

# PRIVACY

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#### OBA/CLE & THE OBA WOMEN IN LAW COMMITTEE PRESENT

#### THE LAW PRACTICE STIMULUS PACKAGE: MANAGE YOUR TIME AND GET NEW CLIENTS APRIL 17, 2009 - REED CENTER, 5800 WILL ROGERS ROAD MIDWEST CITY

#### FEATURED SPEAKER : JUDI CRAIG, PH. D., MCC

Dr. Craig is a certified senior practice advisor with Atticus, Inc. and a master certified coach. She has coached attorneys since 1996 and has a great deal of coaching experience in increasing income, decreasing stress and time in the office, solving staffing headaches, and taking control of practices. Prior to being recruited by Atticus, Inc, Dr. Craig was president of The Practice Advisor, LLC, where she coached attorneys on all aspects of law practice management. Dr. Craig is the author of four nationally published books and is a former syndicated columnist. She has been interviewed on more than 100 radio stations and has been a guest on Larry King Live, the Today Show, NBC News, and the CBS News.

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ALISON CAVE OBA WOMEN IN LAW COMMITTEE VICE CHAIR OKLAHOMA ATTORNEYS MUTUAL INSURANCE COMPANY, OKC

8:30 a.m.	Registration and Continental Breakfast	Breakou	t B: Make Rain, Not Mist - How Good Lawyers Can Become Great Marketers
9:00	How to Get Everything Done and Still Keep Your Sanity (includes two 10 minute breaks)	. A	<ul> <li>Profile, score and improve your rainmaking skills in 2009. Find out</li> </ul>
	<ul> <li>Overview of a business model for a law practice/firm</li> <li>Goal setting</li> <li>Getting rid of all those things you're "tolerating"</li> <li>Quality of clients • Managing interruptions</li> <li>Batching similar tasks • Weekly planning</li> <li>The power hour(s) • Case status management meeting</li> <li>Creating a time template • Useful scripts for staff</li> <li>Delegation that works • And more!</li> </ul>		<ul> <li>how you can compare to others! Get a jump on the competition!</li> <li>Learn the five most important elements of great referral marketing that gets you clients now.</li> <li>Make marketing a habit and accelerate your marketing efforts</li> <li>Learn the secrets of how to stay truly focused on bringing in new clients and how to target the best clients and</li> </ul>
12:00 p.m Networking lunch (included in registration)			referral sources. • Discover how to keep marketing
1:15 1:30	Break Breakout A: Public Sector Smorgasbord • Protocol and decorum • Administrative law arena • Is there life after government employment?		simple, very effective and consistent with your personal values. And learn practical steps to grow your practice consistently over time.
		3:00	Break
6 HOURS	Representing the unpopular client     MCLE_Ø HOURS ETHICS	3:10	What's on Your Mind? Roundtable Discussion
	L STIMULUS TUITION: \$100	4:00	Book Signing & Reception
REGISTI	ER AT WWW.OKBAR.ORG/CLE	5:00	Adjourn

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### THEME: PRIVACY

Editor: Melissa DeLacerda





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From the President

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By Jim Calloway

### SOS! We Need All Hands on Deck If Not Now, Then When? If Not Us, Then Who?

By Jon K. Parsley

I am calling upon all OBA members to attend the OBA Day at the Capitol on March 17, 2009. The activities start at 11 a.m. at the Oklahoma Bar Center. This year, more than ever before, your participation is critical.

Our association is under attack. I want to repeat that our profession is under attack. The judicial branch is under attack. The rights of the citizens of the state of Oklahoma are under attack. Several of the bills moving through the Legislature will have a devastating effect on the Oklahoma Bar Association, the practice of law, the administration of justice and the rights of the citizens of Oklahoma if they become law.

Senate Bill 997 seeks to make the payment of OBA dues voluntary, which would have the effect of basically abolishing our association as we know it. Several bills seek to have Supreme Court rules reviewed by the Legislature for approval. Several bills seek to change the Judicial Nominating Commission process. There are more than 50 bills that we are monitoring because of the possible adverse impact they would have. These bills are in addition to the tort reform bills and the bills seeking to put a limitation on the amount of attorney

fees which can be charged.



Jon Z. Parsley

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

There is a tendency to think that others will handle it. This is no time for complacency. We need to get away from that way of thinking. We are all attorneys. We are all members of the Oklahoma Bar Association. We are all in this together. I need you to pitch in and help. These issues are not about whether you are a defense attorney or a plaintiff's attorney — these measures affect us all. We need to use the day at the Capitol to let our Legislature know that we are concerned about these issues. We need to make sure they are making decisions with the true facts — not some half truths or unsubstantiated statements they may have heard. It is critical for us to weigh in on these issues, because our very survival as an association is at stake.

I must admit that my goals as president did not initially include taking on a battle to save the association. When I first faced these issues, I wondered if I OBA Day at the Capitol March 17



was up to the task and if now was a good time for our association to involve itself in these issues. I was reminded of my responsibility by one of our members who asked, "If not you, then who? If not now, then when?" Now I must say to each of you as we strive to protect that which is our sworn duty to defend, "If not *us*, then who" and "If not *now*, then when?"

Thanks for everything you do for our association. I look forward to seeing everyone on March 17!

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### **EVENTS CALENDAR**

#### MARCH 2009

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3

- 17 **OBA Day at the Capitol;** 11 a.m.; State Capitol; Contact: John Morris Williams (405) 416-7000
- 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
  - **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

**OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

Hudson Hall Wheaton Inn Pupilage Group Six; 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041

- **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
- 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

**OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686

- 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
  - **OBA Bar Center Facility Committee Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: J. William Conger (405) 208-5845

**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 2009

**OBA Board of Bar Examiners Committee Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Board of Bar Examiners (405) 416-7075

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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The Oklahoma Bar Journal

# PRIVACY

# In the Wake of Contagious Diseases, Looking for the Balance between Personal Privacy and Public Health

By Martha Rupp Carter

**privacy** . . . 2. the state of being free from intrusion or disturbance in one's private life or affairs: *the right to privacy*<sup>1</sup>

Mericans revel in the right of privacy afforded but not mentioned in the U.S. Constitution. Individuals' right of privacy can limit governmental intrusion, even intrusion for a public purpose. Sometimes the balance goes the other way, with privacy yielding to public good. This balance has changed over time and continues to evolve. How intact is personal privacy in terms of bodily integrity and decisional privacy when an individual suffers an infectious disease that endangers public health? The answer is that it all depends.

#### PART 1: LONG AGO

The balance in 1907 for Mary Mallon, "Typhoid Mary," was not much to her liking. "Typhoid Mary" became then and continues today as a metaphor for contamination, disease and death. Mary Mallon made her living as a cook for elite New York families. Unknown to these families and to Mary, she carried invisible microbes for *salmonella typhi bacilli*, the source of one of the 19th century's worst killers, typhoid fever. Between 1900 and 1907 when investigation led to her, Mary Mallon infected some 22 people who suffered serious typhoid symptoms including a death through food she prepared.<sup>2</sup>

Medical science developments at the end of the 19th century were significant. They included the startling discovery that typhoid could be transmitted by healthy people. It was Mary Mallon's fate to be the first healthy carrier of typhoid to be discovered and charted in North America. She was the first of hundreds of New Yorkers discovered to carry typhoid bacilli in their gall bladders and to transmit through urine and feces via unwashed hands.

It took health authorities three visits and police help to apprehend and transport Mary. They had to overcome her threatening carving fork and sharp tongue, her marked lack of both cooperation and belief in their assertions. Once stool tests established the typhoid bacilli in her system, it was decided not only could Mary Mallon not cook for a living, she could not live among others. The basis for imposing isolation was her refusal to accept her carrier state, and, her assertions she was healthy and had not infected others. In 1907 when aged 37, Mary was placed in a small cabin on grounds of an isolation hospital on an island in the East River. There she lived alone for two years against her will, was subjected to repeated laboratory tests and denied contact with relatives and friends. Mary Mallon was provided no court hearing or ruling of the legality of any of these intrusions on her privacy.<sup>3</sup>

She remained a third year in isolation after her writ of habeas corpus was heard and denied. Courts of the early 20th century were less attuned to and vigilant of individual rights and due process, tending to uphold public health statutes so long as the state did not act arbitrarily or unreasonably or go beyond that reasonably required for public safety.<sup>4</sup>

The New York Health Department's statutory authority allowed it to use all "reasonable means for ascertaining the existence and cause of disease or peril to life or health, and for averting the same . . ." and further gave it authority over "any person with any contagious, pestilential or infectious disease . . . . "5 These provisions were enacted before knowledge of healthy carriers. The health authority argued the new science of bacteriology established Mary to be "sick" because she harbored pathogenic bacteria and could spread disease; they presented evidence of her occupation as a cook and the risks of her carrier status attendant to that occupation within the broader argument that isolation was appropriate for carriers. Her attorney argued she was not "sick" as she had no physical symptoms; the department failed to follow due process in incarcerating Mary; and, the department could not legally continue to isolate her indefinitely.<sup>6</sup> Public health experts supporting the case that isolation for carriers was unnecessary were not called. The judge, believing Mary a public menace, upheld health officials, dismissed the writ and remanded Mary Mallon to the custody of New York City's Board of Health. Liberty considerations of healthy typhoid fever carriers remained unaddressed as no limitations were placed on health's authority to protect the public.7

Over the time of Mary Mallon's story, it became known that roughly 3 percent of all typhoid cases would yield healthy carriers, like Mary. It also became clear that carriers were too numerous to allow isolation of all. The public's health thus required development and implementation of health policy, such as prohibiting known carriers from handling food, rather than isolation of individuals.

In 1910, Mary got a second chance. The new state health commissioner knew her isolation was not medically indicated; hundreds of carriers were free in the city; and, Mary was dangerous only when she cooked food others ate. For her release, Mary Mallon signed an affidavit that she would not cook. Following several years of oversight by health authorities after her release, contact with Mary Mallon ended.

In 1915, typhoid fever erupted in a maternity hospital, striking 25 doctors, nurses, hospital staff, including two unfortunates who died. Investigation revealed that the new cook, "Mrs. Brown," employed shortly before the outbreak, was one and the same as Typhoid Mary. After Mary Mallon was located, trapped and returned to isolation, she lived alone for 23 years until her death. To the end, Mary Mallon vehemently denied she was a carrier or had transmitted typhoid to others.<sup>8</sup>

#### PART 2: 100 YEARS LATER

Andrew Speaker, globetrotting attorney/honeymooner dubbed "TB Guy" in the 2007 tuberculosis scare, emerged as the potential "Typhoid Mary" of the second millennium. His actions centered attention on the sufficiency of laws on public health powers and the appropriate balance between individual liberty and privacy rights with public health powers. TB Guy, modern-day metaphor for contagious disease risk, suffered tuberculosis instead of typhoid. TB Guy lost a lot less liberty than Typhoid Mary due to living a hundred years later and perhaps due to being an attorney instead of a cook.

Tuberculosis is not as easy to catch as a cold, but when a TB infected person spews out TB bacilli in a cough, sneeze or laugh, only a few bacilli need to be inhaled to cause infection. The risk of infection depends on how infectious the TB infected person is, the duration of the exposure and ventilation.<sup>9</sup> One-third of all people in the world are infected with dormant TB bacteria; although not sick with TB, they could become sick if their immune systems are weakened by age, illness or medications. Only people with active TB need treatment.<sup>10</sup>

Increase in TB cases worldwide since 1980s funding cuts and the AIDS pandemic led to an increase in incomplete or inadequate antibiotic TB treatments; this has produced drug resistant TB strains.<sup>11</sup> Multidrug-Resistant TB (MDR-TB) emerged during this time; MDR-TB includes TB strains that are resistant to at least two of the most potent anti-TB drugs. MDR-TB often appears when a patient takes an incomplete course of anti-TB medications or is acquired during exposure to air shared with persons harboring MDR-TB. Extensively drug-resistant tuberculosis (XDR-TB) is even more problematic because it is resistant to both the more potent and some lesser potent anti-TB drugs. The World Health Organization issued a global alert about XDR-TB in 2006. As of 2007, 48 cases of XDR-TB have been reported in the U.S. since 1993 with 12 fatalities.<sup>12</sup> MDR-TB and XDR-TB are curable if doctors can figure out which antibiotics are effective in time. According to one physician, "I'd sooner have a diagnosis of cancer than XDR-TB." The cure rate is under 30 percent and fewer than half survive more than five vears.<sup>13</sup> The bottom line is that XDR-TB has the potential to "transform a once treatable infection into an infectious disease as deadly, if not more so, than TB at the beginning of the 20th century."14

At a time when the Centers for Disease Control and Prevention (CDC) believed Andrew Speaker suffered from XDR-TB, Speaker flew from Atlanta, Ga., to Paris to Athens to the Aegean holiday island of Santorini for his wedding, to Rome for his honeymoon, from Rome to Prague, Czech Republic, to Montreal, Canada, and drove across the U.S.-Canadian border. Over 1,000 people were on these flights. The U.S. Border Patrol agent who failed to detain Speaker at the border disregarded a warning to hold the traveler, wear a protective mask when dealing with him and to call health authorities because Speaker "did not look sick"<sup>15</sup> Lipo

ties because Speaker "did not look sick."<sup>15</sup> Upon Speaker's return to the U.S., the CDC placed him under involuntary isolation; he was the first person subjected to a CDC isolation order since 1963 when a suspected smallpox carrier was quarantined.<sup>16</sup>

TB Guy led health authorities on a merry chase around the world as well as in the world of public opinion, creating concerns of credibility, competence and accountability across the spectrum. The barrage of publicity began after Speaker left for Europe when federal officials held a news conference to urge his fellow passengers to get tested for tuberculosis because they had been exposed to the most dangerous form of the disease.<sup>17</sup> Ensuing publicity blamed Speaker for potentially exposing others to a dangerous disease; he became an international pariah.<sup>18</sup> In the public relations war, TB Guy portrayed himself and his family as "victims of bumbling and disingenuous bureaucrats."<sup>19</sup> The interplay between actions and limits of authority of the local health department and the CDC, with a man committed to his course regardless of cost to others, raised questions about the adequacy of public health powers and laws in the United States.<sup>20</sup>

Before Speaker left Georgia he knew he had MDR-TB; he knew he needed to go to a Denver facility for specialized treatment requiring a few weeks to arrange; he had said he was going out of the country; he was advised and/or strongly recommended not to travel; he had been told that he was not contagious or a threat and was not required to wear a mask. A spokesperson for the Fulton County Health Department countered that Speaker was advised he was not

TB Guy led health authorities on a merry chase around the world as well as in the world of public opinion, creating concerns of credibility, competence and accountability across the spectrum.

highly contagious but was infectious and should not travel. Speaker advanced his travel by 48 hours flying from Atlanta, Ga., to Paris on May 12, 2007, while from May 11 to 13, county public officials tried to deliver written notice to Speaker that travel would be against medical advice and risked harming others' health. On May 22, the CDC confirmed test results showed that Speaker had XDR-TB.<sup>21</sup> When authorities were able to reach Speaker in Italy, they warned him to no avail not to fly aboard commercial aircraft and urged him to turn himself in to Italian health authorities.22 Speaker responded to the news by booking a flight to Canada to avoid a "no fly" list. Unwilling or unable to fund the cost for private flight and fearing death from TB if held in Rome without the necessary and specialized

treatment available in Denver, he flew commercially anyway.<sup>23</sup>

The CDC director stated the government was legally constrained before its isolation order imposed after Speaker's return to the country as federal law allows isolation or quarantine only for individuals coming in from a foreign country or territory. Reportedly, Georgia public health laws allowed Speaker to be confined for two weeks with travel allowed only for medical appointments; a Georgia court confinement order can isolate an infected patient only after he ignores medical advice unless the governor declares a public health emergency.<sup>24</sup> The director of the Fulton County Health and Wellness Department testified before a Senate committee that the county did not have authority to order Speaker not to travel; when his office sought legal advice from the county attorney on whether it could seek an order prohibiting Speaker



from traveling, the response was that a court would not block Speaker's travel unless he had violated specific requests from health officials, which had not happened.<sup>25</sup>

In the aftermath of TB Guy's adventures, the country's top tuberculosis experts called for an increase in federal research dollars to develop new TB drugs and enhance domestic tuberculosis programs. They also sought expanded authority to restrict travel by infected persons and explicitness in counseling patients on the risks of infecting others. One said, "I think we've been too mealy-mouthed in our communication of risk to patients."<sup>26</sup> Aggressive action to protect the public is difficult to timely call as laboratory

testing is not precise. Discordant TB test findings from laboratories occur and must be resolved, and health officials must often act before repeat tests are available.

This concern was somewhat borne out with Speaker, who was eventually determined to have MDR-TB and not XDR-TB. At the time Speaker was released from the National Jewish Medical and Research Center in Denver after two months of care, including surgery to remove a portion of infected right lung in July 2007, he was deemed no longer contagious and there was no further detectible evidence of infection. His ongoing antibiotic care will necessitate his checking in with local health officials five days a week over a period of two years so that his treatment can be directly observed.<sup>27</sup>

#### PART 3: GENERAL LAW

State authority to compel isolation and quaran-

tine derives from the police power through the 10th Amendment to the U.S. Constitution.<sup>28</sup>

The seminal case on public health powers, Jacobson v. Massachusetts,<sup>29</sup> was decided in 1905 because Henning Jacobson refused to submit to vaccination against smallpox. The Massachusetts Legislature empowered municipal boards of health to require vaccination if necessary for public health or safety. Accordingly, the Cambridge Board of Health adopted a regulation that smallpox was prevalent and increasing in the city, ordering all inhabitants to be vaccinated. Jacobson refused, was convicted and sentenced to pay a \$5 fine. Jacobson argued that a com-

pulsory vaccination law is unreasonable, arbitrary and oppressive, "hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best." The Supreme Court disagreed, opining:

But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state'...<sup>30</sup>

The court particularly noted its holding was not that the statute established an absolute rule requiring vaccination if facts established death would result or the adult's health seriously impacted.<sup>31</sup> *Jacobson* is noteworthy not only for its support of police power regulation but also for its recognition that separation of powers and federalism necessitated deference to the state legislation.

*Jacobson* establishes the "floor of constitutional protection," and the proposition that public health powers are constitutionally permissible only if in conformity with four standards: public health necessity, reasonable means, proportionality and harm avoidance.32 The standard of public health necessity would require that a subject of compulsory intervention pose a threat to the community. Reasonable means require the methods of intervention be designed to prevent or ameliorate the threat. Proportionality indicates that the human burden imposed is not wholly disproportionate to the expected benefit. Harm avoidance refers to consideration that health measures not pose a health risk to the subject.

Due process and privacy implications as to bodily integrity and decision making originate in the Fifth and 14th Amendments to the U.S. Constitution prohibiting government from depriving individuals of "life, liberty, or property, without due process of law." The due process clause imposes two obligations, substantive due process that requires government to provide sound reasons to invade personal freedoms, and, procedural due process requiring a fair process for individuals subject to state regulation or coercion.<sup>33</sup>

The state's interests of preserving health, harm prevention and preserving effective therapies must be balanced with the individual interests of bodily integrity, personal autonomy and liberty.<sup>34</sup>

# PART 4: OKLAHOMA LAW ON TUBERCULOSIS

Oklahoma laws related to TB were amended in 2008 to address concerns in handling TB infected persons; old language indicated public health action was indicated for persons who were in a "contagious" state rather than those who had active tuberculosis disease. The problem was that there is no scientific bright line for when a person is actually in fact at one point in time contagious and at the next not contagious. The statutes were thus problematic in sufficiently protecting public health.

The amended statutes define "tuberculosis disease" and distinguish between "active tuberculosis disease" requiring public health intervention and "tuberculosis infection."<sup>35</sup> Persons diagnosed with tuberculosis (a disease caused by Mycobacterium tuberculosis complex) are considered to have "active tuberculosis disease" until they have completed a full course of antituberculosis treatment as prescribed or approved by the State Commissioner of Health.<sup>36</sup> "Tuberculosis treatment" is defined to mean tuberculosis therapy with an American Thoracic Society/ Centers for Disease Control and Prevention recommended regimen or other regimen prescribed or approved by the commissioner.

Standards of tuberculosis treatment are provided.<sup>38</sup>

If an Oklahoma local health official has reasonable grounds to believe a person has active tuberculosis and that person will not voluntarily seek a medical examination, the health official is authorized and required to order the person to undergo an examination by a physician approved for such examination; the examination is to include a chest x-ray, examinations of sputum and other procedures as approved.<sup>39</sup> It is the suspected person's duty to submit to the examination at the time and placed ordered by the health official. If the examination determines the person has active or suspected active tuberculosis disease, the person is required to comply with the orders of the State Commissioner of Health.40

Health officials must instruct persons with active disease on the precautions necessary to protect members of the person's household and the community from becoming infected and to determine if those instructions are carried out through periodic investigation. A duty is imposed on persons with active disease: "It shall be the duty of such person to live in such a manner as not to expose members of the person's family or household, or any other person with whom the person may be associated, to danger of infection."<sup>41</sup>

However, rights of persons with active disease are recognized. Oklahoma health officials are not empowered or authorized "to restrict in any manner the individual's right to select the mode of treatment of his choice nor to require any physical examination of a patient who in good faith relies upon spiritual means or prayer for healing."<sup>42</sup>

Upon reasonable grounds to believe a person has active tuberculosis disease, the State Commissioner of Health may require isolation, hospitalization or other confinement for treatment of the person.43 The means of isolation or quarantine shall generally be the least restrictive means that effectively protects unexposed and susceptible individuals.<sup>44</sup> If a person is convicted for violating provisions relating to submitting to the medical examination, complying with the orders of the State Commissioner of Health, and acting so as not to unnecessarily expose others to the danger of infection, then the person "shall be committed by the judge of the district court for isolation or confinement and treatment in such institution or at such location or facility as designated by the State Commissioner of Health."45

Persons who contest an order for isolation may request an individual proceeding or hearing in accordance with administrative rules.<sup>46</sup> Violating lawful orders of Oklahoma health officials is criminalized conduct, as is the conduct of an infected person to willfully expose others in any public place or thoroughfare.<sup>47</sup>

#### **PART 5: CONCLUSION**

Could TB Guy have happened in Oklahoma instead of Georgia? Yes, he could and likely in any other state as well. Individuals take seriously and exercise vigorously their rights to privacy, bodily integrity and decision making. Some do so irresponsibly without regard to the "social contract" connecting individuals within local, state, national and worldwide communities. Public health operates as it is both empowered and limited within the constitutional and legal framework. Public health powers in the present balance are not designed, and public health officials not equipped, to be as quick at the draw as individuals who are not initially personally accountable; see themselves as above and beyond valid health recommendations, cautions and directives; and are willing to risk the health of others to do as they please. Some might not want to live with a government that was designed to do so. Accordingly, a TB Guy places all at risk. It may be less likely because of the Do Not Board (DNB) list developed by federal agencies, a list managed by the CDC and the U. S. Department of Homeland Security. The public health DNB list enables public health officials to prevent travel on commercial aircraft by persons who pose a risk for infection to other travelers. This public health tool is intended to supplement local public health measures insufficient to keep contagious persons from boarding commercial aircraft if conditions are met.48

Something for everyone to remember as privacy rights are exercised at the expense of public health is that TB Guy's generation is far more litigious than Typhoid Mary's. Lawsuits were filed against TB Guy by some fellow passengers from the friendly skies.<sup>49</sup> And also to remember is that police powers exercised for public health are likely to wax stronger as threats to public health increase. Should the deadly epidemics of America's past return in newer, more virulent forms, national health will be at stake. TB Guy amply illustrates that voluntary compliance is absolutely critical to public health.

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2. Typhoid Mary, Judith Walzer Leavitt, Beacon Press, 1996.

3. Typhoid Mary, Judith Walzer Leavitt, Beacon Press, 1996.

4. Larry Gostin, "Traditional Public Health Strategies," in *AIDS and the Law: A Guide for the Public*, New Haven: Yale University Press, 1987, pp. 47-65.

5. *Typhoid Mary*, chap. 3, p. 71, citing the Greater New York Charter, Sections 1169, 1170 (emphasis supplied).

6. Typhoid Mary, chap. 3, p. 81.

7. Typhoid Mary, chap. 3, pp. 90, 91.

8. Typhoid Mary, chap. 6.

9. "Drug-resistant TB Is Best Battled at the Source," USA Today, www.usatoday.com/news/health/2007-06-10-tb-cover\_N.htm.

10. "Drug-resistant TB Is Best Battled at the Source," USA Today, www.usatoday.com/news/health/2007-06-10-tb-cover\_N.htm.

11. "Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis," Howard Markel, Lawrence Gostin, David Filder, Journal of the American Medical Association, Vol. 298, No.1, July 4, 2007.

12. "Experts Call for More Research and More Vigilance Against TB," June 15, 2007, New York Times, www.nytimes.com/2007/06/15/health/ 15tb.html.

13. "Drug-resistant TB Is Best Battled at the Source," USA Today, www.usatoday.com/news/health/2007-06-10-tb-cover\_N.htm.

14. "Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis," Howard Markel, Lawrence Gostin, David Filder, Journal of the American Medical Association, Vol. 298, No.1, July 4, 2007.

15. http://en.wikipedia.org/wiki/2007\_tuberculosis\_scare.

16. "Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis," Howard Markel, Lawrence Gostin, David Filder, Journal of the American Medical Association, Vol. 298, No.1, July 4, 2007.

17. The CDC circulated information via the Health Alert Network to alert health care providers of the potential follow up care for passengers on the flights taken by Andrew Speaker. According to CDC Udate 00262 - Corrected: Investigation of U.S. Traveler with Extensively Drug Resistant Tuberculosis (XDR TB) dated May 29, 2007, CDCHAN-00262-07-05-29-UPD-N, the CDC advised: "As there has never been an airline contact investigation for XDR TB, it is not known if the current recommendations are adequate to determine the possible range and risk of transmission of infection. Because of the serious consequences of XDR TB and anticipated public concern, in addition to the contacts listed above, all U.S. residents and citizens on these flights should be notified and encouraged to seek TB testing and evaluation." The advisory indicated that persons seated in the same row as the "index patient" and in the two rows ahead and two rows behind and the cabin crew members working in the same cabin "should be" evaluated for TB infection to include initial evaluation and testing with follow up eight to ten weeks later for reevaluation.

18. "Experts Mostly Back Way U.S. Reacted in TB Case," July 5, 2007, The New York Times, www.nytimes.com/2007/07/05/us/05tb. html.

19. "A TB Patient Turns to His Inner Lawyer," June 8, 2007, The New York Times, www.nytimes.com/2007/06/08/us/08speaker. html.

20. "Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis," Howard Markel, Lawrence Gostin, David Filder, Journal of the American Medical Association, Vol. 298, No.1, July 4, 2007.

21. "Extensively Drug-Resistant Tuberculosis: An Isolation Order, Public Health Powers, and a Global Crisis," Howard Markel, Lawrence Gostin, David Filder, Journal of the American Medical Association, Vol. 298, No.1, July 4, 2007.

22. http://en.wikipedia.org/wiki/2007\_tuberculosis\_scare; "Little Cooperation from Family Early in TB Case, Messages Show," June 13, 2007, The New York Times, www.nytimes.com/2007/06/13/us/13tb. html; "A TB Patient Turns to His Inner Lawyer," June 8, 2007, The New York Times, www.nytimes.com/2007/06/08/us/o8speaker.html; CDC Update 00262 - Corrected: Investigation of U.S. Traveler with Extensively Drug Resistant Tuberculosis (XDR TB) dated May 29, 2007, CDCHAN-00262-07-05-29-UPD-N indicates that drug susceptible TB and XDR TB spread the same way. When a person with TB disease of the lungs coughs, sneezes, speaks or sings, the TB bacilli become aerosolized. The bacilli can float in the air for several hours depending on the environment. Persons who breathe air containing TB bacilli can become infected. The risk of acquiring TB depends on factors including the extent of disease in the source patient, duration of exposure, and ventilation. Persons who become infected usually have been exposed for several hours or days in poorly ventilated or crowded environments. An important way to prevent transmission is to limit an infectious person's contact with others.

23. "Exclusive: TB Patient Asks Forgiveness But Defends Travel," ABC News, http://abcnews.go.com/GMA/OnCall/Story?id=3231184 &page=2; "Traveling Tuberculosis Patient Hits Back at Critics," June 10, 2007, International Herald Tribune Americas, www.iht.com/articles/2007/06/10/frontpage/health.php?page=2.

 http://en.wikipedia.org/wiki/2007\_tuberculosis\_scare.
 "Lawmakers Rip CDC 'Meltdown' in TB Case," June 6, 2007, The Atlanta Journal-Constitution, www.ajc.com/helath/content/ health/stories/2007/06/06/0607nattb.html.

26. "Experts Call for More Research and More Vigilance," June 15, 2007, The New York Times, http://www.nytimes.com/2007/06/15/ health/15tb.html; "Experts Mostly Back Way U.S. Reacted in TB Case," July 5, 2007, The New York Times, www.nytimes.com/2007/07/05/ us/05tb.html.

27. "Traveler with TB Is Released After Treatment in Denver," July 27, 2007, The New York Times, www.nytimes.com/2007/07/27/ health/27tb.html?\_r=1.

28. Gibbons v. Ogden, 22 U.S. 1 (1824).

29. Jacobson v. Massachusetts, 197 U.S. 11 (1905).

30. Jacobson at 26 (citations omitted).

31. Jacobson at 39 (citations omitted).

32. Public Health Law: Power, Duty, Restraint, Lawrence O. Gostin, University of California Press, Ltd. (2000), pp. 68-69.

33. Public Health Law: Power, Duty, Restraint, Lawrence O. Gostin, University of California Press, Ltd. (2000), p. 72, chap.3, ft. 60.

34. Public Health Law: Power, Duty, Restraint, Lawrence O. Gostin, University of California Press, Ltd. (2000), chap. 8, p. 219, chap.8, fig. 14.

35. Okla. Stat. Ann. tit. 63, § 1-401 (Supp. 2008). "Active tuberculosis disease" means a stage in the disease when pathologic changes present and can be demonstrated. "Tuberculosis infection" means a stage in which the person has a positive or a history of a positive response to a test but not having evidence of the disease.

