

# WIT **JOURNAL**

Volume 81 ♦ No. 27 ♦ October 9, 2010

## PROBATE & ESTATE PLANNING

Last Will  
AND TESTAMENT

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portion of "my Trustees"

the Executive and Trustee of the person or persons from  
his Will and of the trusts created under this Will as

\_\_\_\_\_

is the authority to act in that capacity

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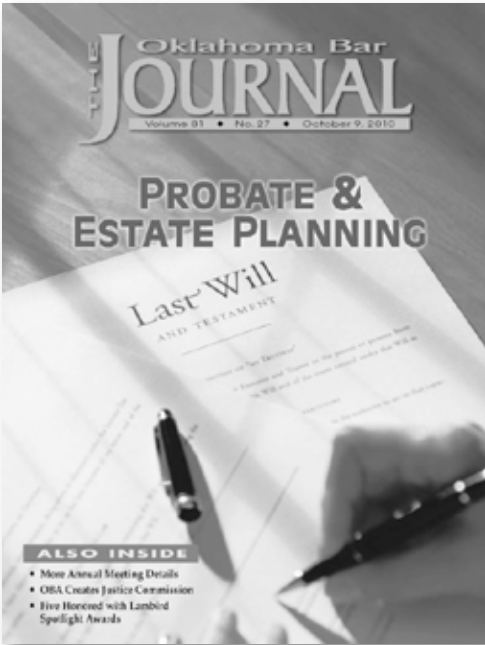
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**PROBATE & ESTATE PLANNING**

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PHOTO HIGHLIGHTS:  
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# Normandy, D-Day and a Farmhouse

By Allen Smallwood

I have been accused of having an obsession with the Second World War. My excuse is that having been born exactly two years after it was over and having as a first memory of television watching an Army staff sergeant (whose name escapes me at this point) describing the epic battles of that conflict in an early '50s television program called "The Big Picture," I grew up actually believing that everyone dressed in shades of black, gray and white during that war. I also remember my father pointing out certain friends who were veterans of that war and at that time were still vibrant young men in their mid-30s. The ravages of time are sad. With that history, we scheduled a family vacation with friends in Normandy, France, this summer.



*Allen M. Smallwood*

President Smallwood  
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My wife, Barbara, and our second granddaughter, Khloe, spent 60 days in a farmhouse in Normandy. It was located a few miles inland from the point on the coast where Utah and Omaha Beaches joined as the designated invasion locale on June 6, 1944. I, along with several members of our association, met there on July 4, 2010, and enjoyed a day-long tour of Utah and Omaha beaches, as



*American Cemetery in Normandy, France*

well as the American Cemetery at Colleville-sur-Mer and other battlefield spots critical to the Normandy Invasion on June 6, 1944.

I thought I knew quite a bit about the invasion, but our tour guide, a Brit who has lived in Sainte Mère Église, Normandy, for the last 20 years, possessed encyclopedic knowledge of virtually everything that happened on that fateful morning. After viewing the cliffs at Pointe du Hoc, where the 2nd Ranger Battalion, in the process of losing half of its numbers, finally scaled the 200-foot cliffs and silenced the guns that had been previously removed from the point in anticipation of the invasion, we marveled at the thought that only a handful of the tens of thousands of men involved in this operation had previously seen combat.

The most moving part of the tour was standing on the eastern-most edge of Omaha Beach and looking several thousand yards to the east of the most picturesque and beautiful sandy beach on a warm summer afternoon you could

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# EVENTS CALENDAR

## OCTOBER 2010

- 12 **Death Oral Argument**; Kevin Ray Underwood – D-2008-319; 10 a.m.; Court of Criminal Appeals Courtroom
- 14 **OBA 2011 Budget Public Hearing**; 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- 15 **OBA Board of Governors Meeting**; 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000  
**Association of Black Lawyers Meeting**; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776  
**Lawyers Helping Lawyers Assistance Program Training**; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donita Douglas (405) 416-7028  
**OBA Military Assistance Task Force Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Dietmar Caudle (580) 248-0202
- 18 **OBA Alternative Dispute Resolution Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 20 **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
- 21 **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 OSU Tulsa; Contact: Jack Brown (918) 581-8211
- 22 **OBA Communications Committee Meeting**; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Douglas Dodd (918) 591-5316
- 23 **OBA Young Lawyers Division Board of Directors Meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595
- 27 **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

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## Estate Tax Issues in 2010: Still Crazy after all these Years

By Henry G. Will

Our saga began in 2001 when EGTRRA<sup>1</sup> was passed by Congress and signed by President George W. Bush. Everyone knew the federal estate and generation-skipping transfer (GST) taxes expired on Dec. 31, 2009, so everyone thought Congress would enact a permanent fix effective in 2010. Over the past 10 years under EGTRRA, the federal estate tax went through a series of changes so that in 2009 the exemption amount (unified credit) for each decedent was \$3.5 million and the top estate tax rate was 45 percent. Most practitioners felt confident that this tax regime would be made permanent by Congress for 2010 and the following years, with a few tweaks, of course. However, the extremely partisan Congress did not pass legislation in 2009 to stabilize the estate tax. On Jan. 1, 2010, the “impossible”<sup>2</sup> happened: The federal estate and GST taxes expired and the estate tax world became crazier than ever.

Well into the fourth quarter of 2010 there is no clarity on federal estate and GST tax law from Congress. While estate planners have become familiar with the law now in effect in 2010 and that which is on the books for 2011, much interpretation of existing law and speculation about proposed legislation has left us very uncertain about how to guide our clients. It is still crazy after all these years.

This article will review the estate tax and related laws in 2010, some of the issues raised by the status of the law in 2010 and the sunset of EGTRRA at the end of 2010, the prospect of pre-EGTRRA (*i.e.*, 2001) law returning

in 2011, practitioner responses to the current situation and prospects for legislation.

### ESTATE TAX LAW IN 2010

In 2010, no federal estate tax applies to estates of decedents dying after Dec. 31, 2009<sup>3</sup> (although a retroactive estate tax could be passed), no GST tax applies to generation-skipping transfers made after Dec. 31, 2009<sup>4</sup> (although a retroactive GST tax could be passed), and a modified carryover basis (instead of a stepped up basis) applies to assets of decedents dying in 2010.<sup>5</sup> The federal gift tax continues to apply to lifetime transfers made during 2010, subject to a lifetime exemption of \$1 million and a per

donee exclusion of \$13,000. Importantly, the gift tax rate in 2010 is 35 percent,<sup>6</sup> but this rate will change to a top rate of 55 percent in 2011.<sup>7</sup> Will Congress in 2010 enact estate and GST taxes retroactive to the beginning of 2010, or will any tax adopted be prospective only? If estate and GST taxes are adopted (whether effective in 2010 or 2011), will they be similar to what was in effect at the end of 2009 with a \$3.5 million applicable credit amount and a top tax rate of 45 percent, or will there be significant modifications? Will Congress eliminate the federal estate and GST taxes altogether? Will Congress let the 2001 estate tax regime scheduled to become applicable in 2011 as is now provided by the sunset rules of EGTRRA?<sup>8</sup>

Publicity about recent deaths of wealthy Americans in 2010 keeps speculation alive about the estate tax.<sup>9</sup> However, most planners have stopped guessing what Congress will do because they were surprised (if not shocked) when the 2009 estate and GST tax laws were allowed to expire with no successor estate or GST tax for 2010.<sup>10</sup> Many professionals in the estate planning field have called for Congress to act, including some who appeared before Congress urging action to provide clarity in this area. For example, the Iowa Bar Association wrote a letter with over 1,000 lawyers' signatures to Sen. Grassby urging legislation and the American College of Trust and Estate Counsel (ACTEC) detailed the many issues that have surfaced and how they could be corrected<sup>11</sup> and circulated the list to congressional staff members.

#### **ISSUES IN 2010 CAUSED BY ONE YEAR ESTATE AND GST TAX SUSPENSION AND THE SUNSET PROVISIONS OF EGTRRA**

Estate planners have struggled throughout 2010 to identify and answer many questions raised by EGTRRA's provisions for suspension of estate and GST tax laws, the sunset of EGTRRA on Dec. 31, 2010, and the uncertainty about future laws that may replace those now on the books. Early in 2010, ACTEC identified many important issues raised by the one-year suspension of federal estate and GST taxes. See Exhibit A hereto for a complete list of the issues summarized by the Washington Affairs Committee of ACTEC for congressional staff members on Feb. 22, 2010.<sup>12</sup> Of particular importance are problems with the GST tax (assuming it is reinstated) because events occurring in 2010 that are not taxable can have a dramatically adverse

GST tax impact years later.<sup>13</sup> Some counsel have suggested that gifts to grandchildren in trust be avoided in 2010, or that gifts be made to donor's children, who in turn would fund a trust for their own children in order to avoid the donor's "transfer" to a GST trust. Other anomalies possibly resulting from the sunset provision of EGTRRA include the following:

- (a) Gifts deemed to have been completed in 2010 because of Code Section 2511(c) under the law as written must be disregarded if EGTRRA is treated as if it had never been enacted: Will future gift tax calculations need to take the 2010 transfers into account under Section 2502(a)?
- (b) If carryover basis applies in 2010 but is to be treated as if it had never been enacted due to the sunset provisions of EGTRRA Section 901, will a sale of the property after 2010 use carryover basis or stepped-up basis to determine gain or loss for income tax purposes?

#### **GUIDANCE IN 2010**

In 2010, estate planners have been guided by numerous estate planning articles, books and seminars that focus on the current unique situation. Two seminal documents published early in 2010 have provided excellent guidance for estate planners this year.<sup>14</sup> Using this guidance, we now are notifying clients of the uncertain state of affairs, reviewing documents for hidden traps such as tax-based formula clauses for funding marital and by-pass trusts and other provisions in wills and trusts that might have unintended consequences depending on how the tax law applies upon a client's death, and counseling against transfers to GST trusts. In 2010, estate planners are trying to more clearly specify in wills and trusts how distributions are to occur if no estate or GST tax applies to the decedent's estate and to draft flexible provisions that allow an estate plan to work for a client whose death occurs in 2010 or later in spite of the current uncertainty of the tax laws. Other popular techniques include making lifetime gifts to QTIP trusts and postponing the QTIP election until there is more clarity, making lifetime gifts at lower gift tax rates in 2010, using QTIP trust marital deduction provisions in testamentary documents so that elections can be made after death if an estate or gift tax continues and an election is needed to qualify for the marital deduction, disclaimer arrange-

ments in testamentary documents, and trust protectors with powers to amend. In addition, sophisticated lifetime transfers are very popular, such as those to charitable foundations and to younger generation beneficiaries, including transfers by way of GRATs, CLATs, CRUTs and sales to defective grantor trusts, when these seem appropriate for the client. Past midyear 2010, we continue to use valuation discounts for minority interests and lack of marketability.

To aid the interpretation of documents prepared before 2010 by decedents whose death occurs in 2010, several states (but not Oklahoma) have adopted special statutes that establish presumptions for interpretation.<sup>15</sup>

### **NO OKLAHOMA STATE DEATH TAX**

Oklahoma decedents who die in 2010 (and later) are spared tax and complications because the Oklahoma Estate Tax was repealed effective Jan. 1, 2010.<sup>16</sup> However, other state death taxes may apply depending on the situs of the decedent's property, thereby giving rise to questions about computation of the estate tax in such other jurisdictions when no QTIP election for federal purposes is allowed due to the absence of a federal estate tax.<sup>17</sup>

### **LAW TO BECOME APPLICABLE IN 2011**

If EGTRRA "sunssets" as now written, in 2011, the following taxes will be in effect:<sup>18</sup>

- 1) A federal estate tax will apply to decedents' estates subject to a \$1 million unified credit and a top tax rate of 55 percent (60 percent for transactions between \$10 million and \$17,184,000);
- 2) Generation-skipping transfers made during lifetime or by a decedent at death will be taxed at a rate of 55 percent (60 percent for transfers between \$10 million and \$17,184,000) with an exemption of \$1 million adjusted for inflation;
- 3) The federal gift tax will apply to lifetime transfers as it does in 2010 but with a top tax rate of 55 percent (60 percent for transfers between \$10 million and \$17,184,000) and the \$1 million lifetime exemption and the \$13,000 per donee exclusion will continue to apply;
- 4) The estate and gift tax systems will be unified as they were in 2001; and

- 5) Carryover basis will expire and stepped-up basis will apply again as before 2010.

Although law to this effect has been enacted by Congress, it is anyone's guess whether such law will remain in effect.

### **THE BIG QUESTION: WHAT WILL HAPPEN TO THE FEDERAL ESTATE AND GST TAXES?**

What we don't know is how long the federal estate, GST and gift tax regimes scheduled to become effective in 2011 will remain in place or whether such taxes will be applicable at all in 2010 and thereafter. Another very serious question is whether Congress will "fix" the issues created by EGTRRA.<sup>19</sup>

#### *The Obama Administration Proposals*

President Obama's 2010 budget assumes that a federal estate tax will be in effect similar to that which existed in 2009. In addition, the Obama Administration announced in the Greenbook for 2009 three proposals that would affect federal estate and gift taxation. These appear in H.R. 436 as proposed by Rep. Pomeroy in 2009 and in S. 3533 as proposed by Sen. Bernie Sanders in 2010 and may be expected in regulations under Code Section 2704(b) and other proposed legislation. The proposals are stated as follows in the 2009 Greenbook:<sup>20</sup>

- 1) **Require Consistency in Value for Transfer and Income Tax Purposes.** "This proposal would require both consistency and a reporting requirement. The basis of property received by reason of death under section 1014 would have to equal the value of that property for estate tax purposes. The basis of property received by gift during the life of the donor would have to equal the donor's basis determined under section 1015. This proposal would require that the basis of the property in the hands of the recipient be no greater than the value of that property as determined for estate or gift tax purposes (subject to subsequent adjustments). A reporting requirement would be imposed on the executor of the decedent's estate and on the donor of a lifetime gift to provide the necessary information to both the recipient and the IRS. A grant of regulatory authority would be included to provide details about the implementa-

“The basis of property received by reason of death under section 1014 would have to equal the value of that property for estate tax purposes.”

tion and administration of these requirements, including rules for situations in which no estate tax return is required to be filed or gifts are excluded from gift tax under section 2503, for situations in which the surviving joint tenant or other recipient may have better information than the executor, and for the timing of the required reporting in the event of adjustments to the reported value subsequent to the filing of an estate or gift tax return. The proposal would be effective as of the date of enactment.”

**2) Modify Rules for Valuation Discounts.**

“This proposal would create an additional category of restrictions (disregarded restrictions) that would be ignored in valuing an interest in a family-controlled entity transferred to a member of the family if, after the transfer, the restriction will lapse or may be removed by the transferor and/or the transfer’s family. Specifically, the transferred interest would be valued by substituting for the disregarded restrictions certain assumptions to be specified in regulations. Disregarded restrictions would include limitations on a holder’s right to liquidate that holder’s interest that are more restrictive than a standard identified in regulations. A disregarded restriction also would include any limitation on a transferee’s ability to be admitted as a full partner or holder of an equity interest in the entity. For purposes of determining whether a restriction may be removed by member(s) of the family after the transfer, certain interests (to be identified in regulations) held by charities or others who are not family members of the transferor would be deemed to be held by the family. Regulatory authority would be granted, including the ability to create safe harbors to

permit taxpayers to draft the governing documents of a family-controlled entity so as to avoid the application of section 2704 if certain standards are met. This proposal would make conforming clarifications with regard to the interaction of this proposal with the transfer tax marital and charitable deductions. This proposal would apply to transfers after the date of enactment of property subject to restrictions created after Oct. 8, 1990 (the effective date of section 2704).”<sup>21</sup>

**3) Require Minimum Term for Grantor Retained Annuity Trusts (GRATs).**

“This proposal would require, in effect, some downside risk in the use of this technique by imposing the requirement that a GRAT have a minimum term of 10 years. Although a minimum term would not prevent “zeroing-out” the gift tax value of the remainder interest, it would increase the risk of the grantor’s death during the GRAT term and the resulting loss of any anticipated transfer tax benefit. This proposal would apply to trusts created after the date of enactment.”

*Proposed Legislation Regarding the Estate Tax*

In January 2009, Sen. Pomeroy started the process of legislation that would “fix” the estate tax by introducing H.R. 436, the “Certain Estate Tax Relief Act of 2009.” H.R. 436 would continue the federal estate and GST taxes in 2010 as they were at the end of 2009 and would repeal the carryover basis rules. Subsequently, many estate, gift and GST tax bills have been introduced in Congress and it is likely that many more bills affecting the federal estate, gift or GST taxes will be introduced for consideration in 2010. Bills and resolutions in the U.S. Congress can be found on the Internet at [www.govtrack.us](http://www.govtrack.us). Following are the principal bills proposed as of the date of preparation of this article that would affect estate planning.

**A. H.R. 4154** “Permanent Estate Tax Relief for Families, Farmers and Small Businesses Act of 2009.” This bill was passed by the House of Representatives on Dec. 31, 2009 and sent to the Senate on Jan. 20, 2010. H.R. 4154 would:

- 1) Repeal carryover basis (by repealing Subtitles A and E of title V of EGTRRA);

- 2) Retain the estate tax (by repealing the Sunset provision in Section 901 of EGTRRA);
- 3) Establish a \$3.5 million applicable exclusion amount (by amending section 2010(c) of the Code); and
- 4) Establish a 45 percent maximum estate tax rate (by amending section 2001(c) of the Code).

H.R. 4154 also would establish the "Statutory Pay-As-You-Go Act of 2009." However, on Feb. 12, 2010, President Obama signed H.J. Res. 45 which increased the federal debt ceiling to \$14.3 trillion and contains Pay-As-You-Go rules. Accordingly, the Pay-As-You-Go issue has been separated from proposed estate tax legislation.

B. **S. 3533 "Responsible Estate Tax Act."** This bill was introduced by Sen. Bernie Sanders (I-VT) on June 24, 2010. If adopted, it would:

- 1) Repeal carryover basis (by repealing subtitles A and E of title V of EGTRRA);
- 2) Reinstate estate and generation-skipping taxes (by repealing the Sunset provisions in section 901(a) of EGTRRA)
- 3) Establish a \$3.5 million unified credit against the estate tax;
- 4) Establish the following estate tax rates on estates over \$3.5 million:
  - 45 percent on assets over \$3.5 million up to \$10 million;
  - 50 percent on assets over \$10 million up to \$50 million; and
  - 55 percent on assets over \$50 million.
- 5) Impose a 10 percent surtax on assets in excess of \$500 million;
- 6) Retroactively reinstate the estate tax back to Jan. 1, 2010;
- 7) Disallow minority interest discounts for "non-business" assets; and
- 8) Provide additional relief for farmers, allowing them to reduce the value of their farmland by \$3 million.

In addition, S. 3533 contains the following provisions to enact the Obama Administration proposals:

1) **Grantor Retained Annuity Trusts: S. 3533** would require GRATs to (a) have at least a 10-year term, (b) prevent annuity payment amounts from decreasing during the first 10 years and (c) include remainder interests with a value greater than zero determined at the time of transfer.

2) **Basis Information: S. 3533** would enact new Code section 6035 that would require (a) the executor of each estate to furnish each person acquiring property from the decedent a statement of the value of the property, and (b) the person who gifts property and is required to file a gift tax return to furnish the donee a statement of the adjusted basis of the property, the fair market value of the gift, the amount of gain or loss recognized by the grantor on a transfer to a trust and the amount of gift tax paid by the transferor. In addition, (c) Section 1014 would be amended to require the basis to be used by the acquirer of the property consistently with the information reported to such person under section 6035.

3) **Valuation Rules for Certain Transfers of "Non-business Assets": S. 3533** would not allow valuation discounts with respect to "non-business assets," which are defined generally as any asset not used in the active conduct of a trade or business. Passive assets are defined to include several classes of property, including cash, debt instruments, commodities, collectibles and assets which produce royalty income (other than a patent, trademark or copyright). Exceptions are made for certain passive assets including real property used in the active conduct of a real property trade or business in which the transferor materially participates.

*Other Notable Legislative Proposals affecting Estate, Gift or GST Taxes*

C. **Tax Extenders: H.R. 4213**, the "American Jobs and Closing Tax Loopholes Act of 2010," included several tax extenders including one for IRA charitable rollovers, but it failed to pass the Senate.



D. **GRAT Limitations.** Several bills include provisions similar to those in S. 3533 to amend Code §2702's definition of "qualified interests" and provide that a retained annuity interest will only be a qualified interest if the term of the interest is "not less than 10 years," the annuity payments don't decrease from one year to the next, and the remainder interest in the GRAT is greater than zero.

E. **Possible Vehicle for an Estate Tax Bill:** H.R. 5486, the "Small Business Jobs Tax Relief Act of 2010" was passed by the House on June 15, 2010. The bill was combined with H.R. 5297, the "Small Business Lending Fund Act of 2010" and has been approved by the House. The combined bill has been sent to the Senate as H.R. 5297, the "Small Business and Infrastructure Jobs Tax Act of 2010." It may become a vehicle for estate tax legislation.

F. **Discount Limitations.** Minority interest and lack of marketability discounts are targeted in the provisions of H.R. 436 and S. 3533 and may indicate what is to come.

G. In July, Sens. Kyl (R-AZ) and Lincoln (D-AR) indicated they might introduce a bill in the Senate to establish an estate tax with a \$3.5 million exemption that will increase over time to \$5 million, and a top tax rate of 45 percent. Commentators did not expect it to succeed.

## PREDICTION

In the fourth quarter of 2010, it is dangerous to make predictions, but the political situation in Washington, D.C. leads to a logical one: After the 2010 elections in November, the "lame-duck" Congress may have the fortitude to continue the major provisions that were in the 2009 law by enacting something like the Sanders bill (S. 3533) for a temporary period of two or three years. That would enable Congress to avoid "raising taxes" by the return of pre-EGTRRA law when EGTRRA sunsets and to delay final decisions about a highly emotional topic until after the presidential election in 2012.

While 2010 has been challenging, the uncertainty and multiple legislative possibilities have caused us to focus on facets of federal estate, GST and gift tax law we have not closely reviewed before. In order to serve our clients

well, it is absolutely essential that we remain alert. Stay tuned for interesting developments the rest of this year.

1. EGTRRA means Pub. L. No. 107-16, 107th Cong. 1st Session (June 7, 2001), known as the "Economic Growth and Tax Relief Reconciliation Act of 2001."

2. Some of the country's leading lawyers and commentators wrote a comprehensive article in February 2010 entitled, "The Impossible Has Happened: No Federal Estate Tax, No GST Tax, and Carryover Basis for 2010," Jonathan G. Blattmachr, Mitchell M. Ganns, Howard M. Zaritsky and Diana S.C. Zeydel in *Journal of Taxation*, February 2010, at 68ff (hereinafter cited as Blattmachr, et al 2010 *JT* article").

3. EGTRRA in Section 501(a) added §2210 to the Internal Revenue Code of 1986, as amended (the Code) that provides "(a) in general...this chapter (Chapter 11) shall not apply to estates of decedents dying after Dec. 31, 2009."

4. Code Section 2664, added by EGTRRA, states that the GST tax rules do not apply to "generation-skipping transfers made after Dec. 31, 2009."

5. Under EGTRRA, Code Sections 1014(f) and 1022(a) give a person who receives property from a decedent who dies during 2010 an adjusted basis equal to the lesser of the fair market value of such property on the decedent's death or the adjusted basis of the property in the hands of the decedent, subject to two basis adjustments: a \$1.3 million aggregate basis increase and the \$3 million "spousal property basis increase."

6. The 35 percent gift tax top rate was imposed by EGTRRA.

7. Fifty-five percent was the top gift estate and GST tax rate before EGTRRA was enacted. The sunset provisions of EGTRRA Section 901 have the effect of restoring the tax rates in effect before EGTRRA was enacted in 2001.

8. Section 901 of EGTRRA is referred to as the "sunset provisions of EGTRRA."

9. Some interesting cases have been noted in the press. The estate of Donald Duncan, a Texas billionaire who died in 2010 with an estate estimated to be \$9 billion might escape estate taxes altogether because of the "fortuitous" timing of his death, although (absent a retroactive tax) assets in his estate will be subject to the modified carryover basis which could result in large income taxes when his property is sold by his heirs. George Steinbrenner's death in July 2010 raised some similar observations.

10. "No one can predict accurately what Congress will do in 2010 regarding the estate and GST taxes...Anyone who claims to know what Congress will do should be considered a dangerously unreliable source of information." Howard M. Zaritsky, *Practical Estate Planning in 2010*, Thomson Reuters/WG&L, published in March 2010 (hereinafter cited as Zaritsky, *Practical Estate Planning*).

11. ACTEC prepared a list of specific proposals to correct questions left open and confusing in the current law. See "Addressing Technical Issues Relating to the Estate and GST Taxes," June 18, 2010, at the ACTEC public website, ACTEC.org under "Legislative and Regulatory Analysis." Also, see Howard M. Zaritsky, "Practice Alert: GST Planning in 2010 - Another Fine Mess They've Gotten Us Into." *RIA Planners Alert*, July, 2010, pp 2-3.

12. "Issues Raised by the One-Year Suspension of the Estate and GST Taxes," Feb. 22, 2010. Exhibit A hereto is a reproduction of the ACTEC summary of issues which can be found on the ACTEC public website at ACTEC.org.

13. Zaritsky notes that direct-skip transfers in trust in 2010 could lose the benefit of the move-down rule of Code Section 2653(a) that ordinarily would protect subsequent transfers from GST tax. The risk is that since Code Section 2664 states that the GST tax rules do not apply to generation-skipping transfers after 2009 may eliminate the move-down rule. Even though the EGTRRA "sunset" rule states that tax laws apply to transfers after 2010 as if EGTRRA (including Code Section 2664) "had not been enacted," one cannot be certain how IRS and the courts will interpret the "never been enacted" language. See Zaritsky, op cit at p.2. Similar risks of interpretation of the sunset rules apply to annual exclusion gifts in trust and discretionary distributions to possible skip persons from testamentary generation-skipping trusts created by estates of decedents who die in 2010.

