

Oklahoma Bar JOURNAL

Volume 80 ♦ No. 4 ♦ February 14, 2009

IMMIGRATION

VISAS

ALSO INSIDE

- Family and Medical Leave Act Regulations
- Policy Change Allows More Online CLE

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

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Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

Program Planner/Moderator

Kevin D. Berry, Perrine, McGivern, Redemann, Reid, Berry & Taylor, P.L.L.C., Tulsa

8:30 a.m. Registration & Continental Breakfast

9:00 **Welcome to the Wonderful, Wacky World of Mediation**
William Sparks, W.E. Sparks, Inc., Tulsa

9:50 **Break**

10:00 **Electronic Diagnostic Evaluation of Carpal Tunnel Syndrome**
Dr. Kathleen Sisler, Central States Orthopedic Specialists, Tulsa

10:50 **Can I Do That? Daily Ethical Considerations (ethics)**
Michael McGivern, Perrine, McGivern, Redemann, Reid, Berry & Taylor, P.L.L.C., Tulsa

11:40 **Networking lunch (included in registration)**

12:10 **Looking Back from Across the Bench - Observations From a Judge**
Judge Eric Quandt, Workers' Compensation Court, Tulsa

1:00 **Workers' Compensation Case Law Updates**
Jack Zurawik, Jack G. Zurawik, P.C., Tulsa

1:50 **Break**

2:00 **What to Expect - An Overview of Pending Workers' Compensation Legislation**
Senator Tom Adelson, District 33, Tulsa

2:50 **Adjourn**



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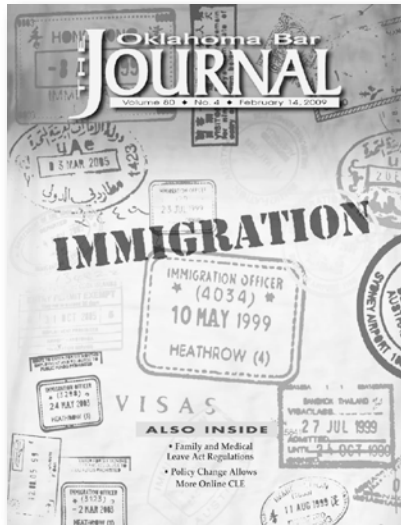
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**THEME:
IMMIGRATION**

EDITOR: JOHN MUNKACSY

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NEW FMLA
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Administration of Justice: It's our Job

By Jon Parsley

I am honored and privileged to serve as your president for 2009.

Our association has a great year planned. There are plans in the works for several new and exciting programs and enhancements to some existing programs. In addition to the work of the OBA on behalf of its members, we also have the responsibility to ensure that the rule of law prevails and that all citizens of our state have reasonable and responsible access to the justice system. The work on behalf of our members and on behalf of the public requires us to be vigilant in ensuring that able advocates are free to pursue liberty and justice for all.

This legislative session several bills have been filed that directly affect our association. Senate Bill 997 proposes to deintegrate the Oklahoma Bar Association – leaving behind a voluntary bar association with no structure for admission or discipline. Absent our current structure, the state of Oklahoma would be left without any standards for admission or system to discipline or disbar lawyers who violate our ethical standards.

Also, “tort reform” that has morphed into the now common name of “lawsuit reform” has found its way back onto the legislative agenda. There are several bills and resolutions that if passed would result in caps on noneconomic damages, limits on attorney fees, and even subject Supreme Court rules to approval of the Legislature. This year the collection of proposed legislative enactments outnumbers years past. I fear that the passage of many of these bills would infringe upon the rights of the citizens of this state and would have a negative impact upon the administration of justice and our profession.

In light of what appears to be a serious attack upon our profession and the rights of all persons to seek redress in an open and unbiased forum, the Board of Governors has authorized me to create the Administration of Justice Task Force. The task force is charged with identifying legislation that may negatively affect our profession and/or threatens to deny equal justice under the law to all. The task force is further charged to make recommendations to the Board of Governors on what positions and responses it deems appropriate. It is anticipated

that the task force will be working closely with our Legislative Monitoring Committee so that timely review of all the pending bills can be accomplished.

In order that we have balanced and learned positions and responses, I have called upon lawyers throughout the state. It is my goal to bring together plaintiffs’ lawyers,

defense lawyers, corporate counsel and attorneys from academia. As an important voice for our profession, I want to ensure that we have every segment of our association represented and have given full and equal opportunity to express opinions on a wide range of

issues. Beyond diversity of practice areas and geography, I expect we will have a diversity of opinions and ideas. In the end I hope that we will be able to articulate an honest message to deliver to the Oklahoma Legislature regarding the proposals that we will be studying.

At the present I will use my best efforts to work with the leadership of the House of Representatives and the Senate. Many bills introduced every session do not make it to the finish line of the governor’s desk or a ballot for a vote of the people. Sometimes a bill dies because the members of the Legislature decide sua sponte that the bill is not a good idea. Other times it takes an educated and engaged public to provide information to legislators to prevent undesirable

In short, it may well be time that we advocate for ourselves.



Jon Z. Parsley

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

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EVENTS CALENDAR

FEBRUARY 2009

- 16 **President's Day** (State Holiday)
- 17 **OBA Civil Procedure Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- OBA Professionalism Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Shariisse O'Carroll (918) 584-4192
- 18 **OBA Law-related Education Close-Up Program**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- OBA Appellate Practice Section Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gene Bertman (405) 605-6100 x111
- OBA Solo and Small Firm Planning Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: B. Christopher Henthorn (405) 350-1297
- 19 **OBA Law-related Education Close-Up Program**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Jack Brown (918) 581-8211
- OBA Government and Administrative Law Practice Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Patricia A. Podolec (405) 760-3358
- Hudson Hall Wheaton Inn Pupilage Group Five**; 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041
- OBA Mock Trial Committee Meeting**; 5:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066
- 20 **OBA Board of Governors Meeting**; 9 a.m.; Tulsa County Bar Center, Tulsa; Contact: John Morris Williams (405) 416-7000
- OBA Law Schools Committee Annual Visit**; Oklahoma City University School of Law, Oklahoma City; Contact: Judge Mike D. DeBerry (580) 286-2221
- OBA Family Law Section/Guardian Ad Litem Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Amy E. Wilson (918) 439-2424
- Administrative Justice Task Force Committee Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bill Grimm (918) 584-1600

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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Oklahoma Bar Association Day at the Capitol *March 17, 2009*

- 11:00 -11:10 *Welcome - Jon Parsley, OBA President*
- 11:10- 11:30 *Bills of Interest - Duchess Bartmess,
Chair of Legislative Monitoring Committee*
- 11:30- 11:50 *Civil Practice Update - Brad West,
West Law Firm, Shawnee, Oklahoma*
- 11:50- 12:10 *Break for lunch buffet*
- 12:10- 12:20 *Uniform Laws and Commercial Law update,
Fred Miller, Uniform Law Commissioner*
- 12:20 12:30 *Events of the Day, John Morris Williams,
OBA Executive Director*
- 12:30-1:00 *Break*
- 1:00- 5:00 *Members to go to capitol to visit
with legislators*
- 5:00-7:00 *Legislative reception in Emerson Hall*

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Tuition

All courses are priced at \$100, except the program on April 9, which is \$50. Register at www.okbar.org/cle

Programs and Times:

Feb. 25 - Adobe Acrobat 9 for Attorneys – The Basics - 11:00 a.m.

March 3 - Word for Attorneys Part 1 – The Basics - 11:00 a.m.

March 4 - Best of Google - 11:00 a.m.

March 11 - Word for Attorneys Part II – Intermediate - 11:00 a.m.

March 18 - Adobe Acrobat 9 for Attorneys – The Basics - 11:00 a.m.

April 9 - Viruses, Spyware & Scripts! Oh, My! How to Protect your Computer - 11:30 a.m.

April 29 - Advanced Internet Searching - 11:00 a.m.





Dada v. Mukasey: The Supreme Court Addresses the Conflict between the Motion to Reopen and Voluntary Departure Provisions

By T. Douglas Stump and Kelli J. Stump

On June 16, 2008, the U.S. Supreme Court issued its decision in *Dada v. Mukasey*,¹ holding that an individual who has been granted voluntary departure must be permitted to request withdrawal of such grant and proceed on a motion to reopen. The decision resolved the split among several circuit courts and disagreed with those circuit courts that had previously held the voluntary departure period is tolled upon the timely filing of a motion to reopen. This article will briefly discuss the conflict between the voluntary departure and motion to reopen provisions and address the court's resolution of the conflict in *Dada*.

VOLUNTARY DEPARTURE AND THE MOTION TO REOPEN PROVISIONS: THE 'CATCH-22'

Individuals placed in immigration removal proceedings are often given the opportunity to voluntarily depart the United States provided they are able to meet certain eligibility requirements.² An order of voluntary departure cannot exceed 120 days, and if granted at the conclusion of proceedings, the period cannot exceed 60 days.³ A grant of voluntary departure is often desirable because it allows the individual to leave the United States without being subject to the consequences that result from an order of removal. Serious consequences result, however,

when one fails to depart the United States before the lapse of the voluntary departure date. For instance, the individual may be subject to a monetary fine of up to \$5,000, and he or she is subject to a 10-year bar⁴ from several forms of relief including adjustment of status, cancellation of removal, change of status, registry and voluntary departure.⁵ Further, the voluntary departure order becomes a removal order upon failure to timely depart.⁶

The voluntary departure period begins to run immediately from the time the immigration judge enters the order. If an individual is granted voluntary departure at the close of removal proceedings and then timely appeals his or her

case to the Board of Immigration Appeals (BIA), the voluntary departure period is tolled.⁷ If the appeal is dismissed, the BIA will reinstate the voluntary departure for a period not exceeding 60 days.⁸ While the voluntary departure period is tolled during the pendency of an appeal before the BIA, it has repeatedly held that the voluntary departure period is not tolled upon the filing of a motion to reopen.⁹ Thus, the consequences for failure to timely depart become an issue when an individual files a motion to reopen his or her case because the BIA will unlikely decide the case before lapse of the voluntary departure period.

Since 1996, an individual under a final order of removal is entitled to only one motion to reopen, absent limited exceptions, and has only 90 days to file a motion to reopen his case.¹⁰ Thus an issue arises because the voluntary departure period usually expires before the deadline to file the motion to reopen. Because the BIA has held that the voluntary departure period is not tolled upon the filing of a motion to reopen, an individual has very little time to file the motion and obtain a decision before lapse of the voluntary departure period. For instance, if the BIA's decision dismissing an appeal reinstates voluntary departure for 60 days, in order to avoid the consequences for failure to timely depart, the individual must discover the basis for reopening, file the motion to reopen, and obtain a decision within 60 days. Such turnaround is highly unlikely, as the "BIA rarely if ever rules on a motion to reopen before an alien's voluntary departure period has expired."¹¹ While an individual may apply for an extension of the voluntary departure, an extension is unlikely because the voluntary departure period cannot exceed 60 days in most cases, as an individual filing a motion to reopen likely received voluntary departure at the conclusion of proceedings.¹² Additionally, if an individual departs the United States for any reason, including voluntary departure, while a motion to reopen is pending, a conflict arises because the motion is deemed abandoned.¹³ Thus, prior to *Dada*, many individuals found themselves in a "Catch-22" because if they left the country to avoid the voluntary departure consequences, they abandoned their motion to reopen. Alternatively, if they remained in the United States to pursue their case, they risked the consequences associated with failing to depart.¹⁴

PRE-DADA CIRCUIT SPLIT: TOLLING OF THE VOLUNTARY DEPARTURE PERIOD

The conflict between the voluntary departure and motion to reopen provisions resulted in a split among the circuits regarding the interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) changes to the provisions and whether or not the timely filing of a motion to reopen tolled the voluntary departure period. Prior to *Dada*, the 3rd, 8th, 9th and 11th Circuits had found that the timely filing of a motion to reopen automatically tolled the voluntary departure period if filed prior to the voluntary departure deadline.¹⁵ The 1st, 4th and 5th Circuits concluded that the voluntary departure period was not tolled.¹⁶

The first court to address the issue was the 9th Circuit in *Azarte v. Ashcroft*. In *Azarte*, the court granted a petition for review of the BIA's denial of a motion to reopen on the basis that the petitioners were ineligible for relief because they had overstayed the voluntary departure period at the time of the decision.¹⁷ After the BIA dismissed the petitioners' appeal and reinstated voluntary departure, the petitioners discovered new evidence and before lapse of their voluntary departure period, they filed a motion to reopen based on the new evidence and on the basis of ineffective assistance of counsel.¹⁸ Six months later, after lapse of the voluntary departure period, the BIA denied the motion to reopen on the basis that the petitioners overstayed the voluntary departure period and were consequently ineligible for the relief requested should the case be reopened.¹⁹

The petitioners timely filed a petition for review in the U.S. District Court for the 9th Circuit Court of Appeals. The 9th Circuit considered *Matter of Shaar*, the BIA precedent holding that the voluntary departure period is not tolled upon the filing of a motion to reopen, and the court noted that *Shaar* applied to pre-IIRIRA statutes.²⁰ Before IIRIRA, there were no time limits on motions to reopen or voluntary departure.²¹ Individuals were given long periods to depart, which could be extended, and motions to reopen were never time-barred.²² Citing to traditional canons of statutory construction, the 9th Circuit noted that new statutes require new interpretation and it must look at the statute as a whole and give meaning to all its provisions.²³ The court noted that the new motion to reopen provisions did not "establish a time by which

the BIA must make its decision regarding a motion to reopen."²⁴ Consequently, the court found that the BIA's interpretation deprived the motion to reopen provision of meaning as it eliminated the availability of motions to people granted voluntary departure.²⁵ As a result, the court held that the voluntary departure period is tolled when an individual files a motion to reopen before lapse of the voluntary departure date and when he or she requests stay of deportation or an extension of voluntary departure.²⁶

The 3rd, 8th and 11th Circuits later agreed with the 9th Circuit and held that the filing of a motion to reopen prior to lapse of the voluntary departure date tolled the voluntary departure period pending a decision on the motion to reopen.²⁷ The 5th Circuit was the first court to decide otherwise and hold that the filing of a motion to reopen before the lapse of the voluntary departure date did not toll the voluntary departure period.

In *Banda-Ortiz v. Gonzales*, the 5th Circuit considered the policy regarding voluntary departure and stated that "voluntary departure is the result of an agreed-upon exchange of benefits between an alien and the Government."²⁹ "It is not granted 'unless the alien requests such voluntary departure and agrees to its terms and conditions.'"³⁰ The court held that tolling the voluntary departure period for motions to reopen would deprive the government of its benefit in granting voluntary departure.³¹ The court compared the situation to "the accused in a criminal prosecution demand[ing] not only the chance of acquittal at trial but also the benefits that go

with a guilty plea and the acceptance of responsibility."³² Thus, in light of the purpose behind voluntary departure, the 5th Circuit held that the BIA reasonably interpreted the governing statutes to prevent the tolling of the voluntary departure period.³³ The court further noted that an alien is permitted to file the motion to reopen,

but it must be resolved before the agreed upon voluntary departure date and to avoid interference with the government's interest in the finality of an alien's voluntary departure.³⁴ The 1st and 4th Circuits later followed *Banda-Ortiz* and held that the voluntary departure period is not tolled upon the filing of a motion to reopen.³⁵ The Supreme Court granted *certiorari* to resolve the disagreement among the Court of Appeals in *Dada v. Mukasey*.³⁶

DADA V. MUKASEY: YOU CAN HAVE YOUR CAKE, BUT YOU CAN'T EAT IT, TOO.

In *Dada*, the Supreme Court granted *certiorari* after the 5th Circuit denied a petition for review the denial of a motion to reopen by the BIA.³⁷ Similar to the other cases discussed herein, the BIA denied Dada's motion to reopen on the basis he overstayed the voluntary departure period despite filing the motion prior to the voluntary departure deadline.³⁸ Dada also sought to withdraw the voluntary departure request prior to the voluntary departure deadline. Dada filed a petition for review in the 5th Circuit.³⁹ Relying on its decision in *Banda-Ortiz*, the 5th Circuit held that the BIA's

reading of the applicable statutes was reasonable and refused to toll the voluntary departure period.⁴⁰

“... many individuals found themselves in a ‘Catch-22’ because if they left the country to avoid the voluntary departure consequences, they abandoned their motion to reopen.”



The Supreme Court held oral argument on Jan. 7, 2008, to resolve the conflict between the motion to reopen and voluntary departure provisions. After argument, the court ordered supplemental briefing regarding whether an alien may be permitted to withdraw his voluntary departure request prior to lapse of the voluntary departure deadline.⁴¹ In its decision six months later, the court considered the statute for motions to reopen and voluntary departure and the purpose for each mechanism. The court noted “the purpose of a motion to reopen is to ensure a proper and lawful disposition... [and expressed its reluctance] to assume that the voluntary departure statute was designed to remove this important safeguard.”⁴² Consequently, the court decided that it must “read the Act to preserve the alien’s right to pursue reopening while respecting the Government’s interest in the *quid pro quo* of the voluntary departure arrangement.”⁴³

In doing so, the court held that while it did not find statutory authority to toll the voluntary departure period because the government would lose its benefit of a cost-free departure, an alien must be permitted to withdraw his request for voluntary departure before expiration of the departure period and without regard to the underlying merits of the motion to reopen.⁴⁴ Thus, pursuant to *Dada*, the alien has the choice to either abide by the terms of voluntary departure or, alternatively, to forfeit voluntary departure and risk a removal order to remain in the United States to pursue the motion, but the alien cannot have both.⁴⁵ The court stated that allowing withdrawal of the voluntary departure request does not strip the government of its benefit because an alien who requests withdrawal is placed in the same position as an alien who did not receive voluntary departure.⁴⁶ Similarly, the alien benefits if his motion is granted, as he will not suffer the consequences for failing to depart, but he suffers the consequences of a removal order if his motion is denied.⁴⁷

Interestingly, the court hinted to future review as it noted that “a more expeditious solution to the untenable conflict between the voluntary departure scheme and the motion to reopen might be to permit an alien who has departed the United States to pursue a motion to reopen post-departure, much as Congress has permitted with respect to judicial review of a removal order.”⁴⁸ Note, however, as previously discussed, the regulations state that an alien who departs

the United States during the pendency of a motion to reopen is deemed to have abandoned the motion.⁴⁹ The court stated that because the regulation was not challenged in *Dada*, it could not be considered.⁵⁰ Thus, until that issue is presented and decided, an alien must withdraw his request for voluntary departure in order to pursue a motion to reopen.⁵¹

CONCLUSION

Although the *Dada* decision is considered to be a victory in the immigration community because it forces the government to permit withdrawals of the voluntary departure request and allow an individual to proceed on a motion to reopen, immigration advocates across the country remain unsatisfied. If the voluntary departure period is not tolled, the alien remains vulnerable because the filing of a motion to reopen does not protect the alien from removal. An alien must file a stay of removal with the same immigration authorities that ordered the original removal, and stays of deportation are difficult to obtain. Such situation places yet another hurdle before the alien because as previously discussed, a departure, including removal, from the United States renders the motion abandoned. Arguably, if immigration authorities execute the alien’s removal before a decision is reached on the motion to reopen, the alien is effectively prevented from pursuing the motion to reopen – the very relief *Dada* sought to safeguard.⁵²

1. 128 S. Ct. 2307 (2008).

2. INA §240B, 8 U.S.C. §1229c.

3. See generally INA §240B(a), 8 U.S.C. §1229c(a).

4. The rules pertaining to voluntary departure changed in 1996 with the implementation of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). IIRIRA significantly changed the voluntary departure rules as it limited the time individuals may be permitted to depart and limiting any extensions of the voluntary departure period. Additionally, under pre-IIRIRA voluntary departure, individuals who failed to depart the United States were subject to a five year bar of relief. Compare INA §240B(d) with INA §242B(e)(2)(A) (1995).

5. INA §240B(d), 8 U.S.C. §1229b(d).

6. 8 C.F.R. §241.7.

7. *Matter of Villegas Aguirre*, 13 I&N Dec. 139 (BIA 1969).

8. *Matter of A-M-*, 23 I&N Dec. 737 (BIA 2005).

9. *Matter of Shaar*, 21 I&N Dec. 541 (BIA 1996).

10. INA §240(c)(7), 8 U.S.C. §1229a(c)(7). IIRIRA changed the status of motions to reopen in 1996, changing them to a statutory form of relief. *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005).

11. *Azarte*, 394 F.3d at 1282.

12. 8 C.F.R. §1240.26(f).

13. 8 C.F.R. §1003.2(d). Note that some circuits have held that an individual may continue to have his case reviewed if he departs, other circuits have upheld the validity of the provision. See *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007) (holding the Board has jurisdiction to adjudicate a motion post departure because the regulation barring motions to reopen filed after a person departs or is removed, 8 C.F.R. § 1003.2(d), is invalid because it conflicts with the motion to reopen statute.); But see *Singh v. Gonzales*, 468 F.3d 135 (2d Cir. 2006).

