THE Oklahoma Bar JOURNAL
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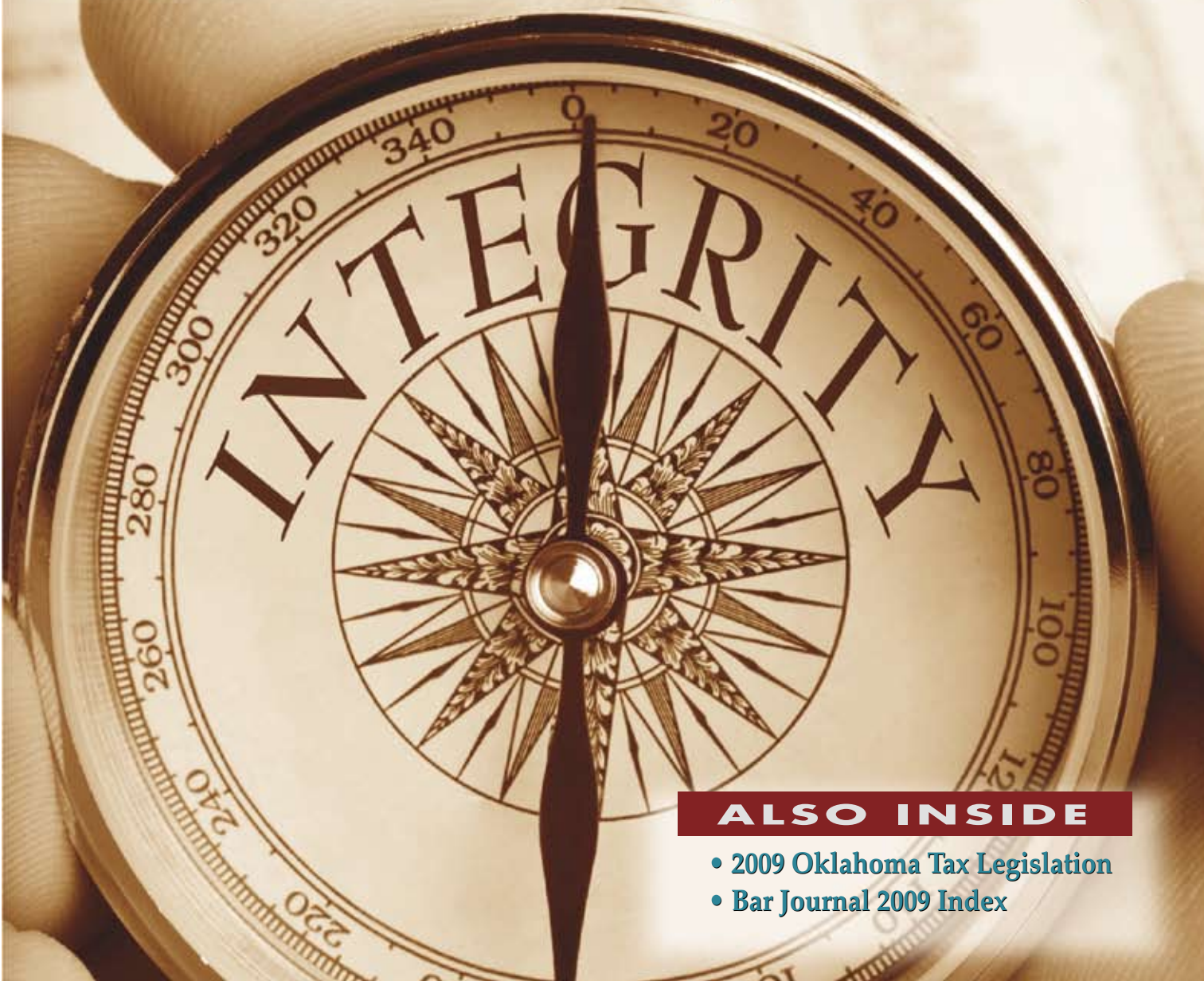
Ethics & Professional Responsibility



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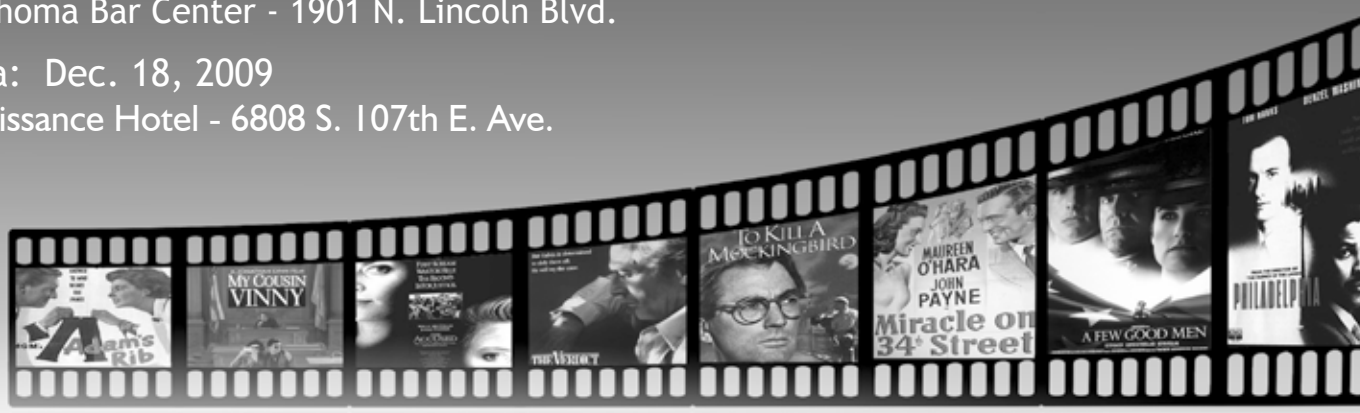

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Steven O. Rosen
Mr. Rosen's law practice began at Lord, Bissell and Brook, Chicago, in 1977, where he worked as an associate. He specialized in aviation matters at that firm. Mr. Rosen formed The Rosen Law Firm in 1997, which has offices in Portland and Salem, Oregon. He and his firm specialize in litigation, trial, and appellate work in federal and state courts. Mr. Rosen has taught his continuing legal education program, "Movie Magic: How the Masters Try Cases," in 28 states.

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Larry Pozner is a founding partner of the 18 lawyer Denver litigation firm of Reilly Pozner & Connelly LLP. The firm handles both the plaintiff and defense sides of complex commercial litigation, class actions, and criminal defense work. He is a nationally-recognized legal commentator (NBC Nightly News, The Today Show, CBS, CNN, NPR, and Court TV), covering such highly publicized trials as the Oklahoma City bombing trials and the Jon Benet Ramsey case.

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THEME:
ETHICS &
PROFESSIONAL RESPONSIBILITY

EDITOR: JAMES T. STUART

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PLUS

2009 A Great Year

By Jon K. Parsley

Wow! I cannot believe I am already writing my last president's letter. It has gone by so fast. This year has been a wonderful year for the Oklahoma Bar Association.

We began the year with a **legislative session** that was turbulent, to say the least. There were numerous proposed bills which were detrimental to our association and to the rights of the citizens of Oklahoma. I issued a call to arms and was never so proud as when almost 400 lawyers showed up to march on the Capitol to express our concerns about the legislation. I appointed the Administration of Justice Task Force to review and advise the Board of Governors on the pending legislation. They did a great job. The session ended with our association intact and minimal damage to the rights of Oklahoma citizens.

Another important event at the beginning of the year was the **hiring of a new general counsel** for our association. The search committee performed a nationwide search. We had numerous applicants, who were interviewed on several occasions and pared down to three finalists. The Board of Governors then hired Gina Hendryx as our new general counsel. She has been doing a wonderful job.

President Parsley practices in Guymon.
jparsley@ptsi.net
(580) 338-8764

Oklahoma **hosted the president of the American Bar Association** for a visit. We were very honored to have the ABA president feel it was important to visit Oklahoma. Shortly thereafter, **we celebrated Law Day**. Law Day was a huge success as always. I was especially proud to be in attendance in Wewoka at the Law Day celebration at which Justice Hargrave received his 60-year pin.

Several other events stand out in my mind as great happenings this year: We graduated our first ever **Leadership Academy** class in May. This was a very distinguished group of future bar leaders. The **Solo and Small Firm Conference** was a great event in June that was followed by the **CLE cruise** to the Caribbean in July. The **Women in Law Committee** put on one of the best events of the year. The conference featured Cherie Blair, wife of former British Prime Minister Tony Blair. Her speech was truly inspirational. That same week, the OBA hosted its first ever **Technology Fair**, which was free to members, well attended and a great seminar with lots of practical information.

I am honored to have served in the capacity of president this year.

The highlight of the year for me was the **Annual Meeting**. It was exhilarating to see ideas that I had in January turn into reality in November. Gene Kranz, the NASA flight director during the Apollo 13 incident, was an amazing luncheon speaker. The plenary session tribute to Abraham Lincoln was wonderful. The first OBA Comedy Club with comedian Henry Cho was a great success. Overall, the Annual Meeting was one of the best ever held.

The **Board of Governors** of our bar did a great job this year. If you know one of them, take the time to say, "Thank you!" They do a great service for our association, volunteering count-

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NOTICE of change of address (which must be in writing and signed by the OBA member), undeliverable copies, orders for subscriptions or ads, news stories, articles and all mail items should be sent to the Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152-3036.

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EVENTS CALENDAR

DECEMBER 2009

15 **Death Oral Argument;** Phillip Anthony Summers; D-2008-313; 10 a.m.; Court of Criminal Appeals Courtroom

16 **Ginsburg March Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Linda Samuel-Jaha (405) 609-5406

18 **OBA Appellate Practice Section Meeting;** 11:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brian Goree (918) 382-7523

25 **OBA Closed** – Christmas Holiday

JANUARY 2010

1 **OBA Closed** – New Year's Day Observed

7 **House of Representatives Rule Making Seminar;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Amy Aldin (405) 962-7603

8 **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424

12 **Death Oral Argument;** Clarence Rozell Goode Jr.; D-2008-43;10 a.m.; Court of Criminal Appeals Courtroom

14 **OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

15 **OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

OBA Board of Governors Meeting; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

16 **OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595

18 **OBA Closed** – Martin Luther King Jr. Day

20 **Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271

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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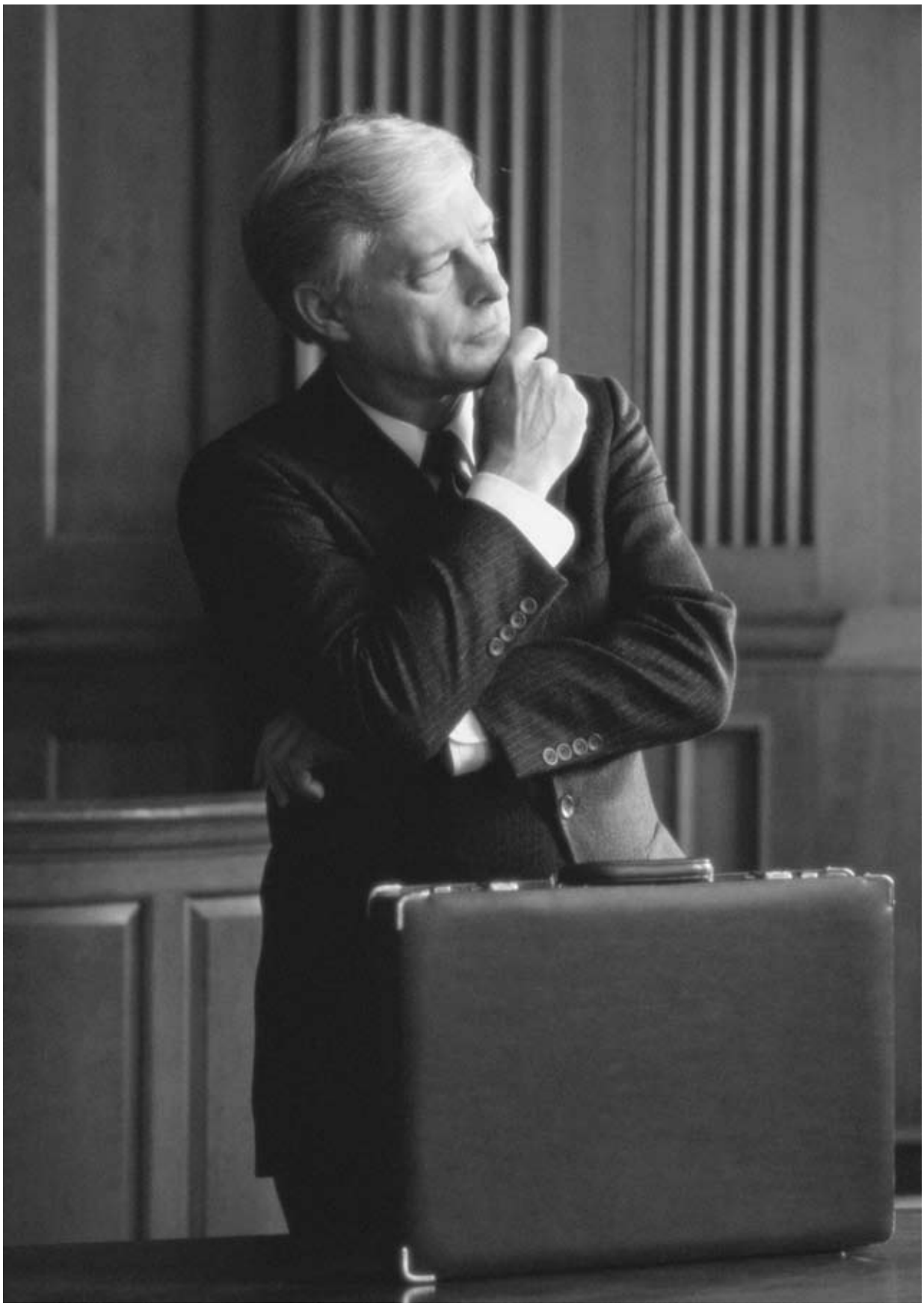

Ethics &
PROFESSIONAL
RESPONSIBILITY

Frequently Asked Ethics Questions

By Gina Hendryx and Travis Pickens

It is probably a good sign that ethics issues count for many of the questions posed to members of the OBA staff. Lawyers are people who like to follow the rules, and it is one of our goals to make it easier for lawyers to follow them, especially when the rules involve the Rules of Professional Conduct and the supervision of the Oklahoma Supreme Court. We have selected some of the questions most often asked (or the most interesting) and provided an advisory response. Practitioners should keep in mind that the ultimate authority in ethics issues is the Oklahoma Supreme Court; everyone else is simply providing the best guidance they can. Any ethics question can be addressed to Ethics Counsel by telephone at (405) 416-7055 or by e-mail at travisp@okbar.org.

1) What is the difference between the OBA's Offices of General Counsel and Ethics Counsel?

Generally, under the supervision of the Professional Responsibility Commission, the Office of General Counsel is charged with the investigation and prosecution of alleged misconduct or incapacity of any lawyer. The procedures are outlined in the Rules Governing Disciplinary Proceedings.[1]

The Office of Ethics Counsel was created to provide all Oklahoma lawyers a resource for specific and confidential guidance as to ethics questions and to encourage the proactive consideration and handling of ethics issues. The guidance provided is a privileged, confidential communication and is not shared with the office of General Counsel (unless at the lawyer's request in responding to a bar complaint).

2) Am I responsible for the conduct of nonlawyers such as paralegals and law clerks I supervise?

Nonlawyers such as student law clerks and paralegals are not directly bound by the ORPC, but their supervising lawyers are and must make reasonable efforts to ensure that the firm has effected precautionary measures and the nonlawyer assistants' conduct is compatible with the professional obligations of the lawyer. The supervising lawyer will be responsible for the ORPC violations of the people they supervise if the supervising lawyer orders, ratifies or

fails to mitigate the result of the misconduct.[3] "Measures" is a key word. Measures could include requiring staff to read the rules annually, discuss the rules with their supervising attorneys and to audit CLE ethics courses. The measures should be set out in the employee's employment contract.

3) Is there a "federal" code of professional conduct?

There is not a "national" code of professional conduct, although federal courts have their own admission requirements and local rules that must be followed and which may provide rules of "conduct." The ABA has promulgated "model" rules of professional conduct that have been widely adopted by various states, with various modifications. The Oklahoma ORPC closely tracks the ABA's model rules, making ABA ethics opinions a helpful research resource. The Oklahoma modifications to the ABA rules are set out in the comments that follow each Rule of Professional Conduct.

4) With what code of professional conduct am I bound when I am practicing law outside the state of Oklahoma, when in a case *pro hac vice* for example?

As an Oklahoma lawyer, you are subject to the disciplinary authority of this jurisdiction regardless of where the conduct occurs – as is an out-of-state lawyer practicing in Oklahoma. You may be subject to the disciplinary authorities of both jurisdictions for the same conduct.[4]

Choice of law rules in the ORPC seek to limit the exercise of only one set of rules to a lawyer. Generally, with matters pending before a tribunal, the rules of the jurisdiction in which the tribunal sits will control.[5] For any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred should control, unless the predominant effect of the conduct is in a different jurisdiction.[6]

5) Are the "Standards of Professionalism" and "Lawyer's Creed" adopted by the OBA Board of Governors part of the ORPC?

No. The "Standards of Professionalism" and "Lawyer's Creed" found on the OBA Web site are separate from the ORPC. They were promulgated by the OBA Board of Governors to articulate the high ideals and civil behavior that every Oklahoma lawyer should emulate and honor. They were not intended as a basis for discipline or to establish standards of conduct in an action brought against a lawyer.

6) Does the violation of a ORPC give rise to a cause of action or a presumption that a legal duty has been breached?

No. The rules are designed to provide guidance and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.[7]

7) What resources are available to attorneys on ethics issues through the Office of Ethics Counsel?

There are a variety of resources:

- Use the "Ethics & Professionalism" tab on the OBA's Web site, www.okbar.org. The tab has links to applicable rules, comments, opinions, ethics articles and tips.
- E-mail your question to the Ethics Counsel at travisp@okbar.org
- Call the Ethics Counsel at (405) 416-7055, or toll-free at 1 (800) 522-8065.

8) What should I expect when I call or write the Ethics Counsel with a question?

The office is a resource for lawyers with questions pertaining to their own practices and cases. Therefore, when *you* call with a question pertaining to your own situation, the advice will be advisory in nature, but still direct and specific. Research into Oklahoma ethics opinions, ABA ethics opinions and case law may be necessary to give you the best advisory advice possible based upon the time allowed.

If you call with respect to the behavior or ethical issue as to *another lawyer*, counsel will endeavor to provide you references to the portions of the ORPC and ethical opinions or cases that may apply to the question but does not offer an "opinion" or pre-judge the situation as there are undoubtedly other pertinent facts or factors that might affect the advice. The Ethics Counsel does not arbitrate or "decide" ethics issues.

No advice or ethics guidance is provided to *clients or members of the general public* who may call except perhaps for polite referral to the OBA's Web site. The Office of Ethics Counsel is a resource to help members of the OBA. On average, 10-20 calls or contacts with ethics questions are made to the office each day.

9) What is the procedure to obtain a written ethics opinion?

Advisory opinions of the Ethics Counsel are primarily informal and by telephone or e-mail, although written materials are sometimes forwarded or a written response provided in appropriate instances.

The OBA Legal Ethics Advisory Panel (LEAP), on the other hand, serves in an advisory capacity for OBA members seeking formal written opinions concerning compliance with the ORPC. The opinions are intended as a guide to responsible professional behavior. Advisory opinions are simply that, and are non-binding. Binding interpretation and application of the Rules of Professional Conduct remain exclusively with the Oklahoma Supreme Court.

The Legal Ethics Advisory Panel is a body made up of two divisions, one sitting in Tulsa County and the other in Oklahoma County. Requests are made to the panel coordinator (the rules for application are on the OBA's Web site). The request should relate to prospective conduct only and contain a complete statement of facts pertaining to the intended conduct, together with a clear, concise question of legal ethics. The panel then votes to accept or reject the request. It must raise a serious ethical issue of general concern. The opinion will focus only upon the Rules of Professional Conduct, not issues of law being litigated. No LEAP opinion shall be binding on any lawyer disciplinary body. The opinions shall not be construed to be anything other than advisory in nature; however, following the guidance given can help avoid harmful ethical missteps and can be used as a mitigating factor in the event of disciplinary scrutiny.

10) Is there a duty to self-report?

No, although it may be used as a mitigating factor in the event of a later disciplinary review.

11) How long should I keep a closed case file?

Unfortunately, there is no hard and fast answer to this question. Most state ethics committees agree that lawyers are not obligated to keep client files indefinitely. However, most jurisdictions concur that "clients and former clients reasonably expect from their lawyers that valuable and useful information in the lawyer's files, and not otherwise readily available to the clients, will not be prematurely and carelessly destroyed."[8]

The ORPC do not provide specific direction or guidelines on the subject of file retention. However, ORPC 1.15(a) does require that complete records of client account funds (trust accounts) and other client property be kept for five years after termination of the representation.

The length of time that a file should be retained may depend on various factors, such as:

- Files pertaining to claims of minors should be maintained until the child is beyond the age of majority and any statutes of limitations have expired.
- Some probate, estate and/or guardianship matters may require an indeterminate retention period.
- Real estate title opinions and title insurance work may require a far more lengthy retention of work product.
- Statutes of limitation.
- The nature of the particular case and related substantive law.
- The client's needs.
- Your fee agreement or other understanding with the client.
- Requirements of your malpractice carrier.

12) Should our firm have a document retention policy?

Yes. All lawyers and law firms should implement a written file storage, management and retention policy and should follow the policy uniformly. Some provisions for the retention policy should include:

- Files will be maintained only for a specified period of time.
- Original documents will be returned to the client upon conclusion of the representation.
- The client may have the file upon expiration of the time period.
- If not retrieved by the client, the file will be destroyed once the time period passes.

Clients should be sent a closing letter notifying them of their right to take any documents not previously furnished to them and advising them of the date that the file documents will be destroyed. The policy can be made a part of the client's fee agreement.

13) How should I dispose of a client's file material?

A lawyer must protect a client's confidences when disposing of file contents. This generally means that the file must be shredded or incinerated. Care should be taken if these tasks are contracted to outside companies. The lawyer should ensure that documents are disposed of without review of confidential information by the contractor's employees or others. There are companies familiar with these duties of confidentiality that market specifically to law firms.

You should consider retaining an index of destroyed files, copies of your fee agreement, as well as any other key documents.

14) What rights do I have to retain the file from the client or successor counsel if I have not been paid?

Two different scenarios prompt the same inquiry. Is it proper to retain, until the fee is paid, a client's papers, money and other property that came into the attorney's possession in the course of the professional employment? Oklahoma recognizes the common law *retaining lien*, also known as a general lien or possessory lien. The retaining lien is an attorney's claim to hold a client's file, money or property until the fee is satisfied. The retaining lien may be applicable when a client's failure to comply with a fee agreement has led to a lawyer's withdrawal or when a client has discharged an attorney and there remains an outstanding fee balance.

In the case *Britton and Gray PC v. Shelton*,[9] the Oklahoma Court of Civil Appeals set forth guidelines to assist in determining when it is proper to assert and enforce a retaining lien. "Oklahoma law recognizes two types of lien by which a lawyer may secure payment for services: 1) a statutory charging lien and 2) a common-law general possessory or retaining lien.... The retaining lien generally attaches to all property, papers, documents, securities and monies of the client coming into the hands of the attorney in the course of the professional employment."

However, "a lawyer [may not] take money or property entrusted to him for a 'specific purpose' and apply it to the attorney's fee claim."[10] For example, money paid to an attorney for the "specific purpose" of taking a deposition would not be subject to a retaining lien.

In *Britton*, the court held that the assertion of a retaining lien that is prejudicial to the client is inconsistent with the lawyer's continuing duty to the client. When determining whether or not to claim a retaining lien to original documents you should assess 1) whether the client will suffer serious consequences without the documents and 2) whether any prejudice to the client can be mitigated by means other than a return of the documents.

