

Insurance Law

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OBA LEADERSHIP

ACADEMY

Strong Demand for Counseling Services Drives Continued Free Member Service

By Bill Conger

In my last letter concerning work/life balance, I gave you some alarming statistics about the health and well-being of members of our profession. I want to share what your bar association is doing to address these issues. As I mentioned previously, in 2006 the Oklahoma Bar Association lost a member a month to suicide. In response to our concerns about the mental health and well-being of our members, the association's Board of Governors worked out an expansion of services of the Lawyers Helping

Lawyers Program to assist lawyers in trouble with things other than drug and alcohol issues. We contracted with LifeFocus Counseling, to team up with the LHL Program to cover crisis intervention counseling for attorneys experiencing emotional or stressrelated issues. The LHL has done a wonderful job helping attorneys with substance abuse issues, but we felt there were other issues affecting our attorneys that needed that same attention.

The OBA is providing this service to its members at no cost. Lawyers using the service will remain completely anonymous. *OBA members may call*

LifeFocus Counseling Services directly at (405) 840-5252 or toll-free (866) 726-5252 to work with a counselor in their area. The service is available 24 hours a day.

We have been very surprised and excited about the utilization of this program and how well it took off. Initially, this was a program that we questioned what kind of utilization there would be. The OBA allotted \$6,500 for members to use for counseling as needed estimating this allotment would last approximately one year. When those funds were near exhaustion at five months into the program, we were astonished.

The OBA has done a wonderful job encouraging help through LHL, but as one member stated, "It only scratched the surface," and there are so many issues beyond its scope. It is very common for substance abuse to be a form of self medicating when there is more of a mental health issue underlying. LHL has done a great job at welcoming this program and utilizing it as a referral source for those needs. The bridging of

"...raw numbers tell us that more attorneys are seeking assistance from our program and for issues other than substance abuse." these two resources has helped us ensure the very best care for our members.

Although participation in the program is totally confidential, the raw numbers tell us that more of our attorneys are seeking assistance from our program and for issues other than substance abuse. From 2006 to 2007 the number of total clients tripled, the number of crisis interventions tripled and

the number of appointments more than doubled from the year before.

LifeFocus has two full-time personnel devoted to Lawyers Helping Lawyers — Dr. Wenona Barnes and Rex McLauchlin. They also have additional counselors on contract for additional needs.

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President Conger is general counsel at Oklahoma City University. bconger@okcu.edu (405) 208-5845

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Insurance

Overview of Oklahoma Automobile Insurance Law

By Jon Starr

This article is intended to give legal practitioners a basic overview of automobile insurance law so they may gain a general understanding as well as some starting points before they begin more detailed research on specific issues involving their cases.

When addressing any issue involving automobile insurance in Oklahoma, it is important to determine whether or not the issue is a "first-party" issue, a "third-party" issue or some combination of the two. "First-party" refers to coverage on an insurance policy that belongs to the person who is making a claim for benefits from that policy. These coverages include, but are not limited to, uninsured/ underinsured motorist coverage ("UM/UIM"), medical payment coverage ("med pay"), collision coverage, comprehensive coverage and rental reimbursement coverage. "Third-party" claims are when the claimant makes a claim against someone or entity who has liability coverage to cover at least a portion of any legal liability they may have as a result of an accident either for bodily injury or property damage. This article will address some thirdparty liability coverage issues first.

THIRD-PARTY LIABILITY

Minimum Limits

For years, the Oklahoma financial responsibility and compulsory insurance laws required liability limits of \$10,000/\$20,000/\$10,000. This meant that there was \$10,000 per person for personal injury claim maximum limits, \$20,000 aggregate for all personal injury claims per accident and \$10,000 maximum for property damage. Any policy written or renewed after April 2005, however, is required to provide minimum limits of \$25,000 per person, \$50,000 per accident and \$25,000 for property damage.¹

Discovery of Limits

Once litigation has commenced, the insurance liability limits of the opposing parties are discoverable.² However, there is no requirement in Oklahoma that an insurance company or its insureds disclose liability limits prior to litigation being filed. This sometimes complicates handling of uninsured/underinsured motorist claims by UM/UIM carriers because, in potential underinsured motorist situations, the UM/UIM carrier needs to know the underlying liability limits to determine whether or not the claim would trigger UM/UIM benefits. This issue will be addressed in more detail later in this article.

The Oklahoma Compulsory Liability Insurance Act³ provides that:

On or after January 1, 1983, every owner of a motor vehicle registered in this state . . . shall, at all times, maintain in force . . . security for the payment of loss resulting from the liability imposed by law for bodily injury, death and property damage sustained by any person arising out of the ownership, maintenance, operation, or use of the vehicle . . .

The phrase "arising out of the operation, ownership, maintenance, or use" or some similar language has been interpreted fairly broadly by both Oklahoma state courts and federal courts. In *Earl W. Baker & Co. v. Lagaly*,⁴ the court found that a driver opening the door of a bus to allow a child to exit and then cross traffic where she was injured would fall under the "arising out of" language. In *Penley v. Gulf Ins. Co.*,⁵ a truck driver negligently pumping gasoline from a tanker into a diesel motor grader was held to be "incident to and out of the use of the truck." In *Oklahoma Farm Bureau Mut.*

*Ins. Co. v. Mouse,*⁶ the court held that a claimant who had been instructed to climb up on a combine, which was on a truck, to dislodge the breather pipe that had been stuck under a bridge and who subsequently fell and injured himself was "the result of the use of the truck."

Exclusions

Because of the financial responsibility act and compulsory law in Oklahoma, the courts have routinely

held that attempts to exclude liability coverage from otherwise innocent victims are void as a matter of public policy up to the minimum liability limits required by statute. However, these exclusions are valid and enforceable above the minimum limits because once the state-imposed minimum limits have been satisfied, public policy favors the issue as one of basic contract between the two parties.

The following Oklahoma cases have dealt with the exclusions in the face of the minimum liability limits and found those exclusions invalid. In *Young v. Mid Continent Cas. Co.*,⁷ the court held an exclusory clause, which excluded liability coverage for the operation of the insured vehicle if operated by a person under the age of 25, was invalid up to the minimum limits. In *Equity Mutual Ins. Co. v. Spring Valley Wholesale Nursery Inc.*,⁸ the court held an exclusion that sought to preclude liability coverage on a commercial vehicle outside a 200 mile radius of the company location was invalid up to the minimum limits. In Nation v. State Farm Ins. Co.,9 the court invalidated an exclusion that precluded residents of the named insured's household from recovering under the liability coverage in the policy. In *Harkrider v. Posey*,¹⁰ the court held that a misrepresentation on the insured's application that there were no residents of the household 14 years of age or older and would not invalidate the coverage under the liability portion of the policy up to the statutory minimum limits. In Hartline v. Hartline,11 the court held that another "named insured" on the policy living in the household would not be excluded from liability coverage up to the minimum limits where there was no UM/UIM



Because of the financial responsibility act and compulsory law in Oklahoma, the courts have routinely held that attempts to exclude liability coverage from otherwise innocent victims are void as a matter of public policy up to the minimum liability limits required by statute.

coverage available. In *O'Neill v. Long*,¹² the court held that once the omnibus clause in the policy was triggered by permissive use, even if

it was restricted to not allowing anyone else to drive, the subsequent granting of permission by the original permissive user to someone else outside those restrictions would not preclude an innocent victim from recovering the liability limits up to the minimum statutory rate. In *Tapp v. Perciful*,¹³ the court held that the "automobile business exclusion" that precluded coverage for a vehicle that was being "repaired, serviced, or used by any person employed or engaged in any way in a car business" was invalid up to the minimum limits.

While there are exclusions contained in every policy that may ultimately be held valid, to this point the "specifically named driver" exclusion is the only exclusion which has withstood a challenge before the Oklahoma Supreme Court. In Pierce v. Oklahoma Property & Cas. Ins. Co.,¹⁴ the court upheld an exclusion of a specifically named driver. The court evaluated conflicting public policies and upheld this exclusion that allows members of a household to obtain coverage by excluding other members of the household who have poor driving records. The court reasoned that it would be bad public policy to preclude all drivers in a household from obtaining liability coverage due to the bad driving records of a single member of the household. Although one Court of Appeals opinion¹⁵ questioned whether the Oklahoma Supreme Court would still follow the Pierce holding, it was referenced in the Tapp opinion by the Supreme Court as the law in Oklahoma after the Court of Appeals decision.

Intentional Act

A panel of the Oklahoma Civil Court of Appeals recently found no liability coverage for an admitted intentional act. In *Equity Insurance Co. v. Garrett*,¹⁶ the court found that the driver's admission that she intentionally drove her vehicle into another person – although she claimed she did not intend to injure – was sufficient to preclude liability coverage under a policy which covered injury for automobile accidents but excluded coverage for intentionally caused injuries.

Duty To Defend and Duty to Indemnify

An insurance company owes two duties within the liability portion of any policy. One is a duty to defend, and one is a duty to indemnify. In *Conner v. Trans America Ins. Co.*,¹⁷ the court held that sometimes a duty to defend will arise even though a duty to indemnify may not be triggered. Generally, a duty to defend is based upon allegations in the pleading by the adversary to the insured.¹⁸ However, the 10th Circuit Court of Appeals held that even if the allegations in the pleadings do not trigger coverage, actual facts known to the insurance company may be sufficient to still trigger the duty to defend.¹⁹

FIRST-PARTY COVERAGES

Uninsured/Underinsured Motorist Coverage

In Oklahoma, uninsured/underinsured motorist coverage tends to be the most prominent in case law concerning first-party automobile coverage. UM/UIM coverage is applicable when the insured is "legally entitled to recover" from an "owner or operator of an uninsured/underinsured motor vehicle."20 UM/ UIM coverage in Oklahoma applies to situations when the adverse tortfeasors are totally uninsured, as well as situations when they merely carry insufficient liability limits, thus making them underinsured. Typically, UM/ UIM coverage comes into play when there is no liability insurance for the tortfeasor, such as "hit and run" situations, insolvent liability carriers, or insufficient liability limits.

In "hit and run" situations, physical contact is "not required."²¹ UM/UIM coverage can be triggered in a "hit and run" situation even when the owner of the vehicle has been identified, but the driver of the vehicle at the time of the accident remains unknown.²²

In Oklahoma, the UM/UIM carrier is required to conduct an independent investigation and evaluation, and it may not rely upon the tortfeasor carrier's investigation and evaluation.²³ Once the UM/UIM carrier's evaluation of the "most likely worth" of the claim exceeds the underlying tortfeasor's limits, the UM/UIM carrier must pay from dollar one of the value of the claim up to their policy limits and seek reimbursement from the tortfeasor's carrier under its rights of subrogation.²⁴

Stacking of UM/UIM limits is allowed by an insured if separate premiums are paid for UM/ UIM coverage on multiple vehicles within a household.²⁵ There is no such thing as "excess" UM/UIM in Oklahoma; all UM/UIM is primary.²⁶ If an umbrella liability policy requires some amount of UM/UIM coverage in the underlying liability policy, the umbrella policy limits may not count when examining coverage to determine whether the tortfeasor is underinsured.²⁷

The statute of limitations for UM/UIM coverage is five years – the same for any written contract.28 Allowing the two-year statute of limitations to run against the tortfeasor does not prohibit collection of UM/ UIM funds if UM/UIM coverage would still have been triggered.²⁹ However, allowing the two-year statute of limitations to run against the tortfeasor does not change potential а underinsured case into an uninsured case.³⁰ The UM/UIM carrier's right to pursue subrogation against the tortfeasor is still subject to the two-year statute of limitations applicable to all negligence cases despite the fact that there is a fiveyear statute of limitations for claimants to pursue UM/UIM benefits.³¹

Once a tortfeasor's liability policy limits are tendered, the insured may exercise a statutory remedy requiring the UM/ UIM carrier to sub-

stitute payment of the tortfeasor's limits or waive subrogation rights within 60 days. The statute requires sending a certified letter advising the UM/UIM carrier of the tender, providing a medical authorization and providing an employment authorization if wages or income are at issue.³² Failure to follow the prescribed statutory procedure and providing the required authorization will prevent the 60 days from beginning to run on such a request.

Hospital liens are not enforceable against UM/UIM benefits in Oklahoma.³³ Doctor liens, however, are enforceable against UM/UIM benefits in Oklahoma.³⁴ There is no right of set-off for medical payment coverage payments under Oklahoma UM/UIM.³⁵ There is no right



Under Oklahoma Statutes, insurance companies are required to offer UM/UIM coverage in an amount equal to the minimum liability limits on the vehicle.

of setoff for worker's compensation payments against UM/UIM coverage in Oklahoma.³⁶

The Oklahoma Supreme Court has recognized that a UM/UIM carrier can be bound by the outcome of litigated matters in at least three scenarios. In Keel v. MFA Ins. Co.,37 the court held that the UM/UIM carrier is bound 1) by a direct action brought against the UM/UIM carrier without suing the tortfeasor; 2) by an action brought against the tortfeasor and the UM/UIM carrier in the same action; and 3) by litigation against the tortfeasor in which the

> UM/UIM carrier is put on notice of the litigation so that the UM/UIM carrier may, under certain circumstances, intervene in the action and participate in discovery and/or trial.³⁸ The UM/UIM carrier. however, would not be bound by litigation filed against the tortfeasor if no notification is given to the UM/UIM carrier.

Under Oklahoma Statutes, insurance companies are required to offer UM/UIM coverage in an amount equal to the minimum liability limits on the vehicle.³⁹ If the insured elects not to purchase UM/UIM coverage or to purchase UM/UIM coverage with lower limits than the liability limits, a written waiver must be signed by one of the named insureds.⁴⁰

MEDICAL PAYMENT COVERAGE

Oklahoma insurance companies also typically offer medical payments coverage commonly referred to as "med pay," rather than personal injury protection coverage, which is sometimes sold in other states. Medical payment coverage covers reasonable and necessary medical expenses up to the limits of the coverage regardless of who was at fault in the accident. The insurance company does not have a right of subrogation for medical payment coverage against its named insureds or members of their household, but may subrogate against liability claims of guest passengers in the car who are not named insureds or a member of the named insureds household.⁴¹ According to an Oklahoma ethics opinion, attorneys handling matters on a contingent fee probably should not take a contingent fee out of a medical payment benefit paid to the insured if the attorney did no more than collecting and mailing in the bills to the insurance company.⁴²

PHYSICAL DAMAGE COVERAGES

The terms of an insurance contract generally govern comprehensive and collision coverage for the physical damage to a vehicle. Therefore, one should not confuse the law applicable only to third-party liability property damage claims (such as that allowing for depreciation⁴³ or allowing loss of use damage on certain commercial total losses but not personal automobile total losses44) when handling first-party property damage claims. The fair market value for total losses under first-party coverage can be determined by National Automobile Dealer's Associations Official Used Car Guide, the cost of a comparable motor vehicle in the local market when a comparable vehicle is available, or if a comparable vehicle is not available in the local market, quotations obtained from two or more qualified dealers located in the local market. Any deviation from one of these methods in determining the fair market value under a first-party total loss must be supported by documentation giving the particulars of the condition of the vehicle.45

CONCLUSION

When faced with an automobile insurance issue, it is always important to determine first whether you are dealing with a third-party liability claim or first-party claim. Once that determination is made, the information in this article should provide an attorney with a better handle on some of the basic automobile insurance law in Oklahoma. Two excellent resources for Oklahoma automobile insurance law are Brad Smith's treatise "Oklahoma Automobile Insurance Law and Practice,"⁴⁶ or Rex Travis' written materials from CLE presentations he has given on UM/UIM law.⁴⁷

1. 47 O.S. ' 7-324. 2. 12 O.S. ' 3226(B)(1). 3. 47 O.S. ' 7-600 et seq. Section 7-601(B). 4. 144 F.2d 344 (10th Cir. 1944) 5. 1996 OK 84, 414 P.2d 305 (Okla. 1966) 6. 1953 OK 212, 268 P.2d 886 (Okla. 1954) 7. 1987 OK 88, 743 P.2d 1084 8. 1987 OK 212, 747 P.2d 947 9. 1994 OK 54, 880 P.2d 887 10. 2000 OK 94, 24 P.3d 821 11. 2001 OK 15, 39 P.3d 765 12. 2002 OK 63, 54 P.3d 109 13. 2005 OK 49, 120 P.3d 480 14. 1995 OK 78, 901 P.2d 819 15. McElmurry v. Garbow, 2005 OK CIV APP 38, 116 P.3d 198 16. 2008 OK ČIV APP 23 17. 1972 OK 64, 496 P.2d 770 18. Maryland Cas. Co. v. Willsey, 1963 OK 4, 380 P.2d 254 19. American Motor Ins. Co. v. Southwestern Grayhound L., 283 F.2d 648 (10th Cir. 1960) 20. 36 O.S. ' 3636(B) 21. Biggs v. State Farm Auto. Ins. Co., 1977 OK 135, 596 P.2d 430 22. Brown v. United States Auto. Ass'n, 1984 OK 55, 684 P.2d 1195 23. Buzzard v. Farmers Ins. Co., 1991 OK 127, 824 P.2d 1105 24. Burch v. Allstate Ins. Co., 1998 OK 129, 977 P.2d 1057 25. Keel v. MFA Ins. Co., 1976 OK 86, 553 P.2d 153 26. Burch v. Allstate Ins. Co., 1998 OK 129, 977 P.2d 1057 27. Geico General Ins. Co. v. Northwestern Pacific Indemnity Co., 205 OK 40, 115 P.3d 856 28. 12 O.S. ' 95(A)(1) 29. Burch v. Allstate Ins. Co., 1998 OK 129, 977 P.2d 1057 30. Burch v. Allstate Ins. Co., 1998 OK 129, 977 P.2d 1057 31. Employers Mut. v. James Mosby, 1997 OK 93, 943 P.2d 593 32. 36 O.S. ' 3636 33. Kratz v. Kratz, 1995 OK 63, 905 P.2d 753 34. Broadway Clinic v. Liberty Mutual Insurance Co., 2006 OK 29, 139 P.3d 873 35. Aetna Cas. and Sur. Co. v. State Bd. for Property and Cas. Rates, 1981 OK 153, 637 P.2d 1251 36. Chambers v. Walker, 1982 OK 128, 653 P.2d 931 37. 1976 OK 86, 593 P.2d 153 38. Brown v. Patel, 2007 OK 16, 157 P.3d 117 39. 36 O.S. ' 3636 (F) 40. 36 O.S. ' 3636(G)(H) & (I) 41. 36 O.S. ' 6092 42. OBA Ethic Opinion No. 306 43. Brennen v. Aston Jr., 2003 OK 91, 84 P.3d 99 44. DTS Tank Service, Inc. v. Vanderveen, 1984 OK 49, 683 P.2d 1345 45. 36 O.S. ' 1250.8 46. Smith, Oklahoma Automobile Insurance Law and Practice, (Redbud Publishing Co., Inc. 1996) <bsmith@thebarkeylawfirm.com> 47. www.travislawoffice.com/cleindex.html

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Insurance

Abstract of First-Party Insurance Law

By Kenneth Elliott

Il dwelling homes with mortgages and most business properties in Oklahoma have property insurance coverage that covers a variety of risks. All such policies contain the statutory fire policy and many other common provisions.

The law interpreting these policies addresses an array of issues and circumstances such as waiver and estoppel, insurable interest, insurance fraud, policy exclusions and the rights of the mortgagee. This article is an overview of some of the legal and factual considerations that arise from such policies.

POLICY CONSTRUCTION

The Statutory Fire Policy

The basic provisions of the fire insurance policy in Oklahoma are statutory. The provisions may be found at 36 O.S. § 4803, which is derived from the New York statutory fire policy. The provisions in the statute, if not specifically included in the policy contract, are included by implication.¹ An insurer may, of course, add other perils or coverages to the fire policy. The provisions of the statutory fire policy may be amended or altered by an insurer so as to expand coverage, but not to restrict coverage.

One advantage of the statutory language is that it is similar to the language in statutory fire policies in many other states and the basic terms, conditions and legal tenets arising from the provisions (statute of limitations, waiver, examination under oath, misrepresentation, mortgagee rights) have received significant judicial attention.

Reasonable Expectation Doctrine

The Supreme Court has adopted the "reasonable expectation doctrine" as it relates to policy interpretation. Under this doctrine, if the insurer or the agent creates a reasonable expectation of coverage on the part of the insured, even though not supported by the policy language, the insured's expectation will prevail over the policy language. In Max True Plastering Co. v. U.S. Fidelity and Guar. Co.² the court, while recognizing that provisions of the policy that are "clearly and definitely set forth in appropriate language, and upon which calculations of the company are based, should be maintained unimpaired...," held that the doctrine of reasonable expectations may be applied to "ambiguous contract language or to exclusions which are masked by technical or obscure language or which are hidden in the policy provisions."

In *Simpson v. Farmers Insurance Co.*³ the court observed that it would not apply the doctrine to language that was not ambiguous, hidden or masked by technical or obscure language.

Waiver and Estoppel

An insurer may waive the provisions of an insurance policy. It must be remembered that although an insurer may by its conduct be estopped in denying coverage for a risk which the insured had been led to believe was covered, the doctrine of estoppel cannot be invoked to broaden coverage of the policy so as to bring within its protection risks that are not included under the terms of the policy. Illustrative of this principle is *Western Ins. Co. v. Cimarron Pipe Line Const. Inc.*,⁴ where the insured sought coverage for physical injury and property damage for work it had completed. The policy contained a completed operations exclusion. The insured argued estoppel, claiming the policy writing agent had told him he thought the policy provided such coverage. The court

refused to apply the doctrine of estoppel to bring within the terms of the policy coverage which was specifically excluded.

In contrast is *Pendleton v. Pan American Fire and Casualty Co.*,⁵ where the insurer was estopped from denying coverage after defending the insured for a loss without issuing a reservation of rights.⁶

There are certain claim activities that are deemed not to be a waiver by statute. Title 36 O.S. § 3630 states that the acknowledgment of receipt of a notice of loss, furnishing a proof of loss for a claim, investigating a loss or claim or engaging in any negotiations toward a possible settlement of a loss or claim is deemed not to constitute a waiver of any provision of a policy or of any defense of the insurer.

POLICY DEFENSES

Insurable Interest

The requirement that the insured have an insurable interest in the subject of the policy is statutory in Oklahoma. See 36 O.S. § 3605.

The Oklahoma Supreme Court has adopted the "factual expectations test" to determine if insurable interest exists. Under this test, insurable interest exists if the insured would gain some economic advantage by the property's continued existence or if the insured would suffer some economic detriment in case of the loss or destruction of the property.⁷ Under this test, the lack of legal title does not defeat the requirement of insurable interest. In *Conti v. Republic Underwriters Ins. Co.*⁸ the court held that a son having possession and beneficial use of property had an insurable interest even though the property was in his father's name. The court has also held that a co-tenant who is liable to other co-tenants for damage to or destruction of the common property has an insurable interest to the extent of his potential legal liability.⁹



The Oklahoma Supreme Court has adopted the 'factual expectations test' to determine if insurable interest exists.

The court has held an obligation on a note secured by the insured property creates an insurable interest to the extent of the mortgage debt. In *Johnson v. Allstate Ins. Co.*¹⁰ the insured deeded the insured property to her husband and relinquished possession, but her name remained on the mortgage. The court held that she had an insurable interest to the extent of the balance owed on the note. In *Snethen, supra,* a good faith purchaser of a stolen vehicle had an insurable interest because possession of the vehicle was "lawful" although not "legal."

Statute of Limitations

The statutory fire policy includes a one-year period of limitations. With respect to the peril of fire, this limitation has been upheld.¹¹ In *Walton v. Colonial Penn. Ins. Co.*¹² the one-year period survived a constitutional challenge.¹³

The statute of limitations begins to run from the date of the loss. The statutory period of limitations may be waived by the insurer's conduct of continued negotiations which lulls the insured into believing the claim may be paid. *See, e.g., Insurance Co. of North America v. Board of Education*¹⁴ (where the denial of the claim is not made in sufficient time so as to allow the insured to file suit within the one year period of limitations, the period is deemed waived).¹⁵

The one-year statute of limitations does not apply to all risks afforded by the multi-peril policy. In *Wagnon v. State Farm Fire and Casual* ty^{16} the court held that theft coverage in a homeowner's policy fell within the definition of casualty coverage under 36 O.S. §707 and was not subject to the one-year period of limitations. The court did not define the statute of limitations for theft coverage.

Fraud/False Swearing After the Loss

The statutory policy language provides that the policy shall be void if an insured conceals or misrepresents any material fact or circumstance. See 36 O.S. § 4803.

The public policy of Oklahoma with respect to the insured's obligation to be truthful in connection with the submission of a claim is demonstrated by the fact that the state requires the following statement to appear on policies and claim forms:

"WARNING: Any person who knowingly, and with intent to injure, defraud or deceive any insurer, makes a claim for the proceeds of an insurance policy containing any false, incomplete or misleading information is guilty of a felony."¹⁷

Misrepresentation will void the policy if it is 1) material, 2) willful and 3) made with the intent to deceive the insurer.¹⁸ It is not necessary for the insurer to actually be deceived by the misrepresentation. *See, e.g., Long v. Insurance Co. of North America*¹⁹ and *Goodwin v. Maryland Casualty Co.*²⁰ A mere mistake, inadvertence or good faith belief as to the matter being represented will not sustain a charge of fraud

and false swearing. However, the intent to deceive is implied where the misrepresentations were knowingly and deliberately made.²¹ The misrepresentation is material if it would influence the judgment of a reasonable insurer in determining its course of action.²²

In Oklahoma, there are decisions that recognize misrepresentations that inflate the value of the subject matter of the claim as being material.²³ It has also been recognized that a misrepresentation concerning the place where property is stored is material. *See Long v. Insurance Co. of North America*.²⁴ It is well settled in other jurisdictions that misrepresentations concerning financial condition and status, prior losses and ownership may be material.

Misrepresentations in the Application of Insurance

The effect of misrepresentations made by an insured in an insurance application is governed by 36 O.S. § 3609 which states that misrepresentations on the application of insurance may prevent recovery if they are 1) fraudulent, 2) material to the risk or hazard or 3) the insurer would not have accepted the risk if the true facts had been made known.

With regard to objective misrepresentations made in property insurance applications, the courts have construed the three alternatives listed in 36 O.S. § 3609 to be inclusively disjunctive. In other words, if any of the three alternatives are satisfied, the policy is void. If a misrepresentation is material, it need not also be fraudulent, *i.e.* "[t]he untruth of any material representation relied on by the insurance company in making the contract will avoid the contract, wholly irrespective of the intent, whether innocent or fraudulent, with which such misrepresentation was made."²⁵

Where the insured misrepresents the fact of previous claims in an application for insurance (*i.e.*, previous theft losses in application for personal property insurance) the Oklahoma court has held such misrepresentations are material as a matter of law and are sufficient to void the policy. *See Hobbs v. Prudential Property and Casualty Co.*²⁶

In *Scottsdale Ins. Co. v. Tolliver*²⁷ the Supreme Court was asked to answer a certified question from the federal court as to whether "Oklahoma law requires a finding that the insured intended to deceive the insurer before a misrepresentation, omission or incorrect statement on an insurance application can serve as a ground to prevent recovery...." The Supreme Court refused to answer the question stating that the settled law required proof of intent. However, the authority relied upon by the court deals exclusively with life insurance contracts and not with property insurance contracts. The issue of misrepresentation on the application of a life insurance contract is distinguishable from a property insurance contract.²⁸

Innocent Joint Insured Doctrine

The "innocent joint insured" doctrine holds that the action of one insured that voids the policy (such as willful destruction of the property or misrepresentation) will void the policy with respect to an innocent joint insured. Oklahoma courts, in contrast to the general trend across the country, have adhered to this doctrine. It was first established in Short v. Oklahoma Farmers Union.29 Here, a husband and wife were co-insureds of a residence they jointly owned. The husband burned the residence without the involvement or knowledge of the wife. The court held that, "[w]here, as here, the title to the property is held jointly and that property is

insured under a single policy and is destroyed by a joint insured's act of arson, the entire policy is void..."³⁰ Included in the dicta is a strongly worded statement concerning the public policy against arson.

In United Services Automobile Association v. *McCants*³¹ the court upheld *Short*. In *McCants*, the husband and wife were joint insureds but the wife was not a title owner of the residence. The wife burned the residence. The court of appeals, relying on *Short*, held the husband could recover because the wife was not a joint

66 The 'innocent joint insured' doctrine holds that the action of one insured that voids the policy (such as willful destruction of the property or misrepresentation) will void the policy with respect to an innocent joint insured.



owner. The Supreme Court held this was a misapplication of *Short*, that the only requirement for coverage to be voided as to the innocent coinsured was for the innocent party to be a joint insured with the offending insured. Joint ownership of the property was not material to the contractual consequence of an insured deliberately destroying the insured property.

In an unpublished opinion³² the court held that the false statement of a daughter who was

an insured at the time of the fire but was not a member of the household at the time of the false statement was binding on the named insureds.

POLICY LIMITATIONS/ EXCLUSIONS

Business Pursuits

The Oklahoma court has upheld limitation of coverage for "business pursuits" found in homeowners policies, declaring such limitations as unambiguous. In Shadoan v. Liberty Mutual Fire Insurance Co.33 the court had before it a clause that limited its exposure for business property that was "[u]sed at any time or in any manner for any business purpose." The insured submitted a

claim for tools which he stated he sometimes used in connection with his employment. The court found that the extent to which the property was used in connection with the business was immaterial the court concluded that, "[t]he issue is not whether the [property] was used 'primarily' for a business purpose, but whether it was used at all for any business purpose."³⁴

In *Wiley v. Travelers Insurance Co.*³⁵ the court held that a hobby pursuit can be considered a business for purposes of a property insurance contract if the hobby included a profit motive. In this regard there may be many factual issues to consider rendering the question for the jury.³⁶

Wear and Tear

The policy exclusion for wear and tear has received attention from the court. In *Bank of Oklahoma, N.A. v. Continental Casualty Co.*³⁷ the court held excessive deterioration caused by the occupant's failure to maintain the property may be classified as a fortuitous event. In this case, a mortgagee was a named insured under a special hazard insurance policy. The owner of the property had failed to maintain the property for eight years. The court stated that while some wear and tear could be anticipated, the gross failure of the owner to maintain the property could not have been expected or anticipated and was, therefore, a fortuitous and covered event.

Cancellation

With respect to notice of cancellation for nonpayment of premium, the court has held that proof of mailing is sufficient. In State Farm Fire & Cas. Co. v. Van Horn³⁸ the insurance company sent a cancellation notice because of non-payment of the premium. The insured and mortgagee denied receiving the notice. The court held that it was not necessary to prove that the notice was received but was sufficient to prove the notice was mailed by the insurer. Although the opinion is not published, it cites numerous Oklahoma Supreme Court cases that reflect the same holding.39 However, evidence that the insured and/or loss payee did not receive the notice of cancellation can, under certain circumstances, rebut the presumption of mailing, thereby creating a question of fact.⁴⁰

MEASURE OF RECOVERY UNDER THE POLICY

Actual Cash Value

Oklahoma follows the "broad evidence rule" in establishing the actual cash value in the context of a fire insurance policy. This rule was established in *Rochester American Ins. Co. v. Short.*⁴¹ The rule stands for the proposition that any relevant evidence may be considered in determining the value of the property for which payment is owed under a property insurance contract, including the market value, cost to rebuild or replace and depreciation. The court in *Rochester* identified several factors in determining actual cash value, such as the purchase price, location and condition of the building, and purpose for which the building was being used. This definition of actual cash value recently received positive reinforcement in *Tyler v. Shelter Mutual Insurance Co.*⁴²

The court has reviewed the meaning of actual cash value in the context of assessing depreciation to a roof,⁴³ holding that a roof is a single product consisting of both materials and labor which are subject to depreciation in determining its actual cash value.

Replacement Cost Provision and Depreciation

The general "replacement cost" provision of the contract, whereby the actual cash value is initially owed and the balance of the actual cash value and the replacement cost is not owed until the property is actually replaced, has been upheld as valid and enforceable. *See Pope v. Farmers Ins. Co.*⁴⁴ and *Bratcher v. State Farm Fire and Cas. Ins. Co.*⁴⁵

CLAIMS ADMINISTRATION

Unfair Claims Settlement Practices Act

The Oklahoma Unfair Claims Settlement Practices Act is found at 36 O.S. § 1250.1 et seq. This is an administrative act. One specific section has important implications in the administration of claims. Sections 1250.6 and 1250.7 impose time limitations on the property insurance carrier. Within 45 days after the receipt of a proof of loss, the insurer must advise the insured of the acceptance or denial of the claim or if further investigation is necessary. If the investigation is not completed within 60 days of receipt of the proof of loss, the insurer must notify the insured in writing stating the reasons why additional time is needed. Any investigation must be completed within 120 days of the receipt of the proof of loss. The statute states the time restrictions do not apply to investigations of possible fraud or arson "... which is supported by specific information giving a reasonable basis for the investigation..." (§ 1250.7)

Because the Unfair Claims Settlement Practices Act is regulatory in nature, a violation of the terms of the act cannot form the basis of a private cause of action or an action for bad faith.⁴⁶

Examinate Under Oath

The examination under oath is an important tool available to the property insurer in the

investigation of possible fraud, value of a claim or issues of coverage. There are no cases in Oklahoma limiting the right to take the examination under oath or to seek relevant information and material from the insured. There is some question regarding the effect of an insured refusing to submit to the examination under oath. In Winters v. State Farm Fire and Casualty Ins. Co.47 the insured refused to submit to an examination under oath until after a related criminal matter was resolved, resulting in a two-year delay. State Farm denied the claim. The court, relying heavily on a Kansas case that dealt with the failure to submit a proof of loss, held that the requirement for an examination under oath was merely a condition contained in a unilateral contract and the insurer must show prejudice resulting from the non-compliance before denying coverage.

Appraisal

The statutory policy provides for an appraisal process to resolve a claim. It is best utilized where the dispute is over the valuation of the claim as opposed to disputes concerning coverage.

In Oklahoma, the appraisal is binding only on the party requesting the procedure.⁴⁸ Denial of liability for the claim by the insurer waives the insurer's right to invoke appraisal.⁴⁹

Rights of the Mortgagee under the Standard Mortgage Clause

It is well established that the standard mortgage clause creates a separate contract between the insurer and the mortgagee that cannot be defeated by the misconduct or negligence of the insured.⁵⁰ This principle applies not only to situations where the insured voids the policy by some misdeed, but also where coverage is void as to the insured because of a lack of insurable interest. $^{\mbox{\tiny 51}}$

A mortgagee is not bound by a settlement between the mortgagor and the insurer. In *Conner v. Northwestern National Cas. Co.*⁵² the insured and insurer agreed to a settlement of a fire insurance claim. The settlement check was issued to the insured and mortgagee. The insured forged the mortgagee's endorsement. The court held that the mortgagee was entitled to maintain an action to recover the proceeds because it was not aware of, nor did it consent to the settlement. The court found that as between the insured, insurer and the mortgagee, it would not hold the mortgagee responsible for the forged endorsement.

The protection afforded the mortgagee was expanded in First State Bank of Idabel, Oklahoma v. State Farm Fire and Cas. Co.53 The insured's restaurant was damaged by fire. The claim was settled, but the mortgagee was not included on the check. The insured used the proceeds of the settlement to repair the fire damage, which actually increased the value of the restaurant. The insured then defaulted on the note and the mortgagee foreclosed and sued the insurance company for the proceeds of the policy. The court awarded the policy proceeds to the mortgagee although the collateral had been increased in value by reason of the repairs financed by the settlement with the insured. The court reasoned that to do otherwise would give the insured the "unilateral right to determine whether the policy proceeds are to be used to restore the mortgaged premises." The court stated the mortgagee must consent to the settlement and be given the opportunity to agree to use the proceeds to make repairs.

The Supreme Court in *Shebester v. Triple Crown Insurers*⁵⁴ held an insurer has an obliga-



The court stated the mortgagee must consent to the settlement and be given the opportunity to agree to use the proceeds to make repairs.

tion to honor claims of mortgagees who were not named on the policy, but of which the insurer had notice. The insured purchased a horse under an agreement whereby the seller financed the purchase. The insured promised to name the seller on a policy of insurance, which he did not do. The horse died. The seller submitted a claim to the insurer, submitting the installment contract as proof of his interest. Payment was made to the insured only. The court found that the insurer had an "implied in law obligation to pay the rightful claimant."55 It further held the "agent for an undisclosed insurer is itself bound by a quasi-contractual duty, not only toward the beneficiary of the policy, but also to those outsiders of whose claimed interest in the proceeds the agent has timely notice."56

CONCLUSION

Property insurance contracts are pervasive in our society and are essential to provide protection against the accidental damage or destruction of property. In a state where severe weather is common, issues concerning the duties and rights of both the insurer and insured have received significant judicial attention. In order for the practitioner to address the issues that arise from the claims made under property insurance policies, he or she must be aware of the statutes and the body of judicial interpretation of specific contract language that relates specifically to property insurance policies.