36. Okla. Stat. Ann. tit. 63, § 1-401 (Supp. 2008).

37. Okla. Admin. Code Tit. 310, chap. 521, § 310:521-3-2.

38. Okla. Admin. Code Tit. 310, chap. 521, § 310:521-3-2.

39. Okla. Stat. Ann. tit. 63, § 1-402 (Supp. 2008).

40. Okla. Stat. Ann. tit. 63, § 1-402 (Supp. 2008). 41. Okla. Stat. Ann. tit. 63, § 1-403 (Supp. 2008).

42. Okla. Stat. Ann. tit. 63, § 1-405 (2001).

43. Okla. Stat. Ann. tit. 63, § 1-410 (Supp. 2008). "Isolation" means the confinement of one or more persons who have or are suspected of having an infectious disease constituting a biologic public health threat to an appropriate location to prevent the transmission of disease. This term contrasts with the term quarantine. "Quarantine" means to restrict the movement and activities of one or more persons who are known or suspected to have been exposed to an infectious disease constituting a biologic public health threat, generally for the duration of the maximum incubation period of the known or suspected disease. Okla. Admin. Code Tit. 310, chap. 521,§ 310:521-1-2.

44. Okla. Admin. Code Tit. 310, chap. 521, § 310:521-7-4.

45. Okla. Stat. Ann. tit. 63, § 1-410 (Supp. 2008).

46. Okla. Admin. Code Tit. 310, chap. 521, § 310:521-7-6. The stan-

dard to support the action of public health officials is "preponderance of the evidence." The individual proceeding may be held telephonically or by other electronic means. If the Health Commissioner's order is upheld at the conclusion of the hearing, an appeal may be taken pursuant to Title 75, Section 318 of Oklahoma statutes.

47. Okla. Stat. tit. 21, §§ 1195, 1199 (2001); Okla. Stat. tit. 63, § 1-701 A (2001).

48. MMWR, Sept.19, 2008/57(37):1009-1012 at www.cdc.gov/ mmwr/preview/mmwrhtml/mm5737al.htm. To include someone on the list, the CDC must determine the person 1) likely is contagious with a communicable disease that would constitute a serious public health threat should the person be permitted to board a flight, 2) is unaware or nonadherent with public health recommendations, and, 3) likely will attempt to board a commercial aircraft.

49. http://en.wikipedia.org/wiki/2007\_tuberculosis\_scare.

#### ABOUT THE AUTHOR



Martha Rupp Carter graduated from OSU with a B.A., honors in English, and obtained her J.D. from OU. Following five years of private practice with Sonberg and Waddel, she served in the City of Tulsa legal department for 19 years. She was appointed as Tulsa's city

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# Oklahoma's Security Breach Notification Act

By Eric L. Johnson

**T**t seems like every week we see a report on the news or read a newspaper story about a data or security breach where a per-son's sensitive and personally identifying information, including name, address, Social Security number, credit card number and/or medical history, collected by a bank, company, credit union, hospital, law firm, university, state or federal government entity was released into the "wild" and/or obtained by the bad guys. A data or security breach of a system involves the exposure and/or theft of a person's sensitive personal information; often on a massive scale. The 2008 data breach tally from the Identity Theft Resource Center (ITRC), a nonprofit organization dedicated to the understanding and prevention of identity theft, puts the total number of security breaches through Nov. 25, 2008, at 585; an increase from the final total of 446 reported in 2007. These 585 security breaches resulted in the exposure of over 33 million records.<sup>1</sup> While this number may seem large, it is probably actually larger as the ITRC estimates that in more than 40 percent of breach events, the number of records exposed was not reported or fully disclosed by the breached entity.

The various types of entities that have reported security breaches generally fall into the following categories: (a) educational institutions (public and private colleges, universities and alumni organizations); (b) healthcare organizations (hospitals, healthcare services and healthcare insurers); (c) financial services companies (banks, credit card companies, credit unions, finance companies, insurance companies and investment services); (d) general businesses; and (e) government agencies (federal, state and local governmental agencies).

The reported security breaches can then be categorized by the cause of the breach:

• Hacking: Illegal access through the Internet to data contained in a computer system by a person external to the breached entity (including viruses, Trojan horses and computer security loopholes); • **Improper display or disposition:** Allowing sensitive personal information to be viewed by those who should not have access (for example, information bought by a fake business or sensitive information tossed into dumpsters);

• **Insider access:** An employee or contractor stealing or providing others with access to sensitive personal information held by his or her employer;

• Lost backup: Data storage media containing sensitive personal information lost in the process of transferring the media to another location;

• **Physical theft:** The theft of laptops, computer equipment, other computer storage devices or paper files; or

• Not specified: The specific cause of the breach was not publicly disclosed by the entity suffering the breach.

Oklahoma recently became one of 44 states<sup>2</sup> to enact security breach legislation that requires individuals or entities that own or license computerized data that includes personal information to notify Oklahoma residents of any breach of the security of the system if their personal information was, or is reasonably believed to have been, accessed and acquired by an unauthorized person. Originally introduced in the 2nd Session of the 51st Legislature (2008) for the state of Oklahoma,3 Oklahoma H.B. 2245, titled the "Security Breach Notification Act" was signed by Gov. Henry on April 28, 2008. The act became effective on Nov. 1, 2008, and applies to the discovery or notification of a breach of the security of the system that occurs on or after that date. Note that Oklahoma has had a security breach statute on the books since 2006, but its scope was extremely limited.<sup>4</sup> This article summarizes the salient provisions of the act and its requirements on Oklahoma individuals and entities.

#### APPLICABILITY

The act relates to identity theft and will affect all individuals (natural persons) or entities<sup>5</sup> that own or license computerized data which includes personal information. In addition, the act also applies to any individual or entity that simply maintains computerized data which includes personal information that the individual or entity does not own or license. Personal information means the first name or first initial and last name in combination with and linked to any one or more of the following data elements that relate to an Oklahoma resident — when the data elements are neither encrypted nor redacted:

(a) Social Security number;

(b) driver license number or state identification card number issued in lieu of a driver license; or

(c) financial account number, credit card or debit card number, in combination with any required security code, access code, or password that would permit access to the financial accounts of a resident.

However, the term personal information does not include information that is lawfully obtained from publicly available information, or from federal, state or local government records lawfully made available to the general public.

#### **KEY DEFINITIONS**

The act contains a few key definitions that are central to both the scope and application of the act:

A. Breach of the security of a system means the unauthorized access and acquisition of unencrypted and unredacted computerized data that compromises the security or confidentiality of personal information maintained by an individual or entity as part of a database of personal information regarding multiple individuals and that causes, or the individual or entity reasonably believes has caused or will cause, identity theft or other fraud to any Oklahoma resident. Good faith acquisition of personal information by an employee or agent of an individual or entity for the purposes of the individual or the entity is not a breach of the security of the system, provided that the personal information is not used for a purpose other than a lawful purpose of the individual or entity or subject to further unauthorized disclosure;

**B.** *Encrypted* means transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without use of a confidential process or key, or securing the information by another method that renders the data elements unreadable or unusable;

#### C. Notice means:

1) written notice to the postal address in the records of the individual or entity; 2) telephone notice;

3) electronic notice; or

4) substitute notice, if the individual or the entity required to provide notice demonstrates that the cost of providing notice will exceed \$50,000, or that the affected class of residents to be notified exceeds 100,000 persons, or that the individual or the entity does not have sufficient contact information or consent to provide notice as described above. Substitute notice consists of any two of the following:

(a) e-mail notice if the individual or the entity has e-mail addresses for the members of the affected class of residents;

(b) conspicuous posting of the notice on the Internet Web site of the individual or the entity if the individual or the entity maintains a public Internet Web site; or

(c) notice to major statewide media.

**D.** *Redact* means alteration or truncation of data such that no more than the following are accessible as part of the personal information: (a) five digits of a Social Security number, or (b) the last 4 digits of a driver license number, state identification card number or account number.

#### NOTIFICATION REQUIREMENTS

#### A. Individual or entity owns or licenses computerized data.

An individual or entity that owns or licenses computerized data that includes personal information must disclose any breach of the security of the system following discovery or notification of the breach of the security of the system to *Encrypted* means transformation of data through the use of an algorithmic process into a form in which there is a low probability of assigning meaning without use of a confidential process or key...



any Oklahoma resident whose unencrypted and unredacted personal information was or is *reasonably believed* to have been accessed and acquired by an unauthorized person and that causes, or the individual or entity *reasonably believes* has caused or will cause, identity theft or other fraud to any Oklahoma resident. Except as provided below, or in order to take any measures necessary to determine the scope of the breach and to restore the reasonable integrity of the system, the disclosure must be made without unreasonable delay.

> An individual or entity must disclose the breach of the security of the system if encrypted information is accessed and acquired in an unencrypted form or if the security breach involves a person with access to the encryption key and the individual or entity reasonably believes that such breach has caused or will cause identity theft or other fraud to any Oklahoma resident.

#### B. Individual or entity maintains computerized data owned or licensed by another.

An individual or entity that maintains computerized data that includes personal information that the individual or entity does not own or license must notify the owner or licensee of the information of any breach of the security of the system as soon as practicable following discovery, if the personal information was or if the entity *reasonably believes* was accessed and acquired by an unauthorized person.

#### C. Delay of notice.

The required notice may be delayed if a law enforcement agency determines and advises the individual or entity that the notice will impede a criminal or civil investigation or homeland or national security. Once the law enforcement agency determines that notification will no longer impede the investigation or jeopardize national or homeland security, the required notice must be made without unreasonable delay.

#### COMPLIANCE

The following will be deemed to be in compliance with the notification provisions of the act:

An entity that:

- (a) maintains its own notification procedures as part of an information privacy or security policy for the treatment of personal information and that is consistent with the timing requirements of the act if it notifies Oklahoma residents in accordance with its procedures in the event of a breach of security of the system; or
- (b) complies with the notification requirements or procedures pursuant to the rules, regulation, procedures, or guidelines established by the primary or functional federal regulator of the entity.

In addition, a financial institution<sup>6</sup> that complies with the notification requirements prescribed by the Federal Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice<sup>7</sup> is deemed to be in compliance with the act.

#### PENALTIES AND REMEDIES

The act provides enforcement authority for violations of the act that result in injury or loss to Oklahoma residents to the attorney general or a district attorney in the same manner as an unlawful practice under the Oklahoma Consumer Protection Act (OCPA).<sup>8</sup> Under the OCPA, the attorney general or district attorney may bring an action:

- (A) to obtain a declaratory judgment that an act or practice violates the OCPA;
- (B) to enjoin, or to obtain a restraining order against a person who has violated, is violating, or is likely to violate the OCPA;
- (C) to recover actual damages and, in the case of unconscionable conduct, penalties as provided by the OCPA, on behalf of aggrieved consumer, in an individual action only, for violation of the OCPA; or
- (D) to recover reasonable expenses and investigation fees.

In lieu of instigating or continuing an action or proceeding, the attorney general or a district attorney may accept a consent judgment with respect to any act or practice declared to be a violation of the OCPA. The consent judgment must provide for the discontinuance of the violation of the OCPA, may provide for the payment of reasonable expenses and investigation fees incurred, and may include a stipulation for restitution and for specific performance. Such consent judgment will not operate as an admission of the violation unless the judgment does so by its terms. The consent judgment must also be approved by the court and entered as judgment, and once such approval is received, any breach of the conditions of the consent judgment shall be treated as a violation of the court order.

In addition, the attorney general or a district attorney may investigate if they have reason to believe a violation has occurred and an investigation is in the public interest. The investigation demand may include production of documents. Finally, subpoenas may be issued and hearings may be held.

A violation of the act by a state-chartered or state-licensed financial institution is enforceable exclusively by the primary state regulator of the financial institution. Otherwise, the attorney general or a district attorney will have exclusive authority to bring an action under the act for either actual damages or a civil penalty not to exceed \$150,000 per breach of the security of the system or series of breaches of a similar nature that are discovered in a single investigation.

#### CONCLUSION

There are a vast number of different risks associated with data or security breaches including loss of consumer confidence, possible litigation and regulatory enforcement. As the incidences of data or security breaches are on the rise, it appears that the criminal population may be attacking and stealing more data from entities. Therefore, it is important for individuals and entities that own, license or maintain computerized data to take a look at their information privacy and security polices and the way they handle personal information, from securing data within the organization, to dealing with third parties, such as business partners and vendors, in order to protect consumers against identity theft and maintain consumer confidence. Finally, the individual or entity should also develop and implement a response program in compliance with the act that includes procedures to notify consumers about incidents of unauthorized access to information that causes, or the individual or entity reasonably believes has caused or will cause, identity theft or other fraud to Oklahomans.

Available at: http://idtheftmostwanted.org/ITRC%20Breach%2
 0Report%202008.pdf.
 2. The other states that have enacted some form of security breach

legislation are: Alaska (2008 H.B. 65); Arizona (Ariz. Rev. Stat. § 44-7501 (2007 S.B. 1042, Chapter 23)); Arkansas (Ark. Code § 4-110-101 et seq.); California (Cal. Civ. Code §§ 56.06, 1785.11.2, 1798.29, 1798.82); Colorado (Colo. Rev. Stat. § 6-1-716); Connecticut (Conn. Gen Stat. 36a-701(b)); Delaware (Del. Code tit. 6, § 12B-101 et seq.); Florida (Fla. Stat. § 817.5681); Georgia (Ga. Code §§ 10-1-910, -911); Hawaii (Haw. Rev. Stat. § 487N-2); Idaho (Idaho Code §§ 28-51-104 to 28-51-107); Illinois (815 ILCS 530/1 et seq.); Indiana (Ind. Code §§ 24-4.9 et seq., 4-1-11 et seq.); Iowa (2008 S.F. 2308); Kansas (Kan. Stat. 50-7a01, 50-7a02); Louisiana (La. Rev. Stat. § 51:3071 et seq.); Maine (Me. Rev. Stat. tit. 10 §§ 1347 et seq.); Maryland (Md. Code, Com. Law § 14-3501 et seq.); Massachusetts (2007 H.B. 4144, Chapter 82); Michigan (Mich. Comp. Laws § 445.61 et seq.); Minnesota (Minn. Stat. §§ 325E.61, 325E.64); Montana (Mont. Code § 30-14-1701 et seq.); Nebraska (Neb. Rev. Stat. §§ 87-801, -802, -803, -804, -805, -806, -807); Nevada (Nev. Rev. Stat. 603A.010 et seq.); New Hampshire (N.H. Rev. Stat. §§ 359-C:19 et seq.); New Jersey (N.J. Stat. 56:8-163); New York (N.Y. Gen. Bus. Law § 899-aa); North Carolina (N.C. Gen. Stat § 75-65); North Dakota (N.D. Cent. Code § 51-30-01 et seq.); Ohio (Ohio Rev. Code §§ 1347.12, 1349.19, 1349.191, 1349.192); Oklahoma (Okla. Stat. § 74-3113.1 and 2008 H.B. 2245); Oregon (2007 S.B. 583, Chapter 759); Pennsylvania (73 Pa. Stat. § 2303 (2005 S.B. 712, Act 94)); Rhode Island (R.I. Gen. Laws § 11-49.2-1 et seq.); South Carolina (2008 S.B. 453, Act 190); Tennessee (Tenn. Code § 47-18-2107); Texas (Tex. Bus. & Com. Code § 48.001 et seq.); Utah (Utah Code §§ 13-44-101, -102, -201, -202, -310); Vermont (Vt. Stat. tit. 9 § 2430 et seq.); Virginia (2008 S.B. 307, Chapter 566); Washington (Wash. Rev. Code § 19.255.010); West Virginia (2008 S.B. 340, Chapter 37); Wisconsin (Wis. Stat. § 895.507); Wyoming (Wyo. Stat. § 40-12-501 to -501); District of Columbia (D.C. Code § 28- 3851 et seq.); Puerto Rico (2005 H.B. 1184, Law 111).

3. 2008 Okla. Sess. Law Serv. Ch. 86 (H.B. 2245).

4. 74 O.S. § 3113.1. This security breach statute is only applicable to a state agency, board, commission or other unit or subdivision of state government that owns or licenses computerized data that includes personal information.

5. Entities (or Entity) are defined rather broadly and include corporations, business trusts, estates, partnerships, limited partnerships, limited liability partnerships, limited liability companies, associations, organizations, joint ventures, governments, governmental subdivisions, agencies, or instrumentalities, or any other legal entity, whether for profit or not-for-profit.

6. Any institution the business of which is engaging in financial activities as defined by 15 U.S.C. § 6809. In general, companies that offer financial products or services to individuals, like loans, financial or investment advice, or insurance.

7. 70 Fed. Reg. 15736 (March 29, 2005).

8. 15 O.S. § 751 et seq.

#### ABOUT THE AUTHOR



Eric L. Johnson is a shareholder with Phillips Murrah PC. He has 15 years of experience providing commercial and consumer credit compliance advice on federal and state laws and regulations. He is a registered lobbyist, an adjunct professor of consumer law for Oklahoma City University School of Law and

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# It's Just a Social Security Number, Right?

By Jarod Morris

This article will examine the legal issues and hurdles surrounding bringing a civil claim under 42 U.S.C. §1983 for violation of privacy against a non-federal governmental entity based on the right to privacy of the due process clause of the 14th Amendment. A plaintiff's attorney must be cognizant of the fact that the issue of Social Security number disclosure is one of first impressions for the 10th Circuit.

An individual's right to privacy is a relatively new right when compared with the enumerated rights of the Constitution and the Bill of Rights. One of the first mentions of a specific right to privacy was by Samuel Warren and Louis Brandeis in an 1890 *Harvard Law Review* article titled "The Right to Privacy" in which the two discuss contractual and property rights theories used in support of judicial opinions. The two proposed that a right to privacy is a better solution to successfully resolve issues that failed to fit perfectly into any existing legal theory.

The concepts proposed by Warren and Brandeis were not generally recognized until the 1965 opinion of *Griswold v. Connecticut.*<sup>1</sup> Even then, the justices concurred in the result while citing varying sources of authority within the Constitution. In *Griswold*, Justices John Marshall Harlan and Byron White declared the due process clause of the 14th Amendment authoritative; however, Justice William Douglas authored the majority opinion stating the right to privacy is found in the "penumbras" and "emanations" of other constitutional protections. Not until the Supreme Court decided *Roe v. Wade* did the 14th Amendment's right to privacy gain a strong foothold.<sup>2</sup>

The court indicated that the due process right to privacy encompasses two types of privacy rights. First, an individual should be free in making certain personal decisions such as marriage, abortion, consensual sex between adults and procreation/contraceptives.<sup>3</sup> The second type of privacy right is an individual's right to be free of disclosure of personal information.<sup>4</sup> School, medical and financial records fall under this area of privacy law. Much of this information is also protected by specific federal legislation such as the Family and Educational Rights Privacy Act (school records), Health Insurance Portability and Accountability Act (medical records)<sup>5</sup> and the Gramm-Leach-Bliley Act Financial Privacy Rule 15 U.S.C. §6801 (financial records).

Congress created the federal Privacy Act of 1974,<sup>6</sup> which addresses federal agency use of Social Security numbers. The significant difference between the Privacy Act of 1974 and the cases of the Supreme Court is that the disclosure provision of the Privacy Act of 1974 (Section 3) is applicable to the federal government and agencies, whereas the 14th Amendment right to privacy of the due process clause is extended to the states. The 9th Circuit Court of Appeals stated in *Unt v. Aerospace Corp.* that "[t]he civil remedy provisions of the [Privacy Act] do not apply against private individuals, state agencies, private entities, or state and local officials."<sup>7</sup>

This view was reaffirmed in 2005 by *Penny-feather v. Tessler* ("there is no private right of action").<sup>8</sup>

#### BASIS FOR THE RIGHT TO PRIVACY

A split among the circuits exists regarding the level of protection afforded against the disclosure of personal information.<sup>9</sup> According to the 6th Circuit, there is no general right to privacy in the dissemination of personal information. The 6th Circuit limits the right to privacy to those rights that are "deemed 'fundamental' or 'implicit in the concept of ordered liberty'" and the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private.<sup>10</sup>

Numerous 10th Circuit cases suggest a broader view than the 6th Circuit. "[The Tenth Circuit], however, has repeatedly interpreted the Supreme Court's decision in *Whalen v. Roe*, '...as

creating a right to privacy in the non-disclosure of personal information."<sup>11</sup> In Slayton v. Willingham, the court stated, "[T]he Supreme Court [in Whalen] has explicitly recognized that the constitutional right to privacy encompasses an 'individual interest in avoiding disclosure of personal matters.""12 Additional cases reinforcing this view include Mangels v. Pena,<sup>13</sup> Eastwood v. Dept. of *Corrections of State of Okla*.<sup>14</sup> and Flanagan v. Munger.<sup>15</sup> While it appears the 10th Circuit has not decided a case on the specific issue of public disclosure of a Social Security number, the 10th Circuit may be receptive to the idea that such disclosure

constitutes a violation of the right to privacy. In addition to substantive analysis regarding the right to privacy, should one exist, the claim must be brought within the applicable statute of limitations.

#### STATUTE OF LIMITATIONS

Federal law lacks a statute of limitation for civil rights claims under §1983, and therefore, courts use the applicable state statute of limitations for personal injuries. The 10th Circuit, in *Crosswhite v. Brown* stated "[t]he time within which such action must be brought is to be determined by the laws of the state where the cause of action arose."<sup>16</sup> Any §1983 action arising in Oklahoma must be brought within two years.<sup>17</sup>

In *Alexander v. Oklahoma*, the court recognized two methods for determining the tolling of the statute of limitations.<sup>18</sup> Under Oklahoma law, as set forth in *Lovelace v. Keohane*, the first type of tolling is defined in terms of a "legal disability" of the injured party.<sup>19</sup> The second is the "discovery rule." This rule will delay tolling the statute of limitations "until an injured party knows of, or in the exercise of reasonable diligence, should have known of the discovered injury, and resulting cause of action."<sup>20</sup>

The statute of limitations for a cause of action based on disclosure of Social Security numbers poses problems for the would-be plaintiff. First, people generally do not closely monitor the use of their Social Security number, nor is it feasible to do so with the widespread use of the

> number. Second, the disclosure may never be realized, and when it is, notice may only occur after that person's identity is stolen.

> Should a plaintiff be barred from bringing her claim because she did not know within the two-year statute of limitations that her Social Security number had been disclosed to the public? Is it just to deny a person relief because her attention has just now been called to the disclosure, over which she has very little, if any, control? In the same way a patient may discover a doctor's negligence years after the injurious surgery, a person may learn of the disclosure of her Social Security number long after the hard and fast two-year stat-

ute of limitations has passed. The just response should be to adopt the discovery rule. This will allow the courts to inquire into the factual circumstances surrounding the disclosure and determine what course a reasonable person would have taken in protecting her own financial information. The discovery rule approach will protect innocent parties but still limit those who choose to ignore the warning signs a prudent person would notice.

#### **IMMUNITY DEFENSE**

A public official accused of releasing private information to the public will quickly assert



the defense of quasi-immunity. This defense is a bar to civil liability in certain circumstances; however, it is not an absolute shield to civil liability. A plaintiff must establish "(1) the defendant's actions violated a federal Constitutional or statutory right, and (2) the right violated was clearly established at the time of the conduct at issue[.]"<sup>21</sup> It is not enough to simply "identify a clearly established right in the abstract and allege that the defendant has violated it."22 The plaintiff must show that a reasonable official would understand that the conduct he is engaged in actually violates a constitutionally protected right.<sup>23</sup> Prior conduct must have "some but not precise correspondence" to the conduct in question.<sup>24</sup> The court will look to similar situations that, even though not identical, would still put a reasonable official on notice of what conduct is prohibited.

Inquiry must be made regarding the circumstances of disclosure and the conduct that is prohibited at the time the alleged violation took place. The court focused on "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited."<sup>25</sup> A plaintiff is not required to show that defendant's specific conduct has been declared unlawful by prior case law, but the unlawfulness of the conduct must have been "apparent."<sup>26</sup>

A plaintiff can meet the burden that such unlawfulness was "apparent" by showing a Supreme Court or 10th Circuit opinion that previously dealt with the conduct in question. Lacking such support, the plaintiff may use cases from other jurisdictions; however, this may leave room for doubt that such unlawfulness was "apparent" to a reasonable person in the defendant's situation.

The 10th Circuit, in *Herring v. Keenan*, analyzed similarities between prior case law and the disclosure by probation officer Keenan to Herring's sister and employer that Herring, who was on probation at the time, was HIV positive.<sup>27</sup> The court reviewed countless prior cases only to determine that none address the specific situation where a probation officer disclosed the HIV status of a probationer to the probationer's sister and employer. The plaintiff pointed to the factually similar case of *A.L.A. v. West Valley City* as establishing the questionable conduct as prohibited, thus putting the official on notice.<sup>28</sup>

In *A.L.A.*, a police officer released HIV test results of an arrestee. The disclosure in *Herring* 

occurred in late 1993, but A.L.A. was not decided until 1994, after the Herring disclosure. Only after a case is decided is the official deemed to be on notice that such conduct violates the Constitution. The court then turned to Griffin v. Wisconsin, which dealt with privacy of probationers.<sup>29</sup> The Supreme Court determined that due to the individual's status as a probationer, the interests of the state allow for more intrusion of the right to privacy than might be permitted to an ordinary citizen. Because an individual on probation has a lesser right to privacy than the average citizen and no case had yet established such disclosure as violating a right, the 10th Circuit refused to hold that the alleged violation was so established as to be "apparent" to a reasonable police officer in the same situation.<sup>30</sup>

In an action for the violation of a right to privacy brought in the 10th Circuit, the plaintiff must find analogous cases in other jurisdictions since the 10th Circuit lacks precedent addressing the public disclosure of a Social Security number. The 9th Circuit, in *In re Crawford*, discussed Social Security number disclosure, but failed to go the necessary distance to actually call it a violation of the informational right to privacy established in *Whalen*.<sup>31</sup> "[T]he indiscriminate public disclosure of SSNs, especially when accompanied by names and addresses, may implicate the constitutional right to information privacy."<sup>32</sup>

The 9th Circuit goes on to cite identity theft as a main concern for preventing the disclosure of Social Security numbers. "In an era of rampant identity theft, concern regarding dissemination of SSNs is no longer reserved for libertarians inveighing against the specter of national identity cards." The court acknowledges the fact that Social Security numbers are "not generally disclosed by individuals to the public," implying that such individuals have an expectation of privacy in this information.<sup>33</sup>

*Crawford* falls short of declaring Social Security numbers protected by the right to privacy due to the balanced interests of government disclosure against the risk of injury stating:

the dire consequences of identity theft must be discounted by the probability of its occurrence. Surely government disclosure does enhance the risk of identity theft. However, the realization of the injury still requires two additional, nongovernmental elements: (1) an identity thief and (2) a vulnerable account. An official will receive the benefit of quasi-immunity if the law allegedly broken is not so clearly established as to put a reasonable person in the official's position on notice that his conduct forms the basis for a violation.

*Arakawa v. Sakata*, a district court opinion within the 9th Circuit, takes the dicta from *Crawford* one step further and finds that disclosure of a driver's Social Security number is a violation of the driver's constitutional right to privacy guaranteed by the 14th Amendment due process clause.<sup>34</sup> The decision points to the federal Driver Privacy Protection Act (which prohibits states from releasing drivers' Social Security numbers) as more evidence that Social Security numbers are confidential information and should receive the protection of the informational right to privacy.

The presence of such few cases presents a dilemma the plaintiff must overcome. An official will receive the benefit of quasi-immunity if the law allegedly broken is not so clearly established as to put a reasonable person in the official's position on notice that his conduct forms the basis for a violation. Case law will not establish the right to this degree when decisions are so scattered and inconsistent across the country as to the actual scope of the informational right to privacy. A successful argument must be able to show the court that the totality of all laws relating to Social Security numbers (i.e., In re Crawford, Arakawa, Privacy Act of 1974 and the Driver Privacy Protection Act) are sufficient to put a reasonable official on notice that Social Security numbers deserve protection from disclosure. If this argument can be successfully made, the official will not have the benefit of immunity.

#### STANDING

Standing is one of the first issues generally addressed in any case. However, if the prior

considerations are not met, standing will not even be decided as the court will declare that a Social Security number is not protected by the informational right to privacy and the case will be dismissed. Provided the standing issue is addressed, there are three areas of inquiry.

First, there must be an injury-in-fact. This presents a problem for most disclosure cases because there are no damages. Disclosure of a Social Security number is not an injury that often causes a plaintiff a quantifiable amount of damages. In a unique case, Lambert v. Hartman, the court used an increased risk of harm theory to state that Lambert may have adequately shown an injury-in-fact (case decided on other grounds).<sup>35</sup> Comparing the facts of Lambert to Sutton v. St. Jude Medical S.C. Inc. (Sutton was determined to have proper standing due to an increased risk of harm from a implanted heart valve), the court decided an increased risk of harm is sufficient to show an injury-in-fact.<sup>36</sup> Similarly, Lambert offers the notion that a plaintiff can satisfy the injury-infact requirement of standing by proving the individual suffers from an increased risk of identity theft. If so proven, the other two elements of standing become significantly easier to satisfy.

Second, the injury must be fairly traceable to the alleged violation of the public official. Few cases will offer such an easily traceable trail as *Lambert*; however, if the increased risk of harm theory is accepted, the ability to trace this injury to the disclosure is simple. The increased risk of harm would not have occurred but for the disclosure of the Social Security number by the public official. In most torts, a third party intervenor may break the chain of causation between the first tortfeasor and the alleged injury. However, because the alleged injury occurs at publication, it is virtually impossible for any other party to break the chain of causation, thus limiting the variables that can cause plaintiffs headaches.

