

# THE Oklahoma Bar JOURNAL

Volume 78 ♦ No. 15 ♦ May 12, 2007

## Estate Planning



### ALSO INSIDE

- Honor Your Peers with an Award Nomination
- Membership Milestones
- Ways to Have Fun Practicing Law

# Calendar of Events

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Expand Your Horizon

**May 15 – Tulsa**

**Cutting Edge Issues and Ethics of Adoption Law**

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**May 17 – Webcast**

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**May 18 – OKC**

**Oklahoma Insurance Law Update 2007**

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

**May 23 – OKC**

**Auto Accidents - Perspectives from Both Sides**

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

**May 23 – Tulsa**

**Basic Probate Procedure**

6 hrs. of MCLE credit, including 1 hr. of ethics  
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**May 24 – OKC**

**Basic Probate Procedure**

6 hrs. of MCLE credit, including 1 hr. of ethics  
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**May 24 – Tulsa**

**Auto Accidents - Perspectives from Both Sides**

6 hrs. of MCLE credit, including 1 hr. of ethics  
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Check registration times at [www.okbar.org](http://www.okbar.org)

**May**

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

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

Effective Client Communication in the 21<sup>st</sup> Century Law Office  
*by Jim Calloway*

When a Judge Should Recuse and When a Lawyer Should Ask for Recusal  
*by Judge Anne Gurin*

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

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

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

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

HIPAA Rules All Lawyers Should Know  
*by Teresa Mendez Urkett*

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

Fundamentals of a Personal Injury Claim  
*by Greg A. Ferrar*

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

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

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**THEME:**  
**ESTATE PLANNING**  
EDITOR: MARK CURNUTTE

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## Sometimes You Just Have to Do the Right Thing

By Stephen Beam

Gov. Henry recently vetoed Senate Bill 507. That was the right thing to do. Senate Bill 507 was the so-called "Tort Reform" bill. I am proud to say your Board of Governors took a historic step at its last meeting and unanimously authorized me to send a letter to Gov. Henry asking him to veto Senate Bill 507.

As a mandatory bar association, the OBA did not tread into this territory lightly. In the past, the association was hesitant to take a position on such matters as it might place the association in a difficult political position. Your Board of Governors felt certain provisions of Senate Bill 507 went beyond bad public policy and jeopardized the personal rights guaranteed by our state and U.S. constitutions. Additionally, we felt provisions of this bill were clearly unconstitutional, contrary to the proper administration of justice, infringed upon the independence of the judiciary and gave distinct advantages in the judicial system to certain powerful and well-financed parties.

There are certain issues related to tort reform on which I think we all can agree. One is frivolous lawsuits. The language regarding frivolous lawsuits in Senate Bill 507 only served to make it more difficult to stop frivolous lawsuits.

The bill capped damages, changed long-standing rules of civil procedure and even directed the Oklahoma Supreme Court to follow federal courts in interpreting the new statutes. If the bill had passed, the citizens of this state would have lost constitutional control over the jury system and the legal system as a whole.

On behalf of the Oklahoma Bar Association, I wrote to Gov. Henry urging him to exercise the power vested in him by the Oklahoma Constitution and to veto Senate Bill 507.

It is within the mission of the OBA to take positions on matters that affect the administration of justice. It is interesting that when the association takes a position on this issue its proponents claim the OBA is taking a political position, while on the other hand telling the public the bill is not political but good public policy. It cannot be both ways. If it is political, it is troubling that partisan politics should be allowed to trump the federal and state

constitutions. If it is a matter of public policy, who is better equipped to comment on this matter than the lawyers of this state. From what I was hearing from Oklahoma lawyers, the overwhelming majority of them opposed the legislation. Many of them did not even practice in areas affected by the bill. They just did not find it to be good public policy or constitutionally sound.

The judicial system must be fair and impartial for everyone.

The judicial system must be fair and impartial for everyone. We are not opposed to reform to ensure that everyone gets fair and impartial treatment in the judicial system.

However, to give one side in an adversarial system distinct advantages is not the way to correct any deficiencies that might exist. Individual jury verdicts should not be replaced with one-size-fits-all damages for injured parties. We need to make sure that regardless of political affiliation, social status or personal wealth, everyone gets their day in court before a jury of his or her peers. That is what the founding fathers provided for us. We cannot settle for less. To experiment with a lesser system to appease any special interest group is contrary to the fair administration of justice.

The easy thing to do would have been for the Board of Governors to do nothing. That was not the right thing to do. The right thing to do was to stand up for the rights of the citizens of this state, the administration of justice and the independence of the judiciary. You should be proud of your Board of Governors.



President Beam  
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# EVENTS CALENDAR

## MAY

16 **OBA Appellate Practice Section Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Matthew Free (918) 582-1234

**OBA Solo & Small Firm Conference Planning Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Roger Reneau (405) 732-6000

**OBA Law Day Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Giovanni Perry (405) 601-2222

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

18 **OBA Board of Governors Meeting**; 9:30 a.m.; Jenks; Contact: John Morris Williams (405) 416-7000

**OBA Mentoring Task Force Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jon Parsley (580) 338-8764

**OBA Lawyers Helping Lawyers Committee Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Thomas Riesen (405) 843-8444

25 **OBA Access to Justice Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kade McClure (580) 248-4675

28 **Memorial Day** (State Holiday)

30-31 **Sovereignty Symposium XX**; Skirvin Hilton Hotel, One Park Avenue, Oklahoma City

## JUNE

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

5 **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

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

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

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# Fixing Oklahoma's Insurable Interest Laws

By Gary F. Fuller and Steven P. Cole

**T**he insurable interest provisions of the Oklahoma Insurance Code<sup>1</sup> are flawed. The flaw was exposed by the *Chawla* cases consisting of the decision of the United States District Court for the Eastern District of Virginia,<sup>2</sup> and, on appeal, the decision of the United States Court of Appeals for the Fourth Circuit.<sup>3</sup> Despite the difficult task of pleasing the special interests of the insurance industry *and* trust companies *and* the trusts and estates bar, the flaw can and must be legislatively fixed.

## THE CHAWLA CASES

The *Chawla* cases involved outright deceit and large sums of money, making for good litigation. Harald Giesinger applied for a \$1 million life insurance policy on his life with Transamerica Occidental Life Insurance Company, proposing to name his friend, Vera Chawla, as owner and beneficiary. In the application, Harald lied about his medical history, including numerous maladies stemming from a fatal addiction to alcohol.

Transamerica refused to issue the policy due to Chawla lacking an insurable interest in Harald's life. The proposed owner and beneficiary were thus changed to the "Harald Giesinger Special Trust," naming Harald and Chawla as co-trustees, and the policy was issued.

The trust was irrevocable and its res consisted of Harald's residence. The trust agreement provided that during Harald's life, he retained the right to all income from the trust and the right to occupy the residence. At his death, the trust property was to be distributed solely to Chawla.

Subsequent to the issuance of the policy, the trust sought to have Transamerica increase the policy coverage to \$2.45 million. Transamerica approved a new application and an endorsement upgraded the policy's coverage on Harald's life to the increased amount.

Harald died about a year following the increase in coverage. On Harald's death, Chawla, acting as trustee of the trust, filed a claim for the policy's benefits with Transamerica. After an extensive investigation, Transamerica rescinded the policy and refunded the premiums paid on the policy in the sum of about \$47,000.

Chawla, as trustee, filed suit in the district court. Construing Maryland law<sup>4</sup>, the district court granted summary judgment in Transamerica's favor finding: 1) that material misrepresentations of fact in the application invalidated the policy; and 2) the trust maintained no insurable interest in Harald's life.

On appeal, the Fourth Circuit reviewed *de novo* the district court's summary judgment. The Fourth Circuit affirmed summary judgment to Transamerica on the misrepresentation

issue and *vacated* the district court's ruling on the insurable interest issue, explaining that a ruling on the alternative issue of insurable interest was unnecessary and that "judicial restraint has particular application when a federal court is seemingly faced with a state-law issue of first impression."<sup>5</sup>

#### A FLAW EXPOSED

Notwithstanding the Fourth Circuit's decision in *Chawla*, the district court's decision exposed a flaw in Maryland's insurable interest statute. The Maryland statute prohibited a person acquiring life insurance on another individual's life *unless* the life insurance were payable to:

- 1) the individual insured,
- 2) the individual insured's personal representative; or
- 3) a person with an insurable interest in the individual insured at the time the insurance contract was made.<sup>6</sup>

In order to qualify as a payee of the policy, the trust had to be a "person" with an insurable interest in Harald. Under Maryland law, the trust was a "person." However, the trust was not related to Harald closely by blood or law and, since it held only Harald's residence, it did not have a substantial economic interest in the continuation of the life, health or bodily safety of Harald. By Maryland law, an interest that arises only by the death of an individual (e.g. the policy) is not an insurable interest.<sup>7</sup> Accordingly, the trust did *not* have an insurable interest in Harald's life.

Viewing the trust as a "person" is akin to viewing the trust as a "separate entity." An alternative approach *not* available under the Maryland statute would have been to examine the insurable interest of the trust's beneficiaries and attributing their interests to the trust. Thus, in determining whether an insurable interest exists, two approaches appear possi-



“ The district court's conclusion in *Chawla* would have been the same had Oklahoma law applied. ”

ble: 1) an entity view and/or 2) the attribution of beneficiaries view, but Maryland did not afford the latter.<sup>8</sup>

Unfortunately, Oklahoma's insurable interest law is like Maryland's, providing that no person shall procure life insurance upon the life of another individual *unless* the benefits "are payable to the individual insured or a personal representative [sic], or to a person having, at the time when the contract was made, an insurable interest in the individual insured."<sup>9</sup> Section 3604(C) of the Oklahoma Insurance Code<sup>10</sup> defines "insurable interest" as follows:

"Insurable interest" with reference to personal insurance includes only interests as follows:

1. In the case of individuals related closely by blood or by law, a substantial interest engendered by love and affection;
2. In the case of other persons, a lawful and substantial economic interest in having the life, health, or bodily safety of the individual insured continue, as distinguished from an interest which would arise only by, or would be enhanced in value by, the death, disability, or injury of the individual insured . . . .<sup>11</sup>

The district court's conclusion in *Chawla* would have been the same had Oklahoma law applied. Maryland and Oklahoma share an identical flaw. They both view a trust as a separate entity, requiring that the trust have an insurable interest, if the trust acquires life insurance on the life of an individual.

#### FIDUCIARY LIABILITY AND TAX EXPOSURE

Having exposed the flaw in the Oklahoma statute, the consequences must be considered. There is substantial exposure to fiduciaries for liability. Also, the tax exposure to the insured's

estate could be monumental.

A very common estate planning tool is an irrevocable life insurance trust, called an "ILIT" by estate planners. The tool involves an individual ("grantor") establishing an ILIT for the benefit of family members<sup>12</sup> naming a third party, often an independent, unrelated party, as trustee, for the purpose of causing the ILIT to obtain life insurance on the grantor's life.<sup>13</sup> The grantor will fund the trust with a substantial gift, the income and principal of which can be used to pay life insurance premiums, or the grantor may fund the trust with periodic cash gifts which can be used to pay insurance premiums as they become due. The death benefits of the policy are payable to the trustee of the ILIT. According to the plan, the death benefits are not subject to income tax and are not included in the grantor's estate for federal or Oklahoma estate tax purposes. One would assume there are hundreds of life insurance policies issued to ILITs created by Oklahoma residents who are the named insured under the policies.

It appears that the trustee of an ILIT may not have an insurable interest in the life of an Oklahoma grantor of the ILIT under Oklahoma law even if the trustee and the insured were related. Like the trust in *Chawla*, the ILIT would not be related closely by blood to the grantor. Also, trusts formed solely to hold insurance would not have a substantial economic interest in having the life, health or bodily safety of the individual insured continue. As in Maryland, an interest which arises only by the death of the individual insured is not an insurable interest in Oklahoma.<sup>14</sup> Following the entity view of trusts, an ILIT would almost *never* be able to satisfy the insurable interest rule.

Under Section 3604(B) of the Oklahoma Insurance Code<sup>15</sup>, if a life insurance contract is made where there is no insurable interest, "an executor or administrator . . . may maintain an action to recover [the death] benefits from the person receiving them." Accordingly, if an ILIT is created under Oklahoma law having no insurable interest in the insured and the insurance company pays a death benefit to the ILIT, then the estate of the insured would have an action against the trustee to recover the proceeds of the policy following the insured's death.

The risk of fiduciary liability is substantial. It appears that the trustee of the ILIT would have

liability exposure for purchasing a life insurance policy and paying premiums where there is no insurable interest.

The personal representative of the estate would also have personal liability exposure for not pursuing a claim to recover death benefits from an ILIT trustee where an insurable interest is lacking. The risk of the personal representative would, of course, be greatest where the beneficiaries of the ILIT and the estate are not the same.

Even if the insurance company were inclined to honor a life insurance policy owned by an ILIT, the insurance company might refuse to pay both the ILIT trustee and the insured's estate. Instead, the insurance company might prefer to interplead the death benefit and let the parties fight it out in court.

From a tax perspective, the absence of an insurable interest in the ILIT would be a train wreck. If the insurance company were made to pay a personal representative based on contract law and not the insurable interest statute, it is questionable whether the payment would be excludable from taxable income of the recipient under Code Section 101(a)(1).<sup>16</sup> Also, with the proceeds being payable to the estate instead of the ILIT trustee, the proceeds would be includable in the estate of the insured for estate tax purposes under Code Section 2042(1).<sup>17</sup>

This is a real and substantial problem. If fiduciaries, including legal counsel, have not already cautioned beneficiaries, interested parties, and clients concerning this issue, they should do so now.

## LEGITIMATE USES OF LIFE INSURANCE

There are numerous legitimate uses for life insurance in an ILIT. As discussed above, life insurance is often purchased in an ILIT for family members. Sometimes life insurance is procured in the context of a divorce to insure liquidity for the payment of alimony. With the spread of second or combined families, it is not uncommon to obtain life insurance on behalf of step-children and step-grandchildren. Some obtain life insurance to care for unique needs or to provide for individuals sharing a special relationship to the insured, including maids, long time care-takers or friends.

Legitimate uses of life insurance by ILITs should be protected. Fiduciary liability and tax



consequences of the ownership of the life insurance should be certain.

### PERFECT STORM

The *Chawla* decisions were rendered about the same time that the life insurance industry began to react to a relatively new development known as investor-owned life insurance ("IOLI"). IOLI transactions vary but are typically structured as an arrangement where a lender loans the insured money to buy insurance for two years. If the insured dies within the two-year period, the bulk of the policy proceeds are paid to the named beneficiary after a portion is used to repay the loan. On the other hand, if the insured survives the two year period, the insured can: 1) keep the policy (subject to the loan) and start paying interest and future premium payments, 2) transfer the policy to the lender to satisfy the loan, or 3) sell the policy to an investor group for a sizeable profit over the loan amount. Unless the insured keeps the policy, a third party ends up owning the policy on the life of the insured and could stand to profit on the insured's death.<sup>18</sup> The life insurance industry has opposed IOLI resulting from these arrangements on the grounds that it threatens the tax-favored status of life insurance and that it represents an arbitrage between an annuity and life insurance.<sup>19</sup> According to a recent article in *The New York Times*, however, "insurers are worried because they count on many customers canceling their policies before they die. . . ."<sup>20</sup> If investor groups purchase life insurance

“ The life insurance industry has moved aggressively to ban IOLI. ”

policies and hold the policies until the insured's death, the insurance business becomes much less profitable.<sup>21</sup>

The life insurance industry has moved aggressively to ban IOLI. According to a June 15, 2004, newsletter by the National Association of Insurance and Financial Advisors:

The proponents of IOLI proposals have invested significant resources to promote this legislation. In response, state associations, their members, NAIFA, AALU and the ACLI have made extensive efforts to defeat these proposals as they arise in the various states. For the most part, our efforts have been successful, as legislative sessions ended in Alabama, Florida, Maryland, Oklahoma and South Carolina without the enactment of IOLI legislation. Legislation was enacted and signed into law in Tennessee despite the efforts of Tennessee AIFA and its members, and proposals are still pending in New York, Louisiana, and North Carolina.<sup>22</sup>

The IOLI ban is at odds with a growing market for purchasing life insurance from seniors, an outgrowth of the viatical industry.<sup>23</sup> Citing real life examples of seniors selling their life insurance policies to buy medicine, pay bills, and pay for retirement, *The New York Times* says:

[M]any advocates for the elderly and industry insiders worry that seniors will lose their legitimate ability to sell life insurance policies they have held for years.<sup>24</sup>

In a surprising twist, it is in the interests of the life insurance industry to narrow, restrict and confine "insurable interest." In their zeal to oppose IOLI, however, the life insurance industry has thwarted efforts to remedy the flaw exposed by the *Chawla* cases.<sup>25</sup> Accordingly, tension exists among the special interests of the life insurance industry opposing IOLI, the

interests of the emerging life settlement market, the needs of the insureds, and the desires of the trust companies and the trusts and the estates bar to protect the legitimate and historic uses of life insurance.

The IOLI situation and fixing the flaw exposed by *Chawla*, however, are separate and distinct issues. It is wrong and unacceptable to hold a statutory fix to *Chawla* hostage to solving the IOLI fight. It exposes fiduciaries and insureds alike to unnecessary and significant risk.

## PROPOSED SOLUTION

The flaw in Oklahoma's insurable interest statute must be legislatively fixed. Due to the numerous assumed existing ILITs in Oklahoma, any legislation should be "clarifying" legislation and have a retroactive effect.

In the corporate context, Oklahoma based the Oklahoma General Corporation act upon Delaware law.<sup>26</sup> Delaware law is often used as a model for legislation due to the language having been adopted and interpreted there first.

During the 2006 Oklahoma legislative session, House Bill 2905 sought to fix the Oklahoma Insurance Code by borrowing from Delaware law. Section 3604(C), defining insurable interest, would have been expanded with the addition of the following clarifying language:

4. The trustee of a trust whenever established by an individual has an insurable interest in the life of the individual and the same insurable interest in the life of any other individual as does any person who is treated as the owner of the trust for federal income tax purposes;
5. The trustee of a trust whenever established has the same insurable interest in the life of any individual as does any person entitled to receive any portion of the proceeds of insurance on the life of the individual that are allocable to the person's interest in the trust;
6. If multiple beneficiaries of a trust whenever established have an insurable interest in the life of the same individual, then the trustee of the trust has the same aggregate insurable interest in the life of the individual as the beneficiaries with respect to any portion of the proceeds of

insurance on the life of the individual that are allocable in the aggregate to the beneficiaries' interest in the trust; and<sup>27</sup>

House Bill 2905 was drafted to take a neutral stand on the IOLI fight but to resolve insurable interest as it involves the historic use of ILITs in Oklahoma. The proposed addition to Section 3604(C) would have incorporated both the "entity" view and the "attribution of beneficiaries" view to analyzing the insurable interest of a trust. It was deliberately broad enough to encompass the legitimate and historic uses of life insurance.

House Bill 2905 was vigorously opposed by the life insurance industry and it was defeated. Admittedly, the proposed clarifying language based on Delaware law was strained and difficult to understand.

A more suitable solution is to adopt the approach used under Virginia law. Section 3604(C) would be clarified as follows:

4. A trustee of a trust, whenever established, shall be deemed to have an insurable interest in (i) the individual insured who established the trust, (ii) each individual in whose life the owner of the trust for federal income tax purposes has an insurable interest, and (iii) each individual in whose life a beneficiary of the trust has an insurable interest; and<sup>28</sup>

This approach based on Virginia law is straightforward. It is also consistent with the historic use and current practice of the trust companies and the trusts and estates bar in using ILITs. It does not attempt to solve or address the IOLI. As previously expressed, the IOLI fight should not be injected into the need to fix the Oklahoma insurable interest law based on the flaw exposed by *Chawla*.

## CONCLUSION

The *Chawla* cases exposed a flaw in Oklahoma's insurable interest laws. The flaw creates liability exposure to fiduciaries and a monumental tax exposure to estates of insureds. A reasonable legislative solution is to promptly adopt clarifying language based on the Virginia law.

1. Title 36 of the Oklahoma Statutes (West 2006).

2. *Chawla v. Transamerica Occidental Life Ins. Co.*, No. CIV.A. 03-CV-1215, 2005 WL 405405 (E.D.Va. Feb.3, 2005).

3. *Chawla v. Transamerica Occidental Life Ins. Co.*, 440 F.3d 639 (4th Cir. 2006).

4. Due to the delivery of the policy and payment of the first premium in Maryland, Maryland law applied.

5. *Chawla*, 440 F.3d at 648.

6. Md. Code Ann., Ins. §12-201 (a)(2) (West 2006).

7. Md. Code Ann., Ins. §12-201(b)(3) (West 2006).

8. See Steve Leimberg's Estate Planning Newsletter No. 941 (March 9, 2006) at <http://www.leimbergservices.com>. See also Mary Ann Mancini, "The Chawla Case, Insurance Trusts and the Insurable Interest Rule: 'Houston, We Have a Problem,'" 31 *ACTEC Journal* 125 (2005).

9. 36 O.S. §3604(A.1).

10. 36 O.S. §3604.

11. 36 O.S. §3604(C).

12. Such as a wife, children, grandchildren, etc.

13. By design, the life insurance is applied for and acquired by the ILIT from the outset. If an insured acquires a life insurance policy on his life and transfers the policy to an ILIT and dies within three years of the transfer, the proceeds are included in the gross estate of the insured under Code Section 2035(a) (26 USC §2035(a)). See Donald O. Jansen, "Giving Birth to, Caring for, and Feeding the Irrevocable Life Insurance Trust," 41 *Real Property, Probate and Trust Journal* 571, 614-618 (Fall 2006).

14. 36 O.S. § 3604(C)(2).

15. 36 O.S. § 3604(B).

16. 26 USC § 101(a)(1).

17. 26 USC § 2042(1).

18. Charles Duhigg, "Late in Life, Finding a Bonanza in Life Insurance," *The New York Times* (Dec. 17, 2006), and Rachael Emma Silverman, "Life Insurance as an Investment Draws Scrutiny," *The Wall Street Journal Online* at <http://online.wsj.com/home/us> (Feb. 15, 2006).

19. Steve Piontek, "It's Time to Ban IOLI," *National Underwriter* at <http://cms.nationalunderwriter.com>.

20. Duhigg, *supra*.

21. *Id.*

22. "Update: Investor-Owned Life Insurance (IOLI)" *NAIFA Frontline*, Vol. 2, No. 11 (June 15, 2004).

23. The Oklahoma Viatical Settlement Act is codified at 36 O.S. § 4041 et. seq. Viatical settlements involve the purchase of life insurance policies on terminally ill persons while life settlements (sometimes referred to as senior settlements, lifetime settlements, or high net worth transactions) relate to the purchase of policies insuring people with a life expectancy of between 2 and 12 years. See Morton P. Greenberg and John E. Mayer, CFP, "Extracting Hidden Value from Unwanted Life Insurance Policies," 28 *Estate Planning* No. 9 at 434 (Sept. 2001). Reportedly, the viatical settlement business got its start in the 1980s when investors began purchasing life insurance from terminal individuals afflicted with the HIV virus and in need of immediate cash. After the medical treatments for HIV improved and the infected individuals lived longer, the profits from viatical settlements were decimated. Some of the viatical settlement businesses that didn't fail transitioned to life settlements. See Steve Leimberg's *Estate Planning Newsletter* No. 1045 (Oct. 30, 2006) at [www.leimbergservices.com](http://www.leimbergservices.com).