"Is it proper to retain, until the fee is paid, a client's papers, money and other property that came into the attorney's possession in the course of the professional employment?"

A valid retaining lien will only attach when there are reasonable fees due and owing. It may not be asserted for legal services not yet performed, whether or not the client has agreed to pay for the future services. The attorney claiming the lien has the burden of proof on reasonableness and indebtedness. Once met, it is upon the client to prove prejudice.

In short, the attorney's legal rights to secure payment for services rendered must be balanced with the ethical responsibilities not to harm the client.[11] This overarching consideration makes this collection tool somewhat dangerous to employ. Frankly, there are better ways to ensure payment.

Before you hold a client's file "hostage," weigh the competing factors:

- By holding the property, do I prejudice the client's ability to go forward with the matter?
- Can the client get the retained material by other means?
- Are my fees reasonable?
- Are my claimed fees for completed work?

15) When is it proper to communicate with a represented person?

ORPC 4.2 prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. By restricting lawyers from communicating directly with persons who are represented, Rule 4.2 preserves the attorney-client relationship, protects clients against overreaching by other lawyers and reduces the likelihood that clients will disclose confidential or damaging information.[12]

The rule applies even though the represented person initiates the communication. You should immediately terminate the conversation once you learn the person is represented in the matter.

16) May I give a second opinion?

Yes, if you are as yet uninvolved in the matter.[13]

17) What if I am not sure the person is represented?

Consent of the opposing lawyer is not required to talk with a represented person unless you know a person is represented. "Knowledge" has been defined as actual knowledge, but it may be inferred from the circumstances. The smart thing to do is to ask first.[14]

18) What if their client calls my client?

A party to a matter may speak to other parties, even though both are represented by counsel. *See* ORPC 4.2. However, a lawyer may not "mastermind" the communications between a client and a represented person in an effort to elicit confidential information or a settlement.

19) Is videotaping the opposing party the same as "communicating"?

Observing a party is not the same as "communicating" with the party.[15]

However, taking the act beyond mere observation to contact with the represented person may be improper. A lawyer should not cause a nonlawyer to contact a represented person. The lawyer may not use an investigator or other person to do what the attorney may not. Therefore, the investigator should not engage the represented person in conversation or *ex parte* communications.

A lawyer should not necessarily accept a person's statement that he has fired his attorney. Some states hold that you must contact the opposing counsel to confirm the termination. At a minimum, one should get written confirmation from the client that the attorney has been fired. ABA Formal Ethics Op. 95-396 (1995) states that a lawyer should seek confirmation that a representation has been terminated. In a case involving a court appointment, the lawyer should confirm that the court has granted counsel leave to withdraw.

These are only but a few of the dilemmas faced by attorneys when complying with Rule 4.2 communications. Much more complex issues are raised when the represented party is an organization with current and former employees. Care should be taken to review the applicable case law before contacting persons who may be represented in a matter. Violation of the rule may result in suppression of the evidence, return of documents, monetary sanctions, disqualification, and discipline.

20) My client owes me a lot of money for legal services and advanced expenses. May I charge the client interest on the unpaid balance?

Yes, assuming the money is overdue and the client has agreed. *See* Ethics Opinion No. 286, which can be found at www.okbar.org/ethics/286.htm. Ethics Opinion No. 286 notes that attention should be paid to applicable state and federal law.

> In light of the Committee's opinion it merits mention that there are specific requirements under the Oklahoma Uniform Consumer Credit Code providing for the disclosure of interest under various situations. It is suggested that the attorney review the statutes before proceeding with the charging of interest so that he fully complies with the requirements applicable to his situation.

Ethics Opinion No. 286 does not explicitly require the agreement to be memorialized nor does Oklahoma require all fee agreements to be in writing. ORPC 1.5 requires only contingency fees be in writing while encouraging other fee agreements to be communicated to the client in writing. However, if an Oklahoma attorney intends to attach finance charges to an unpaid legal fee, he would be wise to get the client's agreement to same in writing. The following are suggested:

- Communicate the basis or rate of the fee along with the intent to charge interest on any unpaid balance to the client both orally and in writing.
- Communicate to the client how the interest will be computed both orally and in writing.
- Affirm the client's agreement to the fee and interest by having the client sign the fee agreement.
- Keep the original of the fee agreement and give the client a copy.
- The interest rate must be reasonable, within legal limits, and not usurious.
- The total amount sought from the client (fees plus interest) must be reasonable.

21) Can I lend a client money?

It is not uncommon during the course of litigation for a client, especially one with a pending injury claim, to ask for financial assistance from his or her attorney. The request may be for an "advance," "loan" or "guarantee." Regardless of the form, ORPC 1.8(e) provides "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter."

Advancing living expenses (*e.g.* rent) to a client is prohibited in Oklahoma.[16]

The exception for "costs" and "expenses" encompasses most of the generally accepted charges directly associated with litigation. Costs include filing fees, fees for service of process, and other disbursements that are taxable and included in the judgment.[17] Expenses of litigation have been interpreted to include investigation costs, expenses of medical examinations, and the costs of obtaining and presenting evidence. Fees for legitimate travel related to litigation have been held to be expenses of litigation. However, other jurisdictions have held the advancement of funds for transportation to a medical office for treatment or for payment of treatment to be improper.

The rule prohibits an attorney from making a loan to a client and likewise prohibits the "guaranteeing" of same. The attorney, subject to attorney/client confidence considerations, may confirm the pendency of a settlement and recognize any lawfully obtained liens or encumbrances.

In the past, clients were ultimately liable for all advanced court costs and expenses of litigation. Rule 1.8(e) allows repayment to be contingent upon the outcome of the litigation. The contingent fee agreement must be in writing, and among other things, must state whether the client is responsible for reimbursement of expenses.[18]

22) May I split a fee with another lawyer who only refers the case?

Fee division among lawyers most commonly occurs when one lawyer refers a case to another lawyer. Other scenarios may include when a client's original attorney withdraws and is replaced by a successor or a lawyer withdraws or retires from a firm. Regardless of the circumstances, lawyers from different firms who work on the same case may agree to split the legal fees earned on the case.[19]

A division of fee between lawyers who are *not* in the same firm may be made only if:

1) the division is in proportion to the services performed by each lawyer, or each lawyer assumes joint responsibility for the representation;
2) the client agrees to the arrangement and the agreement is confirmed in writing; and
3) the total fee is reasonable.

The attorneys are not required to disclose to the client the percentage share each attorney is to receive as between themselves, but must as compared to the client. The total fee must be reasonable.

Joint responsibility entails, at least, the obligations required of the lawyer in ORPC 5.1. This rule places the attorney is a "supervisory capacity" to be responsible to some degree for the other lawyer's work and to make reasonable efforts to ensure the other lawyer conforms to the rules of professional conduct. Joint responsibility includes assumption of responsibility to the client "comparable to that of a partner in a law firm under similar circum-

stances, including financial responsibility [and] ethical responsibility to the extent a partner would have ethical responsibility for actions of other partners in a law firm in accordance with Rule 5.1."[20] Be careful in your referrals as your responsibility is more than you may have thought.

The best practice is to have fee division agreements in writing specifying the referring attorney's role in the case and the terms of the split. There should be an agreement with the client and as between the two lawyers.

23) What if the presiding judge is a former partner with me or my opposing counsel?

How long should a judge be required to disclose previous professional relationships with attorneys appearing in the judge's court? The Judicial Ethics Advisory Panel has been reticent to set a specific timeline for how long a judge should continue to disclose previous professional relationships. "We have previously stated that when a new judge assumes office, the judge should, for a reasonable period of time, disclose any immediate past association with an attorney appearing before the Judge."[21] The question before the panel involved a judge who was a sole practitioner for seven years immediately prior to becoming a judge and had been on the bench for two years. The panel stated that this was certainly more than sufficient time to no longer require disclosure of past relationships. Criteria to consider before requesting recusal based on prior professional relationships include:

- the length of the judge's association with the other attorney or firm;
- the closeness of the association;
- the amount of time since the association ended;
- the size of the firm;
- whether the court is located in a non-metropolitan area;
- any financial dealings the judge has with the former partners;
- the duration and closeness of personal relationships between the judge and former partners and associates;
- whether the judge has a personal bias or prejudice toward the former partner or firm;
- whether the judge is still receiving money from the firm or lawyer;
- any continuing social relationship with the attorney.

> "The best practice is to have fee division agreements in writing specifying the referring attorney's role in the case and the terms of the split."

24) My client doesn't want me to pay his doctor's bill. What should I do?

In Oklahoma, a lawyer may have a statutory duty to protect the claims of third parties against client funds or property in the lawyer's possession. ORPC 1.15(d) and (e) provide:

> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (e) When in the course of a representation, a lawyer possesses funds or other property in which both the lawyer and another person claim interests, the funds or other property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved, and the undisputed portion of the funds shall be promptly distributed.

The most prevalent example is when a medical provider files a lien for services rendered. If a medical lien comports with the applicable statutory requirements, an attorney must recognize the validity of the lien and safeguard the funds.[22]

If there is a legitimate dispute over the distribution of the funds or ownership of the property, the lawyer should not unilaterally assume to

arbitrate a dispute between the client and a third party. Further, where there is a dispute over entitlement to the funds, the attorney cannot simply hold the funds indefinitely. The attorney should seek, if necessary, to institute appropriate proceedings to resolve the dispute.[23]

The lawyer may be required to protect the interests of a third party that do not have a valid lien. For example, if a client signs an agreement to pay a medical provider out of settlement proceeds, the attorney may be required to recognize the agreement and not follow client's subsequent instructions to do otherwise.[24]

25) Why is it important to have and properly maintain an IOLTA trust account?

Participation in the Interest on Lawyers' Trust Account (IOLTA) program is mandatory for OBA members that hold client or third-party funds in connection with a representation, unless it is not feasible for the lawyer or law firm to establish an interest-bearing trust account for reasons beyond their control. If the client funds are nominal in amount or to be held for a short period of time, they must be placed in an interest-bearing pooled trust account with the interest going to the Oklahoma Bar Foundation. The foundation's tax I. D. number will be assigned to the IOLTA account.[25]

Nominal in Amount or Held for Short Period of Time

To determine whether the client funds are "nominal in amount" or "to be held for a short period of time," the lawyer shall consider whether the funds could be invested to provide a positive net return or benefit to the client taking the following factors into consideration:

> a) the amount of interest the funds would earn during the period the funds are expected to be deposited;
> b) the cost of establishing and administering the account, including the cost of lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's benefit; and,
> c) the capability of the financial institution to calculate and pay interest to individual clients. ORCP 1.15 (h)(5)

Client funds that do not meet the nominal or short term definitions may be placed in a separate account that may earn interest for the client's benefit. The client's tax I.D. number should be used on such an account.

Trust account violations are among the most serious. Careful attention to the governing rule ORPC 1.15 must be paid, as there are other requirements than those discussed in this response. There is additional information and explanation provided on the OBA Web site. When in doubt, contact the office of Ethics Counsel or the Oklahoma Bar Foundation for assistance.

2009 – Amendment to ORPC:

ORPC 1.15 (g) has been amended to require changes pertaining to IOLTA accounts to be reported within thirty days of when the changes were actually made, not annually as formerly required. 1.15 (g) now reads, in part, as follows:

> Effective January 1, 2009,… [e]ach member of the Bar shall provide the Oklahoma Bar Association with the name of the bank or banks in which the lawyer carries any trust account, the name under which the account is carried and the account number. The lawyer or law firm shall provide such information within thirty (30) days from the date that said account is opened, closed, changed, or modified. The Oklahoma Bar Association will provide on-line access and/or paper forms for members to comply with these reporting requirements. Provision will be made for a response by lawyers who do not maintain a trust account and the reason for not maintaining said account. Information received by the Association as a result of this inquiry shall remain confidential except as provided by the Rules Governing Disciplinary Proceedings. Failure of any lawyer to respond giving the information requested by the Oklahoma Bar Association, Oklahoma Bar Foundation or the Office of the General Counsel of the Oklahoma Bar Association will be grounds for appropriate discipline.

CONCLUSION

In conclusion, an important part of our jobs is to help you successfully navigate the Rules of Professional Conduct. We frequently write for this publication and write and speak for continuing education programs in an effort to provide as much assistance as possible. The phrase "a lawyer should avoid even the appear-

ance of impropriety" is still good advice, but there are an increasing number of opinions and rules to know. We think most lawyers will do the right thing, if they know what the right thing is. We hope this and other articles from our offices help.

1. 5 O.S. Ch. 1. App. 1-A.
2. Oklahoma Rules of Professional Conduct (ORPC) 5 O.S. Ch. 1. App. 3-A, Rule 8.3(d).
3. ORPC 5.3.
4. ORPC 8.5 (a).
5. ORPC 8.5 (b)(1).
6. ORPC 8.5 (b)(2).
7. ORPC Scope [20].
8. ABA Standing Committee on Ethics and Professional Responsibility, Informal Op. 1384 (1977).
9. *Britton and Gray PC v. Shelton*, 2003 OK CIV APP 40, 69 P3d. 1210.
10. *State ex rel. Oklahoma Bar Ass'n v. Cummings*, 1993 OK 127, 863 P.2d 1164, 1170.
11. ORPC 1.16 (d).
12. *See* ABA Formal Ethics Op. 95-396 (1995).
13. *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Butner*, 1998 OK 132, 976 P.2d 542 (Okla. 1998).
14. *See, e.g., State ex rel. Oklahoma Bar Ass'n v. Harper*, 2000 OK 6, 995 P.2d 1143 (Okla. 2000).
15. *Hill v. Shell Oil Co.*, 209 F.Supp. 2d 876 (N.D. Ill. 2002).
16. *See State ex rel. Oklahoma Bar Ass'n v. Smolen*, 2000 OK 95, 17 P.3d 456.
17. *Sellers v. Johnson*, 1986 OK CIV APP 6, 719 P.2d 476, 479.
18. ORPC 1.5(c).
19. ORPC 1.5(e).
20. ABA Informal Ethics Op. 85-1514 (1985).
21. Judicial Ethics Opinion 2003-6, 2003 OK JUD ETH 6, 84 P.3d 808.
22. *See Saint Francis Hospital v. Vaughn*, 1998 OK CIV APP 167, 971 P.2d 401.
23. *See State of Oklahoma ex rel. Oklahoma Bar Association v. Taylor*, 2003 OK 56, 71 P.3d 18.
24. *See* ABA Informal Ethics Opinion 1295 (1974).
25. ORPC 1.15.

ABOUT THE AUTHORS

Gina Hendryx is the General Counsel for the Oklahoma Bar Association. A licensed attorney for the past 25 years, she received her J.D. and B.S. degrees from OCU. She supervises a staff of 12 and serves as the association's counsel on other legal matters. She works with the Professional Responsibility Commission and serves as a liaison to the OBA Board of Governors, OBA committees, the courts, and other local and national entities concerning lawyer ethics issues.

Travis Pickens serves as OBA Ethics Counsel. He is responsible for addressing ethics questions from OBA members, working with the Legal Ethics Advisory Panel, monitoring diversion program participants, teaching classes and writing articles. A former litigator in private practice, he has served as co-chair of the Work/Life Balance Committee and as vice-chair of the Lawyers Helping Lawyers Assistance Program Committee.

Ethics &
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The Monster in the Mirror: Declining Civility in the Practice of Law

By David K. Hale

Most of us begin to learn the importance of good manners from our families. This process continues at church, in school and social settings as we learn about the standards for behavior considered appropriate in particular places and situations. Most young attorneys are first exposed to the accepted manners of the legal profession in law school, although very little education in professionalism is a part of the core curriculum. As a result, an interesting paradox has developed in the legal profession.

Senior lawyers lament the lack of civility in up-and-coming lawyers. They share war stories to reinforce the notion that the profession is taking a turn for the worse. Senior lawyers say that in days past, the practice of law was more fun. The next thing they do is go out and tell law students and young attorneys about how the best and brightest attorneys are the ones who are stepping outside the bounds of civility.

It is hard to argue that many attorneys abandon what little professionalism they have learned in law school once they enter in the pressure-filled marketplace of private practice.[1] Some attorneys lose sight of the human side of the law and adopt a win-at-all-costs strategy in the quest to win cases, increase profits, gain clients and build strong reputations. The question many senior lawyers ask is why this is happening to the next generation of lawyers.

While it may be a tough pill to swallow, the answer to this question is staring back at senior lawyers every morning when they look in the mirror. It is hard to find a senior attorney who does not have a war story or two they love to share. It may be a personal experience or an attorney they know or have worked with, but the stories tend to have a common theme. The theme that echoes through the halls of law schools is that underhandedness and ethical tightrope walking is rewarded handsomely.

A recent article published by the American Bar Association held up seven men as "Lions of the Trial Bar."[2] This article detailed why these men had obtained the status that they had. Two examples stood out exemplifying

why young lawyers of today are not as civil as senior lawyers feel they should be.

The first "Lion" was an attorney from Georgia by the name of Bobby Lee Cook.[3] I do not know Mr. Cook, I have no first hand experience to comment about his legal skills and don't doubt he is fine attorney. That said, the subhead on his write up says it all: "Bobby Lee Cook: Kickin' Asses that needed Kickin.'" The article goes on to detail how he pulled a sheriff out of the witness box and beat him senseless in open court.

The second "Lion" was Joe Jamail.[4] The ABA article on Mr. Jamail detailed one of his less colorful moments, forging documents to get into the Marines. However, the Delaware Supreme Court forever memorialized the bellwether of legal incivility in the case of *Paramount Communications Inc. v. QVC Network Inc.*[5] In the *Paramount* case, Mr. Jamail was admonished by the court in telling an opposing attorney that he "could gag a maggot of a meat wagon," among other things. The court went on to say that while he served his client well, he had also engaged in misconduct.[6]

How can we expect a generation of lawyers to exercise civility when we tell them that attorneys like Mr. Jamail and Mr. Cook are the best of the best? While these men are successful attorneys, they are held up as role models, yet their conduct does not match what other attorneys want to see in co-counsel and opposing counsel. The antics described in the ABA article may be exceptions to generally civil conduct by these two men, but these are the stories being celebrated, as these men are held out as the finest examples of trial attorneys in practice today.

Of course the easy way out would be to pass these men off as another bar's problem. It would be easy to say that the lions of the Oklahoma bar do not act in such an uncivil manner. To do so would be disingenuous at best.

Over the course of my legal education, I have been told repeatedly about a certain Oklahoma attorney who is the pinnacle of fine lawyering and an excellent example of what an attorney should aspire to. Yet, the one war story I know about this attorney is that he intentionally buried opposing counsel with bankers boxes full of paper in response to a discovery request, some of which he knew were not responsive to the request, in an effort to hide a "smoking gun" memo. This lawyer went on admit that he

"...he pulled a sheriff out of the witness box and beat him senseless in open court."

buried opposing counsel knowing that they lacked the capacity to review all the documents produced prior to trial. The story goes on to reveal that this attorney got a verdict in favor of his client, but in subsequent litigation the memo was located and the results of subsequent trials were not so favorable.

Is this a man I should emulate? I have been told repeatedly that the correct answer to that question is yes. However, how do I reconcile his actions with the cry for civility as I begin my career in the next few months? The message I am receiving is that I should aspire to be like these seasoned, respected attorneys. I am told stories about how they acted out in sometimes blatantly improper, uncivil ways. I am told stories about times they stretched the ethical rules to their breaking point. In the next breath, I am told that I need to act in a much more civil manner than what is described in the war stories I commonly hear.

While I am not in a position to say whether civility is truly declining, I can offer this observation as a soon to be member of the bar. Actions speak much louder than words. When someone tells me to emulate Mr. Jamail and then describes how he abuses opposing counsel or tells me to be like the attorney in the next office, and then tells me how he buried the smoking gun in an avalanche of unresponsive paper, what lesson do they really expect me to take away?

Throughout my legal education, I have been sent conflicting messages as to what the proper bounds of civility really are. Being the first to enter the practice of law in my family, immediate and extended, my perceptions of how to play nice with others and have a successful career are still in the early formative stages. Many of my classmates find themselves in similar situations and are entering an increasingly competitive legal market. How do we make sure that people like me avoid the lack of civility detailed earlier in this article?

To cure the ailment of incivility in the practice of law, it needs to be treated much the same

way you would any illness you face. The disease has been diagnosed as declining civility in the practice of law. The medication that is needed is a strong mentoring program.

The syrup may look like the penicillin a child takes for an earache, but it could not be farther from the truth. Mentoring will not provide an overnight cure, but rather a steady dose over a long period of time will be required if civility is to be developed and maintained at the levels many would like to see.

Mentors need to be willing to take time away from their everyday practice to help a younger attorney learn not only proper practice techniques, but how to play well with others. While mentoring is important within the walls of a firm, it needs to reach beyond the confines of firms and their new associates. The reality of the legal profession is that most attorneys will find work in small firms and offices as they come out of school and form their legal personality. There is a danger in such scenarios that mentoring will be insufficient or even nonexistent. Lawyers who are fully invested in the future of the Oklahoma legal community need to step up to the plate and take the time to mold the next generation of lawyers. In doing so, they can help influence the civility of practice overall.

Additionally, for mentoring to be successful, we need to overcome the myth that one person can be an adequate role model. Most new lawyers will need multiple mentors to help them find their voice within the legal community. As their careers mature, they will naturally gravitate away from some mentors and closer to others who have built a practice similar to the one they are building and have done so in a way that resonates with their personality.

To stem the erosion of civility in the practice of law, mentors are needed. Much as the blind listen to the familiar tones of audible signals to cut through the sounds of a busy city and guide them to safety as they cross the street, law students and young attorneys need a strong, familiar voice to drown out the current cacophony of messages besieging them. When they have that voice to follow, they will develop into well-rounded members of the bar, who understand what civility truly means.

1. For a discussion of economic pressures and their contribution to the decline of civility in see Amy Mashburn, *Professionalism in the Practice of Law*, 28 VAL. U. L. REV. 657, 689 (1994).

2. Mark Curriden, *Lions of the Trial Bar*, ABA Journal, available at www.abajournal.com/magazine/article/lions_of_the_trial_bar/ (last visited November 29, 2009).

3. Mark Curriden, *Lions of the Trial Bar*, ABA Journal, available at www.abajournal.com/magazine/article/bobby_lee_cook/ (last visited November 27, 2009).

