

# WTT Oklahoma Bar JOURNAL

Volume 83 ♦ No. 14 ♦ May 19, 2012

## Nonprofit Law



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<sup>1</sup> Social Security Administration, Disabled Worker Beneficiary Statistics, ssa.gov/  
<sup>2</sup> [http://www.cdc.gov/nchs/data/ohrt/ohrt\\_disability/disability\\_stats.asp](http://www.cdc.gov/nchs/data/ohrt/ohrt_disability/disability_stats.asp)  
<sup>3</sup> Council for Disability Prevention, 2011 Report

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# You Do the Math

By Cathy Christensen

The Cornerstone Banquet and Auction benefiting the Lawyers Helping Lawyers Foundation Inc. held March 27 at the Oklahoma Bar Association was a complete success! There simply wasn't enough available space in the April Bar Journal to highlight the evening!

A sold out crowd arrived at the bar center early to socialize during a reception and bid on the silent auction items. More than 180 people mingled in the lobby and enjoyed a touch of friendly competition — each trying to be the winner of carefully selected auction items.

When the silent auction closed, guests found their tables in Emerson Hall for a plated dinner. Emerson Hall was decorated from top to bottom, front to back. The Work/Life Balance Committee, chaired by Sarah Schumacher and Cheri Gray, worked alongside OBA staff to create an atmosphere similar to a construction site — blueprints, work horses, granite, bricks and all! The Lawyers Helping Lawyers Assistance Program Committee, chaired by Tom Riesen, volunteered during the evening as greeters, auction “spotters” and table decorators.

The guests included Gov. Mary Fallin and First Gentleman Wade Christensen, Justice Yvonne Kauger and Justice Joseph Watt of the Oklahoma Supreme Court, Court of Criminal Appeals Judges Clancy Smith and Charles A. Johnson, many district court judges, several past OBA presidents and an overwhelming number of attorneys from Payne County! Also in attendance was Phil Fraim, Oklahoma Attorneys Mutual Insurance Co., a long-time supporter of Lawyers Helping Lawyers.

The evening's auctioneer was OBA member Kevin Sain who drove in from Idabel and volunteered his time. Kevin is an award winning auctioneer and quite an entertainer. I don't think I ever saw so many people so happy to be spending money! The evening raised more than \$45,000!

OBA member Reggie Whitten shared his personal story of tragedy and personal healing after the death of his son Brandon. Reggie discovered that the only way he could cope with his loss was to dedicate himself to helping oth-

ers. Through the work of the Whitten-Newman Foundation, Reggie pursues humanitarian efforts at home and abroad. He performs advocacy work on behalf of veterans and service members through Pros 4 Vets. It is no coincidence that Pros 4 Vets is a generous supporter of the Oklahoma Lawyers for America's Heroes program!



President Christensen and Executive Director John Morris Williams hold an autographed Adrian Peterson jersey donated by Pros 4 Vets during the auction.

Reggie shared with the audience the message of FATE (Fighting Addiction Through Education). He talked about substance abuse and alcohol addiction. Reggie inspired the audience to continue to support the work of the LHL Foundation and its efforts to educate our profession and to lend a hand to our colleagues when needed.

Reggie's love for this bar association runs deep and wide. He is an example of generosity and compassion. Personally, I'd like to thank Reggie for his continued support of the Lawyers Helping Lawyers Assistance Program Committee and the LHL Foundation Inc.

*cont'd on page 1273*



*Cathy Christensen*

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# EVENTS CALENDAR

## MAY 2012

- 22 **OBA Solo and Small Firm Conference Planning Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Collin Walke 405-235-1333
- 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
- 24 **OBA Strategic Planning Committee Meeting**; 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jim Stuart 405-275-0700
- OBA Men Helping Men Support Group**; 5:30 p.m.; The University of Tulsa College of Law; 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033
- 28 **OBA Closed** – Memorial Day Observed
- 31 **OBA Member Services Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Roe Simmons 405-359-3600

## JUNE 2012

- 1 **OBA Military and Veterans Law Section Meeting**; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Robert Don Gifford II 405-553-8736
- 5 **OBA Communications Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dick Pryor 405-740-2944
- OBA Government and Administrative Law Practice Section Meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Tamar Scott 405-521-2635
- 6 **OBA Law Day Committee Meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Association, Tulsa; Contact: Tina Izadi 405-522-3871
- 7 **OBA Men Helping Men Support Group**; 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to: Kim Reber 405-840-3033
- OBA Women Helping Women Support Group**; 5:30 p.m.; The University of Tulsa College of Law 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033

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

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# Oklahoma Nonprofit Corporations

## A Basic Primer on Starting up 501(c)(3) Charitable Organizations

By Gary C. Clark

Many of us have been volunteers working informally with other members of our communities striving to make them a better place to live. Often we are asked to set up a “tax-exempt foundation” so that fundraising can be enhanced by virtue of the income tax deduction for charitable contributions. Of course, you are expected to do the legal work *pro bono* and, if you have never done one before, the amount of time it will take is not insubstantial.

This brief article is intended to provide you the basic information and point you to the available resources to establish an Oklahoma nonprofit corporation<sup>1</sup> that qualifies under Internal Revenue Code (IRC) Section 501(c)(3) as a charitable organization for which donations are deductible under IRC Section 170. By virtue of its very brevity, this article cannot and will not address many of the nuances and complicated issues affecting charitable organizations.

### INFORMATION NEEDED

As with any other legal project, you will need to collect the information needed to complete the assignment. In this instance, rather than a single client, you may be working with a group of people which may require some patience in getting them to coalesce around a single answer to each of the questions you will be asking.

#### *Name Desired*

You will need to know the name the group wishes to use early on so that you can check its availability at no cost through the Oklahoma Secretary of State’s office.<sup>2</sup> This is the same process followed for “for profit” corporations. The

name must include one of the following words: “association,” “company,” “corporation,” “club,” “foundation,” “fund,” “incorporated,” “institute,” “society,” “union,” “syndicate” or “limited” or an abbreviation thereof.<sup>3</sup> Depending on the probability that the name might be taken by another group before you can prepare and file the articles of incorporation, you might reserve the name for 60 days for the relatively nominal cost of \$10.<sup>4</sup>

#### *Purpose*

The organization’s purpose is worth careful consideration. It should be the guiding principle for the group’s intended actions. Hopefully, there is general agreement. Take care to avoid too narrow a purpose that the organization soon outgrows.<sup>5</sup>

#### *Contents of Articles of Incorporation*

Besides name and purpose you will need to establish who will be the registered agent and registered address (physical address, not P.O. box), duration of the corporation (perpetual is recommended). You will need to list at least three incorporators with their respective mailing

addresses to file for incorporation as an Oklahoma not-for-profit corporation<sup>6</sup> and the number of directors (may be as few as one director), together with their names and addresses.<sup>7</sup> The articles of incorporation must include a provision that the corporation will not provide "pecuniary gain, incidentally or otherwise, to its members as such."<sup>8</sup> In addition to what the State of Oklahoma requires to incorporate a nonprofit corporation, the Internal Revenue Service requires the articles to include certain language in order to qualify for tax-exempt status under IRC Section 501(c)(3).<sup>9</sup> See Appendix A for example.

### *Bylaws*

Discuss the need for bylaws and collect any information that might affect the choice of provisions you will include. Caution should be exercised in setting any membership restrictions that might cause the IRS to doubt your public charitable purposes. See Appendix B for example.

### *Sources of Revenue — Private Foundation or Public Charity*

Organizations described in IRC Section 501(c)(3) fall into two categories: private foundations and public charities. To determine which type of charitable organization you will be forming, you will need to know from where the expected revenue for the organization will come.

Under IRC Section 509, all organizations described in Section 501(c)(3) are private foundations *except* the types of organizations described in Sections 509(a)(1), (2), (3) or (4). The excepted organizations are known generically as "public charities". Being a public charity has many advantages over a private foundation. One which may be the most important for some people is the 50 percent of adjusted gross income charitable deduction limitation for public charities compared to a 30 percent (or 20 percent for capital gain property) limitation for private foundations.<sup>10</sup> For obvious reasons, private foundations are subject to greater regulation. The annual informational return required for private foundations is more complex than those required of public charities.<sup>11</sup>

A charitable organization is *not* a private foundation, and is therefore a "public charity," if a substantial part of its support (exclusive of income received in the exercise of its exempt purpose or function) comes from a governmental unit or from direct or indirect contributions from the general public.<sup>12</sup> The "substan-

tial part of support" requirement is met if one-third of its support comes from such sources, or, alternatively, a "facts and circumstances" 10 percent test may be applied.<sup>13</sup>

### *Projected Budget for Three Years*

I should note that if your organization will have less than \$7,500 in gross receipts for the first year, \$12,000 cumulative through the second year and \$15,000 cumulative through the third year (i.e., less than \$5,000 average through three years) you are not required to file the Form 1023 (Application for Recognition of Exemption).<sup>14</sup> The projected budget will help you to determine whether or not you are required to file the Form 1023.

If you expect to exceed those amounts or if you think there is any reasonable possibility of doing so, I would encourage you to file while you have the information at hand. If the Form 1023 is not filed and the organization exceeds any of the limits, it is required to file within 90 days after the period in which the limit was exceeded. Failure to do so will result in the loss of the tax-exempt status for the year in which the limit was exceeded through the year in which the Form 1023 is ultimately filed.<sup>15</sup> There would be no tax deductibility for donations and donors would be required to amend their tax returns. They probably would cease to be donors to the organization.

Assuming that your organization does not qualify for the above exemption from filing, you generally must file the Form 1023 within 27 months of the formation of the entity. The budget information is essential to complete the Form 1023 for filing with the IRS for a start-up nonprofit (and will help determine its status as a public charity). As of May 8, 2012, the IRS was *assigning* applications received in September 2011, for review by examiners.<sup>16</sup> Not surprisingly, forms with complete information are processed more quickly than those which require follow-up.<sup>17</sup> The bad news is that it may take some time to get the IRS determination letter officially recognizing the organization's exempt status. The good news is that the exempt status relates back to the formation of the organization.<sup>18</sup> Be sure to include a properly completed power of attorney form (Form 2848) or the IRS will not discuss the filing with you.

### *Other Form 1023 Required Information*

Go through the core part of Form 1023 (12 pages) and any applicable schedule(s) with the principals and obtain their answers to any

questions of which you are not certain. This may require more than one session because you may be asking questions they have not yet considered.

#### *Plans to Solicit Funds*

Since Oklahoma (and most states) requires registration of organizations conducting charitable solicitations, you must inquire as to any plans to solicit funds.<sup>19</sup> Solicitors and professional fundraisers also must register.

### **ADVISING THE REPRESENTATIVES OF THE ORGANIZATION**

Along with collecting information, you will want to impart advice to the organizers in your meeting with them. At a minimum you will want to inform them of the following:

#### *Filing Fees*

The filing fee of the Oklahoma Secretary of State for the articles of incorporation is only \$25.<sup>20</sup> The current IRS filing fee for the Form 1023 is \$400 for organizations with \$10,000 or less in annual gross receipts during the preceding four years and \$850 for those with more.<sup>21</sup>

#### *Estimate of Time Frames Involved*

Explain the need to first check the name availability (and possible reservation of the name). You should make certain that they understand that the formation of the corporation is relatively within your and their control, but that the Form 1023 processing leading to the issuance of a formal determination letter will take considerable time. However, as long as you and they are comfortable that the organization meets the requirements of IRC 501(c)(3) they may proceed with their activities safe in the knowledge that donations will be deductible under the Internal Revenue Code and the Oklahoma tax code.

#### *Necessity of Observing Corporate Formalities*

Ensure that the organizational meeting of the corporation is held upon issuance of the Certificate of Incorporation by the Secretary of State and that all organizational documents are placed in a corporate notebook. Explain the need for annual meetings of members and periodic meetings of the board of directors with minutes memorializing the actions taken.<sup>22</sup>

### *Need to Obtain an Employer Identification Number*

Even if it is unlikely that the organization will have any employees, you will need to obtain the tax identification number (EIN). The EIN will be required by the bank in order to establish a bank account. You need to caution the organizers that if they are going to have paid employees that the rules relating to employees of for-profit corporations are generally (with a few exceptions) applicable to them.

#### *Activities or Failures Which Might Jeopardize the Tax Exempt Status*

Make sure the organizers understand that there are certain activities which may cause the loss of the tax exempt status. The primary issues would be providing private benefits which inure to the organizers,<sup>23</sup> engaging in more than incidental political activity,<sup>24</sup> and failing to file the annual forms (990 or 990-EZ or 990-N) required by the Internal Revenue Service for three consecutive years.<sup>25</sup>

#### *Fiduciary Duties of Board Members*

Space does not allow for a thorough discussion of the fiduciary duties of nonprofit board members, but include: duties of obedience, loyalty and care. Obviously, you should explain that conflicts of interest must be avoided.<sup>26</sup>

#### *Establish Expectations and Responsibilities of Directors*

Often, directors do not know what is expected of them. As people are asked to serve on the board of directors now and in the future, it would be helpful to provide them a list of the expectations and responsibilities. A thorough, but concise, discussion of a director's responsibilities is cited in the accompanying endnote.<sup>27</sup> Hopefully, this list will not discourage prospective directors from agreeing to serve. In reality though, they should be aware that they are undertaking a serious obligation.

### **CHECKLIST OF ACTION STEPS**

A checklist of the major steps to follow in forming an Oklahoma nonprofit corporation meeting the requirements of IRC 501(c)(3) after the necessary information is gathered is attached as Appendix C. It is not a complete list, but I hope it will serve as a useful guide to those of you who are stepping into uncharted waters. Good luck, and may the waters only come up to your chin!

**APPENDIX A**  
**ARTICLES OF INCORPORATION**  
**(Not for Profit)**

To: Oklahoma Secretary of State  
2300 N. Lincoln Blvd., Room 101, State  
Capitol Building  
Oklahoma City, Oklahoma 73105-4897  
(405) 521-3912

The undersigned, for the purpose of forming an Oklahoma not for profit corporation under the provisions of Title 18, Section 1001, do hereby execute the following articles of incorporation.

1. The name of the corporation is BRIGHTER DAY FOUNDATION, INC.
2. The name of the registered agent and the street address of the registered office in the State of Oklahoma is:  
  
John Doe  
123 S. Main  
Bountiful, Oklahoma 73100
3. The duration of the corporation is perpetual.
4. The purpose or purposes for which the corporation is formed is to engage in any lawful act or activity to provide assistance to the homeless in Bountiful, Oklahoma including, but not limited to, providing or making available food and temporary shelter.

Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate

for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

5. This corporation does not have authority to issue capital stock.

6. This corporation is not for profit, and as such the corporation does not afford pecuniary gain, incidentally or otherwise, to its members.

7. The number of directors to be elected at the first meeting is five.

8. The name and mailing address of each person who will serve as trustee or director are:

Ben Black  
421 N. Main  
Bountiful, OK 73100

Mary White  
823 E. First Avenue  
Bountiful, OK 73100

Susan Brown  
613 E. Sixth Avenue  
Bountiful, OK 73100

Bill Blue  
543 S. Lincoln  
Bountiful, OK 73100

Margaret Green  
711 N. Grant  
Bountiful, OK 73100



9. The names and mailing address of the undersigned incorporators:

Ben Black  
421 N. Main  
Bountiful, OK 73100

Mary White  
823 E. First Avenue  
Bountiful, OK 73100

Susan Brown  
613 E. Sixth Avenue  
Bountiful, OK 73100

WE, THE UNDERSIGNED, for the purpose of forming a not for profit corporation under the laws of the State of Oklahoma, certify that the facts herein stated are true, and have accordingly hereunto set our hands this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Ben Black

\_\_\_\_\_  
Mary White

\_\_\_\_\_  
Susan Brown

## APPENDIX B

### Bylaws of

BRIGHTER DAY FOUNDATION, INC.  
(An Oklahoma Not for Profit Corporation)

### Article One

#### Name and Location

Section 1. The name of the organization shall be BRIGHTER DAY FOUNDATION, INC. (the "Foundation").

Section 2. All Foundation meetings may be held at such places within the City of Bountiful, Oklahoma, as may be determined by the officers.

### Article Two

#### Purposes and Structure

Section 1. **Purposes.** This corporation is organized exclusively for charitable purposes as defined in Section 501(c)(3) of the Internal Revenue Code. The purposes of the Corporation include engaging in any lawful act or activity to provide assistance to the homeless in Bountiful, Oklahoma including, but not limited to, providing or making available food and temporary shelter, and, for such purposes, the making of distributions to organizations that

qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

This Corporation shall be self-governing, self-supporting, non-commercial, non-sectarian, nonprofit and nonpartisan.

No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth above. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes.

The Corporation is organized pursuant to the Oklahoma General Corporation Act and does not contemplate pecuniary gain or profit and is organized for nonprofit purposes which are consistent with the provisions of Section 501(c)(3) of the Internal Revenue Code and its

Regulations as they now exist or as they may be hereafter amended.

### Article Three Membership

Section 1. **Membership.** Membership in this organization is open to any person who will uphold the policies of this organization and agree to its Bylaws.

Section 2. **Qualification.** Eligible persons shall become members by paying the prescribed membership dues. Upon payment of such dues, a member shall be considered in good standing and be entitled to any and all rights and privileges of membership.

Section 3. **Membership Drive.** An annual membership drive shall be conducted each year, with additional members accepted at any time.

Section 4. **Dues.** Annual dues shall be assessed in such amounts as determined by a 2/3 majority of the members. Dues shall be payable at the beginning of each fiscal year.

Section 5. **Annual Meeting.** The annual membership meeting shall be held in on the fourth Monday in July of each year. The nominating committee will nominate a slate of persons for the director positions and the floor will also be open for nominations. Three directors will be elected by simple majority of the membership present.

### Article Four Directors

Section 1. **Qualification.** Any member in good standing is eligible to serve on the Board of Directors.

Section 2. **Powers.** The Board shall be the governing body of the organization and shall manage, control, and direct the affairs and property of the organization.

Section 3. **Compensation.** No Director shall receive compensation for any service he or she may render to the organization. Board members may be reimbursed for actual expenses incurred in the performance of their duties.

Section 4. **Officers.** Officers shall be elected at the first business meeting of the Board of each fiscal year and will take office immediately. The nominating committee will name a slate of officers and the floor will also be open for nominations. The officers will be elected by

simple majority of the Board. Vacancies of offices of unexpired terms shall be filled by appointment by a majority of the remaining officers. The officers and their respective duties are as follows:

a. The President shall:

- Preside at all meetings of the organization;
- Regularly meet with the treasurer of the organization to review the organization's financial position;
- Schedule annual audit of records or request an audit if the need should arise during the year;
- Perform any other specific duties as outlined in these bylaws.

b. The Vice President shall:

- Preside at meetings in the absence or inability of the president to serve;
- Perform administrative functions delegated by the president;
- Perform other specific duties as outlined in these bylaws.

c. The Secretary shall:

- Maintain the records of the minutes, approved bylaws and any standing committee rules, current membership and committee listing;
- Record all business transacted at each meeting of the corporation in a prescribed format;
- Maintain records of attendance of each board member;
- Conduct and report on all correspondence on behalf of the corporation;
- Other specific duties as outlined in these bylaws.

d. The Treasurer shall:

- Serve as chairperson of the Budget and Finance Committee;
- Issue a receipt complying with the Internal Revenue Code and regulations issued thereunder for all monies received and deposit said amounts on at least a weekly basis;

- Present a current financial report to the Board within thirty days of the previous month end;
- Maintain an accurate and detailed account of all monies received and disbursed;
- Reconcile all bank statements as received and resolve any discrepancies with the bank immediately;
- File annual IRS form 990 and OTC form 512-E in a timely manner;
- Submit records to audit committee or auditor appointed by the corporation upon request or at the end of the year;
- Other specific duties as outlined in these bylaws.

Section 5. **Term.** Each elected officer shall serve a term of one (1) year until a successor has been duly elected or appointed.

Section 6. **Meetings.** The Board of Directors shall provide for by resolution the time and place for the holding of at least one annual meeting of the Board, and of the additional regular meetings of the Board, without other notice than such resolution.

Section 7. **Notice.** Notice of any special meeting of the Board of Directors shall be given at least two days previously thereto by oral or written notice delivered personally or sent by mail or facsimile to each Director at his or her business address. Any Director may waive notice of any meeting, and the attendance of a Director at any meeting shall constitute a waiver or notice of such meeting.

Section 8. **Quorum.** A majority of the Board of Directors shall constitute a quorum for the transaction of business at any meeting of the Board; but if less than a quorum of the Directors is present at said meeting, a majority of the Directors present may adjourn the meeting from time to time without further notice. The act of a majority of the Directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

Section 9. **Proxy.** No voting by proxy will be allowed.

## Article Five General Provisions

Section 1. **Fiscal Year.** The fiscal year of this organization shall be July 1 through June 30 of the following calendar year.

Section 2. **Operating Funds.** Operating funds shall be maintained in a general fund, and an accounting of such funds shall be presented at all meetings.

Section 3. **Fiscal Responsibility.** All directors having fiscal responsibility shall be bonded.

Section 4. **Annual Statement.** The directors shall present at each annual meeting, or when called by vote of the members at any meeting, a full and clear statement of the condition of the organization.

Section 5. **Exemption.** This nonprofit organization will qualify as a tax-exempt organization under the provisions of Section 501(c)(3) of the Internal Revenue code and its Regulations as they now exist.

## Article Six Standing Committees

Section 1. **Nominating Committee.** Meet to receive nominations for the elected offices of the organization and to prepare a slate of nominees and a ballot for the election of officers. The committee shall be made up of the President, the Vice President and one at-large person appointed by the President.

Section 2. **Volunteer Committee.** Responsible for organizing and coordinating the recruitment of volunteers to operate the food kitchen and locate temporary sleeping facilities.

Section 3. **Fundraising Committee.** Responsible for developing and managing fundraising projects. The President will chair the committee and name its members as needed.

Section 4. **Membership Committee.** Distribute membership information and coordinate annual membership drive. The Vice President shall chair the committee and name its members as needed.

Section 5. **Budget and Finance Committee.** Prepare an annual budget to be approved by the Board and arrange an annual audit of the financial records.

## Article Seven Amendments

Section 1. **Amendments to Bylaws.** These Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by a majority of the Directors, provided that such alterations, amendments, or proposed substitute Bylaws have been read or distributed to all Directors

present at the previous regular meeting or such action may be made at a special meeting held at least ten days after the regular meeting at which the reading or distribution was made.

**Section 2. Amendments to the Articles of Incorporation.** The Directors may adopt a resolution setting forth any proposed amendment of the Articles of Incorporation, which, if approved by two-thirds of the Directors at the next Board meeting shall become effective immediately.

### CERTIFICATE OF SECRETARY

I certify that I am the duly elected and acting secretary of the Brighter Day Foundation, Inc. and these Bylaws constitute the corporation's Bylaws. The Bylaws were duly adopted at a meeting of the board of directors held on \_\_\_\_\_, \_\_\_\_\_.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Secretary of the Corporation

### APPENDIX C

#### CHECKLIST OF ACTION STEPS

- ✓ Check for name availability - [www.sos.ok.gov/corp/corpinquiryFind.aspx](http://www.sos.ok.gov/corp/corpinquiryFind.aspx)
- ✓ Optional – reserve the name (often not really necessary)
- ✓ Draft Articles of Incorporation (see attached sample form at Appendix B)
- ✓ Draft bylaws (see sample form at Appendix C and see sample education foundation form at [www.ofe.org/lef/startanlef/samplebylaws.htm](http://www.ofe.org/lef/startanlef/samplebylaws.htm))
- ✓ Review Articles and bylaws with organizers and obtain signatures of three incorporators
- ✓ File one signed copy of the Articles of Incorporation with \$25 check with Secretary of State
- ✓ Prepare initial draft of IRS Form 1023
- ✓ Calendar to watch for the Articles of Incorporation to be returned from the Secretary of State stamped “filed” with the certificate of incorporation
- ✓ When articles are returned, hold organizational meeting to adopt bylaws, elect officers, authorize signatures for bank account, etc.

(make certain that minutes are kept and prepared for approval at next meeting).

- ✓ Obtain an Employer Identification Number by going online (<https://sa2.www4.irs.gov/modiein/individual/index.jsp>), or by calling the Business & Specialty Tax Line at (800) 829-4933. You may also complete the form online print it and fax it in.
- ✓ Assist organizers in establishing a bank account, and make certain an accountant helps establish proper financial recordkeeping system
- ✓ Assist the organizers in establishing a process to deliver charitable contribution receipts that meets the requirements of IRC 170 for deductibility (see IRS Publication 1771)
- ✓ Review and revise Form 1023 with organizers
- ✓ Complete the Form 1023 checklist and double check that **everything** is present and complete and that the form is properly signed
- ✓ Periodically check status of the Form 1023 by going to: <http://www.irs.gov/charities/article/0,,id=156733,00.html>
- ✓ Upon receipt of the IRS determination letter, calendar that Form 990, 990-EZ or 990-N must be filed annually no later than the 15th day of the fifth month after the end of each fiscal year
- ✓ Advise the organizers that they must make the Form 1023 and annual Form 990 series filings available for public inspection at its permanent location
- ✓ Upon receipt of the IRS determination letter, complete and submit a signed Form B-16-A to the Oklahoma tax Commission with a copy of the determination letter to obtain the Oklahoma sales tax exemption
- ✓ Calendar that OTC Form 512-E must be filed annually no later than the 15th day of the fifth month after the end of each fiscal year. If non-exempt solicitations will occur, complete and file an Initial Registration Statement with a check for \$15 for expected contributions under \$10,000 (or \$65 for those above) with the Secretary of State
- ✓ If non-exempt solicitations will occur, calendar that annual renewals of the charitable solicitation registration must be filed with the Secretary of State



1. It is also possible to create a charitable trust that can qualify under IRC 501(c)(3) as a charitable organization. Some of the discussion herein regarding the formation of a nonprofit corporation would also pertain to the creation of a charitable trust. For example, the provisions that the Internal Revenue Service requires to be included in articles of incorporation would also need to be included in an appropriately modified form in a trust agreement. See discussion accompanying endnote 9, *infra*.

2. You may go online at [www.sos.ok.gov/corp/corpInquiryFind.aspx](http://www.sos.ok.gov/corp/corpInquiryFind.aspx).

3. 18 O.S. 2011 §1005.

4. 18 O.S. 2011 §1139 and [www.sos.ok.gov/business/fees.aspx](http://www.sos.ok.gov/business/fees.aspx).

5. For example, a purpose statement might be: "This corporation is organized exclusively for charitable purposes, more specifically to engage in any lawful act or activity to provide assistance to the homeless in Bountiful, Oklahoma including, but not limited to, providing or making available food and temporary shelter." You might substitute "educational" for "charitable" in the first sentence if you are forming a foundation to support your local school by, for example: (1) making grants to teachers to support educational efforts or (2) providing scholarships to local high school graduates going on to college.

6. 18 O.S. 2011 §1005(A)(1). The incorporators may be "persons, partnerships, associations, or corporations, or any combination thereof . . ." *Id.*

7. 18 O.S. 2011 §1005(A)(7). If incorporating a church its physical address must be listed.

8. *Id.*

9. Provisions from the IRS sample articles of incorporation form include the following:

"Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code."

"No part of the net earnings of the corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes set forth in Article [ ] hereof. No substantial part of the activities of the corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of these articles, the corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under section 170(c)(2) of the Internal Revenue Code, or the corresponding section of any future federal tax code."

"Upon the dissolution of the corporation, assets shall be distributed for one or more exempt purposes within the meaning of section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code, or shall be distributed to the federal government, or to a state or local government, for a public purpose. Any

such assets not so disposed of shall be disposed of by a Court of Competent Jurisdiction of the county in which the principal office of the corporation is then located, exclusively for such purposes or to such organization or organizations, as said Court shall determine, which are organized and operated exclusively for such purposes." [www.irs.gov/charities/charitable/article/0,,id=123028,00.html](http://www.irs.gov/charities/charitable/article/0,,id=123028,00.html).

10. IRC §170.

11. Compare 990-PF to 990-EZ and 990-N.

12. IRC §170(c)(2) and IRS Publication 557, p. 32. You will find IRS Publication 557 to be an invaluable guide to many of the common issues you may face.

13. *Id.*

14. IRS Publication 557.

15. *Id.*

16. [www.irs.gov/charities/article/0,,id=156733,00.html](http://www.irs.gov/charities/article/0,,id=156733,00.html).

17. To avoid inadvertently failing to file a complete package, be sure to use the checklist included at the end of the Form 1023.

18. IRS Publication 557, p. 6.

19. 18 O.S. 2011 §552.1. There are a few exceptions listed in 18 O.S. 2011 §552.4. Forms for registration are available on the Secretary of State's website.

20. [www.sos.ok.gov/business/fees.aspx](http://www.sos.ok.gov/business/fees.aspx).

21. [www.irs.gov/charities/article/0,,id=232771,00.html](http://www.irs.gov/charities/article/0,,id=232771,00.html).

22. If the corporate formalities are ignored, some enterprising lawyer may someday argue that the directors are not entitled to the partial immunity protections for directors of nonprofit corporations provided by 18 O.S. 2011 §§866 and 867.

23. IRC §501(c)(3).

24. *Id.*

25. IRS Publication 557, p. 12. Penalties for failure to file may also be imposed. *Id.* at p. 13.

26. For a brief memo (slightly dated) describing these duties and some of the implications see [www.cof.org/files/documents/education\\_collaborations/difficultboards/handout1.pdf](http://www.cof.org/files/documents/education_collaborations/difficultboards/handout1.pdf).

27. [www.steppingstones.ca/artman/publish/article\\_49.shtml](http://www.steppingstones.ca/artman/publish/article_49.shtml).

## ABOUT THE AUTHOR



Gary C. Clark is a graduate of Oklahoma State University and the University of Texas School of Law (with honors). In 2004, after almost 30 years in private practice, he became vice president and general counsel of the OSU Foundation. In 2008, he became vice president of university relations at OSU, and he is now vice president and general counsel.