24. Duhigg, *supra*.

25. During Oklahoma's 2006 legislative session, the life insurance industry vigorously opposed legislation designed to address *Chawla*, HB 2905, for fear that a IOLI loophole might inadvertently appear. Thus, clarifying language was not adopted in Oklahoma in 2006.

26. *Woolf v. Universal Fid. Life Ins. Co.*, 1992 OK CIV APP 129, 849 P.2d 1093, certiorari denied (March 24, 1993).

27. The proposed clarifying language followed subparagraph 5 of Section 2704 of Title 18 of the Delaware Code Annotated. The clarifying language would have been inserted into Section 3604(C) of Title 36 of the Oklahoma Insurance Code and the existing subparagraph C(4) would have been renumbered C(7).

28. The proposed clarifying language follows Section 38.2-301 of Title 38.2 of the Virginia Code Annotated. The clarifying language would be inserted into Section 3604(C) of Title 36 of the Oklahoma Insurance Code and the existing subparagraph C(4) would be renumbered C(5).

## ABOUT THE AUTHOR



Gary Fuller is a veteran transactional attorney and shareholder with McAfee & Taft in Oklahoma City. In addition to having lectured extensively to lawyer groups on tax planning subjects, Gary has also been an instructor at the OU College of Law. Prior to receiving his master of laws degree from Yale University, Mr. Fuller served as an attorney in the Judge Advocate General's Corps of the U.S. Air Force.



Steve Cole is a shareholder with McAfee & Taft in Oklahoma City and currently serves as the chairman of the firm's Tax and Family Wealth practice area. Mr. Cole is a frequent author and presenter on tax-related topics. His recent writing credits include: "A Picture of Trusts and Estate Law" included in "Best Practices for Structuring Trusts and Estates," Aspatore Books (2006). Steve earned his master of laws degree from New York University.

## UNITED STATES DISTRICT COURT WESTERN DISTRICT OF OKLAHOMA NOTICE OF LOCAL CIVIL RULES CHANGES

Pursuant to 28 U.S.C. § 2071(b) and Rule 83, Fed. R. Civ. P., the Court hereby gives notice and opportunity for comment on proposed changes to its Local Civil Rules. Paper copies of the proposed new rules are available at the District Court Clerk's Office; and electronic copies are available at <http://www.okwd.uscourts.gov/localrules.htm>. The proposed Local Civil Rules are scheduled to take effect on June 15, 2007. The Court invites comments from any interested person and will accept comments and suggestions through June 4, 2007. Send written comments to the Court Clerk, Attention: Local Rule Change, 200 N.W. 4th Street, Room 1210, Oklahoma City, OK 73102 or send comments electronically to [comments@okwd.uscourts.gov](mailto:comments@okwd.uscourts.gov).

# OKLAHOMA BAR FOUNDATION GRANT APPLICATIONS AVAILABLE

## OKLAHOMA BAR FOUNDATION

### 2007 GRANT APPLICATION PACKETS NOW AVAILABLE

The Oklahoma Bar Foundation (OBF) Grants and Awards Committee is accepting applications from law-related charitable organizations for 2007 grants awards. The deadline for application submission is Tuesday, July 24, 2007.

The Oklahoma Bar Foundation was founded in 1946 to accomplish the charitable purposes of lawyers from all across Oklahoma. OBF is a Section 501(c)(3) nonprofit organization and is the third oldest state bar foundation in the nation. It serves as the charitable arm of the Bar Association and all licensed lawyers in Oklahoma are members of the Foundation. OBF works silently behind the scenes for Oklahoma's children, the poor and our most vulnerable citizens. OBF is financially able to fulfill its mission of advancing education, citizenship and justice for all through the generous support of attorneys by charitable donations and participation in OBF programs such as the Fellows and IOLTA.

Applications are accepted for programs and projects which:

- 1) Provide delivery of legal services to the poor and elderly;
- 2) Promote quality legal education;
- 3) Improve the administration of justice and promote such other programs for the benefit of the public as are specifically approved by the Oklahoma Bar Foundation for exclusively public purposes.

Grants totaling \$464,790 were approved during 2006 by the Oklahoma Bar Foundation Board of Trustees to:

- ◆ **Provide delivery of civil legal aid services to the poor and elderly throughout Oklahoma** and to improve the **administration of justice**. Grants totaling \$280,000 were awarded to Legal Aid Services of Oklahoma, Inc. and the Oklahoma Indian Legal Services Low Income Taxpayer Clinic, and \$73,900 was awarded for legal aid and advocacy services for children, the elderly and victims of violence to Tulsa Lawyers For Children Inc., the Oklahoma Indian Legal Services Inc. Domestic Violence Division, Oklahoma CASA Association for Children, Oklahoma CAAVA Association for Vulnerable Adults, and SANE of Southwest Oklahoma.
- ◆ **Fund educational** programs in the total amount of \$81,500. Awards were made to the OBA Law-Related Education Teacher's Summer Workshop, benefiting school children in grades K through 12; the OBA Young Lawyers Division High School Mock Trial Program; the statewide YMCA Oklahoma Youth & Government Program; the Mayes County and surrounding areas Youth Court; the special touring exhibit of the Oklahoma City Memorial Museum on Lincoln and the Constitution; and the Senior Law Resource Center, Inc. In addition, the Foundation awarded \$29,390 in scholarships.

Grant Applications should be postmarked or delivered no later than **Tuesday, July 24, 2007** to receive consideration. Applications will be accepted early and early application is encouraged. Packets may be downloaded from the web page at [www.okbar.org/obf](http://www.okbar.org/obf) or applications may be requested by writing or calling: Oklahoma Bar Foundation, P O Box 53036, Oklahoma City OK 73152-3036, (405) 416-7070



# Asset Protection Planning

*By Hal Wm. Ellis and LeAnn P. Drummond*

**T**he purpose of this article is to provide a framework for introducing a client to basic asset protection concepts by providing an overview of Oklahoma statutes exempting assets for execution. During the last several years, many lawyers have experienced new and existing clients requesting an appointment to discuss either the general subject of asset protection or a specific technique associated with asset protection planning. After conducting several meetings with clients, without having any knowledge of the client's level of understanding of basic concepts of law, it has become apparent to the authors that acquainting the client with certain general concepts of Oklahoma law can facilitate the planning process.

When a client requests an appointment to discuss asset protection (or to employ some technique the client has heard about), the lawyer can use this opportunity to educate the client to explore his or her current estate plan or lack thereof. This will enable the lawyer to put asset protection planning in the context of estate planning.

This article is a basic overview of fundamental concepts of Oklahoma law to be conveyed to the client during the initial portion of the conference. References will be made to advanced materials for lawyers needing more sophisticated information covering advanced techniques.

## **HOMESTEAD**

Oklahoma, like most U.S. jurisdictions, has protective legislation for the homestead. 31 O.S. §1 exempts the home of persons residing in Oklahoma from attachment or execution

and "...every other species of forced sale for the payment of debts..." The home must be the principal residence. Oklahoma, by statute, principally limits the homestead by area. A homestead outside of a city or town is limited to 160 acres. The acreage need not be contiguous.<sup>1</sup> For homes used as the principal residence within any city or town the exemption is limited to one acre.<sup>2</sup> If the residence is used as a residence and as a business, at least 75 percent of the square footage must be used as the principal residence to qualify for the exemption. When more than 25 percent of the square footage of the residence is used for business purposes, the homestead exemption amount is limited to \$5,000. The client should be informed that homestead exemption will not apply to purchase money mortgages, taxes, other legal assessments for labor and material used for improvements on the principal residence.<sup>3</sup>

## RETIREMENT PLANS

By statute, Oklahoma exempts retirement plans.<sup>4</sup> The exemption is broad. It includes:

...defined contribution plans and defined benefit plans...individual retirement plans, individual retirement annuities, simplified employee plans, Keogh plans, IRC Section 403(a) annuity plans, IRC Section 403(b) annuities, Roth individual retirement accounts...education individual retirement accounts...and eligible state deferred compensations plans governed under IRC Section 457.

The statute makes it clear that the listing of the exemption plans is by way of example not limitation. Although contained in a separate section of 31 O.S. §1 (2001), Oklahoma college savings plans are also exempt.<sup>5</sup>

## INSURANCE AND ANNUITIES

Another group of assets often held by a large number of clients is insurance products. Policy proceeds and cash values, including any “plan or program of annuities” are exempt by statute 36 O.S. §3631.1 (2001). In regard to the exemption for annuities which are exempt under 31 O.S. §1.A.20 and 36 O.S. §3631.1, the purpose for creation of the annuity is important. Annuities created for retirement under the plans exempt by Title 31 are clearly exempt. Annuities arising under tort claims are not generally exempt.<sup>6</sup> The first \$50,000 of claim for personal bodily injury is exempt, not the entire annuity arising from a personal injury claim, e.g. *State of Oklahoma ex rel. The University Hospitals v. Annesley*.<sup>7</sup>

When discussing this area of exemption, the lawyer should be clear that he or she is not recommending an investment in insurance products. A client is often times well advised to consult an independent financial advisor to evaluate the need for insurance and to decide whether the insurance products are a wise and prudent investment given the client’s portfolio.

## UTILIZATION OF LIMITED LIABILITY COMPANIES OR LIMITED PARTNERSHIPS

Often the client or prospective client has a general knowledge of limited liability companies (LLC). For ease of reference, limited liability companies will be discussed, however, the same concepts apply to limited partnerships as

well. Often, a client owns an interest in an LLC but does not have knowledge of how it fits into an estate plan, a benefit of which is asset protection planning. Clients are generally aware that limited liability companies, like corporations, offer limited liability protection under state law. A more sophisticated client may be aware that an LLC is a passthrough entity for income tax purposes. In many cases, however, the client may not remember the details and/or analysis of the discussion with the lawyer, accountant or other advisor who recommended the LLC, LP or sub-chapter S corporation.

From an asset protection perspective, the key element of an LLC is what a creditor receives in the event the creditor acquires a judgment against the owner of the interest in the LLC. A judgment creditor against a limited partner has, historically by statute, been entitled to a charging order.<sup>8</sup> A charging order gives the judgment creditor only the rights of an assignee of the interest. It is an exclusive remedy. The judgment creditor does not become a member, does not have a right to review the books and records, and does not have the right to obtain business and tax information available to members.

An assignee does not have a right to participate in the management of the entity. The charging order allows the assignee to receive distributions to which the member would have been entitled. Where the member’s interest is in a closely held LLC, the result is that even at the end of successful litigation, the judgment creditor with a charging order may not have won much of the value because of its status as an assignee only entitled to distributions, with no ability to reach the underlying assets of the LLC.

## FAMILY WEALTH PRESERVATION TRUST ACT

At this point in the initial interview with a client, the lawyer can introduce the Oklahoma Family Wealth Preservation Trust Act found at 31 O.S. §10 (2004). Enacted in 2004 and amended in 2005, the act allows a grantor to create a trust, the assets of which are exempt from creditors up to \$1,000,000. Growth from the assets of a family wealth preservation trust is also protected. A family wealth preservation trust can be revocable or irrevocable.



A majority in value of the assets of a family wealth preservation trust must be invested in Oklahoma assets. Oklahoma assets are a defined term in 31 O.S. §11.2 (2004). Generally, the Oklahoma assets must consist of interests in Oklahoma-based companies or assets such as real property (including mineral interests located in Oklahoma).

Permissible beneficiaries of the trust under the act include the spouse, children over 18 (or issue) or a non-profit corporation. The grantor is not a qualified beneficiary as defined by this act.

According to the act, no court has authority to require a person holding a power of revocation to exercise the power. The act specifically references §541(c)(2) of the United States Bankruptcy Code or successor provisions. This section of the Family Wealth Preservation Trust Act attempts to insulate the act from bankruptcy code provisions. The act requires a trustee or co-trustee be an "Oklahoma-based bank that maintains a trust department" or an "Oklahoma-based trust company." The Oklahoma Family Wealth Preservation Trust Act is available by statutory authority. There are issues arising under the act. Especially troublesome are questions arising from a non-Oklahoma resident creating such a trust. The act clearly allows a non-Oklahoma resident to cre-

“ A majority in value of the assets of a family wealth preservation trust must be invested in Oklahoma assets. ”

ate such a trust, however, can Oklahoma exemptions benefit a non-resident where the state of residence has no such protection?

The Oklahoma resident with clearly based Oklahoma assets such as real property or LLC interest with situs in Oklahoma may be a good candidate to evaluate the use of a Family Wealth Preservation Trust Act. Is the grantor willing to benefit others instead of himself or herself? Is the grantor willing to use and pay a corporate fiduciary? Is the grantor willing to expend monies to establish a trust that has not been "tested" in litigation, especially in bankruptcy court? These are all issues that must be considered.

#### FRAUDULENT TRANSFER

In the introductory interview, the client or prospective client should be informed of the Uniform Fraudulent Transfer Act. Oklahoma's Fraudulent Transfer Act is found at 24 O.S. §112 (2001). The client does not need, at least at the outset, a detailed analysis of fraudulent transfers. Rather, the client should be made aware of the general existence of the Fraudulent Transfer Act. The lawyer will need to determine that the client is solvent. A reserve should be available after transfers that is sufficient to protect current creditors.

The Oklahoma Fraudulent Transfer Act under §121 provides for a four-year period wherein a cause of action must be brought or it is extinguished. The claimant has one year to bring an action if the alleged fraudulent transfer is discovered under the four-year limitation period. It is helpful to remember that transfers for "reasonably equivalent value" are exempt from the Oklahoma Fraudulent Transfer Act.<sup>9</sup>

#### CONCLUSION

Once the lawyer has informed the client of the basics of exemptions allowed under Okla-

homa law, the lawyer can determine the direction of further planning. The client can estimate the value of the residence and the amount of any existing mortgages. Next, the lawyer can discuss the amount of assets held in retirement plans and whether the client is maximizing deferral under qualified plans or retirement plans. Often clients are unaware of the cash value of existing insurance plans and that such amounts are exempt. At this point the client and lawyer will have an appreciation of directly protected assets.

Many clients will have exposure to limited liability companies, limited partnerships and corporations. Such clients many not have considered the asset protection benefits of LLCs. The lawyer can briefly put in context the traditional estate planning benefits and risks of transferring minority interests of an entity to the spouse or family members via the unlimited marital deduction for transfers to spouses and using annual gift tax exemptions (currently \$12,000 per year per donee) or the lifetime \$1,000,000 gift tax exemption for transfers to children.

After viewing the exemptions for a client's residence, retirement plans, insurance and assets shielded in LLCs, the lawyer and client can decide if more advanced asset protection is warranted. The usual concepts will come into play for advanced techniques that are present in more advanced estate planning. Giving up control, complexity of resulting ownership arrangement, cost and difficulty of compliance with transfer taxes (gift and estate) and minimization of such taxes are all issues that may need to be addressed. Now the client can better balance the benefit of irrevocable trusts and jurisdiction or situs selection, *i.e.* states with laws designed to attract trust business, *e.g.* Alaska, Oklahoma, Nevada, Rhode Island, Delaware, Missouri, Colorado, Utah or offshore jurisdictions, *e.g.* Cook Islands, Cayman Islands, Bermuda, etc.

The client with a traditional estate plan involving trusts, durable powers of attorney, advance directives for health care, pour-over wills, LLCs for non residential property, business assets or operating businesses may find they have engaged in asset protection planning without knowing it. An overall evaluation of the client's current asset and liability composition, likelihood of future but unknown problems, income and estate tax sta-

tus and the client's risk tolerance and tolerance for complication will be assisted if the client understands the basics. The approach recommended in this brief article is more likely to result in a positive outcome for the client when contrasted to the lawyer trying to react to the client's driven desire for the latest "hot" technique. For more thorough and advanced treatment of the subject of asset protection, the reader is referred to Rose and Rothschild, 810-2nd Tax Management, *Asset Protection Planning* (810-2nd Tax Management has an extensive bibliography beginning at p. C-1) and Osborne and Terrill, *Fundamentals of Asset Protection Planning*, 31 ACTEC Journal 319 (2006).

1. 31 O.S. §2.A. (2001).
2. 31 O.S. §2.C. (2001).
3. 31 O.S. §5 (2001).
4. 31 O.S. §1.A.20 (2001).
5. 31 O.S. §24.
6. *In re Cella*, Bkrtcy, W.D. Okla. 1991, 128 B.R. 574.
7. 1999 OK CIV APP 30, 976 P.2d 1109 (1999).
8. See Rosen and Rothschild, 810-2nd Tax Management, *Asset Protection Planning*, p. A-37 for discussion and citations covering the background of charging orders.
9. 24 O.S. §116 (2001).

#### ABOUT THE AUTHOR



Hal Wm. Ellis is in the firm of Ellis & Drummond in Stillwater. He practices in the areas of tax-deferred exchanges, business organizations, tax-exempt organizations, trusts and probate, estate and tax planning. He received his J.D. from OU in 1974. He is a fellow of the American College of Trust and Estate Counsel where he served as the state chair of Oklahoma. He is an American Bar Foundation fellow, and OBF trustee and past president.



LeAnn P. Drummond practices in the areas of business organizations, tax-exempt organizations, trusts and probate, estate and tax planning, and tax-deferred exchanges. She received her B.S. from OSU (accounting) with honors and her J.D. from OU, Order of the Coif. She is a former staff attorney for the IRS District Office, Oklahoma City, and special assistant in the U.S. Attorney's Office Western District. She is chair-elect of the OBA Estate Planning, Probate and Trust Section.

# Patrick A. Williams Criminal Defense Institute

**Date:** June 28-29, 2007

**Location:** Oklahoma City Marriott

**MCLE:** OK - 12 hours, includes 1 hour of ethics; TX - 10 hours, includes 1 hour of ethics (*pending approval*)

**Registration Fee:** \$155 (Deadline June 13)

\$185 (after June 13 or at the door) contingent upon seating availability

## Thursday, June 28

7:30 a.m. Registration and Continental Breakfast  
8:30 a.m. Opening Remarks  
8:45 a.m. **Legislative Update**  
Craig Sutter, Norman  
9:15 a.m. **Court of Criminal Appeals Update**  
James Hankins, OKC  
9:45 a.m. **Crime Scene Reconstruction and Analysis**  
Laura Schile, Norman  
10:25 a.m. Break  
10:40 a.m. **Jury Selection**  
Robert Hirschhorn, TX  
Noon Lunch (on your own)  
1:20 p.m. **Forensic Notions on Motions: Daubert and Kumho**  
Laura Schile and Jim Drummond, Norman  
2:20 p.m. **When it is Necessary to Hire a Forensic Pathologist**  
Dr. Joye Carter, VA  
3:10 p.m. Break  
3:25 p.m. **Presentation of the Patrick A. Williams Indigent Defender Award**  
3:40 p.m. **The Benefits of Having a Second Autopsy Performed**  
Dr. Joye Carter, VA

4:30 p.m. **Ethics: a View from the Court of Criminal Appeals**  
The Honorable Arlene Johnson  
5:30 p.m. Oklahoma Criminal Defense Lawyers Association Reception

## Friday, June 29

7:30 a.m. Continental Breakfast  
8:30 a.m. **Multi-County Grand Jury**  
David Ogle, OKC  
9:25 a.m. **Eyewitness Identification**  
David Feige, NY  
10:25 a.m. Break  
10:40 a.m. **Low-cost, High Impact Demonstrative Evidence**  
David Feige, NY  
11:40 a.m. **Supreme Court Update**  
Steve Gruebel, Tulsa  
12:25 p.m. Wrap Up & Questions  
Jim Bednar, Norman  
Bob Ravitz, OKC  
Pete Silva, Tulsa  
12:45 p.m. Adjourn

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# Advance Planning for End-of-Life Care in Oklahoma

By *W. Thomas Coffman*

**T**he landmark cases that have been the impetus for advance planning for end-of-life care, and continue to be so, are:

- The 1976 case of Karen Ann Quinlan, whose parents had to go to court to have their daughter removed from an artificial respirator;
- The 1990 case of Nancy Cruzan, injured in an automobile accident, whose family fought for three years to have her feeding tube removed; and
- The 2005 case of Terri Shiavo, who lived in a permanent vegetative state for 15 years before courts agreed to allow her to die.

## WHY ADVANCE PLANNING

With the advancement in medical technology, life-sustaining treatments are available that could maintain many of us far longer than what we individually consider meaningful life. Meaningful life is defined by one's own values and beliefs. Autonomy, usually through informed consent or refusal, is an established principle of the law and ethics. It allows a competent adult to accept or reject any offered health care treatment. The problem is that when the time comes to make these decisions, many of us will be unable to make decisions; hence, the need for advance planning.

## HOW TO IMPLEMENT ADVANCE PLANNING

In Oklahoma, there are four approaches to advance planning that are authorized under specific statutes governing their use. They are:

- 1) Advance directive for health care;
- 2) Durable power of attorney for health care;
- 3) Do-not-resuscitate consent; and
- 4) Guardianship of the person.

These four approaches are used to address individual health care decisions and should not be confused with documents used to direct management of financial interests such as:

- 1) Last will and testament (effective upon death);
- 2) Power of attorney or durable power of attorney (effective during life);
- 3) Living trust (effective upon execution and after death); and
- 4) Guardian of the estate (effective during life).

## OKLAHOMA'S ADVANCE DIRECTIVE FOR HEALTH CARE PRIOR TO MAY 17, 2006

In 1991, our legislature enacted the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act.<sup>1</sup> In this law, the legislature established a statutory form for Oklahoma's Advance Directive for Health Care. It includes two types of directives: a living will and a health care proxy. The individual executing an advance directive for health care, also known as the

## IMPORTANT DEFINITIONS WHEN CONSIDERING ADVANCE PLANNING

**Advance Directive:** A general term describing a variety of legal instructions persons can sign ahead of time to express their wishes about future medical treatment. In Oklahoma, advance directives can include a living will and a health care proxy (combined in the Oklahoma Advance Directive for Health Care), a durable power of attorney for health care and a do-not-resuscitate (DNR) consent.

**Airway Intubation:** Insertion of a tube through the airway to get oxygen into the patient's lungs.

**Cardiac Arrest:** Absence of an effective heartbeat.

**Cardiopulmonary Resuscitation (CPR):** Efforts to restore breathing and heartbeat to a patient in cardiac or respiratory arrest. Attempted cardiopulmonary resuscitation (CPR) is the use of life-saving measures when the patient stops breathing. CPR can involve applying forceful pressure to the chest and mouth-to-mouth resuscitation to someone who is experiencing a cardiac or respiratory arrest. CPR may also include airway intubation, mechanical ventilation, electric shock (defibrillation) and intravenous (IV) medications.

**Defibrillation:** Stimulation of the heart with high voltage electrical shock.

**Do-Not-Resuscitate (DNR) Consent:** A person's consent not to have CPR performed on him or her.

**Do-Not-Resuscitate (DNR) Order:** A physician's order not to perform CPR on a patient.

**End-of-Life:** In medical terms, a time when death as the natural result of illness or advanced age is expected within a limited period of time (usually six months to a year).

**End-Stage Condition:** A condition caused by injury, disease or illness which results in severe and permanent deterioration

*Cont. on pg 1288*

"declarant," can designate that the directive applies when:

- the declarant is incapacitated and no longer able to make or communicate decisions; and
- the declarant is in a terminal condition: defined as an incurable and irreversible condition that even with administration of life-sustaining treatment will result in the declarant's death within six months; or
- the declarant is persistently unconscious: defined as an irreversible condition in which thought and awareness of self and environment are absent.

The advance directive may not be followed until the attending physician and another physician find that the declarant's condition is such that the declarant qualifies for it to apply, which means the declarant is either 1) incapable of making decisions and in a terminal condition or 2) persistently unconscious. Even if the declarant otherwise qualifies for the advance directive to apply, in order to protect an unborn fetus, an advance directive may not be followed if the declarant is pregnant.

