1927)

34. *Uhlenhake v. State*, 58 Okla.Crim. 248, 52 P.2d 117 (1935)

35. *Moulton v. State*, 93 Okla.Crim. 324, 227 P.2d 695, 699 (1951)

36. See Note 1, *supra*

37. 103 P. at 542

38. Robert K. Fitzpatrick, Note: Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights, 79 N.Y.U.L. Rev. 1833 (2004)

39. Jessica L. Schneider, High Court Studies: Breaking Stride: The Texas Court of Criminal Appeals' Rejection of the Lockstep Approach 1988-1998, 62 Alb.L.Rev. 1593, 1610-1617 (1999) See also *State v. Sullivan*, 74 S.W.3d 215, 221 (Ark. 2002) (Under independent constitutional and

case law, "pretextual arrests — arrests that would not have occurred but for an ulterior investigative motive — are unreasonable police conduct warranting application of the exclusionary rule.")

40. *Hempele* 576 A.2d at 800, citing Abrahamson, Reincarnation of State Courts, 56 SW.L.J. 951 (1981)

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# Georgia v. Randolph: Beginning of the End for Third-Party Waivers

By John M. Dunn

Ever since Justice Douglas pointed to the “penumbra and emanations”<sup>1</sup> that helped resolve the case of *Connecticut v. Griswold* and legitimized the “right to privacy” in American Jurisprudence, the right to privacy has been intimately linked to the Fourth Amendment. While the “right to privacy” has been recognized as a “fundamental right,” it has not always been recognized as an individual right.<sup>2</sup> That was the case until the court heard of the events which occurred in Americus, Ga., on the morning of July 6, 2001, and decided the case of *Georgia v. Randolph*.<sup>3</sup> Mr. Randolph raised many arguments that directly rely on the language of the Fourth Amendment.

However, a brief review of constitutional law governing search and seizure will show that the argument that a search conducted on the basis of a third party’s consent is unreasonable is dead on arrival. However, the Supreme Court did not base its analysis purely on the language of the Fourth Amendment. As Chief Justice Roberts observed in his dissenting opinion in *Randolph*, the majority based its analysis on changing social expectations, believing this to be the key to the Fourth Amendment requirement for “reasonableness.” He concludes that while they may have looked to the Fourth Amendment, all of the cases they used for their guiding authority refer to a “legitimate expectation of privacy.”<sup>4</sup>

## FACTS OF THE CASE

On the morning of July 6, 2001, Janet Randolph summoned the police to the home that she had shared with her husband, Scott Ran-

dolph. She reported that the couple were going through hard times and had been separated since May of 2001. During that time, she had taken the children to see her parents in Canada. She had returned to the residence in early July. That morning, she and Scott had a domestic dispute. Following that dispute, Scott, fearing that she may again take the children and return to Canada, left the house with the children and hid them from her. As she spoke to the police, Scott returned. After explaining his fears to the police, he agreed to accompany Sgt. Murray to the neighbor’s house and retrieve the children. But when he returned, he learned that Janet had made statements to the police that he was a drug user and there were items of drug evidence in the house. Sgt. Murray confronted Scott about these accusations and he denied they were true. When Sgt. Murray asked for consent to search, Scott refused. Sgt. Murray then asked Janet for consent to



search. She not only gave consent, but escorted the officers to the bedroom where they observed a straw that had a white powdery residue on it. Shortly thereafter, Janet withdrew her consent and the police took the straw and the Randolphs to the police station while the officers applied for a search warrant. During the service of the search warrant, more items of evidence suggesting drug use and drug possession were located. At trial, Scott moved to suppress the evidence on the basis that the search was conducted without his consent.<sup>5</sup>

## A LEGAL HISTORY

At first blush, one may hearken back to the long line of American jurisprudence that governs consensual searches to determine whether the evidence should be suppressed. It begins with the Fourth Amendment itself, which reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>6</sup>

From the very words of the Fourth Amendment, it is clear that the framers were interested in protecting our homes from “unreasonable search and seizure.” The court has long held that “searches conducted outside of the judicial process...are per se unreasonable...subject only to a few specifically established and well-delineated exceptions.”<sup>7</sup> The voluntary consent of a person who exercises dominion and control over the property is one of those exceptions.<sup>8</sup> To enforce this prohibition, the court developed the “exclusionary rule.”<sup>9</sup> In *Coolidge v. New Hampshire*, the court reaffirmed, “it is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.”<sup>10</sup>

At this point, one could imagine Mr. Randolph’s argument to be simply that his home was searched after he refused to consent to the warrantless search, therefore the fruits of that search should be suppressed. After all, it would be improper for the court to allow one party to waive the rights of another. Unfortu-

nately, the court has also held that not all rights are created equal in the eyes of the criminal court. In *Bustamonte*, for example, the U.S. Supreme Court discussed the degree of scrutiny that would be given to the waivers of some specific constitutional rights. Specifically, the court determined, “The Sixth Amendment stands as a constant admonition that if the constitutional safe guards it provides be lost, justice will not ‘still be done.’”<sup>11</sup> The court reasoned that the right to counsel contained in the Sixth Amendment and the Fifth Amendment rights against self-incrimination were necessary to preserve a fair trial.<sup>12</sup> However, the court relegates the rights contained in the Fourth Amendment to a position of only secondary importance.

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment...The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting a fair ascertainment of truth at a criminal trial.<sup>13</sup>

The following term, the U.S. Supreme Court decided the case of *United States v. Matlock*.<sup>14</sup> In this case, the wife of the defendant consented to a search of the residence. However, consent was neither sought nor given by her husband who was being arrested in the front yard and who was the party against whom the fruits of the search were used. The court determined, based on the holding in *Bustamonte* and other similar cases, that one person’s Fourth Amendment rights could be waived by a third party so long as that party has “sufficient relationship to the premises or effects sought to be examined.”<sup>15</sup>

Following *Matlock*, a number of circuit courts and state courts began to apply the holding to cases where one or both parties were present and one party objected to the search, with a leading case being *United States v. Sumlin*.<sup>16</sup> In this case, the 6th Circuit Court of Appeals heard arguments from Sumlin concerning the search of the apartment he shared with his female companion. He contends the agents asked him for his consent to search the apartment. After he refused to waive his Fourth Amendment Rights, the FBI agents obtained consent from the cotenant. The Sixth Circuit Court of Appeals held that the ability for a third person to give the police consent to

search a premises did not depend on the defendant's absence.<sup>17</sup> That court went on to explain:

The rationale behind this rule is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to a search. *There is no reasonable expectation of privacy* to be protected under such circumstances. We cannot see how the additional fact of Appellant's initial refusal to consent in anyway lessened the risk assumed that his co-occupant would consent.<sup>18</sup>

Courts across the country began to adopt the view that when a person cohabitates with another, he or she has assumed the risk that the third party will consent to a search and all that is necessary to have the power to consent to a search is the appropriate relationship with the premises to be searched.<sup>19</sup> That requirement lasted until 1990 when the U.S. Supreme Court heard the case of *Illinois v. Rodriguez*.<sup>20</sup>

In the case of *Illinois v. Rodriguez*, the U.S. Supreme Court heard arguments as to whether the consenting third party had to have actual authority to consent or merely apparent authority. In this case, a woman met police at Mr. Rodriguez's apartment, consented to the search, and produced the key that was used to unlock the door. It was later found that she did not, in fact, live at the apartment and had taken the key without Mr. Rodriguez's knowledge. The court, in holding that apparent authority was sufficient if the officers reasonably believed that actual authority existed, stated:

...[the exclusionary rule assures] no evidence seized in violation of the Fourth Amendment will be introduced at trial, unless he consents. What [a citizen] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but no search will occur that is "unreasonable."<sup>21</sup>

## ARGUMENT AND DISCUSSION

Based upon the holdings of *Matlock*, *Rodriguez* and the *Sumlin* line of cases, the Supreme Court seems to have been in a position to quickly dispose of the *Randolph* case in light of more than 30 years of supporting case law on which to base an opinion. In applying the court's previous holdings to *Georgia v. Randolph*, it seems clear that Janet Randolph had a sufficient relationship to the property, as required by *Matlock*, or at least the apparent authority required by *Rodriguez*, to give consent for the police to engage in a search of the property. As the *Sumlin* line of cases established, Scott Randolph's objections to the search would be irrelevant. The court, however, did not decide this case strictly on Fourth Amendment grounds.

During oral arguments, Justice Souter summarized the state's arguments as advocating a rule under which Scott Randolph would have standing to raise a Fourth Amendment challenge, but while he has an expectation of privacy, Janet Randolph was able to thwart his expectation through her consent.<sup>22</sup> He later summarized Scott Randolph's position as being a search of a home conducted

over the objection of one of the occupants, is unreasonable.<sup>23</sup> Justices O'Connor and Ginsberg pointed out that the rule in *Matlock* was only applicable to situations

“...produced the key that was used to unlock the door.”

where one party was present and the other was absent, which was clearly not the case in *Randolph*.<sup>24</sup> Justice Souter disagreed and stated that to read *Matlock* and *Rodriguez* as cases which permit a third party to give permission to search in the absence of the real party in interest would be to read the cases in a light that is clearly contrary to the facts. Souter reasoned that since in *Matlock* and *Rodriguez*, the “party in interest” was *actually present*, just not asked for consent to search.<sup>25</sup> Mr. Dreeban, appearing *amicus curiae* for the state of Georgia, pointed out that Mr. Matlock's right to object



was relinquished when he was arrested and taken to the police car, while Mr. Rodriguez's right was relinquished by virtue of the fact he fell asleep.<sup>26</sup> Justice O'Connor and Mr. Dreeban agreed that treating one party's consent as valid when the other is absent and as a nullity when the other is present and objecting would "...protect Fourth Amendment rights only by happenstance..."<sup>27</sup>

Chief Justice Roberts inquired as to the nature of the "distinct individual right to privacy" and how such a right could exist in a home that is shared with someone else.<sup>28</sup> Mr. Goldstien, appearing for Mr. Randolph pointed out that contrary to the previous discussion about inviting "guests" into the home, it is a police search of the home that was being discussed.<sup>29</sup> In distinguishing *Lopez* (where the court permitted the sharing of information with the police as not violating of the Fourth Amendment), he pointed out that a police search of the home was more invasive than information that was shared with the third party and that *both* occupants of the home have their own expectation of privacy.<sup>30</sup> The second prong of his defense heightened back to the Fourth Amendment by contending that a search of the home over the objection of one of the occupants who is present is "unreasonable."<sup>31</sup>

Mr. Goldstein correctly points out, and Chief Justice Roberts seems to agree, that under the state's position the only way to ensure that an individual maintains his right to privacy in his house is to live alone.<sup>32</sup> Chief Justice Roberts went on to state that the mere act of living with someone else has the effect of compromising that privacy.<sup>33</sup> But Mr. Goldstein replied that while the arguments may revolve around the expectation of privacy, and it is certainly possible that a cotenant may admit the police over the objection of the other cotenant, the

*reasonable* expectation of what may happen is different.<sup>34</sup>

It is interesting to note that in the early part of oral argument, some of the justices and the attorney for the state indicated that the standard for determining the outcome of the case is the determination of "what is socially acceptable" with regard to the right to invite or exclude others from a dwelling.<sup>35</sup> It would appear that the court was faced with deciding for whom it was "socially acceptable" to prevail in the event where cotenants had different wishes as to whether to admit the police. At the same time, the justices could have been just as easily asked whether it is "socially acceptable" to believe that one only has a right to privacy if one lives as a hermit all of their lives. While this argument appears saved for another day, it seems clear that it is a question that will require answering in order to establish predictability in Fourth Amendment jurisprudence.

#### RULING OF THE COURT AND ANALYSIS

In the majority opinion, Justice Souter stated that the court had adopted a formalistic rule which was justified based on the privacy interests at stake. On one hand, the court weighed the interest of a consenting cotenant to cooperate with the police and invite them into the house against the interests of the potential defendant to exclude the police. Here, the court held that when

a cotenant is present and objects to the search, "...a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable as to him."<sup>36</sup> In his concurring opinion, Justice Stevens explained each party "...has a constitutional right that he or she must independently assert or waive."<sup>37</sup> The court crafted this as a fact-intensive, formalistic rule. The court strained not to reduce *Matlock* and *Rodriguez* to "silly cases" by crafting this specific rule around the standing case law.<sup>38</sup> As a product of this ruling, the court drew a fine line distinction and made



“...search of the home over the objection of one of the occupants ...”



the entire rule revolve about the presence of the party opposing the search being at the door and actively objecting to the search.<sup>39</sup> In so doing, the court let stand the rules which permit a cotenant to consent to a search of the property in the absence of other cotenants or persons with “apparent authority.”<sup>40</sup> Likewise, the police are under no obligation to seek out a cotenant that may be on the premises, sleeping or otherwise unaware of the presence of the police.<sup>41</sup> Nor are the police required to acquire the consent of a cotenant that is later discovered to be present — making “silence is understood to be consent” the rule.<sup>42</sup>

Chief Justice Roberts, in his dissenting opinion, made several observations about the majority opinion. Among them was that the holding of the court does not serve any Fourth Amendment protection. Instead, the chief justice observed:

The rule the majority fashions does not implement the high office of the Fourth Amendment to protect privacy, but instead provides protection on a random and happenstance basis, protecting, for example, a co-occupant who happens to be at the front door when the other occupant consents to a search, but not one napping or watching television in the next room.<sup>43</sup>

While the chief justice would rather have a rule that would permit any one occupant to be able to grant permission to search to the police, he concedes “when the development of Fourth Amendment jurisprudence leads to such arbitrary lines, we take it as a signal that rules need to be re-thought.”<sup>44</sup> The chief justice is right in this observation, however, he will probably disagree in the probable outcome of the re-thinking process.

The opinion of the Supreme Court is significant as it represents a change in thinking from the *Matlock* line of cases. In those cases, the court looked only to whether the party *giving consent* had a sufficient relationship to the property to be searched to make the search reasonable. This standard did not consider the wishes of other parties in interest. It did not consider the interests of the potential defendant against whom any evidence recovered would be used. Under this rule, it was clear that the right to privacy was a “group right” and that any one of the parties holding the right could waive it as it applied to the others. The *Randolph* case represents a distinct change

in the philosophy of the court. *Randolph* represents the first time the court considered the rights or interests of the potential defendant. It represents the first time the court recognized that each of the parties have an *individual* expectation of privacy. Furthermore, this ruling represents the first time a search has been determined to be unreasonable “as to a specific party.”

Should this trend continue, when Chief Justice Roberts gets his wish and this jurisprudence is re-evaluated, the next logical step would be to recognize that the individual does not lose his or her expectation of privacy when they are absent from the property. If the logic of this case were to be expanded just enough to yield the consistency that Chief Justice Roberts is seeking, the rule could be stated that a third party may only waive the privacy interest that he or she possesses. As a result, a search would be unreasonable against anyone that does not give consent. This rule would be uniform and give a bright line for factual application while protecting the privacy interests of those that are not present or not consenting. It seems that any rule which could be articulated as “silence or absence is understood to be consent” cannot long endure, once the court has recognized the significance of an *individual* right to privacy in the face of a criminal investigation.

1. *Connecticut v. Griswold*, 381 U.S. 479, 484-486 (1965).
2. *Id.* Compare with *Schneekloth v. Bustamonte*, 93 S. Ct. 2041 (1973).
3. *Georgia v. Randolph*, 126 S.Ct. 1515, 164 L.Ed. 2d 208 (2006).
4. *Id.* at 1533. (C.J. Roberts, dissenting). (Emphasis in original.)
5. *Id.* at 1519.
6. U.S. Const. Amend. IV
7. *Katz v. United States*, 389 U.S. 347, 357 (1967).
8. *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973).
9. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971).
10. *Id.* at 454.
11. *Bustamonte*, 412 U.S. at 236.
12. *Id.*
13. *Id.* at 241-242.
14. *United States v. Matlock*, 415 U.S. 164 (1974).
15. *Id.* at 171.
16. *United States v. Sumlin*, 567 F.2d 684 (6th Cir. 1977).
17. *Id.* at 687.
18. *Id.* at 688. (Internal citations omitted.) (Emphasis added.)
19. See also *United States v. Hendrix*, 595 F.2d 883 (U.S. App. D.C. 1979), *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992), *United States v. Morning*, 64 F.3d 531 (9th Cir.), and *Randolph*, 126 S.Ct., at 1520. (Footnote 1).
20. *United States v. Rodriguez*, 497 U.S. 177 (1990).
21. *Id.* at 183.
- 22.. Argument of Resp. at 44:16-25, 45:1-2, *Georgia v. Randolph*, 126 S.Ct. 1515.
23. *Id.* at 45:2-5.
24. Argument of Pet. at 8:23-25, 9:1-6, 11-15, *Georgia v. Randolph*, 126 S.Ct. 1515.
25. Argument of Resp. at 46:19-15, 47:1-4, *Georgia v. Randolph*, 126 S.Ct. 1515.
26. Argument of Pet. at 28:1-14, *Georgia v. Randolph*, 126 S.Ct. 1515.
27. *Id.* at 28:7-18.

28. Argument of Resp. at 33:22-25, 34:1, *Georgia v. Randolph*, 126 S.Ct. 1515.  
 29. *Id.* at 34: 4-8, 14-17.  
 30. *Id.* at 34: 6-17.  
 31. *Id.* at 35: 9-25.  
 32. *Id.* at 42: 8-14, 20-23.  
 33. *Id.* at 42: 20-23.  
 34. *Id.* at 43: 13-18.  
 35. Argument of Pet. at 3:24-25, 4:1-12, 11:1-8, 19:23-24, 21:3-7, *Georgia v. Randolph*, 126 S.Ct. 1515.  
 36. *Georgia v. Randolph*, 126 S.Ct. at 1519.  
 37. *Id.* at 1529. (J. Stevens, concurring).  
 38. Argument of Resp. at 48:12-17, *Georgia v. Randolph*, 126 S.Ct. 1515.  
 39. *Georgia v. Randolph*, 126 S.Ct. at 1526.  
 40. *Id.* at 1527.  
 41. *Id.*  
 42. *Id.*  
 43. *Id.* at 1531. (C.J. Roberts, dissenting).  
 44. *Id.* at 1536. (C.J. Roberts, dissenting).

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## Case Comments: *Seabolt v. State*

By Gloyd L. McCoy

On Dec. 15, 2006, the Oklahoma Court of Criminal Appeals decided the case of *Seabolt v. State*.<sup>1</sup> The purpose of this article is to explore the case and its analysis and discuss its impact on search and seizure law in Oklahoma. The case is now perhaps the leading Oklahoma case on the issue of the continued detention of motorists stopped for a traffic violation.<sup>2</sup>

### THE FACTS OF THE CASE

On March 3, 2004, a Muskogee police officer stopped Mr. Seabolt for failure to signal a left hand turn. Mr. Seabolt, at the officer's request, produced a driver's license and insurance verification. The policeman reported the stop to police dispatch and had them check the validity of Mr. Seabolt's license to determine if there were any outstanding warrants for Mr. Seabolt. The officer began to write Mr. Seabolt a warning citation. During this time, the officer radioed for a canine unit to come to the scene. The officer believed that Mr. Seabolt appeared nervous and he thought that he recognized Mr. Seabolt's car as one he had seen earlier in the day at a house suspected of being a place where drugs were being sold. During a discussion with the officer, Mr. Seabolt told the officer that the vehicle belonged to his brother. The officer's record check confirmed this statement.<sup>3</sup>

The policeman later said that he did not see, hear or smell anything to give him cause to think that there were drugs in the car. The only thing that made him suspicious was the fact that Mr. Seabolt was nervous. The canine unit arrived approximately 25 minutes later. The dog alerted on Seabolt's car. The officers then

searched the car and found a suitcase containing items commonly used in methamphetamine laboratories. The special investigative unit officer who responded to the scene later testified that the items appeared to him to have been used at least once to cook methamphetamine.

### ACTIONS AT THE DISTRICT COURT LEVEL

Mr. Seabolt was charged in the Muskogee County District Court with possession of a controlled dangerous substance with intent to manufacture, after former conviction of two or more felonies.<sup>4</sup> At the end of the preliminary hearing, Mr. Seabolt moved to suppress the evidence. The magistrate asked the parties to submit briefs on the issue. Those briefs were not provided in the appellate record when the case reached the Court of Criminal Appeals.

Subsequently, the magistrate overruled the motion. No explanation was contained in the record.<sup>5</sup> At trial, Mr. Seabolt's attorneys did not renew the objection to the improper search and seizure. Mr. Seabolt, with the evidence seized used against him, was convicted by a jury. He was subsequently sentenced to 45 years in prison.

“ The Court is unwilling to impose a rigid time limitation on the duration of a traffic stop...”



## THE APPEAL

On appeal, Mr. Seabolt claimed that the trial court erred in denying his motion to suppress and upholding the search of his car. He argued that the officer did not have reasonable articulable suspicion to detain him the 25 minutes it took for the drug dog to arrive and that his detention exceeded the scope of the traffic stop making the ensuing stop of his car illegal.<sup>6</sup>

There were some procedural problems with the issue raised on appeal. Although the improper search and seizure had been raised to the magistrate, the requested briefs were not part of the appellate record. Additionally, the objection to the introduction of the evidence was not renewed at trial. Thus, Mr. Seabolt was faced with proving that the error was “plain” error. “Plain” error is “error that is plain and obvious,” and that “affected...his substantial rights.”<sup>7</sup> The other option that the Court of Criminal Appeals would have had would have been to hold that trial counsel was ineffective in failing to present the suppression issue at trial.<sup>8</sup>

## BASIS FOR DECISION

In reversing the conviction, the Court of Criminal Appeals<sup>9</sup> set forth the status of the law governing the duration of a traffic stop:

A traffic stop is a seizure under the Fourth Amendment. The scope and duration of such a seizure must be related to the stop and must last no longer than is necessary to effectuate the stop’s purpose. If the length of the investigative detention goes beyond the time necessary to reasonably effectuate the reason for the stop, the Fourth Amendment requires reasonable suspicion that the person stopped has

committed, is committing or is about to commit a crime.<sup>10</sup>

The court, in deciding in favor of Mr. Seabolt, held:

The Court is unwilling to impose a rigid time limitation on the duration of a traffic stop; however, we are concerned with the duration of the traffic stop in the present case. An examination of the record shows no circumstances which justify the length of the detention. Indeed the record leads us to conclude this was a routine traffic stop, which should have resulted in a correspondingly abbreviated detention. The officer should have issued the warning citation to Seabolt expeditiously. Had he done so, Seabolt would have left the scene prior to the arrival of the canine unit. Without evidence in the record to show some reason why it took the officer 25 minutes to fill out the warning citation and complete his traffic stop duties, a finding that the length of the detention exceeded the scope of the traffic stop is justified. We must decide whether the officer’s justification for prolonging the detention was reasonable under the totality of the circumstances.<sup>11</sup>

As stated by the court, the review of the “totality of the circumstances” showed that the detention exceeded the scope of a proper traffic stop. The opinion of the court closed with an analysis of the specific factors that were analyzed in assessing the totality of the circumstances:

Here the officer testified that Seabolt was nervous and fidgety while retrieving his license. The officer saw Seabolt’s car at a house he suspected of drug activity. He did not observe the in and out traffic he associ-

ated with drug activity while Seabolt's car was parked there, nor did he see Seabolt. The officer had no information connecting Seabolt to the occupant of the house and the officer conceded he had not seen the occupant in 30 to 60 days. Under these circumstances, the officer did not have reasonable suspicion to prolong the traffic stop. Seabolt's rights under the Fourth Amendment were violated as a matter of law and the evidence from the search should have been suppressed. The remaining evidence, if any, is insufficient to support a conviction and Seabolt's conviction must be reversed with instructions to dismiss.<sup>12</sup>

Evidence of an individual's nervousness has never, standing alone, been acceptable to the courts as a basis for probable cause. The Eighth Circuit Court of Appeals in *United States v. Bloomfield*<sup>13</sup> held that a defendant's nervousness, shaking and red eyes, together with other evidence did not provide the officer with objectively reasonable suspicion that the defendant was involved in criminal activity and thus search and seizure was invalid. The Tenth Circuit Court of Appeals has stated that they are "wary" of generic "nervousness" claims as asserted here.<sup>14</sup>

The court noted that testimony was presented that the officer had seen pedestrian and vehicle traffic that was consistent with drug activity at the house where the vehicle had been some seven days before Mr. Seabolt's arrest. The officer did not observe any drug-related activity while Mr. Seabolt's car was at the house.<sup>15</sup> Such information the court found was not sufficient to justify a continued detention. Such a decision is proper under the facts.<sup>16</sup>

The Court of Criminal Appeals should not be criticized for failing to establish a "bright line" rule on the length of detention.<sup>17</sup> Such issues are driven by the facts of each situation. Of course, neither should the court be criticized for determining the existence of a constitutional violation here. The facts of this case cried out for suppression.