14. See Blattmachr, et al 2010 *JT* article, and Zaritsky, *Practical Estate Planning*.

15. An attempt was made to amend Title 84 of the Oklahoma statutes by adding new Section 187 that would have provided a will, trust or other instrument of a decedent who died in 2010 that contained a formula referring to various provisions of the federal estate or GST tax laws (such as unified credit or estate tax exemption) or that measured a share of a trust or a gift based on the amount that can pass free of federal estate

or GST taxes, "shall be deemed to refer to the federal estate tax and generation-skipping transfer tax laws as they applied with respect to estates of decedents dying on Dec. 31, 2009." However, this law was not passed.

16. Repealed by Laws 2006, 2nd Ex. Sess., C. 42 §6, eff. Jan. 1, 2010.

17. See Zaritsky, *Practical Estate Planning*, at ¶2.06[3][b].

18. See Blattmachr, et al 2010 *JT* article, at pp 68-69.

19. See ACTEC materials published June 18, 2010, cited at footnote 11.

20. *The Greenbook* can be found at <http://www.ustreas.gov/offices/tax-policy/library/grnbk09.pdf>.

21. Note that this proposal could be enacted by Treasury Regulations for Code Section 2704 instead of through the legislative process.

#### ABOUT THE AUTHOR



Henry G. Will practices law in Tulsa as a shareholder and director of Conner & Winters LLP specializing in estate planning and exempt organizations. He is a graduate of Yale University (magna cum laude, 1962) and Yale Law School (1965) and is a Fellow of ACTEC.

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## Logging Out: Digital Estate Planning

By Ryan Kiesel

*Lucy Smith was an avid blogger and social networker. She regularly uploaded photographs and movies of her children to share with friends and family. She also kept a running commentary of the hilarity of her life on her personal blog connected with her Gmail account. Unexpectedly, Lucy died. Her e-mail, Facebook, Twitter and other social networking accounts remained under electronic lock and key because her family was unable to access the sites to either delete or retrieve information. Her estate planning documents failed to specifically address how to access and dispose of this section of her estate – electronic property.*

**W**hen most people create an account on a social networking site or set up a web-based e-mail service, they probably don't ask themselves, "What will happen to this when I die?" But they should, and the legal community should play a significant role in encouraging their clients to prepare for the possibility of digital immortality.

In recent years, the popularity of social networking sites has exploded. Facebook alone boasts over 500 million active users worldwide.<sup>1</sup> Facebook reports that each month "more than 30 billion photographs, links to Web sites and news articles are shared through the site, and its members spend roughly 700 billion minutes there."<sup>2</sup> The number of individuals using e-mail is even larger. The users of these sites hail from across the globe and, despite their diversity, they all have one thing in common — each of them will die, and the digital estates they leave behind raise several legal and ethical issues.

During the 52nd Regular Session of the Oklahoma Legislature, I sought to address at least one of these issues with the introduction of

House Bill 2800.<sup>3</sup> HB 2800, which will take effect on Nov. 1, 2010, automatically vests the personal representative<sup>4</sup> of an Oklahoma estate with the power to "to take control of, conduct, continue, or terminate any accounts of a deceased person on any social networking website, any microblogging or short message service website or any e-mail service websites."<sup>5</sup>

Many of the online services covered under HB 2800 have policies regarding the accounts of deceased users. In some instances, they require a legal order demonstrating that a personal representative seeking to access the deceased's account has the legal authority to do so. The intent of HB 2800 is to make that power inherent with the administration of the estate. Rather

than having to seek a special order from a court to gain access to an account of the deceased, under HB 2800 it should be sufficient for personal representatives of Oklahoma estates to demonstrate they are acting in their capacity as personal representative.<sup>6</sup>

### **ASSUME YOUR CLIENT IS ONLINE**

For a growing number of Oklahomans, the Internet is increasingly an indispensable part of their personal and professional lives. They live online, but when they die, those online accounts (or most of them<sup>7</sup>) persist. Conducting our lives online has not made it any easier to think about or plan for death.

The failure to plan for the final disposition of digital estates is not exclusive to intestacy. In the course of devising and conveying real and personal property, even the most diligent estate planners can neglect to make provisions for administering a person's digital estate. In the not too distant past, such omissions were excusable. After all, it wasn't that long ago that a will mentioning an e-mail address or a Twitter handle would seem absurd. That is rapidly changing. Today, every estate planning interview with your clients should bring up the subject of their online presence, discuss their options, and advise your clients to develop an online estate plan.

### **'CAN I BREAK THIS LOCK?'**

Even if a social networking or e-mail service by their terms of service forgo any ownership interest in the content users distribute across the platform, they still function as gatekeepers, requiring a user to enter login credentials before they access their online property.<sup>8</sup> So for our purpose of applying HB 2800, let us assume that when you use Google's web-based e-mail client Gmail to e-mail a picture to your friends and family, you do not lose your ownership interest in that photograph. The same is true when you post a picture or a video to Facebook. The question is not whether your client has a property interest; it is a question of access.

It is access that HB 2800 seeks to address. So while you may own that picture you posted on Facebook, you can only access it with a particular username and password. It is at this intersection of privacy, security and property rights that estates can find themselves locked out.

Imagine you have a client who was recently bequeathed a locked chest. Assume all parties stipulate that the deceased intended for your client to have this chest when he passed away,

and your client came to possess the chest through a valid probate process. Inside the chest are letters, home movies, photo albums and other personal affects. Some items promise to be of special significance, and other items will raise the question of why it was thrown in the box to begin with. But there is one problem. The box is locked with a padlock and no one has the key. In fact, some speculate the key may have been accidentally buried with the deceased. Your client wants to know what to do.

There is not significant legal debate that your client, having lawfully come into possession of this chest, has the right to access it, making this more a matter for a locksmith or a robust set of bolt cutters from the local hardware shop than a legal issue. There is no need to call on a court for permission to exhume the body to search the coffin for the key, and it is doubtful any court would entertain such a macabre request. Your client is free to open the chest in any manner he sees fit.

If a hypothetical about a locked chest sounds antiquated, it is because it should. Shoe boxes with important documents, family albums, financial records and so on are being replaced by websites and online applications. Each time you create an account that requires registered users to sign in, you are fashioning a lock that is virtually impossible to crack. This has unfortunately and inevitably led families and estates to seek legal remedies to open online accounts.

### **HB 2800 AND ONLINE PROVIDER POLICIES**

One of the earlier cases dealing with accessing a deceased's account involved Justin Ellsworth, a Marine stationed in Iraq who was killed by a roadside bomb in 2004.<sup>9</sup> When his father attempted to access Justin's Yahoo e-mail account, he was turned away. Only after a California probate court ordered Yahoo to turn over the contents of the account was Justin's father able to access his e-mail.<sup>10</sup> At that time Yahoo said this did not mark a change in its privacy policy, rather compliance with a lawful order.<sup>11</sup>

In the wake of the April 2007 shootings at Virginia Tech, Facebook instituted a memorial policy for the accounts of deceased users.<sup>12</sup> Under Facebook's policy of memorializing an account of a user who has passed away, Facebook "removes certain sensitive information (e.g., status updates and contact information) and sets privacy so that only confirmed friends can see the profile or locate it in search. The Wall



remains so that friends and family can leave posts in remembrance. Memorializing an account also prevents all login access to it.”<sup>13</sup> Since Facebook instituted this policy, the friends and family of deceased users have found solace in posting messages of remembrance online.<sup>14</sup> The practice of remembering the dead online is the focus of an emerging Internet business model of websites devoted entirely to online memorials.<sup>15</sup>

However, permanently removing an account or accessing the deceased user’s content can require considerably more effort. Facebook states that deleting an account requires action from an immediate family member, and obtaining access to content on the account, *i.e.* photo albums, messages, etc. is not granted unless required by law.<sup>16</sup> It is the intent of HB 2800 to grant estates this legal authority to access those portions of an account, granting estates more options than choosing between a memorial profile or deleting the account without first having the opportunity to save certain content.

It is important to note that the terms of service vary from website to website. Some make it easier to obtain access and others make it nearly, if not entirely, impossible. HB 2800 may give estates an easier avenue, but it by no means ensures that websites will not resist attempts to access the accounts of their users who have passed away. Privacy is of the utmost concern for online users and providers, and it will continue to predominate efforts to reconcile our life online with literal death.

HB 2800 is also entirely incapable of divining the intent of the deceased. Without some guidance, estates are left to wonder whether individuals would prefer their Facebook profile to be memorialized or deleted. What if the deceased want their e-mail and social networking legacy to be permanently deleted, and kept private from their families and friends? HB 2800 does not answer this 21st Century equivalent of a testator requesting his papers to be burned upon death.<sup>17</sup> Perhaps online services should offer their users a Kafka clause that allows them to set their preference for access at the time they are establish-

ing the account, including the option to permanently erase their online identity upon their demise. Until that time, however, clients should be advised that the most effective way to manage their accounts after they die is to make these decisions while they are alive.

## A BRIEF NOTE ABOUT SECURITY AND ESTATE PLANNING

Tech experts suggest that users take an active role in securing their online accounts. Farhad Manjoo, technology columnist at Slate.com and on-air contributor to NPR, suggested that “[y]ou should change your passwords often...[y]ou should not use the same password for several different sites.”<sup>18</sup> Sounds good in theory, but how many people are that diligent? Manjoo admits “you know, changing your passwords often, choosing passwords that are easy to remember, that’s very annoying, and very few people actually follow these simple rules.”<sup>19</sup>

Changing passwords often and keeping multiple passwords seems to fly in the face of leaving behind the necessary information an estate would need to access an account without resorting to the provisions of HB 2800 or other legal action. There are online services that allow individuals to subscribe to a service that keeps all of the passwords in one place and only releases them to authorized individuals after the subscriber has died. But adding an additional step in online security, when only a fraction of people follow current best practices, seems an unlikely solution for the majority of Internet users.

For now, the best solution is to prompt your clients to think about their online activities as an important aspect of their estate planning. Given the variety of online activity, differences in terms of service agreements, and the wishes of your clients, online estate planning, like traditional estate planning, will require unique solutions tailored to your client. With proper planning, none of your clients or their estates will have to use the provisions of HB 2800.

1. Jenna Worthham, “Facebook Tops 500 Millions Users,” *New York Times*, July 21, 2010, [www.nytimes.com/2010/07/22/technology/22facebook.html?\\_r=1&partner=rss&emc=rss](http://www.nytimes.com/2010/07/22/technology/22facebook.html?_r=1&partner=rss&emc=rss).

“The practice of remembering the dead online is the focus of an emerging Internet business model of websites devoted entirely to online memorials.”

2. *Id.*
3. 2010 O.S.L. HB 2800 c. 181, §1.
4. 58 Okla. St. §11. Oklahoma probate law uses the term "personal representative" as a substitute for the more specific terms of executors and administrators of an estate.
5. 2010 O.S.L. HB 2800 c. 181, §1
6. *e.g.* Letters issued to executor or Letters of Administration issued pursuant to 58 Okla. St. §101 and §121.
7. Some online services have dormancy clauses in their terms of service that reserve the service providers right to delete accounts that register no activity for a set period of time.
8. Of course, this is not always the case and intellectual property questions abound online. HB 2800 and this article do not pretend to resolve those issues.
9. Stefanie Olsen, "Yahoo releases e-mail of deceased Marine," *CNET News*, April 21, 2005 [http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038\\_3-5680025.html](http://news.cnet.com/Yahoo-releases-e-mail-of-deceased-Marine/2100-1038_3-5680025.html).
10. *Id.*
11. *Id.*
12. Hailey Branson, "Death need not be the end when online," *Daily Oklahoman*, June 18, 2010 <http://newsok.com/article/3469323>.
13. "What does memorializing an account mean?" Facebook Help Center (accessed July 26, 2010 at [www.facebook.com/help/?faq=15666](http://www.facebook.com/help/?faq=15666)).
14. Hailey Branson, "Death need not be the end when online," *Daily Oklahoman*, June 18, 2010 <http://newsok.com/article/3469323>.
15. Yuki Noguchi, "Online Memorials Bring Strangers and Friends Together in Community of Grief," *Washington Post*, May 29, 2006 [www.washingtonpost.com/wp-dyn/content/article/2006/05/28/AR2006052800877\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/05/28/AR2006052800877_pf.html).

16. "How do I report a deceased user or an account that needs to be memorialized and deactivated or deleted?" Facebook Help Center (accessed July 26, 2010 at [www.facebook.com/help/?page=842#!/help/?faq=13941](http://www.facebook.com/help/?page=842#!/help/?faq=13941)).

17. See, M.A. Orthofer, "Weighing Words Over Last Wishes," *Poets & Writers*, November/December 2003, [www.pw.org/content/weighing\\_words\\_over\\_last\\_wishes](http://www.pw.org/content/weighing_words_over_last_wishes).

18. "Farhad Manjoo Makes Your Passwords Secure." Interview on NPR's Talk of the Nation broadcast on Oct. 8, 2009. Transcript accessed online at [www.npr.org/templates/story/story.php?storyId=113619478](http://www.npr.org/templates/story/story.php?storyId=113619478).

19. *Id.*

#### ABOUT THE AUTHOR



Ryan Kiesel earned degrees in political science and law from the University of Oklahoma. He has served District 28 in the Oklahoma House of Representatives since 2004 and is not seeking re-election. He has also taught as an adjunct professor at the OU College of Law. Ryan lives in Seminole.

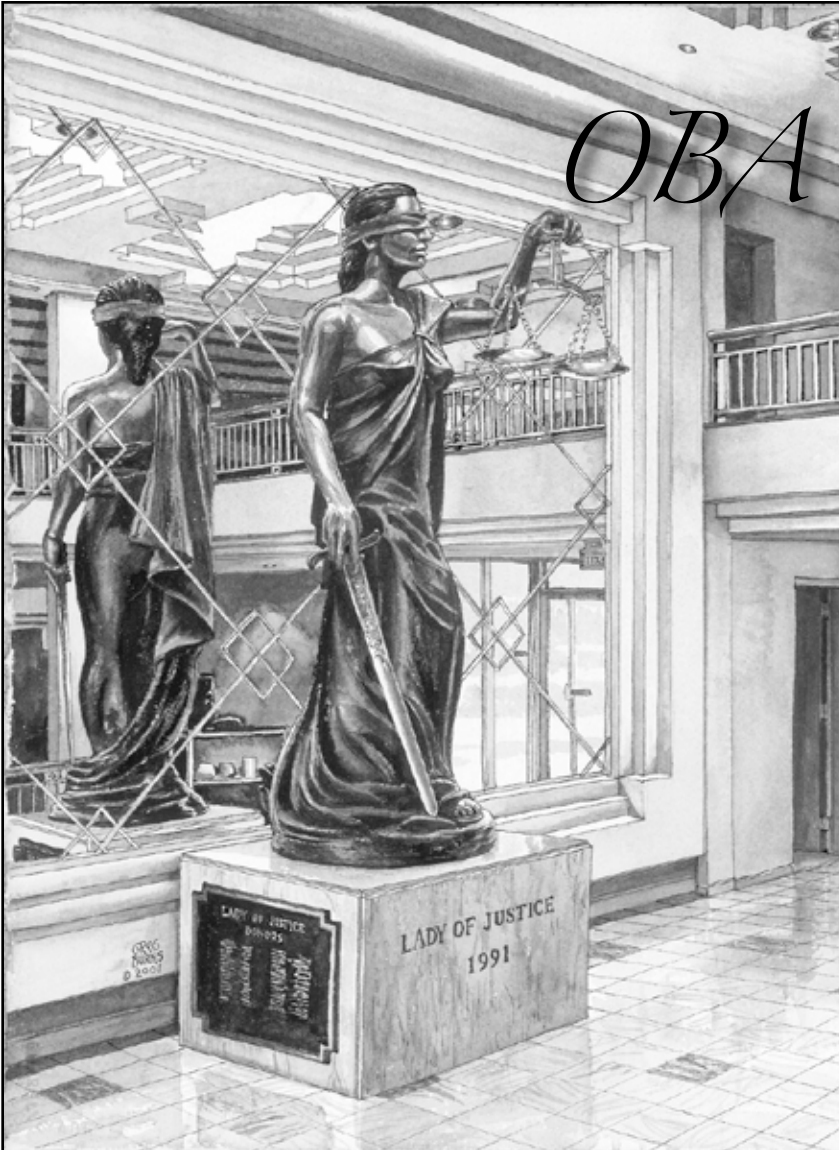
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## Simple Estate Planning for your Client's Children

By Ryan J. Duffy

**T**wo things are certain in life — death and taxes. While most of us put forth a significant amount of effort strategizing to minimize Uncle Sam's impact on our wealth, many clients forget that they must also provide for their minor children in the event of their untimely death. This article will focus on estate planning to protect a client's children.

One of the most commonly overlooked items that should be handled in a proper estate plan is the care for a minor child in the event both parents die at the same time. This is certainly not a pleasant thought for those involved in planning their estates, but proper planning for such a crisis can avoid added stress in an already traumatic situation. Parents often have a very difficult time deciding who should be the proper guardian for their minor children, but such discussion, and even argument, is assuredly preferable to the alternative: two families fighting at the courthouse over children who have recently lost their parents.

One factor guiding the decision-making process is the child's age. The needs of children at a very young age consist mainly of nurturing, so often the proper designated caretaker is a grandparent, or close aunt or uncle, or other family member. In other words, a person that has been around the child significant time, has an emotional bond and will be the most parent-like is often the best choice at a young age. As children grow older, their needs greatly differ. For a child to lose his or her parents one day, and then be forced to move far away and lose his or her friends the next, is certainly a daunting prospect. At such a time in a child's life, it may make more sense to seek the nearest relative geo-

graphically, or even parents of close friends of the children, with whom the child's parents have cultivated a solid relationship. Choosing such a guardian ensures the child can retain a core social network, maintain friendships and stay in the same school.

So, how do you designate a guardian for a minor child? The simplest way is to do so in the parents' Last Will and Testament. While this is not an iron-clad method to dictate who will be the guardian, it is the most effective method available to ensure your preferences are respected. Ultimately the court will do what it deems to be in the best interest of the minor child. However, a parent's wishes expressed during his or her lifetime via a properly drafted and executed Last Will and Testament will be influential to a court of law.

While agreeing on a guardian for a child is the first necessary decision, preparing for a child's financial future is another vital component. First, there is a situation of a married couple with only one parent dying. In today's society, remarriage of the surviving spouse is overwhelmingly common. Contemplating a surviving spouse with another mate following your client's death is not a pleasant thought for the hypothetical decedent, but it is a reality in many

cases. Another unpleasant thought to be sure, but one which deserves contemplation, is a surviving spouse and his or her new mate burning through a surviving child's college fund on the luxuries of their newfound marital bliss. The best solution to this potential problem is to dedicate an amount of money that can only be expended for the needs of surviving children, such as general care, college, starting a career, buying a house or any other number of needs. Doing so not only protects a set amount of money for the child, but also takes some stress off of the surviving spouse who may feel significant guilt in spending money on anything but the children following the death of a spouse.

Setting up the fund for the child may be done via a Trust, which is often not practical for young to middle-age individuals, or through a Last Will and Testament with a vehicle called a Testamentary Trust, which is formed on the death of said individual. An amount stays in Trust solely for the benefit of the children until a certain age is reached, usually 25 and up (depending on various factors), at which point all or a portion is released to the child outright. A Trustee is designated to manage and distribute the money pursuant to your direction as set forth in a properly drafted Trust established during your lifetime or as a component of your Last Will and Testament.

Naturally, the next question is how to fund this gift to the child? A likely concern lies in ensuring the surviving spouse has sufficient funds for financial security after the children are given their share. While many methods are used to reach an acceptable solution based upon available assets, amount to be set aside, etc., commonly the amount to the children is funded, at least in part, by life insurance. A couple may opt to set up a policy they will use solely to fund the children's share, or simply have one policy, of which the first X dollars of proceeds go to the

“Ultimately the court will do what it deems to be in the best interest of the minor child.”

children's share with the remainder to the surviving spouse. Of course more sophisticated and wealthier clients may be capable of funding allocations from their own assets.

If both parents predecease a minor child, the focus is to supply sufficient funding for the guardian to provide for the child, and to protect that money from any undesirable actions of the guardian. As such, it is often a prudent decision to designate a person

other than the guardian, often from the other side of the family, as the Trustee of the children's money. This not only serves as an invaluable check and balance on expenditures of the money, but also ensures that both sides of the family remain a part of the child's life, something that is generally important to couples.

If your clients have children that are minors, or at any age at which financial responsibility has not fully developed, then the client's estate planning should adequately address these vital issues for the children, from both a personal care and financial perspective. The peace of mind for a client associated with knowing that their affairs are handled properly is invaluable.

#### ABOUT THE AUTHOR



Ryan J. Duffy is an associate with Andrews Davis PC of Oklahoma City. His practice focuses on estate planning, tax, business, securities and real estate. He is active on various OBA committees including serving as a chair on the Strategic Planning Committee, and is a member of the Ruth Bader Ginsburg

Inn of Court and the Oklahoma City Men's Dinner Club. He received his B.S. in business administration from OSU and his J.D. from OU.



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## Uniform International Wills Act

*By Patrick Anderson*

In the 2010 Legislature, Oklahoma enacted the Uniform International Wills Act (SB 889). The purpose behind the act is to establish a universal will form that can be accepted in other countries. My first reaction when I was asked to carry this bill was probably much like yours — do we really need this? Since the time that I asked that question I have become more and more aware that there are many Oklahomans who own assets in foreign countries. The enactment of this act will certainly be a benefit for those individuals and most likely for individuals from other countries that own assets in Oklahoma.

The act was promoted by the Uniform Law Commission. Besides Oklahoma, there are 17 other states and jurisdictions in the U.S. that have enacted the Uniform International Wills Act. Those states and jurisdictions are as follows: Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Michigan, Minnesota, Montana, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania and Virginia. It has also been adopted in several other countries, including: Belgium, Bosnia, Ecuador, Herzegovina, Canada, Cyprus, France, Italy, Niger, Portugal and Slovenia.

Oklahoma already recognizes the validity of wills that are executed in accordance with the laws of the jurisdiction in which the will was executed. For instance, Oklahoma courts would recognize the validity of a will executed in France provided that it was executed properly — but how do you convince a judge in Oklahoma that the document was executed prop-

erly? This act is intended to help reduce the problems associated with proving that such a will was executed properly by establishing internationally accepted standards.

The basic requirements for a will to be valid under the Uniform International Wills Act are as follows:

**1) The will must be written.** It may be written in any language. It may be handwritten or written by other means. It does not have to be written by the testator.

**2) The will must be witnessed by two individuals and an “authorized person.”** The testator must declare in the presence of two witnesses and the authorized person that the document is the will of the testator. The testator must sign the document in the presence of the witnesses and authorized person or acknowledge his signature if the testator has already signed the documents. An “authorized person” as defined in the act is an attorney admitted and licensed to practice

“This act is intended to help reduce the problems associated with proving that such a will was executed properly by establishing internationally accepted standards.”

law in Oklahoma. The act also authorizes members of the diplomatic and consular service who have been empowered to supervise the execution of international wills to serve as authorized persons.

**3) The testator must sign each page of the will.** The will may be signed by another person on behalf of the testator if the testator is unable to execute the document. If another party signs the will on behalf of the testator then the reason for the testator not signing the document is required to be stated.

**4) The witnesses and the authorized person must attest the will.** The witnesses and the authorized person must attest the will by signing the document in the presence of the testator.

**5) Each page of the will must be numbered.**

**6) A certificate must be attached to the will.** The certificate shall be prepared by the auth-

orized person and shall declare that the requirements for the execution of a uniform international will have been met. The act provides the certificate form that is to be used.

**7) The testator must be asked if he wishes to make a declaration concerning where the will is to be kept.** If the testator chooses to state where the will is to be kept then the location is to be stated on the certificate.

**8) An international will may be revoked.** An international will is subject to the ordinary rules of revocation of wills.

As you can see, the requirements for creating a valid international will are relatively simple. The enactment of this legislation won't affect the estate planning that you do for 99 percent of your clients, but hopefully it will be an incredibly useful estate planning tool for those clients who can benefit from it.

#### ABOUT THE AUTHOR



Sen. Patrick Anderson has served in the Oklahoma State Senate for six years. He currently serves as the chairman of the Senate Judiciary Committee. He is also an attorney employed in the trust department of Central National Bank & Trust Company of Enid. He was the author of SB 889.



