

# WIT Oklahoma Bar JOURNAL

Volume 81 ♦ No. 23 ♦ September 4, 2010

## OBA ANNUAL MEETING

2010  
NOVEMBER 17 - 19  
TULSA

### ALSO INSIDE

- Appropriated Streamwater: What Every Municipality Should Know
- The Oklahoma Response to the SemGroup Bankruptcy
- Federal Diversity Jurisdiction under the Class Action Fairness Act
- The Sharp Sword of Residential Property Disclosures
- 2010 Oklahoma Tax Legislation



The Oklahoma Bar Association Women in Law Committee &  
OBA/CLE present:

# The 2010 Women in Law Conference:

Changes in Latitudes, Changes in Attitudes

Sept. 30, 2010  
Southern Hills Country Club, 2636 E. 61st St., Tulsa

For information and to register, visit [www.okbar.org/women](http://www.okbar.org/women)



# You are not alone.



## Men Helping Men .....

September 30

### ***Finding Your Balance***

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

**Location**

The Oil Center – West Building  
1st Floor Conference Room  
2601 NW Expressway  
Oklahoma City, OK 73112

- \* **Food and drink will be provided!**
- \* **Meetings are free and open to male OBA members.**
- \* **Reservations are preferred. (We want to have enough space and food for all.)**

For further information and to reserve your spot,  
please e-mail [stephaniealton@cabainc.com](mailto:stephaniealton@cabainc.com).



## Women Helping Women.....

September 23

### ***The Best Plan for Me***

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

**Location**

The Oil Center – West Building  
10th Floor Conference Room  
2601 NW Expressway  
Oklahoma City, OK 73112

- \* **Food and drink will be provided!**
- \* **Meetings are free and open to female OBA members.**
- \* **Reservations are preferred. (We want to have enough space and food for all.)**

For further information and to reserve your spot,  
please e-mail [stephaniealton@cabainc.com](mailto:stephaniealton@cabainc.com).

## LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM



# New Delta Dental Plan Available to OBA Members



- Group dental now available to OBA groups of 1 or more
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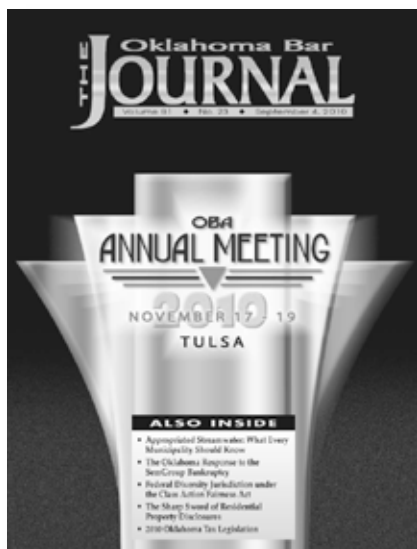
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**THEME:**  
**OBA ANNUAL MEETING**

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## Why Attend the Annual Meeting?

By Allen Smallwood

Most lawyers (particularly solo practitioners like me) are independent folks who pride themselves on going their own way most of the time. However, lawyers as well as other professionals are social creatures and invariably are members of an association whose purpose is to further the aims of the profession, engender a collegial spirit, assist in continuing professional education and improve not only the perception of their profession, but the substance of it as well.

All these goals are advanced by your participation in the Annual Meeting of the Oklahoma Bar Association. Not only are there enjoyable social functions to attend, there is excellent end-of-the year CLE available in virtually all

areas of our profession. Members of the OBA staff and the Board of Governors have engaged in significant amounts of effort to make this a memorable event for all of us.

Of particular interest to me will be the eyewitness identification presentation based upon the wrongful conviction of a Texas man named Ronald Cotton who ended up serving over 10 years in prison for a rape he did not commit. The riveting presentation by the victim of that rape case, the circumstances surrounding the ultimate exoneration of Mr. Cotton and the catharsis that all of them went through in the process is something you will never forget. This will be the Thursday morning OBA/CLE plenary session.



*Allen M. Smallwood*

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

*All in all, I anticipate this will be a memorable meeting, beneficial to all, and I urge all of you to attend and make as much benefit of it as you can.*

We also have scheduled as our luncheon speaker the noted Pulitzer Prize-nominated author Michael Wallis, who will regale us with a history of our checkered past with respect to some of our less than savory citizens operating on the wrong side of the law.

All in all, I anticipate this will be a memorable meeting, beneficial to all, and I urge all of you to attend and make as much benefit of it as you can.

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Oklahoma Bar Foundation (405) 416-7070

# EVENTS CALENDAR

## SEPTEMBER 2010

- 6 **OBA Closed** – Labor Day Observed
- 7 **OBA Uniform Laws Committee Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 8 **OBA Technology Task Force/Critical Systems Subcommittee Meeting**; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- 9 **OBA Legal Intern Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686
- OBA Mock Trial Committee Meeting**; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Contact: Judy Spencer (405) 755-1066
- 10 **OBA Communications Committee Meeting**; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Douglas Dodd (918) 591-5316
- 14 **Death Oral Argument**; 10 a.m.; Wendell Arden Grissom – D-2008-595; Court of Criminal Appeals Courtroom
- OBA Military Task Force Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deborah Reheard (918) 689-9281
- 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
- 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
- Ruth Bader Ginsburg American Inn of Court**; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611
- 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 Unauthorized Practice of Law Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Deborah Reheard (918) 689-9281

For more events go to [www.okbar.org/calendar](http://www.okbar.org/calendar)

The Oklahoma Bar Association's official website: [www.okbar.org](http://www.okbar.org)

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# OBA ANNUAL MEETING

## Author Michael Wallis to Speak on Oklahoma, the Real Wild West

By Jeff Kelton

**A**s Oklahomans, we are all very familiar with Route 66 and its great history. Well, it's time to meet the man credited with sparking the resurgence of interest in this great highway.

Michael Wallis, best-selling author and award-winning reporter, will deliver the keynote address at the 106th OBA Annual Meeting this year, Nov. 17 – 19 in Tulsa.

He is also a historian and biographer of the American West who has gained national notoriety as a speaker and voice talent. In 2006, his voice was heard in *Cars*, an animated feature film from Pixar Studios, also featuring Paul Newman, Bonnie Hunt, Owen Wilson, Michael Keaton and George Carlin.

His topic for the annual luncheon will be, "Lawless Oklahoma — The Epicenter of the Wild West." He will cover the gamut of notorious brigands, rascals, killers and thieves from Territorial days through the years of the Dust Bowl and beyond. He promises to deliver a laugh.

"I figured this would be an interesting subject for a gathering of legal minds, even if all of them are not criminal lawyers and/or prosecutors," Mr. Wallis said.



He has published 16 books, including *Route 66: The Mother Road*. In 2007, two of Michael's latest works — *Billy the Kid: The Endless Ride* and *The Lincoln Highway: Coast to Coast from Times Square to the Golden Gate* — were published by W.W. Norton. His next two books come out in 2011, *David Crockett: The Lion of the West*, published by W.W. Norton. Publisher Abrams will release his 17th book, *The Wild West: 365 Days*.

His work has appeared in hundreds of national and international magazines and newspapers, including *Time*, *Life*, *People*, *Smithsonian*, *The New Yorker* and *The New York Times*.

He has been nominated three times for the Pulitzer Prize and was a nominee for the National Book Award. He has won many other prestigious honors, such as the Will Rogers Spirit Award, Western Heritage Award from the National Cowboy Hall & Western Heritage Museum, Oklahoma Book Award from the Oklahoma Center for the Book and the Best



Western Non-fiction Award from the Western Writers of America.

He was inducted into the Writers Hall of Fame of America, Oklahoma Professional Writers Hall of Fame, Oklahoma Historians Hall of Fame, and he was the first inductee into the Oklahoma Route 66 Hall of Fame.

He received the Arrell Gibson Lifetime Achievement Award from the Oklahoma Center for the Book as well as the Lynn Riggs Award and the first John Steinbeck Award.

Since 1982, Michael and his wife, Suzanne Fitzgerald Wallis, have made their home in Tulsa.

The Annual Luncheon will take place from noon to 1:45 p.m. Thursday, Nov. 18. Mr. Wallis will be available following the luncheon for a book signing at 2 p.m. and a variety of his books will be available for purchase. Cost to attend the luncheon is \$30 with Annual Meeting registration. Seating is limited, so register today. See the registration page in this issue.

*Mr. Kelton is OBA Communications Specialist.*

The Oklahoma Bar Association Family Law Section seeks nominees for the following awards to be presented at its annual meeting on Nov. 17, 2010.

***Outstanding Family Law Attorney for 2010***


***Outstanding Family Law Judge for 2010***

***The Phil and Noel Tucker Outstanding  
Guardian Ad Litem Award for 2010***

Nominees should have made significant contributions to the practice of family law in Oklahoma in 2010, or over an extended period of time. Please submit your nominations and a brief description of the reasons for your nomination by Oct. 8, 2010, to: OBA Family Law Section, Nominations and Awards, c/o David A. Tracy, 1701 S. Boston Ave., Tulsa, OK 74119.



# OBA ANNUAL MEETING



## Annual Meeting Event Highlights

By Carol Manning

### Wednesday • November 17

#### Multi-Track CLE

The Wednesday CLE multi-track format is back again at this year's meeting. Members will have an opportunity to select from more than 20 different sessions. Four tracks of simultaneous CLE programming will be offered: Family Law, Criminal Law, Nuts and Bolts, and How Good Lawyers Survive Bad Times.

The Nuts and Bolts track includes sessions relevant to all attorneys, not just the new lawyer, especially those transitioning into private practice. New this year is a track designed to help our members in these tough economic times. Sessions will be of value to all attorneys, big firm or small firm.

The four tracks occur simultaneously in four meeting rooms at the Crowne Plaza Hotel. Each track is divided into 50-minute blocks, and breaks will coincide. Attendees can mix and match programs they attend and fit together the CLE that best suits their needs. Ethics and technology sessions are scattered throughout the day. Registrants receive materials on a flash drive for all Wednesday sessions, not just the sessions attended. See the CLE grid in this issue for more details.

#### President's Reception

Traditionally the best party of the OBA Annual Meeting and not to be missed is the President's Reception. OBA President Allen Smallwood invites you to join him Wednesday evening beginning at 7 p.m. To celebrate the meeting being held in Tulsa after a four-year run in

Oklahoma City, the reception atmosphere will be inspired by the city's Art Deco architecture. If you've never attended the event before, the appetizers are hearty, and it's a great opportunity to network. Lots of legal VIPs will be there. Each attendee receives two drink tickets. Free with Annual Meeting registration.

### Thursday • November 18

#### OBA/CLE Plenary Session

"Eyewitness Testimony: How Eyewitness Accounts Can Lead to False Accusations" will feature Jennifer Thompson-Cannino and Ronald Cotton. Ms. Thompson, raped at knifepoint by a man who broke into her apartment, eventually identified Mr. Cotton as her attacker. After being convicted and serving 11 years in prison, Mr. Cotton was released after a DNA test proved his innocence. Two years later, Jennifer and Ronald met face to face — and forged an unlikely friendship that changed both of their lives. Together they wrote the book, *Picking Cotton: Our Memoir of Injustice and Redemption*. Each registrant will receive a copy of the book. The science of eyewitness identification will be addressed by Iowa State University professor Gary Wells, and a panel of Oklahoma attorneys will discuss eyewitness identification in Oklahoma. Moderated by Judge Thomas C. Gillert, panelists will be Micheal Huff, Tulsa Police Department, Homicide Division; Douglas E. Drummond, Tulsa County first assistant district attorney; Stephen Kunzweiler, assistant district attorney, Tulsa. Session begins at 9 a.m. and ends at 11:40 a.m. Approved for three hours of MCLE ethics credit, this session is part of the two-day CLE package — or is priced separately.

## Annual Luncheon

Michael Wallis, best-selling author and award-winning reporter, will deliver the keynote address at the 106th OBA Annual Meeting luncheon this year. Probably best known for his books about Route 66, he is also a historian and biographer of the American West who has gained national notoriety as a speaker and voice talent. His topic will be, "Lawless Oklahoma — The Epicenter of the Wild West." He will cover the gamut of notorious brigands, rascals, killers and thieves from territorial days through the years of the Dust Bowl and beyond. He promises to deliver a laugh.



OBA awards will also be presented. Time: 12:15 p.m. Cost: \$30 with Annual Meeting registration, which is required to purchase a ticket. A book signing will immediately follow the luncheon, and copies of his books will be available for purchase.

## The Incarceration of Women in Oklahoma

A special program, moderated by Supreme Court Chief Justice James E. Edmondson, "The Incarceration of Women in Oklahoma," will feature Laura J. Pitman, Ph.D., deputy director of Female Offender Operations, Oklahoma Department of Corrections, Oklahoma City. Ms. Pitman will focus on the unique role Oklahoma plays in the incarceration of women.

Our state ranks first in the nation in female incarceration, incarcerating 134 women per 100,000 population compared to the national average of 69. Currently, Oklahoma stakeholders are developing strategies to address prevention, intervention and diversion, re-entry and recidivism. Attend this session and learn what is being done about this serious social issue and learn what you need to know if you represent a female criminal defendant.

Annual meeting registration is *not* required to attend this free program that begins at 2:15 p.m. No CLE credit is offered. RSVP requested by filling out the Annual Meeting registration form online or in print.

## Why Attend the Annual Meeting?

**"I anticipate this will be a memorable meeting, beneficial to all, and I urge all of you to attend and make as much benefit of it as you can."**

— Allen Smallwood  
Tulsa, OBA President

**"The Annual Meeting is the place to see friends and renew acquaintances, to learn the concerns and happenings of the Oklahoma bar — and to recall why you chose this profession."**

— Martha Rupp Carter  
Tulsa, Board of Governors

**"The Annual Meeting is the best way to stay connected with our bar association; it is also the best opportunity to meet attorneys from all parts of Oklahoma in a relaxed atmosphere."**

— Mark Hixson  
Yukon, Board of Governors

**"The Annual Meeting is a great way to meet and socialize with attorneys outside of the courtroom in a more relaxed and informal atmosphere. Young lawyers are connected online, but nothing takes the place of personal, face-to-face contacts with other lawyers. Although most young lawyers are busy with work, families and other activities, the Annual Meeting is that once-a-year event that everyone should attend."**

— Molly Aspan  
Tulsa, YLD Chairperson & Board of Governors

## Free Mental Health CLE Seminar

Lawyers face a disproportionate amount of stress, and often work in extraordinarily emotionally charged situations. Couple this with the fact lawyers are often hard-charging high achievers to begin with, and you have a blueprint for a number of mental health issues. The OBA and the Lawyers Helping Lawyers Assistance Program Committee considers this work among the most important of all. For the fourth year, a free seminar will be offered — "Lives in the Balance: Lawyers Helping Lawyers."

LHL Chairperson Tom Riesen will provide the jarring statistics regarding practicing law and the incidence of emotional and mental challenges we face. Panel discussions relating to successfully facing the twin specters of depression and addiction will ensue. Panelists

will include Fulbright and Jaworski attorney Terry O. Tottenham, State Bar of Texas president, and Rebecca Williams, Caba Employee Assistance Services director, Oklahoma City.

The panelists bring fresh information and insights into these topics. This seminar routinely scores among the highest in audience satisfaction. You do enough for your clients, so do something for yourself. You will learn something, maybe something that could save your life. Annual Meeting registration is *not* required. The seminar (1.5 hours, 0 ethics) will be held from 3:45 p.m. to 5:15 p.m. Register by filling out the Annual Meeting registration form online or in print.

### **Music through the Years Featuring Jessica Hunt**

She wowed the judges at the 2007 Annual Meeting as a law student and won the OBA Idol Competition. Jessica Hunt is back this year with a one-hour show that starts at 8 p.m. She'll sing some of her favorite songs from numerous decades, so your generation is sure to be included. It's a free event with Annual Meeting registration. There will be a variety of complimentary yummy desserts to choose from, and each person who attends receives two free drink tickets.



### **Casino Night**



An Annual Meeting favorite that keeps on packing the house every year, Casino Night is back — thanks to the Young Lawyers Division that sponsors the event. Enjoy winning it big at blackjack, roulette, craps and Texas Hold 'em. The good thing is if you lose a bundle, it's only play money. Musical entertainment will add to the festivities, so you can pretend you are in the city where what happens there, stays there. A drawing for awesome prizes will be held at the end of the evening. Casino night will be from 9 p.m.-midnight and is free with Annual Meeting registration.

## **Friday • November 19**

### **President's Breakfast**

President Allen Smallwood invites you to join him for breakfast. It's a long-standing tradition, and each president has offered a unique program that reflects his or her interests. President Smallwood, who has lived in Tulsa most of his life, is very proud of his hometown — and all the things that make it special. The city is known for its Art Deco architecture with only New York City and Miami boasting



more examples of this architectural style. Michelle Place of the Tulsa Historical Society will speak on Tulsa's wealth of sophisticated Art Deco buildings. The breakfast is from 7:30 - 9 a.m. Cost: \$20. Sign up on the Annual Meeting registration form.

### **General Assembly**

Leaders of the Oklahoma Supreme Court and Court of Criminal Appeals will share their current challenges and triumphs. Learn about the state of the Oklahoma Bar Association from OBA President Allen Smallwood. Come see your colleagues, and maybe your bar association, honored with OBA awards. Begins at 9 a.m. Open to all bar members, not just delegates.

### **House of Delegates**

Taking place immediately following the General Assembly, the voice of the membership elects officers and Board of Governors members for 2011. Plus, they make decisions on the OBA's legislative plan and other important issues for next year. President-Elect Deborah Reheard of Eufaula presides during this session. The deadline to submit resolutions to OBA Executive Director John Morris Williams for consideration by the House of Delegates is 5 p.m. Friday, Oct. 1, 2010.

*Ms. Manning is director of OBA Communications.*

# **Civil, Commercial & Employment Mediation Training**

OKC: October 6-8 or December 1-3

## **Family & Divorce Mediation Training**

OKC: September 22-25 or December 8-11

**TULSA: September 15-18 or November 17-20**

These courses meet the training requirements of the District Court Mediation Act of 1998 and are approved by the Oklahoma Bar Association for MCLE credit.

### ***40 Hour Family Mediation Training***

*Our Family Mediation Seminar qualifies for:*

- 40 hours of MCLE credit including two hours of ethics
- Parent Coordinators
- Collaborative Law Practitioners
- Ethics/Professional Responsibility
- Identifying and screening domestic violence issues
- Families in Transition Program

4 DAY MEDIATION TRAINING SESSION \$625

8 AM - 6 PM DAILY

*The financial, legal, social, psychological, and procedural dynamics of divorce mediation are explained and then experienced in mock mediations. This course includes an examination of Oklahoma family law and its impact upon the mediation of domestic subjects such as divorce, property division, custody, visitation, grandparental matters, elder issues, cohabitation, and same-sex relationships.*

### ***24-Hour Civil-Commercial Mediation Training***

*Our Civil-Commercial Mediation Training will encompass:*

- Understanding the dynamics of conflict
- Mediation of cases involving personal injury, employment, contract matters, etc.
- Mediator skills and interventions
- Contexts for using the mediation process
- Ethics/Professional Responsibility

3 DAY MEDIATION TRAINING SESSION \$595

8:30 AM - 5:30 PM DAILY


*This seminar combines lectures, discussion groups, case studies, role-play, and demonstrations. The course explains, illuminates, and provides necessary skills for successful mediations, with emphasis on personal injury litigation, commercial issues, business partnerships, ADA, EEOC, and workplace discrimination issues.*

\* Class size is limited to the first 20 registrants

**Call today to register: (405) 607-8914**



# OBA ANNUAL MEETING



## Stock up on Outstanding CLE at this Year's Annual Meeting

By Donita Bourns Douglas

**O**BA/CLE is returning to Tulsa with diverse and dynamic continuing legal education offerings at this year's annual convention.

### MULTI-TRACK SEMINARS

Wednesday, Nov. 17 – starting at 9 a.m.

The Wednesday CLE multi-track format will be used again at this year's meeting. Members will have an opportunity to select from in excess of 20 different sessions. Four tracks of simultaneous CLE programming will be offered: Family Law, Criminal Law, Nuts and Bolts, and How Good Lawyers Survive Bad Times.

The **Family Law** track is packed with useful information, giving recipients a chance to revisit, refresh and reacquaint themselves on these important foundational areas. Planned by Lori Pirraglia, Oklahoma City, the sessions will include presentations on client intake, temporary order hearings: exhibits and preparing your clients; finding expert witnesses: business valuations and mental health professionals; trial exhibits and witnesses: choosing and preparation; and drafting of decrees and pre-nups.

The ever-popular **Criminal Law** track, planned by Oklahoma City attorney Ben Brown, includes sessions titled "Immigration and Criminal Law: A Practical Explanation in Light of *Padilla v. Kentucky*"; "The Practical and Advanced Use of the Science of Eyewitness Identification in the Courtroom"; "Criminal Law Motions Practice"; "Representing Person Charged with Driving Under the Influence"; and "Working with the Media."

The annual **Nuts and Bolts** track includes sessions relevant to all attorneys, not just the new

lawyer. Planned by Collin Walke, Oklahoma City, on behalf of the OBA Young Lawyers Division, this track includes sessions on administrative law trials, ethics, Chapter 7 bankruptcy, and the art of depositions. Oklahoma City criminal defense attorney Garvin Isaacs will present "Your Job as a Criminal Law Attorney," and OBA Director of the Management Assistance Program Jim Calloway will present "Your Solo Shopping List."

**How Good Lawyers Survive Bad Times** is the final track designed to help our members in these tough economic times. Planned by Mr. Calloway, the sessions will be of value to all attorneys, big firm or small firm. Topics include "50 Tips for Tough Times," "Marketing on a Budget," "The Thrifty Lawyer," "Free, Cheap and Easy Technology Tools" and "Your Law Firm Finances." The day will end on a highlight with OBA General Counsel Gina Hendryx and OBA Ethics Counsel Travis Pickens addressing "Cutting Costs & Corraling Clients without Compromising Ethics."

The four tracks will occur simultaneously in four meeting rooms at the Crowne Plaza. Each track is divided into 50-minute blocks, and breaks will coincide. Attendees can mix and match programs they attend and fit together the CLE that best suits their needs. Ethics and technology sessions are scattered throughout the day. Registrants receive materials on a flash drive for

all Wednesday sessions, not just the sessions attended.

## PLENARY SESSION

Thursday, Nov. 18 – 9 a.m.

In honor of OBA President Allen Smallwood, a criminal defense attorney from Tulsa, the Thursday morning plenary session will focus on the criminal law issues of eyewitness identification.

“Eyewitness Testimony: How Eyewitness Accounts Can Lead to False Accusations,” will feature Jennifer Thompson-Cannino and Ronald Cotton. Ms. Thompson was raped at knifepoint by a man who broke into her apartment while she slept. She was able to escape, and eventually positively identified Mr. Cotton as her attacker. He insisted that she was mistaken — but her positive identification was the compelling evidence that put him behind bars. After 11 years, Mr. Cotton was allowed to take a DNA test that proved his innocence. He was released after serving more than a decade in prison for a crime he never committed. Two years later, Jennifer and Ronald met face to face — and forged an unlikely friendship that changed both of their lives. Together they wrote a book, *Picking Cotton: Our Memoir of Injustice and Redemption*. Each registrant will receive a copy of the book.



Jennifer Thompson-Cannino



Ronald Cotton

The science of eyewitness identification will be addressed by Iowa State University professor Gary Wells. Mr. Wells was also featured with Mr. Cotton and Ms. Thompson on “60 Minutes” in a story about eyewitness identification. Following this presentation, a panel of Oklahoma attorneys will discuss eyewitness identification in Oklahoma. Moderated by Judge Thomas C. Gillert, the panel includes Micheal Huff, Tulsa Police Department, Homicide Division; Douglas E. Drummond, Tulsa County first assistant district

attorney; and Stephen Kunzweiler, assistant district attorney, Tulsa.

## THURSDAY AFTERNOON PROGRAMS

Thursday afternoon offers two compelling programming opportunities. First, “**The Incarceration of Women in Oklahoma**,” begins at 2:15 p.m. and is moderated by Chief Justice James E. Edmondson. Annual meeting registration is not required to attend this free program. No continuing legal education credit is offered.

Featuring Laura J. Pitman, Ph.D., deputy director of Female Offender Operations, Oklahoma Department of Corrections, Oklahoma City, the program will focus on the unique role Oklahoma plays in the incarceration of women.

Oklahoma ranks first in the nation in female incarceration, incarcerating 134 women per 100,000 population compared to the national average of 69. There were 2,651 female offenders incarcerated at the end of fiscal year 2009 — 67.7 percent were for nonviolent offenses and 51.6 percent were for drug offenses. Currently, Oklahoma stakeholders are developing strategies to address prevention, intervention and diversion, and re-entry and recidivism. Attend this session and learn what is being done about this serious social issue, and learn what you need to know if you represent a female criminal defendant.

Second, “**Lives in Balance: Lawyers Helping Lawyers**” is scheduled for Thursday afternoon beginning at 3:45. This program will focus on addiction and mental health issues in the legal profession and the resources available to OBA members. The program is cosponsored by the Lawyers Helping Lawyers Assistance Program, requires no annual meeting registration, and has been approved for 1.5 hours of MCLE credit.

OBA members, mental health professionals and OBA staff will participate in this program. Additionally, State Bar of Texas President Terry Tottenham will participate in the program, sharing information about Texas initiatives in this area.

Join us for some diverse and dynamic CLE in Tulsa town. Reserve your spot now with OBA/CLE and get excited about these opportunities.

Ms. Douglas is director of OBA Educational Programs.

# 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. Robinson	<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

**12-2 p.m. LUNCH (On your own)**

<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
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# 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.  Trial Exhibits and Witness: Choosing and Preparation Kimberly Hays	Representing Persons Charged with Driving Under the Influence Josh D. Lee Charles Sifers	Your Law Firm Finances TBD	Bankruptcy Chapter 7: The Ins and Outs Jennifer Kirkpatrick	
<b>Session 6</b> 4 - 4:50 p.m.  The End/Beginning: Drafting the Decree/ Pre-Nups for New Beginnings Bill LaSorsa	Working with the Media Moderator Doug Dodd  Panel TBD	Cutting Costs & Coralling Clients without Compromising Ethics (ethics) Gina Hendryx Travis Pickens	Mastering the Art of the Deposition 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.	Picking Cotton: Our Memoir of Injustice and Redemption	<b>Speakers:</b> Jennifer Thompson-Cannino, Salem, NC Ronald Cotton, Mebane, NC
9:50 a.m.	The Science of Eyewitness Identification	<b>Speaker:</b> Gary D. Wells, Ph.D., Professor of Psychology, Iowa State University, Ames
10:40 a.m.	Break	
10:50-11:50 a.m.	Eyewitness Identification in Oklahoma	<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

## 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).*

### WEDNESDAY, NOVEMBER 17

OBA REGISTRATION..... 8 A.M. – 5 P.M.

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*

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

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. – 1:30 P.M.

TU COLLEGE OF LAW  
ALUMNI RECEPTION  
AND LUNCHEON..... NOON – 1:30 P.M.

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

### THURSDAY, NOVEMBER 18

OBA REGISTRATION..... 8 A.M. – 5 P.M.

OBA/CLE PLENARY SESSION..... 9 – 11:40 A.M.

OBA ANNUAL LUNCHEON  
FOR MEMBERS, SPOUSES  
AND GUESTS ..... NOON – 1:45 P.M.  
*(\$30 with meeting registration)*

FEATURING:



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

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

THE INCARCERATION OF WOMEN  
IN OKLAHOMA..... 2:15 P.M.  
*(Annual Meeting registration not required  
for admission)*



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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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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*



## FRIDAY, NOVEMBER 19

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

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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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# 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 # \_\_\_\_\_


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).

# OBA ANNUAL MEETING



## House of Delegates

Thank you to the County Bar Presidents of:

Adair, Alfalfa, Beckham, Blaine, Bryan, Canadian, Carter, Cherokee, Choctaw, Cleveland\*\*, Coal, Comanche, Cotton, Creek, Custer, Dewey, Ellis, Garfield, Garvin, Grant, Greer, Harper, Jackson, Jefferson, Johnston, Kingfisher, Kiowa, Logan, Love, Marshall, Mayes, McClain, McCurtain, McIntosh, Muskogee, Okfuskee, Oklahoma, Osage, Ottawa\*\*, Pittsburg, Pontotoc, Pushmataha, Rogers, Roger Mills, Seminole, Texas, Tulsa, 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.

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."

Atoka	Lincoln
Beaver	Major
Caddo	Murray
Cimarron	Noble
Craig	Nowata
Delaware	Okmulgee
Grady	Pawnee
Harmon	Payne
Haskell	Pottawatomie
Hughes	Sequoyah
Kay	Stephens
Latimer	Tillman
LeFlore	Wagoner

# 2011 OBA Board of Governors Vacancies

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

## OFFICERS

### President-Elect

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

**Nominee: Cathy Christensen, Oklahoma City**

### Vice President

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

**Nominee: Reta M. Strubhar, Piedmont**

## BOARD OF GOVERNORS

### Supreme Court Judicial District Two

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

**Nominee: 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**

## 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

### SUPREME COURT JUDICIAL DISTRICT NO. 2

#### **GERALD C. DENNIS, ANTLERS**

Nominating Petitions have been filed nominating Gerald C. Dennis for election of Supreme Court Judicial District No. 2 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011.

**A total of 33 signatures appear on the petitions.**

Nominating Resolutions have been received from the following county:

Coal

### SUPREME COURT JUDICIAL DISTRICT NO. 8

#### **SCOTT PAPPAS, STILLWATER**

Nominating Petitions have been filed nominating Scott Pappas for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011.

Nominating Petitions have been received for the following counties:

Lincoln and Payne

**A total of 57 signatures appear on the petitions**

#### **GREGG W. LUTHER, SHAWNEE**

Nominating Petitions have been filed nominating Gregg W. Luther for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011.

**A total of 25 signatures appear on the petitions.**

### SUPREME COURT JUDICIAL DISTRICT NO. 9

#### **O. CHRISTOPHER MEYERS, LAWTON**

Nominating Petitions have been filed nominating O. Christopher Meyers for election of Supreme Court Judicial District No. 9 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2011. Twenty-five of the names thereon are set forth below:

Dietmar K. Caudle, J. W. Doolin, John N. Fleur, Art G. Mata, Kade A. McClure, Gerald F. Neuwirth, Robert C. Schacher, Fred C. Smith Jr., Arthur R. South, Jay S. Walker, Kenneth L. Youngblood, Bradley W. Burgess, Eddie D. Valdez, Monty Hightower, John Anthony Pereira, Timothy E. Wilson, Susan G. Zwaan, Ana Basora-Walker, Valerie L. Hunt, Jillian D. Welch, Irma J. Newburn, Gregory P. Beben, John Kinslow, Joe B. Dutcher Jr. and Max Hoskins

**A total of 25 signatures appear on the petitions.**

Nominating Resolutions have been received from the following counties:

Comanche and Cotton

#### **MEMBER-AT-LARGE**

#### **RENÉE DEMOSS, TULSA**

Nominating Petitions have been filed nominating Renée DeMoss 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 183 signatures appear on the petitions.**

#### **KIMBERLY K. HAYS, TULSA**

Nominating Petitions have been filed nominating Kimberly K. Hays 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 253 signatures appear on the petitions.**

Nominating Resolutions have been received from the following counties:

Creek and Washington



# OBA ANNUAL MEETING

## OBA Resolutions

*The following resolutions will be submitted to the House of Delegates at the 106th Oklahoma Bar Association Annual Meeting at 10 a.m. Friday, Nov. 19, 2010, at the Crowne Plaza Hotel in Tulsa.*

The deadline to submit resolutions to OBA Executive Director John Morris Williams for consideration by the House of Delegates is 5 p.m. Friday, Oct. 1, 2010

### RESOLUTION NO. ONE: PROCEEDINGS FOR JUDICIAL REVIEW NAMING RESPONDENT, MANNER OF SERVICE AND RECORD OF PROCEEDINGS TO REVIEWING COURT

**BE IT RESOLVED** by the House of Delegates of the Oklahoma Bar Association that the association adopt, as part of its legislative program, as published in *The Oklahoma Bar Journal* and posted on the OBA website at [www.okbar.org](http://www.okbar.org), proposed legislation amending 75 O.S. 2001, Section 318 and 320, Oklahoma Administrative Procedures Act. (*Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5*) (*Submitted by the Government and Administrative Law Practice Section. Adoption recommended by the OBA Board of Governors.*)

**BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:**

SECTION 1. AMENDATORY 75 O.S. 2001, Section 318, is amended to read as follows:

A. 1. Any party aggrieved by a final agency order in an individual proceeding is entitled to certain, speedy, adequate and complete judicial review thereof pursuant to the provisions of this section and Sections 319, 320, 321, 322 and 323 of this title.

2. This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.

3. Neither a motion for new trial nor an application for rehearing shall be prerequisite to secure judicial review.

B. 1. The judicial review prescribed by this section for final agency orders, as to agencies whose final agency orders are made subject to review, under constitutional or statutory provisions, by appellate proceedings in the Supreme Court of Oklahoma, shall be afforded by such proceedings taken in accordance with the procedure and under the conditions otherwise provided by law, but subject to the applicable provisions of Sections 319 through 324 of this title, and the rules of the Supreme Court.

2. In all other instances, proceedings for review shall be instituted by filing a petition, in the district court of the county in which the party seeking review resides or at the option of such party where the property interest affected is situated, naming as respondent(s) the agency and such other party(ies) as the petitioner deems appropriate, within thirty (30) days after the appellant is notified of the final agency order as provided in Section 312 of this title.

