

THE Oklahoma Bar JOURNAL

Volume 80 ♦ No. 20 ♦ August 8, 2009

Bankruptcy

ALSO INSIDE

- Women in Law Conference
- OBA Announces Leadership Academy Participants
- Emerson Hall Renovations

OBA/CLE & THE OBA FAMILY LAW SECTION
PRESENTS

A ROAD MAP OF OKLAHOMA FAMILY LAW

THE ROAD BACK TO BASICS



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OKC: SEPT. 11, 2009 - OKLAHOMA BAR CENTER, 1901 N. LINCOLN BLVD.**

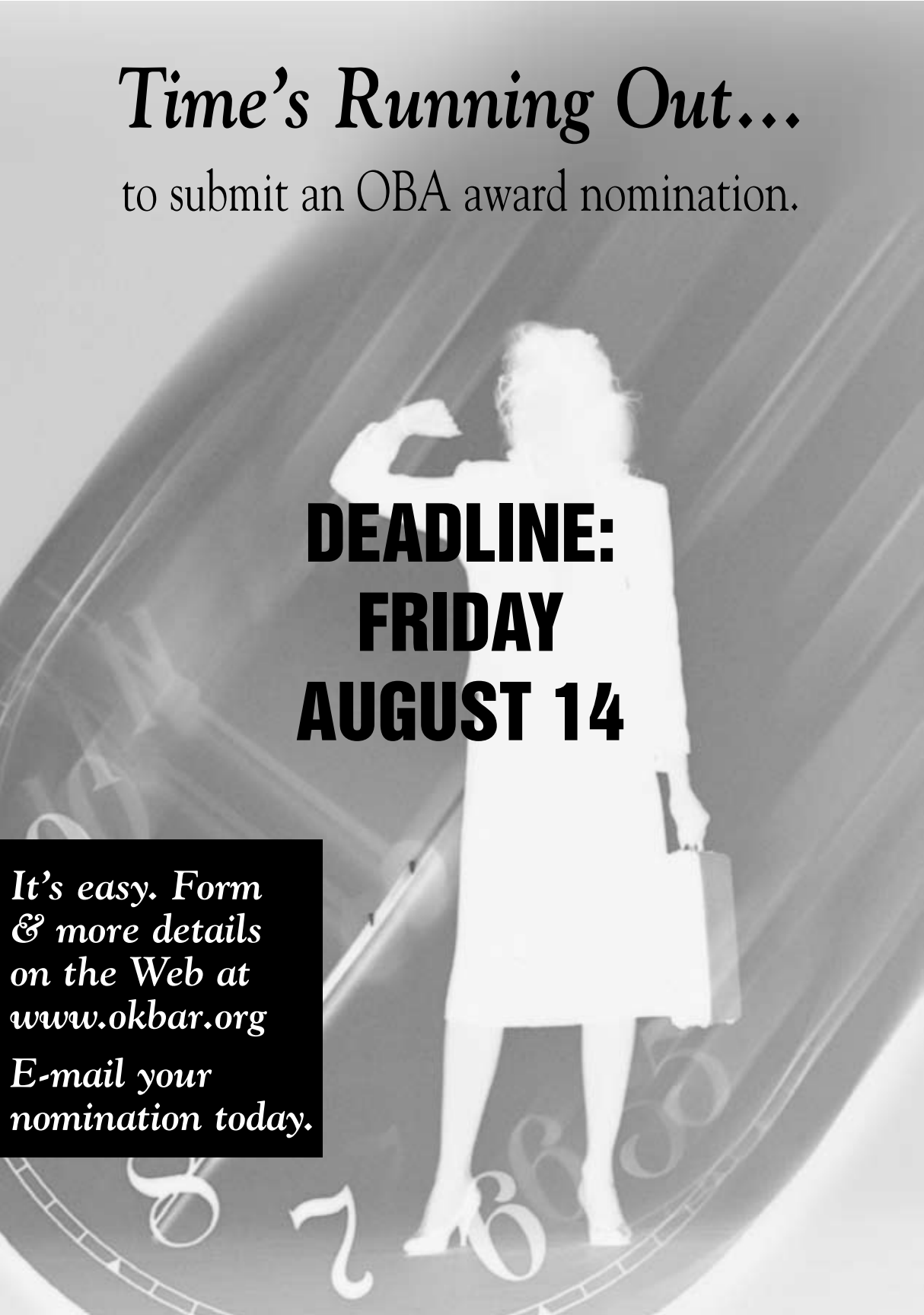
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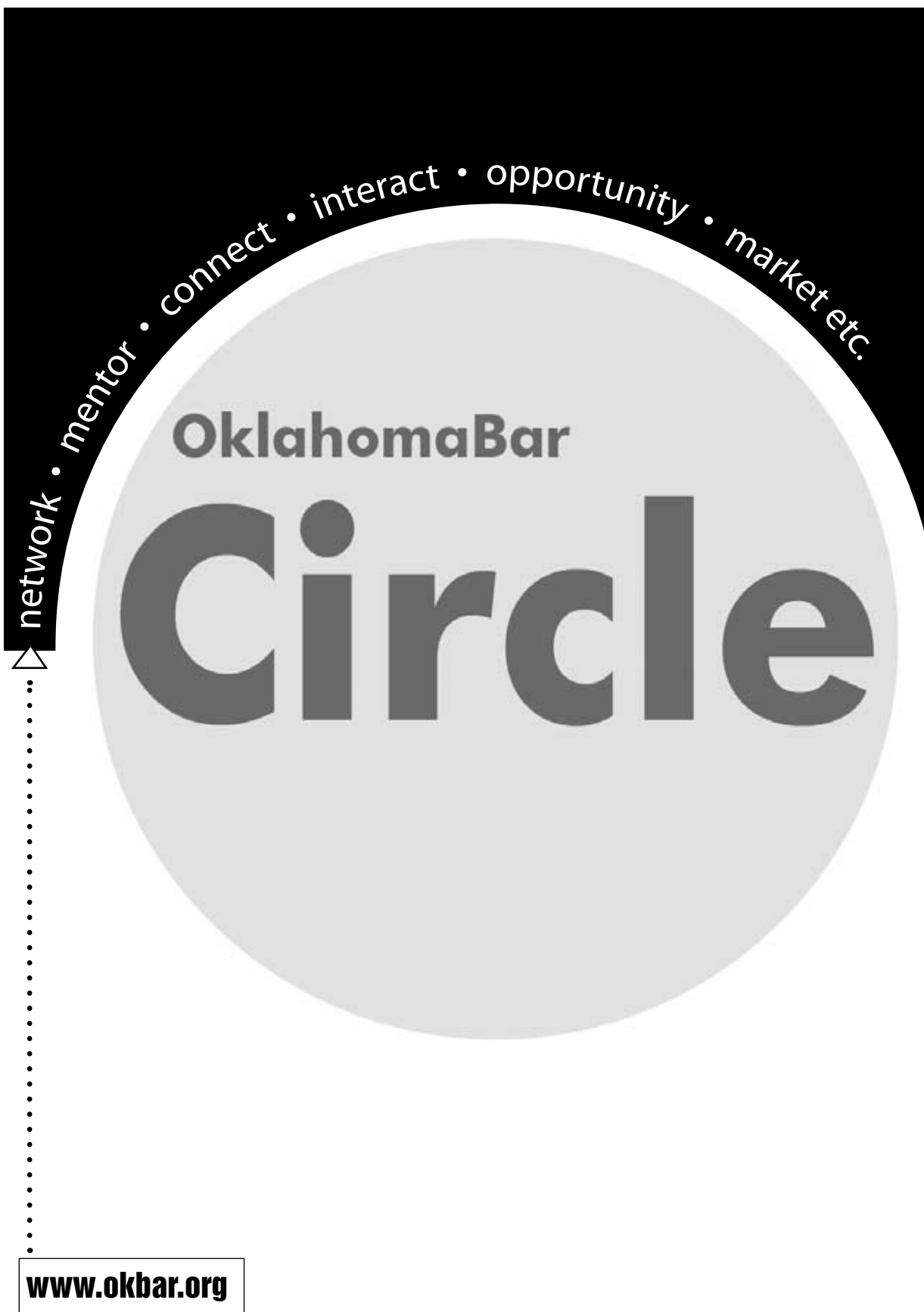
to submit an OBA award nomination.

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THEME:
BANKRUPTCY

EDITOR: JUDGE LORI WALKLEY

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Midyear Review

By Jon K. Parsley

I have now occupied the office of OBA president for a little over half of the year. I want to update you on some significant events that have occurred this year and to draw your attention to some highlights of events yet to come for 2009.

A great deal of time this year was devoted to monitoring and responding to legislation that directly affected the administration of justice. As you recall, there was the one bill to make bar membership voluntary, which would have abolished our association as we know it. There were other pieces of legislation seeking to limit the amount of attorney fees. Tort reform was a major initiative in this legislative session. Many other bills directly or indirectly impacted the practice of law and the administration of justice. To combat this legislation, the Board of Governors appointed the Administration of Justice Task Force. It was chaired by Bill Grimm and David K. Petty. It was a group of approximately 30 lawyers from various practice settings. That group worked tirelessly with the Board of Governors to establish our position on legislation. I issued a call to arms in March, and more than 300 attorneys heeded the call. These attorneys marched to the Capitol to stand up for the rights of Oklahoma citizens. While there were certainly compromises required, our association can be proud that the vast majority of the legislation that would have been devastating to the rights of citizens was not enacted into law.

Another major emphasis this year has been the hiring process for the new general counsel. We conducted a nationwide search and had a large number of very qualified applicants. The Board of Governors was very proud at the end of a long vetting process to hire Gina Hendryx as our new general counsel. Since she took office, she has worked tirelessly to hire new staff where needed and to change office procedures to deal with the backlog of cases and implement more streamlined procedures for the future. The Board of Governors has been very pleased with the progress to date. The Professional Responsibility Commission, which is an integral part of the discipline process, was almost entirely reconstituted. The newly populated commission has been working with our new general counsel to streamline the entire process.

With all that has been accomplished this year, there are still many events to come.

Overall, the discipline process is now geared up with the right personnel and procedures to function very well into the future. Gina Hendryx had worked for years as the OBA ethics counsel. Her hiring as general counsel necessitated the hiring of a new ethics counsel. The Board of Governors is happy to announce that position has also been filled after a long and thorough vetting process with over 50 applications. The OBA has hired Travis Pickens of Oklahoma City as the new ethics counsel.

The next phase of construction on the Oklahoma Bar Center has begun. Emerson Hall in the basement is being reworked to make it more user friendly and to give it a much needed update. Those of you who have not been to the bar center to see the newly renovated east wing should come by to take a tour. We hope to soon be equally proud of the reconstruction in Emerson Hall.

COMING EVENTS

With all that has been accomplished this year, there are still many events to come. While this is not an exhaustive list, the OBA has much to offer our members in the coming months. The Women in Law Conference will have an event on Sept. 22 with Cherie Blair, queen's counsel and wife of former British Prime Minister Tony Blair. This promises to be a great event. That same week the

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EVENTS CALENDAR

AUGUST 2009

- 10 **OBA Member Services Committee Meeting;** 2:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Keri Williams Foster (918) 812-0507
- 11 **OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 13 **OBA Bench & Bar Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 14 **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 15 **OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraetli Epperson (405) 848-9100
- OBA Law-related Education We the People: The Citizen and the Constitution Teacher Training;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 17 **OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 18 **OBA Legal Intern Swearing In Ceremony;** State Capitol; Contact: H. Terrell Monks (405) 733-8686
- OBA Budget Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 26 **OBA Uniform Laws Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 27 **Oklahoma Bar Foundation Lunch;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 28 **OBA Board of Governors Meeting;** Bartlesville; Contact: John Morris Williams (405) 416-7000
- OBA Law-related Education Oklahoma Social Studies Supervisors Association;** 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

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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What Every Lawyer Should Know about the 2005 Bankruptcy Reform Act

By Elaine M. Dowling

The first major overhaul to the Bankruptcy Code in more than 15 years went into effect Oct. 17, 2005. It is properly known as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA” or “the 2005 act”). This statute is not well drafted, is internally inconsistent and the considerable amount of litigation under the 2005 act has produced relatively little consensus on a number of significant issues. There continue to be rapid changes in case law, and even issues once thought settled have been thrown back into flux.¹ Despite all the changes, most debtors still get essentially the same results that they would have gotten filing under the old act. Given that general disclaimer, here are a few things that even non-bankruptcy law practitioners should know about the 2005 act.

REPEAT FILINGS

Every lawyer gets asked how long a debtor has to wait after a bankruptcy filing before a new one can be filed. The old rule that you could file a Chapter 7 every six years and could always file a Chapter 13 is gone. The basic rule is the 2-4-6-8 rule. It looks like this:

Chapter of Former Filing	Chapter of Subsequent Filing	Years Between
13	13	2 ²
7	13	4 ³
13	7	6 ⁴
7	7	8 ⁵

One thing that has not changed, and that appears relatively well settled, is that all of these

time periods run from the date the first case was filed (not discharged) to the date the second case was filed.⁶ If the debtor needs bankruptcy relief before he may file a Chapter 7, the debtor may file a Chapter 13 case (and receive a discharge) four years after filing a Chapter 7. If less than four years has passed, the debtor may still file a Chapter 13 bankruptcy, but he will not be eligible for a discharge.⁷ This allows a debtor, even immediately after a former bankruptcy filing, to cure a default on a mortgage or other secured debt or to repay priority debt over 60 months – which may result in better repayment terms than he could get elsewhere.

If the original bankruptcy filing was a Chapter 13 case, then the debtor may file a Chapter 7 six years after the original Chapter 13 case was filed. Apparently, this means that a Chapter 7

may be filed one year after the completion of a 60-month Chapter 13 plan – although such a filing might result in a bad faith objection.

The shortest time period allowed between filings is the two-year rule that applies when the former case and the subsequent case are both Chapter 13 cases. In that case the debtor may get a discharge if at least two years have elapsed since the filing of a prior Chapter 13 case in which the debtor received a discharge.⁸ The language of this statutory provision raises the possibility that a Chapter 13 plan can be completed in less than the statutory minimum length of three years.⁹

One of the ways in which these provisions may not work as expected involves converted cases. All of these statutory provisions specify the chapter under which a case was *filed* not the chapter under which the discharge was ultimately granted. There is a split in case law as to which time period to apply to cases filed under one chapter and converted to another chapter.¹⁰

THE MEANS TEST

The center piece of the 2005 act is the means test. The basics are deceptively simple. The means test begins with a determination of the debtor's gross income, using a complicated and lengthy definition of income, averaged over the last six months. If the debtor is under the median income for his household and family size, he passes and can stop there. If he is over median income, then he must complete the rest of the means test; and in order to be eligible to file a Chapter 7 bankruptcy the debtor's deductible expenses must consume almost all of his income.

The rest of the means test is about six pages of standardized allowances for certain living expenses, secured and priority debt payments

and a long list of actual living expenses that fit within a means test category. The tricks to the means test are knowing which standardized allowances can be exceeded and by how much, figuring the most advantageous household and family sizes, getting as much debt deducted as possible, determining whether a married couple are better off filing separately or jointly, and then finding ways to deduct the amounts the client actually spends for things. A basic rule for dealing with the means test is that virtually any reasonably necessary expense can be deducted somewhere. Of course, the real problem with the means test is in the details. It is a deceptively simple form that resembles nothing quite so much as a tax return.

Ultimately, the means test determines whether or not the debtor may file a Chapter 7 bankruptcy or if the debtor must file a Chapter 13 case and repay some percentage of his debt to his unsecured creditors. In the event the debtor is required to file a Chapter 13 case, then the chapter 13 distribution to unsecured creditors is determined by the means test.

DOMESTIC SUPPORT OBLIGATIONS

One of the few areas where the 2005 act has actually changed the result that clients can get by filing a bankruptcy has to do with the discharge of divorce related debt. Instead of the age-old dispute as to whether or not divorce related debt is in the nature of support or property division, BAPCPA creates a new term, "domestic support obligation."

(14A) The term "domestic support obligation" means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable non-bankruptcy law notwithstanding any other provision of this title, that is –

(A) owed to or recoverable by –

- (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
- (ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse; former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;

“The language of this statutory provision raises the possibility that a Chapter 13 plan can be completed in less than the statutory minimum length of three years.”

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of –

- (i) a separation agreement, divorce decree, or property settlement agreement;
- (ii) an order of a court of record; or
- (iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unity; and

(D) not assigned to a nongovernmental entity, unless that obligation is assigned voluntarily by the spouse, former spouse, child of the debtor, or such child's parent, legal guardian, or responsible relative for the purpose of collecting the debt.¹¹

The most common area that divorce related debt arises in a bankruptcy context is in dischargeability litigation. The new statute eliminates most of that. Now, any domestic support obligation is non-dischargeable in a Chapter 7 or a 13, and any other debt to a spouse, former spouse or child of the debtor that was incurred in connection with a divorce or separation is also non-dischargeable in a Chapter 7¹² but may be discharged in a Chapter 13.¹³

The reasonable application of this change is that when drafting a divorce decree it should be clear whether or not something is actually in the nature of support or not. If it is not actually in the nature of support, the drafting attorney needs to know that any assignment of debt to his client will be essentially non-dischargeable in a Chapter 7 bankruptcy filing. This can make it almost impossible for clients, post-decree, to discharge in a Chapter 7 debt incurred during the marriage unless the decree is drafted to specifically exclude any potential liability to the other spouse for failing to pay.

DOMESTIC SUPPORT DEBT AND EXEMPT PROPERTY

BAPCPA made a small amendment to Section 522 of the Bankruptcy Code that makes exempt property subject to payment of domestic support obligations (defined above). A significant technicality is that even though exempt property remains subject to the payment of this debt, nothing in the code brings the exempt property back into the estate. Therefore, the bankruptcy trustee does not have the legal right to administer exempt assets to pay domestic support debt (and, of course, assessing a fee against the exempt property for doing so).¹⁴ Exactly what the mechanism is for obtaining

this property on behalf of a domestic support obligation creditor is not specified.

An intriguing possibility for collecting past-due child support would be with the use of an involuntary bankruptcy proceeding, which would then leave the debtor's exempt property (car, house, 100 percent of his wages, retirement accounts, life insurance, household goods, etc.) liable for payment of the domestic support obligation debt. Involuntary bankruptcy proceedings are provided for by 11 U.S.C. § 303 and may be commenced by three creditors having a total debt owed to them of \$12,300.

REPEAT FILERS AND THE AUTOMATIC STAY

In addition to shortening the time period before a debtor is eligible to file again, the 2005 act includes some changes to the automatic stay for repeat filers. If, as of the petition date, the debtor has been in a prior bankruptcy case pending within the preceding one year, the automatic stay with respect to the debtor terminates after 30 days.¹⁵ If the debtor has been in two prior bankruptcy cases in the preceding year, then there is no automatic stay at all with respect to the debtor.¹⁶ It is important to notice the restriction that the stay terminates *as to the debtor*. However, this provision does not necessarily act to either abandon property from the estate or to terminate the stay as to any interest in property belonging to the estate.¹⁷ Also, the code does allow for the automatic stay to be extended or imposed based on a showing of good faith.¹⁸ It should be noted, however, that these restrictions do not apply to the co-debtor stay in a Chapter 13.¹⁹ So, the debtor may not have an automatic stay in place, but the property may still be protected by a non-filing co-debtor if the case was filed under Chapter 13.

The strangest aspect of BAPCPA's attempt to use the automatic stay to discourage serial filings is the concept of the *in rem* automatic stay. Under certain circumstances a creditor may ask the court for *in rem* stay relief. Assuming that this order is properly recorded, no automatic stay may effect that property for two years – even if it is sold to a third party.²⁰

RESIDENTIAL TENANT EVICTIONS

Landlords have gotten very favorable treatment under BAPCPA. A pre-petition judgment for possession of residential real estate must be disclosed by the debtor on the petition. To the extent that this judgment is for possession *only*,

it is not stayed by the automatic stay – although the debtor may be able to get a stay imposed under certain circumstances. The relevant code provision is 11 U.S.C. § 362(b)(22) and provides that the commencement of the case does not act as a stay:

[S]ubject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor.

Although there is no automatic stay as to these judgments, the debtor can obtain a 30-day stay of a judgment for possession if he meets certain requirements including, among other things, that he deposit with the clerk all rent that will become due during the 30 days after the petition is filed. Then, if the debtor can cure all pre-petition defaults within 30 days, the debtor can obtain a further extension of the stay.²¹ Arguably, if the debtor could confirm a Chapter 13 plan providing for the curing of the arrearage within that same 30 days, the confirmation order would bind the landlord in lieu of an extended stay; but that is not expressly contemplated by the statute.

Also, landlords can obtain an exception to the automatic stay in a fairly expeditious manner by establishing either that an eviction has been filed based on endangerment of the property or illegal use of controlled substances on the property; or that the debtor has endangered the property or used illegal, controlled substances on the property within 30 days of the bankruptcy filing.²²

CONCLUSION

This brief article cannot begin to describe all of the traps for the unwary lurking in the current Bankruptcy Code. We had a brief respite from packed bankruptcy dockets after the 2005 act went into effect, but filing rates are increasing quickly around the country. Oklahoma's filing rates have been increasing more slowly

than the country at large, but they are still increasing; and bankruptcy filings affect far more than just the debtor. It will be years before the changes made by the 2005 act are really well understood, and we will probably never have a nation-wide consensus on a large number of issues. Unfortunately, the 2005 act has consequences in many areas of law, most notably in divorce law; and all practitioners need some basic understanding of this ungainly statute.

1. For instance, in July 2008, the 10th Circuit BAP entered an order establishing that a standard ownership allowance on the means test is appropriate even if the debtor does not have a car payment. *Stewart v. Pearson* (*In re: Pearson*), BAP No. WY-07-097. That order was vacated by the 10th Circuit on Jan. 22, 2009, on non-substantive grounds.

2. 11 U.S.C. § 1328(f)(2).

3. 11 U.S.C. § 1328(f)(1).

4. 11 U.S.C. § 727(a)(9).

5. 11 U.S.C. § 727 (a)(8).

6. *See, In re: Sanders*, 551 F.3d 397 (6th Cir. 2008).

7. *See*, 11 U.S.C. § 1328(f)(1).

8. *See*, 11 U.S.C. § 1328(f)(2).

9. *See, In re: Sanders*, 368 B.R. 634 (Bankr. E.D. Mich. 2007).

10. *See, In re: Ybarra*, 359 B.R. 702 (Bankr. S.D. Ill. 2007) and *In re: Hamilton*, 383 B.R. 469 (Bankr. W.D. Ark. 2008).

11. 11 U.S.C. § 101(14A).

12. 11 U.S.C. § 523(a)5 and 15.

