



THE Oklahoma Bar JOURNAL

Volume 79 ♦ No. 33 ♦ December 13, 2008

ETHICS & PROFESSIONAL RESPONSIBILITY

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EDITOR: MARTHA RUPP CARTER

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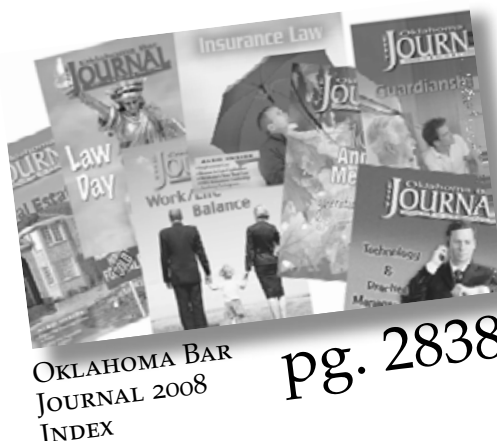


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State of the Association

By Bill Conger

This will be my last letter to you as president of the Oklahoma Bar Association.

It provides me with an opportunity to reflect and to share with you what I believe to be the state of our bar association. But let me first begin by telling you what an honor and privilege it has been for me to serve as your president the past year. Over the past year, I have often been asked if I have enjoyed serving as president — and my answer has always been that I have enjoyed it more than I thought I would. To be sure, I was looking forward to it, but I can honestly say I have gotten so much more out of the experience than I ever could imagine.

This year has been a productive one. We began with a Rule of Law Conference, which was held on April 11 at Oklahoma City University. The planning committee for the conference was ably chaired by Jack Brown of Tulsa and Cathy Christensen of Oklahoma City. The principal purpose was to discuss the importance of the Rule of Law to all of our society, not just to the legal profession. To that end, we invited people from various segments of our statewide community — the government, the medical profession, the clergy, the police and fire department, the business community, the non-profit and philanthropic community and, of course, the legal profession.

We had an “A” list of speakers. Mike Turpen started things out by talking about the Rule of Law in general, plus other topics that seemed to just come to him at the moment. Tom McDaniel, past vice chairman of Kerr-McGee and current president of Oklahoma City University, spoke on the Rule of Law and business. Vince Orza, dean of the Meinders School of Business at OCU, talked about the Rule of Law and the media, and Dr. Cheyn Onar-ecker gave a moving and provocative discussion about the Rule of Law and medicine.

Following these presentations, I moderated a panel discussion on the Rule of Law from a global perspective and how it applied to us here in Oklahoma. The panelists were OSU President and OBA member Burns Hargis; Janet Levit, dean and professor of law at the University of Tulsa College of Law; and District Judge Vicki Miles-LaGrange, who became the chief judge of the United States District Court for the Western District of Oklahoma in November. We concluded with a wonderful luncheon, where Judge Lee West

was our keynote speaker. I know many of you have heard Judge West speak so eloquently on many issues, but his speech at our luncheon was the best I have heard. It was profoundly thoughtful on the Rule of Law and delivered as only Lee West can do.

I am very interested in developing new leaders for our bar association. I created a task force co-chaired by Linda Thomas of Bartlesville and Laura McConnell Corbyn of Oklaho-

ma City to design a curriculum for a Leadership Academy. We sought applicants by publishing in the bar journal and were overwhelmed by the number of outstanding qualifications of our applicants. This year's class consists of 28 persons from all over our state representing a broad base of age diversity as well as gender and ethnic diversity. They met twice this year and will meet three

times in 2009 to cover many different aspects of our profession. The program is rigorous and takes a commitment, but our feedback thus far has been positive and enthusiastic.

For a number of years I have been concerned about the work/life balance aspect of our profession. I am concerned about the fact that our profession ranks at the top for substance abuse and that we are increasingly faced with more evidence of clinical depression and job dissatisfaction among our members. I am concerned that we are losing some of our most promising members, especially women, as they leave the profession. Accordingly, I have

contd on page 2831

**The future of
our bar is
healthy and
bright. But we
are about to
undergo some
significant
changes.**



Bill Conger

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EVENTS CALENDAR

DECEMBER

- 16 **OBA Civil Procedure Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 17 **OBA Administrative Law Section Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Payne (405) 271-1269
- 19 **OBA Board of Governors Meeting**; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
OBA Mock Trial Committee Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066
- 20 **OBA Young Lawyers Division Committee Meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kimberly Warren (405) 239-7961
- 25-26 **Christmas Holiday (State Holiday)**

JANUARY 2009

- 1-2 **New Year's Holiday** (OBA Closed Jan. 2)
- 8 **OBA Mock Trial Committee Meeting**; 5:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066
- 9 **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
- 13 **Death Oral Argument**; Richard Norman Rojem; D-2007-660; 10 a.m.; Court of Criminal Appeals Courtroom
Hudson Hall Wheaton Inn Pupilage Group Four; 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041
- 15 **Supreme Court Chief Justice and Vice Chief Justice Swearing In**; 2 p.m. Supreme Court Courtroom, State Capitol; Contact: John Morris Williams (405) 416-7000
- 19 **Martin Luther King Jr. Day (State Holiday)**
- 20 **Death Oral Argument**; James T. Fisher; D-2005-460; 10 a.m.; Homsey Family Moot Courtroom, Oklahoma City University
- 21 **Ruth Bader Ginsburg American Inn of Court**; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Julie Bates (405) 691-5080
- 23 **OBA Board of Governors Meeting**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
OBA Board of Governors Swearing In; 10 a.m.; Supreme Court Courtroom, State Capitol; Contact: John Morris Williams (405) 416-7000

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

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

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Ethical Considerations and Consequences in the Realm of Electronic Discovery

By Sarah Jane Gillett and Matthew A. Sunday

"Information technology and business are becoming inextricably interwoven. I don't think anybody can talk meaningfully about one without talking about the other." — Bill Gates

The world is a different place than it was 15 or 20 years ago. The rapid development of technology has fundamentally changed the social and economic fabric of America. The creation, and nearly ubiquitous adoption of e-mail, word processing, spreadsheets, databases, and the Internet have transformed the way in which life and work are conducted. Amid these vast technological changes, the disputes which give rise to litigation have continued.

In many ways, technology has added convenience and efficiency to the practice of law. Word processing has certainly simplified the task of drafting pleadings from the days of manual typewriters and carbon copies. The availability of electronic research has allowed practitioners to quickly find case law that once remained hidden among dusty reporters. With these benefits, technology has also brought its challenges, not the least of which involves electronic discovery.

As businesses have incorporated information technology systems into their work processes, the volume of information that is stored has increased exponentially. In 2004, it was estimated that approximately 31 billion e-mails were sent each day in North America.¹ All of those word processing documents, spreadsheets, and databases generated by businesses

are stored on network servers and individual computers. The volume of a company's electronically stored information ("ESI") can easily be in the thousands of gigabytes or terabytes of data. To provide a frame of reference, 1 gigabyte of storage can hold as much as 75,000 pages of Microsoft Word documents or the equivalent of 40 bankers boxes.² As a result, in any given case, the potentially immense quantity of ESI, coupled with the complexity of the various technology systems involved in the generation and storage of data, present numerous challenges to the discovery process as we know it. And failing to successfully navigate the issues presented by electronic discovery can result in significant consequences for both client and attorney.

In 2006, the supreme court approved amendments to the Federal Rules of Civil Procedure

specifically addressing electronic discovery. Currently, 18 states have also adopted specific e-discovery rules.³ Although Oklahoma is not among the states which have amended their rules to address the issues raised by electronic discovery, the ethical obligations imposed by Oklahoma's Code of Civil Procedure and Rules of Professional Conduct apply equally to e-discovery. Further, while Oklahoma courts have not addressed the obligations of counsel with respect to electronic discovery, case law from other jurisdictions provide insight into how Oklahoma courts might apply the rules to these issues.

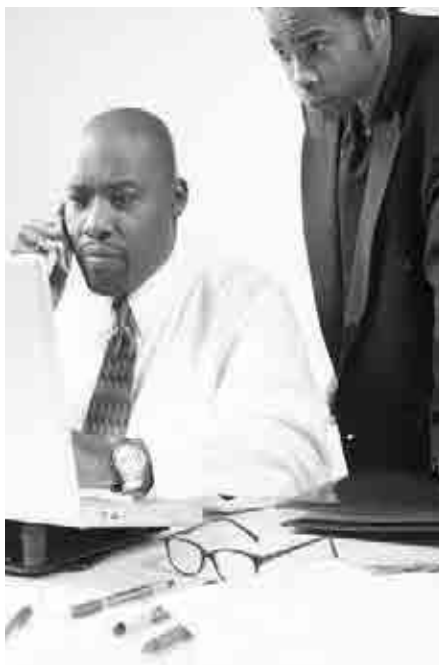
COMPETENT REPRESENTATION INCLUDES E-DISCOVERY

Rule 1.1 of the Oklahoma Rules of Professional Conduct requires that attorneys provide their clients with competent representation. Competency within the context of e-discovery requires an attorney to understand the nature of the client's ESI and information systems.⁴ Additionally, the attorney must take affirmative steps to ensure that the client protects the integrity of electronic data.⁵ An attorney's failure to locate, preserve and produce relevant ESI can result in severe sanctions for both the client and the attorney. In *Phoenix Four Inc. v. Strategic Resources Corp.*, counsel for the defendants spoke with their client at the outset of litigation about the need to identify and gather relevant paper and electronic documents.⁶ Outside counsel relied on the assurances of their client that all relevant data had been located. After counsel represented to the plaintiff that all data was produced, a computer technician located an additional 25 gigabytes of data while repairing a server. Although outside counsel had informed the client of the need to locate rele-

vant data, the court held that blindly accepting the client's representation that such data had been gathered was insufficient. The court observed that outside counsel must engage in a methodical survey that involves communication with "information technology personnel and the key players in the litigation to understand how electronic information is stored."⁷

As a result of outside counsel's "gross negligence," the court ordered the defendants and counsel to reimburse plaintiffs for attorneys' fees and costs, including the costs of retaking depositions necessitated by the late production of ESI.⁸

“... failing to successfully navigate the issues presented by electronic discovery can result in significant consequences for both client and attorney.”



In addition to conferring with individuals who are knowledgeable about the location of ESI, outside counsel must also ensure they develop an understanding of the architecture and capabilities of the information systems utilized by the business. In *GTFM Inc. v. Wal-Mart Stores Inc.*, Wal-Mart's attorney represented to the plaintiffs and the court that Wal-Mart's computer system could not generate information sought by the plaintiffs in their requests for production.⁹ Counsel for Wal-Mart based this representation on the information provided by a senior executive. After the plaintiffs had incurred significant expense in attempting to gather the information through other means, it was revealed during a deposition that Wal-Mart's system did have the capability to generate the requested data. The court imposed sanctions against Wal-Mart, observing that "[w]hether or not defendant's counsel intentionally misled plaintiffs, counsel's inquiries

about defendant's computer capacity were certainly deficient."¹⁰ The failure of Wal-Mart's attorney to confer with someone knowledgeable about Wal-Mart's systems resulted in an award of attorneys' fees and costs totaling \$109,753.¹¹

While it is unlikely that the competency requirement imposed by Rule 1.1 requires an attorney to be an expert in the field of information technology, the relative complexity and specialized nature of electronic discovery necessitates that an attorney either develop some proficiency in the area or obtain guidance from an individual with the requisite skills.

INADVERTENT DISCLOSURE RISKS WAIVER OF PRIVILEGE

Under Rule 1.6 of the Oklahoma Rules of Professional Conduct, an attorney must not disclose information relating to the representation of a client. The sheer volume of data often associated with electronic discovery increases the risk of an inadvertent production of documents protected from disclosure under either the attorney-client privilege or work-product doctrine. If privileged documents are inadvertently produced, it is possible that a court may determine that the privilege has been waived.

In *Victor Stanley Inc. v. Creative Pipe Inc.*, counsel for defendants inadvertently produced 165 electronic documents that were subject to either the attorney-client privilege or work-product doctrine.¹² Prior to the production of the documents, the defendant's counsel notified the court that an individualized privilege review was not possible due to the volume of the documents, suggesting that privileged documents be identified through the use of a keyword search. Subsequently, the court extended the discovery deadline, after which the defendant's counsel represented to the court that there was sufficient time to individually review the documents. After the documents were produced, counsel for the plaintiff discovered the privileged documents. Defense counsel asserted that the 165 documents remained privileged. Plaintiff's counsel not surprisingly argued that the disclosure operated to waive the privilege. The court observed that three approaches have typically been utilized to determine whether an inadvertent disclosure waives privilege:

Under the most lenient approach there is no waiver because there has not been a knowing and intentional relinquishment of the privilege/protection; under the most strict approach, there is a waiver because once disclosed, there can no longer be any expectation of confidentiality; and under the intermediate one the court balances a number of factors to determine whether

the producing party exercised reasonable care under the circumstances to prevent against disclosure of privileged and protected information, and if so, there is no waiver.¹³

The court further observed that the intermediate test requires a balancing of the following factors to determine if the privilege has been waived: "1) the reasonableness of the precautions taken to prevent inadvertent disclosure; 2) the number of inadvertent disclosures; 3) the extent of the disclosures; 4) any delay in measures taken to rectify the disclosure; and 5) overriding interests in justice."¹⁴ Applying the intermediate test, the court observed that despite defendant's representations that each document would be reviewed individually for privilege, defendant's counsel had employed a keyword search to identify privileged documents. Ultimately, defense counsel represented that there had been an attempt to review each document, but that there was not sufficient time. Despite the time constraints, the defendants did not request that the court allow additional time to review the documents. The court held that the inadvertent disclosure waived the privilege, stating "[i]n these circumstances, Defendants' protests that they did their best and that their conduct was reasonable rings particularly hollow."¹⁵

Under these circumstances, even if a court were to conclude that there has been no waiver as a result of inadvertent disclosure, damage to the client can still occur. Like the proverbial saying, once the information has been disclosed, "you can't put the toothpaste back in the tube." Further, if the inadvertent disclosure is the result of outside counsel's failure to address e-discovery issues adequately, counsel may be subject to bar disciplinary measures.

INADEQUATE PRESERVATION MAY CONSTITUTE SPOILIATION

Rule 3.4 of the Oklahoma Rules of Professional Conduct provides that an attorney shall not:

[U]nlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

The rule further requires that an attorney shall not "fail to make reasonably diligent effort to

comply with a legally proper discovery request by an opposing party.” Additionally, Section 3226(G) of the Oklahoma Discovery Code requires an attorney to provide a certification that responses to discovery were “formed after a reasonable inquiry.”¹⁶ The Oklahoma Supreme Court has stated that “[s]poliation occurs when evidence relevant to the prospective civil litigation is destroyed, adversely affecting the ability of a litigant to prove his or her claim.”¹⁷ Other jurisdictions have held that if an attorney does not proactively take steps to ensure that a client adequately preserves ESI, the destruction of such electronic data constitutes spoliation.¹⁸

Zubulake v. UBS Warburg LLC (“*Zubulake IV*”)¹⁹ is recognized by many commentators as the seminal case regarding outside counsel’s obligations concerning the preservation of ESI.²⁰ In *Zubulake IV*, the court observed that the duty to preserve arises “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”²¹ Once the duty to preserve is triggered, a business “must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.”²² The scope of the preservation obligation does not require a business to retain every document and e-mail. Rather a party “must not destroy unique, relevant evidence that might be useful to an adversary.”²³ Outside counsel must identify the ‘key players’ who may have documents relevant to the case. Additionally, counsel must identify the sources of data for each of those key players. In a subsequent opinion (“*Zubulake V*”), the court expanded on outside counsel’s duty regarding

preservation, stating that “a party cannot reasonably be trusted to receive the ‘litigation hold’ instruction once and to fully comply with it without the active supervision of counsel.”²⁴

The consequences for failing to satisfy the preservation obligation can be significant. In *Zubulake V*, the defendant failed to preserve relevant e-mails, despite instructions from outside counsel. Although counsel informed the defendant of its preservation obligation, the court admonished outside counsel: “[c]ounsel failed to communicate the litigation hold order to all key players” and “failed to ascertain each of the key players’ document management habits.”²⁵ Based on the defendant’s spoliation of evidence, the court ordered both monetary sanctions and an adverse jury inference regarding the destroyed e-mails. Ultimately, the adverse inference resulted in a \$29.2 million verdict for the plaintiff.

CONCLUSION

Although Oklahoma courts have not addressed the issue of outside counsel’s obligations regarding preservation of ESI, Oklahoma cases do allow for an adverse inference where there is spoliation of evidence.²⁶ The failure to preserve electronic data may also subject a party to sanctions under Section 3237 of the Oklahoma Discovery Code.²⁷ Additionally, “a party aggrieved by litigation-related misconduct may seek to invoke sanctions available under the criminal law and, in the case of attorney misconduct, by bar disciplinary measures.”²⁸ Until Oklahoma courts or the legislature clarify the scope of counsel’s duty regarding the preservation of ESI, the safest course is to adhere to the guidance of *Zubulake*.



“Other jurisdictions have held that if an attorney does not proactively take steps to ensure that a client adequately preserves ESI, the destruction of such electronic data constitutes spoliation.”

1. *Spam Volume Keeps Rising*, C/Net News.com, September 1, 2004, http://news.cnet.com/Spam-volume-keeps-rising/2100-1032_3-5339257.html.

2. Aran U. Raskas, Commentary: *Clawbacks, Quickpeeks, and the preservation of*, The Baltimore Daily Record, December 4, 2006, http://findarticles.com/p/articles/mi_qn4183/is_20061204?num=4&opg=n16888573&tag=artBody;coll.

3. *Current Listing of States that have Enacted E-Discovery Rules*, K&L Gates, June 18, 2008, <http://www.ediscoverylaw.com/2008/06/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules>.

4. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (“[A] party and her counsel must make certain that all sources of potentially relevant information are identified and placed ‘on hold’ . . . To do this, counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.”)

5. *Id.* (“Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.”)

6. *Phoenix Four Inc. v. Strategic Resources Corp.*, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. 2006).

7. *Id.* at *17.

8. *Id.* at *19, *28.

9. *GTFM Inc. v. Wal-Mart Stores Inc.*, 2000 U.S. Dist. LEXIS 3804, at *4 (S.D.N.Y. 2000).

10. *Id.* at *6.

11. *GTFM Inc. v. Wal-Mart Stores Inc.*, 2000 U.S. Dist. LEXIS 16244, at *10 (S.D.N.Y. 2000).

12. *Victor Stanley Inc. v. Creative Pipe Inc.*, 2008 U.S. Dist. LEXIS 42025 (D. Md. 2008).

13. *Id.* at *19.

14. *Id.* at *25.

15. *Id.* at *42.

16. Okla. Stat. tit. 12, § 3226(G).

17. *Patel v. Ohm Medical Center Inc.*, 1999 OK 33, ¶ 46, 987 P.2d 1185, 1202.

18. See e.g., *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Metropolitan Opera Ass’n Inc. v. Local 100, Hotel & Restaurant Employees International Union*, 212 F.R.D. 178 (S.D.N.Y. 2003). See also, Allison O. Van Laningham, *Navigating in the Brave New World of E-Discovery: Ethics, Sanctions and Spoliation*, 57 Fed’n Def. & Corp. Couns. Q. 327 (2007).

19. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003).

20. See e.g., Mia Mazza, Emmalena K. Quesada, and Ashley L. Sternberg, *In Pursuit of FRCP1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 Rich. J.L. & Tech. 11, ¶ 94 (Spring 2007); Cameron G. Shilling, *Electronic Discovery: Litigation Crashes into the Digital Age*, 22 The Labor Lawyer 207 (2006); Steven W. Teppler, *Spoliation of Digital Evidence*, The SciTech Lawyer 22 (Fall 2007). See also, *Consolidated Aluminum Corp. v. Alcoa*, 244 F.R.D. 335, 339 (M.D. La. 2006).

21. *Id.* at 216.

22. *Id.* at 218.

23. *Id.* at 217.

24. *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

25. *Id.* at 435.

26. See e.g., *Beverly v. Wal-Mart Stores Inc.*, 2000 OK CIV APP 45, ¶ 3, 3 P.3d 163, 165.

27. Okla. Stat. tit. 12, § 3237.

28. *Patel v. Ohm Medical Center Inc.*, 1999 OK 33, ¶ 47, 987 P.2d 1185, 1203 (citing Okla. Stat. tit. 21, § 575).

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Ethics and Professionalism from One Practitioner's Viewpoint

By David R. Cordell

"The trouble with law is lawyers." — Clarence S. Darrow

A decade ago a law partner and mentor of mine, John S. Athens, published an article in the *Oklahoma Bar Journal* titled, "The Decline of Professionalism."¹ At that time, I had been practicing 13 years whereas John had been a member of the bar for 40 years. I encourage you to read his article and compare the observations he made then to today.

Certain things he bemoaned have not changed: the pressure of the billable hour, advertising,² too many lawyers, poor conduct, etc. but either I have been lucky or the professionalism of the bar has improved in my time. Maybe it is because I don't know any better or have come to accept a level of conduct that would not have been tolerated in John's time. Either way, my "list" of lawyers that I do not trust or that I think are unethical is very short, and hasn't changed for years.

While there are several instances I recall where I believed a lawyer was acting unprofessionally or unethically, I have seen exemplary conduct too.

Recently an attorney screamed at a court reporter to the point that she cried. I have seen a lawyer grab original exhibits off of the table and run out of a deposition. More than once a lawyer has tried to excuse his malpractice in missing a deadline by blaming opposing counsel or trying to cover his mistake. In one instance, a lawyer took the client's money, faked filing a lawsuit and then told the client the court had dismissed the case. And most

disturbing, I will never forget the time in a trial when I was convinced that a lawyer suborned perjury from his client. To this day, it still bothers me.

On the other hand, lawyers donate countless hours representing abused children or elderly people who can't afford to pay a lawyer. Virtually every day I see opposing counsel treating each other with civility and cooperating with scheduling. Sometimes it is the clients who are not civil. Another lawyer and I had to actually physically get between our clients to stop an altercation! In one situation where a solo practitioner was overwhelmed and unable to meet briefing deadlines, several attorneys on different cases agreed to multiple extensions so the lawyer could regain control of her docket. Fortunately in my practice the good has outweighed the bad.

Professionalism and ethics can be an esoteric subject involving philosophy, sociology, morality and the like. If you Google "ethics and professionalism in law," there are many scholarly articles. As one ethics consultant has phrased it, "...[e]thics is about the way things ought to

be, not about the way things are. When it comes to ethics, motive is very important. A person of character does the right thing for the right reason. Compliance is about what we must do; ethics is about what we should do. Ethical people often do more than the law requires and less than it allows. The area of discretion between the legal 'must' and the moral 'should' tests our character. Noble talk and framed ethics statements are no substitute for principled conduct. The test is doing the right thing."³

I approach the subject in a practical way. There are many time-tested axioms and sayings that describe the goal – the Golden Rule, "character is what a person does when no one is looking," the Scout Law, etc. – but I believe each of us knows what is right and ethical. The question is how do we do our best to be ethical and professional? Are the two the same thing? One author has posited that "[t]he conduct required by professionalism does not necessarily attach to a person who has done the training and been given the accreditation of a lawyer. Professionalism does not automatically emanate from a professional person."⁴ In other words, strict adherence to the rules set out in the ethical codes does not equal professionalism.

In April 2006, the Oklahoma Bar Association adopted Standards of Professionalism expected of its members.⁵ Our practice is also governed by the Rules of Professional Conduct and we have help from the Lawyer's Creed and Legal Ethics Advisory Opinions.⁶ We should each keep a copy of them handy, but I have always felt that if you have to pull out the Rules of Professional Conduct to check to see if what you have done or are getting ready to do violates any of them, you have your answer before you reach for the book.

While we are products of our up-bringing and law school attempts to prepare us to behave like lawyers, let's not forget the oath we all took:

You do solemnly swear that you will support, protect and defend the Constitution

of the United States, and the Constitution of the State of Oklahoma; you will do no falsehood or consent that any be done in court, and if you know of any, you will give knowledge thereof to the judges of the court or some one of them, that it may be reformed; you will not wittingly, willingly or knowingly promote, sue or procure to be sued, any false or unlawful suit or give aid or consent to the same; you will delay no man for lucre or malice, but will act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client, so help you God.

This is what we all promised to do and is a condition of our privilege to practice law. So, how do we make it happen? Here are some of my practical practice tips, whether original or borrowed:

- Set an example both for your peers and new lawyers. Be a mentor. Don't let clients be the lawyer or your excuse for your own behavior. Balance emotion and objectivity. Live by

“On the other hand, lawyers donate countless hours representing abused children or elderly people who can't afford to pay...”



your word and be known for it. Cooperate where at all possible; it is not a sign of weakness. Being a jerk does not make you more effective. Get to know lawyers personally through bar activities, Inns of Court and social occasions. It is easier to be uncivil to someone you don't know. Treat other lawyers specially!

- Never write a letter (or these days, an e-mail) that you would be embarrassed to see on the front page of the newspaper; you can bet it will end up being an exhibit to a brief. Don't take advantage of an opposing

counsel's difficult situation, whether it be a looming deadline or a bad client. You could be caught in the same bind someday.

- Practice civility in all of your dealings – with opposing counsel, their clients, court personnel, the judges and the public in general. Don't misbehave in depositions. Save your arguments for the court because you are not likely to persuade opposing counsel to yield. Take at least one pro bono matter a year. Serve on your local bar professional responsibility or grievance committee. Don't tolerate someone lying to you or the court but be civil in how you approach it. Remember that judges mean well and that you are not always right. Accept that you will not win every case you take.

- Don't forget that serving as a judge is a public service oftentimes done at personal expense. Respect the office even if you are not happy with the judge. Judges deserve to be called Judges, at all times. Dress up for depositions and client meetings, even if business casual is the fashion of the day.

- Practice law with a sense of urgency but take time to think about what you are doing. You are paid to think not type. Return phone calls; repeat, return phone calls. Make phone calls! E-mail is great but it does not substitute for personal interaction. Get together in person and discuss your case. Explore the possibility of settlement from the day the case is filed, to the end of it.

- Work on one matter a day that you don't like. You know which ones they are. Never do

anything without your client's knowledge and give them copies of everything even if it doesn't reflect well on you. Remember that for most people calling an attorney means they really have a problem. Take your client's problems seriously but not to your personal detriment.

Your license to practice law gives you power to do great good or great harm; always keep that in mind. In short, always try to do the right thing.

1. 1 O.B.J. 1998, Vol. 69 No. 13
2. *Id.* Mr. Athens feared, "One wonders how long it will be before we have billboard advertising by lawyers in Oklahoma."
3. Michael Josephson, American ethics consultant, b. 1942.
4. Professionalism Redefined: More than Ethics, Lillian Corbin (Alternative Law Journal Vol. 28, No. 3, P. 139 (June 2001)).
5. See www.okbar.org/ethics/standards.htm
6. See www.okbar.org/ethics/ethics.htm
5. O.S. § 2

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You Can Get There from Here

A Roadmap of Solutions to Improve the Well-Being, Image and Service of the Bench and Bar

By Sharisse O'Carroll

"The practice of law has been described as hockey while wearing suits. If it is, we can take heart from the best hockey players. They, like the best lawyers, treat other players fairly and with civility. And they win without resorting to cheap shots." — Joni Johnston, Ph.D.¹

Civility and professionalism. Balance and satisfaction. These terms are the buzzwords utilized by a legal profession striving to heal itself in the wake of increased stress and financial insecurity in today's high-tech, high-pressure environment. The words suggest a happy, healthy and prosperous bar whose members are devoted to family, friends and the community, and to competently serving the public and improving the legal system. The reality is that lawyers and judges are becoming increasingly hostile, dissatisfied and uncivil. The question is, how can the well-being symbolized by these words be realized? How can we identify and eliminate the causes of their antitheses? What is the solution to improve our bar's well-being, enhance our bar's image and protect our bar's clients? We can find it. Yes we can get there from here.²

"[C]ivility is not a sign of weakness . . ."
— President John F. Kennedy

By now most are aware of the creative approach taken by Oklahoma Western District Court Judge Vicki Miles-LaGrange to remedy incivility, a problem that has been labeled "a crisis in the legal profession."³ Pursuant to a plaintiff's "Motion for a Protective Order Directing Defendant's Counsel to Cease Offensive and Unprofessional Attacks on Plaintiff's

Counsel," Judge Miles-LaGrange ordered that defendant's counsel write an article on civility and professionalism for publication in the *Oklahoma Bar Journal*.⁴ Judge Miles-LaGrange determined this non-monetary sanction was appropriate in light of offensive comments made by defendant's counsel in letters and pleadings that included a suggestion to a witness that he "[b]e like a potted plant and sit quietly in the corner."⁵

Judge Miles-LaGrange is certainly not the first judge to become frustrated over valuable time wasted reading court filings that serve little purpose other than to personally attack an opponent, nor is she the first judge to sanction unprofessional behavior. In *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*,⁶ the Iowa federal district court judge also required the submission of a bar journal article. In that case the judge found the general objections asserted by plaintiff's counsel to be "obstructionist, frivolous and deplorable." By way of explanation, the attorney argued they were in a "tizzy," they were "caught between counsel" and that in "some jurisdictions general objections [are] ... okay"; however, the court found these reasons "believable, but not justifiable." The court ordered counsel to write an article explaining why the objections he asserted were improper and to submit an affidavit stating that he alone "researched, wrote, and submitted the article for publication."

In Tennessee, a federal district court judge ordered an attorney to write a letter of apology for among other offenses, calling opposing counsel in correspondence "Nazis and redneck pecker-wood[s]." The court lamented the "uncivil, intemperate personal attacks launched by attorneys" and required that in the letter of apology, the attorney "acknowledge the inappropriateness of his personal attacks, and express remorse for injecting such attacks in this case."⁷

In Texas, a federal district court judge warned the lawyers in a case to start conducting themselves as competent lawyers fit to practice in federal court or he would consider ordering the parties to obtain new counsel. The judge became frustrated with the "antagonistic motions full of personal insults," that earned the "disgust" of the court. He admitted he wanted to "scream" at

the lawyers and compared his own responsibilities to that of "a person who supervised kindergarten."⁸

Finally, a Delaware judge assessed attorney's fees for the "continued negative, degrading and insulting correspondence between the two attorneys." The judge declared that "written advocacy has become the most common medium for the commission of uncivil acts," and noted that the attorneys' "mutual incivilities toward each other no doubt increased the fees of each of their clients."⁹

Lawyers who endure their opponents' incivilities sometimes complain that judges rarely do anything to curtail it. In a Washington, D.C. case a judge was found to have done too much. He required a public defender to be shackled and detained following a disagreement in the courtroom. The D.C. Commission on Judicial Disabilities and Tenure determined that the judge violated his duty to be patient, dignified and courteous, issued a reprimand against him and required him to submit a written apology.¹⁰

Whereas incivilities by attorneys usually do not rise to the level of implicating disciplinary rules,¹¹ incivilities by judges violate the provision of the Code of Judicial Conduct that

“The court lamented the ‘uncivil, intemperate personal attacks launched by attorneys’ and required that in the letter of apology, the attorney ‘acknowledge the inappropriateness of his personal attacks, and express remorse ...’”



requires judges to be “patient, dignified and courteous to all who appear before the court.”¹² The consequences of judicial incivility can be fatal.