- 1. De Noya v. Fidelity Phoenix Ins. Co., 1925 OK 465, 237 P. 125.
- 2. 1996 OK 28, 912 P.2d 861.
- 3. 1999 OK 51, 981 P.2d 1262.
- 4. 748 F.2d 1397 (10th Cir. 1984).
- 5. 317 F.2d 96 (10th Cir. 1963).
- 6. See also Braun v. Annesley, 936 F.2d 1105 (10th Cir. 1991).
- 7. Snethen v. Oklahoma State Union of Farmers Educational and Co-op Union of America, 1983 OK 17, 664 P.2d 377.
 - 8. 1989 OK 128, 782 P.2d 1357.
- 9. See also Delk v. Markel American Ins. Co., 2003 OK 88, 81 P.3d 629.
 - 10. 1993 OK CIV APP 198, 870 P.2d 792.
 - 11. Insurance Co. of North America v. Board of Ed. Of Independent
- School Dist. No. 12, Texas County, Okl., 196 F.2d 901 (10th Cir. 1952). 12. 1993 OK 115, 860 P.2d 222.
- 13. See also Burwell v Mid-Century Insurance Co., 2006 OK CIV APP 97, 142 P.3d 1005.
 - 14. 196 F.2d 901 (10th Cir. 1952).
- 15. See also Prudential Fire Ins. Co. v. Trave-Taylor Co., 1944 OK 272, 152 P.2d 273.
 - 16. 1997 OK 160, 951 P.2d 641.
 - 17. 36 O. S. § 3613.1.
 - 18. Orient Insurance Co. v. Van Zant-Bruce Drug Co., 1915 OK 573,
- 151 P. 323. 19. 670 F.2d 930 (10th Cir. 1982).
 - 20. 233 F.Supp. 81 (E.D. Okl., 1964).

- 21. Wagnon v. State Farm Fire and Cas. Co., 146 F.3d 764 (10th Cir. 1998).
 - 22. Id. at ¶ 13.
- 23. See, e.g. Wagnon, supra.; Transportation Ins. Co. v. Hamilton, 316 F.2d 294 (10th Cir. 1963).

24. 670 F.2d 930 (10th Cir. 1982).

25. Firstier Mortg. Co. v. Investors Mortg. Ins. Co., 930 F.2d 1508, 1511 (10th Cir. 1991).

- 26. 1993 OK CIV APP 76, 853 P.2d 252
- 27. 2005 OK 93, 127 P.3d 611.
- 28. United Ben. Life Ins. Co. v. Knapp 1935 OK 1177, 41 P.2d 963,
- Firstier Mortgage Co. v. Investors Mortgage Ins. Co., supra. 29. 1980 OK 155, 619 P.2d 588.
 - 30. *Short* at ¶ 7.
 - 31. 1997 OK 73, 944 P.2d 298.
- 32. Lawrence v. State Farm Fire & Cas. Ins. Co., 166 F.3d 1221 (Table) 1999 WL 26880 (10th Cir. (Okla.).
 - 33. 1994 OK CIV APP 182, 894 P.2d 1140.
 - 34. *Id.,* at ¶ 7.
 - 35. 1974 OK 147, 534 P.2d 1293.
- 36. See also Bailey v. Farmers Insurance Co., 2006 OK CIV APP 85, 137 P. 3d 1260
 - 37. 1992 OK CIV APP 128, 849 P.2d 1091.
- 38. 139 F. 3d 912 (Table, Text in WESTLAW), 1998 WL 58187 (10th Cir. Okla.).

39. See e.g., Midwestern Ins. Co. v. Cathey, 1953 OK 169, 262 P.2d 434; Gilmore v. Grand Prix of Tulsa Corp., 1963 OK 138, 383 P.2d 231.

- 40. See Oaks v. Motors Ins. Corp., 1979 OK 77, 595 P.2d 789.
- 41. 1953 OK 4, 252 P.2d 490.
- 42. 2008 OK 9, _P.3d_.

43. See Redcorn v. State Farm Fire & Cas. Co., 2002 OK 15, 55 P.3d 1017 and Branch v. Farmers Ins. Co., 2002 OK 16, 55 P.3d 1023.

- 44. 1998 OK 77, 962 P.2d 1284.
- 45. 1998 OK 63, 961 P.2d 828.

46. Lewis v. Aetna U.S. Healthcare Inc., 78 F. Supp.2d 1202 (N.D. Okl. 1999); Walker v. Chouteau, 1993 OK 35, 849 P.2d 1085; McWhirter v. Fire

- Ins. Exchange Inc., 1994 OK 93, 878 P.2d 1056.
 - 47. 35 F.Supp.2d 842 (E.D. Okla. 1999).
 48. Massey v. Farmers Insurance Group, 1992 OK 80, 837 P.2d 880.
 - 49. Concordia Fire Ins. Co. v. Barkett, 1925 OK 433, 236 P. 890.
- 50. See e.g., Oklahoma State Union of Farmers Educational and Co-op. Union of America v. Folsom, 1958 OK 104, 325 P.2d 1053, and Western
- Assur. Co. v. Hughes, 1936 OK 621, 66 P.2d 1056.
- See e.g., National Fire Ins. Co. of Hartford v. Dallas Joint Stock Land Bank, 1935 OK 865, 50 P.2d 326; Western Assur. Co. v. Hughes, supra. 52. 1989 OK 85, 774 P.2d 1005.
 - 53. 1992 OK CIV APP 33, 840 P.2d 1267.
 - 54. 1992 OK 20, 826 P.2d 603.
 - 55. Id., at ¶ 21.
 - 56. Id., at ¶ 21.

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Oklahoma Bad Faith Basics

By Phil R. Richards

A searly as 1935, the Oklahoma Supreme Court recognized that an insurer may be liable for the entire amount of a verdict in excess of its policy limits where it fails or refuses, in bad faith, to take advantage of an opportunity to settle within those limits prior to trial.¹ However, not until its 1977 decision in *Christian v. American Home Assur. Co.* did the Supreme Court establish bad faith as an independent tort upon which an insurer could be held liable for both compensatory and punitive damages for the delay or denial in payment of a claim not reasonably in dispute.²

The court noted that an insurer's obligation upon presentation of a proper claim is not limited to the payment of money alone,³ but includes an implied duty of the insurer to "deal fairly and act in good faith with its insured" for the violation of which tort liability could be imposed.⁴ The court recognized that an insurer would not be deemed in bad faith simply because it disputed its insured's claim even to the point of litigation, but rather would be subject to such liability only upon a "clear showing" that the insurer unreasonably and in bad faith withheld payment of its insured's claim.⁵

For many years, the Supreme Court discussed bad faith in the context of an intentional tort.⁶ Thus, in its 1981 decision in *McCorkle v. Great Atlantic Ins. Co.*, the court commented that "the essence of the intentional tort of bad faith with regard to the insurance industry is the insurer's unreasonable, bad-faith conduct."⁷ Again in 1991 the court reiterated that "the plaintiff carries the burden of proof and must plead the elements of this intentional tort, the essence of the tort being the unreasonable badfaith conduct of the insurer."⁸ However, the court repudiated this language and that of similar decisions in its 2005 opinion in Badillo v. Mid Century Ins. Co., when it held that "the minimum level of culpability necessary for liability against an insurer to attach is more than simple negligence, but less than the reckless conduct necessary to sanction a punitive damage award against an insurer."9 Curiously this decision, issued on rehearing after the composition of the court changed and it withdrew a previously issued decision reaching precisely the opposite result, suggested that prior use by the court of the term "intentional tort of bad faith" was a "short hand reference" to such tortious conduct and was not meant to convey that such required that the insured must "prove the insurer intended to harm or deceive its insured."10 Thus, it appears that pending further illumination by the court, the standard of proof of a bad faith claim at present lies somewhere in the undefined territory between negligence and recklessness.¹¹

COMPENSATORY DAMAGES

The compensatory damages recoverable in a bad faith case include those for financial losses, embarrassment and loss of reputation, and emotional distress proximately resulting from

the insurer's improper conduct.¹² Financial losses typically include those that result from the failure of the insurer to honor its policy obligations. Thus, in a bad faith case resulting from the failure of the insurer to pay a firstparty claim, such as for property loss, the financial losses would be the value of the property damaged or lost up to the limits of the policy. As regards a case which arises from an uninsured or underinsured motorist claim, the financial losses would be the value of the underlying tort claim up to the limit of the UM/UIM coverage under the policy. In a case involving the wrongful failure to defend and indemnify the insured from a third-party claim, the financial losses would include the cost of defense of the claim, irrespective of the limit of coverage unless the policy was a "wasting" policy,¹³ and the amount of any resulting judgment or settlement up to the limit of the policy. Where the bad faith claim arose from the wrongful failure of the insurer to settle a thirdparty liability claim within the limits of the policy's coverage when an opportunity to do so was presented, the financial losses would include the amount of any verdict in excess of the coverage limit of the policy.

Damages for embarrassment and loss of reputation seem rarely to be a significant factor in bad faith cases in this author's experience. Principally this has been because most plaintiffs have conceded either that those who have an opinion of them do not know that they had an insurance claim denied or do not think less of them because such occurred. However, by way of example, it is certainly conceivable that the delay or denial of an insurance claim could place an insured in a precarious financial position which might injure the insured's reputation

in the community or be a source of embarrassment to the insured.

Damages for emotional distress are available where the insured is an individual or partnership. These damages are something of a wild card in bad faith litigation, since it is difficult to predict the amount that a jury will award. Such damages should compensate for the distress proximately resulting from the handling of the insurance claim, rather than for the underlying injury which gave rise to the claim. Thus, in a case involving the wrongful denial of health insurance benefits for cancer treatment, it is the emotional distress arising from the denial of the insurance benefits rather than the emotional trauma associated with the cancer that is to be compensated (assuming, of course, that the evidence does not establish that the claim denial prevented the insured from obtaining treatment or otherwise aggravated the cancer). In practice, however, the distinction between the two is often blurred. Thus, the insured's lawyer may seek to emphasize that the insult of having a claim wrongfully denied was all the more damaging where the insured was already afflicted with the emotional trauma of a cancer diagnosis, while the insurer's attorney may urge that the emotional issues related to the insurance claim were negligible next to those with which the insured dealt in relation to the cancer diagnosis and prognosis.



Thus, in a bad faith case resulting from the failure of the insurer to pay a first-party claim, such as for property loss, the financial losses would be the value of the property damaged or lost up to the limits of the policy.

Emotional distress damages should not be available in certain types of bad faith cases. For instance, a corporate insured cannot suffer emotional distress by reason of the wrongful delay or denial of its insurance claim.¹⁴ Similarly, where the insured dies as a result of the insured event before the insurer is given notice of it through submission of a claim, no emotional distress could have resulted to the insured from a wrongful delay or denial of the claim since the insured had no knowledge of it. Thus, for instance, where an uninsured motorist claim for the death of the insured in an auto accident is wrongfully denied when submitted by the insured's estate, no emotional distress damages would be recoverable by the estate since none were suffered by the insured in relation to the insurance claim.

BAD FAITH LIABILITY

As noted above, the Christian court viewed the tort of bad faith as one arising from a breach by the insurer of a duty of good faith and fair dealing which constituted an implicit term of the insurance contract.¹⁵ As a contractbased duty, an action for its breach is available to an insured as a party to the contract, against the insurer with whom the insured contracted. However, even though both the insurer and insured have mutual obligations under the terms of the insurance contract, in its decision in First Bank of Turley v. Fidelity and Deposit Ins. Co. of Maryland, the Supreme Court held that Oklahoma law does not permit the insurer to bring such an action against its insured.¹⁶ In short, Oklahoma does not recognize "reverse bad faith" as a actionable claim. For the breach of an obligation of the insurance contract, including presumably the implied duty of good faith and fair dealing, the insurer is permitted only a total or partial defense to the insured's claim.¹⁷

WORKERS' COMPENSATION CLAIMS

The court has, however, expanded the scope of liability for bad faith beyond that of traditional first-party insurers. The tort of bad faith is available not only against property and casualty, health, life and disability insurers in Oklahoma. To the contrary, decisions of Oklahoma's appellate courts in recent years have broadened the scope of that exposure.

For instance, for almost a decade the Oklahoma Supreme Court left unanswered the question of whether a workers' compensation claimant may sue a workers' compensation insurer for bad faith under any circumstances. Such a claimant is, by statute, deemed an insured under the workers' compensation policy.¹⁸ Thus, the claimant is not a stranger to the insurance contract. However, insofar as the insurer is legally obligated to defend the employer against whom the claimant asserts a workers' compensation claim, the relationship between claimant and insurer is certainly not a traditional first-party insurance relationship.

In Whitson v. Okla. Farmers Union Mut. Insur. Co.,¹⁹ the Oklahoma Supreme Court rejected a claimant's attempt to impose bad faith liability upon his employer for the manner in which a workers' compensation claim was defended, but left open the possibility that such a claim might lie against a workers' compensation insurer. Thereafter, in Anderson v. United States Fidelity & Guarantee Co.,20 the court held that insurers were exempt from liability to workers' compensation claimants for conduct which occurred prior to the issuance of an award, but left open the possibility that post-award conduct of the insurer might give rise to such liability. The result was a confused state of litigation as to whether such liability would lie and, if so, which rulings of the workers' compensation court would constitute an "award" which would trigger the insurer's obligation of good faith and fair dealing, if such existed.

These questions appeared to have been finally answered by the court in its decision in Deanda v. AIU Insur.²¹ In that case, the court held that imposing bad faith tort liability upon workers' compensation carriers would be inconsistent with the legislative scheme which established the workers' compensation system.²² The court found that remedies against an insurer and employer were available to a workers' compensation claimant for failure to satisfy awards of the workers' compensation court, and that the adequacy of those remedies was purely a matter within the province of the legislature. Thus, the court concluded that "Oklahoma does not recognize the tort of bad faith against a workers' compensation insurance carrier for post-award conduct."23

However, two years later in *Sizemore v. Continental Casualty Company*²⁴ the court reconsidered its holding in *Deanda* and overruled it. In doing so, the court made two significant rulings. The first concerned the question of whether an employer which was "self-insured" for purposes of workers' compensation coverage could be held liable for bad faith as an insurer. The court noted that the Workers' Compensation Act had been amended to include within its definition of an "insurance carrier" those employers which were individual self-insureds or members of a group self-insurance association, and thus found that such a self-insured employer was subject to the same tort liability as was an insurance company.²⁵

The second ruling was that an insurer or selfinsured employer would be subject to bad faith liability for the failure to pay a workers' compensation award, although the Sizemore decision included some language suggesting that such liability would only arise where the workers' compensation claimant had first followed the procedure set forth within 85 O.S. Ann., § 42(A) providing for the filing of the award as a judgment with the district court.²⁶ Significantly, the court discussed the procedure under that statute as one providing a remedy for "late payment" of workers' compensation benefits, although the procedure is available where the benefits are not paid within 10 days.27 Thus, it is at least arguable that, under the authority of the Sizemore decision, the failure to pay a workers' compensation award within 10 days of its issuance is a sufficient basis upon which to predicate a bad faith claim.

THIRD-PARTY ADMINISTRATORS

The court has also imposed liability for bad faith, in some instances, upon third-party administrators. Third-party administrators, or TPAs, are independent companies that provide claims administration services for insurance companies. A TPA, under the terms of its contract with an insurance company, may perform some or all of the claims service functions that would otherwise be handled by the claim department of the insurer. This can include the receipt, investigation and processing of claims, claims adjudication, claim payment and appeal adjudication. Depending upon the nature of the TPA, compensation for these services can be based upon a flat fee, a per capita fee based upon the number of insureds, an adjustable fee based upon claim volume or a percentage fee based upon claim payments. A TPA which is affiliated with an insurance company may also either underwrite or assume some part of the risk. These companies are perhaps most often utilized in the context of health insurance claims; nonetheless, they can also be found handling property and casualty claims, typically for smaller insurers.

Historically, the Oklahoma Supreme Court has held that since the duty of good faith and fair dealing arises from an implied covenant of the insurance contract, liability for the breach of that duty can only be imposed upon the insurer. Thus, those acting as its agents in discharging the insurer's non-delegable duties, as strangers to the insurance contract, are not subject to bad faith liability.²⁸ However, in 1995 the 10th Circuit Court of Appeals, in Wolf v. Prudential Insur. Co. of America,²⁹ predicted that the Oklahoma Supreme Court would expand tort liability for bad faith to include third-party administrators under circumstances where the TPA was sufficiently involved in the claim process to be acting as a *de facto* insurer.

It was not until January 2004, in *Wathor v. Mutual Assur. Admin. Inc.,*³⁰ that the Oklahoma Supreme Court finally reached this issue. In *Wathor*, the Supreme Court adopted the reasoning of the 10th Circuit in *Wolf*, and expanded bad faith liability to include TPAs under certain limited circumstances. Specifically, the court held that:

In a situation where a plan administrator performs many of the tasks of an insurance company, has a compensation package that is contingent on the approval or denial of claims, and bears some of the financial risk of loss for the claims, the administrator has a duty of good faith and fair dealing to the insured.³¹

However, absent such special circumstances, the court reaffirmed the general rule that normally liability should not be imposed upon a TPA since it is not a party to the insurance contract.³²

The *Wathor* decision is best understood by its comparison of the duties of the TPA sued in *Wolf* to those of the TPA in the case before it. In Wolf, the 10th Circuit noted that the TPA "had primary control over benefit determinations (including some intermediate appeals)" and "received a percentage of the premiums paid for participant coverage" which "increased as losses decreased" and, after losses reached a certain level, the TPA "had to share the risk" until, after a point, the TPA "had to underwrite the entire risk."33 Thus, the 10th Circuit concluded that the TPA had a "special relationship" with the insured equivalent to that which the insured would have with an insurer upon which bad faith liability might be imposed.³⁴

By contrast, although the TPA in Wathor was required initially to determine "whether any particular claim for benefits qualifies for payment under the Plan," it did not have final authority to approve or deny claims or adjudicate appeals, was "compensated by a flat fee based solely on the number of participants in the plan," and "assume[d] no risk for any claims filed under the plan."35 Under these circumstances, the Supreme Court found that bad faith liability would not extend to the TPA. Although it performed some of the claim handling tasks for which an insurance company is traditionally responsible, its compensation was not tied to the outcome of its claim adjudications and it did not share in the risk of loss. As such, the court found that the TPA "had neither the power, the motive, nor the opportunity to act



66 The matter was submitted to arbitration, with the result that an award was entered against the contractor for breach of contract...

in Worldlogics Corp. v. Chatham Reinsur. Corp.,³⁷ which extended tort liability for bad faith to sureties.

Worldlogics was the owner of a construction project, on which Chatham had issued a performance bond. When the contractor failed to satisfactorily perform under the construction Worldlogics contract, made demand upon Cha-

tham to take over the project and complete construction as required by its bond. Chatham allegedly refused to do so, or even to conduct a timely or adequate investigation of the contractor's alleged breach. Worldlogics then sued the contractor for breach of the construction contract and sued Chatham upon its bond.

The matter was submitted to arbitration, with the result that an award was entered against the contractor for breach of contract, and against Chatham upon its bond. Worldlogics then amended its petition to additionally assert a claim of bad faith against Chatham, for failing to perform a timely and adequate investigation and for unreasonably denying Worldlogics' claim. The issue presented on appeal was whether such a claim of bad faith would lie against a surety.

The Court of Civil Appeals considered whether a suretyship contract presented one of

unscrupulously,"36 and thus should not be excepted from the general rule that bad faith liability will not fall upon those who are strangers to the insurance

Wathor is significant in affirming that while bad faith liability is typically confined to the insurer, it can extend to a third-party administrator under limited circumstances where the TPA has a financial stake in the outcome of its claims adjudications which might provide a motive to act unscrupulously. While this basis for liability is narrow, where it exists the liability would appear to be co-extensive with that of the insurer for which it acts.

RECENT DEVELOPMENTS

contract.

Perhaps one of the most interesting, and potentially significant, expansions of bad faith liability in recent years was the result of a decision of the Oklahoma Court of Civil Appeals. In June 2004, that court issued its decision



the limited circumstances in which a breach of the duty of good faith and fair dealing, implied in every Oklahoma contract as noted above, would give rise to bad faith tort liability. In deciding this issue, the court noted that suretyship contracts are included within the definition of an insurance contract under the Oklahoma Insurance Code, that sureties are subject to the Oklahoma Unfair Claim Settlement Practices Act, and that Oklahoma law has consistently interpreted the obligations of a surety by reference to the laws governing the interpretation of policies of insurance.³⁸ Moreover, the court concluded that parties do not enter into contracts with sureties to obtain a commercial advantage, but rather to obtain security or protection similar to that provided by an insurance policy.³⁹ The court thus determined that imposition of tort liability for a breach of the obligations of the surety would be appropriate, in order to deter sureties who might be inclined to delay payment of obligations due upon their surety contract.⁴⁰

Of particular interest in this decision is the court's recognition of the potential dilemma which the imposition of bad faith liability creates for the surety. In arguing against such liability, Chatham noted that the demands upon a surety are often inconsistent, as the project owner seeks the assumption and completion of the project by the surety as the bond obligee, while the contractor, the principal on the bond, may insist that it is not in breach and thus intervention by the surety is inappropriate. The Court of Civil Appeals noted that the Colorado Supreme Court had acknowledged this problem in stating:

We recognize that the commercial surety is put in an awkward position in handling simultaneous claims made by the principal and the obligee . . . Although the commercial surety's obligation may be more

...this complexity does not authorize a commercial surety to disregard its obligation to act in good faith.

complex than those of an insurer, this complexity does not authorize a commercial surety to disregard its obligation to act in good faith.⁴¹

The Oklahoma Court of Civil Appeals held that "a surety can act in good faith towards both parties; acting in good faith toward one party does not necessitate acting in bad faith toward the other."⁴² Thus, the court found that a surety owes a duty of good faith and fair dealing to both the principal and the obligee upon its surety bond, and subjected the surety to liability for a breach of that duty as to either the obligee or the principal.

It would seem that the *Worldlogics* case may prove to be of considerable significance, assuming that the Oklahoma Supreme Court does not reach a contrary conclusion should it address this issue in the future. As the World*logics* court recognized, when a surety is called upon by an obligee to perform upon its contract, it can be assumed that the relationship between the obligee and the surety's principal has deteriorated. At that point the obligee is claiming that the principal has breached its contract, although the principal may well assert that it has performed or that its ability to perform has been impaired by the obligee. Under these circumstances, the duty of good faith and fair dealing would presumably require that the surety perform an investigation and reach a conclusion as to whether a breach of the principal contract has occurred. Yet it seems clear that either the principal or the obligee will be dissatisfied with the conclusion reached by the surety. *Worldlogics* makes the surety subject to a claim of bad faith by, and potential bad faith liability to, the dissatisfied party. Thus, the Worldlogics decision would seem to create the potential for a vast new area of bad faith litigation.

ERISA

In the face of this seeming expansion of bad faith liability in recent years, ERISA has been the one area in which such liability has been precluded, although such was on the basis of federal, rather than state, law. The Employee Retirement Income Security Act, or ERISA, was passed by Congress to encourage employers to provide welfare and retirement benefits to employees. Among the incentives utilized by ERISA to encourage employers to provide these benefits was a limitation on the liability which employers might face for implementing such a program. In effect, ERISA limits employers' liability where payments are wrongfully withheld to an obligation to make the payments due and precludes the imposition of other tort or contractual liability. This liability protection is not only extended to the employer but also to others acting on behalf of the ERISA plan in its administration.

Because ERISA is a federal law, virtually all cases involving an ERISA plan land in federal court. For years, a split of authority existed among the Oklahoma federal bench as to whether the protection from liability afforded by ERISA extended to an insurance company whose policy is purchased to fund all or part of an ERISA plan. However, in 2004 the 10th Circuit Court of Appeals addressed this issue in the case of Allison v. UNUM Life Insur. Co. of America,⁴³ and concluded that certain U.S. Supreme Court decisions made clear that Oklahoma's bad faith tort had, indeed, been preempted by ERISA. While the circuit's analysis is more legally complex than it is interesting, the court essentially held that although Oklahoma's bad faith law was directed toward the insurance industry, it did not regulate the spreading of policyholder risk, which it interpreted as meaning affecting a change in the distribution of risk between the insured and insurer based upon the substantive terms of the insurance contract.⁴⁴ Since the savings provision of ERISA exempts from its pre-emptive effect only those state laws which regulate the insurance industry, in the sense that they are both directed toward the insurance industry and affect the distribution of risk between an insurer and an insured, pre-emption would apply to preclude the imposition of bad faith liability based upon the handling of a claim for employee welfare benefits under an ERISA plan.45

CONCLUSION

In any event, it would now appear to be settled that insurers participating in an ERISA plan are not subject to bad faith liability. Indeed, their liability is limited to an obligation to pay benefits which were wrongfully withheld.

Although bad faith has existed as an independent tort under Oklahoma law since 1977, there is still much unsettled about the definition and scope of this theory of recovery. As noted above, as recently as the Badillo decision in 2005, the court redefined this "intentional" tort as one requiring proof of something between negligence and recklessness. Only a year before had the court expanded bad faith liability to include third-party administrators, and a year after it reversed its earlier decision precluding the imposition of bad faith liability upon workers' compensation insurers and permitted recovery upon such claims. It has yet to pass upon the Court of Civil Appeals expansion of bad faith liability to include sureties, but there appears little reason to believe that such liability will not be affirmed. Although there remains much that is unsettled in the law governing this tort, it appears clear that it will remain an expanding part of Oklahoma's tort law for the foreseeable future.

- 1. Boling v. New Amsterdam Cas. Co. 1935 OK 587, 46 P.2d 916.
- 2. 1977 OK 141, 577 P.2d 899.

5. Id. at ¶ 26.

6. Goodwin v. Old Republic Ins. Co., 1992 OK 34, ¶¶ 8, 14, 828 P.2d 431, 433, 435; Buzzard v. Farmers Ins. Co. (Buzzard II), 1991 OK 127, ¶ 12, 824 P.2d 1105, 1109; Buzzard v. McDanel (Buzzard I), 1987 OK 28, ¶ 9, 736 P.2d 157, 159; Manis v. Hartford Fire Ins. Co., 1984 OK 25, ¶¶ 6-13, 681 P.2d 760, 761-62; McCorkle v. Great Atlantic Ins. Co., 1981 OK 128, ¶ 21, 637 P.2d 583, 587.

11. It should be noted that the current Oklahoma Uniform Jury Instructions — Civil do not conform to this standard of proof. For example, OUJI-Civ 22.2, which defines bad faith in the context of a first party insurer's failure to pay a claim, requires only a finding by the jury that the refusal to pay was "unreasonable under the circumstances" for liability to attach. Similarly, OUJI-Civ 22.3, concerning bad faith liability to an insured in relation to the handling of a third party liability claim, allows liability to attach if the insurer's actions were "unreasonable under the circumstances" so long as the other elements are satisfied. Nowhere do the pattern instructions define "unreasonable" conduct as being that which is more than negligent, but less than reckless. Such a standard is, in fact, strikingly similar to the definitions of negligence and ordinary care set forth within OUJI-Civ 9.2 and 9.3, respectively.

12. See OUJI-Civ 22.4.

13. The types of liability policies most familiar to the practitioner, such as personal and commercial auto policies and commercial general liability policies, typically provide that the insurer has the right and duty to defend claims covered under the policy. Generally, this obligation continues regardless of the expense incurred, even where it exceeds that of the coverage limit of the policy, so long as the policy

^{3.} Id. at ¶ 19.

^{4.} Id. at ¶ 25.

^{7.} McCorkle, supra., at \P 21.

^{8.} Buzzard II, supra., at ¶ 12.

^{9.} Badillo v. Mid Century Ins. Co., 2005 OK 48, ¶ 28, 121 P.3d 1080.

^{10.} *Id.* at note 6; citing *McCorkle*, *supra*.

limit is not exhausted through settlement or payment upon a judgment. However, some types of liability policies, such as Directors and Officers policies and many professional liability policies, provide that the cost of defense of a claim against the insured comes out of, and diminishes, the policy's coverage limit. This type of policy is referred to by various terms, including as a "wasting" policy.

14. However, in such a case the rough equivalent of such damages may be available in the form of damages for loss of reputation. Thus, where a wrongful claim denial impairs the ability of a small corporation to provide its product or services to its customers on a timely basis, such may form the basis for a claim of reputational injury which may result in an award similar to that granted the individual insured for emotional distress.

15. Christian, supra., 1977 OK 141 at ¶ 25; see also Wathor v. Mut. Assurance Admr's Inc., 2004 OK 2 ¶ 5, 87 P.3d 559. 16. 1996 OK 105 ¶¶ 24, 26, 928 P.2d 298.

17. Id.

18. 85 O.S. 1978, § 65.3 provides that "Every contract of insurance issued by an insurance carrier for the purpose of insuring an employer against liability under the Workers' Compensation Act shall be conclusively presumed to be a contract for the benefit of each and every person upon whom insurance premiums are paid, collected, or whose employment is considered or used in determination of the amount of premium collected upon such policy . . . which contract may be enforced by such employee as the beneficiary thereof."

19. 1995 OK 4, 889 P.2d 285.

- 20. 1997 OK 124, 948 P.2d 1216.
- 21. 2004 OK 54, 98 P.3d 1080.

22. Id. at ¶ 18.

- 23. Id. at ¶ 24.
- 24. 2006 OK 36, 142 P.3d 47.

25. Id. at ¶ 17. It is interesting to note that the definition of an "insurer" in the Oklahoma Insurance Code is somewhat different than that contained within the Workers' Compensation Act referenced in Sizemore. The Insurance Code defines an "insurer" as including "every person engaged in the business of making contracts of insurance or indemnity." 36 O.S. Ann., § 103(A). It would thus appear that a "selfinsured" outside of the context of workers' compensation would not be subject to bad faith liability under the rationale of Sizemore, and the author is not aware of any Oklahoma Supreme Court decision that would impose such liability.

- 26. Id. at ¶¶ 28, 29.
- 27. Sizemore, supra., at ¶ 26.
- 28. See Timmons v. Royal Globe Insur. Co., 1982 OK 97, 653 P.2d 907.
- 29. 50 F.3d 793 (10th Čir. 1995).
- 30. 2004 OK 2, 87 P.3d 559.
- 31. Wathor, 2004 OK 2 at ¶ 12.
- 32. Wathor, 2004 OK 2 at ¶ 18.

33. Wathor, 2004 OK 2 at ¶ 10.

34. Wathor, 2004 OK 2 at ¶ 11. 35. Id. at ¶ 1.

36. Id. at ¶ 13 (citations omitted).

37. 2005 OK CIV APP 16, 108 P.3d 5, cert. denied 2005.

38. Id. at ¶ 12; citing the Oklahoma Unfair Claim Settlement Practices Act, 36 O.S. 1997, § 1250.1 et seq.

40. Id. at ¶ 14.

41. Id. at ¶ 16, quoting Trans. America Premier Insur. Co. v. Brighton School District 27J, 940 P.2d 348, 353 n. 4 (Colo. 1997).

42. Worldlogics, 2005 OK CIV APP 16 at ¶ 16.

43. 381 F.3d 1015 (10th Cir. 2004).

44 Id at 1027

45. It is interesting to note that, in response to a certified question of law from Judge Holmes, the Oklahoma Supreme Court reached a similar conclusion the year before Allison in the case of Hollaway v. UNUM Life Insur. Co. of America, 2003 OK 90, 89 P.3d 1022. However, as the Tenth Circuit noted in Allison, the application of ERISA's preemption clause and its saving provision presents a pure question of federal law, and hence the decision of the Oklahoma Supreme Court was merely persuasive rather than binding. Indeed, the analysis of the 10th Circuit essentially ignored the Hollaway decision in reaching its conclusion, other than to acknowledge in a footnote that the decision had been issued.

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^{39.} Id. at ¶ 13.



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Insurance

Payment of the Undisputed Amount in Uninsured Motorist Claims: What Insurance Companies and Attorneys Should Know

By David Bernstein

The Oklahoma Supreme Court has made it clear for over 30 years that an insurer has a duty to promptly pay its insured amounts that are not in dispute where there is no legal or factual issue regarding said undisputed amounts. In *Christian v. American Home Assur. Co.*,¹ the Oklahoma Supreme Court quoted *Fletcher v. Western National Life Ins. Co.*,² to explain why insurance companies would be subject to the implied duty to act in good faith and deal fairly:

"An insurer owes to its insured an implied-inlaw duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy. ... The violation of that duty sounds in tort notwithstanding that it may also constitute a breach of contract. ...We think that, similarly, the implied-in-law duty of good faith and fair dealing imposes upon a disability insurer a duty not to threaten to withhold or actually withhold payments, maliciously and without probable cause, for the purpose of injuring its insured by depriving him of the benefits of the policy." (Emphasis added).

"...To some extent this special relationship and these special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured. ... To some extent the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract '... to obtain a commercial advantage but to protect [himself] against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing ... insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss...' These considerations are particularly cogent in disability insurance. The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity."(Emphasis added).

The Oklahoma Supreme Court went on to state in *Christian*:

¶20 *Our Insurance Code requires insurance companies to make immediate payment of claims.* Title 36 O.S. 1971 § 4405 A 8, requires

the following provision to be included as a standard clause in all individual accident and health policies:

"TIME OF PAYMENT OF CLAIMS: Indemnities payable under this policy for any loss ... will be paid immediately upon receipt of due written proof of such loss." (Emphasis added).

¶21 This statutory duty imposed upon insurance companies to pay claims immediately, recognizes that a substantial part of the right purchased by an insured is the right to receive the policy benefits promptly. Unwarranted delay precipitates the precise economic hardship the insured sought to avoid by purchase of the policy. (Emphasis added).

¶22 While this provision would not deter an insurance company from refusing payment on a claim that it had reasonable cause to believe was factually or legally insufficient, *it does express the intent of our*

legislature to impose upon insurance companies an obligation to pay a valid claim on a policy promptly. (Emphasis added).

¶23 The obligation of an insurance company, such as appellee, on a disability policy is not for the payment of money only, *it is the obligation to pay the policy amount immediately upon receipt of proper proof of loss...* (*Emphasis added*).

¶25 We approve and adopt the rule that an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for which consequential and, in a proper case, punitive, damages may be sought. We do not hold that an insurer who resists and litigates a claim made by its insured does so at its peril that if it loses the suit or suffers a judgment against it for a larger amount than it had offered in payment, it will be held to have breached its duty to act fairly and in good faith and thus be liable in tort.

¶26 We recognize that there can be disagreements between insurer and insured on a variety of matters such as

insurable interest, extent of coverage, cause of loss, amount of loss, or breach of policy conditions. Resort to a judicial forum is not per se bad faith or unfair dealing on the part of the insurer regardless of the outcome of the suit. Rather, tort liability may be imposed only where there is a clear showing that the insurer unreasonably, and in bad faith, withholds payment of the claim of its insured. (Emphasis added).

In *Barnes v. Oklahoma Farm Bureau*, 2000 OK 55, 11 P.3d 162, the Oklahoma Supreme Court advised in paragraph 11 of its opinion that "failure to pay undisputed amounts" is an example of an insurer breaching its duty of good faith and fair dealing.

The Oklahoma Supreme Court recently ruled in *Garnett v. Government Employees Insurance Company*³ that if an insurance company disputes the value of a UIM claim (where the medicals bills and loss of income are covered



56 ...'failure to pay undisputed amounts' is an example of an insurer breaching its duty of good faith and fair dealing.
under the liability portion of the claim), then the insurance company does *not* have to pay its initial offer on the UIM claim since the value of the UIM claim is in dispute.

In Garnett, Garnett was a passenger Hargrove's pickup, which was rear-ended by Fain. Both vehicles were insured by Government Employees Insurance Company (GEICO). Garnett sustained \$6,510.50 in medical expenses and \$716.16 in lost wages. GEICO initially offered to settle the liability claim for \$8,700. The UIM carrier (GEICO) initially valued the total claim at \$11,000 to \$13,000, and by subtracting the liability limits of \$10,000, valued the claim at \$1,000 to \$3,000. The UIM carrier initially offered Garnett \$1,000 to settle the UIM claim. Eventually, GEICO settled the liability claim for the liability policy limits of \$10,000. Thereafter, GEICO eventually offered the top end of its evaluation of \$3,000.00 to settle the UIM claim. Garnett demanded that GEICO pay the \$3,000 to Garnett as the "undisputed amount" without settlement of the UIM claim. GEICO refused, and suit was brought for bad faith and breach of contract for GEICO refusing to pay the "undisputed amount." The trial court granted GEICO summary judgment, the Court of Appeals affirmed, the Oklahoma Supreme Court accepted certiorari, and ruled:

¶23 Here, the passenger (Garnett) established that he had sustained \$7,226.66 in damages for medical expenses and lost wages. He also alleged that he sustained damages for pain and suffering and mental anguish. The insurer valued his UIM claim somewhere between \$1,000 and \$3,000. The passenger argued that the claim should have been valued somewhere between \$13,000 and \$15,000. Ultimately, the jury awarded the passenger (Garnett) \$5,000, a number greater than the insurer's (GEI-CO's) estimate, but closer to the insurer's range than to the passenger's. Clearly, the UIM claim was legitimately disputed, as evidenced by the jury's award. Because a legitimate dispute existed between the parties as to the value of the UIM claim, the trial court did not err by granting summary judgment to the insurer on the issue of whether the insurer's failure to tender the "undisputed amount" constituted bad faith.

In *Hatfield v. Liberty Mutual Insurance Co.*,⁴ the insurer and insured agreed that the insured's medical bills exceeded \$90,000, and the tortfea-

sor at fault had only \$25,000 of liability coverage. The insured owned two vehicles covered by \$25,000 of uninsured motorist/underinsured motorist (UM/UIM) coverage. The insurer maintained that stacking was not available under the policy, and offered to pay the \$25,000 UIM policy limits in the event that the insured signed an "underinsured release," which would waive his right to any amount in excess of \$25,000. The insured refused to sign the release and brought suit against the insurer, alleging that the insurer acted in bad faith by refusing to pay the "undisputed" \$25,000 UIM payment. At the conclusion of the evidence, the insurer moved for judgment as a matter of law. The district court denied the motion, and the 10th Circuit affirmed, finding that a reasonable jury could find that the insurer's actions constituted bad faith. The court determined that where there is a legitimate dispute as to one component of a claim, a jury may reasonably conclude that it is not reasonable to hold payment of the undisputed amount hostage to relinquishment of a legitimately disputed component of the claim. There was no dispute that the insurer owed at least the \$25,000 policy limits of one UIM policy and that money should have been paid promptly.