13. *See*, 11 U.S.C. § 1328(a)(2).

14. *See, In re: Quezada*, 368 B.R. 44, (Bankr. S.D. Fla. 2007).

15. *See*, 11 U.S.C. § 362(c)(3).

16. *See*, 11 U.S.C. § 362(c)(3).

17. *See, In re: Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006). However, for a contrary finding see *In re Jumpp*, 356 B.R. 789 (BAP 1st cir. 2006).

18. *See*, 11 U.S.C. § 362(c)(3)(B).

19. *See*, 11 U.S.C. § 1301 which imposes the co-debtor stay independently of § 523 and was not amended by BAPCPA.

20. *See*, 11 U.S.C. § 362(d)(4).

21. *See*, 11 U.S.C. § 362(1).

22. *See*, 11 U.S.C. § 362(b)(23).

ABOUT THE AUTHOR



Elaine M. Dowling graduated from the OU College of Law in 1990. She started her practice with a downtown Oklahoma City commercial litigation firm, and then went into practice with her father, Matt Dowling. After several years as a general practitioner, she began limiting her practice to consumer debtor's work. She now files consumer bankruptcies, defends collection and foreclosure cases and will assist consumers with problems under the Fair Credit Reporting Act.

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Consumer Bankruptcy and Means Testing: An Overview of Practice in the Western District of Oklahoma

By Michael Rose

The *dancing days* of bankruptcy are over. The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005 made wholesale changes to bankruptcy laws that were designed to prevent bankruptcy abuse and to make obtaining bankruptcy relief more difficult for consumer debtors. The biggest change for most consumer debtors and their attorneys came in the form of the “means test.”

Most truly poor folks still qualify for Chapter 7 relief. For middle to higher income debtors, the means test determines whether that debtor will qualify for a Chapter 7 case, and if not, determines the amount of disposable monthly income (DMI) that should be used for payment to unsecured creditors in a Chapter 13 repayment plan.¹

The means test was, and still is, the most difficult part of the 2005 reform for most lawyers to master. This article is not a comprehensive examination of the intricacies of how the sixpage mathematical formula works, nor is it an overview of recent means test judicial decisions. Bankruptcy practitioners not *dazed and confused* by the basics already have excellent resources for obtaining this information elsewhere.²

THE MEANS TEST: WHAT IS IT AND HOW DOES IT WORK?

Most consumer debtors prefer to file for Chapter 7 relief, which gives them a discharge of most unsecured debts, and gets them out of the bankruptcy system in less than five months,

rather than the typical five-year Chapter 13 repayment plan. Debtors who do file for Chapter 13 relief usually prefer to pay their unsecured creditors as little as possible during their repayment plan.

Essentially, the means test is a mathematical formula starting with six months of the debtor's pre-petition income, calculated to a monthly average (this yields the debtor's current monthly income, or CMI). From the debtor's gross income, deductions are made. Typical deductions include averages for payroll taxes, payroll deductions for items such as health care and child support, and payments for debts such as mortgages and car loans.

For living expenses such as groceries, clothing, medical expenses and fuel for vehicles, the Bankruptcy Code adopts Internal Revenue Service collection standards for such living expenses. These living expenses can be found on the United States Trustee's Web site³ and are included and updated as part of the software subscription offered by most bankruptcy software companies.

Once all of the deductions are made from the debtor's gross current monthly income, (CMI), the end result is called "disposable monthly income" or DMI. DMI is meant to represent the amount of money available monthly for payment of unsecured debts.

If this number is less than 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,000⁴, the debtor qualifies for Chapter 7 relief. If the debtor chooses to file for Chapter 13 relief (to stop a home foreclosure, for example), the debtor will not be required to make payments toward unsecured debts in the Chapter 13 plan. Moreover, the plan term may be as little as 36 months rather than the required 60 month plan for debtor's whose DMI exceeds this threshold amount.⁵

For debtors whose DMI exceeds this threshold, Chapter 7 offers *no quarter*. That debtor has but one bankruptcy option: a Chapter 13 repayment plan that devotes the debtor's monthly DMI for payment of unsecured debts for a period of 60 months.

STARTING WITH THE BASICS

Before sweating the means test, there are a few initial facts to check that may get an attorney off the hook. In the following cases, a debtor is not required to complete a means test and will generally qualify for Chapter 7 relief without one.

Does your client's income exceed the *median household income* for a family the same size in Oklahoma? If not, your client need not complete the means test and will qualify for Chapter 7 relief (or in Chapter 13, need not make payments toward unsecured claims). Median income figures are updated often and can be found on the United States Trustee's Web site (see fn.3).

Is your client a "*consumer debtor*?" Debtors whose debts do not primarily consist of consumer debts can bypass the means test for purposes of qualifying for Chapter 7. Many Oklahomans are self-employed, own rental property or run small businesses. And many of those folks operate their businesses using credit cards to keep running during the lean months. If your client's debts are more business-related than consumer⁶, your client need not complete the means test in order to qualify for Chapter 7 relief.

What is your client's *household size*? This seemingly innocuous question is complicated

by non-traditional or mixed families, freeloading adult children who live with their parents, adult children with special needs, and underemployed relatives or friends who live with the debtor. And what about the debtor who has a roommate simply for expense-sharing purposes?

Generally speaking, the household size equals the number of people who live in the home (or heads on beds, a term often used by local trustees). If the debtor simply has a roommate, examine the debtor's records to determine that the "roommates" are not in fact co-mingling funds, which would indicate a domestic living arrangement. A roommate should not be counted as a member of the debtor's household and need not provide pay records as part of the debtor's means test. A domestic partner's income should be included.

Whose *income records* do you need to collect? If any members of the household work, you'll need to collect their income records for the same six-month period as the debtor's. This income will need to be included as "household income" for purposes of the means test.

SPECIAL CIRCUMSTANCES AND BUDGET ISSUES

Often, your client's means test results will not reflect the actual financial circumstances that your client is facing. The Bankruptcy Code allows debtors to deviate from the means test if such circumstances rise to the level of "special circumstances" that would limit your client's ability to fund a Chapter 13 plan.⁷ In such cases, your client must provide documentation of such circumstances and sign an affidavit concerning those circumstances. The following are some common "special circumstances" encountered in Oklahoma that may allow a debtor to deviate from the means test's DMI.

Recent Drop in Pay

The means test looks backward six months from the date of the bankruptcy filing. Following the economic collapse that began last year and has filtered its way into the Oklahoma economy, this situation arises frequently now. Those consumers who have not lost the jobs upon which their means test numbers were based (an obvious special circumstance) may still be faced with a loss of overtime hours, bonuses, commissions and other incentives.

For example, car salespeople, who typically earn excellent wages, are withering on the lots this year much like their inventory. Oilfield

“Many consumers decrease their tax withholdings prior to filing for bankruptcy in order to bring home more pay while in times of financial crisis.”

workers have also experienced significant losses of income in the past few months. A car salesperson who earned \$8,000 per month six months ago may be earning less than half that much now. Look at recent paystubs to get an accurate picture of the debtor's actual current ability to fund a Chapter 13 plan. Beware, however, this *good times bad times* fact pattern is a double-edged sword. Read on.

The Flip Side: 707(b)(3)

On the other hand, if a debtor's income has seen or will see a substantial increase in the near future, the United States Trustee may bring a Motion to Dismiss under 11 U.S.C. §707(b)(3). This is because the debtor's means test numbers may not reflect their actual ability to fund a Chapter 13 plan and provide payment toward unsecured debts. In Chapter 13 cases, the trustee may argue that the means test does not truly reflect the debtor's actual ability to pay. The Chapter 13 trustee may insist on a higher payment to unsecured creditors than the means test suggests if the test is not an accurate representation of a debtor's current and future ability to pay.

Ongoing Medical Expenses

Many debtors suffer from chronic medical problems for which they are un- or under-insured and that may affect their ability to fund a Chapter 13 plan. Ask your client about prescription costs, out-of-pocket medical expenses, and any special needs related to the debtor or a family member's health. Generally, such additional expenses are not “special circumstances” because the means test allows for the actual medical expenses of the debtor. However, because this information is often difficult to obtain and quantify, many lawyers overlook additional health expenses. If a debtor suffers from a debilitating condition that may affect their ability to earn money in the future, or

may require future medical treatment, this may be considered a “special circumstance.”

Student Loan Obligations or other Non-Dischargeable Debts

If a Chapter 7 discharge may leave a debtor with ongoing, *substantial*, non-dischargeable debt obligations after the bankruptcy, the existence of such obligations may be considered a “special circumstance.”

Home Energy Costs

Energy costs may vary with rural debtors and those whose homes are large or not energy efficient. Have your clients collect their home energy bills for six months and compare them to the averages used for the means test. Deviate from the standards if you can prove your case. Please note that any additional home energy expenses should be listed on Line 37 of the means test.

Transportation Costs

With gas back at just over \$2 per gallon, fuel costs may not currently be an issue for many debtors. When gas prices double again, or if the debtor has a long commute to work, or drives her personal car for business purposes and spends a lot of money on fuel, this may be cause to deviate from the average standards used for the means test.

Payroll Withholdings and Tax Liability

Many consumers decrease their tax withholdings prior to filing for bankruptcy in order to bring home more pay while in times of financial crisis. This will often result in a tax liability at the end of the tax year. By taking home more money each month in an effort to alleviate financial problems, these debtors have created false disposable income in their means tests. Post bankruptcy filing, these debtors will need to adjust their withholdings in order to avoid future tax liability. This will decrease their disposable monthly income (DMI).

Proving that these debtors have adjusted their withholdings is as easy as providing payroll information after the adjustments have been made.

ADVISING YOUR CLIENT

Most consumer debtors want quick answers to the questions, “Do I qualify for a Chapter 7?” or “What will my Chapter 13 payment be?” Until you have gathered the information neces-

sary to prepare the means test, you really won't know the answers to these questions. And as it turns out, the information necessary to prepare the means test is basically all of the information necessary to prepare the entire case for filing... and then some.

Some consumer debtors, particularly those with very high DMI, may prefer to negotiate with creditors directly or participate in a credit counseling program rather than file for Chapter 13 relief and commit to a five-year bankruptcy repayment plan. For this reason, attorneys may want to advise middle to higher-income clients that they will not know the results of the means test until the work in preparing the case is substantially completed. The author advises his clients that there will be a fee for finding the answers to these questions, and requires that fee to be paid in order for the work to be completed.

Consumer debtors *trampled under foot* by their means test results have but two options. Some debtors choose to participate in a Chapter 13 reorganization plan, knowing that any balance left on their unsecured debts will be discharged at the end of their five-year repayment plan. These debtors see a light at the end of the tunnel and are willing to sacrifice their spending habits in order to reach a goal. Some debtors choose to negotiate directly with their creditors or participate in debt repayment plans outside of bankruptcy rather than submit to a Chapter 13 budget for five long years.

The author suggests avoiding *communication breakdown* by breaking bad news as quickly as possible. Letting potential clients know that not everyone can live within a Chapter 13 budget, and that they may not like the results of their means test, generally prevents finger pointing and hurt feelings later in the attorney-client relationship.

HANDLING CASES IN THE WESTERN DISTRICT OF OKLAHOMA

Chapter 7 Cases

The Chapter 7 panel trustees, who administer assets and perform other functions too numerous to discuss here, do not participate in the review and prosecution of means test-related issues. This is a function of the Depart-

ment of Justice, via the office of the United States Trustee. If a motion to dismiss a Chapter 7 case is means test based, the motion will come from Assistant U.S. Trustee Herbert Graves or one of his staff attorneys.



Generally, the U.S. Trustee's office would rather assist you on difficult issues than to bring a motion to dismiss the case once an improperly-prepared means test has been filed. Mr. Graves' office, following the 2005 reforms, hosted means test luncheons to assist debtors' attorneys with means test issues. Although debtors' attorneys and the office of the U.S. Trustee may disagree on some legal issues, there is usually no reason that mathematical and other "mechanical" differences cannot be resolved with a telephone call or e-mail.

Debtors whose means test numbers are suspect can expect a thorough questioning at their meeting of creditors from an attorney from the U.S. Trustee's Office. Often, this is an uncomfortable experience both for the debtor and lawyer. And often, the problems with such cases could have been easily resolved prior to the meeting.

Some attorneys still frequently use only a month or two of income information to prepare the means test, only to find later that the United States Trustee will want to review all six months of the debtor's pre-petition pay. Collecting all six months' worth of pay information is necessary for a means test to pass muster with the UST's office, so attorneys do their clients no favors by allowing them to submit only two or three months' income for their means test calculations.

Additionally, attorneys frequently make adjustments to the means test without providing notes or explanations regarding the reasons for such changes. Often, a written explanation (either in the form of a letter, notes filed in the case, or a statement of special circumstances) is all the UST's office needs to make sense of an unusual means test.

Most bankruptcy practitioners use a spreadsheet of some sort to calculate the debtor's current monthly income (CMI) and payroll deducted expenses. Typically, attorneys use six months of income information, entering each paystub's information on the spreadsheet by category, adding them together, and dividing by six (months) to get a monthly average for each item. This spreadsheet should be filed with the court and allows the trustee to review the spreadsheet to determine the means test's accuracy with respect to CMI and certain payroll deductions.

Finally, it seems as though some lawyers have just not mastered the basics of the means test. Attorneys who practice bankruptcy law only part-time may need to brush up on means testing basics from time-to-time just to ensure that the right number goes into the right line on the test. Unless a significant part of an attorney's practice is devoted to bankruptcy work, learning the intricacies of means test may not be worth the time spent.

Chapter 13 Cases

Chapter 13 Trustee John Hardeman and his staff handle means test-related issues as well as *all* other issues related to Chapter 13 cases. The means test is a starting point for determining the debtor's disposable monthly income (DMI) in Chapter 13 cases. One of the Chapter 13 trustee's duties is to ensure that debtors who are able commit the required DMI for payment toward their unsecured debts. As a result, the Chapter 13 trustee's office thoroughly reviews all Chapter 13 means tests.

The Chapter 13 trustee's office will consider special circumstances such as the ones described above, but will require thorough documentation to prove the debtor's case for deviating from the means test. Again, differences in mathematical conclusions or other mechanics of the means test can usually be resolved with a telephone call or e-mail.

Attorneys not using an entire six-month pay history to calculate the debtors' CMI can

expect a request for further information from the Chapter 13 trustee. In unusual cases, or where the debtor's income varies month-to-month, forwarding all six months of payroll information to the trustee's office in advance of the meeting of creditors will help the trustee determine whether the means test was correctly prepared.

With unusual cases, it helps to attach an explanation or statement of special circumstances to the means test so that the trustee's office understands the facts giving rise to a deviation from the standard numbers. Using a spreadsheet as described above is always a good idea, allowing both the debtor's attorney and the trustee's office to review how the means test numbers were reached.

Additionally, the Chapter 13 trustee will want employment records for non-filing spouses or domestic partners. If the debtor has a second job, or supplemental income, pay records must be submitted. Generally, six months of pay will be required. Many attorneys provide proof of the debtor's primary employment, but forget to provide detailed information regarding other household income. As with Chapter 7 cases, the more information you provide, the better the trustee will understand your means test.

Finally, post-petition changes to a Chapter 13 debtor's income can have much greater consequences than in a Chapter 7 case. In Chapter 7, as long as the debtor passes the means test, the court will not be concerned (in most cases) to what happens to the debtors' income post-petition. In Chapter 13 cases, however, the means test is used to determine the debtors' Chapter 13 payment for the next five years. Significant drops in income can make a plan payment unaffordable for debtors, and Chapter 13 practitioners need to be ready to amend the Means test and modify the plan payments when needed.

CONCLUSION

Nearly four years into means testing, and the new form of "qualifying" for Chapter 7 bankruptcy relief still occasionally confuses the novice and frustrates the experienced. The means test need not be a *heartbreaker*, however. Many of the basic legal issues have been addressed by the local bench, which leaves figuring out the math and applying the specific facts of a case in order to sort things out.

As noted previously, excellent sources are available for those wanting to understand the means test's mathematical formulas. Once an attorney has learned the basics, it's just a matter of keeping up on local practice and opinions. Often, difficult questions can be answered quickly just by knowing whom to ask.

Not every case warrants deviation from the typical means test figures. But for those that do, "special circumstances" may be how you quantify the difference between the means test's DMI and your client's actual ability to pay.

The keys to successful practice in this area are to prepare your means test clients for the worst-case scenario, solicit information regarding your clients' actual monthly expenses, including any that are exceptional, and look for unusual circumstances that may help your clients reduce their disposable monthly income. If necessary, consult your potential adversary (the trustee) to discuss issues that may become a problem later in the case. Your clients will *thank you* for it.

1. 11 U.S.C. §§707(b), 1325(b)

2. The OBA's Annual Advanced Bankruptcy Seminar, held each December, offers analysis of means test topics, explained by local bankruptcy trustees. Past materials and future attendance may be

helpful to the novice. The *National Association of Consumer Bankruptcy Attorneys* (NACBA) provides its members with access to means test materials including instructions, legal briefs, and decision updates. See www.NACBA.com. *Consumer Bankruptcy News*, published by LRP Publications, is also an excellent source for keeping up to date on recent opinions. See www.lrp.com.

3. www.usdoj.gov/ust/ea/bapcpa/meanstesting.htm

4. 11 U.S.C. §707(b)(2)

5. 11 U.S.C. §1325(b)

6. A debtor's mortgage liability is often the largest debt, and is usually considered a consumer debt. Make sure not to overlook mortgage debts when determining whether a case is a "consumer" or "business" case.

7. 11 U.S.C. §707(2)(B)(i)

ABOUT THE AUTHOR



Michael Rose graduated with honors from the University of Oklahoma College of Law in 1994. Since then, his practice has focused on consumer protection and bankruptcy cases, including litigation and appeals. Mr. Rose has been a featured speaker at continuing legal education seminars, and has appeared on local radio and television stations in question and answer shows relating to bankruptcy and other consumer issues. Mr. Rose's offices are located in northwest Oklahoma City.

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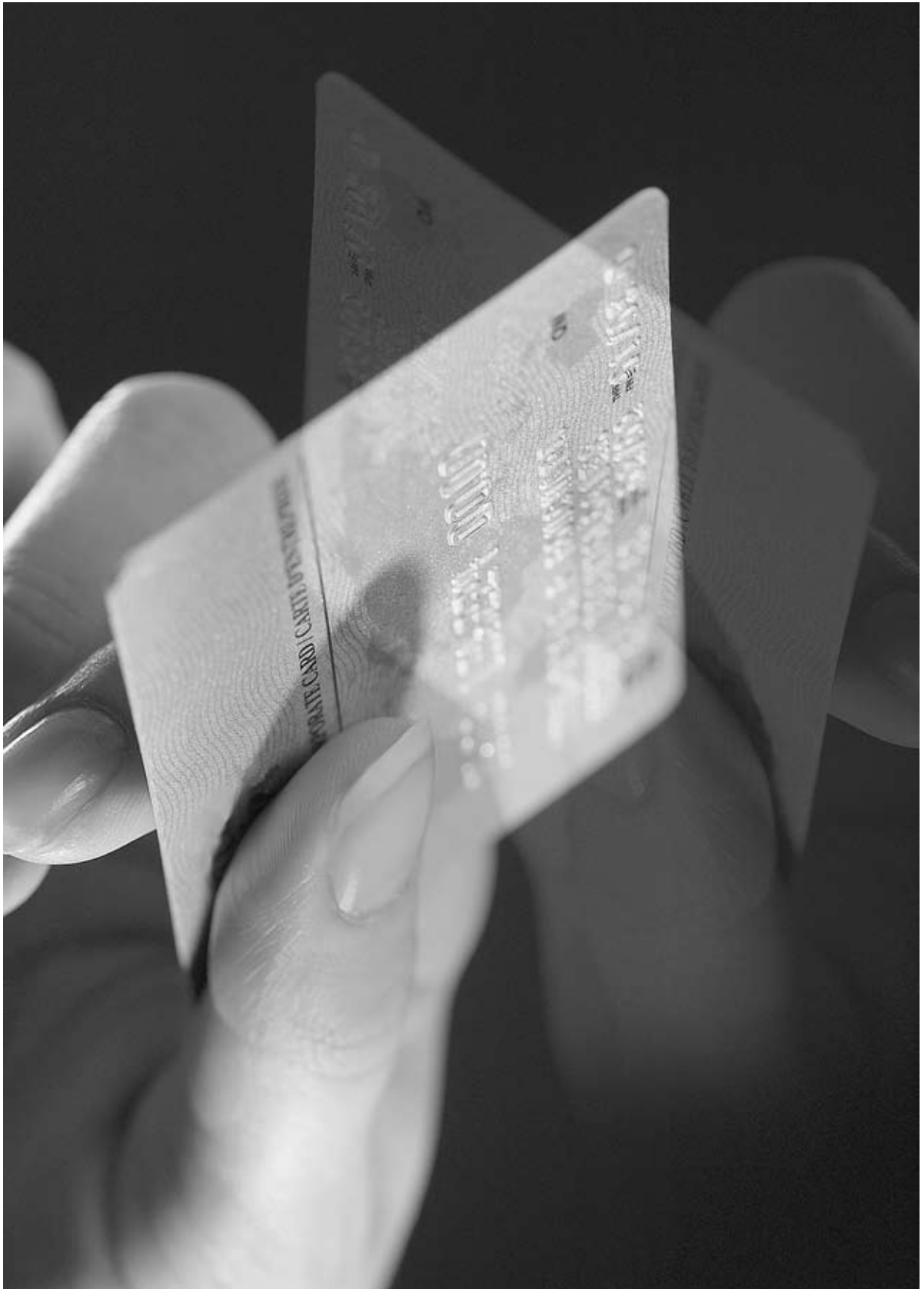
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Credit Card Balance Transfers as Recoverable Preferences in Chapter 7 Proceedings

By Michael W. Boutot

In its decision in *Parks v. FIA Card Services N.A. (In re Marshall)*¹ delivered at the end of last year, the U.S. Court of Appeals for the 10th Circuit became possibly the first federal court of appeals to rule that using an electronic balance transfer from one credit card to pay off the balance on another within 90 days before a bankruptcy filing is an avoidable preferential transfer under 11 U.S.C. § 547(b) even where the funds never passed through the debtor's hands. While previous courts had earlier held that a payment made by a credit card convenience check or similar method drawn on one card to pay another was a preference², the 10th Circuit has now extended this doctrine to include wholly electronic transfers where the debtor would, at first glance, seem to never have any control or possession of the funds, and where those funds would not seem to have been part of the bankruptcy estate.

