



THE Oklahoma Bar JOURNAL

Volume 81 ♦ No. 7 ♦ March 13, 2010

Workers' Compensation Law

ALSO INSIDE

- Tax Court's Drafting Tips for Transfers of Partnerships or LLC Interests
- Charging Order Protection for a Single Member LLC
- Check Scams That Target Lawyers
- Solo and Small Firm Conference

2010
OBA SOLO & SMALL
FIRM CONFERENCE
& YLD MIDYEAR MEETING

JUNE 24-26



DOWNSTREAM CASINO RESORT, QUAPAW, OK

FAMILY

FRIENDS

EDUCATION

NETWORKING

RELAXATION

www.okbar.org/solo



MAF
MANAGEMENT ASSISTANCE
FUND



RENEW. RECHARGE. REVITALIZE

DOWNSTREAM
CASINO RESORT

oba • cle
OKLAHOMA COUNCIL OF
LAWYERS



THE OKLAHOMA LAWYERS ASSOCIATION

Your Voice at the Capitol



As a champion for Oklahoma's system of justice, the OLA advocates on behalf of its members through the political and legislative processes.

OLA promotes the interests of the legal profession, advocating positions on law-related issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

HERE ARE A FEW OF THE BENEFITS OF JOINING OLA:

1. A year-round weekly e-mail Capitol Call (except in July), covering legislative developments, pre-session interim studies, etc., for each practice area (civil procedure, criminal procedure, family law, estate planning, employment law, etc.).
2. Capitol Alert e-mail newsletter during session updating members on bills of interest and legislative alerts as needed.

For a complete list of benefits visit us at www.oklawyers.org.

JOIN OLA TODAY!
www.oklawyers.org

405.633.1803 | tbalkman@oklawyers.org



Disability

The risk may
be more
than you think.

It Happens More Often Than You'd Imagine.

- In just the past hour, almost 3,000 Americans became disabled.¹
- Almost one-third of Americans entering the workforce today (3 in 10) will become disabled before they retire.²

Disability Causes Severe Financial Hardship.

- 350,000 personal bankruptcies every year are blamed on injuries and unexpected illnesses.³
- 71% of American employees live paycheck to paycheck,⁴ without enough savings to cushion the financial blow.

Be Prepared. Call us TODAY to find out more about this important insurance protection.

¹ National Safety Council, Injury Facts 2008 Ed.

² Social Security Administration Fact Sheet Jan 31, 2007

³ "Illness & Injury as Contributors to Bankruptcy", Health Affairs, Feb 2, 2005

⁴ American Payroll Association, "Getting Paid in America" Survey, 2008

**Disability Income
Protection
Policies Replace
Your Income In
Your Time Of Need**



Especially for members of:



1.800.530.4863 • beale@bealepro.com
www.bealepro.com

Serving Oklahoma's Legal and Accounting Professionals since 1955.



contents

March 13, 2010 • Vol. 81 • No. 7



DEPARTMENTS

- 572 FROM THE PRESIDENT
- 644 FROM THE EXECUTIVE DIRECTOR
- 646 ETHICS/PROFESSIONAL RESPONSIBILITY
- 648 OBA BOARD OF GOVERNORS ACTIONS
- 651 OKLAHOMA BAR FOUNDATION NEWS
- 655 ACCESS TO JUSTICE
- 657 YOUNG LAWYERS DIVISION
- 659 CALENDAR
- 661 FOR YOUR INFORMATION
- 663 BENCH AND BAR BRIEFS
- 667 IN MEMORIAM
- 643 EDITORIAL CALENDAR
- 672 THE BACK PAGE

FEATURES

- 575 REVISITING THE VORTEX: THE COLLISION OF THE OKLAHOMA WORKERS' COMPENSATION ACT, FMLA AND ADA
By Madalene A.B. Witterholt and Tynan D. Grayson
- 585 MAJOR CAUSE – WHAT DOES IT MEAN?
By Judge Tom Leonard
- 589 MEDIATION AND WORKERS' COMPENSATION
By Michael G. Coker
- 595 THE EVOLUTION OF WORKERS' COMPENSATION IN INDIAN COUNTRY
By Jay Jones
- 599 THE EIGHT-WEEK SOFT TISSUE INJURY TTD LIMITATION
By James M. Wirth
- 605 ILLEGAL ALIENS, IMMIGRATION POLICY AND WORKERS' COMPENSATION
By Pamela K. Cornett
- 613 MEDICARE CONSIDERATIONS FOR THE WORKERS' COMPENSATION PRACTITIONER
By Valerie J. Evans
- 619 PAIN MANAGEMENT FOR WORK-RELATED INJURIES
By Bob Burke

pg. 628

CHECK SCAMS THAT
TARGET LAWYERS



PLUS

- 623 ESTATE PLANNING, PROBATE AND TRUST SECTION NOTE: *PRICE V. COMMISSIONER: TAX COURT'S DRAFTING TIPS FOR TRANSFERS OF PARTNERSHIPS OR LLC INTERESTS*
By Jon H. Trudgeon
- 625 ESTATE PLANNING, PROBATE AND TRUST SECTION NOTE: CHARGING ORDER PROTECTION FOR A SINGLE MEMBER LLC MAY STILL BE ILLUSORY
By Steven P. Cole
- 628 CHECK SCAMS THAT TARGET LAWYERS
By Robert T. Luttrell III
- 633 SOLO AND SMALL FIRM CONFERENCE
- 639 OKLAHOMA LEGISLATIVE REPORT
- 642 PHOTO HIGHLIGHTS: OBA DAY AT THE CAPITOL

Students Demonstrate Knowledge of American Government

By Allen Smallwood

We have all heard or experienced the horror stories. Polls which reflect that a large percentage of our population believes the three branches of government are composed of Republicans, Democrats and the military. High school, or even college-age, students who can't put the American Civil War in the correct century or who are unsure whether the American Civil War preceded the American Revolution. The most recent example was the OBA Annual Meeting speaker a couple of years ago who related the anecdote of the well-educated college student who not only was clueless about the alignment of the warring powers in the second World War, but ended her interview with asking, "Who won?"

Last month I had the privilege and opportunity to relieve my anxiety about the concerns addressed above. I was privileged to give brief remarks at the OBA Law-related Education-sponsored program, "We the People." This program was led by Jane McConnell, our OBA Law-related Education coordinator, ably assisted by Debra Jenkins. This event last month was the culmination of competition

between high school groups studying, debating and delivering papers and presentations on the American system of government — focusing on the three branches of government, the provisions of the Constitution relating to each, the importance and reach of the Bill of Rights, and how all of these not only relate to each other, but have a direct bearing on the freedoms, privileges and obligations of all of us as citizens.

A review of the topics revealed a sophistication worthy of graduate level political science seminars. What was truly heartwarming was the teenage enthusiasm reflected by the participants when the awards ceremony was conducted. It was gratifying to know that the future of our state and society will be shortly in the hands of such intelligent, energetic and precocious young citizens. I might suggest that all of us (including perhaps even members of our state Legislature) review some of the materials provided at that program. We all could benefit from a renewed understanding of civics.

DELEGATION ATTENDS ABA MEETING

In February, the Oklahoma delegation to the American Bar

continued on page 643



Allen M. Smallwood

President Smallwood
practices in Tulsa.
amsmallw@swbell.net
(918) 582-1993

*It was gratifying
to know that
the future of our
state and society
will be shortly in
the hands of such
intelligent, energetic
and precocious
young citizens.*

OFFICERS & BOARD OF GOVERNORS

Allen M. Smallwood, *President*, Tulsa
Deborah Reheard, *President-Elect*, Eufaula
Mack K. Martin, *Vice President*, Oklahoma City
Jon K. Parsley, *Immediate Past President*, Guymon
Jack L. Brown, Tulsa
Martha Rupp Carter, Tulsa
Charles W. Chesnut, Miami
Glenn A. Devoll, Enid
Steven Dobbs, Oklahoma City
W. Mark Hixson, Yukon
Jerry L. McCombs, Idabel
Lou Ann Moudy, Henryetta
David A. Poarch, Norman
Ryland L. Rivas, Chickasha
Susan S. Shields, Oklahoma City
James T. Stuart, Shawnee
Molly Aspan, Tulsa, *Chairperson*,
OBA/Young Lawyers Division

BAR CENTER STAFF

John Morris Williams, *Executive Director*;
Gina L. Hendryx, *General Counsel*;
Donita Bourns Douglas, *Director of Educational Programs*; Carol A. Manning, *Director of Communications*; Craig D. Combs, *Director of Administration*; Travis Pickens, *Ethics Counsel*;
Jim Calloway, *Director of Management Assistance Program*; Beverly S. Petry, *Administrator MCLE Commission*; Jane McConnell, *Coordinator Law-related Education*; Loraine Dillinder Farabow, Debbie Maddox, Ted Rossier, *Assistant General Counsels*; Katherine Ogden, *Staff Attorney*, Tommy Butler, Sharon Orth, Dorothy Walos and Krystal Willis, *Investigators*

Nina Anderson, Manni Arzola, Debbie Brink, Melissa Brown, Brenda Card, Sharon Dotson, Morgan Estes, Johnny Marie Floyd, Matt Gayle, Susan Hall, Brandon Haynie, Suzi Hendrix, Misty Hill, Debra Jenkins, Jeff Kelton, Durrel Lattimore, Debora Lowry, Heidi McComb, Renee Montgomery, Wanda Reece-Murray, Tracy Sanders, Mark Schneidewent, Robbin Watson, Laura Willis & Roberta Yarbrough

EDITORIAL BOARD

Editor in Chief, John Morris Williams, News & Layout Editor, Carol A. Manning, Editor, Melissa DeLacerda, Stillwater, Associate Editors: P. Scott Buhlinger, Bartlesville; Dietmar K. Caudle, Lawton; Sandee Coogan, Norman; Emily Duen-sing, Tulsa; Thomas E. Kennedy, Enid; Pande Ramirez, Okmulgee; James T. Stuart, Shawnee; Leslie D. Taylor, Oklahoma City; January Windrix, Poteau

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

Oklahoma Bar Association (405) 416-7000
Toll Free (800) 522-8065 FAX (405) 416-7001
Continuing Legal Education (405) 416-7006
Ethics Counsel (405) 416-7055
General Counsel (405) 416-7007
Law-related Education (405) 416-7005
Lawyers Helping Lawyers (800) 364-7886
Mgmt. Assistance Program (405) 416-7008
Mandatory CLE (405) 416-7009
OBJ & Communications (405) 416-7004
Board of Bar Examiners (405) 416-7075
Oklahoma Bar Foundation (405) 416-7070

EVENTS CALENDAR

MARCH 2010

- 15 **OBA Alternative Dispute Resolution Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 16 **OBA Volunteer Night at OETA**; 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018
- 17 **Oklahoma Council of Administrative Hearing Officials**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 18 **OBA Access to Justice Committee Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- 20 **OBA Title Examination Standards Committee Meeting**; 9:15 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kraettli Epperson (405) 848-9100
- 24 **OBA Professionalism Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Shariisse O'Carroll (918) 584-4192
- 25 **OBA Leadership Academy**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
OBA Strategic Planning Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Deborah Ann Reheard (918) 689-9281
- 26 **OBA Board of Governors Meeting**; Weatherford, Oklahoma; Contact: John Morris Williams (405) 416-7000
OBA Leadership Academy; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 27 **OBA Young Lawyers Division Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595

APRIL 2010

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

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

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

THE OKLAHOMA BAR JOURNAL is a publication of the Oklahoma Bar Association. All rights reserved. Copyright© 2010 Oklahoma Bar Association. The design of the scales and the "Oklahoma Bar Association" encircling the scales are trademarks of the Oklahoma Bar Association. Legal articles carried in THE OKLAHOMA BAR JOURNAL are selected by the Board of Editors.

THE OKLAHOMA BAR JOURNAL (ISSN 0030-1655) IS PUBLISHED THREE TIMES A MONTH IN JANUARY, FEBRUARY, MARCH, APRIL, MAY, AUGUST, SEPTEMBER, OCTOBER, NOVEMBER AND DECEMBER AND BIMONTHLY IN JUNE AND JULY. BY THE OKLAHOMA BAR ASSOCIATION, 1901 N. LINCOLN BOULEVARD, OKLAHOMA CITY, OKLAHOMA 73105. PERIODICALS POSTAGE PAID AT OKLAHOMA CITY, OK. POSTMASTER: SEND ADDRESS CHANGES TO THE OKLAHOMA BAR ASSOCIATION, P.O. BOX 53036, OKLAHOMA CITY, OK 73152-3036. SUBSCRIPTIONS ARE \$55 PER YEAR EXCEPT FOR LAW STUDENTS REGISTERED WITH THE OKLAHOMA BAR ASSOCIATION, WHO MAY SUBSCRIBE FOR \$25. ACTIVE MEMBER SUBSCRIPTIONS ARE INCLUDED AS A PORTION OF ANNUAL DUES. ANY OPINION EXPRESSED HEREIN IS THAT OF THE AUTHOR AND NOT NECESSARILY THAT OF THE OKLAHOMA BAR ASSOCIATION, OR THE OKLAHOMA BAR JOURNAL BOARD OF EDITORS.



Revisiting the Vortex The Collision of the Oklahoma Workers' Compensation Act, FMLA and ADA

By Madalene A.B. Witterholt and Tynan D. Grayson

Employers beware, and employees beware. While some call this the “Information Age,” employment law practitioners know that it is also the “Age of Employee Rights.” Never in the history of our nation has the employee been entitled to expect so much from the employer. While no one wants to see the return of the Dickensian master-servant model, the individual rights of the employee must be balanced against the employer’s need to run a business. For the general practitioner, this area of the law requires quite a bit of thought before advising a client who is about to fall into the vortex of converging state and federal laws.

No area in the world of employment law has undergone more radical change than that involving the treatment of injured workers. The turn of the 20th century saw employers begin to take responsibility for employee safety and injuries. The turn of the 21st century sees the employer being responsible for employees even if they cannot do the job they were hired to do. The goal for employers is to keep their businesses running while not violating the individual rights of injured employees that are afforded by state and federal law.

The coverage of the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the Oklahoma Workers’ Compensation Act varies, but overlaps in ways that may create a hornet’s nest for employers who must interpret, reconcile and apply them without violating them. A typical on the job injury resulting in medical treatment is covered by not only the Oklahoma Workers’ Compensation Act,

but also the FMLA and by the ADA if the injury results in a covered impairment.

The overlap may become more pronounced in light of the recent amendments to the ADA which reject the Supreme Court’s holdings in *Sutton*¹ and *Toyota*.² Under the amended ADA, the scope of protection afforded by the ADA is more broad.³ Further, mitigating measures are no longer to be considered when determining whether an impairment “substantially limits” a major life activity.^{4,5} As such, more employees with on-the-job injuries or other serious health conditions will undoubtedly qualify as “disabled” within the meaning of the ADA.⁶

Important to understanding the convergence of these many tentacled Acts is understanding 1) the concept of an on the job injury being a serious health condition as defined by the FMLA, 2) the concept of maximum medical improvement (MMI), and 3) when the serious health

condition/on-the-job injury morphs into a disability protected by the ADA.

While an exhaustive interpretation of these acts is not within the scope of this article, an attempt is made to cover some specific areas of concern that may be encountered in the vortex that exists where these laws collide.⁷

THE BASICS

The FMLA covers employers with 50 or more employees.⁸ The ADA covers private, state and local government employers with 15 or more employees.⁹ In general, for employers with fewer than 15 employees, only Oklahoma's workers' compensation laws apply.¹⁰

The FMLA defines a "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves (a) inpatient care in a hospital, hospice, or residential medical care facility; or (b) continuing treatment by a health care provider."¹¹ It is quite easy to understand that most people injured on the job will qualify for protection under the FMLA umbrella simply by meeting the course of treatment prong of FMLA protection.

The ADA, on the other hand, requires that a person's health condition be permanent in nature in order to be protected.¹² Oftentimes, work-related injuries result in temporary impairments, or impairments that do not create substantial limitations on major life activities. As such, many injuries triggering workers' compensation benefits may not equate to "disabilities" triggering ADA protection.¹³ Moreover, an award for a percentage of disability through the workers' compensation system based on an impairment rating does not equate to a "disability" protected by the ADA. As such, the mere fact that an employee has had a permanent partial disability (PPD) award, does not mean they are "disabled" under the ADA.¹⁴

It is this sort of confusion that could lead to an employee erroneously being considered "disabled" even though they are not technically disabled under even the relaxed requirements of the amended ADA. In effect, the employee who was not previously protected by the ADA as a result of their workers' compensation injury could become protected because they are "regarded as" having a "disability." Employers should exercise caution to avoid automatically concluding that the "D" in permanent partial disability is the same as the "D" in ADA, thus qualifying an employee for

the reasonable accommodations afforded by the ADA.

It is also important to understand that the fact that an employee is at MMI¹⁵ does not mean he or she will not also require continuing medical treatment that will result in future FMLA protection and/or ADA accommodation in the nature of leave. This will be discussed in more detail herein.

PRE-EMPLOYMENT PROCEDURES AND THE THREE ACTS

Prior Workers' Compensation Claims

The practice of inquiring into a job applicant's prior workers' compensation claims is perilous and generally prohibited.

Under the Oklahoma's Workers' Compensation Act (OWA):

[e]xcept as otherwise provided by state or federal law and subject to the provisions of this section, an employer may inquire about previous workers' compensation claims paid to an employee while the employee was employed by a previous employer. If the employee fails to answer truthfully about any previous permanent partial disability awards made pursuant to workers' compensation claims, the employee shall be subject to discharge by the employer.¹⁶

This section of the OWA has the unfortunate result of giving employers a false sense of security as to the legality of pre-employment workers' compensation checks. The OWA is antithetical to the ADA under which an employer may only make pre-employment inquiries into the ability of an applicant to perform job-related functions.¹⁷ The ADA restricts the right of employers to inquire into an applicant's claim history by providing that an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability."¹⁸ Moreover, the regulations implementing the ADA further clarify that inquiries into an applicant's prior work-related injuries are not acceptable pre-employment inquiries.¹⁹ As such, any practice in this regard cannot be justified under the ADA as an inquiry into the ability of an applicant to perform job-related functions. This is especially so, since the information obtained would pertain to all types of injuries and disabilities, not just job-related functions. Further, once an employer possesses

the unnecessary knowledge of an applicant or employee's history of workers' compensation injury, how will it prove its employment decisions were not affected by this knowledge? Proving a negative is one of a lawyer's most difficult tasks.

Drug Testing

Drug testing is not considered a "medical examination" under the ADA.²⁰ Therefore, an employer may conduct drug tests of job applicants to determine the illegal use of drugs and may make employment decisions based on the results of the test without violating the ADA.²¹

Pursuant to Oklahoma's Standards for Workplace Drug and Alcohol Testing Act (Drug Act), an employer may require job applicants to undergo drug and alcohol testing upon a conditional offer of employment as long as the testing 1) is required of all applicants for a particular job classification, and 2) does not violate the ADA.²² An employer may use a refusal to undergo testing or a confirmed positive test as a basis for refusing to hire an applicant.²³

Speaking of drug testing, as a result of amendment to the Drug Act in 2005, post-accident drug testing no longer requires an employer to have a reasonable suspicion that an employee is using drugs or alcohol.²⁴ Employers can arrange for their employees to be automatically drug tested following any on-the-job injuries. However, drug testing still requires a written workplace drug policy that is in conformance with the Drug Act as well as other strict rules of compliance.²⁵

Physical Exams – Post-Offer/Pre-Employment

Under the ADA, an employer "may require a medical examination (and/or inquiry) *after* making an offer of employment to a job applicant and *before* the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such examination (and/or inquiry) regardless of disability."²⁶ The information obtained during such post-offer pre-employment physical exams must not be used for any reason inconsistent with the purpose of the ADA.²⁷

The medical examination need not be job-related or consistent with business necessity.²⁸ However, if certain criteria are used to screen out an employee with a disability, the exclu-

“From a workers' compensation perspective, light duty first comes into play when an employee has *not* achieved MMI.”

sionary criteria must be job-related and consistent with business necessity.²⁹ Further, it must be that performance of the essential job functions cannot be accomplished with reasonable accommodation.³⁰

Under Oklahoma law, information obtained in a post-offer pre-employment physical examination can be used as a "base line" in defending against workers' compensation claims subsequently filed by the employee. For example, the use of base line audiometric tests to defend against claims of work-induced hearing loss.

SPECIFIC RETURN TO WORK ISSUES

Light Duty

Under Oklahoma workers' compensation law, an employer is not required to make work available to an employee with medical restrictions. Under the ADA (if an employee is at MMI and disabled), if an employer has light duty work available, it must offer it as a reasonable accommodation unless it will cause the employer an undue hardship. An employee can decline light duty and elect FMLA leave (continuous or intermittent). However, if an employee refuses light duty, they may not be a qualified individual with a disability entitled to protection under the ADA because they rejected a reasonable accommodation. Further, in light of several U.S. Department of Labor opinions, care must be taken in the manner in which employees are urged to return to light duty.³¹

From a workers' compensation perspective, light duty first comes into play when an employee has *not* achieved MMI. If a form 3 (employee's first notice of injury) *has not* been filed by the employee and the employer has light duty work available consistent with the employee's restrictions, the employer may invite the individual to return to work while promptly terminating the temporary total disability (TTD) payments. If the employee is resistant to return to a light duty assignment,

the employer should then offer to place the employee on *unpaid* FMLA leave.

On the other hand, if a form 3 *has* been filed, the employer may need to petition the Workers' Compensation Court for an order terminating TTD payments if the employee refuses to return to a light duty assignment.³² Should the employee refuse the light duty offer, the employer may seek to recover temporary disability benefits, via a request for TTD overpayment. As the burden to prove the offer was made and rejected rests on the employer, employers are urged to make offers of reinstatement to light duty in writing.³³

Other Issues: the FMLA and the OWA

Oklahoma's workers' compensation law does not require an employer to rehire or retain any employee who is physically unable to perform their assigned duties.³⁴ Contrarily, under the FMLA an employee is generally entitled to be returned to the same position they held before taking FMLA leave, or to an equivalent position with equivalent pay, and other terms and conditions of employment.³⁵ Nevertheless, if an employee is unable to perform the essential functions of a job upon return from FMLA leave, the employer has no duty to return the employee to the same job.³⁶ Further, an employer may deny reinstatement to a "key employee" if it is necessary to prevent substantial economic injury to the operation of the employer.³⁷

In addition, an employer may refuse to reinstate an employee if it can show that the employee would not otherwise have been employed at the time reinstatement was requested.³⁸ For example, an employee who is laid off due to reduction in force or some other legitimate reason during the course of FMLA leave.³⁹ Employers must be careful to ensure that a discharge (or refusal to reinstate in the case of a "key employee") authorized by the FMLA does not in turn violate Title 85, section 5 of the OWA, which prohibits discharging injured employees in retaliation for the exercise of their rights under the OWA (see discussion later in this article).⁴⁰

Under the ADA, an employer is required to offer a returning employee their same position unless it would impose an undue hardship. Reassignment may be a reasonable accommodation, but an employer is not required to "bump" other employees and the employee must be qualified for the job.⁴¹

Return to Work Certifications – Physical Exams of Current Employees

Upon return to work, the ADA and FMLA allow employers to require fitness for duty certifications. Under the ADA, certification must be job related and consistent with business necessity, and may include an assessment of an employee's ability to perform job-related functions.^{42,43} Under the FMLA, an employer may require a fitness-for-duty certification as a condition of restoring an employee whose leave was occasioned by their own serious health condition.⁴⁴ Such policies must be uniformly applied to all employees returning from leave.⁴⁵

LIMITS ON LEAVE AND BENEFIT TERMINATION

The OWA has apparent internal inconsistencies regarding the limits of leave. On the one hand it contains very specific language regarding leave and benefits set out in Section 5 as follows:

A. No person, firm, partnership, corporation, or other entity may discharge, or, except for nonpayment of premium, terminate any group health insurance of any employee because the employee has in good faith:

1. Filed a claim;
2. Retained a lawyer for representation regarding a claim;
3. Instituted or caused to be instituted any proceeding under the provisions of this title;
4. Testified or is about to testify in any proceeding under the provisions of this title; or
5. Elected to participate or not to participate in a certified workplace medical plan as provided in Section 14 of this title.

B. No person, firm, partnership, corporation, or other entity may discharge any employee during a period of temporary total disability solely on the basis of absence from work.

C. After an employee's period of temporary total disability has ended, no person, firm, partnership, corporation, or other entity shall be required to rehire or retain any employee who is determined to be physically unable to perform assigned

duties. The failure of an employer to rehire or retain any such employee shall in no manner be deemed a violation of this section.

D. No person, firm, partnership, corporation or other entity may discharge an employee for the purpose of avoiding payment of temporary total disability benefits to the injured employee.⁴⁶

On the other hand, TTD benefits are only allowed for up to 156 weeks after which they can only be extended under the limited circumstance of some type of new or consequential injury.⁴⁷ However, the statute does not appear to establish a limit on the number of weeks a person can be considered TTD for purposes *other than* compensation. In other words, a person may continue to be classified as TTD even after they are no longer eligible to be compensated. While this situation is rare in its occurrence, a strict interpretation of Title 85 would lead one to this conclusion and disallow termination based on absenteeism for during a period of unpaid TTD.

In addition, Oklahoma law provides that state employees who have sustained a work-related injury, must be placed on leave without pay if the employee requests it.⁴⁸ After a state employee has been on leave without pay for a period of one year, they may be discharged from employment.⁴⁹ Again, this flies in the face of the OWA. As such, it is recommended that no employee who is still off on leave due to an on-the-job injury be terminated without just cause. Nothing in the act prohibits the termination of an employee off on leave as a result of a reduction in force layoff, but the reason for termination can not be absenteeism. Needless to say, this inconsistency has resulted in strong opposition and litigation.⁵⁰

A question which the Oklahoma Supreme Court has yet to answer is how does Title 85, Section 5's prohibition against termination for absenteeism as a result of an on-the-job injury apply when the absenteeism is a result of an injury for a *different* employer? The Oklahoma Court of Civil Appeals has held that the statute's prohibition against discharge applies to successor employers and not just the employer against whom a claim was filed.⁵¹ Strictly interpreting the statute, the Court of Civil Appeals explained that exempting subsequent employers would allow them to defeat the Legislature's intent and would discourage employees

from exercising their rights.⁵² Thus, the safest assumption regarding this issue is that any exercise of workers' compensation rights triggers the protections of Section 5, and an employee's position and benefits should be guarded accordingly.

Under the ADA, leave may be required as a reasonable accommodation so long as it is not an undue hardship.⁵³ As such, leave beyond the 12 weeks required under the FMLA may be required. The issue would therefore be the continuation of health insurance eligibility.

The FMLA provides for up to 12 weeks of leave during any 12-month period because of a serious health condition that makes the employee unable to perform the functions of the job.⁵⁴ FMLA leave can run concurrently with workers' compensation leave if an employer provides notice to the employee.⁵⁵ Care should be taken that all proper notice for the FMLA character of the leave should be given to employees. This includes notice of the requirement for the pay-

“Under the ADA, unpaid medical leave is a reasonable accommodation and must be provided unless it imposes an undue hardship on the operation of the employer's business.”

ment of insurance premiums, at the same rate employees were paying them while actively working, must be given.⁵⁶ Once the 12 weeks is completed, the employer can terminate the health insurance benefits of an employee off on workers' compensation leave assuming the employer treats all employees the same, *i.e.* it does not allow employees to extend benefits over the 12 weeks for any other reason. If an employee fails to make his or her premium payments while on leave, then the benefits can be terminated if certain conditions are met.⁵⁷ Again, employers are cautioned to treat all employees the same in this situation so as not to run afoul of Section 5 of the OWA. A conservative inter-

pretation of Title 85, Section 5 should allow for termination of health insurance benefits if all similarly situated employees who are off for more than 12 weeks of leave, regardless of reason, have their *benefits* terminated.⁵⁸

INTERMITTENT OR REDUCED LEAVE

An employee may take FMLA leave intermittently if it is medically necessary.⁵⁹ The employer is required to maintain the employee's health insurance at the same level as before the leave was taken.⁶⁰ The employer can temporarily transfer the employee to another position, so long as the pay and benefits are equivalent and the new position better accommodates recurring periods of leave.⁶¹ At the end of intermittent leave, the employee is entitled to reinstatement into a substantially equivalent position.⁶² TTD may also be available if the employee is at MMI. Thus, an employee who has returned to work after a medical leave related to an on-the-job injury, may need additional time off for additional procedures. Depending on the amount of TTD used and whether their case is still open (or a re-open is appropriate in a post-adjudication situation), TTD benefits may be reinstated.⁶³

Under the ADA, intermittent leave or part-time employment may serve as a reasonable accommodation.⁶⁴ An employer may also transfer an employee to a new position if it can show that keeping the employee in their current position during the period of intermittent leave would impose an undue hardship. The ADA does not require that the pay and benefits in the new position be equivalent. So, an employer may transfer an employee to a lower paying position if 1) no accommodation in the employee's current position without an undue hardship, and 2) there is no vacant position for which the employee qualifies with equal pay and benefits.

Under the ADA, unpaid medical leave is a reasonable accommodation and must be provided unless it imposes an undue hardship on the operation of the employer's business.⁶⁵

ULTIMATE RETURN TO WORK ACCOMMODATIONS FOR DISABLED WORKERS

The ADA defines "disability" as

- a physical or mental impairment that substantially limits one or more major life activities of such individual;
- a record of such an impairment; or

- being regarded as having such impairment.

The Supreme Court's decision in *Toyota* narrowed the scope of protection afforded by the ADA by strictly interpreting the term "substantially limits" to require a greater degree of limitation in ability to perform a major life activity.^{67,68} In addition, in *Sutton* Supreme Court held that whether an impairment substantially limits a major life activity is to be determined with reference to ameliorative effects of mitigating measures such as blood pressure medication and eyeglasses.⁶⁹

The *Sutton* and *Toyota* decisions were specifically rejected by Congress in the ADA Amendments Act (ADAAA), which went into effect Jan. 1, 2009.⁷⁰ These recent changes to the ADA make it easier for an individual seeking protection under the ADA to establish that they have a disability within the meaning of the ADA. As such, an individual with a work-related injury or serious health condition may be covered under the ADA, FMLA and OWA.

Reasonable Accommodation of Disabilities

"Disabilities" within the meaning of the ADA must be reasonably accommodated by an employer, unless the employer can show that the accommodation would impose an "undue hardship"⁷¹ on the operation of its business.^{72,73} Among the reasonable accommodations that an employer may have to provide are: 1) making existing facilities used by employees readily accessible; 2) job restructuring; 3) part-time or modified work schedules; 4) reassignment to a vacant position; 5) acquisition or modification of equipment or devices; 6) appropriate changes to exams, training materials or policies; 7) the provision of qualified readers or interpreters; 8) permitting the use of leave; and 9) other similar accommodations.⁷⁴

An employer is not required to provide an accommodation that is primarily for the personal benefit of the disabled individual.⁷⁵ As such, only job-related adjustments or modifications (specifically those that help the employee perform the job in question) are required.⁷⁶ Thus, an employer is not required to provide items such as a prosthetic limb, a wheelchair, eyeglasses, hearing aids or similar devices if they are also needed off the job.⁷⁷ Nevertheless, items that might otherwise be considered personal may be required as a reasonable accommodation if they are specifically designed or required to meet job-related rather than per-

sonal needs.⁷⁸ For example, eyeglasses specifically designed to help an employee see office computer monitors, but not otherwise needed by the individual outside of the office.⁷⁹ However, this is not the case under the OWA. The obligation of an employer to provide vocational retraining, eye glasses, hearing aids, prosthesis, special vehicles and the like is a fact question for the workers' compensation court and is not an uncommon event in the life of a workers' compensation case.⁸⁰

An employer cannot force an employee to accept an accommodation.⁸¹ However, an employee's refusal to accept an accommodation that results in their inability to perform the essential functions of the job, prohibits consideration of the employee as a qualified individual with a disability.⁸² At this point, if an employee refuses to accept an accommodation and return to work, then termination would be acceptable under the ADA. Caution in making such a termination decision should be made as to ensure that all offers of accommodation are reasonable and supported by independent medical advice. Termination at this point may subject an employer to exposure for retaliatory discharge under Title 85, Section 5.