In circumstances where an insurance company believes certain elements of damages are undisputed, can the insurer take the position that it will not pay certain elements of damages that are undisputed without requiring the insured to sign a release giving up his/her claim regarding the disputed elements of damages? Can the insurer successfully make the public policy argument that complete settlements are preferred over piecemeal settlements, which overrides the insured's desire to have certain element(s) of a UM/UIM claim be paid promptly which are not disputed? If an insurer delays paying an insured certain elements of a claim which are admittedly owed and undisputed, has the insurer let its interest override the insured's interest? If it makes sense under a certain set of facts and there is no reason other than the insurer's desire to not settle cases piecemeal, must the insurer pay the undisputed portion of the UM/UIM claim?

Most insurance companies will agree that each UM/UIM claim must be handled on its own merits, and the insurance company should give the insured's interest in having the undisputed portion of his/her UM/UIM claim paid promptly equal weight to the insurer's desire to not settle claims piecemeal. The insurance company must look at the facts of each case to make a proper decision.

Insurance companies pay claims piecemeal where there is no dispute in every other type of first-party coverage. For example, on medical payments coverage, the insurance company will promptly pay each medical bill as it is submitted without requiring а release from its insured (assuming the insured purchased said coverage) once each bill is determined to be reasonable, necessary and related to the accident. The insurer does not make the insured wait until any disputed medical bills are resolved before it promptly pays the undisputed medical bills under the medical payment coverage. If the insured is in an accident, damages his/her car and makes a claim under his/ her collision coverage, the insurer will pay for the amount it determines to be necessary to repair the car. If the body shop later finds hidden damage due to the accident, the insurance company will make a supplemental payment to cover the hidden damages on this first-party claim without requiring a release.



Insurance companies pay claims piecemeal where there is no dispute in every other type of first-party coverage.

PAYMENT OF AN UNDISPUTED ELEMENT OF AN UNINSURED MOTORIST CLAIM

Let's change the facts from *Garnett*. An insured is in an accident caused by a driver with no insurance where liability is clear, fractures a bone as a result of the accident, incurs medical bills of \$5,000 which the insurer agrees are reasonable, necessary and related to the

accident, goes through pain and suffering as a result of the accident and has UM coverage of \$25,000 which the insurer agrees is in force and applies to the facts of the accident. A settlement package is sent requesting the UM policy limits of \$25,000. The insurer evaluates the claim at \$15,000 to \$20,000, and makes an initial offer of \$16.000. The insured requests that the insurer go ahead and pay the \$5,000 for the medical bills, which the insurer admits are reasonable, necessary and related to the accident without settlement of the uninsured motorist claim. In other words, the medical bills on the insured's UM claim are "undisputed." There is no liability coverage to cover the medical bills incurred. The insurance company refuses to pay the "undisputed amount" of the UM claim without a release because it disputes the whole value of the UM claim. Has the insurer exposed itself to a bad faith claim?

These latter facts are distinguishable from *Garnett* since in *Garnett*, the insurance company disputed the value of the UIM claim and there was liability coverage to pay

the medical bills, lost wages and over \$2,700 of pain and suffering. It was certainly possible that a jury could award less than \$2,700 for pain and suffering and never expose the UIM coverage of GEICO. In the present example, there is no doubt that the insurance company will have to pay at least the medical bills of \$5,000, since the insurance company does *not* dispute them as being reasonable, necessary and related to the accident. In other words, the insurance company is going to have to pay at least \$5,000 on the UM claim since it is undisputed.

There is no policy provision which prohibits payment of the undisputed portion of the UM claim. There is no statute which prohibits payment of the undisputed portion of the UM claim. There is no public policy consideration which prohibits payment of the undisputed portion of the UM claim. The only possible reason an insurance company can argue that it will not pay the undisputed portion of the UM claim is that UM coverage is not a periodic payments coverage, and that the insurance company will settle the UM claim only when all elements of the UM claim can be settled together — not piecemeal.

The author is aware of no insurance policy that states that the insurance company can delay paying the undisputed portion of an uninsured motorist claim until all elements of the UM claim are resolved. An insurer that refuses to pay undisputed elements of an uninsured motorist claim appears to contradict everything that Christian stands for.

In this example, an insured has outstanding medical bills, and the insurance company states the insured is not entitled to payment of the medical bills under the UM coverage even though the medical bills are undisputed. Taking this position, the insurance company will allow medical providers to hassle the insured and possibly have the insured's credit hurt until all of the elements of the UM claim are resolved. In effect, the insurance company is holding its insured who paid premiums for UM coverage hostage and won't pay the undisputed portion of the UM claim until the insured settles all elements of the UM claim. Does this

position by an insurance company make sense, especially when the jurors will think this same thing could happen to them or their family or friends?

As a practical matter, it is unclear why an insurance company would not issue a check to its insured for the "undisputed" portion of an uninsured motorist claim, since the insurer could advise the jury it paid what was undisputed and the lawsuit is over the disputed portion of the UM claim. The jury would probably look positively at the insurer for trying to do what was right. Instead, when an insurer refuses to pay the undisputed portion of an uninsured motorist claim without a release when money for undisputed medical bills is owed, a jury will usually look negatively at the insurer, and substantial verdicts can arise.

1. 1977 OK 141, 577 P.2d 899.

- 2. 10 Cal. App.3d 376, 89 Cal. Rptr. 78, 47 A.L.R.3d 286 (1970). 3. 2008 OK 43, ____ P.3d ___. 4. 98 Fed. Appx. 789 (10th Cir. (Okla.) 2004).

ABOUT THE AUTHOR



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Insurance

I Want One Of Those! Experts in A Bad Faith Case — Everyone Needs One, Or Do They?

By Michael W. Brewer

What seems like decades ago, I had the opportunity to try three different civil jury trials in the course of a little more than one year before the same federal judge in Oklahoma. That still seems like a lot of face time before this particular judge in a short time frame. At that time I had already completed 20 or 30 jury trials, including some involving experts.

I was used to the normal jury instruction from OUJI concerning expert witnesses. However, I was not ready for this judge's introduction of each and every expert called by the parties. As each expert would take the stand to testify, the judge would advise the jury along the lines of something like this:

The next witness is an expert witness; anybody can pay an expert witness to say anything. You are to consider this testimony and give it the weight that it is worth.

This is as close to a quote as I can get after these many years. At that time, I was a little bit taken aback by this introduction, especially when it was my expert and not the expert retained by the adverse party. However, this trial judge introduced every expert the same way in every case.

After more years of trying jury cases with expert testimony involved and working with focus groups, jury consultants and post-verdict jury surveys, it became abundantly clear to me that this jurist had hit the nail squarely on the head when describing expert testimony as far as jurors were concerned. In many ways, experts are simply witnesses compensated by their respective parties to give testimony favorable to their positions. Otherwise, there would be no reason for them to appear at trial and give testimony. This radically altered my thinking as to whether you would even need an expert to rebut the other side's expert.

This is especially true in the world of insurance bad faith. Despite the adoption of *Daubert* and *Kumho Tire*¹ by Oklahoma courts, experts abound in civil jury trials. Many are allowed to testify on the basis that they will aid the jury to find the truth of the matter in dispute. Unfortunately, although this basis does appear to be based on evidentiary rules 2702 or 702, it does not sound much like Daubert or Kumho Tire at all. If in fact the law mandates that the trial judge be the gatekeeper of experts, is this gate ever in a closed position? In the world of bad faith insurance law, does the fact that you are one of 16,076 attorneys licensed by the Oklahoma Bar Association mean that you are qualified to give expert opinions in an insurance bad faith case? Moreover, does it mean that if you are one of the thousands of licensed adjustors by the Oklahoma Insurance Commission, you are automatically qualified to give expert opinions in a bad faith insurance case?

Broken down to its basic foundations, bad faith cases fall into two categories. The issues either have to do with the denial of coverage or the handling of a covered claim, or both. While each matter must be determined on a case-bycase basis, the intent of this article is to give the

reader a bird's-eye view of the process and hopefully some practice pointers you can use in your own practice (for those of you who choose to remain litigators or trial lawyers and not become mediators, arbitrators or trial experts/consultants). In the end, experience tells us that jurors are more inclined to believe the introduction of expert witnesses of the jurist who shocked my world with his pronouncement before my expert could even give his name. After all, my client had paid good money for that expert to appear at trial and give his opinions.

BACKGROUND

What is the purpose of having experts testify regarding bad faith in insurance cases? The 10th **Circuit Court of Appeals** has held that jurors are capable of determining whether bad faith exists based on their common sense and their life experiences.2 One does not need to be an expert to recognize the presence or absence of bad faith. The average person knows bad faith when they see Expert testimony it. regarding insurance com-

pany bad faith is not a necessity, because whether someone has acted in bad faith is a question of fact that the jury can decide without the opinion of an expert.³ This seems to indicate to us that a so-called bad faith expert is not necessary. In short, not just anyone can be a bad faith expert. Only when the testimony can add something extra and valuable to the jurors' understanding of a case and the bad faith elements should the courts allow expert testimony regarding insurance bad faith practices.⁴ Courts

66 If expert witnesses are allowed to testify, they better offer something to the case besides a factual or legal conclusion. across the country have generally refused to allow expert witnesses to testify in insurance bad faith claims when "it is within the capability of the fact finder, unaided by expert testimony, to assess whether an insurer acted in bad faith or breached its duty of care."⁵ Expert testimony is not a "prerequisite to the submission of a bad faith claim."⁶

It is the province of the jurors, not the attorneys or the experts, to reach factual conclusions. If expert witnesses are allowed to testify, they better offer something to the case besides a factual or legal conclusion. What would be the purpose of the jury if the experts simply fed them the conclusion?

OKLAHOMA LAW

Oklahoma has adopted Daubert and Kumho Tire, U.S. Supreme Court cases which, taken together, state that experts testifying about any specialized knowledge must be reliable and their testimony must be relevant. In *Daubert*, the Supreme Court named the trial courts the "gatekeepers," giving them discretion to allow or exclude expert testimony based on the

reliability and relevance of the testimony.⁷ Experts testifying about insurance bad faith practices must therefore have some specialized knowledge, be reliable and give relevant testimony.

Oklahoma's evidence rule regarding expert testimony, 12 O.S. § 2702, is the same as Federal Rule of Evidence 702. To satisfy Rule 702, the witness must be an expert, meaning that she must have specialized knowledge, and the expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."8

Interpreting the first requirement, that the witness must be an expert, *Daubert* said that to be an expert the witness and her testimony must be reliable and relevant. *Daubert*



The jury did not need the expert's opinion to analyze the evidence presented.

identified four factors to consider when determining whether the expert's proposed testimony is reliable:

- Whether the theory or technique used by the expert can be or has been tested;
- Whether the theory or technique has been subjected to peer review and publication;
- Whether there is a known or potential rate of error of the technique or method; and
- Whether the theory or technique has obtained general acceptance within the scientific community.⁹

Kumho Tire explained that the *Daubert* factors should apply to other testimony besides scientific testimony, but the *Daubert* factors should be considered only to the extent they are relevant to the subject of the testimony.¹⁰ The 10th Circuit has held that the methods employed by the expert witness in reaching her factual conclusion must be "scientifically sound" and her opinion must be based on "facts which satisfy Rule 702's reliability requirements."¹¹

Once it is established that the testimony is reliable and relevant and being given by a qualified expert, the next test for admissibility is whether the testimony offered by the expert witness will aid the trier of fact in understanding the evidence presented. The 10th Circuit has called the requirement of helpfulness to the trier of fact the "touchstone of admissibility."12

Several Oklahoma and 10th Circuit cases illustrate how seemingly qualified "experts" are excluded from giving expert testimony because they do not help the jurors understand the

evidence. One expert witness was disqualified when the judge ruled that the jury was competent and capable to compare an insurance company's actions with the industry standard for insurance companies.¹³ The jury did not need the expert's opinion to analyze the evidence presented. Several other 10th Circuit cases have held that "[w]hen the normal experiences and qualifications of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary" and sometimes even improper.¹⁴

In addition to satisfying the *Daubert* and *Kumho Tire* factors of reliability and relevance and the Rule 702 requirement of aiding the jury in understanding the evidence, the expert testimony must also not provide a legal conclusion to the jury. It is the province of the judge, not the expert witness, to instruct the jury on what law to apply.

In a recent U.S. District Court decision in Oklahoma, the court excluded expert testimony which would have given the jury a legal conclusion regarding the evidence offered.¹⁵ The expert witness in that case was going to testify as to his opinion of fault in an insurance bad faith case.¹⁶ The court went on to say that

the expert's testimony would have "impermissibly invade[d] the province of the jury."¹⁷ This ruling goes to the same proposition stated before: jurors are capable of making their own conclusions based on the evidence presented to them. Expert witnesses are not called upon to decide the case for the jury. Rather, expert witnesses are called on to explain difficult ideas to the jury that the jury would not otherwise understand. The U.S. Supreme Court has held that an expert testimony gives a legal conclusion and should therefore be inadmissible when "there is too great an analytical gap between the data and the opinion offered."¹⁸

Most of the witnesses called to testify as experts in insurance bad faith cases are attorneys, insurance adjusters or claims handlers. Even if an attorney has extensive experience with insurance bad faith claims, the ultimate

test for admissibility of her expert testimony is always whether her testimony would assist the trier of fact.¹⁹ The same is true for insurance adjusters, claims handlers and any other witness called to testify as an expert in a bad faith case. Remember also that besides having experience in the field, the experts must base their opinions on "reliable facts" and "reliable methodol-



Sometimes less is really more.

ogy."20 Providing the jury with a legal conclusion does not qualify as aiding them. In fact, this more than likely crosses the line of what is reserved for the court as jury instructions on the law.

RECENT OKLAHOMA CASELAW

In a pre-Daubert 1998 decision, the Oklahoma Court of Civil Appeals found in Hall v. Globe Life & Acc. Ins. Co. that it was not error for the trial court to allow testimony in an insurance bad faith case of an expert witness who testified about the adequacy of the insurer's investigation of the insured's claim.²¹ The court allowed the testimony on the narrow issue of adequacy of the insurer's investigation because

it was "relevant to the matter and potentially helpful to the jury."22

Several other Oklahoma cases have followed suit after Hall in deciding to admit expert testimony in insurance bad faith cases when the expert testifies about a narrow issue that the court deems that the jury cannot understand on its own. Two such cases are Hale v. AG Ins. Co. and Heffron v. District Court of Okla. Co., where the Oklahoma Court of Civil Appeals held that "expert testimony on the adequacy or inadequacy of the carrier's pre-denial investigation may be relied on by both sides to support their respective positions in the case."23 24 These last two cases show us that post-Daubert Oklahoma courts allow expert witnesses in insurance bad faith cases, but narrow the scope of the expert's testimony. Now such testimony must also satisfy the requirements of expert

> testimony set out in Daubert, Kumho Tire and Rule 2702.

CONCLUSION

Think twice the next time you consider using an expert witness in an insurance bad faith case. Give careful consideration to who your expert is and what areas they are qualified to testify about, as well as the specific issue in the case you intend to have

them address. Sometimes less is really more. Ask yourself whether that expert is really offering anything to the jury that the jury could not figure out on its own. Just because the judge allows your bad faith expert to testify does not mean that such testimony will gain you points with the jury. A final consideration may be whether such expert testimony builds a basis for appeal into the trial record.

6. Id. 7. Id. at 597.

^{1.} Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

^{2.} Thompson v. State Farm Fire & Cas. Co., 34 F.3d 932 (10th Cir. 1994).

^{3.} *Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir. 1971). 4. Thompson at 941.

^{5.} John J. Pappas, "Butler Pappas on Bad Faith," Mealey's Litigation Report: Insurance Bad Faith, Vol. 17, #14 (November 2003).

8. Fed. Rules of Evidence 702.

9. Daubert at 592-595.

10. Kumho Tire.

11. Mitchell v. Gencorp Inc., 165 F.3d 778, 781 (10th Cir. 1999).

12. Werth v. Makita Elec. Works, Ltd., 950 F.2d 643, 648 (10th Cir.1991).

13. Thompson.

14. Seikel v. American Medical Security Life Insurance Co., 2007 WL 4859272 (W.D. Okla. 2007), Wilson v. Muckala, 303 F.3d 1207, 1219 (10th Cir. 2002), citing Frase v. Henry, 444 F.2d 1228, 1231 (10th Cir. 1971).

- 15. North American Specialty Ins. Co. v. Britt Paulk Ins. Agency, Inc., 2007 WL 2694323 (E.D. Okla. 2007).
 - 16. Id.
 - 17. Id.
 - 18. General Electric v. Joiner, 522 U.S. 136, 146 (1997).
- 19. Transcontinental Ins. Co. v. Lemons, 2007 WL 4856868 (W.D. Okla. 2007).
- 20. Combs v. Shelter Mut. Ins. Co., 2007 WL 4748227 (E.D. Okla. 2007).
- 21. Hall v. Globe Life & Acc. Ins. Co., 968 P.2d 1263, 1266 (Okla. Civ. App. 1998).

22. Id.

Hale v. A.G. Ins. Co., 138 P.3d 567, 573 (Okla. Civ. App. 2006).
 Heffron v. District Court of Okla. Co., 77 P. 3d 1069, 1077 (Okla. Civ. App. 2003).

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Insurance

Discoverability of the Insurance Company's Claims File in Third-Party Litigation

By Joseph T. Acquaviva Jr.

The contents of an insurance company's claims file are thought to include the veritable "keys to the cash,"""the thought processes of the claims department" and "of all who contribute to the contents of the claims file." Plaintiff attorneys issue discovery requests seeking production of the claims file (or at least portions of it) and such requests are often resisted based upon a claim of "privilege." Often the insurance company whose claims file is the subject of the subpoena or discovery request is uncertain how to respond. The purpose of this article is to address the issue of discoverability of an insurance company's claims file in third party litigation and to provide a reasonable approach for responding to such discovery requests which can be as easy as A, B, C.

THE WORK PRODUCT DOCTRINE

The U.S. Supreme Court first recognized the work product doctrine in *Hickman v. Taylor.*¹ In *Hickman*, five sailors drowned when their tugboat sank. Three days after the accident, the owners of the tugboat hired a law firm to investigate and to defend them in potential claims. During the attorneys' investigation, they took recorded statements from four of the surviving crew members.

Approximately one year after the accident, Hickman filed suit against John M. Taylor and George Anderson, individually, and trading as Taylor and Anderson Towing and Lithurage Company.² The plaintiff's attorney submitted discovery requests for the identity and production of any:

Oral or written statements, records, reports or other memoranda...concerning any mat-

ters relative to the towing operation, the sinking of the tug, the salvage and repair of the tug, and the death of the deceased.³

The defendants objected to the requests on the basis that the discovery sought privileged information obtained in anticipation of litigation. The trial court ordered the requested documents produced.⁴ The 3rd Circuit Court of Appeals reversed the trial court holding that the documents were "privileged" and therefore not subject to discovery.⁵ The U.S. Supreme Court, on *certiorari*, affirmed the holding of the court of appeals and held that the documents requested were protected from discovery because they were work product. The court reasoned:

Historically, a lawyer is an officer of the Court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusions by opposing parties and their counsel.

Proper presentation of a client's case demands that he assemble information, fits what he considers to be relevant in facts, prepares his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, state-

ments, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case (153 F.2d 212, 223) as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing, and the interest of justice would be poorly served.6

The court recognized that the special protection from discovery given to an attorney's "work product" is supported on three bases. First, the work product doctrine prevents needless interference with the work of an attorney. Second, protection promotes efficiency and fairness. Third, adopting the work product doctrine would protect the legal professional from demoralization.⁷ Application of the work product doctrine is often confusing and inconsistent.

THE SCOPE OF DISCOVERY UNDER THE OKLAHOMA DISCOVERY CODE

Parties may obtain discovery of any matter not privileged, which is relevant to the subject matter involved in a pending action, whether it relates to a claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and the location of any books, documents or other

tangible things and the identity and location of persons having knowledge of any discoverable matter.⁸

In cases where the defendant is insured, it is not uncommon for in-house adjusters, out-side adjusters and/or retained counsel to act immediately after an accident is reported to

the insurance company. The fruits of the investigation are generally summarized and placed in the claims file. Decisions to pay or not to pay a claim are typically based upon information "discovered" as well as documents gathered, summarized and placed in the claims file. A claims file may contain the names of witnesses, statements from witnesses, photographs, medical bills, records and reports, a statement from the claimant or potential plaintiff, correspondence between the insurance company and the claimant/plaintiff and/or his/her counsel, an accident report and any other information that appears to the claims adjuster/supervisor to be reasonably necessary based upon the fact of the particular claim. Some of the information is gathered as a matter of course and at other times an investigation is conducted in anticipation of litigation.



The fruits of the investigation are generally summarized and placed in the claims file.

In responding to a subpoena or discovery request for documents from the liability insurer's claims file, how does one determine whether the documents are "privileged" and therefore protected from discovery? Courts recognize that the mere status of an attorney-client relationship does not

make every communication between the attorney and client protected or privileged.⁹

In order to be covered by the attorney-client privilege, communication between a lawyer and client must relate to legal advice or strategies sought by the client.¹⁰ To sustain a claim of work product protection, a litigant must demonstrate that the documents at issue were prepared in anticipation of litigation by or for the defendant or by or for the defendant's representative.¹¹

In analyzing whether a particular document is protected from discovery, one must first determine whether the document includes factual information provided by an independent witness and gathered by the insurer or its legal representative (ordinary work product) or an intellectual analysis of information by the insurer or its legal representative (opinion work product). In Hall, supra, the Oklahoma Supreme Court held that an insurer was required to produce a factual witness statement taken by its attorney during the investigation of a fire loss claim prior to the insurer's denial of the claim, the statement of the witness essentially being that the insured had hired people to burn his house.¹² In doing so, the court determined that the crucial inquiry as to whether a document was protected by a qualified work product privilege was whether the document was secured by the insurer (or its employee) in anticipation of litigation or Z merely in the ordinary or regular course of business.13

Following the court's reasoning in *Hall*, it is clear that the court recognizes that "a central part of the business of insurance companies is to investigate claims, review them and decide whether or not to pay" and that "documents prepared in the ordinary course of business by the insurer, its employees and agents in regard to such endeavors cannot automatically be deemed to have been generated in anticipation of litigation merely because litigation may be deemed a contingency. For the anticipation of litigation threshold to be met, the primary motivating purpose behind the creation of a document or investigative report must be in aid of possible future litigation, although litigation need not be imminent at the time of the document's creation.¹⁴ Further, the court recognized that whether an insurance company's investigatory documents were prepared in anticipation of litigation turns on the facts of each particular case.¹⁵

HOW TO RESPOND TO A REQUEST FOR PRODUCTION OF CLAIMS FILE DOCUMENTS

The recent Oklahoma Supreme Court decision of *Scott v. Peterson*¹⁶ provides some guidance concerning the obligations of a party

responding to such requests. *Scott* involved an action by homeowners (Scotts) against their roofer (Perfection) for damages to their home. The Scotts sought discovery of the claims file of the roofer's liability insurer (NAICO), and filed a motion to compel production of the file. The roofer and the insurer objected to the discovery and sought a protective order.¹⁷

The trial court granted the protective order and a writ ensued. The Oklahoma Supreme Court accepted original jurisdiction and explained that the party objecting to discovery did not satisfy its burden to show a privilege or exemption from discovery, and upon that party's failure to present facts sufficient to adjudicate the privilege and exemption, the trial court was required to order that party to file a privilege log and the documents under seal.¹⁸

Without reading any further, it is clear that based upon the court's ruling in *Scott* that a request for claims file documents is not in and of itself improper. It is also clear that once the request is made, the burden falls upon the party resisting discovery to demonstrate that the documents are privileged or otherwise exempt from discovery. Specifically, the court stated:

Assuming, but not deciding, that the Perfection-NAICO relationship is an attorney-client relationship for certain purposes, Perfection's blanket assertion of the privilege for the entire claims file is not supported by either facts or authority showing that the communications in the file are of such a nature that *all* would qualify pursuant to 12 O.S. Supp. 2002 § 2502.¹⁹ Consequently, Perfection must show that *particular* documents in the claims file are privileged, and this it did not do.²⁰

In order to successfully invoke the work product doctrine, the party asserting the privilege must distinguish between 1) communications and things prepared in anticipation of litigation or for trial by or for another party or by or for a representative of that other party, etc., that *may* be discoverable and 2) the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation, of which a court shall protect against disclosure.²¹ Ordinary work product prepared in anticipation of litigation or trial is discoverable if the party seeking the materials makes the required showing, but opinion work product prepared in anticipation of litigation or for trial is not

discoverable except in extraordinary circumstances.²²

The *Scott* court also recognized that the party opposing the production on a claim of privilege must make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.²³

When a party or nonparty responding to a subpoena [discovery request], fails to provide a privilege log and a log is necessary to adjudicate an asserted privilege, the trial court "shall order" the party asserting the privilege to file a privilege log.²⁴

The party asserting the privilege should request an *in camera* review of the documents and request that the court determine whether a

privilege or exemption from discovery exists as to particular documents.²⁵

CONCLUSION

Discovery disputes are not favored by the courts. Before asserting boiler plate objections and withholding the entire claims file consider whether it contains medical bills, records and reports of the party making the request. Does it contain communication between the Plaintiff's lawyer and the claims adjuster? Are there financial documents or other information in the claims file that required an authorization to obtain? Are there documents that are public records (accident reports, weather reports, newspaper articles, etc.)? The decision to assert an objection on the basis of privilege should be well thought out and not a knee-jerk reaction to what may initially seem like an absurd request.

Object wisely, prepare an appropriate privilege log and request an *in camera* review. It's as easy as A, B, C.

1. George E. Hickman, as Administrator of the Estate of Norman E. Hickman v. John M. Taylor and George Anderson, individually, and trading as Taylor and Anderson Towing and Lithurage Company, 329 U.S. 495, 67 S.Ct. 385 (1947).

2. 4 F.R.D. 479 (E.D. Pa. 1945).

3. Supra, note 1 at 387-88.

4. *Supra*, note 3 at 483.

5. 153 F.2d 212 (3rd Cir. 1945).

6. *Supra*, note 2 at 510-11, 67 S.Ct. 373. 7 *Id*

8. 12 O.S. 2004 §3226(b)(1).

9. Scott v. Peterson 2005 OK. 84, at ¶7, 126 P.3d 1232; United States v. Johnston, 146 F.3d 785, 794 (10th Cir. 1998).

10. Supra, note 3 at 794

11. Hall v. Goodwin, 1989 OK. 1988, at $\P7,775$ P.2d 291, 293. The Hall court recognized that "because Oklahoma adopted its Discovery Code



12. *Supra*, note 13 *Hall*, 775 P.2d at 291-92.

13. Id. at 295.

14. Id. at 294, Janicker v. George Washington University, 94 F.R.D. 648, 650 (D.D.C. 1982).

15. Hefron v. District Court of Oklahoma County, 2003 OK. 75 at ¶71, 77 P.3d 1069, citing Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D.Ga. 1982); see also Chambers v. Allstate Ins. Co., 206 F.R.D. 579 (S.D.W.Va. 2002); Wikel v. Wal-Mart Stores, Inc., 197 F.R.D. 493 (N.D. Okla. 2000).

16. 2005 OK 84, 126 P.3d 1232

17. *Id.* at ¶0. The liability insurer, National American Insurance Company (NAICO) was not a party to the lawsuit.

18. *Id.* at ¶1.

19. A. As used in this section:

1. An "attorney" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

2. A "client" is a person, public officer, or corporation, association, or other organization or entity, either public or private, who consults an attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney;

3. A "representative of an attorney" is one employed by the



Ordinary work product prepared in anticipation of litigation or trial is discoverable if the party seeking the materials makes the required showing... attorney to assist the attorney in the rendition of professional legal services;

4. A "representative of the client" is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client; and

5. A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

B. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

1. Between the client or a representative of the client and the client's attorney or a representative of the attorney;

2. Between the attorney and a representative of the attorney;

3. By the client or a representative of the client or the client's attorney or a representative of the attorney to an attorney or a representative of an attorney representing another party in a pending action and concerning a matter of common interest therein;

4. Between representatives of the client or between the client and a representative of the client; or

5. Among attorneys and their representatives representing the same client.

C. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the attorney or the attorney's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

D. There is no privilege under this rule:

1. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

2. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

3. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney;

4. As to a communication necessary for an attorney to defend in a legal proceeding an accusation that the attorney assisted the client in criminal or fraudulent conduct;

5. As to a communication relevant to an issue concerning an attested document to which the attorney is an attesting witness;

6. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients; or 7. As to a communication between a public officer or agency and its attorney unless the communication concerns a pending investigation, claim or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

20. Supra, note 18 at ¶7

21. 12 O.S. 2001 § 3226 (B)(2).

22. Id. at ¶8, citing, Ellison v. Gray, 1985 OK 35, 702 P.2d 360, 363; 12 O.S. 2001 § 3226 (B)(2).

23. 12 O.S. 2001 § 3226 (B)(4).

24. When a claim of privilege or other protection from discovery is made in response to any request or subpoena for documents, and the court, in its discretion, determines that a privilege log is necessary in order to determine the validity of the claim, the court shall order the party claiming the privilege to prepare and serve a privilege log upon the terms and conditions deemed appropriate by the court. The privilege log shall be served upon all other parties. Unless otherwise ordered by the court, the privilege log shall include, as to each document for which a claim of privilege or other protection from discovery has been made, the following:

a. the author or authors,

b. the recipient or recipients,

c. its origination date,

d. its length,

e. the nature of the document or its intended purpose, and

f. the basis for the objection.

The court may conduct an in camera review of the documents for which the privilege or other protection from discovery is claimed. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to subsection C of Section 3226 of this title.

25. *Supra*, note 18 at ¶18.

ABOUT THE AUTHOR

Joseph T. Acquaviva Jr. is a partner in the law firm of Wilson, Cain & Acquaviva. He was admitted to the bar in 1986 after graduating from OCU. He is admitted to all district courts and federal courts of Oklahoma and the U.S. Court of Appeals, 10th Circuit. Guest Lecturer, L.S.U. National Institute of Trial Advocacy Training Program. Currently his practice is primarily limited to products liability and insurance bad faith.





Insurance

Republic Underwriters Ins. Co. v. Fire Ins. Exchange:

The Fallacy of the Pro Rata Clause and Its Influence on the Application of the Equitable Doctrines of Subrogation and Contribution in Oklahoma

By Clayton B. Bruner

"Even a cursory reading of judicial opinions in this area reveals a great deal of confusion in the courts about the equitable doctrines of subrogation and contribution, their differences and their appropriate applications to various factual circumstances."¹

One court has even stated that it is "difficult to think of two legal concepts that have caused more confusion and headache for both courts and litigants than have contribution and subrogation."²

It must be stated initially that the Oklahoma Supreme Court has adhered to its description above and has failed to provide clarity as to one doctrine's applicability over the other. Generally, when multiple insurers cover the same risk of an insured, Oklahoma courts apply equitable subrogation broadly.3 For example, in *Republic*, the Oklahoma Supreme Court stated that equitable subrogation is intended to be "pliable and capable of being molded to attain justice to compel the ultimate discharge of a debt or obligation by the party who in good conscience ought to pay for it."4 In contrast, Oklahoma courts have applied equitable contribution narrowly when multiple insurers cover the same risk.⁵ This strict application, however, is unfounded.⁶

EQUITABLE SUBROGATION V. EQUITABLE CONTRIBUTION

Equitable Subrogation

Subrogation is a derivative concept.⁷ In the conventional sense, subrogation is created by

agreement or contract between parties and grants to the parties a right to pursue reimbursement from a third-party after payment of a loss.⁸ Equitable subrogation, on the other hand, is based on the principles of equity and does not depend on contract.⁹ Equitable subrogation's goal is to "place the *entire* burden for a loss on the party who is ultimately responsible for it and by whom it should have been discharged, and to relieve *entirely* the insurer who indemnified the loss and who is not responsible for paying for it."¹⁰

In the insurance context, a claim based on equitable subrogation allows the insurer who indemnified a loss to stand in the shoes of the insured to pursue recovery from the party ultimately responsible, normally the uninsured or underinsured party at fault in an accident.¹¹ However, between insurers of a common risk, equitable subrogation is normally applied to "shift defense costs between primary and excess insurers."¹² In application, the doctrine shifts the costs absorbed by the excess insurer to the primary insurer given that the primary insurer is *principally* responsible for defending the insured.¹³ Until the primary insurance is exhausted, the excess insurer is thought to



have the superior equitable position.¹⁴ Accordingly, where two insurers cover the same risk of an insured, equitable subrogation should apply only when one of the insurers is deemed primary, and the other excess. Absent this fact, no insurer could rightfully claim a superior equitable position.

Equitable Contribution

Equitable contribution is the right to recover, "not from a party primarily liable for a loss, but from a co-obligor or coinsurer who shares com-

mon liability with the party seeking contribution."¹⁵ The right belongs to each insurer individually.¹⁶ The right to contribution is based on the equitable principle that the burden of indemnifying the insured should be distributed among those insurers who independently contracted with the insured, "with the loss equitably distributed among those who share liability for it in direct ratio to the proportion each insurer's coverage bears to the total coverage provided by all insurance policies."¹⁷ The doctrine thus assumes the existence of two or more contracts of insurance covering the same

Equitable contribution is the right to recover, 'not from a party primarily liable for a loss, but from a co-obligor or co-insurer who shares common liability with the party seeking contribution.' particular risk of the same insured.¹⁸

In insurance, equitable contribution typically arises when multiple insurers cover the same risk and are obligated to indemnify the same insured.¹⁹ In this context, each insurer has "independent standing to assert a cause of action against its co-insurers for equitable contribution when it has undertaken the defense or indemnification of the common insured."20 The theory is that the debt one insurer pays is equally owed by co-insurers of the same risk and should be paid in pro rata proportion to their respective coverage of the risk.²¹ Where two primary insurers cover the same risk, each will have a right to contribution, "but in the absence of agreement there is generally no right of contribution between a primary and excess insurer, because they do not share a common obligation with common rights."22 Thus, where two insurers cover the same risk of an insured, equitable contribution should only apply when both are considered primary insurers. Absent this fact, the two

insurers would not share a common obligation to the insured.

THE FALLACY OF THE PRO RATA CLAUSE AND ITS INFLUENCE ON THE DOCTRINES

Republic Underwriters Ins. Co. v. Fire Ins. Exchange

*Republic Underwriters Ins. Co. v. Fire Ins. Exchange*²³ is the seminal case for the proposition that pro rata clauses obstruct the application of the doctrine of equitable contribution

when multiple, primary insurers cover the same risk. In Republic Underwriters Ins. Co. v. Fire Ins. Exchange, two primary insurers covered the same property against fire. Republic Underwriter's policy had a property coverage limit of \$10,000 and a living expense limit of \$4,000.²⁴ Fire Insurance Exchange's policy had a property coverage limit of \$15,000 and a living expense limit of \$3,000.25 Both insurance policies contained pro rata clauses that limited each company's liability to the proportion of the loss that their respective coverage bore to the total coverage.²⁶ Republic received notice of loss and paid the insured its property limits of \$10,000 and an additional \$701.85 in living expenses.²⁷ Fire, on the other hand, denied liability completely. Thus, Republic brought suit under the doctrine of equitable subrogation and/or contribution, seeking reimbursement of the amount it had paid over its proportionate share.28

In its effort to avoid liability, Fire argued that because both companies contracted with pro rata clauses, which fixed their respective liability to a definite amount, neither was obligated to pay for the entire loss.²⁹ Since both were only obligated to pay the insured a specific amount depending on the loss and the pro rata apportionment, the companies were not under a common burden to the insured.³⁰ Because there was no common liability, Fire argued that Republic had no right to contribution and therefore should be deemed a volunteer as to its payment over its proportionate amount.³¹ Fire's proposition, in essence, would eliminate the application of equitable contribution when multiple insurers use pro rata clauses to apportion the loss in proportion to their respective coverage limits.

The Oklahoma Supreme Court correctly recognized that Fire's proposition was not embraced under Oklahoma law, but ultimately failed to seize the opportunity to expand equitable contribution's applicability.32 The court merely stated "[i]rrespective of this authority which limits contribution rights to contracts evincing a common or concurrent liability, this Court is unwilling to impede early payment of an insured's loss by characterizing the carrier paying the full loss as a volunteer"³³ The statement clearly indicated the court was seeking an equitable result in favor of Republic regardless of the doctrine applied. In the end, the Oklahoma Supreme Court applied the doctrine of equitable subrogation holding that it was

pliable and flexible enough to compel Fire Insurance to pay its proportionate share of the loss.³⁴ The court never reasoned why equitable contribution could not apply under the circumstances.

It is obvious, however, that equitable contribution was intended to remedy the exact issue in *Republic*. Fire and Republic were both primary insurers of the same risk. Additionally, both were obligated to pay a proportionate share of any loss up to their respective policy limits. The court, however, failed to implement the doctrine of contribution. Instead, the court applied equitable subrogation to a scenario where neither insurer could have had an equitable superior position. Fire and Republic were both primary insurers and neither one was primarily responsible for the entire loss.

It could have been argued that a pro rata clause should have no effect on Republic's right to indemnification based on the doctrine of contribution. Pro rata clauses deal exclusively with apportionment of the loss, not the *obligation* of the insurer to pay its fair share. The clauses are essentially the reaffirmation of an insurer's obligation to pay only its proportional share of an insured's total loss when multiple insurers exist. More importantly, pro rata clauses were meant to eliminate the exact factual scenario Republic and Fire faced — *i.e.*, one obligated insurer paying more than its fair share of a loss. It should be inconceivable that the same clause that *prevents* an insurer from being liable for more than it was contractually obligated to pay could have the exact opposite effect if applied under the doctrine of equitable contribution.³⁵ The pro rata clause simply does not have that much force.