14. This is another issue because while some courts have held that the reopening of a case extinguishes the removal order, including the voluntary departure order, other courts have held that the reopening of a case does not reopen the grant of voluntary departure and failure to depart bars the individual from the relief sought in reopening. See *Orichitch v. Gonzales*, 421 F.3d 595 (7th Cir. 2005) (The act of reopening vacates a voluntary departure order and consequently eliminates any §240B(d) bar to relief); *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (the BIA's granting of the motion to reopen means there is no longer a final decision to review); but see *Wright v. Ouellette*, 171 F.3d 8, 12 (1st Cir. 1999) (filing a motion to reopen is more akin to starting a new proceeding); *Singh v. Gonzales*, 468 F.3d 135 (2d Cir. 2006) (holding that the respondent is barred from adjustment of status because IJ's granting of MTR does not vacate the effect of prior noncompliance with a voluntary departure order). While the *Dada* decision should prevent the voluntary departure consequences in future cases because petitioners will have withdrawn their voluntary departure request, the outcome of cases pending pre-*Dada* that are reopened and the petitioner did not request withdrawal of the voluntary departure grant remains unknown.

15. See *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005), *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005), *Azarte v. Ashcroft*, 394 F.3d 1278 (9th Cir. 2005), and *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006).

16. See *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *Banda-Ortiz v. Gonzales*, 445 F.3d 387 (5th Cir. 2006), and *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007).

17. *Azarte*, 394 F.3d at 1289.

18. *Id.* at 1281.

19. *Id.*

20. *Id.* at 1286-87.

21. 8 U.S.C. § 1254(e) (1995) (repealed 1996); 8 C.F.R. § 3.2 (1995).

22. *Azarte*, 394 F.3d at 1286.

23. *Id.* at 1287-88.

24. *Id.* at 1284.

25. *Id.* at 1288.

26. *Id.* at 1289.

27. See *Kanivets v. Gonzales*, 424 F.3d 330 (3d Cir. 2005), *Sidikhouya v. Gonzales*, 407 F.3d 950 (8th Cir. 2005), and *Ugokwe v. United States Att'y Gen.*, 453 F.3d 1325 (11th Cir. 2006).

28. 445 F.3d 387 (5th Cir. 2006).

29. *Banda-Ortiz v. Gonzales*, 445 F.3d 387, 389 (5th Cir. 2006).

30. *Id.* (quoting 8 C.F.R. §240.25(c)).

31. *Id.* at 390.

32. *Id.* at 391 (quoting *Alimi v. Ashcroft*, 391 F.3d 888, 892 (7th Cir. 2004)).

33. *Id.*

34. *Id.*

35. See *Dekoladenu v. Gonzales*, 459 F.3d 500 (4th Cir. 2006), *Chedad v. Gonzales*, 497 F.3d 57 (1st Cir. 2007).

36. *Dada v. Mukasey*, 128 S. Ct. 2307, 2312 (2008).

37. *Id.*

38. *Id.* at 2311-12

39. *Id.* at 2312

40. *Id.*

41. *Id.*

42. *Id.* at 2318.

43. *Id.*

44. *Id.* at 2319.

45. *Id.* at 2319-20.

46. *Id.* at 2320

47. *Id.*

48. *Id.*

49. 8 C.F.R. §1003.2(d). See also Note 13, *supra*.

50. *Dada*, 128 S. Ct. at 2320

51. *Id.*

52. See Note 13, *supra*.

ABOUT THE AUTHORS



T. Douglas Stump has more than 25 years of experience in a practice focused on employment-based immigration law, complex deportation, federal litigation and family immigration matters. He is national secretary and member of the executive committee for the 11,500-member American Immigration Lawyers Association. He is the past president of AILA Texas Chapter and an adjunct professor of immigration law. He is a frequent speaker and author on immigration law topics.



Kelli J. Stump is an associate with Stump & Associates. She focuses her immigration law practice on complex deportation, federal litigation, and family- and employment-based immigrant petitions. She has argued the voluntary departure issue twice in the 10th Circuit Court of Appeals and she is currently serving her second term as the Oklahoma AILA Immigration Customs Enforcement Liaison for the Texas Chapter of AILA.

THE MUSCOGEE (CREEK) NATION DISTRICT COURT

“DOING BUSINESS IN INDIAN COUNTRY”

Seven Years of Quality CLE

March 12th and 13th, 2009

Tribal Mound Building Auditorium
Okmulgee, Oklahoma

Moderators: Shelly Grunsted, BA, JD, LL.M, Professor - University of Oklahoma
Patrick E. Moore, BBA, JD, LL.M, Muscogee (Creek) Nation District Court Judge

Some of the Many Faculty members include:

Mark Jarboe – Partner, Head of Indian Gaming, Dorsey & Whitney, LLP,
Minneapolis, MN
Richard Monette – Professor of Law, University of Wisconsin
Phillip Wilson, President, Labor Relations Institute, Broken Arrow
Judith V. Royster, BA, MA, JD, Professor of Law, University of Tulsa
Shannon Prescott, JD, Director Muscogee (Creek) Nation Citizen Legal Services
Department
Joe Valandra, Past Chief of Staff for the National Indian Gaming Commission
Townsend Hyatt, BS, JD, Managing Partner – Hyatt Law Firm
D. Michael McBride, III – Partner & Chair of Indian Law & Gaming Practice Group

COURSE OUTLINE DAY ONE

March 12th, 2009

- 8:30 - Registration and Continental Breakfast
- 8:40 - Ceremonial Opening Exercises
- 8:50 - Welcome and Introduction by **Patrick Moore**, Comments
- 9:00 - **ITEDSA – the new Energy Development Act– Professor Judith Royster**
- 10:00 - Break
- 10:10 - ITEDSA – Continued – **Professor Royster**
- 11:00 - Cossey v. Cherokee Nation Enterprises, LLC. - **D. Michael McBride**
- 11:50 - Lunch - Culinary Arts Chefs OSU
- 1:15 - Tribal Investments with Bonds in a Plunging Economy– **Townsend Hyatt**
- 2:20 - Break
- 2:30 - Water law and Land Rights – Where’s the Sovereignty? – **Professor Richard Monette**
- 3:30 - Exerting Sovereignty in Responsible, Renewable, and Revenue
Building Ways – **Shannon Prescott**
- 4:30 - Question and Answer Session – **All Faculty and Speakers**
- 5:00 - Supreme Court Swearing in Ceremony
- 5:30 - Barbeque Dinner Provided at the Okmulgee Casino in conjunction with the Annual Meeting of the
Muscogee (Creek) Nation Bar Association

March 13th, 2009

COURSE OUTLINE DAY TWO

- 8:50 - Opening Remarks - Judge Patrick E. Moore

9:00 - Tribal Employment Responsibilities-Federal and State Mandates – **Phillip Wilson**
 10:00 - Break
 10:05 - Ethical Responsibility – It all Starts with You – **Professor K. Smith**
 10:55 - Break
 11:00 - Redefining Tribal Identity through Economic Development - **Mark Jarboe**
 12:00 - Lunch - Culinary Arts Chefs OSU
 1:30 - NIGC's Proposed Class II Regulations-Tribal Impact- **Joe Valandra**
 2:20 - Break
 2:30 - National Indian Gaming Regulations – **National Indian Gaming Representative**
 3:20 - Panel Discussion- Question and Answer Session – **Faculty and Speakers**
 4:30 - Closing Comments and Evaluations
 Adjourn

Tuition: **\$150.00 for ATTORNEYS and LAYMAN who preregister on or before March 7th**
\$175.00 for walk-in registrations - space available.

Cancellations: Cancellations will be accepted at any time prior to seminar date, however, a cancellation fee of \$50.00 will be charged.

13* Hours of CLE Credit with 1 hour of ETHICS

**REGISTRATION FORM
 DOING BUSINESS IN INDIAN COUNTRY-2009**

Name _____
 Firm/Organization _____
 Address _____
 City _____ State _____ Zip _____
 OBA Member ☐ Yes ☐ No OBA Bar # _____ E-Mail _____
 Make Check payable to Muscogee (Creek) District Court - CLE Program and mail entire page to:
 Muscogee (Creek) District Court, P.O. Box 652, Okmulgee, Oklahoma 74447
 *Applied for _____

Questions contact the District Court @ 918.758.1400 or mvskoke@aol.com

****Speakers/Topics subject to change**

The first of these is the *Journal of the Proceedings of the General Assembly of the Church of Scotland*, which is published annually. It contains a full and complete account of all the proceedings of the Assembly, from the opening of the Session to the closing of the same. It is a most valuable work, and one which is highly respected by all who are interested in the affairs of the Church.

The second of these is the *Annals of the Church of Scotland*, which is published annually. It contains a full and complete account of all the events which have taken place in the Church of Scotland during the year. It is a most valuable work, and one which is highly respected by all who are interested in the affairs of the Church.

The third of these is the *Register of the Church of Scotland*, which is published annually. It contains a full and complete account of all the members of the Church of Scotland, and of the various churches and congregations which are connected with the Church. It is a most valuable work, and one which is highly respected by all who are interested in the affairs of the Church.

The fourth of these is the *Minutes of the General Assembly of the Church of Scotland*, which is published annually. It contains a full and complete account of all the proceedings of the Assembly, from the opening of the Session to the closing of the same. It is a most valuable work, and one which is highly respected by all who are interested in the affairs of the Church.

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U.S. Immigration Benefits for Foreign Investors

By Vance Winningham and William O'Brien

The Magna Carta that King John of England signed in 1215 at Runnymede under duress mandated that foreign merchants be allowed to travel throughout the kingdom and that they be exempt from the payment of "evil tolls."¹ And in 1924, the U.S. Congress authorized the issuance of visas to foreign nationals who wished to come to this country to engage in trade provided that their home country had a treaty with the U.S. that allowed American citizens the same right in their nation.² Such treaties have become known as "friendship treaties." And since that time the national legislature has seen fit to create different categories of noncitizens who are permitted to come to the U.S. for the purpose.

There are currently two classes of nonimmigrant visas that a foreign citizen who wishes to enter the U.S. to invest in businesses here can utilize. The category known as "E-1" allows admission to a foreign national who will engage in "substantial trade" between the U.S. and his or her host country.³ An "E-2" visa holder is required to develop and operate a business venture in which he or she has invested a "substantial amount of capital."⁴ The terms "substantial trade" and "substantial amount of capital" are not defined in the relevant law. Both categories require that the visa holders be citizens of nations that have friendship treaties with the U.S.⁵ A list of those countries is in place at the U.S. State Department's Web site. The majority of holders of those visas are citizens of European and Asian nations since nations in those two areas constitute the majority of states

that have friendship treaties with the U.S. There are several subcategories of those visas, but they all have certain requirements that include the recipient of the visa must be in an executive or supervisor role in the company that he or she is investing in, he or she must have skills that are necessary for the operation of the business in question, or the skills he or she possesses must be essential to the businesses' successful operation. There is no test set forth for determining if an applicant's skills qualify for that designation, and it is determined on a case-by-case basis.⁶ In addition, he or she must show an intent to depart the U.S. when his or her nonimmigrant visa expires. A holder of an E class visa can normally remain in the United States for a two-year period, and can apply for extensions of the visa provided he or she still meets the criteria for the visa.⁷

The Immigration and Nationality Act that was originally passed by the U.S. Congress in 1952 was amended in 1990 to allow foreign investors to immigrate to the U.S. and become what is known as a "lawful permanent resident" (LPR).⁸ That enactment is codified in Section 203 (b) (5) of the Immigration and Nationality Act and this category is known as "EB-5." The individual in question must be coming to this nation to develop a new commercial venture that will employ at least 10 U.S. citizens or legal permanent residents.⁹ The employees cannot be the foreign national's spouse or children.¹⁰ The measure was said to have been inspired by a series of laws passed by the Canadian parliament that had been enacted in a successful effort to entice business people in the British Crown colony of Hong Kong to emigrate to Canada before that colony became part of the People's Republic of China in 1997.

The investor must invest at least \$1 million into the venture, unless the site of the business is in a "targeted area" where the investment only has to be \$500,000.¹¹ A "targeted area" is defined in the statutes as either a rural area or an area that has an unemployment rate of at least 150 percent of the national average.¹² A rural area is described as one that is not located within a metropolitan statistical area or the outer boundary of a city or town with a population of 20,000 or more.¹³ The businesses must be in operation for at least two years and the jobs created must be in place for that time period as well.¹⁴

The regulations that were implemented in accordance with that section mandate that the business being formed does not have to be financed by a single applicant.¹⁵ Several foreign investors can jointly fund the undertaking to achieve the required investment and job creation. And to qualify for admission into the U.S. under the section each individual applicant will have to be engaged in the daily operations of the business.¹⁶

In 1992, Congress established the "Immigrant Investor Pilot Program" to encourage foreign investment in what were designated "regional centers" that are in need of economic development.¹⁷ It was somewhat different than the LPR investment visa congressional enactments. That program allows foreign investors who wish to immigrate to the U.S. to obtain lawful permanent resident status by investing capital in ventures located in those areas.¹⁸ The minimum amount of capital that has to be invested is \$500,000. The Department of Homeland Security

was tasked with the responsibility of approving the creation of regional centers. A regional center is defined as "any economic unit, public or private, engaged in the promotion of economic growth, improved regional activity, job creation and increased domestic capital investment."¹⁹ And an applicant for that designation must show that their proposed program will focus on a specific geographical region, promote economic growth, and improve regional productivity, create at least 10 new jobs, increase domestic capital investment, have a positive effect on the regional economy, and generate a demand for business services and construction jobs throughout the center's geographical area.²⁰ A combined total of 10,000 immigrants' visas have been set aside for such foreign investors on a yearly basis. But the number of annual applicants for those visas has always been below the number allotted. A study of LPR investors conducted by the Government Accounting Office found that the majority of businesses that were set up by them were hotels and motels, manufacturing, real estate and domestic sales.²¹ It was further found that 41 percent of the businesses were set up in California, followed by Maryland, Arizona, Florida and Virginia, respectively.²²

In 2005, the Department of Homeland Security created the Investor and Regional Center Unit to oversee the operation of regional centers and to consider applications for new ones. The Investor and Regional Center Unit has evolved into the Foreign Trader, Investor, and Regional Center Program (FTIRCP).²³ As of this date, several counties in western Oklahoma are included in a regional center. The FTIRCP and its bureaucratic predecessor have approved more than 30 applications for regional centers throughout the nation, and of those currently in operation, most are located in Pennsylvania and Vermont, Louisiana and Texas, South Dakota, Iowa, Wisconsin, California and Hawaii.²⁴

The business ventures that have been launched under the auspices of the program include several that could be replicated in Oklahoma. They include an assisted living center for the elderly in the state of Washington, a venture designed to finance the renovation of moribund business areas in Philadelphia, a variety of cattle operations and a meat packing plant in South Dakota, and an ethanol fuel producing plant in Kansas.²⁵ And both public and private entities are involved in many of these undertakings. After Hurricane Katrina, the FTIRCP amended the regional center designation to include all of the parish of

Orleans, La., and authorized the regional center there to engage in a broad array of needed infrastructure development activities, and approved the City of New Orleans' plan to enter into a memorandum of understanding with a private entity to oversee the regional center activities.²⁶ The FTIRCP also required that that regional center retain the services of another private entity that would monitor the center's activities to ensure that they were in compliance with the program's regulations.²⁷

The FTIRCP has denied several applications for regional center designations in recent years on the grounds that the applications did not contain sufficient documentation.²⁸ And in several other instances applicants were advised by that entity that they needed to submit additional documentation in support of their respective applications to demonstrate that the necessary number of jobs would be created.²⁹

As noted above, the U.S. program is said to have been inspired by the laws that were enacted by the Canadian parliament. But the program adopted in Canada has lesser standards for such immigrants. To qualify under that program, an immigrant investor has to have a net worth of at least \$800,000 Canadian dollars and make an investment in that nation of \$400,000 Canadian dollars.³⁰ Our northern neighbor also offers what is known as an "entrepreneurial visa" for foreign nationals who have a net worth of at least \$300,000 Canadian dollars, and will invest and operate a new business that will create at least one full-time position that will be filled by a non-family member.³¹ According to figures contained in a report to the U.S. Congress by the Congressional Research Office, the Canadian investor visa program attracted a total of \$6.6 billion Canadian investment in that nation for the period from 1986 through 2004.³² In contrast, the American investor visa program generated an investment of \$1 billion in businesses for the period from 1992 through 2004.

The U.S. Congress may wish to lower the amount of investment needed to qualify as an immigrant investor as a way to foster economic growth.

1. MAGNA CARTA, paragraph 41.
2. 43 Stat, 153.
3. 8 USCA Section 101 (a) (15)(e).
4. *Id.*

5. C. Haddal, *Foreign Investors Visas*, 1.29.07, Congressional Research Service, page 14.
6. 8 C.F.R. Section 206.6
7. *Id.*
8. 8 USCA Section 203 (b) (5)
9. 8 C.F.R. Section 204.6 (j)
10. 8 USCA Section 203
11. *Id.*
12. *Id.*
13. 8 C.F.R. Section 6 (j)
14. *Id.*
15. 8 C.F.R. Section 206.6
16. *Id.*
17. Section 610 Public Law 102-395 (Oct. 6, 1992)
18. *Id.*
19. 8 C.F.R. Section 204.6 (m)
20. 8 C.F.R. Section 204.6
21. US Government Accountability Office, *Immigrant Investors*, April 2005 p. 8.
22. *Id.* at 10.
23. L. Stone, *New Life for the Immigrant Investor Program*, draft received by Vance Winningham by the author on 5.30.07
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. US Government Accountability Office, *Immigrant Investors*, April 2005, p. 18.
31. *Id.*
32. *Id.*
33. *Id.*

ABOUT THE AUTHORS



E. Vance Winningham is the founder of the immigration law firm, Winningham Stein & Basey. He is the former president of the Texas-Oklahoma-New Mexico Chapter of the American Immigration Lawyers Association. He was a member of the first Board of Trustees of the American Immigration Law

Foundation based in Washington, D.C. He is the founder and administrator of AmericanVisas.com, a national network of U.S. immigration lawyers. He earned his J.D. from OU in 1966.



William O'Brien is an assistant attorney general for the state of Oklahoma. He has a B.A. from Loyola University of New Orleans, a bachelor of liberal studies and masters of public administration from OU, an M.A. from OSU, a J.D. from OCU School of Law and an LL.M from Tulane University. He is a member of the

Oklahoma, Louisiana and Texas Bar associations.

NOTICE OF INVITATION TO SUBMIT OFFERS TO CONTRACT

THE OKLAHOMA INDIGENT DEFENSE SYSTEM BOARD OF DIRECTORS gives notice that it will entertain sealed Offers to Contract ("Offers") to provide non-capital trial level defense representation during Fiscal Year 2010 pursuant to 22 O.S. 2001, §1355.8. The Board invites Offers from attorneys interested in providing such legal services to indigent persons during Fiscal Year 2010 (July 1, 2009 through June 30, 2010) in the following counties: **100% of the Oklahoma Indigent Defense System caseloads in Atoka, Coal, Cherokee, Delaware, Logan, Ottawa, Payne, and Pontotoc Counties, Oklahoma.**

Offer-to-Contract packets will contain the forms and instructions for submitting Offers for the Board's consideration. Contracts awarded will cover the defense representation in the OIDS non-capital felony, juvenile, misdemeanor, traffic, youthful offender and wildlife cases in the above counties during FY-2010 (July 1, 2009 through June 30, 2010). Offers may be submitted for partial or complete coverage of the open caseload in any one or more of the above counties. Sealed Offers will be accepted at the OIDS offices Monday through Friday, between 8:00 a.m. and 5:00 p.m. **The deadline for submitting sealed Offers is 5:00 PM, Thursday, March 5, 2009.**

Each Offer must be submitted separately in a sealed envelope or box containing one (1) complete original Offer and two (2) complete copies. The sealed envelope or box must be clearly marked as follows:

FY-2010 OFFER TO CONTRACT

TIME RECEIVED:

_____ COUNTY / COUNTIES

DATE RECEIVED:

The Offeror shall clearly indicate the county or counties covered by the sealed Offer; however, the Offeror shall leave the areas for noting the time and date received blank. Sealed Offers may be delivered by hand, by mail or by courier. Offers sent via facsimile or in unmarked or unsealed envelopes will be rejected. Sealed Offers may be placed in a protective cover envelope (or box) and, if mailed, addressed to OIDS, FY-2010 OFFER TO CONTRACT, Box 926, Norman, OK 73070-0926. Sealed Offers delivered by hand or courier may likewise be placed in a protective cover envelope (or box) and delivered during the above-stated hours to OIDS, at 1070 Griffin Drive, Norman, OK 73071. **Please note that the Griffin Drive address is NOT a mailing address; it is a parcel delivery address only.** Protective cover envelopes (or boxes) are recommended for sealed Offers that are mailed to avoid damage to the sealed Offer envelope. **ALL OFFERS, INCLUDING THOSE SENT BY MAIL, MUST BE PHYSICALLY RECEIVED BY OIDS NO LATER THAN 5:00 PM, THURSDAY, MARCH 5, 2009 TO BE CONSIDERED TIMELY SUBMITTED.**

Sealed Offers will be opened at the OIDS Norman Offices on Friday, March 6, 2009, beginning at 9:00 AM, and reviewed by the Executive Director or his designee for conformity with the instructions and statutory qualifications set forth in this notice. Non-conforming Offers will be rejected on Friday, March 6, 2009, with notification forwarded to the Offeror. Each rejected Offer shall be maintained by OIDS with a copy of the rejection statement.

Copies of qualified Offers will be presented for the Board's consideration at its meeting on **Friday, March 27, 2009**, at Griffin Memorial Hospital, Patient Activity Center (Building 40), 900 East Main, Norman, Oklahoma 73071.

