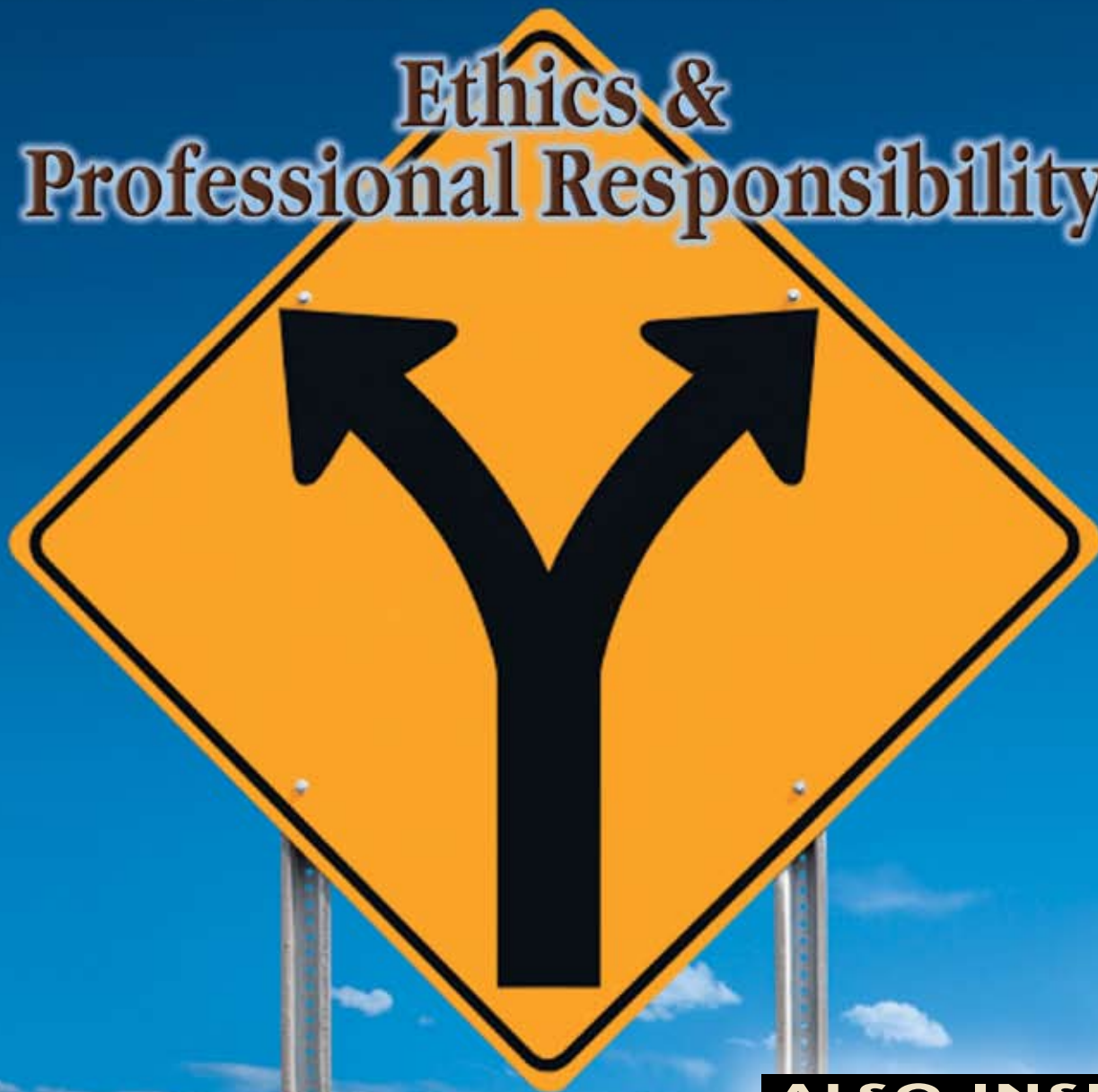


THE Oklahoma Bar JOURNAL

Volume 82 ♦ No. 33 ♦ December 10, 2011

Ethics & Professional Responsibility



ALSO INSIDE

- Taxation Law
- Real Property Law
- Bar Journal 2011 Index

OBA/CLE PRESENTS

RECENT DEVELOPMENTS 2011

Dec. 15 & 16, OKC

Oklahoma Bar Center - 1901 N. Lincoln Blvd.



www.okbar.org

The OKC program will be webcast.
Prices vary.

Day 1

8:30 a.m.

Registration and Continental Breakfast

9

Bankruptcy Law Update

Samuel G. Bratton, II, Doerner Saunders Daniel & Anderson, Tulsa

9:50

Break

10

Labor and Employment Law Update

Michael Lauderdale, McAfee & Taft, P.C. Oklahoma City (tentative)

10:50

Health Law Update

David McKinney, GableGotwals, Tulsa

11:40

Networking Lunch (included in registration)

12:30 p.m.

Criminal Law Update

Barry L. Derryberry, Research and Writing Specialist;
Federal Public Defender, Tulsa

1:20

Break

1:30

Oklahoma Tax Law Update

Kevin Ratliff, Hartzog Conger Cason & Neville, Oklahoma City

2:20

Ethics

Travis Pickens, Ethics Counsel,
Oklahoma Bar Association

3:10

Adjourn

Day 2

8:30 a.m.

Registration and Continental Breakfast

9

Business and Corporate Law Update

Gary Derrick, Derrick and Briggs, LLP, Oklahoma City (tentative)

9:50

Break

10

Real Property Update

Kraettli Epperson, Mee Mee Hoge & Epperson, PLLP,
Oklahoma City

10:50

Family Law Update

Professor Robert Spector,
University of Oklahoma College of Law, Norman

11:40

Networking Lunch (included in registration)

12:30 p.m.

Estate Planning & Probate Law Update

Stephanie Chapman, McAfee & Taft, P.C., Oklahoma City

1:20

Break

1:30

Law Office Management and Technology Update

Jim Calloway, MAP Director, Oklahoma Bar Association

2:20

Ethics Update

Gina Hendryx, OBA General Counsel, Oklahoma City

3:10

Adjourn

Details:

Credit: Approved for 12 hours MCLE/ 2 Ethics for both days. 6 hours MCLE/ 1 ethics for day 1 or 2 only. The live seminar and webcast has also been approved for 5 hours of Texas mandatory CLE credit, including 0.75 hours of ethics for Day 1, and 5 hours of Texas mandatory CLE credit, including 0.75 hours of ethics for Day 2.

Tuition: \$275 (both days), \$150 (day one or day two), for early-bird registrations received with payment at least four full business days prior to the seminar date; \$300 (both days), \$175 (day one or day two), for registrations received within four full business days of the seminar date.

Cancellation Policy: Cancellations will be accepted at any time prior to the seminar date; however, a \$25 fee will be charged for cancellations made within four full business days of the seminar date. Cancellations, refunds, or transfers will not be accepted on or after the seminar date.

Live Streaming CLE Replays

Recent Developments 2011 - Day 1

Dec. 30, 2011 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

Recent Developments 2011 - Day 2

Dec. 30, 2011 - 3:30 p.m. Your Computer. 6 hours MCLE/ 1 ethics

Recent Developments 2011 - Day 1

Dec. 31, 2011 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

Recent Developments 2011 - Day 2

Dec. 31, 2011 - 3:30 p.m. Your Computer. 6 hours MCLE/ 1 ethics

Some Doors Close While Others are Pushed Open: Recent Changes in the Creation of Employer Liability

Jan. 5, 2012 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

Ag Futures: The Latest Developments in Agriculture Law and Their Projected Impact on Oklahoma Ag Producers and Landowners

Jan. 10, 2012 - 9 a.m. Your Computer. 6 hours MCLE/ 1 ethics

How to Get More Business

Jan. 12, 2012 - 3 p.m. Your Computer. 1 hours MCLE/ 0 ethics

Visit www.okbar.org/cle for full listing.



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*The Real Risk of Disability in the United States, Milliman Inc., on behalf of the LIFE Foundation, May 2007

THEME:
ETHICS &
PROFESSIONAL RESPONSIBILITY
EDITOR: MELISSA DeLACERDA

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Happy Trails to You

By Deborah Reheard

It does not seem possible that I am writing my last president's page. It seems like just a couple of months ago that I was anguishing over starting the year with potentially inspiring words, and suddenly I find myself looking for something insightful to end my year as your bar president.

Funny thing about time — the less you have, the quicker it goes.

I have drawn on my families — both immediate and legal — not only for help and support this year, but also for some words of wisdom and funny anecdotes to share as I have traversed the state. When thinking about how time flies, I'm reminded of a true story I have told a few times that gets across a couple of points — time is relative and perception is everything.

When my niece, Kristin, turned six many years ago, we were having a family birthday party for her. My mother began talking about how she remembered the day Kristin was born and what everyone was doing. "Your Aunt Debbie was at law school, and the hot water heater broke at the house, and we had to get everyone to the hospital, and it was so cold." Kristin was amazed that her Nanny Gladys could remember back six whole years, Kristin's entire lifetime. "Oh, honey, I can remember when your brother Clinton was born. PaPaw Tom was in the field, and we had to go get him off the tractor and get him to the hospital in time." Well, this was truly amazing because Clinton was 10 years old and that was longer than Kristin had been alive.

My mother, never one to stop when she was on a roll, said, "Oh honey, I can remember the day your Aunt Debbie was born. I had to stay in town at your great-grandmother's house after she was born because they were using the road in front of the farm to haul dirt to build the Will Rogers Turnpike." Well, you could have heard a pin drop as they say. Kristin's mouth flew open; her eyes got big, and she looked straight at me and said, "You're older than the turnpike?!"

Yes, 30-some years is forever when you are six, but not so long when you are 50-something. And one person's perception of a long time is another person's just yesterday. We have spent a lot of this year working on time and perception — giving time to those who need the unique



President Reheard and her husband, Dale Gill

skills we lawyers possess and improving the public perception of lawyers one good deed at a time.

Thanks to my loved ones, my lawyer family, my law office family and my OBA staff family for a great year. I could not have done it without you, and I am forever grateful. Only with your help has so much been accomplished.

To quote one more famous philosopher, Roy Rogers, as I ride off into the sunset, "Happy trails to you, until we meet again."

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EVENTS CALENDAR

DECEMBER 2011

- 14 **OBA Justice Commission Meeting**; 2 p.m.; Oklahoma Bar Center,
Oklahoma City; Contact: Drew Edmondson (405) 235-5563
- 15 **OBA Bench & Bar Committee Meeting**; 12 p.m.; Oklahoma Bar
Center, Oklahoma City and OSU Tulsa; Contact: Barbara Swinton
(405) 713-7109
- 16 **OBA Board of Governors Meeting**; 9 a.m.; Oklahoma Bar Center,
Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 17 **OBA Young Lawyers Division Committee Meeting**; 10 a.m.;
Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa;
Contact: Roy Tucker (918) 684-6276
- 20 **OBA Civil Procedure and Evidence Code Committee Meeting**;
3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact:
James Milton (918) 591-5229
- 22 **OBA Men Helping Men Support Group**; 5:30 p.m.; The Center for
Therapeutic Interventions, Suite 510, Tulsa; RSVP to: Kim Reber
(405) 840-3033
- 26-27 **OBA Closed** – Christmas Day Observed

JANUARY 2012

- 2 **OBA Closed** – New Year's Day Observed
- 6 **OBA Law Day Committee Meeting**; 12 p.m.; Oklahoma Bar Center,
Oklahoma City; Contact: Tina Izadi (405) 522-3871
- 10 **OBA Law-related Education SCOPE Task Force Meeting**;
11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Reta Strubhar
(405) 354-8890
- 12 **OBA Leadership Academy**; 11 a.m.; Oklahoma Bar Center, Oklahoma
City; Contact: Heidi McComb (405) 416-7027
- 13 **Board of Bar Examiners**; 9 a.m.; Oklahoma Bar Center, Oklahoma City;
Contact: Bar Examiners (405) 416-7075
- OBA Solo and Small Firm Conference Planning Committee
Meeting**; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with
teleconference; Contact: Charles W. Chesnut (918) 542-1845
- OBA Family Law Section Meeting**; 3:30 p.m.; Oklahoma Bar Center,
Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800

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

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

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The OBA's Discipline Diversion Program

By William R. Grimm

On Dec. 9, 2003, the Oklahoma Supreme Court adopted a revision to Rule 5.1 of the Oklahoma Rules Governing Disciplinary Proceedings (RGDP) to provide for a diversionary program to be administered through the Office of the General Counsel (OGC) of the Oklahoma Bar Association.¹

The Discipline Diversion Program (Diversion Program) was previously adopted by the OBA Board of Governors and submitted to the Supreme Court after a two-year study of the disciplinary system by the Disciplinary Task Force. The task force was charged with considering possible changes designed to make the disciplinary system more efficient, particularly for minor transgressions that reflect poorly on the profession, yet still maintain a degree of responsibility for the offending actions. Prevention, not punishment, was the primary consideration espoused by the task force in its recommendation of a diversion program to assist attorneys who receive complaints that stem from minor complaints due to disorganization, procrastination, poor office management or other personal challenges occurring in their respective practice.

The Diversion Program is designed to address "lesser misconduct" without the necessity of filing formal charges for violations under the RGDP or Rules of Professional Conduct (the Rules). Eligibility for the Diversion Program is at the sole discretion the Professional Responsibility Commission (PRC) upon the recommendation of the OGC. Participation by the respondent-attorney is consensual and totally confidential. Any aggrieved respondent-attorney can refuse

to participate, in which case a formal investigation of the grievance will be pursued by the OGC for presentation to the PRC.

The primary purpose of the Diversion Program is to provide remedial education of ethical obligations and responsibilities to those attorneys whose actions do not jeopardize the public, the administration of justice or the profession as a whole. Serious misconduct by an attorney is never considered an option for eligibility to participate in the Diversion Program. Most generally, the lesser misconduct includes those actions which would not restrict the respondent's license to practice law and probably not result in any public discipline by the Supreme Court. However, such actions certainly reflect adversely upon the legal profession and may be harmful to the administration of justice or the provision of legal services to the public.

If selected to participate in the Diversion Program, the respondent-attorney is required to enter into a contract that specifically provides the disciplinary matter shall be held in abeyance pending successful completion of the contract terms. The contract is tailored to provide specific educational and/or behavioral programs designed to assist the respondent-attorney's practice, procedures and/or per-

“The primary purpose of the Diversion Program is to provide remedial education of ethical obligations and responsibilities...”

sonal issues affecting their respective practice. The required programs are presented by OBA staff and require mandatory attendance by the respondent-attorney.

All aspects of the Diversion Program will be monitored by the OBA Ethics Counsel. Participants will meet with the OBA Ethics Counsel regularly throughout the term of the agreement to discuss compliance with the program requirements. Some of the more prevalent programs currently being required include:

- 1) **Ethics School:** Ethics School consists of a half-day program with its purpose to share information and resources to assist the respondent-attorney in avoiding future complaints. The topics covered will include an overview of the discipline system; the attorney/client relationship; fee agreements; conflicts and other subjects designed to assist the respondent-attorney in the management of his or her daily practice.
- 2) **Trust Account School:** This half-day program gives the respondent-attorney practical advice and assistance in managing the client fund trust account; funds required to be placed in trust account; rules about record keeping; accounting basics; fee agreements and rule requirements that need to be addressed.
- 3) **Law Office Management School:** A full-day program, Law Office Management School provides recommendations to assist with technology issues from hardware to software; scheduling; docketing; inter-office and time management.
- 4) **Communication and Client Neglect School:** This half-day program offers the respondent-attorney practical advice and assistance in docketing; file procedures; communication techniques; stress man-

agement and other matters in dealing with client needs.

- 5) **Professionalism School:** This half-day program supplies the respondent-attorney with a better understanding of the Oklahoma Standards of Professionalism, as adopted by the OBA; professionalism in the day-to-day affairs of the respective practice and better ways “to be a lawyer.”

In addition to the “school” curriculum offered through one or more of the instructional classes, there are additional resources that can be

Diversion Program Fund

Monies generated for a newly created Diversion Program Fund from private gifts and program fees will be used to furnish attorneys with some basic resources and tools crucial to a well run law practice, in addition to on-site office consultations and in-depth management guidance. The best way for lawyers to deal with bar complaints and defend malpractice claims is to attempt to avoid them altogether. Oklahoma Attorneys Mutual Insurance Co. has made a generous donation of \$10,000 to support this fund.

OAMIC President Phil Fraim said, “When I first learned of the Discipline Diversion Program, it made so much sense for OAMIC to become involved and to serve as a sponsor. Providing lawyers with helpful tools in areas where deficiencies might exist dovetails perfectly with what we strive to do in the risk management process.”

Mr. Fraim thinks OAMIC’s sponsorship helps avoid, or even mitigate, one legal malpractice claim, then it is money well spent. Yet, for the organization it goes much deeper than simply quantifying sponsorship dollars against claims saved. Mr. Fraim sees the vision of OAMIC is as a strong advocate for lawyers, not just the largest writer of lawyers’ professional liability insurance in the state. OAMIC is always seeking ways to add value to the efforts of those who provide legal services in Oklahoma.

“Over the past 20 years we have seen a number of carriers come and go in Oklahoma, but that is simply not an option for OAMIC,” Mr. Fraim said. “Our sole market is the Oklahoma legal community. What sets us apart from others who may write LPL insurance from time to time is that we truly care about the success of our insureds!”

OAMIC has distinguished itself through a strong record of support to the Oklahoma Bar Association. Its goal is to be there whenever bar members need them. They pledge to continue to search for ways to make the “business of practicing law” better for Oklahoma lawyers.

made a part of the contractual arrangement to assist with the individualized requirements of the Diversion Program, including:

1) **Management Assistance Program Office**

Review: This program will provide an in-office site visit to review the respondent-attorney's office procedures. After evaluation, recommendations will be made to better facilitate the day-to-day running of the respondent-attorney's practice.

2) **Lawyers Helping Lawyers Assistance**

Program: This program is designed to assist the respondent-attorney with issues ranging from depression to substance abuse to work/life balance. No reports are maintained other than the respondent-attorney's participation in the program, which is voluntary and confidential.

3) **Mentor Referral:**

This program is designed to match the respondent-attorney with a more experienced one to discuss matters that need attention on a day-to-day basis in order to provide a different perspective on how to manage the daily practice of law.

4) **Medical/Psychological Monitoring:**

This program assists the respondent-attorney with medical or psychological issues that require attention. No reports are maintained other than the respondent-attorney's participation is voluntary and confidential.

Participation in the Diversion Program requires reimbursement of the investigative costs incurred by the OGC and has a fixed fee of \$40 per month to defray monitoring costs, which is spelled out in the contract. Additionally, each of the various schools has a compulsory fee ranging from \$150 to \$250 per half day which in certain instances can be waived by the PRC upon a showing of financial need. None of the instructional programs or classes associated with the Diversion Program may be used for continuing legal education credit.

Under the Rules, the contract provides that material violation will render the respondent-attorney's participation in the Diversion Program voidable and that the misconduct allegations be sent to the PRC for consideration of formal charges. A material breach is defined in the contract to include a failure to timely complete the requirements of the Diversion Program, such as the designated school programs,

or new allegations of professional misconduct. Additionally, a material violation of the contract shall be considered as admissible evidence in any subsequent disciplinary proceeding for the original grievance against the respondent-attorney.

At the successful conclusion of the Diversion Program, a report will be submitted to the PRC regarding the respondent-attorney's participation. The report will include a recommendation of the OGC and Ethics Counsel regarding the contracted-for resolution of the grievance allegations against the respondent-attorney. A successful completion of all requirements will assure the respondent-attorney of an outcome from the grievance allegations that will result in either a dismissal; a letter of admonition or a private reprimand from the PRC. However, participation in the Diversion Program can be considered by the PRC in any future allegation of misconduct against the respondent-attorney.

Over the past two years, 47 respondent-attorneys have participated in the Diversion Program resulting in successful conclusion of their "lesser misconduct." Many of the respondent-attorneys have expressed not only gratitude for the opportunity to participate, but an earnest belief they actually benefitted from the programs presented in the Diversion Program. These results have provided respondent-attorneys with a substantially better chance at reasonable rehabilitation rather than a public retribution for their transgressions from the Rules.

1. 2003 OK 108, 84 P.3d 105

ABOUT THE AUTHOR



William R. Grimm practices primarily in business and commercial litigation. He received his juris doctorate in 1973 and a bachelor of business administration in accounting and finance in 1970 from the University of Oklahoma. He is an active member of many professional and civic organizations. Mr.

Grimm served as OBA president in 2006. He currently serves as a member of the Professional Responsibility Commission and as co-chair of the OBA Unauthorized Practice of Law Task Force. Also, he is an ABA member and was selected as an American Bar Fellow in 2003.

A First-Person Account of the Diversion Program

By Anonymous

As I sat in the room waiting for my first formal diversion class to start, I kept thinking to myself (in the words of the great philosophers Laurel and Hardy) "This is another fine mess you've gotten us into." The collective "us" here, means me, myself and I. My attendance at these diversion classes did not feel optional. I could either take a "deal" and attend the required classes or go to a full blown hearing with the potential for an even more distasteful outcome — more attorneys fees than I ever wanted to spend and the possibility of discipline. The diversion classes seemed like the lesser of two evils. Was I ever surprised that the classes turned out to be pleasant, informative and very helpful. The primary reason for this turn of events was the OBA personnel involved — Travis Pickens, Jim Calloway and his assistant Amy Kelly. All of these individuals treated me like a person, not like a criminal. All of the individuals in the diversion program were sensitive to the situation and were adamant that I would take something good from a bad experience. I am glad they took that stance.

The initial diversion class involved an in-house evaluation of the business of my practice — a visit by Jim Calloway of the Management Assistance Program. Laurel and Hardy again came to my mind — what have I gotten myself into? Jim assuaged my fears immediately. We talked about the practice of law, how it has changed over the past 10 or so years and how the practice of law continues to change. We discussed goals for me. We discussed strategies I could implement — almost immediately — to aid in the practice of law. We discussed many topics, all of which made me think on a deeper level than just from where is the next month's rent appearing. Jim's attitude — I am here to help you, use me as a resource, think about your practice, but also think about your life — was most engaging. He never came across as arrogant or superior. His attitude was one of support. Not only was he interested in me and how my practice operated, but he was also interested in me as a person. Whether he identified with me as a very small firm, as was his back-

ground, or whether he identified with me as a person who was facing a professional hurdle, I am uncertain. I know he treated me with respect and kindness. For that attitude, I will always be grateful.

The trust account portion of the diversion program was taught by Travis Pickens. The trust account class, primarily a review of what we learned in law school with a few updates in the statutes, was enjoyable. Again, the emphasis was on not why I was present, but rather information which I may need in the future. There were other attendees present and for some obvious reasons, we did not exchange full names or telephone numbers. Travis gave us information which would be useful in day-to-day operations of practice in a small firm setting. Some of the examples and scenarios would be applicable no matter the size of the firm or the type of private practice. Throughout the class we were treated as adults, not as wayward children. This helpful attitude continued throughout the class and the discussions. We were not presented with any surprises at the end of the class.

The diversion program and the attendant classes were intended to be an alternative to formal punishment which could be career ending. The program is a welcome addition to help attorneys who find themselves in a situation similar to mine — forced to make a purely business decision and making the best of a bad situation. In that regard, the program worked for me.

If Amy, Jim and Travis meant for me to almost enjoy the time I spent with them and to learn something in the process, then they have succeeded. They helped to ease my initial fears about attending the classes and I appreciate the fact that through this process, I survived a very painful professional situation. The information and (dare I say it) care I received aided me in a very difficult time. I am grateful for the consideration and understanding the OBA representatives gave to a member who was facing these issues.

OBA Needs Volunteers for 2012 Committees

Teamwork makes things happen and that's very true for all our OBA committees. If you're not yet a committee member, I urge you to get involved. There's no better way to network among colleagues — and isn't that an investment in your career worth the time out of the office?

The variety of committees makes it easy to find something you are interested in. Pick one and help me make a difference. I need you on my team.

If you work in or around Tulsa, videoconferencing from there with the bar center in Oklahoma City saves travel time. We want your participation.

It's easy to sign up online at www.okbar.org. You can also complete this form and either fax or mail it to the OBA. I need to start working on committee appointments soon, so please respond by

deadline extended to Dec. 21, 2011.

Cathy Christensen

Cathy Christensen, President-Elect

Standing Committees

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

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

Please Type or Print

Name _____ Telephone _____

Address _____ OBA # _____

City _____ State/Zip _____

FAX _____ E-mail _____

Committee Name

1st Choice _____

2nd Choice _____

3rd Choice _____

Have you ever served
on this committee?

☐ Yes ☐ No

☐ Yes ☐ No

☐ Yes ☐ No

If so, when?
How long?

☐ Please assign me to only one committee.

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

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

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

Fax: (405) 416-7001



An Ethics Checklist: Withdrawal From A Case

By Travis Pickens

One of the most important skills a lawyer can master is how to withdraw from a case and close the file. Several bar complaints are filed each year simply because the attorney handled the termination of their representation badly. Withdrawing from a case, under any circumstances, is a pivotal emotional point for many clients. Beyond this personal component, there is also a simple matter of withdrawing and closing the file properly, in compliance with the *Oklahoma Rules of Professional Conduct*.

START WITH THE FEE AGREEMENT

Termination of the attorney-client relationship should be anticipated and covered in your written fee agreement. For this alone, you should consider including:

a. a notice that a motion to withdraw may be filed at any time if proper grounds. (12 O.S. §2005.2 C.)¹

b. a list of the possible grounds for termination, both mandatory and discretionary (Oklahoma Rules of Professional Conduct 1.16).

c. your document retention policy (Note: Begin with ORPC 1.15—five (5) years after the **termination** of representation relates to client property and client account records only, but it makes a good **beginning** point for considering whether a file may be safely destroyed. [see “File Retention Guidelines – Rules for Document Retention,” G. Hendryx, *The Oklahoma Bar Journal*, Vol. 82 – No. 2, 1/15/2011])

d. provisions related to the delivery of the file after termination and payment of last fees and

costs (e.g. copy charges, delivery charges, etc.). (See Oklahoma Ethics Opinion 295. Generally, if the lawyer wishes to keep copies of documents the *client* has furnished, the lawyer should cover the expense. If the lawyer charges for copies, it is permissible to charge for copies requested by the client or new lawyer.)

e. provisions related to a statutory charging lien, and/or common law file-retention lien (see *Britton and Gray v. Shelton*, 2003 OK CIV APP 40). Generally, you can retain a client’s file if you are owed money unless to do so would prejudice the client. (Not recommended. There are better, less antagonistic, ways to ensure payment. The client, and successor lawyer, can easily argue prejudice.)

f. provisions for mediation and/or arbitration (ABA Formal Opinion 02-425. Generally, lawyers may include mediation and arbitration provisions in fee agreements relating to both fee disputes and malpractice claims, with restrictions. Before using these provisions, you

should discuss them with your malpractice carrier.)

g. be clear as to who exactly your client is, the scope of representation, and when it ends (ORPC 1.2). Define these as narrowly as possible.

h. provisions for “successor” counsel in the event of your death or incapacity (*see* ORPC 1.3 [5] and Rules Governing Disciplinary Proceedings 12.1 *et seq.* Generally, every solo lawyer ought to have a succession plan in case of sudden death or disability, and a successor counsel selected to step in and notify the OBA and clients)

i. special considerations if counsel has been court appointed, or if the client lacks or is of diminished capacity.

HAVE PROPER GROUNDS FOR WITHDRAWAL

(ORPC 1.16) Rule 1.16 lists both mandatory and discretionary grounds for withdrawing. Avoiding adverse impact to the client is fundamental; take all reasonable steps to mitigate the consequences to the client. Remember, the client can always fire you, with or without a reason. When you want to withdraw, it is always best to obtain the client’s permission, if possible. You may be required to remain in a case by the tribunal, even if you and the client want to terminate the representation. (ORPC 1.16 (c))

GIVE PROPER NOTICE

Give reasonable notice to the client (ORPC 1.16), either in person or in writing.

a. notify and discuss with the client in person if possible (if you have a difficult client, consider asking an assistant to observe and prepare a memo to the file documenting the conference).

b. act promptly, and while there is still time for employment of other counsel.

c. be courteous, always. Write a “termination” letter assuming it will later be read by the OBA general counsel or a judge. Be thorough and cover your interests, but do not unnecessarily anger your client. Present the reason for your withdrawal, but do so accurately and unemotionally.

d. advise of important matters, deadlines, and statutes of limitations or deadlines (be careful if unsure or not clear).

e. confirm the client’s permission to withdraw, or ask for written consent to withdraw.

f. advise the importance and urgency of employment of successor counsel, or confirm that successor counsel has already been retained.

g. generally explain the major implications of being *pro se* (receipt of notices, court deadlines, statutes of limitations, etc.)

h. if no consent, advise that there will be a hearing on your motion to withdraw.

i. typically, it is inadvisable to bill the client for your withdrawal. They resent it, even if it can be justified.

j. consider waiving or not charging for nominal, last-minute “closing” costs.

k. consider waiving/reducing some of the final charges/fees as a courtesy to your client to help the client retain someone else. In many cases, that will be the client’s immediate concern (and the one that can create the most client frustration).

l. advise the necessity or benefits, if any, of filing motions for extension and/ or continuance.

m. advise that an order will be forthcoming with a deadline to either have successor counsel enter an appearance, or be deemed *pro se*, and that a court could hold the client in default if the proper actions are not taken.

n. notify opposing counsel, and if possible, obtain their consent.

STRICTLY FOLLOW STATUTORY PROCEDURE

(12 O.S. §2005.2 and applicable district and local rules). Generally, the statutory procedure required includes a motion with proper grounds and advising the court if the case is currently set for motion docket, pretrial conference or trial; notice to all parties; the client’s signature on the motion, or a certificate that the client has been notified or a good faith effort has been made to locate the client and the client cannot be found; if no successor counsel, the name and address of the party; and an order stating in instances with no successor counsel that the client (unless a corporation) shall be deemed *pro se* after 30 days.