“We close at 5” – “Four callous words that make a caricature of Texas justice.”¹³ Condemned inmate Michael Richard was executed a few hours after Texas Court of Criminal Appeals Presiding Judge Sharon Keller refused to keep the courthouse open an extra 20 minutes past 5 p.m. to enable the attorneys to file a last-chance pleading on his behalf. The attorneys were having computer problems that prohibited them from filing the pleading before 5 p.m. Keller’s actions violated the courts’ unwritten policies — on execution days the courts do not have a strict closing time. Three judges waiting at the courthouse for Richard’s filing were not informed that Keller had closed the building. Judge Cheryl Johnson who was assigned to the case, told the media she was “angry” and dismayed by Keller’s actions.¹⁴

Keller’s conduct was perceived as uncivil, unprofessional and abusive by journalists as well as the more than 1,600 citizens who signed a petition calling for her ouster. Further, her lack of empathy, compassion and judicial temperament resulted in the establishment of a Web site for members of the public to sign the judicial complaint, view a video of the protests against her, listen to songs written in her dishonor, leave comments and make donations.¹⁵

In California Judge Robert Fitzgerald became infamous for bullying a defendant into pleading guilty before a trial although DNA evidence had already exonerated him. The judge threatened to send the defendant to prison for life if convicted by a jury. When the defendant protested his innocence, the judge nonchalantly replied, “innocent people get convicted too.” After the defendant served 16 months for a crime he did not commit, the trial judge was criticized and the defendant was released by the appellate court.¹⁶

Cases like these do very little to heighten the public’s trust and respect for the justice system. Declining civility and professionalism has also been blamed for increased dissatisfaction of the bench and bar. But are incivility and lack of professionalism the cause of dissatisfaction or the consequence?

“Sometimes you got to get sick before you can feel better” — Frank Zappa

Over the past three decades, dozens of studies and surveys conducted by consulting firms, institutes, courts, law schools, medical colleges and bar associations nationwide have consistently confirmed that the legal profession is increasingly unhappy and unwell. Law school makes us sick morally, psychologically and physically. Practicing law makes us sicker. Our profession is ill in spite of impressive efforts by bar association committees to promote mentoring services,¹⁷ diversity concepts,¹⁸ work/life balance materials¹⁹ and community service opportunities.²⁰ Although laudable, these efforts have proven inadequate.²¹ In the interests of protecting our image, serving our clients and improving our system of justice, our state court justices and bar leaders should help us heal by forming a Chief Justice’s Commission on Professionalism.²²

When the American Bar Association developed the Model Code of Professional Responsibility in 1969 (rewritten in 1983, and renamed the Model Rules of Professional Conduct), the organization’s goal was to have the disciplinary rules adopted in every jurisdiction. The ABA successfully realized this goal.²³ In 1999, the National Conference of Chief Justices determined that each state should establish a “Commission on Professionalism . . . under the direct authority of the appellate court of highest jurisdiction” to “coordinate the activities of the bench, the bar and the law schools” in meeting the needs of the legal community with respect to lawyer professionalism.²⁴ The ABA supports the chief justices’ recommendation and hopes to similarly realize the goal to have a Professionalism Commission established in every jurisdiction. Currently, nearly a third of the states have Commissions or Centers on Professionalism and that number will likely double by the end of 2009.²⁵ The commissions already in operation have proven successful in improving professionalism and correspondingly the legal profession’s public image.²⁶

Accordingly, the question for Oklahoma is not whether it will join the other jurisdictions and develop a commission; rather the question is when. The time is now for the Oklahoma justices to focus on the well-being of its bench and bar through a Chief Justice’s Commission on Professionalism.

*“An anxious heart weighs a man down”
— Proverbs 12:25*

THE PROBLEM*

(*Warning — this information may be distressing). American lawyers suffer from depression, anxiety, alcoholism, drug abuse, suicidal thoughts, alienation, hostility and related physical problems more frequently than other professionals or the population as a whole.²⁷

Lawyers are depressed. According to numerous studies, including one conducted over the past twenty years by Johns Hopkins University, the rate of major depressive disorder for attorneys is higher than that found in any other occupation and is nearly four times higher than that found in the general population. Statistically, although only three to nine percent of the general public suffer from depression, at least 19 to 20 percent of practicing lawyers suffer from depression.²⁸

Law school causes depression. According to empirical studies and anecdotal evidence, students enter law school with psychological profiles similar to those of their peers in other graduate and professional programs. However, law schools are unique in that their students suffer disproportionate psychological damage prior to graduation. Studies consistently show that although entering law students experience depression at approximately the same rate as the general population, by the spring of the third year, the rate of clinically elevated anxiety, hostility and depression is nearly four times higher. "Clinically elevated" means the condition optimally calls for professional intervention. Further, two years after graduation, the rate of depression is still twice as high as that of the general population.²⁹

Lawyers abuse alcohol. Alcohol abuse among lawyers and law students is at least two times higher than the general population.³⁰ Although the length of a lawyer's practice seems to be unrelated to rates of depression, the length of practice does seem to have a relationship to alcohol abuse. Lawyers practicing

for 20 years or more were significantly more likely to abuse alcohol.³¹

Lawyers are dissatisfied. Multiple studies conducted by respected consulting firms, law schools and bar associations, including one comprehensive study conducted by the ABA Young Lawyers Division of the same group of attorneys in 1984, and 1990, demonstrate a substantial decline in lawyer satisfaction. Taken together, studies indicate that almost half of practicing attorneys would not choose again to be a lawyer and would change jobs if they had a reasonable alternative.³²

Notably, associates and partners in the largest firms are the least satisfied in spite of receiving the highest earnings.³³

“... studies indicate that almost half of practicing attorneys would not choose again to be a lawyer and would change jobs if they had a reasonable alternative.”

For example, of those lawyers working as solo practitioners or in small firms of 25 lawyers or less, 38 percent responded they would not consider changing jobs in the next two years. However, only 1 percent of lawyers working in large firms were similarly committed to their jobs. According to a report in the *Wall Street Journal*, lawyers at the largest firms were “so turned off by the grind of big-time practice” they were willing to leave six-

figure salaries behind.³⁴

In every study on career satisfaction, the results show that lawyers devote very little time to life outside work, tend to not exercise much, are less involved with their families and have a higher divorce rate than other professionals.³⁵ Moreover, these studies suggest that stress and dissatisfaction are bad for your health. Lawyers suffer from elevated rates of ulcers, coronary artery disease and hypertension.³⁶

“Virtue does not come from wealth, but... wealth, and every other good thing which men have...comes from virtue” — Socrates

THE CAUSE

Why are lawyers so unhealthy and unhappy? The most common complaints are increased pressure to attract and retain clients in a “fero-

ciously competitive marketplace," an increased emphasis on money and materialism, social isolation, insufficient attention to family and personal needs ("living to work, rather than working to live"),³⁷ an inadequate legal education, and a lack of civility and collegiality among lawyers.³⁸

Too much competition. Law practice today is faster, more competitive and more pressurized than ever before. In 1951 there was one lawyer for every 695 Americans. In 2000, there was one lawyer for every 264 Americans. If this rate remains consistent, by 2050 there will be one lawyer for every 100 Americans.³⁹ An American Bar Fellows research study of Chicago law firms over the past 25 years found the increased competition for new clients is overwhelming. In 1975, 54 percent of practicing lawyers were in large firms and these firms earned 65 percent of the total income. In 1995, 63 percent of practicing lawyers were in large firms and these firms earned 78 percent of the total income. Thus, in 1995, 37 percent of the practicing bar, including small firms and solo practitioners, were competing for 22 percent of the remaining available total income.⁴⁰ According to the Internal Revenue Service, "the inflation adjusted income of solo practitioners has been flat since the mid-1980s."⁴¹ Furthermore, between 1975 and 1995, income for attorneys in the top 25 percent of earners grew 22 percent while the income for the other 75 percent of earners dropped.⁴²

Too little training. Law is virtually the only profession that does not require some form of clinical or supervised practical training prior to licensure in any jurisdiction. For example, in California, New York and Ohio clinical training or apprenticeship is required for medical doctors, social workers, accountants, marriage and family therapists, and embalmers, but not for lawyers. According to one legal scholar, "[i]t may provide cold comfort to the deceased, literally, that their embalmer is required to have more practical training prior to licensure than the attorney that drafted their estate plan."⁴³ Consequently, law schools do not expose students to many of the basic skills needed to succeed in practice such as how to draft simple transactional documents, how to interview and handle clients, how to deal professionally with colleagues and how to bill their time.⁴⁴ In 1992, pursuant to a survey conducted by the ABA Task Force on Law Schools and the Profession, practicing lawyers respond-

ed that their law school training left them deficient in skills that they were forced to acquire on their own after graduation.⁴⁵

Unfortunately, there are some skills in which lawyers never become proficient. For example, many lawyers are poor writers. As one researcher stated, modern legal writing is often "flabby, prolix, obscure, opaque, ungrammatical, dull, boring, redundant, disorganized, gray, dense, unimaginative, impersonal, foggy, infirm, indistinct, stilted, arcane, confused, heavy-handed, jargon- and cliché-ridden, ponderous, weaseling, overblown, pseudointellectual, hyperbolic, misleading, uncivil, labored, bloodless, vacuous, evasive, pretentious, convoluted, rambling, incoherent, choked, archaic, orotund, and fuzzy ... Lawyers don't know basic grammar and syntax. They can't say anything simply. They have no judgment and don't know what to include or what to leave out. They do not know how to tell a story — where to begin, when to end, or how to organize it. They get so carried away with their advocacy that they distort and even deceive."⁴⁶ Law schools reward theoretical scholarship that has the most pages, the most footnotes and the most citations — the inverse of the succinct, concise and direct briefs necessary to avoid burdening overworked judges.⁴⁷

Too little morality. Good moral character is beneficial to health and well-being. A lack of good moral character results in depression and unprofessional behavior. Plato and Aristotle determined that good moral character consists of practical wisdom, moderation, courage and justice. Practical wisdom requires the ability to exercise good judgment. Good judgment requires empathy — the ability to see things from others' perspective without necessarily endorsing their view — and detachment — the ability to remain objective and contain one's feelings. Courage and moderation require a sense of proportion about when and how to act. Justice is the virtue directed at caring for others.⁴⁸

The Preamble to the Rules of Professional Conduct recognizes that good moral character is foundational to ethics and professionalism, noting that a lawyer is "guided by personal conscience" and that "difficult ethical problems ... must be resolved through the exercise of sensitive professional and moral judgment guided by the principles underlying the Rules."⁴⁹ Although not specifically defined, the elements of good moral character clearly include hones-



“Similarly, judges will often exercise their power in an abusive and bullying manner to disguise their fears of weakness, vulnerability and inadequacy.”

ty, integrity, self-respect, respect for others, reliability, trustworthiness, empathy, and dedication. These ideals are imparted in Oklahoma’s definition of professionalism which states, “professionalism for lawyers and judges requires honesty, integrity, competence, civility and public service.”⁵⁰

Moral character is determined by intrinsic or extrinsic motivations and values. A person is intrinsically motivated by choosing a self-directed action to promote not only his or her own welfare, but also the welfare of others. Intrinsic motivations are indicative of personal growth, self-understanding, close relationships with others and commitment to community improvement. The consequences of intrinsic motivations are lawyers who are confident, competent, happy, satisfied, professional and civil. Conversely, extrinsically motivated choices are directed toward external rewards such as money, grades, honors, avoidance of guilt or punishment, and pleasing or impressing others. Extrinsically motivated values produce frustration, distress and depression.⁵¹

Studies show that law school is detrimental to moral character. Law schools teach students to “think like a lawyer”; they do not teach empathy, caring and compassion, the qualities every lawyer should possess and qualities we would want our own lawyer to possess.⁵² In a comparative survey of professional schools, graduates of medical and dental school demonstrated an increase in awareness of moral responsibility whereas law graduates demonstrated a decrease. Studies show that during the first year of law school, the generally intrinsic values and motivations of the students shifted significantly toward more extrinsic orientations and well-being and life satisfaction fell substantially as a result.⁵³

Law students are robbed of their intrinsic values by unyielding financial burdens,⁵⁴ unbal-

anced focus on competition and grades, insufficient professional and practical instruction, inattention to personal needs, and de-emphasis on the needs of family and social life.⁵⁵ After graduation, when achievement is no longer measured by grades or scholastic measures, lawyers tend to measure their success by other extrinsic values such as money, prestige and status which lead to greed, anger and dishonesty.⁵⁶

Not surprisingly, lawyers who chase the almighty dollar are generally stressed, unhappy and unsatisfied regardless of how much they earn. Research has shown that, with the exception of those living in poverty, people are almost always wrong in thinking that more money will make them happier. Once people are able to afford life’s necessities, increasing levels of affluence matter surprisingly little. When people experience a rise in income, they quickly adjust their desires and expectations accordingly and surmise that they need even more money to bring them happiness. As more money almost always requires more work, money not only fails to buy happiness, it actually buys unhappiness.⁵⁷

In addition, extrinsic values and motivations contribute to feelings of vulnerability, inferiority, insecurity, inadequacy, awkwardness, weakness and lack of control. To conceal these emotions, lawyers will often overcompensate through dominance, aggression and ambition. Studies have documented incidents of misrepresentations of fact, dilatory behavior and dismissive attitudes, especially against newly admitted lawyers who observed that practitioners try to take advantage of less experienced lawyers and begin a relationship with hostility “to try to establish dominance.” Most troubling is that a majority of newly-admitted lawyers stated that when confronted with offensive behavior, they would likely respond in kind.⁵⁸

Similarly, judges will often exercise their power in an abusive and bullying manner to disguise their fears of weakness, vulnerability and inadequacy.⁵⁹ This results in lawyers and judges who are dissatisfied, less service-oriented and more inclined toward undesirable conduct with enormous detrimental consequences for the profession and those served by the profession.⁶⁰

"Everybody, sooner or later, sits down to a banquet of consequences."
— Robert Louis Stevenson

THE CONSEQUENCES

Unprofessional conduct affects everyone exposed to such behavior and the ripple effect of incivility is spread throughout the bar.⁶¹ The epidemic of declining professionalism has lowered public opinion and damaged attorneys' self-esteem. A survey conducted in the 1990s found that public confidence in lawyers' ethical standards was about the same as that for auto mechanics and substantially less than that accorded to bankers, accountants and doctors.⁶² Negative values, such as greed, fear, anger, aggression, selfishness, suspiciousness, cynicism, interpersonal conflict, Machiavellianism and ruthlessness (if not fraud, dishonesty and antisocial behavior), have become associated with the legal profession, and lawyers are perceived by themselves as well as the public as aggressive, dishonest, unethical, overwhelmingly materialistic, insensitive, uncaring and rude.⁶³

Unhappy lawyers not only burden their families. Given their role in a public profession they also injure their clients by failing to provide adequate representation. Unhappiness and depression are intimately associated with passivity and poor productivity at work. Dissatisfaction leads to neglect and incompetence. Neglect and failure to communicate are the most frequent complaints made by clients.⁶⁴ However, formal recognition usually comes late in lawyers' careers, after a long period of unrecognized and unaddressed problematic behavior. By that point, inadequate representation may already have caused irreparable injuries to clients and the legal system. The task, then, is to protect the public against harm by addressing potential problems before they rise to the level of disciplinary offenses.⁶⁵

Unsatisfied lawyers also burden the courts. Extrinsically-motivated lawyers may file frivolous lawsuits built on little evidence in the

hope of a fast settlement or may be tempted to handle cases that are beyond their competence or outside their area of expertise. The results can be disastrous and the clients pay the price.⁶⁶

"Lead me, follow me, or get out of my way ..."
— General George S. Patton

THE CURE

The biggest challenge to fostering professionalism is finding a way to encourage high quality work in the face of daunting personal and economic pressure.⁶⁷ Generally, the four main components of professionalism are ethical behavior, competence, civility and community service requiring a legal professional to have adequate skills, sensitivity, a moderate lifestyle and a commitment to the community. As in other jurisdictions grappling with diminished professionalism, Oklahoma has responded to professionalism needs through various activities such as establishing an ethics hotline to improve ethical behavior, adopting standards of professionalism to address civility, developing a mentoring program to improve competence, and forming various committees to focus on health, work/life balance and community service. While commendable, these efforts have not, as one researcher observed, "filled the shoes left vacant by the fading profiles of the legal profession."⁶⁸

Funding limitations, demands on time of volunteers and lack of coordination result in the duplication of effort, gaps in coverage and lost opportunities in professionalism programs and activities. Furthermore, the limitations inherent in the leadership, organization, structure and priorities of the state bar do not lend itself to a long-term commitment to the growth and development of professionalism efforts. Committee chairs and memberships change over the years. The bar president, who serves two years of significant service as president-elect and president while practicing law, has significant competing priorities during the short tenure.⁶⁹

More must be done — more programs, greater coordination of programs and a commitment to innovation within the profession must be present. Although resistance to the introduction of a new paradigm can be expected with established organizations, the challenge of institutionalizing lifetime professionalism can be met by forging a new entity to collaborate with the existing constituencies of the state

bar. The Oklahoma Supreme Court is the best fit for such a professionalism entity. The Oklahoma Supreme Court sets the standards for admission of attorneys to the practice of law and has exclusive regulatory authority.

A Chief Justice's Commission on Professionalism is necessary because professionalism should be recognized as the hallmark of the practice of law. A Chief Justice's Commission on Professionalism would benefit the bar and the public through the following activities:

- providing greater clarity and coordination among existing programs to increase their reach and impact. The commission would serve as an umbrella organization to coordinate all of the bar's professionalism efforts such as Mentoring, Diversity, Work/Life Balance, Bench and Bar, Law-related Education, Professionalism, Lawyers Helping Lawyers Assistance Program and Legal Internship;
- implementing legal writing clinics and seminars that could be mandatory pursuant to a court's order;
- providing a clearinghouse for national professionalism resources, seminars and latest developments;
- developing professionalism continuing legal education seminars for all areas of practice, in addition to the required ethics and serving as a source for professionalism speakers;
- establishing a judicial hotline so that judges may consult legal experts concerning compliance with the Code of Judicial Conduct pursuant to Proposed Code of Judicial Conduct Canon 2.9 [Comment 9];
- designing law school orientation programs that provide information about the realities and expectations of practice. These programs are crucial because a greater percentage of entering law students are "millennials," the generation that first graduated from high school in 2000. Millennials are more motivated to learn when they see a stronger connection between the task and their goal, and they respond best to activities that connect them to their real life and authentic situations. Research suggests that to help students transition into law school, law schools must introduce students to the realities of the profession and demonstrate

how law school relates to the practice of law;⁷⁰

- activating diversion and peer review programs;
- coordinating and encouraging statewide participation in pro bono and community service activities. Studies show that lawyers who provide community service and free legal services are more satisfied and enjoy higher self-esteem. Pro bono and community services improve professionalism, boost lawyer morale and also cause the public to look more favorably upon the bar. Further, pro bono and community service activities were routinely engaged in by lawyers in the past, who are believed to have enjoyed greater self-satisfaction and public esteem than today's lawyers. Such activities also are believed to be hallmarks of a profession as opposed to a trade;⁷¹
- identifying, enunciating and encouraging adherence to the non-mandatory Standards of Professionalism that involve aspirations higher than those required by the Oklahoma Rules of Professional Conduct.

Finally, a Chief Justice's Commission on Professionalism is necessary because empirical studies, surveys and evidence show they are successful. Jurisdictions with established commissions have experienced improvement in lawyer satisfaction, competence, interpersonal relationships (including multiethnic and multi-racial), self-esteem and public service.⁷²

"Be patient and you will finally win, for a soft tongue can break hard bones." — Proverbs 25:15

THE COMMITMENT

In 2005, Judge Deanell R. Tacha of the U.S. Court of Appeals for the 10th Circuit, wrote of the legal profession:

we are the profession whose core duty is to resolve disputes in an orderly, civilized, fair, and professional manner. To the extent that we fail, we diminish ordered liberty and undermine the rule of law ... it falls to us then to treat the problem [the loss of civility in the larger society] with a very heavy dose of civil discourse in the most difficult settings — settings where people are often angry, distressed, emotional, and under extreme pressure.

Judge Tacha added:

To the extent the legal professionals involved are able to bring to the situation a clear commitment to thoughtful listening, tolerant mutual respect, and measured, caring advocacy and decision making, they shine a light upon the meaning of ordered liberty for all who are affected by the justice system. We are the keepers of civility in that system. We are the keepers of the rule of law. We must, therefore, be models of civility wherever we are. We have a compelling responsibility to bring the sense of mutual respect and measured discussion to our most difficult societal contexts. That defines civility. That is, in fact, a central responsibility of the legal profession. It has never been needed more.⁷³

Unequivocally, if we are doing our jobs properly, “we take on other people’s burdens, we relieve stress, we pursue justice. We enable mankind to live a more peaceful and just life. We take the veneer of civilization and we make it a little thicker.”⁷⁴ As keepers of the civility and keepers of the rule of law, the time to shine the light has arrived.

1. Avoiding Incivility in Litigation,” (LexisONE, August 2003). www.lexisone.com/balancing/articles/august2003.html

2. See Barbara Glesner Fines, “Overview of Humanizing Need: Fundamental Principles and Challenges of Humanizing Legal Education,” 47 Washburn L.J. 313, 316 (Winter 2008) (the reverse of “You Can’t Get There from Here,” a phrase that has been used to describe the deficiencies in legal education. It is the punch line to an old joke about getting directions from a Yankee).

3. See David A. Logan, “Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility,” Wash. & Lee L. Rev. (Summer, 1999). Logan notes that bar leaders have expressed alarm at opinion polls that regularly reflect little respect for lawyers and the need to bolster ethics and professionalism “in all phases of the lawyer’s life.”

4. *Johnson v. Government Employees Insurance Co.*, Case No. CIV-07-868-M (W.D. OK), Order dated April 15, 2008.

5. The Court’s order can be found at: http://lawprofessors.typepad.com/legal_profession/files/07-cv-868.pdf. See also Debra Cassens Weiss, “Lawyer Who Made Snarky Comments Ordered to Write Civility Article,” at: http://abajournal.com/news/lawyer_who_made_snarky_comments_ordered_to_write_civility_article

6. 198 F.R.D. 508, 517-18 (N.D. Iowa 2000).

7. 190 F.R.D. 449, 460-61 (E.D. Tenn. 1999).

8. *Klein-Becker v. Stanley*, Case No. A-03 - CA-871-SS W.D. Texas (Order signed July 21, 2004).

9. *Muster v. Muster*, 921 A.2d 756, 767 (Del. Fam. Ct. 2005).

10. Debra Cassens Weiss, “D.C. Judge Cited for Ordering Detention of Talkative PD” ABA Journal (Mar. 21, 2008) www.abajournal.com/news/dc_judge_cited_for_ordering_detention_of_talkative_pd/

11. In *United States v. Wunsch*, 84 F.3d 1110, 1117, 1119 (9th Cir. 1996), the Court struck as unconstitutionally vague provision 6068(f) of the California disciplinary rules that required lawyers to “abstain from all offensive personality.” In that case the defense attorney had written a sexist letter to the federal prosecutor. The Court determined that it would be impossible for lawyers to know what was “offensive” given the ambiguous language of the statute; thus the rule had a chilling effect on some constitutionally protected speech. *Id.* Since this decision, California has adopted civility guidelines addressing the behavior previously found offensive under section 6068(f). See The State Bar of Cal., California Attorney Guidelines of Civility and Professionalism (2007) available at <http://calbar.ca.gov/calbar/pdfs/reports/Atty-Civility-Guide.pdf>. The California Guidelines were adopted on July 20, 2007.

In 2003, Arizona amended its Rules of Professional Conduct and removed the word “zealous” from the Preamble. The amended Preamble states lawyers are expected to maintain “a professional, courteous and civil attitude toward all persons involved in the legal system.” Ariz. R. S. Ct. Preamble (2006). Citing the revised Preamble, the Arizona Disciplinary Commission imposed a public reprimand and one year probation upon an Arizona lawyer who shouted epithets at a doctor during settlement negotiations, abused the judge whom he called “crazy” during a tirade that lasted several minutes, and suggested to opposing counsel that he “go perform an unnatural sex act” on himself. See *In Re John Thomas Banta*, Judgment and Order (Nos. 02-1070, 02-1628, 02-2066) (Mar. 23, 2005). In September of 2007, Arizona amended Rule 41(g) of the Arizona Rules of Professional Conduct that required lawyers to “abstain from all offensive personality.” The current rule requires lawyers to “avoid engaging in unprofessional conduct.” “Unprofessional conduct” means substantial or repeated violations of the Oath of Admission to the Bar or the Lawyer’s Creed of Professionalism of the State Bar of Arizona.

More recently in a Michigan case, an attorney was disciplined for stating on a radio show that the appellate judges who had reversed a large judgment were “Nazis” and “jackasses.” The Court found the attorney had violated two provisions of the Michigan Rules of Professional Conduct designed to regulate civility. Rule 3.5(c) prohibited a lawyer from engaging in “undignified or discourteous behavior toward the tribunal.” Rule 6.5[a] required that lawyers “treat with courtesy and respect all persons involved in the legal process . . .” *Griev. Adm’r v. Fieger*, 719 N.W.2d 123 (Mich. 2006). In a separate action in federal court, the attorney successfully challenged the constitutionality of both provisions. The U.S. District Court found the provisions were overbroad, vague and unenforceable. See *Fieger v. Mich. Supreme Court*, 2007 U.S. Dist. LEXIS 64973 (E.D. Mich., Sept. 4, 2007).

12. 5 O.S. ch. 1 app. 4 Canon 3(B)(3) Oklahoma Code of Judicial Conduct..

13. “Texan of the Year Finalist: Sharon Keller — Judge said ‘We close at 5’ Cast Pall on Texas Justice,” Dallas Morning News, Editorial (Sunday, Dec. 20, 2007). See also Hooman Hedayat, “Killer Keller Must Resign,” The Daily Texan Online (Oct. 18, 2007); <http://media.www.dailytexanonline.com/media/storage/paper410/news/2007/10/18/Opinion/Killer.Keller.Must.Resign-3040460.shtml>

14. “Judge: ‘We Close at 5’ - Texas Judge’s Decision To Close On Time Lead to Immediate Execution,” ABC News (Oct. 12, 2007) <http://abcnews.go.com/WN/story?id=3724883>.

15. <http://sharonkiller.com/>

16. See Dana Parsons, “O.C. Justice System Fails Again” Los Angeles Times, (Nov. 2, 2006) http://www.scottborthwick.com/images/_Los_Angeles_Times_O.C._justice_system_fails.pdf

See also <http://www.ocweekly.com/news/news/there-once-was-a-judge-from-nantucket/8902/> — noting that in 1991 Judge Fitzgerald grabbed national headlines for writing a poem to a man he sentenced to prison that stated:

The sentence I’ve chosen/To you may seem cold/You’ll pay and you’ll pay/All the while you’ll grow old/One day you will die/A funeral your warden will hold/For you will serve your entire natural life/And not be paroled.

17. www.okbar.org/members/committees/mentormatch.htm

18. www.okbar.org/members/committees/diversity.htm

19. www.okbar.org/members/worklife/Default.htm

20. www.okbar.org/members/committees/disaster.htm

21. To view a similar survey format, see generally a survey that was implemented in South Carolina at: http://professionalism.law.sc.edu/docs/professional_character_development/010.pdf. Oklahoma must rely upon presumptive comparisons of surveys and studies performed by other jurisdictions as no Oklahoma professionalism survey has been conducted. In 2006, under the tutelage of then Bar President Bill Grimm, a joint subcommittee of the OBA Professionalism Committee and Bench & Bar Committee developed a professionalism survey for Oklahoma judges and lawyers. The joint subcommittee was co-chaired by Court of Civil Appeals Judge Jane Wiseman and attorney Sharon Corbitt. Implementation of the survey was delayed so it would not interfere with the judicial elections held in November of that year. In early 2007, the Board of Governors voted to table the survey indefinitely. As of this writing, no action has been taken on the Oklahoma Professionalism survey. In December of 2007, Sharon Corbitt tragically died in a house fire as a consequence of the statewide ice storm and power outage.

22. The National Conference of Chief Justices developed a National Action Plan to correct the unprofessional behavior of lawyers. The Justices agreed that unprofessional lawyers create a lack of public confidence and impede the effective administration of justice. Working Group on Lawyer Conduct and Professionalism, Conference of Chief Justices, Report: A National Action Plan on Lawyer Conduct and Professionalism 1 (1999) [hereinafter “National Action Plan”].