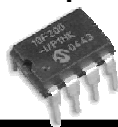
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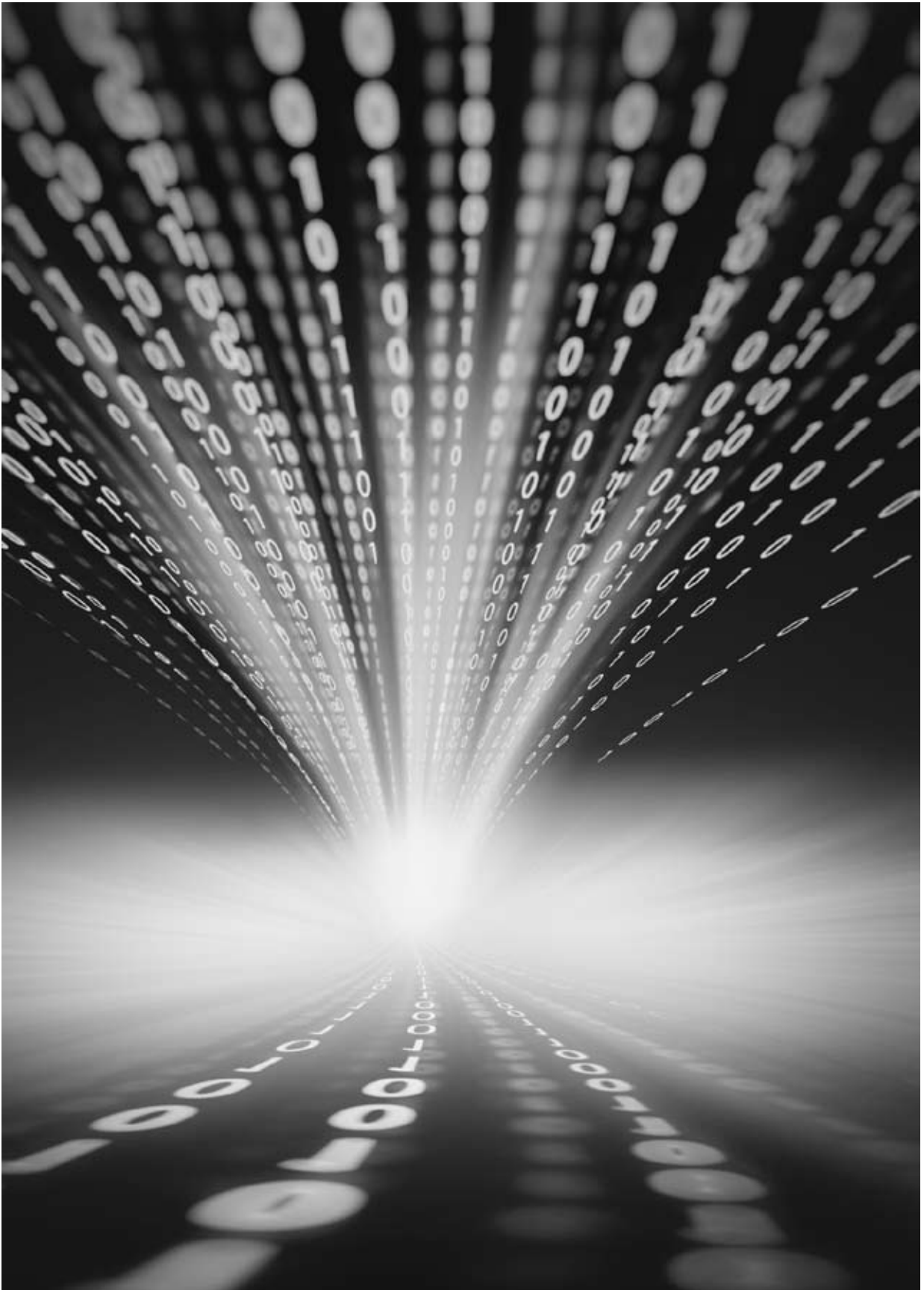
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# Do You Know Where Your Data Is?

## Why an Effective Records Management Policy Is Essential for the Modern Nonprofit

*By Sarah Jane Gillett and Brandon Rule*

**T**he past decade has ushered in two trends that significantly impact nonprofits: first, sharp increases in the amount of data created, sent, received and retained; and, second, increased scrutiny as to governance practices. Put simply, the combination of these trends makes improved records management practices an essential task for the nonprofit organization of today.

A few statistics aptly illustrate the data explosion that is occurring. It has been reported that 281 exabytes of data now exist in the world.<sup>1</sup> To put this figure in context, an exabyte is a billion gigabytes and one gigabyte of data is the hard copy equivalent of as many as 10,000 documents, depending on the types of files that make up the gigabyte. Multiply 10,000 times one billion times 281 and that extremely large number represents a rough approximation of the number of documents now existing on computer systems and global networks. Further, that amount of digital data is growing rapidly, at a rate of nearly 60 percent per year. In short, organizations of all stripes are being buried under an ever-growing mountain of data.

At the same time, organizational governance issues are receiving attention at both the federal and state level. The Sarbanes-Oxley Act (SOX) took effect in 2002.<sup>2</sup> Passed in response to infamous corporate and accounting scandals, SOX primarily targeted publicly traded corporations, seeking to rebuild public trust by imposing broad governance standards and increasing the oversight obligations for board members on

financial transactions and auditing processes. Certain provisions of SOX apply to nonprofits as well: namely, sections governing whistleblower protection and document destruction.<sup>3</sup> Many nonprofits took proactive steps to adopt policies and procedures enhancing governance practices in response to SOX.

Moreover, in the wake of SOX, several states passed laws imposing additional obligations on nonprofits. Most notably, the California Nonprofit Integrity Act of 2004<sup>4</sup> includes a robust set of governance requirements for nonprofits doing business in that state. Other states (like New York, Maine, Kansas and Massachusetts) have subsequently followed California's lead in enacting laws addressing nonprofit corporate governance. Oklahoma recently amended its own Solicitation of Charitable Contributions Act to impose certain document retention requirements on charitable organizations, among other things.<sup>5</sup> While no federal statute analogous to SOX presently addresses the governance of nonprofits directly, the IRS stepped in to fill the vacuum through the use of the revised Form 990 (Return of Organization Exempt from Income Tax).<sup>6</sup>

## IRS REQUIREMENTS

In December 2007, the IRS revised the Form 990 to significantly increase the disclosure obligations of nonprofit organizations concerning corporate governance. Enhanced transparency and compliance concerns clearly played a role.<sup>7</sup> Over a three-year phase-in period, the IRS imposed additional reporting requirements on nonprofit agencies.<sup>8</sup> On Aug. 19, 2008, the IRS issued the final version of the Instructions to the Form 990. The revisions significantly enhanced the obligations of nonprofits reporting to the IRS.<sup>9</sup> Among the topics related to corporate governance on the Form 990 is a question regarding the organization's written document retention and destruction policies.<sup>10</sup>

The IRS has signaled its intent to use the Form 990 as an "enforcement tool" for nonprofit governance issues. What does this mean? Responses contained in the Form 990 may trigger an audit, compliance check or simply increased scrutiny.<sup>11</sup> Because the Form 990 is a publicly filed document, nonprofits should anticipate that its funders, community partners, prospective board members, ratings agencies and local regulators will review it and make decisions about the agency based on its responses. Nonprofits have traditionally completed the Form 990 with the assistance of tax preparers, accountants, or tax lawyers but may now want to consult with legal counsel with expertise in governance and records management to answer the revised Form 990's detailed governance questions. Moreover, while at present the IRS does not "require" "correct" responses to governance questions on the Form 990, there is no question that exempt organizations increasingly face pressure to enact governance policies and procedures tailored to the Form 990 or face pointed questions on why the agency has declined to do so.

## OKLAHOMA LAW

In addition to the questions on the Form 990 regarding document retention, nonprofits need to become familiar with a very recent Oklahoma law that imposes certain document retention requirements on charitable organizations. Revisions to Oklahoma's Solicitation of Charitable Contributions Act took effect on July 1, 2011 (the act).<sup>12</sup> Under the act, charitable organizations are required to maintain for five (5) calendar years records of documents and information required for disclosure pursuant to Section 552.3.<sup>13</sup> In a nutshell, Section 552.3 requires

charitable organizations to provide information about the agency, its directors, officers, and executives, its charitable solicitations practices and receipts and its expense allocations.<sup>14</sup>

## RECORDS MANAGEMENT

The explosion of electronically stored information (referred to as ESI) and the enhanced scrutiny of the post-SOX world coupled with a very real lack of resources has created a quandary for nonprofit organizations. Nonprofits are typically less prepared to deal with the explosion of digital information than for-profit organizations because they often lack the resources to create a robust records management infrastructure. For example, it is not uncommon to find nonprofits utilizing operating systems and software of an older vintage, along with outdated computers and file servers that are stretched to capacity. Questions to be considered by nonprofits relating to the data explosion include, what happens to all of that information once it enters the organization's servers or cloud environment? Should it be retained or destroyed? If it is retained, then where should it be kept, in what format and for how long? Does the organization have a thoughtful protocol to back up data in the event of a disaster? And, a follow up question, does the organization have a process in place to secure records, wherever they may be, if related to an anticipated lawsuit or investigation?

As a result of these considerations, we have been increasingly charged with advising nonprofit organizations on records management. This topic is complex, as it involves multiple disciplines including legal, information technology, records management, and audit, to name a few. Many nonprofits outsource some or all of these functions, so collaboration with the organization's outside advisors is a typical part of the project.

The cornerstone of a records management project is a records retention and destruction policy along with an itemized schedule. In addition to allowing the organization to answer "yes" to the records retention policy question on the IRS Form 990, there are business reasons such a policy makes good sense. A good records retention schedule will identify the types of business documents that rise to the level of "records" within your organization and will specify applicable minimum retention periods dictated by law. In addition to legal considerations, a comprehensive schedule will



assimilate the best judgment of the organization's employees as to their institutional need for the records — for example, how long they must retain the records to fulfill the organization's mission, serve its clientele and preserve its history for archival purposes. One of the most important reasons for records management is to enable the organization to dispose of unnecessary records and to minimize duplicate copies of records, thus reducing storage and maintenance costs. Organizations that operate with effective records management are more efficient for the simple reason that workers can more quickly and easily locate documents. Finally, if the organization encounters litigation (as most do), routine document destruction under a reasonable records retention policy can serve as a defense for the organization against a claim that the organization has either negligently or intentionally spoliated evidence.<sup>15</sup>

#### **DRAFTING AND IMPLEMENTING THE RECORD RETENTION POLICY**

Both the scope of the policy and the types of records that will be covered must be determined in the first instance. The retention schedule should always discuss certain key categories of records that are particularly pertinent to financial, legal and human resources concerns, such as accounting and tax records, legal documents, real estate records, board-related records and personnel records. Depending on the nature of the organization, there are likely to be additional categories of records unique to the organization's operations and mission that should be included in a comprehensive schedule as well. In today's world, it is critical that a retention policy incorporate both digital and hard copy records. If your organization is operating under a records retention policy that was prepared solely for hard copy documents, then you are probably failing to account for at least three-quarters of the records that are created, received or maintained today.<sup>16</sup>

While there are a variety of formats to choose from, successful policies share the following elements: 1) they are clearly written and available to all stakeholders, both employees and

**“A good rule of thumb is to ensure that the organization is reviewing the policy at least once every two to three years and modifying it, as appropriate.”**

board members; 2) they incorporate feedback and comments from the organization's stakeholders; 3) they involve careful assessment of the organization's electronic data and storage practices;<sup>17</sup> 4) they specify document categories by using descriptive language known and understood within the organization; 5) they assign appropriate retention time frames and document locations; and 6) they identify the personnel responsible for performing the retention and destruction tasks.

Ideally, the result of the policy should be to retain records necessary for legal and regulatory obligations, business purposes

and archival needs while disposing of the rest with regular frequency. Actual policy implementation requires a significant amount of education and training within the organization and may clash with some mindsets that prefer to retain all information “just in case.” The more support the policy has from the highest level of organization management as well as the board of directors, the more likely it is to be followed. And once implementation has been achieved, this is not a policy that can be “shelved” for any significant period of time. A good rule of thumb is to ensure that the organization is reviewing the policy at least once every two to three years and modifying it, as appropriate. Even if the business of the organization has not changed, there may be additional regulation that could necessitate policy changes. For example, organizations that accept credit card payments must adopt the Payment Card Industry Data Security Standard (PCI DSS) which imposes a number of evolving security requirements, such as limiting access to cardholder data and the destruction of certain types of sensitive cardholder data within mandated time limits.<sup>18</sup> Any effective document retention policy must take into account the access restrictions and the retention requirements of the PCI DSS.

#### **RECORDS RETENTION AND LITIGATION**

The flip side of a records retention policy is a legal hold policy. When the organization is not under a “legal hold,” it may freely destroy

records under a well-crafted retention schedule. If, on the other hand, the organization anticipates that litigation or a government investigation is likely, then it has a duty to suspend its document destruction program and identify and retain any related records immediately.<sup>19</sup> Failing to recognize the likelihood of impending litigation, failing to understand the scope of the records that should be retained, or failing to communicate the need for retention to the appropriate individuals, can place the nonprofit in jeopardy of spoliating evidence and being the recipient of spoliation sanctions.<sup>20</sup>

The key to managing this risk is to put a process in place to assist the organization in quickly implementing a legal hold, should it become necessary. While nonprofits are not often regular litigants, a nonprofit of any size has employees and, if that employment relationship sours, it may give rise to claims under both federal and state law. Any such claims or threatened claims may throw the nonprofit squarely into a legal hold situation.<sup>21</sup> The best practice is to plan for this event by designing a legal hold process proactively as part of a litigation readiness strategy. Waiting for the retention of outside counsel on a particular claim may cause delay that results in the loss of relevant information if the organization has experienced the trigger event well in advance of contacting outside counsel.

## CONCLUSION

In short, developing a well-reasoned and comprehensive records management policy that is tailored specifically to your nonprofit should be a governance and strategic goal for 2012. With digital data on the rise, identifying the records to maintain and store and discarding the rest (absent a legal hold situation) is a best practice to employ and the nonprofit will reap benefits in terms of cost savings, legal compliance and efficiency by doing so. One final note — while certain pieces of the records management puzzle should be put together by the organization itself, it is equally important for these policies to be reviewed by counsel who are familiar not only with the laws and regulatory requirements governing nonprofits but also experienced in the preparation of records retention and destruction policies and schedules as well as legal hold processes.<sup>22</sup>

1. See TechWatch news reporting "Sharp increase in the amount of data in the 'digital universe,'" by Isabelle Chaize at [www.techwatch.co.uk/2008/03/13/sharp-increase-in-the-amount-of-data-in-the-digital-universe/](http://www.techwatch.co.uk/2008/03/13/sharp-increase-in-the-amount-of-data-in-the-digital-universe/).

2. Pub. L. 107-204, 117 Stat. 745.

3. See 18 U.S.C. §§1513(e), 1519.

4. Cal. Gov't Code sec. 12580 *et seq.*

5. See Okla. Stat. tit. 18, §552.1 *et seq.*

6. The Form 990 is the annual federal tax return required to be filed by most tax-exempt organizations. Many states also require nonprofit organizations to file a Form 990.

7. IRS Background Paper, Summary of Form 990 Redesign Process (Aug. 18, 2008), available at [www.irs.gov/pub/irs-tege/summary\\_form\\_990\\_redesign\\_process.pdf](http://www.irs.gov/pub/irs-tege/summary_form_990_redesign_process.pdf).

8. The new filing requirements began for larger nonprofits (\$1,000,000 or more in gross receipts or \$2,500,000 or more in assets) in tax year 2008. As of tax year 2010, all exempt organizations with gross receipts above \$200,000 or assets above \$500,000 are covered. In addition, the Form 990-EZ used by many smaller agencies incorporates some of the schedules for the revised Form 990.

9. The revised Form 990 incorporates a broad selection of governance questions. Part VI ("Governance, Management and Disclosure") of Form 990 includes an extensive set of questions related to corporate governance (28 in all), including topics such as board size and structure, conflicts of interest management, director independence, audit practices, written governance policies, and the role of governance in preparing the Form 990 itself. The organization is asked to disclose whether it has whistleblower and document retention policies in place as of the last day of its tax year. Form 990, Part VI, Lines 13, 14.

10. Form 990, Part VI, Section B, Line 14.

11. See IRS, Governance and Related Topics - 501(c)(3) Organizations (Feb. 4, 2008), available at [www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf)

12. Okla. Stat. tit. 18, §552.1 *et seq.*

13. Okla. Stat. tit. 18, §552.6.

14. Specifically, Section 552.3 requires charitable organizations to provide: 1) the organization's name and mailing address; 2) name and mailing address of each officer, director, trustee, and salaried executive employee; 3) name and mailing address of each professional fundraiser with custody of the contributions or each person that is directly responsible for the payment and distribution of funds collected; 4) name and mailing address of each professional fundraising counsel; 5) for charitable organizations registering for the first time, a statement of whether or not the organization believes first-year contributions will exceed \$10,000; 6) the purposes for which contributions are to be used; 7) a copy of the most recent Form 990 or tax-exempt letter; 8) identification of the period of time or periods during which solicitations are to be conducted; 9) identification of specific methods solicitation; 10) whether the solicitation is to be conducted by professional fundraisers, employees or volunteers of the charitable organization; and 11) if using professional fundraisers, the names and addresses of each professional fundraiser, the basis of payment to each professional fundraiser and the nature of the financial arrangements between the organization and each professional fundraiser. Okla. Stat. tit. 18, §552.3(A). Further, organizations that have solicited funds in the previous year must report: 1) the gross amount of donations received; 2) total program service expenses; 3) total management and general expenses; 4) total fundraising expenses; and 5) the aggregate amount paid, or payable, to professional fundraisers and professional fundraising counsel. Okla. Stat. tit. 18, §552.3(B).

15. See Fed. R. Civ. P. 37(f), providing a limited "safe harbor" prohibiting the imposition of sanctions under the Federal Rules of Civil Procedure absent exceptional circumstances if a party loses electronically stored information as a result of the "routine, good faith operation" of an electronic information system. When a well-crafted records management policy underpins the operations of the system, it is likely that a court would deem the issue as falling within this safe harbor.

16. Just the basic task of managing the email received on a daily basis is becoming more and more challenging. Tech website Royal Pingdom estimates that more than 100 trillion emails were sent globally in 2010. Another firm believes the average worker sends and receives 110 e-mail messages each day.

17. For example, the policy should account for backup data stored by the organization's IT group, various versions of the organization's Internet website, any electronic mail archive, and data stored in the cloud under a contract with a third-party provider.

18. The most recent version of the PCI DSS (2.0), enacted in October 2010, went into effect on Jan. 1, 2012. See PCI DSS 2.0, available at [https://www.pcisecuritystandards.org/documents/pci\\_dss\\_v2.pdf](https://www.pcisecuritystandards.org/documents/pci_dss_v2.pdf)

19. The legal hold itself will vary depending on the circumstances, but should contain certain key components: 1) a designated communication protocol with personnel who are in charge of any servers and digital data; 2) a process for preserving information that may only reside on the individual computers of employees or former employees; 3) a written communication directive to the personnel who it is

believed possess relevant information with clear instructions about next steps; and 4) follow-up to the personnel within a reasonable time frame.

20. Whether and under what circumstances a particular court might impose sanctions against a nonprofit for loss of evidence is a highly fact specific inquiry and one that is beyond the scope of this article.

21. There are many legal hold “triggers” such as the service of a lawsuit on the nonprofit, a credible threat that the organization is about to be sued, a significant and unanticipated event such as a severe injury or death, the breach of a contract, contemplation of filing a lawsuit, or the filing of an employment claim with an agency such as the U.S. Equal Employment Opportunity Commission.

22. With respect to all of the policies discussed, there are some good resources that are publicly available to get your organization started in the right direction. *The Nonprofit Policy Sampler* published by BoardSource includes basic information about document retention and destruction policies. The Association of Records Managers International (ARMA) is an excellent resource as well: ARMA is a nonprofit professional association that is a recognized authority on managing records and information. In 2009, ARMA developed “Generally Accepted Recordkeeping Principles” (GARP®) that outline and define a general framework for proper records management programs. See [www.arma.org/garp/](http://www.arma.org/garp/).

## ABOUT THE AUTHORS



Ms. Gillett is a shareholder in the Tulsa office of Hall Estill and has nearly 20 years of experience in all phases of commercial litigation, including alternative dispute resolution. She developed and currently heads the firm’s electronic discovery practice group. She is a member of Sedona Conference Working Group 1 on Electronic Document Retention and Production, the American Bar Association’s Electronic Discovery and Digital Evidence Committee and the Civil Procedure Committee of the Oklahoma Bar Association.



Brandon Rule is an associate in the Tulsa office of Hall, Estill, Hardwick, Gable, Golden & Nelson PC, practicing primarily in the business litigation field. He is a member of the firm’s electronic discovery practice group and advises clients on issues related to records retention, litigation readiness, and the role of electronic evidence in litigation.

**OBA/CLE AND  
OKLAHOMA ATTORNEYS MUTUAL INSURANCE COMPANY  
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06



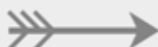
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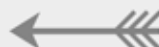
12

# OBA Solo and Small Firm ★ Trial College ★

## THE WILL OF FORTUNE: FROM PROBATE TO MALPRACTICE



### PROGRAM PLANNERS/MODERATORS



**PHIL FRAM,** OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY  
**ALISON CAVE,** OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY  
**BILL BANDI,** OKLAHOMA ATTORNEYS MUTUAL INSURANCE, OKLAHOMA CITY

### TRIAL COLLEGE JUDGE

**MICHAEL BURRAGE,** WHITTEN BURRAGE LAW FIRM, OKLAHOMA CITY



MCLE

**CREDIT**



**\$125**

★ **EARLY-BIRD.**

At least 4 days  
prior to seminar

**\$150**

★ **LATE**

4 days within  
seminar date

## REGISTRATION - 7:30 A.M.

**7:45**

# WELCOME

- ★ INCLUDES INTRODUCTIONS
- ★ PHIL FRAM

**9:15**

# FACT WITNESS EXAMINATION

- ★ WITNESS: ALISON CAVE
- ★ PLAINTIFF ATTORNEY: ALETIA TIMMONS  
TIMMONS AND ASSOCIATES, OKLAHOMA CITY
- ★ DEFENDANT ATTORNEY: BETTY OUTHIER WILLIAMS  
ATTORNEY AT LAW, MUSKOGEE

**3:45**

# CLOSING STATEMENTS

- ★ PLAINTIFF ATTORNEY: GIL STEIDLEY  
STEIDLEY & NEAL, PLLC, TULSA
- ★ DEFENDANT ATTORNEY: CHARLES ALDEN  
ALDEN DABNEY, OKLAHOMA CITY

**DON'T MISS THIS  
all-star CAST!**

**1ST BREAK - 9 A.M.**

**8**

# OPENING STATEMENT

- ★ PLAINTIFF ATTORNEY: MICHAEL HOGAN  
ALLFORD, IVESTER, GREEN & HOGAN, MCALESTER
- ★ DEFENDANT ATTORNEY: JOE FARRIS  
FELDMAN FRANDEN WOODARD & FARRIS, TULSA

**LUNCH (INCLUDED IN REGISTRATION)  
11:45**

**1 p.m.**

# EXPERT WITNESS EXAMINATION

PLAINTIFF EXPERT WITNESS: BILL BANDI  
PLAINTIFF ATTORNEY: GEORGE CORBYN  
CORBYN HAMPTON, OKLAHOMA CITY  
DEFENDANT ATTORNEY: MURRAY ABOWITZ  
ABOWITZ, TIMBERLAKE, DAHNKE & GISINGER, P.C.,  
OKLAHOMA CITY

**5 - WRAP UP**

**5:45 ADJOURN**

★ REGISTER AT [WWW.OKBAR.ORG/CLE](http://WWW.OKBAR.ORG/CLE)

**2ND BREAK - 3:30 P.M.**





# Oklahoma Lawyers Serving on Nonprofit Boards

## Recognizing and Managing the Risk

*By Renée DeMoss and Melissa Taylor*

**C**an you imagine any of these scenarios occurring in your life as a lawyer?

1) Jane is a new associate at a large Oklahoma City law firm. She is advised by her mentor attorney to find a nonprofit organization and get on the board as a director to network and begin developing business opportunities. After all, her mentor serves on the boards of two nonprofit corporations, one of which is a substantial firm client. Jane thinks this might enhance her career and enable her to help out a local charity at the same time. She is concerned, however, about her personal exposure to liability if she serves on a board.

2) Jim is an attorney with his own small firm in Altus. His son plays baseball with a community youth baseball association, and Jim was asked to serve on the association's board. It doesn't meet often, and he has not reviewed documents creating the organization or its bylaws and policies. At the association's request, Jim drafted some rules for the association that included legal eligibility requirements for umpires. A young player is seriously injured during a game due to an umpire's actions. The injured player's family sues the umpire and threatens to join as defendants the association and board of directors, including Jim.

3) Julie, a district attorney in Idabel, was on the board of a local women's shelter and served as its treasurer. Due to her busy schedule, she missed most of the board meetings and was not

aware of the shelter's dire financial situation. Unbeknownst to Julie, the shelter did not pay employee withholding and FICA taxes to the IRS, who now looks to her for payment.

These lawyers are representative of the many Oklahoma lawyers who are leaders in their communities and are often approached to serve as directors of nonprofit organizations. Happy to be of service, and perhaps intending to provide pro bono services as part of their duties, they automatically say yes, without considering whether their personal assets and businesses could be affected. Despite the legal protections that exist to shield volunteers, including lawyers, from tort liability, such protections do not cover all situations, and cannot prohibit suits from being filed by any number of potential plaintiffs.

The consequences of a lawsuit can be significant. A nonprofit director can be personally liable to pay a money damage award under certain circumstances, and even if claims filed are ultimately dismissed, hefty fees can be incurred in obtaining a dismissal. Further, a lawyer's activities on a nonprofit board are subject to scrutiny under the Oklahoma Rules of Professional Conduct (ORPC), and conflicts of interest can arise that require a lawyer to withdraw from representation, or prohibit future representation, of clients. With such potential risks, it makes sense

for Oklahoma lawyers to assess both the risk exposure and available protections before automatically agreeing to serve on a nonprofit board.

Rule 6.1 of the ORPC encourages lawyers to render public interest legal services, and many lawyers readily volunteer to serve on all types of nonprofit boards.<sup>1</sup> This article is intended to provide information about specific legal and ethical duties with which a lawyer must comply while serving on a board, acts and omissions that can give rise to liability, legal protections that are in place and other protections that may be available, and questions that lawyers should ask if they are contemplating service on nonprofit boards or are currently providing such service.

## **KNOW YOUR FIDUCIARY AND ETHICAL DUTIES**

Directors of nonprofit boards must comply with the same legal and fiduciary duties that have developed over time to govern the conduct of directors of for-profit corporations.<sup>2</sup> These include the duty of care, the duty of loyalty and the duty of obedience, as well as the ORPC.

### *Duty of Care*

The duty of care requires a corporate director to act with the care a person in a similar position would reasonably believe to be appropriate under similar circumstances.<sup>3</sup> Individual directors meet the duty of care by actions including regular attendance at board meetings, making informed decisions on issues that come before them (*e.g.*, reading information provided and requesting additional information if necessary), and carrying out their duties in a reasonable and responsible manner. Situations where a director can breach this duty include failing to become informed of all material information before making decisions, failing to monitor the entity's affairs, and failing to exercise prudent stewardship of the entity's resources.

### *Duty of Loyalty*

The duty of loyalty requires a director to act in good faith and in a manner that the director reasonably believes to be in the organization's best interests, always exercising independent judgment.<sup>4</sup> A director must refrain from self dealing and personal activities that could injure or take advantage of the organization. Breaches can occur when a director profits from the use of non-public information, or competes with the organization to its detriment.

The duty of loyalty raises particular concerns for the lawyer who serves on a nonprofit board. First, the Oklahoma statute that provides nonprofit directors with some protection from tort liability explicitly excludes breaches of the duty of loyalty from its application, so that this type of breach can result in a legal claim against a director and potentially a judgment for money damages.<sup>5</sup>

Second, the duty of loyalty requires consideration of conflicts of interest that may arise from board service. An attorney who takes on the dual roles of lawyer and nonprofit director must determine whether the responsibilities he has in these two separate roles conflict. ORPC 1.7 states that an Oklahoma lawyer shall not represent a client if it would create a "concurrent conflict of interest" — if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."<sup>6</sup> Concurrent conflicts can impair a lawyer's ability to exercise independent judgment in representing clients, require a lawyer to withdraw from representing a client or face disqualification, and lead to the loss of the attorney-client privilege. The ORPC details steps that a lawyer should take regarding such conflicts, including full explanation of the conflict issues to all interested parties.<sup>7</sup>

An ABA ethical opinion identifies four potential conflict situations that can arise when a lawyer serves as a board director.<sup>8</sup> In the first, the nonprofit asks the lawyer to represent it in a deal that he opposed in his role as a director. This lawyer must determine whether his potential representation of the nonprofit in the deal could be materially affected by his prior opposition to it, such that Rule 1.7 precludes the representation. In the second, the nonprofit asks the lawyer for an opinion on whether actions the entity took while he sat on the board as a director were legal. The concern here is that the lawyer would be unable to exercise the independent professional judgment required to render such opinion. He may be ethically required to advise the organization to seek other counsel on the matter.

The third situation involves the board's consideration of actions involving the lawyer's law firm, such as whether the nonprofit should retain the firm that he works for in a particular matter. In this situation, it is important that the board have in place and comply with appropri-

ate procedures that detail how conflicts should be addressed. Further, the conflicted director should not participate at all in the decision on whether to hire the firm. Finally, the situation may arise where the entity on whose board the lawyer sits is a client of his firm. This potential conflict requires examination of the individual lawyer's relationship with the firm client, the depth of his financial, professional or personal ties to, and dependence on, the client, and his ability, and that of his firm, to represent it in any action that involves the directors, who may need independent counsel.

A lawyer serving as a director should be aware of any attorney-client relationship that develops with the entity and the potential consequences. Some attorneys may enter board service intending to provide legal services, either pro bono or with an eye to compensation, or a nonprofit may ask an attorney on its board to undertake legal services, intentionally creating a attorney-client relationship. In other cases, a lawyer-director may believe he is communicating to the board about purely business matters, and not giving legal advice, but this may not be clear to non-attorney directors, and an unintended attorney-client relationship can form. The lawyer who sits on a nonprofit board should be careful to explain to the other directors as well as the entire staff exactly in what capacity he is acting — as lawyer or director/business advisor. If an attorney-client relationship does develop between the nonprofit and the lawyer/director, the lawyer may need to withdraw from current representation or decline future representation of certain clients because the client relationship created with the nonprofit, unintended or not, creates a conflict of interest.<sup>9</sup>

The attorney must also take care to explain when an attorney-client privilege exists and how to preserve it. For example, a lawyer/director's comments in a board meeting on matters such as proper procedures to follow in terminating an employee, or the legal points of a proposed vendor contract could lead other directors to think he is acting as the entity's lawyer. The lawyer should explain that the attorney-client privilege does not cover situations where he is acting as a director and giving business advice, but only when he is giving legal advice. He should further explain that in those instances when he is acting as a lawyer, the privilege can be waived, and that communications that should be privileged would be subject

to disclosure in a lawsuit.<sup>10</sup> The board minutes should reflect that discussions took place on such issues to help preserve the privilege.

Lawyer/directors should be aware that the duty of loyalty can continue under certain circumstances even after the lawyer ceases to serve as a director. In an Arkansas case, a law firm was disqualified from representing a client against a hospital on whose board of directors one of its attorneys had served. After his board term ended, the firm filed a lawsuit against the hospital on behalf of an injured patient. Because information that the lawyer was privy to in his role as director was potentially involved, the hospital moved to disqualify the entire firm. The court explained that the firm had to be disqualified even though the lawyer was no longer on the board. "A lawyer cannot take action to the detriment of an entity when it may be based upon confidential information he gains during a fiduciary relationship with the entity."<sup>11</sup>

### *Duty of Obedience*

Another duty cited as owed to a nonprofit is the duty of obedience.<sup>12</sup> This requires directors to perform their responsibilities in accordance with applicable laws and the terms of the entity's charter or articles of incorporation. Directors must ensure that the entities on which they serve meet all legal requirements and operate in accordance with the charitable purpose for which the entity was granted tax-exempt status. Further, directors are fiduciaries who are responsible for protecting the entity's assets.

Situations where a director could breach the duty of obedience include failing to follow statutes affecting fundraising, co-mingling organization assets with a director's personal dealings, and participating in activities which could jeopardize the entity's tax-exempt status. For example, nonprofits with a 501(c)(3) designation are strictly forbidden from engaging in "political activities" and are prohibited from lobbying except to an "insubstantial degree."<sup>13</sup> A director who contributes to a political campaign fund or makes verbal or written public statements of position favoring or opposing a candidate for public office is participating in political activities, and one who attempts to influence proposed legislation is lobbying. If a director's activities are such that they can be viewed as made on behalf of the entity, the director risks the entity's tax-exempt status.