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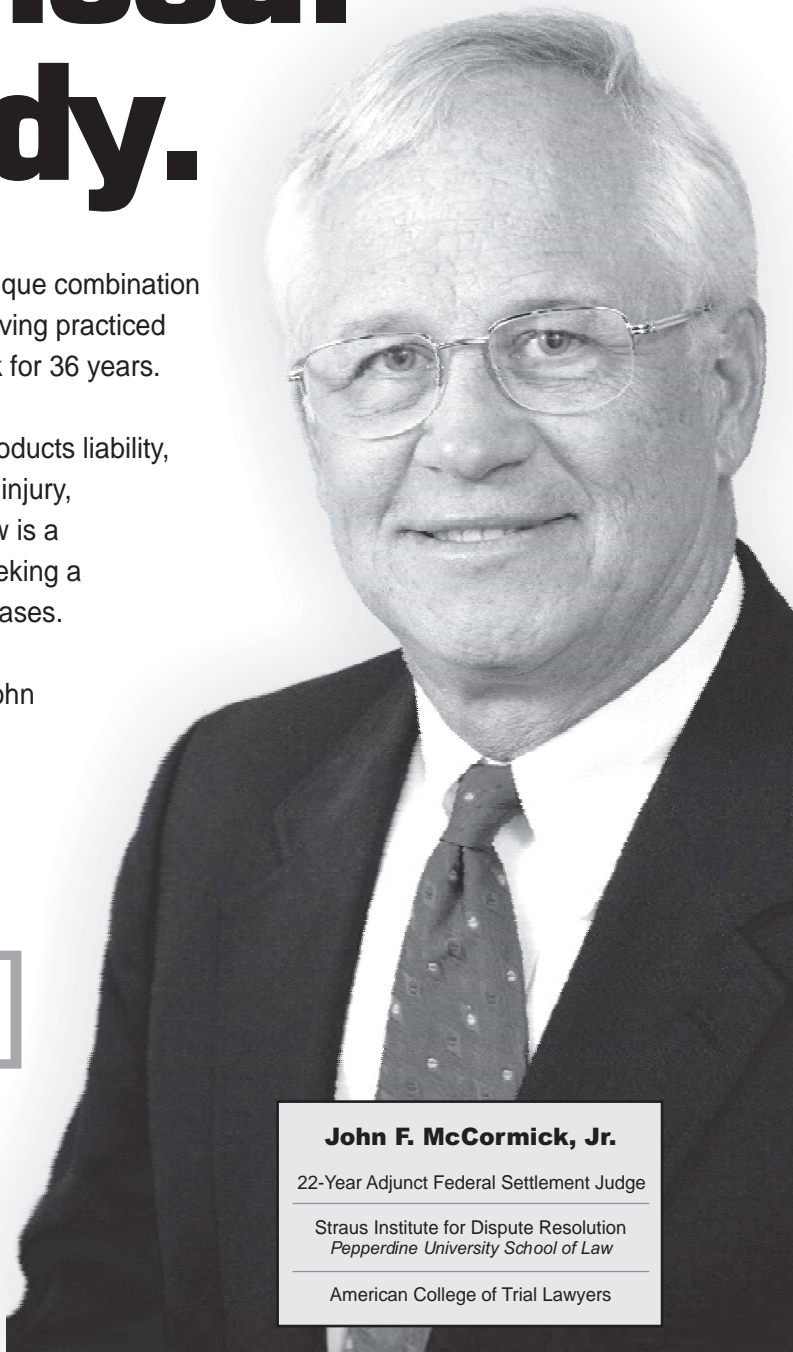
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## Recent Changes to the Creditor Claim Process in Oklahoma Estates under Okla. Stat. tit. 58 §337

By Cory Hicks

**T**he creditor claim process is an important part of Oklahoma probate procedure.<sup>1</sup> Effective Oct. 31, 2008, the Oklahoma Legislature changed the creditor claim rejection process by amending OKLA. STAT. tit. 58 §337. The change basically alters the amount of time a creditor has to file suit on a claim which a personal representative rejects through refusal or neglect. This is the first change to the statute in 20 years. The new language is somewhat difficult to interpret but becomes clearer as one looks at the legislative background. The main goal of this article is to give an overview of the change.

### OVERVIEW OF THE CREDITOR CLAIM PROCESS

Generally, the personal representative ("PR" or "PRs") of an estate must give written notice to all "known creditors" and "reasonably ascertainable creditors" within two months after the court issues the document that officially appoints them (*i.e.* letters). The PR has a responsibility to use "reasonably diligent efforts" to find the creditors of the decedent, including a search of the personal effects of the decedent.<sup>2</sup>

After a diligent search, the PR must file notice to creditors in substantial compliance with the statute in the district court where the probate procedure is being conducted. Within 10 days of filing this notice in the district court, the PR or their attorney must send a file-stamped copy to all creditors by first-class mail or personal delivery.<sup>3</sup> Then the PR or their attorney must document this mailing or deliv-

ery (or non-mailing/non-delivery) by an affidavit filed with the district court.<sup>4</sup>

The PR must also give creditors notice by publication in a newspaper in the county where the probate is filed. This notice must publish twice — one time per week, for two consecutive weeks. The first publication must take place within 10 days of the date notice to creditors is filed.<sup>5</sup>

With limited exceptions, creditors must present claims to the PR or their attorney as instructed in the notice within two months of the filing of the notice, or the claims are forever barred.<sup>6</sup>

### BARRED CLAIMS

Once the PR gives notice to creditors, there are several ways a creditor claim can become barred:

1) The most common way is for a creditor to fail to file a claim as set forth in the notice.

2) If a creditor makes a claim,<sup>7</sup> the PR can “directly” reject the claim, in whole or part, and send notice of the rejection within five days to the creditor.<sup>8</sup> The creditor then generally has 45 days to bring suit or the claim is barred.<sup>9</sup>

3) Likewise, even if a PR accepts a claim, the district court may directly reject the claim, in whole or part.<sup>10</sup> The creditor then generally has 45 days to bring suit or the claim is barred.

4) If a creditor brings a suit on a rejected claim, whether as part of the creditor claim process or as an independent action, a court can find all or part of the claim invalid on its merits. The PR, may “require satisfactory vouchers or proofs or other evidence”<sup>11</sup> from a creditor.

5) The PR can “indirectly” reject the claim through refusal or neglect. “If the personal representative refuses or neglects to endorse such allowance or rejection for thirty (30) days after the claim has been presented to him, such refusal or neglect is equivalent to a rejection on the thirtieth day after presentment of the claim to the personal representative, regardless of the date on which the claim may have been actually rejected in whole or in part.”<sup>12</sup> At that time, the creditor then generally has 45 days to bring suit or the claim is barred. This option of the “indirect rejection” by the PR is similar to the option of the “pocket veto” by the president under the U.S. Constitution.<sup>13</sup>

It is this indirect rejection process and the response timeline for creditors to file suit that is at the heart of the recent change.

### TEXT OF NEW CHANGE

The Oklahoma Legislature brought about this change by adding a new Section F to the end of the existing OKLA. STAT. tit. 58 §337. The wording of the new Section F is important, so it is replicated in full below:

F. For estate proceedings commenced after Oct. 31, 2008, the following provisions shall apply:

1) If the personal representative rejects a claim, in whole or in part, but refuses or neglects to mail a notice of the rejection not later than five (5) days following the date of partial or total rejection as required in

paragraph B of this section, the forty-five-day time period for limitation of actions as specified in Section 339 of this title shall not begin until the personal representative has mailed notice of rejection to the creditor by regular, first-class mail to the creditor’s last-known address. In no event shall such limitation extend past the date that a petition for final accounting is filed; and

2) If the treatment of any claim by the personal representative or judge is deemed equivalent to a rejection, as described in paragraph 1 or 2 of subsection C of this section, the forty-five-day time period for limitation of actions specified in Section 339 of this title shall not begin until the personal representative has mailed notice of the deemed rejection to the creditor by regular, first-class mail to the creditor’s last-known address. In no event shall such limitation extend past the date that a petition for final accounting is filed.

### THE FIRST V. SECOND SENTENCES

The first sentences of F1 and F2 seem clear. Standing alone, the first sentences appear to do away with an important aspect of the indirect rejection/pocket veto option of a PR.

Under the prior scheme, 30 days after a claim is filed, if there is no action by the PR, the claim is deemed rejected. After this rejection, a creditor has 45 days to file suit or the claim is barred. This all happens without additional direct notice to the creditor. Under the first sentences, the 45 day limit to file suit would not begin running until the PR directly rejected the claim and notified the creditor directly. However, as one keeps reading, the first sentences are tempered by the second sentences.

The second sentences of F1 and F2 are strikingly different than the first sentences - to the point of being at odds in some respects. The second sentences seem to make this adjustment: the window for creditor suits, although enlarged by the first sentences, potentially indefinitely, nonetheless does not stay open forever. The second sentences set an outward boundary: the time for a creditor to file suit when a PR indirectly rejects their claim “in no event” shall extend beyond “the date that a petition for final accounting is filed.”

In sum, it appears that the sentences read together measure the time for a creditor to file a suit on a claim that a PR indirectly rejects/

pocket vetoes, not by the old bright line of 45 days, but instead by the new line of when the PR files a petition for final accounting.

### THE LEGISLATIVE PATH BEHIND THE SENTENCES

The original proposed bill in the Oklahoma House of Representatives contained only the first sentences, essentially seeking to do away with the indirect rejection/pocket veto option of PRs without any qualification. The Oklahoma Senate later amended the House bill to add the second sentences, limiting the time for creditors to file suits on indirectly rejected claims to the filing of a petition for final accounting. The bill then went to conference committee, passed both legislative bodies, and eventually was signed into law by the governor.<sup>14</sup> The give and take of the political process appears to be the reason for the two-sentence structure of each section of the change and the tension between the first and second sentences.

### INTERPRETING THE SENTENCES

The best reading of the new change, both from the language of the statute and the underlying legislative process, appears to be to read the second sentences as modifications to or limits on the general rule of the first sentences. There are a few strong textual and procedural reasons for this interpretation.

First, the second and final sentences contain very strong, absolute language: “in no event.”

Second, legislatively, the second and final sentences were crafted as an amendment to the original proposed bill which contained only the first sentences. This amendment was clearly a proposal to modify or limit the original proposed bill. If the second sentences did not modify or limit the first sentences in any way, there would have been no need for an amendment.

Third, the Legislature did not strike OKLA. STAT. tit. 337(C), the very statute that established the indirect rejection/pocket veto, when adding the new 337(F). The simplest and clearest way to do away with 337(C) would have been to delete it, which the Legislature did not. The new changes should not be wrongly stretched to effectively delete 337(C).

### THE SENTENCES IN PRACTICE

It appears both sentences can have their desired effect under certain circumstances.

“The give and take of the political process appears to be the reason for the two-sentence structure of each section of the change and the tension between the first and second sentences.”

**Example 1:** In the Smith estate, the PR files notice to creditors on March 1 and mails notice to the only known creditor on the same day. The presentment date is May 1 — two months from the filing of the notice. The creditor files a proper claim under law with the PR on April 15. The PR does not file a petition for final accounting and distribution until Oct. 1.

**A. Under the Old Indirect Rejection Scheme:** If the PR did nothing, the claim would be equivalent to rejection 30 days after April 15, or after May 15. The creditor would then have 45 days to file suit, or until June 29, or the claim would be barred.

**B. Under First Sentences Only (Original Proposed Bill):** The first sentences, which alone were the original bill, would extend the time for the creditor to file a claim beyond 45 days — indeed indefinitely in this example — because the PR never sent the creditor a rejection notice.

**C. The Effect of the Second Sentences (Amendment and Second Sentences in the Eventual Law):** The creditor would have until the PR filed the petition for final accounting and distribution on Oct. 1. In this case, it appears the intent underlying both the first and second sentences was met. The creditor filing time was extended because the PR never gave the creditor a rejection notice; yet, the creditor filing time did not extend indefinitely, thus eventually allowing the estate to close definitively.

However, under a different set of facts, the new change could produce a different result.

**Example 2:** In the Smith estate, the PR files notice to creditors on March 1 and mails notice to the only known creditor on the same day.



The presentment date is May 1 — two months from the filing of the notice. The creditor files a proper claim under law with the PR on March 10. The PR files petition for final accounting and distribution on May 2, the day after the presentment date.

**A. Under the Old Indirect Rejection Scheme:** If the PR did nothing, the claim would be effectively rejected 30 days after March 10 or after April 9. The creditor would then have 45 days to file suit, or until May 24, or the claim would be barred. Under the old scheme, it would not be proper for the PR to file a petition for final accounting and distribution until after May 24 — the May 2 filing would be premature.

**B. Under First Sentences Only (Original Proposed Bill):** After the creditor filed its claim on March 10, the time for the creditor to file its claim would never expire because the PR never sent notice of the rejection to the creditor.

**C. The Effect of the Second Sentences (Amendment and Second Sentences in the Eventual Law):** The creditor would no longer have a right to bring a suit on the indirectly rejected claim after the PR filed the petition for final accounting and distribution May 2. This example gives the creditor a much shorter timeline to file than the 45 days under the prior indirect rejection scheme — in this example some 22 days less.<sup>15</sup>

It is unclear whether the Legislature accounted for a situation such as the one set forth above in Example 2. However, as long as everyone involved in the probate process is aware of the change, they can adjust their behavior accordingly.

## SUMMARY

1) The indirect rejection/pocket veto appears to still be an option for PRs.

2) The first sentences of the new change began as a bill to effectively do away with the indirect rejection/pocket veto, but was tempered by an amendment in the form of the second sentences.

3) When a deemed rejection takes place (after 30 days), the language of the first sentences can and often will extend the time for creditors to file claims beyond the former 45 day limit. (see Example 1 above)

4) However, the second sentences of the new change limit the time for creditors to file suit to the unknowable (from the creditor's perspective) time when the PR files a petition for final accounting. This could, in some circumstances, shorten the time for creditors to file suit after a deemed rejection to even less than the former 45 day limit. (see Example 2 above)

5) The new change measures the time for a creditor to file a suit on a claim that a PR indirectly rejects/pocket vetoes, not by the old bright line of 45 days, but instead by the new line of when the PR files a petition for final accounting.

6) It appears the 45 day timeline is still in place for direct rejections with notice of rejection sent to the creditor.

## CONCLUDING COMMENTS

1) The new system put in place by the change is not a bad system, and indeed is much, much better than the original proposed bill. However, the prior statutory scheme was superior for at least a couple of reasons.

First, the system was clearer and gave all parties involved more bright-line guidance — down to specific number of days. Second, the prior system had been in place for at least 20 years. It was the well-known, well-established practice of all involved in the probate process. Case law had been established under the statute to further guide practitioners.

It would probably bring more clarity to the law and all the parties involved in the probate process if the Legislature deleted the new Section F of OKLA. STAT. tit. 58 §337 and reinstated the former statutory scheme.

2) The new changes should not be interpreted as doing away with the indirect rejection/pocket veto option for PRs, nor should the Legislature seek to do this in the future, as the original House bill related to the recent changes did. It is beyond the scope of this article to set forth all the arguments on this point, but a few key points are below.

**A. The Law Protects the Vigilant.** As a fundamental principle of Oklahoma probate law, the burden to pursue creditor claims should primarily be on creditors — not PRs and heirs. Creditors generally have more sophistication and resources. They also have a strong motivation to collect what is owed to them. The law generally

protects the vigilant, not those who sit back and wait on the law or other parties.

**B. How much notice is enough?** PRs already have the burden to directly contact creditors once. Creditors also get a second notice by publication, which occurs twice. PRs should not be further required in every estate, in every situation, to contact creditors directly again a third time regarding acceptance or rejection. Can creditors not follow up on their own claims without the law requiring PRs to walk them through the process at estate expense? If creditors lobby hard enough, will PRs have to eventually give creditors notice of every hearing — just like the decedent's own family and beneficiaries? One day will PRs be required to give creditors notice to sell property?

**C. PRs need flexibility to deal with different types of creditors in different situations.** Generally if there is a clear, genuinely-owed debt, PRs and families do their best to take care of it. It is vague printouts from debt collectors, years of old charges from hospitals (often beyond the statutes of limitations), mysterious surcharges from credit card companies and the like that PRs do not rush to pay. Often creditors who present the least-clear claims are the most unwilling to negotiate and communicate professionally. The law should not make it more difficult for PRs to negotiate with, and deny when necessary, these types of creditors. Yet these creditor groups tend to have better-funded lobbies and louder voices in the political square than the PRs and heirs of small and medium sized estates.

**D. Liquidation Policies.** There was much rhetoric in the Oklahoma Legislature during the repeal of the Oklahoma estate tax about protecting estates from liquidation, especially estates of small business owners and family farmers. Yet, most attorneys who routinely are involved in “mom and pop” estates of small and medium size would report, if asked, that creditors are almost always a larger issue than the estate tax, especially in recent years. Liquidations are much more likely to happen to pay bills than to pay estate tax. Why would the Oklahoma Legislature repeal the estate tax, largely to prevent liquidations, and then make changes to creditor claim laws in

probates that make it harder and more expensive for PRs to negotiate with creditors and deny them when necessary — leading to more liquidations to pay creditors? This seems inconsistent policy-wise.

3) To the best of this author's knowledge, these changes were made without substantial discussion with the Estate Planning, Probate, and Trust Section of the Oklahoma Bar Association, or other groups. If this is in fact the case, it does not seem to make sense to pass laws without substantial discussion with the very group that will be most affected in helping citizens implement them. The dialogue between the Legislature and the bar needs to improve.

4) The use of revocable living trusts has increased greatly in recent years. To the best of the author's knowledge, there is no creditor claim statute that relates to the administration and distribution of these trusts. There is really no compelling underlying legal rationale for this difference between trust and estate administration. Rather than spending time developing creditor claim rules that are more burdensome on estates and PRs, why not spend that energy attempting to develop a fair, uniform system for handling claims in cases of all Oklahoma decedents with revocable estate plans?

In conclusion, attorneys and all persons involved in the probate process need to be aware of the recent changes to the creditor claim laws. In sum, it appears the new changes measure the time for a creditor to file a suit on a claim that a PR indirectly rejects/pocket vetoes, not by the old bright line of 45 days, but instead by the new line of when the PR files a petition for final accounting. Hopefully this article will be of some use in raising awareness of the new changes and related issues.

1. Throughout this article the term “probate” is used in a general sense to refer to both procedures where there is a will as well as those where there is not a will. Similarly, the term “personal representative” or “PR” (“PRs” plural) is used in a general sense to refer to the official court-appointed representative of an estate, whether there is a will or not, and could even apply to a special administrator under Okla. Stat. tit. 58 §215. This is done for simplicity of communication and because the claims process is largely, if not exactly, the same in each circumstance.

2. OKLA. STAT. tit. 58 §§331, 331.1.

3. *Id.* at §§331, 331.2.

4. *Id.* at §332.

5. *Id.* at §331.

6. *Id.* at §§331, 333. Some common exceptions to this general rule are: where decedents have been dead for more than five years, the presentment time is shortened to one month; and, mortgagees holding real estate mortgages do not lose the right to foreclose by failing to file a creditor's claim, although they do lose the right to a deficiency judgment against the estate.

7. *Id.* at §334.

8. *Id.* at §337(B).

9. *Id.* at §§337, 339. The time for suit is two months after the claim becomes due, if it is not yet due.

10. *Id.* at §337(A). The statute does not state this directly, but presumably if the court directly rejected a claim, the PR would send notice in the same manner they would had the PR directly rejected the claim.

11. *Id.* at §334.

12. *Id.* at §337 (C)(1). This similar rule is applied to judges under §(C)(2).

13. Under Article I, Section 7 of the U.S. Constitution, when Congress is not in session and a bill passed by Congress is presented to the president, if he neither signs the bill into law nor vetoes the bill but takes no action at all (*i.e.* just “sticks the bill in his pocket”), the bill will automatically be “pocket vetoed” after 10 days.

14. <http://webserver1.lsb.state.ok.us/WebBillStatus/main.html>

15. Practitioners representing PRs might give some thought as to whether it would be the best practice to allow creditors 45 days to file suit before trying to bar them with a petition for final accounting, at least until this statute is more established and/or clarified through case law. At the very least, clients should be clearly advised on this point.

## ABOUT THE AUTHOR



Cory Hicks practices in Guymon, primarily in the areas of probate and trust administration, estate planning, real estate and business law. He is an adjunct professor of business law at Oklahoma Panhandle State University. He received his law degree from the University of Oklahoma, where he was a published member of the *Oklahoma Law Review*. In 2009, he graduated from the OBA's first Leadership Academy.

## PUBLIC NOTICE FOR REAPPOINTMENT OF INCUMBENT BANKRUPTCY JUDGE

The current 14-year term of office of Terrence L. Michael, United States Bankruptcy Judge for the Northern District of Oklahoma at Tulsa, Oklahoma, is due to expire on June 8, 2011. The United States Court of Appeals for the Tenth Circuit is presently considering whether to reappoint Judge Michael to a new 14-year term of office.

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| 8:00 - 8:30    | Registration  |  |
| 8:30 – 9:00    | <i>Welcome</i>  | The Honorable Dana Murphy, Corporation Commissioner  |
| 9:00 – 10:00   | <i>Panel: The Rulemaking Process, Oil and Gas Conservation Rules, Horizontal Drilling and Spacing Regulations, the OCC's Rules of Practice</i><br><br><b>Moderator:</b> The Honorable Dana Murphy, Corporation Commissioner; <b>Panel:</b> Angela Burckhalter, Vice President Regulatory Affairs, Oklahoma Independent Petroleum Association; Ron Dunkin, Manager, Technical Services, Oil and Gas Conservation Division; Chad McDougall, Vice President, JMA Energy Company; John Reeves, Attorney at Law; Terry Stowers, Attorney at Law and National Association of Royalty Owners                                 |  |
| 10:00 – 10:15  | Mid-Morning Break   |  |
| 10:15 – 11:15  | <i>Panel: Oklahoma Perspective on Current National Issues -- Horizontal Drilling, Hydraulic Fracturing; Water Use, Recycling, and Disposal; Oil Spill Prevention; and Carbon Capture and Storage</i><br><br><b>Moderator:</b> Lori Wrotenbery, Director, Oil & Gas Conservation Division; <b>Panel:</b> Paul Hagemeyer, Vice President, Environmental Compliance, Chesapeake Energy Corp.; Barbara Rauch, Supervising Attorney, Oklahoma Department of Environmental Quality; Keith Tracy, Attorney/CO2 Business Development, Chaparral Energy, L.L.C.; Michael Zumwalt, Chief Financial Officer, 212 Resources Corp. |  |
| 11:30 – 12:30  | Catered Lunch   | Emerson Hall   |
| 12: 00 – 12:30 | <i>Mock OCC Environmental Permit Hearing</i><br><br><b>ALJ David Leavitt, ALJ Michael Norris, ALJ William Peterson, ALJ Michael Porter, ALJ Paul Porter, Office of Administrative Proceedings; Connie Moore, Senior Assistant General Counsel, Office of General Counsel; Lee Levinson, Attorney at Law; Robert Miller, Attorney at Law</b>   |  |
| 12:30 - 1:30   | <i>Ethics Presentation</i>  | Andrew Tevington, General Counsel, and Jim Hamilton, Senior Assistant General Counsel, Office of General Counsel |
| 1:30 - 2:30    | <i>Panel: Horizontal Drilling, Hydraulic Fracturing, and the OCC's Environmental Permitting Process</i><br><br><b>Moderator:</b> The Honorable Jeff Cloud, Corporation Commissioner; <b>Panel:</b> Professor Christopher A. Tytanic, Oklahoma City University School of Law; Tim Baker, Manager, Pollution Abatement Dept., Oil and Gas Conservation Division; Dale Cottingham, Attorney at Law; Dean Couch, General Counsel, Oklahoma Water Resources Board; Brad Gungoll, Attorney at Law; Keith Thomas, Senior Assistant, General Counsel, Office of General Counsel   |  |
| 2:30 – 2:45    | Mid-Afternoon Break   |  |
| 2:45 – 3:45    | <i>Panel: Update on the Oil and Gas Conservation Adjudication Process</i><br><br><b>Moderator:</b> ALJ Michael Decker, Director, Office of Administrative Proceedings; <b>Panel:</b> ALJ Patricia MacGuigan, Oil and Gas Appellate Referee; ALJ Curtis Johnson; ALJ Susan Osburn; ALJ Michael Porter; Office of Administrative Proceedings; Richard Books, Attorney at Law; Eric King, Attorney at Law; Gregory Mahaffey, Attorney at Law; John Moricoli, Attorney at Law; Sally Shipley, Deputy General Counsel, Office of General Counsel   |  |
| 3:45 - 4:00    | <i>Evaluation and Acknowledgements</i>  | ALJ Michael Decker   |

Please checkout the Oklahoma Corporation Commission's information booth in the lobby for demonstrations of the Commission's new website and current online oil and gas forms and reports. Guidance about online filing of forms and reports with the Oil and Gas Conservation Division will be available from 8 a.m. - 4 p.m.

**Fee:** \$65 (pre-registration by COB Wednesday, November 17, 2010) or \$75 (registration at the door). Please make checks payable to: "Oklahoma Corporation Commission, 2010 Oil and Gas Institute." No credit cards please. The seminar is approved by the Oklahoma Bar Association's Mandatory Continuing Legal Education Commission for 6.5 hours of MCLE credit, with 1 hour ethics credit included.

Please register online at [www.occeweb.com](http://www.occeweb.com) "Hot Topics" menu. Register by mail or fax: c/o Ms. Snooks Campbell, Office of Administrative Proceedings, Oklahoma Corporation Commission, P.O. Box 52000, Oklahoma City, Oklahoma 73152-2000, Telephone: (405) 521-2756, Facsimile: (405) 522-6397. Seating is limited so please register promptly. Please follow-up with a telephone call if you fail to receive a confirmation e-mail response to an online registration. Additional inquiries to: ALJ Michael Decker, OAP Director (405) 521-2241, [m.decker@occemail.com](mailto:m.decker@occemail.com). Thank you.



## Dealing with Undue Influence

By LeAnn Page Drummond

Estate planning attorneys are occasionally approached by the caretaker, pastor, friend, financial advisor, charity representative, child or other confidant to prepare a will for an elderly individual. What does an attorney do in these circumstances when the client is elderly and looks to someone else, like a confidant, to help decide important issues? What if this same testator sincerely desires to make a sizable bequest to a charity or a specific beneficiary such that the bequest will effectively disinherit family members? How does an attorney assist with a will with an unnatural bequest so that the will is admitted to probate? To be of assistance, an attorney needs to understand Oklahoma case law regarding undue influence.

The purpose of this article is to assist attorneys drafting a will or trust in identifying techniques to minimize claims of undue influence. The statements in this article primarily focus on “undue influence” as it relates to wills — however, this same type of analysis by analogy could be applied to the validity of a trust.<sup>1</sup>

The Oklahoma Supreme Court has held that when a will is offered for probate, the court is to focus on whether the will was executed with statutory formalities, whether the testator was competent at the time of the will making and determine if the will is the product of undue influence, fraud or duress.<sup>2</sup> Accordingly, the issue of testamentary capacity is generally a separate and distinct issue from the issue of undue influence because the requisite mental capacity is separate from the loss of free agency by another.<sup>3</sup> Asserting undue influence is not the same as asserting a lack of capacity. However, as a practical matter, a testator’s impaired

physical or mental condition is relevant in both capacity and undue influence cases. In many situations, the will contestant will often claim lack of testamentary capacity as well as undue influence.