C. Copies of the petition shall be delivered in person or mailed, postage prepaid, to served upon the agency and all other parties of record, and proof of such delivery or mailing proof of such service shall be filed in the court within ten (10) days after the filing of the petition. ~~within ten (10) days after the filing of the petition.~~ Any party not named as a respondent in the petition is entitled to respond within ten days of receipt of service. The court, in its discretion, may permit other interested persons to intervene.

D. In any proceedings for review brought by a party aggrieved by a final agency order:

1. The agency whose final agency order was made subject to review may be entitled to recover against such aggrieved party any court costs, witness fees and reasonable attorney fees if the court determines that the proceeding brought by the party is frivolous or was brought to delay the effect of said final agency order.

2. The party aggrieved by the final agency order may be entitled to recover against such agency any court costs, witness fees, and reasonable attorney fees if the court determines that the proceeding brought by the agency is frivolous.

SECTION 2. AMENDATORY. 75 O.S. 2001, Section 320, is amended to read as follows:

Within ~~thirty (30)~~sixty (60) days after service of the petition for review or equivalent process upon it, or within such further time as the reviewing court, upon application for good cause shown, may allow, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review. For purposes of this section, "record" shall include such information as specified by Section 309 of this title. By stipulation of all parties to the review proceeding, the record may be shortened. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs resulting therefrom. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

## **RESOLUTION NO. TWO: NEW RULE 31 — JUDICIAL REVIEW OF FINAL ORDERS UNDER THE ADMINISTRATIVE PROCEDURES ACT**

**BE IT RESOLVED** by the House of Delegates of the Oklahoma Bar Association that the Association adopt, as part of its legislative program, as published in *The Oklahoma Bar Journal* and posted on the OBA website at [www.okbar.org](http://www.okbar.org), proposed addition of Rule 31 to the Rules for District Courts of Oklahoma. (*Requires 60% affirmative vote for passage. OBA Bylaws Art. VIII Sec. 5*) (*Submitted by the Government and Administrative Law Practice Section. Adoption recommended by the OBA Board of Governors.*)

## **RULES FOR THE DISTRICT COURTS OF OKLAHOMA (NEW) RULE 31. JUDICIAL REVIEW OF FINAL ORDERS UNDER THE ADMINISTRATIVE PROCEDURES ACT (APA)**

**A. Scope.** This rule applies to any action initiated in district court in which a party is seeking judicial review of a final order in an individual proceeding pursuant to §318 of Title 75 of the Oklahoma Statutes, or is seeking a review of a declaratory ruling, or refusal to issue such a ruling, by an agency pursuant to §307 of Title 75. These procedures shall also be used for other requests for judicial review of a final administrative order as long as there is specific statutory authority to otherwise initiate such review. Where this rule is in conflict with procedures set out in the Oklahoma Statutes, the procedures found in the statutes will prevail. Interlocutory orders issued by an agency, including an administrative law judge, are not appealable to the district court.

**B. Initiating Judicial Review.** Actions seeking judicial review under the Administrative Procedures Act (the APA) are special proceedings not governed by the Oklahoma Pleading Code. Any party entitled to seek such judicial review shall initiate the review by filing a Petition For Judicial Review within thirty (30) days of the final agency order in the appropriate district court in the form prescribed in (L) below. The party or parties filing a Petition shall be referred to as the Petitioner or Petitioners. The agency and other parties of record before the agency named as Respondents shall be served with a copy of the Petition. Service shall be accomplished by mailing, postage prepaid, a copy of the Petition to each named Respondent or Respondent's counsel of record before the agency, or by service in person. Cross or counter petitions for judicial review may be filed within thirty (30) days of the final agency order by service upon opposing parties or their counsel of record by first class mail, or by service in person.

**C. Response to Petition for Judicial Review.** Within twenty (20) days after service of the Petition for Judicial Review, Respondent(s) shall file a response in the form prescribed in (M) below. If a cross or counter petition for judicial review is taken by the Respondent(s), Petitioner shall respond within twenty (20) days using this same form.

#### **D. Amendments to Petitions and Responses.**

Unless otherwise provided by law, the Petition, Cross or Counter-Petition or Response may only be amended with leave of court for good cause shown. However, a Response to an Amended Petition or Amended Cross or Counter-Petition may be filed without leave of court within twenty (20) days of the filing of the Amended Petition.

#### **E. Standards and Scope of Judicial Review.**

Unless otherwise specifically provided by statute, the review of a final agency order or ruling shall be confined to the administrative record, and conducted by the Court without a jury. Any order on judicial review reversing or modifying an agency order or ruling shall state with specificity the provisions of 75 O.S. §322 relied upon by the Court.

#### **F. Agency's Notice of Filing of the Record.**

Pursuant to the requirements of §320 of Title 75, the administrative agency whose decision or ruling is being reviewed shall assemble the record for judicial review, and within sixty (60) days the agency shall transmit the assembled record to the district court and notify all parties in writing of the transmittal. The time for filing the record may be extended by the court for good cause shown.

#### **G. Oral Argument and Briefing Schedule.**

The Court, upon request, shall hear oral argument and receive briefs. (1) If as noted in the Petition and Response, both the Petitioner and the Respondent(s) indicate a desire to file briefs in the case, the following schedule shall apply. The Petitioner shall file a brief-in-chief within forty (40) days from the filing of the administrative record in district court. The Respondent(s) shall have thirty (30) days thereafter to file a Response brief, and the Petitioner shall have ten (10) days thereafter to file a reply brief. If only one party indicates a desire to file a brief, such brief shall be filed within forty (40) days from the filing of the administrative record. No response brief need be filed, unless ordered by the court. If no party desires to file a brief, the court shall base its decision upon the record, and shall be confined to the issues raised in the Petition and Response. When all briefs have been filed, any party may inform the court and all other parties, that the case is submitted and ready for review by the court. (2) If a party alleges that there were irregularities in procedure before the agency to be established by additional evidence, the briefing schedule set forth in paragraph (1) shall not apply. The

nature of the alleged irregularities must be described with particularity and an initial list of witnesses and evidence provided. In such cases, the party making such allegation shall notify the assigned judge who shall then set a scheduling conference. At this conference, the judge shall set appropriate deadlines and hearing dates. The judge may set a briefing schedule at this time, or may wait until after the evidentiary issues are presented. Briefing schedules established by the court may be extended for good cause shown.

**H. Brief Length.** Without leave of the court, briefs in chief and in response shall not exceed twenty (20) pages; and reply briefs shall not exceed five (5) pages. Page limitations herein exclude the cover, index, appendix, signature line and accompanying information identifying attorneys and parties, and the certificate of service.

**I. Motions.** All motions filed shall be accompanied by a concise brief or list of legal authorities supporting the motion, except motions requesting an extension of time. Briefs in response to a motion shall be filed within fifteen (15) days after the service of the motion, unless a different schedule has been entered.

#### **J. Additional Time After Service By Mail.**

Whenever a party has the right or is required to do some act under this rule within a prescribed period after the filing or service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

**Special Note As To Timeliness of Court Decision:** Existing District Court Rule 27 provides, in part:

**Matters Taken Under Advisement.** In any matter taken under advisement, a decision shall be rendered within sixty (60) days of the date on which the matter was taken under advisement or, if briefs are to be submitted, within sixty (60) days of the date of the filing of the final brief. When a trial court takes a matter under advisement, the judge shall specify the date by which a decision shall be rendered. If briefs are to be submitted, the dates for filing such shall also be specified. The Chief Justice may extend the deadline for a decision upon sworn application for an extension of time of the trial judge setting forth with specificity the reasons therefore.

**K. Form of Petition For Judicial Review.**

IN THE DISTRICT COURT OF  
\_\_\_\_\_ COUNTY  
STATE OF OKLAHOMA

Petitioner, )  
 )  
 )  
v. ) No. )  
 )  
Respondent(s) )

PETITION FOR JUDICIAL REVIEW CROSS-  
PETITION  
AMENDED PETITION COUNTER-PETITION  
(Select one of the above pleadings.)

**I. PROCEDURAL HISTORY**

Agency/tribunal: \_\_\_\_\_  
Case Number: \_\_\_\_\_  
Nature of Case: \_\_\_\_\_  
Name of Party or Parties \_\_\_\_\_  
Filing this Petition: \_\_\_\_\_  
Date Petitioner Received \_\_\_\_\_  
Notice of Final Order: \_\_\_\_\_

**II. DISPOSITION BEFORE AGENCY  
OR TRIBUNAL**

Attach a copy of the Final Order to be  
reviewed.  
Nature of Final Order Petitioner  
Seeks to Review: \_\_\_\_\_  
Relief or Action Sought by Petitioner Before  
Agency or Tribunal: \_\_\_\_\_  
Relief or Action Sought by Respondent Before  
Agency or Tribunal, or Action Sought by  
Agency or Tribunal: \_\_\_\_\_  
Relief or Action Ordered by  
Agency or Tribunal: \_\_\_\_\_

**III. SUMMARY OF THE CASE**

Attach, or insert here, a brief Summary of the  
Case not to exceed one 8 ½" x 11" double  
spaced page.

**IV. ISSUES TO BE RAISED ON  
JUDICIAL REVIEW**

Attach, or insert here, the Issues to Be Raised  
on Review. Include each point of law alleged as  
error.

**V. ANY RELATED OR PRIOR REQUESTS  
FOR JUDICIAL REVIEW:**

\_\_\_ YES \_\_\_ NO.

If so, identify by style, citation if any, and  
Court Case Number.

Style: \_\_\_\_\_  
Number: \_\_\_\_\_  
Citation: \_\_\_\_\_

**VI. ORAL ARGUMENT AND BRIEFS**

Does the Petitioner desire to present oral  
argument? \_\_\_ YES \_\_\_ NO

Does the Petitioner desire to file a brief in  
support of the Petition? \_\_\_ YES \_\_\_ NO

**VII. ALLEGATION OF PROCEDURAL  
IRREGULARITIES**

Does the Petitioner claim or allege that there  
were irregularities in procedure before the  
agency? \_\_\_ YES \_\_\_ NO

If so, describe with particularity the irregu-  
larities and provide an initial list of witnesses.

DATED \_\_\_\_\_, 20\_\_

Submitted by:

(Signature of Attorney  
or Pro Se Party)

Name: \_\_\_\_\_  
OBA No. \_\_\_\_\_  
Firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Facsimile: \_\_\_\_\_

**VIII. CERTIFICATE OF MAILING TO  
RESPONDENT(S) AND AGENCY  
(TRIBUNAL)**

I hereby certify that on the \_ day of \_\_, 20\_\_, a  
true and correct copy of the above and forego-  
ing was mailed, postage prepaid, to the follow-  
ing Agency (Tribunal), and other parties, or  
their counsel of record before the agency:

\_\_\_\_\_  
Signature

**(OPTIONAL SERVICE IN PERSON):**

I hereby certify that on the \_ day of \_\_, 20\_\_, a  
true and correct copy of the above and forego-  
ing was delivered to the following Agency  
(Tribunal), and other parties, or their counsel of  
record before the agency:

\_\_\_\_\_  
Signature

**L. Form of Response.**

IN THE DISTRICT COURT OF  
\_\_\_\_\_ COUNTY  
STATE OF OKLAHOMA

Petitioner,

v.

No.

Respondent(s)

RESPONSE TO PETITION FOR JUDICIAL  
REVIEW

**I. OBJECTION TO PETITION?**

Is this Petition subject to dismissal for want  
of jurisdiction? \_\_\_\_ YES \_\_\_\_ NO

If your answer is yes, explain below or attach  
a statement not to exceed one 8½" x 11" double  
spaced page.

**II. RESPONDENT'S BRIEF STATEMENT OF  
THE CASE**

Attach, or insert here, a brief Summary of the  
Case not to exceed one 8½" x 11" double spaced  
page.

**III. ORAL ARGUMENT AND  
RESPONSE BRIEF**

Do(es) the Respondent(s) desire to present  
oral argument? \_\_\_\_ YES \_\_\_\_ NO

Do(es) the Respondent(s) desire to file a brief  
in support of this Response? \_\_\_\_ YES \_\_\_\_ NO

DATED \_\_\_\_\_, 20\_\_

Submitted by:

(Signature of Attorney  
or Pro Se Party)

Name: \_\_\_\_\_

OBA No. \_\_\_\_\_

Firm: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

Facsimile: \_\_\_\_\_

**VI. CERTIFICATE OF MAILING TO  
RESPONDENT AND AGENCY (TRIBUNAL)**

I hereby certify that on this \_\_\_\_ day of \_\_\_\_\_,  
20\_\_ a true and correct copy of the above  
and foregoing was mailed, postage prepaid, to  
the following Agency (Tribunal), and other  
parties, or their counsel of record before the  
agency:

\_\_\_\_\_  
Signature

**(OPTIONAL SERVICE IN PERSON):**

I hereby certify that on the \_\_\_\_ day of \_\_\_\_\_,  
20\_\_ a true and correct copy of the above  
and foregoing was delivered to the following  
Agency (Tribunal), and other parties, or their  
counsel of record before the agency:

\_\_\_\_\_  
Signature



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ATTORNEYS AT LAW

# ‘Schedules of Use’ for Appropriated Streamwater

## What Every Municipality Should Know

By Dale E. Cottingham and Patrick R. Wyrick

Municipalities in Oklahoma, like everywhere across the country, have to plan for the future needs of their communities. This planning centers on anticipating future growth with attendant increased demand for the varied services provided by the community — not the least of which is providing water. Municipalities are required to plan in advance and make appropriation for water use well into the future, in most cases *decades* into the future. Typically, municipalities secure their future needs through a schedule of use, which is part of the municipalities’ permit to appropriate water. This article will discuss selected issues faced by municipalities in Oklahoma as they deal with securing and administering schedules of water use as part of their state permit.

### OKLAHOMA’S STATUTORY FRAMEWORK

Oklahoma’s “first in time, first in right” approach to water appropriations rewards forward-looking municipalities by allowing such municipalities to establish an appropriative right superior to that of later appropriators.<sup>1</sup> Of course, there is a catch, in the form of a significant limitation on a municipality’s ability to anticipatorily appropriate water. In an attempt to balance the “first in time, first in right” approach with the need to prevent speculative appropriations that can act as obstacles to development,<sup>2</sup> Oklahoma law places a barrier in the form of a “use it or lose it” provision which requires that, in certain cases, appropriated water be put to beneficial

use within seven years of the date of issuance of a permit for water.<sup>3</sup>

Like most general rules, there are exceptions. Properly understood and utilized, these exceptions can provide an effective mechanism to avoid the restrictive “use it or lose it” provision, allowing municipalities to look far into the future in anticipating water needs. Thus, in order to take full advantage of Oklahoma’s appropriative framework, municipalities and their attorneys should be conversant in both the permitting process (as it relates to their future use of the water) and the continuing use requirements placed on them by Oklahoma law.

## ANTICIPATING FUTURE USE AT THE PERMITTING STAGE

While preparing its application for filing with the Oklahoma Water Resources Board (OWRB), a municipality must articulate to the OWRB how and when it plans to use the water it seeks to appropriate.<sup>4</sup> The municipality is thus immediately confronted with a choice: should it, or should it not, request a schedule of use?

If the municipality chooses to file its application without a requested schedule of use, the “entire” amount of water appropriated by way of a “regular” (non-temporary) permit must be “put to beneficial use within a period of no less than seven (7) years.”<sup>5</sup> Although the relevant statute allows for a period of time equal to or greater than seven years, the OWRB by default allows the permittee only the minimum seven years to put the water to beneficial use. Thus, by failing to request a schedule of use, a municipality guarantees that it will be subject to the most restrictive form of the “use it or lose it” provision.<sup>6</sup> Because predicting future water needs is difficult, a municipality that overestimates its needs and appropriates a large amount of water that it finds itself unable to use within seven years risks losing the part of the permitted water that it does not use within seven years of permit issuance, which would force the municipality to re-apply for a permit to appropriate a new water supply. The municipality would then be in line behind all the permits that have been filed in the interim — hardly a desirable position.

This result can be avoided, however, if the municipality secures a permit subject to a schedule of use. The first step is to include a proposed schedule of use with the application.<sup>7</sup> Oklahoma law provides that the OWRB “shall” issue such a schedule if, after considering the present and future needs of the stream system of origin, the OWRB determines that 1) the proposed use will promote the optimal beneficial use of the water, and 2) that the appropriated water cannot be put to beneficial use within seven

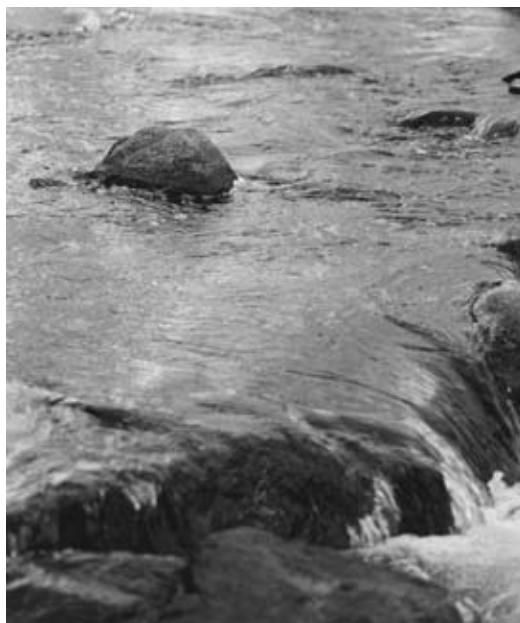
years.<sup>8</sup> Once those determinations are made, the OWRB will issue a permit based upon the proposed schedule of use submitted by the applicant.<sup>9</sup>

Additionally, the relevant regulation provides that “where appropriate,” the proposed schedule of use must be “supported by population data from the Oklahoma Department of Commerce.”<sup>10</sup> The regulation does not articulate what an “appropriate” circumstance might be; however, it would seem a municipality proposing a schedule of use based upon anticipated population growth is within the regulatory intent. Thus, a municipality proposing a schedule of use should be prepared to compile such population data to support its claimed anticipated future water needs. Without such supporting data, the municipality risks having its proposed schedule of use rejected and risks finding itself subject to the OWRB’s default “use within seven years” requirement.

## CONTINUING REQUIREMENTS ONCE A PERMIT IS SECURED

Once a permit is secured, and regardless of whether a schedule of use was issued, the municipality has a continuing obligation to report its annual usage of the appropriated water to the OWRB.<sup>11</sup> Willful failure to satisfy this annual reporting requirement “may” be considered by the OWRB as non-use of the appropriated water for that reporting period, potentially resulting in forfeiture of the water right.<sup>12</sup> It is therefore important that a municipality accurately and timely meet its reporting obligation.

Even if a municipality satisfies its reporting obligations, it can still lose its appropriative rights in certain instances.<sup>13</sup> For instance, a permit-holding municipality *without* a schedule of use (and thus subject to the seven-year use it or lose it provision) that fails to commence within seven years use of the entire amount of water it has appropriated can lose its appropriative right to the unused water.<sup>14</sup>



Similarly, a permit-holding municipality *with* a schedule of use that fails to commence use of any incremental amounts within the corresponding time periods on its OWRB approved schedule of use will lose its appropriative right to the unused increment. The amount lost is then subtracted from the total amount appropriated and the remaining increments are adjusted accordingly. For example, a typical schedule of use looks something like this:

Year	Amount (ac-ft)	Percentage (%)
2010	40,000 ac-ft	40%
2020	50,000 ac-ft	50%
2030	60,000 ac-ft	60%
2040	70,000 ac-ft	70%
2050	80,000 ac-ft	80%
2060	90,000 ac-ft	90%
Life of Project	100,000 ac-ft	100%

If, at the end of 2010, the municipality reported to the OWRB that it had not used any water, the permittee would lose its right to the 40,000 ac-ft increment that the schedule contemplated would be used by 2010. That 40,000 ac-ft would be subtracted from the 100,000 ac-ft total, with the revised schedule of use looking something like this:

Year	Amount (ac-ft)	Percentage (%)
2020	30,000 ac-ft	50%
2030	36,000 ac-ft	60%
2040	43,000 ac-ft	70%
2050	48,000 ac-ft	80%
2060	54,000 ac-ft	90%
Life of Project	60,000 ac-ft	100%

Subsequent reports of non-use would result in similar adjustments to the schedule of use.

A different, but similar circumstance exists when a municipality commences use of the appropriated water, but then fails to put to use all or some of the water. If *any* part of the appropriated water goes unused for seven continuous years, the right of use of the unused amount of water is subject to loss and reversion to the public.<sup>15</sup> Importantly, not only must the water be used, it must be used for the non-wasteful purposes for which it was appropriated, and it must be used in the place described in the water right.<sup>16</sup> Use of water outside of those parameters is not considered by the

OWRB to be “use” at all — at least not for purposes of the “use it or lose it” provision.

Fortunately, a permit-holding municipality must be given some due process before a water right can be forfeited for nonuse. Oklahoma law provides that the permit holder be given 30 days notice of a hearing at which the permit holder is afforded the opportunity to present “substantial competent evidence that the failure to beneficially use the water subject to forfeiture was caused by circumstances beyond the control of the claimant and the claimant was ready and willing to use the water.”<sup>17</sup> Regulations accompanying the relevant statute more specifically set out the ways in which nonuse of appropriated water can be “excused.”<sup>18</sup> Most significant (at least to a municipality) is the allowance for nonuse which occurred because “need for the water did not develop as anticipated or when a schedule of use was added or amended.”<sup>19</sup> If a municipality intends to rely on this excuse, however, it must be ready and able to prove that it maintained “significant” infrastructure such as “lakes, storage rights in lakes, pipelines, pumps and other appurtenances at a capacity necessary to put the amount of water subject to forfeiture to the use authorized.”<sup>20</sup>

Through utilization of this excuse provision, a municipality could appropriate an amount of water sufficient to satisfy its anticipated future needs, request a graduated schedule of use, and then begin building the infrastructure necessary to accommodate the appropriated water.<sup>21</sup> Even if the need for the water does not develop as soon as the municipality thought, so long as the municipality has developed the infrastructure necessary to put the water to use, the municipality should be able to take advantage of the excuse remedy and not lose its right to the unused water. Thus, the rules honor capital investments made by a municipality in an effort to put the water to use as anticipated.

## CONCLUSION

Oklahoma law allows a municipality to appropriate water to satisfy future needs. By employing a schedule of use, a municipality can anticipate a plan to meet such future needs. A schedule of use also allows a municipality to avoid forfeiture of permitted water. Additionally, a municipality can avoid loss of permitted water for failure to comply with a schedule of use by way of the excuse provision. In this way,



## municipalities in Oklahoma can engage in significant planning for future water use.

1. This article focuses only on appropriations of stream water, and not groundwater. Groundwater appropriations are governed by a separate and regulation regime, which is outside the scope of this article.

2. The legislative purpose of Oklahoma's "first in time, first in right" scheme is "to provide for stability and certainty in water rights." See OKLA. STAT. tit. 82, §105.1A.

3. OKLA. STAT. tit. 82, §105.16-105.17.

4. See OKLA. STAT. tit. 82, §105.9.

5. OKLA. ADMIN. CODE §785:20-9-2(a).

6. See OKLA. ADMIN. CODE §785:20-9-2(a) ("Unless a schedule of use is requested by the applicant and granted by the Board, the time for putting the entire amount of appropriated water to beneficial use shall be seven (7) years[.]")

7. See OKLA. ADMIN. CODE §785:20-9-2(b) (contemplating that the schedule of use authorized by the OWRB be based on "a proposed schedule of use to be submitted by the applicant.")

8. *Id.*

9. *Id.*

10. OKLA. ADMIN. CODE §785:20-9-2(a).

11. See OKLA. ADMIN. CODE §785:20-9-5.

12. *Id.*; see also OKLA. ADMIN. CODE §785:20-9-3.

13. Although outside the scope of this article, two particular instances are worth mentioning. First, stream water permits authorizing use of the water outside the stream system from which the water originates are subject to a once every five year review by the OWRB to ensure that the area of origin continues to have a water supply adequate to supply its needs. See OKLA. STAT. tit. 82, §105.12(B)(2). Second, stream water permits authorizing use of the water outside the state are subject to review at least once every 10 years to determine whether there has been a substantial or material change in the facts which supported the granting of the permit. See OKLA. STAT. tit. 82, §105.12(F).

14. See OKLA. ADMIN. CODE §785:20-9-3(b).

15. See OKLA. ADMIN. CODE §785:20-9-3(c).

16. OKLA. ADMIN. CODE §785:20-9-3(c)(3).

17. OKLA. STAT. tit. 82, §105.17(C).

18. See OKLA. ADMIN. CODE §785:20-9-3(e)(3) (3) ("In addition to any cause which may be provided by law, acceptable cause for nonuse includes but is not limited to the following:

A) damage to claimant's field, pump, pipe or other equipment caused by flooding or other events after reasonable diligence to repair same;

B) claimant's service on active duty in the armed forces;

C) placement of land to which an irrigation water right is appurtenant into a federally sponsored conservation reserve or soil bank program;

D) wrongful acts of others which prevented water usable for claimant's authorized purposes from reaching the claimant's point of diversion, and

E) need for the water did not develop as anticipated when the water right was obtained or when a schedule of use was added or amended, and the water right holder acquired and has properly maintained significant infrastructure (such as lakes,

storage rights in lakes, pipelines, pumps and other appurtenances) at a capacity necessary to put the amount of water subject to forfeiture to the use authorized.")

19. See OKLA. ADMIN. CODE §785:20-9-3(e)(3)(E).

20. *Id.*

21. It is important that a municipality follow this sequence, as Oklahoma law requires that the permit application be filed prior to commencement of construction of the infrastructure to support the beneficial use of the water. See OKLA. STAT. tit. 82, §105.9 ("Any person, firm, corporation, state or federal governmental agency, or subdivision thereof, intending to acquire the right to the beneficial use of any water shall, before commencing any construction for such purposes..., make an application to the Board.")

### ABOUT THE AUTHORS



Dale E. Cottingham is a director with GableGotwals. He has taught water law as an adjunct professor at OCU School of Law since 1998. He has published several papers on water law and often speaks on water issues. In his legal practice, he's involved himself in groundwater and stream water issues throughout Oklahoma.



Patrick R. Wyrick is an associate with GableGotwals. He is a 2007 graduate of the OU College of Law. While at OU, he was a member of the Order of the Barristers and national moot court team. He was recognized as the outstanding advocate at the first-year moot court competition and received an American Jurisprudence Award in Supreme Court decision-making. Prior to joining GableGotwals, he served as law clerk for Judge James H. Payne.

# SB 1615: The Oklahoma Response to the SemGroup Bankruptcy

By Mark E. Schell and Robert D. McCutcheon

**T**he Oklahoma Legislature recently enacted SB 1615, the “Oil and Gas Owners’ Lien Act of 2010,” signed into law by Gov. Brad Henry on April 20, 2010. Codified at 52 O.S. §549.1, *et seq.*, SB 1615 passed the Oklahoma Senate on a vote of 44-0 and the Oklahoma House of Representatives on a vote of 98-0, and it was effective on April 20, 2010. The authors of this article have firsthand knowledge of the drafting of SB 1615 and the legislative process by which SB 1615 was enacted. The purpose of this article is to summarize for the Oklahoma bench and bar the circumstances out of which SB 1615 arose, the problems SB 1615 is intended to resolve and the mechanisms SB 1615 employs to resolve those problems.

## THE SEMGROUP BANKRUPTCY

A number of related companies under the SemGroup umbrella filed for Chapter 11 bankruptcy protection in Delaware on July 22, 2008. Those consolidated proceedings will be referred to collectively as “the SemGroup Bankruptcy,” and the affiliated SemGroup entities joined in the SemGroup Bankruptcy will collectively be referred to as “SemGroup” for purposes of this article. Certain issues of Oklahoma law were interpreted in the SemGroup Bankruptcy in such a manner as to subordinate the interests of Oklahoma oil and gas producers and royalty owners to the interests of lending institutions with security interests in oil and gas purchased from the producers by SemGroup. SB1615 is the Oklahoma Legislature’s response to this and other such unfavorable judicial interpretations of Oklahoma’s producer lien and revenue laws.

In the months preceding its bankruptcy filing, SemGroup had been purchasing oil and gas from the producers under terms providing that production payments generally were due 20-50 days after the date of the delivery of that production. By way of example, oil typically was paid for on the 20th day of the month following actual delivery to SemGroup, so a well operator selling oil during June would be paid for that oil on July 20. Without notice of any financial difficulties SemGroup was encountering in June, that same producer would likely continue to sell oil to SemGroup in July until the producer failed to receive payment on July 20 for June production. By then, SemGroup would have acquired 50 days of oil production without paying for it, and this, in fact, is what occurred. As of July 22, 2008, the date the bankruptcy petition was filed, SemGroup owed the owners of oil and gas produced from Okla-

homa wells in excess of \$127 million — most of it for sales in June and July.

### THE LEGAL OPTIONS THEN AVAILABLE TO OWNERS OF OKLAHOMA OIL AND GAS PROCEEDS

The economic stakes for the affected Oklahoma producers and royalty owners were tremendous given the \$127 million price tag of the production purchased but not paid for by SemGroup, but their rights to recover the amounts owed to them were severely restricted by federal bankruptcy laws and certain restrictive judicial interpretations of Oklahoma's producer lien laws in effect at the time.

The Oklahoma producers' lien law in effect at the time of the SemGroup Bankruptcy filing was the Oil and Gas Owner's Lien Act, 52 O.S. §548.1, *et seq.* (the Section 548 Act). The Section 548 Act granted an "interest owner" a "continuing security interest in and a lien upon the oil or gas severed, or the proceeds of sale if such oil or gas has been sold, to the extent of his interest until the purchase price has been paid to the interest owner."<sup>1</sup> The Section 548 Act required filing a lien notice to perfect the lien. The 10th Circuit Court of Appeals, in *Arkla Exploration Co. v. Norwest Bank of Minneapolis*, 948 F.2d 656 (10th Cir. 1991) [*Arkla*], had construed the Section 548 Act in a manner that substantially undercut the producers' statutory lien rights: the *Arkla* case held that, as a matter of law, a lender with a prior perfected security interest under the Oklahoma Uniform Commercial Code had superior rights to those of an Oklahoma producer claiming a lien under the Section 548 Act. At the time of the SemGroup Bankruptcy there had been no decision of an Oklahoma court addressing the issue of these relative priorities.

The Oklahoma producers countered the *Arkla* case by asserting that the Oklahoma Production Revenue Standards Act, 52 O.S. §570.1, *et seq.*, in Section 570.10 (Section 570.10), created an implied trust in favor of the producers. As such, the proceeds of the production sold to SemGroup would be deemed to be held in trust for the benefit of the producers as the rightful owners of those proceeds. The producers' argument was that, since SemGroup was a mere trustee and not the owner of oil and gas revenues held in trust for the producers — the Bankruptcy Court had no legal authority to dispose of those revenues as assets of the estate, and SemGroup's secured lenders had

no basis upon which to assert the priority of their liens as to those revenues. At the time of the SemGroup Bankruptcy, Section 570.10 had not been construed by any court with respect to the implied trust issue.

### THE INITIAL SEMGROUP BANKRUPTCY PROCEEDINGS

Accordingly, from the perspective of Oklahoma producers, the lines were drawn very early in the SemGroup Bankruptcy. On one side was SemGroup, along with a consortium of its non-Oklahoma secured lenders (secured lenders), asserting that the secured lenders had prior perfected security interests in the oil and gas production purchased by SemGroup from the producers — as well as the proceeds of that production, and that their rights were superior to the rights of the Oklahoma producers and royalty owners to the oil and gas or its proceeds. On the other side were several active producers who asserted that Section 570.10 imposed an implied trust on the proceeds of production such that production proceeds were not part of the debtor's estate and, therefore, could neither be disposed of by the Bankruptcy Court nor subject to any purported security interest granted to the secured lenders. Initially, some of the more active Oklahoma producers filed their own adversary proceedings in the SemGroup Bankruptcy, seeking an adjudication of their rights and a turnover of the proceeds of the oil and gas they sold to SemGroup. The parties eventually agreed to a court-sanctioned procedure by which producers could file an omnibus adversary complaint in the bankruptcy that would be binding on all Oklahoma claimants and interest owners asserting rights to any proceeds in the case, and such an adversary complaint was filed on behalf of the Oklahoma producers and interest owners (the Oklahoma Proceeding).

It was during this stage of the proceedings in the SemGroup Bankruptcy that the Oklahoma producers began to take additional actions to obtain clarification and protection of their rights to oil and gas production and revenues. The producers took a two-fold approach: first, they sought an official opinion construing Section 570.10, and second, they began drafting legislation that would clarify and protect their rights to payment for the proceeds of their production. The former of these efforts resulted in a Nov. 5, 2008, attorney general's opinion construing Section 570.10, and the latter resulted in the passage of SB 1615.

## THE ATTORNEY GENERAL'S OPINION

Given the Section 570.10 issues raised in the SemGroup Bankruptcy and the absence of judicial authority construing that provision, the producers sought an official interpretation of Section 570.10. On Sept. 10, 2008, Sen. Brian Bingman formally requested an official opinion of the attorney general of the state of Oklahoma as to the following:

- Whether Section 570.10 creates an implied trust under which a person holding production revenue or proceeds must do so for the benefit of the legal owner of the revenue or proceeds; and
- Whether the person receiving production revenue or proceeds has any right, title or interest in the revenue or proceeds.