## CASES FROM OTHER JURISDICTIONS SUPPORT RULING

The Court of Criminal Appeals cited a Kansas appellate decision in support of its reasoning.<sup>18</sup> In *State v. Boykins*,<sup>19</sup> the Kansas Court of Appeals considered whether an officer was justified in extending the detention of a motorist based on the driver's nervous behavior and the officers' observation of the car minutes before the stop at a home under police

surveillance for drug activity.

The facts of *Boykins* were uniquely similar to those in *Seabolt*.<sup>20</sup> The Kansas court found that "mere propinquity" to others independently suspected of criminal activity together with the defendant's display of anxiety and nervousness when stopped for a traffic violation did not amount to reasonable suspicion of criminal activity.<sup>21</sup> The *Boykin* court also found that the defendant's stop at a suspected drug house without evidence the defendant did anything suspicious or was connected somehow to the occupants of the house did not amount to reasonable suspicion of criminal activity.<sup>22</sup> The *Boykin* case cited numerous cases from the Tenth Circuit Court of Appeals supporting their holding.<sup>23</sup>

The Arkansas Supreme Court in *Sims v. State*<sup>24</sup> provides additional support for the Court of Criminal Appeals' ruling. There, the court ruled that police officers did not have reasonable

suspicion that the defendant was committing a crime and, thus, were not justified in detaining

“...the officer had seen pedestrian and vehicle traffic that was consistent with drug activity...”



him after the legitimate traffic stop ended. The officers had said that the stop was continued because the defendant was “nervous” and “sweaty.” The Arkansas court commented that most people would be sweaty on a hot July afternoon such as the one on which the defendant was stopped.

The ruling of the Court of Criminal Appeals is, of course, consistent with Supreme Court law.<sup>25</sup> There are also numerous federal appellate cases that support the ruling in *Seabolt*.<sup>26</sup> Basically, although there is no direct language to the effect, the Court of Appeals decision was that it would not sanction a “fishing expedition” or allow an officer’s hunch to establish reasonable suspicion.<sup>27</sup>

## CONCLUSION

The right to search and seizure by the state of Oklahoma is in derogation of the right to be free from search and seizure of one’s person, home and property, which includes one’s automobile. Accordingly, the right of the state to search and seize must be strictly construed to afford protection against abuse.<sup>28</sup> Although there is always a temptation in law enforcement situations to let the ends justify the means, courts must be resolute to protect the constitutional rights of its citizens.<sup>29</sup> In *Seabolt*, the Oklahoma Court of Criminal Appeals did not let the ends justify the means. As a result, all citizens’ rights are protected.<sup>30</sup>

1. *Seabolt v. State*, 2006 OK CR 50, – P.3d –, 2006 WL 3718056.

2. For a general discussion of the issue, see Thomas Fusco, Annot., “Permissibility Under Fourth Amendment of Detention of Motorist by Police, Following Lawful Stop, To Investigate Matters Not Related to the Offense,” 119 A.L.R.Fed. 567. See also Chris K. Viser, “Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car,” 40 Wake Forest L.Rev. 1287 (2006); Wayne R. LaFave, “The ‘Routine Traffic Stop’ From Start to Finish: Too Much ‘Routine,’ Not Enough Fourth Amendment,” 102 Mich.L.Rev. 1843 (2004); Recent Developments, “Criminal Procedure – Length of Traffic Stop Detention,” 57 Ark.L.Rev. 441, 443 (2004); Amy Vasquez, Comment, “Do You Have Any Drugs, Weapons, or Dead Bodies in Your Car? What Questions Can a Police Officer Ask During a Traffic Stop?” 76 Tul.L.Rev. 211 (2001). For a general discussion of Fourth Amendment issues facing a defense lawyer, see Josephine Potuto, “A Practitioner’s Primer on The Fourth Amendment,” 70 Neb.L.Rev. 412 (1991).

3. 2006 WL 3718056 \*1.

4. *State of Oklahoma v. Dallas Jay Seabolt*, Case No. CF-2004-179. Seabolt was charged with the violating 63 O.S. Supp. 2003, Section 2-401(G).

5. In the federal court system, the judge in addressing a motion to suppress is required to make specific findings of fact and conclusions of law. Fed.R.Crim.P. 12(d). When factual issues are involved in deciding a suppression motion, the federal district court “must state its essential findings on the record. The decision to write a separate written memorandum opinion is discretionary. *United States v. Williams*, 951 F.2d 1287 (D.C.Cir. 1991)(Findings not only “enable appellate courts to perform their reviewing function,” but also serve to “inform the parties and other interested persons on the grounds of the ruling” and “add discipline to the process of judicial decision-making”).

6. 2006 WL 3718056 \*1.

7. *Hogan v. State*, 2006 OK 19, 139 P.3d 907, 923.

8. For citations to cases in which defense counsel have been held to be ineffective for failing to raise suppression issues, see generally Annot., “Adequacy of Defense Counsel’s Representation of Client Regarding Search and Seizure Issues – Motions and Objections During Trial and Matters Other Than Pretrial Motions,” 117 A.L.R.5th 513 (2004). See also *Commonwealth v. Melton*, 556 A.2d 836 (Pa.Super. 1989)(Defendant established that his counsel was ineffective in failing to seek suppression of identification testimony).

9. The opinion was authored by Judge Arlene Johnson. Judges Charles Johnson and Charles Chapel concurred. Judge David Lewis “specially concurred.” Judge Gary Lumpkin dissented.

10. 2006 WL 3718056 \*2 (internal citations omitted).

11. 2006 WL 3718956 \*2 (footnote and internal citation omitted).

12. 2006 WL 3718956 \*3.

13. *United States v. Bloomfield*, 24 F.3d 1043 (8th Cir. 1994).

14. *United States v. Hall*, 978 F.2d 616, 621 (10th Cir. 1992)(“While a person’s nervous behavior may be relevant, we are wary of the objective suspicion supplied by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials, even recognizing that reasonable suspicion may be the sum of noncriminal acts and is based on the totality of the circumstances”). See also *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992)(nervousness as a basis for suspicion must be considered with caution and normalcy is not dispositive). For analysis of demeanor evidence in general, see Jeremy A. Blumenthal, “A Wipe of the Hands, A Lick of the Lips, the Validity of Demeanor Evidence in Assessing Witness Credibility,” 72 Neb.L.Rev. 1157 (1993).

15. 2006 WL 3718056 footnote 2.

16. See generally Margaret Raymond, “Down the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion,” 60 Ohio St.U.L.Rev. 99 (1999).

17. See generally, Aaron Mendelsohn, Note, “The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of the Circumstances Test,” 88 J.Crim.L. & Crimin. 930 (1998); *United States v. Ramos*, 12 F.3d 1019, 1025 (11th Cir. 1994)(“Fourth Amendment search and seizure law is fraught with uncertainties and difficult distinctions. Nearly every case in this area of the law has some feature distinguishable from the next”).

18. 2006 WL 3718056 \*3.

19. *Id. State v. Boykins*, 118 P.3d 1287 (Kan.App. 2005).

20. In analyzing search and seizure cases, the Court of Criminal Appeals ruling depends on an assessment of the facts and circumstances of each case. *Sutton v. State*, 1972 OK CR 191, 499 P.2d 1954. Thus, when citing authority in support of the defendant’s position it is logically important to cite cases with similar fact patterns.

21. *Boykins*, 118 P.3d at 1291.

22. *Id.* at 1291.

23. The Tenth Circuit Court of Appeals decisions cited in *Boykin* include *United States v. McRae*, 81 F.3d 1528, 1534 n. 4 (10th Cir. 1996); *United States v. Fernandez*, 18 F.3d 874, 879-80 (10th Cir. 1994); *United States v. Hall*, 978 F.2d 616, 621 n. 4 (10th Cir. 1992); *United States v. Millan-Diaz*, 975 F.2d 720, 722 (10th Cir. 1992).

24. *Sims v. State*, 157 S.W.3d 530 (Ark. 2004).

25. See *Florida v. Royer*, 460 U.S. 491, 500 (1983)(“[A]n investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop”) and *United States v. Place*, 462 U.S. 696, 709-10 (1983)(rejecting detention of 90 minutes).

26. For analogous federal circuit court cases, see *United States v. Wilson*, 935 F.2d 116 (4th Cir. 1991); *United States v. Jensen*, 462 F.3d 399 (5th Cir. 2006)(Denial of defendant’s motion to suppress in a prosecution for drug and firearm related charges is reversed and remanded for entry of judgment of acquittal where an officer unreasonably extended a traffic stop beyond the point at which a van occupant’s identification was cleared. defendant’s consent to search was not independently given); *United States v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000)(finding search illegal and consent invalid where officer employed “dilatory” tactics of delayed handling over of warning ticket); *United States v. Dortch*, 199 F.3d 193, 198 (5th Cir. 1999)(“The Constitution was violated, however, when the detention extended beyond the valid reason for the extended stop. To be sure, Dortch did not feel free to leave even after the officer had informed him that the computer check was completed because the officers still held his license and rental papers and had told him they were going to detain his car until the dog team arrived”); *Martin v. Tipton*, 2006 U.S. Dist.Lexis 43894 (E.D.Tex. 2006)(court overrules motion for summary judgment on qualified immunity issue over overlong traffic stop that resulted in drug dog check 31 minutes after stop that produced nothing. “A jury could find that holding Martin for 31 minutes while waiting for drug dog after the clean computer check of his driver’s license and license plate was



not objectively reasonable. There is a genuine issue of material fact as to whether an objectively reasonable officer, in light of the clearly established law, would have continued to call for a drug dog after finishing the computer check"); *United States v. Edgerton*, 438 F.3d 1043 (10th Cir. 2006)(Denial of motion to suppress evidence in prosecution for conspiracy to possess with intent to distribute cocaine is reversed where, under the circumstances, an extended seizure of defendant's vehicle due to an officer's inability to read a lawfully displayed temporary registration tag was improper); *United States v. Kaguras*, 2006 WL 1585989 (10th Cir. 6-9-06)(unpublished)(The officer issued a warning citation but kept the defendant's rental contract for an additional 40 seconds and continued to question the defendant. The officer said he wanted to ask more questions. Defendant said no that he wanted to get going. Drug dog sniff occurred. Tenth Circuit ruled that the unjustified detention began when the officer issued the citation but retained the rental contract. The traffic stop was continued without consent. No reasonable suspicion for detention); *United States v. Brown*, 405 F.Supp.2d 1291 (D.Utah 2005)(involving defendant stopped by police officer on highway for speeding; court ruled "initially invalid stop evolved into an unreasonable detention").

27. Courts have never sanctioned "fishing expeditions" or allowing an officer's hunch to establish reasonable suspicion. For Oklahoma authority, see *Bettylou v. State*, 1977 OK CR 124, 562 P.2d 862 (courts should not allow "aimless fishing expeditions"); *State v. Holden*, 1959 OK CR 95, 344 P.2d 595 (Purpose of constitutional provision against unreasonable searches is to prevent exploratory searches upon mere suspicion). For examples of authority from other jurisdictions, see *United States v. Arizu*, 534 U.S. 266, 274 (2002)(stating that "an officer's reliance on a mere 'hunch' is insufficient to justify an investigatory stop"); *United States v. Gregory*, 79 F.3d 973, 980 (10th Cir. 1996)("[T]he only purpose for the officer to continue to detain defendant was to embark upon an improper 'fishing expedition in hope that something

might turn up"); *United States v. Pruitt*, 174 F.3d 1215, 1221 n. 4 (11th Cir. 1999)("The fact that Moore's hunch ultimately turned out to be correct, i.e., that Pena and Garrido were illegally transporting marijuana in their van – is irrelevant for the purposes of the Fourth Amendment"); *Bowen v. State*, 685 So.2d 942, 944 (Fla.App. 1996)("Crose's testimony amounts to merely a hunch, which is insufficient to justify an investigatory search"); See generally Craig S. Lerner, "Reasonable Suspicion and Mere Hunches," 59 Vand.L.Rev. 407 (2006).

28. *Brinegar v. State*, 97 Okl.Cr. 299, 262 P.2d 464 (1953).

29. *United States v. Ivy*, 165 F.3d 397, 404 (6th Cir. 1998).

30. For comments by a court dealing with similar situation of suppressing evidence in a narcotics case,, see *United States v. Womack*, 191 F.3d 879, 879 (8th Cir. 1999)("While we are not unsympathetic to the uphill task faced by law enforcement in their efforts to curb the flow of illegal narcotics through the channels of commerce, we must guard against the temptation to eviscerate the protections of the Fourth Amendment for the sake of expediency").

## ABOUT THE AUTHOR

Gloyd L. McCoy is an attorney with the law firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis. He is a graduate of the OU College of Law. In 2006, Mr. McCoy was awarded the Thurgood Marshall Award for outstanding appellate advocacy by the Oklahoma Criminal Defense Lawyers Association.

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# Planes, Trains & Automobiles:

## The Fourth Amendment and Your Vehicle

By Robert Don Gifford

*I was runnin' down the road tryin' to loosen my load...*

— *The Eagles*

### FRIDAY NIGHT LIGHTS

It's a fine autumn Oklahoma evening as you find a seat in the bleachers to watch a much-ballyhooed football match-up of rival high schools when your cell phone rings. A quick glimpse of the incoming number gives you pause. It is a long-time client that you have done various legal work for over the years ranging from a divorce to estate planning, whom you enjoy his company but have come to learn that every question is "urgent" and will undoubtedly require much "handholding" in his latest foray into yet another legal predicament. Dutifully, you answer on the second ring.

Before you can say "Hello," you are cut off with a thick-tongued, "Counselor! It's me, Jerry. I'm in a bit of a pickle and I need some quick advice." Thinking that you can actually smell the alcohol through the phone and before inquiring further, Jerry states (in a manner often described as "slurred speech" with a "staggered gait") that he was "truckin' down a one-way street"<sup>1</sup> when a passing police officer dared to pull him over. After an "exchange of pleasantries," Jerry was now sitting on the curb, not appreciating the fact he was not handcuffed (yet), while "Barney Fife and his bullet" (as he described it) was rummaging through his pick-up truck.

"Counselor, this copper hasn't read me my rights and he sure didn't get any warrants to

take a gander in my truck! Tell you what, when I make bail I'll be in your office first thing bright and early to sue ole Barney Fife's blatant violation of my 'tutional rights!"

Before you can respond to gently remind him your area of practice is non-criminal and suggest a referral, you hear an official sounding voice say, "Sir, will you please hang up your phone, stand up and place your hands on top of your head." You also hear something said about a "green, leafy substance" and a "sawed-off shotgun."

"Jerry, listen to me..." you begin to warn, but are greeted with silence and a "call ended" on your cell phone. You check the time on your watch, take a sip of your now-lukewarm drink, and finally take your seat on the now-crowded bleachers while the sounds of the band, cheerleaders and fans disappear into the backdrop of your mind.

Pondering the array of questions to come with the next day's phone call, the range of questions begins to awaken your "issue-spotting" senses. Drawing from your memory of law school criminal law and procedure, you remember most of the generalities (and more importantly, the wisdom of a referral to outside counsel) as to the lawfulness of the search of the pick-up truck, the propriety of the questioning without advising your client of his rights and the deluge of other scenarios as it fills your thoughts. This is where we begin...

## THE END IS OUR BEGINNING

*"When [Lenny Bruce] died, the last incomplete words in his typewriter were 'Fourth Amendment.'"*<sup>2</sup>

While the Constitutions of both the United States<sup>3</sup> and Oklahoma<sup>4</sup> recognize the right of people to be "secure in their person, house, papers and effects against unreasonable searches," the U.S. Supreme Court has authorized the warrantless searches of motor vehicles since 1925 in public places with probable cause. Because the inherent mobility of the vehicles provided the "exigency" — meaning that if officers took the time to obtain a warrant, the object of the search would disappear, the U.S. Supreme Court has recognized a lower expectation of privacy in motor vehicles than in a home and noted that vehicles were subject to pervasive government regulation.<sup>5</sup> As the times have changed and our use of autos has become a necessity to even function in modern-day America, vehicles have become logical locations for a criminal to hide and for police to seek unlawful contraband.<sup>6</sup>

### WHAT IS A "MOTOR VEHICLE" ?

Although the motor vehicle exception has also been referred to as the "automobile" exception, this is somewhat of a misnomer because courts have applied this exception in situations involving other types of conveyances. For example, in *California v. Carney*<sup>7</sup> the Supreme Court upheld the warrantless search of a motor home by federal agents finding that while capable of being used as house, the motor home was more like a vehicle. The court indicated that absent clear indications that the character as a vehicle has been changed significantly, such as being situated on cement blocks with utility

connections, the motor vehicle exception applies.<sup>8</sup>

Courts have applied the vehicle exception to other "vehicles" such as airplanes,<sup>9</sup> trains<sup>10</sup> and houseboats.<sup>11</sup> In applying the vehicle exception to these non-automobiles, courts have generally considered their inherent mobility and the lessened expectation of privacy they provide. It should also be noted that "mobility" does not mean that the vehicle and its contents need to be mobile at the time of the search.<sup>12</sup>

### PROBABLE CAUSE

*The young man knows the rules, but the old man knows the exceptions.*

— Justice Oliver Wendell Holmes

The U.S. Supreme Court has explained that the probable cause standard is a practical non-technical concept that deals with probabilities

— not hard certainties — derived from a totality of the circumstances in a given factual situation. Probable cause is determined by evaluating "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act;" it is "a fluid concept...not readily, or even usefully, reduced to a neat set of legal rules."<sup>13</sup>

The automobile "exception" to the warrant requirement only applies to searches supported by probable cause.<sup>14</sup> In Oklahoma, an officer may pull a vehicle over for an offense committed in their presence.<sup>15</sup> It is important to know that even if that officer's "subjective intent" in stopping the car is merely a pretense for other reasons (e.g., initiate a discussion, plain view search, etc.), it does not matter. The U.S. Supreme Court has found that such subjective intent in a "pretextual stop" is actually irrelevant so long as there is a reasonable



“ Courts have applied the vehicle exception to other ‘vehicles’ such as airplanes, trains and houseboats. ”



probable cause basis to believe a traffic offense has occurred.<sup>16</sup> In *Whren v. United States*, undercover police officers stopped a vehicle for otherwise minor traffic violations, and during the stop, one of the officers looked inside and saw a passenger holding a bag containing what was subsequently discovered to be illegal narcotics. During the litigation of the case, the defendant moved to suppress the contraband on grounds that the traffic stop was pretextual; in other words, the officer actually wanted to find drugs, not necessarily enforce minor traffic laws. A unanimous court held that the real question is if the officers “could” have lawfully stopped the suspects for traffic violations, then the officer’s subjective motivations are irrelevant. Because the fact that traffic laws were indeed violated, the stop and the subsequent discovery of illegal drugs during the investigation was lawful.

Oklahoma courts have also followed that same rationale in stating, “[w]e have repeatedly held that a law enforcement officer may stop and question a person if there is a reasonable suspicion to believe the person is wanted for past criminal conduct.”<sup>17</sup> A law enforcement officer must only be “able to point to specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion.”<sup>18</sup> Even if an officer stopped because he thought the driver failed to dim the lights, and the lights were in fact “dimmed,” but merely improperly aimed; the police officer still had valid reason to believe a crime had been committed so the stop was lawful.<sup>19</sup> In *Arkansas v. Sullivan*, the Supreme Court reinforced its prior decision by holding that the Supreme Court of Arkansas could not inquire into the arresting officer’s subjective motivation on the theory that it could interpret the U.S. Constitution more broadly than the U.S. Supreme Court.<sup>20</sup>

### **IF WE ALL KEEP QUIET, WE ALL WALK OUT TOGETHER. WELL, MAYBE.**

Oklahoma law provides that police officers have the authority to direct, control or regulate traffic,<sup>21</sup> and the U.S. Supreme Court has made it clear that questions leading to incriminating statements without prior *Miranda* warnings are proper.<sup>22</sup> The court found that persons are not considered in “custody” (the triggering factor for *Miranda* warnings) and that such ordinary traffic stops are “noncoercive.”<sup>23</sup> In a 2003 unanimous U.S. Supreme Court decision, the

court held that a police officer had probable cause to arrest a front seat automobile passenger on drug possession charges after a search of the car, consented to by the driver, that revealed a large amount of money in the glove compartment and five baggies of cocaine in the armrest in the back seat.<sup>24</sup>

When a lawful custodial arrest of an automobile’s occupant is made, the Fourth Amendment also allows a contemporaneous search of the passenger compartments, regardless of whether the officer initiated contact with the arrestee while he was still in the car. According to a recent Supreme Court opinion, “[i]n all relevant respects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.”<sup>25</sup> While the vehicle itself may be considered “open season,” persons are not. While passengers in a vehicle generally lack standing to contest a search because of the accepted view that a passenger neither has property or a possessory interest in the car or the property seized,<sup>26</sup> the U.S. Supreme Court in *United States v. DiRe*, an opinion from over 50 years ago, the court ruled that probable cause to search a car did not justify a body search of a passenger.<sup>27</sup> Searching a passenger requires a much more particularized probable cause to believe that evidence will be discovered on that person. In *Knowles v. Iowa*, the Supreme Court refused to extend that reach to conduct full-blown searches of anyone issued a citation for minor traffic offense.<sup>28</sup>

It should be noted that at the time of this writing, the U.S. Supreme Court agreed on Jan. 19, 2007, to take up the case *Brendlin v. California*.<sup>29</sup> The Supreme Court has agreed to review the issue of when police make a traffic offense stop, is a passenger “seized” under the Fourth Amendment, thus allowing a passenger to contest the legality of the traffic stop and having standing to have evidence suppressed?

