

THE OKLAHOMA BAR JOURNAL

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Criminal Law



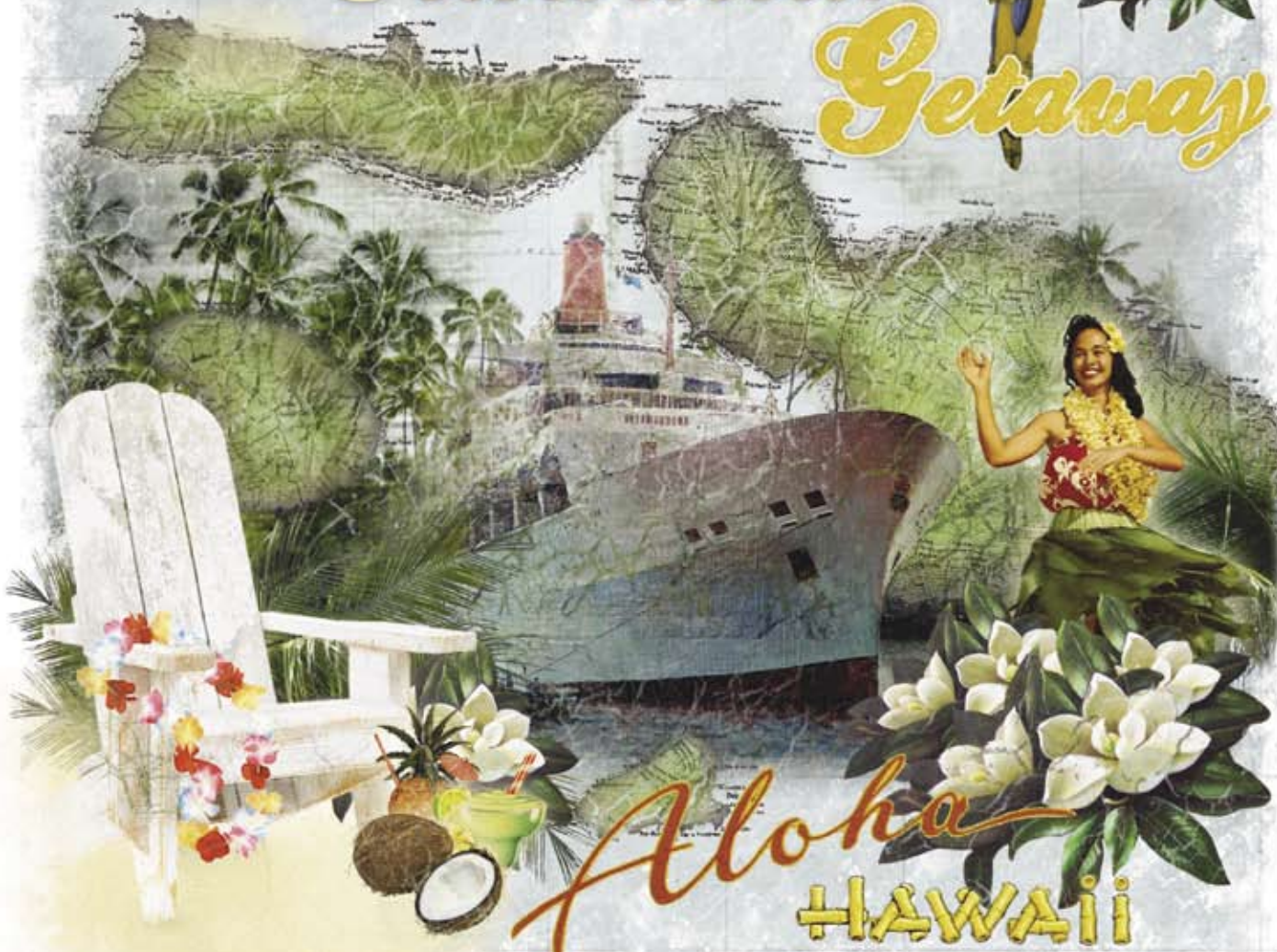
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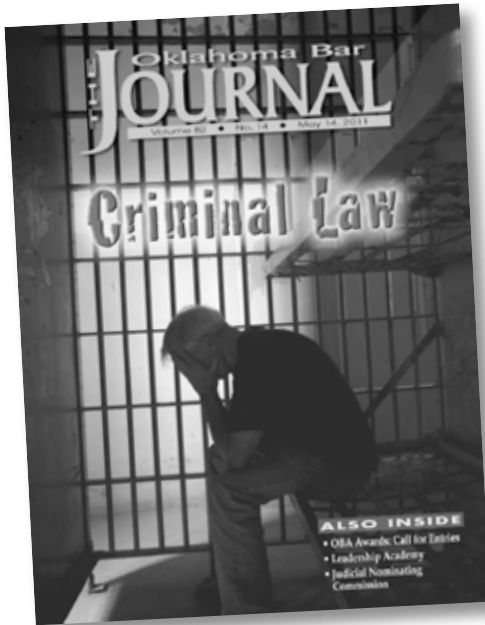
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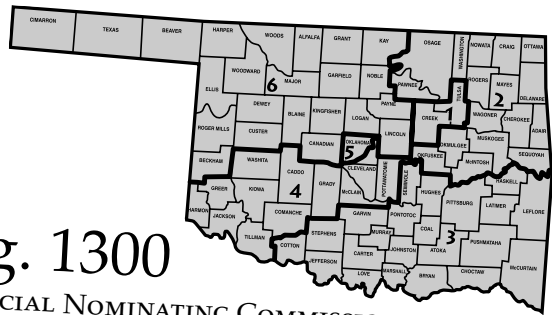
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Words to Inspire New Lawyers

By Deborah Reheard

Nearly 100 new young lawyers joined our ranks in the past few weeks. We gathered for an admissions ceremony at the Supreme Court, where family and friends of new admittees beamed with pride as the new lawyers stood to take their oath.

One of the traditions of this ceremony is for the OBA president to make remarks. Once again I found myself hoping that something I said that day would have an impact on them. I have been asked to publish those welcoming remarks. Here they are as best as I can remember them.

Today is undoubtedly one of the proudest days of your lives. It is not only a proud day for you, but for the many family members and friends who are here to support you and share in this special day.

Today should also be one of the most humble days of your lives. You are joining a noble profession where you will be called upon in a few moments to take an oath to support, protect and defend the Constitution of the United States and the constitution of this great state — and where it will be your duty to guarantee equal justice for all.

So what words of advice do I have for you?

Work hard. This is a demanding and time-consuming profession. You will climb ladders, beat your chests, slay dragons and tilt a few windmills. There will always be a big case, a big deal, a big client. Remember that the most important case you handle in your career is the case you are handling that day. It is someone's life, someone's liberty, someone's livelihood, someone's loved one.

Be prepared. You are full of knowledge, but you do not know everything and you never will. The practice of law is not a game of win at all costs. Your honesty, integrity and reputation are the greatest tools you will take into a courtroom or a boardroom. Lose your reputation for honesty and integrity, and it is lost forever.

Underpromise and overachieve.

Never lie to your clients and never lie for them.

Not everything is a battle — choose your battles wisely.

And if you remember nothing else that I say today, remember this — *do the right thing.*

Work hard. Be prepared. Give back. Give back to your profession, to your community, to yourself. You will give up too much of your life to this profession. It is demanding and time-consuming. You will come early, stay late. Clients and cases will rule your life if you let them. But only one thing matters at the end of the day or at the end of your career — you cannot get back time with your mom, your dad, your brother, your sister, your son, your daughter, your friends, your family. You cannot recapture that time, so build some in as you chase your dream.

That great philosopher, the late Tommy Reheard, my dad, said, "Money can buy a really nice dog, but it can't make him wag his tail."

And another great philosopher, Winston Churchill said, "Many of the great things in life are simple and many can be expressed in

one word — freedom, justice, honor, duty, mercy, hope." May I add pride, humility and service. Pride — in who you are, what you do and your achievements. Humility — not a lack of assertiveness nor a lack of advocacy but a lack of arrogance. Service — to your profession, your community, yourself.

As you come forward to sign the roll of attorneys, stand up straight, square your shoulders. Come forward with a humble swagger and continue that humble swagger throughout your career and throughout your life. You deserve to be proud of your accomplishments.

Be proud to be a lawyer.

Lose your reputation for honesty and integrity, and it is lost forever.



Deborah Reheard
President Reheard
practices in Eufaula.
dreheard@reheardlaw.com
(918) 689-9281

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EVENTS CALENDAR

MAY 2011

- 17 **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
- 18 **Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 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
- 19 **OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109
- OBA Bar Association Technology Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601
- 20 **OBA Military Task Force Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Deborah Reheard (918) 689-9281
- OBA Access to Justice Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jim Stuart (405) 275-0843
- 21 **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
- 23 **OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121
- 25 **OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 26 **OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- OBA Justice Commission Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563

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

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

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Criminal Voir Dire A Defense Perspective

By Cynthia Viol

Every criminal trial has at least one issue that terrifies the defense lawyer. The fear is that once the jury gets wind of that fact or piece of evidence, the defense case is over. If the defense lawyer has not explored the jurors' opinions and feelings about that issue in voir dire, it is.

In a recent trial, a non-capital murder case, my greatest fear was that my client initially called 911 and reported a suicide. He lied. He repeated the elaborate lie to detectives that day at police headquarters. In a subsequent police interview after the medical examiner's report came back with a finding of homicide, he eventually abandoned the suicide lie and gave the statement, "I shot her." The defense was accident and/or "heat of passion" manslaughter.

I told the jury in voir dire that he lied. Then I asked them how they felt about that. This line of inquiry led to an open discussion about lying and I was able to intelligently exercise my peremptory strikes. The defense did not get a jury instruction on accident, nor did we get an instruction on manslaughter. The jury had two choices: malice aforethought first-degree murder or acquittal. About 30 minutes prior to reaching a verdict, the jury sent out a note asking if "temporary loss of temper" was "malice aforethought." The jury convicted my client of first-degree murder. But raising — and dealing with — my greatest fear about the case, resulted in a jury that was able to view the evidence fairly, despite the lie and the absence of a manslaughter instruction.

IDENTIFY THE FEAR

Obviously, the first objective for the defense lawyer in voir dire is to identify the lawyer's fears as they relate to the issues in the case. The second objective is to identify the prospective

jurors' fears as it relates to the issues in the case. The goal is to seat as many jurors as possible who can put themselves in the defendant's shoes and see through his eyes. To do that, the lawyer must discover each prospective juror's vulnerability.

For example, in a rape or child-sex case it is generally the men who will most likely fear, and identify with, the defendant's vulnerable position. To open up the discussion, ask the initial question, "How many of you men have *never* thought about how easy it would be for someone to accuse you of rape?" There are usually one or two men who will say the thought has never crossed their mind. However, most of the men will say they have at least thought about it. Ask those men, "How do you feel about that?" Some men respond better to the question, "What do you *think* about that?" Let them talk. After this discussion, follow up with the question, "How would you defend yourself against a charge of rape or sexual impropriety?" The common response is that DNA evidence would prove their innocence. When asked, "What if there isn't any DNA evidence — what if it is just your word against hers?" the men's eyes get very big and they begin to see the case through the defendant's eyes. In one sexual abuse trial, a male juror responded, "I'd hire *you*" which made everyone laugh and the jurors began to open up and talk more freely. Never underestimate the power of natural and spontaneous humor in voir dire.

OBSTACLES TO SEATING A FAIR AND IMPARTIAL JURY

Two of the biggest obstacles to seating a fair and impartial jury in a criminal case in Oklahoma can be the law and the immense discretion the law gives to district judges in conducting voir dire. The Court of Criminal Appeals has consistently recognized that “[t]he purpose of voir dire examination is to ascertain whether there are grounds to challenge prospective jurors for cause and to permit the intelligent use of peremptory challenges.”¹ However, the court has also consistently held “[t]he manner and extent of voir dire is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion.”² The Court of Criminal Appeals has repeatedly stated that “[t]he trial court may properly restrict questions that are repetitive, irrelevant or regard legal issues upon which the trial court will instruct the jury.”³ Thus, in Oklahoma, the trial judge has almost unfettered discretion to decide whether a particular inquiry is “proper” or “improper” and restrict defense counsel’s questioning of the jury panel accordingly.

This problem is compounded by the fact that most of the voir dire case law in Oklahoma arises out of capital murder cases and involves whether a prospective juror can consider all three punishments — life, life without parole, and death — upon conviction for first-degree murder. For all other felony jury trials, there is little case law to aid the judge in exercising his discretion in determining whether a question is “proper” or “improper.”

The law is clear that a juror who cannot follow the law is unqualified to serve. However, in *Nauni v. State*, the Court of Criminal Appeals held that the trial court does not abuse its discretion in restricting “voir dire questioning regarding legal issues the trial court had to instruct the jury upon.”⁴ The holding in *Nauni* appears to control in trial courts in Oklahoma, despite the more recent case of *Eizember v. State*, in which the Court of Criminal Appeals acknowledged “...an important aspect of voir dire is to educate prospective jurors on what will be asked of them under the law.”⁵

The duty to educate the jury on the applicable law appears to rest solely with the judge — not defense counsel.⁶ In regard to defense counsel, the *Nauni* case seems to control and results in defense counsel standing before a sea of unknown faces belonging to individuals

who have already assured the trial judge and the prosecutor they can follow the law, but who are usually ignorant of the law they have agreed to follow.

The case of *Patton v. State* painfully illuminates defense counsel’s dilemma.⁷ In *Patton*, defense counsel was not allowed to inquire whether the prospective jurors could give meaningful consideration to lesser included offenses to murder in the first degree. The Court of Criminal Appeals determined that such restriction was not error and that such inquiry by defense counsel was improper. The Court of Criminal Appeals reasoned that the jurors’ agreement to follow the law in general “...indicates to us each juror indicated he or she could consider a lesser included instruction.”⁸ Although there may be a prospective juror out there in Oklahoma somewhere who will tell a judge or prosecutor that he or she will *not* follow the law in general, I have never met one. I have met numerous prospective jurors who, when adequately informed of the applicable law, have stated they could not in good conscience follow that law.

This becomes problematic for the defense in regard to the issue of punishment. Under the holding in *Nauni*, many trial judges routinely prohibit the defense attorney from informing prospective jurors of the minimum applicable punishment and then asking if they could consider that punishment for someone they found guilty beyond a reasonable doubt of that offense. When the defense is prohibited from informing the jury of the applicable minimum punishment, a prospective juror’s assurance that he or she will follow the law and consider the minimum punishment, without knowing the minimum punishment, is hollow assurance indeed. This is particularly onerous when your client is charged with an offense for which there is no minimum punishment.

In one of my sexual abuse jury trials in Oklahoma County, the judge initially allowed me to ask prospective jurors if they could consider no time in prison for someone convicted of sexual abuse of a child. It was only after numerous jurors indicated they could not consider no time in prison for someone convicted of child sexual abuse that the judge shut down that line of questioning. He then “rehabilitated” the jurors with a general “will you follow the law” admonishment. Arguably, each one of those jurors should have been removed for cause for an inability to consider the full range of punishment.

There appears to be at least one exception to the *Nauni* rule. The Court of Criminal Appeals has determined that it is not error to allow the prosecution to voir dire the jury on the law of direct and circumstantial evidence — law upon which the trial court instructs the jury in almost every criminal case.⁹ In *Dodd v. State*, the court held that the state has the “...right to find out if any prospective jurors were unable either as a matter of principle or simple misunderstanding, to give circumstantial evidence the same weight accorded to direct evidence, as the law would require them to do.”¹⁰ If it is proper for the state to tell the jury the law on direct and circumstantial evidence to determine if the jurors can follow the law as given, it is difficult to understand why defense counsel cannot inform the jury of the minimum punishment applicable to the offense on trial to determine if the jurors can consider the minimum punishment for that offense.

Moreover, in regard to punishment, OUJI-CR 1-5, 12 Alternate 1 (No Death Penalty) directs trial courts to inform prospective jurors of the maximum punishment available for the charged offense — but not the minimum punishment. Presumably, under OUJI-CR 1-5, the prosecution can inform, ask and qualify prospective jurors on the specific applicable maximum punishment, but defense counsel in Oklahoma County were routinely prohibited from informing, asking and qualifying prospective jurors on the specific applicable minimum punishment. However, the Oklahoma Court of Criminal Appeals in a recent, unpublished opinion, addressing this issue of first impression found that “...in single-stage trials, non-capital defendants must be allowed during voir dire to investigate possible sentencing bias and unwillingness to follow the law among prospective jurors, including unwillingness to consider the entire legally authorized sentencing range(s) at issue in a case.” *Frye v. State*, Case No. F-2009-998, delivered May 5, 2011 (unpublished). Although the opinion was ordered “not for publication” and is not precedent, the court’s language in *Frye* provides some persuasive authority which defense counsel may rely upon when seeking to inform prospective jurors of the specific minimum punishment in a case and then inquiring whether those jurors can consider the minimum punishment. If they cannot, they should be challenged for cause. It is an issue that should be raised, and preserved, in every criminal trial.

JURORS’ DEFINITION OF ‘BEYOND A REASONABLE DOUBT’

Another issue in Oklahoma law which is problematic for the defense is the well settled law that prohibits defining “beyond a reasonable doubt” for the jury.¹¹ If the law does not define “beyond a reasonable doubt,” it necessarily follows that the law allows jurors to define it for themselves.

In a case in which the defense objective is acquittal, it is imperative that defense counsel have some knowledge regarding each individual juror’s definition of “beyond a reasonable doubt” or how high each juror sets the bar on “beyond a reasonable doubt.” Without that knowledge, defense counsel cannot intelligently exercise peremptory strikes.

I have developed a question that gives insight into each prospective juror’s opinion and beliefs regarding the “beyond a reasonable doubt” standard. To date, only two judges have refused to allow me to ask the question. Choose a juror at random and ask, “As a juror, what would be your greatest fear? 1) That you would send an innocent man to prison or 2) That you would let a guilty man go free?” Regardless of the answer given, always ask, “Why?” Then ask the entire panel, “Who disagrees with Mr. Jones?” Always ask why they disagree or agree. To those who choose option one (innocent man to prison) assign a number value of “1.” To those who choose option two (guilty man go free), assign a number value of “10.” The final question in voir dire is always, “Who considers themselves to be a leader?” Obviously, defense counsel wants a jury of “1s” who consider themselves to be leaders.

The theory behind the question is that jurors who fear sending an innocent man to prison will have a higher “beyond a reasonable doubt” standard than those who fear letting a guilty man go free. If I could ask only two questions in voir dire, I believe I could intelligently exercise my peremptory strikes with the answers to these two questions.

PRESERVATION OF ERROR

The lack of published case law dealing with non-capital felony voir dire issues is a definite problem in Oklahoma — for trial judges and defense lawyers. However, the defense bar bears a portion of the blame for the problem because criminal defense lawyers often fail to preserve potential voir dire error for appeal.

In regard to denial of challenges for cause, the law is clear. In order to preserve the error, trial counsel must 1) exercise a peremptory strike on the challenged juror, 2) request an additional peremptory strike, 3) identify for the record by name and number the juror sitting on the jury that would have been struck if the additional peremptory strike had been granted, 4) give a reason the sitting juror would have been struck (this is where the above question on beyond a reasonable doubt can become even more valuable), 5) exhaust all peremptory challenges and 6) refuse to pass the jury for cause.¹²

In regard to preserving error upon the trial court's restriction of defense counsel's voir dire, always prepare a detailed voir dire outline for trial. I do not write out opening statement, final argument, direct examination or cross-examination. But I do not go to trial without a written voir dire outline.

The outline allows defense counsel, upon restriction of voir dire, to approach the bench and read into the record each and every question or questions defense counsel would have asked if the court had not restricted voir dire. Defense counsel can then state into the record the following: "I need to ask each and every juror these questions in order to unearth challenges for cause and to intelligently exercise my peremptory strikes." And further: "This restriction of voir dire by the court violates my client's right to a fair jury, a fair trial and effective assistance of counsel guaranteed under the United States and Oklahoma Constitutions."

It is elementary that, in order to preserve potential voir dire error for appeal, the voir dire must be taken down by the court reporter. There is no reason a reasonably competent criminal defense trial lawyer would waive a record of voir dire. But it is done on a regular basis in Oklahoma trial courts. Never waive a record in voir dire!

Although there is clearly a lack of published Court of Criminal Appeals case law addressing voir dire issues applicable to non-capital cases, there are two important published Court of Criminal Appeals cases favorable to the defense which must be read by every criminal defense lawyer who tries criminal cases in this state: *Mitchell v. State*, 136 P.3d 671 (Okla. Cr. 2006) and

Johnson v. State, 218 P.3d 520 (Okla. Cr. 2009). Also, the Court of Criminal Appeals' language in the recent, unpublished case of *Frye v. State* may also prove helpful to defense counsel when the trial judge seeks to impose strict time limitations on defense counsel in voir dire. *Frye v. State*, Case No. F-2009-998, delivered May 5, 2011 (unpublished). Read and understand these cases and take a copy to court with you.

Finally, when you stand before 12 jurors in final argument and prepare to place your client's life into their hands, always remember these are the people you have chosen. Do everything in your power in voir dire to learn as much as you can about them. And then trust them to do their job — just as your client has trusted you to do yours.

1. *Patton v. State*, 973 P.2d 270 (Okla. Cr. 1998); *Duvall v. State*, 825 P.2d 621, 631 (Okla. Cr. 1991), *cert denied*, 506 U.S. 878, 113 S.Ct. 224, 121, 121 L.Ed.2d 161 (1992); *Mayes v. State*, 887 P.2d 1288, 1298 (Okla. Cr. 1994). See *Warner v. State*, 144 P.3d 838 (Okla. Cr. 2006); *Golden v. State*, 127 P.3d 1150, 1154 (Okla. Cr. 2006); *Dodd v. State*, 100 P.3d 1017, 1029 (Okla. Cr. 2004).
2. *Black v. State*, 21 P.3d 1047, 1057 (Okla. Cr. 2001); *Patton v. State*, 973 P.2d 270, 280 (Ok. Cr. 1998).
3. *Black v. State*, 21 P.3d 1047, 1057 (Okla. Cr. 2001); *Nauni v. State*, 670 P.2d 126, 130 (Okla. Cr. 1983).
4. *Nauni v. State*, 670 P.2d 126 (Okla. Cr. 1983).
5. *Eizember v. State*, 164 P.3d 208, 221 (Okla. Cr. 2007).
6. See *Johnson v. State* 218 P.3d 520 (Okla. Cr. 2009).
7. *Patton v. State*, 973 P.2d 270 (Okla. Cr. 1998).
8. *Patton v. State*, 973 P.2d 270 (Okla. Cr. 1998), citing *Allen v. State*, 871 P.2d 79, 90 (Okla. Cr. 1994), *cert denied*, 513 U.S. 952, 115 S.Ct. 370, 130 L.Ed.2d 322 (1994).
9. See OUJI-CR 9-2, 9-3, 9-4, 9-5.
10. *Dodd v. State*, 100 P.3d 1017, 1029 (Okla. Cr. 2004), citing OUJI-CR No. 9-4.
11. *Harris v. State*, 84 P.3d 731 (Okla. Cr. 2004); *Romano v. State*, 909 P.2d 92 (Okla. Cr. 1995); *Spitznos v. State*, 666 P.2d 1307 (Okla. Cr. 1983); *Wallace v. State*, 250 P.2d 484 (Okla. Cr. 1952); *Abbott v. Territory*, 94 P. 179 (1908).
12. *Jones v. State*, 201 P.3d 869 (Okla. Cr. 2009); *Browning v. State*, 134 P.3d 816 (Okla. Cr. 2006); *Grant v. State*, 58 P.3d 783 (Okla. Cr. 2002); *Warner v. State*, 29 P.3d 569 (Okla. Cr. 2001).

ABOUT THE AUTHOR



Cynthia Viol is the roving conflict/overload attorney for western Oklahoma for the Oklahoma Indigent Defense System (OIDS). She has worked as an assistant Dallas County public defender, trial attorney for the Texas State Counsel for Offenders and an assistant Oklahoma County public defender. She was

a founding member, past-secretary and past-president of the Oklahoma County Criminal Defense Lawyers Association. She graduated from Texas Tech University School of Law in 1986.

REGISTRATION AND
CONTINENTAL BREAKFAST

APPELLATE LAW AS A
"SPECIALTY" - OVERVIEW OF
NATURE OF THE PRACTICE,
SKILL SETS AND ETHICS
INVOLVED IN APPELLATE
PRACTICE (ETHICS)
DAWN HALLMAN,
HALLMAN & ASSOCIATES, P.C.,
NORMAN

BREAK

APPELLATE LAWYERS AT TRIAL -
DISCUSSION OF THE VALUE OF
GETTING AN APPELLATE
ATTORNEY INVOLVED IN THE
CASE PRIOR TO APPEALS
MARYGAYE LEBOEUF,
ATTORNEY AT LAW,
OKLAHOMA CITY

8:30 a.m.

9

9:50

10

OBA/CLE PRESENTS

ADVANCED APPELLATE PRACTICE

PROGRAM PLANNER/MODERATOR

RICHARD J. GORALEWICZ, LEGAL AID SERVICES OF OKLAHOMA,
CASHION

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OKC:
OKLAHOMA BAR CENTER
1901 N. LINCOLN BLVD.

2

JUNE

TULSA:

RENAISSANCE HOTEL
6808 S. 107TH E. AVE

3

JUNE

ARGUING AGAINST (OR IN THE
ABSENCE OF) PRECEDENT -
TACTICS, STRATEGIES AND
ETHICS OF ADVOCATION FOR
NEW OR NOVEL LEGAL THEORIES
OR FOR CHANGES IN EXISTING
LAW (ETHICS)

PROFESSOR LAURIE JONES,
OKLAHOMA CITY UNIVERSITY
SCHOOL OF LAW, OKLAHOMA CITY

10:50

NETWORKING LUNCH
(INCLUDED IN REGISTRATION)

11:40

APPEALS OUTSIDE THE RECORD -
ADDRESSING POST-
CONVICTION MOTIONS IN
CRIMINAL CASES AND APPEALS
ON ISSUES BEYOND THE TRIAL
COURT RECORD

CINDY DANNER,
OKLAHOMA INDIGENT DEFENSE
SYSTEM, NORMAN

12:10

POWER OF STORY - USE OF
STORYTELLING TECHNIQUES IN
LEGAL ADVOCACY
PAULA WOOD,
LEGAL AID SERVICES OF OKLAHOMA,
OKLAHOMA CITY

1

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\$175 6 MCLE/1.5 ETHICS CREDIT

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BREAK

ORAL ARGUMENT - A MOCK
ORAL ARGUMENT IN A FEDERAL
CIVIL RIGHTS/EMPLOYMENT CASE
AND FOLLOW-UP DISCUSSION
RAND EDDY,
EDDY LAW FIRM, OKLAHOMA CITY
MICHAEL AVERY,
MCAFFEE & TAFT, OKLAHOMA CITY

ADJOURN

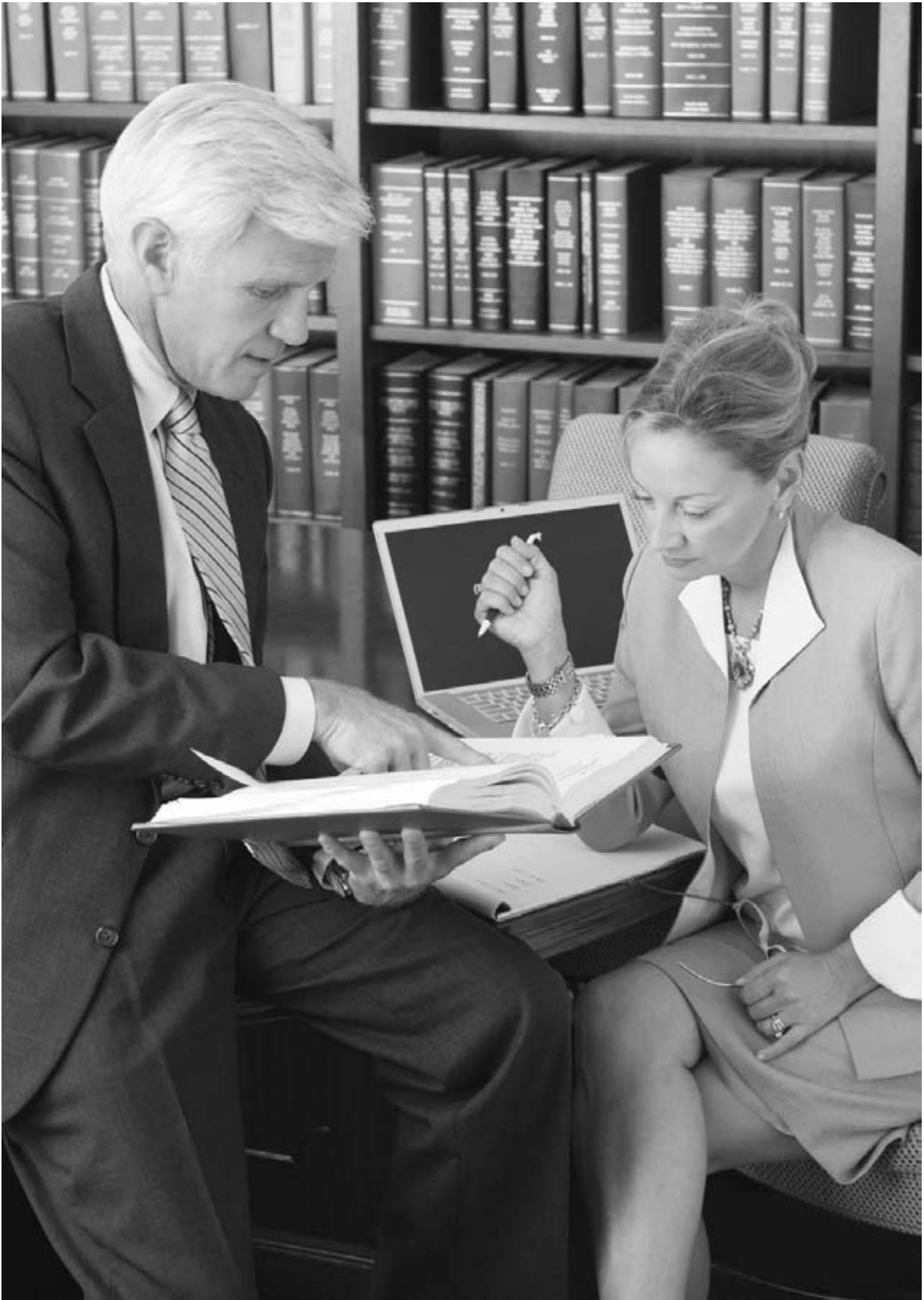
1:50

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2:50

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What Do You Mean ‘Dismissed’?

By Suzanne P. Heggy

Initiating and perfecting a criminal appeal requires more than just filing a petition in error or preparing a brief for the court’s review. Time limitations, record completion, the execution and filing of proper documents, pleadings and motions, briefing rules and specifications, *inter alia*, all constitute part of appellate counsel’s duty to ensure that the criminal appeal or appellate proceeding filed in the client’s case is properly perfected and submitted for review.

On average, the Oklahoma Court of Criminal Appeals reviews and disposes of 1,200 cases annually. An appeal to the court may be taken by a defendant as a matter of statutory right from any judgment against him, wherein any intermediate decision or order of a court made in the progress of a criminal case may be reviewed.¹ The time and manner of exercising the right to appeal in a criminal matter is governed by statute, the provisions of which are mandatory, and appeals must be taken and filed in the manner prescribed by law.²

The Legislature has given the Court of Criminal Appeals authority to establish the procedure for filing appeals and original proceedings in criminal matters. Those appellate procedures are given the force of statute.³ These procedures are set forth in the “Rules of the Court of Criminal Appeals,” and can be found in the appendix of Chapter 18 of Title 22 of the Oklahoma Statutes and online at www.okcca.net/online/rules/rulesrvr.jsp. The very first rule, Rule 1.0, sets out the format for citation to the rules: “Rule_____, *Rules of the Court of Criminal Appeals*, Title 22, Ch.18, App. (year).” Rule 1.0(D). In this article, all rule references are to these “Rules of the Oklahoma Court of Criminal Appeals.”

Once the client decides to appeal a criminal conviction, compliance with the court’s rules determines whether the appeal will be submitted for resolution or summarily dismissed.

Regardless of the ability to rectify such an error, the last thing an incarcerated client wants to hear is that his attorney’s inability to follow the rules has caused a delay in the resolution of his claims, or, even worse, the dismissal of his request for relief.