In response to Sen. Bingman's request, the Oklahoma attorney general issued his official opinion on Nov. 5, 2008. According to the attorney general:

The Legislature intended an implied trust (whether resulting or constructive) under the provisions of Section 570.10(A) of Title 52. [citations omitted]. Furthermore, the holder of the revenue or proceeds of oil and gas production is an implied trustee who has no rights in or to such revenue or proceeds and who is under a statutory duty to pay the revenue or proceeds of oil and gas production to the implied beneficiaries; *i.e.*, the owners legally entitled thereto. The holder of the revenue or proceeds of oil and gas production acquires no right, title or interest in such revenue or proceeds.<sup>2</sup>

If the attorney general's opinion had been applied in the SemGroup bankruptcy case, the proceeds of oil and gas production sold to SemGroup would have been held by SemGroup as an implied trustee for the benefit of the Oklahoma producers and royalty owners on whose behalf that production was sold — SemGroup would have had no rights in those proceeds and could not have granted a security interest in them to the secured lenders. However, Section 570.10 covered only "proceeds" of production and not rights in unsold product in SemGroup's inventory on the date of bankruptcy which would have been covered only under the Section 548 Act.

## THE INITIAL LEGISLATIVE EFFORTS

The initial legislation supported by the producers group was introduced as HB 2055 during the 2009 legislative session. HB 2055 was actively sponsored by the Oklahoma Independent Petroleum Association (OIPA) and also had support of royalty owners. The fundamental approach of HB 2055 was to add a new section to Article 9 of the Oklahoma Uniform Commercial Code that would grant the owners of interests in oil and gas a first priority purchase money security interest in oil and gas when severed and in the proceeds of that oil and gas when sold. The key elements of HB 2055 were: (a) the purchase money security interest was automatically perfected without the necessity of filing a UCC-1 or other instrument (as would have been required under the Section 548 Act or traditional UCC principles); and (b) the security interest would survive until the interest owner was paid in full. HB 2055 found its genesis in similar legislation enacted by Texas (Texas Producers' Act). The Texas Producers' Act had been asserted on behalf of Texas producers in the SemGroup bankruptcy and was the subject of an omnibus adversary proceeding (Texas Proceeding) similar to the Oklahoma Proceeding.

HB 2055 passed both houses of the state Legislature unanimously, but because of legislative rules, HB 2055 was referred to a conference committee. There the bill sat when substantial opposition arose from a group of both first purchasers and also downstream purchasers of oil and gas from first purchasers. The concern initially expressed was only that HB 2055 provided for the security interest to continue in the production sold even as to oil and gas sold to a buyer in the ordinary course of business. That issue was resolved by compromise, and the proponents of HB 2055 were willing to insert language protecting the buyer in the ordinary course of business identical to the Texas Producers' Act. However, in the final hours of the legislative session, certain first purchasers and downstream purchasers had an amendment inserted that would have abolished Section 570.10 on a prospective basis. Those groups had been advised of the potential impact of the attorney general's opinion and wanted Section 570.10 repealed. The last minute insertion of the repeal of Section 570.10 effectively poisoned the bill — the 11th-hour repeal of Section 570.10, even on a prospective basis, was deemed by the proponents of HB 2055 as adverse to the

rights of the claimants in the SemGroup Bankruptcy – and it would have fractured the bipartisan support HB 2055 enjoyed. The speaker of the house would not allow the bill to be brought out of conference committee without a resolution of the matter. No accommodation on the issue of repeal of Section 570.10 was possible, and thus HB 2055 was not reported out of the conference committee.

### THE SUBSEQUENT SEMGROUP BANKRUPTCY PROCEEDINGS

While HB 2055 was winding its way through the 2009 legislative session, cross-motions for summary judgment were filed both in the Oklahoma Proceeding and the Texas Proceeding by all interested parties. These motions put into issue the questions of the rights of the secured lenders vis-à-vis the Oklahoma producers and royalty owners under Oklahoma law and the Texas producers and royalty owners under the Texas Producers' Act. Soon after the adjournment of the 2009 legislative session, the bankruptcy judge ruled on the motions. The secured lenders won. The Oklahoma and Texas producers and royalty owners lost.

As to the Oklahoma Proceeding, the bankruptcy judge ruled that Section 570.10 did not create an implied trust as the attorney general had opined. In so ruling, the bankruptcy judge acknowledged that Section 570.10 had not been subject to judicial review and that the matter was one of first impression. The bankruptcy judge also acknowledged the persuasive effect of an attorney general's opinion under Oklahoma law. However, the bankruptcy judge disagreed with the attorney general and refused to follow his opinion. The bankruptcy judge also ruled that the *Arkla* decision was binding on the determination of priorities under the Section 548 Act. With respect to the Texas Proceeding, the judge held that Texas' producer-friendly modifications to the Texas Uniform Commercial Code, which created a lien priority in favor of Texas producers as against those claiming through the debtors of production, were inapplicable to the case. Instead, the judge ruled that the laws of the states in which the first purchasers were incorporated, Delaware and Oklahoma, applied. The judge went on to hold that Texas producers, to the extent they had perfected security interests only under Texas law, held unperfected interests subordinate to those of SemGroup's lenders in that case.<sup>3</sup>



Although the ruling in the Texas Proceeding did not directly affect existing Oklahoma law, given that HB 2055 was patterned on the Texas concept of incorporating oil and gas lien rights under the umbrella of the Uniform Commercial Code, the ruling was a clear signal that a different legislative approach was needed in order to adequately protect Oklahoma's producers and royalty owners. One of the holdings in the Texas Proceeding was that, under certain circumstances and subject to certain exceptions, the law of the state of the debtor's incorporation – not the law of the state in which the security interests arose or where the product or proceeds of those interests were located — determines the priority of competing security interests. The Texas Producers' Act on which HB 2055 was patterned required no separate recording to perfect the purchase money security interest in oil and gas sold or the proceeds thereof, and the same concept was incorporated in HB 2055. The bankruptcy court's ruling in the Texas Proceeding placed substantial doubts on the efficacy of approaching the statutory remedy from a Uniform Commercial Code standpoint. Consequently, SB 1615 was drafted based on completely different legal underpinnings in an attempt to ensure that Oklahoma law would govern the interpretation of SB 1615 and would control its application in all respects.

### ENACTMENT OF SB 1615

Immediately following the Bankruptcy Court's rulings in both the Oklahoma and

Texas Proceedings, the OIPA appointed a committee to consider the best approach to a legislative response to the rulings and to protecting the rights of Oklahoma producers and royalty owners to payment for their production. At the same time, dialogues were opened with previous opponents of HB 2055. Following those discussions, the OIPA committee drafted legislation that, in substantial form, was enacted as SB 1615. SB 1615 had the support of the OIPA, the royalty owners, and some of the businesses that had originally opposed HB 2055. SB 1615 initially drew opposition from some members of the banking community as well as some of the first purchasers and downstream purchasers who were instrumental in the defeat of HB 2055. However, all of the objections of the various interests groups were resolved through compromise, and SB 1615 passed without objection by any of the interested groups. As referenced earlier, the final vote on SB 1615 reflected unanimous approval from both houses — in the Senate, the vote was 44-0, and in the House, the vote was 98-0.

### THE PROVISIONS OF SB 1615

#### *Synopsis of Oklahoma Oil and Gas Law Relating to SB 1615*

SB 1615 was written to protect the right to be paid for oil and gas produced and sold regardless of the nature of the interest involved. To place SB 1615 in its proper context, it is useful to briefly review the nature of mineral ownership under Oklahoma law, principles governing mineral extraction and sale, and the legal relationships between the various parties with competing interests in minerals situated in Oklahoma.

The mineral interest represents the total of all interests possible in the oil, gas and other minerals. The owner of such an interest may convey undivided interests in the full mineral interest. The owner likewise may create various present and future interests in the minerals. With reference to benefits to be derived from exploitation of the minerals, the mineral owner has multiple incidents of ownership including (a) the right to enter upon the land and to extract oil and gas; (b) the power to confer such right upon another by executing an oil and gas lease; (c) the right to receive all payments under such a lease, including the bonus, delay rentals and royalties; and (d) retention of a reversionary interest upon the expiration of an oil and gas lease.<sup>4</sup> To this list of the incidents

of mineral ownership, SB 1615 adds one more item: the right to be secured in the payment for oil and gas when sold. The right to be so secured follows the oil and gas upon extraction and inures to the benefit of each and every owner of an interest in the minerals and the severed oil and gas regardless of the nature of that interest.

Because the risk and expense of drilling and completing an oil and gas well is considerable, the mineral owner seldom undertakes such operations. Rather, the mineral owner customarily executes an oil and gas lease that grants to another (known as the lessee) the rights of exploration, drilling and production (*i.e.*, the first incident of mineral ownership), while retaining the remaining incidents and benefits of ownership, including the right to receive royalties.<sup>5</sup> In addition to executing an oil and gas lease, there is another mechanism by which the right to explore for oil and gas can be transferred from the mineral owner, and that is through a forced pooling order issued by the Oklahoma Corporation Commission. Under a forced pooling order, an unleased mineral owner (or a lessee under an oil and gas lease) is afforded the opportunity to participate in development of oil and gas minerals — in the absence of an election to participate, those rights are transferred by operation of the pooling order to the operator of the unit.<sup>6</sup> Thus, the principal operative instruments for the transfer of a mineral interest owner's first incident of ownership, the exploitation of oil and gas minerals, are the oil and gas lease and the pooling order. Under either an oil and gas lease or a pooling order, the transferee of a non-participating mineral interest owner's right to explore and produce has what is referred to as a "working interest" and the original mineral interest owner retains what is referred to as the "royalty interest."

While the execution of an oil and gas lease does not vest title to the oil and gas minerals in the oil and gas lessee, the lessee does acquire a vested interest in the land. The oil and gas lessee's interest in the land is known as a profit a prendre, an incorporeal hereditament. This interest of the oil and gas lessee constitutes an interest or an "estate" in land for purposes of conveyancing, but it is not "real estate" as that term is used in certain statutes.<sup>7</sup>

Although not "real estate" in the pure sense of that term, various "real estate" concepts apply to an oil and gas lease: oil and gas leases

# “Arrangements for the sale of the extracted oil and gas product must then be made so that all of the ownership interests can realize the full benefit of the bargains made under the lease or pooling order.”

are subject to the statute of frauds; the assignment of an oil and gas lease must comply with formalities of instruments affecting real estate; leases must be acknowledged and recorded in order to impart constructive knowledge; a lessee may maintain an action in equity to quiet title; general rules of implied warranties in the sale of personalty do not apply to an oil and gas lease; the oil and gas lease is real property for the purposes of a vendor's lien; the sale of a lease is not subject to the Uniform Commercial Code; the oil and gas lease is classified a "property or rights to property" for purposes of the federal tax lien and is subject to such lien; a lessee is considered an "owner" and therefore has standing before the Oklahoma Water Resources Board to seek a groundwater use permit; transfers of leases are treated in the same manner as transfers of real property and are subject to the recording statutes; and, an oil and gas lessee is entitled to intervene as a matter of right in condemnation proceedings.<sup>8</sup>

Oil and gas are extracted from the reservoirs in which they are trapped and brought to the surface by the working interest owners under either the oil and gas lease or a pooling order. However, extraction of oil and gas is just the first part of the exploitation process. Arrangements for the sale of the extracted oil and gas product must then be made so that all of the ownership interests can realize the full benefit of the bargains made under the lease or pooling order. At this point of the exploitation process, another set of contracts comes into play. Typically, sales arrangements are made by the operator of an oil or gas well under either a joint operating agreement or through individual marketing agreements. In addition to any applicable provision under an oil and gas lease,

the joint operating or marketing agreements typically set the terms by which the operator or working interest owner is given the authority to sell the oil and gas product on behalf of those with an interest in the product, including the royalty share. Occasionally, a working interest owner that is not an operator elects to separately market that owner's share of the oil or gas as well as the royalty share attributable to that owner's working interest share.

In all events, the working interest owner or operator sells the oil or gas on behalf of itself, any other working interest owners that have contracted with them to sell their share of production, and the other ownership interests involved, including the royalty owners. Oil typically is sold at the well site. Gas is sold either at the wellhead or off premises. While the point of sale and the market dynamics are different for each type of sale, the oil or gas product eventually is sold to what is defined under SB 1615 as a first purchaser under a variety of contractual arrangements that are separate from the joint operating agreement or other marketing arrangements with the seller of the product. The first purchaser then resells the oil or gas product in a variety of commercial transactions, both physical and financial.

## OVERALL PURPOSE

SB 1615 is intended to provide each of the various ownership groups described above, and others who derive rights through them, a first priority lien to secure payment for their interest in oil and gas sold to a first purchaser. As enacted, SB 1615 replaces the Section 548 Act, and it is much broader in scope and effect than its predecessor. As explained in detail in the first part of this article, SB 1615 is designed to remedy some of the deficiencies perceived to be present in the Section 548 Act as well as to address some of the issues that emerged in the SemGroup Bankruptcy.<sup>9</sup>

## NATURE, EXTENT AND DURATION OF LIEN

The first priority lien afforded by SB 1615 attaches to oil and gas in place, including at the earliest stage of the exploitation process, and the lien follows that oil and gas upon severance through all of the various types of commercial transactions relating to its extraction and sale. The lien extends to the "oil and gas rights" of an "interest owner." Oil and gas rights are broadly defined in Section 549.2(9) as any legal or equitable right, title or interest in and to 1)

oil, 2) gas, 3) proceeds of oil and gas, 4) an oil and gas lease, 5) a pooling order and 6) an agreement to sell.

An interest owner is defined in Section 549.2(6) as a person owning an interest of any kind or nature in oil and gas rights before purchase of oil and gas production by a first purchaser, defined in Section 549.2(4) as the first person that purchases oil or gas from an interest owner, either directly or through a representative, under an agreement to sell. An interest owner includes a representative and a transferee interest owner. A representative is defined in Section 549.2(16) as any person who is explicitly or implicitly authorized to sell oil or gas or to receive the proceeds of oil and gas production on behalf or for the benefit of an interest owner under an agreement to sell. Section 549.2(21) defines a transferee interest owner as a person that acquires oil and gas rights from an interest owner that transfers or conveys oil and gas rights, in whole or in part. An agreement to sell is defined in Section 549.2(2) as any enforceable agreement, whether express or implied, whether oral or written, by which an interest owner, either directly or through a representative, agrees to sell or is deemed by applicable contract or law to have agreed to sell oil or gas upon or after severance to a first purchaser.

The lien is a statutory lien, granted and existing as part of and incident to the bundle of rights conferred by ownership of oil and gas and all rights deriving from that ownership. The lien exists in and attaches to all oil and gas in the state of Oklahoma as of the effective date of SB 1615, it continues uninterrupted and without lapse on and after severance, and it further continues uninterrupted and without lapse in and to all proceeds of the sales of such oil and gas.<sup>10</sup> The lien exists until the interest owner (including a representative first entitled to receive the sales price) has received the sales price.<sup>11</sup> Sales price is defined in Section 549.2(17) as the proceeds a first purchaser agrees to pay an interest owner or representative under an agreement to sell.

Consequently, the lien attaches immediately to oil and gas rights, including oil and gas in place, and it follows the physical oil and gas product when severed, the severed oil and gas product when sold to a first purchaser and the proceeds of such a sale. There is no interruption of the lien throughout the entirety of these transactional processes. Even when the lien

drops off of the physical oil and gas product when sold by a first purchaser, the lien continues without interruption in all proceeds of such a sale.

The lien exists in the proceeds of the sale of oil or gas under an agreement to sell until the interest owner entitled to be paid the sales price actually receives the sales price.<sup>12</sup> Proceeds are broadly defined in Section 549.2(14) as any of the following when paid or to be paid in consideration of, or as a consequence of, the sale of oil or gas under an agreement to sell: oil or gas on or after severance; inventory of raw, refined or manufactured oil or gas after severance and rights to or products of any of the foregoing; cash proceeds, accounts, chattel paper, instruments, documents or payment intangibles with respect to any of the foregoing.

## **PERFECTION OF OIL AND GAS LIEN**

The lien is granted and exists as part of and incident to the ownership of oil and gas rights, and it is perfected automatically without the need to file a financing statement or any other type of documentation. The lien exists and is perfected from the effective date of SB 1615.<sup>13</sup>

## **PRIORITY OF OIL AND GAS LIEN**

Except for certain permitted liens, an oil and gas lien takes priority over any other lien, whether arising by contract, law, equity or otherwise, or any security interest [security interest being defined in Section 549.2(18) as a security interest governed by Article 9 of the Oklahoma Uniform Commercial Code].<sup>14</sup> There are two categories of permitted liens listed in Section 549.2(11): (a) a pre-existing mortgage lien or security interest granted by a first purchaser or (b) a lien created by statute, rule or regulation of a governmental agency for storage or transportation charges. The two categories of permitted liens are narrowly defined and apply only to the circumstances in those definitions.

Pre-existing mortgage liens or security interests are permitted liens for priority purposes only if all of the following conditions are met: (a) the holder of the lien/security interest is not an affiliate of the first purchaser; (b) the lien/security interest secures payment under a written instrument of indebtedness signed by the first purchaser and accepted in writing by the payee prior to the effective date of SB 1615; and (c) the mortgage lien/security interest must be validly perfected with a first priority against the claims of all persons under applicable law



other than persons holding a statutory or regulatory lien as to which first priority is granted by statute or regulation. Even if a mortgage lien/security interest comes within the definition of a permitted lien, the priority of such a mortgage lien/security interest is lost when the written instrument of indebtedness is modified, amended or restated in either of two ways: 1) to increase the principal amount of the indebtedness outstanding on the effective date of SB 1615 or 2) to extend the stated maturity in effect on the effective date of SB 1615.

For the statutory or regulatory lien to be a permitted lien with priority over an oil and gas lien, such a lien must be validly perfected and enforceable and may not be in favor of an affiliate of a first purchaser. The priority accorded a statutory or regulatory lien is only as to storage or transportation charges, including terminal charges, tariffs, demurrage, insurance, labor or other charges, owed by a first purchaser in relation to oil or gas originally purchased under an agreement to sell. The priority of such a statutory or regulatory lien is limited to the listed charges for 90 days from the time the first purchaser delivers oil or gas for storage or transportation.

## **RIGHTS OF PURCHASERS**

Section 549.6 provides that an oil and gas lien has priority over the rights of any purchaser except as specifically set forth in that section. Section 549.6 provides that a purchaser [defined in Section 549.2(15) as a person that is not an affiliate of a first purchaser and that takes, receives or purchases oil or gas from a first purchaser] takes free of an oil and gas lien, and is relieved of any obligations created by Section 570.10, only in either of the following events: (a) the purchaser is deemed to be a buyer in the ordinary course of business of the first purchaser's business as defined in Article 9 of the Oklahoma Uniform Commercial Code; or (b) the purchaser has paid all of the consideration due the first purchaser, including by exchange of oil or gas, net-out or set-off, under all applicable enforceable contracts in existence at the time of the payment. However, even if such a purchaser takes free of the oil and gas lien, the lien continues uninterrupted in the proceeds paid to or otherwise due the first purchaser.

## **COMMINGLING**

Section 549.5 governs the relative priorities where oil or gas sold by different interest owners is commingled to ensure that there can be

no argument that the lien is lost by the fact of commingling and to prescribe the rules for accommodating potentially competing priorities in the commingled product. Section 549.5 provides that its purpose is to recognize the continuation of oil and gas lien rights in the commingled product stream only as to a volume of product proportionate to the volume of product that originated from an interest owner. The basic concept under Section 549.5 is that the lien continues without interruption and attaches to and is automatically perfected as to any commingled product. The lien attaches only to the volumes out of the commingled product equal to the volumes of product to which the lien originally attached. The lien has priority over any security interest or other lien that is not a lien under SB 1615 or a permitted lien, whether or not the security interest or other lien has been properly perfected. If more than one lien under SB 1615 attaches to the commingled product — then the liens rank equally in the proportion that the respective sales prices secured by each lien bears as a percentage of the total of the sales prices secured by all liens applicable to the production at the time the production was commingled.

## **CERTAIN MATTERS NOT AFFECTED OR IMPAIRED BY SB 1615**

Section 549.8 lists several matters that are not affected by SB 1615. They are: (a) the time at which legal title to oil and gas may pass by agreement or operation of law subject to an oil and gas lien; (b) the right of a first purchaser to take or receive oil and gas under the terms of a division order (provided the division order doesn't modify, waive or abrogate in any respect the rights of an interest owner under SB 1615); and (c) the right of a first purchaser to take or receive oil and gas under an agreement to sell, subject to the anti-waiver provisions in Section 549.9.

Section 549.11 provides that the rights of an operator of an oil and gas well to be paid, set-off or withhold funds from another interest owner as security for or in satisfaction of any debt or security interest are not impaired by SB 1615. Section 549.11 also provides that in the event of a dispute between an operator and another interest owner, a good faith tender of funds operates as a tender of the funds to both in any of the following circumstances: (a) it is made to the person designated in writing as the appropriate recipient by the operator and other interest owner; (b) it is made to a person

who otherwise shows himself or herself to be the one entitled to the funds; or (c) it is made to a court of competent jurisdiction in the event of litigation or bankruptcy.

### **RESTRICTIONS ON WAIVER OF RIGHTS UNDER SB 1615**

Given the potential for substantial inequality in bargaining power between an interest owner and a first purchaser, Section 549.9 provides that the rights granted by SB 1615 cannot be waived except under very circumscribed conditions. No interest owner shall be required, as a condition or term of an agreement to sell or otherwise, to waive, relinquish or release any oil and gas lien or any rights under SB 1615 other than upon payment in full of the sales price. Likewise, no interest owner can be required to agree to any provision that would apply the law of any state other than the state of Oklahoma insofar as the same relates to rights under SB 1615. Such attempted waivers or agreements are declared to be void as a matter of the public policy of Oklahoma. However, Section 549.9 does permit the waiver of rights under SB 1615 only when: (a) the first purchaser posts a letter of credit in form and amount satisfactory to the interest owner or the interest owner's representative; or (b) the first purchaser agrees to a binding contractual arrangement satisfactory in form and substance to the interest owner or the interest owner's representative to prepay or escrow the sales price under an agreement to sell and the first purchaser then performs all of its obligations under the agreement to sell.

### **ENFORCEMENT OF THE OIL AND GAS LIEN**

Section 549.10 provides for the enforcement of the oil and gas lien, including matters relating to limitations, venue and consolidation of actions. The lien expires on a rolling monthly basis one year after the last day of the month following the date proceeds from the sale of oil or gas subject to such lien are required by law or contract to be paid to the affected interest owner. In the event of an intervention of a bankruptcy or other insolvency or reorganization proceeding, the limitations period is tolled for an additional 90 days from the earlier of: (a) the final conclusion or dismissal of such proceedings or (b) the date final relief is obtained from the applicable tribunal authorizing the commencement of an enforcement action. In addition to any other court of competent jurisdiction, an

action to enforce the lien may be commenced in the district court of the county in which the oil and gas well is located, or the oil or gas is produced, or wherever the unpaid-for oil or gas or the proceeds of that oil and gas may be found. Proceedings involving multiple wells in one county can be joined in the same action. Where separate actions are commenced, the district court may consolidate them. The court shall allow to the prevailing party in any enforcement action all costs of the action, including a reasonable attorney's fee. Nothing in SB 1615 impairs or affects the right of any interest owner to maintain a personal action to recover the debt against any person liable for payment of the sales price or to exercise any other rights and remedies available at law or in equity.

### **RIGHTS CUMULATIVE**

Section 549.12 provides that the rights under SB 1615 are intended to be cumulative with all other rights an interest owner may otherwise have at law or in equity. Section 549.12 also provides a statutory construction mechanism to resolve potential conflicts between SB 1615 and any other rights so that the interest owner's rights are liberally construed and the statutory construction that affords the most comprehensive protection to the interest owner to secure the receipt of the sales price shall be given preference. Section 549.12 also provides that any rights of an interest owner accrued under the provisions of the Section 548 Act are preserved to the extent not in conflict with SB 1615.

### **CONCLUSION**

SB 1615 is Oklahoma's legislative response to the potential issues inherent in any insolvency or reorganization proceeding involving an operator, a representative or a first purchaser, including the issues that surfaced in the SemGroup Bankruptcy. SB 1615 had broad support both of royalty owner groups and oil and gas producers. By unanimous vote of both houses of the Legislature, the state of Oklahoma, through SB 1615, has determined that the owners of interests in oil and gas, including the producers that take the extraordinary exploratory risks required to extract oil and gas from below the surface, bring that oil and gas to the surface, and then sell that oil and gas into commerce, and those royalty interest owners claiming through them — are the first to be paid for their ownership rights and efforts. No person who derives financial benefit from the extraction and sale of oil and gas

from Oklahoma wells, including the first purchasers or any financial institutions claiming under them, will be permitted to capitalize their companies or collateralize their loans at the expense of those who provide that capital and/or collateral. SB 1615 unequivocally provides Oklahoma producers and royalty owners superior lien priority status with respect to oil and gas production or revenues derived through their efforts or based on their interests in Oklahoma oil and gas, and it expands and strengthens the arsenal of weapons available to them to protect and preserve those rights in the event they someday find themselves once again in the position of being a creditor in the bankruptcy or insolvency proceedings of an entity that has purchased and not paid for their oil and gas production.

1. 52 O.S. §548.2.
2. 2008 OK AG 31.

3. The opinion in the Oklahoma Proceeding may be found at *In re SemCrude, L.P.*, 407 B.R. 140, 2009 WL 1740750 (Bankr. D. Del. June 19, 2009). The opinion in the Texas Proceeding may be found at *In re SemCrude*, 407 B.R. 112, 2009 WL 1740748 (Bankr. D. Del. June 19, 2009). Also, in *McKnight v. Linn Operating Inc.*, CIV-10-30-R (W. D. Okla.), the plaintiffs argued, among other theories, that Section 570.10 created a fiduciary duty under the implied trust articulated in the attorney

general's opinion. Judge David L. Russell granted the defendant's motion to dismiss the Section 570.10 fiduciary claim relying on the Bankruptcy Court's decision in the Oklahoma Proceeding to find that Section 570.10 created no implied trust and therefore imposed no fiduciary duties.

4. Kuntz, *The Law of Oil and Gas* §15.2 [herein Kuntz].
5. Kuntz §15.1.
6. 52 O.S. §87.1(d).
7. Kuntz §23.23.
8. *Id.*

9. In this article, citations to SB 1615 shall be to a specific section of SB 1615, e.g., to "Section 549.1."

10. Section 549.3.
11. Section 549.3.C.
12. *Id.*
13. Section 549.4.
14. Section 549.7.

## ABOUT THE AUTHORS

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As we welcome a new class of incoming students, we remain an integral part of Oklahoma's legal community. A look back at 2009-2010 at OCU LAW:

**September 24:** The classes of 2010 and 2011 competed in the annual Powderpuff Football game to raise money for OCU LAW's Scholarship Fund. The 3Ls won, 28-14, over the 2Ls. Halftime entertainment was provided by the Thunder Girls.



**October 13:** Bestselling author John Grisham spoke to a crowd of 1,800 people on the OCU campus to kick off fundraising efforts for the Oklahoma Innocence Clinic. The next night Dennis Fritz, one of the men about whom Grisham wrote *The Innocent Man* spoke on a panel of exonerated individuals, their families and their attorneys.



**October 29:** Yale Law Professor Reva Siegel delivered the Quinlan Lecture in the Homsey Family Moot Courtroom. Her remarks were titled "Race Talk and Ricci: The Court and the Confirmation Process."



**November 16-17:** The same week that President Obama made an historic visit to China, Professor Jerome A. Cohen and Judge John M. Walker, Jr. visited OCU LAW for a series of events on the legal system of China. Underwriting was provided by Hobby Lobby.



**February 9-11:** The Honorable Neil M. Gorsuch of the U.S. Court of Appeals for the Tenth Circuit served as OCU LAW's third McAfee & Taft Jurist-in-Residence.



**April 8:** Notre Dame University Law Professor Nicole Stelle Garnett delivered the 2010 Brennan Lecture, titled "Restoring Lost Connections: Land Use, Policing and Urban Vitality" in the Homsey Family Moot Courtroom.



**May 16:** Oklahoma Governor Brad Henry delivered the commencement address to the 143 members of OCU LAW's graduating class of 2010. Of his cousin, incoming OCU President and former OCU LAW Dean Robert Henry, the Governor said, "Robert's a pretty cool guy ... for a judge."



**June 16:** OCU LAW hosted a candidates' forum for the three candidates for Oklahoma Attorney General in advance of the July 27 primaries. The event was co-sponsored by *The Journal Record* and moderated by OETA's Dick Pryor.

# Federal Diversity Jurisdiction under the Class Action Fairness Act

## Putting the Cart before the Horse

By Chace W. Daley

In response to rampant abuse of the class action device in state courts, Congress passed the Class Action Fairness Act (CAFA) in February of 2005.<sup>1</sup> CAFA was passed to prevent state courts from keeping cases of national importance out of federal courts, demonstrating in-state bias, and imposing their state views on out-of-state residents.<sup>2</sup> With the goal of keeping legitimate class actions in federal court, CAFA amended the federal diversity statute, 28 U.S.C. §1332, to provide a more lenient diversity standard for class actions.<sup>3</sup>

While this expanded diversity standard has given class-action plaintiffs newly found access to federal courts, it has also raised difficult questions regarding federal diversity jurisdiction. Specifically, what happens when a “class action” brought in or removed to federal court under CAFA is later *denied* class certification by the federal court? Does the federal court retain jurisdiction under CAFA even though the suit is not technically a class action under the federal rules? Or must the suit be remanded to state court or dismissed if the plaintiffs cannot meet the general requirements for federal jurisdiction?

Until recently, federal courts had come to two very different conclusions in attempting to respond to this “new and evolving legal issue,” with compelling arguments on each side of the dispute.<sup>4</sup> Recent circuit court cases, however,

have shed light on this important jurisdictional question.

### FEDERAL DIVERSITY JURISDICTION UNDER CAFA

CAFA incorporates a broader, more lenient standard than the traditional rules of federal diversity for qualifying class actions. Specifically, CAFA creates federal diversity jurisdiction over “class actions” in which: 1) an aggregated total of more than \$5 million, exclusive of interests and costs, is in controversy; 2) at least one member of the plaintiffs’ class creates diversity with one defendant; and 3) there are 100 or more members in the class.<sup>5</sup> It is not these three diversity requirements, however, that have left federal district courts scratching their heads. On the contrary, it is CAFA’s seemingly *most basic* requirement that federal courts

have struggled with, namely, the requirement that the suit constitute a “class action.”

## CLASS CERTIFICATION

To successfully bring a class action, plaintiffs must meet certain requirements before being certified as a class by a ruling court. Class certification is governed by Rule 23 of the Federal Rules of Civil Procedure, which sets out four prerequisites that must be met to become a class. These requirements are often referred to as “numerosity, commonality, typicality, and adequacy of representation.”<sup>6</sup> More specifically, under Rule 23(a) the requirements are satisfied if:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.<sup>7</sup>

Not only must class action plaintiffs meet these requirements, but plaintiffs must also meet one of the additional requirements of Rule 23(b). This may require a showing by the class members that prosecuting separate actions by or against individuals would have certain unjust consequences, or that questions of law or fact common to class members predominate over any question affecting the individual class members.<sup>8</sup> If the court finds that all of these elements are met, then a class certification order is issued. While the determination is to be made “as soon as practicable,” by its nature the determination of whether a class action is certifiable must take place after the class action is initially brought.<sup>9</sup>

## THE QUESTION

While the requirements of CAFA diversity jurisdiction and the requirements of class certification are well known, the collision of these two principles has left federal courts somewhat perplexed. The question that federal courts have struggled to answer is the following: what happens to a class action brought in — or removed to — federal court under CAFA that is later determined not to be a class action at all?

CAFA does not expressly address whether remand or dismissal is required after a denial of class certification or other post-filing events destroy the original basis for federal jurisdiction. CAFA applies “to any *class action* before or after the entry of a class certification order by

“... the 7th Circuit held that class certification was not required in order to retain federal jurisdiction under CAFA.”

the court with respect to that action.”<sup>10</sup> The term “class action” means “any civil action filed under rule 23 of the Federal Rules of Civil Procedure ....”<sup>11</sup> The term “class certification order” is defined as “an order issued by a court approving the treatment of some or all aspects of a civil action as a class action.”<sup>12</sup> To date, federal district courts have used and interpreted these definitions differently leading to inconsistent results and the emergence of two primary legal theories.<sup>13</sup> In *Salazar v. Avis Budget Group Inc.*,<sup>14</sup> a California district court summarized the two theories that have materialized:

Courts retaining jurisdiction after denial of class certification rely on two propositions. First, they note federal courts determine removal jurisdiction at the moment the case is removed and subsequent determinations [that] the plaintiff cannot prove the jurisdictional facts alleged do not affect continued jurisdiction. Second, these courts note class certification orders are interlocutory and subject to change.

Courts remanding the action to state court after denial of class certification rely on two counter-propositions. First, they hold the issue of class certification is a legal determination that plaintiffs’ claims do not constitute an actual or potential class action, a prerequisite for CAFA jurisdiction. Specifically, these courts reason, unlike a post-filing change of residence or change in the amount of his claim, a denial of class certification is a determination there is not — and never was — CAFA diversity jurisdiction. Second, these courts believe [cases retaining jurisdiction ignore] Federal Rule of Civil Procedure 12(h)(3), which instructs “if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.”<sup>15</sup>

While these are the two predominant views that have emerged from lower federal court

opinions, they are by no means the only analytical routes taken. Other ideas used to address the issue have included requiring a determination of whether there is “a reasonable foreseeable possibility” of class certification,<sup>16</sup> the application of supplemental jurisdiction under 28 U.S.C. §1367,<sup>17</sup> or even the use of the doctrine of abstention by the federal court.<sup>18</sup> Fortunately, recent circuit court opinions have significantly narrowed the discussion on this jurisdictional issue.