REINSTATE OR TERMINATE: THE SERIOUS HARM DEFENSE

Sometimes employers do not want to return an employee to work after a serious on-the-job injury. This is because of the potential (real or perceived) of future injury to the employee. In making this type of a bold decision, careful attention should be paid to the ADA and the concept of serious harm. The EEOC provides, in its concept of the "direct threat," an avenue for evaluating such a situation.⁸³ The EEOC advises that an employee need not be returned to their previous job if their continued employment would cause a direct threat of serious harm to their health or the health of others.⁸⁴ "Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Determining whether a direct threat exists

involves a fact-intensive, individualized inquiry taking into account the specific circumstances of the employee involved. Regardless of whether or not an employee is disabled under the ADA, consideration of this potentiality must be made because the ADA protects not only the disabled but those persons who are *perceived* as disabled or who have a *history* of disability. If an employer can prove the return to work of any employee will result in a significant risk of harm then the employee may be terminated if no other open position exists.⁸⁵

In determining whether continued employment of a person poses a "direct threat," the EEOC suggests consideration of the following factors:

- the duration of the risk
- the nature and severity of the potential harm:
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

While these factors may at first glance appear duplicative, they can best be understood by reviewing the examples in the pre-amendment ADA guidance. The EEOC suggests on the one hand, a typist who broke her wrist while pick-

ing up a box who is returned to work without restriction, is probably not going to be injured going back to typing because that sort of work was not what caused her injury nor is there any support for the notion that a broken wrist is more susceptible to the dreaded carpal tunnel syndrome. Contrast this with the example of a maintenance worker who has such a severe ankle injury that walking on concrete — as is required by her job — will cause the employee to have immediate, severe, permanent damage to her ankles. In a nutshell, the

second employee meets all of the criteria (*i.e.* the harm is very likely to occur, it will be immediate, permanent and severe). As a practical consideration, and with the potentiality of litigation always a factor, this type of analysis should be done in conjunction with a medical opinion. Employers should not decide whether



an employee is going to suffer irreparable harm. Rather, a well-credentialed and informed medical practitioner should be consulted. This will not result in a complete defense to a wrong decision. In another interesting twist under the ADA, the employer may still be responsible for a wrong decision even if the employer in good faith based its decision not to return an employee to their previous job based on legitimate medical advice.⁸⁶

THE POINT OF IT ALL

Dissecting the animal created by the marriage of the ADA, FMLA and Oklahoma's workers' compensation laws can be problematic, but it can be done successfully (without incurring legal liability) if one proceeds with caution. Evaluate each situation by starting at the beginning; looking at the on-the-job injury; understanding the employee's TTD status; knowing when the employee is at MMI; and looking at the impact of the FMLA, the OWA and the ADA on the proposed course of action. This timeline examination of a case will not only help take the crackers out this alphabet soup, but it will afford a practitioner the best chance of giving "A" advice while minimizing the chances of an employer's actions being awarded a "D" from a reviewing court.

1. *Sutton v. United Air Lines Inc.*, 527 U.S. 471 (1999). In *Sutton* the Supreme Court determined that mitigating measures were to be considered when determining whether an impairment "substantially limits" a major life activity.

2. *Toyota Motor Mfg., Ky. Inc. v. Williams*, 534 U.S. 184 (2002). In *Toyota* the Supreme Court determined that the term "substantially limits" should be strictly interpreted which created a demanding standard for qualifying as disabled.

3. 42 U.S.C. §12102; ADA Amendments Act of 2008, Pub. L. 110-325, §2.

4. Nevertheless, the ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall continue to be considered. 42 U.S.C. §12102(4)(E)(ii).

5. 42 U.S.C. §12102(4)(E); ADA Amendments Act of 2008, Pub. L. 110-325, §2.

6. See 42 U.S.C. §12101.

7. For purposes of this article the reader should assume that the injured worker's claim has been accepted by the employer and that the injury requires, at a minimum, a course of routine medical treatment as defined by the FMLA.

8. 29 U.S.C. §2611(4).

9. 42 U.S.C. §12111(5)(A).

10. Oklahoma's Worker's Compensation Act exempts certain employers and specifically excludes certain employees. These exemptions and exclusions are found in sections 2.1 and 2.6 of Title 40. Okla. Stat. tit. 40, §§2.1, 2.6.

11. 29 U.S.C. 2611(11).

12. EEOC's Notice of Proposed Rulemaking to Implement the ADA Amendments Act of 2008, 74 Fed. Reg. 48,431, 48,448 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)). However, impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active. 42 U.S.C. §12102(4)(D). For example, epilepsy, multiple sclerosis, bipolar disorder. EEOC's Notice of Proposed Rulemaking to Implement the ADA Amendments Act of 2008, 74 Fed. Reg. 48,431, 48,447 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)).

13. EEOC's Notice of Proposed Rulemaking to Implement the ADA Amendments Act of 2008, 74 Fed. Reg. 48,431, 48,448 (Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630.2(j)).

14. See *Baffoe v. W.H. Stewart Co.*, 211 F.3d 1277, *4 (10th Cir. 2000).

15. MMI means "that no further material improvement would reasonably be expected from medical treatment or the passage of time." Okla. Stat. tit. 85, §3.

16. Okla. Stat. tit. 85, §110.

17. 42 U.S.C. §12112(d)(2).

18. 42 U.S.C. §12112(d)(2).

19. 29 C.F.R. §1630.13 – 1630.14.

20. 29 C.F.R. §1630.16(b).

21. 29 C.F.R. §1630.16(b).

22. Okla. Stat. tit. 40, §§553-554.

23. Okla. Stat. tit. 40, §554.

24. Okla. Stat. tit. 40, §554(3).

25. Okla. Stat. tit. 40, §555.

26. 29 C.F.R. §1630.14 (emphasis added).

27. 29 C.F.R. 1630.14(b)(2).

28. 29 C.F.R. §1630.14(b)(3).

29. *Id.*

30. *Id.*

31. U.S. Dept. of Labor, FMLA Opinion Letter, No. FMLA-75, 1995 WL 1036746 (Nov. 14, 1995); U.S. Dept. of Labor, FMLA Opinion Letter, No. FMLA-35, 1994 WL 1016743 (Apr. 19, 1994); U.S. Dept. of Labor, FMLA Opinion Letter, No. FMLA-17, 1993 WL 939406 (Nov. 15, 1993).

32. Okla. Stat. tit. 85, Appx. Rule 15.

33. *Wal-Mart Stores Inc. v. Berg*, 99 P.3d 1205 (Okla. Civ. App. 2004); see also *Cummings v. Armin Plastics*, 5 P.3d 1099 (Okla. Civ. App. 2000)

34. Okla. Stat. tit. 85, §5(C).

35. 29 C.F.R. §825.214.

36. 29 C.F.R. §825.116(c).

37. 29 C.F.R. §§825.216(b), 825.217(c); 29 U.S.C. §2614(b).

38. 29 C.F.R. §825.216(a).

39. 29 C.F.R. §825.216(a).

40. See Okla. Stat. tit. 85, §5.

41. See 42 U.S.C. §12111(8).

42. An employer may also conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program that is available to an employee. 29 C.F.R. §1630.14(d).

43. 29 C.F.R. §1630.14(c).

44. 29 C.F.R. §825.312(a).

45. 29 C.F.R. §825.312(a).

46. Okla. Stat. tit. 85, §5.

47. Okla. Stat. tit. 85, §22. Interestingly, prisoners lose their rights to TTD benefits in most circumstances. Okla. Stat. tit. 85, §22(13) ("Any employee convicted of a misdemeanor or felony and sentenced to a term of incarceration of at least ninety (90) days in this state or in any other jurisdiction shall have all benefits for temporary total disability awarded by the Workers' Compensation Court forfeited by order of the Court on motion of the employer or the employer's insurer after confirmation of the employee's incarceration. The Court also may order the forfeiture of such benefits on its own motion upon receipt of notice from the Director of the Department of Corrections that the person awarded the benefits is incarcerated as an inmate in a facility operated by or under contract with the Department. The provisions of this subparagraph shall not apply to any benefits awarded to an inmate for compensable injuries sustained by the inmate while in the employ of a private for-profit employer or while employed in private prison industries, involving a for-profit employer, which deal in interstate commerce or which sell products or services to the federal government.")

48. Okla. Stat. tit. 74, §840-2.21(A).

49. Okla. Stat. tit. 74, §840-2.21(D); *Glasco v. State ex rel. Okla. Dept. Corrections*, 188 P.3d 177 (Okla. 2008).

50. *Glasco*, 188 P.3d 177.¶

51. *Taylor v. Cache Creek Nursing Ctrs.*, 891 P.2d 607, 610 (Okla. Civ. App. 1994).

52. *Id.*

53. 29 C.F.R. Appendix to Part 1630 (commentary on §1630.9).

54. 29 U.S.C. §2312(a)(1)(E).

55. 29 C.F.R. §825.702(d)(2).

56. 29 C.F.R. §825.300.

57. 29 C.F.R. §825.212.

58. The authors are unable to locate any case law strictly on point, but the lessons learned from those available cases in conjunction with the FMLA, make this a reasonable conclusion.

59. 29 U.S.C. §§2611(9), 2612(b)(1).

60. 29 U.S.C. §2614(c).

61. 29 U.S.C. §2612(b)(2).

62. 29 U.S.C. §2614(a).

63. Okla. Stat. tit. 85, §28.
64. 42 U.S.C. §12111(9).
65. 29 C.F.R. Appendix to Part 1630 (commentary on §1630.9).
66. 42 U.S.C. §12102(1).
67. *Toyota*, 534 U.S. 184.
68. ADA Amendments Act of 2008, Pub. L. 110-325, §2
69. *Sutton*, 527 U.S. 471.
70. ADA Amendments Act of 2008, Pub. L. 110-325.
71. An "undue hardship" is an action requiring significant difficulty or expense, when considered in light of certain factors including the nature and cost of the accommodation, and the financial resources of the employer. 42 U.S.C. §12111(10).
72. An employer is not required to provide a reasonable accommodation for an individual who is only "regarded as" disabled. 42 U.S.C. §12201(h).
73. 42 U.S.C. §12112(b)(5)(A).
74. 42 U.S.C. §12111(9); 29 C.F.R. Appendix to Part 1630 (commentary on §1630.2(o)).
75. 29 C.F.R. Appendix to Part 1630 (commentary on §1630.9).
76. *Id.* ("if an adjustment or modification assists the individual throughout his or her daily activities, on and off the job, it will be considered a personal item that the employer is not required to provide").
77. *Id.*
78. *Id.*
79. *Id.*
80. For example, see Okla. Stat. tit. 85, §§15-16.
81. 42 U.S.C. §12201(d); 29 C.F.R. §825.702(d)(1).
82. 29 C.F.R. §1630.9(d); 29 C.F.R. §825.702(d)(1).
83. EEOC Guidance on Workers' Compensation and the ADA, EEOC Notice No. 915.002 (July 6, 2000).
84. *Id.*
85. *Id.* (The ADA guidance suggests that if the return of the employee to their position will cause irreparable harm, the employer must look for another position to transfer the employee into. A job need not be created, but all reasonable efforts should be made to keep the employee employed. This pushes the employer beyond the usual bounds of accommodation.)
86. *Id.*

ABOUT THE AUTHORS



Madalene A.B. Witterholt serves as a director for Crowe & Dunlevy. This distinguished TU alum (B.A. 1980; J.D. 1983) serves in the corporation's Tulsa offices, practicing in labor and employment, litigation and trial, and worker's compensation law. Before working for Crowe & Dunlevy, she worked as a law clerk to Judge James O. Ellison, judge of the U.S. District Court, Northern District.



Tynan Grayson is an attorney with Crowe & Dunlevy. Her practice focuses on labor and employment litigation. She graduated magna cum laude from OCU School of Law in 2005, and was voted most likely to succeed by OCU faculty. Prior to joining Crowe & Dunlevy, she served as law clerk to Judge Vicki Miles-LaGrange, chief judge of the U.S. District Court for the Western District of Oklahoma.



Print or Electronic?

You now have a choice.

Continue receiving your printed *Oklahoma Bar Journal* court issues (two per month) in the mail – **or** receive an e-mail with a link to the electronic version instead. Mailed copies stop. There's no dues reduction, but you save some trees.

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

Want the print version?
No need to do anything.



Major Cause – What Does It Mean?

By Judge Tom Leonard

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."

Lewis Carroll, *Through the Looking Glass*

"The more things change, the more they stay the same."

Jean-Baptiste Alphonse Karr

Five years after enactment of the 2005 reforms, we still don't know what the Legislature meant by the term "major cause." The Oklahoma Supreme Court has not addressed the issue, and the only published case from the Court of Civil Appeals does not address the term's underlying meaning.¹ One approach to analyzing major cause is comparing the new term to the existing concepts that set causation boundaries for the compensability of an injury.

Oklahoma law has always limited workplace injuries to those arising out of and in the course of employment. However, the 2005 amendments to the Oklahoma Workers' Compensation Act changed the definition of "injury" to "compensable injury" and limited recovery of benefits to those employments that are the "major cause" of the injury or illness.² Has the amendment created a new element of proof that substantially changes the evaluation of compensability, or is it the same element in new clothing? It is an element of medical causation, but what does it mean?

According to the act, "major cause" is the "predominate cause" of the resulting injury or illness. This description is not helpful. A quick check of the thesaurus reveals that major means predominant and predominant is a synonym for

major.³ The definition could just as easily have stated "the major cause is the major cause." Trying to craft a workable definition by this traditional means is fruitless, so we must turn to settled workers' compensation law to look for analogous theories.

The Oklahoma Legislature's decision to use the term "major cause" suggests it intended to make a comparison between a worker's work-related trauma or exposure and the worker's other physical conditions or activities that may have contributed to his or her current injury. Many times, this issue arises when the worker has a pre-existing condition that is dormant or active, such as degenerative joint disease. Does the injury and the resulting need for medical treatment arise from the pre-existing disease or from the workplace trauma?

The act provides that workers with previous disability or impairment are not precluded from receiving benefits. Aggravation injuries have long been held compensable. With only minor changes the statute allowing compensability has remained in effect since the act's inception in 1915.⁴

Consequential injuries arise after the initial injury-dealing trauma. They are compensable only if there is a causal nexus between an event that occurs after a work-related injury and a subsequent injury or death without breaking the chain of causation.⁵

Since aggravation injuries and consequential injuries are both linked to the medical causation issue, review of the evaluation method for these two types of injury may lead us to workable criteria for major cause.

AGGRAVATION INJURIES

In Oklahoma, a worker's disability is compensable when a pre-existing, dormant physical condition or predisposition is aggravated or accelerated by injury.⁶ Benefits are not limited to perfectly healthy workers even when evidence indicates the worker may be disabled by disease in the future even though accidental injury had not occurred.⁷

*Stiles v. Oklahoma Tax Commission*⁸ involved a claim that stress and tension caused the claimant's rheumatoid arthritis to flare up. The Supreme Court reversed a three-judge panel's order denying compensation for aggravation of the pre-existing arthritis and held: "It is a general rule in Workers' Compensation Law that an employer takes an employee as he finds him. That is, if an employee has a predisposition to be sensitive to stressful situations, the employer cannot avoid liability when the stresses imposed by the employment situation result in disability on the part of the employee."

A claim for heart disease was found compensable in *Refrigerated Transport Inc. v. Creek*.⁹ The claimant had a prior history of heart disease, and employer argued that under the Supreme Court's prior ruling in the *Haynes v. Pryor High School*¹⁰ claimant had to prove a change in heart pathology. The Supreme Court held that the

“In Oklahoma, a worker's disability is compensable when a pre-existing, dormant physical condition or predisposition is aggravated or accelerated by injury.”

claim was compensable as an aggravation injury because the change in heart pathology mandated by *Haynes* "antedate[d] the accident which consists of a traumatic aggravation."¹¹

In his concurring opinion, Justice Opala pointed out the distinction between cases with a new injury (change of pathology) and aggravation injuries. When there is no underlying pathology, there must be proof of some internal failure or harm precipitated by work-trauma or exposure. Where the accident consists "of pre-existing and

known pathology being accelerated or advanced," it is sufficient that the medical proof "attributes an 'extension' or enlargement of the old, known and described condition to the proved efforts of on-the-job labor."

In *Dempsey v. Ballard Nursing Center*¹² claimant asserted that she was injured while lifting patients. At the time of her injury claimant had a pre-existing spondylolisthesis in her back. Denial of her claim by the trial court was based on employer's medical evidence stating that her surgery was due to pre-existing spondylolisthesis and not the incidents occurring on the injury date. Judge John F. Reif (now Justice Reif) summarized the extant law of aggravation injuries and then found the following:

"The problem with this opinion [from employer's medical report] is that it essentially says claimant needs surgery for the effects of the spondylolisthesis, and the injury of July 12, 2002, did not cause the spondylolisthesis. The question which the doctor did not address is whether the injury of July 12, 2002, aggravated the spondylolisthesis so that it requires surgery *now*, as opposed to surgery being the general medical treatment that would have eventually been needed to correct this condition." (Emphasis in original.)

CONSEQUENTIAL INJURIES

Consequential injuries occur after the initial compensable accident. Therefore the two-pronged test of arising out of and in the course of has been satisfied, and a different standard is applied to determine compensability of the post-accident injury. A series of three Supreme

Court cases delineate the rule for assessing the compensability of these injuries.

*Matter of the Death of Stroer*¹³ involved a worker who became despondent after an unsuccessful surgery to his shoulder. His subsequent suicide was found compensable and affirmed on appeal. The Supreme Court held “[t]he act of suicide is not an intervening cause of death and the chain of causation is not broken in cases where the incontrovertible evidence reflects that, **but for** the injury, there would have been no suicide.”

In *Bostick Tank Truck Service v. Nix*,¹⁴ the worker suffered a compensable heart attack. Eleven years later while undergoing implantation of a temporary pacemaker, his heart began to fibrillate and he died. The widow’s death benefits award was upheld, because “the medical proof shows that, **but for** the prior on-the-job heart attack, fibrillation would not have occurred.” Further, the court found the employer is liable for “all legitimate consequences of a compensable injury.”

*Matter of the Death of Gray*¹⁵ involved a worker who herniated a disc in his lumbar spine. Pre-surgical testing of his 20-year-old pacemaker resulted in a recommendation to modify it before the back surgery. Gray died while undergoing the pacemaker surgery. After the trial court denied the widow’s death benefits claim, the Supreme Court reversed and held: “the employee had never suffered any significant problems with his pacemaker; the need to check the pacemaker and remove and replace it appeared only after the disabling back injury and because of the back injury; and the replacement of the pacemaker was a necessary precursor to the operation for the back injury and would not have occurred **but for** the injury.”

CONCLUSION

Major cause requires claimants to prove a medical connection between the trauma and the claimed injury. While the Legislature may have intended it to be something new, it is a codification of old, well-established concepts for evaluating medical causation. A workable test for determining whether employment is the major cause of the injury is the one used in pre-2005 reform cases to evaluate aggravation of a pre-existing condition. The major cause question is another way of asking “has there

been an aggravation of a pre-existing condition that necessitates medical treatment now?”

1. In the case of *Irisndt Inc. v. Brock*, 2008 OK CIV APP 5, 176 P.3d 370, Brock had a pre-existing injury to his right knee resulting in two surgeries and degenerative arthritis with bone-to-bone contact. When Brock then twisted his bad knee at work, the parties agreed to a final, unappealed order of compensability. Six months later the treating physician recommended a total knee replacement. Employer argued that the Brock’s employment was not the major cause of his need for medical treatment (TKR). The trial judge authorized the surgery, and the employer appealed. The COCA affirmed holding that major cause is an element of compensability, but not “of the need for a particular course of treatment for a compensable injury.”

2. 85 O.S.Supp.2003 §3, Definitions, provided:

12. a. “Injury” or “personal injury” means only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally result therefrom and occupational disease arising out of and in the course of employment as herein defined. Only injuries having as their source a risk not purely personal but one that is causally connected with the conditions of employment shall be deemed to arise out of the employment.

85 O.S.Supp.2005 §3 provides, in pertinent part:

13. a. “Compensable injury” means any injury or occupational illness, causing internal or external harm to the body, which arises out of and in the course of employment if such employment was the major cause of the specific injury or illness.

16. “Major cause” means the predominate cause of the resulting injury or illness.

3. *Thesaurus.com*. Inexplicably the drafters of the legislation used “predominate,” the outdated version of “predominant.” The modern version will be used throughout the rest of this article.

4. 85 O.S. §22(7); “Where an accidental personal injury, arising out of and in the course of employment and within the terms of the Workmen’s Compensation Act, aggravates and lights up a pre-existing physical condition, the injured employee is, nevertheless, entitled to compensation therefor.” *Patrick & Tillman Drilling Co. v. Gentry*, 1932 OK 241, 9 P.2d 921.

5. *Matter of the Death of Stroer*, 1983 OK 94, 672 P.2d 1158; *Matter of the Death of Gray*, 2004 OK 63, 100 P.3d 691; *Bostick Tank Truck Service v. Nix*, 1988 OK 128, 764 P.2d 1344.

6. *Refrigerated Transport Inc. v. Creek*, 1979 OK 11, 590 P.2d 197.

7. *Halliburton Services v. Alexander*, 1976 OK 16, 547 P.2d 958.

8. 1987 OK 85, 752 P.2d 800.

9. 1979 OK 11, 590 P.2d 197.

10. 1977 OK 1, 566 P.2d 852.

11. *Id.* @ paragraph 18.

12. 2004 OK CIV APP 18, 84 P.3d 1071.

13. 1983 OK 94, 672 P.2d 1158.

14. 1988 OK 128, 764 P.2d 1344.

15. 2004 OK 63, 100 P.3d 691.

ABOUT THE AUTHOR



Judge Tom Leonard graduated from OSU and the OU College of Law. Since 2004 he has served as one of 10 judges at the Oklahoma Workers’ Compensation Court. He is author of the Web site “Oklahoma Workers’ Compensation” at www.workerscompensationok.com. LexisNexis selected his blog, “Judge Tom Talks,” at www.judgetom.blogspot.com, as one of the Top 25 in 2009 for workers’ compensation.



Mediation and Workers' Compensation

By Michael G. Coker

Mediation is an alternative dispute resolution process available in the Oklahoma Workers' Compensation Court at the request of either party or by unilateral order of the trial judge. The mediation process is an alternative only and does not infringe upon the ultimate right of the parties for a trial on the merits.

HISTORICAL CONTEXT

Traditionally mediation has seen little use in the workers' compensation arena. As late as the 1970s, the State Industrial Commission offered rapid remedies to the injured employee through quick, simple hearings. Disability benefits were low. Permanent and total disability was capped at \$25,000. Medical costs were limited. X-rays were the primary diagnostic tool of the day, and surgeries were rare. Awards were predictable. Most nonsurgical cases went to hearing over a disability range of 0 – 20 percent and settled at 10 percent (\$2,500). Surgeries gained about 25 percent. Legal issues were limited. If the employer had coverage, the commission had jurisdiction. Only "hazardous employments" were required to have coverage. Cumulative trauma was not yet recognized. Rates of compensation were so low almost every worker qualified for the maximum. Occupational disease was not well defined. In short, there existed no real incentive to mediate.

The landscape began changing when coverage became extended beyond hazardous employment. Immediately, most of the state's work force came under the jurisdiction of what was to become the State Industrial Court, then the Workers' Compensation Court, a court of record with rules of evidence. The reform also set in

motion a benefit system which tied the maximum compensation rate to a percentage of the state's average weekly wage. The number of cases exploded, and the benefit exposure escalated. At the same time the medical community discovered the MRI and a variety of new surgical techniques.

Fast forward to the new millennium. By the year 2000, workers' compensation had become big business in Oklahoma, an industry in itself with medical, legal and administrative costs unrivaled in previous decades. At this juncture the state legislature chose to promote mediation as an alternative dispute resolution in workers' compensation. Coincidentally, Title 85 O.S. §172 was also reformed. These unrelated changes to the existing law sparked a major increase in the use of mediation.

Prior to 2000, mediation was available by agreement of the parties but there existed no mechanism or program of court involvement. Consequently, mediation was seldom used. More importantly, prior to the 2000 reforms in workers' compensation, the vast majority of permanently and totally disabled workers were paid benefits by the Multiple Injury Trust Fund under Title 85 O.S. §172. Statutory changes removed that burden from the Trust Fund and returned it to the employer and insurance car-

rier. The amendments also increased the statutory benefits to a minimum of 15 years, allowed the benefits to be compromised by a lump sum payment, but prohibited the court from compromising the benefits by its own order. These changes added a new six-figure exposure to virtually every case in which the injured employee did not return to work. At the same time the ability of the court to issue any type of compromise order was eliminated. These cases cried out for mediation. By 2005 the legislature addressed both issues again. The court was given the power to order mediations without the agreement of all the parties in an amended version of 85 O.S. §3.10. The liability for permanent and total disability under 85 O.S. §172 was shifted back to the Multiple Injury Trust Fund.

Giving the court the ability to initiate mediation on its own has resulted in an increase in the number of mediations. This may be offset in the future by the return of the Trust Fund which is exempt from mediation under the present statute.

STATUTORY AUTHORITY

The statutory authorization for mediation at the Oklahoma Workers' Compensation Court is Title 85 O.S. §3.10. Pursuant to that statute, the Oklahoma Workers' Compensation Court has adopted Rule 52. Mediation. Lastly, mediation is the subject of Workers' Compensation Court Administrator Rule 4 (as last amended effective Feb. 22, 2008).

INITIATION OF THE PROCESS

The process of initiating a mediation is varied. The parties can simply agree to select a mediator and attempt to resolve their dispute without any notification to the court. If they do select a mediator who is on the court approved list, that mediator will report the outcome of the mediation to the court maintaining proper confidentiality.

Either party may initiate the mediation process by filing a motion for mediation with the Workers' Compensation Court on a Form 13. Once again the parties can select their own mediator at this point, or proceed to a pre-hearing conference before an assigned judge. At that conference, a mediator may or may not be selected on the spot. If the parties request, an order will be issued referring the case for mediation with a mediator selected by the par-

ties or an order might be issued appointing a specific mediator.

The court may on its own initiative order the referral for mediation. The selection of a mediator under court order may be left to the determination of the parties or may be determined by the judge.

COURT APPEARANCE

Presently, most mediations are held at court after the trial docket – however, the time and place of the mediation is left up to the parties and is scheduled by the parties and mediator, not the court. The usual and customary fee is \$800. By statute, the payment of the fee is the responsibility of the respondent — however, the cost is often shared between the parties by agreement. Some mediators may require prepayment deposits and/or cancellation fees.

Cancellation by either party or by the mediator is not uncommon, however, as a courtesy to all involved, notice of the cancellation should be given as soon as possible.

“The parties can simply agree to select a mediator and attempt to resolve their dispute without any notification to the court.”

The court contemplates attendance of all parties at the mediation. If there is some reason that your client cannot attend personally, then they should be available by telephone to speak with both their attorney and the mediator. The failure of a party to attend or be available during the mediation has a significantly negative impact on the outcome of the mediation.

At the conclusion of the mediation, the mediator is required to file a mediation report with the court administrators office. This office is compiling statistics on mediation results.

ETHICAL CONSIDERATIONS

The court requires that the parties engage in a mediation in good faith. While good faith is

not clearly defined by the court, it has become clear that the court expects the parties to give resolution of the dispute a chance. Both sides are expected to participate. Both sides are expected to attend. Both sides are expected to listen. If a respondent comes to a mediation and makes absolutely no offer of settlement under any circumstances, then that party should be prepared to explain that position to the court. The time for explanation should have been prior to the mediation.

The mediation is expected to be a means of dispute resolution. It is not expected to be a discovery tool for either party. It is not expected to be a delaying tactic for either party.

The mediation is not a pretrial nor is it a mini-trial. It is not the role of the attorney to try his case to the mediator. The mediation itself is not necessarily an adversarial procedure. The attorneys are not there to add stress or conflict. The attorney is there to help his client make an informed decision.

There may well be a built-in conflict between the monetary interest of the attorneys and the clients. Settlement of a case at mediation may very often produce less attorney fees than trial of the case. The attorney must be mindful of his responsibility to his client in that regard.

The mediator is not meant to be an evaluator or judge of the issues at hand. The mediator is to be a facilitator of an agreement, which resolves the dispute at hand. Though an attorney, he does not represent either party. Nor is his role necessarily to represent the court. In most cases, the mediator has more latitude and can put together more remedies by agreement than the court can put together by order. The mediator can suggest methods and amounts of settlement, but ultimately the attorneys of the parties are responsible for concluding and implementing the result of any negotiations.

PRIME ISSUES FOR MEDIATION

Some cases are more conducive to mediation than others. Obviously, the usual nature and extent, permanent partial disability case can be tried to the court quicker and with more efficiency than it can be mediated. More complicated cases are the more usual subjects of mediation.

The "all or nothing" workers' compensation claim is a prime candidate. These are death claims or 3E claims. The law does not allow the court to compromise these claims through trial.

The only way they can be compromised is by agreement. Once the court finds the case is compensable, then the benefits are automatic. Once the court finds the case is not compensable, then there are no benefits at all.

The "a lot or nothing" case is similar to the "all or nothing." Into this category fall most denials. The marginal difference between this case and the "all or nothing" is that the court can find these cases compensable and yet still decide how much disability is going to be awarded. Apportionment cases fall into this category as do heart and lung cases, which may have causation questions. Occupational disease cases, Hepatitis C and AIDS cases may also be considered for mediation because there is some question regarding the compensability and there may be high exposure both in medical benefits, disability benefits and possible death benefits in the future.

Cases involving third-party tortfeasors may also be ripe for mediation. Settlement of these cases may result in a savings to the respondent in payment of medical bills. Settlement may also result in a savings to the claimant with regard to reimbursement of benefits through subrogation.

Mediations often involve questions of law as well as questions of fact. If the parties don't want to submit to a long appeal process or don't want to risk an appeals decision that will significantly impact the existing law, they mediate.

INCENTIVES

As noted above, a primary incentive to mediate is the ability to come to a conclusion by agreement that is unavailable to the court by order. In a death case, it is a compromise of benefits. In a 3E case or other permanent total disability case, it may be payment of a lump sum. If the claimant is on Social Security, then the lump sum may be a beneficial option, which can be amortized over the claimant's lifetime to reduce the Social Security set off and maximize the amount of money which actually makes it to the claimant's pocket.

In high exposure cases, the respondent obviously has an incentive to settle if the claimant is willing to discount that exposure in return for a guaranteed result or a quick payment.

Unless there is some perceived incentive by both parties, there is little chance of a successful resolution through mediation.

PREPARATION

Preparation is key to a successful mediation. Each party should identify the incentive it has to engage in mediation. Each attorney should prepare his client for the other side's point of view. Each side should not only be ready to state a value that it places on the case, but also be aware that the other side has different considerations and different ways of computing that value.

Both sides should have their case prepared for trial. If the case is not ready for trial, it is probably not ready for mediation either. If Medicare and Social Security are involved, then the parties need to know the impact of a court order on those benefits. The parties need to be prepared to discuss the method of settlement. Is it more beneficial for the case to be joint petitioned, dismissed or denied? Is a structured settlement appropriate? If these questions are unanswered prior to the mediation, it is unlikely that a conclusion will be reached at mediation. Even so, the mediation may have some value in identifying those questions to be answered by the parties at a later date prior to finalizing a settlement.

CONCLUSION

Mediation is not for everybody and is not for every case. Nothing is accomplished without give and take. Most successful mediations

involve gains and losses for both sides. The mediation process is similar to the settlement discussions that go on daily in the halls of the Workers' Compensation Court. It is a more formalized process. It gives the parties a day in court, which does not necessarily bind them to an outcome. It also explores remedies, which can only be achieved through compromise rather than litigation. It is not a process that is meant to replace or infringe upon the ultimate right of the parties to a trial before the judge – however, it does present an alternative to exercising that right to trial.

ABOUT THE AUTHOR



Michael G. Coker is a sole practitioner of workers' compensation law in Oklahoma City. A 1975 graduate of the University of Oklahoma College of Law, he was a long-term member of the firm Oldfield and Coker specializing in workers' compensation defense. He has also served several terms as a director of the

Workers' Compensation Section of the Oklahoma Bar Association. In addition to his defense practice, he serves regularly as a mediator of workers' compensation cases.

www.okbar.org
Your source for OBA news.