The flawed reasoning of Fire's proposition becomes clear when one realizes it bases liability for the loss directly on the time Republic settled its claim, rather than on both insurer's contractual obligation to the insured. If pro rata clauses were enforced in this manner, it would literally compel multiple insurers of a single risk to settle at the exact same time, so neither paid more than its proportionate share of the total loss. This outcome would render the doctrine of equitable contribution useless because the doctrine would never have to be applied — *i.e.*, both insurers would know exactly what each owed, so neither would ever pay more than its proportionate share. A pro rata clause should never be construed so strictly that it forfeits an insurer's right to seek



indemnification from a mutually obligated insurer just because it settles early. The day or time a particular insurer settles with an insured should have no bearing on what an insurer is contractually obligated to pay.

Ultimately, Fire's proposition was an attorney's creative attempt to skirt a contractual obligation to pay a proportionate share of a loss. The proposition promotes bad settlement

tactics. It rewards insurers who delay settlement negotiations by potentially freeing them of their contractual obligation to pay. More importantly, the strict application of the pro rata clause under the doctrine of equitable contribution impedes the underlying policy the doctrine was founded on: that multiple insurers who contract to cover the same risk are obligated to pay their proportionate share of a loss in order to equalize the common burden shared by coinsurers in the name of justice.³⁶ Instead of applying contribution broadly to a factual scenario where it clearly applied, the *Republic* court created confusion by applying the doctrine of subrogation to attain justice. In the end, the court could have applied equitable contribution and obtained the same result. Accordingly, Republic should be viewed as a result based decision, and therefore an unpersua*sive* application of the doctrine of contribution.

Excess insurance clauses provide, under the terms of the policy, that the excess insurer is liable only after primary coverage has been exhausted.

REPUBLIC'S PROGENY IN OKLAHOMA

U.S. Fidelity Guar. Co. v. Federated Rural Elec. — Creating Confusion

The Oklahoma Supreme Court created more confusion between the application of the two doctrines in $\overline{U.S.}$ Fidelity Guar. Co. v. Federated Rural Elec. Ins. Corp.³⁷ In U.S. Fidelity, the court's primary holding was that an excess insurer is not liable to a primary insurer under the doctrine of equitable subrogation prior to exhaustion.³⁸ However, the court, in dictum, stated, "[R]epublic correctly recognized that contribution was not an appropriate remedy because when insurance contracts contain pro rata clauses, each

> contract is independent of the others, and the liability is several as the insurers who have restricted their liability do not have a common and concurrent obligation."³⁹ The court cited Equity Mutual Ins. Co. v. Spring Valley Wholesale Nursery Inc.40 as additional authority for its affirmation of the proposition the *Republic* court *clearly* stated was not embraced under Oklahoma law.41 However, a close reading of Equity Mutual reveals

that it is unsound authority for the court's statement in *U.S. Fidelity*.

Equity Mutual Ins. Co. v. Spring Valley Wholesale Nursery Inc.

Equity Mutual dealt exclusively with conflicts of apportionment among insurers when multiple policies cover the same risk.⁴² Specifically, the court dealt with priority battles between policies containing excess insurance clauses, escape clauses and pro rata clauses. Excess insurance clauses provide, under the terms of the policy, that the excess insurer is liable only after primary coverage has been exhausted.⁴³ Escape clauses, on the other hand, disclaim all liability if other insurance is available.⁴⁴ The court held "when one policy provides pro rata coverage and another provides only excess coverage, the pro rata policy is to be treated as

primary."45 Similarly, the court held when one policy provides an escape clause and another provides a pro rata clause, the pro rata coverage will be deemed primary.⁴⁶ It then held that when insurers designate in their policies the same method of apportionment, the contract controls.⁴⁷ Further, if insurers fail to provide for apportionment, the loss should be shared among multiple insurers on a pro rata basis.48 However, the court never discussed how the existence of multiple pro rata clauses restricts liability, or how the restriction causes multiple insurers to lose a common obligation to an insured, or even more importantly, a right to contribution.49 Thus, it is clear that the U.S. Fidelity court's reliance on this case for its statement in dictum was unfounded.

Pentz v. Davis – Creating Clarity

Pentz did not cite Republic, but it is by far the best analysis of when the doctrines should be available for indemnification purposes. Pentz dealt with the conflict of priority and apportionment when multiple UM policies existed for a single loss.⁵⁰ The court stated that the applicable UM statute, 36 O.S. § 3636, was silent with regard to priority of payments, but found that insurers who settled were entitled to proceeds of any settlements against any person or entity legally responsible for the damages with subrogation rights.⁵¹ Clearly, insurers do not lose their right to indemnity among other primary insurers who cover the same risk because payment "entitles the UM insurer to seek a distribution of the burden of loss among all the insurers..."52

The court, however, stated that its research revealed "no general rule for distributing the burden of loss among UM insurers."⁵³ Nevertheless, "[u]pon payment to the injured insured, the equitable remedies of subrogation and contribution are available [to the insurer]."⁵⁴ Accordingly, Pentz clearly holds that contribution is available as a remedy when multiple UM insurers cover the same risk and one pays on the loss.

Thus, contrary to the proposition in *Republic*, a pro rata clause merely setting forth that multiple insurers are only liable for their proportionate share of a loss should not eliminate the application of the doctrine of equitable contribution where it clearly applies. That is, when multiple insurers covering a single risk are deemed primary — *i.e.*, the UM insurers in *Pentz* — all owe an obligation to the insured to

pay on the loss. If one primary insurer pays more than its proportionate share, that insurer should be allowed to seek contribution from the other primary insurers, once all insurers settle with the claimant.⁵⁵ Thus, *Pentz's* holding created clarity for both of the doctrine's application in instances when multiple, primary insurers cover a single loss.⁵⁶

CONCLUSION

In the end, the *Pentz* holding is correct, *i.e.* — the doctrine of equitable contribution should be available for indemnification purposes when multiple primary insurers cover the same risk, and one insurer pays more than its obligated share. Considering the foundational principles of the two equitable doctrines, contribution should be the doctrine preferred and applied under these circumstances regardless of whether the policies contain pro rata clauses.

Further, the factual distinctions of *Pentz* and *Republic* are distinctions without difference. The application of equitable contribution should not depend on whether the primary insurers are UM insurers (*Pentz*) or Fire insurers (*Republic*). Thus, *Republic's* decision and *U.S. Fidelity's* affirmation of that decision should both be viewed as unpersuasive applications of the doctrine of equitable contribution in Oklahoma law.

1. U.S. Fidelity Guar. Co. v. Federated Rural Elec. Ins. Corp., 2001 OK 81, 37 P.3d 828, 832.

2. Firemans Fund Ins. Co. v. Maryland Casualty Co., 65 Cal.App.4th 1279, 77 Cal.Rptr.2d 296, 302 (1998).

3. Id at 835 (citing Republic Underwriters Ins. Co. v. Fire Ins. Exchange, 1982 OK 67, 655 P.2d 544).

 Republic Underwriters Ins. Co., 655 P.2d at 546 (citing Mid American Trailer Sales Inc. v. Moorman, 576 P.2d 1194 (Okla. Civ. App. 1977).
 Id.

6. See Republic Underwriters Ins. Co. v. Fire Ins. Exchange, 1982 OK 67, 655 P.2d 544; Equity Mutual Ins. Co. v. Spring Valley Wholesale Nursery Inc., 1987 OK 121, 747 P.2d 947, 954; U.S. Fidelity Guar. Co. v. Federated Rural Elec. Ins. Corp., 2001 OK 81, 37 P.3d 828, 835; Pentz v. Davis, 1996 OK 89, 927 P.2d 538.

- 7. U.S. Fidelity Guar. Co., 37 P.3d at 831.
- 8. Id.
- 9. Id.

10. *Id* at 832 (emphasis added).

14. Id (citing Maryland Cas. Co. v. Nationwide Mutual Ins., 81 Cal. App.4th 1082, 97 Cal.Rptr.2d 374, 377 (2000)).

15. U.S. Fidelity Guar. Co., 37 P.2d at 832.

16. Firemans Fund Ins. Co., 77 Cal.Rptr.2d at 304.

- 17. Id.
- 18. Id at 305.
- 19. Id.
- 20. Id. 21. Id.

22. U.S. Fidelity Guar. Co., 37 P.2d at 832 (citing Firemans Fund Ins. Co. v. Maryland Casualty Co., supra).

23. 1982 OK 67, 655 P.2d 544.

24. Id at 545.

^{11.} Id.

^{12.} Id. 13. Id.

- 25. Id.
- 26. Id.
- 27. Id.
- 28. Id.
- 29. Id at 546.

30. Id (citing Commercial Union Ins. Co. of N.Y. v. Farmers Mutual Fire Ins. Co., 457 S.W.2d 224 (Mo.App.1970)).

31. Id.

32. Id.

33. Id at 547. 34. Id.

35. Under *Republic*, the court stated that the use of a pro rata clause when multiple, primary insurers cover a single risk would essentially make the first insurer to settle a volunteer as to its payment under the doctrine of equitable contribution. Thus, the very clause that limits an insurer's liability would actually provide a windfall for the insurer who delays its settlement of a particular claim.

36. Firemans Fund Ins. Co. v. Maryland Casualty Co., 65 Cal.App.4th 1279, 77 Cal.Rptr.2d 296, 304 (1998).

37. 2001 OK 81, 37 P.3d 828.

38. Id at 835.

- 39. Id (emphasis added).
- 40. 1987 OK 121, 747 P.2d 947, 954.

41. Id.

42. Id at 954.

43. Id. 44. Id.

- 44. Id
- 45. Id.
- 46. Id.

47. Id.

48. *Id.* The court provided a great example of pro rata apportionment stating: "if one insurer has a policy limit of \$100,000, another \$200,000 and a third \$300,000, the first would pay 1/6 of the loss up to \$100,000, the second would pay 1/3 of the loss up to \$200,000 and the third would pay 1/2 of the loss up to \$300,000. 49. *Id.*

- 50. Pentz v. Davis, 1996 OK 89, 927 P.2d 538.
- 51. Id at 541.
- 52. Id at 542.
- 53. *Id* (emphasis added).
- 54. Id (emphasis added).
- 55. See Armstrong World Industries, Inc. v. Aetna Casualty & Surety
- Co., 45 Cal.App. 4th 1, 105-06, 52 Cal.Rptr.2d 690 (stating "apportion-

ment among multiple insurers must be distinguished from apportionment between an insurer and its insured. When multiple policies are triggered on a single claim, the insurers' liability is apportioned pursuant to the "other insurance" clauses of the policies or under the *equitable doctrine of contribution*. (Emphasis added). That apportionment, however, has no bearing upon the insurers' obligations to the policyholder. A pro rata allocation among insurers 'does not reduce their respective obligations to their insured.' The insurers' contractual obligation to the policyholder is to cover the full extent of the policyholder's liability up to the policy limits").

56. Multiple UM insurers covering a single loss necessarily means that the insurers would all be deemed primary insurers of the risk, as none could be viewed as excess. Thus, *Pentz's* holding (*that both doctrines are available*) should be applied broadly to all instances when multiple, primary insurers cover the same risk and one pays more than its fair share of the loss.

ABOUT THE AUTHOR



Clayton Bruner graduated from the OU College of Law in 2008. He received his B.A. in 2005 from Southwestern Oklahoma State University. Prior to college, he played professional baseball with the Detroit Tigers organization for six years. While attending SWOSU, he worked as an insurance agent

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Insurance

Differences in Handling Insurance Claims under State Law vs. ERISA A Difference of Kind, Not Degree

By Joseph Clark

The purpose of this article is to explore the procedural and substantive differences in litigating an insurance claim under state law and under the federal law known as ERISA (Employee Retirement Income Security Act). Because this is an examination of the differences between how a first party insurance claim would proceed under state law versus the federal law, it will not be an in-depth examination of either law.

For example, we will not discuss in detail how one would prove a state cause of action for insurance bad faith. Nor will we examine in detail the nuances of judicial review of a denial under the arbitrary and capricious standard applied in most ERISA cases. Given the forum, I will try to the best of my ability to simply set out my understanding of the law without any editorial comments. Anyone who knows my feelings on this particular issue will recognize how difficult that might be. However, it appears that the facts will speak for themselves.

DEVELOPMENT OF STATE INSURANCE LAW

The regulation and taxation of the business of insurance has traditionally been a matter left to the states. In *Paul v. Virginia*,¹ the U.S. Supreme Court held that the issuance of a policy of insurance was not a transaction of interstate commerce even though the parties were domiciled in different states but was a simple contract of indemnity against the loss and subject to regulation by the state. Based on this case, it was severally assumed that federal regulations of the insurance business was improper because it should rest exclusively with the states.

That assumption was dealt a significant blow in the case of *United States v. South-Eastern Underwriters Assoc.*² That case held that a fire insurance company that conducted a substantial part of its business across state lines was engaged in interstate commerce and, thus, the commerce clause of the federal constitution applied to that interstate commerce. The case followed up stating that because the Sherman Act did not intend to exempt insurance companies, the anti-trust laws set out in the Sherman Act applied to insurance companies.

In the following year, the U.S. Congress responded with the McCarran-Ferguson Act³ which declares in § 1011 its policy as "[t]he Congress hereby declares that the continued regulation and taxation by the several states of the business of insurance is in the public interest, …" Thus, up and until the time of the passage of the Employee Retirement Income Security Act,⁴ insurance law and its regulation have been essentially a matter of state law. All three branches of state government have been involved in the regulation and taxation of the insurance industry. It appears every state has a Department of Insurance or an insurance commissioner as part of its administrative branch. The Oklahoma Insurance Department and insurance commissioner are established in 36 O.S.§ 301 *et. seq.* The insurance code provides that the insurance commissioner must examine the books of foreign insurance corporations periodically, license foreign insurance corporations to do business in the state of Oklahoma and serves as foreign insurance corporations' registered service agent.

We also see that there is significant regulation of the insurance industry by the Legislature. Title 36 of the Oklahoma Statutes is entirely dedicated to the insurance industry. In

addition to establishing the Department of Insurance and the Office of the Insurance Commissioner, it provides for such things as guaranty funds, types of insurance, licensor, mandated insurance coverage, required policy provisions and unfair claims procedures. The list could go on and on, but the point is that every facet of the insurance industry is statutorily regulated.

Perhaps most important to the practitioner is the formulation of common law regulating the insurance industry by the courts. The nature of state insurance regulation was recognized by the Oklahoma Supreme Court in the seminal insurance bad faith case of *Christian v. American Home Assur. Co.*⁵ In that case, the court stated the following:

> "We have recognized the *quasi*-public nature of insurance companies and the need to subject the companies to state control for the protection and benefit of the public. *Oklahoma Benefit Life Ass'n v. Bird*, 192 Okl. 288, 135 P 2nd 994 (1943). Perusal of our insurance code, Title 36 of the Oklahoma Statutes, reveal extensive government regulation of the industry in this state."⁶

In regulating the *quasi*-public industry of insurance, the state courts in general, and Oklahoma in particular, have developed a body of common law which favors the insureds, beneficiaries and coverage, rather than the insurers, denials and exclusions. For example, in the case of *Aetna Ins. Co. v. Zoblotsky*,⁷ the Oklahoma Supreme Court stated:

"[w]e have held that contracts of insurance will be liberally construed in favor of the objects to be accomplished, and that if the provisions of a policy of insurance are capable of being construed in two ways, that interpretation should be placed upon them which is more favorable to the insured. *Continental Casualty Company v. Veaty*, Okl., 455 P.2nd 684." At 481 P.2nd At 764. The case of *Phillips v. Estate of Greens*-

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field, 1993 Okla. 110, 859 P.2nd 1101, goes even further and tells us "[w]hen and insurance contract is susceptible of two meanings, i.e., if it is subject to an ambiguity, the familiar rule of insurance contract interpretation applies and words of inclusion are literally construed in favor of the insured and words of the exclusion are

strictly construed against the insurer."8

Then we have the development of bad faith. In some states this is the result of a statutory regulation, but in most states, and in particular in Oklahoma, it is a development of the common law. In *Christian, supra*, the Supreme Court stated,"[w]e approve and adopt the rule that an insurer has an implied duty to deal fairly and act in good faith with its insured and that the violation of this duty gives rise to an action in tort for which consequential and, in proper cases, punitive damages may be sought."⁹ It is not the purpose of this paper to delve deeply into what is and is not insurance bad faith. The importance for this paper is that it exists and it provides additional remedies to an insured or beneficiary aggrieved by a breach of the obligation of good faith and fair dealings by the insurer and in addition the sanctions of punitive damages when the conduct of the insured so warrants.

The point relevant to this paper is that state insurance law is skewed in favor of the insured and coverage rather than in favor of the insurer and denials. Most, if not all states, will have some extracontractual damages and/or sanctions when the conduct of the insurer warrants imposition of those damages and/or sanctions under the appropriate state law.

DEVELOPMENT OF ERISA

On Labor Day 1974, President Ford signed ERISA into law, codified at 29 USC §§ 1001 et seq. A full discussion of the scope and breadth of ERISA is beyond the topic covered in this paper. It has been stated that "[t]he basic goal of ERISA was the protection and enhancement of the delivery of promised benefits."10 ERISA was designed to regulate pension and retirement funds, particularly to address the funding of such plans. In order to effectuate a uniformed regulation, ERISA superseded or pre-empted all state law in so far as they may now or hereafter relate to any employee benefit plan. This pre-emption clause is found at 29 USC § 1144 (a). Any state law which regulates insurance, banking or securities was "saved" from that pre-emption.¹¹ Finally, there is what has been referred to as the "deemer" clause which tells us that any employee benefit plan established to provide certain benefits will not be deemed to be an insurance company or other insurer for the purposes of the savings clause.¹² Briefly, as I understand it, the federal law pre-empts all state law except insurance, banking or security laws. But, that any employee's benefit plan is not subject to state laws proporting to regulate insurance companies, insurance contracts, banks, trust companies or investment companies.

The savings clause had what appeared to be a good start in the case of *Metropolitan Life Ins. Co., v. Massachusetts.*¹³ That case involved an action brought by Massachusetts' attorney general against insurer to force Massachusetts' statute setting forth mandatory minimum health care benefits. In ruling in favor of the state court regulations, the Supreme Court made the following ruling:

"We therefore decline to impose any limitation on the savings clause, beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it. If a state law 'regulates insurance,' as mandated-benefit laws do, it is not pre-empted. Nothing in the language, structure or legislative history of the act supports a more narrow reading of the clause, whether it be the supreme judicial court's attempt to save only state regulations unrelated to substantive provisions of ERISA, or the insurer's more speculative attempt to read the savings clause out of the statute."¹⁴

The case that first got me involved in ERISA was Pilot Life Ins. Co. v. Dedeaux.¹⁵ That case stated that Mississippi's insurance bad faith law was directly pre-empted by ERISA because it was not a law that was directed solely to the insurance industry. In reading that case, it appears that Mississippi recognizes that punitive damages are available in a contract case when the breach of contract also involves conduct that amounted to an independent tort. In that case, the solicitor general argued that Congress clearly expressed an intent that the civil enforcement provision of ERISA be the exclusive vehicle for actions by an ERISA plan participants and that allowing state court causes of action would pose an obstacle to the purposes and objectives of ERISA. The court agreed but this constituted dicta in the case because the ultimate holding was that Mississippi's bad faith laws simply was not an insurance law directed to regulate the insurance industry.

In regards to the *Pilot Life* case, I would make the following two observations. In the 1974 U.S. Code and Administrative News, the final report on ERISA stated the following:

"The enforcement provisions have been designed specifically to provide the secretary and participants and their beneficiaries with broad remedies for readdressing or permitting violations of the Retirement Income Security for Employees Act as well as the amendments made to the Welfare Pension Disclosure Act. The intent of the committee is to provide the full range of legal and equitable remedies available both in state and federal courts and to remove jurisdictional and procedural obstacles which in the past appeared to have hampered effective enforcement of fiduciary responsibilities under state law for the recovery of benefits due to participants."¹⁶

At 29 U. S. C. § 1132 we have the civil enforcement section of ERISA. This particular statute provides for a variety of causes of action to effectuate ERISA's scheme. The actions that a beneficiary or participant would file against an insurance company to collect benefits is set out in 29 U.S.C. § 1132 (a)(1)(B). At 29 U.S.C. § 1132 (e)(1) we have the jurisdictional statute. It tells us:

"Except for actions under subsection (a) (1) (B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions, under this subchapter brought by the secretary, participant, beneficiary, fiduciary, or any other person referred to in § 1021 (f) (1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1) (B) and (7) of subsection (a) of this section."

It was because of the Pilot Life case that I first became involved in ERISA. I believed then, and I believe now, that a cause of action under Christian v. American Home Assur. Co.¹⁷ was a law directed toward the insurance industry only and a common law method to regulate the insurance industry. I felt that it met the McCarren-Ferguson test. Because of that belief, I set out to prove that you could have an Oklahoma insurance bad faith cause of action in ERISA. It is not the purpose of this particular article to rehash that argument but my reasoning was brilliantly restated by Judge Sven Holmes in the case of Lewis v. Aetna U.S. HealthCare Inc.¹⁸ After that decision, my arguments were rejected in the case of Conover v. Aetna U.S. Health-*Care Inc.*¹⁹ and certiorari to the U.S. Supreme Court in that case was denied. Other subsequent cases have also upheld the idea that Oklahoma's bad faith cause of action is not saved from ERISA pre-emption.

A case that I thought would breathe life into my bad faith argument and further the argument that state common law insurance rules of interpretation were saved from ERISA preemption is *Unum Life Ins. Co. of America v. Ward.*²⁰ In that case, the U.S. Supreme Court ruled that California's notice-prejudice rule regulated insurance within their meaning of ERISA's savings clause. This appeared to be important at the time because the notice-prejudice rule was a law that was developed under a common law scheme or case law scheme rather than through some legislation or administrative dictates. Also important was that the notice-prejudice rule had general contractual law principals regarding forfeiture but was a specific application of that general contractual law directed solely toward insurance. It was thought that this same reasoning could apply to that entire body of insurance law that, for example, took the general contract rule that states a contract is to be construed against the maker and hones it into a different rule that terms of inclusion are to be broadly interpreted and terms of exclusion are to be narrowly interpreted. As we will see in a moment, that appears to be an argument that has been generally rejected.

Unum, supra. is interesting from another standpoint. In this case, as set out in footnote 7 of the opinion, the solicitor general argued that there is nothing in the enforcement provision that would require a state law that regulates insurance and as such saved is never the less pre-empted if it provided a state-law cause of action or remedy. Again, the court did not have to get to that particular issue because the solicitor general's current argument was that Ward had sued under the enforcement provision for benefits due and sought only the application of the state insurance law as a relevant rule of decision in that action.

The Supreme Court then decided the case of *Rush Prudential HMO Inc. v. Moran.*²¹ In that case, the court found that an Illinois statute requiring HMOs to provide independent review of disputes between primary care physicians and HMO to determine whether or not a procedure was medically necessary was a saved state insurance law. The court recognized that the state law may well settle the fate of a benefit claim but it does not enlarge the claim beyond the benefits available in an action brought under ERISA's enforcement scheme. The court also noted that an insurance regulation is not pre-empted merely because it conflicts with substantive plan terms.

Rush also pointed out that if a state law provided additional remedies outside of ERISA's enforcement scheme that it would likely be declared pre-empted. That issue was finally reached in the case of *Aetna Health Inc. v. Davi*-

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la.²² That case involved the Texas Health Care Liability Act (THCLA) which provided bad faith type damages for a wrongful denial of healthcare benefits. That case finally turned the *Pilot Life, dicta* reasoning into a binding holding. Finding that any state court cause of action that provides remedies outside of ERISA's enforcement scheme completely preempted, even if it were a saved state insurance state law.

What about state laws concerning insurance contract interpretation? I believe the following quotation sets out pretty much what most courts would rule in this particular area.

"Are state laws governing insurance policy interpretation preserved under ERISA? Like the other circuits which have already addressed this issue, we think not. See Sampson v. Mutual Benefit Life Ins. Co., 863 F.2d 108, 110 (1st Cir.1988); McMahan v. New England Mutual Life Ins. Co., 888 F.2d 426, 429-30 (6th Cir.1989); Brewer v. Lincoln National Life Ins. Co., 921 F.2d 150, 153 (8th Cir.1990); Evans v. Safeco Life Ins. Co., 916 F.2d 1437, 1440-41 (9th Cir.1990). We cannot imagine any rational basis for the proposition that state rules of contract interpretation "regulate insurance" within the meaning of § 1144(b)(2). Of course, these decisional laws affect the way plan benefits may ultimately be distributed, but that's a far cry from stating that they have "the effect of transferring or spreading a policyholder's risk." In our view, they simply force the insurer to bear the *legal* risks associated with unclear policy language. See Brewer, 921 F.2d at 153; McMahan, 888 F.2d at 429.

Even more importantly, a contrary answer would fly in the face of Congressional intent. ERISA's legislative history, discussed in a plethora of ERISA pre-emption



cases, undeniably demonstrates that Congress expects uniformity of decisions under ERISA. See Pilot Life, 481 U.S. at 56, 107 S. Ct. at 1557 (1987) ("The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions without the necessity of reference to varying state laws."); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9, 107 S.Ct. 2211, 2216, 96 L. Ed.2d 1 (1987) (ERISA's pre-emption provision was designed to eliminate the "threat of conflicting or inconsistent State and local regulation of employee benefit plans."). That expectation would almost certainly be defeated were we to preserve 50 different state laws of insurance policy interpretation under the guise of federal common law. We therefore conclude that ERISA pre-empts state decisional rules, and that any ambiguities in ERISA plans and insurance policies should be resolved by referring to the federal common law rules of contract interpretation. Hammond v. Fidelity and Guar. Life Ins. Co. 965 F.2d 428, 430 (Č.A.7 (Ill.),1992)."

DIFFERENCES BETWEEN LITIGATING AN INSURANCE CLAIM IN STATE COURT UNDER STATE LAW VERSUS LIT-IGATING THE SAME INSURANCE CLAIM UNDER ERISA IN FEDERAL COURT

Introduction

The main purpose of this article is to show the striking difference between litigating an insurance claim under state law and under ERISA. The contrast will be shown first procedurally and then second substantively. Several assumptions are going to be made regarding this particular purchase of insurance. First, we will have a situation where in most instances, the insurance was purchased by the insured using post-tax dollars. Claims will be for ben-

efits, either under a disability policy or a life insurance policy and will be considered a firstparty action against the insurance company. That is a policy where either the insured or the beneficiary is bringing an action directly against the insurance company for policy benefits. The employer will not be a party to this lawsuit. The only real difference between the two actions is that the one is brought under state law will not be governed by ERISA and the second policy will. Either the first policy was purchased privately outside of the employment arena or, if purchased as part of a group policy, ERISA does not apply because the employment involved government or church employment or the safe harbor provision of ERISA applies. Exceptions to ERISA go beyond the scope of this article.

Further, because anyone who is the least bit interested in this subject should be familiar with a normal civil court proceeding, it is unnecessary to set out the statutory or case law authority for the state court proceeding.

State Court Procedure

Any reader the least bit interested in this topic knows what happens in a civil action on an insurance contract. The insured, beneficiary or claimant will typically be the plaintiff in the lawsuit, although an insurer could file a declaratory judgment action. It is possible that the state court action could be removed to federal court on diversity but it would still proceed under the substantive law of the appropriate state. Procedurally, the federal action and the state action would be quite similar as our state pleading code and the discovery code are modeled after the federal acts.

Regardless of what court actually hears the matter, both courts would allow extensive discovery on all relevant issues. The parties would have available to them paper discovery such as requests for admission, interrogatories and motions to produce. Depositions of witnesses and parties would be allowed.

The parties would be allowed to confront and test the witnesses against them. For example, if a record review was done by a doctor for the insurance company, the plaintiff would be allowed to examine the doctor and his or her relationship with the insurance company. Is the doctor a full-time employee or is the doctor's practice dedicated to doing this type of work or is the doctor engaged in the practice of medicine and this is simply a facet of that doctor's business? Of course, the same would be true of the defendant. They could examine the doctor supporting the plaintiff's claim and determine whether or not they have some sort of ongoing relationship with the plaintiff's counsel and if these claims are a substantial part of the doctor's business.

Of course, we are all familiar with motion practice and both parties would have available to them motions for summary judgment or partial summary judgment to either eliminate or narrow the issues to be tried.

Ultimately, the parties would be entitled to a trial by jury if the court determined that there are factual issues on either the contract claim for benefits and/or an issue of bad faith denial.

Federal Court Procedure

The "civil action" brought pursuant to 29 U.S.C. § 1132(a) (1)(B) "to recover benefits due [to the participant or beneficiary] under the terms of his plan, to enforce his rights under the terms of his plan or to clarify his rights to future benefits under the terms of the plan" is much different than the typical civil action that we outlined above.

There is generally no discovery allowed, particularly on the issue of entitlement to benefits. Sometimes there can be ancillary issues such as whether or not ERISA applies or the scope of review but that is generally the exception rather than the rule.

Basically what happens is the parties enter into a scheduling order where they submit an administrative record. Generally, the administrative record is limited to the paper documents that were reviewed by the insurance carrier in making its claims determination. In the case of a disability claim that would include medical records, Social Security records, workers' compensation records, other retirement benefits, functional capacity examinations and their results, Psychological examinations and their results, peer review reports, job classifications, correspondence between the parties and provider, the plan or insurance policy, and other claims forms. The typical administrative record will not necessarily include all of these documents but those would be the documents that you would typically see. Sometimes there may be something other than paper documents such as surveillance film, and I have started to make it a practice in some cases of submitting my own video recorded statement of the claimant if I get the case during the administrative process.

As stated in the typical case, no discovery is done. So, for example, if a doctor conducts an independent medical examination at the request of the insurer, or does what is called a peer review which is a review of the medical records and other documentation conducted by a doctor, the same inquiries conrelationship cerning between the doctor conducting the IME or peer review cannot be done in the ERISA case.

Not only are the parties not allowed to confront the witnesses against

them, but they are not able to present the witnesses who support their claim. For example, as a plaintiff you might only have available to you the medical records of a treating physician. You would not be able to present that doctor in a trial setting where you could ask the doctor those magical questions that would turn the doctor's expressions in the medical records into relevant, admissible and credible expert testimony.

After an administrative record is submitted and agreed to between the parties, some form of briefing schedule will occur. This varies from court to court, but the two most common briefing schedules are where the parties file simultaneous opening briefs and simultaneous answer briefs, or the plaintiff having the burden of proof files an initial brief in chief with the defendant filing an answer brief, and the plaintiff entitled to a reply brief. The case is then taken under advisement and the court, in due time, will issue an opinion and a judgment and order.

The parties are not entitled to a jury trial. In this circuit, we have the case of *Adams v. Cyprus Amax Mineral Company*,²³ where it was ruled that an action brought pursuant to 29 U.S.C.



After an administrative record is submitted and agreed to between the parties, some form of briefing schedule will occur. § 1132 (a)(1)(B) was one seeking equitable relief rather than a suit at law.

That appears to me to be in conflict with the U.S. Supreme Court case of Great-West Life & Annuity Insurance Company v. Knudson.²⁴ That was an action where the insurance company was bringing an action for money damages seeking subrogation under the terms of an insurance policy. That action was brought under another section of the enforcement section, 29 U.S.C. § 1132(a) which the Supreme Court interpreted as only allowing a fiduciary to bring an action that would recognized in a court of equity. The court pointed out, "A claim for money due and owing under a con-

tract is quintessentially at action at law."25

In *Great-West Life & Annuity Insurance Company v. Knudson, supra,* the U.S. Supreme Court went on to point out the following:

"In the very same section of ERISA as Section 502 (a)(3), Congress authorized 'A participant or beneficiary' to bring a civil action 'to enforce his rights under the terms of the plan,' without reference to whether the relief sought is legal or equitable. 29 U. S.C. § 1132(a)(1)(B) (1994 Ed). But Congress did not extend the same authorization to fiduciaries. Rather, Section 502(a)(3), but its terms only allow for equitable relief. We will not attempt to adjust 'carefully crafted and detailed enforcement scheme' embodied in the test that Congress has adopted. Mertens, supra, at 254, 113 S.Ct. 2036. Because petitioners are seeking legal relief — the imposition of personal liability of respondents for a contractual obligation to pay money — Section 502(a)(3) does not authorize this action. Accordingly, we affirm the judgment of the Court of Appeals."26

It appears that every federal Circuit Court of Appeals that has addressed the issue of right to trial by jury has determined that no such right exists, although some district courts have allowed jury trials.²⁷ It does not appear that there have been any recent decisions by circuit courts allowing jury trials and the U.S. Supreme Court has yet to rule on this specific issue.

State Substantive Law

Again, an insurance case can proceed either in state or federal court under diversity but will proceed in federal court under state law. There are potentially some significant differences even though the federal action is under state law, the two most prominent being that under state law if an action includes both a contract cause of action and an action for bad faith, it cannot be bifurcated for trial in state court but can in federal court.²⁸ Some also think that the summary judgment standard is different in state and federal courts.

The basic lawsuit from a substantive view would still be the same, regardless of in what court it proceeded. The primary issue in the state court cause of action would be whether or not the insured or beneficiary is disabled under the terms of the contract. The plaintiff would have the burden of proving this by a preponderance of the evidence. The fact finder, typically a jury, would be instructed on the relevant state court rules of interpretation outlined above such as the reasonable expectation doctrine, rule that terms of inclusion are broadly interpreted and terms of exclusion are narrowly interpreted, and any other such rules of contract interpretation as the facts might warrant.

Of course, if there was evidence that the defendant breached the obligation of good faith and fair dealing, then that cause of action would be available to the plaintiff with its additional elements of damages.

Absent issues that would warrant a reversal and retrial on appeal, the trier of fact would ultimately decide the rights of the parties. Either the plaintiff would prevail on some or all of his or her causes of action or the defendant would prevail. There would be appropriate post-judgment motions for attorney fees and/or costs but a trial would ultimately result in a final resolution of this matter. This is significant as we will see in a moment.

Insurance Claims under ERISA Substantive Law

I will first remind the reader that in this instance we are talking only about a direct action against an insurer under ERISA. In our case we will assume that the insurer is both the underwriter and the entity making the claims determination so there is what is referred to as an inherent conflict of interest. In the 10th Circuit, the standard of review in these cases is presently found in the case of *Fought v. Unum Life Ins. Co. of America.*²⁹ This sets out the standard of review in the 10th Circuit, at least at this point. A recent Supreme Court case, *Metropolitan Life Ins. Co. v. Glenn* 128 S. Ct. 234 (June 15, 2008), appears to require a more favorable review from the claimant's perspective of considering the entire record.

Because this article simply points out the differences between an insurance claim under ERISA and one under state court law, I will not go into great detail on the standard of review and how it developed. This entire bar journal article could be devoted to that single issue. The law, as I understand it, is basically when an insurance company who has an inherent conflict of interest denies a claim under ERISA, it has the burden of proving its denial was reasonable under a substantial evidence standard. Substantial evidence has been determined to be more than a scintilla but less than a preponderance of the evidence.

ERISA law has developed where most ERISA claims are reviewed under an arbitrary and capricious standard. This is the result of the U.S. Supreme Court's decision in *Firestone Tire* & Rubber Co. v. Bruch.³⁰ Although that decision stated that the *de novo* standard of review was the appropriate standard for reviewing an employer's denial of benefits, because of what the court went on to say, that standard is not the one typically employed. In a *de novo* review, it is up to the court to determine the proper interpretation of the plan terms and not for the fiduciary. However, the court went on to state that where discretion is conferred upon the trustee, the trustee's interpretation will not be disturbed if reasonable. Not surprisingly, all insurance policies and other plan documents confer a grant of discretion which changes the standard of review from de novo to one of arbitrary and capricious. A good example of how that works in a practical situation is the Oklahoma Supreme Court case of Cranfill v. Aetna Life Ins. Co.³¹ Cranfill involves an accidental death policy where the insured died in a single vehicle accident where the insured was well above the legal limits of intoxication. It was argued by the insurance carrier that this was not an accident under the terms of the insurance policy. I will not go into the entire reasoning of the case but simply point out the following quotation from the opinion which succinctly as possible points out the differences between a case decided under state law and ERISA:

"Aetna asserts there is a split of authorities on this issue and further asserts that the majority of jurisdictions, as well as the more recent decisions, support its denial of Mrs. Cranfill's claim. As it turns out, the split is between the federal courts on one hand and state courts on the other. Aetna urges us to adopt the federal rationale that is used to resolve insurance disputes that are governed by ERISA.^{FN4} We decline to do so for two reasons. First, federal courts are entirely free to choose the meaning that is to be given to the critical terms in contest (*i.e.*, the word "accident" and the phrase "intentionally self-inflicted injury").^{FN5} We, in contrast, are bound by Oklahoma's common-law jurisprudence. Second, in most ERISA cases, the federal courts must affirm the denial of benefits unless the decision to deny benefits was arbitrary and capricious. ^{FN6} We are not persuaded by the federal scheme. Instead, we are persuaded by the reasoning of other state courts which have overwhelmingly held that an insured's death, in circumstances similar to the circumstances of this case, is accidental and is not intentionally."32

This case points out as well as any the differences between deciding a case under state insurance law and under ERISA's common law scheme. We have the same factual situations, and the same insurance policy and yet the result is predictable in both courts and totally different. Under state law, the policy benefits are payable and, quite frankly, with the Cranfill, supra, decision, I believe a denial would be in bad faith and yet under federal law, the predicted result would be that the insurance carrier's denial would be upheld because its interpretation of an accidental death policy and the word "accident" and "unexpected, unintended and unforeseen in the eyes of the insured" is not unreasonable.