## STATUTORY AND OTHER PROTECTIONS

The business judgment rule protects a director from personal liability to a corporation and its shareholders for even erroneous or harmful actions if the director acted in good faith, on an informed basis, and with the rational, honest belief that he acted in the entity's best interests.<sup>14</sup> It is generally believed that the conduct of nonprofit directors would, if challenged, also be evaluated under this rule.

Oklahoma also has in place statutes specifically immunizing directors of nonprofit corporations from tort liability in certain circumstances.<sup>15</sup> Their underlying premise is that a director of a nonprofit entity, as a valuable volunteer, should not be held vicariously liable in tort for harm caused by the acts of the entity's employees or other directors, or due to ordinary negligence in his own performance of his duties. The federal Volunteer Protection Act also provides limited protection from specific tort liability,<sup>16</sup> and nonprofit directors may find protection in the Oklahoma statute that permits a corporation to indemnify a director if he is sued for acts taken in his capacity as a director.<sup>17</sup>

### *The Oklahoma Volunteer Protection Statutes*

In response to a widespread belief that nonprofit volunteers were refusing to serve due to fear of tort exposure and the inability of nonprofits to obtain insurance to cover them, Oklahoma and 28 other states adopted "volunteer protection statutes" between 1984 and 1997.<sup>18</sup> The protection offered by such statutes varies widely from state to state. Some protect only directors and officers of a nonprofit from tort liability; some cover only volunteers performing particular activities, such as firefighters; some provide protection by capping the amount of damages that can be recovered against a volunteer.

Notably, however, they all have limits. They do not shield directors from liability for grossly negligent, reckless or intentional acts. Further, no state statute can shield a nonprofit director from liability for claims arising from violations of federal law such as ERISA, Civil Rights Act or ADA violations, or from liability arising under federal tax laws.

Oklahoma's statutes shield directors of nonprofit corporations from personal tort liability by immunizing them, first, from vicarious liability for negligent acts of the nonprofit's employees and other board directors,<sup>19</sup> and

“Oklahoma also has in place statutes specifically immunizing directors of nonprofit corporations from tort liability in certain circumstances.”

second, from negligent breaches of fiduciary duties owed to the entity.<sup>20</sup> Oklahoma legislators responsible for enacting the statutes explained their underlying intent in the statute itself:

### §865. Liability of Director — Findings of Legislature

The Legislature finds that nonprofit corporations serve important functions in providing services and assistance to persons in the state and that in order for these nonprofit corporations to function effectively, persons serving on the board of directors should not be subject to vicarious liability for the negligence of corporate employees or other directors. The Legislature finds that potential exposure to vicarious liability has a detrimental effect on the participation of persons as directors of nonprofit corporations and that providing immunity to directors of such corporations for certain types of liability will promote the general health, safety and welfare of citizens in the state.

The extent of the immunity from vicarious liability provided is set forth in Section 866. A nonprofit director is shielded from personal liability for money damages resulting from any ordinary negligent act or omission of either an employee of the nonprofit or another director of the nonprofit. He can, however, be held vicariously liable in tort for the grossly negligent or intentional torts of those individuals. Further, a director can be held personally liable for money damages stemming from his own grossly negligent acts and omissions and intentional torts.

Section 867 of the statute addresses tort liability of a nonprofit director for negligent breaches of fiduciary duty and immunizes him



from personal liability to the corporation or its members arising from breach of some, but not all, of the fiduciary duties he owes to the non-profit:

#### §867. Breach of Fiduciary Duty - Liability

In addition to the immunity provisions of Section 866 of Title 18 of the Oklahoma statutes, no member of the board of directors of a nonprofit corporation shall be personally liable to the corporation, or members thereof, for monetary damages for breach of fiduciary duty as a director, provided that such immunity from liability shall not extend to:

- 1) any breach of the director's duty of loyalty to the corporation;
- 2) any acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of the law; or
- 3) any transaction from which the director derived an improper personal benefit.

This provision appears to be in part a codification of the business judgment rule, and provides immunity for a director's negligent breach of the duty of care and the duty of obedience. If a director acted in good faith and did not derive an improper benefit from his negligent conduct, he cannot be held personally liable to the nonprofit or its members for his actions and decisions. Conversely, if he breached the duty of loyalty, or acted in bad faith or intentionally, he is not immunized from tort liability.

#### *The Federal Volunteer Protection Statute*

The federal Volunteer Protection Act,<sup>21</sup> enacted in 1997 in part to address the gaps in coverage arising from the many differences in state laws, also provides certain tort immunity for nonprofit volunteers, and is not limited to directors of nonprofits. The federal law does not, however, shield a director from vicarious liability for certain torts committed by employees or other directors, as the Oklahoma statute does.

The federal law preempts state laws "to the extent that such laws are inconsistent with the Act" but does not preempt state laws that provide additional protection for volunteers.<sup>22</sup> Directors who seek protection under state statutes generally also seek protection under the federal statutes.<sup>23</sup>

Requirements for immunity under the federal statute are that a volunteer: 1) must not receive compensation exceeding expense reimbursement or anything in lieu of compensation valued above \$500, 2) must act within the "scope of his responsibilities" at the time of the alleged act or omission for which he seeks immunity, and 3) must be "properly authorized" to so act.<sup>24</sup> Similar to the Oklahoma statutes, immunity is not available if the alleged harm was due to the volunteer's gross negligence or willful or criminal misconduct.<sup>25</sup>

#### *Limitations of Volunteer Protection Statutes*

On a practical level, the statutes have additional limitations. They do not, and cannot, prohibit the filing of lawsuits against nonprofit directors, which leaves open the possibility that a director could incur significant expenditures of time and money on defense fees and costs if a lawsuit, even a frivolous one, is filed. Further, the statutes essentially lay out appropriate pleading language for potential plaintiffs. By including allegations that a director committed gross negligence or acted in bad faith in violating the duty of care or the duty of obedience, as opposed to ordinary acts of negligence, a plaintiff states a claim sufficient to survive a motion to dismiss. Further, although a plaintiff would certainly bear the burden of proof to show that a director acted without good faith, such allegations create fact issues which increase a plaintiff's chances of both surviving a motion for summary judgment and obtaining a review of the facts by a jury.<sup>26</sup>

Neither does Oklahoma's volunteer protection statute shield nonprofit directors from personal liability for violations of federal law, including federal tax law. For example, the Internal Revenue Code requires employers to withhold from their employees' wages federal income FUTA and FICA taxes (which includes social security and Medicare),<sup>27</sup> and to hold these funds in trust for the United States.<sup>28</sup> Section 6672 of the Internal Revenue Code imposes personal liability on any person who: 1) is "responsible" for collection and payment of those taxes, and 2) "willfully fails" to see that they are paid,<sup>29</sup> including the employer's directors, officers or agents who are responsible for "the employer's decisions regarding withholding and payment."<sup>30</sup> The Internal Revenue Code defines a responsible person as one "required to collect, truthfully account for, and pay over any tax."<sup>31</sup> The U.S. Supreme Court has ruled this language includes all "persons

responsible for collection of third-party taxes and not...[only] those persons in a position to perform all three of the enumerated duties set forth above.”<sup>32</sup> Thus, anyone charged with the duty to “collect” or “account for” or “remit” withholding taxes is a “responsible person” for purposes of Section 6672, including corporate directors.<sup>33</sup>

Limited relief from this tax liability is available under Section 6672(e) of the Internal Revenue Code; personal liability for nonpayment of withholding taxes will not be imposed on any “unpaid, volunteer member” of a tax-exempt organization, including directors, as long as such member: 1) is solely serving in an honorary capacity, 2) does not participate in the day-to-day or financial operations of the organization, and 3) does not have actual knowledge of the failure on which such penalty is imposed. However, even if a director does meet all three of these requirements, he would still be personally liable for FUTA and FICA taxes if otherwise no person at all would be liable for their payment under Section 6672(a).

#### *Statutory Indemnity*

An Oklahoma nonprofit director facing a lawsuit may be entitled to have the entity pay his attorney fees, costs and any awards resulting from such suits under the Oklahoma corporate indemnity statute. These rights are important, as the number of lawsuits filed against nonprofit entities is rising. Even though most are dismissed or settled, significant attorney fees and defense costs can be incurred.<sup>34</sup>

A corporation’s governing documents should address whether it will offer its directors permissive indemnification and, if so, how to determine whether it will be provided if a request is made. The statutes state that for permissive indemnity, an entity must determine if its director “acted in good faith and in a manner [he] reasonably believed to be in or not opposed to the best interests of the corporation.” This determination must be made by either 1) a majority vote of the directors who are not parties to the action, even if that number is less than a quorum, or 2) a committee of directors designated by a majority vote of directors, even if less than a quorum, or 3) independent legal counsel in a written opinion.<sup>35</sup> If the entity finds the director met these requirements, it can pay his “expenses, including attorneys’ fees, judgments, fines and amounts paid in settlement actually and rea-

sonably incurred...in connection with [the] action, suit or proceeding.”<sup>36</sup>

A director may request that a corporation advance payment of expenses he incurs while defending a lawsuit based on his actions as a director. He may obtain indemnity even if the lawsuit at issue is a derivative action brought by or on behalf of the corporation itself, as long as he is not ultimately “adjudged to be liable to the corporation.”<sup>37</sup> Further, even if he is found to be liable to the corporation, a court can still order the corporation to pay indemnity if it determines that the director “is fairly and reasonably entitled to indemnity for expenses.”<sup>38</sup>

The statute also contains mandatory provisions. A corporation *must* indemnify a director for expenses he incurred that were “actually and reasonably incurred” in his defense of a lawsuit if he was ultimately “successful on the merits [of the case] or otherwise.”<sup>39</sup> A corporation can thus be required under the statute to indemnify a director for the reasonable expenses he incurred in defending a lawsuit that was, for example, dismissed because the plaintiff lacked standing, a statute of limitations had run, or insufficient evidence existed to support the suit.

It is important to note that even in those situations where indemnity is available, it may provide little relief if a nonprofit’s assets are limited. A critical issue is whether the entity has the assets to cover its indemnity obligations. Small nonprofits or new ones may not. Also, it is often the case that when a board director is sued, the nonprofit entity itself is sued too, thereby creating a further drain on any resources.

#### **INSURANCE PROTECTION**

Insurance can provide a nonprofit director with protection from lawsuit costs and awards, but like other forms of protections, insurance has its limits, and does not always provide the perfect answer.

##### *Types of Insurance Coverage Available*

Professional liability, or malpractice coverage, can provide protection for the Oklahoma lawyer when he is acting in the role of lawyer for a nonprofit entity. It is important to recognize, however, that such insurance generally does not cover claims made against a lawyer when they arise solely out of his service to an organization as a director.

An individual's personal liability insurance, such as a homeowner or an umbrella liability policy, may cover volunteer activities and can provide protection from actions taken during board service, but only for bodily injury and property damage for which the insured is held liable. Business endeavors are generally excluded from such coverage.

Directors and officers (D&O) insurance can be helpful in protecting lawyers serving as directors of nonprofits, and Oklahoma nonprofit organizations are specifically authorized to purchase and maintain such policies.<sup>40</sup> This type of insurance does not cover bodily injury or property damage, but instead covers damage resulting from erroneous decisions made by a director, generally defined as "wrongful acts." Although what is covered as a wrongful act depends on the specific definitions of an individual D&O policy — "wrongful acts" typically include any actual or alleged act or omission, error, misstatement, misleading statement, neglect or breach of duty by an insured person in the discharge of his duties.

The provisions of any insurance policy must be carefully reviewed to determine the particular extent of coverage, and how different available policies may interact. For example, professional liability policies, as noted above, generally limit coverage to claims arising solely out of a director's service as a professional, such as a lawyer. Conversely, D&O policies often limit claims to those arising solely out of a lawyer's service as a director. If it is unclear in a particular claim situation whether a lawyer acted solely in his capacity as a director for a nonprofit or also acted as a lawyer, coverage could be challenged under both policies.

#### *D&O Insurance Coverage Issues*

D&O policies can 1) provide for payments of lawsuit defense costs and liability awards directly from the insurer to a defendant director (A-Side Coverage), 2) provide reimbursement to a nonprofit entity for amounts it advanced to a director to satisfy indemnification claims (B-Side Coverage), and 3) provide coverage for the nonprofit entity itself for its own wrongful acts (C-Side Coverage). Insurers may provide one or more of these types of coverage in many different formats.<sup>41</sup>

Potential drawbacks exist with all D&O policies. Some are cost prohibitive, particularly for nonprofits without adequate funding sources. Also, unlike general liability policies which

have somewhat standard provisions, D&O policy provisions can vary greatly, with serious coverage issues, just a few of which are noted herein.

D&O claims coverage can be narrowly written. Claims covered by such policies generally include employment-related claims, including discrimination, harassment and wrongful termination claims, claims for failure to provide services, and claims for mismanagement of entity assets, but studies show that the majority of claims made against nonprofits are employment-related.<sup>42</sup> Coverage for such claims should be carefully evaluated, as, for example, the definition of a "wrongful employment act" can be defined broadly to include acts such as workplace harassment, or defined narrowly to cover only certain acts, such as sexual harassment.

The amount of coverage provided by a D&O policy and the total amount of protection offered for all claims during the covered time frame can be an issue. Most D&O policies include the costs of defending a claim within the policy limits of liability, including attorneys' fees and certain costs, so the possibility exists that multiple claims or even one big claim can effectively use up all of the policy coverage. This means that the amount of protective coverage purchased must be enough to cover all potential awards and defense costs of all claims.

Specific D&O policy exclusions should be carefully reviewed. Typical exclusions do not provide coverage for claims involving personal profit or fraud, claims made by one director against another, or claims involving facts and circumstances known to a director at the time the policy went into effect that he reasonably could have expected to give rise to an action during the policy period. Other exclusions found in D&O policies include exclusions relating to bankruptcy and violations of federal law.

#### **COMMON-SENSE PROTECTIONS**

An Oklahoma lawyer who is asked to serve as a director of a nonprofit board can take several steps to address and manage any potential risks.

1) Make sure the nonprofit entity on which you serve as a director is incorporated as a 501(c)(3) nonprofit charitable organization. If it is not, many potential protections, such as

immunity under the Oklahoma volunteer protection statutes, would not be available.

2) Consider whether you actually have the time and flexibility in your schedule to meet your fiduciary duties, including attending board meetings, becoming familiar with the organization and its issues, and ensuring appropriate board decisions are made.

3) Review the entity's governing documents such as articles of incorporation and bylaws for provisions that address potential liability, immunity and indemnification. Ask if adequate policies and procedures are in place related to financial policies, audits and other important areas. Consider asking for financial information to determine the viability of any indemnity rights, and to determine whether the organization is properly paying required taxes to the IRS.

4) Examine potential insurance coverage, including any D&O coverage, its amounts, limits, types of acts covered, and exclusions. Review your own professional liability coverage. It may not cover legal services provided to a nonprofit organization on a pro bono basis, and it may limit coverage if a lawyer is also a director. Examine your homeowner's policy and umbrella liability policy for potential coverage.

5) Consider whether you intend to provide legal services, personally or through your law firm, whether another law firm represents the organization, and if so, what types of services that firm provides. Recognize the potential consequences if an attorney-client relationship develops with the entity.

6) Determine how to identify concurrent conflicts of interest, whether the entity has policies in place addressing conflicts, and how they will be dealt with. Determine whether, if conflicts do arise, they can be resolved through written waivers. Be prepared to fully explain to the entity's staff and other directors about potential conflicts, the attorney-client privilege, how to preserve it, and the potential for withdrawal of representation.

## CONCLUSION

In the situations posed at the beginning of the article, Oklahoma lawyers who were currently serving or contemplating service on nonprofit boards were facing dilemmas that this article has attempted to address.

First, consider Jane. She is a new associate contemplating serving on a nonprofit board.

She should not shy away from such important service but should keep in mind the suggestions listed above in determining which nonprofit board she can best serve. She should discuss with her mentor attorney how the firm addresses potential conflicts relating to nonprofit directors, specifically those where the organization is a firm client, and proper ways to deal with any conflicts under the ORPC.

Next, consider Jim, who is facing a potential lawsuit as a lawyer for allegedly drafting inadequate rules, and as a director of the entity responsible for the rules. His professional liability coverage should provide protection for actions he took as a lawyer, as long as he made it clear to the organization that he was acting as a lawyer when he prepared the rules. Even if Jim's legal work was inadequate, he should be protected from liability for money damages stemming from board service under Oklahoma's volunteer protection statute, if his conduct did not amount to gross negligence and if the association is a 501(c)(3) entity. He may, however, be responsible for defense costs if a lawsuit is filed. If the association's governing documents allow for this, he may ask the association for advance payments, and if he is "successful on the merits or otherwise," he can require that the association pay his costs. If the entity has a D&O policy, he may need to make a claim under the policy.

Finally, consider Julie. Her service on the nonprofit board may lead to her personal responsibility for payment of federal withholding taxes which the organization did not pay to the IRS. She should consider whether Section 6672(e) of the Internal Revenue Code provides any relief, and if she satisfies its requirements, whether any other person will be held liable for the taxes imposed by Section 6672(a). She should resolve to attend all meetings in her next board position, and stay apprised of the entity's activities and financial status.

1. ORPC Rule 6.1.

2. See Chris Newbold, *The Complete Guide to Bar Foundations* (1st ed. 2007); Section of Bus. Law, Am. Bar Ass'n, *Guidebook for Directors of Nonprofit Corporations* 21 (George W. Overton, ed., Am. Bar Ass'n 1993). See also, e.g., *Wilson v. Harlow*, 1993 OK 98, 860 P.2d 793 (citing *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *McKee v. Interstate Oil & Gas Co.*, 1920 OK 8, 188 P. 109, 112); *Summers v. Cherokee Children & Family Services Inc.*, 112 S.W.3d 486 (Tenn. App. 2002).

3. See, *Hargrave v. Canadian Valley Elec. Co-op. Inc.*, 1990 OK 43, 792 P.2d 50.

4. See, *id.*

5. 18 O.S. §867.

6. ORPC Rule 1.7.

7. ORPC Rule 1.7, Comment 35 states:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the

responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

8. ABA Formal Ethics Opinion 98-410.

9. *Business Law Today*, "Lawyers' Service on Nonprofit Boards," William L. Boyd III (November/December 2008).

10. ORPC Rule 1.7, Comment 35.

11. *Berry v. Saline Memorial Hospital*, 907 S.W. 2d 736, 739 (Ark. 1995).

12. See *Newbold*, *supra*; *Shorter College v. Baptist Convention of Georgia*, 614 S.E.2d 37 (Ga. 2005).

13. 26 U.S.C. §501(c)(3).

14. See, e.g., *Hargrave v. Canadian Valley Elec. Co-op. Inc.*, 1990 OK 43, 792 P.2d 50; *Beard v. Love*, 2007 OK CIV APP 118, 173 P.3d 796 (citing *Emerald Partners v. Berlin*, 787 A.2d 85, 89 (Del. 2001)).

15. 18 O.S. §§865-867.

16. 42 U.S.C. §§14501-14505.

17. 18 O.S. §1031.

18. 18 O.S. §§865-867.

19. 18 O.S. §866.

20. 18 O.S. §867.

21. 42 U.S.C. §§14501-14505.

22. 42 U.S.C. §14502.

23. See, e.g., *Episcopal Church in Diocese of Connecticut v. Gauss*, 28 A.3d 302 (Conn. 2011).

24. 42 U.S.C. §§14503 & 14505.

25. 42 U.S.C. §14503.

26. *Beard v. Love*, 2007 OK CIV APP 118, 173 P.3d 796; see also, *Desert Equities Inc. v. Morgan Stanley Leveraged Equity Fund II*, 624 A.2d 1199 (Del. 1993) ("[A] fairly pleaded claim of good faith/bad faith raises essentially a question of fact which generally cannot be resolved on the pleadings or without first granting an adequate opportunity for discovery.") (citing *Lewis v. Fuqua*, 502 A.2d 962, 971 (Del. Ch. 1985) for the proposition that the defendants' good faith is a question of fact).

27. 26 U.S.C. §§3402(a), 3102(a).

28. 26 U.S.C. §7501(a); *Erwin v. United States*, 591 F.3d 313 (4th Cir. 2010).

29. *Plett v. United States*, 185 F.3d 216, 218 (4th Cir. 1999); *O'Connor v. United States*, 956 F.2d 48, 50 (4th Cir. 1992).

30. *Slodov v. United States*, 436 U.S. 238, 247 (1978) (interpreting 26 U.S.C. §6672). Section 6672(a) of the Code provides that "[a]ny person required to collect, truthfully account for, and pay over any tax . . . who willfully fails" to do so shall be personally liable for "a penalty equal to the total amount of the tax evaded, or not . . . paid over."

31. 26 U.S.C. §6672(a).

32. *Slodov*, 436 U.S. at 250.

33. See, *O'Connor*, 956 F.2d at 51.

34. RISKfacts, Directors' and Officers' Insurance: Important Liability Protection, [www.coveragefirst.com/portal/server.pt/gateway/PTARGS\\_0\\_21939\\_410328\\_0\\_0\\_18/RISKfacts-DnO\(1\).htm](http://www.coveragefirst.com/portal/server.pt/gateway/PTARGS_0_21939_410328_0_0_18/RISKfacts-DnO(1).htm) (last visited March 13, 2012).

35. 18 O.S. §1031(D).

36. 18 O.S. §1031(A).

37. 18 O.S. §1031(B).

38. *Id.*

39. 18 O.S. §1031(C).

40. 18 O.S. §1031(G).

41. *Business Law Today*, "Directors and Officers Liability Insurance for Nonprofit," Steven M. Foxmore (July/August 2009).

42. State Liability Laws for Charitable Organizations and Volunteers, Nonprofit Risk Management Center (Sept. 2001, updated 12/2009).

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# Guidelines to Shield Board Members of Nonprofit Organizations From Personal Liability

By April Merrill

**N**onprofit charitable organizations are given major tax exemptions because these organizations provide important benefits for society. In turn, nonprofit organizations face special legal requirements not imposed on taxable, for-profit entities or individuals. The IRS and governmental agencies, impose responsibilities and constraints to hold the nonprofits accountable.<sup>1</sup>

Generally, lawsuits and tax exemption suits are filed against the nonprofit organization itself and seldom will charges include individual board members.<sup>2</sup> However, there is always a potential risk that individual board members can be sued for a breach of their *fiduciary* duty including illegal actions or omissions to act that violate legally recognized **standards of care**.<sup>3</sup> Decades of legal precedent have established three overriding fiduciary duties to which a nonprofit board of directors must adhere: the duty of care, the duty of loyalty and the duty of obedience.<sup>4</sup> Each of these duties will be examined along with concrete actions that nonprofit organizations and individual board members can take to document that these duties have been met.

## DUTY OF CARE

Nonprofit organizations, along with their governing board members, are required by law to carry out their responsibilities "in good faith, in a manner that is in the best interests of the organization and such care, including reasonable inquiry, as an ordinarily prudent person in

a like position would use under the circumstances."<sup>5</sup> Thus, the individual board members must pay attention to the organization's activities and operations. Accountability for this duty of care can be demonstrated by the following actions by board members:

- Know the **nonprofit mission** and keep it ever in mind when making decisions.<sup>6</sup>
- **Attend meetings of the board and the committees** to which they are assigned. If a board member cannot be involved in a meeting, the minutes should reflect that fact.
- Prepare for board meetings by **reviewing the agenda** and reports.
- Carefully review the minutes and correct any errors.<sup>7</sup>
- Record detailed meeting **minutes** so that the organization can document its conscientious review and approval of the budget, financial statements, auditing matters, insurance coverage, personnel performance

and compensation, and the performance of the organization as a whole.<sup>8</sup>

- Because the board acts as a whole, in accord with corporate bylaws, it is important to note the existence of a **quorum** and a proper vote on any actions of the board, including how many voted in favor or in opposition to a particular measure along with any abstentions, whether due to conflicts or otherwise.<sup>9</sup>
- **Dissent should be noted.** Board members should participate in the decision-making process. Silence is deemed to be concurrence. If a director is opposed to an action to be undertaken by the organization, the director should speak up and have his or her dissent noted in the minutes.<sup>10</sup>
- **Obtain information, before voting,** to make appropriate decisions.
- Use independent judgment. **Ask about information that is unclear.**
- **Avoid Self-Dealing.** Board members of nonprofits need to be aware of the self-dealing rules.<sup>11</sup>
- **Review the organization's finances.**
- Oversee the compliance with important **tax filing requirements.**<sup>12</sup>

## DUTY OF LOYALTY

The duty of loyalty is about putting the interests of the nonprofit organization before the board member's own interests.<sup>13</sup> The duty of loyalty requires board members to exercise their power in the interest of the organization and not in their own interest or the interest of another entity, particularly one in which they have a formal relationship. This duty is carried out by the following acts:

1. Adopt and maintain a **conflict of interest policy** to know about any potential conflict at the time the organization is entering into the transaction with the person. A conflict of interest policy can help protect the organization and board members by establishing a process for disclosure and voting when situations arise in which board members may actually or potentially derive personal benefit as a consequence of the organization's activities.<sup>14</sup>
2. **Avoid Self-Dealing.** Board members of nonprofits need to be aware of the self-

dealing rules and avoid the use of the nonprofit organization's opportunities for the individual's personal gain or benefit.<sup>15</sup>

3. Avoid disclosure of confidential information about the nonprofit organization.<sup>16</sup>

## DUTY OF OBEDIENCE

The duty of obedience requires that directors of a nonprofit organization comply with applicable federal, state, and local laws, adhere to the entity's articles of incorporation and bylaws and follow the mission. The nonprofit organization must ensure that its originating legal documents are in good order. Thus, the following documents must be carefully prepared and maintained:

1. Create an **Articles of Incorporation** which articulates a nonprofit public purpose (i.e. charitable, educational, religious, scientific, literary, cultural or humanitarian purpose) that will benefit the public. The prospective nonprofit corporation should assure that no *specific individual* will profit from the services rendered because nonprofits are designed to benefit the *public*.<sup>17</sup>
2. File a **Certificate of Incorporation** with the state's Secretary of State. The certificate should recite the organization's intent to engage in tax-exempt business activities, to provide reasonable compensation to its employees and to limit political activities and not interfere with political campaigns and to distribute any remaining assets after debts upon dissolution for charitable purposes.<sup>18</sup>
3. Select at least the minimum number of required **founding directors/incorporators** willing to take fiduciary and legal responsibility for the corporation being formed.
4. Establish **bylaws** governing the operations of the board and adhere to them, closely. The bylaws establish important facts including how board members are designated, whether members have term limits and whether there must be one or more members representing specific interests.<sup>19</sup>
5. **Know and understand the Articles of Incorporation and Bylaws.** Board members should be certain that board actions are consistent with provisions in these documents.
6. Comply with all **regulatory and reporting requirements**, such as overseeing the filing

of annual information returns and payment of employment taxes.<sup>20</sup>

7. Keep the IRS apprised of any updates to the **nonprofit mission statement**. Technically, the mission of a nonprofit is what the organization reported to the IRS in its application for tax-exempt status, as well as what is reflected in the organization's governing documents (its articles of incorporation and bylaws). The organization may well have updated or amplified its mission statement at board meetings or in publications (i.e. "mission creep"), but if these updates are inconsistent with the original statement of mission, the changes do not officially change the federal tax-exempt purposes unless the IRS is formally notified.<sup>21</sup>

8. **Maintain a "Board Handbook."** To establish that individual board members are adhering to the nonprofit's duty of obedience as well as duty of care; each board member must maintain and update a "**board handbook**." Having these documents close at hand helps incoming and ongoing board members fulfill their responsibilities. Key documents that are often included in the board handbook, are:

- Charter/Certificate of Incorporation (which includes the mission statement).
- Tax-exempt determination letters from the IRS
- Bylaws
- Board Policies, including "conflict of interest" policy
- Organization chart of board and key staff
- List of board members, with contact information
- Current strategic plan
- Recent and/or key resolutions
- Minutes from recent and/or key meetings
- Fundraising information and expectations
- Current annual budget and long-term capital plan
- Most recent annual state report
- Most recent Form 990 filing
- Media relations policy<sup>22</sup>

### SPECIAL PRECAUTIONS FOR ATTORNEYS WHO SERVE ON NONPROFIT BOARDS

Attorneys who sit on nonprofit boards need to give special consideration to the relationship between their role as a board member and their

role as legal counsel. Some of the possible risks an attorney faces when sitting on a nonprofit board include:

1. **Role confusion**— Is the attorney acting as a legal counsel or a board member or both? Where an attorney serves on a board only as a board member and not as counsel, the relationship should be clarified *in writing*. Where a lawyer serves in the dual role of board-member/attorney, he or she should make it clear at all times in which capacity he or she is serving, and *the minutes should reflect that status*.
2. The lawyer-director may in some circumstances be held to a **higher standard of care** (i.e. an *ordinarily prudent attorney/board member*), at least as to legal matters, than that applicable to non-attorney board members.<sup>23</sup>

1. Leslie Rosenthal, *Good Counsel, Meeting the Needs of Nonprofits*, 10-11, (2012).
2. Bruce R. Hopkins, *Private Foundation Law Made Easy*, 287, (2008).
3. Rosenthal, *supra* at 7.
4. Hopkins, *supra* at 283.
5. Wexler, Robert A., *What Every Nonprofit Board Member Should Know*, 7, [www.adlercolvin.com/nonprofit](http://www.adlercolvin.com/nonprofit), September 2010.
6. Rosenthal, *supra* at 6.
7. *Id.*
8. *Id.* at 50-51.
9. *Id.*
10. *Id.*
11. Hopkins, *supra* at 289-291.
12. *Id.*, 284.
13. Rosenthal, *supra* at 9, Wexler, *supra* at 7.
14. Wexler, *supra* at 8.
15. Hopkins, *supra* at 289-291.
16. *Id.* at 284.
17. Rosenthal, *supra* at 22.
18. *Id.* at 23.
19. *Id.*
20. Hopkins, *supra* at 285.
21. Rosenthal, *supra* at 7.
22. *Id.* at 49-50.
23. Wexler, *supra* at 27.

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# Practical Advice for Planned Giving to Nonprofit Organizations

*By Susan B. Shields and Stephanie Chapman*

Charitable planned giving, during lifetime or at death, can take many forms. Charitable organizations usually cannot plan for either the amount of charitable contributions that they are likely to receive or the timing of that receipt. Instead, the “planning” involved in “planned giving” typically involves assisting a donor (the giver) with making a charitable gift that is in keeping with the donor’s personal goals and the donor’s financial and estate planning. Planned giving helps the donor achieve the donor’s objectives and desires to support a charitable activity or a charitable cause that they have already accepted.

A planned gift is a gift that is legally provided for during the donor’s lifetime and generally regarded as having been made at a particular date, although the principal economic benefits are not received by the charity until a later date. Death is the usual common denominator of deferred gifts. Although the donor plans the gift now and may even make a charitable contribution right away, its use by the charity is postponed until someone (often the donor) dies. The following is a brief discussion of some common types of planned charitable gifts.

## BEQUESTS

A simple form of planned charitable gift is a gift to charity in a will or trust that takes effect at the death of the donor. For example, a person may provide for the following type of specific bequest in his or her will:

“Upon my death, I leave the sum of \$50,000 (or 5 percent of my estate) to the Oklahoma Bar Foundation.”

If a donor leaves the residue or remainder of his or her estate (what is left over after specific bequests are made) to charity, or a portion of the residue to charity, the donor makes a “residuary bequest.” A gift becomes a “contingent bequest” if the donor makes the gift dependent upon the occurrence or nonoccurrence of a specific event. For example, a contingent bequest may be used by a young donor who leaves all of his or her estate to his or her family, with a contingent beneficiary designation that provides that if all of the donor’s family dies before the donor, then the remainder of the estate goes to a charity.