The court routinely dismisses appellate criminal proceedings, or issues show cause orders relating to such proceedings, as a direct result of counsel’s failure to follow the court’s rules. The rules matter, and are essential to the proper consideration and resolution of a defendant’s issues. Compliance is mandatory, and failure to follow the rules could result in dismissal of the appellate proceeding.

This article focuses on the initiation and perfection of appeals (and other criminal proceedings) which are properly presented to the Court of Criminal Appeals for resolution. While those well-versed in appellate criminal practice will likely find very little use for this discourse, those attorneys new to practice in this area, and those representing a client in a criminal matter who feel they are practicing outside of their “comfort zone” may find this article useful.

FIRST THINGS FIRST: KNOW WHAT YOU’RE FILING

Section I is titled “General Rules of the Court and Definitions.” Start here. Pay particular attention to Rule 1.2 which distinguishes the method

for bringing appeals and original actions. The various types of criminal appellate proceedings are defined at Rule 1.2., in detail, with statutory references and notations. The general categories include regular appeals, original proceedings, post-conviction appeals, and all other appeals. Rule 1.2(A) – (D). Each general category contains several specific types of appeals or proceedings.

Rule 1.2 defines “regular appeals” as felony and misdemeanor appeals (including capital cases), certiorari appeals, state and municipal appeals, juvenile and youthful offender appeals, resentencing appeals and requests for expungement of records. Rule 1.2(A). Original proceedings, wherein the party seeks extraordinary relief, include applications for writs of prohibition, mandamus, and *habeas corpus*. Rule 1.2(B). Post-conviction appeals include capital and non-capital post-conviction appeals. Rule 1.2(C). The “all other appeals” category encompasses appeals from revocation of parole, bail pending trial or appeal (*habeas corpus*), disqualification of judges, revocation of a suspended sentence, acceleration of a deferred judgment and sentence, drug court terminations, contempt judgments and sentences, orders for detention for non-payment of fines or costs (Rule 8), and judicial review of prison disciplinary proceedings revoking earned credits. Rule 1.2(D).

Determine the type of appeal or criminal proceeding to be filed in each client’s situation, and pinpoint the specific rule which outlines the method and procedure for pursuing that type of action. Rule 1.2 references the applicable rules governing the procedure for bringing the respective appeals and original actions. For example, Rule 1.2(A)(1) specifies that felony and misdemeanor appeals are governed by sections II and III of the court’s rules. Generally speaking, all of the corresponding information needed to properly initiate and perfect the client’s appeal or original proceeding will be found within the cited applicable rule. That being said, the inevitable exceptions to each of the general rules are also categorized by type of appeal. Remember: specific controls over general. Thus, in the section titled “Felony and Misdemeanor Appeals”, Rule 1.2(A)(1) provides that the specific provisions of sections VII and IX control in juvenile and capital cases, respectively, over the general provisions of sections II and III. It is the lawyer’s job as legal

counsel to know which rule applies to a client’s situation.

TIMING IS EVERYTHING

Next, counsel should review Rule 1.4. This section of the rules is titled “Computation of Time for Appeals” and, like Rule 1.2, it is sub-categorized. The time limitations at Rule 1.4 must be read in conjunction with the specific rules governing the type of appeal being filed, or counsel risks missing the filing deadline. Word to the wise: **Do not ignore the time limitations.**

Misdemeanor and non-capital felony appeals must be perfected by filing of the petition in error, original record, transcripts and evidence within 90 days from the date the judgment and sentence is *pronounced*. Rule 1.4(A). State appeals (with the exception of juvenile cases), and resentencing appeals in misdemeanor and non-capital felony cases are perfected in the same manner, starting from the date of the order entered by the trial court. Rules 1.4(C)(1) & (2). Capital appeals must be perfected within six months from the date the judgment and sentence is *pronounced*, with the filing of the petition in error, original record, transcripts and evidence, and trial judge’s report. Rule 1.4(B). A resentencing appeal in a capital case is to be perfected in the same manner as a capital appeal. Rule 1.4(C)(2).

Certiorari appeals are to be perfected as set forth at Rule 4.3(A), and the filing date commences on the date the trial court ruled on the application to withdraw plea. Perfection of certiorari appeals requires the filing of a petition for writ of certiorari, an original record (including a copy of the order denying the application to withdraw plea), transcripts of the plea proceedings and the evidentiary hearing on the application to withdraw, within 90 days from the date the trial court ruled on the application to withdraw plea. Rule 4.3(A). In plea convictions where the death penalty is imposed, the time period for perfecting the appeal is extended to six months. *Id.*

Remember, the time limitations governing perfection of direct appeals for non-capital felonies are also applicable to appeals challenging the revocation of a suspended sentence (Rule 1.2(D)(4)), challenges to alleged errors in an acceleration proceeding (Rule 1.2(D)(5)(b)), drug court terminations (Rule 1.2(D)(6)), and contempt cases (Rule 1.2(D)(7)).

Juvenile appeals are considered *sui generis*, and time is of the essence. Time limitations are shorter for these appeals. The record in a juvenile matter must be completed within 40 days of the date the trial court enters its order. Perfection of juvenile appeals must be completed within 60 days of the date the trial court enters a final order adjudicating a juvenile as delinquent or certifying or denying certification of a juvenile to stand trial as an adult or to be sentenced as an adult. Rule 7.3(A). Perfection requires the timely filing of a petition in error, certified copy of the original record, transcript of the proceedings and a supporting brief. *Id.*

Applications for extraordinary relief must be filed within 30 days from the date the trial court's order is filed in the district court. Rule 10.1(C). A petition in error seeking post-conviction relief must be filed with the court within 30 days of the date the final order of the district court is filed with the district court clerk. Rule 5.2(C)(2). The same is true for filing an appeal from a district court review of prison disciplinary proceedings. Rule 15.3(A).

The state is limited in the type of appeals it is allowed to file. Rule 6.1 *et seq.*; see also, 22 O.S. 2001 §§1053 and 1089.1. The state must announce, in open court (if the ruling is made in open court) its intent to appeal the decision of the ruling magistrate,⁴ and the appeal must then proceed through the district court before being submitted to the Court of Criminal Appeals for review.⁵ The state's failure to follow the procedure set forth at section 1089.2 constitutes a waiver of the right to appeal and the magistrate's order becomes final. There is no appeal from this procedural default. The state must also file a notice of intent to appeal and designation of record in the trial court, and failure to timely file these documents constitutes waiver of the right to appeal. Rule 2.1(D).

Calculating a filing deadline from any date other than the one specified in the court's rules could cause the appeal or proceeding to be untimely filed and may ultimately result in dismissal.

DO IT RIGHT THE FIRST TIME (OR YOU'LL BE DOING IT AGAIN!)

Filing of the notice of intent to appeal and designation of record in the **trial court** is required to initiate the client's appeal. A certified copy of the trial court filing must then be filed with the Court of Criminal Appeals within 10 days of the district court filing. Rules 2.1(B) & 2.5(A). It is trial counsel's responsibility to complete and file the notice of intent to appeal and designation of record in the district court. Rule 1.14(D)(1). However, appellate counsel must verify that the trial counsel has filed these pleadings. Filing of the notice of intent to appeal and designation of record in the trial court is jurisdictional, and failure to timely file waives the appeal. Rules 2.1(B) & 2.5(A). If trial counsel has not filed these jurisdictional pleadings, appellate counsel will have to obtain a recommendation for a direct appeal out of time from the trial court, and then be granted an appeal out of time from the Court of Criminal Appeals before the client's appeal can proceed. Rules 2.1(E)(1) & (E)(2).

A similar problem arises in certiorari appeals. Before an appeal of a guilty plea or plea of *nolo contendere* can be initiated in the Court of Criminal Appeals, the defendant must have filed an application to withdraw plea in the trial court, and the trial court must have ruled on that application. Rules 4.2(A) & (B). Verify that the application to withdraw plea has been filed and ruled upon. If not, counsel will have to obtain a recommendation for a certiorari appeal out of time from the trial court, and then be granted an appeal out of time from the Court of Criminal Appeals. Rules 2.1(E)(1) & (E)(4). Only then can counsel proceed with the client's appeal.⁶ Upon payment of the filing fee, or submission of a pauper's affidavit or the trial court's determination of indigency, the court clerk will issue a certificate of appeal which contains due dates for the filing of the petition in error, the original record and the transcripts of the trial proceedings. Rule 2.1(B).

Once the client's appeal or appellate proceeding has been properly initiated, a whole new set of due dates and time limitations come

“Applications for extraordinary relief must be filed within 30 days from the date the trial court's order is filed in the district court.”

into play. It is appellate counsel's responsibility to ensure that **all** records necessary to complete an appeal are filed. Rule 2.1(C). The message is repeated throughout the court's rules. *See* Rules 2.1(C), 2.4(B) & 3.2(C)(3). Rule 3.2(C)(3) provides that appellate counsel is required to "constantly monitor" the preparation of the appeal record, and is "ultimately responsible" for it being timely filed. Rule 2.4(B) notes that other provisions of the court's rules do not "abrogate the ultimate responsibility of the appellate attorney" to ensure timely filing of the records necessary for commencing an appeal. While the rules are quite specific as to the duties of the district court clerk (Rule 2.2(A)) and the court reporter (Rule 2.2(B)) to assemble the record (including exhibits and transcripts) for transmission to the Court of Criminal Appeals for review, the rules also specify that appellate counsel is ultimately responsible for ensuring that the appeal record is complete and filed in a timely manner. Rules 2.4(B) & 3.2(C). Counsel is charged with taking appropriate action to guarantee the timely filing of the appeal record, and is required to use available court procedures to secure the filing of a timely, complete record. Rules 2.4.B. & 3.2.C(3).

Attorneys should become familiar with the rules regarding preparation and transmittal of the appeal record. The appeal record in non-capital felony and misdemeanor cases must be ready for transmission within 90 days from the date judgment and sentence is imposed. Rule 2.3(A). In capital cases, the time limitation is six months, *id.*, and in juvenile cases the record must be ready for transmittal in 40 days. Rule 7.3(A). The record in an extraordinary writ proceeding must be filed with this court within the 30-day time period for filing a request for relief, and the petitioner is responsible for ensuring that the record is filed. Rule 2.3(B)(4).

Appellate counsel is also obligated to ensure that the correct number of copies is filed, and that the proper parties are served. Rules 1.9(A) & (B). The court will not consider any pleadings, brief or motions submitted without proof of service to the adverse parties. *See also*, Rules 3.12(C), 3.4(A), 4.4, 7.5(C), 8.8(D)(5), 10.3, & 15.3(E).

The rules specify in great detail the contents, style and time limitations for filing a petition in error in a direct appeal (Rule 3.1), a certiorari appeal (Rule 4.3), a post-conviction appeal (Rule 5.2(C)), appeals in juvenile matters (Rule 7.5), appeals in Rule 8 proceedings (Rule

8.8(D)), capital post-conviction appeals (Rule 9.7(A)), extraordinary writs (Rule 10.1(C)), and appeals from orders reviewing prison disciplinary proceedings (Rule 15.3). Generally speaking, the petition in error should contain specifics relating to the trial court proceeding from which the appeal is lodged, including the trial court case number and county, the judge issuing the final judgment or order being appealed, the charged offense, the judgment and sentence imposed, the statutory authority and type of appeal being filed, and the nature of the relief the appellant is seeking.

Filing the client's notice of intent to appeal and designation of record in the trial court is jurisdictional in a direct appeal. Also jurisdictional is the filing in the Court of Criminal Appeals the petition in error,⁸ petition for writ of certiorari,⁹ or post-conviction appeal petition in error.¹⁰ Failure to **timely** file constitutes waiver of the right to appeal. If the appeal or other appellate procedure is not timely filed, the court will decline appellate jurisdiction and dismiss the action. *See* Rule 3.12(B)(1). A motion to file the client's petition in error out of time will not be granted.

Specific types of appeals or requests for relief require the filing of certain designated pleadings, transcripts, orders or other documents in order to be perfected. Determine what specific documents are required for the type of appeal or request for relief needed. To complete a direct appeal, file a petition in error, an original record, and a transcript of evidence. Rules 3.2(A) – (C). Completion of a certiorari appeal requires the filing of a petition for writ of certiorari, an original record, a transcript of the proceedings in which the plea of guilty or *nolo contendere* was taken, and a transcript of the evidentiary hearing on the application to withdraw plea. Rule 4.3(A). Post-conviction appeals require the filing of a petition in error with supporting brief, *with a certified copy of the order attached*.¹¹ Rule 5.2(C)(2). Juvenile appeals, which are assigned to the court's accelerated docket, are perfected upon the filing of a petition in error, a certified copy of the original record, a transcript of any recorded proceedings, and an application for accelerated docket (Form 13.14), which serves as the appellant's brief. Rules 7.3(A) & 7.5(C).

It is the petitioner's burden, in a case where relief is sought by way of extraordinary writ, to ensure that the record is filed **with** the petition seeking extraordinary relief. Rules 2.3(B)(4) &

10.1(C). Petitioner must file a petition, a supporting brief, a certified copy of the original record applicable to the writ, including a certified copy of the order entered by the trial court, a certified copy of any supporting evidence presented to the trial court in support of the request for relief, and an original transcript of any proceedings conducted on the petition, if applicable. Rule 10.1(C).

Matters assigned to the accelerated docket require the filing of an application for accelerated docket (which serves as the party's brief), and an accelerated docket waiver (unless it is a case automatically assigned to the accelerated docket)(Rule 11.5), in addition to any other documents required with respect to the specific type of appeal being filed.¹² The application for accelerated docket (fast track) only serves as the appealing party's brief. It does not operate as a substitute for the petition in error, which must still be filed.

Requests for expungement of criminal appeal records require filing of an application for expungement and a certified copy of the trial court's order recommending expungement. Rule 14.2. Appeals seeking review of prison disciplinary proceedings require the filing of a petition in error, with a certified copy of the district court's final order attached, a supporting brief, and a copy of the applicable appeal record. Rule 15.3(A). Failure to include the proper documentation could delay resolution of the client's issue and may result in dismissal of the appeal.

BUT WAIT, THERE'S MORE. . .

If these rules, in general, are not enough to make counsel re-think practicing criminal appellate law, there are other pitfalls that may catch unaware those unfamiliar with the court's rules and procedures. These are listed in no particular order, but are common mistakes which routinely surface in appellate filings.

- ◆ The court does not recognize the mailbox rule. The client's writ, appeal, application, petition, motion, etc., must be received and filed in the court clerk's office on or before the due date. Mailing it **on** the due date is not sufficient.

- ◆ A request for an appeal out of time is **always** filed as an application for post-conviction relief. This includes requests for a direct appeal, certiorari appeal, or post-conviction appeal out of time. Rule 2.1(E). There is no "out of time" appeal for extraordinary writs that were not

timely filed, state appeals which were not properly perfected, or untimely petitions for rehearing.

- ◆ A post-conviction appeal seeking an appeal out of time must have certified copies of both the trial court order and the application filed in the trial court attached to the application for post-conviction relief filed with this court. If these documents are not attached to the application, counsel will receive an order directing him to provide a sufficient record or show cause why the appeal should not be dismissed. Rule 2.1(E)(1).

- ◆ Parties desiring to represent themselves in a direct appeal can only do so after obtaining permission from the trial court. Rule 1.16.

- ◆ Only *pro se* appellants/petitioners and licensed attorneys may sign and file pleadings with the court clerk. Rule 1.6.

- ◆ If a party is represented by appellate counsel, only briefs submitted by counsel will be accepted for filing. Appellate counsel must certify that any *pro se* arguments submitted for filing comply with Rule 3.4(E).

- ◆ A motion to dismiss a pending appeal made by the appellant/petitioner must have attached to the motion an affidavit personally executed by the appellant/petitioner acknowledging waiver of the right to appeal and the bar to raising the issues on appeal at a future time. Rule 3.12.B.(2).

- ◆ The client has 20 days to file a petition for rehearing, or the decision becomes final. Rule 3.14. Petitions for rehearing are only allowed in regular appeals, as defined at Rule 1.2(A). There is no petition for rehearing allowed in a post-conviction appeal, a request for extraordinary relief, a Rule 8 hearing, a petition for review of a disciplinary proceeding, revocation of suspended sentence appeals, acceleration of deferred sentence appeals, drug court termination appeals, or contempt citation appeals. Rule 3.14(E).

- ◆ The time to appeal an adverse ruling begins running from the date the original order denying relief is either pronounced or filed, depending upon the rule requirement for the specific filing. Filing a petition for rehearing, motion for reconsideration, motion to review prior ruling, etc., in the trial court will not extend the filing date for purposes of perfecting the appellate proceeding.

◆ There are specific rules governing the contents of an appellate brief addressing everything from the length of the brief to the type size. Follow the rules or the brief will be stricken or returned for appropriate corrections. Rule 3.5.

◆ Section XIII of the rules contains forms which are required to be used in Oklahoma criminal cases. Rule 13.1 *et seq.*

◆ Once counsel enters an appearance on behalf of an appellant/petitioner, he or she is required to continue representation of the appealing party until completion of the appeal or other appellate criminal proceeding, or upon entry of appearance of substitute counsel to represent the appellant/petitioner. Rule 3.6(A).

SO, WHAT'S NEXT?

Although it may not seem like it, following the rules to properly initiate and perfect the client's appellate criminal proceeding is much easier than trying to undo a mistake which has caused the dismissal or delay of the client's criminal matter. The rules serve a purpose. They level the playing field and provide an orderly, consistent, timely procedure for appellate review of criminal matters. There should be no surprises, on either side, as to how the appellate criminal process works. The responsible parties can determine the extent of their duties to facilitate the appeals process by simply reading the rules. For the most part, getting the appellate process started just requires that counsel follow directions.

1. 22 O.S. §1051(a); *White v. Coleman*, 1970 OK CR 133, ¶11, 475 P.2d 404, 406 "[I]t is to be remembered that appeal is a creature of statute and exists only when expressly authorized." See also, *Anderson v. District Court of Oklahoma County*, 1967 OK CR 72, ¶2, 427 P.2d 437; *Knight v. Page*, 1965 OK CR 68, ¶7, 402 P.2d 922; *Love v. State*, 1963 OK CR 80, ¶4, 385 P.2d 512.

2. 22 O.S. §1051(a).

3. 22 O.S. §1051(b).

4. 22 O.S.2001 §1089.2(A); Rule 2.1(D).

5. See, 22 O.S.2001 §1089.2.C.

6. In seeking out-of-time appeals, counsel must ensure that his pleadings "adequately identify the specific final orders, judgments, or sentences from which a right of appeal was allegedly lost and for which an out-of-time appeal is being requested." *Dixon v. State*, 2010 OK CR 3, ¶6 n.5, 228 P.3d 531, 532 n.5. "Any petition to this Court for an out-of-time appeal must provide sufficient information for this Court to determine whether the petitioning party is entitled to the out-of-time appeal being requested." *Id.*

7. Rules 2.1(D), 2.5(A), 4.2(D), 6.1(D)(1), 7.2, & 15.3, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2010).

8. Rules 3.1. 7.5(A), & 8.8(D)(1).

9. Rule 4.3(A).

10. Rule 5.2(C)(5).

11. The court rule does not require the filing of a record in a post-conviction proceeding. If no record is designated for transmittal to this court, the matter will be decided on the pleadings filed, which may or may not provide a sufficient record for proper review.

12. Matters automatically assigned to the accelerated docket can be found at Rule 11.2(A).

ABOUT THE AUTHOR



Suzanne P. Heggy is a staff attorney in the Orders Division at the Oklahoma Court of Criminal Appeals. She currently serves as president of the Canadian County Bar Association, vice chairperson of the OBA Law-related Education Committee and chairperson of the LRE Special Committee on Public Education. She is a 1982 graduate of UCO and a 1986 graduate of the OU College of Law.



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Location

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.....

Tulsa • May 26, 2011

Time - 5:30-7 p.m.

Location

The Center for Therapeutic Interventions
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Tulsa, OK 73145

Women Helping Women.....

Oklahoma City • June 9, 2011

Time - 5:30-7 p.m.

Location

The Oil Center – West Building
10th Floor – 2601 NW Expressway, Suite 1000W
Oklahoma City, OK 73112

.....

Tulsa • June 2, 2011

Time - 5:30 - 7 p.m.

Location

The Center for Therapeutic Interventions
4845 South Sheridan, Suite 510
Tulsa, OK 74145

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LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM





A Natural History of the *Leon* Good Faith Exception in Oklahoma

By Jim Drummond

In 1961, the U.S. Supreme Court issued its landmark decision in *Mapp v. Ohio*,¹ establishing the exclusionary rule and making clear that the “fruits of the poisonous tree” doctrine requires suppression of all illegally seized evidence. Jurisprudence since then has steadily eroded that doctrine in a variety of contexts, but nowhere more significantly than in the court’s 1984 decision of *United States v. Leon*.²

The fundamental rule of *Leon* is that an officer who relies in good faith on a search warrant that is later found to be invalid need not endure the suppression of the seized evidence, because the exclusionary rule is not inherent in the Fourth Amendment, and is instead a judge-made rule designed to deter law enforcement officers from performing unreasonable searches and seizures. The Supreme Court in *Leon* made clear that, under the U.S. Constitution, the exclusionary rule is not designed to protect criminal defendants from unreasonable searches and seizures, but to penalize and act as a deterrent to officers who engage in such conduct.³

This disjunct between individual rights and the deterrence of officers has not typically found favor in the Oklahoma Court of Criminal Appeals, and until recently it was crystal clear that Oklahoma did not recognize the *Leon* good faith exception in trial-level criminal cases.⁴ In short, *Leon* has not fared so well in Oklahoma. This article will examine the history of the *Leon* good faith exception in this state, and the cautious approach that has been taken by the Court of Criminal Appeals to departing from this exception to the exclusionary rule.

OKLAHOMA CASE LAW PRIOR TO *LEON*

The natural history of *Leon* in Oklahoma began its development largely with the 1980 Fifth Cir-

cuit decision in *United States v. Williams*.⁵ Thirteen of the 24 judges on the Fifth Circuit bench held en banc “that evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized:”

We do so because the exclusionary rule exists to deter willful or flagrant actions by police, not reasonable, good-faith ones. Where the reason for the rule ceases, its application must cease also. The costs to society of applying the rule beyond the purposes it exists to serve are simply too high in this instance the release on the public of a recidivist drug smuggler with few or no offsetting benefits. We are persuaded that both reason and authority support this conclusion.⁶

In 1983, the year before the Supreme Court decided *Leon*, the State of Oklahoma in *Hightower v. State*⁷ argued that the search pursuant to an arrest by officers not named in the warrant, though invalid, should not result in exclusion of the seized evidence because the officers arrested the defendant in good faith. The Court of Criminal Appeals rejected the good faith argument even though *Williams* was invoked as a case which the Supreme Court (prophetically) had declined to review:

The State's suggestion that the officers' good faith prevents application of the exclusionary rule supposes the officers' ignorance of the law. Formulations of the so-called "good faith" exception to the exclusionary rule do not include within their scope actions in ignorance of established law. See, e.g., *United States v. Williams*, []. . . (the officers' good faith belief must be based on articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully; the officer's unawareness of constitutional requirements would not suffice). Assuming arguendo that a good faith exception should be recognized, it would not be applicable in the case at bar.⁸

A year later, the state tried again in *Beeler v. State*,⁹ which the Court of Criminal Appeals decided less than five months before the opinion in *Leon* was handed down by the U.S. Supreme Court. In *Beeler*, the Oklahoma Court of Criminal Appeals held that the good faith exception could not save illegally seized evidence from suppression because "a majority of the United States Supreme Court has not recognized a good faith exception to the exclusionary rule, and it would be inappropriate for a state court to alter established Fourth Amendment doctrine by approving such an exception."¹⁰ The Oklahoma Court noted that theretofore the U.S. Supreme Court "has frequently required the suppression of evidence in cases which the police arguably were acting in good faith...Adoption by this court of a doctrine limiting the exclusionary rule to searches and seizures conducted 'in bad faith, as urged by the attorney general, would appear barred by *Mapp v. Ohio* [] in which the Supreme Court ruled that 'all evidence obtained by searches and seizures in violation of the [United States] Constitution is, by that same authority, inadmissible in a state court.' (367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081), and subsequent decisions applying that rule."¹¹ This makes clear that the *Leon* good faith exception would be among the first decisions making a giant leap away from *Mapp*.

THE LEON DECISION

On July 5, 1984, the Supreme Court issued *Leon*, in which for the first time a majority stated that the exclusionary rule is not a corollary of the United States Constitution and that it could be trimmed to fit fact situations where the objective of deterrence of officer violations could be met. Previous cases not requiring sup-

pression of illegally seized evidence typically involved evidence seized pursuant to laws later found unconstitutional and cases where the principle was newly announced and not applied retroactively because the contribution to police deterrence was hard to find in retroactive applications. *Leon* broke ground to identify situations where the search warrant was invalid under existing law and yet the evidence would not be suppressed because the officer acting in good faith had a right to rely on the finding of probable cause by a "detached and neutral magistrate."¹² The majority was careful to observe that good faith could not exist where the violation was knowing, deliberate or egregious.¹³ The test created was a balancing test involving "evaluation of the costs and benefits of suppressing reliable physical evidence seized by officers reasonably relying on a warrant."¹⁴ The costs were expressed as detriments to the truth-finding process,¹⁵ and the benefits as deterrents to police abuse of the Fourth Amendment provisions.

OKLAHOMA LAW SINCE LEON

Leon has been understood in Oklahoma to apply only where there is a warrant issued, as happened in *Leon*, which turns out to be invalid, and never where the search is warrantless. Two years after *Leon*, the Court of Criminal Appeals decided in *Lowry v. State*¹⁶ that where the search warrant was later found "defective in its imprecise drafting and by its failure to state the reliability of the confidential informants," the search was warrantless:

Since the search warrant was invalid, the police officers' forced entry into the appellant's residence and his subsequent warrantless arrest was unlawful. The Supreme Court has held that a warrantless arrest of an individual in his own residence is barred by the Fourth Amendment to the United States Constitution. []¹⁷ Since the appellant's arrest, in the case at bar, was procured without a warrant in his own residence, the arrest was in violation of the Fourth Amendment.¹⁸

This seems to have been an implicit rejection of *Leon* in the guise of distinguishing it, since there was, as in *Leon*, a warrant issued but later found invalid. Oklahoma decided that a search pursuant to an invalid warrant was, in effect, warrantless, an approach that has its logic but which interprets the U.S. Constitution differently than the Supreme Court. Oklahoma is of

course free to take such an approach in interpreting Oklahoma's Constitution, under Art. 2, §30, and effectively did so in *Lowry*. In dissent, Judge Bussey would have adopted and applied the good faith exception of *Leon*.¹⁹

Two years after *Lowry*, in *Farmer v. State*,²⁰ the Court of Criminal Appeals said that "a good faith exception to the exclusionary rule applies only where officers rely in good faith on a search warrant," and cited *Leon*. The court refused to extend the exception to Farmer's case, where the officers searched pursuant to the "unprivileged consent" of a third party on Farmer's premises.²¹ The Oklahoma Court still had not explicitly rejected *Leon*, yet now arguably felt compelled to acknowledge it as long as it could distinguish *Leon* from the case at bar. But in its next significant decision, in 1992, the court would be required to confront a trial court decision that *Leon* applied, in *Solis-Avila v. State*.²² Though the "trial court found that there was not enough of a factual basis stated in the affidavit to justify the nighttime execution of the search warrant," it overruled a motion to suppress in reliance on *Leon*.²³ In reversing the trial court, the Court of Criminal Appeals for the first time rejected *Leon* explicitly:

This Court . . . has never adopted the *United States v. Leon* "good faith" exception to search warrants such as in this case and we see no reason to do so at this time. We agree with appellant that the trial court erred by failing to sustain his motion to suppress after finding that the search warrant was improperly executed. Therefore, in a four-to-one (4-1) vote, we find that this case must be REVERSED and REMANDED WITH INSTRUCTIONS TO DISMISS.²⁴

Seven months after *Solis-Avila*, the court decided the *Richardson v. State* case, applying *Leon* to revocation proceedings under a more lenient view of the Fourth Amendment in post-conviction proceedings (see footnote 4 herein), overruling prior state precedents. The door seemed to crack open a bit. Even so, the Oklahoma Court continued to make it clear that *Leon* could never apply where the search was warrantless; and in 1994, in considering a warrantless arrest in *Tomlin v. State*,²⁵ the Court of Criminal Appeals held:

[T]here is no "good-faith exception" to the rule excluding illegally-obtained evidence for warrantless misdemeanor arrests. The good-faith exception in the search-and-

seizure context applies only in a very limited number of cases where officers, in good faith, rely on what appears to be a valid search warrant. []²⁶ This court has refused to extend the exception to any other types of cases. See *Farmer v. State* [(court refused to extend good-faith exception to consent searches); see also *Solis-Avila v. State* []]. An officer's good faith in making a warrantless felony arrest is not an acceptable substitute for probable cause, regardless of where he gets his information. []²⁷ If good faith cannot save a warrantless felony arrest, surely it cannot save a warrantless misdemeanor arrest, where the need for a factual basis for the arrest is much greater.

The court emphasized the presumption that all warrantless searches are presumptively unreasonable "under both federal and state constitutional law," and that the state has the burden to prove that a warrantless arrest is lawful.²⁸

RECENT HISTORY

In 2006, the Court of Criminal Appeals revisited *Leon* in the context of an anticipatory search warrant, which was not authorized by 22 O.S. § 1222 at that time. The court in *Dodson v. State*²⁹ seemed to acknowledge *Leon* when it said that "the good faith exception enunciated in *Leon* will save a valid anticipatory warrant. However, anticipatory search warrants are not authorized by Oklahoma law and are therefore not valid. Officers are assumed to have 'a reasonable knowledge of what the law prohibits. A well-trained officer in Oklahoma should have known that such warrants were not specifically allowed under our statutes.'"³⁰ The court invited the Legislature to amend § 1222 to authorize anticipatory search warrants, which would allow a search warrant to be issued to take effect on the happening of a future triggering event. The Legislature did so in 2007. In denying application of *Leon*, however, the court seemed to signal that it was moving toward acceptance of *Leon* by citing its language as authority for the principle that a warrant authorized by the statute found invalid would result in excluding evidence "only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule. *Leon* [] at 918 []. The purpose of the exclusionary rule is to 'deter police misconduct' and not 'to punish the errors of judges and magistrates.'"³¹ Judge Lumpkin dissented strongly, feeling that

anticipatory warrants were authorized under existing statutory language and that *Leon* should be applied there.

Last year, in *State v. Sittingdown*³² the defense community in Oklahoma wondered if the Court of Criminal Appeals had finally embraced *Leon* without reservation — or not. Sittingdown was searched pursuant to a civil writ, issued after a civil monetary judgment against him. The Court of Criminal Appeals stated the facts surrounding the writ and replicated its language:

The “Writ of General Execution” stated in part:

NOW, THEREFORE, You are commanded that of the goods and chattels of the said John Sittingdown, an individual, you cause the money above specified to be made; and for want of goods and chattels you cause the same to be made by EXECUTING ON THE CASH REGISTER AT THE DEBTOR’S PLACE OF BUSINESS AS WELL AS ANY CASH ON THE PERSON OF MR. JOHN SITTINGDOWN. And make return of this Execution, with your certificate thereon, showing the manner you have executed the same, within sixty days from the date hereof.

When the deputies arrived at the establishment, Appellee was leaving the bar. Deputy Swenn informed Appellee he had a paper to serve him and suggested they step back inside. Swenn asked Appellee “to take all of his money, everything out of his pockets.” When Appellee started emptying his left front pocket, a small clear baggie containing a white crystal substance (methamphetamine) was mixed in with the money. Appellee was taken into custody.³³

The Court of Criminal Appeals discussed the nature of civil writs at length and decided that the mandate to collect cash from Sittingdown’s person rendered the search reasonable.³⁴ Apparently the civil writ is similar in nature to a warrant under Supreme Court precedent. Since it was a reasonable search under the language of

the writ whose legitimate purpose was to collect money from Sittingdown, there should have been no need to discuss *Leon*. But Judge Lumpkin, writing for the majority, took the opportunity to write that *Leon* was applicable as well:

In addition to the fact that the actions of the officers were reasonable, they were also acting in “good faith” and their actions fall directly under the criteria outlined by the United States Supreme Court in *United States v. Leon* []. Since this Court has previously held. . . []³⁵ that the Federal Constitution and the Oklahoma Constitution are the same in the rights protected, we find *Leon* is applicable here. The exclusionary rule is not applied when a law enforcement officer has conducted a search in “objectively reasonable reliance” upon a search warrant issued by a magistrate and has abided by the terms of the warrant even if the warrant is subsequently determined to be invalid. [] The same rationale applies to a civil writ or order. The fruits of a search and seizure pursuant to a civil writ will not be suppressed even if the writ is subsequently found invalid if the officer acted in “objectively reasonable reliance” upon the civil writ and abided by its terms.