At Home



At Work



And on the Go

ALA's 9th ANNUAL VENDOR EXPO and NEW MEMBER LUNCHEON



WEDNESDAY, MARCH 24, 2010

Platinum Sponsor: Xcel Office Solutions

☞ DON'T MISS THE EARLY BIRD DRAWING ☜

☞ Displays for over 30 Vendors
with their latest products
and/or services in one location

☞ FABULOUS DOOR PRIZES

☞ Professional Development
Vendor Partnering
Professional Discounts

VENDOR FAIR: 10:00AM - 1:30PM

LUNCHEON: 11:30AM - 12:45PM

COST: \$20.00

WHERE: SKIRVIN HILTON HOTEL
2ND FLOOR BALLROOM
1 PARK AVENUE
OKLAHOMA CITY

RSVP: KFERGUSON@GOODWINMEE.COM

☞ SPEAKER: TODD HUSTON

TOPIC: A WINNING TEAM

Mn Huston is the World's only disabled athlete to hold a world record in an Able-Bodied Sport, mountain climbing. His talk will be inspirational, full of humor, insight, courage and hope for overcoming life's changes.

GOLD SPONSORS

Advanced Network Design
Beale Professional Services
BMI
Express Employment Professionals
Idexs
McLain Chitwood Office Products
Metro Business Supplies

Oklahoma Attorneys Mutual Ins. Co.
Ozarka Water & Coffee Service
Software@Law, Inc.
Standley Systems
Susan Frew & Company
Underground Vaults & Storage
Bill Warren Office Products

For more info: Lisa Rose 405-235-7700 Julie Montgomery 405-235-5553



OKC
Chapter



The Evolution of Workers' Compensation in Indian Country

By Jay Jones

An Indian tribe is a distinct sovereign nation, and no state has jurisdiction over the tribe without the assent of the tribe or by act of the U.S. Congress.¹ An Indian tribe is subject to suit only where Congress has authorized suit or the tribe has expressly waived its immunity.² That immunity extends to a tribe's commercial activity.³

The above rules of law set forth the premise for any discussion of tribal sovereign immunity. The discussion of sovereign immunity, however, is never clear, never easy and always subject to vigorous debate. Things have changed. Tribes have reached a position of great commercial success and are hiring more employees than ever, including non-tribal members, who are suffering work-related injuries. Workers' compensation practitioners are now challenged to proceed through the tribal court systems in representing their clients, or file a claim in the Oklahoma Workers' Compensation Court and fight a tribe's sovereign immunity challenge to jurisdiction. Either option will present a unique set of issues to be addressed.

The assertion of sovereign immunity in the Oklahoma Workers' Compensation Court has undergone a tremendous evolution in the last dozen years. The Oklahoma Supreme Court injected Oklahoma's estoppel act into the discussion in 1997, found in Title 85 Sections 65.2 and 65.3. In that year, the court issued four opinions on the topic: *Dominic v. Creek Nation*, 1997 OK 41, 936 P.2d 935; *Muscogee Nation v. Smith*, 1997 OK 66, 940 P.2d 498; *Wahpepah v. Kickapoo Tribe of Oklahoma*, 1997 OK 63, 939 P.2d 1151; and *Little v. Muscogee Creek Nation*, 1997 OK 57, 938 P.2d 739. The estoppel act prevents a carrier from denying coverage if three elements can be

proven. The three elements needed to invoke the estoppel act require that premiums be collected by the carrier for that employee, the injury must occur during the policy period, and the employee must suffer a work-related injury. In *Dominic*, the court commented that the purpose of estoppel "is to prevent both an employer's and an employee's ensnarement in the false belief that compensation has been provided, only later to discover the protection unavailable."⁴ The court in all four cases used the estoppel act as a tool to hold the tribal carriers in Oklahoma courts, although there was no evidence the carriers were wrongfully denying the tribal employers' insurance coverage. It is important to note the Oklahoma Supreme Court did not address whether the tribe retained its sovereignty but instead focused upon the employee's rights against the tribe's insurance carrier.⁵

In 2005, the Oklahoma Court of Appeals issued an important opinion on this topic in *Squirrel v. Bordertown Bingo*.⁶ The *Squirrel* court recognized that before the estoppel act can be asserted by a claimant against a carrier, the carrier must first have issued a policy to cover injuries under the Oklahoma Workers' Compensation Act.⁷ This is based upon the language of Title 85 §65.3 which states in part, "Every contract of insurance issued by an insurance carrier for the purpose of insuring an employer against

liability under the Workers' Compensation Act shall be conclusively presumed to be a contract for the benefit of each and every person upon whom insurance premiums are paid..." (emphasis added)

The court in *Squirrel* ruled the policy in that case was ambiguous in that regard and found dual jurisdiction in both the tribal and Oklahoma courts. *Squirrel* is very important because the Oklahoma Court of Appeals recognized that the Oklahoma Workers' Compensation Court would have had no jurisdiction over the carrier, or the tribe, if the policy had not provided for the payment of benefits pursuant to the Oklahoma Workers' Compensation Act.

In 2007, the Oklahoma Court of Appeals found Oklahoma's estoppel act inapplicable and denied jurisdiction for the first time. In *Hall v. Cherokee Nation*,⁸ the court recognized the threshold requirement set forth in *Squirrel* and analyzed the policy in that context. The court noted the language of the policy at issue made no reference to the Oklahoma Workers' Compensation Act but rather made clear the policy was issued solely for benefits payable pursuant to tribal workers' compensation ordinances, thereby precluding application of Oklahoma's estoppel act.⁹ This analysis was again followed to deny jurisdiction in *Pales v. Cherokee Nation Enterprises*,¹⁰ *Quinton v. Cherokee Nation Enterprises*¹¹ and *Hamby v. Cherokee Nation Casinos*.¹²

No distinction has been drawn between tribal member and non-tribal member employees in the area of tribal workers' compensation law. This is because the U.S. Supreme Court has permitted tribal regulation of non-tribal members who enter consensual relationships with the tribe.¹³

Several tribes in Oklahoma have enacted their own workers' compensation ordinances, including the Cherokee Nation, Muscogee (Creek) Nation, Citizen Potawatomi Nation, Comanche Nation, Quapaw Tribe, Kaw Nation, Kickapoo Tribe and Wyandotte Nation. Those tribes have workers' compensation insurance written specifically for their tribal ordinances and provide a dispute resolution mechanism for contested claims.

The various tribal ordinances generally contain similar features regarding claims management. They designate an administrator, who is often the insurance carrier's claims adjuster. That administrator makes determinations

regarding all issues including compensability and the need for medical treatment. A claimant who disagrees with the administrator is typically provided an opportunity to challenge the administrator's determination within a statutorily defined period of time. If that reconsideration does not resolve the dispute, appellate relief is provided to either an appeals committee or to binding arbitration. Some tribal ordinances permit further appeal within the tribal court system, often requiring membership in the tribal court's bar association.

The tribal ordinances do not provide forms similar to those used in the Oklahoma Workers' Compensation Court to trigger litigation. Thus, it is important for any practitioner to immediately contact the designated tribal administrator to provide notice of representation and to contest an administrator's decision. Often the claimant will have been in contact with the administrator and will have received documentation from the administrator, which will provide the practitioner with contact information to initiate a challenge to the administrator's determination. If the administrators contact information is not available, it is suggested that claimant's counsel contact the tribal employer's human resources department in writing by certified mail. This correspondence will trigger action by the employer to notify the tribal workers' compensation administrator.

The adequacy of the tribal dispute resolution mechanism is often questioned. Is it proper for the administrator to be the one "guarding the hen house"? How can a dispute be fairly resolved by a committee or in arbitration? How is it fair for the injured employee when there is no specific tribal "court" to resolve the claim? The answer again relates to the first paragraph of this article. The U.S. Supreme Court has recognized the right of Indian tribes to regulate their internal and social relations, to make their own substantive law in internal matters, and to enforce that law in their own forums.¹⁴ No federal statute mandates either the necessity or manner of establishing tribal courts. Nor does the establishment of tribal courts necessarily supplant the existence or vitality of traditional methods of dispute resolution.¹⁵

Not all tribes have enacted workers' compensation legislation, but that does not permit the state of Oklahoma to step in and assume jurisdiction. Oklahoma relinquished all control over tribal land in Article I, §3 of its Constitution. Oklahoma did not choose to assert sovereignty

(with tribal consent) over workers' compensation matters pursuant to "Public Law 280," found at 25 U.S.C. §1322, when that process was permitted by federal legislation in the 1950s. Thus, the Oklahoma Workers' Compensation Court has no basis to assert jurisdiction simply because a tribe has not enacted its own workers' compensation legislation. To do so would violate the well-founded principles of sovereign immunity. Oklahoma has no more legal authority to assert jurisdiction over a tribal claim than it does over a claim of any other foreign nation.

Many tribes that do not have their own workers' compensation ordinances have chosen to obtain workers' compensation insurance. It is common for the carriers to provide their own "fall back" ordinances to be followed. The "fall back" ordinances are useful in providing a framework within which claims can be analyzed and processed. The "fall back" ordinances are usually not formally adopted by the tribes, which calls into question their legitimacy, especially by counsel representing an injured tribal employee. The authority for the "fall back" ordinances is derived from the purchase of the insurance contract. It must be remembered, however, that there is no legal basis for the Oklahoma Workers' Compensation Court to assert jurisdiction over an Indian tribe, whether that tribe uses "fall back" ordinances, or has no ordinance at all.

If the tribe has not adopted these fall back ordinances by tribal resolution, how can a claimant be bound by them? The answer takes us back to the premise of this debate mentioned the first paragraph. The state of Oklahoma has no basis or authority to enforce its own state laws by default simply because the tribe has not enacted its own legislation.

Workers' compensation is a creature of statute, a result of "the great compromise" in which no fault liability is established with capped damages. A tribe has its own inherent sovereign right to provide workers' compensation benefits in any manner it so chooses, express or implied. The tribe also has the right to refuse workers' compensation benefits or insurance for its employees, just as the state of Oklahoma could do at any time. This seems "appalling" to some because we have enjoyed workers' compensation legislation in Oklahoma for almost 100

years. However, the premise of this article must be kept in mind; unless a tribe expressly waives its sovereign immunity or the U.S. Congress expressly waives the tribe's immunity, there is simply no means for the state of Oklahoma to force its jurisdiction upon a tribe. The tribe has an inherent sovereign right to provide benefits if it so chooses, and it has an inherent sovereign right to choose the means by which the benefits will be provided.

CONCLUSION

This is an interesting time to practice tribal workers' compensation law. The Oklahoma courts are recognizing tribal sovereignty, and the number of Indian tribes enacting their own workers' compensation legislation is growing. Over time, the tribal systems will be further developed, and practice in those systems will become more commonplace. As the tribal systems are developed, the practitioner will need to stay abreast of the benefit delivery systems of the various tribes and be willing to proceed through their various dispute resolution systems.

1. *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832).
2. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies Inc.*, 523 U.S. 751, 118 S. Ct. 1700, 140 L.Ed.2d. 981 (1998).
3. *Id.* at 760.
4. *Id.* at ¶15.
5. *Id.* at ¶8.
6. *Squirrel v. Bordertown Bingo*, 2005 OK CIV APP 95, 125 P.3d 680.
7. *Id.* at ¶10.
8. *Hall v. Cherokee Nation*, 2007 OK CIV APP 49, 162 P.3d 979.
9. *Id.* at ¶19.
10. *Pales v. Cherokee Nation Enterprises*, 2009 OK CIV APP 65, ___ P.3d ___.
11. *Quinton v. Cherokee Nation Enterprises*, 2010 OK CIV APP 16, ___ P.3d ___.
12. *Hamby v. Cherokee Nation Casinos*, 2010 OK CIV APP 21, ___ P.3d ___.
13. *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981).
14. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S. Ct. 1670, 1675, 56 L.Ed.2d 106.
15. F. Cohen, *Handbook of Federal Indian Law*, §4.04[3][c][iv][B] (2005).

ABOUT THE AUTHOR



Jay Jones is an attorney with Walls Walker Harris & Wolfe in Oklahoma City. He practices primarily in the area of workers' compensation defense. Mr. Jones is a 1993 graduate of the OU College of Law and is a member of the Oklahoma Bar Association, the Cherokee Nation Bar Association and the Muscogee (Creek) Nation Bar Association.



The Eight-Week Soft Tissue Injury TTD Limitation

Eight Published Appellate Decisions Later

By James M. Wirth

When the Oklahoma Legislature hastily passed workers' compensation reform in a 2005 special session, it set off the beginning of what would become a firestorm of litigation regarding the interpretation and constitutionality of its overhaul. With more than four years now passed, some provisions have been struck down and others affirmed or interpreted, but no other issue has been as prolifically contentious as the eight-week temporary total disability limitation placed on soft tissue injuries. With eight published opinions specifically addressing it, including an Oklahoma Supreme Court decision that self-proclaims to be a binding authority resolution, does the debate continue?

Below is 1) a review of the statute in question; 2) an identification of the ambiguities; 3) an outline of the appellate decisions; 4) arguments on unresolved concerns; and 5) a conclusion indicating the current state of the law.

REVIEW OF THE STATUTE

The limitation on Temporary Total Disability (TTD) benefits for soft tissue injuries was created in 2005 by statute during an emergency special legislative session to overhaul Oklahoma's Workers' Compensation Act.¹ Although Enrolled Senate Bill No. 1X, (SB 1X), became effective on July 1, 2005, arguments interpreting the soft tissue limitation on TTD benefits have continued. This is due to patent ambiguities in the law's language, which are likely due to the rush in which the bill was passed. Even so, the statute was

again amended in 2009, but this amendment did not attempt to resolve these concerns.²

SB 1X amended §22 of the Workers' Compensation Act to create a new subsection at §22(3)(d), which begins as follows:

With respect to injuries occurring on or after January 1, 2003, in case of disability, partial in character but permanent in quality, the compensation shall be seventy percent (70%) of the employee's average weekly wages, and shall be paid to the employee for the period prescribed by the following schedule:³

The subsection then enumerates various body parts and the *permanent partial disability* benefits for each.⁴ Thus far, it is essentially the same as previous versions of the statute, but covers injuries occurring after Jan. 1, 2003. However,

between the enumerated body parts of “Hernia” and “Other Cases,” the 2005 amendment added a “Soft Tissue Injury” subsection to §22(3)(d), which provides in relevant part:

Soft Tissue Injury: In case of a nonsurgical soft tissue injury, *temporary total compensation* shall not exceed eight (8) weeks. A claimant who has been recommended by a treating physician for surgery for a soft tissue injury may petition the Court for one extension of *temporary total compensation* and the court may order such an extension, not to exceed sixteen (16) additional weeks, if the treating physician indicates that such an extension is appropriate or as agreed to by all parties. In the event the surgery is not performed, the benefits for the extension period shall be terminated.⁵

The “Soft Tissue Injury” subsection goes on to state:

In all cases of soft tissue injury, the employee shall only be entitled to appropriate and necessary medical care and *temporary total disability as set out in paragraph 2 of this section*, unless there is objective medical evidence of a permanent anatomical abnormality.⁶

The “paragraph 2 of this section” *i.e.* §22(2)(c), provides in relevant part:

With respect to injuries occurring on or after November 1, 1997, total payments of compensation for temporary total disability may not exceed a maximum of one hundred fifty-six (156) weeks in the aggregate except for good cause shown, as determined by the Court.⁷

The latter subsection was not amended in the 2005 workers’ compensation reform.

The “Soft Tissue Injury” section additionally excludes certain types of injuries including: “Injury to or disease of the spine, spinal disks, spinal nerves or spinal cord, where corrective surgery is performed.”⁸

IDENTIFICATION OF THE AMBIGUITY

Ambiguity is immediately apparent from a plain reading of the above quoted statutes.

First, the eight-week rule by its initial language purports to limit temporary total compensation, but it is found in §22(3), which by its title and content specifically concerns permanent partial disability.⁹ Moreover, the “Soft Tis-

sue Injury” subsection is found in an enumerated schedule of permanent partial disability benefit rules.¹⁰

Second, although the “Soft Tissue Injury” subsection by its language limits “temporary total compensation” to eight weeks (with the possibility of an additional 16 weeks if surgery is recommended), it then provides that temporary total disability benefits shall be pursuant to “paragraph 2,” which allows for up to 156 weeks.¹¹

Finally, the language that “the employee shall only be entitled to appropriate and necessary medical care and temporary total disability ... unless there is objective medical evidence of a permanent anatomical abnormality,” seems to imply that the rule is meant to be a limitation on permanent partial disability and not on temporary total disability.¹²

APPELLATE COURT DECISIONS

The ambiguities regarding Okla. Stat. tit. 85, §22(3)(d) (2009), have been acknowledged by each division of the Oklahoma Court of Civil Appeals (COCA) as well as the Oklahoma Supreme Court:

COCA Division I

- *Gee v. All 4 Kids Inc.*, 2006 OK CIV APP 155, 149 P.3d 1106 (Okla. App. 2006).
- *CMI/Terex Corp. v. Stevens*, 2008 OK CIV APP 102.

COCA Division II

- *Public Supply Co. v. Steenbock*, 2008 OK CIV APP 53, 186 P.3d 263 (Okla. App. 2008).

COCA Division III

- *Curling v. City Chevrolet*, 2007 OK CIV APP 63, 164 P.3d 1141 (Okla. App. 2007).

COCA Division IV

- *Sysco Food Services of Oklahoma LLC v. Cunningham*, 2007 OK CIV APP 52, 162 P.3d 973 (Okla. App. 2007).
- *Urrutia v. Wendy's Old Fashioned Hamburgers*, 2007 OK CIV APP 104, 171 P.3d 915 (Okla. App. 2007).

Oklahoma Supreme Court

- *Bed Bath & Beyond Inc. v. Bonat*, 2008 OK 47, 186 P.3d 952 (Okla. 2008).

Although the Soft Tissue Injury subsection has been extensively reviewed and each time the stated goal was to ascertain the legislative intent through statutory construction, the resulting holdings have varied widely. As demonstrated below, Oklahoma appellate courts have held that the legislative intent was for a TTD limitation, a PPD limitation or no limitation at all.

The *Gee* court held that the reference to the 156-week limitation¹³ in §22(2)(c) was last in position and therefore controlling, rendering the eight-week limitation meaningless.¹⁴ The *Sysco* court held that where surgery is performed it is effectively not a soft tissue injury and therefore the 156-week limitation in §22(2)(c) is controlling in all surgery cases.¹⁵ This interpretation renders meaningless the specific exclusion of spinal injuries that result in surgery from being soft tissue injuries. The court in *Curling* adopted the holding in *Gee*.¹⁶ The *Urrutia* court held that the Legislature intended to make soft tissues a “specific injury” like hernias and limited temporary total disabilities to the eight weeks as articulated in Soft Tissue Injury subsection of §22(3)(d), rendering the reference to the 156-week TTD limitation in §22(2)(c) meaningless.¹⁷ In the *Public Supply* case, the court held that the Legislature intended to make soft tissues a “specific injury” and that the eight-week limitation applies to *permanent partial disability* benefits and that the 156-week limitation in §22(2)(c) applies to temporary total disability benefits, rendering the phrase “temporary total compensation,” found in the Soft Tissue Injury subsection of §22(3)(d), meaningless.¹⁸ In *Bed Bath*, the Oklahoma Supreme Court furthered the decision in *Sysco* by holding that not only are the limitations in the Soft Tissue Injury subsection of §22(3)(d) inapplicable in surgery cases but that surgery recommendations should be treated the same and have the 156-week limitation in §22(2)(c).¹⁹ This holding rendered the 16-week extension language in the Soft Tissue Injury subsection of §22(3)(d) meaningless. The court provided that its interpretation was necessary to prevent an employer’s refusal to approve a surgery from altering the character of the allowable benefits.²⁰ Lastly, the *CMI* court followed *dicta* in *Bed Bath* and limited temporary total disability benefits to eight weeks in a case where surgery was neither recommended nor performed.²¹

The *Bed Bath* case involved only one specific set of facts (TTD benefits when surgery is rec-

ommended but not yet performed) and the court refused to limit TTD pursuant to the Soft Tissue Injury subsection of §22(3)(d) under that specific circumstance.²² However, the court in *dicta* found that:

It is clear that the Legislature intended to limit the period of TTD for certain soft tissue injuries. Section 22(3)(d) limits benefits to eight weeks for non-surgical soft tissue injuries.²³

The *Bed Bath* court further provided that, “this Court provides this analysis as binding authority for resolution of the [§22(3)(d)] ambiguity.”²⁴ Therefore, although it is technically *dicta*, the Oklahoma Supreme Court made it clear that it intends its opinion in *Bed Bath* to be binding authority for an eight-week limitation of TTD in nonsurgery cases. However, besides being *dicta*, the court did not address many of the concerns raised about §22(3)(d).

ARGUMENTS ON UNRESOLVED CONCERNS

Despite the seven separate published appellate court opinions addressing Okla. Stat. tit. 85, §22(3)(d) discussed in the previous section, there remain unresolved concerns that the statute is 1) irreconcilable and unconstitutionally vague; 2) violative of equal protection rights for dividing claimants into classes; and 3) an improper delegation of authority.

Is §22(3)(d) Unconstitutionally Ambiguous and Vague?

The Oklahoma Supreme Court in *Bed Bath* provided that, “A statute must be read to render every part operative and to avoid rendering parts thereof superfluous or useless.”²⁵ However, as discussed in the previous section, each of the eight opinions interpreting §22(3)(d), render various parts of the statute useless. The direct contradictions in the statute make construction an impossibility and the degree of ambiguity is evidenced by the variance of the opinions of Oklahoma’s various appellate courts. If there is no interpretation that would render every part operative, must not the statute be unconstitutionally vague? According to Division II of the Oklahoma Court of Civil Appeals in the very recent decision of *Arrow Trucking v. Jimenez*, no. In that case, without specific analysis, the court held that, “Sections 22(2)(c) and 22(3)(d) are not unconstitutionally ambiguous or vague,” based on *Bed Bath* and *Beyond Inc.* precedent.²⁶

Does §22(3)(d) Violate Equal Protection?

Okla. Stat. tit. 85, §22(3)(d) (2005), divides claimants, for the purpose of temporary total disability benefits, into classes based on whether an injury is to soft tissue or to bones and joints. Soft tissue injuries are limited to eight weeks of temporary total disability with the possibility of an extension of an additional 16 weeks for surgical candidates.²⁷ The Oklahoma Supreme Court in *Bed Bath*, reconstructed the statute, modifying the classes into claimants with non-surgical soft tissue injuries and all other claimants. Given the purpose of TTD, does either of the models for class division have a rational basis, as required under an equal protection claim?

The purpose of temporary total disability is to replace the loss of wages during the temporary healing period.²⁸ The healing process continues until the claimant is released from medical treatment at maximum medical improvement. It is well established in medical practice that conservative treatments should be exhausted prior to recommending any surgery, as surgical intervention is inherently costly and risky. Furthermore, it is not uncommon for conservative treatments, such as physical therapy, to require eight weeks or more of treatment prior to considering surgery. Therefore, even when surgery is recommended, the recommendation may not come within the initial eight weeks subsequent to the injury. In this circumstance, application of the eight-week TTD limitation would result in a lapse of benefits even for cases that later become surgical cases.

Temporary total disability benefits are only applicable when a claimant is still treating, therefore, any reduced statutory limitation for benefits only affects claimants who are unable to work, still in the healing process and still receiving medical treatment. The only result then of limiting temporary total disability benefits to eight weeks would be to require claimants to choose between going without income or to returning to the work that the claimant's physician determined he or she should not be doing. This does not appear to advance the

purpose of TTD to replace the loss of wages during the temporary healing period.

However, the Oklahoma Court of Civil Appeals, Division II, has recently issued a published opinion finding a rational basis does exist.²⁹ The court in this opinion found that "the critical question [for an equal protection argument] is whether the classification rest upon a difference which bears a reasonable relationship to *any of the goals of the Workers' Compensation Act.*"³⁰ The court held that this test is met as it is reasonable to conceive that a worker that does not have surgery performed: 1) would be less in need of extended compensation; 2) suffered an injury of less severity; and 3) would need

less time to recover compared with a worker undergoing surgery.³¹ The court additionally noted that the classifications increase the certainty and predictability of an employer's liability.³² The court acknowledged that §22(3)(d) may favor employers and result in some inequality among claimants but found the classification is reasonably related to a legitimate government goal contained in the Workers' Compensation Act.³³

Is §22(3)(d) an Unconstitutional Delegation of Judicial Power?

The Oklahoma Constitution provides that the state government is divided into legislative, executive and judicial branches and "neither shall exercise the powers properly belonging to either of the others."³⁴ "Whether evidence supports an award of [temporary] compensation presents an issue of fact," for the trial court (the judicial branch).³⁵ Furthermore, "[t]he trial tribunal is the sole judge of the credibility of witnesses and of the weight and value to be accorded to the testimony adduced."³⁶ It could be argued that the Legislature through §22(3)(d) improperly delegated the authority to determine TTD beyond eight weeks from the trial court (judicial branch) to the treating physician by arbitrarily allowing the physician's determination on surgical prospects to determine TTD status.

A very recent opinion of the Oklahoma Court of Civil Appeals, Division II, in *Arrow Trucking Co. Inc. v. Jimenez*, has addressed this issue.³⁷

“It is clear that the Legislature intended to limit the period of TTD for certain soft tissue injuries.”

The court in this opinion held that it is not an unconstitutional delegation of judicial authority because it “does not predetermine adjudicative facts, but rather limits an available award, based on the facts determined by the factfinder.”³⁸ The court further describes it as “post-fact-finding, legislative limitations.”³⁹

CONCLUSION

More than four years after the Legislature amended the Workers’ Compensation Act and created an eight-week limitation on the TTD benefits available for soft tissue injuries, parties continue to argue the interpretation and constitutionality of the rule. Even with eight published appellate opinions addressing the statutory section in debate, there are still arguments that have not been addressed. However, the Oklahoma Supreme Court in *Bed Bath*, albeit in *dicta*, did provide an interpretation and specifically state in its opinion the intent that it be binding authority to resolve the issue.

In summary, Okla. Stat. tit. 85, §22(3)(d) limits TTD in nonsurgery, soft injury cases to eight weeks. If surgery is performed *or recommended*, there is no special limitation and the TTD duration is governed by §22(2)(c). Section 22(3)(d) in practice does not provide a further limitation on permanent partial disability benefits. It is likely that §22(3)(d) does not violate equal protection. It is likely that §22(3)(d) is not an unconstitutional delegation of judicial authority.

There is still a question of whether the direct contradictions contained in §22(3)(d) make it unconstitutionally ambiguous. But, given that each of Oklahoma’s Court of Civil Appeals and the Oklahoma Supreme Court have published opinions interpreting §22(3)(d), and *Bed Bath* expressed the intent that its opinion be binding authority for resolution of the ambiguity, it is likely that any appellate court analysis will find §22(3)(d) constitutional.

1. 2005 O.S.L 479.

2. 2009 O.S.L. 172 (changed the calculation of the state’s average weekly wage from occurring every three (3) years to occurring annually).

3. Okla. Stat. tit. 85, §22(3)(d) (2009).
4. *Id.*
5. *Id.* (emphasis added).
6. *Id.* (emphasis added).
7. Okla. Stat. tit. 85, §22(2)(c) (2009).
8. Okla. Stat. tit. 85, §22(3)(d) (2009).
9. Okla. Stat. tit. 85, §22(3) (2009).
10. Okla. Stat. tit. 85, §22(3)(d) (2009).
11. Okla. Stat. tit. 85, §22(3)(d) (2009); Okla. Stat. tit. 85, §22(2)(c) (2009).
12. Okla. Stat. tit. 85, §22(3)(d) (2009).
13. The 156-week TTD limitation can be extended to a maximum of 300 weeks with good cause shown, pursuant to Okla. Stat. tit. 85, §22(2)(C) (2009).
14. *Gee v. All 4 Kids Inc.*, 149 P.3d 1106, ¶13 (Okla. App. 2006).
15. *Sysco Food Services of Oklahoma LLC v. Cunningham*, 162 P.3d 973, ¶13 (Okla. App. 2007).
16. *Curling v. City Chevrolet*, 164 P.3d 1141, ¶9 (Okla. App. 2007).
17. *Urrutia v. Wendy’s Old Fashioned Hamburgers*, 171 P.3d 915, ¶5 (Okla. App. 2007).
18. *Public Supply Co. v. Steenbock*, 186 P.3d 263, ¶31 (Okla. App. 2008).
19. *Bed Bath & Beyond Inc. v. Bonat*, 186 P.3d 952, ¶15 (Okla. 2008).
20. *Id.* at ¶16.
21. *CMI/Terex Corp. v. Stevens*, 2008 Okla. Civ. App. 102, ¶10.
22. *Bed Bath & Beyond Inc. v. Bonat*, 186 P.3d 952, ¶15 (Okla. 2008).
23. *Id.* at ¶12.
24. *Bed Bath & Beyond Inc. v. Bonat*, 186 P.3d 952, ¶10 (Okla. 2008).
25. *Bed Bath & Beyond Inc. v. Bonat*, 186 P.3d 952, ¶11 (Okla. 2008).
26. *Arrow Trucking Co. v. Jimenez*, 2010 Okla. Civ. App. 9, ¶9.
27. Okla. Stat. tit. 85, §22(3)(d) (2009).
28. *Emery v. Central Oklahoma Health Care*, 158 P.3d 1052, ¶17 (Okla. 2007) (citing *Gray v. Natkin Contracting*, 44 P.3d 547, ¶13 (Okla. 2001)).
29. *Arrow Trucking Co. v. Jimenez*, 2010 Okla. Civ. App. 9.
30. *Id.* at ¶11 (citing *Rivas v. Parkland Manor*, 12 P.3d 452, 457 (Okla. 2000) (emphasis added)).
31. *Arrow Trucking Co. v. Jimenez*, 2010 Okla. Civ. App. 9, ¶12.
32. *Id.* at ¶13.
33. *Id.* at ¶14.
34. Okla. Const. art. IV, §1.
35. *Bed Bath & Beyond Inc. v. Bonat*, 186 P.3d 952, ¶6 (Okla. 2008).
36. *Yocum v. Greenbriar Nursing Home*, 130 P.3d 213, ¶18 (Okla. 2005).
37. *Arrow Trucking Co. v. Jimenez*, 2010 Okla. Civ. App. 9.
38. *Id.* at ¶16.
39. *Id.*

ABOUT THE AUTHOR



James M. Wirth started a solo practice on Jan. 1, 2010, after practicing five years in the areas of workers’ compensation, personal injury, family law and criminal defense. He received his J.D. from TU in 2004. He founded and organizes EsquireEmpire.com, a collaboratively authored Web site on Oklahoma law, featuring a toolbar for Oklahoma attorneys, a child support calculator and legal directories, *et cetera*.



Illegal Aliens, Immigration Policy and Workers' Compensation

By Pamela K. Cornett

Jose Estrada is your final appointment for the day. Mr. Estrada has brought his son Victor to interpret as you discuss Mr. Estrada's options following an injury on the job. Mr. Estrada suffered a crushing injury to his leg on the job where he has worked for the last 10 years. His employer took him to the emergency room, and Mr. Estrada underwent surgery to treat the leg. He was taken off work and advised to follow up with the orthopedic doctor who performed the surgery. The workers' compensation insurance carrier initially provided medical benefits and temporary total disability benefits. However, the insurance company now believes Mr. Estrada to be in the country illegally and has refused to pay any more benefits asserting that to pay benefits would violate the law. Mr. Estrada is not able to work and is unable to afford medical treatment.

Mr. Estrada is, in fact, in the country illegally and obtained work initially through a temporary agency and he provided the agency with a false Social Security number. After working on temporary jobs for a number of years, he eventually began working at his current employment and has worked there steadily for the better part of a decade.

A claim is filed and Mr. Estrada is awarded back benefits and medical treatment by the Workers' Compensation Court. The insurance company appeals the decision of the trial court on the grounds that Mr. Estrada is in the country illegally and to pay him benefits would violate federal immigration laws. The Oklahoma Appellate Court decides the case similarly to the majority of courts faced with this issue. In the discussion of

the issues, the courts have discussed federal immigration laws and the interrelationship with state laws protecting its workers.

FEDERAL IMMIGRATION CONCERNS

Federal immigration law prohibits the hiring or employment of illegal or unauthorized aliens. Supreme Court interpretation of that law reversed an award of payment of back wages to an illegal alien who was illegally terminated from his job but who had provided fraudulent documentation to secure the employment. It is against this backdrop that this article examines Oklahoma's Workers' Compensation Act¹ as it is applied to claims by illegal aliens for workers' compensation benefits due to injuries arising out of and in the course of their employment.