FILE A MOTION TO WITHDRAW AND OBTAIN AN ORDER

Strictly follow statutory procedure. If your client or any party does not consent, then set a hearing. If your client agrees to your with-

drawal, then that typically is the only basis you need. If not, then be as general as possible and avoid a “noisy withdrawal,” stating something that will be used against your client by the other party or that may prejudice them with the judge. In matters of client dishonesty or other prickly circumstances, the statement “professional considerations require termination of the representation” should typically be accepted by the court. The comments to *Rule* 1.16 counsel that lawyers should remain mindful of their obligations to the client and the court under 1.6 (Confidentiality) and 3.3 (Candor Toward the Tribunal).

IF THERE IS A SUCCESSOR COUNSEL

Cooperate promptly and fully with any reasonable request by the new counsel. Do not criticize the client.

WRITE A CLOSING LETTER TO THE CLIENT

Be courteous, informational and clear.

a. again, assume it could someday be read in court, or by the OBA general counsel

b. be thorough, and consider reference to at least the following:

- all returned or enclosed original documents and property
- prior delivery and client’s current possession of all pleadings, correspondence or other papers and property
- important deadlines and statute(s) of limitations (unless unsure, unclear or otherwise unnecessary – but always advise client to act promptly if there is more to be done)
- consequences for inaction, e.g. default, dismissals, a barred claim
- refund of advanced payments for fees and expenses, along with a written summary accounting reflecting your calculations (do this in person if possible and ask the client to initial and approve the accounting and receipt of returned funds)(Note: Fees must be both **reasonable** and **earned** under *ORPC* 1.5. If fees are unearned, or costs not incurred, then they must be returned. See *ORPC* 1.5 and 1.16)
- reminding/advising of your document retention policy and that your copy of the

file will eventually be destroyed on or after a certain date

- your policy as to costs/fees for additional copies or follow-up work requested by the client
- confirm your understanding as to whether there will be a successor counsel
- offer to cooperate in “any [reasonable] way” with new counsel
- end on a positive note, and thank them for the opportunity to serve them

DOCUMENT RETENTION AGREEMENT

a. make it part of your fee agreement, either within the agreement or as an attachment

b. be clear that documents will eventually be destroyed after a certain date

c. include provisions regarding costs for additional copies or retrieval expenses

d. return original documents and papers to your client immediately upon the end of representation and get a receipt (avoid keeping original or valuable papers at any time)

e. continue to reasonably safeguard the confidentiality of the information (*ORPC* 1.6)

f. do not destroy anything for at least five (5) years after the representation ends (*ORPC* 1.15) AND then you should consider destruction of files on a **file by file** basis thereafter. Consider at least the following:

- are there any unasserted claims that are not barred by statutes of limitation (either on behalf of or in defense of a client)
- double check to make sure you do not have any original documents or papers
- are there any minors or incapacitated persons involved
- the risk of destruction as compared to the costs of storage
- any documents that you may need to defend yourself in the event of a later grievance or malpractice claim
- any documents that would be difficult or impossible to replace in the event of a later action
- destruction of the files must be done in a way to reasonably protect the confidential-

ity of the information (e.g. shredding or burning)

- the documents must be stored in a way that reasonably maintains the confidentiality of the files
- whether billing and trust records should be kept indefinitely
- check with your malpractice carrier regarding any recommendations
- other law that may apply (e.g. adoption laws)
- keep an index or identification of the files and cases, both those kept and destroyed
- always keep copies of the fee agreement and closing letter
- electronic storage of documents for the long term can be a great alternative

1. The following checklist is designed to address ethical considerations. It is intended as a guide to best practices and may exceed the minimum requirements imposed by the Rules of Professional Conduct. All citations are to state law. Statutory procedure, district court and local rules control, and should always be consulted for current law.

ABOUT THE AUTHOR



Travis Pickens serves as OBA ethics counsel. He is responsible for addressing ethics questions from OBA members, monitoring Diversion Program participants, teaching classes, speaking at continuing education programs and other law-related seminars and writing articles for *The Oklahoma Bar Journal* and other publications. A former litigator in private practice, he has served as co-chair of the Work/Life Balance Committee and as vice-chair of the Lawyers Helping Lawyers Assistance Program Committee.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Judge for Oklahoma Court of Civil Appeals District Six, Office Two

This vacancy is created by the retirement of the Honorable Carol M. Hansen effective January 1, 2012.

To be appointed to the office of Judge of the Court of Civil Appeals, one must be a registered voter of the respective judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, such appointees shall have had a minimum of four years experience as a licensed practicing attorney, or as a judge of a court of record, or both within the State of Oklahoma.

Application forms can be obtained online at www.oscn.net under the link to Judicial Nominating Commission, or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Stiles, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9862, and should be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Friday, December 16, 2011. If applications are mailed, they must be postmarked by midnight, December 16, 2011.**

Jim Loftis, Chairman
Oklahoma Judicial Nominating Commission

POSITION ANNOUNCEMENTS: ASSISTANT PROFESSOR – CLINICAL EDUCATION

UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

The University of Oklahoma College of Law is seeking applications for two positions in its live client clinical program: 1) Faculty Supervisor, Criminal Clinic and 2) Faculty Supervisor, Civil Clinic. The initial appointment for each position will be a three year term contract followed by eligibility for a long-term presumptively renewable contract consistent with ABA standards.

POSITIONS: ASSISTANT PROFESSOR, CLINICAL EDUCATION:

The Assistant Professor, Clinical Education, Criminal has a primary responsibility for teaching lawyering skills to law students in the criminal clinic through the direct supervision of Licensed Legal Interns. Clinic students defend clients in misdemeanor and minor felony cases in Cleveland and McClain Counties. The Assistant Professor is responsible for overseeing a criminal caseload of an estimated range of 40 to 80 cases.

The Assistant Professor, Clinical Education, Civil has a primary responsibility for teaching lawyering skills to law students in the civil clinic through the direct supervision of Licensed Legal Interns. Clinic students represent clients in a variety of civil cases including domestic relations cases; consumer protection; probate; and landlord tenant. The Assistant Professor is responsible for overseeing a civil caseload of an estimated range of 40 to 80 cases.

Both applicants should be familiar with clinical education pedagogy to appropriately shape their supervisory techniques. The Assistant Professors will work collaboratively with the Director and other clinical faculty to provide programmatic enhancement activities and to continue the growth of clinic offerings. The Assistant Professors will assist in providing classroom instruction in lawyering skills courses. The Assistant Professors will also assist and participate in clinic related activities as assigned by the Clinical Director.

The Assistant Professors will be expected to participate in appropriate professional activities within the College of Law and the legal profession. While there is no scholarship requirement, the Assistant Professors are expected to participate in activities that benefit the legal profession. The teaching abilities of an Assistant Professor shall be evaluated by the College of Law using assessments from students, faculty teaching in the Clinical Program, the Director and other indications that demonstrate a record of good teaching.

QUALIFICATIONS:

Applicants must have a Juris Doctorate degree from an ABA Accredited Law School. Applicants, if not currently licensed to practice law in the State of Oklahoma, must be eligible for and willing to obtain such licensure. A minimum of 5 years practice experience in the relevant area or 2 years as a clinical faculty member is required. Applicants must have a demonstrated interest in pro bono service and appreciate the dynamics of representation of low income persons.

APPLICATIONS:

Applications should be submitted to Cheryl B. Wattley, Director, Clinical Education, University of Oklahoma College of Law, 300 Timberdell Road, Norman, Oklahoma 73019.

Please include a cover letter, resume or curriculum vitae, and contact information for three references. Applications received by Jan. 9, 2012, will be assured full consideration; the search will remain open until the position is filled. Confidential inquiries and requests for further information may be directed to Cheryl B. Wattley at cwattley@ou.edu.

The University of Oklahoma is an Equal Opportunity/Affirmative Action Employer. Women and minorities are strongly encouraged to apply.



What is the Lawyers Helping Lawyers Assistance Program?

By John Morris Williams

The title to this article ends with a question mark because the program often is not what it is commonly perceived to be. Just exactly what is the LHLAP? In the 1980s attorneys Bob Looney, T. Ray Phillips and some other giants in the recovery community put together the Lawyers Helping Lawyers Committee. The primary focus was alcohol addiction and the traditional 12-step program most often associated with Alcoholics Anonymous was an often utilized treatment method. While the Oklahoma Bar Association does not endorse any treatment plan or programs, we are aware there are many options that are available that can be helpful.

The program since the early days has expanded greatly. Today, we are finding more and more areas of need related to substance abuse and mental health issues. Why more? That is an easy and a complicated question. The easy part is because we provide a safe harbor and the stigma associated with seeking help is eroding. The complicated part involves many dynamics. There are so many more choices today and exposure to new types of addiction. The Internet, casinos and drugs easily manufactured at home are the most obvious gateways to new types of addictive behaviors. These new gateways offer new challenges that do not easily fit the original Lawyers Helping Lawyers model. The consequences of these new challenges have the potential for the same bad outcomes as alcohol and drugs of old.

Here are the figures that we all must be aware of:

15-18 percent of attorneys will have a substance abuse problem vs. 10 percent of the general population.

Over 1/3 of attorneys say they are dissatisfied and would choose another profession if they could.

Attorneys have the highest rates of depression and suicide of any profession.¹

In addition, the general population in Oklahoma has significantly higher mental illness rates when compared to the rest of the country.² On a scale with 50 being the worst, Oklahoma

ranks 46 in depression, 39 in suicide rates and overall are in the top tier for serious mental health issues. Taking into consideration the statistics of the profession, coupled with the general population base from which we are drawn in Oklahoma, it does not take a great leap of logic to realize that we have some serious issues facing us.

Add to these statistics, the overall stress level of the work, and it is not surprising that as a profession we suffer in greater proportions than the general population. Also, it should not be unappreciated that resources and opportunities are also greater for us than the general population to indulge in some pretty damaging behaviors. For instance, if you own your own firm and practice without staff there is a small chance of anyone checking your Internet use or confronting you if you smell of an alcoholic beverage. Thus, many of us are working without any safety net in a statistically substantiated zone of danger.

The OBA for the past several years has utilized an outside employee assistance program third-party administrator and provider to provide intake and counseling services. The move to an outside independent service was done partially to ensure OBA members that their inquiries or requests for assistance were in no way communicated to the OBA. The confidential integrity of the system has worked well in that regard. During the past 12 months our provider has reported 54 new cases and 12 cases active from the previous 12 months. Also, session utilization has more than tripled in 2011 from previous years.³ The utilization report shows that direct self reporting and seeking help after visiting the OBA website are the two most common

My Story

By Anonymous

My background is probably typical – in a period of 8 years I experienced a great deal of emotional upheaval and events that had a significant impact on my well being.

One fall evening in 2009 I was sitting at the table crying. I had come to a point where I no longer cared what happened to me.

The Oklahoma Bar Journal was on the table in front of me, opened to a page with a Lawyers Helping Lawyers Assistance Program advertisement. I remember thinking how incredibly corny for me to be in such a state, and for the advertisement to appear like an apparition in front of me like that. It was sappy. I woodenly picked up the phone and called the hotline. I remember that while the phone was ringing I thought that I should hang up before anyone answered. I certainly couldn't have any information I may tell them getting out and becoming known. That would ruin me.

The next thing I knew, I was telling my entire story to the girl that answered the phone. She listened. It all sounded scripted and ridiculous to me in that moment. I talked because I thought that this phone call is all the help I would have, that no one would really call me back, but the next morning Rebecca called. Not only did she listen, she put me in touch with another lawyer — a mentor — so that I would have someone available in moments of crises. Together, Rebecca and my mentor helped me make appointments with professionals that could guide me through the foggy place I was in at that time, to the place of security and self-assurance that I am in now.

Over the next few months I began to be much improved. I was again employable. Life was no longer a chore to be done, moment by grueling moment, until I could get home and block it all out by going to sleep. I was not alone. LHLAP was in contact with me the entire time, and I could contact them when I needed to do so. I was also able to contact my mentor. With the care of professionals, I have been able to live with my issues, and I am currently working toward removing these obstacles from my life. It is going well. Today I have better employment and I enjoy my work and my life.

Today, two years later, I am doing work I love, belong to and am a leader in civic organizations, and most importantly, my relationships with my children and friends have been restored.

LHLAP is the real deal. It is immediate help. It is professional and private. If I had known this kind of help was being offered, I would have called nine years ago, when my life began to unravel.

I would strongly urge anyone reading this, if you have any kind of problem, stress, alcohol, depression, drug use — call them today. If you don't like it you don't have to use them, but at least call. It costs you nothing and may save your life — like it did mine. ■

Troubles and Triumph

By Anonymous

When I was 17 I was so angry. I had lost my best friend three years earlier and quickly became unmanageable. I remember reaching the first of several lows but not quite a bottom. I had decided that my life was no longer needed. Before I knew it, I was at a religious camp and I made peace with my Higher Power. However, I didn't make peace with myself. I had no idea how to start living.

Through the years, even in social addiction, I managed to obtain a law degree and became a licensed professional in two separate fields. I felt that I was a social user and there was no real consequence to my actions. I managed to appear as a small town boy who did well and served the community. It was a mask. It was vanity and arrogance but most of all it was the grip of addiction teaching me the false security of denial.

My last years of my active addiction were as if I was watching myself fly an airplane in a circle. It seemed as if I was hoping to run out of fuel so maybe, just maybe, I wouldn't burn as I crashed. I finally hit a bottom. I realized that I was totally out of control. I had let one license go inactive and soon found myself willingly surrendering the other to avoid further embarrassment and additional legal troubles.

Then I discovered recovery through Alcoholics Anonymous and Narcotics Anonymous. I remember the first meeting I attended. There was an addict attending that had this glowing expression of peace. I didn't recognize it at the time. It came to me later while working through the 12 steps of recovery. The look of joy and peace that had so firmly been planted in my memory came from within her. That addict and the addict with her had something I so desperately wanted.

At three years clean I went to my first OBA Annual Meeting to start catching up on my CLE. It was like going to the swimming pool and sticking a big toe in the water. Would I be scorned, welcomed or indifferent? I felt welcomed from the many attorneys I had developed friendships with over the years. Yet I felt very out of place, as if I didn't welcome myself.

That night I went to a 12-step meeting on the south side of Oklahoma City. As I shared some of my nervousness without saying which convention I was attending, I noticed a man in a tie nodding his head. After that meeting he introduced himself and his community was not too far from my area. He told me his struggles before being admitted to the OBA. This is when he asked if I had developed a mentorship with the Lawyers Helping Lawyers program. I was stunned. I had no idea that was provided to former attorneys.

The Lawyers Helping Lawyers program gave me a new insight and for the first time I actually thought there was a slim hope of returning to this profession. The mentorship and the guidance for reinstatement helped me make better decisions. One decision was to have five years clean rather than just the five years requirement before seeking reinstatement. That decision helped me become more prepared and served as a lesson in humility.

I now have 11 years clean. I attend my 12-step program on a regular basis and serve on the Lawyers Helping Lawyers Assistance Program Committee. The attorney I met at that meeting in south OKC became my new sponsor last year. I have the blessed privilege to be a sponsor. I work and try to live the steps as presented in recovery.

I have learned that being of service is a spiritual principle and I honestly believe that to be true. I have been blessed to serve at various levels of service including at a regional and world service position in my 12-step fellowship.

I am so honored and humbled that a power greater than myself has allowed my recovery to be of service. Through action in my personal recovery, I have now accepted and surrendered my addiction to that peace I so desperately sought. I am now finally a productive, happy and willing member of society.

Thank you

avenues for lawyers to seek help. This is encouraging in the fact that OBA members feel safe in utilizing our third-party provider without fear of negative ramifications for seeking help. Our program statistics mirror the national picture. Depression, alcohol/substance abuse and stress top the list of problems presented. Twenty-five percent of members seeking help reported depression as the primary reason for seeking treatment. This category is closely followed by alcohol/substance abuse and work stress which are reported in almost identical numbers.

Rebecca Williams of CABA Inc., who coordinates the OBA LHLAP, recently noted:

"The utilization reports for the last 12 months are not significantly different from what we have seen in the past. The number of cases continue to grow as the program becomes better advertised but, the types of cases remain consistent."

She also stated:

"We have mental health providers answering our hotline 24/7/365 because often people reach a crisis point during the late hours when they are alone and isolated. The OBA offering up to six free hours of counseling allows us to immediately address people in crisis and gives us time to plan more permanent treatment options."

Of the 66 cases open with CABA Inc. 31 of the cases also resulted in a referral to the LHLAP Committee for peer assistance.⁴ Tom Riesen who has chaired the LHLAP Committee for the past several years commented:

"We are better trained and have greater resources than ever before. While not every case has an optimal conclusion, I have seen first hand, lives changed and saved because of this program. It is some of the most rewarding work I have done in my career."

Riesen, who in the past served as a staff attorney in the OBA general counsel office also stated:

"When I was prosecuting lawyers for misconduct I often saw the result of untreated mental health and alcohol/substance abuse and the

"...OBA members feel safe in utilizing our third-party provider without fear of negative ramifications for seeking help."

negative impact it had on clients and the profession. To work on the prevention side, besides being very rewarding, is just plain good business for the profession. We all benefit when our peers are healthy and sober."

The OBA LHLAP is greatly assisted by Oklahoma Attorneys Mutual Insurance Company. Half of the cost of the third-party provider and crisis hotline are paid by a generous contribution from OAMIC. Also, in the past couple of years the OBA has received some generous contributions from OBA members that have allowed the program to do significantly more outreach. However, even with the added resources the program is underfunded when it comes to longer-term treatment options and outreach to those who may need more resources than are currently available.

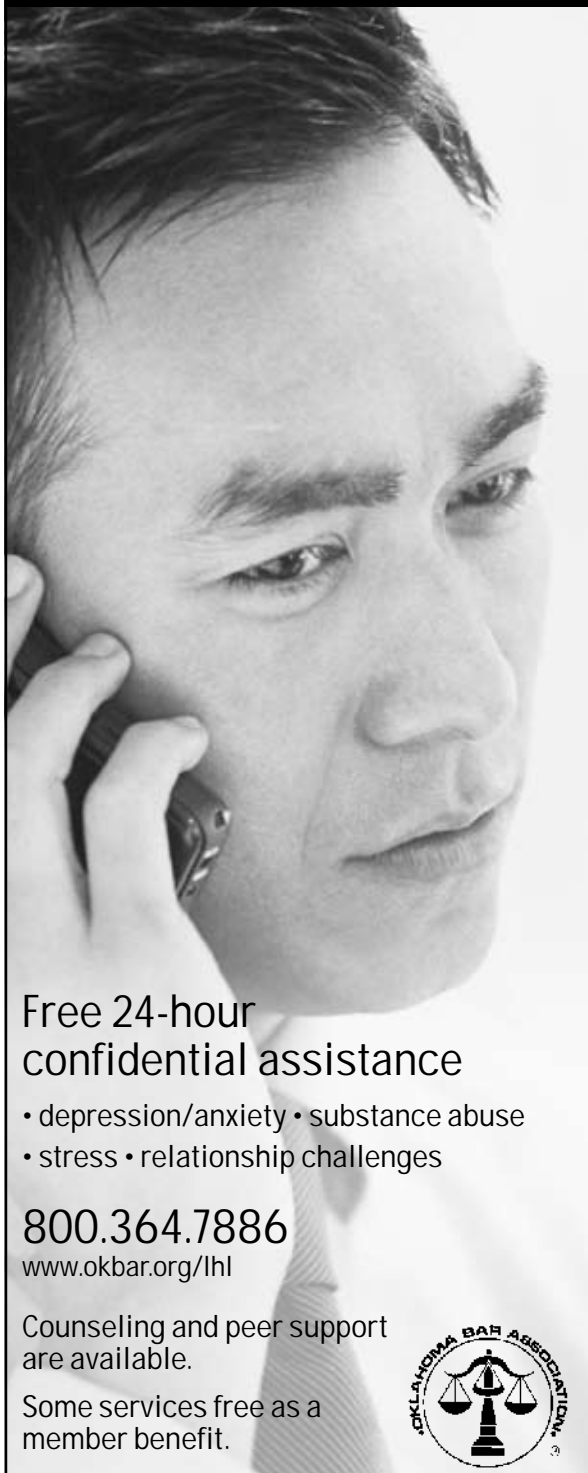
President-Elect Cathy Christensen has made LHLAP a priority for 2012. To that end, she has worked with the LHLAP leadership to revitalize the Lawyers Helping Lawyers Foundation. She has enlisted the help of OBA Governor Susan Shields and has the final work done to make the foundation operational. In talking about the LHL Foundation, Christensen said:

"The foundation's purpose will be to provide support individually and globally to OBA members struggling with the stress and anxiety of professional demands that may sometimes lead to mental or emotional health issues or substance abuse."

As president, Christensen plans to do significant fundraising and increase both the capacity and the visibility of the program. She has already had several planning meetings and is set to have a kickoff event in the early spring. This level of leadership will significantly add to the program. Every OBA member should support her efforts with both their active participation in this work and with their check-books. It will make us all better and it has proven to be a good business investment as confirmed by LHLAP Chair Tom Riesen.

This article began with a question mark and hopefully it has given some answers. Unfortunately, it also contained some grim statistics and amplified unmet needs. Hopefully, it also truthfully reflected the issues we face as a pro-

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Counseling and peer support
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**LAWYERS HELPING LAWYERS
ASSISTANCE PROGRAM**

fession and put forth the message that the OBA is addressing these issues with the resources it has available and has made a positive impact on the lives of those who sought help.

The resources at this time are professional, free of charge and confidential. Peer assistance is readily available if appropriate and requested. If you have an issue, help is just a call away. If you have time and or financial resources to donate you will likewise be warmly received. In the end, we all have the potential to stumble and we all have the responsibility to see that the public we serve is protected and our peers are supported in time of need. We are a helping and caring profession. It is only right that we help and care for our own as well.

1. <http://lifeatthebar.wordpress.com/2006/03/14/surveys-of-lawyers-satisfaction-levels/>.

2. "Ranking America's Mental Health: An Analysis of Depression Across the States," Mental Health America, www.nmha.org/go/state-ranking.

3. *Oklahoma Bar Association Lawyers Helping Lawyers Annual Report for the Period Nov. 1, 2010 - Oct. 31, 2011*, as reported by CABA Inc.

4. *id.*

ABOUT THE AUTHOR



John Morris Williams is the executive director of the Oklahoma Bar Association. He previously served as executive director of Legal Aid Services of Oklahoma. He earned his bachelor's degree in education from East Central University and his J.D. from the OU College of Law.



Ethics

& PROFESSIONAL RESPONSIBILITY

Dealing with Difficult Lawyers

By Travis Pickens

From a very small group of lawyers, there remains discourteous and annoying behavior in our profession, particularly litigation. The general coarsening of society does not help, but this sort of behavior has been around as long as there have been lawyers. Most of this behavior does not rise to the level of a disciplinary offense; it is simply unattractive, or burdensome to deal with.

This group of lawyers requires special consideration and handling. With experience, you learn how to deal with these types, but young lawyers can go through some fairly bad experiences until they learn how to effectively manage. This article is intended to give such lawyers a head start.

Annoying behavior can take many forms, along a spectrum of simple haughty behavior, to name-calling, to sexist remarks, to threatened violence. This article is not intended to address the obviously bad, sanctionable behavior, and disciplinary violations, but rather the far more common behavior that makes certain lawyers difficult with whom to deal.

Imposing enforceable rules strictly related to "civility" is a difficult matter. Not only does it seem inconsistent with our notion of a noble "profession," but enforceability of such a code could prove difficult, for a variety of reasons. In addition to the aspirational "standards of professionalism" and "lawyers creed" adopted by the OBA Board of Governors, there appears to be ample general support for reasonable and civil litigation conduct in our Oklahoma Model Rules of Professional Conduct, for example:

- Comment [1] to Rule 1.3 "Diligence" states: "The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect."
- Comment [4] to the Rule 3.5 "Impartiality and Decorum of the Tribunal" states that a lawyer's function is to provide "evidence and argument" so that a case may be legally decided. The comment goes on to state that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."
- Rule 4.4 "Respect for Rights of Third Persons" states in paragraph (a) that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."
- Rule 8.4 "Misconduct" sets out a list of examples of professional misconduct that includes engaging in conduct "that is prejudicial to the administration of justice."

There is often a difference between “difficult” behavior and a disciplinary rule violation, however. I have identified (nonscientifically, and with a bit of fun) several patterns of behavior that can be neatly catalogued into difficult, annoying “types,” and then offered some practical advice as to how to best deal with the behavior. (**Please note:** the following “types” are not based upon any single lawyer. Rather, they are a composite of many lawyers encountered over the years. These are generalizations, but are authentic representations of “difficult” behavior. Do not be offended if you see yourself in some of these, as they are done with a bit of humor. Most of us have earned these labels or worse at different times.)

THE ‘PIT BULLY PUPPY DOG’

- A. Sees a lawsuit as a “war,” and the opposing party as an “enemy” to be destroyed; this type is constantly and unnecessarily combative;
- B. Has been enabled somewhat by the public, as this behavior fits a stereotype reinforced in books and movies;
- C. Often acts one way with the adversary (pit bully), another way with the court (puppy dog);
- D. This lawyer usually uses a lot of military terminology and reads Tom Clancy novels.

Best strategy: Document, document, document. Set boundaries. Look for ways to reveal behavior to the court. Make this person communicate in writing as it will likely be a much different communication than over the phone or in person. Show this lawyer no weakness as it will almost always lead to worse behavior, but do not overreact. The best strategy is not to “react” at all. Deflect the threats. Resist the temptation to go “Rambo” yourself. Leave the military jargon to the men and women that are risking their lives every day, dodging real bombs and bullets. This is litigation, not war.

THE ‘UNTREATED ISSUE-FUNCTIONER’

- A. Has an issue, e.g. alcohol, anger, depression, that negatively impacts his or her personality, but either denies the problem, is enabled or refuses to address the problem. This person functions well enough on a day to day basis, but impacts negatively most everyone he or she encounters;
- B. Usually practices as a solo, or with one or two understanding or enabling others;

C. Will not tolerate accountability;

D. At the right time, you might consider encouraging this person to get some help. Referrals to LHL are confidential.

Best strategy: See “Pit Bully Puppy Dog” strategy. Look for patterns in behavior and use them to your advantage, e.g. Does this lawyer often not agree to reasonable requests? Find a way to bring that to the judge’s attention. These lawyers are not typically malicious, but rather suffer from a significant issue that is not being addressed and that has a direct negative impact on their behavior, and you. You should not indulge them at the expense of your client, but your response should be tempered, and balanced to some degree with compassionate tolerance and perhaps help at some later point (e.g. a referral to Lawyers Helping Lawyers).

THE ‘DIPLOMAT’

- A. You may never know the whole truth. This lawyer uses multiple levels of communication and is a cunning manipulator.
- B. Avoid predicting the future for your client, as there will be many surprises.
- C. There is usually a multi-leveled agenda being worked by this lawyer.
- D. Overuses the phrase “my friend.”

Best strategy: Do your homework and research to determine the real goal of this constant chameleon. It will usually be based upon pure self-interest, and less so on doing “justice” or “win/win” solutions. Know that the lawyer will fear looking bad more than angering his or her client. Use that to your advantage, by repeatedly pointing out weaknesses in their case and the likelihood of a bad result. Most of all, know there is no deal unless and until that deal is in writing.

THE ‘MISREPRESENTING LETTER WRITER’

- A. Usually writes the letter or email as a follow-up to a conversation or a personal encounter;
- B. If the discussion included A, B and C, the writer will write a letter with A, B, C, and *add* D, or will *spin* A, B and C, into X, Y and Z.
- C. Writes letters after every conversation or encounter with you, and is building a “record” to be used against you later;

D. Begins every letter with the phrase, “This letter confirms that” or “we agreed that” and ends with something like, “if you do not agree with all of the above, please contact me within fifteen minutes of your receipt of this letter.”

Best strategy: Go 100 percent “paper” yourself. In other words, eliminate the opportunities for the misrepresenter to mischaracterize phone calls and personal conferences. If appropriate, use misrepresenting letters as attachments to discovery motions or briefs. Reply and correct every misrepresentation. Look for other ways to eliminate this lawyer’s serial misrepresentations, like working out a master discovery plan at the beginning.

THE ‘OPIE TAYLOR MEETS MACHIAVELLI’

A. “Opie” is a local that uses all the advantages of his/her turf.

B. Opie is almost always disarming and easy-going, but the wheels are constantly turning. He/she knows the judge and influential people in town, well, and what they are likely to do in almost every situation. There is nothing corrupt about Opie; he or she just has a great advantage.

C. Opie is often a person of influence in town — well-liked, respected and sometimes feared, and usually represents a local resident or interest; assume the odds will favor Opie in tight cases, although there are always some folks in town that resent Opie’s influence;

D. Opie is not always a lawyer in a small community or town; larger cities have “Opies,” too. They are just usually not as obvious until you do some checking.

Best strategy: If against Opie, then do some research and hire the local “mongoose” to be your local lawyer (there is always a competing lawyer, because a good business model requires an able adversary. But you may have to go to a different town or city.) Otherwise, be the one to hire “Opie” when you go to that turf.

THE ‘DENTIST’

A. Has an “assembly line” type practice with multiple layers of subordinates;

B. Will not take a personal interest in your case until it is close to a major deadline or the trial;

C. Uses several subordinates to “run” their cases, sometimes billing for the time of their staff;

D. Dealing with this lawyer is somewhat akin to going to some dentists — you spend 99 percent of your time with the staff. They may have a superior business model but it can be frustrating for the opposing counsel.