23. www.abanet.org/cpr/centennial.html. Every state has adopted ethical rules based upon the ABA model except California whose ethical rules embrace the concepts of the ABA model but not the format. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10158&id=3422.
24. See National Action Plan, *supra* note 22.
25. ABA Center for Professional Responsibility Professionalism Initiatives Consortium, ABA Mid-Year Meeting, Los Angeles, CA (February, 2008). A list of states with commissions and the ABA guide to Professionalism Commissions can be found at: www.abanet.org/cpr/professionalism/profcommissions.html
26. See Avarita Hanson, "Professionalism and the Judiciary: Lessons Learned as Georgia Approaches 20 Years of Institutionalizing Professionalism," Chief Justice Of Ontario's Advisory Committee on Professionalism Tenth Colloquium on the Legal Profession (March 2008). www.lsuc.on.ca/media/tenth_colloquium_hanson.pdf
27. John Conley, "How Bad is it out There? Teaching and Learning about the State of the Legal Profession in North Carolina, 82 N.C.L. Rev. 1943, 1978 (2004) (citing Susan Saab Fortney, "Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements," 69 Univ. Mo. K.C. L. Rev. 239, 243 (2000); Ruth Ann McKinney, "Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?," 8 Legal Writing 229, 229 (2002)).
28. Only three occupations were discovered to have statistically significant elevations of MDD. Lawyers topped the list followed by pre-kindergarten and special education teachers, and secretaries. "Statistically significant elevated levels of depression" is strongly correlated with clinical impairment, and suggests the need for specific treatment. See Patrick J. Schiltz, "On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession," 52 Vand. L. Rev. 871(1999)(citing William W. Eaton et al., Occupations and the Prevalence of Major Depressive Disorder, 32 J. Occupational Med. 1079 (1990)). See also G. Andrew H. Benjamin et al., The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers, 13 Int'l J.L. & Psychiatry 233, 240 (1990).
29. Schiltz, *supra* note 28 at 874-75.
30. Susan Daicoff, "Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes," 11 Geo. J. Legal Ethics 547, 555-556 (1998) (citing Michael A. Bloom & Carol Lynn Wallinger, Lawyers and Alcoholism: Is it Time For a New Approach?, 61 Temp. L. Rev. 1409 (1988). "Some studies . . . suggest the incidence of chemical dependency in legal professionals might be as much as fifty percent (50%) higher than for the general population." Andrew V. Hansen, Alcoholism in the Lawyer's Context, 7 Legal Ref. Serv. Q. 231, 236 (1987)).
31. See Benjamin, *supra* note 28 at 241. See also James R. P. Ogloff, David R. Lyon, Kevin S. Douglas, V. Gordon Rose, "More Than 'Learning to Think Like a Lawyer': The Empirical Research on Legal Education, 34 Creighton L. Rev. 73 (2000).
32. See Schiltz, *supra* note 28 at 883-889 (citing American Bar Ass'n, The Report of At the Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives — Its Impact on Law Firms and Client Services 11 (1991); Hildebrandt, Client Advisory 1998, at 7 (1998); Task Force on Professional Fulfillment, Boston Bar Ass'n, Expectations, Reality and Recommendations For Change 2 (1997); Young Lawyers Div., American Bar Ass'n, The State of the Legal Profession 1990, at 51 (1991)). A study conducted by the RAND Institute of Civil Justice found that California attorneys were "profoundly pessimistic" about the law; only half said they would choose again to be a lawyer; and 70% said they would change careers if they got the chance. *Id.* at 882.
33. *Id.* See also *infra* note 57 and accompanying text (money does not buy happiness).
34. *Id.* at 887-88. (quoting Richard B. Schmitt, From Cash to Travel, New Lures for Burned-Out Lawyers, Wall St. J., Feb. 2, 1999, at B1).
35. *Id.* at 880. A "disturbing" 43% of respondents in a North Carolina survey stated that the demands of their work did not allow them enough time for a satisfying outside life. (citing N.C Bar Ass'n, Report of the Quality of Life Task Force and Recommendations 4 (June 20, 1991)).
36. "Law school teaches law students to compete over making money." *Id.* at 876 (citing Connie J.A. Beck et al., Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers, 10 J.L. & Health 1, 49 (1995-1996)).
37. *Id.* at 889-890.
38. See Daicoff *supra* note 30 at 557-58.
39. Jason M. Dolin, "Opportunity Lost: How Law School Disappoints Law Students, The Public, and the Legal Profession," 44 Cal. W. L. Rev. 219 (2007).
40. John P. Heinz, Robert L. Nelson, Rebecca L. Sandefur, Edward O. Laumann, *Urban Lawyers, The New Social Structure of the Bar*, 100 (University of Chicago Press, 2005).
41. *Id.* at n.59.
42. Fines, *supra* note 1 at 324.
43. Dolin, *supra* note 39 at 237-38 (citing Robert J. Borthwick & Jordan R. Schau, Note, Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors, 25 U. Mich. J.L. Reform 192 (1991)). ("Law, unlike other professions, requires no formal apprenticeship").
44. *Id.*
45. www.abanet.org/legaled/publications/onlinepubs/macrate.html
46. Tom Goldstein and Jethro K. Lieberman, *The Lawyer's Guide to Writing Well*, (University of California Press, 1988).
47. Dolin, *supra* note 39 at 253-54. ("Once written, these scholarly articles have little utility to the bench and bar and are almost always ignored.")
48. Lawrence S. Krieger, "Essay on Professionalism and Personal Satisfaction: The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness," 11 Clinical L. Rev. 425, 433 (Spring, 2005). See also Mark Neal Aaronson, "Be Just to One Another: Preliminary Thoughts on Civility, Moral Character, and Professionalism," 8 St. Thomas L. Rev. 113, 143-51 (Fall, 1995).
49. 5 O.S. ch.1 app.3-A Preamble ¶¶ 7, 9 (Rules of Professional Conduct)(emphasis added).
50. Approved by the OBA Board of Governors, 4/20/06, www.okbar.org/ethics/standards.htm.
51. Psychological studies show that people who are in a good mood, who are not in a hurry, and who empathize with others, are more helpful. In one behavioral psychology study, subjects who had just found a dime were twenty-two times more likely to help a woman who had dropped some papers than subjects who did not find a dime (88% v. 4%). In another behavioral study, passersby who were not in a hurry were six times more likely to help an unfortunate person who appeared to be in significant distress than were passersby in a hurry (63% v. 10%). Finally, in yet another study, subjects who were instructed to take the perspective of the person in distress felt empathy and thus were more likely to help than subjects in a low empathy condition. See generally J. Rachels, *Naturalism*, 74-91 (The Blackwell Guide to Ethical Theory, Oxford/ Blackwell Publ. 2000). These findings are consistent with legal professional surveys that suggest lawyers who are motivated by altruistic goals, who maintain a reasonable schedule, and who perform community service are more satisfied with their jobs, perform more competently, and have fewer instances of substance abuse.
52. Paula Lustbader, "Humanizing Legal Education Symposium: Humanizing Orientation: You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow," 47 Washburn L.J. 327, 335 (2008).
53. *Id.* See also Fines, *supra* note 2 at 316-17, 323.
54. Law students today pay up to 267% more for their education, compared with costs in 1990. See *id.*
55. See Roy Stuckey et al., Clinical Legal Educ. Ass'n, Best Practices for Legal Education: A Vision and a Roadmap 18 (2007). See also William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law 24 (2007) (The Carnegie Report).
56. See Daicoff, *supra* note 30 at 567.
57. Schiltz, *supra* note 28 at 922 ("Psychologists . . . refer to this process as the "hedonic treadmill.") See also Task Force on Professional Fulfillment, Boston Bar Ass'n, Expectations, Reality and Recommendations For Change 2-3 (1997)("One of the most interesting and ironic findings of the Task Force was a reiteration of the theme that money does not buy happiness.")
58. For example, see Report, Boston Bar Association Task Force on Civility in the Legal Profession (May 23, 2002).
59. See Daicoff, *supra* note 30 at 588-89.
60. Schiltz, *supra* note 28 at 918. (" Let me tell you how you will start acting unethically . . . an extra fifteen minutes added to a time sheet here, a little white lie to cover a missed deadline there . . . after a while, your entire frame of reference will change. You will still be making dozens of quick, instinctive decisions every day, but those decisions, instead of reflecting the notions of right and wrong . . . will instead reflect . . . what is profitable, and what you can get away with.")
61. *Lee v. American Eagle Airlines*, 93 F. Supp.2d 1322 (S.D. Fla. 2000).
62. Heinz, *supra* note 40 at 77. See also Schiltz, *supra* note 28 at 889.
63. See Daicoff, *supra* note 30 at 592.
64. For a state by state breakdown, see Stephen E. Schemenauer "A Century Later: Answering Roscoe Pound's Call For Change in the

Administration of Justice. Comment: What We've Got Here . . . is a Failure . . . to Communicate: A Statistical Analysis of the Nation's Most Common Ethical Complaint, *Hamline L. Rev.* 629, 666 (Summer, 2007). Oklahoma's 2007 Annual Report shows that the top three areas of misconduct resulting in formal grievances were Neglect (thirty-six percent), Personal Behavior (seventeen percent), and Misrepresentation (fifteen percent).

Oklahoma Bar Association, Annual Report of the Professional Responsibility Commission and Professional Responsibility Tribunal 8 (2007), available at www.okbar.org/members/gencounsel/2007annualreport.pdf.

65. See Schiltz, *supra* note 28 at 873.

66. Dolin, *supra* note 39 at 229.

67. Conley, *supra* note 27 at 1954.

68. Antonio "Tony" Alvarado, "Essay: A Radical Proposal for Lifetime Professionalism," 37 *St. Mary's L.J.* 1053, 1063 (2006).

69. See Hanson, *supra* note 26.

70. Lustbader, *supra* note 52 at 339-40.

71. See Daicoff, *supra* note 30 at 530.

72. See *supra* note 23 for ABA list of Commission Web sites. The author appreciates the surveys, statistical data, and anecdotal evidence provided by Cheryl Niro, Illinois, Avarita Hanson, Georgia, Mel Wright, North Carolina, and Carl Zahner and John Berry, Florida. There are similarities and differences in the structure and funding of Commissions in each jurisdiction, just as there are similarities and differences in the states' ethical rules. Generally, Commissions consist of an Executive Director or Chair, appointed members of the bench, appointed members of the practicing bar, the Deans or designated representatives from each of the state's accredited law schools, certain state bar staff members, and certain elected officers of the state's bar. Funding may be provided through CLE proceeds or annual registration fees. For example the Illinois Supreme Court designated a ten dollar (\$10) amount paid by each attorney in their annual registration fee to be allocated to fund the Commission. (Illinois is the most recent state to establish a Commission). The structure of Illinois' Commission

is set forth in Illinois Rule 799 of the Rules Governing the Legal Profession and Judiciary and can be found at: <http://www.iardc.org/rulesS-CT.html#Rule 799>

73. "The Benchers," *American Inns of Court Magazine* (July/August 2005).

74. Thomas D. Morgan & Ronald D. Rotunda, *Professional Responsibility Problems and Materials*, 25-26 (Foundation Press, 9th ed. 2006).

ABOUT THE AUTHOR



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Lawyers Should Have a Professional I.D.

By Lawrence K. Hellman

No, this column is not about a national I.D. card system that some have proposed. Instead, the topic is about one's *professional identity* — how it develops and how it influences your life and our legal system.

A healthy discussion about professional identity and purpose has developed in the wake of the Carnegie Foundation's publication in 2007 of an assessment of contemporary legal education: *Educating Lawyers: Preparation for the Profession of Law*.¹ The report made two principal recommendations. First, preparation for practice should be understood to involve three distinct, but related, "apprenticeships:" cognitive, practical, and ethical-social.² Second, the three apprenticeships should be administered in an "integrated" manner.³

The Carnegie Report proposes that understanding the role and purpose of a lawyer should be viewed as an *integral part* of a lawyer's training and of a lawyer's work.⁴ It views professional identity to be as essential as legal knowledge and practice skills to performing properly as a lawyer.⁵ Those who do not appreciate the inextricable relationship between knowledge, skills, and professional expectations will have a sense of professional identity and purpose that is likely to be inaccurate, incomplete or confused.⁶

Law school is an intensely acculturating experience. High achievers all, beginning law students are eager to learn what they're supposed to learn. And, indeed, there is a lot to learn. Of course, much of the focus at the

beginning is on substantive knowledge — legal doctrine and procedural rules — with ample attention to analytical and communications skills. What lawyers are supposed to *do* with their growing body of knowledge and mastery of skills is not always discussed. How they are supposed to *feel* about the legal outcomes they encounter in the cases they study is not necessarily considered to be part of the curriculum.

According to the Carnegie Report, students at many law schools "are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses ... They have no way of learning when and how their moral concerns may be relevant to their work as lawyers and when these concerns could throw them off track. Students often find this confusing and disillusioning. The fact that moral concerns are reintroduced only haphazardly conveys a cynical impression of the law that is rarely intended ..."⁷

As students progress through law school, they inexorably are forming a professional identity, but this is often an unguided (and unexamined) journey.⁸ The search for professional identity and purpose continues as the law school graduates enter practice.⁹ Like formal apprentices of a bygone era, new lawyers

seek to observe more experienced practitioners and learn from their examples. But who is there to discuss which examples are sound and which are flawed? In the absence of an environment that creates opportunities for reflection and criticism (like clinical rounds in medical school), what is there to fall back on but one's intuition?

The Preamble of the Model Rules of Professional Conduct identifies some principles that may help a lawyer to begin to develop a well-grounded sense of professional identity. While sometimes bordering on platitudes, the broad statements in the Preamble provide a perspective on the position of lawyers in society that can provide a foundation for one's professional identity. For example, the Preamble speaks of the lawyer as a "public citizen having a special responsibility for the quality of justice."¹⁰ This concept is further developed by the suggestion that lawyers should be engaged in seeking "improvement in law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession."¹¹

Statements such as these do not establish enforceable rules. Rather, they seek to articulate a sense of *professional* identity that is separate from the identity of clients, or even from one's *pre-professional* self. They express a sense of purpose and responsibility that is neither universally instinctive nor easily internalized. Yet, without such a sense of purpose and responsibility, how can lawyers justify to themselves or to society their control of the legal system?

So how does one acquire a "valid" professional I.D.? The process can begin by introducing the Preamble's vision of what it means to be a lawyer at the very beginning of law school and thoroughly and effectively integrating this perspective throughout all aspects of the curriculum. A central goal of overall curriculum should be understood to be to assist students to form a sense of professional identity that is confident, secure and healthy.

While the Preamble calls on all lawyers to view themselves as having a special responsi-

bility for the quality of justice delivered by the legal system, wisely, the Carnegie Report does not ask the law schools to indoctrinate their students with some preferred view of "justice." It recognizes that any such effort would be both "illegitimate and ineffective."¹² After all, the formation of one's professional identity is an inherently individual process. The Carnegie Report simply proposes that matters of ethics, morals, and justice must be addressed persistently throughout law school *in connection with*

“...the broad statements in the Preamble provide a perspective on the position of lawyers in society that can provide a foundation for one's professional identity.”



the development of the cognitive and practice skills that the students are acquiring in law school.¹³ Otherwise, the ethics rules and broad visions of professional identity and purpose will tend to be viewed as peripheral considerations, not factors that go to the core of being a lawyer.¹⁴ Because "law school cannot *help* but affect students' values or ethical perspectives,"¹⁵ the schools should seek to do so intentionally and constructively, not accidentally and confusingly.¹⁶

But the Carnegie Report has a blind spot. No matter how purposeful the law schools become with respect to helping their students begin to form their professional identity, it is a mistake to view the influence of the law schools in the formation of their students' professional values as occurring in a vacuum, protected from the influences of the practice world. An empirical study I conducted more than two decades ago investigated the influence of law office

work *during law school* on how law students absorb professional values.¹⁷ The study “demonstrated that a student’s practice environment quickly supersedes law school as a source of reference for demarcating professionally acceptable behavior.”¹⁸ There is every reason to believe that the practice environment continues to dominate the formation of professional identity after one’s graduation from law school and admission to the bar.

If the Carnegie Report is right about how legal education has been conducted at most law schools up to now, this means that the lessons of “the real world” are being taught mostly by lawyers whose sense of professional identity and purpose was inadequately developed during their law school years and who are, therefore, ill-equipped for this instructional role.

For future generations of lawyers to have a more confident and comprehensive sense of professional identity and purpose than their predecessors, the law schools and the profession will have to join efforts and simultaneously address the challenge.

NOTE: This article is an updated version of articles on the subject published by Dean Hellman in The National Law Journal and the March 2008 Oklahoma County Bar Association’s publication, Briefcase.

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1. William M. Sullivan, et. al., *Educating Lawyers: Preparation for the Profession of Law* (2007) (hereinafter “Carnegie Report”).
2. *Id.* at 27-29.
3. *Id.* at 13, 160-61, 191-92, 194-97.
4. *Id.* at 3-4.
5. *Id.* at 31.
6. *Id.* at 127-28.
7. *Id.* at 187-88.
8. *Id.* at 140.
9. ABA Section on Legal Education and Admissions to the Bar, *Legal Education and Professional Development — An Educational Continuum*, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap 305-17 (1992).
10. ABA, Model Rules of Professional Conduct Preamble Para. [1].
11. *Id.* Preamble Para. [6].
12. Carnegie Report, *supra* note 1, at 135.
13. *Id.* at 142-43.
14. *Id.* at 31-33.
15. *Id.* at 139.
16. *Id.* at 140.
17. Lawrence K. Hellman, *The Effects of Law Office Work on the Formation of Law Students’ Professional Values: Observation, Explanation, Optimization*, 4 GEO. J. LEGAL ETHICS 537 (1991).
18. *Id.* at 611.

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Ethical Rules Regarding Division of Fees among Lawyers Not in the Same Firm

By Greg Haubrich and Jake Pipinich

Although long practiced, “referral fees” or “co-counsel fees” historically were based on gentlemen’s agreements that were either not addressed, or were discouraged, by ethical rules. Co-counsel fees are now expressly permitted by Oklahoma’s Rules of Professional Conduct. However, co-counsel fees may only be paid (or accepted) if there is a written agreement with the attorneys’ mutual client, the lawyers have accepted joint responsibility to the client and the entire fee is reasonable. The requirement of written client consent is likely to be considered a state public policy that overrides freedom of contract between lawyers and may be determined to prevent even *quantum meruit* recovery by a lawyer who has performed work for a client but whom the client does not wish to receive a fee.

HISTORICAL BACKGROUND

Contingency fees are an American development, forbidden by common and criminal law in the English legal system. The concept of contingent fees would have run afoul of statutes and ethical prohibitions prohibiting maintenance (meddling in the subject of a lawsuit by a stranger to the litigation), champerty (acquiring an interest in the lawsuit the outsider was meddling in) and barratry (encouraging vexatious litigation).¹ On the American frontier, however, the practice arose of attorneys acquiring contingent interests in their clients’ cases:

Settlers who had purchased titles from mere squatter-enclosers and had built homes, cleared farms and paid taxes for

years, now found themselves ejected, their improvements treated as mere offsets for rent they had not paid to the true land grantees. These disseized settlers, desperate for legal representation and with no ability to pay up-front fees, had no choice but to use attorney contingency fee arrangements to defend their rights at trial or on appeal.²

As the use of contingency fees arose, so did the practice of paying referral fees. The most common example is the “general practitioner” referring a personal injury case to a personal injury trial lawyer. The practice remains controversial, and “pure” referral fees are prohibited in many jurisdictions.³ Proponents of refer-

ral fees argue that referrals serve the interest of clients by providing access to superior specialized legal services and to lawyers who have the resources and particular skills without which seriously injured people would be overwhelmed by the resources of giant corporations and insurance companies. Opponents contend that referrals treat clients like commodities, enrich referring lawyers who perform no work for the client and relieve referring lawyers of their ethical responsibilities to their clients.⁴

In Oklahoma, prior to 1993, DR 2-108(A) permitted division of fees by lawyers in different firms only "in proportion to the services performed and the responsibility assumed by each." The latter provision, "the responsibility assumed by each," was such a general, vague phrase that it was used to justify the common practice of paying one-third or some other percentage to a referring lawyer. Both referring and referred-to lawyers considered payment of such fees to be a matter of honor, good business and service to mutual clients who otherwise would not have a realistic opportunity to have their cases presented on a level playing field with the powerful interests arrayed against them. The proportionality that appeared to be required by the rule was honored by being winked at.

R.P.C. Rule 1.5(e), effective from 1993 to 2007, permitted proportional division according to the work performed or responsibility assumed by the lawyers, but also permitted a "division of fees between lawyers not in the same firm [if] by *written agreement with the client, each lawyer assumes joint responsibility for the representation* [and] the total fee is reasonable." Thus, it was made clear that co-counsel fees were permitted to be paid to a referring lawyer, but only so long as he assumed responsibility to the client for the work performed on the case. Committee comments clarified that the rule was intended to cover cases in which a fee was contingent and the client was referred to a trial specialist. The client was not required to

be advised of how the fee was to be divided.⁵ One common way of meeting the requirement was for the trial lawyer to include a provision in his contingency contract with the client that he assumed joint responsibility with the referring lawyer.

2007 AMENDMENT

Last year Rule 1.5(e) was modified, as follows:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) *the client agrees to the arrangement and the agreement is confirmed in writing;* and

(3) the total fee is reasonable.

The Committee Comment 7 to the amendment clarifies what is intended:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the

basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement and the agreement must be confirmed in writing. Contingent fee agreements must be in writing and signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the repre-

“... permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole.”

sentation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

Thus, there is now a clear ethical framework and road map for division of fees among lawyers in different firms. With written client consent after full disclosure, attorneys may refer cases to one another and divide the fees either proportional to the work performed, or on a percentage basis, so long as the total fee is reasonable and both attorneys assume responsibility to the client.

This reform did not occur in a vacuum. The revision was suggested by the ABA model rule, and is based on it, although there is a significant difference. Model Rule 1.5(e) reads:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

The distinction is that the ABA rule expressly requires that the client agree in writing to the "share each lawyer will receive," whereas the Oklahoma version does not. That omission must be considered intentional and suggests that Oklahoma will not require that lawyers disclose the proportional or other basis on which their fees will be divided. Disclosure is not prohibited, of course, and "the arrangement" could conceivably be interpreted to include the specifics of the arrangement, including the shares the lawyers have agreed to apportion.

RELEVANT CASE AUTHORITY FROM OTHER JURISDICTIONS

A number of American jurisdictions have previously required written disclosure and consent by clients to fee-splitting arrangements. These are sometimes referred to as the "Illinois Rule" because Rule 1.5 (f-i), Illinois Rules of Professional Conduct, requires very

explicit disclosure to the client of fee-splitting arrangements. Authority in jurisdictions that have client-consent requirements is potentially relevant in Oklahoma in three situations: 1) disputes between clients and attorneys; 2) disputes among attorneys; and 3) disciplinary complaints. The potential issues are made more complex by the fact that Oklahoma attorneys cannot perfect a lien without filing a lawsuit,⁶ and that *quantum meruit* may no longer be a reliable basis for stating an attorney's fee claim if the a client does not consent to a former attorney receiving a fee.

The California Supreme Court, interpreting a similar rule, refused to permit payment of "referral fees" or even *quantum meruit* when there was no written consent to the arrangement by the client. Rule 2-200 of California's Professional Responsibility Rules reads:

(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless:

(1) The client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division...

In *Chambers v. Kay*,⁷ Chambers and Kay had worked together on a sexual harassment case. They shared an office, but were not partners. They had a disagreement over the case, and Kay "fired" Chambers from the case with their client's approval. Kay sent a letter to Chambers affirming their previous fee division agreement: 16.5 percent of the total fee. He sent a copy of the letter to the client, but did not obtain her written consent to the division. Chambers, by letter, accepted the offer. HELD: the contract between the two lawyers was void and unenforceable under any theory because the client had not consented, in writing, to the division:

Just as a client has a right to know how his or her attorney's fees will be determined, he or she also has a right to know the extent of, and the basis for, the sharing of such fees by attorneys. Knowledge of these matters helps assure the client that he or she will not be charged unwarranted fees just so that the attorney who actually provides the client with representation on the legal matter has 'sufficient compensation' to be able to share fees with the referring attorney. Disclosure of these matters to the cli-

ent should be in writing because the client should not be expected to mentally retain such information throughout the pendency of the case.” ... Moreover, “[requiring the client’s written consent to fee sharing impresses upon the client the importance of his or her consent, and of the right to reject the fee sharing.”⁸

The court even declined to award Chambers compensation on a *quantum meruit* basis. It held that even though the client was aware of the division of fees, and that Chambers had performed substantive work on the case, the lack of written consent to fee division by the client precluded compensation to Chambers:

Chambers’s performance of legal services in the Weeks case and Kay’s acknowledgment of the fee-sharing agreement are irrelevant in light of rule 2-200’s language expressly barring attorneys from dividing any fees (except between partners, associates, or shareholders) without the client’s written consent. (Rule 2-200 (A) (1) . . .) Although Chambers argues that rational reasons exist for allowing a division of fees despite the lack of written client consent, e.g., it would effectuate the intent of the contracting attorneys and would avoid incentives for fraud in the inducement of such contracts, we remain mindful that we adopted the rule to protect the public and to promote respect and confidence in the legal profession. (See rule 1-100(A), 1st par.) *Because attorneys who negotiate fee divisions without fulfilling their obligations under rule 2-200 undermine the public’s respect and confidence in the legal profession by failing to put the best interests of their clients first, and because attorneys are fully capable of safeguarding their own interests simply by obtaining the requisite client consent, we are not*

*persuaded that Chambers’s proffered reasons are sufficient to disregard rule 2-200’s command.*⁹

And further: “We perceive no legal or policy justification for finding that the fee the parties negotiated without the client’s consent furnishes a proper basis for a *quantum meruit* award in this case.”¹⁰

Let’s take a step back and get this straight. A lawyer may promise to pay a co-counsel fee, then break his promise and not be guilty of ethical violations? In some jurisdictions, yes. Indeed, the lawyers should never have entered into the agreement in the first place, and payment of the fee without written client consent may itself be an ethical violation. Interpreting the Illinois rule, the 7th Circuit Court of Appeals held that “precise compliance” with the disclosure requirements of the rule is required as a matter of public policy even though it might allow lawyers to avoid negotiated agreements to pay referral or other co-counsel fees.¹¹ In our legal community we pride ourselves on the fact that our word is sufficient to rely on and transact business. However, our clients’ right to disclosure and consent to division of fees trumps even our word as our bond to our brothers and sisters of the bar.



“... clients’ right to disclosure and consent to division of fees trumps even our word as our bond ...”

Here’s the part that really bothers me and will bother many of you as well. Suppose I accept and work up a case and negotiate a settlement offer which I consider reasonable and recommend to my client. At this point, hypothetically, I have not filed a case and do not have a perfected attorney’s lien. (See 5 O.S. §6, fn. 5.) The client rejects my recommendation, fires my firm and hires another lawyer. Some time later the client settles, or obtains a verdict, for an amount similar to the offer my former client originally rejected. Can the second attorney call me up and negotiate an agreement for a fee division? Not without client consent.

Next question: Can I make a claim based on the work I have done? The answer should be that the judge can divide a fee equitably in a fee dispute between attorneys, even though he cannot enforce a fee-division agreement that was not consented to by the client. Sometimes, however, I've noticed some diversion between that what I think the law should be and what it actually turns out to be once the appellate courts get ahold of it.

Well, you may say, *Chambers* was a California case and surely other jurisdictions haven't followed it: "*Au contraire, mon frère.*"¹²

Under a Texas rule requiring both disclosure to the client of a fee-splitting arrangement, and consent by the client whether oral or written, attorneys were not permitted to divide fees under a fee-division arrangement because the client denied that he knew of or consented to the arrangement:

In substance, the trial judge, in his finding and conclusion number five, which is attacked by Lemond, found and concluded that the referral agreement is void and unenforceable as being against public policy because Jones, the client, was never informed of the fee-splitting agreement between Lemond and Jamail, and never consented to such arrangement after full disclosure. That finding ... does not present reversible error. Under the facts as found by the trial court, the referral agreement is unenforceable under the laws of this state.¹³

The Minnesota Supreme Court, considering a fee-splitting referral arrangement under a professional responsibility rule virtually the same as Oklahoma's, likewise held the arrangement was void unless the client had given his consent:

The purpose of these rules governing fee-splitting agreements is to protect the client's best interests throughout his/her representation. Each client has a right to choose the attorney that he/she prefers and to be knowledgeable about the specifics of his/her case, especially those terms regarding the payment of fees. To allow attorneys to proceed with fee-splitting arrangements without the client's written agreement or knowledge would put the client at a severe disadvantage in the lawyer-client relationship.

...

In this case, while the attorneys may initially have intended to divide the labor and responsibility, Hollender performed no work on the case and did not maintain joint responsibility for the case because of his untimely death. Koch was neither told of the share that each attorney would receive, nor did he consent to the fee split and joint representation in writing. The fee-splitting agreement did not comply with two of the three requirements of Rule 1.5(e).¹⁴

On the other hand, practical and equitable considerations have led some jurisdictions to hold that failure to comply with Rule 1.5(e) is not an automatic defense permitting a referred-to lawyer to violate his or her word to a referring attorney. In Maryland, for example, violation of the rule is not a *per se* defense to an action to enforce a fee-splitting agreement. Factors to be considered include:

- the nature of the alleged violation;
- how the violation came about;
- the extent to which the parties acted in good faith;
- whether the lawyer raising the defense is at least equally culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation;
- whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement;
- whether the client, in particular, would be harmed by enforcing the agreement; and,
- any other relevant considerations.

See, *Goldman v. Cooper*,¹⁵ and *Post Chartered v. Bregman*.¹⁶ A court can issue a valid equitable order enforcing or modifying the agreement, and has the power to return all or a portion of the fee to the client if the client was harmed by the agreement.¹⁷ Violations of the rule are still, however, matters for consideration by the Bar.¹⁸

JOINT VENTURERS

One additional problem may be presented by the act of fee splitting itself. If attorneys are found to be in a joint venture, joint and several liability may attach, allowing liability in excess of the amount of the fee received by an indi-

vidual attorney. "A joint venture is defined by *Martin v. Chapel, Wilkinson, Riggs & Abney*, 1981 OK 134, 637 P.2d 81, 'as an association of two or more persons to carry out a single business enterprise with the objective of realizing a profit.'"

The essential criteria for ascertaining the existence of a joint venture relationship are: (1) joint interest in property, (2) and express or implied agreement to share profits and losses of the venture and (3) action or conduct showing cooperation in the project ... The contribution by the respective parties need not be equal or of the same character, but there must be some contribution by each co-adventurer of something promotive of the enterprise.¹⁹

Can it be said that fee splitting creates a joint venture? Yes: "A joint venture has been found to exist where attorneys have agreed to share fees."²⁰ The effect of a finding of a joint venture can lead to joint and several liability. "Where the relationship between attorneys is one of more nearly equal responsibility, authority, and profit sharing, it may fit the legal description of a joint venture . . . permitting joint and several liability."²¹ Although the *Lampkin* court only found several liability to the extent of unjust enrichment, the court clearly recognized the concept of joint ventures in the context of attorney fee sharing. Therefore, an attorney need always be aware of the omnipresent specter of potential joint and several liability if fee splitting arrangements are to be used. In other words, with regard to potential co-adventurers, "choose wisely and well."²²

ATTORNEY LIENS AND PROPOSED LEGISLATIVE ACTION

Attorneys should be able to enforce liens for work they have done on behalf of a client, whether a case has been filed or not. A contrary rule encourages litigation and denies lawyers compensation for work they perform on behalf of their clients. Recent Oklahoma authority states that Oklahoma recognizes only a statutory lien, which is created by filing a case (5 O.S. §6); or a charging lien, based on a lawyer's possession of a client's property.²³ This appears to overrule or at least ignore older authority,

“... relationship between attorneys is one of more nearly equal responsibility, authority, and profit sharing, it may fit the legal description of a joint venture ... permitting joint and several liability.”

which protected a lawyer's claim when third parties entered into collusive or exclusive settlements which the client obtained following discharge of an attorney or by settling around his attorney. See, e.g., *Goldberg's Loan Office v. Evans*.²⁴ If a lawyer has not filed a case, she has no lien. Thus, arguably, under the new version of Rule 1.5(e) a client or subsequent lawyer has no enforceable obligation to pay a lawyer for work which benefited her client. In fact, equity aside, it may be an ethical violation for a subsequent lawyer to pay a previously discharged lawyer without obtaining written client consent.

Attorney fee contracts routinely state that the client gives a lien to the attorney. Unfortunately, under our statutes and case authority this is not a lien. The Oklahoma Legislature should consider modifying the lien statutes to permit an attorney to perfect a lien by contract with her client, unless she is fired for cause. Notably, 5 O.S. § 9, which limits a discharged attorney's lien to one-third of "the amount sued on," is also archaic since Oklahoma no longer permits suit for specific amounts, but only for jurisdictional amounts (in excess of \$10,000 for district court, in excess of \$75,000 for federal diversity jurisdiction). 5 O.S. § 9 should be amended to permit a discharged attorney's claim to be based on the amount recovered, not the amount sued on; and to permit recovery according to contractual terms so long as the contract complies with ethical provisions governing the content and substance of attorney fee agreements.