Finally, the injury must be one that can be redressed by judicial intervention. Future damages cannot be predicted when a plaintiff is exposed to an increased risk of harm. The very nature of this damage means the harm may never materialize. However, the threat itself is very real. The best solution, and one suggested in *Lambert*, is a credit monitoring fund for all parties affected by the disclosure. "If Lambert were able to prove that she continues to face an increased risk of identity theft, she could likely

show that monitoring suspicious activity on her credit report would not only combat that future risk, but would also help to redress the past financial injury that she has suffered."37

Courts have long struggled with the scope of the informational right to privacy. The Supreme Court left doubt as to its scope so each circuit must determine for itself what the right to privacy will encompass pending clarification. Some courts interpret it very narrowly. Currently, most jurisdictions do not recognize a right to privacy sufficient to prevent most disclosures of one's Social Security number. As the consequences of disclosing Social Security numbers begins to rise (*i.e.*, more identity theft), courts will be pressed to recognize Social Security numbers as constitutionally protected information and begin to chip away at the belief that a single number, which unlocks so much of a person's life, is not worthy of constitutional protection.

This area of law will likely change in the next few years. It will be interesting to see how each circuit continues to develop its own law as well as to which case the Supreme Court will grant certiorari to finally finish what the justices started in Whalen over 30 years ago.

- 1. 381 U.S. 479 (1965).
- 2. 410 U.S. 113, S.Ct. 705 (1973).
- 3. Whalen v. Roe, 429 U.S. 589, 598-99, S.Ct. 869, 876-77 (1977). See also Eisenstadt v. Baird, 405 U.S. 438 (1972) and Lawrence v. Texas, 539 U.S. 558 (2003).
  - 4. Whalen at 598. 5. See also Herring v. Keenan, 218 F.3d 1171, (10th Cir.2000).
  - 6. 5 U.S.C.A. § 552A, Pub.L. 93-579.
  - 7. 765 F.2d 1440, 1447 (9th Cir.1985).
  - 8. 431 F.3d 54 (2nd Cir.2005)
  - 9. J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Circ.1981).
  - 10. DeSanti at 1090-1091.
  - 11. Herring v. Keenan, 218 F.3d 1171, 1175 (10th Cir.2000). 12. 726 F.2d 631, 635 (10th Cir.1984).

  - 13. 789 F.2d 836, 839 (10th Cir.1968).

- 14. 846 F.2d at 630-31 (10th Cir.1988).
- 15. 890 F.2d 1557, 1570 (10th Cir.1989).
- 16. 424 F.2d 495, 496 (10th Cir. 1970). 17. 12 Okla. Stat. §95A.3.
- 18. 382 F.3d 1206, 1217 (10th Cir. 2004). 19. 831 P.2d 624 (Okla. 1992)
- 20. Id.
- 21. Jantzen v. Hawkins, 188 F.3d 1247 (10th Cir.1999).

22. Hilliard v. City and County of Denver, 930 F.2d 1516, 1518 (10th Cir.1991).

23. Anderson v. Creighton, 483 U.S. 635, S.Ct. 3034, 97 L.Ed.2d 523 (1987)

24. Eastwood v. Dept. of Corrections of State of Okla., 846 F.2d at 630 (10th Cir.1988).

25. Hilliard at 1518 (quoting Hannula v. City of Lakewood, 907 F.2d 129,131 (10th Cir.1990)).

26. Hilliard at 1518.

- 27. 218 F.3d 1171 (10th Cir.2000),
- 28. 26 F.3d 989 (10th Cir.1994).
- 29. 483 U.S. 868.
- 30. Herring, at 1176.

31. 194 F.3d 954 (9th Cir.1999).

32. Crawford at 958. 33. Id.

34. 133 F.Supp.2d 1223 (D.Hawai'i, 2001),

35. 517 F.3d 433 (6th Cir.2008). The county court clerk posted traffic citations on the clerk's Web site. Each citation included the Social Security number of the individual receiving the citation. Lambert had quantifiable damages because the citation misrepresented her Social Security number by a single digit, and the identity thief repeated this on applications for credit in Lambert's name. The thief was convicted prior to disposition of Lambert's case and the thief admitted to obtaining Lambert's information from the clerk's Web site.

36. 419 F.3d. 548, 575 (6th Circ.2005).

37. Lambert at 438.

#### ABOUT THE AUTHOR



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# Up Next: The Genetic Information Nondiscrimination Act

By Anita K. Chancey

Information Nondiscrimination Act (GINA) that was then signed into law by President George W. Bush on May 21, 2008.<sup>1</sup> As the name suggests, this law seeks to protect an individual from discrimination based on the individual's genetic information. A simple definition of genetic information is any information obtained from genetic testing (for screening, health care or any other reasons) or is based on family history of disease. GINA prevents health plans and health insurance issuers (health insurers) from using genetic information when determining coverage, premiums or benefits received by an individual. GINA also protects employees from the improper use of such information by an employer in hiring, firing, job placement or promotion, among other items. This article explores a brief history of genetics leading up to the passage of GINA and the resulting impact GINA will have on health plans, insurers and employers.

#### **HISTORY OF GENETICS**

Genetics had their beginning in the mid 1800s with Gregor Mendel's discovery that traits found in peas could be used to produce specific traits in successive crops. Since his discovery, this technique has been used to modify both plants and animals alike. For instance, the tomato you eat has probably been modified by Mendel's theories. The milk cow has been bred to produce more milk. It is because of Mendel, we learned in science class why one person had blue eyes and another brown.

This quiet beginning in genetics by Mendel, led to the 1930s and 1940s, when scientists began to learn that genes were part of other structures, specifically DNA and RNA. Continued study ultimately led to the discovery of the structure of DNA by James D. Watson and Francis Crick (the famous double helix). This breakthrough led to study of the properties of specific genes, the complete sequencing (makeup) of DNA found in various bacteria, the ability to link a specific gene on human DNA to cystic fibrosis, to discovering the possible connection between genes and other disorders.

Then, in 2003, through the Human Genome Project, the sequencing of the entire genetic makeup of human DNA was completed.<sup>2</sup> At this time, scientists believe that over 15,000 human diseases and disorders have a genetic component. Already more than 1,000 genetic tests have been developed for human conditions allowing an individual to determine his or her susceptibility to a disease or disorder. The ability to obtain this information has caused concern that discrimination will occur.



In fact, the concerns that led to the passage of GINA (that genetic information will be misused) started with the passage in 1907 by Indiana requiring the forced sterilization on people suffering from "genetic disorders" such as mental illnesses, mental retardation, blindness, hearing loss, as well as other handicaps. By 1981, the majority of states had passed similar laws. Additionally, in 1927, the Supreme Court approved such sterilizations in *Buck v. Bell*,<sup>3</sup> a decision that has never been overturned. While most states have overturned these laws, a few states continue to retain them by simply adding provisions of due process and equal protection for the individual.<sup>4</sup>

In the United States, sickle cell anemia most commonly affects African Americans and Hispanics.5 In the 1970s, both states and the federal government began mandatory testing. While other ethnic groups could develop the disease, the testing focused on African Americans. At first it appeared that the testing arose from a desire to diagnose and treat the disease. However, records were not kept confidential and led to discrimination against African Americans based on the results of the tests.<sup>6</sup> In some states, such testing was mandatory. Results of such tests were not kept confidential, leading to discrimination both in employment and in health insurance. This also appeared to be an indirect method of racial discrimination. To end this discrimination, Congress passed the National Sickle Cell Anemia Control Act in 1972, allowing such testing if it was done only on a voluntary basis. States that continued to do mandatory testing were subject to the loss of federal funding.

Then in 1998, Lawrence Livermore Laboratories in Berkeley was found to have been performing tests for syphilis, pregnancy and sickle cell on employees without their knowledge or consent for years.7 Burlington Northern Santa Fe Railroad also began genetic testing on employees to determine those who were susceptible to carpal tunnel syndrome, again without their knowledge or consent. Though it did not appear that there had been any actual discrimination resulting from this testing, the

Equal Employment Opportunity Commission in 2001 filed a civil lawsuit against the railroad stating that such testing violated the Americans with Disability Act (ADA).<sup>8</sup> While not admitting it violated the ADA, the railroad settled the case in 2002 for \$2.2 million.

These incidents of the misuse of genetic information have led to the fear that more discrimination will occur especially given the advancing knowledge in the field of genetics. There are a variety of state and federal laws in place that provide some protection against discrimination based on genetic information.<sup>10</sup> However, because of the lack of uniformity with this quilt-work of laws, Congress passed GINA to ensure that health plans, health insurers and employers do not discriminate against individuals based on genetic information.

# GENERAL INFORMATION RELATING TO GINA

There are two types of genetic information: that which is obtained from genetic testing and that based on family history. Genetic testing is being done at all levels, including prenatal testing, diagnostic testing, pre-symptomatic testing and carrier testing. Of course, the infamous use of DNA testing cannot be overlooked. There are frequent advertisements on both TV and the Internet that offer tests for specific disorders or provide an individual a complete sequence of his or her DNA sequence. From that, the individual may gain information of risks that currently may be tested for or retain the tests so as to determine in the future what risks may be present. Doctors also order genetic screening to acquire information based on a patient's symptoms or family history, or even to ensure that a patient does not have a reaction to a particular drug.<sup>11</sup> There are many reasons that genetic testing might be done. All lead to the acquisition of genetic information.

Additionally, a person or entity may also acquire genetic information based on an individual's family history. Family history includes any information that is obtained from the collection of genetic information of a fetus. A family member includes a dependent and any individual who has a relation with the individual within four degrees (for instance, a lineal descendant that is a great, great grandfather is related to the individual within four degrees). If a person has a family history of a particular disorder or disease and it may have been shown that the disorder or disease has a genetic basis, then there is a likelihood that the person will have the same disorder or disease. For instance, if a woman has many relatives in her family that have had breast cancer, then it is more likely the woman will also develop breast cancer.<sup>12</sup> Science has shown that certain breast cancers are tied to specific genetic anomalies.

On the other hand, a person is not discriminated against under GINA if a disease or disorder manifests itself that has a genetic cause (other laws such as the ADA may still provide protection). Taking the previous example, the woman who had many family members with breast cancer may suffer discrimination that is banned by GINA, but if she develops breast cancer herself, she is no longer protected by GINA. Other commonly recognized diseases that are genetically linked include ALS, Crohn's disease and multiple sclerosis. Once the disease manifests itself, the insurer may raise premiums or contributions or reject an individual's application for health insurance.

# TITLE I – HEALTH PLANS AND INSURERS

Title I focuses on discrimination by health plans and insurers because of genetic information. The first four sections cover specific health plans (Sec. 101 through Sec. 103), health insurance obtained by an individual on the private market (Sec. 102) and Medicare Supplemental Insurance (Sec. 104).<sup>13</sup> Many provisions in these sections are identical. However, each section amends a different part of the U.S. Code. Section 101 amends the Employee Retirement Income and Security Act of 1974 (ERISA), Section 102 amends the Public Health Service Act, Section 103 amends the Internal Revenue Code of 1986 and Section 104 the Social Security Act.

As noted, there are many similar provisions in the first four sections of Title I. These include

that an individual's premium or contribution amounts may not be adjusted because any genetic information of the individual or the individual's family. While genetic information may be used in determining payment of a health claim, that use must be minimal.<sup>14</sup>

As would be expected, a health plan or insurer may not request or require a person to undergo genetic testing.<sup>15</sup> However, if the request was made as part of a research project, an individual may be asked to undergo genetic testing (but not required) if:

- A request is made in writing. The research must comply with various regulations of the Secretary of Health and Human Services (HHS), the Social Security Act, and the Health Insurance Portability and Accountability Act (HIPAA).
- The individual must understand that compliance is voluntary and that there will be no action against the individual who does not volunteer for the research (for instance, the individual may not be denied coverage).
- Any genetic information collected in the research cannot be used to adjust premiums, or contributions.
- Health and Human Services has to be notified of the research.

Another requirement in the first four provisions is that genetic information may not be asked for, required of or purchased on an individual for purposes of coverage or benefits. However, if there is an incidental collection of information, then GINA is not violated.

Genetic information of a fetus or embryo of the individual or his or her family members may not be used. This would include information gained when a woman is pregnant or obtained because of reproductive technology.

An additional requirement found in Section 102 is that the health insurer may not determine eligibility or continued eligibility of an individual based on genetic information. An insurer may not use genetic information to set insurance rates or deny coverage to a person because of a pre-existing condition that is based on genetic information. Similarly, genetic information may not be used to deny an individual health coverage.



Another requirement in the first four provisions is that genetic information may not be asked for, required of or purchased on an individual for purposes of coverage or benefits.

#### Penalties

The penalties in Title I vary depending on the section. For instance, in Section 101, penalties are used to enforce the section and may be assessed against the sponsor of a group health plan or the insurer's such plan, if one. The amount of civil penalty that may be assessed is \$100 a day for each day the plan or insurer is not in compliance with GINA. If there is more than one penalty with respect to an individual, the minimum penalty increases to \$2,500 a day. If the violation is more than de minimus, the penalty increases to \$15,000 per day. The maximum penalty that may be assessed is \$500,000.

However, if the violation occurred when the entity exercised reasonable diligence but did not discover the violation, no penalty will be assessed. Penalties are also not assessed if the failure was due to reasonable cause and not willful neglect or the failure was corrected within 30 days of when the failure should have been discovered. Additionally, the secretary of the Department of Labor may waive any penalty.<sup>16</sup> Section 102 has the same penalties available as found under Section 101.<sup>17</sup>

Under Section 103, the penalties are governed by the Internal Revenue Service (IRS). The amount of the penalty is not set forth in GINA but instead is an excise tax that is assessed under § 4890D of the Internal Revenue Code. GINA directs the IRS to make any conforming changes to the code necessary to enforce this provision in GINA.<sup>18</sup> As with Section 103, no enforcement provisions are provided for Section 104. However, the secretary of Health and Human Services may set forth regulations governing enforcement of GINA.

Section 105 applies the privacy rules of HIPAA. The genetic information protected by the first four sections of Title I are also protected by HIPAA. HIPAA covers any genetic information gathered, either inadvertently or through means such as research as well. Similar to Section 103, Section 105 does not set forth any specific enforcement provisions or penalties. The secretary of Health and Human Services oversees HIPAA privacy rules and may provide that the existing enforcement provisions of HIPAA will be applied or may promulgate new or additional rules through the regulatory process.<sup>19</sup>

The effective date of Sections 101-105 of Title 1 is 12 months after GINA became law on May 21, 2008. All agencies governing these sections are to issue regulations by the effective date. The Medicare supplement insurance coverage of GINA will also determine which states need to come into compliance with this new law. However, if states have not issued guidance with the changes by May 21, 2009, they will not be in violation of GINA.

The various agencies overseeing Title I have been directed to coordinate both regulations and policies as they apply to the above sections. A first step in issuing the regulations was recently completed by the Department of Labor, Internal Revenue Service and Health and Human Services. These departments issued a request for comments on GINA. The deadline for submitting comments were due on Dec. 9, 2008, regarding Sections 101 through 104. This is a normal step in the regulatory process, but does not indicate when proposed or final regulations may be issued.

#### TITLE II OF GINA

The focus of Title II focuses on employers and their employment practices. As with Title I, genetic information is defined as the information from the genetic test of an individual or the genetic tests of the individual's family members, as well as the manifestation of a disease or disorder of the individual's family.<sup>20</sup> Along with employers, employment agencies, labor organizations and training programs are covered by Title II. The employees that are protected by GINA include:

- an employee (including an applicant) or a former employee,<sup>21</sup>
- a state employee except elected officials and their appointees,<sup>22</sup>
- a federal congressional employee,<sup>23</sup>
- a federal executive branch employee,<sup>24</sup> or
- a federal employee of the U.S. military, executive agencies, U.S. Postal Service employees, the judicial branch units of the government of the District of Columbia, and certain other employees of specific federal governmental entities.<sup>25</sup>

As with Title I, many of the provisions in Title II apply to several sections.<sup>26</sup> It is unlawful for an employee to be discriminated against by failing or refusing to hire, discharging any employee, or to discriminating with respect to an employee's compensation, terms, conditions, or privileges of employment based on genetic information.<sup>27</sup> There also may not be any limitation of an individual seeking referral for any job because of the individual's genetic information.<sup>28</sup> A person's genetic information may not be used to deny or expel labor organization membership, interfere in a training, retraining program, apprenticeship or interfere with any employment opportunities.

Additionally, an employee may not have his or her work limited, segregated or classified based on genetic information in a manner that adversely affects the status of the employee.<sup>29</sup> The genetic information may not be used to limit, segregate or classify information that would deprive an individual the opportunity to obtain employment.

Genetic information may not be requested, required or purchased about an employee or the employee's family.<sup>30</sup> Exceptions to this rule include:

- Inadvertent request or requirement of genetic information.
- Genetic services provided to the employee, including those through a wellness program.
- The employee provides prior, written, knowing and voluntary authorization.
- Only the employee and a licensed health professional have access to the information.
- Genetic information is collected and known only in the aggregate with no personal, identifiable information.<sup>31</sup>
- Obtain genetic information of an employee or the employee's family to comply with certification requirements of the Family and Medical Leave Act and any similar state laws.<sup>32</sup>
- Purchase genetic information that is commercially and publicly available.<sup>33</sup>

Information may also be collected in the workplace for genetic monitoring of the biological effects of toxic substances in the workplace.<sup>34</sup> For instance, an employee may work in a scientific lab that studies a substance that

66 ... law enforcement may also obtain genetic information for certain purposes, such as identifying human remains, but only if no other means may achieve the purpose.



may have not only a toxic effect on the employee, but also impact the employee's genes. The employee must receive a written notification of the testing, the employee has to provide a voluntary written authorization prior to the testing, the employee must receive the results of the tests, and the testing must comply with the Occupational Safety and Health Act of 1970 and state monitoring requirements, the Federal Mine and Health Safety Act of 1977, and the Atomic Energy Act of 1954.<sup>35</sup>

Section 202 and 205 provide that law enforcement may also obtain genetic information for certain purposes, such as identifying human remains, but only if no other means may achieve the purpose.<sup>36</sup>

Section 206 of Title II focuses on the confidentiality of genetic information. If any entity, from an employer to a labor organization obtains genetic information, information must be treated as confidential medical information and kept on separate forms and in separate medical files consistent with the requirements of American Disability Act (42 U.S.C. 12112(d)(3)(B)). The information may be disclosed to the employee upon written request with the informed consent of the employee in accordance with 45 C.F.R. 46.116.

Disclosure may also be made in connection with the employer's compliance with the certification provisions of Section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under state family and medical leave laws. Additionally, genetic information obtained by an employer may be disclosed to a health agency if the information is related to an imminent hazard and the employee is informed of the disclosure. Finally, under regulations promulgated by Health and Human Services regarding HIPAA privacy and under the Social Security Act, genetic information may be released as allowed under those regulations.

#### Damages

In general, employees are entitled to the damages, costs and fees provided by an applicable federal discrimination statute. The applicable statutes are Title VII of the Civil Rights Act of 1964, the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, the Extension of Certain Rights and Protections to Presidential Offices, and Section 717 of the Civil Rights Act of 1964. All of these statutes provide for compensatory and punitive damages pursuant to Title VII, 42 U. S.C. § 1981(a). However, a cause of action may not be brought based on alleged disparate impact.<sup>37</sup>

Finally, the EEOC is to issue recommendation within one year of the effective date of GINA, May 21, 2009. The employment provisions take effect on Nov. 21, 2009.

#### Study of Impact of GINA

Six years after the enactment of GINA, a genetic nondiscrimination study commission will be formed consisting of:

- A member appointed by the majority leader of the Senate
- A member appointed by the minority leader of the Senate
- A member appointed by the chairman of the committee on health, education, labor, and pensions of the Senate
- A member appointed by the ranking minority member of the committee on health, education, labor, and pensions of the Senate
- A member appointed by the speaker of the House of Representatives;
- A member appointed by the minority leader of the House of Representatives;
- A member appointed by the chairman of the committee on education and labor of the House of Representatives
- A member appointed by the ranking minority member of the committee on education and labor of the House of Representatives

This committee will issue a report within one year that summarizes the findings and makes any recommendations relating to GINA.

#### CONCLUSION

The nuts and bolts of GINA may appear straightforward. But is not necessarily straightforward when putting GINA to work. Regulations that will be published on all segments of GINA may either simplify or complicate GINA. Obvious guidance is needed — for instance, how will the exception involving FMLA actually work? While regulations often provide guidance that assists in implementing a new statute, often additional requirements are added within the regulations that are unexpected. An example of that which may be foreseen is in the area of HIPAA. GINA applies to

health plans, health insurers and employers, vet a section on HIPAA is included in those provisions. On its face, none of the parties are HIPAA covered entities, therefore would not seem to be directly covered by GINA. The regulations will hopefully flesh out these details. One possibility is that every doctor and hospital will have to add some information on protection of genetic information to their HIPAA notice of privacy practices. While not trying to bring all gloom and doom at this time concerning GINA, it is very important to realize that GINA is still in its infancy and, as time passes, putting GINA to practice will become more clear.

Author's Note: Ms. Chancey would like to express her gratitude to her colleague Ms. Rebbeca Fowler who provided invaluable assistance on the sections of the article relating to employment law.

1. Public Law No. 110-233 (hereinafter, P.L. 110-233).

2. See http://www.ornl.gov/sci/techresources/Human\_Genome/ home.shtml for more information on the Human Genome Project 3. 274 U.S. 200 (1927). The Supreme Court, in a case that originated

in Virginia, found legal the sterilization of the mentally retarded for the protection and health of the state. It was alleged that Carrie Buck, the plaintiff, was the daughter of a mentally retarded mother. The mother was said to be incorrigible, became a prostitute and gave birth to a mentally retarded daughter, Carrie.

4. At this time, over 37 states have passed laws prohibiting various aspects of genetic information.

5. See Mayo Clinic at http://www.mayoclinic.com/health/sicklecell-anemia/DS00324/DSECTION=risk%2Dfactors.

6. Dr. Howard Markel, National Human Genome Research Institute, National Institutes of Health, Promoting Safe and Effective Genetic Testing, Appendix 6 (April 2006) found at http://www.genome.gov/10002401.

7. Norman-Bloodsaw, et. al v. Lawrence Berkeley Laboratory, 135 F.3d 1260 (9th Cir 1998).

8. Equal Employment Opportunity Commission v. The Burlington Northern and Santa Fe Railway Co. No. 02-0456 (E.D. Wisc. Filed May 8, 2002. The railroad was using a genetic DNA test for Chromosome 17 deletion, which is claimed to predict some forms of carpal tunnel syndrome.

9. Id. at DKT #2.

10. Pub. Law 110-233, Congressional Findings #4.

11. See Food and Drug Administration Information for Health Professionals, July 24, 2008 which warned that patients with a specific genetic defect were likely to have a severe reaction to an antiviral medication. http://www.fda.gov/cder/drug/InfoSheets/HCP/aba cavirHCP.htm.

12. Family History, Inheritance, and Breast Cancer Risk, SPENCER INSTITUTE FOR COMPARATIVE CANCER RESEARCH, Cornell University, Fact Sheet #48 (July 2003).

13. GINA will amend Titles 26, 29 and 42 of the United States Code. Because the codification has not been completed, all references will be to the Public Law (P.L.).

14. The amount of information may be used to determine payment may be seen in regulations promulgated by the secretary of Health and Human Services under part C of title XI of the Social Security Act and Section 264 of the Health Insurance Portability and Accountability Act of 1996 consistent with secretary of Health and Human Services.

15. P.L. 110-233, § 101(a). This does not restrict a physician from ordering genetic testing.

- 16. P.L. § 101(e). 17. P.L. § 102(d)(5).
- 18. P.L. § 103(e).
- 19. P.L. § 105(c).
- 20. P.L. 110-233, § 201(4).

21. P.L. 110-233, § 201(2)(A). See also 42 U.S.C. § 2000e(f). Hereinafter, any reference to an employee also includes an applicant.

22. Id. See also 42 U.S.C. § 2000e-16c(a).

23. Id. See also 2 U.S.C. § 1301.

24. Id. See also 3 U.S.C. § 411(c). 25. Id. See also 42 U.S.C. § 2000e-16.

26. The common provisions apply to employees, individuals seeking employment, members of a labor organization and employees and former employees involved in a training or retraining or apprenticeship.

27. Id. at § 202(a).

- 28. P.L. 110-233 § 203(a).
- 29. Id. at § 202(b).
- 30. Id.
- 31. Id. 32. Id.
- 33. Id.
- 34. Id.
- 35. Id.
- 36 Id

37. Pub. Law Section 208(a).

#### ABOUT THE AUTHOR



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# Identity Theft Red Flags and Address Discrepancies

By Eric L. Johnson

dentity thieves use people's private and personally identifi-able information to open new accounts and misuse existing Laccounts, creating havoc for consumers and businesses. The crime of identity theft afflicts millions of Americans each year, and in some cases, causes devastating damage to its victims. A recent Federal Trade Commission (FTC) report estimated that over 8.3 million U.S. adults discovered they were victims of some form of identity theft, causing them to spend between \$1,200 and \$2,000 and 55-130 hours to recover.1 Researchers have estimated the total number of victims to be closer to 10 million with the total costs to individuals and businesses over \$50 billion a year. Under recently promulgated federal regulations, financial institutions and creditors, such as banks, finance companies, automobile dealers, mortgage brokers, utility companies, telecommunications companies, and including many doctors' offices, hospitals and other health care providers, are now required to implement a written program to detect, prevent and mitigate instances of identity theft. This article will briefly summarize two of the new federal regulations impacting Oklahoma businesses, the "Address Discrepancy Rule" and "Card Issuer Rule," and describe in detail the "Red Flags Rule."

#### BACKGROUND

On Nov. 9, 2007, the Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, the Office of Thrift Supervision, National Credit Union Administration and Federal Trade Commission (FTC) (collectively, the agencies) jointly issued an Identity Theft Red Flags and Address Discrepancies Final Rule (the Final Rule)<sup>2</sup> and Interagency Guidelines (guidelines) — implementing Section 114 of the Fair and Accurate Credit Transactions Act of 2003 (the FACT Act)<sup>3</sup> and Section 315 of the FACT Act. The FACT Act added new sections to the federal Fair Credit Reporting Act<sup>4</sup> intended primarily to help consumers fight the growing crime of identity theft. Improved accuracy, privacy, limits on information sharing and new consumer rights to disclosure were also included in the FACT Act.

Section 114 of the FACT Act authorized the agencies to: (i) issue guidelines for use by financial institutions and creditors regarding identity theft with respect to their account holders or customers; (ii) prescribe regulations requiring financial institutions and creditors to establish reasonable policies and procedures for implementing the guidelines to identify possible risks to account holders or customers or to the safety and soundness of the institution or customers; and (iii) prescribe regulations that would require credit and debit card issuers to assess the validity of notifications of changes of address under certain circumstances. The Final Rule implementing Section 114 of the FACT Act requires each financial institution or creditor to develop and implement a written Identity Theft Prevention Program (Program) to detect, prevent and mitigate identity theft in connection with certain types of accounts (the Red Flags Rule). In addition, the Final Rule also describes reasonable policies and procedures that debit or credit card issuers must employ to assess the validity of notifications of change of addresses in certain circumstances (the Card Issuer Rule).

Section 315 of the FACT Act provided that if a person has requested a consumer report from a nationwide consumer reporting agency (CRA), and the request includes an address for the consumer that substantially differs from the addresses in the file of the consumer, and if the CRA provides a consumer report in response to the request, the CRA must notify the requesting party of the existence of the discrepancy. The Final Rule implementing Section 315 of the FACT Act describes reasonable policies and procedures that a user of consumer reports, such as a creditor or employer, must utilize when a CRA sends the user a notice of address discrepancy (the Address Discrepancy Rule).

The Final Rule became effective Jan. 1, 2008, with mandatory compliance on Nov. 1, 2008. However, on Oct. 22, 2008, the FTC issued an enforcement policy statement that delays enforcement of the Red Flags Rule until May 1, 2009.<sup>5</sup> However, note that this does not affect enforcement of the Address Discrepancy and Card Issuer Rules. Nor does it affect compliance for entities not under the jurisdiction of the FTC. The salient provisions of these rules are summarized below.

#### ADDRESS DISCREPANCIES

Under the Address Discrepancy Rule, a user of consumer reports must develop and implement reasonable policies and procedures designed to enable the user to form a reasonable belief that a consumer report relates to the consumer about whom it has requested the consumer report when the user receives a notice of address discrepancy. A "notice of address discrepancy" means a notice sent to a user by a CRA pursuant to 15 U.S.C. § 1681c(h)(1) that informs the user of a substantial difference between the address for the consumer that the user provided when requesting the consumer report and the address in the CRA's file for the consumer.

Examples of such reasonable policies and procedures include:

1) Comparing the information in the consumer report provided by the CRA with information it:

(a) Obtains and uses to verify the consumer's identity in accordance with Customer Information Program (CIP) requirements<sup>6</sup>;

(b) Maintains in its own records, such as applications, change of address notifications, other customer account records, or retained CIP documentation; or

(c) Obtains from third-party sources; or

2) Verifying the information in the consumer report provided by the CRA with the consumer.

It is important to note that any employer who obtains a consumer report for employment purposes is considered a user of a consumer report. As a user of consumer reports, an employer is required to develop and implement these reasonable policies and procedures designed to enable it to form a reasonable belief that the consumer report relates to the applicant/employee about whom it has requested the report.

A user may also be required to develop and implement reasonable policies and procedures for *furnishing* an address for the consumer that the user has reasonably confirmed is accurate to the CRA from whom it received the address discrepancy notice. Among other reasonable means, a user may reasonably confirm that an address is accurate by verifying the address with the consumer, reviewing its own records to verify the consumer's address, or verifying the address through third-party sources. Further, these policies and procedures must provide that the user will furnish the confirmed address to the CRA as part of the information that the user regularly furnishes for the reporting period in which it establishes a relationship with the consumer. However, this obligation to reasonably confirm and report the address only arises when the user:

- can form a reasonable belief that the consumer report relates to the consumer about whom the user requested the report;
- establishes a continuing relationship with the consumer; and
- regularly and in the ordinary course of business furnishes information to the CRA from which the address discrepancy notice relating to the consumer was obtained.