ELEMENTS OF A PREFERENTIAL TRANSFER

Before analyzing the case at hand, it is necessary to set the stage by defining the scope and purpose of the trustee's power to recover "preferential" payments to creditors. The Bankruptcy Code at 11 U.S.C. § 547(b) allows a trustee or debtor-in-possession to recover payments made by the debtor to a particular creditor under certain circumstances:

The trustee may avoid any transfer of an interest of the debtor in property:

1) to or for the benefit of a creditor;

2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

3) made while the debtor was insolvent;

4) made:

A) on or within 90 days before the date of the filing of the petition;

B) ...; and

5) that enables such creditor to receive more than such creditor would receive if:

A) the case were a case under Chapter 7 of this title;

B) the transfer had not been made; and

- C) such creditor receive payment of such debt to the extent provided by the provisions of this title.

The purpose of the statute is to secure an equal distribution of assets among creditors of a similar class and to discourage actions by creditors that might prematurely compel the filing of a bankruptcy petition.³

A central issue to a § 547(b) analysis is the definition of an “interest of the debtor in property,” *i.e.*, the nature of the funds transferred and their relation to the bankruptcy estate. The Bankruptcy Code does not define this phrase.⁴ However, since the purpose of the statute is to preserve property in the estate to make it available for distribution to creditors, property subject to the preferential transfer statute is best understood as property which would have been part of the estate had it not been transferred before the commencement of the bankruptcy proceedings.⁵ The fundamental inquiry under § 547(b) is whether the debtor had a legal or equitable interest in the property transferred such that the transfer at issue diminished or depleted the debtor’s estate.⁶

Some courts have used the “dominion/control test” to determine whether a transfer of property was a transfer of “an interest of the debtor in property.” This test states that the transfer is of an “interest of the debtor in property” if the debtor exercised dominion or control over the transferred property. Other courts have chosen the “diminution-of-the-estate test” which makes the transfer an “interest of the debtor in property” if it deprives the bankruptcy estate of resources which would otherwise have been used to satisfy the claims of creditors.⁷ However, as previously noted, these courts were dealing with factual situations where the debtor used a physical convenience check or balance transfer check to conduct the transaction, a situation which would seem to have more in common with the use of a personal check to pay a creditor than a completely electronic bank to bank transfer.

For instance in⁸ *Mukamal v. Bank of America (In re Egidi)*, the debtor transferred multiple credit card balances to one card using a convenience check for at least one of the transfers.⁹ The court noted that a “preference” is defined as a transfer that enables a creditor to receive payment of a greater percentage of his claim against the debtor than he would have received had the transfer not been made and that credi-

tor participated in the distribution of assets of the bankruptcy estate.¹⁰ The court applied the dominion/control test and found that the debtor had control of the funds because “the disposition of those funds was in her control.”¹¹ “When a debtor uses a loan availability to pay one creditor, thereby “moving the debt” from one creditor to another, if the debtor has controlled the decision to pay and to whom the payment should be made — the debtor has sufficient control of the funds used for those funds to constitute property of the debtor.”¹²

Similarly, in *Growe v. AT&T Univ. Card Serv. (In re Adams)*,¹³ a debtor used convenience checks from one credit card issuer to pay another credit card within 90 days before filing a Chapter 7 petition.¹⁴ The court, utilizing the diminution-of-the-estate test, concluded that the debtor had diminished the estate, not by increasing debtor’s liabilities, but by “negatively impact[ing] equal distribution of assets among [the debtor’s] creditors.” The debtor had accessed funds that were available to her by using the convenience check. The bankruptcy court concluded that although she could have chosen to distribute these funds equally among her creditors, she transferred them to one select creditor. Therefore, the transfer was a preferential transfer of an interest of the debtor in property.¹⁵

THE MARSHALL DECISION

The decision in the *Marshall* case is unique because the transfers were completely electronic, where the balance was transferred from one creditor to another without passing through the hands of debtors. Debtors had two credit card accounts with MBNA (now FIA Card Services), both with significant balances owed. They also had two credit card accounts with Capital One. Debtors used the electronic balance transfer offers from the Capital One cards to pay off the balances of the MBNA cards within 90 days before they filed their bankruptcy petition. No convenience checks or balance transfer checks were used.¹⁶ The trustee brought an adversary proceeding to set aside the balance transfers, arguing that they amounted to preferential payments to the receiving credit card companies.¹⁷ The bankruptcy court denied the trustee’s complaint, finding that the “theoretical possibility” that a debtor could draw upon a line of credit from a credit card was not sufficient to show that the debtor had a property interest in the proceeds of the balance transfer as required under § 547(b).

The court found that a debtor's line of credit is not an asset available for the payment of creditors in a Chapter 7 proceeding.¹⁸ It reasoned that the funds paid to MBNA were assets of Capitol One, and that the debtors had no interest in them as is required by 547(b). Debtors merely took advantage of an offer to substitute one creditor for another, which had no impact on the bankruptcy estate.¹⁹

The trustee appealed the bankruptcy court's decision to the U.S. District Court of Kansas.²⁰ The district court also denied the trustee's complaint, accepting the MNBA's analysis utilizing the "earmarking doctrine."²¹ This doctrine holds that the trustee may not recover funds transferred within the preference period when the debtor borrowed those funds, and the lender lent them for the purpose of paying a specific debt.²² It held that because the funds were advanced by Capitol One for the purpose of paying the balances owed to MBNA, the debtors did not have the requisite control over the funds to constitute an interest in property, and that there was no diminution of the bankruptcy estate.²³

The trustee next appealed the district court's decision to the 10th Circuit. There, the court reversed the district and bankruptcy court's decisions and remanded the case for disposition consistent with its ruling.²⁴ The key to the court's decision is that it relied on a view that "technology masks the processes" involved in the balance transfer.²⁵ It found that the funds were an asset of the bankruptcy estate "for at least an instant" before being transferred.²⁶ Breaking down what occurred, the court found that:

- 1) the debtors drew on their Capitol One line of credit,
- 2) that draw converted the available credit into a loan,

- 3) the debtors directed Capitol One to use the loan proceeds to pay MBNA, and
- 4) Capitol One complied.

The court found that this series of events was "essentially the same as if the debtors had drawn on their Capitol One line of credit, deposited the proceeds into an account within their control, and then wrote a check to MBNA."²⁷ The fact that the transfers were completely electronic was irrelevant. It was the debtors' control of the funds, *no matter for how short a time*, which was dispositive.²⁸ The court also rejected the MNBA's "earmarking doctrine" argument. Critical to its analysis is the fact that for funds to be earmarked, it is the *lender* who must provide the requirement of to whom the funds are to be paid. In this case, Capitol One was not the entity that made the requirement. Debtors decided who should receive the funds — the lender merely complied with their instructions.²⁹

“Critical to its analysis is the fact that for funds to be earmarked, it is the lender who must provide the requirement of to whom the funds are to be paid.”



While at first seeming counter-intuitive, the decision is in line with the majority of jurisdictions regarding preferential transfers. The use of technology, such as electronic transfers of funds, serves to speed up the transaction and mask the underlying processes. However, once the series of events is deconstructed, as done by the 10th Circuit, the elements of the transaction may be more clearly seen and the law applied. The main impact of the *Marshall* decision will be felt by the credit card companies who are the recipients of funds transferred from another card. While

in the past they may have been at risk to turn funds over to the trustee that were gained from individual payments of the debtors, they now run the risk of much larger amounts being recovered when those funds were the product of a balance transfer.

1. *Parks v. FIA Card Services N.A. (In re Marshall)*, 550 F.3d 1251 (10th Cir. 2008)

2. See, e.g., *Meoli v. MBNA Am. Bank N.A. (In re Wells)*, 382 B.R. 355 (B.A.P. 6th Cir. 2008) (transfer made with convenience checks); *Mukamal v. Bank of Am. (In re Egidi)*, 386 B.R. 884 (Bankr. S.D. Fla. 2008) (at least one

convenience check used); *Yoppolo v. Greenwood Trust (In re Spitler)*, 213 B. R. 995 (Bankr. N.D. Ohio 1997) (convenience check used).

3. *Marshall, Supra* at 1254, citing *Gillman v. Scientific Research Prods. Inc. of Del. (In re Mama D'Angelo Inc.)* 55 F.3d 552, 554 (10th Cir. 1995).

4. *Marshall, Id* at 1255.

5. *Id*; citing *Begier v. IRS*, 496 U.S. 53, 58-9 (1990).

6. *Manchester v. First Bank & Trust Co. (In re Moses)*, 256 B.R. 641, 645 (10th Cir. BAP 2000).

7. *Marshall, Supra* at 1255-56.

8. *Mukamal v. Bank of America (In re Egidi)*, 386 B.R. 884 (Bankr. S.D. Fla. 2008).

9. *Id* at 886.

10. *Id* at 889, citing *Union Bank v. Wolas*, 502 U.S. 151, 160-61 (1991).

11. *Id* at 894.

12. *Id* at 894-95.

13. *Grove v. AT&T Univ. Card Serv. (In re Adams)*, 240 B.R. 807 (Bankr. D. Maine 1999).

14. *Id* at 808.

15. *Id* at 812.

16. *Marshall, Supra* at 1253.

17. *In re Marshall*, 372 B.R. 511, 512-13 (Bankr. D. Kan. 2007).

18. *Id* at 518.

19. *Marshall, Supra* at 1253-54.

20. *In re Marshall*, 2008 WL 544452, *1 (D. Kan. 2008).

21. The judicially-created earmarking doctrine was originally limited to situations where the lender who provided funds to a debtor to pay off a creditor was also obligated to that creditor as either a guarantor or a surety. Eventually, this doctrine was expanded to encompass situations where the lender was not a guarantor of a surety, but still

provided the debtor with funds to pay off a specific debt. *Moses, Supra* at 645-46.

22. *Marshall, Supra* at 1254.

23. *Id*; *In re Marshall*, 2008 WL 544452 at **6-8.

24. *Marshall, Id* at 1258.

25. *Id* at 1256.

26. *Id* at 1258.

27. *Id* at 1256.

28. *Id* at 1257.

29. *Id*.

ABOUT THE AUTHOR



Michael W. Boutot's practice focuses on legal research and writing and civil appellate advocacy in both state and federal courts. He is a member of the Oklahoma Bar Association's section on appellate law.



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Mediation: Its Uses and Abuses *Andrea Braeutigam, J.D., L.L.M., Program Manager, Oklahoma State University Institute for Dispute Resolution*

10:00 a.m. - 10:50 a.m.

Tort Reform – General Issues *Reggie Whitten, Whitten, Burrage, Priest, Fulmer, Anderson & Eisel, OKC*

11:00 a.m. - 11:50 a.m.

Trial By Jury *Garvin A. Isaacs, Garvin A. Isaacs, Inc., Oklahoma City*

12:00 a.m. - 1:00 p.m.

Barbeque Lunch (included in registration fee) — Sponsor TBA

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Digital Law Office *Jim Calloway, Oklahoma Bar Association*

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Title 10A – General Issues *T/B/A*

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Administrative Expense Claims in Bankruptcy

§ 503(b)(9): “The 20-Day Claim”

By Sidney K. Swinson and Brandon C. Bickle

A vendor selling goods to a buyer on an unsecured basis can find itself in a precarious position for payment, if the buyer later files bankruptcy. Unsecured prepetition vendors have historically been given no preferential treatment under bankruptcy law. These sellers have historically been assigned the unfortunate status of unsecured creditors of the debtor's bankruptcy estate, and share in the distribution of estate assets, if at all, pro-rata with all of the other unsecured creditors, and only *after* all secured and “priority” claims have been exhausted by estate assets. Often, the estate is extinguished before any such payments are ever made.

In 2005, Congress created a special priority for prepetition sellers of goods to a debtor, for such sales made in the ordinary course of business and within 20 days before the debtor's bankruptcy filing.¹ This article addresses the significance of this recent addition to the Bankruptcy Code, its benefits and how it may be used by those representing vendors who sell goods to customers who later file for bankruptcy.

PRIORITY CLAIMS AND ADMINISTRATIVE EXPENSES UNDER THE BANKRUPTCY CODE²

“Priority” claims, as referenced above, are unsecured claims that receive payment from estate assets prior to all other unsecured claims. Claims qualifying for “priority” status are listed under § 507 of the Bankruptcy Code. At the top of this list are “administrative expenses.”³ With certain limited exceptions (*see infra* Note 12), administrative expense claims are first in priority among all other unsecured claims in a bankruptcy case.

An “administrative expense” is an expense of the bankruptcy estate itself, “aris[ing] out of a transaction between the creditor and the debtor's trustee or debtor in possession...”⁴ An expense is “administrative” only “to the extent that the consideration supporting the claimant's right to payment was both supplied to and beneficial to the debtor-in-possession in the operation of the business.”⁵ The policy behind affording priority status for administrative expenses (in the context of a reorganization case) is to “increase the likelihood that a successful reorganization will occur.”⁶ Absent such priority, creditors would normally be unwilling to extend credit and supply goods or services to bankruptcy debtors, which could potentially thwart reorganization efforts.⁷

The “allowance and treatment” of administrative expenses is governed by § 503 of the Bankruptcy Code.⁸ Subsection (a) of § 503 allows entities to “file a request for payment of an administrative expense,” and subsection (b)

describes the expenses allowable as administrative expenses in any bankruptcy case. Generally, allowable administrative expenses fall within one of two categories: “(1) the operational expenses of a reorganizing debtor, and (2) the expenses associated with the bankruptcy reorganization process itself.”⁹ Of course, the nature of administrative expenses differs depending upon the size of the case and whether the case is a liquidation case under Chapter 7, or a reorganization case under Chapters 11, 12 or 13.

11 U.S.C. § 503(b)(9)

Congress added subsection (b)(9) to § 503 of the Bankruptcy Code as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), providing a new category of administrative expense for “the value of any goods received by the debtor within 20 days before the date of commencement of a case ... in which the goods have been sold to the debtor in the ordinary course of such debtor’s business.”¹⁰

*The Benefits of § 503(b)(9),
“The 20-Day Claim”*

Among the various administrative expenses allowable under § 503, subsection (b)(9) is truly unique. Unlike the other subsections of § 503, subsection (b)(9) applies to *prepetition* debt.¹¹ Thus, the first benefit to vendors providing goods to a debtor within 20 days before a debtor’s bankruptcy filing is converting what would otherwise be a prepetition unsecured claim into an allowable administrative expense.¹²

Second, the claim is more likely to be paid in a Chapter 11 case because administrative expense claims enjoy first priority status as against almost all other priority claims, regardless of the chapter under which the bankruptcy is currently pending.¹³ Thus, what was once an unsecured claim required to share pro-rata with all of the other unsecured creditors of the debtor’s bankruptcy estate, is now, by virtue of § 503(b)(9), elevated in most cases to the highest position an unsecured creditor can obtain against the assets of a bankruptcy estate – an allowed administrative expense claim.

A Chapter 11 plan of reorganization cannot be confirmed without providing for payment of all administrative expense claims as of the effective date of the plan, unless the holders of such claims agree to different treatment.¹⁴ Prior

to the creation of “the 20-day claim,” all unsecured claims for goods sold to the debtor prepetition were treated as general unsecured claims – subject to classification in a plan of reorganization, to plan voting, and ultimately subject to partial payment in a plan confirmed over the creditor’s dissent.¹⁵ Under § 503(b)(9), qualifying sellers now have a far greater likelihood of receiving payment.

Finally, a third benefit is the possibility that holders of “20-day claims” will be paid earlier.¹⁶ As discussed, *infra* Part III(D), in most cases § 503(b)(9) claims are paid at the same time as all other administrative claims. However,

“Second, the claim is more likely to be paid in a Chapter 11 case because administrative expense claims enjoy first priority status as against almost all other priority claims...”

“[s]ince the liability is an administrative expense and not a prepetition claim, a Chapter 11 debtor with adequate resources can pay the allowed administrative expense prior to confirmation.”¹⁷ Where fair and appropriate (a case-by-case, “facts and circumstances” analysis), bankruptcy courts may order faster payment of certain administrative expenses over others.

*Interplay with Reclamation Rights
under State Law*

A § 503(b)(9) administrative expense claim can also serve as a “fallback” right for a vendor who fails to timely exercise its reclamation rights under state law.

Under Oklahoma’s Uniform Commercial Code, Okla.Stat.tit. 12A § 2-702, a seller who discovers that its buyer has received goods on credit while insolvent is permitted to reclaim the goods upon demand made within 10 days of the buyer’s receipt of the goods.¹⁸ A seller’s state law reclamation rights are also recognized

under federal bankruptcy law, at 11 U.S.C. § 546(c), which extends the reclamation period to 45 days, assuming, of course, that the buyer ultimately files bankruptcy.

Unfortunately, reclamation rights don't always provide protection for sellers because reclamation rights are subordinate to the rights of a buyer in the ordinary course of business or a bona fide purchaser for value (*i.e.*, in both cases, a purchaser from the initial buyer).¹⁹ Reclamation rights are also lost if the goods become subject to a security interest (as inventory or equipment, for instance) given by the buyer to its lender.²⁰

A seller who sells goods to a buyer in the ordinary course of business within 20 days of the buyer's bankruptcy filing, and fails to timely make the requisite demand for reclamation, or is otherwise precluded from exercising its reclamation rights under state law, is still eligible for an administrative expense claim against the debtor's bankruptcy estate for the value of such goods under § 503(b)(9).

Qualifying for and Obtaining Allowance of a § 503(b)(9) Administrative Expense Claim

To qualify for an administrative expense claim under § 503(b)(9), the claimant must establish the following:²¹

- 1) The claimant sold "goods" to the debtor;²²
- 2) The goods were received by the debtor within 20 days before filing; and
- 3) The goods were sold "in the ordinary course of business."²³

As with all other administrative expense claims under § 503, "notice and a hearing" (*i.e.*, court approval) is required for allowance of § 503(b)(9) administrative expense claims by the bankruptcy court.²⁴ A qualifying claimant should file a motion with the court requesting allowance and payment of the claim, and obtain an order from the court granting the same.

Because of the difficulty of filing a motion (as opposed to simply filing an unsecured claim), in some large Chapter 11 cases with multiple 20-day claims, the bankruptcy courts have allowed the administrative expense claimants to assert the claim using a modified version of the proof of claim form (Official Form 10).

Timing of § 503(b)(9) Administrative Expense Payments

As a final point, an issue that has arisen since the enactment of § 503(b)(9) has been the timing of payments for allowed § 503 administrative expense claims. The courts are in agreement that such timing is generally left to the discretion of the bankruptcy court.²⁵ At least in theory, payment could be ordered as of: 1) the commencement of the bankruptcy case; 2) at the time of allowance by the court; 3) at any point in time prior to plan confirmation, at the debtor's discretion; or 4) on the effective date of the plan (*i.e.*, along with payment of other administrative expenses).²⁶ Generally, three factors are considered in determining the timing of payment of allowed administrative expense claims:

- 1) Prejudice to the debtors;
- 2) Hardship to the claimant; and
- 3) Potential detriment to other creditors.²⁷

Courts balance these factors while also considering the overall goals and objectives of bankruptcy.²⁸

In most cases, administrative claimants must wait until payments are distributed to all other administrative claimants.²⁹ Where exceptional circumstances exist, faster payment may be available.³⁰

CONCLUSION

In sum, § 503(b)(9) affords sellers of goods to buyers who later file for bankruptcy a valuable tool for increasing the likelihood of payment from the debtor's bankruptcy estate. Where goods are provided to the buyer within 20 days of the buyer's bankruptcy filing, in the ordinary course of the buyer's business, the seller is eligible for an administrative expense against the buyer's bankruptcy estate. Allowance and payment of such claims requires approval of the bankruptcy court and, absent special circumstances, such claims are usually paid at the same time as other administrative expenses. The elevated priority status of administrative expense claims in bankruptcy makes § 503(b)(9) a favorable addition to the Bankruptcy Code for prepetition ordinary course sellers of goods to a bankrupt debtor.

1. 11 U.S.C. § 503(b)(9).

2. The Bankruptcy Code is located at Title II of the United States Code.

3. *Id.* § 507(a)(2).

4. *In re Commercial Fin. Serv. Inc.*, 246 F.3d 1291, 1294 (10th Cir. 2001) (citation omitted).

5. *Id.*
 6. *Id.* at 1293.
 7. *Id.*
 8. See *In re Bookbinders' Restaurant Inc.*, 2006 WL 3858020, at * 2 (Bankr. E.D. Pa. Dec. 28, 2006); 11 U.S.C. § 503.
 9. *Bookbinders' Restaurant*, 2006 WL 3858020, at *3.
 10. See *In re Plastech Engineered Prod. Inc.*, 397 B.R. 828, 831 (Bankr. E.D. Mich. 2008); 11 U.S.C. § 503(b)(9).
 11. *In re Brown & Cole Stores LLC*, 375 B.R. 873, 878-79 (9th Cir. BAP 2007).
 12. See *Bookbinders' Restaurant*, 2006 WL 3858020, at *3.
 13. Where applicable, unsecured claims for domestic support obligations have priority over § 503(b)(9) administrative expenses. See 11 U.S.C. § 507(a)(1). As claims for domestic support obligations are unlikely to exist in commercial bankruptcy cases, as a practical matter, § 503(b) administrative expense claims have first priority in cases involving "ordinary course" sales of goods from sellers to buyers. See *Id.* § 507(a)(2).
 14. 11 U.S.C. § 1129(a)(9)(A).
 15. *Bookbinders' Restaurant*, 2006 WL 3858020, at *3; 11 U.S.C. §§ 1123(a)(1), 1126(c).
 16. *Bookbinders' Restaurant*, 2006 WL 3858020, at *3.
 17. *Id.*
 18. The 10-day requirement does not apply, however, where the buyer has made a misrepresentation of solvency, in writing, to the seller within 3 months before delivery of the goods. OKLA. STAT. tit. 12A § 2-702.
 19. OKLA. STAT. tit. 12A § 546(c).
 20. See *In re Child World Inc.*, 145 B.R. 5, 7 (Bankr. S.D.N.Y. 1992).
 21. 11 U.S.C. § 503(b)(9); *In re Goody's Family Clothing Inc.* 401 B.R. 131, 133 (Bankr. D. Del. 2009).
 22. "Goods is not defined in the Code and so the definition used in Article 2 of the Uniform Commercial Code is likely to be used." 4 *Collier on Bankruptcy* ¶ 503.16[1] (15th ed. rev. 2008); see *In re Goody's Family Clothing Inc.*, 401 B.R. 131, 134 (Bankr. D. Del. 2009) (Under U.C.C. Art. 2, "[g]oods' means all things (including specially manufactured goods) which are moveable at the time of identification to the contract for sale other than money in which the price is to be paid, investment securities [covered under U.C.C. Art. 8] and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty."); U.C.C. § 2-105 (1977); see also *Plas-tech*, 397 B.R. at 836 (applying U.C.C. definition of "goods").
 23. "The 'ordinary course of business' generally refers to day-to-day business affairs." *In re Cascade Oil Co. Inc.*, 51 B.R. 877, 882 (Bankr. Kan. 1985) (11 U.S.C. § 364 context); *In re Magic Circle Energy Corp.*, 64 B.R. 269, 275 n.11 (Bankr. W.D. Okla. 1986) (noting that the term "ordinary course of business... is universally construed as a transaction that occurs in the day to day operations of a business," regardless of the Bankruptcy Code section in which it arises).
 24. Contrast the related, but readily distinguishable circumstance arising under § 546(c) of the Bankruptcy Code. Under this section, sellers who provide goods to a commercial bankruptcy debtor *after* the bankruptcy case has been filed, assuming the goods were provided "in the ordinary course of business," are allowed payment out of estate assets by bankruptcy trustees (or debtor-in-possession, as the case may be), without first obtaining prior approval of the bankruptcy court. See 11 U.S.C. § 363(c)(1). Payment under § 503(b)(9), by contrast and like all other approved administrative expense claims, requires notice and a hearing by the bankruptcy court prior to payment. See *Bookbinders' Restaurant*, 2006 WL 3858020, at * 3-6; see also discussion *infra* Part III(D).
 25. See *In re Global Home Prod. LLC*, 2006 WL 3791955, at *3 (Bankr. D. Del. Dec. 21, 2006); *Bookbinders' Restaurant*, 2006 WL 3858020, at *1. This aspect of the law was settled prior to the enactment of § 503(b)(9). See *Bookbinders' Restaurant*, 2006 WL 3858020, at * 4 (describing the court's discretion in this regard as "black letter law" and concluding

that Congress, in enacting § 503(b)(9), "did not intend to alter existing practice under § 503(b)") (providing numerous citations, including 4 *Collier on Bankruptcy* ¶ 503.3, at 503-13 (15th rev. ed. 2006)); see also *In re King*, 392 B.R. 62, 67-68 (Bankr. S.D.N.Y. 2008); *In re LTV Steel Co. Inc.*, 288 B.R. 775, 778-79 (Bankr. N.D. Ohio 2002).