An attorney should keep in mind that the same type of evidence reflecting testamentary competency<sup>4</sup> such as testator’s appearance, conduct, habits and conversations is helpful to reflect on whether the testator had an independent will which is a component of the claim of undue influence. Generally, in undue influence cases, the requisite testamentary capacity of the testator is present.

It is important to understand the term “undue influence.” Undue influence is that degree of influence which destroys the testator’s free agency and rises to a level of coercion which in effect substitutes another’s will for that of the testator’s.<sup>5</sup> The Oklahoma Supreme Court has further held that a claim of undue influence

can be sustained whether or not the person exerting the overbearing influence actually benefits personally under the will's terms.<sup>6</sup> Thus, a representative of a charity can be found to have exerted undue influence over a testator even though the representative did not personally benefit.<sup>7</sup> Although Oklahoma statutory law prescribes the manner of executing and attesting a will and sanctions undue influence as a ground for a will's invalidation, it provides no detailed provision regarding either the procedure or the proof in these contests.<sup>8</sup> The statute of limitations for undue influence is five years.<sup>9</sup> Influence of a general nature is not sufficient to constitute undue influence. Undue influence consists of action directed toward the creation of the will.<sup>10</sup>

The Oklahoma Supreme Court in a series of cases, *Beal*,<sup>11</sup> *Maheras*,<sup>12</sup> *Sneed*<sup>13</sup> and *Holcomb*<sup>14</sup> has developed Oklahoma case law regarding undue influence and the procedural presumptions. These cases have consistently held that the burden of proof to first produce evidence of undue influence is upon the contestant.<sup>15</sup> In 1998, the Oklahoma Supreme Court in *Beal* established that this burden of proof can shift to the proponent of the will in the case of alleged undue influence upon a finding by the trial court (a) that a confidential relationship existed between the will maker and another, stronger party and (b) that the stronger party actively assisted in the preparation or procurement of the will.<sup>16</sup> In 1995, the Supreme Court in *Maheras* provided balance to this shift of the burden of proof by offering the following five factors which give rise to the presumption of undue influence:

- 1) Whether the person charged with undue influence was not a natural object of the maker's bounty;
- 2) Whether the stronger person was a trusted or confidential advisor or agent of the will's maker;
- 3) Whether the confidant was present and/or active in the procurement or preparation of the will;
- 4) Whether the will's maker was of advanced age or impaired faculties; and
- 5) Whether independent and disinterested advice regarding the testamentary disposition was given to its maker<sup>17</sup>

In 2002, the Supreme Court in *Holcomb* re-characterized these factors of undue influence as a non-exclusive list that are probative on the presumption of undue influence as argued by the contestant.<sup>18</sup> Once the will contestant establishes a rebuttable presumption of undue influence, the burden of producing evidence shifts to the will proponent.<sup>19</sup> Under the *Maheras* standard, the proponent of the will may rebut the presumption of undue influence by producing evidence on the following two elements: 1) the severance, or nonexistence of the confidential relationship, or 2) that the testator had competent and independent advice on the subject.<sup>20</sup> The Supreme Court in *Holcomb* re-examined the application of the two elements in rebutting the presumption of undue influence by the will proponent and clarified that these two elements were not the only factors that should be considered in rebutting the presumption of undue influence by the will proponent. The Supreme Court further held that although the two elements cited in *Maheras* generally suffice to rebut the presumption, their absence is not fatal to the presumption's rebuttal so long as other probative evidence is adduced.<sup>21</sup>

In its holding, the Supreme Court emphasized that the will proponent does not have the burden of persuasion, but simply must introduce *some* evidence from which the trier could find that undue influence did not engender the will's dispositive provisions.<sup>22</sup> Therefore, if the will proponent introduces evidence which would support a finding that undue influence was not brought to bear against the will maker, the presumption disappears and the trial court must determine the existence or nonexistence of undue influence on the preponderance of the evidence and the burden of proof is restored to contestant. If however, a proponent cannot do this, a directed verdict should be entered against the will proponent.<sup>23</sup>

The *Holcomb* case abandons the *Maheras* concepts that the only way the presumption of undue influence in those situations involving a confidant who participates in the preparation or procurement of the will may rebut is by either showing the severance of the confidential relationship or the existence of independent counsel. Under *Beal* and *Maheras*, if independent counsel was not involved in the preparation or procurement of the will then presumption of undue influence was almost impossible to rebut if the will contestant had

established that a confidant had participated in the procurement of the will. In *Holcomb*, although the Supreme Court concluded that independent advice was not given, there was support to a finding of the nonexistence of undue influence based upon the independent and strong-willed nature of the testator as well as the rationality of the disposition scheme of the will in question. Specifically, the testator had indicated to a disinterested neighbor that she named her daughter as sole beneficiary in gratitude for the care her daughter had given her and concern for the daughter's financial security. The Supreme Court ultimately held based upon the facts and circumstances of the case that the District Court's determination that the will was the testator's free and voluntary act was not contrary to the weight of the evidence.<sup>24</sup>

Given the presumptions, it is important that attorneys focus on the following three key concepts: 1) existence of a confidential relationship, 2) active participation or procurement of the will by the confidant and 3) whether independent advice was given. In developing these three concepts, the attorney should give consideration to the age, personality, health and ability of testator to handle financial affairs because courts appear to give significant weight to a testator's testamentary deference.

First, the concept of confidential relationship is defined as existing whenever trust and confidence are placed by one person in the integrity and fidelity of another.<sup>25</sup> Oklahoma courts have examined confidential relationships in and among wife and husband,<sup>26</sup> minister and church member,<sup>27</sup> nephew and uncle,<sup>28</sup> illicit lovers,<sup>29</sup> maid, chauffeur and their employer,<sup>30</sup> financial advisor,<sup>31</sup> co-trustee and trustor.<sup>32,33</sup> In *Beal*, the Oklahoma Supreme Court held that declaring a relationship confidential is where there is weakness on one side and strength on the other resulting in dependence. Thus, the condition of the testator is of critical importance in determining whether one individual, in effect, overpowers another individual.<sup>34</sup>

Second, the participation that will taint a will must be active participation or procurement in

**“In order to be ‘sufficiently dissociated,’ the attorney should carefully analyze her relationship with the confidant to ensure there is not a conflict of interest.”**

the substance of the testamentary act and not just participation in formal matters undertaken at the direction of the will maker.<sup>35</sup> Factors to consider in “active participating or procurement” include confidant contacting the necessary advisors, meeting advisors without testator present, making the appointments, transporting testator to meetings, paying for legal services, safekeeping the will, knowing the terms of the will and voicing opinions regarding disposition scheme. The more factors present in a case, the greater the likelihood that a court will find that the confidant engaged in active procurement.

Third, in *Holcomb*, the Supreme Court held that for advice to be considered independent, the advisor must 1) provide the will maker with a full and private consultation regarding the disposition of his estate, 2) be competent to inform the will maker about the legal effect of his dispositive intentions and 3) be sufficiently dissociated from the interest of the proponent of the will.<sup>36</sup> In order to be “sufficiently dissociated,” the attorney should carefully analyze her relationship with the confidant to ensure there is not a conflict of interest. Any relationship between the attorney and the confidant should be disclosed to testator, and if deemed necessary, a waiver of the conflict of interest should be signed by the testator. Also, the attorney should be in compliance with the rules of professional conduct if the confidant, rather than the testator, is paying for the services.

In summary, in deciding whether an attorney should undertake the engagement of an elderly person who desires to make a sizable bequest to a charity or a specific beneficiary such that the bequest will effectively disinherit family members, the attorney should consider the following precautions:

- Testator should consult with an independent and disinterested advisor, without the confidant being present or driving the client to see the advisor. Have testator carefully explain to advisor the reasons for his bequest and why he does not want to give to his heirs. This testimony can be critical. A disinterested advisor is better



suit to testify about conversations with the testator, rather than attorney. Request advisor prepare contemporaneous memorandum regarding the discussions.

- Consider response of other family members whose interest is reduced or eliminated in the new will. A family meeting may be an effective tool to address issues while testator is alive.
- When advisable, will should remain in possession of decedent. Evidence reflecting that will was not changed, altered or revoked during the time of execution and demise may be helpful in establishing a lack of undue influence.
- Attorney should not bypass the testator in drafting and review of estate planning documents in favor of the confidant. Attorney should provide full and private consultation regarding will and its ramifications and attorney should not meet with confidant without testator present.
- Confidant should not be present during the execution ceremony of the will. Attorneys may want to consider securing witnesses with long-term relationships to the testator, rather than staff members.
- Attorney should consider medical evaluations of testator by health professionals.
- Attorney may want to videotape or record meetings in which the testator explains his disposition scheme.
- Attorney should consider utilizing no-contest clauses which reduce or eliminate a beneficiary's request if beneficiary contests the will.

Taking precautions such as those listed above should be carefully considered by the attorney so that will contests based upon undue influence may be avoided.

1. *Estate of Gerard v. Gerard*, 1995 OK 411, 911 P.2d 266 (applying *Maheras* analysis in equitable challenge to validity of trust).
2. *In re Estate of Lacy*, 1967 OK 123, 431 P.2d 366, 368.
3. *Estate of Sneed*, 1998 OK 8, 953 P.2d 1111, 1119.

4. Testamentary competence is knowing in a general way the property a testator owns, the persons who are the natural objects of his bounty, and generally the effect of testator signing a will. Whether one possesses testamentary capacity is a question of fact. See *In re Estate of Lacy*, 1967 OK 123, 431 P.2d 366, 371.

5. *Estate of Sneed*, 1998 OK 8, 953 P. 2d 1111, 1117.

6. *Estate of Maheras*, 1995 OK 40, 897 P.2d 268, 273.

7. *Id.* at 274.

8. 58 O.S. 1991 §§41 (2), 1. 61(3) and 84 O.S. 1991 §43. See also, *White v. Palmer*, 1971 OK 149, 498 P.2d 1041, 1406-1407.

9. See 12 O.S. 1991 §95(a)(12). *Burkes v. Estate of Burkes*, 1997 OK 76, 945 P.2d 481, 484.

10. 824 2nd Tax Management Testamentary Capacity and Validity of Wills A-56 (2007).

11. *Estate of Beal*, 1989 OK 23,769 P.2d 150.

12. *Estate of Maheras*, 1995 OK 40, 897 P.2d 268.

13. *Estate of Sneed*, 1998 OK 8, 953 P.2d 1111.

14. *Estate of Holcomb*, 2002 OK 90, 63 P.3d 9.

15. *Estate of Beal*, 1989 OK 23, 769 P.2d 150, 154.

16. *Id.*

17. *Maheras*, 1995 OK 40, 897 P.2d at 272-273.

18. *Holcomb*, 2002 OK 90, 63 P.3d at 15.

19. *Id.*

20. *Maheras*, 1995 OK 40, 897 P.2d at 273.

21. *Holcomb*, 2002 OK 90, 63 P.3d at 18-19.

22. *Id.* at 19.

23. *Id.*

24. *Id.* at 22.

25. *Id.* at 16.

26. *Estate of Mowdy*, 1999 OK CIV APP 4, 973 P.2d 345.

27. *Maheras*, 1995 OK 40, 897 P.2d at 273.

28. *Hubbell v. Houston*, 1967 OK 138, 441 P.2d 1010, 1011.

29. *Estate of Newkirk*, 1969 OK 93, 456 P.2d 104.

30. *In re Lillie's Estate*, 195 OK 597, 159 P.2d 542.

31. *In re Martins' Estate*, 1953 OK 260, 261 P. 2d 603.

32. *Edwards v. Urice*, 2009 OK CIV APP 20, 220 P.3d 1145.

33. For a more in depth discussion and example of relationships deemed confidential relationship, See 824 2nd T.M. Testamentary Capacity and Validity of Wills at A-57, 58.

34. *Beal*, 1989 OK 23, 769 P.2d at 155.

35. *Holcomb*, 2002 OK 90, 63 P.3d at 16-17.

36. *Holcomb*, 2002 OK 90, 63 P.3d at 19.

## ABOUT THE AUTHOR



LeAnn Page Drummond graduated from OSU and received her J.D. from OU with distinction and was named to Order of the Coif. She is a partner with Ellis & Drummond in Stillwater and of counsel with Glass Wilkin of Tulsa. Her practice focuses on estate and tax planning, corporate law, tax-exempt organizations, trust litigation and probate. She was past chair of the OBA Estate Planning, Probate and Trust section and regularly presents on recent developments in the areas of estate planning, probate and trust law.

# FAMILY PRACTICE MONTAGE XIV

## ***SELECTED TOPICS FOR PRO BONO ATTORNEYS***

Monday, October 25, 2010

Oklahoma Bar Center, Emerson Hall, 1901 N. Lincoln Blvd., Oklahoma City, Oklahoma

MCLE Credit of 7.0 Hours, Including 1.0 hours of ethics

### **PROGRAM AGENDA**

Moderator: Richard J. Vreeland

- 8:30-8:55 Registration & Continental Breakfast
- 8:55-9:00 Welcome
- 9:00-9:50 Recent Developments in Family Law  
**Robert G. Spector**, Glenn R. Watson Centennial Chair in Law, Univ. of Oklahoma College of Law
- 9:55-10:45 Understanding the Hidden Dynamics of Domestic Violence.  
**Matt Atkinson**, Oklahoma Coalition Against Domestic Violence and Sexual Assault
- 10:50-11:40 Working With OCSS as a Necessary Party  
**Amy Wilson and Elizabeth Wilson**, Oklahoma Child Support Services
- 11:40-1:00 Lunch (on your own) Sign-in after lunch for the afternoon session.
- 1:00-1:50 Domestic Violence – Law Enforcement Perspective  
**Detective Robert Kemmet**, Oklahoma City Police Department
- 1:55-2:45 The Power of Story  
**Paula Wood and Richard Goralewicz**, Staff Attorneys, Legal Aid Services of Oklahoma Inc.
- 2:55-3:45 Ethics Update 2010  
**Travis Pickens**, Ethics Counsel, Oklahoma Bar Association
- 3:50-4:40 UCCJEA – Still Misunderstood After All These Years  
**T. Neil Lynn**, Oklahoma City Managing Attorney, Legal Aid Services of Oklahoma Inc.

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## Update: Rights of Beneficiaries to Sue on Behalf of the Estate

*In re Estate of Bleeker, 2007 OK 68*

By Sarah C. Stewart

### POTENTIAL CLIENT

A distraught, confused, and concerned potential client enters your office one day. Through her tears, she tells you the story of how her loved one recently passed away. Your potential client was named in the will, but another was named executor of the estate. The executor does not care about the estate's beneficiaries. Your potential client knows this because she has told the executor of specific possessions other beneficiaries have swindled from the estate. She knows the value and quantity of each of the items these beneficiaries have taken from the others.

When your client told the executor of the theft, the executor shrugged his shoulders and refused to investigate further. He told her there was no proof and he did not want to expend the estate's resources on the claim. Your potential client tells you one of the items taken was an item that was meant to go to her, an item with little monetary value, but profound sentimental value. She desperately wants this item, as it helps her remember the good times she spent with the loved one she lost. "How can you help me?" she asks you, as she dabs her eyes with a tissue. What do you tell this potential client? How can you help her and others in similar situations?

### THE LAW

#### *The General Rule*

Though the general rule followed for many years is that a personal representative must bring claims on behalf of the estate, the question of whether a devisee/legatee under a will, other than an personal representative, could sue on behalf of the estate in certain situations remained unanswered. Until recently, Oklahoma courts had not settled the issue, though other state courts had answered this question in the positive. However, in 2007, the Oklahoma Supreme Court joined the trend in other states by allowing exceptions to the general

rule only a personal representative may sue on behalf of the estate.

The case of *In re Estate of Bleeker*, 2007 OK 68, gave the Oklahoma Supreme Court a chance to rule on whether parties other than the appointed personal representative of the estate may seek leave of court to bring suit on behalf of the estate. *In re Bleeker* concerned an aunt who was named administratrix of her nephew's estate. Beneficiaries of the estate moved to remove the aunt as personal representative because she failed to timely execute certain duties, like filing an inventory, and a professional fiduciary was appointed as the successor personal representative.

Before her removal, the aunt filed an ancillary action against several beneficiaries, claiming they had removed property from the estate and refused to return all of the property they had removed. She alleged the beneficiaries committed fraud, conspiracy to defraud and conversion of estate property. The successor personal representative refused to pursue the claim because it found the cost of pursuing such a claim not worth the benefit, particularly given the unknown value and extent of the missing property.

After the aunt was removed as personal representative, the beneficiaries argued she no longer had standing to pursue the ancillary action against them. The trial court agreed, and dismissed the aunt's claims. The aunt, relying on the common law of other states, argued her position as a beneficiary of the estate allowed her to bring claims on the estate's behalf when the appointed personal representative refused to do so.

### *The Exception*

The Oklahoma Supreme Court ultimately agreed with the aunt. The court reiterated the general rule that title to decedent's property passes to the personal representative at death; and thus, the personal representative usually retains the right to bring suit on the estate's behalf. However, the court recognized exceptional circumstances where beneficiaries could bring suit. These circumstances include 1) the personal representative's refusal to act, 2) fraud, and 3) collusion.

Though generally, the personal representative retains responsibility for the matters of the estate, there is no rule stating the court may not allow other parties to bring an action. Thus,

“Though generally, the personal representative retains responsibility for the matters of the estate, there is no rule stating the court may not allow other parties to bring an action.”

since extenuating circumstances like refusal to act, fraud and connivance necessitate action to protect the estate, beneficiaries may petition the court to bring suit on the estate's behalf.

In order to receive permission to bring a claim, the beneficiary must first petition the court and allege the reasons why the beneficiary should be allowed to bring the claim. The beneficiary is then entitled to an adversarial hearing regarding the claim. The court noted that certain factors, like whether the beneficiary seeking to pursue the claim would be responsible for paying the attorney's fees and costs associated with such action, were relevant to the probate court's decision.

### THE IMPLICATIONS

Judy Tuggle, an Oklahoma attorney with the firm of McAlister, McAlister and Tuggle, is 17-year veteran of trust and estate administrations, and strongly agrees with the court's ruling in *Bleeker*, saying that because time is of the essence in the case of many probates, it is important to bring these types of claims quickly. Assets originally known to be part of the estate may no longer exist or come up missing during the probate process.

If beneficiaries are unable to fight for the assets that are important to them in certain situations, they will be left without any recourse when their loved ones' assets disappear. The *Bleeker* court's decision will help speed up the probate process and the retrieval of assets for beneficiaries in certain situations. “The representative should represent the estate, but if the representative is dragging his or her feet, the beneficiaries will suffer,” Ms. Tuggle said.

Additionally, the court in *Bleeker* seems to infer that if the beneficiary agrees to pay for the legal fees and expenses of pursuing a claim, then this is strong factor in favor of the probate

court allowing such action. Such an outcome should alleviate a hesitant personal representative's concerns, since the beneficiary seeking to pursue the claim will be responsible for any attorney's fees and court costs expended to locate or retrieve the property they seek. It appears such a decision is equitable in that the person bearing the costs is the one creating the cost, instead of risking the other beneficiaries' inheritances in what may be a fruitless pursuit of assets.

Ultimately, the court's decision allows beneficiaries the choice of pursuing their inherited assets from the estate when the personal representative ignores their interests. As many attorneys have discovered, usually personal representatives serve the interests of the majority of beneficiaries, and sometimes, the minority beneficiary interest is just as important. As such, the decision in *Bleeker* opens the door to protecting minority beneficiaries' interests whenever they are willing to fight for them, particularly if willing to pay the costs of such action. Moreover, the court protects personal representatives' rights by implementing a procedure in which the beneficiary must first petition the court and meet specific criteria in order to receive permission to act on behalf of the estate. Such built-in safeguards assure that the decedent's choice of personal representative is not disturbed unless interference is absolutely necessary.

*Editor's Note: Look for the following probate articles in the January 2011 issue:*

*Pledges to a Charity: Can They Be Enforced and When Should They Be?*

*By Gary C. Clark*

*Puzzling Predicaments of Probate Parts 1 – 3*

*By Judge Linda Morrissey and Julie Bushyhead*

#### ABOUT THE AUTHOR



Sarah Crystal Stewart is an attorney at McLendon & Murphy PC in Oklahoma City. She represents clients in family law, estate planning, probates, foreclosure defense and business organization. She received her B.A. in Spanish and in journalism and broadcasting with an emphasis on public relations from Oklahoma

State University. She received her J.D. from Oklahoma City University.

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## Men Helping Men .....

October 28

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**Time** - 5:30-7 p.m.

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# Labor and Employment Law Section

## About Face by Oklahoma Supreme Court Means Discrimination Claims Can be Brought Against Small Employers

### *Smith v. Pioneer Masonry Inc.*

By Kimberly Lambert Love and Shannon P. Wheeler

Gone are the days that Oklahoma small employers are exempt from employment discrimination lawsuits. State and federal statutory antidiscrimination laws such as the Oklahoma Anti-Discrimination Act (OADA),<sup>1</sup> Title VII of the Civil Rights Act, as amended (Title VII),<sup>2</sup> the Age Discrimination in Employment Act (ADEA)<sup>3</sup> and the Americans with Disabilities Act (ADA)<sup>4</sup> apply only to employers with a minimum threshold number of employees (*i.e.* 15 or 20).<sup>5</sup> Oklahoma courts in the past have given deference to this legislative limitation and have likewise held that small employers cannot be sued under the common law public policy tort claim established in *Burk v. K-Mart Corp.*<sup>6</sup> for terminations that allegedly violate Oklahoma's public policy against employment discrimination.<sup>7</sup> However, as part of an ongoing expansion of the *Burk* tort,<sup>8</sup> the Oklahoma Supreme Court held that *all* employers in Oklahoma regardless of size may be liable in tort for employment discrimination.

#### SMITH V. PIONEER MASONRY INC.

In late 2009, the Oklahoma Supreme Court issued its opinion in *Smith v. Pioneer Masonry Inc.*,<sup>9</sup> holding that small employers (those with less than 15 employees) are no longer immune from common law public policy tort claims alleging employment discrimination. Although small employers remain excluded from statutory remedies for employment discrimination,

the court in *Pioneer* made it clear that employers may be subject to a *Burk* tort claim for employment discrimination "regardless of the number of employees."<sup>10</sup>

In *Pioneer*, Mr. Smith brought suit against his employer, a small construction company with less than 15 employees, alleging that he was constructively discharged due to racial discrimination and harassment.<sup>11</sup> *Pioneer* moved to dismiss the lawsuit based upon *Brown v. Ford*,<sup>12</sup> and argued that a *Burk* tort was not available to the plaintiff because his employer had less than the 15 employee threshold required by the OADA. The *Pioneer* trial court agreed and dismissed the *Burk* tort claim. On appeal, the Oklahoma Court of Appeals affirmed the trial court's decision on the same basis.<sup>13</sup> However, the Oklahoma Supreme Court reversed and overruled its previous precedent in *Brown*.

The *Pioneer* decision appears to be a continuation of the Oklahoma Supreme Court's recent revitalization and expansion of the *Burk* tort principles. For example, in *Saint v. Data Exchange Inc.*,<sup>14</sup> and *Shirazi v. Child Learning Ctr. Inc.*,<sup>15</sup> the court reversed earlier precedent and extended *Burk* tort liability to all forms of discrimination covered by the OADA — reasoning that all individuals subjected to employment discrimination consist of a single class to which the *Burk* tort remedy is available. This holding was

based on Oklahoma Constitution article 5 §46, which “requires that the same remedies must be applicable to everyone within the same class of employment discrimination.”<sup>16</sup> This class of employment discrimination, as defined by the OADA<sup>17</sup> includes race, color, religion, sex, national origin, age and handicap.<sup>18</sup> It is on this same constitutional principle that the Oklahoma Supreme Court based its opinion in *Pioneer*,<sup>19</sup> finding that all employees subjected to discrimination, regardless of the size of their employer, are nonetheless members of that general class who may bring a *Burk* tort claim.<sup>20</sup> Thus, the court held that while the Oklahoma Legislature can exclude small employers from *statutory* remedies under the OADA, such exclusion does not protect small employers from the independent *common law* remedy of a *Burk* tort for discharge based upon discrimination.<sup>21</sup>

### EXHAUSTION REQUIREMENTS

An interesting issue in light of the *Pioneer* decision is whether employees are required to exhaust administrative remedies prior to bringing a *Burk* tort claim for employment discrimination. The OADA, 25 O.S. §1901, requires claimants to first exhaust administrative remedies prior to filing a complaint for handicap discrimination under the OADA. In *Atkinson v. Halliburton Co.*,<sup>22</sup> the court required the plaintiff to exhaust administrative remedies under §1901 as a prerequisite to filing a *Burk* tort claim for handicap discrimination.<sup>23</sup> The court reasoned that exhaustion of administrative remedies is a long standing jurisdictional requirement before resorting to the court system.<sup>24</sup> Further, the court found that §1901 would be rendered “meaningless and irrelevant” if employees were not first required to exhaust.<sup>25</sup> However, the exhaustion requirement in §1901 only applies to handicap discrimination claims because the OADA does not provide a private right of action for claims of discrimination based on race, color, religion, sex, national origin or age. Following the expansion of the *Burk* tort principles in *Saint* and *Shirazi*, there has been speculation as to whether the rule in *Atkinson* requiring exhaustion of administrative remedies is applicable to a *Burk* tort claimant pleading discrimination

“...the court's holding in *Pioneer* potentially jeopardizes the requirement for claimants to exhaust administrative remedies prior to filing a *Burk* tort claim.”

other than handicap discrimination. Likewise, the new rule set forth in *Pioneer* leads to even more speculation as to whether a *Burk* tort claimant alleging discrimination against a *small* employer will be required to exhaust administrative remedies since the OADA specifically excludes small employers.<sup>26</sup> The speculation arises because the facts in *Atkinson* were limited to only handicap discrimination and the employer had more than 15 employees.