In general, so long as a donor is competent, his or her estate planning documents may be amended prior to death. Thus, no charitable bequest in a will or revocable trust should be treated by the charity as a total certainty. It is advisable for a donor who wishes to make a charitable bequest for a specific purpose to contact the charity before drafting his or her will or trust. This will more likely assure that the gift is drafted in such a way as to be acceptable to the

charity and in a manner that will accomplish the donor's charitable purposes.

## **OUTRIGHT PLANNED GIFTS**

While most planned gifts are also deferred gifts, this is not always the case. In many circumstances the donor achieves greater income tax benefits<sup>1</sup> by making a charitable gift today rather than including such a gift in his or her estate plan. Outright gifts can consist of any property that is transferred directly from a donor to a qualified charity, including cash, securities, real estate and personal property.

Cash gifts are the simplest form of charitable gift for both the donor and the charity. In the case of cash gifts, the total amount can be deducted from the donor's annual income up to a limit of 50 percent (30 percent in certain circumstances) of the adjusted gross income of the donor. If the gift exceeds 50 percent of adjusted gross income, the deduction may be carried over up to five years or until the deduction is completely exhausted.

Gifts of appreciated securities to a public charity can result in additional tax savings to the donor. First, the fair market value of the securities at the time the gift is made may be taken as an income tax charitable deduction. The deduction limit for securities is 30 percent of adjusted gross income; however, again, the excess deduction can be carried over by the donor for the next five tax years. Further, in most cases, no capital gains tax is paid on the built-in appreciation of securities given to a qualified charity, so long as the securities are long-term capital gain property.

Outright gifts can also be made of tangible personal property, including art, jewelry, antiques, automobiles and other items. If the object donated is related to the work and purposes of the charity (such as a gift of a painting to an art museum), the donor may deduct the current appraised value of the gift from income taxes. As with securities, the deduction cannot exceed 30 percent of adjusted gross income but excess deductions may be carried over. If the tangible property given is not related to the recipient's charitable purposes, then it is deductible only to the extent of its cost basis to the donor. Gifts of automobiles valued at over \$500 to a charity are subject to special rules under the American Jobs Creation Act of 2004.

Real estate may also be given away as a charitable gift. The tax treatment for gifts of

land, farms, homes and other real property is the same as the treatment of appreciated securities. Real estate can also be given in the form of a bargain sale. A bargain sale involves a donor who transfers appreciated property, such as real estate, to a charity in return for a price that is less than the actual fair market value of the property. The excess of the fair market value of the property over the sales price becomes a charitable contribution to the organization. The charitable contribution limit for bargain sales is 30 percent of adjusted gross income.

Under the strategy of making a gift with a retained life estate, donors may gift their personal residences or farms to a charity and continue to live there for the remainder of their lifetimes. The agreement can be made for one or two lives or for a term of years. The donor receives an immediate income tax deduction for the present value of the remainder interest going to the charity. The property gifted may be the donor's principal residence or a second home, vacation home or even stock in a cooperative apartment used as a residence. A written agreement is necessary to establish who will be responsible for repairs, property taxes, casualty insurance and ongoing maintenance for the gifted property. For example, if the residence is rented out to others, the agreement should provide for management of the property and specify how rent will be divided. The agreement also should cover the disposition of the property in the event the donor chooses to move away.

The donor receives a benefit by making a gift with a retained life estate by removing a significant asset from probate and estate tax exposure. The donor also receives a current charitable deduction for income tax purposes, bypasses capital gains tax on the property and retains the right to live in the property for his or her lifetime.

## **GIFTS IN TRUST**

A donor may wish to give assets to charity in a manner that will pay lifetime income to a donor or a designated beneficiary. Alternatively, a donor may wish to give an income stream to charity, retaining a reversionary interest in the gifted assets. However, a donor is only entitled to a charitable deduction for income, gift or estate tax purposes when he or she makes a contribution to a charitable organization by means of a trust if the gifts are made in



a qualifying charitable lead trust, qualifying charitable remainder trust or a pooled income fund. A charitable lead trust provides income to a charity for a defined term with the trust remainder ultimately passing to noncharitable beneficiaries, such as the donor, or the donor's family. A charitable remainder trust provides income to the donor or the donor's family for a defined term with the remainder passing to charity.

Charitable lead trust and charitable remainder trust income payments may be made annually, or more frequently, and the payments may be fixed annuity payments or fluctuating unitrust (*i.e.* percentage of principal) payments. Both charitable lead trusts and charitable remainder trusts may be created either during a donor's lifetime or at the donor's death. The defined term of the trust may be for a term of years or measured by the lifetime of the donor or another person. The determination of whether to use a charitable lead trust or a charitable remainder trust, and the decisions on these variables, should be considered in light of each particular donor's personal and tax planning objectives.

### CHARITABLE GIFT ANNUITY

A charitable gift annuity is a contract between the donor and the charity. The donor makes a gift of cash or appreciated securities qualifying for long-term capital gain treatment to the charity in exchange for the obligation of the charity to make fixed income payments for one or two lifetimes. The rate of return is based on the age of the beneficiary or beneficiaries at the time of entering into the annuity agreement. The annuity contract is a general obligation of the charity, and is the only type of gift arrangement that requires the charity to back the obligation with assets of the organization.

In a charitable gift annuity, the value of the property transferred by the donor is greater than would be necessary to purchase a commercial annuity of the same amount. The difference is the gift portion of the annuity, and this factor provides the basis for a charitable income tax deduction. The value of the annuity must be less than 90 percent of the value of the

**“The past few years have been a tumultuous time, and the tax system has been the focus of numerous proposed and actual overhauls.”**

gifted property to qualify as a charitable gift annuity.

Most charities who issue gift annuities subscribe to rates published periodically by the American Council on Gift Annuities. Doing so avoids the need of the charity to independently obtain actuarial tables.

### LIFE INSURANCE

Donors may also choose to designate a charity as the primary or contingent beneficiary of a life insurance policy. Estate tax benefits are generally realized by having these assets pass to charity. Donors who wish to name a charity as the beneficiary of their life insurance policy get leverage by making a charitable gift at a fraction of the face value of the policy.

Sometimes a donor has a life insurance policy which is no longer needed because the original reasons for its existence have been fulfilled. A donor may choose to use such a policy to complete a pledge for making a major charitable gift without having to expend additional dollars.

As with bequests, a donor can also name a charity as the contingent beneficiary of a life insurance policy. A donor can also assign dividends from a policy to a charity and receive income tax deductions as the charity receives the dividends.

### GIFTS OF RETIREMENT PLAN ASSETS

Donors may also designate a charity as a primary or secondary beneficiary of a qualified retirement account, such as an IRA or a 401(k) account. If the qualified plan assets pass to charity after the death of the account owner, an estate tax charitable deduction will be available and income tax liability will be avoided. Historically, however, lifetime charitable gifts funded with retirement plan assets have not been favorable from a tax standpoint. To make a lifetime gift, the donor must withdraw assets from a plan, report the withdrawal as taxable income, and then claim a charitable deduction for the gift, which deduction may not entirely offset the income tax liability.

The provision for tax-free distributions of up to \$100,000 from IRAs for donors age 70 ½ and older to public charities expired at the end of

2011. This tax break may be reauthorized by Congress later in 2012.

## PROPOSALS RELATED TO PLANNED GIVING

The past few years have been a tumultuous time, and the tax system has been the focus of numerous proposed and actual overhauls. The area of planned giving has not been spared. For the past three years, the president has proposed a 28 percent cap on itemized deductions, including charitable deductions, for individuals with annual incomes of \$200,000 or more and for families earning \$250,000 or more. While a number of people had, optimistically it turns out, predicted that the charitable deduction would be excluded from the proposed cap this year, the proposed budget does not include such an exclusion.<sup>2</sup> Interestingly, the cap is part of the "Buffett Rule," a reference to billionaire Warren Buffett's stated frustrations with the perceived inconsistency of the current tax code.

In addition to the cap, the current budget proposal would eliminate a charitable deduction for conservation easements on golf courses. The rationale given for this proposal is that conservation easements are often overvalued and more so in the context of golf courses because nearby property owners can benefit from overvaluation separate from the deduction. Finally, although the expired allowance for tax-free distributions from individual retirement plans for charitable purposes is often cited as a popular provision, the proposed budget did not include such a provision.

The budget is not the only proposal for tax reform. Numerous other proposals would convert the charitable deduction into a credit. Some even contemplate that the IRS could pay the credit to charities, as opposed to refunding it directly to the taxpayer. These seem unlikely to gain widespread support, but are being discussed in congressional testimony and other writings. Further, some have proposed limiting charitable contributions to allow a deduction only for contributions in excess of 2 percent of adjusted gross income.

## CONCLUSION

"Planned giving" can be a misleading label. Numerous techniques currently exist to afford taxpayers tax deductions for charitable gifts even where the charity cannot be certain when or how much it will receive. However, at a time when charities are struggling to find new funding sources and maintain their existing relationships, beggars can't always be choosers. And in a time when comprehensive tax reform seems more and more likely, all tax planning, including charitable planning, is a little more interesting.

1. This paper does not address the tax rules applicable to charitable planned giving in detail. However, reference may be made to Internal Revenue Code Sections 170 et seq. and IRS Publication 526, "Charitable Contributions."

2. The budget proposals can be found in General Explanations of the Administration's Fiscal Year 2013 Revenue Proposal (the *Green Book*) published by the Treasury Department.

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# Unrelated Business Income Tax (UBIT)

## What Is It and Why Should My Exempt Organizational Clients Care?

*By Hugh M. Robert*

**W**hen I first started representing exempt organizations, I heard the term Unrelated Business Income Tax (UBIT) but never knew what it was or why it was important to my clients. While complex tax matters I refer to attorneys who specialize in tax, it is important to understand at least the basics of UBIT so your clients, who prior to engaging in certain activities, can understand their potential tax liability as it relates to income generating activities. This article should be a primer on the subject and is not exhaustive by any means.<sup>1</sup>

In order for an organization to be exempt under Section 501(c)(3) of the Internal Revenue Service Code, organizations must be organized and operated exclusively for one or more of the purposes provided in Section 501(c)(3). However, treasury regulations provide a primary purpose test for its standard of "exclusivity."<sup>2</sup> The determination of whether an organization is operated primarily for exempt purposes generally depends on an analysis of all the facts and circumstances. An organization's unrelated business activities must be confined to something less than a substantial portion of a tax exempt organization's overall activities.

An exempt organization is allowed to engage in some activities that are not related to their exempt purpose, or unrelated business. Nearly everything else an exempt organization does is a related business activity.

### HISTORY OF UBIT

The Revenue Act of 1950<sup>3</sup> was passed primarily as a means of eliminating a source of unfair competition with for profit businesses and mak-

ing exempt organizations pay the same tax on non-exempt business purposes. It was also seen as a more effective method than revoking the status of exempt organizations. Since 1950, UBIT has been expanded, first in 1969<sup>4</sup> to include virtually all exempt organizations and then again in 1978.<sup>5</sup> While unfair competition has been noted as one of the primary purposes of UBIT, many courts in their analysis have identified other objectives which are equally important.<sup>6</sup>

### UBIT DEFINED

Generally, Section 511(a)(1) imposes a tax on "unrelated business income" of tax-exempt organizations. The term "unrelated business income" is defined in section 512(a) as "the gross income derived by any organization from any unrelated trade or business...regularly carried on by it, less the deductions allowed by this chapter which are directly connected with the carrying on of such trade or business."<sup>7</sup>

Unrelated Business Income Tax is applied to income that is 1) from a trade or business, 2) that is regularly carried on by the exempt organiza-

tion, and 3) where the conduct is not substantially related to organization's exempt function. Where an exempt organization has unrelated business income, they must provide the amounts and activities on IRS Form 990-T.

#### *Trade or Business?*

The treasury regulations have generally defined a trade or business as any activity that is carried on for the production of income from the sale of goods or performance of services.<sup>8</sup> The IRS also looks to see whether or not there is a profit motive to the activity.<sup>9</sup> Courts have interpreted this as when an activity is "purposed primarily for reasons other than the production of income, it does not constitute a trade or business."<sup>10</sup>

As with any rule, there are exceptions. An exempt organization can have something used for dual purposes. For example, where an exempt organization has facilities that are primarily used for an exempt purpose, but also uses it for a non-exempt purpose, only the revenue generated by the non-exempt activities would be subject to UBIT. One example is a university using its facilities to hold football camps over the summer that generate revenue. Its use during the regular academic year where it is supporting the educational mission of the university would not be subjected to UBIT, however the football camp revenue would. Another example is where a tax-exempt educational institution rents rooms to individuals other than students.<sup>11</sup>

Dual purpose use is one that many exempt organizations overlook as "most of the activities" are related to their exempt purpose, but often have uses that fall outside the scope of their mission. A recent tax court decision illustrates this point, where a homeowners association was renting out their parking lots at their beach club during the evening hours to third parties. The tax court found that while during the day only the members and guests were allowed to utilize the facilities, thus fulfilling its mission/purpose, after 4 p.m., it leased out the parking lots to third-party businesses and therefore fell outside its mission.<sup>12</sup>

A second exception is where the overall activity may be related to the organization's exempt purpose but a portion of it is not.<sup>13</sup> In this instance, the IRS has the authority to apply the "fragmentation rule" where an "activity does not lose identity as trade or business merely because it is carried on within a larger

aggregate of similar activities or within a larger complex of other endeavors which may, or may not be related to the exempt purpose of the organization."<sup>14</sup>

Another exemption is where goods are sold in an exempt function activity. Examples of such are goods that are made by disabled persons and sold by an organization that employs and assists them as their mission. There are limitations to this exemption where the organization has used the exempt function activity beyond what is necessary to accomplish the intended purposes.

#### *Regularly Carried On By the Exempt Organization*

In order for UBIT to apply, the exempt organization must "regularly carry on" the unrelated business activity. Generally, when an income generating activity occurs with frequency and continuity, and can be compared with the activities of non-exempt organizations, it will most likely meet the "regularly carried on" requirement. For example, if an organization has its annual fundraising event for its charitable purpose, generally that would not be considered "regularly carried on."

However, if the organization sells advertising for an annual ad book where they solicit extensively throughout the year, it could be seen as "regularly carried on." The NCAA challenged this position and the 10th Circuit overturned U.S. Tax Court. The NCAA sold advertising for its program for the basketball tournament and did not report the revenue as UBIT on its return. The court held that "the NCAA's involvement in the sale of advertising space was not sufficiently long-lasting to make it a regularly carried on business solely by reason of its duration and that the activity was sufficiently infrequent to preclude a determination that it was regularly carried on. (because it was only published once per year.)"<sup>15</sup> The IRS has announced it will not follow the NCAA case outside the 10th Circuit and has since assessed UBIT for similar activities.

#### *Substantially Related to Organization's Exempt Function*

The "substantially related" determination is one that is a factual question based on the activity in question and the mission or exempt purpose of the organization.<sup>16</sup> The IRS looks at each fact, circumstances and missions of the organization.<sup>17</sup> If the activity supports or fur-

thers the organization's exempt purposes, then the income produced will not be unrelated business income.<sup>18</sup> For example, if a folk museum sells prints of the works of art it has displayed as part of its collection, it will likely be found to be related to the exempt purpose of the museum. If however, the same fine art museum decided to sell science books for kids, it would not be found to be substantially related to the museum's exempt purpose, even though it could fall under the educational purpose as found in Section 501(c)(3).<sup>19</sup>

#### *Exclusions Under Section 513*

Even if an activity meets the definition of an unrelated trade or business, it may not be subject to UBIT if it meets one of the statutorily provided exclusions. Some of the exclusions include:

**Volunteer Labor** – Any activity in which substantially all the work of the trade or business (probably 85 percent) is performed without compensation is immune from tax. In assessing the contribution made by volunteers, such factors as the monetary value of the services rendered, the number of hours worked, the intrinsic importance of the volunteer work performed, and the degree of reliance placed upon volunteers should be considered (Reg. 1.513-1(e)(1)).

**Donated Merchandise** – Any unrelated activity involving the sale of merchandise, substantially all (probably 85 percent) of which was received as gifts or contributions, is exempt regardless of whether the labor to operate the activity is paid or volunteer (Reg. 1.513-1(e)(3)). (i.e. thrift shops).

Business or trade carried on primarily for the convenience of students, members, patients, or employees. For example, a university gift shop or cafeteria where its operation is primarily for the convenience of students. This is not without limitation, if the gift shop sells items such as watches, CDs or DVDs.

#### *Exclusions Under Section 512(b)*

There are a number of activities that are exempt from treatment as unrelated business found in Section 512(b) of the code. Two of the most common exclusions are related to intellectual property, specifically, income derived from research and royalties.

Research performed for the "United States or any of its agencies or instrumentalities, or any state or political subdivision thereof is exclud-

ed from UBIT."<sup>20</sup> Colleges and university research is also excluded from UBIT where performed for any person by colleges, universities and hospitals.<sup>21</sup> Additionally, "fundamental research" is also excluded so long as it meets the criteria as defined by Section 512(b)(9).<sup>22</sup>

Royalty income is also generally excluded from UBIT as provided for in Section 512(b)(2). This includes payments for a variety of intellectual property rights such as the use of logos of an exempt organization. The IRS has defined royalties as "a payment must relate to the use of a valuable right. Payments for the use of trademarks, trade names, service marks, or copyrights, whether or not payment is based on the use made of such property, are ordinarily classified as royalties for federal tax purpose."<sup>23</sup>

One recent opinion involved a credit union that granted the use of its goodwill and customer list in connection with the sale of accidental death and dismemberment insurance. Here, the court held that the income from the granting of use of intangible property constitutes royalties that are not subject to UBIT.<sup>24</sup>

However, the royalty exemption does not include income derived from services, such as personal appearances or endorsements of products.<sup>25</sup> This is an area that has quite a few cases that have produced varying results. Specifically, the IRS has varying interpretations as to whether a payment received by an exempt organization is a royalty for purposes of the exclusion from UBIT. One line of cases involves exempt organizations agreements with affinity credit cards<sup>26</sup> and another involves exempt organizations renting their mailing lists.<sup>27</sup>

Royalty income on development can also be seen as exempt depending on the circumstances. In a private letter ruling, the IRS found a private foundation was not responsible or liable for operating costs or liabilities attributable to the for profit corporation's developing, exploring, equipping, owning, operating, and/or maintaining oil and gas properties – or for storing, handling, treating, or marketing oil or gas, where the foundation invested in the corporation and receives net profits interest.<sup>28</sup> However, that is not the end of the discussion, Section 1.512(b)-1(b) provides that "overriding royalties and deductions connected with such income shall be excluded in computing unrelated business taxable income. Mineral royalties shall be excluded whether measured by



production or by gross or taxable income from the mineral property. However, where an organization owns a working interest in a mineral property, and is not relieved of its share of the development costs by the terms of any agreement with an operator, income received from such an interest shall not be excluded.” In the scenario described by the IRS, the foundation did not have more than a net profits interest.

## CONCLUSION

It is highly recommended that an organization monitor its unrelated business income activities to ensure that it is still delivering its mission and not just spending time generating revenue. If an organization does not stay focused on its mission and exempt purpose, it could jeopardize its tax exempt status. One suggestion for organizations that have a substantial amount of unrelated business income activity to consider is for those activities to be put into a subsidy. As exempt organizations look at alternative or new means of income activity, they should analyze whether UBIT will apply. Even if income activities generate revenue to sustain the mission of the organization, it is not good enough to exempt the organization from having to pay UBIT as it is not what the income is used for, rather where the money came from.

1. For a full discussion on UBIT and the various tests mentioned in this article, I recommend *The Law of Tax-Exempt Organizations*, Tenth-edition, by Bruce R. Hopkins, published by John Wiley & Sons, Inc. 2011. See also IRS Publication 598, [www.irs.gov/publications/p598/index.html](http://www.irs.gov/publications/p598/index.html).

2. Generally, unrelated business activities must be confined to something less than a substantial portion of the organization's overall activities. “An organization will be regarded as ‘operated exclusively’ for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in Section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.” Treas. Reg. §1.501(c)(3)-1(c)(1).

3. Pub.L. No. 814, §301, 64 Stat. 906, 947 (1950).

4. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 541.

5. Pub. L. No. 95-502, 92 Stat. 1693, 1702 (1978).

6. *Louisiana Credit Union League v. United States*, 693 F.2d 525, at 540-541 (5th Cir. 1982). “Congress enacted the predecessors of section 511-513 to eliminate a perceived form of unfair competition, that aim existed as a corollary to the larger goals of producing revenue and achieving equity in the tax system.”

7. *Louisiana Credit Union League v. United States*, 693 F.2d 525 (5th Cir. 1982).

8. Treas. Reg. §1.513-1(b).

9. Courts have also looked to whether or not there is a motive for profit in determining whether or not an income generation activity can be deemed a trade or business. See *United States v. American Bar Endowment*, 477 U.S. 105, 110 n.1 (1986).

10. *Carolina Farm & Power Equipmt. Dealers Assoc. v. United States*, 541 F.Supp. 86 (E. Dist. N.C. 1982).1. The court held that in order for an activity to reach the level of a trade or business, it must “be operated

in a competitive, commercial manner.” Citing *Disabled American Veterans v. United States*, 650 F.2d 1178, at 1187 (Ct. Cl. 1981).

11. See PLR 201106019.

12. *Ocean Pines Assoc. Inc. v. Comm’r*, 135 T.C. 13 (2010).

13. Generally, an exempt organization's revenue derived from advertising in its magazine or periodical is regarded as an unrelated business and subject to UBIT. There are of course even exceptions to this, for example, a student run newspaper that has advertisers that are commercial in nature, can be exempted from UBIT as the advertising revenues contribute to the university's mission and educational development by providing training to the students.

14. IRC §513(c); Treas. Reg. §1.5134-1(b).

15. *National Collegiate Athletic Ass’n v. Commissioner*. 914 F. 2d 1417 (1990).

16. Ordinarily, a trade or business is substantially related to the activities for which an organization is granted exemption if the principal purpose of such trade or business is to further (other than through the production of income) the purpose for which the organization is granted exemption. 26 C.F.R. §1.513-2(a)(4).

17. This includes examination of the Articles of Incorporation of the Association. See *Anateus Lineal 1948 Inc. v. United States*, 366 F. Supp. 118 (W.D. Ark. 1943); and *Carolina Farm & Power Equipmt. Dealers Assoc. v. United States*, 541 F.Supp. 86 (E. Dist. N.C. 1982). The assessment of whether the production or distribution of goods or performing of services involved and accomplishment of organization's exempt purpose “depends in each case upon the facts and circumstances involved.” *Bellco Credit Union v. United States*, 735 F. Supp 2d 1286 (D.C. Colo. 2010) citing 26 C.F.R. §1.513-1(d)(2).

18. For an activity to be considered substantially related, the activity must “contribute importantly” to accomplishment of the organization's exempt purposes. Treas. Reg. §1.513-1(d)(2)

19. Rev. Rul. 73-105, 1973-1 C.B. 264, [www.irs.gov/pub/irs-tege/rr73-105.pdf](http://www.irs.gov/pub/irs-tege/rr73-105.pdf).

20. Section 512(b)(7).

21. Section 512(b)(8)

22. This exclusion is limited to organizations that engage primarily in fundamental research.

23. Rev. Rul. 81-178, 1981-2 C.B.135, [www.irs.gov/pub/irs-tege/rr81-178.pdf](http://www.irs.gov/pub/irs-tege/rr81-178.pdf).

24. *Bellco Credit Union v. United States*, 735 F. Supp 2d 1286 (D.C. Colo. 2010).

25. *Id.*

26. *Sierra Club Inc. v. Comm’r*, 86 F.3d 1526 (9th Cir. 1996), *Oregon State Univ. Alumni Ass’n Inc. v. Comm’r*, 193 F.3d 1098 (9th Cir. 1999)

27. See *Disabled American Veterans v. United States*, 650 F.2d 1178 (Ct. Cl. 1981); *Sierra Club Inc. v. Comm’r*, 86 F.3d 1526 (9th Cir. 1996); and *Planned Parenthood Fed. of Am. Inc. vs. Comm’r*, 77 T.C.M. (CCH) 2227 (1999).

28. PLR 201142026.

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# Supporting Organizations and Donor Advised Funds

## Update on Charitable Giving and Tax Exempt Organizations

By Matt Farris

**I**n December 2011, the Treasury Department issued its *Report to Congress on Supporting Organizations and Donor Advised Funds* as mandated by Section 1226 of the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (2006).

In response to concerns regarding perceived abuses of tax law through undue donor influence and/or control over supporting organizations and sponsoring organizations of donor advised funds,<sup>1</sup> Title XII of the Pension Protection Act made numerous changes to provisions of the Internal Revenue Code<sup>2</sup> addressing charitable giving and tax-exempt organizations, including the enactment of reforms targeting federal tax law provisions specifically applicable to supporting organizations and donor advised funds.<sup>3</sup> Treasury's report summarizes the act's reforms affecting the organization and operation of supporting organizations and donor advised funds, and also responds to specific questions posed by certain members of Congress addressing their concerns related to supporting organizations and donor advised funds.

This article highlights the Pension Protection Act's major changes to the code provisions governing supporting organizations and donor advised funds, the proposed regulations issued since the enactment of the act specific to supporting organizations,<sup>4</sup> Treasury's analysis and conclusions offered within its report, and reactions to the report from Sen. Chuck Grassley and the charitable sector.

### OVERVIEW OF TAX-EXEMPT CHARITABLE ORGANIZATIONS:

Tax-exempt charitable organizations advance public purposes rather than private interests. To that end, such organizations must be organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes; to foster national or international amateur sports competition; or for the prevention of cruelty to children or animals.<sup>5</sup> Donors utilize supporting organizations and donor advised funds to support these types of charitable organizations.

Internal Revenue Code Section 501(a) specifically exempts organizations described in code section 501(c)(3) from income tax liability that are organized and operated exclusively for charitable, religious, educational or other specified purposes.<sup>6</sup> The public at large commonly refers collectively to such tax-exempt charitable organizations as 501(c)(3)s. However, the code distinguishes among various types of 501(c)(3) charitable organizations.

By default, a code section 501(c)(3) organization is a private foundation unless it meets the additional requirements of code section 509(a)(1), (2) or (3). Organizations that meet one of the requirements of code section 509(a) are gen-

erally referred to as public charities. As shown within diagram appearing at the end of this article, code section 509(a) divides 501(c)(3) charitable organizations into two subcategories: private foundations and public charities.<sup>7</sup>

Generally, a public charity is distinguished from a private foundation to the extent it receives a greater amount of public support or oversight than does a private foundation.<sup>8</sup> The “public charity” moniker stems from the fact that such organizations derive their support primarily from broad based public support. Furthermore, in exchange for less restrictive rules governing transactions with insiders, more generous charitable contribution deduction limits and no distribution requirements, donors to public charities give up all control over the donated assets and are not permitted to control the charity.<sup>9</sup> In contrast, private foundations typically derive their support from, and are often controlled by, a small number of donors.<sup>10</sup> Consequently, private foundations are subject to a different, and more burdensome, tax regime than are public charities.<sup>11</sup>

## **SUPPORTING ORGANIZATIONS AND DONOR ADVISED FUNDS**

In order to be classified under the code’s less onerous tax regime applicable to public charities, supporting organizations and donor advised funds sponsoring organizations<sup>12</sup> must operate within the parameters set forth in code sections 509(a)(3) and 509(a)(1), respectively. As seen in the diagram appearing at the end of this article, a sponsoring organization such as a church, hospital or university that receives a substantial amount of public support to fund its operations qualifies to be taxed as a public charity under code section 509(a)(1), and may therefore act as a donor advised fund sponsoring organization. Similarly, in order for a supporting organization to be taxed as a public charity under code section 509(a)(3), the supporting organization must have a particular type of structural relationship with a supported organization.<sup>13</sup>

### *Supporting Organizations*

A supporting organization is an organization described under code section 509(a)(3) that has a prescribed relationship with one or more public charities described in either section 509(a)(1) or (2). To qualify as a supporting organization under section 509(a)(3) of the code, an organization must satisfy three requirements:

- (1) the organization must be organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more specified public charities described in section 509(a)(1) or (2);
- (2) the organization must be: (i) operated, supervised, or controlled by; (ii) supervised or controlled in connection with; or (iii) operated in connection with one or more public charities described in section 509(a)(1) or (2); **and**,
- (3) the organization must *not be* controlled directly or indirectly by one or more disqualified persons other than foundation managers and other than one or more public charities described in section 509(a)(1) or (2).<sup>14</sup>

As more fully set forth below, a supporting organization is classified as a Type I, II or III supporting organization based on whether its relationship with its supported organization(s) is described in subparagraph (i), (ii), or (iii) of code section 509(a)(3)(B):

- (1) A Type I supporting organization is one that is operated, supervised, or controlled by one or more section 509(a)(1) or 509(a)(2) [supported] organizations.<sup>15</sup> The relationship is comparable to a “parent-subsidiary” corporate relationship in that the supported organization can direct the policies, programs, or activities of the supporting organization. The relationship may be established by the fact that a majority of the officers, directors, or trustees of the supporting organization is appointed or elected by the governing body, members of the governing body, officers acting in their official capacity, or the membership of one or more of the supported organizations.<sup>16</sup>
- (2) A Type II supporting organization is one that is supervised or controlled in connection with one or more section 509(a)(1) or 509(a)(2) [supported] organizations.<sup>17</sup> The relationship is comparable to a “brother-sister” corporate relationship in that the two organizations are under common supervision or control. The relationship may be established by the fact that control or management of the supporting organization is vested in the

same persons that control or manage the supported organization(s);<sup>18</sup>

- (3) A Type III supporting organization is one that is operated in connection with a section 509(a)(1) or (2) [supported] organization.<sup>19</sup> The governing board of a Type III supporting organization is not controlled by its supported organization(s) or by those who control the supported organization(s). Instead, in order to be a Type III supporting organization, a supporting organization must be responsive to the needs of the supported organization(s) and be significantly involved in the operations of the supported organization(s). The regulations set forth two tests — a responsiveness test and an integral part test — which must be met in order to establish that the supporting organization meets the Type III relationship test.<sup>20</sup>

The code further classifies Type III supporting organizations into two sub-types:

- (a) A functionally integrated Type III supporting organizations is one which is not required under regulations established by the secretary to make payments to supported organizations due to the activities of the organization related to performing the functions of, or carrying out the purposes of, such supported organizations;<sup>21</sup>
- (b) A non-functionally integrated Type III supporting organization is one that primarily makes grants to its supported organization(s).<sup>22</sup>

#### *Donor Advised Funds*

For the first time, the Pension Protection Act codified the definition of a donor advised fund, although this type of charitable giving arrangement has existed for more than 70 years.<sup>23</sup> A donor advised fund is now defined as a fund or account owned and controlled by a sponsoring organization, which is separately identified by reference to contributions of a donor or donors, and with respect to which the donor, or any person appointed or designated by such donor (“donor advisor”), has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of the funds.<sup>24</sup>

Unlike other public charities which engage in charitable activities, donor advised funds and supporting organizations generally do not engage in direct charitable activities. Instead, they provide charitable support to active public charities. Because donor advised funds and supporting organizations are classified as public charities rather than private foundations, donors to donor advised fund sponsoring organizations and supporting organizations are generally allowed to claim a current year charitable contribution deduction for a larger percentage of their income donated to these entities than if they had donated to private foundations.<sup>25</sup> Furthermore, the code does not currently require donor advised fund sponsoring organizations or supporting organizations to distribute a percentage of their assets on an annual basis or, for that matter, within any certain time frame whereas private foundations are required to distribute 5 percent of their assets annually.<sup>26</sup>

The widespread popularity and use of donor advised funds and supporting organizations, coupled with a few highly publicized instances of donor abuse, resulted in congressional scrutiny and eventual statutory reform via the enactment of the Pension Protection Act and the subsequent issuance of Treasury’s long anticipated proposed regulations. However, despite the past congressional concerns giving rise to the enactment of the act’s provisions designed to improve organizational accountability and to curb donor abuses (which some members of Congress continue to express today), Treasury’s report generally concludes the act’s current provisions have increased donor/organizational transparency and also serve as appropriate and effective deterrents to tax law abuses.