26. *Bookbinders' Restaurant*, 2006 WL 3858020, at * 3 (citing Ryan T. Routh, "Twenty-day Claims: The Anticipated and Unanticipated Consequences of Code § 503(b)(9), Am Bankr. Inst. J. 24, at 78-79 (Nov. 25, 2006)).

27. *Id.* (citing *In re Garden Ridge Corp.*, 323 B.R. 136, 143 (Bankr. D. Del. 2005); see also *Bookbinders' Restaurant*, 2006 WL 3858020, at * 1.

28. See *Global Home Prod.*, 2006 WL 3791955, at *3 (quoting *In re HQ Global Holdings Inc.*, 282 B.R. 169 (Bankr. D. Del. 2002); see also *In re Dieckhaus Stationers of Kin of Prussia Inc.*, 73 B.R. 969, 972 (Bankr. E.D. Pa. 1987) (the court must consider "other provisions and policies of the [Bankruptcy] Code").

29. See *Global Home Prod.*, 2006 WL 3791955, at *3-4; see also Alan N. Resnick, *The Future of Chapter 11: A Symposium Cosponsored by the American College of Bankruptcy: The Future of the Doctrine of Necessity and Critical Vendor Payments in Chapter 11 Cases*, 47 B.C.L. Rev. 183, 204-205 (2005) (noting that § 503(b)(9) "is a rule of priority, rather than payment").

30. See *Global Home Prod.*, 2006 WL 3791955, at *3-4 ("To qualify for exceptional immediate payment, a creditor must show that 'there is a necessity to pay and not merely that the debtor has the ability to pay'" (citations omitted)).

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The Rugged Resistance to 20-Day Administrative Expenses

By Carole Houghton

In the wake of rising bankruptcy filings, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). Of the new provisions enacted, Congress established a new administrative expense to protect suppliers who sell goods shortly before a customer files bankruptcy, codified at 11 U.S.C. § 503(b)(9) (20-day claims). Section 503(b)(9), provides in pertinent part:

(b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including –

* * *

(9) the value of any goods received by the debtor within 20 days before the date of commencement of a case under this title in which the goods have been sold to the debtor in the ordinary course of such debtor's business.

Section 503(b)(9) denotes a significant departure from pre-BAPCPA law.¹ Prior to BAPCPA, Section 503(b) was limited to six non-exclusive post-petition administrative expenses. However, the term "administrative expense" is not defined in the Bankruptcy Code; therefore, in the context of a Chapter 11, whether a claim is an administrative expense under Section 503(b) is determinative upon a showing that the debt was "actual and necessary" and associated with either the operational expenses of a reorganizing debtor or expenses associated with the reorganization process itself.² Typically, post-petition "trade-debt" incurred by a debtor-in-possession in the ordinary course of business continued as an administrative expense.³ Likewise, under the old regime, there were few, if any, pre-petition

expense arose, it was usually limited to accounting and legal fees or court costs associated with an involuntary filing.⁴

This all changed, however, with the implementation of Section 503(b)(9). As set forth above, Section 503(b)(9) sweeps in *all goods* used in the ordinary course of business and received by the debtor within 20 days before the bankruptcy filing.⁵ Thus, the sheer breadth of Section 503(b)(9) shifts a large sum of pre-petition debt into priority administrative expenses.⁶ The significant impact of this new elevated status is that debtors lost their ability to cram down pre-petition debt in the plan and are required to pay in full these newly defined administrative expenses by the effective date of the plan if they are to successfully reorganize.⁷ Accordingly, this sudden rise in priority of these 20-day claims seemingly changed the landscape of a Chapter 11 case by imposing new financial hurdles on the debtor for the benefit of the creditors.⁸

At least in theory, the new restrictions appeared to benefit the creditor by the perceived inference that debtors would be motivated to promptly pay these 20-day claims to ensure adequate resources were available to satisfy all claims prior to confirmation.⁹ However, in practice, it was quite another matter.

Due to the financial impact of these 20-day claims, debtors fought back and have largely prevailed on this front against immediate payment.¹⁰

Specifically, in *In re Global Home Products LLC*, the court squarely determined creditors were not entitled to immediate payment of 20-day claims.¹¹ The court reasoned, because Section 503(b)(9) is silent on when payment of 20-day claims must be paid, it simply refused to judicially create a separate priority category for 20-day claims that is different from the priority and treatment (timing of payment) afforded other Section 503(b) claims.¹² The *Global Home* court concluded, as with all 503 administrative expenses, the timing of the payment is left to the discretion of the court.¹³ In so doing, the court implemented an equitable balancing test to aid courts in deciphering when payments are appropriate.¹⁴ The factors enumerated are: 1) the prejudice to the debtor, 2) the hardship on the administrative expense holder and 3) the potential detriment to other parties in the case.¹⁵

While the court's position in *Global Home* is arguably contrary to the clear language of Section 503, it has been consistently followed by other courts.¹⁶ Moreover, the courts' treatment with regard to 20-day claims uniformly established the proverbial "line in the sand" by the judiciary to treat all administrative claims under Section 503 equally in order to preserve the orderly and equal distribution among creditors and prevent a perceived race to a debtor's assets. In this regard, courts have refused to attribute priority status to 20-day claims to the detriment of other creditors and have favored critical vendor selections and terms of post-petition financing over the rights of creditors holding 20-day claims.¹⁷

To further exacerbate the inherent pitfalls associated with Section 503(b)(9) there is little to no legislative history to prevent courts from deflating the 20-day claims elevated status to other 503 expenses. This treatment by the courts has ultimately resulted in creative maneuvering by debtors to avoid the impact of the 20-day claims.¹⁸ Notably, debtors have attacked the value of the goods covered by the 20-day claim, asserted a right to set-off on secured 20-day claims, challenged the defini-

“...there is little to no legislative history to prevent courts from deflating the 20-day claims elevated status to other 503 expenses.”

tion of “goods,” and attempted to avoid payment on allegations of preferential transfers under Section 547 of the Bankruptcy Code or other avoidable transfers. Specifically, in *In re Plastech*, the debtor sought to avoid the 20-Day Claim of the creditor under Section

502(d) as a preferential transfer. While the bankruptcy court ultimately determined that Section 502(d) did not apply to 20-day claims in this instance, it expressly recognized that acceptance of the debtor's position would resolve the inherent conflict between the mandatory allowance provision of Section 503(b) and the mandatory disallowance provision of Section 502(d).¹⁹ Thus, the issue is far from settled, and as case law continues to develop, many other potential issues will undoubtedly be revealed.

Accordingly, creditors' attorneys need to be vigilant in identifying 20-day claims early in order to protect the creditor's interest. A motion seeking payment of a 20-day claim should be filed early in the bankruptcy case to substantiate the need for timely payment and adequate protection. Likewise, a notice of reclamation should also be considered to further protect the interest of a creditor. Additional considerations such as conversion to Chapter 7 or holdbacks (including larger than normal holdbacks) on other administrative claimants may also need to be addressed early in the case. Thus at a minimum, creditors' attorneys should be prepared to address the relevant issues pertaining to 20-day claim, which may necessarily include:

- Determine your client's 20-day claims.
- Analyze first-day requests by debtor for post-petition priority financing and its impact on 20-day claims.
- Request that the debtor separately identify all 20-day claims.
- File a motion for immediate payment of 20-day claims (and also a reclamation notice).
- Seek adequate protection under Section 105.
- Identify the ability of the debtor to pay the 20-day claims by pointing out the cost of the product and the profit margin which is

what the debtor should calculate to run the business.

- Identify the hardships that holders of 20-day claims will suffer if payment is delayed.
- Expect an objection from the post-petition lender and be prepared to show why the 20-day claims should not be subordinated to the post-petition financing.²⁰

While the implementation of Section 503(b)(9) initially seemed promising, creditors appear to be no better off than where they were pre-BAPCPA. Certainly, creditors can take some solace in the fact that if their 20-day claim passes muster, they will eventually be paid. However, given the equitable approach taken by courts, creditors should not rely upon the 20-day claim as their only means of recovery. As case law continues to develop, creditors may be given more guidance on how these 20-day claims will be treated, but in the interim, creditors should continue to utilize all provisions of the Bankruptcy Code to enforce and protect their interests.

1. *In re Plastech Engineered Products Inc.*, 394 B.R. 147, 150-151 (Bankr. E.D. Mich. 2008); *In re Bookbinders' Restaurant Inc.*, 2006 WL 3858020, Westlaw op. at 3 (Bankr. E.D. Pa. Dec. 28, 2006) (unpublished op.).

2. *In re Plastech*, 394 B.R. at 151; *In re Bookbinders'*, Westlaw op. at 3.

3. *Id.*

4. *In re Plastech*, 394 B.R. at 151.

5. *Id.* (Emphasis added).

6. *Id.* See also, *In re Bookbinders'*, Westlaw op. at 3.

7. *In re Plastech*, 394 B.R. at 151 citing 11 U.S.C. § 1129(a)(9)(A) (requiring full payment of allowed expenses on effective date of the plan as a condition of confirmation, unless the holder has agreed to different treatment).

8. *Id.*; See also *In re Bookbinders'*, Westlaw op. at 3.

9. *In re Bookbinders'*, Westlaw op. at 3.

10. *In re Plastech*, 394 B.R. at 151; *In re Bookbinders'*, Westlaw op. at 3; *In re Global Home Products, LLC*, 2006 WL 3791955, Westlaw op. at 3 (Bankr. D. Del. Dec. 21, 2006) (unpublished op.).

11. *In re Global Home*, Westlaw op. at 3. See also 11 U.S.C. § 503(b)(9).

12. *In re Global Home*, Westlaw op. at 3.

13. *Id.* at 3-4 citing *In re Garden Ridge Corp.*, 323 B.R. 136 (Bankr. D. Del. 2005); *In re Colortex Industries Inc.*, 19 F.3d 1371, 1384 (11th Cir.

1994); *Matter of Continental Airlines Inc.*, 146 B.R. 520, 531 (Bankr. D. Del. 1992). See also, *In re Modern Metal Products Co.*, 2009 WL 1362632, Westlaw op. at 2-3 (Bankr. N.D. Ill. May 13, 2009) (unpublished op.).

14. *Id.* at 4 citing *In re Garden Ridge*, 323 B.R. at 143.

15. *Id.*

16. *Id.* citing *In re HQ Global Holdings Inc.*, 282 B.R. 169 (Bankr. D. Del. 2002). See also, *In re Plastech*, 394 B.R. at 152 and *In re Bookbinders'*, Westlaw op. at 4.

17. *In re Modern Metal Products Co.*, Westlaw op. at 3; *In re Bookbinders'*, Westlaw op. at 4-6, *In re Global Home*, Westlaw op. at 5.

18. *In re Goody's Family Clothing Inc.*, 401 B.R. 131, 135 (Bankr. D. Del. 2009) (holding creditor did not sell debtor "goods" as defined under Section 503(b)(9)); *In re Samaritan Alliance LLC*, 2008 WL 2520107, Westlaw op. at 4 (Bankr. E.D. Ky. Jun. 20 2008) (unpublished op.) (holding electricity provided to debtor is a service and not goods under Section 503(b)(9)); *In re Benchmark Homes Inc.*, 2008 WL 4844122, Westlaw op. at 2 (Bankr. D. Neb. Oct. 30, 2008) (unpublished op.) (holding 20-day claims did not supersede rights of other lien claimants and trustees reduction of 20-day claims was justified); *In re Pridgen*, 2008 WL 1836950, Westlaw op. at 4 (Bankr. E.D. N.C. Apr. 22, 2008) (unpublished op.) (holding creditor could not substantiate gas was received by debtor within 20 days of commencement of bankruptcy); *In re Plastech*, 394 B.R. at 161-164 (rejecting application of Section 502(d) to 20-day claims); and *In re Brown & Cole Stores LLC*, 375 B.R. 873, (9th Cir 2007) (holding debtor entitled to right to set-off on secured claim under Section 503(b)(9)).

19. *In re Plastech*, 394 B.R. at 161-164.

20. Doneen Douglas Jones, *New Kids On The Bankruptcy Block And Other Recent Bankruptcy Phenomena*, February, 2009, at 2-5.

ABOUT THE AUTHOR



Carole Houghton is an associate attorney with the Oklahoma City office of Fellers, Snider, Blankenship, Bailey & Tippens PC. Her practice areas include real estate, banking, foreclosure, bankruptcy, creditors' rights and lender liability defense matters. She has extensive experience representing the interests of creditors in bankruptcy proceedings in Oklahoma and Texas. She obtained her J.D., cum laude, from Oklahoma City University in 1998.



The Interplay Between Bankruptcy and Divorce

By Tracey Garrison

In my bankruptcy practice, I always ask clients if they have been divorced or are contemplating divorce.¹ There are many areas where bankruptcy and divorce are intertwined and I will discuss several in this article, including changes wrought by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).²

Although the debtors' prisons portrayed in Charles Dickens' novels were eliminated long ago in this country,³ I have encountered people reluctant to file a Chapter 7 bankruptcy because they have been threatened by a former spouse that contempt charges will be filed against them and they will be sent to jail and have the children taken from them. Most of us have heard that the purpose of filing a Chapter 7 bankruptcy is to obtain a fresh start by discharging one's debts. However, this fresh start is jeopardized when a former spouse threatens, "I'm going to have you thrown in jail then I'm going to take the kids from you." Since BAPCPA, it has become harder for former spouses filing Chapter 7 to discharge debts related to a divorce decree, as BAPCPA has enlarged the type of debt which is not dischargeable.⁴

In a Chapter 7 case before BAPCPA, a bankruptcy attorney would discern whether the debts in a decree referred to alimony, maintenance and support as opposed to a property settlement. Debts for the former could not be discharged but debts for the latter could be. Before BAPCPA, property settlement agreements could be discharged in a Chapter 7 if the debtor was not able to pay or if the discharge would benefit the debtor more than preventing

the debt from being discharged would benefit the former spouse.⁵

BAPCPA created the term "domestic support obligation" (DSO).⁶ A DSO is a debt that is:

- (A) owed to or recoverable by:
 - (i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative; or
 - (ii) a governmental unit;
- (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;
- (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of:
 - (i) a separation agreement, divorce decree or property settlement agreement;
 - (ii) an order of a court of record; or
 - (iii) a determination made in accordance with applicable non-bankruptcy law by a governmental unit;...⁷

If a debt qualifies as a DSO it cannot be discharged in a Chapter 7 bankruptcy.⁸ Further, property settlement agreements can no longer

be discharged in a Chapter 7 and if the divorce decree awards money to a spouse in lieu of a property division, it cannot be discharged in a Chapter 7.⁹

If a debtor owes a DSO, the former spouse will be listed as a creditor in the bankruptcy so the former spouse receives notice of the bankruptcy. In the Northern District, debtors fill out Form 4002-1B, which is an affidavit stating whether or not the debtor owes a DSO to a former spouse. If the answer is yes, the debtor is required to list the name and address of the former spouse and the name and address of the debtor's employer. This affidavit is not filed with the court but is given to the trustee for the case. For the Eastern District, I use a different form but the information supplied is the same.

Discharging a debt obligation in a divorce decree has been affected by BAPCPA.¹⁰ If a spouse is ordered in a divorce decree to pay a debt, and the decree has a hold harmless clause (which is nearly universal in the decrees I prepare and encounter), the hold harmless clause means the obligor spouse agreed to indemnify the obligee spouse if the obligor spouse does not pay the debt. Therefore, the obligor spouse who filed bankruptcy is still liable to the other for the debt. This is especially notable with regard to credit card debt. In a pre-BAPCPA case from the Northern District, the court held that a former spouse could discharge credit card debt he was ordered to pay under the decree (even though there was a hold harmless clause) because it was not "alimony, maintenance or support for an ex-spouse."¹¹

Contrast that with a post-BAPCPA case also from the Northern District, wherein a former spouse was not allowed to discharge his obligation to the spouse to pay credit card debt.¹² In this case, a divorce decree ordered the former husband to pay two credit card debts. In addition, the decree contained a hold harmless clause to indemnify the obligee spouse. The obligor spouse subsequently filed bankruptcy, leaving the debts unpaid. Both parties and the court agreed that the credit card debt was not a DSO. The court stated that "... BAPCPA has altered the function of this court with regard to obligations incurred in separation agreements and divorce decrees."¹³ The court further said that "[a]lthough the purpose of bankruptcy is to provide the honest but unfortunate debtor with a 'fresh start,' 30 statutory exceptions to discharge have been created [by Congress]..."¹⁴

The court further stated that BAPCPA "essentially made all obligations to a former spouse found in a separation agreement or divorce decree nondischargeable, whether or not they are directly related to support."¹⁵

BAPCPA has affected bankruptcy stays. When a debtor files for bankruptcy, an automatic stay is put into place which prevents creditors from trying to collect debts.¹⁶ A secured creditor has to file a motion to lift the bankruptcy stay and obtain an order from the court before the creditor can resume collection activities.¹⁷ However, for DSO's, they do not need to file a motion to lift the stay.¹⁸ One also does not need to lift a stay to proceed with a divorce, as long as property is not being divided.¹⁹ There is an exception to the automatic stay for, among other things:

A) of the commencement or continuation of a civil action or proceeding:

- (i) for the establishment of paternity;
- (ii) for the establishment or modification of an order for domestic support obligations;
- (iii) concerning child custody or visitation;
- (iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or
- (v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute...²⁰

However, a motion to lift the bankruptcy stay is still required for property division in a divorce action.²¹ If one is not certain if the debt is a DSO or property division, one can always act in an abundance of caution and file a motion to lift the bankruptcy stay.

When a debtor files bankruptcy, the debtor is allowed to exempt property.²² Although bankruptcy is federal law, one looks to Oklahoma law to determine which property is exempt. Even if property is not exempt, the bankruptcy trustee may decide to abandon the asset. For example, a single debtor is allowed to exempt one vehicle with \$7,500 of equity. The debtor may have a second vehicle which is old, junked, does not run and essentially has no value,

which the trustee may decide is not worth administering and therefore the debtor will retain it. Under BAPCPA, even if an asset is exempt, a creditor spouse with a DSO claim can go after exempt assets.²³

In addition to the above, another reason why I ask potential clients if they have been divorced is to ascertain whether the divorce decree awarded the debtor property which would not be exempt in a bankruptcy, which the debtor has not yet received. I have seen decrees wherein the obligor was allowed several years to make periodic payments toward a property settlement. If the time has not run, the attorney needs to advise the client that the property is at risk of being taken by the trustee when it is received. If the amount of the property yet to be received is low compared to the amount of debt which will be discharged, the client may decide to file anyway, but the attorney needs to discuss this with the client before filing, as it is the client's decision to make, not the attorney's.

A bankruptcy attorney also needs to be aware that if there is a divorce decree within 180 days after filing the bankruptcy, and a debtor receives nonexempt property via the decree, the assets are at risk of being taken by the trustee.²⁴

A divorce can affect a debtor's decision as to whether or not to sign a reaffirmation agreement. Always thoroughly discuss reaffirmation agreements with clients before filing bankruptcy. If a debtor signs a reaffirmation agreement, the debtor will still be personally liable to the creditor for the debt, as if the bankruptcy never happened as to this debt. In conjunction with discussing reaffirmation agreements, I remind them that they cannot file another Chapter 7 for eight years so they need to be certain this is what they want and to consider the consequences if they lose a job and cannot make the payments. Debtors who have a car or mortgage with a former spouse as a co-debtor and have been threatened by the former spouse that they had better make the payments or they will file contempt charges, feel pressure to sign a reaffirmation agreement.²⁵

In summary, there are many areas where bankruptcy and divorce intertwine, some of which have been changed by BAPCPA. It is important to check the federal bankruptcy

rules and statutes as well as the local rules, cases and forms of the districts wherein you practice to keep on top of these changes.

1. Conversely, divorce attorneys should be aware of consequences of bankruptcy, particularly to warn clients that if they agree to be responsible for a debt and the decree has a hold harmless clause, they cannot discharge their obligation to their former spouse by filing bankruptcy.

2. 119 Stat. 23 (2005). BAPCPA went into effect on Oct. 17, 2005.

3. http://myvesta.org/history_debtorprison.html. Also, Okla. Const Art. II § 13 prohibits being imprisoned for debt except for the nonpayment of fines and penalties for law violations.

4. For purposes of this article I use the term divorce decree rather than decree of dissolution.

5. 11 U.S.C. § 523(a)(15), pre-BAPCPA.

6. 11 U.S.C. § 101(14A).

7. *Id.*

8. 11 U.S.C. § 523(a)(5).

9. 11 U.S.C. § 523(a)(15).