In 1986, the U.S. Congress passed the Immigration Reform and Control Act² declaring it "unlawful for a person or other entity to hire, or to recruit, or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien with respect to such employment."³ The law was intended to remove the incentive for illegal immigration by eliminating the jobs that attract illegal aliens. To that end, the legislation created an employment verification system designed to deter the employment of aliens who are unlawfully in the United States and those who are lawfully present but not authorized to work.⁴

Under the employment verification system, aliens who are in the United States legally and approved to work are issued formal documentation of their eligibility status by the federal immigration authorities.⁵ Before hiring an individual, the employer is required to verify that person's identity and eligibility to work by examining the documents issued by the authorities. If the documentation is not provided, the applicant cannot be hired.⁶ If the employer hires the prospective worker without complying with the verification process or if the employer unknowingly hires an illegal alien but subsequently learns that the worker is not authorized to work and does not immediately terminate the employment relationship, the employer is subject to civil or criminal prosecution and penalties.⁷ Congress expressly provided that IRCA would "preempt any State or local law imposing civil or criminal sanction (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens."⁸

It is unlawful for an alien to provide any false document in order to obtain employment.⁹ However, there is no penalty if the alien attains employment without having proper work authorization.

The U.S. Supreme Court was asked to apply the provisions of IRCA in *Hoffman Plastic Compounds Inc. v. NLRB*.¹⁰ In *Hoffman*, Castro, an illegal alien, was terminated from his employment with Hoffman. Three years later, the NLRB concluded that Hoffman had unlawfully selected four employees, including Castro, for layoff, due to involvement in union activities. Hoffman was ordered by the NLRB to offer reinstatement and back pay to the fired employees. At a later compliance meeting before an administrative law judge, it was determined that Castro had fraudulently obtained docu-

ments to support his employment application and that he had never been authorized to work in the United States. His Social Security card and driver's license were also fraudulently obtained. The ALJ determined that the NLRB was precluded from awarding Castro back pay or offering reinstatement because such relief was in conflict with the IRCA. Later, the NLRB reversed the specific issue of back pay.

On appeal, the issue before the Supreme Court was whether an illegal alien who in violation of IRCA gained employment by presenting false work authorization documents could be awarded back pay by the NLRB after the worker was impermissibly terminated for engaging in union-organizing activities. The court held that an award of back pay was prohibited because it would conflict with the purpose of IRCA. Under the IRCA regime, if an undocumented alien obtains employment in the United States, some party has directly contravened explicit congressional policies. "Either the undocumented alien tenders fraudulent identification... or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations."¹¹ The court concluded:

[A]llowing the Board to award backpay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws, and encourage future violations. However broad the Board's discretion to fashion remedies when dealing only with the NLRA, it is not so unbounded as to authorize this sort of an award.¹²

IRCA, WORKERS' COMPENSATION AND PRE-EMPTION

Awards of workers' compensation benefits to illegal aliens have been challenged as contrary to the purpose of IRCA and the teachings of *Hoffman*. Those challenges primarily assert that the employment contract is illegal and unenforceable because IRCA makes employment of unauthorized aliens illegal. Awards of benefits are opposed as allowing payment of wages in violation of *Hoffman*. Intertwined with these arguments is the assertion that IRCA pre-empts state law. However, courts have for the most part held that workers' compensation awards

are not an obstacle to the accomplishment and execution of the policy and purposes of IRCA.

The federal government exercises supreme power in the field of foreign affairs, including immigration, naturalization and deportation.¹³ But the court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by the constitutional power, whether latent or exercised.¹⁴

In *Todd v. Frank's Tong Service Inc.*,¹⁵ the Supreme Court stated that generally, pre-emption is a matter of congressional intent that occurs under four instances:

1) express statutory language; 2) a pervasive regulatory scheme that infers by its presence that Congress felt the federal regulation did not need supplemental state law provisions; 3) an actual conflict between state and federal laws making it physically impossible to comply with both; or 4) where the objectives and purpose of Congress are thwarted by state law.

IRCA contains an express pre-emption clause stating that “[t]he provisions of this section pre-empt any state or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”¹⁶ The plain language appears directed at laws that impose fines for hiring undocumented aliens. “The legislative history of IRCA confirms this interpretation, as the pre-emption language in section 1324a[h][2] was intended to apply only to civil fines and criminal sanctions imposed by state or local laws.”¹⁷ IRCA is silent, however, as to its pre-emptive effect on any other state or local laws, including workers’ compensation.

The Oklahoma Workers’ Compensation Act, requiring employers to pay workers injured as a result of their employment, is not a local law imposing civil or criminal sanctions. Rather, from its inception, the purpose of the Workers’ Compensation Act has been two-fold: 1) to provide support to workers during periods of actual disability, and 2) to provide for their dependents in the event of an occupationally-related death, or to cover hospital, medical and funeral expenses.¹⁸

Thus, it cannot be said that Congress explicitly pre-empted Oklahoma’s workers’ compensation law.

“The Workers’ Compensation Act is considered a law of general applicability and is not one whose object is to regulate immigration.”

It also does not appear that Congress intended to pre-empt state law in this area. Such intent may be implied where Congress has designed a pervasive regulatory scheme that infers by its presence that Congress felt the federal regulation did not need supplemental state law provisions.¹⁹ Immigration is clearly a field where the federal interest is dominant. However, the immigration law, set forth in IRCA, is different than workers’ compensation law and each occupies entirely different fields. The Workers’ Compensation Act is considered a law of general applicability and is not one whose object is to regulate immigration. It applies to all Oklahomans, not just illegal aliens. A congressional intent to deprive states of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws that are directed specifically at immigration concerns.²⁰ States possess broad authority under their police powers to regulate the employment relationship to protect workers within the state. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety, and workmen’s compensation laws are only a few examples.²¹

The final instances in which pre-emption may occur are when an actual conflict between state and federal laws makes it physically impossible to comply with both, or where the objectives and purpose of Congress are thwarted by state law.

OKLAHOMA DECISIONS

The Oklahoma Court of Civil Appeals determined that an award of certain benefits to an illegal alien did not conflict with or thwart the purpose of IRCA in *Cherokee Industries Inc. v. Alvarez*.²² There, the employer appealed the trial court’s award of temporary total disability benefits on two grounds: 1) The claimant was deprived of benefits under the Workers’ Compensation Act because he was an illegal alien who provided false documents to procure his employment in violation of IRCA rendering his

contract of employment void *ab initio*; and 2) The claimant was not entitled to benefits under the Supreme Court's interpretation of IRCA in *Hoffman*, *supra*.

Alvarez suffered several back injuries while working for Cherokee Industries, the last date being March 20, 2002. He sought and was awarded medical treatment and temporary total disability benefits. The medical evidence indicated that he was unable to work and surgery was recommended in March of 2003. The employer argued the temporary total disability (TTD) should not have extended beyond July 3, 2002, the date Alvarez gave notice of his unauthorized status, resulting in his "for cause" termination from employment. The employer appealed.

Concluding that the contract was not void, the court's analysis included a discussion of *Lang v. Landeros*²³ a case decided before *Hoffman*. In *Lang*, the employer appealed an award of benefits to Landeros alleging that the claimant's employment was illegal because he entered the country illegally under federal immigration laws, thereby precluding the Workers' Compensation Court from making an award. The court upheld the finding of the trial court that Oklahoma law does not exclude the claimant from receiving an award.

In reaching that decision *Lang* reasoned that workers' compensation did not exist under common law and therefore, whether an award could be made or denied is purely statutory. The definition of employee and employer are broadly defined under the act and the citizenship status of employees is not addressed in the statutes. The court stated:

This Court may not legislate exceptions or exclusions. This is a matter to be addressed by the Legislature. Any employment is covered by the Workers' Compensation Act unless specifically excluded.²⁴

Adopting the *Lang* approach, the court in *Cherokee Industries* further explained that while the act has exceptions, *i.e.* some sole proprietors, it does not except illegal aliens or undocumented workers. The court examined opinions from other jurisdictions as well that acknowledged that the "mere status of illegal alien does not deprive an employee of all workers' compensation benefits."²⁵

Our law provides that an employee is any person engaged in the employment of any

person under an agreement for work. Being unauthorized does not change the fact that Alvarez was an employee at the time of his injuries.²⁶

The court acknowledged that the remedy provided under the Workers' Compensation Act might be circumscribed by IRCA and that certain benefits may not be available because of the claimant's illegal status. However, the court did not agree that allowing treatment and compensation would ignore and trivialize IRCA or condone and encourage further criminal conduct by allowing the claimant to remain in the state and receive treatment and money.

OTHER JURISDICTIONS

This view is almost uniformly held in other jurisdictions. And compilation of exemplar cases with their rationale is found in *Madeira v. Affordable Housing*,²⁷ a case in which the court was asked to determine whether a New York law allowing compensatory damages to an illegal alien was pre-empted by IRCA. In determining that the law was not pre-empted, the court also addressed the nature of state workers' compensation laws *vis-à-vis* IRCA:

As the Connecticut Supreme Court has observed with respect to federal immigration law, "excluding [undocumented] workers from the pool of eligible employees would relieve employers from the obligation of obtaining workers' compensation coverage for such employees and thereby contravene the purpose of the Immigration Reform Act by creating a financial incentive for unscrupulous employers to hire undocumented workers." *Dowling v. Slotnik*, 712 A.2d at 404, 244 Conn. at 796. Other state courts have echoed this point. *See, e.g., Farmer Brothers Coffee v. Workers' Comp. Appeals Bd.*, 35 Cal.Rptr.3d 23, 28, 2005 Cal. App. LEXIS 1618, at *10 (noting that if employers were permitted to deny workers' compensation benefits to undocumented workers, "unscrupulous employers would be encouraged to hire aliens unauthorized to work in the United States, by taking the chance that the federal authorities would accept their claims of good faith reliance upon immigration and work authorization documents that appear to be genuine"); *Reinforced Earth Co. v. Workers' Comp. Appeal Bd.*, 749 A.2d 1036, 1039 (Pa. Commw.Ct.2000), 2000 Pa. Commw. LEXIS 200, at *8 (noting that the denial of work-

ers' compensation benefits to injured undocumented employees would provide employers with an incentive to violate federal immigration law by "actively seek[ing] out illegal aliens rather than citizens or legal residents because they will not be forced to insure against or absorb the costs of work-related injuries"). At the same time, state courts express understandable concern that the denial of workers' compensation benefits would seriously undermine the state's significant interest in promoting workplace safety and protecting the public fisc by leading employers of undocumented aliens to think that they can "engage in unsafe practices with no fear of retribution, secure in the knowledge that society would have to bear the cost of caring for these injured workers." *Design Kitchen & Baths v. Lagos*, 882 A.2d 817, 826, 388 Md. 718, 733. These twin concerns hardly suggest that a workers' compensation award stands as a direct and positive obstacle to federal immigration policy.²⁸

MONETARY BENEFITS UNDER THE ACT

Whether an award of benefits under Oklahoma law presents a stumbling block to federal immigration policy requires some understanding of the nature of temporary disability benefits and other benefits in general. The Workers' Compensation Act provides that "[e]very employer subject to the provisions of the Workers' Compensation Act shall pay, or provide as required by the Workers' Compensation Act, compensation according to the schedules of the Workers' Compensation Act for the disability or death of an employee resulting from an accidental personal injury sustained by the employee arising out of and in the course of employment, without regard to fault as a cause of such injury."²⁹ Monetary benefits provided an injured worker under the act include benefits for temporary total disability (TTD), temporary partial disability (TPD), permanent partial disability (PPD) and permanent total disability (PTD).

Temporary Total Disability Benefits

"Temporary total disability for which compensation may be allowed is defined as the healing period or that time following an accidental injury when an employee is totally incapacitated from work due to illness resulting from injury."³⁰ The purpose of TTD benefits is to replace wages lost during an employee's healing period.³¹

The compensation to replace the wages is a blend of two elements. The first element is incapacity or loss of function in the physical or medical sense that is established by medical evidence. The second element of temporary total disability is the inability to earn wages that is normally demonstrated by nonmedical evidence touching upon claimant's employment situation.³²

In *Alvarez*, the employer argued that the undocumented worker was not entitled to TTD asserting IRCA prohibitions. However, once the court determined the worker was an "employee" under the act, and that his physical inability to work was substantiated by medical evidence, the award of benefits was properly affirmed. The employer next argued that TTD should not be payable beyond the date the employee was no longer legally eligible for work, *i.e.*, the date he gave notice he was undocumented and his employment terminated "for cause." The court determined there was medical evidence to substantiate that claimant was unable to work and under the facts presented, the fact that the employment was terminated does not impact the order.

The TTD benefits awarded are unlike the back pay prohibited by the Supreme Court in *Hoffman*. The award of back pay was reversed because it was to be paid for wages that could not have been lawfully earned because of the illegal status of the worker. On the other hand, the effect an injury has on a worker has nothing to do with his citizenship or immigration status. "If his capacity to work has been diminished, that disability will continue whether his future employment is in this country or elsewhere."³³ The rights to benefits are not derived from his immigration status but are incident to his employment during the course of which he suffered an injury.

The *Alvarez* court noted that vocational rehabilitation and medical treatment by a specific physician may not be available to a claimant who cannot remain in the country. However, there are benefits impacted by IRCA when the second element of TTD — that element touching upon claimant's non-medical, employment situation — comes into play.

Light Duty Employment

An injured worker who is medically released to light duty work is not entitled to continued temporary benefits unless the employer does not have light duty available.³⁴ If the inability

to return to the employment is due to circumstances under the employer's control, e.g. no light duty available or no longer available,³⁵ and the employer didn't advise of the availability of work,³⁶ whether the worker is undocumented should not be a factor in the continuance of TTD benefits. However, if light duty is available, the employer is prohibited under IRCA from employing an illegal alien, or continuing to employ the worker after his undocumented status becomes known. An employer might successfully argue it is relieved from paying benefits under the holdings in *Akers v. Seaboard Farms*³⁷ and *Wal-Mart Stores v. Berg*.³⁸

In *Akers*, the employee injured his ankle and was returned to light duty work. After working on light duty, his post-accident drug test results came back positive. The employer fired the claimant for misconduct. The employee requested TTD for the period he was under light duty restrictions on grounds that light duty was not available to him. The court held that an employer is not required to continue paying TTD to a claimant who has been fired for misconduct explaining there is nothing in the law requiring an employer to continue to offer light duty after violated employer's policies.

Similarly, in *Berg*, the claimant was released to light duty and was offered light duty. The claimant was not able to accept the light duty because she did not have child care available during the shift in which light duty was offered. The Court of Appeals held that an employer is not required to continue TTD if the light duty is refused for reasons unrelated to the injury or disability.

Court-ordered payment of TTD for reasons unrelated to the injury or disability also appears violative of IRCA and the teachings of *Hoffman*.

Temporary Partial Disability

In limited circumstances, an employer may be relieved from paying TPD. TPD pertains to that time during the healing period when the injured worker has some capacity to work. TPD compensation is paid at the rate of 70 percent of the *difference* between the employee's average weekly wages and the employee's wage-earning capacity thereafter *in the same employment or otherwise*³⁹ subject to some limitations.⁴⁰ TPD is typically paid to an employee who returns to some duty, while still under doctor's care, but earning less than pre-injury wages.⁴¹ There does not appear to be the requirement that the worker actually return to

employment to receive this benefit. The statute speaks in terms of "capacity," an element capable of being proved by means other than actual employment with his pre-injury employer.⁴² While returning to his pre-injury employer, if his status as an alien were known, would be prohibited by IRCA, he could find employment in other employment. Other employment is specifically permitted under the act, and IRCA does not make it a penalty for an alien to work without proper documentation.

Permanent Disability

IRCA purposes are not thwarted by the award of either permanent partial disability or permanent total disability benefits. PPD is synonymous with permanent partial impairment under the act. PPD or PPI is defined as "any anatomical or functional abnormality or loss after reasonable medical treatment has been achieved, which abnormality or loss the physician considers to be capable for being evaluated..."⁴³ In short, permanent partial disability, as distinguished from other payout classes, contemplates recompense for lost physical fitness, though the amount paid the worker must be measured by a percentage of wages he (or she) would have earned *but for* the covered injury.⁴⁴ In the case of PPD, "the worker may be able to work, but the award recognizes a diminishment of bodily function and attendant effect on wage-earning capacity."⁴⁵

PTD under the act means "incapacity because of accidental injury or occupational disease to earn any wages in any employment for which the employee may become physically suited and reasonable fitted by education, training or experience, including vocational rehabilitation; loss of both hands, or both feet, or both legs, or both eyes."⁴⁶ The analysis for PTD benefits is similar to that for TTD. While the employee is totally unable to work, either in the U.S. or elsewhere, an award of benefits would not violate the policy of federal immigration laws.

CONCLUSION

Most monetary benefits available under the Oklahoma Workers' Compensation Act promote the intended purpose of the act by providing support for workers during their disability — without regard to citizenship status. Not only is the purpose accomplished without violating the federal government's goal to eliminate illegal employment, it is instrumental in the fight as well.

1. Oklahoma Workers' Compensation Act located at 85 O.S. 1, *et seq.*
2. 8 U.S.C. §1324a *et seq.*
3. 8 U.S.C. §1324a[1][a].

Under 8 U.S.C. §1324a[h][3] "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the attorney general.

4. 8 U.S.C. §1324a[b].
5. 8 U.S.C. §1324a[b][1][B], [C].
6. 8 U.S.C. §1324a [a][1].
7. 8 U.S.C. §1324a [a][1], [2]; [f][1].
8. 8 U.S.C. §1324a[h][2].
9. 8 U.S.C. §1324(c).
10. *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 122 S.Ct. 1275, 152 L.Ed. 2d 271 (2002).
11. *Id.*, 535 U.S. at 148.
12. *Id.*, 535 U.S. at 151-152.
13. *Hines v. Davidowitz*, 312 U.S. 52, 61 S. Ct. 399, 85 L.Ed. 581 (1941).
14. *DeCanas v. Bica*, 242 U.S. 351, 96 S. Ct. 933, 47 L.Ed 2d 43 (1976).
15. 1989 OK 121, ¶5, 784 P.2d 47.
16. 8 U.S.C. §1342a(h)(2).
17. *Balbuena v. IDR Realty LLC*, 6 N.Y. 3d 338, 812 N.Y. S. 2d 416, 845 N.E. 1246, 1256 (2006) (citations omitted).
18. *Crocker v. Crocker*, 1991 OK 130, 824 P.2d 1117.
19. *See, Todd, supra*, 1989 OK 121, 784 P.2d 47.
20. *See, Peabody Gallion v. A.V. Dollar*, 666 F.2d 1309 (10th Cir. 1981).
21. *DeCanas, supra*, at 356.
22. *Cherokee Industries Inc. v. Alvarez*, 2004 OK CIV APP 15, 84 P.3d 798.
23. *Lang v. Landeros*, 1996 O CIV APP 4, 918 P.2d 404.
24. *Id.*, ¶5 (citations omitted).
25. *Cherokee Industries, supra*, ¶4.
26. *Id.*, ¶8.
27. *Madeira v. Affordable Housing*, 469 F. 3d 219 (2nd Cir. 2006).
28. *Id.*, 245-246.
29. 85 O.S. §11(A).
30. *Yeatman v. Northern Oklahoma resource Center of Enid*, 2004 OK 24, ¶20, 89 P.3d 1095.
31. *B.E.&K Construction v. Abbot*, 2002 OK 75, 59 P.3d 38.
32. *See, Gray v. Natkin Contracting*, 2001 OK 73, 44 P.2d 547; *American Airlines v. Hervey*, 2001 OK 74, 33 P.3d 47.
33. *Majlinger v. Cassino Contr. Corp.*, 2005 NY Slip Op 06785 (NY 9/19/2005), 2005 NY Slip Op 6785 (NY, 2005).
34. *Hinton v. Labor Source*, 1998 OK CIV APP 2, 953 P.2d 358, *B.E.&K. Construction v. Abbot*, 2002 OK 75, 59 P.3d 38.
35. *B.E.&K Construction, supra*.
36. *Hinton, supra*.

37. *Akers v. Seaboard Farms*, 1998 OK CIV APP 169, 972 P.2d 885. The court in *Alvarez* indicated in its notes to their opinion that they were not addressing whether an employee on light duty could be terminated because it was discovered he was an unauthorized alien. n. 6.

38. *Wal-Mart Stores v. Berg*, 2004 OK CIV APP 89, 99 P. 3d 1205.

39. 85 O.S. §22(4)b.

40. 85 O.S. §22(6) provides that the compensation received, as provided for temporary partial disability, shall not, when added to the wages received by such employee after such injury, amount to a greater sum than eighty percent (80%) of the average weekly wages of the employee received prior to said injury.

41. For example: An employee earns \$400.00 a week before his injury and \$100.00 a week after his injury. His benefit would be 70% of the difference of pre- and post-injury earnings or \$210.00. However, that benefit when added to post-injury wages cannot exceed 80% of pre-injury earnings. Under these facts, the TPD benefit (\$210.000 + post-injury wages (\$100.00) cannot exceed 80% of injury earnings (\$320.00). \$210 + \$100 = \$310.00

42. *See, Champion Auto Body v. Industrial Claim Appeals Office of State of Colo.* 950 P.2d 671 (Colo. App. 1997) The claimant entered into a contract of employment subsequent to being terminated from previous employment and relied on those earnings to prove TPD. The court noted that since IRCA does not prohibit an illegal alien from entering into an employment contract, the claimant is not under a legal disability from finding employment.

43. 85 O.S. 3(19).

44. *Farm Fresh Inc v. Bucek*, 1995 OK 44, 895 P.2d 719.

45. *Roberts v. Matrix Services Inc.*, 1993 OK 148, 863 P.2d 1242.

46. 85 O.S. 3(20) *Todd v. Frank's Tong Service Inc.*, 1989 OK 121 ¶5, 784 P.2d 47.

ABOUT THE AUTHOR



Pam Cornett is a sole practitioner in Tulsa practicing primarily in the area of workers' compensation. She graduated with a bachelor of arts from Oklahoma State University and earned her J.D. at the University of Oklahoma in 1981.



For the latest OBA news,
follow us @OklahomaBar
and @OBACLE



Medicare Considerations for the Workers' Compensation Practitioner

By Valerie J. Evans

The workers' compensation carrier joint petitioned Carl I. Amhurt's worker's compensation case for \$35,000. Carl I. Amhurt is 70 years old and a Medicare beneficiary, but the carrier failed to report his claim to see if Medicare paid any of the medical expenses. Six months later, Medicare realizes it has paid for medical treatment to Carl I. Amhurt related to his workers' compensation claim. Who's in trouble? The carrier will be fined \$1,000 per day and Mr. I. Amhurt and his counsel may be liable to reimburse Medicare for all past expenses and future medical care up to the amount of the settlement. All parties to a workers' compensation claim will suffer negative ramifications and such is why practitioners, both respondent and claimant, must be acutely aware of the consequences of having Medicare in the mix of a settlement.

Since the passage of the Medicare Secondary Payer Act of 1980 (MSPA), the workers' compensation practitioner should be well aware of the federal government's intent to ensure the Social Security System does not pay for medical care that should be paid through the workers' compensation system.¹ The act was created to prevent Medicare from paying medical expenses that private insurers should pay. Through various amendments, the federal government has enacted provisions designed to effectuate that purpose.

Under the MSPA and its amendments, it is clear that Medicare is *always* a secondary payer whenever a primary insurance plan (including self-insurance) is available.² With the enactment of the Medicare Prescription Drug, Improvement and Modernization Act of 2003 (MMA),

the federal government essentially made agents of attorneys to carry out its intent to ensure primary plans including self insurance are available. This act empowered Medicare to seek reimbursement from virtually any party who received a primary payment, including Medicare beneficiaries, attorneys, physicians and medical providers, state agencies or private insurers, and any primary insurance plan (even if the primary plan already paid the Medicare beneficiary or other party).³

Under the MMA, claimant attorneys are charged with counseling their clients on the impact Medicare has on a client-beneficiary's settlement. Failure to properly consider any future medical expenses a claimant incurs once a claim has been settled puts the attorney in a position of having Medicare not only going after

the client for reimbursement, but after the attorney as well. Moreover, if Medicare must initiate legal action due to a claimant and or his attorney's failure to consider the future benefits paid by Medicare as the result of injuries sustained from a settled workers' compensation claim, Medicare is entitled to recover double damages plus interest.⁴ The practitioner avoids the threat of penalty by adequately considering Medicare's interests.⁵

Prior to the passage of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA), Medicare considerations were primarily a claimant attorney's concern. With the passage of the MMSEA, respondent attorneys have a duty to ensure their clients, workers' compensation insurers and own-risk employers know what is required under the MMSEA. Section 111 of the act identifies workers' compensation carriers and own-risk employers as "Responsible Reporting Entities" or RREs.⁶

Now, the claims handler must report detailed information regarding a claim directly to Medicare each time a settlement, judgment, award or other payment is made to a claimant who is entitled to receive Medicare benefits. The consequences of failing to report this information will result in a civil penalty of \$1,000 per claim, per day.⁷

At one time it appeared as if the Centers for Medicaid and Medicare Services (CMS) would require RREs to be prepared to report in excess of 100 data field identifiers. But at present, it appears that the only information to be reported is the identity of a Medicare beneficiary whose illness, injury, incident or accident was at issue — as well as such other information specified by the secretary of Health and Human Services to enable an appropriate determination concerning coordination of benefits including any applicable recovery claim and data elements which the secretary also determines.

Hopefully, all insurers and own-risk employers should be aware of this requirement by now. The reporting system is paperless and all information will be handled electronically. As of May 1, 2009, through Sept. 30, 2009, all RREs were to have registered with the Coordinator of Benefits Secure Web site. Each RRE will be assigned a designated representative to assist them through the implementation process. The testing of the electronic data exchange was scheduled to commence Jan. 1, 2010. Initially RREs were to have begun actual reporting on

“Of course, prior to settlement, both parties will want to know what conditional payments have been made.”

Oct. 1, 2009, but that deadline was pushed back to July 1, 2010.⁸

An advantage to the mandatory reporting requirements of Section 111 may be that a claim requiring a Medicare Set-Aside Agreement (MSA) upon settlement will be identified early. The desirable outcome is the delay that often arises from having to wait for CMS review will be minimized.

Respondent attorneys can help with the process of identifying Medicare beneficiaries through the litigation process. It is prudent to ask the claimant during the discovery process whether the claimant is a Medicare beneficiary or if the claimant intends to apply for Social Security benefits. This is especially important if the claim is evaluated at or near \$25,000 before final adjudication or settlement.

The duty to determine whether a claimant is entitled to Medicare benefits rests solely with the RRE. Whether a claim should be reported to CMS is not dependent on whether the claimant is an actual Medicare beneficiary. If respondent attorneys identify actual beneficiaries and those who likely will become beneficiaries, it would help the RRE determine whether a claim should be reported to CMS. If the RRE fails to identify a Medicare beneficiary, the RRE will be subject to a \$1,000 per day, per claim penalty.

To identify which claimants are Medicare beneficiaries or potential beneficiaries, the respondent attorney should ask the appropriate questions during the deposition that will identify or rule out which claimant is more likely than not to be eligible for benefits. Written interrogatories or a portion of the claimant's deposition should be devoted to ascertaining whether any of the criteria for eligibility for Social Security benefits apply to the claimant.

Because the obligation to report is a continuing one, and a claimant's status can change

during the course of litigation, it is wise for the respondent attorney to inquire as to the claimant's eligibility to receive benefits every time claimant is on the record; *i.e.* deposition, court proceedings and joint petition records.

Once the RRE reports the claim to CMS, the MSP Recovery Contractor (MSPRC) will issue a Medicare Secondary Payer Rights and Responsibilities letter. Before Oct. 1, 2009, the Coordinator of Benefits Contractor (COBC) issued a right to recovery letter. Upon receipt of the rights and responsibility letter, claimant's counsel will need to send proof of representation to the MSPRC by mail or fax.

Of course, prior to settlement, both parties will want to know what conditional payments have been made. Conditional payments are those payments made by Medicare for services for which another payer is responsible.⁹ Generally these payments are made during the period of time the respondent denies the claim and the Workers' Compensation Court have yet to determine whether the claim is compensable.

A Workers' Compensation Set-Aside Arrangement (WCMSA) is the recommended method to protect Medicare's interests.¹⁰ A WCMSA is an allocation of funds from a workers' compensation-related settlement, judgment or award that is used to pay for an individual's future medical and/or future prescription drug treatment expenses related to a workers' compensation injury, illness or disease that would otherwise be reimbursable by Medicare.

The amount set aside is determined on a case-by-case basis and should be reviewed by CMS when appropriate. Once the CMS determines set-aside amount is exhausted and accurately accounted for, CMS will agree to pay primary for future Medicare covered expenses related to the workers' compensation injury.¹¹

Although it should go without saying, the claimant attorney cannot take a proposed MSA at face value. The claimant attorney must ensure that the MSA proposal accurately reflects:

- 1) claimant's life expectancy
- 2) claimant's future medical needs
- 3) anticipated prescription costs

The MMSEA is another mechanism by which the federal government seeks to ensure its rights are protected. It is a reminder to the workers' compensation practitioners that their duty is to adequately consider Medicare's interests by proactively advising clients of Medicare's impact on their claim and protecting the client from the harm that would result if they fail to do so.

1. 42 U.S.C. §1395y.
2. 42 C.F.R. §411.20.
3. 42 U.S.C. §1395y(b)(2)(b)(iii).
4. 42 U.S.C. §411.24.
5. 42 U.S.C. §1395y(b).
6. See CMS July 31, 2009, *Alert for Liability (Including Self-Insurance), No Fault-Insurance and Workers' Compensation, Draft Language for Public Comment*.
7. 42 U.S.C. §1395y(b)(8)(E).
8. CMS May 12, 2009, *Revised Implementation Timeline*.
9. 42 C.F.R. §411.21.
10. www.cms.hhs.gov/WorkersCompAgencyServices/04_wcsetaside.asp#TopOfPage.
11. *Id.*

ABOUT THE AUTHOR



Valerie Evans' practice focuses primarily in the area of workers' compensation. She is currently of counsel with Solomon Simmons Sharrock & Associates PLLC and with the Whitten Law Firm. She is a member of the Workers' Compensation Sections of both the Oklahoma Bar Association and the Tulsa County Bar Association in addition to the Northeast Black Lawyers Association.



Oklahoma Bar Circle at www.okbar.org

Look on the right side of the page next to the Fastcase login. Enter your ID and PIN #. Don't know it? That's okay, just click on the Forgot your PIN? link and one will be provided to you shortly. One shorthand way of thinking of Oklahoma Bar Circle is that it is like Facebook for Oklahoma lawyers, but access is allowed only to other Oklahoma lawyers. Think of Oklahoma Bar Circle as an online pictorial directory. This social networking tool can be used to mentor, market yourself, network with other attorneys or find old classmates from law school and reconnect.

www.oklahomafindalawyer.com

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

www.okbar.org/oknewsbar.htm

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

my.okbar.org

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

www.okbar.org

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

www.oba-net.org

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

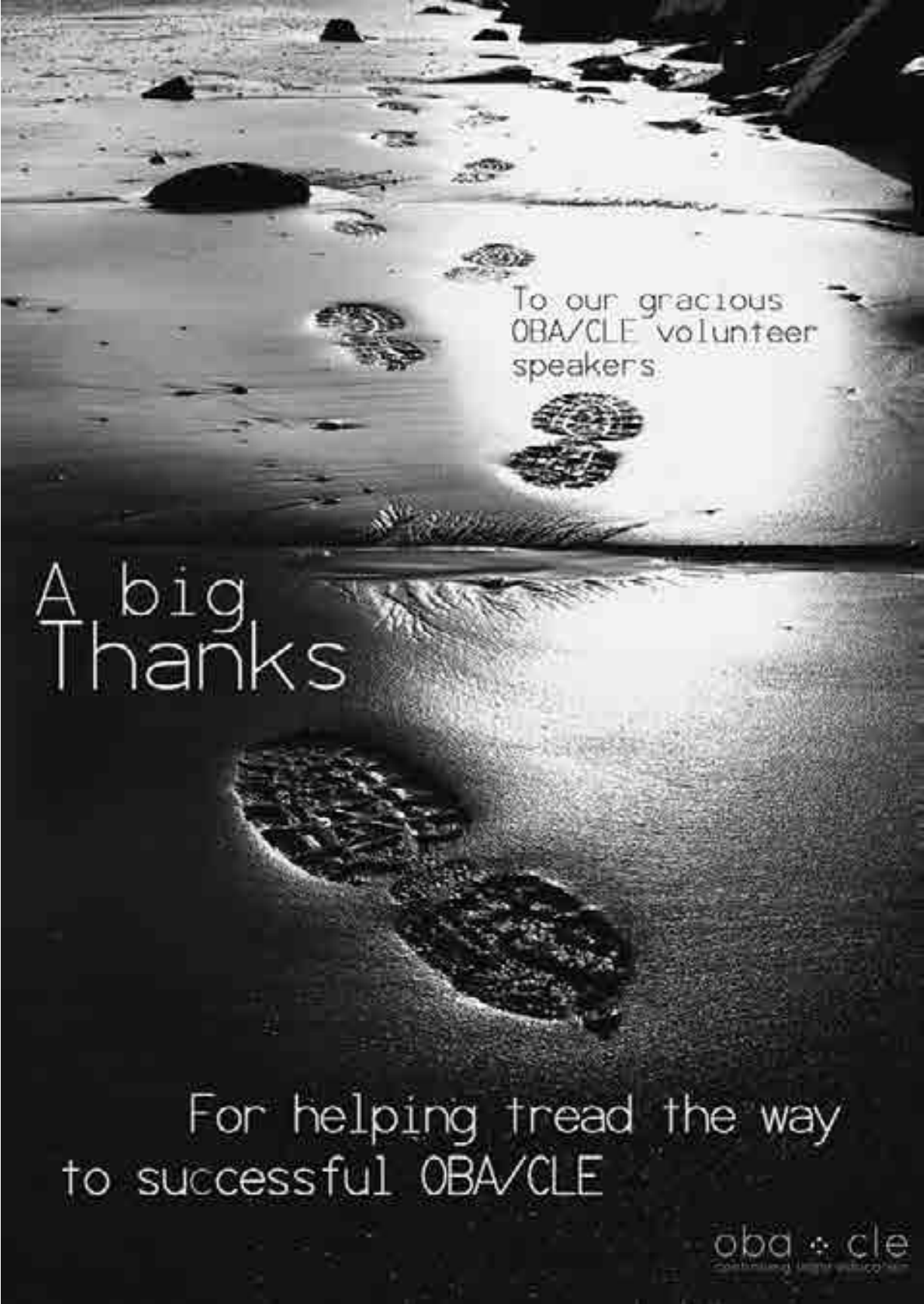
Fastcase at www.okbar.org

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

www.twitter.com/oklahomabar www.twitter.com/obacle

Catch the most up-to-date happenings at and around the OBA including bar events and CLE's. You don't even have to register. You can simply read all of our tweets by going to twitter.com/oklahomabar or twitter.com/obacle.