If executed, the living will section allows the declarant 1) to have general life-sustaining treatment withheld, 2) to have artificially administered nutrition and hydration withheld, and also 3) to direct that other treatment either be withheld or administered. Artificially administered hydration and nutrition must be specifically addressed because of the Oklahoma Hydration and Nutrition for Incompetent Patients Act.<sup>2</sup> This law establishes a legal presumption that every incapacitated person has directed that tube feedings be administered. This presumption is most clearly overcome by use of an advance directive.

The health care proxy section provides for the appointment of a proxy decision maker and an alternate who have designated powers to make similar decisions as are in the living will. The advance directive also has a section where anatomical gift giving can be designated.

The declarant must also make some difficult, thought-provoking decisions. As an example, when choosing a health care proxy, the proxy must be emotionally strong-willed enough to follow the declarant's wishes. Questions to ask the declarant are: Have you informed the proxy of your wishes and are they willing to assume those responsibilities? What specific medical directives do you want to include, *i.e.*, pain med-

ication regardless of whether it might cause your early demise or restriction on use of antibiotics when administration is not life-saving but only prolongs the natural dying process?

Oklahoma's Advance Directive for Health Care must be 1) signed when the declarant is emotionally and mentally competent and 2) witnessed by two individuals who will verify that it was signed in their presence. The witnesses may not be family members or anyone who might benefit from the declarant's death. A notary is not required. Notwithstanding these execution requirements, the advance directive may be revoked, by the declarant, by simply telling an attending health care provider to revoke it, or it may be revoked by tearing it up or otherwise marking it void.

After an advance directive is signed, it is important to notify attending physicians and have copies available so it can be followed. However, a list should be kept of all who are given copies, such as to the declarant's physician, health care proxy, other family members and other places where copies may be kept, such as the glove box of the car or a travel case. This list is necessary so that if the declarant's family situation changes and a change in the advance directive is made, the declarant can easily notify all those who have a copy of the previous advance directive.

### **OKLAHOMA'S ADVANCE DIRECTIVE FOR HEALTH CARE AFTER MAY 17, 2006**

On May 17, 2006, Gov. Brad Henry signed a new Oklahoma Advance Directive Act<sup>3</sup> with the emergency clause attached which provides Oklahomans with more options for their end-of-life wishes. The new statutory form can be found at 63 O.S. §3101.4.C. and copies are available from the Oklahoma Bar Association at [www.okbar.org](http://www.okbar.org). The title of the old act was the Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act.



“ A durable power of attorney for health care can be combined with the advance directive. ”

not affect the validity of an advance directive executed before or after the issuance of this Opinion.

Advance directives made before the new law and using old forms are still valid, but clients should consider executing new advance directives because of the expanded options. See Oklahoma Attorney General Opinion 06-32 dated Sept. 11, 2006.<sup>5</sup>

For an excellent discussion of the new law, see the Health Law Advisory of August 2006 which was prepared by Doerner, Saunders, Daniel & Anderson L.L.P. and can be found at [www.dsda.com](http://www.dsda.com).

### **DURABLE POWER OF ATTORNEY FOR HEALTH CARE**

Another document which is used for advance planning is a durable power of attorney for health care.<sup>6</sup> It is important to dissect this act to understand the document. First, there are powers of attorney that are not durable. To be durable, a power of attorney must include specific language that allows its powers to extend beyond the incapacity of the individual granting the power. Most durable powers of attorney are for decisions other than health care decisions. As a result, the power must be specific to health care decisions. A durable power of attorney for health care can be combined with the advance directive. However, the instrument must be

Oklahoma Attorney General Opinion 06-07 dated April 6, 2006,<sup>4</sup> was the impetus for this change in Oklahoma law, since the official opinion of the attorney general was that:

The Oklahoma Rights of the Terminally Ill or Persistently Unconscious Act, 63 O.S. 2001 and Supp. 2005, §§ 3101.1 – 3201A, is unconstitutional to the extent it limits an individual's right to refuse artificially administered hydration and artificially administered nutrition in advance of incapacity to instances in which an individual has a terminal condition or is persistently unconscious. The conclusion reached here does

*Cont. from pg 1286*

indicated by incompetency and complete physical dependency for which, to a reasonable degree of medical certainty, treatment of the irreversible condition would be medically ineffective.

**End-Stage Dementia:** Dementia such as Alzheimer's disease involves a gradual and irreversible loss of mental abilities. In end-stage dementia, people become unable to speak, walk or move; are unable to control bowel and bladder functions; have decreased appetite and difficulty swallowing and eating; and do not recognize loved ones.

**Intravenous (IV):** Going directly into the vein.

**Mechanical Ventilation:** Use of an artificial breathing machine (respirator).

**Persistently Unconscious or Persistent Vegetative State (PVS):** PVS means an irreversible condition, as determined by the attending physician and another physician, in which thought and awareness of self and environment are absent. PVS is a deep and permanent unconsciousness. Patients may have open eyes, but they have very little brain activity and are capable only of involuntary and reflex movements. Confirming a diagnosis of PVS requires many tests that may take several months. Unlike patients with other types of coma, patients in PVS will never "wake up" and regain health. Patients in PVS cannot feel hunger, thirst or pain.

**Respiratory Arrest:** Inability to breathe on one's own.

**Terminal Condition:** An incurable and irreversible condition that even with the administration of life-sustaining treatment will, in the opinion of the attending physician and another physician, result in death within six months.

**Tube Feeding:** A method of artificially delivering liquid and nutrients for patients that cannot eat or drink by mouth. Usually, for short-term tube feeding, a lengthy tube (called a nasogastric or "NG" tube) is inserted through a patient's nose and esophagus into the stomach. For long-term feeding, a tube may be inserted directly through the skin into the stomach (called a gastric or "PEG" tube) or into the intestines (called a jejunal or "J" tube).

notarized and the execution must be witnessed by two individuals. Oklahoma law now allows a person appointed under a durable power of attorney to make decisions withholding or withdrawing life-sustaining treatment if the instrument complies with the requirements for a health care proxy under the new Oklahoma Advance Directive Act. See Oklahoma Attorney General Opinion 06-34 dated Oct. 17, 2006.<sup>7</sup>

## DO-NOT-RESUSCITATE CONSENT

A do-not-resuscitate consent (DNR consent) is also available for use in advance planning. The attractiveness of this document is its simplicity. This document directs that CPR not be administered in the event of cardiac or respiratory arrest.

Modern CPR techniques were designed to treat those who suffered a sudden, unexpected cardiac or respiratory arrest. When administered timely, CPR can restore healthy patients to normal life. CPR has gradually become the standard for all patients who arrest, often including those with terminal diseases with little chance of survival. To further complicate matters, individuals who knowingly requested and had a DNR consent in their medical record at one health care facility were resuscitated when transferred to a different health care facility. This situation stimulated the development of legislation to assure consumers of their right to have a DNR consent followed no matter where in the state it was initiated. The Oklahoma Do-Not-Resuscitate Act<sup>8</sup> sets out a statutory DNR consent form. However, this document should only be signed by the individual, or the individual's legal representative, when the individual considers himself or herself to be terminal and wants to be sure that no cardiopulmonary resuscitation is administered. Oklahoma law defines the following individuals as the only "legal representatives" who may sign the DNR consent form when the individual has not given directions and is unable to make his or her own decision: 1) a health care proxy, 2) a person appointed under a durable power of attorney for health care, 3) the guardian of the person, or 4) a parent of a minor child. Under this law, it is not permissible for the next of kin to sign to a DNR consent unless designated as one of these legal representatives. These legal representatives are to use the "known wishes" of the incapacitated person in making a DNR decision.

In addition, the DNR law allows a physician to enter a DNR consent upon:

- certifying that the patient would not want to be resuscitated after finding clear and con-

vincing evidence to that effect; or

- determining that CPR would not prevent the imminent death of the patient.

While effective upon signing, the shortcoming of a DNR consent is that it is to be followed even when it is medically appropriate to resuscitate (example of 22-year-old who signs a DNR consent and attempts suicide should not be resuscitated because of his DNR consent). A DNR consent should be signed only by persons who consider themselves near death.



## GUARDIANSHIP OF THE PERSON

Traditionally, if a patient has made no other provisions, (such as executing an advance directive for health care or durable power of attorney for health care), the mechanism for making both medical and non-medical decisions for incapacitated patients has been to appoint a legal guardian. This approach, however, has a number of disadvantages. The guardianship process is often slow and costly for the patient or family. The guardian is generally required to give periodic reports to the court regarding the condition of the patient and the accounting of monies spent on behalf of the patient. The powers of a guardian are only those prescribed by the court and generally do not include withholding or withdrawal of life-sustaining procedures unless specifically authorized by court order. One exception is that a guardian of the person can consent to the withholding or withdrawing of artificial administered hydration and nutrition if authorized to do so as health care proxy in an advance directive for health care.<sup>9</sup> Also, the guardian of the person can sign a DNR consent.<sup>10</sup>

For most adult individuals at the end of life, legal guardianship is an option of last resort for making health care decisions. Far better options to ensure that wishes are honored are for each individual, when still able to make and commu-

“ The guardianship process is often slow and costly... ”

nicate decisions, to execute an advance directive for health care *and* a durable power of attorney for health care.

## CONCLUSION

Completion of the documents outlined above is just the tip of the iceberg for end-of-life care planning. A crucial aspect of advance planning is discussion with family and significant others so that they know values and wishes in the care that should or should not be provided at the end of life. Although never easy, end-of-life care is the hardest when the family has no idea what the patient wants or does not want. Do your clients and their families a favor — encourage them to consider their own values, discuss them with their loved ones and document what they want done.

**Author’s Note:** Some of the above text was adapted for use herein from a paper prepared by Laura L. Cross J.D., R.N., Oklahoma City, and presented by Jan Slater Anderson, corporate legal counsel for St. John Medical Center, to the Tulsa Title and Probate Lawyers Association on Feb. 9, 2006.

1. 63 O.S. § 3101 *et seq.*
2. 63 O.S. § 3080.1 *et seq.*
3. 63 O.S. § 3101 *et seq.*
4. <http://tinyurl.com/2xxym3>
5. <http://tinyurl.com/2dye4q>
6. Uniform Durable Power of Attorney Act; 58 O.S. § 1071 *et seq.*
7. <http://tinyurl.com/2httwf>
8. 63 O.S. § 3131.1 *et seq.*
9. 30 O.S. § 3-119 and 63 O.S. § 3080.1 *et seq.*
10. 30 O.S. § 3-119 and 63 O.S. § 3131.1 *et seq.*

## ABOUT THE AUTHOR



W. Thomas Coffman, a shareholder with Johnson, Jones, Dornblaser, Coffman & Shorb, has been in the private practice of law in Tulsa since 1966. He is a past president of the Tulsa County Bar Association and a fellow of the American College of Trust and Estate Counsel. In addition to lecturing at numerous OBA and TCBA continuing legal education seminars, he is co-author of *Oklahoma Estate Planning, Will Drafting and Estate Administration Forms*.



# The Charitable IRA Rollover

A Few Things You Ought to Know

By Gary C. Clark

**M**any Oklahomans have taken advantage of the federal income tax law that allows them to set aside a portion of their wages into an individual retirement account (IRA) before taxes and have the account grow tax free until withdrawn. Others have rolled over their 401(k) or other retirement plans to IRAs when they retire. As a consequence, IRA accounts are the principal asset of many retired persons.

For estate planners, the conventional wisdom has been that distributions from IRAs generally make poor lifetime giving vehicles but that designating a charity as the beneficiary of the IRA account at death may be an excellent choice. As noted below, lifetime gifts made from IRA withdrawals can be expensive for the taxpayer.

Most of us have not yet had time to read the entire 393-page Pension Protection Act of 2006 (PPA)(H.R.4, Pub. Law 109-280). No doubt it is a low priority for all but a few brave souls. Although its title is no indication, a number of charitable provisions and reforms are included in the act.

For example, many of you may be upset to learn that you failed to take advantage of a charitable contribution of a stuffed exotic animal which more than covered the cost of your hunting trip to Africa before Congress decided that is not the sort of "philanthropy" it wants to encourage. Apparently, trip promoters brazenly advertised outlandish charitable deductions and caught Congress' attention. One is reminded of the adage, "pigs get fat and hogs get slaughtered."

At least Congress gave those that qualify a consolation prize — the so-called charitable IRA rollover. As lawyers, we may be called upon to

advise some of our clients (and perhaps some of our relatives) about this new incentive to philanthropy. In essence, this provision enables individual taxpayers who are at least age 70 and one-half to make up to \$100,000 in charitable donations from IRAs without recognizing the distribution as income, and without receiving a charitable deduction.

The Pension Protection Act added new Section 408(d)(8) to the Internal Revenue Code which provides that "so much of the aggregate amount of qualified charitable distributions with respect to a taxpayer made during any taxable year which does not exceed \$100,000 shall not be includible in gross income of such taxpayer for such taxable year."

## **HOW WERE CHARITABLE GIFTS FROM IRA ASSETS TREATED BEFORE THE PPA?**

Prior to the PPA, a taxpayer who wished to make a donation to the charity from assets held in an IRA would withdraw the funds and write a check to the charity. The taxpayer would report the withdrawal of funds as income and the charitable contribution as a deduction. At first blush, one might assume that the transaction is a wash. It is not quite so simple. In a number of situations the taxpayer was disadvantaged. For instance, if a taxpayer had little other

income, he or she would be caught by the 50 percent of adjusted gross income limitation on the charitable deduction (\$100,000 withdrawal less \$50,000 charitable deduction = \$50,000 taxable income). Even though the unused deductible portion could be carried forward for up to five years, the taxpayer would be forced to pay a tax in the year of the withdrawal and, if the taxpayer died, might never be able to use the entire charitable deduction. For high income taxpayers, increasing the adjusted gross income results in the phased reduction of some itemized deductions a taxpayer might otherwise have available.

### HOW ARE QUALIFIED CHARITABLE DISTRIBUTIONS FROM IRA ASSETS TREATED UNDER THE PPA?

Provided that all the requirements of the statute are met, an individual taxpayer may make a charitable gift or gifts of up to a \$100,000 in the aggregate from traditional individual retirement accounts and Roth IRAs without including the distribution as taxable income. Of course, there is no charitable deduction. Perhaps mindful of the safaris-at-taxpayers'-expense boondoggle, Congress decided to narrowly circumscribe the opportunities to use the charitable IRA rollover.

### WHAT ARE THE REQUIREMENTS TO QUALIFY FOR THE CHARITABLE IRA ROLLOVER?

1. **The taxpayer must be at least age 70 and one-half when the distribution is made.** For a number of years Conrad Teitel, with the aid of many charitable organizations, has lobbied Congress for a charitable IRA rollover provision for all persons age 59 and one-half and over. Given the mounting federal deficits, perhaps we should not be surprised that Congress decided to dip its toe in the water rather than jump all the way in.



2. **The distribution must be made from a traditional IRA or a Roth IRA.** Distributions from 401(k) plans, 403(b) plans, pension plans and other retirement plans do not qualify. However, keep in mind that the taxpayer may roll over funds from the retirement plan to an IRA and then use the charitable IRA rollover.

3. **The taxpayer's the aggregate charitable IRA rollover distributions may not exceed \$100,000 in total in any tax year.** There are no limits on the number of IRAs which may be rolled over or on the number of charitable beneficiaries which may be benefited. All of the rollovers aggregated may not exceed \$100,000 for the tax year per taxpayer. Thus, a couple could each donate up to \$100,000 provided they have the funds in their respective IRAs to do so.

4. **The distribution must be made directly from the IRA trustee to a public charity or a conduit private foundation.** The check must be *directly* from the IRA trustee to a qualifying charity. Contributions to supporting organizations and donor advised funds do not qualify. A sample letter prepared by the Planned Giving Design Center for an account owner to request the IRA trustee to make the distribution is available at [www.pgdc.com/occf/item/?itemID=368499](http://www.pgdc.com/occf/item/?itemID=368499).

5. **The taxpayer may not receive any goods or services in return for the distribution.** Although the taxpayer may use the funds to fulfill a pledge, he or she may not receive benefits. Thus, the rollover may not be used to purchase such things as benefit tickets or donor seating for athletic events.

6. **The distribution must otherwise be fully deductible.** If any portion of the distribution would not be deductible, the distribution is not eligible for exclusion from income. Thus, distributions to split-interest funds, such as a charitable remainder unitrust or charitable gift annuity, are not permitted.

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”

“...there are several groups of taxpayers who may find it advantageous to consider a charitable IRA rollover.”



7. **The taxpayer must obtain written substantiation of the distribution from the charitable donee.** As in other instances of donations, the charitable organization receiving the distribution must provide the taxpayer written substantiation of the donation. Administratively, some difficulties may arise at the charity in connecting the distribution to the taxpayer since the check will be issued and mailed by the IRA trustee. The taxpayer should inform the charity directly that a distribution from the IRA trustee has been requested so that the charity will be expecting it. A sample letter from the donor to the charity alerting it of the coming gift and a sample substantiation letter from the charity to the donor prepared by the Planned Giving Design Center are available at [www.pgdc.com/occf/item/?itemID=368499](http://www.pgdc.com/occf/item/?itemID=368499).

8. **The distribution must be made during 2006 or 2007.** A cautionary note: the critical date is not when the taxpayer requests the transfer but when the distribution is actually made by the IRA trustee. Thus, the taxpayer should make the request sufficiently early to assure the IRA trustee can process the request before year end. In one instance, a taxpayer requested the distribution several weeks before year end and the IRA trustee mailed the check before Dec. 31 but to the wrong address (using a bad zip code). When the Postal Service returned the envelope in January, the IRA trustee issued a replacement check dated in January 2007. Despite the fact the taxpayer did all that he or she could do, the IRA trustee's failure to perform appropriately deprived the taxpayer of the benefit of using the charitable IRA rollover for 2006.

President Bush has asked Congress to make the charitable IRA rollover a permanent part of the tax code. It is not clear how the new Democratic majorities in the House and Senate will respond. Charitable organizations are collecting data to provide Congress on the impact of the rollover provision. For the present you should

advise your clients that they should not count on being able to use it in future years.

#### **WHO MIGHT BENEFIT FROM USING A CHARITABLE IRA ROLLOVER?**

The simple fact is that, for a number of taxpayers, the charitable IRA rollover will have no practical effect. For example, taxpayers who have other income and wish to make only a small donation will probably see no difference in making a qualified charitable distribution from the result under the prior law. On the other hand, there are several groups of taxpayers who may find it advantageous to consider a charitable IRA rollover. Obviously, charitable intent is assumed in each case.

**Taxpayers who wish to make large gifts.** Some donors who are passionate about a cause may wish to make a gift of \$100,000 or more. Often their principal liquid assets are held in an IRA. Now they may use this asset without unwelcome side effects.

**Taxpayers who itemize deductions and have little other income.** As noted above, Section 170(b) limits charitable deductions to a maximum of 50 percent of the taxpayer's adjusted gross income. If the taxpayer has little or no other income, under the prior law he or she would likely pay an income tax on a portion of the withdrawal from the IRA to make the charitable contribution. If the requirements of the PPA are met that is no longer the case. The charitable IRA rollover allows them to donate up to \$100,000 without the potentially adverse impact of the 50 percent of the adjusted gross income limitation.

**Taxpayers who itemize deductions and are already donating 50 percent of their adjusted gross income to charity.** This group is a variation of the prior group. They may have significant other income but are already giving charities at least 50 percent of their adjusted gross income. Any further gifts would be limited by

Section 170(b) and tax would be payable unless they use the charitable IRA rollover.

**Taxpayers who are high income and will suffer a phaseout of deductions if their income is increased.** Itemized deductions for a single taxpayer or a married couple filing jointly taxpayer are reduced by 3 percent of the taxpayer's adjusted gross income in excess of \$150,500. This may not affect many taxpayers and, even then, may not have a large impact but should not be overlooked.

**Taxpayers who claim the standard deduction on their return.** Many retired taxpayers have paid off their mortgage and, with Medicare coverage, have medical expenses that do not exceed the floor of 7.5 percent of adjusted gross income to be deductible. For them, taking the standard deduction may be the most beneficial approach. Whether they wish to make charitable gifts that exceed the standard deduction or lesser gifts, they will be better off taking advantage of the charitable IRA rollover. For example, if they wish to make a gift of \$5,000 without the charitable IRA rollover, they will be required to include \$5,000 of additional income which would be only partially offset by an increased standard deduction. If they wish to make a charitable gift which would be greater than the standard deduction, the adverse effect might be even greater since they lose the benefit of the standard deduction. For example, assume a single taxpayer has ordinary income of \$30,000 (presumably used for living expenses) and wishes to make a gift of \$25,000 from an IRA. Under prior law without the gift, he or she would pay almost \$2,700 in federal income tax after the exemption and standard deduction. If the taxpayer withdraws the \$25,000 from the IRA without relying on the charitable IRA rollover, the taxpayers' income is increased by \$25,000 and is offset by a charitable deduction, but the taxpayer loses the effect of the standard deduction and pays over \$3,600 in federal income taxes. Thus, the Pension Protection Act allows this standard deduction taxpayer to make the \$25,000 gift while saving over \$900 in federal income taxes.

**Taxpayers whose Social Security benefits might be taxed as a result of receiving additional income.** The vast majority Oklahomans over age 70 and one-half receive Social Security benefits. If the total adjusted gross income (including tax-exempt interest) plus one-half the Social Security benefits a single person receives is more than \$25,000, up to 50 percent of the Social Security benefits are subject to income

taxation (for married couples the threshold is \$32,000). Up to 85 percent is taxable if the combined income is more than \$34,000 for a single taxpayer or \$44,000 for a married couple. Obviously, avoiding an addition to income that causes the taxpayer to cross the threshold is advantageous to the taxpayer.

**Taxpayers needing to take a "minimum required distribution" from their IRA even though the funds are not needed.** You may have a client who has enough income to live on and does not want to be forced to withdraw funds from his or her IRA and pay the taxes incurred. The Joint Committee on Taxation's Technical Explanation of the Pension Protection Act makes clear that qualified charitable distributions count toward the minimum required distribution even though excluded from income.

## CONCLUSION

The Pension Protection Act has enabled older taxpayers who have IRAs and wish to make charitable donations without some of the disincentives that were inherent under the prior law. Hopefully, the information in this article may assist you in advising them through the maze. If we are fortunate, Congress will either extend or make permanent the provision and give us a longer time to use our knowledge of the charitable IRA rollover. You may even have an opportunity to expand your client base, since many charities are lobbying for a lowering of the minimum age to 59 and one-half which would coincide with the leading edge of the baby boomer generation. It appears likely that Congress will watch the revenue impact on the federal budget of the new provision before taking any further action.

## ABOUT THE AUTHOR



Gary C. Clark is vice president and general counsel of the Oklahoma State University Foundation. He previously was in private law practice for more than 28 years primarily in the area of estate planning, trusts and estates, most recently as a shareholder/director in Crowe and Dunlevy's Tulsa office. Mr. Clark has served as OBA and TCBA president as well as OBA governor and Oklahoma Bar Foundation trustee.

**STATE OF OKLAHOMA, DEPARTMENT OF  
HUMAN SERVICES CHILD SUPPORT  
ENFORCEMENT ANNOUNCEMENT # 07-C055**

The Tulsa East 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 with the Tulsa-CSE II (Tulsa East) office located at 3840 S. 103rd E. Ave., Tulsa, 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. Experience in the IV-D program and in juvenile proceedings preferred. 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-C055, 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 May 14, 2007 and no later than 5:00 PM Friday May 25, 2007. THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER.

