



WIT Oklahoma Bar JOURNAL

Volume 81 ♦ No. 14 ♦ May 15, 2010

COMMERCIAL LAW

ALSO INSIDE

- International Charitable Gifts and Grants
- New Member Benefit: FedEx
- OBA Awards: Call for Entries

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INSOLVENT ESTATES – MAY 19, 7:30 A.M., YOUR COMPUTER, \$250, 5 HOURS MCLE/O ETHICS

For better or worse, economic conditions have made the insolvent or cash-poor estate an increasingly important part of the estate administration practice. This program will start with the basic elements of the insolvent estate in the context of current statutory and case law, highlighting areas of special concern and offering the steps necessary to properly protect the personal representative. The priority of payment of creditors, both secured and unsecured, will be discussed in detail. Hypothetical examples will be used to generate discussion and offer practical guidance on issues that commonly arise.

WHAT EVERY ATTORNEY NEEDS TO KNOW ABOUT SPECIAL NEEDS TRUSTS MAY 20, NOON, YOUR COMPUTER, \$50, 1 HOUR MCLE/O ETHICS

The objective of this seminar is to introduce the basics of special needs trusts to the general practitioner.

- First, special needs trusts will be discussed. There are three types of special needs trusts: Third Party Supplemental Needs Trusts, Self-Settled Trusts referred to as (d)(4) Trusts, and Pooled Trusts.
- Second, when a special needs trust needs to be used will be used. The general practitioner needs to be able to spot special needs issues in order to bring a specialist into the case.
- Special Needs Trusts need to be considered in probate, guardianship, wrongful death and PI cases.

IDENTITY THEFT, DATA PROTECTION AND PRIVACY: OBSTACLES AND OPPORTUNITIES FOR ALL ATTORNEYS

MAY 20, 11:55 A.M., YOUR COMPUTER, \$175, 3.5 HOURS MCLE/O ETHICS

LEGAL CHALLENGES IN REPRESENTING NONPROFIT ORGANIZATIONS – MAY 25, 11:30 A.M., YOUR COMPUTER, \$100, 2 HOURS MCLE/O ETHICS

This webcast will cover significant corporate legal trends and developments affecting nonprofit organizations, including the continued evolution of corporate governance standards, scrutiny by nonprofit regulators, and community benefit expectations. Additionally, it will cover ethical issues facing lawyers who serve as directors of clients that are nonprofit organizations.

THE INSIDER THREAT AND COMPUTER FORENSICS – ITS NOT JUST A LARGE CORPORATION PROBLEM

MAY 25, 2:00 P.M., YOUR COMPUTER, \$50, 1 HOUR MCLE/O ETHICS

Computer forensics can be used in a wide array of situations that don't necessarily require a computer to be the focal point of a crime. This presentation will give solo attorneys and attorneys at small firms a basic overview of the risks their clients face, how files are deleted and recovered and what types of data can be recovered from various electronic devices.

IS YOUR FIRM AT RISK? EMPLOYMENT ISSUES FOR LAW FIRMS

MAY 26, 2:00 P.M., YOUR COMPUTER, \$100, 2 HOURS MCLE/O ETHICS

- Are your employees (paralegals, law clerks, and summer associates) entitled to overtime pay?
- Can a mandatory retirement age be imposed on partners?
- May an attorney make any work assignments based on an employee's race, gender, or national origin?
- What are your vacation and sick leave obligations?

FACT INVESTIGATION IN PERSONAL INJURY CASES

JUNE 10, 3:00 P.M., YOUR COMPUTER, \$175, 3.5 HOURS MCLE/O ETHICS

In many cases, investigation of the facts before discovery is the single most important part of achieving a good result. Well-planned client and witness interviews, as well as utilizing sources of evidence that are often overlooked, can save plaintiffs and their counsel the considerable expenses associated with a case that turns out to be a dead end. Skilled investigation can save defendants the cost of defending a case that should have been resolved early and enables both sides to give their clients accurate evaluations. This half-day presentation will reinforce fundamentals and discuss new developments.



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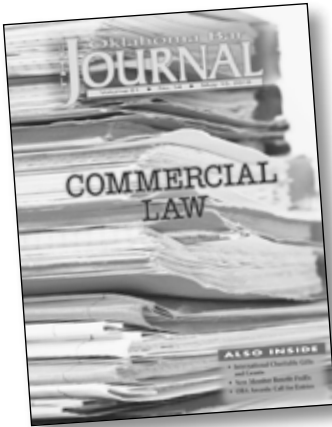


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THEME:
COMMERCIAL LAW
EDITOR: JAMES T. STUART

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I Wonder What Happened to 'You'?

By Allen Smallwood

The spring of 1967 found me as a 19-year-old Marine rifleman in an infantry platoon halfway around the world. I had been "in country" since the previous December and sometime in late March or early April (you lost track of the time over there) my unit was out of the "bush" and was engaged in what amounted to glorified guard duty on a small perimeter on the extreme north end of the Chu Lai Marine Air Base. We were on a narrow peninsula that jugged into the south China Sea called Tam Ky. At that time, that peninsula had been virtually untouched by the war and passed for the closest thing to a "rear area" as you could find. We regularly ran patrols through the half dozen or so small villages dotted throughout the peninsula. We knew there had to be Viet Cong in those villages, or close by. But for the odd mortar round lobbed inside the perimeter every other night or so, it was really pretty quiet. I don't recall firing my rifle the entire three weeks we were there.



Allen M. Smallwood

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

The first morning we were preparing to go on a small squad-sized patrol through the nearest village when I noticed a young man who appeared to be no more than seven or eight years of age (4 feet 9 inches tall, maybe 65 pounds) approach and wave. While we were used to seeing kids in the villages, I don't recall ever seeing a child this small approach a group of fully armed infantrymen by himself. It was one of those moments in your life when you, for some inexplicable reason, immediately make an almost visceral contact with another human being. I said "hi," he smiled and said something in Vietnamese I did not understand. I was struck by the deep bullfrog croaking voice that came out of such a small body. One of the guys in the unit said to ask him if he could get us some beer or Cokes. He did not appear to understand, and as we were leaving on the



President Smallwood with his friend, You.

patrol, we kind of shooed him away. I figured that would be the last of him.

Shortly after daybreak the next morning, he appeared with two 8-ounce, old Coca-Cola bottles full of what were marginally cool Coke and a couple of cans of Philipino Tiger Beer. He gave them to me and said in English, "Hi, pack a Salem?" It was obvious that he was bartering the Cokes and beer for a pack of Salem cigarettes, which I quickly secured from a buddy who smoked menthols. I think the cigarettes were actually Kool's, and not Salem's, but it didn't appear that the kid

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EVENTS CALENDAR

MAY 2010

- 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
- 24 **OBA Uniform Laws Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 25 **OBA Solo and Small Firm Planning Committee Meeting**; 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jim Calloway (405) 416-7051
- 26 **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
- 27 **OBA Member Services Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Keri Williams Foster (918) 812-0507
- 31 **OBA Closed** – Memorial Day Observed

JUNE 2010

- 2 **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
- 4 **OBA Diversity Committee Meeting**; 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021

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

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

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Current Status of the UCC

By Alvin C. Harrell and Fred H. Miller

LEGISLATIVE UPDATE

Nationwide, state legislative activity for uniform acts produced by the Uniform Law Conference (ULC)¹ is off to a significant start in 2010. Focusing on the Uniform Commercial Code (UCC), as of the date of this article there have been 11 introductions.² The current state of the UCC in terms of recent enactments is as follows:

- The 2001 revision of Article 1 has been adopted in 38 states.³
- The 1987/1990 versions of Article 2A have been adopted in every state except Louisiana and Puerto Rico (which are civil law jurisdictions).
- The 2003 and 2005 amendments to Articles 2 and 2A have not been adopted as yet.⁴
- The 1990 revisions of Articles 3 and 4 have been adopted in every state except New York.
- The 2002 amendments to Articles 3 and 4 have been adopted in nine states (including Oklahoma⁵).
- Article 4A has been adopted in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.
- The 1995 revision of Article 5 has been adopted everywhere except Puerto Rico.
- Article 6 has been repealed in 48 states; revised Article 6 has been adopted in California, the District of Columbia and Virginia; original Article 6 remains in effect in Georgia and Maryland.

- The 2003 revision of Article 7 has been adopted in 35 states.
- The 1994 revision of Article 8 has been universally adopted.
- Revised Article 9 has been adopted in all 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands.⁶

UCC AND RELATED DRAFTING AND STUDY COMMITTEE ACTIVITY

Joint Review Committee for UCC Article 9

In early 2008, on the recommendation of the Permanent Editorial Board for the Uniform Commercial Code (PEB), the UCC sponsoring organizations (the ULC and the American Law Institute (ALI)) appointed a Joint Review Committee (JRC) to study issues that have arisen since revised Article 9 was completed in 1999. The JRC issued a report identifying a discreet list of issues and in the fall of 2008 it was authorized to begin drafting a limited range of proposed revisions. In determining what issues to address, the PEB and JRC have been guided by the following principles:

- No change that alters a policy decision made during the process of drafting

revised Article 9 will be made unless it appears that the current provision is creating significant problems in practice;

- changes to the text will focus on areas where the current text is ambiguous or creates substantial problems in practice, or where significant non-uniformity in the states suggests that a revision should be considered; and
- issues should be handled by changes to the comments if the text is sufficiently clear to enable courts to reach the correct result but judicial decisions or problems in practice indicate that clarification might be desirable.

The JRC presented a draft of proposed Article 9 revisions at the ULC's 2009 Annual Meeting and subsequently has been preparing a final draft for approval at the ULC and ALI 2010 Annual Meetings. The process is going well and it is anticipated that the proposed revisions will begin to be introduced in the state legislatures in 2011.⁷ The proposed revisions include a number of beneficial changes, some of which relate to the form of a financing statement, and in this regard the JRC is working closely with the International Association of Commercial Administrators, which publishes the forms and prepares model regulations for central filing offices.⁸

The most difficult and contentious issue for the JRC has been providing further guidance as to the determination of an individual debtor's name for purposes of a financing statement. Currently, Article 9 provides almost no guidance — it merely says to use the individual's name⁹ — and this has resulted in some controversial case law and the adoption in a few states of non-uniform amendments.¹⁰ The JRC has reached a consensus that it will provide the states with the option of adopting either a "safe-harbor" rule or an "only-if" rule. Under the latest draft of the safe-harbor approach, Section 9-503(a)(4)(A) requires a secured party to file under the debtor's individual name but a filing will be sufficient if it uses the name as it appears on the debtor's current driver's license or if it uses the debtor's correct surname and first personal name. The safe-harbor approach should be helpful to filers but does little to reduce the burden and risks the current rule places on searchers.¹¹

The only-if approach provides the same level of certainty for filers while reducing the bur-

den on searchers. The latest draft provides that if a debtor has a current driver's license, the *only* way to perfect will be by using the name on the license. If the debtor does not have a driver's license, the test for sufficiency will be the current test (the debtor's individual name) but with a safe-harbor feature: A filing will be sufficient if it uses the debtor's surname and first personal name. Draft provisions also deal with the potential name-change issues that arise if a financing statement uses the name on a driver's license that expires before the transaction is concluded.

Although the work of the JRC is not done, it has crafted proposed revisions that address problems encountered under current Article 9 and should command the widespread support necessary for rapid enactment.¹²

Articles 2 and 2A and the Uniform Certificate of Title Act

In 2010 the Oklahoma Legislature considered H.B. 3104,¹³ which contained a number of the 2003/2005 amendments to the uniform text of Articles 2 and 2A. UCC Article 2, promulgated in the 1940s, has not been amended since, and produces more litigation and transaction costs than any other UCC Article (since the other UCC Articles have all been subsequently amended to better accommodate changes in practice and technology and to settle ambiguities and splits in court decisions). It is clear that such an update is needed, but it is an unfortunate reality that the public welfare does not always prevail in legislative battles; as a result, narrow interests, perhaps without a fair or full study of the issues, may determine the outcome. The Oklahoma Article 2 and 2A bill, which omits most if not all of the controversial provisions in the 2003 and 2005 uniform text amendments, promises to provide tangible benefits for Oklahoma businesses and citizens. Efforts to update this important area of Oklahoma law, and to preserve it as a matter of state law from the continued threat of federal preemption, will continue.¹⁴

Oklahoma also is considering the Uniform Certificate of Title Act (UCOTA), as a carryover bill from the 2009 session. A number of amendments have been worked out with the Oklahoma Tax Commission.¹⁵ Passage of the bill will not only provide better coordination between Title 47 of the Oklahoma Statutes and UCC Articles 2, 2A and 9 (Article 2 does not even recognize certificate of title issues, so this

coordination is badly needed), but will provide a modern legal structure for certificate of title administration.

INTERNATIONAL ISSUES

International Projects Generally

Greater numbers of international conventions, dealing with subjects that traditionally have been matters of state law, are being concluded and, if ratified, may pre-empt areas of state law covered by or relating to uniform laws. To address these issues, the ULC has developed a close working relationship with the State Department's Office of the Assistant Legal Advisor for Private International Law, known as L/PIL. Two attorneys from L/PIL serve as advisory members of the ULC, and in addition attorneys from L/PIL routinely participate in the meetings of the ULC's International Legal Developments Committee, which advises the ULC Executive Committee on international issues, and in the meetings of the various ULC study and drafting committees working on specific projects. Advising is a two-way street and several members of the ULC serve on the State Department's Advisory Committee on Private International Law, providing L/PIL with advice on such issues as whether the U.S. should encourage the development of a convention in a particular area. As an important aspect of the relationship, in selecting members of its negotiating delegations L/PIL gives strong consideration to ULC members with expertise in the subject matter.

The ULC prefers that international conventions be implemented through state legislation, which can be accomplished through the use of such vehicles as conditional spending and conditional preemption.¹⁶ However, this approach is less appropriate when a convention has a relatively minor effect on state law. Thus, the decision on how to best implement a convention must be made on a case-by-case basis.

Joint Review Committee for Implementation of the UN Convention on Independent Guarantees and Stand-by Letters of Credit

As the name of this convention indicates, it does not apply to commercial letters of credit (although presumably it could be made applicable to such by agreement), but it does cover stand-by letters of credit (and independent guarantees which, as used in other countries, are much the same) and thus relates to UCC Article 5. The ULC and ALI, as sponsors of the

UCC, have formed a joint review committee (JRC) and the JRC has concluded that the convention should be ratified by the U.S. because it is consistent with Article 5 except in two respects, dealing with a different time limitation on so-called perpetual letters of credit and a question of setoff in connection with the issuer's performance which Article 5 leaves to other state law.

The JRC has recommended, and the ULC and ALI and the State Department have tentatively agreed, that it would be inefficient to attempt to amend UCC Article 5 in each jurisdiction by defining the transactions to which the convention applies and then applying to

“Another important convention as to which the ULC and L/PIL have concluded that ratification is appropriate is the United Nations Convention on the Use of Electronic Communications in International Contracts.”



those transactions the convention's rules on perpetual letters of credit and setoff. The current approach to this issue is for the convention to be implemented by federal legislation, drafted by the JRC, providing that: a covered undertaking (a letter of credit) that expressly states that it is governed by the convention is governed by the text of the convention; an undertaking that expressly states that it is governed by a foreign jurisdiction is governed by the law of that jurisdiction, including the convention as it is implemented there; an undertaking that expressly states that it is governed by the law of a U.S. state is governed by that state's law (*i.e.*, that state's version of Article 5) and not the convention; and an undertaking that does not choose the applicable law is governed by uniform Article 5 except as to the two minor differences noted above, in which cases it is governed by the rule of the convention.¹⁷ The references to Article 5 in the proposed federal law refer to the uniform text of Article 5 as approved by the ULC and ALI, not as enacted in any particular state. This will result in the enactment of the uniform text of Article 5 as federal law for these purposes, rather than pre-empting state law by the language of the convention or by implementing federal legislation whose language might differ from that of Article 5.

*United Nations Convention on the
Use of Electronic Communications in
International Contracts*

Another important convention as to which the ULC and L/PIL have concluded that ratification is appropriate is the United Nations Convention on the Use of Electronic Communications in International Contracts. This convention impacts the Uniform Electronic Transactions Act (UETA), which has been enacted in 49 jurisdictions and whose application to the UCC is largely limited to Articles 2 and 2A.¹⁸ The convention is for the most part consistent with the UETA, but the final decision on whether to seek implementation at the state or federal level has not yet been made.

Committee on the Hague Securities Convention

The ULC has appointed a committee to work with L/PIL to assist in the ratification and implementation of this convention, which deals with the choice of law issues that commonly arise in cross-border transactions involving securities held by a securities intermediary in the indirect holding system. This convention relates to UCC Articles 8 and 9.

Other International Efforts Relating to the UCC

Although outside a formal committee structure, ULC and ALI members have been involved in several other international initiatives that relate to the UCC. One is the Convention on Substantive Rules Regarding Intermediated Securities, which was approved by UNIDROIT in October 2009. This convention seeks to harmonize core aspects of interests that are transferred across borders between dissimilar securities markets and to define the basic rights and obligations of account holders, intermediaries and others in these circumstances, *e.g.*, with regard to matters such as: how credits are established; finality; reversibility; loss allocation in the event of a shortfall; and the effects of insolvency. Additional provisions cover practices such as lending and netting.

Another project involves the drafting of regulations to assist countries adopting the Model Inter-American Law on Secured Transactions (Model Law), which was promulgated by the Organization of American States (OAS) in 2002. The Model Law is based on the principles of Article 9 but, drawing from the law of Quebec, is drafted in a style oriented to a civil law jurisdiction. The Model Law contemplates that adopting countries will establish a registry similar to the Article 9 filing system, to serve a public notice function. The referenced project involves the development of regulations to implement such a registry. The resulting Model Regulations on Secured Finance Registry were adopted by the OAS in 2009.

ON-GOING ULC PROJECTS

Still other ULC efforts are less advanced or only in the planning stage, as noted below.

*Drafting Committee on Uniform Certificate of
Title for Vessels Act*

This committee is drafting a proposed uniform act, modeled on UCOTA, designed to establish a uniform certificate of title regime for vessels. A number of states (including Oklahoma) now issue certificates of title for boats, but (as with the current certificate of title laws covering vehicles) these laws are not uniform and often do not relate well to UCC Articles 2, 2A or 9, or to federal law. This drafting committee has made significant progress and there will be a reading of its draft at the ULC's 2010 Annual Meeting; there is no reason to believe that the project will not be completed in 2011.

*Drafting Committee on a
Manufactured-Housing Act*

At its 2010 Midyear Meeting, the ULC's Executive Committee authorized the formation of a drafting committee to work on an act dealing with the conversion of manufactured homes from personal property to real estate. Security interests in manufactured homes as personal property generally are governed by the applicable certificate of title law and UCC Article 9,¹⁹ but many states have statutes under which such a home can be "de-titled" (i.e., the certificate of title can be cancelled), e.g., if the home becomes real estate after it is placed on a permanent foundation.²⁰ These statutes operate in a variety of ways and the ULC, aided by an excellent report prepared by professor Ann Burkhart of the University of Minnesota School of Law and a study undertaken by the ULC Joint Editorial Board for Uniform Real Property Acts, has determined that a uniform act will promote the interests of both lenders and homeowners. The drafting committee has not yet begun its work.

Study Committee on Payment Issues

This committee was created to: react to certain initiatives of Congress and the executive branch that may impact aspects of the payment Articles of the UCC; consider developments in electronic payments; explore whether developing and developed alternative payment methods outside the UCC (like debit and credit cards, stored value devices, and other payment means that are superseding checks and cash in many transactions) that are only partially covered by federal law or are governed mainly by private contracts might benefit from "back up" rules like those in UCC Article 4 for checks; and explore whether rules should be created that would smooth the transition from one payment method to another or deal with the rights and obligations of parties outside the coverage of federal law or private contracts and systems rules.

The committee has issued several detailed papers on issues of practical significance, based on comments from practicing lawyers and others, and continues to seek comments. However, given the focus by many interested constituencies on issues at the federal level relating to the current financial crisis,²¹ and considering the desirability of continued study and discussion of these developments, the committee does not

contemplate a more proactive role prior to at least the fall of 2010.

IMPACT OF PEB COMMENTARIES

In 2009 the PEB issued a commentary (PEB Commentary No. 16, July 1, 2009) on the case of *Winter Storm Shipping Ltd. v. TPI*.²² The court in *Winter Storm* and certain other cases had held that funds transfers in process under UCC Article 4A were subject to seizure under federal admiralty rules. This result was contrary to UCC Sections 4A-502 and 4A-503, and reflected a fundamental misunderstanding of how Article 4A works. Article 4A does not involve traceable funds of an originator being transferred to the beneficiary, but rather a series of payment orders whereby the account of the originator is debited to reimburse the originator's bank for its corresponding payment order to an intermediary bank that must be reimbursed by the originator's bank for, in turn, the payment order of the intermediary bank issued either to a subsequent intermediary bank or to the beneficiary's bank.²³ Based on the new PEB Commentary, *Winter Storm* and related cases were overruled in *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*,²⁴ thus preserving the integrity of UCC Article 4A in that context.

However, two other cases may threaten that integrity in the domestic context, in effect upholding a claim as if it attached to the funds being transferred and rode with them through their journey. The PEB is thus working on a commentary to deal with those cases: *Pioneer Funding Corp. v. American Financial Mortgage Corp.*²⁵ and *Regions Bank v. The Provident Bank Inc.*²⁶

The PEB also is working on commentaries to address: 1) the conversion of electronic chattel paper to tangible chattel paper; and 2) the *Highland Capital* case,²⁷ which erroneously characterized a negotiable instrument as a type of security. The latter commentary, however, is currently on hold because the Article 9 JRC is drafting amendments to Article 8 that may resolve the issue. Finally, the PEB is working on a definitive official text of the UCC to remove technical errors and inconsistencies that have arisen as it has been amended from time to time, and is also considering one or more commentaries on the impact of international conventions on the UCC.

CONCLUSION

The Oklahoma commissioners to the ULC and the Oklahoma Bar Association Uniform Laws Committee and UCC Committee will

continue to support the progress and enactments of UCC updates in Oklahoma, and the development of Oklahoma comments for uniform laws,²⁸ in order to help keep the Oklahoma UCC current and relevant, including laws, both domestic and international, relating to though not a part of the UCC.²⁹

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1. The ULC is also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL). As noted further in this article, the Uniform Commercial Code is jointly sponsored by the ULC and the American Law Institute.

2. Revised Article 1 has been introduced in Massachusetts, Mississippi, Washington and Wisconsin; the 2002 amendments to Articles 3 and 4 have been introduced in Massachusetts and Mississippi; and Revised Article 7 has been introduced in Florida, Georgia, Massachusetts, Washington and Wisconsin. The repeal of Article 6 has been enacted in Wisconsin.

3. The ULC includes as "states" the District of Columbia, Puerto Rico and the U.S. Virgin Islands. See ULC Constitution §9.1. See also UCC § 1-201(b)(38). Citations in this article reference the current uniform text. Regarding Indian tribes, see *id.*, and *infra* note 29.

4. See *infra* this text at note 13.

5. See, e.g., Fred H. Miller & Alvin C. Harrell, *The Work of the Oklahoma Bar Uniform Laws Committee: Oklahoma Enacts UCC Article 3 and 4 and 4A Amendments*, 63 Consumer Fin. L.Q. Rep. 29 (2009).

6. Oklahoma has enacted all UCC Articles and updates (including repeal of Article 6), except for the 2003 and 2005 amendments to Articles 2 and 2A. As to Articles 2 and 2A, see *infra* this text at note 13. Regarding Oklahoma Indian tribes, see *infra* note 29. Current enactment information for all states is available on the ULC website at www.nccusl.org/Update/.

7. The ULC Commissioners from Oklahoma expect to do so.

8. The Oklahoma bill also will contain a number of conforming amendments to other UCC Articles necessary to coordinate with other UCC Articles and related legislation enacted in past years in Oklahoma.

9. UCC §9-503(a)(4)(A). The focus is on "registered organizations" (see definition at UCC §9-102(a)(70)), which comprise the majority of UCC filings, since individual debtors are most often involved in consumer goods transactions that are subject to alternative perfection methods, e.g., under UCC §§9-309 or 9-311(a).

10. See, e.g., *In re Kinderknecht*, 308 B.R. 71 (10th Cir. BAP 2004) ("Terry" was held to be insufficient as to a debtor named "Terrance"). Texas and Tennessee have amended UCC §9-503(a)(4)(A) as enacted in those states, to provide a safe harbor for a secured party that uses the name of the debtor as it appears on a driver's license or state-issued identification card. The safe-harbor concept is further explained in this text below.

11. Which involve issues reminiscent of the problems with "trade names" under old Article 9. See, e.g., William E. Carroll & Alvin C. Harrell, *Russian Roulette — UCC Style*, 52 Consumer Fin. L.Q. Rep. 338

(1998). The trade name issue was resolved in current §§9-503(a) and (c) and 9-506. *Id.*

12. For an earlier, more detailed description of issues being considered by the JRC, see Thomas J. Buiteweg, *UCC Article 9 Joint Review Committee: Issues in Motor Vehicle Finance*, 62 Consumer Fin. L.Q. Rep. 201 (2008). In Oklahoma, two current bills in the 2010 Legislature would adopt non-uniform amendments to UCC Article 9. One, S.B. 2105, would change the place to file to perfect a security interest against all parties in farm products to the Oklahoma Secretary of State's office (Oklahoma Article 9 currently provides for central filing in Oklahoma County, in addition to the filing requirements of the federal Food Security Act which require a filing in the Secretary of State's office).

The other bill, Engrossed S.B. 1615, indirectly amends the Oklahoma UCC by creating a lien for interest owners that will operate much like a purchase money security interest but will revise 52 Okla. Stat. §5548 *et seq.* As such, it will be based on real estate law and will create a lien in favor of interest owners of oil and gas in place that will carry over as to extracted oil and gas as against the first purchaser of the oil and gas, and purchasers from them unless the subsequent purchasers are buyers in ordinary course or take in good faith and for value, in which case the interest owner's lien attaches to the proceeds received by the first purchaser. As of this writing, full details remain to be negotiated. This proposal is a reaction to the holding in *In re Sem-crude*, 2009 WL1740750 (D.Del. June 19, 2009).

13. "Considered," in the sense that it was introduced. However, it was never heard in the House Judiciary Committee as lobbyists killed the bill by meeting privately with certain House members. This is a reminder that such legislative tactics are not limited to the U.S. Congress in connection with controversial issues such as health care reform.

14. This process also is occurring by another method. Many of the Article 2 amendments address ambiguities or splits in decisions and courts already are looking to the amendments for guidance. See, e.g., *Hitchiner Mfg. Co. Inc. v. Modern Industries Inc.*, 2009 WL 3643471, 70 U.C.C. Rep. Serv. 2d 270 (D.N.H. 2009) (discussing Official Comment 6 to UCC §2-207 of the amended uniform text).

15. S.B.1105. See generally Alvin C. Harrell & Fred H. Miller, *Update on UCOTA: A Title Office Perspective?*, 63 Consumer Fin. L.Q. Rep. 88 (2009).

16. As noted in the text below, the two methods by which this may be accomplished are "conditional spending," in which federal funding is withheld from states that do not enact designated legislation, and "conditional preemption," in which a convention is implemented by federal legislation that specifically states that state law controls in states that enact designated legislation but that otherwise inconsistent state law is preempted. The ULC has projects underway using each method. The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance will be implemented through amendments to the Uniform Interstate Family Support Act promulgated in 2008, and federal child-support funding will be withheld from states that do not adopt the amended act. The Senate Foreign Relations Committee recommended on January 22, 2010, that the full Senate give its advice and consent to this Convention. The ULC and L/PIL are working on state and federal legislation that would implement The Hague Convention on Choice of Court Agreements through conditional preemption. An explanation of the advantages of state implementation is beyond the scope of this article, but to mention just one advantage the rules of the convention may be more easily coordinated with other and related state law. See, e.g., Fred H. Miller, *International Legal Developments and Uniform State Laws: A Radical Proposal*, 60 Consumer Fin. L.Q. Rep. 402 (2006); Fred H. Miller, *The Uniform Law Process for the Development of Private State Law: A Model for Other Systems*, *id.* at 4; Fred H. Miller, *The Uniform Law Process and its Global Impact*, 56 Consumer Fin. L.Q. Rep. 136 (2002).

17. The latest draft of the implementing legislation, dated Oct. 8, 2009, may be found at www.law.upenn.edu/bll/archives/ulc/igasloc/2009oct8_clean.pdf.

18. See UETA §3(b)(2). The UETA has been enacted in Oklahoma. See 12A Okla. Stat. §§15-101 *et seq.* The convention also impacts the federal Electronic Signatures in Global and National Commerce Act, commonly referred to as E-SIGN, 15 U.S.C. §§7001-7003. Through the use of conditional preemption, E-SIGN's application is extremely limited in states that have adopted the UETA in the form promulgated by the ULC. See 15 U.S.C. §7002(a)(1).

19. See UCC §§9-109, 9-311.

20. These issues can have significant consequences. See, e.g., *In re Coleman*, 375 B.R. 907 (Bankr. W.D. Mo. 2007) (modification of lien in bankruptcy).

21. See, e.g., Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2009 Annual Survey of Consumer Financial Services Law*, 64 Bus. Law. 465 (2009).

22. 310 F.3d 263 (2nd Cir. 2002), *cert. denied*, 539 U.S. 927 (2003).

23. See, e.g., UCC Article 4A, Prefatory Note; Alvin C. Harrell, *Payment System Issues — UCC Article 4A; Regulations J, S, and D*, 50 Consumer Fin. L.Q. Rep. 49 (1996).

24. 585 F.3d 58 (2d Cir. 2009) cert. denied, order list 559 U.S. No. 09-849 (Mar. 22, 2010). The impact on other cases was immediate. In *Hawkland, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 2009 A.M.C. 2705 (2d Cir. 2009), the Second Circuit held that *Shipping Corp. of India* applied retroactively, and in *Global Maritime Investments v. Companhia Siderurgica Nacional*, 70 U.C.C. Rep. Serv. 2d 640, 2009 WL 4730196 (S.D.N.Y. 2009), the District Court vacated ex parte orders for attachment and garnishment and ordered the return of funds based on the *Shipping Corp. of India* decision. A similar case is *Nova Maritime B.V.I. Ltd. v. Transvast Shipping Co. Ltd.*, 70 U.C.C. Rep. Serv. 2d 591, 2009 WL 4884162 (S.D.N.Y. 2009).

25. 855 A.2d 818 (Pa. 2004), reargument denied, 864 A.2d 1198 (Pa. 2004), cert. den., 544 U.S. 978 (2005).

26. 345 F.3d 1267 (11th Cir. 2003).

27. *Highland Capital Mgt. v. Schneider*, 866 N.E. 2d 1020 (N.Y. 2007).