Highlighting the uncertainty of whether claimants alleging discrimination other than disability discrimination are required to exhaust are two unpublished opinions from the U.S. District Court for the Western District of Oklahoma: *Maiahy v. Target Corp.*<sup>27</sup> and *Williams v. Convergys Corp.*<sup>28</sup> In *Maiahy*, Judge Heaton held that the plaintiff must first exhaust administrative remedies prior to asserting a *Burk* tort claim for age and national origin discrimination.<sup>29</sup> However, in *Williams*, Judge Miles-LaGrange allowed the plaintiff to assert a *Burk* tort claim for sex and race discrimination without first exhausting administrative remedies.<sup>30</sup> Neither the Oklahoma Supreme Court nor the 10th Circuit has published an opinion on the issue of exhaustion of administrative remedies for a *Burk* tort claim since *Atkinson* and the court's recent expansion of the *Burk* tort principles in *Saint*, *Shirazi* and *Pioneer*.

In taking a deeper look at the issue, the court's holding in *Pioneer* potentially jeopardizes the requirement for claimants to exhaust administrative remedies prior to filing a *Burk* tort claim. This is because *Pioneer* may have created an inconsistency between the procedural requirements that members of the same class are required to follow. Under *Atkinson*, a claimant alleging handicap discrimination against an employer with *more* than 15 employees is required to first exhaust administrative remedies. However, there is no requirement for claimants alleging handicap discrimination whose employer has *less* than 15 employees, to exhaust administrative remedies prior to asserting a tort claim. Thus, if claimants of small employers are *not* required to first exhaust administrative remedies and claimants of large-

er employers *are* required to exhaust, an inconsistency may exist among members of the same class. This inconsistency may run afoul of the Oklahoma constitutional requirement for uniformity of remedies.<sup>31</sup> To cure this inconsistency, the court could require *all* claimants to exhaust administrative remedies as a prerequisite to filing a discrimination tort claim or overturn their previous ruling in *Atkinson* and hold that claimants alleging a *Burk* tort for employment discrimination against *any* size employer are not required to exhaust administrative remedies. Employers are likely to argue that the exhaustion requirement set forth in *Atkinson* applies to all claimants seeking to file a *Burk* tort claim for employment discrimination regardless of the number of employees. However, this remains an uncertain area of the law. Neither *Atkinson* nor *Pioneer* addresses the constitutional requirement of uniformity with regard to exhaustion of administrative remedies.<sup>32</sup> While it is impossible to predict the route the Oklahoma Supreme Court will take with this issue, employers should be aware that the court could hold that claimants, regardless of the size of the employer, are *not* required to exhaust administrative remedies prior to filing a *Burk* tort claim.

## CONCLUSION

The court's decision in *Smith v. Pioneer Masonry Inc.* now subjects all employers, regardless of size, to a *Burk* tort claim based on discrimination for race, color, age, sex, religion, national origin and disability. Small employers are now at risk for costly workplace discrimination lawsuits filed by disgruntled employees. The statutory requirement of 15 or more employees is designed to shield small employers from the high cost of such litigation. Interesting, that in these difficult economic times for employers, the court chooses to overlook this important economic policy concern. As the Oklahoma Supreme Court continues to expand and redefine the legal principles surrounding the *Burk* tort, employers and litigators alike should be prepared for more changes that lie ahead.

1. 25 O.S. 2001 §§1101, *et seq.*

2. 42 U.S.C. §2000e, *et seq.*

3. 29 U.S.C. §§621, *et seq.*

4. 42 U.S.C. §12101, *et seq.*

5. See 25 O.S. 2001 §1301(1); 42 U.S.C. §2000e(b); 29 U.S.C. §630(b) (requires an employer to employ 20 or more employees); 42 U.S.C. §12111(5)(A).

6. 1989 OK 22, 770 P.2d 24.

7. In *Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24, the Oklahoma Supreme Court established a tort claim based upon a public policy exception to the at-will termination rule in a narrow class of cases in

which the discharge of an employee is contrary to clear public policy as outlined by state constitutional, statutory or decisional law.

8. In *Saint v. Data Exchange Inc.*, 2006 OK 59, P.3d 1037, the Oklahoma Supreme Court held that a *Burk* tort remedy was available to redress wrongful discrimination claims based on employment discrimination.

9. 2009 OK 82, ¶13, 226 P.3d 687.

10. *Id.* at ¶ 2.

11. *Id.* at ¶ 1.

12. 1995 OK 101, 905 P.2d 223.

13. *Brown v. Ford*, 1995 OK 101, 905 P.2d 223.

14. 2006 OK 59, 145 P.3d 1037.

15. 2009 OK 13, 204 P.3d 75.

16. *Id.* at ¶ 12.

17. 25 O.S. 2001 §1302.

18. *Shirazi*, 2009 OK at ¶ 12.

19. *supra* n. 6.

20. *Id.* at ¶ 11.

21. *Pioneer*, 2009 OK at ¶ 11.

22. 1995 OK 104, 905 P.2d 772.

23. *Id.* at 777.

24. *Id.* at 774.

25. *Id.* at 776.

26. 25 O.S. 2001 §1301(1).

27. 2009 WL 523110 (W.D.Okla. March 2, 2009).

28. 2009 WL 3242036 (W.D.Okla. Oct. 2, 2009).

29. 2009 WL 523110 at \*2. The court based its holding on the long-established doctrine in Oklahoma requiring claimants to exhaust administrative remedies as a *jurisdictional* prerequisite to filing suit. The court also found that if one class of discrimination claimants was allowed to bring suit without exhausting administrative remedies this "would create a dichotomous division of discrimination remedies contrary to Art. 5 §4 of the Oklahoma Constitution." *Id.* (citing *Kruchowski v. Weyerhaeuser Co.*, 2008 OK 105, 202 P.3d 144).

30. 2009 WL 3242036 at \*3. The court based its decision on the 10th Circuit's holding in *Katzer v. Baldor Elec. Co.*, 969 F.2d 935, 938 (10th Cir. 1992) stating "that an employee-plaintiff may state a tort cause of action pursuant to the public policy exception to the at-will employment rule even though there are administrative remedies available to the employee-plaintiff for the alleged discrimination."

31. Okla. Const. Art. 5 §46.

32. See *Atkinson*, *supra* n. 32; *Pioneer Masonry*, *supra* n. 6.

## ABOUT THE AUTHORS



Kimberly Lambert Love is a partner at Titus Hillis Reynolds Love Dickman & McCalmon. With over 25 years of experience, she practices in all areas of employment law. She is the past chairperson of the Labor and Employment Section of the OBA and is a regular contributor to the *OBJ*.



Shannon P. Wheeler graduated with highest honors from the University of Tulsa College of Law in 2008 and was named Order of the Curule Chair. She is an associate with Titus Hillis Reynolds Love Dickman & McCalmon and focuses her practice in the area of employment law and general civil litigation.



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**LAWYERS HELPING LAWYERS  
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# 2010 OBA Award Winners



**Wednesday,  
Nov. 17**

**Law School Luncheons**

**Outstanding Senior Law  
School Student Award**

OCU – Daniel Correa

OU – Christa Evans

TU – Philip Tinker



**Thursday,  
Nov. 18**

**OBA/CLE  
Plenary Session**

8:50 a.m.

**Earl Sneed Award**

*for outstanding continuing  
legal education contributions*

Justice John F. Reif,  
Oklahoma City

## **Annual Luncheon**

**Thursday, Nov. 18**

Noon

### **Award of Judicial Excellence**

*for excellence of character, job performance or achievement  
while a judge and service to the bench, bar and community*

Judge Bryan Dixon, Oklahoma City

Judge James H. Payne, Muskogee

### **Liberty Bell Award**

*for non-lawyers or lay organizations for promoting  
or publicizing matters regarding the legal system*

Sherri Carrier, Tulsa

### **Joe Stamper Distinguished Service Award**

*to an OBA member for long-term service  
to the bar association or contributions to the legal profession*

R. Forney Sandlin, Muskogee

### **Alma Wilson Award**

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

Judge C. William Stratton, Lawton

**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*

R. Clark Musser, Oklahoma City

**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 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*

Retired Judge Milton Craig, Chandler

**General Assembly**

**Friday, Nov. 19**

9 a.m.

**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*

Reggie Whitten,  
Oklahoma City

**Outstanding County  
Bar Association  
Award**

*for meritorious efforts  
and activities*

Muskogee County  
Bar Association

**Hicks Epton Law  
Day Award**

*for individuals or organizations  
for noteworthy Law Day activities*

Comanche County  
Bar Association

**Golden Gavel Award**

*for OBA Committees and Sections  
performing with a high degree  
of excellence*

OBA Family Law Section

**Outstanding Young  
Lawyer Award**

*for a member of the OBA Young  
Lawyers Division for service to  
the profession*

Doris Gruntmeir, Muskogee

Richard Rose, Oklahoma City

**Outstanding Service  
to the Public Award**

*for significant community service  
by an OBA member*

Richard McKnight, Enid

**Award for  
Outstanding  
Pro Bono Service**

*by an OBA member*

Ana Basora-Walker, Lawton

Jim Proszek and Steve Soule,  
Tulsa

**Maurice Merrill  
Golden Quill Award**

*for best Oklahoma  
Bar Journal article*

Klint A. Cowan,  
Oklahoma City

Micheal Salem, Norman

# 2010 House of Delegates

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# OBA ANNUAL MEETING

## Program of Events Crowne Plaza Hotel, Tulsa ♦ Nov. 17-19, 2010

*All events will be held at the Crowne Plaza Hotel unless otherwise specified.  
Submit meeting room and hospitality suite requests to Craig Combs at [craigc@okbar.org](mailto:craigc@okbar.org).  
Submit meeting program information to Melissa Brown at [melissab@okbar.org](mailto:melissab@okbar.org).*

### TUESDAY, NOV. 16

OBA REGISTRATION ..... 4 – 7 P.M.

OKLAHOMA FELLOWS OF THE  
AMERICAN BAR FOUNDATION ..... 7 – 9 P.M.

### WEDNESDAY, NOV. 17

OBA REGISTRATION  
AND HOSPITALITY ..... 8 A.M. – 5 P.M.

OKLAHOMA FELLOWS OF THE AMERICAN  
BAR FOUNDATION ..... 8:30 – 9:30 A.M.

BOARD OF BAR EXAMINERS .... 8:30 A.M. – NOON

OBA/CLE SEMINAR  
REGISTRATION ..... 8:30 – 9 A.M.

OBA/CLE SEMINAR ..... 9 A.M. – 5 P.M.

*See seminar program for speakers  
and complete agenda*

CRIMINAL LAW  
HOW GOOD LAWYERS SURVIVE BAD TIMES  
FAMILY LAW  
NUTS & BOLTS

OU COLLEGE OF LAW  
ALUMNI RECEPTION  
AND LUNCHEON ..... 11:15 A.M. – 1:30 P.M.

OCU SCHOOL OF LAW  
ALUMNI RECEPTION  
AND LUNCHEON ..... 11:45 A.M. – 2 P.M.

TU COLLEGE OF LAW  
ALUMNI RECEPTION  
AND LUNCHEON ..... NOON – 2 P.M.

CRIMINAL LAW SECTION  
LUNCHEON ..... NOON – 2 P.M.

OBA BOARD OF GOVERNORS  
MEETING ..... 2 – 4 P.M.

INDIAN LAW SECTION ..... 2 – 4 P.M.

FRIENDS OF BILL W. .... 5 – 6 P.M.

LAW DAY COMMITTEE ..... 5 – 6:30 P.M.

PRESIDENT'S RECEPTION ..... 7 – 9:30 P.M.  
*(Free for everyone with  
meeting registration)*

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## THURSDAY, Nov. 18

### LEGAL AID SERVICES

PRO BONO BREAKFAST.....7:30 – 8:45 A.M.

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### AMERICAN COLLEGE OF

TRUST AND ESTATE COUNSEL .....8 – 9:30 A.M.

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### AMERICAN COLLEGE OF

TRIAL LAWYERS .....8 – 9:30 A.M.

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### PROFESSIONALISM

COMMITTEE .....8 – 9:30 A.M.

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### OBA REGISTRATION

AND HOSPITALITY .....8 A.M. – 5 P.M.

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### OKLAHOMA ASSOCIATION

FOR JUSTICE SEMINAR.....8:30 A.M. – 4 P.M.

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CREDENTIALS COMMITTEE.....9 – 9:30 A.M.

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### LEGAL INTERN

COMMITTEE .....9 – 10:30 A.M.

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OBA/CLE PLENARY SESSION.....9 A.M. – NOON

---

FAMILY LAW SECTION .....9 A.M. – 5 P.M.

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### ESTATE PLANNING, PROBATE

AND TRUST SECTION .....10 – 11:45 A.M.

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### OBA RULES AND

BY-LAWS COMMITTEE.....10 – 10:30 A.M.

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MCLE COMMISSION .....10:30 – 11:45 A.M.

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### OBA RESOLUTIONS

COMMITTEE .....10:45 A.M. – NOON

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### OBA ANNUAL LUNCHEON

FOR MEMBERS, SPOUSES

AND GUESTS ..... NOON – 2 P.M.  
(*\$30 with meeting registration*)

### FEATURING:



*Michael Wallis*  
**Historian, Biographer  
& Author**  
**Tulsa**

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MICHAEL WALLIS BOOK SIGNING.....2 – 3 P.M.  
(*Books available for purchase*)

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DIVERSITY COMMITTEE FORUM .....2 – 4 P.M.

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### COUNCIL ON JUDICIAL

COMPLAINTS .....2 – 4 P.M.

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REAL PROPERTY SECTION .....2 – 3:30 P.M.

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### THE INCARCERATION OF

WOMEN IN OKLAHOMA

SEMINAR .....2:15 – 3:30 P.M.  
(*Annual Meeting registration  
not required for admission*)

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### OKLAHOMA BAR FOUNDATION

BOARD OF TRUSTEES.....3 – 5 P.M.

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BOARD OF EDITORS.....3:30 – 5 P.M.

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### OBA/CLE: LIVES IN

BALANCE: LAWYERS

HELPING LAWYERS.....3:45 – 5:15 P.M.  
(*Annual Meeting registration  
not required for admission*)

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FRIENDS OF BILL W.....5 – 6 P.M.

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OKLAHOMA BAR FOUNDATION  
FELLOWS RECEPTION .....6 – 7:30 P.M.

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HEALTH LAW SECTION .....6 – 8:30 P.M.

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YOUNG LAWYERS DIVISION  
BOARD OF DIRECTORS  
ANNUAL MEETING.....6:30 – 7 P.M.

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YOUNG LAWYERS DIVISION  
PRESIDENT'S RECEPTION .....7 – 9 P.M.

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MUSIC THROUGH THE YEARS  
FEATURING JESSICA HUNT.....8 – 9 P.M.

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CASINO NIGHT ..... 9 P.M. – MIDNIGHT  
*(Free for everyone with  
meeting registration)*

*Prize drawing at end of the event*

SPONSOR:  
*OBA Young Lawyers Division*

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## FRIDAY, NOV. 19

PRESIDENT'S BREAKFAST.....7:30 – 9 A.M.  
*(\$20 with meeting registration)*

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OBA REGISTRATION AND  
HOSPITALITY.....8 – 10:30 A.M.

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OKLAHOMA BAR ASSOCIATION  
GENERAL ASSEMBLY .....9 – 10 A.M.

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OKLAHOMA BAR ASSOCIATION  
HOUSE OF DELEGATES ..... 10 A.M. – NOON  
*Election of Officers & Members  
of the Board of Governors  
Approval of Title Examination Standards  
Resolutions*

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BALLOT COMMITTEE ..... 11 A.M. – NOON



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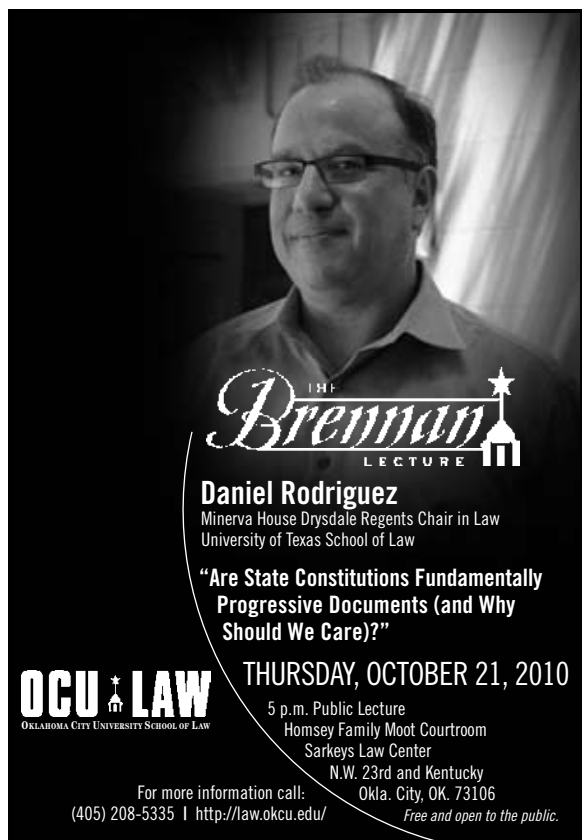
Brokerage fraud and mismanagement of investors' funds occur far more often than people realize. Discovery of brokerage firm misconduct is rarely revealed during good economic times. However, market declines cause investors (or their tax and legal professionals) to identify the real reason for the losses or missing funds. My law practice is devoted to helping those people, including senior citizens, who may have been victimized by the financial industry.

For a free consultation and case review, please call (405) 748-8855 or visit my website at [www.StockAndBrokerFraud.com](http://www.StockAndBrokerFraud.com) or email me at [Law@KurtisWard.com](mailto:Law@KurtisWard.com)

*Kurtis J. Ward*

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**THE Brenman LECTURE**

**Daniel Rodriguez**  
Minerva House Drysdale Regents Chair in Law  
University of Texas School of Law

**"Are State Constitutions Fundamentally  
Progressive Documents (and Why  
Should We Care)?"**

**THURSDAY, OCTOBER 21, 2010**  
5 p.m. Public Lecture  
Homsey Family Moot Courtroom  
Sarkeys Law Center  
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# OBA/CLE Annual Meeting 2010

Crowne Plaza Hotel, Tulsa

**November 17, 2010**

**DAY ONE**

	<i>Family Law</i>  <i>Promenade A</i>	<i>Criminal Law</i>  <i>Promenade B</i>	<i>How Good Lawyers Survive Bad Times</i>  <i>Promenade C</i>	<i>Nuts and Bolts</i>  <i>Promenade D</i>
WEDNESDAY Registration 8 - 9 a.m.	Program Planner/ Moderator Lori Pirraglia	Program Planner/ Moderator Ben Brown Charles Sifers	Program Planner/ Moderator Jim Calloway	Program Planner/ Moderator Collin Walke
<b>Session 1</b> 9 - 9:50 a.m.	<b>Client Intake: Starting Out on the Right Foot/Making Good Client Choices</b>  Jon Ford	<b>Immigration &amp; Criminal Law: A Practical Explanation in Light of <i>Padilla v. Kentucky</i></b>  Joan Lopez Campbell Cooke	<b>50 Tips for Tough Times</b>  Jim Calloway	<b>Administrative Law Trials: We Aren't in Kansas Anymore</b>  Gary Payne
<b>Session 2</b> 10 - 10:50 a.m.	<b>Temporary Order Hearing: Exhibits Needed and Preparing Your Clients</b>  Phil Tucker	<b>The Practical &amp; Advance Use of the Science of Eyewitness Identification in the Courtroom PART I</b>  Professor Gary Wells Ph.D.	<b>Marketing on a Budget</b>  Mark A. Robertson	<b>Get Your Ethics! (ethics)</b>  Gina Hendryx
<b>Session 3</b> 11 - 11:50 a.m.	<b>Finding Expert Witnesses - Business Valuators and Mental Health Professionals</b>  TBD	<b>The Practical &amp; Advance Use of the Science of Eyewitness Identification in the Courtroom PART 2</b>  Professor Gary Wells Ph.D.	<b>The Thrifty Lawyer</b>  L. Michele Nelson	<b>Your Solo Shopping List</b>  Jim Calloway
<b>12-2 p.m. LUNCH (On your own)</b>				
<b>Session 4</b> 2 - 2:50 p.m.	<b>Dissolution Depositions: Taking and Defending</b>  Donelle Ratheal	<b>Criminal Law Motions Practice</b>  TBD	<b>Free, Cheap and Easy Technology Tools</b>  Jim Calloway	<b>Your Job as a Criminal Law Attorney</b>  Garvin Isaacs

# OBA/CLE Annual Meeting 2010

<i>cont'd</i>	<i>Family Law</i>	<i>Criminal Law</i>	<i>How Good Lawyers Survive Bad Times</i>	<i>Nuts and Bolts</i>
<b>Session 5</b> 3 - 3:50 p.m.	<b>Trial Exhibits and Witness: Choosing and Preparation</b>  Kimberly Hays	<b>Representing Persons Charged with Driving Under the Influence</b>  Josh D. Lee Charles Sifers	<b>Your Law Firm Finances</b>  TBD	<b>Bankruptcy Chapter 7: The Ins and Outs</b>  Jennifer Kirkpatrick
<b>Session 6</b> 4 - 4:50 p.m.	<b>The End/Beginning: Drafting the Decree/ Pre-Nups for New Beginnings</b>  Bill LaSorsa	<b>Working with the Media</b>  Moderator Doug Dodd  Panel TBD	<b>Cutting Costs &amp; Coralling Clients without Compromising Ethics (ethics)</b>  Gina Hendryx Travis Pickens	<b>Mastering the Art of the Deposition</b>  Ronald Walker

**4:50 p.m. ADJOURN**

**November 18, 2010**

**DAY TWO**

<b>THURSDAY</b> Registration 8:30 - 9 a.m.	<b>Topic</b>	<b>Program Moderator:</b> Judge Thomas C. Gillert, District Judge, Tulsa
9 a.m.	<b>Picking Cotton: Our Memoir of Injustice and Redemption</b>	<b>Speakers:</b> Jennifer Thompson-Cannino, Salem, NC Ronald Cotton, Mebane, NC
9:50 a.m.	<b>The Science of Eyewitness Identification</b>	<b>Speaker:</b> Gary D. Wells, Ph.D., Professor of Psychology, Iowa State University, Ames
10:40 a.m.	<b>Break</b>	
10:50-11:50 a.m.	<b>Eyewitness Identification in Oklahoma</b>	<b>Panelists:</b> Michael Huff, Tulsa Police Department, Homicide Division, Tulsa Douglas E. Drummond, Tulsa County First Assistant District Attorney, Tulsa Stephen Kunzweiler, Assistant District Attorney, Tulsa Jennifer Thompson-Cannino Ronald Cotton Gary Wells, Ph.D.

# OBA ANNUAL MEETING 2010 Registration Form

Please complete a separate form for each registrant.

Name \_\_\_\_\_

E-mail \_\_\_\_\_

Badge Name (if different from roster) \_\_\_\_\_ Bar No. \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_ Phone \_\_\_\_\_

Name of Non-Attorney Guest \_\_\_\_\_

Please change my OBA roster information to the information above. ☐ Yes ☐ No

## Check all that apply:

- ☐ Judiciary ☐ OBF Fellow ☐ OBF Past President ☐ OBA Past President ☐ YLD Officer ☐ YLD Board Member ☐ YLD Past President  
☐ Board of Bar Examiner ☐ 2010 OBA Award Winner ☐ Delegate ☐ Alternate ☐ County Bar President: County \_\_\_\_\_

## ☐ YES! Register me for the 2010 Annual Meeting, November 17, 18 & 19, in Tulsa.

Events will be held at the Crowne Plaza Hotel. Registration fee includes continental breakfast in hospitality area, President's Reception ticket(s), convention gift, Vendors Expo, Music through the Years and Viva Las Vegas Casino Night.

- ☐ MEMBER: ☐ \$50 through Nov. 3; \$75 after Nov. 3 ..... \$ \_\_\_\_\_  
☐ NEW MEMBER (Admitted after Jan. 1, 2010): ☐ Free through Nov. 3; \$15 after Nov. 3 ..... \$ \_\_\_\_\_  
☐ LAW STUDENT DIV. ☐ \$25 through Nov. 3; \$35 after Nov. 3 ..... \$ \_\_\_\_\_

## ***I will be attending/participating in the following ticketed events in addition to my registration fee for Annual Meeting:***

- ☐ WED. & THURS.: CLE Multitrack ( \_\_\_ [0 or 1] ticket @ \$150 through Nov. 3; \$175 after Nov. 3; and Plenary \$50 for new members through Nov. 3, \$75 after Nov. 3) ..... \$ \_\_\_\_\_  
☐ WEDNESDAY: CLE Multitrack only (\$125/\$150) ..... \$ \_\_\_\_\_  
☐ THURSDAY: CLE Plenary only ( \_\_\_ [0 or 1] ticket @ \$75 through Nov. 3; \$100 after Nov. 3; \$25 for new members through Nov. 3, \$50 after Nov. 3) ..... \$ \_\_\_\_\_  
☐ THURSDAY: Annual Luncheon ( \_\_\_ number of tickets @ \$30 each) ..... \$ \_\_\_\_\_  
☐ FRIDAY: President's Breakfast ( \_\_\_ number of tickets @ \$20 each) ..... \$ \_\_\_\_\_  
☐ Please check here, if under the Americans with Disabilities Act you require specific aids or services during your visit to the OBA Annual Meeting. ☐ Audio ☐ Visual ☐ Mobile (Attach a written description of your needs.)