## RECENT CIRCUIT COURT ANALYSIS

The 11th and 1st Circuits were the first to address the issue of jurisdiction under CAFA after denial of class certification — albeit through *dicta*. In *Vega v. T-Mobile USA Inc.*, the 11th Circuit vacated a district court’s class certification order, and remanded plaintiffs’ claims to proceed as individual claims in federal district court.<sup>19</sup> In a footnote, the 11th Circuit stated that plaintiffs’ failure to show numerosity as required by Federal Rule 23 (resulting in denial of class certification) would *not* divest the federal court of CAFA jurisdiction.<sup>20</sup> The footnote implied that the 11th Circuit would align with lower courts holding that once jurisdiction is established under CAFA, it continues throughout the life of the case.<sup>21</sup> Contrary to *Vega*, language from the 1st Circuit’s decision in *In re TJX Cos. Retail Sec. Breach Litig.* suggested that denial of class certification would defeat CAFA jurisdiction.<sup>22</sup> In so stating, the 1st Circuit cited binding precedent that the duty of the trial court, after finding a lack of jurisdiction, was “to proceed no further but to dismiss the suit.”<sup>23</sup>

In *Cunningham Charter Corporation v. Learjet Inc.*, the 7th Circuit was the first circuit court to provide a decisive opinion on the issue.<sup>24</sup> In *Cunningham Charter*, an Illinois district court denied a motion for class certification and remanded to state court due to lack of federal jurisdiction under CAFA. On appeal, the 7th Circuit followed *Vega* and determined that federal jurisdiction under CAFA did not depend on certification. The 7th Circuit reasoned that in the interest of minimizing expense and delay, “a case should stay in the system that first acquired jurisdiction” and “should not be shunted between court systems; litigation is not ping-pong.”<sup>25</sup> The 7th Circuit held that its conclusion vindicated the general principle “that jurisdiction once properly invoked is not lost by developments after a suit is filed, such as a change in the state of which a party is a citizen that destroys diversity.”<sup>26</sup> Thus, the 7th Circuit held

that class certification was not required in order to retain federal jurisdiction under CAFA.

After *Cunningham Charter*, the 9th Circuit recently addressed the issue directly in *United Steel, Paper v. Shell Oil Co.*<sup>27</sup> In *United Steel*, defendants removed a putative class action from California state court to federal court pursuant to CAFA. After denying class certification, the federal district court concluded that it no longer had jurisdiction under CAFA and remanded the case back to state court. On appeal, the 9th Circuit, following the holdings of the 7th and 11th Circuits, held that the subsequent denial of Rule 23 class certification does not divest a federal district court of jurisdiction. Relying on the reasoning of both *Vega* and *Cunningham Charter*, the 9th Circuit determined that “[h]ad Congress intended that a properly removed class action be remanded if a class is not eventually certified, it could have said so.”<sup>28</sup> Instead, the 9th Circuit held it more likely that “Congress intended that the usual and long-standing principles apply — post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing.”<sup>29</sup> The 9th Circuit did, however, suggest that the CAFA provisions do imply “at most an expectation that a class will or at least may be certified eventually.”<sup>30</sup> Thus, the 9th Circuit suggested that frivolous attempts to invoke federal jurisdiction under CAFA should fail and would compel dismissal.<sup>31</sup>

## CONCLUSION

Until recently, the federal courts had failed to embrace a consistent approach in analyzing and determining federal jurisdiction under CAFA after the denial of class certification. In the wake of the 7th Circuit’s decision in *Cunningham Charter* and the 9th Circuit’s decision in *United Steel*, however, it is clear that the balance in analysis is leaning towards federal courts retaining jurisdiction under CAFA after denial of class certification. While this gives class action plaintiffs and defendants some degree of confidence in making important jurisdictional decisions, there are still numerous circuits which have not addressed the issue. As such, it would be wise for class-action attorneys to stay apprised of developments and commentary related to CAFA diversity jurisdiction as the issue continues to evolve and progress through the federal courts.<sup>32</sup>

1. Pub. L. No. 109-2, §2(b)(2), 119 Stat. 4 (2005).
2. *Id.*; see also *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007) (holding that “Congress enacted CAFA to address inequitable state court treatment of class actions and to put an end to certain abusive practices by plaintiffs’ class counsel . . . by, among other things, broadening federal diversity jurisdiction over class action with interstate implications”).
3. 28 U.S.C. §1332(d).
4. *Good v. Ameriprise Fin.*, 248 F.R.D. 560, 574–575 (D. Minn. 2008) (inviting the parties to submit supplemental briefs given “that the effect of a denial of class certification on CAFA jurisdiction is a new and evolving legal issue”).
5. 28 U.S.C. §1332(d).
6. *General Telephone Co. v. EEOC*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980).
7. Fed. R. Civ. P. 23(a).
8. See Fed. R. Civ. P. 23(b); *Bradford v. Union Pac. R.R. Co.*, 2007 U.S. Dist. LEXIS 72951, \*14 (W.D. Ark. Sept. 28, 2007).
9. Fed. R. Civ. P. 23(c); *Alme v. Allis Chalmers Corp.*, 102 F.R.D. 147, 148 (E.D. Wis. May 16, 1984).
10. 28 U.S.C. §1332(d)(8) (emphasis added).
11. 28 U.S.C. §1332(d)(1)(B).
12. 28 U.S.C. §1332(d)(1)(C).
13. Compare e.g. *Allen-Wright v. Allstate Ins. Co.*, 2009 U.S. Dist. LEXIS 39555 (E.D. Pa. May 5, 2009) (holding federal court maintained jurisdiction over the action despite the denial of class certification); *Chesner v. Stewart Title Guar. Co.*, 2009 U.S. Dist. LEXIS 22453, n.20 (N.D. Ohio Jan. 9, 2009) (“the Court finds persuasive those holding that jurisdiction is continuing and post-removal developments do not alter the Court’s CAFA jurisdiction”); *Leviitt v. Fax.com*, 2007 U.S. Dist. LEXIS 83143, \*24–25 (D. Md. May 25, 2007); *Kitts v. Citgo Petroleum Corp.*, 2009 U.S. Dist. LEXIS 8098 (W.D. La. Jan. 23, 2009) *Giannini v. Schering-Plough Corp.*, 2007 U.S. Dist. LEXIS 48392 (N.D. Cal. June 22, 2007); *Garcia v. Boyar & Miller P.C.*, 2007 U.S. Dist. LEXIS 39072 (N.D. Tex. May 30, 2007); *In re HP Inkjet Printer Litig.*, 2009 U.S. Dist. LEXIS 12271 (N.D. Cal. Feb. 5, 2009); with e.g. *Salazar v. Avis Budget Group Inc.*, 2008 U.S. Dist. LEXIS 94610 (S.D. Cal. 2008) (holding that, due to the denial of class action certification, the court, in effect, never had jurisdiction over the action); *Arabian v. Sony Electronics Inc.*, 2007 U.S. Dist. LEXIS 67769 (S.D. Cal. Sept. 13, 2007); *Jin v. Ben Bridge-Jeweler Inc.*, 2009 U.S. Dist. LEXIS 30514 (E.D. Cal. April 8, 2009) (stating that after class certification denial, CAFA is no longer a basis for jurisdiction); *Ronat v. Martha Stewart Living Omnimedia*, 2008 U.S. Dist. LEXIS 91814 (S.D. Ill. Nov. 12, 2008); *Jones v. Jeld-Wen Inc.*, 2008 U.S. Dist. LEXIS 85145 (S.D. Fla. Oct. 1, 2008); *Giovanniello v. The New York Law Publishing Co.*, 2007 U.S. Dist. LEXIS 56694 (S.D.N.Y. Aug. 6, 2007); *Falcon v. Philips Elecs. N. Am. Corp.*, 489 F. Supp. 2d 367, 368 (S.D.N.Y. 2007); *McGaughey v. Treistman*, 2007 U.S. Dist. LEXIS 126 (S.D.N.Y. Jan. 2, 2007).
14. 2008 U.S. Dist. LEXIS 94610 (S.D. Cal. 2008).
15. *Id.* at \*\*12–15.
16. *Falcon*, 489 F. Supp. 2d at 368 (S.D.N.Y. 2007).
17. *Giannini v. Schering-Plough Corp.*, 2007 U.S. Dist. LEXIS 48392 (N.D. Cal. June 22, 2007).
18. G. Shaun Richardson, *Class Dismissed, Now What? Exploring the Exercise of CAFA Jurisdiction After the Denial of Class Certification*, 39 N.M. L. Rev. 121, 141–148 (Winter 2009).
19. 564 F.3d 1256 (11th Cir. 2009).
20. *Id.* at n.12.
21. See *Lewis v. Ford Motor Co.*, 2010 U.S. Dist. LEXIS 372 (W.D. Pa. Jan. 5, 2010).
22. 564 F.3d 489 (1st Cir. 2009).
23. *Id.* at 501 (emphasis in original) (citing *Mills v. Maine*, 118 F.3d 37, 51 (1st Cir. 1997)).
24. 592 F.3d 805 (7th Cir. 2010).
25. *Id.* at 807.
26. *Id.*; see e.g. *Davis v. Homecomings Fin.*, 2007 U.S. Dist. LEXIS 83459 (W.D. Wash. Mar. 22, 2007) (retaining federal jurisdiction under CAFA after amount in controversy decreased to less than \$5 million).
27. 602 F.3d 1087, 2010 U.S. App. LEXIS 8208 (9th Cir. 2010).
28. *Id.* at \*9.
29. *Id.*
30. *Id.* at \*8.
31. *Id.*; see also *Cunningham Charter*, 592 F.3d at 806 (“If a plaintiff sued in state court a seller of fish tanks on behalf of himself and 1,000 goldfish for \$5,000,001 and the defendant removed the case to federal district court, that court would have to dismiss the case, as it would have been certain from the outset of the litigation that no class could be certified.”).
32. For more information on CAFA and its significance, see Howard M. Erichson, *CAFA’s Impact On Class Action Lawyers*, 156 U. Pa. L. Rev. 1593 (June 2008).

## ABOUT THE AUTHOR



Chace W. Daley is an associate with Hall Estill in Tulsa. As a civil litigation attorney, he handles disputes ranging from complex business and commercial matters, property and construction issues, oil and gas, and general defense work. He received a B.S. in business administration from the University of Missouri and graduated from Washington and Lee University School of Law in 2008.



# The Sharp Sword of Residential Property Disclosures, Somewhat Dulled

By Douglas J. Shelton and Alvin C. Harrell

When it comes to residential real property in Oklahoma and many other states, the traditional notion of *caveat emptor* (buyer beware) is somewhat obsolete, or at least has been significantly modified by statute.<sup>1</sup> For example, the Oklahoma Residential Property Condition Disclosure Act (Disclosure Act)<sup>2</sup> requires a seller of residential property to deliver to the purchaser either a disclaimer or a written disclosure statement of items and improvements included in the sale of the property, and whether such items or improvements are in normal working order.<sup>3</sup>

If the seller fails to accurately and fully disclaim or disclose such problems and defects, the seller may have liability under the Disclosure Act.<sup>4</sup> Moreover, this liability may extend not only to the seller, but also to the real estate licensees (both the listing and selling agent) who handled the transaction, and their real estate sales agencies; other parties, including home inspectors involved in the sale of the home, may have liability under other, traditional causes of action.<sup>5</sup> The good news for the seller and the real estate licensees is that their liability is limited under the Disclosure Act.<sup>6</sup> However, others may be liable based on traditional theories of common law fraud, negligence and/or other potential causes of action. A plaintiff may wish to allege that the seller “negligently” failed to make the required disclosures, in an attempt to avoid the statutory

limits. However, as noted below, such claims are precluded by the Disclosure Act.<sup>7</sup>

This article discusses the rights, duties and liabilities of the parties involved in a real estate sales transaction covered by the Disclosure Act, including the impact of 2003 and 2008 amendments to the Disclosure Act and two recent Oklahoma Supreme Court decisions clarifying the limits on a purchaser’s remedies.

## BASIC RIGHTS AND DUTIES

The scope of the Disclosure Act depends in part on whether a real estate licensee is involved in a sale of residential real estate.<sup>8</sup> Purchasers who believe they are protected by the Disclosure Act should be aware that the term “seller” as defined in the Disclosure Act is limited to a person who is represented by a real estate licensee

(i.e., an agent), or who receives a written request for a disclosure from the purchaser.<sup>9</sup>

Thus, purchasers should be aware that a seller who has not retained a real estate licensee is not required to provide a disclaimer or disclosure statement to the purchaser, unless the purchaser makes a written request for the statement.<sup>10</sup> Otherwise, the requirements of the Disclosure Act will not apply to the seller, and the seller may be insulated from liability under the Disclosure Act for transferring defective property.<sup>11</sup> From a seller's perspective, a written request from the purchaser will trigger the disclaimer or disclosure requirements, even if the seller is not represented by a real estate licensee. An unrepresented seller may not be well-prepared to respond to such a request. Another risk that sellers should be aware of is that, even if a seller delivers the appropriate disclaimer or disclosure statement to the purchaser, there is a further disclosure obligation if defects are discovered after completing the disclaimer or disclosure statement.<sup>12</sup> The Disclosure Act would not shield the seller from liability for such defects. Thus, the Disclosure Act creates some subtle economic risks for parties on both sides of the transaction.

If the purchaser is represented or "assisted" by a real estate licensee, the real estate licensee has a duty "to obtain and make available" to the purchaser the seller's disclaimer or disclosure statement, along with any amendments the seller makes.<sup>13</sup> If the seller does not have a licensee agent, but the purchaser does, the purchaser's agent must obtain the disclaimer or disclosure statement from the seller. As noted, this may impose an unforeseen burden on a seller who is not familiar with these issues. It also illustrates again the significance for the purchaser of assistance or representation by a licensee, since a seller who has not retained a real estate licensee is not required to deliver a disclosure or disclaimer statement unless the purchaser requests it.<sup>14</sup> Thus, the transactional burdens of the buyer and seller, as well as their economic risks, may depend in part on whether either or both are represented by a real estate licensee.

## THE DISCLOSURE ACT

### *Scope and Background*

The Disclosure Act significantly modifies the common law rights, duties and liabilities of the parties and the nature of their potential recoveries, by imposing specific duties on sellers

and real estate licensees and limiting the remedies of aggrieved purchasers.<sup>15</sup> Thus, it is important to understand the scope of the Disclosure Act. Basically, the Disclosure Act requires a "seller" of "property" to deliver, or cause to be delivered, the disclaimer or disclosure statements noted above to the purchaser.<sup>16</sup> However, as usual, the devil is in the details. Section 832.2 essentially defines "seller" to mean a person "attempting to transfer a possessory interest in property,"<sup>17</sup> who is either represented by a real estate licensee or receives a written request from the purchaser.<sup>18</sup> "Property" is defined at section 832.8 as residential real property with one or two units.<sup>19</sup> Thus, the basic requirements<sup>20</sup> are triggered when a seller who is represented by a real estate licensee — or who receives a written request — is attempting to sell real property with one or two residential units to a purchaser.<sup>21</sup> If a transaction is within this scope, the parties' common law rights and duties are superseded by the Disclosure Act.<sup>22</sup>

### *Impact on Caveat Emptor*

The consequence is a dramatic modification of the doctrine of *caveat emptor*, as well as limitations on the seller's traditional remedies. The Disclosure Act shifts some of the traditional risks for purchasers to the seller because, under the common law, absent fraudulent concealment, a seller has no affirmative duty to disclose the condition of or any defects in the property being sold.<sup>23</sup> Thus, at common law the burden is on the purchaser to inspect the property and discover problems with the physical condition of the property.<sup>24</sup> Traditionally, the doctrine of *caveat emptor* has been applied by Oklahoma courts, to impose the burden of property inspection and the risk of defects on the purchaser, when three circumstances are met:

- the purchaser must have had an opportunity to inspect the property prior to sale;<sup>25</sup>
- prior to the sale, both the purchaser and seller must have had access to information regarding the property's condition;<sup>26</sup> and
- the purchaser must have been able to ascertain with "reasonable diligence" the property's condition before purchasing the property.<sup>27</sup>

By essentially shifting these burdens to the seller, who is presumably more familiar with the property than the purchaser, the Disclosure

Act benefits the purchaser by dramatically increasing the level of required disclosure, but (as noted below) at the cost of significant changes to the structure of the purchaser's legal remedies.

Enactment of the Disclosure Act in 1994 came as the result of a legislative drive by the Oklahoma Association of Realtors, as part of the National Association of Realtors' national campaign to enact such protections in the states.<sup>28</sup> Oklahoma's Disclosure Act was implemented and became effective on July 1, 1995.<sup>29</sup>

#### *Disclaimer by a Seller*

A seller covered by the Disclosure Act is required to present either a disclaimer or disclosure statement, as specified in section 833 of the Disclosure Act, to a purchaser of the property, before a purchase contract is signed.<sup>30</sup> If the seller has never lived in the property and is not aware of any defects, a disclaimer statement is sufficient.<sup>31</sup> However, if the seller has lived in the property, or knows that specific property defects exist, a "written property condition disclosure statement" (disclosure statement) must be provided.<sup>32</sup> The Disclosure Act directs the Oklahoma Real Estate Commission (OREC) to draft the form of the disclaimer and disclosure statements and to amend the forms as "necessary and appropriate."<sup>33</sup>

A disclaimer must state that 1) the seller has never occupied the property and makes no disclosures concerning the condition of the property and 2) has no actual knowledge of any defect.<sup>34</sup>

The seller must deliver the disclaimer statement to the purchaser "as soon as practicable, but in any event... before acceptance of an offer to purchase."<sup>35</sup> If the disclaimer statement is delivered to the purchaser after an "offer to purchase" has been made by the purchaser, the offer to purchase can be accepted by the seller only after the purchaser "has acknowledged receipt of the disclaimer statement... and confirmed the offer to purchase."<sup>36</sup> The Disclosure Act and the disclaimer statement forms prepared by the OREC specify that a disclaimer may not be completed more than 180 days prior to the date the form is delivered to or received by the purchaser, and if the seller becomes aware of a defect after delivery of the disclaimer statement to the purchaser,<sup>37</sup> the seller must complete and deliver a disclosure statement to the purchaser.<sup>38</sup>

“... the Oklahoma Disclosure Act does not limit the information the OREC may require on the disclosure statement.”

#### *Disclosure by a Seller*

If the seller is not eligible to provide only a disclaimer statement under section 833.A.1, a disclosure statement must be completed and provided to the purchaser.<sup>39</sup> As with the format of the disclaimer statement, the Disclosure Act directs the OREC to provide a disclosure form for sellers to use.<sup>40</sup> As noted below, the OREC has done so.

The Disclosure Act at section 833 requires certain basic information to be provided in the disclosure statement and this is reflected in the form provided by the OREC. For example, the seller must identify the "items and improvements" included in the sale and indicate whether those items and improvements are in "normal working order."<sup>41</sup> The OREC also may include disclosure of items that are not specified in the Disclosure Act, as the Disclosure Act permits the OREC to make adjustments as "necessary and appropriate."<sup>42</sup>

Importantly, and unlike equivalent statutes in some other jurisdictions, the Oklahoma Disclosure Act does not limit the information the OREC may require on the disclosure statement. Thus, the OREC has the authority to require the disclosure of additional information. The OREC disclosure statement form goes beyond the physical condition of the property, to require the disclosure of information regarding legal issues such as easements, homeowner associations and zoning violations.<sup>43</sup>

Some states' disclosure acts go beyond even this, e.g., to require disclosure of anything that would diminish the value of the property. As noted in a previous article, California's statute requires the disclosure of various "neighborhood" problems, including "neighborhood noise problems."<sup>44</sup> As a consequence, sellers of California residential property have been successfully sued for not disclosing neighborhood nuisances.<sup>45</sup>

In contrast, the Oklahoma Disclosure Act does not require a seller to disclose any neighborhood issues.<sup>46</sup> Instead, it requires that the disclosure statement be "based on actual knowledge of the seller regarding certain physical conditions of the property."<sup>47</sup> Thus, the Disclosure Act does not impose a duty on sellers to disclose nuisances such as neighborhood noise. Although, as noted, the Disclosure Act authorizes the OREC to expand the required disclosures to include non-physical disclosures, currently the only non-physical disclosure requirements relate to legal issues such as easements and homeowner's associations.<sup>48</sup>

#### *Other Notices*

The Disclosure Act also requires that certain other disclosures be made by the seller to the purchaser, *e.g.*, a notice that the disclosure statement extends only to the seller's actual knowledge of the property, is not a representation of the seller's real estate licensee, and that the disclosure statement is not a part of the sales contract.<sup>49</sup> Thus, the disclosures required under the Disclosure Act do not constitute an express or implied warranty and are not "a substitute for any inspections or warranties the purchaser may wish to obtain."<sup>50</sup>

#### *Subsequent Defects; Repairs*

Defects which arise or are discovered by the seller after a disclaimer or disclosure statement has been provided to the purchaser must be disclosed in a new or amended disclosure statement.<sup>51</sup>

The Disclosure Act does not require the seller to disclose previous repairs or corrected problems, unless a deficiency remains.<sup>52</sup> However, the OREC form requires this additional disclosure. Thus, the OREC disclosure form asks if the seller is "aware of any alterations or repairs having been made to correct defects or problems."<sup>53</sup> This requires that a seller disclose his or her knowledge of previously-corrected defects. As reported in a previous article, this language was added as a result of a case in the state of Washington, involving defective and rotted wood that had been removed and repaired by the seller.<sup>54</sup> The sellers were unaware that problems remained despite the repairs. This case illustrates that traditional risks to a purchaser remain, under the doctrine of *caveat emptor*, despite enactment of the Disclosure Act. The Washington court held that there was no duty on the seller's part to disclose the repairs.<sup>55</sup> The OREC responded to this case by requiring sellers to disclose any previous addi-

tions, alterations or repairs to the property. While this addresses the facts in the Washington case, it also illustrates the continuing risks for a purchaser, *e.g.*, where the seller is unaware of defects or previous repairs.

#### *Timing of the Disclosures*

As previously noted, the seller must deliver the required disclaimer or disclosure statement to the purchaser as soon as practicable, but in any event prior to the seller's acceptance of an "offer to purchase" the property.<sup>56</sup> However, the delivery requirements may differ slightly depending on whether the seller is represented by a real estate licensee. If the seller is represented by a licensee, the seller is required to deliver a statement to the purchaser as noted above. However, if the seller is not represented by a real estate licensee, the seller is not required to provide a disclosure statement unless the purchaser makes a written request.<sup>57</sup>

Thus, in the common situation where the seller is represented by a real estate licensee, the seller is required to deliver a disclaimer or disclosure statement prior to the purchaser making an "offer to purchase" the property. If the seller delivers either statement after the purchaser makes an offer, the seller may accept the offer only after the purchaser has acknowledged receipt of the statement and confirmed the offer.<sup>58</sup> This protects the purchaser against a seller's acceptance of the offer prior to the seller's disclosure of any defects.<sup>59</sup>

#### *Buyer Remedies*

The seller is not liable for defects unknown to the seller or disclosed in the disclosure statement, or any amendment delivered to the purchaser before acceptance of the offer to purchase.<sup>60</sup>

Thus, the purchaser remains at risk for defects unknown to the seller, or known and disclosed by the seller, as well as known, undisclosed risks if the seller is or becomes insolvent. Moreover, a seller is not liable for any erroneous, inaccurate or omitted information supplied to the purchaser in the disclosure statement if:

- the error, inaccuracy or omission resulted from an approximation of information by the seller, provided that:
  - more accurate information was unknown to the seller at the time the disclosure was made;

- the approximation in the disclosure statement was clearly identified as such, was reasonable, and was based on the best information available to the seller; and
- the approximation was not used to circumvent the disclosure requirements of the Disclosure Act;
- the error, inaccuracy or omission was not within the actual knowledge of the seller; or
- the disclosure was based on information provided by public agencies and the seller reasonably believed the information to be correct.<sup>61</sup>

As under the common law, the Disclosure Act does not require that a seller inspect the property in order to discover unknown defects; therefore, the seller's liability for delivering an inaccurate disclosure statement is limited.<sup>62</sup> Of course, the seller would be liable for an intentional misrepresentation about the condition of the property.<sup>63</sup>

Negligent nondisclosure is a more difficult matter. The Disclosure Act provides liability only for a failure to disclose defects "actually known" to the seller.<sup>64</sup> In addressing the issue of negligent nondisclosure, the Wyoming Supreme Court considered the common law rule but then concluded that "nondisclosure of information [under the Wyoming disclosure act] cannot support a [common law] claim for misrepresentation."<sup>65</sup> The Wyoming Court then qualified this by stating that a seller could be held liable for negligent nondisclosure if the seller is under a duty "to exercise reasonable care to disclose the matter in question."<sup>66</sup> However, the impact of such reasoning in Oklahoma is unclear, as section 837.F of the Disclosure Act states that the act abrogates common law duties.

Nonetheless, despite section 837.F, it is possible that an Oklahoma court would impose upon the seller a common law duty to exercise reasonable care in disclosing the information required under the Disclosure Act. This remains one of the few issues not clearly resolved under the Disclosure Act.

#### *Duties of a Real Estate Licensee*

In addition to the purchaser and seller, a real estate licensee is subject to specific duties provided in the Disclosure Act.<sup>67</sup> A seller's real estate licensee is charged with assuring that the

required disclaimer or disclosure statement and any required amendments are delivered by the seller to the purchaser.<sup>68</sup> The licensee has a duty "to make such statement available" to the purchaser prior to the seller accepting a purchaser's offer to purchase.<sup>69</sup> A real estate licensee representing a purchaser also has the duty "to obtain and make available" to the purchaser the seller's disclaimer or disclosure statement, along with any amendments.<sup>70</sup>

Licensees also have a duty to disclose any defects that they actually know of but which are not indicated in the seller's disclosure statement or its amendments.<sup>71</sup> However, a real estate licensee has no duty to independently inspect the property or verify the "accuracy or completeness" of any disclaimer or disclosure statement.<sup>72</sup> Thus, a licensee does not have a responsibility to ensure that a seller's disclosure statements are correct, "unless the real estate agent or licensee has actual knowledge of defects that are omitted from or mistakenly listed within the disclosure."<sup>73</sup>

An unusual case handled by one of your authors involved a plaintiff who purchased a home from a bank which had acquired the property by foreclosure after the previous owner (the bank's customer) filed bankruptcy. The bank then sold the home to new owners, who had lived in the house for several years before deciding to sell. The prior bankrupt owner of the house was a real estate broker, and when the new owners decided to sell, they listed the property with his company. The house was then sold to the plaintiff (the purchaser). The purchaser alleged that the septic system was defective and filed suit against the bank, the sellers, the real estate brokerage firm and the broker/former owner. The purchaser claimed that all of the defendants knew of problems with the septic system and failed to disclose the defect. The purchaser also sued the individual who inspected the septic system, and the installer of the septic system.<sup>74</sup>

The purchaser alleged a failure to disclose under the Disclosure Act, but coupled this with common law claims of breach of warranty of habitability, fraud, negligent inspection, negligent services and nuisance — and sought both actual and punitive damages. The real estate licensees and brokerage firm moved for partial summary judgment, and all causes of action were dismissed except the alleged violation of the Disclosure Act.<sup>75</sup> These issues

are covered by section 837.A, 837.B, and 837.F, and the court's decision in this case followed that law. But until 2009, as noted below, there was no direct Supreme Court precedent on the impact of the current text of the Disclosure Act as to this issue. As noted below, however, these issues have now been resolved by the Oklahoma Supreme Court in an important 2009 decision.

## REMEDIES AGAINST THE SELLER AND REAL ESTATE LICENSEE

### *Limitations on Purchaser Remedies*

As noted in the previous article, a purchaser may assert a claim against a seller under the Disclosure Act on two grounds.<sup>76</sup> First, a purchaser may seek damages if the seller did not provide the purchaser with either a disclaimer statement or a disclosure statement before accepting the purchaser's offer to purchase.<sup>77</sup> Second, a purchaser may seek damages if the seller did not disclose a defect which was "actually known" to the seller before the sale.<sup>78</sup> The Disclosure Act limits the recovery to "actual damages,"<sup>79</sup> including the cost of repair, and specifically states that "[t]he sole and exclusive civil remedy at common law or otherwise shall be an action for actual damages, including the cost of repairing the defect — and shall not include the remedy of exemplary damages."<sup>80</sup> Additionally, the Disclosure Act states that court costs and reasonable attorney fees "shall" be awarded to the prevailing party.<sup>81</sup>

The Disclosure Act also states that the "transfer of a possessory interest in [the] property... may not be invalidated solely because of the failure of any person to comply with [the Disclosure Act]."<sup>82</sup> Thus, the purchaser cannot rescind the sale due to a violation by the seller or a real estate licensee.<sup>83</sup>

The Disclosure Act also limits the recovery for a purchaser who cancels a potential purchase of a residence. In *Green v. Braly Investments*,<sup>84</sup> the court denied recovery of the purchaser's deposit under a real estate sales contract on grounds that purchasers are not

entitled to such relief under the Disclosure Act.<sup>85</sup> The court concluded that the Disclosure Act limits recovery to damages for the cost of repairing defects to the property existing as of the date of acceptance of the offer.<sup>86</sup>

An action under the Disclosure Act must be brought within two years from the date of the property transfer, and this remedy "abrogates" all alternative common law rights and remedies.<sup>87</sup> Previously, at common law, purchasers were able to sue sellers for fraud.<sup>88</sup> However, the limitations period for an action in fraud is two years after the purchaser's discovery of the fraud.<sup>89</sup> Thus, the Disclosure Act both shortens the limitation period (because the limitations period begins to run upon the date of the property transfer and not upon the purchaser's subsequent discovery of defects or inaccurate information) and supersedes the alternative contracts and tort law remedies.



“... a purchaser may seek damages if the seller did not disclose a defect which was ‘actually known’ to the seller before the sale.”

In 2003, these issues were addressed by the Oklahoma Supreme Court in *Rogers v. Meiser*.<sup>90</sup> This case, and the Oklahoma Legislature's immediate reaction, are described below.

### HB 1319

In 2003, in HB 1319, the Oklahoma Legislature enacted amendments to Disclosure Act section 837, to expressly limit the purchaser's

claims to those provided by the Disclosure Act and preclude claims of common law fraud and the award of punitive damages for misrepresentations by the seller in a property disclaimer or disclosure statement required under the Disclosure Act. The language in HB 1319 was taken directly from the Oklahoma Supreme Court's decision in *Rogers*. That decision reversed a previous Oklahoma district court decision granting the seller's motion to dismiss any common law liability theory asserted by the purchaser.<sup>91</sup>

In *Rogers*, the Oklahoma Supreme Court held that "[t]he language of the [Disclosure Act] [could not] be interpreted to... supplant/abrogate a common law actual fraud claim based on alleged misrepresentations concerning material defects in residential real property."<sup>92</sup> The Supreme Court concluded that the Disclosure Act was ambiguous and inconclusive as regards any intent to abrogate common law theories and remedies.<sup>93</sup> As a result, the Court held that the Disclosure Act did not preclude the purchaser's assertion of common law fraud claims based upon misrepresentations in the property disclosure statement.<sup>94</sup>

Prior to this case, it was widely believed that, by the terms of the Disclosure Act,<sup>95</sup> punitive damages awards were precluded in actions brought under the Disclosure Act. However, there was some ambiguity due to other statutory provisions allowing the recovery of punitive damages in common law fraud cases.<sup>96</sup> *Rogers* held that a common law claim for fraud in a residential real estate sales transaction could be brought under other law, thus allowing recovery of punitive damages.

This was firmly rejected in HB 1319, and thereafter it appeared clear that the Legislature intended to abrogate the *Rogers* analysis, so that the Disclosure Act would prevent any remedy relating to residential real property disclosures other than those provided for in the Disclosure Act, which limits the recovery to actual damages (and attorney fees).<sup>97</sup>

As amended by HB 1319, the Disclosure Act specifically states that it "supplants and abrogates" alternative common law rights and remedies.<sup>98</sup> The term "supplant" is defined by the *Merriam-Webster Dictionary* to mean to supersede another, or to eradicate and supply a substitute for; the term "abrogate" is defined by *Black's Law Dictionary* as meaning to annul, repeal or destroy; or to repeal a former law by

legislative act, or by usage.<sup>99</sup> The plain meaning of the Disclosure Act after HB 1319 is to eliminate any right to punitive damages in cases relating to residential property disclosures. However, it took another Oklahoma Supreme Court decision to finally put this issue to rest.

*White v. Lim*<sup>100</sup>

In *White*, Steve and Nikki White (as purchasers) sued the Lims (as sellers), along with Karla Yates and her brokerage firm (as real estate licensees), alleging that the residential property they bought had severe termite damage which was not disclosed in the disclosure statement or related communications.<sup>101</sup> The purchasers sought actual and punitive damages, and discovery as to the defendants' tax returns and other financial information.<sup>102</sup> After some procedural sparring by the parties, the trial court sustained the purchaser's discovery motions and overruled the defendants' motions for summary judgment and a new trial, but certified the issue of punitive damages for appeal as an interlocutory order.<sup>103</sup>

The basic issue on appeal was whether the Disclosure Act limits a purchaser's remedies for disclosure violations to actual damages under the Disclosure Act, or alternatively allows separate claims to be asserted under common law or other statutes (e.g., for fraud and punitive damages).<sup>104</sup> In arguing the latter, the purchasers relied on the Oklahoma Supreme Court's holding in *Rogers*,<sup>105</sup> allowing common law fraud claims as a supplement to the Disclosure Act on facts legally indistinguishable from those in *White*.<sup>106</sup> But, of course, HB 1319 intervened between these two cases.<sup>107</sup> Thus, the issue in *White* was whether HB 1319 changed the result in a case based on these facts.