28. See, e.g., Miller & Harrell, *supra* note 5.

29. To illustrate, the latter, the Oklahoma Commissioners are working with real property interests in the Oklahoma Bar Association to adapt the Uniform Real Property Transfer on Death Act to not only fill gaps in the present Oklahoma legislation on this subject but to improve that legislation. While the UCC does not generally deal with real estate, the concepts in this act are similar to ones involving personal property transferred the same way, such as Transfer on Death (TOD) security registration. A committee of the ULC also is working on legislation for adoption by Indian tribes and nations that will reduce the fractionalization of Indian lands and make interests in such real property more adaptable to being used as collateral, in much the same way as UCC Article 9 does for personal property.

In that latter context, the ULC also produced a Model Tribal Secured Transactions Act to provide a workable version of UCC Article 9 for tribes that wish to enact it, and this model act increasingly is being embraced by tribal councils. See, e.g., Bruce A. King, *The Model Tribal Secured Transactions Act and Tribal Economic Development*, 61 Consumer Fin. L.Q. Rep. 804 (2007).

ABOUT THE AUTHORS



Alvin C. Harrell is a professor of law at OCU School of Law and president of Home Savings and Loan Association of Oklahoma City. He is co-author of a dozen books, including "The Law of Modern Payment Systems and Notes" (with Professor Fred H. Miller). He is editor of the *Annual Survey of Consumer Financial Services Law* in *The Business Lawyer*. He chaired the ABA UCC Committee Task Force on State Certificate of Title Laws.



Fred H. Miller is a George L. Cross research professor emeritus at the OU College of Law and of counsel to Phillips Murrah. He is a member of the American Law Institute and serves on the Permanent Editorial Board for the Uniform Commercial Code. He is an Oklahoma commissioner to the National Conference of Commissioners on Uniform State Laws and formerly was its executive director, Executive Committee chair and past president.



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Registration Exemptions under the Federal Securities Laws: A Primer

By Ryne Miller

INTRODUCTION

Wall Street, S-1's, road shows, exemptions and safe-harbor rules – what do the securities laws mean for your small business clients looking to raise capital?¹ And beyond that, how do firms of any size proceed when looking to raise capital without resort to the complex regimen of a registered public securities offering? Section 5 of the Securities Act of 1933 (Securities Act) makes it unlawful to offer or sell a security through the mails or use of interstate commerce unless a registration statement, most commonly an S-1, is in effect as to that security.² However, many securities offerings documented by Oklahoma law firms simply do not require the full rigmarole of filing a registration statement with the Securities and Exchange Commission (SEC) and conducting a public offering on the New York Stock Exchange.³ To that end, this article surveys the registration exemptions available under federal securities law generally and then outlines the requirements of those exemptions most commonly relied on to allow an issuer to raise capital without subjecting itself to the SEC's registration requirements.

Securities Law Basics — Security and Sale

The first two concepts to address are the definition of *security* and the definition of *sale*. Either topic can fill volumes when serving as the focus of the discussion,⁴ but for the purpose of this article a more general review is ade-

quate. "Security" includes an express list of instruments set out in Section 2(a)(1) of the Securities Act, including many instruments that we would expect to see — notes, stocks and bonds. And while the complete statutory list is extensive,⁵ practitioners should note that

it is not exhaustive. Courts routinely find instruments or schemes to constitute a “security” even if they do not carry one of the labels found in Section 2(a)(1).⁶

The term “sale” or “sell” includes every contract of sale or disposition of a security or interest in a security, for value.⁷ Identifying a “sale” of securities is similar to identifying a “security,” wherein many of the transactions constituting a “sale” will be apparent on their face. However, courts will also look to the economics of more esoteric transactions in determining whether or not there has been a “sale” as defined by the Securities Act.⁸ These two definitions are important because only through understanding the definitions of both “security” and “sale” can practitioners identify when their clients may be implicating the registration requirements of the federal securities laws — and are possibly in need of an exemption.

Registration is the Rule. Why allow Exemptions?

As mentioned above, Section 5 of the Securities Act makes it unlawful to offer or sell a security through the mails or use of interstate commerce unless a registration statement is in effect as to that security.⁹ However, several exemptions have been carved out of the Securities Act that allow issuers to conduct a securities offering without the requirement of filing a registration statement with the SEC — an otherwise expensive and time-consuming process.¹⁰ The remainder of this article examines those exemptions. The importance of understanding the exemptions for your clients cannot be overemphasized, because the burden of proving an exemption will generally fall on the person seeking to claim the exemption: “Keeping in mind the broadly remedial purposes of federal securities legislation, imposition of the burden of proof on an issuer who would plead the exemption seems to us fair and reasonable.”¹¹ A rationale for the exemptions has been explained as follows: “The Securities Act’s essential structure of generally requiring registration but then carving out specific exemptions embodies a distinction between two types of securities activity 1) large distributions of securities, generally affected by professional investment bankers and brokers and aimed at the general public regardless of sophistication, and 2) limited or isolated trading or transactions by issuers or individuals. Registration, with its goal of ensuring an adequate flow of accurate information to the investing public, is not deemed to be necessary for the latter.”¹²

Antifraud Provisions and Blue Sky Laws Apply

Whatever the circumstance, an exemption from registration does not exempt an issuer from the SEC’s antifraud rules. That is, the antifraud rules of Section 17(a) of the Securities Act¹³ will still apply to all offerings regardless of whether an exemption is perfected or the securities are registered. Similarly, the antifraud provisions of the Exchange Act of 1934 (Exchange Act) will remain in force notwithstanding any applicable registration exemptions.¹⁴ The antifraud provisions generally require that information provided to investors during an offering be free of false and misleading statements, including omissions that could make otherwise true statements false or misleading. Also, because the SEC does not pre-empt states when it comes to regulating securities, issuers must also remain mindful of applicable state securities law requirements.¹⁵ These are commonly referred to as the Blue Sky laws.

Exemptions Generally

Section 3(a) of the Securities Act provides certain exemptions from registration based on the type of security being offered,¹⁶ while Sections 3(b), 3(c) and 4 exempt certain transactions from registration. This is important because transaction based exemptions are applicable only to a single transaction, and do not necessarily carry over to subsequent transactions. With securities based exemptions, the exemption lies with the security. Note that certain exemptions under Section 3 are actually transaction exemptions notwithstanding the “exempt securities” label that they fall under.

1) Exempt Securities under §3(a)(2) — §3(a)(8) and §3(a)(12) - §3(a)(14)

Several of the Section 3 securities exemptions are not particularly relevant in an article outlining the exempt securities offering framework for small business offerings; nonetheless, they are not unimportant and it only takes a brief effort to review their general effect. Section 3(a) exempts, *inter alia*, government securities and securities issued by banks,¹⁷ short-term commercial paper,¹⁸ securities of certain nonprofit organizations,¹⁹ securities of savings and loan and similar organizations/farmer’s cooperatives,²⁰ securities of railroad/common carrier equipment trusts,²¹ court approved certificates of receivers and trustees under Chapter 11 bankruptcy cases,²² insurance policies and annuity contracts,²³ securities issued in connection with the formation of a bank holding compa-

ny;²⁴ securities issued by certain church employee plans²⁵ and security futures products and standardized options.²⁶ Keep in mind that these exemptions are not absolute: "Securities exemptions are based on the notion that certain instruments have risk-reducing or other characteristics that eliminate the need for investor protections created by the securities laws. Where those characteristics are altered, or are indeed not to be found at all, an ostensible exemption for the security will give way to the reality of the instrument itself and the circumstances in which it is used."²⁷

2) Transaction Exemptions under §3(a)(9) - §3(a)(11), §3(b) and §3(c)

These exemptions are really transaction exemptions not withstanding their placement under the Section 3 "exempt securities" heading. These transaction exemptions include voluntary exchanges between an issuer and security holders — primarily used 1) during recapitalizations when an issuer is exchanging one class of securities for a new class and 2) to issue new securities to a holder upon the exercise of a convertible instrument,²⁸ securities issued in judicially or administratively approved exchanges — useful when reorganizing or exchanging classes of securities outside of bankruptcy,²⁹ and intrastate offerings — discussed more fully *infra*.³⁰ Section 3(b) grants the SEC rulemaking authority to exempt certain offerings up to \$5 million when enforcement of the Securities Act is not necessary in the public interest and investor protection is not compromised.³¹ Section 3(b) is the foundation for Regulation A (Reg. A) and Rule 505 of Regulation D (Reg. D), both discussed more fully *infra*. Section 3(c) is for Small Business Investment Companies (SBICs) and was the foundation for Regulation E, which exempts certain offerings for eligible SBICs.³²

3) Transaction Exemptions under Section 4

With certain exceptions and limitations, Section 4 of the Securities Act exempts transactions by any person other than the issuer, underwriter or dealer;³³ transactions by an issuer not involving any public offering;³⁴ transactions by a dealer (including an underwriter no longer acting as a underwriter in respect of the security involved in such transaction);³⁵ brokers' transactions executed on customers' orders;³⁶ the offer and sale of promissory notes by qualifying issuers and which are secured by first liens on real estate where certain condi-

tions and requirements are met;³⁷ and transactions of no more than \$5 million, where there is no general solicitation, involving offers or sales by an issuer solely to one or more accredited investors.^{38,39}

Raising Capital using an Exemption

This article will now review those registration exemptions most commonly used by small businesses when raising capital.

1) Intrastate Offering Exemption

Noted above, Section 3(a)(11) exempts intrastate offerings. The technical requirements under Section 3(a)(11) are that the issuer be incorporated in the state where it is offering their securities, carry out a significant amount of its business in that state and make offers and sales only to residents of that state.⁴⁰ While there is no fixed limit on the size of the offering or the number of purchasers, the issuing company must ascertain the residence of each purchaser.

Other important issues to keep in mind if relying on the Section 3(a)(11) intrastate offering exemption: If only one purchaser is not a resident of the issuer's state, the offering may lose the exemption and risk being in violation of the registration requirement. If a purchaser resells their securities within a short time to an out-of-state buyer (the usual test is 9 months), the exemption may similarly be lost for the entire transaction. And finally, because of the limited resale market for restricted securities, offerings are generally completed at a discount to what issuers could receive for unrestricted securities issued via a registered public offering.

Qualifying for the intrastate exemption involves gray areas if the business does undertake activities outside of the offering state. Commentators advise that if the issuer holds some of its assets outside the offering state, or derives a substantial portion of its revenues outside the offering state, then they could have difficulty qualifying for the intrastate exemption.⁴¹ To mitigate uncertainty, the SEC developed Rule 147 as a safe harbor for issuers wanting to confirm their eligibility under the intrastate exemption.⁴²

2) Private Offering Exemption and Reg. D, Rule 506

Section 4(2) exempts from registration "transactions by an issuer not involving any public offering."⁴³ Because the exact limits of Section 4(2) are uncertain, it is recommended that prac-

“There are multiple exemptions from the requirement that all securities offerings be registered with the SEC, and the exemptions are useful to many Oklahoma businesses when raising capital.”

tioners rely on the objective standards set out in Rule 506, a safe harbor for private offering exemptions.⁴⁴ Rule 506 is part of Reg. D, and sets the following parameters for an issuer seeking to confirm their eligibility for the private offering exemption: may raise an unlimited amount of capital, cannot use general solicitation or advertising to market the securities, can sell to an unlimited number of accredited investors and up to 35 other purchasers who qualify as sophisticated investors,⁴⁵ no disclosure obligations to accredited investors (subject to the antifraud provisions), must give nonaccredited investors disclosure documents that generally provide the same information that would be provided in a registered offering, and must be available to answer questions from prospective purchasers. The financial statements given to investors need to be certified by an independent public accountant. Finally, investors in a Rule 506 exempt offering receive restricted securities, meaning that they may not offer their securities for resale for up to one year after the initial offering absent registering the securities with the SEC or the application of another registration exemption.

3) Small Securities Offerings, Section 3(b) and Reg. A

Section 3(b) authorizes the SEC to exempt small securities offerings from registration under the Securities Act.⁴⁶ Under their Section 3(b) authority, the SEC enacted Reg. A,⁴⁷ an exemption for public offerings not exceeding \$5 million in any 12-month period. Reg. A comes with more filing obligations than some of the other exemptions — the issuer must file an offering statement (consisting of a notification, offering circular and exhibits) with the SEC for review — but it also offers certain

advantages. First, the securities may be offered publicly and are not restricted, meaning they are freely tradeable in the secondary market after the offering.⁴⁸ The second main benefit of using the Reg. A exemption is that the issuer does not incur Exchange Act reporting obligations as long as they have less than \$10 million in total assets and less than 500 shareholders. Reg. A allows a company considering a full-scale registered public offering to “test the waters” by gauging market interest with a comparatively small unregistered offering.

4) Reg. D, Rule 504

For companies who do not have Exchange Act reporting obligations, Rule 504 provides an exemption from registration for the offer and sale of up to \$1 million of securities in a 12-month period. As with Rule 506, the issuer may not use public solicitation in a Rule 504 exempt offering, and purchasers receive restricted securities.⁴⁹ The Rule 504 exemption comes with no specific disclosure requirements, but as with all of the exemptions, issuers remain subject to the antifraud provisions and any applicable state Blue Sky laws.

5) Reg. D, Rule 505

Rule 505 provides an exemption from registration for an offering totaling up to \$5 million in any 12-month period.⁵⁰ Offerees may include an unlimited number of accredited investors and up to 35 other persons. Unlike Rule 506, Rule 505 places no sophistication requirement on the nonaccredited investor offerees. Securities offered under Rule 505 are restricted, and investors must be informed that they will not be able to resell, without registering their securities with the SEC or the application of another exemption, for a period of one year. There are no affirmative disclosure obligations as to accredited investors, but the issuer remains subject to the antifraud provisions. Nonaccredited investors must be given disclosure documents that are generally the same as those used in registered offerings. Like Rule 506, the financial statements you give investors need to be certified by an independent public accountant.

CONCLUSION

There are multiple exemptions from the requirement that all securities offerings be registered with the SEC, and the exemptions are useful to many Oklahoma businesses when raising capital. Should your clients choose to proceed with an exempt offering, the SEC has

distinct requirements for each particular exemption. The purpose of this article was to introduce and outline the most common registration exemptions, and practitioners will need to review the SEC's rules in full before proceeding with any offering. Finally, always recall that the SEC's antifraud provisions and the relevant Blue Sky laws will impose additional regulatory obligations on any offering.

1. The entity issuing securities will be referred to as the "issuer" in this article.

2. See Section 5(a) and (c) of the Securities Act, 15 U.S.C. §77e(a) and (c).

3. That is not to say that Oklahoma law firms are not equally proficient in leading their clients to successful registered public offerings. For a recent example, the securities team at McAfee & Taft in Oklahoma City represented OOK Capital Advisors LLC in bringing an Oklahoma-based exchange traded fund to market in October 2009. The fund trades on the New York Stock Exchange Arca securities exchange under the symbol OOK. See Brian Bruss, "OOK Advisors launches Okla. investment portfolio", *The Journal Record*, Oklahoma City, Oct. 30, 2009.

4. For a 100+ page article discussing the definition of *security*, see "The Meaning of 'Security'", 1-2 Federal Securities Act of 1933 §2.01 (Matthew Bender & Co. 2009). Likewise, for a sophisticated discussion of the definition of *sale*, see "The Meaning of 'Sale'", *ibid* at §2.02.

5. The term "security" means any note, stock, treasury stock, security future, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or, in general, any interest or instrument commonly known as a "security" or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing." Section 2(a)(1) of the Securities Act, 15 U.S.C. §77b(a)(1).

6. For the classic case, see *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946) (a land sales and service contract was determined to be an investment contract and thus a *security* as defined at Section 2(a)(1) of the Securities Act).

7. See Section 2(a)(3) of the Securities Act, 15 U.S.C. §77b(a)(3).

8. Courts have considered that exchanges, gifts, bonuses, and free stock distributions could constitute a 'sale' under appropriate circumstances. See "The Meaning of 'Sale'", 1-2 Federal Securities Act of 1933 §2.02.

9. See Section 5(a) and (c) of the Securities Act, 15 U.S.C. §77e(a) and (c).

10. SEC Form S-1 officially estimates 833 hours per registration statement. See Form S-1, Securities and Exchange Commission (available at www.sec.gov/about/forms/forms-1.pdf).

11. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 126 (1953), citing *Schlemmer v. Buffalo, R. & P.R. Co.*, 205 U.S. 1, 10 (1907).

12. See 1-4 Federal Securities Act of 1933 §4.01.

13. See Section 17(a) of the Securities Act, 15 U.S.C. §77q(a).

14. See Section 10(b) of the Exchange Act, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5.

15. For a good introduction to the Oklahoma securities laws, see Stephanie Chapman and Stephen Hetrick, *Recent Developments in Oklahoma Law: Oklahoma Uniform Securities Act of 2004*, 57 Okla.L.Rev. 899 (Winter 2004). See also Oklahoma Uniform Securities Act, 71 Okla.Stat. §1-101 *et seq.*

16. See Section 3(a) of the Securities Act, 15 U.S.C. §77c(a).

17. See Section 3(a)(2) of the Securities Act, 15 U.S.C. §77c(a)(2).

18. See Section 3(a)(3) of the Securities Act, 15 U.S.C. §77c(a)(3).

19. See Section 3(a)(4) of the Securities Act, 15 U.S.C. §77c(a)(4).

20. See Section 3(a)(5) of the Securities Act, 15 U.S.C. §77c(a)(5).

21. See Section 3(a)(6) of the Securities Act, 15 U.S.C. §77c(a)(6).

22. See Section 3(a)(7) of the Securities Act, 15 U.S.C. §77c(a)(7).

23. See Section 3(a)(8) of the Securities Act, 15 U.S.C. §77c(a)(8).

24. See Section 3(a)(12) of the Securities Act, 15 U.S.C. §77c(a)(12).

25. See Section 3(a)(13) of the Securities Act, 15 U.S.C. §77c(a)(13).

26. See Section 3(a)(14) of the Securities Act, 15 U.S.C. §77c(a)(14).

27. See 1-3 Federal Securities Act of 1933 §3.01.

28. See Section 3(a)(9) of the Securities Act, 15 U.S.C. §77c(a)(9).

29. See Section 3(a)(10) of the Securities Act, 15 U.S.C. §77c(a)(10).

30. See Section 3(a)(11) of the Securities Act, 15 U.S.C. §77c(a)(11).

31. See Section 3(b) of the Securities Act, 15 U.S.C. §77c(b).

32. See Section 3(e) of the Securities Act, 15 U.S.C. §77c(e), and Regulation E under the Securities Act.

33. See Section 4(1) of the Securities Act, 15 U.S.C. §77d(1).

34. See Section 4(2) of the Securities Act, 15 U.S.C. §77d(2).

35. See Section 4(3) of the Securities Act, 15 U.S.C. §77d(3).

36. See Section 4(4) of the Securities Act, 15 U.S.C. §77d(4).

37. See Section 4(5) of the Securities Act, 15 U.S.C. §77d(5).

38. The *accredited investor* concept comprises a group of defined investors (see Section 2(a)(15) of the Securities Act, 15 U.S.C. 77b(a)(15), and Rule 501(a)(1), 17 C.F.R. §230.501(a)(1)) who are generally perceived as not requiring the same level of regulatory protection as the average consumer. Accredited investors include, among others, a bank, an insurance company, a registered investment company, a business development company, certain employee benefit plans, charitable organizations with more than \$5 million in assets, natural persons with a net worth of at least \$1 million, directors, executive officers, and general partners of the issuer, natural persons with income exceeding \$200,000 in each of the last two years – and a reasonable expectation of making the same income in the current year, and a trust with at least \$5 million in assets and directed by a sophisticated person.

39. See Section 4(6) of the Securities Act, 15 U.S.C. §77d(6).

40. See Section 3(a)(11) of the Securities Act, 15 U.S.C. §77c(a)(11).

41. See www.smallbusinessnotes.com/financing/secexemptions.html (last accessed Dec. 30, 2009), and www.sec.gov/info/smallbus/qasbsec.htm (last accessed Dec. 30, 2009).

42. Rule 147, 17 C.F.R. §230.147, provides issuers with a lengthy discussion outlining the definition of the important terms in the Section 3(a)(11) exemption. The definitions allow an issuer to confirm that their offering meets the requirements for a Section 3(a)(11) exemption.

43. See Section 4(2) of the Securities Act, 15 U.S.C. §77d(2).

44. See 17 C.F.R. §230.506.

45. A sophisticated investor is someone with sufficient knowledge and experience in financial and business matters to make them capable of evaluating the merits and risks of the prospective investment.

46. See Section 3(b) of the Securities Act, 15 U.S.C. §77c(b).

47. See 17 U.S.C. §230.251 *et seq.*

48. Compare this to securities acquired under the private offering exemption, which may not generally be resold for a period of one year unless registered.

49. Note that Rule 504 may also be used for a public offering and result in the issuance of freely tradeable securities under certain circumstances where an issuer complies with applicable state law securities registration rules.

50. See 17 C.F.R. §230.505.

ABOUT THE AUTHOR

Ryne Miller is a judicial law clerk for Magistrate Judge Steven P. Shreder in the Eastern District of Oklahoma. He earned his J.D. with honors from the University of Oklahoma College of Law in 2007 and obtained an LL.M. from the New York University School of Law in 2009. He previously worked in the business law practice of an Oklahoma law firm.

Patrick A. Williams
**CRIMINAL DEFENSE
INSTITUTE**



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THE TULSA COUNTY PUBLIC DEFENDER'S OFFICE
THE OKLAHOMA INDIGENT DEFENSE SYSTEM
OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION**

Thursday, June 24 (7 credits, including ethics and 3.5 Mandated Juvenile Law Training)

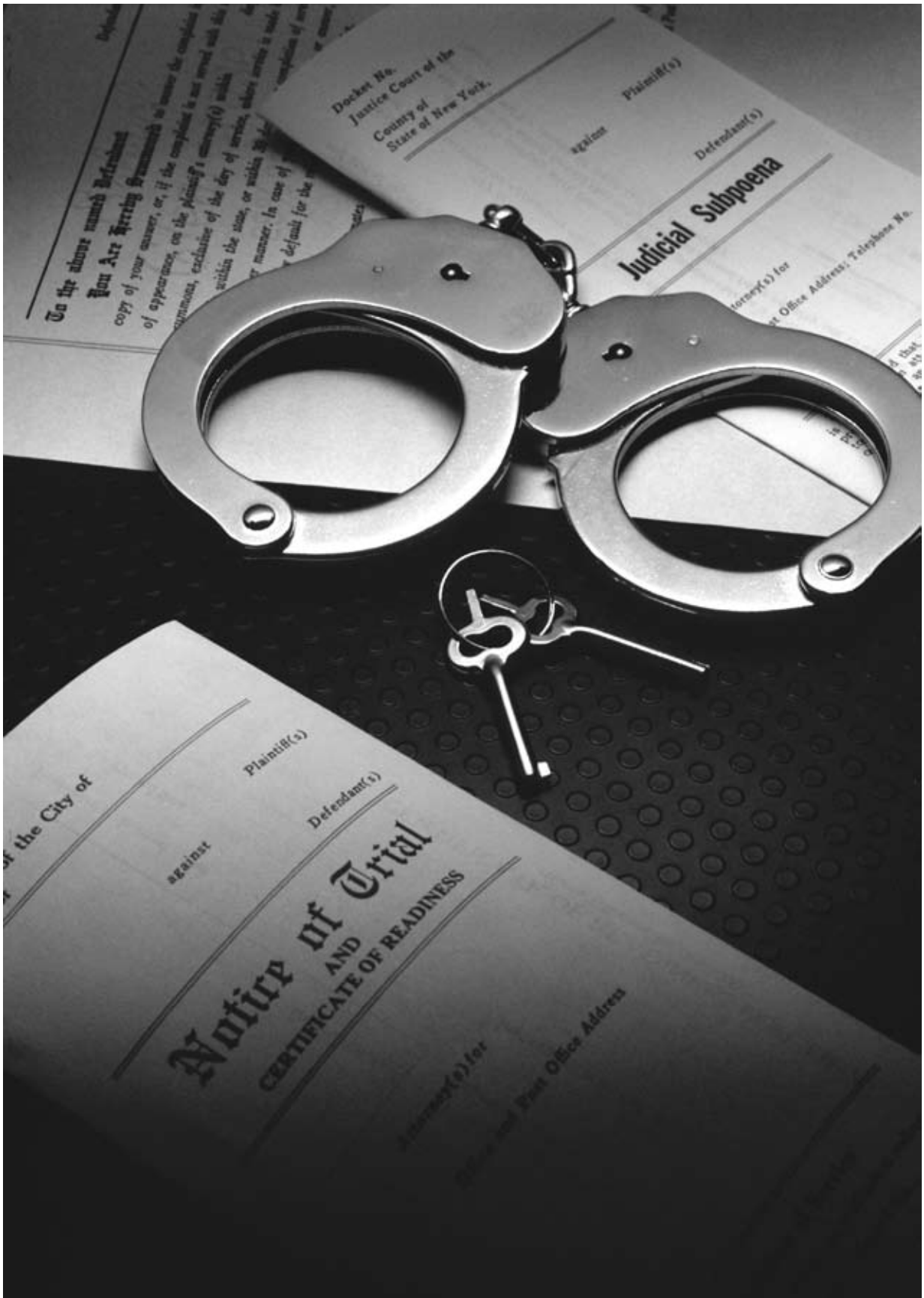
8:30 – 9:00	Welcome- Robert Ravitz, Oklahoma County Public Defender; Joe Robertson, Oklahoma Indigent Defense System; Pete Silva, Tulsa County Public Defender; Andrea Digilio Miller, President, Oklahoma Criminal Defense Lawyers Association
9:00 – 9:50	Medical Examiner/ Labs & ASCLAD; the accreditation issue Jim Drummond, Doug Parr & Mary Long
10:00 – 11:20	Jury Selection- Robert Hirschorn, of Cathy E. Bennett & Associates, Lewisville, TX
11:20	lunch
12:45 – 1:00	Patrick A. Williams & John Adams Awards Presentation
1:00 – 1:50	Interviewing and Cross Examining the Child Complainant- Will Korman, Boston, MA (satisfies 1 credit toward mandated juvenile law training)
2:00 – 3:20	PTSD: diagnoses & treatment of children and adults- Dr. Faust Bianco, Tulsa; Legal Issues- Mary Bruehl, Oklahoma Indigent Defense; and a war veteran's perspective- Tim "Tarzan" Wilson, Oklahoma County Public Defender. (satisfies 1.5 toward mandated juvenile law training)
3:20 – 4:10	Effective Legal Writing- Judge Jane Wiseman, Court of Civil Appeals, Tulsa
4:10 – 5:00	How to Represent the Sex Crime Defendant & Still Get Invited to Cocktail Parties, Will Korman, Boston, MA (satisfies 1 credit toward mandated juvenile law training)(satisfies ethics credit)
5:00 - ?	Cocktails

Friday, June 25 (6 Credits, including 2.5 Mandated Juvenile Law Training)

8:30 – 9:20	Drug Tests, Dog Sniffs & Forfeiture- Doug Parr & Al Hoch, Oklahoma City	
9:20 – 10:10	Story Telling and Jury Persuasion- Tyrone Moncriffe, Austin, TX	
10:20 – 11:10	Story Telling and Jury Persuasion- Tyrone Moncriffe cont'd	
11:10 – 12:00	Y.O Nuts and Bolts- Shena Burgess, Tulsa County Public Defender & Brian Aspen, Tulsa (satisfies 1.5 credit toward mandated juvenile law training)	
12:00 – 12:50	Setting up & Growing Your Law Practice- Devin Resides & John Hunsucker, Oklahoma City	

Friday, June 25 Juvenile Track (comprises remaining 1 ½ credit toward mandated juvenile law training)

1:50 – 2:30	OJA Programs and Dispositional Options- Paul Sandstrom, Tulsa(satisfies ¾ toward Juvenile Training)	
2:20 – 3:20	Privacy Rights of Juveniles- Doris Fransein, Tulsa County District Judge, and Tim Laughlin, Oklahoma Indigent Defense(satisfies ¾ toward Juvenile Training)	



Our Subpoena or Court Order for Those Bank Records May Be Illegal

The Oklahoma Financial Privacy Act

By Paul R. Foster

The Oklahoma Financial Privacy Act¹ (OFPA) imposes responsibilities upon private attorneys and judges in addition to government agency officials, in regard to subpoenas and court or agency orders for records from financial institutions.² Practicing lawyers have been observed issuing subpoenas to financial institutions for protected records without an apparent working knowledge of OFPA. Often, staff personnel in financial institutions are frankly better versed in OFPA than licensed attorneys seeking the records and further, those personnel know it. Private litigant attorneys, government agencies and even judges face mandatory OFPA requirements, with the financial institution statutorily placed as guardian over those records as to those attorneys, judges and government agencies seeking them. Thus, a working knowledge of OFPA and some understanding of the practical effects of its requirements and restrictions are valuable. Due to the experience of the author, the focus of this article will be on civil court subpoenas or court orders, but OFPA applies to Oklahoma criminal court subpoenas as well.³

A brief history concerning the impetus for OFPA is helpful since it has its roots in federal constitutional law and the Federal Right to Financial Privacy Act⁴ (FRFPA), followed by a discussion of the responsibilities imposed, an introduction to some unique problems that arise due to these responsibilities and some

practical and legislative suggestions to address these problems.

A BRIEF HISTORY

In 1976 the U.S. Supreme Court decided *United States v. Miller*,⁵ in which the court held that neither the Fourth Amendment to the

U.S. Constitution nor common law afforded financial institution customers protection from disclosure to government authorities of the customer's records in possession of the financial institution and thus, account records are not the "customer's" records and are wholly unprotected from the government's reach. The FRFPA was thus hastily enacted by Congress to protect the privacy of financial records held in "financial institutions" from access by the federal government to such records or the information contained in those records. Because FRFPA only addressed federal government access, state laws quickly followed to restrict state and local government access, resulting in Oklahoma's version, the OFPA, which became effective May 17, 1979.⁶

The most basic distinction between FRFPA and OFPA is simply this: FRFPA applies when the federal government (including federal courts) seeks access to protected records and OFPA applies when the Oklahoma state government (including Oklahoma and local courts) seeks access to protected records. Thus, for example, a subpoena issued from a federal court or federal agency triggers FRFPA, whereas a subpoena issued from an Oklahoma state or local government court or agency triggers OFPA. Our focus will now turn solely to the OFPA.