The final and significant difference would be that there is a third option under the ERISA scheme of things for the court to decide. In addition to determining whether or not the beneficiary is entitled to benefits or actually whether or not the denial was arbitrary and capricious, the court can remand the action back to the plan administration for further determination.³³ It further appears, at least in most instances, such a remand is a non-appealable order.

CONCLUSION

Given that this is an article in the Oklahoma Bar Journal, I have attempted, to the best of my ability, to simply present the differences in how an insurance claim differs when state law applies and when ERISA's common law scheme applies. It is evidence that the differences are one of a kind rather than degree and substantially affect the rights of the parties. If this analysis is correct, it does beg the question of the purpose of the insurance savings clause in ERIŜA.

1. 75 U.S. 168 (1869) 2. 322 U.S. 533 (1944) 3. 15 U.S.C. §§ 1011-1013. 4. 29 U.S.C. § 1001, et. seq. 5. 1977 Okl. 1471, 577 P.2nd 899. 6. At 902. 7. 1971 Okl. 20, 481 P.2nd 761. 8. 859 P.2nd At 1104. 9. 577 P.2nd At 904. 10. Erisa Practice and Litigation, § 1:1 11. 29 USC § 1144 (b)(2)(A). 12. 29 USC § 1144 (B). 13. 471 U. S. 724 (1985) 14. 471 U.S. At 746-747. 15. 481 U.S. 41 (1987). 16. 1974 U.S. Code and Administrative News, page 4655. 17. 1977 Okl. 1471, 577 P 2nd 899. 18. 78 F.Supp. 2nd 1202 (N. D. Okl.1999). 19. 320 F. 3rd 1076 (10th Cir. 2003). 20. 526 U.S. 358 (1999) 21. 536 U.S. 355 (2002). 22. 542 U.S. 2000 (2004). 23. 149 F.3d 1156 (10th Cir. 1998) 24. 122 S.Ct. 708 (2002). 25. At 713 (internal quotes omitted). 26. At 718 (Emphasis Court's). 27. See Zimmerman v. Sloss Equipment Inc., 72 F.3d 822 (C.A. 10,

1995). 28. See Buzzard v. McDaniel, 1987 Ok. 28, 736 P.2d 157 and Oulds v. Principal Mut. Life Ins. Co., 6 F.3d 143 (C.A. 10, 1993).

- 29. 379 F.3d 997 (C.A. 10, 2004).
- 30. 489 U.S. 101 (1989)
- 31. 2002 Ok. 26, 49 P.2d 703. 32. 49 P.3rd At 707.

33. See Graham v. Hartford Life & Accident Insurance Company, 501 F.3d 1153 (10th Cir. 2007).

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OBA Insurance Law Section Fall Meeting

| ٦ | CLE, Lunch & Golf Outing Tuesday, September 30, 2008 Gaillardia Country Club 5300 Gaillardia Boulevard Oklahoma City, OK 73142 |
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| 8:15 a.m. to 8:30 a.m. | Registration and continental breakfast |
| 8:30 a.m to 8:40 a.m | Welcome and opening remarks, Jon Starr, Section Chairperson |
| 8:40 a.m. to11:35 a.m. | "4X4 of Proper Claims Handling - Communication, Investigation, Evaluation, and Determination" by Jeff Gelona |
| | Jeff Gelona has over 30 years of experience in the insurance industry. He has testified as a insurance expert for both plaintiffs and defendants in cases involving claims of bad faith in Oklahoma. |
| 11:35 p.m. | Lunch and 2009 Officer Elections |
| 12:30 p.m. to 6:00 p.m. | Golf (Gaillardia has limited the number of golfers to the first 52 to register.) |
| Complete the form below, make check payable to OBA Insurance Section, and return by September 12, 2008: | |
| * Oklahoma CLE credit requested (3 hour including). | |
| Full Name: | |
| Address: | |
| City: | State: Zip: |
| Phone Number: | E-mail Address: |
| Are you an OBA Insurance Section member?YesNo | |
| If you are not an OBA Insurance Section Member, would you like to join for \$20.00? Yes No | |
| Amount enclosed (circle one): with | golf: Member \$125 Non-Member \$250 New Member \$145 without golf: Member \$60 Non-member \$160 New Member \$80 |
| I will (handicap) | or will not be playing golf. |
| If there are other individuals attending that you would like to play with in your golf foursome, please list: | |
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| 2) | |
| 3) | |
| Mail with check to: | |
| Oklahoma Insurance Section c/o Jon D. Starr, Chairperson P.O. Box 2619 Tulsa, Oklahoma 74101-2619 | |

* Must be OBA member to attend

Employment Law Section Family and Medical Leave Act Amended for Servicemembers

By Stephanie Johnson Manning and Robyn M. Funk

On Jan. 28, 2008, President Bush signed into law the National Defense Authorization Act of 2008,¹ which amended the Family and Medical Leave Act (FMLA)² of 1993 for the first time since its enactment. The amendments expand the FMLA to provide job protected leave to families of servicemembers of the U.S. Armed Forces. Prior to the amendments, the FMLA provided eligible employees3 up to 12 workweeks of unpaid job-protected leave during any 12-month period for: 1) the birth of a child of the employee and in order to care for such child; 2) the placement of a child with the employee for adoption or foster care; 3) the care of a spouse, son, daughter or parent who has a serious health condition; or 4) the employee's own serious health condition that makes the employee unable to perform the functions of his or her position.⁴ The amendments allow eligible employees leave in two new circumstances: 1) to address issues that arise due to a family member being called to active duty; and 2) to care for a family member who is injured in active duty.⁵

FAMILY LEAVE DUE TO A CALL TO ACTIVE DUTY

Under the first new category of leave, eligible employees are entitled to up to 12 workweeks of unpaid leave during any 12-month period because of "any qualifying exigency" relating to the fact that a spouse, son, daughter or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a "contingency operation."⁶ The amendment defines a "contingency operation" as "a military operation...in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force" or active duty during a war or national emergency.⁷

The term "qualifying exigency" is not defined by the amendment. The U.S. Department of Labor will issue regulations clarifying this phrase and has indicated that the provisions pertaining to family leave due to a call to active duty will not become effective until issuance of the regulations.⁸ In the meantime, the Department of Labor has encouraged employers to voluntarily provide this type of leave.9 Although "qualifying exigency" is yet undefined, it is expected that leave taken under this provision will presumably cover an employee's family member, for example, to arrange for child care or to settle financial matters. However, given the potential breadth of the term, the Department of Labor is being called to provide sufficient guidance to employers to avoid both confusion and abuse.¹⁰

When a call to active duty is foreseeable under this provision, employees are required to provide notice to the employer as is "reasonable and practicable."11 As with most leaves under the FMLA, leave for a "qualifying exigency" may also be taken intermittently or on a reduced leave basis.¹² Furthermore, an employer can require that a request for leave related to active duty or a call to active duty be supported by a certification issued at such time and in such manner as the Department of Labor prescribes.¹³ However, the details regulating such certification are still to come. In the meantime, employers may want to implement a simple recordkeeping form that requests information such as the employee's relation-

ship to the servicemember, the dates for which leave is requested and a statement as to what qualifying exigency exists. Employers, however, may not require certification unless or until the Department of Labor issues regulations requiring such certification.

LEAVE FOR CAREGIVERS OF AN **INJURED SERVICEMEMBER**

The second new category of leave entitles an employee who is a spouse, son, daughter, parent or "next of kin" of a "covered servicemember" to take unpaid leave up to 26 workweeks in one 12-month period to care for an injured servicemember.¹⁴ A "covered servicemember" is defined as a member of the Armed Forces, including the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, in outpatient status or on the temporary disability retired list due to a serious injury or illness.¹⁵ A "serious injury or illness" is specifically defined for a member of the Armed Forces as an injury or illness incurred in the line of active duty that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.¹⁶ Importantly, the servicemember caregiver provision broadens who may be considered a family member entitled to leave, allowing leave for "next of kin," which is defined as the nearest blood relative.¹⁷ For this new category of leave, an employee must provide at least 30 days notice to the employer, unless it is impractical to do so.¹⁸ Leave may also be taken intermittently or on a reduced leave basis.¹⁹

66 ... employers are required to act in good faith in providing necessary leave and encouraged to apply current FMLA-type provisions to this new type of leave where appropriate.

The servicemember caregiver provision is effective immediately.20 The Department of Labor is expected to provide regulations which more fully explain this provision. In the meantime, employers are required to act in good faith in providing necessary leave and encouraged to apply current FMLA-type provisions to this new type of leave where appropriate.²¹ For example, an employer may choose to request the standard medical certification for leave taken under this provision until further guidance from the Department of Labor.²²

As with other leave types under the FMLA, employees taking leave under these new categories can elect, or employers can require an employee, to substitute unpaid FMLA leave with paid vacation leave, personal leave, family leave, or medical or sick leave.²³ Also the combined total leave for these two categories of leave, along with any other FMLA qualifying leave, may not exceed 26 workweeks during a 12-month period. That is, an employee may not combine caregiver leave of 26 weeks with a leave needed for the employee's own serious health condition to exceed the 26 week total. Unless specifically exempted, all other current FMLA requirements apply to these two new categories of leave, such as those requiring reinstatement to the previous position.

Attorneys who represent covered employers should make sure their clients are aware of the new leave entitlements and that their policies and postings are updated to reflect the changes to the law.

3. Eligible employees under the FMLA are those individuals who have been employed by a covered employer for at least one year and have worked a minimum of 1,250 hours during the year. See 29 U.S.C. § 2611(2).

4. See 29 U.S.C. § 2612(a).

5. See 29 U.S.C. § 2612(a)(1)(E); 29 U.S.C. § 2612(a)(3).

6. 29 U.S.C. § 2612(a)(1)(E).

7. 29 U.S.C. § 2611(15) citing 10 U.S.C. § 101(a)(13).

8. The Department of Labor's Wage and Hour Division published a Notice of Proposed Rulemaking under the FMLA. Comments were required to be submitted by April 11, 2008. See www.dol.gov/esa/ whd/fmla/; see also www.dol.gov/esa/whd/fmla/NDAA_fmla.htm (last accessed on April 28, 2008).

9. See Id.

10. President Signs Bill Expanding FMLA Leave for Military Families, 15 FAMILY AND MEDICAL LEAVE HANDBOOK 1, 8 (Peter Susser et al. eds., 2008).

11. 29 U.S.C. § 2612(e)(3).

12. See 29 U.S.C. § 2612(b)(1). 13. See 29 U.S.C. § 2613(f).

14. 29 U.S.C. § 2612(a)(3).

15. 29 U.S.C. § 2611(16). 16. 29 U.S.C. § 2611(19).

- 16. 29 U.S.C. § 2611(12).
 17. See 29 U.S.C. § 2611(18).
 18. See 29 U.S.C. § 2612(e)(2).
 19. See 29 U.S.C. §2612(b)(1).

20. See www.dol.gov/esa/whd/fmla/NDAA_fmla.htm (last accessed on April 28, 2008).

21. See Id.

^{1.} H.R. 4986.

^{2. 29} U.S.C. § 2601 et. seq.
22. President Signs Bill Expanding FMLA Leave for Military Families, 15 Family and Medical Leave Handbook 1, 9 (Peter Susser et al. eds., 2008).

23. 29 U.S.C. § 2612(d)(2)(A) & (B).

Authors' Note: The authors would like to thank Shannon Dodd for her assistance in preparing this article. Ms. Dodd was a third-year student at the University of Tulsa College of Law. Ms. Dodd joined Titus Hillis Reynolds Love Dickman & McCalmon in May 2008.

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Stephanie Johnson Manning focuses her practice in the area of employment discrimination law as an associate with Titus Hillis Reynolds Love Dickman & McCalmon. Ms. Manning graduated with highest honors from the TU College of Law in 2000 and was selected for the Order of the Curule Chair.



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The Oklahoma Bar Association Family Law Section seeks nominees for the following awards to be presented at its annual meeting on November 20, 2008.

Outstanding Family Law Attorney for 2008

Outstanding Family Law Judge for 2008

The Phil and Noel Tucker Outstanding Guardian Ad Litem Award for 2008

Nominees should have made significant contributions to the practice of family law in Oklahoma in 2008, or over an extended period of time. Please submit your nominations and a brief description of the reasons for your nomination by October 17, 2008, to: OBA Family Law Section, Nominations and Awards, c/o David A. Tracy, 1701 S. Boston Ave., Tulsa, Oklahoma 74119.

Employment Law Section Admissibility of 'Me, Too' Evidence in Employment Discrimination Cases

U.S. Supreme Court Declines to Adopt Rule

By Kimberly Lambert Love and Mary L. Lohrke

The U.S. Supreme Court, in a unanimous opinion reversing the 10th Circuit Court of Appeals, recently declined to adopt a blanket rule for the admissibility of so-called "me, too" evidence in a federal discrimination lawsuit. "Me, too" evidence is testimony by nonparties claiming discrimination which is offered to persuade the jury that the plaintiff's termination from employment was discriminatory. In Sprint/United Management Company v. Men*delsohn*,¹ an age discrimination case, Justice Thomas delivered the opinion of the court, which held that the admissibility of "me, too" evidence is a fact-based determination which is best made by the trial court and which is not amenable to per se rules of admissibility.²

The plaintiff, Ellen Mendelsohn, brought suit against her former employer, Sprint/Management Company after her employment was terminated in 2002 as a result of a company-wide reduction in force (RIF) that affected nearly 14,000 employees between 2001 and 2003.³ Mendelsohn, who was 51 years old at the time of her discharge and the oldest employee in her unit, alleged that her selection for layoff was based on her age in violation of the Age Discrimination in Employment Act (ADEA).⁴

As evidence of Sprint's alleged discriminatory bias against older employees, Mendelsohn sought to introduce the testimony of five other former Sprint employees all over 40 years of age who claimed that their supervisors had discriminated against them because of age. Importantly, none of these five employees worked in the same group as Mendelsohn or reported to the same supervisors as Mendelsohn. Furthermore, none of the witnesses had information regarding the selection decisions of Mendelsohn's supervisor.⁵

Prior to trial, Sprint moved *in limine* to exclude the "me, too" testimony of the five former employees under Fed.R.Evid. 401⁶ and 402,⁷ arguing that any reference to alleged discrimination by supervisors other than Mendelsohn's supervisor was irrelevant to the issue of whether the selection decision as to Mendelsohn was based on age.⁸ Sprint also moved to exclude the evidence under Fed. R.Evid. 403,⁹ arguing that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice and confusion of the issues in forcing Sprint to defend multiple claims of discrimination.¹⁰

In a minute order, the district court granted Sprint's motion, excluding evidence of discrimination against employees not "similarly situated" to Mendelsohn.¹¹ The district court defined "similarly situated" employees to include those employees who had been laid off in close temporal proximity to Mendelsohn by the same supervisor as Mendelsohn.¹² The district court provided no additional explanation regarding the basis for its ruling. Because Mendelsohn's supervisor did not supervise any of the other employees Mendelsohn intended to call to testify, the district court excluded their testimony from trial.¹³ After an eight-day trial, the jury returned a verdict for Sprint.¹⁴

On appeal, the 10th Circuit reversed and remanded the case for a new trial. Justice Tymkovich strongly dissented on the ground that the district court did not abuse its discretion in excluding the "me, too" evidence.15 The 10th Circuit treated the district court's minute order as applying a per se rule that evidence from employees reporting to different supervisors is irrelevant to proving age discrimination in the context of a RIF.¹⁶ The 10th Circuit held that the district court erroneously applied the "same supervisor" rule set forth in Aramburu v. The Boeing Co.¹⁷ as a per se bar on the admissibility of "me, too" evidence.18

In Aramburu, a case regarding discriminatory disciplinary action, the 10th Circuit held that dissimilar treatment by a single supervisor can evidence discriminatory motive on the part of the supervisor.¹⁹ The 10th Circuit in Mendelsohn distinguished Aramburu, finding a major difference between cases involving disciplinary action and cases involving dismissal during a company-wide RIF.²⁰ In Mendelsohn, the 10th Circuit declined to extend the "same supervisor" rule in Aramburu to the RIF context, reasoning that such a rule would "make it significantly difficult, if not impossible, for a plaintiff to prove a case of discrimination."²¹ The 10th Circuit then determined that the "me, too" evidence was both relevant and not unduly prejudicial and reversed and remanded the case for a new trial.22

The majority of federal circuit courts have held that "me, too" evidence is generally not admissible unless the witness held the same position and reported to the same supervisor as the plaintiff or there is evidence of a "pattern or practice" of discrimination.23 The 10th Circuit's opinion set the stage for a ruling by the Supreme Court clarifying or setting the standards for the admissibility of "me, too" evidence in individual disparate treatment cases.

However, the Supreme Court declined to resolve the circuit split and adopt a per se rule for the admissibility of "me, too" evidence. Rather, the Supreme Court held that the relevance of "me, too" evidence in an individual employment discrimination case under Fed. R.Evid. 401 is "fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case."²⁴ Likewise, applying Rule 403 to determine if the evidence is prejudicial also requires a "fact-intensive, context-specific inquiry."²⁵ The Supreme Court emphasized the wide discretion and deference to be given district courts in determining evidentiary issues under Rules 401 and 403 and remanded the case with instructions for the district court to clarify the basis for its evidentiary ruling.²⁶

The Mendelsohn decision highlights that the admissibility of "me, too" evidence remains for the trial court to determine on a case-by-case basis in the context of the particular facts of the case. Given the Supreme Court's emphasis on the deference owed the trial court in determining evidentiary issues, attorneys seeking to exclude "me, too" evidence at trial should preserve objections to such evidence by filing motions in limine, arguing both relevance under Rule 401 and prejudice under Rule 403. Defense counsel will be tasked with showing that the "me, too" evidence lacks any connection to the decision affecting the plaintiff's employment. Plaintiff's counsel, on the other hand, will be challenged to demonstrate a link between the "me, too" evidence and plaintiff's circumstances. Factors to consider by the trial court in determining the admissibility of "me, too" evidence include whether the "me, too" events are too remote in time from the events giving rise to the plaintiff's claims, whether different decision makers are involved and whether the "me, too" events are too dissimilar from those that involve the plaintiff.

3. Law.com, Supreme Court Takes On 'Me, Too' Age Bias, www.law. com/jsp/article.jsp?id=1195639466549 (last accessed April 15, 2008).

4. 29 U.S.C. § 621, et seq.

 Denet Solar, et al.,
 S. Mendelsolm, 128 S.Ct. at 1143.
 Fed.R.Evid. 401. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

7. Fed.R.Evid. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.'

8. Mendelsohn, 128 S.Ct. at 1144.

9. Fed.R.Evid. 403. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

10. Mendelsohn, 128 S.Ct. at 1144.

13. Mendelsohn v. Sprint/United Management Co., 466 F.3d 1223, 1225 (10th Cir. 2006). 14. Id.

15. Id. at 1231 (Tymkovich, J. dissenting).

_, 128 S.Ct. 1140 (2008). _ U.S. _ 1.

^{2.} *Id.* at 1143.

^{11.} Id.

^{12.} Id.

16. Mendelsohn, 128 S.Ct. at 1144.

- 17. 112 F.3d 1398 (10th Cir. 1997).
- 18. Mendelsohn, 466 F.3d at 1227-28; Mendelsohn, 128 S.Ct. at 1144.
- 19. Aramburu, 112 F.3d at 1404.
- 20. Mendelsohn, 466 F.3d at 1227.
- 21. Id. at 1228.
- 22. Id. at 1230-31.

23. See, e.g. Wyvill v. United Companies Life Ins. Co., 212 F.3d 296, 302 (5th Cir. 2000) (holding admission of "me, too" testimony by witness not reporting to the same supervisor as the plaintiff was erroneous and prejudicial); Sims v. Mulcahy, 902 F.2d 524, 530-531 (7th Cir. 1990) (affirming exclusion of "me, too" testimony from witness not reporting to the same supervisor as the plaintiff).

24. Mendelsohn, 128 S.Ct. at 1147.

25. Id.

26. See Id. at 1146-1147.

Authors' Note: The authors would like to thank Shannon Dodd for her assistance in preparing this article. Ms. Dodd was a third-year law student at the University of Tulsa College of Law who joined Titus Hillis Reynolds Love Dickman & McCalmon in May 2008.

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NOTICE OF PUBLIC HEARING

The Physician Advisory Committee to the Workers' Compensation Court will hold a public hearing on **August 22, 2008 at 2:00 PM** in the 2nd Floor Courtroom, at the Oklahoma Workers' Compensation Court, 1915 N. Stiles, Oklahoma City, Oklahoma.

The purpose of the hearing is to obtain public comment regarding adoption or modification of the **6th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment** or the adoption of another method or system to evaluate permanent impairment in place of or in combination with such Guides.

Submission of written comment prior to the hearing is encouraged and may be provided in care of Bill Wiles, Workers' Compensation Court, 1915 N. Stiles, Oklahoma City, OK 73105.

The 6th Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment is available for purchase at bookstores carrying medical reference materials and at the American Medical Association's online bookstore. (https://catalog.ama-assn.org/Catalog/home.jsp)

Estate Planning, Probate and Trust Section Oklahoma's New Trust Law

By Michael L. Nemec

On May 23, 2008, the 51st Oklahoma Legislature passed and the governor signed, as part of a much larger bill, nine new provisions to be added to Title 60 of the Oklahoma Statutes.¹ They supplement the existing Oklahoma Trust Act.² No provisions of the Trust Act were repealed. The new sections are to be numbered Section 1101 through Section 1109 of Title 60. The provisions of these new sections (with some exceptions) correspond to Sections 103, 104, 106, 108, 109, 201, 202, 203 and 204 of the Uniform Trust Code drafted by the National Conference of Commissioners on Uniform State Laws as amended in 2005.3 The new sections of Title 60 affect key terms and concepts used in the Trust Act. They also enact important rules respecting the administration of trusts and the ability of the court to be involved in the administration of trusts. Because the new sections were not enacted as part of a comprehensive revision of Oklahoma's law of trusts, some of the provisions do not fit precisely into existing Oklahoma law. While the new provisions often refer to "this act," it is assumed that they are intended to be interpreted to refer to the existing Trust Act and not just to the legislation of which they are a part.

Section 1101 defines terms that are important in interpreting and administering the law of trusts. Among them are "beneficiary," "qualified beneficiary," "person," "property," "terms of a trust" and "ascertainable standard."

In Section 1101 a "beneficiary" is defined as a person who has a present or future beneficial interest in a trust, vested or contingent, or who, in a capacity other than that of trustee, holds a power of appointment over trust property. This definition is not the same as other definitions of "beneficiary" currently found in Title 60.⁴

The phrase "qualified beneficiary" is defined, unless the trust instrument provides otherwise, as a distributee or permissible distributee of a present interest in trust income or principal, or who has a vested remainder interest in the trust, is a charitable organization expressly entitled to receive benefits under the terms of a charitable trust, a person appointed to enforce a trust created for the care of an animal or for another noncharitable purpose, or the attorney general of Oklahoma with respect to a charitable trust having its principal place of administration in Oklahoma. This definition is not the language of the Uniform Trust Code. Instead, it came from the version of the Uniform Trust Code that was introduced by the Oklahoma Bar Association in the 2004 session of the Oklahoma Legislature, but was not enacted.

Oklahoma considers animals to be property not persons.⁵ While the Legislature did not adopt Section 408 of the Uniform Trust Code which allows the creation of a trust for the care of an animal, by implication in defining a "qualified beneficiary" to include a person appointed to enforce a trust created for an animal, the Legislature seems to have adopted the rule that a trust in Oklahoma can be established for the benefit of an animal despite the language of the Trust Act which provides that a trust may only be created for a "person."⁶

A "person" is broadly defined in Section 1101.⁷ Here too there is a difference between the Section 1101 definition and definitions found elsewhere in the Oklahoma Statutes.⁸

In Section 1101, the word "property" is defined as "anything that may be the subject of ownership, whether real or personal, legal or equitable, or any interest therein." While they may not be inconsistent, we now have differing definitions of this significant word.⁹

"Terms of a trust" is defined to include the literal language of the trust instrument and the

manifestation of the settlor's intent regarding a trust's provisions as may be established by evidence that would be admissible in a judicial proceeding.¹⁰

According to the new law, an "ascertainable standard" is "a standard relating to an individual's health, education, support, or maintenance within the meaning of Section 2041(b) 1 (A) or 2514(c) (1) of the Internal Revenue Code of 1986, as in effect or as later amended." This phrase shows up in Section 1101 in the definition of "power of withdrawal." There a "power of withdrawal" is defined as a presently exercisable general power of appointment other than a power exercisable by a trustee "which is limited by an ascertainable standard related to a beneficiary-trustee's health, education, maintenance or support, or which is exercisable by another person only upon consent of the trustee or person holding an adverse interest." Under existing law,¹¹ the holder of a power of withdrawal over trust property can have the rights of the settlor of a revocable trust over the property subject to the power of withdrawal unless otherwise provided in the trust instrument.

Section 1102 creates a standard by which an organization is deemed to have knowledge or notice or (perhaps more important) not to have knowledge or notice of a fact. In the comments to Section 104 of the Uniform Trust Code, the drafters state that "notice to an organization is not necessarily achieved by giving notice to a branch office. Nor does the organization necessarily acquire knowledge at the moment the notice arrives in the organization's mailroom. Rather, the organization has notice or knowledge of a fact only when the information is received by an employee having responsibility to act for the trust, or would have been brought to the employee's attention had the organization exercised reasonable diligence." This new law puts the responsibility on the beneficiary to be sure that an employee of a corporate trustee having responsibility to act for the trust receives notice of any material fact the beneficiary thinks affects the administration of the trust. This section should be read in conjunction with Okla. Stat. tit. 60, §175.57 E. where the statute of limitations for a breach of trust begins to run against a beneficiary when a report or statement from a trustee provides "sufficient information" so that the beneficiary "knows or reasonably should have inquired into" the existence of a claim against the trustee. Paragraph 3 of Section 1102 says that a person has knowledge of a fact when the person has reason to know it from all the facts and circumstances in their possession at the time in question.¹²

Section 1105 specifies how "notice" is given. The manner of giving notice is open ended¹³ but includes first class mail, personal delivery, delivery to the person's last known place of residence or place of business, or through a properly directed electronic message. E-mail, properly directed, should be acceptable notice. Notice is not required for a person whose identity or location is unknown and not reasonably ascertainable by the trustee. Paragraph C of Section 1105 provides that a person can waive a notice otherwise required.

Section 1104 creates the concept of the "principal place of administration" of a trust. The new statute creates a presumption that the principal place of administration of the trust designated in the trust instrument is the "principal place of administration" if a trustee's principal place of business is located in or a trustee resides in the jurisdiction or all or part of the administration of the trust occurs in the jurisdiction named in the trust. Further, the new language found in Section 1104 implies that, among its other powers, the district court has the authority to order, approve or disapprove a transfer of the principal place of administration of a trust.¹⁴

The new law establishes a rule that the trustee is under a continuing duty to administer the trust at a place that is appropriate to the trust's purposes, its administration and the interests of the beneficiary.¹⁵ This language should cause every trustee in Oklahoma to look at whether he, she or it is in compliance with this rule. Despite the express language of the instrument, if the trustee concludes that the facts and circumstances dictate that a different jurisdiction is a more appropriate place to administer the trust, the trustee can attempt to move the principal place of the administration of the trust to another state or outside the country. The new statute sets out a mechanism by which the trustee can change the principal place of administration of the trust without court approval. Nevertheless, an objection from a qualified beneficiary will require the court to approve the transfer of the principal place of administration.¹⁶

Section 1103 states an underlying rule for the administration of trusts. It provides that "the common law of trusts and principles of equity supplement this act, except to the extent modified by this act or another statute of this State." In the comment to Section 106 of the Uniform Trust Code, the drafters say "the common law of trusts is not static, but includes the contemporary and evolving rules of decision developed by the Courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes traditional and broad equitable jurisdiction of the Court, which the Code in no way restricts."17 This section is a complement to Okla. Stat. tit. 60, §175.50 which provides that any statute repealed by the Trust Act which abrogated or restated the common law caused the common law rule to be reinstated and re-established to the extent not amended by the Trust Act.

Section 1106 sets out a rule that the court may intervene in the administration of a trust to the extent that its jurisdiction is invoked by an interested person or as provided by law. Under paragraph C of Section 1106, "a judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights." This supplements and enlarges the authority of the court under current Oklahoma law.18

Section 1107 brings trustees and trust beneficiaries, or at least a trust beneficiary's beneficial interest in the trust, within the jurisdiction of Oklahoma courts regarding trust matters.

Section 1109 redefines and expands which district courts have venue over trust administration.¹⁹ This new language enables a judicial proceeding involving a trust to be brought in the county in Oklahoma in which the trust's principal place of administration is or will be located and if the trust is created by will and the estate is not yet closed, the county in which the decedent's estate is being administered. When there is no trustee, a trust action can be brought in a county in Oklahoma in which a beneficiary resides, in a county in which trust property is located, and if the trust is created

by will in the county in which the decedent's estate was or is being administered.

The new provisions will be effective Nov. 1, 2008. Presumably the new sections apply to existing trusts as well as to all trusts created after the effective date of the act.²⁰

1. Senate Bill No. 1708. The new provisions of Title 60 can be found at Sections 278 through 286 on pages 261 through 268 of S. B. No. 1708.

2. Okla. Stat. tit. 60, §175.1, et seq.

3. The Uniform Trust Code can be found on the Web site of the National Conference of Commissioners on Uniform State Laws: www. nccusl.org.

4. See Okla. Stat. tit. 60, §§175.3 K and 175.102 (2).

5. Okla. Stat. tit. 60, §2.

6. Okla. Stat. tit. 60, §175.6.

7. " 'Person' means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity." Section 1101, paragraph 10. 8. See Okla. Stat. tit. 25, §16 and Okla. Stat. tit. 60, §175.3A.

9. See Okla. Stat. tit. 60, §§ 1 through 9.

10. This Section states the existing common law in Oklahoma. See Crowell v. Shelton, 948 P.2d 313 (Okla. 1997) and In re Living Trust of Reid, 46 P.3d 188 (Okla. Ct. App. 2002).

11. Okla. Stat. tit. 60, \$175.57 E. 3.

12. Contrast this language with Okla. Stat. tit. 25, §§ 10 through 13.

13. "Notice to a person under this act or the sending of a document to a person under this act must be accomplished in a manner reasonably suitable under the circumstances and likely to result in the receipt of the notice or document." Section 1105 A.

14. Section 1104 C.

15. Section 1104 B.

16. Section 1104 E.

17. Comment to Uniform Trust Code §106.

18. See Okla. Stat. tit. 60, §175.23 which provides that a court may construe the provisions of any trust instrument, determine the law applicable to a trust, determine the powers, duties and liability of a trustee, determine the existence or nonexistence of facts affecting the administration of a trust, require an accounting by trustees, surcharge a trustee, and in its discretion supervise the administration of a trust.

19. See Okla. Stat. tit. 60, § 175.23 B which confines venue to the county in which the trustee resides.

20. Okla. Stat. tit. 60, §175.53.

ABOUT THE AUTHOR



Michael L. Nemec is a shareholder in the law firm of Hall, Estill, Hardwick, Gable, Golden & Nelson PC. He is a member of the Tulsa Title and Probate Lawyers and received the Golden Rule Award from the Tulsa County Bar Association in July 2006.

BAR NEWS

Oklahoma Attorneys Selected for Leadership Academy

The Oklahoma Bar Association announces the 28 participants of its inaugural Leadership Academy class selected from applicants throughout the state.

"I am excited about the opportunities this academy will showcase to our state's attorneys," said OBA President Bill Conger of Oklahoma City. "Through this program, the participants will learn how to communicate and motivate more effectively leading to greater success not only in law, but also in service to professional, political, judicial, civic and community organizations."

The OBA Leadership Academy originated from the OBA's Leadership Conference in 2007.

The Leadership Academy will differ from the conference in that it will feature fewer participants and multiple sessions. The academy is set to begin in the early fall of 2008 and continue through May 2009.

Alternates for the academy are Jennifer Kirkpatrick, Nancy Winans-Garrison, Wade Gungoll, Oklahoma City; and Melissa Cornell, Tulsa.

Along with many leadership training activities, Champions for Growth founder Chuck Gold will present at the academy. Gold will provide assistance and professional growth to the participants in their efforts of building teamwork, success and leadership while teaching them how to keep their newly acquired skills.

OBA LEADERSHIP Academy Participants

ARDMORE Carrie E. Hixon of Mordy & Mordy PC

BARTLESVILLE

Tanayia Hubler of Hubler & Reynolds Law Office and Russell Vaclaw, Washington County associate district judge

BRISTOW Lauren Allison of the Law Office of Lauren Lester Allison

> **CORDELL** Megan Simpson of the Washita County District Attorney's Office

Ермонр Melinda L. Alizadeh-Fard of Melinda L. Alizadeh-Fard

> **ENID** Robert Faulk of Faulk Law Firm PLLC

GUYMON Cory Hicks of Field & Hicks PLLC

MUSKOGEE Justin Stout of Wright, Stout & Wilburn

OKLAHOMA CITY Lindsey Andrews of Echols & Associates; Todd W. Blasdel of Rowland & Blasdel PLLC; Anthony L. Bonner Jr. of Cathcart & Dooley; Christine Cave of Meyer Cave & Leonard PLLC; Tina Izadi of the Office of the Attorney General; Annette Jacobi of the Oklahoma State Department of Health; LeAnne McGill of Cathy Christensen PC: Richard Rose of Mahaffey & Gore PC; Christian Szlichta of the Oklahoma Corporation Commission and Jeff Trevillion of the City of OKC

STILLWATER Deborah Scott Pappas of D. Scott Pappas, Attorney at Law

> TAHLEQUAH Diane A. Hammons of the Cherokee Nation

Tulsa

Kimberly Hays of Kimberly K. Hays PLLC; Lindsay McDowell of Rhodes, Hieronymus, Jones, Tucker & Gable; Sharisse O'Carroll of O'Carroll & O'Carroll; Amber Peckio-Garrett of Garrett Law Office PC; Briana Ross of Guaranty Abstract Co.; Robert Raymond Snow of Snow Law Firm PLLC and Jennifer White of Eldridge Cooper Steichen & Leach PLLC

WOMEN IN LAW CONFERENCE

It's All About Me; It's All About You

Finding Strength in Ourselves and in Numbers

SEPT. 18 • TULSA

RENAISSANCE HOTEL

By Amber Peckio Garrett and Jennifer White

The 2008 Oklahoma Bar Association Women in Law Conference just keeps getting bigger and better, and this year is no exception. Scheduled for Sept. 18 in Tulsa at the Renaissance Hotel, the conference will address a broad spectrum of issues relevant to all OBA members, especially women. A possible total of nine mandatory continuing legal education credit hours are available because the conference includes a daytime and evening program.

DAYTIME PROGRAM

This year's daytime program theme is "It's All About Me; It's All About You: Finding Strength in Ourselves and

in Numbers." In keeping with that theme, attorneys of distinction and with wisdom gained from years of practicing law will share information with conference participants about how to succeed in law with humor and grace. Presenters include judges, OBA officers and Lt. Gov. Jari Askins.

In the first program session, "The Search for Kindred Spirits: Getting to the Bench," judges will share information about how to chart your plan on becoming a judge.

In "What Not to Wear! Appropriate Dress for Today's Women Lawyers," do's and don'ts in dress will be discussed. This session includes an actual "fashion" show with special emphasis on district and local court rules dress codes.

The last morning session, "Dare to Achieve More With Sacrificing!," OBA President Bill Conger, Past OBA President Melissa DeLacerda and Anne Sublett of Tulsa Lawyers for Children will discuss how to balance your practice with civic and family commitments.

Newly-appointed University of Tulsa College of Law Dean Janet Levit is the luncheon keynote speaker. Levit is the first female to hold a position as dean at an Oklahoma college of law.

In the afternoon sessions OBA staffers will share their expertise with conference partici-

pants. "Ethics and Professionalism: Tips from the Trenches" is the topic to be addressed by Gina Hendryx, OBA ethics counsel. Jim Calloway, director of the OBA Management Assistance

Program, will present "Working Smarter Not Harder: Practice Tips for Today's Attorney."

"Non-Traditional Careers for Ms. JD" will be discussed by a stellar panel that includes the Oklahoma Lt. Gov. and OBA member, Jari Askins.

EVENING PROGRAM

Are you or is someone you know a "nice girl?" Could a seemingly professional woman be sabotaging her own career simply by working hard, saving the law firm money and refusing certain perks? Surely those things could not be standing between her and the coveted corner office, could they? Think again.

"Nice Girls Don't Get the Corner Office: 101 Unconscious Mistakes Women Make that Sabotage Their Careers" is the presentation scheduled for the Women in Law Conference evening banquet. Dr. Lois P. Frankel will present, with humor and grace, this audiencefriendly program, based on her international bestseller with the same title.

Dr. Frankel literally wrote the book on coaching people to succeed in businesses large and small around the globe. Nice Girls Don't Get the Corner Office and Nice Girls Don't Get Rich are international bestsellers translated into over 25 languages and featured on The TODAY Show, CNN and CNBC, in the New York Times, USA Today, People and TIME Magazine. Business Week named Corner Office one of the top 10 business books of the year when it was released.

Combining her experience in human resources at a Fortune 10 oil company with a Ph.D. in psychology from the University of Southern California, Dr. Frankel is a pioneer in the field of

business coaching. For the past two decades her unique formula has helped thousands of people create winning strategies to achieve superior career successes and business goals.

Whether she has been practicing law for a while or is just starting out, Nice Girls Don't Get the Cor*ner Office* offers a way for a woman to identify and modify specific self-defeating behaviors that are subconsciously making her sound, look, act and be

treated like a "girl." This program hits home with any woman who wants to better understand how she unknowingly sabotages her best efforts to achieve her full career potential and what to do about it.