## ***I will be attending the following ticketed events that do NOT require Annual Meeting registration:***

- ☐ WEDNESDAY: Law School Luncheon – (check one) ☐ OCU ☐ OU ☐ TU  
 ( \_\_\_ number of tickets @ \$30 each ..... \$ \_\_\_\_\_

**TOTAL \$ \_\_\_\_\_**

## ***I will be attending the free event(s) below that do(es) NOT require Annual Meeting registration:***

- ☐ Lives in Balance: Lawyers Helping Lawyers  
☐ Incarceration of Women in Oklahoma

### **THREE WAYS TO REGISTER**

■ **MAIL** this registration form with payment or credit card info to:  
 OBA Annual Meeting  
 P.O. Box 53036  
 Okla. City, OK 73152

■ **FAX** this registration form with credit card information to: (405) 416-7092.

■ **ONLINE** at [www.okbar.org](http://www.okbar.org)  
**CANCELLATION POLICY** Full refunds will be given through Nov. 10. No refunds will be issued after that date.

### **PAYMENT OPTIONS:**

- ☐ Check enclosed: Payable to Okla. Bar Association  
 Credit card: ☐ VISA ☐ Mastercard ☐ Discover ☐ American Express

Card # \_\_\_\_\_

Credit Card CWV/CVC # (on back of card) \_\_\_\_\_

Exp. Date \_\_\_\_\_

Authorized Signature \_\_\_\_\_

### **HOTEL ACCOMMODATIONS:**

Fees do not include hotel accommodations. For reservations contact: Crowne Plaza Tulsa Hotel at (800) 227-6963. Call by Oct. 26 and mention hotel code: Oklahoma Bar Association 2010 Convention for a special room rate of \$105 per night. For hospitality suites, contact Craig Combs at (405) 416-7040 or e-mail: [craigc@okbar.org](mailto:craigc@okbar.org).



# House of Delegates

Thank you to the County Bar Presidents of:

Adair, Alfalfa, Beaver, Beckham, Blaine, Bryan, Canadian, Carter, Cherokee, Choctaw, Cimarron, Cleveland\*\*, Coal, Comanche, Cotton, Craig, Creek, Custer, Delaware, Dewey, Ellis, Garfield, Garvin, Grady, Grant, Greer, Harper, Hughes, Jackson, Jefferson, Johnston, Kay, Kingfisher, Kiowa, Logan, Love, Major, Marshall, Mayes, McClain, McCurtain, McIntosh, Murray, Muskogee, Okfuskee, Oklahoma, Okmulgee, Osage, Ottawa\*\*, Pawnee, Payne, Pittsburg, Pontotoc, Pottawatomie, Pushmataha, Rogers, Roger Mills, Seminole, Sequoyah, Texas, Tillman, Tulsa, Wagoner, Washington, Washita, Woods and Woodward counties for submitting your delegate and alternate selections for the upcoming OBA Annual Meeting. (\*\*Reported, awaiting election)

Listed below are the counties that have not sent their delegate and alternate selections to the offices of the Oklahoma Bar Association. Please help us by sending the names of your delegates and alternates now. In order to have your delegates/alternates certified, mail or fax delegate certifications to OBA Executive Director John Morris Williams, P.O. Box 53036, Oklahoma City, OK 73152-3036, or Fax: (405) 416-7001.

Atoka	LeFlore
Caddo	Lincoln
Harmon	Noble
Haskell	Nowata
Latimer	Stephens

In accordance with the Bylaws of the Oklahoma Bar Association (5 OS, Ch. 1, App. 2), "The House of Delegates shall be composed of one delegate or alternate from each County of the State, who shall be an active or senior member of the Bar of such County, as certified by the Executive Director at the opening of the annual meeting; providing that each County where the active or senior resident members of the Bar exceed fifty shall be entitled to one additional delegate or alternate for each additional fifty active or senior members or major fraction thereof. In the absence of the elected delegate(s), the alternate(s) shall be certified to vote in the stead of the delegate. In no event shall any County elect more than thirty (30) members to the House of Delegates."

"A member shall be deemed to be a resident, ... of the County in which is located his or her mailing address for the Journal of the Association."

# 2011 OBA Board of Governors Vacancies

**Nominating Petition Deadline was 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: Gerald C. Dennis, Antlers**

### 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: Scott Pappas, Stillwater**

**Nominee: Gregg W. Luther, Shawnee**

### 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: O. Christopher Meyers, Lawton**

### Member-At-Large

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

**Nominee: Renée DeMoss, Tulsa**

**Nominee: Kimberly K. Hays, Tulsa**

**Nominee: Mack K. Martin, Oklahoma City**

## 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.

If no one has filed for one of the vacancies, nominations to any of the above offices shall be received from the House of Delegates on a petition signed by not less than 30 delegates certified to and in attendance at the session at which the election is held.

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](http://www.okbar.org).

# OBA Nominating Petitions

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

## BOARD OF GOVERNORS

## MEMBER-AT-LARGE

**MACK K. MARTIN, OKLAHOMA CITY**

Nominating Petitions have been filed nominating Mack K. Martin for election of Member-at-Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011.

**A total of 127 signatures appear on the petitions.**

**help  
save  
lives.**

**Volunteer**

**october 15 @  
the oklahoma bar center @  
noon with free lunch**

We invite you to attend our training October 15th. You will hear how depression, stress, addiction and substance abuse are affecting attorneys in Oklahoma and what LHLAP is doing to help. You will also learn a basic and effective intervention technique for suicide prevention. The work of this committee makes a difference in the lives of attorneys and we want to strengthen our presence as the need grows.

presented by the  
OBA Lawyers Helping Lawyers  
Assistance Program

training program will be from 1 - 3 p.m.

RSVP to Mark Schneidewent @  
marks@okbar.org

## Deadline to register October 8

# OBA Creates Justice Commission

The OBA Board of Governors, at its Sept. 24 meeting, approved a resolution creating the Oklahoma Justice Commission, which will be dedicated to enhancing the reliability and accuracy of convictions. Committee members will represent a wide range of people from the criminal justice community including district attorneys from urban and rural areas, defense attorneys, judges, law enforcement officers, legal scholars, legislators, public defenders, forensic science experts and victim advocates. Below is the resolution in its entirety that provides complete details.

## **OKLAHOMA BAR ASSOCIATION RESOLUTION ESTABLISHING**

### **THE OKLAHOMA JUSTICE COMMISSION:**

#### **A Commission Dedicated to Enhancing the Reliability & Accuracy of Convictions**

WHEREAS, 258 individuals in the United States have been exonerated through post-conviction DNA testing, 17 of whom were sentenced to death, and the average length of time served by these exonerees being 13 years;

WHEREAS, 10 individuals have been exonerated in Oklahoma through post-conviction DNA testing, four of whom were in prison for murder;

WHEREAS, criminologists have concluded that biological evidence is unavailable in the vast majority of criminal cases and that consequently wrongful convictions revealed by DNA testing represent a small proportion of wrongful convictions overall;

WHEREAS, the incarceration of an innocent person not only works an injustice against that individual, but also harms society in that the real perpetrator of a crime remains free and able to commit additional criminal acts;

WHEREAS, it is important for both the criminal justice stakeholders and the citizens of Oklahoma to understand why these individuals were wrongfully convicted and how wrongful convictions may be avoided in the future; and

WHEREAS, thorough, unbiased study and review in other states has resulted in recommendations for significant reforms to the criminal justice system in order to avoid wrongful convictions, and Oklahoma has not engaged in any such review of the state's criminal justice system; now, therefore, be it

RESOLVED, *by the Oklahoma Bar Association*, in recognition of the need to provide a continuing forum for education and dialogue regarding the causes of wrongful conviction of the innocent and, where appropriate, to recommend and assist in the implementation of justice system enhancements, which will increase the reliability of convictions in Oklahoma,

*The Oklahoma Bar Association hereby establishes the Oklahoma Justice Commission: A Commission Dedicated to Enhancing the Reliability & Accuracy of Convictions.*

## **OKLAHOMA JUSTICE COMMISSION**

### **SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION**

The structure and composition of the Commission shall be:

#### **1.1. Commission Membership and Officers:**

The Commission shall consist of as many members as the Chair deems necessary. The officers of the Commission shall include at least a Chair and a Secretary. The Chair of the Commission shall be the President of the OBA or his or her designee. The remaining officers shall be considered upon recommendation of the Chair and shall be elected by a majority of the Commission members.

## **1.2. Selection and Term of Members:**

The Chair shall appoint the Commission's other members in his or her discretion, but representation shall include at least one member from each of the following constituencies: (1) district attorneys (both a representative from urban and rural areas), (2) defense attorneys, (3) trial court judges, (4) appellate court judges, (5) police (both a representative from urban and rural areas), (6) sheriffs, (7) legal scholars, (8) legislators, (9) the office of the Attorney General, (10) the OSBI, (11) victim advocates, (12) public defenders, (13) a CLEET (Council on Law Enforcement Education and Training) representative, (14) an expert or liaison from the innocence community, (15) a forensic science consultant or expert, and (16) a member of the general public. Additional members shall be appointed by the Chair as necessary, and at least one of the members on the Commission shall have litigation experience.

The members of the Commission shall serve a term of two years. Initial terms shall begin at the time the representatives are selected, which shall take place within six months of the resolution's passage.

## **SECTION 2: RESPONSIBILITIES OF THE COMMISSION**

The Commission's major responsibilities shall include raising awareness of the issues surrounding wrongful convictions and studying and providing recommendations regarding the following:

### **2.1. Causes of Conviction of the Innocent:**

The Commission shall seek to research and identify the common causes of conviction of the innocent, both nationally and in Oklahoma. These include, but are not limited to, (1) eyewitness misidentification, (2) unvalidated or improper forensics, (3) false confessions or admissions, (4) forensic science misconduct, (5) government misconduct, (6) incentivized witnesses, and (7) inadequate or improper lawyering.

## **2.2. Implicated Procedures:**

The Commission shall seek to identify law enforcement, forensic, trial and judicial procedures, and attorney techniques, which may cause or increase the likelihood of the conviction of the innocent.

## **2.3. Remedial Strategies and Procedures:**

The Commission shall work to create remedial strategies designed to reduce or lessen the possibility of conviction of the innocent, including, but not limited to, procedural and educational remedies, training of criminal justice practitioners, and the development of procedures to identify, expedite the release of, and rightfully compensate persons wrongly convicted.

## **2.4. Implementation Plans:**

The Commission shall develop plans to implement remedial strategies, such plans to include, but not be limited to, analysis of implementation expenses, ongoing costs, possible savings and the impact on the criminal justice system for each potential solution; projected effectiveness of proposed plans, and any potential negative impact of proposed plans on the conviction of guilty persons.

The Commission shall also perform a cost analysis of wrongful convictions and their effect upon the State.

## **SECTION 3: ADDITIONAL RESPONSIBILITIES OF THE COMMISSION**

The Commission shall provide periodic interim reports of its findings and recommendations as necessary and annual reports no later than 31 December each year to the Oklahoma Bar Association Board of Governors.

This Resolution shall be promulgated by publication in the *Oklahoma Bar Journal* and the OBA's website ([www.okbar.org](http://www.okbar.org)).

Adopted by the OBA Board of Governors this the 24th day of September, 2010.

# Volunteers Critical to OBA Success

I understand that life is hectic, and you're busy making a living at practicing law. I'm a small town lawyer; I know the challenges of making time for volunteer work. But your association needs you. It's important that we have new people every year take an interest in the many areas in which we try to make a difference. Look at the list below, there's got to be one that's worth your time.

Most meetings utilize videoconference, so if you are located near Tulsa, you are spared the travel time with a connection to the bar center in Oklahoma City. I've got some exciting plans for next year — so I hope I can count on you to get involved.

The easiest way to sign up is online at [www.okbar.org](http://www.okbar.org). Other sign-up options are to complete this form and either fax or mail it to the OBA. I need to hear from you by Dec. 1, 2010, so I can begin committee appointments for 2011.



Deborah Reheard, President-Elect

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## Standing Committees

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- |                                |  |   |
|--------------------------------|--|---|
| • Access to Justice            | • Group Insurance                            | • Paralegal                               |
| • Awards                       | • Law Day                                    | • Professionalism                         |
| • Bar Association Technology   | • Law-related Education                      | • Rules of Professional Conduct           |
| • Bar Center Facilities        | • Law Schools                                | • Solo and Small Firm Conference Planning |
| • Bench and Bar                | • Lawyers Helping Lawyers Assistance Program | • Strategic Planning                      |
| • Civil Procedure              | • Lawyers with Physical Challenges           | • Uniform Laws                            |
| • Communications               | • Legal Intern                               | • Women in Law                            |
| • Disaster Response and Relief | • Legislative Monitoring                     | • Work/Life Balance                       |
| • Diversity                    | • Member Services                            |   |
| • Evidence Code                |  |   |

Note: No need to sign up again if your current term has not expired. Check [www.okbar.org/members/committees/](http://www.okbar.org/members/committees/) for terms

Please Type or Print

Name \_\_\_\_\_ Telephone \_\_\_\_\_

Address \_\_\_\_\_ OBA # \_\_\_\_\_

City \_\_\_\_\_ State/Zip \_\_\_\_\_

FAX \_\_\_\_\_ E-mail \_\_\_\_\_

Committee Name

1st Choice \_\_\_\_\_

2nd Choice \_\_\_\_\_

3rd Choice \_\_\_\_\_

Have you ever served  
on this committee?

☐ Yes ☐ No

☐ Yes ☐ No

☐ Yes ☐ No

If so, when?  
How long?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

☐ Please assign me to only one committee.

☐ I am willing to serve on (two or three - circle one) committees.

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

---

Mail: Deborah Reheard, c/o OBA, P.O. Box 53036, Oklahoma City, OK 73152

Fax: (405) 416-7001

# Five Women Honored with Mona Lambird Spotlight Awards

*By Deborah Bruce*

Since 1996 the Spotlight Awards have been given annually to five women who have distinguished themselves in the legal profession and who have lighted the way for other women. In 1998 the award was named to honor the late Mona Salyer Lambird, the first woman president of the Oklahoma Bar Association, and one of the award's first recipients.

The awards are sponsored by the OBA Women in Law Committee and were presented at the Women in Law Conference luncheon on Sept. 30 in Tulsa. Each year all previous winners nominate and select the current year's recipients. A plaque bearing the names of all recipients hangs at the Oklahoma Bar Center in Oklahoma City.

The 2010 Mona Salyer Lambird Spotlight Award recipients are:

## **DEBORAH BROWERS BARNES**

Deborah Browsers Barnes is a judge on the Oklahoma Court of Civil Appeals. She was appointed by Gov. Henry in 2008 and sworn-in by her father-in-law, retired Oklahoma Supreme Court Justice Don Barnes. Graduating first in her class, she was later received the Outstanding OCU Law Review Alumni Award. Her legal career includes private practice with Crowe & Dunlevy and Stack & Barnes in Oklahoma City. She also served as staff attorney for Supreme Court Justice Ralph Hodges and then as in-house attorney and

vice president of human resources with Transok. In 1997, Judge Barnes was the first woman to be named in-house counsel for ONEOK in Tulsa. She has chaired the Oklahoma Board of Bar Examiners, OBA Mineral



Law Section and Tulsa County Bar Association Court Operations Committee. She was selected as a Fellow of the ABA Foundation for Oklahoma. She was a finalist for the Journal Record Woman of the Year and a member of Leadership Oklahoma Class XII. She was reared in Sand Springs and was inducted into the Sandite Hall of Fame Education Foundation.

## **DONNA L. DIRICKSON**

Donna L. Dirickson is a special judge in Custer County. Prior to her appointment, she was a partner in the law firm of Duncan & Dirickson in Weatherford and also worked in the Custer County District Attorney's office. In 2006 she was named the OKDHS Adoptive

Advocate of the Year and in 2009 was honored by the Southwestern Oklahoma State University chapter of the American Association of University Women. She currently serves on the OBA Clients' Security Fund Committee, Women in Law Committee, Solo and Small Firm Planning Committee and the Technology Task Force. She served on the OBA Board of



Governors for three years and was vice-chair for the Lawyers Helping Lawyers Assistance Program. She also served on the Board of Bar Examiners, Legal Ethics Advisory Panel and chaired the OBA Law Office Management & Technology Section. She has served as president and Law Day chair for the Custer County Bar Association, Multi County Youth Services Board of Directors, Great Plains Family YMCA Board of Directors and the Weatherford Kiwanis Club.

## LAURA MCCONNELL-CORBYN

Laura McConnell-Corbyn is a partner with Hartzog Conger Cason & Neville. She has been listed as one of the Top 25 Female Oklahoma Super Lawyers and Top 50 Oklahoma Super Lawyers. In family law she is listed as one of Oklahoma Super Lawyers and in Best Lawyers in America. She is listed in Chambers USA Guide to America's Leading Lawyers and in Benchmark Top Business Litiga-



tors. She is a Fellow of the American Academy of Matrimonial Lawyers and a Fellow of the American Bar Foundation. She was named a Leadership in Law Honoree and a COALA Attorney of the Year. She was in Leadership Oklahoma Class XVI and this year achieved the Profile in Excellence from her alma mater, Oklahoma Baptist University. She has chaired the Oklahoma County Bar Association Bench and Bar Committee and is currently president-elect of the Oklahoma County Bar Association. She has served on the board of directors of Legal Aid and is co-chair of their Oklahoma City Fundraising Committee. She received the Cross and Flame Award from Chapel Hill United Methodist Men for Service to Youth.

## CLANCY SMITH

Clancy Smith was appointed as a judge on the Oklahoma Court of Criminal Appeals on Sept. 1, 2010. A native of Hugo, she began her career teaching high school English in Tulsa and Jacksonville, Fla. After law school, she worked in the private practice of law as a solo practitioner for 14 years. In 1996 she was named a special judge in Tulsa County in the Family



Division, where she served with distinction. In 1996 she received the Outstanding Family Law Judge Award from the OBA Family Law Section. For the next nine years Judge Smith served in the criminal division where she conducted preliminary hearings, arraignments and bond hearings. In 2005 she was appointed as a district judge in Tulsa County where she served in the criminal division and presided over more than 110 felony jury trials. In that capacity she worked closely with Women In Recovery for alternative sentencing options for women. Judge Smith is an active member of the Tulsa County Bar Association. She also served as president of the Johnson-Sontag Chapter of the America Inns of Court for three years, and this year received the James Sontag Award for ethics and civility.

## LINDA S. THOMAS

Linda S. Thomas is a solo practitioner in Bartlesville, where she has represented hundreds of children and adults in deprived and mental health cases. Being a voice for the vulnerable began with her first job as a special education teacher and speech pathologist. A tireless worker for the Oklahoma Bar Association, she has served



on the Board of Governors and as OBA vice president. She chaired the Leadership Task Force and has been the liaison to both the Law Day Committee and Women in Law Committee. She has served on the Budget Committee, Access to Justice Committee and the Strategic Planning Task Force. She chaired the OBA House of Delegates Credentials Committee and served two terms on the OBA Foundation Board of Trustees. She has twice received the OBA President's Award. She also served the Washington County Bar Association by holding every office as well as having chaired CLE, the annual blood drive and the annual toy drive. In Bartlesville she has served on the boards of directors of Run the Streets, Big Brothers and Sisters of Green Country and Family Care Services.

*Ms. Bruce is the Awards Committee chairperson for the Women in Law Committee.*



# OBA Women in Law Conference

Sept. 30, 2010

Southern Hills Country Club, Tulsa

The OBA Women in Law Conference has gained the reputation as a premier event within the Oklahoma Bar Association. This year's event provided the information and tools that women in all sectors of the legal profession need to advance in their professional lives.



*Justice Yvonne Kauger gave the keynote address during the luncheon.*



*Dr. Arin Reeves of the Athens Group consulting firm provided tips for succeeding in the workplace.*



*2010 Spotlight Award winners Judge Clancy Smith, Laura McConnell-Corbyn, Linda Thomas, Judge Donna Dirickson and Judge Deborah Browers Barnes*



*Lynn Worley and Amy Wilson*



*Sarah Wynn, Erin Blohm and Kara Thom*

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I certify that the statements made by me above are correct and complete.

John Morris Williams  
Editor-in-Chief

G   
GREEN



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## FROM THE PRESIDENT

*continued from page 2188*

imagine. The beach on July 4, 2010, was covered with kids playing in the surf, teenagers sunning on the beach, and dogs splashing through the surf catching frisbies. We were wrenched from this beautiful scene by a comment made by our tour guide as he held his hand out pointing in an easterly direction along the vast expanse of Omaha Beach and said, "By 10 a.m. on June 6, 1944, this beach was littered with the bodies of 1,800 dead Americans."

Just above the Normandy Beach lies the most beautiful military cemetery I have seen. It contains the bodies of 9,200 Americans killed in the invasion of France from June 6, 1944, through the liberation of Paris in August of that year. Some of those graves indicate deaths occurring on June 6, 1944, by members of the 29th Division and 1st Division. Those particular graves are located less than 300 meters from the beach where they died.

There is another cemetery outside the city of Carentan approximately 8 to 10 kilometers south of Omaha and Utah beaches. It contains the remains of over 20,000 German soldiers who, like their adversaries the Allies, died in

the battle for France in the summer of 1944. Contrasting the cemeteries is an educational experience on why we fought that war. While the cemetery is reasonably well maintained, very few people appear to visit it. The few individuals who were there at the same time we were appeared to be middle aged or WWII-aged Germans. It is interesting to note that this cemetery is located in the country that was invaded and occupied by Germany. I am not aware of any cemeteries in occupied Europe which contained the honored graves of Germany's adversaries during that occupation.

While all of this was more than enough culture and history to last a lifetime, what Barbara discovered the next day gave me chills.

We were staying in a 300-year-old French farmhouse (one of the largest in the province), a few kilometers west of Carentan, which contains approximately 5,000 – 6,000 people. Barbara had located the farmhouse on a website listing for vacation rentals. After learning there had been apparently some fighting around Carentan, Barbara emailed the owner of the farmhouse. The lady who owns the farmhouse is a French National, who is married to an American diplomat and

has lived in Washington, D.C. for several years. Barbara asked if there was any Normandy Invasion history with respect to the farmhouse. We learned that on the early morning hours of June 6, 1944, members of the 101st Airborne Division landed literally in the front yard and adjoining pond. A German battalion or regimental headquarters was located in one of the farm buildings, and there had to have been a firefight in the front yard where my grandkids and I had been kicking a soccer ball the day before.

I have heard comments from some people my age and younger who feel that we have made a little too much of the "Greatest Generation," particularly with respect to the Second World War. Those people need to go to Normandy, France, and take the tour I took.

Never again perhaps will a great nation be so united in such a cataclysmic struggle where good and evil were so clearly demarked. We, western civilization and the human race owe a debt of gratitude to those men and women who delivered us from perhaps the most tragic bondage that western civilization has ever endured.

# Practicing Law in Hard Times

By John Morris Williams

The reports I have received from several reliable sources indicate that the effects of the national economic downturn have visited Oklahoma lawyers. The stress and pressures of maintaining a law office in slow economic times are the same as with many businesses. Overhead and salaries continue even when the cash flow is slow. I remember starting practice in 1983 shortly after the Penn Square Bank failure and the fallout from its demise. Being new to the practice of law, I was unaware of what practicing in good times looked like. Now I know good times are better. It is like the old saying "I have been rich and I have been poor, rich is better."

Those times in 1983 seem far removed. However, as the economy picked back up in the state of Oklahoma my practice changed. The first couple of years in practice I recall were basically concentrated on debtor-creditor relationships that had gone south. Oftentimes the debtor could not afford representation. I know that because often times when I represented the debtor I found myself involved in another failed debtor-creditor relationship. This says nothing about the countless people who do not have the means to even attempt to hire counsel. The

real kicker is that when times are the hardest is when the least resources are available and the needs are the greatest to assist low-income folks with serious legal problems.

While our pro bono rule is aspirational, providing low cost or no cost legal services or giving money to an organization that provides free legal services is in my mind a very professional thing to do.

My sources also tell me that young lawyers with large student debt are likely to face some serious economic challenges in meeting debt obligations coming right out of law school. This is especially true when they are attempting to start a practice immediately upon graduation. These challenges for young and old alike are resulting in higher incidences of stress-related illnesses and mental health challenges.

Last month I wrote about the program that the Lawyers Helping Lawyers Assistance Program is putting on at the OBA Annual Meeting. I figured if I bugged you about it enough you might come. So here I am at it again. One featured speaker is the current president of the Texas Bar Association who will be speaking on a significant initiative by the Texas Bar Association to address attorney

“If you find that the stresses and challenges of your practice are overwhelming you, let us know what we can do to help.”



stress related to the current economy. I have seen some of their work and it looks like good stuff. This program is free. You do not have to be signed up for the Annual Meeting to attend.

The OBA is very mindful of the times in which we live and strives consistently to give you good value for your

membership. If you find that the stresses and challenges of your practice are overwhelming you, let us know what we can do to help. In addition to LHLAP, our Management Assistance Program, Ethics Counsel and CLE departments all stand ready to assist you with programming and helpful tips to help you in these hard times.

Lastly, I would be remiss in not reminding you that often the best help you can get is from your peers. I believe that nothing can help you

more in developing your practice and your practice skills than the advice of learned peers. Notice I did not say "older." However, someone who has been at the practice of law might be a good peer to consult. I believe that like pro bono work, sharing your knowledge with your peers is the professional thing to do. These are not the first hard times many of us have seen in the practice of law. I want to encourage you to reach out to your professional association and your peers if you begin to feel

overwhelmed in these hard times. I have never seen a time good or bad, when getting learned advice from the OBA or a peer has been a bad thing.

See you at the Annual Meeting!



To contact Executive Director Williams, e-mail him at [johnw@okbar.org](mailto:johnw@okbar.org).