With each Offer, the attorney must include a résumé and affirm under oath his or her compliance with the following statutory qualifications: presently a member in good standing of the Oklahoma Bar Association; the existence of, or eligibility for, professional liability insurance during the term of the contract; and affirmation of the accuracy of the information provided regarding other factors to be considered by the Board. These factors, as addressed in the provided forms, will include an agreement to maintain or obtain professional liability insurance coverage; level of prior representation experience, including experience in criminal and juvenile delinquency proceedings; location of offices; staff size; number of independent and affiliated attorneys involved in the Offer; professional affiliations; familiarity with substantive and procedural law; willingness to pursue continuing legal education focused on criminal defense representation, including any training required by OIDS or state statute; willingness to place such restrictions on one's law practice outside the contract as are reasonable and necessary to perform the required contract services, and other relevant information provided by attorney in the Offer.

The Board may accept or reject any or all Offers submitted, make counter-offers, and/or provide for representation in any manner permitted by the Indigent Defense Act to meet the State's obligation to indigent criminal defendants entitled to the appointment of competent counsel.

FY-2010 Offer-to-Contract packets may be requested by facsimile, by mail, or in person, using the form below. Offer-to-Contract packets will include a copy of this Notice, required forms, a checklist, sample contract, and OIDS appointment statistics for FY-2005, FY-2006, FY-2007, FY-2008 and FY-2009 together with a 5-year contract history for each county listed above. The request form below may be mailed to OIDS OFFER-TO-CONTRACT PACKET REQUEST, Box 926, Norman, OK 73070-0926, or hand delivered to OIDS at 1070 Griffin Drive, Norman, OK 73071 or submitted by facsimile to OIDS at (405) 801-2661.

* * * * *

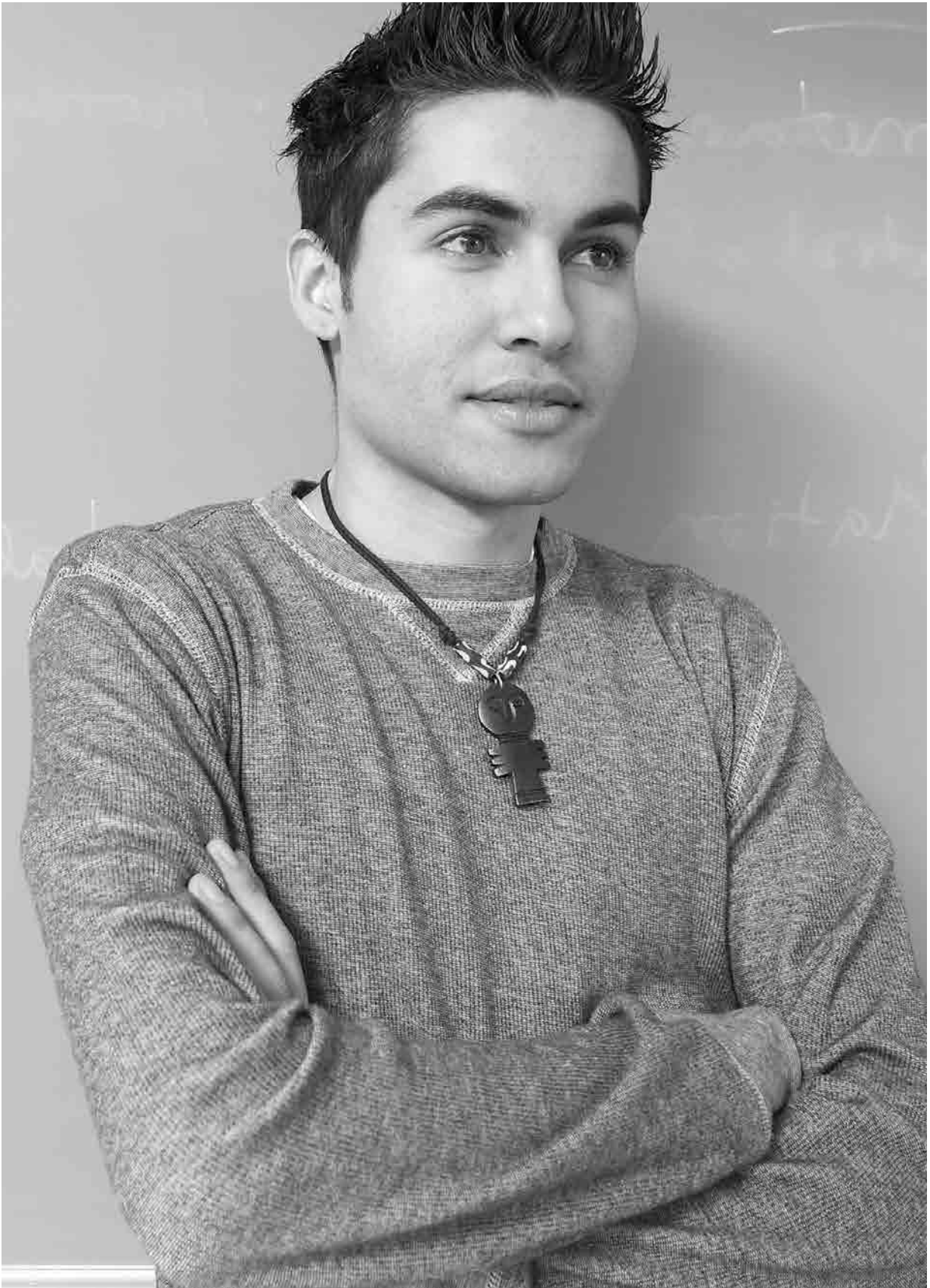
REQUEST FOR OIDS FY-2010 OFFER-TO-CONTRACT PACKET

Name: _____ OBA #: _____

Street Address: _____ Phone: _____

City, State, Zip: _____ Fax: _____

County / Counties of Interest: _____



Florid Language: English Only and its Effect on State Services

By Teresa Rendon and Michael Duggan

Just as surely as the winter snows melt and the first tulips emerge, the English Only proposal makes its annual appearance before the Oklahoma Legislature. Last year a new hybrid blossom budded with a clever twist. In an attempt to shield itself from any potential resistance from the 37 federally recognized Indian tribes in Oklahoma,¹ some of whose leaders had been vocal opponents of the bill in the past, this latest iteration carved out special protection for tribal languages for “respect and encouragement for the use and development of Native American Languages.”²

In contradiction, it also declared that bilingual or bicultural education programs which “maintain a student in a language other than English shall be presumed to diminish or ignore the role of English as the official language.”³ Ironically, many of the bilingual programs in the state are ones that teach indigenous languages. In fact, in the early 19th century the Cherokee Nation, after having been uprooted from the southeastern states, had an impressive system of bilingual education in Oklahoma which resulted in high levels of literacy in Cherokee and levels of literacy in English which were higher than those of English-speaking populations of Texas and Arkansas.⁴

Around 15 years ago or so, we first took a glance at English Only statutes and their impact on state services. At that time there was a growing majority of states, 26 to be exact, with some form of English Only statute. We were concerned that many of our farm worker clients at Legal Aid Services of Oklahoma Inc. were unable to pass the driver’s license exam because of their

lack of fluency in English. Additionally, we were curious to see whether the state of Oklahoma was an anomaly in its failure to provide the driver’s manual and written exam in Spanish to its growing Spanish-speaking immigrant community or whether it was in the national mainstream. For those reasons, we undertook to discover what other states offered for those new immigrants seeking a driver’s license. The research was limited to comparing the services offered by the Departments of Motor Vehicles of the English Only states with those of the remaining 24 non-English Only states. What was discovered was the lack of positive correlation between English Only states and diminished foreign language services in their respective state agencies. By foreign language services, we mean the states offered the driver’s manual and/or the driver’s test in languages other than English. There, in fact, seemed to be an *inverse* relationship between status as English Only and diminished foreign language services. At that time, many English Only states offered the driver’s manual and test in a myriad of lan-

guages, including Spanish, while some non-English Only states had no foreign language services in their driver's licensing agencies.

Last summer with the assistance of second-year law student Shiloh Renes from Oklahoma City University School of Law, we revisited this same research topic to see what, if any, changes had occurred. Our study was identical in its narrow scope, again limited to comparing English Only and non-English Only states in terms of foreign language services offered by those states' Departments of Motor Vehicles. First of all, we discovered that, at the time of this most recent study, there were 30 states with some form of English Only statute or constitutional provision,⁵ and nine states, including Oklahoma, that had some version of an English Only bill pending before their state legislatures.⁶ Last year, just as so many times in the past, Oklahoma's English Only bill briefly blossomed at the Legislature and wilted just as swiftly.

As surely as we throw trash in the trash can and store gold in a vault, where we place an object clearly indicates to us something about its value. Many of the nation's English Only statutes find themselves in the most peculiar places.⁷ Mississippi's English Only statute is located between the designation of milk as the state beverage and the naming of the state butterfly. Montana's follows the state fossil, while North Carolina's statute is nestled between the state's official historical boat and its official dog. The Illinois statute can be found tucked between the weighty matters of its official insect and its state mineral. This raises the question whether this rather odd placement is coincidental or whether these English Only statutes are as symbolic as their contiguous statutes. If, for example, the Arkansas English Only statute bore great weight, one wonders whether situating it after the state bird would be the most suitable placement.

Certain similarities arise in the English Only statutory language that allow researchers to identify discrete groups of statutes. Declaring the English language to be the state's "common language" were the states of Missouri, Alaska, South Dakota, California and Alabama. The Departments of Motor Vehicles of all these states except Alaska continue to provide driver infor-

“There, in fact, seemed to be an *inverse* relationship between status as English Only and diminished foreign language services.”

mation and testing in various foreign languages. The apparently weak statutory language used in these laws appears to leave room for continued governmental use of foreign languages as needed.

Another group of state statutes⁸ declare English to be the state's "official language." These statutes commonly require that all official proceedings, records and publications be in English and that public schools be taught in English. Even these states with

this seemingly more potent statutory language do not expressly require that English will be the only language in which classes will be taught or publications printed. Among these "official English" states, Nebraska, Kansas, Iowa, Idaho, Georgia, Arizona, Utah and Tennessee all have Department of Motor Vehicles publications in at least one foreign language.

How does current language policy affect the state of Oklahoma? The following examples do not represent an exhaustive search, but are merely a cursory list of examples. In our state schools, the medium of instruction is English,⁹ yet federal law requires special services to students who are not yet fluent in English,¹⁰ notice of special programs and outreach in the native tongue of the parents,¹¹ and notice and interpreters for parents of special education students.¹² In our polling places, the Voting Rights Act of 1965¹³ mandates bilingual ballots in counties where the population of voters who are speakers of other languages reaches a certain percentage of the total population. In our courts, there is recognition of the need for state court interpreters and a statutory state certification system established for district court interpreters¹⁴ similar to that of the federal Court Interpreters Act.¹⁵ On our roads and highways, many licensed Spanish-speaking drivers benefit from having the state driver's manual which the State Department of Motor Vehicles publishes in Spanish. One wonders what practical effect, if any, an English Only statute would have. In other words, what is it that is broken that a state English Only statute would fix? Or would the purpose of an English Only statute be merely symbolic, similar to state statutes establishing other official state emblems such as the scissortail flycatcher, the rose rock and mistletoe?¹⁶

Authors' Note: Shiloh Renes, a second-year law student at OCU, assisted with the research for this article.

1. Vol. 7 3 CFR 66, pp. 18553-7. The 37 federally recognized Indian nations in Oklahoma are the following: Absentee Shawnee, Alabama Quassarte, Apache, Caddo, Cherokee, Cheyenne-Arapaho, Chickasaw, Choctaw, Citizen Potawatomie, Comanche, Delaware, Eastern Shawnee, Fort Sill Apache, Iowa, Kaw, Kialegee, Kickapoo, Kiowa, Miami, Modoc, Muscogee, Osage, Ottawa, Otoe-Missouria, Pawnee, Peoria, Ponca, Quapaw, Sac and Fox, Seminole, Seneca-Cayuga, Shawnee, Thlophlocco, Tonkawa, United Keetowah Band of Cherokees, Wichita and Wyandotte.

2. 2009 OK H.B. 2254 Sec. 2 (B).

3. 2009 OK H.B. 2254 Sec. 3 (C)(2)(e).

4. Dicker, Susan J. *Languages in America*. Clevedon: Multilingual Matters, 1996, p. 17.

5. **Alabama** — Ala.Const. Art. 1 Sec. 36.01, **Alaska** — AK ST Sec. 44.12.300, **Arizona** — AZ. Const. Art. XXVIII Sec. 1, **Arkansas** — AR ST Sec. 1-4-117, **California** — Cal. Const. Art. 3 Sec. 6, **Colorado** — CO CONST Art. 2 Sec. 30a, **Florida** — F.S.A. Const. Art. 2 Sec. 9, **Georgia** — Ga. Code Ann. Sec 50-3-100, **Hawaii** — Const. Art. 15, Sec. 4, **Idaho** — ID ST Sec. 73-121, **Illinois** — ILCS 460/20, **Indiana** — IN ST 1-2-10-1, **Iowa** — I.C.A. Sec. 1.18, **Kansas** — KS St. Sec. 73-2801, **Kentucky** — KRS Sec. 2.013, **Louisiana** — enabling statute 2 U.S. Stat. 641 Sec. 3, **Massachusetts** — Mass. Sup. Ct. 1975, *Commonwealth v. Olivo*, **Mississippi** — Miss.Code Ann. Sec. 3-3-31, **Missouri** — V.A.M.S. 1.028, MO ST 1.028, **Montana** — MT ST 1-1-510, **Nebraska** — Neb.Rev.St. Const. Art. I Sec. 27, **New Hampshire** — N.H. Rev. Stat. Sec. 3-C:1, **North Carolina** — N.C.G.S.A. Sec. 145-12, **North Dakota** — ND ST 54-02-13, **South Carolina** — SC ST Sec. 1-1-696, **South Dakota** — SDCL Sec. 1-27-20, **Tennessee** — TN St Sec. 4-1-404, **Utah** — UT St Sec 63G-1-201, **Virginia** — Va. Code Sec. 7.1-42, and **Wyoming** — ST Code 8-6-101.

6. Delaware, Michigan, New Jersey, Ohio, Oklahoma, Pennsylvania, Rhode Island, Washington and West Virginia.

7. Arkansas — following the state song and the state bird; Alabama — followed by the "Sportsperson's Bill of Rights; Georgia — following the designation of the state's first Mural City; Hawaii — following the designation of the Hawaiian flag as the state flag and its state motto; Illinois — following the designation of the state insect and the state mineral; Indiana — following the designation of the state's official stone; Kansas — following the designation of the state's official fire-fighters museum; Mississippi — following the designation of milk as the state's official beverage and the state butterfly; Missouri — following the definition of registered mail; Montana — following the designation of the state fossil and the state ballad; North Carolina — following the state's official historical boat and the official dog; North Dakota — following the designation of the state beverage and the official railroad museum; Tennessee — followed by institutions, symbols, mascots and names; Utah — listed under State Symbols and Designations and followed by state holidays.

8. "Official English" statutes can be found in Nebraska, New Hampshire, Kansas, Iowa, Idaho, Georgia, Arizona, Tennessee and Utah.

9. OK Stat. tit. 70 Art. XV Sec.11-102.

10. *Lau v. Nichols*, 414 U.S. 563 (1974).

11. No Child Left Behind Act, 20 USC 6301 Sec. 118 (Parental Involvement).

12. Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1415 (d) (2).

13. 42 USC Sec. 1973.

14. OK Stat. tit. 20 Sec. 1701 et seq.

15. 28 U.S.C. Sec. 1827.

16. The official state bird O.S. Stat. tit. 25, Chapt. 3, Sec. 98, state rock O.S. Stat Tit 25 Chapt., Sec. 98.1, and state floral emblem O.S. Stat. tit. 25, Chapt. 3 Sec. 92 (A), respectively.

ABOUT THE AUTHORS



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**Form I-9, Employment
Eligibility Verification**

Please read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work eligible individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Verification. To be completed and signed by employee at the time employment begins.

Print Name: Last	First	Middle Initial	Maiden Name
Address (Street Name and Number)		Apt. #	Date of Birth (month/day/year)
City	State	Zip Code	Social Security #
I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.		I attest, under penalty of perjury, that I am (check one of the following): <input type="checkbox"/> A citizen or national of the United States <input type="checkbox"/> A lawful permanent resident (Alien #) A _____ <input type="checkbox"/> An alien authorized to work until _____ (Alien # or Admission #) _____	
Employee's Signature		Date (month/day/year)	

Preparer and/or Translator Certification. (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.

Preparer's/Translator's Signature	Print Name
Address (Street Name and Number, City, State, Zip Code)	
Date (month/day/year)	

Section 2. Employer Review and Verification. To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number and expiration date, if any, of the document(s).

List A	OR	List B	AND	List C
Document title: _____		_____		_____
Issuing authority: _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____
Document #: _____		_____		_____
Expiration Date (if any): _____		_____		_____

CERTIFICATION - I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is eligible to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative	Print Name	Title
Business or Organization Name and Address (Street Name and Number, City, State, Zip Code)		Date (month/day/year)

Section 3. Updating and Reverification. To be completed and signed by employer.

A. New Name (if applicable)	B. Date of Rehire (month/day/year) (if applicable)
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C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment eligibility.

Document Title: _____	Document #: _____	Expiration Date (if any): _____
I attest, under penalty of perjury, that to the best of my knowledge, this employee is eligible to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.		
Signature of Employer or Authorized Representative		Date (month/day/year)

The ICE Storm Cometh: Employer Compliance and Worksite Enforcement

By Melissa M. Chase

No employer, regardless of industry or location, is immune... ICE and our law enforcement partners will continue to bring all our authorities to bear in their fight using criminal charges, asset seizures, administrative arrests and deportations... If you're blatantly violating our worksite enforcement laws, we'll go after your Mercedes and your mansion and your millions. We'll go after everything we can, and we'll charge you criminally.

— Julie L. Myers, Assistant Secretary for Homeland Security,
Immigration and Customs Enforcement¹

BACKGROUND — CLEAR SKIES

Decades ago, it was not illegal for an employer to hire an undocumented worker. That changed with the Immigration Reform and Control Act of 1986 (IRCA).² This section of law requires three things from every U.S. employer:

First, employers are prohibited from knowingly hiring a noncitizen that is not authorized to work for them.

Second, employers must verify the identity and work eligibility of all employees, even U.S. citizens, on a Form I-9, and employers are required to terminate employees if they fail to comply with the verification requirements.

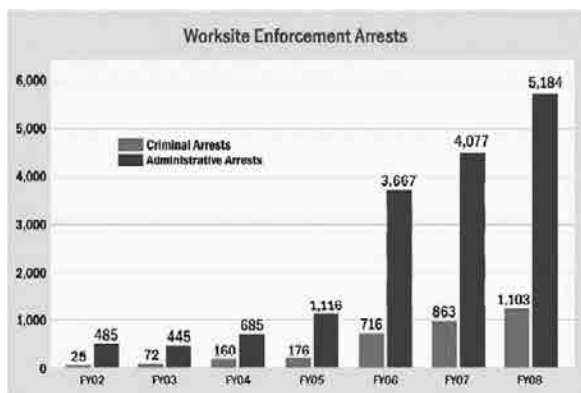
Third, Employers cannot intentionally discriminate in hiring and/or firing on the basis

of an individual's national origin or citizenship status.³

Only in recent years has IRCA truly been enforced, with a dramatic increase since 9/11.⁴ Enforcement is now handled by the U.S. Immigration and Customs Enforcement (ICE) agency which is part of the Department of Homeland Security (DHS). Enforcement has become not only vigorous, but in some cases, extreme.

The dramatic increase in worksite arrests is a good indicator of the cultural climate we live in. ICE has surpassed the numbers from all previous years and in fiscal year 2008 there were over 1,100 *criminal* arrests related to worksite enforcement.⁵ ICE has very clearly shifted its approach toward worksite enforcement by bringing criminal charges against

employers, seizing their assets, and charging more employers with harboring and money laundering violations.⁶ There are very few large companies that have *always* accurately filled out, re-verified and maintained every Form I-9 as required under IRCA. Most companies, if ever audited, would be measured, weighed and found wanting. ICE has made a “strategic shift” in enforcement by focusing on employers that knowingly or recklessly hire undocumented workers.⁷



Although the provisions of IRCA preempt any state/local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens, many states have taken enforcement of IRCA into their own hands, especially after Congress did not come to an agreement on the Comprehensive Immigration Reform Act of 2007.⁸

Oklahoma passed a law that was to become effective on Nov. 1, 2007, that requires all public employers, as well as their contractors and subcontractors, to use a “status verification system” to verify the immigration status of employees.⁹ This law has since been temporarily enjoined and litigation continues.¹⁰

THE FORM I-9 — THE CALM BEFORE THE STORM

Proper I-9 compliance is the starting point for any employer to somewhat insulate them from sanctions, penalties and criminal charges. Employers must pay attention, not only to detail, but to substance as well.¹¹ Pursuant to the provisions of IRCA, employers must complete a Form I-9 for every employee, with few

exceptions. The exceptions include any pre-Nov. 6, 1986 hires, casual domestic workers in a private home on a sporadic, irregular or intermittent basis and independent contractors and their employees.¹² An employer must *review* original documents within three days of hire or re-hire, *re-verify* work authorization only if the employee’s authorization to work expires and *retain* the Form I-9 for three years after date of hire or one year after date of termination, whichever is later.¹³

A new Form I-9 has been released and will be implemented as of April 3, 2009 but currently all employers are mandated to use the Form I-9 with the revision date of June 5, 2007.¹⁴ It is recommended to seek the advice of a corporate immigration attorney if in doubt about any requirements in completing the Form I-9 and/or re-verifying work authorization.