**STATE OF OKLAHOMA, DEPARTMENT OF  
HUMAN SERVICES CHILD SUPPORT  
ENFORCEMENT ANNOUNCEMENT # 07-C056**

The Tulsa 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 Tulsa County West office located at 440 S. Houston, Suite 401 Tulsa, 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-C056, 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 May 14, 2007 and no later than 5:00 PM Friday May 25, 2007. THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER.



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# Probate Avoidance with POD and TOD

By Mark W. Curnutte

Probate avoidance is often a desired goal of the client. This goal can be achieved by using various estate planning tools or techniques, including joint tenancy and revocable trusts, and by using proper beneficiary designations on life insurance, annuities and retirement accounts. One commonly employed probate avoidance device is the “payable on death” or POD account. This article reviews the Oklahoma statutes dealing with POD accounts and similar arrangements such as Totten trusts and TOD registration of securities.

## PAYABLE ON DEATH ACCOUNTS

Several statutes deal specifically with POD accounts. The practitioner must first determine whether the account has been or will be established at a bank, savings and loan, or credit union to identify the applicable statute.

### Bank Accounts

Section 901 of the Oklahoma Banking Code<sup>1</sup> applies to all forms of bank deposit accounts, including, but not limited to, transaction accounts, savings accounts, certificates of deposits, negotiable order of withdrawal (NOW) accounts and MMDA accounts.<sup>2</sup> Section 901B indicates that:

- When a deposit has been made in any bank using the terms “Payable on Death” or “POD,” the deposit shall be paid on the account owner’s death to one or more designated beneficiaries. If an individual beneficiary is not living on the date of the account owner’s death, the deceased beneficiary’s share is to be paid to the estate of the

deceased beneficiary unless the rules for designation of a contingent beneficiary have been followed (see below). Each beneficiary must be a trust, an individual or a nonprofit organization exempt from taxation pursuant to the provisions of I.R.C. § 501(c)(3). This means a for-profit entity, such as a corporation or limited liability company, and certain organizations exempt from the federal income tax under other provisions of the Internal Revenue Code, cannot be named as a POD beneficiaries of a bank account.

- A deposit account with a POD designation constitutes a contract between the account owner(s) and the bank that, upon the death of the last surviving account owner, and after payment of account proceeds to any secured party with a valid security interest in the account, the bank will hold the funds for or pay them to the named primary beneficiary or beneficiaries if living. If the named primary beneficiary is not then living, and *only one primary beneficiary* has been desig-



“...the bank will hold the funds for or pay them to the named primary beneficiary or beneficiaries if living.”

nated, the account shall instead be held for or paid to the estate of the deceased primary beneficiary unless contingent beneficiaries have been designated by the account owner as provided below.

- Each POD beneficiary designated on a deposit account shall be regarded as a primary beneficiary unless specifically designated as a contingent beneficiary.
- **If there is only one primary POD beneficiary** on the account and that beneficiary is an individual, the account owner may designate one or more contingent beneficiaries for whom the funds shall be held or to whom the funds shall be paid if the primary beneficiary is not living when the last surviving account owner dies. If there is *more than one* primary beneficiary on a deposit account, contingent beneficiaries cannot be named.
- If the only primary POD beneficiary is not living and one or more contingent beneficiaries have been designated, the funds shall be held for or paid to the contingent beneficiaries in equal shares, and shall not belong to the estate of the deceased primary beneficiary. If the only primary beneficiary is not living, and one or more contingent beneficiaries have been designated, the share that otherwise would belong to any deceased contingent beneficiary shall instead be held for or paid to the estate of that deceased contingent beneficiary.
- In order to designate multiple primary POD beneficiaries for a deposit account, the account should be styled as follows:

“(Name of Account Owner), payable on death (or POD) to (Name of Beneficiary),

(Name of Beneficiary), and (Name of Beneficiary, in equal shares.)”

- If only one primary POD beneficiary has been designated, the account owner may add the following, or words of similar meaning, in the style of the account or in the account agreement:

“If the designated POD beneficiary is deceased, then payable on the death of the account owner to (Name of Beneficiary), (Name of Beneficiary), and (Name of Beneficiary), as contingent beneficiaries, in equal share.”

- Each beneficiary is entitled to a proportionate share of the account proceeds only after the death of the last surviving account owner, and after payment of account proceeds to any secured party with a valid security interest in the account. In the event of the death of a beneficiary prior to the death of the account owner, the deceased beneficiary’s share shall go to the estate of that beneficiary *unless* one or more contingent beneficiaries have been designated as above provided. All designated *primary* POD beneficiaries shall have *equal shares*. All designated *contingent* POD beneficiaries shall have *equal shares* if the sole primary beneficiary is deceased.

### Savings and Loan Accounts

Section 381.39a of the Oklahoma Savings and Loan Code<sup>3</sup> applies to all forms of deposit accounts established at a savings and loan association or savings bank, including, but not limited to, transaction accounts, savings accounts, certificates of deposits, negotiable order of withdrawal (NOW) accounts, and money market deposit accounts (MMDA).<sup>4</sup> The statutory provisions applicable to savings

and loan POD accounts are similar to the provisions dealing with such accounts at a bank, with *one major exception*. Contingent beneficiaries may be designated only if the account is a *bank account with one primary beneficiary*. Contingent beneficiaries *cannot* be designated if the account is a *savings and loan account*. The proceeds of a savings and loan account must be paid to the beneficiary's estate if the beneficiary dies before the account owner.

Section 381.39a does not contain language like that found in the banking statute, which specifies that each beneficiary must be a trust, an individual, or a nonprofit organization exempt from taxation pursuant to I.R.C. § 501(c)(3). However, the statutory language used in section 381.39a suggests that the beneficiary of a savings and loan account must be a trust or natural person. In this sense the savings and loan provision may be more restrictive than its bank counterpart.

### Credit Union Accounts

Credit union POD accounts are governed by 6 O.S. § 2025. This section presently indicates that when shares are owned or a deposit made by a member using the terms "Payable on Death" or "Payable on the Death of" or "POD," such shares and deposit shall be payable on the member or owner's death to the named beneficiary if living and if not living, to the named beneficiary's estate. Unfortunately, section 2025 is silent with respect to the following issues:

- Can the credit union POD account have multiple or joint owners? The statutory language suggests that the account must have a single owner.
- Can the account owner designate more than one primary beneficiary on the account? The statutory language suggests that the POD account must have a single beneficiary.

It also appears that contingent beneficiaries cannot be designated on a credit union POD account because the account must be paid to the named beneficiary's estate if the beneficiary dies before the account owner.

These statutory deficiencies will be eliminated when a recent amendment to section 2025 becomes effective on January 1, 2008. Beginning on that date the provisions of section 2025 will be nearly identical to the provisions of 6 O.S. §901B, meaning that bank and credit

union POD accounts (but not savings and loan accounts) will be subject to the same rules.

### TOTTEN TRUST ACCOUNTS

Black's Law Dictionary (8th ed. 2004) defines a Totten trust as follows:

A revocable trust created by one's deposit of money, typically in a savings account, in the depositor's name as trustee for another. "Totten trust is an early form of "pay on death" account, since it creates no interest in the beneficiary unless the account remained at the depositor's death. Its name derives from the earliest decision in which the court approved the concept, even though the formalities of will execution were not satisfied: *In re Totten*, 71 N.E. 748 (N.Y. 1904). A Totten trust is commonly used to indicate a successor to the account without having to create a will, and thus it is a will substitute. — Also termed *tentative trust*; *bank-account trust*; *savings-account trust*; *savings-bank trust*; *trustee bank account*.

### Stokes Opinion

In *Matter of Estate of Stokes*, 1987 OK 119, 747 P.2d 300, the Oklahoma Supreme Court stated:

¶ 21 The case before us shares many similarities to the famous New York case of *In Re Totten* and its progeny. There, the New York court found the act of depositing money in a savings account in the name of the depositor and another, beneficial owner, was sufficient to create a trust which the beneficiary could enforce upon the death of the depositor. Since this decision, the "Totten Trust" or tentative trust, has been recognized in many jurisdictions as a valid, trust arrangement which, though revocable during the depositor's lifetime, was sufficient to pass the res of the deposit to the beneficiary upon the depositor's death, independently of the depositor's estate.

The Supreme Court observed that it had not previously ruled on whether a "Totten Trust" may be created in Oklahoma, and determined that the drafters of 6 O.S. 1981 §902 intended to allow the sort of trust described in *In Re Totten*. The court then held that a valid trust may be created by a depositor who places money on deposit in any regular savings scheme, including the purchase of a certificate of deposit,

when such deposit is made in the name of the depositor as trustee for other, designated individuals. The court concluded that the trust thus created, without more, is revocable and tentative during the life of the depositor, and vests in and is enforceable by the beneficiary upon the depositor's death. The res of such a trust passes to the beneficiary by its own terms, independently of the depositor's estate.

A Totten trust account may be established at a bank or savings and loan institution. Whether such an account may be opened at a credit union is unclear. Although *Matter of Estate of Stokes, supra*, suggests it may be possible to establish a Totten trust at a credit union, the concept has no express statutory support in Oklahoma.<sup>5</sup>

### Statutory Provisions

The provisions for creation of a Totten trust account at a bank<sup>6</sup> and savings and loan<sup>7</sup> are, as of this writing, nearly identical. The Banking Code version of the Totten trust statute, 6 O.S. § 902, indicates that:

A. Whenever any deposit shall be made in a bank by any person which is in form in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the interest thereon, may be paid to the person or persons for whom the deposit was made. A deposit held in this form shall be deemed to constitute a Totten Trust. A revocation of such trust may only be made in writing to the bank and the bank shall not suffer any liability for payment of funds pursuant to the trust unless and until it receives written notice of revocation.

B. 1. If a deposit account is opened with a bank by one or more persons expressly as a trustee for one or more other named persons and further notice of the existence and terms of a legal and valid trust is not given in writing to the bank, the bank may accept and administer the account as set forth in subsection A of this section.

Although the remaining provisions of subsection B of §902 seem to deal primarily with deposit accounts opened pursuant to a written

trust agreement or certificate of trust, a portion of subsection B that may apply to Totten trust arrangements — that is, deposits which are “in form in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank” (or savings and loan). Section 902B(3) indicates in relevant part that:

... On the death of the trustee or the survivor of two or more trustees, the bank may pay all or part of the withdrawal value of the account with interest as provided by the certificate of trust. If the trustee did not deliver a certificate of trust, the bank's right to treat the account as owned by a trustee ceases on the death of the trustee. On the death of the trustee or the survivor of two or more trustees, the bank shall, unless the certificate of trust provides otherwise, pay the withdrawal value of the account, with interest, in equal shares to the persons who survived the trustee, are named as beneficiaries in the certificate of trust, and can be located by the bank from its own records. If there is not a certificate of trust, payment of the withdrawal value and interest shall be made as provided by Title 58 of the Oklahoma Statutes.

The meaning of this statutory language, and its applicability to Totten trust accounts, is unclear. The reference to Title 58 of the Oklahoma Statutes confuses the issue even more. Does this language suggest that Totten trust funds are subject to probate in the owner *qua* trustee's estate upon death if there is no written trust agreement or certificate of trust? Or do the provisions of § 902A (or § 381.40a, subsection A) govern, such that the funds may be paid to the beneficiary or beneficiaries for whom the deposit was made upon the account owner's death? Given the widespread availability of POD accounts, perhaps Totten trust arrangements should be avoided because of these uncertainties.

### OKLAHOMA UNIFORM TOD SECURITY REGISTRATION ACT

The Oklahoma version of the Uniform TOD Security Registration Act, 71 O.S. §§901 *et seq.*, was enacted in 1994. The Oklahoma modifications to the Uniform Act<sup>8</sup> are minor in scope and clearly identified in the historical notes.

Following are some of the highlights of the Oklahoma Act:

- Section 902 contains various definitions. The term “beneficiary form” is defined as a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner. Section 905 states that a security, whether evidenced by certificate or account, is registered in *beneficiary form* when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners
- Section 903 provides that registration in beneficiary form is available only with respect to a security held in “sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common.”
- Section 906 indicates that registration in beneficiary form may be shown by the words “transfer on death” or the abbreviation “TOD,” or by the words “pay on death” or the abbreviation “POD” after the name of the registered owner and before the name of a beneficiary.
- Section 907 provides that the designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner’s death. Registration in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.
- Section 908A indicates that on death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On



“ ...or the last to die of all multiple owners...” ”

proof of death of all owners and compliance with any requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners.

- Section 908B provides that if no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.
- Section 908C states that a registration in beneficiary form is not effective, as against an estate of a deceased sole owner or the last to die of multiple owners, to transfer to a beneficiary sums needed to pay debts, taxes and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. A TOD beneficiary is liable to account to the deceased owner’s personal representative for securities so re-registered in the beneficiary’s name or their proceeds to the extent necessary to discharge such claims and charges remaining unpaid after the application of the assets of the decedent’s estate. However, a proceeding to assert this liability may not be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor dependent child of the decedent, and a proceeding may not be commenced later than two years following the death of the decedent.
- Section 909 contains provisions protecting the registering entity (i.e. broker, bank or transfer agent) from liability for re-registration or payment made before receiving written notice from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form.
- Section 910 defines a “nonprobate transfer,” as the term is used in that section, as a transfer on death of an owner whose last domicile was in Oklahoma resulting from a

registration in beneficiary form.

- Section 910C indicates that a transferee of a nonprobate transfer is subject to liability to any probate estate of the decedent for allowed claims against that estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. The liability of a nonprobate transferee may not exceed the value of nonprobate transfers received by that transferee.
- Section 910D provides that nonprobate transferees are liable for the insufficiency described in subsection C of that section in the following order of priority:
  1. A transferee designated in the decedent's will or any other governing instrument, as provided in the instrument;
  2. The trustee of a trust serving as the principal nonprobate instrument in the decedent's estate plan as shown by its designation as devisee of the decedent's residuary estate or by other facts or circumstances, to the extent of the value of the nonprobate transfer received;
  3. Other nonprobate transferees, in proportion to the values received.
- Section 910E indicates that a provision made in one instrument may direct the apportionment of the liability among the nonprobate transferees taking under that or any other governing instrument.
- Section 910F states that, upon due notice to a nonprobate transferee, the liability imposed by this section is enforceable in proceedings in this state, whether or not the transferee is located in this state.
- Section 910G provides that a proceeding under this section may not be commenced unless the personal representative of the decedent's estate has received a written demand for the proceeding from the surviving spouse or a child, to the extent that statutory allowances are affected, or a creditor. If the personal representative declines or fails to commence a proceeding after demand, a person making demand may commence the proceeding in the name of the decedent's estate, at the expense of the person making

the demand and not of the estate. A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

- Section 910H states that a proceeding under this section must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim.
- Section 910I indicates that unless a written notice asserting that a decedent's estate is insufficient to pay allowed claims and statutory allowances has been received from the decedent's personal representative, a trustee receiving a nonprobate transfer is released from liability under this section with respect to any assets distributed to the trust's beneficiaries. Each beneficiary to the extent of the distribution received becomes liable for the amount of the trustee's liability attributable to that assets received by the beneficiary.

Note that portions of section 910 appear to be inconsistent with section 908C. Under the latter section, a transferee beneficiary may be liable to the personal representative for sums needed to pay debts, taxes and expenses of administration, including statutory allowances to the surviving spouse, minor children and dependent children, if other assets of the estate are insufficient. Under section 910, transferee liability exists only for allowed claims against that estate and statutory allowances to the decedent's spouse and children to the extent the estate is insufficient to satisfy those claims and allowances. Section 910 fails to include two important items covered in section 908, namely taxes or other expenses of administration. Furthermore, section 910H provides that a proceeding under section 910 must be commenced within one year after the decedent's death, but a proceeding on behalf of a creditor whose claim was allowed after proceedings challenging disallowance of the claim may be commenced within 60 days after final allowance of the claim. On the other hand, section 908C indicates that a proceeding to assert transferee liability may not be commenced later than two years following the death of the decedent. These statutory inconsistencies apparently arose when section 910 was amended in 1999.



“...FDIC insurance coverage should be considered in the development...”

- Section 911A provides that a registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests for registrations in beneficiary form and for implementation of registrations in beneficiary form. These terms and conditions may include the following: 1) proving death; 2) avoiding or resolving problems created by the divorce or death of a beneficiary in compliance with section 178 of Title 15 of the Oklahoma Statutes; 3) avoiding or resolving any problems concerning fractional shares; 4) designating primary and contingent beneficiaries; and 5) substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death.
- Section 911B indicates that substitution may be indicated by appending to the name of the primary beneficiary the letters "LDPS," standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate.
- Section 911D provides various illustrations of registrations in beneficiary form. For example: a) sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr., and b) multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

#### ESTATE PLANNING WITH POD AND TOD

The POD device is often employed to avoid probate, and its use may be indicated for

clients who utilize a revocable trust as the principal estate transmission instrument. The client may wish to designate the trust as the POD beneficiary of a checking account or certificate of deposit, or as the TOD beneficiary of a brokerage account or certain securities. Use of the POD arrangement allows the client to retain ownership of a checking account in his individual name and designate others as "authorized signers" on the account. This technique also gives the client's attorney-in-fact or guardian (but not the successor trustee) access to funds or securities in the POD/TOD account if the client becomes incapacitated.

**FDIC Coverage.** In some instances, FDIC insurance coverage should be considered in the development and implementation of the estate plan. The owner of a POD account is insured up to \$100,000 *for each beneficiary* if all of the following requirements are met:

1. The account title must include commonly accepted terms such as "payable-on-death," "in trust for," "as trustee for" or similar language to indicate the existence of a trust relationship. These terms may be abbreviated (for example "POD," "ITF" or "ATF").
2. The beneficiaries must be identified by name in the deposit account records of the insured bank.
3. The beneficiaries must be "qualifying," meaning that the beneficiaries must be the owner's spouse, child, grandchild, parent or sibling. Adopted and step children, grandchildren, parents and siblings also qualify. Others including in-laws, cousins, nieces and nephews, friends, organizations (including charities) and trusts do not qualify.<sup>9</sup>

If the POD account has multiple owners, then each co-owner's share of the joint POD

account may qualify for coverage as shown in the following example:<sup>10</sup>

Account Title	Account Balance	Amount Insured	Amount Uninsured
Husband & Wife POD 3 Children	\$600,000	\$600,000	\$0
Husband POD Wife	\$100,000	\$100,000	\$0
Wife POD Husband	\$100,000	\$100,000	\$0
Husband POD Brother and Father	\$200,000	\$200,000	\$0
Husband & Wife POD Grandchild	\$300,000	\$200,000	\$100,000
Total	\$1,300,000	\$1,200,000	\$100,000

**Explanation:** All but one POD account is fully insured. The POD account owned by the husband and wife jointly for one grandchild is insured up to \$200,000 because each owner is only entitled to \$100,000 insurance coverage for each named qualifying beneficiary.

### Tax Apportionment

Estate tax apportionment issues may come into play if significant assets are transferred by way of POD/TOD beneficiary designations. Although these issues are beyond the scope of this article, note that 58 O.S. § 268 provides that:

For property other than the probate estate passing directly upon the death of a decedent to another, by law, the executor or administrator of the estate of the decedent shall have the authority to bring an action in the district court having jurisdiction of the probate estate for the collection of any of the state or federal estate tax due and owing by the nonprobate beneficiaries after ten (10) days following service of notice by such executor or administrator upon such nonprobate beneficiary before suit is filed. Such notice shall state the amount of federal or state tax due to the executor or administrator by the nonprobate beneficiary. In such actions, the court costs and reasonable attorney fees may be assessed in favor of the prevailing party.

### CONCLUSION

Used correctly, POD and TOD arrangements can be another effective weapon in the practitioner's probate avoidance arsenal. Used incorrectly, the client and the intended benefi-

ciaries may get hurt. The practitioner must determine whether a POD account has been or will be established at a bank, savings and loan, or credit union to identify the governing Oklahoma statute. Remember that contingent beneficiaries can be designated only if the account is a *bank account with one primary beneficiary*.<sup>11</sup> Contingent beneficiaries *cannot* be designated if the account is a *savings and loan account*. The proceeds of a savings and loan account must be paid to the beneficiary's estate if the beneficiary dies before the account owner.

Practitioners may wish to avoid Totten trust accounts or arrangements altogether because of uncertainties inherent in the applicable Totten trust statutes. POD accounts may be the better choice.

Registration of securities in "beneficiary form," as in "John Doe TOD Mary Doe" can be an effective probate avoidance device, especially given the increasing popularity of single member limited liability companies treated for income tax purposes as disregarded entities. Remember TOD when you help the next client set up a new business entity.

1. 6 O.S. §§ 101 et seq. The Oklahoma Banking Code provision dealing specifically with POD accounts is 6 O.S. §901B.
2. 6 O.S. § 901C.
3. 18 O.S. §§ 381.1 et seq. The Oklahoma Savings and Loan Code provision dealing specifically with POD accounts is 18 O.S. § 381.39a, subsection B.
4. 18 O.S. § 381.39a, subsection C.
5. Whether the Totten trust arrangement is available at credit unions may be of little practical importance given the availability of credit union POD accounts.
6. 6 O.S. § 902.
7. 18 O.S. § 381.40a.
8. An informative "Summary" of the Uniform TOD Security Registration Act can be found at <http://www.nccusl.org>.
9. See the publication *Your Insured Deposits, FDIC's Guide to Deposit Insurance Coverage* (updated April 2006) at <http://www.fdic.gov>.
10. *Id.*
11. Effective January 1, 2008, designation of contingent beneficiaries will also be allowed with respect to credit union POD accounts under the terms of 6 O.S. §2025.

### ABOUT THE AUTHOR



Mark Curnutte is a partner with Logan & Lowry LLP in Vinita. He is a fellow of the American College of Trust and Estate Counsel and American Bar Foundation. He currently serves as Oklahoma Bar Foundation president.



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# Honor Your Peers with an OBA Award Nomination

It's time to recognize your deserving fellow lawyers and organizations with a nomination for an OBA Award. This year's awards will be presented at the Annual Meeting to be held Nov. 7-9, 2007, in Oklahoma City.

"There is no greater honor than to be recognized by one's peers in the profession," said OBA Awards Committee Chair Gary C. Clark. "This year, we've created the new Trailblazer award, which will honor visionary leaders whose efforts have made a profound impact upon our profession and community. The committee recognizes the importance of honoring those who serve as role models."

It doesn't take much time to nominate colleagues who have performed outstanding work or who exemplify the very best attributes of the legal profession. Nominations are sought for individual lawyers as well as outstanding county bar associations and committees. Bar members, nonmembers and groups such as county bar associations are all welcome to submit nominations. It doesn't matter if the nominee is from one of the major metropolitan areas or from a small town – the Awards Committee takes this factor into consideration.

"Remember, in order to win, a nomination must be submitted," said Mr. Clark. "We've kept the nomination process simple. We ask you to follow through and make sure the committee knows about the people and organiza-

tions you think are worthy of these prestigious awards."

No special forms are required to make a nomination, but a form is available at [www.okbar.org](http://www.okbar.org) if the nominator would prefer to use it. For people who want more direction or need help getting started, nomination suggestions are also available online. Here are some things to keep in mind.

**Nominations must  
be received by  
Monday,  
Aug. 13, 2007.**



\* Nominations must be received by Monday, Aug. 13, 2007.

\* The entire nomination — letter, supporting materials, clippings, seconding letters and attachments included — may be no longer than five single-sided, 8 1/2" x 11" pages. No exceptions!