#### **IDENTITY THEFT RED FLAGS**

#### Introduction

Each financial institution<sup>7</sup> or creditor<sup>8</sup> that offers or maintains one or more "covered accounts" is required to develop and implement a written Identity Theft Prevention Program (program). This program must be designed to detect, prevent and mitigate identity theft in connection with the opening of a covered account or any existing covered account. "Identity theft" has the same meaning as in 16 C.F.R. § 603.2(a), which is a fraud committed or *attempted* using the identifying information of another person<sup>9</sup> without authority. The program must be appropriate to the size and complexity of the financial institution or creditor and the nature and scope of its activities.

To determine whether it must develop a program, each financial institution or creditor must periodically determine whether it offers or maintains covered accounts. As part of this determination, the financial institution or creditor must conduct an initial risk assessment to determine whether it offers or maintains such accounts — taking into consideration the methods that it provides to open or access its accounts and its previous experiences with identity theft. A 'red flag' is a pattern, practice or specific activity that indicates the possible existence of identity theft.



Definition of an 'Account' and a 'Covered Account'

An "account" means a continuing relationship established by a person with a financial institution or creditor to obtain a product or service for personal, family, household, or *business* purposes. An account includes an extension of credit,<sup>10</sup> such as the purchase of property or services involving a deferred payment and a deposit account.

A "covered account" is an account that a financial institution or creditor offers or maintains, primarily for personal, family, or household purposes that involves or is designed to permit multiple payments or transactions, such as the following types of accounts:

- credit card account
- mortgage loan
- automobile loan
- margin account
- cell phone account
- utility account
- checking account
- savings account

The term also includes any other account that the financial institution or creditor offers or maintains for which there is a *reasonably foreseeable risk* to customers (a person that has a covered account with a financial institution or creditor) or to the safety and soundness of the financial institution or creditor from identity theft, including financial, operational, compliance, reputation or litigation risks.

#### Elements of the Identity Theft Prevention Program

The program must include reasonable policies and procedures to:

- identify relevant red flags for the covered accounts that the financial institution or creditor offers or maintains, and incorporate those red flags into the program;
- detect red flags that have been incorporated into the program;
- respond appropriately to any red flags that are detected, in order to prevent and mitigate identity theft; and
- ensure that the program (including the red flags determined to be relevant) is updated periodically to reflect changes in risks to customers and to the safety and soundness of the financial institution or creditor from identity theft.

A "red flag" is a pattern, practice or specific activity that indicates the *possible* existence of identity theft. Each financial institution or creditor that is required to implement a program must provide for the continued administration of the program, and must:

- obtain approval of the initial *written* program from either its board of directors<sup>11</sup> or an appropriate committee thereof;
- involve the board of directors, an appropriate committee thereof, or a designated employee at the level of senior management in the oversight, development, implementation and administration of the program;
- train staff, as necessary, to effectively implement the program; and
- exercise appropriate and effective oversight of service provider<sup>12</sup> arrangements.

#### **PROGRAM GUIDELINES**

#### Introduction

Each financial institution or creditor that is required to implement a program must consider the guidelines described below and include in its program those guidelines that are appropriate. In addition to following the guidelines in designing its program, a financial institution or creditor may incorporate, as appropriate, its existing policies, procedures, and other arrangements that control reasonably foreseeable risks to customers or to the safety and soundness of the financial institution or creditor from identity theft.

#### Identifying Relevant Red Flags

A financial institution or creditor should consider the following factors in identifying relevant red flags for covered accounts, as appropriate:

- the types of covered accounts it offers or maintains;
- the methods it provides to open its covered accounts;
- the methods it provides to access its covered accounts; and
- its previous experiences with identity theft.

Relevant red flags should be incorporated from sources such as: (i) incidents of identity theft that the financial institution or creditor has experienced; (ii) methods of identity theft that the financial institution or creditor has identified that reflect changes in identity theft risks; and (iii) applicable supervisory guidance. The program should also include, as appropriate, relevant red flags from the five categories noted below. The guidelines provide illustrative examples of red flags within each category which a financial institution or creditor may consider incorporating into its program, whether singly or in combination.

## 1. Alerts, Notifications or Other Warnings from CRAs or Service Providers

Alerts, notifications and other warnings received from CRAs or service providers, such as fraud detection services, should be included in the program, including:

• a fraud or active duty alert included with a consumer report;



- a notice of credit freeze provided by a CRA in response to a request for a consumer report;
- a notice of address discrepancy provided by a CRA; or
- a consumer report indicating a pattern of activity that is inconsistent with the history and usual pattern of activity of an applicant or customer, such as a recent and significant increase in the volume of inquiries, an unusual number of recently established credit relationships, a material change in the use of credit, especially with respect to recently established credit relationships, or an account that was closed for cause or identified for abuse of account privileges by a financial institution or creditor.

#### 2. Presentation of Suspicious Documents

Red flags associated with the presentation of suspicious documents should be addressed in the program, including:

- identification documents that appear to have been altered or forged;
- the photograph or physical description on identification documents that is not consistent with the appearance of the applicant or customer presenting the identification;
- other information on the identification documentation that is not consistent with information provided by the person opening a new covered account or customer presenting the identification;
- other information on the identification documentation that is not consistent with readily accessible information on file with the financial institution or creditor, such as a signature card or a recent check; or

• an application that appears to have been altered or forged, or that gives the appearance of having been destroyed and reassembled.

#### 3. Presentation of Suspicious Personal Identifying Information

The presentation of suspicious personal identifying information, such as a suspicious address change, should be considered for inclusion in the program. Red flag examples include:

- personal identifying information provided that is inconsistent when compared against external information sources used by the financial institution or creditor. For example, an address that does not match any address in the consumer report or the Social Security Number (SSN) provided has not been issued or is listed on the Social Security Administration's Death Master File;
- personal identifying information provided by the customer that is not consistent with other identifying information provided by the person (for example, there is a lack of correlation between the SSN range and the date of birth);
- personal identifying information provided is associated with known fraudulent activity as indicated by internal or third-party sources used by the financial institution or creditor. For example, when the address or phone number on an application is the same address or phone number provided on a fraudulent application;
- personal identifying information of a type commonly associated with fraudulent activity, as indicated by internal or thirdparty sources used by the financial institution or creditor – such as an address on an application that is fictitious, a mail drop or a prison, or a telephone number that is invalid or associated with a pager or answering service;
- the submission of a SSN that is the same as that submitted by other persons opening an account or other customers;
- the submission of an address or telephone number that is the same as or similar to the address or telephone number submitted by an unusually large number of other persons opening accounts or other customers;

- the person opening the covered account or the customer fails to provide all required personal identifying information on an application or in response to notification that the application is incomplete;
- the provision of personal identifying information that is not consistent with personal identifying information on file with the financial institution or creditor; or
- for financial institutions and creditors that use challenge questions, cases where the person opening the covered account or the customer is unable to provide authenticating information beyond that which would generally be available from a wallet or consumer report.

## 4. Unusual Use of or Suspicious Activity Related to Covered Account

The unusual use of, or other suspicious activity related to a covered account, should also be addressed in the program. Examples could include circumstances where:

- shortly following the notice of a change of address for a covered account, the financial institution or creditor receives a request for a new, additional, or replacement credit card or a cell phone, or for the addition of authorized users on the account;
- a new revolving credit account is used in a manner commonly associated with known patterns of fraud. For example, if the majority of available credit is used for cash advances or merchandise that is easily convertible to cash (*e.g.*, electronics equipment or jewelry) or the customer fails to make the first payment or makes an initial payment, but no subsequent payments;
- a covered account is used in a manner not consistent with established patterns of activity on the account. For example, nonpayment when there is no history of late or missed payments, a material increase in the use of available credit, a material change in purchasing or spending patterns, a material change in electronic fund transfer patterns in connection with a deposit account, or a material change in telephone call patterns in connection with a cellular phone account;
- a covered account that has been inactive for a reasonably lengthy period of time is used (taking into consideration the type of

account, the expected pattern of usage and other relevant factors);

- mail sent to the customer is returned repeatedly as undeliverable even though transactions continue to be conducted in connection with the customer's covered account;
- the financial institution or creditor is notified that the customer is not receiving paper account statements; or
- the financial institution or creditor is notified of unauthorized charges or transactions in connection with a customer's covered account.

## 5. Notice from Customers, Victims, Law Enforcement, etc.

A response to notices from customers, victims of identity theft, law enforcement authorities or other persons regarding possible identity theft in connection with covered accounts held by the financial institution or creditor, should be included in the program. These include a notification by a customer, a victim of identity theft, a law enforcement authority or any other person that the financial institution or creditor has opened a fraudulent account for a person engaged in identity theft.

#### Red Flag Detection

The program's policies and procedures should address the detection of red flags in connection with the opening of covered accounts and existing covered accounts, such as by:

- obtaining identifying information about and verifying the identity of a person opening a covered account; for example, using the policies and procedures regarding identification and verification set forth in the CIP rules; and
- authenticating customers, monitoring transactions, and verifying the validity of address change requests, in the case of existing covered accounts.

#### Preventing and Mitigating Identity Theft

The program should also provide for appropriate responses to red flags that the financial institution or creditor has detected that are commensurate with the degree of risk posed. In determining an appropriate response, the financial institution or creditor should consider aggravating factors that may heighten the risk of identity theft. These include a data security incident that results in unauthorized access to a customer's account records held by the financial institution or creditor, a third party, or notice that a customer has provided information related to a covered account held by the financial institution or creditor to someone fraudulently claiming to represent the financial institution or creditor (*i.e.* phishing) or to a fraudulent Web site. Appropriate responses may include:

- monitoring a covered account for evidence of identity theft;
- contacting the customer;
- changing any passwords, security codes, or other security devices that permit access to a covered account;
- reopening a covered account with a new account number;
- not opening a new covered account;
- closing an existing covered account;
- not attempting to collect on a covered account or not selling a covered account to a debt collector;
- notifying law enforcement; or
- determining that no response is warranted under the particular circumstances.

#### Updating the Program

Financial institutions and creditors should update the program (including the red flags determined to be relevant) periodically to reflect changes in risks to customers or to the safety and soundness of the financial institution or creditor from identity theft, based on factors such as:

- the experiences of the financial institution or creditor with identity theft;
- changes in methods of identity theft;
- changes in methods to detect, prevent and mitigate identity theft;
- changes in the types of accounts that the financial institution or creditor offers or maintains; and
- changes in the business arrangements of the financial institution or creditor, including mergers, acquisitions, alliances, joint ventures and service provider arrangements.

#### Administering the Program

Oversight of the program by the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management is required and should include:

- assigning specific responsibility for the program's implementation;
- reviewing annual reports prepared by staff regarding compliance by the financial institution or creditor with its duties to detect, prevent and mitigate identity theft; and
- approving material changes to the program as necessary to address changing identity theft risks.

Staff of the financial institution or creditor responsible for the development, implementa-

**66** ...creditors that violate the Final Rule may be subject to civil monetary penalties of up to \$3,500 per violation for 'knowing' violations.

tion and administration of its program should report to the board of directors, an appropriate committee of the board, or a designated employee at the level of senior management, at least annually, on compliance by the financial institution or creditor with its identity theft duties under the Red Flags Rule. The report should address material matters related to the program and should evaluate issues such as: (i) the effectiveness of the policies and procedures in addressing the risk of identity theft in connection with the opening of covered accounts and with respect to existing covered accounts; (ii) service provider arrangements; (iii) significant incidents involving identity theft and management's response; and (iv) recommendations for material changes to the program.

Whenever a financial institution or creditor engages a service provider to perform an activity in connection with one or more covered accounts, the financial institution or creditor should take steps to ensure that the activity of the service provider is conducted in accordance with reasonable policies and procedures designed to detect, prevent and mitigate the risk of identity theft. For example, a financial institution or creditor could require the service provider by contract to have policies and procedures to detect relevant red flags that may arise in the performance of the service provider's activities and either report the red flags to the financial institution or creditor, or take appropriate steps to prevent or mitigate identity theft.

#### Other Applicable Legal Requirements

Financial institutions and creditors should be aware of other related legal requirements that may be applicable, such as:

- for financial institutions and creditors that are subject to 31 U.S.C. § 5318(g), filing a Suspicious Activity Report (SAR) in accordance with applicable law and regulations;
- implementing any requirements under 15 U.S.C. § 1681c-1(h), regarding the circumstances under which credit may be extended when the financial institution or creditor detects a fraud or active duty alert on a consumer credit report;
- implementing any requirements for furnishers of information to CRAs under 15 U.S.C. § 1681s-2, for example, to correct or update inaccurate or incomplete information, and to not report information that the furnisher has reasonable cause to believe is inaccurate; and
- complying with the prohibitions in 15 U.S.C. § 1681m on the sale, transfer and placement for collection of certain debts resulting from identity theft.

#### DUTIES OF CARD ISSUERS REGARDING CHANGES OF ADDRESS

Under the Card Issuer Rule, a debit or credit card issuer must establish and implement reasonable policies and procedures to assess the validity of a change of address if it receives notification of a change of address for a consumer's debit or credit card account and, within a short period of time afterwards (during at least the first 30 days after it receives such notification), the card issuer receives a request for an additional or replacement card for the same account.

Under these circumstances, the card issuer may not issue an additional or replacement card until, in accordance with its reasonable policies and procedures and for the purpose of assessing the validity of the change of address, the card issuer:

- notifies the cardholder of the request at the cardholder's former address or by any other means of communication that the card issuer and the cardholder have previously agreed to use and provides the cardholder a reasonable means of promptly reporting incorrect address changes; or
- otherwise assesses the validity of the change of address in accordance with its identity theft program policies and procedures.

Any written or electronic notice that the card issuer provides must be clear and conspicuous<sup>13</sup> and provided separately from its regular correspondence with the cardholder.

In the alternative, a card issuer may satisfy these requirements if it validates an address pursuant to these methods when it receives an address change notification, but before it receives a request for an additional or replacement card.

#### PENALTIES FOR NONCOMPLIANCE

Although there are no criminal penalties for failing to comply with the Final Rule, financial institutions or creditors that violate the Final Rule may be subject to civil monetary penalties of up to \$3,500 per violation for "knowing" violations. There is no formal guidance on what constitutes "per violation." It is arguable to characterize a failure to comply with the Final Rule, such as implementing a program as required by the Red Flags Rule, as a single knowing violation. However, from an enforcement-avoidance perspective, the better practice is to characterize that failure as one violation per account. From discussions with an FTC staff attorney, this is the way the FTC would probably look at the situation if a creditor were in the unfortunate position of being on the wrong side of an enforcement action. There is also the possibility of state enforcement and state civil actions for violation of the Final Rule.

#### CONCLUSION

The Final Rule incorporates many common sense and obvious business practices that financial institutions and creditors have been following (e.g., declining to open an account when the applicant's identification document does not match his or her appearance or application). In this sense, few financial institutions or creditors will have to change their basic procedures. However, financial institutions and creditors should have written policies and procedures in place that comply with the Address Discrepancy Rule and Card Issuer Rule, as well as a written program to detect, prevent and mitigate identity theft. As noted above, compliance with the Final Rule became mandatory on Nov. 1, 2008. However, enforcement of the Red Flags Rule by the FTC has been delayed until May 1, 2009.

1. Federal Trade Commission 2006 Identity Theft Survey Report, November 2007, available at http://www.ftc.gov/os/2007/11/SynovateFinalReportIDTheft2006.pdf.

2. Identity Theft Red Flags and Address Discrepancies under the Fair and Accurate Credit Transactions Act of 2003; Final Rule. 72 Fed. Reg. 63718 (Nov. 9, 2007), available at http://www.ftc.gov/os/fedreg/2007/november/071109redflags.pdf.

3. Pub. L. 108-159, 117 Stat. 1952.

4. 15 U.S.C. 1681 et seq.

5. FTC Press Release dated Oct. 22, 2008, available at: http:// www.ftc.gov/opa/2008/10/redflags.shtm. The FTC Enforcement Policy is available at: http://www.ftc.gov/os/2008/10/081022idtheftred flagsrule.pdf.

6. See 31 U.S.C. § 5318(1) and 31 C.F.R. § 103.121.

7. The term "financial institution" is defined in the same manner as in 15 U.S.C. § 1681a(t), which defines the term to mean a state or national bank, a state or federal savings and loan association, a mutual savings bank, a state or federal credit union, or any other person that, directly or indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer.

8. The term "creditor" has the same meaning as in 15 U.S.C. § 1681a(r)(5) and includes entities such as banks, finance companies, automobile dealers, mortgage lenders, mortgage brokers, utility companies and telecommunications companies. Note that 15 U.S.C. § 1681a(r)(5) defines the term "creditor" by reference to section 702 of the Equal Credit Opportunity Act, which in turn defines "creditor" rather broadly to mean: any person who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any assignee of an original credit tor who participates in the decision to extend, renew, or continue credit. 15 U.S.C. § 1691a(e). 9. A "person" is not limited to an individual; it could also be a

9. A "person" is not limited to an individual; it could also be a partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity. 15 U.S.C. § 1681a(f).
 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), 10. "Credit" has the same meaning as in 15

10. "Credit" has the same meaning as in 15 U.S.C. § 1681a(r)(5), which defines the term "credit" by reference to section 702 of the Equal Credit Opportunity Act, which construes "credit" to mean the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor. 15 U.S.C. § 1691a(d).

11. "Board of directors" means in the case of a branch or agency of a foreign bank, the managing official in charge of the branch or agency, and in the case of any other creditor that does not have a board of directors, a designated employee at the level of senior management.

 A "service provider" is a person that provides a service directly to the financial institution or creditor.

13. "Clear and conspicuous" means reasonably understandable and designed to call attention to the nature and significance of the information presented.

#### ABOUT THE AUTHOR



Eric L. Johnson is a shareholder with Phillips Murrah P.C. He has 15 years of experience providing commercial and consumer credit compliance advice on federal and state laws and regulations. He is a registered lobbyist, an adjunct professor of consumer law for Oklahoma City University School of Law and

chairs the Legal Committee for the National Automotive Finance Association. He is a frequent speaker and author on consumer financial services issues.



#### OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION

#### PRESENTS

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17 Credits, including 3 Ethics

Friday, April 24

Thursday, April 23	
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7:30 a.m. - 8:00 a.m. Registration 8:00 a.m. – 8:30 a.m. Reaistration 8:00 - 8:15 Opening remarks 8:30 - 9:45 TIM "TARZAN" WILSON (Okla. Co. Public Defender's): Why childhood and poverty matter 8:15 – 9:05 JOHN FLOYD (Federal Defender, 9:45 - 10:35 PROF. JOY HADWIGER, PH.D. Kansas), "IDAHO" JOE WARD (Austin), DALE (Rogers State Univ., Claremore): Aging ANDERSON (OIDS): What is mitigation and populations in prison how do you find it? 9:05 - 9:55 WINSTON CONNOR (Miami, OK): 10:45 - 11:35 ART WILLIAMS, PH.D. (Tulsa): Understanding your client's culture NGRI litigation 10:05 - 10:45 BERT RICHARD (Okla. Co. 12:45 \_ 1:35 CINDY VIOL (OKC): Public Defenders'): Batson post Snyder/ Incorporating capital defense tools into your regular criminal practice Miller-El 10:45 - 11:35 BARRY DERRYBERRY (Federal 1:35 – 2:30 DEBBIE MADDOX (Norman): Defender, Tulsa) & MICHAEL MOREHEAD Imparting your theory of mitigation to the (OIDS): Recent case update jury 11:35 - 12:25 GARY JAMES (OKC): 2:40 – 3:30 JOHN FLOYD (Federal Defender, Prosecutorial Misconduct Kansas): Defense Initiated Victim Outreach 1:30 - 2:50 PROF. SEAN O'BRIEN (UMKC 3:30 - 5:00 JOHN NILAND (Texas Defender School of Law): ABA & Supplementary Service, Austin): Thoughts on how NOT to do Guidelines for Mitigation capital litigation 3:00 - 3:50 GARY JAMES (OKC): Strategic use of the media 3:50 – 5:30 **FEATURING KEYNOTE** SPEAKER: MARK CURRIDEN, (Vinson & Elkins, Dallas), author of "Contempt of Court. The Turn of the Century Lynching That Launched a Hundred Years of Federalism." (Comprises 1<sup>1</sup>/<sub>2</sub> ethics credit).

#### <u>COST</u>

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## The Latest Development in Oklahoma's Wrongful Discharge Doctrine

A Plaintiff's Perspective: The Rise of *Kruchowski* and the Demise of *List* 

By Mark Hammons

For those who practice employment law, one of the great debates has been whether terminations based on race, gender or age would give rise to a state law remedy under Oklahoma's  $Burk^1$  doctrine of wrongful termination. Oklahoma's judicial history in this area has been fraught with twists, turns and inconsistencies.

In Tate v. Browing-Ferris Inc.,<sup>2</sup> the Oklahoma Supreme Court recognized a Burk remedy for job termination based on race discrimination or retaliation for complaining of race discrimination. A similar result was reached in Atkinson v. Halliburton Co.,3 where a common-law remedy for handicap discrimination was recognized as a counterpart to the statutory remedy provided by the Oklahoma Anti-Discrimination Act (OADA).<sup>4</sup> This changed in List v. Anchor Paint *Mfg. Co.,*<sup>5</sup> where the Oklahoma Supreme Court focused on a "status vs. conduct" distinction and held that there would be no Burk remedy for age discrimination victims because the federal statute<sup>6</sup> provided an "adequate remedy." This was followed by Marshall v. OK Rental & Leasing Inc.,7 which held that sexual harassment culminating in a constructive discharge would "not lie because the action was based on the plaintiff's status rather than her conduct" and "because the remedies provided by Federal law in Title VII and Oklahoma's anti-discrimination statutes provided (sic) 'adequate' remedies."8

The *List* and *Marshall* rulings seemed to be the end of state law remedies for persons who were discriminated against based on federally protected characteristics such as race, gender or age. That expectation was upset when the Supreme Court seemingly reversed itself in *Collier v. Insignia Financial Group*,<sup>9</sup> and recognized a *quid pro quo* sex discrimination claim culminating in constructive discharge. *Collier* noted that the state law remedies under the OADA were not adequate and would not prevent recognition of *Burk* claims for relief. "Absent from the discussion in *Collier* was an analysis of the remedies available to the plaintiff under Federal law and their alleged 'adequacy."<sup>10</sup>

The next step on the path was *Clinton v. State* of Oklahoma ex rel. Logan County Election Board.<sup>11</sup> In *Clinton*, "[t]he Court held that because the employee had an 'adequate' federal statutory remedy for wrongful discharge, she could not also assert a *Burk* tort. [The Court] did not discuss the 'adequacy' of the federal remedy"<sup>12</sup> but offered a general statement that a federal remedy adequate to vindicate Oklahoma's public policy would preclude recognizing a parallel *Burk* tort. Once again, this seemed to foreclose state law relief for federally protected victims of discrimination.

That conclusion was unsettled once again in *Saint v. Data Exchange Inc.*<sup>13</sup> In *Saint*, an age discrimination claimant argued that for the federal remedy to be "adequate," it must be the same remedy available to victims of handicap discrimination under the OADA.<sup>14</sup> This argument was premised on a distinction between the *Tate/Collier* decisions and the *List/Marshall/Clinton* decisions. In *Tate* and *Collier*, the Oklahoma Supreme Court held that the OADA created a unified class<sup>15</sup> and that Oklahoma's Constitution<sup>16</sup> precluded dissimilar remedies between members of the class. Accordingly, a *Burk* remedy was allowed to cure this defect. It was

argued that List/Marshall/Clinton were merely general statements as to the "adequacy" doctrine and did not overturn or modify the special requirement of procedural uniformity applicable to policy claims under arising the OADA. Saint agreed with this distinction and held that age dis-

crimination victims were indeed entitled to a state law remedy, because the federal remedies were not the same as those provided by state law.17 Saint, however, engendered a new round of argument as to what Saint meant and how far it extended. "Although Saint also involved age discrimination, it did not address List at all. Saint was decided under a constitutional question, whereas List was not."18 Some argued that Saint effectively overruled List and allowed a state law remedy for age discrimination; others argued that because *Saint* did not mention List, Saint did not truly grant a state-law remedy, and others argued that although Saint did grant a state-law remedy for age discrimination, it had no impact outside of age discrimination.

To resolve these questions, the federal court in *Kruchowski* certified a series of issues including whether *Saint* overruled *List*.

## THE SCOPE OF THE *KRUCHOWSKI* DECISION

The certified questions addressed by the court were rather narrow:<sup>19</sup>

1) Does *Saint v. Data Exchange Inc.*, 2006 OK 59, 145 P.3d 1037 overrule *List v. Anchor Paint Mfg. Co.*, 1996 OK 1, 910 P.2d 1011, and if so, does *Saint* apply retroactively?

2) Does *Saint v. Data Exchange Inc.*, 2006 OK 59, 145 P.3d 1037 allow a plaintiff who alleges a violation of the Federal Age Discrimination in Employment Act, 29 U.S.C. §§621-634, to also pursue a state law claim for wrongful discharge in violation of public policy only if the federal remedy and/or state remedy under the Oklahoma Anti-Discrimination Act, 25 O.S. 2001 §§1101-1901, are proven to be inadequate?

The court could have easily disposed of these

It can no longer be disputed that a parallel *Burk* tort is available for victims of age discrimination.

questions on narrow grounds, but "[b]ecause uncertainty apparently still remains about the nature of the *Burk* tort, to answer today's certified question we must revisit *List*, its predecessors, and its progeny."<sup>20</sup> The court then proceeded to provide a detailed history of the evolution of its *Burk* jurisprudence.<sup>21</sup> In the

course of evaluating its prior precedent, *Kruchowski* not only decided the fate of *List*, but also overruled *Marshall* and *Clinton* and abandoned the "adequate remedy" doctrine with a revised "commensurate remedy" formulation. Shortly after *Kruchowski* the Oklahoma Supreme Court in *Shirazi v. Childtime Learning Ctr. Inc.*, 2009 OK 13, \_\_\_\_ P.3d \_\_\_\_ expressly extended the *Burk* remedy to all forms of discrimination covered by the OADA and made in plain that in the special context of the OADA the unified nature of the class required that the remedies not merely be commensurate but actually be the "same":

Today, we hold that the Okla. Const. art. 5 §46 requires that the same remedies must be applicable to everyone within the same class of employment discrimination. The same class of employment discrimination, as recognized by 25 O.S. 2001 §1302, includes race, color, religion, sex, national origin, age, and handicap. Regardless of whether the remedies originate under federal statutes or state law, pursuant to *Saint v. Data Exchange Inc.*, 2006 OK 59, 145 P.3d 1037, and *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, \_\_\_\_ P.3d \_\_\_\_, rather than looking to the *adequacy* of remedies, a plaintiff may pursue a state law *Burk* tort claim for wrongful discharge in violation of public policy when the *same* remedies are not available to the same class of employment discrimination victims.<sup>22</sup>

This comprehensive re-evaluation of the *Burk* doctrine answers many questions, but it also leaves many more to be decided in the future.

## WHAT KRUCHOWSKI AND SHIRAZI SETTLED

#### OADA Covered Discrimination May Be Redressed by the Burk Doctrine

*Kruchowski*, "expressly overrule[ed] List and reaffirm[ed] that age discrimination victims are part of the employment discrimination class to which *Burk* applies.<sup>23</sup> *Shirazi* extended this holding to "race, color, religion, sex, national origin, age, and handicap" claims.<sup>24</sup>

It can no longer be disputed that a parallel *Burk* tort is available for victims of age discrimination.

#### Clinton and Marshall Are Also Overruled in the OADA Context

"[T]o the extent that the rationale of *Marshall v. OK Rental & Leasing Inc.*, 1997 OK 34, 939 P.2d 1116 and *Clinton v. State of Oklahoma ex rel. Logan County Election Board*, 2001 OK 52, 29 P.3d 543, conflicts with our decision in *Saint* and our decision today, they are expressly overruled."<sup>25</sup>

The List/Marshall/Clinton trilogy of cases had been the primary impediment to persons arguing that all persons covered by the OADA had a Burk remedy equal to the one expressly provided to handicap discrimination victims. The opposing argument - and one made to the Supreme Court in *Kruchowski* – was that since Tate/Collier/Saint did not expressly overrule those cases, the "adequate remedy" doctrine applied to claims under the OADA. Under this argument, the "adequate" (though not identical) federal remedies precluded parallel state law claims. By overruling not only List but also Marshall and Clinton, the Oklahoma Supreme Court put an end to the viability of this argument at least in the OADA context.

Additionally, *Kruchowski* and *Shirazi* explicitly repeated the constitutional requirement that

remedies available to all persons covered by the OADA must be identical: "[A]s required by the Constitution, the same remedies must be made available for everyone within the class of employment discrimination - handicap, race, sex and age."<sup>26</sup> Therefore "a plaintiff may pursue a state law claim for wrongful discharge in violation of public policy when the available remedies to the same class of employment discrimination victims are not uniform and evenhanded- regardless of whether remedies originate under Federal statutes or state law."27 Neither the damage remedies under Title VII nor Title VII's coverage are the same as that provided by the OADA. While Title VII's available damages are *similar* to the tort remedies, the caps on such damages make the potential compensation for non-wage losses and punitive damages less than available under state law.<sup>28</sup> Furthermore, the applicable statute of limitations, the standards for constructive discharge and even the burden of proof are different between state and federal law with, in each case, state law providing a more generous remedy.<sup>29</sup> Such differences mean that the federal schemes provide less protection for Oklahoma's policy interests than is available under state law which makes those federal remedies less than suitable.

#### The Retroactive Effect of Saint

"[T]he *Saint* decision will be given retroactive application to all matters which were in the litigation pipeline, state and federal, when *Saint* was decided, but not to any claims which arose *before Saint* and which were not pending when *Saint* was decided."<sup>30</sup>

Under this application, *Saint* applies to all cases still pending, but it will not be a basis to re-open an otherwise closed case.

#### WHAT KRUCHOWSKI DID NOT SETTLE

#### What Is a "Commensurate" Remedy

To emphasize the change in legal standards as well as the invalidity of the *List/Marshall/Clinton* "adequate remedy" doctrine, the Oklahoma Supreme Court has retreated from that terminology and substituted the term: "commensurate remedy."

It might appear that changing "adequate" to "commensurate" is mere semantics, but the change in the legal test is substantive.