The Mona Lambird Spotlight Awards will also be presented at the evening banquet. These awards have been given annually to five women since 1996. The awards recognize women who have distinguished themselves in

EVENING PROGRAM

- Why women act like girls
- Self-assessment inventory
- 101 self-defeating behaviors
- Eight ways to get ahead without sacrificing your femininity
- Tactics for handling people who try to hold you back
- Success strategies to replace self-defeating behaviors
- And more!

SELF-DEFEATING

BEHAVIORS INCLUDE

questions

Couching statements as

Polling others before

making a decision

Sharing too much

Taking on other

pennies

people's work

personal information

Waiting to be noticed or

Pinching company

called upon in meetings

the legal profession and paved the way for other women. In 1998, the award was named to honor the late Mona Salyer Lambird, the first woman president of the Oklahoma Bar Association, and one of the award's first recipients. The award is sponsored by the OBA Women in Law Committee.

The daytime program has been approved for seven hours of mandatory continuing legal education credit. The evening program has been approved for two hours of mandatory continuing legal education credit. Register online at www.okbar.org/cle. Go to CLE Event Calendar and find the Sept. 18 event.

Women In Law Sponsors

PLATINUM

CONNER & WINTERS CROWE & DUNLEVY DOERNER, SAUNDERS, DANIEL & ANDERSON LLP GABLEGOTWALS Latham, Wagner, Steele & Lehman PC MCAFEE & TAFT Jackie Cooper Imports

Gold

CARR & CARR Eldridge Cooper Steichen & LEACH PLLC GARRET LAW OFFICE PC ROBERTSON CORNELL

SILVER

BOBI HUNT Pray, Walker, Jackman, Williamson & Marlar

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF KARLA JAYE FINNELL, SCBD #5431 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Karla Jaye Finnell should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday**, **October 8, 2008**. Any person wishing to appear should contact Dan Murdock, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF FRANKLIN J. PACENZA, SCBD #5432 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

Notice is hereby given pursuant to Rule 11.3(b), Rules Governing Disciplinary Proceedings, 5 O.S., Ch. 1, App. 1-A, that a hearing will be held to determine if Franklin J. Pacenza should be reinstated to active membership in the Oklahoma Bar Association.

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Tuesday, October 14, 2008**. Any person wishing to appear should contact Dan Murdock, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

PHOTO HIGHLIGHTS

Sovereignty Symposium XXI Oklahoma City, June 4 & 5, 2008



Workers' Compensation Court Judge Mary Black and Chief Justice James R. Winchester



Suzanne Edmondson, Jonna Kirschner and Vice Chief Justice James E. Edmondson admire the Sovereignty Symposium artwork.



Justice Marian P. Opala confers with Professor John Duncan, R.J. Reynolds Chair, North Carolina Central University School of Law; and Elizabeth Lunsford Duncan.



Derrick Smalling presents his artwork to Robert Henry, chief judge of the U.S. Court of Appeals for the 10th Circuit, as Justice Yvonne Kauger assists with the presentation.

Winston Scambler and Oklahoma Supreme Court Justice Steven W. Taylor

The Oklahoma Bar Journal



Members of the Language and Cultural Preservation Panel, moderator, Supreme Court Justice Tom Colbert; co-moderator, Alice Anderton, Intertribal Wordpath Society; Dr. Phillip J. Earenfight, director and associate professor of art history, Trout Gallery, Dickinson College; Dr. Lessley Price, director of distance learning and board member, Cheyenne and Arapaho Tribal College, Southwestern Oklahoma State University; Richard Grounds, director Euchee Language Project; Dr. Blake Sonobe, provost, Southwestern Oklahoma State University; (seated) Joan Frederick, author, San Antonio, Texas; Dr. Henrietta Mann, president, Cheyenne and Arapaho Tribal College.



Justice Rudolph Hargrave and Madeline Hargrave attend the Tribal Leaders' luncheon.



Kirke Kickingbird; Raymond Nauni; Judge Carol Hansen, Oklahoma Court of Civil Appeals; and Professor Alex Skibine, University of Utah School of Law



OBA member D. Michael McBride III, Chickasaw Nation Governor Bill Anoatubby and Oklahoma Secretary of Commerce Natalie Shirley





Shane Jett, Oklahoma House of Representatives; Rodolfo Pelissari and Commander John Herrington (USN, Ret.)



Members of the Sovereignty Symposium Board of Directors: Alicia Timmons, Beth Kerr and Allison Cave

BAR NEWS

2009 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 19, 2008

OFFICERS

President-Elect

Current: Jon K. Parsley, Guymon Mr. Parsley automatically becomes OBA president Jan. 1, 2009 (One-year term: 2009) Nominee: **Allen M. Smallwood, Tulsa**

Vice President

Current: Michael C. Mordy, Ardmore (One-year term: 2009) Nominee: Linda S. Thomas, Bartlesville

BOARD OF GOVERNORS

Supreme Court Judicial District One

Current: Brian T. Hermanson, Ponca City Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties (Three-year term: 2009-2011) Nominee:

Supreme Court Judicial District Six

Current: Robert S. Farris, Tulsa Tulsa County (Three-year term: 2009-2011) Nominee:

Supreme Court Judicial District Seven

Current: Alan Souter, Bristow Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties (Three-year term: 2009-2011) Nominee: Charles D. Watson Jr., Drumright LouAnn Moudy, Henryetta

Member-At-Large

Current: Julie E. Bates, Oklahoma City (Three-year term: 2009-2011) Nominee:

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.

Vacant positions will be filled at the OBA Annual Meeting Nov. 19-21. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2008.

BAR NEWS

OBA Nominating Petitions

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

OFFICERS

PRESIDENT-ELECT

Allen M. Smallwood, Tulsa

Petitions have been filed nominating Allen M. Smallwood for election of President-Elect of the Board of Governors of the Oklahoma Bar Association for a one-year term beginning January 1, 2009.

A total of 289 signatures appear on the petitions.

VICE PRESIDENT

LINDA S. THOMAS, BARTLESVILLE

Petitions have been filed nominating Linda S. Thomas for election of Vice President of the Board of Governors of the Oklahoma Bar Association for a one-year term beginning January 1, 2009.

A total of 284 signatures appear on the petitions.

County Bar Resolutions Endorsing Nominee: Comanche, Payne and Washington County

BOARD OF GOVERNORS

SUPREME COURT JUDICIAL DISTRICT SEVEN

CHARLES D. WATSON JR., DRUMRIGHT

Petitions have been filed nominating Charles D. Watson Jr. for election of the Board of Governors of the Oklahoma Bar Association Supreme Court Judicial District 7 for a three-year term beginning January 1, 2009.

County Bar Resolutions Endorsing Nominee: Creek County

LOUANN MOUDY, HENRYETTA

A Nominating Resolution has been filed nominating LouAnn Moudy for election to the Board of Governors of the Oklahoma Bar Association Supreme Court Judicial District 7 for a three-year term beginning January 1, 2009.

County Bar Resolutions Endorsing Nominee: Okmulgee County

BOOK REVIEW

Missing Witness

By Gordon Campbell

428 pages, ISBN: 978-0-06-133751-2, \$24.95 Published by HarperCollins Publishers 2007



Practicing trial lawyer Gordon Campbell debuts as a murder mystery novelist with *Missing Witness*. The novel's narrator is newly licensed lawyer Doug McKenzie who turns down a big California law firm's offer to work instead at the same firm as famed criminal defense lawyer Dan Morgan in Arizona, When McKen-

zie's chance comes at last to work with Morgan, McKenzie jumps at it, walking off a golf course in the middle of playing a championship final. This case is the perfect opportunity for McKenzie, one that may not come again. Morgan has been called to defend a woman accused of murdering the son of a wealthy rancher who once employed McKenzie's father. McKenzie knows the victim, the accused wife and their daughter, along with the man who inexplicably hires the best criminal lawyer around to defend the woman charged with killing his son.

The facts of the murder unfold, and McKenzie's history with the family and witnesses stands him in good stead in gathering evidence and providing background. Only the dead victim, his wife and troubled young daughter were present at the time of the murder; the daughter lies in a catatonic state brought on by the violence she either viewed or perpetrated. The trial strategy in defending the victim's wife is to proceed rapidly to trial before the daughter emerges from the coma, and, to pin the murder on the daughter. The pleasure of victory for Morgan and McKenzie when their client is acquitted is soon marred when a very disgruntled, outmaneuvered and vindictive prosecuting attorney decides to prosecute the daughter for the crime when she emerges from her catatonia. Again, the wealthy rancher turns to Morgan and demands that he defend his granddaughter of the crime for which his daughter-in-law was acquitted.

The truth is elusive as the facts of the new case defending the daughter conflict with those learned in the defense of the mother. Morgan's larger than life fame and legal abilities are matched with oversized human flaws, making the search for truth ever more difficult. Their new client's mother, and the only other witness to the murder, cannot be found. McKenzie struggles to do right by their young client as Morgan spirals out of control.

The attorney-coming-of-age subplot underlying the mystery plot will interest attorneys. Young McKenzie grapples with issues of guilt and innocence, the boundaries and many challenges of criminal defense, ethics, conflict within a law firm and the human frailties of his hero, Dan Morgan. The plot twists, as well as those of the subplot, are surprising and entertaining and the book will capture the interest of mystery buffs as well as attorneys. *Missing Witness* is a compelling page turner.

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

FROM THE PRESIDENT

cont'd from page 1740

Wenona is CEO at LifeFocus Counseling. She has a Ph.D. in psychology, a master's degree in human relations and a bachelor of arts in criminal justice. She is a licensed alcohol and drug counselor, a certified employee assistance professional, registered traumatologist and an ordained member of the clergy. She is also a certified DUI assessor and a substance abuse professional. Dr. Barnes is a frequent speaker on various topics in her field and serves as a consultant to numerous organizations throughout the country.

Rex McLauchlin is a counselor at LifeFocus Counseling Services and is the representative to the LHL Program. He is a licensed professional counselor and speaks Spanish as a second language. He has a master's degree in clinical psychology and a master's degree in educational administration. His bachelor's degree is in psychology. Mr. McLauchlin specializes in relationship problems, depression and emotional issues.

CALLING ALL MEMBERS

We still need your help! When attorneys call to use the services, they can utilize the LifeFocus Counseling Services to work confidentially with a counselor for substance abuse and/or mental health issues, or they can utilize the peer mentoring program to work with a lawyer who is in recovery and can help assist them to maintain sobriety — or another option is they can use both!

But we need more mentors, and we need more LHL Committee members. You don't have to come to the meetings or be burdened with a lot of extra work to be a part of this. You just have to commit to be available should another attorney in your area need a mentor (call and check on them, get them to AA meetings, help hold them accountable or give them encouragement). We particularly need mentors in the rural areas, but all areas are lacking. If you would be of assistance should the need arise, please contact LifeFocus Counseling and get on the mentor list. We can't do it without you!!

We can all be proud of our award-winning program. It is a model for other state bar associations. In 2007 our bar received the Innovation Award from the Mental Health Association of Central Oklahoma.

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW ADMISSIONS / RECRUITMENT COORDINATOR

The University of Oklahoma College of Law is seeking a law school graduate to serve as a full-time Admissions/ Recruitment Coordinator. This position will work directly for the Associate Dean for Admissions, Scholarships, and Recruitment. Duties and responsibilities will include administering programs for targeting and recruitment of potential law students; performing tours of the facilities; visiting schools, colleges, and job fairs; disseminating admissions, scholarship, and recruitment information as directed; and assisting the Associate Dean with administrative duties as required. This position will also assist the Director of the Pro-Bono Program. Candidates must possess a Juris Doctorate degree and be in good standing with the Bar Association. The annual starting salary range is \$50,000 to \$60,000, with full benefits coverage. Applicants must apply for the position through the University of Oklahoma Human Resources Office. A cover letter, resume, and references will be required. The online job posting can be accessed on the university website at:

www.hr.ou.edu/

The OU Job Requisition is #05978. The O.U. College of Law is an Equal Opportunity/Affirmative Action Employer.

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TRichard A. Mitchell, President

Gary A. Taylor, Executive Director

FROM THE EXECUTIVE DIRECTOR

Moving Brings Back Memories

By John Morris Williams

In the summer of 1963 my family moved from the ranch in Texas back to Stonewall. Okla. - my mother's hometown. We pulled out from Texas late in the afternoon and headed to Oklahoma. I rode in the back of our Rambler station wagon with our bulldog, Mona. Somewhere as the day turned to night on our journey, Mona and I dozed off for the evening. The next morning I awoke, still in the back of the station wagon with a bit of bulldog slobber on me. Mona and I were alone in the back of the car and ready to greet the day. Today, DHS would have my parents taken into custody for leaving a 4-year-old alone overnight in a car. But it was a different time, and Mona and I were none the worst for it.

I remember the feeling of waking up in a new place. We had a new place to live. New surroundings to explore, and my grandmother was living right next door. It was all a wonderful adventure that 45 years later I still remember with some fondness. Everything was new, and I was still surrounded by the people I loved. Looking back, it is not often that you get to move to a new place and take everyone with you.



OBA Receptionist Suzi Hendrix invites you to take a look at the new Board Room, part of the Oklahoma Bar Center east wing renovation.

However, that has happened to me again! We have moved back into the newly renovated east wing of the Oklahoma Bar Center, and I got to take everyone with me. Well, sort of. Since we only moved from the modular spaces temporarily in the parking lot back to our old space, this may not technically be a real move.

To me it is a real move in more than just distance. We have a reconfigured, clean, modern space for member meetings, hearings, Web casts and staff offices. The space is wired and wireless. Much new technology has been added, and more will be added as the budget allows. There is some new artwork, and we have had some old pictures dating back as far as 1911 re-framed. Aside from one of the younger staff members asking me if I knew any of the people in the 1917 photograph, it has been a great experience.

YOU'RE INVITED

On Sept. 11, 2008, at 2 p.m. we will celebrate the renovation completion and want all OBA members to attend the official reopening of the space. It is your bar center, and I hope you are pleased with what you see. Our building committee and the staff were mindful of our responsibilities in meeting the needs of the association and our need to be careful stewards of the association's resources. There will be a short program, great refreshments and tours of the new space.

I am as excited about the new space as I was the fateful morning when Mona and I awoke to a new and wondrous place. Come be part of celebrating it with us!



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

OFFICIAL REOPENING SEPT. 11, 2008, AT 2 P.M.



The waiting area for the new hearing room.

| | IG SPRINGS LEGAL INSTITUTE SPONSORED BY THE WOODWARD COUNTY BAR ASSOCIATION LING SPRINGS STATE PARK - TUESDAY, SEPTEMBER 16, 2008 • WOODWARD, OKLAHOMA | | |
|------------------------------|--|--|--|
| responsibility, legal et | roved by the Mandatory Continuing Legal Education Commission of Oklahoma for a maximum of 6 credit hours, of which 1 hour is credit covering professional hics of legal malpractice prevention. Registration fees: \$150.00 for pre-registrations received prior to the Institute date; \$175.00 for walk-in registrations. naterials included in Registration Fee. Pre-registration is required for lunch and dinner. Cancellations will be accepted at any time prior to the Institute date; however, a \$50.00 fee will be charged for cancellation | | |
| 8 a.m 8:45 a.m. | Registration, Coffee & Doughnuts | | |
| 9 a.m 9:50 a.m. | Wind Energy: Perspectives for Developers and Landowners Shannon L. Ferrel, Assistant Professor – Oklahoma State Univer. | | |
| 10 a.m 10:50 a.m. | Criminal Law - General Practice and the Multi-County Grand Jury; David Ogle, Ogle & Welch, P.C., OKC | | |
| 11 a.m 11:50 a.m. | Foreclosure Law – General Issues; Glenn A. Devoll, Gungoll, Jackson, Collins, Box & Devoll, PC, Enid | | |
| Noon - 1 p.m. | Barbeque Lunch (included in registration fee) Sponsor TBA | | |
| 1 p.m1:50 p. m. | Legal Ethics – Current Developments; Gary A. Rife, Rife & Walters, LLP, OKC | | |
| 2 p.m 2:50 p.m. | OBA – Where We Are and Where We Are Headed; John Morris Williams, Executive Director, Oklahoma Bar Association | | |
| 3 p.m 3:50 p.m. | Immigration Reform – What You Need To Know; Rance G. Stein and Kelly K. Basey, Winningham, Stein & Basey, OKC | | |
| 3:50 p.m 5 p.m. | Social Hour | | |
| 5 p.m 7 p.m. | Steak Dinner (included in registration fee) and Recognition of Honored Guests | | |
| | 2008 BOILING SPRINGS LEGAL INSTITUTE REGISTRATION FORM | | |
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| Address: | | | |
| Phone: | FAX: | | |
| OBA Member? | OBA Number (for CLE credit): | | |
| I will be unable to attend t | he seminar. Please send Materials Only: \$50.00 Do you plan to stay for the evening Social Hour and Steak Dinner?YesNo | | |
| | able to the Woodward County Bar Association and mail this form with check to Careylyn Talley, Woodward County Bar Association, P.O. DK 73802. For more information, please call Justin P. Eilers at (580) 254-5556. | | |

Logging onto the Internet from (Almost) Anywhere

By Jim Calloway, Director, OBA Management Assistance Program

I can now log onto the Internet using my laptop from almost anywhere -roadside, lakeside or poolside. This month we are going to discuss wireless Internet access, in all of its many varieties.

The first time I heard about wireless Internet access I recall that I was quite amazed with the concept. I had long before traded dialup access for the pleasures of a high-speed connection. I had watched the cable company employees dig trenches to install the lines to make that possible. High-speed access over thin air seemed like science fiction.

But yes, it really was true that high-speed Internet connectivity could be obtained wirelessly. Most became quickly familiar with the term "Wi-Fi." Soon it was fairly common to see laptop users in coffee shops, restaurants, book stores and libraries taking advantage of a wireless "cloud." Some became quite adept at ferreting out locations of hotspots. It was even possible to buy a little device to carry that would light up when you are within range of a hotspot. But these hotspots changed frequently. A reliable hotspot might mysteriously vanish

or a free hotspot might install a virtual tollgate.

Many consumers purchased routers and installed wireless clouds in their homes. One no longer had to drill holes and run cable just to be able to access the Internet wherever one wished at home. Sometimes their neighbors could even take advantage. The term "wardriving" was coined to describe those who drove around in a vehicle searching for open Wi-Fi wireless networks.

The criminal element took notice. The idea that your computer could be accessed wirelessly by others with bad intentions came as a bit of a shock. Wireless routers became commonplace and cheap, so they could be easily purchased by good guys and bad guys alike. Wi-Fi security became a concern and encryption blocked many from their formerly free Internet access.

Wi-Fi Security Tip: Today if you are in an airport and your laptop detects a Wi-Fi access point called Free Airport Internet Access, it is quite possible that this free access is provided by a wrongdoer who hopes to obtain your confidential information. If the airport is really providing free wireless Internet access (and some do), there will be signage advising you of that. This is a growing problem not only confined to airports. See FBI press release "WI-FI SECU-RITY: Some Advice from the FBI" (5/6/08) online at http://tinyurl.com/66d7qm. Note: Just because you see a "Free Wi-Fi" indication on your laptop doesn't mean there is a crook. A large number of laptops broadcast this now. See the link to the story explaining why at the end of this article.

Wi-Fi is very convenient and became very popular. Unveiled were grandiose visions of cities providing free wireless Internet access as a public service or for a very inexpensive service paid for on the municipal utility bill. Powerful commercial interests have now delayed or derailed that concept in most cases.

Many consumers now use their mobile phones to access the Internet from almost anywhere, even if it is on a small screen. Smart phones have become ubiquitous, although concerns about fees charged for data services, along with the learning curves, have limited the power use of data-enabled phones to a relative few. Text messaging and e-mail appear

to be the most common data phone uses presently, although the new iPhone is certainly expanding that horizon, as are other phones using the 3G data transfer standard. For more information on 3G technology, see "Learning 3G-Speak" by Dennis Kennedy in the August 2008 American Bar Association Journal, online at http://tinyurl.com/ 58zcql. 3G stands for the third generation of phone technology. If you think that they could have come up with an easier to remember label, you should be reminded that the name for the Wi-Fi standard is IEEE 802.11 plus a letter.

So this concludes our brief summary of how wireless Internet access has evolved. But recent developments are exciting and important for the practicing lawyer – especially the practicing lawyer who has a laptop. These new developments may convince even more of you that your next personal computer should be a laptop.

THE NEXT GENERATION OF HIGH-SPEED WIRELESS

The mobile phone network now provides alternatives for high-speed wireless Internet access. Some of you may have noticed the new series of television commercials that show people logging onto the Internet from various remote, out-of-theway locations with no more searching for a hot spot to have Internet access. This technology again looks too good to be true, but it is certainly true. But, it is not free. Not even close to free.

The ability to log onto the Internet from a laptop computer almost anywhere is significant. For lawyers, this new type of Internet access is certainly worth a look.

For several months now, I've been using Sprint's EVDO service. EVDO stands for Evolution-Data Optimized or Evolution-Data only. (You will not need to ever know that again.)

What you do need to know is that if you plug an EVDO modem into your laptop (or desktop or router) and subscribe to an EVDO service, you will be able to get high-speed Internet access anywhere you can get a mobile phone signal. EVDO is not the only game in town. All of the major mobile companies are offering these high speed wireless services. Before I attempt to cover some of the details and options, let's just discuss what that means for us.

Trial lawyers can sit at the counsel table with full Internet access for their laptops in most any courtroom. The lawyer can e-mail anyone at the office (or elsewhere), do legal research if a novel matter presents itself, use search engines to fact check expert witness testimony and log into their office remote access for other needs.

Emergencies can be handled more quickly. More importantly, decisions about the relative nature of an emergency can be made by the lawyer quickly. Imagine the lawyer who is on a twohour drive back from a series of depositions. The lawyer's mobile phone rings. An important client is in your office and is extremely angry about a document they just received. The secretary is a bit unclear about the situation. "Offer the client some coffee and tell them to have a seat. Then scan the document and e-mail it to me. I'll pull over at the next rest stop and review it. Then I'll call you right back."

A lawyer can use this access to be more efficient. Lawyers can make better use of spare moments. If you arrive somewhere 30 or 40 minutes early, you might have time to boot up your laptop and review some documents, answer e-mail or do most anything that one might do at the office. (Yes, I can hear the Blackberry users now rising up and saying, "but we can do that from our 'Berries." I agree. But if I am going to type a document or e-mail more than a sentence or two, I'd rather have a fullsized keyboard. (Although I admit I have seen some impressive thumb typing.)

After purchasing the modem and paying setup fees, the service costs just under \$60 per month for unlimited Internet access. I'm not sure most of us have either the expertise or discipline to pay for a limited number of megabytes per month. My estimation was that opting for a limited plan would likely cost more when the monthly over-limit charges were accessed.

Even though the service is fairly expensive, if you are a frequent traveler, its use might save you money from time to time. It is apparently a universal fact that the more expensive your hotel room is, the less likely that you will be able to have free Internet service in your room. This is often \$15 or more per day. (Conversely, budget priced hotels often have signs visible touting their free Internet access.) Free airport Internet access is a true rarity unless you are an airline club member. So if

you find yourself frequently paying for Internet access while on the road or spending time driving around trying to locate a restaurant, coffee shop or parking lot with a free Wi-Fi cloud, you might be a candidate for this new breed of wireless.

Using these wireless data networks means greater security than Wi-Fi. As noted previously, a Wi-Fi hotspot can be set up by anybody whether they have much technical expertise or not. Generally speaking when you login to a hotspot it is an unsecured, "open" type of connection. Some lawyers will not be comfortable using an unsecured Wi-Fi hotspot. Certainly the data flowing through the hotspot can theoretically be accessed by the hotspot owner. As a practical matter, this is not likely to be the case, but one cannot make such assumptions. There is also some concern that other users of the same cloud could read your files on your PC. If your laptop is properly secured with a firewall and file sharing disabled, that is likely not a huge risk. But, unfortunately, it is hard to quantify the risk. Law firm IT departments can address the risk with their lawyers.

As for me, I now leave the Wi-Fi access on my laptop disabled. I don't need a hot spot with my EVDO modem.

A few comments about the term "high-speed" are probably in order here. There are lots of technical details, but generally speaking, in an urban area you will get speeds near DSL while in

some rural areas, you might get dropped down to something called 1xRTT (one times Radio Transmission Technology) which is two to three times faster than dialup. That actually sounds slower than it is. No matter what your connection, the download speed is always much faster than the upload speed. This means reasonably fast service, unless you are sending large e-mail attachments or doing other uploading functions. There are some charts about download and upload speed in the "what is EVDO?" link below.

But, as I noted, EVDO offered by Sprint and Verizon is not the only option.

AT&T Wireless provides you information on its LaptopConnect solution at www. wireless.att.com.

Many data-capable handsets can be used as wireless modems by "tethering" them to your phone handset by either a USB cable or a Bluetooth connection. Read more about that at AT&T's page on the topic, http://tinyurl. com/3bjyz3.

Alltel also had information about wireless Internet cards at its Web site, www.alltell. com.

If you are using another wireless carrier, you should contact them for more information about their available plan.

The purpose of this article was to make all Oklahoma lawyers aware of this technology and its potential.

Many litigation firms have already added this new tool to their technology toolbox. Other lawyers are still trying to make sure their laptops are accepted in the courtroom. Some will be puzzled as to why a smartphone does not meet all data access needs. But for some of you, a wireless access modem for your laptop may be just the tool you need.

OTHER SOURCES OF INFORMATION

The "Free Public Wi-Fi" SSID story www.wlanbook.com/free-public-wifi-ssid/ What is EVDO? www.evdoinfo.com/content/view/37/61/ Easy EVDO www.evdoinfo.com/content/view/1896/63 www.evdoforums.com/ http://evdomaps.com/ http://en.wikipedia.org/wiki/Wi-Fi http://en.wikipedia.org/wiki/Wi-Fi http://en.wikipedia.org/wiki/SG http://en.wikipedia.org/wiki/Evolution-Data_Optimized http://en.wikipedia.org/wiki/IEEE_802.11 http://en.wikipedia.org/wiki/Wardriving

Duties to Prospective Clients

By Gina Hendryx, OBA Ethics Counsel

When the revisions to the Oklahoma Rules of Professional Conduct (ORPC) became effective earlier this year, they included the adoption of an entirely new rule that details the ethical obligations owed to a person who consulted with a lawyer but did not subsequently engage the lawyer for representation. Rule 1.18, Duties to Prospective Client, is based upon the Model Rule of Professional Conduct that was approved by the ABA in 2002. It sets forth when a lawyer's duties of confidentiality, loyalty and confidence attach to the "prospective client."

In the initial interview with the prospective client, confidential information is often disclosed to the lawyer. The prospective client may discuss sensitive matters, review documents and rely upon the lawyer's advice. However, in doing so, the lawyer may create a conflict and be disqualified from representing a different client in the same or substantially related matter because of the prior consultation. ORPC 1.18 states the following:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no clientlawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

...a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation...

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

both the affected client and the prospective client have given informed consent, confirmed in writing, or:
 the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.

Not all persons who communicate information to the lawyer are protected under Rule 1.18. Comment [2] states that someone who provides information "unilaterally, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a lawyer-client relationship" is not a prospective client under the rule. Therefore, those run-ins with friends and family in the mall parking lot or at the family reunion don't always result in a "reasonable expectation" of an attorney/client relationship.

To avoid an unwitting disqualification, the lawyer should minimize the opportunity for the prospective client to divulge potentially confidential information. The following are suggestions to assist in that meeting with a prospective client:

Keep accurate records of prospective client meetings. This should include the person's name and the date of the meeting. Too many times the lawyer can't even remember meeting with a prospective client. However, the prospective client "clearly" remembers the consultation and all of the "confidential" information that was shared. This can result in a disqualification simply because you have no records of the meeting.

Develop generic questions for each type of representation you undertake. Go over the same questions with each prospective client. Limit the initial interview to only the information needed to determine whether or not to take the case.

Limit your "advice" to the prospective client. For example, in a divorce matter you may advise the prospective clients on issues such as jurisdiction, venue, child support and property division in Oklahoma. Give the individual information as to your fee, general time it takes to finalize the matter and any other general information about your potential representation.

When confronted by a "former" prospective client that you have a conflict in

your current representation, you will have the information necessary to respond.

Yes, I did meet with X on Jan. 2, 2007, to discuss a potential divorce. I gave X information on filing a divorce in Oklahoma, how long it will take and what it will cost. X only gave me information as to citizenship, residency and ages of children. No confidential information was taken from X.

Some attorneys require the prospective client to sign a waiver of the attorney-client privilege as it applies to the initial interview. However, you should be wary of doing so. This may not protect you from a claim of conflict in all circumstances. The prospective client would have to give "informed consent" and fully understand what is being waived.

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

STATE OF OKLAHOMA, DEPARTMENT OF HUMAN SERVICES CHILD SUPPORT ENFORCEMENT ANNOUNCEMENT # 08-C116

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 – specifically, Juvenile cases. 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 ensure 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 \$3158.67 monthly), dependent on Child Support or Family Law experience. Interested individuals must send a cover letter noting announcement number 08-C116, 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 or email to jobs@okdhs.org. Application must be received no earlier than 8:00 AM Friday, August 8, 2008 and no later than 5:00 PM on Thursday, August 21, 2008. THE STATE OF OKLAHOMA IS AN EQUAL OPPORTUNITY EMPLOYER

July Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, July 25, 2008.

REPORT OF THE PRESIDENT

President Conger thanked board members for attending the reception for the Chinese lawyers and law students held at the Oklahoma Bar Center last night. He reported he attended the board meeting in Texoma, Solo and Small Firm Conference, Leadership Academy meeting, Bench and Bar Committee meeting, reception for the Chinese students and visitors from the Tianjin Bar Association. He taught a course in Freiburg, Germany.

REPORT OF THE VICE PRESIDENT

Vice President Mordy reported he attended the June Board of Governors meeting, Solo and Small Firm Conference, Carter County Bar meeting, Oklahoma Bar Foundation meeting, reception for Chinese attorneys and students and the swearing in of Judge Deborah Barnes to the Court of Civil Appeals.

REPORT OF THE PRESIDENT-ELECT

President-Elect Parsley reported he attended the June board meeting, Solo and Small Firm Conference, State Bar of Texas annual meeting, two Texas County Bar Association meetings, Oklahoma Bar Foundation meeting and a reception for the Chinese students and visitors from the Tianjin Bar Association.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Leadership Academy Task Force meeting, legislative hearing on a "four-day work week" and flex time, Insurance Trust meeting, reception and dinner for Chinese lawyers and law students, open house of Gungoll Jackson et al, monthly staff celebration, directors meeting, swearing in of Judge Barnes to the Court of Civil Appeals and PACE reception. He also spoke to attendees at a PACE session held at the OBA, moderated a program at the Solo and Small Firm Conference, participated in a conference call regarding speaking on a panel for the National Conference of Bar Presidents and did an interview with Tulsa Legal News Editor Ralph Schaefer regarding the building renovation.

REPORT OF THE PAST PRESIDENT

Past President Beam reported he attended the Solo and Small Firm Conference and the Custer County Bar Association meeting.

BOARD MEMBER REPORTS

Governor Bates reported she attended the June board meeting at the Tanglewood Resort, Solo and Small Firm Conference, Cleveland County Bar Association luncheon and reception for representatives of the Tianjin Bar Association and law students. She also completed two articles for OU law school's Sooner Lawyer alumni magazine — one on Burns Hargis and one on Winfrey Houston. Governor Brown reported he attended the OBA Solo and Small Firm Conference, Board of Governors meeting and Bench and Bar Committee meeting. Governor Christensen reported she attended the June board meeting, Solo and Small Firm Conference, Bench and Bar Committee meeting, New Mexico Bar Association annual meeting, Oklahoma Bar Foundation meeting and a reception for the Chinese students and visitors from the Tianjin Bar Association. Governor Dirickson reported she attended the June board meeting, Solo and Small Firm Conference, Custer County Bar Association monthly meeting and was a

CLE presenter at the Solo and Small Firm Conference. Governor Farris reported he attended the June board meeting, Solo and Small Firm Conference, OBA Leadership Academy Task Force meeting and OBA Legal Intern Committee meeting. He also answered phones and gave legal advice for the Tulsa County Bar Association Call-A-Lawyer event on TV station KJRH. Governor Hermanson reported he attended the June Board of Governors meeting, Solo and Small Firm Conference, Bench and Bar Committee meeting, OBA Criminal Law Section's board meeting and wrote an article for the ABA GP/Solo's Law Trends electronic newsletter. Governor Hixson reported he attended the June board meeting, OBA Solo and Small Firm Conference at Tanglewood Resort, Professionalism Committee meeting, Canadian County Bar Association social hosted by Fletcher Dal Handley Jr. and a Clients' Security Fund Committee meeting. Governor McCombs reported he attended the June board meeting, Solo and Small Firm Conference and McCurtain County Bar luncheon. He prepared and emailed a report at the request of the local bar president concerning advantages of an insurance program offered by Beale Professional and contacted several out-ofcounty bar members to set up visits with them about bar association benefits they might not be aware of. Governor Reheard reported she attended the June board meeting, Solo and Small Firm Conference, Bench and Bar Committee meeting and reception for the Chinese

delegation. She also presented a CLE with Governor Stuart and YLD Chair Warren at the Solo and Small Firm Conference, a noon ethics CLE to Custer County Bar Association and assisted in planning a program for joint OBA/OCDLA CLE seminar in October. Governor Souter reported he attended the June board meeting, OBA Solo and Small Firm Conference and a reception for attorneys and law students from China. Governor Stockwell reported she attended the June board meeting, Solo and Small Firm Conference, Cleveland County Bar Association Executive Committee meeting and Cleveland County Bar Association luncheon and CLE. Governor Stuart reported he attended the Pottawatomie County Bar Association's recent photo shoot and Solo and Small Firm Conference. He was a co-presenter on Deb Reheard's CLE seminar at the Solo and Small Firm Conference and reviewed articles for possible publication in the bar journal as a member of the Board of Editors.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Warren reported she attended the June board meeting, Solo and Small Firm Conference, YLD Board meeting, a reception for the Chinese delegation and was a co-presenter of a CLE with Governors Stuart and Reheard at the Solo and Small Firm Conference.

LAW STUDENT DIVISION LIAISON REPORT

LSD Vice Chair Jenny Jackson from the OU College of Law reported the division is working on recruitment. Although not present for the meeting, LSD representative Janoe reported via e-mail that he attended the June board meeting at Tanglewood Resort and a Law Student Division Executive Meeting in Bricktown with Jenny Jackson and Nathan Milner.

BOARD LIAISON REPORTS

Governor Christensen reported on highlights of the New Mexico Bar Association annual meeting she attended. President-Elect Parsley shared details of the State Bar of Texas annual meeting he attended. He said this year's upcoming OBA bar convention keynote speaker Jeffrey Toobin spoke and did an excellent job.

GENERAL COUNSEL REPORT

General Counsel Murdock shared a status report of the Professional Responsibility Commission and OBA disciplinary matters. General Counsel Murdock reported he attended the June board meeting, Solo and Small Firm Conference, OBA Director's meeting and a reception on Thursday evening in honor of the Chinese delegation from Tianjin, China. He also spoke to the group of Chinese lawyers and law students at OCU Law School, presented a CLE at Solo and Small Firm Conference with Gina Hendryx and Jim Calloway, met with Laurie Jones and staff members from the OCU Law School at the OBA where they were filming a video about their volunteer internship program and the interaction

with the Office of the General Counsel and met with the PRT at their annual luncheon meeting and provided information about the new hearing room.

PARALEGAL COMMITTEE RECOMMENDATION TO CREATE PARALEGAL DIVISION

Committee Chair Joseph Bocock reviewed the committee's proposal to amend the OBA Bylaws to create a Paralegal Division within the OBA. The division's mission would be "to provide an established forum for paralegals to improve skills utilized by the legal team in the provision of legal services and to promote interaction among legal assistants and between legal assistants and lawyers to develop better ways to serve the needs of clients and the public." Six states have paralegal divisions. Committee Vice Chair David Poarch helped to answer questions raised by board members. The board voted to issue a "do not pass" recommendation to the committee's proposal that would require a vote of the OBA House of Delegates. President Conger reviewed the history of board action on this proposal two years ago.

PROFESSIONALISM COMMITTEE REQUESTS

Committee Chair Sharisse O'Carroll reported the committee would like to send a letter on OBA letterhead to county bar presidents encouraging counties to adopt a deposition rule similar to the rule adopted in Tulsa and Oklahoma counties. The board voted to file an application with the Supreme Court to make the deposition rule part of the district court rules.

Chair O'Carroll reported the committee recommends the printing of selected Standards of Professionalism on 16" x 20" posters, and she shared the committee's ideas for distribution. The board especially liked the idea of giving copies to new lawyers. The board tabled action until more research is done on cost.

APPOINTMENTS

The board approved:

Oklahoma Bar Foundation — appoint Judge Valerie Couch, Oklahoma City, and Dietmar Caudle, Lawton; reappoint Cathy Christensen, Oklahoma City, and Linda Thomas, Bartlesville, all to three-year terms (expires 12/31/11).

District Attorneys Council - appoint Dennis A. Smith, Arapaho, to complete the unexpired term of Cathy Stocker (expires 06/30/09).

EXECUTIVE SESSION

The Board of Governors voted to meet in executive session to discuss the executive director's annual evaluation.

NEXT MEETING

The board will meet at the Oklahoma Bar Center on Friday, Aug. 22, 2008.

For summaries of previous meetings, go to www.okbar.org/ obj/boardactions

Assistant Federal Public Defender CRIMINAL DEFENSE UNIT 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 Criminal Defense Unit located in Oklahoma City, Oklahoma. The Unit provides services in the representation of indigent persons charged with criminal offenses in the Federal court.