Best strategy: Prepare your client properly for the opposing lawyer’s utilization of this approach. Either insist on personal communication with your peer on the other side, or “match” your responses by utilizing your own staff. Assume this matter will not resolve until the time just before trial. Truthfully, some of these lawyers’ assistants are far easier to deal with than the lawyer, so look for the advantages with this. You can rely on them to pass on messages and requests without enduring the high level of nonsense or antagonism you might otherwise encounter with the attorney.

THE ‘WIZARD OF OZ’

A. Considers him/herself a “Titan of the Legal Community”;

B. Surrounds him/herself with sycophants, and all the trappings of power and influence;

C. Easily affronted, and will go “Henry VIII” to direct attempts to challenge, or worse, humiliate;

D. Is extraordinarily image conscious and will insist upon speaking or dealing with the highest ranking lawyer on the case about the most trivial of matters. Often a Francophile;

Best strategy: Use the wizard’s vanity to your advantage. Mild flattery and toleration of harmless megalomania can help you resolve the matter on good terms. After all, some of these lawyers actually live up to their self image. But be careful, do not overly defer to these types as that will be interpreted by the wizard as abject submission; it will destroy any hope of a favorable settlement. The wizard always has an able associate or junior attorney that will likely be your principal contact. That person is usually calm and cooperative, allowing the wizard to appear remote and terrifying. Do your best to be on good terms with this associate as he or she is your best chance at smooth communications, and cooperation.

THE 'TRAPEZOID HOLIST'

A. The prickly, unpredictable agency lawyer/bureaucrat who arbitrarily wields power over you and your client's matter;

B. Will approve only the "trapezoid" and no other shape, but will not tell you beforehand;

C. Has little patience for questions, or innovative solutions. They do not exercise influence or power in other ways, so they work this fragment of control for all it's worth.

Best strategy: Fortunately, this lawyer is an aberration and appears to be on the decline. Study this type and know the deal beforehand. An attitude of deference, maybe awe, is often helpful. Try to avoid assignment to the holist, or look for ways to end-run or go up the ladder. In the alternative, accept your fate and submit. Become a trapezoid. Managing client expectations, as always, is crucial with this type.

THE 'RELUCTANT ASSOCIATE'

A. Usually works for the "Pit Bully Puppy Dog," the "Wizard of Oz," or "The Dentist";

B. Has no authority, and must "check" with their superior on every matter;

C. Know there is no deal unless and until there is something in writing. Also know, the reluctant associate will burn you time and again if you do not deal with him or her properly.

D. Is often a twin or close relative to the "Misrepresenting Letter Writer."

Best Strategy: Move up the ladder. Insist on speaking to the supervising lawyer. An alternative strategy is to aggressively deal with the associate and not accommodate unreasonable delays, related frustrations and flip-flops. Document everything with copies to the supervising lawyer. The reluctant associate fears angering the supervising lawyer more than angering you. You can use that to your advantage by

bringing clear misrepresentations to the attention of the misrepresenter's supervising lawyer. They will not be pleased (even though they might not let on to you) and the behavior will likely stop.

THE 'MUAMMAR GADDAFI'

A. This lawyer sees his/her talent as far more than it actually is.

B. Operates in a cloud of self-delusion, without commensurate physical evidence of skill or success;

C. Makes all the demands of the "Wizard of Oz," but has nothing with which to back it up;

D. These types are so pathetic in their self-deception, that one must be careful not to be momentarily disarmed, or worse, charmed.

Best Strategy: Avoid moderate flattery which is effective with the "Wizard of Oz," but will absolutely ruin any chance of success with these "Muammars." These types will eagerly take it as affirmation of what they secretly question themselves. You will have created a monster, and your chances of a favorable settlement will evaporate.

ABOUT THE AUTHOR



Travis Pickens serves as OBA ethics counsel. He is responsible for addressing ethics questions from OBA members, monitoring Diversion Program participants, teaching classes, speaking at continuing education programs and other law-related seminars and writing articles for *The Oklahoma Bar Journal* and other publications. A former litigator in private practice, he has served as co-chair of the Work/Life Balance Committee and as vice-chair of the Lawyers Helping Lawyers Assistance Program Committee.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following four judicial offices: All positions are for an eight-year term: July 1, 2012 – June 30, 2020.

Judge, Oklahoma Workers' Compensation Court, Position 4

Judge, Oklahoma Workers' Compensation Court, Position 5

Judge, Oklahoma Workers' Compensation Court, Position 8

Judge, Oklahoma Workers' Compensation Court, Position 9

There is no residency prerequisite imposed upon appointees to the Oklahoma Workers' Compensation Court. To be considered, one must have been licensed to practice law in the state of Oklahoma for a period of not less than five years and shall have at least five years of workers' compensation experience prior to appointment.

Oklahoma Statutes and the Constitution require a minimum of three nominees be sent to the Governor and the Chief Justice of the Supreme Court for selection. The Governor shall appoint one of the nominees to fill the vacancy with the advice and consent of the Senate. Each judge shall continue to serve until his or her successor has been appointed and qualified. (Okla. Const. Art. 7B §4, 85 O.S. §303)

Applications may be obtained online at www.oscn.net under the link to Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 North Lincoln, Suite 3, Oklahoma City, OK 73105, (405) 556-9862. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Friday, January 13, 2012. If applications are mailed, they must be postmarked by midnight, January 13, 2012.**

Jim Loftis, Chairman
Oklahoma Judicial Nominating Commission

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Ethics

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Working the Case

By Don G. Holladay and Judge Timothy D. DeGiusti

Success at trial, or a favorable pretrial settlement, requires thoughtful and aggressive case development. This type of development starts the moment a new engagement comes in the door and continues throughout the case. Evaluation of the case, the legal theories underlying the claims or defenses, and the best approaches to pursue the goals of the representation evolve throughout the life of the case. “Working the case” correctly doesn’t guarantee success, but will vastly increase the chance of a successful outcome. The following pages contain suggested approaches and techniques which establish a philosophy and methodology for properly working a case. These techniques were developed over more than 60 years of combined trial experience, and have led, more often than not, to success in and out of the courtroom.

INITIAL CASE EVALUATION AND GROUNDWORK

Get the client’s version of events, start to finish. Take copious notes and ask questions. While learning the underlying facts from your client, think about whether the client will make a good witness, and start planning for the level of assistance the client or key client representatives will need to improve their ability to testify effectively. Make a note of any key employees of the client or third-party witnesses who will have to be interviewed to verify the client’s version of events and further develop the case. Ask often “what will the other side say about that?”

Gather the basic documents from the client at or before the initial interview and, if possible, review them prior to the first meeting. Ask any

questions raised by the documents. Identify other sources of documents. Consider issues regarding electronically stored information, become knowledgeable about your client’s system of storage and retrieval of such information, and ensure that relevant electronically stored information is preserved by your client. Based on your knowledge of the matter so far, ask yourself what documents will likely be sought by the other side; ask your client to provide those documents to you.

Identify the most likely theories of the claims or defenses based upon the facts and documents obtained from the client and begin your initial legal research.

DEVELOP THEORIES OF THE CLAIMS OR DEFENSES

Before drafting the complaint or answer, the potential theories of the claims or defenses must be thoroughly researched. The importance of knowing the law at the start, and being fully aware of the elements of proof throughout, cannot be overstated. The necessary elements of proof should be the fundamental guide for the casting of the pleadings, the conduct of discovery, and the preparation of witnesses. A firm grasp of the law that will control the claims and defenses provides focus for every aspect of the case and will ensure the best opportunity to obtain, or resist, summary judgment.

If defending, aggressively explore whether a counterclaim can properly be asserted. A well-conceived counterclaim can totally change the character of the action. In many instances, a good counterclaim can become the dominant focus of the litigation. Nothing brings home the attendant risks of litigation to the opposing party like a solid counterclaim, and, thus, can place the case in a posture which fosters favorable settlement or beneficially alters the cost/benefit analysis of the action going forward.

Early on develop a chronology or time line of the case. The chronology should be fluid — add to or delete from the chronology as facts and events present themselves and change in terms of their relative importance. Annotate the chronology with references to documents, exhibits, and deposition testimony. The chronology will aid in your understanding and appreciation of the entire case, as opposed to isolated events and facts. By the time discovery ends, the chronology should be a fully developed demonstrative tool that can easily be used to create a timeline exhibit for use in briefing or at trial.

Fully research at the outset whether attorney fees will be recoverable by the prevailing party. This is a critical issue on which you must advise your client so that the risks of litigation can be adequately weighed. If prevailing party fees are not ordinarily recoverable, consider whether an offer of judgment or similar device can lead to a different result. If so, an offer commensurate with a realistic evaluation of the case can drastically change the complexion of the action, such as impressing upon a contingent fee plaintiff that the litigation could carry significant downside risk.

These considerations can be distilled into a case strategy memorandum or proof checklist outline that, in appropriate situations, may be reviewed with, and approved by, the client so that lawyer and client have a clear idea of the goals and approach of the litigation. Never sugarcoat the possible outcomes of litigation — the client must have a realistic appreciation of the costs, risks and potential benefits of the case.

GATHER THE DOCUMENTS

The techniques and methodology discussed herein are geared mainly toward complex commercial litigation, although they do find application across many areas of litigation. In commercial litigation, requests for the production of documents may well be the only truly beneficial form of written discovery. Gathering the pertinent documents is crucial in a commercial case. Requests for production should be drafted very early on, and supplemental requests should be used throughout the case as appropriate. Think about the contents of the requests carefully, and prepare straightforward, unambiguous and pointed requests. Catch-all requests are okay, but the bulk of the requests should be specific, narrowly focused and drafted with some inkling that responsive documents likely exist. Give careful thought to your approach regarding electronically stored information, and don't hesitate to consult with experts early on if necessary to best address discovery efforts regarding such information.

If documents are produced as they are kept in the ordinary course of business, lead counsel — or associate counsel with a full appreciation of the legal theories of the case — should review the documents. It is absolutely critical that all relevant documents are flagged for production, and that the reviewing lawyer keep track of the documents so designated in order to ensure that selected documents are actually copied and produced.¹ Insist that produced documents are Bates stamped; if opposing counsel does not comply, number them yourself after production. A coherent numbering system is extremely important for the management of complex discovery.

Carefully review produced documents as soon as possible after receipt. Guided by the over-arching knowledge of the elements of proof, tab documents that impress you as key or potentially important — err on the side of inclusion. Eventually, copies of these tabbed

“When preparing your client or affiliated witness for deposition, you should first ensure that the witness has a good understanding of the fundamental theory of the claims or defenses.”

documents will form a key documents file which will help to streamline and focus preparation and briefing. If legal theories evolve or change completely, the totality of documents must be reviewed again to ensure all key documents have been captured.

Unfortunately, trusting that the opposing party has thoroughly reviewed all potentially responsive documents and has made full and complete production is often a fool's paradise. If documents disclose the involvement of third parties, such as consultants, accountants, vendors, business partners, etc., subpoena documents from those sources as well. This technique will often net additional documents that were not produced by the opposing party.

OTHER WRITTEN DISCOVERY

The value of conducting written discovery in addition to requests for production is debatable. Interrogatory answers are almost always drafted by counsel and rarely disclose helpful information. They can be used effectively to discover the names of knowledgeable people and the location of responsive documents and things, but beyond these purposes interrogatories probably should not be relied on. The same can be said about requests for admissions. Thus, time is better spent gathering documents and taking necessary depositions.

INTERVIEW THE WITNESSES

One of the most critical aspects of working the case is conducting key witness interviews. Critical witnesses affiliated with your own client should have been interviewed before the initial pleading or filing the answer. That accomplished, the goal of counsel should be to identify and promptly interview third-party witnesses – and witnesses affiliated or formerly affiliated with the opposing party if permissi-

ble under the applicable ethics rules — before they are interviewed by the opposition.

Exposing third-party witnesses to your theory of the case, and developing a rapport with them, can give you a significant advantage; interviewing important third-party witnesses regarding their version of events before they are interviewed by the opposition is often critical, and deserves the careful attention of lead counsel. Be up front with witnesses regarding the possibility that they will be deposed, and ensure them that you will do everything possible to reduce any resulting inconvenience. Thereafter, you should check in from time to time with critical witnesses to let them know the status of the case and to reinforce favorable information in their accounts of the facts.

When interviewing a third-party witness, ask if they have been contacted by your opposition, and if so, inquire about the matters discussed. Your goal should be to beat your opposing counsel to the punch with respect to all interviews of important third-party witnesses.

PREPARE TO TAKE AND DEFEND DEPOSITIONS

In commercial litigation it is very possible, if not likely, that the case will ultimately be resolved largely on the basis of deposition testimony. This is so not only because of the prevalence of deposition evidence used in support of motions for summary judgment and *Daubert* motions, but also because effective depositions often place the case in a favorable posture for settlement.

When preparing your client or affiliated witness for deposition, you should first ensure that the witness has a good understanding of the fundamental theory of the claims or defenses. Perhaps more than any other form of preparation, such an understanding will serve as a guide and filter for the witness's testimony. While it is true that “the facts are the facts,” operative facts can certainly be couched in favorable terms by a well-prepared witness.

Go over with the witness documents that are likely to be the subjects of deposition questioning, and run through a series of mock questions. Answers that deviate from the theme of the claims or defenses should be discussed to determine whether the response can be improved while remaining consistent with the underlying facts. The witness must be told, however, that in the end it is the witness's rec-

ollection of the facts, not the lawyer's impression, that controls. The witness should also understand that there will likely be a number of questions asked at the deposition that cannot be anticipated, and the witness should be thoroughly instructed on the common rules for deposition testimony.²



When preparing to take the deposition of a witness, counsel must allow for sufficient time to develop a detailed outline for the examination, incorporating all pertinent key documents. Taking a couple of hours the night before, or the day of, the deposition to prepare is woefully deficient. The so-called “discovery” deposition – a meandering examination to find out “what the witness knows” – should be the rare exception, not the rule. Counsel should carefully prepare for depositions with the elements of proof and case strategy firmly in mind. Outlines should be prepared with the aim of amassing proof toward the establishment of the necessary elements of the claims or defenses in a form that can be used in connection with summary judgement briefing, and to tie the witness down at trial.

Key documents must be used effectively during the deposition. Counsel should have sufficient copies of such documents available for use in the deposition. A common technique is to annotate counsel's copy of each key docu-

ment with the questions to be asked of the witness related to that document. The questioning counsel's knowledge of all the pertinent documents should be clear – the witness should learn early on that counsel has a mastery of the facts and the documents such that counsel is in full control of the deposition. Avoid revisiting favorable answers to unambiguous questions, as a subsequent answer will rarely add to the value of the previous testimony. Note in your outline particularly helpful or harmful testimony during the deposition, so that you may focus on the corresponding portion of the deposition transcript as you continue to work your case after completion of the deposition.

Evaluate the deposition promptly while it is fresh in your mind, and make a detailed memorandum to your file noting the helpful, and harmful, parts of the testimony, and annotating any follow up tasks as a result of the deposition.

BE PROACTIVE WITH EXPERTS

Resist the temptation to try to stretch a familiar expert witness's qualifications to fit the needs of your present case. If you have developed a good relationship with an accounting expert, and the current case requires that expertise, of course there is no real problem with using the expert. But don't hesitate to leave your comfort zone if the case calls for an expert with a different set of qualifications. A shaky expert might not survive a *Daubert* challenge, which could be harmful, expensive, or even fatal in the late stages of litigation. In short, do the leg work to find and retain the right expert for the case.

Once the right expert is retained, counsel should be closely involved in the review and editing of the expert's report. Moreover, counsel should actively prepare the expert for deposition as with any other key witness — don't assume that the expert cannot benefit from such preparation or that she knows all the rules of deposition testimony simply because she has given numerous depositions in the past. Also, involve your expert in your preparation for the deposition of the opposing party's expert witness, and consider having your expert attend the deposition to observe and consult as necessary.

TAKE YOUR BEST SHOT ON PAPER

Many cases, or aspects of cases, are disposed of on the basis of briefs. Therefore, you must strive to submit to the court the best written

product possible. Legal writing should be concise, persuasive and avoid wasting space on sharp-tongued rhetoric. Instead of focusing on how misguided the opposition is, demonstrate directly and forcefully how the facts and the law compel a determination in your client's favor. You should edit your written work repeatedly until it is as perfect as possible under the circumstances, striving always for maximum persuasion in minimum space.

BE AN ADVOCATE FOR REASONABLE SETTLEMENT

Commercial litigation is not usually an all-or-nothing game. Most civil cases settle because a reasonable settlement makes economic and business sense. The plaintiff, in recognition of the risks and expense of litigation, agrees to take less in settlement than hoped for under a prevailing-party scenario. The defendant, mindful of the same cost/risk analysis, limits its exposure and buys peace. Settlement, however, is difficult to achieve if counsel have not realistically and honestly evaluated the case — its strengths and weaknesses — and effectively communicated that evaluation to their clients. Some lawyers avoid a candid discussion of weaknesses for fear that the client will blame counsel for the posture of the case, or that the client will conclude the lawyer is not aggressive enough. This situation can be avoided if counsel strives from the start to keep the client informed of the risks of litigation and the ever-present chance that things might not go as hoped. Your client should never be surprised by perceived weaknesses in the case first communicated by the mediator or settlement conference judge.

Counsel should not be reluctant to urge their client to reasonably settle the dispute. Assure the client that, if the case goes to trial, you will be well prepared and will be a zealous advocate, but, likewise, don't hesitate to advocate with your client for settlement if you believe that doing so would be the most sound business decision. Actively prepare your client for the settlement process, and have an agreed strategy in place in advance of the mediation or settlement conference.

TRIAL PREPARATION

If your case is one of the now-rare civil cases that actually goes to trial, you will have a clearly defined trial strategy if you have focused on the elements of the claims or defenses throughout the development of the case. Each

direct examination will be prepared with the elements in mind, and each cross examination will have a well thought-out deposition transcript to guide it and keep the witness in line. You will be very familiar with the key documents necessary to prove your case or to meet the opposition's proof. Nevertheless, intense trial preparation is still required.

Trial witnesses for the case in chief should be rehearsed thoroughly. Their direct examination should be practiced until they — and you — are comfortable with it. They should know in advance every question that will be asked during direct examination. They should be subjected to mock cross-examination and instructed on the rules for testifying.³ You should anticipate objections to exhibits and testimony, and should note potential responses in your examination outline.

Cross-examinations should be well-prepared and outlined, with marginal cross-references to particular exhibits and/or deposition testimony necessary to ensure that the expected answer will be obtained. Don't ramble during cross, and don't waste time needlessly reiterating direct testimony. A good cross-examination is pointed, concise, and designed such that the questioner can make a handful of important points, and sit down.

Everything done in trial, from voir dire to opening statement, witness examinations, and closing arguments, should be true to the theme of your case, and should be calculated to persuasively jibe with the instructions that will be given to the jury. Of course, if you have properly worked your case from the start, everything you have done was pursued with the jury instructions — the rules of law which control the claims and defenses — in mind.

CONCLUSION

These methods and strategies will guide you to an overall better performance for your client, and will usually lead to a successful case. As is evident, at their core most of these techniques are about preparation and anticipation. Always remember the aphorism: preparation beats talent nine out of 10 times because, occasionally, talent gets lucky.

Note: This article was originally published in two parts in The Briefcase and is reprinted with permission from the Oklahoma County Bar Association.

1. A common mistake made by lead counsel is poor judgment regarding delegation of duties to associates. Clearly, junior associates

can properly complete many tasks, but there is no substitute for the involvement of lead counsel in document review, witness interviews and brief writing, as will be discussed more infra.

2. A common formulation of the rules is: 1) Tell the truth; 2) Listen carefully to the question and think about your answer before you give it; 3) Answer only the question asked, and then stop (i.e. don't volunteer extraneous information); 4) Do not become argumentative with the questioning lawyer; 5) Don't bring any documents to the deposition that have not already been produced unless required to do so by a subpoena; 6) Don't be distracted by objections; 7) All proper questions will have to be answered, except in the rare instance that you are instructed not to answer; 8) When shown a document, take the necessary time to review it before testifying about its contents; 9) "I don't know" can be an appropriate answer; and 10) Don't hesitate to ask for a comfort break if needed.

3. A typical formulation is: 1) Tell the truth; 2) Listen to the question; 3) Let the questioner finish before starting your answer; 4) Occasionally turn toward the jury and state your answer directly to them — especially if prompted by the lead-in "Tell the jury what happened when..."; 5) Don't display hostility toward the cross-examining lawyer; 6) On cross-examination, answer only the question asked, then stop; 7) Remember that cross-examination answers can be further explained on re-direct as necessary; 8) Don't be thrown off track by objections — listen to them; 9) If there is an objection, wait for the judge's ruling before answering, and listen to the ruling; 10) Dress appropriately.

ABOUT THE AUTHORS



Don G. Holladay, of Holladay & Chilton, practices primarily in the business litigation area. Over the past 24 years, he has also taught as an adjunct professor at the University of Oklahoma Law Center, teaching courses in trial practice, complex litigation and pretrial procedure. His background includes service on the Local Rules Committee and the Admissions and Grievance Committee for the Western District of Oklahoma federal court.



Judge Timothy D. DeGiusti was appointed U.S. District Judge in 2007. He practiced law for 19 years before taking the bench, 16 of which were with Mr. Holladay. They were founding partners of the Oklahoma City firm Holladay, Chilton & DeGiusti PLLC.

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Men Helping Men

Oklahoma City • Jan. 5, 2012

Time - 5:30-7 p.m.

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • Dec. 22, 2011

Time - 5:30-7 p.m.

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Women Helping Women.....

Oklahoma City • Jan. 12, 2012

Time - 5:30-7 p.m.

Location

The Oil Center – West Building
2601 NW Expressway, Suite 108W
Oklahoma City, OK 73112

.....

Tulsa • Jan. 5 2012

Time - 5:30-7 p.m.

Location

The University of Tulsa College of Law
3120 East 4th Place, JRH 205
Tulsa, OK 74104

Food and drink will be provided! Meetings are free and open to 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 kimreber@cabainc.com.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM





Staff Counsel or Outside Counsel

The Rules of Professional Conduct and Legal Ethics Remain the Same

By Steven Dobbs

Anyone who has a practice in the area of personal injury is aware that most of the major insurance companies that sell liability policies in Oklahoma employ staff counsel to represent the insured/defendant in tort actions.

This article will discuss the history and use of staff counsel in Oklahoma; the ethical obligations of both staff and outside counsel who practice in the area of insurance defense; and explore who the actual client is and the impact of the tripartite relationship.

A DUTY TO DEFEND

It goes without saying that under a policy of liability insurance, the carrier owes, in the event of a lawsuit, a duty to defend the insured. Under the terms of most liability insurance policies, the insurer retains the right to name defense counsel. That seems fair because it is the carrier and not the insured that bears the burden of all costs and eventual liability payments. In selecting counsel, the company looks at many issues; costs, experience, reputation and results.

The landscape of insurance defense has changed dramatically over the last 10 years as companies attempt to manage escalating defense costs by the use of guidelines, both billing and litigation. Some of those efforts have been met with substantial resistance by both the plaintiff and defense bar in a number of states.

To manage those expanding costs, insurance companies have increasingly turned to staff counsel to represent its insureds. Oklahoma is among the vast majority of states that has recognized that right.

BACKGROUND OF STAFF COUNSEL

The use of staff counsel in the United States is not, as sometimes expressed, a new phenomenon. Insurance companies have employed lawyers to defend its insured as far back as 1892.¹

Staff counsel has been used in Oklahoma since at least 1981, and the number of attorneys so employed continues to expand.² Staff attorneys are actual employees of the insurance company. Most of them have come from outside insurance defense firms and have a great deal of experience in both pretrial discovery and trial practice. The office operations are virtually indistinguishable from those of outside counsel except for the continued use of satisfaction surveys sent to both the client and the customer. Unlike the early staff counsel operations, those in practice today are described as “first-class lawyers who are delivering legal services in an evolving format.”³

CHALLENGES TO THE USE OF STAFF COUNSEL

As one might expect, staff counsel has had a direct economic effect on both the plaintiff and defense bar. That has resulted in a number of challenges across the country to the use of staff counsel. To date, the overwhelming majority of states have found the use of staff counsel to be proper.⁴

A recent decision, *Brown v. Kelton*, 2011 Ark. 93 — Ark: Supreme Court 2011,⁵ in which the Arkansas Supreme Court determined that use of staff counsel was a violation of the state's statutory prohibition against the practice of law by a corporation, would not have been important enough to comment upon except for the concurring opinion of Chief Justice Hannah. His comments seemed to indicate, at least in part, that lawyers in a staff counsel office would be unable to put the interests of a client before that of the insurance company/employer, a surprising and somewhat disturbing position. The chief justice, in discussing the obligations of a lawyer towards a client, correctly stated that:

"The relation of an attorney to his client is pre-eminently confidential. It demands on the part of the attorney undivided allegiance, a conspicuous degree of faithfulness and disinterestedness, absolute integrity and utter renunciation of every personal advantage conflicting in any way directly or indirectly with the interest of his client."

He then went on to indicate that he did not believe that a member of the Arkansas Bar, employed as staff counsel, could overcome any alleged pressure brought to bear by that lawyer's employer and that a perpetual conflict of interest would exist. Taken in full context of the tripartite relationship, his comments would seem to apply to all lawyers, not just those employed as staff counsel, that do insurance defense work.

RECOGNITION OF STAFF COUNSEL IN OKLAHOMA

In 1998 the Oklahoma Bar Association adopted *Ethics Opinion No. 309*.⁶ It was the result of an inquiry that asked "In a case in which a liability insurer provides a defense to its insured, may a lawyer who is an employee of the insurer represent the insured?"

The opinion, limited to "instances in which the insurer has provided liability coverage and

is providing a defense to its insured with respect to alleged liability," determined that a lawyer employed as staff counsel owes the client (insured) the same ethical obligation and loyalty that an outside lawyer employed by the insurance company would.

It also emphatically stated that "The Rules [of Professional Conduct] and not the employment relationship or the insurance contract control the staff attorney's obligations to the client in all respects as in the case of any other representation." Or to state it even more clearly, the client is owed an absolute duty, no matter the cost or consequences to the employer. That is a departure from the accepted theory of the tripartite relationship, discussed later in this article.

ETHICAL OBLIGATIONS OF STAFF COUNSEL

The Oklahoma Rules of Professional Conduct, the guideline for all lawyers in Oklahoma, set forth the standard of conduct and representation. The rules make no exceptions for staff lawyers or for outside insurance lawyers representing the insured. No matter who is paying the lawyer, the client is entitled to that lawyer's absolute loyalty. If that loyalty is breached, be it by staff counsel or by outside counsel, the lawyer would be subject to discipline by the Oklahoma Bar Association. A pointed and full discussion of the applicable individual rules can be found in *Opinion 309*.

What then prevents the insurance company from applying undue pressure upon a staff lawyer, and/or attempting to interfere with that lawyer's independent judgment? The simple answer is that nothing can stop the attempt except an individual lawyer's own ethics. To date, staff counsel in Oklahoma has been fiercely protective of that ethical duty.

As an illustration, there has been one instance where an insurance carrier attempted to impose a minimum number of jury trials per staff lawyer in Oklahoma. Recognizing that might be an attempt to regulate the independent judgment of the lawyers in that office, the Legal Ethics Advisory Panel (LEAP) was contacted by the managing attorney of the staff counsel office and requested to render an opinion on three questions:

1. Does an insurance company/corporation supervising an insurance staff counsel program that requires a minimum number

of jury trials before that program's lawyers would be eligible for increased compensation, be it in the form of salary or bonus, constitute the unauthorized practice of law by the insurance company/corporation?

2. If it is the best interest of an insured to settle the case, would the lawyer taking the matter to trial in order to qualify for increased compensation referenced in Question 1, above, constitute an impermissible conflict of interest?

3. Does an insurance staff counsel have an obligation to communicate the organization's stated goals of a minimum number of trials and basis therefore, to the client-insured?

The LEAP rendered *Ethics Opinion 327*⁷ and found question one to be in the negative, number two in the positive and number three in the positive. Armed with that opinion, the staff counsel program backed away from its minimum number of jury trials per lawyer requirement, at least in Oklahoma. What that symbolizes is that staff counsel has the right, duty and obligation to challenge anything that would infringe upon the individual lawyers right to control the defense of the client or infringe upon the lawyer's professional judgment.

ETHICAL OBLIGATIONS OF OUTSIDE COUNSEL

It is undisputed that outside counsel employed to defend an insured are governed by the very same Rules of Professional Conduct that guide staff counsel. It is also undisputed that outside counsel is under the same stress to represent the client and at the same time please the customer, the insurance company.

In many ways, if the law firm's income is substantially tied to one or more insurance companies, the strain and pressure to keep and expand the business relationship places outside counsel in an even greater conflict in trying to apply the same moral and ethical position as staff counsel. That begs the question of whether or not the tripartite relationship is truly workable under either scenario.

DOES THE TRIPARTITE RELATIONSHIP ITSELF CREATE A CONFLICT?

There have been numerous articles written that attempt to explain what the tripartite relationship is. Simply put, it is the three-legged stool created when an insurance company uses a lawyer, be they staff or outside, to represent its insured. It then begs the question, who is the client? What duty is owed by the lawyer to the third-party insurance company that is actually paying the bill and controls not only the settlement of the case but also has the final say in what the lawyer can and cannot do during discovery?

The Oklahoma Rules of Professional Conduct, as well as the ABA Model Rules of Professional Conduct are unclear on that question. The Oklahoma Rules discuss a lawyer's duty to explain the lawyers' role in decision making.⁸ Rule 1.4 covers communicating and consulting with the client and the possibility of limitation of the client's input. In addition, and possibly more importantly, Rule 1.6 defines the lawyer's role in maintaining client confidentiality. That rule becomes very complex and is at the heart of the debate on whether a lawyer can serve two masters.