#### **THE PENSION PROTECTION ACT**

As referenced above, Congress expressed concerns prior to enactment of the act that donors to some donor advised funds and supporting organizations were exerting control over and personally benefitting from their donated assets.<sup>27</sup> Indeed, as the popularity and use of donor advised funds and supporting organizations steadily increased throughout the 1990s, concerns regarding abuses of supporting organizations and donor advised funds emerged within Congress and the executive branch in the early 2000s due to a few highly publicized instances of donor abuse.<sup>28</sup> These congressional concerns resulted in the Senate Finance Com-

mittee conducting hearings on the issue in 2004 and the subsequent release of a "White Paper" containing reform proposals.<sup>29</sup>

This course of events led to a charitable reform through the enactment of the act in 2006 and its inclusion of new rules and sanctions designed to clarify and encourage compliance by donors, supporting organizations, and donor advised fund sponsoring organizations.<sup>30</sup> In addition to the new rules, section 1241(d) of the act directed the secretary of the Treasury to promulgate new regulations under code section 509 specifically applicable to Type III supporting organizations and their supported organizations.<sup>31</sup> Finally, Congress presented specific questions to Treasury through the act addressing issues related to the organization and operation of supporting organizations and donor advised funds.

#### *Reforms Targeting Supporting Organizations and Donor Advised Funds*

Although the code *already* contained deterrents in the form of excise taxes both on donors who receive excess benefits from a public charity and on the charity's managers if they knowingly approved the transaction conferring the benefit, certain members of Congress believed additional reforms were needed specifically for supporting organizations and donor advised funds. Due to the increasing amounts of charitable dollars flowing through supporting organizations and donor advised funds (during tax year 2006: supporting organizations had a net worth of \$226.7 billion at the end of the year; donor advised fund *sponsoring organizations* had a net worth of \$211.3 billion at the end of the year; IRS data indicates that 2,398 donor advised fund sponsoring organizations had 160,000 donor advised funds with assets valued at \$31.1 billion as of the end of tax year),<sup>32</sup> the Pension Protection Act included several provisions specifically aimed at supporting organizations and donor advised fund sponsoring organizations. For example, the act enacted additional disclosure and reporting requirements for both supporting organizations and donor advised fund sponsoring organizations, which increase the transparency of these organizations and enable more oversight by state and federal regulators, supported organizations, and the public.<sup>33</sup>

The act further enacted excise taxes on certain payments from a donor advised fund or a supporting organization to a donor (or a related

person). The act also required a donor advised fund donor to obtain a contemporaneous written acknowledgment from the sponsoring organization that the organization has exclusive legal control over the contributed assets. Finally, the act tightened the rules applicable to Type III supporting organizations, which are not controlled by their supported organizations, and imposed the private foundation excess business holdings rules on donor advised funds and certain supporting organizations.<sup>34</sup>

#### *Reforms Specifically Targeting Non-Functionally Integrated Type III Supporting Organizations*

The act made five changes to the requirements an organization must meet to qualify as a Type III supporting organization.<sup>35</sup> One change, in particular, significantly impacts non-functionally integrated Type III supporting organizations.

As previously referenced, section 1241(d) of the act directed the secretary of the Treasury to promulgate new regulations establishing a mandatory distribution requirement for non-functionally integrated Type III supporting organizations similar to the payout requirement for private foundations.<sup>36</sup> In 2009, Treasury released its proposed regulations, including §1.509(a)-4(i)(5)(ii). To satisfy the proposed distribution requirement, a Type III supporting organization that is not functionally integrated must distribute, with respect to each taxable year, to or for the use of its supported organizations, amounts equaling or exceeding 5 percent of the aggregate fair market value of its non-exempt-use assets (the annual distributable amount), on or before the last day of the current taxable year.<sup>37</sup>

In response to the proposed regulations mandating a 5 percent payout rate for non-functionally integrated Type III supporting organizations, many commentators said that this payout rate was too high and would erode an organization's assets over time. The commentators stated that a Type III supporting organization provides long-term consistent support to specific organizations, while private foundations may pay out to whomever they choose. Further, the commentators noted a supporting organization maintains a governance relationship with its supported organization(s) in a way that a private foundation does not. Because of these differences, commentators argued, the 5 percent private foundation payout requirement should not be imposed on a sup-



porting organization as it would jeopardize the ability of supporting organizations to provide the kind of consistent, reliable, long-term support supported organizations have come to expect.<sup>38</sup>

Accordingly, commentators suggested a number of alternative payout rates. Many of them also recommended allowing an averaging of assets over a period of prior years for purposes of calculating the payout amount, thereby moderating the effect of market volatility.<sup>39</sup> Furthermore, some commentators recommended providing a transition period for the payout requirement to allow organizations sufficient time either to modify their governing instruments or allow them to sell illiquid assets.<sup>40</sup> Alternatively, a number of commentators suggested that the proposed regulations exempt Type III supporting organizations that 1) have no continuing involvement of donors or their family in the governance of the organization; and 2) before the date of enactment of the Pension Protection Act, had distributed to or for the benefit of its supported organizations an amount equal to or greater than the amounts transferred to the organization for which charitable deductions were allowed.<sup>41</sup>

#### *Congressional Questions Posed and Treasury's Responses*

Within the Pension Protection Act, Congress instructed Treasury to produce the report and include therein its responses to specific questions.<sup>42</sup> In response to the questions posed by Congress and after soliciting and receiving public comments, Treasury's report included answers to Congress's questions, as summarized below:

*Question:* Whether the existing deduction rules for contributions to donor advised funds and supporting organizations are appropriate?

*Treasury's Response:* Donations to a donor advised fund or a supporting organization are owned by the sponsoring organization of the donor advised fund or by the supporting organization, which, like other public charities, is generally accountable to the public (either directly or, in the case of supporting organizations, indirectly through their relationships with their supported organizations) ... Because donors to donor advised funds and supporting organizations are like donors to other public charities, giving up both control of the contributed assets and the ability to control the donee organization, the deduction rules seem *appropriate*.

*Question:* Whether donor advised funds should be subject to a distribution requirement?

*Treasury's Response:* IRS data indicate the average payout rate for aggregate donor advised funds in 2006 was 9.3 percent of assets. The payout rates for private foundations tend to hover just above 5 percent. Thus, compared to private foundations, the average payout rates for aggregate donor advised funds in 2006 *appear to be high* for most categories of donor advised fund sponsoring organizations.

“Contributions to donor advised funds and supporting organizations are irrevocable and non-refundable...”

However, it would be premature to make a recommendation regarding distribution requirements for donor advised funds on the basis of this first year of reported data (2006).

*Question:* Whether an advisory role in the investment or distribution of donated funds is consistent with a completed gift?

*Treasury's Response:* Contributions to donor advised funds and supporting organizations are irrevocable and non-refundable (assuming that all existing tax and other legal requirements are met). Provided that the donor advised fund sponsoring organization or the supporting organization asserts contemporaneously that it holds all rights to contributed assets, the sponsoring organization or the supporting organization — not the donor — is the legal owner of the contributed assets and controls how those assets are invested and disbursed. *A donor's non-binding advisory relationship does not alter this legal relationship.* Thus, just as a donor's control of a private foundation does not alter the fact that a gift to the foundation is complete, *it is consistent* to treat donations to donor advised funds and supporting organizations that comply with existing legal requirements as completed gifts even if the donor retains non-binding advisory rights.<sup>43</sup>

*Question:* Whether the issues described in questions 1-3 above are also issues with respect to other forms of charities or charitable donations?

*Treasury's Response:* Issues relating to type, extent and timing of the use of charitable contributions, and the appropriateness of the existing charitable contribution rules, *are the same for all public charities*. Similarly, issues relating to when a charitable gift is considered complete are common to all charitable organizations.<sup>44</sup>

To the surprise of some, the report did not determine additional rules and regulations were necessary to accomplish the Pension Protection Act's aims of mitigating undue donor influence on supporting organizations and donor advised fund sponsoring organizations and improving organizational accountability and oversight. In fact, the report concludes existing laws and the Pension Protection Act reforms adequately and appropriately address congressional concerns expressed in the questions posed to Treasury. With specific reference to the question regarding the necessity of a payout requirement for donor advised funds, the report concludes it would be premature to recommend such a distribution requirement for donor advised funds while noting that the average payout rate for aggregate donor advised funds in 2006 of 9.3 percent of assets *appears to be high* for most categories of donor advised fund sponsoring organizations, as compared to the five percent distribution requirement for private foundations.

## REACTIONS TO TREASURY'S REPORT

Perhaps not surprisingly, given his longstanding misgivings regarding donors' use of supporting organizations to accomplish charitable giving goals,<sup>45</sup> Sen. Grassley quickly issued a rebuke of Treasury's report. With respect to the findings included within the report, Sen. Grassley offered the following comments:

"The study is disappointing and unresponsive. It doesn't advance the ball in closing abusive loopholes. If anything, it gives abusive organizations cause for celebration ... Treasury apparently thinks Congress fixed problems with supporting organizations and donor-advised funds in 2006 ... It's also disappointing that the study used 2006 data. The IRS went to the trouble of revising the Form 990 in 2008 to glean more data from charitable organizations, yet

none of the new data was used in this study ... The superficial review misses the point of trying to determine whether Congress and the IRS should change the distribution rates and tax benefits that apply to these organizations ... Treasury and the IRS missed an opportunity to shed light on loopholes that taxpayers heavily subsidize yet result in financial gains for a few principals and very little money for charities. Unlike the Obama Treasury Department, those of us who want to close loopholes will have to keep drilling down."<sup>46</sup>

On the opposite end of the spectrum of reactions to the report, other commentators have continued to echo the earlier sentiments set forth in the many public comments submitted in response to the Pension Protection Act's reforms and the proposed regulations.<sup>47</sup> After reviewing the report, renowned expert Bruce R. Hopkins offered the following comments:

"This Treasury Department report is a fair and reasonably balanced analysis. The statistics it invokes are a testament to the importance of SOs and DAFs to the charitable sector. The sound message of the report is clear: Let's not have any more legislation on these topics at least until there is greater understanding of the consequences of the laws enacted in 2006. As of now, the data dispel the notion of the need for more tinkering, such as adjustment of the charitable deductions or imposition of payout requirements ... The fact is that many of the PPA's provisions, particularly those pertaining to SOs, are not necessary. They constitute enormous overkill in relation to the ostensible problems. Pre-existing law is ample to address what the report terms "undue donor influence" on SOs and DAFs ... The PPA has nearly wrecked the SO regime. Additional legislation is hardly needed. What is needed is repeal of the elements of the legislation minted in 2006 that are destroying the funding and operations of extremely beneficial SOs."<sup>48</sup>

Supporting organizations and donor advised funds serve as attractive charitable vehicles through which many donors conduct charitable planning and giving. Consequently, supporting organizations and donor advised funds play vital roles within the nonprofit community. Donors who set up donor advised funds at donor advised fund sponsoring organiza-

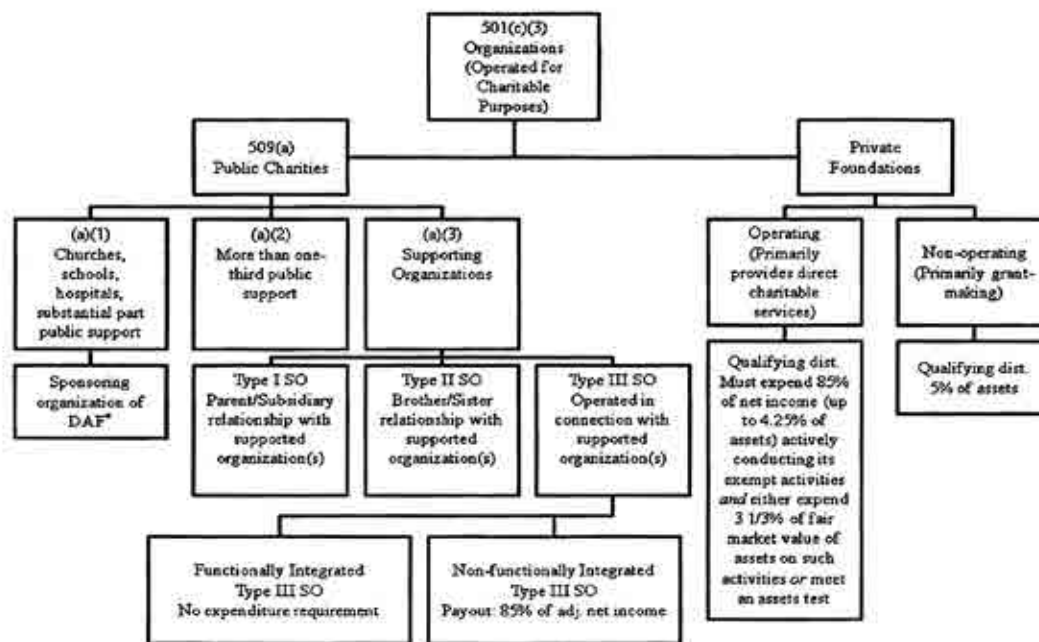
tions enjoy a relatively cost-effective way to realize significant tax benefits while endeavoring to advance the causes they passionately support, even after their death. Moreover, because donor advised funds are managed by the donor advised fund sponsoring organizations, donor account holders have few, if any, administrative responsibilities. Similarly, the code permits supporting organizations to foster a close relationship with one or more chosen charitable organization and to control the timing of charitable tax deductions as well as the timing and amount of grants, while realizing few of their disadvantages.

While certain members of Congress may have posited some legitimate concerns regarding possible tax law abuses by donors to supporting organizations and donor advised funds prior to the enactment of the Pension Protec-

tion Act, the data included within the report suggests such behavior is the exception, not the rule, and existing laws and regulations appropriately address Congress's concerns. Nevertheless, much like the comments referenced above, it appears to be a safe assumption that certain members of Congress and the charitable sector will continue to espouse vastly divergent views of the legitimacy of supporting organizations and donor advised funds to accomplish charitable giving, especially after Treasury issues its final regulations interpreting the reforms included within the act.

*Author's note: The Pension Protection Act instructed Treasury to issue the report one year after the enactment of the act, or on Aug. 17, 2007; however, Treasury submitted the report to Congress on Dec. 5, 2011.*

**Figure 2.1: Universe of Section 501(c)(3) Organizations**



\* Subject to certain restrictions, most organizations described in section 509(a) of the Code may be a DAF sponsoring organization, although most sponsoring organizations are described by section 509(s)(1) of the Code.

1. E.g., U.S. Sen. Charles E. Grassley, (R) (Iowa), and Sen. Max Baucus, (D) (Montana), authored a letter to then Treasury Secretary John Snow, dated Feb. 3, 2005, stating, in part, "[w]e are writing to express our continued concern regarding the inappropriate use of charitable organizations for purposes of tax avoidance and evasion...[w]e are particularly concerned about Section 501(c)(3) charitable organizations avoiding private foundation rules by claiming public charity status as a Type III supporting organization (SO) under section 509 (a)(3) of the Code and section 1.509(a)-4(i) of the Treasury regulations."

2. References to a "code section" are to a section of the Internal Revenue Code of 1986, as amended, unless otherwise indicated.

3. See report, pp. 1 & 9 ("The PPA's provisions largely affect the rules under which SOs and DAF sponsoring organizations must operate to avoid excise taxes and maintain their tax exempt status.")

4. Section 1241(d) of the Pension Protection Act directed the secretary of the Treasury to promulgate new regulations specifically applicable to

Type III supporting organizations and their supported organizations. See 74 Fed. Reg. 48,672 (2009).

5. See Treas. Reg. §1.501(c)(3)-1.

6. See I.R.C., §501(a).

7. See Figure 2.1 to the report. The diagram illustrates the code's division of 501(c)(3) charitable organizations between private foundations and public charities for federal tax purposes.

8. See report, pg. 11

9. *Id.* at p. 13.

10. See 2007-9 I.R.B. 611 (Feb. 2, 2007); See also Appendix E to report (Notice 2007-21).

11. See 2006-51 I.R.B. 1,121(Dec. 18, 2006); See also Appendix D to report (Notice 2006-109).

12. A sponsoring organization is a section 170(c) organization that is not a governmental organization (referenced in section 170(c)(1) and

(2)(A)) or a private foundation and maintains one or more donor advised funds. See I.R.C., §4966(d)(1).

13. See discussion below regarding relationships among Type I, II & III supporting organizations and their supported organizations.

14. Report p. 20 (emphasis added); see also Treas. Reg. §1.509(a)-4(f)(2).

15. See I.R.C. §4966(d)(4)(B)(i).

16. See Treas. Reg. §1.509(a)-4(g).

17. See I.R.C. §4966(d)(4)(B)(ii).

18. See Treas. Reg. §1.509(a)-4(h).

19. See I.R.C. §4943 (f)(5)(A).

20. See Treas. Reg. §1.509(a)-4(i). The proposed supporting organizations regulations maintain both of these tests but propose revisions to both tests which reflect statutory changes made by the Pension Protection Act and address congressional concern that the current regulations do not ensure that there is a sufficient nexus between the supporting organizations and supported organizations.

21. See I.R.C. §4943(f)(5)(B).

22. See Prop. Reg. §1.509(a)-4(i)(5).

23. Report, at p. 1.

24. See I.R.C. §4966(d)(2). Under IRC §4966(d)(2)(B), a donor advised fund does not include a fund or account: 1) that makes distributions only to a single identified organization or governmental entity or 2) with respect to which a donor advises a sponsoring organization regarding grants for travel, study or similar purposes if:

A) the donor's, or the donor advisor's, advisory privileges are performed in his capacity as a member of a committee whose members are appointed by the sponsoring organization;

B) no combination of donors or donor advisors (or related persons) directly or indirectly control the committee; and

C) all grants are awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the sponsoring organization's board of directors.

25. Report, p. 4.

26. See *id.*

27. *Id.* at p. 15 & fn. 1, *supra*.

28. See *id.*, at p. 22.

29. *Id.*

30. See *id.*, at p. 23.

31. See Internal Revenue Service, Notice of Proposed Rulemaking, "Payout Requirements for Type III Supporting Organizations That Are Not Functionally Integrated," REG-155929-06, 74 Fed. Reg. 48,672 (Sept. 24, 2009); see also 2009-47 I.R.B. 650 (Nov. 23, 2009); see generally report, pp. 24-25.

32. During tax year 2006, supporting organizations received \$94.1 billion in total revenue, had total expenses of \$72.5 billion — including \$11.5 billion in grants paid, \$4.0 billion in payments to affiliates, and \$46.9 billion in program expenses — and had a net worth of \$226.7 billion at the end of the year;

During tax year 2006, donor advised fund sponsoring organizations received \$59.5 billion in revenue, including \$9.0 billion in contributions to donor advised funds. These sponsoring organizations had total expenses of \$37.7 billion — including \$5.7 billion in grants paid from donor advised fund assets, \$6.8 billion in other grants paid, and \$20.7 billion in program expenses — and had a net worth of \$211.3 billion at the end of the year. (Assets in donor advised funds are a subset of these amounts);

Prior to tax year 2006, the data available on donor advised funds were very limited; however, IRS data indicate that in tax year 2006, the 2,398 donor advised fund sponsoring organizations had 160,000 donor advised funds. The assets in these funds were valued at \$31.1 billion as of the end of tax year 2006.

See report, p. 79.

33. *Id.*

34. *Id.* In summary form, the report identifies and explains the new laws made applicable to supporting organizations, to Type III supporting organizations (in particular), and to donor advised funds and their sponsoring organizations:

Changes to laws governing supporting organizations address:

- Automatic Excess Benefit Transactions, Donor Control of Supported Organizations; Private Foundation Grants to Supporting Organizations; Donor Advised Fund Grants to Supporting Organizations; Form 990 Filing Threshold; Form 990 Reporting; and Excess Business Holdings.

Changes to laws governing Type III Supporting Organizations address:

- Definition of Functionally Integrated; Strengthened Responsiveness Test; Foreign Supported Organizations, and Payout Requirement.

Changes to laws governing Donor Advised Funds and their sponsoring organizations address;

- Definition of Donor Advised Fund; Definition of Sponsoring Organization; Excise Taxes on Taxable Distributions; Excise Taxes on More-Than-Incidental Benefit; Automatic Excess Benefit Transactions; Excess Business Holdings Rules; Form 990 Reporting; Form 1023 Disclosure; Limits on Charitable Contribution Deduction.

See *id.* at pp. 23-27.

35. See 2009-47 I.R.B. at p. 667:

1) it removed the alternative test for charitable trusts as a means of meeting the responsiveness test;

2) it required the Secretary of the Treasury to set a **new payout requirement** for organizations that are not functionally integrated (generally, those organizations that met the integral part test by satisfying the attentiveness test under the existing regulations) to ensure that such organizations pay a "significant amount" to their supported organizations (emphasis supplied);

3) it provided that a Type III supporting organization must annually provide to each of its supported organizations such information as the Secretary may require to ensure that the supporting organization is responsive to the needs or demands of its supported organization(s);

(4) it prohibited a Type III supporting organization from supporting any supported organization not organized in the United States; and

(5) it prohibited a Type I or Type III supporting organization from accepting a gift or contribution from a person who, together with certain related persons, directly or indirectly controls the governing body of a supported organization of the Type I or Type III supporting organization.

36. See fn. 32, *infra*; See also report, p. 25, fn. 38.

37. See 2009-47 I.R.B. at p. 671.

38. See *id.*, at p. 670.

39. See *id.*, at 671.

40. *Id.*

41. *Id.*

42. See report, pp. 4-5. The precise language of the questions posed by Congress is found in Section 1226 of the Pension Protection Act, as well as in Appendix B to the report.

43. *Current law disallows* a charitable contribution deduction for a contribution to any charity that does not meet the standard of a completed gift, including in the case of a gift to a donor advised fund or supporting organization. Report, p. 82.

44. See report, pp. 80-83.

45. See, e.g., fn. 1, *supra*.

46. See [www.grassley.senate.gov/news/Article.cfm?custome1\\_dataPageID\\_1502=38154](http://www.grassley.senate.gov/news/Article.cfm?custome1_dataPageID_1502=38154) (last accessed March 14, 2012).

47. E.g., "One respondent stated that the PPA left a "cloud of suspicion" hanging over DAFs and SOs and warned that the PPA could have long-term effects on charitable giving." Report, p. 75.

48. Bruce R. Hopkins' *NONPROFIT COUNSEL*, Volume 29 - Number 2, Feb. 2012, p. 3.

## ABOUT THE AUTHOR



Matthew S. Farris is an associate attorney at Rogers and Bell in Tulsa. His primary areas of practice include estate planning, probate, trust administration and related litigation. He serves on various boards and committees for the University of Tulsa College of Law, the Tulsa County Bar Association, American Heart Association, Holland Hall, and he is a graduate of Leadership Tulsa class (45). He and his wife, Stephanie, have two young daughters, Payton and Taylor.

# Bar Members Celebrate Membership Anniversaries

The Oklahoma Bar Association applauds these members who in 2012 reach significant milestone anniversaries.



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# OBA Nominating Petitions

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

## OFFICERS

### VICE PRESIDENT

**DIETMAR CAUDLE, LAWTON**

Nominating Petitions have been filed nominating Dietmar Caudle for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2013. Fifty of the names thereon are set forth below:

**A total of 78 signatures appear on the petitions.**

Nominating Resolutions have been received from the following counties: Comanche, Cotton, Pottawatomie and Seminole

### PRESIDENT-ELECT

**RENEE DeMOSS, TULSA**

Nominating Petitions have been filed nominating Renee DeMoss for election of President-Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning January 1, 2013. Fifty of the names thereon are set forth below:

Stephen Beam, Thomas L. Brett, Cathy Christensen, Gary C. Clark, Bill Conger, M. Joe Crosthwait Jr., Melissa DeLacerda, Sidney G. Dunagan, James R. Eagleton, John A. Gaberino Jr., William R. Grimm, Charles D. Neal Jr., C.D. Northcutt, Bill Paul, David K. Petty, Deborah Reheard, Allen M. Smallwood, Paul M. Vassar, Harry A. Woods Jr., Kenneth L. Brune, Paul Brunton, Deirdre Dexter, Mark W. Dixon, Robert S. Farris, James R. Gotwals, Larry Leonard, Ronald Main, J. Daniel Morgan, Joseph W. Morris, Patrick O'Connor, D. Faith Orlowski, Leonard Pataki, Robert B. Sartin, Gerald C. Dennis, Glenn A. Devoll, Kimberly Hays, Jennifer Kirkpatrick, Chris Meyers, D. Scott Pappas, Nancy Parrott, David Poarch, Ryland R. Rivas Jr., Susan Shields, Bret Smith, Peggy Stockwell, James T. Stuart, Linda Thomas, Drew Edmondson, Reta M. Strubhar and Roy D. Tucker.

**A total of 507 signatures appear on the petitions.**

## BOARD OF GOVERNORS

### SUPREME COURT

### JUDICIAL DISTRICT No. 5

**SANDEE COOGAN, NORMAN**

Nominating Petitions have been filed nominating Sandee Coogan for election of Supreme Court Judicial District No. 5 of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2013.

**A total of 51 signatures appear on the petitions.**

Nominating Resolutions have been received from the following counties: Cleveland, McClain and Garvin

*The Oklahoma Criminal Defense Lawyers Association  
Presents*

*The 20<sup>th</sup> Annual  
Patrick A. Williams*  
**CRIMINAL DEFENSE  
INSTITUTE**



**JUNE 28 & 29, 2012  
HARD ROCK HOTEL & CASINO,  
CATOOSA, OK**

**MCLE Credit**

- OK - 14 Hours, includes 6 hours of Mandated Juvenile Law training\* and 1 hour ethics\*\*

**Location**

**The Hard Rock Hotel & Casino** has a room rate of **\$109.00** for the CDI. This rate is good until **May 28th**. Room reservations can be made by calling **1-800- 760-6700** or online. Use Group Code: **OCDLACDI2012**

**Registration Fees**

<b>-OIDS Contractors/ OCDLA Member</b>	<b>\$150.00</b>
<b>-Non Member/Non OIDS</b>	<b>\$200.00</b>
<b>-Registration after June 16th</b>	<b>\$175.00</b> <b>OCDLA/OIDS</b>
	<b>\$225.00</b> <b>Non OCDLA/OIDS</b>
<b>Hard Rock CDI-T-Shirt in black or white</b>	<b>\$15.00</b>

**FULL NAME:** \_\_\_\_\_ **OBA#:** \_\_\_\_\_

**ADDRESS:** \_\_\_\_\_

**CITY:** \_\_\_\_\_ **STATE** \_\_\_\_\_ **ZIP:** \_\_\_\_\_

**PHONE:** \_\_\_\_\_ **EMAIL:** \_\_\_\_\_

**Visit [www.OCDLAOKLAHOMA.com](http://www.OCDLAOKLAHOMA.com) to register**  
**or mail this ad with payment to: OCDLA, PO BOX 2272, OKC, OK 73101**



# 2012 CRIMINAL DEFENSE INSTITUTE SCHEDULE

## THURSDAY, JUNE 28, 2012 MAIN SESSION

8:00 - 8:15 am	<b>Welcome</b> <i>Tim Laughlin, OCDLA President, Bob Ravitz, Chief Public Defender OK County</i> <i>Pete Silva, Chief Public Defender Tulsa County, Joe Robertson, OIDS</i>
8:15 - 9:55 am	<b>Basics Of Arson Investigation*</b> <i>John Lentini, Scientific Fire Analysis, Big Pine Key, FL</i>
10:10 - 11:25 am	<b>Client Communication Stories &amp; Culture-</b> <i>Shawna Geiger, Colorado Alternate Defense Counsel</i> <i>Laurie James Townes, MD Public Defender Office</i>
11:25 - 12:45 pm	<b>Digital/Electronic Data Forensic Overview*</b> <i>Donovan Farrow, Alias Forensics, Oklahoma City</i>

## BREAKOUT SESSIONS

### TRACK 1

2:00 - 2:50pm	<b>Bring Your Issue To The Forensic Examiner</b> <i>Donovan Farrow, Alias Forensics, OKC</i>
3:00 - 3:50pm	<b>Electronic Discovery Requests &amp; Objections</b> <i>William Campbell, Oklahoma City</i>
4:00 - 4:50pm	<b>Lessons Learned From The Death Belt That Work in Non Death Penalty Cases</b> <i>Chris Adams, Charleston, SC</i>
5:00 - 5:50pm	<b>Expungements--</b> <i>Robert Wyatt IV, Oklahoma City</i>

### TRACK 2

2:00 - 2:50pm	<b>Search &amp; Seizure*</b> <i>Kent Bridge, Oklahoma City</i>
3:00 - 3:50pm	<b>Use of Demonstrative Aids In The Courtroom</b> <i>Shawna Geiger, Colorado Alt Defense Counsel</i>
4:00 - 4:50pm	<b>Appeal Basics/Plea Negotiations --</b> <i>Katrina Legler, OIDS &amp; Jill Webb, Tulsa</i>
5:00 - 5:50pm	<b>Immigration &amp; Revocation Basics for the Defense Attorney</b> <i>Kent Bridge, Oklahoma City &amp; Jason King, Oklahoma City 2:00 -2:50 pm</i>

### TRACK 3

2:00 - 2:50pm	<b>Are Field Sobriety Tests Designed For Failure?</b> <i>Steve Hamilton, Lubbock/Waco, TX &amp; Dr J.L. Booker PhD, Texas</i>
3:00 - 3:50pm	<b>DUI: New Law, Charges &amp; Defenses</b> <i>John Hunsucker, Oklahoma City &amp; Bruce Edge, Tulsa, OK</i>
4:00 - 4:50pm	<b>Fundamentals Of Toxicology*--</b> <i>Tom Kupic, Analytical Research Laboratories</i>
5:00 - 5:50pm	<b>Accurate Interpretation of Toxicology Reports</b> <i>Tom Kupic, Analytical Research Laboratories</i>

## FRIDAY, JUNE 29<sup>TH</sup>

8:00 - 8:30am	<b>Welcome &amp; Presentation of the Patrick A Williams Award</b>
8:30 - 9:20am	<b>Ethics Of Metadata**</b> <i>Steve Nash, Oklahoma City</i>
9:20 - 11:00am	<b>Eyewitness Identification: The Science *</b> <i>Scott Gronlund, University Of Oklahoma</i> <i>James Lampinen, PhD, University Of Arkansas</i>
11:20 - 12:10pm	<b>Attacking The Forensic Case-</b> <i>Chris Adams, Charleston, SC</i>
12:10 - 1:00pm	<b>Being Wrongfully Convicted</b> <i>Daryl Burton, Kansas City, KS</i>
1:10 - 2:00pm	<b>Litigation Strategies/Policies in Juvenile Cases*</b> <i>Kim Dvorchak, Executive Director Colorado Juvenile Defender Coalition</i>

**FOR MORE INFO: Email: [bdp@for-the-defense.com](mailto:bdp@for-the-defense.com) or call the OCDLA: 405-212-5024**

# Know Someone Who Deserves Star Treatment?



OBA awards are the epitome of recognition in the legal profession. Is there a mentor or colleague who has earned the spotlight?