The "adequate remedy" doctrine had generally looked only at financial remedies and then in the abstract rather than in comparison with how other similarly situated persons were protected.<sup>31</sup> That limited analysis had been modified even before *Kruchowski*. "In *Vasek*, [the Supreme Court] equated 'adequacy' of remedies with 'sufficiency,' in other words: Were the remedies available to the plaintiff sufficient to protect Oklahoma's public policy goals?"<sup>32</sup>

It is not merely financial remedies which must be examined to determine whether a proposed alternate remedial system is sufficient to protect those goals.

In terms of financial remedies, the *Kruchowski* test is whether "(a) there is no available statutory ry-crafted remedy or (b) the available statutory remedy is not commensurate with that which is provided for similar work-related discrimination."<sup>33</sup> In the more specialized context of claims pertaining to OADA covered actions, the members of that unified statutory class are not only entitled to commensurate remedies but to the "same" remedies.<sup>34</sup>

The question of what other factors must be considered is not so clear. *Kruchowski* was care-

ful to point out that "[o]ur decision today does not disturb *Vasek*"<sup>35</sup> which involved a claim that federal remedies under 42 U.S.C. § 1983 were adequate, such that there would be no state law remedy for a public employee whistleblower:

> [T]he trial court believed that a *Burk* action might be unavailable to Plaintiff because she may have been able to bring a federal section 1983 action for abridgment of her First Amendment right of free speech. The Court of Civil Appeals affirmed the trial court's holding that Plaintiff's claim was legally insufficient based solely on that argument. Howev-

er, Employer's claimed availability of a section 1983 action does not address or protect the Oklahoma public policy goal advanced by Plaintiff's whistleblowing. The question is not, and never has been, merely whether a discharged at-will employee could possibly pursue a statutory remedy. The question is whether 'a statutory remedy exists that is sufficient to protect the Oklahoma public policy goal.' *McCrady*, 2005 OK 67, ¶ 9, 122 P.3d at 475. Under Employer's view, every whistleblower *Burk* claim would be barred by the potential for a section 1983 remedy based on the whistleblower's right of free speech. Section 1983, however, is not a federal statutory remedy that sufficiently protects the Oklahoma policy goal of reporting unsafe or unhealthy conditions in public buildings. It is not an impediment to Plaintiff's claim of wrongful discharge.36

Significantly, the financial remedies under Sec. 1983 are the same as those for a *Burk* action.<sup>37</sup> Accordingly, *Vasek*'s decision was not based on the "adequacy" of the financial remedy. One part of *Vasek* is clearly determined by whether the proposed alternative is specifically tied to the public policy or is merely a more general remedy which has no direct relationship to a particular policy interest. It would appear that a generalized remedy will not be sufficient to vin-

dicate specific policies. It may be *Vasek* was also concerned that the Sec. 1983 remedy was uncertain. Recent U.S. Supreme Court decisions have significantly narrowed the scope of First Amendment whistleblower protection.<sup>38</sup> Although the Oklahoma Supreme Court did not expressly address this issue, it did indicate that a mere possible remedy was not sufficient.

The court also did not expressly address whether substantive differences in proof or in the statutes of limitation was part of the equation. It would appear that it would be at least a factor in determining whether an alternative

remedy was "commensurate." This question is most easily addressed in the OADA context where state law provides a lower burden of proof, a longer time to file suit and more generous coverage for actions such as constructive discharge. In that context, it would appear clear that the federal remedies do not provide the level of protection the state intends to offer for this kind of wrong and that reliance on the federal remedy alone would not provide all of the protection intended by the OADA. Other comparisons may not be as direct, but they should still be examined in deciding whether an alternative remedy provides "commensurate" relief.

#### Discrimination Not Resulting in Wrongful Discharge

The *Burk* doctrine by definition requires "an actual or constructive discharge."<sup>39</sup> For this reason, the *Burk* doctrine would not cover other sorts of employment wrongs. In contrast, the OADA prohibits discrimination or retaliation in the form of a failure to hire, discrimination regarding compensation or the terms, conditions, privileges or responsibilities of employment, segregation or classification which impairs opportunities or which adversely affects employment status.<sup>40</sup> The OADA provides an administrative remedy to persons suffering some of these harms<sup>41</sup> and a statutory right to handicap discrimination victims to bring their own civil action for any injury to any of these rights.<sup>42</sup>

Under the constitutional rule of equality of remedies, which *Kruchowski* reaffirmed, there would be a constitutional infirmity in the statute unless similar remedies were made available to age, gender and race discrimination victims.

Although this remedy cannot be in the form of a Burk tort, that should not be an impediment to crafting appropriate remedies under other doctrines. It must be remembered that in the root case of Tate, the employee "invoke[d] the com*mon law* of the state to recover compensatory and punitive damages for racially discriminatory and retaliatory treatment."43 Tate acknowledged that "[t]he common law forms 'a dynamic and growing' body of rules that change with the conditions of society."44 In recognition of this principle, the *Tate* court utilized the *Burk* doctrine as a common law remedy for discrimination or retaliation culminating in a discharge from employment. It is consistent with *Tate* and its progeny to conclude that the Oklahoma Supreme Court would likewise recognize a common law remedy<sup>45</sup> for prohibited discrimination or retaliation that caused an injury short of wrongful discharge.

It would be improvident to claim with certainty *which* common law doctrine the Oklahoma Supreme Court might choose to offer remedies for employees suffering from employment discrimination short of termination, but one likely candidate is the so-called "prima facie tort" or "malicious wrong" doctrine. This common law cause of action is set out in the *Restatement of Torts (Second)* § 870 as follows:

One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability.

Oklahoma has expressly adopted this tort. Although it is not commonly used, the cases recognizing it have never been overturned.<sup>46</sup> The point is that although the *Burk* doctrine is not likely to be extended beyond wrongful termination claims, other common-law remedies are available to redress these other forms of discriminatory treatment.

#### Exhaustion of Administrative Remedies

In *Atkinson v. Halliburton Co.*,<sup>47</sup> the Oklahoma Supreme Court held that exhaustion of the administrative remedy was required for handicap discrimination claims. The constitutional requirement of procedural uniformity would seem to counsel that this requirement would apply to *all* claims arising under the OADA, however, Oklahoma precedent is inconsistent on this point.

In Atkinson, the court was careful to note that there was no requirement of exhaustion for other forms of discrimination covered by the OADA. Atkinson explained that its decision arose out of the special language found in 25 O. S. § 1901 prohibiting handicap discrimination. Noting that "'[t]he cardinal rule of statutory construction is to ascertain and give effect to legislative intent'"48 the court explained that "[i]f the Act is construed not to require the filing of a complaint before resorting to the courts, it renders § 1901 meaningless and irrelevant."49 Previously, in Tate v. Browning-Ferris Inc.,50 the court had reached the opposite conclusion for race claims holding that administrative exhaustion was *not* required:

The anti-discrimination statute provides that a person claiming to be aggrieved by a discriminatory practice *may* file with the Commission a written sworn complaint that will trigger the agency's administrative procedure. Whether this affords a mandatory remedy depends on the meaning of the word 'may.' With few exceptions this court has held that 'may' usually denotes *permissive* or *discretional* rather than mandatory action or conduct. We think the legislature used the word 'may' to convey its ordinary meaning and signify permissive rather than mandatory action.

*Atkinson* did not reverse *Tate* and, to the contrary, emphasized that "the reasoning behind *Tate*, [remains] sound in its application to the racial discrimination provisions of the Act"and "[w]e do not depart from that decision."<sup>51</sup> *Atkinson* explained that as to the other forms of discrimination covered by the OADA:

The statute provided no private cause of action, therefore, an aggrieved party could not vindicate his rights in court without having a commonlaw claim. . . Since the addition of § 1901 to the Act, the OHRC no longer has the last word on handicap discrimination under the administrative scheme. \* \* \* Therefore, the reasoning behind *Tate,* though sound in its application to the racial discrimination provisions of the Act, does not apply in the instant case. \*\*\*\*\*

When a party's right of access to the courts is protected by following the statutory scheme, exhaustion of the procedures of that scheme is a condition precedent to filing an action with the courts.<sup>52</sup>

Since the right of access to the courts for age, gender and race claims is not expressly preserved by the OADA statutory scheme, administrative exhaustion would still not be required for those claims under this precedent.

The problem is that *Atkinson* did not address the constitutional requirement of uniformity. Accordingly, if the constitutional issue is raised, there is a real possibility that the Oklahoma Supreme Court might reach a different conclusion.

The possible outcomes are these:

First, the Oklahoma Supreme Court might hold that persons raising OADA *Burk* claims

must follow the administrative scheme set out for handicap discrimination victims.

Second, the Oklahoma Supreme Court might hold that limiting administrative exhaustion to only handicap claims did not violate uniformity requirements because of the futility doctrine. "When an administrative remedy is unavailable, ineffective or futile to pursue, the policy justifications for invoking the exhaustion of administrative remedies doctrine are no longer compelling."<sup>53</sup> Application of this recognized exception might not offend any requirements of procedural uniformity.

Third, the Oklahoma Supreme Court could return to its *Tate* construction of the administrative procedures and hold them to be permissive

> rather than mandatory, and requiring that no one – including handicap claimants – had to first file an administrative claim.

> Frankly, the author cannot offer a reasonable prediction of which course the Supreme Court may choose to follow and therefore a counselor should advise his or her clients to go to the EEOC or the Oklahoma Human Rights Commission (OHRC) and file an administrative complaint. The time for such filing is within 180 days of the wrongful act<sup>54</sup> – not the 300 days

available under federal law. Filing with the EEOC should suffice as a filing with the OHRC as each agency is the agent for the other under their workshare agreements.<sup>55</sup>

#### Availability of Attorney's Fees

*Burk* tort claims in general do not support attorney fee awards.<sup>56</sup> Moreover, there is no overarching equitable power to award attorney's fees.<sup>57</sup>

Oklahoma follows the American Rule concerning the recovery of attorney fees. It provides that each litigant pay for legal representation and that courts are without authority to assess attorney fees in the absence of a specific statute or contract. Exceptions to the Rule are narrowly defined because attorney fee awards against the non-prevailing party have a chilling effect on open access to the

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and to prevailing fair

housing claimants.

courts. For an award of attorney fees to be authorized under a particular statute, the authorization must be found within the strict confines of the statute. If it requires interpretation, it may be read in context with other parts of the statute and with the law in effect at the time of its enactment.<sup>58</sup>

Nonetheless, attorney's fees are clearly part of the remedy available to handicap discrimination claimants<sup>59</sup> and the procedural uniformity requirement set out in *Tate, Collier, Saint, Kruchowski* and *Shirazi* would appear to mandate that attorney fee awards also be available to victims of age, race and gender discrimination.

The author would propose that the OADA itself provides for awards of attorney's fees such that there is no impediment to an award as a matter of state law. There are two reasons for such conclusion.

First, awards of attorney's fees are implicit within the purposes section of the act:<sup>60</sup>

A. The general purposes of this act are to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 to make uniform the law of those states which enact this act, and to provide rights and remedies substantially equivalent to those granted under the federal Fair Housing Law.

B. This act shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the special purposes of the particular provision involved.

The relevant federal law provisions all include assessment of attorney's fees to prevailing employees and to prevailing fair housing claimants.<sup>61</sup> Given the mandate that the OADA "be liberally construed to further [those] purposes," an interpretation allowing attorney's fees would appear to be reasonable.

Second, there is an explicit authorization for the award of fees at the administrative level. If the Oklahoma Human Rights Commission determines that discrimination under the OADA has occurred, it may issue an Order providing relief which may include:

awarding costs, including attorneys fees, to:

a. a prevailing complaining party, or

b. the party complained against, if the Commission determines that the complaint is clearly frivolous,  $\dots$ <sup>62</sup>

A district court action may be brought to enforce such orders<sup>63</sup> and a *Burk* action may be viewed as a mere continuation of the prior administrative process. As pointed out previously, the Oklahoma Supreme Court has – separate from the uniform remedy requirement – interpreted the OADA administrative procedures as a non-exclusive remedy for discrimination.<sup>64</sup> The combination of the policy statement with authorization for administrative level fees can be – and probably will be – interpreted to allow an award of attorney's fees in the course of a purely private action to enforce protected rights.

#### Constitutional Issues

It is apparent that the approach of the defense bar will be to assert that the OADA is unconstitutional, because it fails to provide remedies for actions short of discharge and for persons outside the at-will category.

In this author's view, such challenges are unlikely to be successful. First, it is questionable as to whether employers have standing to raise this infirmity since they are not the actual "victims" of the infirmity.65 Second, the strong preference of Oklahoma decisional law is to construe statutes to avoid constitutional infirmity, and the root case of *Tate* expressly applied this doctrine to the OADA.<sup>66</sup> Indeed, each of the constitutional questions which have followed Tate -Collier, Saint, Kruchowski and Shirazi - were decided expressly with the view of construing the OADA to provide equal remedies throughout the class. The Burk doctrine need not be expanded as other common-law remedies are sufficient to fill in any remaining gaps in coverage. For instances, as to employees terminable only for cause, the well-established doctrine of tortious breach of contract is available to those terminated for a discriminatory reason.67

Moreover, even if the OADA were "unconstitutional" as not providing equal remedies throughout the class, that would not preclude the act from being a clear statement of Oklahoma's policy against discrimination. The sections of the OADA setting Oklahoma's public policy regarding employment discrimination<sup>68</sup> are separate from the individual remedy provided for handicap victims.<sup>69</sup> Thus, the remedies section is sufficiently distinct from the policies and prohibitions that it is unlikely that attacking the OADA for asymmetrical remedies would invalidate the act's policy statements or prohibitions against employment discrimination.<sup>70</sup> Even if the remedies section was invalidated, the Kruchowski/Shirazi rule would require implication of a Burk remedy because there would (in that event) be no state-law remedy and the federal remedies would not provide uniform relief throughout the state statutory class.

#### CONCLUSION

The Kruchowski decision clears up a number of the thorniest issues in the employment discrimination sector of Burk claims. It may now be said with certainty that there are Burk remedies for the entire class of persons covered by the OADA. Nonetheless, there remain unsettled questions about the specific source of remedies available to discrimination victims who are not discharged as well as to whether there are administrative requisites that must precede a civil suit.

There is also now a more detailed "commensurate remedy" test to be applied to the remaining spectrum of Burk claims which will require more than merely looking at the economic remedies provided by a proposed alternative to a Burk action.

1. Burk v. K-Mart Corp., 1989 OK 22, 770 P.2d 24.

2. 1992 OK 72, 833 P.2d 1218.

3. 1995 OK 104; 905 P.2d 772.

4. 25 O.S. §§1101, et seq. The handicap discrimination remedy appears at 25 O.S. § 1901.

5. 1996 OK 1, 910 P.2d 1011.

6. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634.

7. 1997 OK 34, 939 P.2d 116.

8. Kruchowski v. The Weyerhaeuser Company, 2008 OK 105 ¶¶ 14, 15, P.3d \_\_\_\_, 79 O.B.J. 2896, 2899.

9. 1999 OK 49, 981 P.2d 321

10. Kruchowski at ¶ 18, 79 O.B.J. at 2899.

11. 2001 OK 52, 29 P.3d 543.

12. Kruchowski at ¶ 18, 79 O.B.J. at 2899-2900.

13. 2006 OK 59, 145 P.3d 1037

14. 25 O.S. § 1901 makes the full range of normal tort remedies

available to handicap discrimination victims. 15. Tate, ¶ 18, 833 P.2d at 1229-30; Collier, ¶ 14, 981 P.2d at 325-26. 16. Okla.Const., art. 5, § 46:

.The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing ... Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals...

17. Under the ADEA, only earnings loss and liquidated damages are available. There is no recovery for compensatory damages or punitive damages. Spulak v. K Mart Corp., 894 F.2d 1150, 1157 (10th Cir. 1990) ("emotional distress. . . is not an element of ADEA damages") and Bruno v. Western Elec. Co., 829 F.2d 957, 966-67 (10th Cir. 1987) (punitive damages not available in ADEA cases).

18. Kruchowski at ¶ 23, 79 O.B.J. at 2900.

19. Kruchowski at ¶ 0, 79 O.B.J. at 2897. These questions were reformulated from the original set certified to the Court. See ¶ 1 n. 3, 79 O.B.J. at 2903, n. 3 setting out the original questions. 20. *Kruchowski* at ¶ 6, 79 O.B.J. at 2898.

21. Kruchowski at ¶¶ 7-25, 79 O.B.J., 2898-2901.

22. Shirazi v. Childtime Learning Ctr. Inc., 2009 OK 13, ¶12, \_\_\_\_ P.3d (emphasis by the Court).

23. Kruchowski at ¶ 23, 79 O.B.J. at 2900, emphasis supplied.

24. Shirazi, 2009 OK 13, ¶12 25.Kruchowski at ¶25, 79 O.B.J. at 2901. Also see ¶ 34, 79 O.B.J., at

2902

26. Kruchowski, at ¶ 30, 79 O.B.J. at 2902 and Shirazi, 2009 OK 13, ¶12.

27. Kruchowski, at ¶ 35, 79 O.B.J. at 2902-03.

28. Title VII allows the recovery of compensatory and punitive damages, but such damages are limited by a combined cap the upper limit of which is \$300,000.00. 42 U.S.C. § 1981a(b)(3). There is no cap on non-wage loss under state law, and the state caps on punitive damages potentially exceed \$300,000.00.

29. To establish a constructive discharge under federal law, "[t]he bar is quite high in such cases: a plaintiff must show he had no other choice but to quit." *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1221 (10th Cir. 2002). Under state law, "[i]f the employer's behavior is so objectively offensive as to alter the conditions of the plaintiff's employment (causing the employee to resign), a retaliatory constructive dis-charge can be said to have occurred". *Collier*, ¶9, 981 P.2d at 324, emphasis by the Court. Similarly, as to the burden of proof, "the `determining factor' test [used in federal claims] is a more stringent test than the 'significant factor' test" used for the state law claims. Bentley v. Cleveland County Board of County Com'rs, 41 F.3d 600, 606 (10th Cir. 1994). Finally, state law claims are not required to bring a lawsuit within ninety (90) days of issuance of a right to sue letter. Duncan v. City Of Nichols Hills, 1996 OK 16, 913 P.2d 1303, 1310.

30. Kruchowski, at ¶ 28, 79 O.B.J. at 2091.

 Kruchowski at ¶ 12, 79 O.B.J., 2899.
 Kruchowski at ¶ 25, 79 O.B.J., 2809.
 Kruchowski at ¶ 25, 79 O.B.J., 2901 referring to Vasek v. Bd of Cnty Comm'rs, 2008 OK 35, 186 P.3d 928. Vasek itself borrowed the "sufficiency" analysis from McCrady v. Okla. Dep't. of Pub. Safety, 2005 OK 67, ¶ 9, 122 exists that is sufficient to protect the Oklahoma public policy goal.").

33. Kruchowski at ¶ 36, 79 O.B.J., at 2093. This is much the same test advocated by Justice Opala in his concurrence to *Clinton*. See ¶ 12, 29 P.3d at 550 ("adequacy" should be determined by examining whether "(a) there is no statute-crafted remedy or (b) the available statutory remedy is not co-extensive with that provided for like or similar workrelated harms.").
34. Shirazi, 2009 OK 13, ¶¶ 11, 12.
35. Kruchowski, at ¶ 25, 79 O.B.J. at 2091.
36. Vasek, 2008 OK 35, ¶¶ 26-27, 186 P.3d 928, 933-34.

37. "[W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." Memphis Community School Dist. v. Stachura, 477 U.S. 299, 306 (1986). Such "compensatory damages may include not only out-of-pocket loss and other monetary harms, but also injuries such as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering." Id., at 307 quoting Gertz v. Robert Welch Inc., 418 U.S. 323, 350 (1974). "[P]unitive damages may be available in a proper § 1983 case. . . . for acts 'mali-ciously, or wantonly, or oppressively done.'' Memphis, 477 U.S. at 306 n. 9 (quoting Smith v. Wade, 461 U.S. 30, 51 (1983)). 38. Garcetti v. Ceballos, 547 U.S. 410 (2006) (excluding from First

Amendment protection any reports made by a government employee as part of his or her duties).

39. *Kruchowski*, at ¶ 24, 79 O.B.J. at 2900. 40. 25 O.S. § 1302(A)(1), (2).

41. 25 O.S. § 1505(C). This section impliedly but not expressly provides relief in the form of wage damages resulting from demotions and denials of positions and for other actions having a wage impact. It does not provide monetary damages for prohibited actions having a nonwage impact.

42. 25 O.S. § 1901(A).

43. 833 P.2d at 1222, emphasis supplied.

44. 833 P.2d at 1226.

45. That is not to say that the Oklahoma Supreme Court might not ultimately decide that the implied statutory remedy doctrine offered a better unified approach to this result. See Holbert v. Echeverria, 1987 OK 99, 744 P.2d 960, 962-65 (adopting this doctrine)

46. The root case is Hibbard v. Halliday, 58 Okl. 244, 158 P. 1158, 1159 (1916) ("At the common law there was a cause of action whenever one person did damage to another willfully and intentionally, without just cause or excuse." Syllabus by the Court, No. 3). See Mangum Electric Co. et al. v. Border, 101 Okla. 64, 222 P. 1002 (Okla. 1923); Ward v. First Nat'l Bank, 180 Okla. 395, 397, 69 P.2d 1041, 1043 (Okla. 1937); Pacific Mut. Life Ins. Co. v. Tetirick, 185 OK 37, 43, 89 P.2d 774, 780-781 (1939), and Schlirf v. Loosen, 204 P. 651, 653, 232 P.2d 928, 930 (Okla. 1951) applying

the doctrine. Arguably this doctrine is codified in 23 O.S. § 3 ("Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefore in money, which is called damages."). Although it is sometimes argued that Patel v. OMH Med. Ctr. Inc., 1999 OK 33 ¶ 4, 987 P.2d 1185, 1190 expressed a nonrecognition of the doctrine that is not correct. The Supreme Court only noted that it had not used the term "prima facie tort" and cited to Merrick v. Northern Nat'l Gas Co., 911 F.2d 426 (10th Cir. 1990) as a case expressing the view the underlying doctrine had been recognized in Oklahoma. In Merrick, the Tenth Circuit "conclude[d] that Oklahoma would not extend the cause of action for prima facie tort to private sex or religious discrimination between co-workers", id., at 433 (emphasis supplied), but it expressed no view on the application of the doctrine to employers. The OADA prohibits acts by *employers* and would, in connection with 23 O.S. § 3, appear to provide a remedy for employer sanctioned discrimination in employment.

47. 1995 OK 104, 905 P.2d.772 .

48. 905 P.2d at 775, quoting Naylor v. Petuskey, 834 P.2d 439, 440 (Okla.1992).

49. 905 P.2d at 776.

50. 1992 OK 72, 833 P.2d 1218, 1228-1229 (emphasis by the Court).

51. 905 P.2d at 777.

52. 905 P.2d at 777.

53. Waste Connections Inc. v. Okla. Dep't of Envtl. Quality, 2002 OK 94, ¶ 8, 61 P.3d 219, 223.

54. 25 O.S. § 1502(A)

55. 29 C.F.R. § 1601.13.

56. Webb v. Dayton Tire, 1985 OK 7,697 P.2d 519, 522 (worker's compensation retaliatory discharge).

57. Smith v. State ex rel. Dep't of Human Serv's, 1990 OK 19, 788 P.2d 959, 962.

58. Stump v. Cheek, 2007 OK 97, ¶13, 179 P.3d 606, 612-13.

59. 25 O.S. § 1901(D) ("In any action or proceeding under this section the court shall allow a prevailing party a reasonable attorney's fee."). 60. 25 O.S. § 1101.

61. Fees under Title VII are authorized by 42 U.S.C. § 2000e-5(k); under the ADEA by 29 U.S.C. § 626(b) (incorporating the award of attorneys' fees and costs under 29 U.S.C. § 216(b)), and under the ADA under 42 U.S.C. § 12205. Fees under the Fair Housing Act are allowed by 42 USCS 3613(c)(2).

62. 25 O.S. § 1505(C)(6). 63. 25 O.S. § 1506(a).

64. Tate, 833 P.2d at 1227-1229 & n. 64.

65. Foremaster v. St. George, 882 F.2d 1485, 1489-1490 (10th Cir. 1989) (discussing the requirement to show an injury in order to challenge a purportedly unconstitutional statute).

66. Tate, 833 P.2d at 1229 ("When a statute is susceptible to more than one construction, it must be given that interpretation which frees it from constitutional doubt rather than one that would make it fraught with fundamental-law infirmities.")

67. "At least one covenant is always implicit in every contract- the agreement that neither party will intentionally do anything to injure the other party's right to the fruits of the contract." Bonner v. Oklahoma Rock Corp., 1993 OK 131, 863 P.2d 11176, 1185 n. 46 (italics added). "Breach of any contract, and not just an insurance contract, may lead to liability in tort under Oklahoma law." Conover v. Aetna US Health Care Inc., 320 F.3d 1076, 1079 (10th Cir.2003) (emphasis supplied, citing to Beshara v. Southern Nat'l Bank, 928 P.2d 280, 291 (Okla.1996) ("When the factual situation warrants, an action for a breach of contract may also give rise to a tort action for a breach of the implied covenant of good faith and fair dealing.")

68. 25 O.S. §§ 1301-1311.

69. 25 O.S. § 1901.

70. "The severability of a state constitutional or statutory enactment. . . is not contingent on the presence of an express severability clause within the particular enactment. Considerations relevant to severability analysis are outlined in the provisions of 75 O.S.2001 § 11a." Local 514 Transp. Workers Union of Am. v. Keating, 2003 OK 110, ¶ 5, 83 P.3d 835, 843 (Okla. 2003). 75 O.S. § 11a provides that: 1. For any act enacted on or after July 1, 1989, unless there is a provision in the act that the act or any portion thereof or the application of the act shall not be severable, the provisions of every act or application of the act shall be severable. If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid, unless the court finds:

a. the valid provisions or application of the act are so essentially and inseparably connected with, and so dependent upon, the void provisions that the court cannot presume the Legislature would have enacted the remaining valid provisions without the void one; or

b. the remaining valid provisions or applications of the act, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

The policy section, 25 O.S. §1101, was enacted in 1991 as was Sec. 1901 providing remedies to handicap discrimination victims.

#### ABOUT THE AUTHOR



Mark Hammons attended the University of Oklahoma and graduated from Oklahoma City University School of Law in 1975. He served in the Oklahoma House of Representatives from 1972 through 1978. He serves on the board of the National Employment Lawyers Asso-

ciation and is admitted to practice before all Oklahoma state and federal courts; the 10th Circuit Court of Appeals, the U.S. Court of Federal Claims and the U.S. Supreme Court.

#### State of Oklahoma, Department of Human Services **Child Support Enforcement** Announcement #09-C036U

The Oklahoma County Child Support Office has an opening for a full-time attorney (CSE Attorney IV, \$4669.79 monthly) with experience in child support enforcement. This position will be located in the Bethany office located at 7201 NW 10th Street, Oklahoma City, Oklahoma.

The position involves preparation and trial of cases in child support related hearings in district and administrative courts, and preparation and filling of pleadings incident thereto. Duties will also include consultation and negotiation with other attorneys and customers of Child Support Enforcement Divisions. Position will assist office staff with preparation of legal documents and ensure their compliance with ethical considerations.

Active membership in the Oklahoma Bar Association is required. This position may be under filled as a Child Support Enforcement Attorney III (beginning salary \$4067.52 monthly) or as a Child Support Enforcement Attorney II (beginning salary \$3711.05 monthly) or as a Child Support Enforcement Attorney I (beginning salary \$3354.49 monthly). Interested individuals must send a cover letter noting announcement number.

09-C036U, resume, and a copy of current OBA card to: Department of Human Services, Attn: Human Resources Management Division, P. O. Box 25352, Oklahoma City, OK 73125. Application must be received no earlier than 8:00 a.m. Friday, March 13, 2009 and no later than 5:00 p.m. Wednesday, April 1, 2009.

#### THE STATE OF OKLAHOMA IS AN EQUAL **OPPORTUNITY EMPLOYER**

## 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

# A Defendant's Perspective: Kruchowski Raises More Questions Than Answers

By Kristen L. Brightmire

**H** mployment practitioners continue to face the same challenge with this state's  $Burk^1$  tort: Every time a question appears to be answered, it raises many more. That is the situation with the Oklahoma Supreme Court's recent decision in *Kruchowski v. Weyerhaeuser Co.*<sup>2</sup>

#### LET US BEGIN AT THE BEGINNING

In 1989, the Oklahoma Supreme Court, in *Burk v. K-Mart*, announced an employment principle that would keep attorneys busy for almost 20 years thus far. The court stated:

We thus follow the modern trend and adopt today the public policy exception to the atwill termination rule in a narrow class of cases in which the discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law...

Accordingly, we believe the circumstances which present an actionable tort claim under Oklahoma law is where an employee is discharged for refusing to act in violation of an established and well-defined public policy or for performing an act consistent with a clear and compelling public policy.<sup>3</sup>

Shortly thereafter, the Oklahoma Supreme Court held that determination of an actionable "public policy" would be a matter for the court.<sup>4</sup> This determination has been a continual battleground. From its inception in 1989, there has been a steady stream of arguments and decisions defining and redefining this tort.

This article will not repeat the history between *Burk* and *Kruchowski* that was prepared by Mark Hammons and appears in this issue of the Oklahoma Bar Journal. However, the long and winding road that led us to *Kruchowski* did not bring us into the sunlight. It has instead taken us further into the forest.

#### THE HISTORY OF KRUCHOWSKI

When Mr. Kruchowski filed his lawsuit,<sup>5</sup> the commonly held belief was that a *Burk* tort would not lie for a claim of age discrimination. Based upon cases such as *List* and *Clinton*, it seemed settled that a person claiming age discrimination under the Age Discrimination in Employment Act<sup>6</sup> was barred from also bringing a *Burk* tort.