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# Super Charge Your Conference Calls

*By Jim Calloway, Director, OBA Management Assistance Program*

Do you find yourself participating in more telephone conference calls today than several years ago? Many of us have noticed an increase in the number of conference calls, even for fairly major projects, in part due to the challenges and expense of travel. (These are so common that a new term has been invented for them: the teleconference. But I'll still mostly use the old school term.) It seems like any time there is a court case or a project involving several lawyers from different firms, particularly in different states, at some point there will be conference calls.

When you work with lots of volunteer lawyers on projects, you soon learn one of the best ways to move a project along is to have a conference call. The main reason that these are so effective is that everyone sets aside time to think about and work on the project. People will also agree to do something in a conference call when they might decline the request than if it was presented in some other one-to-one method of communication. There is some power in the silence after "So who's going to agree to handle that?"

Maybe there's some peer pressure involved, too.

But whether you are coordinating volunteers, negotiating the language in a pretrial conference order or scheduling half a dozen depositions, there are probably even more conference calls in your future.

There are now some powerful tools and techniques to use



with your conference calls. Here are some tips on powering up your conference calls.

First of all, scheduling a conference call can sometimes seem to take as much time as the actual conference call itself. E-mailing everyone could work well, but we all have such a flood of e-mail to manage, that often someone fails to respond within a reasonable

time. Calling everyone to get available dates and times can be very time-consuming. There are electronic services like MeetingWizard.com that allow you to automate the date/time selection process, provided you start well in advance. With these services, you identify your proposed available dates and times and enter the e-mail addresses for everyone else who will participate. The service then sends them a link to a survey where they can check off the times that work for them.

You will be notified when everyone has responded and can view a chart showing what times work for everyone. MeetingWizard can also prompt them if they do not respond and can be set to remind them the day before the teleconference. The basic MeetingWizard service is free, but registration is required. Other popular meeting scheduler services can be found at [www.timebridge.com](http://www.timebridge.com), [www.setameeting.com](http://www.setameeting.com) and [www.tungle.me/Home](http://www.tungle.me/Home).

If you are scheduling your own teleconferences with people in various time zones participating, take a look at an old standby [www.timeanddate.com](http://www.timeanddate.com) and its Meeting Planner to make

sure you keep the time conversions straight.

One of the biggest distractions in conference calls is caused by the failure to mute. We've all been distracted by hearing people rustling papers, pages over the intercom system and participants responding to whispered inquiries from staff. If you have the call on your speaker phone function, it is probably best to keep it muted unless you are a very active participant or you at least close your door and ask everyone not to disturb you. Yes, keeping the call muted at all times will take a bit of retraining on your part, and you may find yourself being ignored by the others a time or two until you train yourself to unmute as you begin speaking. But your new courtesy skill will serve you well for years.

If you are participating in a conference call by mobile phone, you absolutely have to mute when you are not speaking. Occasional static and wind noises will not be noticed by you, but they will be noticed by everyone else on the call. These are not just distracting, but downright infuriating. Hopefully your smart phone has a mute button. But if not, you must commit the mobile phone key combinations for mute and unmute to memory.

### A TALE OF TWO MUTES

Your office phone most likely has a mute button. But if not, commit that set of key combinations to memory as well.

But that's not the only important muting skill — when the conference call voice introduction gives you the instructions on how to mute,

write down that key combination. This varies from one conference calling service to another, so it is important that you always write it down when it is given at the beginning of the call.

Why, one might ask, do you care about that when there is a mute button on your phone? That mute function will do something your phone will not. Suppose you are on the conference call and an assistant comes with a note that a federal district judge's office is on the phone and says it is urgent or another lawyer has to talk to you immediately about referring you a major case. The natural impulse will be to place the conference call on hold to handle that call. Many of us have had a conference call interrupted by "hold music" when one lawyer places the call on hold to handle an emergency call. You can avoid this inadvertent rudeness, by using the conferencing system's muting instructions before you place the call on hold. This will keep the other participants from hearing the hold music while you talk to His Honor. It is much better than just hanging up because when you pick up the line again, you will be restored to the conference call without having to call back in and re-enter the codes for the conference call.

It depends on the number of participants and your role in the call whether you feel the need to announce that you have to drop out momentarily or just want to sneak out and sneak back in. But it probably makes sense to announce your return if you have been gone more than a few minutes. Of course, no lawyer representing a client on a conference call would want to drop out with-

out announcing they were doing so and whether they thought they would return.

If your law firm has purchased a new phone system within the last five or six years, then it probably has many powerful functions that you do not know how to use. But every lawyer should at least know how to connect two lines together for three-way conference call without bothering the assistant or setting up a formal conference call with a service. Being able to do this easily can make you look good to the lawyer who has no clue how to do it.

I recall once Natalie Kelly, the practice management advisor for the Georgia bar, and I needed to talk to our colleague Reid Trautz, practice management advisor for the Association of Immigration Lawyers of America. I had just hung up the phone with Reid. Knowing that Natalie was on her mobile phone, I said "well, let me figure out how to conference us together." "Oh, I'll do it," Natalie said and hung up.

Within what seemed like seconds, my phone rang with Reid and Natalie on the line. We expressed how impressed we were with how quickly she conferenced us all together on a mobile phone. "Listen," Natalie said, "I have three sisters. I don't have time to repeat all of that family stuff three times."

If you want to impress your colleagues that way, you'll have to learn and practice that skill on your brand of mobile phone. But for your office phone system, you can set up an easy cheat sheet. There are probably booklets explaining all of the features of the phone floating around the office. You probably even had training



that was long-since forgotten. Search the company's website to see if there is a PDF version online. (You can always scan the booklet to PDF if it comes to that, but most should be easily found online.) Download the PDF, store it somewhere on your computer or your network where it will be easy to find (My Documents may be it.) You also may want to rename the PDF file to something easy to locate. If you have Adobe Acrobat, you can add bookmarks to the paragraphs that describe conferencing calls together or you can extract just the page with those instructions and save it as a separate PDF file.

There are numerous services for conference calls and your office probably has already selected a service. But if one ever has to set up a conference on the weekend or for a non-business matter, it should be noted that several services

provide free conference calling by using a toll number (*i.e.* not an 800) number that the attendees dial or you can pay a small fee for a toll-free number. These include [www.freeconferencecall.com](http://www.freeconferencecall.com) and [www.freeconference.com](http://www.freeconference.com). Skype can handle up to nine callers.

### **WEB CONFERENCING – FOR WHEN PICTURES ARE WORTH MORE THAN JUST WORDS**

Web conferencing services are surprisingly easy to use and very effective if documents are to be discussed in a call. Instead of sending a proposed contract or other document around by e-mail and hoping for replies, set a conference call and provide a link so everyone can look at the document and watch as changes are made. Then you can send everyone the final draft (hopefully).

Web conferencing services are fairly easy to set up. The meeting organizer sends all of the participants a link and then they log in to look at the meeting organizer's desktop. It is probably a good idea for the organizer to shut off the e-mail account and close any confidential documents but otherwise you can share anything from a document to a PowerPoint presentation. Many of these services have polling, online data store and other advanced functions.

Lawyers should know how to use web conferencing services like GoToMeeting, Adobe Connect (free for up to three participants) and DimDim (free for up to 20 participants).

Hopefully, this brief overview will make your conference calls more powerful and more enjoyable for everyone.

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# A Breakdown of Out-of-State Attorney Registration

By Gina Hendryx, OBA General Counsel

Since 2005, out-of-state attorneys wishing to appear in an Oklahoma forum must first register with the Oklahoma Bar Association. This registration requirement for attorneys from other jurisdictions can be found in the Rules Creating and Controlling the Oklahoma Bar Association, 5 O.S. Ch.1, App. 1, Art. II. Those rules state that the attorney may appear in an action or proceeding only upon:

- 1) Registering with the Oklahoma Bar Association; and,
- 2) The approval of the court, arbitrator, mediator or administrative or governmental hearing officer where the action or proceeding is pending.

The procedure for registering includes:

- 1) The out-of-state attorney submits to the OBA the original and one copy a completed and signed application. The application form may be found at [www.okbar.org/out\\_of\\_state/forms.htm](http://www.okbar.org/out_of_state/forms.htm).
- 2) Along with the completed form, the attorney should submit current certificates of good standing from the clerk of the

Supreme Court or highest admitting court in which the applicant is licensed to practice law.

- 3) A registration fee of \$350 payable to the OBA is due at the time the application is submitted.

**“All out-of-state attorneys appearing before an Oklahoma tribunal must associate local counsel.”**

Upon receipt of the application, certificates of good standing, and the fee payment, the OBA will review and issue a “Certificate of Compliance.” This certificate is then included as an exhibit to a Motion to Admit or Pro Hac Vice Motion to the appropriate tribunal. All out-of-state attorneys appearing before an Oklahoma tribunal must associate local counsel. It is up to the presiding judge or officer whether to allow the out-of-state attorney

to appear at hearings without the local counsel in attendance.

An Oklahoma court may temporarily admit an out-of-state attorney on a showing of good cause for noncompliance with the provisions of the rule. However, this temporary admission may be for no longer than 10 days and the attorney must comply with the registration requirements.

An annual renewal fee of \$350 is required if the matter remains pending on the anniversary date of the verified application. Failure to renew may result in the imposition of a \$100 late fee. Forms for renewal along with a full description of the requirements and text of the rule may be found at [www.okbar.org/out\\_of\\_state/amended-rule-notice.htm](http://www.okbar.org/out_of_state/amended-rule-notice.htm).

These requirements apply to matters pending before Oklahoma state courts or tribunals. They do not apply to matters pending in the federal courts. If you have questions about this rule or need assistance in getting an out-of-state attorney registered, contact Manni Arzola at [mannia@okbar.org](mailto:mannia@okbar.org) or (405) 416-7061.

# The Thread

By Phil Frazier

It was at the President's Prayer Breakfast, OBA Convention 1999. The Murrah Bombing was still fresh on our minds. The mayor of Oklahoma City was one of the speakers along with the Methodist minister and the Rabbi from churches near the site that received damage from the bombing. Each speaker noted the magnitude of the loss in lives and property.

The thought that anyone could have so little concern in taking lives and destroying property is almost impossible to comprehend and certainly can never be justified. We were reminded that our country was founded by those seeking freedom from unreasonable governmental controls on property rights, religious choices and basic freedom in the conduct of our daily activities. Our Founding Fathers intended that we should no longer live in fear of such things and enacted not only the Constitution but bestowed upon the states the right to enact laws to further such rights to assure protection from those who would chose to invade the life, liberty and peaceable coexistence of the U.S. people, as well as infringe upon our property rights.

As the Rabbi addressed our early morning group, he stated, following his having noted previously some public disdain for our profession, "The very thread that holds our

country together is the protection and perseverance of justice, liberty and freedom. There is only one profession that is dedicated to protection and furtherance of this thread, the lawyers, each of you people seated here this morning."

One might expect from a group of lawyers that such a flattering remark would bring a round of hearty applause. Instead, for a few moments there was absolute silence.

Perhaps it was the sincerity of the remark or that we needed time for it to sink in. "He is right," said the lawyer seated next to me, "and I don't think I am doing my part."

Said another way, are we all, the nearly 16,000 lawyers of Oklahoma, doing our part? Our state bar convention is

only a few weeks away and OBA President Allen Smallwood promises an outstanding convention this year. Will YOU be there? The board of the OBF has worked diligently this year in troubled economic times to help with the financial needs of our many worthy organizations who depend upon the Oklahoma Bar Foundation annual grants. Have YOU done your part? Attendance and participation is what the THREAD is all about for those who are charged with so awesome a responsibility as the lawyer, in the protection of justice, liberty and freedom.

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

## Oklahoma Bar Foundation announces 2010 Roger R. Scott Memorial Award Recipients

- Michael C. Mayhall, Lawton
- Richard R. Riggs, Oklahoma City
- Mart Tisdal, Clinton

*The Roger R. Scott Memorial Award is given to individuals who best exemplify Roger Scott's unqualified dedication to the Oklahoma Bar Foundation and the good work it does in the name of Oklahoma lawyers serving as an inspiration to all individuals connected to the legal profession. The 2010 awards recognizes those who have recruited more than 50 new Fellows each for the foundation, adding to the OBF's ability to fund charitable law-related programs and services throughout Oklahoma. Their work in recruiting new Fellows has helped to further the mission of the Oklahoma Bar Foundation – Lawyers Transforming Lives through the advancement of education, citizenship, and justice for all.*

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# FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: \_\_\_\_\_

Mailing & Delivery Address: \_\_\_\_\_

City/State/Zip: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-Mail Address: \_\_\_\_\_

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

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

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

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

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

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

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

Signature & Date: \_\_\_\_\_ OBA Bar #: \_\_\_\_\_

Make checks payable to:

Oklahoma Bar Foundation • P O Box 53036 • Oklahoma City OK 73152-3036 • (405) 416-7070

OBF SPONSOR: \_\_\_\_\_

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

☐ *General contribution: I need to do more this year and my added  
donation in the amount of \$\_\_\_\_\_ is enclosed.*

***Many thanks for your support & generosity!***

# Reaching Our City...

## Not Just a Name, A Mission

By Cindy Goble

Reaching Our City is a community outreach project located in the Greenvale neighborhood of Oklahoma City. Located at 7710 N.W. 10th St., Reaching Our City offers an array of programs to meet the identified needs of the working poor of the N.W. 10th St. corridor in Oklahoma City.

Reaching Our City programs include a medical clinic, food pantry, daycare, after school program and a resale shop. A few years ago, Reaching Our City and Legal Aid Services of Oklahoma Inc. formed a partnership to offer a legal clinic staffed by volunteer attorneys, which is generally held one time per week.

"We are only scratching the surface. We see so many people, mostly mothers and older women, who have no resources. We are the only opportunity they have for justice, some peace of mind, some understanding of our legal system. Everyone must have access to our legal system if it's going to work. I get greater satisfaction from this work than any I was ever paid for," said attorney Richard Hastings.

**“We are the only opportunity they have for justice, some peace of mind, some understanding of our legal system.”**

Pat Brown, an attorney with Michael L. Loyd & Associates, assisted a client to end illegal practices by the landlord of an apartment complex.

"A couple of well-placed telephone calls, one letter and a few weeks later, the landlord ceased his illegal and oppressive practice. There were some very thankful people at that apartment complex. Sometimes it's very difficult to help our clients whose problems seem overwhelming and complicated. Other times, we can obtain very good results in a short time. No matter what the result, though, I am always impressed with our clients' humility and gratitude," she said.

Sara M. Schneberger is the Legal Aid Coordinator at Reaching Our City. Recently, Sara received a voicemail from a client saying, "Thank you so much for all you are continuing to do for me in my life, you are making a huge change for me in the right direction and I just give God thanks for your love!"

According to Ms. Schneberger, "sometimes the best thing we can do is just listen and provide a place where people can feel that they have been truly 'heard.' When we are able to assist in more tangible ways and can see the positive results from our efforts, it is just the best 'paycheck of the heart!'"

Legal Aid Services of Oklahoma Inc. is a statewide program with offices assisting every county. If you are interested in lending a hand with an outreach project or would like more information about outreach projects, you may contact Cindy Goble, Statewide Pro Bono Coordinator, Legal Aid Services of Oklahoma Inc., by calling (405) 488-6823 or e-mailing her at [cindy.goble@laok.org](mailto:cindy.goble@laok.org).

# 2011 YLD Leadership

## Elections Go Electronic for the First Time

For the first time this year, the YLD will utilize electronic voting for the YLD elections. Each qualified YLD member will receive an e-mail from the OBA with your ballot attached. Simply fill in the proper information and vote for your candidates. Ballots will be e-mailed on or before Oct. 15, 2010, and all ballots are due to the Nominations Committee no later than 5 p.m. Nov. 10, 2010.

The e-mail address used by the YLD will be the one currently on file with the OBA; therefore, if your e-mail is not current with the bar, this may hinder your ability to receive an electronic ballot. If your e-mail is not current, or you do not have your e-mail on file with the OBA, you can receive a replacement ballot by accessing [www.okbar.org/yld](http://www.okbar.org/yld), where you can download a replacement ballot. Once downloaded, print it off and mail, fax or e-mail it to the Elections Committee, c/o Rick Rose, 300 NE 1st, Oklahoma City, OK 73104, fax (405) 236-1520, or [rrose@mahaffeygore.com](mailto:rrose@mahaffeygore.com).

Members can update their e-mail address through My Okbar; however, if your e-mail is not updated before Oct. 15, 2010, you will likely need to download a ballot.

Please remember that your OBA number is required to identify you and to

demonstrate that you are a qualified voter. Ballots without this information, or otherwise nonconforming, will be stricken. Only one ballot, electronic or otherwise, per YLD member. There will be no disclosure of voter ballots.

Members of the Nominating Committee are not eligible to vote except in the case of a tie, which shall be broken by secret ballot of the Nominating Committee. Election results will be announced at the Annual Meeting of the Division held in conjunction with the OBA Annual Meeting.



**Molly A. Aspan**  
*Immediate Past-Chairperson*

Molly has been an associate at Hall, Estill, Hardwick, Gable, Golden & Nelson in its Tulsa office for seven years. Her primary practice area is labor and employment defense litigation. Molly provides employment counseling and advice to numerous employers and represents employers in employment litigation and

administrative matters. Molly has been active on the OBA/YLD Board of Directors since 2004, serving as treasurer, secretary and an elected board member for District 6. Molly is also active in the American Bar Association YLD and has served as an Oklahoma Delegate to the ABA/YLD Assembly since 2005. In addition, Molly has been a Tulsa delegate to the OBA House of Delegates since 2007, has served on the Tulsa County Bar Association Board of Directors, is a past chair of the TCBA/YLD and was named the TCBA Young Lawyer of the Year in 2006. Molly has also been active in the Council Oak/Johnson-Sontag American Inns of Court and has served as an administrator since 2006. She is on the Board of Directors for Legal Aid Services of Oklahoma. Molly received her J.D. from the University of Kansas School of Law in May 2003. While at Kansas, Molly received the Rice Scholarship, a full tuition scholarship and was a member of the *Kansas Law Review*. Molly earned her bachelor of arts degree, with honors, in economics and political science from Fort Hays State University in May 2000. While at Hays, Molly was a state finalist for both the Rhodes and Truman Scholarships. Molly is admitted to practice in all federal and state courts in Oklahoma and Kansas. In

addition to legal activities, Molly is also active in the Junior League of Tulsa and Kirk of the Hills Presbyterian Church, volunteers at the Community Food Bank of Eastern Oklahoma and is a member of the Fort Hays State University Alumni Association Board of Directors.



**Roy D. Tucker**  
2011 Chairperson

Roy has served in various capacities on the OBA/YLD Board of Directors since 2005, including the officer position of secretary and treasurer in 2009 and 2010, respectively. He has previously been involved with the OBA Solo/Small Firm Conference Planning Committee, OBA Attorney Art Show and currently serves as the YLD liaison to the OBA Law Schools Committee. He is a previous award winner for Outstanding Director of the YLD (2006; 2007) and Outstanding Officer (2009). Roy hopes to continue to serve the OBA/YLD as Chair of the division for 2011. Roy is a 2003 graduate of the University of Tulsa College of Law, and was admitted into the OBA the same year. He has been admitted to practice before all federal courts in Oklahoma, as well as the 10th Circuit Court of Appeals. He is very active in Muskogee County Bar

Association, serving as its president-elect and Law Day co-chair. Roy is active with the TU Law Alumni Association, and is a graduate of Leadership Tulsa Class 31. He is a board member for the Muskogee Area Arts Council and is an advisory board member for Health Outreach Prevention Education Inc. in Tulsa. Roy is employed as the assistant city attorney for the City of Muskogee, a position he has held since May 2008. Prior to entering the public sector, Roy was in private practice in Tulsa.

#### **UNCONTESTED ELECTIONS:**

*The following persons have been nominated. They are running uncontested and will be declared elected at the Annual Meeting of the Oklahoma Bar Association Young Lawyers Division.*



**Jennifer Kirkpatrick**  
Chairperson-Elect

Jennifer is an attorney at Argenbright & Kirkpatrick and focuses her practice on representing public utility companies before the Oklahoma Corporation Commission. Previously, she has practiced in the areas of civil litigation, bankruptcy, creditors' rights, commercial and administrative law. She is admitted to practice before all

Oklahoma state courts, as well as the U.S. District Courts for the Western, Eastern and Northern Districts of Oklahoma and the 10th Circuit Court of Appeals. Her educational credentials include a bachelor of arts from Cameron University, a master of arts from the University of Oklahoma, and a juris doctor from Oklahoma City University School of Law. Jennifer is a member of the Oklahoma Bar Association and has served on the OBA Young Lawyers Division Board of Directors since 2008, and is currently serving as secretary for 2010. Recently, she was selected for the OBA's 2009-2010 Leadership Academy. She is also a member of the Oklahoma County Bar Association and the American Bar Association. Jennifer is also actively involved with the Oklahoma Academy for State Goals, a non-partisan policy making group, and has been serving on the both the board of directors and the executive committee since 2008. Jennifer lives and practices in Edmond.



**Kaleb Hennigh**  
Secretary

Kaleb is a partner in the regional law firm of Mitchel, Gaston, Riffel & Riffel PLLC. Kaleb was born and raised near Laverne. He maintains a B.S. degree in agricultural

communications and agricultural economics from Oklahoma State University; a J.D. from the University of Oklahoma College of Law; and an LL.M. in agricultural law from the University of Arkansas School of Law. Kaleb was named outstanding Agricultural Communications Graduate from Oklahoma State University in 2000; and Named Top 10 Graduating Senior from OSU. Kaleb is the recipient of Kelly Beardslee award from OU for Indigent Criminal Work through Legal Clinic at the OU College of Law. Kaleb is currently serving his second term as a YLD board member. He currently focuses his legal practice on real estate and commercial transactions, bankruptcy and debtor/creditor matters, corporations, agricultural transactions, wind energy lease and easements, and estate planning, probate and trust administration. Kaleb, his wife Jennifer, and their two sons Karsen and Jase, reside in Enid.



**Robert R. Faulk**  
*District Four*

Robert is originally from Oklahoma City. He graduated from Northwest Classen High School in 1996. After graduation he attended Oklahoma State University

where he was president of several organizations including Lambda Chi Alpha Fraternity, Political Science Club and College Republicans. Upon his graduation from OSU in 2001 he was awarded the Kenny Gallagher Award for top Arts & Sciences Male. Robert then attended Oklahoma City University School of Law on a prestigious Hatton W. Sumners Scholarship. While at OCU law he founded the Criminal Law Association and was active in many other organizations including Merit Scholars, American Trial Lawyers Association and the Federalist Society. In 2004 he graduated magna cum laude from OCU law and was admitted to the OBA in October 2004. Robert now lives in Enid with his son Baylor and daughter Sophia. He is the managing member of Faulk Law Firm PLLC and practices in the areas of criminal defense, general civil litigation, family law, personal injury, workers' compensation, custody and divorce. He is a member of the OBA, the Garfield County Bar Association treasurer and social chair, member of the American Bar Association, Enid Noon Ambucs past president, is an Oklahoma Bar Foundation Fellow, a member of the Federal Bar of the Western District of Oklahoma, chair of Leadership Greater Enid and is on the Board of Directors for several civic and community organizations including Main Street Enid and the Cherokee Strip Chapter of the Oklahoma State University Alumni Association. He has been appointed to the OBA's inaugural Leadership Academy and recently received an award from the Garfield County Bar Association for Outstanding

Young Lawyer. Robert has been a member of the OBA Young Lawyers Division Board of Directors, representing both the rural counties of the state including Enid, as well as the 4th District, since 2006. His most recent duties on the YLD board have included the planning and execution of the YLD hospitality suites at the Solo and Small Firm Conference and Annual Meeting.



**Breea D. Bacon**  
*District Five*

Breea has served District 5 for almost a year. She was nominated to fill the vacant seat by her fellow YLD directors and has thoroughly enjoyed her experience with the board thus far. Breea graduated from the University of Oklahoma College of Law in 2008 and from Wichita State University with a B.A. in political science in 2005. Currently employed in the Provost's Office at the University of Oklahoma, she loves serving as the assistant director of Academic Integrity Systems, which allows her to create policy on academic integrity, as well as work with students. When not at work or volunteering her time with YLD, the Library Board for the City of Norman or the LUNA Moms Club, she cherishes



spending time with her 3-year-old son, Jordan. Over the past year, her main responsibilities on the board have been organizing the ever-popular YLD suites at both the Solo and Small Firm Conference in Quapaw and this year's Annual Meeting in Tulsa. She has also volunteered her time handing out survival kits to students taking the July bar exam and greeting new admittees at the Oklahoma City new attorney reception. This year's Law Day event in District 5 was quite successful as well. Held at the Norman Public Library, Breea organized an educational program about law for children in the Norman community. From a panel of speakers that included Mayor Cindy Rosenthal, Judge Lori Walkley, Rep. Wallace Collins, Rep. Scott Martin amongst others to a rousing game of Freedom Feud, everyone in attendance learned a lot and had a blast! Breea looks forward to continuing to serve District 5.



**Justin Stout**  
*District 7*

Justin Stout is a partner in the Muskogee law firm of Wright, Stout & Wilburn. He received a bachelor of arts degree from the University of Oklahoma in 1999 and a juris

doctorate, also from OU, in 2002. Justin is a member of the Muskogee County Bar Association and the OBA, and is admitted to practice in the Eastern, Western and Northern Districts of Oklahoma, as well as in the Creek Nation and Cherokee Nation tribal courts. He served as president of the Muskogee County Bar Association in 2006-2007, was chosen to attend the OBA's Leadership Conference in 2007 and was a member of the OBA's 2009 Leadership Academy. He practices primarily in the areas of family law, bankruptcy, criminal law and personal injury. Justin is married to his wife, Shelly Stout, and they have two boys: Reed, 6, and Cameron, 3. Justin has proudly been Reed's soccer coach for three years and has also served as a team coach in Upward Basketball.