PRACTICE SUGGESTION

When attorneys refer clients to others with the intention of splitting fees, in order to comply with Rule 1.5(e) they should enter into written agreements with each other regarding

the division of fees and each take full responsibility for the representation. Additionally, they should consult with their clients, disclose the relationship and enter into written agreements with their mutual clients which include informed consent to the fee division. Contingent fee agreements, which are required to be in writing, should include a provision that defines what will occur if the attorney is discharged without cause, or if the attorney returns the case to the client, and give the lawyer the option to retain a claim on the client's recovery on either a contingent or hourly fee basis. Referring lawyers and referred-to lawyers should consider meeting with their mutual clients together, discussing the fee issues together and obtaining mutual consenting agreements at the time the new lawyer is associated.

CONCLUSION

Cases belong to people, not to their attorneys. The amendments to Rule 1.5(e) are a clear public statement that Oklahoma endorses referrals for the benefit of litigants and provide a mechanism for ethically associating additional counsel to assist one's clients. On the other hand, the rule creates new problems for lawyers who have worked for a client but whom the client will not consent to be paid for that work. Legislative consideration is necessary to protect discharged lawyers from being excluded from equitably recovering expenses and fees when their former clients obtain compensation based, at least in part, on work done by their former counsel.

1. Curzon, *Dictionary of Law*, 6th Ed., London: Longman (2002).

2. Karsten, *Enabling the Poor*, 47 DePaul Law Review 231, 236-7 (1998).

3. See, e.g., New Hampshire Bar Association, *Referral Fees: When They May Be Paid and How They May Be Advertised*, Ethics Committee Formal Ethics Opinion #1995/1996 - 12, May 8, 1996.

4. 66 Texas Bar Journal 972 (Dec., 2003).

5. Oklahoma Rules of Professional Conduct, Rule 1.5(e) (1993), Committee Comment 7.

6. 5 O.S. §6, Oklahoma's attorney lien statute, provides for creation and attachment of a lien only to an action filed in court:

From the commencement of an action, or from the filing of an answer containing a counterclaim, the attorney who represents the party in whose behalf such pleading is filed shall, to the extent hereinafter specified, have a lien upon his client's cause of action or counterclaim, and same shall attach to any verdict, report, decision, finding or judgment in his client's favor; and the proceeds thereof, wherever found, shall be subject to such lien, and no settlement between the parties without the approval of the attorney shall affect or destroy such lien, provided such attorney serves notice upon the defendant or defendants, or proposed

defendant or defendants, in which he shall set forth the nature of the lien he claims and the extent thereof; and said lien shall take effect from and after the service of such notice, but such notice shall not be necessary provided such attorney has filed such pleading in a court of record, and endorsed thereon his name, together with the words "Lien claimed."

7. *Chambers v. Kay*, 1562002 CA 10013.

8. *Id.* at ¶ 67-68.

9. *Id.* at ¶ 74. (Emphasis supplied).

10. *Id.* at ¶ 85 (Emphasis supplied).

11. *Kaplan v. Pavalon & Gifford*, 12 F.3d 87 (7th Cir. 1993).

12. Carlin, George, *circa* 1970.

13. *Lemond v. Jamail*, 763 S.W.2d 910, 914 (Tex.App., 1998).

14. *Christensen v. Eggen*, 577 N.W.2d 221, 225 (Minn., 1998).

15. *Goldman v. Cooper*, 712 A.2d 1, 122 Md. App. 29 (Md. App., 1997).

16. *Post Chartered v. Bregman*, 707 A.2d 806, 349 Md. 142 (Md., 1998).

17. *Goldman*, at 45.

18. *Id.*

19. *Lampkin v. Bloodworth*, 2001 OK CIV APP 29, 23 P.3d 958, 963.

20. *Id.* See, *Duggins v. Guardianship of Washington*, 632 So.2d 420 (Miss. 1993); *Fitzgibbon v. Carey*, 688 P.2d 1367 (Ore. App. 1984); *Floro v. Lawton*, 187 Cal.App.2d 657 (1960).

21. *Id.*

22. *Kligerman v. Lynch*, 223 A.2d 511, 513 (NJ. Super. 1966).

23. *State ex rel Okla. Bar Ass'n. v. Cummings*, 1993 OK 127, 863 P.2d 1164 (Okla. 1993).

24. *Goldberg's Loan Office v. Evans*, 1934 OK 597, 37 P.2d 286.

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Foregoing the ‘Scorched Earth’ Policy: Ethical Cross Examination

By Robert Don Gifford and Stuart Phillips

Be mild with the mild; shrewd with the crafty; confiding to the honest; merciful to the young, the frail, or the fearful; rough to the ruffian, and a thunderbolt to the liar. — Francis L. Wellman¹

He’s lying. You know it, he knows it, and everyone in the courtroom knows it. At least they *should* know it. You rise from your chair for cross-examination, swelling inside with righteous indignation as you prepare to brand him a liar. Just as you prepare to let loose the thunderbolt — you hesitate. Will it help your client’s case to call the witness a liar in open court? Aside from evaluating its actual value as a trial tactic, is it even proper to do it?²

There is no question that cross-examination is venerated in our system. It has been described as an absolute right³ that is an intrinsic part of the guarantees of the Confrontation Clause.⁴ It is often referred to as the greatest legal engine for the discovery of the truth and as one of the most valuable rights given by law.⁵ As Justice Powell phrased it, “The right of cross-examination is more than a desirable right of trial procedure. It is, indeed, ‘an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.’ ”⁶

However, this right is not one that is absolute. The ethical considerations that overlay the evidentiary and tactical concerns of cross-examination are all too easy to overlook. The restraints that exist are, or could be, imposed by our courts, bar licensing authorities, and even our own personal moral code.⁷ Examining all three of these considerations together will

shape the extent to which counsel may cross-examine, as well as the trial tools available in other aspects of a lawyer’s practice niche.⁸ After reviewing general ethical situations that may arise during cross-examination, the hardest is the omnipresent “horns of dilemma” of cross-examining the truthful witness.

ETHICAL UNDERPINNINGS OF CROSS-EXAMINATION

Obviously, cross-examination is not an opportunity to allow counsel to berate witnesses, but serves at least two important functions deemed fundamental to the integrity of our legal system, both of which revolve around the search for truth: 1) to develop relevant facts related to matters covered (or studiously avoided) on direct examination; and, 2) to impeach the veracity or credibility of a witness in order to allow the finder of fact to give proper weight to their testimony.⁹

In the criminal law arena, every attorney is mandated by oath, rule and law to be ethical. Prosecutors, as representatives of the sovereign, are held to even higher standards and expectations.¹⁰ For criminal defense counsel, Justice White sought to modify the view of the truth-seeking function to a pure adversarial function in an oft-cited dissent, writing:

But defense counsel has no... obligation to ascertain or present the truth. Our system assigns him a different mission... [W]e... insist that he defend his client whether he is innocent or guilty... If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. ... [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.¹¹

Despite this candid, if somewhat cynical, assessment, this is not a *carte blanche*. While a criminal defense lawyer may certainly defend the proceeding “as to require that every element of the case be established,”¹² the “overarching duty to advocate the defendant’s cause” is limited to “legitimate, lawful conduct compatible with the very nature of a trial as a search for truth.”¹³ Every Oklahoma lawyer’s responsibilities “as a representative of clients, an officer of the legal system and a public citi-

zen are usually harmonious.”¹⁴ To put it plainly, counsel must act within the bounds of the law.¹⁵

Attorneys are required to comport themselves with both substantive and procedural rules. In the courtroom, a lawyer “is not justified” in consciously violating rules of evidence and procedure in a zealous representation, as they represent a reasoned choice in the manner of effectuating our societal norm of a fair trial.¹⁶ As such, it is improper for a lawyer to ask a question “which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong.”¹⁷ Doing so risks not only reversal, but also disciplinary action and loss of credibility.

In conducting a cross-exam, as with anything, the lawyer is constrained by several ethical requirements. No matter what role you fulfill, a lawyer may not: 1) knowingly make a false statement of material fact to a tribunal; 2) make improper personal commentary on credibility or guilt; 3) offer false evidence; 4) engage in fraud, deceit or misrepresentation; 5) examine a witness for the sole purpose of harassment or abuse; or, 6) allude to matters that are irrelevant or that cannot be supported by evidence.¹⁸

Obviously, a lawyer should not make a false statement of either law or fact¹⁹ nor “knowingly” introduce false evidence or mislead the jury by a misrepresentation during framing a question (the classic “Have

you stopped beating your wife yet?”).²⁰ Here, a misrepresentation includes both an affirmative misstatement as well as knowing nondisclosure of material facts, or even by submitting only partial statements of material facts.²¹ Generally, you should have both a subjective belief that the evidence is true, or casts the testimony in a truer light, and an objective, or factual, basis for it, as well.²²

“Despite the allure of a Perry Mason moment, you must avoid asking a question if there is no reasonable basis to believe it is relevant to the case...”



Since the attorney is not presenting testimonial evidence, personal commentary by counsel is also improper.²³ The Oklahoma courts look with great disfavor on name calling.²⁴ However, while it is improper to call a witness or the defendant a “liar,” or to say that he or she is “lying,” it is permissible to comment on the veracity of any witness when such is supported by the evidence, thereby properly framing the testimony for the finder of fact to draw their own conclusions.²⁵ This can be done ethically by simply pointing out the inconsistencies between testimony and physical evidence, or, as shown later in this article, by the judicious use of prior inconsistent statements.

Despite the allure of a Perry Mason moment, you must avoid asking a question if there is no reasonable basis to believe it is relevant to the case or if the purpose of the question is to degrade the witness.²⁶ For example, cross-examination on irrelevant, but prejudicial character facts is improper.²⁷ This applies with equal force to innuendo and unfair suggestions. In one case, questions regarding venereal disease and suggestions that the defendant “bought” children were held to be demeaning and unfair.²⁸

In a case arising out of Vermont, for example, a man was convicted of sexually assaulting his own three minor sons.²⁹ The conviction was reversed due to a cross-examination of the defendant that was “replete with prior bad acts and improper commentary.”³⁰ For example, the prosecutor asked if he had anal intercourse with his wife, implied he had engaged in homosexual acts with other men and even if he was drunk when his daughter was born.³¹ She even commented that he “had a lot of practice lying.”³² In a laundry list of violations, the court noted the improper personal commentary by the prosecutor, the improper use of uncharged misconduct and the use of prior acts for an improper reason.³³ These questions were properly outside the scope of permissible evidence under the rules and served no legitimate truth-seeking function, serving only to cast the defendant in a negative light, divorced from the facts of the case. As such, the appellate court properly reversed the conviction.

This highlights the interplay between the Rules of Evidence and ethical obligations, as it can be unprofessional conduct to ask a question which the examiner knows cannot support by admissible evidence.³⁴ In fact, it can be unethical to even “allude” to such matters.³⁵

The decision to try to introduce inadmissible evidence is sanctionable even if the other side fails to object.³⁶

This is not to say that every violation of the rules of evidence is unethical. For example, in a case arising out of the state of Oregon, a man was charged with sexually abusing a young girl, he offered character witnesses who testified that he had a strong marriage and that he did not have a reputation for running around on his wife.³⁷ The prosecutor asked each character witness if they knew that he would “often be out away from his wife until 3:00, 4 o’clock in the morning.”³⁸ After objection, the prosecutor assured the court there was a basis for the statement.³⁹ However, the basis apparently was a hearsay statement from the wife’s relative, which was otherwise inadmissible.⁴⁰ The wife had denied the charge and would not support the statement.

The disciplinary action against the prosecutor was later reversed, finding tension between the disciplinary rule that required “admissible” evidence and the evidentiary rule that required only a “reasonable basis” for impeachment.⁴¹ Thus, while the charge could not be supported with admissible evidence, the predicate was apparently sufficient to provide a “reasonable basis,” and, as such, not unethical.⁴²

While it is not proper to cross-examine simply to harass, it is quite acceptable that a witness may feel harassed by legitimate lines of inquiry into uncomfortable matters. So long as you proceed with civility, if there is any other legitimate and proper purpose, the lawyer may zealously cross-examine on a personal trait of even the truthful witness, regardless of the effect.⁴³ In one case, the cross-examiner attempted to *voir dire* a witness to ensure that she was not under the influence of medication or drugs.⁴⁴ While it was proper to inquire as to her present testimonial capacity, when the attorney cross-examined the witness as to whether she was “stoned out of her mind,” the court cautioned that the questions “should not be accompanied by accusations or inferences of improper conduct.”⁴⁵

Another uncomfortable, but permissible, area of inquiry is bias, prejudice or motivation. Since the bias of a witness can impact the ability to tell the truth, cross-examination in this area is construed liberally, even if burdensome or embarrassing to the witness.⁴⁶ Courts have made it clear that witness bias is always rele-

vant, impeachment evidence which establishes bias is always relevant, and that such evidence, when otherwise appropriate, is admissible.⁴⁷

In the criminal context a defendant enjoys many more protections than he does in the civil litigation; however, when the criminal defendant takes the witness stand to testify in his own behalf he is subject to all the rules applicable to other witnesses on cross-examination.⁴⁸ In addition to the subject matter of the direct examination and matters affecting the credibility of the witness, a cross-examination may also delve into “additional matters,” subject to the court’s discretion. Essentially, this means that any witness who “opens the door” to additional matters during the cross-examination may be questioned on the matters as if they were discussed during the direct examination.⁴⁹ In short, when a defendant testifies in his or her own behalf at trial, she runs the risk of presenting damning evidence on cross-examination.⁵⁰

PARTICULAR ISSUES

The Scope of Cross-Examination

A trial lawyer should bear in mind that in addition to developing facts, cross-examination also serves the valuable purpose of impeaching the veracity or credibility of a witness.⁵¹ The general goal of a cross-examination is to demonstrate to the finder-of-fact that the witness’ testimony on direct examination should not be fully believed.

To accomplish this goal, ethical obligations attempt to strike a balance, allowing the examiner more leeway than normal, while still imposing restrictions that help steer the result toward truth.⁵² Thus, while questioning is usually limited to the scope of the direct examination, cross-examination “may exceed the scope of direct in order to effect impeachment of a

witness’s accuracy, memory, veracity or credibility.”⁵³ Furthermore, appellate courts have generally advised that “[c]ross-examination should be liberally allowed for its purposes of explaining, contradicting or discrediting testimony or testing the accuracy, memory, veracity or credibility of a witness.”⁵⁴

Prior Inconsistent Statements

One of the most popular methods of impeachment is to show that the witness has made a prior statement that is, in some way, inconsistent with his trial testimony. This is frequently accomplished by juxtaposing trial testimony with prior testimony from a deposition, a preliminary hearing, mistrial or grand jury proceeding. Inconsistent statements may also be found in documents, pleadings, answers to interrogatories and other oral statements.⁵⁵

Some of the more popular authorities in trial practice suggest that three steps must be taken to impeach a witness with a prior inconsistent statement.⁵⁶ First, the witness must recommit to his most recent testimony. This lays the foundation to establish the difference between the testimony at trial and the prior inconsistent statement. Often, the simplest way to do this is to summarize the testimony (in the form of a leading question) of the witness at trial that conflicts with the prior statement.⁵⁷

Next, establish that the witness actually made the prior statement — have them commit to it. In other words, the witness must testify regarding when and how the earlier statement was made (for example, in a sworn statement). In doing so, the attorney emphasizes the importance of the prior statement and highlights the fact that it was made when the witness’ memory was fresher and, in some instances, was made under oath.



“...witness bias is always relevant, impeachment evidence which establishes bias is always relevant, and... is admissible.”

Finally, confront the witness with the prior inconsistent statement and have the witness begrudgingly admit he made the differing statement. It is important to remember that every inconsistent statement does not equate to a lie, and an attorney should be careful before labeling a witness a “liar.” In some cases, the witness may be elderly, suffer from a brain trauma resulting in a lapse in memory, or some other rational explanation for providing inconsistent statements by an otherwise likeable and honest witness. It is these witnesses that deserve the professionalism of “kid gloves” — or risk the chance of offending a jury or judge.

The jury must have confidence in you as an officer of the court and a “minister of justice.”⁵⁸ Don’t jump on a witness’ obvious mistake. Clear it up for him. The jury will appreciate this and know you are being fair.⁵⁹ Bear in mind that the purpose of impeachment is to get bricks — evidentiary bricks that you can use to build your case.

Use of Improperly-Obtained Evidence

The rules of Miranda and its progeny are imbedded in our legal system, and it is horn-book law that a confession obtained in violation of the Miranda rules cannot be introduced as part of the prosecution’s case in chief.⁶⁰ However, if the accused takes the stand and gives testimony that is contradictory to an otherwise-inadmissible confession, it may come back to haunt him, as the prosecution can use this confession to impeach by contradicting the in-court testimony of the accused. This rule applies only if the statement was “involuntary” due to Miranda warnings not being given.⁶¹ If the statement was obtained through coercion, or is “involuntary” for some other reason, it is not admissible for any purpose.⁶² Likewise, the Supreme Court has held that illegally seized evidence may be used to impeach a defendant’s trial testimony, because the essential purpose of a trial is truth-finding.⁶³

Use of an Accused’s Silence

*Appellant was never silent, he was garrulous.*⁶⁴

Generally, post-arrest silence of the accused (after police have given Miranda warning) cannot be commented on during trial.⁶⁵ Questions such as, “you only gave one statement to the police officers, correct?” are considered improper because they infringe on the accused’s constitutional right to remain silent. Such questions may result in a mistrial; thus to prevent

yourself from snatching defeat from the jaws of victory it would be wise to avoid creating such unnecessary appellate issues.

Of course, once an opponent elects to testify, “credibility may be impeached and his testimony assailed like any other witness.”⁶⁶ “The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do.”⁶⁷ Although inconsistent descriptions of events by a defendant may be said to involve “silence” insofar as they omit facts included in the other versions, there is no requirement of a formalistic interpretation of “silence,” *i.e.*, a defendant may be cross-examined about omissions from an inconsistent statement.⁶⁸

In an example arising from an Oklahoma case, a criminal defendant previously provided a lengthy exculpatory statement recounting the details of an alibi including his association with the victim, but later testified at trial to additional information not related in his earlier statement. The prosecutor properly cross-examined the defendant about the fact that he waited until trial to give information about the gun. The Court of Appeals for the 10th Circuit held that since the defendant had not actually exercised his right to remain silent when questioned by the police, he waived his constitutional right.⁶⁹

While there are other jurisdictions that implicitly recognize an admission by silence,⁷⁰ a defendant who merely fails to deny an accusation of wrongdoing when under investigation “does not support an inference of an admission of the truth of the accusation.”⁷¹ As such, counsel should tread lightly in this area during cross-examination and should avoid the temptation to ask the obvious. While it may be powerful to ask, “If you were innocent, why didn’t you say so every day you were in jail?” it is also clearly improper.

Failing to go to the police can be deemed “silence.” Thus, it is permissible to impeach an accused who claims self-defense by asking him why he did not go to the police for two weeks after the murder.⁷² The U.S. Supreme Court has reasoned that no governmental action induced the accused to stay silent before the arrest and he was not in custody during the period of silence.

THE TRUTHFUL WITNESSES

One of the hardest areas of cross-examination is the “truthful witness” dilemma.⁷³ Our chosen profession has wrestled with how to deal with witnesses in whom an attorney may firmly believe are telling the truth, parsing out moral standards that walk the razor’s edge between when you “know” they are telling the truth versus when you simply “believe” they are telling the truth, and balancing the obligation to your client of “zealous” representation.⁷⁴ For example, in the original 1971 version of the ABA’s Standards for the Defense Function, Standard 7.6(b) made it clear that discrediting a truthful witness was a “misuse” of the power of cross-examination. This was changed in the 1979 version to simply adjure the attorney to take truthfulness “into consideration” when cross-examining.⁷⁵ The 1993 version excises even that modest advice.⁷⁶ The American Law Institute’s “The Law Governing Lawyers” addresses this “particularly difficult problem” by noting that while “legally permissible,” a lawyer “is never required to conduct such an examination.”⁷⁷

It is generally accepted that with a truthful witness a lawyer may use “customary forensic techniques, including harsh implied criticism of the witness’ testimony, character or capacity for truth-telling.”⁷⁸ Of course, the use of these “forensic techniques” must be tempered with the obligation to avoid misleading the jury. As a noted legal scholar has stated, “[I]t is one thing to attack a weak government case by pointing out its weakness. It is another to attack a strong government case by confusing the jury with falsehoods.”⁷⁹

While the practice has gained acceptance in the legal profession, many attorneys have reservations about the effect of what may otherwise be considered a distasteful cross-examination, and the collateral effects on the finder-of-fact as well.⁸⁰ Furthermore, it also exacerbates outside observers’ perceptions that lawyers possess few moral principles.⁸¹ Indeed, aside from disciplinary and evidentiary considerations, each lawyer must live with himself.

Another legal scholar has noted the “seductive” ability to divorce your own sense of morals from that of “the moral world of the lawyer,” and observes that this “role-differentiated” view of person versus lawyer may be necessary to the system, but imposes a heavy burden on lawyers.⁸² As another legal commentator put it, “If moral sensitivity has no place in lawyers’ daily lives, their moral sensitivity will atrophy . . . [and] the adversary life of the lawyer will infect the rest of the lawyer’s life.”⁸³ Perhaps nowhere is this dichotomy more evident than in how you cross-examine a witness whom you firmly believe is telling the truth.

CONCLUSION

Cross-examination is a “necessary art” of the trial attorney which can also be “the curse of a lawyer’s life.”⁸⁴ Regardless of an attorney’s niche of practice, true victory is with the

use of all *honorable* means, not any means necessary.⁸⁵ Despite Cicero’s guidance of “[w]hen you have no basis for argument, abuse the plaintiff,”⁸⁶ a lawyer should not ethically pursue this type of cross-examination if the only purpose is to embarrass, delay or burden the witness.⁸⁷ The use of unethical, unprofessional, immoral or even amoral tactics risks professional reputation and credibility with peers, potential witnesses, jurors and the court. An attorney

licensed in the state of Oklahoma is “guided by personal conscience and the approbation of professional peers.”⁸⁸

There is always ample room to conduct a fruitful and productive cross-examination within the contours of both law and morality. Staying vigilant in avoiding ethical landmines that routinely appear during cross-examination will pay off in dividends down the road in reputation and credibility within the bar — and in the end giving your clients even better representation.

Above all else, however, an ethical cross-examination will allow you to follow the immortal advice of Shakespeare, “This above all: To thine own self be true/And it must fol-

“Cross-examination is a ‘necessary art’ of the trial attorney which can also be the curse of a lawyer’s life.”

low, as the night the day/Thou canst not then be false to any man.”⁸⁹

Authors' note: The views expressed herein are those of the authors, and do not necessarily reflect those of the Departments of Justice.

1. Francis L. Wellman, *The Art of Cross-Examination* 401 (4th ed. 1936).
2. A lawyer is not allowed to give personal opinions, including on credibility. See, e.g., Oklahoma Rules of Professional Conduct 3.4(e) (January 2008).
3. See *Dorsey v. Parks*, 872 F.2d 163 (6th Cir. 1989) (court restricted defense cross-examination designed to expose witness's demeanor and not to elicit facts).
4. U. S. Const. amend. VI. As a matter of constitutional law, the right to cross-examination applies to state criminal proceedings, as well. See *Davis v. Alaska*, 415 U.S. 308, 353 (1974). While cross-examination may be limited, for example, protect witness safety, See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986), it has recently been held to trump many exceptions to the hearsay rule, even in the touchy arena of sex crimes. See *Crawford v. Washington*, 124 S.Ct. 1354 (2004).
5. 5 Wigmore, *Evidence* (Chadborn Rev. 1794) § 1367. See also *Flo-Bend, Inc. v. Pullam*, 570 P.2d 1165, 1166 (Okla. 1977). Wellman, *The Art of Cross-Examination* 216; Larry S. Pozner and Roger J. Dodd, *Cross Examination: Science and Techniques* (Michie 1993).
6. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal citations omitted).
7. There might be a perceived tension between an ethical cross-examination and a competent one, at least in the mind of the layman. The public, fueled by scathing cross-examinations featured on television, may find fault with a lawyer who does not act like a pit bull. However, courts, and bar associations, are loathe to second-guess the competence of a lawyer who makes a knowing, and even arguable, decision to pursue the high road. See generally Allen K. Harris, *The Effect of Overzealous Advocacy on Professionalism — What is a Lawyer's Duty Under Rule 1.3?*, 71 Okla. Bar J. 18 (2000).
8. The decision to cross-examine the witness may be correct, but the thought process on how to proceed may not be correct. Few attorneys have the raw inherent talent to conduct an effective, impromptu cross-examination; most struggle. There are numerous factors that impact counsel's conduct of cross-examination, including talent, experience, preparation, organization, and form. See generally Steven Lubet, *Modern Trial Advocacy* (3d ed. 2004); Thomas A. Mauet, *Trial Techniques* (7th ed. 2007); James W. McElhaney, *McElhaney's Trial Notebook* (4th ed. 2005). Perhaps the best advice is that of Professor Younger: "It's a Commando Raid, not the Invasion of Europe." Videotape: Irving Younger: *The Art of Cross-Examination* (Cornell University, 1975) (on file with the author).
9. *Ark. La. Gas Co. v. Bass*, 698 P.2d 947, 949 (Okla. Civ. App. 1985). From a tactical standpoint, some say cross-examination should be waived more often than not, and that only one time out of twenty does it actually prove beneficial. George F. Short, *Cross-Examination: A Two-Edged Sword*, 24 Okla. L. Rev. 53 (1971).
10. *Berger v. United States*, 295 U.S. 78, 88 (1935); *United States v. Hill*, 953 F.2d 452, 458 (9th Cir. 1991) (noting that their job isn't just to win, but to win fairly); 44-JAN Advocate (Idaho) 8, Advocate, January, 2001, *Effective Cross-Examination: A Practical Approach for Prosecutors, Part II*; Dist. of Columbia Rules of Prof'l Conduct, R. 3.8 (2007).
11. *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White, J., dissenting in part and concurring in part) (footnotes omitted).
12. See Oklahoma Rules of Prof'l Conduct R. 3.1; Oregon Rules of Prof'l Conduct R. 3.1.
13. *Nix v. Whiteside*, 475 U.S. 157 (1986).
14. See Oklahoma Rules of Prof'l Conduct, Preamble: A Lawyer's Responsibilities, para. 8 (2008).
15. See Model Code of Prof'l Responsibility Canon 7 (1981). Model Rules of Prof'l Conduct R. 3.1 cmt (1983) (stating that "[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed").
16. ABA Model Code of Professional Responsibility. Ethical Consideration 7-24.
17. See *People v. Wells*, 34 P. 1078 (Cal. 1893); *Hawk v. Superior Court*, 42 Cal. App. 3d 108, 130, 116 Cal. Rptr. 713, 727 (Ct. App. 1974) (holding lawyer in contempt for deliberately asking question about inadmissible misdemeanor conviction); *In re McDonald*, 609 N.W.2d 418, 426 (N.D. 2000) (a violation is not cured by withdrawing improper evidence after a challenge). See also *Restatement* (Third) sec.

5(2) (a lawyer is subject to discipline for "attempting" to commit a violation).

18. Model Rules of Prof'l Conduct, Rules 3.3(a)(1), 3.3(c), 3.4(a), 3.4(e), and 8.4(c).

19. Oklahoma Rules of Prof'l Conduct R. 3.3(a)(1); Model Rules of Prof'l Conduct R. 3.3(a)(1)(2002).

20. Oregon Rules of Prof'l Conduct R. 3.3(1). See *Doe v. Federal Grievance Committee*, 847 F.2d 57 (2d Cir. 1988) (addressing level of scienter needed to trigger requirement to report false evidence); See also *Office of Disciplinary Counsel v. Price*, 732 A.2d 599, 604 (1999) (attorney cannot willfully avoid actual knowledge of falsity by "closing his eyes").

21. See *In re Kluge*, 27 P.3d 102 (Ore. 2001); Edwin Bolte, *Ethics for Success at the Bar* (1928), at 28-29 (collecting cases); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Georgetown Journal of Legal Ethics 125 (1987); Model Rules of Prof'l Conduct R. 4.1; Oklahoma Rules of Prof'l Conduct R. 3.3, cmt 3 ("There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.").

22. See, e.g., Dist. of Columbia Rules of Prof'l Conduct R. 3.3, cmt. 2 (2007) (a lawyer must either "know" an assertion to be true or "believe" it to be true based on reasonably diligent inquiry).

23. Model Rule 3.4(e). Sadly, this rule is often ignored, especially during "talking objections."

24. *Malicoat v. State*, 992 P.2d 383, 401 (Okla. Crim. App. 2000), cert. denied, 531 U.S. 888 (2000).

25. *Smallwood v. State*, 907 P.2d 217 (Okla. Crim. App. 1995).

26. See ABA Code of Professional Responsibility, DR 7-106 (C)(2). Some Bar Associations have also adopted aspirational codes of civility, such as the *Oklahoma County Bar Association Lawyer's Creed*. This is not subject to enforcement, but one court has noted that a violation "does call for judicial approbation at least." *Krueger v. Pelican Production Corp.* (No. CIV-87-2385-A(D. Ct. Ok. 1989). See also Dist. of Columbia Voluntary Standards For Civility Standard No. 3 (stating that we will not engage in offensive conduct "even if called upon by a client to do so").

27. See *State v. Lawton*, 667 A.2d 50, 55 (Vt. 1995).

28. *United States v. Wolf*, 787 F.2d 1094, 1099 (7th Cir. 1986).

29. *State v. Lawton*, 667 A.2d 50, 53 (Vt. 1995).

30. Id. at 54.

31. Id. at 54-55.

32. Id. at 55.

33. Id. at 55-57.

34. See ABA Standards 5.6(d) and 7.6(d).

35. Oregon Rules of Prof'l Conduct R. 3.4(e).

36. See *Onstad v. Wright*, 54 S.W.3d 799, 807-08 (Tex. App. 2001) (ordering mistrial and imposing \$32,000 in sanctions for attorney repeatedly asking questions in violation of an order *in limine*). See American College of Trial Lawyers, Code of Trial Conduct sec. 18(g) (1972) (stating that "a lawyer should not attempt to get before the jury evidence which is improper," and recommending obtaining a ruling *in limine* outside the jury's presence).

37. *In re Tichenor*, 129 P.3d 690 (Ore. 2006).

38. Id.

39. Id. at 692.

40. Id.

41. Id.

42. *Compare People v. Austin*, 605 N.Y.S.2d 103, 104 (App. Div. 1993) (Prosecutor had fulfilled obligation by serving subpoena on wife to support questions).