OFPA BASICS

OFPA governs subpoenas for financial institution customers' financial records⁷ and specifically prohibits a financial institution from "giving, releasing or disclosing any financial record" of a "customer"⁸ to "any government authority" unless the customer consents in writing or the subpoena served is OFPA compliant.⁹ There are also duties (discussed below in detail) imposed by OFPA on government authorities including private litigation attorneys and judges who issue subpoenas or orders for such records. There is an apparent misconception that OFPA only applies to government agencies seeking records and thus, only applies to the courts when government agencies are seeking the records through the courts. The judiciary is a branch of government¹⁰ and the OFPA has been applied equally to the courts in a civil case where the government authority was not a government agency but was the trial judge who was ordering the turnover of protected records to another private civil party to litigation.¹¹

A subpoena issued in a civil case by an attorney is by the express statutory authority of the attorney *as an officer of the court*¹² and further is enforceable via the judicial power of contempt of court.¹³ Thus, the often heard (and typically rightly rejected) argument in district court that the attorney-issued subpoena is outside the purview of OFPA since this action is on behalf of only a private litigant and not a "government authority," does not appear to be correct. The fact that the subpoena is issued by an attorney for a private litigant doesn't change the character of the subpoena because the very basis for the power of the issuance of the subpoena, *i.e., as an officer of the court*, means it is still a subpoena issued from the court, by the authority of the court with the force and effect of law behind the subpoena. It thus appears such a subpoena and thus, the attorney issuing it as the government authority, may be within the scope of OFPA.

The Party Exception

However, a financial record of a party to the proceeding is a significant exception to the application of at least part of OFPA (referred to hereinafter as the "party exception"). This makes sense because the records of a party to a proceeding would be more likely to be relevant to the issues and a party to a proceeding would be in a position to protect their records from intrusion. OFPA states this exception as follows:

G. The notice and challenge procedures provided for in this section shall not apply when the financial records of the customer:

1. Are sought pursuant to a subpoena in connection with litigation to which the customer is a party, including, but not limited to, litigation between a government authority and the customer; or
2. Are sought pursuant to an administrative subpoena in an adjudicatory proceeding in which the customer is a party.¹⁴

THE GOVERNMENT AUTHORITY'S (ISSUING ATTORNEY, JUDGE OR AGENCY) OFPA RESPONSIBILITIES

Although the financial institution holding the records is charged by OFPA with the duty to not release the records without the government authority's OFPA compliance, the government authority, often the attorney, issuing a subpoena or causing a subpoena to be issued for financial records of a customer of a financial

institution also has several responsibilities, which are summarized as follows:

- 1) Generally, to insure the subpoena is authorized by law (such as 12 Okla Stat. §2004.1) including being compliant with OFPA.¹⁵
- 2) Serve the subpoena on the financial institution.¹⁶
- 3) Serve a copy of the subpoena on the customer or mail to their last known address on or before the date the subpoena is served on the financial institution.¹⁷
- 4) Certify in writing to the financial institution that the attorney has complied with OFPA (hereinafter “OFPA certification”).¹⁸
- 5) Allow sufficient time for performance by the financial institution under the subpoena to insure the customer has 14 days to file a motion to quash the subpoena on certain OFPA specified grounds.¹⁹
- 6) *Prior to the time the record is released, pay the financial institution the costs specified by statute.*²⁰

Except for No. 6, each of these is discussed in detail by reference to their number above.

- 1) The OFPA provides in pertinent part that “[a] court of competent jurisdiction ... may issue a subpoena for a customer’s financial record only if such subpoena is authorized by law. Said subpoena shall specify what financial record is sought....”²¹
 - Again, since the attorney issuing a subpoena is doing so in their capacity as an officer of the court, by so issuing a subpoena for a financial record of a customer of a financial institution, the issuing attorney is taking on the responsibility that the subpoena is “authorized by law.” OFPA is law. Thus, an attorney issuing a subpoena not in compliance with any part of OFPA is apparently violating this duty because the subpoena was not authorized by law (OFPA) to be issued in the first place. Further, the breadth of the duty, *i.e.*, that the subpoena may be issued “only” if it is “authorized by law” is unmistakable as a duty on the issuer. An example would be a subpoena that does not comply with other statutory time limits, such as the 30 day

limit for subpoenas of non parties following service of summons.²²

- OFPA requires that the subpoena “shall specify what financial record is being sought.”²³ Thus, a simple description in the subpoena to “all financial records” does not appear to adequately specify what financial record is being sought. Although no further help is provided by OFPA or Oklahoma case law interpreting OFPA, it would seem reasonable that, aside from relevancy issues, the usual criteria for avoiding an overly broad or burdensome description would suffice, such as a specific time period (often omitted) coupled with a specific type of record (account statements, deposit items, withdrawal items, ACH transactions, payment history, credit reports, credit scores and the like).
- 2) Failure to legally “serve” the subpoena on the financial institution creates two problems under OFPA:
 - a. Since the financial institution is prohibited from giving, releasing or disclosing financial records under a subpoena unless the financial institution has been served with the subpoena,²⁴ the issuing attorney should insure actual legal service of the subpoena on the financial institution has been obtained. In the author’s experience, many subpoenas are sent to banks which are non-parties to the litigation, via facsimile, e-mail and the like, which do NOT constitute “service” and thus, are not sufficient for the release of the records by the financial institution under OFPA.
 - b. Further, such methods arguably do not start the 14 days running for the customer to file their motion to quash since under §2204(C), the 14 days only begins to run from when the subpoena was “served.”
 - 3) OFPA provides specifically: “A copy of the subpoena shall be served on the customer or mailed to his last-known address on or before the date the subpoena is served on the financial institution.”²⁵ Due to the “party exception” identified previously, this requirement is typically going to mean that the copy of the subpoena is being served on a non-party customer

and thus in order to fulfill OFPA's requirements, must be "served" as required for lawful service of any subpoena.²⁶

4) OFPA certification by the attorney issuing the subpoena is required before a financial institution releases the financial records. The language of the statute is very clear: "A financial institution *shall not release* the records of a customer *until* the government authority seeking the records *certifies in writing* that it has complied with the applicable provisions of the Financial Privacy Act."²⁷ (Emphasis Supplied.) Bear in mind that this is now twice that OFPA has provided that financial institutions are specifically prohibited from releasing records, the first discussed above requiring written consent from the customer or upon a subpoena served and issued pursuant to OFPA, the second requiring a certification of OFPA compliance in writing.²⁸ But what does this OFPA certification look like? OFPA does not give any specific direction on this question. OFPA appears in Title 6 of the Oklahoma Statutes, but no definitive statute defining "certify" was identified in Title 6 by the author, apparently leaving the requirement to some reasonable jurisprudential criteria, proposed below.

- Certificates of mailing are commonly affixed to pleadings and papers by attorneys and are signed and dated. Also, since a subpoena is being issued and is signed by the attorney and bears a date of issuance, it is consistent that the certification be signed and dated as well. On the subject of the date, not only would it seem appropriate that the certification be dated, but that the certification bear the "as of" date that the issuing attorney certifies compliance. This is because:
 - a. The issuing attorney is certifying that they have complied with OFPA;
 - b. The non-party customer has 14 days from when that same attorney served or mailed to them their copy of the subpoena in which to file their motion to quash; and
 - c. The financial institution cannot release the records described on the subpoena until they are certain the customer has not sought to protect their records with a motion to quash, so the 14 day

time period required must have expired, so the "as of" date is critical.

- As with a certificate of service on a pleading, the identity and address of the party to whom it is sent (the customer) must be specified.
- Finally, the substance of the certification is that the government authority (the attorney issuing subpoena in this case) "has complied with the applicable provisions" of the OFPA. Presumably, merely a statement to that effect would suffice, *e.g.*: "The undersigned hereby certifies that in issuing this subpoena, they have complied with the applicable provisions of the Oklahoma Financial Privacy Act." Although §2208(A) of OFPA does not specify the extent that substantive compliance must be demonstrated, §2208(B) provides a safe harbor for financial institutions who rely on a certification, so it appears a summary statement of compliance is sufficient, possibly subject to some obvious problems discussed below under "Practical Issues and Solutions."

In summary, it is proposed that a sufficient certification would be signed, dated along with an "as of" date, the name and address of the recipient of a copy of the subpoena, and include an express statement of OFPA compliance. It is worth noting that since there does appear to be a potential civil liability risk to financial institutions which violate OFPA,²⁹ the safe harbor is of great importance and some financial institution counsel may understandably require more than has been suggested here as sufficient to certify compliance with OFPA in order to be willing to release records.

- 5) Both the issuing authority and the financial institution must ensure that the non-party customer is given their full 14 days to move to quash the subpoena.³⁰ Since the exact method of "notice" by the customer to the financial institution of the motion to quash is not identified in OFPA, the financial institution has no choice but to be certain before releasing any records. Because the Oklahoma Pleading Code recognizes a three-day period for mailing delays,³¹ some financial institutions and their attorneys

observe this period before releasing any records, making the first date for release the 18th day after the “as of” date of the issuing attorney’s certification.

PRACTICAL ISSUES AND SOLUTIONS

A brief sampling of practical issues Oklahoma courts or practicing attorneys face when seeking protected records from a financial institution may be of use to the bench and bar. These representative problems can confound and frustrate attorneys and courts and obstruct or delay the production of non-party customer records because of lack of compliance with OFPA and as will be suggested, often may be solved through simple strategic planning by attorneys seeking such records.

1) Problem: Financial institutions are often faced with subpoenas for records of a non-party customer and cannot see from the certification that the non-party customer received notice of the subpoena for their records. This often occurs in the case of a joint bank account where only one person from that joint account is a party to the litigation. The attorney seeking the financial records of John Doe issues a subpoena to AAA Bank for John’s bank records but does not certify that the subpoenaing attorney sent an OFPA notification to Jane Doe, who appears on the bank’s records as a joint account holder with John. If there is an OFPA certification on the subpoena, often it only includes the party, John Doe (which, as noted above, is not necessary due to “the party exception”) and does not mention the non-party customer, Jane Doe, who is also on the bank account. The bank’s “customer” as defined in OFPA, includes Jane and thus the account information sought are also her records under OFPA. This ties the hands of the bank and its attorneys regarding the records that include Jane — the bank is prohibited from releasing the account information because Jane is also on the account and is a) not a party to the litigation and b) did not receive proper notification that her records were being sought. Further, the bank and its attorneys cannot disclose Jane’s identity or other information to either the issuing attorney or the court to allow the notice to be sent, without the very disclosure itself violating OFPA. If the court seeks to force the bank to do so, a writ of prohibition could be the only meaningful option for the bank to avoid violating OFPA. For the bank to divulge the name and address of the non-party customer to the subpoenaing attorney, would in itself be a violation of the



“...the bank is prohibited from releasing the account information because Jane is also on the account and is a) not a party to the litigation and b) did not receive proper notification that her records were being sought.”

OFPA. It is the author’s observation that this unnecessary dilemma could easily have been solved much earlier in the process.

Solution: The issuing attorney has a duty, as outlined above, to notify the non-party customer that they are seeking her financial institution records — so it is important for the attorney to incorporate into their discovery requests directed to the party, including post-judgment collection proceedings such as hearings on assets, document requests or questions to illicit the **names and addresses of people who share their bank accounts** for use in subsequent collection efforts, if any are required. Alternatively, to allow the financial institution to comply with the subpoena timely and in compliance with the OFPA, the financial institution or its attorney could in such circumstances, consider directly asking customer Jane Doe, per Title 6 O.S. §2203(a), for written permission to disclose her financial records (which records should be specified in the written permission document) within the time required by the subpoena.

2) Problem: Add to the above stated scenario that Jane Doe refuses to give AAA Bank written

permission to give her records to the subpoenaing attorney and AAA Bank tries to contact the issuing attorney to report that they will only be complying partially to their subpoena due to OFPA issues and the attorney either a) will not take the bank's (or bank's attorney's) calls (it has happened more than once) or b) refuses to acknowledge the OFPA is relevant. So AAA Bank is forced to hire a lawyer and seek protection from the court within the time frame for compliance recited in the subpoena, resulting in greater expense, delay and unnecessary burden on the court.

Solution: If the court orders AAA Bank to fully comply with the subpoena regardless of the non-party records, one would think that that should be sufficient "cover" for the bank against an OFPA violation. But the court order itself is also "government action" under *Alva State Bank*,³² and thus is not sufficient to free the bank to release the records while merely adding the court itself into the equation, and as noted above, may force the financial institution to seek a writ of prohibition. Perhaps a better solution under current law would be for the court to quash the subpoena to the extent it pertains to non-party bank records and order the issuing attorney to properly notify the non-party of the subpoena — allowing the non-party the statutorily designated period of time within which to object to the release of her records. This raises the question: How does the issuing attorney obtain the information regarding who is on the bank accounts with John Doe and what their addresses are if the bank is prohibited from disclosing this information? If the issuing attorney did not ask for this information during the discovery phase of his case against John, then the information must be obtained from John now, and then proper OFPA notice sent to Jane with the required certification of the issuing attorney in the subsequent subpoena to AAA Bank.

3) Problem: The attorney seeking the records discovers from John that John's mother, Jane, is on his deposit account at AAA Bank and John gives the attorney her address. Attorney issues another subpoena for Jane's records, certifying that Jane was notified at the address John gave and the date of notification gives Jane sufficient time (14+ days) to object prior to the bank's deadline for compliance with the subpoena. Upon receiving the subpoena, bank notes that the address given in the issuing attorney's OFPA certification for Jane is different from the

address in the bank's records. What is the duty of the bank at this point?

Solution: Title 6 O.S. §2208(B) states: "Any financial institution or employee thereof that discloses the financial records of a customer pursuant to the Financial Privacy Act in good faith reliance upon a certificate of the government authority shall not be liable to the customer for the disclosure under any law or regulation." This safe harbor provision will protect the bank if it has a *good faith* belief that the address used was sufficient for notification to Jane. If the address in the OFPA certification matched the bank's records, the bank has no further duty to inquire. However, if the bank's records reflect a different address for Jane and, as is typical for community banks, the bank knows that the address given in the OFPA certification is likely insufficient to give Jane notice, then there is no good faith reliance possible and thus possibly no safe harbor for the bank. The subpoenaing attorney would have to be notified that the OFPA certification is insufficient as to Jane due to an incorrect address. Still yet, the bank would seem to be legally bound by OFPA to not disclose Jane's correct address to the subpoenaing attorney or the court.

4) A Suggested Practitioner Solution: As the three problem examples above illustrate, an attorney or a court may be frustrated by OFPA imposed obstacles in the quest to obtain the financial institution records of non-parties. A suggested practice for attorneys who anticipate the need for financial records is to routinely obtain during discovery the names and current addresses of any non-parties sharing bank accounts with parties to the litigation. Objections to such discovery can be met by clarifying the purpose is to ensure compliance with OFPA in any financial records discovery that may occur and perhaps cover the disclosure with a protective order. This simple practice will save the attorney (and others) a great deal of time should he or she run into OFPA road blocks in gaining prompt access to financial records.

5) Legislative Solutions. OFPA could be amended to present a mechanism streamlining the process in the event that there are non-party customers on accounts about whom the ordering court or the subpoenaing attorney have no knowledge. For example, the financial institution could be statutorily authorized to partially comply with a subpoena or court order such as in the examples above and/or could be authorized or even required to give

notice itself to any joint account holders without divulging their identity to the government authority. The financial institution would in turn, receive a safe harbor from both civil liability and from governmental/judicial enforcement of the subpoena provided it timely responds and certifies to the government authority that the partial compliance was due to OFPA issues and that notice to additional account holders has been sent. Upon such a certification, the subpoena or court order would be extended automatically by a sufficient time to allow the non-party joint account holder to file a motion to quash under existing OFPA procedures.

CONCLUSION

Although by no means an exhaustive exploration of OFPA, perhaps the foregoing can raise our collective consciousness as to OFPA and the unique responsibilities it brings to attorneys, judges and government officials in protecting from government intrusion the privacy all of our private financial records held by financial institutions. As demonstrated, OFPA imposes legal and practical burdens on all parties involved, attorneys, judges and government officials, not just financial institutions. It is hoped this writing provides assistance to those in the bench and bar toward the proper fulfillment of these OFPA duties we share.

1. Title 6 O.S. §§2201-2208.

2. "Financial Institution" is defined in OFPA as: "... any office or branch of a bank, savings bank, building and loan association, savings and loan association and credit union located in the State of Oklahoma (Title 6 O.S. §2202).

3. This article will not cover search warrants which are specifically addressed in §2207 of OFPA.

4. Title 12 U.S.C. §3401 *et seq.*

5. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619 (1976).

6. Title 6 O.S. §§2201-2208, OFPA, has been amended several times since enactment, with the most recent amendment being to §2206 in 2001.

7. It should be noted that both the records and the information contained in those records is protected by OFPA, due to the definition of "financial record" in §2202(b), which includes "any original of, any copy of, any record held by a financial institution, or any information derived therefrom...." (Emphasis Supplied.)

8. "Customer" is defined in OFPA as "... any person, corporation, partnership or other legal entity, or authorized representative thereof, who utilized or is utilizing a service of a financial institution, or for whom a financial institution is acting or has acted as a fiduciary, in relation to an account maintained in the customer's name." (Title 6 O.S. §2202)

9. Title 6 O.S. §§2203 & 2204.

10. Oklahoma Constitution Art. 4, §1.

11. *Alva State Bank & Trust Co v. Dayton*, 1988 OK 44, 755 P.2d 635, applying the OFPA to a district court order.

12. Title 12 Okla Stat. §2004.1(A)(4).

13. Title 12 Okla Stat. §2004.1(E).

14. Title 6 Okla Stat. §2204(G).

15. Title 6 Okla Stat. §2204(A).

16. Title 6 Okla Stat. §2203(b).

17. Title 6 Okla Stat. §2204(B).

18. Title 6 Okla Stat. §2208(A).

19. Title 6 Okla Stat. §2204(C).

20. Title 6 Okla Stat. §2206.

21. Title 6 Okla Stat. §2204(A).

22. Title 12 Okla Stat. §2004.1(A)(5).

23. Title 6 Okla Stat. §2204(A).

24. Title 6 Okla Stat. §2203(b).

25. Title 6 Okla Stat. §2204(B).

26. Title 12 Okla Stat. §2004.1(B).

27. Title 6 Okla Stat. §2208(A).

28. Thus, the OFPA viability of an attorney-issued subpoena to a financial institution, could be expressed simply as: *A served OFPA compliant subpoena + OFPA Certification by issuing authority (attorney) + Prior payment of expenses = Financial records produced by a Financial Institution pursuant to a subpoena.*

29. *Haworth v. Central Nat. Bank of Oklahoma City*, 1989 OK 20, 769 P.2d 740.

30. Title 6 Okla Stat. §2204(C).

31. Title 12 Okla Stat. §2006(D).

32. *Alva State Bank & Trust Co v. Dayton*, note 9, *supra*.

ABOUT THE AUTHOR



Paul R. Foster graduated from the OU College of Law in 1984 and is senior shareholder of Paul Foster Law Offices PC in Norman. His practice focuses on the field of banking and related commercial practice. Of his 26 years of practice, 10 years were as the general counsel for the Oklahoma Banking Department where he was active in both state and national legislative and regulatory matters including the redraft of the Oklahoma Banking Code.



Ignorance of the Law or Bona Fide Error?

Supreme Court Set to Decide in FDCPA Case

By Laurie A. Lucas

Last year, the U.S. Supreme Court granted certiorari in *Jer-
man v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*.¹ The
single issue before the Supreme Court is whether the bona
fide error defense² in the federal Fair Debt Collection Practices
Act (FDCPA or act)³ applies to mistakes of law.⁴ The FDCPA's
bona fide error defense shields third-party debt collectors from
liability for violations under the act if the debt collector can dem-
onstrate that the violation was unintentional, made in good faith
(bona fide) and occurred despite having procedures in place to
prevent the error.⁵ While the federal courts clearly agree that the
defense applies to clerical errors, there is a circuit split about
whether the defense extends to mistakes of law. Besides the 6th
Circuit's holding in *Jer-
man*, the 10th Circuit, in *Johnson v. Riddle*,
also has held that the defense includes mistakes of law.⁶

If the Supreme Court affirms *Jer-
man*, the requirements outlined in *Johnson* will apply
when asserting the defense for a mistake of
law, at least in the 10th Circuit.⁷ In *Johnson*, the
debt collector claimed immunity under the
defense after incorrectly asserting that Utah's
statutory penalty for shoplifting (\$250) could
be included in a claim to collect a bad check.⁸
After agreeing that the defense was applicable
to mistakes of law, the Supreme Court noted
that whether the first prong of the defense is
established requires evidence that the debt col-
lector did not specifically intend to violate the
FDCPA.⁹ This is a "subjective test," but it may
be demonstrated using "inferential evidence."¹⁰

Johnson also noted that whether the violation
occurred in good faith "will often turn on the
debt collector's due diligence practices."¹¹
Reviewing the collector's due diligence prac-
tices means that the second and third prongs of
the defense "will often merge."¹²

Johnson rejected standard examples of due
diligence — sending staff for FDCPA training,
etc. — as unsatisfactory evidence when the
bona fide error defense is asserted for mistakes
of law.¹³ Rather, the court specifically requires
that "the attorney in charge" establish the exis-
tence of procedures "reasonably adapted to
avoid the core legal error that occurred."¹⁴ The

“...the FDCPA already shields debt collectors from liability under the act if they have relied on an FTC advisory opinion...”

attorney in *Johnson* had researched the issue and also had filed a test case to determine the validity of his legal strategy.¹⁵ The 10th Circuit noted that while its *Erie* doctrine analysis¹⁶ of the issue indicated that the shoplifting fee would not have been allowed under the relevant state law — the court did not rule out the possibility that other procedures besides the *Erie* doctrine analysis, which the collector *did not* conduct, might have made the mistake of law “objectively reasonable” — it therefore left the question to the finder of fact.¹⁷

Requiring a jury to determine whether an attorney’s legal mistake under the FDCPA was reasonable, and the difficulties involved in such an inquiry, may be one of the reasons the Supreme Court ultimately holds that the bona fide error defense does not apply to mistakes of law.¹⁸ In addition, the FDCPA already shields debt collectors from liability under the act if they have relied on an FTC advisory opinion,¹⁹ and the Supreme Court indicated some concerns that these safe harbor provisions might be rendered superfluous if the defense were extended to mistakes of law.²⁰ Reversing *Jerman* in light of those concerns would square *Jerman* with the only other Supreme Court case under the act — that case extended the act to attorneys and litigation activities — since any attorney unsure whether a collection strategy might violate the act could ask the FTC for an advisory opinion. Either way, the outcome bears watching since the effect on attorneys who are subject to the FDCPA will be significant.

On April 21, 2010, the Supreme Court held that the FDCPA’s bona fide error defense does not apply to mistakes of law. See *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A.*, No. 08-1200, 2010

U.S. LEXIS 3480, at *59 (Apr. 21, 2010) (7-2 plurality opinion) (Kennedy, J. dissenting). The Supreme Court’s holding effectively overrules the 10th Circuit’s holding in *Johnson v. Riddle*, 443 F.3d 723 (10 Cir. 2006).

1. 538 F.3d 469 (6th Cir. 2007), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1200).

2. 15 U.S.C. §1692k(c) (2006).

3. 15 U.S.C. §§1692-1692p (2006).

4. Brief for Writ of Certiorari at 4, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, -U.S.- (2009) (No. 08-1200).

5. 15 U.S.C. §1692k(c) (2006). The section provides an exemption from liability if the debt collector can demonstrate that “the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.” *Id.*

6. 305 F.3d 1107, 1121 (10th Cir. 2002) (remanding to district court to determine whether defendant was entitled to defense). *Id.* at 1124. See also *Johnson v. Riddle*, 443 F.3d 723, 728-29 (10 Cir. 2006) (reversing and remanding district court’s grant of summary judgment to debt collector and discussing criteria for applying the defense’s requirements to mistakes of law). The 7th Circuit has indicated that it “assume[s]” the defense would apply to mistakes of law, but would rather wait for the Supreme Court to resolve the split. See *Ruth v. Triumph P’ships.*, 577 F.3d 790, 803 (7th Cir. 2009).

7. Unless the Supreme Court holds that the application of the defense is a question of law, in accord with the 6th Circuit, since the 10th Circuit has indicated the inquiry is a fact question. *Johnson*, 443 F.3d at 729. Either way, however, the evidence required to demonstrate the defense should be the same.

8. *Johnson*, 443 F.3d at 724.

9. *Id.* at 728.

10. *Id.*

11. *Id.* at 729.

12. *Id.*

13. *Id.* at 730.

14. *Id.*

15. *Id.* at 730-31.

16. See generally, *Erie v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts, in diversity jurisdiction cases, to apply state substantive law to resolve disputes).

17. *Id.* at 731 & n.4.

18. See Brief for the Petitioner at 15, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, -U.S.- (2009) (No. 08-1200).

19. 15 U.S.C. §1692k(e) (2006).

20. Transcript of Oral Argument at 51-56, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, -U.S.- (2009) (No. 08-1200).

21. *Heintz v. Jenkins*, 514 U.S. 291 (1995).

ABOUT THE AUTHOR



Laurie A. Lucas is an assistant professor of legal studies in the Spears School of Business at Oklahoma State University. Her research is in the area of consumer financial services law with a particular focus on the federal Fair Debt Collection Practices Act. She is a graduate of the OU College of Law.

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There May be Consumer Laws ‘Lurking’ in Your Commercial Transaction

By Eric L. Johnson

As a business/commercial practitioner, you may never have thought you needed to concern yourself with the multitude and varied sets of laws applicable to transactions involving a consumer. After all, the laws applicable to a consumer transaction are distinct from those applicable to a business or commercial transaction, right? Even if you thought you only had to concern yourself with the rules in the Oklahoma Uniform Commercial Code 12A OKLA. STAT. §§1-101 *et seq.* (UCC) – you should know that there are rules within the UCC that may provide for a different outcome when dealing with a consumer transaction. In addition, there are rules outside of the UCC you should be acquainted with when a consumer is involved that could have an impact on your analysis. Finally, you should be aware of how one Oklahoma act that one may typically view as only being applicable to consumers may be used against your business clients, or that you may be able to use against other businesses.

INTRODUCTION

The general structure of law under the UCC contains two fairly distinct sets of legal principles 1) one set of rules that will apply in relationships between merchants and 2) another set of rules that will apply in relationships between merchants and consumers. There are several important differences between a commercial transaction and a consumer transaction. For example, a commercial transaction

usually involves most, if not all, of the following factors:

- (a) two knowledgeable parties;
- (b) contractual provisions which are relatively clear in meaning to the experienced parties;
- (c) contractual provisions which are bargained for or which are boilerplate; and

- (d) parties of sufficient position so that they are able to bargain with each other.

A consumer transaction generally involves the opposite of each of the above factors. Consumer transactions generally involve:

- (a) transactions that are principally for a personal, family or household purpose;
- (b) relatively unknowledgeable consumer;
- (c) forms that were drawn by the other party in technical or legal language seldom read or understood by the consumer; and
- (d) little or no bargaining by the consumer where the consumer is faced with a “take-it-or-leave-it” proposition.

Because of these inherent differences, special rules were developed to protect consumers. Legal rules were drafted, both at the federal and state levels, to protect consumers because it was perceived they could not protect themselves as merchants or business persons are able to do. If you were to visualize a transaction between a merchant and a consumer, you might think of a square bargaining table in a room, where a merchant sits at one end of the table and a consumer sits at the opposite end. Given the above factors, the bargaining table would be profoundly tilted in favor of the merchant. Over the past 40 to 50 years, Congress and state Legislatures have enacted legislation specifically designed to protect consumers and level the inequities at the bargaining table. As each new consumer protection is enacted, the bargaining table tilts a bit more in favor of the consumer.

Most of the federal and state consumer protection laws or rules modify the rules in the UCC either by pre-empting the rules or by supplementing the rules. Thus, it is important for a practitioner advising parties involved in transactions governed by the UCC to recognize that the UCC alone may not be the complete applicable law — and to consider laws outside of the UCC that may have an impact on the transaction, particularly when a consumer is involved in the transaction. Therefore, the purpose of this article is to describe in summary format some of the significant parts of the vast and diverse mix of laws at the federal and state levels that protect consumers and relate to the UCC, especially Article 9.

CONSUMER PROVISIONS IN THE OKLAHOMA UNIFORM COMMERCIAL CODE

The UCC is designed primarily to codify appropriate practices and to provide “default” rules in the absence of an agreement for commercial transactions between merchants. It is not designed to protect the weaker party to a commercial bargain. Therefore, freedom of contract is a basic principle of the UCC. However, how can these principles accommodate transactions that involve a consumer? The rules to protect consumers must be mandatory for the most part or the nonconsumer side will write them out, having both the power and incentive to do so. Consumer rules tend to protect a subset of transaction participants, usually at greater cost to or with less efficiency for other users, which is the reverse of normal UCC policy that attempts to codify the most efficient and least costly rule for the benefit of all. Because states view the need for most special consumer rules differently, a great deal of consumer protection law is found at the local level.

Application of the UCC to Consumer Transactions

The UCC does not exclude transactions between merchants and consumers. Rather, almost all articles of the UCC apply to consumer transactions. This requires an analysis of the UCC rule to determine if the rule is appropriate for a transaction in which one party is a consumer. If the rule is not appropriate, you should note that several options have been utilized in the UCC:

Option 1: The first option is that an exception can be made that excludes consumer transactions from UCC coverage. This option has seldom been used.

Option 2: The most common option is Option 2 which uses a particular rule in the UCC itself that creates a different rule for consumers than for commercial parties.

Option 3: A third option is to defer to consumer protection law outside of the UCC. In essence, the UCC invokes pre-emption of itself.

Option 3 is substantially employed in Article 9, even though most articles also follow Option 2 and contain some particular rules specific to consumer transactions. Option 3 also involves several issues that need to be addressed.

- *First*, unless a Legislature has written the reference to the law outside the UCC more explicitly, the reference to that law is somewhat general;
- *Second*, UCC §1-9-201(b) lists what sort of laws are contemplated, such as retail installment sales acts and small loan acts;¹ and
- *Third*, the references in UCC §1-9-201(b) to statutes or regulations that regulate the rates, charges, agreements and practices for loans, credit sales or other extensions of credit are more specific than the references in §1-103(b), which indicates that other laws outside the UCC supplement the UCC unless displaced by particular provisions of the UCC.²

Article 9-Secured Transactions

Article 9, like other articles of the UCC, defers to consumer protection laws and certain other laws, such as rate limits, charges, agreements and practices outside the UCC. *See* §1-9-201(b) and (c).³ However, Option 2 is employed throughout Article 9 whereby a rule for consumers may be created that is different than the treatment for commercial parties. A summary of the consumer provisions in Article 9 include:

- §1-9-102, which protects certain consumer consignments;
- §§1-9-103 and 1-9-626, which discusses the noncodification of either the “dual status” or “transformation” rules for determining whether a purchase-money security interest (PMSI) continues after a refinance of or other subsequent change in a consumer-goods transaction;
- §1-9-108, which provides that a description only by type of collateral is an insufficient description of consumer goods, a security entitlement or account, or a commodity account in a consumer transaction;
- §1-9-109, which excludes from Article 9 wage assignments and assignments of deposit accounts in a consumer transaction;
- §1-9-201, which subjects the rules of Article 9 to applicable consumer laws;
- §1-9-204, which limits an after-acquired property clause in its reach with respect to consumer goods;
- §1-9-309, which generally permits automatic perfection of a purchase-money security interest in consumer goods;
- §1-9-320, which protects consumer buyers at garage type sales;
- §1-9-337, which protects a nonmerchant buyer of goods (*i.e.* consumer) covered by a clean certificate of title even if there is a perfected security interest in them;
- §§1-9-403 and 1-9-404, which protect a consumer debtor’s ability to assert claims and defenses, §1-9-405 which allows a different rule with respect to modification of assigned contracts to trump the Article 9 rule in the case of a consumer and §1-9-406, which allows payment to the original obligee until notice of assignment;
- §1-9-602, which restricts waiver of certain protections for consumer debtors and obligors (*see also* §1-9-624);
- §1-9-612, which provides a separate timing rule for notice of disposition in a consumer transaction, §1-9-614, which provides a separate rule on what a notice of disposition must contain in a consumer-goods transaction and §1-9-616, which provides for an explanation in connection with a surplus or asserted deficiency in a consumer-goods transaction;
- §§1-9-620 — 1-9-622, which provide special protections and limitations on the ability of a secured party to retain collateral where the collateral is consumer goods or in a consumer transaction;
- §1-9-625, which provides particular sanctions for creditor violations of certain rules in the case of consumers; and
- §1-9-626, which leaves open the allowance or disallowance of a deficiency in consumer transactions.