It is difficult to see how this can be anything other than dicta, however, because even though the majority purported to “find” that the *Leon* exception was applicable, the search was reasonable and was found valid by the court, though found invalid by the trial court

which concluded the writ did not authorize the order to Sittingdown to empty his pockets. Certainly the assertion that the federal and Oklahoma constitutions are always the same in the rights protected cannot be binding in every case — or other than dictum — simply because in the cited cases the court interpreted constitutional provisions of the two jurisdictions in a consistent manner. Nonetheless the *Sittingdown* decision caused qualified rejoicing among prosecutors and qualified dismay among defenders. This uncertainty persists.

“Certainly the assertion that the federal and Oklahoma constitutions are always the same in the rights protected cannot be binding in every case...”

In its recent decision in *Baxter v. State*, decided Aug. 23, 2010,³⁶ Judge Lewis, who dissented in *Sittingdown*, wrote the summary opinion which again refused to apply *Leon* to a warrantless search which was not valid in light of the 2009 Supreme Court decision in *Arizona v. Gant*.³⁷ The state argued that it relied in good faith on the pre-*Gant* law of *New York v. Belton*³⁸ — which law enforcement had widely viewed as *carte blanche* permission to vehicular search incident to a lawful arrest — because *Gant* was not decided until after the search in *Baxter*. But the Court of Criminal Appeals rejected this argument without dissent, quoting *Gant*:

The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law enforcement "entitlement" to its persistence.³⁹

Gant made clear that *Belton* was not overruled but clarified, and that law enforcement officers had gone too far in interpreting *Belton*. *Gant* distinguished the facts in *Gant*'s situation from that in *Belton* on the basis that *Gant* was secured in the patrol car and posed no threat to officer safety, while in *Belton* there were several detainees who were all unsecured and only one officer was present. In any event Oklahoma in *Baxter* found *Gant* to be retroactive to cases on appeal when *Gant* was decided, citing the 1987 Supreme Court ruling in *Griffith v. Kentucky*.⁴⁰

CONCLUSION

What is clear is that in Oklahoma the *Leon* exception does not apply where a search is warrantless. What remains unclear is whether Oklahoma will ever adopt *Leon* in a case where the search warrant is invalid but relied upon in good faith, because none of the cases examined here have ever truly overruled the holding in *Solis-Avila* that Oklahoma has refused to apply *Leon* in invalid warrant cases and that a search warrant later found invalid appears to render that search retrospectively warrantless, as held in *Lowry v. State*. *Sittingdown* did not find good faith in a situation where a warrant was invalid, and the facts there did not involve a warrantless search but an unusual situation involv-

ing a civil writ which trumped and was broader than a criminal search warrant due to its legitimate objectives, also obviating the pat-down search analysis of *Terry v. Ohio*.⁴¹

The advantage of this ambiguity is that both sides have something to argue about before a court historically uneasy and appropriately cautious in applying *Leon*. The freedom of state courts to interpret state constitutions more broadly than the Supreme Court in regard to individual rights is a potent component of the freedom this country enjoys generally. This author agrees with the dissent of Judge Ed Parks, joined by Judge Tom Brett, in *Richardson v. State*, *supra*:

I continue to adhere to the view that the exclusion of evidence obtained through an unreasonable search or seizure is itself a fundamental right under both *art. II, § 30* of the Oklahoma Constitution and the Fourth Amendment. Excluding unlawfully seized evidence not only deters future Fourth Amendment violations. More importantly, it provides a means of acknowledging and upholding the Constitutional rights of those who were in fact victims of the unlawful search or seizure.

Judge Parks criticized the *Leon* language, stating that the exclusionary rule is not a corollary of the Fourth Amendment, and that the sole purpose of that Amendment and of Art. 2, § 30, is to deter officers.⁴² He would have adhered to the absolute prohibition of the fruits of the poisonous tree as *Mapp* appeared to promise, in any proceeding where liberty is at stake, invoking the right of Oklahoma to accord more rights under its Constitution than those now conferred by the Fourth Amendment.

It is not unprecedented for law enforcement officers and judges to produce search warrants that are knowingly specious, and Oklahoma should not lightly dispense good faith coupons — it would be better to err in favor of individual rights. This is only one front on the battle to preserve the Fourth Amendment exclusionary rule from further erosion. The views of Judge Lumpkin are to be respected and considered carefully; certainly it is hard to let indisputably culpable law violators go free, and it is tempting to abdicate state constitutional analysis to Supreme Court precedent which has steadily — but not consistently, see *Gant* — favored law enforcement and curtailed the exclusionary rule. But it may be even harder to see the

Fourth Amendment suffocate under a plethora of exceptions to the exclusionary rule.

1. *Mapp v. Ohio*, 367 U.S. 643 (1961).
2. *United States v. Leon*, 468 U.S. 897 (1984).
3. The court stated:
The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "work[s] no new Fourth Amendment wrong." *United States v. Calandra*, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed.2d 561 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself . . . , and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." *Stone v. Powell*, *supra*, 428 U.S. [465], at 540, 96 S.Ct., at 3073 (WHITE, J., dissenting). The rule thus operates as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, *supra*, 414 U.S., at 348, 94 S.Ct., at 620.
Leon, 468 U.S. at 906.
4. The rule of *Leon* has been recognized in Oklahoma probation revocation proceedings for nearly 20 years, however. In *Richardson v. State*, 1992 OK CR 76, 841 P.2d 603, 603-606, the Court of Criminal Appeals adopted the majority view of the state and federal courts that the exclusionary rule does not automatically apply in probation revocation proceedings to the extent that it would before conviction. The minority of jurisdictions applies the exclusionary just as before conviction because of the liberty interest at stake no less in revocation proceedings than before conviction. See, e.g., *State of New Mexico v. Marquart*, 945 P.2d1027 (N.M. 1997).
5. *United States v. Williams*, 622 F.2d 830 (5th Cir. 1980).
6. *Id.* at 840.
7. *Hightower v. State*, 1983 OK CR 160, 672 P.2d 304.
8. *Id.* at 306-307.
9. *Beeler v. State*, 1984 OK CR 55, 677 P.2d 653.
10. *Id.* at 657.
11. Quoting the California Supreme Court in *People v. Teresinski*, 640 P.2d 753, 758 (1982).
12. *Leon*, 468 U.S. at 912.
13. "Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).12 Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas*, *supra*, 378 U.S., at 111, 84 S.Ct., at 1512. See *Illinois v. Gates*, *supra*, 462 U.S., at 239, 103 S.Ct., at 2332. A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326-327, 99 S.Ct. 2319, 2324-2325, 60 L.Ed.2d 920 (1979)." *Leon*, 468 U.S. at 914.
14. *Leon*, 468 U.S. at 913.
15. "Indiscriminate application of the exclusionary rule, therefore, may well 'generat[e] disrespect for the law and administration of justice'" [citing *Stone v. Powell*, *supra*, at 491.] *Leon*, 468 U.S. at 908.
16. *Lowry v. State*, 1986 OK CR 177, 729 P.2d 511.
17. Citing *Payton v. New York*, 445 U.S. 573 (1980) and *Feaster v. State*, 635 P.2d 617 (Ok.Cr.1981).
18. *Lowry*, 729 P.2d at 512-513.
19. Judge Bussey also cited *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), handed down the same day as *Leon*. In *Sheppard*, the Supreme Court further elaborated: "An error of constitutional dimensions may have been committed with respect to the issuance of the warrant in this case, but it was the judge, not the police officer, who made the critical


mistake. Suppressing evidence because the judge failed to make all the necessary clerical corrections despite his assurance that such changes would be made will not serve the deterrent function that the exclusionary rule was designed to achieve." 468 U.S. at 982.

20. *Farmer v. State*, 1988 OK CR 142, 759 P.2d 1031, **abrogated on other grounds**, *Horton v. California*, 496 U.S. 128 (1990).
21. *Id.* at 1032.
22. *Solis-Avila v. State*, 1992 OK CR 27, 830 P.2d 191.
23. *Id.* at 192.
24. *Id.*
25. *Tomlin v. State*, 1994 OK CR 14, 869 P.2d 334.
26. Citing *Leon* at 919-921.
27. Citing *Castellano v. State*, 1978 K CR 107, 585 P.2d 361, 365-66; *Greene v. State*, 1973 OK CR 191, 508 P.2d 1095, 1098.
28. Citing *Katz v. United States*, 389 U.S. 347, 357 (1967) and *Lucas v. State*, 1985 OK CR 100, 704 P.2d 1141, 1143.
29. *Dodson v. State*, 2006 OK CR 132, 150 P.3d 1034.
30. *Id.* at 1058.
31. *Id.* at 1058-1059.
32. *State v. Sittingdown*, 2010 OK CR 22, 240 P.3d 714.
33. *Id.* at 715-716.
34. The Court cited *Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) for the principle that although a search pursuant to a civil writ is a "seizure" within the meaning of the Fourth Amendment, "no warrant is required when the seizure occurs pursuant to a civil order or writ," citing *Soldal* at 67 n. 11. "In *Soldal* the Supreme Court noted that where officers were acting pursuant to a court order, a showing of unreasonableness in the execution of the civil process would be a 'laborious task indeed.' *Soldal*, 506 U.S. at 71." *Sittingdown* at 717.
35. Citing *DeGraff v. State*, 1909 OK CR 82, 103 P. 538, 541; *State v. Thomason*, 1975 OK CR 148, ¶ 14, 538 P.2d 1080, 1086; and *Long v. State*, 1985 OK CR 119, ¶ 6, 706 P.2d 915, 916-17.
36. *Baxter v. State*, 2010 OK CR 20, 238 P.3d 934.
37. *Arizona v. Gant*, __ U.S. __, 129 S. Ct. 1710 (2009).
38. *New York v. Belton*, 453 U.S. 454 (1981).
39. *Gant*, 129 S.Ct. at 1723 (quoted in *Baxter*, 2010 OK CR 20, 238 P.3d at 937).
40. *Griffith v. Kentucky*, 379 U.S. 314, 322-323 (1987). *Baxter v. State*, *supra*, note 36, held that *Gant* is not retroactive generally, but did apply to cases still on appeal when *Gant* was decided. Nonetheless, the Oklahoma Court refused to apply the good-faith exception to warrantless pre-*Gant* vehicle searches in *Baxter*.
41. *Terry v. Ohio*, 392 U.S. 1 (1968).
42. 841 P.2d at 606.

ABOUT THE AUTHOR



Jim Drummond practices criminal defense in Norman, handling trials and appeals in federal and state courts. Previously he has worked as a state and federal public defender. He was recently named chairperson of the OBA Legal Ethics Advisory Panel. He was the inaugural chairperson of the OBA Criminal Law Section, and also serves on the boards of the Oklahoma Criminal Defense Lawyers Association and the Oklahoma County Criminal Defense Lawyers Association.

REGISTRATION AND CONTINENTAL BREAKFAST	WELCOME AND INTRODUCTION FRED H. MILLER	REVISIONS OF UCC ARTICLES 3, 4 AND 4A - DEALING WITH MORT- GAGE FORECLOSURE ISSUES FRED H. MILLER	BREAK
8:30 a.m.	8:50	9	9:50
OBA/CLE PRESENTS			
UCC		UPDATE ON THE UNIFORM COMMERCIAL & CODE RELATED LAWS 	
PROGRAM PLANNERS/MODERATORS FRED H. MILLER, UNIVERSITY OF OKLAHOMA COLLEGE OF LAW, NORMAN ALVIN C. HARRELL, OKLAHOMA CITY UNIVERSITY SCHOOL OF LAW, OKLAHOMA CITY		REGISTER AT WWW.OKBAR.ORG/CLE	
OKC: OKLAHOMA BAR CENTER 1901 N. LINCOLN BLVD. 26 MAY	UPDATE ON ARTICLES 3, 4 AND 4A CASE LAW AND RELATED ISSUES ROBERT LUTTRELL, MCAFFEE & TAFT, OKLAHOMA CITY	THE 2010 AMENDMENTS TO THE UNIFORM TEXT OF UCC ARTICLE 9 AND RELATED AMENDMENTS ALVIN C. HARRELL	6 CLE/1 ETHICS OK CREDIT 5 CLE/1.75 ETHICS TX CREDIT \$150 EARLY BIRD \$175 STANDARD \$175 LATE
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AUTO SALES FINANCE AND SECURED TRANSACTIONS JAMES MCCAFFREY, PHILLIPS MURRAH, P.C. OKLAHOMA CITY ERIC JOHNSON, PHILLIPS MURRAH, P.C. OKLAHOMA CITY	BREAK	THE FUTURE OF THE UCC: CURRENT UPDATING AND ENACTMENT EFFORTS, FEDERAL PREEMPTION, THE DODD-FRANK ACT, AND CONSUMER CREDIT ISSUES - PANEL DISCUSSION ALL SPEAKERS	RECENT DEVELOPMENTS OF NATIVE AMERICAN RIGHTS TO WATER IN OKLAHOMA MARK WAKER, CROWE & DUNEVEY, OKLAHOMA CITY
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Expungements – Making Sense of a Flawed Law

By Allen Smallwood

“Even God cannot change the past.”

Aristotle

In all fairness, if the above quote is true, then anyone trying to rewrite history through legislation is engaging in the height of arrogance. To the credit of the Oklahoma Legislature, however, and despite some of the flaws contained in Oklahoma’s expungement statutes — it is laudable that legislators have acknowledged the draconian effect a criminal record can have on an individual’s life. While this attempt to allow an individual to rectify a past mistake is not perfect, if it is properly applied with good faith on the part of the record keepers, expungement can accomplish most, if not all, of the implicit goals.

It is important to be aware of the distinctions between the “expungement of a plea of guilty” and the “expungement of arrest records” as contemplated by 22 O.S. §§18 and 19 and this article. I have heard lawyers, and occasionally judges, make statements suggesting that if an individual successfully completes his or her deferred sentence and obtains an “expungement,” it will “be as though it never happened.” This is simply not accurate. Expungements in criminal cases under 22 O.S. §991c, govern only the expungement of the plea of guilty. Those expungements have no effect on any law enforcement records, including records of the Oklahoma State Bureau of Investigation (OSBI). Both practitioners and judges should make sure that an individual who is receiving a deferred sentence or deferred judgment understands that the only expungement that will occur through that particular procedure is expungement of the person’s plea of guilty or no contest in the court clerk records at the county courthouse. The only way one’s arrest records or law enforcement records can be

expunged is through the procedures outlined in this article.

The importance of arrest record expungement statutes has been particularly highlighted by the phenomenal acceleration of our wonderful “information age.” Most individuals who conduct record checks on potential employees or persons of interest long ago learned to bypass the court clerk records. They go instead directly to the OSBI, which, for a nominal fee, will supply that information concerning any of us. The problem with this procedure is that often these records simply are not accurate because they are not updated on a timely basis. It has happened that, many years after a client obtained a dismissal and an expungement of the record of the plea at the courthouse, the OSBI still reflected the case in an active status as a pending felony matter. I also receive calls on a regular basis from lawyers whose civil clients have contacted them about a 20-year-old DUI conviction which is continuing to haunt them, despite several

decades of living an honorable and crime-free life. Therefore, it is important for all attorneys to know that correct use of the expungement statutes is the best and only way to clear one's record.

The Legislature gave birth to the initial two statutes, 22 O.S. §§18 and 19, in 1987, and (as seems to always be the case) has tinkered with them annually since then. This article will focus on a review of the significant provisions of these statutes and their efficacy, and will provide recommendations for proceeding under them.¹

TITLE 22 O.S. §18

Section 18 describes the individuals who are qualified to seek relief and the specified factual situations into which they must fit to obtain relief. Once a *prima facie* case of qualification for relief is made, the burden shifts to the state to establish a reason that an expungement order should not issue. *Hoover v. State*, 2001 OK CR 16, 29 P.3d 591. The statutory subsections are addressed below as listed in the statute.

The person has been acquitted

This section is pretty straightforward and unambiguous. It obviously would apply only to the charge for which an individual has been acquitted. If they were charged in a multi-count indictment or information, and were only being acquitted on one of those counts, the acquitted count is the only one to which the expungement statute would apply.

The conviction was reversed with instructions to dismiss by an appellate court of competent jurisdiction, or an appellate court of competent jurisdiction reversed the conviction and the district attorney subsequently dismissed the charge

This applies to two different circumstances. The first is the rare occasion where an appellate court reverses a conviction and instructs the trial court to dismiss. Those reversals and instructions are not discretionary and the trial court is bound to dismiss the case if so ordered. The second situation is more common and involves a circumstance of a reversal of a conviction and the subsequent dismissal by the district attorney's office. Unlike another provision described below, there appears to be no time limit on these dismissals, nor is there any requirement that a determination be made that the person was factually innocent or that the dismissal was based upon insufficient evidence.

The factual innocence of the person was established by the use of deoxyribonucleic acid (DNA) evidence subsequent to conviction

These situations are becoming more common. Those of us in Tulsa County remember a rape conviction that was reversed several years ago based on a factually erroneous charge and conviction, resulting in a multi-million dollar judgment against the City of Tulsa.

The person has received a full pardon on the basis of a written finding by the governor of actual innocence for the crime for which the claimant was sentenced

This section speaks for itself.

The person was arrested and no charges of any type, including charges for an offense different than that for which the person was originally arrested are filed or charges are dismissed within one year of the arrest, or all charges are dismissed on the merits

This is the most common section used in my experience. The individual seeking expungement must assert and prove that either 1) no charges were filed within one year of the person's arrest, or 2) all charges filed as a result of that arrest were dismissed within one year of the arrest. An ambiguity lies in the fact that this provision appears to contradict the following category with respect to expiration of the statute of limitations. What this means is that if an individual is arrested and no charges are filed within one year, that person may file a petition to have those arrest records expunged. However, the statute of limitations, at least with most felonies, is three years, and the prosecution would still be free — after you filed a petition to expunge the records — to refile those charges, which would defeat your attempt to expunge the records. I have not seen this happen and it would appear to be an act of bad faith on the part of the prosecution but it still is a potential problem. Most of the petitions I have filed, including the form appearing with this article, involved cases that were dismissed within one year of the date of arrest. I have yet to see, in 35 years of practicing law, however, a docket entry reflecting that a prosecutor dismissed a case "on the merits."

It is also critical to remember that the one-year clock begins to run on the date of the individual's arrest, not when the charges were filed or when the charges were dismissed. As we all know, clients are often arrested and the

prosecutor ultimately declines to file charges, perhaps several months later. The one-year clock began on the date of the arrest, not when the declination was made. This can be problematic when your client perhaps was never formally “arrested,” but merely voluntarily surrendered after learning that a bench warrant had been issued. The date of the arrest should be determined to be the date he or she surrendered and was booked through the jail clearing out the arrest warrant. You need to calendar those arrest dates in your file and, if possible, seek to have any period of probation conclude prior to the one-year date of arrest if you intend to use this section to expunge the arrest records.

The statute of limitations on the offense had expired and no charges were filed

This appears to be a pretty straightforward and unassailable category as long as you are certain of the applicable statute of limitations and no charges have ever been filed. If charges are filed and not dismissed within a year, I do not believe you can have your records expunged under this section, but must rely upon the previous section.

The person was under eighteen years of age at the time the offense was committed and the person has received a full pardon for the offense

This section has two parts and is described in the conjunctive, which, in my view, requires the person to be both under the age of 18 at the time the offense was committed and has received a full pardon. It would appear this section would only be necessarily used in serious felony offenses; for less serious offenses, you should be able to obtain relief under the other sections, particularly when an offense was committed by a minor.

The offense was a misdemeanor, the person has not been convicted of any other misdemeanor or felony, no felony or misdemeanor charges are pending against the person, and at least ten years have passed since the judgment was entered

This section applies to misdemeanors and requires the passage of 10 years with no convictions of any crime, felony or misdemeanor, and no felony or misdemeanor charges pending at the time the petition is filed. No pardon is necessary.

The offense was a nonviolent felony, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the

person has received a full pardon for the offense, the person has not been convicted of any other misdemeanor or felony, no felony or misdemeanor charges are pending against the person, and at least ten years have passed since the conviction

This section causes the most problems and defeats most attempts at expungement of serious felony conviction records. A “nonviolent felony” as defined by 57 O.S. §571 is any felony which does not fit into the description of more than 40 violent felony offenses listed in the statute. Based on this, although I have never attempted to expunge a violent felony offense, it would appear that violent felony offenses simply are not subject to expungement. In addition to the passage of 10 years, since the statute is in the conjunctive, it is my opinion one must also obtain a full pardon and assert that no convictions of any other criminal offenses have occurred and that no criminal offenses, misdemeanors or felonies are pending at the time of the petition.

I have recently encountered a “Catch-22” with respect to expungement of non-violent felony offenses. I represented a young man about 20 years ago who was charged with possession of cocaine with intent to distribute. We worked out a resolution where the charge was reduced to possession of cocaine (still a felony) and the individual received a five-year deferred sentence. He successfully completed that deferred sentence and a few years ago contacted me about expunging his arrest records. He met the 10-year requirement, but we needed to obtain a governor’s pardon. As we all know, because a pardon is a political act, not a legal one, this individual contacted the governor’s office through his political connections. Interestingly, the governor’s office’s response was that the individual could not receive a pardon because he had never been convicted, and there was nothing to pardon. Technically, this response was accurate, as a deferred sentence, successfully completed, results in an individual never receiving a felony conviction. However, it appears to defeat the purpose of the statute — though it also appears to be the case — that in order to obtain an order of expungement under this section for nonviolent felony offenses, you must have 10-year passage of time, as well as a governor’s pardon. Otherwise, any objection filed by law enforcement will probably be sustained by the court.

The person has been charged or arrested or is the subject of an arrest warrant for a crime that was

committed by another person who has appropriated or used the person's name or other identification without the person's consent or authorization

This section applies to an individual whose identity has been misappropriated and that misappropriation has caused an erroneous arrest warrant to issue in the person's name. How one would prove that in a petition is not clear.

The concluding paragraph of this section is illuminating and is what causes everyone to doubt the efficacy of the entire procedure. The paragraph specifically describes expungement as the "sealing of criminal records." However, this sealing applies only to the public, and not to law enforcement agencies for law enforcement purposes. More about this later.

TITLE 22 O.S. § 19

Section 19 provides the procedure to be followed, and is straightforward. Local court rules have changed the procedure that was followed for several years. For many years after the passage of the act, a petition to expunge was filed in the criminal case number. A court rule was established several years ago which provides for the petition to be filed at the criminal court clerk's desk, but it is a separate case and receives a miscellaneous (MI) case number. There is a filing fee, no summons is necessary, and the case is randomly assigned to one of the district judges who regularly calls a criminal docket.

My practice is to file the petition, have the case set for a hearing 45 – 60 days in the future by the assigned judge, and send a copy of the petition along with the order setting hearing to the various law enforcement agencies as well as the Tulsa County Court Clerk's office. Do not bother to send it to the Federal Bureau of Investigation. They do not recognize state court orders and you will not receive as much as a signed certified mail return receipt card from them.

However, it is important to remember to include all arresting agencies who had any contact or generated any records with respect to a client's charge. I recently had to amend a petition for expungement because I failed to remember that my client's arrest was not by the Tulsa Police Department but by the police department of the City of Broken Arrow. In those circumstances, you need to include the city court clerk if any records could have been

generated by them or would be held by them, including the city attorney's office, city prosecutor's office and that local agency's law enforcement department.

Section 19, paragraph C, is where the problems begin. While I have rarely had law enforcement agencies (including the OSBI) object to a petition, this paragraph clearly authorizes them to do so and requires the court to make a finding that harm to the privacy of the person at interest outweighs any public interest in retaining the records. However, the "basic identification information" is not to be sealed. What this means is unclear.

Paragraph C also authorizes the court to issue a conditional order of sealing as the court determines appropriate, taking into consideration the various interests of the parties involved. The section also allows any party to appeal a court's order to the Oklahoma Supreme Court, but requires the OSBI to be a necessary party and given notice of the appeal proceedings.

Paragraph D is the most curious section. It attempts to change the past by deeming certain actions to have never occurred, and gives all of us hope (false on many occasions) that we can rely upon the order, in that any inquiry into the matter will reveal a response that the action never occurred and no such record exists with respect to that person — even though the concluding paragraph of §18 clearly requires the preservation of the records. Is this section authorizing the official who is responding to an inquiry to lie? It appears to.

Paragraph E authorizes that "inspection of records" (whatever that means) may only be permitted on separate court order for the person of interest (the person who has obtained the expungement), the attorney general or the district attorney. It clearly indicates the records are maintained.

Paragraph F is the most beneficial to individuals obtaining orders expunging their records. It authorizes an applicant to not disclose any information contained in sealed records, and, although it does not say so, it would appear to include any such statement by an individual even under oath.

Paragraph G is an attempt to grandfather arrest and criminal records existing prior to 1987.

Paragraph H appears to prohibit any physical destruction of any criminal records.

Paragraph I would apply to those circumstances where only one of several counts was expunged, and authorizes unsealed material to be recorded in a separate document and obliterated from the original document.

Paragraph J appears to require that “district court index reference of sealed material” be “destroyed, removed or obliterated.” What this means and how it squares with other provisions of this act is not clear.

Paragraph K appears to apply to “Section 1 of this title.” The only “title” to which it could apply would be Title 22 which contains the statutes with respect to criminal procedure. If this section was meant to apply to Section 18, it does not so state and creates a significant ambiguity.

Paragraph L provides, upon a showing of compelling circumstances and after notice to all interested parties, that certain sealed records can be unsealed. This is further evidence to contradict Paragraph J, and indicates there was never a contemplation by the Legislature that anything be “destroyed, removed or obliterated.”

If any further proof is needed that these records remain extant even after an expungement order, Paragraph M should remove that doubt. It provides nothing shall prohibit the introduction of sealed actions to impeach the credibility of a witness or to provide evidence of character as contemplated by §2608 of the Oklahoma Evidence Code with respect to character evidence.

ADDITIONAL PROVISIONS

Recently enacted, 22 O.S. §19a provides for a procedure to bypass the normal expungement procedures contained in §19 in the unique circumstance of a court’s finding that an individual was arrested or charged as a result of the misappropriation of the defendant’s name, subject to the provisions of Paragraphs D-M of §19 described above.

Section 19b is also a recent statute, titled the “Oklahoma Identity Theft Passport Program.” This applies to individuals who have obtained an order of expungement as a result of an individual committing a crime who has misappropriated the applicant’s name and has obtained an order sealing the records pursuant to that statutory authorization.

Recently, the protective order statutes (22 O.S. §§60 et seq.) were amended to provide for a procedure to expunge victim protective orders. It is found at 22 O.S. §60.18. I have not attempted to use this statute and it appears to have several problems. The statute provides for expungement of what is described as VPOs (victim protective orders) under four separate categories. Included are *ex parte* orders issued but later terminated due to dismissal before a full hearing, or denial of the petition at the hearing, or failure of the plaintiff to appear for a full hearing, and apparently requires the passage of 90 days for any of those to apply. An order also can be expunged if 90 days have passed since the plaintiff failed to appear for a victim protective order hearing; or if either the plaintiff or defendant has had any protective order vacated and three years have passed; or if either the plaintiff or defendant is dead. Once again, expungement is defined as the sealing of victim protective orders for public inspection but not from law enforcement, the court or the district attorney’s office.

The use of the term “VPO” is confusing because I have long used the term “VPO” as an acronym for the criminal offense of “violation of a protective order.” The divergence of legislative theory and criminal law practice appears large.

The statute also provides for filing procedures and answers or objections to the petition. The order of expungement is discretionary with the court even if no objection has been lodged by any party withstanding. Even if an order of expungement is entered, the statute clearly allows access to those records by law enforcement agencies, the district attorney or the court, without any court order.

Consistent with the language in §§18 and 19, these expungement orders do not provide for destruction of court records. Section 60.18 does, however, provide for destruction of sealed material with respect to district court index records. Obliteration and destruction is authorized at the end of a 10-year period.

APPEALS

An expungement action is now considered a civil proceeding, and an appeal is to the Oklahoma Supreme Court. *See In Re Adoption of Supreme Court Rules for Expungement of Records*, 2005 OK 32, 120 P.3d 861; 22 O.S. §19(c).

In *Knight v. State*, 2002 OK CR 19, 46 P.3d 158, the court ruled that a petition is *res judicata* and barred applicant who had filed a prior petition from filing a subsequent petition absent proof of some new harm to privacy or damages of unwarranted adverse consequences which had not been previously litigated in the initial petition.

CONCLUSION

The only way an individual's arrest records or law enforcement records can be expunged is through the procedures outlined in this article. Though imperfect, Oklahoma's expungement statutes offer at least a chance for an individual to clear his or her record. Therefore, it is important for all attorneys to know that correct use of the expungement statutes is the best and only way to accomplish this goal.

1. Copies of a proposed petition and order of expungement are included at the end of this article.

ABOUT THE AUTHOR



Allen M. Smallwood is a solo criminal defense practitioner in Tulsa. He received a B.S. from Oklahoma State University in 1972 and his J.D. from the University of Tulsa College of Law in 1974. He has been a member of the Oklahoma Bar Association and the Tulsa County Bar Association since 1975. He served in the U.S. Marine Corps, 1966-1968. He is a past president of the Oklahoma Bar Association, the Tulsa County Bar Association and former director of the Tulsa County Bar Foundation.

IN THE DISTRICT COURT IN AND FOR
_____ COUNTY
STATE OF OKLAHOMA

_____,)
Petitioner,)
vs.) Case No. _____
OKLAHOMA STATE) OBA # _____
BUREAU OF)
INVESTIGATION,)
_____ COUNTY COURT)
CLERK'S OFFICE,)
_____ COUNTY)
SHERIFF'S OFFICE,))
POLICE)
DEPARTMENT,)
DISTRICT)
ATTORNEY'S)
OFFICE,)
Respondents.)

PETITION TO EXPUNGE PURSUANT TO 22 O.S. §§18 AND 19

The petitioner, _____, through counsel, _____, pursuant to 22 O.S. §§18 and 19, moves to purge and expunge all criminal records for the following reasons:

1. Counsel has attached a copy of the docket sheet in this case ("Exhibits A1 - A_____") which reflects that a felony/misdemeanor charge was filed against this petitioner on _____, 20____, alleging: _____.

2. On _____, this case was dismissed against the petitioner by the State of Oklahoma. This case was dismissed in order to charge the correct party.

3. Pursuant to 22 O.S. §18, counsel submits that this dismissal was made within one (1) year and the manner in which they were dismissed reflects that those were dismissals on the merits, justifying an order of expungement as provided by 22 O.S. §§18 and 19 (see "Exhibits B1 - B3" attached).

4. Having qualified under the statutory provisions referenced above, the petitioner, _____, requests this Court order this defendant's criminal record expunged and any other relief to which he is entitled pursuant to 22 O.S. §§18 and 19.

Attorney for Petitioner OBA # _____

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of _____, 2011, a true and correct copy of the above and foregoing Petition to Expunge Pursuant to 22 O.S. §§18 and 19, was mailed by certified mail to:

NAMED PARTIES

IN THE DISTRICT COURT IN AND FOR
_____ COUNTY
STATE OF OKLAHOMA

_____,)
Petitioner,)
)
vs.) Case No. _____
OKLAHOMA STATE) OBA # _____
BUREAU OF)
INVESTIGATION,)
_____ COUNTY COURT)
CLERK'S OFFICE,)
_____ COUNTY)
SHERIFF'S OFFICE,))
_____ POLICE)
DEPARTMENT,)
_____ DISTRICT)
ATTORNEY'S)
OFFICE,)
Respondents.)

ORDER OF EXPUNGEMENT

On this ____ day of _____, 2011, the petitioner, _____, appears by and through his attorney,

This Court finds notice of petitioner's motion to expunge records has been served by certified mail on the Oklahoma State Bureau of Investigation; _____, _____ County Court Clerk; _____, _____ County District Attorney; _____, _____ County Sheriff's Office; and, _____, _____ Police Department. This Court further finds that all individuals required to be served by statute to obtain an expungement of criminal records have been served, and that none lodges an objection. This Court therefore finds that proper notice has been served on all parties required by statute and that the order of expungement should issue.