10. One area BAPCPA has affected discharges is in the timing of complaints, which I do not discuss in this paper, but it can be found at 11 U.S.C. § 523.

11. *In re Lane*, 147 B.R. 784, 787 (Bankr. N.D. Okla. 1992). However, the court ruled that the debtor/obligor could not discharge the car loan he was ordered to pay in the decree, because the court found that the loan was support.

12. *In re Hosterman*, 07-10575-M (Bankr. N.D. Okla. 2007).

13. *Id.* at 9.

14. *Id.*

15. *Id.* at 12.

16. 11 U.S.C. § 362.

17. In my practice, a stay is most often filed when a debtor falls behind on a mortgage or vehicle loan. When I interview potential clients for Chapter 7 one of the questions I always ask is if they have a mortgage and/or vehicle loan. If so, I ask if they are behind. If so, I ask if they can realistically catch up because if not, the mortgage company and vehicle financing company will file a motion to lift the bankruptcy stay and the house and vehicle can be lost.

18. 11 U.S.C. § 362.

19. *Id.*

20. *Id.*

21. *Id.*

22. 11 U.S.C. § 522(b).

23. 11 U.S.C. § 522(c).

24. 11 U.S.C. § 541.

25. To be found in contempt, the nonpayment must be willful. It seems to me that if a person is in such dire financial straits that he/she needs to file bankruptcy, the nonpayment would not be willful, but there is caselaw stating otherwise. For example, *Riedel v. Riedel*, 1992 OK CIV APP 166, 844 P.2d 184, wherein an obligor ex-husband discharged a debt in bankruptcy which he was ordered to pay in a divorce decree, containing a hold harmless clause. The court held him in contempt. Realistically though, you can't squeeze blood from a turnip, so in some cases, the former spouse will be sent to jail. Maybe we do still have debtors' prisons after all.

ABOUT THE AUTHOR



Tracey Garrison graduated from the TU College of Law in 2006 with honors and was a legal assistant for nearly 17 years before becoming an attorney. She has her own law practice, Garrison Law Office PLLC. She practices in the areas of bankruptcy, divorce, probate and guardianships.

FROM THE PRESIDENT

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OBA is hosting a Technology Fair at the bar center on Sept. 24. It is a day focused on various aspects of technology and will be highlighted by a traveling group from the main ABA Tech Show. It should be another great event.

Finally, I want to encourage everyone to plan now to attend the OBA Annual Meeting in November. It will be in Oklahoma City Nov. 4 - 6 at the Sheraton Hotel. The Annual Meeting is always an excellent opportunity to attend CLE seminars and other special events — and to fellowship with friends and fellow bar members. This year we have lined up an excellent luncheon speaker. We have revised the evening events and will unveil a new event which promises to be fun for all who attend. The Annual Meeting this year will be the best ever.

It has been an absolute pleasure serving as your president so far this year. I hope that all OBA members are proud of the job that the Board of Governors and I have been doing for our association. The year is passing rapidly. I cannot believe it is already half over. I am hopeful that we can accomplish as much in the second half of 2009 as we have accomplished thus far in our pursuit of excellence for all OBA members.

Oklahoma Bar Journal Editorial Calendar

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
leslietaylorjd@gmail.com
Deadline: Sept. 9, 2009
- December
Ethics & Professional Responsibility
Editor: Jim Stuart
jstuart@swbell.net
Deadline: Sept. 9, 2009



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

2010

- January
Meet Your OBA
Editor: Carol Manning
- February
Indian Law
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: Oct. 1, 2009
- March
Workers' Compensation
Editor: Emily Duensing
emily.duensing@oscn.net
Deadline: Jan. 1, 2010
- April
Law Day
Editor: Carol Manning
- May
Commercial Law
Editor: Jim Stuart
jstuart@swbell.net
Deadline: Jan. 1, 2010
- August
Access to Justice
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: May 1, 2010
- September
Bar Convention
Editor: Carol Manning
- October
Probate
Editor: Scott Buhlinger
scott@bwrlawoffice.com
Deadline: May 1, 2010
- November
Technology & Law Practice Management
Editor: January Windrix
janwindrix@yahoo.com
Deadline: Aug. 1, 2010
- December
Ethics & Professional Responsibility
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Aug. 1, 2010

Balancing Life

From Lawyer to First Lady

By Donita Bourns Douglas,
Director of OBA Educational Programs

Much is happening in September in the great state of Oklahoma. School is back in session; football kicks off after a long hiatus; and, roasted corn, funnel cakes and corn dogs are in abundance at the state fairs. "Prost!" can be heard in Choctaw at Oktoberfest; Route 66 is celebrated in Bristow and cooler temperatures begin to bring relief from the summer heat. Now, the OBA Women in Law Committee has given you one more reason to look forward to September!

Cherie Blair, a passionate campaigner for women's equality and human rights for women and children, will be the keynote speaker at the 2009 Women in Law Banquet to be held Sept. 22 at the Skirvin Hotel in Oklahoma City.

Known by many as the wife of former British Prime Minister Tony Blair, Ms. Blair has an impressive resume that carries far beyond her famous name. She is a leading human rights lawyer, queen's counsel and a university chancellor emeritus at the John Moores University. In addition to her human rights work, she has

launched the Cherie Blair Foundation for Women, which aims to promote financial independence for women in the developing world.

Ms. Blair also actively promotes work-life balance policies, having herself experienced the pressures and pleasures of combining a demanding career with being the wife of Britain's prime minister and a mother of four.

Being lauded as "something of a wonder woman" by the *New York Times* for balancing her professional life, public life and private life, Ms. Blair has handled the limelight gracefully and with ease.

After being abandoned by her father at an early age, Ms. Blair was brought up by a single mother in a modest home in Liverpool. She was the first member of her family to attend a university. She earned a place at the London School of Economics, graduated with top honors in law, and was at the top of her class in her bar examination.

Cherie and Tony Blair married in 1980. They have four children. The youngest,



Cherie Blair



Leo, is the first child born to a serving prime minister for over a century.

Throughout her time as prime minister's wife, Ms. Blair continued practicing law. She also is linked to many charities in which she holds active roles. They include the children's charity Barnardo's, the disability charity SCOPE, Breast Cancer Care and the Loomba Trust, which helps widows and their children across the world. She takes a very active role in their work,

visiting projects at home and abroad. Ms. Blair is an ambassador for "London 2012" and a member of UNICEF's Global Task Force on Water.

With Cherie Blair's impressive background and international profile, this year's Women in Law Conference will continue the long-standing reputation of the committee as the host of premiere events within the bar association.

The Sept. 22 events will begin with a private tea in

the afternoon with Ms. Blair and the Mona Salyer Lambert Spotlight Award winners. A pre-banquet reception will begin at 6 p.m. The banquet will begin at 7 p.m., showcasing the Spotlight Award recipients and concluding with Ms. Blair's keynote address.

So, make sure the 2009 Women in Law Conference tops your list of "things to do in September"! See you there.

Judicial Compensation Board Requests Comments on State Judicial Salaries

The Board on Judicial Compensation will hold a meeting on Tuesday, September 15, 2009. The Board wants to solicit public input as to the appropriate salary for the following Oklahoma state court judicial positions:

1. Chief Justice of the Supreme Court;
2. Associate Justices of the Supreme Court;
3. Presiding Judge of the Court of Criminal Appeals;
4. Judges of the Court of Criminal Appeals;
5. Presiding Judge of the Court of Civil Appeals;
6. Judges of the Court of Civil Appeals;
7. District court judges;
8. Associate district court judges; and
9. Special district court judges.

The Board will only consider written responses that are dated, signed by the person submitting them and received by 5:00 p.m., September 1, 2009. Responses should be submitted to the following address:

Judicial Compensation Board
c/o Administrative Office of the Courts
1915 North Stiles, Suite 305
Oklahoma City, OK 73105

Oklahoma Attorneys Selected for Leadership Academy

The Oklahoma Bar Association announces the 26 participants of its second annual Leadership Academy class selected from applicants throughout the state.

"This academy is a great opportunity for our state's attorneys to learn how to better themselves as leaders and teach them what it means to be a leader," said OBA President Jon Parsley of Guymon. "The participants will become more effective in communication and motivation leading to greater success in their professional and personal lives while having the chance to meet and interact with prominent legal and community leaders."

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

The OBA Leadership Academy will offer four sessions, set to begin in the early fall of 2009 and continue through May 2010.

Alternates for the academy are Amy Howe, Oklahoma City; David Crossley, Perry; and Kimberly Hanlon, Tulsa.

Along with many leadership training activities, Dr. Jeff Magee of Jeff Magee International in Tulsa will present at the academy. He will provide educational lectures on leadership and teamwork.

OBA LEADERSHIP ACADEMY PARTICIPANTS

ADA

Jeff Keel of the Chickasaw Nation

ARDMORE

Julie Dewbery of Hester, Austin-Dewbery & Associates

BARTLESVILLE

James Elias of Brewer, Worten, Robinett

EDMOND

A. Gabriel Bass of Bass Law Firm PC and **Jennifer Carter** of the Oklahoma Insurance Department

ENID

Kaleb Hennigh of Mitchel, Gatson, Riffel & Riffel PLLC

JENKS

Carol King of the Law Office of Carol J. King

MUSTANG

Nathan Richter of Denton Law Firm

OKLAHOMA CITY

Faustine Curry of Miller Dollarhide; **Tynan Grayson** of Crowe & Dunlevy; **Larry Harden** of the Oklahoma Department of Agriculture, Food & Forestry; **Celeste Johnson** of Phillips

Murrah PC; **Jennifer Kirkpatrick** of Elias, Books, Brown & Nelson PC; **Lane Neal** of the Oklahoma County District Attorney's Office; **Christopher Papin** of Burnett & Brown PLLC; **Reginald Smith** of Pierce, Couch, Hendrickson, Baysinger, Green; and **Nancy Winans-Garrison** of the Oklahoma Department of Human Services

SHAWNEE

Joseph Vorndran of Canavan & Associates

STILLWATER

Martin High of Oklahoma State University and **Jill Ochs-Tontz** of the Payne County District Attorney's Office

TAHLEQUAH

Chrissi Nimmo of the Cherokee Nation Office of the General Attorney

TULSA

Stacy Acord of McDaniel, Hixon, Longwell & Acord PLLC; **Anthony Gorospe** of Gorospe & Smith PLLC; **Ann Keele** of Monroe & Associates; **Adrienne Watt** of Legal Aid Services of Oklahoma Inc.; and **Amy Wilson** of Child Support Services

OBA Offers Free Tech Fair

Come one, come all to the OBA Technology Fair, featuring ABA TECHSHOW® Roadshow on Sept. 24, 2009 at the Oklahoma Bar Center. There will be lots of fun and educational events along with a great opportunity to pose your toughest technology questions to some knowledgeable experts.

We welcome a group of very special guests including Debbie Foster, president of InTouch Legal who has been named ABA TECHSHOW® 2010 chair; Tom Mighell, senior manager, Professional Services for Fios Inc. and ABA TECHSHOW® 2008 chair and Adriana Linares, president of LawTech Partners, a veteran of many ABA TECHSHOWs. They will join our own Jim Calloway, also a former ABA TECHSHOW® chair.

The day will include a day of free educational presentations, not for MCLE credit, starting at 9 a.m. on many aspects of law office technology.

From better ways to use Microsoft Outlook to how to be a mobile lawyer to how to run a paperless office to latest tools in collaborative technology, there is something in this program for every lawyer. Our featured program is the ever-popular 60 Tips in 60 Minutes at 11 a.m.

Special Statewide Webcast of 60 Tips in 60 Minutes

For those of you who cannot make it to the Bar Center, but would still like to participate, we are having a special statewide Webcast of the 60 Tips in 60 Minutes session beginning at 11 a.m. for a bargain price of only

\$10. As previously noted there is no MCLE credit provided for viewing this program either live or online, but this is a great opportunity for you to pick up some great technology tips. Feel free to invite others to your office to watch the program on your computer with you.

To view the webcast, register in advance at the following link:
<http://tinyurl.com/mhpgm7>

You can also visit the OBA CLE event calendar for Sept. 24, 2009.

Door prizes

Just to make sure that the program starts with a bang, the first 100 lawyers in the door that morning will receive a free flash drive.

There will be drawings for other prizes during the day, including the grand prize of a free registration for ABA TECHSHOW 2010® in Chicago.

Lunch for those who register in advance

Lunch will be provided for those who notify us in advance.

Build Your Law Firm Web site at the Fair

Do you feel like you are the only lawyer without a law firm Web site? Here's your chance to remedy that problem in one day at OBA Technology Fair.

A special arrangement with T&S Web Design gives Oklahoma lawyers the opportunity to have professional web technicians help them create their law firm Web site during the OBA Technology Fair for a bargain rate of only \$500. This price

includes domain name selection and registration, basic Web site design and hosting by T&S Web Design for a year.

This pricing is only good on the day of the OBA Technology Fair.

There are a limited amount of technicians available that day so e-mail Sharon Dotson at sharond@okbar.org to reserve a time. This is for a basic Web site design as defined by T&S. To benefit from this offer it is very important you bring digital documents with text for your Web site and digital photos to the meeting on a flash drive. For those of you who do not have a law firm Web site, this is an incredible opportunity.

Vendor Demonstrations

CoreVault, Thomson West and In Touch Legal will be doing demonstrations of their technology products.

Oklahoma Bar Circle

If you have not yet set up your home page on Oklahoma Bar Circle, OBA staff will be available to help you do that. You do not need to make an appointment in advance to take advantage of this opportunity.

Food and Fun

There will be fun events and snacks at the technology fair. We hope you will be able to spend all or part of your day with us.

Registration

Call Mark at (405) 416-7026 or (800) 522-8065 to RSVP for all day, morning only, afternoon only or lunch only.

OBA Technology Fair Featuring ABA TECHSHOW® Road Show

September 24, 2009 • Oklahoma Bar Center

9:00 a.m. The Lawyer's Guide to Managing Client and Case Information with Outlook

Look around your office — count the yellow pads, sticky notes, random scribbles and “While You Were Out” slips. It doesn’t have to be this way! Microsoft Outlook can help keep you better organized with your client, contact and case information, including e-mail, phone calls, dates, to dos and miscellaneous notes, all at your fingertips. It can also help you to work more effectively which, in turn, will improve client service. Attend this session to learn how today’s most popular information management tool can take you to a new level of organization and client service.

Speakers: Adriana Linares and Debbie Foster

9:50 a.m. Break

10:00 a.m. Collaboration Tools for Lawyers

Collaboration is no longer an option. Online tools like WebEx, Sharepoint, Acrobat Connect, Basecamp, Zoho, wikis and others make it easy for lawyers to work instantaneously with clients and colleagues, whether they’re across the hall or on the other side of the world. Come join the author of an American Bar

Association book on collaborative technologies as he discusses the options available to lawyers, developing a collaboration strategy, and the ethical implications of working with others in an online environment.

Speaker: Tom Mighell

10:50 a.m. Break

11:00 a.m. 60 Tips in 60 Minutes

Everyone loves a great tip! At ABA TECHSHOW, the “60 Tips in 60 Minutes” program is one of the most popular sessions year after year. Our panel includes the current ABA TECHSHOW chair and two past chairs. They will bring you tips on the use of technology in

your practice, including time-saving tech tools, useful Internet resources, ways to save money, ways to use the software you currently own more effectively and much more. This fast-paced program will have something for everyone and focus on tips you can put to work immediately.

Speakers, Adriana Linares, Debbie Foster, Tom Mighell and Jim Calloway

12:00 p.m. Lunch

1:00 p.m. Getting to Paperless: A Lawyer's Step-by-Step Guide

In this session we’ll construct a paperless law office from start to finish - in only one hour - using proven systems designed especially for law office workflows. You’ll be surprised at just how easy and inexpensive it really can be. Take away practical advice about what to get, who should have and use it, and even where it should be placed within your office.

Speakers: Jim Calloway and Debbie Foster

1:50 p.m. Break

2:00 p.m. Mobile Lawyering

From smart phones to remote access to office systems, more lawyers are able to practice law from anywhere. There are so many tools available, learn how you can become a true road warrior and better serve your clients.

Speakers: Tom Mighell and Adriana Linares

2:50 p.m. Break

3:00 p.m. Identity Marketing and Social Networking

No matter the size of your firm, you should be known by your brand. Come learn how to create a unique brand - and how to ethically use it in print and online. The growth of online communities and networks has made your professional reach much wider than ever before. Learn to promote your brand through social networks and virtual worlds to increase your business. We’ll also discuss online reputation management. Make sure you stay on top of what others are saying about you!

Speakers: Jim Calloway and Debbie Foster

4:00 p.m. Adjourn



Emerson Hall Gets an Upgrade

The sound of drills, jack-hammers and buzzsaws can once again be heard at the Oklahoma Bar Center – but this time, it's for Emerson Hall, the building's large basement meeting room.

In late June, crews installed temporary walls to seal off the entrance to the underground floor, and work will continue for the next few weeks.

OBA Executive Director John Morris Williams said this is the first renovation for Emerson Hall since it was built in 1989.

"This room sees several thousand visitors a year, and after 20 years, it's seen some wear and tear," he said.

Along with cosmetic upgrades, including water damage repairs, the restrooms will become ADA-compliant, and the food service area will be reconfigured to make meal service easier and less disruptive to seminar participants and others using the building.

The hall will be carpeted and new ceiling panels and light fixtures will be added overhead. The room will also have additional audio-video components that will enhance speakers' presentations.

Temporary walls have been installed to keep noise and dust to a minimum.



Both the men's and women's bathrooms are being renovated to be ADA-compliant and will feature automatic doors, toilets, sinks, and soap and towel dispensers.



Workers busily revamp Emerson Hall. When completed, the room will be carpeted and feature new lighting and audio-video components.



Payne County Bar Hosts Board of Governors



County bar members organized social activities the day before the board's July 24 meeting in Stillwater. A tour of Gallagher-Iba Arena (home to this large Pistol Pete bronze statue), Pickens Stadium, a visit to a local vineyard and golf were offered.

OBA President Jon Parsley and Payne County Bar President Jodie Gage at the Thursday evening dinner.



The dinner featured a roast and toast to retiring Judge William Wheeler (second from left). Speakers included (from left) Stillwater attorneys Jamie Murray and Melissa DeLacerda, Judge Donald Worthington and Judge Phillip Corley.

OBA Vice President Linda Thomas with OBA board members Deborah Reheard and Donna Dirickson.



Payne County is home to several OBA past presidents including (from left) 2002 President Gary Clark, 2003 President Melissa DeLacerda, OBA Supreme Court Liaison Justice Steven Taylor and 1997 President Willie Baker. Unable to attend the dinner was 1969 President Winfrey Houston.

2010 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 4, 2009

OFFICERS

President-Elect

Current: Allen M. Smallwood, Tulsa
Mr. Smallwood automatically becomes OBA president Jan. 1, 2010
(One-year term: 2010)
Nominee: **Deborah Reheard, Eufaula**

Vice President

Current: Linda S. Thomas, Bartlesville
(One-year term: 2010)
Nominee: **Mack K. Martin, Oklahoma City**

BOARD OF GOVERNORS

Supreme Court Judicial District Three

Current: Cathy M. Christensen, Oklahoma City
Oklahoma County
(Three-year term: 2010-2012)

Supreme Court Judicial District Four

Current: Donna Dirickson, Weatherford
Alfalfa, Beaver, Beckham, Blaine, Cimarron, Custer, Dewey, Ellis, Garfield, Harper, Kingfisher, Major, Roger Mills, Texas, Washita, Woods and Woodward counties
(Three-year term: 2010-2012)
Nominee: **Glenn A. Devoll, Enid**

Supreme Court Judicial District Five

Current: Peggy Stockwell, Norman
Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties
(Three-year term: 2010-2012)

Member-At-Large

Current: Deborah A. Reheard, Eufaula
(Three-year term: 2010-2012)
Nominee: **David A. Poarch, Norman**

Summary of Nominations Rules

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

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

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

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Vacant positions will be filled at the OBA Annual Meeting Nov. 4-6. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2009. Nomination and resolution forms can be found at www.okbar.org.

Oklahoma Bar Association Nominating Petitions

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

OFFICERS

VICE PRESIDENT

MACK K. MARTIN, OKLAHOMA CITY

Nominating Petitions have been filed nominating Mack K. Martin for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2010. Fifty of the names thereon are set forth below:

Cynthia Lynne Andrews, Jennifer Lynn Ivester Berry, Matthew Wayne Brockman, Len Buford Cason, John W. Coyle III, John William Coyle IV, Faustine Elizabeth Curry, Steven Crane Davis, Jack S. Dawson, Jo Anne Deaton, Eric Scott Fisher, Dan Steven Folluo, Scott Christopher Freeny, Charles E. Geister III, John Joseph Griffin, Mark S. Grossman, Larry Doyle Henry, Theresa Noble Hill, Kristin L. Huffaker, Bradley Allen Jackson, James D. Johnson, Robert L. Johnston, Michael S. Laird, Judith Leslie Lareau, Kerry R. Lewis, Randall Edwin Long, Robert Garner McCampbell, Lindsay Jane McDowell, D. Kent Meyers, Judy Hamilton Morse, Clyde A. Muchmore, Michael Jerome Novotny, Robert O. O'Bannon, James David Ogle, Cynda C. Ottaway, Armand Paliotta, Drew Thomas Palmer, Matthew S. Panach, Kevin Brock Ratliff, Christopher L. Rhodes III, John D. Robertson, Kurt Maguire Rupert, Earl Allen Skarky, Kendall Anne Sykes, John Michael Thompson, Cannon Miles Tolbert, Mary Hirth Tolbert, John Hampton Tucker, Charles Stephen Turpin, Rick L. Warren and Clyde Russell Woody.

A total of 54 signatures appear on the petitions.

BOARD OF GOVERNORS

SUPREME COURT JUDICIAL DISTRICT 4

GLENN A. DEVOLL, ENID

Nominating Petitions have been filed nominating Glenn A. Devoll for election to the Oklahoma Bar Association Board of Governors, Supreme Court Judicial District No. 4 seat for a three-year term beginning January 1, 2010.

A total of 54 signatures appear on the petitions.