FEDERAL ACTS AND REGULATIONS

The Federal Consumer Credit Protection Act

In addition to being aware of the consumer provisions in Article 9, a practitioner should also be cognizant of the federal rules outside of the UCC when a consumer is involved that may have an impact on one’s analysis. One such law is the federal Consumer Credit Protection Act⁴ (CCPA). The CCPA was passed by Congress in the late ’60s and regulates con-

“In many instances, the federal law allows a state to ‘opt out’ of the federal law as determined by the Federal Reserve Board.”

sumer and some merchant-to-merchant transactions. Other laws were enacted by Congress under the CCPA such as: the Truth-in-Lending Act (TILA), consumer leasing, credit cards, Fair Credit Billing, Equal Credit Opportunity, Fair Debt Collection and Electronic Fund Transfers. Later, amendments added substantive provisions beyond disclosure, such as prohibiting use of the so-called “Rule of 78” (15 U.S.C. §1615), mandating “restitution” for some disclosure errors (15 U.S.C. §1607(e)), and limiting freedom of contract in connection with so-called “high-rate,” “high fee” mortgages and home equity plans (15 U.S.C. §§1639, 1647). The result was a “Swiss cheese” type effect on the state law which is pre-empted only if a person is subjected to both federal and state laws and could not comply with both. In many instances, the federal law allows a state to “opt out” of the federal law as determined by the Federal Reserve Board. In the case of TILA, five states, including Oklahoma, sought and obtained the opt out.⁵ For the opt out to occur however, the state law must be substantially similar to the federal law in terms of consumer protection and must provide adequate means for enforcement.

At the time of this writing, the CCPA covers the following federal acts and implementing regulations:

- Truth in Lending Act and Regulation Z;
- Fair Credit Billing Act and Regulation Z;
- Consumer Leasing Act and Regulation M;
- Fair Credit Reporting Act;
- Equal Credit Opportunity Act and Regulation B;
- Fair Debt Collection Practices Act;
- Electronic Fund Transfers Act and Regulation E;
- Garnishment restrictions; and
- Credit Repair Organizations.

Other Federal Legislation

In addition to the CCPA, there are other federal acts and regulations that may apply to a commercial transaction as well as a consumer transaction:

- Truth in Savings Act;
- Real Estate Settlement Procedures Act and HUD’s Regulation X;
- Magnuson-Moss Act;
- Expedited Funds Availability Act and Regulation CC;
- Bankruptcy Code provisions;
- Interstate Land Sales Full Disclosure Act; and
- Federal Regulation (*i.e.* the Depository Institutions Deregulation and Monetary Control Act of 1980).

Some of these acts and regulations contain features that have a dual application to both consumer and commercial transactions. For example, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, the Expedited Funds Availability Act, certain Bankruptcy Code provisions and the Interstate Land Sales Full Disclosure Act have features that may apply to both a commercial and a consumer transaction.

STATE LAW

Oklahoma Uniform Consumer Credit Code

A practitioner should also be aware of other state rules outside of the UCC that will apply when a consumer is involved. The Oklahoma Uniform Consumer Credit Code, 14A OKLA. STAT. §§1-101 to 9-101 (U3C) is one such set of rules. The U3C is supplemented by the provisions of the UCC. Section 1-103 of the U3C, *Supplementary General Principles of Law Applicable*, provides that:

Unless displaced by the particular provisions of this act, the Uniform Commercial Code and the principles of law and equity, including the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement its provisions.

The U3C applies to sales, leases and loans “made” in Oklahoma and to modifications, including refinancings, consolidations, and deferrals, made in Oklahoma, of sales, leases, and loans, wherever made.⁶ In addition, the U3C provides rate regulation for two types of commercial purpose transactions:

1) *Sales Other than Consumer Credit Sales (Other Sales)*. U3C §§2-601 and 2-605 cover sale transactions that do not qualify as consumer credit sales (U3C §2-104). There is no limit (except subject to a possible claim of unconscionability) on the rate in this type of transaction. The parties may contract for any annual percentage rate. However, the parties may, by agreement, contract for the consumer credit sale rules of the U3C to apply. Otherwise, none of the general provisions of the U3C apply to *Other Sales*.

2) *Loans Other than Consumer Loans (Other Loans)*. U3C §§3-601 and 3-605 cover transactions that do not qualify as consumer loans (U3C §3-104). The annual percentage rate cannot exceed 45 percent in this type of transaction.⁷ However, the parties may, by agreement, contract for the consumer loans rules of the U3C to apply. Otherwise, none of the general provisions of the U3C apply to *Other Loans*.

Oklahoma Consumer Protection Act

Another set of state rules outside of the UCC that a commercial law practitioner should be aware of is the Oklahoma Consumer Protection Act, 15 OKLA. STAT. §§751-764.1 (OCPA). Although the name implies the primary purpose of the act is to protect consumers, which it does, the OCPA also applies to commercial purpose transactions. The OCPA can be used as a sword or shield in commercial transactions.

1) Important Definitions

Under the OCPA, “person” means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity. “Consumer transaction” means the advertising, offering for sale or purchase, sale, purchase or distribution of any services or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever located, for purposes that are personal, household, or **business oriented** (emphasis added). As noted, the definition of a “consumer transaction” is not limited to consumer transactions and includes business purpose transactions as well. “Deceptive trade practice” means a misrepresentation, omission or other practice that has deceived or could reasonably be expected to deceive or mislead a person to his detriment. The practice may occur before, during or after a consumer transaction and may be oral or

written. “Unfair trade practice” means any practice that offends established public policy or if the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.⁸

2) Unlawful Practices

Section 753 of the OCPA provides a laundry list of unlawful practices that are declared to be unlawful under the OCPA. Note that the unlawful practices described in §752(1) to (11) are described in subjective tests as well as objective tests; *i.e.* “with reason to know.”

3) Additional Unlawful Practices

Section 752A of the OCPA contains some additional unlawful practices related to credit and debit cards that are not included in the laundry list above. A person who accepts credit cards or debit cards for a consumer transaction is prohibited from printing more than the last five digits of the account number or the expiration date on any receipt provided to the cardholder. However, this section only applies to electronically printed receipts, not those that are handwritten or where an imprint or copy of the card is made.⁹

4) Exceptions to the OCPA

The OCPA does *not* apply to publishers, broadcasters, printers or other similar persons, who are involved in the dissemination or reproduction of information on behalf of others without the knowledge that it is unlawful. In addition, the OCPA does not apply to actions or transactions regulated under laws administered by the Corporation Commission or any other regulatory body or officer acting under statutory authority, or acts done by retailers or other persons acting in good faith on the basis of information supplied by others and without knowledge of the deceptive nature of the information.¹⁰

5) Enforcement

Actions by Public Officials

The attorney general or a district attorney may bring an action to: 1) obtain a declaratory judgment that an act or practice violates the OCPA; 2) enjoin, or to obtain a restraining order against a person who has violated, is violating, or is likely to violate the OCPA; 3) recover actual damages and, in the case of unconscionable conduct, penalties as provided by the OCPA, on behalf of an aggrieved consumer, in an individual action only, for

violation of the OCPA; or 4) recover reasonable expenses and investigation fees.¹¹

Consent Judgment

In lieu of instigating or continuing an action or proceeding, the attorney general or a district attorney may accept a consent judgment with respect to any act or practice declared to be a violation of the OCPA. The consent judgment has to provide for the discontinuance of the violation of the OCPA, may provide for the payment of reasonable expenses and investigation fees incurred and may include a stipulation for restitution and for specific performance. The consent judgment will not operate as an admission of the violation unless the judgment does so by its terms. The judgment must also be approved by the court and entered as judgment, and once such approval is received, any breach of the conditions of the consent judgment will be treated as a violation of the court order subjecting a party to all penalties provided by law.¹²

Power of the Court

In any action brought by the attorney general or a district attorney, the court may: 1) issue restraining orders; 2) order compensation for damages; 3) reform the transaction in accordance with a consumer's reasonable expectations; 4) appoint a master or receiver or order sequestration of assets and assess expenses of the master or receiver against the violator; 5) revoke any license or certificate authorizing the violator to engage in a business in Oklahoma; 6) enjoin any person from engaging in business in Oklahoma; or 7) grant other appropriate relief.¹³

Investigations

The attorney general or a district attorney may investigate if they have reason to believe a violation of the OCPA has occurred and an investigation is in the public interest.¹⁴ The investigation demand may include production of documents. Finally, subpoenas may be issued and hearings may be held.¹⁵

6) Liability Under the OCPA

Consumer Actions

The commission of any act or practice declared to be a violation of the OCPA will render the violator liable to the aggrieved consumer under a private right of action for the payment of actual damages sustained by the

customer and cost of litigation, including reasonable attorney fees. In that private action for damages, after adjudication, on motion of the prevailing party, the court may determine that a claim or defense asserted by the nonprevailing party was asserted in bad faith, was not well grounded in fact, or was unwarranted by existing law or a good faith argument for the extension, modification or reversal of existing law. On so finding, the court can enter a judgment ordering the nonprevailing party to reimburse the prevailing party up to \$10,000 for reasonable costs and attorney fees incurred with respect to the claim or defense.¹⁶

Unconscionability

The commission of any act or practice declared to be a violation of the OCPA, if such act or practice is also found to be unconscionable, will render the violator liable to the aggrieved customer for the payment of a civil penalty, recoverable in an individual action only, up to \$2,000 for each violation. In determining whether an act or practice is unconscionable, the following circumstances will be taken into consideration by the court: 1) whether the violator, knowingly or with reason to know, took advantage of a consumer reasonably unable to protect his or her interests because of his or her age, physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement or similar factor; 2) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that the price grossly exceeded the price at which similar property or services were readily obtainable in similar transactions by like consumers; 3) whether, at the time the consumer transaction was entered into, the violator knew or had reason to know that there was no reasonable probability of payment of the obligation in full by the consumer; and 4) whether the violator knew or had reason to know that the transaction he or she had induced the consumer to enter into was excessively one-sided in favor of the violator.¹⁷

7) Violation of the OCPA or an Injunction

Any person who is found to be in violation of the OCPA in a civil action or who willfully violates the terms of an injunction or an order issued pursuant to the OCPA must forfeit and pay a civil penalty up to \$10,000 per violation in addition to other penalties that may be imposed by the court, all as determined by the court.¹⁸ The action to recover such penalties may be

maintained by the attorney general or a district attorney, acting in the name of the state. Recovered penalties may be retained by the attorney general or a district attorney and used for the furtherance of their duties and activities under the OCPA.¹⁹ Actions may apparently be maintained by a consumer as well.

8) Criminal Penalties

In addition to other penalties provided by the OCPA, a person convicted of violating the OCPA is guilty, on a first offense, of a misdemeanor and is subject to a fine up to \$1,000 and/or imprisonment in the county jail for up to one year. If the value of the money or property involved is \$500 or more, or is a subsequent violation, then the convicted person is guilty of a felony and subject to a fine of up to \$5,000 and imprisonment in a state penitentiary for up to 10 years.²⁰

CONCLUSION

These materials are intended to be only a summary of the impact of consumer laws on commercial law transactions. When a consumer is involved, a practitioner should be aware of the rules in the UCC that may provide for a result that is different than one in commercial transactions. Further, you should also become familiar with the federal and state rules outside of the UCC that may have an impact on your commercial transaction. Finally, you should be alert to the impact the OCPA may have on not only transactions involving consumers, but on business transactions as well. The laws and rules discussed in this article play an important role in protecting the consumer in consumer transactions. However, you may not be aware that these traditional consumer protection type laws may also be “lurking” in your commercial transaction.

1. UCC §1-9-201(b) provides: “A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers, and any other statute or regulation that regulates the rates, charges, agreements and practices for loans, credit sales or other extensions of credit.”

2. UCC §1-103(b) provides: “Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.”

3. UCC §1-9-201(c) provides: “In case of conflict between this article and a rule of law, statute or regulation described in subsection (b) of this section, the rule of law, statute or regulation controls. Failure to comply with a statute or regulation described in subsection (b) of this section has only the effect the statute or regulation specifies.”

4. 1968 Pub. L. No. 90-321, 82 Stat. 146 (May 29, 1968), *codified at* 15 U.S.C. 1601 *et seq.*

5. The five states are: Connecticut, Maine, Massachusetts, Oklahoma and Wyoming. Credit or lease transactions subject to the Oklahoma Consumer Credit Code are exempt from Chapters 2 and 5 of the federal act. However, the exemption does not apply to sections 132 through 135 of the federal act, nor does it apply to transactions in which a federally chartered institution is a creditor or lessor. *See* 12 C.F.R. pt. 226, supp. I, §226.29(a) cmt. 4.

6. 14A OKLA. STAT. §1-201(1). *See also* the extraterritorial application in 14A OKLA. STAT. §1-201A.

7. 14A OKLA. STAT. §§3-605 and 5-107(2). Commercial practitioners who have given usury opinions may be familiar with this application of the U3C to commercial loans.

8. 15 OKLA. STAT. §752.

9. 15 OKLA. STAT. §752A.

10. 15 OKLA. STAT. §754.

11. 15 OKLA. STAT. §756.1A.

12. 15 OKLA. STAT. §756.1B.

13. 15 OKLA. STAT. §756.1C.

14. 15 OKLA. STAT. §757.

15. 15 OKLA. STAT. §758.

16. 15 OKLA. STAT. §761.1A.

17. 15 OKLA. STAT. §761.1B.

18. 15 OKLA. STAT. §761.1C.

19. 15 OKLA. STAT. §761.1D.

20. 15 OKLA. STAT. §761.1E.

ABOUT THE AUTHOR



Eric L. Johnson is a shareholder with Phillips Murrah PC. He has 16 years of experience providing commercial and consumer credit compliance advice on federal and state laws and regulations. He is a registered lobbyist, an adjunct professor of consumer law for Oklahoma City University School of Law and chairs the legal committee for the National Automotive Finance Association. He is a frequent speaker and author on consumer financial services issues.



A Primer on Tortious Interference with Economic Relationships in Oklahoma

By Eric Eissenstat and Kyle Evans

*"Win or lose, do it fairly."*¹

*"I believe in rules. Sure I do. If there weren't any rules, how could you break them?"*²

An important component of the free enterprise system is competition. The law generally protects fair competition and provides common law and statutory remedies for unfair competition. Tortious interference is designed to provide a remedy for unfair competition. What is fair or unfair, however, is often not so clear. This article attempts to assist the practitioner in understanding the dynamics of the tort of "interference."

Interference with economic relationships can take many forms. In Oklahoma, "one has the right to carry on and prosecute a lawful business in which he is engaged without unlawful molestation or unjustified interference from any person, and any malicious interference with such business is an unlawful act and an actionable wrong."³ This tort has been actionable ever since the early case of *Schonwald v. Ragains*,⁴ in which the Supreme Court observed:

It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction is one of the most valuable of all rights. Indeed, in the commercial world, the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial

right, which may be protected by any remedy known to the court as fully as a right in the ordinary forms of property.⁵

The possible claims that might arise from an unlawful interference are far too numerous to list. This article provides a general discussion of two common interference torts 1) interference with existing contractual or business relationships (also known as inducing breach of contract) and 2) interference with prospective advantage. These torts are often joined with other common law or statutory causes of action or may be asserted as a stand-alone cause of action. For example, business disputes also present claims under the common law of lender or employer liability, breach of fiduciary duty, fraud, misappropriation of trade secrets, unfair competition, trademark or copyright infringement.

ment, *prima facie* tort or claims for statutory remedies under the federal and state antitrust laws, the Lanham Act, Deceptive Trade Practices Act, Trade Secrets Act, RICO, etc. It is critical, therefore, that the practitioner evaluate all possible legal theories presented by the facts so the most effective legal theories and the broadest remedies are pursued for the client.

INTERFERENCE WITH EXISTING CONTRACTUAL AND BUSINESS RELATIONSHIPS

Interference with contractual and/or business relationships is a hybrid tort. It includes inducing breach of contract, which itself is one of three closely related torts: “[inducing] breach of contract, [inducing] termination of contractual relations, or rendering performance impossible.”⁶ Section 766 of the *Restatement (Second) of Torts* recognizes two varieties of these torts. The first occurs where the tortfeasor interferes with performance of the plaintiff’s contract partner.⁷ The second is where the interference of a contract occurs by preventing the plaintiff’s own performance of the contract or by making the plaintiff’s performance more expensive or burdensome.⁸

While it has been well established that Oklahoma embraces a cause of action for interference with a third party’s performance under section 766,⁹ until recently a question remained as to whether Oklahoma recognizes a cause of action under section 766A for interference with a plaintiff’s own performance of a contract. In *Wilspec Technologies Inc. v. DunAn Holding Group Co.*,¹⁰ the Oklahoma Supreme Court expressly held a tortious interference claim pursuant to section 766A was viable in Oklahoma. The court stated that “[t]he policy reasons for recognizing a tortious interference claim under section 766A and section 766 are virtually the same.”¹¹ The court refused to predicate a cause of action based entirely on the identity of the breaching party finding the harm suffered by a section 766A plaintiff is just as damaging as that of a plaintiff in a section 766 claim.¹²

Interference can thus occur by causing a breach of contract by a third party, causing termination of contractual relationships by a third party rendering performance by the third party impossible, or where a defendant causes a plaintiff to breach, terminate or be unable to perform his own contract.

Elements

In Oklahoma, in order to prevail on a claim for tortious interference with contractual relations, a party must prove:

- 1) That it had a business or contractual right that was interfered with;
- 2) That defendant knew or under the circumstances should have known of the contract or relationship;
- 3) That the interference was malicious, wrongful or intentional;
- 4) That the interference was neither justified, privileged nor excusable (in other words, improper); and
- 5) That damage was proximately sustained as a result of the complained interference.¹³

Although courts have only addressed these elements in the context of a section 766 claim, based on the opinion in *Wilspec* it appears the elements for a section 766A claim would be identical. *Wilspec*, 204 P.3d at 72 (noting that the core distinction between the two causes of action is the party to which defendant’s conduct is targeted). This cause of action extends not only to conduct that results in an actual breach of the contract, but also to conduct that results in substantial interference with the performance or the diminution of value in the contract.¹⁴ The basic theory is that the right to perform a contract and to reap the performance resulting therefrom and also the right to performance by the other party are property rights entitled to protection.¹⁵

Additionally, a tortious interference claim is only viable if the interferor is a stranger to the contract or business relationship.¹⁶ Accordingly, an agent or employee generally cannot be held liable for interfering with a contract between its principal/employer and a third-party.¹⁷ However, Oklahoma courts have recognized that when an employee acts in bad faith and contrary to the interests of the employer, the employee may be subject to liability for tortious interference. See *Martin v. Johnson*, 1998 OK 127, 975 P.2d 889, 896-97 (holding that teacher was not prohibited from bringing claim against her supervisor for interfering with her employment contract even though school district was other party to contract).¹⁸ In *Martin*, the Oklahoma Supreme Court cautioned that every breach of contract claim does not give rise to a tortious interference claim merely

because an employee of the party to the contract was somehow involved. As with any tortious interference claim, the determinative issue remains whether there was a wrongful interference that was not justified, privileged, or excusable.¹⁹

1) Requirement of a Contract or Business Relationship

To establish the tort of intentional interference of existing contractual or business relationships requires that the plaintiff first establish proof of a valid contractual or business relationship. *See Thompson v. Box*, 1994 OK CIV APP 183, 889 P.2d 1282, 1284 (recognizing that virtually any type of contract, including oral, can provide foundation for action but holding facts insufficient to uphold contract). Because the contract must be valid, a party may not recover for inducing breach of an illegal contract such as an illegal covenant in restraint of trade.²⁰

Nevertheless, it is not required that the terms of the contract or relationship be definite. In fact, virtually any type of contract is sufficient for the foundation of a tortious interference action.²¹ For example, in *McNickle v. Phillips Petroleum Co.*,²² the Oklahoma Court of Civil Appeals held a claim could be maintained for tortious interference with an at-will employment contract.²³ The court in *McNickle* stated the focus is not on the type of contract, “but rather on the rights, purpose, means and intent of the party interfering.”²⁴ Further, even though a contract may be unenforceable or voidable by one party, several jurisdictions have held that it does not prevent the assertion of a tort action against a party who interferes with the performance of the contract.²⁵

2) Knowledge and Intent - Malice

This type of tort is universally recognized to be an *intentional* tort. There is generally no recovery for “negligent interference with prospective advantage or negligently inducing breach of contract.” *See, e.g., Restatement (Second) of Torts* §766C (stating that one is not liable for such negligent conduct).²⁶

Thus, the plaintiff must prove the defendant knew of the existence of the contract or business relationship between the plaintiff and a third party. Constructive knowledge is sufficient if the facts and circumstances establish a defendant should have known of the existence of the contractual or business relationship

which was interfered with.²⁷ Moreover, even if a party is mistaken as to the legal significance of the facts or believes there is no contract, liability can still arise where a party knows of facts that give rise to the plaintiff’s contractual rights with another.²⁸ In addition to knowledge, a plaintiff must also prove intent, *i.e.*, that the actions by the defendant were intended to interfere with the contractual or business relationship.²⁹

It is important to distinguish the element of intent from the concept of malice or ill will. In Oklahoma, even though the term malice is utilized, it is utilized in the sense of “legal malice,” as opposed to malice in the popular sense of hatred, ill will or spite. Malice for the purpose of satisfying the element of a tortious interference claim is “the intentional performance of a wrongful act without justification or excuse.”^{30,31} Thus, “[i]ntentional interference may be malice in the law without personal hatred, ill will, or spite.”³²

As a practical matter, proof that an act was malicious and wrongful will also be sufficient to prove that the act was intentional. Likewise, proof of legal “malice,” as defined in Oklahoma, will also show that the conduct was without justification or excuse.

3) Improper Conduct - Absence of Justification, Privilege or Excuse

The original *Restatement* did not require a plaintiff to prove that the defendant’s conduct was improper. Rather it placed the burden on the defendant to show its conduct was justified, privileged or excused. Now, however, the *Restatement (Second) of Torts* requires the plaintiff to affirmatively prove that a defendant’s conduct was improper, *i.e.*, not justified, privileged or excused. The factors most courts consider when analyzing whether conduct is improper are the nature of an actor’s conduct, the actor’s motive, the interest of those with whom the actor’s conduct interferes, the interest sought to be advanced by the actor; the social interest in protecting the freedom of action and the contractual interest of the actor; the proximity or remoteness of the actor’s conduct to the interference and the relationship between the parties.³³

Oklahoma has adopted the *Restatement (Second) of Torts*’s position on this issue and requires the plaintiff to bear the burden of proof to show a defendant’s improper conduct as an element

of an interference claim.³⁴ Adding the “improper” element has a very important impact on the burden of proof in interference cases. For example, in *Continental Trend Resources Inc. v. OXY USA Inc.*,³⁵ the court instructed the jury that it was plaintiffs’ burden to prove that OXY’s interference with plaintiffs’ existing business relationships and prospective economic advantage was without justification, privilege or excuse. Plaintiffs did so, in part, by proving that OXY was asserting contract rights in an effort to interfere with the plaintiffs’ business relationships, even though OXY did not have any contract rights and knew that it had no contract rights. This element also has an impact on the burden of proof in dispositive motions. In *Citgo Petroleum Corp. v. Bray Terminals Inc.*,³⁶ the court granted summary judgment in favor of the plaintiff on defendant’s counterclaim for interference with prospective business advantage because the defendant failed to show that any unlawful means were used to interfere with its business relationship.

Affirmative Defenses

There have been several defenses recognized both in Oklahoma and across the country to the tort of intentional interference. These diverse defenses include competition, assertion of a financial interest by the defendant, responsibility for the welfare of another, truthful information or advice, absolute right of a refusal to deal, etc.³⁷ Nevertheless, courts often tread a fine line in deciding between important competing social interests. In some cases, the underlying motives or interests of the defendant seem perfectly justifiable, yet the particular means chosen to accomplish them are actionable. For example, business competition may be a proper motive, but the use of extortion, bribery or slander would clearly constitute inappropriate means.

Some of the more frequent defenses, both affirmative and otherwise, are discussed below; however, the practitioner should recognize that there are others available beyond those listed in this article.

1) Refusal to Deal

Under Oklahoma law, the existence of an absolute right cannot constitute tortious interference.³⁸ Oklahoma law recognizes that, absent an independent duty to deal, a party is privileged to refuse to do business with anyone. See, e.g., *Paddington Corp. v. Major Brands Inc.*, 359 F.

Supp. 1244, 1245 (W.D. Okla. 1973) (“Absent any purpose to create or maintain monopoly, corporation ... may deal with whomever it wants.”). Thus, in the absence of a statutory or contractual duty to deal, a refusal to deal, without more, cannot constitute tortious interference.³⁹ The refusal to deal must not be, however, for an improper reason.⁴⁰

“There have been several defenses recognized both in Oklahoma and across the country to the tort of intentional interference.”

2) Truthful Information/First Amendment

Providing truthful information generally cannot constitute tortious interference. The *Restatement (Second) of Torts* §772 provides:

One who intentionally causes a third person not to perform a contract or not to enter into a prospective contractual relation with another does not interfere improperly with the other’s contractual relation by giving the third party ... truthful information.⁴¹

This type of defense has been extended to providing good faith honest advice that was requested.⁴² A jury instruction that conduct is justified if the interference was made with “honest intent” has been held sufficient to instruct the jury on the truthful information defense.⁴³

The practitioner should recognize an important distinction between the providing of truthful information and giving advice. Truthful information stands on its own — it is either correct or it is not. Advice, however, is subject to the caveat of nuances of opinion and motive that make it suspect as a total defense. Fact disputes can abound concerning the nature and motivation for the advice and a jury would probably evaluate the same factors identified by the *Restatement (Second) of Torts* §767 with respect to improper conduct.

3) Financial Interest of Defendant

A defendant acting to protect his or her own legitimate financial interests is generally permitted to assert such conduct as a defense. For example, a person acting in good faith to protect its own contractual rights cannot be guilty of tortious interference with prospective contractual relations. *See Haynes v. South Community Hosp. Management Inc.*, 1990 OK CIV APP 40, 793 P.2d 303, 307 (“The law allows interference ... if done by fair means, if under justifiable cause, if to better one’s business and if not to principally harm another.”); *Dollar Rent A Car Systems Inc. v. P.R.P. Enterprises Inc.*, 2006 WL 1266515 *26 (N.D. Okla. May 8, 2006) (“Interference is privileged if the interfering party’s primary focus was protection of legitimate economic interests, rather than interference.”). The *Restatement (Second) of Torts* Section 773 recognizes a privilege if the alleged interference consists of an assertion of good faith of legally protected rights or interests. Oklahoma, even if not labeling it as such, applies similar principles.⁴⁴

4) Competition

Competition is often used as a justification for interference. *See Overbeck v. Quaker Life Ins. Co.*, 1984 OK CIV APP 44, 757 P.2d 846, 848 (“Legitimate competition, by fair means, is always lawful....”) (quoting *Schonwald*); *Restatement (Second) of Torts* §768 (1979) (distinguishing between the torts of existing and prospective economic relations).

The issue of whether competition provides a defense demonstrates one of the more important differences between the two torts of inducing breach of contract and interference with prospective advantage. At the outset, it is impossible to state any clear rule applicable to all cases because of the flexibility usually given the factfinder in deciding whether a defendant’s conduct was improper. Nevertheless, it is generally recognized that competition alone without other justifications should not be a defense to inducing breach of contract, while competition alone is usually recognized as a defense to interference with prospective business advantage.

Section 768 of the *Restatement (Second) of Torts* specifically distinguishes between the two torts in this fashion. Section 768(1) states that interference with competition may be proper wherever the interference is with either

a prospective contractual relationship or a contractual relationship terminable at will. Section 768(2) clearly states, however, that competition alone does not justify interference with a contract not terminable at will. This is because social policies favoring competition are counterbalanced by the desire to encourage and protect the reliability of valid contractual relationships that are not terminable at will.

“Jurors believe in fair competition, but are prepared to punish for unfair competition. This simple concept seems unremarkable but is critical in preparing an interference case for trial.”

INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

In addition to interference with existing contractual and business relationships, Oklahoma courts have embraced a cause of action for interference with prospective economic advantage.⁴⁵ The elements of the two torts, *i.e.*, existing contractual and business relationships vis-à-vis prospective advantage, are substantively similar with the distinction that a party must prove a valid business relationship or expectancy with the reasonable probability of future economic benefit, as opposed to an existing contractual relationship.⁴⁶ It is important for a plaintiff to show that there is a bona fide and reasonable expectancy of a continuing and prosperous relationship and not just the hope or the potential for one. The plaintiff in a prospective advantage case must demonstrate the expected benefit with some reasonable degree of specificity, although not to a certainty.⁴⁷ More than mere hope or optimism is required. The law mandates that a reasonable probability of an economic benefit from a valid prospective relationship occur.⁴⁸ Disputes about the true existence of a future expectancy and causation of harm will often be more hotly contested in cases involving

interference with prospective advantage than in contractual interference cases.

The two sections of the *Restatement (Second) of Torts* (1977) that have heavily influenced the developing law in this area are Sections 766B and 767:

Section 766B - Intentional Interference with Prospective Contractual Relation.

One who intentionally and improperly interferes with another's prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of

- a. inducing or otherwise causing a third person not to enter into or continue the prospective relation,
- b. preventing the other from acquiring or continuing the prospective relation.⁴⁹

Although the elements of the two torts are substantially similar, they are separate and distinct torts and must be separately pleaded. *Tribal Consortium Inc. v. Pierson*, 2009 WL 5194374, *14 (W.D. Okla. Dec. 28, 2009) (stating that the 10th Circuit has rejected "the position that the tort of interference with prospective economic advantage is 'encompassed' within the tort of interference with business relations, and has ruled that the two torts must be separately pleaded") (citing *Champagne Metals v. Ken-Mac Metals Inc.*, 458 F.3d 1073, 1094 (10th Cir. 2006)). Generally speaking, the defenses to the two torts, while not identical, are substantially similar as well.