This Court therefore finds, having reviewed all the pertinent documents, the history of this case, and heard argument of counsel and input from

all interested parties, petitioner's criminal records should be expunged pursuant to 22 O.S. §§18 and 19. For purposes of this Order, expungement of record shall mean the sealing of all criminal arrest records held by any law enforcement agency to which this Order applies.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the criminal court and arrest records of _____, d.o.b. _____, SS# _____, County Case No. _____, and any associated NF numbers, as well as this _____ case number, in the above-referenced matter shall be expunged by the Oklahoma State Bureau of Investigation, the _____ County Court Clerk's Office, the _____ County Sheriff's Office, the _____ County District Attorney's Office, and the _____ Police Department, in accordance with the language of 22 O.S. §§18 and 19. This Court further finds that nothing in this Order requires the expungement or purging of internal records of the _____ County District Attorney's Office.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED pursuant to 22 O.S. §19(H), physical destruction of any criminal justice records is prohibited by law. Pursuant to 22 O.S. §§19(C) and (G), basic identification information is not subject to sealing.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED the above findings are hereby made the order of this Court and will govern the rights, duties, and obligations of the parties hereto.

JUDGE OF THE DISTRICT COURT

READ AND APPROVED AS TO FORM:

Assistant District Attorney OBA # _____

Attorney for Petitioner, OBA # _____



U.S. Supreme Court Illuminates Constitutional Burden

Defense Attorney Must Inform Clients of Immigration Consequences before Plea

By Kelly Basey

Before deciding whether to plead guilty in a criminal case, a defendant is entitled to the effective assistance of competent counsel. In May 2010, the U.S. Supreme Court decision in *Padilla v. Kentucky* illuminated the constitutional burden on criminal defense counsel to inform the noncitizen client of the risk of deportation of a criminal plea. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). The court holds if counsel fails to do so, the first prong of a two-prong test set out by the court in *Strickland v. Washington*, 466 U.S. 668 (1984) is automatically satisfied. Before *Padilla*, the Oklahoma Court of Criminal Appeals held an attorney had no duty to inform his noncitizen clients about the deportation consequences of the criminal plea, but rather not to misinform if asked. *State of Oklahoma v. Marcos Rodriguez*, unpublished opinion, PC-2009-326 (Dec. 21, 2009). However, *Padilla* increases the burden by holding not only is mis-advice unconstitutional but also failure to advise clearly fails to meet an objective standard of reasonable performance for effective assistance of counsel as required by the Sixth Amendment of the U.S. Constitution. *Padilla*, at 12. The reasoning in *Padilla* shed light on Oklahoma criminal lawyers' duty to inform noncitizen clients of the deportation consequences of a criminal plea.

REASONING OF *PADILLA V. KENTUCKY*

In a 7-2 decision, the Supreme Court in *Padilla* holds that legal counsel for a noncitizen charged with a crime has a constitutional obligation to tell the client the deportation consequences of a guilty plea. Justice Stevens writes in his opinion

for the court that the deportation consequences are so tightly intertwined with the criminal consequences that a noncitizen must be advised before he pleads. *Padilla*, at 6. Herein, the court throws out the prevailing argument of whether the immigration consequences are a "collateral matter" to the criminal proceeding. *Id.* The court

reasons that due to changes in immigration law which dramatically raised the stakes of a noncitizen's criminal conviction, the deportation consequences of a criminal plea are an integral part of the plea process. In fact, Stevens describes deportation as "an integral part, indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.*, at 6. He also states that:

...deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. *Id.*, at 8-9. Citing *Strickland v. Washington*, 466 U.S. 668 1984.

Justice Stevens cites the lack of discretion in immigration law regarding who will be deported. Over the century, much discretion has been stripped from the immigration law judge and deportation is a matter of statutory confine. *Id.*, at 3-6. Justice Stevens wrote, "In 1996, Congress also eliminated the attorney general's authority to grant discretionary relief from deportation..." *Id.*, at 6 (internal citations omitted).

The result of criminal defense counsel not informing the noncitizen client satisfied the first prong of the *Strickland* test for ineffective assistance of counsel. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Padilla*, at 9 (quoting *Strickland*, 466 U.S. at 688). To determine this, Justice Stevens acknowledges the helpful role that professional bar associations play in identifying what constitutes reasonable representation. *Id.*, at 9. "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." The court reasoned the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. *Id.*

The opinion states that the issue of not informing fails to meet an objective standard of reasonable performance. "This is not a hard case in which to find deficiency: The consequences of *Padilla*'s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.*, at 11. When deportation will clearly result from

entry of a particular plea, "the defense attorney's duty to give correct advice is equally clear." *Id.*, at 12. Since *Padilla*'s defense attorney failed to do this, the first prong of the *Strickland* test was satisfied. *Id.*, at 9. (The second prong was not discussed in this opinion.)

The court divides the requisite advice into two categories. First, are the "obvious" deportable offenses for which an attorney must advise the client that he will be automatically deported for pleading guilty. Second are the not so obvious offenses which may cause deportation for which the attorney must advise the client that he may be deported. Immigration law is a very turbulent area. It requires a thorough knowledge of the many laws and cases compiling the immigration statutes. Stevens addresses this by offering the duty of the lawyer in the majority of less straightforward cases:

"The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward...a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*, at 12.

Justice Alito filed an opinion in which Chief Justice Roberts joined, concurring in the judgment. The opinion is terse, compelling and revealing regarding the problems criminal defense counsel may have in determining the deportation consequences of the criminal plea. It clarifies that the duty of counsel extends not only to warn the noncitizen client of the general risk of removal, but also, counsel in some cases, must specify what the removal consequences would be. It goes on to describe that various immigration laws are so ambiguous and complex, for example, it may be difficult for counsel to determine even whether a particular disposition is a "conviction" for immigration purposes.

PRACTICAL ADVICE FOR CRIMINAL DEFENSE COUNSEL

As a result of *Padilla*, criminal defense counsel are now aware of the duty to advise the noncitizen client of the deportation consequences of a criminal plea. Consequently, the first duty of the criminal defense counsel now includes ascertaining whether the client is a noncitizen. "Noncitizen" includes authorized and unauthorized persons living in the United States. (U.S. Census Bureau, Current Population Survey, Annual Social and Economic Sup-

plement, 2008). As a result, practitioners should determine the immigration status of every single client. Citizenship of an individual cannot be determined by any color of skin, accent, working status, social status or customary integration. For example, there are numerous non-citizens living in Oklahoma from both Mexico and Canada with no visible signs of noncitizenship. Likewise, there are many naturalized American citizens with a heavy accent and minimal integration. Thus, a practitioner would be wise to abandon all preconceived notions of what a noncitizen looks or sounds like.

A practical consideration for the criminal defense attorney goes deeper than the initial determination of the citizenship of the client. The deportation consequences of a criminal plea may differ based on the type of immigration status the client holds. Some examples are: legal permanent resident versus non-legal permanent resident status; various types of non-immigrant visas versus undocumented entry; visa over-stays versus refugees. Counsel, to protect her client and herself, should determine upon first consultation with the client the exact immigration status of any noncitizen client.

Although the Supreme Court in *Padilla* did not discuss the second prong of *Strickland*, it is important to note in order to find ineffective assistance of counsel, the second prong of *Strickland* must also be satisfied. *Strickland* at 695. The second prong includes the finding that the client was prejudiced by the lack of advice. The defendant must show there is a reasonable probability but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, supra. Oftentimes, in the criminal context, this comes down to a finding of whether the client would have demanded a jury trial instead of pleading if he had known the deportation consequences of his plea.

Finally, in delivering the required information regarding the immigration consequences of the criminal plea to your noncitizen client, it is important to note that the constitutional *ex post facto* prohibition does not apply to immigration law. See *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988). Therefore, whatever the immigration law is now, it may change in the future and be applied to your client *ex post facto*. Whatever counsel tells a client today,

could change tomorrow and cause him to be deportable tomorrow although his criminal plea does not make him deportable today. Thus, all noncitizen clients must be informed that *any* criminal plea *could* cause deportation in the future.

As this is a relatively new decision, there are many unsettled questions. For example, the question as to whether *Padilla* applies to "deportation" consequences only or if it also applies to other "immigration consequences" as in the case of a noncitizen, who due to a criminal plea in the United States, is prohibited from returning to the United States after a foreign visit. Also, there is an unresolved question as to whether *Padilla* should be applied retroactively to past pleas. These issues are being raised in various jurisdictions.

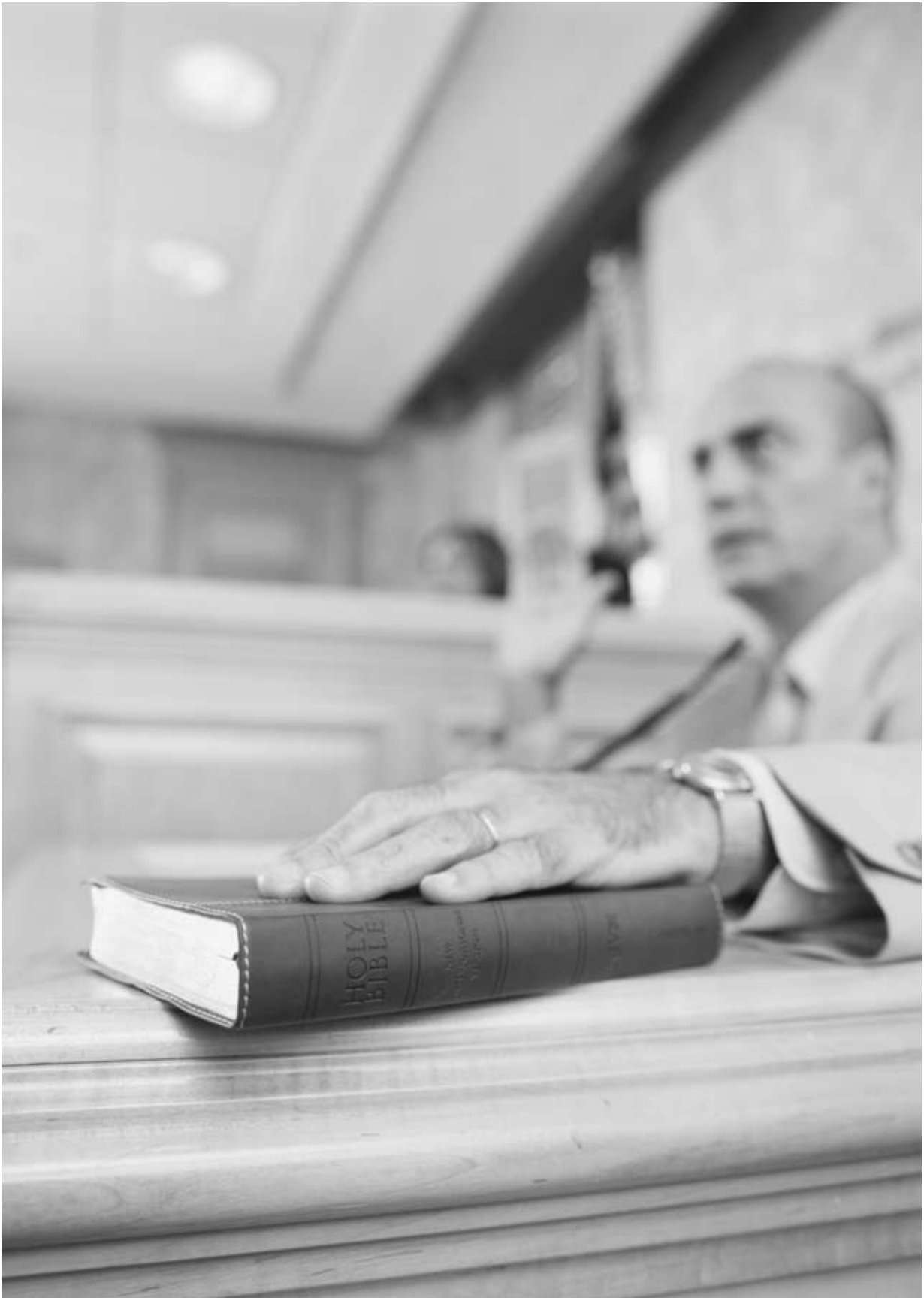
In light of *Padilla*, the criminal defense attorney *must* first ascertain the citizenship and particular immigration status of the noncitizen client. The attorney *must* then explore the deportation consequences as it pertains to the individual in relation to his current immigrant status. Finally, the attorney *must* explain this information to the client before the client decides what course of action to take in a criminal proceeding. These additional requirements provide for a heavier professional duty than Oklahoma criminal defense lawyers have been accustomed to in the past.

Author's Note: Many thanks to my esteemed mentors — my dad, Harry E. Brown Jr., Esq. and E. Vance Winningham, Esq.

ABOUT THE AUTHOR



Kelly K. Basey earned two undergraduate degrees from OSU and a Juris Doctorate from OU law school. She served as assistant district attorney in Oklahoma County for 12 years before focusing her practice for the last six years exclusively on immigration, naturalization and consular law with Winningham & Stein (now Winningham, Stein & Basey). She is a frequent speaker, on the Board of Directors for Girl Scouts of Western Oklahoma and is involved in various charitable and legal organizations.



Cross Examination of the Eye Witness

By Bob Ravitz

That's the man who did this. I will never forget his face." How many times is the trial lawyer confronted with this statement by a witness who just wants to tell the truth, who has no motivation to lie and whose testimony will be believable? This type of evidence is commonplace in criminal cases and is one of the most powerful forms of evidence a prosecutor can produce. How then should a criminal defense attorney confront this evidence, deal with it, or use it to his client's advantage? This paper attempts to identify ideas, concerns and rules that the good lawyer can utilize to overcome this unbelievably damaging testimony from the experience of a long-time criminal defense lawyer who has experienced this situation countless times.

RULE 1: FACTORS TO CONSIDER IN TAILORING THE EYE WITNESS CROSS-EXAMINATION

The defense attorney must understand some of the problems of everyday misidentification and attempt to establish these facts through cross-examination in hopes that the jury will be able to relate to these facts in the defense's closing argument. Such has been established by numerous studies and confirmed by my experience over the years. Such includes:

- The presence of a weapon generally impairs the accuracy of the identification.
- Cross-racial identification is less reliable than same-race identification.
- Little correlation exists between self confidence of the witness and accuracy of the identification.
- Self confidence and accuracy may exist as a result of a belief supplied by others that the

defendant is guilty, strengthening eye witness identification.

- Even though a life-threatening situation may be vividly described in the witness's mind, a life-threatening situation usually increases the likelihood of misidentification.
- Eye witnesses tend to over-state the actual time of the event.
- How photo lineups or regular lineups are presented affects identification.
- The information observed or discussed after the event such as a show-up, a lineup, a pictorial show-up may be incorporated into the memory of the witness.
- Witnesses do not observe everything available to be observed but instead selectively associate data.
- Our ability to identify strangers is weak, thus resulting in underlying unreliability.

- High numbers of misidentifications occur even under good physical conditions.
- The longer the period of time between the occurrence and the identification subjects the identification to greater unreliability as long-term memory is subject to embellishment, incorporation and decay.
- An observation of what seems to be an unimportant event creates a high rate of misidentification.
- Most police place defendant's pictures number two in a photo show-up or number two in a line-up.
- Crime victims want crimes solved.
- A witness who has seen an offender before in another context may subconsciously identify the defendant at a later time.

Many suggestions, listed below, have been made to make the identification process more favorable. The defense lawyer should see if the police utilized any of these, or if the same was established as a fact to the jury.

- Administer the line-up by a person who does not know which member of the line-up is the true suspect to avoid inadvertent tip-offs.
- Have the witnesses view the line-up one at a time, rather than all together.
- Prohibit talking between the witnesses as to the identification process at any time, even when the initial reports are taken by the police.
- Inform witnesses beforehand that the actual perpetrator might not be in the line-up or picture show-up.
- Ensure the show-up contains 10-12 photographs.
- Confirm that officers write down when pictures shown, where, to whom, how and any previous show-ups where someone was not identified should be obtained.
- Provide the names and pictures of show-up or line-up participants to publish the same to the jury.
- Consider sequential police line-ups. Show six persons one at a time or consider sequential photographic show-ups one picture from a pool of potential suspects.

RULE 2: CONSIDER ALL CHARACTERISTICS OF THE WITNESS

Establish these factors on cross-examination if they are helpful. They can assist you in establishing points that weaken the in-court identification.

- Physical characteristics — age, physical disabilities or impairments, sight, glasses, contact lenses, near-sighted, far-sighted or both, wearing glasses or contacts that day, last time eyes checked.
- Occupational issues — current job, previous employment, work with people, type of people and age/race, job duties, do they work with sizes and shapes, i.e. robbery of a clothing store.
- Other impairments — drinking alcohol or using drugs and, if so, frequency and timing of such, including day of event, hours of sleep, allergies.
- Locale — current and previous home addresses, number of cross-race visits in home, number of cross-race contacts with others on a daily basis, personal relation with cross-race individuals.

RULE 3: ADDITIONAL FACTORS FOR CONSIDERATION CONCERNING THE INITIAL EVENT

- Lighting – artificial, location, time of day of incident, shadows, sunlight, overcast, glare.
- Other people in vicinity when the incident first started, who were they, where were they, what were they doing when the incident first started
- Establish distance between witness and perpetrator
 1. Where was witness standing when he first observed the perpetrator?
 2. Was there anything unusual about the perpetrator when he was first observed?
 3. Identify objects to determine distances if necessary. What was the witness doing, what was the perpetrator doing?
 4. Where did perpetrator go, what did perpetrator do, what did witness do?
 5. How was the witness able to observe, eye-to-eye, corner of eye, turn head, mirror.

6. Ask other witness to describe last person who left before the incident began.
7. When the perpetrator left, did he go out the front or back, what were you doing, did the perpetrator leave fast, slow, or normal, back up, turn and leave, did you see whether he got into a vehicle, which way he went

- Looking at gun
- Emotional status — afraid?
- Detail scene
- Barriers or obstacles to sight
- Reenact if it helps

RULE 4: IT IS NOT WHAT THE WITNESS SAYS HE SEES THAT IS IMPORTANT — IT IS WHAT HE DOESN'T SEE.

It is important to consider questions on characteristics witness has not described or has not accurately depicted or described. Obviously, pretrial discovery can assist defense attorneys in identifying what questions to ask, but if the lawyer does not have sufficient pretrial discovery and the witnesses will not speak to him, sometimes the best cross is a discovery cross and while contrary to one of the general rules of cross-examination — never ask a question you do not know the answer of — it can be extremely helpful in proving the unreliability of the identification. A question like “What was the height you described to the police,” is very effective if there is no height in the police report if the height differed substantially from the defendant, or when the witness states “I didn’t describe one,” or “I don’t remember.” The following is a list of characteristics about the **offender** which you may consider.

- Physical characteristics – weight, height, age, hair color/length, sideburns, hairline, body hair, facial hair/color/size/goatee/mustaches. Also, ears, teeth/dental work, nose, eyes (color, thickness of lashes), head or head size, mouth and lips (thickness), forehead, hand/hand size, finger/finger size, fingernails, build.
- Clothing — always include color, style, pattern, and other characteristics; shoe type, socks, shirt (how fastened), pants, belt, coat/jacket (open or closed), hat, tie, scarf.
- Jewelry — chains, watches, bracelets, rings, piercings.

“Police procedures are a fertile field for demonstrating the unreliability of the identification procedure.”

- Skin — scars, tattoos (description), warts, pimples, acne, birthmarks, any other marks, color (black is not an answer), tan, texture (smooth or rough).
- Other characteristics — glasses (including absence thereof), glass frames, sunglasses, distinguishing features, color; voice accent, what was said, Hispanic, English, ordinary talker, talked fast, talked slow; anything else out of place.
- Weapons — kind, color of barrel or grips and knife, length of barrel or knife, style and shape of gun or knife. **Note: the hand the weapon is in is often critical to the identification.**

RULE 5: THE IDENTIFICATION

Cross is not limited to what the witness says on direct, but encompasses all events surrounding the identification prior to the testimony.

Police procedures are a fertile field for demonstrating the unreliability of the identification procedure. In preparing the cross-examination, lawyers should consider all local police procedures through policy and procedure manuals or unwritten policies that spell out how to deal with the identification process and identify whether these techniques were used in your case and examine in detail their reliability. If the police failed to do something their manual requires which has the potential to affect the identification, it should be brought out on cross-examination in detail as to the content of policies that might be considered objectionable, suggestive or areas which could lead to misidentification. The truthful citizen witness who has been victimized by the process and procedures of the police are a fertile way of demonstrating misidentification.

- Actions by police/prosecutors — Identify what was said and done by the officers intentionally or inadvertently prior to the identification process, during the identifi-

cation process, or after the identification process.

1. Identify conversations by the officer to the witness or to other officers overheard by the witness that give signals or nudge the witness to an individual person. Comments such as “he may not look the same” or a discussion of characteristics or description of the individual previously given by the witness are examples of these types of signals. Understand that praise by the officers gives the witness more confidence in the identification.
2. Discovery of the prosecutor’s discussion with the witness prior to preliminary hearing or any hearing or trial is also important. What was said, when it was said, why it was said and how it was said may all be fertile grounds for attacking the identification. The prosecutor’s discussion of the strength of the case, the technical evidence and other eye witness’s descriptions or identifications may turn a tentative identification into absolute certainty by the time she takes the witness stand. What may be an innocuous comment to you or me or to the juries may be extremely important in the overall identification. You must identify what the witness thought of what was said.
3. Statements made when the witness was called to the identification process can also be extremely influential in helping the witness pick out the potential suspect.
- Pictures Seen After Crime — length of time after crime, where and how viewed, number of photos seen.
 1. Number seen at same time
 2. Were pictures black and white, in color or mixture
 3. Mug shots with police numbers on them
 4. How many white, black, Hispanic
 5. How many with mustache, beard
 6. How many with blue, brown, green, etc. eyes
 7. How many matched weight and build
 8. Unable to observe height

9. How many of the age you had described

- Number of pictures you narrowed it down to
 1. Defendant was the only one that looked like the man you described
 2. You relied upon police to present you fair samples of suspects
 3. What distinguishing feature about the picture caused individual to identify defendant
- What did police say before and after you picked out picture
 1. Tell you that you were right
 2. Tell you may not look the same
- Talk to other person before identifying. Overheard other person before identifying. What was said when you were asked to come and view. Talk to other people after identification. Other people present when you picked out pictures. Names.
- The Line-up.
 1. Did witness see pictures before line-up? If so, when, where, who present, what was said, did witness pick out anyone?
 2. What happened day of the line-up?
 3. Was witness called by the police to pick someone out of a line-up?
 4. What else did police or prosecutor say prior to line-up?
 5. You expected the perpetrator to be in the line-up.
 6. Were other people present? Who, where?
 7. Did you talk to others?
 8. Discuss characteristics of the perpetrator. Were you told the perpetrator may no longer look the same?
 9. What did others in line-up look like?
 10. What number did you pick out?
 11. Length of time you viewed each subject. Did you ask to see any subjects more than once?
 12. Other witnesses viewing line-up. Who, did you recognize any of these other witnesses?

13. Were all individuals in the line-up same color, height, and basic description, wearing same clothes?
14. Other distinguishing characteristics about any individual in line-up.
15. After viewing, where did you go?
16. Who else was present when you were placed in a new location, what was said?

- Preliminary Hearing

Oftentimes it helps for the jury to realize the only individual at the preliminary hearing that was seated next to the lawyer was the individual the witness was going to identify. Describe in detail the room and the circumstances behind the identification at preliminary hearing if it is helpful.

1. Person you identify – black, white, Hispanic, Asian, etc.
2. Sitting in front of rail in jail coveralls [orange, red, etc.]
3. How many black, white, Hispanic, etc. were in front of the rail in jail coveralls
4. How many black, white, Hispanic, etc. are in the courtroom
5. How many males/females
6. How many match general description of the person that robbed you that night.
7. Did you expect the defendant to be in the courtroom?
8. Did you look in the door before you came in the courtroom at any time this date?
9. Did you see somebody that resembled the person that robbed you
10. Did you discuss that identification with anyone
11. Did you discuss that identification with the prosecutor
12. Whether to or not — did he tell you to look around the courtroom before making your identification
13. Fair statement – if he did, that you figured that the person was in the courtroom

RULE 6: DON'T OVERKILL CROSS OF CITIZEN WITNESS

Generally, the identification witness is a witness who the defense attorney desires to portray as honest but having a faulty memory or a memory that was tainted by police or prosecutorial tactics, either intentionally or inadvertently, preferably inadvertently. A less aggressive cross, therefore, is the preferred method. The defense lawyer should not attack this witness like he would a snitch with a history of prior convictions. The witness is not lying — she is mistaken. Failure to recognize this tends to cause the jury to sympathize with the witness and the points that the lawyer is making with the witness often go over the jury's head because of their concern for the witness. Use a soft touch. Jurors are persuaded by a story of "I don't know," "I can't remember." Subtlety is the key. This is how to win points with the jury.

RULE 7: SAVE IT FOR CLOSING, DON'T ASK WHY

A string of "I don't know," "I don't recall" answers or "I am not sure," is ruined if a lawyer asks a "what" or "how" question. Avoid it at all costs, stay under control and save your whys for closing.

RULE 8: MAKE USE OF INCONSISTENCIES AND OMISSIONS WITH THE IDENTIFICATION

- Consider different stories
- Consider differences in the identification between different witnesses at the time they observed the event.
- Consider the ability of those witnesses to relate and explain past occurrences.
- Study different descriptions made by the same witness or by different witnesses.
- Identify the different procedures done by witnesses (i.e.: if a witness identifies your client but their identification procedure was different from the witness that doesn't identify your client), this might be effectively pointed out.
- Who had the better view
- Who was less scared
- Whose identification procedure is more reliable

CONCLUSION

The defense attorney should remember that the identification is not limited to what the witness says on direct, but encompasses all events surrounding identification prior to the testimony. He should consider all factors that may make the identification unreliable and lock in witnesses where conflicting descriptions of the defendant by different witnesses exist. Making the eyewitness account unreliable in front of the jury could be the reasonable doubt needed for an acquittal.

ABOUT THE AUTHOR

Bob Ravitz has served as Oklahoma County public defender since 1987. He is also an adjunct professor at OCU School of Law, teaching in the areas of trial practice, capital litigation and criminal procedure. He frequently lectures on topics related to the practice of criminal law, and was the 1996 winner of the Clarence Darrow Award, recognizing Oklahoma's outstanding criminal defense lawyer. He is a 1976 graduate of the OCU School of Law.

NOTICE OF JUDICIAL VACANCY

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

**Associate District Judge
Twentieth Judicial District
Marshall County, Oklahoma**

This vacancy is created by the retirement of the Honorable Richard Miller effective July 1, 2011.

To be appointed an Associate District Judge, an individual must be a registered voter of the applicable judicial district at the time (s)he takes the oath of office and assumes the duties of office. Additionally, prior to appointment, the appointee must have had a minimum of two years experience as a licensed practicing attorney, or as a judge of a court of record, or combination thereof, within the state of Oklahoma.

Application forms can be obtained online at www.oscn.net by following the link to the Oklahoma Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 1915 North Stiles, Suite 305, Oklahoma City, Oklahoma 73105, (405) 521-2450, and should be submitted to the Chairman of the Commission at the same address **no later than 5 p.m., Wednesday, May 25, 2011. If applications are mailed, they must be postmarked by midnight, May 25, 2011.**

Allen M. Smallwood, Chairman
Oklahoma Judicial Nominating Commission

OBA Nominating Petitions

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

BOARD OF GOVERNORS

SUPREME COURT JUDICIAL DISTRICT NO. 6

KIMBERLY K. HAYS, TULSA

Nominating Petitions have been filed nominating Kimberly K. Hays for election of Supreme Court Judicial District No. 6 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2012.

A total of 131 signatures appear on the petitions.



SAVE THE DATE

107th OBA Annual Meeting

Nov. 2-4, 2011

Hyatt Regency, Tulsa



The Oklahoma Indigent Defense System — What It Is and Who It Serves

By Craig Sutter

Whenever the phrase “criminal justice system” is invoked, the first thing that often comes to mind are law enforcement, prosecutorial and corrections functions. However, indigent defense services are a part of that system and are critical in ensuring its effective operation. The Oklahoma Indigent Defense System (OIDS) is the state agency responsible for fulfilling the majority of the state’s obligations under the United States and Oklahoma Constitutions to provide trial, appellate and capital post-conviction criminal defense representation to persons who have been judicially determined to be entitled to legal counsel at state expense.¹

GENESIS OF OIDS

With the Sixth Amendment right to counsel operating in the background, OIDS was created in response to a lawsuit challenging the constitutionality of the prior compulsory court-appointment process. In *State of Oklahoma v. Lynch*, 1990 OK 82, 796 P.2d 1150, the Oklahoma Supreme Court considered that process requiring attorneys to represent indigent defendants without adequate compensation. Under the system prior to the *Lynch* decision, attorneys might appear at a civil motion docket and then find themselves appointed on an indigent criminal case regardless of their desire to be appointed and despite their lack of experience in the area of criminal law. At that time, the statutory fee for capital murder cases was \$200 for services before the preliminary hearing, \$500 for services during the preliminary hearing and \$2,500 for legal services from time the defendant was bound over until final disposition of the case. The compensation for felony and misdemeanor cases varied by county, but ultimately could not

exceed \$500 from initial appearance through the final disposition.² Court appointment in a complex criminal case, such as a death penalty case, could destroy an attorney’s legal practice and potentially short-change the client.

In the *Lynch* case, the Oklahoma Supreme Court analyzed statutes relating to court-appointments and the practical effect the scheme had on reluctant attorneys and their clients. The court concluded that 1) although the capital case court-appointment statute in effect at the time was not facially unconstitutional, under the facts presented, it was unconstitutional in its application; 2) the court-appointment system in effect at the time pressed lawyers into service without affording a post-appointment opportunity to show cause why they should not be forced to accept the appointment; and 3) the court-appointment statute provided an arbitrary and unreasonable rate of compensation for lawyers which may have resulted in an unconstitutional taking of private property depending on the facts of each case.³ The court proceeded to adopt

a statewide system for compensation of court-appointed attorneys tied to the compensation rates for district attorneys and their assistants. That compensation rate became effective immediately with respect to computation of fees in all capital murder cases and was to become effective on Aug. 24, 1992, with respect to non-capital cases, in order to allow the Oklahoma Legislature time to address the problem in the interim.⁴

The Legislature took up the *Lynch* court's invitation by enacting the Oklahoma Indigent Defense Act, 22 O.S. §§1355 *et seq.*, effective July 1, 1991. The act created OIDS and imposed major changes in funding and delivery of criminal defense services at both the trial and appellate levels.

AGENCY STRUCTURE AND HOW SERVICES ARE PROVIDED

OIDS is governed by a five-person Oklahoma Indigent Defense System Board.⁵ The OIDS executive director is the agency's chief executive officer.⁶ The agency's main office is located in Norman, with six satellite offices operating throughout the state.⁷ The agency consists of three program areas: the General Operations Program, the Trial Program and the Appellate Program. The General Operations Program encompasses the Executive Division, which provides all administrative, finance and computer operations services and support throughout the agency. The Trial Program, which involves services to court-appointed clients at the district court level, consists of the Non-Capital Trial Division, the Capital Trial Division — Norman and the Capital Trial Division — Tulsa. The Appellate Program, which provides representation before the Oklahoma Court of Criminal Appeals, consists of the General Appeals Division, the Homicide Direct Appeals Division and the Capital Post-Conviction Division.

The threshold requirement for OIDS representation is that, upon submitting a proper application to the court, a defendant must be judicially determined to be indigent and unable to employ counsel.⁸ OIDS is then responsible for representing indigent defendants at trial in the district courts throughout the state and on appeal before the Oklahoma Court of Criminal Appeals in all capital, felony and misdemeanor cases, state district court traffic cases punishable by incarceration, juvenile delinquency proceedings, adult certification proceedings, reverse

certification proceedings and youthful offender proceedings.⁹ OIDS further represents its court-appointed capital clients in certiorari petitions to the U.S. Supreme Court.¹⁰ OIDS does *not* provide trial representation to indigent defendants charged in either Oklahoma or Tulsa County District Court, which have their own public defender systems, but under certain circumstances does provide representation to defendants convicted in those counties on appeal, as discussed below.¹¹ OIDS does not provide representation in non-capital post-conviction cases, mental health cases, in-need-of-supervision proceedings or juvenile proceedings which are civil in nature.¹²

While steadily increasing over the years, the agency's total caseload has experienced a recent dramatic spike. From the period of July 1, 2009, through June 30, 2010, OIDS provided legal representation in a total of 43,883 cases, an increase of over 11 percent from the previous fiscal year. Projections for the current fiscal year show an additional jump in the agency's overall caseload.