Strong research and writing skills are absolutely necessary. Applicants must possess a commitment to indigent criminal defense, and no less than five years experience as lead counsel in criminal defense litigation. Applicants must be proficient in Word Perfect and ECF. 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, representative writing sample of the applicant's work product, and three professional references to: Gary Farris, Administrative Officer, Office of the Federal Public Defender, Western District of Oklahoma, 215 Dean A. McGee, Suite 109, Oklahoma City, Oklahoma 73102. Applications will be accepted until this position is filled. The Federal Public Defender Organization for the Western District of Oklahoma is an Equal Opportunity Employer.

Invest In a Dream

Oklahoma lawyers are invited to experience the opportunity of investing in a dream — the dream for thousands of Oklahoma children to have a safer and happier childhood. All you need to do to invest in the dreams of children in the Oklahoma foster care system is to become a Fellow of the Oklahoma Bar Foundation. Every year the OBF provides funds to organizations dedicated to helping these children realize their dreams, and your help is needed.

Oklahoma Lawyers for Children ("OLFC") coordinates volunteer lawyers in our state's largest urban area, where 4,200 children are in foster care in Oklahoma County alone. In 2007, the Oklahoma Bar Foundation granted \$25,000 to OLFC to establish a law-student intern program and to help with maintenance of ongoing programs. OLFC is dedicated to providing excellent and free legal representation to every child they represent. All children taken into protective custody in Oklahoma County are represented by OLFC volunteer lawyers in daily show cause emergency hearings, and more than 15,000 children have been represented by OLFC in such hearings since 2000. OLFC volunteer attorneys often go on to represent these same children throughout their entire proceedings in juvenile court, providing a consistent and reassuring presence in an unfamiliar and often frightening situation. Indeed, the outcomes of these proceedings are critical to the children — they dictate where each child will be placed — whether with a parent, another family member, or in foster care. OLFC further assists families in reunification plans, guardianships, and adoptions, as well as other proceedings in juvenile court.

The foundation also granted \$69,365 in 2007 to Tulsa Lawyers for Children ("TLC") for increased staff and materials. TLC is also dedicated to providing excellent representation to children in the foster care system in Tulsa County, where the number of children in foster care reached 1,512 as of April 30, 2008.

With OBF funding, OLFC and TLC have joined forces to draft a Volunteer Lawyers Handbook, which will enable the volunteer lawyers to better navigate through the particular court proceedings involved in juvenile law. Please consider investing in a child's dream today by becoming an OBF Fellow, or upgrading to a Sustaining Fellow or Benefactor Fellow.

The **Oklahoma CASA State Training Conference**, held April 3-4 in Oklahoma City, recently provided training for more than 250 Court Appointed Special Advocates for children, including volunteers, staff members and others who are dedicated to the protection of children.

CASA volunteers are required to complete 12 hours of mandatory training each year that can be fulfilled at this conference. The OBF awarded \$15,000 to CASA in 2007 to help underwrite the costs of the program, where caring individuals from all across the state learn together and inspire each other. The conference focused on the multi-faceted responsibilities CASA volunteers have as they perform their duties as the "eyes and ears of the court," addressing topics such as CASA in the courtroom, CASA relations with DHS, educational advocacy and more.

Keynote speaker Josh Shipp, who was raised in the foster care system, brought a unique perspective to attendees with his message of "Don't Be Average." Mr. Shipp overcame significant challenges when he was raised as a child in the Oklahoma foster care system, and has gone on to become a national speaker who inspires, challenges and entertains; attendees found themselves laughing one moment and wiping away tears the next.

Please consider becoming an OBF Fellow and investing in the dreams of those thousands of Oklahoma children in the foster care system who face incredible challenges early in their lives. To become a Fellow, simply invest the nominal amount of \$100 per year over the next 10 years in the Fellows Program. Your tax-deductible contribution amounts to less than \$10 per month. Special discounts are offered to newer lawyers and are detailed on the enrollment form that follows. It's just that simple ... the return is unlimited, and the benefits are priceless.

In April 1997, Don Nicholson II and D. Kent Meyers, longtime friends and Oklahoma City Lawyers, participated in an OBA Child Watch Tour. Mr. Nicholson had first been introduced to the juvenile system in 1995 when he volunteered for CASA. As a CASA volunteer, he met two little girls who had been placed in foster care after their mother (or her live-in boyfriend) had thrown the youngest girl into the wall, causing brain damage. The girl was only 8 weeks old; her sister was two years old. The mother wanted the children back, which the state was considering, but Nicholson decided to dig into the case a little more. He discovered in the court files, that five years earlier in the same court, three sons had been removed from this mother's care. Nicholson also found that the mother had given birth to another child, a baby girl, shortly before that trial. During the course of that trial involving the three boys, jurors asked if they could terminate the parental rights as to the fourth child, but were told no, because that child was not a part of the case. Jurors terminated the parental rights of the mother as to the three older boys, but six weeks later, their younger sister was dead. The mother had apparently left her outside overnight.

After the earlier case was discovered, the mother gave up her rights to the two little girls and both were adopted by a loving family. Nicholson's experiences as a CASA volunteer led to

experiences us a concern realization of problems of an over-extended juvenile system. Following the Child Watch Tour in 1997, Nicholson and Meyers decided to do something, and Oklahoma Lawyers for Children was formed. OLFC is a non-profit organization driven by passionate and dedicated volunteers who seek to make a difference in the life of a child, one child at a time.

CASA volunteer Buddy Faye Foster is anything but average. In her late 60s, Buddy has accomplished a great deal since becoming a CASA volunteer in 1995. Buddy had already raised her children as a single mom and worked for Boeing on the Saturn 5 project. However, when Buddy lost her 22 year old son while he was serving in the military, it sent her into a deep cycle of grief. During that time, Buddy picked up a magazine and read about the National CASA mission and organization. She felt prompted that CASA work might be something she could do. When she read in a local newspaper that the Oklahoma CASA organization was looking for volunteers, she called and persuaded the local CASA director to let her attend the training classes starting the following Monday, even though she hadn't completed the background check, the initial interview or provided references. Buddy's references and background check were fine and Buddy has been going strong as a CASA volunteer ever since.

Buddy credits being a CASA volunteer to building a bridge of service work that lead her to becoming the first executive director of Oklahoma Lawyers for Children. She currently is chair of the Oklahoma Post Adjudication Review Board, in addition to other committees and groups. Buddy comes to the annual Oklahoma CASA conference every year because, "I always get new information on programs that help in my work." Also, networking and talking with other CASA volunteers in the state help remind Buddy that there are hundreds of success stories here where one person can turn lives around. Buddy knows she has made a difference, "You can do a lot. I get back way more than I ever give. Sometimes someone will walk up to me in the grocery store and say, 'You don't remember me, but you helped get an order with the court so I could get my grandkids." That, in Buddy's opinion, is what Josh Shipp spoke about at the CASĂ State Conference – don't be average.



2008 Oklahoma CASA Association Awards of Excellence winners from left to right: Carmen Miller, Program Director of the Year; Sue Horrocks, Board Member of the Year; Juanita Pollard, Lela Roddy Award; Michael Kulling, Attorney of the Year; Oklahoma CASA Association Executive Director Anna Naukam; Gale and John Flores, Child Advocate of the Year; Tanya Garrett, Volunteer Coordinator of the Year; the Hon. Richard Woolery, Judge of the Year; and Heather Hacker, Caseworker of the Year, and Oklahoma Lt. Governor Jari Askins.

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'Civil Gideon' Oklahoma Style

By Gary A. Taylor

The American civil justice system is experiencing a quiet, nationwide revolution. At issue is the adequacy of the process to ensure fair judgments in certain civil matters which touch on the basic needs of individuals and families. "Civil Gideon" has come to mean that there exists a civil corollary to that established by the U.S. Supreme Court in Gideon v. Wainwright.¹ There are certain nominally "civil" matters that involve interests so basic in our society that litigants in adversarial proceedings, especially low-income parties, should be assured the assistance of counsel. In 2006, the ABA passed resolution 112A, exhorting all levels of government to recognize the importance of these needs and take action:

> RESOLVED. That the American Bar Association urges federal, state and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody as determined by each jurisdiction.

The primary — or at least most obvious — distinction between "civil" and "criminal" Gideon boils down to the possibility of loss of personal physical liberty in the latter context. With one notable exception — "civil" contempt² — the circumstances of concern to the "Civil Gideon" movement do not typically carry the risk of incarceration.³ Oklahoma has recognized that certain proceedings and parties thereto require appointed counsel because the rights involved have been either legislatively or judicially deemed "fundamental": parents threatened with permanent and involuntary loss of parental rights to their children (as well as the subject children); children involved in custody proceedings where credible evidence of abuse and neglect exists; children faced with permanent placement away from their parents; adults or children in mental health commitment cases; and more recently parents (minor parents presenting a special case) who wish to relinquish their rights to adoptive parents; and a number of others more arcane.4

A recent (2006) survey of Oklahoma law conducted under the auspices of Oklahoma's Access to Justice Commission revealed at least 29 separate "civil" circumstances where appointed counsel is required under Oklahoma statutes.⁵ Just as compelling, however, is the myriad of cases which, in the words of then-ABA President Michael Greco:

> "The time has come to ask why this right to counsel has not been extended to lowerincome people facing equally serious civil legal problems—problems that can imprison one just as surely in poverty and despair as behind bars of steel."⁶

By and large, Oklahoma's "civil" appointment requirements involve proceedings affecting fundamental relationships (adoptions; deprived child proceedings); risk of harm to vulnerable Oklahomans (any "custody" proceeding where there is evidence of harm to children resulting from abuse or neglect; protective services for adults) or loss of physical liberty through mental health commitment proceedings. "Civil Gideon" proponents have a broader view of the nature of proceedings that require legal counsel. New York, for example, is considering expanding the right to low-income senior citizens facing eviction or foreclosures.7 The Pennsylvania Bar has adopted a resolution urging the expansion of right to counsel, echoing the ABA resolution. Louisiana has expanded the right to counsel for low-income parents facing loss of parental rights through adoption in

purely "private" cases⁸ (finally catching up with Oklahoma).

"Civil Gideon" supporters have taken their advocacy state to state, relying largely on interpretations of state constitutional due process and equal protection requirements, or convincing legislatures that expansion is proper as a matter of sound public policy. The U.S. Supreme Court precedent for noncriminal right to counsel under the U.S. Constitution is narrowly circumscribed.9 The present constituency of the U.S. Supreme Court likely discourages seeking extension of these "rights" as a matter of federal constitutional law.

OKLAHOMA ON THE FOREFRONT

Oklahoma, in many ways, has been on the forefront of recognizing a civil right to counsel where constraints on physical liberty and interference with certain important relationships were implicated. This is, perhaps, appropriate by virtue of the "open courts" clause contained in Oklahoma's Bill of Rights that, while common in state constitutions, has no federal analog. I recall attending national child welfare conferences in the '80s when Oklahoma's statutory scheme for granting appointed counsel for low-income parents in abuse and neglect (now deprived child) cases was the envy of many so-called "progressive" states, as was our right to jury trial in certain cases. Oklahoma's legislature has been responsive to the demonstrated need to expand the right to appointed counsel. Several years ago I served on the Adoption Law Reform Task Force, when that group recommended, and the legislature established, inter alia, the right to counsel for parents whose children were sought to be adopted without their consent, as well as assuring counsel for the subject children.

Unfortunately, Oklahoma's reach may exceed its grasp when it comes to realization of this promise. As underfunded as our state's defender system may be when it comes to criminal proceedings, the civil side of the right to appointed counsel suffers even more so from the lack of funding, human and other resources, and a comprehensive approach. Furthermore, the problem extends beyond the poorest and the neediest among us. It extends to that ever-dwindling middle class as well. Unrepresented parties at all income levels appear daily in family court, housing disputes and consumer credit claims. Jobs, lives and the futures of entire families their living arrangements, their security, their homes and their possessions often depend on the outcome of these cases. The result is an increase in homelessness, bankruptcy and domestic strife not just among the socalled poorest of the poor, but also those households without the disposable means to hire private counsel but still having too much income to qualify for LSC programs and associated pro bono services. Only through the recognition of a right to counsel in "safety net" cases, coupled with a comprehensive plan to make that right effective, can we resolve the disparity between what exists, on the one hand, in our law books and, on the other hand, the reality within the courtrooms.

Those counties with a public defender system typically use that resource to fulfill this obligation. However, those counties without must depend on their own, usually limited, resources. When these "civil" appointment cases were removed from the purview of the Oklahoma Indigent Defense System a number of years ago, the burden was cast on local courts to either budget for these appointments or to create their own volunteer attorney panels. Either option carries the risk of dilution of the right to effective counsel based on economic or resource limitations at the local level. One often hears the term "unfunded mandate" invoked to describe the burden placed on local courts. Certainly, there is work to be done on the state level to improve that situation.

OPPORTUNITY FOR VOLUNTEERS

Here again is an opportunity for volunteer-minded Oklahoma attorneys to make the civil justice system work more effectively. It is an opportunity to be embraced rather than feared. Many Oklahoma lawyers volunteer on one of the local Legal Aid offices' pro bono panels and thereby increase the capacity of Legal Aid to make, as its mission statement aspires, "equal justice for all a reality." The kinds of cases assigned to these volunteer lawyers include those not yet recognized as obligatory for appointment, but nonetheless have extremely important consequences for lowincome families throughout Oklahoma.

Local courts also need the help of lawyers to assure not only that appointment man-

dates can be followed, but that the parties receive effective assistance. While some courts provide for a fee, these typically cannot cover the cost of truly effective representation. Find out if the court in your county has created a volunteer panel to provide representation in those civil cases where the mandate exists. Then, when called upon, step up and help improve the capacity of these panels to serve the public, whether adequately compensated or not. Our highest calling is to ensure that justice is actually done within our justice system, whether criminal or civil. Those who have done so attest to the immense satisfaction of using their skills for the common good.

Mr. Taylor is the executive director of Legal Aid Services of Oklahoma and an OBA Access to Justice Committee member.

1. 372 U.S. 335 (1963).

2. Oklahoma requires appointment of counsel in any civil contempt proceeding where incarceration is a possible remedy and the respondent is unable to afford counsel. Rule 29, Rules for the District Courts of Oklahoma, Title 12, Ch. 2, App. *See also Walker v. McLain*, 758 F.2d 1181 (10th Cir. 1985).

3. *Cf.* "civil commitment" proceedings, where, loss of physical liberty is certainly implicated, albeit not "incarceration" *per se.*

4. For example, a court must provide a pregnant, unemancipated minor with "counsel" upon her request, when approval for an abortion is sought. 63 O.S. ' 1-740.3(B).

5. This listing included as separate requirements appointments for different parties within the same type proceeding, such as low-income parents *and* the children involved in "deprived child" cases.

6. Quoted in Shriver Center press release at www.povertylaw.org/about-us/ newsroom/news-releases/

CRJIAgReleaseProductionJuly312006. pdf (July 31, 2006).

7. New York Law Journal online, www. nylj.com, March 11, 2008.

8. Louisiana Children's Code, Art. 1245.1.

9. See, e.g., Lassiter v. Dept. of Soc. Serv., 452 U.S. 18 (1981). There, even where permanent severance of parental rights was at issue, the court refused to adopt a *per se* rule.

10. Okla. Const., Art. 2, Sec. 6

Oklahoma Bar Journal Editorial Calendar

2008

September Bar Convention Editor: Carol Manning

■ October Guardianship Editor: Stephen Barnes barneslaw@alltel.net Deadline: May 1, 2008

- November Technology/Practice Management Editor: Melissa DeLacerda melissde@aol.com Deadline: Aug. 1, 2008
- December Ethics & Professional Responsibility Editor: Martha Rupp Carter mcarter@tulsa-health.org Deadline: Aug. 1, 2008

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

2009

- January Meet Your OBA Editor: Carol Manning
- February
 Immigration
 Editor: John Munkacsy
 johnmunk@sbcglobal.net
 Deadline: Oct. 1, 2008
- March Privacy Editor: Melissa DeLacerda melissde@aol.com Deadline: Oct. 1, 2008
- April Law Day Editor: Carol Manning
- May Oil & Gas and Energy Resources Law Editor: Julia Rieman rieman@enidlaw.com Deadline: Jan. 1, 2009
- August Bankruptcy Editor: Judge Lori Walkley lori.walkley@oscn.net Deadline: May 1, 2009
- September Bar Convention Editor: Carol Manning
- October Criminal Law Editor: Pandee Ramirez pandee@sbcglobal.net Deadline: May 1, 2009
- November Family Law Editor: Leslie Guajardo lguajardo@swolaw.net Deadline: Aug. 1, 2009
- December Ethics & Professional Responsibility Editor: Jim Stuart jtstuart@swbell.net Deadline: Aug. 1, 2009

YOUNG LAWYERS DIVISION

WANT TO GET INVOLVED? THEN RUN FOR THE OBA/YLD BOARD OF DIRECTORS

OFFICERS

Chairperson-Elect

Any member of the Division having previously served for at least one year on the OBA/YLD Board of Directors.

Term: One-year term (Jan. 1, 2009 - Dec. 31, 2009) The Chairperson-Elect automatically becomes the Chairperson of the Division for 2010.

Treasurer

Any member of the OBA/ YLD Board of Directors may be elected by the membership of the Division to serve in this office.

Term: One-year term (Jan. 1, 2009 - Dec. 31, 2009)

Secretary

Any member of the OBA/ YLD Board of Directors may be elected by the membership of the Division to serve in this office.

Term: One-year term (Jan. 1, 2009 - Dec. 31, 2009)

BOARD OF DIRECTORS — TWO-YEAR VACANCIES

The following directorships are open for election for a two-year term from Jan. 1, 2009 - Dec. 31, 2010

Vacancies will be in:

District No. 1: Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties

District No. 3: Oklahoma County

District No. 5: Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties

District No. 6: Tulsa County (two seats)

District No. 7: Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties

District No. 9: Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties

At-Large: Any county (two seats)

At-Large Rural: Any county other than Tulsa County or Oklahoma County

BOARD OF DIRECTORS – ONE-YEAR VACANCY

The following directorship is open for election for a oneyear term from Jan. 1, 2009 to Dec. 31, 2009.

Vacancy will be in:

District 4: Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties

NOMINATING PROCEDURE:

Article 5 of the Division Bylaws requires that any eligible member wishing to run

for office must submit a nominating petition to the Nominating Committee. The petition must be signed by at least ten (10) members of the OBA/YLD. The original petition must be submitted by the deadline set by the Nominating Committee Chairperson. A separate petition must be filed for each opening, except that a petition for a directorship shall be valid for one year and two year terms and at large positions. A person must be eligible for division membership for the entire term for which elected.

ELIGIBILITY:

All OBA members in good standing who were admitted to the practice of law 10 years ago or less are members of the OBA/YLD.

Membership is automatic — If you were first admitted to the practice of law in 1998 or later, you are a member of the OBA/YLD!

ELECTION PROCEDURE:

Article 5 of the Division Bylaws govern the election procedure. In October, a list of all eligible candidates and ballots will be published in the OBJ. Deadlines for voting will be published with the ballots. All members of the division may vote for officers and at-large directorships. Only those members with OBA roster addresses within a subject judicial district may vote for that district's director. The members of the Nominating Committee shall only vote in the event of a tie. Please see OBA/YLD Bylaws for additional information.

DEADLINE:

Nominating petitions, accompanied by a photograph and brief resume (in electronic form) for publication in the OBJ, must be received by the Nominating Committee Chairperson no later than 5 p.m. **Friday, Sept. 19, 2008**, at the following address:

Christopher Camp Nominating Committee Chairperson 300 ONEOK Plaza 100 W. Fifth St. Tulsa, OK 74103-4212 **E-mail:** chriscamp@h2law.net

TIPS FROM THE NOMINATING COMMITTEE CHAIRPERSON:

• The YLD's Web site has a sample nominating petition to give you an idea of format and information required by OBA Bylaws (one is also available from the nominating committee)

• Signatures on the Nominating Petitions do not have to be from young lawyers in your own district (the restriction on districts only applies to voting)

• Take your petition to local county bar meetings or to the courthouse and introduce yourself to other young lawyers while asking them to sign — it's a good way to start networking

• You can have more than one petition for the same position and add the total number of original signatures — if you live in a rural area, you may want to fax or e-mail petitions to colleagues and have them return the petitions with original signatures by snail mail

• Don't wait until the last minute — I will only accept faxes or e-mails of the petitions IF the original petitions are postmarked by the deadline

• Membership eligibility extends to Dec. 31 of any year which you are eligible

• Membership eligibility starts from the date of your first admission to the practice of law, even if outside of the State of Oklahoma

• All candidates' photographs and brief biographical data are required to be published in the OBJ. All biographical data must be submitted by e-mail or on a disk, NO EXCEPTIONS. Petitions submitted without a photograph and/ or brief resume are subject to being disqualified at the discretion of the Nominating Committee
HANDBOOK OF SECTION 1983 LITIGATION, 2008 EDITION David W. Lee Lee & Gooch Oklahoma City



9780735574656 - Paperback - 1,169pp - \$275

"Essential... a gem for civil litigators who need a quick reference"

-The Federal Lawyer, August 2007

ou can spend days researching the voluminous commentary on Section 1983 litigation—or you can order a copy of *Handbook of Section 1983 Litigation* by David W. Lee.

Here are five reasons why *Handbook of Section* **1983** *Litigation* is the one reference you will always want in your briefcase:

- 1. Improve your issue spotting skills
- 2. Simplify and expedite legal research
- 3. Prepare a winning litigation strategy
- 4. Locate controlling authority quickly at a hearing, deposition, or negotiation
- 5. Interpret key legal decisions correctly

If you need the short answer to a Section 1983 question, and you can't afford to waste time running down the wrong research path, turn to the **Handbook** of Section 1983 Litigation, 2008 Edition. This essential guide is designed as the practitioner's desk book. It provides quick and concise answers to issues that frequently arise in Section 1983 cases, from police misconduct to affirmative actions to gender and race discrimination. It is organized to help you quickly find the specific information you need whether you're counsel for the plaintiff or defendant.

Act now and add the best single volume on Section 1983 litigation to your library!





August

- 14 OBA Work/Life Balance Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Melanie Jester (405) 609-5280
- 15 OBA Lawyers Helping Lawyers Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tom C. Reisen (405) 843-8444
- 19 OBA Civil Procedure Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James C. Milton (918) 591-5229

OBA Mock Trial Committee Meeting; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066

20 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

Calendar

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11

22 OBA Board of Governors Meeting; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

> Board of Bar Examiners Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dana Shelburne (405) 416-7021

OBA Women in Law Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Amber Nicole Peckio (918) 549-6747

25

29

Hudson Hall Wheaton Inn New Member Orientation Meeting; 12 p.m.; Summit Club/Renaissance Room 31st floor; Contact Michael Taubman (918) 260-1041

OBA Access to Justice Committee Meeting; 10:30 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675



September

OBA Awards Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Gary Clark (405) 385-5146

OBA Paralegal Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Joseph Bocock (405) 552-2256

OBA Board of Editors Meeting; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Melissa DeLacerda (405) 624-8383

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

OBA Professionalism Committee Meeting;

4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse Lynn O'Carroll (918) 584-4192

The Oklahoma Bar Journal

sept. cont'd

12 Board of Bar Examiners Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dana Shelburne (405) 416-7021

> **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4600 or Noel Tucker (405) 348-1789

- 16 OBA Civil Procedure Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James C. Milton (918) 591-5229
- 17 OBA Uniform Laws Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 18 OBA Legal Intern Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Terrell H. Monks (405) 733-8686
- 19 OBA Board of Governors Meeting; Ardmore; Contact: John Morris Williams (405) 416-7000
- 22 OBA Alternative Dispute Resolution Section Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Ann Dudley Marshall (405) 848-5715
- 23 OBA Law-related Education Committee Meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark (405) 232-4271
- 24 OBA Clients' Security Fund Committee Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center; Contact: Michael Charles Salem (405) 366-1234

OBA Member Services Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Keri Williams Foster (405) 385-5148

27 OBA Young Lawyers Division Committee Meeting; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kimberly Warren (405) 239-7961



October

- 2 OBA Work/Life Balance Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Melanie Jester (405) 609-5280
- 9 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
- 10 OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4600 or Noel Tucker (405) 348-1789
- 21 OBA Civil Procedure Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James C. Milton (918) 591-5229
- 23 OBA Legal Intern Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Terrell H. Monks (405) 733-8686
- 24 **OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

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

FOR YOUR INFORMATION

Civil Appeals Court Judge Sworn In

Deborah Ann Browers Barnes of Tulsa was recently sworn in as an Oklahoma Court of Civil Appeals judge. Prior to her appointment, she served as staff attorney for Retired Justice Ralph Hodges from 1985-1989, was in private practice in Tulsa and served as corporate attorney for Transok Inc. and general counsel for ONEOK Inc. and Seminole Energy Services LLC.

"Her breadth of experience makes her a great fit for the Court of Civil Appeals, and I know she will serve the court with honor and integrity," said Gov. Henry.



Oklahoma Court of Civil Appeals Judge Deborah Barnes dons her judicial robe after taking her oath as judge.

Hughey Appointed to Canadian County Bench

Gov. Brad Henry recently appointed Bobby Wayne Hughey of El Reno to an associate district judge position in Canadian County.

Judge Hughey graduated from the OU College of Law in 1985. He has been employed in private practice since 1991, during which time he has worked in a wide variety of legal cases. He has also served Canadian County as a guardian ad litem in child custody and visitation disputes and been actively involved in the Canadian County drug court program.

Prior to his current law partnership, Judge Hughey worked for John Wheatley and Associates and as served as the city attorney for the City of Yukon.



Levit Named TU Law Dean

The University of Tulsa has named Janet Koven Levit as dean of the TU College of Law. Dean Levit has served as interim dean since October 2007.

The appointment makes Dean Levit the first female dean in the college's history as well as the first dean drawn from among the college's faculty since the 1960s.

TU President Steadman Upham said the leadership Dean Levit has provided as interim dean made the decision to elevate her status an easy one.

"In a relatively short time, Janet Levit has guided the law school to impressive successes and through significant milestones," Upham said. "Dean Levit brings to her new appointment many distinguished qualities including leadership, scholarship and a focus on outreach that will play crucial roles in advancing TU's reputation among the nation's law schools. We are excited by the potential the college has under her stewardship."



OBA Vice President Mike Mordy (center) meets with attorney Zhou Chuan Bao and Professor Wan Guo Hua at a reception held in their honor.

OBA Hosts Visiting Chinese Students and Lawyers

The Oklahoma Bar Association hosted a reception and dinner last month for the 30 Chinese students and lawyers participating in OCU Law's Certificate in American Law Program. OBA President Bill Conger presented the group with a proclamation. The program included classes on legal ethics and the role of attorneys in the American legal system, as well as an introduction to American legal research and writing and American trial practice. The Chinese students also had several professional outings to introduce them to the Oklahoma legal profession, including tours of local law firms and meetings with lawyers over lunch.

PACE Institute Attracts Teachers from across Oklahoma

Oklahoma educators attended the 19th annual PACE Institute, funded by a grant from the Oklahoma Bar Foundation and administered by the OBA's Law-related Education program. The institute was held July 13-17 in Midwest City. During the week, participants examined the various aspects of the three branches of the government. Court visits, guest speakers and interactive workshops including a session on the executive branch presented by Attorney General Drew Edmondson were scheduled. Frosty Troy, founding editor of The Oklahoma Observer and member of the Oklahoma Journalism Hall of Fame, served as the keynote speaker for the institute's opening reception.



OBA Law-related Education Committee Chair Jack G. Clark Jr. visits with Norman teacher Charlie Bevers and LRE Coordinator Jane McConnell at the PACE Institute.

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Sept. 1 for Labor Day.



OBA Member Reinstatements

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

Elliot Paul Anderson OBA No. 21098 2990 Bissonnet St., Apt. 11109 Houston, TX 77005

Kerry L. Anderson OBA No. 13311 668 Quail Lane Coppell, TX 75019

William Terry Flaugher OBA No. 2971 4409 Rock Canyon Road Edmond, OK 73025



Fastcase Offers New Printing Feature

The OBA-endorsed Fastcase legal research service has just launched a batch printing feature, which allows users to print multiple cases at once using Fastcase's dual-column printing service. During the beta of this feature, up to 20 documents at a time can be printed either from the search results page, or as cases are read. Fastcase is a free benefit to all OBA members. For more information about the new feature, go to www.okbar.org.

Indian Law Section Presents Scholarships

The OBA Indian Law Section recently awarded three law school graduates \$500 scholarships to cover the cost of attending a bar exam review course. These scholarships were awarded during the Sovereignty Symposium held in June. The scholarships were awarded based on academic merit, expression of need and commitment to practicing Indian law in Oklahoma. Pictured are (from left) Indian Law Section Chair Matthew Morgan,



OCU graduate Jeffrey Taylor, OU graduate Ash Mayfield, Indian Law Section Secretary Debra Gee and Indian Law Section Chair-Elect Joe Williams. The third scholarship was awarded to TU graduate Brandy Inman. Kalos

udge Robert H. Henry was recently selected for induction into the Oklahoma Hall of Fame. He will join 621 others who have been inducted since 1928. Judge Henry has served in each branch of government. He was elected to the Oklahoma Legislature at age 23. He was elected attorney general in 1986 and was re-elected in 1990, becoming the state's first attorney general to run unopposed. From 1991-1994, he was dean and professor of law at OCU School of Law. In 1994, he was appointed to the U.S. 10th Circuit Court of Appeals. He became the circuit's chief judge in January. The 81st annual Oklahoma Hall of Fame will be Nov. 12 in Oklahoma City at the Cox Convention Center.

The Oklahoma County Bar Association presented its annual awards at a July luncheon. Recipients were Michael E. Krasnow, **OCBA** Professional Service Award: Elizabeth Cates and Melissa Hackney, OCBA Community Service Award; Kenneth Nance, OCBA Pro Bono Award; Voices for Children Committee, OCBA **Outstanding Committee** Award; Leslie Guajardo, OCBA Briefcase Award; Judge Vicki L. Robertson, Bobby G. Knapp Bar Leadership Award; John Heatly, OCBA Special Recognition Award; Brandon Long, YLD Outstanding Director Award; Michael Mullins, Friends of the YLD Award; and Bill Conger, YLD Beacon Award. Numerous 50- and 60-year membership awards were also presented.

7illiam H. Hoch III was **V** recently appointed to the American Bar Association's Standing Committee on the Law Library of Congress. Mr. Hoch's three-year appointment will begin in August. Since 1932, the committee has served as the ABA's connection to and voice of the legal profession concerning the continued development and effective operation of the Law Library of Congress. The Law Library of Congress is an important component in spreading the rule of law around the world.

M. Joe Crosthwait was appointed a member of the American Bar Association's Standing Committee on Law and National Security Advisory. The one-year appointment will begin with the adjournment of the ABA's 2008 annual meeting in August. The committee conducts studies, sponsors programs and conferences, and administers working groups on law and national security-related issues.

Six OBA members were recently named The

Journal Record Achievers under 40 – Class V. They are Stacy Acord with the Tulsa firm of McDaniel, Hixon, Longwell & Acord; Christopher L. Camp with the Tulsa firm of Herrold, Herrold & Co.; Christine Cave with the Oklahoma City firm of Meyer Cave; Briana Ross with Guaranty Abstract Co. in Tulsa; **Paige N. Shelton** with the Tulsa firm of Conner & Winters; and **Douglas** J. Sorocco with the Oklahoma City firm of Dunlap, Codding & Rogers. Each year the publication selects 40 individuals under age 40 who have accomplished much and contributed significantly to their communities and state.

V. Burns Hargis has been named to the Chesapeake Energy Corp. board of directors effective Sept. 15. He will serve until the 2009 annual shareholder meeting, then stand for election by shareholders. Mr. Hargis currently serves as the president of OSU and the OSU system. He graduated from OSU in 1967 and with an accounting degree and received his J.D. from OU in 1970.

Anne B. Sublett was presented the Lion of the Bar Award by the Council Oak/Johnson-Sontag American Inn of Court at the annual combined Tulsa Inns of Court Banquet. The award's official description says, "Through a lifetime of contributions to the legal profession, the community, and the law, and a commitment to the highest principles of excellence and integrity, the Council Oak/Johnson-Sontag Inn annually honors this service and recognizes a lawyer who has enriched the lives and careers of generations of attorneys who stand proudly on the recipient's shoulders as a Lion of the Bar."

Kerrilee Kobbeman recently joined McPherson College's board of trustees. Following her graduation from McPherson in 1997, Ms. Kobbeman received her J.D. from University of Arkansas-Fayetteville in 2005, where she graduated summa cum laude. At McPherson, she was a presidential scholar, played volleyball and women's basketball, and was a Who's Who student. She serves as an attorney with Conner and Winters in Fayetteville, Ark.

Benton T. Wheatley of Austin, Texas, has been elected to membership in the Fellows of the Texas Bar Foundation. Fellows of the foundation are selected for their professional achievements and their demonstrated commitment to the improvement of the justice system throughout the state of Texas.

James L. Hall Jr. has been named posthumously an Emeritus Fellow of the American Health Lawyers Association. Mr. Hall served as president of the AHLA from 1995-1996 and was the architect of the dispute resolution system still operated by the AHLA for the healthcare industry. The Fellows are made up of former AHLA presidents, board members and committee members who have been active within the association in past years and who represent a wide range of professional backgrounds, experience and expertise.

T. Douglas Stump was recently elected secretary of the American Immigration Lawyers Association. In his position with AILA, he will work with U.S. business leaders and U.S. senators and representatives to draft comprehensive immigration legislation.

rew Neville has written a tribute to the contributions made by his family and his community in *Jack's* 45th, a history recently released by the Oklahoma Heritage Association. *Jack's* 45th tells the story of Oklahoma and World War II history. It follows the footsteps of Drew's father, Jack Neville, from Adair through the battles fought by Oklahoma's 45th Division Thunderbirds. The book also traces war on the home front, telling the story of Drew's mother, Leota, and others who worked and waited for the end of the war in Oklahoma City. Leota worked at the McDonald Aircraft Plant in Midwest City, helping to produce more than 3,000 C-47s. Jack's 45th gives readers interesting detail on the beginnings of Tinker Air Force Base and the community's support of the war effort.

harles L. Schwabe, Oklahoma judge turned author, released a historical fiction novel titled *Cedar Box Memories*. The story uncovers a family's forgotten origins, bringing to life the tale of their ancestors' emigration from England to early America. The book is available at any bookstore nationwide or can be ordered through the publisher at www.tatepublishing.com/ bookstore. Judge Schwabe obtained his bachelor's degree from OSU in 1965, earned a I.D. from TU in 1972 and served as an associate district judge.



ee Mee & Hoge an-Lnounces that **Kraettli** Q. Epperson and Robert **V. Varnum** have joined the firm. The new name of the firm is Mee Mee Hoge & Epperson. Mr. Epperson joins the firm as a partner. He holds a B.A. in political science from OU, and also holds a M.S. degree in urban and policy sciences from the State University of New York at Stony Brook. His law degree was earned from OCU. His primary focus is on real estate matters including condemnations, ownership disputes, title curative matters and subdivision restrictions development and enforcement. In addition, he has taught Oklahoma land titles at OCU since 1982, has served as the chairman of the **OBA** Title Examination Stan-

dards Committee for over 15 years, and frequently speaks and writes on real estate law. Mr. Varnum will serve in an of counsel capacity with the firm. He is a graduate of OBU, and his law degree is from Georgetown University Law Center. He will enhance the firm's estate planning, trust, trust administration and probate practice areas, bringing more than 15 years of experience in these fields. Other information concerning the firm may be found at www.meehoge.com.

Kelly A. Smakal and Justin B. Munn announce that they have joined each other in the practice of law under the firm name of Smakal Munn PC. The firm maintains a general civil litigation practice with an emphasis in domestic and probate matters. Ms. Smakal earned her J.D. from the University of Arkansas School of Law in Fayetteville in 1996. Her practice is concentrated in all areas of domestic and probate matters, including guardianships and adoptions. Mr. Munn earned his J.D. from Northwestern School of Law of Lewis and Clark College in Portland, Ore., in 1998. His practice emphasizes civil litigation, including domestic and probate matters, and domestic mediation services. The firm's offices are located at 320 S. Boston, Suite 1130, Tulsa, 74103; (918) 582-3400; Fax: (918) 582-3402; ksmakal @cox.net and justinmunn @cox.net. Find them soon at www.smakalmunn.com.

The Crosthwait Law Firm of Midwest City an-

nounces that **Aaron M. Arnall** has joined the firm as an associate attorney. Mr. Arnall received his B.A. cum laude from OBU in 2004 and his J.D. from OCU in 2007. He was formerly with the law firm of Goza, Washington & Coleman PLLC.

rummond Law PLLC announces that **Harvey** Grauberger has joined the firm as an associate. Mr. Grauberger received his B.S. from Northeastern State University in 2003, and his J.D. from TU in 2007, where he was a member of the Order of the Curule Chair, Phi Delta Phi, Tulsa Journal of Comparative and International Law. His practice will focus on civil litigation, commercial transactions, corporate and banking law.

Dert Marshall was recently **B**named president of Blue Cross and Blue Shield of Oklahoma. Mr. Marshall has been with the company since 1996, most recently serving as vice president of external operations. Before joining the not-for-profit insurer, he was vice president and director of operations for another Oklahoma insurance company, had a private law practice and worked for the Oklahoma Insurance Department. He earned an economics degree and his J.D. both from OU. He serves on the boards of the State Chamber. Oklahoma High Risk Pool and the Life and Health Insurance Guaranty Association.