The time has come to nominate Oklahoma lawyers who deserve a round of applause. Awards will be presented at the OBA Annual Meeting to be held Nov. 14-16 at the Sheraton Hotel in downtown Oklahoma City. The deadline for nominations is Friday, Aug. 17.

You know someone who has done something tremendous, now allow them to be recognized.

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

## 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 email your nomination (pick one). Emails should be sent to [jeffk@okbar.org](mailto:jeffk@okbar.org). Fax to 405-416-7089.

Mail to: OBA Awards Committee, P.O. Box 53036, Oklahoma City, OK 73152

## AWARDS AND LAST YEAR'S WINNERS

**Outstanding County Bar Association Award**  
for meritorious efforts and activities  
2011 Winners: Canadian and Washington  
County Bar Associations

**Hicks Epton Law Day Award**  
for individuals or organizations  
for noteworthy Law Day activities  
2011 Winner: Cherokee County  
Bar Association

**Golden Gavel Award**  
for OBA Commit-  
tees and Sections  
performing with  
a high degree of  
excellence  
2011 Winner:  
OBA Civil  
Procedure and  
Evidence Code  
Committee,  
Jim Milton,  
Chairperson

**Liberty Bell Award**  
for non-lawyers  
or lay organiza-  
tions for promot-  
ing or publicizing  
matters regarding  
the legal system  
2011 Winner:  
Oklahoma Coun-  
ty Law Library,  
Oklahoma City

**Outstanding Young  
Lawyer Award**  
for a member of  
the OBA Young  
Lawyers Division  
for service to the  
profession  
2011 Winner:  
Molly Aspan,  
Tulsa

**Earl Sneed Award**  
for outstanding continuing  
legal education contributions  
2011 Winners: Noel and Phil Tucker,  
Edmond

**Award of Judicial Excellence**  
for excellence of character, job  
performance or achievement while  
a judge and service to the bench, bar  
and community  
2011 Winner: Judge Millie Otey, Tulsa

**Fern Holland Courageous Lawyer Award**  
to an OBA member who has courageously  
performed in a manner befitting the highest  
ideals of our profession  
2011 Winner: Not awarded

**Outstanding Service to the Public Award**  
for significant community service by  
an OBA member  
2011 Winner: Philip F. Horning,  
Oklahoma City

**Award for Outstanding Pro Bono Service**  
by an OBA member  
2011 Winner: Stanley Evans, Oklahoma City

**Joe Stamper Distinguished Service Award**

to an OBA member  
for long-term service  
to the bar association  
or contributions to  
the legal profession  
2011 Winner: William  
R. Grimm, Tulsa

**Neil E. Bogan  
Professionalism  
Award**

to an OBA member  
practicing 10 years or  
more who for con-  
duct, honesty, integri-  
ty and courtesy best  
represents the highest  
standards of the legal  
profession  
2011 Winner: Judge  
William J. Holloway  
Jr., Oklahoma City

**John E. Shipp  
Award for Ethics**

to an OBA member  
who has truly exem-  
plified the ethics of  
the legal profession  
either by 1) acting in  
accordance with the  
highest ethical stan-  
dards in the face of  
pressure to do othe-  
rwise or 2) by serving  
as a role model for  
ethics to the other

members of the profession  
2011 Winner: Brooke Smith Murphy,  
Oklahoma City

**Alma Wilson Award**  
for an OBA member who has made a signif-  
icant contribution to improving the lives of  
Oklahoma children  
2011 Winner: Robert N. Sheets,  
Oklahoma City

**Trailblazer Award**  
to an OBA member or members who  
by their significant, unique visionary efforts  
have had a profound impact upon our pro-  
fession and /or community and in doing  
so have blazed a trail for others to follow  
2011 Winner: Donald W. Davis Sr.,  
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.



*Artwork by Mike Larsen*

## **THE SOVEREIGNTY SYMPOSIUM XXV - 2012**

# *Metamorphosis*

JUNE 12 - 13, 2012

SKIRVIN HILTON HOTEL

OKLAHOMA CITY, OKLAHOMA

# THE SOVEREIGNTY SYMPOSIUM AGENGA

## *Metamorphosis*

June 12 – 13, 2012 • Skirvin Hilton Hotel • Oklahoma City, Oklahoma

Presented by

The Oklahoma Supreme Court  
The Indian Law Section of the Oklahoma Bar Association  
Oklahoma City University School of Law • The University of Oklahoma College of Law  
The University of Tulsa College of Law and The Sovereignty Symposium, Inc.

### Tuesday, June 12, 2012

*A.M. 4 Cle credits / 0 ethics included*

*P.M. 4 Cle credits / 3 ethics included*

#### Tuesday Morning:

- 7:30 Registration
- 8:30 – 12:00 PANEL A: TRIBAL ECONOMIC DEVELOPMENT
- 8:30 – 12:00 PANEL B: SEEDS OF SOVEREIGNTY – FROM THE PRESERVATION OF HISTORIC SEEDS TO THE FUTURE OF FOOD
- 8:30 – 10:30 PANEL C: WARRIORS FOR FREEDOM: ISSUES FACING OUR MILITARY MEMBERS PAST AND PRESENT
- 8:30 – 10:30 PANEL D: COMPUTERS, COURTS AND THE TRULY AUTOMATED COURT SYSTEM
- 10:30 – 12:00 PANEL E: DRUG COURTS
- 10:30 – 12:00 PANEL F: EMERGING RISK FACTORS FOR AMERICAN INDIAN STUDENTS IN HIGHER EDUCATION

#### Tuesday Afternoon:

- 1:15 – 2:30 OPENING CEREMONY AND KEYNOTE ADDRESS
- 2:30 – 5:30 PANEL A: DEPARTMENT OF COMMERCE COOPERATIVE EFFORTS IN ECONOMIC DEVELOPMENT
- 2:30 – 5:30 PANEL B: ETHICS
- 2:30 – 5:30 PANEL C: FROM SEMINOLE TO SINGAPORE
- 2:30 – 5:30 PANEL D: UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES – CURRENT EVENTS IN INTERNATIONAL LAW
- 5:30 RECEPTION

### Wednesday, June 13, 2012

*A.M. 4 Cle credits / 0 ethics included*

*P.M. 4 Cle credits / 0 ethics included*

#### Wednesday Morning:

- 7:30 Registration
- 8:30 – 12:00 PANEL A: INTERNET GAMING
- 8:30 – 12:30 PANEL B: INDIAN LAW AND ORDER ACT
- 8:30 – 12:30 PANEL C: COMPLEX ECONOMIC DEVELOPMENT ISSUES FOR THE LEGAL PRACTITIONER
- 8:30 – 5:00 PANEL D: CHILDRENS' ISSUES

#### Wednesday Afternoon:

- 1:30 – 5:00 PANEL A: GAMING
- 1:30 – 5:00 PANEL B: CRIMINAL LAW
- 1:30 – 5:00 PANEL C: SOCIAL MEDIA & INDIGENOUS COMMUNITIES
- 1:30 – 5:00 PANEL D: CHILDRENS' ISSUES
- 1:30 – 5:00 PANEL E: NEW STRATEGIES IN THE STATE AND COUNTY BRIDGE IMPROVEMENT PROGRAM
- 1:30 – 5:00 PANEL F: THE INDIAN GOVERNMENT TAX STATUS ACT

A FULL AGENDA MAY BE FOUND AT  
[WWW.THEOVEREIGNTYSYMPOSIUM.COM](http://WWW.THEOVEREIGNTYSYMPOSIUM.COM)

16 hours of CLE credit for lawyers will be awarded, including 3 hours of ethics.

NOTE: Please be aware that each state has its own rules and regulations, including the definition of "CLE"; therefore, certain portions of the program 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 SPEAKERS

### U.S. Rep. Tom Cole

U.S. Rep. Tom Cole is a fifth generation Oklahoman and an enrolled member of the Chickasaw Nation. He is currently the only Native American serving in Congress. He was awarded the Congressional Leadership award by the National Congress of American Indians and was inducted in the Chickasaw Hall of Fame. Rep. Cole is a member of a distinguished Chickasaw family. His great-aunt, renowned story teller, TeAta Thompson Fisher, was the first person to be named an Oklahoma treasure. His late mother, Helen, served as the mayor of Moore, state representative, state senator, and the Oklahoma Supreme Court's appointee to the Oklahoma Ethics Commission. His late father, John, served 20 years in the U.S. Air Force and worked two decades as a civilian federal employee at Tinker Air Force Base. Tom and his wife Ellen, have one son, Mason, and reside in Moore.



He became the representative for Oklahoma's Fourth Congressional District on Nov. 6, 2002. *Time Magazine* has called Cole "one of the sharpest minds in the House." In addition to his other duties, he serves on the House Appropriations Committee, as a deputy whip in the U.S. House and as Republican Co-Chairman of the Native American Caucus. Before his election to Congress, he served as a college instructor, a member of the Oklahoma State Senate and as Oklahoma's secretary of state. He was also a founding partner and past president of CHS & Associates, a nationally recognized consulting and survey research firm, based in Oklahoma City.

Rep. Cole is a scholar of history and politics. He holds a B.A. from Grinnell College, an M.A. from Yale University and a Ph.D. from the University of Oklahoma. He was a Thomas Watson Fellow and a Fulbright Fellow at the University of London, and he serves on the national boards of Fulbright Association and the Aspen Institute.

### U.S. Deputy Attorney General James Cole



James Cole was sworn in as the U.S. deputy attorney general in January 2011. He joined the Justice Department in 1979 and served for 13 years—first as a trial attorney in the Criminal Division and later as the deputy chief of the division's Public Integrity Section, the office which handles investigation and prosecution of corruption cases against officials and employees at all levels of government. He tried a number of notable cases, including prosecution of a U.S. district judge, a member of Congress, and a federal prosecutor.

From 1992 until 2010, he was a partner at Bryan Cave LLP specializing in white collar defense. He also counseled businesses on securities, regulatory and criminal law issues. In 1995, he was asked to serve as special counsel to the U.S. House of Representatives on standards of official conduct. His investigation led to a bipartisan resolution which resulted in a formal reprimand of the speaker of the house.

Mr. Cole has been a member of the adjunct faculty at Georgetown University Law Center, teaching courses on public corruption law and legal ethics, and he has lectured at Harvard University's Kennedy School of Government. He is former chair of the ABA White Collar Crime Committee and served as the chair-elect of the ABA Criminal Justice Section.

He received his graduate degree from the University of Colorado and his J.D. from the University of California-Hastings.

# Metamorphosis

The Sovereignty Symposium 2012  
June 12 – June 13, 2012

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

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

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

Billing Address if different from above: \_\_\_\_\_

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

Nametag should read: \_\_\_\_\_

E-Mail Address *and/or* Website: \_\_\_\_\_

Telephone: Office: (\_\_\_\_) \_\_\_\_\_ Cell: (\_\_\_\_) \_\_\_\_\_  
Fax: (\_\_\_\_) \_\_\_\_\_

Tribal Affiliation (if applicable): \_\_\_\_\_

If Bar Association Member- Bar #: \_\_\_\_\_ and State: \_\_\_\_\_

# of Persons		Amount Enclosed
	<b>\$250.00</b> <b>Registration fee</b> (\$275.00 if postmarked after May 21).	
	<b>\$150.00</b> <b>Registration for Federal, State or Tribal judges</b> (this fee is waived for Oklahoma District Court Judges).	
	<b>\$150.00</b> <b>Registration, June 13, 2012 only</b> (no one day registration for June 12)	
	<b>TOTAL AMOUNT</b>	

We ask that you register online at [www.thesovereigntysymposium.com](http://www.thesovereigntysymposium.com). This site also contains hotel information and a detailed agenda. The Skirvin Hilton number is 405-272-3040. If you wish to register by paper, please mail this form to:

The Sovereignty Symposium, Inc.  
Oklahoma Judicial Center  
2100 North Lincoln Blvd., Suite 1  
Oklahoma City, OK 73105



# LAW DAY 2012

**THANK YOU**  
to these individuals and  
groups who made  
Law Day 2012  
a success!

## Ask A Lawyer TV Program

Chief Justice Steven Taylor, Supreme Court

Cathy Christensen, OBA President

Moderator: Dick Pryor

OBA Participants and Panelists:

Paul Austin, Lynn Babb, Judge Mark Barcus, Gary Briggs,

Judge Daman Cantrell, Jim Gotwals, Kimberly Hays,

Gregg Luther, Keren McLendon, Lt. Col. Max Moss,

Craig Reffner, Deborah Reheard, Noel Tucker, Phillip Tucker,

Mort Welch, Brad West

The production staff and crew at OETA

Red Rock Video Services

## Ask A Lawyer Free Legal Information Statewide Project

All Oklahoma attorneys who volunteered to answer phones

OBA Law Day Committee Chairperson Tina Izadi

Vice Chair Richard Vreeland and Law Day Committee members

County Law Day Chairpersons

County Bar Association Presidents

### Additional Thanks:

Legal Aid Services of Oklahoma Inc.

Oklahoma National Guard 45th Infantry Brigade Combat Team

Norman Armed Forces Reserve Center

Darwin Motorcycles

Tulsa County Family Court Services

The Winds House

Regional Food Bank of Oklahoma

Printing Inc.

Leslie Blair, State Farm Insurance

Legal Graphics Inc.

Oklahoma County Bar Auxiliary

**1,400 contest  
entries  
received!**

**Nearly 1,100  
calls for free  
legal advice!**

A special thank you to



**More than 200  
volunteer lawyers  
statewide!**

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



## When Experience Counts

GableGotwals welcomes Dean Luthey to the Litigation Team. Whether it is arguing an appeal before the U.S. Supreme Court or handling an Alternative Dispute Resolution, Dean has garnered 30 years of outstanding litigation experience. His clients have included major energy companies, Fortune 500 companies, Indian Tribes, national churches, state and local governmental entities, insurance companies, Big 4 accounting firms, law firms and health care providers.

Welcome Dean!

TULSA · OKLAHOMA CITY · [www.gablelaw.com](http://www.gablelaw.com)



# Session Nears End

By Duchess Bartmess

*Sine Die* of the Second Session of the 53rd Oklahoma Legislature is fast approaching. Between now and the 5 p.m. May 25, 2012, deadline for adjournment, the speed and intensity of the session will increase. The following is a summary of significant legislative and gubernatorial action since the last report.

The bulk of the activity will involve conference committees. When a measure is sent to conference, it can be amended or completely rewritten. The action of the conference committee is reported in the form of a conference committee report that the conference committee members agree to by signing the report.

The following measures are in various stages of conference consideration:

**SB132** – Armed Forces retirement benefits – income tax exemption

**SB134** – physician assistants – medical care in an emergency

**SB201** – motor vehicle registration – debts due to delinquent payment of fines or penalties

**SB447** – criminal procedure – protective order, arrest and bond

**SB1055** – Oklahoma Self-Defense Act – clarifying prohibited condition

**SB1059** – creates Health Care Choice Act



**SB1067** – motor vehicles – officers authorized to have vehicles towed

**SB1230** – tax administration – licensing and permitting procedures

**SB1231** – tax administration – due dates for submitting reports and remitting taxes

**SB1232** – OK Vehicle License and Registration Act – provisions to special license plates

**SB1234** – gross production tax – limit total refund paid during specified time period

**SB1234** – gross production tax – limit total refund paid during specified time period

**SB1235** – OK Quality Jobs Program Act – dismissal from program under specified circumstances

**SB1314** – depositions – allowing attorney to provide counsel

**SB1327** – Regional Water Planning Act

**SB1328** – water quality and quantity monitoring

**SB1336** – Petroleum Storage Tank Indemnity Fund – termination date

**SB1355** – requiring a court order for removal from Sex Offenders Registry

**SB1397** – Medicaid – sliding scale for premium assistance program

**SB1398** – outsourcing certain foster care services by DHS

**SB1406** – paternity – providing exception to presumption

**SB1420** – prohibiting laser sighting device as hunting aid

**SB1436** – repealing franchise tax levy

**SB1464** – OK Quality Jobs Program Act – modifying definitions

**SB1480** – qualification requirements county electrical inspectors

**SB1520** – workers' comp benefits – reimbursement rates – tort claims

**SB1616** – creates Controlled Insurance Programs Act

**SB1617** – Unauthorized Insurers and Surplus Lines Insurance Act

**SB1618** – appointment termination of insurance producers – requiring certain information

**SB1644** – motor carrier permit restrictions and exceptions

**SB1716** – unlawful to cut or damage fence used for certain purposes

**SB1728** – Human Rights Commission – employment-based discrimination

**SB1743** – creates Landowner's Hunting Freedom Act

**SB1795** – mental health and substance abuse facilities

**SB1816** – schools – creating Statewide Virtual Charter School Board

**SB1820** – schools – online pupils weighted for calculation of aid

**SB1868** – Roofing Examination and Review Board

**SB1887** – dissolution of marriage – military retainer pay division determinations

**HB1058** – elections; modifying requirements for formation of a recognized political party

**HB1464** – tax commission; venue of civil actions; appeals

**HB1465** – schools; changing school attendance age date; screening

**HB2075** – insurance; modifying Employer Health Insurance Purchasing Group Act

**HB2198** – penalty – taking, possessing or transporting paddlefish product

**HB2242** – motor vehicles; registration weight of wreckers

**HB2273** – public health and safety; authorizing professional expenses

**HB2286** – marriage; division of certain military benefits

**HB2300** – children; deprived child permanency hearing; modifying requirements

**HB2306** – schools; modifying and deleting certain school requirements

**HB2367** – motor vehicles; written and driving examinations for driver licenses

**HB2396** – criminal procedure; final protective orders

**HB2440** – courts; modifying number of district court judges for certain districts

**HB2494** – adding certain data used to determine a high school annual grade

**HB2510** – prohibiting certain acts related to sales tax exemptions

**HB2522** – firearms; manner in which firearms may be carried by handgun licensees

**HB2525** – authorizing certain traffic stops by law enforcement officers

**HB2535** – property; statutory rule against Perpetuities Act

**HB2563** – state-tribal relations; modifying Native American liaison requirement

**HB2576** – tax provisions; modifying assorted tax provisions

**HB2582** – background checks for nurse aides

**HB2605** – county clerks; records by electronic means

**HB2616** – creating sales tax exemption for durable medical equipment

**HB2621** – tax credits; transferability

**HB2652** – Oklahoma Innocence Collaboration Program

**HB2653** – requiring information on low-point beer permit

**HB2683** – modifying definition of bicycles

**HB2689** – higher education; in-state residency status of dependents of military personnel

**HB2700** – schools; epinephrine injectors

**HB2736** – children; providing for the outsourcing of certain DHS functions

**HB2787** – banks; providing for affidavit of heirship for safe deposit boxes

**HB2836** – flood plain management regulations

**HB2921** – Commercial Pet Breeders Act

**HB2959** – Crimes and Punishments Act

**HB2978** – tax credits; criteria; restrictions

**HB3038** – individual income tax; rates; reductions; deductions and exemptions; sales tax

As of May 11, measures of interest on the desk of the governor awaiting action:

**HB1952** – corporation commission; motor vehicle size and weight enforcement

**HB2250** – motor vehicles; requiring consideration of weighing area levelness

**HB2446** – professional employer organization late-registration fee

**HB2511** – schools; deleting limitation on approved reading screening instruments

**HB2524** – modifying the Real Estate Code

**HB2641** – counseling, family and societal issues on students

**HJR1110** – approving rules of the Department of Environmental Quality

**SB1019** – public housing authorities – filing claim against income tax refunds

**SB1053** – surety bonds for public and private projects

**SB1111** – directing regents to establish University Center of Ponca City

**SB1183** – Department of Human Services to obtain motor vehicle reports

**SB1189** – modifying the Shale Reservoir Development Act

**SB1199** – accrual of certain interest on support payments

**SB1246** – workers' compensation fraud requiring stay of proceeding

**SB1279** – Professional Entity Act

**SB1313** – delivery of service – persons authorized to accept or refuse service

**SB1386** – attorney general – OK Medicaid Program Integrity Act

**SB1401** – disclosure if nursing or specialized facility does not have emergency power generator

**SB1412** – motor vehicles – release of records at no charge to nonprofit providers

**SB1449** – ad valorem tax – income threshold for exemption after specified date

**SB1471** – collection of child support – tax commission to provide information to DHS

**SB1474** – insurance – creating privilege for insurance compliance self-evaluative audit

**SB1497** – OK Consumer Protection Act – going out of business practices

**SB1523** – limited liability companies – imposing fee – modifying form of notice

**SB1554** – State Fire Marshal Commission – modifying membership

**SB1582** – Juvenile Affairs director to appoint and commission campus police

**SB1627** – Oklahoma Energy Initiative – creating

**SB1678** – manufactured homes – requirements for moving or transporting

**SB1690** – Dentistry Board – modifying provisions

**SB1760** – OK Riot Control and Prevention Act

**SB1905** – Prohibiting employer requiring military retiree to participate in employer health insurance

**SB1951** – Wounded Warrior Protection Act

Between April 16, and May 11, the governor approved the following measures, excluding sunset re-creation legislation:

**HB1314** – game and fish; repeal prohibition to hunt white deer

**HB1968** – insurance; prohibiting certain life insurance travel restrictions

**HB2090** – career and technology education; division of building fund levy in certain area

**HB2200** – The Oklahoma Real Estate License Code; modifying definition

**HB2204** – labor; modifying various sections of the Employment Security Act of 1980

**HB2246** – Oklahoma State Bureau of Investigation personnel

**HB2251** – C Property; Oklahoma Trust Act; adding definition for trustee advisor

**HB2260** – motor vehicles; toll evasion notices

**HB2264** – animals; transferring duties to Department of Agriculture, Food, and Forestry

**HB2266** – Public Health Delivery Act

**HB2270** – Nursing Facilities Quality of Care Fee

**HB2281** – counties; authorizing certain officers to designate undersheriff

**HB2289** – private process servers; private process server licenses

**HB2302** – kidnapping

**HB2318** – insurance; modifying insurer examination frequency

**HB2325** – motor vehicles; providing annual permit for certain conservation equipment

**HB2329** – prohibiting convicted arsonist from being a firefighter

**HB2353** – agriculture; Swine Feeding Operations Act; modifying educational training requirements

**HB2364** – prisons; contraband in jails and prisons

**HB2365** – environment and natural resources; modifying radiation source exceptions

**HB2374** – motor vehicles; wrecker operators

**HB2381** – public health and safety; RU-486

**HB2414** – Notice of Opportunity to Repair Act; modifying definition

**HB2419** – prohibiting certain liability during severe weather

**HB2433** – crimes and punishments; false personation

**HB2449** – elections; municipal elections; modifying information contained in resolution

**HB2453** – insurance; modifying various provisions

**HB2458** – insurance; modifying surplus lines requirements

**HB2476** – cities and towns; general powers of municipalities; modifying notice requirement

**HB2495** – game and fish; permitting release of unclaimed venison

**HB2502** – Grand River Dam Authority; modifying terms of board members

**HB2516** – modifying the Reading Sufficiency Act

**HB2518** – crimes and punishments; human trafficking

**HB2521** – torts; charitable clinic

**HB2558** – Employment Security Administration Fund; appropriations

**HB2561** – public health and safety; civil actions against abortion provider

**HB2564** – state government; exception for certain agreements with Indian tribes

**HB2566** – public health and safety; freedom of choice for residents

**HB2568** – modifying penalty for personal injury accidents

**HB2573** – poaching; requiring suspension and revocation of hunting or fishing license

**HB2575** – motor vehicles; providing alternative method to obtain salvage title

**HB2587** – public health and safety; Dental Loan Repayment Program

**HB2643** – roads, bridges and ferries; removing limitation on sign removal

**HB2648** – revenue and taxation; appraisal records; ad valorem protests

**HB2654** – oil and gas; Energy Litigation Reform Act

**HB2655** – counties and county officers; permitting recording if submitted electronically

**HB2656** – conveyances; Uniform Real Property Electronic Recording Act

**HB2686** – professional engineers and land surveyors; modifying various sections

**HB2710** – revenue and taxation; retail establishments; tobacco products

**HB2715** – agriculture; pesticide applicator licenses; modifying prohibited acts

**HB2727** – schools; substitute teachers

**HB2738** – corporation commission; special universal services request

**HB2742** – consumer credit; amending various sections of Uniform Consumer Credit Code

**HB2748** – Real Estate Appraisers Act; modifying application process for reciprocity

**HB2750** – schools; extending authority to remove individual

**HB2786** – agriculture; Agriculture Department record retention schedule

**HB2835** – environment and natural resources; uses of gray water

**HB2902** – counties and county officers; reapportionment of county commissioner districts

**HB2917** – agriculture; poultry feeding operation; requiring nutrient management plan

**HB2920** – game and fish; allowing certain traps

**HB2925** – Oklahoma Farmed Cervidae Act; allowing negotiation of reciprocal agreements

**HB2928** – modifying allocation ending dates – gross production tax;

**HB2941** – pseudoephedrine or ephedrine sales tracking; pharmacy requirements

**HB2942** – public health and safety; adding substances to controlled drug schedules

**HB2967** – athlete agents; modifying the Uniform Athlete Agents Act

**HB2970** – schools; testing

**HB2994** – cities and towns; street improvement districts; procedures

**HB2995** – county commissioners; modifying general powers of board

**HB3000** – schools; school board continuing education requirements; expanding prohibition

**HB3009** – murder in the first degree

**HB3052** – corrections; corrections reform

**HB3074** – liens; providing for hospital lien when injured asserts claim against insurer

**HB3091** – criminal record expungements; expungement qualifications

**HB3110** – revenue and taxation; exempt treatment of certain livestock

**HJR1093** – judicial compensation; disapproving pay increase

**SB46** – sales tax – extending exemption for 100% disabled veterans to surviving spouse

**SB243** – seismic exploration

**SB284** – public trusts to establish police departments

**SB448** – commercial motor vehicles transporting empty storage container tank

**SB987** – first degree murder – expanding crime

**SB1012** – insurance coverage of portable electronics

**SB1016** – OSBI – Internet Crimes Against Children Unit

**SB1042** – solid waste management – recycling roofing shingles

**SB1043** – water discharge permits

**SB1056** – technology – increase number of students seeking industry certification

**SB1060** – attorney general to be notified of insurance fraud

**SB1065** – Anti-Drug Diversion Act – disclosure of information to public

**SB1071** – income tax – reauthorizing donation from refund for programs

**SB1075** – municipal contracting – population restrictions

**SB1082** – Deferred Deposit Lending Act – confidential information

**SB1095** – State Board of Examiners of Psychologists – emergency hearings

**SB1119** – school – inform parents of students with impairments of resources available

**SB1127** – bail bondsmen – qualifications for licensure

**SB1152** – insurance – limit on value of property used as inducement

**SB1179** – Uniform Controlled Dangerous Substances Act – electronic prescribing

**SB1187** – CLEET – authorizing council to waive moneys under certain circumstances

**SB1188** – CLEET – requiring officers to complete legal update

**SB1210** – veteran facilities exempt from specified long-term care regulations

**SB1215** – county purchasing competitive bidding requirements

**SB1218** – alcoholic beverages – authorizing waiver to prohibition

**SB1263** – low-point beer special event permit

**SB1274** – Heartbeat Informed Consent Act – creating

**SB1277** – educational requirements for licensed alcohol and drug counselors

**SB1279** – Professional Entity Act

**SB1346** – municipal judges – appointments for judicial disqualifications

**SB1354** – commissioner of public safety to provide for restricted driver license

**SB1366** – advance directives – clarifying applicability of directive

**SB1371** – confidentiality interpretation as it relates to examinations by insurance commissioner

**SB1425** – storm debris removal – authorizing burning of debris

**SB1439** – Insurance Dept Anti-Fraud Unit – expanding scope of activities investigated

**SB1443** – school – prohibiting withdrawal or denial of accreditation for failure to comply

**SB1465** – sales tax – requirement relating to direct pay permit – sales tax exemption

**SB1475** – creating Service Warranty Act

**SB1493** – OK Certified Real Estate Appraisers Act – license upgrade

**SB1505** – Oklahoma Witness Protection Program

**SB1537** – motor vehicles – specifying information contained on permits

**SB1539** – Department of Corrections to process and export agricultural products

**SB1544** – officers – modifying exception to dual office holding provision

**SB1546** – OSBI – expanding enforcement authority of officers

**SB1565** – dyslexia teacher training pilot program

**SB1580** – State Anatomical Board – donor program registration

**SB1601** – OK Horse Racing Act – expanding locations for fair association race meetings

**SB1621** – Small Employer Health Insurance Reform Act – exempting benefits plans

**SB1640** – turnpikes – penalty

**SB1665** – Energy Litigation Reform Act – creating

**SB1667** – low-point beer and alcoholic beverage licenses

**SB1707** – election dates which special elections may be held

**SB1734** – Uniform Controlled Dangerous Substances Act – investigative authority

**SB1774** – credit card transaction – private education institutions to charge fee

**SB1785** – OK Self-Defense Act – adding non-permitting carry states that OK shall reciprocate

**SB1796** – school district treasurers to invest in obligations of state

**SB1797** – creating Commission for Education Quality and Accountability

**SB1798** – commissioner of public safety – provide rules on collisions on private property

**SB1800** – child care facility review board for nonemergency license revocations – creating

**SB1811** – disaster areas – penalties

**SB1830** – admissibility of evidence – requirements for evidence

**SB1863** – Post-Military Service Occupation, Education and Credentialing Act – creating

**SB1874** – motor vehicles – providing waiver of revocation, suspension, cancellation

As of May 11, 2012, the governor has vetoed the following measures this session:

**HB2241** – statutes and reports; APA; requiring approval of certain rules

**HB2296** – torts; prohibiting liability for owners who allow shelter during severe weather (attempt to override failed)

**HB2308** – Chiropractic Practice Act; modifying powers and duties of board

**HB2669** – cemeteries; surveys and plats; modifying recording

**HB2903** – emergency services; nine-one-one emergency addresses to county election boards

**HB1706** – Oklahoma Drug-endangered Children's Alliance Board

It is not possible to provide a complete list or analysis of each measure here. As has been noted before, the brief description beside each bill number serves only as a general description. Bar members are encouraged to look at the following information, pay particular attention to measures that may be of interest and review the latest version of the measure in its entirety. The Oklahoma State Legislature website is [www.oklegislature.gov](http://www.oklegislature.gov).

*Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee.*





## Oklahoma City University School of Law

### **POSITION ANNOUNCEMENTS:**

#### **ASSISTANT DEAN FOR LAW ADMISSIONS**

The Assistant Dean for Law Admissions designs and implements recruitment strategies and admissions policies and procedures in conformity with the School of Law's strategic plan. The admissions dean is responsible for all aspects of the planning, administration, management and execution of the law school's recruitment and admissions effort, including the training and supervision of personnel in the admissions office.

The position requires a Juris Doctor degree and admission to the bar. Candidates must have two years of experience in the legal profession, in law school admissions or a combination of the two. Five years is desirable.

#### **ASSISTANT DEAN FOR LAW CAREER SERVICES**

The Assistant Dean for Law Career Services directs a comprehensive career services program that includes the Licensed Legal Intern Program, the identification and development of law-related employment opportunities for students and alumni, student and alumni career advisement, the cultivation of prospective employers, the promotion of students and alumni to prospective employers, the use of sophisticated technology, the training and supervision of the personnel of the law career services office and the assessment of the office's operations.

The position requires a Juris Doctor degree and admission to the bar. Candidates must have two years of experience in the legal profession, in law school administration or a combination of the two. Five years is desirable.