Non-Capital Trial Division

The OIDS Non-Capital Trial Division is responsible for providing trial defense services to its court-appointed clients in 75 of 77 Oklahoma counties (the exception being Oklahoma and Tulsa Counties). The majority of OIDS cases are assigned to the division, which litigates everything from district court traffic cases punishable by incarceration to first degree murder cases not involving the death penalty. The division's main office is located in Norman. The division, through its chief and deputy chief, is primarily responsible for directing and administering services provided by attorneys and support staff within the division's five satellite offices as well as the services provided by agency contract attorneys and expert providers.

In 56 Oklahoma counties, the division provides non-capital trial representation through private attorneys who enter into flat-rate fiscal year contracts (commonly referred to as county contracts) with the agency. Each year, the Indigent Defense System Board solicits and considers offers from private attorneys to enter into these contracts, and considers offers by contracting attorneys to renew existing contracts.¹³ Most county contracts have one or more participating attorneys who assume a share of the assigned caseload and are available to handle

cases in which the contracting attorney or other participating attorneys may have a conflict of interest which would preclude representation. Among the factors the board considers in awarding these county contracts are the qualifications of the contracting and participating attorneys, the number of attorneys available to handle the caseload, how many different law firms are involved so as to reduce the number of conflict cases that would otherwise be reassigned to conflict counsel or agency staff, and of course, the cost of the contract. Many of these contracts cover multiple counties.

For various reasons, the agency experienced problems in securing adequate fiscal year contracts in certain geographical regions of the state. OIDS responded to this need by establishing Non-Capital Trial Division satellite offices staffed with agency attorneys, investigators and support personnel.¹⁴ These offices are located in Clinton, Guymon, Mangum, Okmulgee and Sapulpa, serving a total of 19 Oklahoma counties. The agency further employs an attorney who travels throughout the western half of Oklahoma litigating non-capital trial cases in which a conflict of interest precludes satellite office attorney representation.¹⁵

OIDS also contracts with private attorneys to litigate conflict-of-interest cases that cannot be handled by any attorney on a county contract or an agency satellite office. Contracts are also entered into in what are termed "overload cases" when staff attorney caseloads become excessively burdensome. Funding reductions due to the statewide budget crisis have, however, effectively ended overload contracts and substantially reduced the number of conflict of interest contracts, resulting in increased caseloads for staff attorneys and contractors.

Capital Trial Divisions

As with the Non-Capital Trial Division, the agency's Capital Trial Divisions provide legal representation in 75 of 77 Oklahoma counties, excluding Oklahoma and Tulsa Counties. This representation is provided to court-appointed clients who are charged with first degree murder and face a sentence of death, life without parole or life with parole. The caseload is divided between the agency's two capital trial offices. The Capital Trial Division — Norman office litigates cases in 46 counties, roughly covering the western and central parts of the state. The Capital Trial Division — Tulsa office (a satellite office actually located in Sapulpa)

provides representation in 29 counties in the eastern part of the state. Both offices are assigned each other's conflict of interest cases. In those instances where neither office can provide representation to a client due to a conflict of interest with both divisions, the agency enters into a contract with qualified private counsel to represent the client.

General Appeals Division

The OIDS General Appeals Division, located in the OIDS Norman office, litigates non-capital direct appeals (direct appeals are statutory appeals to the Oklahoma Court of Criminal Appeals as a matter of right upon conviction). The division's caseload, like that of the Non-Capital Trial Division, covers everything from district court traffic appeals involving incarceration to first degree murder cases with sentences short of death. Non-capital direct appeals by indigent defendants are assigned exclusively to OIDS in 75 of 77 Oklahoma counties, with the division assigned to litigate direct appeals arising out of Oklahoma and Tulsa Counties only where the defendant was not represented at trial by the county public defender, or where a conflict of interest exists between defendants on appeal. The division and its caseload was the subject of the *Harris v. Champion* litigation, discussed below, which reinforced the need for adequate resources and staff enabling the division to meet briefing deadlines. In the past, overload contracts with private attorneys lessened the excessive caseload carried by division attorneys, but with recent funding reductions, the agency has temporarily ceased contracting such appeals.

Homicide Direct Appeals Division

The Homicide Direct Appeals Division, previously named the Capital Direct Appeals Division, litigates all death penalty direct appeals as well as all homicide appeals filed with the Court of Criminal Appeals. Where a conflict of interest arises, however, the appeal is generally assigned to private contract counsel if the case is capital, or to the General Appeals or Capital Post-Conviction Division if non-capital. The division is required, where warranted circumstances of a case, to file a petition for certiorari before the U.S. Supreme Court when the client is unsuccessful at the state appellate court level. As with the General Appeals Division, Homicide Direct Appeals litigates all appeals arising out of 75 Oklahoma

counties, and in certain cases, from Oklahoma and Tulsa Counties as well.

Capital Post-Conviction Division

Pursuant to the Indigent Defense Act and Capital Post-Conviction statutes, the OIDS Capital Post-Conviction Division is appointed to all capital post-conviction cases arising from all Oklahoma counties. Capital post-conviction cases are commenced upon the filing of an application for post-conviction relief with the Court of Criminal Appeals within 90 days of the filing of the appellant's brief (or reply brief) in his or her pending capital direct appeal.¹⁶ The division also litigates conflict appeals reassigned from the Homicide Direct Appeals and General Appeals Divisions.

Special Services

An indigent defendant's right to expert assistance was established by the U.S. Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985). Such assistance covers a broad range of disciplines, from crime scene reconstructions to client psychological assessments. Expert assistance will generally include evaluations, reports, consultation and often in-court testimony at trial or other proceedings. In light of the *Ake* decision, OIDS is required to furnish necessary expert services, which it accomplishes through contracts with various expert service providers, as well as conducting in-house case psychological evaluations and assessments through the Psychological Services unit.¹⁷ The provision of expert services, in light of a limited budget, require an in-depth analysis of whether services are necessary, the type of services needed and who should provide those services. In recent years, DNA testing has evolved to become a critical issue arising in many criminal prosecutions. Through DNA testing of evidence in old cases, OIDS exonerated six clients who served substantial prison time for crimes they did not commit.¹⁸

A CRUCIAL LINK IN THE CRIMINAL JUSTICE CHAIN

OIDS is funded primarily with state appropriated dollars, supplemented with funding through statutory fees assessed to clients (upon conviction or plea bargain) by the courts at the conclusion of representation. The recent economic downturn, coupled with a substantial increase in the number of court-appointed cases, has put increased pressure on the agency's ability to ensure continued legal defense

services which satisfy the state and federal constitutions. OIDS was the subject of two seminal cases demonstrating the extent of the adverse impact on the criminal justice system when the agency has insufficient resources to adequately represent its clients.

The first is *Harris v. Champion, et al.*, 15 F.3d 1538 (10th Cir. 1994), a federal habeas corpus case filed by numerous Oklahoma Department of Corrections prisoners, many of whom waited three or more years before a brief was filed on their behalf on direct appeal to the Oklahoma Court of Criminal Appeals.¹⁹ The named respondents included OIDS and its governing board, as well as judges of the Oklahoma Court of Criminal Appeals. The court stated that a delay beyond two years is presumptively excessive, and delays due to underfunding or any mismanagement of resources are not a constitutionally sufficient justification.²⁰ The court noted possible violations of the equal protection and due process clauses to the U.S. Constitution, as well as the right to effective assistance of counsel under the Sixth Amendment. The backlog and eventually the case itself was resolved with additional funding appropriated by the Legislature to OIDS and the attorney general's office to contract with attorneys to handle the excessive number of appeals.

Another important case demonstrating the need for sufficient indigent criminal defense resources is *Bednar v. District Court of Kay County*, 2002 OK CR 41, 60 P.3d 1. This case arose during the 2002 statewide funding crisis which resulted in the inability of the agency to enter into conflict-of-interest legal representation contracts with private attorneys (in cases all over the state). This in turn led to contempt proceedings lodged against the agency's executive director in the District Court of Kay County. A petition for writ of prohibition was filed in the Court of Criminal Appeals seeking to dismiss the contempt citation.

In its opinion, the Court of Criminal Appeals first held that contempt proceedings were not properly before the court, concluding other adequate remedies existed. However, the court stated that the issues presented in the case were complex and involved multiple conflicting constitutional and statutory provisions, such as the prohibition from entering into a contract if unencumbered funds are unavailable. The court further stated that the case raised important separation of powers ques-

tions and potential conflicts in jurisdiction between the Oklahoma Court of Criminal Appeals and the Oklahoma Supreme Court. The court affirmed the state's ultimate responsibility to provide counsel, regardless of whether counsel is furnished and paid by OIDS, the court fund or the general fund.²¹ The court ordered the district court to provide counsel at state expense by a certain date, or the defendants in the underlying criminal cases would be released from jail.²²

In order to avoid the release of defendants from jail who were awaiting trial but had no lawyer, an agreement was reached among representatives of all three branches of state government to ensure the immediate provision of defense counsel. This agreement provided that the court fund would pay for conflict counsel representation until the Legislature appropriated supplemental funding the following session for court fund reimbursement and funding of future OIDS conflict cases.

Both the *Harris v. Champion* and *Bednar v. District Court of Kay County* cases drive home the point that the "criminal justice system chain" is only as good as its weakest link. All components of that system, whether district attorneys, the courts, the Department of Corrections or OIDS, must be adequately funded and provided with the necessary resources to keep the entire system operating.

CONCLUSION

Criminal defense representation is not easy under the best of circumstances. Public perception of criminal defense lawyers is often unfavorable because of who they represent. Further, a criminal practice is generally not lucrative in the private sector and certainly not in the public defender arena. Despite a recent wavering budgetary picture, OIDS has been able to successfully meet the state of Oklahoma's constitutional mandates for several reasons. The most important of these reasons is the dedication, tenacity and professionalism of the agency's staff attorneys, support personnel and contract lawyers. While it may from time to time seem like a thankless task, criminal defense work is a noble calling, and those who have heeded that call uphold the highest ideals of our system of justice. The Indigent Defense System Board, the executive director and administration also play a key role in the agency's success in managing its diverse compo-

nents and ensuring all court-appointed clients receive an effective defense, while keeping costs to a minimum and stretching available funding as far as possible. Finally, despite the bleak statewide budget picture, OIDS has been able to continue meeting the agency's and the state's constitutional obligations to the citizens of Oklahoma through the support it receives from members of the Legislature and the Office of the Governor.

1. An indigent's right to court-appointed counsel in a felony prosecution was established by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963). An indigent's right to court-appointed counsel in a misdemeanor prosecution where imprisonment is a real possibility was established in *Argersiner v. Hamlin*, 407 U.S. 25 (1972). The right to counsel at state expense on direct appeal was established in *Douglas v. California*, 372 U.S. 353 (1963).

2. *State v. Lynch*, 796 P.2d 1150, 1990 OK 82, fn. 13.

3. *Id.* at 1153.

4. *Id.* at 1164.

5. 22 O.S.2001, §1355.1.

6. 22 O.S.2001, §1355.4(A).

7. Five satellite offices are OIDS Non-Capital Trial Division offices. One is the OIDS Capital Trial Division — Tulsa office.

8. 22 O.S.2001, §1355(B); 22 O.S.Supp.2002, §1355A. Application is made to the district court by filling out and signing under oath an "Affidavit in Forma Pauperis" set forth as Form 13.3 of Section XIII of the Rules of the Court of Criminal Appeals, 22 O.S.2001, Ch. 18, App.

9. 22 O.S.2001, §1355.6(A).

10. 22 O.S.2001, §1360(D).

11. 22 O.S. 2001, §1355(C).

12. 22 O.S.2001, §1355.6(A).

13. 22 O.S.2001, §1355.8.

14. 22 O.S.2001, §1355.9.

15. This position was created through a grant funded by the U.S. Department of Justice.

16. 22 O.S.Supp.2006, §1089.

17. 22 O.S.2001, §1355.4(D).

18. The agency's involvement and representation in the case of Ron Williamson, who was wrongfully convicted of first degree murder, sentenced to death, and after spending years on death row, was ultimately exonerated by DNA testing, is chronicled in John Grisham's book *The Innocent Man*. Grisham, John *The Innocent Man*, Doubleday, 2006.

19. A separate case, *Harris v. Champion, et al.*, 51 F.3d 901 (1995), filed pursuant to 42 U.S.C. §1983, involved essentially the same parties. The court ultimately held that the claims for damages against the various parties were barred by either the 11th Amendment or qualified immunity, with the claim for injunctive relief relating to brief deadline extensions rendered moot due to a legislative appropriation to OIDS and the attorney general's office to contract backlogged cases out.

20. *Id.* at 1546-47.

21. *Id.* at 3.

22. *Id.* at 3-4.

ABOUT THE AUTHOR

Craig Sutter is the deputy executive director of the Oklahoma Indigent Defense System. Prior to joining OIDS in 2000, he was general counsel for the Oklahoma Department of Mental Health and Substance Abuse Services. He also served as an assistant attorney general from 1988 through 1996 within the litigation division of the Oklahoma Attorney General's Office, litigating civil rights and tort cases throughout the state.

Legislative Session Nears End

By *Duchess Bartmess*

The latest the first session of the 53rd Oklahoma Legislature can be in session is Friday, May 27, not later than 5 p.m. As in past years, leaders of both houses hope to be able to adjourn earlier. Given the complexity of many of the issues they are dealing with, early adjournment may not be possible.

As of the close of business May 6, 2011, the governor has signed 175 legislative measures and five measures have been vetoed. There have been no line-item vetoes, no measures have become law without the signature of the governor and 52 measures are on the governor's desk awaiting action.

SIGNIFICANT MEASURES SIGNED BY THE GOVERNOR

These measures have been signed by the governor but have not been previously discussed in previous bar journal reports:

HB 1209: New law providing physicians who provide medical services at athletic events shall not be liable for damages as a result of any acts or omissions except for committing gross negligence or willful or wanton negligence in rendering the emergency care

HB 1255: Authorizes U.S. attorneys to carry firearms under certain conditions

HB 1274: Provides for alternative teaching certification



HB 1275: Modifies definitions and licensing provisions in Nursing Practice Act

HB 1296: Modifies annexation procedures for cities and towns

HB 1327: Authorizes Forestry Division to plan and conduct prescribed burning at request and expense of landowners for purpose of controlling Eastern Red Cedar and other invasive species; limits liability under Governmental Tort Claims

HB 1358: Authorizes issuance of protective orders against incarcerated persons

HB 1360: Clarifies procedures for issuing protective orders regarding children and juveniles

HB 1414: Authorizes attorney general to charge fee for legal services

HB 1439: Expands the right to use deadly force

HB 1504: Home health care licensing, accrediting agencies

HB 1593: Repealer of municipal employee Collective Bargaining Act

HB 1604: Clarifies guidelines for seizing property

HB 1614: Modifying dates for presidential preference primary

HB 1664: Modifies initiative and referendum procedures

HB 1688: Declaring certain labor contracts void

HB 2024: Damages, periodic payment and evidence of financial responsibility

SB 54: Adds residency requirement to qualifications for district attorney

SB 59: Provides for school employee criminal history checks

SB 147: Modifies signature requirements for incorporation of towns

SB 162: Authorized retired district attorney to carry badge and sidearm

SB 246: Increases maximum bank or credit union deposit which may be transferred to heirs

SB 331: Fraudulent claims: number of persons required to institute certain actions

SB 406: Increases time and distance regarding funeral picketing

SB 530: Livestock Owner's Lien Act of 2011

SB 547: Elective abortion coverage

SB 587: Termination date for well plugging fund

SB 801: Providing for insurance coverage of portable electronics

SB 885: Application of tax rate for certain well types during specified times

SB 923: Gang-related offense as condition of membership

MEASURES WHICH HAVE BEEN VETOED

HB 1227: Ardmore Higher Education Program transferred to regional university system

HB 1471: Added the state veterinarian and one registered veterinarian to membership on the board; provided method of election to determine nominees for appointment by other veterinarians; limited who governor could consider for appointment to the board; required all nominees for appointment to be confirmed by the Senate

HB 1812: Increased competitive bidding threshold on right-of-way projects

SB 186: Sunset action, terminating on July 1, 2014, the Polygraph Examiners Board; State Board of Osteopathic Examiners; Board of Podiatric Medical Examiners; and Oklahoma State Athletic Commission

SB 241: Modified provisions regarding payment procedures for county roads and bridges

SOME MEASURES AWAITING ACTION BY THE GOVERNOR

HB 1010: Justices and judges; retirement age; benefit computations

HB 1355: Modifying duties for burying bodies

HB 1520: Modifying penalties; certain uninsured motorist violation

HB 1549: Crimes; child pornography victims

HB 1586: Modifying the Uniform Athlete Agents Act

HB 1598: Real Estate License Code; exempting certain persons from liability

HB 1615: Elections: Let the Troops Vote Act

HB 1692: Modifying Floodplain Management Act

HB 1821: Oil and Gas Exploration Rights Act

HB 1957: Agriculture; licensing and permits for swine feeding operations

HB 1970: Abortion-inducing drugs

HB 1998: Revenue and taxation; income tax checkoffs; revolving funds

OBA Bills at a Glance

Status of OBA bills as endorsed by the House of Delegates:

SB 940 allows for service of a judgment by means other than mail. Signed by the governor.

SB 941 relates to attorney work product and expert witnesses. Was on House agenda for vote, but did not make deadline to be heard.

SB 942 relates to when a party can dismiss without leave of court. Laid over by House Judiciary Committee for next session.

SB 943 relates to appeals from administrative proceedings and clarifies which parties are necessary to be named on appeal. Signed by the governor.

Current as of May 12, 2011

HB 2004: Teachers' Retirement System of Oklahoma; death benefits; disclaimer

HB 2023: Civil procedure; admissibility for actual amounts paid for medical bills

SB 19: Solid waste - requiring certain slopes on landfill sites; requiring fee

SB 124: Eminent domain

SB 324: Boating safety: evidentiary procedure for testing for operating under the influence

SB 412: Oklahoma Health Care Authority: entities to accept right of recovery and assignment of rights

SB 701: Medical records: access to medical records: requirements for disclosure

SB 704: Class actions: procedures for inclusion in certain class

SB 780: Home Service Contract Act: insurance

SB 928: Roofing contractors: contract cancellation for denial of insurance claim, payment refunds

SB 953: Public Safety: driver license reinstatement fee

SB 954: Public Safety: collision report fee

As always, all the bills signed and pending cannot be discussed here. However, an attempt is made to note some of the more significant bills that might be of interest to the practicing attorney. Also, as always, each practitioner is encouraged to review the list and take a longer look at those measures that could apply to their individual practice. That information can be found online at www.oklegislature.gov.

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



***The Annual Meeting Art
Contest has returned. Start
creating now!***

**NEW CATEGORY FOR ALL MEDIA
MILITARY THEMED ART**

Nominate an Oklahoma Lawyer Deserving of Applause

**To the actor,
it's the Oscar.**



Now is the time to honor Oklahoma lawyers by nominating them for OBA Awards. Awards will be presented at the Annual Meeting to be held Nov. 2-4 in Tulsa. The deadline for nominations is Aug. 17.

Anyone can submit an award nomination, and anyone nominated can win. Nominations don't have to be long; they can be as short as a one-page letter to the OBA Awards Committee. Want to keep it really simple? An easy-to-fill-out form is available online at www.okbar.org.



**To the Olympian, it's
the Gold.**

JUST A FEW RULES

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

jeffk@okbar.org. Fax to (405) 416-7089.
Mail to: OBA Awards Committee
P.O. Box 53036
Oklahoma City, OK 73152



**To the
lawyer, it's
the OBA
Award.**



**To the singer,
it's the
Grammy.**

Continue reading for award descriptions.

AWARDS AND LAST YEAR'S WINNERS

Outstanding County Bar Association Award

for meritorious efforts and activities
2010 Winner: Muskogee County Bar Association

Hicks Epton Law Day Award

for individuals or organizations
for noteworthy Law Day activities
2010 Winner: Comanche County Bar Association

Golden Gavel Award

for OBA Committees and Sections performing with a high degree of excellence
2010 Winner: OBA Family Law Section, Kimberly Hays, Chairperson

Liberty Bell Award

for non-lawyers or lay organizations for promoting or publicizing matters regarding the legal system
2010 Winner: Sherri Carrier, Tulsa

Outstanding Young Lawyer Award

for a member of the OBA Young Lawyers Division for service to the profession
2010 Winners: Doris L. Gruntmeir, Muskogee & Richard L. Rose, Oklahoma City

Earl Sneed Award

for outstanding continuing legal education contributions
2010 Winner: Justice John F. Reif, Skiatook

Award of Judicial Excellence

for excellence of character, job performance or achievement while a judge and service to the bench, bar and community
2010 Winners: Judge Bryan C. Dixon, Oklahoma City & Judge James H. Payne, Muskogee

Fern Holland Courageous Lawyer Award

to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession
2010 Winner: Not awarded

Outstanding Service to the Public Award

for significant community service by an OBA member
2010 Winner: Richard L. McKnight, Enid

Award for Outstanding Pro Bono Service

by an OBA member
2010 Winners: Ana Basora-Walker, Lawton, James J. Proszek, Tulsa & Steven W. Soulé, Tulsa

Joe Stamper Distinguished Service Award

to an OBA member for long-term service to the bar association or contributions to the legal profession
2010 Winner: R. Forney Sandlin, Muskogee

Neil E. Bogan Professionalism Award

to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession
2010 Winner: R. Clark Musser, Oklahoma City

John E. Shipp Award for Ethics

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

members of the profession
2010 Winner: Retired Judge Milton Craig, Chandler

Alma Wilson Award

for an OBA member who has made a significant contribution to improving the lives of Oklahoma children
2010 Winner: Judge C. William Stratton, Lawton

Trailblazer Award

to an OBA member or members who by their significant, unique visionary efforts have had a profound impact upon our profession and /or community and in doing so have blazed a trail for others to follow
2010 Winner: Reggie Whitten, Oklahoma City

NOMINATION WRITING TIPS

Award Committee Chair
Renée Hildebrant shares
these suggestions:



- A respected lawyer or judge has no chance of winning if he or she is not nominated.
- County bars are encouraged to nominate themselves. Smaller bars have an equal chance to win because the number of members is considered in relation to the county bar activities accomplished for Law Day and/or for the entire year.
- A nomination that gives details or shares short stories about why a person deserves to win has a better chance of winning than submitting a bio. Don't assume committee members know your nominee.
- Information about your nominee is better than letters of support. Don't put this off until the last minute; start writing your short, concise nomination today. Your nominee deserves to be considered for an OBA Award.

INDIVIDUALS FOR WHOM AWARDS ARE NAMED

NEIL E. BOGAN — Neil Bogan, an attorney from Tulsa, died unexpectedly on May 5, 1990, while serving his term as president of the Oklahoma Bar Association. Mr. Bogan was known for his professional, courteous treatment of everyone he came into contact with and was also considered to uphold high standards of honesty and integrity in the legal profession. The OBA's Professionalism Award is named for him as a permanent reminder of the example he set.

HICKS EPTON — While working as a country lawyer in Wewoka, attorney Hicks Epton decided that lawyers should go out and educate the public about the law in general, and the rights and liberties provided under the law to American citizens. Through the efforts of Mr. Epton, who served as OBA president in 1953, and other bar members, the roots of Law Day were established. In 1961, the first of May became an annual special day of celebration nationwide designated by a joint resolution of Congress. The OBA's Law Day Award recognizing outstanding Law Day activities is named in his honor.

FERN HOLLAND — Fern Holland's life was cut tragically short after just 33 years, but this young Tulsa attorney made an impact that will be remembered for years to come. Ms. Holland left private law practice to work as a human rights activist and to help bring democracy to Iraq. In 2004 she was working closely with Iraqi women on women's issues when her vehicle was ambushed by Iraqi gunmen, and she was killed. The Courageous Lawyer Award is named as a tribute to her.

MAURICE MERRILL — Dr. Maurice Merrill served as a professor at the University of Oklahoma College of Law from 1936 until his retirement in 1968. He was held in high regard by his colleagues, his former students and the bar for his nationally distinguished work as a writer, scholar and teacher. Many words have been used to describe Dr. Merrill over the years, including brilliant, wise, talented and dedicated. Named in his honor is the Golden Quill Award that is given to the author of the best written article published in the *Oklahoma Bar Journal*. The recipient is selected by the OBA Board of Editors.

JOHN E. SHIPP — John E. Shipp, an attorney from Idabel, served as 1985 OBA president and became the executive director of the association in 1998. Unfortunately his tenure was cut short

when his life was tragically taken that year in a plane crash. Mr. Shipp was known for his integrity, professionalism and high ethical standards. He had served two terms on the OBA Professional Responsibility Commission, serving as chairman for one year, and served two years on the Professional Responsibility Tribunal, serving as chief-master. The OBA's Award for Ethics bears his name.

EARL SNEED — Earl Sneed served the University of Oklahoma College of Law as a distinguished teacher and dean. Mr. Sneed came to OU as a faculty member in 1945 and was praised for his enthusiastic teaching ability. When Mr. Sneed was appointed in 1950 to lead the law school as dean, he was just 37 years old and one of the youngest deans in the nation. After his retirement from academia in 1965, he played a major role in fundraising efforts for the law center. The OBA's Continuing Legal Education Award is named in his honor.

JOE STAMPER — Joe Stamper of Antlers retired in 2003 after 68 years of practicing law. He is credited with being a personal motivating force behind the creation of OUJI and the Oklahoma Civil Uniform Jury Instructions Committee. Mr. Stamper was also instrumental in creating the position of OBA general counsel to handle attorney discipline. He served on both the ABA and OBA Board of Governors and represented Oklahoma at the ABA House of Delegates for 17 years. His eloquent remarks were legendary, and he is credited with giving Oklahoma a voice and a face at the national level. The OBA's Distinguished Service Award is named to honor him.

ALMA WILSON — Alma Wilson was the first woman to be appointed as a justice to the Supreme Court of Oklahoma in 1982 and became its first female chief justice in 1995. She first practiced law in Pauls Valley, where she grew up. Her first judicial appointment was as special judge sitting in Garvin and McClain Counties, later district judge for Cleveland County and served for six years on the Court of Tax Review. She was known for her contributions to the educational needs of juveniles and children at risk, and she was a leader in proposing an alternative school project in Oklahoma City, which is now named the Alma Wilson SeeWorth Academy. The OBA's Alma Wilson Award honors a bar member who has made a significant contribution to improving the lives of Oklahoma children.

Academy Seeks to Develop Future Bar Leaders

By *Deborah A. Reheard*

President John F. Kennedy once said, “Leadership and learning are indispensable to each other.” As president of the Oklahoma Bar Association, I am passionate about leadership, and that is why one of the goals of my presidency is to continue to build on the OBA’s successful foundation in leadership training for tomorrow’s bar leaders.

The OBA has offered multiple leadership training opportunities in the past that have been well received and produced many current OBA leaders. The OBA offered a 2007 Leadership Conference and two classes have graduated from the more extensive OBA Leadership Academy, one in 2009 and one in 2010.

The 2011-2012 Leadership Academy will include about 30 individuals who will be selected. There will be four sessions, beginning in the early fall this year and continuing through April 2012. You can review the programming offered at www.okbar.org/members/leadershipacademy.

If you are selected and attend this program, you will learn what it means to be a leader. You will learn how to communicate, motivate and

succeed not only in your law career, but also in service to professional, political, judicial, civic and community organizations. You will also have a chance to meet and interact with prominent legal and community leaders.

It is also of extreme importance to me that the Leadership Academy participants include members of the OBA who are from diverse backgrounds or who have historically been under represented in OBA leadership. If you fall within one of these categories, I urge you to consider applying for this opportunity.

My thanks to the Leadership Academy Task Force, led by Bartlesville Attorney Linda Thomas. The continued work of the task force is much appreciated.

- Who is eligible? Any OBA member is welcome to apply.
- How do I apply? Fill out the application form online at www.okbar.org/members/leadershipacademy by June 15.



- What is the cost? The OBA will pay for the program, accommodations and food, but participants will be responsible for their own travel.

- Why participate? You will benefit personally and professionally by learning about professional leadership. You will be exposed to the legislative and judicial systems; you will interact with high-level state and local officials and judges and meet many attorneys from the private and public sectors.

Questions? Call or email Co-Chair Linda Thomas at (918) 337-0947, linda@thomasfamilylaw.com, or OBA Educational Programs Director Donita Bourns Douglas at (405) 416-7028, donitad@okbar.org.

Deborah Reheard is 2011 OBA President.

OBA SOLO and SMALL FIRM CONFERENCE

JUNE 9-11 2011 • DOWNSTREAM RESORT • QUAPAW, OK

DAY 1 • Thursday June 9

4 - 6:15 p.m. Registration and check-in at the Resort Lobby
 6:30 - 8:30 p.m. Registration and check-in at the Pool Side Pavilion
 6:30 p.m. Poolside buffet dinner and children's activities
 (included in registration fee)

Barry Switzer will also be poolside Thursday evening.

**Come
& Enjoy
the Fun!**

DAY 2 • Friday June 10

6:30 - 9:30 a.m. Breakfast buffet in Pool Side Pavilion		8:25 a.m.	<div>Welcome</div> <div>Deborah Reheard</div> <div>OBA President</div>	
7:30 a.m. Conference Registration in Resort Lobby				
9:30 a.m. - 3:30 p.m. Children's activities in Buffalo Calf Room		8:30 - 9:20 a.m.	<div>50 Hot Tips in 50 Minutes</div> <div>Tom Mighell</div> <div>Jim Calloway</div>	
9:20 a.m.	Break			
9:30 - 10:20 a.m.	<div>How to Communicate with Clients 101: The Basics</div> <div>Sarah Read – The Communications Center Inc.</div>		<div>12 Hours CLE Credit – Including Ethics</div>	
10:20 a.m.	Break			
10:30 - 11 a.m.	<div>How to Communicate with Clients 201: Avoiding, Mitigating and Resolving Conflict</div> <div>Sarah Read – The Communications Center Inc.</div>			
11:30 a.m. - 12:45 p.m.	LUNCH BUFFET (Included in Seminar Registration Fee)			
	<div>Black Hawk</div>	<div>Sacred Elk</div>	<div>Victor Griffin</div>	<div>Saracen</div>
12:45 - 1:45 p.m.	<div>How to Seize Stuff</div> <div>Joe Miner</div>	<div>How Lawyers Use iPads</div> <div>Tom Mighell</div> <div>Phil Tucker</div> <div>Jim Calloway</div>	<div>How to Talk to a Prosecutor</div> <div>Catherine “Cat” Burton</div>	<div>How to Advise Clients on Medicaid and Nursing Home Eligibility Issues</div> <div>Travis Smith</div>
1:45 p.m.	Break			
2 - 3 p.m.	<div>How to Represent Active Military in Family Law Matters</div> <div>Phil Tucker</div>	<div>Living with Legislative Changes Impacting Civil Trial Practice</div> <div>Jon Williford</div>	<div>How to Draft a Simple Will</div> <div>Susan Shields</div>	<div>How to Handle Expungements</div> <div>Jimmy Bunn</div>

6:30 - 10 p.m. Evening poolside buffet and entertainment by New Odyssey


7:30 - 10:30 p.m. Children's activities in the Buffalo Calf Room

DAY 3 • Saturday June 11

6:30 - 9:30 a.m. Breakfast buffet in Pool Side Pavilion

7:30 a.m. Conference Registration in Resort Lobby

9:30 a.m. - 3:30 p.m. Children's activities in Buffalo Calf Room

	Black Hawk	Sacred Elk	Victor Griffin	Saracen
8:30 - 9:20 a.m.	Packing Heat - Concealed Carry Laws in Oklahoma Jimmy Bunn	How to Cope When Opposing Counsel Acts Like a Jerk Travis Pickens	How to Prepare a Witness Jon Williford	How to Represent Active Military in Consumer Cases Rick Robinson and Hugh Fudge
9:20 a.m.	Break			
9:30 - 10:20 a.m.	How to Do Research on the Internet Tom Mighell	How to Do a Family Law Intake Jon Ford	How to Handle Common Indian Law Situations Chrissi Nimmo moderator	How to Withdraw and/or Close a Case Travis Pickens
10:20 a.m.	Break			
10:30 - 11:30 a.m.	How to Obtain Records from Government Agencies Roy Tucker	Our Favorite Technology Tools Tom Mighell and Jim Calloway	How to Succeed with Staff Jim Priest	How to Advise Clients on Medicaid and Nursing Home Eligibility Issues (Repeat of Day 1) Travis Smith
11:30 a.m.	LUNCH <i>(Included in Seminar Registration Fee)</i>			
12:30 - 1:20 p.m.	How to Get it Right: Accounting and Tax for Law Firms Ted Blodgett			
1:20 p.m.	Break			
1:30 - 2:20 p.m.	How to Avoid the Envelope: Trust Accounting the Right Way Gina Hendryx			
2:20 p.m.	Break			
2:30 - 3:30 p.m.	What's Hot and What's Not in Running Your Law Practice Jim Calloway and Tom Mighell			



2011 SOLO & SMALL FIRM CONFERENCE

AND YLD MIDYEAR MEETING

DOWNSTREAM CASINO RESORT, QUAPAW, OK
JUNE 9-11, 2011

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

Full Name: _____ OBA#: _____

Address: _____ City/State/Zip: _____

Phone: _____ Fax: _____ E-mail: _____

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

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

Circle One

Early-Bird Attorney Registration **(on or before May 26, 2011)** \$175

Late Attorney Registration **(May 27, 2011 or after)** \$225

Early-Bird Attorney & Spouse/Guest Registration **(on or before May 26, 2011)** \$275

Late Attorney & Spouse/Guest Registration **(May 27, 2011 or after)** \$325

Spouse/Guest Attendee Name: _____

Early-Bird Family Registration **(on or before May 26, 2011)** \$325

Late Family Registration **(May 27, 2011 or after)** \$375

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

Spouse/Guest: _____ Family: _____ Age: _____

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

Thursday, June 9 - 18 Hole Golf (_____ of entries @ \$50 each) Total \$: _____

Friday, June 10 - 9 Hole Golf (_____ of entries @ \$30 each) Total \$: _____

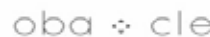
**Make check payable to the Oklahoma Bar Association. Mail Meeting Registration Form to:
CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. FAX Meeting Registration Form to (405) 416-7092**

For payment using _____ VISA _____ Mastercard _____ Discover _____ AmEx

CC: _____

Expiration Date: _____ Authorized Signature: _____

No discounts. Cancellations will be accepted at anytime on or before May 26, 2011 for a full refund; a \$50 fee will be charged for cancellations made on or after **May 27, 2011. No refunds after June 1, 2011. Call 1-(888) 396-7876 for hotel reservations. Ask for the special OBA rate.**





LAW DAY



2011

THANK YOU

to these individuals and
groups who made
Law Day 2011
a success!