### **SCOPE OF THE SEARCH — COMPARTMENTS, CONTAINERS AND PEOPLE**

The U.S. Supreme Court has written, “During virtually the entire history of our country - whether contraband was transported in a horse-drawn carriage, a 1921 roadster or a modern automobile — it has been assumed that a lawful search of a vehicle would include

a search of any container that might conceal the object of the search.”<sup>30</sup> The court has also stated, “If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”<sup>31</sup> In one of the seminal cases on vehicle stops and searches, the high court in *California v. Acevedo* held that if police officers did have the necessary probable cause to believe illegal drugs were in a paper bag and placed in the trunk of a suspect’s car, the officers could stop the car and search the trunk.<sup>32</sup>

In *Florida v. Jimeno*, the U.S. Supreme Court held that a police officer who had obtained a suspect’s general consent to search his vehicle for a certain item did not violate the Fourth Amendment by opening a closed container found within the vehicle which could have reasonably held the object of the search.<sup>33</sup> Given this reduced expectation of privacy generally, courts have little problem justifying warrantless searches of probationers’ and parolees’ vehicles on less than probable cause under either the regulatory/administrative search theory or the Fourth Amendment balance of interest test.<sup>34</sup>

Nearly 30 years ago, the U.S. Supreme Court held in *Pennsylvania v. Mimms* that the interest in protecting an officer’s safety allowed a police officer to order a driver out of a car during a routine traffic stop without any reason to believe the driver committed a crime or posed a safety threat.<sup>35</sup> The Supreme Court extended that authority in *Maryland v. Wilson*<sup>36</sup> to include passengers as well, a move that was seen by many experts as a logical next step.<sup>37</sup>

The Supreme Court’s ruling in *Michigan v. Long*<sup>38</sup> states that officers may always search for weapons in a vehicle when there is a reasonable suspicion a weapon is present and an



“ Generally, the automobile exception permits the search of every part of the vehicle and its contents that may conceal the object of the search. ”

occupant is dangerous. Again, the object of the search (here, a weapon) determines the scope of the search. A console or unlocked glove box is permissible, but not a locked suitcase or a search of the trunk. According to *New York v. Belton*,<sup>39</sup> after a lawful custodial arrest of an occupant, officers may search the entire passenger compartment, including containers, but the trunk is specifically excluded. *Belton* is different in that this type of search was found justified to secure weapons for officer safety and to prevent defendant access and possible destruction of evidence and contraband, rather than because there is probable cause to believe any particular evidence existed.

In *Wyoming v. Houghton*, the Supreme Court discussed whether a passenger’s purse is off limits to officers who had probable cause to search the rest of the car. During an early-morning traffic stop, a state trooper noticed a syringe in the driver’s front breast pocket. After being questioned further — and with what the court recognized as “refreshing candor” — the driver stated he used it to take drugs. Armed with this apparent probable cause, the trooper ordered the driver, as well as the other occupants out to search for any accompanying illegal drugs. One of the occupants left her purse on the back seat as she stepped out of the car. Predictably as fate would have it, she also left illegal narcotics in that purse, and of course they were discovered by the officer. The Wyoming Supreme Court suppressed the evidence, ruling that if an officer knows that container belongs to a passenger not suspected of criminal activity, then it may not be searched. The U.S. Supreme Court, reviewing the historical development of vehicle search cases, reversed the Wyoming decision and found the search proper.

## CONCLUSION

*What I want out of each and every one of you is a hard target search of every gas station, residence, warehouse, farmhouse, henhouse, outhouse and doghouse in that area. Checkpoints go up at 15 miles. Your fugitive's name is Dr. Richard Kimble. Go get him.*

— Deputy U.S. Marshal Sam Gerard, *The Fugitive*

The authority of the government to search a vehicle based only on probable cause is somewhat unique among other rules created in Fourth Amendment jurisprudence. This authority is considered expansive by allowing a search anywhere within a vehicle, including containers and other personal belongings. Traffic stops and vehicle searches have continued to evolve with the ever-growing complexity of modern technology, vehicle design, and the balancing tests of officer safety and auto operator and passenger concerns.

1. Apologies to any Grateful Dead fans.
2. Ronald K. Collins and David M. Skover, *The Trials of Lenny Bruce* p. 418 (2002).
3. The Fourth Amendment provides for the "rights of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized."
4. Article 2, Sec. 30, Oklahoma Constitution provides for "[t]he right of the people to be secure in their persons, house, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported oath or affirmation, describing as particularly as may be the place to be searched and the person or thing to be seized."
5. *Carroll v. United States*, 267 U.S. 132 (1925).
6. See also Kathryn R. Urbonya, "The Fishing Gets Easier," *ABA Journal* 46 (January 1997).
7. 471 U.S. 386 (1985).
8. See also *United States v. Hamilton*, 792 F.2d 837 (9th Cir. 1986); *United States v. Markham*, 844 F.2d 366 (6th Cir.).
9. *United States v. Montgomery*, 620 F.2d 753 (10th Cir. 1980); *United States v. Brennan*, 538 F.2d 711 (5th Cir.).
10. *United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988); *United States v. Tartaglia*, 864 F.2d 837 (D.C. Cir. 1989).
11. *United States v. Hill*, 855 F.2d 664 (10th Cir. 1988). See also *United States v. Albers*, 136 F.3d 670 (9th Cir. 1998).
12. See *Michigan v. Thomas*, 458 U.S. 259 (1982) (police officers who have probable cause to believe there is contraband inside a vehicle

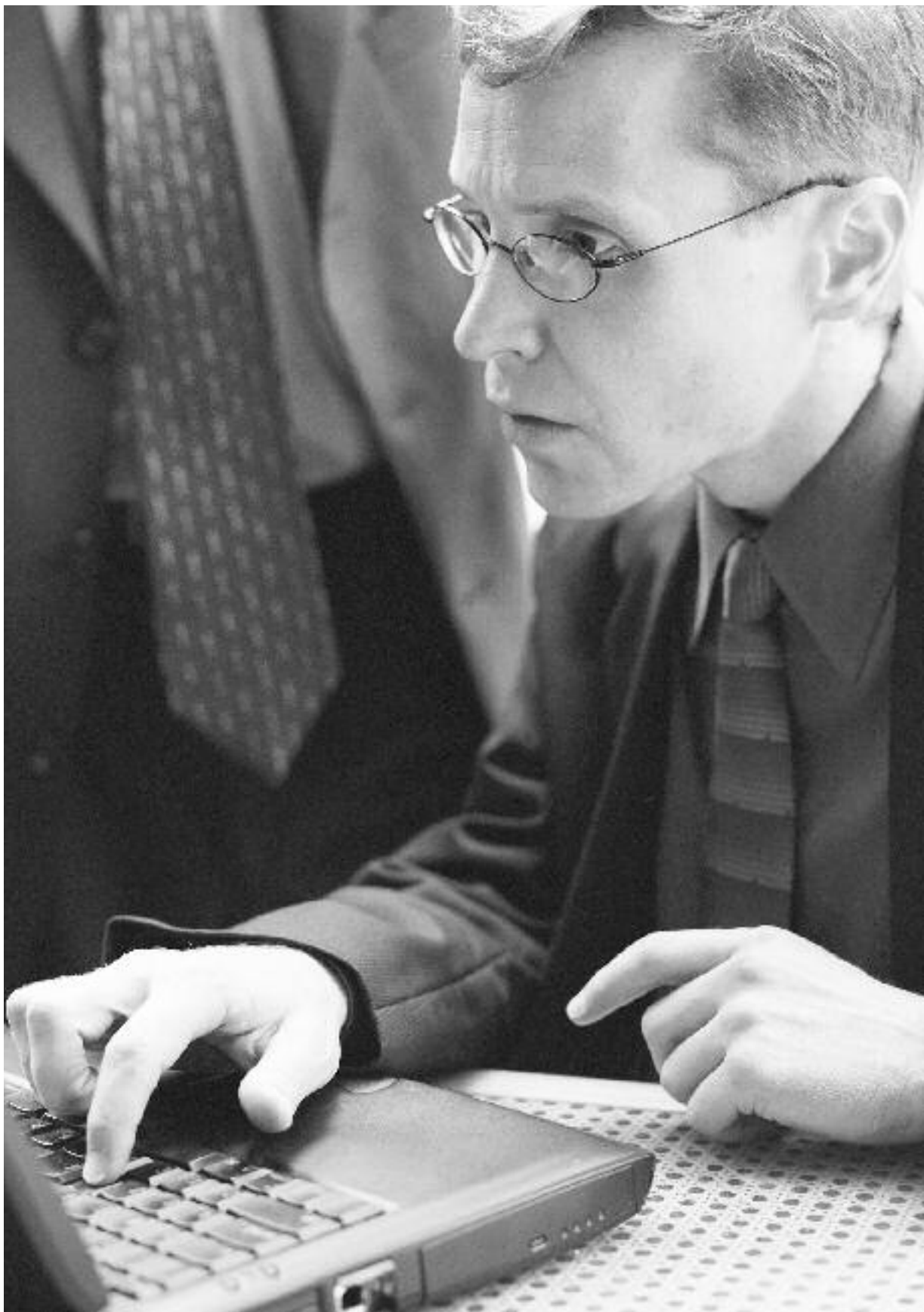
may conduct a warrantless search of that vehicle even after it has been impounded an in police custody and thereby rendered immobile); *United States v. Ross*, (upholding follow-up search at police station); *United States v. Johns*, 105 S.Ct. 881 (1985) (because agents were entitled to seize and search packages immediately, a search three days later was reasonable and did not require obtaining a warrant.).

13. *Illinois v. Gates*, 462 U.S. 213, 231-32 (1983).
14. *United States v. Ross*, 102 S.Ct. 2157, 2164 (1982); *Ferguson v. State*, 520 P.2d 819 (Okla. Cr. 1974).
15. Okla. Stat. tit. 22, section 196.
16. *Whren v. United States*, 517 U.S. 806 (1996).
17. *Epker v. State*, 753 P.2d 916, 918 (Okla. Cr. 1988).
18. *Id.*
19. *United States v. Bustillos-Munoz*, 235 F.3d 505 (10th Cir. 2000); See also 47 OS 12-222 and *Lozoya v. State*, 932 P.2d 22.
20. 121 S.Ct. 1876 (2001).
21. 47 OS 11-103. See also *Munson v State*, 583 P.2d 511 (Okla. Cr. 1978) (Discussing prosecution of an individual for failing to leave the scene of an automobile accident).
22. *Berkemer v. McCarty*, 468 U.S. 420 (1984).
23. See also *United States v. Guzman*, 864 F.2d 1512, 1520 (10th Cir. 1988); *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997).
24. *Maryland v. Pringle*, 540 U.S. 366 (2003).
25. *Thornton v. United States*, 124 S.Ct. 2127 (2004).
26. See *Chambers v. State*, 720 P.2d 741 (Okla. Cr. 1986); *Edwards v. State*, 651 P.2d 1335 (Okla. Cr. 1982).
27. 332 U.S. 581 (1948).
28. See Charles F. Williams, "Red and Blue Light Specials," *ABA Journal* 36 (January 1999).
29. 136 P.3d 845 (2006).
30. *United States v. Ross*, 456 U.S. 798, 820, n.26 (1982).
31. *Id.* at 825.
32. 500 U.S. 565 (1991).
33. 111 S.Ct. 1801 (1991).
34. See *United States v. Payne*, 181 F.3d 781 (6th Cir. 1999); *United States v. Baker*, 221 F.3d 438 (3d Cir. 2000); and *United States v. Stokes*, 292 F.3d 964 (9th Cir. 2002). See also Thomas D. Colbridge, "Probationers, Parolees, and the Fourth Amendment," *FBI Law Enforcement Bulletin* 22
35. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).
36. *Maryland v. Wilson*, 519 U.S. 408 (1997).
37. See Mark Hansen, "Rousting Miss Daisy?" *ABA Journal* 22 (May 1997).
38. 463 U.S. 1032 (1983).
39. 453 U.S. 454 (1981).

## ABOUT THE AUTHOR

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# Search and Seizure of Electronic Evidence in Computer-Facilitated Crimes Against Children

By *Daniel Armagh*

**S**earch warrants are an invaluable investigative tool, and search warrants on computers are an integral part of a comprehensive investigation of child sexual exploitation. However, the search and seizure of computers and related materials is rife with legal pitfalls. You must know the legal principles governing the search and seizure of computer systems, to include the various federal statutes that apply equally to state as well as federal law enforcement.

A violation of the doctrines, statutes or evolved legal principles designed to supplement the privacy protections surrounding electronic evidence, may result in civil damages owed to the former defendant in your exploitation case, as well as the evidence being suppressed in your criminal case.

## **PROBABLE CAUSE**

Mere suspicion, rumor or strong reason to suspect wrongdoing, or the experience and training alone of the investigating officer, are not sufficient to form the basis for probable cause to search and seize the electronic evidence. There must be an “evidentiary bridge” from the disclosure statement of the victim to the electronic devices used by the child predator during the grooming or exploitation of the victim to establish probable cause to seize such devices.<sup>1</sup>

Because a given judge may have limited knowledge of how child predators use com-

puters, you should use your affidavit of probable cause to demonstrate your knowledge and expertise and to educate the court. Remember, however, that your experience and training alone — or your opinions based on knowledge of the behavior of child predators — are not sufficient to sustain a warrant. You must present facts that directly relate to the criminal conduct of the predator in the instant case to carry the burden of sufficient probable cause.

Any specific information about the images stored in the targeted computer or other information about the computer’s contents should be included in the affidavit to assist the court in the analysis of probable cause. An undercover officer, posing online as a child, may receive child pornography or other criminal evidence from a suspect. Parents of children may discover such material and provide it to law enforcement. Provide a narrative descrip-

tion of such images in the affidavit of probable cause, and how they were obtained.

It is important to know whether or not the particular judge considering your application for the issuance of a search warrant deems it necessary to view the images that form your probable cause to conduct a search, or whether a narrative description of the images is preferred by the judge.<sup>2</sup> Another exception to the general rule of attaching images is if the law in your jurisdiction would not allow such images to be filed under seal, then a narrative description of the images coupled with a court reporter transcribing the court's review of the images as the judge views them with any descriptive comments about the images would be appropriate, to include a finding that in the opinion of the court the images meet the legal definition of child pornography. There are a few jurisdictions that have not ruled on the issue of whether or not duplicated images of child pornography that are a part of a search warrant application may be "possessed" by the court clerk once the application is filed with the court. Even though there have been no criminal or civil actions filed against the court clerks, law enforcement, judges or prosecutors in such jurisdictions and qualified immunity may protect such actions, the legal implications of attaching duplicate images to a search warrant application remains an open question in many jurisdictions. In *United States v. Jasorka*, 153 F.3d 58 (2d Cir. 1998), the court held expressly that printing images was permissible for the magistrate to view the images, at footnote number 3. The references are to the discovery process involved in child pornography cases. Defense counsel argues that he cannot zealously defend his client without copies of the child pornography to examine and use to prepare his defense. The prosecutor and law

enforcement officers argue that they have no authority, nor does the court, in ordering the duplication of child pornography that is, after all, unlawful contraband. Historically, especially in state courts, this issue is a decision that is within the sound discretion of the court.

There are three cases in the federal system that have allowed a federal prosecutor to refuse the duplication of photographs and video-tapes for the defense counsel, citing the fact that such items are contraband.<sup>3 4 5</sup> These cases are the exception to the general practice in federal court of ordering the duplication of such evidence pursuant to the Federal Rules of Criminal Procedure.<sup>6</sup> However, a recent new federal statute has significantly changed the analysis concerning the discovery of images depicting the criminal victimization of children.<sup>7</sup> Title 18 U.S.C. 3509 (M) was amended to categorize any visual depiction constituting child pornography under federal law as contraband, and as such, is barred from being duplicated, copied, photographed or otherwise reproduced during the discovery process as long as reasonable opportunity is allowed for defense counsel to view the evidence. Thus far, challenges to the constitutionality of this newly enacted law have failed.<sup>8</sup> Such a statute should have wide application to state court discovery issues in cases involving depictions of child pornography.

## PARTICULARITY

The Fourth Amendment to the Constitution specifies that a search warrant should "particularly" describe the place to be searched and the persons or things to be seized.<sup>9</sup> This particularity requirement presents certain challenges when drafting an affidavit of probable cause to search a computer. The warrant must describe the contraband evidence contained on the



“ This particularity requirement presents certain challenges when drafting an affidavit of probable cause to search a computer. ”

computer with sufficient particularity to guide and control the investigator's judgment about both what to seize and what not to seize.<sup>10</sup> However, at this early point in the investigation, you may not know the particulars of the hardware, software, operating system and disk capabilities of the suspect's computer system, all of which are variables.

The language used in addressing the particularity requirement of the Fourth Amendment in search warrants must be reasonably specific rather than elaborately detailed. The court's decision to issue a search warrant will be based on the totality of circumstances for each individual case.

### INDEPENDENT COMPONENT DOCTRINE

You must have probable cause to seize the computer — but what, exactly, constitutes “the computer”? Probable cause to seize the computer does not necessarily mean authorization to seize the entire computer system — that is, the central processing unit (CPU) and all peripheral devices. Each component in the computer system should be considered independently from the others in analyzing probable cause to seize. **Do not assume that any item connected to the target device may automatically be seized.** To protect the execution of the search warrant from serious challenge in court, articulate a basis in your application for a search warrant for seizing the CPU and all attached or affiliated peripheral devices. The Independent Component Doctrine does not preclude law enforcement from seizing the entire computer system, along with attendant hardware and software. It only insists that the officer provide a basis for seizure in the application for a search warrant. The important point to remember is to articulate facts either based on the investigation of a specific target or on your training, knowledge and experience of similar investigations that the entire computer system played a role in the criminal conduct you are investigating.

### BREADTH AND SCOPE

The scope of a search must be directly related to the scope of a targeted individual's suspected criminal conduct. If, in searching computer files pursuant to a search warrant, you discover evidence that was not anticipated in the warrant, do not continue to open files looking for more unanticipated evidence. Instead,

use a description or printout of the first file containing such evidence as probable cause to obtain another search warrant for the new evidence.

### EXPERT OPINION

An expert's opinion regarding the behavioral characteristics of child predators may provide a basis for obtaining a warrant to search a suspect's residence, business, or computer system. Expert opinion can be used to show how case-specific, documented behaviors commonly seen in known child predators apply to the suspect. If your affidavit of probable cause uses expert opinion in this way, you **must** set forth facts to support classifying the suspect as a particular type of offender.<sup>11</sup> The facts you include in the affidavit in turn corroborate the expert opinion.

**Avoid the use of boilerplate or generic language in describing the behavioral traits of the offender.** Courts will suppress evidence gathered through a search warrant that relies on expert opinion if that opinion is not factually specific and relevant to the target of the search and his behavior typology.<sup>12</sup> If you use an expert opinion in your affidavit for the warrant, you should clearly describe not only the characteristics of the relevant classification of offender, but also the specific facts about the suspect that supports the conclusion he belongs in that offender category. Be aware when using terms such as “child molester,” “situational or preferential child molester,” or “pedophile” to describe the suspect, that such terms often have specific clinical definitions that your evidence must support. Moreover, before using such terms as “pedophile,” “preferential” or “situational” offender, be confident that your education, training and clinical experience qualifies you to use such terms in an informed context, including cross-examination about such terms.

The decision to include expert opinion about offender classification in the affidavit for a search warrant must be considered carefully. **In child sexual exploitation cases, use expert opinion in search warrant affidavits only when necessary.** Circumstances in which using an expert opinion might be considered include:

- Providing additional probable cause.
- Justifying an expansion of the scope of the search.

- Addressing problems concerning staleness of information.
- Supporting the conclusion that the depicted images fall within the statutory definition of child pornography.<sup>13</sup>
- Describing how pedophiles, preferential or situational offenders operate and why the targets behavior is consistent with such conduct.<sup>14</sup>
- How materials collected on a computer may be hidden and therefore it may not be feasible to search for particular files in a person's computer because of mislabeling of files or hiding contraband in computer peripherals, therefore requiring a search of the entire computer.<sup>15</sup>
- The explanation of seemingly innocent behavior that requires the seizure of all parts of a computer system.<sup>16</sup>

### STALENESS OF INFORMATION

Expert opinion is often used in search warrant applications to support the contention that information about the suspect is not stale—that is, the information is still reliable and viable, even though time has elapsed since it was first identified.<sup>17</sup> However, in addressing the question of staleness in a particular case, the court will evaluate lapse of time in the context of all the facts of the case.<sup>18</sup> For example, if expert opinion is used to support the contention that child pornography still exists on a suspect's computer, the opinion must be reasonably based on facts specific to the suspect in question, not a generic suspect. If there is good reason to believe that contraband is still in the place described in the affidavit of probable cause, then there is no staleness.

### ANTICIPATORY SEARCH WARRANT

If, at the time you are applying for a warrant, there is insufficient probable cause to determine that the contraband to be seized is at the location specified in the warrant, you must apply for an anticipatory search warrant. At the time an anticipatory warrant is issued, you must have sufficient demonstrable evidence to support probable cause that contraband will be in the place to be searched at the particular time the warrant is to be executed. Ideally, the anticipatory warrant should state on its face, or by reference and incorporation of the supporting affidavit, what the "triggering event" is that will place the evidence in the location

described. In most cases, you must demonstrate precedent conditions or a pattern of criminal behavior that supports the warrant to obtain an anticipatory warrant.<sup>19</sup>

### EXIGENT CIRCUMSTANCES EXCEPTION

The general exceptions to the warrant requirement apply to computer systems. Exigent circumstances may justify a warrant-less search. To be considered exigent, the circumstances must be urgent, such that, under the particular facts of the case, there would not be sufficient time to obtain a warrant to acquire the evidence.

The authority to seize a container without a warrant does not necessarily authorize a warrant-less search of its contents. While exigent circumstances may justify *seizing* a computer and/or component attachments, *searching* that computer may not be authorized unless you obtain a warrant after the seizure. The scope of the search is limited to the minimum intrusion necessary to prevent the destruction of evidence.<sup>20</sup>

### PLAIN VIEW EXCEPTION

Evidence of a crime may also be seized without a warrant if the investigator is in a lawful position to observe the evidence and if its criminal character is immediately apparent.<sup>21</sup> If you observe child pornography on a suspect's computer screen, you may seize, without a warrant, not only the computer that contains the unlawful images but also access codes or notes taped to the computer that are in plain view. **You may not, however, search a computer seized under the plain view exception.**<sup>22</sup> In such a case, you must obtain a warrant to search the hard drive, disks, peripherals, manuals, or other items, based on the probable cause that the computer contains visual depictions of child pornography (e.g., your observation of the content of the computer's screen). While a minority of opinion suggests that printing the screen content is an acceptable investigative strategy, I discourage the use of the tactic. The current preferable method is to photograph or videotape the screen depicting the contraband in plain view before you seize the evidence and obtain a search warrant to search the computer's hard drive. While videotaping or photographing the screen is not required before seizing the computer, officers should always describe with great specificity what they observed that warranted a warrant-



less seizure of the computer if they cannot document what they saw by photography.

### CONSENT EXCEPTION

Police officers may conduct a warrant-less search of a suspect's computer, even without probable cause, if a person with appropriate authority voluntarily consents to the search. This consent may be expressed ("Yes, you may search my computer.") or implied ("Here is the password to my computer data.") So-called "knock and talks" are also examples of consensual search requests.