\* The name of the person or organization making the nomination should be included in the nomination.

\* A one- or two-page letter is sufficient to make a nomination. A form is available on [www.okbar.org](http://www.okbar.org) but is not required.

\* County bar associations are encouraged to nominate themselves and their bar members.

Each nomination must be entered in only one category.

\* Nominations may be e-mailed as a Word, WordPerfect or PDF attachment. Confirmation of electronic receipt will be sent. Please do not send duplicate copy via fax or mail. Send e-mail to [lorir@okbar.org](mailto:lorir@okbar.org).

\* If using U.S Mail, send to :

Gary C. Clark, Chairperson  
OBA Awards Committee  
P.O. Box 53036  
Oklahoma City, OK 73152

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## 2007 Awards

**Trailblazer Award** to an OBA member or members who by their significant, unique visionary efforts have had a profound impact upon our profession and /or community and in doing so have blazed a trail for others to follow

**Outstanding County Bar Association Award** for meritorious efforts and activities

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**Golden Gavel Award** for OBA Committees and Sections performing with a high degree of excellence

**Liberty Bell Award** for non-lawyers or lay organizations for promoting or publicizing matters regarding the legal system

**Outstanding Young Lawyer Award** for a member of the OBA Young Lawyers Division for service to the profession

**Earl Sneed Award** for outstanding continuing legal education contributions

**Award of Judicial Excellence** for excellence of character, job performance or achievement while a judge and service to the bench, bar and community

**Fern Holland Courageous Lawyer Award** to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession

**Outstanding Service to the Public Award** for significant community service by an OBA member

**Award for Outstanding Pro Bono Service** by an OBA member

**Joe Stamper Distinguished Service Award** to an OBA member for long-term service to the bar association or contributions to the legal profession

**Neil E. Bogan Professionalism Award** to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession

**John E. Shipp Award for Ethics** to an OBA member who has truly exemplified the ethics of the legal profession either by 1) acting in accordance with the highest standards in the face of pressure to do otherwise or 2) by serving as a role model for ethics to the other members of the profession

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years  
1947-2007

**CHOCTAW COUNTY**

Vester V. Songer  
*Hugo*

**CLEVELAND COUNTY**

Frank Elkouri  
*Norman*

**OKLAHOMA COUNTY**

William Martin Allen  
*Oklahoma City*  
Thomas N. Keltner  
*Oklahoma City*  
Charles Rudolph Nesbitt  
*Oklahoma City*  
Wayne B. Snow  
*Oklahoma City*

**STEPHENS COUNTY**

Paul D. Sullivan  
*Duncan*

**TULSA COUNTY**

James G. Davidson  
*Tulsa*  
David L. Dobie  
*Tulsa*  
William P. Huckin Jr.  
*Tulsa*  
Samuel E. Moore  
*Tulsa*  
J.D. Nance Jr.  
*Broken Arrow*

**OUT OF STATE**

Russell Chapin  
*Amelia, FL*  
Robert Edward Fraley  
*Stafford, VA*  
Donald James Quigg  
*Falls Church, VA*  
Shockley T. Shoemake  
*Humble, TX*

50  
years  
1957-2007

**CANADIAN COUNTY**

Henry C. Franke  
*Piedmont*

**CLEVELAND COUNTY**

Maurice Dean Brown  
*Norman*  
Robert Lee Pendarvis  
*Norman*  
William Amis Pipkin  
*Moore*

Murlene Worth  
*Norman*

**DELAWARE COUNTY**

James R. Head  
*Grove*

**GARFIELD COUNTY**

Curtis Lee Horrall  
*Enid*

**GRADY COUNTY**

Clarence L. Maher  
*Chickasha*

**MAJOR COUNTY**

Mary Ridgeway Bailey  
*Fairview*

**MURRAY COUNTY**

W.J. Albright  
*Sulphur*

**MUSKOGEE COUNTY**

Robert Bruce Green  
*Muskogee*

**NOBLE COUNTY**

Robert Leroy Kasper  
*Perry*

**OKLAHOMA COUNTY**

Judge James B. Blevins  
*Oklahoma City*

Gary Ward Davis  
*Oklahoma City*

James Franklin Davis  
*Oklahoma City*

Mathew M. Dowling  
*Oklahoma City*

Henry Frederick Featherly  
*Oklahoma City*

James Wylie George  
*Oklahoma City*

John Edwin Green  
*Oklahoma City*

Jack Hugh Herndon  
*Midwest City*

Judge Paul B. Lindsey  
*Oklahoma City*

Jack T. Massey  
*Oklahoma City*

James N. Posey  
*Bethany*

Enrico J. Romano  
*Oklahoma City*

Bobby Jean Rudkin  
*Edmond*

Albert F. Schrempp  
*Oklahoma City*

Benjamin E. Smith  
*Oklahoma City*

Justice Hardy Summers  
*Oklahoma City*

Raymond Edward Theimer  
*Edmond*



**PITTSBURG COUNTY**

Clyde Stipe  
*McAlester*

**ROGERS COUNTY**

John R. Carle  
*Claremore*

**TULSA COUNTY**

Judge Thomas R. Brett  
*Tulsa*

Darrel G. Camerer  
*Tulsa*

Don L. Dees  
*Owasso*

J. Jerry Dickman  
*Tulsa*

G. Douglas Fox  
*Tulsa*

Joseph Frederick Glass  
*Tulsa*

Thomas Lee Hulett  
*Tulsa*

John Bryan Johnson Jr.  
*Tulsa*

Paul Houston Johnson  
*Tulsa*

Robert Wayne Langholz  
*Tulsa*

Thomas G. Marsh  
*Tulsa*

John Joseph McQueen  
*Tulsa*

Kent Clay Phipps  
*Tulsa*

Jay Samuel Roberts  
*Broken Arrow*

Steven E. Smith  
*Tulsa*

John Jerry Tanner  
*Tulsa*

Phillip E. Tibey  
*Tulsa*

William Donald Toney  
*Tulsa*

Bruce Miller Townsend  
*Tulsa*

George Wesley Underwood  
*Tulsa*

Richard L. Wheatley Jr.  
*Tulsa*

Judge Charles Scott Woodson  
*Sand Springs*

Willis Ray Yarbrough  
*Tulsa*

**OUT OF STATE**

Clifton L. Adams  
*Costa Mesa, CA*

George Crocker Baldrige  
*Joplin, MO*

William Howard Boyles  
*Dallas, TX*

Robert K. Chiles  
*Sarasota, FL*

James T. Comfort  
*Richardson, TX*

Samuel H. Crossland  
*Boise, ID*

Elmer M. Farinella  
*Albuquerque, NM*

William S. Jack Fine  
*Pensacola, FL*

Thomas Dew Gresham  
*Colorado Springs, CO*

William D. Harris Jr.  
*Richardson, TX*

Don Ratcliffe Holland  
*Marble Falls, TX*

Jack Lee Orkin  
*University Park, FL*

Devier Pierson  
*Washington, DC*

Carl F. Smith  
*Lakewood, CO*

Dewey W. Stark Jr.  
*Dallas, TX*

Clifford Oscar Stone Jr.  
*Englewood, CO*

## PUBLIC NOTICE FOR REAPPOINTMENT OF INCUMBENT BANKRUPTCY JUDGE

The current 14-year term of office of Tom R. Cornish, United States Bankruptcy Judge for the District of Eastern District of Oklahoma at Okmulgee, Oklahoma, is due to expire on February 7, 2008. The United States Court of Appeals for the Tenth Circuit is presently considering whether to reappoint Judge Cornish to a new 14-year term of office. Upon reappointment, Judge Cornish would continue to exercise the jurisdiction of a bankruptcy judge as specified in title 28, United States Code; title 11, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101-122, 98 Stat. 333-346. Members of the bar and the public are invited to submit comments for consideration by the court of appeals. All comments will be kept confidential and should be directed to: **David Tighe, Circuit Executive, Byron White United States Courthouse, 1823 Stout Street, Denver, CO 80257.** Comments must be received not later than Thursday, June 21, 2007.

### *Need a replacement for your cassette dictation system?*

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# The Judicial Nominating Commission Elections

**T**he selection of qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 13 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and one at large member elected by the other 12 members. All serve six year terms, except the member at large who serves a two-year term. Members may not succeed themselves on the commission.

The lawyers of this state play a very important role in

the selection of judges since six of the members of the commission are lawyers elected by lawyers. The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2002.) Elections are held each odd numbered year for members from two districts.

## 2007 ELECTIONS

This year there will be elections for members in Districts 3 and 4. District 3 is composed of counties in the southern and southeastern part of the state. District 4 is composed of counties in the central and southwestern part of the state. The procedures for the election will be published in the bar journal.

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 18, 2007, at 5 p.m. to submit their Nominating Petitions. Ballots will be mailed on June 1, 2007, and must be returned by June 15, 2007, at 5 p.m.

It is important to the administration of justice that the OBA members in the Third and Fourth Congressional Districts become informed on the candidates

for the Judicial Nominating Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission. Hopefully, the lawyers in the Third and Fourth Congressional Districts will fulfill their responsibility by voting in the election for members of the Judicial Nominating Commission.

## PROCEDURES OF THE OKLAHOMA BAR ASSOCIATION GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).
2. Ten (10) active members of the association, within

the Congressional District from which a member of the commission is to be elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more county bar associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.
4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.
5. If no candidates are nominated for any Congressional District, the Board of Governors shall select at least two candidates to stand for election to such office.
6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.
7. Under the supervision of the Executive Director, or his designee, the ballots shall be opened, tabulated

and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.
9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.
10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.
11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.
12. The Executive Director, or his designee, shall take possession of and destroy any ballots printed and unused.
13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

**COUNTIES IN EACH DISTRICT ARE AS FOLLOWS:**

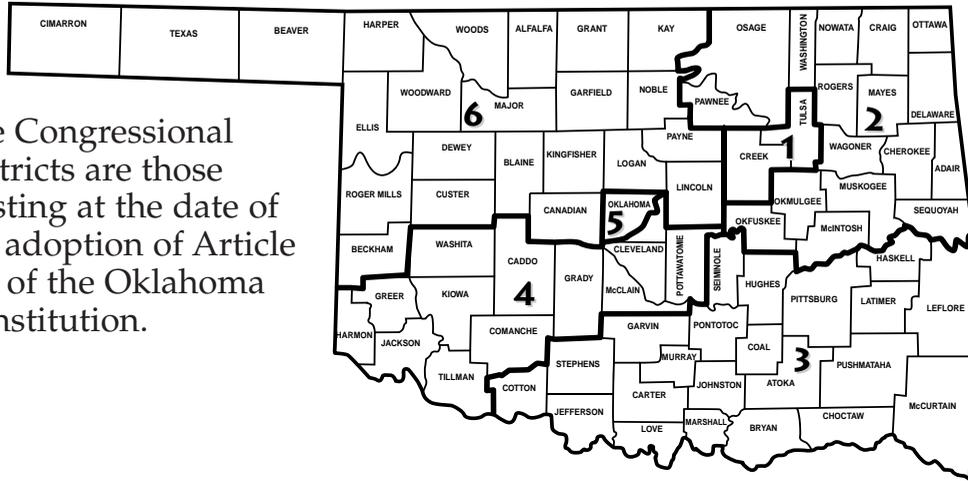
**District No. 3**

**Atoka  
Bryan  
Carter  
Choctaw  
Coal  
Cotton  
Garvin  
Haskell  
Hughes  
Jefferson  
Johnston  
Latimer  
LeFlore  
Love  
Marshall  
McCurtain  
Murray  
Pittsburg  
Pontotoc  
Pushmataha  
Seminole  
Stephens**

**District No. 4**

**Caddo  
Cleveland  
Comanche  
Grady  
Greer  
Harmon  
Jackson  
Kiowa  
McClain  
\*Oklahoma  
Pottawatomie  
Tillman  
Washita**

*\*Oklahoma County only include selected cities: Choctaw, Harrah, Luther, Midwest City, Newalla, Nicoma Park, Spencer*



Note: The Congressional Districts are those existing at the date of the adoption of Article 7-B of the Oklahoma Constitution.

## NOTICE

### JUDICIAL NOMINATING COMMISSION ELECTIONS CONGRESSIONAL DISTRICTS 3 AND 4

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 3 and 4 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 18, 2007. Ballots will be mailed on June 1, 2007, and must be returned by 5 p.m. on June 15, 2007.

**Assistant Federal Public Defender  
FEDERAL HABEAS CORPUS DEATH PENALTY  
DIVISION FEDERAL PUBLIC DEFENDER  
ORGANIZATION WESTERN DISTRICT OF  
OKLAHOMA**

The Federal Public Defender is accepting applications for the position of Assistant Federal Public Defender in the Capital Habeas Unit. The Unit represents death sentenced prisoners in federal habeas corpus litigation proceedings throughout Oklahoma. This is a full time position located in Oklahoma City. Applicants must possess strong writing ability, a commitment to poverty law or indigent criminal defense, and litigation experience in at least one of the following areas: criminal law, death penalty litigation, habeas corpus litigation, or complex federal court civil litigation. Habeas experience desirable but not required. High academic qualifications and exceptional writing ability will be considered in lieu of experience. The position requires travel. Salary commensurate with experience and education, equivalent to salaries for Assistant U.S. Attorneys with similar experience. Qualified persons may apply by forwarding a letter of interest, resume, and representative writing sample to: James A. Drummond, Supervisor, CHU, Office of the Federal Public Defender, Western District of Oklahoma, 215 Dean A. McGee, Suite 109, Oklahoma City, Oklahoma 73102. Application packages must be received no later than May 18, 2007. The Federal Public Defender Organization for the Western District of Oklahoma is an Equal Opportunity Employer.

**ATTORNEY – ARDMORE**

Legal Aid Services of Oklahoma, Inc., is seeking an Attorney for its Ardmore L.O., serving Carter, Garvin, Jefferson, Johnstone, Love, Marshall, Murray, and Pontotoc counties. The attorney will be responsible for cases involving general law issues. Applicants are required to have a J.D. from an accredited law school, and be admitted to practice in Oklahoma. No legal experience is required, however prior experience with indigent individuals and/or seniors is a plus. Salary is according to Legal Aid's salary administration plan. Generous benefits including: health, dental, life, pension, etc. Applicants MUST complete Legal Aid's application, available for printing at this [www.legalaidok.org](http://www.legalaidok.org), forwarding the application and a resume to: Bud Cowser, Director of Operations, 2901 Classen Blvd., Suite 110, Oklahoma City, OK 73106 or FAX to (405) 484-6111. Applications will be accepted until position is filled. Legal Aid is an Equal Opportunity/Affirmative Action Employer.

# OBA SOLO AND SMALL FIRM CONFERENCE & YLD MIDYEAR MEETING

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

DAY 1 • Friday, June 22

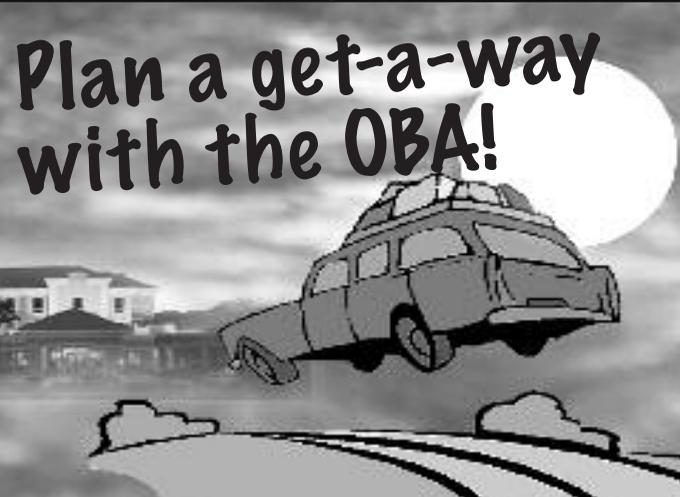
## THE OBA SUMMER GET-A-WAY



Jay G. Foonberg

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

# DAY 2 • Saturday, June 23

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

# 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 DEADLINE:  
MAY 30, 2007**



**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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Call 1(800) 833-6569 Ext. 2664  
before June 18 to make spa appointment.

**See [www.tanglewoodresort.com](http://www.tanglewoodresort.com) for more hotel recreational activities and spa information.**  
Cancellations of activities will be accepted 48 hours before arrival date.

**Mail or fax entire page to: Tanglewood Resort**  
Attn: Teresa, 290 Tanglewood Circle, Pottsboro, TX 75076-Fax (903) 786-2128.

Make check payable to the Tanglewood Resort. If paying by credit card please complete:  
\_\_\_\_\_ VISA \_\_\_\_\_ Master Card \_\_\_\_\_ Discover \_\_\_\_\_ AMX

Credit Card No \_\_\_\_\_ Authorized Signature: \_\_\_\_\_ Expiration Date: \_\_\_\_\_

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

# OBA Legal Ethics Advisory Panel Issues Opinion

*Applications requesting its modification, correction, clarification or withdrawal must be made in accordance with Legal Ethics Advisory Panel rules governing appeals and received by the panel coordinator on or before **Monday, June 11, 2007**. Unless an application for the revision or withdrawal of an advisory opinion is timely received, the opinion shall become final.*

*The rules governing appeals may be found on the OBA Web site at [www.okbar.org/news/news\\_06/EthicsPanel.htm](http://www.okbar.org/news/news_06/EthicsPanel.htm).*

*Send comments to Panel Coordinator Roger R. Scott, 525 South Main, Suite 1111, Tulsa, OK 74103.*

## OBA Legal Ethics Advisory Opinion 2007-OK LEG ETH 01

### INQUIRY:

May an attorney representing a plaintiff in a lawsuit agree in advance to indemnify his client against attorney's fees and costs that might be awarded to the defendant in the event that the defendant is the prevailing party?

### OPINION

An attorney may *not* agree to indemnify his client against attorney's fees and costs in the event that such fees and costs are awarded to the opposing party and taxed as costs against the client.

#### I.

The controlling rule is Rule 1.8 of the Oklahoma Rules of Professional Conduct. Rule 1.8(e) provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

(emphasis added).<sup>1</sup>

Rule 1.8(j) provides that:

*A lawyer shall not acquire a proprietary interest in the cause of action or subject*

*matter of litigation the lawyer is conducting for a client, except that the lawyer may:*

- (1) acquire a lien granted by law or contract to secure the lawyer's fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

(emphasis added).

Rule 1.8(e) allows a lawyer to "advance court costs expenses of litigation" when the repayment of such costs and expenses may be "contingent on the outcome of the matter" (emphasis added). "Advance" means "to supply or furnish in expectation of repayment". MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 17 (10th ed. 1999). To agree to indemnify is not to "advance". The lawyer who agrees to indemnify would have no expectation of repayment under any circumstances. See Cynthia Bulan, *A Small Question in the Big Statute: Does Section 402 of Sarbanes-Oxley Prohibit Defense Advancements?*, 39 CREIGHTON L. REV. 357, 360 & n. 21 (2006) (hereinafter, "Bulan"). According to Bulan,

[t]he right to indemnification is not the same as the right to advancement of defense costs. The right to indemnification gives a person the right to reimbursement of losses or expenses; it is not a right

*This advisory opinion is subject to revision or withdrawal*

for payment at the time the loss is incurred. On the other hand, a right to advancement requires payment of the defense costs as the costs are incurred.

Bulan, 39 CREIGHTON L. REV. at 360-361 & n. 21, citing JOHN F. OLSON ET AL., DIRECTOR & OFFICER LIABILITY: INDEMNIFICATION AND INSURANCE § 5.03[2] (2001) (footnote omitted).<sup>2</sup>

Rule 1.8(j) generally prohibits a lawyer's acquisition of a proprietary interest in "the cause of action or subject matter of the litigation the lawyer is conducting for a client." The only exceptions to the general prohibition are attorneys' liens and contingent fees in civil cases. No exception is made for an indemnification agreement.

The general rule against lawyer acquisition of a proprietary interest in the client's cause of action, and/or the subject matter of the client's litigation, is based upon the old common law rules against champerty and maintenance.<sup>3</sup> See Comments to Rule 1.8 of the Oklahoma Rules of Professional Conduct; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.2.3 at 507 n. 76. The notion is that payment of expenses not expressly authorized by the rule creates a conflict between the client and the lawyer, in that the lawyer has a financial interest in the case. The conflict could adversely affect the lawyer's professional judgment in determining whether to accept a settlement or proceed to trial. Unconditionally guaranteeing the payment of attorney's fees and costs would create the same conflict. Cf. *South Carolina Bar Ethics Committee, Ethics Advisory Opinion 89-12*, 1989 WL 608452 at page \*2 (1989).

## II.

The Alaska Bar Association has addressed a related question—whether an attorney may contingently agree to pay attorney's fees assessed against a client if the client loses on appeal. Ethics Opinion No. 2004-02, 2004 WL 1853007 (April 27, 2004). That opinion dealt with a situation where an attorney fee might be assessed against a client in the event that an appeal in a civil case were to be unsuccessful. The Alaska Bar Association, citing no authority other than Rule 1.8 of the Alaska Rules of Professional Responsibility, concluded that such an agreement was permissible. The Alaska ethics opinion, however, failed to deal with the use of the term "advance" in Rule 1.8(e). In particular, there was no discussion of how an agreement to indemnify—to make a payment in the future—could be an "advance". The distinction between "payments" and "advances" is discussed in

*Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Informal Opinion Number 2000-14*, 2000 WL 1616267 at page \*2 (2000). And see Bulan, 39 CREIGHTON L. REV. at 360-361 & n. 21 (quoted above).<sup>4</sup>

## III.

The history of Rule 1.8(e) suggests that the class of costs and expenses that a lawyer may permissibly advance is limited to traditional case preparation expenses. Old Ethics Rule 42, 5 O.S. 1961, Ch. 1, App. 3, provided:

**Expenses of litigation.** A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

Ethics Rule 42 was superceded by Disciplinary Rule 5-103(B) of the Oklahoma Code of Professional Responsibility, 5 O.S. 1981, Ch. 1, App. 3. DR 5-103(B) was in turn superceded by Rule 1.8(e) of the Oklahoma Rules of Professional Conduct, effective from July 1, 1988. The language of Rule 1.8(e) is identical to the language of DR 5-103(B), except for a gender neutrality change from "his" to "a" client. The 1988 version of Rule 1.8 stated:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to a client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

Rule 1.8(e), Rules of Professional Conduct, 5 O.S.Supp. 1988, Ch. 1, App. 3-A.

Rule 1.8 (e) was amended in 1993. The 1993 language (set forth in Part I. above) tracks amendments to ABA Model Rules of Professional Conduct, and is the current rule. As noted above, the current rule allows repayment of advances to be contingent on the outcome of a case. The current Rule 1.8(e) also deletes the limiting language of prior ABA rules describing permissible "expenses" of litigation. This change may seem to suggest that adverse party attorney's fees might be considered to be "costs" of litigation. It seems more reasonable, however, to read the new language in Rule 1.8(e) as a reversion to the simpler language of the original

Ethics Rule 42, without the contingent component.

Until recently, “court costs and expenses of litigation” were not considered to include attorney’s fees. As a consequence, it is unlikely that the ABA Model Rule drafters, the Oklahoma Bar Association committee, or the Oklahoma Supreme Court believed that the phrase “court costs and expenses of litigation” included attorney’s fees awarded at the end of litigation. Indeed, the Comment to the ABA Model Rule suggests that the ABA drafters eliminated the limiting language (relating to investigation, medical exams, and costs of obtaining and presenting evidence) in order to shorten the rule, that they did not intend to change the accepted understanding of court costs.