**Nearly 2,000
calls for free
legal advice!**

A special thank you to

OETA
THE OKLAHOMA NETWORK

**More than 250
volunteer lawyers
statewide!**

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

Ask A Lawyer TV Program

Chief Justice Steven Taylor

Deborah Reheard, OBA President

Moderator: Dick Pryor

Panelists: Stanley Evans, Robert Don Gifford,
Brady Henderson, Darla Jackson, Susan Krug,
Dewayne Moore, Ryan Pack, Gail Stricklin,
Judge Douglas Stults

The production staff and crew at OETA

Red Rock Video Services

Ask A Lawyer Free Legal Information Statewide Project

All Oklahoma attorneys who volunteered to answer phones

OBA Law Day Committee Chairperson Tina Izadi

Richard Vreeland and Law Day Committee members

County Law Day Chairpersons

County Bar Association Presidents

Additional Thanks:

YWCA of Oklahoma City

Legal Aid of Western Oklahoma Inc.

45th Infantry Museum

Printing Inc.

Leslie Blair, State Farm Insurance

Legal Graphics Inc.

What's Cooking Catering

Oklahoma County Bar Auxiliary

Tulsa County Bar Auxiliary

Janie Morgan

**1,500 contest
entries
received!**

Volunteers Efforts Make Law Day Successful

Lawyers from across the state observed Law Day 2011 with activities ranging from luncheons to award presentations to assisting Oklahomans with their calls for free legal advice. Hundreds of attorneys volunteered over the past few weeks to celebrate our freedom and educate the public on our legal rights and responsibilities. Take a look at some of the various activities in which volunteer attorneys made the day a success.



Pittsburg County Bar Association members competed in a "Race to the Courthouse Steps" a stair climb event for charity. Shown here are (from left) Wesley Cherry, Blake Lynch, John Thomas and Bryan Lynch.



John Thomas, Blake Lynch and Wesley Cherry get set to race to the top of the Pittsburg County Courthouse in McAlester.



Judge Daman Cantrell presents the Tulsa County Bar Association Liberty Bell Award to Taya Slocum and Cortez Tenley.



Tulsa County Law Day Chair Dan Crawford visits with TCBA Law Day luncheon speaker Professor J. Rufus Fears.



Lawyer Danial Smith provides a free legal consultation at Tulsa's Hardesty Library during "Lawyers in the Library."



TCBA volunteers staff the annual Community Law Fair in Tulsa.



John Eagleton is one of more than 50 Tulsa lawyers who answered calls for free legal advice.



Mark Dixon and Mark Schwebe man the phones at the brand new OETA studios in Tulsa during the statewide Ask A Lawyer event.



Rodney Buck presents an award to Mary Ellen Thomas, who took first place in the statewide creative writing contest for eighth graders.



Oklahoma County Bar Association members Margaret Travis, Mary Travis, Zane Wood and Sheila Stinson take calls for free legal advice on Ask A Lawyer day.



Oklahoma County Law Day Chair Lance Leffel makes remarks at the Law Day Luncheon.



Kimberly Brasher and Linda Samuel-Jaha speak with callers at the OETA studios phone bank in Oklahoma City.



Jerry Tubb received the Journal Record Award from publisher Mary Mélon at the Oklahoma County Law Day Luncheon.



Oklahoma County Bar Foundation President Leslie Batchelor (right) presents the Howard K. Berry Sr. Award to Dr. Barbara Bonner, director of the Center for Child Abuse and Neglect, during the Law Day Luncheon.



Oklahoma County Bar Association Members stayed busy answering legal questions throughout the day. It's estimated that Oklahoma lawyers gave away more than \$87,500 worth of free legal advice on April 28.

The Judicial Nominating Commission Elections

The selection of qualified persons for appointment to the judiciary is of the utmost importance to the administration of justice in this state. Since the adoption of Article 7-B to the Oklahoma Constitution in 1967, there has been significant improvement in the quality of the appointments to the bench. Originally, the Judicial Nominating Commission was involved in the nomination of justices of the Supreme Court and judges of the Court of Criminal Appeals. Since the adoption of the amendment, the Legislature added the requirement that vacancies in all judgeships, appellate and trial, be filled by appointment of the governor from nominees submitted by the Judicial Nominating Commission.

The commission is composed of 15 members. There are six non-lawyers appointed by the governor, six lawyers elected by members of the bar, and three at large members, one selected by the Speaker of the House of Representatives; one selected by the President Pro Tempore of the Senate; and one selected by not less than eight members of the Commission. All serve six-year terms, except the members at large who serve three-year terms. Members may not succeed themselves on the commission.

The lawyers of this state play a very important role in the selection of judges since six of the members of the commission are lawyers elected by lawyers. The lawyer members are elected from each of the six congressional districts as they existed in 1967. (As you know, the congressional districts were redrawn in 2002.) Elections are held each odd numbered year for members from two districts.

2011 ELECTIONS

This year there will be elections for members in Districts 1 and 2. District 1 is composed of Creek and Tulsa Counties. District 2 is composed of counties in the northeastern corner of the state. The procedures for the election will be published in the bar journal.

Lawyers desiring to be candidates for the Judicial Nominating Commission positions have until Friday, May 20, 2011, at 5 p.m. to submit their Nominating Petitions. Ballots will be mailed on June 3, 2011, and must be returned by June 17, 2011, at 5 p.m.

It is important to the administration of justice that the OBA members in the First and Second Congressional Districts become informed on the candidates for the Judicial Nominating

Commission and cast their vote. The framers of the constitutional amendment entrusted to the lawyers the responsibility of electing qualified people to serve on the commission. Hopefully, the lawyers in the First and Second Congressional Districts will fulfill their responsibility by voting in the election for members of the Judicial Nominating Commission.

PROCEDURES OF THE OKLAHOMA BAR ASSOCIATION GOVERNING THE ELECTION OF LAWYER MEMBERS TO THE JUDICIAL NOMINATING COMMISSION

1. Article 7-B, Section 3, of the Oklahoma Constitution requires elections be held in each odd numbered year by active members of the Oklahoma Bar Association to elect two members of the Judicial Nominating Commission for six-year terms from Congressional Districts as such districts existed at the date of adoption of Article 7-B of the Oklahoma Constitution (1967).
2. Ten (10) active members of the association, within the Congressional District from which a member of the commission is to be

elected, shall file with the Executive Director a signed petition (which may be in parts) nominating a candidate for the commission; or, one or more County Bar Associations within said Congressional District may file with the Executive Director a nominating resolution nominating such a candidate for the commission.

3. Nominating petitions must be received at the Bar Center by 5 p.m. on the third Friday in May.
4. All candidates shall be advised of their nominations, and unless they indicate they do not desire to serve on the commission, their name shall be placed on the ballot.
5. If no candidates are nominated for any Congressional District, the Board of Governors shall select at least two candidates to stand for election to such office.
6. Under the supervision of the Executive Director, or his designee, ballots shall be mailed to every active member of the association in the respective Congressional District on the first Friday in June, and all ballots must be received at the Bar Center by 5 p.m. on the third Friday in June.
7. Under the supervision of the Executive Director, or

his designee, the ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday of June.

8. Unless one candidate receives at least 40 percent of the votes cast, there shall be a runoff election between the two candidates receiving the highest number of votes.
9. In case a runoff election is necessary in any Congressional District, runoff ballots shall be mailed, under the supervision of the Executive Director, or his designee, to every active member of the association therein on the fourth Friday in June, and all runoff ballots must be received at the Bar Center by 5 p.m. on the third Friday in July.
10. Under the supervision of the Executive Director, or his designee, the runoff ballots shall be opened, tabulated and certified at 9 a.m. on the Monday following the third Friday in July.
11. Those elected shall be immediately notified, and their function certified to the Secretary of State by the President of the Oklahoma Bar Association, attested by the Executive Director.
12. The Executive Director, or his designee, shall take possession of and

destroy any ballots printed and unused.

13. The election procedures, with the specific dates included, shall be published in the *Oklahoma Bar Journal* in the three issues immediately preceding the date for filing nominating resolutions.

COUNTIES IN EACH DISTRICT ARE AS FOLLOWS:

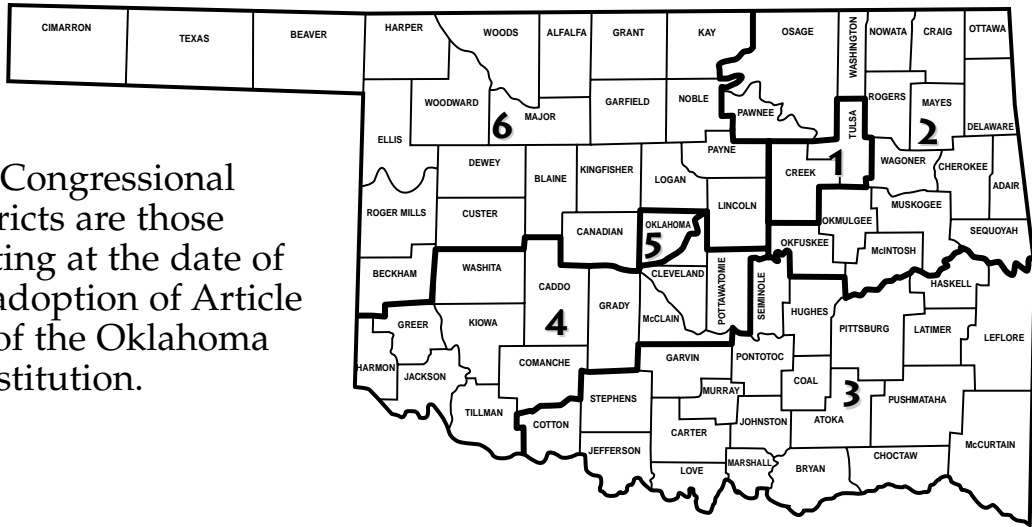
District No. 1

**Creek
Tulsa**

District No. 2

**Adair
Cherokee
Craig
Delaware
Mayes
McIntosh
Muskogee
Nowata
Okfuskee
Okmulgee
Osage
Ottawa
Pawnee
Rogers
Sequoyah
Wagoner
Washington**

see next page for map of Congressional Districts



Note: The Congressional Districts are those existing at the date of the adoption of Article 7-B of the Oklahoma Constitution.

NOTICE

JUDICIAL NOMINATING COMMISSION ELECTIONS CONGRESSIONAL DISTRICTS 1 AND 2

Nominations for election as members of the Judicial Nominating Commission from Congressional Districts 1 and 2 (as they existed in 1967) will be accepted by the Executive Director until 5 p.m., Friday, May 20, 2011. Ballots will be mailed on June 3, 2011, and must be returned by 5 p.m. on June 17, 2011.



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Management Assistance Program Lending Library Gets an Upgrade!

By Jim Calloway, Director, OBA Management Assistance Program

Law practice management books for OBA members to check out and read to improve their law practice have been made available for years through the OBA Management Assistance Program (OBA MAP). Sometimes there was a waiting list when the only copy of a book was checked out. Now, due to a generous grant from the OBA Law Office Management and Technology Section, we have been able to significantly upgrade our offerings by purchasing several copies of popular titles, as well as additional titles in many areas. Hopefully this will make the OBA MAP Lending Library a better member service and reduce the wait time when a popular book is in demand.

Here is a brief look at some of the titles for which we now have multiple copies. *Google for Lawyers* by Carole A. Levitt and Mark E. Rosch is a recently published book, and we are all aware that Google has numerous resources available. Most people are not aware of Google's many offerings, such as Google Profiles, Google Voice, Google Maps, Google Analytics, Google Scholar — and so many more — and most are free! We have other Internet research books by these same authors in the library.

We also have *The Lawyer's Guide to Collaboration Tools and Technology* by Dennis Kennedy and Tom Mighell. These tools represent untapped, often-free technology resources which can be used in law practices. Tom Mighell will be our guest speaker at the OBA Solo and Small Firm Conference this summer. *The Lawyer's Guide to Practice Management Systems and Software* is another popular title, as well as *The Lawyer's Guide to Fact Finding on the Internet*.

Delegating With Confidence

As many of you know, Jim Calloway writes an occasional column for Lawyers USA, which is typically a shortened version of an article already printed in the *Oklahoma Bar Journal*.

This month's article, "Delegating With Confidence" has not been previously published here and so we would like share it with you: <http://tinyurl.com/3mdnbvj>.

But now there are more than books about management and technology that are available through the OBA MAP Lending Library. For example, *Going to Trial: A Step-By-Step Guide to Trial Practice and Procedure* (second edition) by Daniel Small, edi-

“...now there are more than books about management and technology that are available through the OBA MAP Lending Library.”

tor, is a very good book for the new lawyer even though it was originally published in 2002. (Disclaimer: Many of you will not be able to insert the floppy disk that came with it into your current computer).

We also have books about lawyer's quality of life. One of these is called *Law and Reorder* by Deborah Epstein Henry. The subtitle of this book is *Legal Industry Solutions for Restructure, Retention, Promotion and Work/Life Balance*.

We have numerous copies available of the classic book on law office management, *How to Start and Build a Law Practice* by Jay Foonberg (platinum fifth edition). Other law office management books on the shelves are *Flying Solo: A*

Survival Guide for the Solo and Small Firm Lawyer, Fourth Edition, by K. William Gibson, editor, and *Law Office Proce-*

Buying Books Means You Never Have to Return Them

For those who would rather purchase your law practice management books to read at a more leisurely pace, we would like to remind you that American Bar Association books can be purchased at 15 percent discount by OBA members who use the discount code PAB9EOKB at the ABA Web Store. For more detailed instructions on how to do this, please visit www.okbar.org/ababooks.

dures Manuals for Solos and Small Firms, Third Edition, by Demetrios Dimitriou.

Other popular titles include *Virtual Law Practice: How to Deliver Legal Services Online* by Stephanie L. Kimbro, *The Of Counsel Agreement*, Third Edition, by Harold G. Wren and Beverly J. Glascock, *Winning Alternatives to the Billable Hour: Strategies That Work*, by James A. Calloway and Mark A. Robertson, *Forms, Checklists, and Procedures for the Family Lawyer* by Mark A. Chinn, *HIPAA for the General Practitioner* by Melanie D. Bragg, and many, many others.

This is a small selection of available books. You can

download a list of available titles in the lending library online at www.okbar.org/members/map/lending.htm.

The next time you are in the Oklahoma Bar Center, stop by our lending library on the second floor. To provide security for the books, we do keep them in the OBA MAP assistant's office, so feel free to contact Amy Kelly at (405) 416-7008 or amyk@okbar.org to schedule a time when she will be available. For those who cannot easily stop by the Oklahoma Bar Center, OBA members can check out and return books by mail for a nominal shipping and handling fee as described in the accompanying article.

Rules for the Oklahoma Bar Association Management Assistance Program Lending Library

- ☐ Oklahoma Bar Association members shall be entitled to check out one or two books at a time from the library for a period of two weeks.
- ☐ Typically, checkout of books is done in the Oklahoma Bar Center by going to the Lending Library in the OBA MAP assistant's office. Appointments are desired, but walk-ins are accepted if we are available.
- ☐ For whom it is inconvenient to travel to the Oklahoma Bar Center, a convenience charge of \$6 per book will be assessed for shipping and handling. OBA members will be expected to return the book at their own expense.
- ☐ Failure to return a book within the due date shall immediately suspend lending privileges at the OBA MAP Lending Library and may result in other consequences.
- ☐ A book that has been checked out may be purchased by the lawyer who checked it out, by contacting the MAP assistant and paying the price of the book.
- ☐ Some books are not available for purchase.
- ☐ A few titles are available in the Lending Library that are not available to be checked out but may be reviewed in the bar center. These are generally loose-leaf publications.

Lawyers' Duty to Supervise Non-Lawyer Assistants

By Gina Hendryx, OBA General Counsel

At some time in most forms of legal practice, the lawyer will employ the assistance of a non-lawyer. These persons include the traditional secretary and bookkeeper, but more and more lawyers are employing the services of non-traditional aides including engineers, nurses, computer specialists and lobbyists. Regardless of title, non-lawyers are not bound by the ethical rules that apply to attorneys. Therefore, the rules require lawyers to make reasonable efforts to ensure that the conduct of non-lawyer employees or independent contractors is compatible with the professional obligations of the lawyer.

Oklahoma Rule of Professional Conduct 5.3 sets out the lawyer's responsibilities regarding non-lawyer assistants. As with Rule 5.1, lawyers with managerial authority over non-lawyers must make reasonable efforts to establish internal policies and procedures designed to provide assurance that the non-lawyers will act in a way compatible with the Rules of Professional Conduct. These policies and procedures should include appropriate instruction and supervision pertaining to the ethical aspects of their jobs. Of particular importance is the

duty of confidentiality owed to the clients and the obligation not to reveal information relating to a representation. In *State ex. Rel. Okla. Bar Ass'n v. Mayes*, 977 P.2d 9 (Okla. 1999), a lawyer was found to have violated Rule 5.3 by failing to make reasonable efforts to ensure that non-lawyer assistant adhered to his professional obligations. He was also found to have failed to take reasonably remedial measures.

A lawyer who turns over the day-to-day operation of a law office to a non-lawyer assistant does so at his or her own peril. In *State ex. rel. Okla. Bar Ass'n v. Patmon*, 939 P.2d 1155 (Okla. 1997), the lawyer regularly allowed a non-lawyer assistant to sign the lawyer's name and file court documents with oversight. The assistant filed a misleading motion and the lawyer was disciplined for inadequate supervision.

Maintaining client funds is a non-delegable fiduciary responsibility. Lawyers may employ non-lawyer assistants such as bookkeepers and/or accountants to assist in fulfilling this duty, however lawyers must provide adequate training and supervision to ensure that ethical and legal obligations are met. With regard to client funds, "there must be

some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently." *In re Cater*, 887 A.2d 1 (D.C. 2005).

A lawyer who is a partner or a direct supervisor of a non-lawyer has an obligation to take remedial action if the lawyer learns of misconduct by the non-lawyer in time to avoid or mitigate the consequences of the conduct. In *State ex. rel. Okla. Bar Ass'n v. Taylor*, 4 P.3d 1242 (Okla. 2000), the lawyer was disciplined for ratifying the conduct of his wife/office manager who improperly endorsed a client's settlement checks.

Courts generally hold the following as non-delegable tasks:

1. Establishing a lawyer/client relationship
2. Maintaining direct contact with clients
3. Giving legal advice
4. Exercising legal judgment

Review your office policies frequently. Always keep control over your trust account and educate your staff on the rules you must follow.

*The Oklahoma Criminal Defense Lawyers Association
Presents*

The 2011
Patrick A. Williams
**CRIMINAL DEFENSE
INSTITUTE**



JUNE 23 - 24, 2011
NCED CONFERENCE CENTER & HOTEL,
NORMAN, OKLAHOMA

Registration Fees*

-OIDS Contractors	\$150.00	
-OCDLA Members	\$150.00	
-Non Member/Non OIDS	\$200.00	
-Registration after June 16th	\$175.00	OCDLA/OIDS
	\$225.00	Non OCDLA/OIDS

**Contingent upon seating availability*

MCLE Credit

- OK - 12 Hours, includes 6 hours of Mandated Juvenile Law training and 1 hour ethics
- TX - 11 Hours, includes 1 hour ethics

Location

The NCED Conference Center & Hotel is offering a room rate of **\$77.00** for the CDI. This rate is good until June 2nd. Room reservation should be made by calling 1-800-447-9000 ext 0 or online at: <http://cc.nced.com/>. Please reference **Group Code 7720** when making reservations.

FOR MORE INFO:

Email: *bdp@for-the-defense.com* or call the OCDLA: 405-212-5024

**Visit *www.OCDLAOKLAHOMA.com* to register or mail this ad with payment
to: OCDLA, PO BOX 2272, OKC, OK 73101**

2011 CRIMINAL DEFENSE INSTITUTE SCHEDULE

THURSDAY, JUNE 23, 2011

MAIN SESSION

8:30 - 9:00 am	Welcome <i>Tim Laughlin, OCDLA President, Bob Ravitz, Chief Public Defender OK County Pete Silva, Chief Public Defender Tulsa County, Joe Robertson, OIDS</i>
9:00 - 9:50 am	Why You Should Want a Trial Lawyer on the Supreme Court? <i>Norman Pattis, Pattis Law Firm, Bethany, Connecticut</i>
9:50 - 10:40 am	Representation of Foreign National Adults and Children <i>Michael Brooks-Jimenez, Oklahoma City, OK</i>
10:50 - 12:00 pm	Juvenile & Adult Mental Issues That Affect a Criminal Case <i>Jolie Brams, PhD Columbus, Ohio</i>
12:00 - 12:50 pm	State & Federal Case Update <i>Barry Derryberry, Federal Public Defender Office, Tulsa, OK Stuart Southerland, Tulsa County Public Defender Office, Tulsa, OK</i>

BREAKOUT SESSIONS

TRACK 1

2:00 - 2:50 pm	Cross Examination of the SANE Nurse <i>David McKenzie, Oklahoma County Public Defender Office</i>
3:00 - 3:50 pm	Child & Adult Sex Offender Registration & Its Effect <i>Jack Dempsey Pointer, Oklahoma City, OK</i>
4:00 - 4:50 pm	The Proper Child Interview: Jamie Vogt, MS, LPC, Tulsa, OK
5:00 - 5:50 pm	Why Poverty Matters To The Developing Brain: Jolie Brams, PhD, Columbus, OH

TRACK 2

2:00 - 2:50 pm	DUI Mechanics: John Hunsucker, Oklahoma City, OK, Bruce Edge, Tulsa, OK
3:00 - 3:50 pm	Stops/Searches & Seizures: Winston Connor II, Miami, OK
4:00 - 4:50 pm	DRE: Alcohol & Drugs: Jamie Balagia "The DUI Dude" San Antonio, TX
5:00 - 5:50 pm	Consequences of Drug and Alcohol Convictions (on DL) <i>Larry Williamson, Oklahoma Department of Public Safety</i>

TRACK 3

2:00 - 2:50 pm	Perfecting Appeals in Adult and Juvenile Cases <i>Katrina Conrad Legler, OIDS, Nancy McGee, OIDS</i>
3:00 - 3:50 pm	Preserving the Record, Framing Issues & Artfully Telling the Story on Appeal <i>Rebecca Hudsmith, Louisiana Federal Public Defender Office</i>
4:00 - 4:50 pm	When is a Confession Induced? Gary James, Oklahoma City, OK
5:00 - 5:50 pm	Connecting With the Jury: Norman Pattis, Bethany, Connecticut

FRIDAY, JUNE 24TH

8:30 - 8:50 am	Welcome & Presentation of the Patrick A Williams Award
8:50 - 9:40 am	Propensity Evidence: Barbara Bergman, New Mexico
9:50 - 10:40 am	ME Perspectives; Spotting Issues in the ME Report <i>Dr Janice Ophoven, Medical Examiner, Woodbury Minnesota</i>
10:50 - 12:10 pm	Child Maltreatment and Shaken Baby Issues <i>Dr Janice Ophoven, Medical Examiner, Woodbury Minnesota John Zelbst, & Shandra Holmes, Zelbst, Holmes & Butler, Lawton, OK</i>
12:10 - END	Can Good Men Make Good Lawyers? Norman Pattis, Bethany, Connecticut



THE SOVEREIGNTY SYMPOSIUM XXIV - 2011

Seeds of Sovereignty

June 1 - 2, 2011

Skirvin - Hilton Hotel • Oklahoma City, Oklahoma

THE SOVEREIGNTY SYMPOSIUM AGENDA

June 1-2, 2011 at the Skirvin-Hilton Hotel, Oklahoma City, Oklahoma

Wednesday Morning:

- 7:30 – 4:30 Registration
- 8:00 – 8:30 Complimentary Continental Breakfast
- 10:30 – 10:45 Morning Coffee / Tea Break
- 8:30 – 12:00 **PANEL A:**
ECONOMIC DEVELOPMENT AND
INTERNATIONAL TRADE
- 8:30 – 5:30 **PANEL B:**
SEEDS OF SOVEREIGNTY – FROM THE
PRESERVATION OF HISTORIC SEEDS TO
THE FUTURE OF FOOD
- 8:30 – 12:00 **PANEL C:**
INTERNET GAMING IS COMING.
IS INDIAN COUNTRY READY?
- 8:30 – 12:00 **PANEL D:**
NURTURING THE SEEDS – WATER LAW
- 8:30 – 12:00 **PANEL E:**
VETERANS ISSUES

Wednesday Afternoon:

- 1:15 – 2:30 OPENING CEREMONY
- 2:30 – 5:30 **PANEL A:**
ECONOMIC DEVELOPMENT
AND INTERNATIONAL TRADE
[A Continuation of the Morning Panel]
- 2:30 – 5:30 **PANEL B:**
INDIGENOUS RIGHTS AND JUSTICE IN
GUATEMALA: THE MAYA EXPERIENCE
- 2:30 – 5:30 **PANEL C:**
INDIAN COUNTRY CONSTRUCTION
DEVELOPMENT ISSUES
- 2:30 – 5:30 **PANEL D:**
DNA AND TRIBAL MEMBERSHIP
- 2:30 – 5:30 **PANEL E:**
THE SEEDS OF THE FUTURE:
EDUCATION

Thursday Morning:

- 8:30 – 12:00 **PANEL A:**
INDIAN GAMING: AN INDUSTRY
PERSPECTIVE ON REGULATION
- 8:30 – 12:00 **PANEL B:**
UNITED NATIONS DECLARATION OF THE
RIGHTS OF INDIGENOUS PEOPLES
RECOGNITION BY
THE UNITED STATES—WHAT'S NEXT?
- 8:30 – 12:00 **PANEL C:**
SEEDS OF SOVEREIGNTY AND
THE LAND IN WHICH THEY GROW

INDIAN TRUST ISSUES

INDIAN LAND USE ISSUES

INDIAN LAND OWNERSHIP ISSUES
- 8:30 – 12:00 **PANEL D:**
ETHICS AND THE CONCERNS OF
THE JUDICIARY
- 8:30 – 12:00 **PANEL E:**
INDIAN CHILD WELFARE ACT ISSUES

Thursday Afternoon:

- 1:30 – 5:00 **PANEL A:**
GAMING
- 1:30 – 5:00 **PANEL B:**
CRIMINAL LAW
- 1:30 – 5:00 **PANEL C:**
SEEDS OF SOVEREIGNTY AND THE
LAND IN WHICH THEY GROW
[A Continuation of the Morning Panel]
- 1:30 – 5:00 **PANEL D:**
IMPACTS OF THE INDIAN RESERVATION
ROADS PROGRAM IN INDIAN
COUNTRY-PAST AND FUTURE

16 hours of CLE credit for lawyers will be awarded,
including 1 hour of ethics.
NOTE: Please be aware that each state has its own rules and regulations,
including the definition of "CLE," therefore, certain programs may not
receive credit in some states.

*The Sovereignty Symposium was established to provide a
forum in which ideas concerning common legal issues could
be exchanged in a scholarly, non-adversarial environment.
The Supreme Court espouses no view on any of the issues,
and the positions taken by the participants are not endorsed
by the Supreme Court*

SOVEREIGNTY SYMPOSIUM KEYNOTE SPEAKER

Baroness Nicholson of Winterbourne is a member of the Council of Europe and the European Security and Defence Assembly. A former Member of the European Parliament (1999-2009) she now serves as a working peer in the United Kingdom's House of Lords where she is Chairman of the All-Party Parliamentary Group (APPG) on Foreign Affairs and the APPG for Economic Development in Iraq and the Region; as well as Vice-Chairman for the APPGs on Human Trafficking, EU Enlargement and Georgia. From 1999-2004 she was Vice-President of the European Parliament Committee on Foreign Affairs, Human Rights, Common Defence & Security Policy; and from 2004-2009 she was Vice-President of the Committee on Foreign Affairs and Member of the Subcommittee on Human Rights. Her other responsibilities included seven years as Rapporteur for Romania, Rapporteur for Kashmir and for Iraq, President of the Permanent Ad-Hoc Delegation for Relations with Iraq, Chief Observer of the European Union Election Observation Mission to Yemen and election observer in many other countries including Russia, Moldova, Azerbaijan and Armenia.



We ask that you register online.
To Register online please go to: www.thesovereigntysymposium.com
This site also provides hotel registration information and a detailed agenda.
For Hotel Reservations please contact the Skirvin-Hilton Hotel at 405-272-3040 by May 18th.

THE SOVEREIGNTY SYMPOSIUM XXIV - 2011

June 1 – 2, 2011

Oklahoma City, Oklahoma

Registration Form

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Nametag should read: _____ Other: _____

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Fax: (____) _____

Tribal Affiliation (if applicable): _____

If Bar Association Member- Bar # _____ and State _____

# of Persons		Amount Enclosed
	\$250.00	Registration fee <i>(\$275.00 if postmarked after May 16).</i>
	\$150.00	Registration for Federal, State or Tribal judges <i>(this fee is waived for Oklahoma District Court Judges and Staff.)</i>
	\$150.00	Registration, June 2, 2011 only <i>(no one day registration for June 1)</i>
		TOTAL AMOUNT

Please mail this form to:

The Sovereignty Symposium, Inc.
 1915 N. Stiles, Suite 305
 Oklahoma City, OK 73105

The Sovereignty Symposium XXIV is presented by the Oklahoma Supreme Court, The Oklahoma Indian Affairs Commission, The Indian Law Section of the Oklahoma Bar Association, The Oklahoma Arts Council, The University of Tulsa College of Law, The University of Oklahoma College of Law, The Oklahoma City University School of Law and The Sovereignty Symposium, Inc.