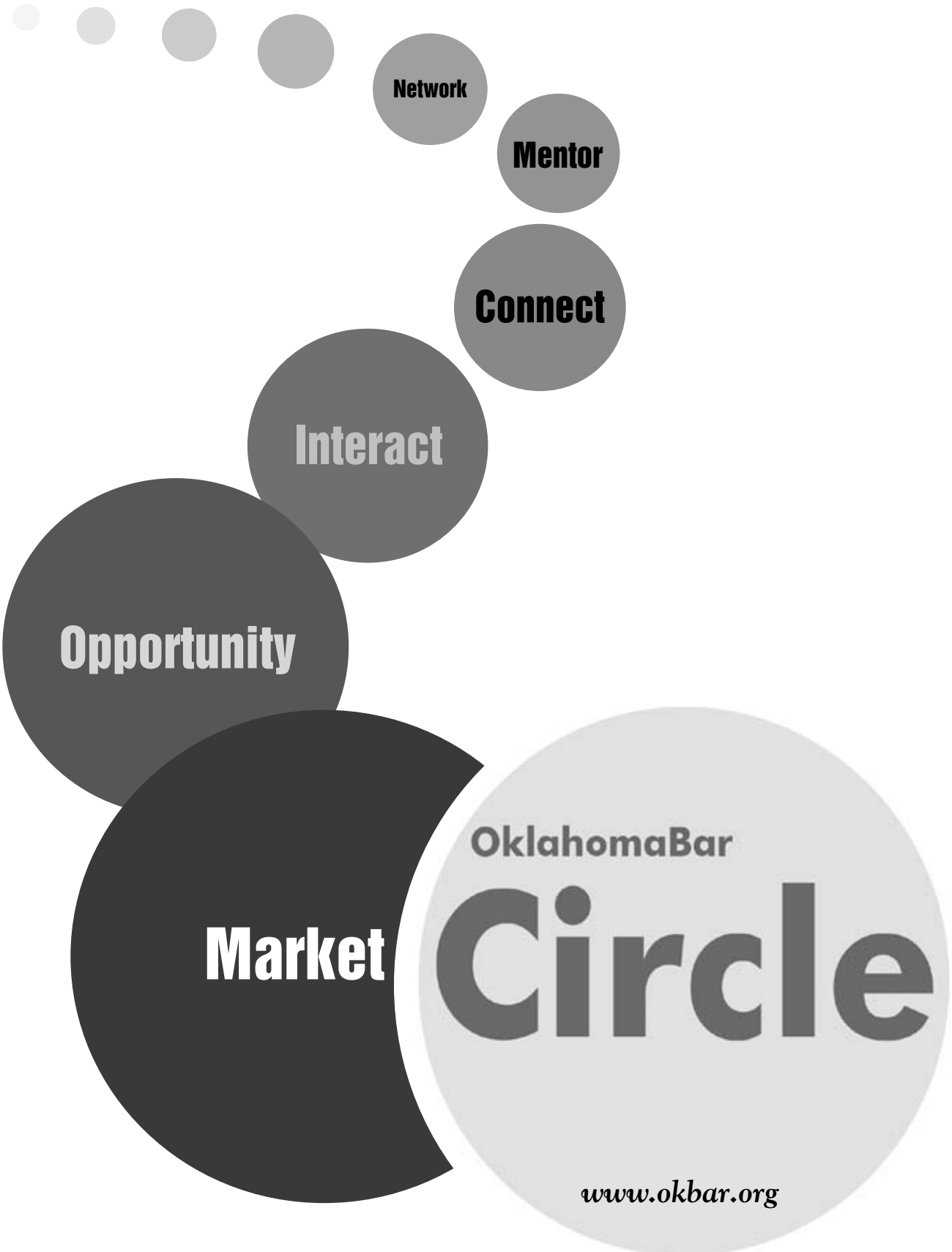
4. Mark Curriden, *Lions of the Trial Bar*, ABA Journal, available at www.abajournal.com/magazine/article/joe_jamail (last visited November 29, 2009).

5. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994).

6. *Id.* at 54.

ABOUT THE AUTHOR

David K. Hale is a third-year law student at the University of Oklahoma College of Law. He will complete his studies this December. During his legal education, he has volunteered in excess of 300 hours while coordinating service projects for the J. Reuben Clark Law Society, in addition to volunteering as a mediator with Early Settlement Mediation. However, his greatest accomplishments come at home as a proud father and husband.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NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

District Judge
Seventh Judicial District, Office 6
Oklahoma County, Oklahoma

This vacancy is due to the retirement of the Honorable Virgil C. Black, effective January 1, 2010.

To be appointed to the office of District Judge, Office 6, 7th Judicial District, one must be a registered voter of Oklahoma County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, or on line at www.oscn.net under the link to Oklahoma Judicial Nominating Commission. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, December 18, 2009. If applications are mailed, they must be postmarked by midnight, December 18, 2009.**

Mark D. Antinoro, Chairman
Oklahoma Judicial Nominating Commission

Social Ethics

By Travis Pickens

You are at the party and you see him coming, the guy across the room you barely know, but he knows you are a lawyer. He fixes his stare on you like a laser-guided missile on a Taliban safe house. If you break for the buffet table, he breaks with you. If you turn for the bar, he swivels like a point guard and is still with you. He's walking faster and closing fast.

You know what's about to happen is inevitable. You hopelessly shrug your shoulders and turn to face your pursuer. He grabs your arm and gets close, in your face, violating traditional customs of personal space. His breath stinks of nacho cheese and scotch. He has a question, a legal question, and he wants you, the lawyer, to stop mid-party, mid-fun away from work, and give him a specific legal opinion on his "unique" fact situation that takes him a full 10 minutes to relate – because he doesn't know how to get to the point and thinks no point can be made without "a little background," which of course includes encyclopedic detail, meaningless asides, a host of rationalizations, and most important of all, hints by inflection and curled lips as to how he wants you to come down.

He finishes a diatribe that makes Fidel Castro look meek, leans in even closer, and waits for you to say the words some clients prize above all others, "Gee, I can see why you did that! You are as right as you can be! I agree with you!" or the corollary, "Gee, I cannot believe that happened! That's blatantly illegal and they can't do that!"

Then, of course, if you do agree (a compelling option because you know it's the only way to break free from this smothering bore in time to get another drink before the bar closes), this guy will tell everyone he sees and knows that "my lawyer agrees with me completely" and that whatever was "clearly legal" or "highly illegal," the meaningless modifiers thrown in for effect. He will quote you in conversations and letters, each time making your advice more pointed, more urgent and more outraged.

And as quick as he came, he will back away from you, the lawyer, with a satisfied smile, followed by a couple of knowing nods, and then turn and leave without a "thank you," any offer to make an appointment at your office, or even buy your lunch. You've just been a victim of lawyer abuse.

How do you avoid this personal tragedy? First, leave work at the office. Physicians and accountants do, we can, too. Second, when you are ensnared by this abuser, grab him by the arm, interrupt him and say something like, "Whoa, I can see this situation is upsetting to you, but I really can't discuss this right now. This kind of [big deal] requires my absolute full attention. I will need to run a conflict check

and visit with you at length in my office before I can discuss even the possibility of representing you. Why don't you call my office Monday morning to make an appointment?"

You do not want the abuser to arguably become a client or potential client now, and you don't want to learn any confidential information, triggering restrictions and duties, for several reasons. One, it's a party, not an office conference. There will never be a fee. Two, whatever you utter will be frozen in the abuser's memory as "The Truth" for ever more. You will never be able to modify, much less retract it. Three, you will open yourself up to a nuisance malpractice claim or bar complaint if the abuser acts on incomplete advice and it turns out there is more to the story (there will be) that would have changed whatever you said. Four, you will have to maintain the abuser's confidences, which is something else you will be doing for nothing. Fifth, you might get to the office Monday and find out your damning opinion related to a client of another lawyer in your office.

Rule of Professional Conduct 1.18 (a) states that "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client." RPC 1.18 (b) says "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client."

Therefore, you *do not want to discuss representation or learn anything* at the party. There is absolutely *nothing* to gain, and perhaps a lot to lose. But, you really don't want to lose a potential client. The abuser may in fact have a legitimate issue and be willing to pay your full fee for the help. So, you are polite and invite him to set up a time at your office. If he is serious, he will. If not, you've wasted no time.

Then, you can go back to the party and have some fun.

ABOUT THE AUTHOR

Travis Pickens serves as OBA Ethics Counsel. He is responsible for addressing ethics questions from OBA members, working with the Legal Ethics Advisory Panel, monitoring diversion program participants, teaching classes and writing articles. A former litigator in private practice, he has served as co-chair of the Work/Life Balance Committee and as vice-chair of the Lawyers Helping Lawyers Assistance Program Committee.

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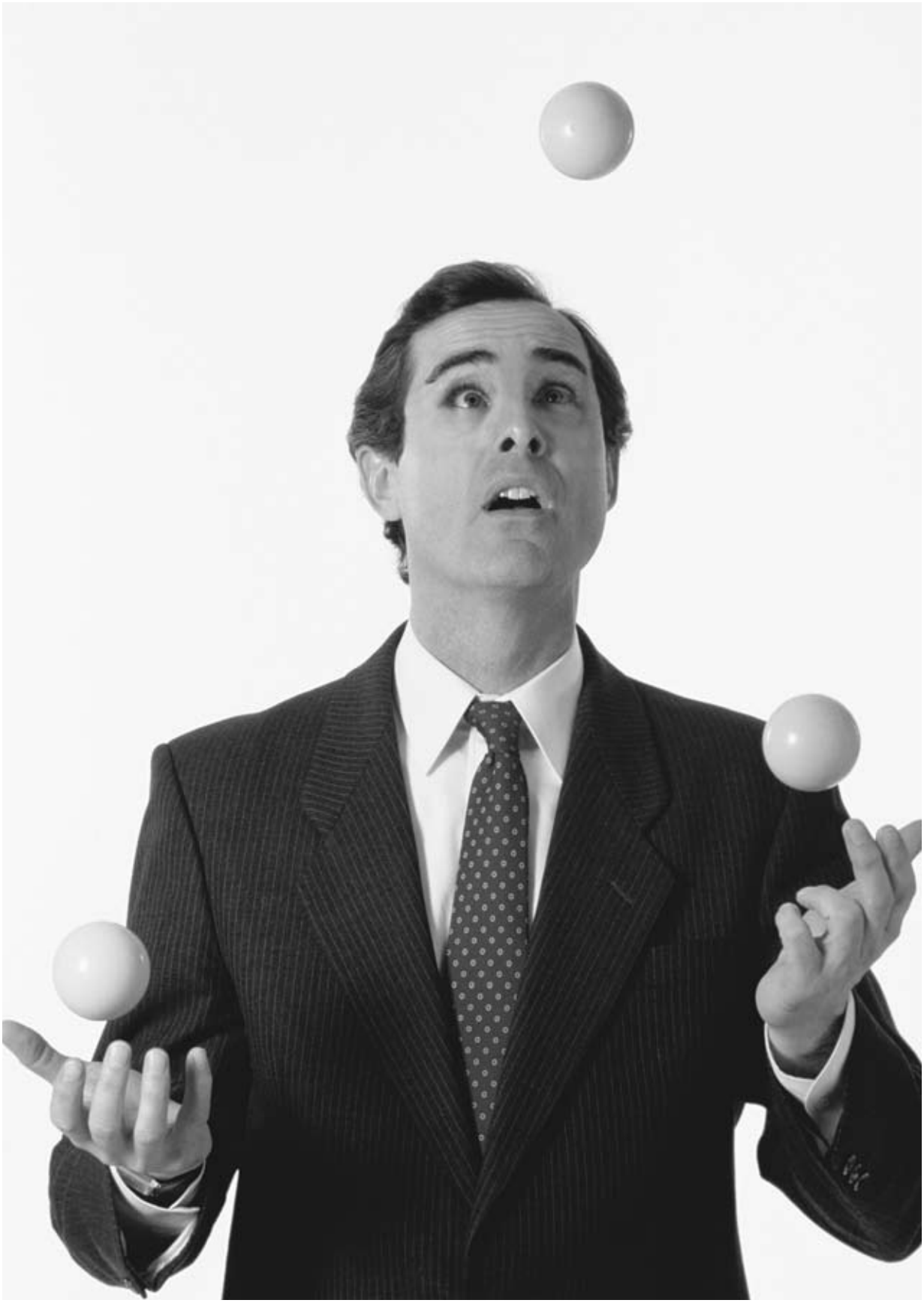

Ethics &
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RESPONSIBILITY

Appellate Advocacy and the Standards of Professionalism

By Justice John F. Reif

"We judges and lawyers of the State of Oklahoma recognize our responsibility to uphold the longstanding traditions of professionalism and civility within the legal system."

Preamble, Standards of Professionalism[1]

The practice of law is a demanding and challenging experience. A lawyer is a lot like a carnival juggler who has attention and effort constantly focused on several things at the same time. Like the juggler, the lawyer is watched with the expectation that nothing will be dropped. In time, however, both the juggler and the lawyer will eventually drop something when the number of things becomes too burdensome.

Among those watching the individual and collective juggling efforts in the practice of law are the professional organizations that oversee the conduct and competence of their members. In recent years, professional organizations, like the Oklahoma Bar Association and the American College of Trial Lawyers, have observed that professionalism and civility are things that the burdened lawyer has dropped more often (or at least more noticeably) than other demands. In response, the Oklahoma Bar Association and American College of Trial Lawyers have taken steps to help lawyers individually and collectively recognize that professionalism and civility actually make juggling the demands of practice a better, more balanced process.

In the fall of 2003, the Oklahoma Bar Association Board of Governors adopted Standards of Professionalism to articulate and promote "the level of behavior we [lawyers and judges] expect from each other and the public expects from us in our dealings with the public, the courts, our clients and each other." These standards go beyond the minimum standards a lawyer must meet under the Rules of Professional Conduct to avoid discipline. However, these standards are not intended to be used as a basis for discipline or as standards of care in an action against a lawyer. They are intended as guidance "to uphold the longstanding traditions of professionalism and civility within the legal system."

In the summer of 2005, the American College of Trial Lawyers adopted standards of pretrial conduct and revised its standards of trial conduct. Its new standards of pretrial conduct recognize that lawyers owe important duties of "courtesy, candor and cooperation" to the judicial system, to other lawyers and to the public, and "can protect [their client's] interests while still applying the highest standards of professionalism." Like the OBA Standards of Professionalism, the ACTL Standards are intended to supplement local rules, procedural rules and rules of professional conduct. Also, like the OBA Standards of Professionalism, the ACTL Standards "should not give rise to any claim, create a presumption that a legal duty has been breached or form the basis for disciplinary proceedings or sanctions." The standards are meant to provide guidance to lawyers on proper professional conduct.

In conjunction with the adoption of the Standards of Professionalism, the OBA Board of Governors also amended the Lawyer's Creed, originally adopted Nov. 17, 1989. The Lawyer's Creed recognizes that a lawyer's conduct "is not governed solely by the Oklahoma Rules of Professional Conduct, but also by standards of fundamental decency and courtesy." The amended Creed pledges "conduct… in a manner consistent with the Oklahoma Bar Association Standards of Pro-fessionalism." The Lawyer's Creed also identifies aspects of "the level of behavior" that the Standards of Professionalism seek to promote such as "a fundamental sense of integrity and fair play," "accommodation," "fundamental decency," "courtesy," "punctual[ity]" and "civility."

While professionalism and civility promote public respect for the legal profession, and mutual respect among its members, they also serve a very practical purpose. As the ACTL Standards observe, "the dignity, decorum and courtesy which have traditionally characterized the courts of civilized nations are not empty formalities [but] are essential to an atmosphere in which justice can be done."

The ACTL Trial Conduct Standards stress that the difficult tasks of discovering the truth and applying the facts to the law "are demanding and cannot be performed in a disorderly environment [and without] order… reason cannot prevail." The Lawyer's Creed similarly recognizes that "[r]ude behavior hinders effective advocacy," while OBA Standard 2.7 reminds that "effective representation does not require, and in fact is impaired by, conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious."

Professionalism and civility are not just cherished values or occasional practices to be employed when required for advantage or appearance. They provide the best possible environment in which advocacy can occur to produce decisions that make the law work and to achieve just results.

The OBA Standards of Professionalism and the ACTL Standards both address civility and professional conduct in particular contexts and areas of practice. Both sets of standards call upon the lawyer to do, or refrain from doing, a variety of things, depending upon the situation faced by the lawyer. While the standards place the most emphasis on professionalism and civility in litigation, many standards apply to appellate advocacy as well.

THE PROBLEM OF UNPROFESSIONAL APPELLATE ADVOCACY

To be sure, problems with unprofessional conduct and incivility do not occur as often in the calmer, reflective context of appellate advocacy as they do in the heat-of-the-moment world of daily practice and litigation. However, appellate advocacy is not without its lapses in professionalism and civility.

A few examples will illustrate this point:

1) In the statement of the case in a petition in error, the appellant's attorney wrote:

- "In a typical rape of justice commonly occurring in Oklahoma court rooms, [Judge X and Appellee] conspired by private prior agreement to deprive [Appellant] of access to court."
- "[Judge X] lied by claiming to have examined the pleadings, heard testimony and reviewed the evidence."
- "It is sufficient to say that [Judge X] is an embarrassment and a disgrace; [Judge X] is merely a typical judge."
- "[Judge X] states in his order that [Appellee] appeared by her attorney. [Judge X] should be compelled to appear before the multi-county grand jury and state whether or not he knows that attorneys are not witnesses and cannot present evidence to the court except through a competent witness."

- "The Supreme Court of Oklahoma is hereby noticed: The people of Oklahoma are fed up with this type of crap coming out of the district courts of Oklahoma and this Supreme Court's appellate divisions."

2) In a brief in chief, appellant's attorney wrote:

- "When reading the trial transcript… it becomes painfully apparent that this trial judge was biased in his feeble attempt to dispense justice."
- "[Judge X] came from an insurance defense background and lost all common sense of fairness upon appointment to bench [which was] a mandate to assist big business and insurance companies."
- "[Judge X] no more understands his role as a jurist than Dennis the Menace understands growing up and leading a productive life."
- "The trial court failed miserably at its job as a jurist, but exceeded with stellar marks in following [a] plan to sacrifice the working men and women of Oklahoma."
- "Respectfully submitted,…"

3) In a petition for certiorari, seeking review of a court of civil appeals decision, the petitioners' attorney wrote:

- "This excerpt from the Decision… reeks with a reweighing of the factual conclusions reached by the Trial Court."
- "This is [*sic*] Court is well aware that [Division X] has taken upon themselves… to inject their own personal philosophy and policy considerations into decisions handed down for their review."
- "[Division X] has reached the point of absurdity with their across the board reversal of virtually every case against Respondent/Employer/Insurance Carrier."
- "If it is supposed to be a secret, it is not a very well kept one and surely this Court must know of the antics of [Division X]."
- "If Claimants see they stand a one in four chance of getting [Division X] and getting their case returned in their favor, that chance is still enough to promote the continued filing of frivolous appeals."
- "To deny certiorari in a case such as this is literally to subsidize [Division X's] improper use of its power."
- "[A]ll that we can do is ask the Supreme Court to step in and supervise the preposterous decisions reached by [Division X]."

In general, sanctions and professional discipline are effective ways to deter this type of advocacy. However, such measures deal with unprofessional conduct and incivility after the fact and do little to promote public confidence in the profession. On the other hand, the standards of professionalism, though lacking an enforcement mechanism, promote both professional development and public confidence by identifying professional conduct that is proper and respected and by condemning behavior that is unacceptable and damaging to the profession. In simpler terms, the standards articulate the "thou shalts" and "thou shalt nots" for the practice of law.

OBA AND ACTL STANDARDS OF PROFESSIONALISM APPLICABLE TO APPELLATE ADVOCACY

While appellate advocacy was not specifically addressed in the OBA and ACTL Standards, Section 4 of the OBA standards addresses "Lawyers' Responsibilities to the Courts and Administrative Agencies." OBA Standards 4.1 and 4.5 in Section 4 are generally applicable to oral and written advocacy, while OBA Standard 4.9 specifically deals with "Writings Submitted to the Court or Tribunal." In addition, OBA Standard 4.10 addresses "*Ex Parte* Communications with the Court."

OBA Standard 4.1 calls upon lawyers to "speak and write civilly and respectfully in all communications with the court." This standard is a special application of the general declaration in OBA Standard 1.7 that "Our public communications will reflect appropriate civility, professional integrity, personal dignity, and respect for the legal system and the judiciary."

OBA Standard 4.5 directs that lawyers "never knowingly misrepresent, mischaracterize, misquote, miscite facts or authorities, or otherwise engage in conduct which misleads the court." This standard complements OBA Standard 1.2 that directs lawyers "not knowingly misstate, distort or improperly exaggerate any fact, opinion or legal authority."

OBA Standard 4.9(a) calls for "[w]ritten materials submitted to [the court to] be factual and

concise, accurately state current law, and fairly represent the party's position without unfairly attacking the opposing party or opposing counsel." Factual accuracy is further stressed in Standard 4.9(b) that declares: "Facts that are not properly introduced in the case and part of the record in the proceeding will not be used in briefs or argument." A similar rule is found in ACTL Pretrial Standard 3(a): "Written briefs and memoranda should not refer to or rely on facts that are not properly a part of the record."

OBA Standard 4.9(d) instructs the advocate "[to] avoid disparaging the intelligence, ethics, morals, integrity, or personal behavior of the opposing party, counsel or witnesses unless any such characteristics or actions are directly and necessarily at issue in the proceeding." The corresponding ACTL Pretrial Standard 3(b) similarly provides: "Neither written submissions nor oral presentations should disparage the integrity, intelligence, morals, ethics, or personal behavior of an adversary unless such matters are directly relevant under the controlling substantive law.

OBA Standard 4.10(a) condemns "*ex parte* communications involving the substance of pending matters… whether in person (including social, professional or other contexts), by telephone, and in letters or other forms of written communication." *Ex parte* communications are likewise addressed in ACTL Pretrial Standard 8. Given the fact that nearly every aspect of appellate practice is done in writing with a corresponding opportunity to respond, the opp*ortunity for and actual occurrence of* ex parte communication in appellate advocacy is extremely rare. It is mentioned here more as a general reminder than a necessary guide or precaution to the appellate practitioner.

In addition to the standards in Section 4, standards in other sections have a direct bearing on appellate advocacy. For example, the concept of "public communications" in OBA Standard 1.7 is broad enough to extend to all filings in the public record, like appellate pleadings, motions and briefs. Standard 1.7 calls for all such communications "[to] reflect appropriate civility, professional integrity, personal dignity, and respect for the legal system and the judiciary."

OBA Standard 1.7 does allow for "good faith expressions of dissent or criticism in public or private discussions when the purpose is to promote improvements in the legal system." Undoubtedly, the authors of the examples above believed they were expressing needed "criticism" of the court whose order they were appealing. Even assuming that they intended "to promote improvement in the legal system," their advocacy did not reflect appropriate civility or respect for the legal system and the judiciary.

Another example of a general standard with a direct bearing on appellate advocacy is OBA Standard 1.10 in Section 1. This standard declares a lawyer "will refrain from engaging in professional conduct which exhibits or is intended to appeal to or engender bias against

> **"OBA Standard 4.1 calls upon lawyers to 'speak and write civilly and respectfully in all communications with the court.'"**

a person based upon that person's race, color, national origin, ethnicity, religion, gender, sexual orientation or disability." A similar declaration is found in ACTL Pretrial Standard 4(a): "Lawyers should refrain from acting upon or manifesting bias or prejudice toward any person based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status."

Further, OBA Standard 2.7 in Section 2 condemns "conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious." This standard also directs that "[i]ll feelings between clients will not dictate or influence a lawyer's attitude, demeanor, behavior or conduct." A corresponding direction appears in ACTL Pretrial Standard 4(a): "In dealing with others, counsel should not reflect any ill feelings that clients may have toward their adversaries."

Finally, OBA Standards 2.10 and 2.11 concerning alternative dispute resolution are applicable to the appellate practitioner in light of the appellate settlement conference procedure provided in Supreme Court Rules 1.250

through 1.253, 12 O.S. 2001, ch. 15, app. 2. Under Standard 2.10, an appellate practitioner should "consider whether the client's interests can be adequately served and the controversy more expeditiously and economically resolved by… alternative dispute resolution." Under this standard, an appellate practitioner "will raise the issue of settlement and alternative dispute resolution as soon as [the merits] can be evaluated and meaningful compromise negotiations can be undertaken. Standard 2.11 requires "good faith" participation in an alternative dispute resolution process and condemns "use [of] the process for purpose of delay or for any other improper purpose." Comparable directives concerning settlement and alternative dispute resolution are found in ACTL Pretrial Standard 9.

CONCLUSION

The OBA and ACTL Standards will not transform every lawyer into a "perfect lady" or "perfect gentleman." Many lawyers by nature have strong, aggressive personalities which are as valuable as their expertise in a particular area of law. The purpose of the standards is to guide the individualized expression of our personalities so that we preserve the appearance of professionalism as we carry out our professional responsibility to clients and society.