STRATEGY

As noted earlier, when a practitioner is faced with a potential interference case, it is also critical to consider pleading other substantive theories of recovery, such as RICO, trade secrets, employment torts, etc. From the plaintiff's perspective, although malice in the form of ill will is not required in Oklahoma, it is usually helpful to marshal such evidence in order to persuade a jury that it should be allowed to recover. Of course, showing ill will by a defendant may also allow the plaintiff to collect punitive damages.⁵⁰ Tortious interference cases turn on fact findings concerning intent, knowledge, causation and malice. Thus, themes and theories to convince the jury that the defendant

harbored malice are very helpful from a plaintiff's perspective because liability then may be found, even where the interference might otherwise be justified if the motive and particular means used are enough to convince the jury that the conduct was "improper." An effective ulterior motive case can be very rewarding.⁵¹

Causation or actual harm is also critical and can be difficult, particularly on a prospective advantage claim. Thus, it is important from a plaintiff's perspective to plan ahead and try to head off all causation defenses a defendant might employ. Key witnesses can normally be found from third parties concerning a defendant's conduct on the causation issues.

From a defendant's perspective, counsel should take advantage of the burden of proof required on the plaintiff to show a negative, *i.e.*, the absence of justification, privilege or excuse. Early depositions from a plaintiff's key witnesses before they fully recognize the nuances of these and other "defenses" can be helpful. Early use of interrogatories and admissions can also head off a potential disastrous outcome. Because third-party witnesses are often key in interference cases, both plaintiff and defense counsel should be careful to assess the dynamics of the situation. Timing is also critical on discovery from such witnesses. Further, causation should be emphasized by the defense, and use of economic and market trends, scientific development, etc. should be utilized to show that the plaintiff's claimed damages were not caused by any interference by the defendant, but rather the variances of the marketplace. Early motions for summary judgment can also be effectively utilized by the defense. Defendants will often assert that they had an absolute right to do what they did in the name of competition or financial interests. Thus, ulterior motive, malice, etc. become important ingredients in an interference trial from both the plaintiff's and defendant's perspective.

It is important for both sides to recognize the ulterior motive element, *i.e.*, if it can be demonstrated by internal memos and communications, it might be wise for a defendant to consider an early settlement. Nevertheless, if there are strong factual circumstances where a defendant can properly explain its conduct, such explanation should be done at an early stage so that an embarrassed or unprepared witness does not appear at trial or on a videotaped deposition.

CONCLUSION

Jurors believe in fair competition, but are prepared to punish for unfair competition. This simple concept seems unremarkable but is critical in preparing an interference case for trial. A defense focused on the plaintiff's own poor business decisions, the vagaries of the marketplace, and fair but tough competition will likely succeed if a jury is persuaded that the facts support such a theme. A prosecution focused on ill will, sharp business practices, repugnant motives, and lack of candor or honesty can result in an explosive plaintiff's verdict.

Simply put, business interference cases often involve a dangerous mixture of large figures and high emotions. Jury studies have indicated that a party's right to contract and operate a business is one of the most important rights to a jury. Competition in business and the free market system are concepts that can trigger strong emotional undercurrents and are perfect topics for inflammatory jury appeals. *See Continental Trend Resources Inc. v. OXY USA Inc.*, 44 F.3d 1465 (\$30 million in punitive damages); *Texaco Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987, writ ref'd n.r.e.) (\$1 billion); *Conticommodity Services Inc. v. Prescott Ball & Turben*, Civil Action No. H-91-81 (S.D. Tex. April 20, 1992), appeal docketed, No. 92-2617 (5th Cir. 1992) (\$134 million); *In re American Cont. Corp./Lincoln Savings & Loan*, MDL Docket No. 834 (D. Ariz. 1992) (\$2.9 billion reduced to \$750 million). Remember:

*"The average juror wraps himself in civic virtue. He's a judge now. He tries to act the part and do the right thing."*⁵²

1. Knute Rockne, Notre Dame football coach (1918-1930).
2. Leo Durocher, Major League Baseball manager (1939-1973).
3. *Crystal Gas Co. v. Oklahoma Natural Gas Co.*, 1974 OK 34, 529 P.2d 987, 989.
4. *Schonwald v. Ragains*, 1912 OK 210, 122 P. 203.
5. Quoting from *Nashville, Chattanooga & St. Louis Ry. Co. v. McConnell*, 82 F. 65 (Cir. M.D. Tenn. 1897). *See also Neff v. Willmott, Roberts & Looney*, 1935 OK 119, 41 P.2d 86.
6. *George A. Fuller Co. v. Chicago College of Osteopathic Medicine*, 719 F.2d 1326, 1331 (7th Cir. 1983).
7. *Restatement (Second) of Torts* §766.
8. *Restatement (Second) of Torts* §766A.
9. *See Mac Adjustment Inc. v. Property Loss Research Bureau*, 1979 OK 41, 595 P.2d 427, 428.
10. *Wilspec Technologies Inc. v. DunAn Holding Group Co.*, 2009 OK 12, 204 P.3d 69.
11. *Id.* at 73.
12. *Id.* at 73-74.
13. *See Wilspec Technologies Inc.*, 204 P.3d at 74; *Voiles v. Santa Fe Minerals Inc.*, 1996 OK 13, 911 P.2d 1205, 1210 n.6; *Morrow Development Corp. v. American Bank & Trust Co.*, 1994 OK 26, 875 P.2d 411, 416; *Wagoner v. Town & Country Mobile Homes Inc.*, 1990 OK 139, 808 P.2d 649; *Mac Adjustment Inc.*, 595 P.2d at 428; *Continental Trend Resources Inc. v.*

OXY USA Inc., 44 F.3d 1465, 1472 (10th Cir. 1995). *See also* Oklahoma Uniform Jury Instructions: Civil 2d, Instruction No. 24.1.

14. *See, e.g., Wilspec Technologies Inc.*, 204 P.3d at 73, *John A. Henry & Co. v. T.G. & Y. Stores Inc.*, 941 F.2d 1068 (10th Cir. 1991); *Continental Trend Resources Inc. v. OXY USA Inc.*, 44 F.3d 1465.

15. *See* 45 Am.Jur.2d *Interference* §§1, 39 (1999).

16. *Wilspec Technologies Inc.*, 204 P.3d at 74 (citing *Voiles*, 911 P.2d at 1209.)

17. *Voiles*, 911 P.2d at 1210.

18. *See Eapen v. McMillan*, 2008 OK CIV APP 95, 196 P.3d 995 (finding that issue of material fact existed as to whether employee's supervisor was acting in bad faith and thus not exempt from tort claim for interference with employment contract); *Houston v. Independent School Dist. No. 89 of Okla. County*, 2010 WL 988406 *6 (W.D. Okla. Mar. 12, 2010) (evidence that school district's human resources officers engaged in intentional racial discrimination was sufficient to survive summary judgment on employee's claim of intentional interference with employment contract).

19. *Martin*, 975 P.2d at 896-97.

20. *See* 45 Am.Jur.2d *Interference* §5 (1999).

21. *See Thompson v. Box*, 1994 OK CIV APP 183, 889 P.2d 1282, 1284.

22. *McNickle v. Phillips Petroleum Co.*, 2001 OK CIV APP 54, 23 P.3d 949.

23. *Id.* at 951.

24. *Id.*

25. *Prosser and Keeton* §129; *Restatement (Second) of Torts* § 766 cmts. f and g; *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989) (stating that [the Texas Supreme Court] has held that the unenforceability of a contract is no defense to an action for tortious interference with its performance and that third persons are not free to tortiously interfere with the performance of a contract). *Girsberger v. Kresz*, 633 N.E.2d 781 (Ill. App. 1993) (contract enforceable for interference purposes even if portion of contract can be renegotiated); *but see Wedgewood Carpet Mills, Inc. v. Color-Set, Inc.*, 2454 S.E.2d 421 (Ga. Ct. App. 1979) (finding no liability where there was indefiniteness and lack of mutuality).

26. *But see Nunnery*, 68 O.B.J. at 1060 (discussing negligent interference in the spoliation setting).

27. *See* 45 Am.Jur.2d *Interference* §9 (1999); Oklahoma Uniform Jury Instructions: Civil 2d, Instruction No. 24.1.

28. 45 Am.Jur.2d *Interference* §9 (1999).

29. *See, e.g., Wilspec Technologies Inc.*, 204 P.3d at 74 (listing malice as an element of tortious interference claim); *Anderson v. Suiters*, 499 F.3d 1228, 1238 (10th Cir. 2007) (upholding denial of plaintiff's request to amend complaint to add claims for tortious interference with contract because the amendments would be futile because there was no allegation that defendant acted with malice or even was aware of plaintiff's contractual relationship).

30. *Morrow Development Corp. v. American Bank & Trust Co.*, 1994 OK 26, 875 P.2d 411, 416.

31. *See also Boyle Services Inc.*, 24 P.3d at 880 ("interference is intentional if the interferer acted with the purpose to interfere the relationship expectancy"); *Navistar International Trans. Corp. v. Vernon Klein Truck Equip.*, 1994 OK CIV APP 168, 919 P.2d 443, 447 (quoting definition in *Morrow*); *Anderson*, 499 F.3d at 1237 (10th Cir. 2007) (quoting definition in *Morrow*).

32. *Del State Bank v. Salmon*, 1976 OK 42, 548 P.2d 1024, 1026.

33. *See Restatement (Second) of Torts* §767; Oklahoma Uniform Jury Instructions: Civil 2d, Comments to Instruction No. 24.1 (stating that trial court may give instruction number 1.05 of the Model Jury Instructions for Business Tort Litigation, which instructs the jury to consider and balance the factors cited in determining whether a defendant's conduct was improper).

34. *See, e.g., Wilspec Technologies Inc.*, 204 P.3d at 74 (listing "the interference was neither justified, privileged nor excusable" as an element of a plaintiff's *prima facie* case for tortious interference).

35. *Continental Trend Resources Inc. v. OXY USA Inc.*, 44 F.3d 1465 (10th Cir. 1995).

36. *Citgo Petroleum Corp. v. Bray Terminals Inc.*, 2005 WL 3681769 *4-5 (N.D. Okla. Nov. 2, 2005).

37. *See Restatement (Second) of Torts* §§768-773.

38. *See, e.g., Ellison v. An-Son Corp.*, 1987 OK CIV APP 71, 751 P.2d 1102, 1106.

39. *See Krebsbach v. Henley*, 1986 OK 58, 725 P.2d 852 (plaintiff's allegations that a medical practice group's refusal to refer patients did not constitute an unlawful restraint of trade; therefore, unlawful interference claim was defeated because a group's refusal to deal with the plaintiff was not unlawful under the antitrust laws and, therefore, could not constitute tortious interference); *but see, Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 885 F.2d 683 (10th Cir. 1989), cert. denied, 498 U.S. 972 (1990) (conduct in the absence of regu-

latory intervention which would have been found to constitute a breach of the duty to perform a contract in good faith can be actionable as tortious interference if it were shown that the actions were done for an improper motive).

40. See *Continental Trend Resources Inc.*, 44 F.3d at 1473.

41. See *Jefferson County School Dist. No. R-1 v. Moody's Investor Service Inc.*, 175 F.3d 848 (10th Cir. 1999) (holding that article which gave negative assessment of bonds being offered by plaintiff was speech protected by the First Amendment from defamation liability and thus could not be the basis of a claim for intentional interference).

42. *Restatement (Second) of Torts* §772.

43. *Continental Trend Resources Inc.*, 44 F.2d at 1473.

44. See *Haynes*, 793 P.2d at 307; *Green Bay Packing Inc. v. Preferred Packaging Inc.*, 1996 OK 121, 932 P.2d 1091; *Morrow Development Corp. v. American Bank & Trust Co.*, 1994 OK 26, 875 P.2d 411; *Del State Bank v. Salmon*, 1976 OK 42,548 P.2d 1024; *Dollar Rent A Car Systems Inc. v. P. R.P. Enterprises Inc.*, 2006 WL 1266515 *26 (N.D. Okla. May 8, 2006).

45. See, e.g., *Wilspec*, 204 P.3d at 71-71; *Brock v. Thompson*, 1997 OK 127, 948 P.2d 279; *Overbeck*, 757 P.2d 846.

46. See *Restatement (Second) of Torts* §766B.

47. See *Crystal Gas Co.*, 529 P.2d at 990; *Hertz v. Lunzenac Group*, 576 F.3d 1103, 1119 (10th Cir. 2009).

48. *Id.*

49. See also Section 767.

50. See, e.g., *Continental Trend Resources Inc.*, 44 F.3d 1465.

51. See *Id.*

52. Jacob D. Fuchsberg, former judge of the New York Court of Appeals.

ABOUT THE AUTHORS



Eric Eissenstat is a shareholder/director at Fellers Snider in Oklahoma City, where he has practiced for the last 26 years. As a trial lawyer, he primarily handles complex business and commercial litigation matters involving antitrust, business torts, computer law and shareholder suits, and he is a frequent speaker and author on these topics. He received a B.S. with honors in political science from OSU and a J.D. with honors from OU.



Kyle Evans is an associate with Fellers Snider in Oklahoma City, where he practices civil litigation. Prior to joining the firm, he served as a law clerk to Judge James H. Payne of the U.S. District Court for the Eastern District of Oklahoma. He earned a B.S. from OSU in 2005 and graduated from the OU College of Law with honors in 2008.

NOTICE OF HEARING ON THE PETITION FOR REINSTATEMENT OF BENNY HAROLD ROBISON, SCBD #5616 TO MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION

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

Any person desiring to be heard in opposition to or in support of the petition may appear before the Professional Responsibility Tribunal at the Oklahoma Bar Center at 1901 North Lincoln Boulevard, Oklahoma City, Oklahoma, at 9:30 a.m. on **Wednesday, June 23, 2010**. Any person wishing to appear should contact Gina Hendryx, General Counsel, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152, telephone (405) 416-7007, no less than five (5) days prior to the hearing.

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COURSE OUTLINE DAY ONE

May 20th, 2010

- 8:30 - Registration and Continental Breakfast
- 8:40 - Ceremonial Opening Exercises
- 8:50 - Welcome and Introduction by **Patrick Moore**, Comments
- 9:00 - Jurisdiction in Indian Country – **Klint Cowen**, Hobbs, Straus, Dean & Walker
- 10:00 - Break
- 10:10 - Trust Lands, Business Opportunities – **Professor Royster**
- 11:00 - Tribal Land Acquisitions – Federal Law updates – **Professor Royster**
- 11:50 - Lunch – Visions Buffett
- 1:15 - Water law – Economic Opportunities – **Professor Richard Monette**
- 2:20 - Break
- 2:30 - Ethical Considerations of Practicing Law in Indian Country **Professor Kathleen Smith**
- 3:30 - Collision of Tribal and Corporate Cultures –Law vs. Fiction– **John Williams**, Connors and Winters, LLP
- 4:30 - Question and Answer Session and Evaluations of Day 1 – **All Faculty and Speakers**
- 5:00 - Supreme Court Swearing in Ceremony-Visions Buffett
- 5:30 - Buffett Dinner Provided at the River Spirit Casino Buffett in conjunction with the Annual Meeting of the Muscogee (Creek) Nation Bar Association

COURSE OUTLINE DAY TWO

May 21st, 2010

- 8:50 - Opening Remarks - Judge Patrick E. Moore
- 9:00 - Tribal Gaming – “Best Interest of the Tribe?” 2010 Update –**Dr. Alan Meister**
- 10:00 - Break
- 10:05 - “Unfulfilled Promise of Self-Regulation under the Indian Gaming Regulatory Act”
- 10:55 - Break
- 11:00 - “Unfilled Promises” Cont’d – **Bill Bettenberg, Homer Law, Washington DC**
- 12:00 - Lunch – Visions Buffett
- 1:30 - National Indian Gaming Developments –National Indian Gaming Commission (NIGC)
- 2:20 - Break
- 2:30 - Federal Tribal Relations –**Montie Deer**, Judge and Past Commissioner, NIGC
- 3:20 - State and Federal Law Updates in regards to Indian Country – **Shannon Prescott**
- 4:30 - Closing Comments and Evaluations of Day 2

Adjourn

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In re Ford: Negative Equity, Hanging Paragraphs and a Split Decision

By Michael R. Pacewicz

The United States Court of Appeals for the 10th Circuit, whose jurisdiction includes Oklahoma, has joined the growing number of courts holding that “negative equity” relating to a trade-in vehicle constitutes part of the purchase-money security interest held by the new vehicle lender.¹ Consequently, a Chapter 13 bankruptcy debtor cannot bifurcate the secured lender’s claim and “cram down” its Chapter 13 plan, such courts have concluded.² The 10th Circuit’s decision is one in a series of cases interpreting what has become known as the “hanging paragraph” of §1325(a) of the Bankruptcy Code.³

BACKGROUND

The facts in *Ford* were relatively straightforward. In February 2007, the debtors purchased a truck, making a down payment of \$1,500 and obtaining \$40,168.30 in financing secured by the truck. At the same time, the debtors traded in another truck. The trade-in was valued at \$16,300 but the debtors owed \$23,500 on it at the time of trade-in, leaving them with \$7,200 in negative equity. Of the \$40,168.30 financed by the debtors, \$11,693.30 included amounts paid on the debtors’ behalf, including the \$7,200 in negative equity paid to the creditor holding a security interest on the trade-in.⁴

Less than four months later, the debtors filed for bankruptcy. They proposed a Chapter 13 plan that reduced the secured debt on the new truck by the \$7,200 in negative equity and scheduled that amount as an unsecured claim.

The creditor, Ford Motor Credit, objected. The bankruptcy court sustained the objection and ordered the debtors to file an amended plan treating the entire debt to Ford Motor Credit as secured debt.⁵

THE MAJORITY OPINION

A divided panel of the 10th Circuit affirmed the bankruptcy court’s order. The decision turned on an interpretation of both §1325(a) and the Kansas version of the Uniform Commercial Code (UCC). The hanging paragraph of §1325 was added to the Bankruptcy Code by Congress in 2005 with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act. In simple terms, the hanging paragraph protects a creditor holding a purchase-money security interest that secures a debt where that debt is the subject of the creditor’s bankruptcy claim. The collateral for the

debt must be a motor vehicle acquired by the debtor for personal use, and the debt must have been acquired within 910 days before the debtor's bankruptcy filing.⁶

The hanging paragraph prevents debtors from bifurcating the secured debt into two claims: a secured claim for the amount equal to the value of the collateral and an unsecured claim for the remainder.⁷ Bifurcating secured claims in this fashion allows debtors to "cram down," or confirm their bankruptcy plans over the objection of the secured creditor.⁸ Stripping a debt, or a portion of a debt, of its secured status is also important because secured creditors must generally be repaid in full before unsecured creditors receive any distribution.⁹

The majority in *Ford*, turning to §9-103 of the UCC and the Official Comments, characterized the key issue as "whether paying off negative equity in a trade-in car is part of the 'price' of the new car or part of the 'value given to enable acquisition of the new car.'"¹⁰ The debtors argued that consumers can acquire rights in a new vehicle without paying off negative equity in an old one, and that a trade-in really encompasses two transactions 1) a transfer of rights to the trade-in vehicle and 2) a transfer of rights in the new vehicle. The creditor, conversely, argued that trade-ins are common occurrences and frequently involve negative equity on the old vehicle. The creditor also argued that the purchase of the new vehicle would not occur without the trade-in, thus, the two transactions are inextricably linked.

The majority sided with the creditor, reasoning that while it might be possible to split the exchange of vehicles into two separate transactions, the parties did not treat it that way. Instead the parties signed one agreement encompassing the trade-in and the purchase of the new truck, Judge Michael Murphy noted,

We conclude the trade-in exchange is essentially a single transaction. The expense incurred in retiring the lien on the trade-in vehicle, therefore, is an "expense[] incurred in connection with acquiring rights" in the new car. Kan. Stat. Ann. §84-9-103 cmt. 3. There is also the requisite "close nexus" between the acquisition of the new vehicle and the secured obligation. *Id.* The entire debt incurred by the debtors is therefore a "purchase-money obligation," the new vehicle is "purchase-money collateral" for the entire obligation, and the security inter-

est in the entire debt is a purchase-money security interest under Kansas law.¹¹

Consequently, the creditor had a purchase-money security interest for the entire amount of the debt, and was protected from bifurcation by the hanging paragraph, Murphy concluded.

THE DISSENT

In dissent, Judge Timothy Tymkovich also looked to the Official Comments to §9-103. Comment 3 to that section lists items such as sales tax, finance charges, freight charges, costs of storage in transit, attorney's fees and collection costs as expenses incurred in connection with acquiring rights in the collateral.¹² Such obligations are included in the "price" of collateral or the "value given to enable the debtor to acquire rights in or use of the collateral."¹³

But unlike the majority, Tymkovich likened the items identified in Comment 3 to "transaction costs" which "add no particular value for either the buyer or seller, but [are] instead 'the cost of using the price mechanism.'" Negative equity, Tymkovich wrote, is not a transaction cost "but a transfer of value for money."¹⁴ Thus,

Unlike the other expenses listed in Comment 3, the amount (and even the existence) of negative equity depends upon circumstances completely unrelated to the price of the new vehicle and its financing or the costs associated with transfer of title. Indeed, negative equity differs vastly for each purchaser, depending in large part on the purchaser's past choices.¹⁵

Consequently, while a new vehicle may be used as security for a loan to pay an antecedent debt (such as negative equity) it does not mean the antecedent debt is part of the price of the new vehicle, he reasoned. In Tymkovich's view "[b]y interpreting the term 'price' in section 84-9-103(a)(2) to mean the actual price of the vehicle plus amounts akin to transaction costs, the limits of PMSIs are easily discernible."¹⁶ Allowing a creditor to create a purchase-money security interest for other money advanced at the same time as the sale of new vehicle would be inviting the creditor to "overload" the purchase-money security interest and defeat limitations that law imposes on such activity, he wrote.¹⁷

In response, Judge Murphy noted that the Official Comment to §9-103 contains no reference to "transaction costs." Had the drafters intended to limit a purchase-money security

interest to the cash price plus transaction costs, they could have done so, Murphy reasoned. He also noted that certain items the drafters did include in the Official Comment, such as attorney's fees and collection expenses, are costs that enable the secured creditor to realize the value of the security interest. Similarly, "[t]he discharge of negative equity clears the title of the trade-in vehicle, permitting the creditor to realize the value of the vehicle it receives as part of the trade," he wrote.¹⁸

Although *Ford* involved the application of Kansas law, it is likely the majority would have reached the same result had the case originated in Oklahoma. The two states' operative subparagraphs of the UCC section discussing purchase-money security interests are identical, and both states have incorporated the Official UCC Comments into their statutory compilations.¹⁹ To date, no circuit court of appeals has reached a conclusion that conflicts with the holding in *Ford*, and only one bankruptcy appellate panel has done so.²⁰

POINT-COUNTERPOINT

Indeed, seven other circuits have similarly held that the negative equity in a trade-in vehicle is part of the purchase-money security interest securing the new vehicle and is therefore protected from bifurcation.²¹ Because the Bankruptcy Code does not define the term "purchase-money security interest," each of those courts, like the 10th Circuit in *Ford*, looked to state UCC law to arrive at a definition of "purchase-money security interest" as that phrase is used in the hanging paragraph.²² Some courts find support for their conclusion in other state motor vehicle statutes that include negative equity in the definition of "price."²³ Others focus on the "package deal" approach noted by Judge Murphy and the "close nexus" mentioned in the Official Comments and stress that the negative equity financing enables the purchase of the new car.²⁴

Contrary viewpoints are not, however, without merit. Like Tymkovich, some judges have argued forcefully that the analysis should focus on the "price" (as that term is defined in the UCC) of the *new vehicle*, not the overall cost of the entire transaction.²⁵ Rolling the negative equity into the purchase-money security interest, they contend, places undue emphasis on an accommodation that simply serves to facilitate the transaction and entice the participation of sellers and lenders.²⁶

“...while a new vehicle may be used as security for a loan to pay an antecedent debt (such as negative equity) it does not mean the antecedent debt is part of the price of the new vehicle...”



Others note that rolling negative equity into the new lender's purchase-money security interest essentially converts another creditor's unsecured claim into a secured claim for the lender. If the buyer had defaulted on the loan to the first lender, that lender would have an unsecured claim for that portion of its loan that was "under water," they point out. When the negative equity becomes part of the new purchase-money security interest, the lender holding that note receives more of the bankruptcy debtor's disposable income than the debtor's unsecured creditors.²⁷ Thus, it is possible to argue that the approach adopted by the majority in *Ford* skews the regime governing priorities among creditors.

CONCLUSION

To be sure, the hanging paragraph serves the laudable purpose of preventing abuse by consumers who buy vehicles shortly before filing bankruptcy and then use the Bankruptcy Code's cram down provisions to strip the lender's secured claim down to the present value of the collateral, which, given the rate at which motor vehicles depreciate, is generally much less than the amount financed. But whether it was intended to give lenders the benefit of a purchase-

money security interest in all sums advanced to the buyer, including those necessary to pay off negative equity in the trade-in vehicle, is far from clear. Suffice it to say the trend, at least among those circuits that have addressed the matter, favors lenders.

1. See *In re Ford*, 574 F.3d 1279 (10th Cir. 2009).
2. See *id.* at 1285.
3. 11 U.S.C. §1325(a).
4. 574 F.3d at 1281.
5. See *id.*
6. The “hanging paragraph” states in its entirety:
For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the one-year period preceding that filing.
- 11 U.S.C. §1325(a)(9).
7. See 11 U.S.C. §506(a).
8. See *id.*; 11 U.S.C. §1325(a)(5).
9. See 11 U.S.C. §1325(a)(5), (b)(1).
10. 574 F.3d at 1284. Section 9-103 states in relevant part:
 - 1) “Purchase-money collateral” means goods or software that secures a purchase-money obligation incurred with respect to that collateral; and
 - 2) “purchase-money obligation” means an obligation of an obligor incurred as all or part of the price of the collateral or for value given to enable the debtor to acquire rights in or the use of the collateral if the value is in fact so used.
 (b) Purchase-money security interest in goods. A security interest in goods is a purchase-money security interest.
- Kan. Stat. Ann. §84-9-103(a)(1)&(2), (b).
11. 574 F.3d at 1285.
12. Comment 3 states in relevant part:
as used in subsection (a)(2), the definition of “purchase-money obligation,” the “price” of collateral or the “value given to enable” includes obligations for expenses incurred in connection with acquiring rights in the collateral, sales taxes, duties, finance charges, interest, freight charges, costs of storage in transit, demurrage, administrative charges, expenses of collection and enforcement, attorney’s fees and other similar obligations.
The concept of “purchase-money security interest” requires a close nexus between the acquisition of collateral and the secured obligation. Thus, a security interest does not qualify as a purchase-money security interest if a debtor acquires property on unsecured credit and subsequently creates the security interest to secure the purchase price.
- Kan. Stat. Ann. 84-9-103 cmt. 3.
13. See *id.*
14. 574 F.3d at 1289.
15. *Id.*
16. *Id.* at 1290.

17. See *id.* Some courts apply the so-called “transformation rule,” which provides that when a transaction involves both purchase money and nonpurchase money obligations, the entire transaction is transformed into a nonpurchase money obligation. See *In re Penrod* 392 B.R. 835, 857 (9th Cir. BAP 2008). Others apply the “dual status” rule, which gives the secured lender a purchase-money security interest equal to the new value financed and a regular security interest for the balance. See *id.*, at 859. Under the UCC, the dual status rule is the default rule with respect to nonconsumer goods transactions. Some states have codified the dual status rule with respect to transactions in consumer goods (or to be more accurate, have eliminated the carve-out for consumer goods transactions), while others have not. Compare, Kan. Stat. Ann. 84-9-103(f) with Okla. Stat. Ann. tit. 12A, §1-9-103(f). The Oklahoma Comments to §9-103, however, indicate that Oklahoma follows the dual status rule in consumer goods transactions. See Okla. Stat. Ann. tit. 12A, §1-9-103, Oklahoma Comments.

18. 574 F.3d at 1285.
19. Kan. Stat. Ann. 84-9-103, Okla. Stat. Ann. tit. 12A, §1-9-103.
20. See *In re Penrod*, 392 B.R. 835 (9th Cir. BAP 2008). Other cases adopting this approach include, *inter alia*, *In re White*, 417 B.R. 102 (Bankr. S.D. Ind. 2009); *In re Hall*, 400 B.R. 516 (Bankr. S.D. W. Va. 2008); *In re Crawford*, 397 B.R. 461 (Bankr. E.D. Wis. 2008); *In re Busby*, 393 B.R. 443 (Bankr. S.D. Miss. 2008); *In re Mancini*, 390 B.R. 796 (Bankr. M.D. Pa. 2008); *In re Hernandez*, 388 B.R. 883 (Bankr. C.D. Ill. 2008); *In re Munzberg*, 388 B.R. 529 (Bankr. Vt. 2008); *In re Look*, (Bankr. D. Me. 2008).
21. *In re Westfall*, 599 F.3d 498 (6th Cir. 2010), *In re Howard*, 597 F.3d 852 (7th Cir. 2010). See *In re Peaslee*, 585 F.3d 53 (2nd Cir. 2009) (following certification of question to New York Court of Appeals); *In re Dale*, 582 F.3d 568 (5th Cir. 2009); *In re Mierkowski*, 580 F.3d 740 (8th Cir. 2009); *In re Price*, 562 F.3d 618 (4th Cir. 2009); *In re Graupner*, 537 F.3d 1295 (11th Cir. 2008).
22. See *In re Dale*, 582 F.3d at 573; *In re Mierkowski*, 580 F.3d at 742; *In re Price*, 562 F.3d at 624; *In re Peaslee*, 547 F.3d 177, 184 (2nd Cir. 2008); *In re Graupner*, 537 F.3d at 1301.
23. See e.g., *Matter of Peaslee*, 13 N.Y.3d 75, 83 (N.Y. 2009).
24. See e.g., *In re Price*, 562 F.3d at 625.
25. See e.g., *In re Mierkowski*, 580 F.3d at 746 (Bye, J., dissenting).
26. See *id.*
27. See *In re Penrod*, 392 B.R. at 842-843.

ABOUT THE AUTHOR



Michael Pacewicz is a shareholder/director based in Crowe & Dunlevy’s Tulsa office. His practice includes commercial litigation, bankruptcy, Indian law and construction law. He also serves as an adjunct settlement judge for the United States Bankruptcy Court for the Northern District of Oklahoma.