“What duty is owed by the lawyer to the third-party insurance company that is actually paying the bill...?”

Although the ABA recognizes and legitimizes the tripartite relationship,⁹ it has refused to adopt a formal position on who the lawyer represents in case of a conflict. The Oklahoma Rules are equally vague. When there are two “clients,” which is owed the greater loyalty, and to what degree? What looks simple on paper often times becomes a quagmire in the daily practice of law. Although it bears repeating that a lawyer's primary duty must be to the insured/client,

there will be times where, under the tripartite relationship, a lawyer may need to consider withdrawing because of a conflict of interest between the competing “clients.” That is one of the inherent and recognized dangers of insurance defense under the tripartite relationship theory.

Another interesting issue that could arise under the tripartite relationship is the application of Rule 5.4 (c). It states that lawyers may not allow a third party that pays the fee to

"direct or regulate the lawyer's professional judgment in rendering such legal services." A reading of that rule along with Rule 1.8 places a heavy burden upon the insurance defense lawyer to be careful not only in resisting any attempt by the third party to control the conduct of the litigation but to also explain the scope of representation to the extent the insured/client not only understands what is happening but also is able to give an informed consent. An example of a possible conflict would be where the lawyer, to properly prepare the defense, wants to do something during the discovery and the insurance company declines to pay for it. Upon the refusal, what is the obligation of the lawyer to notify the client of that refusal? Is the company interfering with the lawyer's professional judgment?

SHOULD OKLAHOMA RECOGNIZE THE TRIPARTITE RELATIONSHIP?

This question merits extensive study and professional commentary that goes far beyond the necessary brevity of this article. However, it seems to actually be the primary issue raised by Chief Justice Hannah in *Brown, supra*. Although his comments were directed at staff counsel, they apply equally to all lawyers who are involved in insurance defense.

He seems to opine that the tripartite relationship is unworkable and a lawyer can only truly have one client, not two. Can a lawyer, any lawyer, really serve two masters without conflict? That question is most often confronted when the defense lawyer determines that it would be in the best interests of the client for the insurance company to settle the case.

Oklahoma has recognized that a liability carrier has the absolute right to control the settlement of the case.¹⁰ What then is the obligation of the lawyer to the client? Does the lawyer, be they staff counsel or outside counsel, have a duty to place the insurance company on demand to settle within policy limits or agree to be bound by and pay any excess judgment? If the client demands that such a letter be sent, what happens to the lawyer's line of business or continued employment? Does that constitute an impermissible conflict of interest and necessitate a withdrawal? What happens when an offer to settle within policy limits is received where punitive damages are truly at issue and not just alleged is an issue far too complex to be discussed in this article. Suffice it to say that scenario could give rise to a conflict of interest between competing clients, the insurance com-

pany and the policyholder, and force the lawyer to withdraw.

As noted above, the three-legged stool of the tripartite relationship is fraught with danger and uncertainty. Some courts have identified a dual-client relationship where the policyholder is the "primary" client.¹¹ That at best leaves the issue unsettled because "primary" leads to the inescapable conclusion that the insurance company is also a client and the previously discussed conflicts still remain.

Perhaps the best solution is the most simple. No matter the insurance company is the employer or paying the bill, it cannot be the client, and its interests must be totally subrogated to that of the client. That position has been adopted in Texas, Montana, Michigan and Connecticut; all of which have decided the policyholder is the only client.¹² That position would seem to be the most clear and would leave no question as to how the Rules of Professional Conduct are to be interpreted.

CONCLUSION

This article has discussed and determined that the ethical obligations of staff counsel and outside counsel are one and the same. The stresses and strains are identical for both and each is expected to comply and act in accord with the highest of ethical behavior.

The second issue, and by far the most troublesome, is whether Oklahoma should, because of the inherent conflicts that will eventually arise, ever adopt or recognize the tripartite relationship or simply declare there can only be one and only one client, no matter the employer.

1. See Charles M. Silver, *Flat Fees and Staff Attorneys; Unnecessary Casualties in the Continuing Battle Over the Law Governing Insurance Defense Counsel*, 4 Connecticut Insurance Law Journal 205, 237-240, 1997-98.

2. Allstate, State Farm, Farmers Insurance, Zurich, Liberty Mutual, Geico, the Hartford and Farm Bureau all have staff counsel offices in Oklahoma.

3. *In re Weiss, Healey & Rea*, 536 A.2d 266 (NJ 1988).

4. To date the author notes that 24 states and the ABA have found in favor of staff counsel and only three states have ruled to the contrary; North Carolina, Kentucky and Arkansas.

5. This case was the result of Farmers' recent attempt to establish a staff counsel presence in Arkansas. A motion to disqualify was filed by plaintiff's counsel, alleging a violation of the Arkansas unauthorized practice of law by a corporation statute, ARK. CODE §16-22-211.

6. The entire text of the opinion can be found on the OBA website.

7. The entire text of the opinion can be found on the OBA website.

8. Rule 1.2(a) and the comments take into consideration that a client might not always have the right to control the course of the litigation and/or settlement.

9. ABA Formal Opinion 96-403; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-403 (1996).

10. *Badillo v. Mid-Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080 (Okla. 2005).

11. *Paradigm Ins. Co. v. Langerman Law Offices*, 24 P.3d 593 (Ariz. 2001).

12. *Safeway Managing General Agency, Inc. v. Clark & Gamble*, 985 S.W.2d 166 (Tex.App.-San Antonio 1998); See *In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806 (Mont. 2000); *Atlanta Int'l Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *Metropolitan Life Ins. Co. v. Aetna Cas. & Sur. Cor.*, 730 A.2d 51 (Conn. 1999).

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Steven Dobbs recently retired as the managing attorney of Dobbs & Middleton (now Middleton, Nowakowski and Smith), staff counsel for Farmers. A frequent lecturer on ethics and the Rules of Professional Conduct, he is a current member of the OBA Board of Governors and a past chairman of the OBA Professional Responsibility Tribunal. Mr. Dobbs is a past recipient of the John E. Shipp Award for Ethics.

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RICO and Robo-Justice

Fraudulent Debt Collection and its Implications on Financial Institutions

By Vaughn Iskanian and Annie Kellough

Speedy debt collection is an increasingly valuable commodity in American society. Debt collection practices, such as “robo-signing” and “sewer service,” allow agencies to collect debts at an astonishing rate.¹ The term robo-signer was created when mortgage companies, “in their zeal to process hundreds of thousands of foreclosures as quickly as possible and get those properties on the market, employed people who could sign documents so quickly they popularized a new term for them.”² Sewer service is “the practice of failing to serve court papers (and instead throwing them in the “sewer”) and filing false affidavits of service with the courts.”³

However, the nationwide debt collection agencies that utilize these fraudulent practices to collect on charged-off debts are beginning to face both negative press coverage and legal ramifications for their use of methods that victimize alleged debtors and defraud the courts in which the cases are filed. As this problem increases throughout the market, the question arises: in an industry that has knowingly allowed, and even benefitted from, the use of these illegal methods, where does the legal responsibility lie? May institutions which knowingly conduct business with debt collection agencies engaged in illegal practices be held accountable under the law? Because “robo-justice” is a new practice, courts are just beginning to deal with these issues and answer the question of which companies in the financial industry may be held liable for fraudulent debt collection.

Financial institutions that have foregone trying to collect on charged-off debts will often sell debt portfolios to a collection agency for pennies on the dollar. The “goal of the debt buyer [who purchases] — for pennies on the dollar — debts that have already been deemed uncollectable by the original creditor, [is to] collect all, most, or some of the debt.”⁴ The debt buyer, if unable to collect on the debt, will often in turn sell the portfolio to another collector. This practice continues to the point that it is not uncommon for one debt portfolio to be handled by a multitude of collection agencies consecutively. Each subsequent agency possesses increasingly inadequate documentation and data evidencing the debt. It has become public knowledge that certain debt collection agencies use fraudulent methods in order to conceal their lack of debt documentation and continue to make a profit in their business. In the last

few years, national newspapers from *The New York Times* to *The Washington Post* have reported on debt collection companies that are targeting the wrong people⁵ and resorting to lawsuits without adequate information.⁶ Companies, such as *Consumer Reports*, have reported on the issue of robo-signing.⁷ Even legal and consumer internet blogs are increasingly addressing the issue of fraudulent debt collection.⁸

Robo-justice, a phrase created during the mortgage crisis to describe the speedy adjudication of foreclosures achieved through the use of fraudulent practices, also pertains to rushed lawsuits against debtors.⁹ The fraudulent practices used during robo-justice defraud the courts. Robo-signers in the debt collection industry spend their days signing affidavits “so quickly that they could not possibly have verified the information in the document under review.”¹⁰ Some collection agencies and their agents have resorted to signing false affidavits of merit stating they have “personal knowledge of the key facts establishing that the debt in each collection action was due and owing.”¹¹ “Robo-signing” defrauds the court through the use of false affidavits and could lead to both civil and criminal penalties on the collection agencies and those profiting from their fraudulent practices. Sewer service not only defrauds the court but also allows default judgments to be taken against debtors who have no knowledge they have been sued.¹² Because, “companies typically purchase scant information about the debts and are sometimes several purchasers removed from the credit-card company or other creditor that originally sold it,”¹³ debt collection agencies often pursue debtors without the required or correct debt documentation.

A financial institution that continues to pursue a relationship with a debt collection agency with the knowledge that it is in constant violation of the Federal Debt Collection Practices Act (“FDCPA”) and other laws could possibly be found liable under various legal theories. One such theory springs from the Racketeer Influenced and Corrupt Organizations Act (“RICO”), which contains prohibitions against persons or entities involved in a conspiracy. RICO allows for both criminal penalties and civil remedies.

The substantive provision under RICO, 18 U.S.C. 1962(c), which may be asserted against fraudulent debt collection agencies, states that an entity must “conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activ-

ity.”¹⁴ While various courts are divided on the structure required to constitute an “enterprise” and the degree of involvement needed to “conduct or participate” in an enterprise’s affairs, “the phrase ‘directly or indirectly’ makes it clear that RICO liability is not limited to those with a formal position in the enterprise.”¹⁵ However, “some part in directing the enterprise’s affairs is required in order to be found guilty of a substantive violation of RICO.”¹⁶ The standard for violating the conspiracy provision under RICO is much more liberal and, potentially, any entity that knowingly endorses or encourages the substantive violations could be held accountable.

Without actively participating in any racketeering activity, it is still “unlawful for any person to conspire to violate any of the provisions” of RICO.¹⁷ As asserted in the Supreme Court case, *Salinas v. United States*, “there is no requirement of some overt act or specific act in the statute.”¹⁸ The court goes on to state that “the RICO conspiracy provision [1962(d)]... is even more comprehensive than the general [federal] conspiracy offense.”¹⁹ The court in *Salinas* relied on the 1915 case of *United States v. Rabinowich* in holding that, “[a] person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense.”²⁰

In *Monique Sykes v. United States District Court for the Southern District of New York*, a class action suit of debtors against a collection agency, their attorneys and their service company, the court held that a defendant may be liable for conspiracy under RICO “where he ‘know[s] the general nature of the conspiracy and that the conspiracy extends beyond this individual role.’”²¹ This standard is unusually broad and mere knowledge of the nature of the offense is enough to find an entity guilty of conspiracy under RICO. In addition, the law firm, that “sought to collect millions of dollars in fraudulently obtained default judgments,”²² along with the collection agency, was held vicariously liable because the firm knew that the “affidavits of service were highly likely to be false.”²³ The Model Code of Professional Responsibility prohibits attorneys from assisting a client in conduct that the lawyer knows is fraudulent. Rule 8.4(c) states that “it is professional misconduct for a lawyer to ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”²⁴ Consequently, in addition to being subject to RICO penalties, attorneys involved in such a conspiracy are also subject

to discipline pursuant to the Model Code of Professional Responsibility.

The Tenth Circuit has followed the broad definition of conspiracy asserted in *Salinas* and *Sykes*. In *United States v. Smith*, the court held that “because [the RICO] conspiracy provision lacks an overt act requirement, a defendant can be convicted under §1962(d) upon proof that the defendant knew about or agreed to facilitate the commission of acts sufficient to establish a §1962(c) violation.”²⁵ In other words, a party need not have violated personally or directly all of the elements necessary for violation of a substantive claim to be guilty of a conspiracy charge. To be convicted under a 1962(d) for conspiring to violate a substantive provision of RICO, the government must prove that “the defendant: 1) by knowing about and agreeing to facilitate the commission of two or more acts 2) constituting a pattern 3) of racketeering activity 4) participates in 5) an enterprise 6) the activities of which affect interstate or foreign commerce.”²⁶ The conduct of the entity itself does not have to fulfill the requirements for violation of the substantive provisions. Knowledge and facilitation of the acts is sufficient to find an entity guilty of conspiracy under RICO.

The Supreme Court in *Salinas* relied on the Model Penal Code definition of criminal conspiracy, which states that a person may be convicted of criminal conspiracy if he, “agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime.”²⁷ The Supreme Court made it very clear that the purpose of the conspiracy is all that is required to prove criminal intent. Relying on the Model Penal Code, the court held that, “so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree ‘to commit’ the crime.”²⁸ Additionally, the Supreme Court held that “so long as they *share a common purpose*, conspirators are liable for the acts of their co-conspirators.”²⁹ (Emphasis added.)

The question then becomes, do financial institutions that continue to sell charged-off debt portfolios to the collection agencies, despite their knowledge of the unlawful tactics used by the agencies in collecting the debt, share the common purpose of making a profit off of the charged-off, poorly documented, debts? Further, even though the financial institutions themselves might not commit the fraudulent acts directly, do the financial insti-

tutions facilitate the fraudulent debt collection activities of the agencies by selling the portfolios to the agencies? A case has recently been filed against a financial institution that “acted pursuant to conspiracy, or alternatively in concert with the common objective of collecting monies ... which were not due or owing.”³⁰ The bank stands accused of “forwarding the collection activities on the alleged account to successive debt collection agencies with knowledge that the previous debt collection agencies had not responded to plaintiffs’ demands for verification”³¹ after the bank had already entered into a settlement agreement with the plaintiff. If a financial institution knowingly agrees to facilitate the continued racketeering practice of the fraudulent companies, it would seem not to be outside of the scope of the RICO conspiracy provision to hold the institution liable.

RICO provides for both criminal penalties (18 U.S.C. §1963) and civil remedies (18 U.S.C. §1964) for commission of a conspiracy. The criminal penalties which may be imposed against an entity found guilty of conspiracy under RICO include: fines, imprisonment for up to 20 years (or longer if the underlying racketeering activity includes the potential penalty of life imprisonment), and forfeiture of any interest or property associated with “any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of” RICO provisions.³² A defendant who is found guilty of criminal violations under RICO may be fined up to “twice the gross profits or other proceeds” gained from the offense.³³

Civil remedies may also be pursued under RICO for a violation of the conspiracy clause. A court may order the defendant to “divest himself of any interest, direct or indirect, in any enterprise; [and] impos[e] reasonable restrictions on future activities.”³⁴ These restrictions may include prohibition of engaging in the same type of endeavor, prohibition of engaging in interstate or foreign commerce activities, and “dissolution or reorganization of any enterprise.”³⁵ Additionally, a court may enter restraining orders against the entity.³⁶ The civil remedies provision of RICO allows “any person injured in his business or property ... [to] recover threefold the damages he sustain[ed] and the cost of the suit.”³⁷ Therefore, every debtor who was injured by a collection agency could sue under RICO and recover three times the damages sustained as a result of being victimized by fraudulent collection methods.

While not liable as a principal under the FDCPA, a financial institution may face civil and criminal charges, including but not limited to incarceration of persons found to have violated provisions of RICO, prohibition against future dealings, and payment of up to triple the damages caused. An entity may face these penalties as a conspirator under RICO for aiding, or even simply being knowledgeable of and agreeing to facilitate, fraudulent debt collection practices. The requirements for conspiracy under RICO are so liberal, in fact, that “one can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.”³⁸ A court could find that the selling of debt portfolios, en masse, to companies known to be using these portfolios to engage in a pattern of fraudulent activities is an act that leads to substantive RICO violations. By selling debt portfolios to a collection agency which a financial institution knows engages in fraudulent collection practices, an institution may be deemed to be agreeing to facilitate the criminal action, without ever engaging in any overt criminal action, and may be liable for civil and criminal penalties under RICO.

1. In one instance, “employees daily signed 200 to 400 of such ‘false and misleading’ affidavits for years.” See Jaime Smith Hopkins, “Consumer advocates want affidavits pulled in Md. debt-collection cases,” *The Baltimore Sun*, (Oct. 3, 2011), available at www.baltimore-sun.com/business/bs-bz-debt-collection-affidavits-20111003,0,5940915.story (last visited Oct. 14, 2011).

2. David Streitfeld, “JPMorgan Suspending Foreclosures,” *N.Y. TIMES*, (Sept. 29, 2010) available at www.nytimes.com/2010/09/30/business/30mortgage.html (last visited Oct. 12, 2011).

3. The Legal Aid Society, “Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers,” available at www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf (May 2010).

4. Peter Holland, “The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases,” (July 2011) available at www.law.umaryland.edu/academics/journals/jbl/issues/6_2/6-2_259_Holland.pdf (last visited Oct. 12, 2011).

5. Sonja Ryst, “‘Debt tagging’ by collection agencies a growing problem,” *The Washington Post*, Aug. 8, 2010.

6. Andrew Martin, Automated Debt-Collection Lawsuits Engulf Courts, *N.Y. Times*, July 12, 2010, available at www.nytimes.com/2010/07/13/business/13collection.html?sq=debt%20collection&st=Search&adxnnl=1&scp=2&adxnnlx=1318529784-kNvDIXfuThnBLjY+xdPjQ (last visited Oct. 13, 2011).

7. “Was your credit-card debt ‘robo-signed’ away?,” *Consumer Reports.org*, (Nov. 1, 2010).

8. See Denise Richardson, “Good News and Bad News about Debt Collection Practices,” www.givemebackmycredit.com, May 26, 2011, available at www.givemebackmycredit.com/blog/2011/05/good-news-and-bad-news-about-debt-collection-practices.html (last visited Oct. 13, 2011); and John Richards, “Foreclosure and Debt Collection Horror Stories,” lawblog.legalmatch.com, Jan. 14, 2011, available at www.lawblog.legalmatch.com/2011/01/14/foreclosure-and-debt-collection-horror-stories/ (last visited Oct. 13, 2011).

9. Holland, *supra*, at Endnote 4, at 263. (See also *Outsourcing Law and Business Journal*, Oct. 2010, available at www.outsourcing-law.com/tag/outsourcing-law/ (last visited Oct. 13, 2011) (using the word in a humorous fashion).

10. Gretchen Morgenson and Andrew Martin, “Battle Lines Forming in Clash Over Foreclosures,” *N.Y. Times* (Oct. 20, 2010) available at www.nytimes.com/2010/10/21/business/21standoff.html?pagewanted=all (last visited Oct. 13, 2011).

11. *Monique Sykes v. United States District Court for the Southern District of New York*, 2010 U.S. Dist. LEXIS 137461, *7 (2010).

12. See *The Legal Aid Society*, *supra* at Endnote 3.

13. *The Baltimore Sun*, *supra* at Endnote 1.

14. 18 U.S.C. §1962(c).

15. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993).

16. *Id.*

17. 18 U.S.C. §1962(d).

18. *Salinas v. United States*, 522 U.S. 52, 63 (1997).

19. *Id.*

20. *Id.* at 64 (citing *United States v. Rabinowich*, 238 U.S. 78 (1915) (involving a conspiracy of multiple parties of an estate to assert involuntary bankruptcy while co-conspirators hid property belonging to the estate)). After *Salinas*, the Supreme Court continued to support the opinion that conspiracies are separate, punishable acts and that conspiracy and “agreement is ‘a distinct evil,’ which ‘may exist and be punished whether or not the substantive crime ensues.’” *United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003).

21. *Sykes* at *31-2 (citing *United States v. Zichettello*, 208 F.3d 72 (2d Cir. 2000)).

22. *Id.* at *5.

23. *Id.* at *17.

24. Model Code of Professional Responsibility, Rule 8.4(c).

25. *United States v. Smith*, 413 F.3d 1253, 1265 (10th Cir. 2005).

26. *Id.* at 1266.

27. Model Penal Code §5.03(1)(a).

28. *Salinas* at 65 (citing Model Penal Code, Tent. Draft No. 10, p. 117 (1960)).

29. *Id.* at 64.

30. *Benson v. LVNV Funding, LLC. et. al.*, Compl. at 11, Ill. 20th Cir. Ct. (2011).

31. *Id.*

32. 18 U.S.C. §1963(a).

33. *Id.* at (a)(3).

34. 18 U.S.C. §1964(a).

35. *Id.*

36. See *Id.* at (b).

37. *Id.* at (c).

38. *Salinas* at 65.

ABOUT THE AUTHORS



Vaughn Iskanian is experienced in litigation and transactional matters, with a significant emphasis on transactional practice, with experience in a wide variety of legal areas. He is familiar with legal issues covering business and commercial contracts, corporate law, torts, securities, banking regulations, environmental law, employment/labor law, administrative law, property law, Native American law and other areas of practice. He is fluent in Russian and Armenian.



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Some Thoughts on Discovery and Legal Writing

“What we have here is failure to communicate”¹

By Judge Paul J. Cleary

There is a famous scene at the end of the movie *Blow Up*² where mimes face off in a tennis match using an imaginary ball and racquets. It reminds me of too many discovery disputes: I sit as the linesman, watching helplessly as the lawyers roil and argue between intermittent swats at imaginary objects.

The fundamental problems that underlie most discovery disputes might be pulled from the pages of a marriage counselor's handbook: Fear of commitment and inability to communicate. Lawyers won't commit to a definition of the legal dispute: It's not a simple breach of contract; it's a contract, fraud, bad faith, conspiracy, racketeering case. The ill-defined nature of the dispute drives discovery into vast, uncharted territory. By the same token, lawyers responding to discovery requests won't commit to a clear statement of what responsive documents exist and which of those will be produced. The purpose of this article is to examine the problem of inartful/incomprehensible discovery requests and responses and to offer some observations and, perhaps, some solutions.

A TYPICAL DISCOVERY DISPUTE

Assume a lawsuit involving a generic dispute between plaintiff, “POE,” and defendant, “DOE,” concerning a contract entered into on July 24, 2010. Each side claims the other has breached the contract by failing to perform.

The following is an approximation of a recent discovery dust-up. For simplicity, the discussion is limited to one request for production served by POE, and DOE's response.³ POE has served a document request on DOE and DOE has offered its response. Dissatisfied with that response, POE demands a Rule 37.1 meeting in an attempt to resolve the matter without court intervention.⁴ When that fails, POE files its motion to compel.

A PRELIMINARY MATTER: DISCOVERY DEFINITIONS AND GENERAL OBJECTIONS

Discovery requests generally open with a litany of definitions that are, in theory, designed to make clear what is being sought. Generally, however, this definitional section consists of mere boilerplate that often bears little relevance to the case at hand. For example, this is a fairly standard definition of the word “document” that is being used by numerous lawyers and law firms across the state:

Document shall mean all tangible objects or media conveying, carrying, containing, storing, or otherwise holding spoken, aural, visual,

written, electronic, or machine readable substance, irrespective of the media upon which such substance is contained, produced, reproduced, stored or kept, and whether in graphic form suitable for visual inspection or in machine-readable form. Such media includes, without limitation, paper, phonographic, photographic, film, magnetic (including without limitation hard-drives, floppy disks, compact discs, DVDs, tape, etc.) computer memory, optical media, magneto-optical media, and any other physical media upon which notations or markings of any kind can be affixed. These terms include, but are not limited to, the original and any identical or non-identical copies of the "document," regardless of origin or location, including all correspondence, records, tables, charts, analyses, graphs, maps, schedules, reports, memoranda, journals, notes, logs, diaries, calendars, appointment books, letters, telegrams, telex and other messages (including, but not limited to reports of telephone conversations, and conferences), studies, directives, books, periodicals, magazines, newspapers, booklets, circulars, advertisements, brochures, bulletins, instructions, minutes, inter and intra-office communications, including electronic communications, contracts, books of account, work orders, purchase orders, materials or parts orders, invoices, statements, checks, bills, files, vouchers, bids, proposals, quotations, requests for quotation, notebooks, scrapbooks, data sheets, paper and electronic data files, paper and electronic databases, data processing cards, computer tapes, computer disks, computer programs, computer printouts, electronic information storage medium, photographs, photographic negatives, videotape or film recordings, telephone records, calling card records, cell phone records, internet account records, credit cards records, audiotape recordings, wire recordings, forms, catalogues, manuals, blueprints, tracings, tabulations, and any other writing or document of any kind, regardless of the manner in which produced, reproduced, stored, or kept, and whether in draft or other form. The term "Document" shall also include voice recordings, films, tapes, and other data compilations from which information can be obtained.⁵

First observation: Unfocused boilerplate is a waste of time. While a well-considered definition can be helpful in discovery matters, this one is decidedly unhelpful. Indeed, not only is it not

“Never have
so many words
accomplished
so little.”

helpful, it discloses something POE's lawyer should keep hidden: He/she is too lazy to shape the definition to the case at hand.⁶ Are magazines, periodicals and cell phone records really what POE is seeking? If not, delete that language. Definitional boilerplate generally holds little usefulness and may actually impede the discovery process by making the discovery request confusing. It

also must be noted that this particular definition runs longer than Lincoln's Gettysburg Address — by 34 words. Never have so many words accomplished so little.

Furthermore, there is a better way to deal with a real definitional problem. Rule 34(a) of the Federal Rules of Civil Procedure provides a working definition of "document:"

Any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form...

Fed. R. Civ. P. 34(a)(1)(A). Reference to this rule probably provides a sufficient definition for most discovery requests.

The respondent's equivalent of the long-winded definitional preamble is the statement of general objections. This is a set of stock, generic objections, supposedly applicable to all of the discovery requests. They usually include a general assertion of privilege and work product protection. They may also include such statements as: "Agreement to produce documents is not an admission of the relevance of any such document." Or, "Agreement to produce requested documents is not an admission that any such documents exist."

Like tedious, unfocused discovery definitions, generic general objections are generally a waste of time. The Federal Rules of Civil Procedure require that the grounds for discovery objections be stated with specificity.⁷ General objections often fail this test. Unless a general objection is specifically asserted against a particular discovery request and the basis for the objection explained, it generally will be ignored.⁸ Without explanation of its specific

application, a general objection does not fulfill the responding party's burden under the federal rules and does not provide sufficient basis for the court to determine whether the objection has merit.

POE'S INITIAL DISCOVERY REQUEST

With the discussion of boilerplate behind us, we return to our mock discovery dispute. POE has served this discovery request:

Produce all documents, electronic data and/or other material of whatsoever kind, whether in your possession or under your custody and/or control, that contain, reflect, mention, reference or summarize any statement, written or otherwise, including, but not limited to, any such statement in electronic format, made by you, obtained by you, made by any person or entity on your behalf, or made by any other person or entity whatsoever concerning, relating to, referencing, or mentioning in any manner whatsoever, the Agreement entered into between POE and DOE on or about July 24, 2010, drafts of that agreement, any suggested revisions to the agreement, and the reasons therefor.

This is hardly a model of communicative clarity. This one sentence contains more than 100 words and is supposed to describe *with particularity* a set of documents. Now let's consider just the basic structure of this single sentence. The structure seems fairly simple: "(DOE) produce X." It is "X" that is the problem; here it includes all materials that:

- 1) Are in DOE's
 - a. possession,
 - b. custody, or
 - c. control
- 2) And
 - a. contain,
 - b. reflect,
 - c. mention,
 - d. reference or
 - e. summarize any statements
 - i. Made by DOE
 - ii. Obtained by DOE
 - iii. Made by any person or entity on DOE's behalf
 - iv. Made by any person whatsoever,
 1. That concern,
 2. relate to,
 3. reference, or
 4. mention in any way

- a. The agreement between POE and DOE,
- b. Drafts of the agreement,
- c. Suggested revisions to the agreement, or
- d. The reasons for any revisions to the agreement.

Second Observation: Simplify your writing. The modifiers outlined above put an awful lot of weight on one sentence. Two suggestions for the lawyer drafting a discovery request: First, if your non-lawyer spouse/friend can't understand what you are saying, rewrite it until he/she can. Second, if you can't diagram the sentence you've written, the sentence is objectionable on its face.⁹ It must be stricken and the author banished to some harmless activity — like document review.

This document request could — and should — be broken into a half dozen requests. Furthermore, it must be revised to identify with particularity what is being sought. In its present form, it is badly conceived and poorly written. These weaknesses make it impossible for a judge to enforce.

Third observation: Attend to basic writing fundamentals. It would be helpful if lawyers occasionally reviewed the simple principles of composition contained in *The Elements of Style*.¹⁰ There, the authors list 12 Elementary Principles of Composition. A few of them are worth emphasizing here: 1) Use the active voice. 2) Put statements in positive form. 3) Use specific concrete language. 4) Omit needless words. And then this:

Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell.¹¹

If the author of the document request above had reviewed it according to those simple principles, it would never have been released for public consumption. At the very least, it would be shorter and more understandable. Ideally, it would request something specific, something concrete — which means it would comply with Rule 34 of the Federal Rules of Civil Procedure.

Rule 34 requires that a document request describe “with reasonable particularity” what is being sought. However one may interpret the phrase “reasonable particularity,” the Request above misses the mark.¹² A Request should be sufficiently concrete so that when the recipient reads it he or she has a clear idea as to what is being requested. The use of so-called “omnibus phrases” — “relating to,” “referring to,” or “reflecting” — frequently undermines this particularity requirement. One such phrase is bad enough, but piling one upon another destroys meaningful communication and violates the author’s obligation under Rule 34. For this reason, some courts have held that the use of omnibus phrases can render a discovery request objectionable on its face.¹³

Such vagueness also means that the court has little ability to enforce the request. How will the judge ever know whether his order to produce has been complied with?