The Comment in the ABA Model Code to the most recent version Rule 1.8 (e)—the version that will become effective in Oklahoma on January 1, 2008—reads:

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. *These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.* Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

(emphasis added).

The rationale for allowing a lawyer to advance costs of litigation is to ensure an indigent client access to justice: A case can neither start nor proceed without payment of costs, experts and discovery. But the access-to-justice rationale does not warrant or justify the provision of an indemnity against an unconventional, non-traditional litigation risk—a risk which will not even be determined until after the case is over. A client can get to his or her day in court without being first insured against the possibility of adverse party attorney’s fees.

#### IV.

An agreement to indemnify a client against attorney’s fees and costs that might be awarded to a defendant as a prevailing party—an agreement to make a payment in the future, upon the fulfillment of a condition—is not an “advance” within the meaning of Rule 1.8(e). Such agreements are prohibited by Rule 1.8(e) and Rule 1.8(j).<sup>5</sup>

1. On April 17, 2007, the Oklahoma Supreme Court adopted amendments to the Oklahoma Rules of Professional Conduct. *In re: Application of the OBA to Amend the Rules of Professional Conduct*, 2007 OK 22, \_\_\_ P.3d \_\_\_. Effective January 1, 2008, Rule 1.8(e) will read as follows:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(emphasis added).

The change in the rule is shown in italics. This opinion does not depend on the current language of Rule 1.8(e) and will not be affected by the amendment.

2. A similar distinction must be drawn between “advancement” and “payment” of costs and expenses. Under the version of Rule 1.8(e) that will become effective on January 1, 2008, it will be possible for a lawyer to pay court costs and expenses of indigent clients. Agreements to indemnify indigent clients are not expressly authorized.

3. See also 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36 (2000) (“Forbidden Client-Lawyer Financial Arrangements”); *State ex rel. Oklahoma Bar Ass’n v. Smolen*, 2000 OK 95, 17 P.3d 456, 458, 459, 462; *State ex rel. Oklahoma Bar Ass’n v. Carpenter*, 1993 OK 86, 863 P.2d 1123, 1127, 1132, 1133; *State ex. Rel. Oklahoma Bar Ass’n v. Smolen*, 1992 OK 116, 837 P.2d 894, 897, 900-901, 905-906 (citing the Restatement and tentative drafts thereof).

4. The Alaska Bar Association opinion seems to be incorrect for other, fact-driven reasons. According to the opinion, the appeal had a substantial chance of success. Absent a successful appeal, the attorney would not be paid. The plaintiff-client might be reluctant to proceed with the appeal for various reasons (e.g., a settlement offer contingent on foregoing the appeal).

The attorney had an interest in proceeding with the appeal. The plaintiff-client, in theory, had an interest in foregoing the appeal. If the attorney is allowed to indemnify the plaintiff-client, the plaintiff-client might be persuaded to reject a settlement offer that is in his or her interest.

If an attorney is allowed to indemnify his or her client, the client may need to submit the question of the fairness of the indemnity proposal to an independent attorney for evaluation. A second order question immediately arises: Can the first lawyer pay for the independent lawyer’s evaluation?

5. Two additional points should be noted. First, the current version of Rule 1.8(e) of the Oklahoma Rules of Professional Conduct (set forth in Part I, above) is not identical with the most recent revision of Rule 1.8(e) of the ABA Model Rules of Professional Conduct. The most recent revision of the Model Rule authorizes “a lawyer representing an indigent client” to “pay court costs and expenses of litigation on behalf of the client”. The Model Rule language emphasizes the distinction—made in the text—between “advances” and “payments”. Model Rule 1.8(e) has been adopted by some states (e.g., Alaska). The Supreme Court of Oklahoma recently adopted Model Rule 1.8(e); it will become effective on January 1, 2008. See notes 1 and 2, *supra*.

*Second*, the practice of advancing expenses is sometimes governed by rules of substantive law and procedure. This is the case, for example, with respect to class actions. See 5 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 15:22 at 79-82 (4th ed. 2002) (if class representative has no financial responsibility for costs and expenses, class certification may be denied). See, e.g., *Ferraro v. General Motors Corp.*, 105 F.R.D. 429, 433 & n. 3 (D. N.J. 1985) (“[A]greement whereby plaintiff’s attorneys agree to advance or reimburse the costs of litigation is highly relevant to the issue of adequate representation.”). In addition, advancements of costs and indemnity agreements may be prohibited by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). See *Bulan*, 39 CREIGHTON L. REV. at 357-385.

# 2008 OBA Board of Governors Vacancies

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

## **OFFICERS**

### **President-Elect**

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

(One-year term: 2008)

**Nominee: Jon K. Parsley, Guymon**

### **Vice President**

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

**Nominee:**

## **BOARD OF GOVERNORS**

### **Supreme Court Judicial District Two**

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

**Nominee:**

### **Supreme Court Judicial District Eight**

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

**Nominee:**

### **Supreme Court Judicial District Nine**

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

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

### **Member-At-Large**

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

**Nominee:**

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

### **Summary of Nominations Rules**

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

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

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

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

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

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Bar Association # \_\_\_\_\_ State \_\_\_\_\_

Registration Fees			
# of Persons			Amount Enclosed
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	<b>\$150.00</b>	Registration, May 31, 2007 only <i>(no one day registration for May 30)</i>	
	<b>\$25.00</b>	Dinner Reception, May 30, 2007 <i>(if registered for the Symposium)</i>	
	<b>\$60.00</b>	Dinner Reception, May 30, 2007 <i>(if not registered for the Symposium)</i>	
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# Leave Now If You Want a Place to Park

By John Morris Williams

This will be my last article for a couple of months. The OBA does not publish theme issues during June and July. However, the OBA will be very busy during those months. The Solo and Small Firm Conference will be our major member event. It is always a great time. This year there is an all-star cast of speakers and many family-friendly events. If you have never been to the event before, this year's conference is one you will want to attend.

The response to our new free online legal research FastCase has been very positive. We have had several training sessions that were well attended. Kudos to Jim Calloway and the Member Services Committee for all their hard work in bringing this great service to us. Also, OBA members should be aware that a vendor agreement with CoreVault has been reached to provide online backup service to OBA members at a discounted price. After Hurricane Katrina, too many of our colleagues in Louisiana and Mississippi lost their data because they did not have offsite backup. While we may not have hurricanes in Okla-

homa, a tornado could destroy an office in a matter of seconds. Without an off-site backup, lawyers are in jeopardy of losing invaluable computer data. The OBA benefits from you entering into an agreement with CoreVault and in the event of a disaster nothing will be of greater value to you.

## BIG MOVE COMING

In July the OBA staff will move out of the east side of the building so that abatement of asbestos can begin. Twenty-two of us will be moving into temporary, modular offices for at least eight months to allow for the abatement and remodeling project to be completed. Please pardon our mess as we try to sort through and move decades of documents, records and miscellaneous items. Everything must be moved out of the area where the work is being performed, and it will be sealed to avoid contamination during the abatement process. All of us

who office in the "old" part of the building will be in temporary quarters located in the parking lot on the west side of the building.

Entry to the temporary offices will be restricted. All persons needing to meet with temporarily relocated staff will need to check in with the receptionist as usual. We will do everything possible to maintain our high standards of member service. Meetings scheduled in the Board of Governors room and Kerr Library will be relocated to meeting space in the west side of the building. Please check the lobby monitor to confirm the location of your meeting. Videoconferencing will still be available in room 131. We apologize for any inconvenience this may cause.

The remodel will result in the building being in compliance with building fire codes and the Americans with Disability Act. Hopefully, our planning will bring you a state-of-the-art Bar Center that will accommodate our space needs for the next 20 years. Reconfiguration of our space will allow for staff offices in the basement to be eliminated, and the creation of extra office

“During the remodeling, parking will be at a premium.”

space will allow for some growth.

## PARKING SPACES LIMITED

During the remodeling, parking will be at a premium. Parking will be available in the parking lot north of the building. Entry to the building will be confined to the south doors. The east doors will be sealed during the asbestos abatement and will continue to be blocked during the remodeling. Members may want to plan on arriving for meetings or events a few minutes earlier than usual in anticipation of more distant parking. Please be mindful that the area in front of the south entrance is a fire lane and is not appropriate for long-term parking.

My next article will be after we have packed up and moved to temporary offices in the middle of July. If I sound hot and tired in that article, I will have earned it. There are a million details to still attend to. The OBA wants you to have a facility that is safe, inviting and useful for you. We ask for your patience during this time.

In closing I want to encourage you to have the best summer ever, starting with the Solo and Small Firm Conference.



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

# Oklahoma Bar Journal Editorial Calendar

## 2007

- August  
**Health Law**  
Editor: Martha Rupp Carter  
[mcarter@tulsa-health.org](mailto: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](mailto:renee.hildebrant@oscn.net)  
Deadline: May 1, 2007
- November  
**Diversion Programs**  
Editor: Judge Lori Walkley  
[lori.walkley@oscn.net](mailto:lori.walkley@oscn.net)  
Deadline: Aug. 1, 2007
- December  
**Ethics & Professional Responsibility**  
Editor: Melissa DeLacerda  
[melissde@aol.com](mailto:melissde@aol.com)  
Deadline: Aug. 1, 2007

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

## 2008

- January  
**Meet Your OBA**  
Editor: Carol Manning
- February  
**Real Estate Law**  
Editor: John Munkacsy  
[johnmunk@sbcglobal.net](mailto:johnmunk@sbcglobal.net)  
Deadline: Oct. 1, 2007
- March  
**Pretrial Litigation**  
Editor: Julia Rieman  
[rieman@enidlaw.com](mailto:rieman@enidlaw.com)  
Deadline: Jan. 1, 2008
- April  
**Law Day**  
Editor: Carol Manning
- May  
**Work/Life Balance**  
Editor: Jim Stuart  
[jtstuart@swbell.net](mailto:jtstuart@swbell.net)  
Deadline: Jan. 1, 2008
- August  
**Insurance Law**  
Editor: Judge Lori Walkley  
[lori.walkley@oscn.net](mailto:lori.walkley@oscn.net)  
Deadline: May 1, 2008
- September  
**Bar Convention**  
Editor: Carol Manning
- October  
**Guardianship**  
Editor: Stephen Barnes  
[barneslaw@alltel.net](mailto:barneslaw@alltel.net)  
Deadline: May 1, 2008
- November  
**Technology/Practice Management**  
Editor: Melissa DeLacerda  
[melissde@aol.com](mailto:melissde@aol.com)  
Deadline: Aug. 1, 2008
- December  
**Ethics & Professional Responsibility**  
Editor: Martha Rupp Carter  
[mcarter@tulsa-health.org](mailto:mcarter@tulsa-health.org)  
Deadline: Aug. 1, 2008

# Subscribe to CoreVault Online Backup at a Discount

*By Jim Calloway, Director, OBA Management Assistance Program*

The Oklahoma Bar Association has endorsed Oklahoma-based CoreVault as the official online backup service of the OBA. This action may come as a surprise to some Oklahoma lawyers who could believe that allowing your confidential client data to be transmitted across the Internet and stored on another computer system outside of your control is a breach of client confidentiality. We do not believe this to be the case as long as the service has been properly vetted.

There are always risks in life. Every time a law firm hires a new employee, they accept the risk that that the employee could turn out to be dishonest and embezzle money from the firm or breach some aspect of the attorney-client confidentiality.

The OBA has invested time and resources reviewing the online backup service provided by CoreVault. It has been vetted by the OBA Member Services Committee and the office of the OBA General Counsel. This is not the first time that we have looked at such a service. In fact, we have reviewed options provided by several online data backup service providers over the years.

Our endorsement of CoreVault represents a decision that the risk of not frequently backing up your precious office data and regularly storing it off site far exceeds any risk, or more accurately any perceived risk, of using an online backup service.

CoreVault provides a complete, full service online backup option. When you sign up with CoreVault, their technicians contact you. There is a setup fee. They install their software remotely over the phone and show you how it works. (This is only for high-speed Internet connections. A dial-up connection is not adequate.) You identify all of the files and folders that you wish to have backed up and they will give you an estimate of the monthly charges. You can then lower or increase the amount of data you wish to back up.

Under this arrangement, OBA members receive a significant discount for the monthly cost of online backup. Some of you will believe that the service is somewhat expensive. Others, who have shopped this market, may find that the opposite is true. This is a form of insurance. Just like life insurance, you hope that you will not use it. But this is the way that you manage the business risk of losing all of your data.

You will probably only want to back up your frequently changing data and new data, which include your forms, your completed client, your billing and accounting records, the data from your practice management software and other information that is frequently changed. So you still may want to a monthly backup to a portable hard drive or make a "mirror image" of the hard drive from time to time. Multiple layers of backup are still a good idea, and it is not cost effective to pay for daily backup of the applications or old archived data.

Once you purchase the service from CoreVault, every night (or as frequently as you request) your data will be first encrypted and then automatically transferred over the

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Internet to the CoreVault Oklahoma City location. Then a duplicate copy of the data will be shipped to its secondary data storage facility located more than 120 miles away from Oklahoma City. You will receive an e-mail confirmation when this is successfully completed. CoreVault receives daily reports on which scheduled backups do not occur. If your data is not backed up for a few days, then they will initiate contact with you to determine whether there is a problem.

Make no mistake. This is an exceptional backup service, protecting your clients and your business continuity.

There are certainly other methods of backing up your data. As long as you are confident that you can restore needed data no matter what disaster befalls you, then you may not require an online backup solution. But increasingly, it appears that daily or every other day backup is the standard. How long would it take you to redo to all of yesterday's work? And how much revenue would this cost the firm when you make the judgment that you could not bill a client twice for the same work just because you lost the data? Then extrapolate that cost for five days.

If you apply that standard, any online backup service is a bargain.

When did you do your last data backup? Was it last night? Are you sure? Or does your firm back up its data every Friday? Let's discuss the ramification of your backup frequency.

*You have a brief due tomorrow on a very significant case involving a lot of money. It involved a lot of research and hard work –*

*almost full time the last three days. You had to request one extension of time, but you have it done now. Just one more quick review after lunch and you are going to drop it in the mail this afternoon, a day before the deadline.*

*When you return from lunch and see the firemen and fire trucks outside of your office, you get a bad feeling. When you learn that apparently it was your computer or monitor that caught on fire. It burned for a while before the firemen hosed it down and then tossed it outside into a convenient barrel of rainwater. You are distracted about a number of things from smoke damage to insurance claims. But you soon recall that brief and wonder when the staff last backed up your computer data. Was it last night or last week?*

It may be weekly backups are not enough to fully protect your business.

My experience tells me that unless you work in a firm large enough to have dedicated IT staff, it is very challenging to do daily backups and make sure that a copy of the backup is stored off-site to guard against complete destruction of the office. In fact, many firms with dedicated IT staff will find that this solution makes sense and frees their staff to do other important tasks.

*A Backup Proposal for Those Who Know That They Aren't Doing Backup Well* was the title of an article I wrote in this space over a year ago. (*Oklahoma Bar Journal* Nov. 19, 2005 - Vol. 76; No.32.) I am still very proud of this article. It is fairly comprehensive and should be reviewed before making the call to CoreVault so you can consider all of the different types of data that you have.

But the article also illustrates that doing a complete backup manually is not easy. Maybe you, too, need to decide whether an automated online service will free up you and your staff for other important tasks.

Carrying a portable hard drive or backup tape home each night for off-site backup is not without its risks either. We see more and more news accounts of corporations who have lost these critical data backups and are then forced to inform their clients that there is the possibility of identity theft. Certainly no law firm would ever want to have to inform its clients that its confidential data had been lost.

In the typical law office, more and more mission-critical data is now located on the office computers and servers. A decade or so ago, the files on a lawyer's computer were largely word processing forms and completed client work. There might have been some accounting records or other material. But normally, most all of the material could be reconstructed from the printed documents and reports, even if that was expensive.

Now we move forward to a world of digital client files, electronic evidence and electronic discovery. Reconstructing the data in a spreadsheet from a printout would be quite time consuming and prone to errors. For many of you, the idea of receiving an e-mail each morning that your backup was successfully completed the night before may become the most important security blanket and risk management tool that you can imagine.

**If you lost all of your records today,  
would you still have your  
clients tomorrow?**

***You would if you were protected by CoreVault.™***

*"Since we've entrusted our data to CoreVault,  
all of our storage needs are handled automatically."  
—Beverly McElroy, Hartzog Conger Cason & Neville*

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# Law Day: An Epilogue

By Dan Murdock, OBA General Counsel

Last week just before Law Day, I received an e-mail from a friend of mine who asked me about “Lawyer’s Day.” She said she had received an e-mail advising her of the opportunity for free legal advice and was given a telephone number for those wanting that advice to call. Naturally, I was amused. I knew what she had received and was able to quickly explain about Law Day and the reasons for its creation. I explained that it was not “Lawyer’s Day” but a day set aside to celebrate the rule of law and how the legal process contributed to the many freedoms that we all share today.

I have been told by those whose opinions I value and trust that Law Day was the idea in 1954 of Hicks Epton, a lawyer in Wewoka. This is in contrast to the ABA’s position that the 1957 ABA President Charles S. Rhyne, a Washington, D.C., attorney, conceived the idea for Law Day. In any event, President Dwight D. Eisenhower formally established Law Day in 1958 to recognize and strengthen our time-honored beliefs of liberty, justice and equality. I have known all about Law Day and the reasons for its creation for a long time and quickly, but politely, corrected my friend

for her misunderstanding. I was proud to be able to do so and expound on the great things that have resulted as a result of the efforts of so many in the legal profession. Yet I was also ashamed that I was amused. Why was it funny? Why was I amused?

Maybe my amusement comes from the perception of some members of the public that lawyers should not be respected or valued for their work. We need to change that perception. For too long we have not taken an assertive position to correct that perception. In a recent OBA CLE program presented in Tulsa and Oklahoma City, Oklahoma Supreme Court Justice Steven W. Taylor said it well. He said that lawyers had done great things for our country. He specifically discussed the areas of social justice, civil rights and human rights and said that each time advancements were made lawyers were there. Justice Taylor was very emphatic when he said that lawyers deserve and should *demand* the respect of the public for their efforts to protect and preserve the rights that are or should be guaranteed to all. I admit that I have been too meek in promoting our profession. So have most of you. That should change.

36 USCA § 113 designates May 1 as Law Day, U.S.A. Its declared purpose is to create a special day of celebration by the people of the United States in appreciation of our liberties. It’s a day we reaffirm our loyalty to the United States and rededicate ourselves to the ideals of equality and justice under law in our relations with each other and with other countries. And, just as importantly, it’s a day we cultivate respect for the law that is so vital for the democratic way of life.

I make special note of the way in which the law is worded. The terms “reaffirmation” and “rededication” are used. This tells us that nothing has been abandoned but reminds us of what is needed from us. What is needed from us, as lawyers, is a greater pride in who we are, a stronger recognition of the past efforts of so many lawyers who have come before us, and a more assertive position about who we are and what we do.

I understand the thought of Justice Taylor that we demand respect. Law Day gives us the perfect opportunity to think more about how we can earn it.

“ I admit that I have been too meek in promoting our profession. ”

# April Meeting Summary

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

## REPORT OF THE PRESIDENT

President Beam reported he met with Chief Justice Winchester on various matters, taped a TV segment for the Ask A Lawyer show, appeared at the Supreme Court conference at which Rules of Professional Conduct amendments were considered, fielded calls and e-mails from various bar members, worked on the YLD regional meeting program, worked on tort reform issues and met with Executive Director Williams numerous times. He attended OBA Day at the Capitol events and the Supreme Court dinner. He attended meetings of the Mentoring Task Force, Leadership Conference Task Force, Awards Committee, State Legal Referral Service Task Force, Custer County Bar Association and the first organizational meeting of the Oklahoma Hispanic Bar Network.

## REPORT OF THE VICE PRESIDENT

Vice President Dawson reported he has been working with the Bar Center Facilities Committee, Mentoring Task Force in addition to gathering material and preparing an agenda for the April 23 Lawyer Advertising Task Force meeting. He also

attended the Canadian County Bar Association meeting.

## REPORT OF THE PRESIDENT-ELECT

President-Elect Conger reported he attended meetings of the Access to Justice Committee, Bar Center Facilities Committee and Work/Life Balance Committee.

## REPORT OF THE PAST PRESIDENT

Past President Grimm reported he attended meetings of the Tulsa Title and Probate Lawyers Association, OBA Bar Facilities Committee and OBA Leadership Conference Task Force.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended meetings of the Leadership Conference Task Force, MCLE Commission, State Legal Referral Service Task Force, Law School Committee, Bench and Bar Committee, Bar Center Facilities Committee and Idea Raiser-100 Great Ideas. He conducted OBA director evaluations and had separate meetings with Dick Beale on storage space, the architect on modular space and with the modular space company in Tulsa, where he viewed several modular unit samples. He

attended the Thursday evening board social event and several other meetings with OBA leadership and others on various subjects.

## BOARD MEMBER REPORTS

**Governor Caudle** reported he attended the March Board of Governors meeting and dinner with the Supreme Court, Comanche County Bar Association meeting, Mentoring Task Force meeting and General Counsel Murdock's CLE ethics presentation and NBA Hornets game. He also participated in the coordination of the Law Day luncheon, golf tournament and barbeque.

**Governor Christensen** reported she attended the March Board of Governors social with the Supreme Court, March Board of Governors meeting, Mentoring Task Force meeting, OBA Bar Facilities Committee meeting, Women in Law Committee meeting, OBA Bench and Bar Committee meeting, Model Code of Judicial Conduct Subcommittee meeting, Hornets CLE seminar and Oklahoma County Board of Directors meeting.

**Governor Dirickson** reported she attended the March board dinner with the Supreme Court, March board meeting, Custer County Bar

Association monthly meeting and Beckham County Bar Association monthly meeting.

**Governor Farris** reported he attended the March Board of Governors dinner with the Supreme Court, March Board of Governors meeting, Tulsa County Bar Foundation meeting and Tulsa County Bar Association meeting. He spoke to two classes at the TU law school about probate administration and chaired the Tulsa Municipal Judicial Nominating Committee meeting.

**Governor Hermanson** reported during the past two months he attended OBA Day at the Capitol activities, State Legal Referral Service Task Force meeting, OBA Criminal Law Section seminar, Thursday night Board of Governors function in Bricktown, Board of Governors meeting, OBA Member Services Committee meeting, OSU Hall of Fame dinner in Stillwater honoring Justice Steven Taylor, swearing-in ceremony of Judge Lee Stout in Newkirk and OETA Festival with other OBA members in Oklahoma City. In Tulsa he attended the OBA Law Practice Management Section reception and brainstorming session.

**Governor Hogan** reported he attended the March board meeting and lunch at the Faculty House, Pittsburg County Bar Association meeting and assisted with information for the Pittsburg County "Ask A Lawyer" program.

**Governor Kennemer** reported he attended two State Legal Referral Service Task Force meetings, March Board of Governors social with the Supreme Court,

March Board of Governors meeting, Mentoring Task Force meeting and Communications Task Force meeting.

**Governor Reheard** reported she attended the Thursday night dinner with the Supreme Court justices, Board of Governors meeting and McIntosh County Bar Association's Law Day planning meeting.

**Governor Souter** reported he attended the Board of Governors dinner with the Supreme Court, March board meeting, OBA Awards Committee meeting and Creek County Bar Association meeting.

**Governor Stockwell** reported she attended the March board meeting, board dinner with the Supreme Court, Cleveland County Bar Association luncheon, OBA Awards Committee meeting and Cleveland County CLE featuring MAP Director Calloway.