TO READ THE FULL JOB DESCRIPTION OR TO APPLY, VISIT OKLAHOMA CITY UNIVERSITY'S WEBSITE AT <http://ocuemployment.silkroad.com>.

**ONLY ONLINE APPLICATIONS WILL BE ACCEPTED.**

*Oklahoma City University is an equal opportunity employer and affirms the values and goals of diversity.*

# Reheard Takes Reins of Pros 4 Vets

By Lori Rasmussen

OBA Immediate Past President Deborah Reheard spent much of 2011 getting the Oklahoma Lawyers for America's Heroes program off the ground, but as it turns out, she was only getting started. Ms. Reheard, who lives and practices in Eufaula, has been selected as the executive director of Oklahoma City-based Pros 4 Vets, and she will now guide that nonprofit organization in its mission of making a difference for those who put their lives on the line for American freedom.

Pros 4 Vets was founded about the same time the OBA launched the military assistance effort. The organization is a coalition of professionals including not only lawyers but star athletes and entertainers. The organization works to assist veterans in a variety of ways, and it partnered with the OBA to provide training for lawyers volunteering pro bono legal services to military members and veterans. Founder and OBA member Reggie Whitten said Ms. Reheard was chosen to lead the nonprofit because of her demonstrated ability to be an effective leader.

"During her tenure as OBA president, Ms. Reheard was instrumental in launching the heroes program," said Mr. Whitten. "The scope and scale of that project was such that it took an enormous effort to get it off the ground. I am convinced her abilities and work ethic make her the right person to lead Pros 4 Vets as we work to ensure we are serving those who serve our country."

Ms. Reheard says under her leadership, Pros 4 Vets will continue its mission of assisting service members and veterans with their legal problems, while also guiding them toward other resources that will address challenges such as treatment and counseling of post traumatic stress disorder. In addition, her goal is to assist other state bar associations as they develop their own legal assistance programs.

"Pros 4 Vets can help kick start other states' programs in ways the OBA cannot, for example through fundraising and hands-on assistance,"



*OBA 2011 President Deborah Reheard*

Ms. Reheard said. "This will enable us to build a network of regional affiliations to ensure even more servicemembers and veterans get the legal help they need."

OBA President Cathy Christensen described the relationship between the bar association and Pros 4 Vets as mutually beneficial, and she said Ms. Reheard's leadership of the nonprofit is the next logical step for the growth of the OBA military assistance effort.

"Deb was a natural fit to lead Pros 4 Vets," Ms. Christensen said. "Her enthusiasm for the OBA heroes program has been contagious, as evidenced by the ever-growing number of attorney volunteers. By harnessing the star power of Pros 4 Vets, we create awareness of both the availability of these services and the continued need to support the heroes program."

Ms. Reheard, who will continue to practice law while she serves as Pros 4 Vets executive director, said, "Our current focus is getting attorneys

enlisted to volunteer as we stand ready to help the thousands of service members who have returned to the state after their year-long deployment in Afghanistan. We owe it those who have made sacrifices for us."

### **OBA MILITARY ASSISTANCE EFFORT CONTINUES**

The heroes program is available to all qualified military servicemembers and veterans, though as Ms. Reheard points out, the need for legal services is expected to increase now that members of Oklahoma's 45th Infantry Brigade Combat Team are home and in the process of reintegrating stateside. The OBA Military Assistance Committee is highlighting the need for family law practitioners to volunteer for the program.

"These men and women risked their lives, and too many of them may soon face unique legal struggles at home related to their service," Ms. Reheard said. "That's where a lawyer's training and expertise can help. Just as no one is left behind on the battlefield, our mission is to leave no one behind in the courtroom."

To volunteer or learn more about the Oklahoma Lawyers for America's Heroes program, visit [www.okbar.org/heroes](http://www.okbar.org/heroes). More information about Pros 4 Vets is available at [www.pros4vets.org](http://www.pros4vets.org).

*Ms. Rasmussen is an OBA communications specialist.*

## **FROM THE PRESIDENT**

*cont'd from page 1196*

The evening's keynote speaker, former noted attorney James Blackburn and author of *Flame-out: From Prosecuting Jeffrey MacDonald to Serving Time to Serving Tables* explained how he almost lost everything when his life spiraled out of control because of crippling depression. Despite serving time in prison and suffering humiliation, Mr. Blackburn never gave up. He never quit. His message to the rapt crowd was that we may experience change and loss in our lives that requires us to start over but with the support and love of friends and family, it is possible to heal and create a meaningful and productive life. Mr. Blackburn delivered a powerful and inspiring message.

So, you do the math:

- 30 OBA staff members as volunteers and greeters
- More than 20 members of the Lawyers Helping Lawyers Assistance Program Committee
- Approximately 20 members of the Work/Life Balance Committee
- 18 members of the Advisory Committee
- One OBA president's son, John Ditmars, and his guest, Liza, as volunteer waiters, plus
- 180 banquet and auction attendees.

It is impossible to predict the number of OBA members who may benefit from the hard work and dedication of the LHL Foundation Inc., but the value of a life saved is priceless.

In the words of legendary football coach Vince Lombardi, "It does not matter how many times you get knocked down, but how many times you get up." As an association, we have made the commitment to help our colleagues if life knocks them down and they need our support to get back on their feet. It is vital to assist them to return to a productive and meaningful life — and the practice of law.

For more information about Lawyers Helping Lawyers Foundation Inc., visit the website [www.lhlfoundation.org](http://www.lhlfoundation.org) or attend one of the Lawyers Helping Lawyers Assistance Program Committee meetings.



# Sandra Day O'Connor's Visit a Hit with Oklahoma Students

More than 200 middle and high school students were presented with the opportunity this week to meet former U.S. Supreme Court Justice Sandra Day O'Connor during her visit to the Oklahoma Bar Center to promote her civics education initiative, "iCivics." Hundreds of other students across the state listened in via a live webcast of the event.

The event was co-sponsored by the Oklahoma Bar Association Law-Related Education Department and Oklahoma City University.

In the morning portion of the program, Justice O'Connor, along with Oklahoma Supreme Court Chief Justice Steven Taylor, took questions submitted by students during a conversation with the justices. The questions were presented by two moderators: OBA President Cathy Christensen and OCU President Robert Henry. The questions were on topics such as a day in the life of a justice, how the two justices ended up in the legal field, and the importance of civics education.

During the afternoon, several Oklahoma schools participated in the "Law



*Students listen to the conversation between Chief Justice Taylor and Justice O'Connor.*



*Oklahoma Supreme Court Chief Justice Steven Taylor (left) is photographed with OBA President Cathy Christensen, OCU President Robert Henry, and former U.S. Supreme Court Justice Sandra Day O'Connor during the iCivics event April 24, 2012.*



School for Educators" seminar at the Reed Center in Midwest City. Teachers heard from speakers from around the state who covered a variety of law-related topics, including issues such as free speech, search and seizure, and the court system.

The night was capped off with the banquet "A Partnership in Civic Education: iCivics in Oklahoma." Gov. Mary Fallin delivered introductory remarks, then Justice O'Connor served as the featured presenter, speaking to a crowd of 350 people about the alarming statistics of the lack of civic education in the school system today. She reiterated the importance of iCivics and welcomed Oklahoma as a player to encourage civic education among students.

The students participating in the event gave the program high marks. Student Colin Miller of Cheyenne Middle School in Edmond said,



*Justice O'Connor speaks to students about civics education.*

"Listening to her was so interesting. We haven't talked at all about the three branches of government in school yet, and she made me want to learn more about how government works."

Those remarks mirror Justice O'Connor's concerns. She believes public schools have drifted from the core. "Only one third of Americans can name the three branches of government and two thirds cannot name a single Supreme Court justice," she said. "And even when civics is taught, it is in a dull and boring way, and students think it's their least favorite subject."



*Law School for Educators gets underway at the Reed Center in Midwest City as part of the iCivics day of programming.*

These facts led Justice O'Connor to aid in the development of [www.iCivics.org](http://www.iCivics.org), designed to be a fun, interactive way for students to learn about civics. Since its inception in 2009, the initiative is present in all 50 states and Oklahoma is proud to be one of them.

OBA president Cathy Christensen of Oklahoma City agrees with the justice, and has made law-related education a focus for her presidential year.

"Students must be given the opportunity to understand the third branch of government and how it affects their lives daily," President Christensen recently said. "When middle school and high school students don't feel active and engaged in the world around them, they begin to fall through the cracks. I think it is important that they realize they have rights *and* responsibilities. Both students and adults must realize that they can make an impact on those around them and their local communities and governments.



*Gov. Mary Fallin emphasized the importance of civic education at the evening banquet.*

Those sentiments were part of the drive to bring Justice O'Connor and her iCivics initiative to Oklahoma.

"Oklahoma leaders in law, education and government recognize that civic education in our state has room for improvement," President Christensen said. "They are committed to working together to find solutions and implement those solutions."



*Former Supreme Court Justice Sandra Day O'Connor delivers the featured presentation at the evening banquet, "A Partnership in Civic Education: iCivics in Oklahoma."*

# Diversity Committee Doing More This Year

By John Morris Williams

The OBA Diversity Committee has been an active and dynamic committee in the past. I want to say nothing here to take away from its past good works. This year, President Christensen made the work of this committee one of the focuses of her year as president. I recently heard her say "...when you put on the pin of the president of the OBA for the first time, you realize, like you may never have realized before, that for one year you represent each of the 17,000 members of the Oklahoma Bar Association." Being inclusive and wishing to include every OBA member is part of her DNA. Therefore, it was no surprise that she wanted to make an extra effort to ensure that the OBA was truly embracing diversity.

Webster's online dictionary ([www.merriam-webster.com](http://www.merriam-webster.com)) defines diversity as:

the condition of having or being composed of differing elements: variety; especially: the inclusion of different types of people (as people of different races or cultures) in a group or organization <programs intended to promote diversity in schools>

This year the Diversity Committee is producing a CLE program and having a luncheon

on Oct. 18, at the Skirvin Hilton Hotel in Oklahoma City. The featured speaker will be Mark Curriden, legal journalist and attorney from Addison, Texas. His presentation is based on his award winning and best-selling book *Contempt of Court* about a lynching and two lawyers that made legal history and forever changed the practice of law. He addresses many of the biggest legal issues that

**“The awards will be given to members of the judiciary, individual attorneys, and groups and entities that have championed diversity.”**

have been around for more than a century including the role of lawyers advocating and defending a politically unpopular client.

"The Diversity Committee is enthusiastic about Mark Curriden's presentation of a century-old story that changed our

justice system," said Diversity Committee Chairperson Kara Smith. "We also appreciate the opportunity to honor beacons of light among us who truly exemplify the values of diversity and inclusion in the manner in which they conduct their work and lives, and generously share those values with others."

The committee will also at that time be awarding the newly-created Ada Lois Sipuel Fisher Diversity Awards. Applications are now being accepted. The awards will be given to members of the judiciary, individual attorneys, and groups and entities that have championed diversity. What a great opportunity to acknowledge and celebrate "the inclusion of different types of people" in our organization and the people who have made an effort to ensure that our organization is welcoming to all of its members. Please look for more details at [www.okbar.org](http://www.okbar.org) and in this and other editions of the *Oklahoma Bar Journal*.

Recently, I had the opportunity to meet with the committee and found myself in a room of good friends, recognized leaders and emerging leaders in our association. Chairperson Kara Smith brings enthusiasm and a strong work ethic as part of her leadership style. Their work needs all of our support. In that regard, sponsors are

needed for the program and lunch. Kara would love to hear from OBA members who want to contribute and participate. Please give her your support and get out your checkbook. I know that this is becoming a recurring theme with me this year. The truth is that we are doing more substantive programming and these things do cost money. Please be generous in assisting this committee. It is good business for us all to be a diverse organization and your contributions are an investment in the future health of the OBA.

Years ago I was appointed to the Diversity Committee of a national organization. I was

referred to as the "token white guy." Although this was said in good humor, it was obvious that I was appointed because of my gender and my race. I was not offended. It was a wonderful learning opportunity and I learned what it was like to be different from everyone else in the room. When we have to work toward diversity we have not achieved the ultimate goal. To fail to work toward diversity is the failure to "represent each of the 17,000 members of the Oklahoma Bar Association." Even more compelling is to take the opportunity to acknowledge the people who are doing this work in making us a truly inclusive organization.

I want to encourage you to support our president and our Diversity Committee by participating in the programming on Oct. 18. It is good business for all of us to come together and make this event a great success.



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

## Diversity Committee Introduces New Awards



*Ada Lois Sipuel Fisher*

### Nomination Deadline June 1

- Three diversity awards will be given to a business, group or organization that has an office in the state of Oklahoma.
- Two more diversity awards will be given to licensed attorneys and an additional award will be given to a member of the Oklahoma judiciary.

### Nomination Submission

- Include name, address and contact number of the nominee.
- Describe the nominee's contributions and accomplishments in the area of diversity.
- Identify the diversity award category (business/group/organization, licensed attorney or judiciary) in which the nominee is being nominated.

Submissions must be received by June 1, 2012. Submissions should not exceed five pages in length.

**Submit Nominations to [diversityawards@okbar.org](mailto:diversityawards@okbar.org)**

***For complete selection criteria and nomination process, visit  
[www.okbar.org/members/committees/diversity/awards.htm](http://www.okbar.org/members/committees/diversity/awards.htm)  
For additional information please contact Kara I. Smith at 405-923-8611.***

# Taking a Charge

By Jim Calloway

With the Oklahoma City Thunder NBA franchise now in our state, many Oklahomans are now a lot more familiar with the rules and practices of professional basketball.

Oklahoma City Thunder Forward/Center Nick Collison is quite versed at taking a charge. For those of you who are not familiar with the game, taking a charge is a situation where a defensive player gets planted solidly in position in front of an offensive player with the ball who is usually “charging” towards the basket. If the maneuver is successful, the defender gets run over and knocked backwards by the offensive player, but the referee will call an offensive foul creating a turnover. (If the offensive player scores, the basket will not be counted.)

Doing a Google search for ‘taking a charge in basketball’ yields an amazing 44 million plus hits. There are videos to watch, coaching exercises and all sorts of information about this sacrificial basketball play. Taking a charge is not limited to the pro ranks, we see this at all levels of basketball. But the power of pro players exceeds that of youngsters playing in middle school. There is, without a doubt, a certain mental toughness involved in accomplishing this maneuver. It takes concentration to stand absolutely still, with the intention

that a charging 250-pound athlete is about to level you.

Obviously, this is not a play for the faint of heart. Falling over backwards onto a hardwood floor is not something most of us would willingly want to do, whether or not we were assisted by the charging athlete. In fact, a popular team-building exercise is a trust exercise, where people close their eyes and allow themselves to

fall over voluntarily backwards, trusting on other participants in the exercise to catch them and lower them gently to the floor.

So, what possible reason could I want to write a law practice tips column about a basketball maneuver? One reason might be that this column was written during NBA play-off season, and there is a lot of excitement about the playoffs around here.

Actually, taking a hard charge is an apt metaphor for what a lot of attorneys find themselves having to do very frequently. A lot of the stress associated with the modern practice of law is that lawyers often have to metaphorically “take a charge” on behalf of their clients.

Many legal matters are quite stressful, and the participants, and sometime their counsel, can get emotionally engaged.

I recall, when I had been working at the OBA for a couple of months, someone asked me what the major difference was between working for the bar association and practicing law. Without even thinking about it much, I shot back, “Well here, hardly anybody ever calls to scream at me or curse me.”

While the response was intended to be humorous, the sad truth is the screaming call



“Falling over backwards onto a hardwood floor is not something most of us would willingly want to do...”



is not an infrequent event for lawyers.

Generally speaking, most matters that justify a lawyer's attention are fairly high-risk, high-reward, and there will frequently be some stress associated with it.

Family lawyers are often used as the example of lawyers who deal with stress and conflict on a regular basis. In fact, I once heard a family lawyer describe her practice as "primarily conflict management." People have intense focus and strong emotions where their marriage and children are involved. Some can be just as emotionally committed to their retirement plan or stock brokerage account. So the stress that a typical family lawyer might have to endure might seem to be greater than the stress of a lawyer who does primarily real estate title examinations. But I would imagine that having to break the news to a couple that they are not going to be able to close on their dream home on the date they intended carries a certain amount of stress as well.

We hear a lot of discussion in our profession about the lack of professionalism and civility. No one likes to deal with an angry lawyer and, with rare exceptions, no one wants to be an angry lawyer either. Lawyers get to receive a lot of emotions and, sometimes, anger during the course of doing their professional duty. Society as a whole often seems to involve more tough talk these days. It is easy for even the best lawyer to lose his or her temper when frustrated by improper actions or a perception that an agreement has not been honored.

Most lawyers greatly enjoy their work and their profession.

**“... we should all remember that the practice of law is a stressful profession, and we should all endeavor not to make it more so.”**

Unpleasant and direct conversations are often part of the territory. We've all had to deal with lawyers who have a hard time maintaining their decorum and civility when they are stressed or angry.

A distraught client calls, very angry about what the other side has just done. It is easy to absorb that anger and pass it along to others, like opposing counsel, particularly when you had advised the client that this action was prohibited by a court order. As lawyers all understand, while there may be consequences for willful violation of court orders or injunctions, they do not serve as self-enforcing mechanisms. Parties will still behave as they wish, and it is often a part of being a good counselor at law to convince the client not only that the court has ordered a certain action or lack of action, but that complying with that court order is not only the right thing to do, but better for the client's long-term interest.

Most lawyers can generate their own stress internally, without outside intervention, in any event. We all give lip service to the truism that no one is perfect. But the law seems to expose imperfections

in a very unforgiving way. Obviously there are different ramifications between failing to file before a statute of limitations date passes and a settlement package proposal that goes out a day later than promised. But it is still easy to beat yourself up over any minor failures. It is sometimes easy to convince yourself that you only have two standards of care — perfection and malpractice.

So, a primary point of this article is that, we should all remember that the practice of law is a stressful profession, and we should all endeavor not to make it more so. Sometimes, this will involve recognition of our own weaknesses and attempts to do better in the way we deal with others. Other times it will involve gently reminding opposing counsel that there is no need to raise their voice in a conversation between two professionals about the law, the facts and each client's best interests.

One of the challenges of our profession is burnout. This particular column was not prompted by the NBA playoffs, although the author shamelessly admits that starting with the NBA was perhaps seen as a good way to entice a few more readers into starting to read the article.

The real motivation for this column was an excellent article that appeared in the May-June, 2012, issue of *Law Practice Magazine*. I would strongly recommend all OBA members read "Burnout: Avoidable, Not Inevitable," by Meloney C. Crawford and Douglas S. Querin, two attorney counselors with the Oregon Attorney Assistance Program who counsel lawyers, judges and law students on mental health, addiction, and stress related issues. You can

find the complete article online at <http://tinyurl.com/6vcanf5>.

We've all heard the phrase "burnout" used at various times and in various ways. But it is true, according to the article, that burnout in the legal profession is greater than that of many other professions. The textbook definition of burnout basically involves the stress that results between job demands and resources, contrasted with the results that an attorney demands of him or herself. The authors outline a three-step process to coping with burnout, or burnout on the horizon.

These steps are:

1. Recognizing the situation and the signs leading up to it

2. Reverse the tide by reducing your stress and seeking support

3. Find resilience by building up your "stress hardness," by developing physical, emotional, and spiritual resources.

More helpful information is contained in the "Burnout" article.

We lawyers often perceive the primary cause of our job stress as having too much to do and not enough time to do it. But having too many unpleasant, loud conversations, arguments and negotiations is likely a more significant cause. Sometimes we cannot do much about the stress that we receive. What we can do is deal with our response to it. Take

care of yourself or you will not be able to take care of your clients — and your family.

If you are truly suffering from stress or you feel like you are headed for burnout, then call the OBA Lawyers Helping Lawyers crisis hotline, a strictly confidential program that is professionally staffed by qualified counselors. They can be reached at 800-364-7886.

*Mr. Calloway is director of the OBA Management Assistance Program. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or [jimc@okbar.org](mailto:jimc@okbar.org). It's a free member benefit!*

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# The Three I'd Monster

By Travis Pickens

Lawyers do not go to law school to become criminals. To do so, the thinking would likely have to go something like this: "Here's the plan: I'll spend three years studying harder than I ever have, with classes full of students as driven as I am, and spend an enormous amount of money, and likely go into debt, so that I can then study for a couple of months, take the hardest test of my life, and then scramble to get a job working under the most stress I've ever known, so that I can then build up a practice and take retainers, so that I can then begin to siphon off profits from the trust account, which by the way is subject to all kinds of restrictions and for which the bank must report any overdraft automatically to the General Counsel's Office."

No, my time so far at the bar association has taught me that lawyers most often get into trouble for three reasons, none of which include criminal intent: **Ignorance, Issues and Isolation.** As support, you may turn to the disciplinary cases reported in the first quarter of this year. Out of the significant disciplinary cases decided through mid April of this year, more than half involved facts related to ignorance, stress, anxiety, isolation, unresponsiveness, anger and/

or substance abuse. I suspect that these factors were also involved somehow in the other cases as well, although not reported.

In seminars I refer to this troublesome trio of issues as the "Three I'd Monster":

**I**gnorance. Lawyers simply do not know the *Oklahoma Rules of Professional Conduct (Rules)* well enough. I usually see two groups: young

“...lawyers most often get into trouble for three reasons, none of which include criminal intent...”

solo practitioners who do not work closely with other lawyers and lack the real-world experience to know how the *Rules* should be applied. They lack access to experienced mentors and agree to do work for the clients most likely to complain should they misstep. They can also be intimidated by older clients and make bad decisions.

The other group I often see are more experienced lawyers who have built up a busy practice but have not studied the *Rules* and related cases for a long time. They tend to have plenty of friends that are lawyers, but they tend to be very much like themselves, middle-to-late-aged and relying on their memory of their "Professional Responsibility" course from 20 years ago. These lawyers tend to attempt to manage the *Rules* by intuition, a flawed approach, although well intended.

**I**ssues. The lawyer has an "issue" that is preventing them from being effective and complying with the *Rules*. The issues could be depression, drugs, alcohol, over-anxiety, and/or the rest. Again, this lawyer is not malintentioned, this lawyer has simply lost control, or failed to manage, an emotion, condition, disease, or need, that has manifested itself into some sort of mental health or substance abuse issue. This issue crowds out and overwhelms the lawyer's focus on much else, including their clients' matters and/or compliance with the *rules*. A minority of these lawyers manage to function at a reduced, but acceptable level. The others do not. They slowly descend into reduced hours, a lack of diligence and

responsiveness, and sometimes, into outright bad acting.

**I**solation. This last “I” unsurprisingly is often linked with the other two. They can all interrelate. The new solos described in paragraph one are often members of this category. They may be practicing in a new city or town, or they may simply be a bit isolated by a shy or quirky personality.

Lawyers with issues often end up as isolated solo practitioners even if they did not start out that way because jobs with companies, agencies and firms bring a certain level of accountability that at some point typically identifies an impacted employee. Sometimes, these lawyers have a uniquely autonomous position, where their interaction is limited with other employees, allowing them to be relatively isolated even though physically surrounded by other people.

As a profession, if we are able to slay or disable the “Three I’d Monster,” future disciplinary complaints and prosecutions will be vastly reduced.

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

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# March Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Wednesday, March 14, 2012.*

## REPORT OF THE PRESIDENT

President Christensen reported she attended the President's Summit, February board meeting and leadership retreat, High School Mock Trial Program final competition, CLE staff meeting, meeting with Executive Director Williams, Solo Conference Chair Collin Walke and YLD Chair Jennifer Kirkpatrick to discuss solo conference, two LHLAP committee meetings, Solo and Small Firm Conference Planning Committee meetings, conferences with Grant Thornton, staff and leadership about the tech audit, Bar Association Technology Committee meeting, Leadership Academy social event, OETA Festival, technology governance group meetings, Southern Conference of Bar Presidents planning meeting for 2013 conference, several planning meetings to finalize Day at Capitol events, Law Day events at the Supreme Court to recognize contest winners, meeting with CLE Director Douglas, Administration Director Combs, Executive Director Williams, Governor Hays and Tammy Childers to discuss OBA 2012 Annual Meeting events and FLS annual meeting, OBA Boot Camp

CLE in Tulsa, dinner with the Professional Responsibility Commission, several planning meetings related to Justice O'Connor's visit to Oklahoma City, the banquet and the public education events, the "Teach In" dinner and conference at OU with Justice Kauger and a meeting with Executive Director Williams, Administration Director Combs and Family Law Section leadership to discuss the solo conference. She also filmed an interview with Freedom 43 TV.

## REPORT OF THE VICE PRESIDENT

Vice President Stockwell reported she attended the President's Summit, Board of Governors meeting, Garvin County Bar Association luncheon, Cleveland County Bar Association luncheon, LHLAP Committee meeting and Bar Association Technology Committee meeting.

## REPORT OF THE PRESIDENT-ELECT

President-Elect Stuart reported he attended the board summit in Tulsa and going-away luncheon for CLE Director Douglas.

## REPORT OF THE PAST PRESIDENT

Past President Reheard reported she attended the President's Summit at Post Oak Lodge, Southern Conference of Bar Presidents 2013

planning conference and dinner with the PRC. She also moderated the OBA Boot Camp CLE in Tulsa, filmed an interview with Freedom 43 TV, met with Secretary of Veterans and Military Affairs Gen. Rita Aragon (ret.) and filmed a segment for the Ask A Lawyer Law Day TV show.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the President's Summit, going-away party for CLE Director Douglas, monthly staff celebration, mock trial finals, CLE staff meetings, directors meeting, web editors meeting, Senate Judiciary, Finance and Appropriations Committee meetings, meetings with Senate bill authors, Canadian County conference room dedication, meeting with President Christensen and Family Law Section leaders, Women in Law Committee meetings, LHLAP committee meeting, Solo and Small Firm Conference Planning Committee meetings, conferences with Grant Thornton, staff and leadership on tech audit, Bar Association Technology Committee meeting, Leadership Academy, a number of conferences with OBA Taxation Section leadership on SB1297, reception at OU law school to celebrate retirement of David Poarch and Stan Evans, OETA Festival, technology governance group meetings, Southern

Conference of Bar Presidents planning meeting for 2013 conference, preconference planning with Post Oak Lodge for 2013 President's Summit, planning meeting to finalize Day at Capitol documents and meetings with Lingo Construction on final issues before starting construction. He also delivered OBA gifts prior to Day at Capitol and finalized and worked with staff and the ABA Division of Bar Services on publication of the director of educational programs advertisement.

### BOARD MEMBER REPORTS

**Governor DeMoss** reported she attended the OBA President's Summit at Post Oak Lodge, Tulsa County Bar Association past presidents meeting, TCBF board meeting, OBA Law Schools Committee visit at OCU and TCBA judicial dinner. **Governor Devoll** reported he attended the President's Summit at Post Oak Lodge and the Garfield County Bar Association February meeting. He also worked on related bar matters. **Governor Hays** reported she attended the OBA Board of Governors leadership retreat, OBA Family Law Section monthly meeting for which she prepared and presented a budget report, Tulsa County Bar Association judicial dinner, Oklahoma Lawyers for America's Heroes CLE/training, TCBA Golf Committee meeting and meeting with President Christensen, Executive Director Williams, Administration Director Combs, CLE Director Douglas, and Tammy Childers regarding the OBA FLS and annual meeting. She also consulted with the OBA Solo and Small Firm Conference Planning Committee and Law Day Committee chair regarding

meeting events. **Governor Meyers** reported he attended President's Summit at Post Oak Lodge, Comanche County Bar Association meeting and via phone the Legal Intern Committee meeting. **Governor Parrott** reported she attended the president's retreat at Post Oak Lodge, Oklahoma County Bar Association board meeting, OBA Law Schools Committee visit/evaluation of OCU Law School with student and faculty presentations and going-away luncheon for CLE Director Douglas. She also was one of the OBA volunteers to take pledges at the OETA Festival fundraiser. **Governor Shields** reported she attended the President's Summit at Post Oak Lodge and the going-away party for CLE Director Douglas. She also worked on LHL Foundation matters and provided a report of Board of Governors matters to the Oklahoma County Bar Association. **Governor Smith** reported he attended a Muskogee County Bar Association meeting and a national conference of criminal justice act representatives. He presided over a mock trial and participated in the Muskogee bar's weekly bowling social. **Governor Thomas**, who did not attend the meeting, reported via email that she attended the President's Summit at Post Oak Lodge.

### SUPREME COURT LIAISON REPORT

Justice Kauger reported the Supreme Court has considered moving the annual judicial conference to the summer with the goal to reinvolve families and will take its suggestion to the state judicial conference for its approval. She reported planning is underway for Sovereignty Symposium, which

will take place June 12 and 13, 2012, and she reviewed speakers who will participate.

### COMMITTEE LIAISON REPORTS

Past President Reheard reported the Sections Leaders Council will hold its next meeting in Tulsa, and its subcommittees are working. She reported the third OBA Boot Camp CLE was held in Tulsa. She said the Oklahoma Lawyers for America's Heroes program has more than 500 volunteers and over 1,000 heroes have been assigned lawyers to help them. Freedom 43 TV did a segment about the boot camp and the program. The Military Assistance Committee is staffing Yellow Ribbon events. Governor DeMoss reported the Diversity Committee is working on creating awards and will present them at a CLE event Oct. 18 at the Skirvin Hotel in Oklahoma City. Award criteria is being developed now. Governor Hays reported the Communications Committee is planning an OBA CLE seminar, and the Law Day Committee is busy working on filming Ask A Lawyer TV show segments. She said the Solo and Small Firm Conference website is now live. Governor Parrott reported the Law Schools Committee is making site visits. President Christensen reported the High School Mock Trial Program is funded in large part by the OBF, and the quality of teams was outstanding. She is optimistic about the state champion team's ability to do well in the national competition. She reviewed the details for the iCivics events that will take place on April 24. She said Oklahoma school superintendents will be invited to attend a

reception in June in Oklahoma City to promote law-related education. Vice President Stockwell reported the Lawyers Helping Lawyers Assistance Program will hold its Cornerstone Banquet and Auction at the bar center on March 27.

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

General Counsel Hendryx reported annual reports for the PRC and PRT were submitted last month. She said the OBA is not a defendant in any current litigation, and construction has started on the remodeling of offices for her department. She reported eight reinstatement hearings will be conducted within the next eight weeks. Written status reports of the Professional Responsibility Commission and OBA disciplinary matters for January and February 2012 were submitted for the board's review.

#### **TAXATION SECTION REQUEST TO AMEND BYLAWS**

The board approved the change to the Taxation Section bylaws regarding the members-at-large on its governing board.

#### **TECHNOLOGY PRESENTATION**

Interim Information Services Manager Watson reported consultant Grant Thornton has been good to work with, and she is happy that decisions have been made on which operating system the OBA will implement. Their recommendations include hiring a network administrator. She said operational rules and training goals for the department are being developed. President Christensen said the Bar Association Technology Committee did a thorough evaluation of the audit and does think the audit

was worthwhile. Ms. Watson was asked to email the report to the Board of Governors.

#### **RECOMMENDATION TO PURCHASE CASE MANAGEMENT SOFTWARE**

President Christensen said the Bar Association Technology Committee recommends the OBA purchase the Louisiana Bar Association case management software for the Office of the General Counsel. General Counsel Hendryx reviewed the purpose of the software and said other bar associations are utilizing the software with few problems. Included with the software purchase is the code that allows modification. The other advantage is only one system is needed to manage all the areas the department deals with, which is not available with the current system. The board authorized the software purchase.