Why not simply request the following:

Produce all documents related to the July 24, 2010, agreement, between POE and DOE including any drafts or suggested revisions.

Produce any documents that discuss the reasons for the suggested revisions described in the previous Request.

Both of these requests are “Tweet-sized.”¹⁴ While they may not be without flaws they at least describe a comprehensible set of documents. That is the first step in the basic communication that defines a discovery request, but to take that step POE must commit to a theory of the lawsuit. POE cannot try to capture in one request all documents tied to a contract-fraud-conspiracy-racketeering-bad faith case. All-encompassing discovery requests reflect a lawyer’s lack of commitment to a theory of the litigation and an unwillingness to take the time to define what documents might be related to a contract claim, what other documents might relate to the elements of a fraud claim, etc. Absent that commitment and initial analysis, the discovery process will be, at best, difficult, and, at worst, an expensive, frustrating waste of time. However, even after the initial analysis is complete, the lawyer must use his/her writing skills to fashion a comprehensible discovery request.

Fourth observation: Listen to Van Morrison. Drafting cogent discovery requests is challenging, but the final product should reflect clarity

of thought, not bewilderment. Too often, lawyers who are capable of writing cogent and coherent briefs, turn semi-lingual when drafting discovery requests.¹⁵ Why would the lawyer who crafted the document request above not realize its flaws and set out to revise and edit it until it made sense? Perhaps Van Morrison has said it best: “When I cleaned up my diction I had nothing left to say....”¹⁶ That is, “If I took the time to edit my writing it would be immediately apparent that I haven’t a clue what I’m talking about” or “I can’t make my discovery request any clearer because I don’t know what I’m looking for.”¹⁷

DOE’S OBJECTIONS AND RESPONSE TO THE DOCUMENT REQUEST

In response to the discovery request above, DOE offered this response:

DOE objects to this request on the grounds that it is vague, overly broad, unduly burdensome, seeks information that is not relevant to the claims and defenses herein and is not reasonably calculated to lead to discovery of admissible evidence. Subject to these objections and the General Objections asserted above, and without waiving same, DOE states that responsive documents, if any exist, will be produced. See attached documents.

The problems presented in DOE’s discovery response are as severe as those in POE’s discovery request. First, the response merely parrots the objection language in Rule 26 without any further explanation. Second, the response both objects *and* responds to the discovery request without defining the line where the objection ends and the response begins. Third, DOE’s response indicates that it has not even undertaken a sufficient search to determine if there are *any* documents responsive to the request. Finally, the response attaches documents without explaining what they are and how they relate to the universe of responsive documents.

DOE’s discovery response recites typical boilerplate language from Rule 26: vague, overly broad, unduly burdensome, not relevant, not reasonably calculated to lead to admissible evidence.... Unless these objections are supported with specific reference to the request at issue and explain the reason for the objection, they fail the test of Rule 34(b)(2)(B).¹⁸ Furthermore, they do not help the court understand or resolve the underlying discovery dispute.

More troubling, DOE's discovery response makes numerous objections but then states that something will be produced subject to the specific and the general objections and "without waiving same." Rule 34 demands more of a commitment than that. The rule provides that a responding party may 1) state that inspection will be permitted as requested; or, 2) state an objection to the request, including the reasons; or, 3) object to part of the request and permit inspection of the rest.¹⁹ Here, DOE has attempted to object *and* produce without distinguishing between the objectionable and the non-objectionable parts of the request.

Fifth observation: Decide whether you are objecting or producing. Sooner or later, the lawyer has to make a decision: Is the document request so vague that I must object and refuse to answer, or can I reasonably infer what is being sought and respond accordingly. If your objection is reasonable, perhaps the issue can be resolved at the meeting with opposing counsel before a motion to compel is filed.

Sixth observation: Find out if responsive documents exist. Many discovery fights would be avoided if the producing party simply stated: "After a good faith search, there are no documents responsive to this request." Unfortunately, the more common response is, "Responsive documents will be produced, if any exist." This last phrase implies that the search for responsive documents has not even begun. If a lawyer responds to a discovery request, at the very least he should know whether or not any responsive documents exist. If he hasn't even made that initial determination, he hasn't fulfilled his responsibility to participate in discovery in good faith.

Seventh observation: If you are producing, identify what is being produced. Further confusing the matter, the response concludes with the admonition: "See attached documents." But what documents are attached? Are they the responsive documents that the author previously told us he didn't know existed? Are they *all* responsive documents? Or just a handful of special favorites? The response does not comply with the requirements of Rule 34.²⁰

SUMMARY

Discovery disputes are often the most unpleasant aspect of the practice of law. However, many discovery problems could be avoided if lawyers kept two simple goals in mind. First, Discovery's underlying purpose is "to

secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. That directive should be in every attorney's mind when drafting discovery requests or responses. Counsel also needs to remember the essential purposes of discovery:

- (1) To narrow the issues;
- (2) To obtain evidence for use at the trial;
- (3) To secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured.²¹

The goal is "to remove surprise from trial preparation so that the parties can obtain evidence necessary to evaluate and resolve their dispute."²² That goal is best satisfied when discovery requests — and the responses — are clear, concise and specific.

Second, the fundamental goal of any written document is communication. If the author doesn't understand what he/she is saying, the reader will be doubly taxed. Meaningful communication — whether in requesting information or responding to the request — requires effective use of grammar and writing skill. Lawyers often fall into the bad habit of boilerplate forms and legalese, trying to "write like a lawyer." This is generally not a worthy goal. As Fordham law Professor John D. Feerick has noted: "When one says, 'You think like a lawyer,' it is taken as a compliment; when one says, 'You write like a lawyer,' it is serious criticism."²³

1. *Cool Hand Luke* (Jalem Productions 1967).

2. (Bridge Films 1966).

3. The dispute described is a composite of several the author has presided over. The document request, definitions, general objections and discovery response are taken nearly verbatim from actual cases.

4. Rule 37.1 of the Local Rules of the U.S. District Court for the Northern District of Oklahoma provide:

With respect to all motions or objections relating to discovery ... this Court shall refuse to hear any such motion or objection unless counsel for movant first advises the Court in writing that counsel personally have met and conferred in good faith and, after a sincere attempt to resolve differences, have been unable to reach an accord.

LCvR37.1.

5. This definition has appeared in several discovery requests recently submitted to the court.

6. Boilerplate definitions are generally of little assistance because they are rarely tailored to the case at hand; instead, the author drops into his document request a stock definition, such as the example above, without regard to its applicability within the context of the specific litigation. This is also true with boilerplate general objections. Lawyers often attach these to all discovery responses without regard to applicability and without tying them to specific discovery requests. If the objections aren't related to specific document requests, they are generally a waste of time. See *Leisure Hospitality, Inc. v. Hunt Properties, Inc.*, 2010 WL 3522444, at *3 (N.D.Okla. Sept. 8, 2010) ("General objections are of little use if they are not applied specifically to a particular discovery request."). Consequently, some courts have held that general objections are impermissible. E.g., *Herd ex rel. Herd v. Asarco, Inc.*, 2002 WL 34584902, at *3 (N.D.Okla. April 26, 2002) ("General or boiler-

plate objections are not proper.”). Others have held that since objections must be stated with specificity, a mere recitation of the familiar litany of overly broad, vague or burdensome, is not sufficient. *Wyatt v. ADT Sec. Services, Inc.*, 2011 WL 1990473, at *2 n. 1 (N.D.Okla. May 23, 2011) (“It is not appropriate to expect the court to sift through general objections to determine which ones might apply to a particular topic.”); See also *Oklahoma v. Tyson Foods, Inc.*, 262 F.R.D. 617, 621 n.4 (N.D.Okla. 2009); *Adhi Parasakthi Charitable, Medical, Educational, and Cultural Society of North Am. v. Township of West Pikeland*, 2010 WL 157534, at *4 (E.D.Pa. Jan. 13, 2010).

7. Fed. R. Civ. P. 34(b)(2)(B).

8. E.g., *Wyatt*, 2011 WL 1990473, at *2 n.1; *Leisure Hospitality*, 2010 WL 3522444, at *3; *Herd*, 2002 WL 34584902, at *3.

9. For discussion of diagramming sentences, see Kitty Burns Florey, *Sister Bernadette’s Barking Dog: The Quirky History and Lost Art of Diagramming Sentences* (Melville House, 2006). Ms. Florey was taught diagramming by Sister Bernadette; in my case it was Sister Joseph Catherine, among others.

10. W. Strunk, Jr. and E. B. White, *The Elements of Style* at 23 [3rd ed. 1979]. For a useful guide on constructing a clear sentence, see Stanley Fish, *How to Write a Sentence: And How to Read One*, (1st ed. 2011).

11. *Id.*

12. For a description of two approaches to defining “reasonable particularity,” see 8B Charles Alan Wright, Arthur R. Miller, Mary Kay Kane & Richard L. Marcus, *Federal Practice and Procedure* §2211 (3rd ed. 1998)[hereinafter, Wright & Miller]. For examples of document requests that courts have found to be too broad, see 10A Fed. Proc. L. Ed. §26:635 [2010].

13. E.g., *Leisure Hospitality*, *supra*, 2010 WL 3522444, at *3 (omnibus phrases undermine obligation to describe what is being sought with “reasonable particularity.”); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 197-98 (D.Kan. 1996) (omnibus phrases “often require the answering party to engage in mental gymnastics to determine what information may or may not be remotely responsive.”); *Audiotext Communications Network, Inc. v. US Telecom, Inc.*, 1995 WL 625962, at *6 (D.Kan. Oct. 5, 1995) (omnibus terms “make arduous the task of deciding which of numerous documents may conceivably fall within its scope.”).

14. A “tweet” is a message sent via the social networking service Twitter. Tweets are limited to 140 characters in length.

15. Which brings to mind the story of an Ohio college professor who returned a student’s writing assignment with the following note:

“I am returning this otherwise good paper to you because someone has printed gibberish all over it and put your name at the top.”

16. Van Morrison is not a legal scholar. He is a music legend of Irish descent — both notable attributes. The quote is from Van Morrison, “No Religion,” on *Days Like This*, Polydor/Umgd Records 1995).

17. Which raises the terrible thought that when counsel informs the court that a document request/response “could not be any clearer,” counsel’s statement is, sadly, all too accurate.

18. E.g., *Leisure Hospitality*, *supra*, 2010 WL 3522444, at *3; *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 519 (S.D.Fla. 2009); *Etienne v. Wolverine Tube, Inc.*, 185 F.R.D. 653, 656 (D.Kan. May 1999) (Objecting party has burden to support its objections.); *Miner v. Kendall*, 1997 WL 695587, at *1 (D.Kan. Sept. 19, 1997) (Conclusory or boilerplate objections are disfavored.). See additional cases cited at footnote 6.

19. Fed. R. Civ. P. 34(b)(2)(B) & (C). See *Leisure Hospitality*, 2010 WL 3522444, at *3.

20. Rule 34(b)(2)(E)(i) provides that “A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.” A party must state whether the documents produced are all of the responsive documents.

21. 8 Wright & Miller, *Federal Practice & Procedure* §2001 (quoting *Weinstein v. Ehrenhaus*, 119 F.R.D. 355, 357 (S.D.N.Y. 1988)).

22. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D.Cal. 1998). 8 Wright & Miller, *Federal Practice & Procedure* §2001 (quoting *Weinstein v. Ehrenhaus*, 119 F.R.D. 355, 357 (S.D.N.Y. 1988)). The goal is “to remove surprise from trial preparation so that the parties can obtain evidence necessary to evaluate and resolve their dispute.”

23. John D. Feerick, “Writing Like a Lawyer,” 21 *Fordham Urb. L. J.* 381 [Winter 1994].

ABOUT THE AUTHOR



Paul J. Cleary has served as U.S. magistrate judge for the Northern District of Oklahoma since 2002. His duties include overseeing discovery in civil litigation. He is a graduate of Worcester Polytechnic Institute and the TU College of Law. He was a law clerk for U.S. District Judge Thomas R. Brett before spending 15 years in private practice. Prior to that, he was a columnist and editorial writer for the *Tulsa World* newspaper.



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Taxation Law Section

2011 Oklahoma Tax Legislation

By Sheppard F. Miers Jr.

Legislation enacted in the 2011 session of the Oklahoma Legislature included changes described below, which are some of the new Oklahoma state laws on taxation.

INCOME TAX

Aerospace Sector New Employee Tax Credit

The tax credits for qualified employers and employees in the aerospace sector in Oklahoma for tuition reimbursement and compensation was modified to be reinstated effective July 1, 2011, for taxable years ending before Jan. 1, 2015. HB 1008, amending 68 O.S. Supp. 2010, §§2357.302, 2357.303, 2753.304; effective Aug. 26, 2011.

Direct Deposit, Card-Based Refunds

The Oklahoma Tax Commission may use a direct deposit system and card-based disbursement system in lieu of checks or warrants for issuing refunds of overpayments of individual income taxes. The tax commission may enter into a contract with, and release taxpayer information to, entities it determines qualified to implement the card-based disbursement system. The tax commission shall not release to any entity contracted for this service the full Social Security number of taxpayers who elect to receive a refund through a card-based disbursement system. SB123, §4; amending 68 O.S. Supp. 2010, §2385.16; effective Aug. 26, 2011.

State Employee Tax Noncompliance Sanction

The statutory provision authorizing tax commission notification of the administrative officer of a state agency employer of an employee's noncompliance with state income tax laws was amended to provide that upon a third notice of noncompliance the employee may be terminated regardless of which agency the employee was employed by at the time of

first and second notices. HB 1231, §2, amending 68 O.S. 2001, §228.1; effective Aug. 26, 2011.

Oklahoma Equal Opportunity Education Scholarship Act Credits

An Oklahoma Equal Opportunity Education Scholarship Act was enacted providing for income tax credits to taxpayers that donate to certain educational organizations, which are defined in the act. An Oklahoma income tax credit shall be allowed for a contribution to an "eligible scholarship granting organization" which shall be equal to 50 percent of the total amount of contributions made during a taxable year, not to exceed \$1,000 for single individuals, \$2,000 for married individuals filing jointly, \$100,000 for any taxpayer which is a legal business entity including limited and general partnerships, corporations and limited liability companies. However, if total qualifying contributions exceed a specified cap on all qualifying taxpayer contributions in a taxable year, the credit allowed to a particular taxpayer shall be equal to the taxpayer's proportionate share of the cap for the taxable year. The cap for contributions to an eligible scholarship granting organization for all single individuals and married individuals filing jointly is \$1,750,000 annually, and for all other taxpayers \$1,750,000 annually. An Oklahoma income tax credit shall also be allowed for a contribution to an "eligible educational improvement grant organization" which shall be equal to 50 percent of the total amount of contributions made during a taxable year, not to exceed \$1,000 for single individuals, \$2,000 for married individuals filing jointly, or \$100,000 for any taxpayer which is a legal business entity including limited and general partnerships, corporations and limited liability companies. However, if total qualifying contributions exceed a specified cap on all qualifying taxpayer contributions in a taxable year, the

credit allowed to a particular taxpayer shall be equal to the taxpayer's proportionate share of the cap for the taxable year. The cap for contributions to an eligible educational improvement grant organization for all single individuals, married individuals filing jointly and for all other taxpayers is \$1,500,000 annually. A procedure for allocation of allowable credits within the specified caps on all taxpayer credits for calendar years, and publication by the tax commission of the percentage of contribution which may be claimed as a credit by taxpayers for a calendar year is established. Any tax credits earned by a taxpayer during the time period beginning on the effective date of the act, Aug. 26, 2011, through Dec. 31, 2012, may not be claimed for any period prior to the taxable year beginning Jan. 1, 2013; and no credits which accrue during the time period beginning on the effective date of the act through Dec. 31, 2012, may be used to file an amended tax return for any taxable year prior to the taxable year beginning Jan. 1, 2013. The act contains statutory definitions of terms that are to apply for determining qualification for and allowance of the credits. Any credits that are allowed to a taxpayer but not used in any tax year may be carried over, in order, to each of the three years following the year of qualification for the credit. SB 969, §1; adding 68 O.S. Supp. 2011, §2357.206; effective Aug. 26, 2011.

New and Modified Refund Check-Off Donations

The tax commission shall include on each state individual income tax return or corporate income tax return for tax years beginning after Dec. 31, 2011, an opportunity for taxpayers to donate to the Public School Classroom Support Revolving Fund, for the benefit of domestic violence and sexual assault services in Oklahoma certified by the attorney general, for the benefit of volunteer fire departments, for the Oklahoma Lupus Revolving Fund, the Oklahoma Sports Eye Safety Program Revolving Fund and for the purpose of supporting music festivals held in the historic Greenwood District. The provisions for donation of refunds to the Oklahoma Chapter of YMCA Youth and Government program and to the Multiple Sclerosis Society are modified to remove a maximum donation limit. HB 1852, §1; adding 70 O.S. Supp. 2011, §1-122; effective July 1, 2011; HB 1998, §§1-5; adding 68 O.S. Supp. 2011, §§2368.22, 2368.23, 2368.24, and amending 68 O.S. Supp. 2010 §§2368.17, 2368.21; effective Jan. 1, 2012; SB 949, §§2-4; adding 68

O.S. Supp. 2011, §§2368.25, 2368.26; effective Nov. 1, 2011.

SALES AND USE TAX

Manufacturer Exemption Extended to Refinery Contractors

For the purposes of the Oklahoma sales tax manufacturer exemption, sales made to any person, firm or entity that has entered into a contractual relationship for the construction and improvement of manufacturing goods, wares, merchandise, property, machinery and equipment for use in a manufacturing operation shall be considered sales made to a manufacturer that is defined or classified in the North American Classification System Manual under Industry Group No. 324110, which is petroleum refining. The purchase must be evidenced by a copy of the sales ticket or invoice which must be retained by the vendor indicating that the purchases are made for and on behalf of such manufacturer, must set out the name of such manufacturer and include a copy of the manufacturing exemption permit of the manufacturer. HB 1954, §1; amending 68 O.S. Supp. 2010, §1359; effective Jan. 1, 2012.

City Sales Tax Collection

The statutory provision requiring the governing body of a city and the Oklahoma Tax Commission enter into contractual agreements whereby the tax commission shall have authority to assess, collect and enforce taxes levied by the city was amended. At the request of a city, the tax commission shall enter into a contractual agreement with the city under which the city would be authorized to engage in compliance activities, either directly or through contract with private persons or entities, to augment the collection of city sales tax by the tax commission. The sole responsibility for administration of compliance activities shall remain with the tax commission to ensure sellers and purchasers will only be required to register, file returns, and remit state and local taxes to one single authority, and enforcement activities are not duplicated. Any contractual agreement entered into for compliance activities, and any person or entity who will be performing compliance activities, must first be approved by the tax commission in its sole discretion. Once approved, the private person or entity shall be appointed as an agent of the tax commission for purposes of such compliance activities. Agreements for compliance activities shall provide that the city, private persons or enti-

ties appointed as an agent and the tax commission may exchange necessary information to effectively carry out the terms of the agreements. The city and any private person or entity appointed as an agent of the tax commission may receive all information necessary for compliance activities and shall preserve the confidentiality of the information in the same manner and be subject to the same penalties as provided by 68 O.S. §205. Cities conducting compliance activities directly or by contracting with private persons or entities must furnish to the tax commission the compliance results and all relevant supporting documentation, and the tax commission shall take such information and issue proposed assessments or conduct other such administrative action as is necessary. A "Tax Commission Compliance Fund" is to be created in the state treasury, which shall be a continuing fund, not subject to fiscal year limitations. The fund shall consist of the first 3/4 of 1 percent of enhanced collections of state sales and use taxes collected pursuant to a city compliance activities agreement. All monies accruing to the fund may be budgeted and expended by the Oklahoma Tax Commission for the purpose of reimbursing a city for enhanced collections of state sales taxes pursuant to a compliance activities agreement. SB 750, §§1-2; amending 68 O.S. Supp. 2010, §2702; effective Sept. 1, 2011.

AD VALOREM TAX

Time of Mailing is Time of Filing

The ad valorem tax code was amended to provide that for any return, claim, statement or document required to be filed with a county assessor or the state, or any payment required to be made to a county assessor within a prescribed period or on or before a prescribed date under the ad valorem tax code, the date of postmark stamped on the cover in which the item is mailed shall be deemed to be the date of delivery or date of payment. The item must be deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the county assessor with which it is required to be filed or to which payment is required to be made. If an item is sent by U.S. registered mail, the registration shall be *prima facie* evidence that the item was delivered to the county assessor to which it was addressed and the date of registration shall be deemed the postmark date. For purposes of this rule if the

prescribed period ends or the prescribed date is a legal holiday or any other day the county assessor office does not remain open for public business until the regularly scheduled closing time, then the prescribed period or prescribed date is to be extended until the end of the next day the office is open until the regularly scheduled closing time. HB 1903, §§ 1-2; adding 68 O.S. Supp. 2011, §2802.2; effective Nov. 1, 2011.

Five-Year Exemption for New Manufacturing Facilities

The ad valorem tax five-year exemption for qualifying manufacturing concerns was amended to provide that an entity which has been granted an exemption for a time period which included calendar year 2009 but which did not meet the applicable base-line payroll requirements during calendar year 2009, shall be allowed an exemption, to begin on Jan. 1 of the first calendar year after the effective date for the number of years, including calendar year 2009, remaining in the entity's five-year exemption period, provided such entity attains or increases payroll at or above the baseline payroll established for the exemption which was in force during calendar year 2009. SB 935, §§1-2; amending 68 O.S. Supp. 2010, §2902; effective Jan. 1, 2012.

Referendum of State Question on Valuation Increases

A proposed amendment to Section 8B, Article 10, of the Oklahoma Constitution was referred to voters as a state question for approval or disapproval. The amendment would provide that on and after Jan. 1, 2013, if locally assessed property qualified for homestead exemption or is classified as agricultural land, any increase in fair cash value of such property in a taxable year shall be limited to 3 percent. HJR No.1002, April 20, 2011; State Question No. 758; Legislative Referendum No. 358, April 25, 2011.

State Board of Equalization To Set County Assessor Fees

The State Board of Equalization shall set a fee or schedule of fees to be used by county assessors for the search, production and copying in electronic and/or digital format of property data, administration files, sketches and pictures of real property maintained within the county assessors' computer systems for commercial purposes. The fee or schedule of fees is to be uniform across the state to the

extent possible, subject to variances between counties based on technology available, personnel and budget resources. The fees must be posted in the office of the county assessor and the county clerk. The statute includes standards referring to reasonable cost based fees and for prescribed times in which requests for records are to be met. The fees shall not apply to a property owner obtaining information on the owner's property for the owner's use. SB 105, amending 68 O.S. 2001, §2864; effective Nov. 1, 2011.

GROSS PRODUCTION TAX

Exemption Extensions

The duration of certain incentive exemptions from gross production tax was extended. Exemptions for secondary recovery projects, tertiary recovery projects, re-established inactive wells, production enhancement projects, new wells with specified depth, qualifying new discovery wells, and three-dimensional seismic shoot and technology wells were extended for completions or exemption qualifications prior to July 1, 2014. HB 1488 §1; amending 68 O.S. Supp. 2010, §1001; effective Jan. 1, 2012.

Horizontal Well and Well Depth Exemption Changes

The exemption for production of oil, gas or oil and gas from a horizontally drilled well, up to 48 months shall only apply to wells qualifying for the exemption prior to July 1, 2011; and the production of oil, gas or oil and gas on or after July 1, 2011, and prior to July 1, 2015, from qualifying horizontally drilled wells shall be taxed at a rate of 1 percent until the expiration of 48 months commencing with the month of initial production. The exemptions of production of oil, gas or oil and gas from wells qualifying by reason of being spudded between July 1, 2002, and July 1, 2005, drilled to a depth of 15,000 feet or greater; wells spudded between July 1, 2005, and July 1, 2011, and drilled to a depth between 15,000 feet and 17,499 feet; and wells spudded between July 1, 2002, and July 1, 2011, and drilled to a depth of 17,500 feet or greater, shall only apply to the production of wells qualifying for the exemption prior to July 1, 2011. The production of oil, gas or oil

and gas on or after July 1, 2011, from wells qualifying for being drilled to specified depths under 17,500 feet shall be taxed at a rate of 4 percent until the expiration of 48 months from the date of first sales; and the production of oil, gas or oil and gas on or after July 1, 2011, from wells qualifying for being drilled to a depth of 17,500 feet or greater shall be taxed at a rate of 4 percent until the expiration of 60 months from the date of first sales. SB 885, §1; amending 68 O.S. Supp. 2010, §1001; effective Aug. 26, 2011.

Gold and Silver Excluded from GPT

The production of gold and silver in Oklahoma has been removed from the types of non-oil and gas minerals upon which the gross production tax is levied. The 3/4 of 1 percent gross production tax will not be levied upon production of gold and silver on and after Jan. 1, 2012. The tax will continue to apply to asphalt, ores bearing lead, zinc,

jack and copper. HB 1488 §1; amending 68 O.S. Supp. 2010, §1001; effective Jan. 1, 2012.

Oil and Gas Excise Tax Rates

The excise tax levied in addition to the gross production tax, equal to .095 of 1 percent of gross value on each barrel of petroleum oil produced in the state that is subject to gross production tax is extended until July 1, 2016. Similarly, the excise tax levied in addition to the gross production tax, equal to .095 of 1 percent of gross value of all natural gas and/or casing-head gas produced in the state that is subject to gross production tax is extended until July 1, 2016. SB 587, §§2-3; amending 68 O.S. Supp. 2010, §§1101, 1102, 1103; effective Aug. 26, 2011.

COIN-OPERATED DEVICE LICENSE TAX

Reduction of Annual Fee

The annual fee on ownership and operation of a coin-operated device was reduced from \$150 to \$75, for each coin-operated music or amusement device; and for each coin-operated vending device requiring a coin of 25 cents or more. HB 1634, §§1-3; amending 68 O.S. Supp. 2010, §1503; effective July 1, 2011.

“The production of gold and silver in Oklahoma has been removed from the types of non-oil and gas minerals upon which the gross production tax is levied.”

MOTOR FUEL TAX

Motor Fuel Tax on Compressed Natural Gas

Motor fuel tax shall be imposed on use and consumption of compressed natural gas at a rate of 5 cents per gasoline gallons equivalent until the income tax credit for compressed natural gas powered vehicles under 68 O.S. 2357.22 expires, at which time the rate of tax imposed on compressed natural gas will be equal to the rate imposed on diesel fuel using a gasoline gallons equivalent. Compressed natural gas shall no longer be taxed as a special fuel under an in lieu of flat fee vehicle decal procedure. HB 1815, §§1-10; amending 68 O.S. Supp. 2010, §§500.3, 500.4, 500.6, 500.28, 500.33 and 68 O.S. 2001, §§701, 723; effective Jan. 1, 2012.

ECONOMIC DEVELOPMENT; TAX/FINANCIAL INCENTIVES

21st Century Quality Jobs Incentive Act Eligibility Requirements

The qualification requirements for incentives payments under the 21st Century Quality Jobs Incentive Act are modified to clarify that an establishment which has met the requirements within 12 quarters of the date of its application, but which at any time during the subsequent 28 quarters fails to meet such requirements in four consecutive quarters shall be ineligible to receive further incentive payments pursuant to its application and approval. SB 154, §§1-2; amending 68 O.S. Supp. 2010, §3915; effective Nov. 1, 2011.

TAX ADMINISTRATION AND PROCEDURE

Tax Commission Sales/Use Tax Audit and Collection Increase

In order to increase the collection of sales and use taxes, the Oklahoma Tax Commission shall conduct hearings pursuant to 68 O.S. 2001, §212 related to sales tax permits issued under 68 O.S. Supp. 2010, §1364 in at least two locations in the state; and the Oklahoma Tax Commission shall add 10 additional sales and use tax audit and/or enforcement personnel as soon as practicable after July 1, 2011. SB 123, §2; adding 68 O.S. Supp. 2011, §1364.3; effective Aug. 26, 2011.

Tax Commission Corporate and Partnership Income Tax Compliance Program

On or after July 1, 2011, the Oklahoma Tax Commission shall initiate a compliance program

that includes an increased assignment of audit staff to conduct audits of corporate and partnership income tax returns. SB 123, §3; not codified in Oklahoma Statutes; effective Aug. 26, 2011.

Required Reporting of Tax Credit Transfers

The transfer or allocation of any tax credit authorized by Title 68 of the Oklahoma Statutes shall be reported to the Oklahoma Tax Commission, and any tax credit authorized by Title 36 of the Oklahoma Statutes shall be reported to the Oklahoma Insurance Department. The transfer or allocation of any tax credit shall be reported by the entity transferring or allocating the credit before the 20th day of the second month after the tax year in which an act occurs which allows the tax credit to be claimed. If the tax credit is transferrable, the report must state whether the tax credit will or may be transferred to another taxpayer and the names of the taxpayers to whom the credit is transferred. The report must also contain specified information regarding pass-through entity involvement in the transfer. The report shall include the tax type, amount of the credit, the statutory or legal authority that is the basis of the credit, and other information required by the Oklahoma Tax Commission and Oklahoma Insurance Department. The report may be required to be filed electronically. The Oklahoma Tax Commission and Oklahoma Insurance Department shall compile a list of transferred credits reported, provide it to the governor, Legislature leadership and director of Office of State Finance, and publish the list. The list shall identify the taxes against which credits may be claimed and the name of the entity that will be claiming the credit. The Oklahoma Tax Commission and Oklahoma Insurance Department shall make an estimate of revenue impact to the state resulting from credits reported. If a taxpayer claims a credit that was not previously reported it will be disallowed, but reinstated and allowed upon filing of the report. The reporting requirement does not apply to the sales tax relief credit, low income property tax relief credit, earned income tax credit, child care/child tax credit, credit for taxes paid to another state, and credit for property taxes on tornado damaged residential property. HB 1284, §§1-3; adding 68 O.S. Supp. 2011, §2357.1A-1; effective July 1, 2011.