MEMBER-AT-LARGE

DAVID A. POARCH, NORMAN

Nominating Petitions have been filed nominating David A. Poarch for election of Member-at-Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2010. Fifty of the names thereon are set forth below:

Andrew M. Coats, C.D. Northcutt, Charles D. "Buddy" Neal Jr., John W. Raley Jr., Guy Clark, Michael C. Mayhall, Don G. Holladay, Brian T. Hermanson, Laura Pringle, Michael P. Sullivan, Lynn A. Pringle, Edward W. Dzialo Jr., David C. Butler, William Woodson Jonella J. Frank, David Swank, Sandee Coogan, Ernest F. Godlove, Robert Lindsay Bailey, Amelia S. Pepper, John J. Gardner, Walt Brune, Grace K. Yates, Patrick Quillian, James. E. Warner III, Heidi J. Long, Stephen R. Johnson, Tim E. DeClerck, E.W. Bill Shaw, Larry D. Lahman, Joe B. Dutcher Jr., Marcus Bivines, Scott McDonald, Mike Winchell, Brenda H. Barnes, Stan Evans, Robert L. Mitchell, Mark E. Fields, Brett D. Cable, Jeanne Snider, Rickey J. Knighton, Jeff H. Bryant, Rebecca R. Frazier, R. Blaine Nice, Leah K. Bunney, Gregory T. Tontz, Sean Michael McKelvey, Thomas E. Salisbury, Grady Lee Turner and Paige Lee.

A total of 69 signatures appear on the petitions.

Sovereignty Symposium 2009

Oklahoma City, June 3-4, 2009



Chief Justice James E. Edmondson, Justice Yvonne Kauger, Vice Chief Justice Steven Taylor, Mr. Boone Pickens and Gov. Henry Bellmon attend the Oklahoma Indian Affairs Commission Tribal Leaders' Luncheon.



Tenth Circuit Court of Appeals Chief Judge Robert Henry and Gov. Henry Bellmon

Justice Rudolph Hargrave (center) visits with members of the Veteran's Color Guard, John T. McIntosh, Mark McKenzie, Jerry Riley and Dan Kendrick.



Justice Tom Colbert addresses a panel.



Lt. Gov. Jari Askins visits with Madeline Hargrave and Suzanne Edmondson.



Justice James Winchester, Justice Marion Opala and Judge A.J. Henshaw



Rep. Ken Miller meets with Justice James Winchester.



Julie Rorie and Red Earth Board Member David Campbell



OBA President Jon Parsley addresses the opening ceremony.



Moderator and members of the Water Law Panel, Attorney General Drew Edmondson; Associate Professor Emily Meazell of the OU College of Law; Stephen Greetham, Special Counsel for Water and Natural Resources for the Chickasaw Nation; and Professor Tai Helton of the OU College of Law.



Enjoying the reception are Julie Rorie, Sovereignty Symposium Executive Coordinator; Christi Craddock; Kyle Shifflett, Oklahoma Supreme Court Legal Assistant; Lin Buchanan, Chief Fiscal Officer for the Administrative Office of the Courts; and Alice Hayes, Finance Officer for the Administrative Office of the Courts.



Chief Justice James Edmondson visits with Dereck Smalling, the artist of the painting presented to Mr. Pickens.



OBA/CLE Caribbean Castaway

This July, bar members and their families enjoyed a five-day cruise to Cozumel and Progreso, Mexico. Passengers' cares faded into the sunset as they enjoyed plentiful fun, fellowship and CLE.



OBA President Jon Parsley and OBA Vice President Linda Thomas enjoy an offshore excursion.



Nancy and Timothy Wells

Melvin and Deborah Gilbertson



A friendly face welcomes Melissa DeLacerda to Cozumel.



Suzanne and Chief Justice James Edmondson



Judge Danny and Denise Allen

It Happened Again

By John Morris Williams

Once again, a sizeable list of names went to the Supreme Court to suspend members' licenses for failure to pay dues or to have sufficient CLE credit reported. Every year I think, "What else can we do to get the numbers lower?" First, I know some folks just decided not to continue their membership and to let their membership lapse by not paying dues. That works.

In a couple of years the Supreme Court will issue an order striking the name from the Roll of Attorneys. The problem with that method is that it will show up as an adverse action in the national reporting services if the member seeks licensure in another jurisdiction. The best way to cancel a membership is a written resignation. I always hate to lose a member, but this method keeps the record clean. So, if you want to stop your membership, please send me a written resignation, and the record will be clear that you voluntarily surrendered your license without ill effect.

Next, invariably we get several complaints from members who claim they did not get their dues statement. We always investigate every complaint. Here is how the story usually goes. We check membership records. The records show we mailed to the last

address provided by the member. Herein lies the rub. We can only mail to the address that is given to us. Even when the mail is returned, we do a search for the member. We check www.oscn.net and see if there is a recent filing that would have a better address, pay search companies to help locate members and try to reach members by phone. As you can see, we spend a fair amount of time and resources looking for folks who do not give us a good address or keep their address current.

UPDATING ROSTER IS EASY

We strive to make it as easy as possible for members to keep their addresses current with us. At the MyOkbar section of our Web site, members can log into the secure portion of the site and change their address there. However, no good deed goes unpunished. On more than one occasion, members have gone into the site and deleted their address and left the contents blank. This deprives us of even a last known address. When we have any kind of an address, we mail three notices before a letter to show cause is sent by certified mail. It is only after these efforts that the member goes on the suspend list. After

the name appears in the order suspending for nonpayment of dues or failure to comply with mandatory continuing legal education requirements, the penalties and reinstatement fees dwarf the original amount owed.

There are two Oklahoma Supreme Court opinions that require members to maintain a current address with the OBA. Still, it is a continuing problem. I joined with General

“The best way to cancel a membership is a written resignation.”

Counsel Gina Hendryx, in asking the Board of Governors to allow us to seek an amendment to the Rules Creating and Controlling the Oklahoma Bar Association and the Rules Governing Discipline to include express language requiring members to maintain a current address with the OBA. Hopefully, this express statement of the requirement will encourage more members to keep their addresses current with us.

continued on next page

To ensure that you do not have an issue with OBA information not reaching you, I want to encourage you to log into MyOkbar at www.okbar.org and check your address. If the information is incorrect, you can quickly correct it and avoid the potential expense and possible suspension of your license. We are dedicated to the professional success of each of our members. However, we need you to keep us informed of how we can contact you.

DATES TO DOCKET

I know you are busy and deal with the stress and pressures of practice. Because we know how hectic your lives can be, we have some great tools built to simplify and accommodate you. Please help us by keeping your contact information current. As a last reminder, you may want to docket Jan. 2 for payment of dues and Dec. 31 for completion of your CLE requirements. We send a preliminary CLE report and the dues statement in November. If you have not heard from us, please check your address online or call us. Please let me know of anything else that we can do to assist you in avoiding additional expense or the suspension of your license.

Lastly, I hope you have had a great summer and are getting geared up for some great events this fall at the OBA and the Annual Meeting!



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



BEING A MEMBER HAS ITS PERKS

- ❑ **www.okbar.org —**
main site or front door for the OBA with links to all other OBA Web presences and much information for members as well as a great deal of information for the public.
- ❑ **Online CLE —**
quality OBA/CLE online programming, plus online seminar programs from other state bar associations. It's a convenient way to get up to three hours MCLE credit.
- ❑ **Practice management/ technology hotline service —**
free telephone calls to the Management Assistance Program (MAP) staff and the OBA Director of Information Systems for brief answers about practical management and technology issues, such as law office software, understanding computer jargon, staff and personnel problems, software training opportunities, time management and trust account management. Call (405) 416-7008.

Lawyers and Alligators

By Jim Calloway, Director, OBA Management Assistance Program

There's an old saying that "when you are up to your waist in alligators, it is hard to remember your objective was to drain the swamp." (OK, maybe some of you heard it differently, but that's the bar journal-friendly version.)

The point of that witticism is not alligators, but priorities. When survival is at stake, everything else becomes a lower priority. Long-term planning becomes totally unimportant until you are sure you have a long-term future.

When I talk with lawyers on the phone, I often hear that they have spent their morning or afternoon "putting out fires." We all know how that goes. One may be an expert in planning and organization, but unexpected things still crop up frequently.

We lawyers live by our dockets. (The rest of the world uses the term calendars, but the rest of the world never uses phrases like *res ipsa loquitur* in conversation either.)

The young lawyer will be taught by circumstances that calendaring an item is of the utmost urgency. If you do not put a court appearance on your office calendar as soon as you learn of it, there is the possibility that the next time you think of it will be when your office gets a notice of

default judgment or dismissal. Careful attention to the calendar is a critical part of law office management.

DOCKET

But while the calendar (aka docket) is a great tool for managing appointments, court appearances and deadlines, it is not a great tool for setting priorities. The most obvious example occurs when a hypothetical lawyer looks at the calendar for tomorrow and sees a deadline that requires a few dozen hours of work to complete.

Of course, lawyers don't (and shouldn't) operate like that. Most scan the calendar for weeks in the future regularly and use some combination of to-do lists, ticklers and other systems. But like so many office systems, using those traditional methods that are paper-based may not allow the lawyers to take full advantage of the digital tools that are available today.

For example, exclusive reliance on a pocket calendar that the lawyer carries in his or her pocket or purse is too dangerous a business practice. If it is lost, there is a big potential risk. That is why your professional liability carrier requires that you certify that you maintain duplicate dockets. But, if you have a courthouse prac-

tice, writing entries in the pocket calendar while you are at the courthouse leaves a time-consuming job for staff to synchronize the pocket calendar with the office calendar by comparing the two calendars.



At a minimum, you should make an additional note of what additions you are making and let the staff use that to update the office docket.

If you happen to leave the pocket calendar in the office overnight, you are still subject to risk such as a fire or other calamity that might destroy both calendars.

Most lawyers understand that a digital calendar is safest and best because you

can regularly back up the data offsite. Synchronize the calendar with a smart phone and you'll have it with you most all of the time. This is true unless you have a judge who bans lawyers from having mobile phones in the courtroom. While that issue is outside the scope of this article, a recent article on law.com at <http://tinyurl.com/mlde25> lists the arguments in favor of lawyers having mobile phones in courtrooms.

TO-DO LIST

Let's move on from calendars to "to do" lists. "To do" list is a clear, but antiquated term. In the digital world, we call these task lists. But whatever you call them, these are a critical part of organization and management. You make a grocery list because you will not recall everything you need at the store. But you also make a grocery list so you can shop quickly and efficiently, instead of pausing to make sure you haven't missed anything.

So it is with task lists. You record something in a task list to make sure you don't forget it. But you also use your task list to organize and prioritize. The problem for most of us is that a complete list of all pending tasks might well be so huge it is impossible to deal with, not to mention the fact it would be daunting to view and perhaps even depressing to contemplate. So no one keeps every possible future assignment on their task list. It is for what we need to be doing now and in the short term. A client's file might have a list of dozens of items that need to be done, but the

lawyer's current task list only reflects a few, often those which must be done before the others can be accomplished.

The same rationale for why the office calendar should be digital applies to the task list as well. It can be synchronized to the smart phone and the data safely backed up. It is true that a paper task list is not as likely to be lost as it rarely leaves the lawyer's desk. But it is equally true that a digital task list allows you to enter a task that must be done three months from now and set it to be brought to your attention at the appropriate time. It is not really possible to do that with a paper task list, which is why so many tasks get placed on the office calendar when they really shouldn't be there. We've all put "start on X" on the calendar at 9 a.m. on some future date when those items



should be tasks rather than calendar entries.

Let me be clear that I understand that for many of you working from a paper task list is the way you feel comfortable. You should print out your task list each morning, use it all day and then you or staff can enter completed and new tasks at the end of the day.

Many people now use digital task lists.

DIGITAL TASK LIST TOOLS

So what digital task list tool should you use? Well, for the vast majority of readers, you should be using the task list that is a part of your practice management software solution. It is the superior tool because it integrates with all of the other information contained in the digital client file. So when you are working on the client file you do not have to re-enter data like client name and file name when you create a new task.

If you do not have practice management software yet, Microsoft Outlook handles tasks as well as e-mail. In fact, Microsoft Office 2007 has a very powerful and easy to use tasks feature. One great time-saving feature is when an e-mail in your inbox contains a task you can drag and drop the e-mail into the tasks, rename it as a task and then delete it from your inbox. There's more on this at my blog, online at <http://jimcalloway.typepad.com>.

There are online task management utilities as well. Remember the Milk is a very popular free

tool and is available at www.rememberthemilk.com. Searching for “to-do list software” in Google will locate desktop applications for you.

Google Calendar was upgraded with a powerful tasks feature this year, although some lawyers are uncomfortable using this tool due to perceived security and terms of service issues. I use many Google apps.

The challenge in properly using a tasks list is determining your priorities from it. What do I have to get done today? What do I want to get done today? This is, and likely always will be, a challenge, in part because this is a moving target and seems to be constantly changing. But, like the shopping list, having the tasks organized and in front of you whether on paper, computer monitor or smart phone makes adapting to changes easier.

TIME MANAGEMENT

I believe that prioritization is one of the most important skills of our times. We all have more things that we would like to do and should do than we will ever be able to do. Determining what eventually gets done and what doesn't is our daily

“...a digital task list allows you to enter a task that must be done three months from now and set it to be brought to your attention at the appropriate time.”

challenge in both our personal and professional lives.

So now we are back to the alligators and putting out fires, the metaphors for those emergency tasks that seem to require immediate attention and make us drop whatever we are doing to address them. These are the things that upset our priorities and increase our stress. How do we deal with these? For me, the answer is not perfect at best. But we have to cope and we can always improve.

First, if one of these emergencies that pops up and requires your immediate attention can be handled in a couple of minutes, it probably makes sense just to do it right then. You won't benefit by adding it to your list if it can really be done in 120 seconds or so.

But if it is going to take a while to accomplish, even though it may be a true

emergency, a moment of reflection is required. In the language of time management expert Stephen Covey, we all run the risk of filling our time with tasks that are “urgent” but not “important.” So before you drop everything to fight that alligator or fight that fire, you should look at your priorities for the

day. Can it be delegated? Should you finish a more urgent project first? Can some other priority be bumped until tomorrow? Can some other priority be delegated? Or is there no choice but to add to the task list “call family and tell them I will be late” or add something to the “work to be done at home tonight” category?

This is, of course, the best example of why we should be working on the things now that are due next week, with those things that are due tomorrow already accomplished. That is not easy, and some would say not possible, in a busy law practice. But hopefully the information you have read here will help.

And, in the spirit of full disclosure, I must note that as I am finishing this piece, it is past the due date.

Beware of Internet Scams

By Gina Hendryx, General Counsel

The Nashville law firm of Bradley Arant Boult Cummings recently fell victim to a debt collection scam that resulted in a loss to the firm of more than \$400,000. The firm reported the scam to the FBI, which led to the arrest of the suspects and the freezing of the funds. Unfortunately, many other firms have not had the same outcome and have lost hundreds of thousands of dollars.

Similar Internet scams are targeting attorneys in Oklahoma and across the country. These are sophisticated debt collection schemes wherein the targeted law firm is contacted by an out-of-state lawyer or company seeking assistance in enforcing a contract or collection of a debt from a local corporation. These alleged "clients" go so far as to set up dummy Web sites, phone numbers and addresses in an effort to appear legit. The law firm may or may not check the references to confirm that the client does indeed exist and then enters into a contract for legal services.

The law firm is authorized by the client to send a demand letter to collect the debt and later receives a cashier's check made payable to the law firm. The law firm deposits the check into its trust account, confirms the funds are available and wires the money to the client.

Unfortunately, the next contact is usually from the bank notifying the law firm that the check was fraudulent and the deposit is being reversed. The client and debtor are frauds, who can no longer be found and the law firm's trust account is out the proceeds.

Oklahoma attorneys have reported being approached for representation in similar matters. One such attorney went so far as to wire the proceeds to the imposter client. However, his trust



“...be suspicious of ‘too good to be true’ opportunities.”

account did not have sufficient funds to cover the withdrawal, and the wire transfer failed resulting in no loss to the attorney or his “real” clients.

Lawyers should use due diligence when investigating a prospective client. Request references, use Internet and banking resources -- and be suspicious of “too good to be true” opportunities. When you receive funds, confirm that the deposit has cleared before transferring funds from your account. Require deposits

from unknown sources to be wired to your account rather than accepting personal or cashier's checks.

If you have doubts about the check, send it for “collection” rather than depositing it into your account. Don't be pressured by a client demanding money from a recently made deposit and carefully research those potential clients that come out of “nowhere” with fast, easy deals. They are usually neither!

Print or Electronic?

THE Oklahoma Bar JOURNAL
Volume 78 ♦ No. 35 ♦ Dec. 22, 2007



Court Material

You now have a choice.

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If you want the electronic version of the court issues and didn't indicate that on your dues statement go online to <http://my.okbar.org/Login> and sign in. Click on "Roster Info" to switch to electronic. Be sure your e-mail address is current.

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OBA/CLE WEBCASTS



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Retirement Reception
for the
Honorable
Glenn D. Adams

Friday, Aug. 28, 2009
4-6 p.m.

Oklahoma Supreme Court
Main Hallway
2nd Floor - Capitol Bldg.
23rd & Lincoln
Oklahoma City

*Court of Civil Appeals Judge Glenn D. Adams
has announced his retirement,
effective August 31, 2009.*

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on the west side of the Capitol Building.
This reception is open to the public.*



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**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT
OF GERALD FRANCIS MEEK, SCBD #5534
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 Gerald Francis Meek 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, September 3, 2009**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Roger Scott's Legacy of Leadership

By Richard A. Riggs

The Oklahoma Bar Association, and particularly the Oklahoma Bar Foundation, suffered a huge loss with the unexpected death of Tulsa Roger Scott on July 1. Roger had served as a trustee of the foundation since January of 2003 and during his entire tenure on the board, chaired, in exemplary fashion, the foundation's Development Committee. The Development Committee is the committee charged with seeking donations to the foundation through the OBF Fellows program and other efforts.

I keep on my desk a pamphlet published by the Character Training Institute that identifies seven "Leadership Perspectives." The pamphlet notes that "success requires viewing problems" from these seven perspectives. Those perspectives are those of a visionary, teacher, server, organizer, mediator, idealist and provider. Roger was one of those rare individuals who exhibited all these perspectives in his work, both as a practicing lawyer and as a volunteer.

Roger had an unqualified dedication to the Oklahoma Bar Foundation and the good work it does in the name of Oklahoma lawyers. He was an active board member, always

willing to take on any assignment – even taking charge of the tasks most of us would prefer to avoid – like asking friends for money. He rarely missed meetings and was always prepared with direct and probing questions. He was instrumental in implementing new OBF programs – not all those programs bore fruit, but Roger simply took failure as an opportunity to try something new. He always led by example and by gentle encouragement. Most impressively, he pursued all this with a positive spirit and a sense of humor.

Roger's volunteer efforts extended far beyond the bar foundation. He served in a number of capacities with the Tulsa County and Oklahoma Bar Associations and much of that work focused on an issue near to his heart - the ethical standards to which lawyers are held. He served for a number of years on the Tulsa County Bar Association Professional Responsibility and Grievance Committee. Fellow Tulsa Phil Frazier recalled that when Roger became chair of this committee, the committee had more than 90 cases pending – when Roger completed his term one year later, all pending cases (that's right, **all cases**) had been resolved.



Roger Scott

His dedication to legal ethics led to service as the chair of the OBA Legal Ethics Committee, as a member of the OBA Professional Responsibility Tribunal and as chair of the City of Tulsa Ethics Committee. As a result of his long standing dedication to legal ethics, Roger was awarded the John E. Shipp Award for Ethics in 2002.

It will come as no surprise to learn that the trustees of the bar foundation uniformly felt a need to honor Roger's contributions to the foundation. To that end, at the July 17 trustees' meeting, the trustees approved the establishment of an annual award in Roger's memory, designed to recognize outstanding efforts on behalf of the foundation. Roger labored mightily to fulfill OBF's purpose – *Lawyers Transforming Lives* – and others who similarly contribute to this cause will be honored each year with this award.

The first recipient of the award will be recognized in November, in conjunction with the OBA annual meeting.

I know Roger will be deeply missed by his family, but I also know they are blessed with many wonderful memories. The thoughts of all the foundation trustees (and many other Oklahoma lawyers) are with Roger's family during this difficult time.

Roger's work with the foundation was centered on raising funds. We are now entering that time of year when the foundation's focus turns in another direction – awarding grants. This is a task that a number of foundation trustees are about to undertake with the same commitment and dedication that Roger exhibited. The foundation is now receiving grant applications. Applications require detailed infor-

mation regarding the potential recipient and its mission, including detailed financial information and a narrative description of the proposed use of OBF funds. Applications are distributed and reviewed by all members of the foundation's Grants and Awards Committee. This year, this committee is under the leadership of Judge Valerie Couch. Other committee members are Dietmar Caudle, Cathy Christensen, Judge Dierdre Dexter, Kevin Donelson, Judge Shon Erwin, Luke Gaither, Leonard Logan, Brooke Murphy, Judge Millie Otey and Dennis Smith. After reviewing the applications, the committee meets for a full day of interviews with applicants. This year, interviews are scheduled for late August. Following the interview process, the committee makes recommendations to the OBA board

which will, in all likelihood, award grants at its September meeting. Service on the Grants and Awards Committee entails a significant time commitment, particularly at this time of year, but many trustees ask to be placed on this committee, as they find that direct exposure to the many organizations supported by OBF to be a uniquely rewarding experience.

Oklahoma lawyers can rest assured that the foundation's Grants and Awards Committee will be carrying out the grant process with a care and sensitivity appropriate to the task, and with an eye to the OBF mission – *to promote justice, fund essential legal services and advance public awareness of the law.*

Richard A. Riggs is president of the Oklahoma Bar Foundation. He can be reached at Richard.riggs@mcafeetaft.com



FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

Name: _____
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Many thanks for your support & generosity!

Making Equal Justice for All a Reality, One Client at a Time

By Cindy Goble

Equal justice for all is one of the legal profession's loftiest goals. With this in mind, what are lawyers willing to do to make equal justice for all a reality?

Consider what it must feel like to be poor and facing the loss of custody of your children to an abusive spouse merely because you cannot afford to pay an attorney. How must a vulnerable senior citizen feel when he or she is preyed upon by predatory lenders or fraudulent repairmen? How about

“Many deserving applicants who qualify for services are turned away simply due to the lack of resources.”

the tragic plight of the elderly victimized by those they love and trust? More and more people are facing legal problems due to the downturn in economic conditions in this country. Sometimes a little legal advice is all they

need to alleviate the problem, but sometimes they need more.

Laws are constantly changing and can be quite complicated to a layperson. It is hard to imagine how anyone can defend or prosecute an action without benefit of counsel, especially in cases involving child custody, loss of a dwelling or loss of income. A defendant in a criminal matter has the constitutional right to representation, and such representation for indigent defendants must be provided by the government. However, in a civil matter, the government has no such responsibility. Of course there are exceptions, such as in contempt actions, but the norm is that if someone needs legal counsel in a civil matter, that person must pay for representation.