43. See *Shephard v. Am. Broad. Co.*, 62 F.3d 1469 (D.C. Cir. 1995).

44. *Reno v. State*, 514 N.E.2d 614, 616-17 (Ind. 1987).

45. Id. at 617.

46. *Scott v. State*, 891 P.2d 1283 (Okla. Crim. App. 1995). Bias is never collateral. The right to impeach for bias is construed liberally; a witness may be cross-examined on any matter tending to show bias or prejudice. When determining whether evidence of bias should be admitted for impeachment, the trial court should determine (1) whether the facts are such that the showing of bias for impeachment is relevant under 12 O.S. § 2401, (2) whether the evidence is admissible under 12 O.S. § 2402, and (3) if admissible, whether the evidence should still be excluded under 12 O.S. § 2403. See also *Livingston v. State*, 907 P.2d 1088 (Okla. Crim. App. 1995).

47. *Mitchell v. State*, 884 P.2d 1186 (Okla. Crim. App. 1994).

48. *Shultz v. State*, 811 P.2d 1322, 1328 (Okla. Crim. App. 1991). See also *Coleman v. State*, 600 P.2d 351, 353 (Okla. Crim. App. 1979); *Brown v. State*, 487 P.2d 963, 966 (Okla. Crim. App. 1971).

49. See Lubet at 53 (discussing the scope of cross examination).

50. *Mayes v. State*, 887 P.2d 1288 (Okla. Crim. App. 1994).

51. *In re Adoption of M.C.D.*, 42 P.3d 873, 883 (Okla. Civ. App. 2001).

52. Charm, 924 P.2d 754, 769 (Okla. Crim. App. 1996)(citing Hall v. State, 698 P.2d at 36). But see White v. State, 458 P.2d 322, 325 (Okla. Crim. App. 1969) ("While it is permissible for counsel to impeach a witness, he cannot do so through hearsay or immaterial matters."); see also Hammons v. State, 254 P.2d 793, 796-97 (Okla. Crim. App. 1953) ("[A] witness cannot be impeached on collateral matters." (citation omitted)).

53. Charm v. State, 924 P.2d at 769; Hall v. State, 698 P.2d at 36 (Okla. Crim. App. 1985).

54. In re D.J.L., 964 P.2d 983, 986 (Okla. Civ. App. 1998); See also Harris v. State, 777 P.2d 1359, 1362 (Okla. Crim. App. 1989).

55. See Mauet, § 6.7 at 242 53 (the text contains cross examinations on various types of prior inconsistent statements). See also Denbeaux, Arseneault & Imwinkelried at 101 12. (discussing and providing examples of the evidentiary foundation for prior inconsistent statements).

56. See Lubet at 119 36; Mauet, § 6.7 at 242 455 and 256 60 (both texts discuss prior inconsistent statements and set forth examples of cross-examination).

57. Of course, this brings the cross-examiner back to the first internal question — do so only if the inconsistency is important enough to warrant it.

58. See United States v. Dancy, 38 M.J. 1, 5 n.5 (A.C.M.R. 1993) ("[a]lthough the prosecutor operates within the adversary system, it is fundamental that the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as to enforce the rights of the public").

59. See generally Ella Jane P. Davis, *Thoughts on the "Emperor Complex," The "Scorched Earth Policy," and Lawyer Professionalism*, 73 FEB Fla. B.J. 30 (1999).

60. See Dickerson v. United States, 530 U.S. 428 (2000) (Miranda is a constitutional right).

61. See Harris v. New York, 401 U.S. 222 (1971); See also Article 31(b), Uniform Code of Military Justice warnings, and Military Rules of Evidence 304(b).

62. See Mincey v. Arizona, 437 U.S. 385 (1978).

63. See United States v. Havens, 446 U.S. 620 (1980).

64. State v. Osborne, 364 N.E. 2d 216 (Ohio 1977) (a defendant voluntarily offers information to police, his toying with the authorities by allegedly telling part of his story is certainly not protected by Miranda or Doyle.).

65. See Doyle v. Ohio, 426 U.S. 610, 616-18 (1976); see also Michigan v. Tyris, 494 U.S. 344 (1990) (any statements obtained after accused invokes his Sixth Amendment right to counsel may be admissible only to impeach accused's testimony at trial); Michigan v. Jackson, 475 U.S. 625 (1986) (after an invocation of the Sixth Amendment right to counsel in a discussion initiated by police, any waiver is presumed invalid and any evidence obtained as a result of such waiver is inadmissible in the prosecution's case-in-chief); United States v. Hale, 422 U.S. 171 (1975) (silence at police station not admissible to impeach testimony at trial); Wainwright v. Greenfield, 474 U.S. 284 (1986) (defendant's exercise of his right to silence after Miranda warnings may not be used at trial as evidence of his sanity).

66. Brown v. United States, 356 U.S. 148, 154 (1958).

67. Raffel v. United States, 271 U.S. 494, 499 (1926).

68. Anderson v. Charles, 100 S.Ct. 2180 (1980).

69. Twyman v. Oklahoma, 560 F.2d 422 (10th Cir. 1977).

70. United States v. Cook, 48 M.J. 236, 239-40 (1998).

71. Military Rule of Evidence (MRE) 304(h)(3); see also Cook, 48 M.J. at 240-41 (holding military judge erred by admitting, over objection of

the accused, evidence of an accused's silence in response to a friend's question as to whether he had committed rape); but see Ruiz, 54 M.J. at 144 (cross-examination of accused without objection regarding his failure to proclaim his innocence to store detective was proper because trial counsel focused on appellant's silence but on the credibility of appellant's testimony regarding being wrongly accused).

72. See Jenkins v. Anderson, 447 U.S. 231 (1980).

73. See generally Carl M. Selinger, *The "Law" on Lawyer Efforts to Discredit Truthful Testimony*, 46 Okla. L. Rev. 99 (1992).

74. Carl M. Selinger, *Criminal Lawyers' Truth: A Dialogue on Putting the Prosecution to Its Proof on Behalf of Admittedly Guilty Clients*, 3 J. Legal Prof. 57, 67-68 (1978). Restatement of the Law Governing Lawyers sec. 152 cmt d. (Council Draft No. 9, 1992).

75. *ABA Standards Relating to the Administration of Criminal Justice* (2d Ed. 1979), Standard 4-7.6(b).

76. *ABA Standards for Criminal Justice: Prosecution and Defense Function*, Standard 4-7.6(b) (3d ed. 1993).

77. Restatement (Third) on the Law Governing Lawyers, sec. 106 cmt. C (2000).

78. See Selinger, 46 Okla. L. Rev. at 100 (discussing policies).

79. Subin at 148.

80. See John G. Douglass, *Symposium, Virtual Cross-Examination: The Art of Impeaching Hearsay*, 34 J. MAR. L. & COM. 149 (2003); *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 Dick. L. Rev. 563 (1996).

81. See also Robert Don Gifford, *Let's Kill All the Lawyers*, 75 Oklahoma Bar Journal 1456 (2004). In the disciplinary arena, even a lawyer's firm belief that the client's case has no merit does not excuse diligent prosecution. See In re Bourcier, 909 P.2d 1234 (Ore. 1996).

82. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1-15 (1975).

83. Robert F. Cochran, Jr., Teresa S. Collett, *The Legal Profession* (2d Ed.) (2003) at 154.

84. J. W. Ehrlich, *The Lost Art of Cross-Examination, or Perjury Anyone?* (1970) at 97, 121.

85. See Thornton v. United States, 357 A.2d 419, 437-38 (D.C. App. 1976).

86. *The Quotable Lawyer* 74 (1986).

87. Model Rules of Prof'l Conduct R. 4.4(a) (2008). Additionally, the rationalization that "it will help my client's case if I harass the other side" is not a sufficient alternative justification.

88. See Oklahoma Rules of Prof'l Conduct, Preamble: A Lawyer's Responsibilities, para. 7 (January 2008).

89. William Shakespeare, *Hamlet*, Act I, Scene iii, lines 78-80.

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Potential Liability of Attorneys for Fraudulent Transfer Claims Pursued by Bankruptcy Trustees

By Patrick J. Malloy III

Most attorneys experienced in bankruptcy are familiar with the bankruptcy trustee's pursuit of fraudulent transfer claims. Either 11 U.S.C. 548 or Section 544 and the Oklahoma Uniform Fraudulent Transfer Act are the vehicles. The "usual suspects" or targets in those cases, identified in 11 U.S.C. 550(a)(1) and (2), are the initial transferee of the transfer, the immediate or mediate transferee of the initial transferee, or the entity for whose benefit such transfer was made. Little thought has been given in the past to a potential target that is not identified in Section 550, the attorney who may have been involved in planning the fraudulent transfer. This article will analyze the potential liability of attorneys in fraudulent transfer claims.

THE HYPOTHETICAL

Seven individuals, the Magnificent Seven, reside in the jurisdiction of a hypothetical Oklahoma bankruptcy court. The Magnificent Seven own an offshore drilling company, Bigdeal Company, located in Bermuda. And, Bigdeal owns Allmine Company, a Delaware corporation with its principal office located in the state of Oklahoma. Allmine is involved in the crude trading business. One of the Magnificent Seven, Numero Uno, is the chairman of the board (COB) of both Allmine Company and Bigdeal Company.

As the price of crude begins to collapse, COB can see the handwriting on the wall. Ultimately, Allmine Company begins to approach the "zone of insolvency." COB conceives of a plan that will permit the Magnificent Seven to pull a substantial sum out of Allmine and, in essence, let the company "die on the vine." COB approaches Easily Used, the chief operating officer of Allmine Company with a proposal to sell the company to him or an entity that Easily forms for the sum of \$2,000,000. Easily does not have \$2,000,000 or the ability to borrow any sum even approximating \$2,000,000. COB advises that this is not a problem. COB instructs Easily to form yet a third

“the... purchaser in the hypothetical, was a mere sham which had no operations, no assets, and no purpose other than to act as a pawn in the overall scheme.”

company, Company of Cards, which will then borrow \$2,000,000 from COB's bank (LBO lender). Allmine Company likewise banks at the same location and just happens to have a C.D. on deposit for an amount approximating \$2,000,000. The loan to Company of Cards will be secured by Allmine Company's C.D. of \$2,000,000. This plan (scheme) is ultimately implemented in the following fashion:

- a) Company of Cards borrows \$2,000,000 from the LBO lender; the loan is secured by Allmine Company's C.D. Company of Cards tenders the \$2,000,000 to Bigdeal Company as payment in full for the stock in Allmine Company.
- b) Upon receipt of payment, Bigdeal Company then distributes the \$2,000,000 in equal shares to the Magnificent Seven in a shareholder meeting in Bermuda.
- c) Immediately after paying Bigdeal, Company of Cards causes Allmine Company to issue a \$2,000,000 plus dividend to Company of Cards. This dividend is then used to pay Company of Cards' loan with the LBO lender with approximately 30 days' interest.

Within four months of these transactions, Allmine Company is forced to file a Chapter 7 proceeding and a trustee is appointed.

ANALYSIS OF THE FRAUDULENT TRANSFER(S)

Clearly the issuance of a \$2,000,000 dividend by an insolvent corporation to its shareholder is a fraudulent transfer.¹ In my view, the trans-

fer constitutes actual fraud under Section 548(a)(1)(A) as it was affected with the actual intent to defraud. The transfer was essentially part of a scheme designed by the selling shareholder to strip the debtor of assets prior to bankruptcy. Company of Cards was merely a pawn in the scheme. The transfer also constitutes constructive fraud under Section 548(a)(1)(B) as the debtor:

- (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
- (ii)
 - (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
 - (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
 - (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or
 - (IV) made such transfer to or for the benefit of an insider; or incurred such obligation to or for the benefit of an insider, under an employment agreement and not in the ordinary course of business.

In the Matter of Wiebolt Stores Inc.(Wiebolt),² the court addressed fraudulent transfer claims arising out of leveraged sales. The Wiebolt court discussed the proof of "actual intent" to defraud at page 504:

"'Actual intent' in the context of fraudulent transfers of property is rarely susceptible of proof and 'must be gleaned from inferences drawn from a course of conduct.' A general scheme or plan to strip the debtor of its assets without regard to the needs of its creditors can support a finding of actual intent."

In the hypothetical, the intent to defraud is particularly apparent. The plan (scheme) to

defraud was motivated by the shareholders' certain knowledge that Allmine Company was headed toward or already in a state of insolvency and that economic collapse was imminent. Moreover, Company of Cards, the LBO purchaser in the hypothetical, was a mere sham which had no operations, no assets, and no purpose other than to act as a pawn in the overall scheme. These facts are, at a minimum, indicia of fraudulent intent. It should also be noted that while 11 U.S.C. §548(a)(1) speaks only of the intent of the debtor, if the transferee dominates the debtor then fraudulent intent of the transferee can be imputed to the debtor.³

In addition to the constructive and actual fraud provisions of Section 548, the trustee can rely on Section 544 which permits the trustee to bring similar fraudulent transfer claims under the Uniform Fraudulent Transfer Act.⁴ Historically, trustees have resorted to Section 544 when the transfers sought to be avoided occurred more than two years (formerly one year) prior to bankruptcy. This "reach back period" for Section 548 claims is limited to two years prior to the commencement of bankruptcy with a four-year "reach back period" for claims under the Uniform Fraudulent Transfer Act. However, as discussed in greater detail below, the potential ability to recover punitive damages may be at least one additional reason for the trustee under the facts of the hypothetical to assert claims under Section 544 in addition to Section 548.

POSSIBLE TARGETS OF THE FRAUDULENT TRANSFER CLAIM INCLUDE ATTORNEYS

The fraudulent transfer in the leveraged buy-out scheme illustrated in the hypothetical provides clear targets for a bankruptcy trustee. The LBO lender which was the immediate transferee of the initial transferee of the fraudulent transfer cannot begin to establish that it acted in "good faith" pursuant to Section 550(b)(1). The Magnificent Seven as the selling shareholder(s) and the entity for whose benefit the transfer was made under Section 550(a)(1) is another. Company of Cards, the initial transferee, presents yet a third target although it is a shell and cannot conceivably satisfy any judgment that might be entered in favor of the bankruptcy estate.

And what about the attorneys with whom players like the CBO and the Magnificent Seven might have consulted? It is quite feasible

that a CBO such as one in the hypothetical would not formulate this scheme on his own and would have received advice from legal counsel. There is no one better positioned than an attorney to understand the intricacies and pitfalls of fraudulent transfer laws. Interestingly, it appears that a party who merely aids and abets in affecting a fraudulent transfer and who is not a transferee cannot be a target of a fraudulent transfer claim.

The Florida Supreme Court determined that under Florida law there is no cause of action for aiding and abetting a fraudulent transfer when the alleged aider-abettor is not a transferee.⁵ Its decision was based on a strict reading and interpretation of the Uniform Fraudulent Transfer Act. In a footnote, the Florida court noted that it was not addressing whether relief was available under any other theory of liability or cause of action and raised the question if a cause of action for civil conspiracy existed. In all likelihood, the same analysis would apply to Section 548 of the Bankruptcy Code although there does not appear to be any cases on the subject.

It is fundamental that officers and directors owe fiduciary duties to the corporation. It appears to be the majority rule that a third-party non-beneficiary can be liable for aiding and abetting a breach of fiduciary duty particularly when the third party is in privity with the fiduciary or has benefited from the breach in some way.⁶

The trustee's pursuit of a claim against the attorneys who assisted in structuring a fraudulent transfer transaction would not be based upon fraudulent transfer law under either Section 548 or 544. It instead would be based upon the trustee's ability to pursue claims available to the bankrupt entity under Section 541. For example, the claim could be for aiding and abetting a breach of fiduciary duty to the corporation which resulted in the dissipation of corporate assets. CBO and others in the hypothetical owed a duty to Allmine Company. Causing the dissipation of corporate assets constituted a breach of that duty.

One defense a trustee can anticipate in this regard is the defense of *in pari delicto*, that the corporation can only act through its officers and directors and, therefore, the bad acts of these parties, including the attorneys, can be imputed to the corporation. The application of this defense to trustees could easily be the sub-

ject of an entirely separate article. In brief, the trustee could respond with the argument that the adverse interest exception applies; if the bad acts are not in the best interests of the corporation, the defense does not apply.⁷ Another line of cases provides that the defense does not apply to a bankruptcy trustee.⁸

One other matter the trustee will be required to confront in this context is a claim that the corporation suffered no damage. Under the hypothetical, the corporation was insolvent or headed that way. Thus, as to the corporation, no harm was done and so there is no foul. The attorney would further argue that at best the transaction resulted in a “deepening insolvency” of the corporation. Oklahoma has recently rejected “deepening insolvency” as a measure of damage.⁹ The ultimate interpretation of the referenced opinion is, again, the subject of another article. Suffice it to say that there is no question that the referenced Oklahoma opinion leaves open the ability of the fiduciary to pursue claims for dissipation of assets. Stripping the corporation of assets clearly qualifies as a dissipation of assets.

DISCOVERY OF ATTORNEY-CLIENT COMMUNICATIONS IN A FRAUDULENT TRANSFER CASE

One interesting aspect of fraudulent transfer claims pursued against both the attorney and the other defendants is the ability to pursue discovery of both oral and written communications between counsel and the parties. In one case, the court discussed the application of the fraud exception to the attorney-client privilege.¹⁰ In that case, pre-petition counsel objected to a requested production of documents on the basis of the attorney-client privilege. The argument made in support of the requested production was that there was evidence of pre-petition fraudulent transfers by the debtor during a point in time when pre-petition counsel was representing the debtor. And accordingly, the requested documents were not protected by the attorney-client privilege as a result of the applicability of the crime/fraud exception to that privilege. Commencing on page 339, the court provided:

There is a privilege protecting communications between the attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from

the law. He must let the truth be told...To drive the privilege away, there must be ‘something to give color to the charge’; there must be ‘prima facie evidence that it has some foundation in fact.’ When that evidence is supplied, the seal of secrecy is broken. *Clark v. United States* 289 U.S. 1, 15, 77 L.Ed. 993, 53 S.Ct. 465(1933).

This court determined that there was sufficient evidence to establish that the debtor had affected certain fraudulent transfers prior to the commencement of bankruptcy at a point in time when it was represented by counsel. As a result, the fraud exception applied and production of the subject documents ordered. It should be noted that in a Chapter 7 proceeding, the trustee controls the privilege and can waive it.

The requirement for the “prima facie” showing needed to eliminate the attorney-client privilege poses questions. For example, if in the hypothetical an attorney had been consulted, would it suffice to overcome the privilege to establish through deposition testimony that the targets of the claim were represented by counsel at the time of the transfer? One court has recommended that the documents be produced for in camera inspection by the court.¹¹

Finally, if it is determined that the same counsel represented both the debtor and the targets during the relevant time periods, the trustee can argue that a “joint client privilege” arose which is waived in a subsequent controversy between the joint clients.¹²

ETHICAL CONSIDERATIONS

What ethical considerations are implicated by counsel participating in or structuring a scheme similar to that outlined in the hypothetical? Rule 1.2(d) of the Oklahoma Rules of Professional Conduct provides that:

“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

In the comments following the rule the following language appears:

“There is a critical distinction between presenting an analysis of legal aspects of ques-

tionable conduct and recommending the means by which a crime or fraud might be committed with impunity.”

I do believe this can be a slippery slope. The facts of the hypothetical as well as experience show how reasonable it is to conclude that legal counsel would be involved in some manner in designing schemes such as those identified in the hypothetical. In this writer’s opinion, it is problematic for a lawyer to counsel a client in such a way as to suggest a path that is ultimately fraudulent. For example, the rule surely cannot be interpreted to excuse a lawyer who, in providing a “legal analysis,” advised the client that if the client is an initial transferee the transfer could be avoided as a fraudulent transfer and proceeded to suggest other ways to affect a fraudulent transfer. The line between advising and assisting a client to commit fraud, and, assisting a client in making good faith effort to determine the law’s meaning as to fraudulent transfers cannot be easily found.

Rule 1.16(a) provides in material part:

“Except as stated in paragraph (c), a lawyer shall not represent a client or where representation has commenced shall withdraw from representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

1.16(b) provides in material part:

“(b) Except as stated in paragraph (c) a lawyer may withdraw from representation of a client if...

(2) the client persists in a course of action involving the lawyers services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetuate a crime or fraud.”

Rule 8.4 entitled Misconduct provides in material part:

“It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules Of Professional Conduct knowingly, assist or induce another to do so or do so through acts of others;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Arguably all of these sections apply to the hypothetical. If the attorney determines that notwithstanding his advice to the contrary, the client(s) insists on going forward with a fraudulent transfer scheme, the attorney must withdraw from any further representation of the client. As a result of the fact that his communications with the client about this subject may, at some time in the future, be discoverable for the reasons discussed above, the attorney should be extremely careful with the substance of any written communications with clients relative to these kinds of topics.

THE ELEMENTS OF THE TRUSTEE’S CLAIM

Section 550 provides that the trustee may “recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of the property.” In the facts of the hypothetical, a trustee would seek a monetary judgment against the defendants for \$2,000,000, the amount of the cash transferred.

Punitive damages in most cases are not raised or litigated, although, in this writer’s



opinion, they should be. There is apparently no authority under Section 548 of the Bankruptcy Code for the recovery of punitive damages. In this context, the argument against the recovery of punitive damages is that Section 548 provides a statutory remedy and any recovery is limited to the exact language of the statute. However, a trustee could assert a claim for punitive damages under Section 544 of the Bankruptcy Code and the Oklahoma Uniform Fraudulent Transfer Act. This would be warranted if a trustee can prove actual intent to defraud not only on the part of the debtor but the actual beneficiaries of the transfer and their counsel as well. One particularly reasoned approach can be found at *Volk Construction Company v. Wilmescherr Drush Roofing Company et al.*¹³ The following is a summary of that court's analysis commencing at page 900:

- i) the Uniform Fraudulent Transfer Act does not prohibit punitive damage awards;
- ii) one section of the Act provides that the courts may resort to any "other relief the circumstances may require."
- iii) another section provides:

"Unless displaced by the provisions of sections 428.005 to 428.059, the principles of law and equity, including the law merchant(sic), and the law relating to principal and agent, estoppel, laches, fraud, misrepresentations, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement these provisions." (see Oklahoma version of this section at 24 Okla. Stat. 122)

The court concluded that the act incorporated pre-act legal and equitable principles as they relate to fraudulent transfers. The court concluded that given these factors punitive damages could be awarded in cases involving actual fraud, noting that Ohio courts had also

“The line between advising and assisting a client to commit fraud, and, assisting a client in making good faith effort to determine the law’s meaning as to fraudulent transfers cannot be easily found.”

authorized the recovery of punitive damages under the Ohio UFTA.¹⁴

Trustees should consider prayers for punitive damages when there is actual fraud involved. Oklahoma's punitive damage statute, 23 Okla. Stat. 9.1, authorizes punitive damages in cases where the defendant has "acted intentionally and with malice towards others." The facts of the hypothetical show that the parties acted with intent to defraud. Punitive damages should apply under these circumstances, not only to punish the wrongdoers but to deter future similar conduct. Under the right circum-

stances, attorneys could be liable for punitive damages in such claims.

The subject of attorney fees does not normally come into play in fraudulent transfer litigation. However, as with punitive damages, trustees should consider asserting claims for attorney fees under Section 544 and the related Uniform Fraudulent Transfer Act. In the *Volk* case (supra), the court allowed the recovery of attorney fees, in addition to punitive damages, in the context of UFTA claim. At page 901, the court provided:

"In this case there is no express statutory authorization or contractual provision for the award of attorney fees. However, we find that the award of attorney fees is justified under the 'special circumstances' exception to the American Rule, which includes situations where a party is shown to have engaged in intentional misconduct. The trial court specifically found that the Appellants completed the transfers with the actual intent to hinder, delay, and defraud creditors of the Corporation."

CONCLUSION

The problem with these types of transactions is that historically attorneys have operated below the radar. They are not readily identifiable in the facts surrounding the transfers and little thought appears to have been given in the past to their potential responsibility for aiding

and abetting fraudulent transfers. That may well change in the future. The attorney's involvement in consulting with clients relative to the topic of leveraged buyouts or any transfers which could be characterized as fraudulent is fraught with both ethical and legal concerns. I believe attorneys should err on the side of caution in these matters—particularly given the almost certain discoverability of attorney/client communications in any future litigation.

1. 18 Okla. Stat. 433; 1049, 1052, 1053.
2. In the Matter of Wiebolt Stores Inc. (Wiebolt) 94 BR 488 (N.D. Ill. 1989).
3. In re FBN Food Services Inc. 185 B.R. 265 (N.D. Ill. 1995); In re Adler Coleman Clearing Corp. 218 B.R. 689 (Bankr. S.D. N.Y. 1998).
4. Oklahoma Uniform Fraudulent Transfer Act (24 Okla. Stat. 116 et seq.).
5. In Freeman 865 So. 2d 1272(Fla. 2004).
6. Restatement(Second) of Torts section 874 cmt. c(1979) (“A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused.”)
7. *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co. Inc.* 267 F3d 340 (3dCir. 2001); In re Jack Greenburg Inc. 212 B.R. 76 (Bankr. E.D. Pa. 1997); In re Investors Funding Corp of N.Y. Sec. Litig. 523 F. Supp. 533 (S.D.N.Y. 1980); *Schaudt v. Brown* 711 F2d 1343 (7th Cir. 1983).
8. *O'Melveny v. Myers v. FDIC*, 512 U.S. 79 (1994); American Bankruptcy Institute Journal, Gerald Baldwin, Frost Brown Todd L.L.C. 23-8 ABIJ (Oct. 2004); *Scholes v. Lehmann*, 56 F3d 750(7th Cir. 1995).
9. *Commercial Financial Services v. J.P. Morgan* 152 P3d 897(Okla. Ct App. 2006).

10. In re Fred T. Cambell 248 B.R. 435 (Bankr. M.D. Fla. 2000).
11. *Michael Grassmueck v. Ogden Murphy Wallace P.L.L.C.* 213 F.R.D. 567 (W.D. Wash. 2003).
12. J.W. Strong, McCormick On Evidence, Section 91 at 355(1992); In re Meghan-Racine Associates Inc. 189 B.R. 562, 572 (Bankr. N.D.N.Y. 1995); In re Sunrise Securities Litigation, 130 F.R.D. 560, 573(E.D. Pa. 1989).
13. *Volk Construction Company v. Wilmescherr Drush Roofing Company et al* 58 S.W. 3d 897(Ct of app, E.D. Mo. 2001).
14. *Aristocrat Lakewood Nursing Home v. Mayne*, 729 N.E.2d 768, 783 (Ohio App. 1999)

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Professionalism in the Courtroom

A View from the State of Washington

By Judge John P. Erlick

If you Google the phrase “lawyers and professionalism,” you get about 1,620,000 hits. That’s a lot of commentary. The purpose of this article is not to debate academically what is or is not professional conduct on the part of attorneys, but rather to provide a more practical guide based on one judge’s perspective from the bench. Defining professionalism may be done using a multiplicity of sources, including the Rules of Professional Conduct (RPCs), which set a minimum standard of conduct, and the local culture in the courtroom, and within the bar.

Local culture or protocol is important to understand, because expected courtroom conduct varies greatly. For example, I recently returned from observing a trial being held in Old Bailey, London’s criminal courts, where the barristers bow to the judge when entering the courtroom and refer to the judge as “Your Lordship.” While those customs are not observed here, counsel in our local federal courts must stand at a podium when addressing the court or examining witnesses, a requirement generally not imposed in our state trial courts.

What *does* our culture expect of counsel appearing in our courtrooms? Again, that culture may vary from courtroom to courtroom across the state. Nonetheless, there is some uniformity of protocol and professional courtesies expected from counsel. At minimum, counsel should at least consider these issues when appearing in superior court.

PROFESSIONALISM AND THE JURY

Don’t waste the jurors’ time. Remember, they are taking time away from their jobs, their

families, and their lives to hear your case. When you’re late returning to court from recess, you’re holding up the judge, the lower bench, opposing counsel and other parties, and 12 jurors (plus alternates). Along these same lines, make sure you have your witnesses ready to testify. It is better to have one witness waiting in the hallway for 20 or 30 minutes than to hold up the entire courtroom because your witness is late or a prior witness’s examination concluded earlier than you had anticipated.

Respect jurors’ privacy. When I first started practicing law, it was not uncommon to inquire about a juror’s religion during voir dire. Conventional wisdom among jury consultants was that Methodists would decide tort damages differently from Baptists or Jews. We have (thankfully) moved on from that type of blanket stereotyping. The point is that before you ask a sensitive personal question of the jury panel or individual, ask yourself whether you truly need that information for this case and what you will do with the information. Most judges will provide for prospective jurors to

discuss highly personal matters outside the presence of the others. If you sense a would-be juror's discomfort responding to a particular question, it may be appropriate to assuage his or her concerns by offering that option.

“Don't approach right up to the jury box and don't lean into it.”

Limit your sidebars and requests that the jury be excused. Sidebars and excusing the jury are sometimes necessary, particularly when you have to address evidentiary issues. However, repeated sidebars and excusing of the jury can be disruptive to the proceedings and annoying to the jurors. Ask yourself whether the objection you have in mind is one you could make for the record in open court while the jury is present, and then reserve supplementation of the record or further argument until the jury is excused for a normal recess.

Respect the jury's "space." In state courts, you are generally free to move about the courtroom. However, in doing so, you should respect the jury's space in the jury box. Don't approach right up to the jury box and don't lean into it.

Don't say, "I'll be brief" when you're not going to be. Attorneys rely on their credibility, particularly before juries. When you say, "I'll be brief," and then launch into a 45-minute soliloquy, what is that communicating to the jury?

Be realistic about the length of your case. Jurors plan and rearrange their lives around the representations of counsel that a case will last a certain period of time. They have to arrange for child care and absences from work, not to mention rescheduling personal appointments and trips. It is better to be realistic on the

length of a case. On the best of days, there are five hours of trial testimony. That assumes no interruptions and no delays in witnesses, the jury or counsel. Generally, with a four-day trial week, that computes to a maximum of 20 hours of trial testimony. A good exercise is to map out all the anticipated witnesses in a case beforehand. Estimate the length of each direct, cross and re-direct examination. In civil cases, you will need to add time for questions from the jury. Then add time for jury selection, opening statements and closing arguments. You may need to take time during the trial day to work on jury instructions (although I typically attempt to work with counsel on those after hours). This will give you a rough estimate of how long your case may actually be.

“Don't hover over the witness...Stepping back during examination lowers the tension and shows respect.”



PROFESSIONALISM AND WITNESSES

Don't interrupt a witness or cut off the witness's answers. Time and again, I've seen attorneys abruptly cut off a witness who is legitimately trying to explain or elaborate upon an answer. Of course, there are circumstances where a witness veers off course, rambles, or is nonresponsive. In those situations, it may be appropriate to ask the court to strike or repeat the question and instruct the witness to answer it. However, too often I've observed an attorney attempt to cut off a witness in mid-sentence. It comes across at minimum as rude — and as trying to keep something from the jury as if you were afraid of what the witness is going to say. Also, when two people are talking at the same time, the record gets compromised.