Tax Commission Collection Agency Referrals

In order to facilitate and expedite collection of taxes more than 90 days overdue from a

taxpayer, the tax commission shall be authorized to contract with a debt collection agency and refer accounts of a taxpayer to the collection agency for collection prior to establishment of tax liability, if a sales tax permit holder fails to file two or more sales tax returns (whether or not such non-filed sales tax returns are consecutive) and if a taxpayer is required to remit withholding taxes and fails to file two or more withholding tax returns, as required by 68 O.S. §2385.3. HB 1231, §3; amending 68 O.S. Supp. 2010, §255; effective Aug. 26, 2011.

TAX AND FISCAL POLICY

Task Force for Study of State Tax Credits and Economic Incentives

A Task Force for the Study of State Tax Credits and Economic Incentives was created. The task force shall consist of 10 members from leadership of the Legislature, and include the director of the Office of State Finance, state treasurer and Secretary of State, or their designees, and the state auditor and inspector. The task force is to conduct a study regarding all state tax credits regardless of the tax type against which such credit may be claimed and any other economic incentives that affect state or local tax liabilities. The study is to include justification for enactment of any state tax credits based upon the relevant economics of the applicable industry or economic sector affected; economic impact related to the utilization of state tax credits; analysis of utilization of credits by tax credit purchasers; impact of tax credits on any and all economic sectors of the state economy; adequacy or inadequacy of state tax credits or other economic incentives; or other matters related to state tax credits or economic incentive the task force deems


relevant. The task force is to meet not later than Sept. 30, 2011, and thereafter to perform its duties. The task force is to produce a final written report of its findings and any recommendations regarding transferable tax credits, which shall be submitted to the governor and speaker of the state House of Representatives and president pro tempore of the state Senate not later than Dec. 31, 2011. HB 1285, §§1-2; adding 68 O.S. Supp. 2011, §2357.1A-1; effective July 1, 2011.

Administrative Rules Procedure and Reporting

Administrative agencies subject to the Administrative Procedures Act, including the Oklahoma Tax Commission, will be required to include in the report of adoption of a permanent administrative rule filed with the governor and Legislature, the citation of any federal or state law, court ruling or any other authority requiring the rule. Any rule which establishes or increases fees shall require approval by the Legislature by joint resolution, and if the Legislature fails to approve the rule on or before the last day of the legislative session, the rule shall be deemed disapproved. HB 1044, §§1-3; amending 75 O.S. 2001, §§303.1, 308; effective Nov.1, 2011.

ABOUT THE AUTHOR

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Taxation Law Section

IRS Attorneys Audit Technique Guide

By Jon H. Trudgeon

The Internal Revenue Service recently released a comprehensive Attorneys Audit Technique Guide (ATG) for auditors to use in reviewing returns of attorneys. It pinpoints the problem areas that IRS agents are instructed to probe for, explains in detail how attorney audits should be conducted and lists the types of documents that should be requested and examined.

The following is an overview of some of the key areas agents are instructed to examine when reviewing an attorney's return.

UNREPORTED INCOME

Generally, attorneys deposit settlement and award proceeds to their trust accounts. Settlement and award checks are usually made out to both the attorney and the client. After depositing the funds to their trust accounts, attorneys must distribute the proceeds. Frequently, the attorney will draw a portion of these funds to cover their fees and case costs, *i.e.*, when a case is taken on a contingency basis. The IRS tells auditors it is important for them to determine if fees were included in income at the proper time. Some attorneys may cash fee payment checks or deposit them directly into personal or investment accounts. If they determined taxable income by totaling deposits made into the general operating accounts, these

fees are omitted from income. Inspecting the endorsements on checks written to or on behalf of the attorney from trust accounts is one important auditing procedure. These checks are income or expense reimbursements. Auditors are also told to pay special attention to all checks that either are deposited into accounts other than the general operating account or are cashed.

DEFERRAL OF INCOME

After a case has been settled, an attorney may attempt to defer earned income by allowing fees to remain in the trust account until the next year. Once the settlement is received, the attorney's fee is both determinable and available and therefore should be included in income. The ATG says that an effective audit step is to analyze the source of funds remaining in the trust account at year-end, particularly if there is a large ending balance.

NONCASH PAYMENTS INSTEAD OF FEES FOR SERVICES RENDERED

Auditors are told that examination of the client ledger cards will many times lead to the discovery of noncash payments. Also, verifying the basis of newer assets, such as partnership interests or stock, may reveal that they were noncash

“Some attorneys may cash fee payment checks or deposit the money directly into personal or investment accounts.”



payments for services. ATG examples: An attorney may borrow a large sum of money from a corporate client and then pay it off by performing legal services. The loan is shown on the attorney's books, but not the income resulting from the relief of the debt. When no loan repayments were noted, the lender was contacted, and it confirmed the loan and the credits against the outstanding balance posted when the attorney rendered legal services. As another example, an attorney who sets up partnerships or corporations may accept an interest in the formed entity as payment for legal services rendered.

Bartering, namely the exchange of legal services for other services, is another source of noncash income. Auditors are told that an effective audit tool would be to compare the attorney's work schedule with his claimed fees. If the attorney's workload has not decreased, but claimed fees from one or more clients has, that may indicate he is performing services in exchange for noncash payments. These variations should be noted and questioned as deemed appropriate, says the ATG.

CONSTRUCTIVE RECEIPT

Income earned under the constructive receipt doctrine is an exception to the general rule that cash basis taxpayers must have actual receipt of income before it is taxable. Income is constructively received if it is subject to the demand of a taxpayer and there are no substantial limitations or conditions on the right to receive it. The ATG cites the example of a criminal defense attorney acting as a public defender who was paid an hourly rate plus any costs incurred. He had to submit a billing statement to the county government on a monthly basis to receive payment. At the end of the year, a Form 1099 was issued to the attorney for the income that was actually paid. To defer income, the attorney did not bill the county for services rendered for the second half of the year. Since billings were submitted only for the first half of the year, the attorney's gross income was considerably understated.

ADVANCED CLIENT COSTS

Attorneys who take cases on a contingency fee basis commonly pay litigation expenses on behalf of clients and recover the costs out of the settlement or award. These attorneys generally use a cash basis of accounting and may deduct those expenses when paid, and include the recovered costs in income when received. The

ATG says this causes a distortion of income since it can take years to resolve these cases. It concludes that courts have determined that costs paid on behalf of a client are loans for tax purposes, and are not deductible as a current cost of conducting business. The costs are the client's and not the attorney's since there is an expectation of reimbursement. However, a bad debt deduction may be taken in the year that any costs are determined to be uncollectible. The ATG advises auditors to raise this issue if the amount of deducted client costs is "material."

By contrast, the ATG says cash-method attorneys are generally allowed a current deduction for client reimbursed costs which are allocated to normal operating expenses (for example, secretarial costs or copying costs). These are general office-type expenses which would reasonably be incurred even if not charged to a particular client. Of course, if a current deduction is taken, any subsequent reimbursement from the client would be treated as income in the year of reimbursement under the Code Sec. 111 tax benefit rule.

The ATG notes that taxpayers and their representatives have argued that if advanced costs are to be treated as loans, then the recovery of these loans shouldn't create taxable income. In *Canelo*, (1969) 53 TC 217, the tax court held that an "erroneous deduction exception" applied to the tax benefit rule and determined that the tax benefit rule could only be used in cases in which a proper deduction was originally taken. The ATG points out that there are several actions on decision which address this issue and that many circuit courts have rejected the tax court's "erroneous deduction exception."

OTHER ISSUES

The ATG for attorneys covers a host of other issues, including the following:

- Whether an attorney has misclassified employees as independent contractors.
- Whether the attorney has properly issued Forms 1099 to independent contractors for payments made to them out of an attorney's trust fund. The ATG notes that it is possible for a taxpayer to present copies of Forms 1099 to an agent without ever filing them with the IRS or providing copies to the payees, and explains how agents can find out if the IRS has received the forms. It also notes that 1099s are required to be filed for payments to recipients of lawsuit

settlements or awards unless specifically exempt from tax under Code Sec. 104.

- Whether the attorney has filed Form 8300 where required. Generally, each person engaged in a trade or business who, in the course of that trade or business, receives more than \$10,000 in cash in one transaction or in two or more related transactions, must file Form 8300.

The text of IRS's Attorneys Audit Technique Guide can be accessed at <http://tinyurl.com/739qo56>.

ABOUT THE AUTHOR



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



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Real Property Law Section

The Real Estate Mortgage Follows the Promissory Note Automatically, Without an Assignment of Mortgage

The Lesson of BAC Home Loans

By Kraettli Q. Epperson

This article concerns whether an assignment of a real estate mortgage is required by Oklahoma law. There is a recent 2010 Oklahoma Court of Civil Appeals case that provides the answer to this specific question (the “BAC case”).¹ The simple and clear answer is “No.” As stated by the Oklahoma Supreme Court, and quoted in the BAC case: “The indorsement and delivery of the note carries with it the mortgage without any formal assignment thereof.”² Stated in an informal way: the tail follows the dog. Consequently, no formal assignment of a mortgage is necessary and, consequently, no recording of the assignment of a mortgage is required, in order for the owner of the note to enforce both the note and the related mortgage.

Over the last few years, several challenges in courts around the country have arisen to the use of Mortgage Electronic Registration Systems Inc. (MERS) as a nominee (*i.e.*, limited agent) taking the real estate mortgage for a named (*i.e.*, disclosed) principal, meaning the lender, with the lender advancing the funds and holding the promissory note.³ Due to the desire of the lender to ensure that the lien of its mortgage is ahead of other lenders or creditors taking lien interests after the execution of its mortgage, such lender will promptly — out of self-interest — file its mortgage of record with the local county clerk to give third persons “constructive notice” of its lien.⁴ However, the county clerk provides such recording as a public service, and there is no statutory obligation for a lender to file its mortgage.⁵ By the same token, there is no statutory duty to file an

assignment of mortgage. If the lender chooses to take advantage of this recording service, or to use the court system to foreclose the mortgage lien, then it must pay the statutory mortgage tax when it files its mortgage, or at least by the time it files a foreclosure.⁶ On the other hand, due to its sovereign immunity, the county clerk has no liability for failing to properly record and index the instruments filed by any person.⁷ There are several statutes which make it clear that once a person files a document which purports to convey a fee simple interest, when in fact the conveyance is meant to only convey a mortgage lien on the real property, then an explanatory instrument must accompany such earlier filing, and, in the absence of such clarifying recording, the public can take the initial document at face value as a fee simple conveyance.⁸

In the event that the loan is paid off or refinanced — which occurs in the majority of situations — the mortgage is simply released of record by one of four parties: the original lender, the current person entitled to enforce the note, or MERS on behalf of either the original or subsequent holder of the note, and everyone is satisfied, including the title examiner.⁹

However, as the total number of defaulting borrowers has increased dramatically over the last few years (since the current recession began in 2008), the result is that the absolute number of borrowers who are choosing to fight their foreclosures has also increased.

The borrowers’ defenses come in many forms: 1) some are substantive issues (*e.g.*,

demanding full credit for all payments made); 2) others are pre-suit procedural in nature (e.g., insisting on notice of default and an opportunity to cure), and 3) others arise in the lawsuit concerning mixed legal/factual issues (e.g., does the plaintiff have standing, as the current holder of both the note and mortgage).

One issue in the third category which has arisen in regard to the use of MERS is the following: When 1) MERS takes the real estate mortgage as the nominee (*i.e.*, limited agent) for the lender (which lender advances the funds and holds the note), and 2) the secured note is thereafter indorsed to a subsequent holder, does there need to be an assignment of mortgage to the new holder of the note, in order for the new holder of the note to be legally allowed to sue the debtor to simultaneously enforce the promissory note and foreclose the real estate mortgage?

While there may be other unanswered questions in Oklahoma about the use of MERS as a nominee/agent/mortgagee, this article leaves such issues for others to address. Instead, this article focuses solely on the “assignment of mortgage” issue, namely: *If the note is indorsed and thereby transferred to another person, then is it necessary for the mortgage to be assigned in writing to the subsequent holder, with such assignment filed of record, before the later holder of the note has the ability both to enforce the note and to foreclose such mortgage?*

A promissory note is a negotiable instrument covered under Oklahoma’s Uniform Commercial Code,¹⁰ and the Permanent Editorial Board for the Uniform Commercial Code issued a report concerning the “Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes,” dated Nov. 14, 2011. Such report was issued because “[a]lthough the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. ... The Permanent Editorial Board for the Uniform Commercial Code has prepared this Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage on real property.” (page 1) This report directly addresses our “assignment of mortgage” issue (at page 12): “What if a note secured by a mortgage is sold..., but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution

of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee.” On that same page, the report continues by noting “the UCC is unambiguous: the sale of a mortgage note...not accompanied by a separate conveyance of the mortgage securing the note does not result in the mortgage being severed from the note.” This report condemns in strong language a recent state court case from Massachusetts — which reflects a minority trend — which cites “common law precedents pre-dating the enactment of the current text of Article 9 to the effect that a mortgage does not follow a note in the absence of a separate assignment of the mortgage, but did not address the effect of Massachusetts’ subsequent enactment of UCC §9-203(g) on those precedents.”

This UCC report’s answer is consistent with the law of Oklahoma, as such law is expounded in the BAC case: the real estate mortgage follows the note automatically.¹¹

The BAC case involves a summary judgment by the trial court granting judgment on a promissory note along with ordering foreclosure of a real estate mortgage. Although the appellate court remands the case, such remand is solely due to the unanswered question as to whether the plaintiff, BAC, currently holds the note. What is significant is that the remand is not for the purpose of determining the holder of the mortgage, because the appellate court clearly holds, quoting an Oklahoma Supreme Court case, that: “*The indorsement and delivery of the note carries with it the mortgage without any formal assignment thereof.*”¹² To reach this conclusion, the appellate court discusses the holdings in four cases from other states dealing with the concepts related to MERS.¹³ In addition, it relies on several Oklahoma UCC statutes.¹⁴ Ultimately, it bases its position on three earlier precedential Oklahoma Supreme Court cases.¹⁵ In addition, in order to educate itself on the nature and history of the MERS system, the appellate court reviewed a then-upcoming law review article discussing MERS.¹⁶

The facts of the BAC case reflect omissions in the paperwork supporting the endorsement of the note and the assignment of the real estate mortgage, existent when the petition for foreclosure is initially filed. These initial errors included, as shown on the copy of the note

attached to the petition, the omission of the name of the new holder of the note, although the initial lender (American Home Mortgage) had its assistant secretary place her initials on the stamp which was intended to show the endorsement from American Home Mortgage, the initial lender, to a subsequent note holder. The name of the new note holder was left blank. When the motion for summary judgment was filed, the plaintiff, BAC Home Loans Servicing LP f/k/a Countrywide Home Loans Servicing LP (hereinafter BAC), attached a copy of the note showing the name "Countrywide Document Custody Services, a division of Treasury Bank, N.A." stamped in the indorsement space that had been left blank in the copy attached to the petition. But an endorsement to BAC was still lacking.

In the mortgage assignment, MERS, "as Nominee for American Home Mortgage" assigned the mortgage to Countrywide Home Loans Servicing LP. The assignment was undated but signed by "Kimberly Dawson, 1st Vice President" for MERS. The acknowledgment attached to the assignment was undated but signed by Regina McAninch as a notary public in the state of Texas. A file-stamp by the county clerk of Rogers County, Oklahoma, appeared on the mortgage document but not on the mortgage assignment.¹⁷ BAC attached to the motion for summary judgment a copy of the mortgage assignment identical to the one attached to the petition except that it was dated April 20, 2009, and bore the file-stamp of the Rogers County clerk showing it was filed of record on July 16, 2009.¹⁸

When the lender's motion for summary judgment was filed, the trial court found that all of the essential errors had been corrected.

There was one particularly important initially missing fact which the trial court ruled was satisfied at the time of its consideration of the lender's motion for summary judgment. The trial court apparently heard oral argument and saw documentary evidence — presumably the back side of the note — which document was not included in the appellate record.¹⁹

“The BAC case involves a summary judgment by the trial court granting judgment on a promissory note along with ordering foreclosure of a real estate mortgage.”

The trial court granted summary judgment to BAC, the foreclosing lender, holding the plaintiff had proven it was the current holder of the promissory note, and the real estate mortgage.

The debtor appealed.

The appellate court stated: "BAC attached a copy of the note showing the name 'Countrywide Document Custody Services, a division of Treasury Bank, N.A.' stamped in the indorsement space that had been left blank in the copy attached to the petition. The copy of the note attached to the motion also contained upside-down and backwards text in the area of the indorsement, suggesting the page had addi-

tional indorsements on the back, but the attachment does not include a copy of the back of the page."²⁰

The appellate court reversed the summary judgment and remanded it to the trial court for trial explaining: "The record on summary judgment in the present case contains conflicting evidence as to the ownership of the note. The note, in which the Whites promised to pay a sum certain to the order of Lender, is a negotiable instrument pursuant to 12A O.S.2001 §3-104(a). It may be indorsed specially to be payable to an identified person or it may be indorsed in blank to be payable to bearer. 12A O.S.2001 §3-205(a) and (b). If the note was indorsed in blank and BAC was in possession of the original note, then BAC was the owner of the note and entitled to bring this action. 12A O.S.2001 §§3-205(B) and 3-110. The note in the record appears to be indorsed to Countrywide Document Custody Services, a division of Treasury Bank, N.A.; we are unable to determine from the record submitted to us that the instrument was later indorsed in blank and transferred to BAC. Although BAC's attorney represented at hearing the note was indorsed in blank and in BAC's possession, no evidence was entered into the record at the hearing. The hearing consisted of oral argument only on the motions for summary judgment and was not a trial. This appeal comes to us as an accelerated appeal from a summary determination. We must base our review upon the record the parties have actually made and not one which is

theoretically possible. Based on the record before us, we conclude there is a question of fact as to the ownership of the note. Accordingly, we REVERSE the trial court's order granting summary judgment in favor of BAC and REMAND this matter for trial."²¹

It is significant that neither the trial court nor the appellate court expressed any concern about who held an assignment of the real estate mortgage. Instead, the appellate court held:

"In Oklahoma, ownership of the note is controlling, and assignment of the note necessarily carries with it assignment of the mortgage. *Gill v. First Nat. Bank & Trust Co. of Oklahoma City*, 1945 OK 181, 159 P.2d 717, 719. 'The mortgage securing the payment of a negotiable note is merely an incident and accessory to the note, and partakes of its negotiability. The indorsement and delivery of the note carries with it the mortgage without any formal assignment thereof.' *Prudential Ins. Co. of America v. Ward*, 1929 OK 71, 274 P. 648, 650. Proof of ownership of the note is proof of ownership of the mortgage security. *Engle v. Federal Nat. Mortg. Ass'n*, 1956 OK 176, 300 P.2d 997, 999. Therefore, in Oklahoma it is not possible to bifurcate the security interest from the note. An assignment of the mortgage to one other than the holder of the note is of no effect."²²

This paragraph 10 from the appellate court decision makes it clear that no assignment of the real mortgage is required in order for the holder of the note to institute and complete the real estate mortgage foreclosure.

It is interesting to note the steps followed by the appellate court in the analysis it followed to reach its final decision. In particular, the appellate court lists and summarizes the holdings of the four out-of-state cases dealing with MERS, and then states:

"Oklahoma law is in accord with these cases."

What does this statement mean?

A review of these four out-of-state cases shows that they held, as summarized by the Oklahoma appellate court (§9):

"...MERS lacked any enforceable rights because *there was no evidence MERS owned the promissory note* secured by the mortgage. *Id.* at 167-168. Similarly, appellate

Courts in Arkansas, Missouri and Maine have *refused to allow MERS or its assignee to assert rights against the mortgagor because it did not hold the note* secured by the mortgage." (emphasis added)²³

In other words, the dispositive question is: Who holds the note?

A review of these four out-of-state cases also makes it clear that, as a practical matter, if the subsequent note holder wants to receive notice of a court action being filed, which could impact its mortgage lien, such as the foreclosure of a money judgment or other mortgage, or the conduct of a tax sale, then either the initial note holder (e.g., ABC Bank) or MERS, as nominee/agent/mortgagee for the initial note holder, must sign and file an assignment of mortgage (i.e., from ABC Bank to XYZ Bank). The debtor/mortgagor is protected, by statute, by receiving credit for all payments made to the initial note holder, up until the assignment of mortgage is recorded. Also, the assignee of the mortgage is entitled to recover from the assignor any payments made to such assignor after such assignment is recorded.

Hence, the four rules being stated directly or by implication in this BAC case are:

- 1) any endorsement of a note must be by the holder of the note, and not by MERS (if MERS is the nominee/agent only as to the mortgage); and
- 2) a subsequent holder of the note automatically holds the real estate mortgage, without the need for the execution (or recording) of an assignment of the mortgage; and
- 3) a holder of a mortgage who does not also hold the note (or does not hold the express authority to act for the note holder) cannot institute an action to enforce the note; and
- 4) in order to give the debtors and third parties notice that the mortgage interest is being held by someone other than the initial mortgagee (e.g., being held by XYZ Bank — the later holder of the note — instead of the initial holder, ABC Bank), there must be a recorded assignment of the mortgage by the mortgagee (e.g., by ABC Bank or by MERS as nominee/agent for ABC Bank).

In other words, the execution (and filing) of an assignment of mortgage is not required by statute and is not necessary for the enforcement of the note and the mortgage by whoever is the current holder of the promissory note. Such preparation and filing of an assignment of mortgage would be solely for the benefit of the current note holder for the purpose of giving the debtors and third parties constructive notice of the name of the current holder of the note and mortgage.

1. 2011 OK CIV APP 35, 256 P.3d 1014.

2. *Id.* at ¶10.

3. Typical language from a "MERS Mortgage" provides: "'MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument." "OKLAHOMA — Single Family — Fannie Mae/Freddie Mac UNIFORM INSTRUMENT – MERS Form 3037 1/01 (rev. 12/03)."

4. 25 O.S. §§10-13; 16 O.S. §§15-16; 46 O.S. §§6-7.

5. There is a land recording system, known as the Torrens Title system, which was used in the United States solely in Cook County, Illinois (containing Chicago), whereby the local government kept track of all land titles, and issued a title certificate, like a car title is issued in Oklahoma. However, "Attorneys preferred the fast, efficient title insurance company methods to the slower administrative processes of the Torrens system. Also in the late 1970s the practice of selling mortgages to a secondary market became widespread, but institutional investors would not accept a Torrens certificate as a guarantee of title. In view of the declining use of the Torrens system, in January 1992 the Illinois legislature began the process of phasing it out." (<http://encyclopedia.chicagohistory.org/pages/1262.html>) The Torrens Title system is not used in Oklahoma.

6. 68 O.S. §1907.

7. *Board of County Com'rs of Tulsa County v. Guaranty Loan & Inv. Corp. of Tulsa Inc.*, 1972 OK 78, 497 P.2d 423.

8. 46 O.S. §§8, 10, and 11.

9. Oklahoma Title Examination Standard 24.12.

10. 2011 OK CIV APP 35 at ¶11: "The note...is a negotiable instrument pursuant to 12A O.S.2001§3-104(a). It may be indorsed specially to be payable to an identified person or it may be indorsed in blank to be payable to bearer. 12A O.S. 2001 §3-205(a) and (b)."

11. 12A O.S. §§1-9-607(a)(3) and (a)(5)(b) and 1-9-203(g); the 2001 UCC Comment to 12A O.S. §1-9-203(g) provides: "9. Collateral Follows Right to Payment or Performance. Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien. See Restatement (3d), Property (Mortgages) §5.4(a) (1997). See also Section 9-308(e) (analogous rule for perfection)." As explained in the article on MERS at 120, which article is referred to by the BAC case appellate court (see footnote 17 below), "Thus, in *Carpenter v. Longan*, the United States Supreme Court announced the classic

statement of this rule: 'The note and mortgage are inseparable.... An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity.'" 83 U.S. (16 Wall.) 271, 274 (1872).

12. 2011 OK CIV APP 35 at ¶10.

13. *Id.* at ¶9.

14. *Id.* at ¶11: "The note, in which the Whites promised to pay a sum certain to the order of Lender, is a negotiable instrument pursuant to 12A O.S.2001 §3-104(a). It may be indorsed specially to be payable to an identified person or it may be indorsed in blank to be payable to bearer. 12A O.S.2001 §3-205(a) and (b). If the note was indorsed in blank and BAC was in possession of the original note, then BAC was the owner of the note and entitled to bring this action. 12A O.S.2001 §§3-205(B) and 3-110."

15. *Gill v. First Nat. Bank & Trust Co. of Oklahoma City*, 1945 OK 181, 159 P.2d 717; *Prudential Ins. Co. of America v. Ward*, 1929 OK 71, 274 P. 648; *Engle v. Federal Nat. Mortg. Ass'n*, 1956 OK 176, 300 P.2d 997.

16. *Id.* at ¶8: Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, Real Property, Trust and Estate L.J. (forthcoming) (available at <http://ssrn.com/abstract=1684729>).

17. 2011 OK CIV APP 35 at ¶3.

18. *Id.* at ¶4.

19. *Id.* at ¶6.

20. *Id.* at ¶4.

21. *Id.* at ¶11.

22. *Id.* at ¶10.

23. It should be noted that in several of these out-of-state cases, the ruling which went against MERS did so because its principal has already filed a motion to intervene or to set aside the judgment, and had been turned down. It is logical but not instructive to be told that the principal's agent does not get a "second bite at the apple" when the principal has been rebuffed.

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Thanks for the ‘Wows’

By John Morris Williams

I heard something this year that is a quote from Joel Osteen of the Lakewood mega church located in Houston. The essence of the quote was, “there is a reason the windshield is so big and the rearview mirror is so small.” Please know I am not endorsing any creed or religion here. However, for some reason those words hit me. It was a reminder that regardless of how big the achievements or the failures of the past — they are just that — in the past. Each year at this time I take a moment or two and look in the rearview mirror. Sometimes I perhaps linger a bit longer than I should. Regardless, what I always see is the past.

This year has seen some incredible things happen here at the OBA and in the world. Most of them have been reported in the *Oklahoma Bar Journal* and the news. I will not attempt to recap or rearview mirror all of those. One brief example of change this year is that the OBA moved to iPads for our board meetings and saved some trees. Undoubtedly you have seen several new and expanded programs. The list of rearview mirror images is large, thanks to our elected leaders, our hard-working staff and to you our member — for whom we exist to serve — for giving us vision, direction and resources.

I particularly mentioned the iPads because they represent so much more than a singular gadget in the rearview mirror. They symbolize something very large in the windshield. Currently, we are in the midst of a technology audit. We have seen some technology challenges this year and as I talk to colleagues around the country and business people, we certainly are not alone. Our goal here is to make the best use of resources to best serve our members. Nothing more, nothing less. Everyone who seems to know anything about technology, which seems to be almost everyone, knows one thing. It never stands still. Hopefully, 2012 will result in a new strategic plan for technology both internally and externally. I see this as an opportunity for a major wow. Special thanks to President Reheard and President-Elect Christensen for their support in helping us meet these challenges. I anticipate some major windshield time in this area.

Former Apple CEO and iPad inventor Steve Jobs, in his final words before his death this year is reported to have said, “Oh Wow, Oh Wow, Oh Wow.” Those present reported he was looking in the windshield, not the rearview mirror. (I promise I did not steal that when I wrote my article for the

September edition of the *OBJ*. He was still alive at the time I wrote the article.) I like the idea that such a brilliant and creative man saw a “wow” in whatever windshield he was looking through. The OBA had some “wow” windshield time this year with some of the new and creative projects and events, and for that I am most thankful.

As this year ends, I am going to try and not look too much into the rearview mirror and really try and start looking in the windshield. Fortunately, some of this year’s wows are ongoing and I have a bit of insider information on some of next year’s plans that definitely are major windshield “wows.”

As always, I want to wish you and those near and dear to you a safe and wonderful holiday season and a happy new year. May your windshield time be filled with “wows” both professionally and personally.



To contact Executive Director Williams, email him at johnw@okbar.org.

Gadgets, Gizmos and Apps

By Jim Calloway

In the early days of personal computing, you had to load everything you wanted to have on your computer yourself.

The Internet was still being established. You could use your 300 baud modem to log into computer bulletin board systems (BBS) or access message board networks with names like "Fidonet."

When someone fixed a software deficiency or created a workaround, it was commonplace to post the file so others could use it. The BBSs were packed with helpful little utility files. I remember installing one utility file that was supposed to save paper and ink by letting you print rough drafts of documents reduced so that four pages could be printed on a single piece of paper. (I think my eyesight was better back then.)

There were lots of "hobby coders" back in those days and the financial arrangements, if there were any, consisted of "send me a donation if you like it." Then Microsoft and other companies emerged as a power. The utility programs were sometimes purchased by Microsoft to be incorporated into an operating system or application. Often a feature would be incorporated into the next release from Microsoft, rendering the coder's creation useless.

So today we mostly buy larger, comprehensive software suites like Microsoft Office. There are more features than we are likely to ever learn or use in modern software suites. More features will be incorporated in the next version.

So, here are a few utilities (for computer, not for phone) that you might find to be of interest — at least until Microsoft or Google assimilates them.

Stickies (www.zhornsoftware.co.uk/stickies/) – Do you have yellow sticky notes all over your work space, attached to your monitor, cell phone, briefcase, laptop and the dashboard of your car? Then you live in a sticky state of mind. Never fear, there is a free application to take your sticky notes to the next level. Integrate them into your computer desktop using an app appropriately called Stickies.