WHAT DOES ‘KNOWINGLY’ EMPLOY UNDOCUMENTED WORKERS MEAN?

An employer may have either actual or constructive knowledge of undocumented workers. Actual knowledge is imputed if the employer has tangible knowledge of an employee being undocumented, e.g., an employee discloses that his documents are all false or if the employer assisted the employee in obtaining the false documents.

Constructive knowledge may be imputed to the employer depending on a “reasonable person” standard as well as reviewing the totality of the circumstances in a given case.¹⁵ While reviewing the totality of the circumstances, DHS may impute the employer with constructive knowledge if the employer: fails to complete or improperly completes Form I-9; has information that the person is unauthorized to work; acts with reckless and wanton disregard; and/or deliberately fails to investigate suspicious circumstances. It is important to keep in mind that “knowledge” for purposes of IRCA cannot be inferred solely on the basis of an individual’s accent or foreign appearance,¹⁶ e.g., “well the employee looks foreign and can barely speak English, so they probably are illegal.”

INDEPENDENT CONTRACTORS AND SUBCONTRACTORS

Companies can learn some lessons regarding constructive knowledge and independent contractors from the infamous "Wal-Mart" case.¹⁷ Although a Form I-9 does not have to be completed for independent contractors and subcontractors, employers can be held liable for employing contractors and subcontractors if the employer has knowledge of undocumented workers.¹⁸

The Wal-Mart case involved a large amount of employees who were employed by Wal-Mart's independent contractors and were not apparently authorized to work in the U.S. Wal-Mart was raided.¹⁹ Wal-Mart never conceded or admitted any liability but instead negotiated a settlement wherein Wal-Mart paid \$11 million to the federal government. In addition, Wal-Mart hired a full-time in-house immigration attorney who was placed in charge of compliance. This is a business expense that one can immediately see as being more cost efficient than paying out \$11 million. The 12 corporations and executives who actually employed the unauthorized workers pleaded guilty to criminal charges and agreed to pay an additional \$4 million.²⁰

In the Oklahoma Taxpayer and Citizen Act, any entity who contracts with an individual independent contractor must request the contractor's employment authorization. If the contractor cannot provide authorization, the entity must withhold Oklahoma income taxes at the top marginal rate.²¹ As referenced above, this act has been temporarily enjoined and litigation is ongoing.²²

THE NO-MATCH LETTER — THE SKY IS LOOKING GRIM

A no-match letter is a notice from the SSA of a discrepancy between wage reporting and SSA information on file. A no-match letter is not a notice that an employee is not authorized to work nor is it a statement about an employee's immigration status or an implication that incorrect information was intentionally provided. The SSA notifies employees and employers of the mismatch because the employee will not receive credit for the social security earn-

ings until the mismatch is resolved.²³ Oftentimes, a no-match letter is simply the result of an employee's procrastination in changing their name with the SSA after a marriage, divorce or legal name change.

Currently, an employer is required to respond to the no-match letters in a "timely" manner and notify the SSA of any necessary corrections.²⁴ Because of the apparent lack of clarity, the DHS promulgated a new regulation detailing what reasonable steps should be taken by an employer when a no-match letter has been received. The DHS adopted the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" rule in August 2007 and was to be implemented in September 2007. The underlying idea of the regulation is that an employer who takes "reasonable steps" is under a "safe harbor" from potential liability. Reasonable steps include correcting the mismatch and verifying the correction with the SSA and/or DHS within a specified time period.²⁵ The concern employers have is that the new no-match letter will result in unlawful/unfair discrimination and create unnecessary, and even unconstitutional burdens on the employers.²⁶ This rule has been temporarily enjoined by the court in *American Federation of Labor, et al. v. Chertoff*.²⁷ The DHS has attempted to address the courts concerns by issuing a "Supplemental Final Rule."²⁸ Currently, there has been no resolution and the temporary injunction remains on the original rule.²⁹

THE AUDIT AND INSPECTION — THERE IS A STORM A BREWING

In the past, ICE would typically audit an employer's Form I-9s because it was focusing on a particular industry or because it had received information about unauthorized workers.³⁰ Paper violations are the most common problem found in an audit and are seen across the board on Form I-9s for U.S. citizens and foreign nationals alike. Paper violations can consist of simply not completing the Form I-9 correctly, or failing to document the re-verification of work authorization.³¹ ICE may use the opportunity of an audit to gather information about the premises, the employees, and the practices and policies of the company for a possible future raid.³²



AN ICE RAID — THE EYE OF THE STORM

ICE will typically obtain information which may reveal large numbers of unauthorized workers employed at a company. ICE will use this information to secure a search warrant to perform a raid and arrest and interrogate employees. Arrests will be made of anyone who cannot prove legal status on the spot — including U.S. citizens.³³ The investigation will typically continue for months and even years and in some cases there will be a second raid.³⁴ Legal representation is necessary throughout this entire process. In many cases, criminal, civil and immigration attorneys are required to represent the company, the executives, the supervisors and the employees that are involved in the matter.³⁵

Civil Penalties can range from \$110 to \$1,100 for *each* failure to properly complete and maintain a Form I-9 for each employee, a paper violation. Penalties can include up to \$16,000 for *each* unauthorized worker the employer *knowingly* hired or continued to employ, as well as the seizure and forfeiture of assets.³⁶ More recently, employees have been filing civil class action suits under the Racketeer Influenced and Corrupt Organizations Act (RICO)...and many have won.³⁷ These lawsuits are filed by a class of current and/or former employees that claim that the employer's practice of hiring, and sometimes harboring, undocumented workers and encouraging them to enter the United States illegally, artificially suppresses the employee's wages. The employees do not need to be authorized to work in order to have standing to sue under RICO.³⁸

Criminal Penalties can range from a \$3,000 fine for each violation and six months in prison all the way up to a \$250,000 fine for each

undocumented worker and 20 years in prison. Criminal charges may include harboring, identity theft, fraud, trafficking, money laundering and conspiracy and document fraud. It is apparent that criminal indictments are the future of worksite enforcement.³⁹

"Harboring" means any conduct that tends to substantially facilitate an unauthorized person to remain in the U.S. illegally. An employer can be convicted of the felony of harboring unauthorized workers if the employer takes any action in reckless disregard of the undocumented status, such as ordering them to obtain false documents, altering records, obstructing inspections, or taking other actions that facilitate the unauthorized employment.⁴⁰ Any person who within any 12-month period hires 10 or more individuals with actual knowledge that they are unauthorized workers is guilty of felony harboring.⁴¹ DHS continues to push the envelope by trying to expand the scope of "harboring" activities.

Money laundering charges are brought against employers where money earned/saved from knowingly employing unauthorized workers is put back into the company and the company continues to have a policy of employing unauthorized workers. This practice cannot only result in criminal charges but can also lead to the seizure and forfeiture of assets.



THE AFTERMATH — WHAT CAN AN EMPLOYER DO?

If not done so already, an employer should retain immigration counsel to develop and initiate a program for corporate immigration compliance and perform an internal audit. This can be helpful in future negotiations with the U.S. Attorney and ICE. The best defense is a good offense. Employer awareness and proactive compliance initiatives are among the most

important things an employer can do in order to prepare for, or offset, the possible damage created by an ICE storm.

1. www.ice.gov/pi/news/factsheets/worksite_cases.htm, www.washingtonpost.com/wp-dyn/content/article/2006/04/15/AR2006041501049.html Julie Myers resigned from ICE on November 5, 2008, a day after the Presidential election. www.dhs.gov/xnews/releases/pr_1225920873224.shtm
2. Immigration and Nationality Act (INA) §§ 274A-274B; 8 U.S.C. § 1324a-1324b, *Hoffman Plastic Compounds Inc., v. National Labor Relations Board*, 535 U.S. 137, 147 (2002).
3. INA §§ 274A-274B; 8 U.S.C. § 1324a-1324b.
4. www.ice.gov/pi/news/factsheets/worksite.htm, www.ice.gov/pi/news/factsheets/2006accomplishments.htm, www.ice.gov/doclib/about/ice07ar_final.pdf
5. www.ice.gov/pi/news/factsheets/worksite.htm
6. www.ice.gov/pi/news/factsheets/worksite.htm
7. www.ice.gov/doclib/about/ice07ar_final.pdf
8. 8 U.S.C. § 1324a(h)(2), See Secure Borders, Economic Opportunity and Immigration Reform Act of 2007 (S. 1348).
9. 25 Okla. Stat. § 1313(B)&(C) and 68 Okla. Stat. § 2385.32
10. www.uschamber.com/assets/nclc/henrypreliminjunction.pdf
11. www.swiftraid.org/, www.usatoday.com/money/industries/food/2006-12-12-immigration-swift_x.htm (Swift & Co. Inc. had been investigated previously and sued over not complying with I-9 requirements, thereafter they were members of the Basic Pilot Program to verify work authorization of employees. The subsequent raids on Swift found false documents to be the issue).
12. INA §§ 274A-274B, 8 U.S.C. §§ 1324a-1324b.
13. INA §§ 274A-274B, 8 U.S.C. §§ 1324a-1324b.
14. www.uscis.gov/files/form/I-9.pdf
15. 8 C.F.R. § 274a(l)(1)
16. 8 C.F.R. § 274a(l)(1); *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 884-887 (1975)
17. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/
18. 8 C.F.R. 274a(l)(1)
19. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/, *Wal-Mart Raids by U.S. Aimed At Illegal Aliens*, New York Times, October 24, 2003, www.michigandaily.com/content/immigrants-arrested-wal-mart-raid
20. http://money.cnn.com/2005/03/18/news/fortune500/wal_mart_settlement/
21. 25 Okla. Stat. § 1313(B)&(C) and 68 Okla. Stat. § 2385.32
22. www.uschamber.com/assets/nclc/henrypreliminjunction.pdf
23. www.ssa.gov/legislation/nomatch2.htm
24. www.ssa.gov/legislation/nomatch2.htm
25. 8 C.F.R. §274a.1, 72 Fed. Reg. 45611 (August15, 2007) ("Safe Harbor Rule")
26. *American Federation of Labor, et al. v. Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007)
27. U.S. District Court Judge Charles Breyer of the Northern District of California issued a preliminary injunction in October 2007 which remains in effect today. (*AFL-CIO v Chertoff*, NDCal, No 3:07-cv-04472-CRB)
28. 73 Fed. Reg. 63843 (October 28, 2008)
29. *AFL-CIO v. Chertoff*, NDCal, No 3:07-cv-04472-CRB

30. www.ice.gov/doclib/about/ice07ar_final.pdf, http://findarticles.com/p/articles/mi_m0ZQQ/is_10_56/ai_n30928420
31. www.ice.gov/pi/news/factsheets/worksite_cases.htm
32. www.ice.gov/pi/news/factsheets/worksite_cases.htm
33. www.globalresearch.ca/index.php?context=va&aid=9792, www.coxwashington.com/reporters/content/reporters/stories/2008/02/14/CITIZEN_RAIDS14_COX.html, www.usatoday.com/news/nation/2008-06-24-Immigration-raids_N.htm
34. www.ice.gov/pi/news/factsheets/anatomy_case.htm, www.foxnews.com/story/0,2933,236044,00.html
35. www.ice.gov/pi/news/newsreleases/articles/080417_dallas.htm, www.ice.gov/pi/news/factsheets/pilgrimspridefactsheet.htm
36. INA §§ 274A, 274B; 8 U.S.C. §§ 1324a, 1324b; 28 CFR 68.52; 8 C.F.R. § 274a.10; 8 CFR § 270.3
37. 18 USC §§ 1961-1968, *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1170 (9th Cir. 2002), *Williams v. Mohawk Industries Inc.*, 465 F.3d 1277 (11th Cir. 2006), cert. denied, 2007 U.S. LEXIS 2798 (Feb. 26, 2007), *Zavala, et al., v. Wal-Mart Stores Inc.*, Civil Action No. 03-Civ.-5309 (JAG) (D.N.J.)
38. Homicz, *Private Enforcement of Immigration Law: Expanded Definitions Under RICO and the Immigration and Nationality Act*, 38 Suffolk U.L. Rev. 621, 624 (2005), *Trollinger v. Tyson Foods Inc.*, 370 F.3d 602 (6th Cir. 2004)
39. INA § 274A; 8 U.S.C. § 1324a; 8 C.F.R. § 274a.10; 18 USC § 371. Paul Cuadros, *The New Tactics of Immigration Enforcement*, Time Magazine, Aug. 7, 2006, at www.time.com/time/nation/article/0,8599,1223600,00.html
40. INA 274(a)(3); INA § 274(a)(1)(B), *U.S. v. Kim*, F.3d ---, 1999 WL 803256 (2nd Cir. Oct. 8, 1999)
41. INA § 274(a)(3); *Vega-Murillo v. U.S.*, 247 F.2d 735 (9th Cir. 1957), cert. denied 357 U.S. 910
42. www.ice.gov/pi/nr/0811/081103boston.htm, www.ice.gov/pi/nr/0810/081030cedarrrapids.htm, www.washingtonpost.com/wp-dyn/content/article/2006/04/15/AR2006041501049.html
43. www.ice.gov/pi/news/insideice/articles/InsideICE_032805_Web2.htm

ABOUT THE AUTHOR



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Immigration Due Diligence in Mergers and Acquisitions

By Richard J. Salamy

In a merger, acquisition or reorganization of any business, many important details and deal points are discussed, negotiated and incorporated into innumerable drafts of a definitive agreement. Yet one critical area, often overlooked by transaction lawyers, may have serious consequences to the acquiring company and its future employees — immigration law. If considered at all, immigration issues are relegated to second-tier concerns that, in the minds of the lawyers, can be handled after the closing. In many cases, however, “after the closing” is too late, and the acquiring company may find itself at the mercy of U.S. Citizenship and Immigration Services (USCIS) or worse, U.S. Immigration & Customs Enforcement (ICE), the enforcement bureau of the U.S. Department of Homeland Security (DHS).¹ An acquiring company may also discover it has lost the services of key employees of the acquired company.

To uncover immigration-related issues in time to successfully resolve them, the prudent transaction lawyer should carefully consider these immigration issues well in advance of closing:

DISCUSS THE FORM OF ACQUISITION OR REORGANIZATION WITH IMMIGRATION COUNSEL

The acquiring company and its foreign national employees may face different issues depending on whether the transaction is a stock or asset sale or if the company is simply undergoing a reorganization.

CAREFULLY EXAMINE ALL USCIS FORM I-9s OF AN ACQUIRED COMPANY

By federal law, employers must verify the employment authorization of all employees, citizens and noncitizens alike, by completing a

USCIS Form I-9 for each employee at the time of hire.² Independent contractors are excluded. Examining the I-9s of the acquired company is important for two reasons. First, it provides the acquiring company with an overview of the acquired company’s workforce because I-9s include information about an employee’s immigration status. Second, a review of the acquired company’s I-9s will reveal whether the acquired company has diligently complied with federal requirements and its own internal I-9 policies, if it has any. This provides the acquiring company with an opportunity to consider whether it is assuming potential liabilities for noncompliance.

When reviewing an acquired company’s I-9s, ask these six questions:

1. Does an I-9 exist for every employee of the company? Verify the I-9 records against the company's payroll records.

2. Have the I-9s been fully and properly completed?

3. Does the acquired company have a written I-9 policy? Is it being followed? Consider whether the acquired company's I-9 policies are consistent with the acquiring company's policies and whether there will be any difficulties in integrating the two systems.

4. If the I-9s contain errors, are they technical (which may be excused) or substantive (which may result in fines or imprisonment)?

5. What are the potential civil and/or criminal penalties?

I-9 Violations: These are sometimes considered "paperwork" violations because they are directly related to whether and how the I-9 is completed. The monetary penalty for an I-9 violation (either technical or substantive) is a minimum of \$110 and a maximum of \$1,100 per employee.³ Factors affecting the amount of the penalty within that range include: the size of the employer's business, the employer's good faith in completing the I-9, the seriousness of the violation, whether or not the employee was an unauthorized alien, and a history of any prior violations.⁴

Employing Unauthorized Employees: ICE may sometimes use I-9 violations, alone or together with other facts, to allege that an employer has hired an employee who is not authorized to work for that employer. These are more serious violations than "paperwork" violations because they are accompanied by higher fines and the potential for imprisonment. The civil and criminal penalties for employing unauthorized employees are:

Civil Penalties: First offense — a fine of not less than \$275 and not more than \$2,200 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than \$375 and not exceeding \$3,200 for each unauthorized employee with respect to whom the offense occurred on or after March 27, 2008. Second offense — a fine of not less than \$2,200 and not more than \$5,500 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than \$3,200 and not exceeding \$6,500 for each unauthorized employee with respect to

whom the offense occurred on or after March 27, 2008. Third and subsequent offenses — a fine of not less than \$3,300 and not more than \$11,000 for each unauthorized employee with respect to whom the offense occurred before March 27, 2008, and not less than \$4,300 and not exceeding \$16,000 for each unauthorized employee with respect to whom the offense occurred on or after March 27, 2008.⁵

Criminal Penalties: If a person or entity engages in a "pattern or practice" of unauthorized employment violations, then the penalty is a fine of not more than \$3,000 for each unauthorized alien, not more than six months imprisonment for the entire pattern or practice, or both.⁶

6. Should the acquiring company re-verify all the employees of the acquired company by completing new I-9s for them or may it simply assume responsibility for those employees by retaining the existing I-9s?

IDENTIFY ALL EMPLOYEES THAT ARE CURRENTLY IN AN IMMIGRATION STATUS THAT MIGHT REQUIRE ADDITIONAL FILINGS WITH THE U.S. DEPARTMENT OF LABOR (DOL) OR USCIS IN ORDER TO PRESERVE THEIR EMPLOYMENT AUTHORIZATION AND IMMIGRATION STATUS

Whether any additional filings need to be made with DOL or USCIS to preserve the immigration status of an employee of the acquired company will depend on the current status of the employee and where that employee is in the "immigration pipeline."

EMPLOYEES IN NONIMMIGRANT (i.e. TEMPORARY) STATUS

There are a variety of nonimmigrant visas that allow a foreign national to work in the U.S., but two common nonimmigrant visas are (a) the H-1B, for professionals whose positions typically require a bachelor's degree, and (b) the L-1, for executives, managers and specialized-knowledge personnel working for a company abroad and entering the U.S. to work for a company with a qualifying relationship (*i.e.* parent, subsidiary, or affiliate) to the company abroad.

H-1B Professional Status: H-1B visa petitions remain valid and amendments to those petitions are not required so long as the job performed for the acquiring company is substantially the same

as the original job and the acquiring company qualifies as a "successor-in-interest," as discussed later in this article.⁷ However, a memorandum explaining the reorganization, merger or acquisition must be added to that employee's H-1B public access file. The acquiring company should have an authorized representative execute a sworn statement on behalf of the acquiring company expressly acknowledging the assumption of all obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective Labor Condition Applications (each, an LCA) filed by the acquired company with the DOL. Unless the acquiring company chooses to file new LCAs and H-1B petitions, the acquiring company should not employ any H-1B employee until this statement is executed and made available in the H-1B public access file for that employee.⁸ If the location of the job or the position itself changes substantially, a new LCA must be filed with the DOL and posted at the new work site. The acquiring company then must file an amended H-1B petition.

Successor employers should also issue a letter to new H-1B employees who travel abroad to assist them in gaining re-entry to the United States. This letter should confirm that the company has succeeded the previous employer and that the terms and conditions of employment remain the same.⁹

L-1 Intracompany Transferees: L-1 visa petitions will remain valid as long as the company abroad where the employee was originally employed is also acquired or the acquired company has an overseas branch and there is no substantial change in the capacity of the L-1 employee's employment.¹⁰

EMPLOYEES SEEKING PERMANENT RESIDENCY STATUS

Applying for and receiving permanent residency (a "green card") may take several years of waiting and require a variety of filings with three different government agencies: DOL, USCIS, and U.S. Department of State. Employees may be affected differently depending on what stage of processing they are in when the transaction closes. Generally, there are three

stages in the process of becoming a permanent resident based upon an offer of employment in the U.S.: (a) labor certification with the DOL, (b) filing an immigrant visa petition with USCIS, and (c) consular processing at a U.S. consulate abroad, or, if the employee is in the U.S., applying with USCIS to "adjust status" to permanent residency.

Prior to Filing Application for Labor Certification: For most permanent residency cases, an employer must attempt to recruit a willing, available

and qualified U.S. worker for the position he is offering to the foreign national. This process is called "labor certification." If a new employer is a successor-in-interest and the employee's job duties and location will not change, the new employer may utilize the recruiting efforts of the acquired company and file an application for labor certification.¹¹

Pending Labor Certification: If the acquired company filed an application for labor certification after July 16, 2007 that is still pending, the acquiring company may not be substituted for the original employer.¹² The pending application should be withdrawn and the new employer must submit a new application under its own name. The only alternative is allowing the application to be approved and trying to persuade

“... the test for successorship sometimes requires merely that the acquiring company assume the acquired entity's *immigration-related* assets and liabilities.”