It is all too rare that a legal issue is presented, and answered, with such clarity as in *White*. The Supreme Court noted the obvious point that the Court's role is to give effect to the intention of the Legislature as expressed in the language of the statute, and "if the Legislature amends a statute whose meaning has been judicially determined, we may presume that the Legislature's intent was to alter the law."<sup>108</sup> In doing so in this case, the Court concluded, the Legislature "utilized mandatory, clear and unmistakable language limiting the right of a purchaser to recover for failure to disclose known defects in residential property to those provided in the Disclosure Act."<sup>109</sup> The Court used similarly clear and unmistakable lan-

guage indicating that the Disclosure Act displaces any common law or statutory alternative to the Disclosure Act remedies, *i.e.*, it prohibits fraud claims and punitive damages and provides “the exclusive vehicle for recovery where misinformation is communicated in the sale of residential property...”<sup>110</sup>

### *Damages*

There can no longer be any reasonable doubt that the exclusive remedy for a purchaser, for disclosure violations governed by the Disclosure Act, is to recover “actual damages, including the cost of repairing the defect.”<sup>111</sup> As noted, the prevailing party is also entitled to court costs and reasonable attorney fees.<sup>112</sup> For purposes of seller liability, this leaves only the question of how to calculate the damages. Traditionally, the method of calculating damages depends upon the nature of the harm to the property.<sup>113</sup> The basic choice is between the cost of repair and the diminution in value caused by the breach of duty. In *Ellison v. Walker*,<sup>114</sup> for example, the Oklahoma Supreme Court stated that the measure of damages to real property is the reasonable cost of repairing the damage or restoring the property to its former condition, where that cost is less than the diminution in value and the property can be restored to substantially the condition it was in prior to the injury. Thus, the normal measure of the remedy for repairable damage to real property is the cost of repairing the damage rather than the diminution in value resulting from the defect or damage.

Of course, it is possible that undisclosed defects may cause permanent damage to the property, *i.e.*, property that cannot be economically repaired or “cannot be substantially restored to its condition prior to suffering the damage.”<sup>115</sup> In *Keck v. Bruster*,<sup>116</sup> the Oklahoma Supreme Court determined that “where damages are of a permanent nature, the measure of damage is the difference between the actual value (of the property) immediately before and immediately after the damage is sustained.”<sup>117</sup> In effect, for permanent damage to real property, the measure of damages is the resulting diminution in value.<sup>118</sup>

### **THE 2007 STATUTORY AMENDMENT**

In 2007, Oklahoma enacted another revision to the Disclosure Act, at section 836.A and B, inserting “or assisting” in the scope provision defining the duty of a real estate licensee to

obtain a disclosure or disclaimer statement from a seller.<sup>119</sup> For example, section 836.A now reads in part as follows:

“A real estate licensee representing or assisting a seller has the duty to obtain from the seller a disclaimer statement or a disclosure statement...”<sup>120</sup>

As a result of this change, a real estate licensee has the duty to obtain and provide a disclaimer or disclosure statement, whether the licensee is representing *or otherwise assisting* the seller or purchaser. This apparently expands the scope of the Disclosure Act for real estate licensees, imposing duties under the Disclosure Act in scenarios where the licensee is providing services that fall short of a formal representation.<sup>121</sup> But see the discussion immediately below.

It appears that there may be a potential conflict between the 2007 amendments to section 836 and the role played by the definition of “seller” in section 832.2, in that the latter requires representation by a real estate licensee and the former does not. Both sections purportedly implicate the scope of the Disclosure Act.

One possible interpretation is that section 836 effectively expands the definition of “seller” at section 832.2, for purposes of section 836. Section 832.2 defines “seller” as one who is represented by a real estate licensee or (if not) has received a written request from the purchaser for a disclaimer or disclosure statement pursuant to the Disclosure Act, essentially limiting the scope of the act to such sellers. However, under the 2007 amendment, a real estate licensee who is not representing a “seller” as defined in section 832.2 may nonetheless have duties under the Disclosure Act, pursuant to section 836, thus expanding the scope to cover transactions involving sellers who are not within the definition of the term “seller” in section 832.2. On the other hand, if the term “seller” as used in section 836 means “seller,” as defined in section 832.2, as is apparently the case throughout the rest of the Disclosure Act, then the 2007 amendment could be rendered essentially meaningless, as it would apply only to a transaction involving a “seller,” defined to mean one represented by a real estate licensee or who has already received a disclosure request from a purchaser. In this case, despite the apparent intent, section 836 of the Disclosure Act would not apply to a real estate licensee assisting an unrepresented seller.



## THE CARBAJAL CASE

In *Carbajal v. Safary*,<sup>122</sup> a real estate licensee (Safary) represented Carbajal (the purchaser) in Carbajal's purchase of a home. The sales contract provided a 10-day inspection period for the purchaser, but Carbajal chose not to obtain a structural inspection, instead relying on an oral description by Safary of a six-month old structural report provided by the sellers.<sup>123</sup> The sellers had obtained this structural report and provided it to Safary (as agent for Carbajal). Safary orally advised Carbajal that the report was "clean" and did not indicate any structural defects.<sup>124</sup> Carbajal did not receive a copy of the structural report until after the sale was closed. He subsequently discovered foundation cracks and alleged there were "profound structural and foundation problems" with the property, with estimated repair costs of \$70,000.<sup>125</sup> Carbajal sued Safary, alleging violations of the Disclosure Act and seeking damages including these repair costs.

The trial court dismissed the complaint and the Oklahoma Court of Civil Appeals affirmed, on grounds that Carbajal had not provided any evidence that the licensee's disclosure duties were triggered or violated by the receipt of the six-month old engineer's report.<sup>126</sup> The Oklahoma Supreme Court affirmed, noting that the six-month old structural report provided no indication of structural damage or defects, and there was no other evidence that Safary had any knowledge of such defects.<sup>127</sup> The Supreme Court concluded that "Safary did all that was required under [section] 836 by informing Carbajal that the report was 'clean.'"<sup>128</sup>

The Supreme Court's discussion of the Disclosure Act in *Carbajal* is concise and clear. The basis of the decision appears to be that the structural report indicated there were in fact no structural deficiencies, and this was the only information Safary had. Safary told Carbajal that the report was "clean," which was accurate, so he did not have a duty to disclose anything else. Therefore, this complied with the requirements of Disclosure Act sections 833 (required form of disclosure) and 836 (agent's duty to disclose).

The Court's opinion in *Carbajal* approvingly quotes language from the court of appeals decision, noting that a real estate licensee's duty to disclose is limited to his or her actual knowledge of defects in the property, defined as a condition with a "materially adverse effect

on the monetary value of the property."<sup>129</sup> The Oklahoma Supreme Court agreed with the court of appeals that no such defects were identified in the structural report, and therefore Safary violated no duty to disclose any such defects.<sup>130</sup>

## CONCLUSION

The law of *caveat emptor* was significantly revised by enactment of the Disclosure Act in Oklahoma. The Disclosure Act has resulted in improved disclosure of known defects by sellers and real estate licensees, and creates a sharp sword for purchasers when undisclosed defects known to the seller are subsequently found in their homes. This significantly reduces the procedural and substantive law burdens for purchasers seeking to recover for such disclosure violations, as compared to the previous requirements for a common law fraud claim.

A compensating factor for sellers is the purchaser's loss of punitive damages as a possible recovery. While this loss likely affects a relatively small number of cases, it necessarily means a focus on (and limitation to) actual damages.<sup>131</sup> Together with the provision mandating an award of prevailing party attorney fees and costs,<sup>132</sup> this provides an incentive for the seller to make a good faith effort at disclosure, and for both parties to settle on reasonable terms rather than engaging in extensive litigation over these issues. The Legislature and Oklahoma Supreme Court have further clarified these issues. The result appears to be better disclosure, and the likelihood of a satisfactory, negotiated settlement when disclosure fails. But, as usual, pitfalls and some uncertainties remain for all parties. Purchasers, sellers and real estate licensees should take due note and be aware of this legal environment.

1. See Douglas J. Shelton & Brandon J. Shelton, *Fair Disclosure of Defects in Residential Property*, 77 OBJ 2453 (2006) [Shelton & Shelton]; and Douglas J. Shelton, *The Sharp Sword of Residential Property Disclosures*, 75 OBJ 1391 (2004) [hereinafter Shelton]. Portions of this article are indebted to these prior publications. Since those articles were published, the further developments as described here include two Oklahoma Supreme Court decisions and another statutory amendment.

2. 60 Okla. Stat. §§831 *et seq.* See, e.g., *id.* §833 (disclosure and disclaimer requirements).

3. See *id.* §833; Shelton & Shelton, *supra* note 1. The terms "seller" and "purchaser" are defined in the Disclosure Act. See *infra* this text at notes 16-22.

4. See *infra* this text at notes 60-66 (buyers' remedies); *infra* this text at notes 111-118 (measure of damages).

5. See Shelton, *supra* note 1. "Real estate licensee" is defined in the Disclosure Act at 60 Okla. Stat. §832.4 as a person licensed under the Oklahoma Real Estate License Code, 59 Okla. Stat. §§858-101 *et seq.*

6. See 60 Okla. Stat. §837 and *infra* this text at notes 76-130.

7. See sources cited *supra* at note 6.

8. See definition of "seller" at 60 Okla. Stat. §832.2; Shelton, *supra* note 1; *infra* this text at notes 15-29.

9. See *supra* note 8. But see 60 Okla. Stat. §836; *infra* notes 11 and 122-130.

10. *Id.*

11. See 60 Okla. Stat. §837 (remedies). On the other hand, there may be some doubt as to the applicability of the Disclosure Act in this circumstance. See 60 Okla. Stat. §832.2. (defining “seller,” a key term regarding the scope of the Disclosure Act, in terms of representation by a licensee or receipt of a request from a buyer). See also discussion below at notes 15-22. But see *infra* this text at notes 119-121 (scope for duties of licensee).

12. 60 Okla. Stat. §834.C.

13. *Id.* §836.B. See *infra* this text at notes 119-121.

14. See *supra* notes 8-9; Shelton, *supra* note 1, at 1392.

15. See 60 Okla. Stat. §837; authorities cited *supra* at note 1.

16. See *supra* this text at note 3.

17. Theoretically, this could include a rental transaction, e.g., the lease of a rent house or duplex unit. However, the remedies provisions of the Disclosure Act make such a claim unlikely, as actual damages would be limited to making the property habitable for the lessee.

18. See 60 Okla. Stat. §832.2. See also *id.* §832.3, defining “purchaser” as one attempting to acquire a possessory interest in property. Compare *id.* §832.6, discussed *infra* at notes 119-130 (scope and duties imposed on real estate licensees).

19. Thereby including single family homes and duplexes. While the Disclosure Act inherently has its primary impact in the context of “used” homes, the scope appears to include newly-constructed properties as well.

20. See 60 Okla. Stat. §833; *supra* note 3.

21. See *id.* §832; Shelton & Shelton, *supra* note 1. But see *infra* notes 119-130 (scope and duties for real estate licensees).

22. See 60 Okla. Stat. §§833-837.

23. See, e.g., *Sewak v. Lockhart*, 699 A. 2d. 755 (Superior Ct. Penn. 1997) (fraudulent concealment of structural damage constituting a hidden, latent defect); *Van Booven v. Small*, 938 S.W. 2d. 536 (Mo. 1997) (fraudulent concealment of fire damage); cf. *Smith v. Stanley*, 477 S.E. 2d. 618 (Ct. App. Ga. 1997) (no fraudulent concealment when ordinary care in making an inspection would have revealed the defect); *Swinton v. Whitinsville Savings Bank*, 42 N.E. 2d. 808 (Mass. 1942) (there is no fiduciary duty of disclosure in an arms-length transaction absent a tortious concealment).

24. See, e.g., *Gutelius v. Sisemore*, 1961 OK 243, 365 P.2d 732.

25. *Wyrick v. Campbell*, 1918 OK 1, 170 P. 267, 67 Okla. 240.

26. *McDaniel v. Quinn*, 1957 OK 23, 307 P.2d 127.

27. *Onstott v. Osborne*, 1966 OK 3, 417 P.2d 291, 294. See also Shelton, *supra* note 1, at 1393.

28. See National Association of Realtors, *Property Condition Disclosure* 3, 13-21 (1993); Shelton, *supra* note 1, at 1393; *Rogers v. Meiser*, 2003 OK 6, 68 P.3d 967, 975 (Okla. S. Ct.) (citing Gatlin, *Reforming Residential Real Estate Transactions: An Analysis of Oklahoma's Disclosure Statute*, 22 Okla. City Univ. L. Rev. 735, 744 (1997)).

29. Residential Property Condition Disclosure Act, 1994 Okla. Sess. Laws 620, 625. See Shelton, *supra* note 1; Gatlin, *supra* note 28.

30. See 60 Okla. Stat. §833. See *supra* this text at note 3; Shelton, *supra* note 1, at 1393.

31. See 60 Okla. Stat. §833.A.1.

32. *Id.* §833.B.

33. *Id.* §833.D.

34. *Id.* §833.A.1.

35. 60 Okla. Stat. §834.A. “Offer to purchase” is defined at *id.* §832.1, as a written contractual offer to purchase property.

36. *Id.* §834.B.

37. 60 Okla. Stat. §833.C; Shelton, *supra* note 1, at 1393.

38. 60 Okla. Stat. §834.C. If the offer to purchase has been made, it must be re-confirmed. *Id.*

39. *Id.* §833.C.

40. *Id.* §833.D.

41. *Id.* §833.B.1; Shelton, *supra* note 1, at 1394.

42. 60 Okla. Stat. §833.D.

43. Shelton, *supra* note 1, at 1394, citing the OREC’s website at [www.state.ok.us/~orec/news.html](http://www.state.ok.us/~orec/news.html). The OREC disclosure statement began as one page; it is now three pages in length.

44. Cal. Civ. Code §1102.6. See Shelton, *supra* note 1, at 1394.

45. *Alexander v. McKnight*, 9 Cal. Rptr. 2d 453, at 456. In *Alexander*, the court concluded that buyers normally do not discover a neighborhood nuisance when examining a residence.

46. See Shelton, *supra* note 1, at 1394.

47. 60 Okla. Stat. §832.10. But see *supra* note 43 (disclosure of legal issues).

48. See *supra* this text at note 43; Shelton, *supra* note 1, at 1394.

49. 60 Okla. Stat. §834.B.2.b.

50. 60 Okla. Stat. §833.B.2.c.

51. See 60 Okla. Stat. §834.C.

52. See 60 Okla. Stat. §833 (required disclosures); Shelton, *supra* note 1, at 1395.

53. Shelton, *supra* note 1, at 1395.

54. *Hughes v. Stusser*, 1996 WA 150, 415 P.2d 89, 68 Wash.2d 707; see Shelton, *supra* note 1, at 1395.

55. *Hughes*, 415 P.2d 89.

56. See 60 Okla. Stat. §834.A; *supra* this text and note 35; Shelton, *supra* note 1, at 1395.

57. See 60 Okla. Stat. §832.2.b.

58. See 60 Okla. Stat. §834.B; Shelton, *supra* note 1, at 1395.

59. *Id.*

60. See 60 Okla. Stat. §§833, 835.A.

61. *Id.* §835.B.

62. *Id.*; Shelton, *supra* note 1, at 1396.

63. See 60 Okla. Stat. §837.B.

64. *Id.* See also *supra* note 23 (common law standards).

65. *Richey v. Patrick*, 904 P.2d 708, 802 (Wyo. 1995). The latest Oklahoma caselaw is consistent on this point. See *infra* notes 100-110.

66. *Richey*, 904 P.2d at 802.

67. See 60 Okla. Stat. §836. This applies whether the licensee is representing or merely “assisting” the seller. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* §836.B.

71. *Id.* §836.C.

72. *Id.* §836.E. See also discussion below at notes 119-130.

73. Shelton, *supra* note 1, at 1397. See also discussion below at notes 119-130.

74. These facts were previously recited, in Shelton, *supra* note 1, at 1397.

75. *Id.*

76. See Shelton, *supra* note 1, at 1397.

77. 60 Okla. Stat. §837.A.1, B.

78. *Id.* §837.A.2, B.

79. *Id.* §837.B.

80. *Id.* See also *id.* §837.F.

81. Tit. 60 Okla. Stat. §837.D. Obviously, this cuts both ways.

82. *Id.* §837.E.

83. *Id.* See also Shelton, *supra* note 1, at 1397.

84. 1998 Ok Civ App 121, 963 P.2d 26, 69 OBJ 3266.

85. *Id.* See also Shelton, *supra* note 1, at 1397.

86. *Id.* See also 60 Okla. Stat. §837.B.

87. See 60 Okla. Stat. §837.C, F.

88. See *Gutelius v. Sisemore*, 1961 OK 243, 365 P.2d 732; *Finefrock v. Carney*, 1953 OK 327, 263 P.2d 744, 747; *Eckert v. Flair Agency Inc.*, 1995 Ok Civ App 151, 909 P.2d 1201, 1204, 67 OBJ 430; *Brown v. B & D Land Co.*, 1991 Ok Civ App 95, 823 P.2d 380, 381 63 OBJ 387. See also sources cited *supra* at note 23.

89. See Tit. 12 Okla. Stat. §95. See also *Baker v. Massey*, 1977 OK 170, 569 P.2d 987, 991.

90. 2003 OK 6, 68 P.3d 967.

91. *Id.* See also Shelton, *supra* note 1, at 1398.

92. *Rogers*, 68 P.3d at 969.

93. *Id.* at 978.

94. *Id.* See also Shelton, *supra* note 1, at 1398.

95. See 60 Okla. Stat. §837.B.

96. 23 Okla. Stat. §9.1.

97. See *supra* this text and notes 76-89. The Supreme Court issued the *Rogers* opinion on Feb. 4, 2003; on Feb. 26, 2003, the Oklahoma House of Representatives passed HB 1319. See Shelton, *supra* note 1, at 1398.

98. 60 Okla. Stat. §837.F.

99. See Shelton, *supra* note 1, at 1398.

100. 80 OBJ 2083 (S.Ct. Oct. 13, 2009); 2009 OK 79, 224 P.3d 679.

101. *Id.*, 80 OBJ 2083-85.

102. *Id.*

103. *Id.*, at 2085. This appeal followed. *Id.*

104. *Id.* at 2084.

105. 68 P.3d 967. See *supra* this text at notes 90-97.

106. See *White*, 80 OBJ at 2085.

107. *Id.*

108. *Id.* at 2086.

109. *Id.*

110. *Id.* The trial court’s decision was reversed and remanded accordingly. *Id.*

111. 60 Okla. Stat. §837.B.

112. *Id.* §837.D.

113. See Shelton, *supra* note 1, at 1401.

114. 1955 OK 86, 281 P.2d 931.

115. See Shelton, *supra* note 1, 1401.

116. 1962 OK 35, 368 P.2d 1003.
117. *Keck*, 368 P.2d at 1005.
118. See *Keck*, 368 P.2d, at 1005 (quoting *A.B.C. Construction Co. of Oklahoma v. Thomas*, 347 P.2d 649 at 651).
119. Laws 2007, c. 42, §6 (eff. Jan. 1, 2008) (codified at Tit. 60 Okla. Stat. §836.A and B).
120. *Id.* §836.A. See also *id.* §836.B (similar obligation for a licensee representing or assisting a purchaser).
121. Recall that the scope of the Disclosure Act is otherwise limited by the definition of "seller" at *id.* §832.2, in turn referencing representation by a real estate licensee (or a request from the purchaser).
122. 80 OBJ 1474 (2009).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 1475.
127. *Id.* at 1476. The engineer's structural report concluded: "There are no structural requirements at this residence." *Id.*
128. *Id.* It can be noted here that 60 Okla. Stat. §836.E expressly provides that the real estate licensee has no duty to conduct an inspection or verify any statements or disclosures by the seller.
129. *Carbajal*, 80 OBJ at 1476 (quoting the Oklahoma Court of Civil Appeals opinion in the case).
130. *Id.*
131. See 60 Okla. Stat. §837.B.
132. *Id.* §837.D.

## ABOUT THE AUTHORS



Douglas J. Shelton received his bachelor's degree in 1978 and his J.D. in 1981 from the University of Oklahoma. He is admitted to practice in all Oklahoma state and federal courts, and the U.S. Court of Appeals for the 10th Circuit. He is a member of the Oklahoma Bar Association, Cleveland County Bar Association, and the Oklahoma and American Associations for Justice. He is a partner in Shelton Voorhees Law Group, which practices in the area of civil litigation including trials and appeals in construction, real estate, nursing home and personal injury.



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# Taxation Law Section

## 2010 Oklahoma Tax Legislation

By Sheppard F. Miers Jr.

Legislation enacted in the 2010 session of the Oklahoma Legislature included the changes summarized below, which are some of the new Oklahoma state laws on taxation.

### INCOME TAX

#### *Two-Year Moratorium/Income Tax Credits*

A two-year moratorium is imposed on numerous Oklahoma income tax credits. The moratorium shall be in effect for the time period from July 1, 2010, through June 30, 2012. The Oklahoma income and bank privilege tax credits subject to the two-year moratorium are credits allowed for 1) hazardous waste recycling and reduction, 2) gas used in manufacturing, 3) investment in depreciable property used in manufacturing or net increase in employees engaged in manufacturing, 4) contributions to the Energy Conservation Assistance Fund, 5) utilities or burning coal to generate utilities for manufacturing, 6) investments in agricultural processing, 7) employer provision of child care services, 8) qualifying expenses of entities providing of child care services, 9) guaranty fee for small business financing, 10) production of electricity generated by zero-emission facilities, 11) Oklahoma manufacturers of advanced small wind turbines, 12) food service establishment immunization of employees against Hepatitis A, 13) historic hotel and newspaper plant rehabilitation; qualified rehabilitation certified historic structures, 14) contractor expenditures in construction of energy efficient residential property, 15) employer payment of eligible wages and medication expenses for injured workers returning to work, 16) investment cost of qualified recycling facilities, 17) ethanol facility production, 18) biodiesel facility production, 19) ad valorem taxes exempted for an enterprise locating a new facility or expanding

a facility within an enterprise zone and incentive district, 20) purchase and transportation of poultry litter, 21) profit from investment in for production of new Oklahoma film or music project, 22) cost of dry fire hydrant or water storage for it, 23) qualified railroad reconstruction or replacement expenditures, 24) costs associated with operation of business of rearing specially trained canines, 25) tuition reimbursed to qualified aerospace employee, 26) compensation paid to a qualified aerospace employee, 27) qualified aerospace employees, 28) income of financial institution pursuant to a loan under the Rural Development Loan Act, 29) bank and credit union origination fee paid to Stafford loan guaranty program, 30) net increase in full-time employees in computer services, data processing or research and development. SB 1267, §§1-32, amending 27A O. S. 2001, §2-11-303; 68 O. S. Supp. 2009, §2357.; 68 O. S. Supp. 2009, §2357.4; 68 O. S. 2001, §2357.6; 68 O. S. Supp. 2009, §2357.11; 68 O. S. Supp. 2009, §2357.25; 68 O. S. Supp. 2009, §2357.26; 68 O. S. Supp. 2009, §2357.27; 68 O. S. 2001, §2357.30; 68 O. S. Supp. 2009, §2357.32A; 68 O. S. Supp. 2009, §2357.32B; 68 O. S. Supp. 2009, §2357.33; 68 O. S. Supp. 2009, §2357.41; 68 O. S. Supp. 2009, §2357.46; 68 O. S. Supp. 2009, §2357.47; 68 O. S. 2001, §2357.59; 68 O. S. Supp. 2009, §2357.66; 68 O. S. Supp. 2009, §2357.67; 68 O. S. 2001, §2357.81; 68 O. S. Supp. 2009, §2357.100; 68 O. S. Supp. 2009, §2357.101; 68 O. S. Supp. 2009, §2357.102; 68 O. S. Supp. 2009, §2357.104; 68 O. S. Supp. 2009, §2357.203; 68 O. S. Supp. 2009, §2357.302; 68 O. S. Supp. 2009, §2357.303; 68 O. S. Supp. 2009, §2357.304; 68 O. S. Supp. 2009, §2370; 68 O. S. Supp. 2009, §2370.3; 68 O. S. Supp. 2009, §54006; effective July 1, 2010.

*Special Exception; Delayed Use of Credits for  
Manufacturing Operations, Zero-Emission  
Electricity Facilities, Certified Historic Hotel,  
Newspaper Plant or Registered Historic Structures  
Accruing in Moratorium Period*

The two-year moratorium on income tax credits under SB 1267 from July 1, 2010, to June 30, 2012, is modified for the credits for investment made in qualified depreciable property placed in service for use in a manufacturing operation, qualified aircraft maintenance or manufacturing facility or a qualified web search portal. Such credits accrued during that period shall be limited to a period for two taxable years, and limited in each taxable year to 50 percent of the total amount of the accrued credit; may not be claimed for any period prior to the taxable year beginning Jan. 1, 2012; and may not be used to file an amended tax return for any taxable year prior to the taxable year beginning Jan. 1, 2012. Tax credits allowed for production and sale of electricity generated by zero-emission facilities in the state, and for qualified rehabilitation expenditures incurred in connection with any certified hotel or certified newspaper plant building located in an increment or incentive district created pursuant to the Local Development Act, or for qualified rehabilitation expenditures incurred in connection with a certified historic structure may be claimed beginning July 1, 2012, for any event, transaction, investment, expenditure or other act occurring on or after July 1, 2010, except that any tax credits which accrue during the period July 1, 2010, through June 30, 2012, may not be claimed for any period prior to the taxable year beginning Jan. 1, 2012. No credits which so accrue during the period July 1, 2010, through June 30, 2012, may be used to file an amended tax return for any taxable year prior to the taxable year beginning Jan. 1, 2012. HB 3024, §§2, 4, 5, 7; amending 68 O.S. Supp. 2009, §§2357.4, 2357.32A, 2357.41; effective June 10, 2010.

*Eighteen-Month Moratorium on Credits  
for Qualified Small Business Capital  
Company Investments*

A moratorium is placed on credits allowed for qualified small business capital investments on or after June 1, 2010, through Dec. 31, 2011. During the moratorium no amount of qualified investment in a qualified small business capital company or which has not been invested in one or more Oklahoma small business ventures prior to the effective date of the moratorium, shall be eligible for any credit. No

qualified investment made in a qualified small business capital company or in one or more Oklahoma small business ventures during the period of the moratorium shall be eligible for any credit. No amount of qualified investment made in conjunction with investment in Oklahoma small business ventures prior to the effective date of the moratorium, shall be eligible for any credit. No qualified investment made in conjunction with investment made by a qualified small business capital company in Oklahoma small business ventures during the period of the moratorium shall be eligible for any credit. SB 1590, §§1-3; adding 68 O. S. Supp. 2010, §2357.61a; amending 68 O. S. Supp. 2009, §§2357.62, 2357.63; effective June 1, 2010; (Note: SB 1590 was enacted without emergency effective date clause).

*Eighteen-Month Moratorium on Credits  
for Qualified Rural Small Business Capital  
Company Investments*

A moratorium is placed on credits allowed for qualified investment in qualified rural small business companies on or after the effective date of the moratorium through Dec. 31, 2011. No amount of qualified investment in a qualified rural small business capital company which has not been invested in one or more Oklahoma rural small business ventures prior to the effective date of the moratorium shall be eligible for any credit. No qualified investment made in a qualified rural small business capital company or qualified investment made by a qualified rural small business capital company in Oklahoma rural small business ventures during the period of the moratorium shall be eligible for any credit. No amount of a qualified investment made in conjunction with investment made by a qualified rural small business capital company which has not been invested in Oklahoma rural small business ventures prior to the effective date of the moratorium shall be eligible for any credit. No qualified investment made in conjunction with investment made by a qualified rural small business capital company in Oklahoma rural small business ventures during the period of the moratorium shall be eligible for any credit. SB 1590, §§4-6; adding 68 O. S. Supp. 2010, §2357.73; amending 68 O. S. Supp. 2009, §§2357.72a, 2357.74; effective June 1, 2010; (Note: SB 1590 was enacted without emergency effective date clause).

### *Income Tax Credit; Business Activity Tax*

For taxable years beginning on or after Jan. 1, 2010, and ending on or before Dec. 31, 2012, a credit shall be allowed against Oklahoma income tax in the amount of \$25 of the Oklahoma business activity tax paid. No credit is allowed for any amount tax paid by a person subject to Oklahoma franchise tax equal to the amount such person paid or was required to pay for the taxable period prior to Dec. 31, 2010. The credit may only be taken for the year in which the business activity tax is levied and may only be taken if it is timely paid. The credit is not refundable and shall not carry forward. SJR 61 §6; adding 68 O.S. Supp. 2010, §1219; effective Aug. 27, 2010.

### *Clean-Burning Motor Vehicle Credit; Electric Motor Vehicle Manufacturer Credit*

The credit for investment in qualified clean-burning motor vehicle property is limited to investments in qualifying property placed in service before July 1, 2010. Equipment installed in a vehicle propelled by a hydrogen fuel cell or property related to the delivery of hydrogen into the fuel tank of a motor vehicle shall only be eligible for a credit for tax year 2010. A one-time income tax credit shall be allowed to electric motor vehicle manufacturers for electric motor vehicles manufactured in the state. The credit for manufacturing is allowed for qualifying electric motor vehicles manufactured after June 30, 2010. Modifying existing electric motor vehicles shall not be considered manufacturing. The credit is allowed in different amounts for electric motor vehicles, medium-speed electric motor vehicles and low-speed electric motor vehicles, as defined in the statute. A five-year carryover of the credit is allowed. HB 3024, §§3, 6; amending 68 O. S. Supp. 2009, §2357.22; adding 68 O. S. Supp. 2010, §2357.402; effective June 9, 2010.

### *Credit for Donations to Biomedical and Cancer Research Institutes*

A credit is allowed against Oklahoma income tax for any taxpayer that makes a donation to an independent biomedical research institute or a cancer research institute that meets certain qualifying requirements, including receiving specified levels of funding from the National Institutes of Health and National Cancer Institute. Specified limits apply to the number and amount of credits allowed. The credit is intended to apply to donations to Oklahoma Medical Research Foundation and the OU Cancer Insti-

tute, subject to specified limits. SB 1919, amending 68 O.S. Supp. 2009, §2357.45; effective Jan. 1, 2011.

### *Registered Emergency Medical Responder Death Benefit Exemption*

A death benefit paid to a registered emergency medical responder for death in the line of duty shall be exempt from Oklahoma income tax. HB 2551, §4; amending 68 O.S. Supp. 2009, §2358; effective Jan. 1, 2010.

### *Add Back of Federal Debt Discharge Exclusion*

The amount excluded from federal taxable income for discharge of indebtedness upon reacquisition of a debt instrument under Internal Revenue Code section 108(i)(1) must be added back to Oklahoma taxable income for taxable years beginning on or after Jan. 1, 2010. SB 1396, §1; amending 68 O.S. Supp. 2009, §2358; effective Aug. 27, 2010.

### *Coal Credit Extension*

The credit allowed for utilities or burning coal to generate utilities for use in manufacturing operations in Oklahoma is extended to apply to tax years ending on or before Dec. 31, 2014, (subject to moratorium for the period July 1, 2010 through June 30, 2012). HB 2519, §1; amending 68 O.S. Supp. 2009, §2357.11; effective Nov. 1, 2010.

### *Tourism Project Tax Credits Extension*

Income or sales tax credit incentives provided for approved projects under the Oklahoma Tourism Development Act are modified to include a destination hotel. Credit amounts are to be based on a percent of approved cost that will result in a project being revenue neutral to the state as determined by the Tax Commission. No credits will be authorized after 2015. SB 461, §§1-4, amending 68 O. S. Supp. 2009, §§2357.36, 2357.37, 2357.40; effective May 10, 2010.

### *Specified Tax Return Preparer Electronic Filing*

A specified tax return preparer as defined in section 6011 of the Internal Revenue Code must file all individual income tax returns prepared by such preparer by electronic means after Dec. 31, 2010. The federal definition of "specified tax return preparer" means, with respect to any calendar year, any tax return preparer unless such preparer reasonably expects to file 10 or fewer individual income tax returns during such calendar year. HB 3166,

§4; amending 68 O. S. Supp. 2009, §2385; effective Nov. 1, 2010.

## SALES AND USE TAX

### *Out-of-State Retailers Deemed to Be Engaged in Business in Oklahoma*

An out-of-state retailer shall be deemed to be engaged in the business of selling tangible personal property for use in Oklahoma under certain circumstances. This will be deemed if 1) the out-of-state retailer holds a substantial ownership interest in, or is owned in whole or in substantial part by, a retailer maintaining a place of business within this state, and 2) the out-of-state retailer sells the same or a substantially similar line of products as the related Oklahoma retailer and does so under the same or a substantially similar business name, or the Oklahoma facilities or Oklahoma employees of the related Oklahoma retailer are used to advertise, promote or facilitate sales by the retailer to consumers. In the alternative, this will be deemed if the out-of-state retailer holds a substantial ownership interest in, or is owned in whole or in substantial part by, a business that maintains a distribution house, sales house, warehouse or similar place of business in Oklahoma that delivers property sold by the out-of-state retailer to consumers. A retailer that is part of a controlled group of corporations with a member corporation that is a retailer engaged in business in the state is presumed to be a retailer engaged in business in the state. Any retailer making sales of tangible personal property to purchasers in the state by mail, telephone, Internet or other media that has a local contractor to perform installation or maintenance services in the state shall be considered a retailer. HB 2359, §1; amending 68 O. S. Supp. 2009, §1401; effective July 1, 2010.