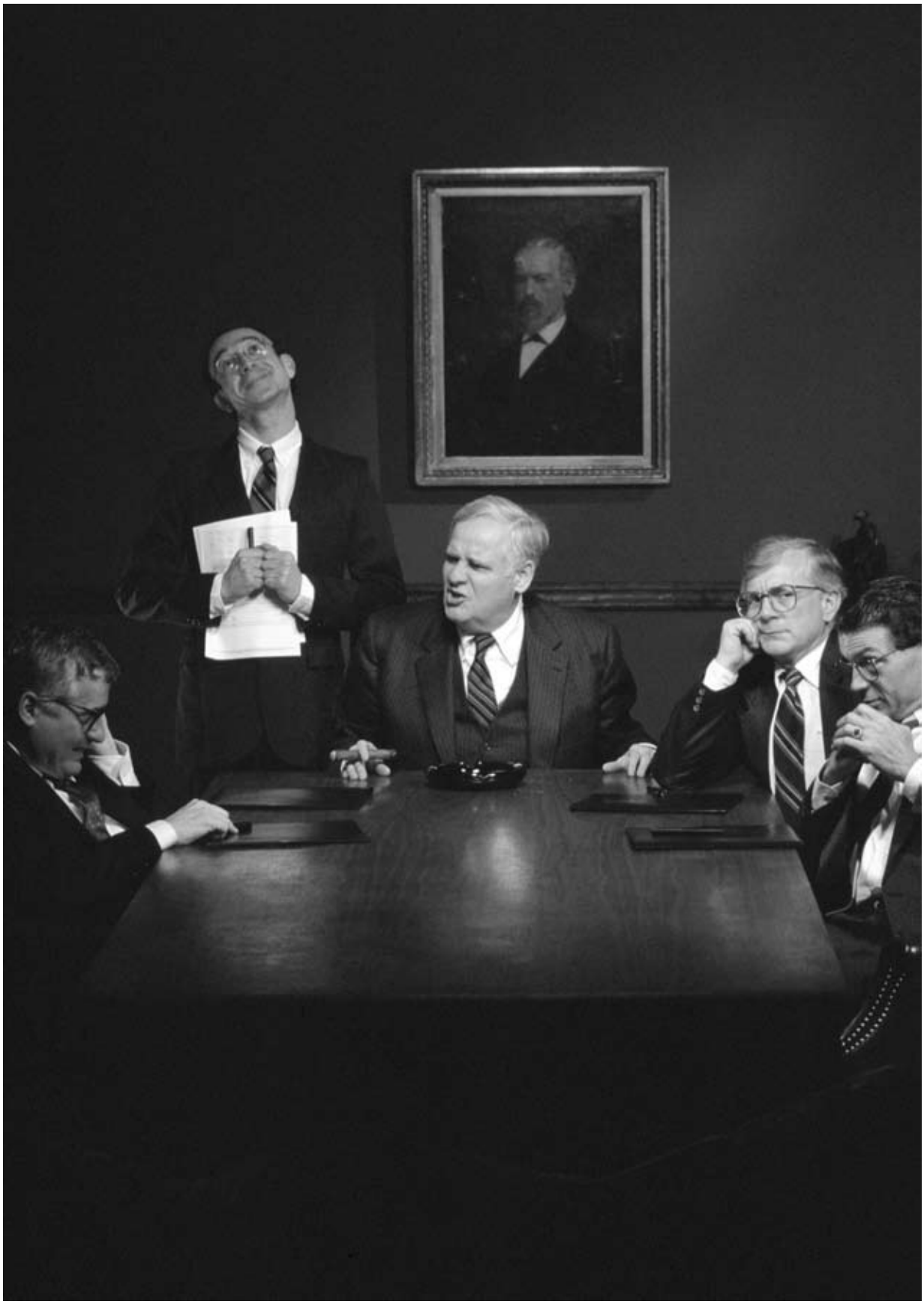
Frequent reminders of the principles and practices set forth in the standards will hopefully have the effect of a lawyer "thinking twice" when tempted to resort to offensive conduct. Stopping and thinking about the appearance and effect of our conduct not only deters discourteous and offensive conduct, but can also transform one's attitude in general. As James Allen pointed out in his book, *As a Man Thinketh:* "Every thought seed sown or allowed to fall into the mind, and to take root there, produces its own, blossoming sooner or later into act, and bearing its own fruitage of opportunity and circumstance."

Stated another way, the OBA and ACTL Standards represent "right thinking," that little by little, will translate into proper action that will in turn yield recognition and respect for lawyers and our profession. In the final analysis, our individual success as lawyers and the success of our profession, depend upon the thought given to the conduct we value and respect, as much as the thought given to achieve a just result for a given legal problem.

1. Approved by the Oklahoma Bar Association Board of Governors Nov. 20, 2002, and the Oklahoma Judicial Conference on Dec. 20, 2002.

ABOUT THE AUTHOR

Justice John Reif of Skiatook was appointed to the Oklahoma Supreme Court by Gov. Brad Henry in October 2007. He has served in the state judiciary for over 28 years. Before joining the Supreme Court, Justice Reif served as a member of the Oklahoma Court of Civil Appeals for 23 years. He has also served as a special district judge and an assistant district attorney in Tulsa County. He earned a law degree and a bachelor's degree at the University of Tulsa.



Ethics &
PROFESSIONAL
RESPONSIBILITY

Ethical Issues with Employee Acts or Omissions

By Gina L. Hendryx

A supervisory lawyer must take reasonable steps to ensure the compliance of firm lawyers with ethical standards. Oklahoma Rule of Professional Conduct 5.1 requires partners and supervisory lawyers make reasonable efforts to assure that other lawyers in the firm conform to the Rules. Requirements upon supervisory lawyers include:

A. Partners or lawyers with managerial authority shall make reasonable efforts to ensure that the firm has in effect, measures to provide assurance that all lawyers in the firm conform to ethical standards.

B. Lawyers with direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to ethical standards.

Paragraph A includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations organized to practice law. This includes lawyers with managerial authority in a legal services organization or in a government setting. These managerial lawyers must establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will comply with the Oklahoma Rules of Professional Conduct. These policies and procedures should address detection and resolution of conflicts of interest, docketing procedures, client fund and property accounting, and ensure that inexperienced lawyers are properly supervised. The adequacy of these measures will be weighed by factors including the type of practice, size of the firm and structure of the firm. For example, a small firm of experienced lawyers may require only "informal supervision and periodic review of compliance with the required systems," while at larger firms or in practice situations in which complex ethical issues often arise, "more elaborate measures may be necessary." Oklahoma Rule of Professional Conduct 5.1, cmt. [3]. See *In Re Cohen*, 847 A.2d 1162 (D.C. 2004) (firm failed to offer associates rudimentary ethics training or mechanism for review and guidance by supervisors).

Paragraph B applies to lawyers who have supervisory authority over the work of other lawyers in a firm. In *In Re Ritger*, 556 A.2d 1201 (N.J. 1989) the court held "when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required that the supervisor simply be available." There are many lawyer ethics cases from other jurisdictions disciplining supervisory attorneys for failing to supervise and train inexperienced associates. Assigning excessive caseloads to

inexperienced lawyers may also violate Rule 5.1(b). ABA Formal Ethics Op. 06-441 (2006) states that it is the supervisory lawyer's responsibility to ensure that subordinate's caseload is not so excessive that lawyer cannot provide competent and diligent representation to the clients.

Paragraph C of Rule 5.1 states that a lawyer may be held responsible for another lawyer's ethical violations if the lawyer "orders" or "ratifies" the specific conduct involved or fails to take appropriate remedial action upon learning of the improper conduct. See e.g. *In Re Weston*, 442 N.E.2d 236 (Ill. 1982)(lawyer disciplined for failing to correct problems caused by mentally ill associate once they became known).

Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of the Rules. See Rule 5.1, cmts. [7] and [8].

SUPERVISION OF NON-LAWYERS

At some time in most forms of legal practice, the lawyer will employ the assistance of a non-lawyer. These persons include the traditional secretary and bookkeeper, but more and more lawyers are employing the services of nontraditional aides including engineers, nurses, computer specialists and lobbyists. Regardless of title, non-lawyers are not bound by the ethical rules that apply to attorneys. Therefore, the rules require the lawyer make reasonable efforts to ensure that the non-lawyer employee or independent contractor's conduct is compatible with the professional obligations of the lawyer.

Oklahoma Rule of Professional Conduct 5.3 sets out the lawyer's responsibilities regarding non-lawyer assistants. As with Rule 5.1, lawyers with managerial authority over non- lawyers must make reasonable efforts to establish internal policies and procedures designed to provide assurance that the non-lawyers will act in a way compatible with the Rules of Professional Conduct. These policies and procedures should include appropriate instruction and supervision pertaining to the ethical aspects of their jobs. Of particular importance is the duty of confidentiality owed to the clients and the obligation to not reveal information relating to a representation. In *State ex. Rel. Okla. Bar Ass'n v. Mayes*, 977 P.2d 9 (Okla. 1999), a lawyer was found to have violated Rule 5.3 by failing to make reasonable efforts to ensure that non-lawyer assistant adhered to his professional obligations. He was also found to have failed to take reasonably remedial measures.

A lawyer who turns over the day to day operation of a law office to a non-lawyer assistant does so at her own peril. In *State ex. rel. Okla. Bar Ass'n v. Patmon*, 939 P.2d 1155 (Okla. 1997), the lawyer regularly allowed non-lawyer assistant to sign lawyer's name and file court documents with oversight. Assistant filed a misleading motion and lawyer was disciplined for inadequate supervision.

Maintaining client funds is a nondelegable fiduciary responsibility. Lawyers may employ non-lawyer assistants such as bookkeepers and/or accountants to assist in fulfilling this duty, however lawyers must provide adequate training and supervision to ensure that ethical and legal obligations are met. With regard to client funds, "there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently." *In re Cater,* 887 A.2d 1 (D.C. 2005).

A lawyer who is a partner or a direct supervisor of a non-lawyer has an obligation to take remedial action if the lawyer learns of misconduct by the non-lawyer in time to avoid or mitigate the consequences of the conduct. In *State ex. rel. Okla. Bar Ass'n v. Taylor*, 4 P.3d 1242 (Okla. 2000), the lawyer was disciplined for ratifying the conduct of his wife/office manager who improperly endorsed client's settlement checks.

Courts generally hold the following as nondelegable tasks:

1) Establishing a lawyer/client relationship
2) Maintaining direct contact with clients
3) Giving legal advice
4) Exercising legal judgment

"A lawyer who turns over the day-to-day operation of a law office to a non-lawyer assistant does so at her own peril."

OF COUNSEL RELATIONSHIPS

The term "of counsel" denotes a relationship that is "close, regular and personal." ABA Formal Ethics Op. 90-357 (1990). Most malpractice carriers require "of counsel" lawyers to be covered on the firm's insurance policy. Whether ethics rules on supervision apply depends on the relationship between lawyers and not on the designation. "Of counsel" is most likely an inappropriate designation if there is a supervisory role of one over another.

ORPC 5.1 and 8.4 (a) impose disciplinary responsibility for the conduct of a partner, associate or subordinate. "Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules. ORPC 5.1 cmt. [7].

ABOUT THE AUTHOR

Gina Hendryx is the General Counsel for the Oklahoma Bar Association. A licensed attorney for the past 25 years, she received her J.D. and B.S. degrees from OCU. She supervises a staff of 12 and serves as the association's counsel on other legal matters. She works with the Professional Responsibility Commission and serves as a liaison to the OBA Board of Governors, OBA committees, the courts, and other local and national entities concerning lawyer ethics issues.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Ethics & PROFESSIONAL RESPONSIBILITY

How to Stay in the Other 94 Percent: Avoiding Attorney Grievances

By Janis Hubbard

"I always find that statistics are hard to swallow and impossible to digest. The only one I can ever remember is that if all the people who go to sleep in church were laid end to end they would be a lot more comfortable."

Mrs. Robert A. Taft[1]

Can it be? Yes. Percentage wise, fewer grievances were lodged against attorneys in 2007 and 2008 than in years past. The annual report of the Professional Responsibility Commission and Professional Responsibility Tribunal for calendar year 2008[2] reflects that there were 1,522 grievances involving a total of 988 attorneys received by the OBA's Office of the General Counsel. The 2008 annual report also reflects total membership of 16,275 attorneys. This means that six percent of attorneys received grievances in 2008. The annual reports filed in previous years reflect the percentage of attorneys receiving grievances was seven percent five years ago in 2003, and about nine percent 10 years ago in 1998.

We can speculate as to why the percentage of grievances has dropped in the last 10 years. It could be because we have better law practice management tools and better communication systems with e-mail and cell phones. It could be that the added member service support programs of the bar association are assisting attorneys to better handle client and case issues. Or, it could be that attorneys are just trying harder. The truth is, the percentage of grievances has decreased – and that reflects well on our profession.

GRIEVANCES ARE CONSTANT

> "Statistics can be made to prove anything – even the truth." ~ *Author Unknown*

What does remain constant is that clients, and others, continue to file grievances against attorneys. Some lawyers receive more than one grievance. In 2008, the Office of the General

Counsel received 1,522 grievances, opened 283 grievances for investigation against 201 attorneys and handled informally by correspondence 1,239 grievances involving 885 attorneys. The types of attorney misconduct alleged in the grievances opened for formal investigation have not changed significantly over the last 10 years. By far, the highest number of complaints, 49 percent, concerned allegations of neglect. Running a distant second, third and fourth are allegations involving an attorney's personal behavior, misrepresentation and trust account violations, respectively. The areas of practice receiving the most complaints in 2008 were litigation (26%), family law (23%) and criminal law (20%). Over the last 10 years, these areas of law generally receive more complaints than any other types of law.

COMMUNICATION IS KEY

> "While the individual man is an insoluble puzzle, in the aggregate he becomes a mathematical certainty. You can, for example, never foretell what any one man will be up to, but you can say with precision what an average number will be up to. Individuals vary, but percentages remain constant. So says the statistician."
>
> *~ Arthur Conan Doyle*

How do you stay in the other 94 percent of lawyers who don't receive a complaint? Individually, we can take steps to decrease the possibility of receiving a grievance and to keep up the good trend in these statistics. First, communicate well and often with your clients. Communication is still the source of most complaints, which oftentimes includes allegations of neglect of the client's case. Today is the day of instant information. With high-tech abilities, clients expect instant access to their attorney and immediate responses to their inquiries. When clients e-mail their lawyer, they expect a prompt response. If a client does not receive a quick response to repeated e-mails to the attorney, the client may write a grievance letter to the Office of the General Counsel. It is possible there will be an increase in grievances against attorneys who do not quickly respond to these high-tech communications from their clients.

Rule 1.4, of the Oklahoma Rules of Professional Conduct,[3] (ORPC), states, in part, that a "lawyer shall promptly comply with reasonable requests for information." All clients will never be happy all of the time, however most clients will better tolerate having to wait for a response from their lawyer if they have been receiving regular communications apprising them of their case status.[4]

Begin good communication and understanding with your clients by having a written fee agreement, which is required for a contingent fee.[5] If the attorney-client agreement is not required to be in writing, at least have an engagement letter setting forth the terms of the representation. Maintain your billing records and bill your client regularly and note all of your communications on your bills.

Communications can be in the form of telephone calls or letters sent the old-fashioned way or by e-mail. It is recommended to follow up telephone calls with a letter summarizing your conversation. However, a word of warning to attorneys in responding to e-mails – take as much care in writing an e-mail to your client as you would writing and sending a letter through the U.S. mail. Just like letters, e-mails can become evidence and used against you in a bar discipline complaint or a civil suit.

Further, be sure to return calls to your client and respond to their inquiries. Better yet, be proactive and send your client copies of all of your correspondence in the case. If there are long periods in which there is no correspondence, then send out a brief status letter to your client, preferably every month.

IF A COMPLAINT IS FILED

Should someone file a grievance against you, the Office of the General Counsel will inform you. In their letter to you, they will explain the allegation and the rules implicated, whether you need to respond to the grievance, and whether you are to send your response to the client or the Office of the General Counsel.

Whatever you do, do not fail to respond to the request of the Office of the General Counsel! If you do fail to respond, it can cause an informal matter to be opened for investigation or even formal charges to be filed against you for failure to respond to the Oklahoma Bar Association.[6] Further, your response to the allegations submitted to the OBA must be a full and fair response, or again, the Office of the General Counsel can open the matter for investigation and request the filing of formal charges against you.[7] Failure to respond to the Office of the General Counsel and the court has resulted in disbarment.[8] As in all other cases, you should have an attorney represent you in this

process. If you choose to handle a grievance on your own, you should at least have another attorney review your response before you submit it to the Office of the General Counsel.

If the Office of the General Counsel opens a formal investigation against you, it will be thoroughly investigated and then presented to the Professional Responsibility Commission for action. The article "What Does the General Counsel Do?" explaining the procedures used by the Office of the General Counsel in processing grievances against attorneys is available on the OBA Web page at www.okbar.org/members/gencounsel/about.htm.

Should the Professional Responsibility Commission authorize that formal charges be filed against you, the Office of the General Counsel will file a formal complaint with the clerk of the supreme court. You have 20 days to file your response.[9] Generally, the public docket reflects these charges within 20 days after filing. A trial panel of the Professional Responsibility Tribunal is selected within 10 days and a hearing is set not less than 30 nor more than 60 days from the date of appointment of the trial panel.[10] Generally, the hearing is open to the public.[11] The Professional Responsibility Tribunal presides over the hearing and receives evidence. The Oklahoma Supreme Court, which has the exclusive original jurisdiction in all attorney discipline matters,[12] then receives the transcript, evidence and entire record. The court issues a briefing schedule and when all briefs are in or waived, the court considers the matter and renders an opinion that, generally, is made public.

CONCLUSION

Do not become a statistic — except to be in the high percentage of attorneys who do not receive a complaint. If you have concerns about a particular situation, the OBA Ethics Counsel is available to answer your questions.

1. Mrs. Robert A. Taft was married to the son of U.S. President (1909-1913), William Howard Taft and the ninth Chief Justice. Before Dwight Eisenhower defeated him, Robert A. Taft, was the frontrunner of the GOP for the presidential nomination in 1952.

2. See OBA Web page link at: www.okbar.org/members/gencounsel/2008AnnualReport.pdf.

3. Oklahoma Rules of Professional Conduct, 5 O.S. 2001, Ch. 1, App. 3-A (Supp.2008).

4. Rule 1.4. Communication

(a) A lawyer shall:

1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these rules;

2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

3) keep the client reasonably informed about the status of the matter;

4) promptly comply with reasonable requests for information; and

5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

4. Rule 1.4, ORPC, *COMMENT*, states at ¶ 4:

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

5. Rule 1.5 of the Oklahoma Rules of Professional Conduct, 5 O.S. 2001, Ch. 1, App. 3-A (Supp.2008)

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of determination.

6. Rule 5.2, Rules Governing Disciplinary Proceedings, (hereinafter RGDP), 5 O.S. 2001, Ch. 1, App. 1- A (Supp.2008).

The failure of a lawyer to answer within twenty (20) days after service of the grievance (or recital of facts or allegations), or such further time as may be granted by the General Counsel, shall be grounds for discipline.

7. *Id.*

8. *State ex rel. Oklahoma Bar Ass'n v. Kinsey*, 2008 OK 98, 205 P.3d 866.

9. Rule 6.4, RGDP.

10. Rule 6.7, RGDP.

11. Rule 6.9, RGDP.

12. *State ex rel. Oklahoma Bar Ass'n. v. Thomas*, 1995 OK 145, ¶ 2, 911 P.2d 907.

ABOUT THE AUTHOR

Janis Hubbard, an attorney with Derryberry & Naifeh LLP in Oklahoma City, focuses her practice in the areas of professional responsibility, administrative law, criminal defense and general civil litigation. She was admitted to the Oklahoma bar in 1993. She previously served as First Assistant General Counsel for the Oklahoma Bar Association for almost a decade. During her tenure at the bar association, she developed an expertise in issues concerning attorney professional responsibility.

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Ethics &
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Attorneys Behaving Outrageously

By Gian R. Johnson

In today's society, behaving in a less than refined manner is no longer met with the same level of disdainful stares that it once was. Instead, improper outbursts are excused away or met with a light slap on the wrist, followed by an obligatory promise not to repeat such behavior in the future. While the days of formal etiquette classes are behind us, the sometimes-utter disregard for basic manners seems to have placed modern society in a realm of uncertainty, where an outrageous outburst can occur anytime and anywhere. Even the courthouse is not immune from the growing influx of outrageous behavior. Within the last year, countless attorneys have found themselves facing sanctions, suspension and even disbarment after conducting themselves in a less than professional and ethical manner both in and out of the courtroom.

Last year, a New Orleans attorney received a five-year suspension from the New Orleans district court after failing to heed warnings to change his unprofessional behavior. Among the multiple complaints against him, the attorney was charged with using "abusive language to challenge the court's authority."[1] Even after receiving his punishment from the district court, the attorney was unapologetic about his behavior and continued to allege that the court was corrupt, refusing to comply with the punishment received. Specifically, he was quoted as saying he would "submit to anger management classes only upon the condition that each member of the court first complete charm school."[2] His statements exemplify the lack of respect some attorneys are beginning to have for the judicial system. The courtroom was once seen as a place where judges were the ultimate rulers and no one dared challenge the words being spoken from the bench.

This case is an example of the recent 180 that has taken place. Not only do attorneys now feel free to challenge judges in open court, but they also believe it is acceptable to do so in a disrespectful and distasteful manner. Possibly the biggest problem is that this type of behavior is not specific to one area of the country, but rather is a growing problem across the nation.

In Maryland, one attorney accompanied his client in breaking into the client's soon-to-be ex-wife's house. While searching for evidence to use in their case against her, the attorney vandalized the home, stole property and even killed a kitten by microwaving it.[3] Even more

shocking than the atrocious actions he committed was the punishment he received from the state bar association: suspension with the option to apply for reinstatement after a year. While the Supreme Court handed down a harsher punishment – disbarment – the slap on the wrist received from the state bar association seems to be the norm for attorneys. The Maryland Bar Association admitted they must receive multiple complaints from several clients before an investigation will take place. This waiting period gives attorneys a free pass to act as they please while the state bar turns a blind eye to the harm they are causing to both their clients and the reputation of the legal profession. Waiting for multiple complaints does not ensure the quality of the allegations; it merely creates the opportunity for more outrageous behavior to occur.

Another Maryland area attorney exemplifies this. He committed a stream of unethical acts before the state bar finally held disbarment proceedings against him. For his first unethical act, he settled a client's case without consent to do so, subsequently forging the client's signature on the settlement check and depositing it in his personal account. He spent part of the settlement money before the client recovered the remainder in a lawsuit against him.[4] Following these actions, the attorney was punished with only a brief suspension. The suspension, however, was not enough to derail him. During his suspension, he continued to take on clients and misuse client funds. He was reinstated and suspended several additional times before finally being brought before the state bar for punishment. Disbarment occurred at a hearing he refused to attend. Had the punishment following his first unethical act been harsher, the extent of the total harm caused could have been substantially mitigated.

Presently, commissions exist, both on the state and national level, that are tasked with the job of ethics enforcement. These commissions are made up of fellow attorneys and hear charges brought against attorneys before assigning punishments determined by the association's civility standards. Some commissions, such as the one set up by the Maryland bar, have minimum standards that must be met before they will begin investigating an attorney for allegations of misconduct. As is often the case, the commissions were undoubtedly created with the best of intentions, but unfortunately that is not always enough. Upon closer observation, a system filled with loopholes and areas for improvement is quickly revealed.

"...he settled a client's case without consent to do so, subsequently forging the client's signature on the settlement check and depositing it in his personal account."

While ethics commissions allow attorneys to be tried by their peers, there are some drawbacks. Mainly, although a trial before one's peers is one of the foundations of the American justice system, a trial for unethical conduct by an attorney, before a panel of attorneys, has all the makings of a biased situation. While the outrageous behavior of their peers may anger some on the panel, it is equally likely that the offenders will find sympathizers. These sympathizers may seek to give softer punishments because they think, "Their behavior wasn't that bad," or, "If I made a mistake like that, I would want the panel to go easy on me." While it may be thought that handing down a lighter punishment to one's brethren is being kind or helpful, it is actually doing more harm than good. Some offenders may be thankful that they got off easy, making a solemn vow to walk the path of the straight and narrow for the remainder of their legal careers; others will not be deterred from future wrongful acts. Worse yet, because the punishment received was less severe than anticipated or deserved, they will think their outrageous behavior was worth it; teaching them that they can get what they want in the present without having to suffer harsh consequences for it in the future.