In recognizing that social or financial barriers to equal justice exist, the Rules of Professional Conduct exhort attorneys to make efforts toward removing those barriers. There are a couple of ways to break down social or financial barriers to equal justice for all. An attorney can either donate money or time and expertise to non-profit organizations serving

“at risk” populations. Pro bono participation is beneficial in many ways. Participation can relieve the burden of the court from having to deal with pro se litigants. It also benefits legal services programs by taking some of the burden off of an already overloaded system. Many deserving applicants who qualify for services are turned away simply due to the lack of resources.

PRO BONO ATTORNEY BENEFITS

While clearly pro bono advice or representation is beneficial to the client, many attorneys do not realize the benefits pro bono service can be to them — both personally and professionally. First of all, it is remarkably rewarding for a pro bono attorney to represent a person who otherwise would not have had the benefit of legal advice or representation. Secondly, pro bono participation through the Pro Bono Program of Legal Aid Services of Oklahoma Inc. offers abundant benefits, such as professional liability insurance coverage, free continuing legal education courses, discounts on many continuing legal education courses

offered through the OBA, access to the advocate Web site at www.probono.net/ok and consultation with experienced legal aid attorneys, just to name a few.

Sometimes low-income clients contact attorneys directly. If a potential client contacts a private attorney and subsequently qualifies for services at Legal Aid, that client can be treated as if the referral had originated through Legal Aid. If a lawyer is currently providing pro bono representation to someone who qualifies for Legal Aid, that lawyer would only need to call the local Legal Aid office and "self-refer" the case. Contact information for Legal Aid offices throughout the state of Oklahoma is available at www.legalaidok.org.

In addition to the many benefits of pro bono representation offered by Legal Aid, nothing prohibits that pro bono attorney from collecting attorney fees from the adverse party, as long as the fee does not come from the client or from assets the

client would have been entitled to receive. Furthermore, goodwill is generated by pro bono representation. Clients are so proud of having their own attorney that they will likely tell family, friends and acquaintances, which can be an excellent source of private pay case referrals in the future.

There is absolutely no limit to pro bono opportunities! Even if an attorney cannot take cases for representation due to his or her work schedule, that attorney can participate in, or even launch, an after-hours or weekend outreach project. Legal Aid will gladly provide all the training and support needed to make such an effort a success. Additionally, such volunteer attorneys are amply protected by Legal Aid's professional liability insurance.

In the past, some attorneys have been hesitant to participate in outreach clinics due to concerns regarding conflicts of interest. The Rules of Professional Conduct, 5 O.S. § Rule 6.5 (OSCN 2009),

Appendix 3-A, provide some protection to those who participate in projects sponsored by nonprofit and court-annexed limited legal services programs. The rule excuses the conflict of interest as long as the attorney is not aware of the conflict and it is a short-term limited legal service without expectation that there will be continuing representation in the matter.

Why not begin an advice clinic in your church or other organization? Even though most attorneys have incredibly challenging schedules, most can muster an extra two or three hours of time every month to donate. The greatest benefit, aside from the personal satisfaction from helping someone else, is the positive impact such pro bono representation will have on the low-income and senior population. Why don't we all pitch in, break down the barriers and do our part to make equal justice for all a reality?

Ms. Goble is pro bono coordinator for Legal Aid Services of Oklahoma Inc.



**For the latest OBA news,
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and @OBACLE**



OBA Web Sites

What Information Do They Provide?

www.okbar.org/oknewsbar.htm

- ▶ Designed with the needs of OBA members in mind, OKNEWSBar has been created to allow you to quickly access new Oklahoma and U.S. Supreme Court opinions as well as up-to-date legal news and law practice management tips.

www.okbar.org

- ▶ The official Web site of the Oklahoma Bar Association. It's your one-click resource to all the information you need, including what's new at the OBA, ethics opinions, upcoming CLE seminars, staff contacts, and section and committee information.

my.okbar.org

- ▶ On this site, you can do everything from changing your official address, enrolling in a CLE course, checking your MCLE credits and listing your practice areas on the Internet so potential clients can find you. The PIN number required is printed on your dues statement and can be e-mailed to you if the OBA has your current e-mail address.

www.oba-net.org

- ▶ Members-only interactive service. Free basic service with premium services available to enhance the member benefit. Lawyers are empowered to help each other through online discussions and an online document repository. You must agree to certain terms and be issued a password to participate in OBA-NET.

www.oklahomafindalawyer.com

- ▶ People from across Oklahoma visit this Web site every day in search of an attorney. How can you get your name on this list for free? Signing up is easy – log into your account at my.okbar.org and click on the “find a lawyer” link.

Fastcase at www.okbar.org

- ▶ The OBA teamed up with Fastcase in 2007 to provide online legal research software as a free benefit to all OBA members. Fastcase services include national coverage, unlimited usage, unlimited customer service and unlimited free printing — at no cost to bar members, as a part of their existing bar membership. To use Fastcase, go to www.okbar.org. Under the Fastcase logo, enter your username (OBA number) and password PIN for the myokbar portion of the OBA Web site.

Young Lawyers Help Oklahoma Heroes

Over the last two months, the OBA/YLD has coordinated three separate Wills for Heroes events in Pottawatomie, Bryan and Garfield counties.

The Wills for Heroes program is designed to provide free wills to volunteer and emergency first responders in Oklahoma. The OBA/YLD oversees the program in the state. This month, the YLD would like to highlight and extend its appreciation to those YLD members who participated in and helped to coordinate the events.

In Bryan County, young lawyer Matt Mickle, who coordinated the June program in Durant, said they received great feedback and encouragement from Durant Police Chief Cook, Fire Chief Dow and Bryan County EMS Director Barrett.

Robert Faulk and Kaleb Hennigh of Enid co-chaired and coordinated the Garfield County event and worked with Garfield County Sheriff Bill Winchester and Enid Fire Department Chief Philip Clover to make this a possibility. Mr. Faulk and Mr. Hennigh organized and helped draft 17 wills for first responders.

Sheriff Winchester expressed the department's appreciation for the efforts of the OBA.

In Pottawatomie County, OBA/YLD Board Member Joe Vorndran helped organize a very successful Wills for Heroes event in which several firefighters and first responders expressed their deepest appreciation for the Pottawatomie County Bar Association and the OBA.

The YLD also wants to express its sincere appreciation for the Wills for Heroes state Chair Cody McPherson of Oklahoma City, who traveled to and participated in each of the above events.

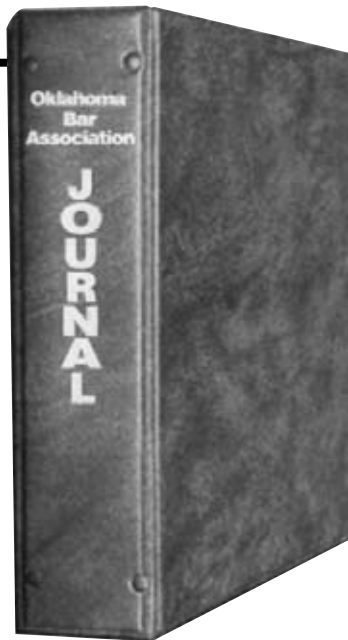
We still need more Wills for Heroes events throughout the state. If your local bar association would be interested in organizing an event for your county or community, please visit the Wills for Heroes section of the YLD home page at www.okbar.org/members/yld/willsforheroes.htm.



Whitney Kerr prepares a will at the Wills for Heroes event at the Durant City Hall Council Chambers.

Kaleb Hennigh (right) completes a will for a first responder in Enid last month.





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www.okbar.org/oknewsbar.htm

August

- 10 OBA Member Services Committee Meeting;** 2:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Keri Williams Foster (918) 812-0507
- 11 OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa and teleconference; Contact: Deborah Reheard (918) 689-9281
- 13 OBA Bench & Bar Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 14 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 15 OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100
- OBA Law-related Education We the People: The Citizen and the Constitution Teacher Training;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 17 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 18 OBA Legal Intern Swearing In Ceremony;** State Capitol; Contact: H. Terrell Monks (405) 733-8686
- OBA Budget Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 26 OBA Uniform Laws Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 27 Oklahoma Bar Foundation Lunch;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 28 OBA Board of Governors Meeting;** Bartlesville; Contact: John Morris Williams (405) 416-7000
- OBA Law-related Education Oklahoma Social Studies Supervisors Association;** 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

Calendar

- 29 OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478

September

- 7 OBA Closed – Labor Day Observed**
- 8 OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 9 OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 10 OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- OBA Awards Committee Luncheon;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: D. Renee Hildebrant (405) 713-1423
- OBA Awards Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: D. Renee Hildebrant (405) 713-1423
- 11 OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 15 OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229



September

- 16 Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611
- 18 Oklahoma Bar Foundation Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 19 OBA Title Examination Standards Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 21 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- 22 New Admittee Swearing In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners (405) 416-7075
OBA Women in Law Conference; Skirvin Hotel; Oklahoma City; Contact: Deborah Reheard (918) 689-9281
- 24 OBA Technology Fair;** Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051
- 25 OBA Board of Governors Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 26 OBA Women in Law Walk of Hope;** Oklahoma Bar Center, Oklahoma City; Contact: Deborah Reheard (918) 689-9281
- 29 OBA Law-related Education Elementary Level PROS Training;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 30 OBA Law-related Education Secondary Level PROS Training;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024



October

- 1 OBA Legal Intern Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- 2 Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613
- 6 OBA New Lawyer Experience;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051
- 9 OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 16 OBA Board of Governors Meeting;** Guymon; Contact: John Morris Williams (405) 416-7000
- 19 OBA Alternative Dispute Resolution Subcommittee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Andrea Braeutigam (405) 640-2819
- 20 OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 21 Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

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.

New Employees Join the OBA



Travis Pickens

Three bar members recently joined the staff of the Oklahoma Bar Association. Travis Pickens is the new ethics counsel, and Debbie Maddox and Ted Rossier have been hired as assistant general counsels. As ethics counsel, Mr. Pickens will be responsible for answering ethics questions from OBA members,

working with the Legal Ethics Advisory Panel, monitoring diversion program participants, teaching classes and writing articles. He received his undergraduate degree and J.D. from OU, and was admitted to the bar in 1984. With more than 22 years of experience in private practice, his general civil litigation practice began with Musser & Bunch PC in Oklahoma City. He later

associated with Mitchell Klein Pickens & Peck, also of Oklahoma City. He is adjunct professor of commercial law for OBU's International Graduate School (MBA) in Oklahoma City. Mr. Rossier comes to the OBA most recently from the Oklahoma State Department of Health, where he served as assistant general counsel. OBA members may recognize his work as a CLE speaker, and as a member of the OBA Legal



Debbie Maddox

Intern Committee. Ms. Maddox graduated from the OU College of Law in 1989. She has been a lawyer in the Army JAG Corps and was also with the Oklahoma Indigent Defense System's Capital Trial Division for 11 years. She was most recently in private practice in Norman, where she represented clients in criminal cases and family law cases.



Ted Rossier

Indian Law Section Presents Scholarships



The OBA Indian Law Section recently awarded three law school graduates \$500 scholarships to cover the cost of attending a bar exam review course. These scholarships were awarded during the Sovereignty Symposium held in June. The scholarships were awarded based on academic merit, expression of need and commitment to practicing Indian law in Oklahoma.

Pictured are (from left) OU graduate Anna Rangel-Clough, TU graduate Cynthia Burlison, Indian Law Section Chair Joe Williams, Indian Law Section Secretary Jeff T. Keel and Indian Law Section Chair-Elect Debra Gee. The third scholarship was awarded to OCU graduate Shandi Stoner.

OBA Member Resignations

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

Patrick Allen Brooks
OBA No. 1164
3 Woods Pond Road
Chickasha, OK 73018

J. Pink Dickens
OBA No. 10633
P.O. Box 200
Wall, TX 76957-0200

Sherril Elder Flood
OBA No. 17580
3151 S. 85th St. E.
Muskogee, OK 74403

Morris L. Hatley
OBA No. 3984
P.O. Box 24128
Oklahoma City, OK 73124

Andrea Neiman Jackson
OBA No. 4579
568 Bedford Ave.
St. Louis, MO 63130-4101

Ditty Susan John
OBA No. 21714
1011 Pheasant Drive
Mesquite, TX 75150

Robert Davis Neilson
OBA No. 6608
3900 Galt Ocean Dr., Apt. 1108
Ft. Lauderdale, FL 33308

Brenda E. Oldham
OBA No. 11948
P.O. Box 2077
Florence, AZ 85232

Michael Christopher Pflieger
OBA No. 18447
2025 Longwood Road
Lynchburg, VA 24503

Kelly Jo Walker
OBA No. 17356
2701 White Rock Drive
Fort Worth, TX 76131

Anita Enz Wertz
OBA No. 2741
7507 El Monte Circle
Shawnee Mission, KS 66208

William Breaux Wood
OBA No. 14147
P.O. Box 543
Calera, OK 74730

Kenneth R. Yost
OBA No. 9957
8620 NW 114th St.
Oklahoma City, OK 73162

OBA Member Reinstatements

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

James R. Bond
OBA No. 14436
3838 NW 36th St., Suite 107
Oklahoma City, OK 73112

Dawn Elizabeth Cash
OBA No. 16628
P.O. Box 269060
Oklahoma City, OK 73126-9060

Paul Martin Haire
OBA No. 14588
504 Joe Willis Street
Las Vegas, NV 89144

Kristy A. Lambert
OBA No. 15075
5616 W. 82nd Street
Prairie Village, KS 66208

Allison Jean Mardis
OBA No. 20763
202 Jessica Drive
Box C-16
Enterprise, AL 36330

Chad Robert Reineke
OBA No. 20316
6305 Waterford Blvd., Suite 32
Oklahoma City, OK 73118

Dino E. Viera
OBA No. 11556
3330 Kingman St., Suite 1
Metairie, LA 70006

William P. Willis Jr.
OBA No. 9708
400 S. Muskogee Ave.
Tahlequah, OK 74464-4428

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

James M. Branum
OBA No. 21087
3334 W. Main St., PMB #412
Norman, OK 73072

Cari Leigh Brown
OBA No. 16814
600 N. Grand
Tahlequah, OK 74464

Nathan David Corbett
OBA No. 21633
1919 Beaumont, Apt. G
Norman, OK 73071

Joseph John Jordan
OBA No. 19998
4113 Silverton Circle
Norman, OK 73072

John Randall Long
OBA no. 12379
2624 NW 61st St.
Oklahoma City, OK 73112

Anthony B. McKesson
OBA No. 12776
5350 S. Western Ave., Suite 406
Oklahoma City, OK 73109

John Houston Nix
OBA No. 17956
514 N. Elm
Sherman, TX 75090

Jonna Lynn Reynolds
OBA No. 21336
8177 S. Harvard Ave., No. 211
Tulsa, OK 74137-1612

Dean Michael Solberg
OBA No. 12490
5711 E. 71st St., Suite 200
Tulsa, OK 74136

Judicial Nominating Commission Election Results



Larry D. Ottaway

Larry D. Ottaway of Oklahoma City was declared the winner of the District 5 Judicial Nominating Commission position after receiving 41 percent of the total ballots cast. According to the election rules as promulgated by the Oklahoma Bar Association Board of Governors, a run-off election is avoided when one candidate receives more than 40 percent of the vote. Of the three other candidates, the next highest vote getter only received 26 percent with the remaining two candidates receiving 21 percent and 12 percent respectively.

Stephen D. Beam of Weatherford ran unopposed this year for District 6. Both candidates will serve six-year terms.



Stephen D. Beam

Shepherd Selected as District Judge

Gov. Brad Henry recently appointed Darrell Shepherd of Wagoner to the position of District Court Judge District 15, Office 2, which covers Wagoner and Cherokee counties.

Judge Shepherd graduated from Northeastern Oklahoma State University in 1983 and earned his J.D. from TU in 1986. He served as assistant district attorney in Carter County from 1986 to 1990 and held the same position in Wagoner County from 1990 to 1995. Since 1995, Judge Shepherd has served as an associate district judge in Wagoner County.

In the past two years, Judge Shepherd has implemented and presided over mental health court and juvenile drug court in Wagoner County.

In an ABA Leadership Position?

Many OBA members are active in American Bar Association sections, committees, task forces and related organizations. Oklahomans tend to rise to the top when it comes to leadership. If you are among those leaders, we'd like to hear from you so all OBA members in ABA leadership positions can be recognized. E-mail Communications Director Carol Manning at carolm@okbar.org.

OU College of Law Dean Plans Retirement



Dean Andrew M. Coats

Andrew M. Coats has announced his plans to retire as dean of the OU College of Law.

Dean Coats' retirement will be effective June 30, 2010. He will continue to teach at the

law school after his retirement.

Appointed as the 11th OU law dean in April 1996, he was a senior partner at Crowe & Dunlevy prior to his appointment. He also served as president of the American College of Trial Lawyers, the OBA and the American Board of Trial Advocates of Oklahoma as well as mayor of Oklahoma City and district attorney of Oklahoma County.

Kudos

V Burns Hargis and Justice Steven W. Taylor have been nominated to be inducted into the Oklahoma Hall of Fame. Mr. Hargis is currently the president of OSU and previously practiced law and served as president of the Oklahoma County Bar Association and the Oklahoma Bar Foundation. Justice Taylor is currently the vice chief justice of the Oklahoma Supreme Court. After earning his law degree in 1974 from OU, he spent four years in the U.S. Marine Corps and became the youngest judge in the U.S. Armed forces. He later became the mayor of McAlester and served as a trial judge. They will be inducted to the Hall of Fame Nov. 12.

The Oklahoma County Bar Association presented its annual awards in June. The winners are: Professional Service Award, **Kieran D. Maye Jr.**; Community Service Award, **Brandon P. Long**; Pro Bono Award, **John E. Miley**; Outstanding Committee, Community Service Committee; *Briefcase* Award, **William W. Gorden**; Bobby G. Knapp Bar Leadership Award, **Robert D. Nelson**; Special Recognition Award, **Judge Carol Hubbard**; President's Award, **Steven L. Barghols**; Young Lawyers Division Outstanding Director, **Denise Eaton Cramer**;

Young Lawyers Division Beacon Award, **Hugh A. Baysinger**; Friends of the Young Lawyers Award, **Judge Vicki Robertson**.

T. Douglas Stump was appointed by the American Immigration Lawyers Association as the association's new treasurer.

William Mawer has been named dean of the School of Education and Behavioral Sciences at Southeastern Oklahoma State University. He has served as associate dean since February. He holds a B.S. in education from the University of Toledo and a J.D. from Ohio Northern University.

John R. Woodard III was elected to the Goodwill Industries of Tulsa Inc. Board of Directors for a three-year term in May.

Randy Grau is scaling 19,340 feet to the top of Mt. Kilimanjaro in Tanzania. He is dedicating the climb to the Rwanda Outreach and Community Foundation, and specifically, to raise funds for the Kigali International Community School in Kigali, Rwanda.

Cyndy C. Ottaway has been named vice president of The American College of Trust and Estate Counsel Foundation. She was elected in March. She is the only Oklahoman serving in a leadership role for the ACTEC Foundation.

Donald F. Heath Jr. received a master of divinity degree at Phillips

Theological Seminary in Tulsa. He has served for the past two years as the minister of Edmond Trinity Christian Church. He is also a partner at Mullins, Hirsch, Edwards, Heath, White & Martinez PC.

Lee Peoples was recently appointed director of the OCU Law Library. His article, "The Citation of Wikipedia in Judicial Opinions," will be published in volume 12 of the *Yale Journal of Law & Technology*.

Stanley L. Evans, assistant dean at OU College of Law and chairman of the Oklahoma Human Rights Commission, received the Toastmasters International Communication and Leadership Award for 2009 at the District 16 Spring Conference held in May.

M. Joe Crosthwait Jr. has been reappointed to the ABA's Standing Committee on Law and National Security for 2009-2010 and to the Commission on the Impact of the Economic Crisis on the Profession and Legal Needs. He is also the immediate past president of the National Conference of Bar Presidents.

Mary Ellen Ternes has been appointed co-chair of the Climate Change, Sustainable Development and Ecosystems Committee of the ABA's Section of Environment, Energy and Resources.

Fred C. Smith Jr. was appointed by Gov. Brad

Henry to serve as district attorney for Comanche and Cotton counties. Mr. Smith has served as the area's first assistant district attorney since 1987.

Brent Wright completed the Program for Research Fellows in National Security at the John F. Kennedy School of Government at Harvard University. The fellowship consists of research and study on foreign and defense policy and a range of national security and homeland security issues.

Charles W. Adams, a law professor at TU, received a TU Outstanding Teacher Award at TU's May commencement. He teaches civil procedure, evidence, intellectual property, Internet law and patent law.

Jay Shanker released the third edition of his book, *Entertainment Law and Business*. The 700-page book is written as a comprehensive guide to the legal and business sides of the entertainment industry.

On The Move

Hartzog Conger Cason & Neville announces that **John J. Griffin III** has joined the firm as an associate. Mr. Griffin received his J.D. in 2005 with honors from OU. His practice includes mergers and acquisitions, private placement and securities offerings, commercial law, tax planning, tax controversies and business transactions.

Van Meter Law Firm announces that **Charles J. Watts** has joined the firm. Additionally, the firm has changed locations and is now located at 600 N. Walker, Suite 101, Oklahoma City, 73102; (405) 228-4949.

Robert C. Newark III has joined the Whittle Law Firm PLLC, 5151 Flynn Parkway, Suite 308, Corpus Christi, Texas, 78414.

Steidley & Neal PLLC has named **Gary Clark Crapster** of counsel in its Tulsa office. Mr. Crapster practices civil litigation and represents businesses and individuals in Texas and Oklahoma.

Rainey Martin LLP announces that **Jeffrey I. Crain** has joined the firm as an associate. Mr. Crain received his J.D. from OCU in 2003, where he graduated summa cum laude. His practice will include litigation and dispute resolution, employment law and intellectual property.

Brown & Sain PC and **Mitchell K. Leonard** have joined together to form the law firm of Brown, Sain & Leonard PLLC. The new firm has relocated to The MarketPlace, 2100 E. Washington, Suite C, Idabel, 74745; (580) 208-2880.

Jerry D. Balentine PC & Associates announces that **Sara G. Murphy** has joined the firm. Ms. Murphy earned her law degree from OU in 2002. Her practice includes estate planning and business planning.

Herrold Herrold & Co. PC and **Sneed Lang PC** have merged to form **Sneed**

Lang Herrold PC. The firm is based on the top floor of Williams Center Tower I at 1 W. Third St. in Tulsa.

Derryberry & Naifeh LLP announces that **Janis Hubbard** has joined the firm. Ms. Hubbard received her J.D. from OCU. She recently served as first assistant general counsel for the Oklahoma Bar Association. Her practice includes professional responsibility, administrative law, employment law, probate and estates, general civil litigation and criminal defense.