For all other member benefits and resources: Visit www.okbar.org/members/benefits.htm



To our gracious
OBA/CLE volunteer
speakers

A big
Thanks

For helping tread the way
to successful OBA/CLE

oba • cle
continued education



Pain Management for Work-Related Injuries

The Crisis in Continuing Maintenance Medical

By Bob Burke

Continuing medical care for injured workers in Oklahoma long after the workers' compensation case is adjudicated has dramatically increased in the last decade — causing a spike in costs for employers and insurance carriers and a crisis for pain management doctors and injured workers — which has in turn led this issue to the forefront of workers' compensation reform.

Employers are required by statute to provide medical care for injured workers. 85 O.S. 14(A)(1) provides:

The employer shall promptly provide for an injured employee such medical, surgical or other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus as may be necessary after the injury.¹

After an award for permanent disability, the right to receive further medical care, commonly called continuing maintenance medical (CMM), is limited to medical treatment which does not change or improve the claimant's physical condition but merely constitutes day-to-day maintenance of the worker's permanent condition.²

The employer has a continuing duty to furnish medical treatment for as long as it is needed, if the judge includes a provision for CMM in the permanent partial disability order.³ CMM continues until the Workers' Compensation Court finds it is no longer needed.⁴

The Oklahoma Workers' Compensation Schedule of Hospital and Medical Fees (fee schedule) and guidelines promulgated by the Physician Advisory Committee have helped

control the cost of medical care in the early stages of a workers' compensation claim while an injured worker is receiving active medical treatment, including surgery.

PAIN MANAGEMENT INCREASES

Before 2000, it was rare to have CMM in the form of pain management awarded in work-related injuries beyond six months following surgery. In a simple back surgery case, the claimant was often prescribed only a pain killer and muscle relaxer for six months. CMM beyond that time period was reserved for the most severe cases such as failed surgeries, amputations and debilitating occupational diseases.

Now, CMM is awarded in the majority of cases, including nonsurgical cases. In a recent case that was ordered to mediation by the Workers' Compensation Court, the judge had awarded \$12,000 for permanent partial disability and CMM for an injured worker with a back injury not deemed serious enough for surgery. The insurance company then paid \$300,000 for pain management during the next six years — \$50,000 annually for group therapy sessions, doctor's visits and nine daily medications, including narcotics. Not only had the intensive pain management cost the insurance company 25 times the

permanent disability award, it is a tragedy for the lady who was injured. On the day of the mediation, she hardly knew what day of the week it was. In her 40s, she is now on Social Security disability, largely due to the addictive narcotics she takes.

CMM is now costing employers or insurance companies more than the court award for permanent disability in a surprising number of cases. It is never ending. Just a few years ago, one would expect pain management to taper off quickly after a permanent disability trial. Now there are cases in which narcotics are being prescribed three or four years after successful surgeries. It is not uncommon to see cases in which a claimant is taking five or six different types of prescription medicine daily several years after reaching maximum medical improvement and being released by a surgeon.

A PROBLEM FOR SETTLEMENT

The common awarding of CMM is hindering settlements of workers' compensation cases in two ways. If CMM has been awarded, the cost of a joint petition settlement rises to a level that many insurance companies are unwilling to pay. It is a common occurrence that half the settlement value of a claim is based upon the carrier's exposure for longtime CMM.

The second hurdle that CMM places in the road to settlement concerns Medicare Set Asides (MSA). If a judge has awarded CMM, or if the carrier has been paying for CMM for months after surgery and the claimant is eligible for Medicare, the federal government must approve any final settlement more than \$25,000, and in all instances, must consider if the settlement will shift the burden of medical care onto the Medicare system. The lengthy delay in getting an MSA approved and the often high cost of the MSA are strong deterrents to settlement.

A SOCIETAL PHENOMENON

Injured workers are not the only Oklahomans affected by the recent increase in the use of prescription pain medication. Drug manufacturers report that shipments of prescription pain medicines to Oklahoma pharmacies and hospitals more than doubled over a four-year period ending in 2006 — enough in one year to give every state resident about 60 pain pills.⁵

A report released by the U.S. Drug Enforcement Administration shows both Tulsa and Oklahoma counties ranked in the top 15 areas

of highest prescription pain pill misuse. The report, cited by *The Oklahoman* in a feature article, reveals Oklahoma is the only state in the nation with two counties in the top 15. From 2002 to 2006, the National Survey on Drug Use and Health said more Oklahomans used painkillers for nonmedical purposes than nearly any other state. Only areas in West Virginia and Utah ranked higher.⁶

The Oklahoman further reported that Oklahoma's Prescription Monitoring Program shows nearly a 40 percent increase in prescribed doses of hydrocodone, commonly sold under the brand names Lortab and Vicodin, from the years 2007 to 2009. Officials cannot explain the dramatic increase.⁷

“...the federal government... must consider if the settlement will shift the burden of medical care onto the Medicare system.”

COURT MOVES TO RESTRAIN

The Oklahoma workers' compensation system is attempting to limit CMM as it relates to pain management. Judges are reviewing cases more closely to determine if surgeons or other treating doctors recommend CMM, especially narcotic pain medicine. Judges also have begun inserting special language in permanent disability orders that allows quicker and more frequent reviews of the need for pain management. It is anticipated that judges will be quicker to appoint an independent medical examiner (IME) when there is a dispute over the need for CMM or there is perceived over-prescribing of narcotics.

One of the tools available to Workers' Compensation Court judges is the Guidelines for Prescription of Opioid Medications for Acute and Chronic Pain (Pain Management Guidelines) developed and adopted by the Physician Advisory Committee (PAC) and the administrator of the Workers' Compensation Court.⁸

The PAC is composed of nine physicians — three appointed by the governor, three appoint-

ed by the president pro tempore of the state Senate, and three appointed by the speaker of the Oklahoma House of Representatives.

The Pain Management Guidelines acknowledge the problem that often arises:

The long-term use of prescription opioid medications for chronic pain may be a factor in the development of long-term disability and therefore must be monitored carefully to avoid this problem. This condition may be preventable if at-risk patients and practices are proactively identified and managed appropriately.⁹

A COMPLEX PROBLEM

Recognizing that CMM in the form of pain management is a complex area, the Pain Management Guidelines attempt to distinguish between acute and chronic pain in recommending reasonable and necessary treatment.

The guidelines limit treatment of acute pain for traumatic injuries to three weeks and the prescribing of schedule III and IV drugs to eight weeks.¹⁰ Pain-management doctors are encouraged to know their patients well in order to spot alcohol or substance abuse, mood or psychotic disorders that might be contraindicated to prescribing narcotics.

There is special care given in the guidelines to the use of opioid medications for chronic pain. The goal of opioid medications in chronic pain should focus on improvement of function and activity level.¹¹ Beyond two to four months of opioid use, a special in-depth assessment is required. Included are instructions to the physician to obtain relevant laboratory studies and urine drug screens, a psychosocial evaluation, and assess the likelihood the patient can be weaned from opioids in the event there is no improvement in pain and function.¹²

Strict limitations have been placed on pain-management physicians. Doctors and their patients must sign a treatment agreement that outlines the risks and benefits of opioid use, the conditions under which opioids will be prescribed and patient responsibilities. There can be only a single prescribing physician, a single pharmacy must be used to fill the prescriptions whenever possible, the lowest possible effective dose must be used, and the appearance of misuse or nonuse of medications must be actively looked for.¹³

For the first time, the guidelines set specific parameters for prescribing opioids beyond six months. Doctors should discontinue opioids if there has been no overall improvement in function.¹⁴

REFORM OPTIONS

Because of the increases in cost of medical treatment in workers' compensation cases in Oklahoma, several possible solutions likely will be discussed in the next few years. Some will suggest limiting CMM to one year. Others will recommend using an independent medical examiner in every case to determine the need for CMM. Another proposal is to allow the Workers' Compensation Court to hire a medical director to administratively control CMM and take that decision away from judges and lawyers.

There is a real crisis in CMM in Oklahoma and how to control it will be at the forefront of future discussions of workers' compensation reform in Oklahoma.

1. 85 O.S. 14(A)(1).

2. *Bill Hodges Truck Co. v. Gillum*, 1989 OK 86, 774 P.2d 1063.

3. *Pitchford v. Jim Powell Dozer Inc.*, 2000 OK 12, 996 P.2d 935.

4. *Baxter v. Montgomery Exterminating*, 1998 OK CIV APP 75, 962 P.2d 666.

5. *The Oklahoman*, Sept. 20, 2009; 2009 Annual Report, U.S. Drug Enforcement Administration.

6. *Ibid.*

7. *Ibid.*

8. "Guidelines for Prescription of Opioid Medications for Acute and Chronic Pain," adopted by the administrator of the Oklahoma Workers' Compensation Court, effective April 1, 2007, revised effective Nov. 1, 2007.

9. *Ibid.*, p. 1, Introduction.

10. *Ibid.*, III (A).

11. *Ibid.*, IV, Introduction.

12. *Ibid.*, IV (A).

13. *Ibid.*, IV (C).

14. *Ibid.*, IV (G).

ABOUT THE AUTHOR



Bob Burke has represented injured workers before the Oklahoma Workers' Compensation Court since 1980. With a journalism degree from the University of Oklahoma and a law degree from Oklahoma City University, he has served on the Advisory Council on Workers' Compensation and the Fallin Commission on Workers' Compensation Reform. Since he was Oklahoma secretary of commerce in 1977, he has frequently helped rewrite workers' compensation laws and has served as mediator in more than 1,500 work-related cases.



**Has your insurance company
paid you money?**

It has if you're insured with OAMIC!

17.75% DIVIDEND FOR 2009

More than \$21.8 million in policy dividends over the past 16 years has greatly reduced net professional liability insurance costs for policyholders.

It Pays To Be An OAMIC Insured!

www.oamic.com

(405) 471-5380

(405) 471-5381 FAX



Assistant Director of Professional Development COLLEGE OF LAW



The University of Tulsa College of Law seeks an Assistant Director of Professional Development, who will be responsible for supporting the Assistant Dean in all endeavors of the Professional Development Office, including: marketing law students and graduates in a broad spectrum of professional opportunities; planning and implementing educational programs; planning, promoting and assisting students with career and networking strategies; assisting in the on-campus and off-campus interviewing programs; assisting with compilation of statistical data as requested; community outreach; and providing excellent customer service to TU Law students and alumni. The Assistant Director also supervises all coordination of Public Interest opportunities for students. For more information regarding this position, please visit our website at www.utulsa.edu/personnel/jobs.

Please submit a cover letter, resume and the names, addresses and phone numbers of three references to: The University of Tulsa, Office of Human Resources, 800 S. Tucker Drive, Tulsa, OK 74104 or email to tujobs@utulsa.edu **or** fax to (918) 631-3543. The review of applications will commence immediately and will continue until the position is filled.

Estate Planning, Probate and Trust Section

Price v. Commissioner

Tax Court's Drafting Tips for Transfers of Partnerships or LLC Interests

By Jon H. Trudgeon

In recent years, a popular device used by estate planners and business planners has been the establishment of Limited Partnerships (LP) or Limited Liability Companies (LLC) to hold interests in business and/or investment properties. This device is often coupled with intergenerational gifts of ownership interests in the LP or LLC. Such transfers are touted as attractive planning tools because of the ease of transferring fractional interests, the centralized management and control that can be built into the LP or LLC entity, availability of substantial discounts in the valuation of the transferred and retained interests due to lack of marketability and minority interests, and more.

We have also seen a significant number of challenges to claimed benefits from these transactions, including reduced transfer taxes, both gift taxes and estate taxes. The taxpayers have certainly won or, at least, been pleased with the results of many of these challenges in decisions of the tax court, federal district court and appellate courts – sometimes even though the facts presented were not ideal. But, the IRS has also recorded some wins and made its points.

Some cases deal with pure issues of the valuation of assets – some address more technical issues asserting retained interests by a donor, continued controls and enjoyment of the property after a purported gift. Some have raised the issue of whether the transfer was a completed gift. A few have raised the question as to whether the gift of the interest qualified for the annual gift tax exclusion.

The recent tax court decision in *Price v. C.*, T. C. Memo. 2010-2, (Jan. 2, 2010) is in this latter

category. In this decision, the tax court reminds us that the governance provisions of operating agreements and transfer restrictions can have unintended effects on how a transaction fits into the transfer tax regime. In drafting these agreements, planners must consider the wishes of their clients regarding control of the property and how those provisions will be seen as demonstrating a retained interest under IRC Section 2036 or a gift of something other than a present interest so that the gift incurs unintended gift taxes. The planner and his taxpayer client may have to make hard choices as to what tax benefit is most important and what potential benefit can be left on the table. The planner must face these questions on provisions throughout the governing documents of the entity whose ownership interests are being transferred.

In *Price*, Mr. and Mrs. Price made gifts of fractional interests in the partnership each year after it was formed until they had given their children all of the limited partnership interests. Their gift tax returns reported no tax due as a result of the Prices' annual gift tax exclusion and available lifetime gift tax exempt amount. The IRS accepted the taxpayer's valuation of the transferred interests, even though the appraisal claimed substantial discounts. The IRS issued its deficiency on the portion of that value which the taxpayers claimed was exempt from gift tax because of the donor's annual gift tax exclusion.

The tax court found that the gifts to the three children did not constitute present interest gifts that would qualify for the annual gift tax exclusion. The court pointed out that the donees

had no ability to withdraw their capital accounts and drew attention to Section 11.1 of the agreement that says, “no partner shall sell, assign, transfer, encumber or otherwise dispose of any interest in the partnership without the written consent of the partners;...” Section 11.2 of the agreement says, “Any assignment made to anyone, not already a partner, shall be effective only to give the assignee the right to receive the share of profits to which his assignor would otherwise be entitled, ...and shall not give the assignee the right to become a substituted limited partner.” The court found this analogous to the circumstances in *Hackl v. C.*, 118 T.C. at 297, where transfers subject to the contingency of approval “cannot support a present interest characterization, and ...can hardly be seen as a sufficient source of substantial economic benefit.” The court pointed out that when the initial gift was made, the Price children were not members of the partnership and, therefore, never became substitute partners.

The court also cited several other provisions of the partnership agreement, similar in term and effect to provisions common to many partnership and LLC operating agreements – providing other partners a purchase option regarding the gifted interests and making distributions subject to the discretion of the general partner and secondary to the partnership’s non-tax business purpose of “achieving a reasonable, compounded rate of return, on a long term basis.” Although the donees, in fact, received substantial distributions from the partnership, the partnership agreement provided no obligation to make those distributions and no opportunity for the donees to enforce their interest in receiving annual distributions. The IRS asserted and the court found that the donees did not have the right of possession and enjoyment of the property transferred or the income from the property necessary to qualify for the annual gift tax exclusion.

In *Price*, the tax court analyzed a whole series of provisions in the partnership agreement that were common and frequently used provisions (some even included to address other potential challenges from the IRS) and found that they supported the court’s finding that the gifts did not constitute a present interest and did not qualify for the annual gift tax exclusion.

Planners should make themselves familiar with the facts, reasoning and holdings of the tax court in *Price*. Then they should review the provisions of partnership and operating agreements to be sure that they address the issues and preserve the intended tax results upon the creation of the entity and upon the transfer of interests by gift or upon the death of the owner. This may lead to different drafting decisions for some provisions. Clients should be advised of the potential adverse effect of provisions in the agreement as well as the effect of helping to preserve other, more significant, rights and benefits. Where possible, draftsmen should find the course that does not result in losing one benefit to preserve another.

There are available to planners a number of other, more detailed, commentaries on *Price*, *Hackl* and other cases cited therein or addressing other issues mentioned herein – both in commercial research sources and the public domain. The publicly available sources include www.ACTEC.org, the site sponsored by the American College of Trust and Estate Counsel. Commentaries on the public portion of the ACTEC site will lead persons interested in the topics to other available resources.

Estate Planning, Probate and Trust Section members are encouraged to submit short articles for publication consideration. Guidelines can be found at www.okbar.org/obj/notes.htm.

ABOUT THE AUTHOR



Jon Trudgeon is a member of Hartzog Conger Cason & Neville Law Firm. He has served on the Oklahoma Bar Association Board of Governors; as Oklahoma Bar Foundation president; Oklahoma Fellows of the American Bar Foundation, state chair; Oklahoma County Bar Foundation Trustee; Oklahoma County Bar Association treasurer and vice president; and president of the Oklahoma City Estate Planning Council. As a Fellow of the American College of Trust and Estate Council, he currently serves on the Charitable Planning Committee and as the state chair for Oklahoma.

Estate Planning, Probate and Trust Section

Charging Order Protection for a Single Member LLC May Still Be Illusory

By Steven P. Cole

On Nov. 30, 2009, in *Arrington v. Kruger*,¹ the Oklahoma Court of Civil Appeals issued an opinion which, on its face, vigorously supports the use of single member limited liability companies (LLCs) for asset protection due to Oklahoma's restrictive charging order statute.² The *Arrington* opinion is so clear and debtor friendly, it will be exceedingly tempting to take and apply the court's analysis out of context. Estate planning counsel should exercise caution, however, before embracing *Arrington* as the answer to asset protection.³

The *Arrington* case arose out of a state receivership proceeding.⁴ Kent Arrington, as trustee of the Paceco Financial Services Inc. Trust, had obtained a trial court judgment against Paul A. Kruger for \$2.2 million. In his pursuit to collect the judgment against Kruger, Arrington obtained a charging order against Kruger's 100 percent interest in four Oklahoma LLCs. The charging order against the LLCs did not yield a recovery, so Arrington sought the imposition of a receivership over the LLCs, asking to "step into Kruger's shoes" and take title to the LLCs. The trial court granted Arrington's request, appointing a receiver to take control and operate the LLCs. Kruger appealed, resulting in the debtor friendly opinion.

The *Arrington* court, relying on well-established rules of statutory construction, found that Oklahoma's charging order statute, 18 O.S. Supp. 2008 §2034, was absolute and clear. According to the court, Section 2034 limits the "sole and exclusive" remedy of an LLC mem-

ber's judgment creditor to a charging order; therefore, the trial court erred in appointing a receiver over the four single member LLCs.

In reaching its decision, the court distinguished *In re Albright*⁵ in which a federal bankruptcy court held that a debtor's entire membership interest in a wholly owned LLC passed to the bankruptcy estate, causing the trustee to become a "substituted member," and allowing the trustee to take over management of the LLC. According to the *Arrington* court, *Albright*⁶ relied on a Colorado charging order statute⁶ which did not specify that a charging order was the "sole and exclusive" remedy of a member's judgment creditor. Because Oklahoma's charging order statute, Section 2034, differed from Colorado's, the court in *Arrington* reasoned that *Albright* did not apply.

While the court's analysis of *Albright* may be correct in the context of an Oklahoma receivership proceeding, any implication that *Albright* would have been decided differently had Oklahoma law applied instead of Colorado law is questionable at best. The difference between a state receivership proceeding and a federal bankruptcy proceeding is material, posing an uncomfortable reality for estate planning counsel.

In the federal bankruptcy case of *Movitz v. Fiesta Investments LLC*,⁷ referred to as "*In re Ehmann*," the bankruptcy trustee claimed he had acquired the status of a substitute LLC member by virtue of the debtor's bankruptcy filing. Despite an Arizona charging order stat-

ute which specifically limited a creditor's remedy to a charging order, the *Ehmann* court held that the trustee had all of the rights and powers regarding the LLC that the debtor held at the commencement of the case. According to the court, the LLC operating agreement was not executory within the meaning of Bankruptcy Code Section 365(e)(2),⁸ therefore the LLC member had no binding unfulfilled obligation to the LLC, Bankruptcy Code Section 541(c)(1)⁹ controlled, and the trustee stepped into the shoes of the debtor LLC member.

The *Ehmann* case was cited approvingly in *In re Baldwin*,¹⁰ an unpublished decision of the United States Bankruptcy Appellate Panel of the 10th Circuit.¹¹ In *Baldwin*, parents created a limited partnership with their daughter owning a 99 percent limited partnership interest. Upon the filing of a Chapter 7 bankruptcy petition, the bankruptcy court declared the daughter's limited partnership interest to be property of the bankruptcy estate. According to the 10th Circuit, although state law determines the nature of the debtor's partnership interest, federal law determines the extent to which that partnership interest becomes a part of the estate. Consequently, the trustee in *Baldwin* successfully stepped into the shoes of the debtor with respect to the partnership interest.

Arrington may be correctly decided in the context of an Oklahoma receivership proceeding. To distinguish *Arrington* from *Albright* on the basis of state law, however, is half the story. *Arrington* is an Oklahoma receivership case, while *Albright* is a federal bankruptcy case. There are other cases, including *Ehmann* and *Baldwin* which suggest that a trustee in bankruptcy would not be limited to a charging order over a debtor's membership interest in an Oklahoma single member LLC. On the contrary, it is very possible, if not likely, that in a federal bankruptcy setting a bankruptcy trustee would step into the debtor's shoes. In other words, the trustee would own the LLC membership interest and the charging order protection would be illusory.¹²

1. No. 106,223, 2009 OK CIV APP ___, ___, P.3d ___. The opinion of the Oklahoma Court of Civil Appeals was issued in *Arrington* as "Released for Publication" on Nov. 30, 2009. A Petition for Certiorari

was filed with the Oklahoma Supreme Court in the case on Dec. 10, 2009, and is presently pending.

2. A charging order statute limits a judgment creditor's remedies against the LLC member by prohibiting the creditor from seizing or selling the LLC member's membership interest and from seizing or selling the LLC's assets. Historically, charging order statutes were intended to allow creditors to protect their rights in the distributions from a partnership while at the same time protecting the partnership against unwanted partners. The holder of a charging order would be treated on an assignee of the partnership interest but not succeed to a right of management of the partnership. See generally, Thomas E. Rutledge and Thomas Earl Geu, The Albright Decision, Why an SMLLC is not an Appropriate Asset Protection Vehicle, Business Entities, September/October 2003 at 16; Elizabeth M. Schurig and Amy P. Jetel, A Shocking Revelation! Fact or Fiction? A Charging Order Is the Exclusive Remedy Against a Partnership Interest, Probate & Property, November/December 2003 at 57; Daniel S. Kleinberger, Carter G. Bishop, and Thomas Earl Geu, Charging Orders and the New Uniform Limited Partnership Act, Dispelling Rumors of Disaster, Probate & Property, July/August 2004 at 30; William S. Forsberg, Asset Protection and the Limited Liability Company, Not the Panacea of Creditor Protection That You Might Think!, Probate & Property, November/December 2009 at 39; and Alan S. Gassman and Sabrina M. Moravecky, Charging Orders: The Remedy for Creditors of Debtor Partners, Estate Planning, December 2009 at 21. Oklahoma's LLC charging order statute is found at 18 O.S. Supp 2009 § 2034 (hereinafter sometimes referred to as "Section 2034") and provides as follows:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the membership interest. A charging order entered by a court pursuant to this section shall in no event be converted into a membership interest through foreclosure or other action. This act does not deprive any member of the benefit of any exemption laws applicable to his or her membership interest. This section shall be the sole and exclusive remedy of a judgment creditor with respect to the judgment debtor's membership interest.

3. LLCs are commonly utilized in asset protection planning to take advantage of the liability shield afforded by the LLC form of business entity, protecting a member against the liabilities of the LLC. This article addresses the use of a single member LLC to protect assets placed into the LLC against the claim of a member's judgment creditor. While the focus of the article is upon single member LLCs, the same analysis would generally apply to multiple member LLCs.

4. Oklahoma's general receivership statutes appear at 12 O.S. 2001 §1551 through 1559, serving as a means to carry a judgment into effect.

5. 291 B.R. 538 (Bank. D. Colo. 2003).

6. Colo. Rev. Stat. §7-80-703.

7. 319 B.R. 200 (Bankr. D. Ariz. 2005); the opinion in *Ehmann* was later withdrawn by order dated January 25, 2006 after the parties settled. Accordingly, the withdrawn opinion is not precedential authority. See *In re Ehmann*, 337 B.R. 228 (Bankr. D. Ariz. 2006).

8. 11 U.S.C.A. §365(e)(2), which, if applicable, permits the enforcement of executory contract restrictions on the bankruptcy trustee's powers. In an "executory" contract duties must be performed in order to receive benefits while in a non-executory contract the benefits will be received even if nothing further is done. See Steve Leimberg's Asset Protection Planning Newsletter #59 (February 8, 2005) at www.leimbergservices.com; and Steve Leimberg's Asset Protection Planning Newsletter #81 (April 24, 2006) at www.leimbergservices.com; Forsberg, *supra* note 2; and Gassman and Moravecky, *supra* note 2. In order to make an LLC operating agreement executory, consideration might be given to adding ongoing obligations of the members, including a contribution obligation, the requirement that a member serve on an oversight board and adding noncompetition provisions for members.

9. 11 U.S.C.A. §541(c)(1), which expressly provides that an interest of the debtor becomes the property of the estate notwithstanding any agreement or applicable law that would otherwise restrict or condition a transfer of such interest by the debtor.

“To distinguish *Arrington* from *Albright* on the basis of state law, however, is half the story.”

10. NO. ADV.NO. 04-7126, BANKR. 04-72919, BAP.NO. EO-05-114, 2006 WL 2034217 (10th Cir. BAP, Okla., July 11, 2006) *affid.*, 593 F.3d 1155 (10th Cir. 2010).

11. Like *Ehmann*, the *Baldwin* opinion is non-precedential. See Steve Leimberg's Asset Protection Planning Newsletter #89 (August 8, 2006) at www.leimbergservices.com. On Jan. 26, 2010 the United States Court of Appeals for the 10th Circuit affirmed portions of the Bankruptcy Appellate Panel ("BAP") decision in *Baldwin*; however, the BAP's affirmation that the bankruptcy estate owned the limited partnership interest was not raised on appeal. Accordingly, the 10th Circuit's Opinion presupposes ownership of the limited partnership interest in the bankruptcy estate. *In re Baldwin*, 593 F.3d 1155 (10th Cir. 2010).

12. 11 U.S.C.A. §303. Bankruptcy Code Section 303 governs the filing of involuntary proceedings in bankruptcy. Generally, an involuntary case may be commenced under Chapter 7 or 11 if there exists aggregate noncontingent claims against the debtor exceeding \$13,475 and the requisite number of claimants. Accordingly, the threshold for forcing a debtor into involuntary bankruptcy is relatively low. In many instances, a determined creditor will easily sidestep *Arrington* and invoke the Bankruptcy Code, *Ehmann*, and *Baldwin* with the filing of a petition for involuntary proceedings in bankruptcy.

ABOUT THE AUTHOR



Steve Cole is a shareholder with McAfee & Taft in Oklahoma City. His practice concentrates on helping families and individuals achieve their financial and personal goals. He is a frequent author and presenter on tax-related topics. He earned his J.D. from OU in 1985 and his LL.M. (taxation) from NYU in 1988. His writing credits include "Fixing Oklahoma's Insurable Interest Laws," 78 OBJ 1271 (2007).



Nicole Garnett

Professor of Law
University of Notre Dame Law School

**"Restoring Lost Connections:
Land Use, Policing, and Urban Vitality"**

THURSDAY, APRIL 8, 2010

5 p.m. Public Lecture
Homsey Family Moot Courtroom
Sarkeys Law Center
N.W. 23rd and Kentucky, Okla. City, OK. 73106
Free and open to the public.

For more information call:
(405) 208-5335 | <http://law.okcu.edu/>

OCU LAW
OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW

Check Scams That Target Lawyers

How Check Scams Work and How to Avoid a Loss

By Robert T. Luttrell III

Numbers of lawyers, and the general public, are being targeted with a scam that goes something like this: A message, usually e-mail, arrives requesting services or wanting to buy goods. The sender usually checks out in an Internet search. (Web sites aren't that hard to set up.) At some point a check arrives in what appears to be a legitimate business transaction. The check may be in response to a demand letter from a lawyer in the payment of a claim or as a retainer to pay for services in advance or for the purchase price of a car. You get the picture. The check looks and feels like a real check, maybe even a cashier's check. Usually, it purports to be issued by (or drawn on) a bank at a remote location with no local branches.

Almost immediately after the check arrives, there is a request to send part of the funds by wire transfer. The client may want the amount collected less fees. The client may have overpaid the retainer and want a refund. The car buyer may have paid for shipment and now says they have taken care of this expense directly and would like a refund. There are an infinite number of variations on the basic theme: 1) apparently legitimate transaction, 2) arrival of check and 3) request to wire out funds.

Once the funds are wired, they are almost impossible to recover. UCC §4A-211. The wire is usually to an account in another country. And, in any event, the funds are typically again wired to another institution out of reach as soon as they hit the designated bank. So, the victim is left to hope that the check is "good." It never is.

These scams work because of a basic misunderstanding of how checks are collected and when the funds represented by those checks

“There are an infinite number of variations on the basic theme: 1) apparently legitimate transaction, 2) arrival of check and 3) request to wire out funds.”

are “good,” *i.e.* they cannot be reclaimed. Because of complaints that deposits were not available for use in a timely manner, Congress adopted the Expedited Funds Availability Act (12 USC §4001-4010). The Federal Reserve Board adopted Regulation CC (12 CFR §229.1 *et seq.*) to implement it. Among other things, they mandate the latest time when funds of various types of deposits must be “made available” to the depositors. Funds from

cashier's checks must be "made available" within two business days. Many banks have adopted shorter "availability schedules." These schedules do not bear any relationship to how long it may take to discover that a check will not be paid.

Checks that are "sent through clearing" (all deposited checks) do not have positive confirmation of payment. The funds become "available" for withdrawal based on the bank's availability schedule (with the maximum limit governed by FRB Reg CC). "Available" funds do not equal collected funds. A check can be returned after the funds have been "made available." Having the funds "available" is not the same as knowing that the check has paid. If a check is sent through clearing, you get a negative confirmation that the check is not paid when it is returned. This will generally take three to four days at best. The check is handled electronically. Scammers gain additional time by using a fake bank routing number. Then, the counterfeit check bounces around in the clearing system until it kicks out to get human attention. In those cases, the check can take a week or more to find its way back to your account.

Numerous time frames are thrown out about when it is safe to "assume" that a check is "good:" "midnight deadline," 11 days or a week. There really is no time after which it is safe to assume that the check has paid. (Obviously the longer the time, the more likely it has paid. But that is a rule of probability, not a rule of law.)