To combat the rise of outrageous and unethical behavior by attorneys, there are two key areas that must undergo change. First, changes need to be made to the limits state bars are allowed to set before they will conduct an investigation into allegations of misconduct. Instead of requiring an attorney to receive multiple complaints from different clients, state bar associations should handle the first allegation as seriously as they do subsequent allegations.

Although this may be more time consuming, it will be worth it in the long run. By giving attorneys a get out of jail free card until the allegations have mounted against them, they have little incentive to alter their behavior the first time around. This free ticket allows attorneys to act fearlessly in a sense, as they continue to behave in a manner that disgraces the profession and inflicts harm on countless individuals. As seen in the examples above, attorneys can get off with a warning for forging legal documents and stealing from clients, not learning their lesson the first time around. Worse yet, under the current rules, one attorney was allowed to steal from and deceive additional clients before the state bar finally decided to subject him to an investigation. Had the investigation been initiated after his initial offense, the subsequent clients affected by his unethical antics could have been substantially reduced.

Second, severity of punishments received should be increased. When an attorney finally does make it to the punishment stage, it is not uncommon for the punishment received to be the equivalent of a mere slap on the wrist, especially if it is the attorney's first charged offense. Disbarment is a last resort, rightfully reserved for the most serious of offenses, but the alternatives do little in terms of deterring future misconduct. While sanctions and suspensions are an acceptable norm, it is the gravity in which they are received which needs altering. Suspending an attorney for a year after he has committed multiple felonies or forging a client's name on a settlement check is hardly what one would consider a harsh sentence.

The attorneys who received the punishments may argue that a suspension, no matter the length, adversely affected their livelihood. While some suspensions are from a certain courthouse, as seen in the case of the New Orleans attorney, others are from the practice of law entirely. Attorneys who received the latter punishment have a better argument that they were taught a costly lesson. Likewise, these attorneys are also the ones most likely to abandon their outrageous and unethical ways. Those receiving suspension only from a particular courthouse, however, are provided with loopholes that allow them to continue practicing law, possibly in an unfit and unethical manner. This not only prevents attorneys from recognizing the gravity of their actions, but does little to discourage future wrongdoings as well. In these cases, it is likely the victims would have preferred to see the punishment time of their offenders be greater, especially when the attorney returns to his old ways the minute the punishment ends.

The legal profession is routinely joked about as being one that lacks morals and ethics. Television shows emphasize dramatic courtroom performances as the mark of good attorneys where the message seems to be: "the more dramatic and outrageous the attorney behaves in the courtroom, the better." This is unfortunate. In real life, the majority of attorneys are both moral and ethical, but it's the small group that insists on behaving in an outrageous manner that society typically uses to label all attorneys. By conducting investigations earlier and increasing the punishments received for ethics violations or outrageous conduct, attorneys can work to minimize the negative exposure generated by the extreme acts of a few and hopefully start to rebuild the tarnished reputation of the legal profession.

1. Susan Finch, "New Orleans Lawyer Suspended from Court for Language, Frivolous Claims," *Times-Picayune*, Nov. 11, 2008, www.nola.com/news/index.ssf/2008/11/new_orleans_lawyer_suspended_f.html [last visited Nov. 24, 2009].

2. *Id.*

3. Anju Kaur, "Bad Lawyers Worsen Under Mild Punishments," *Capital News Service*, Jan. 2, 2008, tinyurl.com/y88szt6 [last visited Nov. 24, 2009].

4. *Id.*

ABOUT THE AUTHOR

Gian Johnson is currently a third-year law student at the University of Oklahoma. She is an Ada Lois Sipuel Fisher and Oklahoma Bar Association Scholarship recipient and a member of several student organizations. Her educational concentration is in health law, and she has recently interned for Legg Mason and the Maryland attorney general.

FROM THE PRESIDENT

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less hours. The board this year faced some very significant and important issues. Board members helped me in dealing with these issues with tenacity and hard work. The Board of Governors did an outstanding job this year, as did my vice president, Linda Thomas. I was very proud to have the board meeting in October in Guymon — a first in OBA history.

The **OBA directors and staff** also did a great job this year. Every idea I had was turned into reality by the men and women who work so hard for us. The OBA has a super set of directors, led by John Morris Williams. Many other events too numerous to mention were a success this year because of our staff. The staff at our association is absolutely top notch.

I am honored to have served in the capacity of president this year. It is a year that will bring fond memories to me in the years to come. It has been difficult continuing the practice of law in Guymon while attending to the duties as president, but I would not trade this experience for anything in the world. Thank you for allowing me to serve as your president. I am very confident in the future leadership of Allen Smallwood and Deb Reheard. I leave the presidency of our association in very capable hands.

We have had a great year!

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Taxation Law Section

Oklahoma Tax Legislation

By Sheppard F. Miers Jr.

Legislation enacted in the 2009 session of the Oklahoma Legislature included the changes summarized below, which are some of the new Oklahoma state laws on taxation.

INCOME TAX

Armed Forces Pay Exemption

The salary or compensation received by any person from the United States, other than retirement benefits, as a member of the Armed Forces shall be 100 percent deducted from taxable income for state income tax purposes on or after July 1, 2010. The deduction allowed for taxable years before July 1, 2010, is limited to the first $1,500 of compensation. For taxable years beginning Jan. 1, 2015, and all years thereafter the 100 percent deduction shall be subject to a determination by the State Board of Equalization that revenue collections exceed revenue reductions. If a positive determination is not made, the deduction will revert back to the first $1,500 of active duty Armed Forces salary or compensation. A Special Committee on Soldier Relief is established to review state tax revenue generated by members of the armed forces. SB 881, §§1-4; amending 68 O.S. Supp. 2008, §2358; adding 68 O.S. Supp. 2009, §§2355.1C; 2355.ID. effective July 1, 2010.

Investment Credit/Change of Entity

The Oklahoma income tax investment credit was amended to provide that if a C corporation qualified for the credit, subsequently changes its status to that of a pass-through entity which is being treated as the same entity for federal operating tax purposes, the investment credit will continue to be available as if the pass-through entity had originally qualified for the credits subject to the limitations otherwise applicable. SB 318, §9; amending 68 O.S. Supp. 2008, §2357.4; effective Jan. 1, 2010.

Qualified Clean-Burning Motor Vehicle Credit

The state income tax credit allowed for investments in qualified clean-burning motor vehicle fuel property was modified. The period of the credit was extended to tax years beginning before Jan. 1, 2015. The definition of "qualified clean-burning motor vehicle fuel property" was modified to add equipment installed to modify a motor vehicle so that it may be propelled by a hydrogen fuel cell. The credit allowed for methanol or a mixture of 85 percent methanol and gasoline (M-85), and for a combination of at least 50 percent natural gas were discontinued. Such modification equipment must be new and must not have been previously used to modify or retrofit any vehicle propelled by gasoline or diesel fuel. The same changes will apply as to originally equipped motor vehicles. The credit allowed for property directly related to delivery of alternate clean-burning fuels was modified to specifically exclude a building or its structural components, to extend to delivery of hydrogen, and exclude delivery of methanol and M-85. The credit will be allowed for a metered-for-fee, public access recharging system for vehicles propelled in whole or in part by electricity, if the property is new and has not been previously installed or used to refuel vehicles powered by compressed natural gas, liquefied natural gas, liquefied petroleum gas, hydrogen or electricity. The credit will be allowed for property directly related to the compression and delivery of natural gas from a private home or residence, for noncommercial purposes, into a fuel tank of a motor vehicle propelled by natural gas, if the property is new

and has not been previously installed or used to refuel vehicles powered by natural gas. The definition of "qualified electric motor vehicle" was amended to delete from the definition the words "to the extent of the full purchase price of the vehicle" with respect to vehicles originally equipped to be propelled only by electricity. The definition of a "motor vehicle" was amended to mean a motor vehicle originally designed by the manufacturer to operate lawfully and principally on street and highways. The credit allowed is 50 percent of the cost for equipment to modify a motor vehicle to be propelled by clean-burning fuel for originally equipped motor vehicles and electric motor vehicles; a per location credit of 75 percent of the cost of qualifying clean-burning fuel delivery equipment; and a per location credit of the lesser of 50 percent of the cost or $2,500 for private residence natural gas compression and delivery property. The Oklahoma Tax Commission was given the power to promulgate rules by which the credit shall be administered, and the power to establish and enforce penalties for violations. HB 1949, §1; amending 68 O.S. Supp. 2008, §2357.22; effective Jan. 1, 2010.

Federal Net Operating Loss Carryback

For tax years beginning after Dec. 31, 2007, and ending before Jan. 1, 2009, the federal net operating loss deduction shall be adjusted so that years to which losses may be carried back shall be limited to two years. For tax years beginning after Dec. 31, 2008, the years to which losses may be carried back shall be determined solely by reference to Section 172 of the Internal Revenue Code, with the exception that the terms "net operating loss" and "taxable income" shall be replaced with "Oklahoma net operating loss" and "Oklahoma taxable income." SB 318, §10; amending 68 O.S. Supp. 2008, §2358; effective June 9, 2009.

Small Business Expense Add Back

For tax years beginning on or after Jan. 1, 2009, and ending on or before Dec. 31, 2009, any amount in excess of $175,000 which has been deducted as a small business expense under Section 179 of the Internal Revenue Code as provided in the American Recovery and Reinvestment Act of 2009 shall be added to Oklahoma taxable income. SB 318, §10; amending 68 O.S. Supp. 2008, §2358; effective June 9, 2009.

Real Estate Investment Trust Add Back

The dividends-paid deduction otherwise allowed under the federal tax law in computing net income of a real estate investment trust that is subject to federal income tax shall be added back in computing the state income tax if the trust is a captive real estate investment trust. The timing of classification of a real estate investment trust is clarified. SB 916, §1; amending 68 O.S. Supp. 2008, §2358; effective Jan. 1, 2010.

Motor Vehicle Excise Tax Increase

For the taxable year beginning Jan. 1, 2009, and ending Dec. 31, 2009, in the case of individuals who use the standard deduction — the Oklahoma adjusted gross income shall be increased by any amounts paid for motor vehicle excise taxes which were deducted as allowed by the Internal Revenue Code. SB 318, §10; amending 68 O.S. Supp., 2008 §2358; effective June 9, 2009.

Unemployment Compensation Increase

For taxable years beginning after Dec. 31, 2008, taxable income shall be increased by any unemployment compensation exempted under Section 85(c) of the Internal Revenue Code. SB 318, §10; amending 68 O.S. Supp. 2008, §2358; effective June 9, 2009.

Livestock Show Award Exclusion

For taxable years beginning after Dec. 31, 2008, any payment in an amount less than $600 received by a person as an award for participation in a competitive livestock show event shall be exempt from taxable income. The payment shall be treated as a scholarship amount paid by the entity sponsoring the event and it shall cause the payment to be categorized as a scholarship in its books and records. SB 318, §10; amending 68 O.S. Supp. 2008, §2358; effective June 9, 2009.

ARRA Bonus Depreciation Add Back

For income tax returns filed after Dec. 31, 2007, by corporations and fiduciaries, federal taxable income shall be increased by 80 percent of any amount of bonus depreciation received under the American Recovery and Reinvestment Act of 2009, under Sections 168 (k) or 1400L of the Internal Revenue Code, for assets placed in service after Dec. 31, 2007, and before Jan. 1, 2010. SB 318, §11; amending 68 O.S. Supp. 2008, §2358.6; effective June 9, 2009.

Income Tax Withholding

Effective March, 2010, every employer required to remit federal withholding under the Federal Semiweekly Deposit Schedule shall file Oklahoma withholding returns pursuant to the Tax Commission's electronic data interchange program. Employers shall pay over the amount withheld under the Oklahoma withholding tax provisions on the same dates as required under the Federal Semiweekly Deposit Schedule. For employers making payments under other than by electronic funds transfer, a withholding return shall be filed with each payment, and for employers making payment by electronic funds transfer, a return shall not be required to be filed with each payment. A withholding return for payments made by electronic funds transfer shall be filed monthly on or before the twentieth day of the month following the close of each monthly period. SB 318, §12; amending 68 O.S. Supp. 2008, §2385.3; effective Nov. 1, 2009.

Oklahoma Film Enhancement Rebate Program

For documented expenditures made in Oklahoma directly attributable to the production of a film, television production, or television commercial, a rebate of 35 percent shall be allowed for expenditures made after July 1, 2009. The rebate is increased by an additional 2 percent of documented expenditures if a production company spends at least $20,000 for use of music created by an Oklahoma resident that is recorded in Oklahoma — or for the cost of recorded songs or music in Oklahoma for use in the production. The eligibility requirements for rebate were modified to provide that the production company must have filed or will file any Oklahoma tax return or tax document required by law, and the minimum budget for a film shall be $50,000, of which not less than $25,000 shall be expended in Oklahoma. No claims for rebate for expenditures made on or after July 1, 2009, shall be paid prior to July 1, 2010. SB 318, §14; amending 68 O.S. Supp. 2008, §3624; effective July 1, 2009.

Armed Forces Casualty Exclusion

Any payment made by the U.S. Department of Defense (DOD) as a result of the death of a member of the U.S. Armed Forces who has been killed in action in a designated DOD combat zone shall be exempt from Oklahoma income tax during the taxable year in which the individual is declared deceased by the Armed Forces. Income earned by the spouse of such an individual shall also be exempt from Oklahoma income tax in that year. Any Oklahoma income tax collected in the year shall be refunded, and the statute of limitations on refunds shall not apply. SB 721, §1; adding 68 O.S. Supp. 2009, §2358.1A; effective Jan. 1, 2010.

Refund Donation to Folds of Honor Scholarship Program

The state income tax individual and corporate tax return forms for tax years beginning after Dec. 31, 2009, shall contain a provision to allow a donation from a tax refund for the purpose of providing academic and vocational training scholarships administered through the Folds of Honor Scholarship Program, for dependents of military service members killed or wounded in action in Iraq or Afghanistan. SB 721, §2; adding 68 O.S. Supp. 2009, §2368.17; effective Jan. 1, 2010.

Refund Donation to YMCA Youth/Government Program

The state income tax individual and corporate tax return forms for tax years beginning after Dec. 31, 2009, shall contain a provision to allow a donation from a tax refund not to exceed $25 for the benefit of the Oklahoma chapter of the YMCA Youth and Government program. HB 1661, §1; adding 68 O.S. Supp. 2009, §2368.17 (or non-duplicative section number); effective Jan. 1, 2010.

SALES AND USE TAX

Sales Tax Exemptions; Conservancy Districts

The sale of tangible personal property and services to the Arbuckle, Fort Cobb, Foss Reservoir, Mountain Park and Waurika Lake Master Conservancy Districts shall be exempt from Oklahoma sales tax. SB 318, §8, amending 68. O.S. Supp. 2008, §1356; effective July 1, 2009.

Notice of Municipal Annexation

The statutes pertaining to annexation of territory by cities and towns were amended to require notice of annexation be mailed to the Sales and Use Tax Division of the Oklahoma Tax Commission. The Tax Commission is required to notify all known sales tax vendors within the boundaries of annexed territories regarding the applicable rate of sales tax. SB 517, §§1-3; amending 11 O.S. Supp. 2008, §§21-103, 21-104; adding 68 O.S. Supp. 2009, §119; effective Nov. 1, 2009.

ESTATE TAX

Oklahoma Uniform Principal and Income Act

The Oklahoma Uniform Principal and Income Act was amended to modify the definitions of payment and separate fund (401(k) Plan, IRA), and to provide for the treatment of a series of payments to a trust qualifying for the federal estate tax marital deduction under Section 2056(b)(7) or 2056(b)(5) of the Internal Revenue Code. A trustee shall determine the internal income of each separate fund as if the separate fund were a trust subject to the act — and upon request of the surviving spouse shall demand distribution of the internal income, and allocate to income of the recipient trust to the extent of the internal income from such separate fund and distribute the amount to the surviving spouse, and allocate any excess to principal of the recipient trust. A procedure for determining value based internal income of such a separate fund is provided. The provisions of the act pertaining to apportionment and payment of income tax required to be paid by a trustee of a trust were modified, and transitional effective dates are prescribed for the changes enacted. SB 981, §§1-4; amending 60 O.S. 2001, §§175.409, 175.505; adding 68 O.S. Supp. 2009, §175.603; effective Nov. 1, 2009.

GROSS PRODUCTION TAX

Extension of Exemptions

The expiration of dates of exemptions from the gross production tax for secondary recovery projects, tertiary recovery projects, horizontally drilled wells, re-established inactive wells, production enhanced projects, certain deep wells, new discovery wells and three-dimensional seismic shoot wells were extended to include production, wells and projects completed prior to July 1, 2012. SB 313, §1; amending 68 O.S. Supp. 2008, §1001; effective July 1, 2009.

AD VALOREM TAX

State Board of Equalization; Assessment of Video Service Providers

The Ad Valorem Tax Code is amended to define the terms video programming and video service provider as a subclass of public service corporations assessed by the State Board of Equalization. Video service providers shall be required to file a certification of total gross receipts with the State Board by April 15, which shall determine assessment using the statewide average of the assessment ratios applied to assets of cable television companies. The statewide average assessment ratio applied to personal property of cable television companies shall be assumed to be 12 percent. SB 314, §1; amending 68 O.S. 2001, §2808; effective Jan. 1, 2010.

Manufacturing Facility Exemption Requirements

The five-year ad valorem tax exemption for qualifying manufacturing plant facilities was amended to provide that if a facility fails to meet the increased annualized payroll requirement for exemption that such requirement shall be waived for claims for exemptions involved meeting certain specified conditions related to location, type of manufacturing, workforce and plant size. The amendment provides that if the applicant obtaining such waiver of the payroll requirement ceases to operate all of its facilities in Oklahoma on or before four years after any initial application for exemption is filed by such applicant that all sums of property taxes exempted under the amendment that relate to the application shall become due and payable as if the sums were assessed in the year in which the applicant ceases to operate all its facilities in Oklahoma. SB 318, §13; amending 68 O.S. 2008 Supp., §2902; effective June 9, 2009.

Manufacturing Facility Exemption; Marine Engine Plant

The requirements for the five-year ad valorem tax exemption for qualifying manufacturing plant exemption were modified with respect to certain applications for exemption filed on or after Jan. 1, 2004, and on or before March 31, 2009, and all subsequent annual exemption applications filed related to such initial applications for a marine engine manufacturing plant meeting specified employment requirements. SB 929, §§1-3; amending 68 O.S. Supp. 2008, §2902; effective May 29, 2009.

Sale of Property for Delinquent Taxes

The Ad Valorem Tax Code was amended with respect to collection of delinquent ad valorem taxes by modifying provisions pertaining to notice of sale of property for taxes, the definition of an incapacitated taxpayer with respect to the right to redeem property sold for delinquent taxes, and for the time of disposition of any proceeds from a sale in excess of taxes, penalties, interest and cost due. HB 1048, §§1-4; amending 68 O.S. Supp. 2008, §§3106, 3113, 3131; effective Nov. 1, 2009.

CIGARETTE AND TOBACCO PRODUCT TAXES

Licensing, Fees, Reporting, Penalties Modified

The state cigarette and tobacco product tax statutes were modified to clarify language, increase and modify license fees and applications for licenses; provide for agreements by applicants, prohibit certain activity by licensed retailers of cigarettes, modify reporting requirements and procedure, and amend penalties. SB 608, §§1-24; amending 68 O.S. Supp. 2008, §§113, 304, 305, 309, 312, 312.1, 316, 348, 350.1, 360.4, 360.5, 378; amending 68 O.S. 2001, §§309, 312, 348, 350.1, 403.1, 413, 415, 418, 425, 426, 427, 428; repealing 68 O.S. 2001, §§349, 427.1, 427.2; adding 68 O.S. Supp. 2009, §§349.1, 360.9; effective Jan. 1, 2010.

ECONOMIC DEVELOPMENT; TAX/FINANCIAL INCENTIVES

21st Century Quality Jobs Incentive Act

An act to provide incentives to attract growth industries and sectors to Oklahoma in the 21st century through a policy of rewarding businesses with a highly skilled, knowledge-based workforce was enacted. The act provides for quarterly incentive payments based on gross payroll for a 10-year period to businesses that qualify by meeting certain prescribed requirements of a defined "basic industry." To qualify, a business must apply to the Department of Commerce, be engaged in a defined "basic industry," hire at least 10 full-time employees in Oklahoma within 12 quarters, pay an average annualized wage that equals or exceeds 300 percent of a specified average county wage level, have a basic health benefit plan, and not have received or qualified for approval for incentive payments under certain other incentive payment statutes. The act contains incentive payment, reporting, other state tax incentive exclusion and continuing eligibility provisions and requirements. SB 938, §§1-11; adding 68 O.S. Supp. 2009, §§3911 -3920; effective Nov. 1, 2009.

Oklahoma Quality Jobs Program Act; Investment Tax Credit

Any establishment which has qualified to receive quarterly incentive payments under the Oklahoma Quality Jobs Program Act, for a 10-year period with a project start date after Jan. 1, 2010, shall be eligible to receive the Oklahoma income tax investment tax credit provided for in 68 O.S. Supp. 2009, §2357.4 if the establishment qualifies for the credit based on investment made after Jan. 1, 2010, pays an average annualized wage which equals or exceeds the average state wage, and obtains a letter from the Oklahoma Department of Commerce that the business activity of the entity will result in a positive net benefit rate. SB 909, §1; amending 68 O.S. Supp. 2008, §3607; effective Jan. 1, 2010.

Oklahoma Quality Jobs Program Act; Federal Contractors

The Oklahoma Quality Jobs Program Act was amended to provide for incentive payments to be made to a qualified federal contractor that performs testing, research, development, consulting and other services in Oklahoma. HB 1468, §1; amending 68 O.S. Supp. 2008, §3603; adding 68 O.S. Supp. 2009, §3604.1; effective July 1, 2009.

Oklahoma Quality Jobs Program Act; Wind Industry

The Oklahoma Quality Jobs Program Act was amended to provide that a "basic industry" in which a business may qualify for incentive payments includes support, repair and maintenance service activities for the wind industry. HB 1953, §1; amending 68 O.S. Supp. 2008, §3603; effective Nov. 1, 2009.

Oklahoma Community Economic Development Pooled Finance Act

A new Oklahoma Community Economic Development Pooled Finance Act was enacted. The act is to encourage and provide for local governments in the state to cooperate to develop regional infrastructure and economic development projects. The act authorizes pooled financing of regional projects involving local governmental entities. HB 2067, §§1-21, adding 62 O.S. Supp. 2009, §§891.1-891.15; amending 68 O.S. 2001, §§2705, 1370; 74 O.S. 2001, §1004; effective July 1, 2009.

TAX ADMINISTRATION AND PROCEDURE

Interest/Income Tax Refunds

For income tax returns filed after Jan. 1, 2010, if a tax refund is not paid to the taxpayer within 90 days after the return is filed, the Tax Commission will be required to pay interest on the refund at the same rate specified for interest on delinquent tax payments. In the case of income tax returns filed electronically, interest on refunds payable by the Tax Commission shall

run beginning 20 days after the return is filed. SB 11, §1; amending 68 O.S. Supp. 2008, §217; effective Jan. 1, 2010.

Disclosure of Delinquent Taxpayers

The Oklahoma Tax Commission shall prepare, maintain and disclose a list of all persons who owe delinquent taxes, including interest penalties, fees and costs in excess of $25,000, which are unpaid for more than 90 days after all appeal rights have expired and for which a warrant has been filed. The list shall be posted on the Internet. A special page shall show those persons who have the 100 largest delinquent taxpayer accounts. A delinquent taxpayer must be given 90 days prior notice of intended posting of the taxpayer's name on the list. A taxpayer must be removed from the list within 15 days after payment in full or entering into a pay plan agreement with the Tax Commission. SB 318, §§2, 3; amending 68 O.S. Supp. 2008, §205; adding 68 O.S. Supp. 2009, §205.5; effective Nov. 1, 2009.