### *Statement of Legislative Intent*

A statutory declaration of intent is made to specifically include within the state use tax all storage, use or other consumption of tangible personal property purchased or brought into the state through the continuing, regular or systematic solicitation in the state consumer market by out-of-state retailers through the Internet, mail order and catalog publications. HB 2359, §8; adding 68 O. S. Supp. 2010, §§1407.5; effective July 1, 2010.

### *Out-of-State Vendors Must Notify Purchasers of Use Tax Liability*

An out-of-state vendor not required to collect Oklahoma use tax shall provide readily visible notification on its retail Internet website or retail catalog and invoices provided to customers that use tax is imposed and must be paid by the purchaser, unless otherwise exempt, on the storage, use or other consumption of tangible personal property in the state. This requirement shall not be effective as law until a Tax Commission rule has become effective pursuant to the Oklahoma Administrative Procedures Act. HB 2359, §2; adding 68 O. S. Supp. 2010, §1406.1; effective July 1, 2010.

### *Out-of-State Retailer Compliance Initiative*

The Oklahoma Tax Commission is to establish an out-of-state Retailer Compliance Initiative to encourage voluntary registration and remittance of use taxes owed to the state of Oklahoma. The tax commission shall not seek payment of uncollected use taxes from an out-of-state retailer that registers to collect and remit use taxes on sales prior to registration if the retailer was not registered in Oklahoma in the 12-month period preceding the effective date of July 1, 2010. Assessment of uncollected use taxes, penalty or interest for sales during the period the retailer was not registered is precluded provided registration occurs prior to July 1, 2011. That relief is not available as to a matter on which a retailer has received a notice that an audit has commenced, or for use taxes already paid or collected. The relief continues as long as a retailer continues registration and collection and remittance for a period of at least 36 months, and the statute of limitations is tolled during such period. Registration shall not be used as a factor in determining whether a retailer has nexus in Oklahoma for any other taxes including income taxes. Registered retailers shall receive a discount for timely reporting and remitting use taxes. No registration fee will be charged for registration under the program. The Oklahoma Tax Commission must issue rules detailing the program. HB 2359, §3, adding 68 O. S. Supp. 2010, §1407.2; effective July 1, 2010.

### *Internet Retailers Outreach Program*

The Oklahoma Tax Commission shall implement an outreach program to Internet retailers, which shall include contacting them for review of their business activities to determine if such activities may require the registration and collection of Oklahoma use taxes and the provid-

ing of information to the out-of-state retailers about the Retailer Compliance Initiative to encourage registration in Oklahoma. HB 2359, §4, adding 68 O. S. Supp. 2010, §1407.3; effective July 1, 2010.

*Use Tax Vendor Recordkeeping,  
Compliance Deduction*

To compensate sellers and vendors for keeping use tax records, filing reports and remitting tax when due, a deduction is allowed equal to the amount provided by vendors under the Oklahoma Sales Tax Code. The intent of the Legislature to specifically include within the use tax the storage, use or consumption of tangible personal property purchased or brought into the state through solicitation of out-of-state Internet, mail order and catalog retailers is stated. HB 2359, §§7, 8, amending 68 O. S. 2001, §1410.1; adding 68 O.S. Supp. 2010, §1407.5; effective July 1, 2010.

*Consumer Use Tax Compliance Initiative*

To encourage voluntary disclosure and payment of use taxes owed to the state, the Oklahoma Tax Commission is to establish a Consumer Compliance Initiative for consumers liable for payment of use taxes. A taxpayer shall be entitled to a waiver of penalty, interest and other collection fees due if the taxpayer voluntarily files delinquent tax returns and pays the taxes due during the initiative. No assessment of use tax levied shall be made for more than one year prior to the date the consumer registers to pay applicable use taxes under the initiative. This shall not be available to a consumer with respect to any matter or matters for which the consumer received notice of the commencement of an audit and which audit is not yet finally resolved including any related administrative and judicial processes, and is not available for use taxes already paid or remitted to the state. The Oklahoma Tax Commission must promulgate rules detailing the terms and other conditions of the program, and develop and distribute a fact sheet explaining responsibilities regarding the reporting and payment of use taxes and how business entities can examine their records to establish the use tax due on purchases from out-of-state sellers. The fact sheet will be made available on the Oklahoma Tax Commission's website, and by mail to targeted industries, existing licensees and all tax commission license applicants. The tax commission is authorized to publicly advertise the Consumer Compliance Initiative. To assist consumers in remitting use taxes due, the tax commission shall develop and maintain an

option for consumers to remit use taxes through an Internet-based portal. HB 2359, §5, adding 68 O. S. Supp. 2010, §1407.4; effective July 1, 2010.

*Tax Return Preparer Duties on  
Use Tax Compliance*

Any person that prepares any state tax returns or reports for an Oklahoma taxpayer, other than the employer of the preparer, for compensation, when assisting taxpayers in preparing an individual income tax return, must advise their clients of their responsibility to remit use taxes through the use tax remittance line on the individual income tax return or by filing a consumer use tax return. HB 2359, §6, amending 68 O. S. Supp. 2009, §249; effective July 1, 2010.

*Vendor Compensation Sales Tax Collection,  
Recordkeeping, Filing*

To compensate the seller or vendor in keeping sales tax records, filing reports and remitting tax when due, the seller or vendor shall be allowed a deduction of 1 percent of the tax due, subject to a maximum of \$2,500 per month. The deduction was previously 2 ½ percent, subject to maximum of \$3,300 per month. In the event federal authority authorizes Oklahoma to require remote sellers to collect and remit sales and use taxes, the Oklahoma Tax Commission is authorized to promulgate rules which provide for deductions in amounts subject to limitations in the Streamlined Sales and Use Tax Agreement for all sellers and vendors. HB 2359, §14; amending 68 O. S. Supp. 2009, §1367.1; effective July 1, 2010.

*Vendor Compensation; Use Tax  
Recordkeeping, Filing*

For the purpose of compensating the seller or vendor in keeping use tax records, filing reports and remitting tax when due, a seller or vendor shall be allowed a deduction equal to the amount provided for vendors under the Oklahoma Sales Tax Code. HB 2359, §7, amending 68 O. S. 2001, §1401.1; effective July 1, 2010.

*Streamlined Sales and Use Tax  
Agreement Incentives*

A remote seller vendor that initially contracts with a certified service provider for collection and remittance of Oklahoma sales and use taxes to the state between Oct. 1, 2010 and July 1, 2011 will be allowed start-up cost incentive compensation of 20 percent of the taxes collected for six months, not exceeding \$500, subject to payback. A remote seller vendor is



allowed additional options and compensation arrangements under provisions of the statute. HB 2359, §13, amending 68 O. S. Supp. 2009, §1354.31; effective July 1, 2010.

#### *Tax Commission Collection of City and County Sales Tax*

Cities and counties are required to contract with the Oklahoma Tax Commission to have it collect city and county sales taxes. The tax commission is authorized to release to a city the list of sales and use tax collections of persons in the city, a list of taxpayers issued a sales tax permit and of taxpayers whose business stopped in the city during the previous month. The tax commission is authorized to refer accounts of taxpayers that have not filed for two or more months to a debt collection agency without establishment of tax liability after notice to the taxpayer. A city may upon request to and approval by the tax commission, engage private auditors or audit firms, subject to specified information and cost allowance features. HB 2359, §§9, 10, 15, 16; amending 68 O. S. 2001, §205.1, 68 O.S. Supp. 2009, §255, 68 O. S. 2001, §1371, 68 O.S. Supp. 2009, §2702; effective July 1, 2010.

#### *Penalty for Refusal to Honor Disabled Veteran Exemption*

The \$500 penalty for a vendor's willful or intentional refusal to honor a sales tax exemption for disabled veterans is made a misdemeanor subject to successive \$500 penalties for each violation. The tax commission is to refer any vendor who has refused to honor the exemption more than once to the district attorney for prosecution. The vendor for this purpose means the individual most responsible for supervising conduct of any employee who refuses to honor the exemption. SB 1321, §1; amending 68 O. S. Supp. 2009, §1361.1; effective July 1, 2010.

#### *Sales Tax Exemption Precious Metals*

An Oklahoma sales tax exemption shall be allowed for sales of gold, silver, platinum, palladium or other bullion items such as coins and bars and legal tender of any nation, which legal tender is sold according to its value as precious metal or as an investment. The items must be stored within a recognized depository facility, as defined in the statute. The exemption does not apply to fabricated metals that have been processed or manufactured for artistic use or as

jewelry. HB 3166, §5; amending 68 O. S. Supp. 2009, §1357; effective Nov. 1, 2010.

#### *Sales Tax for Operation of Regional Transportation Authority*

A combination of cities, towns and counties or their agencies may levy a sales tax for construction, maintenance and operation of transportation or regional economic development projects with voter approval. This authority previously extended to planning, financing and constructing projects. HB 2846, §1-2; amending 68 O. S. Supp. 2009, §1370.7; effective Nov. 1, 2010.

#### *Streamlined Sales and Use Tax System*

A new classification of Model 4 Seller is added to the definitions governing administration of the Streamlined Sales and Use Tax Administration Act. All sales by florists shall be sourced to the business location of the vendor. HB 3166, §2, 3; amending 68 O. S. Supp. 2009, §§1354.15, 1354.27; effective Nov. 1, 2010.

### **AD VALOREM TAX**

#### *Business Activity Tax in Lieu of Ad Valorem Tax on Intangible Personal Property*

A business activity tax code is enacted to be levy a business activity tax in lieu of ad valorem tax on intangible personal property that is not exempted by Article 10, §6A of the Oklahoma Constitution. The business activity tax in lieu of ad valorem tax on non-exempted intangible personal property is to be in effect for 2011 and 2012. The business activity tax in lieu of ad valorem tax on non-exempt intangible personal property will not apply to public service corporations, railroads and air carriers. SJR 61, §§1-5; adding 68 O. S. Supp. 2010, §§1215, 1216, 1217, 1218; effective Aug. 27, 2010.

#### *Amendment in Lieu Insurance Company Fees/Taxes*

Under the current statutes in effect, insurance companies must annually report to Oklahoma's insurance commissioner the total amount of direct written premiums, membership, application, policy and/or registration fees charged annually and must annually pay certain license fees and taxes. Such fees and taxes are paid in lieu of all other state taxes or fees, except certain delineated fees and taxes. Such excepted fees and taxes now include ad valorem taxes levied on intangible personal property. SJR 61 §20; amending 36 O.S. Supp. 2009, §624; effective Aug. 27, 2010.

### *Exemption Retained by Refinanced Projects*

Certain public trust financed projects exempt from ad valorem taxation immediately before a financing or refinancing of the construction, acquisition and/or improvement and rehabilitation shall not become subject to ad valorem taxation because they are financed or refinanced. HB 2615, §§1-2, amending 60 O. S. Supp. 2009, §178.6; 68 O. S. Supp. 2009, §2887; effective Nov. 1, 2010.

### *Tax Sale Notices*

The notice procedures in sale of property for delinquent ad valorem tax are amended to clarify determination of record owners. HB 2935, §§1-3, amending 68 O. S. Supp. 2009, §§3106, 3127; effective Nov. 1, 2010.

## **FRANCHISE TAX**

### *Moratorium on Levy of Franchise Tax*

A moratorium is placed on the levy of the Oklahoma franchise tax in conjunction with the levy of the new Oklahoma business activity tax. The moratorium applies to requirements to file any and all reports or returns due or which would have been due pursuant to the provisions of the Oklahoma franchise tax code for the taxable periods beginning July 1, 2010, and ending before July 1, 2013. SJR 61, §§1,17; placing moratorium on 68 O. S., 2001, §§1203-1212; effective Aug. 27, 2010.

## **OKLAHOMA BUSINESS ACTIVITY TAX**

### *Business Activity Tax; In Lieu of Ad Valorem Tax/Intangible Personal Property*

An Oklahoma business activity tax code was enacted. The declared purpose of the law is to establish a revenue-neutral mechanism to provide a more fair and simplified taxation of businesses and individuals in Oklahoma while maintaining revenue levels for support of the general governmental functions of the state. The code is effective for tax years beginning on or after Jan. 1, 2010, and shall expire and cease to have the force and effect of law for tax years beginning after Dec. 31, 2012, unless extended by the Legislature. For tax years beginning on or after Jan. 1, 2010, an annual business activity tax of \$25 is levied on each person doing business in this state. In addition, an annual business activity tax equal to 1 percent of the net revenue from business activity that is allocated or apportioned to Oklahoma is levied on each person doing business in Oklahoma. The 1 percent business activity tax on net revenue is not

required to be paid for 2010, 2011 or 2012. However, any corporation or other person subject to the Oklahoma franchise tax must pay a business activity tax equal to the amount of franchise tax such corporation or person was required to pay for the taxable period ending prior to Dec. 31, 2010. The business activity tax shall not be levied for the taxable year during which the person begins doing business in Oklahoma, although the person must file a "no tax" report to comply with regulations adopted by the Oklahoma Tax Commission. The tax required to be paid is in lieu of any and all other taxes levied by the state, counties, cities or towns on intangible personal property of any person, except for public service corporations, railroads and air carriers. The business activity tax is also in lieu of the ad valorem tax on intangible personal property of each person for calendar years 2007, 2008 and 2009 in which the person was doing business in the state. Refunds of tax for those years are not allowed, however, and ad valorem tax methodology as to personal property is not changed by the law. The conditions under which a person is considered to be "doing business" in Oklahoma for purposes of the business activity tax are specified by statute. SJR 61, §§1-13; adding 68 O. S. Supp. 2010, §§1215-1228; effective Aug. 27, 2010.

### *Reporting and Payment of Business Activity Tax*

The business activity tax is due and payable for individuals on the same dates as provided for filing of individual income tax returns; and is due and payable for all other persons on or before July 1 following the close of the taxable year and subject to specified penalties if not paid before the next ensuing Sept. 15. The Oklahoma Tax Commission is directed to amend individual income tax returns to allow individuals to report and pay the business activity tax on the individual income tax return. For tax years beginning on or after Jan. 1, 2013, all payments and reports required shall be paid and filed electronically. SJR 61 §7; adding 68 O.S. Supp. 2010, §1220; effective Aug. 27, 2010.

### *Business Activity Revenue Information Reporting*

Each person subject to the Oklahoma business activity tax code shall file with the Oklahoma Tax Commission a sworn statement that shall include the amount of total revenue allocated or apportioned to Oklahoma and the deductions provided under the code to arrive at net revenue, identification of the type of person or entity for which the statement (return) is filed, the North American Industry Classifica-

tion System code for the business activity in which the person is engaged, the location of the person's office or offices, the names of officers, members, partners or registered agents, if any, and the residence and post office address of each on the last day of the tax year, and such further information as the tax commission may require. The tax commission may request and each person subject to the business activity tax must furnish any information deemed necessary for a correct computation of the business activity tax. The rules of confidentiality of tax information shall not prevent the tax commission from furnishing names of officers, members, partners or registered agents of any person subject to the tax, and the tax commission may furnish certificates to show compliance or non-compliance by any person, and collect a \$1 fee for each certificate furnished. For tax years 2010, 2011 and 2012, the tax commission shall promulgate rules for the furnishing of information required. The tax commission shall make a good faith effort to prescribe a form to enable persons to comply with the reporting required by the business activity tax code, based on the latest information available in a manner that will be least burdensome. SJR 61 §8; adding 68 O.S. Supp. 2010, §1221; effective Aug. 27, 2010.

*Penalty and Forfeiture for Non-Reporting and Non-Payment*

For failure to file a business activity tax report, the tax commission shall levy a penalty of 10 percent of the tax due and delinquent. The tax commission may enter an order directing suspension of the charter or other instrument of organization of an entity and forfeiture of all corporate or other rights, except for entities under the authority of the state banking board or state banking commissioner. Directors, officers or trustees of an entity whose right to do business is forfeited with his or her knowledge shall be deemed and held liable in same manner as the entity, as if partners. A non-reporting entity shall be denied the right to sue or defend in courts of the state, and contracts of the entity shall be voidable. Notice of such suspension and forfeiture must be sent by certified mail, return receipt requested, to the last known address of the registered agent or managing officer. The tax commission is to enter an order and transmit it to the Secretary of State. The charter or other instrument of a non-reporting entity shall be revived and reinstated upon compliance and payment of a reinstatement fee of \$15. SJR 61 §11; adding 68 O.S. Supp. 2010, §1224; effective Aug. 27, 2010.

*Discount of Business Activity Tax*

On and after Jan. 1, 2013, a discount shall be allowed against the 1 percent business activity tax on net revenue of a person from business activity allocated or apportioned to Oklahoma. The discount will be based upon the level of a taxpayer's net revenue, with graduated amounts of total discount or partial discount for different levels of net revenue. A 100 percent discount is to be allowed for net revenue of \$50,000 or less. No discount is to be allowed for net revenue greater than \$250,000; and differing discounts are allowed between those levels. SJR 61 §9; adding 68 O.S. Supp. 2010, §1222; effective Aug. 27, 2010.

*Assessment of Tax; Tolling of Limitation Period*

The statute of limitations for assessment of tax is tolled and extended until the amount of taxable income for any year under the Internal Revenue Code has been finally determined. If taxable income for federal income tax is changed or corrected from amounts included in the federal income tax return and it affects a taxpayer's Oklahoma net revenue, the taxpayer must file an amended return for Oklahoma business activity tax. The tax commission shall make assessment within two years from the date the return is filed. If a taxpayer does not file the statute of limitations is tolled. SJR 61 §14; adding 68 O.S. Supp. 2010, §1226; effective Aug. 27, 2010.

*Business Activity Tax as a Credit against Annual Certification Fees*

Payment of the annual \$25 business activity tax for 2011, 2012 and 2013 will entitle a person doing business in Oklahoma who is not subject to the franchise tax to a credit against the total amount it is required to pay or remit to the Oklahoma Secretary of State for its annual certificate. The credit is non-refundable and only one credit per year is permitted. SJR 61 §18; adding 18 O.S. Supp. 2010, §1142.2; effective Aug. 27, 2010.

*Amendment to Oklahoma's Financial Institution Privilege Tax*

A tax imposed on state and national banks and credit unions for the privilege of doing business within Oklahoma is amended to provide that it is in addition to the Oklahoma business activity tax. SJR 61 §19; amending 68 O.S. Supp. §2370; effective Aug. 27, 2010.

## GROSS PRODUCTION TAX

### *Tax Rate; Exemption Extension*

The reduced gross production tax rates that apply for gas produced when lower average prices exist was extended through June 30, 2013. The exemption for economically at-risk oil or gas leases was extended for production in calendar years through 2013. SB 1882, §§1-2, amending 68 O. S. Supp. 2009, §§1001,1001.3a; effective May 10, 2010.

## ESTATE TAX

### *Estate Tax Release Not Required in Probate; No Estate Tax Lien*

The Oklahoma statutes governing probate procedure are amended to provide that for deaths occurring on or after Jan. 1, 2010, no release of estate tax liability is necessary; and that no lien related to Oklahoma estate tax shall attach to any property passing through the estate of a decedent, and no order exempting estate tax liability shall be necessary to authorize release of such property or for title of real property to be marketable. SB 1895, §§1-6; amending 58 O. S. 2001, §§282.1,635,912,1104; adding 68 O.S. Supp. 2010, §804.1; effective June 9, 2010.

## CIGARETTE AND TOBACCO PRODUCT TAXES

### *Person May Hold Dealer and Wholesaler Licenses*

A person shall be allowed to hold a retail and a wholesale license for the sale of tobacco products in the state. HB 2359, §22; amending 68 O. S. Supp. 2009, §415; effective July 1, 2010.

## TAX ADMINISTRATION AND PROCEDURE

### *Taxpayer Transparency Act; Publication of Taxpayers Claiming Tax Credits*

The Taxpayer Transparency Act is amended to require the Oklahoma Tax Commission to prepare and maintain a list of all taxpayers who have claimed any tax credit authorized by state law and related to a tax administered by the tax commission. The list shall be posted on the Internet through the Taxpayer Transparency Act website for tax years beginning in 2011. The name of the taxpayer, the amount of the credit and the specific statutory provision under which the credit was claimed will be listed. The list shall be updated at least monthly. The list shall include identity of all taxpayers and organizations in the chain of custody or claim of the

credit at any time from the time earned until claimed on a tax return. The listing and disclosure is not required for a limited number of allowable tax credits which are excepted from the listing rule. The tax commission shall also maintain a list of persons or entities that may be able to claim a credit as a result of allocation of credits based on federal income tax pass-through treatment applicable to the entity that makes a qualified investment in a qualified small business capital company or a qualified rural business small business capital company. HB 3422, §§1-4, amending 62 O. S. Supp. 2009, §46; 68 O. S. Supp. 2009, §205; adding 68 O. S. Supp. 2010, §205.6; effective July 1, 2010.

### *Tax Commission Production of Information to Incentive Review Committee*

The tax commission is required and authorized to collect, organize and produce information in compliance with requests by the Incentive Review Committee created to conduct an annual review of existing tax incentives. This action is subject to any confidentiality or privacy restrictions placed on information collected by the tax commission. The tax commission must provide a written summary if a request cannot be responded to because of features of the tax commission's information technology or management systems. HB 3024, §1; amending 68 O. S. Supp. 2009, §205.4; effective June 9, 2010.

### *State Tax Liability Information; Building Permits*

A city or county issuing a building permit must provide the applicant a list of Oklahoma state taxes which may potentially be assessed against any Oklahoma taxpayer or out-of-state taxpayer who applies for a building permit. The requirements do not apply to building permits for new construction or remodel projects less than \$50,000 in value. Local officials must report unregistered occupancy permit applicants to the Tax Commission. SB 1900, §§1-2; adding 11 O. S. Supp. 2010, §43-101.2, 19 O. S. Supp. 2010, §241.1; effective Nov. 1, 2010.

### *State Agency, Court Claim Intercept; Taxpayer Refunds*

The procedures and notifications required by statute for claims of a state agency, a municipal court or a district court seeking to collect a debt, unpaid fines and cost or a final judgment of at least \$50 from an individual Oklahoma income tax refund were modified. HB 3166, §1;

amending 68 O. S. Supp. 2009, §205.2; effective Nov. 1, 2010.

## TAX AND FISCAL POLICY

### *Municipal Fiscal Impact Act*

A fiscal impact statement shall be required for any bill or resolution in the Legislature determined to have potential fiscal impact on municipalities. A bill or resolution determined to have a direct adverse fiscal impact on municipalities in excess of \$100,000 statewide shall not be reported out of committee or be acted upon by the Legislature unless a fiscal impact statement of the bill is made. Any bill, resolution or amendment determined to have direct adverse fiscal impact on municipalities in excess of \$100,000 statewide for which an emergency clause has not received a supermajority vote of three-fourths of the membership of both houses of the Legislature shall not go into effect until July 1 of the following calendar year. HB 3054, §1-2; adding 11 O. S. Supp. 2010, §17-301; effective Nov. 1, 2010.

### *Establishment of the Task Force on Comprehensive Tax Reform*

A 21-member Task Force on Comprehensive Tax Reform is created for the purpose of recommending amendments to law, reviewing the different types of tax imposed on businesses and individuals in the state, and developing recommendations and proposed legislation to provide increased simplification and fairness in the state's tax structure. The review must include a review of ad valorem taxation of personal property, ad valorem assessment methodologies of wireless telecommunications companies, replacement of the Oklahoma corporate income tax, franchise tax, and/or bank privilege tax, and reduction of the Oklahoma individual income tax. The review may include a review of other items. The members of the task force will include the chair and vice-chair of the House Revenue and Taxation Subcommittee of the Appropriations and Budget Committee, the

chair and vice-chair of the Senate Finance Committee, the director of the Office of State Finance, an Oklahoma Tax Commission appointee, four appointees of the Oklahoma House of Representatives, four appointees of the Oklahoma Senate, and seven appointees of the Governor. The appointees must meet certain laid-out criteria. The task force must submit its final report to the governor, the president pro tempore of the Senate and the speaker of the House of Representatives on or before Jan. 1, 2012. SJR 61 §15; not codified; effective Aug. 27, 2010.

### *Task Force on Tax Incentives Natural Gas Pipeline Capacity*

A task force is created to study availability, use and fiscal impact of current ad valorem, income, gross production, sales and other tax incentives to the natural gas pipeline transmission industry, and report to the leadership of the Oklahoma Legislature by Dec. 31, 2010. SB 2169, §§1-3; not codified; effective July 1, 2010.

### *State Question/Rainy Day Fund Increase*

A proposed amendment to the Oklahoma Constitution would be submitted as a state question for vote of the people in order to increase the amount of money to be deposited in the Constitutional Reserve Fund, also known as the "Rainy Day Fund." The increase would be to 15 percent of the amount estimated for the annual state budget, instead of the current cap of 10 percent. SJR 51, State Question No. 757, to amend Okla. Const., Art. 10, §23.

## ABOUT THE AUTHOR

Sheppard F. Miers Jr. is a shareholder in the Tulsa office of GableGotwals and practices in the areas of federal and state taxation. The author acknowledges information, guidance and assistance on the subject of this article received from Alicia Emerson, senior policy analyst, Research Division, and Joanie Raff, legislative analyst, Finance Committee Staff, Oklahoma State Senate.

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# Need a New Outlook on Your Law Practice?

Since the Oklahoma Bar Association's Women in Law Committee's inception in 1997, planning and executing successful annual conferences has always been a priority. This year is no exception. Led by co-chairs Renée DeMoss and Heather Louise O'Banion, "Changes in Latitudes, Changes in Attitudes" has been slated for Sept. 30, 2010, at Southern Hills Country Club in Tulsa.

This year's conference aims to provide the information, tools and inspiration that women in all sectors of the legal profession and in all stages of their careers need to advance in their professional lives. It also increases the value and the power they wield in their workplaces, with their clients and in their communities.

The Women in Law Committee has always taken pride in offering insightful and powerful guest speakers during the conference, and this year it is pleased to announce that Dr. Arin Reeves will be the featured speaker and guest.

Dr. Reeves of the Athens Group consulting firm has worked with diversity and inclusion in organizations for

more than 15 years. In her consulting practice, she has worked with over 100 law firms, almost 50 Fortune 500 companies, and dozens of universities and law schools, as well as various bar associations and trade organizations. Dr. Reeves has been featured on NPR for her work on women of color in the legal profession and is cited often in online and traditional media as an expert in diversity and inclusion in workplaces.

The day's events kick off at 9 a.m. with "Success by Design: Tools for Succeeding and Advancing in Your Workplace - Your Way." The luncheon will feature Oklahoma Supreme Court Justice Yvonne Kauger as keynote speaker. This year's Spotlight Award winners will also be recognized during the luncheon. Dr. Reeves will moderate the afternoon judicial panel discussion, "Tips from the Bench: Taking it to the Next Level," which will include a panel of distinguished ladies from the



Dr. Arin Reeves

**Tuesday, Sept. 30**  
**Southern Hills Country Club**  
**Tulsa**

*Full schedule of events at  
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bench. OBA General Counsel Gina Hendryx will speak on "Transition Ethics," and following that will be a panel discussion on "Tips on Getting the Work: What Clients Look for in Hiring." The day



will conclude with a well-deserved margarita and cheeseburger reception.

This year's conference planners are also pleased to announce that several key sponsors have joined with the OBA Women in Law Committee to make this event possible. This year's sponsors are: Conner & Winters; Crowe & Dunlevy; Doerner, Saunders, Daniel & Anderson LLP; GableGotwals; Latham, Wagner,

Steele & Lehman PC; and the University of Oklahoma College of Law.

Since the first two-day conference in 1998, the Women in Law Committee's goal has been to host an event to support other women in their practice of law, to break the glass ceilings of law firm partnerships and judgeships, and to share information and successful projects. Past banquet speakers include U.S.

Supreme Court Justice Sandra Day O'Connor, U.S. Supreme Court Justice Ruth Bader Ginsburg, Erin Brockovich, and many other outstanding female attorneys and business leaders.

For event information and registration for this year's conference, visit [www.okbar.org/women](http://www.okbar.org/women), or contact the OBA Continuing Legal Education department at (405) 416-7006 or [cle@okbar.org](mailto:cle@okbar.org).



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**IS PLEASED TO ANNOUNCE THAT  
BRADLEY A. JACKSON  
IS NOW A PARTNER IN THE FIRM**

Brad Jackson earned his law degree from The University of Tulsa in 1992 and his B. S. in Finance-Accounting from Oklahoma State University in 1989. He was admitted to the Oklahoma State Bar in 1992, as well as to the U. S. District Court for the Eastern, Western and Northern Districts of Oklahoma, and the U. S. Court of Appeals, Tenth Circuit.

Prior to joining Steidley & Neal's Tulsa, Oklahoma office, Mr. Jackson was a Partner in the Tulsa law firm of Rhodes Hieronymous, concentrating his practice very successfully in the areas of Professional Negligence, Engineering and Accounting, Trucking Litigation, Construction Law, Medical Malpractice Defense, Fire Litigation, Nursing Home Defense, and Personal Injury Defense.

Mr. Jackson is a member of the Oklahoma Bar Association, Tulsa County Bar Association, Defense Research Institute, American Board of Trial Advocates, and has served as President (2006) and is currently on the Board of Directors of the Oklahoma Association of Defense Counsel. He and his wife, Dana have three children.



# Are You Happy Practicing Law?

By John Morris Williams

More studies have come out about the dissatisfaction with the practice of law. At the recent ABA annual meeting, I heard from a couple of colleagues who are undertaking a study of this situation through their state bar associations. I am somewhat at a loss. On the one hand, I wonder what can be done? On the other hand, I wonder if our membership is reflective of these national trends. I suspect that we might be closer to the national trends than we want to admit.

In the past seven years that I have served as your executive director, I have become very involved with our Lawyers Helping Lawyers Assistance Program. We have put in place what some say is the best program in the country. Yet, those of us who work in this area know there is much to be done.

Oklahoma has the highest mental illness rate per capita in the United States. We are near the absolute bottom in treatment dollars. Most people who have reached the bottom with substance abuse and/or mental health issues have few resources left. The resources are depleted as the person goes through the dark tunnel that often leads them to a crossroads between death and treatment.

Our Lawyers Helping Lawyers Assistance Program is in the process of recreating a nonprofit entity to assist with treatment dollars. The resources are very small. But, we have to start somewhere.

where along the way we just forget to be happy. It sounds pretty simple, but the research seems to support it. The research suggests that each of us has a happy index number, and even if we win



“Studies on happiness suggest that deep within each of us is a happy person. Somewhere along the way we just forget to be happy.”

As I attend Lawyers Helping Lawyers Assistance Program meetings, I see people in the room who went down the dark tunnel and found light at the other end. Treatment, support and coming together to address these issues are not signs of weakness. They are signs that we are resilient and willing to lift each other up.

Studies on happiness suggest that deep within each of us is a happy person. Some-

the lottery in about a year, we will revert to our original index number. This somewhat explains why big lottery winners after awhile end up in some real messes. The research shows making some simple changes can significantly alter your life and the lives of people around you.

I am not sure that the real question is whether you are happy practicing law. Maybe the question is more simple. Maybe it's, "How happy are

you?" If your happiness index is low and you enter into a profession that has large amounts of stress, you deal with other people's problems, have a large amount of debt and an income stream that does not support your anticipated lifestyle, you might be in need of some help. At least these are conditions that can make for some unhappy people.

Numerous scholars, philosophers — and a few just plain, happy people — suggest to me that we need to become what we wish others to be. That business of "it starts with me" is heady stuff that requires us to retool how we work and live. Perhaps shifting from

"mortal combat" to enlightened problem solver in litigation has some promise. Perhaps changing work habits to stop living off of "deadline adrenaline" and take some of the chaos out of your life might help.

I am not sure I have the answers. In fact, I know I don't. I know that as a profession we seem to have a large amount of dissatisfaction. However, I know many pretty happy lawyers. Maybe instead of continuing to study why we are unhappy, we should start studying the happy lawyers and find out their secrets.

#### ANNUAL MEETING PROGRAM

Since this issue is about the Annual Meeting, I must

conclude by telling you that the Lawyers Helping Lawyers Assistance Program will be putting on a great program on Thursday afternoon. If you are not happy, come see what we have to offer. If you are happy, come share your secrets. I promise either way, your being at the program could very well contribute to someone's happiness. Maybe even yours!



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



#### GARY C. CRAPSTER

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### IS PLEASED TO ANNOUNCE THAT **GARY C. CRAPSTER** IS NOW A PARTNER IN THE FIRM

Gary Crapster received his law degree from SMU Law School, graduating Order of the Coif in 1976. He is a member of the State Bar of Texas, the State Bar of Oklahoma, all Texas and Oklahoma District Courts and all Federal District Courts in both Texas and Oklahoma. He has been elected to the American College of Trial Lawyers and the American Board of Trial Advocates and has served as Chair of the Dallas Bar Association Business Litigation Section and the ABA Litigation Section's Business Torts Committee.

Prior to joining Steidley & Neal, P.L.L.C. as Of Counsel in 2009, Mr. Crapster was a senior partner with the Dallas law firm of Strasburger & Price, LLP, where he practiced his entire career before moving to Oklahoma. Mr. Crapster handles all kinds of Civil Trials including Commercial and Business Litigation, Insurance Litigation, Professional Liability, Class Actions, Governmental and Civil Rights Litigation, and Products Liability.

Mr. Crapster was recognized as a Texas Super Lawyer every year since the inception of the state-wide poll conducted by Texas Monthly magazine, and now as an Oklahoma Super Lawyer, and is currently listed in The Best Lawyers in America. He and his wife have raised two children who became practicing lawyers, one in Texas and one in Oklahoma.

# Is the World Wide Web Too Much Like the Wild Wild West?

## Internet Security Issues

By Jim Calloway, Director, OBA Management Assistance Program

The World Wide Web seems more like the Wild Wild West these days. The digital equivalents of robbers and gun-slingers seem to be hiding around every corner.