Don't hover over the witness. I doubt if many attorneys have actually sat in the witness

chair during a trial. For parties and lay witnesses unfamiliar with the courtroom setting, it can be a daunting, intimidating experience. If you must approach an adverse witness to hand him or her an exhibit, ask to approach, and then step back. Stepping back during examination lowers the tension and shows respect.

After a witness has answered, don't add gratuitous editorial comments. Proper procedure is to ask a question and let the witness answer. I had one case in which I had to admonish counsel because he repeatedly would comment after a witness's answers with phrases such as, "Oh, I see," or "So that's your answer." It's inappropriate and unprofessional.

PROFESSIONALISM AND OPPOSING COUNSEL

In the heat of litigation, emotions and zealous advocacy sometimes get the best of an attorney. I've rarely seen aggressive conduct be effective in the courtroom. Rather, respectful and reasoned presentations are much more persuasive. This means not interrupting your opposing counsel's argument. You'll have your opportunity to respond. That's the appropriate time to address the points opposing counsel has made with which you disagree. In addition, whether the court has a court reporter or is recorded, interruption of counsel, witnesses, or the court compromises your record. If you have a court-reported courtroom, the reporter is likely to advise counsel that he or she cannot report with two people talking simultaneously. With a video or audio taped recording, you get no such warning and the recording may be garbled.

Don't address your arguments toward opposing counsel. Don't turn to him or her and state, "I did so provide those documents to you." Such conduct rapidly turns up the heat in the courtroom; it personalizes an attack on counsel. Proper practice and common courtesy is to address the court. Direct colloquy with counsel during argument is inappropriate.

PROFESSIONALISM AND THE LOWER BENCH

Know who they are and what they do. The court clerk handles the exhibits, records the minutes, and assists attorneys with trial notebooks and numbering and marking exhibits. If the courtroom has an audio or video tape record, the clerk is in charge of that. The bailiff

does the judge's scheduling; answers the phones; coordinates motions and hearings; manages juries; and coordinates trial readiness, pretrial conferences and trial calendars. If the record is not automated, the courtroom court reporter creates the official record.

During trial, please understand that while the bailiff and the clerk are there partly to assist you, they still have their other courtroom responsibilities such as managing the jury, answering phones and assisting the judge. Please don't ask the lower bench to make copies for you. Also, our phones are extremely busy. To keep the lines available, we ask that you not use the court phones.

PROFESSIONALISM AND THE COURT

When addressing the court, please don't refer to us as "Sir" or "Ma'am." Reserve that for your parents or commanding officer. The proper way to address the court is "Your Honor" or "Judge ____." (Until one of us starts wearing a powdered wig, "Your Lordship" would be entirely unwarranted.) Some judges prefer that attorneys stand when addressing the court. Find out whether the judge before whom you are appearing has such a preference and what other protocols apply in that courtroom. The bailiff will be familiar with the judge's preferences in this regard, or they may be posted on the judge's Web site.

When we've ruled, we've ruled. If you truly need clarification of a judge's ruling, you may ask for it. But don't use it as an opportunity to re-argue your motion. Similarly, as is my practice, if the judge asks whether there are any questions, this is not an invitation to continue arguing or to re-argue your point. Once we've ruled, if you want further relief, you have the option of a motion for reconsideration.

Be prepared. Know your case law, your exhibits and your record. As judges, we do our best to prepare for oral argument on motions and trial issues. That said, during argument, counsel often refer to particular evidence or facts. You should be prepared to cite specifically in the record where we can find it. That makes for a much more efficient hearing. If it's not in the record, we can't rely on it in our decision.

CONCLUSION

The above is one judge's perspective on professionalism in the courtroom. It is not exclusive or comprehensive of all issues involving

professional conduct in the courtroom. I suspect an entire edition of *Bar News* could be devoted to the topic. Another edition could be devoted to attorney professionalism outside the courtroom. And I'm confident that other judges would have different perspectives — and different priorities than those I've discussed above. I also believe there are some universalities about professionalism in the courtroom — courtesies toward the lower bench, respect for the jury, patience with witnesses, and civility toward opposing counsel. As for the court, the best guidance I can give is to know your judge and the judge's courtroom.

This article, originally published in the August 2008 Washington State Bar News, is reprinted with permission from the author and the Washington State Bar Association.

ABOUT THE AUTHOR



Judge John P. Erlick was elected to the King County Superior Court in September 2000, after concentrating in private practice on defense of professional liability cases. He is currently the King County Superior Court chief civil judge. He serves on the State Commission on Judicial Conduct and chairs the Superior Court Judges' Association (SCJA) Ethics Committee. He previously served as the SCJA appointee to the State's Ethics Advisory Committee.

**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT
OF LESLIE M. HAGER, SCBD #5419 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 Leslie M. Hager 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 **Thursday, February 12, 2008**. Any person wishing to appear should contact Jan Hubbard, First Assistant 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.

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Professionalism for Attorneys — Young and Old

By Gerard F. Pignato

I have been an attorney for 23 years, but I have been a baseball fan for as long as I can remember. I watch the sport wherever and whenever I can, even the Little League World Series. In one game of the Little League World Series last summer, the pitcher inadvertently hit the batter with a wild pitch, causing the batter to grimace before trotting to first base. Shaken, the 12-year-old pitcher met the batter at first base to apologize. The announcer for the game and I immediately reacted with the same thought: It is unfortunate we do not see more of this type of sportsmanship among the *professionals* in the major leagues. In fact, it is not uncommon to see major league pitchers *intentionally* hit opposing batters.

To be certain, professional baseball players are paid to do their job well and ultimately to win. They compete against other players and teams who are also being paid to succeed. It does not follow, however, that good sportsmanship must be set aside in the process. The legal profession – especially litigation – is no different.

Payne County District Judge Michael Stano wrote in his article “Another Take on ‘Civility’”¹ that his high school debate classes have learned the values of competition at an early age and often act more professional than lawyers who have been practicing for many years. My own son is a high school debater – and gentleman – and I can appreciate that comment. Some debate coaches, however, fail to follow their students’ examples. On Aug. 14, 2008, the debate coach for Fort Hayes State

University in Kansas was disciplined after he swore at officials and mooned judges at a tournament earlier this year.² Modern-day debate format can be traced back to the famous stump debates between Lincoln and Douglas. Even Abraham Lincoln deviated on occasion from his moral compass; for example, he was known to make fun of the shorter Stephen Douglas’ height (5 ft. 4 in.).³

A commentator for the recent Olympics wrote with some degree of satire, “If you want an endless event in which everyone pretends to respect everybody else, go to couples therapy.”⁴ Needless to say, this article is not about baseball or debate, but the values learned from such friendly strife in our youth can have great impact upon us as adults – values that are particularly important in the practice of law. Judge Stano observed that “[R]judeness seems more

predominate among attorneys who have been practicing longer.” This is probably true. Even respected senior lawyers can spin flowery praise one moment and biting fulmination the next. The reason for this metamorphosis is beyond the scope of this article, but the question merits thought and consideration, nonetheless. The purpose of this article is two-fold: 1) to suggest a sensible line of demarcation between professional and unprofessional attorney conduct, and 2) to impress upon young lawyers that professionalism is a lifelong and worthy commitment, and that there should be – and are – ramifications for improper behavior.

DISCUSSION

Lawyers are expected to be zealous and aggressive advocates for their clients. But where is the line drawn, especially in light of First Amendment freedom of speech considerations? When I was a first-year associate, the senior partner in my firm – a brilliant member of the bar – threw one of my briefs back at me complaining that it resembled a law review article more than a zealous piece of advocacy. Tenacity, he lectured, was the hallmark of a successful trial lawyer. Another senior lawyer at the time explained to me following an unusually contentious deposition that “a deposition is not a deposition without a little blood-letting.”⁵ Too often zeal becomes confused with incivility. Cook County Circuit Judge Richard Curry recently expressed his opinion of “zeal,” as follows:

Zealous advocacy is the buzzword which is squeezing decency and civility out of the law profession. Zealous advocacy is the doctrine which excuses, without apology, outrageous and unconscionable conduct so long as it is done ostensibly for a client, and, of course, for a price. Zealous advocacy is the modern-day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyers’ claim to officer-of-the-court status.⁶

“... impress upon young lawyers that professionalism is a lifelong and worthy commitment, and that there should be — and are — ramifications for improper behavior.”



DEROGATORY COMMENTS BY OPPOSING COUNSEL

In the modern world of cyberspace, many of us have probably already read the outrageous exchange between Texas counsel that took place during a recent deposition:

A: You don’t run this deposition, understand?

B. Neither do you.

A. You watch and see. You watch and see who does, big boy. And don’t be tellin’ other lawyers to shut up. This isn’t your g _ _ d _ _ _ job, fat boy.

B. Well, that’s not your job, Mr. Hairpiece.

WITNESS: As I said before, you have an incipient . . .

A. What do you want to do about it, a _ _ h _ _ _?

B. You’re not going to bully this guy.

A. Oh, you big tub of s _ _ _ , sit down.⁷

Many lawyers have heard offensive comments made by other attorneys. Some comments might be considered rude or in poor taste, while others are outright unprofessional. A Minnesota lawyer was disciplined for using anti-Semitic epithets at a deposition (e.g., “don’t use your little sheeny Hebrew tricks on me, Rosen.”).⁸ A California attorney was sanctioned for making sexist comments to a female attorney.⁹ A lawyer’s ethnic slurs against opposing counsel in which he made improper references to the “mafia” reflected on his fitness to practice law.¹⁰ Another lawyer who made sexist

remarks to a female opposing counsel at a deposition (e.g., “be quiet, little girl,” “go away, little girl”) was disciplined for participating in behavior “undertaken primarily . . . to harass or maliciously injure another.”¹¹ And, of course, most lawyers practicing in Oklahoma are aware of District Judge Wayne Alley’s order entered in the Western District of Oklahoma: “If there is a hell to which disputatious, uncivil, vituperative lawyers go, that would be one in which the damned are eternally locked in discovery disputes with other lawyers of equally repugnant attributes.”

The above examples of attorney misconduct are obvious. However, an attorney can also be held responsible for an out-of-control client who uses profanity during a deposition. In *GMAC Bank v. HTFC Corp.*, the court affirmed the sanction of defense counsel, Joseph Ziccardi, for failing to control his client during a deposition. The following occurred:

Q: This is your loan file, what do Mr. and Mrs. Fitzgerald do for a living?

A: I don’t know, open it up and find it.

Q: Look at your loan file and tell me.

A: Open it up and find it. I’m not your f _ _ _ ing b _ _ _ .

Q: Take a look at your loan application.

A: Do it yourself. Do it yourself. You want to do this in front of a judge? Would you prefer to do this in front of a judge? Then, shut the f _ _ _ up.

Q: Sir, take a look –

A: I’m taking a break. F _ _ _ him. You open up the document. You want me to look at something, you get the document out. Earn your f _ _ _ ing money a _ _ hole. Isn’t the law wonderful? Better get used to it. You’ll retire when I’m done.¹²

The exchange during this deposition encompasses several pages in the published opinion, but this one excerpt probably adequately conveys the message (not to mention that decorum

prohibits quoting the remaining dialogue). The attorney representing this hostile deponent, although not participating in the vitriolic exchange, was sanctioned nonetheless for failing to stop the deposition and/or immediately withdrawing from representation of that client.¹³

A lawyer is required to maintain respect for the courts and counsel and to refrain from

“A lawyer is required to maintain respect for the courts and counsel and to refrain from ‘undignified or discourteous conduct which is degrading to a tribunal.’”

“undignified or discourteous conduct which is degrading to a tribunal.”¹⁴

The reality is, the First Amendment does not confer upon attorneys an unfettered right of free speech.¹⁵ “Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.”¹⁶ Justice Cardozo once wrote:

Membership in the bar is a privilege burdened with conditions. [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.¹⁷

Similarly, the court in *In Re Snyder, supra*, at 647, observed: “All persons involved in the judicial process – judges, litigants, witnesses, and court officers – owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone.” Perhaps the best standard is the Golden Rule: “Treat others as you want to be treated.” Quite frankly, this might be the most objective – and understandable – standard available.

A line separating professional and unprofessional conduct exists, although not always clearly defined. The context and setting of the questionable speech is also important. It “should not be considered in a sterile setting, detached from the milieu in which it took place.”¹⁸ Litigation and trial practice can create stress and pressure not present in other areas of

the law. As a result, counsel practicing in these areas must make an extra effort to refrain from saying, writing or doing something that might be regretted later. If your impulse to react and respond would result in something a reasonable person would find rude, harsh, insulting or offensive, don't do it! The most effective arguments in the courtroom, in briefs – and in letters – use simple words, words that create pictures and action, words that generate feeling. Unfortunately, legal pleadings and correspondence between counsel are often bereft of a single alive word. They are usually a pernicious exercise, and dull, much like a professor's pedantic talk. However, there is never a valid reason to cross the line and make such animated speech or writing *unprofessional* or *uncivil*. Attorneys representing clients in the complicated arena of law today must understand that service to one's client requires confronting certain realities and that you cannot use one ethical consideration as an alibi to neglect another.

CONCLUSION

It is never too late for older, experienced lawyers to reflect on the values learned in years past, remove them from the dustbin and apply them once again. Values are not something that can be donned or discarded, like a used baseball uniform.

Young lawyers have continued to learn this intriguing and sometimes confusing profession. Each time a senior lawyer takes a young associate to a deposition or trial for the first time, a new world opens – one full of values that will take shape over a lifetime. Winning is

always fun, but it pales in comparison to the opportunity to shine by displaying professionalism. Robert Lewis Stevenson said, "*Don't judge each day by the harvest you reap, but by the seeds you plant.*" That is perhaps the greatest lesson a mentor can convey to a student: The practice of law is a clear example of virtue rewarded.

1. Judge Michael Stano, "Another Take on Civility," 78 OBJ 3131.
2. Jeffrey R. Young, *The Chronicle of Higher Education*, Fort Hayes State University, August 14, 2008.
3. Allen C. Guelzo, *Lincoln and Douglas*, p. 29, Simon & Schuster (2008)
4. Joel Stein, "Swifter, Higher, Meaner," *Time Magazine*, September 1, 2008, p. 25
5. I prefer to allow the author of this profound statement to retain his anonymity.
6. Comment (Kathleen P. Browne), *A Critique of the Movement: Why Rambo Will Not Go Away*, 77 Marq. L. Rev. 751, 767 (1996)
7. Renee DeMoss, "Legal CPR," *Tulsa County Bar Association*, August 2007
8. *In Re Swann*, 833 F.Supp. 794; *In Re Keller*, 502 NW2d 504 (N.D. 1993)
9. *In Re Williams*, 414 NW2d 394 (Minn. 1987)
10. *In Re Cavanagh*, 189 A.D.2d 521, 597 N.Y.S.2d 24 (App. Div. 1st Dept. 1993)
11. *Principe v. Assay Partners*, 586 N.Y.S.2d 182 (Sup. Ct. 1992)
12. *Id.*
13. *Id.*
14. *In Re Snyder*, 472 U.S. 634, 645, n. 7 (1985)
15. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034, 1075 (1991)
16. *Id.* at 1080
17. *People ex rel. Karlin v. Culkun*, 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928)
18. *Eddy v. Brown*, 715 P.2d 74, 77 (Okla. 1986)

ABOUT THE AUTHOR

Gerard F. Pignato is a shareholder in the firm of Pignato, Cooper, Kolker & Roberson PC in Oklahoma City. He has been practicing for 24 years and specializes in the area of complex insurance litigation and bad faith law.

FROM THE PRESIDENT

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emphasized a meaningful and active committee on work/life balance, which has been chaired since its inception by my dear friend and colleague, Melanie Jester. That committee has conducted many substantive seminars, as well as creating an excellent Web site and regular contributions to the *Oklahoma Bar Journal*. Meaningful work/life balance requires a change in the culture of our profession and that will not happen overnight. However, with a strong Work/Life Balance Committee, we can be instrumental in this cultural change.

On Sept. 11, 2008, the Oklahoma Bar Association held a dedication ceremony for the east wing renovation of the Oklahoma Bar Center. The entire east wing was gutted and all asbestos was removed. Staff members housed in the east wing were temporarily relocated to modular buildings in the west parking lot.

This was phase III of a four-phase rehabilitation project of the Oklahoma Bar Center. It was completed on time and within budget — and without borrowing. There are many new features to the east wing including a new board room, new offices and a new hearing/broadcast room, which will provide additional space for PRT hearings and to produce webcasts. In addition, preparation has been made for enhanced technology. To date we have spent approximately \$2 million for the project, much of which went to asbestos abatement and to have the building meet code and ADA regulations.

One important matter that we are currently addressing is the search for a new general counsel for our association. I have appointed Gary Clark to chair a Search Committee. Its task is to recommend to the Board of Governors a position description and qualifications for the general counsel and to seek candidates through appropriate advertising and through solicitation of nominations. It will then forward three or more unranked names to the Board of Governors who are acceptable and best qualified to be considered for employment as general counsel at the Oklahoma Bar Association. Gary has already submitted a

tentative timeline for the process, and we are hopeful that we will fill the position sometime in March 2009.

Let me say a word about the financial condition of the association. Simply stated, we are in good shape. We have a budget of approximately \$6 million. It is funded mostly from dues and CLE collects approximately \$1 million a year. Our third biggest contributor to the revenue is out-of-state attorney registrations, which provides \$250,000 in original registration fees and renewal fees. Our reserves are in cash and approximate \$1.6 million. We are debt free.

The future of our bar is healthy and bright. But we are about to undergo some significant changes. Note, for example, the theme for this year's

Annual Meeting — Generations of Change. Many of you in our association are “baby boomers.” I am one of them. In fact, in our profession the baby boomers represent a large group and guess what — we are getting old. Over the next 10 years, many of us will be retiring and that will have a profound impact on our profession — on practitioners, the judiciary and legal education. We will have a whole new generation of lawyers that will fill these

ranks and become the practitioner, the judge or the law professor.

In closing, I owe a great deal of thanks to so many people. To so many of you who gave me kind words of encouragement. To my wife, Sherri, and my daughters, Christin, Jennifer and Erin, who have provided me so much support. To John Morris Williams and the staff at the OBA who kept me out of trouble. To Tom McDaniel and Larry Hellman at OCU, who allowed me the time to devote to my duties at the bar association. To my assistant, Gayla DeGiusti, and to Debbie Brink at the OBA, who kept me organized and on time. To the Board of Governors whose dedication and commitment are unparalleled and whose advice and insight have been so valuable. And finally, to all of you for your service to the bar and your commitment by serving on so many committees. Thank you all!

“One important matter that we are currently addressing is the search for a new general counsel for our association.”

House of Delegates Actions

Actions of the OBA House of Delegates on matters submitted for a vote at the 104th Annual Meeting on Friday, Nov. 21, 2008, are as follows:

RESOLUTION NO. ONE

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its Legislative Program, as published in *The Oklahoma Bar Journal* and posted on the OBA Web site at www.okbar.org, proposed legislation, based in part on a model ABA act, creating new law to be codified as 74 O.S. Section 9100 et seq. and amending existing laws to create a State Office of Administrative Tax Hearings to have authority to hear Oklahoma tax controversies and to implement an independent Oklahoma Tax Commission internal review and settlement program. (*Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5*) (Submitted by the OBA Taxation Law Section. Adoption recommended by the OBA Board of Governors.)

Action: Adopted

ADOPTED

RESOLUTION NO. TWO

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Oklahoma Tax Commission adopt, as published in *The Oklahoma Bar Journal* and posted on the OBA Web site at www.okbar.org, the proposed rule set forth below creating the Independent Appeals Office to resolve tax controversies without formal administrative protest proceedings or litigation. (*Requires simple majority affirmative vote for passage.*) (Submitted by the OBA Taxation Law Section. Adoption recommended by the OBA Board of Governors.)

Action: Adopted

ADOPTED

RESOLUTION NO. THREE

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its Legislative Program, as published in *The Oklahoma*

Bar Journal and posted on the OBA Web site at www.okbar.org, legislation to amend 12 O.S. 2001, § 2005 relating to service of process and 12 O.S. 2001, § 3237 relating to award of expense of motions in discovery disputes. (*Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5*) (Submitted by the OBA Civil Procedure Committee. Adoption not recommended by the OBA Board of Governors.)

Action: Withdrawn

WITHDRAWN

RESOLUTION NO. FOUR

BE IT RESOLVED by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its Legislative Program, as published in *The Oklahoma Bar Journal* and posted on the OBA Web site at www.okbar.org, amendments to Rules for District Courts of Oklahoma, Rule 5, ¶ F (sub ¶ 7) regarding payment of jury fees, Scheduling Order and Pre-Trial Conference Order. (*Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5*) (Submitted by the OBA Civil Procedure Committee. Adoption recommended by the OBA Board of Governors.)

Action: Adopted

ADOPTED

TITLE EXAMINATION STANDARDS

Action: The Oklahoma Title Examination Standards revisions and additions published in the *Oklahoma Bar Journal* 79 2379 (Oct. 18, 2008) and posted to the Web site at www.okbar.org were approved in the proposed form. The revisions and additions are effective immediately.

ADOPTED

All resolutions are available in their entirety at www.okbar.org



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OBA Idol winner Jessica Hunt, a 2L at the TU College of Law



Annual Luncheon speaker Jeffrey Toobin



Jazz musician Justin Echols entertains the crowd at Just Desserts



Board of Governors voting held at the House of Delegates



President-Elect Jon Parsley

2008 Attorney Art Show

The 2008 OBA Art Show was another great success. Twenty-two artists entered 63 pieces of art in eight different categories. A panel of three judges scored the art and awards were presented to the attorney artists listed below.

Best in Show/Artist of the Year — The 2008 OBA Artist of the Year goes to Judge Michael Stano of Stillwater for his color photograph titled "Seal Beach." The photo depicts California seals sunning on a Pacific Ocean beach. Judge Stano took the photo on a recent trip to Los Angeles. This is Judge Stano's second "Artist of the Year" award. He won in 2006 with a black and white photograph of the Disney Music Hall.



"Seal Beach"



OBA Vice President Mike Mordy presents the 2008 Artist of the Year Award to Judge Michael Stano at the Annual Luncheon.

OIL PAINTING

1st Place
Don Holladay
"Fractures"

2nd Place
Don Schooler
"Oklahoma Sunset"

3rd Place
Don Holladay
"Insurgency"

COLOR DRAWING

1st Place
Don Schooler
"Ghanian Elder"

2nd Place
Paula Davidson Wood
"Blue Girl"

3rd Place
Don Schooler
"Ghanian Beauty"

COLOR PHOTOGRAPHY

1st Place
Judge Michael Stano
"Seal Beach"

2nd Place
David Bernstein
"A New Morning"

3rd Place
David Bernstein
"Country Road"

BLACK AND WHITE PHOTOGRAPHY

1st Place
Kenni B. Merritt
"Fresh Powder"

2nd Place
Judge Michael Stano
"Bench"

3rd Place
Judge James Croy
"Christmas Snow"

ACRYLIC

1st Place
Don Holladay
"Isolation"

2008 Attorney Art Show

2nd Place
Melissa DeLacerda
"Domestic Docket"

THREE- DIMENSIONAL

1st Place
A. Scott Johnson
"Buffalo Skinner"

2nd Place
Charles H. Pankey
"Reeds"

3rd Place
Julie Rivers
"Santa Fe Impressions"

MIXED MEDIA

1st Place
David Van Meter
"Blind Witness"

2nd Place
Don Schooler
"Free Fall"

3rd Place
Francis Courbois
"First Day"

CRAFT

1st Place
Teresa Rendon
"Flowery Skull Chair"

3rd Place
Teresa Rendon
"Flaming Skulls Chair"

A BROAD BASED COMMITMENT TO INDIAN LAW FEDERAL • TRIBAL • INTERNATIONAL

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- Specialized library collection in Indian and Indigenous law



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- Full time professors who specialize in Indian law
- Flexible Academic or Research Track
- Well-respected annual symposium in Indian law

Lisa Impson (left) JD '01,
Chickasaw Nation Legal
Department and Regina
Hovet (right) '01,
General Counsel, Sauk-
Suiattle Indian Tribe.

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My Last Article This Year

By John Morris Williams

Last month I did not write an article. On occasion, I just don't write an article. Never once have I had someone say that they missed my article. I know that life is full and meaningful for all without my drab and probably too tedious musings. However, as the year comes to an end I feel compelled to talk about the year that has been and to brag a bit on our leadership and staff.

One of the highlights of this year was the completion of the east wing renovation. It was desired that we have an efficient, clean and safe place for staff to work. With the abatement of the asbestos and the replacement of the mechanical systems, that end was achieved. It was also desired that we upgrade the meeting space for the Board of Governors and have more workable dedicated space for our elected leadership to use for meetings. To that end I think the new board room and president's conference meet or exceed expectations. Many thanks to the Oklahoma Supreme Court, the Board of Governors, Bar Center Facilities Committee and most especially our members for making this project a reality.

This spring we hosted the Rule of Law Conference led by President J. William "Bill" Conger. It was a great outreach to the community and gave us a great opportunity to tell our story as lawyers. Jack Brown and Cathy Christensen were exceptionally helpful with the Rule of Law Conference. At the end of the summer, we launched the OBA Leadership Academy. The inaugural class is an impressive group. I suspect that there are many future Board of Governors members and presidents in that group. Incoming Vice President Linda Thomas, Laura McCon-

learn something from the president. I am fortunate to work closely with the OBA-elected leadership -- especially the president. From Bill Conger I learned that bumps in the road teach us important lessons and give us an opportunity to learn and grow. No wonder he is such a great teacher at OCU! Bill, thanks for your tutoring and your patience.

Lastly, there are a couple of people who usually do not like, seek or find the limelight - the incredible duo of my assistant, Debbie Brink, and Bill Conger's assistant, Gayla DeGiusti. I certainly do not

“ May the holiday season and the new year find you with peace, health and happiness. ”

nell Corbyn, CLE Director Donita Douglas and the rest of the task force were invaluable to getting the Leadership Academy off the ground.

This year had a few bumps along the way, and I am grateful for the leadership of our Board of Governors and President Conger. Every year I

want to take anything away from the other great assistants with whom I have worked -- both in my office or in the offices of our past presidents. However, this year I am *especially* thankful for their work. If we were late, they tried their best to make us on time. If there was a deadline, they pushed us to get it done. If

there were long days or difficult situations, they were true professionals. Thank you Debbie and Gayla.

This year has had some personal challenges with serious illnesses in my family and among our staff here at the OBA. Things turned out so much better than I first feared for all concerned. To that end I am thankful. Sometimes our priorities are easy to misplace

when all we have to worry about is our own comfort. During some of the harder days, I was reminded that it is not *what* you have in your life but *who* you have in your life that is important. That is a good lesson to remember as well.

In closing, I hope that your year ends with a sense of accomplishment and thankfulness. May the holiday sea-

son and the new year find you with peace, health and happiness.



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

Oklahoma Bar Journal Editorial Calendar

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: Jan. 15, 2009

■ 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 Taylor
lguajardo@gmail.com
Deadline: Aug. 1, 2009

■ December

Ethics & Professional Responsibility

Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Aug. 1, 2009

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

Disposable News: Anatomy of iGoogle

By Jim Calloway and Catherine Sanders Reach



We are all dealing with information overload. Now there are tools available to help organize all the information coming at us from every direction. But sadly, the number of organizational tools available has also become part of the information overload.

We want to show you how you can easily set up your own personalized “online newspaper” that will provide you with the content you desire. For an investment of less than an hour of your time, you can get news and sports headlines, practice management assistance and updates from almost any information source you can imagine, all organized for you at a site you will be regularly visiting.

Behold iGoogle, the personal information portal.

Think of your iGoogle page as your daily newspaper, except this one is updated constantly and serves up news and other timely information from sources you have selected. The reason why we like this analogy is that the newspaper is today’s news. Rarely would you read yesterday’s newspaper,

and you would almost never read last week’s paper.

iGoogle is handy! When you need to use Google for search, it is there. You can quickly scroll down and see some current headlines. You can click to read more if you wish or just move on. There will be more news tomorrow. If you missed part of the news while you were in trial last week, you just missed it.

So if you’ve heard about these great Internet news sources, but never really had time to learn how to use RSS newsfeeds, this simple tutorial is for you. If you have set up a RSS newsreader, but never seem to be able to find the time to go and read all of the items that it collects, then this article is *really* for you! Reading instructions can be a bit tedious sometimes, but there can be a big payoff for you in these.

iGoogle is also referred to as the Google homepage. But this is not the Google Reader, which is a “traditional” RSS feed reader/news aggregator. iGoogle offers much more than just RSS feed reading. If you don’t understand RSS, check out the ABA Legal Technology

Resource Center primer at www.abanet.org/tech/ltrc/fyidocs/fyirss.html.

While the customizable homepage is not a new concept – MyWay, MyYahoo and many others provide some sort of personal portal – iGoogle, by sheer force of the power of Google, offers substantially more than the competition including gadgets for LinkedIn, Facebook, the Google applications “suite” and a host of third party gadgets that do everything from offer a word of the day to stock tickers to the weather.

GETTING STARTED

All you need is a free Google login. We think everyone should have one of these logins to use Google services such as Gmail, Google Docs and Google Calendar.

If you do not already have an iGoogle page, or have never actually customized the page, start out by going to www.google.com/ig and get started. Google will offer to help by customizing the information that appears on your page based on geographic location. After that you will have a page that can be

customized however you like, as often as you like. You will need to login to Google, using either your Gmail username and password or your Google username and password. Unless you refuse the cookie, you will stay logged in almost perpetually as long as you use it. If that is of concern, make sure to logout when you leave your session.

As with all things Internet-based, one benefit of iGoogle is that it is available to you wherever you can get access to the Internet. We actually like the idea that when you need to use Google for searching, you are now presented with your iGoogle page instead of the mostly blank Google home page.

GETTING ORGANIZED

Once you have the initial iGoogle page you will want to start adding feeds and gadgets. Feeds, or news-feeds, are stories you may read in your newspaper. These can come from traditional news services, or blog posts or any one of a number of sources. The Oklahoma Supreme Court releases its opinions via RSS feeds, for example, as do a few other courts. You may hover the cursor over a headline to read the first paragraph or so of the story or click on the link to be taken to the original item.

You can organize your feed content that you add by creating subject headings in the left navigation. This is a recent change in iGoogle, which formerly used tabs.

Create a subject heading called "family law" or "Google Apps" or "legal technology" to begin creat-

ing subpages that let you access the information you want more quickly. If you do not create subject headings, the iGoogle default page will get crowded quite quickly. (But if you just want to start with a few feeds displayed on the default page, that is perfectly fine too. We just think you will grow out of that phase soon.)