Professional License Renewal/Reissuance

The statutory provisions governing nonrenewal of professional licenses for noncompliance with state income tax laws were amended to refer to action to not renew or reissue a license. HB 1295, §1; amending 68 O.S. Supp. 2001, §238.1; effective Nov. 1, 2009.

Tax Commission Notices; Taxpayer Change of Address

For purposes of notices given by the Tax Commission to taxpayers by mail to the last-known address of the taxpayer, if the Tax Commission receives an address from the U.S. Postal Service as result of a change of address submitted to it, the "last-known address" of the taxpayer shall mean the address provided. SB 318, §4; amending 68 O.S. 2001, §208; effective June 9, 2009.

Tax Commission; Debt Collection Agency Fees

The maximum fees payable by the Tax Commission to a debt collection agency under a contract for collection of delinquent taxes was increased to 35 percent of the total amount of delinquent taxes, accrued penalties and interest collected from the taxpayer and shall be added to the taxpayer delinquency. SB 318, §5; amending 68 O.S. Supp. 2008, §255; effective July 1, 2009.

TAX AND FISCAL POLICY

Communications Tax Study

The Oklahoma Tax Commission shall conduct a study of the administrative issues concerning state and local communications taxes, and focus on identifying the administrative simplifications and law changes that would be required in Oklahoma to comply with national proposals impacting such taxes. The Tax Commission shall work with impacted local government entities and businesses. It shall prepare and present a report of its findings and present the report to the Governor and leadership of the Legislature prior to Dec. 1, 2009. SB 318, §18; (not codified), effective July 1, 2009.

Task Force to Study Transferable Tax Credits

A task force to study transferable tax credits is to be created by appointment of 9 members by the Governor and leaders of the Legislature. The task force is to conduct a study regarding all tax credits that are transferable to any person or entity other than the entity to whom or to which credits are initially made available pursuant to the statute creating the credit. The study shall include justification for enactment of transferable tax credits based on relevant economics of an industry or economic sector, the economic impact of utilization of credits, and analysis of utilization of credits by tax credit purchasers. The task force is required to produce a final written report of its findings and recommendations and submit it to the Governor and leaders of the Legislature by Dec. 31, 2009. HB 1097, §1; adding 68 O.S. Supp. 2009, §2357.11A, effective May 27, 2009.

ABOUT THE AUTHOR

Sheppard F. Miers Jr. is a shareholder in the Tulsa office of Gable & Gotwals and practices in the areas of federal and state taxation. The author acknowledges substantial assistance received on the subject of this article from Alicia Emerson, senior policy analyst, research division, Oklahoma Senate.

The United States Court of Appeals for the Tenth Circuit seeks applications for a bankruptcy judgeship in the Western District of Oklahoma. Bankruptcy judges are appointed to 14-year terms.

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2nd Choice _____	❑ Yes ❑ No	_____
3rd Choice _____	❑ Yes ❑ No	_____
	❑ Yes ❑ No	_____

❑ Please assign me to only one committee.
❑ I am willing to serve on (two or three - circle one) committees.

Besides committee work, I am interested in the following area(s):

_____

Mail: Allen M. Smallwood • 1310 S. Denver Ave., Tulsa, OK 74119
Fax: (918) 582-1991 • E-Mail: amsmallw@swbell.net

SAVE THE DATE

2010 OBA DAY AT THE CAPITOL

TUESDAY, MARCH 2, 2010

Mingle and visit with members of the Okla. Legislature at the OBA Day at the Capitol about the OBA legislative agenda.

Register and meet at the Oklahoma Bar Center for the day's briefing at 10:30 a.m.

Lunch will be provided at Noon.

Visit with the legislators at 1 p.m.

Reception at the Bar Center for legislators and bar members at 5 p.m.

HELP SHOW OUR LEGISLATORS HOW MUCH WE CARE!

Bright Lights, Big City

By John Morris Williams

Growing up in Stonewall, going to "the City" was a big deal. We didn't often go at night, but when we did, I always knew we were close when I began to see billboards that were lighted up. I know that sounds a bit strange these days. We didn't even have a traffic light, so a lighted billboard was something to behold.

The thing that intrigued me about the lighted billboards was that they were always visible. The message was available 24/7 — always on. It took a bit more expense and a bit more equipment, but they were working all the time — always at the ready for any passerby. For those passing by, it didn't cost them anything to look, and the billboards served as beacons that something big and exciting was coming up soon.

Every year at this time, I begin to reflect a bit on the year that has passed. It is usually a bittersweet time. I marvel at what has been accomplished during the year, the good times I have had with our leadership and other members, the great events and the progress we have made in trying to enhance the professional lives of our members.

On the other hand, it is a time of sadness as leadership and board positions change. People who I have worked closely with for years are no longer going to be as present as they once were. I have been fortunate to work with such kind and forgiving people. They have encouraged me, accepted my limitations and coached me to be better than I am. To lose that kind of support and friendship is a tough thing.

Fortunately, we have some great folks coming on the board and moving into leadership positions. It is with excitement and high hopes that I look to the new year.

Every year I also reflect on what I have particularly learned from the president. I have had the opportunity to work closely with a string of great OBA presidents. Jon Parsley was a lit-up billboard for sure. I knew before the year started that I was approaching something big and exciting. The guy just lights up everything around him with his enthusiasm, and he lit up this bar association.

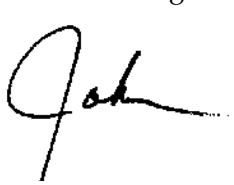
Let me tell you some things that happened if you are not aware. First, he funded a full-time Web editor position so that daily when you "drive" by our Web site you see a new message. Jon took firm and responsible positions to protect our profession and the association. Under his leadership a new general counsel was hired, and we held some great events. The Tech Fair and Annual Meeting being just a couple of recent examples. Emerson Hall was remodeled into a state-of-the-art meeting facility. These are but a few of the many great things accomplished under his leadership.

I would be remiss by not telling you some other things. First, Jon was the first mega text-messaging president I have encountered. By about March I got pretty good at it. I must admit that it was a fun and efficient way to do business.

Second, Jon was a championship debater. He enjoys the "pro" and the "con" and sees both sides well. He knows his preferences, but he will hear out both sides. Just be careful — once the wheels start turning there's no use in arguing 'cause you will probably lose. Fortunately, we did not have any of that. I saw the bright lights early and knew to just enjoy the ride.

As the year comes to a close, I want to thank Jon and all of those who served in governance for the association this past year. I am lucky to work with such talented, giving and compassionate people. I appreciate the members of the Oklahoma Supreme Court who give us support and encouragement from their superintending position. To the great staff here at the OBA, many, many thanks for all you do every day. Last, but not least, I want to thank each of you, our members, for the opportunity to serve you this year.

From here at my desk, I am beginning to see into next year. Until then, I wish all of you the best of the holiday season. Bright lights, big city here we come again!



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

Oklahoma Bar Journal Editorial Calendar

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
  jtstuart@swbell.net
  Deadline: Jan. 1, 2010
- August: **Oklahoma Legal History**
  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

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

Client Directed Billing: Shifts in Who Defines the Value of Legal Services

By Jim Calloway and Mark A. Robertson

Certainly the year 2009 has seen a lot of high profile discussion about alternative billing for law firms. In the last 60 days, more than 80 articles in both legal and general circulation publications have appeared discussing alternative billing and how to appropriately value legal services. From Big Law to Main Street lawyers, many are struggling to address the increasing demands by clients to use some measure other than the billable hour to value legal services.

Even the label has changed! What we lawyers have discussed for years as "alternative billing," is now often called "alternative fee arrangements" (AFA). That, too, seems like a term coined by clients rather than law firms.

Are we seeing a shift in how and who defines value for the work we do? Consider the following items.

Evan Chesler in the Jan. 12, 2009, edition of *Forbes* magazine, wrote a piece titled "Kill the Billable Hour" tinyurl.com/77uoln. This was particularly noteworthy because Chesler is a presiding partner at Cravath, Swaine & Moore, one of the most elite of the mega-law firms. He says lawyers should bill like Joe the Contractor does.

He writes:

> "Clients have long hated the billable hour, and I understand why. The hours seem to pile up to fill the available space. The clients feel they have no control, that there is no correlation between cost and quality….
>
> "The billable hour makes no sense, not even for lawyers. If you are successful and win a case early on, you put yourself out of work. If you get bogged down in a land war in Asia, you make more money. That is frankly nuts….
>
> "Contractors bill a lot, too. Last year my wife and I decided to put in a new kitchen. We called in a contractor (let's call him Joe). Joe arrived with a clipboard, measuring tape and calculator. We told him what cabinets and appliances we wanted. He measured and calculated. A few days later he came back with a price. We thought the price was fair and agreed to it. We didn't care how many hours Joe, or his electrician or his plumber, would be running their meters. That was Joe's problem; we had our price." *Id.*

On Monday, Aug. 24, 2009, the debate about alternatives to the billable hour in the legal industry became even more high profile as articles appeared about the topic in both the *Wall Street Journal* and *Corporate Counsel*. *The Wall Street Journal* piece, "Billable Hour Under Attack" began:

> "With the recession crimping legal budgets, some big companies are fighting back against law firms' longstanding practice of billing them by the hour.
>
> "The companies are ditching the hourly structure — which critics complain offers law firms an incentive to rack up bigger bills — in favor of flat-fee contracts. One survey found an increase of more than 50 percent this year in corporate spending on alternatives to the traditional hourly-fee model.
>
> "The shift could further squeeze earnings at top law

> firms. The past 18 months have been brutal for some big law firms…"

On Dec. 1, 2009, coverage of a survey in *Corporate Counsel* magazine supported the idea of change. "Just over half of the 231 companies surveyed by the Hildebrandt consulting firm said they either have started or will start negotiating non-hourly billing arrangements with their outside counsel. Just over a quarter said they are considering them. And only 18 percent said they have no plans to abandon the billable hour.

"The American Lawyer and the Association of Corporate Counsel jointly surveyed 587 general counsel and chief legal officers in October, and found that 39 percent paid law firms more money this year under alternative fee arrangements than they did in 2008. Meanwhile, just over half, 53 percent said spending on alternative fee arrangements had stayed the same. Only 8 percent said it had fallen." *The Bell is Tolling for the Billable Hour: 'Change is Here to Stay'* tinyurl.com/y8f7tpd

Bruce MacEwen on his well-regarded Adam Smith, Esq. blog responded with a great analysis of this discussion in his post *The Billable Hour Debate Is Not About the Billable Hour*. We encourage you to read his thoughts online at tinyurl.com/nnyw9j where he writes:

> "What's wrong with the billable hour?
>
> "From my fundamental economic perspective, all you need to know is that it starts and ends the pricing determination based on 'cost of production' rather than 'value to client.' In my book, that's per se irrational….
>
> "It's just plain a weird way to price products or services, because it fundamentally disconnects price from perceived value in the eyes of clients." *Id.*

From Fortune 500 companies to Main Street shops and individuals needing legal help, the economy is forcing everyone to look at the costs they incur in hiring lawyers. More and more, clients are directing how the value of the legal services they use is determined and many of them are looking at alternatives to hourly billing. This issue may represent one of the greatest future challenges to our profession. But, of course, we have both thought that for several years now. Our latest book, *Winning Alternatives to the Billable Hour: Strategies That Work: Third Edition* was published by the American Bar Association in the summer of 2008.

Are hourly timesheets going away? No – we still need to keep track of our time to know what it costs us to deliver the services. (Although alternative billing guru Ron Baker says this is pointless "cost accounting.") Are hourly billings going away? No – there are still matters that will be too complex to adequately estimate or budget, too many variables to consider and too many in house bean-counters out there that want to see the time records, still believing that it is a sound way to measure value. Having said that, some law firms state they have done that very thing.

Lawyers on Wall Street and on Main Street need to look at how they bill and be proactive in providing clients with choices on how to be billed for legal services that meet their definition of value.

We are living in a time of great change — both economic and client driven. We see the successful businesses. We know that they embrace the efficiencies of technology, they adapt to changing consumer needs and demands, they provide good customer service and they continue to improve and evolve. They are demanding we do the same if we are going to be their trusted advisors.

If it were easy, all the smart lawyers would have already done it. But there are smart lawyers and smart clients who are using alternative billing methods. How do you start? Let us suggest modest steps. You recall the old saying "How do you eat an elephant?" Answer: "One Bite at a time."

So litigators, are there some routine tasks that should be

billed on a task completed basis rather than an hourly basis? What about filing documents with government clerks? Hourly or fixed? Consider this and revise your policies accordingly.

IT'S ALL ABOUT RISK

One of the business principals at work in the consideration of billing methods other than strictly hourly basis is the allocation of risk. In hourly work, the client assumes all of the risk of a project taking more time than anticipated. In a personal injury contingency fee situation, the attorney assumes the risk of not being paid if there is no recovery.

Just as much as the lawyer does not wish to work for free, the modern client does not wish an open-ended unlimited commitment either. The traditional hourly model shifts all of the risk of unanticipated demands or complications to the client, with the lawyer being in the position to bill and collect more in that event, subject only to the risk of client nonpayment. Any alternative billing strategy will entail the law firm assuming some degree of risk of complications. But if implemented correctly, fixed fees can combine with improvements in delegation and use of technology to free up the lawyer's time to do the more complex and interesting legal work while increasing firm revenues.

TASK-BASED BILLING AS OPPOSED TO FLAT FEES

Some lawyers think of a flat fee for an entire matter as the only alternative to hourly billing. But the more fair and workable plan is likely some hybrid arrangement that includes flat fees for certain tasks and perhaps even some limited hourly charges. Most lawyers would be unlikely to agree to an unlimited number of depositions for a fixed fee at the beginning of an uncertain matter, for example, and some might argue that such an arrangement has the potential to create a conflict of interest between lawyer and client. It could be agreed, however, that preparation for and taking of each deposition would be charged at a "per deposition" fee, with one rate for in-state and another for out-of-state.

EMPLOYING CHANGE ORDERS

Suppose a lawyer was building a home and, in early construction, the lawyer (or spouse) decided granite countertops were needed in the kitchen instead of the material specified in the contract. What would the builder do? The builder could say "No, too late. You signed the contract." Or the builder could say "Well, that's a lot more trouble and expense for me, but I'll do it. No charge." But only a softhearted lawyer would agree to do extra work for no charge.

In reality, the builder would figure out the costs of the modification and some additional profit and give the customer a form called a "change order" that specified additional charges and/or delays and required the customer's signature.

Lawyers who enter into alternative billing arrangements would be well served to follow the builder's example. First, the original agreement should specify in detail everything that the lawyer is obligated to do under the fixed fee or task-based billing arrangement. Then when the client decides something else is needed or there is a change in plans, the lawyer provides

TIPS FOR IMPLEMENTING ALTERNATIVE BILLING

1. Take your time, using "bite-sized" steps.
2. Mine your closed files for objective data. Your recollection may be a bit biased.
3. Start with things that make sense to you and the client. e.g. a flat fee for courthouse filing, no matter who does it.
4. Written agreements and documentation are keys.
5. Pay special attention to areas where you can delegate and automate better.
6. Look at the goals from client's viewpoint: predictability is at least as important as cost.
7. Do other aspects of firm management need to change to reflect this reality?
8. If your firm rewards based on billable hours, change the focus to dollars billed and received. (We should have done this all along).
9. Could one aspect of your practice be transformed? e.g. Corporate formation, minute book and first year's minutes, up to two hours of phone questions answered, running your new business advise letter, all bundled together. Client gets predictability and "free" calls to lawyer. You get a year to prove how valuable you are.
10. Keep reviewing and improving the process.

> Although some may view this reluctance as an attempt to conceal something from the consumer, in reality, the lawyer is exercising time-tested judgment.

a change order for the client to sign, specifying the additional steps and additional attorney fees.

Not all clients will willingly and immediately sign the change order, but as we lawyers like to say, we now have framed the issues for discussion.

YOUR FEE AGREEMENT SHOULD EVOLVE OVER TIME AS YOU LEARN FROM EXPERIENCE

Unknown contingencies can increase the cost of legal representation. The lawyer with experience in the type of matter is often in a better situation to anticipate these contingencies and provide for them in a task-based attorney-client agreement. Sometimes a corporate client or insurance company may have a better understanding of the possibilities than the lawyer. But there is always the possibility of unusual events that were not anticipated. In that case, one will turn to the language of the original attorney-client agreement. Sometimes the client will be obligated to pay more and sometimes a fair reading of the contract will require the attorney to handle the complication for no additional payment.

Rather than rail about the unfairness of working for free, the lawyer is well served to just do the work and inform the client that there will be no additional charge. Hopefully the client will be impressed with the lawyer's integrity.

But the lawyer may take this opportunity, if needed, to modify the template for the attorney-client agreement for future matters and provide how this situation will be handled next time. Hopefully, over the years, the contract will evolve so that unforeseen complications will be much less likely to occur.

GO "CISCO" ON YOUR FEE PROPOSALS

Cisco Systems is a builder of computer network equipment. All of Cisco's outside legal work is handled under alternative agreements reported Neil Rubin, its vice president of litigation in a recent *Corporate Counsel* article tinyurl.com/yzuu5yd. Two models are used. Simpler or routine matters are bundled together, and firms are invited to bid, on a flat fee basis, for the work. For more complex or protracted claims, Cisco pays a flat monthly fee, plus a bonus for a favorable result. "These days everyone's talking about this," says Rubin, "but we've been doing [alternative fee agreements] for a long time now." Cisco has been using these alternative fee arrangements since 2002.

> "Our goal [with novel fee arrangements] isn't for firms to be less profitable," says Rubin, "It's to tie [Cisco's] success to the law firm's success." Paying successful firms a bonus on top of a flat monthly fee does just that, he says. What's more, the bonus Cisco pays decreases over time to further incentivize outside lawyers to get good results quickly.
>
> "Rubin acknowledges that novel fee agreements require more up-front work than simply negotiating an hourly billing rate. Outside counsel and in-house lawyers need first to sit down and discuss what's most important to the client, not just decide when the check will arrive. But it's been Rubin's experience that firms are getting more and more receptive to his flat fee/incentive-based model."

Consider investing some time reviewing filings for a firm client over several years and ask yourself — can I propose a flat fee to this client for this type of work? How can we measure value to the client and a reward for the lawyers if there is a successful outcome?

SOLO AND SMALL FIRMS REPRESENTING CONSUMER CLIENTS FACE DIFFERENT CHALLENGES AND OPPORTUNITIES

The majority of lawyers in the United States practice in a solo or small firm setting. These lawyers often face different challenges concerning pricing for their services. Yet, in many ways, a smaller-sized practice — with its lack of bureaucracy and certain institutional traditions — allows lawyers to move more nimbly in adopting changes.

Solo and small-firm lawyers often represent individual consumers on personal and small

business matters. Clients who are often cost-conscious, often expect a flat or fixed fee or a contingent fee rather than the billable hour. Their experience with lawyers is usually very limited.

For consumer legal services, fees are often based upon market forces and lawyer experience, rather than negotiation with prospective clients. But these "inexperienced" clients are those who might most appreciate the clarity of many alternative fee arrangements.

For many consumer clients, a statement of the lawyer's hourly rate — the cost per hour — is not sufficient information. Almost immediately, the next question is, "How many hours will it take?" or, "What will the total cost be?" This is when lawyers often give a most unsatisfactory answer: "It depends."

It is not surprising that this can be a source of frustration for the potential client. After all, most consumer purchasing experiences do not work this way. Even a car dealer will make a firm offer. In fact, the Main Street lawyer has a fairly accurate mental understanding of what an average fee for this matter will total. But the estimate communicated to the client is often couched in broad terms, with many disclaimers. The lawyer cannot give an exact quote when the number of total hours to be expended is unknown to the lawyer, as well as the client.

Although some may view this reluctance as an attempt to conceal something from the consumer, in reality, the lawyer is exercising time-tested judgment. The experienced lawyer knows that if an average fee is mentioned, the client may focus on that number as "the fee." If the lawyer quotes an estimate of $2,000, the lawyer will view a final total billing of $2,165 to be right on target. But too many clients would respond with, "No, wait, you said $2,000." So the lawyer learns to express the estimate as a range, with plenty of room at the top end of the range to ensure that the total fee will almost certainly be less than the highest number mentioned. In this example, the lawyer, if pressed, would quote a range from a low of $2,000 to a high of $4,000 or $5,000.

Imagine how much more consumer-friendly and nonthreatening this transaction would be if the lawyer simply said, "This probate case can all be yours for the low price of $X." Many lawyers will object that there are many variables, and many contingencies.

But the lawyer does understand the variables — far better than the client. Lawyers know they will treat a client fairly, but they also want to make sure they are not treated unfairly by working many extra hours without additional compensation.

The alternative fee arrangement need not be based upon only one flat fee. The fee agreement may cover numerous contingencies: if event A happens, one fee will be charged; if B happens, then another fee. The most important thing is for the client to be able to understand and comprehend fees quoted in this manner. Written materials for the client to take home and review are extremely important in these situations.

Hourly billing may be simple for the lawyer, but a consumer will appreciate the clarity and certainty of a fixed fee — even if that certainty is embodied in a road map with a dozen possible total fees, depending upon future variables.

CONCLUSION

If 2009 is any example, we are going to see a lot more interest in alternative fee arrangements in 2010. Both lawyers and clients are engaged in this and it seems extremely doubtful that we will return to business as usual.

Jim Calloway is the director of the OBA Management Assistance Program. His award-winning blog is Jim Calloway's Law Practice Tips at http://jimcalloway.typepad.com. He co-authored Winning Alternatives to the Billable Hour with Mark Robertson.

Mark A. Robertson is a partner in the Oklahoma City law firm of Robertson and Williams. He is a former chair of the American Bar Association Law Practice Management section, currently a Delegate to the American Bar Association House of Delegates and co-author of the book, Winning Alternatives to the Billable Hour (3 ed).

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

District Judge
Twenty-first Judicial District, Office 1
Cleveland County

This vacancy is due to the appointment of the Honorable William C. Hetherington, to the court of Civil Appeals effective November 19, 2009.

To be appointed to the office of District Judge, one must be a registered voter of Cleveland County at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointee shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both, within the State of Oklahoma.

Application forms can be obtained by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, or on line at www.oscn.net under the link to Oklahoma Judicial Nominating Commission and must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Tuesday, January 5, 2010. If applications are mailed, they must be postmarked by midnight, January 5, 2010.**

Mark D. Antinoro, Chairman
Oklahoma Judicial Nominating Commission

Lawyerly Blessings

By Travis Pickens

Activist and writer Anne Lamott says there are two prayers: "Help me! Help me! Help me!" and "Thank you! Thank you! Thank you!" We lawyers (religious or not) know that prayer, don't we, when looking for a missing trial exhibit or trying to get that extension of time?

We should be giving thanks, instead, for things perhaps less immediately consequential and more profoundly significant. We should give thanks for the things that still make America the best place to live in the world and being a lawyer in America the best career in the world. We should give thanks for courts that work, where, almost all of the time, the judge or jury makes a logical decision that is supported by the evidence. We should pause to admire the operation of our judicial system. For all the rules and requirements imposed upon its participants, it is in fact largely self-regulated, guided by the simple inherent honesty and honor of its participants. Likewise, we should be thankful for a system that honors the truth above all and is designed to find it even when it may be hidden or distorted.

We should be thankful for the role that lawyers play in everyday life. An entire section of the Oklahoma Rules of Professional Conduct are devoted to "public service" (ORPC 6.1 through 6.5). An attorney sits on almost every governing board there is, business, charitable or religious, and usually without compensation.

> "For a moment, think of your life without your attorney friends."

People think we know all the laws. We don't, of course, but we know most or how to find them, and a non-lawyer never will. We are professional problem-solvers, and most of us have outstanding communication and social skills. Can you imagine a world where non-lawyers populated every board? ("Help me! Help me! Help me!"). Lawyers make society work. To put it more bluntly, without lawyers, society does not work at all.