However, while Mr. Kruchowski's case was pending, the Oklahoma Supreme Court issued its opinion in *Saint v. Data Exchange.<sup>7</sup> Saint* was interesting because, in a two-page decision, it declared "[a]ge-discrimination victims are part of the employment discrimination class, and as such must be afforded the same rights as the other members of the class. Therefore, we find that there is a *Burk* tort remedy for those who allege employment age discrimination." To many, *Saint's* failure to address *List*<sup>9</sup> or *Clinton*<sup>10</sup> caused there to be doubt as to its meaning. Was *Saint* just a discussion of the constitutional issues without any intent to disturb the pronouncement in *List* or the test set forth in *Clinton*?

Based upon *Saint*, Mr. Kruchowski moved to amend his lawsuit to

include a *Burk* tort. During the motion phase of Mr. Kruchowski's case, a flurry of decisions was being handed down from the various federal courts in Oklahoma – often in conflict with one another. Because of the varied opinions among members of the bench and the bar that arose from the *Saint* decision, the *Kruchowski* trial court certified certain questions to the Oklahoma Supreme Court seeking to clarify whether or how *Saint* related to the *List*, *Marshall* and *Clinton*<sup>11</sup> cases. In short, the trial court sought guidance on whether Mr. Kruchowski could move forward with a claim for age discrimination under both the federal ADEA and the state-based *Burk* tort.

## THE SCOPE OF THE *KRUCHOWSKI* DECISION

In *Kruchowski*, the Oklahoma Supreme Court finally addressed the two lines of cases that had developed. The first line of cases (*List*, *Marshall* and *Clinton*) had set forth a test that, in part, held that a plaintiff could not pursue a *Burk* tort if he had adequate statutory remedies available.<sup>12</sup> The second line of cases (*Tate* <sup>13</sup> and *Collier*) seemed to focus on the constitutional infirmities of the Oklahoma Anti-Discrimination Act (OADA), OKLA. STAT. tit. 25, § 1301 *et seq*. Whether the case law was, as often described, a pendulum, or merely the result of different arguments being presented for the court's resolution, it was undeniable that the waters were muddy.

In *Kruchowski*, the Oklahoma Supreme Court endeavored to reconcile the two lines of cases. As such, it expressly overruled *List* (age discrimination). The court noted that *List* had failed to address the constitutionality arguments that

In *Kruchowski*, the Oklahoma Supreme Court endeavored to reconcile the two lines of cases. As such, it expressly overruled *List* (age discrimination). had been raised previously in Tate. Instead, the List "postulated that court because the plaintiff's rights were protected by the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, [Mr. List] had more comprehensive remedies than the Tate plaintiff did under the Federal Civil Rights Act of 1964, 28 U. S.C. §1447."<sup>14</sup> The *List* court "implicitly equated the fact that the plaintiff had more remedies available to him

than the Tate plaintiff with the term 'adequate' remedies."<sup>15</sup> The *Kruchowski* court believed the same was true of the *Marshall* and *Clinton* decisions – that the discussion of "adequacy" did not address the constitutional issues raised in *Tate*.<sup>16</sup> However, the court did not overrule *Marshall* and *Clinton* in their entirety, but cautioned that, "[t]o the extent that the rationale of *Marshall*... and *Clinton* ... conflicts with our decision in *Saint* and our decision today, they too are expressly overruled."<sup>17</sup>

The *Kruchowski* court did not overrule one critical point in the *Burk* jurisprudence: an actionable public policy must be articulated in the decisions, statutes, Oklahoma Constitution, or the federal Constitution.<sup>18</sup> However, past that, the *Kruchowski* court called into question many of the previous understandings of the bar and bench.

In its closing paragraph, the court tries to provide guidance by setting forth what some will argue is the new test to determine whether a *Burk* cause of action can exist:

In order to assert such a claim [based upon *Burk*], the plaintiff must make a showing that a breach of Oklahoma's public policy occurred for which (a) there is no available statutory-crafted remedy or (b) the available statutory remedy is not **commensurate** with that which is provided for similar work-related discrimination.<sup>19</sup>

In other words, a plaintiff must first show a breach of an actionable public policy occurred when he was discharged (constructively or otherwise) and then either that there is no available statutory remedy or that the available statutory remedy is not commensurate with the statutory remedy provided to other similar forms of employment discrimination. Clear as mud.

## MORE QUESTIONS THAN ANSWERS POST-KRUCHOWSKI

## 1. The imposition of *Burk* does not make the OADA "constitutional."

In cases such as *Kruchowski*, the plaintiffs rely upon the Oklahoma Anti-Discrimination Act (OADA), OKLA. STAT. tit. 25, § 1302 *et seq.*, as the basis of the actionable public policy. The OADA declares that employers may not discriminate against a person in employment opportunities due to that person's "race, color, religion, sex, national origin, age, or handicap."<sup>20</sup> However, the only members of the protected classes who are provided a private right of action are those claiming handicap discrimination in employment. Section 1901 of the OADA permits a plaintiff to sue and recover for various acts of handicap discrimination. It reads:

A. If a charge for discrimination in employment on the basis of handicap is filed under the provisions of Section 1101 through 1801... the charging party may commence an action for redress against any person who is alleged to have discriminated against the charging party and against any person named as respondent in the charge...

C. If it is determined in such action that the defendant or defendants in such action have discriminated against the charging party on the basis of handicap as charged in the petition, the aggrieved party shall be entitled to nominal or actual damages. Actual damages shall include, but are not limited to, reinstatement or hiring, with or without back pay, or any other legal or equitable relief as the court deems appropriate...

OKLA. STAT. tit. 25, § 1901 (A), (C). It is the fact that the OADA provides a private right of action and remedy to victims of handicap discrimination but **not** to other victims of discrimination protected by the OADA that led to the court's decisions in *Tate, Collier, Saint,* and now *Kruchowski*.

In short, it appears it is the court's position that the OADA is constitutionally infirm and the way to cure the infirmity is to permit a plaintiff to use the *Burk* tort to close the gap. *See Saint*, 2006 OK 59, ¶ 6, 145 P.3d at 1039; Collier, 1999 OK 49, ¶ 14, 981 P.2d at 326 ("The *Burk* tort gives the discharged victim a private cause of action for quid pro quo sexual harassment comparable to that statutorily accorded to victims of handicap discrimination. Hence, our adopted construction of the act ... avoids the pitfall of according asymmetrical remedies to members of a single class of employment-discrimination victims."); Tate, 1992 OK 72, ¶ 18, 833 P.2d at 1230 ("Our Constitution absolutely interdicts the passage of special law that would sanction disparate remedies for those who complain of employment discrimination.") Yet, this position creates innumerable problems that will surely be presented to the courts in the coming months and years.

Under the court's analysis, the OADA is unconstitutional. The court's attempt to cure the problem with the imposition of *Burk* may be shortsighted. *Burk* does not provide all victims protected under the OADA with the same rights and remedies as those afforded to the victims of handicap discrimination. Here is a quick list of some of the undeniable differences:

- *Burk* is limited to discharges.<sup>21</sup>
- The OADA is not.22
- *Burk* applies only to at-will employees.
- The OADA has no such limitation.
- *Burk* does not provide attorney's fees for the prevailing party.<sup>24</sup>
- The OADA does.<sup>25</sup>

If the OADA is constitutionally infirm because it provides different members of the same class with different remedies, **the OADA is still constitutionally infirm**. Burk simply does not reconcile the many differences in the treatment of victims of handicap discrimination versus victims of other forms of employment discrimination.<sup>26</sup>

The court has stated that Section 1901, without *Burk*, causes the OADA to be unconstitutional. Yet, the imposition of *Burk* does not fully cure those constitutional infirmities. Thus, this author contends Section 1901 should be stricken. OKLA. STAT. tit. 75, § 11a(1) "If any provision or application of the act is found to be unconstitutional and void, the remaining provisions or applications of the act shall remain valid..." Under this law, Section 1901 could be stricken, rendering the remaining provisions of the OADA constitutional.



## 2. An unconstitutional statute cannot form the basis of a *Burk* public policy.

Surely, when the Oklahoma Supreme Court adopted "the public policy exception to the atwill termination rule in a narrow class of cases in which discharge is contrary to a clear mandate of public policy as articulated by constitutional, statutory or decisional law[,]"27 it did not intend that an **unconstitutional** statute be an articulation of public policy. Without a valid public policy, arguments over the meaning of terms such as "adequacy," "sufficient," and "commensurate" are immaterial. Perhaps, this issue comes back to the beginning, to the cases of Burk and Pearson, wherein it was recognized that the court must determine, in the first instance, whether an actionable public policy has been proffered.<sup>28</sup> A statute with such obvious constitutional defects should not be permitted to stand as this state's declaration of a public policy.

#### 3. There are immediate unresolved issues surrounding the applicability of *Kruchowski* to *Burk* claims predicated on the OADA.

Some courts will be disinclined to grapple with the issue of the ongoing constitutional issues arising out of the OADA. You should anticipate that many cases, at least at the trial court level, will proceed under the seeming answer provided by *Saint* and *Kruchowski* – a person claiming the OADA as the public policy for his wrongful discharge case may proceed under *Burk* (regardless of the existence or ade-

quacy of a federal statutory remedy). So, what remains?

- Will *Burk* be expanded to forms of discrimination other than discharge?<sup>29</sup> If not, will we see a surge in plaintiffs alleging *prima facie* tort? Will we see courts implying statutory remedies that the Oklahoma Legislature did not see fit to design?<sup>30</sup>
- Will *Burk* be expanded to cover a plaintiff who was not *at-will*, relying upon the OADA?
- Will a plaintiff have to comply with the OADA's procedural requirements to bring a *Burk* tort?<sup>31</sup>
- Will a prevailing plaintiff be entitled to recover attorney's fees?

Many of these decisions involve drastic changes to the nature of the *Burk* tort and torts in general.

## 4. A roadmap of post-*Kruchowski Burk* claims.

Of course, victims of discrimination prohibited by the OADA are but one of a variety of plaintiffs using the *Burk* tort to redress improper discharges. How will the broad spectrum of cases be analyzed?

Practitioners like a simple "test" to determine whether *Burk* is at issue. Based upon the parts of *Clinton* not overruled, *Vasek*<sup>32</sup> and *Kruchowski*, this author might suggest the following roadmap to determine whether a plaintiff can pursue a *Burk* claim:

- 1. Was the plaintiff an employee at-will?
- 2. Was the plaintiff discharged or constructively discharged?
- 3. Was the discharge in significant part for a reason that violates an articulated public policy as established in the decisional, statutory or constitutional law of the state of Oklahoma or as established by a provision of the U.S. Constitution that prescribes a norm of conduct for Oklahoma?
- 4. Is there an absence of a federal or state statutory remedy sufficient<sup>33</sup> to protect the Oklahoma policy goal? If not, is the federal or state statutory remedy commensurate with that which is provided for similar work-related discrimination?

Questions one, two and three appear to be already part of the *Burk* jurisprudence. It is question four that raises new and potentially complicated issues.

First, the court must decide whether there is a federal or state statutory remedy sufficient to protect the Oklahoma policy goal. Not all statutes, even those that provide monetary damages, will suffice. For example, in Vasek, the employer argued that the plaintiff could have brought a claim under 42 U.S.C. § 1983. While the Court of Civil Appeals found § 1983 to be a sufficient statutory remedy, the Oklahoma Supreme Court disagreed. The court stated that "[t]he question is not, and never has been, merely whether a discharged at-will employee could possibly pursue a statutory remedy. The question is whether 'a statutory remedy exists that is sufficient to protect the Oklahoma public policy goal."<sup>34</sup> The court went on to hold that "Section 1983, however, is not a federal statutory remedy that sufficiently protects the Oklahoma policy goal of reporting unsafe or unhealthy conditions in public buildings."35 The question of whether an available statutory remedy is sufficient to protect Oklahoma's public policy will undoubtedly be up for debate on a statute-by-statute review.

Then, if there is an available statutory remedy, the court must determine whether that remedy is **"commensurate"** with remedies **"provided for similar work-related discrimination."** 

While there are cases discussing the "adequacy" of remedies, we will now be looking to our dictionaries to discover the true meaning of "commensurate." To save the reader some time, here are but a couple of the many definitions of "commensurate":

- 1. having the same measure; of equal extent or duration. 2. corresponding in amount, magnitude, or degree. 3. proportionate; adequate. 4. having a common measure; commensurable.<sup>36</sup>
- 1. equal in measure or extent: coextensive (lived a life commensurate with the early years of the republic) 2. corresponding in size, extent, amount, or degree: proportionate (was given a job commensurate with her abilities).<sup>37</sup>

Now that we have an understanding of "commensurate," we need to understand what will be compared.

What did the court mean when it referred to "similar work-related discrimination?" Unless the relied-upon statute addresses similar protected classes, such as the OADA, the applicability of this prong seems subject to interpretation. For example, had the Vasek court found § 1983 was a statute sufficient to protect Oklahoma's policy to protect those who report unsafe conditions in public buildings, the court would then have analyzed whether § 1983 provided remedies commensurate with remedies provided for similar work-related discrimination. To what other statute would § 1983 be compared? Are the remedies of § 1983 (a civil rights statute) viewed against other statutory remedies for victims of civil rights violations (e.g., Title VII of the Civil Rights Act or the ADEA)? Are they viewed against remedies provided under the Occupational Safety and Health Act? The defining of the phrase "similar work-related discrimination" will undoubtedly be accomplished only on a case-by-case basis.

#### CONCLUSION

The *Kruchowski* decision designs new parameters by which *Burk* tort claims will be analyzed. However, attorneys for both employers and employees agree that it raises substantial questions about how the *Burk* tort will be applied prospectively.

When squarely faced with an attack on the constitutionality of Section 1901, will the court strike down the statute? In the meantime, how can the OADA, with its constitutional infirmities, form the basis of an actionable public policy?

Will age discrimination plaintiffs be permitted a *Burk* tort without exhausting administrative remedies? Will prevailing plaintiffs be entitled to attorney's fees? If so, will prevailing plaintiffs in other *Burk* claims (not based upon the OADA) be entitled to attorney's fees? That seems to push the bounds of tort law into a new realm.

Is *Burk* going to morph into a myriad of torts depending upon the underlying public policy? All of these questions remain unanswered... for now.

1. Burk v. K-Mart Corp., 1989 OK 22, 770 P.2d 24.

2. Kruchowski v. Weyerhaeuser Co., 2008 OK 105.

3. Burk, 1989 OK 22, ¶¶ 17, 19, 770 P.2d at 29.

4. Pearson v. Hope Lumber & Supply Co., 1991 OK 112, ¶ 4, 820 P.2d 443, 444.

5. In fact, Mr. Kruchowski was but one of several plaintiffs, each of whom claimed age discrimination. However, for ease of reading, this article will simply refer to Mr. Kruchowski.

6. Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq.

7. Saint v. Data Exchange Inc., 2006 OK 59, 145 P.3d 1037.

8. Saint, 2006 OK 59, § 6, 145 P.3d at 1039.

9. List v. Anchor Paint Mfg. Co., 1996 OK 1, 910 P.2d 1011.

10. Clinton v. State ex rel. Logan County Election Bd., 2001 OK 52, 29 P.3d 543.

11. Marshall v. OK Rental & Leasing Inc., 1997 OK 34, 939 P.2d 1116.

12. See, e.g., Clinton, 2001 OK 52, ¶ 9, 29 P.3d at 546. 13. Tate v. Browning-Ferris Inc., 1992 OK 72, 833 P.2d 1218.

14. Kruchowski, 2008 OK 105, ¶ 12.

15. Kruchowski, 2008 OK 105, ¶ 13.

16. Kruchowski, 2008 OK 105, ¶ 15 ("Again, looking to the 'adequacy' of the remedies available to the plaintiff, Marshall determined that because the remedies provided by federal law in Title VII and Oklahoma's anti-discrimination statutes provided 'adequate' remedies, there was no reason to extend the Burk tort exception to Marshall's claim." (footnotes omitted)); Kruchowski, 2008 OK 105, ¶ 19 ("The [Clinton] Court held that because the employee had an 'adequate' federal statutory remedy for wrongful discharge, she could not also assert a Burk tort.").

17. Kruchowski, 2008 OK 105, ¶ 34 (citations omitted).

18. Kruchowski, 2008 OK 105, n. 22 ("Only a specific Oklahoma court decision, state legislative or constitutional provision, or a provision in the federal Constitution that prescribes a norm of conduct for the state can serve as a source of Oklahoma's public policy.")

19. Kruchowski, 2008 OK 105, ¶ 36 (emphasis added).

20. Okla. Stat. tit. 25, § 1302(A).

21. Burk, 1989 OK 22, ¶ 17, 770 P.2d at 28; Williams v. Dub Ross Co., 1995 OK CIV APP 9, ¶ 14, 895 P.2d 1344, 1346 ("The Williams do not cite us to any authority, and we are aware of none, which extends the public policy tort exception to a situation in which the employeremployee relationship is merely contemplated."); Davis v. Bd. Of Regents of Okla. State Univ., 2001 OK CIV APP 65, § 8, 25 P.3d 309, 310 ("Plaintiff cites no authority, nor do we know of any, which recognizes a cause of action in Oklahoma for retaliatory lateral reassignment or demotion."); Sanchez v. Philip Morris Inc., 992 F.2d 244, 249 (10th Cir. 1993) ("Therefore, the district court properly dismissed Appellee's public policy tort claim as Oklahoma has yet to create an exception to the employment at-will doctrine in the failure to hire context.")

22. Okla. Stat. tit. 25, § 1302(A).

23. Burk, 1989 OK 22, ¶ 17, 770 P.2d at 28 ("We thus follow the modern trend and adopt today the public policy exception to the atwill termination rule ... "); McCrady v. Okla. Dept. of Pub. Safety, 2005 OK 67, ¶ 9, 122 P.3d 473, 475 ("[T]he plaintiff must establish that he or she was an at-will employee...")

24. See, e.g., N. Tex. Prod. Credit Ass'n v. McCurtain County Nat'l Bank, 222 F.3d 800, 818 (10th Cir. 2000) ("Oklahoma follows the American rule concerning attorney's fees in tort cases, i.e., the prevailing party cannot obtain attorney's fees unless there is a showing that the opponent acted in bad faith, vexatiously or oppressively.")

25. Okla. Stat. tit. 25, § 1901(D).

26. In its briefing, counsel for Weyerhaeuser argued that the only solution to the constitutional issues of the OADA, as identified by the Oklahoma Supreme Court, was to strike Section 1901. This issue was not addressed in the Kruchowski decision.

27. Burk, 1989 OK 22 ¶ 17, 770 P.2d at 28.

28. Pearson, 1991 OK 112, ¶ 4, 820 P.2d at 444 ("The first issue is whether the determination of public policy is a question for the jury or for the court. The determination of public policy is generally a question of law.... Questions of law are to be determined by the court, not the jury." (citations omitted)).

29. If you were to select single sentences within Kruchowski, an argument could be made for both positions. However, it seems clear that Kruchowski did not change the requirement that a Burk tort involve a discharge (or constructive discharge). Kruchowski, 2008 OK 105, ¶ 36 ("[T]he Burk claim's actionable character is anchored solely in the employer's discharge in breach of Oklahoma's public policy.")

30. The doctrine of implying statutory remedies was set forth in Holbert v. Echeverria, 1987 OK 99, ¶¶ 7, 8, 744 P.2d 960, 962-3. Assuming arguendo the doctrine applies to unconstitutional statutes, it should not be applied to the OADA because there is no indication that the Oklahoma Legislature intended to create a private right of action for victims other than victims of handicap discrimination. Section 1901 was passed well after the OADA prohibited employment discrimination based upon race, color, religion, sex, national origin or age. Yet, the Oklahoma Legislature granted the private right of action to victims of handicap discrimination only.

31. See Atkinson v. Halliburton Co., 1995 OK 104, 905 P.2d 772; Tate, 1992 OK 72 ¶ 16, 833 P.2d at 1228-29 (comment upon whether the administrative procedures are permissive or mandatory). Mark Hammons' article provides a description of the competing arguments and ends with an acknowledgement that he, like this author, cannot predict the outcome of this debate.

32. Vasek v. Bd. of County Commissioners, 2008 OK 35, 186 P.3d 928. 33. Note that in Vasek, the court used the word "adequate". Vasek, 2008 OK 35, ¶ 14, 186 P.3d 928, 932.

34. Vasek, 2008 OK 35, ¶ 27, 186 P.3d 928, 934.

35. Id.

36. The Random House College Dictionary (Rev.Ed. 1982). 37. Merriam-Webster OnLine Dictionary, (retrieved 1-12-09).

#### ABOUT THE AUTHOR



Kristen Brightmire is a partner with, and heads the Employment Law Practice Group for Doerner, Saunders, Daniel & Anderson. Ms. Brightmire has substantial experience in labor and employment law, representing employers. She counsels clients as to employee-related matters such as policies, handbooks, contracts,

severance programs, severance agreements and relocation programs. She represents clients throughout the litigation process from the administrative agency through trial and appeal. Ms. Brightmire also serves as an adjunct settlement judge.

## OBA EVENT

# Solo and Small Firm Conference Lets You Combine Work and Play

By Jim Calloway, Director, OBA Management Assistance Program

Are you ready to think about some fun in the sun? Would you like to experience some really great educational programs? Make plans now to attend the 2009 OBA Solo and Small Firm Conference, held in conjunction with the YLD Midyear Meeting and the Estate Planning, Probate and Trust Section Midyear Meeting. Mark your calendar for June 11 - 13, 2009. The location is the Tanglewood Resort on the shores of Lake Texoma.

We have a great lineup of CLE programming focused on the solo or small firm lawyer — and also focused on these economic times.

This year we welcome several out-of-state experts as well as hearing from our own Oklahoma lawyers who are leaders in our field.

For the first time, we welcome Irwin Karp, who is a productivity consultant with Productive Time in Sacramento, Calif. He is also an attorney with more than 30 years of experience, so he knows the obstacles that can get in the way of staying organized and focused. He was the managing partner of a small firm for nearly 20 years before starting his consulting firm.

His plenary session is "Multitasking Gone Mad – Coping in a Wired, Demanding, Distracting World." Technology has made it easier to stay connected to work. But, is this a good thing or has something gone awry? This plenary session will address the emotional and physiological consequences of always being connected, as well the potentially negative impact on legal work. He will explore the impact of multitasking, ways to deal with keeping lots of balls in the air and how to stay focused on priority tasks.

He will also give another presentation titled "Overcoming Procrastination -How to Kick the Habit." This program will be repeated, just in case you put it off and miss the first session. Procrastination creates undue stress. This breakout session will focus on how lawyers can complete their work with more control and less crisis management. Attendees will learn how to recognize your individual style of procrastination and overcome it, how to break down legal work into component parts so it doesn't

> appear so overwhelming, and how to focus on what you really need to accomplish.

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Ross Kodner is president of Microlaw Inc. and is making a return engagement to the OBA Solo and Small Firm Conference after several previous visits with us. He has received many honors and awards for his work and is a well known opinion leader in legal technology circles. His presentations include "Tightwad Technology for Tough & Trying Times: Better Word, Outlook & Acrobat" and "Buying Law Office Technology 101: How to Buy Right and Spend Smart."

In a day where there is a national movement toward digitizing all medical records, his program "The PaperLESS<sup>TM</sup> Office: Practicing Lean and Green" covers some extremely important concepts for today's small firm lawyer.

Nerino Petro is the practice management advisor for the State Bar of Wisconsin and will be visiting our conference for the first time. Nerino is a former speaker at ABA TECHSHOW and numerous other events. He brings us two presentations that he has done for ABA TECHSHOW and other venues, "Using Speech Recognition & Digital Dictation" and "Practice Killers: Six Things That Can Kill Your Practice." Nerino is recognized by many of us as the go-to guy nationally on digital dictation issues.

We also welcome Texas lawyers Steven W. Novak and Daniel H. McCarthy of The Blum Firm PC. They will inform us about the "Top 10 Mistakes in Estate Planning," as well as providing a "Federal Estate Tax Update." If you are a lawyer who does estate planning, you will not want to miss these programs.

Our conference will open with the ever-popular and fast-paced "50 Tips in 50 Minutes" and close with "What's Hot and What's Not in Running Your Law Practice," where we will have drawings for door prizes as well as a final opportunity to get your questions answered or perhaps stump our experts.

I'm very excited to do a program called "Your Online Persona — What Does the Internet Think of You?" I've been asked to talk about online reputation management for ABA TECHSHOW 2009, and I wanted to talk to our small firm lawyers about this important cutting-edge topic. This may sound like a technology program, but it is really a program about marketing

and some things about the Internet that every lawyer should know. We will cover everything from how to get noticed by the search engines to how some lawyers are using social networking tools like Facebook and Twitter to increase their online visibility. I'll also be doing a quick program on some useful Web sites you may need to be using.

#### THE FUN STUFF

There will be lots of fun social events and entertainment as well. The Young Lawyers Division has promised us an opening social event on Thursday night that will be the best ever, and on Friday evening we will be entertained by comedy ventriloquist Ian Varella, who has done thousands of performances on international cruise ships, Las Vegas shows and corporate events — performing as an opening act for the country's biggest stars. He has also appeared on HBO, Showtime and the Nashville Network. For more information about Ian, you can visit his Web site at www.comedyvent.com.

A new event this year is a cocktail reception in honor of Oklahoma's solo and small firm lawyers hosted by the University of Oklahoma College of Law.

## EDUCATIONAL SESSIONS

Our diverse selection of educational sessions should provide something of interest to every lawyer.



Work-life balance is an issue for all of us. To that end, we feature "Finding Sanity in the Practice of Law" with Miami attorney Chuck Chesnut and "Don't Let Hard Times Drag You Down" with Oklahoma City attorney Julie Rivers.

Those who practice in the family law arena will no doubt be attending "New Child Support Guidelines: Déjà Vu All Over Again" with Oklahoma City lawyer Amy Wilson and "Military Law Developments Relating to Family Law" with Tulsa lawyer Bill LaSorsa.

Practicing in an almost paperless environment is not just a theory anymore. Oklahoma City lawyer Elaine Dowling will show us how she does it with her program "My 'Paperless' Bankruptcy Practice."

Lawyers with a personal injury component to their practice will enjoy "A Lawyer's Guide to Understanding Medical Records" with Tulsa attorney Martha Rupp Carter and "Negotiating with Insurance Companies in These Trying Times" with Shawnee attorney Brad West.

Our opening session Saturday morning will be "Money and Ethics: Potential Pitfalls When Handling Client Funds" with OBA Ethics Counsel Gina Hendryx.

"Search & Seizure Primer and Update" will be the focus of Norman lawyer Jim Drummond.

The conference will feature several panel discussions on various topics of interest including "Starting/Restarting a Law Practice," the "Oklahoma Family Wealth Preservation Act," "From Chaos to Cases: Case Management Systems are Practice Power Tools" and "50 Marketing Tips in 50 Minutes."

All in all, it looks like another great OBA Solo and Small Firm Conference. The only additional thing we need to make it perfect is you. Reserve your hotel room and register early. We think this selection of great programming may cause our conference to sell out early.

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DAY 1	• Friday June	12	
8:25 a.m.	<b>Welcome</b> Jon Parsley OBA President	8 I	ome Enjoy Fun!
8:30 a.m. – 9:20	Ross Kodner,	D Tips in 50 Minutes Ross Kodner, Nerino Petro, Jim Calloway	
9:20 a.m.		Break	
9:30 a.m. – 10:20 a.m.	Practice Killers: Six Things That Can Kill Your Practice Nerino Petro	<b>The Paper LESS™ Office</b> Ross Kodner	Search & Seizure Primer and Update Jim Drummond
10:20 a.m	Break		
10:30 a.m 11:20 a.m.	Your Online Persona- What Does the Internet Think of You? Jim Calloway	Military Law Developments Relating to Family Law Bill LaSorsa	Using Speech Recognition & Digital Dictation Nerino Petro
11:20 a.m		Break	
11:30 a.m. – noon (30 min session)	Don't Let Hard Times Drag You Down Julie Rivers	Federal Estate Tax Update Steven W. Novak, Daniel H. McCarthy	<b>25 Handy Websites</b> Jim Calloway
Noon		LUNCH BUFFET	
1:00 p.m 1:50 p.m	Multitasking Gone Mad	— Coping in a Wired, Demo Irwin D. Karp	anding, Distracting World
1:50 p.m.		Break	
2:00 p.m 3:00 p.m	Overcoming Procrastination — How to Break the Habit Irwin D. Karp	Tightwad Technology for Tough & Trying Times: Better Word, Outlook & Acrobat Ross Kodner	Top 10 Mistakes in Estate Planning Steven W. Novak Daniel H. McCarthy

DAY	Y 2 • Saturday Ju	ine 13 •	Tanglew	ood Resort
8:25 a.m.	Welco	<b>MC</b> – John Morr	ris Williams, OBA Exe	ecutive Director
8:30 a.m. – 9:20 a.m.	Money and Ethics:	Money and Ethics: Potential Pitfalls When Handling Client Funds Gina Hendryx – Ethics		
9:20 a.m		Bre	eak	
9:30 a.m. – 10:20 a.m.	Buying Law Office Technology 101: How to Buy Right and Spend Smart Ross Kodner	How to Brea (REPEAT	oming nation — ak the Habit SESSION) ). Karp	Starting/Restarting a Law Practice Panel Nerino Petro, Lou Ann Moudy, Chuck Chesnut, Mark Hixson
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10:30 a.m 11:20 a.m.	My "Paperless" Bankruptcy Practice Elaine Dowling	A Lawyer to Under Medical Martha Ru	r's Guide standing Records	Oklahoma Family Wealth Preservation Act Ben Kirk Jr. – Moderator
11:30 a.m.	Lunch – No	) Speaker	r – Hotel	Checkout
12:30 p.m 1:20 p.m.	New Child Support Guidelines: Déjà Vu All Over Again Amy Wilson	Finding in the Prac Chuck (	tice of Law	Negotiating with Insurance Companies in These Trying Times Brad West
1:20 p.m.		Bre	ak	
1:30 p.m 2:20 p.m.	From Chaos to Cases: Case       50 Marketing Tips         Management Systems are Practice       in 50 Minutes Panel         Power Tools       Mark Robertson - Moderator         Ross Kodner, Nerino Petro & Jim Calloway       Mark Robertson - Moderator			
2:20 p.m.		Bre	ak	
2:30 p.m 3:30 p.m.	What's Hot and What's Not in Running Your Law Practice Ross Kodner, Nerino Petro & Jim Calloway	Plan	a not	-a-way OBA!
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CHILDREN ACTIVITIES (3 yrs. & up)	FRIDAY, JUNE 12, 2009
9:30 am - 11:30 am: Age Appropriate Crafts	9:30 am: Golf
No. \$13 each child \$	
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No. \$13 each child \$	
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SATURDAY, JUNE 13, 2009	
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#### FROM THE EXECUTIVE DIRECTOR

# Strike the Title

By John Morris Williams

We are nearing the point in the session where bills are to be voted out of their house of origin or die. The next order of business will be for Senate bills to go to the House, and House bills go to the Senate. The respective houses will send the forthcoming bills to an assigned committee. If the bill, or some modified version of it, survives the committee, it will progress for a vote on the floor of the respective legislative chamber. Each chamber of the Legislature will conclude this work near the end of April.