Item: An eastern Oklahoma lawyer reports that her computer is infected with malware that alternates between delivering pornography and apparent news items from *Good Morning America*. Despite sending the computer off to a professional technician for a "cleaning," the infection reappears as soon as she tries to use it again for work. Numerous other Oklahoma lawyers report similar problems.

Item: A Spanish newspaper reported that a contributing factor in a Spanair plane crash which killed 154 people in Madrid two years ago was a Trojan infection on the main airline computer system, which clogged the system and caused a failure to trigger an alarm about technical faults.

Item: An August 2010 article in *The New York Times* "Web Photos That Reveal Secrets, Like Where You Live" discusses Adam Savage, host of the popular science program "MythBusters," posting a photo of his car parked outside of his house on Twitter



with the tweet "now I'm off to work." Because the iPhone he used automatically inserts geotags that reveal the coordinates of the exact longitude and latitude of where photos are taken — someone who knew of this could easily locate his home and would also know that he just left it. (Note: One can disable the geotagging feature of the iPhone camera if desired).

Item: According to security software vendor McAfee, one tenth of websites devoted to the actress Cameron Diaz contain malware designed to steal information from the computer of the visitor. McAfee noted finding about six million malware infected systems and that apparently over 55,000 new types of malware come out every day.

Item: In August 2010, the U.S. Department of Defense publicly expressed concern over China's rapidly evolving cyber-warfare capabilities. U.S. government computer systems

and others around the world continue to experience intrusions that "appear" to originate within China, according to the Pentagon.

Item: In August 2010, the Federal Aviation Administration announced that its computer systems remain vulnerable to cyber attacks despite improvements in the past year.

Item: A staggering 92 percent of all e-mail is now spam and over 40 percent of that came from a single botnet, the Rustock botnet, according to Symantec's August 2010 MessageLabs Intelligence Report. (A botnet is a large collection of computers that have been compromised and can be operated collectively by the one who set it up, known as the "bot herder.") The report also found that one out of every 328 messages contained a virus and one out of every 363 was a phishing attack (an e-mail designed to get one to give up personal information like passwords, credit card numbers or bank account numbers).

Item: Recently the Internet security firm Panda Labs reported its discovery that 25 percent of newly created worms are specifically

designed to spread through USB storage devices. This is not limited to USB flash drives, but includes other USB-connected devices as external hard drives, digital cameras, MP3 players and smart phones.

Item: *The Wall Street Journal* completed a series this summer about how privacy is compromised at the most commonly visited websites. *The Journal* catalogued tracking files that were placed on computers at the top 50 most visited websites and the results were stunning. "The 50 sites installed a total of 3,180 tracking files on a test computer used to conduct the study. Only one site, Wikipedia.org, installed none. Twelve sites, including Dictionary.com, Comcast Corp.'s Comcast.net and Microsoft Corp.'s MSN.com, installed more than 100 tracking tools apiece in the course of *The Journal's* test." The information obtained from these tracking files creates a profile of users that is then auctioned off to various corporations. A credit card issuer may only display the less attractive card options when you visit their website based on this profile.

Malware is a term used to collectively refer to all of the various bad things that your computer may "catch" online. These include computer viruses, trojans, adware, spyware and other tracking software.

In the early days of the Internet, one Oklahoma law firm installed one computer with Internet access in their library, which was not connected to any other computer. E-mail, electronic filing and online legal research have done away with that setup

now, but maybe they were ahead of their time.

As the *WSJ* series points out, spyware is used for illegal purposes such as stealing credit card information and also for legal, but ethically questionable practices, like collecting and auctioning off the records of your Internet activities.

So what's a lawyer to do?

Let's think like lawyers and prioritize the issues. As repugnant as it may seem that the business community thinks it is OK to place secret snitches on your computer to profile you and then auction off the results, stopping that is beyond the scope of this article and the individual efforts of most of us.

First issue is that all of the spyware and malware could literally cause our computers to grind to a halt and become unusable. The second issue is that even if the malware and spyware does not kill the computer, the collective impact is to make it run slower and slower.

Lawyers do not want to put their business operations at risk due to a dead computer, whether it is a victim of malware, flood or fire. Backing up your data is your critical first step to avoid many technological disasters, including your computer dying from "malware overload." If you have IT staff in your firm, they are aware that this is their most important job. If you are in a smaller firm or a solo practitioner, then backup is your responsibility and one way to make certain there is no breakdown is have multiple layers of backups. You can use an online backup like OBA-endorsed CoreVault. But you can and should make a copy

of all of your files regularly on a portable hard drive or two. You can even copy forms, client documents and your case management data on a small flash drive as long as you make certain it is securely stored.

Of course, while good backup procedures help us recover from disaster, most of us would rather avoid disaster in the first place.

Practice safe computing. "Don't click on unfamiliar e-mail attachments" has become a bit of a cliché, but it bears repeating. Don't click on e-mail attachments unless you are expecting them — like a draft of a pretrial conference memo from opposing counsel on the day before it is due. Your bank probably isn't e-mailing you and if you need to check your account go to the normal website. Do not try to save time by clicking on a link in an e-mail you think is from your bank.

Never click on a pop-up window indicating malware has been detected on your computer and should be eliminated unless this message is from a software tool you have purchased and installed. Fake malware warnings and offers to clean your computer via pop-up windows are created by malware and clicking on the warnings can give you a massive dose of malware.

The required tools for protecting your computer sound intimidating to the amateur. But there's really no safe alternative. You need a firewall. You need antivirus software. You need antispyware software, if for no other reason but to regularly clean off those tracking cookies and tracking programs that *The Wall Street*

*Journal* tells us popular web-sites install on our computers.

## THE FIREWALL

Most PC users will want to activate their Windows 7, Vista or XP firewall. These products, particularly the later ones, do a decent job. Your Internet service provider likely also provides you some firewall protection. Larger firms may have a hardware/software combination firewall managed by their IT staff. These products do a good job. When you click on an e-mail attachment or a link to run a bad file, you are telling these products it is OK to let the process past the firewall. This is why it is so important that the computer user be cautious. Some users prefer purchasing a commercial firewall software product.

## WIRELESS SECURITY

Whether you have a wireless network at home or at work, it is no longer appropriate to have it wide open where anyone can log in. Leave that setting for the coffee shops and hotel chains to defend. You have to set up security and require a password to log in. If you have an open network and no longer have the instructions on how to configure it, you can locate them online at the wireless router company's website. But if you have an old "G" router, it may be simpler just to go buy a new faster "N" router that will come with all of the instructions right in the box and end up with faster Internet access in the process.

## MICROSOFT SECURITY ESSENTIALS

If you don't consider yourself a technology expert and use a Windows-based computer, then it is probably essential that you download and install

“...all of the spyware and malware could literally cause our computers to grind to a halt and become unusable.”

Microsoft Security Essentials, although some of the commercial products listed in the next section may be preferred by some. But Microsoft has provided a nice, free product that replaces its Microsoft Live OneCare.

“Microsoft Security Essentials provides real-time protection for your home PC that guards against viruses, spyware and other malicious software. Microsoft Security Essentials is a free download from Microsoft that is simple to install, easy to use, and always kept up to date so you can be assured your PC is protected by the latest technology. It's easy to tell if your PC is secure — when you're green, you're good. It's that simple,” according to the Microsoft website.

You can download Microsoft Security Essentials here: [www.microsoft.com/security\\_essentials](http://www.microsoft.com/security_essentials) or here: <http://tinyurl.com/kwsxcu>

## ANTIVIRUS AND ANTISPYWARE SOFTWARE

As the reader has no doubt determined by now, using antivirus and antispyware products is a requirement these days for the small firm lawyer with no IT department assistance and for the home user as well. When I use

Google to search for these products, I am usually not happy with the initial results, which are mostly sales oriented. I tend to use the Google advanced tools to limit my searches to resources I trust that do software product reviews. These include sites like [www.pcmag.com](http://www.pcmag.com), [www.pcworld.com](http://www.pcworld.com) and [www.lifehacker.com](http://www.lifehacker.com) and <http://reviews.cnet.com/software>.

I would never install a free antimalware product without first reading a review of it from a trusted source. Even then, I'd see if I could download it from a site that I know is legitimate and has security safeguards like <http://download.cnet.com>. (I note that when I visited CNet while writing this article, five of the six most popular downloads were antimalware products).

In fact, *PC Magazine* reviewed several free anti-malware products in its “Best Free Software of 2010” feature. This part of the feature is online at <http://tinyurl.com/yjtl49k>. But for most lawyers, while free is nice, you really should upgrade to the paid professional version of these products, even though some free versions enjoy good reputations.

Personally, at home I have had good results from Webroot's Antivirus with Spysweeper.

When there are really bad malware infections on a computer, nothing seems to work as well as Malwarebytes Anti-Malware and their free and paid anti-virus tools garner great reviews.

Some infected computers will block one from visiting sites that provide malware cleaning and protection. For a

do-it-yourself cleaning of an infected computer, you can disconnect the computer from the Internet and load the free version of Malwarebytes Anti-Malware from a USB flash drive. The cleaning may take a few hours and may also convince you to buy their product.

Our operating systems have stronger defenses now as well. Windows 7 and Vista are sold with User Account Control (UAC), which will search for potential risks and immediately suspend operations if a problem is identified.

### **SOCIAL NETWORKING ISSUES**

Recently many Facebook users got messages from their Facebook friends on how they could get a brand new iPhone 4 for absolutely free. Just click this link. If they would just take a second to think about it, they might consider whether it is more likely that their friend has had his or her Facebook account compromised in some manner or there's a really a secret plan to give away free iPhones that hasn't been leaked to the media. There's no harm in reading these messages, but always send a message to your friend to confirm it really came from them before clicking on unusual

## **Starting Your Law Practice Program Dates Set**

- **Sept. 28 - Tulsa**
- **Oct. 5 - Oklahoma City**

For several years the OBA has presented The New Lawyer Experience Program a few days after the new members of the Oklahoma bar are sworn in. Although brand new lawyers are our target audience and attend in good numbers, we have always had a significant number of experienced lawyers in attendance. Some were changing their careers and others just wanted a refresher course on law practice management. This year we have decided to rename the program to better reflect the subject matter. It will now be called Starting Your Law Practice. It is still free, with a free lunch provided by Oklahoma Attorneys Mutual Insurance Company. But the curriculum has been redesigned to reflect the economic realities of opening a law practice in these challenging times. The program will be held Sept. 28, 2010, at the Tulsa County Bar Association and Oct. 5, 2010, at the Oklahoma Bar Center. More details can be found on the OBA events calendar at [www.okbar.org/calendar](http://www.okbar.org/calendar). To register, e-mail [marks@okbar.org](mailto:marks@okbar.org) or call Mark at (405) 416-7026.

links. You can still click away on the YouTube video links that they send you.

### **CONCLUSION**

One rule of thumb before installing these antimalware products is to set a restore point in case something unexpected happens. Generally speaking, it is a bit risky to run two antivirus software programs from different companies. It is likely they will conflict unless the real-time, on-access scanning is disabled

and even then there are no guarantees. There is no permanent harm from this. The computer may just run slow, lock or reboot frequently. According to online reports, running two antispyware solutions does not seem to create the same issues and one may find things that the other missed.

Hopefully, putting some of the "sheriffs" detailed above on the job will make you feel a little less like you are in the

# Five Rules to Avoid Bar Complaints in Private Practice

By Travis Pickens, OBA Ethics Counsel

**1) Dabbling can be a disaster.** Do not “dabble” in high-conflict, high-emotion litigation. Full-time family lawyers and criminal defense attorneys are born for their work and would never do anything else. There is also a fairly sizable group of gifted lawyers that can competently, successfully and profitably do family or criminal law and one or two other areas. If you are not in one of these two groups, then find some other areas in which to dabble. These two areas typically comprise almost 50 percent of the grievances filed each year. Responding to a grievance of any arguable merit (or simply which appears creditable, even though untrue), with the assistance of seasoned independent counsel, will likely be at least a \$2,000 experience and some lost sleep.

**2) Educate your client.** Educate your client with your fee agreement and other informational materials. Think of your fee agreement as more than the monetary terms. If done well, it will likely be your best defense if you or your work is ever challenged. Require the client to read it and initial each page. Be specific as to the identity of the client and the scope of the work you plan to do. Do not overstate your

responsibility. Think about incorporating the following types of provisions: interest on past-due amounts (check applicable consumer credit law); payment to you in a

“Think of your fee agreement as more than the monetary terms.”

contingency matter if you are terminated without cause; mediation and arbitration clauses in the event of a dispute and choice of law and venue clauses if the client is out of state. Make sure that the client agrees to follow all laws during your representation, and will not discuss the case, you, the opposing party or lawyers, and judges on social websites or other media.

Inform the client of the uncertainty of litigation and the inability to promise results, and that most public records are available on the Internet. You can do this through an informational packet available in hard-copy and electronic

form. Make sure the client acknowledges in the fee agreement that it has been provided and that they have read it. Have a trusted assistant sit with you during your initial explanation in case the client later claims some kind of misunderstanding. You will have a credible third-party witness who can bolster the defense of a grievance or claim. Prepare a DVD with your standard explanation for routine matters (e.g. how a lawsuit proceeds or the fundamentals of estate planning) and have your assistant show it to each new client. Update it as needed, do not use stale material. It will save you time, your client money and the boredom of covering the same material client after client.

**3) Toxic people make terrible clients.** This can happen in any area of law, and with all kinds of people, from the simple to the sophisticated. If the vibe is bad at the beginning, it will never get better, and it will likely get worse. Look for and keep the “A” and “B” attitude clients. Avoid and eventually stop representing the “C” and “D” attitudes. Hurt people will hurt people, and toxic people have generally been hurt or are hurting themselves. If you choose to represent these folks, then do so

with your eyes wide open, your file fully documented and your malpractice premium fully paid.

**4) Create realistic expectations.** It is all about meeting *realistic* expectations. Sympathize with your client but be honest about the options available and what may happen. Clients appreciate the truth,

even if it is bad news. It is about trust. Be careful as well in what services you promise the client. Be realistic about your own limitations and do not be afraid to ask the client to associate with another lawyer if in uncertain waters.

**5) Keep your promises.** Clients generally understand good lawyers are busy. What

they do not understand is when you fail to meet a promise (see Rule 4). Return all calls as quickly as possible, but no later than the next 24 hours.

*Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact Mr. Pickens at [travis@okbar.org](mailto:travis@okbar.org) or (405) 416-7055; (800) 522-8065.*

## Oklahoma Bar Journal Editorial Calendar

### 2010

- October:  
**Probate**  
Editor: Scott Buhlinger  
[scott@bwrlawoffice.com](mailto:scott@bwrlawoffice.com)  
Deadline: May 1, 2010
- November:  
**Technology & Law Practice Management**  
Editor: January Windrix  
[janwindrix@yahoo.com](mailto:janwindrix@yahoo.com)  
Deadline: Aug. 1, 2010
- December:  
**Ethics & Professional Responsibility**  
Editor: Pandee Ramirez  
[pandee@sbcglobal.net](mailto: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](mailto:leslietaylorjd@gmail.com)  
Deadline: Oct. 1, 2010
- March:  
**Criminal Law**  
Editor: Dietmar K. Caudle  
[d.caudle@sbcglobal.net](mailto: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](mailto:kennedy@gungolljackson.com)  
Deadline: Jan. 1, 2011

- August:  
**Children and the Law**  
Editor: Sandee Coogan  
[scoogan@coxinet.net](mailto: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](mailto:janwindrix@yahoo.com)  
Deadline: May 1, 2011
- November:  
**Environmental Law**  
Editor: Emily Y. Duensing  
[emily.duensing@oscn.net](mailto:emily.duensing@oscn.net)  
Deadline: Aug. 1, 2011
- December:  
**Ethics & Professional Responsibility**  
Editor: P. Scott Buhlinger  
[scott@bwrlawoffice.com](mailto:scott@bwrlawoffice.com)  
Deadline: Aug. 1, 2011



# August Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Aug. 27, 2010.*

## REPORT OF THE PRESIDENT

President Smallwood reported he attended the American Bar Association meeting in San Francisco and worked on details of the November Annual Meeting to be held in Tulsa.

## REPORT OF THE PRESIDENT-ELECT

President-Elect Reheard reported she attended the July board meeting, initial meeting of the Unauthorized Practice of Law Special Committee, ABA meeting in San Francisco and Strategic Planning Committee meeting. She participated in a budget meeting with Executive Director Williams and Administration Director Combs in addition to numerous planning sessions for president-elect initiatives. She served as an Oklahoma delegate to the ABA House of Delegates and gave the keynote address at the Tulsa County Bar Association awards luncheon.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the staff budget meeting, monthly staff celebration, staff meeting with the web team, directors meeting, NABE/NCBP meeting in San Francisco, Technology Task Force

meeting, Strategic Planning Committee meeting, Unauthorized Practice of Law Special Committee meeting and various planning meetings with President-Elect Reheard and others. He also spoke at the OU law school to the entering class as part of its orientation.

## REPORT OF THE PAST PRESIDENT

Past President Parsley reported he attended the August board meeting, ABA Annual Meeting in San Francisco and served as a delegate in the ABA House of Delegates.

## BOARD MEMBER REPORTS

**Governor Brown** reported he attended the Tulsa County Bar Association Awards and Nominations Committee meeting, ABA Annual Meeting and ABA Judicial Division meetings. He also was an ABA CLE speaker for "Justice 12.0: Is There An App For That?" and a keynote speaker for the Professionalism Day program at the University of Tulsa College of Law. **Governor Carter** reported she attended the coordinated meeting at the Tulsa County Bar Association for Syrian attorneys participating in the International Visitor Leadership Program and the Tulsa County Bar Association annual luncheon. She also had an article

published in *The Oklahoma Bar Journal*. **Governor Chesnut** reported he attended the July board meeting and Ottawa County Bar Association monthly meeting. **Governor Devoll** reported he attended the July board meeting, Bench and Bar Committee meeting and a function of the Garfield County Bar Association. **Governor Dobbs** reported he attended the Chinese student reception, July board meeting and Technology Task Force meeting. He gave the introduction of "Professional Expectations in Law School and Law Practice" at OCU OBA. **Governor Hixson**, unable to attend the meeting, reported via e-mail that he attended the July board meeting and reception for Chinese lawyers and students, Canadian County Bar Association social and the Canadian County Community Sentencing Planning Council meeting. **Governor McCombs** reported he attended two McCurtain County Bar Association luncheons. **Governor Moudy** reported she attended the July Board of Governors meeting and the court improvement project for juvenile courts. **Governor Poarch**, unable to attend the meeting, reported via e-mail that he attended the July board meeting, Strategic Planning Committee meeting and the Unauthorized Practice

of Law Special Committee meeting. **Governor Rivas** reported he attended the July board meeting. **Governor Shields** reported she attended the August board meeting, Oklahoma County Bar Association meeting and OBA Strategic Planning Committee meeting.

#### **LEGISLATIVE PROGRAM – PROPOSED RESOLUTION NO. 1**

Government and Administrative Law Practice Section Chair Jami Fenner and section member Jim Barnett reviewed the section's proposed resolution regarding proceedings for judicial review naming respondent, manner of service and record of proceedings to reviewing court amending 75 O.S. 2001, Sec. 318 and 320. The board voted to send the resolution to the House of Delegates for consideration and to recommend it be adopted.

#### **LEGISLATIVE PROGRAM – PROPOSED RESOLUTION NO. 2**

Government and Administrative Law Practice Section Chair Jami Fenner and section member Jim Barnett reviewed the section's resolution proposing the addition of Rule 31 to the Rules for the District Courts of Oklahoma regarding judicial review of final orders under the Administrative Procedures Act. The board voted to send the resolution to the House of Delegates for consideration and to recommend it be adopted.

#### **POLICY FOR PLACING ITEMS ON BOARD OF GOVERNORS AGENDA**

Executive Director Williams explained the challenges of dealing with last-minute

additions to the Board of Governors agenda. Attention was called to the policy with the required procedure that references the Executive Committee, which does not exist in the OBA bylaws. The board voted to amend the policy by striking reference to the Executive Committee and inserting "president, vice president or executive director." The board voted to amend the policy by deleting the phrase, "at least two members." The amended sentence will read, "In order for an item to be added to the agenda less than ten (10) days prior to the meeting date, the president, vice president or executive director must authorize doing so."

#### **REPORT OF THE GENERAL COUNSEL**

General Counsel Hendryx reported the Clients' Security Fund Committee held its quarterly meeting in July and that the Office of the General Counsel received 143 overdraft notices from January through July 2010. She said a request for an explanation is sent to the attorney and based on the response, a determination is made on how to proceed. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for July 2010 was submitted for the board's review.

She also reported she attended the Annual Meeting of the National Organization of Bar Counsel, Technology Task Force subcommittee meeting, August PRC meeting, Strategic Planning Committee meeting and the UPL Special Committee meeting. She obtained a permanent injunction in a UPL matter in Tulsa County District Court, participated in

the OCU Professionalism Program for 1L students, spoke to the Tulsa University Legal Assistant Program and spoke to the OCU Professionalism Class.

#### **REVISED MODEL CODE OF JUDICIAL CONDUCT**

Acting as Bench and Bar Committee Co-Chair, Governor Brown reported the ABA House of Delegates at its August 2010 meeting approved amendments to the ABA Model Code of Judicial Conduct. The board voted to send the proposed Code of Judicial Conduct for Oklahoma to the OBA House of Delegates with no recommendation, but the motion failed. The board voted to send the proposed Code of Judicial Conduct for Oklahoma to the OBA House of Delegates and to recommend it be adopted. Motion passed with a 13-2 vote.

#### **PROPOSED ENFORCEMENT PROCEDURE**

Governor Brown reported that he and Bench and Bar Committee Co-Chair Cathy Christensen had a conference call with William Baker, chair of the Professional Responsibility Panel on Judicial Elections. During the call, Mr. Baker shared his opinion and that of fellow panel member Retired Judge Milton Craig. It was noted that the layperson member of the three-member panel has resigned. During this judicial election year, the panel has received numerous complaints of violations. Governor Brown said he is taking the proposed Rules for the Committee on Judicial Elections back to the committee and will resubmit for board consideration.

## REVIEW OF INVESTMENT POLICY

Past President Parsley suggested that the OBA's investment policy be amended to require that investments be placed in a government-insured financial institution and to encourage utilization of Oklahoma institutions. Discussion followed. It was decided Executive Director Williams will work with Past President Parsley on the exact wording for a proposed investment policy amendment. The board tabled action until next month.

## BUILDING UPDATE

Executive Director Williams called attention to the new board room signage outside the door in the lobby. An

event has been planned for March 8, 2011, at which the Mona Salyer Lambird Board Room will be rededicated. The date is significant because it will be International Women's Day. He reported the new lobby furniture has been ordered, and exterior problems in the back of Emerson Hall have been fixed. He said the furniture arrival will conclude Phase Four of improvements to the Oklahoma Bar Center.

## LEGAL INTERN COMMITTEE ANNUAL REPORT

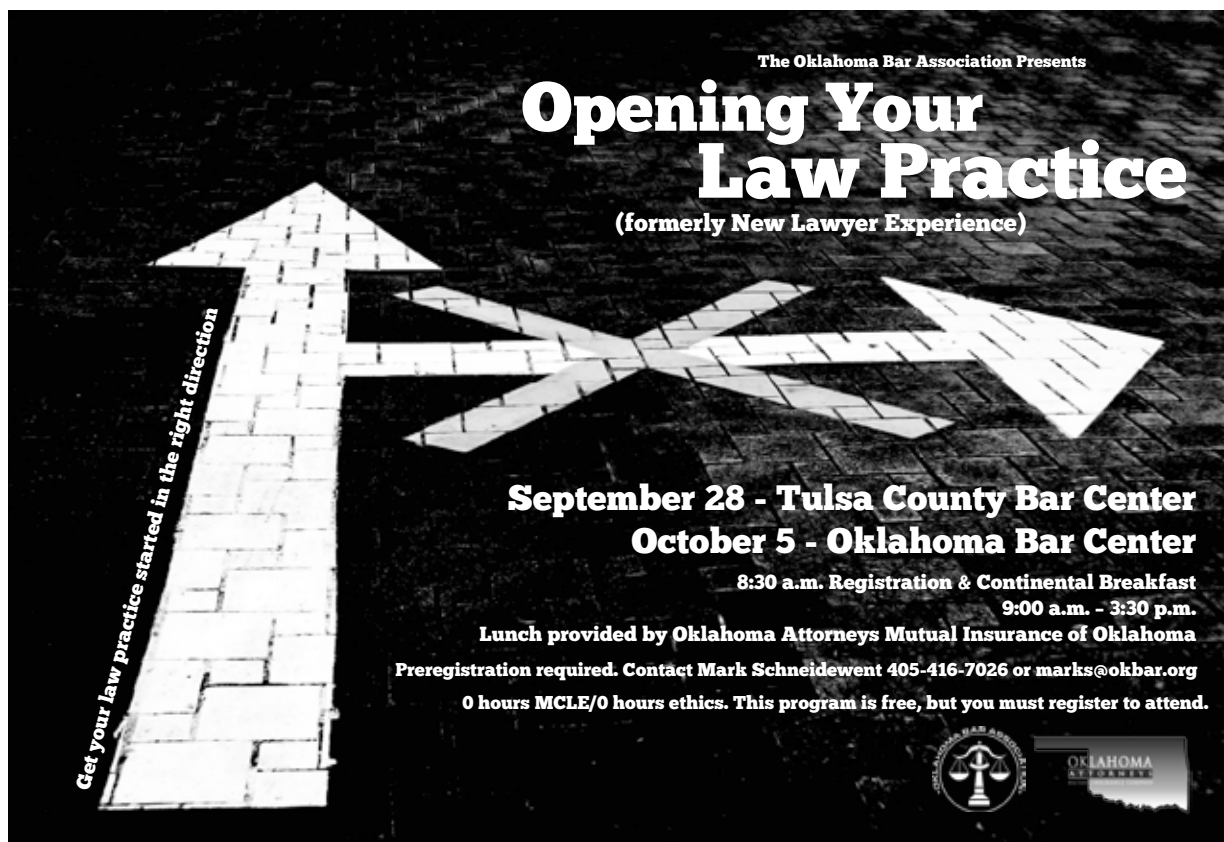
The report was tabled due to the absence of Governor Hixson, who was attending a funeral.

## OBF TRUSTEE APPOINTMENTS

Past President Parsley moved, Governor Brown seconded to approve President Smallwood's recommendations to reappoint Jack S. Dawson, Oklahoma City; Mike Mordy, Ardmore; and Dennis A. Smith, Clinton; for second three-year terms (expiring 12/31/13) as Oklahoma Bar Foundation Trustees. Motion passed.

## NEXT MEETING

The Board of Governors will meet at 9 a.m. at the Tulsa County Bar Association in Tulsa on Friday, Sept. 24, 2010.



The Oklahoma Bar Association Presents

# Opening Your Law Practice

(formerly New Lawyer Experience)

**September 28 - Tulsa County Bar Center**  
**October 5 - Oklahoma Bar Center**



8:30 a.m. Registration & Continental Breakfast  
9:00 a.m. - 3:30 p.m.

Lunch provided by Oklahoma Attorneys Mutual Insurance of Oklahoma

Preregistration required. Contact Mark Schneidewent 405-416-7026 or marks@okbar.org

0 hours MCLE/0 hours ethics. This program is free, but you must register to attend.

Get your law practice started in the right direction



# OBF 101 Review

By Phil Frazier

Last month's Oklahoma Bar Foundation article contributed through collaboration with OBF Fellows Barbara Sears and Anne Sublett has generated new interest in the OBF and its importance to needy recipients.

If you missed the article, I respectfully suggest you find your Aug. 7, 2010, *Oklahoma Bar Journal*, Vol. 81, No. 20, and read it (page 1714). If you are not now a Fellow, read the article and then ask yourself why not? Favorable comments we have received regarding this article make it worthwhile to review the purpose and need for the OBF.

The OBF is the charitable giving arm of the Oklahoma Bar Association. Our 26-person board raises and distributes money to worthy charitable organizations. Our grant funding provides legal services to the elderly and disadvantaged, helps to provide law-related public education and provides improvements to the judicial system. In a world in which the law and lawyers are sometimes presented in a negative light, our supporting worthy organizations reflects our bar's generosity and support for the needy citizens and organizations within our state.

Often when I approach other lawyers about becoming a Fellow, they initially ask, "How much does it cost?" Fellows are asked to donate \$1,000 over 10 years which equates to \$8.34 per month. This monthly calculation is based upon the \$100 per year payment toward the \$1,000 donated pledge. Although \$8.34 per month is a small amount for a lawyer to give back to his profession, when multiplied by many lawyers choosing to become Fellows, it makes it possible for the foundation to enable our grant recipients to continue with their important work.

Our grant recipients include Legal Aid, YMCA Youth and Government Programs, both Oklahoma and Tulsa Lawyers for Children, OILS Low-Income Taxpayer Legal Services, Oklahoma High School Mock Trial competition, several domestic violence legal service programs and advocacy work on behalf of children and vulnerable adults to name a few of the endeavors funded each year.

Although pro bono work or other timely commitments are not required of Fellows, we have many lawyers, who are already Fellows, and some who are not Fellows, who donate a significant

“The OBF is the charitable giving arm of the Oklahoma Bar Association.”

amount of their time for pro bono work assisting the recipients of the foundation grants. I know the lawyer personally who took on "Mary's case" alluded to in the Aug. 7, 2010, bar journal article. The hours that particular lawyer spent on "Mary's case" total substantially more "dollars" than the cost of the Fellow status within the OBF. As we all know, in the business of being a lawyer, time is money. Nevertheless, if a fellow lawyer can donate well in excess of "\$1,000 billable hours" and contribute as an OBF Fellow, then certainly each of us can afford to pay \$100 per year over a period of 10 years.

The Fellows of the Oklahoma Bar Foundation are the life blood of the organization and with the continuing downturn in our economy, it is more important than ever that we not only maintain but increase the number of Fellows helping to provide basic funding in order that our

vital services be kept in place and maintained.

The number of lawyers in Oklahoma now totals approximately 16,000 members. Of the 16,000 lawyers, only 1,585 are Fellows. These attorneys comprising our Fellow membership are private practitioners, judges, some in-house counsel and even a few Fellow members who are not attorneys. Many of us have different types of legal careers, but we all share a common goal, to make our state a better place and to make the public aware of all the contributions made by lawyers and our judicial system. Thus far this year, we have been able to add 24 new

Fellows but need to add significantly to this number.

This year, the Oklahoma Bar Foundation expects to award approximately \$425,000 in grants to the recipients chosen to receive funding. These recipients, like all of us, are experiencing tough times in the present economic climate – nevertheless, as stated herein, a small amount donated by each Fellow becomes a large sum when enough lawyers participate.

I know there are many demands on your charitable dollars, however, I would urge you to become an OBF Fellow today. As stated herein, the financial commitment

is not overwhelming and the rewards you and our profession receive from generously giving, certainly exceeds the small amount of a Fellow contribution.

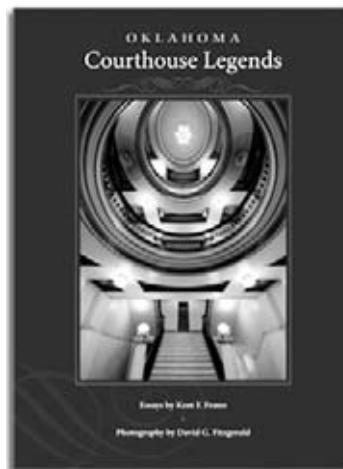
Please feel free to contact me or our Director Nancy Norsworthy for further information. Thanks also to all Oklahoma lawyers who have chosen to become Fellows, and thanks in advance for those who see, appreciate and are willing to help fulfill our needs.

*Phil Frazier is president of the Oklahoma Bar Foundation. He can be reached at [pfrazlaw@swbell.net](mailto:pfrazlaw@swbell.net).*

## Watch for an exclusive book event “Oklahoma Courthouse Legends”

during the 2010 OBA Annual Meeting

**Available at the  
OBF Exhibit Booth!**



**...Experience the Excitement of Oklahoma’s turbulent history...**

Photographer David Fitzgerald and author, Kent F. Frates, *Esq.*, have collaborated to populate the book with a rich historical cast of fearless lawmen, ferocious prosecutors, clever lawyers, noted judges, evil criminals and noteworthy politicians. Don’t miss it!

*A portion of the proceeds go to the Oklahoma Bar Foundation*



# FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

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

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

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

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

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

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

☐ Total amount enclosed, \$1,000

☐ \$100 enclosed & bill annually

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

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

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

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

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OBF Fellows today!*

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

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

# Pro Bono Representation and Criminal Defense Lawyers

By Jim Drummond

There is often found in criminal defense representation a phenomenon I call "below bono," or inadvertent pro bono representation. While not completely pro bono, or without a fee charged, such "below bono" representation should nonetheless be recognized as satisfying a lawyer's ethical obligation to render services pursuant to Model Rule 6.1, which states that every lawyer has a professional responsibility to provide legal services to those unable to pay.

"Low bono" generally involves an agreement that the client will be responsible for actual out-of-pocket expenses incurred by the attorney — but that the fee or cost for time spent will be waived. "Below bono" is actually a term of my devising and is how I characterize a situation where the fee charged, or charged and collected, does not equal the actual costs of the criminal litigation which the attorney must incur, such that the attorney honorably proceeds knowing full well he will end up losing money on the case. I view "pro bono" as usually involving no fee and no costs charged to the client.

A client will call me, often because the client has little money and a court has

ordered the client to try to get private attorney representation because the client managed to post a bail bond. Title 22, Section 1355(A)(D) provides:

D. If the defendant is admitted to bail and the defendant or another person on behalf of the defendant posts a bond, other than by personal recognizance, this fact shall constitute a rebuttable presumption that the defendant is not indigent.