We should be grateful for the pleasures of our company. When I list my close friends, almost all are lawyers. I would bet yours are, too. We are the most interesting of people, at least to ourselves. We read and follow the news. Most of us are fluent in sports, religion, finance and politics.

Some of us love the law and will sit in fascination discussing what may or may not be its proper interpretation, or better yet, what the opposing counsel or a judge may do with it.

Because we deal with the top decision makers and serve our communities, we know what goes on in town. Importantly, many of us tell great jokes. Almost all of us get the jokes. For a moment, think of your life without your attorney friends. Aren't they perhaps the greatest blessing?

We should acknowledge and thank the women and men that work with us as part of our staffs. They are our captive audiences all the year long. I once read a book on some of the world's great geniuses. Almost all of them were insufferable in some way. Some lawyers share that characteristic, but strangely, we don't seem to mind. No other group enjoys stating their opinions more, about everyone and everything.

What other group routinely challenges the thinking of each other like lawyers?

We are under almost constant stress, financial or time pressure and can be difficult managers. Our clients, with whom many of our staffs work, are often scared or angry. These are not the seeds of a harmonious working environment. Thankfully, our staffs are wired for the law just as we, else they would never last a week.

We should consider our clients a blessing. Whether they are rich or broke, honest or dishonest, an individual or a huge bureaucracy, they are our *raison d'être*, and we ought never to forget that. Without them, there would be no holiday bounty for you and me.

Finally, we should be grateful for the thought and spirit behind our Rules of Professional Conduct. No other profession devotes the care and attention to ethical behavior as lawyers. No other profession takes its ethics more seriously or strives for honorable behavior more earnestly. We lawyers prefer to bear the increasing burden of regulation as opposed to the increased risk of harm to our clients. Not every profession does that.

After you contemplate the greater blessings of creation and family this holiday season, remember and appreciate as well our judges, staffs, fellow lawyers and clients. Say Thank you! Thank you! Thank you! For them, for us, we should be grateful indeed.

Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact Mr. Pickens at travisp@okbar.org or (405) 416-7055; (800) 522-8065.

FREE CLE

The Low Income Taxpayer Clinic at Oklahoma Indian Legal Services, Inc. Presents

An Introduction to Practice:
U.S. Bankruptcy Court and U.S. Tax Court

Oklahoma City

Dates: 9: 00 AM until 4: 00 PM, Monday, December 21, 2009 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, December 22, 2009
(Lunch each day from Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Monday, December 28, 2009 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, December 29, 2009
(Lunch each day from Noon until 1:00 PM)
7: 00 AM until 8: 00 PM, Wednesday, December 30, 2009 (registration: 6:45 AM)
(Lunch: Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Monday, January 4, 2010 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Tuesday, January 5, 2010
(Lunch each day from Noon until 1:00 PM)
9: 00 AM until 4: 00 PM, Wednesday, January 6, 2010 (registration: 8:30 AM) and
9: 00 AM until 4: 00 PM, Thursday, January 7, 2010
(Lunch each day from Noon until 1:00 PM)

Location: The Low Income Taxpayer Clinic at Oklahoma Indian Legal Services, Inc.
4200 Perimeter Center Drive, Suite 222
Oklahoma City, OK 73112-2310
Voice: 1.800.658.1497

CLE Credit: This course has been approved by the Oklahoma Bar Association Continuing Legal Education Commission for twelve (12) hours of mandatory CLE credit, including one (1) hour of ethics.

Tuition: This CLE course and its accompanying materials are free. Attendees will neither be solicited nor expected to make a contribution of time or money. This course is funded by an LITC Program Grant.

Cancellation Policy: Cancellations will be accepted at anytime.

Enrollment: Call 1.800.658.1497 (toll free) or 405.943.6457 and request course enrollment.

FREE CLE

November Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Sheraton Hotel in Oklahoma City as part of the OBA Annual Meeting on Nov. 4, 2009.

REPORT OF THE PRESIDENT

President Parsley reported he attended the board meeting in Guymon. He also had various conferences with staff about Annual Meeting issues.

REPORT OF THE VICE PRESIDENT

Vice President Thomas reported she attended the Board of Governors dinner with the Texas County Bar Association, October board meeting and the tour of the Panhandle.

REPORT OF THE PRESIDENT-ELECT

President-Elect Smallwood reported he has finalized OBA budget matters, made standing committee appointments and made final preparations for the Annual Meeting in 2010.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Board of Governors meeting, Texas County Bar dinner, Board of Bar Examiners annual dinner, Board of Governors dinner, monthly staff celebration, staff meetings for Annual Meeting, meeting with the Family Law Section regarding its practice manual and an Oklahoma Judicial Conference reception.

BOARD MEMBER REPORTS

Governor Brown reported he attended the OBA Bench and Bar Committee meeting and the ABA Standing Committee on Judicial Independence meeting in Washington, D.C. **Governor Carter** reported she attended the Board of Governors dinner with the Texas County Bar Association, October board meeting in Guymon and Tulsa County Bar Association Community Outreach Committee meeting. **Governor Chesnut** reported he attended the dinner with the Texas County lawyers at the Parsley house in Guymon, October Board of Governors meeting in Guymon and the Ottawa County Bar Association monthly meeting. **Governor Christensen** reported she attended the OBA board meeting in Guymon with the Texas County Bar Association, OBA function at President Parsley's ranch in Guymon, OBA Bench and Bar Committee meeting and Oklahoma County Bar Association meeting. **Governor Dirickson** reported she attended the October board meeting and monthly Custer County Bar Association meeting. **Governor Dobbs** reported he attended the October board meeting and that he will be a speaker at the plenary CLE at the Annual Meeting. He expressed appreciation for the flowers sent as condolence for the death in his family. **Governor Hixson** reported he attended the function at President Parsley's Ranch with the panhandle lawyers, October board meeting and Canadian County Bar luncheon. **Governor McCombs** reported he attended the McCurtain County Bar luncheon, Guymon barbecue at the Parsley residence, Guymon board meeting and lunch after the board meeting. **Governor Moudy** reported she attended the Texas County Bar reception and dinner at the home of President Parsley, October board meeting and celebrated the OBA Communications Department and Law Day Committee awards and achievements. **Governor Reheard** reported she attended the October board meeting with the Texas County Bar Association and the October board meeting in Guymon. She also presented CLE in Tulsa and Oklahoma City. **Governor Stockwell** reported she attended the Board of Governors dinner with the Texas County Bar Association, October board meeting and the tour of the panhandle. **Governor Stuart** reported he attended the Texas County board meeting and Pottawatomie County Bar Association meeting. As a member of the Board of Editors, he also worked on recruiting articles for his upcoming *Oklahoma Bar Journal* issue.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Rose reported the division has a goal to offer a quality hospitality suite at the Annual Meeting that will exceed the success of their suite hosted during the Solo and Small Firm Conference. Their theme this year is the Wild YLD West, and some quality prizes will be given away. He also attended the board meeting in Guymon, October YLD meeting and a YLD function at the Kelsey Briggs Run Against Child Abuse.

COMMITTEE LIAISON REPORT

As Women in Law Committee chairperson, Governor Reheard reported accounting from the recent event is now complete with money remaining.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the *George Mothershed v. Oklahoma Bar Association* case, filed in Oklahoma County District Court, has been dismissed. She attended the board meeting and activities in Guymon and the October meeting of the Professional Responsibility Commission. She also gave CLE presentations to the Pottawatomie County Bar Association, Tulsa County Bench and Bar group and at an OBA/CLE program. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for October 2009 was submitted for the board's review.

STRATEGIC PLANNING COMMITTEE FINANCIAL PLANNING SUBCOMMITTEE REPORT

Subcommittee Chair Harry Woods Jr. reported the subcommittee met several times during the year to review the association's current financial status for the purpose of making recommendations for both the near and distant future. He reviewed the subcommittee's report and its recommendations. President Parsley said this is an effort to be fiscally responsible and not to let finances become too thin that would create a crisis situation. Mr. Woods said the subcommittee took into account projections for reserve funds in making its recommendations.

The board voted to approve the subcommittee's recommendations which are (a) the association plan to increase annual dues by $25, effective Jan. 1, 2013, subject to revision in the event of material intervening circumstances; (b) the Board of Governors adopt the report of the subcommittee and make it a part of the association's Strategic Plan; (c) commencing promptly after adoption of such a plan, it be widely publicized to members of the association; (d) in the interim between adoption and implementation of such plan, the officers and Board of Governors of the association monitor the financial condition of the association to determine whether the recommended timing and amount of the proposed dues increase remains appropriate and if not, make adjustments as needed; (e) as part of the continuing oversight of this matter, the subcommittee review the proposed dues increase in approximately two years and advise the officers and the members of the Board of Governors whether the recommended timing and amount of the dues increase remains appropriate and, if not, recommend changes to the timing and/or amount, as appropriate; and (f) the Board of Governors adopt a policy that the association's goal is to maintain a general reserve equal to the average of three months' expenses for the immediately preceding year and that the reserve be exclusive of committee and section funds.

It was noted that this proposed action may be voted upon at the House of Delegates in 2012. The board directed the publication of the subcommittee report twice in the *Oklahoma Bar Journal* and on the Web site as part of the OBA Strategic Plan.

OBA Strategic Planning Committee

Financial Planning Subcommittee Report

Editor's Note: The Board of Governors at its Nov. 4, 2009, meeting voted to approve the subcommittee's report. This proposed action may be voted upon at the House of Delegates in 2012. The board directed this report to be published twice in the Oklahoma Bar Journal and on the Web site as part of the OBA Strategic Plan.

On March 16, 2009, President-Elect Allen M. Smallwood appointed Stephen D. Beam, Renee DeMoss, Robert S. Farris, Brian T. Hermanson and Harry A. Woods Jr. as members of the Financial Planning Subcommittee of the Strategic Planning Committee, with Harry A. Woods Jr. to serve as the chair of the subcommittee. He requested that the subcommittee review the association's current financial status with an eye toward making recommendations for both the near and distant future.

The subcommittee met at the Oklahoma Bar Center on May 27 and Aug. 18, 2009. Subcommittee members present at both meetings were Harry Woods, chair, Stephen Beam, Robert Farris and Brian Hermanson. Member Renée DeMoss attended the May 27 meeting, but, due to a scheduling conflict, was unable to attend the Aug. 18 meeting. Also present at both meetings were Allen Smallwood, president-elect; John Morris Williams, executive director; and Craig Combs, director of administration. Board member Steven Dobbs attended the Aug. 18 meeting. Copies of minutes of the meetings are available online at www.okbar.org/members/committees/FinancialExhibit1.pdf and www.okbar.org/members/committees/FinancialExhibit2.pdf.

Prior to the meetings, staff provided subcommittee members with substantial information, including (a) the 2004 Finance Commission Report; (b) financial statements for 2004 through 2008; (c) the 2009 budget, (d) projected 2009 actual results; (e) the proposed budget for 2010, and (f) pro forma statements of revenue, expenditures and reserves for 2010 through 2019. At the meetings, staff summarized the data contained in the materials furnished to subcommittee members and answered questions posed by subcommittee members.

After thorough discussion among members and staff, the subcommittee developed a consensus on the following points:

1. At the present time, the financial condition of the association is excellent.
2. Projected revenue through 2012, based upon the existing dues structure and other sources of revenue, should be sufficient to meet anticipated expenses and reserve requirements through 2012.
3. Based upon reasonable assumptions, it would be prudent and in the best interests of the association and its members for annual dues to be increased by $25, effective Jan. 1, 2013 (a pro forma statement which demonstrates the need for a dues increase at that time is available online at www.okbar.org/members/committees/FinancialExhibit3.pdf).
4. If adopted and implemented, the recommended dues increase should result in the next dues increase, thereafter, being needed in approximately five to seven years (*i.e.* 2018 to 2020).
5. As a matter of good planning, it is desirable to have periodic, relatively small increases, every five to seven years, as opposed to periodic large increases on a

longer cycle (*e.g.* the approximately 15-year cycle between the last two dues increases).

6. The Board of Governors should decide, this year, the projected timing and amount of the next dues increase.
7. The decision by the Board of Governors on this matter should be made a part of the association's Strategic Plan.
8. Commencing promptly after such decision is made, it should be widely publicized to members of the association.
9. The benefits of long-range planning for a dues increase and publicizing the plan, include the following: (a) future candidates for office, officers and members of the Board of Governors will be aware of such plan and can act accordingly; and (b) members of the association will be better and more timely informed concerning the financial condition of the association.
10. In the interim, between the present and the date when specific action is taken to implement a dues increase, the officers and Board of Governors of the association should continue to monitor the financial condition of the association and determine whether the recommended timing and amount of the proposed dues increase remains appropriate and, if not, make adjustments as needed.
11. Such monitoring should include directing the subcommittee to review this matter in approximately two years and advise the officers and Board of Governors of the association whether the recommended timing and the amount of the potential dues increase remains appropriate and, if not, recommend changes.

At the Aug. 18 meeting, formal motions were made, seconded, and unanimously adopted which recommend the following: (a) The association plan to increase annual dues by $25, effective Jan. 1, 2013, subject to revision in the event of material intervening circumstances; (b) the Board of Governors adopt the report of the subcommittee and make it a part of the association's Strategic Plan; (c) commencing promptly after adoption of such a plan, it be widely publicized to members of the association; (d) in the interim between adoption and implementation of such plan, the officers and Board of Governors of the association monitor the financial condition of the association to determine whether the recommended timing and amount of the proposed dues increase remains appropriate and if not, make adjustments as needed; (e) as part of the continuing oversight of this matter, the subcommittee review the proposed dues increase in approximately two years and advise the officers and the members of the Board of Governors whether the recommended timing and amount of the dues increase remains appropriate and, if not, recommend changes to the timing and/or amount, as appropriate; and (f) the Board of Governors adopt a policy that the association's goal is to maintain a general reserve equal to the average of three months' expenses for the immediately preceding year and that the reserve be exclusive of committee and section funds.

DATED: September 3, 2009

Harry A. Woods Jr., Chair
Financial Planning Subcommittee

OBF 2009 Courthouse Improvement Grants

By Richard A. Riggs

At the November board meeting, the Oklahoma Bar Foundation Trustees approved OBF's 2009 courthouse improvement grants. You will recall that these grants were made possible by a *cy pres* award directed to the foundation by Beaver County Judge Gerald H. Riffe. The court's order directed the foundation to dedicate a portion of the *cy pres* award to fund improvements to Oklahoma courthouses. In response to the court's order, the foundation established procedures by which counties may submit requests for funding those projects. These procedures contemplate annual awards from the fund's earnings, and 2009 marks the second year in which the foundation has awarded courthouse improvement grants.

As one may expect in this day and age, most of the requests this year reflected a desire to update courthouse technology. A list of the 2009 awards follows this article, and you will see that significant improvements to courthouse facilities throughout the state will be funded and access will be improved. Particularly at this time, when government budgets at every level are strained, the Oklahoma Bar Foundation is honored to play a role in facilitating much needed improvements that will aid our state's judiciary, practicing lawyers and citizens.

> "The foundation's success is possible only through the efforts of dedicated Oklahoma lawyers."

Coupled with OBF's traditional grants, the courthouse improvement grants bring the total amount awarded by OBF during 2009 to over $600,000. I am pleased to report that by reason of these awards, aggregate grants by the foundation since its founding have reached the $9 million level. These dollars are impressive, and they provide a testament to the generosity of those Oklahoma lawyers who have played a role in the foundation's mission over the years, but the dollars are not nearly as impressive as what they have done to improve the lives of Oklahomans.

As the year draws to a close, it is appropriate to recognize those who have contributed so much to the foundation's mission. The foundation's staff has been extraordinarily helpful this year, particularly in working with Oklahoma banks in establishing electronic reporting procedures for IOLTA accounts. Nancy Norsworthy, the foundation's director, is approaching her 25th anniversary with the foundation and has been instrumental in the foundation's growth in each of those years. Tommie Lemaster has been with the foundation almost three years and Ronda Hellman joined the foundation earlier in 2009.

The foundation's success is possible only through the efforts of dedicated Oklahoma lawyers. A number have served as OBF Trustees. Each Trustee has contributed in his or her special way to further the foundation's mission. Many lawyers have supported the foundation with their contributions. Special thanks are in order for the more than 1,500 Oklahoma lawyers who have become OBF Fellows and have thereby committed to make annual contributions to the foundation.

I am confident that 2010 will be another successful year for the Oklahoma Bar Foundation, a success that will not only accomplish good works but will cast a favorable light on the Oklahoma bar and its member attorneys. On behalf of the foundation Trustees, best wishes for the holiday season and a healthy and prosperous 2010.

2009 Oklahoma Bar Foundation Court Grant Awards

District Court of Grady County **$5,500**

Funding for one digital court reporting system

District Court of Muskogee County **$5,000**

Funding for one video arraingment system

District Court of Oklahoma County **$23,000**

Funding for Wireless Internet equipment (hardware) for the Oklahoma County Courthouse facility to be able to wire three floors (main controller & three floors on Wi-Fi)

District Court of Oklahoma County, Juvenile Division **$11,000**

Funding to provide a glass enclosure waiting area for a separate court waiting area for victims and witnesses from offenders. This project will pave the way for "future plans" for designated attorney/client meeting areas.

District Court of Cleveland County **$9,500**

Funding for a sound system in one courtroom

Total 2009 OBF Court Grant Awards = $54,000

Please note 80 OBAJ 539-540 (March 14, 2009) where additional such awards were announced during 2009.

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

Season's Greetings from Your Oklahoma Bar Foundation!

One of the true joys of the holiday season is the opportunity to thank our foundation supporters and to wish each of you the very best for a happy and prosperous new year.

The OBF Board of Trustees and Staff

Fellow Enrollment Form

❍ Attorney ❍ Non-Attorney

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

Firm or other affiliation: _____

Mailing & Delivery Address:_____

City/State/Zip: _____

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

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

__ Total amount enclosed, $1,000

__ $100 enclosed & bill annually

__ *New Lawyer 1st Year*, $25 enclosed & bill as stated

__ *New Lawyer within 3 Years*, $50 enclosed & bill as stated

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

Lawyers Transforming Lives through education, citizenship and justice for all. Join the OBF Fellows today!

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

Signature & Date: _____ **OBA Bar #:** _____

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

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

Many thanks for your support & generosity!

Americans with Disabilities Act Basics

What Attorneys Need to Know about the ADA and Representing the Deaf and Hard-of-Hearing

By Emily Hufnagel and Collin Walke

Imagine you are pulling through a fast food drive-thru line and trying to order at the speaker box, except the person on the inside listening to you talk into the speaker cannot understand what you are saying because you are deaf. As a result, you pull up to the window to make your order in person. The person waiting on you has caught on that you are deaf and tries to help you order in between giggles and jeers with the other restaurant employees. By now you are holding up the drive-thru line, so the employee asks you to pull over into the parking lot to write down your order. At this point in time you are becoming frustrated because all you want is a burger and Coca-Cola. You finally place your order.

However, when your order finally comes, you get a foreign substance in your drink and food significantly different from what you ordered. You ask for a new drink and burger but are refused. In a last-ditch effort to get the lunch you ordered, together with some respect, you confront the store manager and demand a refund — only to be thrown out by a security guard.

The above fact pattern is extremely similar to the case of *Bunjer v. Edwards*[1] and is a prime example of why the Americans with Disabilities Act (ADA)[2] was implemented. Moreover, the above fact pattern shows you the frustration a deaf or hard-of-hearing person goes through just to order lunch; imagine what frustration a deaf or hard-of-hearing person must have when they are trying to litigate a case.

This article addresses the special needs of those within the deaf and hard-of-hearing community, as well as the application of the ADA to law firms representing the deaf and hard-of-hearing.

COMMUNICATION BARRIERS

In a recent presentation to the OBA Access to Justice Committee, Glenna Cooper, division director of Communication Service for the Deaf of Oklahoma, informed the committee that it can take as many as 15-20 phone calls before a deaf client finds an attorney who will hire an interpreter. Few paying clients, on average, need to make that number of phone calls before finding an attorney who will at least meet with them or even agree to representation.

Translator services in Oklahoma typically start at $50 per hour, and under the ADA, that cost cannot be passed

onto the client.[3] Moreover, certain individuals may require a certified deaf interpreter, which is commonly used when an individual's communication method is so unique as to require two interpreters working in tandem to ensure comprehension. Obviously, two translators at $50 an hour is an expense that cuts into an attorney's profit margin. However, under the ADA, lost profit is not a sufficient justification to deny representation to a deaf or hard-of-hearing person.[4]

THE ADA

The ADA prohibits discrimination based upon disability in places of public accommodation.[5] The term "disability," as used within the ADA, means a "physical or mental impairment that substantially limits one or more major life activities" of an individual.[6] Hearing is a major life activity.[7] The phrase "public accommodations" specifically includes law offices.[8] Therefore, the ADA covers practicing attorneys and their law offices, as well as deaf and hard-of-hearing clients. A covered entity is required to make reasonable accommodations for disabled individuals.

Simply because the ADA covers law offices and prospective deaf and hard-of-hearing clients does not mean that an attorney is required to take a deaf or hard-of-hearing person's case; rather, the ADA prohibits attorneys from not taking cases for the sole reason that the prospective client is deaf. In other words, an attorney can decline to represent a deaf or hard-of-hearing client for any reason the attorney would deny representation to a hearing client.

Once an attorney decides to undertake representation of a deaf or hard-of-hearing individual, "[t]he ADA requires attorneys engaged in private practice to provide equal access to their services by providing auxiliary aids and services necessary to ensure effective communication between individuals who are deaf and their attorneys. Such auxiliary aides and services include, but are not limited to, qualified sign language interpreters, real-time captioning and assistive listening systems/devices."[9] These auxiliary aids are some examples of the "reasonable accommodations" that the ADA requires of all covered entities.

An attorney may decline to represent an individual who is deaf or hard-of-hearing because such representation would be an "undue burden." The Justice Department has outlined certain factors to determine whether an accommodation is an "undue burden," which include the nature and cost of the accommodation and the financial resources of the law firm or practice.[10] Additionally, case law exists allowing one to make the argument that severe reduction in profitability creates an undue burden and/or fundamentally alters the nature of the services provided.[11] Unfortunately, exactly how much loss of profit constitutes an undue burden is unclear.

SOLUTION

Perhaps the best solution is for attorneys to fulfill the aspirational goals of the Oklahoma Rules for Professional Conduct and actively seek to represent deaf and hard-of-hearing clients. Better yet, consider representation on a pro bono or low bono basis. Another alternative is to look at what other states are doing. Some states, not including Oklahoma, have pooled resources to create "communication access funds" so that attorneys can apply for reimbursement or advance funding when they need to pay for communication access services. The National Association for the Deaf advocates for the establishment of such funds, and its Web site has links to several states that have already implemented such programs.[12] Establishing such a fund in Oklahoma would dramatically increase deaf and hard-of-hearing persons' access to the courts.

For more information relating to establishing communication access funds or information regarding interpreters, attorneys can contact Emily Hufnagel at (405) 513-7055 or Collin Walke at (405) 837-2982.

Emily Hufnagel is in private practice with the Bass Law Firm PC in El Reno. Collin Walke is of counsel to Quick, McCown and Spradlin in Oklahoma City.

1. 985 F. Supp. 165 (D.D.C. 1997).
2. 42 U.S.C.A. §§12101 et seq.
3. *See* 28 C.F.R. §36.301(c).
4. *See* 1 Henry H. Perritt Jr., *Americans with Disabilities Act Handbook*, 421 (4th Ed., 2009)(*citing Emery v. Caravan of Dreams Inc.*, 879 F. Supp. 640, 644 (N.D. Tex. 1995); *Mayberry v. Von Valtier*, 843 F. Supp. 1160, 1166-67 (E.D. Mich. 1994)).
5. 42 U.S.C.A. §12182(a).
6. 42 U.S.C.A. §12102(1)(A).
7. 42 U.S.C.A. §12102(2)(A).
8. 42 U.S.C.A. §12181(7)(F).
9. Communication Access Funds for Legal Services, National Association of the Deaf; www.nad.org/issues/justice/lawyers-and-legal-services/communication-access-funds (last visited Nov. 9, 2009).
10. CRS Report for Congress, www.law.umaryland.edu/marshall/crsreports/crsdocuments/97826A.pdf (citing 28 C.F.R. §36.104) (last visited Oct. 25, 2009).
11. *See* note vi, *supra; see also* 28 C.F.R. § 36.104.
12. www.nad.org/issues/justice/lawyers-and-legal-services/communication-access-funds (last visited Nov. 9, 2009).