Crowe & Dunlevy recently announced the addition of Linda K. Greaves, who will serve of counsel in the firm's labor and employment practice group. Ms. Greaves' other areas of practice include civil rights litigation, law, torts, licensing, ad valorem taxation, appellate practice and Oklahoma election law. She previously served as the chief assistant district attorney for the civil division of Tulsa County. Before beginning her law career, she was employed by the Department of Human Services and the Alcohol **Beverage Laws Enforcement** Commission. She earned her **B.S. from West Texas State** University in 1972 and her J.D. from TU in 1994.

auren L. Fuller has joined L the Academy of Managed Care Pharmacy as assistant director of government relations. Her primary responsibilities for AMCP include representing the academy and advocating on issues of importance to managed care pharmacy on Capitol Hill and in related forums. For the past seven years, her focus has been on health-related issues. Prior to her work on the Hill, Ms. Fuller was with three Washington, D.C. law firms and with the Legal Services Corporation. She has also served as an administrative judge for the Merit Systems Protection Board. She may be reached at (703) 683-8416, ext. 673, or at lfuller@amcp.org.

Pray, Walker, Jackman, Williamson & Marlar has named **Patrick R. Busby** an associate of the firm. Mr. Busby is a graduate Cumberland School of Law and a member of the Alabama bar. He will focus his litigation practice in business, real estate and tort disputes in both state and federal courts. He will practice in the firm's Tulsa office.

Mahaffey & Gore an-nounces that **Richard L. Rose** has joined the firm as an associate. Mr. Rose's litigation practice encompasses energy law, environmental law, residential disclosure, contract disputes, insurance coverage, products liability and other commercial controversies, at both the trial and the appellate levels. In addition to his civil litigation work, he is the chair-elect of the OBA Young Lawyers Division, past chair for the Oklahoma County Bar Association Young Lawyers Division and chair of the **OBA** Disaster Relief Committee. Mr. Rose received a B.S. from Southern Nazarene University and a J.D. from OCU.

A Daniel Woska & Associates PC announces its affiliation with The Hankins Law Firm in Houston, Texas. Grover G. Hankins is primarily engaged in environmental litigation, including toxic tort cases nationwide. Mr. Hankins has affiliated with the Woska firm in an of counsel capacity, in conjunction with a variety of cases that their two firms are handling.

GableGotwals announces that Tammy D. Barrett has joined the firm in the Tulsa office as of counsel. Ms. Barrett served as judicial law clerk to Judge Gregory K. Frizzell in the U.S. District Court for the Northern District of Oklahoma from 2007-2008. She also served as judicial law clerk to Judge Sam A. Joyner from 1995-2007. Ms. Barrett earned her B.S. with honors in English and social science from Emporia State University in 1990. She obtained her J.D. with honors from OU in 1990. Ms. Barrett's emphasis is in the areas of complex litigation, federal practice and appellate practice.

C teven R. Mackey was **J**recently promoted to executive vice president, secretary and general counsel of Helmerich & Payne Inc. Mr. Mackey joined the company in 1986 and has served as vice president and general counsel since 1988. He is a 1972 graduate of OSU and a 1976 graduate of the University of Notre Dame Law School. He presently serves as a Trustee of the Oklahoma Bar Foundation and formerly served a three-year term on the OBA Board of Governors.

Rosenstein, Fist & Ringold announces that Matthew **J. Ballard** has joined the firm as an associate attorney. Mr. Ballard received a B.A. in 1999 and a J.D. in 2002, both from OU. He was previously an Oklahoma County assistant district attorney and with Carle & Higgins in Claremore. His primary practice areas are education law and civil litigation. Rosenstein, Fist & Ringold has offices located at 525 S. Main, Suite 700, Tulsa, 74103 and 2801 N. Lincoln Blvd., Suite 224, Oklahoma City, 73105; www.rfrlaw.com.

lassWilkin PC in Tulsa Jannounces that M. Scott Hall has joined the firm as an associate attorney. Mr. Hall graduated from the University of Arkansas with a B.S. in business administration magna cum laude. He received his J.D. from the University of Arkansas, magna cum laude in 2006. Mr. Hall practices in the areas of corporate and business organization, commercial and securities, health law and commercial and civil litigation.

hickasaw Nation Gov. Bill Anoatubby recently named Matthew L. Morgan as interim gaming commissioner for the tribe. The gaming commissioner serves as the primary regulator of the Chickasaw Nation's gaming operations. Mr. Morgan currently serves on the executive committee of the Board of Directors of the National Indian Gaming Association. He is chair of the OBA Indian Law Section. Mr. Morgan earned his J.D. from the OU College of Law and a bachelor of business administration with a minor in Native American studies from the Price School of Business at OU.

Doerner, Saunders, Daniel & Anderson LLP has named Kristen L. Brightmire as the leader of the firm's 10-attorney employment law practice group. Ms. Brightmire is an adjunct settlement judge for the U.S. District Court, Northern District of Oklahoma in labor, employment and benefits cases, and the editor of the Oklahoma Employment Law Letter. Ms. Brightmire began her career with Doerner, Saunders in 1990 following graduation from the TU law school.

allas-based U.S. Risk Insurance Group Inc. named J. Brian Hobbs as president of Professional Claims Managers Inc., a wholly owned subsidiary of U.S. Risk and the company's specialty third-party claims administrator. Mr. Hobbs joined Professional Claims Managers Inc. in 1998 and served in the capacity of senior claims counsel and most recently executive vice president. He holds a Texas adjuster's license - property/ casualty. He graduated from OCU School of Law in 1994.

Jared Aden Looper recently joined the Office of the Attorney General as an assistant attorney general in the criminal appeals division. Mr. Looper is a 2006 Vanderbilt graduate. He previously worked as an associate at Foliart, Huff, Ottaway and Bottom.

Burch & George PC announces that Chris Smith has joined the firm as of counsel. He will practice in the areas of divorce, custody, general civil litigation, business litigation and formation, education law and estate planning. Mr. Smith was previously an associate with Burnett & Brown PLLC. He is a graduate of Oklahoma Christian University and earned his law degree from OU.

The Oklahoma City firm of Edmonds, Cole, Hargrave, Givens & Woodson PC has changed its name to Edmonds Cole Law Firm.

cAfee & Taft an-Manounces the additions of Charles S. Plumb as a shareholder and A. Clarise Ashworth and Lincoln C. McElroy as associates. Mr. Plumb most recently was a partner with Tulsa-based Doerner, Saunders, Daniel & Anderson for 26 years. His practice focuses on counseling employers on compliance with a broad range of state and federal employment laws and regulations and educating management on best practices for avoiding disputes arising from the employer/employee relationship. He is a graduate of Southern Methodist University and the Ohio State University School of Law. Ms. Ashworth practices in the areas of general civil litigation, complex business litigation and environmental litigation. She most recently worked as a litigation associate at the law firm of Hershenson, Carter, Scott & McGee in Norwich, Vt. After earning her bachelor's degree from OU in 2004, she went on to graduate summa cum laude with her master of science degree in environmental law and cum laude with her J.D. from Vermont Law School in 2007. Mr. McElroy's state and federal litigation practice is primarily concentrated in the areas of commercial litigation, oil and gas litigation, and the representation of management in employment-related disputes involving discrimination, wage and hour claims, wrongful termination, employment contracts and unemployment claims. Prior to joining McAfee & Taft and relocating to Tulsa, he worked as a litigation associate with the Oklahoma City law firm of Hartzog Conger Cason & Neville for four years. Mr. McElroy is a 2004 honors graduate from the OU College of Law, where he was named to the Order of the Coif.

7. Gordon Harris has been named a state's attorney in the Tulsa West Child Support Enforcement office. Mr. Harris received his B.A. in philosophy from OU and his J.D. with dean's honors from Washburn University School of Law. Prior to joining the Tulsa West office, he was a case manager with OKDHS and an associate attorney in a practice focusing on employee benefits law. The Tulsa West Child CSE office is located at 440 S. Houston, Ste. 401, Tulsa, 74127-8927.

Terry Gust is now of counsel with Rice & Reneau in Midwest City. He may be reached at 1401 S. Douglas Blvd., Ste. A, Midwest City, 73130; (405) 733-2775; Fax: (405) 737-7446.

The Oklahoma Tourism and Recreation Department named **Kris Marek** the director of Oklahoma State Parks. Ms. Marek has held numerous roles within the State Parks Division over the last 33 years, most recently serving as interim director of state parks and director of conservation and planning. She holds a B.A. in recreation from Purdue University, masters of regional and city planning from OU, as well as a J.D. from OCU.

ndrews Davis announces **H**that John Frederick ("Fred") Kempf Jr. has joined the firm as a shareholder. His practice areas include real property, title law, commercial transactions, oil, gas and minerals, probate and estate planning, telecommunications and dispute resolution. He obtained his undergraduate degree from OSU and his J.D. from OCU. Prior to joining the Andrews Davis firm, Mr. Kempf practiced with the firm of Pate, Kempf and Knarr PC.

CAnany, Van Cleave & **IVI** Phillips PA announces that Jodi J. Fox has joined the firm as an associate in the Kansas City, Kan., office. Ms. Fox joins the worker's compensation defense practice group. She earned her J.D. and her M.A. in 1998 from TU and her bachelor of arts degree in 1995 from Luther College in Decorah, Iowa. Ms. Fox began her practice in Oklahoma and now also handles cases throughout Kansas and Missouri.

The Center for Education Law announces that **Craig A. Crimmins** has joined the firm as a senior associate attorney. Mr. Crimmins earned a bachelor's degree from Cameron University and his J.D. from OU. He served as an officer and judge advocate in the U.S. Air Force from 1999-2004. In 2004, he returned to Oklahoma to take a position as a staff attorney for the Oklahoma State School Boards Association, serving in that position until June 2008. The Center for Education Law is a private law firm which limits its practice to representing Oklahoma schools.

Loyd Brent Palmer recently became an associate with Colclazier & Associates in Seminole. He earned his J.D. from OCU in 2007 and holds bachelor's degrees in political science, history and film studies, all from OU.



Chirley Cox gave the **J**commencement address at St. Gregory's University's spring graduation ceremony. Ms. Cox, a legal services developer for the state Department of Human Services' Aging Division, has been an advocate for those on the margins of society for more than 20 years. She is also a frequent speaker on issues involving end-of-life decisions, senior fraud, the legislative process and advocacy for the elderly. She also has a long list of recent honors, including the 2007 Latino Community Development Agency Advocate of the Year Award, the Central Oklahoma Community Forum's 2007 Labor/Religion Community Service Award, and the OBA's 2005 Outstanding Service to the Public Award.

Sheldon J. Sperling, U.S. Attorney for the Eastern District of Oklahoma, delivered the keynote address at the Oklahoma Law Enforcement Officer's Memorial Service in May. The service honored Oklahoma law enforcement officers who died in the line of duty while serving their communities and the citizens of Oklahoma. The service drew hundreds of law enforcement officers. surviving victim family members and dignitaries. The commemorative meeting was held at the Oklahoma Law Enforcement Memorial at the Department of Public Safety headquarters in Oklahoma City.

Tudge James Francis Gillet addressed the Nebraska Senate Committee on Education in opposition to LB 1141, for an act relating to schools to provide for evaluation of students in schools which elect not to meet state accreditation or approval requirements, to harmonize provisions and to repeal the original section. LB 1141 proposed additional regulations on home-educated students. One of five major presenters, his comments focused on the due process and equal protection ramifications of the proposed legislation and the importance of empirical data to support any state intrusion upon personal liberties. He appeared in his personal capacity.

Timothy C. Dowd presented the Oklahoma point of view in a five-state discussion of the differences in oil and gas law at the American Association of Petroleum Landman Annual Institute in Chicago. The panel discussion involved oil and gas attorneys from Texas, West Virginia, New York and Pennsylvania. He also addressed the AAPL assembly on the title aspects of Oklahoma probate procedures.

John D. Rothman provided a CLE presentation to the Oklahoma Association of Defense Counsel at its annual meeting in Dallas on the topics of "Advocacy of Mediation: Redundant Ritual or Useful Opportunity" and "Recommended Settlement Figures, Mediation Numbers and other Post-Mediation Mechanisms to Finalize Settlement."

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:

Melissa Brown Communications Dept. Oklahoma Bar Association P.O. Box 53036 Oklahoma City, OK 73152 (405) 416-7017 Fax: (405) 416-7001 or E-mail: barbriefs@okbar.org

Articles for the Sept. 13 issue must be received by Aug. 25.



IN MEMORIAM

Robert Wayne Beal of Chickasha died April 15. He was born Dec. 30, 1949, in Wasco, Calif., and grew up in Texas. **He entered the U.S. Air Force while he was still in high school.** After serving in the Air Force, he finished his high school education. He later attended OU law school, where he earned a law degree in 1984. He moved to Chickasha in 1985 and served as assistant district attorney for Comanche and Grady counties.

Bob J. (B.J.) Cooper of Oklahoma City died April 21. He was born Jan. 28, 1935, in Shawnee. He grew up in Tecumseh, where he graduated high school as class president and valedictorian when he was 16 years old. He attended OU and was active in the Ruf-Neks Club. He later earned a combined business and law degree from OU. During his senior year of law school, he began working for the firm of Butler, Rinehart and Morrison, and accepted a permanent position there after graduation. He was named senior partner less than 10 years later. He was active in the American Bar Association and the OBA, serving a term as OBA vice president. He also served as vice president of the Federation of Insurance and Corporate Council. He was an adjunct professor of law at both OU and OCU. He loved to read and build in his

workshop. Memorial contributions may be made to the Oklahoma Bar Foundation, the Oklahoma Historical Society or the Tecumseh Alumni Association.

Robert Y. Empie of Okla-homa City died June 21. He was born Nov. 3, 1919, in Oklahoma City. He attended OU and Northwestern University. He then began courses at OCU to pursue a law degree. In 1943, he took time out from his banking job and school to pursue is love of flying. He was hired at Eastern Airlines and was drafted. He applied to the Air Force Cadet Program, where he graduated a P-40 pilot. In 1945, he received his commission as 2nd Lieutenant. After the war, he returned to his job at Stock Yards Bank and school. He earned his law degree in 1950. He was called back to active duty during the Korean conflict, helping organize the 80th Air Depot Wing and served as its Adjutant General. stationed 2 ¹/₂ years outside Casablanca, French Morocco. Upon returning to Oklahoma City, he resumed work at Stock Yards Bank, ultimately becoming president and CEO. He was intensively active in state banking legislative problems, helping Oklahoma banks obtain a modern banking code. He served as president of the Oklahoma Bankers Association and the president of the

Association of State Banks before being appointed by Gov. Nigh as state bank commissioner for an eight-year term. After leaving the bank commission, he retired two more times, but each time was called back to help resuscitate troubled banks. He was active in numerous community and civic organizations. Memorial donations may be made to the Bob Empie Scholarship at OCU Law.

obert E. Goldfield of Calera died May 24. He was born Dec. 3, 1941, in Philadelphia, Pa., and grew up in McAlester. He earned a B.S. from Northeastern State University in 1964. He served as a Captain in the U.S. Army from 1967-1971, spending a couple of years in Vietnam. After his service, he obtained his law degree from OU in 1974. After graduation, he spent the next five years working as a staff attorney in the legal services division of the Oklahoma State Legislative Council. From 1980 until his retirement as a public utility administrative law judge, he worked at the Oklahoma Corporation Commission. He was an avid Sooner fan.

Dr. U.V. Jones II of Lubbock, Texas, died May 17. He was born Nov. 15, 1917, in Snyder. He attended from the Oklahoma Military Academy, graduated from the OU law school and pursued

graduate studies at OU and the University of Washington, where he earned a masters in legal law library sciences. His legal career included service as county attorney for Kiowa County, a corporate attorney for Anderson Pritchard and a private lawyer. The last 30 years of his career, he turned to an academic career first as head law librarian at Emory University in Atlanta, and then returning to the Southwest to co-found the (then) Texas Technological College School of Law, where he was head law librarian, professor of legal research and writing, and in later years, professor emeritus of the Texas Tech University School of Law. He was connected with the law school from its beginning and took great pride and satisfaction in its successes.

ori Moon Kastner of Tulsa died June 25. She was born July 2, 1963, in Frankfurt, Germany, while her father was on assignment with Raytheon Corp. The family returned to the U.S. when she was three weeks old. She grew up in Owasso and earned a bachelor's degree from TU. She worked at Penn Well Publishing for several years until she decided to go to law school at TU. She earned her J.D. in 1992, receiving the Order of the Curule Chair. She worked in various legal positions at Tulsa law firms until she joined the Oklahoma Court of Civil Appeals in November 1995. She moved to the Oklahoma Supreme Court in 2005, most recently working as a judicial assistant to Justice Tom

Colbert. She also had taught legal writing classes at the TU law school on an adjunct basis. She served in numerous leadership capacities at the B'nai Emunah Preschool and Heritage Academy, and was a tireless volunteer for activities there and at Webster High School. Rescuing stray animals was another one of her passions. She was known for her love of her children, animals and for her respect for the law. Memorial donations may be made to Bank of Oklahoma, c/o Kastner Children Contribution Fund, P.O. Box 2300, Tulsa, 74192.

Tohn D. Montgomery Sr. of Norman died June 28. He was born June 27, 1928, in Hobart. He entered the NROTC program at OU where he also lettered in track. After receiving his commission, he served with the U.S. Navy for three years and completed two tours of duty in Korea. He then returned to OU and received his law degree. In 1955 he returned to Hobart, where he joined his father in law practice. He was an attorney in Hobart for 50 years. He remained in the U.S. Naval **Reserve until his retirement** as Captain in 1988. In 1980 he was named Hobart Citizen of the Year. He served as Rotary president and was active in other community organizations. In 1989 he received the OBA President's Award.

Samuel Edward Moore of Tulsa died in May. He was born July 11, 1914, in Okmulgee. He graduated from Okmulgee High School and attended the University of Arkansas for two years before transferring to OU. He was called into service in 1943. **He served as a 2nd Lt. in the anti-aircraft in the Caribbean for two years.** He returned to Oklahoma to pass the bar. He was associated with several law firms before decided to open a private practice. He practiced law in Tulsa for 60 years.

r iles Albert Penick Jr. of **J** Tulsa died May 30. He was born March 24, 1910, in Muskogee. His family moved to Tulsa in 1917, and he graduated from Central High School in 1928. He attended college at the University of Virginia and OU, where he was a member of the tennis and swimming teams. He earned a law degree from OU in 1934. In 1935, he joined his father at Dorset Co., working in oil exploration, development and production. He became president of the company in 1945 upon his father's death. In later years he worked in real estate and equity management. He retired in 2001.

G iles Kenneth Ratcliffe of Edmond died May 23. He was born Aug. 14, 1926, in Healdton. After high school he enlisted in the Army where he served six years in both World War II and the Korean War. Following his service, he enrolled at Abilene Christian College and from there, he earned a law degree from OCU in 1958. He worked as a city attorney for Oklahoma City for 26 years. He retired in 1987.

Tames W. Rodgers Jr. of Holdenville died May 26. He was born Sept. 30, 1917, in Holdenville. His education at OU was interrupted by World War II. He was a waist gunner and radio operator on the B-24, "Diamond Lil," serving with the rank of staff sergeant. The Diamond Lil was shot down over Austria, and due to a mix-up in parachutes, he was listed as killed in action. He was awarded three bronze stars and a purple heart, which were presented posthumously to his parents. The mistake was corrected six weeks later when it was discovered that he was a prisoner of war. After his liberation, he returned to OU and received his law de-

gree in 1948. He returned to Holdenville where he practiced law with his father until his father's death in 1969. He maintained his practice until 1995 when he retired. Active in several community organizations, his consuming passion was the American Legion. He served as commander of the Department of Oklahoma in 1954 and on several national committees through the years. Memorial contributions may be made in his name to the American Legion's Children's Home Endowment Fund, 1300 Summers Place, Ponca City, 74604 or the Oklahoma Medical Research Foundation.

ames Robert Steele of Corpus Christi, Texas, died May 18. He was born Aug. 26, 1919, in Berlin. He obtained an associate's degree from Cameron College, a bachelor's degree from OSU and law degree from TU. He joined the Army at the outbreak of World War II and was assigned to Schofield Barracks in Hawaii. He remained in the Army reserves, retiring as Lt. Colonel. After World War II, he worked as an accountant in Arkansas. He later moved to Bartlesville where he was an accountant and CPA for Phillips 66 Petroleum Co., retiring after 30 years. He then moved to Sallisaw, where he lived on his dream acreage until May 2007.

Cherokee Nation Senior Assistant Attorney General

OVERVIEW: The Senior Assistant Attorney General shall assist the Attorney General for the Cherokee Nation. Represents the Cherokee Nation as requested by the Attorney General. Provides advice and guidance to assigned staff if any. Responsible for providing legal advice and assistance and conducting preventive legal and/or prosecutorial activities of the Cherokee Nation. RESPONSIBILITIES: Represents the Cherokee Nation in actions and proceedings before various courts, administrative bodies, agencies, and commissions as needed. Appears, at the request of the Attorney General, before any court or commission, board or officers, any cause or proceeding, civil or criminal, in which Cherokee Nation may be an interested party, and may, if it appears to be in the best interest of the Cherokee Nation, assume control of the prosecution or defense of the Cherokee Nation's interest. Assists the Attorney General with meetings and consultations with agency heads, elected officials and other individuals associated with local, State, Tribal or National Government or other business entities as may be deemed necessary, beneficial and appropriate for the interest of the Cherokee Nation. Keeps abreast of legislation, opinions, regulations, court decisions, circulars and authoritative legal opinions necessary for goal and objective accomplishment. Provides professional legal advice and assistance in cases often having unique and very difficult legal questions requiring extensive and complex research and interpretation or applications of statutes, laws, regulations, contracts, court decisions, directives, orders, opinions or other legal instruments. Plans, directs, supervises staff and coordinates the legal work within the Senior Assistant Attorney General's area of responsibility as assigned by the Attorney General. Conducts legal reviews and conducts research by utilizing a variety of resource materials including Tribal, State, Federal or other laws and/or regulations. Reviews case law, statutes, legal indexes, reporters and published opinions (with an emphasis in Indian law) as a basis for case development and advice. Develops strategies, interviews witnesses and handles other details in preparation for presentation or trial. Drafts persuasive pleadings, legal opinions, and briefs and other legal documents. Conducts a professional presentation of cases. Reviews and analyzes pending and/or proposed legislation, prepares reports on legislative proposals, reviews legislative material prepared in other offices, participates in the drafting of legislation relating to the Cherokee Nation, and assists the Attorney General in Council and Congressional matters concerning such legislation. Provides advice and input to various tribal officers on proposed legislation, rule changes or other legal matters. Contacts and confers with members of legislature and other holders of public office to advise and gain support for legislation pertaining to Cherokee Nation. Verifies information has been thoroughly researched and approved before release. Advises Cherokee Nation administrative officials, departments, divisions, boards, and committees on transactions of business involving internal affairs, tribal council, directors, officers and government relations with the general public. Assists the Attorney General in developing, implementing, and maintaining guidelines and procedures for department operations. Assists the Attorney General in establishing and formulating goals and objectives for the department, and for each function within the department. Assists the Attorney General in developing and implementing long- and short-term plans for designated area of responsibility. Provides direction to assigned subordinate staff in matters of department operations. Coordinates, assigns and delegates the activities and functions to the appropriate assigned staff. Communicates and reports department operational information and activities to the Attorney General and to administrative officials as appropriate. Performs work in independent fashion with little to no guidance. QUALIFICATIONS: Must have successfully completed a full course of study in a school of law accredited by the American Bar Association (ABA) and have a professional law degree (Juris Doctorate); no substitutions. An additional 7 years service, a majority of which is in the public sector either as an elected official or working in the office of an elected official or other public service, is required. Prefer experience to be in both civil and criminal background. At least 2 years prior litigation experience (either civil or criminal) required. At least 1 year prior supervisory experience required. Environmental law experience a plus.



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^b Designed with the needs of OBA members in mind, OKNEWSBar has been created to allow you to quickly access new Oklahoma and U.S. Supreme Court opinions as well as up-to-date legal news and law practice management tips.

www.okbar.org

The official Web site of the Oklahoma Bar Association. It's your one-click resource to all the information you need, including what's new at the OBA, ethics opinions, upcoming CLE seminars, staff contacts, and section and committee information.

my.okbar.org

On this site, you can do everything from changing your official address, enrolling in a CLE course, checking your MCLE credits and listing your practice areas on the Internet so potential clients can find you. The PIN number required is printed on your dues statement and can be e-mailed to you if the OBA has your current e-mail address.

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People from across Oklahoma visit this Web site every day in search of an attorney. How can you get your name on this list for free? Signing up is easy – log into your account at my. okbar.org and click on the "find a lawyer" link.

Fastcase at www.okbar.org

The OBA teamed up with Fastcase in 2007 to provide online legal research software as a free benefit to all OBA members. Fastcase services include national coverage, unlimited usage, unlimited customer service and unlimited free printing — at no cost to bar members, as a part of their existing bar membership. To use Fastcase, go to www.okbar.org. Under the Fastcase logo, enter your username (OBA number) and password PIN for the myokbar portion of the OBA Web site.

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POSITIONS AVAILABLE

RODOLF & TODD, an AV rated defense firm in Tulsa that specializes in medical malpractice litigation, seeks a litigation associate with a minimum of 4 years experience. Trial experience is preferred. This position requires a person who is hard working and self motivated. Salary is negotiable depending on experience level. Please send resumes and a list of references to ehall@rodolftodd.com.

THE OKLAHOMA TAX COMMISSION is accepting applications for an attorney position in the General Counsel's Office in Oklahoma City. Duties will include representation of the Commission in administrative tax protest proceedings and appeals, primarily in the area of corporate income tax. Applicants must be recent law school graduates (zero to two years experience) and licensed or eligible to be licensed to practice law in Oklahoma courts, both federal and state. Interested applicants must have strong research and writing skills and a professional attitude in dealing with taxpayers, other attorneys, auditors and support staff. The starting salary is \$42,000.00 annually, plus state employee benefits. Please submit a resume and writing sample to Kathryn Bass, Chief Deputy General Counsel, Oklahoma Tax Commission, General Counsel's Office, 120 N. Robinson, Suite 2000W, Oklahoma City, OK 73102-7801. The closing date is September 5, 2008. The Oklahoma Tax Commission is an equal opportunity employer.

OKC FIRM SEEKS ATTORNEY: 3-10 years experience; computer engineering degree or similar background; heavy trial docket on national basis; securities knowledge or experience helpful. The position involves extensive travel, research, writing, motion practice and trial attendance. Submit resumes to Box "G," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

JOB DESCRIPTION: Assistant Attorney General Muscogee (Creek) Nation Department of Justice. The Assistant Attorney General is directly responsible to the Attorney General. Duties include providing legal representation of the Office of the Principal Chief, the National Council, other officers and employees of the Muscogee (Creek) Nation, its boards and authorities. Applicant must be a graduate of an accredited law school, licensed to practice law in any state and willing to become a member of the Oklahoma Bar. Computer skills and education or experience in Federal Indian law preferred. Submit a resume, salary requirement, references no later than August 29, 2008, to: Muscogee (Creek) Nation Personnel Services, P.O. Box 580, Okmulgee, OK 74447 (918) 756-8700 or 1-800-482-1979 x 390.

POSITIONS AVAILABLE

REQUEST FOR PROPOSALS. The Housing Authority of the City of Ada, Oklahoma is seeking proposals from qualified legal counsel to enter into an incidental agreement for periodic legal counseling and representation on a case by case basis. Contract will be for a 2 year period. The Ada Housing Authority consists of four projects containing 275 dwelling units and community/maintenance buildings; the Housing Authority also administers the Section 8 program with a total of 110 units. Interested parties must possess a professional law degree and be a member in good standing of Oklahoma State Bar Association and be licensed to practice law in Oklahoma. Successful candidates shall also have experience in working with complex and difficult legal cases and be well versed in Housing Authority law and employment issues including worker's compensation. Firms/candidates will also be requested to review policies both new and existing from a legal standpoint and will report to Executive Director and Board of Commissioners. To be considered for the above work, each party should respond with a letter of interest which includes experience data on the individual and/or firm, including fee schedule, retainer, proof of malpractice insurance coverage along with a proposed letter of engagement. Selected counsel will need to be available during some if not all board meetings which meet on the third Thursday of the month at 5:00 p.m. and be available for conference call. Counsel will also be required to be responsive within reasonable amount of time not to exceed a 24 hour period. Each proposal will be rated on a list of factors that is available from the Housing Authority of the City of Ada. To be considered, proposals must be received at the office of the Housing of the City of Ada not later than 4:00 p.m. on August 19, 2008. Address proposals to: Wendi J. Zachary, Interim Director Ada Housing Authority, P.O. Box 1622, Ada, Oklahoma 74820 (580) 436-1613. The Housing Authority of the City of Ada is an Equal Opportunity Employer.

REYNOLDS, RIDINGS, VOGT & MORGAN, an AV rated downtown OKC law firm which primarily represents creditors in business litigation, business bankruptcy and commercial collections seeks associate attorney 0 to 2 years experience. E-mail resume to jimvogt@rrvmlaw.com or fax to (405) 232-7911.

DOWNTOWN OKC AV rated insurance defense firm seeks associate attorney with 0-4 years experience. Excellent research and writing skills required. All replies kept confidential. Resume and writing sample should be sent to: Box "O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ROBINETT & MURPHY is seeking two (2) attorneys with 3 to 6 years of experience in litigation-based practice. Position requires strong analytical skills and experience in conducting discovery. Mail resume, cover letter, and writing sample to Lawrence R. Murphy, Jr. at 624 South Boston, Suite 900, Tulsa, Oklahoma 74119 or Imurphy@ robinettmurphy.com.

POSITIONS AVAILABLE

AV RATED CARR & CARR ATTORNEYS Tulsa Office seeks attorney with personal injury experience, Plaintiff or Defense, to handle pre-litigation injury cases. Compensation is performance based with a monthly minimum. Good people and computer skills a plus. Send resumé and salary requirements to sdunn@carrcarr.com.

FULL-TIME ATTORNEY

Lawton, OK - Great Plains Improvement Foundation, Inc., (GPIF) is seeking applicants for a full time attorney in their Child Support Enforcement Program. The position will require the attorney to prepare and try child support cases to establish paternity and child/medical support; enforce and modify orders for child/medical support. Duties will include policy and procedure review, legal research for pre-trial proceedings, for both routine and difficult cases. The successful applicant will also supervise the legal work of assistants. An application and/or job description may be obtained by calling GPIF at: (580) 353-2364 or by faxing your request to (580) 353-1952. The application, resume and writing sample should be submitted no later than August 29, 2008 to: Great Plains Improvement Foundation, Inc., Attn: Attorney Ad, P.O. Box 926, Lawton, OK 73502.

LEGAL ASSISTANT - STATE FARM INSURANCE COM-PANIES IN-HOUSE COUNSEL, Angela Ailles & Associates has openings for two Paralegals. Job duties include drafting discovery and legal documents in complex cases, legal research and writing, docketing/calendaring/scheduling, and anticipating medical issues, proactively identifying new areas of discovery and applying knowledge of medical terminology, injuries and treatment. Paralegal experience in personal injury litigation required, insurance defense litigation is preferred. State Farm offers an excellent salary and benefits package. If interested, please go to www.statefarm.com — Career Center — Become a State Farm Employee, search for Job # 13586 and submit your online application. EOE

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POSITIONS AVAILABLE

THE OKLAHOMA ALCOHOLIC BEVERAGE LAWS ENFORCEMENT (ABLE) COMMISSION is accepting applications for the unclassified position of General Counsel to be located in the ABLE Commission's Oklahoma City office. Applicants must be admitted to or eligible for admission to the Oklahoma Bar Association. Interested applicants should have strong research and writing skills, be familiar with administrative rulemaking, and have experience representing clients in state and federal courts. Duties will include: providing legal counsel to Commission, Director and staff; representing the agency in administrative hearings and hearings and procedure before various state agencies; representing the agency in State and Federal courts; drafting statutes, administrative rules, legal briefs and memos; providing legal training to staff; legislative analysis; and answering questions from media, industry, staff, applicants and the public. A minimum of five to ten years of experience is preferred. The annual salary will range between \$59,623.08 and \$67,591.20 and will be commensurate with education and experience. Please submit a cover letter, resume, and writing sample no later than August 25, 2008 to: Luke Simms c/o Oklahoma ABLE Commission 4545 N. Lincoln Boulevard, Suite 270 Oklahoma City, OK 73105. The Oklahoma ABLE Commission is an equal opportunity employer.

MUSCOGEE (CREEK) NATION, DEPARTMENT OF JUSTICE-ASSISTANT PROSECUTOR. The Assistant Prosecutor is directly responsible to the Attorney General, except as to such matters in which the Attorney General has delegated direct supervision to the Prosecutor. The Assistant Prosecutor's primary role is to assist the Prosecutor in representation of the Nation in all criminal, juvenile and elder proceedings in the Muscogee (Creek) Nation District Court, state and federal courts and in other proceedings in which the Muscogee (Creek) Nation has an interest. Applicant must be a graduate of an accredited law school and be licensed to practice law in Oklahoma. Computer skills and education or experience in Federal Indian law preferred. Indian Preference. Submit a resume, salary requirement, and references no later than August 29th, 2008, to: Muscogee (Creek) Nation Personnel Services, P.O. Box 580, Okmulgee, OK 74447.

ASSOCIATE POSITION AVAILABLE: 4-6 years experience; research/writing skills; graduated-top 25%; law review or federal judicial clerk experience desired. Submit resume to Federman & Sherwood, 10205 N. Pennsylvania Avenue, OKC 73120 or wfederman@aol.com.

THE LAW FIRM OF PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P. is accepting resumes for an associate attorney with five years litigation experience. Also, resumes are being accepted for an associate with significant research and writing experience and preferably appellate procedure experience. Please send resumes to P.O. Box 26350, Oklahoma City, OK 73126.

POSITIONS AVAILABLE

THE OKLAHOMA STATE DEPARTMENT OF HEALTH. Office of General Counsel, is accepting applications for a Staff Attorney I (Assistant General Counsel) position. Duties include providing general legal services to the Department, with emphasis in administrative and state court litigation in support of OSDH Consumer Health programs and the Nurse Aide Registry. Responsibilities include preparing correspondence, legal opinions, pretrial, trial and appellate pleadings, and hearing room or court room presentation of evidentiary hearings or trials. Some travel required. Position requires general knowledge of drafting pleadings, legal memoranda, briefs and correspondence relating to legal issues and client representation; candidate must be willing to develop skills in evidentiary presentations and related procedures, strategy and tactics, and have the ability to perform complex legal research, multi-task and meet deadlines. Education and experience: Juris Doctorate degree from an ABA accredited law school; active membership in good standing with OBA; and 0-2 years of licensed legal practice, with trial experience preferred. Demonstrated legal writing skills are necessary. This is an entry-level position with a salary range of \$48,000 to \$51,000 per year. To apply, send resume and writing sample to: Tom L. Cross, Deputy General Counsel, 1000 N.E. 10th Street, Room 206, OKC, 73117, or email to tomlc@health.ok.gov. Position close date is August 15, 2008. The State of Oklahoma is an Equal Opportunity Employer.

AV RATED OKC FIRM SEEKS ATTORNEY with some oil and gas experience. Land records review a plus. Strong academic performance and writing skills required. Significant opportunity for motivated candidate. All inquiries shall be maintained in confidence. Please send resume, transcript and list of references to Box "B," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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Getting a Handle on School By Judge David A. Barnett

One of the priorities in my family has always been the pursuit of a formal education, perhaps because my dad had little (eighth grade), and my mom had attended two years of college. Whatever the reason, there is an abundance of formal education among my siblings. I have my own theory about why we pursued formal education, at least as the same applies to my brother, James, and me.

As kids, we always had specific chores assigned on the farm. These would be our responsibility on a dayto-day basis, year around. However during the summer vacation, we would be assigned additional specific farm work, depending on what needed attention and

on what we were able to do. For a number of years in the 1950s, James and I were most qualified to work at the task of "hoeing cotton," so that was our recurring assignment. Roger, being the oldest of the boys, was most often assigned to drive one of the tractors.

The job of chopping the weeds out of the cotton crop doesn't require a whole lot of training or intellect, and it is always tedious and hot. As kids are prone to do, James and I usually made the job more difficult by incessant procrastination and griping. We rarely missed an opportunity to delay our assignment and often prayed for an interruption by rain or storm.

One particular cotton patch was on the Barnett home place, miles from where we actually lived. So, the agenda was for our dad to take us to the farm, get us started on our task and then attend to the work in another field or perhaps at another farm. As a result of the low level of supervision required, it was not uncommon for us to watch dad drive off, lay our hated hoes down on the ground and seek some diversion, such as playing on the creek, pulling legs off

grasshoppers or swimming in the pond over the hill from the cotton patch.

We didn't realize it, but dad was onto our agenda from the start, because the weeds were not disappearing very fast. On one of the days we decided to go swimming in the farm pond, dad circled back and didn't find us in the field but eventually located us at the pond. After he had chastised us for swimming without adult supervision, he began to talk to us very directly about our assigned task in the cotton patch. I shall never forget the clarity of his promise as he said, "Boys, you can take as long as you want to

finish this field, but in the fall, when all the other kids are back in school, you'll still be chopping weeds."

Well, after he left us in the cotton patch, James and I discussed whether or not he would really hold us out of school to finish our job. We concluded that he would do whatever was necessary. All of a sudden, the dreaded first day of school was seen in a new light as we set about to finish our job. Education became an exciting endeavor, at least compared to spending the fall in the cotton patch with a hoe. We finished with time to spare, and actually took some pride in having

completed the job.

I never forgot the lesson learned that day, and it has helped to sustain me in times when the "going gets rough" and especially in the sometimes tedious pursuit of higher education.

> Judge Barnett is associate district judge in Tillman County.

Editor's Note: Have a short, funny, intriguing or inspiring story to share? E-mail submissions to carolm@okbar.org.



On one of the days we decided to go swimming in the farm pond...