Between the end of April and sine die (adjournment), numerous bills will go through the conference process. Conference committees deal with a large number of bills. This process is needed to reconcile the differences in bills passed by the respective houses. For example, the Senate passes a bill, and the House amended it and then passes it. The bill is then sent to a conference committee, and the conferee work out an acceptable compromise on the bill. The bill then goes back to both houses for an up or down vote. If the conference committee version is accepted by both houses, it then goes to the governor.

This session I have had a number of people ask me about the title being stricken off a bill and the reason therefore. Below are explanations from the House and the Senate:

> The House Web page states: "STRICKEN TITLE: Often a member of one of the houses will 'strike the title' as an amendment. This 'cripples' the bill so that the house of origin will be able to consider the legislation again before it is acted upon in its final form."

> The Senate Web page states: "Strike the Title to change the title of a bill to a few words which are briefly descriptive but constitutionally unacceptable. The major intent of this action is to ensure that the bill will go to a conference committee. The same effect may be achieved by striking the enacting clause. Any Senate legislation being reported out of a Senate committee, with the exception of an appropriation bill, must have an enacting clause or resolving clause and a Senate and House author."

If you are not familiar with the legislative process, you might find it helpful to visit the Legislature's home page and see just how things work at the Capitol.

As you can see, the main reason is to ensure that the bill will go to a conference committee and that it will be heard one more time before final passage. Even bills that sail through without other amendments that have their title struck will be heard again. In short, for many bills it is not over until it is over. The final hours of the legislative session are extremely busy for this and other reasons.

This year there are a number of bills that are of concern to our profession and our organization. The process is far from over, and there is still time to review and comment on pending legislation if you are so inclined. The Oklahoma Legislature Web site www. lsb.state.ok.us is a good place to start. You can look up bills, lawmakers and track the progress of pending legislation. You can even see if the title has been struck!

The large volume of bills and the ever increasing number of bills that directly relate to the legal profession require each of us as public citizens to monitoring legislation to ensure that we maintain a fair, just and healthy legal system. The OBA does not involve itself in social issues or issues that are not directly related to the administration of justice. Our bylaws prohibit the OBA from going outside of our areas of interest. Our job is to inform and educate. Our first task is to educate ourselves to the process. If you are not familiar with the legislative process, you might find it helpful to visit the Legislature's home page and see just how things work at the Capitol.

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

## Oklahoma Bar Journal Editorial Calendar

## 2009

- April Law Day Editor: Carol Manning
- May Oil & Gas and Energy Resources Law Editor: Julia Rieman rieman@enidlaw.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 leslietaylorjd@gmail.com Deadline: Aug. 1, 2009
- December Ethics & Professional Responsibility Editor: Jim Stuart jtstuart@swbell.net Deadline: Aug. 1, 2009

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

## 2010

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

# Representing Multiple Clients in the Same Transaction

By Gina Hendryx, OBA Ethics Counsel

Representation of multiple clients in the same transaction or matter is routinely undertaken by lawyers. In most instances, such representations are permitted with the proper disclosures and consent. Lawyers represent multiple clients in civil matters, class actions, family law, transactional and criminal matters. Each has its own advantages and disadvantages — as well as its own potential for conflict.

The following article will review the potential for conflict when representing multiple clients to a transactional or contractual matter and the implications of the same.

#### RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or

> (2) there is a significant risk that the rep-

resentation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing. The language of Rule 1.7 makes it unlikely that the lawyer could ever represent opposing parties in litigation. Most states include prohibitions against representing, for example, the husband and wife in a divorce. However, it is the language of Rule 1.7 that permits the representation of multiple parties wherein their interests are aligned either in the contractual or transactional setting.

#### CONCURRENT CONFLICT OF INTEREST: MATERIAL LIMITATION

In determining whether the multiple representation poses the potential for conflict, the lawyer must consider whether her "ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests." Model Rule of Professional Conduct 1.7 cmt. [8]. If the lawyer believes that she can carry out the representations reasonably and diligently, then the lawyer may proceed but only after she has obtained the informed consent of all affected clients. Rule 1.7 requires the consent
to be confirmed in writing by the clients.

Multiple clients have valid rationale for hiring the same attorney. Cost sharing, alignment of interest and personal familiarity are all factors that cause aligned clients to seek out the same attorney. However, many such clients do not understand the potential conflicts that come with shared counsel. Therefore, the need to provide a thorough explanation of the potential problems of shared counsel must be fully explained to the clients. It is imperative to include in the explanation that should their interests become adverse, the attorney may have to withdraw from representation of both clients and force them to obtain separate counsel.

Multiple clients need to be informed of the effect of such an arrangement on the attorney-client privilege. "With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised." Model Rule of Professional Conduct 1.7 cmt. [30].

#### ADVANCE CONSENT TO FUTURE CONFLICTS

Requesting a client to consent to a future conflict is subject to the test of paragraph (b). Whether or not such a provision is enforceable is generally determined by the nature of the conflict that arises and the ability of the client to understand the potential for same. Even if the client has given consent to a future conflict, that provision may be unenforceable depending on the nature of the conflict and the understanding of the client. "Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and openended, then the consent ordinally will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved." Model Rule of Professional Conduct 1.7 cmt. [22].

If the multiple clients have common interests and are seeking a common objective, joint representation may be possible. Potential for conflict is always present, but less of a risk when the representation involves a nonlitigation matter. However, common interest may be insufficient if there is the possibility for the development of disagreements. This determination must be made on a case by case basis.

If undertaken, the lawyer must provide competent, even-handed representation to all clients and may not advance the position of one to the detriment of another. While this tenant may be obvious to the lawyer, it is not so to the client who may perceive actions of the lawver as being unfair or onesided. Evaluation, explanation and consent are key to deciding when to and, more importantly not to, become involved in the common representation of multiple clients. Should the clients become adverse to one another during the pendency of the representation, the lawyer should withdraw from representation of both and instruct all affected to seek new counsel. Because of the duty of confidentiality, the lawyer cannot "elect" to represent one against the other.

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.

# February Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Tulsa County Bar Center in Tulsa on Friday, Feb. 20, 2009.* 

#### WELCOME

President Parsley thanked Tulsa County Bar Association Director Sandra Cousins for the hospitality. TCBA President-Elect Deirdre Dexter welcomed the board to Tulsa.

### REPORT OF THE PRESIDENT

President Parsley reported he attended the January board meeting, Thursday evening gathering with Leadership Academy members, swearing-in ceremony, has-been party in Oklahoma City, OETA Festival, Texas County Bar Association meeting, Annual Meeting planning meeting, in addition to the National Conference of Bar Presidents and House of Delegates at the ABA Midyear Meeting in Boston. He also met with Sen. Coffee and Fred Morgan regarding pending legislation, met with Chief Justice Edmondson regarding OBA issues and participated in various conferences regarding the Administration of Justice Task Force.

## REPORT OF THE VICE PRESIDENT

Vice President Thomas reported she attended the January board meeting, Thursday evening social

event with the Board of Governors and the members of the OBA Leadership Academy, swearing-in ceremony for President Parsley and new board members at which she was sworn in as the new OBA vice president, has-been party, Women In Law Committee meeting, Washington County Bar Association meeting, Oklahoma Bar Foundation meeting in Drumright, ABA Midyear Meeting in Boston, OETA telethon and Thursday evening dinner at The Summit Club with the Board of Governors. She moderated the January session of the **OBA** Leadership Academy and was named to and has been monitoring various pieces of legislation in conjunction with the Administration of Justice Task Force.

#### REPORT OF THE PRESIDENT-ELECT

President-Elect Smallwood reported he attended the January board meeting, has provided service to the Judicial Nominating Commission, reviewed legislation with respect to the Oklahoma Association for Justice Committee and reviewed information with respect to participation in the Bar Leadership Conference in Chicago in March.

#### REPORT OF THE PAST PRESIDENT

Past President Conger reported he has been monitoring various pieces of legislation and has reviewed the Administration of Justice Task Force Opinion No. 1.

#### REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the Board of Governors Thursday night social event, has-been party, YLD dinner and roast of outgoing Chairperson Kim Warren, monthly staff celebration, Senate Judiciary Committee reception, ABA Midyear Meeting, OETA Festival and OBA Annual Meeting planning meeting. He has interviewed several candidates for the Web editor position, has had several meetings with President Parsley on administration of justice issues and has met with the decorator on new furniture purchases.

#### BOARD MEMBER REPORTS

**Governor Brown** reported he attended the OBA board meeting, outgoing governors dinner, Bench and Bar Committee meeting, Legal Aid Services of Oklahoma board meeting, OBF board meeting

and retreat, ABA Midyear Meeting in Boston and ABA Judicial Division meetings. Governor Carter reported she attended the January board meeting, swearing-in ceremony for President Parslev, Tulsa County Bar Association Executive Committee meeting, TCBA board meeting, participated in interviews for a legal placement service and was sworn in as a new member of the Board of Governors. Governor Chesnut reported he attended the January board meeting, swearing-in ceremony of President Parsley and new board members, Mentor Committee meeting in Oklahoma City, Ottawa County Bar Association meeting and monitored legislation as a member of the Administration of Justice Task Force. **Governor Christensen** reported she attended the January board meeting, swearing-in ceremony for President Parsley and new board members, has-been party, Women In Law Committee meeting and Bench and Bar Committee meeting. Governor Dirickson reported she attended the January board meeting, swearing-in ceremony for President Parsley and new board members, Thursday evening gathering with Leadership Academy members, has-been party in Oklahoma City, Custer County Bar Association meeting, planning meeting for a legislative breakfast hosted by the Custer County Bar Association and Solo and Small Firm Conference planning meeting. Governor **Dobbs** reported he attended the OBA Civil Procedure Committee meeting, OBA Professionalism Committee

meeting and spoke on "Ethical Expectations in a Tripartite Relationship" in San Diego, Calif. at the Farmers Insurance Managing Attorney Conference. Governor Hixson reported he attended the January board meeting, swearing-in ceremony, hasbeen party in Oklahoma City, OETA Festival and February Canadian County Bar Association meeting and CLE. Governor McCombs reported he attended the January board meeting, hasbeen celebration, McCurtain County Bar Association luncheon, OAJ Tulsa meeting regarding current legislation and provided input for Tri-County Law Day observance. Governor Moudy reported she attended the swearing-in ceremony, January board meeting and hasbeen dinner. She also served as a scoring panelist for two rounds of the high school mock trial competition in Okmulgee County on Feb. 12. Governor Reheard reported she attended the January board meeting, swearing-in ceremony for President Parsley and new board members, chaired the Women In Law Committee meeting, contacted Women In Law Committee members regarding subcommittees and regional Women In Law meetings, participated in a telephone conference with WIL Vice-Chairperson Allison Cave and CLE Director Donita Douglas with the spring WIL speaker, and monitored legislation as a member of the Administration of Justice Task Force. Governor Stockwell reported she attended the January board meeting, swearing-in ceremony of President Parsley and new board members and the Access to Justice Committee meeting. Governor Stuart reported he attended the January board meeting, swearing-in ceremony of President Parsley and new board members, has-been dinner, Thursday evening gathering with Leadership Academy members, OETA Festival, Board of Editors meeting, assisted in coordinating regional mock trial rounds in Shawnee and monitored legislation as a member of the Administration of Justice Task Force.

#### YOUNG LAWYERS DIVISION REPORT

Governor Rose reported he attended the Board of Governors swearing-in ceremony, has-been dinner, Leadership Conference, YLD January meeting, roast of YLD Past Chairperson Kim Warren and ABA Midyear Meeting in Boston.

#### SUPREME COURT LIAISON REPORT

Vice Chief Justice Taylor reported Executive Director Williams has been to conference several times for proposed rule changes. He said the court appreciated the notice placed in the *Oklahoma Bar Journal* requesting bar member comments on one of those rule changes. He encouraged board members to contact him regarding any questions they may have.

#### LAW STUDENT DIVISION LIAISON REPORT

LSD Chair Janoe reported he attended the January board meeting, swearing-in ceremony of new board members and officers, hasbeen dinner, Thursday evening social event and Law Student Division Executive Board meeting.

#### COMMITTEE LIAISON REPORTS

Governor Moudy reported she received a summary of the Law Day Committee meetings as follows: Ask A Lawyer day has been set for Thursday, April 30, and the television show will air from 7 – 8 p.m. The Law Day Committee has identified two client stories that will be developed into segments for the Ask A Lawyer TV show. Contest winners have been selected and will be invited to a special event at the Supreme Court with the Chief Justice on Feb. 20. Names of the winners and photos of their entries are on www.okbar.org. The next meeting for the Law School Committee is the site visit for OCU Law School on Friday morning, Feb. 20. The site visit for TU Law School is April 17. OU Law School will be in October.

#### REPORT OF THE GENERAL COUNSEL

Written status reports of the Professional Responsibility Commission and OBA disciplinary matters for December 2008 and January 2009 were submitted for the board's review.

## ANNUAL REPORT OF THE PRC AND PRT

The board approved the Annual Report of the Professional Responsibility Commission and Professional Responsibility Tribunal for calendar year 2008.

#### RESOLUTION

The board voted to issue a resolution of appreciation to the Tulsa County Bar Association for its hospitality in hosting the February board meeting.

#### **EXECUTIVE SESSION**

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

#### NEXT MEETING

The Board of Governors will meet at the Oklahoma Bar Center in Oklahoma City on Friday, March 20, 2009.

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

C C State Street		
Oktahoma Bar Association	Custom Designed Binders for your Oklahoma Bar Journal	
OU R	Attractive, durable binder will keep your Bar Journals accessible and provide easy storage for 12 issues. They cost \$15.95 each prepaid.	
RNAL	Please send: binders for the Oklahoma Bar Journal at \$15.95. Make check payable to Oklahoma Bar Association.	
	TOTAL ENCLOSED \$	
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P.O. Box 53036 Oklahoma City, OK 73152	CITY ZIP PHONE	

# Cy Pres Awards Further Access to Justice

### By Richard A. Riggs

At an Oklahoma Bar Foundation meeting a couple of years ago, the possible receipt of "Cy Pres funds" was raised. OBF Trustee Bill Conger was brave enough to ask the question that was on many trustees' minds: "Who is this guy *Cy Pres*? He is awfully generous with his money." Since that meeting **OBF** Trustees have learned much about "this guy" Cy Pres and the significant benefits that "his money" can provide. I would like to take this opportunity to share with you a little of what we have learned and how these funds have been used to further the administration of justice in Oklahoma.

You may remember from your law school days that *cy pres* is an equitable doctrine that permits a court to fairly distribute a trust fund the original purpose of which has, for some reason, failed. The term literally means "as near as possible," suggesting that once the original purpose of the fund has failed, the court may distribute it for the "next best" use. The law provides broad discretion to courts in determining the "next best" use for the fund.

The *cy pres* doctrine has been applied in a variety of contexts, including probates and litigation involving trusts. However, it has been in class action proceedings where the *cy pres* doctrine has frequently been used to authorize distributions of residual funds to further access to justice. The residual funds in class actions result from claimants not asserting their claims and from interest earned on deposited funds. In a number of class actions throughout the country, courts have determined that an appropriate "next best" use of residual funds is the dedication of such funds to the provision of legal services. In light of the fact that these proceedings can result in significant residual sums, these awards have proven to be of enormous benefit to legal service and related organizations.

Oklahoma courts have joined courts in other states in endorsing this use of residual class action funds. An especially creative use of such funds was utilized in the case of *Lobo Exploration Company v. BP America Production Company,* a class action filed in the district court of Beaver County. In that case, pursuant to the court's *cy pres* authority, Judge Gerald H. Riffe awarded \$2,000,000 in residual funds to the Oklahoma Bar Foundation "to promote the administration of justice..." Judge Riffe's order directed that at least \$1,000,000 of the award be used to "establish and maintain a grant program for the benefit of Oklahoma district and appellate courts, including their clerks and reporters, with a primary focus being for capital improvements and extraordinary expenditures necessary to promote the administration of justice." The court noted that such "extraordinary expenditures" may include courtroom improvements, equipment, furniture and fixtures that will facilitate administration of class actions and other complex cases. The OBF was charged with the responsibility, after consultation with the court administrator, of identifying appropriate uses of these funds, consistent with the court's order, and establishing a grant approval process to administer the award of such funds.

After consultation with the court administrator, the OBF carefully considered both the process by which awards would be granted and the appropriate use of awards and in 2008 initiated the first round of grants under this program. Courts were notified of the availability of these funds and were invited to submit grant requests. Requests were received late in 2008 and reviewed by the foundation's grants and awards committee. The committee's recommendations for awards were approved by the OBF board at its Jan. 30, 2009, meeting. Accompanying this article is a summary of these awards, all of which will provide much needed courthouse improvements. The foundation will follow a similar process in considering awards from this fund in 2009 and in subsequent years.

The remainder of the Lobo cy pres award was distributed to the Oklahoma Bar Foundation for use under its existing grant program for the administration of justice. As noted above, courts in a number of states have used the *cy pres* doctrine to award residual class action funds in this manner. Those states include Minnesota, California, New York, Texas and Michigan. Illinois has gone so far as to adopt legislation to require that 50 percent of residual funds be awarded to legal service providers. North Carolina has adopted similar legislation. The Washington Supreme Court has adopted a rule that provides that at least 25 percent

of residual funds be awarded to the Legal Foundation of Washington. In November, the Massachusetts Supreme Court adopted a rule contemplating the distribution of residual funds "to support activities and programs that promote access to the civil justice system for low income residents..." These awards have clearly become an important funding source for bar foundations, legal service providers and other charitable organizations. There is little doubt that these awards will continue to play a vital role in enabling these organizations to fulfill their purposes, particularly in the current economic climate in which other sources of funding are threatened.

I suspect Bill Conger really knew who "this guy" *cy pres* was when he raised that question a few years ago. I didn't. In the interim, however, I have learned much about *cy pres* awards and the extent to which they can do good. One thing that I have learned is that these awards do not just show up — they come about only from the efforts of participants in appropriate litigation and, as an OBF trustee, I am truly grateful to the Oklahoma lawyers and judges whose foresight, generous spirit and dedication to justice have made these awards possible. If you have any questions regarding *cy pres* awards or the foundation's administration of *cy pres* funds, please do not hesitate to contact us.

*Cy pres* awards are only one revenue source by which the Oklahoma Bar Foundation fulfills its mission. Contributions by Fellows of the bar foundation remain an important source of funding and, if you have not already done so, I encourage you to become an OBF Fellow, with the assurance that your contributions will be dedicated to very worthwhile organizations furthering the administration of justice in Oklahoma. Thank you for your consideration.

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

## 2008 OBF Court Grant Awards for Improvement of Access to Justice

Courtroom Tools and Technical Equipment Awards:

Adair County District Court	\$3,628
Comanche County District Court	10,715
Craig County District Court	3,577
Ellis County District Court	4,400
Garvin County District Court	9,000
Tulsa County District Court	<u>11,200</u>
Total Oklahoma Bar Foundation Grants	\$42,520

OBF Fellow Enrollment Form				
O Attorney O Non-Attorney				
Name:	e) County			
Firm or other affiliation:				
Mailing & Delivery Address:				
City/State/Zip:				
Phone:Fax:				
<ul> <li>New Lawyer within 3 Years, \$50 enclosed &amp; bill as stated</li> <li>I want to be recognized as a Sustaining Fellow &amp; will continue my annual gift of at least \$100 - (initial pledge should be complete)</li> <li>I want to be recognized at the leadership leve contribute at least \$300 - (initial pledge should be complete)</li> </ul>				
Signature & Date:	OBA Bar #:			
Make checks p Oklahoma Bar Foundation • P O Box 53036 • Ok				
OBF SPONSOR:				
O I/we wish to arrange a time to distribution to the Oklahoma contact information is listed a	) discuss possible cy pres Bar Foundation and my above.			
Manu thanks for your	annat Constant			
Many thanks for your s	support & generosity:			

# The Ethics of Selecting Clients An OBA/CLE Webcast Seminar

DATE: TIME: LOCATION:	April 1, 2009 Noon Your choice - any place with a computer!	
CLE CREDIT:	This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 1 hour of mandatory CLE Credit, including 1 hour of ethics. This is considered <b>live</b> MCLE seminar credit, not <b>online</b> seminar MCLE credit. Questions? Call (405) 416-7006	
TUITION:	\$50. No discounts. Register online at www.legalspan.com/okbar/webcasts.asp	
CANCELLATIO POLICY:	N Cancellations, discounts, refunds, or transfers will not be accepted.	
OBA Ethics Counsel, Gina Hendryx, will address ethics issues and the prospective client:		
<ul> <li>Obtaining enough information to determine representation without creating a potential conflict</li> </ul>		
Identifying	g the problematic client before the problem occurs	
Delineating responsibilities between attorney and client		
Program Presenter Gina Hendryx, OBA Ethics Counsel, Oklahoma City		
PROGRAM: 12:00 p.m.	The Ethics of Selecting Clients	
1:00 p.m.	Adjourn	
Register online at www.legalspan.com/okbar/webcasts.asp		

# Legal Aid, Corporate and Law Firm Partnership Results in Big Dividends

When a Tulsa, Oklahoma clinic offering legal help to the elderly shut down about a year ago, it hardly seemed like a positive development. Yet it proved to be the catalyst for an award-winning collaboration between Legal Aid Services of Oklahoma, The Williams Companies Inc. and Tulsa law firm Hall Estill.

Lawyers from Williams, a Tulsa-based energy company, had contacted Legal Aid about getting involved in pro bono work. When the clinic closed, Legal Aid saw an opportunity to provide Williams' attorneys with a manageable and rewarding project. Williams reached out to Hall Estill to bring additional attorneys on board, and the partnership took off. Last month, the project received the 2008 CPBO Pro Bono Partner Award from the Association of Corporate Counsel and the Pro Bono Institute.

Legal Aid used technology as a key element to help the project get off the ground, according to Margaret Shinn, community education and pro se coordinator, who manages the Probono.net/ OK site. Simply put, "the Web site provides a way to make resources readily available to lawyers working with pro bono clients statewide," Margaret said. Volunteers can access videotaped trainings as well as other materials such as practice manuals, research and case law references. The project also makes use of Pro Bono Net's National Document Assembly project, which gives volunteers access to interactive online forms for preparing

The OBA Access to Justice Committee encourages Oklahoma corporations and law firms to consider establishing partnerships, like this one, so that more people with limited means can embrace America's promise of justice for all. It's the right thing to do. wills, powers of attorney and advance medical directives.

The partnership with Williams and Hall Estill also includes an initiative to provide guardians *ad litem*, something that non-lawyers such as paralegals can participate in, and recently expanded to encompass garnishment exemption claims.

The corporate attorneys, while nervous at first, find the work incredibly rewarding, said Craig Rainey, assistant general counsel at Williams. "I think virtually every case we have taken has resulted in the lawyer or paralegal getting a hug from the client at the end," he said. "To get that sort of feedback is just very emotional and not something we get from our regular clients." The ability to access online support materials has been extremely helpful, he added. "The most important thing is its ability to help sustain the program by making it easy to bring in people who didn't volunteer initially."

Legal Aid has a long track record of using technology to increase its reach and provide resources for pro bono attorneys. The organization recruits pro bono volunteers primarily through free CLE seminars it provides twice a year. These are videotaped and posted on probono.net/ OK, where they are available on the desktop to anyone who registers with the site. "It's far less cumbersome than trying to gather everybody together for training," Margaret said.

In addition to being used for the elder law project, document assembly templates are available for family law matters such as dissolution of marriage and child support. The site's e-mail tools also come in handy to communicate with members given the state's rural nature.

Overall, the site "definitely makes it easier" for lawyers to volunteer, Margaret said. "People think it's great." "It's something else that allows us to recruit attorneys and provide them with resources," adds Scott Hamilton, Legal Aid Tulsa Law Office managing attorney.

Probono.net/OK has close to 1,300 members — about 10 percent of the state's total attorney population. Pro bono participation has been steadily increasing, according to Scott. The successful partnership with Williams "allows us to expand our efforts in recruiting attorneys in corporate counsel departments," he noted.

Margaret's role in community education includes responsibility for printed materials, probono.net/OK and OKLaw.org (the state's LawHelp site). She has been at Legal Aid for about four years, though her involvement with pro bono extends back more than 20 years, to when she began her legal career as a tax attorney. Her first pro bono case was with Scott. "He had a really unique bankruptcy case with a tax question," she said. That case ended up going to the Court of Appeals and making law in the Tenth Circuit.

Her more recent jobs have been in public interest law, including working with the mentally ill and women in prison. "There but for the grace of God," she said.

This article, originally published in the December 2008 Probono.net News, was reprinted with permission.



### YOUNG LAWYERS DIVISION

#### **DID YOU KNOW?**

Every year, twice a year, the OBA/YLD assembles and passes out hundreds of "survival kits" to bar applicants. YLD board members and volunteers give one kit to each bar exam applicant in both Oklahoma City and Tulsa. Each kit contains items that applicants may need during the bar exam everything from water to pencils and a pencil sharpener to antacids, candy and a stress ball.



YLD board members assemble bar "survival kits" before the board meeting.



Pictured left to right, Jennifer Kirkpatrick, Elias, Book & Brown; Gabe Bass, Bass Law Firm; Emily Hufnagel, Bass Law Firm; Rick Rose, Mahaffey & Gore; and Karolina Roberts, Elias, Book & Brown. Not pictured Briana Ross, American Eagle Title Insurance Company. These volunteers passed out bar "survival kits" the morning of the exam.

"The applicants most certainly rely on the 'survival kits' provided to them by the YLD. For the YLD representatives to personally hand them out and offer words of encouragement, especially on that first day of the exam, is a pleasant surprise for some and comforting for others. They have heard from others taking the exam before them that the YLD program provides certain articles and many of those items are things they would not have thought of bringing themselves. It is of comfort to them that someone cares about what they are going through." — Cheryl Beatty, Oklahoma Board of Bar Examiners

### LAWYER LEADERS IN OUR COMMUNITIES

This month, the YLD focuses on lawyer leaders serving as mentors. The YLD highlights two members of the bar who have mentored Oklahoma youth through the Boy Scouts.

#### COMMUNITY LEADERSHIP -BOY SCOUTS OF AMERICA

Judge Stephen Friot, United States District Judge for the Western District of Oklahoma, first became involved in scouting in 1987 when his son joined Cub Scouts. Now, 22 years later, he is the council commissioner for Oklahoma's Last Frontier Council. The Last Frontier Council serves 24



Stephen Friot, United States District Judge for the Western District of Oklahoma

counties in central and western Oklahoma. In addition to being council commissioner, Judge Friot is also a member of the troop committee for Boy Scout Troop 4, a merit badge counselor, and the cook for adult campers during scout camps.

"This is how I like to spend my free time," Judge Friot comments. "In my opinion, as council commissioner, I have the best job in the council."

Judge Friot spends an average of 15-20 hours per month working with scouts and on scouting activities. Judge Friot says the most rewarding part about scouting for him is "the opportunity to mentor youth who may not have other role models, to succeed in scouting and develop leadership skills that help them today and in the future."

Arthur Schmidt, a shareholder at the Oklahoma City law firm of Mahaffey & Gore, is also involved with Boy Scouts of America. He works with scouts through St. Mark the Evangelist Catholic Church in Norman, the organization that holds the local charter for his Troop 217 out of the Last Frontier Council in Oklahoma City.

Mr. Schmidt first became involved in scouting in the early 1980s when he acted as the liaison between the pastor of St. Joseph's church in Norman and the troop. Later he acted as an adult leader, serving on the Pack Adult Committee, organizing the pinewood derby, serving as an assistant scoutmaster and serving as the scoutmaster for the troop for five years. Mr. Schmidt also served on the Sooner District Committee at various times, in roles

dealing with membership and fund raising. Currently, Mr. Schmidt is St. Mark's chartered organization representative, and is serving as the council's committee chair for the organization of the 2010 jamboree contingent being sent to Washington, D.C. by the Last Frontier Council.

"I truly believe we help to light the spark within the scouts to become active citizens who care about their communities," he says.

Mr. Schmidt spends an average of 15-20 hours per month working with scouts and on scouting activities. He says the most rewarding part about volunteering for him is the chance to watch his troop's scouts go on to be productive members of society, serving in the armed services, becoming professionals, engineers, teachers and outstanding workers in the community.

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 rrose@mahaffeygore. com.



Arthur Schmidt, Mahaffey & Gore, (back row, second from left) pictured with other leaders and scouts from jamboree Troop 1917.