Taxation Law Section

Guidelines for International Charitable Gifts and Grants

By Jon H. Trudgeon

In the past month there has been a spate of activity on the tax/charitable planning front regarding gifts to support charitable causes overseas. Two Tax Court decisions published April 22, 2010, suggest that there is confusion among taxpayers about the deductibility of such gifts. Clients have also raised issues in connection with charitable gifts related to “mission” trips to Africa. All of this suggests that it is appropriate for lawyers to arm themselves with some basic knowledge so that they can help their clients avoid expensive mistakes.

The U.S. Tax Court recently ruled that gifts to foreign churches made through a relative in a foreign country are not deductible.¹ The U.S. Tax Court also held that gifts to missionaries at small local churches outside the United States, and gifts directly to individuals, are not deductible.² This decision contains a good discussion of how to make such gifts deductible and why the taxpayers’ gifts failed to be deductible.

The activity of organizations which are eligible to receive tax deductible donations in the United States can generally be considered to be charitable activity when conducted somewhere else around the world. Thus, “relief of the poor and distressed or the underprivileged” is charitable activity whether the beneficiaries are inside or outside the United States.³ But, how you make your contributions can make a difference in the efficiency of the application of your money.

Some of the rulings in this area can be confusing. The IRS has ruled an organization created for the purpose of “assisting underprivileged people in Latin America to improve their

living conditions through education and self-help programs”⁴ is tax-exempt as a charitable group.⁵ This ruling involved a U.S.-based entity that actually conducted charitable activity in a foreign country.

“Friends organizations,” however, can be seen differently. These are organizations formed to solicit and receive contributions in the United States and to expend the funds on behalf of a charitable organization in another country. Slightly different facts can lead to different results in tax treatment of the contributions. Charitable contributions made directly to an organization, not created or organized in the United States, generally are not tax deductible.⁶ But, a foreign charitable organization may apply to the IRS, on Form 1023, for recognition as a public charity. When approved, the organization is considered a public charity, eligible to receive tax deductible gifts.

Contributions to a U.S. charity that transmits the funds to a foreign charity are deductible only in certain limited circumstances. Donors need to have an understanding of what those circumstances are, if they intend to make those contributions. Money goes a lot further and has a greater impact if made with deductible dollars instead of nondeductible ones. There is a procedure for a U.S. donor to submit data to the IRS regarding a foreign charity with an affidavit of equivalency or attorney opinion letter that can result in the foreign charity being considered the “equivalent” of a U.S. charity.⁷

The IRS has published guidance for potential donors in this area.⁸ The IRS rulings provide

five illustrations of support by domestic charities and the tax treatment to be given to them:

- 1) A conduit entity formed by a foreign organization to receive donations in the United States;
- 2) A conduit formed by individuals in the United States;
- 3) A tax-exempt U.S. charitable organization that agrees to solicit and funnel contributions to a foreign organization;
- 4) A U.S. charitable organization that frequently makes grants to charities in a foreign country, to address its own exempt purpose, following review and approval of the uses to which the money is put; and
- 5) A U.S. charitable organization that forms a subsidiary organization in a foreign country to facilitate its tax-exempt operations.

The IRS ruled that contributions to U.S. entities in the first, second and third examples above were not deductible. Contributions to the fourth were considered deductible because there was no earmarking of contributions (the contributions were not earmarked for a foreign organization) and “use of such contributions will be subject to *expenditure control* by the domestic organization.” In the fifth example, contributions to the U.S. organization were deductible because the “foreign organization was merely an administrative arm of the domestic organization,” fulfilling its charitable purposes. The domestic organization was the “real recipient” of the contributions.

The IRS has ruled that contributions to a U.S. charity that solicits contributions for a specific project of a foreign charity are deductible only in certain circumstances. This requires that the U.S. charity maintain *expenditure controls* over the funds for the project. *Expenditure control* would not be present if the money is deposited in a foreign account to be drawn upon by a representative of the foreign charity or the representative of a foreign charity is given a debit card. Likewise,

organizations formed in the United States for the purpose of raising funds and merely transmitting them to a foreign charity, as a conduit, are not eligible to attract deductible charitable contributions when *expenditure control* over the funds rests with the foreign entity.⁹

The test is whether the domestic organization is the real recipient of the contribution, as it must be for the charitable contribution deduction to be allowed. The domestic organization must have and must exercise *expenditure control* over the donated funds and exercise discretion as to their use.¹⁰ The IRS has ruled that the person signing the check, or holding the debit card, must be an official (an officer, director or board-authorized representative) of the domestic entity. It may not be an employee or official of the foreign entity. Attention to detail in the minutes of the domestic organization is essential.

Allegations that both U.S. charities and foreign charities have played a role in financing intermediaries for global terrorist activities have brought increased scrutiny on gifts to foreign charities. The implications for charities of this increased scrutiny from agencies, once thought far removed from issues of tax exemption, are likely to develop over several years.

Donors should also be aware that the U.S. Patriot Act and Executive Order 13224 prohibit contributions to individuals or organizations that support terrorism. In November 2002, the Treasury Department issued “Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities.” The guidelines cover four topics: 1) governance; 2) disclosure and transparency in governance and finance; 3) financial practices and accountability; and 4) antiterrorist financing procedures. The guidelines are non-binding. Compliance with the recommended procedures shall not be construed to preclude any criminal or civil sanctions by the Department of the Treasury or the Department of Justice against persons who provide material, financial, or technological support or resources to, or engage in prohibited transactions with, persons designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1986, as amended,



or the International Emergency Powers Act, as amended.

The section of the Anti-Terrorist Financing Guidelines dealing with antiterrorist financing procedures delineates a series of steps that a U.S. charity should take before distributing any charitable funds to foreign recipient organizations. The guidelines call for the collection of the following information:

- 1) The foreign recipient organization's name in English and the language of origin, including any acronyms or other names used;
- 2) The jurisdiction in which the foreign recipient organization maintains a physical presence;
- 3) The jurisdiction in which the foreign recipient organization was formed or incorporated;
- 4) The address and phone number of any place of business of the foreign recipient organization;
- 5) The foreign recipient organization's principal purposes and a detailed report of its projects and goals;
- 6) The names and addresses of organizations to which the foreign recipient organization currently provides or proposes to provide funding, services or material support;
- 7) The names and addresses of any subcontracting organizations used by the foreign recipient organization;

8) Copies of any public filings or releases; and

9) The foreign recipient organization's existing sources of income, such as official grants, private endowments and commercial activities.

Gifts to foreign charities and individuals are generally not deductible; but, with a little planning, there may be a way.

1. *Anonymous v. Commission of Internal Revenue*, T.C. Memo 2010-87 (22 April 2010).

2. *Jeffery N. Wilkes et ux v. Commission*, T.C. Summ. Op. 2010-53 (22 April 2010).

3. Rev. Rul. 68-117, 1968-1 C.B. 251.

4. Rev. Rul. 68-165, 1968-1 C.B. 253; 80-286, 1980-2 C.B. 179.

5. IRC §170(c)(2)(A); Rev. Rul. 63-152, 1963-2 C.B. 101.

6. Rev. Rul. 78-436, 1978-2 C.B. 187; Rev. Proc. 92-94, 1992-2 C.B. 507.

7. Rev. Rul. 63-252, 1963-2 C.B. 101; amplified in Rev. Rul. 66-79, 1966-1 C.B. 48.

8. Rev. Rul. 63-252, 1963-2 C.B. 101.

9. Rev. Rul. 75-434, 1975-2 C.B. 205; Rev. Rul. 66-79, 1966-1 C.B. 48; Rev. Rul. 75-65, 1975-1 C.B. 79;

10. Rev. Rul. 74-523, 1974-2 C.B. 34 (Re Estate Tax Deduction).

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.

OBA Announces FedEx Discount Program for Members

We are pleased to announce that as an OBA member, you are now eligible to receive valuable discounts of up to 26 percent on select FedEx® shipping services*.

The OBA is proud to support its members and has teamed up with FedEx to help boost your bottom line. If you are looking for reliable and cost-effective shipping, you can count on FedEx to deliver. You can now take advantage of the following discounts on select FedEx shipping services:

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- Up to 70 percent on FedEx Freight® and FedEx National LTLSM services

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The OBA and FedEx understand that the success of your business depends on your ability to deliver your goods and services to your customers on time and that is why we are excited to bring you these valuable discounts on the services you need the most.

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Nominate Someone Who Deserves to be Honored

Bet you had good intentions of nominating someone who's been a mentor to you or is a legend in your county, but you got busy and didn't get it done. Or maybe you practice in a small town and think there's no point because big city lawyers have the advantage.

Anyone can submit an award nomination. Anyone nominated can win. If you think it takes too much time to write a nomination, think again. A nomination can be as short as one page. Hate filling out forms? Good news, you don't have to fill one out, but we have one if you prefer to use one. It's available online at www.okbar.org. Writing a letter to the OBA Awards Committee is all it takes to make a nomination.

The winners of the 2010 OBA awards will be honored Nov. 17-19 at the OBA Annual Meeting in Tulsa. The winners will be determined by the OBA Board of Governors upon recommendation of the OBA Awards Committee from nominations received on or before Aug. 11, 2010.

NOMINATION WRITING TIPS

Award Committee Chair Renée Hildebrant shares these suggestions:

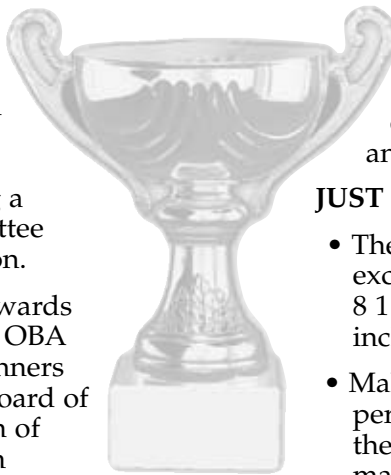
- A respected lawyer or judge has no chance of winning if he or she is not nominated.
- County bars are encouraged to nominate themselves. Smaller bars have an equal chance to win because the number of members is considered in relation to the county bar activities accomplished for Law Day and/or for the entire year.

- A nomination that gives details or shares short stories about why a person deserves to win has a better chance of winning than submitting a bio. Don't assume committee members know your nominee.
- Information about your nominee is better than letters of support.

Don't put this off until the last minute; start writing your short, concise nomination today. Your nominee deserves to be considered for an OBA award.

JUST A FEW RULES

- The entire nomination cannot exceed five single-sided, 8 1/2" x 11" pages. (This includes exhibits.)
- Make sure the name of the person being nominated and the person (or organization) making the nomination is on the nomination.
- If you think someone qualifies for awards in several categories, pick one award and only do one nomination. The OBA Awards Committee may consider the nominee for an award in a category other than one in which you nominate that person.
- You can mail, fax or e-mail your nomination (pick one). E-mails should be sent to jeffk@okbar.org. Fax to (405) 416-7089. Mail to: OBA Awards Committee
P.O. Box 53036
Oklahoma City, OK 73152





"My Earl Sneed Award is truly one of the highlights of my career. To be recognized by your fellow attorneys and judges is the ultimate compliment."

*Deborah A. Reheard,
Eufaula*

"I received the 2009 Award for Outstanding Pro Bono Service. I was surprised, honored and humbled to receive this award from my peers in the Oklahoma Bar Association. I never dreamed that I would be considered for it. I was just trying to help my community in the best way I could. Every time I look at the award on my wall, I think of my colleagues that made it possible, and it encourages me to keep doing pro bono service."

John E. Miley, Oklahoma City



Here is the list of award categories along with the names of last year's winners:

OUTSTANDING COUNTY BAR ASSOCIATION AWARD

for meritorious efforts and activities
2009 Winners: *Bryan County Bar Association & Garfield County Bar Association*

HICKS EPTON LAW DAY AWARD

for individuals or organizations for noteworthy Law Day activities
2009 Winners: *Cleveland County Bar Association & Oklahoma County Bar Association*

GOLDEN GAVEL AWARD

for OBA committees and sections performing with a high degree of excellence
2009 Winner: *Law Day Committee*

LIBERTY BELL AWARD

for nonlawyers or lay organizations for promoting or publicizing matters regarding the legal system
2009 Winner: *Theresa Hansen, Tulsa*

OUTSTANDING YOUNG LAWYER AWARD

for a member of the OBA Young Lawyers Division for service to the profession
2009 Winner: *Kimberly Warren, Tecumseh*

EARL SNEED AWARD

for outstanding continuing legal education contributions
2009 Winners: *Judge William C. Kellough, Tulsa & Deborah Reheard, Eufaula*

AWARD OF JUDICIAL EXCELLENCE

for excellence of character, job performance or achievement while a judge and service to the bench, bar and community
2009 Winner: *Judge Farrell Melton Hatch, Durant*

FERN HOLLAND COURAGEOUS LAWYER AWARD

to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession
2009 Winner: *Not awarded*

OUTSTANDING SERVICE TO THE PUBLIC AWARD

for significant community service by an OBA member
2009 Winner: *Jim Sharrock, Oklahoma City*

AWARD FOR OUTSTANDING PRO BONO SERVICE

by an OBA member
2009 Winner: *John E. Miley, Oklahoma City*

JOE STAMPER DISTINGUISHED SERVICE AWARD

to an OBA member for long-term service to the bar association or contributions to the legal profession
2009 Winner: *Nancy Parrott, Oklahoma City*

NEIL E. BOGAN PROFESSIONALISM AWARD

to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession
2009 Winner: *Jack L. Brown, Tulsa*

JOHN E. SHIPP AWARD FOR ETHICS

to an OBA member who has truly exemplified the ethics of the legal profession either by 1) acting in accordance with the highest ethical standards in the face of pressure to do otherwise or 2) by serving as a role model for ethics to the other members of the profession

2009 Winner: Sidney Swinson, Tulsa

ALMA WILSON AWARD

to an OBA member who has made a significant contribution to improving the lives of Oklahoma children

2009 Winner: Judge Donald Deason, Oklahoma City

TRAILBLAZER AWARD

to an OBA member or members who by their significant, unique visionary efforts have had a profound impact upon our profession and/or community and in doing so have blazed a trail for others to follow

2009 Winner: Annette Jacobi, Oklahoma City

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Kerry McGill

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New Laws to Follow – Now or Later?

By *Duchess Bartmess*

The Oklahoma Constitution contains several provisions which directly affect the legislative process. Section 58 of Article V, provides in part:

No act shall take effect until ninety days after the adjournment of the session at which it was passed, except enactments for carrying into effect provisions relating to the initiative and referendum, or a general appropriation bill, unless, in case of emergency, to be expressed in the act, the Legislature, by a vote of two-thirds of all members elected to each House, so directs. An emergency measure shall include only such measures as are immediately necessary for the preservation of the public peace, health, or safety... [emphasis added].

Awareness of exactly when a new law goes into effect is important in the practice of both civil and criminal law. Whether or not a new law must be complied with immediately or at some future date depends on a second vote by the members in each house of the Legislature.

The delayed effective date allows submission to the vote of the people on the legislative act through the referendum process prior to its becoming law. When two-thirds of the members of each house of the Legislature vote to attach the emergency clause to a bill, the language of that bill becomes effective immediately and cannot be submitted to a vote of the people. Sometimes a bill contains both an effective date and an emergency clause. This protects the language of the bill from being subject to voter action. When the Legislature adopts a law that creates a new right or prohibits an action which was permissible prior to the adoption of the new law, time has to be allowed



for the enforcing entity, whether civil or criminal, to develop procedures and enact rules for enforcement.

Traditionally, Nov. 1, which is well beyond the 90th day requirement, is the date designated by the Legislature as the date for new laws to become effective. Prior to this legislative procedural decision, questions arose as to exactly when a new law became enforceable. On occasion, the exact hour and minute of the signing by the governor became an issue. These potentially technical procedural issues have been resolved by the use of the specific operative date, with or without an emergency clause.

As of May 1, the governor has signed 178 bills and the emergency provision has been used sparingly.

Some of the bills that may be of interest to attorneys in general practice which have the emergency clause attached are:

HB 2921 Allows a county to use electronic commerce and conduct transactions by electronic means for county contracts.

HB 2967 Modifying required documentation for transporting merchandise for hire.

HB 3210 Extends time for emergency drought conditions declarations and exempts fireworks sales.

SB 1369 Exclusions for owners to obtain building permit requirement.

SB 1615 Creates the Oil and Gas Owners' Lien Act of 2010.

SB 1645 Addresses definitions in relation to child abuse crimes.

SB 1699 OK Indigent Health Care Act — adds persons not subject to verification.

SB 2142 Modifying procedures for electronic absentee voting materials.

SB 2170 Creates a Task Force on Standardization of Courtroom Security.

Some of the bills that may be of interest to attorneys in general practice which do not have the emergency clause attached are:

SB 1287 Adds persons to consent to orders in probate actions.

SB 1325 Modifying the "Do-not-resuscitate" consent form.

SB 1387 Motor vehicles — expands applicability of personal injury accidents.

SB 1679 Removes license suspension of a childcare facility for failing to maintain liability policy.

SB 1812 Modifying notice requirement when municipality is selling unclaimed property.

SB 1814 Employment discrimination — adds reference to pregnancy to definitions.

SB 1864 Municipality annexation — allows court costs and attorney fees for prevailing property owner.

SB 1938 Clarifying venue in emergency custody orders.

SB 2038 Modifying requirements for certification as a court reporter.

SB 2039 Modifying service of process provisions.

SB 2040 Specifying time of payment of court cost fees.

SB 2104 Increases time period for notice of liens.

SB 2201 Allows leasing of property for certain purposes in probate matters.

HB 2552 Authorizes assistant district attorneys to carry firearms.

HB 2729 Regulating use of chemical agents and electroshock weapons in juvenile facilities.

HB 2776 Authorizes release of investigative reports regarding death or near death of a vulnerable adult.

HB 2827 Authorizes victims of crimes to request emergency temporary order of protection.

HB 2865 Adds crime of committing a felony with a firearm to three-year statute of limitations.

HB 2946 Establishes new procedures for commencement of an action based on a construction-related accessibility claim — dismissal, attorney fees and sanctions.

HB 3128 Allows the assignment of death benefits of certain entities authorized to provide funeral services.

HB 3169 Workers' compensation — exempts the spouse of any exempt employer.

HB 3312 Authorizes counties to use reverse auction bidding.

HB 3323 Requires DHS to obtain a confidentiality form for the recipient of service recipient information within a home, designating it as Kelley's Law.

HB 3340 Adds to drug forfeiture hearing requirements.

Remember more information can be found on the Oklahoma Legislature's website at www.lsb.state.ok.us or on the OBA website at www.okbar.org — scroll down to find "Featured Links" and click on "Legislative Agenda."

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



LAW DAY



2010

THANK YOU

to these individuals and
groups who made
Law Day 2010
a success!



A special thank you to



for providing public service air time and for producing Ask A Lawyer.

Ask A Lawyer TV Program

Chief Justice James Edmondson

Allen Smallwood, OBA President

Moderator: Dick Pryor

Panelists: Julie Bays, Rees Evans, Rick Goralewicz,
Judge Kyle Haskins, David Humphreys,
Judge Richard Kirby, Barbara Sears,
Tsinena Thompson, Liz Wilson

The production staff and crew at OETA

Red Rock Video Services

Ask A Lawyer Free Legal Information Statewide Project

All Oklahoma attorneys who volunteered to answer phones

OBA Law Day Committee Chairperson Tina Izadi

Vice Chairperson Giovanni Perry
and Law Day Committee members

County Law Day Chairpersons

County Bar Association Presidents

Printing Inc.

Oklahoma County Bar Auxiliary

Tulsa County Bar Auxiliary

Janie Morgan

Trina Burks

Leslie Blair, State Farm Insurance

Lottinville's Wood Grill

Volunteers Create Successful Law Day

Lawyers across Oklahoma held many Law Day celebrations over the last few weeks. County bars sponsored events that included luncheons, award ceremonies, presentations at local schools, answering phone calls for free legal advice and more. Take a look at a few ways Oklahoma lawyers celebrated Law Day 2010.



Ed Maguire, Angela Ailles-Bahm, Cathy Christensen and Curtis Thomas take calls for free legal advice at the Oklahoma City phone bank. More than 2,700 calls statewide were made to this year's Ask A Lawyer.



Joe Young (left) receives his 50-year pin from retired Judge Milton Craig at the Lincoln County Bar Association Law Day picnic on May 7.



Paula Wilburn (center) and Muskogee County Law Day Co-Chairperson Doris Gruntmeir explain a will provision to a Muskogee Police Department officer as part of the Wills for Heroes program conducted April 27 and 28 at Arrowhead Mall.



Seminole County Bar President Brad Carter presents the Distinguished Service Award to the family of deceased member John E. Lively during the county's Law Day luncheon. Mr. Lively tragically passed away in August 2008.



Cleveland County District Court Judge Tom Lucas presides over a mock trial re-enactment of the Scopes Monkey Trial held in his courtroom in Norman, in which 150 members of the public attended. Retired Judge Glenn Adams portrayed prosecutor William Jennings Bryan, Micheal Salem acted as defense counsel Clarence Darrow, and Cleveland County Law Day Chair Don Pope served as moderator. A jury, consisting of spouses and friends of local attorneys, rendered a verdict. While the jury was deliberating, a panel discussion examined whether this really was the trial of the century. The above parties are joined by Chief Judge of the Court of Criminal Appeals Charles Johnson.



Journal Record Award recipient U.S. Judge Lee West (left) and Oklahoma County Bar Association President Bryan Dixon at the Oklahoma County Law Day luncheon.



Cleveland County Bar Association President Craig Sutter (right) presents Max Darks with his 60-year bar membership pin at the Law Day reception. Receiving 50-year pins at the reception were Edward Adwon, Velmer Dimery, Fred Gipson, Bob Richardson, Irby Taylor and Preston Trimble.

Mark Schwebke, Kimberly Moore-Waite, Zach Schreiner and Bob Farris field calls for free legal advice at the Tulsa County phone bank.





Pat O'Connor and Mike Esmond at the Tulsa County Law Day luncheon.



Magistrate Judge T. Lane Wilson (left) and Magistrate Judge Paul J. Cleary (right) congratulate a newly sworn-in U.S. citizen at the Tulsa County naturalization ceremony.



Ramona Wolf answers a call at the Oklahoma City Ask A Lawyer location.



2011 OBA Board of Governors Vacancies

Nominating Petition Deadline: 5 p.m. Friday, Sept. 17, 2010

OFFICERS

President-Elect

Current: Deborah Reheard, Eufaula
Ms. Reheard automatically becomes OBA president Jan. 1, 2011
(One-year term: 2011)

Nominee: Cathy Christensen, Oklahoma City

Vice President

Current: Mack K. Martin, Oklahoma City
(One-year term: 2011)

Nominee: Reta M. Strubhar, Piedmont

BOARD OF GOVERNORS

Supreme Court Judicial District Two

Current: Jerry L. McCombs, Idabel
Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer, LeFlore, McCurtain, McIntosh, Marshall, Pittsburg, Pushmataha and Sequoyah Counties
(Three-year term: 2011-2013)

Nominee: Vacant

Supreme Court Judicial District Eight

Current: Jim T. Stuart, Shawnee
Coal, Hughes, Lincoln, Logan, Noble, Okfuskee, Payne, Pontotoc, Pottawatomie and Seminole Counties
(Three-year term: 2011-2013)

Nominee: Vacant

Supreme Court Judicial District Nine

Current: W. Mark Hixson, Yukon
Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman Counties
(Three-year term: 2011-2013)

Nominee: Vacant

Member-At-Large

Current: Jack L. Brown, Tulsa
(Three-year term: 2011-2013)

Nominee: Vacant

Summary of Nominations Rules

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

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

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

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

Vacant positions will be filled at the OBA Annual Meeting Nov. 17-19. Terms of the present OBA officers and governors listed will terminate Dec. 31, 2010. Nomination and resolution forms can be found at www.okbar.org.

OBA Nominating Petitions

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

OFFICERS

PRESIDENT-ELECT

CATHY M. CHRISTENSEN, OKLAHOMA CITY

Nominating Petitions have been filed nominating Cathy M. Christensen for election of President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2011. Fifty of the names thereon are set forth below:

Molly A. Aspan, Steven L. Barghols, Stephen D. Beam, Fred L. Boettcher, Jack L. Brown, Susan Carns, Martha Rupp Carter, Charles W. Chesnut, D. Wade Christensen, Gary C. Clark, Andrew M. Coats, J. William Conger, Sandee Coogan, Lisa Cosentino, M. Joe Crosthwait Jr., Jack S. Dawson, Melissa G. DeLacerda, Renee DeMoss, Steven Dobbs, Joe E. Edwards, John A. Gaberino Jr., Charles E. Geister III, Jimmy Goodman, James R. Gotwals, William R. Grimm, V. Burns Hargis, W. Mark Hixson, John A. Kenney, Tara Ann LaClair, William G. LaSorsa, J. Duke Logan, Kieran Dennis Maye Jr., Jerry L. McCombs, Laura H. McConnell-Corbyn, Ryan Meacham, Judy Hamilton Morse, Brooke S. Murphy, Charles D. "Buddy" Neal Jr., D. Faith Orlowski, Catherine H. Petersen, David K. Petty, David A. Poarch Jr., Bob Rabon, Deborah A. Reheard, R. Forney Sandlin, Susan S. Shields, Peggy Stockwell, Michael C. Turpen, Reggie N. Whitten and Harry A. Woods Jr.

A total of 298 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties:

Kay, Pittsburg and McIntosh

OFFICERS

VICE PRESIDENT

RETA M. STRUBHAR, PIEDMONT

Nominating Petitions have been filed nominating Reta M. Chaney Strubhar for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2011. Fifty of the names thereon are set forth below:

Khristan K. Strubhar, Rustin J. Strubhar, Richard D. Strubhar, Ed Abel, William J. Baker, A. Gabriel Bass, Michael Burrage, Cathy M. Christensen, Andrew M. Coats, J. William Conger, Gary C. Clark, M. Joe Crosthwait Jr., Jack Dawson, Glenn A. Devoll, Jennifer J. Dickson, Steven Dobbs, William A. Edmondson, Maria Tully Erbar, Michael D. Evans, Michael Fields, Kathleen Flanagan, Jan Grant-Johnson, Jimmy Goodman, William R. Grimm, Patty Moore Grotta, Keeley Harris, Suzanne P. Heggy, Mark Hixson, William Hugh James, Cornelius (Neal) Leader, Richard L. McKnight, Judy Hamilton Morse, Brooke S. Murphy, Charles D. "Buddy" Neal Jr., D. Faith Orlowski, William G. Paul, Jon K. Parsley, David K. Petty, David A. Poarch, Fenton Ramey, Deborah A. Reheard, Bob Rabon, Micheal Salem, R. Forney Sandlin, Allen M. Smallwood, Peggy Stockwell, Melanie Stucky, David Swank, Matt Wheatley and Harry A. Woods Jr.

A total of 356 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties:

Canadian, Cotton, McIntosh and Pittsburg.

continued from page 1172

knew the difference. Impressed with what appeared to be an overnight learning of at least a few words in English, I began to talk with him. He obviously understood virtually nothing that I said initially, but on each succeeding day, his English vocabulary increased by dozens (and sometimes hundreds) of words.

I met with him regularly right after daybreak as my watch during that period of time began at 2 a.m. and lasted until sunrise. Everyone was awake at sunrise, but I generally was the first one to greet him as he approached the perimeter where we were lightly dug in. The nearest village was only a quarter of a mile away, and while I never saw him there, I assumed that's where he lived. He never arrived with any other people who appeared to be family or friends — he was always alone and always seeking me out. However, he obviously had a place of leadership among his peer group. I remember once we were entering a village on an offensive patrol after we had been hit with a few mortar rounds the night before and fully expected to receive sniper fire sometime during that patrol. The kid and some other youngsters came running out to us, and I motioned and yelled for them to get out of the way for fear they might get caught in a crossfire. The kid yelled something to them in Vietnamese, which they immediately obeyed and all disappeared.

On probably the second day of my relationship with this

kid, he asked me my name. I told him "Allen," and in reciprocation, I asked him what his name was. He said "Y O U." I smiled, shook my head, and I said, "No, not me," thinking when he said "You," he was meaning "me." "What is *your* name?" I repeated, and he once again said "You." We went through this Abbott and Costello "who's on first" routine for a

“He obviously understood virtually nothing that I said initially, but on each succeeding day, his English vocabulary increased by dozens (and sometimes hundreds) of words.”

couple of minutes until, with a disgusted look on his face, he drew in the wet sand with his right big toe (I never saw him with sandals or shoes) the English word "Y O U," pointed to himself and said, "My name, You." Obviously, "You" was the sound of his name in Vietnamese, and he had somehow figured out how to transliterate the Vietnamese sound of his name into the English second person singular or plural pronoun in the nominative or objective case (I didn't know that at the time but learned it later in an English grammar course). I knew then I was dealing with an extraor-

dinary human being in a tiny package.

The photo of me and "You" was on one of the few rolls of film I was able to send home. I had completely forgotten about it, and the first time I saw it was when I returned to the states in the spring of 1968. My father had it developed and framed, where it stayed on his desk until his death in 1970.

My relationship with "You" continued to grow, and he appeared to be able to find virtually anything that we wanted, whether military ordinance, food, beverage, as long as we could come up with "pack a Salem." On one occasion he even offered me the services of his 14-year-old sister in exchange for a "carton a Salem" (not a pack). I mysteriously declined this offer, and that's when I learned he was in fact 13 years of age. At some point in time, my platoon commander learned of my interaction with "You" and urged me to bring him in so we could pump him for intelligence for the location of any Viet Cong in the area. I somehow managed to avoid that for "You" as I simply felt that would have been a betrayal of my friendship with him.

I also learned some interesting Vietnamese history that I only fully appreciated after taking a southeast Asian history course several years later in college. During one of our conversations, he was referring to things which were "number one," or good, as well as things which were "number 10," or bad. We were coming up with subjects and labeling them either number one or number 10, and I said, "Ho Chi Minh

number 10." His eyes grew big, and his bullfrog voice croaked with the veins sticking out in his neck as he said, "No, no, no! Ho Chi Minh number one." As you might suspect, that caused concern to me, but I let it pass thinking maybe he had misunderstood me. Only later did I learn that most of the Vietnamese, whether north or south at that time, had a reverence for Ho Chi Minh because he had kicked the French out of Indochina some 12 to 13 years earlier. Ho Chi Minh may have been a communist, but he was a nationalist first and most Vietnamese other than the hardcore members of the Republic of South Vietnam recognized that.

Inevitably, as occurs in combat situations, we got the word at 2 a.m. one morning to "saddle up" and by daylight our entire unit had disappeared from Tam Ky — never to return.

I've often wondered over the years how many days "You" came to the perimeter looking for me before finally concluding that he had been callously abandoned by his new American friend. I've also often wondered what ultimately happened to "You." The Ho Chi Minh reference could very well have been a latent, but as yet unrealized, desire to join the insurgency. I doubt that because "You" was too strong willed, independent and driven to succeed to submit himself to that kind of

authority. "You" would be 56 today. If anybody could have survived that slaughterhouse, it would have been him. Possessed of what may very well have been genius-level intelligence and language skills, coupled with scrounging abilities without equal, I have always felt that "You" survived the war and became successful at whatever he chose to pursue. Of course, my rose-colored, 43-year-old memory likes to think that "You" made it to America and is now a multimillionaire.