**Know the  
difference between  
pro bono, low bono  
and below bono?**

Some judges enforce this rebuttable presumption harshly and have actually revoked bond and had the client thrown in jail prior to appointing indigent counsel. Most judges are not so strict, but the pressure to enforce the presumption is there. In such cases, I usually advise the client of an anticipated fee,

based on a plea bargain being agreed to, and advise the client that if the case goes to trial, the fee will be higher. I ask for the initial fee in advance, deposit it in my trust account and earn it at the agreed rate. Yet I know full well that in many of these cases, the initial, up-front fee is the last money I will see because the client simply cannot afford to pay any more.

Once I have agreed to take the case, I will not abandon the client (unless I know the client can pay me, but decides to stiff me; then I will withdraw from representing the client). I know many fine defense lawyers who do what I do, and they often wind up spending more on investigation, experts and other legal costs than they have been paid. This is why I call such cases "below bono."

Criminal defense clients are usually poor or they would not be in the jam they hire me to resolve. I do not charge these clients long distance telephone costs, copying costs or time spent on their case by my legal assistant. I charge them for my time only. I know many criminal defense lawyers who do the same. This approach is not saintly; it's just that it's not ethically acceptable to abandon the

indigent client, and the work has to be done. Of course, the judge may well refuse to let me out anyhow. I seldom go “upside down” in a case with a beatific smile on my face and a hymn in my heart. Thus, I am a reluctant “angel” when actually losing money happens.

I am fortunate to have a majority of my practice compensated by the federal government in trial and appellate level cases. It is not good business practice for a criminal defense lawyer to take any pro bono cases at all, because making a living, even for the very best criminal defense attorneys, can be a dicey proposition. There are some excellent lawyers who

do very well in criminal defense and who are every bit as generous with their time. But perhaps the majority of criminal defense lawyers rely, as I do, on government appointments or (as I have not) must branch into other areas of law that can finance the pro bono and “below bono” cases. Many also are paid over a long period of time, with occasional gaps. It is hard to demand \$100 from a client who absolutely cannot get a job and who has a wife and children, or to ask the parents of a client to keep paying when their home is threatened with foreclosure.

Thus, “below bono” representation is often a lesson in micro-economics — a sum that seems trifling to us is absolutely huge to an indigent client. Pro bono work is wonderful and necessary, but for many lawyers whose practice is limited to criminal defense, it is hardly *noblesse oblige* or disposable time. It is street reality, and we practice various levels of “below bono” work regularly. I think such work merits recognition as meeting our ethical duties, and it provides a service to the courts and to the clients.

*Mr. Drummond practices in Norman.*

## **NOTICE: JUDICIAL ELECTION COMPLAINTS**

Please take notice that the Professional Responsibility Panel on Judicial Elections is available to receive complaints concerning candidates running for judicial office in the upcoming elections. In the event that you believe that a candidate has violated the Judicial Canons or other rules applying to Judicial Elections, please forward your written, verified complaint with any supporting documentation to the following address:

*Professional Responsibility Panel on Judicial Elections  
c/o William J. Baker  
P.O. Box 668  
Stillwater, OK 74076*



# Join the YLD – Keep the Momentum Going Strong!

By Molly Aspan, YLD Chairperson

If you have been reading my YLD letter every month, then you know that the level of participation of new attorneys in the OBA and the YLD has been steadily increasing this year. I have received many e-mails and phone calls from YLD members looking for ways to become involved, and I have enjoyed speaking with each of you about opportunities for involvement. In addition to our Board of Directors, we had new attorneys participate in our statewide Community Service Day in May, attend our YLD Midyear Meeting and suite at the Solo and Small Firm Conference in June, attend our new attorney receptions in April, distribute bar exam survival kits in both February and July, assist in organizing the high school Mock Trial competition in March, serve on various YLD committees, and serve as a YLD liaison to various OBA committees. I would like to take this opportunity to again thank each of those volunteers for your time and commitment to the OBA and the YLD.

In this issue of *The Oklahoma Bar Journal*, you will find more opportunities to become involved in the YLD. First, I would like to invite all attorneys to attend a new attorney reception in either Tulsa or Oklahoma City to

congratulate new admittees and welcome them into the OBA. Next, I would like to encourage all YLD members to register for and attend the OBA Annual Meeting in November. Finally, I encourage individuals looking for more ways to become involved to review the materials on the next few pages and consider running for a seat on our YLD Board of Directors.

## NEW ATTORNEY RECEPTION AND HAPPY HOURS

The YLD is once again hosting receptions and happy hours welcoming new members to our profession. The swearing-in ceremonies will be held on Sept. 23, and the YLD will be involved by hosting a cookie and punch reception for new admittees and their families following the ceremony.

Then, on **Oct. 5 at 5:30 p.m.**, the YLD would like to invite all members to attend a happy hour welcoming the new admittees into the YLD and the bar. The happy hour receptions will be held in Oklahoma City at **Mickey Mantle's Steakhouse** in Bricktown and in Tulsa at **Leon's Restless Ribbon** in Brookside. We hope that many of our members use this opportunity to meet the

new admittees, as well as to meet other members and learn more about the YLD.

## YLD ANNUAL MEETING

The YLD Annual Meeting is held in conjunction with the OBA Annual Meeting on Nov. 17-19 at the Crowne Plaza Hotel in Tulsa. In addition to a track of CLE programs geared toward newer attorneys and the YLD Annual Meeting and Friends & Fellows event, the meeting also offers social events and networking opportunities for members of the YLD. Over the course of the three-day event, the YLD will once again be hosting its hospitality suite, which provides lawyers of all ages the opportunity to meet with their colleagues on an informal basis and to discuss both personal and professional issues in a friendly and welcoming session. The YLD will also be sponsoring Casino Night, which is free with Annual Meeting registration. I would encourage all new attorneys and YLD members to mark your calendars and plan to attend the OBA Annual Meeting.

Additionally, if you are a past YLD chair, please be watching your mail for an invitation to a reception at the Annual Meeting honoring

all our past chairs and our Friends and Fellows of the YLD.

## **ABA ANNUAL MEETING IN SAN FRANCISCO**

YLD Directors Jennifer Kirkpatrick, Doris Gruntmeir, Robert Faulk, Amber Peckio Garrett and I attended and participated as the Oklahoma delegates at the ABA/YLD Assembly at the ABA Annual Meeting on Aug. 5-7. I also attended and participated in the ABA House of Delegates. The ABA Annual Meeting provided extensive networking opportunities for young lawyers, a forum for CLE and professional development programming, and assembly business including presentation by ABA officers and sections and debate and vote on numerous resolutions.

The ABA Assembly also included an introduction of the ABA/YLD 2010-11 initiatives: 1) the public service project *Serving Our Seniors*, which will provide low-income seniors with pro bono legal services in the form of wills, powers of attorney, and advance healthcare directives; 2) the *Law Day Video Contest* for 9-12 graders to submit three-minute videos on the importance of discourse, participation and the effect of the law in their daily lives; 3) state *Civil and Law Academies* targeting high school students in each state over the President's Day weekend; 4) the *Committee Teleconference Program*, where the ABA/YLD will present educational programs covering hot topics in specific areas of the law, law practice management, or personal themes free of charge to all

members; and 5) the *New Partner and In-House Counsel Conference* for individuals who are new partners, in-house counsel or interested in becoming either.

## **BOARD OF DIRECTOR ELECTIONS**

If you are interested in becoming more involved in the OBA/YLD, consider running for a position on the YLD Board of Directors. The YLD Board of Directors has monthly meetings that are typically held on Saturday mornings in Tulsa and/or Oklahoma City. Nominating petitions must be submitted by 5 p.m. Friday, Oct. 1, 2010, and questions can be directed to the Nominating Committee.

### **WANT TO GET INVOLVED?**

### **RUN FOR THE OBA/YLD BOARD OF DIRECTORS**

**DEADLINE: OCT. 1**

**at 5 p.m.!**

#### **Officers:**

##### **Chairperson**

**Qualifications:** Any member of the division having previously served for at least two years on the OBA/YLD Board of Directors.

**Term:** One-year term (Jan. 1, 2011 - Dec. 31, 2011).

##### **Chairperson-Elect**

**Qualifications:** Any member of the division having previously served for at least one year on the OBA/YLD Board of Directors.

**Term:** One-year term (Jan. 1, 2011 - Dec. 31, 2011). The chairperson-elect automatically becomes the chairperson of the division for 2012.

##### **Treasurer**

**Qualifications:** Any member of the OBA/YLD Board of Directors may be elected

by the membership of the division to serve in this office.

**Term:** One-year term (Jan. 1, 2011 - Dec. 31, 2011).

##### **Secretary**

**Qualifications:** Any member of the OBA/YLD Board of Directors may be elected by the membership of the division to serve in this office.

**Term:** One-year term (Jan. 1, 2011 - Dec. 31, 2011).

## **Board of Directors (Two-Year Vacancies)**

The following directorships are open for election for a two-year term from Jan. 1, 2011 to Dec. 31, 2013.

### **District No. 1:**

Craig, Grant, Kay, Nowata, Osage, Ottawa, Pawnee, Rogers and Washington counties

### **District No. 3:**

Oklahoma County  
(one seat)

### **District No. 5:**

Carter, Cleveland, Garvin, Grady, Jefferson, Love, McClain, Murray and Stephens counties

### **District No. 6:**

Tulsa County (two seats)

### **District No. 7:**

Adair, Cherokee, Creek, Delaware, Mayes, Muskogee, Okmulgee and Wagoner counties

### **District No. 9:**

Caddo, Canadian, Comanche, Cotton, Greer, Harmon, Jackson, Kiowa and Tillman counties

### **At-Large:**

(two seats)

### **At-Large Rural:**

Any county other than Tulsa County or Oklahoma County (one seat)

## Nominating Procedure:

Article 5 of the Division Bylaws requires that any eligible member wishing to run for office must submit a nominating petition to the Nominating Committee. The petition must be signed by at least 10 members of the OBA/YLD. The original petition must be submitted by the deadline set by the Nominating Committee chairperson. A separate petition must be filed for each opening, except that a petition for a directorship shall be valid for one year and two year terms and at large positions. **A person must be eligible for division membership for the entire term for which elected.**

## Eligibility:

All OBA members in good standing who were admitted

to the practice of law 10 years ago or less are members of the OBA/YLD. **Membership is automatic — If you were first admitted to the practice of law in 2000 or later, you are a member of the OBA/YLD!**

## Election Procedure:

Article 5 of the division bylaws governs the election procedure. In October, a list of all eligible candidates and ballots will be published in the *OBJ*. Deadlines for voting will be published with the ballots. All members of the division may vote for officers and at-large directorships. Only those members with OBA roster addresses within a subject judicial district may vote for that district's director. The members of the Nominating Committee shall only vote in the event of a tie. Please see OBA/YLD bylaws for additional information.

([www.okbar.org/members/yld/bylaws.htm](http://www.okbar.org/members/yld/bylaws.htm))

## Deadline:

Nominating petitions, accompanied by a photograph and brief resume (in electronic form) for publication in the *OBJ*, must be received by the Nominating Committee chairperson no later than **5 p.m. Friday, Oct. 1, 2010**, at the following address:

Rick Rose  
OBA YLD Nominating  
Committee Chairperson  
Mahaffey & Gore PC  
300 N.E. 1st  
Oklahoma City, OK  
73104-4004  
(405) 236-0478  
Fax: (405) 236-1840  
E-mail: [rrose@mahaffeygore.com](mailto:rrose@mahaffeygore.com).

### Tips from the Nominating Committee Chairperson:

- The OBA/YLD website ([www.okbar.org/yld](http://www.okbar.org/yld)) has a sample nominating petition to give you an idea of format and information required by OBA bylaws (one is also available from the nominating committee).
- Signatures on the nominating petitions do not have to be from young lawyers in your own district (the restriction on districts only applies to voting).
- Take your petition to local county bar meetings or to the courthouse and introduce yourself to other young lawyers while asking

them to sign — it's a good way to start networking.

- You can have more than one petition for the same position and add the total number of original signatures — if you live in a rural area, you may want to fax or e-mail petitions to colleagues and have them return the petitions with original signatures by snail mail.
- Don't wait until the last minute — faxes or e-mails of the petitions will only be accepted IF the original petitions are postmarked by the deadline.
- Membership eligibility extends to Dec. 31 of any year which you are eligible.

- Membership eligibility starts from the date of your first admission to the practice of law, even if outside of the state of Oklahoma.

- All candidates' photographs and brief biographical data are required to be published in the *OBJ*. All biographical data must be submitted by e-mail or on a disk, NO EXCEPTIONS. Petitions submitted without a photograph and/or brief resume are subject to being disqualified at the discretion of the Nominating Committee.

# Calendar

## September

- 6 OBA Closed** – Labor Day Observed
- 7 OBA Uniform Laws Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Fred Miller (405) 325-4699
- 8 OBA Technology Task Force/Critical Systems Subcommittee Meeting;** 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Craig Combs (405) 416-7040
- 9 OBA Legal Intern Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: H. Terrell Monks (405) 733-8686  
**OBA Mock Trial Committee Meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Contact: Judy Spencer (405) 755-1066
- 10 OBA Communications Committee Meeting;** 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Douglas Dodd (918) 591-5316
- 14 Death Oral Argument;** 10 a.m.; Wendell Arden Grissom – D-2008-595; Court of Criminal Appeals Courtroom  
**OBA Military Task Force Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Deborah Reheard (918) 689-9281  
**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
- 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  
**Ruth Bader Ginsburg American Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611
- 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 Unauthorized Practice of Law Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Deborah Reheard (918) 689-9281
- 18 OBA Title Examination Standards Committee Meeting;** Tulsa County Bar Center, Tulsa; Contact: Kraettli Epperson (405) 848-9100
- 20 OBA Member Services Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Keri Williams Foster (405) 607-0464  
**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
- 22 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
- 23 New Admittee Swearing In Ceremony;** House of Representatives Chambers; Contact: Board of Bar Examiners (405) 416-7075  
**Oklahoma Bar Foundation Trustee Meeting;** 4 p.m.; Tulsa Country Club, Tulsa; Contact: Nancy Norsworthy (405) 416-7070
- 24 OBA Board of Governors Meeting;** 9 a.m.; Tulsa County Bar Center, Tulsa; Contact: John Morris Williams (405) 416-7000  
**OBA Board of Editors Meeting;** 2:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Carol Manning (405) 416-7016
- 25 OBA Law-related Education Representative Democracy in America and Project Citizen Programs;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024  
**OBA Young Lawyers Division Board of Directors Meeting;** 10 a.m.; Tulsa County Bar Center, Tulsa; Contact: Molly Aspan (918) 594-0595
- 28 OBA Law-related Education PROS Teacher Training;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024  
**OBA New Lawyer Experience;** 8:30 a.m.; Tulsa County Bar Center, Tulsa; Contact: Jim Calloway (405) 416-7051  
**Death Oral Argument;** 10 a.m.; Marlon Deon Harmon – D-2008-657; Court of Criminal Appeals Courtroom
- 29 OBA Law-related Education PROS Teacher Training;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

- 30 **OBA Women in Law Conference**; Southern Hills Country Club; Tulsa; Contact: Renée DeMoss (918) 595-4800
- OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jack Brown (918) 581-8211
- OBA Survey Task Force**; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Brian Hermanson (580) 762-0020

## October

- 1 **OBA Diversity Committee Meeting**; 11 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Marvin Lizama (918) 742-2021
- Oklahoma Bar Foundation Meeting**; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070
- 5 **OBA New Lawyer Experience**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jim Calloway (405) 416-7051
- 6 **OBA Women in Law Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Renée DeMoss (918) 595-4800
- OBA Clients' Security Fund Committee Meeting**; 2 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Micheal Salem (405) 366-1234
- 8 **OBA Family Law Section Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly K. Hays (918) 592-2800
- 12 **Death Oral Argument**; 10 a.m.; Kevin Ray Underwood – D-2008-319; 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**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Bacy (405) 424-5510
- Lawyers Helping Lawyers Assistance Program Training**; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donita Douglas (405) 416-7028
- 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

- 19 **OBA Civil Procedure Committee Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 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
- 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; 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



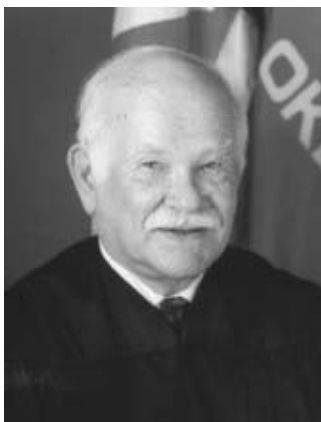
### Justice Hargrave Announces Retirement

Oklahoma Supreme Court Justice Rudolph Hargrave recently announced plans to retire by the end of the year. His last day will be Friday, Dec. 31.

Justice Hargrave worked as a trial judge for 14 years before being appointed to the Supreme Court by Gov. David Boren in 1978.

"I've been on the court 32 years, I think that's long enough," he said. "This has been an experience that I have enjoyed tremendously."

Justice Hargrave, 85, earned his law degree from the University of Oklahoma in 1949. He became a county judge in Seminole County in 1964. The following year he served as Seminole County Superior Court judge from 1967 to 1969. He then served as a



district judge in Seminole County from 1969 to 1978.

In 1989, he was elected chief justice of the Supreme Court, and during his term as chief justice, he was elected by the National Conference of Chief Justices as vice president, the only Supreme Court justice ever to serve in that position.

Justice Hargrave says he plans to enjoy his retirement with his wife Madeline of 61 years in their home in Wewoka. He and his wife enjoy taking bus trips and enjoying a good horse race.

He said he is ready to spend time traveling with his wife and visiting grandchildren.

The Judicial Nominating Commission will begin accepting applications for nominees soon. Applicants must be 30 or older and must be a practicing attorney or judge for at least five years.

Applicants for Hargrave's position must live within the area of the 8th Judicial District, which is composed of Noble, Payne, Logan, Lincoln, Okfuskee, Pottawatomie, Seminole, Hughes, Pontotoc and Coal counties.

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## BENCH & BAR BRIEFS

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## Kudos

**A**ndrew M. Coats, dean Emeritus of the University of Oklahoma College of Law, received the American Inns of Court's 2010 Professionalism Award for the 10th Circuit. The award was presented Aug. 28 at the 10th Circuit Judicial Conference at Colorado Springs, Colo.

**C**asady School in Oklahoma City has elected Crowe & Dunlevy's Director

**Eric Fisher** to serve as chairman of its Board of Trustees.

**T**he Board of Oklahoma County Commissioners recognized **D. Kent Meyers**, **Don R. Nicholson II** and the late Buddy Faye Foster for their contributions made to the abused and neglected children of Oklahoma. The newly constructed court waiting area at the Oklahoma County Juvenile Justice Center has been named "Meyers, Nicholson and Foster Lobby." Mr. Meyers and Mr. Nicholson founded Oklahoma Lawyers for Children, a nonprofit organization that works to protect

children by provided them the full benefit of pro bono legal counsel and services.

**T**elisa Webb Schelin was recognized by the *Dallas Business Journal* as one of its "40 Under 40 for 2010." Ms. Schelin is vice president and assistant general counsel for Behringer Harvard and corporate secretary and general counsel for Behringer Harvard REIT I Inc.

**M**eredith Brockman has been selected to serve on the Board of Directors for the Oklahoma City Indian Clinic. Ms. Brockman is a general practitioner at

the Rivas Law Office in Chickasha.

## On The Move

**C**rowe & Dunlevy announces **Margaret Millikin** and **David Sullivan** as co-chairs of the firm's intellectual property practice group. Ms. Millikin's practice encompasses intellectual property, including IP transactional matters and litigation. Mr. Sullivan is a registered patent attorney and has served as co-chair of the intellectual property practice group since 2008. His practice primarily focuses on obtaining and enforcing patent right for his clients.

**J**udy Tuggle has moved her practice, Judy Tuggle PLLC, to 12436 St. Andrews Dr., Suite B, Oklahoma City, 73120; (405) 235-8445; jt@judytugglelaw.com.

**P**hillips Murrah PC of Oklahoma City announces **David A. Walls** as an attorney of counsel to the firm. Mr. Walls also serves as general counsel to a privately-held Oklahoma oil and gas company and is on the board of advisors to the DJH Foundation. The firm also announces the addition of **A. Michelle Campney**. Her practice primarily involves transaction and litigation work for small businesses, including consulting, estate and succession planning.

**B**eatty & Wozniak PC announces **M.A. "Murph" Shelby** as an attorney of counsel to their Denver offices. His practice focuses on domestic and international E&P and mid-stream transaction, venture formation, capitalization and taxation.

**J**uliet N. Brennan, Rusty Smith and Martha J. Cherbini of Muskogee have opened their own law firm. Brennan, Smith & Cherbini PLLC is located at 417 W. Broadway, Muskogee, 74401; (918) 687-4400; www.muskogeelawyers.com. The firm concentrates in the areas of family law, probate, business law, criminal law, personal injury and injury defense, workers' compensation, insurance law, bankruptcy, Social Security disability and wrongful discharge.

**M**ichael C. Taylor has moved his office to 1831 E. 71st, Suite 318, Tulsa, 74136.

**S**coggins & Cross PLLC of Oklahoma City announces the addition of **Nick Slaymaker** to the firm. His practice involves representing healthcare providers on regulatory, licensing and administrative matters. He previously served as general counsel to the Oklahoma State Department of Health.

**L**loyd T. Hardin Jr. has joined McAfee & Taft in Oklahoma City. His practice involves real estate sales and acquisitions, exchange, construction and development, financing and refinancing, commercial leasing and real

estate management. Mr. Hardin is a graduate of the OU College of Law.

## At The Podium

**M**ark A. Robertson of Oklahoma City will present a program in Minneapolis Sept. 8 to the Minnesota Chapter of the Legal Marketing Association on the subject, "Alternative Fee Arrangements: Helping Your Firm 'Get It' and Marketing it."

*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:

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

**Articles for the Oct. 9 issue must be received by Sept. 13.**

**Robert (Bob) Jordan** of Tulsa died June 10. He was born Jan. 18, 1921, in Siloam Springs, Ark. **He served in the United States Marine Corps in World War II at Iwo Jima.** He graduated from the University of Tulsa College of Law in 1956. He operated his own law practice for 30 years. He enjoyed golfing and fishing and was an avid OU football fan.

**Cindy Marie Foley** of Norman died Aug. 10. She was born June 14, 1957, in Midland, Texas. She graduated from Central State University with honors and a B.A. in criminal justice. She then went on to receive her J.D. from the University of Oklahoma College of Law in 1983. She began her legal career in the Oklahoma County Public Defender's Office and then became a professor and attorney at the Legal Defense Clinic at OU. Memorial contributions may be made in her honor to the M.D. Anderson Cancer Center melanoma research, Birth Choice of Oklahoma, Sister B.J.'s Pantry c/o Our Lady of Perpetual Help or the OKC YWCA Battered Women's Shelter.

**Juandell Doyle Glass** of Norman died June 30. He was born Sept. 19, 1932, in Lockney, Texas. He graduated from the University of Texas School of Law in 1960 with an LLB. **He was an active member of the U.S. Navy from 1954-1956, he then served in the Naval Reserve until his retirement as a full captain.** Mr. Glass also served in the IRS Intelligence Division in

Texas and as an attorney with the Office of Chief Counsel-IRS in Ohio and Oklahoma. He was an active member in the First Baptist Church Norman, where he was a Bible study teacher. He was a long time volunteer with the Norman Regional Hospital Auxiliary and the Matamoros Children's Home in Mexico. Memorial contributions may be made to First Baptist Church, Norman Building Fund, 211 W. Comanche, Norman, 73069.

**Lonnie Hardin** of Tulsa died July 11. He was born Jan. 25, 1955, in Tulsa. He was admitted to the OBA in 1980, and he was an attorney for Verizon Wireless. He was associated with the Oaks Indian Mission, a Lutheran organization that operates a group home for American Indian children.

**John Edward Rooney** of Tulsa died June 28. He was born Dec. 16, 1927, in Muskogee. He graduated from Shattuck Military Academy in Minnesota in 1944 and received his B.A. and J.D. from Georgetown University in Washington, D.C. He was the host chairman of the 1968 Republican Governor's Conference, chairman of Gov. Dewey Bartlett's Inauguration Committee, a past president of the Georgetown University Alumni Association, a past chairman of the NCCJ's Tulsa chapter, past chairman of the Benedictine Sisters Advisory Board, past president of Children's Medical Center and a former director of Gilcrease Museum Associa-

tion and Cascia Hall School. He was chairman of The Rooney Corp. Memorial contributions may be made to Holy Family Cathedral in Tulsa or to the John E. Rooney scholarship fund at Georgetown University in Washington, D.C.

**Wayne DeVan Sharbrough Jr.** of Tulsa died July 26. He was born June 7, 1934, in Laurel, Miss. **He was a lieutenant commander in the U.S. Navy and a past commander of the U.S. Naval Reserve in McAlester.** He was a life member and former district commander of the U.S. Power Squadrons, and belonged to several other organizations including Tulsa Midtown Rotary Club and the ABA. Memorial contributions may be made to the Michael J. Fox Foundation for Parkinson's Research at [www.michaeljfox.org](http://www.michaeljfox.org) or Emergency Infant Services at [www.emergencyinfantservices.org](http://www.emergencyinfantservices.org).

**William Donald Toney** of Tulsa died June 8. He was born May 8, 1927, in Salisaw. **He served in World War II and the Korean Conflict. He was a crewmember of USS Whiteside (AKA90), and following his graduation from Oklahoma State University and the University of Oklahoma, he received an appointment as a naval officer and retired from the Naval Reserves in 1987, as a lieutenant commander in Naval Intelligence.** He was admitted to the OBA in 1957. Memorial contributions may be made to the Rotary Club in Tulsa or your favorite charity.



## SERVICES

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STAFF ATTORNEY – MCALESTER: Legal Aid Services of Oklahoma is seeking an attorney for its McAlester Satellite Office, serving Pittsburg County. The attorney will be responsible for cases involving general law issues. Applicants are required to have a J.D. from an accredited law school and have been admitted to practice in Oklahoma for at least 3 years. Prefer interest in working with indigent individuals. Salary is according to Legal Aid's salary administration plan. Compensation includes generous benefits including health, dental, life, pension and more. Applicants must complete Legal Aid's application at: [www.legalaidok.org](http://www.legalaidok.org). Applicant should attach a resume to the online application, fax or mailed application. Online submissions are preferred. Review materials needed for the online application or print the application for submission by mail or fax at this link: [www.oklaw.org/link.cfm?2879](http://www.oklaw.org/link.cfm?2879). Submissions of your completed application and a resume by mail or fax: Bud Cowser, Director of Operations, 2915 Classen Blvd., Suite 500, Oklahoma City, OK 73106. Fax to (405) 488-6111. Applications will be accepted until the position is filled. Legal Aid is an Equal Opportunity/Affirmative Action Employer. View the complete version of this job description at this link: [www.oklaw.org/link.cfm?2878](http://www.oklaw.org/link.cfm?2878).

LEGAL ASSISTANT - CRIMINAL DIVISION: The U.S. Attorney's Office is seeking to fill one or more legal assistant positions in its criminal division. This position is the equivalent to a legal secretary. Beginning salary is \$38,790 per year. See vacancy announcement 10-WOK-24-D at [www.usajobs.opm.gov](http://www.usajobs.opm.gov) (Exec Office for US Attorneys) for specific information. Applications must be received by mail or hand-delivered to Lisa Engelke, Human Resources Specialist, 210 Park Ave., Suite 400, Oklahoma City, OK 73102, by 5 p.m. Central Time on Sept. 14, 2010.

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NW OKC FIRM SEEKS ASSOCIATE with 2-5 years experience with strong academic, excellent analytical, writing and research skills to work in the areas of litigation, probates, guardianships, business and commercial law. Send resume and salary requirements to [lawfirmad@gmail.com](mailto:lawfirmad@gmail.com). All applicants will be kept in strictest confidence.

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# Musings and Memories

By Nellie Perry

The big day has come and gone. Everybody asks me how it feels, as if I have crossed into another world. I guess I have. With the coming of my 80th birthday, I hoped for a sudden inspiration — at least a burst of energy or a feeling of new wisdom.

It did not happen. All that was different was that I felt like a Ouija board trying to answer the questions I asked myself.

Those questions are not new. I agree with whichever ancient philosopher it was who said, "The unexamined life is not worth living"... or words to that effect.

Some of those questions and the answers I chose follow:

Me: How did you make it this far?

Myself: I was lucky.

Me: What's the best thing about being 80?

Myself: Time to reflect, remember and appreciate the past and to dream about the future.



Me: What's the worst thing about being 80?

Myself: Time to reflect, remember and regret the past and worry about the future.

Me: What are you most proud of?

Myself: My family and my friends.

Me: What are you most ashamed of?

Myself: Neglecting my family and my friends.

Me: What would you do differently?

Myself: Laugh more; complain less; praise more; criticize less.

Me: What goals went unfulfilled?

Myself: I didn't sell a book.

Me: What are your worries about the future?

Myself: That I will lose my memory.

Me: What are your regrets about the past?

Myself: I forgot.

Me: What is your advice to people at work?

Myself: First, show up. Second, listen. Third, return phone calls. Fourth, do what you promise.

Me: What is your advice to today's parents?

Myself: Say "yes" whenever possible and mean it when you say "no."

Me: What is your secret for a good life?

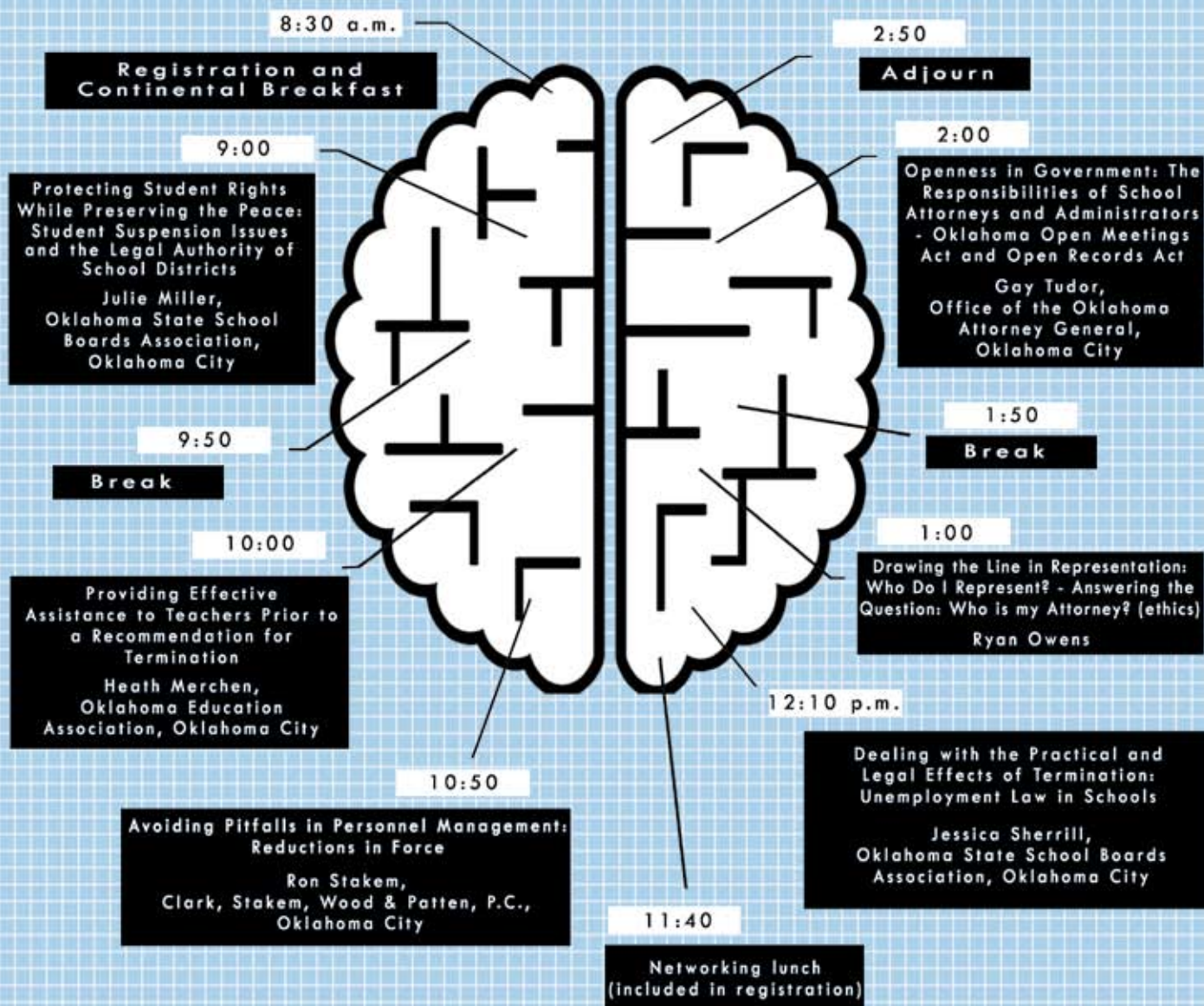
Myself: I was lucky.

*Ms. Perry is a retired lawyer (OU Law class of 1982) from Hobart, who now lives in Stillwater.*



# School Law: Bridging the Gap Between Practitioners and Administrators:

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A close-up portrait of Brent Kimball, a man with dark hair, wearing a dark suit, white shirt, and a blue patterned tie. He is looking slightly off-camera with a subtle smile.

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COULD GIVE ME  
MORE WORK NOW.  
TURNS OUT  
THEY’RE RIGHT.”**

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