USCIS at the I-140 petition stage that the acquiring entity qualifies as a successor-in-interest.

Approved Labor Certification: If the application for labor certification has been approved by DOL, then the acquiring company may be allowed to utilize the approved labor certification to support an immigrant visa petition filed with USCIS, but this issue is not clear. In the past, USCIS allowed employers to present evidence of successorship and proceed with permanent residency, but a recent amendment to the labor certification regulations has cast doubt on the continued success of this strategy.¹³

Approved Immigrant Visa Petition: If (a) an employment-based immigrant visa petition has been approved by USCIS for an employee and (b) the employee has filed an application to adjust status to permanent residency which application has been pending for more than 180 days, then the employee may commence employment with the new employer without the new employer filing a new I-140 petition.¹⁴ If immigrant visa petition is still pending or the application to adjust status has not been pending less than 180 days, the new employer will need to file a new immigrant visa petition.

INCLUDE ASSUMPTION OF IMMIGRATION LIABILITIES IN THE DEFINITIVE AGREEMENT

As mentioned earlier in this article, the continuity of immigration status and employment authorization will often depend on whether the acquiring company qualifies as a “successor-in-interest” in the eyes of the USCIS and DOL.

In permanent residency (*i.e.*, “green card”) cases, a “successor-in-interest” occurs when:

“...the prospective employer of an alien (and the entity that filed the certified labor certification application form) has undergone a change in ownership, such as an acquisition or merger, or some other form of change, such as a corporate restructuring or merger with another business entity, and the new or merged, or restructured entity *assumes substantially all of the rights, duties, obligations, and assets of the original entity.*”¹⁵ (emphasis added)

However, at least some USCIS adjudicators are applying a more stringent standard and granting successor-in-interest status to an acquiring company only if it assumes all of the rights, duties, obligations, and assets of the acquired company.¹⁶

With respect to nonimmigrant visa petitions (such as H-1B nonimmigrant visa petitions), the test for successorship appears to require merely that the acquiring company assume the acquired entity’s *immigration-related* assets and liabilities.¹⁷

In order to document the status of the acquiring company as a successor-in-interest, at least with respect to nonimmigrant visa petitions, a prudent lawyer might include a provision in the definitive agreement similar to this:¹⁸

“Effective on and after the Closing Date of the Transaction, (a) Seller shall cease to serve and Buyer shall commence to serve as the sponsoring and petitioning employer for petitions, applications and other filings with U.S. Citizenship and Immigration Services, the U.S. Department of Labor, or the U.S. Department of State (including any U.S. embassy or consular post) (collectively, the “Immigration Documents”) requesting employment-based nonimmigrant visa benefits on behalf of or with respect to Seller’s employees who are offered employment by Buyer, and (b), Buyer shall assume all immigration-related obligations and liabilities that have arisen or will arise on or after the Closing Date for such employees in connection with the Immigration Documents. By Seller and Buyer closing the Transaction and Buyer’s hiring the Employees, Seller and Buyer intend for Buyer to be deemed the Seller’s successor-in-interest for the purpose of U.S. immigration law.”

Of course, this is only a sample. The precise language of any provision in a definitive agreement should be negotiated and drafted to fit the facts of the particular transaction, the status of the particular employees at risk of losing immigration status, and the current law and guidance with respect to qualifying as a successor-in-interest.

Immigration law is a sometimes Byzantine maze of statutes, regulations, policy guidance and field memoranda. This article has only provided a brief overview of certain issues that arise in a merger or acquisition of a company that employs foreign nationals. Ideally, immigration counsel would be brought in well ahead of closing to thoroughly evaluate whether any pitfalls exist for the acquiring company and how to preserve some of the most valuable assets of the acquired company – its employees.

1. A detailed list of recent ICE investigations and prosecutions can be found at: www.ice.gov/pi/news/factsheets/worksite_cases.htm.

2. Immigration and Nationality Act (INA) § 274A(b)(1)(A); 8 CFR 1274a.2(b).

3. 8 CFR § 274a.10(b)(2).

4. INA § 274A(e)(5).

5. 8 CFR § 274a.10(b).

6. 8 CFR § 274a.10(a).

7. INA § 214(c)(10).

8. 20 CFR § 655.730(e).

9. Memo of M. Cronin, Acting Executive Associate Commission, Program, HQPGM 70/6.2.8 9 (June 19, 2001), reprinted in 78 Interpreter Releases 1108-17 (July 2, 2001).

10. 8 CFR § 214.2(l)(7)(I)(C).

11. PERM FAQ, Round 10 (May 9, 2007), available at www.foreign-laborcert.doleta.gov/pdf/pern_faqs_5-9-07.pdf.

12. 20 CFR § 65.11(b).

13. Id.

14. § 106(c) of the American Competitiveness in the Twenty-First Century Act of 2002 (AC21); See also BCIS Memorandum, "BCIS Guidance on AC21 Applicability to Concurrent Filings/Revoked I-140s" (August 4, 2003).

15. USCIS, Adjudicator's Field Manual (AFM) § 22.2(b)(5).

16. USCIS Says 'All or Nothing': Latest Developments on Successor-in-Interest. S. Ellison and P. Hejninian, AILA Immigration and Nationality Law Handbook 93 (2008-09).

17. INA § 214(c)(10).

18. Adapted from an excellent article by Angelo A. Paparelli, *Assuage Therapy: Enticing M&A Lawyers to Help with Immigration Successorship*, AILA Immigration & Nationality Law Handbook 39 (2007-2008 ed.).

ABOUT THE AUTHOR



Richard Salamy practices primarily in the areas of business immigration and commercial transactions. His immigration practice is focused exclusively on representing employers and employees entering the United States for employment in a variety of professional positions.

He also provides guidance to employers on I-9 compliance and Social Security non-match inquiries. Richard also assists companies in expanding internationally, sometimes combining his experience in immigration law with his experience in commercial transactions.

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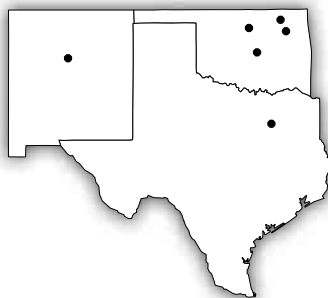
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Labor and Employment Law Section

DOL Overhauls Family and Medical Leave Act Regulations: Important Changes You Should Know About

By Mary L. Lohrke and Stephanie Johnson Manning

The U.S. Department of Labor (DOL) published final regulations to the Family and Medical Leave Act¹ (FMLA) on Nov. 17, 2008. The new regulations, effective Jan. 16, 2009,² provide guidance on the Servicemember Leave Amendments enacted last year. Additionally, the new regulations make a number of significant changes to the original regulations dating back to 1995. This article highlights the additions and more notable changes to the regulations.

TIGHTENED DEFINITION OF SERIOUS HEALTH CONDITION INVOLVING 'CONTINUING TREATMENT'

The new regulations tighten the definition of a serious health condition that involves "continuing treatment" entitling an employee to FMLA leave. The "continuing treatment" test may be met when an employee's (or sick family member's) condition involves more than three consecutive calendar days of incapacity plus: (i) treatment two or more times by a health care provider; or (ii) one treatment by a health care provider that results in a "regimen of continuing treatment" (such as the use of a prescription drug).³ The new rules clarify that the first visit to the health care provider in either case must occur within seven days of the first day of incapacity.⁴ For

leave involving two visits to a health care provider, the second visit must occur within 30 days of the first day of incapacity.⁵ To qualify as a chronic serious health condition, the condition must require at least two visits to a health care provider per year.⁶

INCREASED EMPLOYER NOTICE OBLIGATIONS

The new regulations significantly increase the notice requirements for employers.⁷ Employers must provide the required general notice of FMLA rights in an employee handbook.⁸ If the employer does not have an employee handbook, the employer must give FMLA notice to each new employee upon hiring.⁹ Notably, notice may be provided electronically.¹⁰ The DOL has included a model general notice which may be used.¹¹

In addition to the general notice requirements, the new regulations impose upon employers individual eligibility notice and designation notice requirements.¹² Under the new regulations, employers must notify an employee of his or her eligibility for FMLA within five business days after the employee's request for leave or the employer has acquired knowledge that the leave may be FMLA qualifying.¹³ If the employee is not eligible, the notice must state the reason for ineligibility

(e.g. failure to meet the requirement for 12 months of service or 1,250 hours worked).¹⁴ With each eligibility notice, employers must also provide a written rights and responsibilities notice detailing the specific expectations and obligations of the employee.¹⁵ The notice must include certain provisions such as notice that the leave may be designated as FMLA, any requirement to furnish medical certification, any requirement for the employee to pay his or her share of the health benefits premium, and the consequences for failure to return after leave.¹⁶ The DOL has provided a sample form that meets these new requirements that may be used by employers.¹⁷

Once an employer has enough information to make a designation determination (usually after receipt of the medical certification), the employer must provide the employee with a designation notice within five business days.¹⁸ If an employer requires a fitness-for-duty certification to return to work, the employee must be so notified in the designation notice.¹⁹ If the employer requires that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, a list of essential functions must be provided with the designation notice.²⁰ The DOL has also provided a sample designation form that employers may use.²¹

REMOVAL OF PENALTIES FOR FAILURE TO PROPERLY DESIGNATE

The new regulations reflect the current law following the U.S. Supreme Court decision in *Ragsdale v. Wolverine World Wide Inc.*,²² which invalidated a penalty provision for failure to properly designate FMLA leave.²³ Under the facts of *Ragsdale*, the penalty provision would have required an employer to provide an additional 12 weeks of FMLA leave after the 30 weeks of leave the employee had already received because the employer failed to properly designate the leave as FMLA.²⁴ The Supreme Court held that the penalty provision was inconsistent with the statutory entitlement to only 12 weeks of FMLA leave and contrary to the statute's remedial requirement that the employee demonstrate individual harm.²⁵ The new regulations eliminate the "categorical" penalty provision, but clarify that an employer may still be liable where an employee suffers individualized harm because an employer fails to follow the notification rules.²⁶

NEW EMPLOYEE NOTICE OBLIGATIONS

The new regulations modify the old rules which allowed employees to provide notice to an employer of the need for unforeseeable FMLA leave two business days *after* an absence, even if notice could have been provided earlier.²⁷ Under the new regulations, an employee needing FMLA leave must comply with the employer's usual and customary call-in procedures for reporting an absence, unless there are unusual circumstances.²⁸ This provision is obviously meant to help curb the disruption caused by employees not reporting the need for leave until after returning from an absence.

STREAMLINED MEDICAL CERTIFICATION PROCESS

The new regulations include several provisions designed to streamline the medical certification process and improve communication. First, if a medical certification is incomplete or insufficient, the employer must notify the employee of the specific deficiency, in *writing*, and allow the employee seven calendar days to cure the deficiency.²⁹

Additionally, the new regulations allow, under certain conditions, direct contact between the employer and the health care provider for either authentication of a medical certification or for clarification of information on a medical certification form.³⁰ However, the employer must first obtain the employee's consent to contact the health care provider.³¹ Under no circumstances may the employee's direct supervisor contact the health care provider.³² Further, employers may not ask for additional information beyond that required by the certification form.³³ If an employee refuses to consent to employer contact with the health care provider and fails to cure any deficiencies in the medical certification, leave may be denied.³⁴

Finally, the new regulations simplify recertification. Specifically, the regulations adopt a prior DOL opinion letter allowing an employer to request a *new* certification annually in conjunction with a condition lasting beyond a single leave year.³⁵ Further, the regulations clarify that an employer may request recertification at least every six months if the request is in conjunction with an absence.³⁶ This is so even if a specific duration is specified on the medical certification.³⁷ The DOL included two new medical certification forms that employers may use — one for an employee's own serious

health condition and one for a family member's serious health condition.³⁹

CHANGES TO THE FITNESS-FOR-DUTY CERTIFICATION PROCESS

The regulations make two changes to the fitness-for-duty certification process. First, an employer can require more than a "simple statement" of the ability to return to work.⁴⁰ Employers may now require certification specifically addressing whether an employee can perform the essential functions of the job.⁴¹ Second, while the current regulations prohibit requiring a fitness-for-duty certification to return to work from intermittent leave, the new regulations allow an employer to request a fitness-for-duty certification every 30 days, but only if reasonable safety concerns exist.⁴²

CLARIFICATION FOR LIGHT DUTY

The regulations clarify that the time employees spend performing "light duty" work does not count against an employee's leave entitlement.⁴³ Instead, the employee's right to reinstatement is tolled during time spent on a light duty assignment.⁴⁴ This could result in providing an employee job protection for longer than 12 weeks. For example, an employee may take six weeks of FMLA leave, return and work six weeks of light duty, and then take the remaining six weeks of FMLA leave – all without affecting the employee's right to reinstatement. An employee's right to reinstatement, however, ceases at the end of the applicable 12-month FMLA year.⁴⁵

NO OBLIGATION TO EXTEND PERFECT ATTENDANCE AWARDS

Under the new rules, employers are now allowed to deny a "perfect attendance" award to an employee who does not have perfect attendance because of taking FMLA leave.⁴⁶ An employer may only do so as long as it treats employees taking non-FMLA leave the same as those taking FMLA leave.⁴⁷ For example, if an employee taking paid vacation would be eligible for the bonus, an employee taking FMLA leave and substituting paid vacation would also be eligible.

SUBSTITUTION OF PAID LEAVE

The old and new regulations provide that an employee may take, or employers may require the employee to take, any accrued paid vacation, personal leave or family leave offered by their employer concurrently with any FMLA

leave.⁴⁸ Under the new regulations, an employee who elects to use any type of paid leave concurrently with FMLA leave must follow the employer's policy that applies to other employees taking that type of paid leave.⁴⁹ However, an employee is entitled to the *unpaid* FMLA leave even if he or she does not meet the employer's policy conditions for taking paid leave.⁵⁰

CLARIFICATION REGARDING SETTLEMENT OF PAST FMLA CLAIMS

The regulations clarify that employees can voluntarily settle or release past FMLA claims without court or DOL approval.⁵¹ However, prospective waiver of FMLA claims continues to be prohibited under the regulations.⁵²

IMPLEMENTATION OF MILITARY FAMILY LEAVE

The new regulations implement the recent statutory amendments entitling eligible employees to FMLA leave because of a "qualified exigency" arising from the employee's spouse, son, daughter, or parent being called to active duty in support of a contingency operation.⁵³ The regulations provide examples of broad categories of what could constitute a "qualified exigency," such as 1) short notice deployment; 2) military events and related activities; 3) childcare and school activities; 4) financial and legal arrangements; 5) counseling; 6) rest and recuperation; and 7) post-deployment activities.⁵⁴ Additionally, the regulations provide a "catch-all" provision for activities not encompassed in the other categories, but agreed to by the employer and employee.⁵⁵

The new regulations additionally provide guidance on the new provision allowing an employee up to 26 workweeks of leave in a single 12-month period to care for an injured servicemember (including a member of the national guard or reserves) with a serious injury or illness incurred in the line of duty if the employee is the spouse, son, daughter, parent, or next of kin of the servicemember.⁵⁶ The "next of kin" concept is new to the FMLA and includes the nearest blood relative to the injured servicemember who is not the servicemember's spouse, parent, son or daughter.⁵⁷ The DOL included two new certification forms which can be used by employees and employers to facilitate the certification requirements for military family leave.⁵⁸

CONCLUSION

The new regulations provide employers more latitude to obtain information from employees and health care providers and provide new tools for preventing employee abuse of FMLA leave. Employers, however, assume more demanding obligations to inform employees of their FMLA rights and responsibilities. Employers should be advised to update existing FMLA policies, procedures, and forms to comply with the new regulations and to take advantage of the new tools provided.

1. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,073 (Nov. 17, 2008) (to be codified at 29 C.F.R. pt. 825). The text of the final rule is at www.dol.gov/federalregister/PdfDisplay.aspx?DocId=21763.
2. *Id.* at 67,934.
3. 29 C.F.R. §825.114(a)(2) and (b); *see also* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,079 (to be codified at 29 C.F.R. §825.115(a)(1)).
4. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,079 (to be codified at 29 C.F.R. §825.115(a)(3)).
5. *Id.* at 68,079 (to be codified at 29 C.F.R. §825.115(a)(1)).
6. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,080 (to be codified at 29 C.F.R. §825.115(c)(1)).
7. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300).
8. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(a)(3)).
9. *Id.*
10. *Id.*
11. WH Publication 1420, *id.* at 68,123 (to be codified at 29 C.F.R. pt. 825 (appendix D)).
12. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(b)-(d)).
13. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(b)(1)).
14. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.300(b)(2)).
15. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(c)(1)).
16. *Id.* at 68,096-97 (to be codified at 29 C.F.R. §825.300(c)(1)(i)-(vii)).
17. Form WH-381, *id.* at 68,124-25 (to be codified at 29 C.F.R. pt. 825 (appendix D)).
18. *Id.* at 68,097 (to be codified at 29 C.F.R. §825.300(d)(1)).
19. *Id.* at 68,097 (to be codified at 29 C.F.R. §825.300(d)(3)).
20. *Id.*
21. Form WH-382, *id.* at 68,126 (to be codified at 29 C.F.R. pt. 825 (appendix E)).
22. 535 U.S. 81, 122 S.Ct. 1155 (2002).
23. *Id.* at 96.
24. *Id.* at 94.
25. *Id.* at 90-91.
26. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,097 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.300(e)).
27. 29 C.F.R. § 825.303(a) (1995); *see also* The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,099-100 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.303(a) and (c)).
28. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,099-100 (Nov. 17, 2008) (to be codified at 29 C.F.R. §825.303(a) and (c)).
29. *Id.* at 68,100-01 (to be codified at 29 C.F.R. §825.305(c)).
30. *Id.* at 68,102 (to be codified at 29 C.F.R. §825.307(a)).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*

35. *Id.* at 68,101 (to be codified at 29 C.F.R. §825.305(e)); *see also* Wage and Hour Opinion Letter, FMLA2005-2-A (September 14, 2005).
36. *Id.* at 68,103 (to be codified at 29 C.F.R. §825.308(b)).
37. *Id.*
38. Form WH-380-E, *id.* at 68,115-18 (to be codified at 29 C.F.R. pt. 825 (appendix B)).
39. Form WH-380-F, *id.* at 68,119-22 (to be codified at 29 C.F.R. pt. 825 (appendix B)).
40. *Id.* at 68,105 (to be codified at 29 C.F.R. §825.312(b)).
41. *Id.*
42. *Id.* at 68,106 (to be codified at 29 C.F.R. §825.312(f)).
43. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.220(d)); *see also* Wage and Hour Opinion Letter FMLA-55 (March 10, 1995).
44. *Id.* at 68,096 (to be codified at 29 C.F.R. §825.220(d)).
45. *Id.*
46. *Id.* at 68,093 (to be codified at 29 C.F.R. §825.215(c)(2)).
47. *Id.*
48. 29 C.F.R. §825.207(a); The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,089 (to be codified at 29 C.F.R. pt. 825.207(a)).
49. The Family and Medical Leave Act of 1993, 73 Fed. Reg. 67,933, 68,089 (to be codified at 29 C.F.R. pt. 825.207(a)).
50. *Id.*
51. *Id.* at 68,095-96 (to be codified at 29 C.F.R. §825.220(d)).
52. *Id.*
53. *Id.* at 68,083 (to be codified at 29 C.F.R. §825.126(a)).
54. *Id.* at 68,083-84 (to be codified at 29 C.F.R. §825.126(a)(1)-(7)).
55. *Id.* at 68,084 (to be codified at 29 C.F.R. §825.126(a)(8)).
56. *Id.* at 68,084-85 (to be codified at 29 C.F.R. §825.127(a)).
57. *Id.* at 68,085 (to be codified at 29 C.F.R. §825.127(b)(3)).
58. Form WH-384 (Certification of Qualifying Exigency for Military Family Leave), *id.* at 68,127-129 (to be codified at 29 C.F.R. pt. 825 (appendix G)) and Form WH-385 (Certification for Serious Injury or Illness of Covered Servicemember), *id.* at 68,130-33 (to be codified at 29 C.F.R. pt. 825 (appendix H)).

ABOUT THE AUTHORS



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Thank you, Linda and Drew

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MCLE Change Allows More Online CLE

The Oklahoma Bar Association is, once again, responding to the wants of its membership by now allowing OBA members to obtain up to six hours of the required 12 MCLE hours by archived online continuing legal education programming. The OBA Mandatory Continuing Legal Education Commission approved this modification, and the change became effective Jan. 1, 2009.

MCLE Commission Chair Margaret Hamlett Shinn said, "The MCLE Commission recognizes the need for lawyers to broaden their ability to take advantage of available technology. Many lawyers are acquainted with participating in online 'live' CLE presentations, and now we can use online 'archived' presentations to meet up to six hours of the annual continuing legal education requirements."

The six-hour limitation applies to only pre-recorded online programming. Live online programming, telephone seminars, Webcasts and Webinars are not included in this limitation, and members may obtain all 12 hours with these forms of delivery.

Members who have not yet complied with 2008 MCLE requirements must comply with the 2008 online limit, therefore, they can only obtain three hours of archived online programming.