The subject headings are easy to change and it is easy to move a feed or a gadget into a different subject heading by dragging and dropping. To add a new subject heading in the left navigation you will need to start in the default heading of "home" and click on the square box with the downward arrow on the right of the title. A drop down menu will appear. You will then click on "add a tab" to create a new subject heading, which subsequently creates a new page for content. When you add a new tab iGoogle will ask the tab name with an option to automatically add items based on the tab name. This is a nifty feature that will pre-populate a page with some RSS feeds and gadgets for that keyword. For instance, the tab name "legal" pre-populates the page with RSS feeds from CNN Law and recent decisions from the U.S. Supreme Court, among others. You can delete any of these that you wish.

As we said, Google Gadgets do an amazing number of things. This means your newspaper page can have cartoons, stock quotes, games or weather features as opposed to just stories.

ADDING 'STUFF' TO iGoogle

There are two ways to add gadgets and feeds to iGoogle—reactively and proactively.

Reactive adding is pretty simple so we will cover it first. As you surf the Web and run across a useful Web site or blog, remember to look for the option to subscribe to new content via RSS. This is the reactive way to add content to your iGoogle portal.

Most Web sites with RSS Feeds have an obvious button to click to subscribe to their feed. Many now have specific buttons for iGoogle or Google Reader. If you run across a site that offers feeds, but does not have an obvious way to add it to your iGoogle page, don't worry. Simply copy the URL for the RSS and add it as explained below. See the OSCN RSS Feed page at www.oscn.net/Applications/OSCN/rss.asp for an example.

To proactively add content and gadgets to iGoogle simply click on "add stuff" in the upper right corner of iGoogle. This will take you to a keyword search for feeds and gadgets. You can find gadgets to allow you to insert all of your Google applications, like Gmail, Google calendar, Google Notebook and Google Bookmarks. Create a tab called "Google Apps" and you will now have a portal to all your Google interactions on one page. These gadgets can be expanded within iGoogle so that you can actually use the application without having to go to the application itself. You can now get access to

everything Google from one page instead of moving in and out of the applications.

To expand a gadget, you can click on the box in the upper right corner of the gadget to maximize it, or click on the gadget name in the list under the subject heading in the left navigation panel. There are gadgets to let you interact with other online applications as well, such as Twitter, Facebook, LinkedIn and more. Keep in mind that the third-party applications offered through the "add stuff" page may pose privacy or security concerns. So you may want to do a little research before adding. Note the developer, the number of users, and the rankings in determining what is well-accepted.

Another proactive way to add "stuff" to iGoogle is to actively search for and add content. For instance, you might create a tab for patent law. To populate that tab you could do a search for "patent law" in Google Blog search. On the results page you see the option to "subscribe" in the left hand column. Click on "RSS" then "add to your personalized Google homepage." This will add a search feed for the phrase "patent law" to your iGoogle patent law tab.

Within the tab, the patent law search feed will appear in a box. You can customize this box to show the nine most recent search results, or as few as one by clicking on the box with the arrow in the upper right corner and choosing "edit settings." This will show the search results in reverse chronological order with the newest result appearing at the top, oldest

“Most Web sites with RSS Feeds have an obvious button to click to subscribe to their feed. Many now have specific buttons for iGoogle...”

at the bottom. As new results come in, the oldest will automatically be deleted. The same holds true for all gadgets based on RSS feeds in iGoogle, whether a search feed, a news site, or a blog. Unlike a true RSS feed reader you cannot manage feeds with iGoogle or archive posts. That's why we call this "disposable news." There are many ways to save these items for later reference, but that's outside of today's lesson.

Google Alerts (www.google.com/alerts) is a nice free service that sends you an e-mail notification when a search term you have submitted (like your name or your biggest client's name) appears in one of many monitored news services. If you have any Google Alerts set up, you can now choose to have the results sent to iGoogle, rather than via e-mail. Look for the ability to create search feeds in other Google content search like Google Video, News, Groups etc.

GREAT FEED FOR YOU TO TRY

Here's a great feed for you to put into your iGoogle

page: the PMA Pipe. The PMA Pipe combines the posts from several blogs from practice management advisors in state bars and law societies across North America. The OBA incorporates the PMA Pipe into the Law Practice section of OKNewsBar (www.okbar.org/php/lawPractice.php). Between everyone's efforts, this feed is updated several times a week and often daily. We think that you will enjoy this diverse set of opinions about practice management and law office technology on your iGoogle page. We also think getting a little bit of practice management advice daily is a good way for busy lawyers to learn. Here's a simple way to do this: Type tinyurl.com/2tkl3k into your browser address bar and hit enter. After the PMA pipe page loads, copy the long address from the browser address bar and paste that feed into iGoogle.

CONCLUSION

The above description really only covers the proverbial tip of the iceberg when it comes to iGoogle. Google itself has plans to continue to expand and enhance functionality, including plans to integrate Google Chat in the near future. While some of the functionality is not necessarily intuitive, it is generally easy to use.

Once you have mastered the basics of iGoogle, you may want to explore adding more gadgets that let you further customize your information gathering. Tools like Google Custom Search allow you to create a searchable directory of specific Web sites. Keep an eye out for new gadgets by perusing

“add stuff” occasionally. The final step is to either make iGoogle your browser homepage or remember to visit it daily to keep up with all that is meaningful or new to you. And, if you visit Google regularly, that part will take care of itself.

Editor’s Note: This column was also published, in a slightly different form, in the December 2008 issue of Law Practice Today, an e-zine published monthly by the American Bar Association’s Law Practice Management Section. Law Practice Today is online at www.abanet.org/lpm/lpt.

Jim Calloway is the director of the OBA Management Assistance Program and manages the Solo & Small Firm Conference. He served as the chair of the 2005 ABA TECHSHOW board.

Catherine Sanders Reach is the director of the American Bar Association Legal Technology Resource Center. Ms. Reach was a guest speaker at the OBA Solo & Small Firm Conference in 2008.



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OBA Seeks General Counsel Applicants

The Oklahoma Bar Association, an integrated bar association of 16,000 members, seeks a General Counsel. The Office of the General Counsel acts as chief disciplinary counsel supervising a staff of 12 and as counsel to the Association on other legal matters.

The successful candidate must have a minimum of 10 years of practice experience and be (or become) a member in good standing of the Oklahoma Bar Association. Competitive salary and generous benefit package.

Application and complete job description are available by going to www.okbar.org/generalcounselsearch.htm or by writing to:

**General Counsel Search Committee
P.O. Box 53036
Oklahoma City, OK 73152**

All applications will be kept confidential. Applications must be received by 5 p.m. on Jan. 12, 2009.

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FDIC Announces IOLTA Changes

By Gina Hendryx, OBA Ethics Counsel

The recent economic woes coupled with the instability of some banking institutions have caused much concern about the security of client funds held by lawyers in their pooled interest-bearing trust accounts commonly referred to as IOLTA (Interest On Lawyer's Trust Account) accounts. Effective Nov. 21, 2008, the FDIC extended the Temporary Liquidity Guarantee Program (TLGP) to client funds deposited in IOLTA accounts. All funds in an IOLTA account, regardless of size, will now be insured in full by the FDIC and backed by the full faith and credit of the U.S. government as part of the TLGP program through Dec. 31, 2009, provided the banking institution has opted to participate. The majority of Oklahoma banks are participating in the TLGP, however there are some banks primarily in the rural areas of the state that have chosen to opt out of the TLGP. The following link is to the FDIC site listing those banks that have opted out of the TLGP: www.fdic.gov/regulations/resources/TLGP/tagp.xls. The site notes that this list is in the process of being refined and should not be considered final. If you have any questions or concerns regarding the institution where you have your IOLTA

account, you should contact the bank directly.

The American Bar Association, state IOLTA programs, and community and consumer groups organized a nationwide effort to persuade the FDIC to include IOLTA funds in this expanded insurance program. In a letter to the FDIC, representative of 50 IOLTA programs throughout the country called for extension of the insurance coverage to IOLTA accounts noting that IOLTA programs provided more than \$212 million in 2007 for the provision of civil legal services to the poor.

The Oklahoma Rules of Professional Conduct require lawyers and law firms to hold client or third-party funds in a trust account at an FDIC insured bank or savings and loan association. Funds that are nominal in amount or to be held for a short period of time are to be placed in a pooled interest-bearing account (IOLTA) with the interest paid to the Oklahoma Bar Foundation. Client or third-party funds that are not "nominal in amount" or will not be held "for a short period of time" may be deposited in a separate interest-bearing individual trust account with the interest paid to the client or third party. The TLGP pro-

gram has only been extended to IOLTA accounts and does not apply to individual lawyer/client trust accounts.

IOLTA ACCOUNTS

The FDIC treats the deposits in an IOLTA account as the accounts of the individual clients provided certain requirements are met. Therefore, funds in an IOLTA account are insured as funds of the actual owner to the same extent as if deposited by the actual owner rather than the lawyer or law firm. However, as noted above, the TLGP now provides unlimited insurance coverage for IOLTA accounts at least through Dec. 31, 2009.

The requirements that must be met for the FDIC to treat deposits in lawyer pooled trust accounts as funds of the individual client include:

- The fiduciary name of the account must be disclosed in the account title. For example, John Smith Client Trust Account
- The account must contain the tax identification number of the Oklahoma Bar Foundation for IOLTA accounts.
- The identities and interests of the clients must be ascertainable from

records maintained in the regular course of business by the depositor. Therefore, the lawyer or law firm must have documentation and records reflecting all transactions of the account attributable to each client or third party.

SEPARATE INTEREST-BEARING ACCOUNTS

As stated above, the lawyer or law firm may establish a separate trust account on behalf of a client or third party whose funds are not nominal in amount or are going to be on deposit for an extended period of time. These accounts should reflect the party for whom the money is held. For example, John Smith Client Trust Account for the Benefit of Joe Jones. This account may earn interest and the interest must be paid to the client or

third party. Such accounts are often employed for large retainers, settlement funds that will be on deposit for a lengthy period of time and sale proceeds that are awaiting a determination of ownership. These separate interest-bearing trust accounts are limited to the \$250,000 FDIC insurance coverage. These accounts must also satisfy the FDIC requirements for being treated as a fiduciary account including the name requirements, using the client's tax ID or Social Security number on the account and maintaining adequate records of transactions. Because of the \$250,000 per depositor insurance coverage limit, lawyers should discuss the possibility that the client may already have money on deposit with the institution and make sure that the client's insurance coverage is

not capped at \$250,000, leaving other funds uninsured. If a client's funds in the non-IOLTA lawyer trust account exceeds \$250,000, the lawyer or law firm should consider dividing the funds into interest-bearing accounts at different institutions and/or investigate banking options such as the CDARS program for protecting deposits in excess of \$250,000.

For more information on the TLGP program, visit www.fdic.gov/regulations/resources/TLGP/index.html and www.fdic.gov/deposit/deposits/changes.html.

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.

November Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Sheraton Hotel in Oklahoma City on Wednesday, Nov. 19, 2008, as part of the Annual Meeting.

REPORT OF THE PRESIDENT

President Conger reported he attended the October Board of Governors meeting and special meeting of the Board of Governors. He had numerous discussions with Executive Director Williams concerning the Annual Meeting and with Gary Clark and others concerning the general counsel search. He also taped a segment of "The Verdict" television show with Kent Myers and Mick Cornett.

REPORT OF THE VICE PRESIDENT

Vice President Mordy reported he attended the Board of Governors cruise and dinner, October board meeting and special board meeting.

REPORT OF THE PAST PRESIDENT

Past President Beam reported he attended the Board of Governors cruise and dinner, October board meeting, special board meeting, Civil Procedure Committee meeting, Custer County Bar Association meeting and made arrangements for the Western Oklahoma Bar Alliance suite.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the Thursday night social event, staff meetings for Annual Meeting, reception for Chief Justice Winchester, Annual Meeting events and monthly staff celebration. He also participated in the General Counsel Search Committee subcommittee teleconference.

BOARD MEMBER REPORTS

Governor Bates reported she attended the October board meeting, special board meeting and Cleveland County Bar Association meeting. **Governor Brown** reported he attended the OBA Bench and Bar meeting and the ABA Judicial Division Appellate Judges Conference in Phoenix, Ariz.

Governor Christensen reported she attended the Board of Governors Oklahoma River cruise, dinner at Rocky's, October board meeting, special board meeting, OBA Bench and Bar meeting and Oklahoma County Bar Association meeting. **Governor Dirickson** reported she attended the October Board of Governors meeting, special board meeting and Custer County

Bar Association monthly meeting. **Governor Farris**, unable to attend the meeting, reported via e-mail that he attended the Board of Governors special meeting in Oklahoma City, Tulsa County Bar Association board meeting and that he made a presentation on estate planning to retirees at First Presbyterian Church in Tulsa. **Governor Hermanson** reported he attended the Board of Governors cruise on the Oklahoma River, dinner at Rocky's, October board meeting, Bench and Bar Committee meeting, Kay County Bar Association meeting, Kay County Bar Criminal Law group dinner and Judge Kistler's swearing-in ceremony in Stillwater, where he presented Judge Kistler with a framed certificate on professionalism from the American Board of Trial Advocates. **Governor Hixson** reported he attended the Board of Governors Oklahoma River cruise, dinner at Rocky's, October board meeting, special board meeting and November Canadian County Bar Association luncheon and CLE presentation. **Governor McCombs**, unable to attend the meeting, reported via e-mail that he attended the Oklahoma River cruise and dinner at Rocky's, October board

meeting, special board meeting and McCurtain County Bar Association meeting.

Governor Reheard reported she attended the October board meeting, special board meeting and OCDLA board meeting. She also finalized plans for OCDLA annual meeting held in conjunction with the OBA Annual Meeting. **Governor Souter** reported he attended the board social, Board of Governors meeting in Oklahoma City, special board meeting and Creek County Bar Association meeting with speaker Gina Hendryx, OBA ethics counsel. **Governor Stockwell** reported she attended the October board meeting, special board meeting, Cleveland County Bar Association Executive Committee meeting and CCBA monthly meeting with CLE.

YOUNG LAWYERS DIVISION REPORT

Governor Warren reported she attended the Board of Governors cruise and dinner, October board meeting, special board meeting, October YLD board meeting and YLD lunch.

LAW STUDENT DIVISION LIAISON REPORT

LSD Chair Janoe reported he attended the Board of Governors cruise of the Oklahoma River, dinner at Rocky's and two OU OLSD meetings, as well as participating in the various recruitment activities of the group. He also met with Treasurer Nathan Milner to discuss finances and his attendance of the October board meeting. Janoe said the law students are excited about participating in OBA Annual Meeting events and have

scheduled a division reception and meeting as part of those events.

GENERAL COUNSEL REPORT

A written status report of the Professional Responsibility Commission and OBA disciplinary matters was submitted for the board's review.

PROFESSIONALISM COMMITTEE REQUEST

Committee Chair Sharisse O'Carroll reported the committee has researched the cost of printing selected portions of the Standards of Professionalism on parchment, and the cost is \$2 each. A full text version has also been prepared for judges. She reported the committee is requesting funding to produce the standards and permission to distribute them for free to new lawyers at the swearing-in ceremonies. She also suggested they could be sold to lawyers at the OBA Annual Meeting. The committee passed out the standards rolled and tied with a bow to new lawyers at the spring swearing-in ceremony this year. President Conger noted there are about 450 new lawyers admitted as OBA members each year, and they are not familiar with the Standards of Professionalism. The board approved the funding and distribution of the standards to new lawyers at a cost of up to \$1,000 with the provision that continuation of the project be reviewed in three years.

LEGAL INTERN COMMITTEE REQUEST TO AMEND RULES ON LEGAL INTERNSHIP

Legal Intern Committee Chairperson Terrell Monks reviewed the proposed changes to Rule 10.1 regarding fees. The board approved the committee's proposed amendment. Chairperson Monks reviewed the background of the committee's recommendation to reduce from 50 to 45 the number of academic hours a law student applicant must have completed before applying for a limited license as a licensed legal intern. The board approved the amendment. It was noted that representatives of all three law schools serve on the committee. Both proposed changes will be submitted to the Supreme Court for its approval. The board expressed its appreciation to Chairperson Monks and his committee for their work.

OKLAHOMA CODE OF JUDICIAL CONDUCT

Governor Brown, who serves as Bench and Bar Committee co-chairperson, reviewed the background of the committee's work over the past several years to draft proposed changes to the Oklahoma Code of Judicial Conduct. He introduced committee member Professor David Swank, who has served as the subcommittee's reporter. Professor Swank reviewed highlights of the proposed Code of Judicial Conduct and noted sections of special interest. President Conger and President-Elect Parsley agreed that the board will be deliberate in its consideration of the proposed revisions and not take quick

action. The board will discuss amendments at its meetings over the next several months.

GENERAL COUNSEL SEARCH COMMITTEE

President Conger reported that he has appointed a committee to conduct a nationwide search to fill the position of OBA General Counsel. Past President Gary Clark of Stillwater will serve as the chairperson. President-Elect Parsley reported a job

description has been drafted by the committee and will be posted on the Web site. An advertisement has also been drafted. It is the committee's intention to begin advertising the position immediately. The board approved the appointments.

EXECUTIVE SESSION

An executive session was held.

PROPOSED 2009 OBA BUDGET

The board approved the 2009 OBA budget, which will be submitted to the Supreme Court for final approval.

NEXT MEETING

The board will meet at 9 a.m. at the Oklahoma Bar Center in Oklahoma City on Friday, Dec. 19, 2008.

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

Celebrating OBF's Years of Grants, Growth and Lawyers Transforming Lives

By President Renée DeMoss

You know the old saying – time changes everything. Fortunately, time has affected the Oklahoma Bar Foundation in a manner that deserves celebration. This year, we celebrate the “generations of change” within the OBF, and its many years of grants, growth, and lawyers transforming lives.

At the time of its creation in 1946, the “founding fathers” of the OBF envisioned a wonderful future for the organization. Those pioneering members described their vision like this:

“Our primary purpose is to improve the administration of justice, to advance the general welfare of the constituent members, and to conserve the interests of our clients and the public. The Oklahoma Bar Foundation will, therefore, be devoted to these ends.”

* * * * *

“Each lawyer is urged to give their support and cooperation to the foundation... the glories of the possibilities are ours, if all will but realize them.”

One of the most notable “possibilities” realized with the help of the foundation was the establishment of a new home for all Oklahoma lawyers, which was accomplished by the completion and dedication of the Oklahoma Bar Center building in 1962.

Over the ensuing years, the foundation evolved into a separate 501(c)(3) corporation, functioning as the official charitable arm of the Oklahoma bar. In the name of Oklahoma attorneys, the foundation now provides critical funding to organizations that meet the legal needs of disadvantaged Oklahomans. Without the funding provided by the OBF, some Oklahoma domestic violence victims



Renée DeMoss

might be without protection; some elderly Oklahomans might be without legal assistance on issues ranging from fraud to consumer debt; some abused and neglected Oklahoma children might not receive pro bono legal services. Through the OBF's provision of financial support to nonprofit organizations furnishing legal services to thousands of Oklahomans, Oklahoma lawyers do indeed transform lives.

THEY ALWAYS SAY TIME CHANGES THINGS, BUT YOU
ACTUALLY HAVE TO CHANGE THEM YOURSELF.

—ANDY WARHOL

The actions Oklahoma lawyers have taken to support the foundation have changed over time. In the early years, individual lawyers primarily contributed through donations to scholarship funds maintained and granted by the foundation. Such contributions led to the establishment of significant scholarships to students at our three Oklahoma law schools exceeding \$50,000 every year, and over \$912,000 total through 2008. Some such scholarships have been made in honor of beloved Oklahoma lawyers such as Maurice Merrill and Thomas Hieronymus, while others are dedicated to law students concentrating their studies on a particular area of the law.

In 1978, the OBF "Fellows" program was begun. Oklahoma lawyers joined forces to further the foundation's charitable work by making individual donations in the amount of \$1,000, either through a one-time pledge, or payment of \$100 a year for 10 years. Subsequently, the "Sustaining Fellows" level of giving was created for those dedicated lawyers who had completed their initial \$1,000 pledges and desired to continue giving, as well as the "Benefactor Fellows" level in 2004. These generous individuals are the lifeblood of the organization, as they continue to support the foundation through additional annual gifts of \$100 or \$300. In recognition of the Fellows program, a new annual scholarship was established in 2007 that is funded solely from Fellows donations. Annual Fellows scholarship totaling \$15,000

are now available to our law students.

In 1983, our state supreme court took a historic step and approved the Interest On Lawyers Trust Accounts Program ("IOLTA") in Oklahoma. This authorized Oklahoma attorneys to voluntarily donate to the foundation the interest earned on small and short term client trust funds held in checking accounts. Twenty-one years later, in 2004, the court joined other states across the nation, and approved a change that rendered the IOLTA Program mandatory. Now interest funds on all lawyers' small and short-term client trust funds held in pooled checking accounts are pledged to the foundation to support the charitable mission. As a result of the court's action, IOLTA income has grown to be the largest single source of funding for legal services and projects in Oklahoma, generating over \$1 million in 2007.

As the years have passed, the grant awards for OBF's legal service funding have dramatically increased. From its founding in 1946 to the establishment of mandatory IOLTA in 2004, the OBF granted awards in the amount of almost \$5 million. Just this year alone, 23 different programs will receive OBF grants totaling \$857,500. When the additional \$54,500 awarded for Oklahoma law student scholarships is added, the total grant awards for 2008 equals \$912,000. ***OBF grants have thus grown over the years to exceed the \$8 million award level, with a total of \$8,429,915 to date.***

A final funding change has occurred quietly over the past three years, with the OBF's good fortune to receive some very significant cy pres awards. Cy pres funds are final, surplus funds in class action and other proceedings, that for any number of reasons cannot be distributed to the class members or beneficiaries who were the intended recipients. These funds have helped enable the OBF to expand its charitable mission and dramatically improve its capacity for new initiatives. Although the parties responsible for these awards wish to remain out of the limelight, they have made a tremendous difference in OBF's ability to promote law-related causes and programs throughout Oklahoma. We are very grateful to those who have helped to facilitate these awards.

The year 2008 itself has brought a host of changes to the foundation. In January, the Board of Trustees dedicated time to a first-ever board retreat, and used that initial session to launch a year-long planning project to refine its mission, put in place updated governance and financial policies and procedures, and renew its efforts to serve disadvantaged Oklahomans. A Past Presidents Advisory Council has been formed, office space has been updated to accommodate the foundation's growth, and new program initiatives are being pursued.

One asset that has not changed through the years is the dedication of the individuals who lead the foundation. We celebrate each of the 47 past presidents who have served the foundation so well

through the years, as well as the many officers and trustees who have donated so generously of their time, talents and funds. We also celebrate those individual attorneys within the bar who have stepped up and become Fellows, as well as those individuals who have contributed by naming the OBF in estate planning gifts and other donations. And last but not least, we celebrate the truly dedicated foundation staff - including Nancy Norworthy, who has been a part of the OBF since 1985 - Tommie Lemaster and Marie Golloway. They work tirelessly to serve the foundation.

The year 2008 was a financially challenging one for the OBF, and the years 2009 and beyond promise to be even more challenging. Two major sources of OBF grant income are directly dependent on the economy – the investment of endowments and

other funds, and the IOLTA Program based on interest funds. Remittances from these sources are decreasing, and without the help of Oklahoma attorneys, OBF will not be able to continue grant funding at the increased levels of the past several years. Participation in the OBF Fellows program by all Oklahoma attorneys is now more important than ever before.

As we celebrate the past 62 years of OBF growth, grants and lawyers transforming lives, we hope to have reason to celebrate in the years ahead. We need your help as an OBF Fellow to do that. Every lawyer licensed to practice law in Oklahoma is a member of the OBF, and every charitable action taken by the foundation helps promote and improve the reputation of those members, as well as makes available the

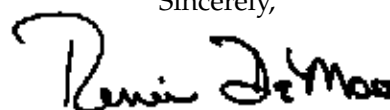
opportunity to help transform the lives of Oklahomans in need.

There is no doubt that the work of the OBF is worthy, as evidenced by the agencies receiving foundation funds. Please help OBF move forward to better serve the legal profession and our state by signing up to become an OBF Fellow today. With your help, the changes in our future can surpass those we celebrate today.

"They always say time changes things, but you actually have to change them yourself."

- Andy Warhol
(The Philosophy of Andy Warhol)

Sincerely,

A handwritten signature in black ink that reads "Renée DeMoss". The signature is fluid and cursive, with the first name "Renée" and last name "DeMoss" clearly distinguishable.

Renée DeMoss



FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

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

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

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

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

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

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

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



Signature & Date: _____ OBA Bar #: _____

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

OBF SPONSOR: _____

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

Many thanks for your support & generosity!

Heroes Make College Education Possible for Incarcerated Women

By Suzanne Edmondson

In the early fall of 1996, I ventured out my door for my first trip to a women's prison, Eddie Warrior Correctional Center (EWCC) in Taft, Okla. I was shaking in my shoes for several reasons, not the least of which was my fear that the incarcerated women with whom I was meeting may well include someone that my husband, Jim, had sent to prison. He was then a long-time district judge in Muskogee County. As I entered the prison classroom, I was relieved to find a gathering of women, literacy tutors all, who could very well have been fellow members of Franklin School PTA.

For many months I worked with and enjoyed getting to know these women. I began doing programs in the community with EWCC's principal, Dr. H.C. Davis. We spoke to the Lake Tenkiller Women's Association in the spring of 1997, and a woman in the audience gave us \$50 to help educate an incarcerated woman.

We couldn't cash the check. A vehicle was needed, and Jim suggested a not-for-profit corporation. Enter Hero #1.

Retired Muskogee attorney Kay Wilson worked many hours with me to incorporate Friends of Eddie Warrior (FEW) Foundation Inc. We could finally cash checks and began a viable college program at EWCC. FEW exists solely for the college education, both tuition and books, of qualified, indigent incarcerated women of the correctional center. We partner with Connors State College in Warner. Connors sends certified teachers to EWCC. All classes



actually take place at the prison, which benefits our students with its hands-on aspect, and teachers modeling behavior add an important dimension that is lacking in many of their students' lives.

A wonderful philanthropist in Muskogee approached me in the post office one day and invited FEW to apply for a grant. She said, "I assume you are a 501(C)(3)." Kay Wilson and I had applied, but the process was stalled. Enter Hero #2, Muskogee attorney Ron Wright, who in short order drafted new bylaws, clarified FEW's purpose and obtained 501(C)(3) tax exempt status. Pro bono. FEW was shipshape at last. With all its bona fides in place, FEW grew and went about the business of educating the women of Eddie Warrior.

In the late '90s, a former FEW student contacted me. After her release, she'd returned to Texas, received her bachelor's degree and wanted to go to law school. An impediment to that was her continued obligation to the Oklahoma Department of Corrections. Hero #3, District Judge Jim Goodpaster, who has recently retired, heard her pleas for release from DOC supervision in open court and granted her request. (This woman today is an OBA member.)

Time passed, FEW continued its work, and Jim and I relocated to Oklahoma City. In 2007 a question arose about FEW's tax exempt status. I consulted Oklahoma City attorney Tim Larson, our fourth hero. Tim navigated the hoops and hurdles of the IRS like the pro he is, and FEW is once again in fine shape. His fee for many hours of work? \$28 for copies.

Until this year, every dollar given to FEW has gone to tuition and textbooks for our college students. FEW has no employees and no overhead. This semester, fall 2008 takes us to 860 classes funded. I've written just one check other

“Tim navigated the hoops and hurdles of the IRS like the pro he is, and FEW is once again in fine shape.”

than for tuition and books -- to a CPA firm for FEW's tax return last year. Alas, that will be an ongoing expense, and to my way of thinking, it will deprive four women of college classes.

The bar has spoiled me. My complaint is minor when I consider what has been so generously given to the foun-

dation. I am grateful for much wise counsel and many kindnesses along the way, and I thank you all, including especially the Oklahoma Bar Foundation, Oklahoma Board of Bar Examiners and OBA members Jim Edmondson, Tom Colbert, Yvonne Kauger, Judge Carol Hansen, Tom Alford, J. William Conger, John Morris Williams, Robert Ravitz and Mike Mordy.

Merry Christmas, y'all. OBA rocks!

Mrs. Edmondson is FEW founder and secretary/treasurer. For more information about the foundation, e-mail fewfund@cox.net.

YLD ELECTION RESULTS ANNOUNCED

The YLD Board of Directors convened for its regular monthly business meeting on Nov. 20, with Chairperson Kimberly Warren presiding over the session. Immediate Past Chairperson of the division and current YLD Nominating Committee Chairperson Chris Camp announced the results of the election for the open YLD board positions.

The officers of the division for 2009 will be: Chairperson – Rick Rose (Oklahoma City); Chairperson-Elect – Molly Bircher (Tulsa); Treasurer – Nathan Johnson (Lawton); Secretary – Roy Tucker (Muskogee); and Immediate Past Chairperson – Kimberly Warren (Tecumseh).

New to the Board of Directors in 2009 will be: Lindsey Andrews (Judicial District No. 3); Robert Faulk (Judicial District

No. 4); Shawnae Robey (Judicial District No. 5); Amber Peckio Garrett (Judicial District No. 6); Kimberly Moore-Waite (Judicial District No. 6); Roy Tucker (Judicial District No. 7); Nathan Johnson (Judicial District No. 9); Javier Ramirez (At Large); LeAnne McGill (At Large); and Doris Gruntmeir (At Large – Rural).

YLD PRESENTS AWARDS AT ANNUAL BREAKFAST

The YLD closed out the 2008 Oklahoma Bar Convention with its annual Friends and Fellows Breakfast. Fellows of the YLD are chosen annually from members of the OBA who are no longer young lawyers, but have served with distinction as a YLD officer, director or committee chairperson, or

who have otherwise demonstrated their support of the division and dedication to the objectives of the YLD. Similarly, Friends of the YLD are named each year to recognize those non-lawyers who have contributed significantly to the division and its many community service projects.

After breakfast was served, Kim Warren called the group to order to recognize the 2008 YLD award recipients:

YLD Fellows:

Myra Coffman
Leslie Lynch

YLD Friends:

Julie Camp
Jeff Kelton

Outstanding YLD Committee Chairperson:
Briana J. Ross
(Gift of Life Committee)

Outstanding YLD Director:
Doris L. Gruntmeir

Outstanding YLD Officer:
Molly A. Bircher



Javier Ramirez, Chris Camp, Julie Camp and Pandee Ramirez enjoy a game of blackjack at Casino Night at the OBA Annual Meeting

December

- 16 OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 17 OBA Administrative Law Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Payne (405) 271-1269
- 19 OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- OBA Mock Trial Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066
- 20 OBA Young Lawyers Division Committee Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kimberly Warren (405) 239-7961
- 25-26 Christmas Holiday** (State Holiday)

Calendar



January



- 1-2 New Year's Day** (OBA Closed Jan. 2)
- 8 OBA Mock Trial Committee Meeting;** 5:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066
- 9 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
- 13 Death Oral Argument;** Richard Norman Rojem; D-2007-660; 10 a.m.; Court of Criminal Appeals Courtroom
- Hudson Hall Wheaton Inn Pupilage Group Four;** 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041
- 15 Supreme Court Chief Justice and Vice Chief Justice Swearing In;** 2 p.m. Supreme Court Courtroom, State Capitol; Contact: John Morris Williams (405) 416-7000
- 19 Martin Luther King Jr. Day** (State Holiday)
- 20 Death Oral Argument;** James T. Fisher; D-2005-460; 10 a.m.; Homsey Family Moot Courtroom, Oklahoma City University
- 21 Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Julie Bates (405) 691-5080
- 23 OBA Board of Governors Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- Board of Bar Examiners Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dana Shelburne (405) 416-7021
- OBA Board of Governors Swearing In;** 10 a.m.; Supreme Court Courtroom, State Capitol; 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.