The best practice to be safe is to go to your bank and ask to send the check for "collection." Ninety percent of the tellers may not know what you mean. This is done all the time with oil and gas lease drafts. UCC 4-501. When you finally find someone who does, the check will go out of the bank under a "collection letter," not "through clearing" under a "cash letter." Then you will receive positive confirmation some days later that the check has been paid. As you would expect, there is a fee for this special handling.

Some people want to talk to the bank and rely on what the bank "said." What the bank "says" may not be what the customer "hears." When talking to the bank, either the depository

“The best practice to be safe is to go to your bank and ask to send the check for ‘collection.’”



or the payor, the customer must listen carefully to the "bank speak." All the payor bank will generally say is that "a check in that amount will clear at this time," not that "we will pay your check when presented." Or the depository bank will say that the "funds will be available on," not that "these funds are good." Any commitment that a particular check represents "good" funds and will be paid according to its terms should be in writing. That will clear up the ambiguity. I have never seen a bank give such an assurance.

To recap, the standard check collection process contains no positive feedback that a check is "good." If a depositor wants to know that a check has paid, the check should be sent by the bank "for collection." Then the collection is outside the normal system and a positive response "up or down," as they say in government, is received. There are lots of ways for the bad guys to trick the regular check collection system so that a check may bounce around for days or weeks before it finds its way back. If the money is gone, the depositor is liable. See UCC §3-415 and the bank's deposit account agreement.

As a further aside and to keep you up at night, the way some of these scams work is to alter a legitimate check. In such a case, a claim against the depositor for breach of warranty can exist for as long as three years. UCC

§§4-111 & 4-207(a)(3). Altered checks are usually, but not always, caught within about 60 days. But that is well outside the time that lawyers would be required to forward client funds. MRPC Rule 1.15(d). This warranty liability cannot be disclaimed by a non-recourse indorsement. UCC §4-207(b). It may be possible to disclaim this warranty in the collection letter by sending the check "without recourse and disclaiming any warranties created by the contract of indorsement," but that is an open question.

In the days of a flat world it may be increasingly difficult, but the way for lawyers to keep out of trouble is to know their client.

ABOUT THE AUTHOR



Robert T. Luttrell III is an attorney with McAfee & Taft. He has more than 35 years experience representing banks, savings associations and other financial institutions and lenders in all areas of banking, including commercial lending, real estate and consumer finance, regulatory compliance and deposit-taking activities.

Attorney

Magellan Midstream Partners GP, LLC is seeking an Attorney. The successful candidate will provide legal services to our refined products, crude oil and ammonia pipelines and terminals and to the related business groups including the M&A group. The Attorney will also provide legal counsel and guidance on all commercial contract matters, including right-of-way and asset purchase and sale activities.

Requirements:

Juris Doctor degree and licensed to practice in Oklahoma with 2-5 years experience as a practicing attorney in the areas of contracts, real estate, business development and business operations. Experience in the energy industry or related field is preferred.

This position will be filled at a level commensurate with the candidate's education and experience.

Serves as legal counsel for commercial services. Providing overall legal service and counsel to executives and employees relating to commercial matters, including FERC.

Negotiating and drafting commercial arrangements, including acquisitions, dispute resolution, and project matters (including T&D agreements, capacity leases, etc.).

Handling real estate matters, including negotiating encroachment agreements, pipeline right-of-way disputes and requests for delineation of blanket easements, review and preparation of correction instruments, general advice on title and easement matters.

Other projects and assignments as directed.

Additional requirements:

The ability to communicate effectively orally and in writing in English with co-workers, supervisors, internal and external customers; the ability to work in stressful conditions; the ability to adapt and respond in changing circumstances; the ability to use a personal computer with the Windows® operating system to complete time sheets, send and receive email, and access information posted on the Company's intranet; availability as needed to work on both a scheduled and call-out basis; and the ability to work at the assigned job site.

The above statements are intended to describe the general nature and level of work being performed by employees assigned to this job. They are not intended to be an exhaustive list of all responsibilities, duties, skills, or working conditions.

Interested candidates should apply online at: <http://www.magellanlp.com/careers.asp>



Magellan Midstream Holdings, GP, LLC is an Equal Opportunity Employer



Attention OETA Donors

Don't forget to call
in your pledge on
Tuesday, March 16
from 7 – 10 p.m.

To keep the OBA at
the "Underwriting Pro-
ducers" donor level, we
need to raise \$5,000
from OBA members.

For 31 years, OETA has
provided television time
as a public service for
the OBA's Law Day "Ask
A Lawyer" program. By
assisting OETA, we
show our appreciation.



OETA Festival Volunteers Needed

OBA members are asked again this year
to help take pledge calls during the OETA
Festival to raise funds for continued
quality public television.

- Tuesday, March 16
- 5:45 - 10 p.m.
- OETA studio at Wilshire &
N. Kelley, Oklahoma City
dinner & training session
- recruit other OBA members
to work with you

For 31 years OETA has provided
television time as a public service for
the OBA's Law Day "Ask A Lawyer"
program. By assisting OETA, we show
our appreciation. It is also a highly visible
volunteer service project.

- Contact Jeff Kelton to sign up.
Phone: (405) 416-7018
E-mail: jeffk@okbar.org
Fax: (405) 416-7089

Name: _____

Address: _____

City/Zip: _____

Phone: _____

Cell Phone: _____

E-mail: _____

**Mail to OBA, P.O. Box 53036
Oklahoma City, OK 73152**



Solo and Small Firm Conference 2010: Renew, Recharge, Revitalize

By Jim Calloway, Director, OBA Management Assistance Program

A new location, new ideas to improve your practice and a new Web site are just some of the ways that the 2010 OBA Solo & Small Firm Conference will help you renew, recharge and revitalize your practice. June 24 -26, 2010, is the date for the conference to be held for the first time ever at the Downstream Casino Resort near Quapaw, Okla.

Visit www.okbar.org/solo to get more information about the conference, including all of the CLE session descriptions, and to register for the conference. You can reserve your room at the conference discount rate by calling 1-888-DWNSTRM (396-7876). You can also learn more about our sparkling new conference location by visiting its Web site at www.downstreamcasino.com.

Renew — Renew your circle of other professional colleagues and your knowledge of cutting-edge law office

tools that small firms can actually use.

Recharge — Recharge your spirit by taking some time to learn and to relax in this beautiful rural resort setting.

Revitalize — Revitalize your commitment to better serving your clients and to improve your business practices. Many Oklahoma lawyers will tell you that there's nothing like this conference to put a spring back into your step as you return to the office with new information and answers to some of your recent questions. Maybe you will even decide to expand into a new area of practice after listening to some of our informative sessions.

Speaking of new practice areas, we all know that questions about Indian law are of growing significance in our state. Solo and small firm practitioners encounter more Indian law issues in their everyday practice. That is one

reason we have scheduled a special plenary session: **Everything You Wanted to Know About Indian Law, But Were Afraid to Ask.** This session will cover some basic and advanced concepts including representing your client in tribal court, contracting issues with Indian tribes, handling tort and prize claim disputes and developing an Indian law practice.

This year marks the return of Catherine Sanders Reach to the OBA Solo and Small Firm conference. Catherine is the director of the ABA Legal Technology Resource Center and was very well received in her previous visit to the conference. She will do several programs for us including **Powerful Client Communications Tools and Advanced Training in PDF Files.** She and I will collaborate for **50 Hot Tips in 50 Minutes** and **What's Hot & What's Not in Running Your Law Practice.**

OBA SOLO and SMALL FIRM CONFERENCE

JUNE 24-26, 2010 • DOWNSTREAM RESORT • QUAPAW, OK
www.okbar.org/solo

Great Hotel Rates for Solo & Small Firm Conference

Call the Downstream Resort at 1-888-DWNSTRM (396-7876) and use the phrase OKBAR to get the discount hotel rate. The nightly room rate is \$95 per night plus a 10% occupancy charge for Thursday and Friday nights.

Because this is such a fun location, we anticipate that many will want to stay over Saturday night and have negotiated a rate of \$119 plus occupancy charge for Saturday night. However, there is no reserved room block Saturday night, so make an early decision if you want to stay Saturday.

Cloud computing might seem like an unlikely topic for this conference, but many businesses are already keeping their data "in the cloud." Being familiar with this concept will help you advise your business clients. Our session **Cloud Computing for Lawyers** will focus on the tools lawyers might use begins with Jack Newton. Jack is president and co-founder of Themis Solutions Inc. of Vancouver, British Columbia. The company's flagship product is Clio, a practice management solution for lawyers. Jack will discuss the benefits of the cloud computing approach for lawyers and law firms.

OBA Ethics Counsel Travis Pickens will follow up on that discussion and address some of the legal, ethical and security concerns of lawyers keeping client data in the cloud.

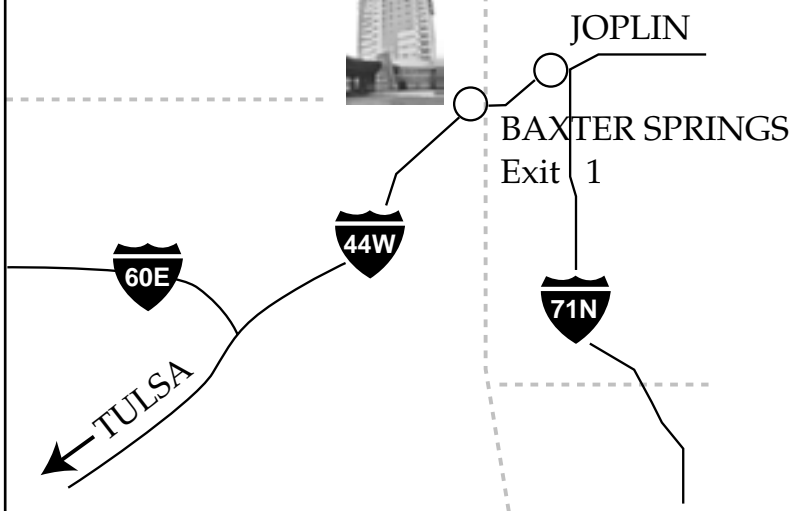
Our OBA president and vice president, Allen Smallwood and Mack Martin, have established reputations as seasoned criminal defense lawyers. They have agreed to do a joint presentation: **Learning from Legends: Oklahoma Criminal Law Practice.**

Norman attorney Don Pope will give us his take on **Why Practicing Law is Killing Your Law Practice.** He says it is possible to increase your level of client care while also increasing your income and reducing stress.

I'm also going to do a repeat of my presentation for ABA TECHSHOW™ 2010, **The Traveling Lawyer.** This will cover everything from remote access to the office network to what a traveling lawyer should carry in his bag of tricks.

There will be many excellent programs this year, from **How to Deal With Difficult Clients**

DOWNSTREAM CASINO RESORT



to **Recent Developments in Family Law**; from **Current Issues in Estate Planning to Fair Debt Collection Practices Act — The Good, the Bad, and the Ugly**. You can find a complete list of presentations in the schedule accompanying this article.

But, as always, the OBA Solo and Small Firm Conference features family fun and networking opportunities as well as educational programs.

Friday night poolside entertainment will be provided by Cruize Control. Their music is a blend of tropical rock and classic rock, featuring lots of Jimmy Buffet covers. You can get a preview at the band's Web site: www.cruizecontrolband.com.

This year will bring a whole new set of exciting children's activities, focusing on Native American culture, befitting our new location where we will be guests of the Quapaw tribe. Attendees will be able to enroll their children in supervised activities while they attend the educational sessions.

Parents — As a special inducement to encourage you to bring your children, there will be no charge for the children's activities this year! The range of activities depends on the number and ages of children we have preregistered. They might learn to make dream catchers, do beadwork, learn how to make a hand drum and drum stick, or build a teepee or a wickiup,

or enjoy demonstrations of pow-wow dancing and stomp dancing. Perhaps some local tribe members will teach them how to make fry bread (as well as eat it). Knowing the kids are having safe, supervised fun while you learn is a great combination.

Speaking of fun activities, the Downstream Casino and Resort not only features adult gaming diversions, but the pool is simply incredible with cabanas, refreshments and outdoor fire pits. Make certain you pack for fun in and around the pool. There is a gym, a nearby golf course and Joplin is just a few miles away.

For those who want to arrive early on Thursday, a golf tournament is being planned and administered by OBA Director of Administration Craig Combs. Otherwise, just make sure you are there early enough to check into your room and unpack before the activities start Thursday evening at 6:30 p.m.

You can make your reservations at Downstream by calling 1-888-DWNSTRM (396-7876) and using the phrase OKBAR to get the discount hotel rate.

There may be a new location this year, but we will have the same traditional mix of fun and great programs targeted for the solo and small firm lawyers along with lots of products and services from our vendor sponsors.

2010 SPONSORS

Co-Producer

Oklahoma Attorneys
Mutual Insurance
Company

Gold

Legal Directories
Publishing Company Inc.

Silver

Beale Professional Services

OBA Estate Planning,
Probate and Trust Section

OBA Family Law Section

OBA Indian Law Section

West, a Thomson Reuters
business

Bronze

ABA Retirement Funds

Clio

CoreVault

Law Firm Merchant Account

LexisNexis

Software@Law

Tab3™/Practice Master

OBA SOLO and SMALL FIRM CONFERENCE

JUNE 24-26 2010 • DOWNSTREAM RESORT • QUAPAW, OK

DAY 1 • Friday June 25

**Come
& Enjoy
the Fun!**

8:25 a.m.	Welcome Allen Smallwood OBA President			
8:30 a.m. - 9:20 a.m.	50 Hot Tips in 50 Minutes Catherine Sanders Reach Jim Calloway			
9:20 a.m.	Break			
9:30 a.m. - 10:20 a.m.	Cloud Computing for Lawyers Jack Newton Travis Pickens			
10:20 a.m.	Break			
10:30 a.m. - 11 a.m.	The Oklahoma Supreme Court: Current Issues and Other Stuff Chief Justice James E. Edmondson			
11 a.m. - 11:30 a.m.	Favorite Law Office Tech Tools Catherine Sanders Reach Jim Calloway			
11:30 a.m. - 12:45 p.m.	LUNCH BUFFET <i>(Included in Seminar Registration Fee)</i>			
	Black Hawk	Sacred Elk	Victor Griffin	Saracen
12:45 p.m. - 1:45 p.m.	Why Practicing Law is Killing Your Law Practice Don Pope	Learning from Legends: Oklahoma Criminal Law Practice Allen Smallwood Mack Martin	Powerful Client Communications Tools Catherine Sanders Reach	Fair Debt Collection Practices Act - The Good, the Bad, and the Ugly (Part 1) Joseph B. Miner
1:45 p.m.	Break			
2 p.m. - 3 p.m.	How to Deal With Difficult Clients Debbie Maddox	Recent Developments in Family Law Kimberly Hays Lori Pirraglia	The Traveling Lawyer Jim Calloway	Fair Debt Collection Practices Act - The Good, the Bad, and the Ugly (Part 2) Joseph B. Miner

**12 Hours
CLE Credit –
Including
Ethics**

DAY 2 • Saturday June 26

8:25 a.m.

Welcome

John Morris Williams
OBA Executive Director

8:30 a.m. –
9:20 a.m.

Can I Take This Case? A Primer on Conflicts - ETHICS

Gina Hendryx
OBA General Counsel

9:20 a.m.

Break

9:30 a.m. –
10:20 a.m.

Everything You Wanted to Know About Indian Law, But Were Afraid to Ask

O. Joseph Williams
Jeff Keel

10:20 a.m.

Break

10:30 a.m. –
11:30 a.m.

Keys to Managing a Twenty-First Century Law Office

Jim Calloway

11:30 a.m.

LUNCH *(Included in Seminar Registration Fee)*

Black Hawk

Advanced Training in PDF Files

Catherine Sanders Reach

Sacred Elk

Current Issues in Estate Planning

Gale Allison
Lee Ann Drummond

Victor Griffin

Indian Child Wel- fare Act Transfers to Tribal Courts and Sex Offender Registration in Indian Country

Steve Hager
Chrissi Ross Nimmo

Saracen

Why Practicing Law is Killing Your Law Practice

Don Pope

1:20 p.m.

Break

1:30 p.m. –
2:20 p.m.

Criminal Defense Motions Practice

Debbie Maddox

Domestic Violence and the Court System

Deb Stanaland

Unclaimed Property in Oklahoma

Kathy Janes

Starting a Law Practice Q & A

Jim Calloway

2:20 p.m.

Break

2:30 p.m. –
3:30 p.m.

What's Hot & What's Not in Running Your Law Practice

Catherine Sanders Reach
Jim Calloway



DOWNSTREAM RESORT – QUAPAW



2010 OBA SOLO & SMALL FIRM CONFERENCE & YLD MIDYEAR MEETING

DOWNSTREAM CASINO RESORT, QUAPAW, OK

JUNE 24-26, 2010

Register online at www.okbar.org/solo or return this form.

Full Name: _____ OBA#: _____

Address: _____ City/State/Zip: _____

Phone: _____ Fax: _____ E-mail: _____

List name and city as it should appear on badge if different from above: _____

Registration Fees: Registration fee includes 12 hours CLE credit, including one hour ethics. Includes all meals: Thursday evening, poolside buffet, breakfast buffet Friday & Saturday, buffet lunch Friday & Saturday, Friday evening buffet.

Circle One

Early-Bird Attorney Registration (**on or before June 10, 2010**) \$175

Late Attorney Registration (**June 11, 2010 or after**) \$225

Early-Bird Attorney & Spouse/Guest Registration (**on or before June 10, 2010**) \$275

Late Attorney & Spouse/Guest Registration (**June 11, 2010 or after**) \$325

Spouse/Guest Attendee Name: _____

Early-Bird Family Registration (**on or before June 10, 2010**) \$325

Late Family Registration (**June 11, 2010 or after**) \$375

Spouse/Guest/Family Attendee Names: **Please list ages of children.**

Spouse/Guest: _____ Family: _____ Age: _____

Family: _____ Age: _____ Family: _____ Age: _____

Total \$: _____

Thursday, June 24 - 18 Hole Golf (_____ of entries @ \$50 each)

Total \$: _____

**Make check payable to the Oklahoma Bar Association. Mail Meeting Registration Form to:
CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. FAX Meeting Registration Form to (405) 416-7092**

For payment using _____ VISA _____ Mastercard _____ Discover _____ AmEx

CC: _____

Expiration Date: _____ Authorized Signature: _____

No discounts. Cancellations will be accepted at anytime on or before June 10, 2010 for a full refund; a \$50 fee will be charged for cancellations made on or after **June, 11 2009. No refunds after June 16, 2010. Call 1-(888) 396-7876 for hotel reservations. Ask for the special OBA rate.**



MAP



RENEW. RECHARGE. REVITALIZE



oba ♦ cle

Language Guide to Navigating the Legislative Process

By *Duchess Bartmess*

We lawyers have our special language, often referred to as “legal-ese.” Most professions and occupations also have their own “language,” words that have special meaning to people involved in the activities of that profession or occupation. (How many of you have totally adjusted to the fact that to turn off your computer you click on the START prompt?)

Well, the same is true in the legislative world. For three years now the bar association has been encouraging members of our profession to become more aware of legislative measures and to be active in helping the Legislature create better quality laws in terms of language, constitutionality — and in limiting unintended consequences.

However, even after we gain entrance to the Legislature’s Internet home page, thanks to John Morris Williams’ good information in this issue, how do we find out what stage of the process is the measure in and what exactly is happening? In other words, what do all those special words and terms mean in understanding the legislative process?

The Legislature has created an exhaustive glossary of legislative terms that can be viewed on its Web page at www.lsb.state.ok.us. Here are some of the more important commonly used ordinary words and phrases with somewhat unique meanings when used in the legislative process:

Act — The bill or resolution which has been adopted according to constitutional requirements and has therefore become law. Often it is used as a generic term applied to any mea-

sure working its way through the legislative process.

Agenda — The list of measures which are scheduled to be considered either in a committee or by the full body of either house.

Advancement — A procedure by which a measure on the floor is moved to third reading and is no longer subject to amendment in the house in which it is being considered. [*from the Glossary of Legislative Terms*]

Bill — The document introduced in either house of the Legislature to change existing law or add a new law. Sometimes the words “Act” and “Bill” are used interchangeably.

Calendar — The printed list by each house of the measures that are scheduled to be heard. Being on the calendar does not guarantee the measure will be heard.

Committee of the Whole — The full body of either house acting as a committee. The final action of a committee of the whole is not final action on a measure.

Committee Substitute — When there are enough amendments to a measure before the committee to create possible misunderstanding or errors, a committee substitute can be presented to a committee or a committee can direct a committee substitute be prepared reflecting their actions on the measure. This is also the method of inserting language in a filed “shell bill.”

Crippling or Striking the Title — Striking the title assures the opportunity for a second look by the house in which the title was struck.

Effective Date — The specific date on which a measure becomes law. If no effective date is specified in the bill, and there is no emergency clause attached, pursuant to constitutional directive, the act becomes effective 90 days after final adjournment of the session in which the act was passed.

Emergency — A finding by the Legislature that there is an emergency, as defined in the Constitution. The provision which is attached to an act passed, requires a separate two-thirds approval by both houses making the adopted measure effective immediately. [Art.5, Section 58]

Engrossed — The designation of the bill or resolution document signed by the presiding officer of the house of passage, required by the Constitution, which is then sent to the other house for consideration. An engrossed measure is not the final version. [Art. 5, Section 35]

Enrolled — The designation of the bill or resolution which is the final version, passed by both houses, signed by the presiding officer of each house which is sent to the governor for action. This is the version that is filed with the secretary of state after gubernatorial action. The secretary of state is the official repository for all enrolled documents.

General Order — The order of business of the full membership of measures reported out of committee that is subject to debate or amendment from the floor. Sometimes referred to as “being on the calendar.” A measure on general order is still “alive,” as distinguished from a measure which fails to make it out of committee.

Legislative Day — Any day on which the legislature meets. No limits on number of days or length of days. However, each regular session is required by the Constitution to adjourn by 5 p.m. on the last Friday in May. [Art. 5, Section 26]

Measure — A bill or resolution introduced in either or both houses of the Legislature.

Motion to Reconsider — Motion from the floor after action has been taken on a measure to again consider the measure, regardless of whether it passed or failed. There is a three-day time limit to make a motion.

Printed Bill — The version of the measure that is provided to the members for floor

action. It is a printing of the measure as it passed out of committee.

Readings — The Constitution requires three readings on three different days in each house of measures intended to become law, and on the day of consideration and final passage the measure must be read at length. [Art. 5, Section 34].

Bills on OBA Legislative Agenda

Only matters that have been approved by at least 60 percent of the members voting at the House of Delegates can be placed on the OBA Legislative Program. The matters set forth below were approved by the House of Delegates at the 2009 Annual Meeting and have been introduced in the Oklahoma Legislature.

Both bills have passed out of the Senate Judiciary Committee and await consideration by the House Judiciary Committee.

SB 2039: Clarifies procedure for statewide and single or multiple county licensing of process servers. Amends discovery and disclosure statutes to provide greater detail and explanation for electronic discovery, closely following the Federal Rules of Civil Procedure. Provides for mandatory disclosure of certain information and protection of confidential or other protected documents. Requires electronic data to be included in response to a request for business records. Addresses the form in which electronic data is to be provided. Allows for “clawback” agreements. Provides for courts to limit or expand the number of written depositions, requests for the production written or electronic data, requests. Includes provisions for partial production of information when the whole category may not be discoverable. Recognizes good faith destruction of documents in the normal course of business and exempts such good faith destruction from being subject to sanctions.

SB 2040: Requires that the fee for a civil jury trial must be paid at the time of pretrial by the party requesting a jury trial.

On the OBA Web site at www.okbar.org/members/committees/legislative you will find more detailed information about both bills.

Recall — The method by which a measure can be retrieved from the governor prior to his action for correction of errors.

Resolution — There are three types of resolutions that either or both houses can adopt. Only a joint resolution has the force and effect of law because it follows the same procedural requirements for a bill to be adopted. A simple resolution reflects the will of only one house. Usually used to commend or to specifically recognize individuals, groups or entities. A concurrent resolution is used when both houses have the same intent on an issue or commendation. Simple and concurrent resolutions do not have the force and effect of law and are not codified in the statutes. Joint resolutions are the measures utilized to propose referendums.

Rules Committee — The Rules Committees are for practical purposes controlled by the leadership. Assignment of a measure to the Rules Committee frequently means it will not be reported out of committee, unless it is a measure that leadership wishes to proceed.

Shell Bill — A measure which usually amends a section of existing law that contains no substantive change. Often a “shell bill” will have very few amendments which reflect a change such as “his his or hers.” These bills are usually used later in the session to address issues that have just become of interest or concern to the author, or for use when there is a controversial or complicated issue.

Title — The Constitution requires “[e]very act of the Legislature shall embrace but one

subject, which shall be clearly expressed in its title” [Art 5, Section 57], and all measures have to be passed by both houses in exactly the same form. All measures have titles when they are introduced.

At the beginning of each Legislature, each house establishes, by rule, certain important deadlines. These deadlines control when a bill must be filed, when a bill has to be reported out of committee for action by the full house which apply to the bills in the house of origin, as well as bills from the opposite house. Although these deadlines are controlling, exceptions can be made pursuant to the rules of the particular house — by unanimous consent or by a certain date to be considered.

Generally, if the author of a bill is unable to meet these deadlines, the bill is considered dormant. However, this is not an absolute certainty, and it is possible for a bill to be resurrected at the last minute. This does not happen often, but it is a possibility that anyone particularly interested should be aware of.

This limited list is intended to provide a quick reference to some of the more often used “words and terms of art” and a glimpse of legislative procedure. As lawyers, we are more familiar with many legislative terms that the general public may not know or understand. For a complete list of those words and terms the Legislature deems worthy of defining, you are encouraged to look at the full glossary.

Ms. Bartmess practices in Oklahoma City and is chairperson of the Legislative Monitoring Committee.



Informed.

We have the knowledge and experience to effectively and efficiently handle difficult and intricate immigration cases.

For more information contact
Amir M. Farzaneh at 405.528.2222.

Hall, Estill, Hardwick, Gable, Golden & Nelson
A Professional Corporation

Tulsa, OK Oklahoma City, OK Northwest Arkansas Washington, D.C. www.hallestill.com

HALL
ESTILL
ATTORNEYS AT LAW

OBA Day at the Capitol

March 2, 2010 • Oklahoma City



OBA President
Allen Smallwood visits
the Oklahoma Senate.



OBA Vice President Mack Martin, President Allen Smallwood,
President-Elect Deb Reheard and Rep. Terry Harrison visit at the
evening reception at the bar center.



Neil Lynn, Kimberly Hays and
Noel Tucker get ready to meet
with legislators.



Sen. Sean Burrage, Rep. Cory Williams
and Cathy Christensen



Rep. Wade Rousselot, Jeff Noble, Rep. John Wright and Randy Grau

continued from page 572

Association attended its mid-year meeting in Orlando, Fla. Before you become jealous, let me assure you that the weather, at least for central Florida, was downright cold. What was very warm, however, was the fellowship we all had with other members throughout the country. Particularly satisfying were the discussions had with the delegates from the Southern Conference of Bar Presidents, which comprises delegations from what amounts to the southeast section of the country. Learning that the delegations from Florida to Virginia and Georgia to Texas are facing the same challenges we face was not only sobering but to some extent comforting knowing that we're all in the same boat.

Budget crunches, including reduced funding for the judiciary and legal services to indigents, was a great concern of all. It made me proud to know that our bar association is self funding and in excellent financial condition, particularly compared to those state bar associations that are not integrated and therefore at least to some extent dependent upon the state Legislature for a portion of their funding. This re-emphasized my desire to continue our efforts to maintain our independent judiciary as well as the independence of our bar association.

Oklahoma Bar Journal Editorial Calendar

2010

- April:
Law Day
Editor: Carol Manning
- May:
Commercial Law
Editor: Jim Stuart
jtstuart@swbell.net
Deadline: Jan. 1, 2010
- August:
Oklahoma Legal History
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: May 1, 2010
- September:
Bar Convention
Editor: Carol Manning
- October:
Probate
Editor: Scott Buhlinger
scott@bwrlawoffice.com
Deadline: May 1, 2010
- November:
Technology & Law Practice Management
Editor: January Windrix
janwindrix@yahoo.com
Deadline: Aug. 1, 2010
- December:
Ethics & Professional Responsibility
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Aug. 1, 2010
- March:
Criminal Law
Editor: Dietmar K. Caudle
d.caudle@sbcglobal.net
Deadline: Jan. 1, 2011
- April:
Law Day
Editor: Carol Manning
- May:
Real Estate and Title Law
Editor: Thomas E. Kennedy
kennedy@gungolljackson.com
Deadline: Jan. 1, 2011
- August:
Children and the Law
Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: May 1, 2011
- September:
Bar Convention
Editor: Carol Manning
- October:
Labor and Employment Law
Editor: January J. Windrix
janwindrix@yahoo.com
Deadline: May 1, 2011
- November:
Environmental Law
Editor: Emily Y. Duensing
emily.duensing@oscn.net
Deadline: Aug. 1, 2011
- December:
Ethics & Professional Responsibility
Editor: P. Scott Buhlinger
scott@bwrlawoffice.com
Deadline: Aug. 1, 2011

2011

- January:
Meet Your OBA
Editor: Carol Manning
- February:
Tort/Civil Litigation
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: Oct. 1, 2010

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

Tracking Legislation in the Digital Age

By John Morris Williams

One of the significant changes brought about by technology is the ability to track legislation in almost real time. While there are a couple of very good commercial services that charge a subscription fee, the Oklahoma Legislature site is very good for most purposes, and it is free. The site can be found at www.lsb.state.ok.us. The legislative staff even offers training on how to use the site prior to the beginning of the session. I know many of our members are veteran users of the site, and I apologize for being overly simplistic here.

The OBA Legislative Monitoring Committee will give information on selected bills in the bar journal and on our Web site. However, the volume and constant movement of bills, as well as publication deadlines, makes it almost impossible to keep the information current on a daily basis.

One of the best resources is the Oklahoma Legislature Web site. Once you go to the site, you can find a wealth of information and can perform many tasks. The House and the Senate both maintain their own information within the site. You can find contact information for legislators, see text of bills, check

bill status and even get committee meeting information. The site is updated often and is generally current within 24 hours or less of legislative action.

When you go to the home page, there are three columns. The middle column is where you can find information on pending bills. If you click on the "Status of Measures" line, it will take you to a new page that can help you find what you are looking for quickly. Here you can find a bill if you know its author or search for bills by subject matter. One of the best features is the "Personal Bill Tracking" function. You will find this and the other functions on the left side of the screen. Simply click on the "Personal Bill Tracking" line, and it will take you to a page where you can put in the bill number once and save it.

Thereafter, every time you want to check the status of the bill you can go back to the tracking function, and it will tell you where the bill is in the legislative process. When you type in the bill, put in the house of origin designation and the bill



number. For example, Senate Bill 1001 would be put in sb1001 and House Bill 1001 one would be put in as hb1001. Multiple bills can be added simply by adding a comma and a space between the bills. Do remember to hit the "save" function each time you add a bill to the list. Once you have located the bill and put it on your list, you can check the bill status throughout the session. The site has a good glossary of terms on the home page, and the "help" function has further information on bill "flags." It is important to understand the terms when looking up a current status of a bill. For instance, "CS," or committee substitute, means that the bill has been changed since

being introduced, and the version that is going to be heard by the assigned committee has language added or deleted from the original version. The assigned committee on hearing the bill can further amend the bill, and the bill can be amended on the floor of either chamber.

An amendment of the bill by the opposite chamber from where the bill originated will necessitate a conference committee, and the result is a "CCR," or a conference committee report. I think it is suffice to say that the legislative process has its own vocabulary, and each of the chambers has its own set of procedural rules. The site does a good job of explaining the terms and the process. The Legislature should be applauded for adding this transparency to state government and making it available free to all our citizens. Each year there are more than 3,000 bills in play at the beginning of the session. Without this computerized

system of tracking, the task is daunting. Even with this technology it is difficult to ascertain the content of all the bills from their summary. The site also has a search function for specific terms. On the home page you can look for bills with certain terms. For instance, if you are interested in landlord and tenant issues, you can search by those terms. I put in the term "landlord" and found 29 bills. You can search by individual house or both. To see the full text of measures, simply go to the home page and click on "Full Text of Measures," and you will get a listing of all the bill numbers. Then, click on the number, and the text will come up.

As the session progresses, make sure you know the status of the bill and look for its current version. When you go to the "Text of Measures" page you will select the house of origin, the current session (2010 regular session) and the current status. The status col-

umn has several selections, and you need to know the current status to get the current version of the bill.