The OBA Continuing Legal Education Department catalog for online programming is available at www.legalspan.com/okbar/catalog.asp. The OBA/CLE online catalog has hundreds of CLE hours available for viewing, including many OBA/CLE programs and continuing legal education programs from other state bar associations. OBA/CLE provides continuing legal education programming via many delivery mechanisms.

WHAT IS AN ONLINE VIDEO PROGRAM?

OBA/CLE online programs include archived video programs. After registering for an online program, registrants receive an e-mail with a link to the online program. The program does not have to be viewed immediately and is usually available for viewing to the registrant for several weeks. The program includes a video replay and downloadable materials. An online video program is considered an online purpose of MCLE credit, and members are limited to six hours of archived video and audio programming each year.

WHAT IS AN ONLINE AUDIO PROGRAM?

OBA/CLE online programs include archived audio programs, or more commonly called CLEtoGo. After registering for an online audio program, registrants receive an e-mail with a link to the online program. The program can then be downloaded to any personal digital player. The program does not have to be listened to immediately and is usually available to the registrants for several weeks. The program includes downloadable materials. Registrants are required to provide an audio code available in the program in order to download a certificate of completion. An online audio program is considered an online purpose of MCLE credit, and members are limited to six hours of archived video and audio programming each year.

WHAT IS A WEBCAST SEMINAR?

OBA/CLE Webcasts are programs broadcast live ("real time") over the Internet. The Webcast includes live video stream of the presenter, downloadable materials and PowerPoint slides, if used by the presenter. After registering for a Webcast, registrants receive an e-mail with instructions. For some programs, registrants may also e-mail questions to the pre-

sender. A Webcast program is considered a live program and not an online program for purposes of MCLE credit.

WHAT IS A WEBINAR?

OBA/CLE Webinars are programs broadcast live ("real time"). Audio is delivered over the telephone. Materials and PowerPoint presentations are delivered via the Internet. Webinars have a live desktop component that makes this form of delivery appropriate for technology training. A Webinar is considered a live program and not an outline program for purposes of MCLE credit. After registering for a Webinar, registrants receive an e-mail with instructions.

WHAT IS A TELEPHONE SEMINAR?

OBA/CLE telephone seminars are programs broadcast live ("real time"). Audio is delivered over the telephone. Materials and PowerPoint presentations are delivered via the Internet. A telephone program is considered a live

program and not an online program for purposes of MCLE credit. After registering for a telephone seminar, registrants receive an e-mail with instructions.

WHAT IS A VIDEO SEMINAR?

OBA/CLE videotapes many of its live programs. Those videotapes can be replayed for MCLE credit if viewed at the Oklahoma Bar Center or if viewed at the same time and same place with five or more OBA members. Videotapes and materials are shipped nationwide. The six-hour limit doesn't apply to videos viewed in this manner.

With these forms of online CLE delivery, OBA members have access to continuing legal education year-round and 24/7. With the CLE live programs, OBA members also have access to quality continuing legal education coupled with the networking and fellowship opportunities available from coming together – the best of all worlds!

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FROM THE PRESIDENT

cont'd from page 236

legislation from passing. I need you to be part of an educated and engaged public who will work to educate members of the Legislature on the effect of bills that will hamper our profession and in the end negatively impact the administration of justice in our state. In short, it may well be time that we advocate for ourselves.

APPRECIATION EXPRESSED

Too often the people who matter most do not hear the words "thank you" often enough. So, before we set about the task of building, enhancing and protecting the profession and the system of justice we so dearly cherish; hear these words, "Thank you!" Nothing this year will be possible without an active and engaged membership. So – from Guymon to Idabel, from Miami to Hollis and all points between – I thank you now and ask for your help to meet the challenges of the coming year.

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NOTICE OF JUDICIAL VACANCY

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

District Judge Fifteenth Judicial District, Office 2 Wagoner and Cherokee Counties

This vacancy is due to the retirement of the Honorable Bruce Sewell effective March 1, 2009.

To be appointed to the office of District Judge for the Fifteenth Judicial District, Office 2, one must be a legal resident of Wagoner or Cherokee 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 and must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, February 27, 2009. If applications are mailed, they must be postmarked by midnight, February 27, 2009.**

Robert C. Margo, Chairman
Oklahoma Judicial Nominating Commission

Younger than Usual

By John Morris Williams

For the first time in my life the president of the United States and the president of the Oklahoma Bar Association are both younger than I am. I like to think that they are both younger than usual for the offices they hold. It is not that I am getting old. They are both just younger than usual for the office. That is comforting logic. The truth is that we are witnessing the beginning of a generational change in leadership. That has significance for our profession and our association.

More than one-half of OBA members are over 50 years of age. At national meetings I have attended the last few years, there has been a running conversation on the aging of the profession. The demographics show that the first of the baby boomers reached 65 last year. For lawyers that does not necessarily mean retirement. With the recent downturns in the economy, retirement may not be an option for many other people in the work force as well.

Not only will we be starting to see generational changes in elected leader-

ship, we will also see generational changes in many other areas. The effects of this for the legal profession have been studied for some time. The New York State Bar Association has been a leader in this area. Its Web site has a fairly good collection of materials that can be found at tinyurl.com/crpwpr. A speaker I recently heard on the subject talked about "lawyers who practice for 15 minutes too long," meaning that as we age we need to be cognizant of the fact that our competencies may diminish with the aging process. Some states are seeing an increase in disciplinary matters due to issues related to the aging lawyer population.

Demographic information that we collect at the OBA shows that the national trends are true for us as well. The growth rate of the profession will level off or decline in the next five to 10 years. Lower or nonexistent dues and MCLE requirements for senior lawyers could also have a financial impact on bar associations. In short, it is an issue that requires our attention and some planning.

Another interesting aspect of this phenomenon is where these issues are being addressed within the organizational confines of bar associations. For the time being these issues are being presented to lawyer assistance programs. In the past, lawyer assistance programs primarily have been given the task of addressing substance abuse and mental health issues. The pairing of aging issues with the existing lawyer assistance programs creates new issues as

“...as we age we need to be cognizant of the fact that our competencies may diminish with the aging process.”

well. First, I can see organizational resistance because of the separateness of the issues. Second, I am concerned that the needed expertise and resources to



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FROM THE EXECUTIVE DIRECTOR

assist in this area at the present are woefully lacking.

Some states have begun to address these issues by having court ordered or voluntary "caretaker attorneys." Lawyers who practice in a firm may have the support systems in place to check competencies, ensure continuation of the practice and, most importantly, protect clients in the event of physical or mental impairment. Solo practitioners and their clients may be at greater risk. This is an interesting concept. Court ordered or

voluntary caretaker lawyers take over the practice of incapacitated lawyers and protect the clients until the lawyer is able to return to practice or new counsel can be substituted. I lack the expertise to advocate for or against such programs; however, I do find the concept interesting.

I am certain our new president, Jon Parsley, is up to the tasks that are before our association. I am equally as certain that the challenges of our profession will be addressed to ensure that the

public is well served. Lastly, I am thankful to witness this changing of the guard. It comforts me to know that our profession and our association has at-the-ready talented and capable leaders for the future.

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

More Thoughts on Practicing Law in Tough Economic Times

By Jim Calloway

Last month I covered practicing law in tough economic times. We're going to stay on that topic for one more month. But we are going to focus more on a few ideas that are good for good times as well as hard times.

FOLLOW THE MONEY

The famous advice of "Deep Throat" to *Washington Post* reporter Bob Woodward about the Watergate scandal should be followed in your law office as well: "Follow the money."

Reviewing your internal financial reports regularly is an important part of maintaining the firm's profitability in tough economic times. Monthly reviews of your financial reports may no longer be sufficient. Many firms will be well advised to switch to either weekly or bi-weekly review. You would never allow a client to operate a business without checking their inventory, bank balances and financial statements very regularly. Why would your law firm have any lesser standard?

An increase in accounts receivable is the first bellwether of a recession's impact on

your firm. It may be that a list of who is delinquent with their accounts, including the balance owed, should be distributed to the lawyer assigned to their matter so it can be handy at their desks. When a client calls seeking additional services or wishing to inquire about the status of their matter, it is totally appropriate to bring up the fact that the client is delinquent in their agreed obligations to pay fees to the firm.

Cutting costs is often difficult in a professional services firm of any kind. But it may be that increasing revenues is also difficult during bad times and so, this is an area you must consider. Just be careful, as the saying goes, to only cut fat and not muscle, particularly "muscle" that produces revenue.

Look at each item of your monthly and annual overhead and determine how important it really is. Could the firm retreat be held in a borrowed cabin or spare room provided by a client rather than in a location where costs will be significant? For some, the idea of doing things "on the cheap" impacts their self-image and

their view of what a professional lawyer's life should be. It is helpful to stress to everyone that some of these measures may be temporary and that all of them will increase the profitability of the firm and the potential compensation for the partners.

If that doesn't work, just look the other lawyers in the eye and tell them to quit whining and be happy they have paying work to do.

Remember that your staff is likely having tough times too. Make sure you have obvious and sufficient checks and balances on the funds you receive so that no one is tempted to help themselves to money they are not entitled to receive. Some firms may even resort to checking out office supplies rather than having the supplies open for anyone to take. This will be taken poorly by some. Stress that you are improving "the system" and that there is no suspicion about anyone.

Many law firms now have two staff members participate in opening the mail and identifying incoming checks just to have that extra level of security.

Larger firms have bonded professionals in their accounting department to handle financial matters. In a smaller firm, it is important that all bank statements are delivered to a supervising attorney so that they can be opened and reviewed for questionable items before anyone else in the office has access to them.

We certainly appreciate that many of you have loyal assistants that you trust with your money and would trust with your life. We do not intend to impugn the integrity of those individuals. However, you may recall the words of a former United States president, "trust, but verify." To the extent that everyone in the firm is aware of your stringent financial controls, there is lessened temptation to do something wrong. If everyone recognizes that the firm is fairly loose with the way money is handled, the opposite is true.

If your firm has a fairly lax purchasing structure, perhaps you need to consider whether every lawyer should be able to make purchases without first having the purchases approved by others. Certainly we all know what we want and the things that we perceive that we need. That treatise may be important and helpful with the current matter. But if you haven't needed it prior to this particular matter, would it be better to go review it at the local law library? Having everyone justify every purchase to others in the office will no

doubt result in savings for the firm.

CLIENT SCREENING

Canadian Practice Management Advisor Deborah E. Gillis recently published the article, "In a Tough Economy, the Importance of Effective Client Screening in Law Practice Today." The article is online at tinyurl.com/dle4xx. I strongly suggest that you read this entire article.

Careful selection of clients and declining matters that will be difficult or unprofitable should be an important aspect of your firm's business plan for the next two years, and perhaps from this point forward.

The client who cannot pay an adequate retainer or who has a type of matter that your firm has not handled in several years presents even more of a red flag in bad times. (Although taking a new matter from a new client without a retainer should raise a red flag at any time).

ARE LAY-OFFS AHEAD?

Lay-offs are difficult and painful to manage. But the uncertainty created by postponing the inevitable is bad for office morale. If you have to reduce staff, do it earlier rather than later. Then try to reassure the remaining staff that you believe you have made the needed cuts and their jobs are secure.

It may be that alternative arrangements could be accomplished.

I recently had the opportunity to participate in a podcast panel discussion, "It's the Economy, Stupid" with a

stellar group of co-presenters including Mark Powers (president of Atticus), Mark Chinn, William C. Cobb, Professor Kamran Dadkhah and Thomas J. Ahrens. Typically the Atticus coaching firm makes these podcasts available to its graduates, but this one is available to anyone. You can listen to this one-hour podcast on your computer for free online at tinyurl.com/csxlxh.

One of the lawyers participating in that podcast noted that when layoffs became inevitable at his law firm, he decided to discuss it with everyone. When you think about it, that was a bold and courageous move. As a part of the discussion, the associate lawyers and staff came up with a proposal that everyone should take a 20 percent pay cut in return for not working on Fridays. So now on Fridays in this law firm, only the partner and the receptionist are at the office. Obviously this probably cannot continue for an extended period, but the fact that everyone agreed on this approach and everyone is still employed has certainly been a boost for office morale, given the circumstances.

Another Canadian practice management expert, David Bilinsky, is against the current trend of law firm layoffs.

"Don't start laying off staff," he writes. "[T]hat not only reduces your income earning ability, it works against the firm's culture (sending a message to every person to head for the lifeboats) and that works

against morale – and you will need good staff to carry you through the tough times.” (“Practice Talk - Strategies for Surviving a Recession” on the Canadian Bar Association Web site at tinyurl.com/5ufdxg.)

CUTTING THE MARKETING BUDGET

Bad times are not the times to cut your marketing budget, although re-examining how you are spending your marketing dollars may be a fine idea.

In my opinion, one rule of thumb for all but a few should be: *More on the Internet, less on Yellow Pages.*

Every law firm or lawyer in private practice must have a Web site. A large segment of our society now uses the Internet to search for every type of service they need, including legal services. This will only grow in the future.

In that regard, if you missed my article in the Nov. 8, 2008, *Oklahoma Bar Journal* “Web Site How-To Tips for the Small Firm Lawyer,” it is now online at tinyurl.com/6cfcm4.

OUTSOURCE YOUR FINANCING

As I noted in last month’s column, in a bad economy, the possibility that clients will not be able to pay their fees is dramatically increasing. One of the logical conclusions of this is that every law firm should accept cred-

it cards. The expense of a very small service charge is now almost inconsequential compared with the possibility of not getting paid at all. Accepting credit cards is basically outsourcing your financing. If a potential client has no available line of credit on any credit card and cannot convince any friend or family member to loan him or her money for attorney’s fees, do you really want to become the financing agent for the potential client and bear the risk of not getting paid?

LOOK FOR THE SILVER LINING

Oklahoma Gov. Brad Henry in his Feb. 2, 2009 State of the State address noted that the Chinese character for “crisis” also denotes “opportunity.”

There will certainly be some areas of legal practice that grow in tough times, while others shrink. Due to some of the financial scandals, it is clear that there will be lots of work for securities litigators. Many attorneys who have ceased doing bankruptcy work will be starting to do that type of work again. It may be that many take a second look at alternative dispute resolution given the cost of litigation.

Just recently, Ron Baker published an essay on *Recession-proofing Your Firm*. He is a true expert on the billing methods and profitability of

professional services firms. He has written numerous books on alternative billing and is a speaker in high demand. “For now, the current crisis is an enormous opportunity for firms to help their customers grow their businesses,” he states.

He also believes that coping with a recession is more than cutting costs or cutting staff. He says, “Don’t take a hatchet to costs. No business has ever cut its way to prosperity. Some costs should probably be increased now, especially innovation in new services, talent, and retention marketing.”

Baker’s essay, *Recession-proofing Your Firm*, is online at tinyurl.com/dba4ak. I wish that all of you would take the opportunity to read his suggestions for positive proactive change and perhaps be encouraged about some of the opportunities for you to come out of these “tough times” with an even more vibrant and profitable law practice.

Hopefully things will not get as bad as the worst scenarios that can be imagined. But just remember that you can always revisit these two articles from the first two months of 2009, either in the bar journal archives at www.okbar.org (where the links work) or in the stack of *Oklahoma Bar Journals* you have neatly organized in your office.

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The Oklahoma Credit Union League (OCUL) currently has a position available for a Vice-President, Compliance & Governmental Affairs. This position will oversee all of the OCUL's dues-supported regulatory and compliance initiatives and services, and is responsible for the preparation and management of the budget for this division of Advocacy. Responsibilities also include regulatory advocacy before federal and state regulators, and functions as the lead legislative counsel/analyst during Oklahoma state legislative sessions.

Duties of this position will encompass providing comprehensive operations and regulatory compliance assistance to credit union personnel and League staff; overseeing and participating in the development of compliance updates and maintenance of the League website and the development of various literatures; preparing regulatory compliance "comment letters" for federal and state regulatory bodies in response to comment calls; and assisting with legislative and corporate issues as requested. Position will also prepare and conduct seminars and training on various topics and issues, as well as, maintain excellent working relations with federal and state regulators.

Must have JD Degree from an accredited law school along with a minimum of 3 years of legal experience. Licensed to practice law in the state of Oklahoma, or willingness to obtain license within one year. Professional, with exceptional interpersonal and communication skills is required. Extensive knowledge of the credit union system and operations, and federal & state laws/regulations affecting the credit union movement and financial institutions is imperative.

Please send resumes in MS Word format to Human Resources at careers@okleague.org. Salary requirements must be included for consideration.

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Payments of Fees by a Third Party

By Gina Hendryx, OBA Ethics Counsel

Lawyers face conflicts of interest in all facets of legal representation. Litigation or transaction, civil or criminal, no practitioner is immune from these ethical mine fields. Commonly employed but fraught with potential for conflict, the payment of legal fees by a third party is largely accepted as a proper means of securing legal representation for the client who might otherwise not have the financial means to hire an attorney.

Whether it is contractual as in the insurance defense representation or charitable as in legal services assistance, there is nothing inherently wrong with the client receiving assistance in paying the legal bill. The Oklahoma Rules of Professional Conduct recognizes third-party fee payment and address the potential pitfalls that may arise:

"RULE 1.8: CONFLICTS OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's

independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6."

INFORMED CONSENT

In any representation where the fee will be paid by a third party, the lawyer must obtain the client's consent to the payment arrangement. The details cannot be kept secret from the client.¹ The Oklahoma Rules of Professional Conduct define informed consent in its terminology section:

"RULE 1.0: TERMINOLOGY

(e) "Informed Consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

There is no checklist or "form" document provided in the rules for guidance in obtaining informed consent.

A consensus of authorities agrees that:

- 1) The lawyer must disclose the arrangement with the client. Do not delegate this responsibility to a paralegal or to the person paying the bill. *See In Re Geeding*, 12 P. 3d 396 (Kan. 2000) (lawyer who never met personally with client to explain third-party fee arrangement and obtain informed consent violated Rule 1.8.)
- 2) The lawyer must disclose the identity of the payer. The client must know the circumstances and conditions of the payment.²
- 3) The lawyer must explain any "material risks" and any "reasonably available alternatives." *See People v. Rivers*, 933 P. 2d 6 (Colo. 1997) (lawyer violated Rule 1.8(f) by failing to disclose potential conflicts posed by third-party payments).
- 4) After explanation and review of the risks, have the client confirm the same in writing. This may be contained in the attorney-client contract or by separate writing. Informed consent, confirmed in writing should be obtained at the outset of the representation

and not after legal work has begun.³

INDEPENDENCE OF PROFESSIONAL JUDGMENT

Oklahoma Rule of Professional Conduct 1.8(f)(2) and 5.4(c) both mandate that the third-party payer have no control over the client's representation:

"RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

These two rules read (and often cited in disciplinary cases) in tandem make it abundantly clear that the payer should have no control over the scope of the representation. Third-party payers often have different interests from the client. The payer may not direct the manner, means or desired outcome of the representation. For example, in *In Re Rumsey*, 71 P.3d 1150 (Kan. 2003), the attorney was found to have violated Rules 1.8 and 5.4 by permitting the client's mother, who was paying the legal fees, to veto appeal of a custody order. Before the practitioner agrees to the third party payment of fees, the

matter should be fully discussed and explained to the person or agency paying the legal fees. Just as informed consent is fully explained to the client, the payer should receive a full explanation of what will and will not be expected. It is recommended that the explanation be reduced to writing and the payer confirms same in writing.

The insurance defense representation may permit the lawyer's conduct to be directed by someone other than the client. The insurance company paying the lawyer's bill often directs the scope of the representation. The contract of insurance usually dictates that the client will cooperate with the insurer and will permit the insurer to make various decisions regarding the representation. However, outside of the insurance defense scenario, the lawyer should not seek to have the client consent or agree to the payer having any control over the scope of the representation.

PROTECT CLIENT CONFIDENCES

It is human nature to want to know what you are getting for your money. This is true in the legal arena especially when an interested person is paying the legal fees for another. Usually the payer has a vested interest in the representation following a certain tract. Nonetheless, Rule 1.8(f)(3) requires the

lawyer maintain the confidentiality of client information. The client may consent to the release of information to the payer. This consent should be separate from the consent to payment by a third party. The client's informed consent to the third-party payment arrangement does not equate to informed consent to reveal confidential information.⁴ Even if the client has agreed that the lawyer may keep the payer informed, the lawyer should avoid revealing sensitive information or confidences that could harm the client's interests.⁵

When someone other than the client is writing the check, the lawyer's duties to the client must include consideration of consent, confidentiality and control as it pertains to the involvement of the third-party payer. Such a payment arrangement should be refused if it prevents the lawyer from providing competent representation.

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

1. *State ex rel. Oklahoma Bar Ass'n v. Watson*, 897 P.2d 246 (Okla. 1994).

2. *Restatement (Third) of the Law Governing Lawyers* §122 (1).

3. ABA Formal Ethics Opinion 02-248 (2002).

4. *Restatement (Third) of the Law Governing Lawyers* §134 cmt. e (2000).

5. ABA Formal Ethics Op. 01-421 (2001).

January Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Jan. 23, 2009.

REPORT OF THE PRESIDENT

President Parsley reported he attended the swearing-in ceremony for Chief Justice Edmondson and Vice Chief Justice Taylor. He was the commencement speaker at the OCU Law School graduation, spoke at the Garfield County Bar Association meeting, met with Oklahoma Senate leadership and with Chief Justice Edmondson.