#### **REPORT OF THE YOUNG LAWYERS DIVISION**

Governor Camp reported the YLD sent Roy Tucker to ABA Law Day in Washington, D.C. where he met with many of Oklahoma's representatives. He also reported past YLD Chair Keri Williams has done a great deal of work on planning the program for the Affiliate Outreach Program meeting that will take place this weekend. He attended the Board of Governors dinner with the Supreme Court, March Board of Governors meeting, OBA Leadership Conference Task Force meeting and planning teleconference with the YLD New Attorney Committee. He chaired the March YLD Board of Directors meeting.

#### **REPORT OF THE SUPREME COURT LIAISON**

Justice Taylor reported the Supreme Court approved the amendments to the Rules of Professional Conduct that will become effective Jan. 1, 2008. He said Ethics Counsel Hendryx did a fine job in making the presentation. Justice Taylor said the order and the new rules have been posted to [www.oscn.net](http://www.oscn.net). President Beam reported the OBA will produce the new rules as a separate printed publication for all members in addition to having them available on its Web site.

#### **LAW STUDENT DIVISION LIAISON**

LSD Chair Robben reported she attended the March Board of Governors social with the Supreme Court and the March Board of Governors meeting. She noted that this was her last meeting, and she said she will forever be grateful for the experience, which has meant so much to her.

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

General Counsel Murdock shared a status report of the Professional Responsibility Commission and OBA disciplinary matters. He reported he conducted an Office of the General Counsel staff meeting and spoke to President-Elect Conger's Introduction to the Practice of Law class at OCU with Ethics Counsel Hendryx. He attended a Professional Responsibility Commission meeting, OBA directors meeting, monthly OBA staff celebration, OU reception for the law student pro bono program and Clients' Security Fund meeting.

## **DISCUSSION OF SENATE BILL 507**

Board members heard brief comments from attorneys Brad West and Larry Tawwater, who addressed issues contained within Senate Bill 507 that has passed both the House and Senate in the Oklahoma Legislature. Governors were given the opportunity to speak. The board voted to send a letter encouraging Gov. Brad Henry to veto the proposed legislation. The board authorized the Public Information Department to send out a news release about the letter to Gov. Henry that the Board of Governors voted to send. The board authorized an editorial from President Beam to be distributed to daily newspapers across the state. It was noted Justice Taylor was not present during the discussion of this agenda item.

## **BAR CENTER RENOVATIONS**

Executive Director Williams reported the week of July 16 is projected for east wing employees to move to the temporary units. A floor plan draft of the temporary space will be available soon. Work has started on the new location for the telephone system. President-Elect Conger reported the Bar Center Facilities Committee will ask the architects of the new front entrance to do a plan to soften the rough finish, which was intended to be a contrast to the white marble exterior. The committee still wants to add quotes to the entrance.

## **PRESENTATION**

President Beam presented LSD Chair Robben with an OBA certificate of appreciation and thanked her for her service on the Board of Governors. She thanked board members for the wonderful experience and their support.

## **LAW DAY COMMITTEE REPORT**

Committee Chair Giovanni Perry reported that new members had joined the committee this year to provide much needed assistance. She reviewed the content of the four Ask A Lawyer TV show segments that will air on OETA May 1 and other Law Day activities. She said volunteers had been recruited to translate the TV show into Spanish for the second year and asked the board to consider increasing the committee budget next year to allow professional translators to be used.

## **COMMITTEE LIAISON REPORT**

Governor Hermanson reported on behalf of the Member Services Committee that the contract with CoreVault has been signed, and an official announcement to the membership is coming as soon as a co-branded Web site is developed. The board approved the vendor endorsement at its March meeting.

## **APPEAL TO LEGAL ETHICS OPINION 2006 OK LEG ETH 01**

Legal Ethics Advisory Panel member Jim Drummond reviewed the process used by the panel in issuing an advisory opinion. Attorneys Allan Brook III, Michael Joseph and David Petty addressed the board. The

board voted to grant the appeal and to withdraw the opinion. The board voted to express appreciation to the panel for its time and effort. It was noted Justice Taylor did not participate in the discussion and Governor Dirickson was not present during consideration of this agenda item.

## **PROPOSED FAMILY LAW SECTION LOGOS**

The board voted to require all OBA sections wanting to use logos to utilize the existing OBA logo with the addition of the section name. The board tabled action on the development of a policy regarding logo utilization and approval.

## **AWARDS COMMITTEE RECOMMENDATIONS**

The board approved Awards Committee recommendations for 2007 awards that include the criteria for the new Trailblazer Award.

## **LEGISLATIVE UPDATE**

Executive Director Williams reviewed the status of bills on the OBA legislative agenda. He noted the civil procedure bill has passed.

## **OKLAHOMA GET-A-WAY**

MAP Director Calloway reviewed events planned for the Solo and Small Firm Conference, YLD Midyear Meeting and Estate Planning, Probate and Trust Section Midyear Meeting June 21-23, 2007, at Tanglewood Resort on Lake Texoma.

## **NEXT MEETING**

The board will meet Friday, May 18, 2007, at 9:30 a.m. at the Holiday Inn Express in Jenks.

# OBF Funds Senior Law Programs

The oldest of the baby boomers turned 60 last year. Perhaps the nation's most celebrated generation, born between 1946 and 1964; boomers vowed to never grow old but to age well.

Life expectancy at the turn of the century was approximately 46 years; today it is approximately 77 years. The number of citizens over age 85 will double by 2030, and by 2050, 40 percent of the population will be older than 50.<sup>1</sup> For the first time in history, seniors will outnumber children and youth. It is anticipated these increases will create a huge burden on society when a majority of the population consists of those that traditionally require care and are heavily dependent on others.

During the last decade in Oklahoma, the over age 65 population has been increasing at a rate faster than the population as a whole. Factors contributing to this growth include the immigration of retirees to the state, aging of our population and increased movement for closer proximity to families and services.<sup>2</sup>

**The OBF provided \$298,000 during 2006 to three organizations that provide services to Oklahoma seniors** — Legal Aid Services of Oklahoma's

Senior Law Project and two new programs the Senior Law Resource Center and the Oklahoma CAAVA pilot program.

Legal Aid Services of Oklahoma's (LASO) Senior Law Projects are an important source of free legal advice, counseling and community education throughout the state for citizens age 60 or older. Assistance is available in many different types of cases, such as wills, garnishments, debt collection or credit problems, consumer issues, Medicaid, Medicare and other medical access issues, public and subsidized housing issues, food stamps, Social Security and Supplemental Security Income, veteran's benefits, guardianship and power of attorney services. Each of Legal Aid's 11 service offices throughout the state has such a project. For more information about LASO's Senior Law Projects, call your nearest Legal Aid office, or visit Legal Aid's Web site, [www.legalaidok.org](http://www.legalaidok.org).

The new Senior Law Resource Center was established in 2006 to meet the growing legal needs

of elders, caregivers and people of all ages preparing for the next phases of their lives. The organization's purpose is to empower Oklahomans to age with independence, dignity and security by providing high-quality, affordable legal information, resources and services. The SLRC began operations this year by offering free community workshops and launching an online resource center. The organization is working toward becoming a central source for comprehensive

I have had such a great experience working as a law-student intern at the Senior Law Resource Center (SLRC). A majority of my research has been focused on sections of the SLRC Web site. In particular, I have been focusing on health issues within elder law such as hospice care and DNRs. Through this research I have gained practical experience in statutory interpretation and have learned to reword it in such a way that the everyday non-professional would be able to understand the law and answer their particular legal questions. Overall, the experience has been incredibly helpful to my own education, and I look forward to the continued practical experience that will be gained through the internship while helping aging Oklahoma citizens.

*Stephanie Powers*  
*University of Oklahoma Law Student*

guidance and assistance with various issues that arise as citizens age and is utilizing pro bono volunteers and law-student interns to develop and present educational programs. Student interns currently conduct elder law research, write educational content for the online resource center and develop written materials for community presentations. Please contact Catheryn Koss direct at SLRC (405) 528-0858 or ckoss@oklahomaseniorlaw.org for more information.

The second new program is the Oklahoma Court Appointed Advocates for Vulnerable Adults (OCAAVA) pilot program that will train advocates to work for the best interests of vulnerable adults within Oklahoma's court system. Citizens will serve as trained OCAAVA volunteers, at the discretion of the court, to function as the eyes and ears

of the court in the protection of vulnerable citizens. OCAAVA volunteers are to provide reliable, unbiased information to the judges in court cases. Work and plans are underway to establish the pilot program in Oklahoma County with eventual expansion into one of the more rural outlying counties. Please contact Georgette Clark direct at OCAAVA (405) 521-2281 for more information on the program.

The 2000 U.S. Census reports 429,566 Oklahomans were 65 years of age and older. By 2015, the over age 65 population is predicted to increase by 37 percent and will likely double by 2030.<sup>3</sup> The senior population shows no signs of slowing down or decreasing in size. It is nearly impossible to clearly define or label such a diverse group of people, but diversity is one of their greatest assets and strengths.

Seniors have the potential to be as great an influence on the future of America as this country's past was on them. By 2020, the senior population will number approximately 115 million nationwide. These statistics indicate that senior law programs are becoming more important to all Oklahoma citizens.

#### HOW CAN YOU 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. Please contact OBF at (405) 416-7070 for more information on the Fellows program.

1. National Center for Health Statistics' Web site, [www.cdc.gov/nchs](http://www.cdc.gov/nchs).

2. The Aging Boom, Report of the Shades of Gray Task Force (May 2001).

3. 2000 U.S. Census, The Census Bureau.





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# Long-term Care Insurance

## *Whether, When and What Kind*

By Catheryn Koss

The elderly is one of the fastest growing and most vulnerable segments of our society. Providing much-needed legal information and assistance to seniors and their caregivers is an excellent way for practicing and retired attorneys to make a difference.

### **Legal Assistance for Oklahoma Seniors**

Those interested in helping seniors with Medicare and other insurance issues can volunteer with the Oklahoma Insurance Department's Senior Health Insurance Counseling Program. Call (800) 763-2828 to find out when the next three-day training is scheduled. Attorneys can also do pro bono work for older clients through the Senior Law Project at Legal Aid Services of Oklahoma (Oklahoma City – Sharon Ammon (405) 557-0020; Tulsa – Jeanie Wheeler, (918) 584-3338). If you are interested in giving free community presentations on elder law issues, contact Catheryn Koss at the Senior Law Resource Center (405) 528-0858.

### **Long-Term Care Insurance Overview**

According to a recent report published by Gen-

worth Financial, the average annual cost of a private room in an Oklahoma nursing home is \$48,136.<sup>1</sup> The rising costs of long-term care combined with recent changes in institutional Medicaid eligibility requirements<sup>2</sup> are heightening the public's interest in long-term care insurance. Older people are frequent targets of long-term care insurance advertisements and sales pitches. This article briefly explores how to help your clients determine if and what kind of long-term care insurance is right for them.

### **Is Long-Term Care Insurance Right for Your Client?**

Before clients purchase long-term care insurance, they should assess their financial situation and preparedness for other more immediate financial risks. Do they have adequate retirement savings and health insurance?<sup>3</sup> If appropriate, do they have sufficient life and disability insurance? Insurance companies are required to provide a potential buyer with a "personal worksheet" designed to assess the suitability of long-term care insurance.<sup>4</sup>

Most basic policies offer coverage only as long as the

policy holder pays the premium. Unless they opt for a non-forfeiture benefit (discussed below), clients should be confident in their ability to pay the premiums (taking into consideration future rate increases) for the rest of their lives or at least until they need long-term care.<sup>5</sup>

### **When Should Your Client Buy Long-Term Insurance?**

If your client has decided to purchase long-term care insurance, the next question is at what age should the client buy the policy. Arguments for early purchase include lower premiums, the risk of becoming ineligible due to future deteriorating health and the possibility of needing long-term care sooner than expected. On the other hand, younger consumers will likely pay premiums for several decades before ever needing long-term care. Unanticipated financial difficulties may force some to allow policies to lapse.

Because most policies are designed with the current healthcare system in mind, medical advances, changes in how care is delivered and policy reforms may diminish the value of the coverage.<sup>6</sup> Clients should balance these risks, taking into considera-

tion their age, health and financial situations, to decide when to purchase. Younger purchasers should strongly consider purchasing inflation protection (discussed below).

### What Kind of Policy Should Your Client Purchase?

Begin by helping your clients identify their reasons for buying long-term care insurance. If the client wants to preserve assets for the next generation, the benefit amount should be high enough to cover most or all of the anticipated costs of care. If the client simply wants to remain independent and at home as long as possible, more limited coverage may allow the client to prevent impoverishment during shorter, temporary periods of care.<sup>7</sup>

Once the client's goals are identified, assess how well particular policies would meet those objectives and weigh the costs of increased coverage. Variables in policies include:<sup>8</sup>

- **Covered Services and Exclusions** — Some policies specify particular services covered or limit the kinds of facilities where care can be received.

- **How Benefits are Paid** — Benefits are paid either based on actual expenses (expense incurred) or at a set dollar amount (indemnity method).

- **Amount of Coverage** — Policies have lifetime benefit maximums as well as daily, weekly, or monthly limits. Often different types of services (e.g., nursing home care

versus home care) will carry different maximum benefit amounts.

- **Benefit Triggers** — Eligibility for covered services is based on the policyholder's inability to carry out a specified number of "activities of daily living" (ADLs). ADLs may include bathing, dressing, toileting, continence, transferring (moving in and out of a chair or bed) and eating. Because bathing is one of the first ADLs to be lost, finding a policy that includes it as a benefit trigger is preferable. Alternatively, eligibility may be based on a loss of cognitive ability.

- **Elimination Period** — Most policies have a waiting period after the policy holder begins to receive long-term care.

- **Inflation Protection** — Inflation protection helps to ensure that the coverage will still be adequate many years in the future. Some policies allow holders to increase the benefit amount periodically for an additional cost.

- **Waiver of Premium** — This allows the policy holder to stop paying premiums at a point after long-term care begins or after the company begins paying benefits.

- **Nonforfeiture Guarantee** — This option protects policyholders unable to continue paying premiums. If the policy is cancelled, the company will return a portion of the money paid.

### Conclusion

Consumers should research the insurance com-

pany before purchasing a policy. The Financial Division of the Oklahoma Insurance Department can determine if a company is licensed in Oklahoma and in good standing. The department's Senior Health Insurance Counseling Program at (800) 763-2828 is an excellent source of information. SHICP-trained volunteers provide free insurance counseling for seniors.

### About the Senior Law Resource Center

The Senior Law Resource Center is a nonprofit organization providing legal information and services to elders and caregivers in Oklahoma. Attorneys give free community presentations on a variety of elder law issues and one-on-one legal services are offered on a sliding-scale basis. For more information, call (405) 528-0858 or go to [www.OklahomaSeniorLaw.org](http://www.OklahomaSeniorLaw.org).

1. Jim Killackey & Jeff Raymond, *Health: Long-term Care Planning Urged, Nursing Home Costs Average \$48,136 a Year*, *The Oklahoman*, April 4, 2007, at 11.

2. *Deficit Reduction Act of 2005*, Pub. L. No. 109-171, 120 Stat. 4 (Feb. 8, 2006).

3. Mark Merlis, *Private Long-term Care Insurance: Who Should Buy It and What Should They Buy?* (The Henry J. Kaiser Family Foundation) (March 2003).

4. 36 O.S. §4429(C)(2).

5. Oklahoma Insurance Dep't., *2003-05 Shopper's Guide Long-Term Care Insurance Senior Health Insurance Counseling Program "SHICP"* 7.

6. Merlis at 9-12.

7. *Id.* at 21-9.

8. *2003-05 Shopper's Guide Long-term Care Insurance* at 9-15.

*Ms. Koss is executive director of the Senior Law Resource Center.*

## YLD HOSTS SUCCESSFUL REGIONAL CONFERENCE

Young lawyers from neighboring states gathered in Oklahoma City for the American Bar Association/Young Lawyers Division South Central Regional Conference April 20-21. The conference was part of the ABA's Affiliate Outreach Program (AOP), which affords young lawyers from surrounding states the opportunity to converge in small settings where they can exchange ideas and resources regarding the development of public and member service programs.

Things kicked off on Friday afternoon with guest speaker Hindi Greenberg, president of Lawyers in Transition and author of *The Lawyer's Career Change Handbook: More Than 300 Things You Can Do With a Law Degree*. Ms. Greenberg — christened “the Ann Landers for lawyers” by the *Los Angeles Times* — has been widely acknowledged by major legal publications, news periodicals and television news networks for her expertise on attorney career satisfaction.

That evening, YLD members and conference attendees joined the OBA Board of Governors at Remington Park for a private suite dinner and reception. Also among those the YLD was pleased to welcome were ABA/YLD Chair Jay Ray from McKinney, Texas; Affil-

iate Assistance Director Ryan Reed from Bowling Green, Ky.; ABA/YLD South-Central District Representative Amy Freedman from Texarkana, Ark.; New Mexico YLD Chair Erika Anderson; Tulsa County Bar Association YLD Chair Adam Marshall; and former OBA Law Student Division Chair LeAnne McGill.



*YLD Chair Chris Camp, YLD Immediate Past Chair Keri Williams and ABA/YLD Chair Jay Ray enjoy the evening at Remington Park.*

The conference picked up again on Saturday morning with informative presentations by ABA leaders on topics ranging from the development of division membership to budget planning and implementation. Meetings concluded with presentations by YLD affiliates of their various public and member service projects.

The YLD extends special thanks to OBA/YLD Immediate Past Chair Keri Williams for planning an informative conference, and for providing Oklahoma's young lawyers with a chance to learn from those with unsurpassed bar leadership experience.

## YLD DIRECTOR VISITS NATION'S CAPITAL

YLD Director Roy Tucker represented Oklahoma at ABA Day in Washington, D.C. April 18-19. The event focused on meeting our nation's elected officials on the legislative initiatives and agendas supported by the ABA. During the two-day

meeting, Mr. Tucker, along with Oklahoma delegates Judge Jodi Levine, Jack Brown, William Hoch and Dwight Smith, met with Oklahoma's senators and representatives to ask for support on key legislation.

Among the legislative items discussed were: 1) an increase of \$80 million for Legal Services Corporation, the national corporation which provides substantial funding for state legal aid services, including Oklahoma; 2) an immediate and substantial increase in federal judicial pay; 3) a loan forgiveness program for attorneys in public service;

4) reauthorization of the Indian Health Care Act; 5) and reauthorization of the Juvenile Justice Act.

"We appreciate Roy's willingness to tackle a tough two days in D.C.," said YLD Chair Christopher Camp. "It is important that Oklahoma's young lawyers let their voices be heard on mat-

ters that directly impact them, their clients, the legal profession and the administration of justice."

After the first full day of lobbying, participants were invited to a reception at the Library of Congress with ABA President Karen Mathis.

#### THANK YOU

The YLD Wills for Heroes Project would like to thank the Tulsa offices of Gable & Gotwals and Lynco Inc. for their generous donation of laptop computers and portable printers. Beginning next month, the YLD will be using this equipment for the off-site preparation of wills and estate planning documents for police, firemen and other first responders.

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# Calendar

## May



- 18 OBA Board of Governors Meeting;** 9:30 a.m.; Jenks; Contact: John Morris Williams (405) 416-7000
- OBA Mentoring Task Force Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jon Parsley (580) 338-8764
- OBA Lawyers Helping Lawyers Committee Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Thomas Riesen (405) 843-8444
- 25 OBA Access to Justice Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kade McClure (580) 248-4675
- 28 Memorial Day** (State Holiday)
- 30-31 Sovereignty Symposium XX;** Skirvin Hilton Hotel, One Park Avenue, Oklahoma City

## June

- 16 OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Matthew Free (918) 582-1234
- OBA Solo & Small Firm Conference Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Roger Reneau (405) 732-6000
- OBA Law Day Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Giovanni Perry (405) 601-2222
- 17 OBA Work/Life Balance Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melanie Jester (405) 609-5280



- 1 Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judge Barbara Swinton (405) 713-7109
- 5 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
- 6 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Steven Dobbs (405) 235-7600

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- 8 **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Donelle Ratheal (405) 842-6342
- 12 **OBA Bar Center Facilities Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Bill Conger (405) 208-5845
- 13 **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
- 14 **OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 18 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Larry Yadon (918) 595-6607 or Barry Davis (405) 607-8757
- 20 **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
- 21-23 **OBA Solo & Small Firm Conference and YLD Midyear Meeting;** Tanglewood Resort on Lake Texoma; Contact: (405) 416-7050
- 22 **OBA Board of Governors Meeting;** Tanglewood Resort on Lake Texoma; Contact: John Morris Williams (405) 416-7000
- 29 **OBF Trustees Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

## July



- 4 **Independence Day** (State Holiday)
- 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) 208-5845
- 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
- 12 **OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 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 Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Larry Yadon (918) 595-6607 or Barry Davis (405) 607-8757
- 18 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Steven Dobbs (405) 235-7600
- 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;** Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- OBA Mentoring Task Force Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jon Parsley (580) 338-8764
- 21 **OBA Title Examination Standards Committee Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 840-2470
- 24-27 **OBA Bar Examinations;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Board of Bar Examiners (405) 416-7075

*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).*



Oklahoma County Ask A Lawyer co-chairs Mike Krasnow and Mike Blaschke (standing back, left) greet and assist volunteers while taking calls for advice.

### Volunteers Create Successful Law Day

Hundreds of lawyers across Oklahoma joined together May 1 to answer phone calls for free legal advice to celebrate Law Day. This year, lawyers in 48 counties answered more than 2,500 calls for advice. This was the 29th year the OBA has coordinated this community service. Oklahoma City attorney Giovanni Perry serves as OBA Law Day Committee chair.

### Bar Auxiliary Supports Mock Trial Winners

Oklahoma County Bar Auxiliary President Jane Kenney (right) presents a \$500 check to the Oklahoma's High School Mock Trial champion team from Ada High School. The funds were presented to the team to assist with travel expenses to the National High School Mock Trial Finals in Dallas. The auxiliary has been instrumental in making financial donations to the program since its inception 27 years ago.



In addition to their work on behalf of the Mock Trial program, both the Oklahoma County and Tulsa County bar auxiliaries were busy this year providing delicious meals served to Ask A Lawyer volunteers during Law Day.

## Pace XVIII Deadline Extended

The OBA Law-related Education Department has extended until June 1 the deadline for applications to participate in the 2007 PACE Summer Institute.

PACE (Programs Advancing Citizenship Education) is aimed at teachers and will take place July 8-12 at the Reed Conference Center

in Midwest City. This year's institute, "Oklahoma Centennial: A State of Many Nations," will expose educators to various aspects of the Oklahoma judicial system, Native American courts, citizenship education and public policy.

For more information, contact LRE assistant Jeanne Minson at (405) 416-7023, or visit [www.okbar.org](http://www.okbar.org) to download an application.

### Holiday Hours

The Oklahoma Bar Center will be closed Monday, May 28 for Memorial Day and Wednesday, July 4 for Independence Day.



### OBA Member Resignation

The following OBA member has resigned as a member of the association and notice is hereby given of such resignation:

Gretchen Pauline  
Hoover  
OBA No. 14596  
3810 Indian Lake Rd.  
Rhineland, WI 54501

### OBA Member Reinstatement

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

James Scott Dilbeck  
OBA No. 20192  
2713 Wyandotte Way  
Norman, OK 73071

## Calling All Writers

We need you on the "Back Page." Share your story or poetry that conveys humor, intrigue or inspiration to others. Submissions should be short, a maximum of two double-spaced pages or one and 1/4 single-spaced pages, and preferably related to the practice of law. E-mail Carol Manning with submissions or questions at [carolm@okbar.org](mailto:carolm@okbar.org).