**Erin L. Means**  
*At Large Rural*

Erin practices in the area of civil litigation in the Enid office of the firm Gungoll, Jackson, Collins, Box & Devoll PC. She was raised on a third-generation wheat and cattle farm near Cherokee and graduated summa cum laude with a B.S. in political science as valedictorian from St. Gregory's University in 2005. She earned her juris doctor with

honors from the University of Oklahoma in 2009. While in law school, Erin was a note editor for the *Oklahoma Law Review* and a member of the Warren McGee Civil Rights Moot Court team and the Luther Bohanan American Inn of Court. Erin's honors include Order of the Coif, the American Juris-prudence Award in Supreme Court Decision Making, the GableGotwals Supreme Court Award, the Captain Brian E. Wheeler Summer Write-on Competition Award and the Salem Civil Rights Award. Additionally, Erin recently served as research and editorial assistant for the Third Edition of the *Research Manual on Scientific Evidence* published by the Federal Judicial Center. Erin is admitted to practice in the state of Oklahoma and the U.S. District Court for the Western District of Oklahoma. She is a member of the Oklahoma and Garfield County Bar Associations and is an Oklahoma Bar Foundation Fellow. In her free time, she enjoys reading, running and playing outdoors with her son, Andrew.

## CONTESTED ELECTIONS:

**Robert R. Faulk**  
*Treasurer*

(Biography appears on page 2273)



**Amber Peckio-Garrett**

*Treasurer, District Six  
and At Large*

Amber is a partner with the Oklahoma law firm of Garrett Law Center PLLC. She received dual bachelor's degrees in economics and political science from South-eastern Oklahoma State University. She received her juris doctor degree from the University of Tulsa College of Law, where she served as articles editor for the *Tulsa Journal of Comparative and International Law* and as the Student Bar Association Speaker of the House. She was admitted to practice in Oklahoma in 2003, and she practices in the areas of consumer protection, insurance disputes, product liability, family law and criminal defense. Amber is admitted to practice in all courts in the state of Oklahoma and before the U.S. District Court for the Eastern District of Oklahoma and the U.S. District Court for the Northern District of Oklahoma. She is an active member of the OBA, American Bar Association, American Association of Justice, the Oklahoma Association for Justice and the Tulsa County Bar Association. She currently serves the Oklahoma Bar Association as OBA Young Lawyers Division board

director, representing District 6 for Tulsa (2007, 2009). She also serves as a member on the MCLE Commission (2009-2012), the Professionalism Committee (2007, 2009), member and as immediate past chairperson for the Women in Law Committee (2007, 2009). She has served as a member of the OBA Lawyer Advertising Task Force (2007). She is a graduate of the inaugural 2008-2009 OBA Leadership Academy. Amber was named ABA Law Practice Management Section Young Lawyer Fellows for 2010-2011 and Super Lawyers 2010 Oklahoma Rising Stars. Amber is a frequent moderator and presenter of continuing legal education for the OBA and other professional organizations. In addition to her work with the OBA, Amber also serves on the pro bono attorney panel for Legal Aid of Oklahoma for Tulsa and surrounding counties working with at-risk women and families.



**Joe Vorndran**

*Treasurer*

Joe is a partner with the Shawnee law firm of Stuart, Clover, Duran, Thomas & Vorndran LLP. His practice is focused on general civil litigation, family law, and municipal law. Joe received his B.A. from the University of

Oklahoma in May 2003, where he was a member of the OU Scholars program, Order of Omega Honor Fraternity, and numerous other campus committees. He received his J.D. from the University of Oklahoma College of Law in May 2006, where he was a class representative, on the Dean's Council, and a member of the SBA Board of Governors. Joe was admitted to the practice of law before all Oklahoma state courts in September 2006. Joe has served as the District Eight Representative for the YLD Board of Directors since 2006, is on the Community Service Committee, is a volunteer for the Oklahoma Bar Foundation Mock Trial Program, attended the 2007 OBA Leadership Conference, and was a delegate to the 2009-2010 OBA Leadership Academy. He is a member of the Pottawatomie County Bar Association and served as president from 2007-2009, a member of the American Bar Association, and a Fellow of the Oklahoma Bar Foundation. In 2008 he received the District 5 Child Abuse Prevention Task Force "Child Advocate of the Year" Award. Joe also serves on the Board of Directors for the OU Chapter of Sigma Alpha Epsilon.

**Jennifer Kirkpatrick**

*At Large*

(Biography appears on page 2272)

*continued on next page*



**LeAnne Z. McGill**  
*District Three and At Large*

LeAnne is a partner with the Edmond law firm of McGill & Rodgers, where her practice focuses on all areas of family law. She has served on the OBA/YLD Board of Directors for the last two years and the OCBA/YLD Board of Directors for the last four years. She received her B.A. in English and political science from Oklahoma State University in 2003 and her juris doctorate from Oklahoma City University School of Law in 2006. Aside from her participation in the YLD, LeAnne is active in the OBA Family Law Section, currently serving on the section's executive board as co-chair of the social committee. She has also served on several OBA committees including the Mentoring Task Force, the Law Day Committee and the Women in Law Committee. In addition, LeAnne is a graduate of the 2008-2009 OBA Leadership Academy, the 2007 OBA Leadership Conference, and she served as the first chair of the OBA Law Student Division. LeAnne is also active in the American Bar Association, having held several positions within the organization including two terms as the National Secretary Treasurer of the ABA Law Student Division and one term as the National

Pro Bono Committee Co-Chair for the Law Student Division. She has also served on the YLD Programming Team and as chair of the YLD Access to Justice Committee. In addition to bar activities, LeAnne is a member of the OCU Law Alumni Association Board of Directors, the Ginsburg Inn of Court, EWF International, Edmond Women's Club, Class XXVI of Leadership Edmond, and volunteers with the American Cancer Society and the Salvation Army. LeAnne is a lifelong resident of the Oklahoma City area and resides in Edmond with her husband.



**Karolina Roberts**  
*District Three and At Large*

Karolina is currently serving on the YLD Board of Directors as the District 3 representative. She is also a YLD liaison to the Professionalism Committee and the Bar Center Facilities Committee. She is an associate at Elias, Books, Brown and Nelson. Her practice is devoted primarily to the areas of civil litigation, ad valorem and bankruptcy law. Karolina graduated with honors from the University of Oklahoma College of Law, where she was on the Dean's Honor Roll every semester. She received, amongst other awards, the Nathalie Pierrepont Comfort

Scholarship and the Oklahoma Bar Foundation Scholarship. Additionally, she earned an Academic Achievement Award in Interviewing and Counseling. Karolina was a member of the *American Indian Law Review*. During the 2007-2008 school year, she was elected Articles Development Editor where she helped create and implement a new peer-review program. For her contribution to the law review, she received the AILR Outstanding Third Year Law Student Award. Karolina graduated with a bachelor of arts in political science in 2005.



**Sarah C. Stewart**  
*District Three and At Large*

Sarah is an attorney at McLendon, Duden & Sasser PC. She represents clients in family law, estate planning, probates, foreclosure defense and business organization. She received her B.A. in Spanish and in journalism and broadcasting with an emphasis on public relations from Oklahoma State University. She received her J.D. from Oklahoma City University.



**Michael Cooper**  
*District Six and At Large*

Michael is an associate with the Tulsa firm of Sneed Lang Herrold PC, where he focuses his practice on all areas of civil litigation. He has been admitted to practice in the U.S. Districts Courts for the Northern and Eastern Districts of Oklahoma, as well as the U.S. Court of Appeals for the 10th Circuit. Michael is a May 2009 graduate of the Oklahoma City University School of Law where he was a Hatton W. Sumners Scholar, served as president of the Student Bar Association, and participated in various other academic and extracurricular activities. He received his B.A. from Oklahoma City University, majoring in political science, history and Spanish. While playing on the varsity soccer team at OCU, he

also served as president of the Student Senate. Born in Tulsa on Oct. 25, 1983, Michael and his wife Stephanie currently live in Broken Arrow and attend St. Pius X Catholic Church.



**Tim Rogers**  
*District Six and At Large*

Tim is an associate at Barrow & Grimm PC. His law practice focuses primarily on business and commercial litigation (state and federal), construction law and fidelity and surety law. He graduated from Oklahoma State University where he received his bachelor of science in business administration in economics and a minor in finance in 2005. While at Oklahoma State, Tim was a member of the Beta Theta Pi Fraternity, Phi Alpha Delta Legal Fraternity, Delta Sigma Pi Business Fraternity,

Economics Society and Phi Eta Sigma Honor Fraternity. Tim received his J.D. with honors from the University of Tulsa College of Law in 2008. While in law school, he served as a Research Assistant to Professor Lyn Entzeroth and was an editor for the *Tulsa Law Review*. Tim was also involved with the Phi Delta Phi Honor Legal Honor Fraternity, Phi Kappa Phi Honor Fraternity and received the CALI "Excellence for the Future" Award for outstanding achievement in the study of Constitutional Law II. Tim is the current chair of the Young Lawyers Division of the Tulsa County Bar Association and also serves on the OBA Communications Committee. He is a member of the American Bar Association and an associate in the Council Oak/Johnson-Sontag Chapter of the American Inns of Court. In addition to his legal activities, Tim serves on the Board of Directors of the Tulsa Chapter of the Oklahoma State Alumni Association and The Collaboratorium. He is admitted to practice before the Supreme Court of Oklahoma, the U.S. District Courts for Northern, Eastern and Western Districts of Oklahoma and the Cherokee Nation.

# Calendar

## October

- 12 Death Oral Argument;** Kevin Ray Underwood – D-2008-319; 10 a.m.; Court of Criminal Appeals Courtroom
- 14 OBA 2011 Budget Public Hearing;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- 15 OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- Association of Black Lawyers Meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776
- Lawyers Helping Lawyers Assistance Program Training;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donita Douglas (405) 416-7028
- OBA Military Assistance Task Force Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Dietmar Caudle (580) 248-0202
- 18 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Andrea Braeutigam (405) 640-2819
- 20 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
- 21 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 OSU Tulsa; Contact: Jack Brown (918) 581-8211
- 22 OBA Communications Committee Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Douglas Dodd (918) 591-5316
- 23 OBA Young Lawyers Division Board of Directors Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Molly Aspan (918) 594-0595
- 27 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
- 28 Oklahoma Bar Foundation Meeting;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070



- 29 OBA Unauthorized Practice of Law Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deborah Reheard (918) 689-9281

## November

- 10 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
- Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611
- 11 OBA Closed – Veteran's Day Observed**
- 12 OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800
- 17-19 OBA 106th Annual Meeting;** Crowne Plaza Hotel, Tulsa
- 25-26 OBA Closed – Thanksgiving Day Observed**

## December

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

- 6 **OBA Law-related Education Law School for Legislators;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024
- 10 **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 **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
- 16 **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 OSU Tulsa; Contact: Jack Brown (918) 581-8211
- 17 **OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 18 **OBA Young Lawyers Division Board of Directors Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595

- 20 **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
- 23-24 **OBA Closed** – Christmas Day Observed
- 31 **OBA Closed** – New Year Holiday Observed



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Your source for OBA news.



At Home



At Work



And on the Go

**OBA President to Chair Judicial Nominating Commission**

OBA President Allen Smallwood of Tulsa began a term as chair of the Oklahoma Judicial Nominating Commission, starting

this month. President Smallwood has served on the commission for five years. The commission is made up of 13 members: six lawyers and seven non-lawyers. The commission annually elects one of its members to serve as chair.

**WANT TO SAVE MONEY?**

**Register for the OBA Annual Meeting before the early bird registration deadline of Nov. 3! Fill out the registration form in this issue, or register online at [www.okbar.org](http://www.okbar.org)**

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**Learning Lessons in Conflict Resolution**

More than 50 teachers, students and school administrators attended the PROS (Peaceful Resolution for Oklahoma Students) program for two days at the end of September at the Oklahoma Bar Center. PROS is a collaborative project of the Early Settlement Programs administered by the Oklahoma Supreme Court, Administrative Office of the Courts and the OBA Law-related Education Department. This school-based peer mediation program encourages young people to resolve conflicts in a positive and constructive manner. Strategies center on building strong student self-esteem and teacher efficacy in dealing with on-site conflicts such as fighting and harassment.



*Students complete an exercise in peer mediation at the PROS program at the bar center.*

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**OBA Member Resignations**

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

Patrick James Brandt  
OBA No. 19415  
1905 E. Abram St., Suite B  
Arlington, TX 76010

Jason Craig Pitcock  
OBA No. 19911  
100 I Street S.E., Apt. 504  
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## OBA Member Reinstatements

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

Alyssa Montene Lee  
OBA No. 22207  
2013 Oak Dr.  
Moore, OK 73170

Ted Lee Ryals  
OBA No. 20107  
1932 Parkside Court  
Moore, OK 73160

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

Geoffrey Allan Evans  
OBA No. 20200  
11424 Kingswick Dr.  
Oklahoma City, OK 73162

## Columbus Day Notice

The Supreme Court Clerk's office will be open on Columbus Day, Oct. 11. If your appeal-time trigger occurred 30 days before this date, your time to bring an appeal will not be extended by failing to file on Columbus Day.

## Oklahoma Bar Journal Editorial Calendar

### 2010

- November:  
**Technology & Law Practice Management**  
Editor: January Windrix  
janwindrix@yahoo.com  
Deadline: Aug. 1, 2010
- December:  
**Ethics & Professional Responsibility**  
Editor: Pandee Ramirez  
pandee@sbcglobal.net  
Deadline: Aug. 1, 2010

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

### 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



## Kudos

**Charles P. Rainbolt** of Cordell has been appointed as a trustee of the Oklahoma Housing Finance Agency by Gov. Brad Henry.

**Joseph Williams** was recently sworn-in to be a justice on the Supreme Court of the Sac and Fox Nation. The jurisdiction of the Sac and Fox Nation court extends to the activities that occur on Indian Country within the boundaries of the Sac and Fox Reservation.

The Association of Business and Communication Professionals has awarded Crowe & Dunlevy as a 2010 Communitas Award winner in the leadership in community service category. In 2009, every member of the firm's leadership team served in at least one board position and 90 percent of the firm's attorneys currently serve on boards or are active in some type of leadership or volunteer activity.

The Federation of Defense & Corporate Counsel has elected **F. Thomas Cordell Jr.** of Chickasha as its president.

The Grand of Tau Kappa Epsilon has appointed **Walter W. Jenny Jr.** of Oklahoma City as a judiciary chairman. He has served as district vice president and chapter advisor at Omicron-Phi and Epsilon-Sigma.

## On The Move

**Jay Fields** has been promoted to senior vice president of the Fiesta Bowl. The Fiesta Bowl annually stages over 40 events including the Insight Bowl, Tostitos Fiesta Bowl, and in 2011 will host the Tostitos BCS National Championship. He oversees several areas including sales and marketing, media operations, public relations, BCS Liaison, Big 12 Liaison and committee membership. He may be reached at [jfields@fiestabowl.org](mailto:jfields@fiestabowl.org).

**Bernard Jones** was recently promoted as OCU School of Law's associate dean for admission and external affairs. In his new position, he will continue to lead student recruitment effort, alumni relations, special events and various fundraising responsibilities.

**Sean A. Nelson** has joined the Law Office of Richard A. Nelson PC in Edmond. His practice involves collections, criminal defense, estate planning, family law, personal injury, Social Security disability and workers' compensation. Mr. Nelson is a graduate of OCU School of Law.

McAlister, McAlister & McKinnis PC of Edmond has named **Jon Austin** as a shareholder of the firm. Mr. Austin's practice involves business law, commercial real estate,

acquisitions, financing, development and leasing.

**Taylor W. Baird** has joined Vaughn, Winton & Clark PLLC in Edmond. His practice involves real estate law, adoptions and collections. Mr. Baird is a graduate of Pepperdine University School of Law.

**Anne M. Ditmore** of AMD Law PLLC has joined Community Care College as the Paralegal Department head. Ms. Ditmore is a graduate of the TU College of Law, and she may be reached at [aditmore@communitycarecollege.edu](mailto:aditmore@communitycarecollege.edu).

**Doris L. Gruntmeir** has moved to the Department of Veterans Affairs, Office of Regional Counsel, 575 N. Pennsylvania St., Room 309, Indianapolis, 46204; (317) 916-3375. She is now the assistant regional counsel for Region 22 (Indiana and Kentucky) and supervises the attorneys and support in her region.

**Carrie A. House** has joined Irwin Law Firm in Tulsa. Her practice involves business planning, estate administration, probate, estate planning, guardianship, elder law and tax. She is a graduate of the OU College of Law.

**Tracy Cotts Reed** has joined Love, Beal & Nixon PC in Oklahoma City. Her practice involves family law, civil litigation and appellate law. She is a graduate of the OU College of Law.

**M**unson & Co. PC of Edmond announces **M. Chase Ritter** as an associate attorney. His practice involves oil and gas law, real property taxation and commercial law. He is a graduate of OCU School of Law.

**Brett A. Rutherford** joined Best & Sharp in Tulsa. His practice involves medical malpractice defense, general insurance defense litigation and municipality. Mr. Rutherford is a graduate of the TU College of Law.

**A**ndrew R. Schroeder has joined Palmer Wantland in Oklahoma City. His practice involves corporate and business planning for closely held entities, estate planning, taxation, finance and real estate. Mr. Schroeder is a graduate of OCU School of Law.

**T**he Law Office of Cindy Allen PLLC of Norman announces **Arlette Srouji** as an associate counsel. She is a graduate of the OU College of Law. Her practice involves international adoption and immigration law.

**C**rowe & Dunlevy of Oklahoma City announces **Jay Albert, Allen Hutson, N. Georgeann Roye, Amy Sellars** and **Christopher Michael Staine** as it newest associates. Mr. Albert, Ms.

Roye and Mr. Staine graduated from the OU College of Law. Mr. Hutson is a graduate of OCU School of Law, and Ms. Sellars graduated from Rutgers School of Law. Mr. Albert, Mr. Hutson, Ms. Roye, Ms. Rughani and Mr. Staine are based in the firm's Oklahoma City office, while Ms. Sellars is in the Tulsa Office.

## At The Podium

**P**awnee attorney, activist and author **Walter R. Echo-Hawk** presented his book titled, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided*, at a book talk Sept. 21 at the Oklahoma Heritage Association Museum.

**H**erbert Joe of Dallas, Texas, was retained as a forensic audio and voice expert for the Abu Dhabi Judicial Department of the United Arab Emirates. He testified as a forensic expert witness about his results on an on-site analysis for the Public Prosecution Office of

the Abu Dhabi Judicial Department.

**D**on Powers of Edmond recently presented a seven-week class titled "Liberty & Freedom," at the H&H Gun Range. The class covered the Declaration of Independence, the 28 principles of freedom used by the Founders to structure the Constitution and the American Revolution.

*Compiled by Jenefar de Leon*

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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Fax: (405) 416-7089 or  
E-mail: [barbriefs@okbar.org](mailto:barbriefs@okbar.org)

**Articles for the Nov. 6 issue must be received by Oct. 18.**

## IN MEMORIAM

**Prudence Mae Little** of Madill died May 22. She was born Nov. 16, 1942, in Clinton, Iowa. She graduated from Wellesley College with honors and a B.A. in economics in 1965. She went on to receive her J.D. from the University of Oklahoma College of Law in 1968. She began her career working for Attorney General G.T. Blankenship in Oklahoma City. Ms. Little then returned to Madill to practice law. She was involved in the building of the Fran Drummond Day Care Center and the expansion of the Madill City Library. In 1985, she received the Marshall County Citizen of the Year. She was then appointed by former Gov. Henry Bellmon as a founding member of the Oklahoma Ethics Commission. Ms. Little

served on the board for the Oklahoma Council on Research and Graduate Education, the Women's Foundation of Oklahoma, the Oklahoma Arts Institute, the Wellesley College Club of Dallas and the University of Oklahoma Alumni Association. Memorial contributions may be made to the Oklahoma School of Science and Mathematics Foundation, 1141 N. Lincoln Blvd., Oklahoma City, 73104; or the Fran Drummond Fund, P.O. Box 247, Madill, 73446.

**Charles Rabon Martin** of Tulsa died Aug. 27. He was born July 27, 1944, in Tulsa. He grew up in Brookside and attended Cascia Hall Preparatory School. He graduated from the University of Tulsa College of Law in 1968. He was a charter member,

director and two-term president of the Oklahoma Criminal Defense Lawyers Association and founder of the Tulsa Criminal Defense Lawyers Association. He served as a state coordinator for the National Organization for the Reform of Marijuana Laws. Mr. Martin was a contributor writer for *Uptown News* in Tulsa under the pseudonym Debonus Dementis. As Debonus Dementis, he was selected Tulsa's favorite newspaper humorist in The Best of Tulsa's readers' poll for *Uptown News*. He enjoyed baseball, tennis, photography, competitive diving and his '57 Chevy. Memorial contributions may be made to the American Cancer Society or the Rabon Anthony Martin Educational Trust Fund in Tulsa.



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BUSY AV-RATED OKC/TULSA insurance defense firm seeks associate with 3 to 10 years experience for OKC office. Excellent opportunity for the right person. Personal injury/insurance defense/civil litigation experience helpful. Competitive salary and benefits. Send resume to Wilson, Cain & Acquaviva, 300 N.W. 13th Street, Suite 100, Oklahoma City, OK 73103.

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# Farewell to a Mentor

By R. Steven Haught

Recently while attending a Thunder basketball game, the announcer asked: "Did a teacher make a big impact on your life?" At first I could not think of anyone in particular. Thinking back on my teachers, I could say that my first grade teacher changed my life. My mother was my first grade teacher but changed my life more as a mother than as a teacher.

I certainly benefitted from having good teachers in undergraduate and law schools, but "big impact"? That was a high standard. All of a sudden the answer came to me: the teacher who changed my life didn't work at a school. It was the man who gave me my first job as a lawyer and taught me how to practice law.

Our first meeting was unusual. I had heard from a friend that the law firm in question was looking for a lawyer in the litigation department. I immediately sent a letter and resume to my future mentor. I received no reply. I called on several occasions to set up an appointment but my calls were never returned. Then I decided on a strategy that would either be successful or disastrous.



Full of the kind of indignation that only a 25-year-old law student can muster, I traveled to the law firm and asked to speak with the hiring attorney. I was told that he was not in, and I responded that I would wait until he arrived. I waited in the lobby for a couple of hours and eventually was told that my future employer would see me now in his office. He gave me a stern look and said: "I hear that you demanded to see me and would not leave until you did so. Is that right?" "Yes," I hesitantly replied. Then he grinned and said: "Good. I want someone who is aggressive. When can you start?"

My mentor followed a "sink or swim" training methodology. I tried my first solo jury trial two weeks after I was sworn in and second-chaired my mentor in many federal trials before taking over the lead chair. He

played a game in which he would always permit me to examine some witnesses or give an opening or closing but he wouldn't tell me what I was going to do. Then in the midst of trial, he would turn to me with a mischievous smile and say: "Do you want to do this?" I always said yes.

He taught me the value of preparation. He taught me to start with the trial brief and jury instructions, to work backwards in order that everything we did at the beginning would lay the groundwork for the trial to come. He taught me to be honest and professional with opposing counsel, judges and court personnel.

We had a good run together but then he was voted out of the firm by a narrow vote of the firm's partners after a very spirited altercation at a partners' meeting, with me being in the minority. Although he

was an excellent attorney, he was a difficult partner.

I did not hear from him after that, but after he retired, several of his clients called me and said he had recommended me to take over their legal needs. I always meant to call him to thank him for being my teacher, but somehow I never got around to it.

Recently I received a call telling me that he had died. I called several other lawyers he had mentored to tell them about the funeral. None wanted to attend, and I did not blame them. He was a difficult man, and had even sued me along with all of the other partners when he was expelled from the firm.

Nonetheless I wanted to pay my last respects. Arriving at the funeral service early, I took a seat on the second row, just behind the family seating. I searched the crowd for other lawyers who had worked with him and found only one.

As the service concluded, I leaned forward, as close to the casket as space would allow, and finally, belatedly, said farewell to the teacher who changed my life.

*Mr. Haught practices in Oklahoma City.*

# BACK TO THE FUTURE

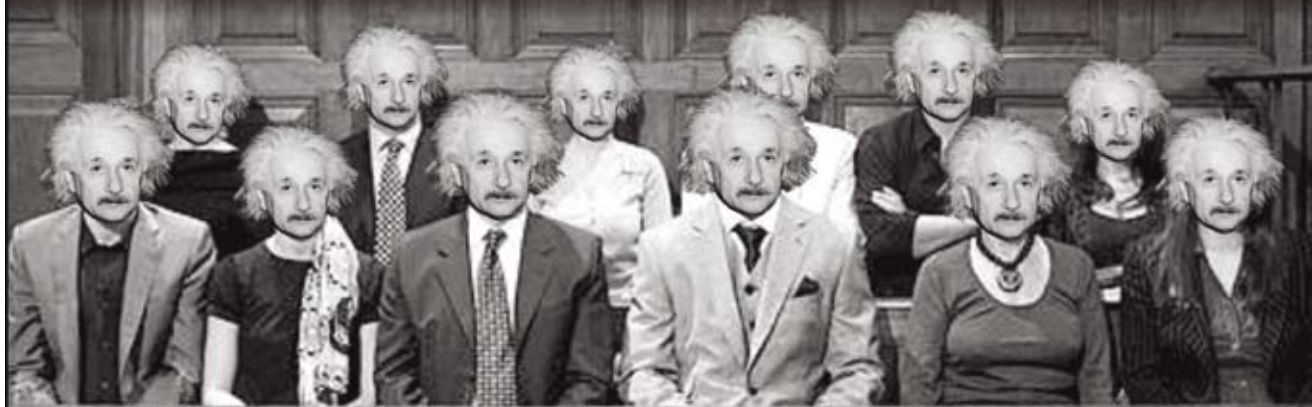
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