February Meeting Summary

The Oklahoma Bar Association Board of Governors met at Post Oak Lodge in Tulsa on Friday, Feb. 18, 2011.

REPORT OF THE PRESIDENT

President Reheard reported she attended the January board meeting, swearing-in ceremony for new board members, Solo and Small Firm Conference Planning Committee meeting, Military Assistance Task Force meeting, Bar Association Technology Committee meeting, has been celebration, Southern Conference of Bar Presidents mid-year meeting, National Conference of Bar Presidents mid-year meeting, American Bar Association mid-year meeting, ABA House of Delegates, three Yellow Ribbon redeployment events for Oklahoma National Guard soldiers deploying to Afghanistan — in Tulsa, Norman and Midwest City, and a farewell to the 45th ceremony at the Oklahoma City Arena.

She had meetings with staff on improvements and expansion of the Oklahoma Lawyers for America's Heroes website, Oklahoma Justice Commission Chair Drew Edmondson, OCU Law School Dean Lawrence Hellman and Innocence Project attorney Madelene Deleon. She attended the Innocence Project luncheon hosted by OCU Law School. She coordinated military CLE with the OBA/CLE Department and did an interview with KFOR

regarding the Oklahoma Lawyers for America's Heroes program.

REPORT OF THE VICE PRESIDENT

Vice President Strubhar reported she attended the swearing-in ceremony at the Supreme Court, a swearing-in ceremony for a new judge in Canadian County, president's luncheon, has been dinner, We the People welcome and awards ceremony, LRE judging for Supreme Court Teacher and School of the Year award and deployment ceremony for the 45th in Oklahoma City.

REPORT OF THE PRESIDENT-ELECT

President-Elect Christensen reported she attended the January board meeting, swearing-in ceremony for new board members, Solo and Small Firm Conference Planning Committee meeting, Military Assistance Task Force meeting, Bar Association Technology Committee meeting, has been celebration, Innocence Project luncheon hosted by OCU Law School, evening reception hosted by OCU Law School for the Innocence Clinic, Southern Conference of Bar Presidents mid-year meeting in Atlanta, National Conference of Bar Presidents mid-year meeting, American Bar Association mid-year meeting

in Atlanta, ABA House of Delegates, the farewell to the 45th ceremony and two Yellow Ribbon redeployment events for Oklahoma National Guard soldiers deploying to Afghanistan. She met with Oklahoma Justice Commission Chair Drew Edmondson, OCU Law School Dean Lawrence Hellman and with staff on improvements and expansion of the Oklahoma Lawyers for America's Heroes website.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the January board meeting, swearing in of officers, has been celebration, interviews for MATF coordinator, OBA legislative reading day, Senate judiciary meeting, Bar Association Technology Committee meeting, President's Summit, NABE, NCBP and SCBP meetings in Atlanta and monthly staff celebration. He moderated a program at East Central University featuring retired Justice Hargrave and had a routine meeting with Corevault on data backup issues.

REPORT OF THE PAST PRESIDENT

Past President Smallwood reported he worked with the Attorney General's Office and OBA General Counsel Gina Hendryx in defense of attacks seeking the abolishment of the

Judicial Nominating Commission.

BOARD MEMBER REPORTS

Governor Carter reported she attended the January board meeting, swearing-in ceremonies at the Oklahoma Supreme Court, president's luncheon and has been celebration. She was sworn in on February 10 as a special judge in Tulsa County.

Governor Chesnut reported he attended the January board meeting, swearing-in ceremony for new board members, president's luncheon, has been celebration, Solo and Small Firm Conference Planning Committee meeting and Ottawa County Bar Association monthly meeting.

Governor Dobbs reported he attended the swearing in of new members, has been party and January board meeting. **Governor Meyers** reported he attended the January board meeting, swearing-in ceremony, president's luncheon and has been dinner. **Governor Moudy** reported she attended the swearing-in ceremony, president's luncheon and has been party. She also helped host a reception for Judge John Maley with the Okmulgee County Bar Association.

Governor Pappas reported she attended the swearing-in ceremony, president's luncheon and has been party. She had planned to attend one of her assigned bar committee meetings, but it was cancelled due to weather. **Governor Poarch** reported he attended the January board meeting, swearing-in ceremonies at the Supreme Court, president's luncheon, has been dinner and Bohanon Inn of Court. He also worked with academic legal intern issues.

Governor Shields reported she attended the January board meeting, swearing-in ceremony for new board members, president's luncheon and has been party. She also worked on liaison issues with the OBF and OBA on the Oklahoma Lawyers for America's Heroes out-of-cycle grant and on Lawyers Helping Lawyers nonprofit issues.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported she attended the January meeting of the Ruth Bader Ginsburg Inn of Court, PRC January meeting and National Organization of Bar Counsel mid-year meeting in Atlanta. She obtained a temporary injunction in an unauthorized practice of law matter in Pontotoc County, gave a presentation to a legal ethics class at the OU College of Law and to the Oklahoma County Bar Association, prepared and filed the PRC Annual Report with the Oklahoma Supreme Court, filed briefs and participated in the oral argument in the *Fent v. Henry, et.al.* case.

LAW DAY COMMITTEE REPORT

Communications Director Manning reported the date for the Ask A Lawyer TV show and free legal advice statewide community service project has been confirmed for Thursday, April 28, 2011. She said production of the TV show is underway and an event to honor first-place contests winners hosted by the Supreme Court chief justice has been planned. She reported the committee is trying to identify county bar Law Day chairpersons to share helpful event and promotion information;

however, responses are slow coming in. Board members agreed to make phone calls, and Ms. Manning said she would email board members a list of counties that have named chairpersons.

OETA FESTIVAL

President Reheard reported the OBA will volunteer to take pledges to support the state's PBS television station on March 16, 2011. Pledges of \$5,000 or more from OBA members will keep the OBA in the top donor category recognized each month in its monthly program guide.

PROFESSIONAL RESPONSIBILITY COMMISSION 2010 ANNUAL REPORT

General Counsel Hendryx reported the number of informal and formal grievances stayed about the same as 2009; however, the severity of grievances increased last year. She said 2010 was the first year to most accurately see results from the implementation of the trust account overdraft reporting program. Other bar associations of similar size in other states are receiving significantly more overdrafts than Oklahoma. She noted an overdraft notification triggers an inquiry, not a grievance. She said the number one reason overdrafts occur is the attorney writes a check before the client's check is deposited. She reported diversion school is working well, and she reviewed the information contained in the report. PRC Chair Melissa DeLacerda reported the Office of the General Counsel is in excellent shape and catching up on old cases. She said hiring Ms. Hendryx as general counsel was a good decision, and she

is doing a marvelous job. Attendance at PRC meetings is good, and camaraderie has developed among members. The commission is seeing a trend in lack of civility issues, which is the subject of a new class being developed.

PROFESSIONAL RESPONSIBILITY TRIBUNAL 2010 ANNUAL REPORT

General Counsel Hendryx reported this year the PRT decided to take responsibility for filing a separate report instead of relying on the OGC to prepare it. Board members were provided a copy for their review.

AMENDMENT TO RULES CREATING AND CONTROLLING THE OKLAHOMA BAR ASSOCIATION

President Reheard reported a draft of an amendment to add a waiver for OBA members serving in the military was shared with JAG officers, and they made suggestions for changes. It was noted a CLE exemption for those in military service already exists. Educational Programs Director Douglas commented that a dues waiver does not automatically grant an OBA member a MCLE exemption. A separate application is required for an MCLE waiver if the member was not on active duty for the entire year. Administration Director Combs was asked about dues issues. Proposed

rules allow for the executive director to exercise discretion in granting waivers. Discussion followed. The board agreed with the concept of a waiver for active duty military members but decided to tweak the language, submit to JAG officers again and submit for an email vote.

AMENDMENT TO GUIDE FOR COMMITTEES AND SECTIONS

President Reheard reviewed the proposed additions to paragraph 3.2 of the Guide for Committees and Sections that would require a section to meet annually or be subject to dissolution. The board approved the amendment.

AMENDMENT TO THE RULES OF THE SUPREME COURT OF THE STATE OF OKLAHOMA ON LEGAL INTERNSHIP

Governor Poarch reviewed proposed new Rule 2.3 that would allow more law students to have more client content. The board approved the amendment.

SUPREME COURT REVIEWING PANEL APPOINTMENTS

President Reheard reported the Supreme Court has appointed Charles Donald Neal Jr., McAlester; Trent Hall Baggett, Norman; and Brant Matthew Elmore, Norman; as the Supreme Court Reviewing Panel, which reviews and approves law graduate

applications for the Licensed Legal Internship Program.

OKLAHOMA JUSTICE COMMISSION APPOINTMENT

President Reheard reported that she has appointed W.A. "Drew" Edmondson as the chairperson of the new Oklahoma Justice Commission.

SECURITIES COMMISSION NOMINEES

President Reheard has been asked to submit the names of several nominees to the governor as suggestions for one appointment to the Securities Commission, which is for a six-year term ending July 2017. Board members were asked to send President Reheard recommendations for lawyers who perform security work.

EXECUTIVE SESSION

The board voted to go into executive session. The board met and voted to come out of executive session.

NEXT MEETING

The Board of Governors met in Muskogee on April 22, 2011, and in Enid on May 13, 2011. Summaries of those actions will be published after the minutes are approved. The next meeting of the Board of Governors will be held June 10, 2011, at the Downstream Resort during the Solo and Small Firm Conference.

Dualies

By John Munkacsy

WE OKLAHOMA LAWYERS ARE "DUALIES!" UPON ADMISSION TO PRACTICE AS AN OKLAHOMA LAWYER, WE HOLD MEMBERSHIP IN THE OKLAHOMA BAR ASSOCIATION (OBA) AND THE OKLAHOMA BAR FOUNDATION (OBF).

The OBA and the OBF are sister organizations with parallel missions assisting each other in fulfilling their respective missions and purposes. The foundation is organized under section 501(c)(3) of the Internal Revenue Code as a charitable organization and is governed by a Board of Trustees. Nancy Norsworthy, director of the foundation, is in her 26th year and is ably assisted by Ronda Hellman. A third staff position is currently vacant. The bar association operates under the auspices of the Oklahoma Supreme Court and falls under the direction of the Board of Governors and John Williams, the executive director. Each organization endeavors to better the public understanding and respect for the legal profession.

The foundation's investment portfolio is under the management of Bank of Oklahoma. Throughout BOK's management, the foundation's investments have outperformed market indices. The

foundation's purpose — *Lawyers Transforming Lives* — is fulfilled, in the name of Oklahoma attorneys, by providing critical funding to qualified organizations that meet the legal needs of disadvantaged Oklahomans. Through the year 2010, the foundation has awarded grants totaling in excess of \$9.5 million. The awards were given in your name! Do you know from whence the \$9.5 million came?

Without the funding provided by the foundation, some Oklahoma domestic violence victims might be without protection; some elderly Oklahomans might be without legal assistance on issues ranging from fraud to consumer debt; and some abused and neglected Oklahoma children might not receive pro bono legal services. Financial support by the foundation to nonprofit organizations furnishing legal services to thousands of Oklahomans — Oklahoma lawyers indeed *transform lives*.

The \$9.5 million 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 proceedings, that for any number of reasons cannot be distributed to the class members or beneficiaries

who were the intended recipients). A 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.

Dualies work in tandem to pull a heavy load and provide added support. The OBF Fellows program is an excellent way to strengthen the work being accomplished and here is how it works.

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 pledge, or payment of \$100 a year for 10 years. Most Fellows after meeting their pledge have continued with annual giving as Sustaining Fellows and others have stepped up to the premier Benefactor Fellows level in continuing support to the foundation through annual gifts of \$300. The foundation even has a special reduced payment plan for newly admitted lawyers. The Fellows signup process is easy and all contributions are tax-deductible; a form follows for that purpose.

The equivalent of less than one hourly billing annually can allow the foundation to increase charitable work across Oklahoma. We need your support to be able to strengthen services throughout Oklahoma.

Welcome honored members of the OBF Fellows Program. The following distinguished lawyers and supporters of the law are new Fellows or have recently converted to higher levels, as noted. Many thanks for your generosity and com-

mitment to help in providing legal-related services all across the state.

Benefactor Fellows of the Oklahoma Bar Foundation

David O. Beal, *Oklahoma City*
G. David Bryant, *Oklahoma City*
James B. Blevins Jr., *Oklahoma City*
Judge James Michael Caputo, *Owasso*
Frederic Dorwart, *Tulsa*

Thomas W. Hosty, *Oklahoma City*
James M. Levine, *Oklahoma City*
Prof. Judith L. Maute, *Norman*
Miles C. Zimmerman, *Chandler*

Sustaining Fellows of the Oklahoma Bar Foundation

Belva Brooks Barber, *Poteau*
Stephen D. Beam, *Weatherford*
Ret. Judge Nancy L. Coats-Ashley, *Oklahoma City*
Gary W. Derrick, *Oklahoma City*
Kent W. Gardner, *Oklahoma City*
John W. Garland, *Anadarko*
David R. Garrison, *Ponca City*
Justice Noma Gurich, *Oklahoma City*
James F. Howell, *Midwest City*
Bryce Johnson, *Oklahoma City*
Judge William C. Kellough, *Tulsa*
Jeff E. Lynch, *Edmond*
William D. Lunn, *Tulsa*
Mack K. Martin, *Oklahoma City*

Gordon R. Melson, *Seminole*
Mack J. Morgan III, *Oklahoma City*
Susan A. Muscari, *Tulsa*
Judge Gerald F. Neuwirth, *Lawton*
Robert J. Nichols, *Tulsa*
Phillip R. Scott, *Waurika*
Leland W. Shilling, *Purcell*
Brian E. Shipp, *Idabel*
Kimberlee T. Spady, *Hinton*
Dave Stockwell, *Norman*
T. Douglas Stump, *Oklahoma City*
Ken Ray Underwood, *Tulsa*
Tom Walker, *Ardmore*

Fellows of the Oklahoma Bar Foundation

Aaron M. Arnall, *Midwest City*
Jennifer Beale, *Oklahoma City*
Mike Blake, *Oklahoma City*
Ryan Lee Brown, *Oklahoma City*
Chris J. Collins, *Oklahoma City*
Amber R. Corbin, *Oklahoma City*
Denis Cote, *Altus*
Charles Eric Davis, *Lawton*
Christin Murphy Donovan, *Tulsa*
Broc L. Elmore, *Norman*
Prof. Martin A. Frey, *Tulsa*
Tiffany N. Graves, *Tulsa*
Rachel Gusman, *Tulsa*
Misti D. Halverson, *Wayne*
John E. Harper Jr., *Tulsa*
Suzanne P. Heggy, *Yukon*
Gregory M. Heiser, *Norman*
Rex Hodges, *Oklahoma City*
Stephanie D. Jackson, *Oklahoma City*
Kristi A. Johnson, *Blanchard*
Sabah Khalef, *Tulsa*
Jennifer H. Kirkpatrick, *Oklahoma City*
David Leavitt, *Edmond*

Brandon P. Long, *Oklahoma City*
Andrew Lee McAlester, *Tulsa*
Michelle Jane Millbern, *Alexandria*
Linda M. Modestino, *Yukon*
Jeffrey E. Niese, *Tulsa*
Warren Chiahsiong Plunk, *Oklahoma City*
Timothy Lee Rogers, *Tulsa*
Sarah J. Schumacher, *Oklahoma City*
Catherine Rose Seagraves, *Stillwater*
Stephanie Singer, *Tulsa*
Valerie R. Smith, *Oklahoma City*
Sarah C. Stewart, *Oklahoma City*
Justin Clay Stout, *Muskogee*
Roy D. Tucker, *Muskogee*
Lee Turner, *Ponca City*
Benjamin D. Waters, *Tulsa*
Samantha Weyrauch, *Tulsa*

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

LAWYERS TRANSFORMING LIVES — Our OBF Mission:

To promote justice, fund critical legal services, and advance public awareness of the law.



FELLOW ENROLLMENT FORM ☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

Mailing & delivery address: _____

City/State/Zip: _____

Phone: _____ E-Mail Address: _____

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!

___ \$100 enclosed & bill annually

___ Total amount enclosed, \$1,000

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

___ *New Lawyer within 3 Years*, \$50 enclosed & bill annually as stated

___ 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)

**LAWYERS
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# _____

PLEASE KINDLY MAKE CHECKS PAYABLE TO: Oklahoma Bar Foundation • P.O. Box 53036 • Oklahoma City, OK 73152-3036 • (405) 416-7070

Many thanks for your support & generosity!

A Day to Remember

By Jeff Kelton

The day began for OBA President Deborah Reheard and President-Elect Cathy Christensen on April 27 at 0500 hours. That's 5 a.m., also known as way too early. Wakeup call, breakfast, bus to Tinker Air Force Base, flight on a military KC-135 to Gulfport, Miss., mid-air refueling of two F-16 jets, bus to Camp Shelby, High Mobility Multipurpose Wheeled Vehicle (Humvee) rollover crash training, rifle ranges and patrolling mock villages. An unbelievable trip for civilians to experience, just another day in the life of a military service member awaiting deployment.

Reheard and Christensen quickly learned they hadn't volunteered for a Disney ride. After about 10 minutes of getting "suited" up — helmet, protective vest, and elbow and knee pads — they walked up the platform and entered the Humvee. With gunfire blaring through the speakers, the vehicle rolled from side to side and turned completely upside down. "I admit I screamed like a girl but I didn't scream the whole time. When we went completely upside down, I quit screaming. My vest had moved up over my windpipe



OBA President Deborah Reheard and President-Elect Cathy Christensen

and I couldn't scream," Reheard said.

"I don't think I had a realistic grip on how much they trained and the time they sacrifice for us — the intensity and sophistication of the training — until I saw it firsthand, and we got the mild version," Reheard said.

The two bar leaders traveled to Camp Shelby as part of the group Employer Support of the Guard and Reserve (ESGR) to support the thousands of men and women of the 45th Infantry of the Oklahoma National Guard set to leave for the Middle East very soon. ESGR was established in 1972 to promote cooperation and understanding between Reserve compo-

nent members and their civilian employers and to assist in the resolution of conflicts arising from an employee's military commitment.

"These brave people chose to leave their day jobs and volunteer to honor this commitment that doesn't let up, regardless of the circumstances. I felt it was important to go to continue to show support," Reheard said.

The opportunity came about once Reheard recognized a need and developed — Oklahoma Lawyers for America's Heroes — providing free legal advice to those who have honorably served or are serving this nation who otherwise cannot afford or do not have access to the legal

services they need. Through her initiative, she began making contacts and became involved with the various Yellow Ribbon ceremonies for the soldiers who were about to be deployed. These events would act as a sendoff and vendors would provide resources and materials to help them and their families.

"As they get closer and closer to deployment, the intensity and the emotions build. While I knew we wouldn't have the opportunity at Camp Shelby to answer legal questions, we could show them that we are behind them, not just when it was easy or convenient for us," Reheard said.

The trip for the civilians came to a close that afternoon. But what ended as a day trip for Reheard and Christensen is daily reality for the brave men and women who protect our freedom — and it is now time to help protect them.

VOLUNTEERS STILL NEEDED

Oklahoma lawyers are still needed to volunteer pro bono legal services, especially those with experience in family law, estate planning, consumer and credit issues, and disability and benefits issues. Go to www.okbar.org/heroes to sign up. You'll also find resource materials to prepare you for your volunteer ser-

vice. President Reheard says the time is now to help those who help us.

"Seeing what these people go through, and the focus it takes, the last thing they need while overseas is to be worrying about issues they have going on at home," she said.

Reheard hopes to one day visit Camp Shelby again to support the brave men and women of the armed services.

"I've already put it on my list as one of the top 10 experiences of my life."

She hopes her story provides you with more incentive to volunteer and realize that there is a large group who still needs legal help.



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The Impact of Cumulative Knowledge

By Karen A. Pepper Mueller

To be perfectly honest, I was skeptical. When the concept of establishing the first ever weekly pro bono *pro se* waiver divorce docket clinic at the Oklahoma County Courthouse was presented — its mission: to assist *pro se* litigants whose divorces are denied due to defects in procedure and paperwork — I thought, “No way!” Although inarguably a fabulous idea, how could we **possibly** find the legal resources to invent such a place?

In March 2011, The Project, as it has affectionately become known, celebrated its first year anniversary. From a handful of inventors, now on any given Thursday afternoon, The Project boasts two or three volunteer attorneys, who rotate weekly from a roster of close to 20, the pro bono coordinator of Legal Aid Services of Oklahoma, a professor from Oklahoma City University School of Law, along with several law students (35 of whom have now participated), and an attorney from The Department of Human Services, Child Support Division. As if that isn’t extraordinary enough, The Project also enjoys the hospitality of the wonderful and knowledgeable Oklahoma County Law Library staff,

whose board of trustees graciously allows The Project to call the library **home**. Not to mention the domestic judges, who, with the endorsement of the presiding district court judge eagerly courted The Project, (no pun intended!), recognizing how it could substantially improve docket efficiency and promote good will in the community.

“In the early days, it was easy to keep track of the number of clients we had served...”

The Project now enjoys a full-time administrator, a dedicated Oklahoma City University law student who attends Monday and Wednesday’s *pro se* dockets before the clinic formally commences operations prior to Thursday’s docket — preparing intake forms and giving us a “heads up” on how many clients may be awaiting us when we arrive on Thursday, and the nature

of their problems — further expediting the process.

In the early days, it was easy to keep track of the number of clients we had served, but as the months went by I have lost count of how many have benefited. Several hundred is probably a conservative estimate. On any given Thursday afternoon, our team works feverishly to have flawed divorce decrees corrected and approved that same day. Work schedules, transportation and children often impair a client’s ability to return on subsequent days. Also, situations of domestic violence, for which The Project screens, providing safety measures and contact information when needed, put clients at additional risk when requiring further contact with an abuser to finalize divorce proceedings.

As with most great concepts, the success of The Project can be attributed to collective sacrifice...of time, knowledge, energy and creative thought. At first, just a handful of visionaries — we met, we discussed, we researched legal and ethical considerations, we debated, we created and continued to pull more volunteers in. Says OBA Ethics Counsel Travis Pickens, with whom we visited, “The Project is a win/

win/win situation. The litigants benefit from professional advice, the judges benefit from faster, smoother dockets, and OCU students benefit from observing actual hearings guided by some of our best lawyers.” When the inevitable day came for us to launch The Project, we stepped back, held our breath and watched our creation take its first steps...

My skepticism has been replaced with pride, that a vibrant collaboration of outstanding, often untapped legal resources has sprung to life,¹ its heart safely tucked in the law library, a sanctuary for legal knowledge, access to justice and hope. Its mission, to provide access for those whose access has hit a temporary bump (sometimes mountain!) in the road. Always solvable, with the right resources and determination. And I wonder, if too often we overlook and take for granted the power and impact of the cumulative knowledge we have to share.

For me, the joy of The Project’s success is bittersweet. Merely a year after its primitive, awkward debut, it

appears (most days) to function effortlessly. I recognize that my presence is no longer essential. On the days when other commitments prevent me from volunteering, I have confidence that the process, under the direction of many capable hands, will flow smoothly: from the stunned disbelief of *pro se* litigants as the court pronounces fatal defects; to the consultation and subsequent brainstorming among seasoned legal veterans and enthusiastic law students; to the grateful smiles of relief, resolution and closure when the judge approves the newly corrected papers, most often on the same day.


One of the domestic docket judges, who presided over the inaugural docket for The Project and who has presided over subsequent monthly dockets, stated that “It has been a privilege to work with all of the volunteers and to see a project that truly provides access to justice for people in need to come together in such a cohesive manner. The efforts of this team have changed the lives of citizens who needed

assistance but who did not know where to turn, who could not afford to find the help they needed and believed their situation to be helpless. The team’s efforts in many ways have also changed the clients’ perceptions of attorneys and the court system and represent what is good about our profession.”

Still, I am regularly drawn back each week, to observe, to assist and to marvel at this collaborative achievement. In the scheme of the universe, not all that many billable hours ago, I was one of those eager law students I now have the privilege to mentor, who couldn’t wait to make a difference in our community. Now I understand, that for a lawyer, it just doesn’t get much better than this.

Ms. Mueller practices in Oklahoma City.

1. The Oklahoma County Courthouse *Pro Se* Waiver Divorce Docket Project is a collaboration of Oklahoma County pro bono lawyers; Oklahoma City University School of Law; Legal Aid Services of Oklahoma; district court judges; Oklahoma Child Support Services, a division of DHS; and the Oklahoma County Law Library staff and Board of Trustees.



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YLD Events Prove Successful, More to Come

By Roy D. Tucker, YLD Chairperson

The YLD's hard work paid off in April, when Oklahoma became one of four states that have fully implemented the Serving Our Seniors Project. The state joins Georgia, Montana and New Mexico in efforts to assist senior citizens with legal needs; 18 other states have similar projects in the works.

The YLD project kicked off at the Muskogee Public Library, with YLD directors and volunteers drafting estate plans for qualified senior citizens. Though the turnout was modest for those who ventured out under the drizzly sky to take advantage of the free service, the enthusiasm was high for those who did. During the course of the day, the words "thank you" were uttered too many times to count, followed by heartfelt and sincere "you're welcome's." Plans for a second project date in the Oklahoma City metro area are in the works by Seniors Committee Co-Chairs Amber Peckio Garrett and Bryon Will. In September, the YLD will host a third project in Tulsa. The YLD appreciates the volunteers who assisted with the project: Nick Jones of Barrow & Grimm, Christine McInnes of McAtee and Woods, and Tim Doty of Loves.



Muskogee Mayor John Tyler Hammons joins YLD members in showing his support for the SOS project. Front row, from left: Michael Cooper, Nick Jones, Roy Tucker, Mayor Hammons, Tim Doty. Back row, from left: Bryon Will, Kaleb Hennigh, Eric Davis, LeAnne McGill, Joe Vorndran.



YLD member Justin Stout cleans the showers at Muskogee's Gospel Rescue Mission, while volunteer Justin Tehauno, a student at Bacone College, tackles the walls.

Also in April, the YLD held its second annual statewide community service day at homeless shelters across the state. In Oklahoma City, volunteers landscaped the grounds at the City Rescue Mission. In Tulsa, volunteers painted walls and bookshelves in the family playroom at the Day Center for the Homeless. In Muskogee, volunteers painted bathrooms, replaced ceiling tiles and cleaned the pantry at the Gospel Rescue Mission. In Lawton, volunteers painted and installed 10 new doors at the Carter Crane Emergency Homeless Shelter. In Shawnee, volunteers from the Pottawatomie County Bar Association sorted food and toiletries at the Shawnee Rescue Mission. Each of these projects was completed in one day. While the work was hard, the results were rewarding. Special thanks to our Community Service Committee Co-Chairs, Jennifer Kirkpatrick of Hall Estill and Colin



YLD Chair Roy Tucker paints the pantry at the Gospel Rescue Mission in Muskogee.

Walke of Sweet Law Firm, as well as each of our YLD volunteer coordinators at each site. Photos taken during these “done in a day” community service events accompany this article.

The YLD welcomed 60 new and young lawyers to the Oklahoma Bar and the Young Lawyers Division at the biannual new admittee receptions held in Oklahoma City and Tulsa. We hope these new members join us next month for the YLD Midyear Meeting, scheduled to coincide

with the annual Solo and Small Firm Conference, set for June 9-11 at the Downstream Casino Resort in northeastern Oklahoma. Registration and information for our meeting is available at www.okbar.org/solo.



Oklahoma County YLD members “get their hands dirty” in the garden at City Rescue Mission. From left: Jennifer Kirkpatrick, LeAnne McGill, Karolina Roberts.



Tulsa volunteers take a break from their hard work during their service at Day Center for the Homeless. From left: Larry Rose, Tim Rogers, Molly Lawyer, Nate Lawyer, Briana Ross, Michael Cooper, Jeremy War, Jeff Niese.



Lawton area lawyers pose for a group shot during their day working at the Carter Crane Emergency Homeless Shelter. Front: Mark Stoneman. Middle, from left: Ana Basora-Walker, Irma Newburn. Back, from left: John Kinslow, Jared Ellis, Eric Davis, Jillian Welch.



Jennifer Kirkpatrick, LeAnne McGill, Lane Neal, Karolina Roberts and Collin Walke work in the garden at City Rescue Mission in Oklahoma City.



YLD volunteers renovate the family playroom at Day Center for the Homeless in Tulsa.



Mark Stoneman installs a new door at the homeless shelter in Lawton.



Lawton attorney Ana Basora-Walker works on one of 10 new doors at the Carter Crane Center.



Irma Newburn paints at the Lawton shelter.



Luvana John prepares walls for a fresh coat of paint at the Carter Crane Shelter in Lawton.

 A black and white photograph of three white cards pinned to a dark bulletin board. The top card is titled 'YLD News'. The bottom-left card is titled 'Become an OBA Committee Member' and lists information about volunteering alongside judges and bar members. The bottom-right card is titled 'Connect With Us!' and provides website and Facebook links.

Become an OBA Committee Member
Volunteer alongside judges and bar members
(30 committees and task forces to choose from)
More information at www.okbar.org/members/committees

YLD News

Make a Difference
Get involved with YLD projects that better the community.
Learn more about the projects and how to sign up at www.okbar.org/yld.

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Calendar

May

- 17 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
- 18 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
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
- 19 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109
OBA Bar Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601
- 20 OBA Military Task Force Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Deborah Reheard (918) 689-9281
OBA Access to Justice Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jim Stuart (405) 275-0843
- 21 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
- 23 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121
- 25 OBA Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 26 OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
OBA Justice Commission Meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563

30 OBA Closed – Memorial Day Observed

June

- 2 OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, 1st Floor Conference Room; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033
OBA Women Helping Women Support Group; 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- 3 OBA Board of Editors Meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carol Manning (405) 416-7016
OBA Lawyers Helping Lawyers Assistance Program Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Donita Douglas (405) 416-7028
Oklahoma Bar Foundation Committee Meeting; 12:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Nancy Norsworthy (405) 416-7070
- 7 OBA Legal Intern Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Candace Blalock (405) 238-3486



- 8 OBA Diversity Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jeff Trevillion (405) 778-8000
- OBA Government and Administrative Law Practice Section Business Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Bryan Neal (405) 522-0118
- 9-11 Solo and Small Firm Conference;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: OBA Management Assistance Program (405) 416-7008
- 9 OBA Women Helping Women Support Group;** 5:30 p.m.; The Oil Center – West Building, 10th Floor; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033
- 10 Board of Bar Examiners Meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Cheryl Beatty (405) 416-7075
- OBA Board of Governors Meeting;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: John Morris Williams (405) 416-7000
- OBA Family Law Section Meeting;** 3:30 p.m.; Downstream Casino Resort; Quapaw, Oklahoma; Contact: Kimberly Hays (918) 592-2800
- OBA YLD Midyear Meeting;** Downstream Casino Resort; Quapaw, Oklahoma; Contact: Roy Tucker (918) 684-6276
- Oklahoma Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson (405) 721-7776
- 14 OBA Law-related Education Foundations of Democracy Institute Dinner;** Norman, Oklahoma; Contact: Jane McConnell (405) 416-7024
- OBA Law-related Education Task Force Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Reta Strubhar (405) 354-8890
- 15 Oklahoma Council of Administrative Hearing Officials;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Carolyn Guthrie (405) 271-1269 Ext. 56212
- 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
- 16 OBA Bench & Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton (405) 713-7109

OBA Bar Association Technology Committee Meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Gary Clark (405) 744-1601

- 21 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 Professionalism Committee Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Patricia Podolec (405) 760-3358
- 23 OBA Men Helping Men Support Group;** 5:30 p.m.; The Center for Therapeutic Interventions; Tulsa; RSVP to: Stephanie Alton (405) 840-3033
- OBA Justice Commission Meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Drew Edmondson (405) 235-5563
- OBA Audit Committee Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Susan Shields (405) 235-9621
- 24 OBA Access to Justice Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Jim Stuart (405) 275-0843
- 27 OBA Alternative Dispute Resolution Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: D. Michael O'Neil Jr. (405) 239-2121

July

- 4 OBA Closed** – Independence Day Observed
- 7 OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, 1st Floor Conference Room; Oklahoma City; RSVP to: Stephanie Alton (405) 840-3033
- 8 OBA Communications Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Mark Hanebutt (405) 948-7725
- OBA Family Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa; Contact: Kimberly Hays (918) 592-2800
- 13 OBA Diversity Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Jeff Trevillion (405) 778-8000

Jaques' Long-Time Service Recognized

The Oklahoma Supreme Court and the OBA Board of Bar Examiners recently honored Frank Jaques of Ada for his 40 years of service to the association as a member of the Oklahoma Board of Bar Examiners.