This nifty little application functions like a to-do-list with alarms, a memory, and the beautiful square yellow visual of a sticky note. In a perfectly disciplined mind, all of the uses for sticky notes would be incorporated into the functions in your email application using reminder notes, appointments and tasks. For some of us, that will never happen. Enter Stickies. This tiny app, contained in a super fast download and install, was recently reviewed by *PCWorld*. (www.pcworld.com/downloads/file/fid,24249/description.html).

Take a look and see if this might be a tool that helps your sticky state of mind stay organized.

Once installed the icon resides in your task tray near the clock in the lower right corner of your monitor. A click on the icon or the key combination Windows key + S creates a new note; a right click on the icon displays options to create a new note. A right click on the title bar of an existing note lets you change options. Although it is not a web-based mobile app, it is a very tidy, quite handy addition to your monitor desktop. (The Stickies material above was reprinted with permission from the PMA Tips blog. <http://pmatips.com/wordpress/>).

Microsoft Security Essentials — This one is a puzzler. It is from Microsoft and it is free. Really? Well, according to most reviewers, this works very well in detecting and removing malware. Read the *PC World* editors' review of the product here: www.pcworld.com/downloads/file/fid,79777/description.html. The download link is there, too. It is a free way to protect your PC from malware.

Pure Text 2.0 (www.stevemiller.net/puretext/) – By now all lawyers have learned the difference between Paste and Paste Special in their word

processors. Paste Special allows you to paste in just the letters and characters from your clipboard into your document. This keeps you from having numerous, unwanted fonts and other formatting within the same document. This works great in either Microsoft Word or WordPerfect. Pure Text 2.0 allows you to paste unformatted text (pure text!) into anything, including web forms or other applications that do not have a paste special feature. This program is completely free and works in versions of Windows from Windows 95 to Windows 7. As the sites states, "PureText is basically equivalent to opening Notepad, doing a PASTE, followed by a SELECT-ALL and then a COPY. The benefit of PureText is performing all these actions with a single hot-key and having the result pasted into the current window automatically."

SimplyFile and EZDetach (www.techhit.com) — Email management is certainly a pain for most of us. These two Outlook plugins from TechHit can greatly assist the practitioner. One of the basic steps in managing email is setting up topical folders in Outlook to store emails. Some lawyers have folders with client's names, or other indentifying labels like Personal, Bar Committees, Vacation, Child sports or any one of a number of things. SimplyFile assists you in filing the emails correctly. It can predict where the email should be filed and improves as it learns from your use of Outlook. It also has a Quick-Pick option to let you quickly choose a correct folder. SimplyFile costs \$49.95 and comes with a 30 day risk-free trial.

For those of us who fall behind in keeping up with our

Outlook inboxes or keep a lot of emails filed in Outlook folder. You may hear from the IT department that your PST file is too large and you need to clear out some stored email. (If you do not have an IT department, your computer will let you know as Outlook begins to crash frequently.) Going through emails to delete ones you no longer need is a necessary, but time consuming task. Well, emails can take up a lot of hard drive space but the thing that really uses hard drive space is the attachments to emails. EZDetach allows you to remove the attachments and store them in a folder on your computer or network. They are no longer in the Outlook PST file. But they are replaced with a link to the file. If you decide to forward that email, then EZDetach asks you if you want replace the attachment in your outgoing email. EZDetach is \$39.95 and also comes with a 30 day risk-free trial.

Credenza (www.credenza.com) — If you are a solo practitioner with no staff and using Microsoft Outlook to run your practice, then Credenza may be just the product for you. The reference to solo practitioner is intentional. Credenza Basic is now free. But it lacks several features of Credenza Pro, including full-text searching, some billing functions and sharing your "client files" with others. Credenza Pro has those features, but it costs \$24.95 per month per user. So with several lawyers and staff that could add up quickly. You can compare the features here: www.credenzasoft.com/comparison.html.

Here is a colleague's review on the product: www.okbar.org/s/fzzd1. Several of us are concerned that when an email

is deleted in MS Outlook, then the email is in effect removed from the "client file." So we are talking with the developer to more fully understand this. This product is from the same people who produce Amicus Attorney.

X1 and Copernic (www.x1.com and www.copernic.com) — Desktop search is an important tool. We all try to logically store things so they can be found when we need them, from email to word processing files to paper files. But sometimes you still cannot locate files quickly on your computer. Desktop search tools index all of your files, so they can be quickly located. X1 and Copernic both do that very well. Each product costs \$49.95 and has a free trial.

Microsoft Vista and Windows 7 have good desktop search features. The Apple Mac OS X for a long time has included the desktop search feature Spotlight. So if you have those operating systems you may not need these utilities, but the free-trial period lets you compare and make that decision for yourself.

Copy2Contact (www.copy2contact.com) — This is another program in the oldie-but-goodie category. Having good information on your contacts in Outlook is very helpful, especially since so many of us now synchronize our smart phones with our Outlook contacts. You never know when you will need a fax number or street address on the road. Most all of us have opened up an Outlook Contact looking for an address or phone number, only to find that it only has the name and email address. Copy2Contact allows you to copy all of the contact information from a digital source, such as an email

signature block, group roster, web page or electronic pleading. Then you can insert the information into an Outlook Contact in one easy step and the software magically places all of the information into the proper places in the contact form. It is almost always correct. Copy2Contact Personal is \$39.95. The Pro version adds more features for \$79.95. There is a 14-day free trial. There are special versions for Blackberry, iPhone and Google apps, as well.

CCleaner (www.piriform.com/ccleaner) — Sometimes your computer gets junked up with too many old and unused files. Sometimes an old computer is taken home when it is replaced and you want it to be clean of all traces of the prior user. The CCleaner website claims it “is the number-one tool for cleaning your Windows PC. It protects your privacy online and makes your computer faster and more secure. Easy to use and a small, fast download.” It removes temporary files, history, cookies and download history for all of the major browsers as well as unused and old registry entries. It comes in three “flavors” — free with no support, home edition for \$24.95 and business edition for \$34.95. (These prices reflect a \$5 reduction for its end-of-the-year sale.)

CCleaner got a five star rating from CNet: <http://download.cnet.com/ccleaner/>.

Darik's Boot And Nuke (www.dban.org/download) There have been lots of horror stories about computers

being discarded or donated with lots of confidential information still on the hard drive. Files that are merely deleted can be recovered and viewed by the next user. DBAN is *the* free tool to reformat a hard drive so that no information can be recovered. It is very simple. Just burn the file to a blank disc and boot the computer with it. But be very careful as this really is like a nuclear weapon. Put it in the wrong computer and all the data will be wiped with no hope of recovery. Use a marker to write warnings on the CD before downloading to it and discard it after use. You can download it again if you need it in the future. In my judgment, a DBAN-loaded CD is too dangerous to keep around the office.

Keepass (Free Open Source — <http://keepass.info/>) **and LastPass (free or premium version for \$1 per month** — <https://lastpass.com/>) — Today even the most modest Internet user has dozens of user name and password combinations. There are three insecure ways to keep track of them: 1) Using the same password for most or all online sites, 2) writing them down on a Post-it note or sheet of paper or 3) having a document on your PC named Passwords that has them all. The best practice is to use a password manager to keep track of all passwords. Then you can have long secure passwords for everything and you only have to remember the password for your computer and the password for your password manager. These prod-

ucts have other helpful features as well.

YouSendIt (www.yousendit.com) for many years has been the easy way to transfer large files for free instead of attaching them to an email. You upload the file to YouSendIt and give the recipient a link to download the file within the next seven days. The premium version has additional features. There are many similar products and many of my colleagues swear by MediaFire (www.mediafire.com/), but I have not tried it yet.

SnagIt (www.techsmith.com/screen-capture.asp) is a great tool to capture an image of anything that is on your computer screen. It is \$49.95, but they offer a free 30-day trial. The Windows 7 clipping tool performs the same function and is already on your computer if you run Windows 7.

TrueCrypt (www.truecrypt.org) is a “free open-source disk encryption software for Windows 7/Vista/XP, Mac OS X and Linux.” If you want to encrypt a USB flash drive or a laptop's hard drive, this is a great free tool. Check out the FAQs on the website to learn of all of the features.

Well, we are out of space this month. But I will close with two sources for phone apps that I have mentioned here earlier in the year, www.iphonejd.com and <http://thedroidlawyer.com/> from Oklahoma City lawyer Jeffrey Taylor.

Mr. Calloway is director of the OBA Management Assistance Program.



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William Bernhardt spent ten years as a litigator and partner at one of Oklahoma's most prominent law firms. After his books consistently hit the New York Times bestseller list, he left the law to write and teach writing full-time. Bernhardt also holds a Master's Degree in English Literature, giving him a unique résumé—the only legal writing instructor in the nation who has had academic acclaim, a successful, award-winning law practice, and numerous New York Times best-selling novels.

In law school at the University of Oklahoma, Bernhardt wrote for the Oklahoma Law Review, won the C.L. Love Scholarship for Outstanding Legal Writing, and was a member of the three-person Moot Court team that won the National Championship in 1985. Bernhardt himself was named Best Speaker. While practicing law, he received awards from Legal Services of Eastern Oklahoma and the Oklahoma Bar Association for his pro bono work and his work with a law-oriented Explorer Scout post. In 1994, Barrister Magazine named him one of the top twenty young lawyers in America.

His subsequent writing career has been equally impressive. He has over ten million books in print that have been translated into more than two dozen languages. His bestselling series of novels, featuring lawyer Ben Kincaid, inspired Library Journal to dub him the "master of the courtroom drama."

Bernhardt's novels are renowned for their unexpected twists, breathless pace, humor, and insightful consideration of issues confronting contemporary American society. Bernhardt has twice won the Oklahoma Book Award for Best Fiction, and he has also received the Southern Writers Guild's Gold Medal Award. He was presented with a Career Achievement Award at the 2000 Booklovers Convention in Houston, and he is one of only thirty people inducted into the Oklahoma Writers Hall of Fame, and the youngest author ever so honored.

In 2000, Bernhardt was honored with the H. Louise Cobb Distinguished Author Award, which is given "in recognition of an outstanding body of work that has profoundly influenced the way in which we understand ourselves and American society at large." He recently received the Royden B. Davis Outstanding Author Award from the University of Scranton in Pennsylvania.

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Six New Year Resolutions for 2012

By Travis Pickens

1

Reread the *Oklahoma Rules of Professional Conduct* and *Comments* (There are 57 rules. Covering one set a week

is about right.) The rules are short, the comments longer, but neither too long to delay this important task. And, you need to read the book, because there will not be a movie.

Read the *Opinions Issued by the Supreme Court* (and the occasional Courts of Appeal opinions), regarding interpretation and application of the *Oklahoma Rules of Professional Conduct*. Nothing brings the rules into focus like reading cases with lawyers in actual situations. The Oklahoma Supreme Court is the final arbiter and much can be learned from their analysis, the tone of their opinions and the level of discipline they impose. This is serious business.

2

Treat Ethics Like You Do the Areas of Law You Practice for Money. You cannot hope to comply with the *Oklahoma Rules of Professional Conduct* simply by "feel." Instead, treat your professional responsibilities as a full-fledged

part of your everyday practice. Know it like you do the areas of law you practice for money. A good first step is to accept all of these resolutions, and to appoint an in-house ethics expert. Everyone should know the rules, but you need someone to supervise and to propose changes in office policy or procedure as necessary.

Develop a Succession Plan for Your Law Office or Law Department,

selecting a lawyer or lawyers to step in for you and notify and protect your client(s), in case of your incapacity or death. Failing to plan for the succession of your law practice creates as much chaos as failing to do estate planning. This will be addressed in more detail in future journals, but two steps are paramount: incorporating this plan into your engagement agreement and relationship with current clients, and developing a plan and set of instructions for the lawyers that will step in for you.

Write the Perfect Fee Agreement(s) for Your Practice. We spend so

5

much time serving others that we fail to serve ourselves, and that is

a big mistake. A fee agreement is not just about money, it's about good client communication and may be the best defense to a bar complaint. There are no advantages to not having a written fee agreement in every matter.

Create a Great Set of Explanatory Materials for Your Clients. They may

be in electronic, paper or audio/visual form, covering everything from office hours, to your policies for return calls and emails, to the routine matters and court procedures of your areas of law. Like the fee agreement, this is good client communication and can be a handy document to have in the event a grievance is filed. Plus, it saves tens of hours each year. Many grievances are filed each year after a client's expectations have been frustrated, wrongly or rightly. This is a great way to avoid, and defeat if necessary, ungrounded grievances.

6

Travis Pickens is ethics counsel for the OBA. Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact Mr. Pickens at travis@okbar.org or (405) 416-7055; (800) 522-8065.

A Tradition of Giving Back

By John Munkacsy

Many noteworthy accomplishments deserve mention this year.

The Oklahoma Bar Foundation is recognized under section 501(c)(3) of the Internal Revenue Code as a charitable organization and is governed by a board of trustees. Nancy Norsworthy, our director, has now completed her 26th year with us, ably assisted by Ronda Hellman and Jessi Hesami, who joined the staff this year. The trustees of the foundation have again committed their collective time, talents and resources to continue to make the OBF the best it can be.

At the heart of the foundation's purpose lies the ability to award monetary grants to deserving, qualified charitable organizations with proven records of assistance to Oklahoma citizens. Their assistance meets the foundation's mission: *Lawyers Transforming Lives* to promote justice, fund critical legal services and advance public awareness of the law. Thorough vetting of grant recipients precedes any award. Grants are conditioned upon appropriate reporting and by visible attribution. Trustees make site visits from time to time and grant recipients are expected (and do help) to promote the foundation and enhance the image of Oklahoma lawyers.

The foundation's investment portfolio is under the management of Bank of Oklahoma. Throughout BOK's manage-

ment, the investments have outperformed market indices and the foundation is regularly audited by qualified accounting and audit firms. The latest audit, by Hogan Taylor LLP, for the years 2009 and 2010, was clean and without qualification.

“Probably the most significant project this year has been the new foundation website, a project initiated in 2010.”

Oklahoma lawyers are “Dualies!” Upon admission to practice as an Oklahoma lawyer we hold dual membership in the Oklahoma Bar Association and the Oklahoma Bar Foundation. From its inception, the foundation has awarded grants totaling in excess of \$10,000,000. The awards were given in your name! Do you know from whence the \$10,000,000 came? Funding came (and funding continues) from three primary sources, the OBF “Fellows” program, Interest On Lawyers Trust Accounts (IOLTA) and *Cy Pres* awards (surplus funds in class action and other proceed-

ings, that for any number of reasons cannot be distributed to the class members or beneficiaries who were the intended recipients). A good portion also came from invested funds left by caring lawyers who wanted to provide a continuance in shaping the future of an educated and participating citizenry long after they were gone, creating a tradition of giving back.

Besides committee work and regular board meetings, trustees also were present at the OBA Solo and Small Firm Conference, the spring and fall swearing-in ceremonies of newly admitted lawyers, the Women In Law Conference, CLE programs, and other events to help promote the foundation and recruit new Fellows. The trustees entered into an Affinity Agreement with a new partner, UMB Bank. The marketing effort has just begun and OBA members will have the opportunity for a new OBF credit card with great benefits. Probably the most significant project this year has been the new foundation website, a project initiated in 2010. This tool will give the foundation much better exposure to Oklahoma lawyers and the public.

Dedicated Oklahoma lawyers have joined forces to further the foundation's charitable work as “Fellows” by making individual donations in the amount of \$1,000 — either through a one-time gift — or annual payments of \$100 for 10 years. Most Fellows after meeting their initial

pledge, continue annual giving as Sustaining Fellows. Others step up to the premier Benefactor Fellows level by continuing to support the foundation through annual gifts of \$300. The foundation has a special reduced payment plan for newly admitted lawyers. The sign-up

process is easy, the money is put to good use and all contributions are tax-deductible.

The equivalent of less than one hourly billing annually will allow the foundation to increase its charitable work across Oklahoma.

Will the Tradition of Giving Back continue with YOU?

John D. Muncaksy Jr. is the president of the Oklahoma Bar Foundation. He can be reached at johnmunk@sbcglobal.net.



Oklahoma Bar Center
1901 North Lincoln Boulevard
Oklahoma City OK 73105-4901
foundation@okbar.org

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Dear Oklahoma Bar Members:

The Oklahoma Bar Foundation and Oklahoma Bar Association are jointly announcing a new credit card program exclusively for our membership.

The new credit card program through UMB Bank, n.a. offers a competitive rate with no annual fees. When you use your Card, UMB Bank will pay royalties to the Bar Foundation, enabling the Foundation to provide important charitable grant funding for:

- Free legal assistance to the poor and elderly;
- Safe haven for the abused;
- Protection and legal assistance to children;
- Public law-related education programs, including programs for school children;
- Law student scholarships for those we expect to follow our charge;
- Other activities that improve the quality of justice for all Oklahomans.

Many of the programs utilize pro bono legal services, such as the OBA Oklahoma Lawyers for America's Heroes program, that further compound OBF grant dollars. OBF helped to provide support to 38 different programs and projects this year alone as the need for services continues to grow each year.

We all carry credit cards and this is another way to join in the OBF tradition of giving back. Here are more details about the credit card:

- No Annual Fee*
- Low Variable APR*
- Earn 1 point for every dollar spent, 2 points for every dollar of interest billed. Redeem your points from a seemingly endless selection of merchandise, travel, account credits, gift cards and more!
- Visa Zero Liability protection protects you from unauthorized purchases online and off**
- Additional benefits include auto rental collision damage waiver, warranty service and travel emergency assistance services

We urge you to sign up for your new OBF VISA card today on-line at <http://www.cardpartner.com/pro/app/oklahoma-bar-foundation> or give the Oklahoma Bar Foundation a call at (405) 416-7070 or via e-mail at foundation@okbar.org should you wish an application be sent to you. Help support the OBF mission of: Lawyers Transforming Lives to promote justice, fund critical legal services, and advance public awareness of the law. Request your new OBF VISA card today***

Sincerely,

John Muncaksy
President
Oklahoma Bar Foundation

Deborah A. Reheard
President
Oklahoma Bar Association

* Purchases and balances transfers made within the first 6 months the account is open will have a monthly periodic rate of 0.00%, which corresponds to an Annual Percentage Rate of 0.00%. After 6 months, any amount remaining unpaid from any Purchases or Balance Transfers will bear interest at the rate for Purchase Advances applicable to your Account at that time. The Purchase Advance APR is a variable rate which, as of November 1, 2011, is 12.99%. We may end your 0.00% APR, and apply the Penalty APR, if you make a late payment. The Penalty APR is calculated by adding 18.50 percentage points to the Base Rate as set forth in your Cardholder Agreement, currently 23.75% APR. Minimum Finance Charge is \$.50. Balance Transfer Fee after the first 6 months will be 3% of the amount of the Balance Transfer, with a \$15 minimum and no maximum. Foreign Transaction Fee when making purchases outside the US will be 2% of the US dollar amount of each Cash Advance or Purchase. Cash Advance Fee is 3% of the amount of the Cash Advance, with a \$15 minimum and a \$50 maximum.

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FELLOW ENROLLMENT FORM ☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

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The Oklahoma Bar Foundation was able to assist 23 different programs or projects during 2010 and 25 in 2009 through the generosity of Oklahoma lawyers – providing free legal assistance for the poor and elderly; safe haven for the abused; protection and legal assistance to children; law-related education programs; other activities that improve the quality of justice for all Oklahomans. The Oklahoma Bar legend of help continues with **YOU**.

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

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___ Total amount enclosed, \$1,000

___ *New Lawyer 1st Year*, \$25 enclosed & bill annually as stated

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___ I want to be recognized at the higher level of **Sustaining Fellow** & will continue my annual gift of at least \$100 – (initial pledge should be complete)

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

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TRANSFORMING LIVES**

*Through education,
citizenship and
justice for all.*

*The Oklahoma Bar
legend of help continues
with YOU!*

- ∞ To become a Fellow, the pledge is \$1,000 payable within a 10-year period at \$100 each year; however, some may choose to pay the full amount or in greater increments over a shorter period of time.
- ∞ The OBF offers lesser payments for *newer* Oklahoma Bar Association members:
 - — **First Year Lawyers:** lawyers who pledge to become OBF Fellows on or before Jan. 2, of the year immediately following their admission may pay only \$25 per year for two years, then only \$50 for three years, and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.
 - — **Within Three Years:** lawyers admitted three years or less at the time of their OBF Fellow pledge may pay only \$50 per year for four years and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.
- ∞ **Sustaining Fellows** are those who have completed the initial \$1,000 pledge and continue their \$100 annual contribution to help sustain grant programs.
- ∞ **Benefactor Fellows** is the highest leadership giving level and are those who have completed the initial \$1,000 pledge and pledge to pay at least \$300 annually to help fund important grant programs. Benefactors lead by example.

Your Signature & Date: _____ OBA Bar# _____

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Many thanks for your support & generosity!

Military Assistance Program Celebrates First-Year Success

By Lori Rasmussen

Nearly 800 Oklahoma servicemembers and veterans received no-cost legal help this year through the OBA's military assistance initiative. The Oklahoma Lawyers for America's Heroes program has drawn more than 600 lawyers from across the state as volunteers, and the project is expected to grow even larger in 2012.

The program most recently included legal clinics hosted by 22 county bar associations across the state on Veterans Day, Nov. 11. Almost 200 military members and vets received on-the-spot advice, and those whose questions could not be answered during the clinic were referred to volunteer lawyers who have agreed to take a case for a military client on a pro bono basis.

Lawyer volunteers typically answer questions related to issues including military benefits, family law, consumer issues and foreclosures. Some servicemembers are even facing criminal complaints, often stemming from injuries and post-traumatic stress disorder associated with their service.

OBA President Deborah Reheard of Eufaula said, "Hundreds of members of Oklahoma's 45th Infantry Brigade are due back home this spring after

"We must make sure no one is left behind in the justice system, just as no one is left behind on the battlefield."

just as no one is left behind on the battlefield."

More than \$1.5 million worth of legal services have been donated to qualifying servicemembers and veterans. Lawyer volunteers in the program must pledge to provide a minimum of 20 hours to their client. Volunteers also have received special training preparing them



Canadian County lawyers volunteer at the Veterans Day clinic hosted by their local bar association. From left: Reta Strubhar (Piedmont); Mike Denton (Mustang); Roger Rinehart (El Reno); Chris Henthorn (Yukon); Nathan Richter (Mustang); Richard Strubhar (Piedmont); Susan Dobbins (Mustang); Khristan Strubhar (Yukon); Bill James (Yukon); Matt Wheatley (Yukon).

deploying to Afghanistan earlier this year, and we anticipate a number of them may face legal hurdles as they reintegrate state-side. That's why this program continues to be vitally necessary. We must make sure no one is left behind in the justice system,

to better represent service men and women and their unique legal needs. Free CLE seminars were offered in February and August to those who signed up.

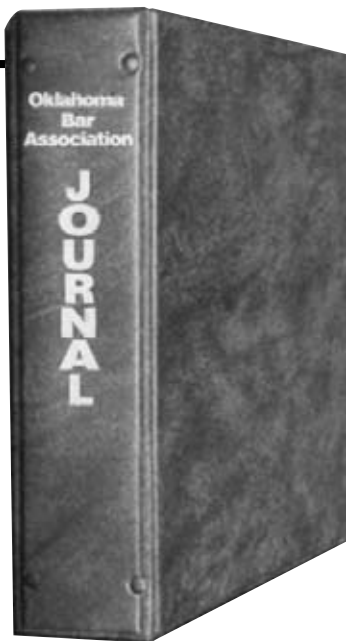
"Lawyers have a special set of skills enabling them to serve

those who have fought and are fighting," Reheard said. "We put out the call, and the members of our profession stepped up and will continue to step up. We owe it to those who put their lives on the line defending our freedom."

Oklahoma lawyers may continue to volunteer for the program in the coming year by visiting www.okbar.org/heroes.



Oklahoma County lawyers Dan Zorn (left) and Richard Nix assist a veteran during the clinic held at the Oklahoma Bar Center.



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Make a Will Program

By Laurie W. Jones

On April 21, 2012, volunteer lawyers, law students, pastors, notaries and other administrative support personnel will gather to provide estate planning services to eastside Oklahoma City community residents through the Make a Will Program. The program is sponsored by the Southwestern Urban Foundation in collaboration with the Oklahoma City Chapter of the Black Lawyers Association, the Baptist Ministers Association, the Methodist Ministerial Association, Concerned Clergy for Spiritual Renewal, Legal Aid Services of Oklahoma, and the law schools at Oklahoma City University and the University of Oklahoma. The program was developed in response to the reported statistic that approximately 80 percent of African-Americans do not have a simple will, and it is designed to encourage the protection of family wealth through education and execution of a will. The volunteers mobilize on a Saturday in April to provide the services necessary for community residents to leave with a fully executed will that will protect their families and assets and give them peace of mind and the satisfaction that they have planned for the future.

The education of community members about probate procedure, bequests and lega-

cy giving begins on "Make a Will Sunday," which precedes the Saturday legal services clinic. On this Sunday, participating churches offer sermons, announcements, information packets, and guest speakers about the importance of wealth protection and preservation. Noting that many people spend more time planning their vacation than their lives, the Rev. Victor T. McCullough encourages his congregation to make the changes necessary to establish a financial legacy for their children and the community. Drawing on the verse from Proverbs that "The good leave an inheritance to their children's children," church members are encouraged to take action to be good stewards of their finances. They are invited to participate in the legal clinic the following Saturday.

At the clinic, volunteer lawyers, law students and support staff provide free legal consultation and service on completing a will, advance directive and understanding the probate process. For more complex estate planning matters, referrals to local attorneys and legal service providers are offered. A team of financial managers is available for consultation and advice on how to build assets, as well as how to protect them. Leonard Benton, execu-

tive director of the Southwestern Urban Foundation, noted that "This is a good partnership. We recognized the serious need among families to protect assets, and this effort localizes resources to address community needs."

Now in its third year, the Make a Will Program has helped nearly 200 community members and has involved scores of volunteers. The lawyers and law students provide valuable pro bono service to the community. The law students learn how to work with and for a client and how to draft a will. The community members receive information and services that allow them to be intentional about the preservation and distribution of their wealth. The churches and pastors provide important information and spiritual guidance during the process. The collaborative effort results in meaningful access to justice for Oklahomans.

For more information about the Make a Will Program or to volunteer for it, contact Leonard Benton of the Southwestern Urban Foundation at (405) 424-2889 or Sharon Ammon of Legal Aid Services of Oklahoma at (405) 488-6824.

Ms. Jones is interim associate dean for academic affairs and the pro bono coordinator at the Oklahoma City University School of Law.

YLD Year in Review

By Roy D. Tucker, YLD Chairperson

As I reflect on my year as YLD chair, I am humbled when I look back at the division's previous leaders and their accomplishments. Having been active in the YLD since 2005, I have many fond memories of the chairs with whom I have served. Each has inspired me and influenced me as a leader. To those before me, I say "thank you." To those who come after me, I can only hope that I have served the YLD well and have accomplished things for which you can be proud.

2011 was an exciting, and sometimes exhausting, year for the YLD. We undertook several new projects and continued many of those which have become synonymous with the YLD. We answered President Reheard's call to produce a handbook for both lawyers and veterans to assist with the Oklahoma Lawyers for America's Heroes initiative. Those handbooks are now on their second printing because of the overwhelming generosity of the volunteer lawyers who participated in the initiative. We also held three Serving Our Seniors Project events to pro-



Outgoing YLD Chair Roy Tucker and 2012 Chair Jennifer Kirkpatrick enjoy the western theme during the recent Annual Meeting.

vide free simple estate plans to low-income senior citizens. We completed much needed revisions on our seniors' handbook. We instituted successful speed networking events at the Solo/Small Firm Conference and at Annual Meeting. We pledged to assist the Oklahoma Bar Foundation in securing new fellows, and were honored to be recognized by the OBF when we received the Roger Scott Memorial Award. Finally, we held an ABA Affiliates Outreach Program, South-Central Regional Young Lawyers Conference where young lawyers from Missouri, Oklahoma and

Kansas congregated to exchange ideas and find ways to reinvigorate young lawyer participation and diversity in membership.

All of these projects were new this year, and yet we strove to continue to maintain other projects which are historically important to the YLD. We continued the bar exam survival kits, which have been a bar-taker's mainstay for many years. We continued our statewide community service day working to improve homeless shelters across the state. We represented Oklahoma at the annual and mid-year ABA meetings, and also the ABA/YLD spring and fall conferences. And of course, we continued hosting our infamous suites and new-admittee soirees.

As Jennifer Kirkpatrick takes the chair in January, I have no doubt that the YLD will be led by a conscientious, experienced and talented leader in 2012. In the coming weeks, I will be proud to pass the proverbial gavel. I look forward to seeing her vision for the YLD.