REPORT OF THE VICE PRESIDENT

Vice President Thomas reported she attended the new governors orientation, Washington County Bar Association Christmas party, the swearing-in ceremony of Chief Justice Edmondson and moderated the Jan. 22 Leadership Academy session.

REPORT OF THE PRESIDENT-ELECT

President-Elect Smallwood reported he worked on Judicial Nominating Commission matters by way of conference calls, attended Supreme Court Justice Jim Edmondson's swearing-in ceremony and reviewed certain applications for the OBA general counsel appointment.

REPORT OF THE PAST PRESIDENT

Past President Conger reported he attended the swearing-in ceremony of Chief Justice Edmondson and Vice Chief Justice Taylor.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the holiday board dinner, December board meeting, new governors orientation, directors' meeting, directors' retreat, monthly staff celebration, swearing in of Chief Justice Edmondson, Garfield County Bar Association luncheon, Supreme Court Conference on proposed Rule 5 changes and joint Board of Governors and Leadership Academy dinner. He met with the court administrator and attorney general's staff regarding domestic violence issues, Web editor hiring team, President Parsley, Chief Justice Edmondson and spoke to the Leadership Academy.

BOARD MEMBER REPORTS

Governor Brown reported he attended the December board meeting, holiday board dinner, Bench and Bar Committee meeting and swearing-in ceremony of Chief Justice Edmondson and Vice Chief Justice Taylor. **Governor Carter** reported she attended the December board meeting, new board members' orientation, Tulsa County Bar Association January Board meeting and Tulsa County Bar Association Law Week Committee meeting. **Governor Chesnut** reported he attended the Ottawa County Bar Association

meeting, the December Board of Governors meeting and the new board member orientation. **Governor Christensen** reported she attended the December board meeting, holiday board dinner, Bench and Bar meeting, swearing-in ceremony of Chief Justice Edmondson and Vice Chief Justice Taylor and Women in Law Conference planning session with Governor Reheard, who is WIL Committee chair, Vice President Thomas and Governor Dirickson. **Governor Dirickson** reported she attended the December board meeting, swearing-in ceremony of Chief Justice Edmondson and Vice Chief Justice Taylor, Women in Law planning session with Governor Reheard, Vice President Thomas and Governor Christensen. **Governor Dobbs** reported he attended the December board meeting, new member orientation, swearing-in ceremony for the new board and the has beens' dinner. **Governor Hixson** reported he attended the December board meeting and Christmas dinner, January Canadian County Bar Association luncheon and CLE presentation. **Governor McCombs** reported he attended the social gathering at the Oklahoma City Golf and Country Club, December board meeting and McCurtain County Bar luncheon. **Governor Moudy** reported she spoke at a training event for volunteer

coordinators sponsored by the Oklahoma Center for Non-Profits in Tulsa at OSU-Tulsa. **Governor Reheard** reported she attended the December board meeting, swearing-in ceremony for Chief Justice Edmondson, Bench and Bar Committee meeting, Thursday night event with Leadership Academy, conducted numerous conference calls as Women in Law Committee chairperson and made several subcommittee appointments. **Governor Stockwell** reported she attended the December Board of Governors meeting and December Cleveland County Bar Association Executive Committee regular meeting. **Governor Stuart** reported he attended the December board meeting and worked with High School Mock Trial Coordinator Judy Spencer to find a mock trial venue in Shawnee.

YOUNG LAWYERS DIVISION REPORT

Governor Rose reported he attended the December board meeting, new board members' orientation and hosted a lunch with Judge Weaver in the Western District. He said the YLD has created a committee to identify lawyers who are doing community service to inspire others.

LAW STUDENT DIVISION LIAISON REPORT

LSD Chair Janoe reported he attended the December board meeting in Oklahoma City, Cleveland County Bar Association luncheon and discussed pending consideration of OLSD bylaws with Law Student Executive Board.

REPORT OF THE GENERAL COUNSEL

A written status report of the Professional Responsibil-

ity Commission and OBA disciplinary matters was submitted for the board's review.

MCLE COMMISSION APPOINTMENTS

The board approved President Parsley's appointments of Debra Schwartz, Oklahoma City, and Amber Peckio Garrett, Tulsa, for three-year terms (expire 12/31/11).

LAW STUDENT DIVISION BYLAWS

The board approved the division bylaws presented by OLSD Chairperson Janoe.

COURT ON JUDICIARY APPOINTMENTS

The board approved President Parsley's reappointment of Bryce L. Hodgden, Woodward, to a two-year term (expires 3/1/2011) on the Appellate Division and reappointment of Brad Heckenkemper, Tulsa, to a two-year term (expires 3/1/2011) on the Trial Division.

CHILD ABUSE TRAINING AND COORDINATION COUNCIL APPOINT- MENTS

The board approved President Parsley's recommendations of Eric Eissenstat, Cynthia Kay Pichot and My My Hoang to be submitted as proposed appointments to the Child Abuse Training and Coordination Council.

OETA FESTIVAL

Communications Director Manning briefed the board about the volunteer effort OBA members participate in every year to support the state's PBS television station in its fundraising efforts by staffing phones and taking pledges. She said the goal on the evening of Feb. 5 is to raise \$5,000 in private dona-

tions from lawyers to keep the OBA in the top underwriting producers level, recognized in the monthly OETA programming guide. She asked for additional volunteers.

APPOINTMENTS

President Parsley announced that he has appointed:

Work/Life Balance Committee – Julie Rivers, Oklahoma City, chairperson; and Caroline Larsen, Oklahoma City, vice chairperson.

Clients' Security Fund – Micheal Salem, Norman, chairperson; and Brett Willis, Oklahoma City, vice chairperson.

LEADERSHIP ACADEMY SCHEDULE

President Parsley called board members' attention to the two-day January program schedule for Leadership Academy participants. He said the speakers were among the who's who in Oklahoma.

EXECUTIVE SESSION

The board voted to go into executive session, met in executive session and voted to come out of executive session.

CREATION OF TASK FORCE

The board approved the creation of an Administration of Justice Task Force as recommended by President Parsley.

NEXT MEETING

The board will meet at the Tulsa County Bar Center in Tulsa on Friday, Feb. 20, 2009.

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

University of Tulsa Immigrant Rights Project Supported by OBF

By Richard Riggs and Elizabeth McCormick

Imagine the plight of the young Afghan citizen who, out of a desire to oppose the Taliban and bring democracy to Afghanistan, collaborated with the United States and United Nations forces. The Taliban, aware of his collaboration, first wrote threatening letters to the young man and his family. When these threats did not deter his collaboration, the Taliban burned his family's home and farm to the ground.

Also, consider the case of a young woman living in Oklahoma with her husband, a lawful permanent resident, and two young children, both United States citizens, one in need of major medical treatment. Her husband was physically and sexually abusive. This woman could ordinarily seek citizenship or permanent resident status only if sponsored by her abusive husband, leaving him in a position of control and leaving her with the fear that reporting the abuse could subject her to the threat of removal from the country and separation from her children.

What hope does our legal system provide to these victims? Responding with the kind of compassion for which the United States is known, federal law provides opportunities for asylum for those under threat in their home countries, such as the young Afghan citizen mentioned above. It also provides remedies for noncitizen victims of domestic violence, such as the young woman described above, through such laws as the Violence Against Women Act and the Victims of Trafficking and Violence Protection Act.

As lawyers well know, however, the mere passage of law does not assure access to justice. That is particularly true for victims such as those described. In most cases these victims lack financial resources. Asylum applicants often flee their home countries with few possessions. Survivors of domestic violence are often cut off from financial resources by their abusers. Consequently, victims such as these must rely on the generosity of others for life's basic necessities,

with few, if any, resources to pursue legal remedies. The lack of resources is not the only problem, however. Cultural and language barriers often make it more difficult for these victims to acquire an understanding of the protection afforded by law and to access the American justice system. Victims of domestic violence are routinely subjected to their abusers' threats to report the victims to immigration authorities if the abuse is reported.

You will probably not be surprised to learn that Oklahomans have recognized the need to assure legal services are available to immigrants and have responded to that need with passion and commitment. One project born of that commitment is sponsored by the University of Tulsa College of Law. Through its Boesche Legal Clinic, and under the leadership of Professor Elizabeth McCormick, the college has sponsored an Immigrant Rights Project since 2006. The Oklahoma Bar Foundation is honored to have been able to provide financial sup-

port to this project through the foundation's 2008 grant awards. The OBF grant provided funds for travel expenses and translation and expert witness services essential to effective representation of clinic clients.

While the clinic provides critically needed services in response to tragedies of a magnitude few of us face, it also provides valuable learning experiences for participating law students. Students must not only understand the law; they must grapple with the difficult social, economic and cultural circumstances that face their clients. Students must research the conditions existing in the home countries of those seeking asylum and must work with interpreters, social service providers and mental health professionals to fully assess and respond to their clients' needs. Through routinely dealing with a wide variety of cultures, religions and nationalities, these students are given valuable opportunities to experience diversity. These benefits are in addition to the benefits associated with all legal clinic work — giving students first hand experience in effective advocacy on behalf of real life clients and an appreciation of the need for pro bono service. To date, approximately 50 TU law students have worked in the Immigrant Rights Project.

In 2008, the Tulsa College of Law project was enhanced

through the establishment of the Tulsa Immigrant Resource Network, a program that provides training and education to immigrants and advocates in the Tulsa community. These efforts afford immigrants the opportunity to learn about the legal protections available to them and the avenues available to pursue those protections. They also provide the private bar with opportunities for pro bono service, grounded with important training in immigration law.

Has this program borne fruit? Consider this — the victims described in the opening paragraphs are not hypothetical cases. Those victims are clients who have been served by TU's Immigrant Rights Project. Two Tulsa law students represented the Afghan victim of Taliban threats as he sought asylum in the United States. They represented him throughout the asylum process and traveled with him to Houston for his asylum interview. These efforts resulted in a grant of asylum to this young man. Another Tulsa law student has represented the victim of domestic violence. This student has effectively assisted that victim and her two young children as she seeks to file an immigration petition. If her petition is granted, she will be able to remain in the United States and with her children.

Oklahoma lawyers can be proud that their foundation is

assisting dedicated professors and students in providing these legal services — services that may literally save lives. The foundation can do so only through the generous contributions of Oklahoma lawyers and, if you are not already a Fellow of the Oklahoma Bar Foundation, I encourage you to become one, with the assurance that your contributions will be used to support important programs such as TU's Immigrant Rights Project. Thank you for your consideration.

HOW YOU CAN HELP

OBF faces extreme challenges in being able to maintain grant funding levels during 2009. The Federal Reserve's steep reduction of benchmark interest rates plunged to near zero during December and will seriously impact interest that makes OBF grants possible. The decline is occurring precisely as legal needs are soaring. Your participation in the Fellows program is key to being able to keep vitally needed programs available. Please complete and mail the following Fellow Enrollment Form today.

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

Elizabeth McCormick is the director of the TU Immigration Rights Project. She may be reached at elizabeth-mccormick@utulsa.edu.



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)

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

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

Many thanks for your support & generosity!

Pro Bono or Reduced Cost Legal Services Relating to Immigration

By William F. O'Brien

Immigrants and other individuals in need of immigration legal services are often unable to afford legal representation. In Oklahoma, a variety of legal services and programs relating to immigration are being provided on a pro bono or reduced-cost basis.

The Catholic Charities Immigration Assistance Program in Oklahoma City was created in 1987 to meet the immigration needs of indigent undocumented people and permanent residents in western Oklahoma. According to its director, Margie Solis, the program is affiliated with the United States Catholic Conference. The program is accredited by the Board of Immigration Appeals and is authorized to represent clients before that body as a result. Low-cost legal services are provided by the program to individuals who earn less than 180 percent of the U.S. poverty guidelines as set forth by the U.S. Department of Health and Human Services. The program serves immigrants and individuals who are in need of immigration services but who are unable to pay for the services of a private attorney. The program staff

provides services and information in both English and Spanish. The primary services provided by the program include assistance with filing applications of persons eligible to remain in the United States on a permanent basis, providing representation for eligible individuals before the immigration court and assistance with filing paperwork for eligible individuals to bring additional family members into the United States. Attorneys interested in obtaining more information about the immigration services offered may contact the program at (405) 523-3001.

In eastern Oklahoma, Catholic Charities of Tulsa has an Immigration Assistance Office that is operated by three individuals licensed to appear before the immigration court. The Tulsa office provides legal services to immigrants, including assisting them with filing petitions to adjust their status to that of permanent residents and filing applications allowing immigrants to bring family members into the country. Services are offered at a reduced cost based upon income. Attorneys interested in obtaining

more information about the services offered may call Catholic Charities of Tulsa at (918) 585-8167.

In Oklahoma City, students participating in the Oklahoma City University School of Law Immigration Clinic receive academic credit for providing legal services to immigrants and their families. The clinic is funded by a grant from the Inasmuch Foundation of Oklahoma City that was established by the late Edith Kinney Gaylord. The OCU students who participate in the clinic provide services under the supervision of clinical instructor Christina Misner-Pollard. Services are provided by the clinic without cost to the eligible clients.

In eastern Oklahoma, the Immigrants Rights Project was established in 2006 by the University of Tulsa College of Law's Boesche Legal Clinic. Through participation in the project, law students receive academic credit for providing legal services to non-citizens in immigration matters. The project offers legal services to non-citizens who are seeking political asylum in the United States as a result of the fear of persecution in their home

nations. Professor Elizabeth McCormick, director of the Immigrants Rights Project, supervises the students who are providing services through the project, which are provided free of charge.

In 2008, TU's Boesche Legal Clinic also established the Tulsa Immigrant Resource Network (TIRN) through funding provided by the George Kaiser Family Foundation. TIRN has created a network of attorneys in the Tulsa area who provide legal representation to immigrants on a pro bono basis, educate the immigrant community regarding their legal

rights and also provide representation to immigrants in the Tulsa area who are involved in removal proceedings. In furtherance of those goals, TIRN sponsors CLE programs designed to educate local attorneys, particularly those attorneys who participate in the pro bono attorney network, about legal issues relating to immigrants. TIRN also works with community organizations to provide training for staff on a variety of immigration issues, including training relating to potential relief for immigrants that have been victims of domestic abuse. Seminars to educate

detained immigrants regarding their legal rights are also provided by TIRN at detention facilities in Oklahoma. Attorneys interested in providing legal services through TIRN can request to be added to the pro bono network by calling TIRN at (918) 631-5799. Currently, TIRN serves only the Tulsa area, but Oklahoma City would benefit from establishing a program to provide similar immigration services through an attorney network in the Oklahoma City area.

William F. O'Brien is an assistant attorney general for the state of Oklahoma.

**NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT
OF KWAME TELLI MUMINA, SCBD #5499 TO MEMBERSHIP IN THE
OKLAHOMA BAR ASSOCIATION**

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Thursday, April 2, 2009**. Any person wishing to appear should contact Janis Hubbard, First Assistant General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

Supreme Court Requests Comments from OBA Members

New Rule Proposed for Rules of the District Courts

The Board of Governors of the Oklahoma Bar Association has presented to the Oklahoma Supreme Court a new rule to be added as Rule 31 to the Rules of the District Courts for the state of Oklahoma. The complete text of the proposed rule is set forth below. Prior to adoption, amendment or rejection of the proposed rule, the Oklahoma Supreme Court has requested that an opportunity for comment be allowed. Written comments shall be submitted by March 2, 2009, to John Morris Williams, Executive Director, Oklahoma Bar Association at P.O. Box 53036, Oklahoma City, OK 73152-3036 or electronic comments shall be sent to proposedrule31@okbar.org.

Rule 31. Conduct During Depositions

- A. Objections to questions during an oral deposition are limited to "Objection, leading" and "Objection, form." Objections to testimony during the deposition are limited to "Objection, nonresponsive." These objections are waived if not stated as phrased during the oral deposition. All other objections need not be made or recorded during the deposition to be later raised in court. Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing court or other sanctions.
- B. An instruction to a deponent not to answer a question shall be limited to the grounds set forth in Section 3230 E. 1. of the Discovery Code, 12 O.S. 2001 § 3230 E. 1. The attorney instructing the witness not to answer shall give a concise, nonargumentative, nonsuggestive explanation of the grounds for the instruction if requested by the party conducting the examination.
- C. Counsel and a witness shall not engage in private, off-the-record conferences during the actual taking of the deposition, except for the purpose of deciding whether to assert a privilege or to move for a protective order. Private conferences may be held, however, during agreed recesses and adjournments.





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A big
Thanks

For helping tread the way
on a successful 2008 CLE
fall season

Your 2008 fall volunteers • The Hon. Virgil Black The Hon. Annita Bridges
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Red Walters Bill Wells Marshall Wells Terry West Nathan Whatley Terri White John
Wiggins Michael Wilds Joseph Williams Rebecca Williams Amy Wilson John Wimbish
Vance Winningham Matthew Winton Connie Wolfe Brandi Woods-Littlejohn Karen Worth



OBA Web Sites

What Information Do They Provide?

NEW!

www.okbar.org/oknewsbar.htm

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

www.okbar.org

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

my.okbar.org

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

www.oba-net.org

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

www.oklahomafindalawyer.com

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

Fastcase at www.okbar.org

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

MEMBER SPOTLIGHT

Jeff Trevillion is a native of Tulsa and graduated from Booker T. Washington High School in 1994. He went on to attend Moorehouse College in Atlanta, Ga.; however, he ultimately obtained a B.B.A. from Langston University in Tulsa with honors in 1999. Jeff moved to Oklahoma City upon accepting a position as a financial auditor with the Fleming Cos., and later accepted a position with Devon Energy and became a certified public accountant.

In fall 2003, Jeff became the first African American to enter the joint juris doctor and master of business administration program at OU. While at OU, he earned several academic honors including the Ford Scholarship, the Royce Savage Scholarship and the A.L. Jeffery Municipal Scholar award for writing. Jeff also served as the financial secretary on the NBLSA board of directors. He was awarded both degrees in May 2007, becoming the first African American to obtain the J.D./M.B.A. degrees from OU simultaneously.

Jeff has been admitted to practice law in Oklahoma and the U.S. District Court Western District of Oklahoma. He formerly clerked as an intern for Oklahoma Court of Criminal Appeals Judge David B. Lewis. Jeff is currently an assistant municipal counselor with the city of Oklahoma City.

He is a member of the American Bar Association, the National Bar Association, the Oklahoma County Bar Association, the Oklahoma Society of Certified Public Accountants and Phi Alpha Delta International Legal Fraternity. Jeff is also proud to be a part of the OBA's 2008-2009 Leadership Academy. He currently resides in Oklahoma City with his wife and children.



Jeff Trevillion

SERVICE TO OUR COMMUNITY

This month, the YLD focuses on lawyer leaders serving as mentors. One youth program YLD members have partnered with is Big Brothers Big Sisters.

Brandon Long is an associate at McAfee & Taft. Brandon first became involved with Big Brothers Big Sisters in 1994. That same year, Brandon was matched with his "Little Brother," Crosby, who was then just eight years old. Over the next 10 years, Brandon and Crosby

met for three to four hours every week to watch a movie, go bowling, play video games or spend time with each other's families.

Fourteen years have passed since they first met. Crosby is now 22 and Brandon is married with four children. But they still get together when they can, and they still refer to each other as "my brother."

Brandon says the most rewarding part of being a "Big Brother" has been the friendship that he and Crosby now have, and seeing Crosby turn out to be such an outstanding, good guy.

The YLD wants to hear from those individuals or groups who are really making a difference in their community, their city or the state. Likewise, we want to hear about any ideas you may have, or projects about which you have heard, that are not yet in practice but which could be of great benefit to the people of Oklahoma. Our committee will take these ideas and projects and put them together with lawyers looking for ways to volunteer.

Please e-mail your stories and ideas to rose@mahaffeygore.com.

INFORMATION

For more information regarding these and other YLD projects, check out our Web site at www.okbar.org/members/yld/default.htm or e-mail Rick Rose at rose@mahaffeygore.com.