Mr. Jaques retired from the board in December 2009 and has seen the board through many changes over his 40 years of volunteer service. Having been appointed by Oklahoma Supreme Court Chief Justice Pat Irwin, at the request of Justice Denver Davidson in 1969, he served as chairman of the board in 1975, 1986 and 1995. He was subsequently reappointed at the request of Justice Rudolph Hargrave for the remaining terms. Justice Hargrave himself retired from the Oklahoma Supreme Court in December 2010.

More than 90 percent of lawyers practicing today in Oklahoma were admitted during Mr. Jaques' service to the board.

BBE member Ron Wright of Muskogee said, "Mr. Jaques served the Board of Bar Examiners with integrity and concern and provided



Frank Jaques and Retired Justice Rudolph Hargrave view the bronze plaque honoring Mr. Jaques that will be displayed at the Pontotoc County Law Library.

invaluable guidance and counsel to the board through the many changes the admission process has seen during his years of service."

In recognition of his service, the board presented him with a bronze plaque that, with the assistance of the Pontotoc County Bar Association, will be dedicated on May 20 in Ada, and will hang in his honor at the Pontotoc County Law Library.

High School Mock Trial Team Earns Top 15 Spot at Nationals

Nine students from Christian Heritage Academy in Del City competed in the National High School Mock Trial Competition, held earlier this month in Phoenix. The team placed 13th in the final standings.



Christian Heritage Academy Mock Trial team members take a break in the courtroom during the National Finals competition May 6-8, 2011.

The Christian Heritage Academy team earned the right to advance to nationals representing Oklahoma by defeating Clinton High School in the state championship. The national competition featured 48 championship-winning teams, including teams from Guam, Australia and South Korea and first place teams from across the country. Indiana's team took home first place honors.

Bar Journals Take Summer Vacation

Look for the next bar issue of the *Oklahoma Bar Journal* (with color cover) to be published Aug. 6. You'll still receive court material in June and July. Deadline for submissions for the next news issue is July 11.



Judge Michael DeBerry

Judge DeBerry Honored for Efforts to Prevent Child Abuse

Associate District Judge Michael DeBerry of Idabel received the Outstanding Elected Official Award presented by the State Inter-agency Child Abuse Prevention Task Force.

Judge DeBerry presides over deprived child, juvenile and domestic cases in McCurtain County. The task force says he was chosen for the honor because he has devoted his entire career to providing the babies, children and parents of McCurtain County with the support and encouragement needed to reach their full potential in life. The task force also recognized him for making himself available for the Child Welfare and Protective Services whenever he is needed, even if it is in the middle of the night, saying nothing is more important to him than the safety of children.

The task force also lauded Judge DeBerry for ensuring that his staff receives continuing education about the latest laws regarding children and that parents understand the importance of parenting classes to help them provide a safe and loving environment for children, saying his decisions always revolve around the child's safety.

Justice Kauger Named Red Earth Ambassador

Oklahoma Supreme Court Justice Yvonne Kauger has been named Red Earth Ambassador of the Year for 2011. The award is presented to individuals who have made a significant contribution in presenting a more positive image of Native Americans.

Justice Kauger will be honored at the upcoming Red Earth Gala scheduled for June 2, 2011, at the Cox Convention Center in Oklahoma City. The proceeds of this event will benefit the Red Earth Museum and Education Program.

The goal of Red Earth is to provide arts and cultural education programs to students of all ages and to showcase the heritage that is uniquely Oklahoma.



Justice Yvonne Kauger

OBA Member Reinstatements

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

Herbert Randolph Taylor
OBA No. 12869
230 N. Collegiate Dr.
Paris, TX 75460-4800

OBA Member Resignations

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

Annie D. Dawson
OBA No. 21956
333 Andover Dr., No. 252
Burbank, CA 91504

Joe W. Hamlin
OBA No. 3766
310 N.W. Ridgeview Way
Lawton, OK 73505

Cynthia A. Klots
OBA No. 15279
51112 Plymouth Valley Dr.
Plymouth, MI 48170

Holiday Hours

The Oklahoma Bar Center will be closed Monday, May 30, for Memorial Day and Monday, July 4, to observe Independence Day.

Kudos

Annette Prince of Oklahoma City has been named 2011 Social Worker of the Year by the National Association of Social Workers Oklahoma Chapter. The association chooses a member who exemplifies the profession's best values, demonstrated by distinguished achievement and specific accomplishments in the practice of social work. She received the award during the annual meeting.

Cynda Ottaway of Oklahoma City was recently elected to serve as president of the American College of Trust and Estate Counsel Foundation for the 2011-2012 year. The college is a national, nonprofit association of 2,600 trust and estate lawyers peer-elected to membership based on substantial contributions to the field of trusts and estates law.

Jerry E. Shiles of Oklahoma City has been appointed to the advisory board of the DocuBank Electronic Healthcare Directives Registry, a national registry for advance medical directives.

Crowe & Dunlevy recently announced its 2011 executive committee. The firm has re-elected **Roger A. Stong** president. Joining him on the committee will be new additions **Robert G. McCampbell** and **Timila S. Rother**, as well as returning members **Kevin**

D. Gordon and Randall J. Snapp.

The winners of the annual *Journal Record* Leadership in Law Award were announced during the Oklahoma County Bar Association Law Day Luncheon May 2. OBA President **Deborah Reheard** of Eufaula is among the winners for 2011. Other winners this year are: **Jacob Diesselhorst**, Edmond; from Oklahoma City: Supreme Court Justice **Tom Colbert**, **Paul Dudman**, **Drew Edmondson**, **Eric Fisher**, **Sam Fulkerson**, **Lawrence Hellman**, **Doneen Douglas Jones**, Supreme Court Justice **Yvonne Kauger**, Court of Criminal Appeals Judge **David Lewis**, **Jim Priest**, **Susan Shields**, **Ryan Wilson**, **Michael Wofford** and **J. Todd Woolery**. Winners from Tulsa are **Gary Betow**, **Steven Broussard**, **Renée DeMoss**, **Walter Echo-Hawk Jr.**, **Gerald Hilsher**, **Graydon Dean Luthey Jr.**, **Lori Roberts** and **Kathy Taylor**.

On The Move

Sherry Abbott Todd of Ada has taken oath of office as special judge of the District Court of the Chickasaw Nation, replacing Special Judge **Dustin P. Rowe**, who was recently appointed Chickasaw Nation District Court Judge. Ms. Todd had been serving as the magistrate of the District Court of

the Chickasaw Nation since 2004. She is a graduate of the OU College of Law.

The Patrick Aaron Thompson law firm announces that **Charles Michael Thompson** will join the firm, the name of which will become Thompson Law Firm. The firm will practice primarily in the areas of criminal defense, family law, consumer bankruptcy, wills and probate, and real property in Lincoln, Logan, Noble, Payne, Pawnee and Creek counties.

Hornbeek Vitali & Braun PLLC announces **Larry G. Cassil Jr.** has become of counsel to the Oklahoma City firm. Mr. Cassil will practice with the firm's civil litigation department, focusing primarily on insurance coverage/bad faith, employment and appellate law. He is a 1988 graduate of the Columbia School of Law.

The Shelton Voorhees Law Group announces **Bryan K. Walkley** has joined the Oklahoma City firm. Mr. Walkley will continue his practice emphasizing bad faith insurance, business and commercial law, personal injury, products liability, homeowners associations, real estate and disputes involving wills and trusts. He will also continue as a trained mediator in both civil and family law. Mr. Walkley can be contacted at (405) 605-8800; bwalkley@sheltonlawok.com.

Felker, Sander & Associates PC announces **Katherine A. Smith** of Oklahoma City has joined the firm as an associate. Ms. Smith will assist the

firm in its practice areas of creditor's rights, subrogation and defense in civil matters. She holds an undergraduate degree from OSU and graduated cum laude from the OCU School of Law in 2010.

Barnum & Clinton announces the addition of **Donald R. Lindauer II** to the firm as a senior associate. His practice, including more than 20 years of experience, will focus in the areas of insurance defense and civil and workers' compensation litigation. He will join the firm at their Norman offices. He is a graduate of OCU School of Law.

Paul Quigley and the Quigley Law Firm announce **David Henry** and **James Hill** have joined forces as an association of trial lawyers under the name of Quigley, Henry and Hill. The firm will continue to be headquartered at 3501 N.W. 63rd St., Suite 100 in Oklahoma City.

Edmond law firm Rubenstein & Pitts PLLC announces that **Jim Priest**, **Leah Avey** and **Terry Stokes** have joined the firm, expanding its litigation and transactional practice. Mr. Priest is an experienced litigator who is also an ordained minister in the Church of the Nazarene. He currently serves full-time as executive director of the non-profit organization FATE (Fighting Addiction Through Education). He may be reached by email at jpriest@oklawpartners.com. Ms. Avey's primary areas of practice are employment law, including representation before governmental and state agencies, and civil litigation. She earned her J.D. from OCU in 2007, and was previously associated with the firm Whitten & Burrage. She may

be reached at lavey@oklawpartners.com. Mr. Stokes concentrates his practice on planning, advice and litigation in general civil matters with emphasis on contractual issues, business formation and planning, asset protection, trusts and estates, administrative law, and other areas. His clients include businesses and individuals participating in the areas of architecture and construction, property development, oil and gas services and general business. He earned his J.D. from OCU in 1985 and was a partner in the firm of Fuller Tubb Pomeroy & Stokes until its dissolution. He then joined the Edmond firm of McAlister, McAlister, McKinnis & Tuggle. He may be reached at tstokes@oklawpartners.com.

Andrews Davis announces that **L. Win Holbrook** of Oklahoma City has accepted a position as a shareholder. He joined the firm of counsel in 2009 and practices in the bankruptcy department. He has served since 1985 on the panel of trustees for the United States Bankruptcy Court for the Western District of Oklahoma. His undergraduate and law degrees are from OCU.

Crowe & Dunlevy recently named **William H. Hoch** of Oklahoma City as chair of the firm's bankruptcy and creditors' rights practice group. Attorneys in the practice group represent both debtors and creditors in workouts, prepackaged bankruptcies and traditional bankruptcy proceedings. Mr. Hoch serves as a director and concentrates his practice in the areas of bankruptcy, commercial litigation, creditor's rights, loan workouts, con-

sumer law, copyright and trademark infringement, anti-trust and related litigation.

The Groom Law Firm is relocating its Oklahoma City offices to Edmond in May. Attorneys **Thad Groom**, **Pete Mills**, **James Kaufman** and **Sid M. Groom Jr.** will office at 17 E. Hurd St., P.O. Box 4000, Edmond, 73083. The firm's new phone number is (405) 285-9559.

Richard Mann announces the opening of his law office at 247 N. Broadway, Suite 106, Edmond, 73034. He will continue his practice of civil litigation, trials and focusing on defense of employment and civil rights cases. He may be reached at (405) 509-6835; mannlaw@coxinet.net.

At The Podium

William G. Paul of Oklahoma City recently spoke at the Oklahoma Law Review Banquet, held in April at the Lloyd Noble Center in Norman. He spoke about hot topics in law that are in need of good law review treatment, getting involved in the legal community and effectuating positive change. He also provided advice for young lawyers.

C Steven Hager of Oklahoma City recently addressed the State Bar of New Mexico's "Indian Law 101" conference in Albuquerque, N.M. He spoke about the Indian Child Welfare Act and how to recognize its issues in a variety of cases.

UCO Professor **Marty Ludlum** recently spoke to the International Cemetery, Cremation and Funeral Association in Las Vegas, and the Oklahoma Funeral Directors Association in Tulsa about issues related to the death care industry.

Jerry Shiles of Oklahoma City recently spoke at the Down Syndrome Association of Central Oklahoma annual convention, addressing the need for planning not only by the parents of a special needs child, but also by other friends or family members who might be leaving something in their wills or trusts to the child or a parent of the child.

Oklahoma City lawyer **Kyle Sweet** recently spoke at the Texas Society of

Medical Staff Service Specialists annual conference in San Antonio. His presentations covered legal issues associated with disruptive physicians, negligent credentialing claims, medical staff due process and national practitioner data bank reporting.

Oklahoma Corporation Commission attorney **Susan Dennehy Conrad**, who serves as assistant general counsel for the Oil and Gas Conservation Division, was the guest speaker in April for the Capital Association of Division Order Analysts. Her presentation was on the commission's new rules for Horizontal Drilling.

Compiled by Ashley Schovanec.

How to place an announcement: If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award or given a talk or speech with statewide or national stature, we'd like to hear from you. Information selected for publication is printed at no cost, subject to editing and printed as space permits. Submit news items **(email strongly preferred)** in writing to:

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Fax: (405) 416-7089 or
Email: barbriefs@okbar.org

Articles for the August 6 issue must be received by July 18.

IN MEMORIAM

Conrad J. Carson of Broken Arrow died April 20. He was born Nov. 9, 1947, in New Orleans, La., earning a bachelor's degree from OU in 1970. **He served in the U.S. Army until 1971, when injured and honorably discharged.** He earned his J.D. from TU in 1982, after studying accounting and working for the IRS. He engaged in the private practice of law in Tulsa until 2010. Memorial contributions may be made to American Cancer Society or the University of Oklahoma.

Donald C. Church of Tulsa died April 29. He was born Dec. 16, 1919, in Elkhart, Kan. He was raised in Tulsa, graduating from Central High School in 1936 and TU in 1942. **During World War II, he served in the U.S. Army as trial judge advocate at**

Camp Perry, Ohio. After the war, he worked for several years as vice president and legal counsel for the Insurors Indemnity and Insurance Company. He opened his own general law office in 1955 and practiced for 50 years. He was a 32nd degree Mason and member of various other civic clubs and social organizations. Memorial contributions may be made to the Little Light House, a charity serving Tulsa children with special needs.

Catherine Smith Dodson died March 9. She was born in Coalgate on Feb. 9, 1915, graduated from Miami High School in 1932. She attended Fontbonne College in St. Louis before graduating from the Oklahoma School of Law (now OCU) in 1939, one of very few women in her

law school class. She worked for Kirkpatrick Oil in Oklahoma City, then for the Beard Company as corporate secretary until her retirement in 1993. She was an active member of Christ the King Catholic Church and frequently volunteered to assist ailing parishioners. She enjoyed traveling, particularly to Europe, to which she traveled several times. Since 2003 she has lived near family in Granger, Ind.

Lifelong Tulsa resident **Gomer Allan "Pat" Evans Jr.** of Tulsa died March 18. He was born July 21, 1944, in Tulsa. He received his bachelor of business administration from OU in 1966. He worked as a bailiff while attending TU College of Law, earning his J.D. in 1968. He practiced law in Tulsa for more than 40

years. He enjoyed golf, horse racing, and travel, but his greatest passion was spending time with his family, especially his grandchildren.

Michael Mendel Goldberg of Edmond died April 14. He was born in McAlester on Jan. 25, 1943 and raised in Wilburton. He graduated from OU and the OU College of Law, also earning a master of laws from George Washington University Law School. **He served for 20 years as an officer in the U.S. Navy JAG Corps retiring with the rank of commander.** Continuing his dedication to public service, he worked a further 21 years for the Oklahoma Court of Civil Appeals. Memorial contributions may be made to the Leukemia & Lymphoma Society.

David Warren Griffith of Tulsa died April 19. He was born June 13, 1944, in Oklahoma City, graduating from OSU and the TU College of Law. In addition to his legal practice, he loved being outdoors and spending time with his family. Memorial contributions may be made to Alzheimer's Association or St. Simeon's Episcopal Home Foundation.

John N. Henderson of Stigler died April 13. He was born Jan. 2, 1947 in Fort Smith, Ark. He was a graduate of the TU College of Law. He was a retired associate district judge and attorney in Haskell County. In addition, he was a dedicated horseman. Memorial contributions may be made to John Henderson Scholarship Fund or Stigler Community Development Foundation c/o Stigler First National Bank.

Paul Russell Hodgson of Tulsa died Jan. 11. He was born in Goodrich, Kan., on Aug. 25, 1924, and attended Parker Rural High School. **He enlisted in the Army Air Corp during World War II, serving as a pilot flying bombardier training missions and attaining the rank of first lieutenant.** He earned a B.S. in business from the University of Kansas, relocating to Tulsa in 1949 to work as a CPA. He graduated from the TU College of Law in 1963, beginning his own law practice in 1964. That same year he served on Gov. Dewey Bartlett's Committee on Tax Reform, helping draft the modern Oklahoma Tax Code. In 1975, he became associated with the firm of Morrel Saffa Craige PC where he served of counsel and continued to practice until his death.

Pat Pate Sr. of Poteau died on March 10. He was born Aug. 15, 1931, in Wellington, Texas, earning a degree in geology and an L.L.B. at Sol Ross University in Alpine, Texas. He received his law degree from University of Arkansas, Fayetteville. **He served as a paratrooper in the U.S. Army 82nd Airborne Division.** He moved with his family to Poteau in 1961. He served eight years as district judge for LeFlore, Latimer and Haskell counties, six years as associate district judge in LeFlore County and served four years in the LeFlore County Prosecuting Attorney's Office. He participated in several civic and community organizations and was an active member of First Baptist Church of Poteau.

Warren O. Romberger of Oklahoma City died April 16. He was born Nov. 3, 1920, in Oklahoma City. **During World War II, he served in the U.S. Coast Guard.** After the war, he completed a law degree from OCU. He worked for Oklahoma Abstract Company for many years before becoming an attorney for the City of Oklahoma City, and upon retirement was honored by the mayor with a Warren O. Romberger Day. In addition to his legal career, he was also a successful real estate developer. He was a member of the Rail Fan model train club and served as president of the Oklahoma City Bowling League. Memorial contributions may be made to St. Luke's United Methodist Church.

Stuart Strasner Sr. of Baton Rouge, La., died May 7. He was an Oklahoma native who was born May 11, 1929. He graduated from Panhandle State University and from the OU College of Law in 1954. **He served in the U.S. Army as a member of the JAG Corps.** During the course of his legal career, he maintained a law practice in Oklahoma City while working as a bank consultant in Baton Rouge, and he also worked as a lobbyist for numerous medical, legal and business organizations. He served as OBA executive director from 1978 to 1981. He was dean of the OCU School of Law from 1984 to 1991, and later served as director of the university's graduate banking program.

Robert E. Waller died May 2. He was born Jan. 26, 1929, in Wynona. He attended Claremore schools and

attended OSU on a music scholarship, graduating in 1952. He immediately entered the U.S. Air Force and served during the Korean Conflict, ultimately spending 30 years in the military, retiring with the rank of colonel after flying several dangerous reconnaissance missions during the Cold War. Upon retirement from the Air Force in 1982, he moved to Tulsa and enrolled in the TU College of Law. After graduating, he practiced several years in Coweta and later in Tulsa. He was the municipal judge in Coweta and Porter until shortly before his death. Memorial contributions be made to Sojourn Care Hospice.

Richard "Dick" Henry Wills Jr. of Tulsa died April 2. He was born on April 16, 1916, in Claremore and graduated from Tulsa Central High School in 1934. He earned a bachelor's degree from Harvard in 1938 and

completed his J.D. at the University of Michigan in 1941. Shortly after Pearl Harbor, he enlisted as a private in the U.S. Army, serving until his discharge in May of 1946 with the rank of captain. He served as a plainclothes investigator of civilian personnel and as an officer attached to General MacArthur investigating Japanese war crimes. Once discharged, he returned to Tulsa to practice law and was twice appointed by the Supreme Court of Oklahoma to serve as a temporary judge on the Court of Civil Appeals. He was an avid fisherman, bowler, handball player and golfer. Memorial contributions may be made to the First Presbyterian Church of Tulsa.

James Edward Work of Oklahoma City died April 18. He was born on Jan. 16, 1927, in Wewoka and attended Classen High School in Oklahoma City. He served during World War II in the

U.S. Navy as a member of the Naval Expeditionary Force stationed in the Philippines and received the Philippine Liberation Award. Upon discharge, he attended OU and earned a B.A. in 1950 and a J.D. in 1953. He practiced law with the Oklahoma City law firm of Gilliland, Withington and Shrink for 57 years until his death. He was a former OBA vice president and was a member of the Board of Bar Examiners. He served as general counsel to Judicial Reform Inc., a director of the American Judicature Society, pro bono general counsel for the Oklahoma Art Center and Allied Arts Foundation in Oklahoma City and as president of the Legal Aid Society of Oklahoma County. He also served on the boards of numerous civic and community organizations. Memorial contributions may be made to the University of Oklahoma Foundation.

Oklahoma Bar Journal Editorial Calendar

2011

- August:
Children and the Law
Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: May 1, 2011

- September:
Bar Convention
Editor: Carol Manning
- October:
Labor and Employment Law
Editor: January J. Windrix
janwindrix@yahoo.com
Deadline: May 1, 2011

- November:
Military Law
Editor: Dietmar Caudle
d.caudle@sbcglobal.net
Deadline: Aug. 1, 2011
- December:
Ethics & Professional Responsibility
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2011

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

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PARALEGAL NEEDED. DOWNTOWN OKC LAW FIRM. Must have civil litigation experience. Eligible employees receive benefits including medical, dental and disability insurance, 401k, parking. Our employees are aware of this ad. Please submit resume and salary requirements to "Box K," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

PROGRESSIVE BRICKTOWN DEFENSE FIRM with offices in Oklahoma City, Dallas and Houston, seeks trial lawyer with 10-15 years experience in expert intensive, medical malpractice and/or product liability practice. Very significant opportunity for aggressive self-starter. Email inquiries to Curgus@berryfirm.com. Join a team of difference.

NAVICO INC. IS LOOKING FOR AN IN-HOUSE LEGAL COUNSEL responsible for managing legal matters relating to all of the company's business. In particular, will be responsible for coordinating patent prosecution for all of the company's business units throughout the world, working with outside patent counsel to prosecute U.S. and foreign patent applications, providing timely advice to internal clients and collaborating with business partners across multiple business divisions, performing intellectual property (IP) due diligence analyses, providing litigation support, and supporting other legal matters including reviewing confidentiality agreements, license agreements and other agreements involving IP. Send resume to: Chad.Bowers@navico.com.

UNIQUE NORTHWEST OKLAHOMA CITY INVESTMENT AND ADVISORY FIRM seeks organized, hard working and loyal team member for an entry level position. Areas of exposure include oil and gas, public securities, banking and private equity. Position requires excellent communication, Microsoft Office and attention to details. Please send resume to Ebassett@vhgroup.org.

IMMEDIATE OPENING FOR AN ASSISTANT DISTRICT ATTORNEY in Pottawatomie and Lincoln Counties, with primary duties in Shawnee office. Successful applicant will be responsible for felony criminal cases, including domestic violence prosecution. Prosecution experience of at least 3 years is preferred. Salary commensurate with experience and qualifications. Interested applicants should respond with a current resume to Richard L. Smothermon, District Attorney, 331 N. Broadway, Shawnee, OK 74801.

AV RATED DOWNTOWN OKC FIRM seeks associate with general litigation experience, strong academic background and writing skills. Must be prepared to assume substantial responsibility. Compensation commensurate with production. Please send resumes in confidence to "Box Y," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

LITIGATION ATTORNEY: 1 TO 7 YEARS EXPERIENCE. Primarily insurance defense practice. Taylor, Ryan, Schmidt & VanDalsem PC; Suite 850, 1437 S. Boulder Ave., Tulsa, OK 74119; (918) 749-5566; law@trsvlaw.com.

POSITIONS AVAILABLE

ASSOCIATE ATTORNEY - LITIGATION. Minimum of 2 years experience preferred. Small, downtown OKC insurance defense firm with desire to grow. Benefit package. Our employees are aware of this ad. Please submit resume and salary requirements to "Box L," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

AV-RATED TULSA FIRM CURRENTLY SEEKING attorney for research and writing position. Applicants must have a minimum of 5 years experience in research and writing in civil litigation and excellent academic credentials. Send resume and writing sample to "Box O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

TITLE ASSISTANT: FULL-TIME POSITION with First American Title & Trust Co. Job Duties: Support the commercial title department with closings and recordings. Creates title files and assists in preparing title commitments, policies and endorsements and supplemental documents. Creates title files and documents all work. Provides customer service to customers and internal offices. Assists underwriters with workload and coordinates daily functions of department, interprets and acts on instructions from customers and title officers, audits calculations and legal documents for accuracy, communicates recording information and prepares legal property documents, examines and interprets tax and assessment reports, follows title practice regarding the issuance of title commitments, policies, endorsements and guarantees, property price endorsements and communicates professionally with all customers and employees. Qualifications: High School diploma or equivalent. Title experience preferred. Excellent verbal/written communication skills. Strong customer service orientation and strong detail orientation. Send resumes to kabyers@firstam.com.

PARALEGAL – EXPERIENCED PARALEGAL NEEDED for busy south OKC law firm. Seeking qualified paralegal that has a litigation background. Candidate must have ability to do legal research, draft petitions, motions and briefs; looking for highly-motivated person with superior communication skills who is comfortable dealing with clients. Competitive salary, bonus and benefits based upon experience and motivation. Send resume to "Box A," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

FOR SALE

BEAUTIFUL LAKEFRONT, LAKE HOUSE FOR SALE on Oklahoma side of Lake Texoma, steps from sandy beach, blocks from boat launch. 3/2, multi-level deck, outdoor shower, sprinkler system, wet-bar, tile floors, fireplace, large windows open to million dollar view. Secluded area next to Corp of Engineers forested property. Pat Maher, pmaher@shannongracey.com.

The Best Fee I Ever Received

By Michael P. Warwick

Lawyers have been known to brag a little about their great courtroom victories and the size of the fees they received. Since I have had an office and small business practice for most of my 35+ years as a lawyer, I just don't have a lot of great war stories to tell. Stories about contract disputes, probate and the intricacies of the U.C.C. just don't hold an audience. I certainly cannot brag about the "million dollar verdict" I got. I usually just stand and listen, generally with envy.

Some time ago as I sat in the courtroom waiting my turn at a routine motion docket, my mind began to wander as I listened to a couple of lawyers argue a motion for summary judgment. I could throw away my Ambien if I could get a recording of that argument. But, I digress too much. I started to think of my past cases and the best fee I ever got. I think I know what it was.

Many years ago, before *Burk v. K-Mart* and its progeny made it a little easier to win an employment case, I took a wrongful termination case for a woman who had been fired after many years of service to her employer. Before I agreed to take the

case I spent considerable time explaining the law and advising the woman that the odds were against her because her case did not exactly fit any of the existing exceptions to the employment-at-will doctrine. She wanted to proceed and she was willing to pay my fee. What more did a young lawyer need?



I worked hard on the case and ended up spending far more time and effort than I had expected when I set my

fee. I also became more and more convinced that a wrong had been done, and surely a jury would see the same thing. I survived the motion to dismiss, motion for summary judgment, and seemingly endless discovery produced by the lawyers representing the employer, and finally got my case set for trial. I hoped for a good settlement offer, but none came. We went to trial. I survived the demurrer and motion for directed verdict, and even got jury instructions that at least gave my client a chance to win.

We lost.

I was dreading the walk back to my office with my client. She was understandably upset and disappointed. I was certain that she would not remember our conversations about how difficult her case was. We walked in silence. When we got to the office she didn't blame me or accuse me of incompetence as I feared. She thanked me for my efforts and then asked a question no client asked before or since.

She asked if she could give me a hug.

Mr. Warwick practices in Shawnee.

OBA/CLE PRESENTS

OKC:
OKLAHOMA BAR CENTER
1901 N. LINCOLN BLVD.

25
MAY



MAKING YOUR CASE WITH A BETTER MEMORY

TULSA:
RENAISSANCE HOTEL
6808 S. 107TH E. AVE.

26
MAY



FEATURED SPEAKER: PAUL MELLOR

PAUL MELLOR IS A NATIONALLY KNOWN MEMORY TRAINING CONSULTANT WHO HAS A "PASSION ABOUT THIS SUBJECT." AS PRESIDENT OF SUCCESS LINKS, HE PRESENTS SEMINARS ON STRENGTHENING MEMORY, HAS WRITTEN EXTENSIVELY ON MEMORY IMPROVEMENTS AND HAS BEEN FEATURED AND QUOTED IN SEVERAL MEDIA, INCLUDING NEWSWEEK, THE WALL STREET JOURNAL, THE SAN DIEGO UNION-TRIBUNE, CBN TELEVISION, AND USA TODAY. A POPULAR RADIO AND TELEVISION GUEST DEMONSTRATING HIS TECHNIQUE, PAUL'S SKILLS HAVE HELPED THOUSANDS OF PROFESSIONALS TO BE MORE PERSUASIVE, MORE INFLUENTIAL, AND MORE POWERFUL WITH THE USE OF TRAINED MEMORY. A GRADUATE OF WESTERN CAROLINA UNIVERSITY, PAUL WAS A FINALIST IN THE 2006 USA MEMORY CHAMPIONSHIP IN NEW YORK CITY.

REGISTRATION &
CONTINENTAL
BREAKFAST

8:30 a.m.

DEPOSITION DEMONSTRATION
INTRODUCTION WITH DEMONSTRATION
DISPLAYS THE LIGHTNING SPEED OF A
TRAINED MEMORY. YOU WILL SEE THE
EASE OF REMEMBERING INFORMATION
FROM A DEPOSITION. EMPHASIS IS
PLACED ON WHY WE FORGET AND
HOW WE CAN REMEMBER.

BREAK

9 10:15

HOW TO SPEAK WITHOUT NOTES TO
JURORS DISCOVER SECRETS ON HOW TO
PRESENT A CASE WITHOUT NOTES. LEARN
STEP-BY-STEP TECHNIQUES ON HOW TO
DRAFT YOUR REMARKS, PREPARE YOUR
MIND AND DELIVER A POWERFUL
PRESENTATION. TO KEEP THE JURY IN
THE PALM OF YOUR HAND, YOU'LL HAVE
TO LET GO OF YOUR NOTES.

10:30

NETWORKING
LUNCH
(INCLUDED IN
REGISTRATION)

12:15 p.m.

CROSS EXAMINATION
WITH CONFIDENCE
USING THE TWO STEP FORMULA IN RECALL
YOU WILL ACQUIRE THE SKILL IN REMEMBERING
TO ASK KEY QUESTIONS DURING CROSS
EXAMINATION. USE OF EXAMPLES AND
ILLUSTRATIONS HELP REINFORCE THE
PROFICIENCY WHEN DEALING WITH THOSE
ON THE WITNESS STAND.

12:45

BREAK

2:00

REMEMBER NAMES AND FACES OF JURORS IN
TRIAL, CLIENTS IN PRESENTATIONS, AND IN
OTHER PROFESSIONAL SETTINGS
YOU WILL LEARN THE FACIAL FORMULA TO QUICKLY
REMEMBER A NAME. ATTENTION IS PLACED ON
CONCENTRATION TECHNIQUES AND FOCUSING
ON RECALLING THE NAMES CORRECTLY. USE OF
PICTURES AND EXAMPLES CREATE A PROVEN
SYSTEM IN CORRECTLY MATCHING A NAME TO A
FACE. YOU WILL LEARN HOW TO REMEMBER FIRST
NAMES AND LAST NAMES

2:15

ADJOURN

4:30

INCLUDED IN THE REGISTRATION
ARE THE BONUS
BOOKLETS, MEMORY MAGIC
AND HOW TO REMEMBER
NAMES. THESE TWO
BOOKLETS GO BEYOND THE
SEMINAR, PROVIDING YOU A
FOUNDATION TO TRAIN YOUR
BRAIN ON REMEMBERING IN-
FORMATION, AS WELL AS
VISUAL CLUES ON HOW TO
REMEMBER OVER 500
COMMON FIRST NAMES.

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ORG/CLE**

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\$250

STANDARD

8MCLE/0ETHICS

CREDIT

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EARLY-BIRD REGISTRATION WILL BE ACCEPTED AT
LEAST FOUR FULL BUSINESS DAYS PRIOR TO SEMI-
NAR. STANDARD REGISTRATION RATES APPLY AFTER
THAT. CANCELLATIONS FEES WILL NOT BE APPLIED IF
RECEIVED BEFORE FOUR FULL BUSINESS DAYS OF SE-
MINAR. \$25 FEE APPLIED WITHIN FOUR FULL BUSI-
NESS DAYS OF SEMINAR. CANCELLATIONS, RE-
FUNDS, OR TRANSFERS WILL NOT BE ACCEPTED ON
OR AFTER SEMINAR DATE.

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