It is hard in the space permitted to give a full explanation of the site and all its functions. However, I hope I have at least given you enough information for you to at least try it. I have been pleasantly surprised by the number of our members who are frequent users of the site. While I try my best to keep up with matters in the session, I very much appreciate our members who give me a heads up on bills they are watching. If you get a minute to try the site, I think you will find it fairly easy to use and will give you information quickly on bills that relate to your practice. If you find something really interesting and wish to share it with me, I would love to hear from you.

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

Domestic Relations and Criminal Law Continue to Receive Most Grievances

By Gina Hendryx, OBA General Counsel

The 2009 Annual Report of the Professional Responsibility Commission (PRC) and the Professional Responsibility Tribunal (PRT) was filed with the Oklahoma Supreme Court by the Office of the General Counsel on Feb. 5, 2010. The annual report reflects grievances and complaints lodged against attorneys that were received and processed in 2009 by the general counsel.

The PRC considers and investigates any alleged grounds for discipline or incapacity of a lawyer called to its attention or upon its own motion and takes such action as deemed appropriate including the issuance of a private reprimand or referral for the filing of formal charges. Under the supervision of the PRC, the Office of the General Counsel investigates these attorney grievance matters and reports its findings directly to the commissioners. The PRC consists of five lawyers and two non-lawyer members.

Should a formal grievance be referred for the filing of formal charges with the Supreme Court, a three-member panel of the PRT presides at the hearing and prepares a report that

includes findings of fact and conclusions of law with a recommendation to the court as to discipline if such is indicated. The PRT is composed of 14 lawyers and seven nonlawyer members.

1,076 attorneys constitutes approximately 9 percent of the attorneys licensed to practice law in Oklahoma. Therefore, 91 percent of the attorneys licensed to practice law in Oklahoma did not receive a grievance in 2009.

Good News:
 “Ninety-one percent of the attorneys licensed to practice law in Oklahoma did not receive a grievance in 2009.”

Bad News:
 “The overwhelming complaint received against attorneys is that the lawyer is being inattentive to either the legal matter or the client.”

A review of the statistics for 2009 indicates that a total of 1,500 informal and formal grievances involving 1,076 attorneys were received and processed by the Office of the General Counsel. To put this in perspective, the total number of Oklahoma licensed attorneys as of Dec. 31, 2009 was 16,438. Considering the total membership, the receipt of 1,500 grievances involving

Of those grievances referred for investigation, more than 50 percent were complaints of neglect. This statistics holds true year in and year out. The overwhelming complaint received against attorneys is that the lawyer is being inattentive to either the legal matter or the client. The next most often-received complaint is that of misrepresen-

tation (10%) followed closely by personal behavior (9%).

In 2009, the areas of practice receiving the most grievances were domestic relations (25%) and criminal law (22%). Again, these two practice areas historically receive the most complaints.

Last year the PRC issued private reprimands to 15 attorneys involving 17 grievances. In addition, 22 grievances were dismissed with a letter of admonition cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule. The PRC dismissed 140 grievances after a full investigation found the

matters were without merit. The commission voted the filing of formal charges against seven lawyers involving 24 grievances.

In 2009, 18 disciplinary cases were acted upon by the Oklahoma Supreme Court. Of those 18, two lawyers were disbarred, five lawyer resignations pending disciplinary action were approved, three lawyers were suspended, one lawyer received a public censure and four matters were dismissed without discipline.

In addition to the public discipline, the court also issued two private reprimands

and three confidential interim suspensions.

Statistically, 2009 was similar to previous years. The number of grievances received was slightly lower than 2008, but the number of attorneys receiving those grievances increased. Neglect continues to be the most common complaint and the practice areas of domestic relations and criminal law routinely garner the most dissatisfaction with lawyer performance.

You may view the complete annual report at www.okbar.org/members/reports/2009/prc-prt.pdf.

OKNEWSBAR

- The latest Oklahoma and U.S. Supreme Court opinions
- Up-to-date legal news
- Law practice management tips

...all in one place.



www.okbar.org/oknewsbar.htm

February Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Feb. 19, 2010.

REPORT OF THE PRESIDENT

President Smallwood reported he attended the ABA Midyear Meeting in Orlando, Fla. and gave brief remarks at the We the People meeting at the Oklahoma History Center. He also reported that he reviewed the latest legislative proposals relating to our association.

REPORT OF THE PRESIDENT-ELECT

President-Elect Reheard reported she attended the January swearing-in ceremony, January Board of Governors meeting, president's luncheon hosted by President Smallwood, 2010 has beens dinner, ABA winter meeting in Orlando including the House of Delegates, Southern Conference of Bar Presidents and National Conference of Bar Presidents meetings held during the ABA meeting. She also monitored legislation relevant to the OBA.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the SCBP, NABE and NCBP programs at ABA Midyear Meeting, OBA Access to Justice Committee

meeting, Audit Committee meeting, directors meeting, monthly staff celebration and NW Oklahoma Alliance reception. He also spoke at the YLD orientation, met with the Legislative Monitoring Committee chairperson, met with the Member Survey Task Force co-chairpersons, had conferences with various members of the Legislature and attended committee meetings.

REPORT OF THE PAST PRESIDENT

Past President Parsley reported he attended the swearing-in ceremony, January Board of Governors meeting, ABA Midyear Meeting and House of Delegates at the ABA meeting.

BOARD MEMBER REPORTS

Governor Brown reported he attended the new officer and governor swearing-in ceremony, Board of Governors January meeting, OBA Bench and Bar Committee meeting, ABA Midyear Meeting and chaired the ABA Judicial Division Council meeting. **Governor Carter** reported she attended the January swearing-in ceremony, January Board of Governors

meeting and judged a mock trial proceeding for the quarterfinals. **Governor Chesnut** reported he attended the January swearing-in ceremony, January Board of Governors meeting, monthly meeting of the Ottawa County Bar Association, president's luncheon hosted by President Smallwood and the 2010 has beens dinner. He also prepared for the Investment Committee meeting. **Governor Devoll** reported he attended the January Board of Governors meeting, swearing-in ceremony for the new officers and governors and the Garfield County Bar Association February meeting. **Governor Dobbs** reported he attended the swearing-in ceremony, has beens dinner and January board meeting. **Governor Hixson** reported he attended the Board of Governors swearing-in ceremony, January board meeting, president's luncheon hosted by President Smallwood, 2010 has beens dinner and the Canadian County Bar Association monthly luncheon and CLE presentation. **Governor McCombs** reported he attended the swearing-in ceremony for the new officers and board members,

Thursday night dinner at Bellini's, Friday board meeting, Friday night has been dinner and the McCurtain County Bar Association luncheon.

Governor Moudy reported she attended the January board meeting and has been dinner. **Governor Poarch** reported he attended the January swearing-in ceremony, January board meeting, president's luncheon hosted by President Smallwood, 2010 has been dinner, Cleveland County Bar Association luncheon, Bohanon Inn AIC meeting, regional national trial competition for law students sponsored by the American College of Trial Lawyers and the OBA Bench and Bar Committee meeting. **Governor Rivas** reported he attended the January swearing-in ceremony, January Board of Governors meeting, president's luncheon and has been dinner. He also reviewed the board material to prepare for the upcoming February meeting. **Governor Shields** reported she attended the January swearing-in ceremony, January Board of Governors meeting, president's luncheon hosted by President Smallwood, 2010 has been dinner, OBF Trustee meeting and orientation for new trustees. She also conferred with Tom Riesen, chair of Lawyers Helping Lawyers Assistance Program, concerning 501(c)(3) issues regarding that committee. **Governor Stuart** reported he attended the January swearing-in ceremony, January Board of Governors meeting, president's luncheon, 2010 has been dinner, *Oklahoma*

Bar Journal Board of Editors meeting and worked on recruiting articles for the May issue. He also worked on Audit Committee proposals.

REPORT OF THE SUPREME COURT LIAISON

Chief Justice Edmondson expressed appreciation for the Thursday evening hospitality at the board's dinner.

COMMITTEE LIAISON REPORT

Governor Stuart reported the board's Audit Committee will meet this afternoon to review audit proposals and will make a recommendation to the board at its March meeting.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported that one of two cases pending against the OBA has been dismissed. She announced that the hearing room is now fully furnished. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for January 2010 was submitted for the board's review. She said the PRC is short on nonlawyer members, and they are waiting on the governor's appointments. She also reported she attended the January PRC meeting and the midyear meeting of the National Organization of Bar Counsel. She reported that she prepared and filed the Annual Report of the PRC, PRT and General Counsel for 2009 with the Oklahoma Supreme Court and presented an ethics CLE for

the Oklahoma County Bar Association. The board approved the reports.

REPORT OF THE YOUNG LAWYERS DIVISION

YLD Chair Aspan thanked board members who participated in the YLD orientation, and she reviewed the events held. She told board members the division is organizing a statewide community service day on May 1 to perform projects at libraries across the state. She said YLD members will be putting together bar exam survival kits and handing them out at the February bar examination.

NEW MEMBER BENEFIT PROPOSED

Member Services Committee Chair Keri Williams Foster reported the committee is recommending an agreement with Meridian One Corp., which is an independent freight broker and marketing services contractor of FedEx and is authorized to market discounted rates. Ms. Foster said the agreement would allow the OBA to offer members discounts ranging from 4-70 percent on a variety of FedEx services with a 1 percent royalty to the association. Firms with existing accounts would still be eligible for the member discounts. The board approved the nonexclusive, two-year agreement.

PROPOSED INDIAN LAW SECTION BYLAWS AMENDMENTS

Indian Law Section Chair Debra Gee reviewed the changes requested by the section that were to add

associate members, to eliminate the Budget Committee, to allow fax or electronic voting and to create an automatic succession of officers. The board approved the amendments except the elimination of the Budget Committee and wording referencing the Budget Committee.

BOARD OF MEDICOLEGAL INVESTIGATIONS APPOINTMENT

President Smallwood reported the OBA's previous appointment to the board has resigned, and he has appointed Wesley E. Johnson, Tulsa, to fill the position.

MEMBER SURVEY TASK FORCE UPDATE

Executive Director Williams reported he has met with task force leaders Brian Hermanson and Joe Crosthwait. Task force members will be recruited. He shared preliminary

thoughts that bar members might be asked additional questions related to strategic planning that have not been asked in the past.

MORTGAGE FORECLOSURE SEMINAR UPDATE

Executive Director Williams reported the seminar that is free to members who donate 20 hours of pro bono service to Legal Aid Services of Oklahoma has drawn a good response with 175 lawyers registered.

OBA FACEBOOK

MAP Director Calloway reviewed the basics of Facebook with board members. Discussed were the pros and cons of utilizing this social media and the consequences of allowing an open forum of comments. Examples of Facebook pages of other bar associations were viewed.

ABA REPORT

President Smallwood reported several board members attended the ABA Midyear Meeting in Orlando, which included a meeting of the Southern Conference of Bar Presidents. He said discussion among the bar associations within that region made him aware that all the states are experiencing the same challenges as Oklahoma. President-Elect Reheard said she attended court funding crisis sessions.

LEGISLATIVE UPDATE

Executive Director Williams reviewed the agenda of events for OBA Day at the Capitol on March 2 and announced there was one speaker change. Also, he reported both OBA bills came out of committee last week.

NEXT MEETING

The Board of Governors will meet in Weatherford on Friday, March 26, 2010.

Oklahoma Lawyers — We're Number One

By Phil Frazier

A few years ago, around 2000-2001, Oklahoma lawyers were dealing with the possibility of multidisciplinary practices. Imagine accountants officing with lawyers and working on the same subject matter. Further, imagine insurance companies and banking institutions, lawyers, accountants and real estate specialists performing the same duties out of the same offices.

It was my privilege to be in Chicago when the American Bar Association was addressing these issues. The New York bar as well as the California bar had completed their presentations and stated their positions regarding multidisciplinary practice. Only 10 minutes were left between the last presentation and the break for lunch when it was Oklahoma's turn to make its presentation. The chairman of the meeting agreed to recess at that time and come back later for the Oklahoma presentation. The Oklahoma representative, Guy Clark, and the Board of Governors had spent a lot of time and effort addressing these issues as well as the concerns we had regarding multidisciplinary

practice. Guy, the spokesman for the Oklahoma Bar Association, advised the chairman that he could make the Oklahoma presentation in fewer than 10 minutes. In fewer than 10 minutes, the Oklahoma plan was presented by Guy and its adoption was moved by both the California bar and the New York bar.

“In all endeavors, if we do not strive to become better at what we do and more dedicated to our cause, we simply slip backward.”

At about that same time, Oklahoma lawyers were faced with the proposition of mandatory CLE between graduating from law school and passing the bar and beginning in private practice. This matter was considered and debated before the OBA Board of Governors. The majority saw little need for an

attorney who had just passed the bar to be required to take a CLE class before he could begin practice. The Young Lawyers Division representative with the Board of Governors, Pat Cipola, made an outstanding presentation opposing adoption of the CLE requirement. His remarks were followed by Supreme Court Justice Joseph Watt who at the time was the Supreme Court liaison to the Board of Governors.

Justice Watt began by saying his time was limited due to some urgent court matters but matters affecting the practice of law by Oklahoma lawyers, new and old, were equally important. The proposition of such a CLE requirement was defeated.

This struck me as an example of how Oklahoma lawyers at both ends of the profession, new lawyers and older lawyers alike, including a Supreme Court justice, could reason together so effectively for the betterment of our profession.

The Oklahoma Bar Foundation, although the third oldest in America, was one of the last to obtain mandatory IOLTA. This accomplishment

was through the unyielding and untiring effort by several lawyers from across the state that are active with the OBF. Certainly some Oklahoma lawyers have opposed the IOLTA program; however, no one has denied the many benefits it has enabled the foundation to provide for Oklahoma citizens less fortunate and in need of legal services.

Neither can one overlook the enthusiasm of Oklahoma lawyers who have enjoyed working with and being a part of the foundation and its many grants and awards.

Through public awareness of the good things lawyers do through the bar foundation, our most valuable asset, our reputation, is enhanced in the eyes of those we serve and who become aware of the foundation's services.

At the 2010 ABA's National Conference of Bar Presidents and National Conference of the Bar Foundations held during the first week of February, Oklahoma was well represented. OBA Executive Director John Williams and OBF Executive Director Nancy Norsworthy were joined by OBA President Allen Smallwood and OBA President-Elect Deborah Reheard. OBA Past President Jon K. Parsley was also in

attendance as was Carol Manning, OBA director of communications.

Past OBF President Renee DeMoss serves on the National Council Bar Foundation Board as does Sandra Cousins, executive director of the Tulsa County Bar Association and Tulsa County Bar Foundation. Both were present for the national conference.

The Oklahoma lawyers in attendance were not limited to just foundation officers and association officers representing the state. Jack Brown, a member of the OBF and an active member with the ABA, was present as was TCBA President Deirdre Dexter, and OBA Past President M. Joe Crosthwait Jr., immediate past president of the National Conference of Bar Presidents. Also, TCBF President Leonard Pataki was present and actively involved in all of the meeting events. Other Oklahoma lawyers in attendance were too numerous to list.

As we sat through two-and-a-half days of meetings (and more for some), we received information about the bar associations and bar foundations representing states from all across the country. We also learned and it was confirmed by the presentations that the lawyers of Oklahoma are sec-

ond to none. It would be foolhardy to ever think that we cannot learn from others; nevertheless, the more I have had the pleasure of associating with lawyers from all across the United States, the prouder I am of being an Oklahoma lawyer and a Fellow with the Oklahoma Bar Foundation.

During the course of introductions, a program moderator noted, and said it best, "We have two lawyers from two states known as football powerhouses and especially strong bar associations and bar foundations, Oklahoma and Alabama."

We must continue this tradition and reputation. In all endeavors, if we do not strive to become better at what we do and more dedicated to our cause, we simply slip backward.

As a member of the Oklahoma Bar Association, we urge you to consider becoming a Fellow and become active with the Oklahoma Bar Foundation. Our continuing progress and performance at the highest level depends on the continuing activity of all Oklahoma lawyers.

Phil Frazier is president of the Oklahoma Bar Foundation. He can be reached at pfrazlaw@swbell.net.



FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

Mailing & Delivery Address: _____

City/State/Zip: _____

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

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

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

☐ New Lawyer 1st Year, \$25 enclosed
& bill as stated

☐ New Lawyer within 3 Years, \$50 enclosed
& bill as stated

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

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

*Lawyers Transforming
Lives through educa-
tion, citizenship and
justice for all. Join the
OBF Fellows today!*

Signature & Date: _____ OBA Bar #: _____

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

OBF SPONSOR: _____

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

Many thanks for your support & generosity!

oba • cle
continuing legal education

SPRING

LIVE SEMINAR SERIES COMING SOON

Produced by OBA/CLE in association with OBA/MCLE

Directed by Donita Douglas
Assistant Director Renee Montgomery
Assistant Heidi McComb
Materials Coordinator Nina Anderson
Production Brandon Haynie
Registrar Mark Schneidewent
registrations www.okbar.org/cle



ACTA



Pro Bono As You Go

By Jim Priest

"Never do nothing for nobody for nothing, Jimmy!" Those words of exasperated advice were spat out by Emil Rossi, a lawyer I worked for while I was in law school. Emil was doing a piece of "pro bono" work for someone in a quiet, unsung way and was frustrated by the lack of appreciation and cooperation the pro bono client was exhibiting. Funny thing, Emil didn't really mean what he said. All during the time I worked with him he continued to do other quiet, unsung pro bono work for people. Most of them were not as frustrating as the one who prompted his advice.

I think about Emil's advice from time to time, especially when I'm doing some pro bono work for someone who seems underappreciative. I have done pro bono work in a variety of settings. Some of the work has been done through organized nonprofit agencies, and some work has been done for nonprofit agencies themselves. But I've also done some pro bono work for people who just came to me with a request for representation in the normal course of my practice. I call this "pro bono as you go."

We often think of pro bono as legal work for which you

are not paid anything and perform through some legal nonprofit entity. But pro bono work can also involve work you do for free or at a deep discount because of the client's financial situation. Like Emil's pro bono work, it's done quietly and without fanfare. Pro bono work can be very rewarding — in non-financial ways. More about that later.

WHY DO PRO BONO WORK?

There are many reasons *not* to engage in pro bono work. To name just a few:

- You don't make any money.
- It takes your attention away from regular clients who depend on your availability.
- It may take you out of your comfort zone.
- You don't make any money.
- The usual fare of cases are messy — sometimes legally, sometimes emotionally.
- If you talk about your pro bono cases, people think you're bragging.
- You don't make any money.

So why should lawyers do pro bono work? First, as you

mom always told you, "because you ought to."

The ABA Model Rules of Professional Conduct addresses the "ought to" of pro bono:

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means . . .

You're probably not "inspired" by this kind of thumb in the back, but there it is. We have a professional responsibility to provide legal services to those who cannot pay. But feeling obliged is not a great motivator. A better motivator is knowing that you have helped someone in need.

As I mentioned, pro bono work can involve "pro bono as you go" work that you do at a deep discount because of the client's financial situation. That was the situation with Jim, a client referred to

me by Shawnee attorney Paul McKinney many years ago. Jim had just been fired from his job and was being sued by three former co-employees. He had nowhere to turn and was in a real legal and financial jam. In our initial interview, I told Jim I didn't know if I could help him. I figured he could not afford a lawyer. But I was impressed by both his sincerity and his plight, and I took his case at a deeply discounted hourly rate in order to help him.

After protracted discovery and a trial in Pott County, we finally prevailed, not only against the co-workers but also in a wrongful discharge lawsuit against Jim's former employer. After the verdict was returned, a very happy and relieved Jim turned to shake my hand and said, "You've got a friend for life!" I get a Christmas card every year from Jim and his wife that is signed "Your friends for life." I didn't get any financial reward on Jim's "pro bono as you go" case, but I gained a lifetime friend.

So whether you volunteer for pro bono work through a legal services association, or you do it "as you go," the reward is not found in the money or in knowing you've fulfilled your "professional responsibility." The reward is in using your legal skills to help someone in need and, in the process, making a friend for life.

Mr. Priest practices with the Oklahoma City law firm of Whitten Burrage in the field of employment and civil rights matters.



Jim
PRIEST
ATTORNEY ■ GENERAL

...three decades of
practicing law

...the experience to
protect Oklahoma

www.jimpriest.com

Events to Offer Members Chance for Networking and Service

By Molly Aspan, YLD Chairperson

I would like to begin my letter this month by first thanking everyone who has contacted me in the past few months wanting to become involved in the YLD. When I wrote my first letter for the January bar journal urging more active participation, I never imagined that I would receive so many responses. I have spoken with many of you and hope to continue to do so. It is not too late to get involved. In fact, there are many opportunities coming up in the next few months for anyone who would like to participate.

NEW ATTORNEY RECEPTION AND HAPPY HOURS

The YLD is once again hosting a reception and two happy hours welcoming new members to our profession. The swearing-in ceremony will be held April 22, and the YLD will be involved by hosting a cookie and punch reception for new admittees and their families following the ceremony.

Then, on **April 27 at 5:30 p.m.**, the YLD would like to invite all members to attend a happy hour welcoming the new admittees into the YLD and the OBA. The happy hour receptions will be held in Oklahoma City at **Mickey**

Mantle's Steakhouse in Bricktown and in Tulsa at **Leon's Restless Ribbon** in Brookside. We hope that many of our members use this opportunity to meet the new admittees, as well as to meet other members and learn more about the YLD.

STATEWIDE COMMUNITY SERVICE PROJECT DAY

The YLD is organizing a statewide Community Service Project to be held on **Saturday, May 1** in conjunction with Law Day. On May 1, the YLD is hosting this event to provide an avenue for lawyers across the state to give back to their communities, specifically to public libraries in their communities.

The YLD Board of Directors and Community Service Committee have coordinated with the Oklahoma Department of Libraries and identified 12 public libraries across the state for projects this year. These 12 public libraries are spread throughout the state so that all lawyers can be involved helping out their local communities with other attorneys in their area. The YLD will be hosting community service projects at the **Ponca City Library, McAlester Public Library, Library of Enid and Garfield County, Norman Public Library,**

Muskogee Public Library, Shawnee Public Library, Lawton Public Library, and Perry Carnegie Public Library, as well as two projects in both the **Oklahoma City Metropolitan Library System** and the **Tulsa City-County Library System**. Times and details of each project will be included in next month's *Oklahoma Bar Journal*, as well as posted on the OBA/YLD Web site at www.okbar.org/yld.

If you have any questions about this project or are interested in hosting a project at a public library not yet identified, please contact me at maspan@hallestill.com or (918) 594-0595 or the YLD Community Service Committee Chair Jennifer Kirkpatrick at jhkirkpatrick@eliasbooks.com or (405) 232-3722.

YLD MIDYEAR MEETING

The OBA/YLD Midyear Meeting will be held in conjunction with the annual Solo and Small Firm Conference on June 24-26 at the Downstream Resort in Quapaw, Okla. (near Joplin). This conference offers social events and networking opportunities for YLD members, as well as outstanding CLE — much of which is geared toward younger attorneys. Some of the programming includes

Learning from Legends: Oklahoma Criminal Law Practice, Why Practicing Law is Killing Your Law Practice, How to Deal with Difficult Clients, Keys to Managing a 21st Century Law Office, and an Ethics program on Conflicts. Early bird registration for the Solo and Small Firm Conference is June 10.

Ross and I attended and participated as the Oklahoma delegates at the ABA/YLD Assembly at the ABA Mid-year Meeting in February. I also attended and participated in the ABA House of Delegates. The ABA/YLD Mid-year Meeting provided extensive networking opportunities for young lawyers, a forum for CLE and professional development programming, and assembly business

including presentations by ABA officers and sections, elections of new officers, introduction of the "Touch 10,000" program, recognition of National Outstanding Young Lawyer Award recipients, and debate and vote on four resolutions. If you are interested in becoming involved in the ABA/YLD, the deadline for the scholarship program is April 15. Applications can be found online at www.abanet.org/yld/scholarships.



YLD members make sure to include plenty of goodies in the bar exam survival kits.

BAR EXAM SURVIVAL KITS DISTRIBUTED

The YLD Board of Directors and the YLD New Attorney Committee assembled bar exam survival kits at its February Board of Directors meeting. Wayne Edgar, Jennifer Kirkpatrick, Lane Neal and Karolina Roberts passed out the kits at the bar exam in Oklahoma City, and Kimberly Moore-Waite handed out the kits in Tulsa. Though few were actually excited to take the exam, many were grateful for the essentials provided by the YLD.

ABA MIDYEAR MEETING IN ORLANDO

YLD Directors Jennifer Kirkpatrick, Hannah Cable, Briana

MOCK TRIAL FINALS

The YLD Mock Trial Committee held its state finals on March 2 with Christian Heritage Academy edging out Ada High School for the top honors. Thank you to all members of the Mock Trial Committee, Committee Chair Erin Moore, OBA Mock Trial Coordinator Judy Spencer and all the individuals who volunteered to help with the competition. We will be cheering on Christian Heritage Academy as they represent Oklahoma at the National Mock Trial Competition in May in Philadelphia.



(Back Row) Molly Aspan, Jennifer Kirkpatrick and Doris Gruntmeir; (Front Row) Briana Ross and Hannah Cable at the ABA Midyear Meeting in Orlando

Calendar

March

- 15 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 16 OBA Volunteer Night at OETA;** 5:45 p.m.; OETA Studio, Oklahoma City; Contact: Jeff Kelton (405) 416-7018
- 17 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 18 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- 20 OBA Title Examination Standards Committee Meeting;** 9:15 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kraetli Epperson (405) 848-9100
- 24 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
- 25 OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- OBA Strategic Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Deborah Ann Reheard (918) 689-9281
- 26 OBA Board of Governors Meeting;** Weatherford, Oklahoma; Contact: John Morris Williams (405) 416-7000
- OBA Leadership Academy;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 27 OBA Young Lawyers Division Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595



April

- 1 OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- 2 Oklahoma Bar Foundation Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 
- 6 OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark (405) 232-4271
- 7 OBA Women in Law Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renee DeMoss (918) 595-4800
- 9 OBA Diversity Committee Meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021
- OBA Communications Committee Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Douglas Dodd (918) 591-5316
- OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800
- 14 OBA Government and Administrative Law Practice Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jami Fenner (405) 844-9900

- 15 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- 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
- 17 OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100
- 19 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 20 OBA Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 21 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 22 New Admittee Swearing In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners (405) 416-7075
- OBA Leadership Academy;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 23 OBA Board of Governors Meeting;** McAlester, Oklahoma; Contact: John Morris Williams (405) 416-7000
- Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Bacy (405) 424-5510
- 24 OBA Young Lawyers Division Board of Directors Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595
- 27 OBA New Lawyer Experience;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051
- 28 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
- 29 OBA Ask A Lawyer;** OETA Studios, Oklahoma City; Contact: Tina Izadi (405) 521-4274

May

- 5 OBA Women in Law Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renee DeMoss (918) 595-4800
- 7 OBA Diversity Committee Meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021
- 11 OBA Law-related Education Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack G. Clark (405) 232-4271
- 13 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
- 14 OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800
- 15 OBA Title Examination Standards Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 18 OBA Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 19 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 20 OBA Access to Justice Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Kade A. McClure (580) 248-4675
- 21 OBA Board of Governors Meeting;** Tulsa County Bar Center, Tulsa; Contact: John Morris Williams (405) 416-7000
- 22 OBA Young Lawyers Division Board of Directors Meeting;** Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595
- 26 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
- 31 OBA Closed – Memorial Day Observed**

Miller Selected as District Judge

Gov. Brad Henry recently appointed Gary E. Miller as district judge for Canadian County. He replaces Judge Edward Cunningham, who retired.



Judge Miller was formally sworn in March 12. He earned his bachelor's degree from UCO and his J.D. from OCU School of Law. He was most recently the director of Children and Family Services for the Oklahoma Department of Human Services. Prior to that, he served as an associate district judge in Canadian County from 1993 to 2008. He worked in private practice from 1978 to 1993.

While a judge, he was honored with awards such as the CASA Judge of the Year in 2000; and the Oklahoma Department of Human Services Adult Protection Award in 1995. He was named Yukon's Citizen of the Year in 2001.

Bar Exam Embraces Technology

The February bar exam marked the first time test-takers were allowed to use their laptops on the essay portion of the exam. About half of the 95 people taking the exam took advantage of this new option. The exam was administered with ExamSoft, a program that disables any other computer programs while in use and wirelessly downloads test answers. Last month's bar exam was also the first time it was completely held at the Oklahoma Bar Center and the Tulsa County Bar Center.



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 Philadelphia in



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

May. The competition was held March 2 in the Bell Courtroom at the OU Law Center in Norman. This year's case focused on cyberstalking. One student accused another student's chat room postings and Internet threats of causing emotional distress that affected academic performance, resulting in the loss of a scholarship. The annual competition is sponsored by the 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 (left) and Justice Joseph Watt (right) congratulate teacher Sandra Warren and Principal Tom Padalino of Tulsa's Thoreau Demonstration Academy, which received the annual School of the Year Award Feb. 25. The school received a \$1,000 stipend and plaque recognizing the school and students for their achievement.



Diane Walker of Muskogee's Ben Franklin Science Academy receives a trophy from OBA Law-related Education Committee Chair Chip Clark. Ms. Walker was 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 resignations:

David Michael Adams
OBA No. 21565
414 Nicollet Mall, 5th Fl.
Minneapolis, MN 55401-1993

Slaton Jay Anthony
OBA No. 16561
418 3rd Street S.W.
Mount Vernon, IA 52314

Richard A. Ault
OBA No. 378
809 Timberdale Dr.
Edmond, OK 73034-4258

Miguel A. Comancho
OBA No. 12235
P.O. Box 223834
Christiansted VI
St. Croix, U.S. AE 00822-3834

Donovan Duane Dobbs
OBA No. 14118
P.O. Box 1236
Ozark, MO 65721-1236

Mikilin Moana Esposito
OBA No. 22789
6037 Meridian Dr., No. 411
Lincoln, NE 68506

Glen Allen Glass
OBA No. 12183
Room 14 U
1010 N. St. Mary's St.
San Antonio, TX 78215

William Harvey Hinkle
OBA No. 4229
1730 W. Virgin St.
Tulsa, OK 74127-2510

Frances Sears Lowenfield
OBA No. 18585
6761 170th Ave.
Bloomer, WI 54724

Joseph Vince Thomas Lyon
OBA No. 21274
10021 Vanderbilt Cir., No. 4
Rockville, MD 20850

Sutton Aleksandra
Smith Murray
OBA No. 18996
5708 S. Louisville Ave.
Tulsa, OK 74135

Richard Dan Russell
OBA No. 7842
Oak Bluff Estates
72 Twin Ridge Parkway
Round Rock, TX 78664

Jared Arthur Saunders
OBA No. 18460
4930 Stoneback Pl.
Lawrence, KS 66047

OBA Member Reinstatements

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

Sherri Toxshana Fleming
OBA No. 20483
2305 Summerwalk Parkway
Tucker, GA 30084

Obie Luschin Moore
OBA No. 6348
DP Holding SA
Rue du Stand 60-62
Geneva, Switzerland, FO 1204

Debra Stump
OBA No. 20547
1607 Mason Hill Dr.
Alexandria, VA 22307

Kudos

Gov. Brad Henry appointed **Dennis Shook** as Wagoner County associate district judge. Judge Shook has been in private practice in Wagoner County since 1983. Before that, he was an assistant district attorney in Wagoner County for two years. He has also served as municipal judge for Wagoner and Coweta and as town attorney in Porter. Judge Shook received his J.D. from TU in 1980.

Martha Oakes was recently sworn in as special judge of Oklahoma County. Judge Oakes was previously with the Oklahoma Tax Commission. Prior to that, she was a Grady County assistant district attorney. She graduated from the OU College of Law in 1990 and served on the OBA/YLD board in past years.

James J. Proszek published an article in the inaugural issue of *Damage Prevention Professional*, the 2010 winter edition. The article, titled "Unfolding The Story: Developing Effective Interviewing Techniques," is part one of two articles written for the publication and discusses strategies for preparing and optimizing witness interviews prior to damage settlement litigation.

Robert S. Lafferrandre has been honored with the Distinguished Service Award of "Outstanding Defense

Lawyer for 2009" by the Oklahoma Association of Defense Counsel.

The Edmond firm of Powers at Law LLC was selected as the Bank of Oklahoma/Edmond Chamber 2009 Small Business of the Year. **Don Powers** and **Dr. G. Kay Powers** are the members/managers of the firm.