February

- 16 President's Day** (State Holiday)
- 17 OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 18 OBA Law-related Education Close-Up Program;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gene Bertman (405) 605-6100 x111
- OBA Solo and Small Firm Planning Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: B. Christopher Henthorn (405) 350-1297
- 19 OBA Law-related Education Close-Up Program;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Jack Brown (918) 581-8211
- OBA Government and Administrative Law Practice Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Patricia A. Podolec (405) 760-3358
- Hudson Hall Wheaton Inn Pupilage Group Five;** 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041
- OBA Mock Trial Committee Meeting;** 5:45 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Judy Spencer (405) 755-1066



Calendar

- 20 OBA Board of Governors Meeting;** 9 a.m.; Tulsa County Bar Center, Tulsa; Contact: John Morris Williams (405) 416-7000
- OBA Law Schools Committee Annual Visit;** Oklahoma City University School of Law, Oklahoma City; Contact: Judge Mike D. DeBerry (580) 286-2221
- OBA Family Law Section/Guardian Ad Litem Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Amy E. Wilson (918) 439-2424
- Administrative Justice Task Force Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bill Grimm (918) 584-1600
- 21 OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100
- OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478
- 23 Administrative Law Judges Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Gary Payne (405) 271-1269
- 24 Death Oral Argument;** Richard Norman Rojem; D-2007-660; 10 a.m.; Court of Criminal Appeals Courtroom
- OBA Bar Center Facilities Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bill Conger (405) 208-5845
- 24-27 OBA Bar Examinations;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Board of Bar Examiners (405) 416-7075
- 28 OBA Law-related Education Representative Democracy in America Teacher Training;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

March

- 3 OBA High School Mock Trial Finals;** OU Law School; Bell Courtroom; Norman, Oklahoma; Contact: Judy Spencer (405) 755-1066
- 5 OBA Diversity Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Linda L. Samuel-Jaha (405) 290-7030
- 6 OBA Law Day Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Tina Izadi (405) 521-4274
- Oklahoma Uniform Jury Instructions Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams (918) 631-2437



- Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613
- 10 **OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Reheard (918) 689-9281
- 11 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 13 **Oklahoma Bar Foundation Trustee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- OBA Family Law Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4600 or Noel Tucker (405) 348-1789
- 17 **OBA Day at the Capitol;** 11 a.m.; State Capitol; Contact: John Morris Williams (405) 416-7000
- OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 19 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Jack Brown (918) 581-8211
- 20 **OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 21 **OBA Title Examination Standards Committee Meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City, Contact: Kraettli Epperson (405) 848-9100
- OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Rick Rose (405) 236-0478

- 24 **Hudson Hall Wheaton Inn Pupilage Group Six;** 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041
- 25 **OBA Clients' Security Fund Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Micheal Charles Salem (405) 366-1234
- 26 **OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: H. Terrell Monks (405) 733-8686
- OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade McClure (580) 248-4675
- 27 **OBA Awards Committee Meeting;** 1 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Renee Hildebrant (405) 713-1423
- 31 **OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271

April

- 3 **Board of Bar Examiners Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dana Shelburne (405) 416-7021
- Oklahoma Trial Judges Association;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613
- 8 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Sharisse O'Carroll (918) 584-4192
- 9 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Jack Brown (918) 581-8211
- 10 **OBA Family Law Section Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Lynn S. Worley (918) 747-4600 or Noel Tucker (405) 348-1789
- 14 **OBA Women in Law Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Reheard (918) 689-9281
- 16 **New Admittee Swearing In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners (405) 416-7075

This master calendar of events has been prepared by the Office of the Chief Justice in cooperation with the Oklahoma Bar Association to advise the judiciary and the bar of events of special importance. The calendar is readily accessible at www.oscn.net or www.okbar.org.

McBride Appointed District Judge

Gov. Brad Henry recently appointed Judge Terry McBride as district judge for the 12th Judicial District in Craig, Mayes and Rogers counties.

Judge McBride succeeds Judge James D. Goodpaster, who retired.

"He has demonstrated the experience, integrity and temperament that are essential to be a truly outstanding jurist," Gov. Henry said.

Judge McBride graduated from OSU in 1975 and earned his law degree from the TU College of Law in 1979. In addition to having been in private practice, he has served as an assistant district attorney and a special district judge. Since 1999, he has been an associate district judge in the 12th Judicial District.

Bar Supports Public Television

The OETA raised more than \$5,600 in private donations as part of its volunteer effort to support the state's PBS-TV station during the annual OETA Festival. The donation sustained the association's top "Underwriting Producers" level that is recognized in the station's monthly programming guide.



President Jon Parsley presents a check to on-air personality and lawyer Kim Brasher during the OETA Festival Feb. 5.

Bar members turned out in force the evening of Feb. 5, taking pledges by phone during the fundraiser. This year's volunteers were Ginger Adair, Melinda Alizadeh-Fard, Louis Barlow, Mary Jane Coffman, Amy Cornforth, Melissa DeLacerda, Brian Hermanson, Mark Hixson, Greg James, Mark Koss, John Langford, Tracey Miller Langford, Sherry Oden, Jon Parsley, Jan Preslar, Charles Rouse, Linda Ruschenberg, Lori Sander, Sarah Soles, Jim Stuart, Kimberly Thomas, Linda Thomas, Margaret Travis, Mary Travis, Tim Wallace and Nathan Whatley.



OBA President Jon Parsley is sworn into office in a ceremony last month.

OBA Board Members Sworn In

Nine new members of the OBA Board of Governors were sworn in to their positions on Jan. 23. The new officers are President Jon K. Parsley, Guymon; President-Elect Allen M. Smallwood, Tulsa; Vice President Linda S. Thomas, Bartlesville; Immediate Past President J. William Conger, Oklahoma City; Martha Rupp Carter, Tulsa; Charles Chesnut, Miami; Steven Dobbs, Oklahoma City; Lou Ann Moudy, Henryetta; and Young Lawyers Division Chairperson Richard Rose, Oklahoma City.

OBA Member Reinstatements

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

Stewart Michael Moss
OBA No. 6471
7458 Parnell Ave.
Las Vegas, NV 89147

Brian Scott Sever
OBA No. 19701
4623 31st Road South
Arlington, VA 22206

OBA Member Resignations

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

Delores J. Bledsoe
OBA No. 875
410 Morris Ave.
Poteau, OK 74953

Patrick Allen Brooks
OBA No. 1164
3 Woods Pond Road
Chickasha, OK 73018-7140

David Walter Deal
OBA No. 19791
1430 Drolette Way
Benicia, OK 94510

Marylinn M. Gravis
OBA No. 11936
P.O. Box 445
Jenks, OK 74037

Edward Emerson Lane
OBA No. 16255
2813 Hiawassee Road
Suite 302
Orlando, FL 32835

Margaret Mahady Rich
OBA No. 17235
186 Lakewood Dr.
Luling, LA 70070

J. Tully McCoy
OBA No. 5925
P.O. Box 758
Purcell, OK 73080-0758

Richard C. Newman
OBA No. 6650
202 E. Washington Ave.
Athens, TN 37303

Samuel Paul Richards
OBA No. 7554
7412 Burbank St.
San Diego, CA 92111-4338

Eric L. Rosenblad
OBA No. 16945
P.O. Box 1509
Pittsburg, KS 66762

Steven Robert Saindon
OBA No. 20136
14607 San Pedro, Suite 125
San Antonio, TX
78232-4368

Brenda E. Seman
OBA No. 11700
15411 Lakeport Crossing Dr.
Cypress, TX 77429

R. Reid Stewart
OBA No. 20949
4514 Cole Ave., Suite 300
Dallas, TX 75205

L. Wayne White
OBA No. 9546
3935 E. Wisteria Circle
Sugar Land, TX
77479-2821

Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Monday, Feb. 16 in observance of President's Day.

Oklahoma Bar Journal Editorial Calendar

2009

■ March
Privacy
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Jan. 15, 2009

■ April
Law Day
Editor: Carol Manning

■ May
Oil & Gas and Energy Resources Law
Editor: Julia Rieman
rieman@enidl.com
Deadline: Jan. 15, 2009

■ August
Bankruptcy
Editor: Judge Lori Walkley
lori.walkley@oscn.net
Deadline: May 1, 2009

■ September
Bar Convention
Editor: Carol Manning

■ October
Criminal Law
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: May 1, 2009

■ November
Family Law
Editor: Leslie Taylor
lguajardo@ymail.com
Deadline: Aug. 1, 2009

■ December
Ethics & Professional Responsibility
Editor: Jim Stuart
jstuart@swbell.net
Deadline: Aug. 1, 2009

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

Kudos

Dean Couch, Lou Persons and **Gerald Hilsher** volunteered at the Regional Food Bank of Oklahoma in November. They helped by filling bags with food that will be distributed to school students as part of the Food for Kids Backpack program. Other attorneys who practice environmental law volunteered as well.

On The Move

James W. Larimore and **William E. van Egmond** have been elected directors of Crowe & Dunlevy. Mr. Larimore was an honors graduate from University of Texas School of Law where he served as a member of the *Texas Law Review*. His practice includes business and commercial transactions along with securities laws and taxation. Mr. van Egmond earned a juris doctor degree from University of Texas and was a recipient of the Lois A. Donaldson Scholarship. He practices aviation title, finance and regulatory law.

Rick Mullins and **Jim Webb** have been elected as the newest members of McAfee & Taft's board of directors by the firm's shareholders. Mr. Mullins serves as the firm's litigation practice

group leader and practices many forms of business-related litigation. Mr. Webb's practice involves business-related litigation, including products liability, mass tort, labor and employment, and other areas. Additionally, he was one of the lawyers who helped bring the NBA to Oklahoma City by working on behalf of The Professional Basketball Club LLC in their case against the City of Seattle.

McAfee & Taft announces that **Brandon L. Buchanan** and **Jennifer Beth Rader** have been named shareholders. Mr. Buchanan, a 2000 graduate of the OU College of Law, served as a legal advisor to the Oklahoma State Senate Judiciary, clerk to Supreme Court Justice Marian P. Opala, and legislative director for OU's Norman campus and Health Sciences Center, and was a litigation associate for another law firm prior to joining McAfee & Taft in 2005. Ms. Rader graduated from OU with a bachelor's degree in biology and chemistry. Before attending law school, she taught courses in physics, anatomy, chemistry and biology at Crescent High School. Ms. Rader's practice includes all areas of intellectual property where she handles complex property issues for several foreign and domestic clients.

Steven R. Welch has been named as the associate general counsel of Devon Energy Corp. Mr. Welch will supervise legal matters regarding the company's central and western exploration and product divisions. Prior to this, he was a shareholder

and director of McAfee & Taft's Oklahoma City office where he worked for more than 27 years.

Trimble Law Office PC announces that **Elise D. Hayes** has joined the firm as an associate. Ms. Hayes received her J.D. from the OU College of Law in May 2005 and holds a B.B.A. in accounting with a minor in legal studies from OU. She was formerly associated with Traynor, Long & Wynne PC of Enid, and may now be reached at 231 S. Peters, Norman, 73069; (405) 321-8272. Her practice areas include probate and civil litigation.

Hartzog Conger Cason & Neville announces that **David A. Elder** has been named a partner of the firm. Mr. Elder has been an associate with the firm since 2005. He has previously worked as an associate for a firm in Washington, D.C. He holds a juris doctorate from Harvard Law School.

Scott W. Stone announces the opening of his law firm at 729 W. Main, Suite 200, Duncan, 73533. Mr. Stone practices in areas of real estate and title law, banking, civil litigation, oil and gas, school law, estate planning and probate law.

Corbyn Hampton announces that **A. Ainslie Stanford II** has joined the firm as a partner. Mr. Stanford will focus his practice on all phases of civil litigation work. He has spent the last several years representing clients ranging from large international clients to small business owners in a wide variety

of industries, including but not limited to the energy industry and the financial services sector. Before joining the firm, he was with another Oklahoma City law firm practicing civil litigation. He earned his J.D. from OU in 2000, as well as a B.B.A. in finance from OU in 1997. He may be reached at (405) 239-7055.

Brigid F. Kennedy announces the relocation of her firm, The Kennedy Law Firm, to 909 S. Meridian Ave., Suite 700, Oklahoma City, 73108; (405) 778-8820.

Jerri K. Neighbors announces the opening of the law office of Jerri K. Neighbors PLLC at 1420 Linwood Blvd., Oklahoma City, 73106. Ms. Neighbors' practice includes family law, civil litigation, consumer law and bankruptcy. She is a 2001 graduate of OCU law, cum laude. She holds a B.S. from Texas Christian University. Prior to beginning her own practice, she was an associate with the firm of Norman & Edem PLLC. Ms. Neighbors may be reached at (405) 232-2694.

Rosenstein, Fist & Ringold announces that **Eric D. Wade** has been made a member of the firm and **Micah T. Zomer** has joined the firm as an associate attorney. Mr. Wade earned his law degree from TU in 2001, with honors. In law school, he was the articles editor of the *Tulsa Law Review* and a member of the Order of the Curule Chair. Mr. Wade has worked at Rosenstein, Fist & Ringold since 2001. Mr. Zomer received his law degree from OU in 2008. While in law school, he was symposium editor of the *American Indian Law Review* and his article, "Returning Sovereignty to the Osage Nation: A Legislative

Remedy Allowing the Osage to Determine Their Own Membership and System of Government," was published in the fall 2008 issue.

Stacy R. Morey and Debbie S.L. Self announce the opening of their new firm, Self, Morey & Associates, with offices in Oklahoma City and Norman. The firm represents clients in the areas of business, corporate, contracts, insurance, employment, regulatory compliance, civil rights, criminal expungements, bankruptcy, family law, consumer protection and estate planning. Ms. Morey earned her J.D. from OU in 1995. She is the former chief counsel for the Oklahoma State Bureau of Investigation and a former assistant district attorney. Ms. Self earned her J.D. from OU in 1995. She is the former chief counsel for Claimetrics (a subsidiary of Express Personnel), and a former assistant attorney general. They may be reached at 116 S. Walker Ave., Oklahoma City, 73102, (405) 237-3344; and 1800 N. Interstate Drive, Norman, 73072; (405) 364-3000; stacy@selfmoreylaw.com; debbie@selfmoreylaw.com.

Mulinix, Ogden, Hall, Andrews & Ludlam PLLC announces that **Martin A. Brown** and **Collin Walke** have joined the law firm. Mr. Brown practices venture capital and private equity transactions, commercial real estate transactions, complex commercial litigation, corporate and securities law, and compliance. Mr. Walke graduated magna cum laude from OCU School of Law in 2008 where he was a merit scholar, on the dean's honor roll and received the CALI Awards for Constitutional Law, ADR/Family Law, Professional Responsibility, and Religion and the Constitution. He also served on the ABA Law Stu-

dent Division's Board of Governors from 2006-2007. His practice includes civil litigation and family law.

At The Podium

Bill Wells will present "Crossfire: Navigating the New FMLA, the New ADA and Oklahoma's Workers' Compensation Act" on Feb. 19 at the South Oklahoma City Chamber of Commerce and on Feb. 24 at the Great Plains Technology Center in Lawton. Mr. Wells is also scheduled to present the program to the Central Oklahoma Manufacturers Association on March 24. He has already presented the program, a three-hour seminar that is focused on the statutory and regulatory changes to the Family and Medical Leave Act, the Americans with Disabilities Act, and recent Oklahoma Supreme Court decisions involving Oklahoma's Workers' Compensation Act, at the State Chambers of Oklahoma and the Canadian Valley and at the Pioneer Technology Centers.

Mark D. Christiansen served as a co-chair and moderator of a two-day national royalty litigation conference in Denver in December. The program was titled, "Private Oil and Gas Royalties: The Latest Trends, Developments and Challenges in Oil and Gas Royalty Litigation" and discussed a variety of issues related to oil and gas royalty litigation. Mr. Christiansen gave a presentation on recent developments in oil and gas royalty litigation in the Oklahoma courts.

David A. Trissell recently delivered remarks at the National Guard Judge Advocate conference in Orlando, Fla., which included 300 Army and Air National Guard judge advocates and paralegals from across the nation. Mr. Trissell discussed the role of the Federal Emergency Management Agency and in particular, the office of chief counsel, in disaster response and recovery operations. He was selected as FEMA chief counsel in 2004.

Compiled by Rosie Sontheimer

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

Melissa Brown
Communications Dept.
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152
(405) 416-7017
Fax: (405) 416-7089 or
E-mail: barbriefs@okbar.org

Articles for the March 14 issue must be received by Feb. 23.

IN MEMORIAM

Joseph E. Burns of Ponca City died Jan. 18. He was born in Ponca City on Aug. 19, 1925. **In 1943 he joined the Army and served in Foggia, Italy, until the end of World War II.** After the war, he attended the University of Missouri and OSU and then attended OU law school where he graduated in 1948. He began practicing law at his father's firm in Ponca City and then joined with Chester Armstrong to found the law firm of Baumert, Cummings, Hiatt and Young. He served as president of the Board of Directors of the First National Bank and Commander of the American Legion Post in Ponca City and was a member of the Board of Directors of Kay County Federal Bank, the Veterans of Foreign Wars and the Rotary Club. Additionally, he served a term as a Ponca City commissioner and was a reading volunteer at Garfield School.

Bobby Gene Carpenter of Oklahoma City died on Sept. 23. He was born April 15, 1944, in Hartner, Kan. He graduated with a juris doctorate from OCU School of Law and practiced law in Oklahoma for more than 36 years.

Kenneth Craig of Wayne died Dec. 23. He was born in Pauls Valley and was raised in Wayne. **After high school, he enlisted in the U.S. Navy and served for three years.** After returning home, he attended East Central University where he received his B.A. and then attended OCU School of Law where he graduated and received his juris doctorate. He served as court clerk for the Court of Criminal Appeals. After 10 years of working as a court clerk, he opened up his own law firm in Moore and practiced law for nearly 30 years. Additionally, he served as the Moore city attorney and participated in various organizations over the years.

Phyllis Hurley Frey of Tulsa died on Nov. 3. She was born on Aug. 10, 1940, in McAndrews, Ky. She graduated from the TU College of Law in 1981 and went to work for the United States Bankruptcy Court for the Northern District of Oklahoma as the estate administrator. She stopped practicing law to take the academic route and joined her husband in writing textbooks for paralegals. Memorial contributions may be made to

DVIS, Neighbor for Neighbor or to a local library.

Robert C. Taylor of rural Crawford County, Ark., died May 9. He was born in July 31, 1930, in Tulsa. He graduated from TU in 1952 and received his juris doctorate from TU in 1956. He became trust officer and assistant vice president of the First National Bank of Tulsa and proceeded to graduate from Southern Methodist University Banking School in 1964. After moving to Fort Smith, Ark., he became vice president and trust officer of City National Bank. He provided legal work for numerous community organizations by serving as board member, member or volunteer for the Fort Smith Museum of History, Project Compassion, March of Dimes and many other organizations. He was an avid and accomplished film photographer who captured the lives of his friends and family members in nearly 80 scrapbooks and thousands of hours of home movies. After retiring from law after more than 38 years, he spent much of his time exploring this hobby.

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NORTH OKC LAW FIRM has space available. Office includes executive desk, receptionist, internet, copier, fax, and kitchen. Recently renovated office with wood flooring in reception area and new carpet in office. \$400 per month. Call McBride & Associates, P.C. (405) 842-7626.

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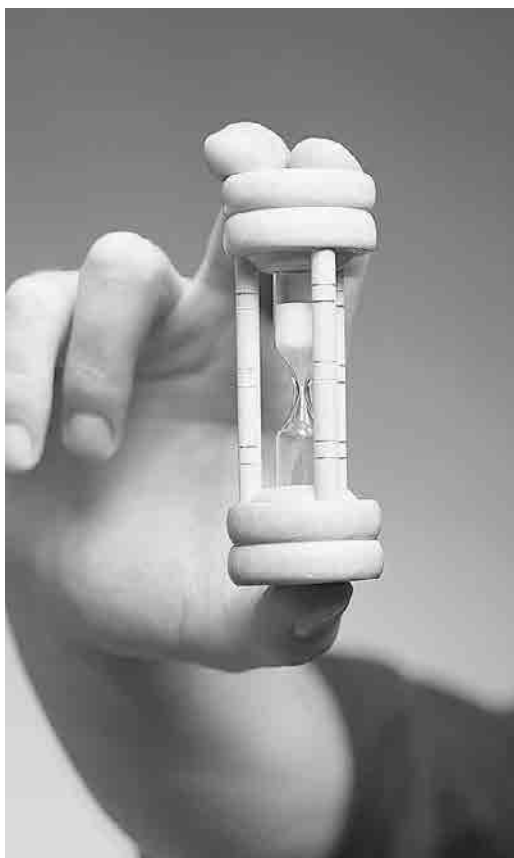
Déjà Vu

By Judge David A. Barnett

In the many years I have served as a district court judge in Oklahoma, I have made many adjustments, but one of the most difficult was the adjustment to being the only judge in the small county I had moved away from upon graduation from high school. Up to the time of finishing high school, my whole life had been spent in that community. The difficult part was that I had lived in eight or nine other communities in four states in the 24 years since I had graduated from high school. None of the other communities was less than 100 miles from the county seat to which I returned as judge. My visits to the community had been primarily on holidays, and I had not kept in close contact with many people in the community except my immediate family and a small number of close friends.

I soon learned that I had missed out on much of what had happened in the 24 years I had been gone, both in the life of the community and the lives of the folks I had known as I grew up. The result is that I felt a little like the legendary Rip Van Winkle, who napped for 25 years.

On a day not long after I had assumed my duties, I checked my calendar and found a divorce case styled



as *D— v. D—*. When I looked at him, I almost felt as though I was looking at a kid I had graduated from high school with 24 years ago, who was also named Ricky D—. After my initial puzzlement, I asked the kid who his dad was. He advised me that it was none other than my high school classmate, Ricky D—.

On another occasion, I heard the probate case of Maggie W—, who during her life had been a friend of my mother and a member of her home demonstration club. Maggie's

sister Emma, and her mother Mrs. M— had also been members of Mom's club. I had been fairly well acquainted with all three through my mother's association with them. I remembered that Mrs. M— was a small lady who suffered from arthritis, and bore visible signs of it. When the case was called, the executrix of Maggie's estate, a small lady suffering from arthritis who looked exactly like Mrs. M—, was brought into my chambers in a wheelchair. I knew that Mrs. M— had died many years before, but throughout the hearing, I had to keep reminding myself that the lady was not Mrs. M—, but her daughter Emma.

I recall numerous other incidents of seeing the offspring of someone I had grown up with, and having to keep reminding myself that I was seeing the next generation, and sometimes even a third generation. Now that I am well into my 60s, I'm just happy to see someone who looks familiar, for even when I look in the mirror each morning, I see my dad instead of the young man I thought I was!

Judge Barnett is associate district judge in Tillman County.



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