Whether law enforcement exceeded the scope of consent given will be decided by the court on a case-by-case factual analysis.<sup>23</sup>

If more than one person has access to a computer, you can usually rely on the consent of any person who has authority over the computer. In such circumstances, all persons using the computer are considered to have assumed the risk that a co-user could discover evidence of a crime or permit law enforcement to search the computer for evidence of criminal activity. However, in a recent case involving consensual searches, the United States Supreme Court held that if any one of the multiple users of the computer is present and objects to a consensual search of the home (and presumably the computer), law enforcement cannot search pursuant to the consent of another user.<sup>24</sup> The objecting party must be present at the time consent is given by a co-user to negate the search and communicate their objection to law enforcement. The test to determine whether a person has the authority to consent is an objective one: Would the facts available at the time consent was given cause a person of reasonable caution to believe that the person who gave consent had authority over the premises and, therefore, the authority to grant consent to the search?<sup>25</sup>



“ If more than one person has access to a computer, you can usually rely on the consent of any person who has authority over the computer. ”

The defendant's creation of a separate directory on the computer may not provide the exclusivity necessary to prevent a search consented to by a co-user. However, if the defendant guarded the separate directory with a secret password, the court may hold that the officer needed the defendant's consent to search that particular directory.<sup>26</sup>

An individual may also imply limitations, and you must also recognize and respect those. For example, if a person attempts to prevent you from seeing a password to encrypted data, that act limits the scope of consent to data available without the use of the password.<sup>27</sup> In computer-related cases, the defendant often will agree that consent was given to "look around the house" but contend he never gave the officer consent to search the computer. **Permission to look around the house does not constitute, by itself, sufficient consent to search a computer in the house.** If you observe Web addresses

such as "lolita.com," "pre-teensex.com," or "alt-sex.com" on the computer screen in the defendant's house, that observation, does not authorize you to seize or search the computer, regardless of your training and experience.<sup>28</sup> In this discussion, the screen is displaying addresses that the officer knows based on his experience and training are probably child porn sites, however there is no "immediately apparent criminal activity" that the police officer observes when viewing only addresses, and therefore, without more than the addresses the officer cannot seize or search the computer. The scope of a consensual search and any expansion of the original scope are measured by what a typical reasonable person would have understood by the exchange between the officer and the suspect. Note that a suspect's signing of a generic consent form

only proves voluntary consent and is not relevant to the scope of the search.<sup>29</sup>

### **SPECIAL CONSIDERATIONS: PRIVILEGED AND CONFIDENTIAL COMMUNICATIONS**

When gathering evidence, you may want to examine computer materials that contain privileged or confidential communications, such as the records of doctors, lawyers and clergy. Special statutes govern searches of such materials. When you draft an affidavit for a search warrant to examine privileged and confidential communications, narrow your focus to include only data relevant to the investigation. Describe such data as specifically as possible. Generic, boilerplate affidavits are insufficient and often result in suppression of the evidence.<sup>30</sup>

Before executing search warrants for privileged or confidential communications, you should be thoroughly briefed by a knowledgeable attorney on the restrictions of the Privacy Protection Act of 1980 (PPA), all accompanying regulations, and all applicable Federal and State privacy statutes.<sup>31</sup> Officers should also be aware of the Cable Communications Policy Act (CCPA)<sup>32</sup> that establishes guidelines for cable owned and operated Internet Service Providers (ISPs) and set forth a national standard for the privacy of cable Internet service subscribers. The CCPA sets forth procedures by which cable-owned ISPs reveal to government agencies information about subscribers. Prior to the recent enactment of the USA Patriot Act of 2006, as amended, (Patriot Act) the CCPA required all cable owned or operated ISPs to notify the subscriber before releasing any information to law enforcement. Obviously, this became an early warning system for criminal targets that law enforcement was interested in obtaining your records and probably would be paying you a visit soon. Officers should know that as a result of the Patriot Act all cable owned and operated ISPs now must adhere to the Electronic Communications Privacy Act (ECPA) regarding the search and seizure of evidence from the target's ISP, irrespective of ownership.<sup>33</sup>

Another privacy statute that officers should be aware of is the Family Educational Rights and Privacy Act.<sup>34</sup> Some cases involve high school or college students and the search and seizure of their records on campus. When investigating in the school environment, offi-

cers should obtain a grand jury subpoena, court order or search warrant, depending on factual circumstances, not an administrative subpoena or summons, to access a student's basic subscriber information.<sup>35</sup>

If your search involves communications on ISP computer systems or records, bulletin board services, newsgroups or other Web-based systems, you should be aware of relevant sections of the Electronic Communications Privacy Act in addition to the PPA, so that you can avoid liability for violations of these laws. The basic provisions and exemptions of each law are summarized below.

### **PRIVACY PROTECTION ACT OF 1980**

Through the PPA, Congress has given protection to the press and others extending beyond that provided by the Fourth Amendment to the Constitution. It is a violation of the PPA for any government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize the following using a search warrant, unless one of the exceptions under the PPA to the general search warrant prohibition applies:

- Work product materials are written materials that are prepared, produced, authored or created, whether by a person in present possession of the materials or by another person; that are intended to be communicated to the public; and include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored or created such materials (e.g., private memos, interview notes, or mental impressions, books, poems, diaries if intended to be published to the public).<sup>36</sup>
- Such materials cannot be contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as the means of committing a criminal offense.
- Documentary materials possessed by a person reasonably believed to have a purpose to disseminate to the public written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes or disks such as a newspaper, book, broadcast or other similar form of public communication in or affecting interstate or foreign commerce, however does not include materials, contraband or the fruits



“ Unless an exception to the PPA’s search warrant prohibition applies, law enforcement must use a subpoena to obtain such materials. ”

of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as the means of committing a criminal offense.<sup>37</sup>

**Unless an exception to the PPA’s search warrant prohibition applies, law enforcement must use a subpoena to obtain such materials.** The PPA is based on the rationale that serving a subpoena is a less intrusive means of obtaining evidence and thereby provides greater protection for innocent parties who intend to publish materials to the public. For a valid claim to be made under the PPA, two conditions must exist:

- A search and seizure must have taken place.
- Intent to disseminate the information publicly must be shown.

Subjects of searches that violate the PPA may not move to suppress the evidence obtained in a criminal trial, so such claims will not impede the criminal prosecution of someone accused of victimizing a child.<sup>38</sup> However, because the statute does allow for civil remedies, **investigators who violate the PPA may be liable for damages.** Note that the PPA precludes a law enforcement agency from asserting a good faith defense to civil claims.<sup>39</sup> In this regard, the PPA is a strict liability statute.<sup>40</sup>

Therefore, if an officer violates a provision of the PPA but does so in good faith, as an individual he is probably protected from a successful lawsuit because he acted in good faith. Exceptions to such good faith protection are acting in bad faith, intentional or wanton destruction of property, or the waiver of good faith immunity protection by the state sovereign for violations of the PPA. Conversely, the agency for which the officer is employed cannot assert a good faith defense of the individ-

ual officer and therefore if the PPA is violated, irrespective of the good faith intentions of the officer, the agency that employs the officer will be held strictly liable for the violation.<sup>41</sup> The PPA provides safeguards for confidential relationships, but it does not apply to criminal suspects. **Although publication or possession of legal adult pornography is protected under the PPA, publication or possession of child pornography is not.**<sup>42</sup> Under the PPA, government officers or employees, in connection with the investigation or prosecution of a criminal offense, may search for or seize work product or documentary materials if:

- Probable cause exists to believe the person possessing such materials has committed or is committing a criminal offense, other than possession, to which the materials relate.
- There is reason to believe that immediate seizure of such materials is necessary to prevent the death of or serious bodily injury to a human being.
- Serving a subpoena to produce the materials would result in destruction, alteration, or concealment of evidence.
- A court order to produce the materials was not complied with, and either appellate remedies are exhausted or delay would threaten the ends of justice.<sup>43</sup> The ECPA and PPA are involved and complex laws that require experienced attorneys to guide and provide legal advice and direction on issues relevant to the jurisdiction of these statutes.

## ELECTRONIC COMMUNICATIONS PRIVACY ACT

The ECPA governs access to electronic communications — for example, e-mail, account information or subscriber information — that

are stored by electronic communication services and remote computer services. For the statute to apply, the communication must be electronically stored or disseminated on a system that has an interstate or foreign commerce nexus. **The ECPA protects only communications in electronic storage in the possession of the service provider.** It does not protect communications downloaded by the user to another computer not maintained by a provider.

Under the ECPA, anyone who provides electronic communication services or remote computer services to the public is prohibited from voluntarily disclosing the contents of the electronic communications they store or maintain. The ECPA protects clients of Internet service providers from disclosure of such information to third parties.<sup>44</sup> The exceptions to the general nondisclosure rules under the ECPA depend on the type of information in question (basic subscriber information, transactional records, or the contents of communications), where it is stored, and how long it has been stored. The type of due process instrument (warrant, subpoena, or court order) you will need to gain access to information protected under the ECPA also depends on these three variables, as summarized below:

- Suspects generally have no expectation of privacy regarding **basic subscriber information** which includes, but is not limited to, name, address, connection records, time and duration of online sessions, number identity information, length of service, and types of services used by the suspect).<sup>45</sup> In a recent criminal case involving a police officer's access to the target's basic subscriber information from an Internet service provider pursuant to an invalid subpoena, the court denied the defendant's motion to suppress stating that the ECPA does not provide suppression as the remedy for such access. The court held that section 2707 provides for a civil remedy for aggrieved individuals, and section 2708 provides that this is the only remedy for non-constitutional violations of the ECPA, as there is no expectation of privacy in basic subscriber information held by an Internet service provider (ISP).<sup>46</sup>
- Access to **transactional records** (non-content records such as account logs or session logs that document the duration of a user's

online activity) requires a warrant or court order because of the heightened expectation of privacy with respect to personally identifiable information about an individual's online activities.<sup>47</sup> To obtain a search warrant or court order, you must show articulable facts that these records are relevant and material to an ongoing criminal investigation. These are facts that show "that there are specific and articulable grounds to believe that the records are relevant and material to an ongoing criminal investigation." H.R. Rep. No. 102-827, at 31 (1994), also quoted in full in *United States v. Kennedy*, 81 F. Supp. 2d 1103 (D. Kansas 2000) The ECPA does not require court orders to meet the same burden of probable cause as would be required for the issuing of a search warrant, and these orders may be served on out-of-jurisdiction ISPs. The reader must be cautioned that no court as of this writing has ruled on the constitutionality of any aspect of the USA Patriot Act of 2006 discussed herein.

- The **contents** of a suspect's communications are often the most damaging evidence against him. Persons or entities (e.g., an ISP) may disclose the contents of communications if they receive lawful consent from the originator of the communications, from an addressee, or from the intended recipient of such communications.<sup>48</sup> You may send a message to me at my mother's computer address if I do not have a computer or am visiting my mother. Therefore, I would be the intended recipient and my mother would be the addressee. Contents have the highest degree of an expectation of privacy under the law, and therefore usually require a search warrant for law enforcement to seize and to search them.
- Electronic service providers (ESP) and remote computer storage service providers (RCS) may monitor and intercept real-time communications for the purposes of maintaining and protecting their equipment.<sup>49</sup> If either an electronic service provider or remote computer storage service provider discovers illegal activities while monitoring their equipment, they may report such activities to law enforcement but are not required to under the ECPA. However, they are prohibited from revealing the conduct to any other entity.<sup>50</sup>



- Conversely, recent legislation now requires an electronic service provider or remote computer storage service provider to report any apparent child pornography to the CyberTipline at the National Center for Missing and Exploited Children. Failure to report such a violation can result in a fine of \$50,000 for an initial failure to report, and \$100,000 for a second or subsequent failure to report a violation.<sup>51</sup>



“The sophisticated use of computers in criminal activity complicates law enforcement efforts...”

- You can use a warrant or subpoena to compel both types of service providers governed by the ECPA to disclose the contents of a suspect's electronic communications. The type of legal process required depends on the age of the communication and whether you want the suspect to know about your request for the electronic evidence stored in his computer:

- 1) **If the communications have been stored for 180 days or less**, disclosure of their contents to a governmental entity requires a search warrant. The search warrant requires the demonstration of sufficient probable cause.
- 2) **If the communications have been stored for 181 days or more**, prosecutors may, under rule 41 of the *Federal Rules of Criminal Procedure*, use a search warrant (which does not require notice to the subscriber) to seize e-mail communications. Alternatively, prosecutors may use an administrative subpoena, grand jury subpoena, or, pursuant to 18 U.S.C. 2703(d), a court order (all of which require notice to the subscriber).
- 3) At your request, the service provider must preserve all records and other evidence in its possession relating to

the target computer pending the issuance of a court order or other legal process. This period of retention is 90 days, with an option for an additional 90 days if you request it. In your subpoena or court order, you may require the service provider to create a backup of the contents of all communications contained in the suspect's e-mail file. As explained above, this may be done without notice to the customer/suspect under certain circumstances.<sup>52</sup>

If you ask the service provider to preserve the evidence, your letter should clearly state that you only want the evidence to be preserved and should **direct the service provider not to search the evidence** until you have served the appropriate search warrant or other due process instrument. **If the service provider searches the evidence at the direction of law enforcement before the**

**search warrant has been served, the evidence may be suppressed because of the agency relationship created with law enforcement.**

## CONCLUSION

The sophisticated use of computers in criminal activity complicates law enforcement efforts, but it should not deter the aggressive pursuit of those who use computer technology to victimize children. There are many additional legal issues regarding searching and seizing electronic evidence that cannot be addressed in the space provided by this article. By following proper investigative procedures and keeping in mind relevant legal considerations, investigators can avoid losing valuable evidence. By staying current on the most recent technological advancements and the attendant legal analysis, the criminal justice system can successfully hold child sexual predators accountable for their criminal behavior. It is of paramount importance to identify competent legal counsel when faced with

investigations that involve the search and seizure of electronic evidence in computer-facilitated crimes against children.

1. *United States v. Guay*, 2001 US Dist. LEXIS 20508 (D. Me. 2001)
2. *United States v. Leon*, 468 U.S. 897 (1984) holding "failure to attach images but narrative description would suffice under a good-faith exception..."
3. *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995).
4. *United States v. Horn*, 187 F.3d 781 (8th Cir. 1999).
5. *United States v. Husband*, 246 F.Supp.2d 467 (E.D. VA 2003)
6. Federal Rules of Criminal Procedure, Rule 16 (a) (1) (c); "the government shall permit the defendant to inspect and copy items which are material to the preparation of the defense or were obtained from or belong to the defendant upon request."
7. *Adam Walsh Child Protection and Safety Act of 2006*
8. *U.S. v. Brion Dodd Johnson*, (N. District of Iowa, Cedar Rapids Division, 2006)
9. The complete text of the Fourth Amendment is as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
10. *United States v. Upham*, 168 F.3d 532 (1st Cir. 1999).
11. *United States v. Weber*, 923 F.3d 1338 (9th Cir. 1990).
12. *United States v. Zimmerman*, 277 F.3d 426 (2002).
13. *United States v. Brunette*, 256 F.3d 14 (1st Cir. 2001).
14. *United States v. Campos*, 221 F.3d 1143 (10th Cir. 2000).
15. *Id* at 31.
16. *United States v. Hay*, 231 F.3d 630 (9th Cir. 2000).
17. *Id* at 31.
18. *United States v. Guay*, 2001 US Dist. LEXIS 20508 (D. Me. 2001).
19. *United States v. Loy*, 191 F.3d 360 (3rd Cir. 1999).
20. *United States v. Reed*, 935 F. 2d 641 (4th Cir.), *cert. denied*, 112 S.Ct. 423 (1991).
21. *State v. Schroeder*, 613 N.W. 2d 911 (Wis. 2000), 21 *United States v. Gray*, 78 F.Supp.2d 524 (1999).
22. *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999).
23. *United States v. Barnette*, 989 F.2d 546 (1st Cir. 1993), *United States v. Salvo*, 133 F.3d 943 (6th Cir. 1998).
24. *Georgia v. Randolph*, 2006 WL 707380 (GA 2006).
25. *United States v. Smith*, 27 F. Supp. 2d 1111 (Illinois, 1998).
26. *Trulock et al v. Louis Freeh et al*, 275 F.3d 391 (4th Cir. 2002).
27. *United States v. Habershaw*, 2001 WL 1867803 at 1 (D. Mass.2002).
28. *United States v. Habershaw*, 2001 WL 1867803 at 2,3 (D. Mass.2002).
29. *United States v. Habershaw*, 2001 WL 1867803 at 4 (D. Mass.2002).
30. *United States v. Hay*, 231 F.3d 630 (9th Cir. 2000).
31. 42 U.S.C 2000aa-2000aa-12.

32. 47 U.S.C. 551 et seq.
33. 47 U.S.C. 551(h).
34. 20 U.S.C. 1232g.
35. 20 U.S.C. 1232g(6)(b)(1)(J)(i).
36. 42 U.S.C. 2000aa-7(b).
37. 42 U.S.C. 2000aa-7(a).
38. 42 U.S.C. 2000aa-6.
39. A good faith defense is a defense based on the honest intent to act without taking an unfair advantage and with the absence of malice or design to defraud.
40. *Davis v. Gracey et al*, 111F.3d 1472 (10th Cir. 1997).
41. 42 U.S.C. 2000aa-6(c).
42. *Benson v. United States*, 1995 LEXIS 31837 (1995), *Depugh v. Sutton*, 917 F. Supp. 690 (1996).
43. 42 U.S.C. 2000aa-(b).
44. 18 U.S.C. 2702 et seq.
45. 18 U.S.C. 2703 (c)(2).
46. *United States v. Hambrick*, 55 F. Supp. 2d 504, 507 (W.D. Va. 1999).
47. 18 U.S.C. 2703(d).
48. 18 U.S.C. 2510(8).
49. 18 U.S.C. 2511(2)(a).
50. 18 U.S.C. 2511(3)(b)(iv).
51. 42 U.S.C. 13032.
52. 18 U.S.C. 2705(a)(2)(E), 2705(b).

## ABOUT THE AUTHOR



Daniel Armagh is a trial attorney focusing on the litigation of cases involving crimes against children. He is recognized in the areas of investigation and prosecution of crimes against children and has authored numerous articles in the field. He also lectures frequently at national and international forums, most recently at Interpol in Lyon, France; ARD-CHECHI in Moscow, Russia; the ISPCAN Conference in Denver, Colo.; Europol in Thun, Switzerland; and the FBI Academy in Quantico, Va.

## STATE OF OKLAHOMA, DEPARTMENT OF HUMAN SERVICES CHILD SUPPORT ENFORCEMENT ANNOUNCEMENT # 07-C024

The Oklahoma County Child Support Office has an opening for a full-time attorney ( CSE Attorney IV, \$4078.70 monthly)with experience in child support enforcement. This position will be located in the Oklahoma County-CSE IV office at 5905 N. Classen Blvd, Oklahoma City, Oklahoma. The position involves preparation and trial of cases in child support related hearings in district and administrative courts, and preparation and filing of pleadings incident thereto. Duties will also include consultation and negotiation with other attorneys and customers of Child Support Enforcement Division. Position will assist office staff with preparation of legal documents and insure their compliance with ethical considerations. Active membership in the Oklahoma Bar Association is required. This position will be underfilled as a Child Support Enforcement Attorney III (beginning salary \$3703.36 monthly), Child Support Enforcement Attorney II (beginning salary \$3380.14 monthly) or as a Child Support Enforcement Attorney I (beginning salary \$3158.67 monthly), dependent on Child Support or Family Law experience. Interested individuals must send a cover letter noting announcement number 07-C024, resume, and a copy of current OBA card to: Department of Human Services, Attn.; Human Resource Management Division, P.O. Box 25352, Oklahoma City, OK 73125. Application must be received no earlier than 8:00 AM Monday March 12, 2007 and no later than 5:00 PM Friday March 23, 2007. THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER



## Free Training Sessions

Get the most out of your free OBA legal research member benefit. Sign up today for a one-hour class.

### Monday, April 23

2 – 3 p.m. Oklahoma Bar Center, OKC  
4 – 5 p.m. Oklahoma Bar Center, OKC

### Tuesday, April 24

9 – 10 a.m. Oklahoma Bar Center, OKC  
2 – 3 p.m. Oklahoma Bar Center, OKC  
4 – 5 p.m. Oklahoma Bar Center, OKC  
6:30 – 7:30 p.m. OU College of Law, Norman Classroom 2

### Wednesday, April 25

9 – 10 a.m. Tulsa County Bar Center  
11 – noon Tulsa County Bar Center  
1:30 – 2:30 p.m. Tulsa County Bar Center

## To sign up

for a class in Oklahoma City or Norman,  
e-mail [marks@okbar.org](mailto:marks@okbar.org)  
or call (405) 416-7026  
for a class in Tulsa,  
e-mail [scousins@tulsabar.com](mailto:scousins@tulsabar.com)

***Reminder – Be sure to include the class date & time.***

For more info about this member benefit, see the Fastcase story on [www.okbar.org](http://www.okbar.org)



# OBA Solo & Small Firm Conference

## Ten Years and Counting

By Jim Calloway, Director, OBA Management Assistance Program

Registration is now open for the 2007 edition of the annual OBA Solo and Small Firm Conference that will be held at Tanglewood Resort at Lake Texoma on June 21-23. The Solo and Small Firm Conference Planning Committee has worked hard to make sure our 10th annual conference equals the high standards set in previous years with an outstanding lineup of presentations, great family social events and networking opportunities. This year we will add magic!

Jay G. Foonberg will be our keynote speaker. He is the author of *How to Start and Build a Law Practice*, which is now in its fifth edition and is the best-selling law practice management book of all time.

Mr. Foonberg said, "I am picturing a highway leading to a fork in the road; one branch labeled 'Trail of Tears' and the other labeled 'Trail of Cheers.' The first road has an overhanging road sign reading 'Bar Complaints, Low Income, Unhappy Professional Life.' The other road sign over the other highway reads 'Happy Professional Life, High Income, Good Practice.' You can choose the 'Trail of Cheers' if you're willing to learn what you're doing right, what you're doing wrong, and are willing to make some changes."

Mr. Foonberg's address is titled "The Nine Steps for Making Money and Staying Out of Trouble from Womb to Tomb."

ABA TECHSHOW 2007 chair Dan Pinnington will be another of our invited guests. Readers of my blog will recognize Dan's name. He is director of practicePRO, the practice management advisory service of the Lawyers' Professional Indemnity Co. in Canada. PracticePRO has produced many outstanding free online booklets on important law firm management topics. Dan will talk about several topics, including how not be sued for malpractice. Dan is a regular columnist in *Law Practice* magazine.

We will also welcome Alabama State Bar Practice Management Advisor Laura Calloway. She is the finance editor of and regular columnist with *Law Practice* maga-

## June 21-23

## Tanglewood Resort

## at Lake Texoma

Young Lawyers Division Midyear Meeting

Estate Planning, Probate and  
Trust Section Midyear Meeting





zine. She will be doing a special program on small law firm finance called "Secrets to the Profitable Small Law Firm." She also serves on the ABA TECHSHOW planning board and serves on the ABA Law Practice Management Section Council.

Our Friday night social event will feature "A Night of Magic" with Rob Lake. This production blends unique illusions, hilarious comedy and audience participation into a state-of-the-art theatrical spectacle the whole family will love. Rob Lake has mesmerized audiences around the globe with his production "A Night of Magic." Now he brings his entertaining show to the OBA Solo and Small Firm Conference.

Our Thursday evening social event brings poolside dining with games, karaoke, fun activities and even a chance to ride a mechanical bull. It is a great opportunity to meet lawyers from all across the state in a relaxed setting.

In addition to the national experts, we will hear from many of our local experts. Please check the accompanying program schedule for all of the presentations and speakers.

The OBA Young Lawyers Division holds its midyear meeting in conjunction with the OBA Solo and Small Firm Conference. In addition to Mr. Foonberg, several other presentations should

be of interest to young lawyers such as "Nuts and Bolts of Handling a DUI" and "Trying the Automobile Accident Case."

The Estate Planning, Probate and Trust Section will again hold its midyear meeting in conjunction with the OBA Solo and Small Firm Conference. They have invited Amarillo, Texas attorney Charles E. King to give two presentations to the conference. These presentations are titled "Vehicles of Charitable Giving" and "Estate Planning Revisions in Light of Higher Exemptions."

Golf will be an important part of this year's conference as we are reinstating the Friday afternoon nine-hole scramble, and Thursday afternoon provides an opportunity for golf with the Board of Governors.

This will be our 10th annual OBA Solo and Small Firm Conference, and we hope that the attendees believe they just keep getting better. This is a great opportunity for you to take your family to a resort setting for the "official" OBA Summer Get-a-Way. If you have never been to this conference, this should be the year you decide to go. If you have been to prior conferences, you know how much fun you can have while satisfying all of your annual MCLE requirements.

Register for the conference now and reserve your room soon as space is limited.