TEACHING LIFE LESSONS ON THE FIELD

This month, the Young Lawyers Division wants to highlight the work attorney Bruce Rooker is doing as a Norman Parks and Recreation Summer Youth Softball League coach.

Bruce Rooker has been an OBA member since 1979. He practices at Mahaffey & Gore PC in Oklahoma City, specializing in the areas of mineral law and real property law. Like many coaches, Bruce originally started coaching because he had a child on the team and it was a chance to spend some quality time with his daughter. Now that his daughter has grown up and moved away, Bruce continues to coach. Bruce recognized that there are fewer and fewer parents with the time and skills to coach, and he realized that he could make a difference, so he continued to coach. In fact, Bruce only coaches when there is a team for which no one has signed up to coach, which, so far, has been every season.

Currently, Bruce is co-coaching with his good friend, Steve Day. Bruce said he has no plans to stop coaching and says he will continue "so long as I have fun doing it, and I feel I have something to offer the girls about the game and growing up." Bruce sees coaching as not only teaching a sport, but also as a way to help prepare youth for the challenges of tomorrow. Bruce told us, "Softball is the perfect sport for teaching what life is about. The team can't succeed without working together, and one player can't throw another out unless a team member is there to catch the ball." Bruce started out using these lessons to help his own daughter, but realized that this is a good way to show his players that whom you choose as your friends, boyfriends and co-workers is important, since they can make you better or bring you down. Bruce tells his team that, in softball, as in life, you have to practice and work to be the best you can be. "Your coach can tell you what to do, but he can't hit the ball for you."

At left - Bruce Rooker (back row, left) with his softball team.

At right - YLD Chair Rick Rose presents an award to Gabe Bass at the OBA Annual Meeting last month. Mr. Bass was named an outstanding YLD director. Other award recipients were Chief Justice James Edmondson, Vice Chief Justice Steven Taylor, Candace Bass, Cody McPherson, John Weaver, Robert Faulk and Roy Tucker.

Calendar

December

15 **Death Oral Argument;** Phillip Anthony Summers; D-2008-313; 10 a.m.; Court of Criminal Appeals Courtroom

16 **Ginsburg March Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Linda Samuel-Jaha (405) 609-5406

18 **OBA Appellate Practice Section Meeting;** 11:45 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brian Goree (918) 382-7523

25 **OBA Closed** – Christmas Holiday

January

1 **OBA Closed** – New Year's Day Observed

7 **House of Representatives Rule Making Seminar;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Amy Aldin (405) 962-7603

8 **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424

12 **Death Oral Argument**; Clarence Rozell Goode Jr.; D-2008-43;10 a.m.; Court of Criminal Appeals Courtroom

14 **OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

15 **OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027

OBA Board of Governors Meeting; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

16 **OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595

18 **OBA Closed** – Martin Luther King Jr. Day

20 **Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

21 **OBA Law-related Education Committee 2010 Supreme Court Teacher and School of the Year Judging;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jack G. Clark Jr. (405) 232-4271

22 **Oklahoma Bar Foundation Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

23 **OBA Law-related Education We the People State Finals;** 10 a.m.; Oklahoma History Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

February

12 **OBA Board of Editors Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Carol Manning (405) 416-7016

OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424

15 **OBA Closed** – President's Day

17 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

18 **OBA Law-related Education Close-Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Law-related Education Close-Up Teachers Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

19 **OBA Board of Governors Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000

22-26 **OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

New OBA Board Members to be Sworn In

Nine new members of the OBA Board of Governors will be officially sworn in to their positions on Jan. 15, 2010, at 10 a.m. in the Supreme Court Courtroom at the State Capitol. The new officers are President Allen Smallwood, Tulsa; President-Elect Deborah Reheard, Eufaula; and Vice President Mack Martin, Oklahoma City.

To be sworn in to the OBA Board of Governors to represent their judicial districts for three-year terms are Glenn Devoll, Enid; David Poarch, Norman; Ryland Rivas, Chickasha; and Susan Shields, Oklahoma City.

To be sworn in to one-year terms on the board are Immediate Past President Jon Parsley, Guymon; and Young Lawyers Division Chairperson Molly Aspan, Tulsa.

Nominations Being Accepted for Educator Awards

Applications for the 2010 Supreme Court Teacher and School of the Year are now being accepted by the OBA Law-related Education Department. The winning school and teacher will both be presented with a $1,000 award during a ceremony at the Supreme Court in Oklahoma City in February.

Applications are due Wednesday, Jan. 13, 2010. Encourage the educators you know to apply at www.okbar.org/public/lre/awards.htm.

Bar Center Holiday Hours

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

OBA Member Resignations

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

Daniel Joseph Guarasci
OBA No. 10654
20 Lawrence Bell Dr., Ste. 300
Williamsville, NY 14221

Michael Daven Hesse
OBA No. 17468
1518 Legacy Dr., Ste. 250
Frisco, TX 75034-6042

Rita Teague Russell
OBA No. 12511
9843 Amberg Path
Helotes, TX 78023

New Version of Old E-mail Scam Prompts OBA to Schedule Free Webcast

Many Oklahoma lawyers recently received e-mails from a "new client" asking them to collect alimony or back child support. These were followed almost immediately by delivery of a Citibank "Official Check" in excess of $300,000 payable to the lawyer. These checks are forged checks, but the banking system may not reverse the charges on a forged check for over 10 days. If funds have been wired out before then, the lawyer bears the loss.

The scam has prompted the OBA to sponsor a free webcast on this topic on Dec. 15 at noon. It will feature OBA General Counsel Gina Hendryx and OBA Management Assistance Program Director Jim Calloway. Register at tinyurl.com/ylafsmy.

Kudos

Robert D. Nelon has been elected president of the Defense Counsel Section of the Media Law Resource Center, a non-profit organization dedicated to monitoring issues and developments pertaining to First Amendment rights.

Allen Harris has been reappointed to the American Bar Association Center for Human Rights Advisory Council in Washington, D.C.

Richard P. Hix has been selected as a fellow of the Litigation Counsel of America.

Robert G. McCampbell and **David B. Donchin** have been elected fellows of the American College of Trial Lawyers.

Lynne Driver was recently named a fellow of the American College of Bond Counsel.

Kelli Stump served as co-chair for an American Immigration Lawyers Association conference in Puerto Vallarta, Mexico, in November.

Johnny Beech has been named to the board of the Edmond Lacrosse Club as one of its founding members.

Mike Voorhees has been elected secretary of the Oklahoma Foundation For Medical Quality and will serve on the OFMQ executive committee in addition to serving on the board of directors.

On The Move

The Norman law firm of Pitchlynn & Williams PLLC announces the opening of a satellite office located in the Council Oak Center, 1717 S. Cheyenne Ave., Tulsa, 74119. The firm also announces the additions of two associates, **Stephanie Moser Goins** and **Rachel Csar**, both of whom will work in the Norman office. Ms. Goins is a 2008 OU graduate and former editor in chief of the *American Indian Law Review*. Ms. Csar is a 2009 OU graduate and served as the articles editor/writing competition director for the *American Indian Law Review*.

Conner & Winters announces the addition of **Daniel Carsey** as a senior associate to its Oklahoma City office. Mr. Carsey will focus on environmental, energy and business matters. He earned his J.D. from TU in 2005, graduating with highest honors, and joins Conner & Winters from the Tulsa law firm of Jones Gotcher.

Crowe & Dunlevy has named **Elizabeth Barnett, Brandee Bruening, Scott Butcher, Julia Stein Dittberner, Wendee Grady, Eric Money** and **Jessica Reinsch Perry** as its newest associates. Ms. Barnett focuses her practice on the areas of appellate law and trial and litigation. She graduated from the OU College of Law. Ms. Bruening focuses her practice on general litigation. She is a graduate of the OU College of Law. Mr. Butcher's area of practice is general litigation. He graduated from New York University School of Law. Ms. Dittberner concentrates her practice in the areas of aviation and aircraft. She is a graduate of OCU School of Law. Ms. Grady's practice includes financial institutions and finance, commercial real estate, corporate and securities, and Indian law and gaming. She graduated from the TU College of Law. Mr. Money focuses his practice in the area of general litigation. He graduated from the OU College of Law. Ms. Perry focuses her practice in general litigation, and she graduated from the OU College of Law.

West & Associates announces that **Jon C. Franke** has joined the firm. Mr. Franke earned his J.D. from OCU in 1990. Bringing his insurance defense experience, he will primarily be involved in plaintiff personal injury practice and expert testimony.

The Francy Law Firm announces the addition of two new associates to its practice. **Kimberly A. Jantz** is a recent graduate of the TU College of Law and has previously worked as an intern for the Tulsa County public defender's office in the juvenile division. **Geoffrey H. Beeson** previously held a position as a state's attorney with Oklahoma Child Support Services and is a trained mediator.

Fellers Snider Law Firm announces that three new associates have joined the Oklahoma City office: **Kyle D. Evans, Whitney A. Walstad** and **Dr. Michael S. Young**. Mr. Evans practices in the area of civil litigation. Prior to joining the firm, he served as a law clerk to Judge James H. Payne of the U.S. District Court for the Eastern District of Oklahoma. He graduated from OSU with a B.S. in 2005 and the OU College of Law with honors in 2008. Ms. Walstad practices primarily in the area of civil litigation. She graduated magna cum laude from OU with a B.B.A. in finance and marketing in 2005. She graduated from the OU College of Law with honors in 2009. Dr. Young is a registered U.S. patent attorney practicing intellectual property law with emphasis on patent prosecution and licensing of medical and surgical devices, and biotechnology. He has a J.D. from Creighton University and both a B.S. and M.S. in biomedical engineering from Boston University. He then graduated from Boston University School of Medicine and completed residency in neurology and fellowships in electromyography, neurorehabilitation and motor control.

GlassWilkin PC announces that **Jared K. Nelson** has joined the firm as an associate attorney. He earned his B.S. in geography from Texas A&M University and his J.D. with honors from TU. His practice areas include business formations and transactions, general civil litigation, health care, construction, real estate, banking and energy.

Shelton Voorhees Law Group announces that **Scott D. Caldwell** has joined the firm as a partner. Mr. Caldwell received his J.D. from OU in 2000. He received a bachelor's degree in music education from Southwestern Oklahoma State University in 1996. His areas of practice include plaintiff's personal injury, bankruptcy, family law, probate, products liability and toxic tort litigation.

McAfee & Taft announces the addition of seven new lawyers to its Tulsa office. **Robert J. Joyce** focuses his practice on complex environmental, toxic tort and regulatory matters and has experience in the refining, aviation/aerospace, mining, petroleum and manufacturing industries. **Kathy R. Neal's** practice is primarily focused on the representation of management in all aspects of labor and employment law. **Chris A. Paul** concentrates his practice on business issues and transactional and regulatory matters for businesses primarily engaged in highly regulated industries. **Leanne G. Barlow** focuses her practice on all aspects of estate and business continuation planning. **Chris K. Miller** is a registered patent attorney whose practice encompasses all aspects of intellectual property law. **Sharolyn C. Whiting-Ralston** is a trial lawyer who represents employers in all phases of labor and employment law, including litigation before state and federal courts, regulatory and administrative agencies, and arbitration panels. **David M. Winfrey** brings experience in the areas of environmental, occupational health and safety, and transportation law.

Lester Loving & Davies announces the addition of new attorney of counsel **D. Matt Hopkins**. Mr. Hopkins' areas of practice include administrative law, banking and commercial law, corporate and business law, estate planning, government relations and lobbying, guardianship and probate, and state and local government law.

Nelson Roselius Terry & Morton announces that **Carolyn Smith** and **Melissa Salling** have become associates with the firm. Ms. Smith received her B.A. from Purdue University in 2005 and her J.D. from Indiana University School of Law in 2008. Ms. Salling received her B.A. from Louisiana State University in 2006 and her J.D. from the OU College of Law in 2009.

Lori L. Young announces the opening of her law office, Young Law Office. Ms. Young has a general practice with an emphasis on employment law. The office is located at 400 E. Central, Ste. 300E, Ponca City, 74601; (580) 765-9311; www.loriyounglaw.com.

S. Richard Farber and **M. Jay Farber** announce the opening of their new law offices of Farber & Farber at 5753 NW 132nd St., Oklahoma City, 73142. Richard Farber is a trial lawyer whose primary focus is injury law. Jay Farber, a former federal and state prosecutor and former public defender, will concentrate his practice in criminal law. They may be reached at (405) 603-3600 or at farberlaw@coxinet.net.

At The Podium

Leah Farish addressed the United Nations' Special Political and De-Colonization Committee in October at the U.N. She spoke to about 200 ambassadors and international officials about the plight of the Sahrawi people held in Algerian camps by purported leaders, the Polisario. Ms. Farish suggested solutions to the 35-year-old stalemate and was invited to meet with officials before and after her remarks to explore additional remedies.

Margaret Millikin recently gave a presentation on intellectual property, patents and trademarks at the Society of Women Engineers "Sharpen Your Skills" seminar last month at the Public Service Company of Oklahoma general offices in Tulsa. The seminar offered strategies and advice for start-up companies and tools and suggestions for meeting the needs of today's marketplace.

T. Douglas Stump presented a report on comprehensive immigration reform on behalf of the American Immigration Lawyers Association national office at the Texas Chapter AILA Fall Conference in Puerto Vallarta, Mexico. Mr. Stump is a national executive officer for the organization and provided an update on developing legislation and President's Obama's commitment to reform.

Matthew Stump spoke during the American Immigration Lawyers Association Texas Chapter Conference held in Puerto Vallarta, Mexico, in November. The presentation focused on the most recent issues related to outstanding researcher, extraordinary ability and national interest waiver employment visas. The session was titled, "Dot Your 'I's' and Cross Your 'T's': OR, EA and NW Specifics."

Oklahoma County District 3 Commissioner **Ray Vaughn** and Deputy Commissioner **Randy Grau** recently gave presentations at the Bethany Kiwanis Club at Southern Nazarene University and at the Engineers Club of Oklahoma City at Hometown Buffet. Both presentations were about the developments at the Tinker Aerospace Complex and U.S. Department of Justice issues with the county jail and potential solutions on fixing the jail.

Rick Goralewicz and **Paula Davidson Wood** recently spoke to attendees of the National Legal Aid and Defender's Association annual conference in Denver. Their presentation was titled, "Rule 1.14 — Safety Net or Snare?" and consisted of several case studies and discussion of the ethical issues in dealing with cognitively impaired clients.

Courtney Davis Powell recently spoke to the Western Oklahoma Human Resources organization in Elk City. The discussion focused on wage garnishments — what garnishments are, the procedure for obtaining a garnishment, how to calculate the amount to be withheld and other employer oriented considerations.

Roy John Martin, general counsel of the Oklahoma Department of Consumer Credit, spoke to members of the Oklahoma Association of Mortgage Professionals in Tulsa and Oklahoma City in October. The topic of discussion was the recently enacted Oklahoma Secure and Fair Enforcement for Mortgage Licensing Act.

Luke Wallace and **David Humphreys** presented a program at the National Consumer Law Center's Annual Consumer Rights Litigation Conference in Philadelphia on the topic of "Jury Trial of a Telephone Abuse Debt Collection Case." The presentation focused on the trial of *Fausto v. Credigy Services* from the U.S. District Court for the Northern District of California.

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

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Articles for the Jan. 16 issue must be received by Dec. 21.

Stephen Neal Deutsch of Edmond died Nov. 24. He was born Sept. 25, 1958, in Washington, D.C., attended State University of New York and graduated with a B.A. from Eastern Illinois University in 1982. He earned his J.D. from OCU School of Law in 1986. He served as an Assistant District Attorney in Oklahoma County for 25 years. Memorial donations may be made to the Rachel and Michael Deutsch Support Trust at MidFirst Bank, P.O. Box 7833, Edmond, 73083.

James Carl Pinkerton of Tulsa died Oct. 14. He was born Feb. 9, 1936, in Tulsa. He attended Lee School, Horace Mann Junior High and Central High School. He then went on to Princeton University, graduating in 1957. In 1960, he graduated from the OU College of Law. He then entered the practice of law with his father. He became an associate bar examiner from 1961-1973 and examiner from 1973-1985. In 1979, he was chairman of the Board of Bar Examiners. Also during this time, 1978-1980, he was the president of the Tulsa State Planning Forum and a longtime member of Tulsa Title and Probate lawyers. Memorial contributions may be made to the charity of your choice.

Harold Culver Theus of Yukon died Nov. 26. He was born Sept. 26, 1915, in Homer, La. He received a bachelor of theology degree from Bethany Peniel College in 1937. **During college, he had already enlisted in the Oklahoma National Guard, and when the 45th Infantry Division was called to active duty in 1940, he went to Fort Sill and Camp Barkeley as a chaplain. The Army Air Corps, however, needed pilots, so he applied for and was accepted for fighter pilot training. He spent the rest of World War II in the Army Air Corps**. After leaving the Army Air Corps in 1945, he enrolled in law school at OU. After graduation from law school, he became an assistant to the Oklahoma County attorney and then moved to private practice. In 1949, he moved to Washington, D.C., where he was legislative counsel for the National Reserve Officers Association. **When the Korean War broke out, he returned to active duty and went to Seoul, Korea, as a liaison officer coordinating Army troop movements and Naval and Air Force actions. He was twice decorated for valor in combat. After Korea, he continued in the Air Force Reserve until his retirement in 1975 as a lieutenant colonel**. In 1955, he returned to private law practice in Oklahoma City until he was appointed as first assistant to the county attorney and chief of both the civil and criminal divisions. In 1960, he defeated the incumbent county judge and served three terms. In 1966, he was elected district judge of Oklahoma County, where he served until his retirement in 1981. Memorial contributions may be made to the Alzheimer's Association, 3555 N.W. 56th St., Suite 220, Oklahoma City, 73112; or a charity of choice.

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VACANCY ANNOUNCEMENT: The Sac and Fox Nation is now accepting resumes for the positions of District Court Judges and Supreme Court Justices. For information on minimum qualifications, please contact the Court Clerk at (918) 968-2031. Mail resumes to the Tribal Secretary at 920883 S. Hwy 99 Bldg. A, Stroud, Oklahoma 74079 or by fax at (918) 968-1142. Deadline is January 15, 2010.

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DOWNTOWN OKLAHOMA CITY, AV RATED, product liability and insurance defense firm seeks attorney with at least 5 years of experience. Please send resumes to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

Holiday Gifts

By Lisbeth McCarty

Years ago, after I graduated from law school, some of my friends took jobs with high-powered law firms. I chose to work for a solo practitioner. The experience I gained was invaluable, but not quite the same experiences my colleagues were having.

My boss represented a company whose plant manufactured Mexican food for sale in the frozen-food aisles of grocery stores. The products were much loved by consumers; apparently, the smell of peppers being cooked was not embraced so happily by the neighbors who lived near the plant. Thus, the company was the defendant in a nuisance suit.

Around Christmas time, this client gave each of us employees our very own bag of frozen chile rellenos, wrapped in bright red Christmas paper and

adorned with a green string bow. For the record, according to 5 O.S. Supp. 2008, Rule 1.8, Rules of Professional Responsibility (Comment: Gifts to Lawyers [6]), "A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted." The same rule was in effect at the time we received the bags of chile rellenos.

As December neared its end, almost every day, one of my friends working at a big-name firm would call me to tell me with excitement that he or she had just received a bonus check for so-many-hundreds of dollars.

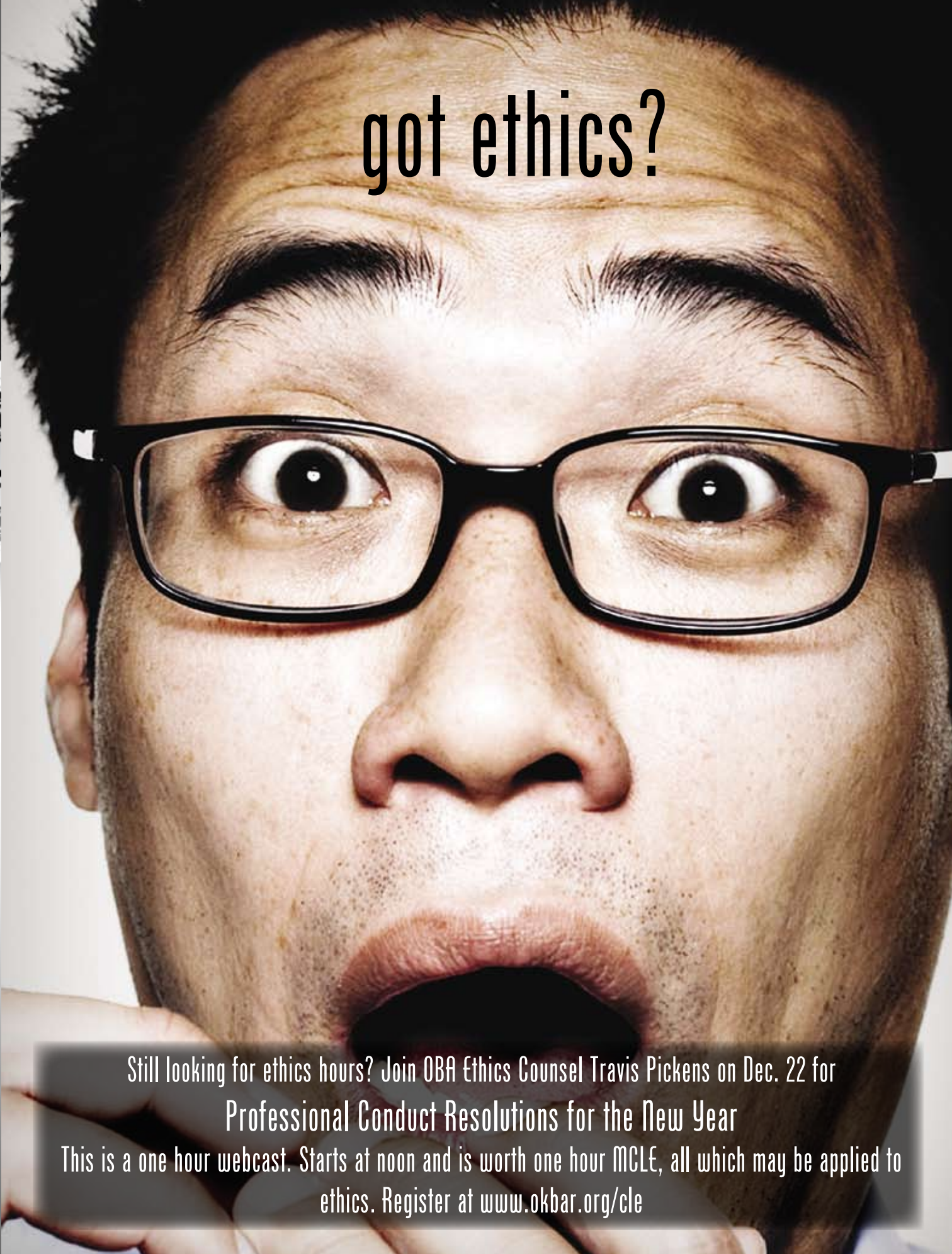
"What did you get for a bonus?" The caller would inevitably ask.

Quite honestly, I responded, "Well, I didn't get a bonus check from my boss, but I got a bag of chile rellenos from a client. And they are delicious!"

My friends thought I was kidding. I wasn't. The rellenos really were delicious.

Ms. McCarty practices in Norman.

Editor's Note: Have a short, funny or inspiring story to share? Law-related topics are preferred, but not required. E-mail submissions to carolm@okbar.org.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