Leah Farish published an article in Creighton University's *Journal of Religion and Society* on the close relationship between the Westminster Confession of Faith and the First Amendment. It can be found online at <http://moses.creighton.edu/jrs/2010/2010-2.html>.

Johnny Beech was named program planner and facilitator for Southwestern Oklahoma State University's Sports Management Conference, which featured athletic directors speaking on various college sport management topics of interest to Division II-sized programs.

The Board of Directors of Legal Aid Services of Oklahoma has elected **Patrick Layden** of McAlester to serve as the organization's president for 2010. Mr. Layden, who represents the Pittsburg County Bar Association on Legal Aid's board, has been a member since 2002 and, prior to that, served on the board of Legal Services of Eastern Oklahoma. **Eleanor Thompson** of Oklahoma City was elected vice president and **Lucille Logan** of Oklahoma City was elected secretary-treasurer.

For the third consecutive year, Conner & Winters participated in the American

Red Cross Stocking Stuffer Program. The team dedicated approximately 150 non-work hours to the event and raised more than \$1,000. They stuffed 275 stockings for underprivileged children and children affected by tragedy.

On The Move

Stephen L. DeGiusti is the new general counsel for Quest Resource Corp., as announced last month. The e-mail address published was incorrect. He can be reached at sdegiusti@qrcp.net.

Mulnix Ogden Hall Andrews & Ludlam PLLC of Oklahoma City announces **Sally Ketchum Edwards, Joseph K. Goerke, Armando J. Rosell, Jeffrey E. Tate** and **Travis W. Watkins** as members of the firm. Ms. Edwards received a B.A., summa cum laude, from UCO in 1975 and a J.D. from OU in 1979. Her practice is focused in the areas of federal and state taxation, estate and gift taxation, estate planning, probate, trusts and estate litigation. Mr. Goerke received a B.S. from OSU in 1986 and a J.D. from OU in 1989. His practice primarily involves civil litigation, including areas of insurance defense, insurance coverage issues, insurance subrogation, personal injury, products liability, premise liability, banking, commercial disputes and trust disputes. Mr. Rosell received a B.A. from

Southern Methodist University in 1995 and a J.D. from OCU in 2000. His practice is primarily focused in business litigation, bankruptcy, real estate law and transactions, banking law, entity formation, creditor's rights, and sports and entertainment law. Mr. Tate is a 1996 graduate of the OU College of Law. He concentrates his practice in the areas of bankruptcy and reorganization, commercial litigation, real estate litigation and creditor's rights. Mr. Watkins received his J.D. from OCU in 1999. His practice is primarily concentrated in trial litigation, including personal injury and employment matters.

Andrews Davis of Oklahoma City announces that **Darin C. Savage** has joined the firm. Mr. Savage is an associate with more than six years of experience in the areas of oil and gas, energy, commercial real estate, real property and business. Mr. Savage received his undergraduate degree, master's degree and law degree from OU.

Pierce Couch Hendrickson Baysinger & Green LLP of Oklahoma City announces **Elizabeth R. Sharrock**, **Daniel J. Hoehner** and **Jerrod S. Geiger** as partners in the firm. Ms. Sharrock earned her J.D. from OU in 1997 and practices in the areas of medical malpractice, civil rights and insurance defense. Mr. Hoehner earned his J.D. from OU in 1984 and practices in the areas of gaming law, insurance coverage and insurance defense. Mr. Geiger's area of practice is workers' compensation and insurance defense.

Conner & Winters of Tulsa has named **Kathryn Kindell** as its newest partner

and the addition of **John L. Williams** to its Native American/American Indian practice team. Ms. Kindell graduated with honors from the TU College of Law and now practices in the corporate group focusing on corporate and securities law and mergers and acquisitions. Prior to joining Conner & Winters, Ms. Kindell practiced in the legal department of a telecommunications corporation. Mr. Williams concentrates his practice in Indian Country business transactions, energy development, tribal law, tribal corporate structure, regulatory law, FERC compliance and other natural resources law. He earned both his B.S. in chemical engineering, graduating cum laude, and his J.D. from TU.

McAfee & Taft of Oklahoma City and Tulsa has named attorneys **Stephanie Chapman**, **Todd Court**, **Stephen M. Hetrick**, **Mark W. Malone**, **Beau M. Patterson**, **Natalie K. Ramsey**, **Paul A. Ross** and **Ronald T. Shinn Jr.** as shareholders, and **Jennifer Callahan** has been elected to its board of directors. Ms. Chapman is a tax and family wealth lawyer whose practice is focused in the areas of taxation of business transactions and wealth transfer planning. Mr. Court is a trial lawyer who represents employers in a variety of labor and employment matters as well as assisting clients with general litigation involving disputes in real estate and commercial contracts. Mr. Hetrick is a corporate lawyer whose practice encompasses a broad range of complex business transactions, including the organization, financing, acquisition, reorganization and divestiture of all types of entities,

including the acquisition, development, leasing, management and financing of real estate and state and local taxation matters. Mr. Malone is a tax and family wealth lawyer who assists clients in estate planning, administration of estates, settlement of complex estate matters and settlement and litigation of disputes regarding wills and trusts. Mr. Patterson is a corporate lawyer whose practice involves a broad range of business transactions and general representation of business entities in the areas of creditor's rights, health care, oil and gas transactions, regulatory compliance and real estate matters. Ms. Ramsey is a trial lawyer whose practice involves the representation of employers and management exclusively in all phases of litigation before federal and state courts, regulatory and administrative agencies and arbitration panels. Mr. Ross is a trial lawyer whose primary practice fields include general commercial litigation, Native American law, and the representation of employers in labor and employment disputes. Mr. Shinn is a trial lawyer whose experience includes cases involving franchise and license agreements, health-care litigation, business torts, shareholder and corporate disputes, and white collar criminal defense. Ms. Callahan is an employee benefits and tax lawyer whose practice is focused on executive compensation and benefits planning private and public companies of all sizes across a broad range of industries. She earned her J.D. from OCU and her bachelor's degree from California Polytechnic State University.

Robinett & Murphy of Tulsa announces that former Judge **Robert Perugino** and **Sarah W. Poston** have become of counsel to the firm and also announces **Christian D. Barnard** and **Cheryl A. Jackson** as new associates. Mr. Perugino will focus on family law matters and will continue his mediation services in family law disputes. He will also handle probate and guardianship matters. He can be reached by e-mail at rperugino@robinettmurphy.com. Ms. Poston joins the firm after practicing with private firms in Ohio and completing federal clerkships in both Michigan and Connecticut. She will focus primarily on the firm's civil litigation matters. Her e-mail address is sposton@robinettmurphy.com. Both Ms. Barnard and Ms. Jackson are 2009 graduates of the TU College of Law and will focus on the firm's civil litigation practice. They can be contacted by e-mail at cbarnard@robinettmurphy.com and cjackson@robinettmurphy.com.

Phillips Murrah PC of Oklahoma City announces **Dawn Rahme** as shareholder and director. Her practice is concentrated in the areas of tax, tax controversy and litigation, family wealth transfer planning and corporate law. Ms. Rahme received a bachelor's degree and J.D. from TU, then went on to complete New York University School of Law's graduate tax program.

The shareholders of the Tulsa law firms Johnson Jones Dornblaser Coffman & Shorb and the Davis Law Firm of Oklahoma announce that their firms have combined to become Johnson & Jones PC. **John Johnson**,

Ken Dornblaser, **Randy Shorb**, **Andy Johnson** and **Chris Davis** are the shareholders of Johnson & Jones PC. **Jon Cartledge**, **Luke Bomer**, **Ryan Fulda** and **Trevor Hughes** are the associate attorneys. **Paul King-solver** is of counsel to the firm. The firm's office is located at 2200 Bank of America, 15 W. 6th Street, Tulsa, 74119; (918) 584-6644; Fax: (888) 789-0940.

Bryan L. Kingery and **Roger B. Hale** announce the formation of Wyatt, Kingery, Hale & Associates. **Don L. Wyatt** will be of counsel to the new firm. **Michael L. Harris** and **Heather L. Hammond** are associates in the firm. Mr. Kingery will focus his practice in the area of Oklahoma workers' compensation claimant's cases, while Mr. Hale will focus on the areas of Social Security disability, veteran's administration disability and catastrophic personal injury/medical malpractice plaintiff cases. Mr. Harris will limit his practice to Social Security disability and veteran's administration disability claims. Ms. Hammond will limit her practice to Social Security disability claims. The nationwide toll-free phone number remains 1 (800) 522-4595.

Former Payne County Associate District Judge **Robert Murphy** has moved to Spokane, Wash. Judge Murphy accepted a position with the state of Washington's Office of Administrative Hearings as an administrative law judge. His office is located at 221 N. Wall Street, Spokane, Wash., 99223. Judge Murphy can be reached by phone at (509) 456-3989 or by e-mail at judgermj@gmail.com.

Best & Sharp Inc. of Tulsa announces **Shannon E. Bickham** as an associate of the firm. Ms. Bickham graduated from the OCU School of Law in 2007. Since that time, she has been a Tulsa County assistant district attorney. At Best & Sharp, her practice areas will include medical malpractice defense, general insurance defense litigation and other tort litigation.

LeAnne McGill and Faye Rodgers announce the opening of their new firm, McGill & Rodgers PLLC. The firm will focus primarily on the practice areas of family law, estate planning and general civil litigation. McGill & Rodgers is located at 1600 E. 19th St., Suite 402, Edmond, 73013; (405) 285-8048.

Jon M. Williford announces the opening of his new firm, Jon M. Williford PLLC, in Oklahoma City. He may be reached at (405) 239-2454 or by e-mail at jonwillifordlaw.com. Mr. Williford has worked in all areas of personal injury and medical malpractice litigation and plans on continuing that work at his new firm.

T.D. Williamson Inc. announces **Bill Fisher** as general counsel, corporate secretary and chief compliance officer. As supervisor of the company's legal staff in the U.S., Norway and Belgium, he oversees all legal matters throughout the TDW global organization. He is responsible for ensuring compliance with laws and regulations worldwide and for facilitating interaction with the Board of Directors in corporate governance matters. Mr. Fisher received a B.A. from TU and a J.D. from the OU College of Law.

GlassWilkin PC of Tulsa announces that **Philip D. Hixon** has joined the firm and **David W. Lawson** has been named an associate. Mr. Hixon is a member of the American Bar Association, Tulsa County Bar Association and Defense Research Institute. He earned his bachelor's of business administration, summa cum laude, from UCO and his master's of business administration from OCU. He earned his J.D., summa cum laude, from OCU. Mr. Hixon's practice is concentrated in the areas of construction law, environmental law, civil and general litigation, toxic torts and insurance defense. Mr. Lawson is a member of the Tulsa County Bar Association and the American Institute of Architects. Mr. Lawson earned his bachelor's degree in architecture from OSU and his J.D. from the OU College of Law. His practice is concentrated in the areas of business transactions, business and civil litigation, construction law, professional liability and real estate.

Shelley Clemens has been named to lead the U.S. Attorney's Office in Tucson, Ariz. Ms. Clemens has been a deputy chief in the crimi-

nal division since January 2008 with responsibilities for violent crimes occurring within the Tohono O'odham Nation and the Pascua Yaqui Tribe and assaults on federal law enforcement officers. As chief assistant, she will run and manage the Tucson office, which has 71 attorneys plus support staff.

At The Podium

Members of Phillips Murrell's commercial and consumer financial services department spoke recently at the annual Commercial Law Update, a continuing legal education seminar held in Oklahoma City. Attorneys **Eric L. Johnson, James A. McCaffrey** and **Fred Miller** briefed attendees on the latest developments in commercial and consumer law and their impact on Oklahoma businesses.

Wallace W. Kunzman Jr. addressed attendees of the 2009 NASAA Corporate Finance Training Seminar held in Tampa, Fla. Mr. Kunzman presented information

on regulatory and policy issues involving non-traded real estate investment trusts, direct participation programs and SEC/FINRA disclosure developments. Mr. Kunzman also spoke at the 2007 NASAA Corporate Finance Training Seminar.

Compiled by Chelsea Klinglesmith

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 May 15 issue must be received by April 19.

Eugene (Gene) Guy Boerner III of Tulsa died Jan. 10. He was born Dec. 26, 1971, in Baton Rouge, La. Mr. Boerner grew up and spent most of his life in Tulsa. He was valedictorian of Metro Christian Academy, class of 1990. He attended OSU and completed his bachelor's degree at TU. He continued his education at the OU College of Law. He earned his J.D. and won an American Jurisprudence Award in spite of breaking both arms during his first year of law school. His work as an intern for the Tulsa law firm of Pezold, Barker & Woltz earned him a position there as an associate where he practiced in the area of oil & gas. Though technically a member of Generation X, he displayed a work ethic more common to the generation prior. Mr. Boerner was a

gifted musician who enjoyed playing and listening to music.

Charles Edward (Chuck) Cheek of Houston died April 17, 2009. He was born Oct. 7, 1950. A graduate of the University of Tennessee College of Law, he received his degree and was licensed in 1975. Following law school, he moved to Tulsa where he worked in the legal department of Gulf Oil Co. In 1985 he moved to Houston to join Enron and was chief litigation counsel for the company until 2005 when he retired. He was a member of the state bar associations in Oklahoma, Tennessee and Texas. Memorial donations may be made to the Pittsfield First Christian Church, Pike County Mounted Angels or Great Strides c/o Airmans-Hires Funeral Home, Box 513, Pittsfield, Ill., 62363.

William (Bill) W. Wiles of Edmond died Feb. 27. He was born April 18, 1942, in Shawnee. He graduated from Shawnee High School, Oklahoma Baptist University and the OU College of Law. **After earning his J.D., Mr. Wiles served in the U.S. Navy JAG Corps before going into private practice.** He joined the Oklahoma Workers' Compensation Court as a staff attorney after more than 30 years in private practice. Mr. Wiles enjoyed roasting coffee, hiking, camping and canoeing. He loved national parks, especially Yellowstone. Memorial contributions may be made in Mr. Wiles' name to the Yellowstone Park Foundation at www.ypf.org or 222 E. Main St., Suite 301, Bozeman, Mont., 59715.



OIL & GAS PROFESSIONALS
7000+ YOU

Chesapeake Energy Corporation is seeking talented professionals for the positions listed below. Chesapeake, an Oklahoma City-based company, is the largest independent producer of natural gas in the U.S. and the most active driller of new wells in the U.S. In 2009 Chesapeake was added to **FORTUNE Magazine's 100 Best Companies to Work For** list. Ideal candidates should be self-motivated team players and possess excellent interpersonal skills. A high degree of analytical ability and excellent oral and written communication skills are necessary for success in our fast-paced and rewarding environment.

Oil & Gas Collection Attorney – Primary responsibilities will be collection of accounts receivables and other operations related to litigation. Qualified candidates must be current members of the Oklahoma or Texas Bar Association with a minimum of three to five years experience. Expertise in all aspects of collections and a working knowledge of oil and gas law and operations are required.

**FORTUNE
100 BEST
COMPANIES
TO WORK FOR 2009**

Chesapeake offers excellent compensation and benefit packages including a very generous equity compensation plan. For immediate and confidential consideration, please visit our company website, www.chk.com, to either submit a résumé or complete an online personal profile.

No telephone inquiries please. An Equal Opportunity Employer.

Family & Divorce Mediation Training

OKC • March 24 - 27

Tulsa • April 14 - 17



Approved for 40 hours of MCLE credit

This course is lively and highly participatory and will include lecture, group discussion, and simulated mediation exercises

Cost: \$625 includes all materials

The Course for Professional Mediators in Oklahoma

This course fulfills the training requirements set forth in the District Court Mediation Act of 1998

Contact:

The Mediation Institute

(405) 607-8914

James L. Stovall, Jr.

13308 N. McArthur

Oklahoma City, OK 73142

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM



If you need help coping with emotional or psychological stress please call 1 (800) 364-7886. Lawyers Helping Lawyers Assistance Program is confidential, responsive, informal and available 24/7.



SERVICES

APPEALS and LITIGATION SUPPORT — Expert research and writing by a veteran generalist who thrives on wide variety of projects, big or small. **Cogent. Concise.** Nancy K. Anderson, (405) 682-9554, nkanderson@hotmail.com.

HANDWRITING IDENTIFICATION POLYGRAPH EXAMINATION

Board Certified	Court Qualified
Diplomate — ABFE	Former OSBI Agent
Life Fellow — ACFE	FBI National Academy

Arthur D. Linville (405) 636-1522

INTERESTED IN PURCHASING PRODUCING & NON-PRODUCING Minerals; ORRI; O & G Interests. Please contact: Patrick Cowan, CPL, CSW Corporation, P.O. Box 21655, Oklahoma City, OK 73156-1655; (405) 755-7200; Fax (405) 755-5555; E-mail: pcowan@cox.net.

MEDICAL MALPRACTICE

Need to file a med-mal claim? Our licensed medical doctors will review your case for a low flat fee. Opinion letter no extra charge. Med-mal EXPERTS, Inc. Nationwide since 1998. www.medmalEXPERTS.com. 888-521-3601.

OF COUNSEL LEGAL RESOURCES — SINCE 1992 — Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 20 published opinions with numerous reversals on certiorari. **MaryGaye LeBoeuf** (405) 728-9925, marygaye@cox.net.

EXPERT WITNESSES • ECONOMICS • VOCATIONAL • MEDICAL Fitzgerald Economic and Business Consulting Economic Damages, Lost Profits, Analysis, Business/Pension Valuations, Employment, Discrimination, Divorce, Wrongful Discharge, Vocational Assessment, Life Care Plans, Medical Records Review, Oil and Gas Law and Damages. National, Experience. Call Patrick Fitzgerald. (405) 919-2312.

TRAFFIC ACCIDENT RECONSTRUCTION

INVESTIGATION • ANALYSIS • EVALUATION • TESTIMONY 25 Years in business with over 20,000 cases. Experienced in automobile, truck, railroad, motorcycle, and construction zone accidents for plaintiffs or defendants. OKC Police Dept. 22 years. Investigator or supervisor of more than 16,000 accidents. **Jim G. Jackson & Associates Edmond, OK (405) 348-7930**

LITIGATION SUPPORT SERVICES: Need litigation support but want to avoid the expense of hiring an associate? Contact TulsaContractAttorney@yahoo.com to learn how an experienced contract attorney can benefit your practice by providing litigation support services on an as-needed basis. Specializing in appeals, research and writing.

SERVICES

RESIDENTIAL APPRAISALS AND EXPERT TESTIMONY in OKC metro area. Over 30 years experience and active OBA member since 1981. Contact: Dennis P. Hudack, SRA, P.O. Box 21436, Oklahoma City, OK 73156, (405) 848-9339.

CONSULTING ARBORIST, tree valuations, diagnoses, forensics, hazardous tree assessments, expert witness, depositions, reports, tree inventories, DNA/soil testing, construction damage. Bill Long, ISA Certified Arborist, #SO-1123, OSU Horticulture Alumnus, All of Oklahoma and beyond, (405) 996-0411.

BRIEF WRITING, APPEALS, RESEARCH AND DISCOVERY SUPPORT. Fifteen years experience in civil litigation. Backed by established firm. Neil D. Van Dalsem, Taylor, Ryan, Schmidt & Van Dalsem P.C. (918) 749-5566, nvandalsem@trsvlaw.com.

AFARM Consulting, L.C.

Raleigh A. Jobes, Ph.D.
2715 West Yost Road • Stillwater, OK 74075-0869
Phone (405) 372-4485 FAX (888) 256-7585
E-Mail raj@afarmconsulting.com

Agricultural Economic and Business Consultant

Will provide independent and objective analysis of agricultural related problems.
Resume and Fee schedule sent upon request.

BUSINESS VALUATIONS: Marital Dissolution * Estate, Gift & Income Tax * Family Limited Partnerships * Buy-Sell Agreements * Mergers, Acquisitions, Reorganization & Bankruptcy * SBA/Bank Required. Dual Certified by NACVA and IBA, experienced, reliable, established in 1982. Travel engagements accepted. Connally & Associates, P.C. (918) 743-8181 or bconnally@connallypc.com.

LEGAL BILLING SERVICES — Solos and small firms can now streamline their billing process by allowing us to provide them with professional, detailed billing statements in a timely fashion. Save time, increase profitability and become more efficient. Excellent references and 10 years of Timeslips experience. Call toll free (866) 943-5151 or www.mybillingdepartment.com.

OFFICE SPACE

OFFICE SHARE — NEWLY CONSTRUCTED TOWN CENTER in the Village duplex suite, just off Hefner east of May, west of Penn; two medium private offices available; reception/waiting area; large conference room; coffee bar; bath. Flexible arrangements in sharing overhead of approx. \$750 per month per office. Call Joe at (405) 740-1261.

EXECUTIVE SUITES FOR LEASE: Beautifully restored building in Downtown/Midtown Arts District. Walking distance to County and Federal Courthouses. Reception, phone, internet, cable tv, copy/fax/scanner, free parking. Secretarial suites available. Case sharing opportunities with 6 practicing attorneys. (405) 272-0303.

OFFICE SPACE

DOWNTOWN TULSA OFFICE SPACE – One office for rent with space for support staff. Space includes reception area, conference room, copy machine, fax and Internet access. Additional services available. Contact (918) 583-6964 or (918) 582-8803.

MIDTOWN RENAISSANCE OFFICE SPACE FOR LEASE: Office space yours in a beautifully renovated 1920s building in the heart of Midtown within walking distance to many new restaurants and the Boulevard Cafeteria. Amenities include receptionist, phones, Internet, copier, fax, postage meter, 2 conference rooms, library, kitchen, housekeeping, onsite file storage and parking. Located in the vicinity of 12th and Walker. (405) 627-1380 or (405) 204-0404.

SOUTH OKC OFFICE SPACE in a building complex surrounding a tranquil park-like setting in the Willowbrook Gardens Professional Building complex located on South Walker Avenue just south of I-240. No long-term lease required. Variety of space available from as little as one office up to as much as 5,000 square feet. Renovated in 2007. Carpeted floors, offices range from small/moderate to large, large reception area, built-ins, kitchen, and offices with a view! Call (405) 239-3800.

OFFICE SPACE AND SUPPORT SERVICES AVAILABLE. Contact Jim Lee or David Kisner at (405) 848-5532.

POSITIONS AVAILABLE

PARALEGAL /LEGAL ASSISTANT (Part-time possibly turning into full-time.) Small south central Oklahoma law office looking for a highly knowledgeable individual proficient in Microsoft Word and Outlook. Responsible for maintaining dockets, drafting, editing and proofreading documents and other duties as needed. Please e-mail Resume' and References to cindy@cjohnsonenterprises.com.

IN-HOUSE REAL ESTATE ATTORNEY. Solid OKC-based national corporation seeking an attorney with 3 to 7 years of experience. Strong transactional experience is required. Experience with real estate transactions, especially commercial leasing, is a plus. Position will provide counsel to the company's real estate and construction departments. Duties will include negotiating and drafting commercial lease documents, resolving disputes with existing leases, and providing counsel on a wide variety of real estate and construction issues. Exceptional working environment, competitive salary, medical/dental plan, life ins., 401k, etc. Applications MUST include resume', writing sample, and salary requirements. Send to "Box CC," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

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

POSITIONS AVAILABLE

OKLAHOMA CITY LAW FIRM, seeking trial lawyer with two to five years experience to handle all phases of Personal Injury litigation. Please send resume and references to "Box T," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

DOWNTOWN OKLAHOMA CITY, AV RATED, INSURANCE DEFENSE LAW FIRM with emphasis on Commercial Trucking Litigation, seeks associate attorney with 0-2 years of litigation experience, good writing skills and looking for new challenges. Compensation package is commensurate with level of experience. Please send resume in confidence via email to karen@millsfirm.com.

EXPERIENCED PARALEGAL NEEDED for very busy Edmond law firm. Experience in civil litigation required. Salary commensurate with experience. Please send resume and references to "BOX AA," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSISTANT UNITED STATES ATTORNEY: The United States Attorney's Office for the Western District of Oklahoma is currently seeking applicants for a term appointment not to exceed 14 months which may be extended. The applicant selected will have the primary responsibility of working with criminal and civil appeal matters. Salary is based on the number of years of professional attorney experience. Applicants must possess a J.D. degree, be an active member of the bar in good standing (any jurisdiction), and should have legal practice experience post-J.D. Interested applicants should send their resumes to: Robert J. Troester, Executive Assistant U.S. Attorney, U.S. Attorney's Office, Western District of Oklahoma, 210 Park Avenue, Suite 400, Oklahoma City, OK 73102. Resumes must be received no later than March 19, 2010, and should reference announcement number 10-WOK-15-A.

ASSISTANT GENERAL COUNSEL III: The Oklahoma Department of Mental Health and Substance Abuse Services (ODMHSAS) is recruiting for an Assistant General Counsel III. This position performs responsible professional legal work in preparation & presentation of cases in court & administrative proceedings, & advises the agency & personnel regarding legal matters. Requires: Juris Doctorate degree from an ABA accredited law school and member in good standing with the Oklahoma Bar, with a min. of 6 yrs exp. in practicing law. Preference may be given to applicants with civil & administrative litigation, trial exp. & for individuals with a min. of 1 yr. exp. in representing governmental entities in litigation & trial exp. Applicant must be willing and able to fulfill all job related travel normally associated with this position. Salary range: \$60,000 – 75,900, ODMHSAS offers excellent benefit & retirement packages; reference #2010-10 CO with job title & send resume with a writing sample & a copy of your most recent performance evaluation to address below. Reasonable accommodation to individuals with disabilities may be provided upon request. Application period: 2-19-2010 – 3-27-2010. EOE. ODMHSAS – Human Resources, 2401 NW 23rd, Suite 85, OKC, OK 73107, Fax (405) 522-4817, humanresources@odmhsas.org.

POSITIONS AVAILABLE

IN-HOUSE COUNSEL: The Bama Companies in Tulsa, Oklahoma is seeking a transactional attorney with 7 years experience in contract/business law. This role is responsible for drafting, reviewing and negotiating contracts for various departments and for providing counsel in the areas of labor and employment, real estate, product's liability and workers' compensation. Reporting to the Director of Legal Services, this position is a hands-on role with varied day-to-day responsibilities and the potential for growth as a leader within the Bama system. Prefer undergraduate business degree and/or broad business knowledge and skills. Please apply online at www.bama.com or send resume to hrdepartment@bama.com.

THE OU COLLEGE OF LAW IS SEEKING APPLICANTS for Associate Director of the Office of Professional & Career Development. This individual will work with students and alumni counseling on career objectives, training on job-searching techniques, networking, drafting resumes and other correspondence, interviewing and other essential professional career development processes. Additional responsibilities will be developing and implementing programs on job-search essentials, professional career development and available career options; surveying graduates and researching the legal community for data and trends of the legal career market; and assisting with job fairs and on-campus interview activities. Although a J.D. is preferred applicants must possess a Bachelor's Degree or an equivalent combination of education/job-related experience; 2 years of demonstrated experience and success in legal recruitment, legal job-search process or career counseling; superior oral communication skills, including interpersonal, public speaking and counseling; excellent writing skills; ability to develop and maintain effective collaborative working relationships; and basic office equipment and computer skills. Applicants are required to submit a cover letter, resume and list of references. For further information, go to <https://jobs.ou.edu> (See Requisition #:09013).

POSITIONS AVAILABLE

CONTRACT MANAGER, OU MEDICAL CENTER: Applies high level technical knowledge to manage and process contracts such as service, referral source and income guarantees. Develops, implements and maintains methods for ensuring contract compliance. Works with hospital Directors and HCA legal department to prepare documents. Bachelor's Degree + 3 yrs experience in managing contracts. To apply submit application at www.oumedicine.com or for questions contact Diane Gonzales, Recruiter (405) 271-5728 Ext 53707. EEO/AA Employer M/F/V/D.

PARALEGAL WITH EXPERIENCE HANDLING SOCIAL SECURITY DISABILITY CASES needed for busy Tulsa office. Pay commensurate with experience. Bonus for bilingual ability. Send resume to "Box A," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152. All replies kept confidential.

CLASSIFIED INFORMATION

CLASSIFIED RATES: One dollar per word per insertion. Minimum charge \$35. Add \$15 surcharge per issue for blind box advertisements to cover forwarding of replies. Blind box word count must include "Box _____, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152." Display classified ads with bold headline and border are \$50 per inch. See www.okbar.org for issue dates and Display Ad sizes and rates.

DEADLINE: Tuesday noon before publication. Ads must be prepaid. Send ad (e-mail preferred) in writing stating number of times to be published to:

Jeff Kelton, Oklahoma Bar Association
P.O. Box 53036, Oklahoma City, OK 73152
E-mail: jeffk@okbar.org

Publication and contents of any advertisement is not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly non-discriminatory.

‘Too Bad for You, Buster...’

By Jerry Sokolosky

In my last year of law school at OU after taking the legislation class taught by Dr. Maurice Merrill, it occurred to me that I could be the Democrats’ gift to good government.

I shared my vision with politically savvy classmates like Rex Travis, Andy Coats, Gordon Melson, Buzz Goodwin, Bob Macy and Larry Derryberry. Since none of them objected, I assumed it was absolutely unanimous that I run for office.

In 1964 I borrowed the filing fee from a senior partner and filed for the House of Representatives. Rex Travis counseled me that the only way that I could be elected — with my name and no money — was to knock on every door

in the district. I set out to do just that.

It was a very hot July afternoon, and I rang a doorbell. Two children came to the door. The young lady

was about 12 and her brother about 8. I asked if their parents were home, and they said no.

I thought as long as I was there I would

give them my pitch. I said I was Jerry Sokolosky, running for the House of Representatives. They thought that was pretty funny. Undaunted, I continued, handing them a brochure and asking them to give it to their parents when they came home. They grinned and nudged each other knowingly. I thanked them and turned around to leave.

As I stepped off the porch, the young man stuck his head out the door and yelled, “Too bad for you Buster, we’re for Nixon.”

I lost that election and ever since the revelations of Watergate, I’ve always wondered if Richard Nixon had something to do with it.

Mr. Sokolosky practices in Oklahoma City.



Medicaid Planning 101

Wednesday, March 17, 2010 - 2 p.m.

1.5 hours total MCLE

Thurgood Marshall's Coming!

Wednesday, March 24, 2010 - 11 a.m.

3.5 hours total MCLE, 3.5 hours ethics

Thurgood Marshall is one of the giant figures in the history of American jurisprudence. As the passionate and embattled civil rights lawyer who acted as the lead attorney for the plaintiffs in *Brown v. Board of Education* of Topeka, KS, he helped win the U.S. Supreme Court decision to legally end racial segregation in the public schools in the United States. The movie portrays Marshall as an old man as he ruminates and relives past trials and victories and uses Marshall's mastery of language, storytelling and imitation to create a powerful presentation.

Estate Planning & Public Benefit Issues for Family Law

Wednesday, March 24, 2010 - 3 p.m.

4 hours total MCLE, .5 hours ethics

Family law and estate planning overlap in certain cases. Understanding the effects changes to family dynamics as a result of divorce can also impact estate-planning documents and public benefits. Our experienced faculty will provide basic estate planning and public benefit guidance family lawyers need to know to best serve their clients.

- Discrepancies between prenuptial agreements and wills or trust agreements
- When it could be in the best interests of a protected person for the conservator to agree to a divorce to protect the spouse's assets
- Handling a death mid-proceeding
- Ethical issues for both the estate planning and divorce lawyer
- Public Benefits 101 – what programs are available and what rules apply

Best Practices for Record Retention

Thursday, March 25, 2010 - 12:30 p.m.

1 hour total MCLE, .5 hours ethics

Business Development Techniques to Build Your Law Practice

Tuesday, April 6, 2010 - 3:30 p.m.

3.5 hours total MCLE, .5 hours ethics

- What's different in the New Economy?
- Which practices are thriving?
- The four primary sources of new business
- Stop "making a pitch" and start interviewing prospective clients
- Exercise: Your 30-second commercial
- Which activities are a waste of time and which ones are worth your time
- What's different in the New Economy?



LEGAL RESEARCH THAT SPEAKS THE SAME LANGUAGE YOU DO: HUMAN.

WestlawNext™

Introducing a new Westlaw®. Legal research goes human. There's your professional life and there's your personal life. WestlawNext™ recognizes both, with a more intuitive, you-centric legal research system. Now, finding the information you need is as easy as searching for it the way you say it. And intelligent tools let you filter, tag, and folder that information effortlessly. For greater efficiency. And confidence. We've always worked for you. Today, we work like you. User-friendly, meet human-friendly. That's knowledge to act. **Discover more at WestlawNext.com**