So my young (old?) friend, if by some miracle you made it to America and are reading these words, you'll know how to find me. I have an old photograph I'd love to show you.

Oklahoma Bar Journal Editorial Calendar

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

2011

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

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

Facebook

By John Morris Williams



Okay, I did it. I gave up and joined Facebook. I fought it. Determined that LinkedIn, Oklahoma Bar Circle and two or three other networking sites had me overwhelmed. Thought adding Facebook would just send me over the edge. I get hundreds of e-mails a week. Without the spam filter, I would be getting a few hundred more for pharmaceuticals regarding certain men's health issues and bids for brides from former Soviet bloc countries. Of course, a few asking me to be involved in a couple of multimillion dollar offshore or African estates still sneak through.

Needless to say, I am a bit overwhelmed with all the electronic data coming at me. I have learned to cope. The "add to junk senders list" has even begun to be used on my friends who send me non-work related stuff. Sorry about that. Just can't take it anymore.

Now in a weak moment I signed up for Facebook. I have seen people with 300+ friends. I was never that popular. To my surprise in a matter of about 48 hours I had more than 30 friends. Old friends from high school seemed to be the first. There were even a couple that I did not know that I added as friends just because they

looked good. I wish I had a better-looking picture. Who knows, maybe I would get even more friends if I looked good.

The sad part is that the new world of social media is complex, and I am a bit simple. It allows old friends to reconnect and for people who look good to become "friends." Of course, I want good-looking people on my friends list. Even if I don't know them, I want to have them there —

“I can see some real potential for the OBA to get in the mix so that we can tell you what is happening in our association and in our profession.”

making my numbers look good and impressing people with all the beautiful people I know. So far, the beautiful people aren't flocking to me. Not to say that my old friends are not beautiful. I think a

picture with a hat and maybe sunglasses could help me.

In today's world, law practice management experts like our own Jim Calloway will tell you that social networking media is an essential marketing tool for lawyers. It used to be joining the Lions Club or Rotary was the way to do it. I still like those groups and think they serve a real purpose for networking and service to our community.

When I first started this job, I interviewed Winfrey Houston, who was OBA president in 1969. He advised me that lawyers need to be careful to not let our electronic capacities become a total substitute for face-to-face interaction with our peers. The world seems to be moving more and more toward our social and business connections and interactions to be done electronically. This has to a large degree changed how the world works.

In the past I have written about the labor and expense it takes to support these systems. I am not certain of how this will play out. Right now I know that it brings certain efficiencies and allows us to find and reach out to people who we never before could have reached. On the other hand, it seems sometimes

people halfway around the world know us better than the people next door. Depending on your neighbors, I guess that could be a good thing.

I am delighted to hear from and catch up with my friends from Stonewall. Who would have thought we would have come so far? However, this has added about another 20 deals that show up on my phone and in my e-mail every week. What have I done?

Social networks do have real possibilities for groups that have common interests like tax or immigration law. It is a quick way to ask a question and get a response from your peers. The possi-

bilities are great. I can see some real potential for the OBA to get in the mix so that we can tell you what is happening in our association and in our profession. We try to do that on our website. However, the ease and quickness of getting out a Facebook message is so tempting. My hope is that we don't become one of those hit "delete" organizations in your life.

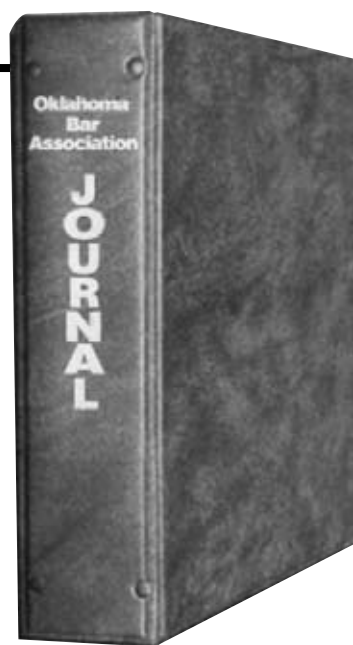
We are looking at the use of social media. You can sign up for Twitter and follow us already @OklahomaBar or @OBACLE. Oklahoma Bar Circle is also available. Facebook just seems the next place to go. Already our CLE Department and Young Law-

yers Division are on Facebook, and both seem to be thriving. I think this is a valuable tool that lawyers should look at and learn something about.

In the meantime, my friend, Amy, from high school (I think) has gotten some eggs on some Farmville deal (or something like that), and I need to go check and see what that is all about.



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



Mail to:
Communications Dept.
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152

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A Lawyer's Most Valuable Asset

By Jim Calloway, Director, OBA Management Assistance Program

Businesses have different types of valuable assets depending on the nature of the business. For some, the most valuable asset on the balance sheet may be the physical plant and equipment. For others, it may be inventory or a strong share of the marketplace. In the soft drink industry, it might be the brand of a product or its secret formula.

What is a lawyer's most valuable asset? Many might say that it is the lawyer's book of business. After all, the ability to have clients pay you for future services is indeed a valuable asset and building that client base is one of the great challenges of the business of practicing law.

Others might say that a well-trained and efficient staff is the most valuable asset. Having gone without staff assistance for the last few months, I can certainly appreciate that sentiment.

Others might say that a lawyer's most valuable asset is the lawyer's education and training. This, too, is very valuable.

But the best answer is that a lawyer's most valuable asset is the lawyer's integrity. Many late-night comedians lampoon members of the legal profession as being synonymous with liars. For those of us who are lawyers and those who work with lawyers, we appreciate that lawyers are



“While most lawyers would never be tempted to outright lie, all of us are tempted to shade the truth a little bit from time to time.”

perhaps some of the most truthful individuals that one will ever encounter.

While honesty and integrity are very important personal attributes, there is also a very practical reason for this. Lawyers deal with the repercussions for individuals who have been caught in untruths and other misstatements. We have seen how one thoughtless misstatement, particularly one uttered in a deposition or

on the witness stand, can change the entire course of a proceeding. A lawyer is well aware that the lawyer making a misrepresentation to a court can affect that lawyer's credibility for many years to come and could have more severe consequences. Being truthful is in fact a responsible business practice. A good reputation for integrity is important for a lawyer's success.

Still, we are all fallible human beings and temptation is out there for all of us.

While most lawyers would never be tempted to outright lie, all of us are tempted to shade the truth a little bit from time to time.

How we deal with these temptations is of course the basis of our character and what gives us personal integrity.

It is certainly tempting when one has failed to complete an assignment on time to tell the client something like, “I’ve completed that project, but won’t be able to meet with you until the afternoon because I’m tied up all morning. Please schedule an appointment with me in the afternoon to go over the assignment.” The lawyer’s intention is to complete the project that morning before the afternoon meeting.

Of course, that situation provides the opportunity for another law to intervene: Murphy’s Law. Putting

oneself in a situation where something absolutely has to be done in the morning, whether due to procrastination or a lack of candor, seems to invite illness, automobile trouble, power outages or other types of emergencies.

The last thing that lawyer wants to hear when he is flat on his back in bed deathly ill is to hear from his assistant, "The client understands you are sick, but is still keeping the appointment to pick up the project so he can review it. Where is it? I can't find it."

That lawyer would really wish he had said to the client, "I'm really sorry that I haven't gotten that project completed and intend to give it an immediate priority. So I'm going to get it done in the morning, and we can schedule an appointment to meet in the afternoon to go over the project together." The irony is that the client would have likely been just as satisfied with that answer as the evasion.

Honesty is the best policy. That may well be a cliché, but it is also a good business practice.

On the occasion of his being sworn in as OBA president in January, President Allen M. Smallwood, a Tulsa lawyer whose practice is focused on criminal defense, told those present for the ceremony the following:

"I'm going to tell each of you the same thing that I tell all of my clients. I'm a good lawyer. I won't lie to you nor lie for you. You'll have my undivided loyalty and my best efforts on your behalf."

What better motto could a lawyer of integrity have?



Unauthorized Practice of Law

By Gina Hendryx, OBA General Counsel

Every jurisdiction prohibits the unauthorized practice of law (UPL). In Oklahoma, the Supreme Court has original and exclusive jurisdiction over all matters involving admission to practice law in this state and to discipline for cause any other "persons, corporations, partnerships or other entities engaged in the unauthorized practice of law." Rule 1.1, Rules Governing Disciplinary Proceedings, 5 O.S. 2001, Ch.1, App. 1-A. The General Counsel of the Oklahoma Bar Association is charged with the responsibility of investigating and prosecuting allegations of UPL.

An investigation involving an allegation of UPL may be instigated by grievance, request or by the Professional Responsibility Commission (PRC) or General Counsel's own initiative. Rule 5.1, Rules Governing Disciplinary Proceedings. The General Counsel may request a nonlawyer to respond to the allegations of UPL. Upon completion of the investigation, the General Counsel reports its findings and recommendations to the PRC. The PRC may either dismiss the matter or direct the General Counsel to initiate any action permitted by law through the appropriate court, including maintaining a suit for injunctive relief. Rules 5.1 and 5.3, Rules Governing Disciplinary Proceedings and *R.J. Edwards Inc. v.*

Hert, 1972 OK 151, 504 P.2d 407. Recently, the PRC has authorized the issuance of cease and desist letters and the filing for injunctive relief against nonlawyers believed to be engaging in UPL.

The OBA's Office of the General Counsel recently obtained injunctive relief against a nonlawyer in Tulsa County District Court after asserting that the individual was engaged in the unauthorized practice of law. This marks the first time in over two decades that this office has sought and obtained such relief against a nonlawyer.

In Oklahoma, the practice of law is defined as "the rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent." *Hert* at ¶ 20. Oklahoma's definition is very similar to other jurisdictions in that it requires a case-by-case determination as to whether the acts complained of rise to the level of the practice of law. Some activities clearly fall within the definition such as representing others in court matters, preparing legal pleadings and advising others on legal matters.

In the Tulsa County case, the OBA presented evidence at the temporary injunction hearing that the nonlawyer had appeared in a represen-

tative capacity in court on behalf of another and had given legal advice on foreclosure matters. Based upon this testimony and other evidence, the court granted the temporary injunction and enjoined the nonlawyer from performing such acts in the future.

This office will continue to investigate and, when necessary, prosecute the practice of law by nonlawyers. Protection of the public from persons who have not obtained the skill and training necessary to provide professional legal judgment is the primary reason for the prosecution of UPL. Protection of the public interest requires that legal advice and services be rendered by qualified persons admitted to the practice under the laws of the state of Oklahoma, and who are at all times subject to the discipline and control of the courts.

Members of the bar have an ethical duty to report instances of UPL and may be subject to discipline if he or she assists a nonlawyer in engaging in UPL. If you have reason to believe that a nonlawyer is practicing law, you should report same to the OBA. If you have questions whether your acts are assisting a nonlawyer, you should contact the Ethics Counsel at the OBA to confidentially review same.

April Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Holiday Inn Express in McAlester on Friday, April 23, 2010.

REPORT OF THE PRESIDENT

President Smallwood reported he participated in preliminary planning for the Annual Meeting in November and scheduled speaking and participation engagements for upcoming Law Day celebrations.

REPORT OF THE VICE PRESIDENT

Vice President Martin reported he attended the OBA Board of Governors meeting in Weatherford, Oklahoma County Bar Association Board of Directors meeting and OCBA Executive Committee meeting.

REPORT OF THE PRESIDENT-ELECT

President-Elect Reheard reported she attended the March board meeting in Weatherford and the bombing memorial anniversary event in Oklahoma City with President Bill Clinton as the keynote speaker and Reflections of Hope Award recipient. She also chaired the Strategic Planning Committee meeting, began work on the 2011 OBA budget and organized the

President-Elect Initiative on Technology Task Force.

REPORT OF THE PAST PRESIDENT

Past President Parsley reported he attended the March board meeting in Weatherford, Strategic Planning Committee meeting and two Texas County Bar Association meetings.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported that he attended the new admittee swearing-in ceremony, staff strategic planning meeting, monthly staff celebration, Leadership Academy graduation and Pittsburg County Law Day dinner. He met with CoreVault regarding computer backup services, OG&E regarding power issues and met several times with the builder and designer regarding the remodel. He prepared the 2010 staff evaluations.

BOARD MEMBER REPORTS

Governor Brown reported he attended the OBA Access to Justice Committee meeting, OBA Bench and Bar

Committee meeting and ABA Day at the U.S. Capitol in Washington, D.C. He also moderated an OBA Bench and Bar Committee Forum on Self-Represented Litigants and met with all of Oklahoma's Congressional representatives about funding for Legal Services Corporation and other legislation affecting the legal profession. **Governor Carter** reported she attended the March board meeting in Weatherford, Tulsa County Bar Association Board of Directors meeting, TCBA Law Day Committee meeting and Professional Responsibility Tribunal hearing. **Governor Chesnut** reported he attended the March Board of Governors meeting in Weatherford and the Ottawa County Bar Association meeting. **Governor Devoll** reported he attended the March board meeting in Weatherford, assisted Reta Strubhar with her campaign for OBA vice president and attended the Garfield County Bar Association April meeting. **Governor Hixson** reported he attended the March board meeting in Weatherford, Canadian County Community Sentencing Planning Council and

Canadian County Bar Association luncheon.

Governor McCombs reported he attended the Weatherford social event and the March board meeting.

Governor Moudy reported she attended the OBA Day at the Capitol, and she worked on Okmulgee County Law Day activities.

Governor Poarch reported he attended the OBA Bench and Bar Committee meeting, Board of Governors March meeting in Weatherford and the admission ceremony for new lawyers at the State Capitol.

Governor Shields reported she attended the March Board of Governors meeting.

Governor Stuart reported he attended the board meeting in Weatherford and the OBA Communications Committee meeting. He also worked on obtaining May 2010 *Oklahoma Bar Journal* articles and on Pottawatomie County Law Day activities.

REPORT OF THE SUPREME COURT LIAISON

Chief Justice Edmondson reported the remarks of President Smallwood and YLD Chair Aspan at the swearing-in ceremony were well received.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported she attended the quarterly meeting of the Clients' Security Fund Committee, swearing-in ceremonies for the successful February bar exam participants, March meeting of the Ruth Bader Ginsburg Inn of Court, closing banquet of the Ruth Bader Ginsburg Inn of Court and

the Leadership Academy graduation luncheon.

She also gave ethics presentations to the Phi Delta Phi fraternity at OCU, Chesapeake Energy Legal Department, American Immigration Lawyers' Association meeting in Austin, Texas and to Bill Conger's OCU trial practice class. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for March 2010 was submitted for the board's review.

RATIFICATION OF E-MAIL VOTE RE: STATE BAR SUPPORT FOR LEGAL SERVICES CORPORATION

The board ratified an e-mail vote to join other state bar associations in signing a letter to members of Congress urging increased funding for Legal Services Corporation (LSC) and encouraging Congress to engage in a bipartisan effort to reauthorize LSC. Support was requested by the National Conference of Bar Presidents.

REQUEST FOR OBA TO PARTICIPATE IN ATTORNEY GENERAL FORUM

Oklahoma Lawyers Association Executive Director Thad Balkman described an evening event planned for June 9, 2010, to give voters an opportunity to learn more about the candidates for attorney general. The board voted not to cosponsor the event. Mr. Balkman was encouraged to contact the law schools for potential participation.

PURCHASE OF LADY OF JUSTICE PRINTS

Executive Director Williams reported Greg Burns, the artist commissioned in 2001 to do an original watercolor piece of art for the OBA and to make color lithographs of the Lady of Justice statue for sale to OBA members, has a remaining supply of 183 unframed prints. He closed his retail gallery four years ago and now has a website gallery, which does not offer framing services. He no longer can store the inventory. He offered to sell the remaining inventory to the OBA at \$15 per print if the entire group is purchased. The board voted to authorize purchase of the lot at \$2,745 with a request that Mr. Burns sign the prints or at least a portion of them.

WELCOME

Former OBA President Charles "Buddy" Neal, on behalf of District Court Judge Bartheld, welcomed board members to Pittsburg County. He noted that local county bar members appreciated board members coming to McAlester to attend their annual Law Day banquet. He encouraged the board to continue meeting in other counties besides Oklahoma.

TECHNOLOGY INITIATIVE

President-Elect Reheard said there is a need for a task force to look at future issues. The current Bar Association Technology Committee is being invited to participate with a new OBA task force. Executive Director Williams

briefed the board on the technology issues.

BUDGET COMMITTEE APPOINTMENTS

The board approved President-Elect Reheard's appointments of Martha Rupp Carter, Tulsa; Jon Parsley, Guymon; Ryland Rivas, Chickasha; Peggy Stockwell, Norman; Bill Grimm, Tulsa; Ken Delashaw, Marietta; Doris Gruntmeir, Muskogee; Angela Ailles-Bahm, Oklahoma City; Reta Strubhar, Piedmont; and

Cathy Christensen, Oklahoma City; to the Budget Committee.

RESOLUTIONS

The board voted to issue resolutions of appreciation to the Pittsburg County Bar Association and to the firm of Steidley and Neal for their hospitality extended to the board during its April meeting in McAlester.

LEGISLATIVE REPORT

Executive Director Williams reported the bills on the OBA Legislative

agenda have gone to the governor and have been signed.

BAR CENTER UPDATE

Executive Director Williams reported the receptionist will be moved to her new location on April 30. Appropriate signage will be added to direct people's attention to the new location.

NEXT MEETING

The Board of Governors will meet at 9 a.m. in Tulsa on Friday, May 21, 2010.

PUBLIC NOTICE FOR REAPPOINTMENT OF INCUMBENT BANKRUPTCY JUDGE

The current 14-year term of office of Dana L. Rasure, United States Bankruptcy Judge for the Northern District of Oklahoma at Tulsa, Oklahoma, is due to expire on January 5, 2011. The United States Court of Appeals for the Tenth Circuit is presently considering whether to reappoint Judge Rasure to a new 14-year term of office.

Upon reappointment, Judge Rasure would continue to exercise the jurisdiction of a bankruptcy judge as specified in title 28, United States Code; title 11, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § § 101-122, 98 Stat. 333-346.

Members of the bar and the public are invited to submit comments for consideration by the court of appeals. All comments will be kept confidential and should be directed to:

David Tighe
Circuit Executive
Byron White United States Courthouse
1823 Stout Street
Denver, CO 80257

Comments must be received not later than Friday, June 18, 2010.

Validation

By Phil Frazier

This space dedicated to the Oklahoma Bar Foundation generally encourages Oklahoma lawyers to become Fellows of the foundation. Frequently we discuss what the foundation has accomplished or hopes to accomplish.

This month's article is about *Validation*. Right up front I will admit to a degree of plagiarism. On Easter Sunday our pastor's message was titled *Validation*. He spoke of events in the lives of people long before us, as well as now, that validate their needs and the fulfillment of the good works of others to accommodate those needs.

Later in the day, as I reflected upon the sermon, the similarities between the church mission and the mission of the foundation struck an interesting parallel.

Clearly, the church seeks to fulfill a spiritual need and to help those less fortunate in many ways and for a variety of reasons. Our pastor's sermon offered the resurrection and events immediately following as *Validation*.

The OBF, through the generosity and dedication of OBF Fellows and Oklahoma lawyers, has recognized and fulfilled the needs of thousands

“A successful result always validates the time, effort, hard work and preparation that goes into a case.”

of Oklahomans. These needs have included and continue to include legal aid to the indigent, safe haven for the abused, protection and legal assistance to children, scholarships to law students who we expect to follow our charge and many, many other individuals and their causes.

The validation of the need for the OBF is best expressed by what it has done and the people whose lives have been transformed through the contribution in work, time and financial generosity of the Oklahoma Bar Foundation.

Your foundation, since its formation in 1946, has recognized special needs throughout Oklahoma and has endeavored to fulfill those needs with rewarding satisfaction but with the continuing desire and goal to do more. Further validation of

the need and accomplishment of the OBF's mission is illustrated recently by the increase in lawyers choosing to become Fellows. Many are young lawyers or lawyers new to membership in the Oklahoma Bar Association. Generous Cy Pres donations have enabled the Oklahoma Bar Foundation, for the past few years, to donate to our beneficiaries the largest financial grants in the history of the OBF.

I know of no other feeling of satisfaction to a lawyer than the validation at the conclusion of a case that states our cause and result were right. So it is to all who are Fellows with the Oklahoma Bar Foundation. A successful result always validates the time, effort, hard work and preparation that goes into a case. So it is with the work of the Oklahoma Bar Foundation. The need is recognized and the mission to transform lives, once accomplished, is surely validation of the work of the Oklahoma Bar Foundation and the foundation Fellows as well as the foundation staff.

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

The Oklahoma Bar Foundation wishes to gratefully acknowledge and thank our newest members of the Fellows program. Please contact the OBF at foundation@okbar.org or (405) 416-7070 to add your name to the growing list of supporters.

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Many thanks for your support & generosity!

Rationing Justice

Balancing Demand, Needs and Priorities in Civil Legal Services

By Gary A. Taylor

"If we are able to keep our democracy, there must be one commandment: thou shalt not ration justice." Judge Learned Hand, speaking on the occasion of the 75th anniversary of the founding of the Legal Aid Society of New York, Feb. 16, 1951.

Despite the wisdom of Judge Learned Hand's quote, anyone familiar with the American justice system, and its aspiration to create a level playing field for the dispensation of justice regardless of status or wealth, knows that justice is rationed every day. Access to competent legal counsel for the poor, whether charged with a crime or unlawfully threatened with the loss of their family's shelter, is perpetually at risk due to the shifting winds of politics and economies. One needs to look no further than the recently published expressions of concern regarding the underfunding of Oklahoma's indigent defense system to see these pressures at play.

This brief article will focus not on the criminal justice system, but on similar issues applicable to the civil justice system, which exists largely under the radar of public attention. More specifically,

it addresses the manner in which the access to counsel dedicated to securing civil justice to the poor must be rationed among many deserving applicants. It aspires in some small measure to answer the question, "Why?" when a person in need cannot be provided with counsel. It also demonstrates how that decision is not the product of arbitrariness or whim, but by the application of standards for service provision developed with the most compelling needs of those to be served in mind and invoking the help of the community in their development.

I have been involved with the provision of civil legal services to low-income Oklahomans since my graduation from law school in 1977. My current position requires me to be a fundraiser, a manager of people and budgets and to perform many other tasks removed from direct representation of the clients our program serves. But occasionally I must justify to an applicant for services, her mother, or — with some tact — her state senator why Legal Aid was unable to help her in this time of trouble.

Saying "no" to a person seeking help is something that a Legal Aid lawyer is forced to do every day somewhere in the state, always with regret. It was so when I was a brand new attorney, and it is no easier now — especially when the applicant is sitting across from you and tears begin to flow or anger begins to show. The disappointment is expressed in many ways: a challenging "I've paid taxes my entire life, and this is the first thing I've asked for," a reluctant but accepting "I understand" or by a question to which there may be no adequate answer, "Where else can I go?"

DEMAND VS. NEEDS

By the measure of the last decennial census, there are 675,000 or so Oklahomans who would qualify for legal assistance from civil legal services providers in Oklahoma — essentially 125 percent of the federal poverty guidelines. Anyone who lives or who has lived at that standard knows there is little margin to cover extraordinary expenses, such as hiring an attorney. But the American Bar Association has estimated that low-income households on average will experience at

least one civil legal need per year. These requests must be screened by the provider, eligibility determined, merits vetted and attorney resources — staff or volunteer — found.

One protocol might say simply “first come, first served,” and when the saturation point has been reached, those awaiting assistance should reapply tomorrow or next week or next year. This approach is manifestly inadequate; there are emergencies, literally life-and-death circumstances of domestic violence for example, and many other legal problems that do not adhere to an arbitrary schedule or an endless “waiting list.” Further, it rewards those who may have developed the greatest skill in maneuvering through, or gaming, the system rather than fairly identifying those with the most compelling need. If resources were wholly adequate to meet this demand, the question of priorities would perhaps never surface. The urgent and the routine would both be handled as a matter of course. But we know this is not the case.

NEEDS APPRAISALS AND PRIORITY STATEMENTS

In response to the real world of inadequate resources to meet all the demand, providers of civil legal services to those who cannot afford them in the marketplace are charged with identifying the most important needs of the client community, developing protocols for efficiently determining basic eligibility and criteria for identifying those situations when an applicant’s problem for help meets that standard of compelling need — and finally matching

that client with an attorney or other legal resource. The process is technically called “setting priorities,” and the challenge is implementing them in service provision. As all legal services practitioners know, however, using the word “priority” to an applicant in need is both denigrating and unsatisfying — and to be avoided.

“It is a significant challenge to any system to determine eligibility as well as ‘priority’ of an applicant’s request for legal help as early as possible in the process, in order to use resources most efficiently.”

The process begins with a legal “needs appraisal” of the community. As Legal Aid is a recipient of funding from the federal Legal Services Corporation, the needs appraisal and the priority-setting process are required and somewhat circumscribed by federal regulation. We schedule these every five years, our last in 2007-08; when done well, these are expensive and labor intensive. So, to conduct one more frequently is impractical, although priorities are “reviewed” annually to include newly identified needs. We gathered information through surveys directed

at the client community, other service providers, the bench, the bar and our own experienced staff among others.

With the help of a consultant, regional “town halls” were conducted to enable the public to comment and select individuals chosen for personal interviews. The gathered data and an analysis of the results were developed into a report. In turn, this report was vetted by our board of directors and finally priorities for service delivery memorialized in a detailed statement adopted by the board at a public meeting. That priorities statement may be found on our website at www.legalaidok.org.

PRIORITIES IN THE DELIVERY OF LEGAL SERVICES

Stating priorities is one thing; operationalizing or “implementing” them is another. The demands on any system of “intake” whether conducted in person, over the telephone, using web-based resources or otherwise are tremendous. It is a significant challenge to any system to determine eligibility as well as “priority” of an applicant’s request for legal help as early as possible in the process, in order to use resources most efficiently.

Further, the priority of the case is not the final consideration for how much of a program’s limited resources (or any at all) should be committed; most real-life situations are not so easily pigeon-holed or susceptible to mechanical application of these criteria. The last consideration is whether the case has merit, including whether there is a legal solution to the problem

presented. Legal Aid's system of intake, assessment and case assignment allows for a range of services to be given to eligible applicants: information, advice, help with legal forms, development of customized documents and so forth. But full representation is usually reserved for those clients and cases involving a "priority" matter.

Generally speaking, Legal Aid's priorities revolve around core needs such as:

- securing freedom from harm and violence (much of our family law and domestic violence work)
- access to, or protection from loss of, adequate housing (unlawful eviction, fair housing concerns, loss of public housing eligibility, homelessness prevention)
- income maintenance for survival (unemployment, disability, public benefits, protection of basic survival income from illegal seizure or garnishment)
- access to health care (Medicaid, Medicare)
- improving outcomes for children using the law (medical-legal partnerships,

abuse and neglect custody matters)

- protecting the rights of vulnerable populations (disability and access to public accommodations, senior citizens services)
- ensuring fair access to the justice system (confronting barriers such as language, disability, poverty, protecting the right to appointed counsel in civil matters).

So if one hears of an applicant being "turned down" for services, it is likely that the level of services offered or given was considered inadequate to meet the legal problem presented — and likely it was because full representation was not provided after these processes and criteria were applied. But it is also possible that the Legal Aid office, *including its contingent of pro bono volunteers*, was operating at or beyond its capacity.

EXPANDING RESOURCES TO MEET DEMAND AND NEED

In Oklahoma, there are about 10,000 potentially eligible clients to every Legal Aid attorney. A number of years ago, the Legal Services Corporation defined "minimum

access" to services as two attorneys for every 10,000 eligible. Even with the generous help of Oklahoma's pro bono volunteer attorneys and small alternative local volunteer resources, the disparity between even "minimum" access and reality is great. This fact and the discussion above should not discourage, but challenge, our sense of the justice system's best aspirations.

Giving assistance to the most needy among us reflects the highest principles of our profession and is personally satisfying as those who regularly volunteer would attest. The opportunities for volunteerism both within and outside a Legal Aid program are plentiful. One may check our website to review them. Many of those with "non-priority" legal problems truly need the guidance of an attorney. Volunteering to help in even simple cases not only gives these individuals the sense that our justice system is fair and accessible — but also raises the esteem of the profession to the benefit of us all.

Mr. Taylor is executive director of Legal Aid Services of Oklahoma Inc.



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ATTORNEYS AT LAW

Lawyers Volunteer in Statewide Community Service Effort

By Molly Aspan, YLD Chairperson

I would like to thank the over 60 volunteer attorneys who participated in the first Statewide Community Service Project Day at 12 public libraries across the state on Law Day, May 1. The event received widespread support and publicity, from the Oklahoma Department of Public Libraries to the bar association to the selected libraries throughout the state. I would also like to thank the YLD Board of Directors and Jennifer Kirkpatrick, the chair of the YLD Community Service Committee, for all their work organizing and implementing this event.

I would also like to take this opportunity to congratulate the new attorneys that were admitted to the bar last month. We invite you to become involved in the YLD and are looking forward to meeting and working with you in the future.

Finally, I would like to invite all members, including the new admittees, to join us at our YLD Midyear Meeting on Friday, June 25 at 5:30 p.m. Our YLD Midyear Meeting is held in conjunction with the annual Solo and Small Firm Conference at the Downstream Resort in Quapaw, Okla. (near Joplin). The conference offers social events and networking opportunities for members

of the YLD as well as outstanding CLE. Registration for the conference can be found in this bar journal as well as on the OBA website at www.okbar.org/solo.

SERVICE PROJECT DETAILS

By Jennifer Kirkpatrick, YLD Secretary/Community Service Committee Chairperson

As the “public service arm of the bar,” YLD members are committed to serving Oklahoma not just through their professional role as attorneys, but also through volunteer service in the

community. In an effort to provide that volunteer service, as well as provide lawyers across the state an opportunity to network with each other, the Community Service Committee planned and organized a Community Day of Service. The inaugural event was recently held on May 1 in conjunction with Law Day and involved 60 attorneys working at 12 public libraries across the state.

“The Young Lawyers Division selected libraries to be the focus of this year’s community service project for several reasons. Libraries are widely utilized by a cross-section of people, they’re located in communities large and small — and lawyers have a special fondness for the written word,” said Molly Aspan, YLD chairperson.

The specific projects ranged from landscaping and general cleanup outside the libraries to re-shelving books and replacing glass on coffee tables inside the facilities. Four books on legal topics were also donated to each library: *The American Bar Association Complete Personal Legal Guide — The Essential Reference for Every Household*; *The American Bar Association Guide to Wills and Estates*; *The American Bar Association Guide to Resolving Legal Disputes*



Muskogee County volunteers prepare the framework for a new sidewalk in front of the library.