Calendar

December

- 14 OBA Justice Commission Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563
- 15 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Barbara Swinton (405) 713-7109
- 16 OBA Board of Governors Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000
- 17 OBA Young Lawyers Division Committee Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Roy Tucker (918) 684-6276
- 20 OBA Civil Procedure and Evidence Code Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: James Milton (918) 591-5229
- 22 OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions, Suite 510, Tulsa; RSVP to: Kim Reber (405) 840-3033
- 26-27 OBA Closed** – Christmas Day Observed



January

- 2 OBA Closed** – New Year's Day Observed
- 6 OBA Law Day Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Tina Izadi (405) 522-3871
- 10 OBA Law-related Education SCOPE Task Force Meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Reta Strubhar (405) 354-8890
- 12 OBA Leadership Academy;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- 13 Board of Bar Examiners;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bar Examiners (405) 416-7075
- OBA Solo and Small Firm Conference Planning Committee Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Charles W. Chesnut (918) 542-1845
- OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800
- 16 OBA Closed** – Martin Luther King Jr. Day
- 18 OBA Women in Law Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Deborah Bruce (405) 528-8625
- Luther Bohanon American Inn of Court Meeting;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Maryann Roberts (405) 740-3124
- 19 OBA Board of Governors Swearing-In Ceremony;** 10:30 a.m.; Ceremonial Supreme Court Courtroom, State Capitol; Contact: John Morris Williams (405) 416-7000
- OBA Leadership Academy;** 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb (405) 416-7027
- OBA Board of Governors Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000



February

10 OBA Solo and Small Firm Conference Planning Committee Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Charles W. Chesnut (918) 542-1845

OBA Family Law Section Meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800

15 OBA Law-related Education Close-Up; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

16 OBA Law-related Education Close-Up; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

OBA Law-related Education Close-Up Teachers Meeting; 1:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Jane McConnell (405) 416-7024

16-18 OBA President's Summit; Post Oak Lodge, Tulsa; Contact: John Morris Williams (405) 416-7000

20 OBA Closed – President's Day

22 Ruth Bader Ginsburg American Inn of Court; 7 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donald Lynn Babb (405) 235-1611

February 28 – March 2

OBA Bar Examinations; Oklahoma Bar Center, Oklahoma City; Contact: Oklahoma Board of Bar Examiners (405) 416-7075

20 Oklahoma Bar Foundation New Trustee Orientation; 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

Oklahoma Bar Foundation Meeting; 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy (405) 416-7070

27 Oklahoma Uniform Jury Instructions Meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Chuck Adams (918) 631-2437

28 Legislative Reading Day; 8 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: John Morris Williams (405) 416-7000



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Judge Couch Named OCU Law Dean

Federal Magistrate Judge Valerie K. Couch has been named the 12th dean of Oklahoma City University School of Law, and she will begin her duties July 1. Her selection comes after a year-long search.

OCU President Robert Henry said, "Judge Couch will be an exceptional dean. She has been involved with our law school as an adjunct faculty member for a decade and her rapport with students and faculty is sterling, as is her reputation within the legal community."

Judge Couch was appointed U.S. magistrate judge for the Western District of Oklahoma in March 1999. Prior to that, she was in private practice with the Oklahoma City firm Hartzog Conger & Cason PC, where she was an associate from 1983-88 and a director and shareholder from 1988-99.

She holds a juris doctor and a master's degree in English literature from OU. She received her bachelor's degree in English literature from UCLA.

She will succeed Dean Lawrence Hellman, who will now lead the law school's Innocence Clinic, a project dedicated to exonerating those wrongfully convicted of crimes.



New OBA Board Members to Take Oath

Nine new members of the OBA Board of Governors are set to be sworn in to their positions Jan. 19 at 10:30 a.m. in the Supreme Court Ceremonial Courtroom at the State Capitol. Officers set to take the oath and their new positions are Cathy Christensen, Oklahoma City, president; James Stuart, Shawnee, president-elect; and Peggy Stockwell, Norman, vice president.

To be sworn into the Board of Governors to represent their judicial districts for three-year terms are Kimberly Hays, Tulsa; Nancy Parrott, at large, Oklahoma City; Bret Smith, Muskogee; and Linda Thomas, Bartlesville.

To be sworn into one-year terms on the board are Deborah Reheard, Eufaula, immediate past president; and Jennifer Kirkpatrick, Oklahoma City, Young Lawyers Division Chairperson.

OBA Member Resignations

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

Blaine Reagan Boyd
OBA No. 21610
4500 N. Rock Cliff Rd.
Ponca City, OK 74604

Matthew Thomas McClintock
OBA No. 18770
P. O. Box 3579
Evergreen, CO 80437

Volunteers Critical to OBA Success

Joining an OBA committee not only helps further the work of the association, but is a fun networking and social opportunity for you! President-Elect Cathy Christensen invites all Oklahoma lawyers to sign up for an OBA committee or to re-enlist if your term is expiring. Signing up for a committee online is easy at www.okbar.org, or use the form in this issue.

Bar Center Holiday Hours

The Oklahoma Bar Center will be closed Monday and Tuesday, Dec. 26 and 27, in observance of the Christmas holiday. The bar center will also close Monday, Jan. 2 to observe the New Year's holiday.

Kudos

Dallas E. Ferguson was awarded the Oklahoma Justice Award presented by Legal Aid Services of Oklahoma. Mr. Ferguson graduated from Cornell University and later received his J.D. from Columbia University School of Law.

Cherokee County Bar Association recently elected **Robert Garcia** as president, **Corey Upchurch-Johnson** as secretary and treasurer, and **B.J. Baker** as Law Day chair.

McAfee & Taft attorney **Rusty LaForge** was appointed by Oklahoma Governor Mary Fallin to serve a four-year term as a commissioner on the Uniform Law Commission. The commission seeks to strengthen the federal system by providing rules and procedures that are consistent from state to state, but also reflect the diverse experience of the states. Mr. LaForge is a shareholder with McAfee & Taft, where he is a corporate lawyer whose practice is primarily concentrated on regulatory and transactional matters affecting banks, bank holding companies and other financial institutions.

The Oklahoma Lawyers Association has named **Jim Drummond**, **W. Devin Resides** and **Noel Tucker** to its board of directors. Mr. Drum-

mond is a private criminal defense lawyer handling trial and appellate cases at the federal and state level. He is licensed in Oklahoma and Arizona, as well as in all Oklahoma federal district courts, the 5th and 10th Circuit Courts of Appeals and the U.S. Supreme Court. Mr. Resides is co-founder and manager of Resides & Resides PLLC. He practices in the areas of commercial litigation, family law, government contracting, labor and employment law, appellate advocacy and workers' compensation. He is the creator of the Father and Children's Law Center. Ms. Tucker serves on the ABA Family Law Section Council and is a past chair of the OBA Family Law Section and continues to serve as its legislative chair. She has been published and regularly presents in the areas of adoption, paternity, ethics, legislation and guardian *ad litem* representation, and is also a contributing editor for the OBA *Family Law Section Practice Manual*.

Several Oklahoma attorneys were recognized at the recent annual conference of the Oklahoma Child Support Enforcement Association held in Norman. **Judge Mark Barcus** of Tulsa was honored as the "Legal Community Partner of the Year," for his handling of the civil contempt dockets of the Tulsa DHS child support offices in Tulsa, and for his community outreach on behalf of children. Named as "Attorney of the Year" was **Richard Long** of the Durant child sup-

port office; and recognized as the "State Office Employee of the Year" was **Anthony "Tony" Jackson**, chief counsel for the Center of Coordinated Programs of the Oklahoma Child Support Services Division.

Carla Sharpe was recently selected to the board of directors for OKC Beautiful. Ms. Sharpe is senior counsel for Devon Energy Corporation where she handles the legal work associated with Devon's real estate and office properties. She is also the legal attorney for Devon's downtown Oklahoma City headquarters project.

The Pittsburg County Bar Association hosted the second annual PAWS 5k-9 in November. They had more than a dozen volunteers and more than 50 attendees. They were able to raise more than \$2,000 for the Pittsburg and Latimer County PAWS animal welfare organization.

OCU will bestow honorary doctorate of human letters degrees to **Bob Burke** and **J. William Conger** at the fall graduation ceremony on Dec. 16. Mr. Burke has written more than 70 books about Oklahoma and Oklahomans and was named to the Oklahoma Hall of Fame. Mr. Conger joined OCU as general counsel and faculty in the law school. He is the founding partner of Oklahoma City law firm Hartzog Conger Cason & Neville and past president of the OBA.

On The Move

Mulinux Ogden Hall & Ludlam announces **Rob Johnson** has joined the firm of counsel and **Stacy Ramdas, Lindsey Mulinux and Riley Mulinux** are new associates. Mr. Johnson graduated with his bachelor's from OSU and received his J.D. from OU College of Law. Upon graduating from law school, he worked in Washington D.C. as a legislative assistant to U.S. Rep. Wes Watkins, and legislative director to U.S. Rep. Tom Cole. He was elected to the Oklahoma House of Representatives in 2004. In 2005, he was selected as one of the 50 legislators from around the country for the State Legislative Leadership Foundation's Program for Emerging Political Leaders. He was also awarded the prestigious Legislator of the Year award from the Oklahoma Independent Petroleum Association in 2007. Ms. Ramdas graduated *magna cum laude* from William Mitchell College of law in St. Paul, Minn. Her practice areas include oil, gas and other energy-related transactions and commercial litigation. Ms. Mulinux received her B.A. in English literature from Arizona State University and her J.D. from the OU College of Law. Her practice will focus on business and civil litigation. Mr. Mulinux received his J.D. from the OU College of Law. His practice focuses on civil litigation.

Sandra Benischek Harrison has been named chief administrative officer of the

Oklahoma Department of Human Services. Her responsibilities include management of support services, human resources, inter-governmental relations, communications and volunteerism. She received her J.D. from the OU College of Law.

The law firm of Helms, Underwood & Cook announces **Zachary J. Foster** has become a new associate at the firm. Mr. Foster graduated *cum laude* from OCU School of Law. His practice areas include general civil and business litigation, oil and gas litigation, agricultural law, business law and business entity formation.

McAfee & Taft announces that **Ryan Cross** has joined the firm, practicing in the areas of intellectual property with an emphasis on patent preparation and prosecution, technology transfer and information technology. Mr. Cross will also handle intellectual property issues related to mergers, acquisitions and other business transactions. He previously served as corporate counsel for ConocoPhillips and its predecessor company for 20 years. He received his bachelor's degree and master's degree in physics from OSU and earned his J.D. from the OU College of Law.

The Law Firm of Pignato, Cooper, Kolker & Roberson PC announces that **Aaron P. Budd** has joined the firm as an associate. Mr. Budd is a 2011 graduate of the University of San Diego School of Law. Mr. Budd will practice in the area of general insurance defense.

Spherexx.com, a marketing company specializing in technology, announces **Lauren Lester Allison** will serve as in-

house of counsel and executive assistant to the president and CEO. Ms. Allison will also provide legal services for Spherexx.com. She received her B.A. in law and society at TU, where she also received her J.D. She has served as the coordinator of academic achievement and bar support at TU College of Law. Her private practice included real estate, civil and business litigation. She was also recently elected president of the Creek County Bar Association.

At The Podium

Garvin A. Isaacs of Oklahoma City was the speaker at the recent "One Shot for Justice," the Wyoming public defender's annual training seminar in Lander, Wyo. He presented a two-hour lecture on cross examination.

Oklahoma Department of Human Services Director **Howard Hendrick** and **Gary Dart**, director of the Oklahoma Child Support Services Division of OKDHS, both spoke at the recent annual conference of the Oklahoma Child Support Enforcement Association held in Norman.

Submit news items via email to:
Lori Rasmussen
Communications Dept.
Oklahoma Bar Association
(405) 416-7017
barbriefs@okbar.org

Compiled by Nikki Cuenca

Articles for the January 14 issue must be received by January 6.

Kainor Carson of Tulsa died Nov. 5. He was born March 3, 1925, in Urbana. He graduated from the TU College of Law. He is described by friends and loved ones as an “old school” lawyer.

Judy Ann Copeland of Edmond died Nov. 6. She was born on Jan. 28, 1969, in El Paso, Texas. She graduated valedictorian from Stroud High School and later graduated from Northeastern State University with a B.A. in political science. She received her J.D. from the OU College of Law. She worked with the Oklahoma Office of Attorney General from 1993 to 1997, followed by positions in the Oklahoma Governor’s Office as both general and deputy general counsel from 1997 through 2003. She went on to the Oklahoma County District Attorney’s Office and subsequently to the U.S. Attorney’s Office where she worked from 2004 until she took her position as legal counsel to Gov. Mary Fallin. She had a passion for sports, especially for the OU Sooners as well as the Oklahoma City Thunder. Memorial contributions may be made to the Sooner Golden Retriever Rescue or the Judy Herber Scholarship Fund.

James Harley Ivy Jr. of Waurika died Nov. 19. He was born on April 14, 1918, in Waurika. He graduated from the OU College of Law in 1941. **He served in the U.S. Army in Germany, where he was involved in the prosecution of Nazi war crimes.** After returning from the war, he practiced law with his father and brother, earning his 70 year service pin this year. He was an active participant in civic life in Waurika over the years, serving in turn as mayor of Waurika, city commissioner and as president of the Waurika Lions Club,

and he was a member of First Christian Church. Memorial contributions may be made to the Oklahoma Medical Research Foundation.

Robert “Bob” Macy of Newalla died Nov. 18. He was born on July 5, 1930, in Indianapolis. He graduated from Broad Ripple High School and earned a football scholarship to Earlham College, where he graduated with degrees in geology and religion. **He enlisted in the U.S. Air Force and spent most of his service time at the Ardmore Air Force Base.** He worked as a police officer while attending the OU College of Law. After receiving his J.D., he moved to Ada and started his legal career as an assistant county prosecutor. He served as the Oklahoma County district attorney for 21 years. Contributions may be made to the Cowboy Crisis Fund.

F.E. McAnally died Nov. 10. He was born on Sept. 3, 1919, in Coyle. He graduated from Coyle High School and later received his J.D. from the OU College of Law. **He served in the U.S. Army during World War II and Korea. He was a highly decorated veteran who reached the rank of captain and earned a Purple Heart, Bronze Star and Silver Star while serving in Europe during World War II.** After the war, he practiced private and corporate law in Oklahoma, Mississippi and Arkansas until his death. He also previously served as Logan County district attorney.

David L. Pauling of Tulsa died Nov. 28. He was born Sept. 4, 1943, in El Paso, Texas. He graduated from Lawton High School and graduated from OU with a B.A. in journalism. **He served as a first**

lieutenant in the U.S. Army Artillery and commander of a missile unit in Germany. After discharge from the army, he received his J.D. from the TU College of Law. He served the city of Tulsa’s legal department first as a trial lawyer and then manager of the litigation division until his appointment as city attorney. Memorial contributions may be made to the New Hope Prison Ministry.

Barry Simms of Oklahoma City died Oct. 3. He was born Sept. 6, 1931, in Lindsay and graduated from Kemper Military Academy. **He served in the U.S. Army.** He attended OSU and received his J.D. from the OU College of Law. He supported many social, civic and fine arts organizations. He was also recognized with awards for his pro bono legal work.

Judge Alan Edmond Synar of Edmond died Nov. 5. He was born April 14, 1955, in Memphis, Tenn. He went to Muskego High School and later went to OU, where he received his B.B.A. and his J.D. He was appointed associate municipal judge for the city of Edmond in 1988 and became the presiding judge in 1993. Memorial contributions may be made to Edmond Family Counseling.

John Albert Williams of Muskogee died Nov. 12. He was born Oct. 17, 1939, in Tulsa. He attended Central High School in Oklahoma City and later graduated from OU. **He served in the Marine Corps for four years during the Korean Conflict.** After he returned, he graduated from the OCU School of Law in 1970 and began working for the Veterans Administration for 32 years as a field attorney. He opened his own law practice after retiring in 2000.

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AV-RATED OKLAHOMA CITY WORKERS' COMPENSATION DEFENSE FIRM is accepting resumes for an associate attorney. At least 2+ years insurance defense preferred, workers' compensation a plus. Must be a motivated team player, well organized and have the ability to communicate effectively. Competitive salary and benefits. Excellent opportunity for the right person. Some in-state travel required. Send replies to "Box O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

WILSON, CAIN & ACQUAVIVA, AV RATED OKC/TULSA insurance defense firm, seeks associate with 5+ years litigation experience in bad faith/civil litigation for OKC office. Excellent long term opportunity for the right person. Competitive salary and benefits. Send resume to Wilson, Cain & Acquaviva, 300 N.W. 13th Street, Suite 100, Oklahoma City, OK 73103.

ENVIRONMENTAL ATTORNEY - ONEOK INC., a diversified energy company, is seeking a well-qualified environmental attorney for its Tulsa office. Required qualifications include a minimum of 7 years full-time legal practice handling complex multi-jurisdictional environmental issues, including those under the CAA, CWA, RCRA, and CERCLA, as well as state regulatory regimes, with a primary emphasis on permitting, compliance, enforcement and remediation. Experience with OSHA, DOT and state health and safety laws is a plus, and experience in the natural gas and oil industry is desired. This position includes extensive interaction with business and operations personnel, as well as regulatory and administrative agency personnel. Therefore, the successful candidate must have proven leadership skills, excellent interpersonal skills, and excellent oral and written communication abilities. Please submit cover letter, resume and salary requirements to ONEOK at www.theonetoworkfor.com, posting number IRC 44427.

ASSOCIATE ATTORNEY: AV-rated, downtown Oklahoma City litigation firm has an immediate position available for an associate attorney with 5+ years experience. A qualified candidate must have solid litigation experience, including a proven aptitude for performing legal research, drafting motions and briefs and conducting all phases of pretrial discovery. Salary is commensurate with experience. Please send resume to sdt@jctokc.com.

POSITIONS AVAILABLE

OKLAHOMA CITY LAW FIRM looking for an associate attorney with 2-5 years experience in social security disability law. Must be able to handle all aspects of SSDI claims. All replies confidential. Please send resume to "Box A," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSOCIATE WITH 4-8 YEARS CIVIL DEFENSE litigation experience needed by AV-rated Tulsa firm. Insurance defense or railroad litigation a plus. Very busy, fast-paced office offering competitive salary, health/life insurance, 401k, etc. Send resume and writing sample (10 pg. max) in confidence via email to legalhrmgr@aol.com.

LEGAL RESEARCH AND WRITING ASSISTANT with at least 5 years experience needed by AV-rated Tulsa firm. Very busy, fast-paced office offering competitive salary, health/life insurance, 401k, etc. Send resume and writing sample (10 pg. max) in confidence via email to legalhrmgr@aol.com.

MCCORMICK & BRYAN LAW FIRM SEEKS full-time associate with 5-7 years experience. Solid experience in civil litigation in state and federal courts; excellent legal research skills and ability to analyze legal issues; capable of drafting motions and briefs, knowledgeable in handling pretrial discovery; aptitude for listening and relating to clients; and exceptional ethical standards required. Experience in employment law, real estate or tribal law a plus. Send resume and writing sample to Gene Bertman, McCormick & Bryan Law Firm, The Quarters at Kelly Pointe, 2529 S. Kelly, Suite A, Edmond, OK 73013. All replies shall remain confidential.

THE OKLAHOMA CORPORATION COMMISSION has an opening for an attorney in the Office of General Counsel, Public Utilities section. This is an unclassified position with a maximum salary of \$57,440 annually. Applicants must be admitted to the Oklahoma bar and have 2 years of practice in any of the following areas: administrative, general, or public utility regulation including 1 year of litigation. Send resume and writing sample to: Oklahoma Corporation Commission, Human Resources Division, P.O. Box 52000, Oklahoma City, OK 73152-2000. For inquiries, contact Lori Mize at (405) 522-0260 or at l.mize@occcemail.com. Deadline: Dec. 23, 2011.

TULSA AV-RATED MEDIUM SIZED FIRM seeks attorney with five to ten (10) years of business litigation experience who is looking for new challenges and affiliation with an established and growing law firm. The ideal candidate will have solid litigation experience, excellent communication skills and be well organized. The compensation package is commensurate with level of experience and qualifications. An exceptional benefit package includes bonus opportunity, health insurance, life insurance, and 401K with match. Applications will be kept in strict confidence. Please send resume to "Box J," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

ASSOCIATE ATTORNEY: OKC AV-RATED LAW FIRM has an immediate position available for an associate attorney with 3-5 years experience for general civil/commercial defense practice, health care law. Must have solid litigation experience for all phases of pretrial discovery and trial experience with excellent research and writing skills. Submit a confidential resume with salary requirements, references and writing sample to "Box U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSISTANT PUBLIC DEFENDER POSITION available in Tulsa County. Must have two years trial experience preferably in criminal law. Please send resume to Pete Silva Jr., Chief Public Defender, 423 South Boulder, Suite 300, Tulsa, OK 74103-3805 or fax to (918) 596-5540.

ASSOCIATE ATTORNEY: We are an Oklahoma City law firm that primarily deals with transportation law that is looking for an associate attorney who will assist with supervisory duties. Legal and managerial experience is preferred but not required. Salary is commensurate with experience. If you are interested please send resume and references to P.O. Box 271320, Oklahoma City, OK 73127-1320.

PHILLIPS MURRAH PC IS LOOKING FOR a title attorney with at least 5 years experience in oil and gas title work. Phillips Murrah will provide an excellent starting salary and benefits. Please submit your resume to Carla Sullivan, 101 N. Robinson, 13th Floor, Corporate Tower, Oklahoma City, OK 73102 or clsullivan@phillipsmurrah.com.

AV-RATED TULSA BUSINESS AND REAL ESTATE LAW FIRM seeks associate attorney with 1-3 years experience. Primary responsibilities include research, brief writing and discovery matters. Compensation commensurate with experience and skills. Submit resume and references to kmonaghan@hollowaymonaghan.com.

ASSOCIATE ATTORNEY: BROWN & GOULD PLLC, a downtown Oklahoma City litigation firm has an immediate position available for an attorney with 3-5 years of litigation experience. A qualified candidate must have solid litigation experience, including a proven aptitude for performing legal research, drafting motions and briefs and conducting all phases of pretrial discovery. Salary is commensurate with experience. Please send resume, references, writing sample and law school transcript to tina@browngouldlaw.com.

ASSOCIATE ATTORNEY WITH 0-5 YEARS EXPERIENCE WANTED for Oklahoma City AV-rated DUI defense firm but associates also handle criminal defense and personal injury. The ideal candidate will have experience with criminal defense and personal injury and the ability to manage a very large docket. We are a very busy and fast-paced office offering competitive salary commensurate with experience and medical benefits. Please send cover letter and resume to John Hunsucker, Hunsucker Legal Group at John@OKDUI.com.

POSITIONS AVAILABLE

SENIOR HS&E/CORPORATE ATTORNEY: Continental Resources Inc. is seeking a senior health, safety and environmental (HS&E)/corporate attorney. This is an exciting opportunity to join Continental's expanding legal team. Continental is an independent oil and natural gas exploration and production company. The company has maintained a crude oil focused growth strategy since the late 1980s and is on track to triple its size from 2009 to 2014. The company has the largest acreage positions in the Bakken and Anadarko Woodford resource plays and is the number two oil producer in the Rocky Mountains. This position requires substantial HS&E and oil and gas experience, including experience with federal and state HS&E laws and regulations applicable to oil and gas exploration, production and transportation, regulatory matters arising in connection with land and operations and any related compliance and administrative proceedings. The job requires the successful candidate to provide compliance advice regarding existing operational and HS&E regulatory requirements and strategic advice on emerging issues, including water and air issues. In addition, candidates should also have (i) substantial experience in oil and gas transactions and contracting (including crude oil purchase agreements, natural gas gathering, processing and purchasing agreements, and master service contracts) and (ii) other oil and gas, operational, land and/or regulatory experience. The successful applicant will be highly skilled, have excellent interpersonal skills, and have experience in effectively managing outside counsel. The position will entail interaction with other business units within the Continental team, including operations, exploration, land, and business and compliance personnel. Work experience/required skills are: excellent academic record; 7-15 years legal experience with HS&E and oil and gas matters; established leadership skills; experience with various federal and state HS&E laws and regulations specific to the oil and gas industry, including CAA, CWA, RCRA, EPCRA and OSHA; oil and gas contracting, including complex crude oil purchase agreements, natural gas gathering, processing and purchase agreements, and experience in regulatory, operational and land issues; general experience in environmental health and safety compliance counseling; ability to collaborate and work well with the internal and external stakeholders, including operations and business personnel, compliance personnel, and legal, regulatory and administrative personnel; excellent oral and written communication skills; contract negotiation, drafting and execution; J.D. from accredited law school; and member of state bar in good standing. This is an outstanding opportunity for a highly skilled, motivated and proactive counsel looking to join an excellent team and growing company. Interested candidates should visit www.contres.com to submit an application and resume online.

POSITIONS WANTED

FORMER LICENSED ATTORNEY WITH OVER 30 YEARS civil practice experience seeks position with law firm or corporation. Contact Jim Golden at j_golden@cox.net or (405) 209-0110.

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All up-to-date complete sets w/ current pocket parts, incl. Oklahoma Decisions (P.1st, P.2d, P.3d), Oklahoma Statutes Annotated, Oklahoma Digest, CJS, AmJur and ALR 6th, 1400+volumes excellent condition, \$20,000. Contact 918-392-0505.

CLASSIFIED INFORMATION

CLASSIFIED RATES: One dollar per word per insertion. Minimum charge \$35. Add \$15 surcharge per issue for blind box advertisements to cover forwarding of replies. Blind box word count must include "Box _____, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152." Display classified ads with bold headline and border are \$50 per inch. See www.okbar.org for issue dates and Display Ad sizes and rates.

DEADLINE: Tuesday noon before publication. Ads must be prepaid. Send ad (e-mail preferred) in writing stating number of times to be published to:

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Publication and contents of any advertisement is not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly non-discriminatory.

Oklahoma Bar Journal Editorial Calendar

2012

■ January

Meet Your OBA

Editor: Carol Manning

■ February

Environmental Law

Editor: Emily Y. Duensing
emily.duensing@oscn.net
Deadline: Oct. 1, 2011

■ March

Work Life Balance

Editor: Joseph M. Vorndran
joe@scdtlaw.com
Deadline: Oct. 1, 2011

■ April

Law Day

Editor: Carol Manning

■ May

Nonprofit Law

Editor: Dietmar Caudle
d.caudle@sbcglobal.net
Deadline: Jan. 1, 2012

■ August

Family Law

Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: May 1, 2012

■ September

Bar Convention

Editor: Carol Manning

■ October

Opening a Law Practice

Editor: Melissa DeLacerda
MellssDE@aol.com
Deadline: May 1, 2012

■ November

Homeland Security

Editor: Erin Means
means@gungolljackson.com
Deadline: Aug. 1, 2012

■ December

Ethics & Professional Responsibility

Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Aug. 1, 2012

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

A Counselor of a Different Sort

By Amy Beth Dobbins

I practiced law for eight years, but before that, I taught high school English. I was raised by educators, and as much as I had dreamed of becoming an attorney, once I arrived in legal land I found myself a tiny bit disillusioned. I really wanted my life to count, to have that ever-elusive “fulfillment” of which Oprah continually speaks. Simply stated, I wanted to help people. More specifically, I wanted to help the younger set, and I wasn’t quite sure that I had hit the mark in law.

After much prayer and deliberation, I thanked my bosses, hugged my co-workers, shed a few tears and packed my things. I was venturing back into the school house as a middle school counselor. I was very excited, but also a bit nervous, hoping that the two professions would not be polar opposites and that my skills and education would be transferable. And, indeed, I have been amazed at just how closely

related the two fields have been and how well-prepared I was for the job, having practiced law.



On a daily basis, I have used either my mediation or negotiation skills, or both, to elicit the “truth” and further justice in various conflicts. Sure, I’m not dealing with the settlement of a lawsuit, but, as any 12-year-old will tell you, working out differences with the “mean girls” is no small task.

As for cross-examination skills, well those have certainly come in handy as well. It’s amazing how many versions of the burrito-flew-across-the-cafeteria one can get from a

14-year-old witness...ahem... I mean student. Affirmative defenses? You betcha. There are plenty of those pled in middle school.

The judge? The jury? Well they appear in the form of constant public opinion, and deliberations can be long and hard with the constant changes in the political tide.

As for whether the switch was truly the best move for me personally, I am unsure, as I am still awaiting the verdict at its time. What I know with certainty, however, is that if we endeavor daily to help people, “fulfillment” will come in one form or another. And that notion is transferable to any profession.

Amy Beth Dobbins served as a school counselor at Oliver Middle School in Broken Arrow for the past two years. She is currently working with middle school and high school students as a career advisor for Tulsa Technology Center.

A DAY AT THE COURTHOUSE CLE

6 HOURS OF CLE WITH 1 HOUR OF ETHICS

Location: Oklahoma State University – Oklahoma City, 900 N. Portland University Center 3rd Floor

Come hear Supreme Court Justice Noma Gurich, Judge Vicki Miles-LaGrange, Judge Bryan Dixon, Judge Kenneth Watson, Judge Edward Cunningham and Public Defender Robert Ravitz on a variety of topics concerning civil and criminal law.

December 16, 2011. 8:30 a.m. – 3:50 p.m.
6 Hrs. of CLE pending including 1 hr. of ethics Cost - \$100 for every person registered at least 4 days prior to event. Extra \$25 at the door. Space is limited. Lunch provided for those pre-registered.

- | | |
|----------------------|--|
| 8:30 to 9 a.m. | Registration and Continental Breakfast |
| 9:00 to 9:50 a.m. | Public Defender Robert A. Ravitz: The Need for Sentencing Reform in Oklahoma |
| 9:50 to 10 a.m. | Break |
| 10:00 to 10:50 a.m. | Judge Kenneth C. Watson: A View from the Bench; The Procedural and Practical Approach to the Practice of Criminal Law in Oklahoma County |
| 10:50 to 11 a.m. | Break |
| 11:00 to 11:50 a.m. | Judge Edward C. Cunningham: Alternative Dispute Resolution: When to Do It and How to Succeed |
| 11:50 a.m. to 1 p.m. | Lunch |
| 1:00 to 1:50 p.m. | Justice Noma D. Gurich: A Survey of Recent Supreme Court Opinions |
| 1:50 to 2 p.m. | Break |
| 2:00 to 2:50 p.m. | Judge Bryan C. Dixon: Do's and Dont's for the Courtroom |
| 2:50 to 3 p.m. | Break |
| 3:00 to 3:50 p.m. | Judge Vicki Miles-LaGrange: Ethical Do's and Dont's for the Federal Judiciary |

Please send registration and fee to ABL-CLE c/o Kysha M. Williams, Williams Law Office 5909 NW Expressway, Suite 206, Oklahoma City, OK 73132 or email: kysha@okcsportslawyer.com . For questions, please call 405-603-5961.

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