## March

- 17 **OBA Day at the Capitol;** 11 a.m.; State Capitol; Contact: John Morris Williams (405) 416-7000
- 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 **OBA Civil Procedure Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
  - **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 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

**OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686

# Calendar

- 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 Bar Center Facility Committee Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: J. William Conger (405) 208-5845

**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 OBA Board of Bar Examiners Committee Meeting; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Board of Bar Examiners (405) 416-7075

**Oklahoma Trial Judges Association Meeting;** 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 Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 10 OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Contact: Amy Wilson (918) 439-2424
- 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
- 18 OBA Title Examination Standards Committee Meeting; Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100
- 21 OBA Civil Procedure Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229

**Hudson Hall Wheaton Inn Pupilage Group Six;** 5:30 p.m.; Federal Building, 333 West Fourth St.; Contact: Michael Taubman (918) 260-1041

## April

- 24 **OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 25 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
- 30 **OBA Ask A Lawyer;** OETA Studios, Oklahoma City and Tulsa; Contact: Melissa Brown (405) 416-7017

## May

1 Oklahoma Trial Judges Association Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613

> Hudson Hall Wheaton Inn Spring Banquet; 6 p.m.; Contact: Michael Taubman (918) 260-1041

- 5 OBA Law-related Education Representative Democracy in America; 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 6 OBA Law-related Education Project Citizen Showcase; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 8 OBA Family Law Section Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Amy Wilson (918) 439-2424
- 12 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
- 13 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
- 14 OBA Bench & Bar Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- 16 OBA Title Examination Standards Committee Meeting; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 19 OBA Civil Procedure Committee Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229



**OBA Law-related Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark Jr. (405) 232-4271

- 22 OBA Board of Governors Meeting; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 23 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
- 25 Memorial Day OBA Closed
- 28 OBA Legal Intern Committee Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- 29 Oklahoma Bar Foundation Trustee Meeting; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

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

### FOR YOUR INFORMATION

#### Mock Trial Champion Named

Del City's Christian Heritage Academy defeated Ada High School in the final round of competition to claim the Oklahoma High School Mock Trial Championship. Christian Heritage Academy will represent Oklahoma in the national competition, to be held in Atlanta in May. The competition was held March 3 in the Bell Courtroom at the OU Law Center in Norman. The two teams argued a homicide case in which the defendant was accused of providing meth to a friend, who was found dead after a fire thought to have been started by a meth lab located in a cabin on a remote lake in Oklahoma. The annual competition is sponsored by the



*Christian Heritage Academy celebrates its first place finish in the state mock trial championship.* 

OBA Young Lawyers Division and the Oklahoma Bar Foundation. Teams are paired with volunteer attorney coaches. Christian Heritage Academy's attorney coach is Jennifer Miller, and the attorney coach for Ada High School is Frank Stout.

**Oklahoma Supreme Court Recognizes Teacher and School of the Year** 



Chief Justice James Edmondson congratulates Principal Terry Hopper of Norman's McKinley Elementary, which received the annual School of the Year Award Feb. 26. The school received a \$1,000 stipend and trophy recognizing the school and students for their achievement. Linda C. Gunsaulis of Fairview's Cornelsen Elementary makes a few remarks after being recognized as Teacher of the Year. She received a \$1,000 stipend and trophy for her excellence in teaching citizenship skills.



#### **OBA Member Resignations**

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

George J. Affe OBA No. 156 109 Meherrin Terrace Leesburg, VA 20175

Michael B. Arkin OBA No. 320 1041 Angel Road Corrales, NM 87408

Patricia Ann Gentry Ford OBA No. 3027 340 E. Randolph, Unit 1703 Chicago, IL 60601

Katherine Hine OBA No. 10075 189 [Rear] E. Water St. Chillicothe, OH 45601

Pamela Anne McLemore OBA No. 16691 16 N. Sandalwood St. Wichita, KS 67230-6612

Kimberly Ann Morgan OBA No. 6394 1116 Potomac Pl. Carson City, NV 89703

Louis Robert Newman OBA No. 6649 3020 NE 32nd Ave., No. 825 Ft. Lauderdale, FL 33308

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

Charles A. Schuette OBA No. 7989 2901 S. Bayshore Dr., No. 6C Coconut Grove, FL 33133

James Donald Stevens OBA No. 8614 218 Crest Court Norman, OK 73071-3025

Donald Scott Zimmerman OBA No. 10002 7519 Marquette St. Dallas, TX 75225



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A schedule of events is available at www.law.utulsa.edu/symposium

#### **Topics Include**

Simple Rules for Complex Innovation: Intellectual Property as Property

The Legal Regulation of Discrimination

The Holmesian Bad Man and Common Law Contracts



The event is free and open to the public.

CLE credit is available with registration.

For more information, call Lynn Miller at (918) 631-5038.

The University of Tulsa is an equal employment opportunity/affirmative action institution. For disability accommodations, contact Jane Corso at (918) 631-2315

### Breaking Up - Not So Hard to Do? Managing Law Firm Lay Offs and Splits

An OBA/CLE Webcast Seminar

DATE: TIME: LOCATION:	April 8, 2009 Noon Your choice - any place with a computer!
CLE CREDIT:	This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 2.5 hours of mandatory CLE Credit, including 1 hour of ethics. This is considered <b>live</b> MCLE seminar credit, not <b>online</b> seminar MCLE credit. Questions? Call (405) 416-7006
TUITION:	\$125 No discounts. Register online at <a href="http://www.legalspan.com/okbar/webcasts.asp">www.legalspan.com/okbar/webcasts.asp</a>
CANCELLATION POLICY:	Cancellations, discounts, refunds, or transfers will not be accepted.

No one wants to talk about it until it happens, but then it might be too late. What are the practical and ethical considerations if a law firm breaks up? What are the practical and ethical considerations if a lawyer leaves a firm? Gina Hendryx, OBA ethics counsel, and Jim Calloway, director of the OBA Management Assistance Program discuss the full range of problems generated by these unfortunate, but all too common, situations. This course focuses on the difficult issues encountered when law firms break up or individual lawyers separate from the firm.

#### **Program Presenters**

**Gina Hendryx**, OBA Ethics Counsel, Oklahoma City **Jim Calloway**, Director, OBA Management Assistance Program, Oklahoma City

#### PROGRAM:

12:00 p.m. Breaking Up - Not So Hard to Do? Managing Law Firm Lay Offs and Splits

(One 10-minute break will be taken)

2:10p.m. Adjourn

Register online at www.legalspan.com/okbar/webcasts.asp

### BENCH & BAR BRIEFS



Judge Tom R. Cornish has been named as the new chief judge of the 10th Circuit Bankruptcy Appellate Panel. Judge Cornish has served as a member of the Bankruptcy Appellate Panel since 1996. He received his J.D. from the OU College of Law and a LL.M. degree from the University of Virginia. Judge Cornish previously served on the Oklahoma Court of Criminal Appeals.

ick Pryor will be inducted into the Oklahoma Journalism Hall of Fame next month. Mr. Pryor is an Emmy award-winning journalist who has been a news anchor for 17 years with OETA's Oklahoma News Report and also serves as deputy director of OETA. He has worked at numerous television stations throughout the state, served as the chief of staff to the lieutenant governor in 2007 and as the public relations director for the 89ers in 1990-91. Mr. Prvor earned his I.D. from OU in 1993.

Donald F. Heath Jr., Glenn M. White and Tracey D. Martinez have been named to the Board of Directors of the Mullins, Hirsch & Jones PC in Oklahoma City. Mr. Heath practices in all areas of oil and gas law including title examination. Mr. White is a trial attorney practicing businessrelated litigation including oil and gas, energy and contracts. Ms. Martinez is a trial attorney practicing family litigation including divorce and child custody matters. The firm is now known as Mullins, Hirsch, Edwards, Heath, White & Martinez PC.

**E**"Dealmaker of the Week" by *American Lawyer* for his efforts in helping Interstate Bakeries, maker of Twinkies and Wonder Bread, in its bankruptcy case and eventual emergence from Chapter 11.

Eric Johnson, a shareholder with Oklahoma City-based Phillips Murrah, has authored the ABA's 2008 Supplement to Professors Rohner & Miller's Truth in Lending treatise on the federal Truth in Lending Act and Regulation Z. Mr. Johnson also provided the federal update for the 2007 Supplement.



Ed Slaughter has been appointed partner-incharge of the Hawkins, Parnell & Thackston LLP Dallas law office. Mr. Slaughter is a trial attorney who practices business and tort litigation. He has been with the firm for over six years and serves as the national trial counsel and national coordinating counsel for defendants with cases pending in Texas and across the country.

tkinson, Haskins, Nellis, Brittingham, Gladd & Carwile announces that J. Craig Buchan has been named a partner of the firm. Mr. Buchan joined the firm just after receiving his J.D. from the OU College of Law. While in law school, he served as the note editor for the Oklahoma Law Review and was a member of the National Trial Team. His practice includes medical negligence, products liability, premises liability and automobile negligence.

Phillips Murrah announces that Jim Roth has joined the firm. Mr. Roth will assist with the firm's energy and alternative energy regulatory practice groups. Prior to joining the firm, he served as the Oklahoma Corporation Commissioner and as chief deputy and attorney to the Oklahoma County Clerk. He received his law degree from OCU in 1994.

Hall, Estill, Hardwick, Gable, Golden & Nelson PC announces that **James C. Shaw** has joined the firm as special counsel in the Oklahoma City office. Mr. Shaw received a B.S. in business administration from Presbyterian College, a master's in accounting from Georgia State University and his J.D. from the University of South Carolina. His practice areas include corporate, commercial, estate planning and real estate.

Tierce Couch Hendrickson **L** Baysinger & Green LLP announces that Michael D. **Tupper, Trent A. Glasgow** and **Reginald O. Smith** have joined its Oklahoma City office. Prior to joining the firm, Mr. Tupper worked as an assistant district attorney in Cleveland County. He practices in the areas of civil rights, civil and government liability and medical malpractice. Mr. Glasgow received a master of public health from OU in 2002 and his J.D. from TU in 2008. His areas of practice include medical malpractice and insurance defense. Mr. Smith served in the U.S. Navy before receiving his J.D. in 2008 from OCU. He practices in the areas of medical malpractice and insurance defense.

Michael P. Copeland was nominated by the president of the Republic of Palau and confirmed by the Palauan Senate to serve as the country's special prosecutor. Mr. Copeland will be responsible for lead investigations and prosecutions of all crimes related to corruption in the nations elected and public offices. He is a 1997 graduate of the OU College of Law. He may be contacted at: Office of the Special Prosecutor, P.O. Box 1702, Koror, Palau 96940; (680) 488-3291; michael. p.copeland@gmail.com.

Fellers Snider Law Firm announces that **S. Fred** Jordan Jr. has joined the firm as an associate in the firm's Tulsa office and that Irena Damnjanoska has joined the firm as an associate in the firm's Oklahoma City office. Mr. Jordan is an Oklahoma state representative and serves as the assistant majority whip and vice chairman of the Judiciary Committee. Prior to joining the firm, he was a captain in the U.S. Marine Corps, and served in the Staff Judge Advocate's Office at Marine Corps Air Station Cherry Point, N.C. He received his law degree from the University of Ĭowa College of Law in 1999. His practice will focus on general litigation. Ms. Damnjanoska received her J.D. from OCU School of Law in 2008. Prior to joining the law firm, she was a business plan consultant for FUDERELO, a nonprofit organization in Nicaragua. Her practice will focus on secured transactions, bankruptcy, commercial, banking, consumer and corporate law.

unlap Codding announces that **John** Behles and Joseph D. **Maxey** will join the firm as associates and that Charles "Chic" Krukiel will join as of counsel. Mr. Behles focuses his practice on patent law. He graduated from TU with a degree in mechanical engineering and from the TU College of Law in 2004. Mr. Maxey recently graduated from the OU College of Law. Prior to law school, he served on active duty in the U.S. Air Force, completing a 20-year career in 2007. His practice includes patent law in electrical and mechanical arts. Mr. Krukiel practices in the areas of intellectual property, technology licensing, patent law and foreign intellectual property. Prior to joining Dunlap Codding, Mr. Krukiel was assistant general counsel and chief IP counsel for INVISTA S.a.r.l.

CAfee & Taft announces **L**that Heidi Slinkard Brasher and Christina M. Vaughn join the firm's Tulsa office as litigation associates and that Rachel Blue joins its intellectual property practice group. Also, Kendra M. **Robben** joins the firm's Oklahoma City office as an associate. Ms. Brasher is a trial lawyer who represents management in all aspects of labor and employment law, including state and federal litigation matters. She earned a bachelor's degree in psychology from the University of Kentucky and a J.D., with honors, from OCU School of Law. Prior to joining McAfee & Taft, she served as a judicial law clerk for Judge Steven P. Shreder. Ms. Vaughn practices Native American law, business-related litigation, general civil litigation, complex business litigation and environmental litigation. She earned her law degree, with honors, from the TU College of Law. Ms. Blue graduated from the TU College of Law. Immediately after graduation from law school, she worked for the U.S. Patent and Trademark Office in Washington, D.C. She now practices intellectual property law, franchise law, entertainment law and unfair competition matters. Ms. Robben practices in areas of family wealth planning, general business transactions and agricultural related law. She graduated first in her class at the OCU School of Law where she served as the chair of the **OBA** Law Student Division.

Holladay & Chilton PLLC announces that **Stephen R. Johnson** has been made a partner of the firm. Mr. Johnson's practice is primarily in the areas of business and commercial litigation. Prior to joining the firm, Mr. Johnson practiced law with James P. Linn PLLC. He received his J.D. in 1982 from the TU College of Law.

Malcolm McCollam announces that his firm, MalcolmLaw PC, will be moving to 1316 E. 35th Pl., Suite 200, Tulsa 74105; (918) 582-1414. Mr. McCollam's practice includes busi-

ness law and litigation, mediation, collaborative family law and bicycle accident injuries.

Doerner, Saunders, Daniel & Andersen LLP announces that Michael C. Wofford has joined the firm as of counsel. Mr. Wofford graduated from OU with a B.A. in political science in 1974 and received his J.D. from the OU College of Law in 1977. He practices in the areas of environmental, regulatory, Indian, public health, occupational safety and energy projects.

The Sherwood Law Firm announces that John F. McCormick Jr. has become an associate in the firm. Mr. McCormick is a trial lawyer who practices in the areas of medical negligence, defective products and vehicular crashes. Due to his addition, the firm has changed its name to Sherwood and McCormick. The Richardson Law Firm announces that **Paul Boudreaux** will join the firm as an owner and partner. Mr. Boudreaux is a 1980 graduate from the OU College of Law. The firm has changed its name to Richardson, Richardson, Boudreaux.



Chris A. Paul made presentations on "Legal Issues and Corrosion Control Programs" at the 56th annual Corrosion Control Course at OU's Norman campus in January and on "Legal Issues and Pipeline Integrity Programs" at the 21st International Pipeline Pigging & Integrity Management Conference in February in Houston, Texas.

ami Fenner and Courtney Davis Powell spoke at seminars sponsored by Lorman Education Service. Ms. Fenner addressed medical record abuse at the seminar titled "Medical Records Law in Oklahoma" in January in Oklahoma City. Ms. Powell addressed the basic framework of the Family and Medical Leave Act and provided an update on recent regulation changes at the FMLA seminar in February in Oklahoma City. Both women represent healthcare providers, employers and employees in workplace matters.

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 April 11 issue must be received by March 23.

### IN MEMORIAM

Tohn Campbell Howard of

Arcadia died Feb. 15. Mr. Howard was born July 4, 1942, in Wewoka and went on to attend OU where he received his B.A. in journalism in 1965. He then attended OCU School of Law and graduated with his J.D. in 1969. He began his legal career in the Oklahoma Attornev General's Office in 1968 and became the editor of the first two volumes of the Opinions of the Oklahoma *Attorney General*. Later, he served as the first assistant district attorney for Canadian County before opening a private practice in 1971. Additionally, he was very involved civically. In El Reno, he served as the president of the United Fund, Board of Directors of the Chamber of Commerce, and co-founder of Youth and Family Services and was a member of the Sacred Heart Parish Council and the Knights of Columbus. As a member of the Army National Guard, he also had an extensive military background. He joined the A Btry, 171st FA, 45 Division in 1957 and retired from the Army National Guard in 1997 as a Colonel.

**B**ruce Frederick McGuigan died Feb. 19. He was born July 6, 1928, in Escanaba, Mich. After graduating high school, he joined the Navy and served from 1953 to

1956. He earned a B.S. in business from OCU and went on to work for 20 years as an accountant with the U.S. Department of the Treasury. He then returned to OCU and received his J.D. in 1971. After working at a local law firm, he opened up his own private firm where he continued to practice for many years. He was active in his law fraternity, the Men's Club at the Cathedral of Our Lady of Perpetual Help and the Knights of Columbus. He was the co-founder of the Federal Employees (now Allegiance) Credit Union. Memorial contributions may be made to the Holy Angels Building Fund, 317 N. Blackwelder, Oklahoma City 73106-5213 or to the Bishop John Carroll School Endowment Fund, 3214 N. Lake, Oklahoma City 73118.

Cally Rae Merkle Mock of **O**klahoma City died Feb. 14. She was born in Wichita Falls, Texas, on Feb. 28, 1943. She graduated from OU in 1965 with a B.S. in chemistry and graduated first in her class at the OU College of Law in 1973. After receiving her degree, she served as the law clerk to Judge William J. Holloway and proceeded to practice at several Oklahoma City law firms before joining McAfee & Taft in 1988. A strong advocate for women's rights, she served as the first female member and as chairperson of the Oklahoma Board of Bar Examiners and as a board member of Planned Parenthood of Central Oklahoma. Additionally, she was a co-founder of the Oklahoma Committee to Promote Women's Health. Memorial contributions may be made to Planned Parenthood of Central Oklahoma or KGOU-Oklahoma public radio.

**Tohn Richard Zieren** of Austin, Texas, died Feb. 26. He was born in Paris, Ill., on July 28, 1945. He served his country in the U.S. Air Force as a captain during the Vietnam War. After the war, he received both his J.D. and M.B.A. degrees in 1976 and later earned a master of science- science and technology commercialization degree from the University of Texas in 2001. He worked for over 25 years as an attorney and his practice mostly focused on the oil and gas industry. He has worked as the associate general counsel for Apache Corp., the vice president and general counsel for Transok LLOC, and, most recently, as the executive vice president and managing director of Red Oak Energy Partners LLC. Memorial donations may be made to The Richard Zieren Memorial Fund at the American Brain Tumor Association; abta.org.

### CLASSIFIED ADS

#### SERVICES

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AMANDA O'QUINN AND MELINDA NELSON O'Quinn and Nelson Law Office, PLLC Attorneys at Law and Private Mediators Eagerly accepting referrals Guardian *ad Litem*, Family Law, Domestic/Civil/Commercial Mediation, Research and brief drafting 1800 N. Interstate Dr., Ste. 121 Norman, OK 73072 (405) 290-1441 aoquinnlaw@cox.net, mnelsonlaw@cox.net

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DOWNTOWN OFFICE SPACE AVAILABLE. Eight rooms plus secretarial spaces. Can include furnishings and copier. Very nice space at a low price. (405) 236-8282 or email sschoeb@srselaw.com.

NORTH OKC LAW FIRM has office 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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DOWNTOWN OKC within walking distance to Courthouse. Parking, copier, fax, conference room, reception area, kitchen, phone system. 1-3 offices available. Corner of Reno & Walker. James Dunn (405) 239-1000 ext 2.

#### **POSITIONS AVAILABLE**

AV RATED OKLAHOMA CITY INSURANCE DE-FENSE FIRM seeks associate attorney with 0-4 years experience. Excellent research and writing skills required. All replies kept confidential. Resume and writing sample should be sent to "Box H," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

MCGIVERN LAW, primarily an insurance defense firm, seeks either a full or part-time Associate for its Tulsa office with at least 1 year of experience. The Associate will work both for the District Court and Worker Compensation departments. The Associate's job duties will be heavily focused on research and writing, and involve motion and appeal brief drafting, medical records summarization, written discovery drafting, and assisting clients in responding to written discovery. Please forward resume, writing sample and salary requirements to Jon Starr at jstarr@ mcgivernlaw.com or mail to Jon Starr, P.O. Box 2619, Tulsa, OK 74101-2619.

#### **POSITIONS AVAILABLE**

LEGAL ASSISTANT/SECRETARY FOR SMALL OKC DOWNTOWN OFFICE. Must be experienced with civil litigation. Must also be proficient in typing and Word Perfect. Must have strong work ethic and must be self motivated. Competitive salary based on experience. Please email resumes to tina@browngouldlaw.com.

NW OKC AV RATED FIRM seeks Associate with 3-6 years of experience with exceptional research and writing skills to work in the areas of litigation, probates, guardianships, business and commercial law. Send resume and salary requirements to lawfirmad@gmail. com. All applicants will be kept in strictest confidence.

PROMINENT AV-RATED DOWNTOWN OKLAHO-MA CITY LAW FIRM seeks attorney with 3-5 years of mergers and acquisitions, corporate and securities law experience. Must have strong academic credentials. Compensation is commensurate with the position and the applicant's experience. Please send resume with list of references to Box "W," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SOUTHWEST OKLAHOMA AV RATED LAW FIRM located one (1) hour from Oklahoma City and Norman in Anadarko, Caddo County Seat. Two (2) man firm seeking a purchaser of law practice consisting of building and equipment. Great opportunity for young attorney/attorneys. This is the oldest continuously operated law firm in Caddo County. Attorneys are looking for retirement. Please send reply in confidence to Box "G," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE LAW FIRM OF HOLDEN CARR & SKEENS seeks experienced litigators for the firm's Oklahoma City and Tulsa offices. Holden Carr & Skeens is an insurance defense firm with a broad client base and a strong presence in Oklahoma. The firm seeks attorneys with 10 years of experience or more in litigation and, in particular, jury trial practice. Proven track record in business development is preferred. The firm strives to be the best and requests nothing less from its members, therefore strong academic credentials and trial practice skills are required. Salary is commensurate with experience. Applications will be kept in the strictest confidence. Resumes and writing samples should be sent to ChelseaHill@HoldenOklahoma.com.

ASSOCIATE ATTORNEY: The firm of Conner & Winters, LLP is seeking an associate attorney with 2 – 6 years experience for its Oklahoma City office. Strong academic credentials and excellent writing skills required. Business litigation experience a plus. Competitive salary and benefits. Send resume, writing sample and transcript in confidence to "Box P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152 Direct inquiries to Conner & Winters will not be accepted.

#### **POSITIONS AVAILABLE**

DOWNTOWN AV RATED LAW FIRM, business litigation practice, seeks experienced lawyer with portable practice for of counsel relationship. Send resume to Box "B," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SOCIAL SECURITY DISABILITY ATTORNEY needed for busy multi-state plaintiffs' practice. Must be able to handle volume case load. Experience with criminal law and/or estate planning a plus. Compensation commensurate with experience. Send replies to Box "O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

RAINEY, ROSS, RICE & BINNS, AV-rated OKC firm is seeking a litigation attorney with strong research and writing skills, and 3 + years experience. Send resume and writing sample in confidence to: Office Manager, Rainey, Ross, Rice & Binns, 735 First National Center West, Oklahoma City, Okla. 73101-2324.

THE OKLAHOMA GEICO STAFF COUNSEL law office of Michael H. Githens is looking for an attorney with 2-4 years of experience in insurance defense and/ or personal injury practice. The attorney will be expected to handle a case load including research, drafting pleadings and motions, attending depositions, mediations, court appearances and trial. The applicant must be admitted to practice in the State of Oklahoma and be willing to travel throughout the State. Good organizational, communication and computer skills are required. Please email resumes to mgithens@geico.com.

AV RATED SMALL DOWNTOWN TULSA FIRM seeks associate. Excellent academic background, research skills, writing skills and 5+ years of litigation experience required in areas of general civil litigation and domestic relations. Compensation package commensurate with experience and performance. Send resume including references and writing sample to Box "T," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

AV RATED TULSA FIRM McDaniel, Hixon, Longwell & Acord, PLLC seeks an associate with 2-3 yrs. experience who is eager to be a contributing member of a successful litigation team. Candidate must possess excellent research and writing skills, a proactive outlook and strong decision-making abilities. Top 25% of graduating class preferred. Compensation package commensurate with experience. Resume, cover letter, class rank and writing sample must be included for consideration. Email information to info@mhla-law.com or fax to (918) 382-9200.

ATTORNEY with 32+ yr. general practice is planning retirement and looking for an attorney to ease the transition. Office located in Okmulgee County with strong client base and low overhead. Thomas H. Stringer, Jr., (918) 652-9623, t.stringerjr@sbcglobal.net.

### **POSITIONS AVAILABLE**

LEGAL SECRETARY/LEGAL ASSISTANT. Small OKC AV-rated firm engaged in a variety of federal and state court litigation seeks legal secretary/assistant. Must have sufficient experience to assist in organizing files and docketing as well as providing meaningful, selfdirected contribution to discovery and trial preparation. Please send resume to Box "J," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ATTORNEY. SMALL OKC AV-RATED FIRM engaged in a variety of federal and state court litigation seeks attorney who is an excellent writer with experience or committed interest in oral advocacy. Must be hard-working, confident and good with people. Please send resume, and writing sample to Box "C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

THE CHEROKEE NATION is seeking a regular full time Senior Assistant Attorney General. The Senior Assistant Attorney General shall assist the Attorney General for the Cherokee Nation. This individual represents the Cherokee Nation as requested by the Attorney General. They provide advice and guidance to assigned staff, if any. They are responsible for providing legal advice & assistance and conducting preventive legal and/or prosecutorial activities of the Cherokee Nation. The pay range for this position begins at 55K. All applications must be submitted electronically at www.cherokee.org no later than 4/3/2009. Indian preference will be considered.

EXTREMELY BUSY SOCIAL SECURITY FIRM seeks Attorney. Applicants must have Trial experience, be able to handle a large volume of cases and be familiar with listings and grids. Must have strong communication skills, work ethic and be willing to travel. Position will require lots of energy and competence. Competitive salary based on experience. Please send resume to "Box I," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LEGAL SECRETARY/ACCOUNTING CLERK: Oklahoma office of a national firm seeks a legal secretary with an accounting background. Responsibilities will include preparing documents, reception coverage, answering phones as needed and performing all tasks requested by supervising attorneys. Microsoft Word, Excel, Outlook and typing 65+ wpm required. Bank reconciliation, financial reporting and accounts receivable/payable experience necessary. Salary commensurate with experience. Full benefit package. Mail resume to: 117 Park Avenue, 2nd Floor, Oklahoma City, OK 73120 or e-mail: dbond@hobbsstraus.com.

IMMIGRATION LAWYER NEEDED for busy law practice. Would handle both family based and business cases. Some travel will be required. Competitive salary and production bonuses paid. Please send resume and summary of experience to "Box D," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

#### **POSITIONS AVAILABLE**

GENERAL COUNSEL. Privately held international energy company seeking candidates for General Counsel in Oklahoma City. Strong academic credentials and references required. 5 to 10 years experience preferred including in contracting and acquisitions. Competitive salary and benefits. Send applications with résumé and references to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

DOWTOWN OKC AV FIRM with active civil litigation practice is seeking an attorney with 5 years minimum litigation experience. Send resume to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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#### **POSITION WANTED**

ATTORNEY AVAILABLE FOR CONTRACT OR TEM-PORARY HELP. Attorney experienced in litigation, contracts and many other areas is available to help you. New to Tulsa but with twenty-five years of hands-on experience including law firm, corporate in-house and judicial clerkship. Call Lisa Voorhis, (918) 288-6807, or email lisavoorhislawyer@yahoo.com.

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## Peacock Blue By Paula J. Alfred

awyers are rich in stories. I'm no exception. Having worked for 21 years as an assistant Tulsa County public defender, I consider myself a story billionaire. This is a true story of odd friendships, death, courage and an ice storm.

Ache, hate, cry and forever are words that come to mind for the tragedy that occurred on Aug. 17, 1992, the day four people at Lee's Famous Recipe Chicken in Tulsa were shot, execution style. Some tragedies are beyond words, or even thought, and this was one. Corey Hamilton was convicted and sentenced to death for these crimes. I represented him on direct appeal.



What did the victims and their families feel? As a distant spectator, I can only imagine myself in their shoes. My gut tightens and my breath constricts before I succumb to a thought more bearable. But my empathy also extended to Corey, whose life, for whatever reason, had brought him to this sad end. I advocated for Corey's right to a constitutionally fair trial while trying to uphold his humanity and dignity. At his behest, I corresponded with him beyond the period of my representation. We shared in the deep but limited friendship between a lawyer and her client involved in a life and death struggle.

In December 2006, I received a call asking me to be a witness to Corey's execution. Having seen him grow into a man of quiet strength and inner peace, I felt the request was the last conversation between friends. Circumstances did not permit much latitude in what support I could offer. I discovered his favorite color was peacock blue and decided that

peacock blue would be one of the last things Corey saw before his death.

My friend, Paul Brignac, a former public defender, came to visit me the day before the execution. I told him that I'd have to cut our visit short as I had to shop and told him why. Paul, a man with a strong reverence for life, asked if he could take me and buy whatever I found. Even overwhelming angst for my client could not prevent my bruised vanity when I had to reveal my dress size as we shopped. Thankfully those feelings remained background hum to the deep connection I felt with my friend that night. The next day, accompanied by the loving presence of Susie Rutledge, our office secretary, I made my way to big Mac. Susie's presence felt as comforting as homemade soup on a frigid day.

That evening the peacock blue suit felt like a good friend with his hand on the small of my back as I listened to Corey's last words, "I wish everyone could experience the love of God the way I have. I love everyone. To the victims' families, I pray that you have peace and all that you are in need of." At 6:14 p.m. on Jan. 9, 2007, Corey faced his death with courage and equanimity. I have no idea if he was warmed by his favorite color, but I like to think that he was. As I walked out, a prison guard handed me my last letter from Corey, and I cried for the tragedy of it all.

I attended Corev's funeral, although the roads were so icy that my husband, Jim, insisted on going with me. I wondered how a funeral service for a man who had been convicted of four heinous murders could be a celebration of life, love and family, but it was. And as things sometimes happen, a woman scheduled to speak at Corey's funeral did not show. From the pulpit the minister looked to Corey's mother for guidance. Seated on the front pew I heard his mom say in a strong, confident voice, "Mrs. Alfred will speak." I almost turned around to look for another Mrs. Alfred. It's probably the best, most heartfelt closing argument I've ever given. After I returned to my seat, Jim, looked at me and said, "Why didn't you tell me you were going to speak?" I squeezed his hand and smiled. Sometimes being a lawyer feels so good.

*Ms. Alfred practices in Tulsa.* 

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