# 2007

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# OBA SOLO AND SMALL FIRM CONFERENCE & YLD MIDYEAR MEETING

JUNE 21-23, 2007 • TANGLEWOOD RESORT • LAKE TEXOMA

DAY 1 • Friday, June 22



## THE OBA SUMMER GET-A-WAY



Jay G. Foonberg

8:25 a.m.	<b>Welcome</b> Stephen D. Beam OBA President		
8:30 a.m.	<b>50 Tips in 50 Minutes</b> Laura Calloway, Dan Pinnington and Jim Calloway		
9:20 a.m.	<b>Break</b>		
9:30 a.m. - 11:00 a.m.	<b>Plenary Session</b>  <i>The Nine Steps for Making Money and Staying Out of Trouble from Womb to Tomb</i>		
11:00 a.m.	<b>Break</b>		
11:10 a.m. to Noon	<b>Secrets to the Profitable Small Law Firm</b>  Laura Calloway	<b>Electronic Evidence &amp; Electronic Discovery</b>  Eric S. Eissenstat & Brooks A. Richardson	<b>Nuts and Bolts of Handling a DUI</b>  Sonja Porter
Noon	<b>LUNCH BUFFET</b>		
1:00 p.m. - 1:50 p.m.	<b>Accounting for Lawyers: Understanding Financial Statements, Accounts and Other Mumbo Jumbo</b>  Craig Combs	<b>Oh How Do I Cloud Title? Let Me Count the Ways</b>  D. Faith Orłowski	<b>Trying the Automobile Accident Case</b>  David Bernstein
1:50-2:00 p.m.	<b>Break</b>		
2:00 p.m. - 3:00 p.m.	<b>Splitting Up, Then Moving On: Relocation Headaches</b>  Donelle H. Ratheal	<b>Estate Planning Revisions in Light of Higher Exemptions</b>  Charles E. King	<b>Improving Client Service and Satisfaction</b>  Jim Calloway

## DAY 2 • Saturday, June 23

8:25 a.m.	<b>Welcome</b> <i>John Morris Williams</i> <i>OBA Executive Director</i>		
8:30 a.m.	<b>Risk Management – How to Avoid a Malpractice Claim (Ethics)</b> <i>Dan Pinnington &amp; Phil Fraim</i>		
9:20 a.m.	<b>Break</b>		
9:30 a.m.	<b>OSCN, FastCase and Other Legal Research Tools</b> <i>Jody Nathan</i>	<b>Jury Selection: Pitfalls and Pratfalls</b> <i>Brian T. Hermanson &amp; Creekmore Wallace</i>	<b>Accounting for Lawyers (part 2) Excel with Excel</b> <i>Dan Pinnington</i>
10:20 a.m.	<b>Break</b>		
10:30 a.m. 11:30 a.m.	<b>Why Law Firms Fail (And How to Avoid It)</b> <i>Laura Calloway, Dan Pinnington and Jim Calloway</i>	<b>Vehicles of Charitable Giving</b> <i>Charles E. King</i>	<b>Parenting Tips for the Working Professional</b> <i>Melanie Jester, Moderator</i> <i>Dr. Noel Jacobs</i>
11:30 a.m.	<b>LUNCH BREAK — No Speaker — Hotel Check Out</b>		
12:30 p.m. - 1:20 p.m.	<b>Who's Your Daddy? Nuts and Bolts of the Uniform Parentage Act</b> <i>Amy E. Wilson</i>	<b>Deposition Workshop</b> <i>Jack Dawson</i>	<b>Pet Project – The Only Property That Will Miss You When You Are Gone</b> <i>D. Faith Orlowski</i>
1:30 p.m. - 3:10 p.m.	<b>What's Hot and What's Not in Running Your Law Practice</b> <i>Laura Calloway</i> <i>Dan Pinnington</i> <i>Jody Nathan</i> <i>Jim Calloway</i>	<div><div>Plan a get-a-way with the OBA!</div></div>	
<div><div>Spend some vacation time with your family at Tanglewood and still get all your CLE for the year!</div></div>			

# The OBA Summer Get-A-Way

**OBA Solo & Small Firm Conference  
and YLD Midyear Meeting  
June 21-23, 2007 • Tanglewood Resort — Lake Texoma**

## REGISTRATION FORM:

THIS FORM SHOULD BE TYPEWRITTEN OR PRINTED "LEGIBLY"

Registrant's Name: \_\_\_\_\_ OBA#: \_\_\_\_\_

Address: \_\_\_\_\_ City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-Mail: \_\_\_\_\_

List name and city as it should appear on badge if different from above: \_\_\_\_\_

**Registration Fees:** Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals: Thursday evening Poolside Buffet; Breakfast Buffet Friday & Saturday; Buffet lunch Friday & Saturday; Friday evening Ballroom Buffet.

### Circle One

Early-Bird Attorney Registration (**on or before May 30, 2007**) \$175

Late Attorney Registration (**May 31, 2007 or after**) \$225

Early-Bird Attorney & Spouse/Guest Registration (**on or before May 30, 2007**) \$275

Late Attorney & Spouse/Guest Registration (**May 31, 2007 or after**) \$325

Spouse/Guest Attendee Name: \_\_\_\_\_

Early-Bird Family Registration (**on or before May 30, 2007**) \$325

Late Family Registration (**May 31, 2007 or after**) \$375

Spouse/Guest/Family Attendee Names: **Please list ages of children.**

Spouse/Guest: \_\_\_\_\_ Family: \_\_\_\_\_ Age: \_\_\_\_\_

Family: \_\_\_\_\_ Age: \_\_\_\_\_ Family: \_\_\_\_\_ Age: \_\_\_\_\_

**Materials on CD-ROM only** Total: \$ \_\_\_\_\_

**Thursday, June 21 • Golf With the BOG • 18 Hole Golf** (\_\_\_\_\_ of entries @ \$50 ea.) Total: \$ \_\_\_\_\_

**Friday, June 22 • Nine Hole Golf** (\_\_\_\_\_ of entries @ \$35 ea.) Total: \$ \_\_\_\_\_

**Total Enclosed: \$ \_\_\_\_\_**

**Make check payable to the Oklahoma Bar Association. MAIL Meeting Registration Form to:  
CLE REGISTRAR, P.O. Box 960063, Oklahoma City, OK 73196-0063. FAX Meeting Registration Form to (405) 416-7092**

For payment using \_\_\_ VISA or \_\_\_ Master Card: CC: \_\_\_\_\_

Expiration Date: \_\_\_\_\_ Authorized Signature: \_\_\_\_\_

**No discounts.** Cancellations will be accepted at anytime on or **before May 30, 2007** for a full refund; a \$50 fee will be charged for cancellations made on or **after May 31, 2007**. **Call 1 (800) 833-6569 for hotel reservations. Ask for the special OBA rate.**





**OBA Solo & Small Firm Conference and YLD Midyear Meeting**  
**June 21-23, 2007 • Tanglewood Resort - Lake Texoma • (800) 833-6569**

## **HOTEL REGISTRATION FORM**

Registrant's Name: \_\_\_\_\_ Phone: \_\_\_\_\_

Address: \_\_\_\_\_ City/State/Zip: \_\_\_\_\_

Spouse/Guest/Family Attendee Names: \_\_\_\_\_

\_\_\_\_\_  
Name Age, if under 21

\_\_\_\_\_  
Name Age, if under 21

\_\_\_\_\_  
Name Age, if under 21

### **HOTEL INFORMATION**

Arrival Day/Date: \_\_\_\_\_ Departure Day/Date: \_\_\_\_\_ No. of People: \_\_\_\_\_

Please check room preference: \_\_\_\_\_ Single Condo \$99 \_\_\_\_\_ New Hotel Room \$119 \_\_\_\_\_ Tower Suite \$129

\_\_\_\_\_ Smoking Room \_\_\_\_\_ Non-Smoking Room Special Requests: \_\_\_\_\_

#### **CHILDREN ACTIVITIES (3 yrs. & up)** **FRIDAY, JUNE 22, 2007**

9:30 am - 11:30 am: Age Appropriate Crafts  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

11:30 am - 1 pm: Story Time (lunch included)  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

1 pm - 3 pm: Supervised Swimming  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

7:30 pm - 10:30 pm: Movies & Popcorn  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

#### **SATURDAY, JUNE 23, 2007**

9:30 am - 11:30 am: Age appropriate games  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

11:30 am - 1 pm: Story Time (lunch included)  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

1 pm - 3 pm: Supervised Swimming  
\_\_\_\_\_ No. \$12 each child \$ \_\_\_\_\_

TOTAL for Children \$ \_\_\_\_\_

Private babysitting available for children  
3 and under \$10 per hour, arrange at front desk.

#### **SPOUSE/GUEST ACTIVITIES** **FRIDAY, JUNE 22, 2007**

9:30 am: Golf  
9/\$35, 18/\$50 (call for tee time)  
\_\_\_\_\_ No. Golfers 9/\$35 \$ \_\_\_\_\_  
\_\_\_\_\_ No. Golfers 18/\$50 \$ \_\_\_\_\_

#### **RECREATIONAL ACTIVITIES**

4 Outdoor Swimming Pools & Jacuzzi  
2 Lighted Tennis Courts  
Playground & Volleyball Court  
Belgian Horseback Riding  
Croquet & Badminton  
Lake Texoma Striper Fishing

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**CANCELLATION PENALTY IF ROOM NOT CANCELLED BY 6 P.M. JUNE 15, 2007**

# YLD Thanks Mock Trial Volunteers

The final round of this year's Oklahoma High School Mock Trial Championship was a match-up of two teams that had never made it to that stage of competition – Ada and Shawnee high schools. At the Bell Courtroom at the OU College of Law on March 6, Ada defeated Shawnee for the honor of representing Oklahoma at the National High School Mock Trial Championship to be held in Dallas May 10 – 12.



*YLD Mock Trial Committee members put many hours into making the 2006-2007 program a success.*

The Mock Trial Committee, the Young Lawyers Division and the Oklahoma Bar Foundation wish to express their gratitude to all of those members of the bar who volunteered during this year's competition.

"The Mock Trial Program owes its tremendous success to the hundreds of volunteer attorneys and judges who selflessly give their time to serve as attorney coaches, trial site coordinators, presiding judges and scoring panelists. Our volunteers are to be commended," said Mock Trial Committee Chair Jennifer Scott Moradi.

The Mock Trial Program, which has benefited more

than 19,000 students since its inception 27 years ago, would not be possible without the generous support of the Oklahoma Bar Foundation and the Oklahoma Bar Association.

The competition began in January with 49 teams representing 46 schools from all corners of the state. The top finishers include, in third place, Christian Heritage Academy, Del City; fourth, Clinton High School; fifth, Catoosa High School; sixth, El Reno High School; seventh, Broken Arrow High School; and eighth, Jenks High School.

This year's Mock Trial Executive Committee mem-

bers are Chairperson Jennifer Scott Moradi; Executive Vice Chairperson Rachel McCombs; Immediate Past Chairperson Christine Cave; Vice Chairperson/Oklahoma City Trial Site Coordinator Erin Moore; Vice Chairperson/Tulsa Trial Site Coordinator Marsha Rogers; Vice Chairpersons Case Development Johnathan Horton, Sandra Benischek Harrison and Nicole Longwell; and Mock Trial Coordinator Judy Spencer. Other Mock Trial Committee members are Julie Austin, Dessa Baker-Inman, Jennifer Bruner, Jim Buxton, Joe Carson, Jeremy Carter, Cristian Szlichta and Kathryn Walker.

## ATTORNEY COACHES

Lauren Allison  
Amber Bass  
Chris Box  
Gary Briggs  
Damon Cagle  
Judge Daman Cantrell  
Sharon Cole  
MaryAnn Coleman  
Jacquelyn Dill  
L. Don Smitherman  
Brian Drummond  
Catina Drywater  
Susan Eades  
Judge Shon Erwin  
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J.D. Falsetti  
Christine Ford  
Joe Gardner  
David Guten  
Brady Haggard  
Barrett Harris  
Wyatt Hill  
Terry Holtz  
Mike Horn

James Keeley  
Steve Kessinger  
Michelle Kirby-Roper  
Rita Lamkin  
Shawn Lawhorn  
James Levine  
Adam Marshall  
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Emily Maxwell  
Deborah Moon  
Judge Robert Murphy  
Mark Osby  
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Judge Susie Pritchett  
Erin Quinn  
Tim Roberts  
Dennis Sagely  
Steve Sasser  
Jeff Smith  
Tom Steece  
Frank Stout  
James Thornley  
Randall Wood

## TRIAL SITE COORDINATORS

Sheila Barnes  
Jennifer Bruner  
Cathy Christensen  
Lisa Cosentino  
April Eberle  
Eric Edwards  
Don Elwick  
Bill Haselwood



*The final round  
of competition gets  
under way in the  
Bell Courtroom  
at the OU College  
of Law.*

Frank Holdsclaw  
Dessa Baker-Inman  
Rita Jencks  
Dana Lamb  
Leslie Lynch  
Lou Ann Moudy  
Corrine O'Day-Hanan  
John Parris  
Jackie Jo Perrin  
Marsha Rogers  
Robin Rollins  
Judge Gary Snow  
James Stuart  
Leah Terrill-Nessmith  
Linda Thomas  
Lori Whitworth  
Keri Williams

## FINAL PRESIDING JUDGE

Judge David Lewis

## FINAL SCORING JUDGES

Judge Daman Cantrell  
Retired Judge  
Ken Dickerson  
Judge Niles Jackson  
Judge Millie Otey  
Retired Justice  
Hardy Summers

## PRESIDING JUDGES

Judge Robin Adair

Judge Bruce Allen  
Judge Gayla Arnold  
Charles Barker  
David Bryan  
David Butler  
Judge Daman  
Cantrell\*\*\*\*  
Judge Glenn Carter  
Christine Cave\*\*  
Ben Chapman  
Holli Chennault\*\*  
Judge Douglas Combs  
Judge Edward  
Cunningham\*\*\*\*  
Robert Davis  
Michael Denton  
Judge Kenneth  
Dickerson\*\*  
Don Easter\*\*  
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Mike Finnerty  
Sherril Flood  
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Sandra Harrison  
Phil Hawkins  
Judge Brian  
Henderson  
Mark Hixson  
Johnathan Horton

Gary James\*\*  
Jenna Johnson\*\*  
Leslie Ellis Kissinger  
Michael Kulling  
Jeff Lynch\*\*\*  
Jim McClure  
Judge Tim Olsen  
Martin Ozinga  
Jim Pettis\*\*  
Clay Pettis\*\*  
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Carolyn Romberg  
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Carmelita Shinn  
Judge Steven Shreder  
Judge Gary Snow\*\*\*  
Bill Sparks  
Bill Speed  
Mike Spychalski  
Judge Michael Stano  
Theresa Stidham-  
Williams  
Weldon Stout  
Doug Todd  
Randy Wagner  
Joe Weaver  
James Marshall  
Neil West  
Judge Kimberly West  
Teressa Williams\*\*

# **SCORING PANELISTS**

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Kristen Anderson  
Julie Austin  
Jennifer Barnes  
Sheila Barnes  
Ana Basora  
Julie Bates  
Emily Booth  
Jack Boyer  
John Brewer  
Megan Brooking  
Michael Brown  
Timothy Brown  
Sue Buck  
Judge Lowell  
Burgess Jr.  
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Ken Chesnutt  
Paul Choate\*\*  
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Terri Craig  
Peggy Cunningham  
Anne Darnell  
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Jerry Dennis  
Gerald Dennis  
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Melinda Dunlap  
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C.J. Henderson  
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William Huser  
Douglas Jacobson  
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Luwana John  
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Eric Johnson  
Celeste Johnson  
Nathan Johnson  
Joe Jordan  
Vic Kennemer\*\*\*  
Jennifer King

Jennifer Kirkpatrick  
Kristopher Koepsel  
Norman Lamb  
Scott Landon  
Tom Lane  
Caroline Larsen  
Niki Lindsay  
Marvin Lizama  
Heath Lofton  
Randy Long  
J.P. Longacre\*\*  
Christopher Lyons  
Tom Manning  
Byrona Maule  
Gaylene McCallum  
Scott McCann  
Rachel McCombs\*\*\*  
Kelli McCullar  
Tracy McDaniel\*  
Michael McMahan  
Gerald Miller  
Jennifer Miller  
John Miller  
Brian Mitchell\*  
Nason Morton  
Regina Moyer  
Melanie Nelson  
Sue Nigh  
Luke Nikas  
Rod Nixon  
Judge Tim Olsen  
Wes Owens  
Scott Pappas  
J. Parker  
John Parris\*\*\*  
Lisa Patel\*\*  
Jackie Jo Perrin\*  
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Sue Phillips  
Leslie Kucko-Porter  
David Proctor  
Rogan Rinehart  
Ryan Roberts  
Rick Rose  
Casey Saunders  
Lynne Saunders\*\*  
John Schneider  
Drew Schwartz  
Jennifer Scott  
Carol Seacat  
Courtney Selby  
A. Shafer  
Darpana Sheth  
Michael Simpson  
Amanda Smallwood  
Trisha Smith  
Barbara Stoner  
Weldon Stout  
Khristan Strubhar  
Christian Szlichta\*\*  
Patrick Thompson  
Shelley Tipps  
Joy Turner\*  
Larry Vickers  
Joe Vorndran  
Rob Wallace  
Amy Waters  
Joe Weaver  
Cregg Webb  
Matt Wheatley  
Chris Wilson

\* served twice  
\*\* served three times  
\*\*\* served four times



*Ada High School team members pose with their trophy. They were coached by teacher Angie Dean and attorney Frank Stout.*



# New OBA Group to Address the Needs of Hispanics

The Oklahoma Hispanic Bar Network is organizing a group to actively promote economic, social, political and educational advancement within the Oklahoma Hispanic community.

The first meeting will be held Wednesday, April 4, 3 - 5 p.m. at the Oklahoma Bar Center in Oklahoma City and Tulsa County Bar Center in Tulsa. Lawyers, judges and law students who are of Hispanic descent or who have an interest in issues that involve the Hispanic community are invited. If you are interested in attending, contact Saul Olivarez at (405) 227-9700 or saul.olivarez@gmail.com.

Mr. Olivarez said anyone can attend the meeting, even if they are not Hispanic.

"I want all to come. It's so important to me that the OHBN is an inclusive, not exclusive, group. Why? Because it betters us all to work together. So basically if you serve or have an interest in serving the Hispanic community or are of Hispanic descent, then join the network," he said.

At its first meeting, Mr. Olivarez said he wants an open dialogue with new members about the group's official name, mission statement and how the group can reach out to the community. The OHBN will also elect officers, write bylaws and have an annual membership fee, he said. The group will try to schedule monthly meetings.

"There's a tremendous need for this group in Oklahoma. Hispanics are the largest and fastest growing minority group in the state. It is only necessary and proper that the community have access to a group of legal professionals who openly cater to their needs and interests," Mr. Olivarez said.

He said the idea for the OHBN came to him during law school when he was active in OCU's Hispanic Law Student Association.

"One of the first projects I'd like to see would be to have at least one OHBN member in every county of the state. The important thing is that the Hispanic community has a legal resource to go to," Mr. Olivarez said.

Future projects the OHBN plans to undertake include seminars educating Hispanics about their legal rights, assisting them with business planning and advising them on immigration matters. Additionally, the OHBN would like to form partnerships with the State Hispanic Chamber of Commerce, League of United Latin American Citizens and the Latino Community Development Agency.

Mr. Olivarez said the Hispanic community has the same concerns as everyone else in the state, especially immigration, health care, education, the economy and discrimination.

The OHBN will bring a sense of accountability to attorneys assisting the Hispanic community, he said.

"You always hear stories of those bad apples that can tarnish the reputation of our profession and cause mistrust. By creating the network and informing the Hispanic community about our purpose, they will have a resource that they can trust. Now, this doesn't guarantee there will be no bad apples, but it allows them to know that there is a group out there to help them," Mr. Olivarez said.

Another project the OHBN will pursue is encouraging more Latinos to enter the legal profession. This can be accomplished through mentoring programs, classroom presentations and educating parents about the importance of education, Mr. Olivarez said.

"Hispanics are a hard-working, determined people and if given the chance, they will succeed," he said.



# 2007 OBA DAY AT THE CAPITOL

Tuesday, March 27

Mingle with members of the Oklahoma Legislature at the OBA Day at the Capitol – a full day of opportunities for bar members to visit with legislators about the OBA legislative agenda.

Meet at the Oklahoma Bar Center at 10 a.m. for the day's briefing.

Talk to your legislators over a barbecue lunch provided by the OBA at the Capitol.

At 5 p.m., a legislative reception will be held at the bar center for both bar members and legislators.

More information  
available at  
[www.okbar.org](http://www.okbar.org)

# The Gift

By Shad Helmstetter, Ph.D.

199 pages, ISBN-09727821-4-1, \$19.95  
Published by Park Avenue Press, 2005

"The Gift" is a self-improvement book on reaching personal growth sufficient to reach your life's dreams. The author, Dr. Shad Helmstetter, is a behavioral researcher and a best selling author who has appeared on television and radio programs including "Oprah Winfrey" and CNN News.

The book's premise is that if you use the right tools, the 12 described in the book, you will find success. The tools are described as gifts which lead to magical results when employed. The natural born, or trained, skeptics that attorneys are may limit acceptance of the book's offerings. Warning must be provided that the advice is a tad sullied by repeated references (including in the forward, a whole chapter and in the listed resources) to an organization that epitomizes success for its employees because it fosters their use of the 12 tools. The book appears to be a thinly veiled marketing tool for a skin care organization. But, if one can get around this, the book's advice is practical and may be helpful.

One tool that is discussed is the gift of surrounding yourself with success. This is accomplished by surrounding yourself with people who reach their goals, feel good about themselves, do things that are fulfilling, have plenty of money in the bank and share good with the people around them. Avoiding negative people and the "idle bystanders of life" who don't share your goals is key. However, the author provides a solution to throwing out your negative spouse or avoiding a negative parent if you must keep them in your life: keep moving forward and use positive "self-talk."

The gift of choice, distinguishes between life-directing choices appreciated as such and the

seemingly insignificant choices not identified as choices. Unthinking action or action based on habit is actually choice and often determines whether or not you succeed. According to the author, making these decisions as conscious choices rather than operating out of habit would be life-changing. The author suggests that using yet another tool, the gift of helping other people to grow, will make your own life better as you help improve the lives of others.

The gift of believing in yourself, emphasizes that fulfillment begins with self-belief. Self-belief comes from both the positive programming and reinforcement we receive as children, and, from the repeated experience of small successes such as through good grades at school, doing well enough in a sport, anything into which you can expend effort and win in some way. A technique for creating a moment of "instant self-belief" is provided for use in stressful situations: envision a photograph of yourself in your most perfect possible moment; tell yourself that you believe in yourself, that this is your day, and nothing can stop you.

The gift of changing your self-talk begins with the premise that the human brain not only stores all the messages received from the beginning of life, but acts on all of them as if they are true. These messages form the beliefs we have about ourselves. Despite being programmed to believe and act on all these messages, 77 percent of all the messages (according to behavioral researchers) are negative, false, counter-productive and work against us. Examples of such common self-talk include, "I can never find anything," "today just isn't my day," "I'm just not creative, organized, good at

much, etc.” The author suggests 1) monitoring your self-talk by listening to everything you say or think when talking to yourself, 2) either stopping or changing negative self-talk by editing everything you say or think; and 3) listening daily to the right kind of self-talk, examples of which can be located on the Web at [www.selftalk.com](http://www.selftalk.com).

The author also discusses the gift of exceptional attitude, attitude being defined as how you choose to view and approach each moment of your life, yourself and other people. His premise is that if your attitude is not right, your life will not be either as attitude controls virtually everything about you (whether you believe in the best or the worst; how you feel; how you react to problems and deal with people; how you see yourself and how others see you; and every choice you make).

Attitude is the single most valuable tool as the right attitude will enable you to do anything. Exceptional attitude reminds you of your purpose and your worth, rather than what you lack; calms your mind; levels your day; puts value into the little things you do and reveals their importance; and, puts you back in control of you. Steps to attaining an exceptional attitude include an awareness of your attitude at all times; always “owning” your attitude, not allowing anyone or anything to own or control it; and to build your attitude in positive ways by using positive self-talk frequently.