## Bar Journals Take Summer Vacation

Look for the next bar news edition of the Oklahoma Bar Journal (with color cover) to be published Aug. 4. You'll still be receiving court material in June and July. Deadline for submissions for the next news issue is July 16.

## So You Want to be the Next John Grisham?

Now's your chance! Enter the Sixth Annual Legal Fiction Writing Contest for Lawyers sponsored by SEAK Inc. The purpose of the competition is to encourage lawyers to become more interested in and adept at writing legal fiction. A short story or novel excerpt in the legal fiction genre, typed and not exceeding 2,500 words, should be submitted by Sept. 7, 2007. Judging will be based on originality, quality of writing and the potential of the author. Prizes include \$1,000 cash for first place! Entries should be sent to: SEAK Inc.- Legal Fiction Competition; Attention: Steven Babitsky, President; P.O. Box 729; Falmouth, MA 02541.

# Kudos

The **Carter County Bar Association** recently raised scholarship money for three local graduating high school students. Among the recipients was the daughter of an Ardmore attorney, Mitch Sperry, who died last year.

Tulsa attorney **W. Thomas Coffman** completed 21 years of continuous service in various capacities as a fellow of the American College of Trusts and Estate Counsel. He was elected a fellow in 1979 and began his service to the college as Oklahoma State chair from 1986-1992, and continued on as national regent from 1992-1998. Mr. Coffman was a National Foundation Board member from 1995-2001 and National Membership Selection Committee member from 2001-2007.

Nicomia Park attorney **Randy L. Goodman** will serve as Rotary District 5750 team leader for a group study exchange program to Rio de Janeiro, Brazil. The district includes Oklahoma City and the northwest quadrant of Oklahoma. The program is a vocational and cultural program designed to promote peace through a better understanding of world cultures. Members of the team also include Enid

attorney **Robert Faulk** and Durant attorney **Matt Mickle**. Immigration attorney **Lawrence Davis** will serve as interim chairman of the program

**Randall Grimmett** has been promoted to senior vice president/membership group of the American Society of Composers, Authors and Publishers (ASCAP). In this new position, Mr. Grimmett will play a major role in the membership group's business affairs and membership operations in the U.S. and abroad. He began his music career in management and business affairs and he joined the ASCAP 13 years ago.

**Larry D. Ottaway** of Foliart, Huff, Ottaway & Bottom participated in the Masters in Trial for SEABO-TA, a regional affiliate of the American Board of Trial Advocates, in Atlanta in April. Mr. Ottaway also served on the faculty of the ABA Tort Trial and Insurance Practice National Trial Academy in Reno, Nev., also in April.

The **Pontotoc County Bar Association**, in conjunction with East Central University's Legal Professions Association and the Student Activities Center, recently hosted a Law Day Blood Drive on the ECU campus to benefit the Oklahoma Blood Institute. Fifty blood donations were collected during the drive.

The 2007-2008 Officers for the Oklahoma County Bar Auxiliary were announced. They will be in place May 10, and they are: President Jo Jones; First Vice Presidents Sheila Manners and Cathy Kirk; Second Vice Presidents Marilyn Summers and Anne Holbrook; Secretary Lynn Pickens; Corresponding Secretary Judy Riggs; and Treasurer Ellen Morgan.

The OCU School of Law presented Phillips, McFall, McCaffrey, McVay & Murrah with the Law Firm Mark of Distinction at the Legal Affairs banquet held April 21 at the Skirvin Hotel. OCU law professor **Alvin Harrell** received the Justice Marian P. Opala Award for Lifetime Achievement. Proceeds from the event benefited scholarships at Oklahoma City University School of Law.

**Don Templin** of Dallas has been named a fellow of the American College of Trial Lawyers. He accepted the honor at the recent 2007 spring meeting of the college in La Quinta, Calif. Founded in 1950, the college is composed of U.S. and Canadian trial bars. Lawyers must have a minimum of 15 years trial experience before being considered for fellowship.

**Gov. Brad Henry** has appointed **Lt. Gov. Jari Askins** as Oklahoma's small business advocate, a role

tasked with providing assistance to small business owners throughout the state. The governor issued the executive order May 7 in conjunction with "Small Business Day" at the state Capitol. Gov. Henry said, "Jari Askins is a proven leader with a strong and unwavering commitment to Oklahoma's small businesses. This is a perfect fit, and one that I am confident will help our economy continue to grow."

## On The Move

**J**ames Sears Bryant was recently named a partner in the St. Louis-based law firm of Stolar Partnership. He will lead the firm's educational practice. Mr. Bryant will receive his doctorate in higher education management from the University of Pennsylvania in May. For the last 10 years, Mr. Bryant was of counsel to Dow, Lohnes in Washington D.C., and the last two years he also served as assistant to the dean of external affairs at the Amos Tucker School of Business at Dartmouth College.

**G**ableGotwals announces that **Leah Phelps Carpenter** has joined the firm as an associate in their Tulsa office. She received her undergraduate degree from OU in 1994 and her J.D. from the TU College of Law in 2004. Prior to joining the firm, she most recently practiced law in Dallas. Her legal practice area is commercial litigation.

**T**he law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson PC announces the addition of **Julianna P. Deligans** as an associate in the Oklahoma City office. She received her undergraduate degree with honors from OSU and her J.D. from the OU College of Law. Ms. Deligans will add the practice of intellectual property law to the Oklahoma City office. Her other specialty areas include trademarks, copyrights, unfair competition and licensing.

**R**andy Evers has joined Legal Aid Services of Oklahoma Inc. as a staff attorney in the Court Defender Office in Oklahoma City. Before joining Legal Aid, Mr. Evers was a sole practitioner in Norman, specializing in general criminal practice, trial, appellate and post conviction. He spent several years as appellate defense counsel, Capital Post-Conviction Division, of the Oklahoma Indigent Defense System. Mr. Evers received his undergraduate degree from OU and his J.D. from OCU. Mr. Evers may be contacted at (405) 297-3190.

**H**unton & Williams LLP announces that **Chet A. Fenimore** has joined the firm as managing partner of its Austin, Texas office. Mr. Fenimore was formerly a shareholder with the law firm of Jenkens & Gilchrist. His practice focuses on corporate and regulatory representation of companies operating throughout the United States, with an emphasis on banks and financial institutions. He received his J.D. from OU in 1993.

**T**he Edmond law firm Lester, Loving & Davies PC announced that **George S. Freedman** is now a partner with the in the firm. Mr. Freedman, who was formerly of counsel to the firm, received his J.D. from the University of Missouri in 1993. His practice focuses on family law, employment law, business consultation and corporate litigation.

**T**he Edmond firm of Rubenstein, Bryan, McCormick & Pitts PLLC announces the addition of **Daniel G. Howard** and **Jonathan D. Reiff** as counsel to the firm, and that **Carol Wood Mitchell** has recently been associated with the firm.

Mr. Howard received his B.A. and M.B.A. from OSU. He earned his J. D. from OCU in 2003 where he graduated magna cum laude. His practice concentrates in intellectual property, corporate formation and general business planning.

Mr. Reiff received his J.D. from Wake Forest University in 1967 and his L.L.M. in taxation from SMU in 1981. He has practiced law in Oklahoma City since. He is a 1960 graduate of Harvard College and is the author of a number of tax and other legal articles. His practice concentrates in estate planning for complex estates, and personal and business tax and organizational planning.

Ms. Mitchell received her J.D. from SMU. She practiced commercial, transactional and bankruptcy law in Tulsa for 21 years before moving to Edmond in 2004.

She has served for three years as a Chapter 7 panel trustee for the Northern and Eastern Districts of Oklahoma.

**N**ewton, O'Connor, Turner & Ketchum PC announces **Thomas M. Klenda** has become of counsel with the firm. Mr. Klenda received his undergraduate degree from OSU in 1977 and his J.D. from TU in 1980. His practice focuses on franchise law, real estate, commercial transactions, business organizations, and estate and asset protection planning. He may be reached at the firm's offices located at 15 W. 6th St., Suite 2700, Tulsa, 74119; by phone at (918) 587-0101; or by e-mail at [tklenda@newtonoconnor.com](mailto:tklenda@newtonoconnor.com).

**L**egal Aid Services of Oklahoma opened its McAlester Satellite Office the first week in May to serve the civil legal needs of low-income and elderly persons in Pittsburg County. The new office is open part time and is located at 1335 East Carl Albert Parkway in McAlester. For additional information on the McAlester Office call **Mary Mosshammer** at (580) 326-9655.

**G**lassWilkin PC of Tulsa announced that **Clint M. Patterson** joined the firm as an associate attorney. Mr. Patterson graduated from the University of Chicago with a B.A. in political science. He received his J.D. from the TU College School of Law in 2004. He formerly served with the Tulsa County District Attorney's Office.

**A**ndrews Davis announces that **June E. M. Phillips** has joined the firm as an associate. Ms. Phillips received her undergraduate degree from Indiana University, her master's degree in health administration from OU and her law degree from the TU College of Law. Andrews Davis is located at 100 N. Broadway, Suite 3300, Oklahoma City, 73102. Ms. Phillips can be reached at (405) 272-9241.

**T**odd Taylor announced the relocation of his office to 5761 N.W. 132nd Street, Oklahoma City, 73142. He has 21 years experience in business and commercial litigation, trust and estate litigation, banking and healthcare. Mr. Taylor may be reached by phone at (405) 470-6649 or by e-mail at [todd.taylor@taylorlawOKC.com](mailto:todd.taylor@taylorlawOKC.com).

**C**onner & Winters LLP announces **Brad Williams** has joined the firm's Oklahoma City office as an associate. He will work in both the firm's commercial transactions and litigation practice areas. Mr. Williams graduated from the OU College of Law in 2003 after earning his undergraduate degree in energy management from OU. He is also admitted to practice in Texas.

**D**aniel Woska, **Douglas A. Swim** and **Dan M. Peters** announced the opening of their new offices at 3037 N.W. 63rd, Suite 251, Oklahoma City, 73116. The firm will handle a variety of matters including business litigation, securities matters, catastrophic injuries to chil-

dren (including Cerebral Palsy and Erbs Palsy), healthcare negligence, arbitration and mediation, consumer litigation, employment law, labor law and administrative law. The firm can be reached by telephone at (405) 562-7771, by fax at (405) 285-9350, or by e-mail at [www.woskaswim.com](http://www.woskaswim.com).

**P**ignato and Cooper PC announces the name of the firm has changed to Pignato, Cooper, Kolker & Roberson PC.

## At The Podium

**Chris A. Paul** of Joyce & Paul PLLC of Tulsa co-presented "A Broader View of SCADA" at the Energy Telecommunications and Electrical Association's 2007 Conference in Houston. The presentation reviewed the emerging regulatory and legal issues that surround SCADA, and how these issues interface with the technical demands and capabilities of systems.

**F**red H. Miller of Oklahoma City planned and moderated a seminar titled "Primer on Modern Payment Systems," hosted April 19 by the OBA in Oklahoma City. Other presenters included **James A. McCaffrey** and **Eric L. Johnson**. The event provided practicing attorneys from across the state of Oklahoma with a discussion of payment system issues that affect

Oklahoma business transactions.

**J**ohn D. Rothman, legal director of the Oklahoma Mediation/Arbitration Service, recently spoke at the annual meeting of the Association of Attorney Mediators in Santa Fe, N.M., on the topic of "Recommended Settlement Figures, Mediator's Number and Other Post-Mediation Mechanisms to Finalize Settlements."

**T.** Douglas Stump spoke at the recent AILA Texas Chapter Conference in Las Vegas. His presentation focused on *mandamus* litigation against the Citizenship and Immigration Services.

**T**ulsa attorneys **Brad A. Jackson** and **Theresa Noble Hill** instructed in the recent program "The Fundamentals of Construction Contracts: Understanding the Issues in Oklahoma." The program provided information on the basic contract principles, key contract provisions, change orders and contract modifications. It was designed to provide a clear understanding of the implied terms and obligations in construction contracts. It also focused on contract administration and dispute resolution.

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  
Public Information Dept.  
Oklahoma Bar Association  
P.O. Box 53036  
Oklahoma City, OK 73152  
(405) 416-7018  
Fax: (405) 416-7001 or  
E-mail: [barbriefs@okbar.org](mailto:barbriefs@okbar.org)

**Articles for the Aug. 4 issue must be received by July 16.**

# www.okbar.org

## Your source for OBA news.



**At Home**



**At Work**



**And on the Go**

**H**arold G. Clark Jr. of Edmond died March 19. He was born Feb. 23, 1928, in Dallas. Clark attended Highland Park High School. He received his undergraduate degree and his J.D. from SMU. He practiced law in the Dallas District Attorney's Office as well as with Delta Airlines and later with LTV Aerospace. **He was as member of the U.S. Coast Guard and attained the rank of lieutenant commander.**

**R**etired Judge Jesse Robinson Field of Shawnee died March 31. He was born Jan. 25, 1911, in Hobart. Mr. Field graduated from Hobart High School in 1928. He attended the Oklahoma Military Academy for two years and received his L.L.B. degree in law. He practiced privately as an attorney for eight years and served as the Oklahoma state representative for Kiowa County. Mr. Field was an FBI agent from 1942-1973, and then as special court judge in Pottawatomie County for 23 years. He was a member of Kiwanis-Hobart, Shawnee (Diamond X) and the Society of Former FBI Agents.

**J**ohn A. Ladner of Tulsa died April 10. He was born July 22, 1928. He earned an undergraduate degree in 1950. **He served in the Air Force as a judge advocate general officer in charge of**

**military police during the Korean War.** After his discharge, he graduated from the OU College of Law in 1956. Mr. Ladner worked for his father's law firm, Ladner and Livingston, before he took a job with Sun Oil Co. He was later named general counsel of Sun Oil Pipeline. He was a Gilcrease Museum docent and a counselor for First Methodist Church's Healing Ministries.

**V**irginia Dorothy Lobaugh of Tulsa died April 9. She was born Oct. 28, 1914, in Littleton, West Va. She graduated from Tulsa Central High School. In 1942, Ms. Lobaugh was one of the first female graduates from the TU College of Law. She was an attorney for Service Pipeline and Amoco. Ms. Lobaugh was past president of the Pilot Club of Tulsa and past chairman of Eastern Star. She was a member of the Tulsa County Bar Association, Oklahoma Association of Woman Lawyers and the Quota Club.

**R**obert Ben Struble of Norman died April 19. He was born March 19, 1954, in Stillwater. He received his undergraduate degree from OSU and his law degree from the OCU School of Law. Mr. Struble served as the senior deputy general counsel for the Oklahoma Tax Commis-

sion. He went on to work with Ernest and Young LLP and was a principal with Grant Thornton LLP. He was a member of the board of trustees for Youth Services for Oklahoma County. He was also an Eagle Scout and avid Cub Scout leader.

**J**ohn Ernest Wagner of Oklahoma City died May 3. He was born on Dec. 19, 1926, in Hockerville. **After high school, Mr. Wagner joined the Army and trained as a Japanese linguist at Louisiana State University, Yale University and the University of Minnesota. He served in Tokyo in 1946 as an interpreter-stenographer. He was also commissioned as an officer in the Counter Intelligence Corps.** He received his law degree from OU with honors in 1954. He established his own law practice in 1961. He served in the Oklahoma Legislature and as a GOP county chairman. He served as president of the Oklahoma Interscholastic Press Association and the Greater Oklahoma City Council of Churches. Mr. Wagner was a member of Regional Aids Interfaith Movement and established the Agency for Christian Ministry. Memorial contributions may be made to St. Paul's Episcopal Cathedral of Oklahoma City.

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## POSITIONS AVAILABLE

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## POSITIONS AVAILABLE

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**ANGELA D. AILLES AND ASSOCIATES,** in-house counsel for State Farm Mutual Automobile Insurance Company, seeks associate attorney with 2-5 years of insurance defense experience. The attorney must be a motivated self-starter with a strong desire for continuous personal and professional development. Candidates should be able to handle his or her own case load with supervision. Fax resume to (405) 478-0906. Equal Opportunity Employer.

**MID-SIZE OKLAHOMA CITY FIRM; CORPORATE/M&A ASSOCIATE** with 1-4 years experience. Prestigious AV rated law firm seeks self-motivated associates committed to producing high quality work. Evidence of academic excellence is required. Corporate law experience and a working knowledge of private securities law as well as mergers and acquisitions are required. Salary above \$100,000, with performance bonus. Send resume, cover letter outlining previous experience, transcript and references to Box "E," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

**OKC AV FIRM SEEKS** associate with 2-5 yrs. Experience. The attorney must be a motivated self starter. This position allows an attorney to handle his or her own case load with supervision. An associate is needed with experience in insurance defense, workers compensation defense and insurance subrogation. Send resume and salary requirements to Box "N," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

**Ramsey and Gray, P.C., DOWNTOWN OKC AV FIRM,** seeks associate with at least 3 years experience in Family Law and/or Civil Litigation. Strong academic background, research and writing skills required. Prior deposition, hearing and trial experience preferred. Must be prepared to immediately assume substantial responsibility. Compensation and benefits commensurate with abilities. Send resume to Michael D. Gray, at Ramsey and Gray, P.C., 101 North Robinson Avenue, Suite 700, Oklahoma City, Oklahoma 73102.

## POSITIONS AVAILABLE

SMALL OKLAHOMA CITY FIRM WITH HEAVY CASE LOAD seeks associate with experience in personal injury, criminal defense and civil litigation. Our firm practice focuses mainly in personal injury, family practice, criminal practice and immigration. All contacts will be kept confidential. Compensation package commensurate with experience and performance. Send resume to Box "R," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LEGAL SECRETARY — State Farm Insurance Companies In-House Counsel, Angela Ailles & Associates seeks Legal Secretary. Job duties include word processing, docketing/calendaring/scheduling, preparation of standard pleadings, and assisting with preparation of draft discovery responses. Secretarial Experience in insurance defense litigation is preferred. State Farm offers an excellent salary and benefits package. If interested, please fax your resume to (405) 478-0906. Equal Opportunity Employer.

OKC DOWNTOWN AV RATED FIRM seeks self-motivating, hard working attorney desirous of practicing family law and general civil litigation. Submit resume and writing sample to Box "P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

IMMEDIATE OPENING - EXCELLENT OPPORTUNITY: Small Oklahoma City AV rated law firm with substantial caseload seeks experienced paralegal. Experience with plaintiff's personal injury highly recommended. Benefits include your own office in a beautiful historical building, health care/dental package, and great support staff/co-workers. Salary commensurate with experience and performance. Must have excellent organizational, computer, typing and communication skills and be ready to "jump right in". All contacts will be kept confidential. Send resume to Box "H," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SMALL DOWNTOWN TULSA A-V rated firm with business and commercial litigation practice seeks lawyer with 2 to 5 years experience. Flexible hours possible. Pay commensurate with experience and effort. Contact will be kept confidential. Please submit resume to: Box "C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

## WILLS

ATTN: ALL WILL DRAFTING ATTORNEYS: If any attorney has any information regarding the existence of a formal or handwritten Last Will of a decedent named Mary A. Keys, a/k/a Mary Agnes Keys, who died on October 11, 2006, a resident of Muskogee County, please contact the undersigned who is representing Mr. Steve Kauble, Personal Representative of the Estate of Mary A. Keys, Muskogee County District Court, Case No. PB-2006-139. Curtis J. Shacklett, Barber & Bartz, 525 S. Main Street, Suite 800, Tulsa, Oklahoma 74103-4511, (918) 599-7755, E-mail: cshacklett@barberbartz.com.

## FOR SALE

ATTRACTIVE 86" X 42" Kimbell desk with blue inlay leather and glass top. Leather desk chair and two matching blue leather side chairs. Matching 78" credenza with front folding doors and six drawers. All in excellent condition. (918) 747-4600.

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# Fun Is Not a Four-Letter Word

## 10 Ways to Have Fun Practicing Law

By Melanie Jester

**H**ave you stopped lately to consider whether you are injecting some fun into your everyday work week? Curiosity and creativity are a lawyer's most essential tools. Here are a few suggestions (ranging from the serious to the absurd) to jump-start your work week:

**1** **Send a monk-e-mail.** Dress your chimp for laughter success, add a text message and select a voice. Your chimp will speak your e-mail to a friend (or opposing counsel)! Go to [CareerBuilder.com/monk-e-mail](http://CareerBuilder.com/monk-e-mail).

**2** **Foster a client-relationship.** The practice of law is largely the practice of building relationships. Learn a hobby or personal interest of a client. Send a small gift, relevant book, article or even a cartoon recognizing your client's interest.

**3** **Pick a pick-me-up theme song.** Upbeat music is a sure-fire way to infuse some energy. Need ideas? Poll your co-workers for a list of their favorites or check out the *Real Simple* iMix on iTunes, a playlist of "power songs."

**4** **Give yourself gold stars.** Tackle a project you've been procrastinating over and earn a gold star. Chart your progress and give yourself one month to earn 10 stars. At the end of the month reward yourself with a personal splurge.

**5** **Unwind with a "deep thought."** Remember the soothing voice and picturesque nature scenes that accompanied Saturday Night Live's *Deep Thoughts* by Jack Handy? When work is too serious, unwind with one of your favorite Handy thoughts at [www.deepthoughtsbyjackhandy.com](http://www.deepthoughtsbyjackhandy.com).

**6** **Stretch your brain.** Schedule one hour at least once a month to study recent developments in your practice area. Write a brief summary of what you learned and e-mail it to your practice group. Ask for comment and feedback.

**7** **Think outside the box.** Pick one area of your practice you would like to improve upon (negotiation techniques, marketing practices, billing methods) and brainstorm about novel approaches. Consult colleagues for suggestions, search for an Internet-based discussion or check out *The Art of Possibility: Transforming Professional and Personal Life* by Rosamund Stone Zander and Benjamin Zander.

**8** **Conduct a self-evaluation.** Where are you professionally? Set goals on how to improve neglected or underdeveloped skills. Keep the goals simple. Take some action each day toward reaching your goals. Don't stress out about these goals! This is supposed to RELAX you!

**9** **Spread enthusiasm.** Write a note of congratulations, praise or encouragement to a co-worker.

**10** **Liven up your language.** The lawyer's medium is words. If you've become mired in the monotony of legalese, give a boost to your vocabulary. Subscribe to Merriam-Webster's Word of the Day e-mail at [www.m-w.com](http://www.m-w.com).

**DON'T STOP WITH THESE SUGGESTIONS.** Come up with your own top 10 list. Deliver it to your office colleagues Letterman style.

**NEED HELP?** Look for suggestions in these books: *301 Ways to Have Fun at Work* by Dave Hemsath and Leslie Yerkes; *Work Like Your Dog* by Luke Barber and Matt Weinstein.

*Ms. Jester is an attorney in Oklahoma City and chairs the OBA Work/Life Balance Committee.*



**Financial Security**



**takes more than a wish.**



**Long Term Disability? The risk  
may be greater than you think.**

**Good financial plans  
are better than wishes.**

According to the National Underwriters "Why Disability" booklet

- **At age 42 it is four times more likely that a person will be seriously disabled than die during the working years.**
- **Men have a 43% chance and women a 54% chance of becoming seriously disabled during their career life.**

According to [www.soundfinancialplan.com](http://www.soundfinancialplan.com) from the MDRT

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

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

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

According to the U.S. Census Bureau Survey "Income Program & Participation"

- **The average 45 yr. old earning \$50,000 per year would have only enough savings to care for family needs six months or less.**

Disability insurance reflects your determination to see that your family does not face financial hardship. If you are unsure of the financial impact your disability would have on your family, the professionals at Beale can help you plan with confidence for those who depend on you.

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