Richards & Connor announces that former U.S. Attorney **David E. O'Meilia** has joined the firm as a partner and **Jennifer A. White** has joined the firm as an associate. Mr. O'Meilia's practice will include both civil and criminal litigation with an emphasis in business and commercial issues, complex civil litigation, corporate compliance and investigations, government investigations, and related civil and regulatory proceedings. He received his law degree from TU in 1976. Ms. White will practice medical malpractice defense, products liability and general civil litigation. She received her law degree from TU in 2005.

Lee Law Center PC announces that **Emily B. Milan** has joined the firm as an associate. Ms. Milan is a recent graduate of the OU College of Law. She will practice civil rights defense and employment law.

At The Podium

Eric L. Johnson moderated the legal committee panel at the National Automotive Finance Association's national Non-Prime Auto Financing Conference in Ft. Worth, Texas. He gave automotive finance industry executives an overview of the latest legal developments that impact lenders, car dealers and automotive finance companies.

David A. Trissell participated in a panel discussion at the fifth annual legal conference, "Strengthening Partnerships for Perilous Times," which brought together judge advocate generals and their staffs as well as other emergency response personnel to discuss federal efforts for protecting the homeland. Mr. Trissell also provided remarks on FEMA's response authorities.

John D. Rothman gave a CLE presentation in Fort Worth, Texas, in April to the Association of Attorney-Mediators. He spoke on the topic of "Joint Sessions and Attorney Advocacy at Mediation: How to Effectively Manage this Increasingly Controversial Part of the Mediation Program."

Melissa R. Tipton-Dunkins spoke during the local NAACP chapter's fifth annual Law Day observance in Hutchinson, Kan., in May. She is a Hutchinson native.

Travis M. Dodd spoke at the 2009 International TechLaw Annual Meeting and World Conference in

Seattle in May. He presented his paper titled "Information Responsibility in the New Mobile Communications Paradigm" as part of a panel on data protection/privacy.

Amir M. Farzaneh spoke at the Society for Human Resource Management HR Conference in Oklahoma City. He spoke on the topic, "Organizational Consulting Skills for HR Professional," and he addressed immigration compliance.

Jay D. Adkisson made presentations on "Captive Insurance Companies" at the annual meeting of the American Association of Life Underwriters in Washington, D.C., and at the Houston Chapter of the Society of Financial Services Professionals. He also spoke on the topic of "Asset Protection at the American College of Obstetricians and Gynecologists" in Chicago and at the annual retreat of the Financial Planning Association in Palm Desert, Calif.

T. Douglas Stump was a featured speaker at the Federal Bar Association Annual Immigration Seminar in Memphis in May. He spoke on "Meeting the Challenges of Non-Immigrant Visas" and on "Strategies to Avoid or Release USICE Hold in a 286(g) World."

Barbara Ann Bartlett, president of the Oklahoma Academy of Collaborative Professionals, spoke to the OACP at its annual conference in Stillwater in May. The presentation emphasized the use of mental health coaches as an integral part of the divorce process for those participating in collaborative divorce.

M. Joe Crosthwait Jr. delivered the keynote speech to the District and County Law Presidents' Association of the Law Society of Upper Ontario. The theme of his speech was "Enlightened Self-Governance: The Proverbial Progeny of Nature and Nurture." He discussed the state of civics education in the U.S. and Canada.

Scott Rowland lectured on "Contemporary Constitutional Issues Facing Prosecutors" at the Career Prosecutor Course sponsored by the National District Attorneys Association in Charleston, S.C., in June. In July, he spoke for the NDAA's summer conference in Orlando.

David W. Lee spoke to the Association of Governmental Risk Pools in Daytona Beach, Fla., in March. His presentation was on "Recent Developments in Federal Civil Rights and Employment Law Cases and Statutes."

Compiled by Rosie Sontheimer

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Articles for the Sept. 5 issue must be received by Aug. 17.

James E. Bishop of Tulsa died Jan. 4. He was born Feb. 19, 1920. **He served his country in World War II as major and B-29 pilot in the South Pacific.** He received his J.D. and CPA from OU and was a Tulsa attorney for many years. Also, he was a member of the First Christian Church. Memorial contributions may be made to the charity of your choice.

Joe R. Boatman of Bartlesville died Jan. 25. He was born Sept. 24, 1920, in Tama-ha. He attended Northeastern Oklahoma State University from 1939 to 1942. **He served in the U.S. National Guard during that time. He entered the U.S. Army Air Corps in 1943 and was honorably discharged in 1946 after serving the bulk of his time as a criminal investigator in Guam during World War II.** He graduated from Northeastern Oklahoma State University in 1947. Then he served as a criminal deputy sheriff for Muskogee County and taught government and sociology at Connors State College. In 1953, he graduated from OU with a law degree and served as the assistant county attorney in Muskogee County and later began his private practice in Muskogee. He was appointed special hearing officer for the U.S. Department of Justice from 1963 to 1968. Memorial donations may be made to the Washington-Nowata Nutrition Project, 301 E. Angus, Dewey, 74029.

Kathy Evans Borchardt of Tulsa died May 27. She was born on Aug. 7, 1944,

and grew up in Tulsa. She worked as a legal secretary before attending law school at TU. While at TU, she served as the first president of the TU Women's Law Caucus. After earning her law degree in 1976, she began to practice divorce and employment law at her own law firm in Tulsa. She continued her involvement in women's issues and became the founding president of the Tulsa Women Lawyer's Association in 1983. She also contributed her professional time and energy by volunteering as a pro bono attorney for Legal Aid Services of Oklahoma, speaking at civic groups and seminars and teaching family law at TU Law School.

Anastasia Cesario of Norman died July 12. She was born June 3, 1980, in Las Vegas, New Mexico. She graduated from the OU College of Law in 2005 and was a member of the Tau Beta Sigma National Honorary Band Sorority, the Pride of Oklahoma and of the Organization for the Advancement of Women in Law, where she was also a former vice president. She started working at Oklahoma Indigent Defense System in 2005 and received the 2008 Outstanding Attorney of Year for Capital Post-Conviction Award. She was actively involved in HOPE of Oklahoma and Norman Relay for Life. Memorial donations may be made in her name to the OU Foundation for the OU Cancer Institute, P.O. Box 26901, BRC West 1417, Oklahoma City, 73126.

Judge Richard Clarke of Tulsa died May 29. He was born June 20, 1960, in Wichita, Kan. After receiving his law degree from TU in 1985, he became a special judge for Tulsa County and went on to practice law with Barber and Bartz Law Firm. His achievements include being named the National Adoptive Father of the Year and being a member of Fellowship Bible Church. Memorial contributions may be made to the Fellowship Bible Church in Tulsa.

Vernie E. Harris of Fredericksburg, Texas, died July 14. He was born Sept. 8, 1915, in Delhi. He received his B.A. and J.D. from OU. After graduation, he served as marshal and chief law clerk of the Oklahoma Court of Criminal Appeals for two years. **He joined the U.S. Navy, serving in the Southwest Pacific Theater and Philippines in operations as captain of an LCI in the amphibious fleet. He then practiced law in Elk City until he was recalled to service in 1951 and served as a legal officer at the naval station in Kodiak, Alaska.** Much of his private time was spent attending Memorial Presbyterian Church. He was also active in Friends of the Library, where he was past president; Hill Country Community Needs Council driver; Fredericksburg Music Club; board member for Habitat for Humanity; and many other civic organizations. Memorial donations may be made to Memorial Presbyterian Church of Fredericksburg, Pioneer Memorial Library or to the charity of choice.

Craig Roy Kennamer of Oklahoma City died March 30. He was born Dec. 16, 1954, in Castro Valley, Calif., and moved to Oklahoma City in 1956. He majored in journalism at OU and received his degree in 1977. While at OU, he was a member of the Sooner swim team and an 'O' Club letterman. In 1991, he received his J.D. from OCU. His career life included working as an attorney with McKinney, Stringer and Webster and then with the Oklahoma Department of Environmental Quality. Outside of work, he loved gardening, working on his home and making artwork. Memorial donations may be made to the Craig R. Kennamer Memorial Scholarship Fund at Midfirst Bank, 2225 N. May Ave., Oklahoma City, 73107, c/o Joy Kennamer/Special Memorial Fund.

Benjamin France Lewis of Oklahoma City died July 2. He was born Aug. 21, 1921, in Enid and later moved to Oklahoma City. **He served in World War II as a basic training instructor at several locations, including Red Skelton. In Germany, he learned how to fly as an intelligence officer and as a private pilot for many years.** After he came home, he completed his law degree at OU and then began working as an attorney at Ben Lewis and Associates. In addition to his career, he served on many community boards including the YMCA, the Oklahoma Safety Council, Oklahoma City Beautiful and the Oklahoma City Metropolitan Real Estate Association. He also enjoyed many years of service for OPUBCO and Gaylord family as their attorney

and insurance counsel. Additionally, he served as elder and other positions with the First Presbyterian Church, which he joined in 1939.

Max Allan Martin of Comanche died May 14. He was born Nov. 18, 1942, in Wichita, Kan., and grew up in Ponca City. **He served in the U.S. Navy from July 1961 to June 1963 as a quartermaster on the U.S.S. Hancock.** After being discharged from the Navy, he attended OSU and then attended the OU College of Law. At OU, he was a member of the Order of the Coif and the OU Review. In 1969, he received his J.D. and graduated third in his law school class. After graduating he served as an assistant attorney general and later worked as an oil and gas attorney at Kerr-McGee Oil Co. in Oklahoma City. After leaving Kerr-McGee, he served as law clerk for Oklahoma Supreme Court Justice William A. Berry for several years, then left to pursue his dream of opening a small town law practice with his wife. Memorial donations may be made to the Stephens County Humane Society.

Joel Holcomb McNatt of Oklahoma City died June 18. He was born in Louisville, Ky., on April 20, 1958. He earned his B.A. in journalism from OU. After graduation, he worked in the oil and gas industry for 15 years before attending law school at OCU. While practicing law, he remained active in the Oklahoma City Association of Petroleum Landmen and served on the Board of Directors for Rebuilding Together OKC. His personal life included attending Chapel

Hill United Methodist Church, fishing, playing golf, grilling and making music. Memorial donations may be made to Rebuilding Together OKC in his honor.

Claude H. "C.H." Mullen-dore Jr. of Houston, Texas, died May 6. He was born July 14, 1929, in Miami. He received his law degree from OU. **Upon completing college, he served his country in the U.S. Air Force as an officer in the Judge Advocate's office.** Once he completed his service in the Air Force, he worked at the firm of Kerr, Conn and Davis as an attorney. Later, he joined Cenergy Pipeline Co. as executive vice president, H.N.G. Industrial Natural Gas Co. as president and H.N.G./Internorth Gas Marketing as senior vice president. When HNG became Enron, he was president of Enron Gas Marketing Inc. and Enron Gas Services, and chairman and managing director of Enron Gas U.K. Ltd. In his free time, he attended St. Martin's Episcopal Church and hunted duck.

Charles E. Norman of Tulsa died Jan. 2. He was born Sept. 2, 1930, in Quanah, Texas. In 1953, he graduated from OU College of Law. At the age of 22 he began his law practice and went on to become assistant city attorney and then city attorney, serving from 1959 to 1968. He was a founding member of the firm Norman Wohlgenuth Chandler and Dowdell. He was the recipient of the 2005 J. Paschal Twyman Award at TU where he served as chairman of the Board of Trustees and an emeritus trustee of the university. He was instrumental in the planning and

development of the Tulsa Performing Arts Center and was chairman of the PAC Trust. The Charles Norman Theatre in the PAC was named in his honor. Contributions may be made to Cal Farley's Boy's Ranch 600 W. 11th St., Amarillo, Texas, 79101 and to Susan G. Komen for the Cure, P.O. Box 650309, Dallas, Texas, 75265.

Judge Richard Watson Pickens of Enid died June 28. He was born June 30, 1929, in Enid. He graduated from OCU School of Law in 1961. He moved to Sedona, Ariz., and lived there until November 1974, when he was appointed by Gov. Hall to be associate judge of Harper County. From 1981-1992, he was district judge for District 4 in Enid and was later appointed to the Court of Tax Review. He later became presiding judge for Northwest Judicial District. He served on the board of directors of Wheatland Mental Health, the Enid Rotary Club and the Grand National Quail Club and on the board of trustees for Boy Scouts of America. His awards included the Distinguished Law Alumnus of OCU and the Lifetime Achievement Award from Garfield Bar Association. Memorial donations may be made in his memory to OCU School of Law or the Civil War Preservation Trust with Brown-Cummings Funeral Home.

Manville Robert Redman of Lawton died Feb. 7. He was born Aug. 17, 1925, in Oklahoma City. **He was a student at OU when he joined the Army to serve with Field Artillery Units in World War**

II. He returned to earn a law degree at OU. He moved to Lawton, where he served as a county attorney and city attorney and was elected to the Oklahoma House of Representatives. He continued in private practice until 2008. Some of his civic activities and recognitions included Outstanding Young Man of Lawton, Downtown Kiwanis Club of which he was past president, past president of the Lawton CampFire Girls and past president of the Comanche County Bar Association. He was a trustee and co-chairman of the Louise D. McMahon Foundation. Memorial contributions may be made to Kids Across America, Kanakuk Kamp Ministries, 1353 Lakeshore Dr., Branson, Mo., 65616.

Mary Bailey Romine of Okmulgee died April 17. She was born Dec. 15, 1929, in Dewar and soon moved to Okmulgee where she lived most of her life. She received an associate of arts degree from William Woods College for Women, a bachelor of arts degree from East Central State College and a law degree from OU, where she was one of three women in her graduating class. She practiced law in Okmulgee for 43 years. She went on to become the first female county/associate district judge in Okmulgee County and the first female Okmulgee city attorney. She made strong contributions to her community by serving on several corporate boards. Her many civic activities included service as a director of the University of Oklahoma Association, associate editor of the

Oklahoma Bar Journal and director of the Creek Nation Association for Children with Learning Disabilities.

Roger Scott of Tulsa died July 1. He was born Aug. 11, 1935. He graduated from the TU College of Law in 1960. He had served as a member of the Grievance and Professionalism Committee longer than any other member of the Tulsa County Bar, as chairman of that committee, as a member of the OBA Professional Responsibility Tribunal and as a trustee to the Oklahoma Bar Foundation. He was recognized by the OBA for his work within the TCBA and received the John Shipp Award in 2002 for exemplifying high ethical standards. Additionally, he was an active member of the Tulsa Masonic Lodge and a 33rd degree Mason. He also loved maintaining his classic Corvair and participating as an active member of the Tulsa Corvair Club. Memorial donations may be made to the Oklahoma Bar Foundation.

Edward Boyd Stewart of Del City died May 24. He was born April 27, 1929, in Chickasha and later lived in Pauls Valley and Paoli before settling in the Del City area. **He served his country in the Army Air Force as a paratrooper during the Korean conflict.** He received his law degree from OCU and became an attorney and municipal judge in Del City for 13 years. Later in life, he was an entrepreneur in real estate, cattle ranching and personal finance. Some of his hobbies included horses, cattle ranching, creative writing and reading classic westerns.

John Edward “Buster” Sushnik of Bartlesville died May 21. He was born Aug. 15, 1919, in Bartlesville where he was raised. **After graduating high school, he enlisted in the U.S. Army Air Force in June 1942 and served during World War II.** In December of 1945, he was honorably discharged from the Army and attended OSU, earning a degree in economics. After school, he worked for Farmers Insurance in Oklahoma City while at the same time attending law school at OCU. After working for Farmers Insurance for 30 years, he opened a law firm in Oklahoma City. He later moved to Bartlesville to be near his grandchildren.

Phillip E. Tibey of Tulsa died April 12. He was born Dec. 20, 1921, in Cleveland, and he spent most of his boyhood growing up in Oklahoma City. **He enlisted in the U.S. Coast Guard where he served in the Pacific during World War II.** After returning home, he graduated from the

TU College of Law in 1957 and went on to work as an attorney for Skelly and Getty Oil Cos. until he retired in 1982. He gave many years in service to Neighbor for Neighbor and Meals On Wheels.

Howard Blair Upton Jr. of Tulsa died March 20. He was born May 17, 1922, in Tahlequah and received his B.A. from OU in 1943. **He served as a U.S. Navy bomb disposal officer in Europe and Japan.** Following the war, he received his law degree from OU in 1948. He then moved to Tulsa where he joined Western Petroleum Refiners Association as a labor attorney. Later he worked at and later managed Petroleum Equipment Institute. In his free time, he enjoyed writing. His feature articles have appeared in such periodicals as *Reader’s Digest*, the *Saturday Evening Post* and the *Wall Street Journal*. For many years the in-flight magazine of Southwest Airlines published his bylined column in each

issue, and his book reviews have long been a feature of the Sunday edition of the *Tulsa World*. For more than a decade his humorous verse appeared two or three times each month on the op-ed page of the *Wall Street Journal*.

Marjorie Icilone Wilmarth of Oklahoma City died Feb. 26. She was born July 31, 1915, in Oklahoma City. She attended OCU School of Law, where she completed her degree in 1937. She worked as an oil and gas real estate attorney at APCO, retiring in 1962. She later worked in her father’s business, Kot’n Rib’n Badges, which supplied badges nationwide. She also served as president of CWF at First Christian Church, where she was a member for more than 35 years. Two of her greatest loves were dogs and the Jewel Box Theatre housed at First Christian Church. Memorial contributions may be made to the Jewel Box Theatre, 3700 N. Walker, Oklahoma City, 73118.

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Plan B as a Way of Life Special Olympics – 2009

By Paul Thomas

It seems that there is always a threat of storms. Today there is a 40 percent chance. Well, after all, it is May in Oklahoma.

This Wednesday morning, as the Jenks athletes board the activity bus for Stillwater under a cool, lights-flashing, Campus Police escort — parents, siblings and friends come to send the athletes off with a bit of fan fare.

Beneath the surface of the happy send off, there is a nagging ache foretelling an approaching storm that is still too far off to see. I suspect that the ache is caused by caring and knowing. Caring — because we love these kids. Knowing — because our experience with them tells us that issues will arise — at the most inopportune times. But for now, there are lots of smiles and awkwardly wonderful hugs.

Anticipation of fun may be even better than actual fun.

As his turn to get on the bus approaches, my son Matt asks me repeatedly if he will be able to sleep in his own bed tonight. Hearing me say that I will be picking him up and bringing him home for the night doesn't bring him peace. But when he sees me later this afternoon — he will greet me with an "oh — there you are... finally" and he will not have to worry about the sleeping-in-my-own-bed storm that was gathering.

I arrive in Stillwater at about 4:30 p.m. and meet

the Jenks team in the lobby of one of the dormitories on the OSU campus. I find Matt amusing his teammates and the "peer helpers" with a dialogue he repeats from one of his favorite videos. On cue, he greets me with the "oh — there you are . . . finally." Without missing a beat, he picks up his dialogue where he had paused it.

The "peer helpers" are Jenks high school students who volunteer for this duty — they stay with their athletes through the day — and bunk with them in one of the dorm rooms for the night. I cannot describe how fearless these peer helpers are. To a person, they were gracious, patient and willing to be storm chasers. I think of myself at their age and have to admit that I probably would not have been so generous with my time.

The Jenks team won its softball game on Wednesday, which meant that Matt would play again on Thursday — the game was scheduled for 10:30 a.m.

Overnight, the storm came.

Literally. It rained, flashed, crashed and splashed most of the night. News reports told of Special Olympics' tents being blown away as inches of rain made softball fields useful only for fishing.

In the morning the skies in Tulsa were dark, low and a light rain was falling. I called the Jenks Special Olympics coach and was told that it was not raining



there and that in Special Olympics, there is always a Plan B. If the fields are too soggy they would find another place to play. Matt and I headed down the Cimarron Turnpike.

About halfway to Stillwater I get a call from the coach — she tells me the game has been rescheduled to 11:30 and that if I am close enough, I could meet the team at the dorm and Matt could ride to the game venue on the bus. Matt wanted to ride with the team — so we pushed through the campus chaos to find the dorm and the team bus.

The new game venue, it turns out, was the indoor equine arena that is part of the veterinary medicine and animal husbandry programs at OSU. Let your imaginations go here for just a moment — you wouldn't be far off. Unexpected aromas and textures were abundant. We arrived to find two games in progress — that's right, two at once. They put the batters essentially back to back hitting away from each other toward the big open doors at either end of the arena. An excellent Plan B. While quarters were a bit

cramped and aromatic, there were no complaints from the players.

During the Jenks game, one of the players, a young lady with quite a burden of disabilities, hit the ball in play down the first base line. On her way to first, she was just about to pass the place where her ball had come to rest when she stopped, bent down, picked up the ball and threw it to the first baseman — she threw herself out. Both teams cheered enthusiastically.

As anticipated, the storm had indeed come. But with the help of storm chasers and people who live a Plan B kind of life — these special kids had a non-storm-deterred chance to play and be cheered. It was simple and beautiful. Matt came home with a bronze medal and a big smile. I came home with yet another blessing.

If you get a chance, check out the Special Olympics Oklahoma Web site: www.sook.org to be moved and inspired.

Mr. Thomas is a trial attorney with the Office of the United States Trustee in Tulsa.

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8:30 a.m. Registration & Continental Breakfast

9:00 a.m. Introduction to Dealing with Cities and Towns: Different organizational structures, powers, duties and lines of authority - Diane Pedicord, General Counsel, Oklahoma Municipal League, Oklahoma City

9:50 a.m. Break

10:00 a.m. Introduction to Interacting with Public Schools: Rights and responsibilities for schools, administrators, teachers, support staff, and students - Stephanie J. Mather, Center for Education Law, Oklahoma City

10:50 a.m. Your Land: Rights and Limits on Use: Dealing with Public Entities in the Regulation and Use of Private Property - Dan Brummitt, Assistant Municipal Counselor, Office of the Municipal Counselor, Oklahoma City
Susan Randall, Assistant Municipal Counselor, Office of the Municipal Counselor, Oklahoma City

11:40 a.m. Networking lunch (included in registration)

12:10 p.m. Open Meeting and Open Records Act: How to Seek, Find and Participate in Dissemination of Public Information - Mike Vanderburg, Attorney at Law, Okmulgee

1:00 p.m. Learning the Ropes of the Governmental Tort Claims Act: Procedural requirements, immunities and limits on liability - David W. Kirk, Lytle, Soule & Curlee, Oklahoma City - Ray Jones, Lytle, Soule & Curlee, Oklahoma City

1:50 p.m. Break

2:00 p.m. Special Employment Provisions Related to Public Employers: Section 1983 Constitutional Claims and Civil Rights Actions - Margaret McMorow-Love

2:50 p.m. Adjourn

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