The gift of finding your focus acknowledges that many bright people do not know what they want. As a truth of human behavior is that what you expect most is what you will get, not knowing what you want is a problem. A “focusing quiz” of 30 questions is provided to guide those who do not know what they want. Reaching focus requires taking the time to do so and making the effort. Suggestions include talking and thinking about your future and determining your likes and dislikes. Other suggestions include actively daydreaming about having anything you can imagine and

often asking yourself the question, “Who am I really, and what do I want.”

After you realize focus, the next gift to explore is setting great goals for yourself. Setting goals results in lives lived by choice rather than chance. The most important goals are short-term goals, and they must be written down. Writing down a goal along with the plan to achieve it increases the chances of reaching the goal from 5 percent to 70-80 percent. These written short-term goals are what allow you to reach the bigger, life-time goals that must also be set.

The gift of taking control of your time and your life is also discussed. This involves asking yourself at the beginning of each day what you will do with your time and, at the end of the day, reviewing how you spent your time. The gift of putting yourself in action entails first determining what stops you. The author lists and describes the primary reasons for not acting, including not knowing what to do, perceiving the task is too difficult, lacking the commitment to act and being afraid.

Useful action steps are provided with regard to the gift of never giving up. These action steps entail first assessing the situation and deciding whether or not the goal is still important and should remain a goal, deciding that the obstacles you face are normal and natural steps to success, choosing to believe you can accomplish the goal and restating your personal determination to reach the goal.

Finally, the author discusses the gift of doing something you love. The question to ask is, “What would I do if I won the lottery tomorrow?” The advice is to find something you love to do that fulfills you and do it.

The author provides helpful information, suggestions and exercises. Although the marketing overlay is frustrating and may generate skepticism, it does not negate otherwise useful material.

*Martha Rupp Carter, Tulsa, is a member of the Oklahoma Bar Journal Board of Editors.*



# OBA Legislative Report

*By John Morris Williams, OBA Executive Director*

The First Regular Session of the 51st Legislature has convened. Two of the three bills on the Oklahoma Bar Association Legislative Agenda have progressed. House Bill 1828 did not get a favorable vote in the Judiciary Committee subcommittee. However, a favorable resolution regarding the bill's substance has been reached. The two remaining bills have each passed out of their house of origin and will hopefully be heard in committee in the next few weeks.

Below is a list of the OBA bills. The OBA Web site has a link under the "Legal Research" tab to the Oklahoma Legislature Web site, which has full text of bills and current status information. The Legislature Web site can be accessed directly at [www.lsb.state.ok.us](http://www.lsb.state.ok.us). Among the bills pre-filed are those bills adopted by the OBA House of Delegates.

## The OBA bills are:

### • SB 634 •

This bill amends existing law to allow service to be obtained by use of courier service such as UPS or FedEx as long as delivery service provides a signed receipt, record of to whom delivery was made, date of delivery, address where served and the person or entity making the delivery. United States Postal Service changes in Certified Mail delivery may have made this type of service less dependable than in the past. Use of commercial carriers provides safeguards and procedure that ensure due process is met. The bill also allows a party or attorney to agree to electronic service (facsimile or e-mail). The party agreeing to electronic service has to consent to such in writing and file the consent in the case. The proposed amendment provides that consent can be included in an Entry of Appearance. The bill allows a party or attorney an option of using electronic means of service. It does not mandate or require the use of electronic service or notice.

A committee substitute was introduced that amends 12 O.S. §§ 140.1 696.2., 696.3, 1083, 2004.1, and 2005. These new provisions were part of last year's OBA Legislative Agenda. The amended language provides: who pays new filing fee on transfers of a case, relate to service of final judgment on parties, provide for dismissal without prejudice of cases in which no pleading has been filed or action taken for after a year and relate to service of a subpoena in a case pending out of state and subpoenas for production or inspection in cases pending outside of Oklahoma. These amendments clarify existing statutes and do not contain major revisions or changes in existing law.

**Author:** (S) Lerblance, (H) Sullivan

**Status:** Passed Senate and assigned to House Judiciary

### • HB 1716 •

This bill provides a new section of law clarifying that the "mail box rule" applies to ad valorem protests and makes the practice uniform for the entire state. Current practice in almost all counties in the state is to use the mail box rule in determining when notice of a protest is received. This statute allows taxpayers the ability to know with certainty that the protest is timely filed and received. Otherwise, the protesting taxpayer may mail the protest well within the allotted protest period and due to postal delays or mishandling upon receipt by the taxing authority be denied the right to appeal.

**Author:** (H) Miller, (S) Lamb

**Status:** Passed House, waiting for Senate Committee Assignment

### • HB 1828 •

This bill recodifies and reinstates 11 O.S. 2001, Section 27-111.1 that was repealed in 2006. The purpose of the bill is to require the sheriff in counties of more than 200,000 population to create a system where certain persons may pass quickly to gain entrance to the courthouse. Under this bill the sheriff would be required to provide an identification card to the persons stated in the statute, plus others the sheriff may determine.

**Author:** (H) Kiesel

**Status:** Failed Do Pass in subcommittee and is dormant

# A Good Day to You

By John Morris Williams

I recently met with Dr. Wenona R. Barnes, with whom the OBA contracts for its crisis intervention hotline. We are in the process of renegotiating fees for the program. As you have probably seen from President Beam's article in the January bar journal, there is a great need to fund this program with an eye on it becoming a permanent member benefit. Many thanks to the OBA Family Law Section's generous gift of \$10,000 and Past President Bill Grimm and his firm in contributing \$1,000. We are now at 22 percent of our goal of \$50,000. I feel good, and you will too when you contribute to this endeavor. Of course, I am going to give some, too.

It is hard to prove a negative, but our suicide numbers are down, and I think this program is helping. I know for certain in one incidence that, through a contact to the crisis hotline, a fatalistic outlook has been changed to an optimistic outlook. All the services are confidential, and I do not know the identity or location of anyone who has used the service. One member allowed a communication to the counselor to be anonymously communicated to us. The following is an excerpt from that letter:

"...the Counselor you sent me to has helped me to identify many of the underlying causes of my physical and emotional

distress. I am learning new patterns of thinking to avoid 'beating myself up' over perceived failure. I have more good days than bad days now.

I am grateful to the OBA for providing the impetus to take some long-delayed action. Opening the e-mail from the OBA regarding Crisis Intervention Services now being available, on one sleepless night, was like a Godsend."

I do not know about you, but having more good days than bad days is what it is all about. I never thought in my legal career that this would be an issue that would involve me. However, like you I got in this to help people, and it gives us just another opportunity to do what we are all called to do. So often lawyers are the caregivers and it is not our nature to ask for help or acknowledge our "bad days." Let us be mindful that none of us are beyond the "bad days," and it is in all our interests to make sure that we have a resource for ourselves and our peers when there are more bad days than good days.

When it comes to asking for money for a good cause, I seem to have less and less shame. I tell people that a sin-

gle person asking for money is what we call a beggar. Two people asking for money is a fund-raising committee. So President Beam and I are a team on the committee raising money for this great cause.

To get to the point: we still need your help. I know there are many good causes out there and I am not asking that you cut anyone one else out. Just think of this as an investment for all of us. Just think of the fact that you will be helping someone have more good days than bad. Gee, can you think of a better cause? **If you, your county bar association, section, committee, affiliated association, etc. can make a contribution, you will help us continue this great program.**

A good day to you, and may you have more good days than bad.

For help with stress, depression or addiction, call LifeFocus Counseling Services at (405) 840-5252 or toll-free (866) 726-5252.

The OBA offers all bar members up to six hours of free crisis counseling.

It's strictly confidential and available 24 hours a day.



To contact Executive Director Williams, e-mail him at [johnw@okbar.org](mailto:johnw@okbar.org)

# Heroes: Who Are They?

By Dan Murdock, OBA General Counsel

When I was growing up, I had my heroes. They were usually professional athletes or the stars of the western serials I watched on Saturday mornings.

John F. Kennedy was an exception to the usual. I, like most of you, remember where I was at special times. I remember where I was on Nov. 22, 1963. I was sitting in my fifth hour English IV class on a cool overcast day when the announcement of his death came over the intercom. I, along with the rest of the world, was shocked. I had lost a hero. I first became acquainted with then-Sen. Kennedy when an older brother living in Boston sent me a copy of *Profiles in Courage* as a gift. I was fascinated by the tales of those men who did something that they thought was right while doing so cost them so much. Their deeds were heroic, but at the time, they were not considered heroes.

Today we hear much about heroes. The term is used frequently by many in a multitude of situations. In his book, *Cowboy Ethics, What Wall Street Can Learn From the Code of the West*, James P. Owen writes that we can all be heroes in our own lives. Most of us will never be presented with the opportunity to be considered a "real hero." But that doesn't mean that we are not. Each day lawyers are heroes to

their clients. Each day, lawyers have a positive impact on the lives of others. All lawyers have that opportunity. If you question my statement, please read the preamble to the Rules of Professional Conduct.



The Rules of Professional Conduct are the "rules of the game." Although not a game, the practice of law has guidance in those rules, and those rules outline the proscribed way in which to conduct ourselves while we practice our profession. The preamble begins as follows: "A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." It ends by stating that lawyers play a vital role in the preservation of society. You cannot ask much more of a profession.

There are those who will demean our profession and tell us that lawyers are responsible for many of the ills of the world. I admit that there are problems and that lawyers do not always do the things that need to be done to honor the profession. Yet, if you look at the statistics, an overwhelming majority do so each day.

You will hear criticism of representing this particular client or defending those accused of heinous crimes. Lawyers are not only representing the injured or the criminal defendant, but they are representing the system of justice under which we live and are so fortunate to have the opportunity to do so.

In January 2000, new OBA President Joe Crosthwait paid tribute to a few of the presidents who had served previously in that role. Included, *inter alia*, were Jim Turner, Jimmy Fellers, Bill Paul, Neil Bogan and Mona Lambird. He said that individually and collectively they left a significant and abiding legacy founded upon individual integrity and relentless dedication to our profession, our association, and those common principles of a fair, just and accessible legal system. Each lawyer has that opportunity.

What will be your legacy to the legal profession?

# February Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center on Friday, Feb. 16, 2007.*

## REPORT OF THE PRESIDENT

President Beam reported he attended the January swearing-in ceremony, luncheon, January board meeting and party for outgoing board members. He also attended the We The People competition, Annual Meeting Task Force meeting and OBF meeting. At the ABA Midyear Meeting in Miami, he attended meetings of the National Conference of Bar Presidents, Southern Conference of Bar Presidents, ABA GP/Solo midyear meeting, ABA House of Delegates, Oklahoma delegates dinner and YLD delegates dinner.

## REPORT OF THE VICE PRESIDENT

Vice President Dawson reported he attended the swearing-in ceremony, president's reception, "has beens" party and Bar Center Facilities Committee meeting. He has been working with the Mentoring Task Force and will attend a task force meeting this afternoon. He asked board members for ideas to allow mentoring to work. Methods used in the past have not been effective.

## REPORT OF THE PAST PRESIDENT

Past President Grimm reported he attended the president's luncheon, "has beens" festivities, Tulsa Title and Probate Lawyers Association meeting and funerals for longtime OBA members D. William Jacobus and James Robinson.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the "has beens" party, NABE/NCBP ABA midyear meetings, staff directors meeting, Annual Meeting Task Force meeting, Senate Judiciary Committee meeting and the board's Thursday evening dinner. In separate meetings he met with legislative leaders on OBA legislation, the architect to work on construction contracts, the caterer for OBA Day at the Capitol, OTLA Executive Director Emily Truelove and Oklahoma County Law Librarian Venita Hoover.

## BOARD MEMBER REPORTS

**Governor Bates** reported she attended Board of Governors January events - Thursday night social, swearing-in ceremony, Fri-

day board meeting, President Beam's celebration at Rocky's and the "has beens" party. She also attended the OBA State Legal Referral Service Task Force meeting, OBA Work-Life Balance Committee meeting, Cleveland County Bar Association meeting/CLE and will attend the roast for 2006 YLD Chair Keri Williams.

**Governor Caudle** reported he attended the January board meeting, swearing-in ceremony for new board members, swearing-in ceremony for Chief Justice Winchester and Vice-Chief Justice James Edmondson, lunch at Rocky's hosted by President Beam, "has beens" party at the Oklahoma Museum Café and Comanche County Bar Association CLE luncheon. He also wrote the access to justice article regarding the status of lawyer referral in Oklahoma for the January bar journal and chaired the January State Legal Referral Service Task Force meeting at the Oklahoma Bar Center.

**Governor Christensen** reported she attended the board dinner in Bricktown, swearing-in ceremony, board meeting, lunch hosted by President Beam, "has beens" dinner, OBA Women in Law Committee planning ses-



sions and OBA Bench and Bar Committee meeting. She also served as a trial site coordinator for the YLD Mock Trial Competition.

**Governor Farris** reported he attended the Board of Governors dinner in Oklahoma City, board swearing-in ceremony at the Oklahoma Supreme Court, January board meeting, luncheon hosted by President Beam, "has beens" party, Tulsa County Bar Association board meeting and TCBA Long-Range Planning Committee meeting. **Governor Hermanson** reported he will miss next month's meeting. He attended the governors dinner in Bricktown, board swearing-in ceremony, January board meeting, lunch hosted by President Beam, OBA Membership Services Committee meeting, "has beens" party, American Board of Trial Advocates annual dinner at the Oklahoma History Center and ABA midyear meeting in Miami, Fla. He also served as a judge for the We The People competition at the Oklahoma State Capitol.

**Governor Hogan** reported he attended two meetings of the Pittsburg County Bar Association and will be meeting with the Pittsburg County Bar Association president before the next meeting to help with ideas for a short informative presentation at the next monthly meeting. **Governor**

**Kennemer** reported since his last report he attended two Seminole/Hughes Counties Bar Association luncheons, OBA staff appreciation luncheon at the bar center, Board of Governors December meeting and Christmas

party, two State Legal Referral Service Task Force meetings, retirement party for Associate Judge Lee Stilwell, retirement party for Sue Beets with the Farm Service Agency in Okemah, swearing-in ceremonies for Associate District Judge Timothy Olsen and swearing-in ceremonies of Chief Justice Winchester and Vice-Chief Justice Edmondson at the Supreme Court. He judged the High School Mock Trial competition as a scoring panelist and will also judge the quarter final round in Wewoka. He prepared and disseminated a complete electronic attorneys directory for all attorneys, district attorneys and judges in Seminole and Hughes counties. He also shared the directory with all court house staff. He gave a talk at the Pontotoc County Bar Association luncheon in Ada about OBA updates and accomplishments of the Board of Governors during 2006. **Governor Reheard** reported she attended the swearing-in ceremony for new Board of Governors officers and members in addition to the ceremonial swearing-in ceremony for the new McIntosh County associate district judge. **Governor Souter** reported he attended the Board of Governors' function and meeting in Oklahoma City, board swearing-in ceremony, lunch hosted by President Beam, "has beens" party hosted by outgoing board members and OBA Uniform Laws Committee meeting.

**Governor Stockwell** reported she attended the January Board of Governors meeting, swearing-in ceremony for

new board members at the Supreme Court Courtroom and Cleveland County Bar Association luncheon and CLE.

## REPORT OF THE YOUNG LAWYERS DIVISION

Governor Camp reported as a result of recent promotion efforts more than 100 lawyers have volunteered to participate in the Wills for Heroes program. He attended the Board of Governors swearing-in ceremony, January board meeting, luncheon hosted by President Beam, Board of Governors "has beens" party, Wills for Heroes Project Executive Committee teleconference, Children & the Law Committee planning meeting, ABA Young Lawyers Division Bar Leadership Academy, ABA Young Lawyers Division Assembly, dinner for OBA/YLD delegation, Oklahoma delegates dinner and meeting of the ABA House of Delegates.

## REPORT OF THE SUPREME COURT LIAISON

Justice Taylor reported Executive Director Williams has delivered proposed changes to the Rules of Professional Conduct to the Supreme Court, which will review the material soon. He explained the court holds conferences twice a week that produce stimulating debates. He said much of the court's work is unseen, and one example is that every petition for cert is reviewed by all nine justices. Much time is spent researching issues before the court, which requires a great deal of reading and writing. He

said he is looking forward to serving on the Board of Governors that will allow him to spend more time with lawyers. He encouraged board members to ask questions about the court and its procedures.

### **LAW STUDENT DIVISION LIAISON**

LSD Chair Robben reported she attended the board dinner in Bricktown, swearing-in ceremony, board meeting, lunch hosted by President Stephen Beam and "has beens" dinner. She chaired the OLSD Executive Board meeting at which they planned for the upcoming semester and held elections for the next chairperson. She announced that Shiny Pappy, currently a 2L at OCU, will be the next OLSD chair and the next representative to the Board of Governors beginning in May.

### **COMMITTEE LIAISON REPORTS**

Governor Hermanson reported Law-related Education held a We The People competition that was won by Enid High School, which will go on to national competition. He said the Member Services Committee will be looking at several vendors offering off-site document storage/back-up services. Governor Christensen reported the Bench and Bar Committee did not utilize the funds approved at the January meeting to send one member to the ABA subcommittee meetings in Miami.

### **REPORT OF THE GENERAL COUNSEL**

General Counsel Murdock shared a status report of the Professional Responsibility Commission and OBA disciplinary matters. He reported he presented a Saturday evening CLE at the Hornets basketball game, a noon CLE in Poteau for the LeFlore County Bar Association, a noon CLE for TU law students and an evening seminar with Dean Fathree on substance abuse issues in the practice of law at the OCU School of Law. He participated in the Pro Bono Fair at the OU College of Law and attended the monthly meeting of the Professional Responsibility Commission, an evening reception at Platt College for their legal assistants program and a meeting of the OBA staff directors.

### **BAR CENTER RENOVATIONS**

Executive Director Williams reported the Bar Center Facilities Committee will meet this afternoon. He said a presentation on a proposed new telephone system will be made at next month's board meeting, and he described the features the new system would offer. He said he has almost finalized a contract with the architect. Pre-asbestos removal inspections were conducted recently to determine exactly what is needed to be done to remove the existing asbestos, which will facilitate cost estimates to be obtained from abatement companies. He also reported the Technology Committee is working on suggestions for future needs, and some ideas were shared. He has not seen floor plans

yet and said the final contract will include provisions to encourage construction deadlines are met in completely manner.

### **APPOINTMENTS**

The board approved:

Child Abuse Training and Coordination Council - nominations to the Oklahoma Commission on Children and Youth for its selection of one representative - Gina Farris Webb, Sayre; Linda S. Thomas, Bartlesville; and Lisa Birdwell, Weatherford (expires upon resignation or death)

Court on Judiciary - Appellate Division - appoint Bryce L. Hodgen, Woodward, for a two-year term (expires 3/1/09)

Court of Judiciary-Trial Division - reappoint William Brad Heckenkemper, Tulsa, for a two-year term (expires 3/1/09)

Women in Law Committee - appoint Co-Chairpersons Elizabeth Joyner, Tulsa; Cathy Christensen, Oklahoma City; and D. Faith Orlowski, Tulsa

Lawyers with Physical Challenges Committee - appoint Chairperson Melissa K. Sublett, Tulsa

Advertising Task Force - appoint Chairperson Jack Dawson, Oklahoma City, to a new task force being created.

## ABA MEETING HIGHLIGHTS

President Beam reported that he, along with President-Elect Conger, Governor Camp and Executive Director Williams attended several meetings in Miami. He said at the meeting of the National Conference of Bar Presidents, other bars indicated an interest in the OBA's mental health program. He noted that Past President Joe Crosthwait is an NCBP officer. President Beam said some states are conducting a leadership academy and several models for leadership conferences exist. OBA Leadership Conference Task Force Chair Linda Thomas will look at those models to organize an event in Oklahoma. Governor Camp shared information on YLD meetings he attended. He said the YLD Assembly considered two resolutions, and he briefed the board on the issues. In Miami he distributed information on the upcoming YLD regional meeting in Oklahoma City. President Beam reviewed details about the April meeting that will involve activities with the conference participants. Governor Camp suggested a way to encourage YLD involvement is for board members to attend at least one YLD committee meeting this year.

## OBA DAY AT THE CAPITOL

Executive Director Williams reviewed the events planned for the day including a photograph of bar members on the steps of the capitol. He explained the caterer previously used by the OBA for several years is no longer doing catering and a replacement will be found. He reviewed current pending legislation. President Beam encouraged board members to attend even if they could only attend the legislative reception in the evening.

## OETA VOLUNTEER NIGHT

Public Information Director Manning briefed the board on the annual community service event. She explained OBA members are being recruited to take phone calls for pledges to support the state PBS television on Thursday, March 15, 2007. The TV station is working with the OBA to produce Ask A Lawyer that will air on May 1, 2007. Board members were encouraged to make personal donations to continue the OBA's high level of financial sponsorship that is recognized in OETA's monthly program guide.

## NEXT MEETING

The board will meet at 9:30 a.m. at the Oklahoma Bar Center in Oklahoma City on Friday, March 30, 2007.

## Oklahoma Bar Journal Editorial Calendar

### 2007

- April  
**Law Day**  
Editor: Carol Manning
- May  
**Estate Planning**  
Editor: Mark Curnutte  
mcurnutte@loganlowry.com  
Deadline: Jan. 1, 2007
- August  
**Health Law**  
Editor: Martha Rupp Carter  
mcarter@tulsa-health.org  
Deadline: May 1, 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**  
Editors: Melissa DeLacerda  
melissde@aol.com  
Deadline: Aug. 1, 2007

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

# The Oklahoma Bar Foundation Cy Pres Awards



## WHAT ARE CY PRES AWARDS?

Cy pres awards are final surplus funds in class-action cases, and sometimes other types of court proceedings, that for any number of reasons cannot be distributed to class members or beneficiaries who were the intended recipients. Cy pres distribution of surplus funds is utilized when it has become difficult or impossible to identify those to whom damages should be assigned or distributed. In these instances, the court may authorize a cy pres distribution to appropriate charitable organizations. The trust doctrine of cy pres and the courts' broad equitable powers permit use of such funds for public interest purposes by educational, charitable and other public service organizations. Cy pres funds may be used to support current programs or, where appropriate, to constitute an endowment and source of future income for long-range programs that can be used in conjunction

with other contemporaneously raised funds.

## WHY CONSIDER THE OKLAHOMA BAR FOUNDATION FOR CY PRES AWARDS

The OBF's mission of "Advancing education, citizenship and justice for all" makes it a perfect match for class-action cy pres awards, as the underlying premise for class actions is to make access to justice a reality for "the little guy" who otherwise would not be able to obtain the protection of our court system.

Through the OBF's comprehensive grant award process, applicants and a panel of diverse individuals with a wide range of interests and expertise come together to strategically and objectively allocate resources to support dozens of outstanding law-related programs and initiatives, making OBF an attractive charitable investment choice for cy pres awards.

The OBF has the flexibility of using cy pres awards to

expand its comprehensive program or to target funds toward specific access to justice projects and initiatives. Moreover, OBF's mission of advancing education, citizenship and justice for all is as American as apple pie. Corporate and institutional defendants involved in class-action litigation need not be concerned about cy pres funds going to a party that is possibly antagonistic to their corporate or business interests.

The OBF is a proven organization that has been helping people for the past 60 years. OBF holds an important place in public interest law and in the philanthropic community with diverse stakeholders that work to address legal aid needs and eliminate systemic barriers to access to justice.

## OBF CAN DO MORE WITH CY PRES AWARDS

Over the past year, the Oklahoma Bar Foundation has been fortunate to receive some generous cy pres awards. These cy pres



awards are key components for growth and outreach of OBF's charitable mission and will enable the OBF to provide for increases in overall grant awards and the capacity for new initiatives. Cy pres awards to the Oklahoma Bar Foundation can and will make a tremendous difference benefiting law-related programs throughout Oklahoma. Please contact Nancy Norsworthy at (405) 416-7070 or [nancyn@okbar.org](mailto:nancyn@okbar.org) to have a member of the Foundation Board of Trustees discuss specifics with you.