Inside and Outside the Courtroom and The American Bar Association Guide to Credit and Bankruptcy.

More specifically, the following projects were completed:

Mary Kimberly Library, Kiowa

Project Coordinator Hannah Cable and a team of over 20 volunteers planted 10 Bradford pear trees and five maples on the library grounds. In addition to planting trees, the volunteer team created a flower bed to add some color to the large double lot on which the library sits. The volunteer team received extra support and encouragement from the community spectators.



Irma Newburn makes the windows shine like new at the Lawton Public Library.

Lawton Public Library

Project Coordinator Nathan Johnson and a team of lawyer volunteers from Comanche County beautified the Lawton Public Library by washing a full city block of windows and picking up trash on the library grounds.

Enid Public Library

Project Coordinators Kaleb Hennigh and Robert Faulk worked with the Enid Public Library to complete a massive book shifting project. Seven Garfield County attorneys provided 14 hours of community service rearranging several areas of the library and moving books from one area to another.

Muskogee Public Library

Project Coordinators Roy Tucker and Doris Gruntmier assisted the Muskogee Public Library in redesigning the rest area outside of the front entrance to the library. Young lawyers from Muskogee worked to clean up the landscaping and prepare the ground for a new sidewalk for benches. The lawyer volunteers also supervised local juveniles who assisted in the project in order to obtain their required community service hours.

Norman Public Library

Project Coordinator Breea McCorkle designed and hosted a two-part service project at the Norman Public Library. From 12 to 2 p.m., volunteer lawyers assisted in organizing, re-shelving and alphabetizing the library's DVD collection. At 2 p.m., a program was held in the Children's Department. The attendees enjoyed crafts and games and heard from guest speakers Mayor Cindy Rosenthal, Rep. Scott Martin, Rep. Wallace Collins and Officer Flores of the Norman Police Department.

Oklahoma City Metropolitan Library System

Project Coordinators Jennifer Kirkpatrick, Karolina Roberts, Collin Walke and

Lane Neal worked with Carol Manning, OBA Communications Director, and the maintenance staff of the Metropolitan Library System to clean up the outdoor area around the Belle Isle Library. The volunteers also pulled up old landscaping and planted new plants and flowers around the grounds.

Perry Carnegie Public Library

Project Coordinator Bryon Will presented the four ABA books to the director of the Perry Carnegie Library during Perry's annual Mayfest celebration.



Jacob Biby presents books to Holly Labossiere, director of the Ponca City Library.

Ponca City Library

Project Coordinator Jacob Biby and a team of four lawyer volunteers from Kay County cleaned out flower beds and planted new flowers on the library grounds. The

volunteers also replaced glass on coffee tables inside the library.

Shawnee Public Library

Project Coordinator Joe Vorndran and five lawyers from Shawnee removed some old landscaping and planted new flowers around the Shawnee Public Library. The volunteers also added new mulch to the flower beds and did some general upkeep around the grounds.

Tulsa City-County Library System

Project Coordinators Molly Aspan, Kimberly Moore-Waite, Amber Peckio Garrett and Briana Ross worked with volunteers to spruce up

landscaping by cleaning out flower beds and planting new flowers at three libraries in the Tulsa area: Brookside Library, Schusterman-Benson Library and Nathan Hale Library.

The event was definitely a success. Volunteer lawyers left the completed projects with a sense of giving back to their communities. Directors, volunteer coordinators and patrons from the recipient libraries have expressed their gratitude and appreciation for the time and effort from the volunteer lawyers. Please watch the YLD page in the bar journal early next year for details on the next Community Day of Service.



Volunteers from the Garfield County Bar Association rearrange several areas of the Enid Public Library.



Karolina Roberts, Lane Neal, Collin Walke and Jennifer Kirkpatrick revamp the landscaping around the Belle Isle Library in Oklahoma City.

Calendar

May

- 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
- 24 OBA Uniform Laws Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 25 OBA Solo and Small Firm Planning Committee Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jim Calloway (405) 416-7051
- 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
- 27 OBA Member Services Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Keri Williams Foster (918) 812-0507
- 31 OBA Closed** – Memorial Day Observed

June

- 2 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
- 4 OBA Diversity Committee Meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021
- Oklahoma Bar Foundation Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- OBA Communications Committee Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Douglas Dodd (918) 591-5316
- 9 OBA Government and Administrative Law Practice Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jami Fenner (405) 844-9900
- 11 Oklahoma Trial Judges Association Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: A.J. Henshaw (918) 775-4613
- 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 Civil Procedure Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 16 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
- 17 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
- 18 Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Bacy (405) 424-5510
- OBA Board of Editors Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Carol Manning (405) 416-7016
- 19 OBA Title Examination Standards Committee Meeting;** Stroud Community Center, Stroud; Contact: Kraettli Epperson (405) 848-9100

June

- 21 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
- 23 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
- 24-26 Solo and Small Firm Conference;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: OBA Management Assistance Program (405) 416-7051
- YLD Midyear Meeting;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: Molly Aspan (918) 594-0595
- 25 OBA Board of Governors Meeting;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: John Morris Williams (405) 416-7000

July

- 5 OBA Closed – Independence Day Observed**
- 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 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 Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Allison Thompson (405) 840-1661
- 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
- 17 OBA Title Examination Standards Committee Meeting;** Oklahoma Bar Center, Oklahoma City; Contact: Kraetli 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



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- 23 OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 24 OBA Young Lawyers Division Board of Directors Meeting;** 10 a.m. Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595
- 27-30 OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

Jones Appointed District Judge

Gov. Brad Henry recently appointed Judge Glenn Martin Jones as district judge for the 7th Judicial District in Oklahoma County.

"Judge Glenn Jones has served the people of Oklahoma with distinction as a special judge for 16 years," Gov. Henry said. "With his experience, temperament, knowledge of the law and love of the community, I know he will continue his stellar record of public service as a district judge."

Judge Jones earned his bachelor's degree from OU in 1973 and his juris doctorate from the OU College of Law in 1976. He served as a special judge in Oklahoma County for the past 16 years. Prior to 1994, he worked in private practice. He replaces Judge Virgil Black, who retired.



OBA Leadership Academy Class Marks Graduation

The 2009-2010 OBA Leadership Academy class met all the requirements for graduation, and a ceremony was held April 22 at the Oklahoma Bar Center. Over the last 10 months, the 25 participants took part in training activities to build teamwork, success and leadership while teaching them how to keep their newly acquired skills. Graduates are **Stacy Acord**, McDaniel, Hixon, Longwell & Acord PLLC, Tulsa; **A. Gabriel Bass**, Bass Law Firm PC, El Reno; **Jennifer Carter**, Jennifer Carter Consulting LLC, Edmond; **Faustine Curry**, Miller Dollarhide, Oklahoma City; **Julie Austin Dewberry**, Hester, Austin-Dewberry & Associates, Ardmore; **James Elias**, Brewer, Worten, Robinett, Bartlesville; **Anthony Gorospe**, Gorospe & Smith PLLC, Tulsa; **Tynan Grayson**, Crowe & Dunlevy, Oklahoma City; **Larry Harden**, Oklahoma Department of Agriculture, Food & Forestry, Oklahoma City; **Kaleb Hennigh**, Mitchel, Gaston, Riffel & Riffel, PLLC, Enid; **Martin High**, Oklahoma State University, Stillwater; **Celeste Johnson**, Phillips Murrah PC, Oklahoma City; **Jeff Keel**, The Chickasaw Nation, Ada; **Ann Keele**, Monroe & Associates, Tulsa; **Carol King**, The Law Office of Carol J. King PLLC, Jenks; **Jennifer Kirkpatrick**, Elias, Books, Brown & Nelson PC, Oklahoma City; **Lane Neal**, Oklahoma County District Attorney, Oklahoma City; **Chrissi Nimmo**, Cherokee Nation Office of Attorney General, Tahlequah; **Jill Ochs-Tontz**, Payne County District Attorney's Office, Stillwater; **Christopher Papin**, Burnett & Brown PLLC, Oklahoma City; **Nathan Richter**, Denton Law Firm, Mustang; **Joseph Vorndran**, Canavan & Associates PLLC, Shawnee; **Adrienne Watt**, Legal Aid Services of Oklahoma Inc., Tulsa; **Amy Wilson**, Oklahoma Department of Human Services, Child Support Services, Tulsa; **Nancy Winans-Garrison**, Oklahoma Department of Human Services, Child Support Services, Oklahoma City.



Holiday Hours

The Oklahoma Bar Center will be closed Monday, May 31 for Memorial Day and Monday, July 5 to observe Independence Day.

Bar Journals Take Summer Vacation

Look for the next bar news edition of the *Oklahoma Bar Journal* (with color cover) to be published Aug. 7. You'll still be receiving court material in June and July. Deadline for submissions for the next news issue is July 12.

10th Circuit Bankruptcy Appellate Panel Announces Rule Amendments

The local rules for the U.S. Bankruptcy Appellate Panel of the 10th Circuit (BAP) have been amended and went into effect May 1. The amendments include 10th Circuit BAP Local Rule 8008-1(a), which requires that all documents other than sealed documents, filed on or after May 1, must be electronically filed using the BAP's Appellate CM/ECF system. Detailed instructions for electronic filing registration are available on the BAP website, www.bap10.uscourts.gov.

The site's new features include:

- 1) Full text of the amended rules;
- 2) An FAQ that highlights changes in the amended rules;
- 3) An updated guide to BAP appeals; and
- 4) ECF Procedures and Guidance; including an ECF Exemption Form for those unable to file electronically.

Call (303) 335-2900 if you have any questions or need assistance.

Ask A Lawyer Results

With the annual Ask A Lawyer free legal advice campaign under our belts, call totals are rolling in from county bar associations across the state. Local Ask A Lawyer numbers were sponsored in 29 counties, staffed by 277 attorneys. The unofficial total number of calls is at 2,759 with call tallies still being expected from Garfield, Jackson, McCurtain, McIntosh, Payne and Pittsburg counties.

OBA Recognized for Proactive Stance on Scam Prevention

Scams targeting lawyers have become more prevalent in recent months. To spread awareness, the OBA has published articles and advice about the issue in the bar journal and online. *Lawyers USA*, a national legal publication, featured the OBA's prevention efforts in its April 2010 issue. For more information, go to www.okbar.org/scams.

OBA Member Resignations

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

Jason Winslow Galbraith
OBA No. 21186
2682 Calmwater Drive
Little Elm, TX 75068

Franklin C. Hoover
OBA No. 4350
P.O. Box 4636
Medford, OR 95701

Cathleen Lockhart
OBA No. 21423
202 East Locust
San Antonio, TX 78212

Stephanie Lee Reaugh
OBA No. 19202
7439 Stonecrest Drive
Dallas, TX 75254

Jack Edward Wheeler Jr.
OBA No. 20891
211 N. Robinson Ave.,
Ste. 1800
Oklahoma City, OK 73102

OBA Member Reinstatement

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

Emily Jay Seikel
OBA No. 21809
2412 Wilson St., Unit A
Austin, TX 78704

Calling All Writers

We need you on the "Back Page." Share your story or poetry that conveys humor, intrigue or inspiration to others. Submissions should be short, a maximum of two double-spaced pages or one and 1/4 single-spaced pages, and preferably related to the practice of law. E-mail Carol Manning with submissions or questions at carolm@okbar.org.

Kudos

Judge Martha F. Oakes was recently sworn in as the newest Oklahoma County special district judge, and she will handle the drug court docket. Judge Oakes is a 1990 graduate of the OU College of Law. After graduation, until April of 1998, she served as Grady County assistant district attorney. She then worked as an assistant general counsel for the Oklahoma Tax Commission until her appointment to the bench.

The Oklahoma County Bar Association presented its annual awards at its Law Day luncheon April 30. Receiving the Howard K. Berry Sr. Award was **Gail Stricklin**, and **Judge Lee West** received the Journal Record Award. Leadership in Law recipients were **Judge Tammy L. Bass-LeSure**, **Rachel Blue**, **Teresa Meinders Burkett**, **LeAnne Burnett**, **Robert J. Campbell Jr.**, **Mark D. Christiansen**, **H. Edward DeBee**, **Michael Decker**, **Sidney Dunagan**, **Jon A. Epstein**, **Glenn Floyd**, **Sarah Jane Gillett**, **Pamela H. Goldberg**, **Brent Johnson**, **Eric Johnson**, **Paul Johnson**, **Bernard Jones**, **Bryan King**, **Susan French Koran**, **Mike LaBrie**, **Fred Leibrock**, **Cori Loomis**, **D. Michael McBride III**, **James McMillin**, **Joseph Morris**, **Nancy Parrott**, **Chris Paul**, **David Pepper**, **Travis Pickens**, **Wendy**

Poole, Courtney Davis Powell, Dawn Rahme, G. Calvin Sharpe and Raymond Zschiesche.

The Mid-Continental Oil and Gas Association of Oklahoma recently recognized **Mark Christiansen** with the Distinguished Service Award. Since 2004, he has volunteered as chairman of the Mid-Continent Oil and Gas Association's Legal Committee and represented the association in lawsuits affecting the oil and gas industry.

Jodi B. Levine, a U.S. administrative law judge in the office of hearings and appeals at the Social Security Administration in Oklahoma City, has been awarded the Grassroots Advocacy Award from the American Bar Association in recognition for her work to educate congress on the Social Security disability process through the ABA-sponsored and Social Security Administration-endorsed mock Social Security hearings presented to members of congress and their staffs.

Gaylon C. Hayes of Oklahoma City was admitted to the State Bar of Texas on Feb. 5.

James R. Agar II was recently promoted to the rank of Colonel by the U.S. Army Judge Advocate General's Corps. He currently serves as the regional defense counsel of the U.S. Army Trial Defense Service in Fort Leavenworth, Kan. Colonel Agar will be reassigned to Fort Leonard Wood, Mo., this summer, where he will assume his

duties there as the staff judge advocate.

Oklahoma County Commissioner **Ray Vaughn** was inducted into the Edmond Hall of Fame last month. Mr. Vaughn has a long history of public service, including terms as Edmond city attorney and judge, member of the Oklahoma Legislature and currently, the chairman of the Oklahoma County Commissioners.

John D. Rothman was recently named to the board of directors of the Association of Attorney-Mediators, a national non-profit trade association.

Jennifer Spragins Harris has been promoted to vice president of operations of National Debt Resolution LLC in Phoenix. She will provide overall direction and guidance to the operational activities of the organization, as well as day-to-day leadership and management of all company operations. Ms. Harris received her J.D. with distinction from OU in 2003.

Crowe & Dunlevy has re-elected **Roger A. Stong** president. Mr. Stong, who joined the firm in 1985 and was named president in April 2008, is leading Crowe & Dunlevy for the third consecutive year. Selected to serve on the firm's fiscal year 2010 executive committee are **Kevin D. Gordon**, **William H. Hoch III**, **Cynda C. Ottaway** and **Randall J. Snapp**.

Larry D. Ottaway served as director of the National Trial Academy, held last month at the National

Judicial College in Reno, Nev. The mentorship program for trial lawyers is sponsored by the Tort Trial & Insurance Practice Section of the American Bar Association and the American Board of Trial Advocates.

On The Move

H Leo Austin & Associates has moved, and the correct toll-free phone number is (866) 436-0006.

Goolsby Proctor Heefner & Gibbs of Oklahoma City announces **Matthew C. Frisby** and **Bryan E. Stanton** as partners in the firm. Mr. Frisby received his B.A. from UCO in 1997 and his J.D. from OU in 2001. His practice primarily involves civil litigation, including areas of personal injury and workers' compensation. Mr. Stanton received his B.A. from OU in 1998 and his J.D. from TU in 2001. His practice is concentrated in civil litigation with an emphasis on personal injury and insurance defense. Both can be reached at (405) 524-2400.

Heroux & Helton PLLC of Tulsa announces the addition of **Blaine M. Dyer** and **Blake A. Hayes**. Mr. Dyer joins the firm as an associate. His practice is focused in the areas of business and energy transactions, business formation and planning, commercial real estate law, and real estate and mineral title opinions. He is a graduate of the OU College of Law. Mr. Hayes has joined the firm as of counsel. His practice involves all aspects of the law, including general

civil and criminal litigation, personal injury, family law and business transactions. Mr. Hayes was previously in private practice in Tulsa, and he graduated from the OU College of Law in 2005.

Andrews Davis announces that **Ryan J. Duffy** has joined the firm as an associate. He brings experience in the areas of estate planning and administration, tax, corporate organization, transactional law, real estate, commercial litigation and probate. Mr. Duffy received his undergraduate degree from OSU and his law degree from the OU College of Law.

Mee Mee Hoge & Epperson PLLP of Oklahoma City announces **Joshua C. Greenhaw** as a partner. Mr. Greenhaw graduated from the OU College of Law in 2001. His practice focuses on mineral law, commercial and real property litigation, civil litigation, real property development and title law.

David A. Trissell has recently been appointed as FEMA/DHS Attaché to the U.S. Missions to the European Union and NATO in Brussels, Belgium. Previously FEMA chief counsel, Mr. Trissell will be advising the ambassadors and collaborating with the EU Commission, NATO and member countries in areas of terrorism/disaster preparedness and planning, as well as issues of mutual aid and coordination of humanitarian assistance and crisis response within the EU. Mr. Trissell received his J.D. from OU in 1992.

Paul E. Hamilton has opened a new office. The Law Office of Paul E. Hamilton PLLC is located at 1341 W. Mockingbird Lane, Suite

960W, Dallas, Texas, 75247. Mr. Hamilton has also been appointed alternate municipal judge for the city of Grand Prairie, Texas.

Kevin Blaney and **Chris Tweedy** announce the formation of their law firm, Blaney and Tweedy PLLC, located at 204 N. Robinson, Suite 2601, Oklahoma City, 73102; (405) 235-8445. The firm's practice is concentrated in the areas of banking, real estate, commercial transactions, business sales and acquisitions, healthcare, technology and business litigation. Mr. Blaney's e-mail address is kblaney@btlawokc.com and Mr. Tweedy's e-mail address is ctweedy@btlawokc.com.

Walker, Ferguson and Ferguson of Oklahoma City announces that **Erin Blohm** has joined the firm as an associate. Ms. Blohm earned a B.A. in history from Arizona State University, graduating magna cum laude. She earned her law degree from OU in 2009. Ms. Blohm will practice in the area of insurance defense.

Hert, Baker & Koemel PC of Stillwater has changed its name to Hert, Baker, Koemel & Ihrig PC. **Robert L. Hert, William J. Baker, John E. Koemel** and **Andrew M. Ihrig** are members of the firm. **Tina M. Koemel** and **Jon C. Ihrig** are of counsel. The firm remains located at 222 E. Seventh Ave., Stillwater, 74074; (405) 377-8644.

Jay Walters has returned to Fellers Snider law firm as director and shareholder. Mr. Walters represents businesses, individuals, and tribal governments in federal and state courts and before arbitration panels in disputes involving securities fraud,

gaming, intellectual property, antitrust, products liability, trade secrets and other business-related controversies.

Crowe & Dunlevy recently named **Margaret Millikin** and **Geren Steiner** shareholders of the firm. Ms. Millikin is a director and shareholder in the firm's Tulsa office, practicing intellectual property law, including IP transactional matters and litigation. Mr. Steiner serves as a director and shareholder in the firm's Oklahoma City office, where he focuses his practice in the area of commercial litigation, including real estate, banking, products liability and antitrust litigation.

J. Barrett Ellis has joined McAfee & Taft in its Oklahoma City office. Mr. Ellis is a corporate lawyer who represents financial institutions, including banks, bank holding companies, savings associations and lenders in regulatory and transactional matters. He earned his J.D. from Harvard Law School. Following graduation, he practiced for more than three years in the Chicago office of an international firm before joining McAfee & Taft.

At The Podium

Daniel Howard of Edmond was a presenter for the inaugural Veterans Entrepreneurship Program in February, hosted by the Riata Center for Entrepreneurship at OSU's Spears School of Business. Mr. Howard presented on the subject "Legal Issues for the Entrepreneur."

Chris A. Paul of Tulsa spoke at the Building Owners and Managers Association of Tulsa in April on "Records and E-mail." Also last month, Mr. Paul spoke to the TU cyber security faculty and students about "SCADA, Security Control Systems and Cyber Law."

Amir Farzaneh of Oklahoma City was program co-chair for the Texas/New Mexico/Oklahoma American Immigration Lawyers Association annual spring conference, held last month in Austin, Texas.

John D. Rothman of Tulsa contributed to the CLE portion of the Association of Attorney-Mediators Annual Meeting and Advanced Attorney-Mediator Training held in March in St. Louis, Mo. He covered the topic of

"Marketing Your Mediation Practice."

Lynn C. Rogers spoke at the city of Norman public forum series on sustainable water resources on the "Use of Public Trusts to Collectively Acquire and Deliver Water Resources" last month. Also last month, he spoke at the spring workshop of the Oklahoma Association of Municipal Attorneys on "The Role of Public Trusts in Public Finance."

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:

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E-mail: barbriefs@okbar.org

Articles for the Aug. 7 issue must be received by July 12.

Robert (Bob) W. Brown of Kansas City, Mo., died April 21. He was born June 8, 1932, in Tulsa. He graduated from Tulsa Central High in 1950. He attended Westminster College and later graduated from OU with B.A. degrees in political science and history and an LL.B. from the OU College of Law. Following passage of both the Missouri and Oklahoma bar exams, he practiced law at the Hoskins, King Law Firm in Kansas City, where he specialized in civil and criminal tax, business organization and business and estate planning. He was an Eagle Scout and a lifelong member of the OU Foundation and Optimist International. He worked in the office of the staff judge advocate at Ft. Bliss, Texas, where he conducted a tax clinic for more than 4,000 clients and headed the tort claims office. He was a patron of children's issues and was president of Johnson County Girls Home. Memorial contributions may be made to the Crittenton Center, 10918 Elm Ave., Kansas City, Mo., 64134; or St. Joseph Medical Center, at 1000 Carondelet Dr., Kansas City, Mo., 64114.

John D. Cheek of Oklahoma City died April 12. He was born Aug. 7, 1920, in Oklahoma City. He attended Edgemere Grade School, Harding Junior High, Classen Senior High, Westminster College in Fulton, Mo., and the OU School of Arts and Science. **Mr. Cheek entered active military service as a field artillery officer during WWII.** He returned to the United States in 1946. He received a B.A. in 1942, then entered the OU College of

Law, receiving an LL.B. degree and a J.D. in 1947. He practiced civil law for 55 years with his brothers, under the firm name Cheek, Cheek & Cheek. He organized and operated several businesses, including City Parking Co., Federal Aviation Title & Guaranty Co., Federal Aviation Title Insurance Agency, Oil and Gas Minerals Associates, and Cheek Properties LLC. He was a charter member of Westminster Presbyterian Church, where he served as deacon, elder, member of the board of trustees, first Boy Scout master of the Westminster Boy Scout troop and member of the first board of directors of Westminster Day School. Memorial donations may be made to Westminster Presbyterian Church, 4400 N. Shartel, Oklahoma City, 73118; or Westminster College, 501 Westminster Ave., Fulton, Mo., 65251.

Arthur Leroy Ellsworth of Oklahoma City died Dec. 23, 2009. He was born March 2, 1917, in El Reno. He was a 1938 summa cum laude graduate of OU, where he captained the basketball team and was president of Alpha Tau Omega fraternity. In 1941, he graduated from the OU College of Law. A Rhodes Scholar nominee, he was admitted to the master of laws program at Harvard Law School and was enrolled there in late 1941. **Pearl Harbor activated his ROTC status as an officer in the U.S. Army. He served in Washington, D.C. at the Pentagon, and in England and Normandy. He went through the European Campaign as a Major in General George S. Patton's Third Army as part**

of the military government of cities in France as they were liberated. After the war, he returned to Oklahoma City and became a CPA. He then practiced tax and estate law for more than 60 years. An avid camper, hiker and explorer of innumerable "back roads," he and his wife traveled for decades to international destinations. He was happiest when he was working on a project, either at his own house or that of his children.

Isaac Sheppard Funderburk of Osage Beach, Mo., died Jan. 13. He was born Feb. 8, 1972. He graduated from OCU School of Law in 2001.

Carl W. Jones of Bartlesville died March 27. He was born Aug. 9, 1916, in Austin, Texas, where he graduated from Austin High School in 1933 and from the University of Texas in 1937. **His Texas National Guard unit was mobilized in July of 1940, putting on hold his last year of law school. He served in the 57th Cavalry Brigade until August of 1941, when he was accepted into the Army Air Corps. Mr. Jones was commissioned as a Second Lieutenant upon graduation from navigator's school.** He later began his law career in Ft. Worth, Texas, but was soon hired to open a new office for Phillips Petroleum Co. in Midland, Texas. He was transferred to Bartlesville in 1963. He retired as senior counsel of Phillips Petroleum Co. in 1979. He was an avid fisherman, hunter and shooter.

David Lewis Medford of Oklahoma City died March 11. He was born June 9, 1953, in Oklahoma City. He was a member of the band

IN MEMORIAM

"Fingers" and playing the guitar was his passion. He earned his law degree from OCU in 1990.

Walter W. Mounts of Oklahoma City died March 14. He was born Oct. 1, 1926, in Clinton. Mr. Mounts graduated from OU and passed the bar exam in 1956. He retired as a clerk with the U.S. Bankruptcy Court in 1990. **He was a veteran of the Korean Conflict.** He was a faithful member of Mayfair United Methodist Church.

Robert Harold Tips of Tulsa died May 1. He was born Sept. 19, 1935, in San Angelo, Texas. **Mr. Tips was a retired Brigadier General in the U.S. Army Judge Advocate General's Corps.** He graduated from Will Rogers High School in Tulsa and received his B.A. and J.D. from OU. He was named assistant city prosecutor for Tulsa in 1967 and was chief of the trial division until 1973.

Until the time of his death, he practiced privately. He was former president of the congregation at First Lutheran Church in Tulsa and former president of the Tulsa Title and Probate Lawyers Association. He enjoyed fishing, hunting, golf, woodturning and studying history. Memorial donations may be made to the Akdar Shrine Transportation Fund, 2808 S. Sheridan, Tulsa, 74129.

Douglas Michael Todd of Oklahoma City died March 31. He was born Dec. 12, 1967, in Rockledge, Fla. Mr. Todd was a graduate of Kilgore High School in Texas. He then spent two years at Kilgore Junior College before attending the University of Texas at Tyler. He graduated from OCU School of Law, passing the Oklahoma bar exam in August 1993. He then went to work for Rainey Ross Rice and Binns law firm. He later worked for Magistrate Judge Sam Joyner at the Tulsa

Federal Court System, and in 2002 he moved to Oklahoma City to practice law at the Phillips Murrah law firm. Memorial contributions may be made to Bridge Creek Public Schools, c/o Doug Todd Memorial, 2209 E. Sooner Rd., Blanchard, 73010.

Paul Edward Vestal Sr. of Tulsa died March 31. He was born Sept. 11, 1928, in Tulsa. A longtime Tulsa attorney, he most recently served as the Grove city prosecutor, where he lived for the past 15 years. He graduated from Union Consolidated School in 1946 and the TU College of Law in 1968. He was best known for his Christian faith and desire to share it with others. Memorial donations may be made to the American Heart Association, 5700 N. Portland Ave., Ste. 203, Oklahoma City, 73112; or Gideon's International, P.O. Box 140800, Nashville, Tenn., 37214.

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DELAWARE RESOURCE GROUP, A BUSEY GROUP COMPANY, seeks candidates for corporate counsel to assist with employment law, government regulations, contracts, corporate law, teaming agreements and coordination with outside counsel. Successful candidate must be flexible, adaptable and able to multi-task in a fast-paced environment. Business development capabilities with corporate team are a plus. Northwest OKC location, company paid benefits and salary based on experience. Candidates should submit resume, cover letter, and at least 2 writing samples by e-mail cbusey@buseygroup.com or fax (405) 721-7779, to the attention of Cathy Busey.

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Reflection on a Basic Economic System

By Matt Kane and Reggie Whitten

It is fairly easy as Americans to forget how great both our country and economy are even in its recent current financial climate, at least until you venture outside the U.S. and travel nearly halfway around the world to a dry, land-locked country in eastern Africa. Recently, several members of the Oklahoma bar, along with several doctors, engineers, journalists and four NFL football players (Adrian Peterson, Tommie Harris, Roy Williams and Mark Clayton) took part in a mission trip to northern Uganda. As a part of PROS FOR AFRICA, an international nonprofit organization, five bar members (Reggie Whitten, Mike Hinkle, John Hargrave, Matt Kane and Jay Mitchel) spent a week in northern Uganda providing destitute children with food, water, medical care and most importantly — love.

There one finds a land and people marred by the ravages of war and its companions — disease, famine and despair. Concerns there are sharply focused not so much on the nuances of a commercial system but the mere availability of particular products.



Sister Rosemary

Any water, let alone clean water, is worth a several hours walk. Food is dependent on the weather, and variety is not an option. Primitive medical care can only be found at a rundown building disguised as a hospital about 70 kilometers south on a desolate dirt road. PROS FOR AFRICA set out to alleviate some of these concerns, even if only for a short time.

On the heels of one of Africa's longest standing conflicts where thousands have perished and more than 20,000 children have been kidnapped, it is not as if the Ugandan people are without a desire to enhance the stability of their country's economy. In a remote area near the

border with Sudan, harshly afflicted by murder, maiming, kidnapping and rape at the hands of the Lord's Resistance Army, a spark of hope endures. Sister Rosemary Nyirumbe, an unassuming Catholic nun, who can best be described as an oasis in a vast desert of violence and poverty, directs the St. Monica Girls' Tailoring Centre in Gulu, Uganda.

At great personal risk, Sister Rosemary takes in young women who have been abducted, raped and even impregnated by LRA soldiers during the long-standing conflict. Not only does she provide these young women with necessary life skills and vocational training, but more importantly, she instills them with a sense of hope and self-worth. By helping them find an income-making activity, they become self-reliant.

Spend less than a minute with Sister Rosemary and you will have no doubts that each and every girl who walks into St. Monica with little more than the clothes on her back will leave with training she can

use to support herself and her children, if need be. Equally, if not more important, is the mindset that each girl gains from Sister Rosemary. A sense of love and accomplishment coupled with a notion that their life has meaning. What could be better? Along the way, she and the young women at St. Monica make necklaces of colorful beads from recycled newspaper, construct purses on foot-powered, treadle sewing machines, cater meals for various events and bake cakes that are legendary throughout Uganda — all of which raise funds to support the school's activities.

As each student embraces Sister Rosemary's teachings, the people of northern Uganda move one step closer to lasting peace and economic prosperity. For those of us fortunate enough to witness St. Monica first hand, it serves as a reminder that, with an open heart, a bit of forethought and elbow grease heavily applied, each of us can make a real and lasting difference.

Mr. Kane and Mr. Whitten practice in Oklahoma City.



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