President's Award Winners Recognized

Along with the annual OBA awards presented during last month's Annual Meeting, President Bill Conger named three President's Award winners. Cathy Christensen of Oklahoma City, Jack Brown of Tulsa and David Swank of Norman received awards for their commitment to the OBA Bench and Bar Committee. The three were instrumental in revising the Oklahoma Code of Judicial Conduct.

New OBA Board Members to be Sworn In

Eight new members of the OBA Board of Governors will be officially sworn in to their positions on Jan. 23, 2009, at 10 a.m. in the Supreme Court Courtroom at the State Capitol. The new officers are President Jon Parsley, Guymon; President-Elect Allen Smallwood, Tulsa; and Vice President Linda Thomas, Bartlesville.

To be sworn into the OBA Board of Governors to represent their districts for three-year terms are Martha Rupp Carter, Tulsa; Charles Chesnut, Miami; Steven Dobbs, Oklahoma City; and Lou Ann Moudy, Henryetta.

To be sworn in to one-year terms on the board are Immediate Past President Bill Conger, Oklahoma City; and Young Lawyers Division Chairperson Richard Rose, Oklahoma City.

Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Thursday, Dec. 25 and Friday, Dec. 26 in observance of the Christmas holiday. The bar center will also close Thursday, Jan. 1 and Friday, Jan. 2 for the New Year's holiday.

Nominations Being Accepted for Educator Awards

Applications for the 2009 Supreme Court Teacher and School of the Year are now being accepted by the OBA Law-related Education Department. The winning school and teacher will both be presented with a \$1,000 award during a ceremony at the Supreme Court in Oklahoma City in February.

Applications are due Wednesday, Jan. 14, 2009. Encourage the educators you know to apply at www.okbar.org/public/lre/awards.htm.

OBA Member Resignations

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

Leah Jaye Marshall
OBA No. 19872
12530 S. Ash Ave.
Jenks, OK 74037

Kenneth Lee Ross
OBA No. 18316
7906 Bosque Blvd.
Woodway, TX 76712



Ray Vaughn shares lessons he learned as a former state representative at Law School for Legislators, a program designed to familiarize newly elected non-lawyer Oklahoma legislators with practical issues in legislation.

Kudos

The Interstate Oil and Gas Compact Commission announced that **Gov. Brad Henry** will serve as its 2009-2010 chairperson. The IOGCC helps represent the interests of energy states by promoting safe and efficient recovery of domestic oil and natural gas reserves, energy conservation and environmental protection, among other things. Established in 1935 by Oklahoma Gov. E.W. Marland, IOGCC is the oldest and largest interstate compact organization in the country.

Cary E. Hiltgen has been named president-elect of DRI — the Voice of the Defense Bar. Mr. Hiltgen was elected to his new DRI post at the 2008 Annual Meeting of the 22,500-member organization. He will serve a one-year term and become president of DRI, the nation's largest organization of defense trial lawyers, for 2009-2010.

The Federal Bar Association has selected **D. Michael McBride III** as general counsel on the FBA's National Board of Directors. At the recent national meeting of the Federal Bar Association, the FBA honored Mr. McBride with special awards for his leadership as vice president of the 10th Circuit and as chair of the Indian Law Section. The Federal Bar Association is a national organization of over 16,000 lawyers and judges advanc-

ing the issues of federal lawyers and the judiciary.

Richard D. Osburn was nominated and confirmed as the district judge for the Mille Lacs Band of Ojibwe. He took the oath of office on Nov. 20 at the Mille Lacs Band headquarters in Onamia, Minn.

On The Move

Benjamin H. Odom, John H. Sparks and Tava S. Jones announce that they have joined with each other in the practice of law under the firm name of Odom, Sparks & Jones PLLC in Norman. The firm provides assistance in the areas of health care law, estate planning, real estate matters, insurance bad faith, oil and gas, employment law, products liability law, bankruptcy law, insurance defense, civil rights law and workers' compensation law. Mr. Odom earned his J.D. from OU in 1984. Mr. Sparks earned his J.D. from OU in 1994. Ms. Jones earned her J.D. from OU in 1995. The firm's offices are located at 2350 McKown Drive, Norman, 73072; (405) 701-1863; Fax: (405) 310-5394; odomb@odomsparks.com, sparksj@odomsparks.com and jonest@odomsparks.com. **Jon Vittitow**, formerly of The Vittitow Law Office PC, is associated with the firm.

Hall, Estill, Hardwick, Gable, Golden & Nelson

PC announces the election of **Karissa K. Cottom** as shareholder in the Tulsa office. Ms. Cottom received a B.A. in psychology from OSU and her J.D. from Baylor University School of Law, magna cum laude. Her practice areas include appellate practice, construction, corporate/commercial litigation, electronic discovery, energy and natural resources, litigation and oil and gas.

Conner & Winters LLP announces the addition of five new attorneys. **Daniel E. Gomez, Teena S. Kauser, Laura J. Long, Christopher R. Smiley and Christopher R. Wilson** have joined the firm as associates. Mr. Gomez has joined the firm's Tulsa office as an associate attorney. He concentrates his practice on civil and commercial litigation. He received his bachelor of science degree in economics from OSU in 2004 and earned his J.D. from Southern Methodist University in 2008. While at SMU, he was awarded the William "Mac" Taylor Inn of Court Scholarship. Ms. Kauser has joined the firm's Tulsa office as an associate attorney. She practices in the areas of mergers and acquisitions, general corporate matters, securities regulation and real estate. She earned her bachelor of arts degree in 2005 from the University of Texas and a J.D. in 2008 from OU. During law school, she received an American Jurisprudence Award in Legal Research and Writing. Ms. Long has joined the firm's Oklahoma City office as an associate attorney and

practices in the areas of energy litigation, commercial litigation and employment litigation. She earned her bachelor of science degree from Texas Christian University in 2003, graduating summa cum laude. She earned her master of arts degree in 2005 from the University of Arkansas and her J.D. with highest honors from OU in 2008. She graduated Order of the Coif. Mr. Smiley has joined the firm's Northwest Arkansas office as an associate attorney. He focuses his practice on commercial litigation, bankruptcy, banking and finance, labor and employment law, and real estate. He earned his bachelor of science degree in accounting in 2004 from the University of Nebraska and his J.D. from the University of Arkansas in 2008. He was a member of the Arkansas Law Review. Mr. Wilson has joined the firm's Tulsa office as an associate attorney and practices primarily in the areas of mergers and acquisitions, securities regulation and general corporate matters. He earned a bachelor of business administration degree from Oklahoma Baptist University, graduating magna cum laude in 2005. He received his J.D. from the TU College of Law in 2008, graduating with highest honors. He was the valedictorian of his law school class and the recipient of the Martin Fellows Smith Award for the Outstanding Student in the College of Law.

Paul Foster Law Offices PC has moved to a new location in Norman. The new location is 860 Copperfield Drive, Suite B, Norman, 73072. The mailing address remains the same: P.O. Box 720550, Norman, 73070.

Marion C. Bauman PC has moved to a new location in Norman. The new location is 860 Copperfield Drive, Suite B, Norman, 73072.

GableGotwals announces that **Patrick R. Wyrick** has joined the firm as an associate in the Oklahoma City office. Mr. Wyrick served as judicial law clerk to Judge James H. Payne, chief judge in the U.S. District Court for the Eastern District of Oklahoma in 2007 and 2008. Mr. Wyrick earned his bachelor of arts degree in sociology and criminology from OU in 2004 where he was chosen Outstanding Graduating Sociology/Criminology Senior. He also played varsity baseball and was a First Team All-American Scholar/Athlete. He obtained his J.D. with distinction from OU in 2007 where he was a member of the school's National Moot Court Team, the Order of the Barristers and the Ruth Bader Ginsburg American Inn of Court. He practices in the areas of complex litigation, federal practice and appellate practice.

The Oklahoma Department of Human Services announces that **Sandra Benischek Harrison** has been selected as the new coordinator of the Office of Legislative Relations and Policy. Prior to her employment at DHS, Ms. Harrison served as an attorney with Andrew Davis PC, where her practice areas included Native American law, administrative law and governmental relations. She also has experience with legislative and executive branches of state government. She received a bachelor of arts degree from the University of New Mexico in 1991. She received a master of public administration degree in 1993 and a J.D. in 2000 from OU.

Crowe & Dunlevy recently announced the addition of **Cori H. Loomis** as an advisory director in the firm's Oklahoma City office where she will focus her practice on assisting health care providers with transactional, reimbursement, legislative and regulatory compliance issues. Ms. Loomis has experience in matters relating to joint ventures, Anti-Kickback Statute, Self-Referral Law (Stark II), EMTALA, HIPAA, Medicare and Medicaid reimbursement rules, tax-exemption issues, medical staff issues, and entity organizational and governance documents. Most recently, she was with an Oklahoma City law firm where she was a member of the health care and labor and employment practice groups. Previously, she served as general counsel for the Oklahoma State Medical Association and prior to that she was the director of compliance for the OU Health Sciences Center.

Crowe & Dunlevy recently announced the addition of **Margaret S. Millikin** as a director in the firm's Tulsa office where she will focus her practice in all phases of intellectual property law, with particular emphasis in patent and trademark matters. She has represented large, international clients as well as small business owners and individual inventors. Before joining the firm, she was a corporate intellectual property attorney with Owens Corning, Honeywell International and Hercules Inc., and she managed the US IP office for Basell N.V. (a joint venture of BASF and Royal Dutch Shell). Prior to gaining corporate experience, she was an associate in private law firm settings with McKinney & Stringer PC and Rosenstein, Fist and Ringold.

Phillips Murrah PC announces that **Kathryn D. Terry** has joined the firm's litigation and trial practice department. Ms. Terry focuses her practice in the areas of labor and employment and insurance coverage and defense. She brings to her new position with Phillips Murrah more than 10 years of experience in labor and employment, including civil rights, employee benefits, and hiring and separation negotiation. She will continue to represent major insurance companies and their insureds, resolving both liability and coverage disputes. She graduated from OU in 1993, summa cum laude, with a bachelor of arts degree in economics. She went on to receive her J.D. from OU and was admitted to the bar in 1996. She graduated at the top of her law school class and is a member of the Order of the Coif.

The Tawwater Law Firm PLLC announces that **Jason A. Ryan** has joined the firm. Mr. Ryan will practice in a wide range of areas, including personal injury, medical malpractice, products liability, negligence, insurance bad faith, wrongful death, nursing home negligence, pharmaceutical litigation, torts, motor vehicle collisions and other civil litigation matters.

Tommy Dean and Michael Matthews announce the opening of the Law Firm of Dean & Matthews PLLC at 4501 N. Classen Blvd., Suite 102, Oklahoma City, 73118. The firm's areas of practice include criminal law, family law, tax planning, business formation and real estate law. Mr. Dean, a 2008 OCU School of Law graduate, received the Alumni Association 2008 Service Award, the Judge Tom

Brent Criminal Law Award and the Oklahoma City Real Property Lawyers Association Property Law Award. Mr. Matthews graduated from OCU School of Law in 2008. He served as the editor in chief of the *Oklahoma City University Law Review* and received OCU's Outstanding Graduate Award. They may be reached at (405) 843-8700 or dandmlaw@gmail.com.

Rubenstein McCormick & Pitts PLLC announces that **A. Kyle Swisher** and **Eugene K. Bertman** have joined the firm. Mr. Swisher's areas of practice include estate planning/asset protection, probate and guardianship, business formation and planning, contracts, tax disputes and general business transactions. He earned his J.D. from OU in 1997 and was previously associated with Klingenberg & Associates PC in Oklahoma City. Mr. Bertman's areas of practice include all phases of civil trial and appellate litigation. He also works with clients on estate planning, corporate formation and succession, and various other business transactions. He earned his J.D. from OCU in 2002 and was previously associated with the Wallace & Bertman PC in Oklahoma City. They may be reached at kswisher@oklawpartners.com and gbertman@oklawpartners.com.

Charles A. Dickson III announces the opening of his law office at 4808 N. Classen Blvd., Oklahoma City, 73118. His practice will continue to involve civil litigation with an emphasis on personal injury matters. He may be reached at (405) 418-4183.

Andrews Davis announces that **Mark Pruitt** and **Jon**

Goss have joined the firm. Mr. Pruitt joins Andrews Davis as of counsel. Mr. Pruitt obtained his J.D. from OCU and practices in the areas of wealth transfer, wealth preservation, trusts and estates, probate, business law and taxation. Mr. Goss joins Andrews Davis as an associate. He was admitted to the OBA in 2007 after graduating from OU. In May 2008, he received his LL.M. in taxation from the New York University School of Law. He practices in the area of tax.

Kirk & Chaney announces that **Jake Jones** and **Srin Surapanani** have recently joined the firm. Mr. Jones joins Kirk & Chaney as a partner. He was admitted to the OBA in 1982 and obtained his J.D. from OU. He previously served on the Judicial Nominating Commission and is currently vice chairman of the Oklahoma Indigent Defense System. He practices in the areas of health care, civil rights, municipal, school, bad faith, employment law and mediation. Mr. Surapanani joins Kirk & Chaney as an associate. He was admitted to the Texas bar in 1996 and the OBA in 2006. He obtained his J.D. from the University of Texas. He practices in the areas of health care and litigation.

Michele McElwee has been named an associate with Resides & Resides PLLC. Prior to joining the firm, Ms. McElwee served as an assistant district attorney with the Oklahoma County District Attorney's Office and as an assistant public defender with the Oklahoma County Public Defender's Office. She will lead the Father and Children's Law Center of Resides & Resides where she

will specialize in cases involving significant financial, property and business assets, as well as complex custody issues. She holds a bachelor of science in education from OU and graduated cum laude with a J.D. from OCU.

Barrow & Grimm PC announces that **Timothy L. Rogers** has joined the firm as an associate. Mr. Rogers earned his B.S.B.A. in economics and a minor in finance in 2005 from OSU. He obtained his J.D. with honors from the TU College of Law in 2008. While in law school, Mr. Rogers held several academic membership positions including editor for the *Tulsa Law Review*, Phi Delta Phi Honor Fraternity and Phi Kappa Phi Honor Fraternity. His practice is focused on the areas of business and commercial litigation, construction law, and fidelity and surety law.

The Enid firm of Field, Trojan & Long PC announces that **J. Brandon Harvey** has joined the firm. He earned his undergraduate degree from OSU and his J.D. from OU. His areas of practice include real property, business and corporate law, oil and gas/energy law, estate planning, probate, personal injury and criminal law.

Ron Mason and Kirk Olson announce the formation of their new firm, Mason & Olson. Mr. Mason has more than 16 years of trial and litigation experience and practices in the areas of insurance coverage disputes including both first and third party, auto liability, premises liability, business litigation, property disputes and eminent domain. He is a 1992 graduate of the OU College of

Law. Mr. Olson has more than 16 years of trial and litigation experience and practices in the areas of catastrophic injury and wrongful death cases, auto/trucking accidents, nursing home litigation, sexual abuse/misconduct litigation, bad faith litigation, products liability and dental malpractice cases. He received his J.D. from the OU College of Law in 1992. The office is located at 8265 S. Walker Ave., Oklahoma City, 73139; (405) 600-9300; Fax: (405) 600-9301.

Lawrence R. Scott has relocated his law office to 19 N. Broadway in Edmond. He will continue his general law practice with an emphasis in criminal defense and creditor litigation. His mailing address is P.O. Box 1159, Edmond, 73083. He can be reached at (405) 715-2779.

At The Podium

Thad Balkman, vice president of external relations of Phoenix Motorcars, testified before the U.S. Senate Energy & Natural Resources Committee in September. He was one of five witnesses asked to testify about the current state of electric vehicles and the prospects for wider deployment in the near future. Mr. Balkman cited the EPA projected rating of 135 mpg, the ability to rapid charge in 10 minutes and the zero emissions of Phoenix electric vehicles. He also gave seven legislative suggestions for the senators to consider.

T. Douglas Stump was a speaker at the University of Texas' 32nd Annual Conference on Immigration and Nationality Law held in October in San Antonio. His session provided a step-by-step analysis on obtaining the green card through adjustment of status in the U.S. and consular processing at U.S. embassies abroad and related litigation strategies.

University of Central Oklahoma professor **Marty Ludlum** recently gave a presentation to the CLADEA (Consejo Latinoamericano de Escuelas de Administración) Conference in Puebla, Mexico. His presentation was on global differences on business ethics.

Eric L. Johnson, James A. McCaffrey and Fred H. Miller presented two sessions at the 2008 National Conference on Consumer Finance Law in Dallas in November. The conference is a non-profit organization comprised of law professors, lawyers and financial services industry executives that offers educational services, publications and research related to commercial and consumer financial services law. Mr. Johnson discussed the new federal proposed Risk-Based Pricing Regulations, while Mr. McCaffrey and Mr. Miller jointly presented a detailed discussion on legal issues facing credit service organizations. Mr. Johnson also recently moderated and presented Legal Update 2008 at the national Non-Prime Auto Financing Conference in Ft. Worth, Texas.

Paula Davidson Wood and Richard J. Goralewicz of Legal Aid Services of Oklahoma Inc. conducted a work-

shop at The Canadian Conference on Elder Law in Vancouver, British Columbia in November. Their presentation, titled "Sounds of Sirens: Still Hazy After All These Years," addressed the protection of elders from financial abuse while maintaining their autonomy.

Joseph P. Miner was the featured speaker for the CLE presentation, "Collection Law: The Good, the Bad and the Profitable in Oklahoma." He presented on topics such as the Fair Debt Collections Practices Act, going to court on a typical collection action and post-judgment collection procedures.

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items (**e-mail strongly preferred**) in writing to:

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Articles for the Jan. 10 issue must be received by Dec. 22.

Leon George Belote of McAlester died Nov. 8. He was born Nov. 24, 1931, in Houston. He graduated from McAlester High School in 1950 and attended South Texas Junior College on a basketball scholarship. **He then joined the U.S. Navy and served for four years during the Korean War, where he was a part of an underwater demolitions team. He received the National Defense Service Medal, the United Nations Service Medal, the Korean Service Medal and the Good Conduct Medal.** After his military service, he received a scholarship offer to play basketball at Sam Houston State University. He received his J.D. in 1960 from the University of Texas School of Law, where he was senior class president and a member of the Delta Theta Pi fraternity. After graduation, he worked for Humble Oil Co.'s legal department. In 1961 he moved to McAlester to practice law and eventually opened his own practice there. He served on the board of directors of the National Bank of McAlester, was past president of the McAlester Lions Club, past president of the Navy League, member of the Toastmasters Club, member of the McAlester VFW Post 1098 and was a member of the McAlester Elks Lodge. He also served as McAlester's city attorney for several years.

Amos Earl Black IV of Anadarko died Nov. 25. He was born May 11, 1974. He received his bachelor's degree from OSU in business in 1997 and he obtained his law degree from TU in 2002. In law

school, he received the AmJur and CALI Awards for Excellence for earning the highest score in several of his courses. He was made member of the Phi Delta Phi Legal Honor Fraternity and was listed on the Dean's Honor Roll. He practiced in Anadarko alongside his father, representing tribal entities and practicing Indian gaming law. He served as the tribal prosecutor in the Court of Indian Offenses at the Bureau of Indian Affairs Anadarko Agency. He was the current president of the Caddo County Bar Association.

Danny Miller Corn of Oklahoma City died Nov. 12. He was born April 1, 1946, in Lawton. He was a 1964 graduate of Putnam City High School. He received his B.S. from Central State College in 1969 where he was a member of the Sigma Tau Gamma fraternity. He received his law degree from OU in 1977. He practiced law in Oklahoma City for more than 30 years. In 1994 he ran as an Independent U.S. Senate candidate. Memorial contributions may be made to the Oklahoma Special Olympics, 6835 S. Canton Ave., Tulsa, 74136 or the Danny Corn Memorial Fund, First Commercial Bank, 1601 S. Kelly Ave., Edmond, 73013.

Robert H. Davis Jr. of Ardmore died July 29. He was born April 7, 1925, in Bynum, Texas. **He served his country in the U.S. Army Air Corps as a second lieutenant pilot.** He received his J.D. from the Southern Methodist University School of Law and served as assistant district attorney in

Dallas County. He also served as a special agent with the Federal Bureau of Investigation. He retired from Otis Engineering (Halliburton) as vice president. He served on several boards including Oklahoma Christian University, Amber University (now Amberton), First National Bank of Ardmore, Carrollton Farmers Branch School Board, Carrollton Farmers Branch Rotary Club past president and director, Paul Harris Fellow. He served as a deacon at Walnut Hill Church of Christ in Dallas and was a life-long pilot. Memorial contributions may be made to Camp Deer Run, 1227 C.R. 4590, Winnsboro, Texas, 75494 or Pettijohn Springs Christian Youth Camp, Box 440, Madill, OK 73346.

Jess J. Horn of Edmond died Nov. 27. He was born Aug. 20, 1928, in Quinlan. **He enlisted in the Army in 1946 and served until 1949.** He attended Heidelberg University in Germany while in the service. After he was discharged, he attended Oklahoma A&M. **In 1950, he was recalled to active duty during the Korean War.** In 1951, he moved to Oklahoma City where he worked as an insurance claims adjuster and attended OCU at night until 1962 when he obtained his degree in law and then received his J.D. in 1975. He practiced law in Oklahoma City from 1962 to 2001. He was well known throughout the state for his abilities as an attorney, particularly the way he handled DUI and DWI cases. He was responsible for the seminal cases of *Westerman v. State*, 525 P.2d 1359 (Okl.Cr.

1974), and *Evans v. Lambert*, 418 P.2d 217 (Okl.Cr. 1966). He had varied interests, but the one that he enjoyed the most was playing pool. He was a member of the Oklahoma County Bar Association and the Oklahoma Criminal Defense Lawyers Association.

Henry Raymond Palmer of Oklahoma City died Nov. 8. He was born March 6, 1927. **He served in the U.S. Army from 1944-1947 and the U.S. Army Reserve from 1947-1954.** In 1952 he graduated from OCU School of Law. He tried cases before the U.S. District Courts for the western and eastern districts of Oklahoma, the U.S. Court of Military Appeals, U.S. Court of Appeals, 10th Circuit and the U.S. Supreme Court. He was an adjunct professor of law at OCU from 1971-1976 and served on the Oklahoma Judicial Nominating Commission from 1978-1982. He was chair of the OBA Workers' Compensation Committee from 1964-1982. He was also chair and board member of the Oklahoma Bar Public Liability Insurance Company and the Oklahoma Attorneys Municipal Insurance Company from 1985-2000. He was a long-time patron of the Oklahoma Bar Foundation.

Mark Stephen Schwartz of Oklahoma City died Nov. 13. He was born March 1, 1950, in New York City. He

earned a bachelor's degree in philosophy and a master's in human relations from OU. He earned his J.D. from OCU. He practiced law in Oklahoma City, where he focused on public, corporate, labor and real estate law. In 1987, he served on the Oklahoma City Traffic Commission and was elected to the city council in the same year. He was re-elected to the council in 1991 and in 1995. After the federal building bombing, he worked with President Bill Clinton and others in coordinating local and federal efforts. He was selected as president of the Oklahoma Municipal League and president of the National League of Cities. In 1999, he was chosen by Energy Secretary Bill Richardson to be the deputy general counsel for energy policy in Washington, D.C. At the Energy Department, he helped coordinate the department's preparations for potential problems during Y2K. In 2006, he returned to Oklahoma City and began practicing law. Memorial contributions may be made in Mark's name to ZERO: The Project to End Prostate Cancer, www.zerocancer.org; to Temple B'nai Israel, 4901 N. Pennsylvania Ave., Oklahoma City, 73112; or to a charity of your choice.

Michael M. Stewart of Oklahoma City died Dec. 2. He was born Nov. 19, 1947.

He attended Casady School, graduating in 1966 after serving as the captain, quarterback and the leader of the football team and receiving the school's highest honor, the Casady Award. He graduated cum laude from Yale University in 1970. **He was an officer in the U.S. Navy from 1970 to 1973.** He graduated from the OU College of Law with honors in 1976, winning the Nathan Scarrit Prize and earning academic honors as a member of the Order of the Coif and the managing editor of the *Law Review*. He joined the law firm of Crowe & Dunlevy in 1976 and led the firm as its president from 2000 to 2002 and its business department since 1998. The firm selected him to represent it with Lex Mundi, an international organization of law firms. He was also a civic leader in Oklahoma City. He was president of the Omniplex Science Museum from 1992 to 1993. He was a member of the board of trustees of Casady School until his death, and served as chair of the board from 2003 to 2005. He was also a member of the Rotary Club of Oklahoma City, the Oklahoma Venture Forum and the Economic Club of Oklahoma. Memorial contributions may be made in his honor to Casady School or All Souls' Episcopal Church in Oklahoma City.

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HALL ESTILL, ONE OF THE LARGEST FIRMS IN OKLAHOMA, is actively searching for an Office Administrator for our Oklahoma City office. Hall Estill is a general practice business law firm with offices located in Tulsa, Oklahoma City, Fayetteville, AR., and D.C. While our home office is located in Tulsa; Oklahoma City is the second largest office with 50+ employees. As the Office Administrator you will exercise a high level of authority and discretion for the day-to-day operational functions of the office. As a leader in the office the ideal candidate will be responsible for everything included in the operational functions of the local office of a large law firm, with an emphasis on human resources, office services, vendor relations, facilities management, event planning, as well as application and IT support. The Office Administrator works directly with the local office Administrative/Managing Committee, the Firm's Executive Director, and is responsible for implementing firm-wide administrative leadership to ensure consistency in firm-wide management across all disciplines to include, accounting, billing, human resources, marketing, technology and recruiting. Qualifications include: 5-10 years minimum office management experience in a professional services firm, preferably a law firm. Bachelor's degree or equivalent experience. Strong leadership skills and ability to manage personnel and interpersonal issues. This is an excellent opportunity to work for a great law firm, with competitive salary and benefits. Qualified candidates can submit their resumes to msims@hallestill.com.

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OKLAHOMA BASED, MULTI-STATE FIRM seeks associates for Oklahoma offices, several locations statewide. Emphasis on Family Law, Child Support Enforcement, and Native American law. Strong work ethic and self motivation skills required. All replies considered confidential. Send resume and salary requirements to: Box "S," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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December Justice

By Lisbeth L. McCarty

Author's Note: This poem is written with respect for and apologies to decent prosecutors everywhere.

'Twas the night before Christmas and all through the court
All the lawyers were stirring with last-minute work.
The judge was all robed and seated in his chair
In hopes that the lawyers would all be prepared.
The prosecutor performed the voir dire with great care
In hopes that jurors would give the defendant "The Chair."

The prisoners were nestled, all snug in their chains
With visions of freedom dancing through their brains.
But the one jolly defendant who was named Mr. Claus
Claimed innocence with such vigor that it gave them
all pause.

Then, the prosecutor jumped up and stated
real quick,
"This bum, who goes by an alias, St. Nick,
Was breaking and entering through the roof
of a house.

He's guilty as sin! C'mon, fry the louse!
Oh, believe me, dear jurors, his bad
deeds are real.
He even took in a bag for the things
he would steal!"

As the prosecutor droned on in his
"reversible" way,
The jurors were awakened by the
sound of a sleigh.
Yes, out on the lawn there arose such
a clatter
The spectators rushed out to see what
was the matter.

Well, what would their wondering eyes
behold
But a company of criminal defense lawyers
unfold.
Headed, of course, by Saint Justinian
who shouted,
"That prosecutor cannot defeat any of us!"

Itching for action, the lawyers started to squirm
As Justinian commenced with a roll call of the firm,

"Now Hull, now McCoy, now Cinnamon, now McCarty,
Now Purcell, let's go show them how tough we can be."

Then Justinian told the judge, "Let's examine that sack."
And he dumped out the contents of Mr. Claus' pack.
Suddenly the floor was filled with great toys
That Mr. Claus was taking to all girls and boys.

"Why, this man wasn't stealing at all," said the judge.
"Instead, it's been proven, his heart's full of love."
The jurors applauded as Mr. Claus was released.
The prosecutor turned red and looked at his feet.

Claus said, "Oh, you've helped all right, Justinian.
But, how can I pay you? You know I am penniless."
Then, suddenly Claus brightened and slapped
his big belly.

(And, of course, it shook like a bowl full of jelly.)

He reached into his bag while the lawyers waited agog
And pulled out a Best Buy catalogue.

"Order your pleasure, send the bill to the
North Pole

In care of dear Santa... And now, I must go."

The defense lawyers were stunned 'cause
it seemed so bizarre
To be soon owning gifts they'd always
admired from afar.

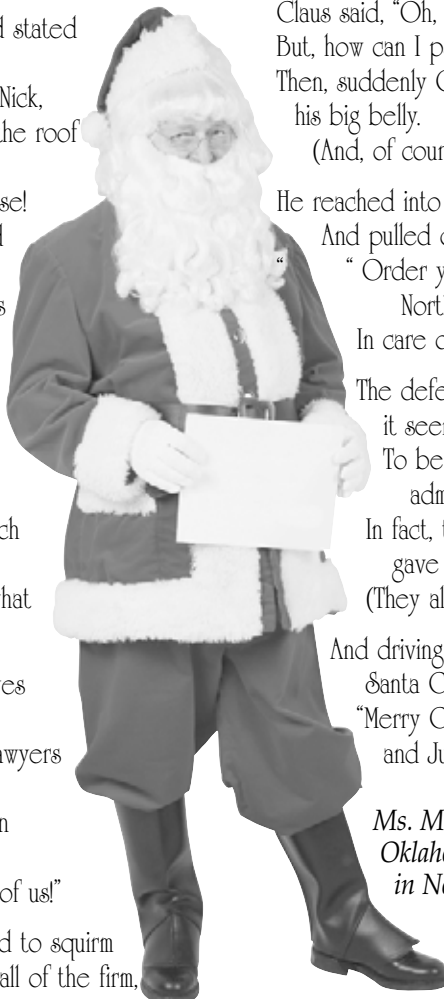
In fact, they were so pleased that they
gave Santa their sleigh.

(They all owned defense mobiles, anyway.)

And driving from sight, then shouted
Santa Claus,

"Merry Christmas, Happy New Year
and Justice to All!"

*Ms. McCarty is a lawyer with the
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