### WHAT WE DO

The Oklahoma Bar Foundation is the charity of choice for Oklahoma attorneys. The OBF provides Oklahomans, and Oklahoma lawyers in particular, with a convenient one-stop method of supporting many different law-related nonprofit organizations. By providing more than \$6.6 million in grant award assistance, the OBF works to improve access to justice throughout our state. OBF invests in organizations and initiatives that have proven to be effective in providing quality legal assistance to less fortunate citizens.



### Specifically, OBF carries out its mission of:

#### ... Advancing education, citizenship and justice for all through our support of:

- The delivery of legal aid services for lower income citizens in all 77 counties
- Programs that educate Oklahoma school children about the American system of justice and the rule of law
- Children's legal aid services and child advocacy programs
- Victims' programs and projects
- Legal resource projects and educational programs for our more senior citizens
- Promotion of broader community support for access to justice through ancillary support of court projects and public education and awareness programs

### WHO WE ARE

The Oklahoma Bar Foundation is a Section 501(c)(3) organization that works to improve access to justice for people in our state who are impacted by poverty, abuse and discrimination. Incorporated in 1949, OBF is the third-oldest state bar foundation in the United States,

an achievement that all Oklahoma attorneys can be proud of. All lawyers duly licensed to practice law in Oklahoma are members and can become Fellows through annual contributions of only \$100 over a 10-year period. Fellow contributions, IOLTA trust account revenues, earnings on investments, planned gifts, income from other sources, and now — cy pres awards, have enabled the OBF to invest more than \$6 million in law-related charitable projects over the past 20 years.

The OBF mission recognizes that access to justice is central to our democratic society and that the legal community has an obligation to be a leader in making our justice system accessible for the less fortunate. The OBF provides concerned professionals with an opportunity to come together in a concerted effort of support that can make an important difference in the lives of many.

### OTHER WAYS YOU CAN HELP

Attorneys and others interested parties can help to provide services across Oklahoma through membership in the OBF Fellows program and other general contributions. Join with Oklahoma attorneys and help us to make a real improvement in the lives of others.

# 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*)

**YES –**  
**I support charitable good works**  
**& agree to become a member of**  
**the OBF Fellow Program.**

Signature & Date: \_\_\_\_\_ OBA Bar #: \_\_\_\_\_

Make checks payable to:  
Oklahoma Bar Foundation • P O Box 53036 • Oklahoma City OK 73152-3036 • (405) 416-7070

**OBF SPONSOR:** \_\_\_\_\_

☐ *If we wish to arrange a time to discuss possible cy pres distribution to the Oklahoma Bar Foundation and my contact information is listed above.*

***Many thanks for your support & generosity!***

# FBA Chapter Provides Needed Legal Assistance

*By Judge Robert Bacharach*

The Federal Bar Association — Oklahoma City Chapter contributes to the federal district court in innumerable ways. One involves the provision of needed legal representation, and the FBA's involvement has proven invaluable.

In 2006, 137 prisoner civil rights cases were filed in the Western District of Oklahoma. In virtually all of these cases, the inmate plaintiffs are unrepresented and the judges must screen the complaints to determine their facial validity. In a growing number of cases, the inmate plaintiffs require legal representation. For example, the case may be ready for trial or the inmate plaintiff may be unable to conduct necessary depositions from his jail cell.

Ten years ago, Congress anticipated this dilemma with the enactment of the Prison Litigation Reform Act. In 28 U.S.C. § 1915(e)(1), the statute provides that "[t]he court may request an attorney to represent any person unable to afford counsel." In the past, judges have attempted to solve the problem by asking attorneys on a case-by-case basis to accept these cases. The result has been unintended coercion

on the attorneys who receive these calls.

**WANTED:**  
**Lawyers who**  
**would**  
**benefit from**  
**experience**  
**practicing in**  
**federal court.**

**REWARD:**  
**Mentoring.**

Approximately two years ago, the Federal Bar Association stepped in to solve this dilemma for the bench and bar. Now, when a judge needs to request legal representation, he or she can call one person — the FBA liaison. Currently, that person is Crowe & Dunlevy attorney Will Hoch. Mr. Hoch then contacts prospective attorneys to find someone willing to accept the representation.

With the shrinking number of cases going to trial, the FBA is attempting to create a win-win situation by finding attorneys who will benefit from the experience. In particular,

the FBA is inviting participation by young lawyers who would gain needed experience from the representation.

At the same time, the FBA and others have collaborated to reduce the burden on the attorneys taking these cases by providing:

- mentoring,
- free legal research by law students, and
- reimbursement of legal expenses.

The FBA recognizes that relatively few attorneys practice in civil rights litigation. Thus, the FBA has obtained mentoring for attorneys who might like to take these cases. A seasoned civil rights attorney, Rand Eddy, has offered to mentor attorneys who accept prisoner cases from the FBA.

The law schools at the University of Oklahoma and Oklahoma City University have also stepped in to aid lawyers taking these cases. Both law schools sponsor programs for law students to provide free legal research for lawyers serving on the FBA panel. The contact person for OCU is Professor Laurie W. Jones, who is the

pro bono and public interest law coordinator. She can be reached at (405) 208-5965 or e-mail at [ljones@okcu.edu](mailto:ljones@okcu.edu). For OU, the contact person is Judith Maute, William J. Alley professor of law and president's associates presidential professor, who can be reached at (405) 325-4747 or [jmaute@ou.edu](mailto:jmaute@ou.edu).

Even the court has stepped in to ease the financial burden. Through Miscellaneous Order No. 22, the court has established a fund to provide limited reimbursement for the cost of "deposition transcripts, expert witness fees and other extraordinary expenses not reasonably included in law office overhead."

The FBA's service to the court has proven invaluable, but the legal assistance program cannot continue without the active involvement of practitioners in this district. If you are interested in serving on the FBA panel of attorneys for inmate cases, please contact Will Hoch at (405) 235-7700 or [HochW@CroweDunlevy.com](mailto:HochW@CroweDunlevy.com).

### INVESTIGATOR CAPITAL HABEAS UNIT

FEDERAL PUBLIC DEFENDER ORGANIZATION WESTERN DISTRICT OF OKLAHOMA: The Federal Public Defender Organization for the Western District of Oklahoma is accepting applications for investigators to assist attorneys representing prisoners sentenced to death. Multiple positions will be filled, subject to funding availability. **Minimum requirements:** high school diploma, or equivalent, three years' general experience and three years' experience utilizing the skills essential to this position. These positions will be stationed at the offices of the Federal Public Defender in downtown Oklahoma City. Frequent travel will be necessary. **Required qualifications:** a high level of technical competence, creativity, and dedication are required. Computer based and traditional research methods, interviewing, record review and assessment, and writing are essential. **Specialized training and experience:** death penalty mitigation development or related disciplines such as the assessment and treatment of issues related to mental health, drug and alcohol addiction, or educational and developmental deficits. **Salary and benefits:** salary commensurate with experience and demonstrated ability. Benefits include health, life, and disability insurance, thrift savings, and retirement plans subject to employee participation. Direct deposit required. **Restrictions:** Outside employment is prohibited. This is not a Civil Service position. Send a letter and a full résumé, with references and writing samples, to Federal Public Defender, 215 Dean A. McGee, Suite 109, Oklahoma City, Oklahoma 73102. No telephone calls, please. Applications are due on or before March 15, 2007. The Federal Public Defender Organization for the Western District of Oklahoma is an Equal Opportunity Employer. All qualified persons are encouraged to apply.

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## ABA/YLD REGIONAL CONFERENCE COMES TO OKLAHOMA CITY

The OBA/YLD will host the American Bar Association/Young Lawyers Division South Central Regional Conference at the Sheraton Hotel in downtown Oklahoma City April 20-22. The conference is part of the ABA's Affiliate Outreach Project (AOP), where young lawyers from surrounding states come together to exchange ideas and resources regarding their activities. Specifically, affiliate YLD leaders share their experiences with the AOP program registrants and participants, who gain valuable insight on developing, implementing and carrying out successful public and professional service programs in their own state or county bar associations. CLE is also scheduled.

In addition to the programming activities, numerous social and recreational events are available. Friday night's entertainment will be at Remington Park Race Track and Casino. The OBA/YLD has reserved a private suite with food and drinks for all attendees, among which will be several members of the OBA Board of Governors and YLD Board of Directors. Bricktown is also sure to be a popular destination.

Registration for the event is \$60, which includes all AOP and CLE programming and meetings, dinner and drinks on Friday night at Remington Park, and a luncheon on Saturday. For more information,

contact Keri Williams at (405) 385-5148 or [kwilliams@osugiving.com](mailto:kwilliams@osugiving.com).

## CHILDREN & THE LAW COMMITTEE BOOK DRIVE

By Carol King, Co-Chair, Children & the Law Committee

A few weeks ago, I met with Greg Kelly, who is an instructor at Hale High School in Tulsa, regarding our mentoring partnership. As we talked about the needs of the students in his business law and street law classes, he told me that due to budget problems, he doesn't even have enough textbooks to send home for each student. In addition, he has a limited amount of legal materials available to adequately teach elements of constitutional law. Without adequate materials, how do we expect our students to learn the basics of our legal system?

As a show of support for Oklahoma's youth, I would like to invite the Oklahoma legal community to make a monetary contribution so that the Children & Law Committee can provide these materials to Mr. Kelly's classes. In lieu of a monetary donation, you may purchase one or more of the following requested books to donate. Please contact me at

[carol.king@sbcglobal.net](mailto:carol.king@sbcglobal.net) for more information, and thank you for your willingness to help.

## Requested Items (all available from Amazon.com)

*Gideon's Trumpet*  
by Anthony Lewis

*The Death Penalty*  
by Ted Gottfried

*Brown v. Board of Education*  
by Diane Telgen

*United States v. Virginia: Virginia Military Institute Accepts Women*  
by Barbara Long

*Engle v. Vitale: Separation of Church and State*  
by Carol Haas

*Miranda v. Arizona: Rights of the Accused*  
by Gail Blasser Riley



## MARK YOUR CALENDARS!

YLD Midyear Meeting • June 21-23  
Tanglewood Resort on Lake Texoma

## New Event this Year!

On the night of Friday, June 22, the YLD is chartering a bus from Tanglewood to the Deep Ellum district in Dallas.

The bus has a full bar, plasma TVs – the works.

**Register at [www.okbar.org](http://www.okbar.org) today!**

# Calendar

## March

- 13 OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Conger (405) 521-5845
- 15 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- OBA Law Day Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Giovanni Perry (405) 601-2222
- OBA Volunteer Night at OETA;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Melissa Brown (405) 416-7017
- 18 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
- 17 OBA Title Examination Standards Committee Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 840-2470
- 21 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



- 27 OBA Day at the Capitol;** State Capitol, Oklahoma City
- 29 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
- OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: H. Terrell Monks (405) 733-8686
- 30 OBA Board of Governors Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- OBA Access to Justice Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675



## April

- 3 OBA Communications Task Force Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melissa DeLacerda (405) 624-8383
- 4 OBA Alternative Dispute Resolution Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Larry Yadon (918) 595-6607 or Barry Davis (405) 607-8757
- Oklahoma Hispanic Bar Network Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Saul Olivarez (405) 227-9700
- 10 OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Conger (405) 521-5845
- OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chip Clark (405) 232-4271

apr. cont'd

- 11 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
- OBA Awards Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Gary Clark (405) 385-5146
- 12 OBA Bench and Bar Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 13 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 16 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
- 17 Death Oral Argument, Scott James Eizember v. State – D-05-319;** 10 a.m.; Price Turpen Courtroom, University of Tulsa College of Law
- 18 OBA Clients' Security Fund Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Micheal Salem (405) 366-1234
- 19 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- 20 OBA Board of Governors Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 20-22 YLD South Central Regional Conference;** Sheraton Hotel, Oklahoma City; Contact: Keri Williams (405) 385-5148
- 27 OBF Trustees Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

## May

- 1 OBA Ask A Lawyer Day;** Oklahoma City and Tulsa; Contact: Lori Rasmussen (405) 416-7018
- 8 OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Conger (405) 521-5845
- OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Steven Dobbs (405) 235-7600
- 9 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 Bench and Bar Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 11 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 17 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280
- OBA Communications Task Force Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melissa DeLacerda (405) 624-8383
- 18 OBA Board of Governors Meeting;** Tulsa; Contact: John Morris Williams (405) 416-7000
- 28 Memorial Day** (State Holiday)



*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](http://www.oscn.net) or [www.okbar.org](http://www.okbar.org).*

**OBA/CLE and Oklahoma Trial Lawyers Association Present**  
**Nursing Home Negligence in Oklahoma: Advanced Topics for**  
**Plaintiffs and Defendants**

<b>DATES &amp; LOCATIONS:</b>	<b>Tulsa</b> April 13, 2007 Crowne Plaza Hotel 100 E. 2 <sup>nd</sup> Street	<b>Oklahoma City</b> April 20, 2007 Oklahoma Bar Center 1901 N. Lincoln Blvd.
<b>CLE CREDIT:</b>	This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6 hours of mandatory CLE credit, including 1 hour of ethics.	
<b>TUITION:</b>	\$150 for early-bird registrations with payment received at least four full business days prior to the seminar date; \$175 for registrations with payment received within four full business days of the seminar date. Register online at <a href="http://www.okbar.org/cle">www.okbar.org/cle</a> .	
<b>CANCELLATION POLICY:</b>	Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.	

**Program:**

**Program Planner/Moderator**

Mark A. Cox, Merritt and Associates, Oklahoma City

<b>8:30 a.m. Registration &amp; Continental Breakfast</b>  <b>9:00</b> <b>Proving the Pressure Ulcer Case</b> <u>Tulsa Program</u> Ted Sherwood, Ted Sherwood & Associates, Tulsa <u>Oklahoma City Program</u> Mark A. Cox	<b>12:10 p.m. Defending the Falls Case</b> <u>Tulsa Program</u> Timothy Harmon, Secrest, Hill, & Butler, A P.C., Tulsa <u>Oklahoma City Program</u> Denis Rischard, Rischard & Phipps, P.C., Oklahoma City
<b>9:50</b> <b>Break</b>	<b>1:00</b> <b>Recent Developments and Assisted Living Cases</b> <u>Tulsa Program</u> Guy Thiessen, Carr & Carr, Tulsa <u>Oklahoma City Program</u> Jo Slama, Slama Legal Group, Oklahoma City
<b>10:00</b> <b>Defending the Pressure Ulcer Case</b> <u>Tulsa Program</u> George Gibbs, Gibbs Armstrong Borochoff Mullican & Hart, P.C., Tulsa <u>Oklahoma City Program</u> Kyle Sweet, Heron, Sweet, Fox & Trout, P.C., Oklahoma City	<b>1:50</b> <b>Break</b>
<b>10:50</b> <b>Proving the Falls Case</b> <u>Tulsa Program</u> Thomas Evans, Thomas S. Evans & Associates, Ponca City <u>Oklahoma City Program</u> David Kennedy, Attorney at Law, Sherman	<b>2:00</b> <b>Ethics in Litigating Nursing Home Negligence Cases (ethics)</b> <u>Tulsa Program</u> Thomas LeBlanc, Best & Sharp, Inc., Tulsa <u>Oklahoma City Program</u> Glendell Nix, Nix & McIntyre, LLP, Oklahoma City
<b>11:40</b> <b>Networking lunch (included in registration)</b>	<b>2:50</b> <b>Adjourn</b>

**Nursing Home Negligence in Oklahoma: Advanced Topics for Plaintiffs and Defendants**

☐ **Tulsa**  
April 13, 2007

☐ **Oklahoma City**  
April 20, 2007

☐ **Materials only**  
**\$80**

Register online at [www.okbar.org/cle](http://www.okbar.org/cle)

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 or Mail  
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 Authorized Signature \_\_\_\_\_





*Attending this year's Cowboy Crisis fundraiser are (from left) David Nimmo, Judge Tom Landrith, Bob Macy, Greg Taylor, Deresa Gray Clark, Chris Ross and Bob Gray.*

### **Pontotoc County Lawyers Help Injured Marine**

Pontotoc County attorneys recently helped raise more than \$126,000 to assist several members of their community, including this year's primary beneficiary, Cody Hill, an Ada Marine severely injured during service in Iraq.

Contributing to their community has become an annual event for these

lawyers. Since 2003, the Cowboy Crisis Fund has hosted an annual fundraiser featuring actor Wilford Brimley as spokesperson. Former Oklahoma County District Attorney Bob Macy, who started his legal career in Ada, serves on the organization's executive committee. The event raises money each year for 25-30 community members who have serious medical conditions. Local attorneys support the organization with their contributions and attendance at the annual event.

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### **OBA LRE Coordinator Attends Teacher Training Overseas**

OBA Law-related Education Coordinator Jane McConnell and fourth grade teacher Jeanie Driskill of Weatherford recently traveled to High Tatras, Slovakia to attend a Foundations of Democracy Professional Development Seminar. Ms. McConnell and Ms. Driskill worked with Slovakian exchange teachers in curricular materials on the four concepts fundamental to understanding politics and government: authority, privacy, responsibility and justice. The event was sponsored through the CIVITAS teacher exchange grant with the Center for Civic Education in Calabasas, Calif. Oklahoma has been participating in this program to exchange and train teachers in civic education for five years.



*OBA helps send Oklahoma teacher Jeanie Driskill (left) to civics education training in Slovakia.*

### From the General Counsel's Office

OBA General Counsel Dan Murdock recently announced the promotion of **Janis Hubbard** to first assistant general counsel and the addition of **Janna D. Hall** as assistant general counsel. Ms. Hubbard has worked for the OBA a total of seven years in addition to serving as Criminal Court of Appeals court administrator. She is a 1992 graduate of OCU School of Law. Ms. Hall graduated from the TU College of Law in 1997, and has worked with several firms in both Oklahoma City and Tulsa, most recently with Mulinix Ogden Hall Andrews & Ludlam. She also served as an in-house attorney for E.I. DuPont de Nemours in Wilmington, Del.

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### OBA Member Reinstatement

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

Jeffery Kim Reeds  
OBA No. 10117  
P.O. Box 609  
Deale, MD 20751

### OBA Member Resignations

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

Ruth E. Anderson  
OBA No. 20586  
39300 Country Club Dr.  
Farmington Hills, MI  
48331

James A. Bagley Jr.  
OBA No. 411  
P.O. Box 3554  
Greenwood Village, CO  
80155

Charlene L. Boone  
OBA No. 17807  
P.O. Box 75525  
Oklahoma City, OK  
73147

Andrew C. Byers  
OBA No. 1399  
15 E. 55th Street  
Kansas City, MO 64113

John Farber  
OBA No. 10799  
12700 S. Air Depot  
Oklahoma City, OK  
73165

Marilyn S. Hey  
OBA No. 14219  
727 N. Leonard St.  
Girard, KS 66744

Keith D. Holcomb  
OBA No. 14371  
601 E. Walnut  
Columbia, MO 65201

Michael Francis Jones  
OBA No. 17205  
723 Main St.  
Texarkana, TX 75501

Nicki N. Neil  
OBA No. 17684  
518 N. Ozark  
Girard, KS 66743

Mary E. St. Ville  
OBA No. 8732  
W264 S7300 Kings Peak  
Court  
Waukesha, WI 53189

Barbara Womack Webb  
OBA No. 10157  
224 S. Market St.  
Benton, AR 72105

# Kudos

**O**klahoma Supreme Court Justice **Steven W. Taylor** was recently named to the OSU Alumni Hall of Fame, the highest honor bestowed by the OSU Alumni Association. It is given as recognition of outstanding professional and personal achievement bringing honor and distinction to the university. Justice Taylor received his B.A. in political science in 1971.

**F**ellers, Snider, Blankenship, Bailey & Tippens is pleased to announce the election of the following executive committee members. **Kevin R. Donelson** of Oklahoma City was re-elected as president. Other committee members are **Warren F. Bickford**, Oklahoma City; **Michael R. Ford**, Oklahoma City; **John D. Russell**, Tulsa; and **Terry L. Watt**, Tulsa. **Doneen D. Jones** of Oklahoma City will continue as secretary.

**N**icholas Bykowski, an assistant attorney general in the Florida Attorney General's Office, was recently elected president of the Florida Government Lawyers Bar Association for a one-year term beginning February 2007. Mr. Bykowski previously was elected and served as association treasurer from 2005 to 2007.

**M**argaret Lowery was recently appointed by the Illinois Supreme Court to the Commission on Character & Fitness of the Illinois Board of Admission to the Bar. Additionally, Ms. Lowery was also selected by Westlaw to author two published chapters on healthcare law for the Third Edition of the Law of Medical Practice in Illinois.

**T**he Oklahoma Association of Defense Counsel recently installed their new officers for 2007 at their annual winter meeting. Taking office are: president, **Grady H. Parker**; president-elect, **Roger N. Butler Jr.**; treasurer, **Angela D. Ailles-Bahm**; secretary, **Nathan E. Clark**; DRI state representative, **Jon Starr**; vice president, **Jeromy E. Brown**; vice president, **James K. Secrest III**; vice president, **David Russell**; board of directors, **Robert N. Naifeh Jr.**; board of directors, **Kyle N. Sweet**; board of directors, **Jennifer E. Jackson**; and board of directors, **Leslie Guajardo**.

**N**icom Park attorney **Randy L. Goodman** was inducted in February into the Oklahoma Press Association Quarter Century Club. The club honors those who have dedicated 25 or more years of professional service to the newspaper industry. Mr. Goodman began his journalism career as a newspaper carrier, and after receiving his law degree from OCU in 1985, was named vice president/general counsel of Okla-

homa County Newspapers. He continues to serve as counsel to several individual publishing entities and other companies.

**A**manda S. Proctor of Tulsa has been appointed a member of the Tax Commission of the Otoe-Missouria Tribe of Oklahoma. Ms. Proctor is a graduate of Harvard University and the TU College of Law.

**M**ark W. Maguire of Tulsa was recently inducted into the American Board of Trial Advocates, a nationwide organization of trial lawyers representing both the plaintiff and defense which is dedicated to the preservation of the constitutional right of a jury trial. Membership is by invitation only and election based on active trial participation and courtroom experience as a trial lawyer.

**M**ike Voorhees has been selected as the 2007 vice president of governmental affairs for the South Oklahoma City Chamber of Commerce. Committees under this division include the 2007 Oklahoma City Bond Issue, South 44th Street Corridor Redevelopment, Leadership Development, Business Development, Oklahoma River Development, Hispanic Initiative and Core To Shore.

**B**TI Consulting Group Inc. has announced that Tulsa attorney **Stephen W. Lake** of Gable Gotwals will join the BTI Client Service All-Star Team in 2007 for the second

year. More than 250 individual corporate counselors at Fortune 1000 and other large organizations are surveyed each year asking them to name a person that they believe delivers "ideal client service." Mr. Lake joins a group of 113 attorneys in the country who were found to have given the best client service to Fortune 1000 clients.

**L**ee M. Holmes and Tracy L. Speck Neisent of Oklahoma City and Fred T. Fox Jr. of Lawton recently attended the National Academy of Elder Law Attorneys UnProgram in Dallas. There were several sessions on Medicaid planning after the Deficit Reduction Act of 2005, veterans benefits for the disabled and life care contracts.

## On The Move

**T**he Tulsa law firm of Secrest, Hill and Butler announces that **James K. Secrest III** is now a shareholder of the firm. Mr. Secrest is a 2000 graduate of the TU College of Law.

**S**hena-Rae Dell McRae has joined the firm of Sanders & Associates PC. Ms. McRae is a 2004 graduate of the TU College of Law. She will concentrate her practice in the areas of Social Security, workers' compensation and personal injury. She previously worked for Judge Caroline E. Wall as a bailiff and for the law firm of Elias & Hjelm.

**T**imothy J. Bomhoff has been named of counsel with the Oklahoma City law firm of McAfee & Taft. Mr. Bomhoff's practice encompasses a wide range of civil litigation involving complex business cases, labor and employment, securities arbitrations, products liability, mass tort (including asbestos defense), and oil and gas and contract disputes. He earned a bachelor's degree from OSU in 1984 and went on to graduate with honors from the OU College of Law.

**H**artzog Conger Cason & Neville is pleased to announce that **Kristen O'Connor Anderson** has joined the firm as an associate. Ms. Anderson received her J.D. with honors in 2005 from the OU College of Law. She holds a B.A. in political science from Western Washington University. She will focus her practice in wealth transfer planning, trusts and estates, tax planning and tax controversies, and business transactions.

**C.** Michael Zacharias, formerly a Tulsa County special district judge, has left the bench and returned to private practice in Tulsa and Northeastern Oklahoma. He will focus his practice on family law issues, trials, appeals and mediation. He will office in the Parkland Plaza Building, 2121 S. Columbia Ave., Suite 500, Tulsa, 74114. Phone: (918) 744-0201, fax: (918) 747-8820, e-mail: cmzlaw@yahoo.com or cmz@toddalexanderlaw.com.

**J**oe Hampton, Cara Nicklas and Amy Pierce are pleased to announce the formation of the Hampton Law Firm PLLC. Mr. Hampton is a former director of

Ryan, Whaley & Coldiron PC in Oklahoma City, and will continue his practice in complex litigation and arbitration matters. Ms. Pierce is also a former director of Ryan, Whaley & Coldiron PC in Oklahoma City and will continue her practice in a variety of litigation, arbitration and employment matters. Ms. Nicklas was formerly of counsel with Ryan, Whaley & Coldiron PC in Oklahoma City and has previously served as assistant general counsel for the Oklahoma Tax Commission and Oklahoma Employment Security Commission. She will continue her practice in the areas of litigation, arbitration and employment matters. The Hampton Law Firm's office is located at One Leadership Square, Suite 1910, Oklahoma City. Phone: (405) 702-4344, [www.hamptonlawokc.com](http://www.hamptonlawokc.com).

**C**rowe & Dunlevy announced that **D. Michael McBride III** has joined the firm as a director and will chair the firm's Indian Law and Gaming Practice Group. He will be located in the firm's Tulsa office. Mr. McBride has practiced primarily in the areas of federal Indian law and gaming, as well as complex federal, civil and criminal litigation. In his new position, he will continue to represent tribes and tribal entities, as well as individuals and corporations conducting business with them. He is a 1993 graduate of the OU College of Law, and received his B.A. from Trinity University in 1989. He may be reached at 500 Kennedy Building, 321 S. Boston, Tulsa, 74103-3313, Phone: (918) 592-9824, Fax: (918) 599-6317, e-mail:



mike.mcbride@crowedunlevy.com

**T**he law firm of Haupt Brooks Vandruff Cloar announces it has moved its downtown Oklahoma City offices to its new building in Bricktown at 224 E. Main St. The firm's phone number remains (405) 231-4600.

**T**he Drummond Law Firm of Tulsa announces the addition of **Donna Marie De Simone** and **Anne M. Zimmermann** as associates. Ms. De Simone received her health law certificate and J.D. from TU. She is a former associate counsel for a health care system and also previously with Adams, Coogler, Watson of Florida. Her current practice is civil litigation, banking and insurance defense. Ms. Zimmermann received her undergraduate degree from Truman State University in 1998 and her J.D. from TU in 2005. She is also licensed Missouri and will focus her practice on civil litigation and commercial transactions.

**J**ohn A. Alberts and Carol J. Rolke have announced the formation of the Alberts and Rolke law office, located at 211 N. Robinson, Suite 304, Oklahoma City, 73102.

**T**he Tulsa law firm of Atkinson, Haskins, Nelson, Brittingham, Gladd & Carwile announces that **Matthew R. Dowdell** has joined the firm as an associate. Mr. Dowdell obtained his J.D. from the TU College of Law in May 2004. He previously served as in-house counsel for an oil and natural gas operator and producer. He is a 1998 graduate of Christian Brothers University, in Memphis, Tenn.

**T**he Edmond law firm of McAlister McAlister McKinnis & Tuggle announces **Terry Stokes** has joined the firm. His practice will continue to focus upon all aspects of general civil litigation, appellate practice, and general individual and business issues. He will lead the firm's litigation department while continuing his general civil and business practice. He was most recently the managing shareholder of Fuller Tubb Pomeroy & Stokes PC. The offices of McAlister, McAlister, McKinnis & Tuggle are located at the Kirkpatrick Bank Building, 15 E. 15th St., Edmond, and the firm's mailing address is P.O. Box 1569, Edmond, 73083-1569. Mr. Stokes may be reached at (405) 359-0701, or [tstokes@mmmtlaw.com](mailto:tstokes@mmmtlaw.com).

**C**onner & Winters LLP is pleased to announce the promotion of two attorneys to partner. **Julia Forrester-Sellers** and **Katy Day Inhofe** have been promoted to partner in the firm's Tulsa office. Ms. Forrester-Sellers focuses her practice in the litigation section of the firm, and has represented clients in all aspects of civil litigation. She earned an undergraduate degree from OU and a J.D. with honors from TU. Ms. Inhofe's practice centers around corporate, transactional and securities law, concentrating in mergers and acquisitions, private placements and securities regulation. She earned an undergraduate degree from Washington University in St. Louis and J.D. with honors from TU.

**T**he Tulsa firm Feldman, Franden, Woodard, Farris and Boudreaux announces that **Millicent L. Hughes** has

joined the firm as an associate attorney. Ms. Hughes received her J.D. from the OU College of Law in May 2006. Her practice will focus on general civil litigation, insurance defense and appellate practice. Ms. Hughes may be contacted via e-mail at [mhughes@tulsalawyer.com](mailto:mhughes@tulsalawyer.com).

**B**arrow & Grimm PC of Tulsa announces the addition of **Allison H. Loehr** to the firm. Ms. Loehr is a graduate of the TU College of Law and received her LL.M., with emphasis in health law, from Benjamin N. Cardozo School of Law in New York City. She also holds a master of health administration from the OU Health Sciences Center and a B.A. from Washington University in St. Louis.

**H**errolld Herrolld & Co. PC in Tulsa announces it has named **Christopher L. Camp** as a shareholder and director, and that **John A. Bugg**, **Andrew T. Harrison** and **Rebecca R. Hert** have been named associates.

Mr. Camp joined the firm in June 2004. His practice focuses on general civil and commercial litigation as well as labor and employment law and litigation.

Mr. Bugg joined the firm in January 2006. He previously practiced with a large Tulsa law firm and was a pastor at Woodland Acres Baptist Church in Tulsa. His practice focuses on civil and commercial litigation and labor and employment litigation, along with estate planning and commercial transactions.

Mr. Harrison joined the firm in September. His prac-

tice focuses on business transactions, commercial law and litigation, medical administrative proceedings and transactions, and general civil litigation.

Ms. Hert joined the firm in August. Her practice focuses on general civil and commercial litigation, bankruptcy law and litigation, creditor's rights and probate, trust administration and estate planning.

**L**ytel, Soule & Curlee PC announces that **Michael C. Felty** has joined the firm as a director and shareholder, and that **Tim J. Doty II** and **C. Austin Reams** have joined the firm as associates.

Mr. Felty is predominately engaged in the defense of product liability and commercial litigation. Following service in the U.S. Army, he received an undergraduate degree from Cameron University in 1981 and a law degree from the OU College of Law in 1984.

Mr. Doty practices general civil litigation, business organization and estate planning. Mr. Doty graduated from the OU College of Law in 2006. He received his B.S. in accounting from Kansas State University in 2003.

Mr. Reams practices in the areas of premises and product liability defense, commercial litigation, appellate law, and has published on issues involving the commerce clause of the United States Constitution. In addition to a J.D. from OCU School of Law in 2001, he received a master's degree in international relations from Boston University in 1995 and a bachelor's degree in

Russian language and literature from OSU in 1992.

**T**he board of directors of McAfee & Taft has elected **Richard Nix** to a three-year term as managing director of the firm. He succeeds John Hermes as only the third lawyer to hold the position in the firm's 55-year history. Mr. Nix, a graduate of the OU College of Law, joined the firm in 1985 and concentrates his practice in the area of employee benefit services. The shareholders of McAfee & Taft have elected **Elizabeth Dalton Tyrrell** as the newest member of its board of directors. Ms. Tyrrell represents clients in a wide range of business transactions, including organization, acquisitions and mergers, secured and unsecured lending, and business contracts. She earned her law degree from Southern Methodist University and her bachelor's degree in economics from the University of Virginia.

**M**cAfee & Taft has further expanded its litigation practice group with the addition of associate attorneys **Brandon P. Long** and **Dara K. Wanzer**. Mr. Long is a trial lawyer who practices in the areas of labor and employment law and complex business litigation. Prior to joining the firm, he most recently worked as a litigation associate in the Dallas office of the international law firm of Baker & McKenzie. He earned a bachelor's degree in accounting from the OCU and his J.D. from the OCU School of Law in 2004. Ms. Wanzer's state and federal litigation practice is focused on labor and employment law and general civil litigation,

particularly in the areas of energy, healthcare, insurance, products liability defense and real estate. She is a 2005 honors graduate from the OU College of Law. Prior to joining McAfee & Taft, she practiced as a litigation associate with another Oklahoma City-based civil practice law firm.

**H**iltgen & Brewer PC announces the addition of **Kim Tran**, **Julie Muslow-Leclercq** and **Lance Cook**. All three will practice in the areas of insurance defense, products liability and business litigation. Ms. Tran and Mr. Cook are both 2006 graduates of OCU School of Law. Ms. Muslow-Leclercq graduated from SMU School of Law in Dallas in 2004.

**Sidney A. Musser Jr.**, **Harry J. "Trey" Kouri III**, and **Michael E. Grant** are pleased to announce the formation of "Musser, Kouri & Grant, A Bricktown Law Firm." Mr. Musser will continue his practice in workers' compensation. Mr. Kouri will continue his practice in workers' compensation, personal injury and Social Security Disability. Mr. Grant will continue his practice in family law and personal injury. The new firm is located at 114 E. Sheridan, Suite 102, Oklahoma City, 73104. They can be reached by phone at (405) 840-4357 and (800) 239-7046, or by fax (405) 235-3425.

**Janie Simms Hipp** of Fayetteville, Ark., was recently named the national program leader for risk management education, CSREES, United States Department of Agriculture. Her new position is located within the Washington, D.C., offices of USDA CSREES,

and she is responsible for administering risk management education efforts (price, income, production, legal and human resource) throughout the United States' land grant and extension system and administering the Trade Adjustment Assistance Program for farmers and ranchers. She is a 1984 graduate of OCU School of Law and received an LL.M. in agricultural law from the University of Arkansas School of Law in 1992.

**Randy Grau** announced he has accepted a position as a deputy county commissioner for Oklahoma County, District 3. He may be contacted at Oklahoma County Commissioner's Office, District 3, 320 Robert S. Kerr, Room 621, Oklahoma City, 73102, phone: (405) 713-1503, fax: (405) 713-7134, e-mail: rgrau@oklahomacounty.org

**GableGotwals** announces that **John Henry Rule** has re-joined the firm in its Tulsa office as a shareholder. Mr. Rule's legal practice is in the areas of complex commercial litigation, and he has represented individuals and large corporations in the litigation area for over the past 25 years. He received a J.D. with honors from the University of Texas and a B.A. from OCU. In 2007, Mr. Rule received his master of divinity degree with honors from the Virginia Theological Seminary in Alexandria, Va., and was ordained a deacon and priest in the Episcopal Diocese of Oklahoma.

**Holden & Carr** is pleased to announce that **Michelle Baldwin Skeens** has been named partner. The firm will now be known

as **Holden Carr & Skeens**. Ms. Skeens is a 1996 graduate of the West Virginia University law school.

**Littler Mendelson** announces **Russell D. Chapman** has joined the Dallas office as of counsel, to practice in the areas of ERISA, employee benefits, employment and related litigation. Mr. Chapman holds an LL.M. from SMU Dedman School of Law, where he currently serves as an adjunct professor, teaching ERISA enforcement and litigation. Formerly, he was an adjunct professor of law at OCU School of Law. He received his J.D. from the TU College of Law with honors in 1978 and his B.A. from OU in 1975.

## At The Podium

**Tim Rhodes**, Oklahoma County chief deputy court clerk, was the speaker at a recent Oklahoma County Bar Association CLE program. The topic was district court administrative orders, and their origin and purpose.

**Douglas J. Shelton** and **Mike Voorhees** both of Oklahoma City, recently spoke at the Conference on Consumer Finance Law seminar "2006 Commercial Law Update." Mr. Shelton spoke on real estate disclosures and mold litigation, and Mr. Voorhees spoke on the Fair Debt Collection Practices Act and other debt collection issues.

**Amir M. Farzaneh** recently serves as a panel member at the Sooner Human Resource Society Forum speaking about immigration law and work-site enforcement. The meeting addressed legislative updates key for human resource professionals in 2007. In addition, Mr. Farzaneh recently co-authored the Immigration Law Update 2007, published by the Council on Education in Management. The chapter he wrote was titled, "Emerging Trends: Proposed Administrative and Legislative Changes That Could Affect Your Organization."

Oklahoma City attorney **Shawn J. Roberts** was recently a speaker in Tulsa at the National Business Institute's seminar "Find it Free and Fast on the Net: Strategies for Legal Research on the Web." Mr. Roberts discussed investigative research and use of government resources on the Internet.

**David B. Whitehill** of Tulsa recently spoke at a National Business Institute seminar held in Tulsa on "Exempt Organizations in Oklahoma: A Legal Guide." Mr. Whitehill's presentations were titled, "Considerations in Joint Ventures between Tax-Exempt Organizations and For-Profit Entities" and "Unrelated Business Income."

**John W. Mee Jr.** was a recent guest speaker at the monthly lunch meeting of the Society of Financial Services Professionals. Mr. Mee's topic was "2006 Estate Planning Update: Selected Issues."

**Leah Farish** of Tulsa was recently a panelist at

Boston College on the subject "Headscarfs and Holy Days: Should the Law Make Exceptions?" The event was sponsored by the college's Boisi Center for Religion and Public Life.

**M**ichael W. Brewer of Oklahoma City was a speaker at the recent Defense Research Institute Annual Product Liability Seminar in New Orleans, La. The topic of his presentation was "Proof of Defect Based on Circumstantial Evidence."

**A.** Stephen McDaniel of Tulsa spoke on "Using Disclaimers in an Uncertain Estate Planning Environment" at the March meeting of the Oklahoma City Estate Planning Council. The coun-

cil presents five nationally and locally recognized speakers each year on estate planning topics and provides a forum for the exchange of professional knowledge.

**J**ohn D. Hastie of Norman recently chaired a CLE program for the Hawaii Bar Association in Honolulu. The program is a miniature version of the American Law Institute's modern real estate transactions course. Mr. Hastie's presentation dealt with all aspects of representing developers, lenders, investors and users of commercial real estate projects.

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:

Lori Rasmussen  
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Oklahoma Bar Association  
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Fax: (405) 416-7001 or  
E-mail: [barbriefs@okbar.org](mailto:barbriefs@okbar.org)

**Articles for the April 14, 2007 issue must be received by March 26.**

## **Mediation Training**

(includes Civil, Commercial, Family and Divorce)

Presented By:

**J. Kenton Francy, Hugh Rineer**

Adjunct Professors, University of Tulsa, College of Law

**March 26, 27, 29 and 30, 2007**

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Mail to: Hugh Rineer, 1921 South Boston Ave., Tulsa, OK 74119-5221 • (918) 583-8700



**Bryce Allen Baggett** of Oklahoma City died Feb. 15. Mr. Baggett was born June 4, 1932, and raised and educated in Oklahoma. He served the Oklahoma State Legislature from 1958 to 1972. He was appointed to the National Conference of Commissioners on Uniform State Laws in 1968 and was made a life member in 1988.

**Russell Cook** of Oklahoma City died Feb. 19. He was born May 12, 1952, in Oklahoma City. He received his B.A. from OU in 1979. He received his J.D. with distinction from OCU in 1982 and was admitted to the bar that same year. Mr. Cook served both state and federal courts for almost 25 years. He was a partner at Hartzog Conger Cason & Neville.

**Jefferson Gideon Greer** of Tulsa died Feb. 12. He was born May 13, 1921, in Parsons, Kan. **After graduating high school, he joined the Navy. A Pearl Harbor survivor, Greer served as a radioman aboard the USS Helena.** He graduated from the TU School of Law in 1955. He spent 40 years as a personal injury lawyer in Tulsa. Mr. Greer served as the Oklahoma Trial Lawyers Association president, the Pearl Harbor Survivors president and editor emeritus of "The Advocate."

**Elliot Hampton Howe** of Tulsa died Jan. 21. He was born Sept. 26, 1919, in Eufaula. He graduated from Eufaula High School and attended Warner Junior College. **He joined the Navy and served in**

**the Pacific during World War II.** He graduated from the TU School of Law. He enjoyed a long career in private practice, and was a dedicated member of the Creek Nation serving as its first chief justice. He was a member of the Sons of the American Revolution, Sons of the Confederacy and The Tulsa County Bar Association.

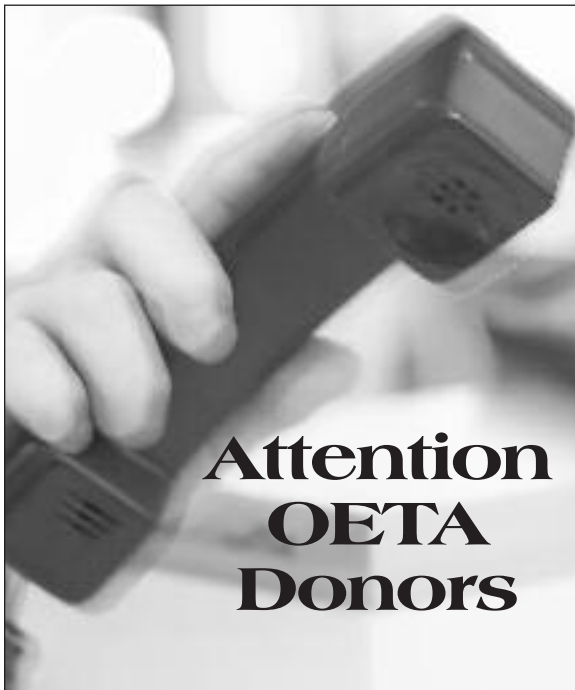
**Julie Kaye McMahon** of Tulsa died Feb. 1. She was born Nov. 14, 1961, in Fort Worth, Texas, and graduated from Ball High School in 1979. She was a 1988 graduate of Texas A&M at Tarleton and received her law degree from the TU School of Law in 1991. Ms. McMahon went on to work for the Tulsa County Public Defenders Office, representing the rights of abused and neglected children. She loved the children she represented, often keeping up with them for several years after their journey through the legal system. She was active in Habitat for Humanity. Memorial contributions can be made to Habitat Humanity of Tulsa, or your local chapter.

**James Anthony Robinson** of Tulsa died Feb. 6. He was born Jan. 19, 1929, in Bristow. He graduated high school from Cascia Hall Preparatory School. He received his undergraduate degree from OSU and attended law school at OU. **Mr. Robinson served in the U.S. Air Force.** His professional career included private practice, providing oil and gas counsel and as well as working in the banking industry. He was a rancher, car enthusiast and raised Mor-

gan horses. He was active in Friends of Catholic Education Endowment Trust, Tulsa Boys Home, St. John Health Center, Day Center for the Homeless and Catholic Charities. Memorial contributions can be made to Friends of Catholic Education Endowment Trust.

**Howard Michael Sowers** of Tulsa died Jan. 31. He was born Jan. 21, 1923, in Gage. **During World War II, he served in Europe as a Forward Observer in the 71st Infantry Division and Field Artillery. He was awarded the Silver Star. He served again in the Korean War.** He received his undergraduate and law degrees from OU. He worked for Amerada Hess Corporation for 37 years and retired as the manager of the Property Tax Department. Memorial donations can be made to the American Cancer Society or Trinity United Chapel Methodist Church.

**Clyde Stallings Jr.** of Pottsboro, Texas, died Jan. 17. He was born Sept. 12, 1928, in Kenefic. He graduated from SOSU. **He served as a naval aviator aboard the USS Yorktown, operation Deep Freeze Naval research lab, U.S. Naval Forces Fleet and Antisubmarine Warfare Group. He retired from the Navy as lieutenant commander in 1971.** He was the Bryant County district attorney for three years. He was a member of the Florida State Bar, Bryan County Bar Association and Elks Lodge. He also enjoyed gardening, fishing and spending time with his family.



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# A Brown Paper Bag

By Jerry Sokolosky

It was 1962. I was a brand new lawyer. My law degree and certificate of Supreme Court admission were still at the picture framer.

Clay Baum, 64, was arrested and charged in federal court with walking into the then City National Bank and Trust of Oklahoma City. It was alleged that he handed the teller a brown paper bag containing a half-empty bottle of Pepto Bismol and a note. The note said "Bomb – Give me your monie." (sic) It so frightened the teller that she pushed the note and paper bag back to Mr. Baum, which he retrieved and left the bank. The FBI found the bag and note in a trash can outside the bank. Mr. Baum signed a confession. I was appointed by Judge Luther Bohanan to represent him.

After arraignment I casually inquired of Judge Bohanan about federal procedure. I tried to frame my question so as to indicate that I was intimately familiar with state procedure. Judge Bohanan, always a kind and caring person, knew better and

said, "Son, if it were me, I think the first thing I'd do is go down to the county jail and talk to my client." I really hadn't thought about that because I was so concerned about what paper work I should file.

The jailer asked for my bar card.

It had not come in the mail but he called Mr. Baum down for the visit. Boldly, I asked, "Mr. Baum did you attempt to rob that bank?" "No sir," he said. "Well, why did you sign the confession?" "Because they said they would give me some dope," he responded. Aha! The lights went on and the bells rang. It was a bar exam question. Coerced confession – Motion to Suppress, which I quickly filed.

At the hearing I tried to overcome my nervousness with bravado. "Now, Mr. Baum, did you attempt to rob that bank?" I asked. "No sir." "Why did you sign a confession?" "Because they said

they would give me some dope." For some reason I thought I must continue. "Mr. Baum, have you ever seen that bank?" "No, sir." "Do you even know where that bank is located?" "No, sir." I sat down smugly, anticipating the immediate release of my

client and a stellar career in criminal law.

The assistant U.S. attorney was Jack Parr, who later served many years as an Oklahoma County district judge.

He rose and quietly asked, "Now Mr. Baum, about how far from the bank were you when you were arrested?" "Oh, about six blocks," he proudly responded. I quickly and quietly left the courtroom before Judge Bohanan could envision the concepts of "frivolous motion" and "direct contempt."

After conviction, Mr. Baum asked a favor. "Can you get me transported back to the federal prison in Springfield in time for

Thanksgiving?" Jack Parr and Judge Bohanan cooperated, and Mr. Baum had Thanksgiving dinner in Springfield. I later learned that he had spent his entire adult life in one prison or another and was either unwilling or incapable of making it on the outside.

About 15 years later I was taking a statement from an inmate in the federal prison in Seagoville, Texas. Afterwards, the deputy warden approached me saying that Mr. Baum had been transferred there, had attained senior trustee status, found out that I was there and asked to see me. He said we could use his office.

Clay was showing his age but looked chipper and was smiling broadly in his white trustee's uniform. He thanked me again for what I had done for him, and as we were leaving, he gave me what I considered to be his only worldly possessions. Three broken cookies in a brown paper bag.

*Mr. Sokolosky practices in Oklahoma City.*