#### **LEGISLATIVE UPDATE**

Executive Director Williams briefed board members on the current status of the OBA's bills and reviewed the handout provided. He encouraged board members to participate in OBA Day at the Capitol.

#### **LEGAL ETHICS ADVISORY PANEL APPOINTMENT**

The board approved President Christensen's recommendation to appoint James R. Waldo, Oklahoma City, to complete the unexpired term of Peter Bradford, which expires 12/31/13.

#### **RATIFICATION OF EMAIL VOTE SUPPORTING ROBERT BACHARACH**

The board voted to ratify the email vote to issue a resolution supporting Judge Robert

Bacharach's nomination for a position on the U.S. 10th Circuit Court of Appeals. It was noted the judge called the OBA to express his appreciation to the board for taking action on his behalf.

#### **RESOLUTION FOR JUDGE JOHN E. DOWDELL**

The board voted to issue a resolution in support of Judge John Dowdell's nomination to serve on the U.S. District Court for the Northern District of Oklahoma.

#### **LEGAL GUIDE FOR YOUNG ADULTS IN OKLAHOMA**

President Christensen asked board members to review the proposed content of the updated booklet titled, "You're 18 Now! It's Your Responsibility!" that is a project of the Young Lawyers Division. She said Past President Reheard was looking at a proof and noticed inaccurate legal information.

#### **LAWYER IN EVERY SCHOOL**

YLD Chair-Elect Joe Vorn-dran reported as a Community Day of Service Project the YLD has set a goal of making a presentation in at least one classroom in every county on the subject of legal responsibilities once a person turns 18 years old. The updated guide will be used as a handout. He said they had a good head start but needed help recruiting contact persons to make a presentation in 22 counties. He handed out a list of the counties without a contact person and the list of those who have volunteered. He said work has started on a 15-20 minute video that can be used to review the guide. Governor Kirkpatrick noted that Sonic is sponsoring

the print version of the guide and has the back page ad. The guide will also be available as a smartphone app, and they are working with the same company that created the OBA Annual Meeting app. The YLD is seeking an app sponsor for \$5,000. A Spanish translation of the guide is in development now, and it will be available in electronic format only.

## EXECUTIVE SESSION

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

## DIRECTOR OF INFORMATION TECHNOLOGY POSITION

The board voted to approve Executive Director Williams' recommendation to promote Interim Information Services Manager Robbin Watson to the position of Information Technology Director.

## NEXT MEETING

The Board of Governors met April 25, 2012, at the Oklahoma Bar Center in Oklahoma City and May 18, 2012, at The Mayo Hotel in Tulsa. Summaries of those actions will be published after the minutes are approved. The next board meeting will be held June 22, 2012, at the Choctaw Casino Resort in Durant in conjunction with the Solo and Small Firm Conference.

# Oklahoma Bar Journal Editorial Calendar

## 2012

### ■ August

#### **Family Law**

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

### ■ September

#### **Bar Convention**

Editor: Carol Manning

### ■ October

#### **Opening a Law Practice**

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

### ■ November

#### **Homeland Security**

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

### ■ December

#### **Ethics & Professional Responsibility**

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

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



# How to Avoid the ‘F’ Word and Employ the Three Ds of Nonprofit Board Membership

By Shon T. Erwin

You have no doubt been recruited to join a nonprofit board. Do not consider this a compliment. The recruiter presumes that a law degree confers not only a special knowledge and understanding of the law, but in particular the law of nonprofit corporations. What your recruiter and the general public fail to understand is that lawyers often have no more understanding of nonprofit corporations than the average layperson. This is a dangerous situation for both you and the nonprofit organization you have now agreed to serve. The organization considers you an expert and will expect (pardon the “f” word) free advice immediately. You will offer that advice, hopefully within your own area of expertise. You will do so for the same reason you joined the board, to give back to your community and to make the world a slightly better place. Free advice is to be expected, but do not stray from your own area of expertise. In most cases the best legal advice a lawyer member of a nonprofit board can give is to “get a lawyer.” For those among us who ignore the increasing risks and continue

to serve on nonprofit boards, I salute you and offer you the three “Ds” or duties of nonprofit board membership.

You have a **Duty of Care** to the organization which is carried out by the following acts: 1) Regular attendance at meetings of the board and appropriate committees; 2) advance preparation for board meetings, such as reviewing reports and the agenda prior to meetings of the board; 3) obtaining information before voting, to make good decisions; 4) use of independent judgment; 5) periodic examination of the credentials and performance of those who serve the organization; 6) frequent review of the organization’s finances and financial policies; and 7) compliance with filing requirements, particularly annual information returns.

You have a **Duty of Loyalty** to the organization which requires that board members exercise their power in the interest of the organization and not in their own interest. In practice, the duty of loyalty is carried out by the following acts: 1) disclosure of any conflicts of interest; 2) adherence



*Shon T. Erwin  
2012 OBF President*

to the organization’s conflict of interest policy; 3) avoidance of the use of corporate opportunities for the individual’s personal gain or benefit; and 4) nondisclosure of confidential information about the organization.

You have a **Duty of Obedience** to the organization’s central purposes. The board must ensure that the organization functions within the law, both the “law of the land” and its own bylaws and other policies. The board members serve as guardians of the mission of the organization. The duty of obedience is carried out by the following acts: 1) compliance with all regulatory and reporting requirements, such as filing the annual information return (usually, IRS Form 990) and paying the employment

taxes; 2) examination of all documents governing the organization and its operation, such as the bylaws and policies; and 3) making decisions that fall within the scope of the organization's mission and governing documents.

Now that you have been reminded of the basics, go forth and be that person at the board meeting who asks the questions no layperson will ever ask: "Has everyone filed a conflict of interest disclosure form? Is this within our bud-

get? Have our payroll taxes been paid? Is this really within our mission? Shouldn't we hire a lawyer (not me) and get a legal opinion on this issue?"

Charitable service is its own reward, and I am immensely proud that lawyers serve in great numbers on the nonprofit boards of our state. I am indeed fortunate to be serving the Oklahoma Bar Foundation where every member of the Board of Trustees is a lawyer. OBF trustee meetings feature well-prepared lawyers com-

mitted to their fiduciary roles and to the three Ds of non-profit board membership. This level of commitment coupled with the generosity of OBF's donors allows your Oklahoma Bar Foundation to transform the lives of Oklahomans through the advancement of education, citizenship and justice for all.

*Shon T. Erwin is the president of the Oklahoma Bar Foundation and can be contacted at shonlaw@gmdde.com.*

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# Day of Service Reaches Out to Schools

By Jennifer Heald Kirkpatrick

It is with great personal pride that I can announce that the 2012 YLD Community Day of Service was a tremendous success! This year's project resulted in over **30 lawyers** volunteering almost **100 hours** to give presentations to more than **2,000 high school juniors and seniors** in **40 high schools** located in **25 counties**. I cannot say thank you enough to all the volunteers who made this project a success. I'd like to say a special "thank you" to Joe Vorndran, Chair of the YLD Children and the Law Committee, who worked tirelessly to match schools with volunteer attorneys and to the YLD board who jumped into this challenge with good grace and humor.

Now that I've had the opportunity to brag on the passionate people who made this project a success, I'd like to tell you some more about the project itself and the motivation behind it.

I think we can all recall the bustle and excitement of the last few months and weeks before high school graduation. There are final papers to write, final exams for which to prepare, yearbooks to sign, and the elation (or disappointment) of the senior prom. It is also a time during which high school seniors are gearing up to begin life as adults, whether they choose college, vocational school or a job. What they are



*Students at Shawnee High School listen as OBA YLD members present information geared toward graduating seniors approaching their 18th birthdays during the division's annual Community Day of Service.*

often not prepared for is the way their rights and responsibilities change when they turn 18. In many cases, what they don't know can cause serious complications for their future.

For the 2012 YLD Community Day of Service, YLD members and attorney volunteers visited classrooms across the state to deliver presentations aimed at seniors and explaining how their legal obligations change when they turn 18. The presentations were based on information contained in the recent publication titled "You're 18 Now: It's Your Responsibility," a legal guide for young adults rewritten and updated by the YLD and published by the OBA Law-Related Education Department. The publication contains sections outlining the basics of contract

law, criminal law, family law, domestic abuse, voter registration and social media use. The YLD felt these areas of law were particularly vital for young adults to understand so they can be aware of the serious consequences of their actions.

For those of us who volunteered, going back to high school was both nostalgic and a bit of a shock to get a first-hand glimpse of how much things have changed in the last 10 to 20 years. Some volunteers viewed with pride the renovations and growth that has taken place in their hometown high schools. Others were saddened to see deterioration of the physical school buildings combined with an increase in student-related crime, teen pregnancies and dropout rates.

Regardless of size or location, participating schools reported that the information provided was vital for high school seniors transitioning to life outside the protective umbrella of their parents' homes. Anita D. DeToy, M.Ed., social studies teacher at Del City High School and Oklahoma County Election Board chairperson, found the topics discussed in the publication to be timely, as several of her students have already faced issues addressed in the publication such as obtaining credit, buying a car, leasing an apartment and the unintended consequences of social media use. She also reported that she was sure her students had received some benefit from the publication since many continued discussing the topics several days after the presentation. There may have even been a few students inspired to become the next generation of lawyers, a future YLD chair or even the OBA President.

The following provides a breakdown of the counties and schools that graciously permitted us to share this information with their students:

### **Participating Counties**

Canadian  
Comanche  
Creek  
Garfield  
Garvin  
Greer  
Harmon  
Jackson  
Jefferson  
Kiowa  
Logan  
McCurtain  
Murray  
Muskogee  
Noble  
Nowata  
Oklahoma  
Osage  
Payne  
Pontotoc  
Pottawatomie  
Roger Mills  
Seminole  
Tillman  
Washington

### **Participating Schools**

Ada High School  
Altus High School  
Bartlesville High School  
Cheyenne High School  
Chisholm High School  
Cimarron High School  
Del City High School  
Douglas High School  
Drummond High School  
Emerson High School

Enid High School  
Fairview High School  
Frederick High School  
Garber High School  
Guthrie High School  
Hilldale High School  
Hobart High School  
Indiahoma High School  
Idabel High School  
Kremlin-Hilldale High School  
Mangum High School  
Morrison High School  
Muskogee High School  
Mustang High School  
Northeast Academy for Health Sciences and Engineering  
Nowata High School  
Oklahoma Centennial High School  
Pawhuska High School  
Pauls Valley High School  
Pioneer-Pleasant High School  
Pond Creek High School  
Seminole High School  
Shawnee High School  
Stillwater High School  
Southeast High School  
Sulphur High School  
Waukomis High School  
Waurika High School  
Woodward High School

*Ms. Kirkpatrick practices in Oklahoma City and chairs the YLD. She can be reached at [jkirkpatrick@hallestill.com](mailto:jkirkpatrick@hallestill.com).*

# Calendar

## May

- 22 OBA Solo and Small Firm Conference Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Collin Walke 405-235-1333
- 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
- 24 OBA Strategic Planning Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Jim Stuart 405-275-0700
- OBA Men Helping Men Support Group;** 5:30 p.m.; The University of Tulsa College of Law; 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033
- 28 OBA Closed** – Memorial Day Observed
- 31 OBA Member Services Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Roe Simmons 405-359-3600

## June

- 1 OBA Military and Veterans Law Section Meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Robert Don Gifford II 405-553-8736
- 5 OBA Communications Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Dick Pryor 405-740-2944
- OBA Government and Administrative Law Practice Section Meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Tamar Scott 405-521-2635
- 6 OBA Law Day Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Association, Tulsa; Contact: Tina Izadi 405-522-3871
- 7 OBA Men Helping Men Support Group;** 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to: Kim Reber 405-840-3033
- OBA Women Helping Women Support Group;** 5:30 p.m.; The University of Tulsa College of Law 3120 East 4th Place, Tulsa, John Rogers Hall (JRH 205); RSVP to: Kim Reber 405-840-3033

- 8 OBA Law-Related Education Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact: Suzanne Heggy 405-556-9612
- OBA Solo and Small Firm Conference Planning Committee Meeting;** 1:30 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Collin Walke 405-235-1333



- 13 OBA Diversity Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Kara Smith 405-923-8611
- 14 OBA Appellate Practice Section Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Greg Eddington 405-208-5973
- OBA Women Helping Women Support Group;** 5:30 p.m.; The Oil Center – West Building, Suite 108W, Oklahoma City; RSVP to: Kim Reber 405-840-3033
- 15 Oklahoma Association of Black Lawyers Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact: Donna Watson 405-721-7776
- OBA Rules of Professional Conduct Committee Meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa and teleconference; Contact: Paul Middleton 405-235-7600
- 19 OBA Bench and Bar Committee Meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact: Barbara Swinton 405-713-7109
- 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

## High Marks at Nationals for Clinton Mock Trial Team

Clinton High School earned a fourth place finish during the National High School Mock Trial Championship held May 4-6 in Albuquerque N.M. The ranking represents the highest ever finish for an Oklahoma team.

"This year at the nationals, there were 46 teams competing, representing 42 states, Guam, the Mariana Islands and South Korea," said Jennifer Bruner, chairperson of the OBA Young Lawyers Division Mock Trial Committee that coordinates the competition in Oklahoma. "The team's strengths this year were their ability to lay a solid foundation for the admission of evidence, their poise and composure, and the chemistry between the team."

The case presented during this year's national competition involved elements of greed, revenge, extortion and murder pitting the U.S. government against a former Congressperson. The Mock Trial program is designed to teach students the principles of trial advocacy as they apply skills of debate, speech and critical thinking during a fictitious courtroom proceeding, with students playing the roles of prosecutor, defense attorney and witness.

"The goal of the team for this season was to play with passion, and they did," Ms. Bruner said. "This team worked especially hard during the period leading up to and during the competition, and we were impressed not only with the team's dedication, but their continued reception to coaching and ability to evolve, right up to the very last round of the competition."

In addition to the team's award, senior Donticia Banks was recognized as one of the top 10 best witnesses in the competition.

Clinton's team is coached by teacher Kathy Kelley, attorney Julie Strong and Judge Jill Weedon. Team members in addition to Banks are Dayanna Barrios, Sarah Hill, Gerardo Marrufo, Chase Maxwell, CJ Smith, Emily Steffers and Quinn Weedon.

The team advanced to nationals through a series of rounds of competition that began in January. The team, one of two from Clinton High School, won the state finals in Norman in March.

Tulsa County District Judge Daman Cantrell has long been involved with the Mock Trial program in Oklahoma, and served as a judge at this year's national competition.

"It was a thrilling and exciting weekend of competition," Judge Cantrell said. "Clinton High School demonstrated they could compete with the best in the nation and delivered! Most of the teams at nationals were elite private schools, and I was particularly glad to see that an Oklahoma public school with excellent teaching and coaching showed it could defeat and compete with schools like Exeter from New Hampshire and Breck School from Minnesota that have tuition on a par with elite liberal arts colleges. This team was one for the ages."

The Mock Trial Program is sponsored and funded by the OBA Young Lawyers Division and the Oklahoma Bar Foundation.



*Several OBA members traveled to Albuquerque to serve as judges at the national Mock Trial competition or to support the Clinton High School team. Photographed with team members are OBA YLD Mock Trial Committee Chair Jennifer Bruner, Judge Daman Cantrell, Christine Cave, Nicole Longwell, Melissa Peros and the team's attorney coach Judge Jill Weedon. Also participating were OBA Mock Trial Coordinator Judy Spencer, teacher coach Kathy Kelly and assistant teacher coach Ashley Kelley.*

## OBA Groups to Meet at Solo and Small Firm Conference

The Choctaw Resort Casino in Durant is THE place to be June 21-23, 2012. Six OBA groups will hold meetings in conjunction with the annual Solo and Small Firm Conference. The **General Practice/Solo and Small Firm Section** will meet Thursday, June 21, at 5 p.m. in the Executive Miko Suite. On Friday the **Board of Editors** will meet at 9:30 a.m., the **Board of Governors** at 3:30 p.m. and the **Law Office Management and Technology Section** at 5:15 p.m. — all in the Executive Miko Suite. On Saturday, the **Lawyers Helping Lawyers Assistance Program Committee** will meet at 8 a.m. in the Executive Miko Suite, and the **Young Lawyers Division** will hold its midyear meeting at noon in the YLD Suite. The early-bird deadline to register is June 8. More information and online registration is at [www.okbar.org/solo](http://www.okbar.org/solo).



## ¿Habla Español? Or Do You Speak Another Language?

If you speak a language fluently in addition to English, the OBA encourages you to add that to your official roster information. Go to [myOkbar.org](http://myOkbar.org) and log in. Click on Roster Info Update – scroll down to the bottom – and you'll see the boxes in front of 10 different languages. If you are included in the OBA's free lawyer listing service called [OklahomaFindALawyer.com](http://OklahomaFindALawyer.com), the information about languages on your listing there is automatically updated from the roster. Cool, don't you think?

## Family Law Legislative Change Takes Immediate Effect

On May 15, 2012, Gov. Mary Fallin signed into law SB 1951, titled "Wounded Warrior Protection Act" that treats certain limited military/veteran benefits as separate property of the servicemember in a dissolution of marriage action. The act carries an emergency provision, making it effective immediately. A copy of the act can be found at [www.okbar.org](http://www.okbar.org) or [www.oklegislature.gov](http://www.oklegislature.gov).

### OBA Member Resignations

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

James Armon Bost  
OBA No. 981  
P.O. Box 3445  
Tulsa, OK 74101-3445

Russell Wayne Kroll  
OBA No. 15281  
4124 E. 98th St.  
Tulsa, OK 74137

### OBA Member Reinstatements

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

Paul Hickey, OBA No. 21460  
P.O. Box 26278  
Little Rock, AR 72221-6278

David Gregory Prentice, OBA No. 22277  
7404 N.W. 135th St.  
Oklahoma City, OK 73142

## Fastcase 50 Nominations

Fastcase, a comprehensive online legal research service that's a free OBA member benefit, is seeking nominations to honor the law's smartest, most courageous innovators, techies, visionaries and leaders. Nominate a deserving hero, friend or colleague online at [www.fastcase.com/fastcase50](http://www.fastcase.com/fastcase50). Deadline: before Friday, June 22, at 5 p.m. CDT. Lawyer or nonlawyer, techie or nontechie, anyone is eligible. Winners will be announced on July 20.



## Legal Aid Reports Two Phone Scams in Metro OKC

Attorneys at Legal Aid Services of Oklahoma in Oklahoma City are reporting two apparent phone scams in the metro area.

Senior Project Attorney Rick Goralewicz said, "The first scam seems to be targeting senior citizens, and it involves a man calling and identifying himself as a Legal Aid employee. The caller says that Legal Aid is participating in a debt elimination program for people with consumer debt of \$5,000 or more. The caller then asks for confidential information such as income, birth date and Social Security number." Legal Aid has no such program and the organization never calls to solicit business. In all cases at Legal Aid, the client must initiate the process.



In the second scam, callers are telling victims of the mortgage foreclosure crisis that they are eligible for big cash settlements, and the caller will help them receive expedited benefits for a fee. Then the caller asks for personal information such as Social Security numbers and bank account numbers. Oklahoma's attorney general is in charge of any benefits, and there is no private company involved. In order to find out if you are eligible for any benefits from the foreclosure settlement, you must contact the Attorney General's Office.

For additional information on these consumer scams, call Mr. Goralewicz at 405-488-6812 or Managing Attorney Neil Lynn at 405-488-6783.

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### Invite Teachers to Attend the Hatton W. Sumners Teacher Institute

June 11-14, 2012, the Hatton W. Sumners Teacher Institute for 3rd-12th grade teachers will be held in downtown Oklahoma City. The institute will focus on the Foundations of Democracy curriculum authored by the Center for Civic Education, which explores the four concepts of democracy — authority, responsibility, privacy and justice. On the final day, educators receive training for Justice Sandra Day O'Connor's iCivics program. Funding from the Hatton W. Sumners Foundation allows the conference to be offered at no charge with all expenses paid for attendees. In addition, educators receive a free classroom set of Foundations of Democracy textbooks. Application deadline is May 18, 2012. Program details are online at [www.okbar.org/public/lre/programs/sumners.htm](http://www.okbar.org/public/lre/programs/sumners.htm).

### Moved Lately or Changed Your Email Address?

Just a reminder that OBA members have access to their roster info (and more) 24/7 through the password-protected portion of the OBA website at <http://my.okbar.org/Login>. The OBA limits email sent to members and never sells or shares member email addresses with vendors. If your email address is not current, then you are missing out on the monthly E-News, an electronic newsletter designed for quick scanning.

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### Just For Fun: ABA Peeps in the Law Contest



Barbara Rush, a legal assistant with a Tulsa law firm, won the ABA's 4th Annual Peeps in Law diorama competition. You know what a Peep is, right? That marshmallow bunny or chick covered in pastel-colored sugar typically found in Easter baskets? When online voting ended April 12, Barbara's entry had a whopping 607 votes to claim the \$100 gift basket. View the winner and finalists at [www.okbar.org/s/peeps](http://www.okbar.org/s/peeps).

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### Bar Journal Theme Issues to Take Summer Break

Look for the next *Oklahoma Bar Journal* issue devoted to a practice area (with color cover) to be published Aug. 11, 2012. You'll still receive court material issues twice a month in June and July.



# Kudos

**C**rowe & Dunlevy has selected **Kevin D. Gordon** president of the firm. He joined the firm in 1984, is a director and has served on the firm's executive committee for several years. The firm has also named its fiscal year 2012 executive committee. Serving on the committee will be **John M. Thompson, Gary R. McSpadden, Timila S. Rother** and **William H. Hoch**.

# On The Move

**J**odie Justiss-Dinsmore has been named director of global legal affairs and assistant general counsel for The Coleman Company Inc. Her office is located at 3600 N. Hydraulic, Wichita, Kan., 67219.

**R**oberta Browning Fields has joined the law firm of McAfee & Taft in its Oklahoma City office. She is a trial lawyer with more than 25 years of legal experience. She will focus her practice on the representation of employers and management in all areas of employment law, including litigation in state and federal courts, in arbitrations and before regulatory and administrative agencies. She also trains and counsels employers on a broad range of mat-

ters affecting the workplace. A portion of her practice is devoted to public utility law, railroad law and civil litigation. She is a 1984 graduate of the OU College of Law.

**E**nvironmental Federation of Oklahoma President and General Counsel **James R. Barnett** will join Doerner, Saunders, Daniel & Anderson LLP. In addition, firm partner **Michael C. Wofford** has been appointed vice president of Environmental Federation of Oklahoma, a statewide non-profit that encourages Oklahoma companies to play a role in the development and implementation of state and federal environmental laws, regulations and policies. Mr. Barnett has been in the private practice of law in the Oklahoma City area since 1991, previously serving more than 13 years as executive director of the Oklahoma Water Resources Board. His practice areas include water, environmental, administrative and natural resources law. He is a 1967 graduate of the OU College of Law. Mr. Wofford has practiced law for 35 years, focusing on environmental and energy law. He sits on the legislative committees of both the Environmental Federation of Oklahoma and the Oklahoma State Chamber of Commerce. He is a 1977 graduate of the OU College of Law.

**Donelle H. Ratheal, Darquita L. Maggard** and **Deborah E. Fortune** announce the formation of their new firm, Ratheal, Maggard & Fortune PLLC. The

firm is located at 4045 N.W. 64th St., Suite 210, Oklahoma City, 73116. The firm has a second office in Weatherford, located at 310 N. State St., Suite 2, to meet the needs of its clients in western Oklahoma. Ms. Ratheal practices in the areas of family law (domestic and international), probate and general litigation, at the trial and appellate levels. She is a 1992 graduate of the OU College of Law. Ms. Maggard practices in the areas of family law (domestic), probate and bankruptcy. She is a 1992 graduate of the OU College of Law. Ms. Fortune practices in the areas of family law (domestic), probate, and oil and gas, at the trial and appellate levels. She is both a former trial examiner and special counsel for the Oklahoma Corporation Commission. She is a 1979 graduate of the OU College of Law. The firm also announces the addition of **David W. Smith II** and **Jason Gresham** as associates. Mr. Smith practices in the areas of family law (domestic and international), civil litigation, debt collection and bankruptcy. He is a 2008 graduate of the OCU School of Law. Mr. Gresham practices in the areas of family law (domestic and international), probate, debt collection, and oil and gas. He is a 2010 graduate of the OCU School of Law. Firm members may be reached by phone at 405-842-6342, or toll free at 855-842-6342. Firm members may be reached by email using the individual's first name with the firm's name, e.g., donelle@rathealmaggardfortune.com.

**Colby L. Robertson** has joined the Edmond office of law firm Evans & Davis as an associate attorney where his practice will focus on estate planning, business organization and succession planning, and general civil litigation. He is a 2011 graduate of the OU College of Law. He may be reached by e-mail at colby@evansdavis.com or at 405-286-2335.

**Brian Duncan** has been appointed a federal administrative law judge with the U.S. Occupational Safety and Health Review Commission in its Denver office. The commission is an independent federal agency responsible for adjudicating disputes between OSHA and regulated employers accused of committing workplace safety and health violations. He is a 1999 graduate of the OU College of Law.

**Craig L. Rainey** was named senior vice president and general counsel of The Williams Companies Inc. in Tulsa. He joined Williams in 1999, where he has served in a variety of legal leadership positions, including senior counsel for energy marketing and trading as well as assistant general counsel for the company's exploration and production and mid-stream businesses. Prior to that, he served on the legal staff of Occidental Petroleum Corp. He is a 1977 graduate of the OU College of Law.

The law firm of Barrow and Grimm PC of Tulsa has named **Christopher A. Barrow** and **David A. Sturdivant** as preferred shareholders of the firm. The firm has also named **Timothy L. Rogers** as a member. Mr. Barrow was

admitted to the Oklahoma Bar in 2004. He is also a member of the state bar of Texas. His practice is concentrated in commercial litigation, business law and estate planning. Mr. Sturdivant was admitted to the Oklahoma Bar in 2005. His practice is concentrated in business and commercial litigation, general business matters and family law. Mr. Rogers was admitted to the Oklahoma Bar in 2008. His practice is concentrated in business and commercial litigation, construction law and surety law.

**Jim Beeby** has been appointed administrative law judge for the Middlesboro, Ky., Office of Disability Adjudication and Review, a division of the Social Security Administration. He was previously a senior attorney and section chief for the Federal Deposit Insurance Corporation Litigation/Bankruptcy Section. He also served for a year in Iraq as deputy director of the Office of Constitutional and Legislative Affairs, which was an adjunct to the political division of the U.S. Embassy in Iraq. In that capacity, he led a team of 14 attorneys and other professionals to advise the Iraqi parliament and executive office holders on drafting legislation regarding constitutional, hydrocarbons and election law. He is a 1979 graduate of the OCU School of Law. He may be reached at jim.beeby@ssa.gov and his phone number remains 505-818-9647.

**James M. Burson** has become a special partner in the firm of Hobbs, Straus, Dean & Walker LLP. He joined the firm in 2003, prior

to that he worked for the New Mexico Public Defender's Office and practiced with Quinlan, Bloom & Associates in Alamogordo, N.M., representing the Mescalero Apache Tribe. His Indian law practice includes employment, construction, federal contracting, real estate transactions, business and economic development, oil and gas, gaming, education, and governmental development and taxation. He earned his J.D. in 1999 from the University of New Mexico, obtaining certificates in both Indian Law and Natural Resources Law.

**Johnson Hanan & Vosler** of Oklahoma City announces **Kari A. Hawthorne** and **Sean P. Snider** as its newest partners. Both are graduates of the OCU School of Law and practice primarily in the area of medical malpractice defense. Ms. Hawthorne has been in practice with Johnson Hanan & Vosler since 2006, and Mr. Snider joined the firm in 2008.

**John Paul Truskett** has opened the Truskett Law Firm PLLC. He focuses his practice primarily on personal injury and worker's compensation cases. He is a 2004 graduate of the TU College of Law. The firm is located at 2202 E. 49th St., Suite 400, Tulsa, 74105, online at truskettlaw.com. Mr. Truskett can be reached at 918-230-6575 or john@truskettlaw.com.

**Crowe & Dunlevy** announces **Tanya S. Bryant** has been elected a director with the firm's Labor and Employment Practice Group. She represents management in employment-related matters ranging from policies

and procedures to lawsuits brought by employees under federal and state law. In addition, she has handled Oklahoma Employment Security Commission hearings and Equal Employment Opportunity Commission investigations. She is a 2004 graduate of the OCU School of Law.

**Christopher S. Thrutchley** of Tulsa has joined Doerner, Saunders, Daniel & Anderson LLP. His areas of practice include labor and employment law and frequently lectures and writes on the topic. He is certified by the Human Resources Certification Institute as a senior professional in human resources and is a former director of human resources for one of Tulsa's largest unionized employers. He is a 1993 graduate of the TU College of Law.

**Logan Logan & Lowry LLP**, with offices in Vinita and Grove, announces the addition of **John P. Seidenberger** and **Bryce P. Harp** as associates with the firm. Mr. Seidenberger's areas of practice include civil litigation, bankruptcy and banking. He graduated from the OU College of Law in 2011. Mr. Harp will concentrate his practice in civil litigation and transactions. He is a 2011 graduate of the TU College of Law.

**GableGotwals** announced two attorneys have joined the firm. **Wes Pebsworth** is an associate in the Tulsa office. He advises clients on various litigation matters, including insurance law, general commercial litigation and bankruptcy. He served as an intern with U.S. Magistrate Judge T. Lane Wilson in the Northern District of Oklaho-

ma. He is a 2011 graduate of the TU College of Law. **Talitha Ebrite** recently rejoined the firm as of counsel in the Oklahoma City office. She was with GableGotwals from 2006 to 2010 until she joined the exploration and production function of Devon Energy Corp. Her practice focuses on business litigation (state and federal), with an emphasis on matters relating to the oil and gas industry. A significant portion of her practice is also devoted to closing commercial loans for nonprofit certified development companies that administer loans for the U.S. Small Business Administration.

## At The Podium

**Microsoft attorney Jim Banowsky** recently organized and spoke at a seminar at the European Patent Office in Munich, Germany. Topics from the seminar included Microsoft's patent strategy in Europe together with several technical presentations on state of the art technology. The seminar was intended to help patent examiners understand recent developments in technology, and speakers included researchers and attorneys from Microsoft in U.S. and Europe. He formerly practiced in Norman.

**Mary Ellen Ternes** moderated sessions titled "Business Risks of Carbon Counting" and "Counting Sequestered Carbon: CCS/EOR Conversion" and was a

panelist during a session titled "Carbon, Capture and Sequestration: Regulatory and Policy" at the Carbon Management Technology Conference in Orlando, Florida, in February. She also presented "Environmental Liability: Regulation, Compliance and Litigation Risk" at the AIChE Spring Meeting and Eighth Global Congress on Process Safety in April in Houston. In addition, she was the featured speaker in "A Conversation with Mary Ellen Ternes" discussing energy and environmental law in a forum presented by the *Energy Law Journal* at the TU College of Law in April.

**Scott McCreary** co-presented sessions titled "Back to the Basics – An Examination of United States Citizenship; Aircraft Registration and Alternatives for Non-U.S. Citizens" and "The FAA Registry on the Razor's Edge" at the National Business Aviation Association's 2012 Aircraft Registration Conference in Delray Beach, Fla., in February.

**Frank Polk** co-presented "If Things Are Better, Why Am I Still Nervous – Reducing Risks in a Closing" at the National Business Aviation Association's 2012 Aircraft Registration Conference in Delray Beach, Fla., in February.

**Mary Quinn Cooper** presented "Secrets of a Super Deposition" at the "Sharing Success" Seminar for Women Lawyers presented by DRI, the leading organization of defense attorneys and in-house counsel in Scottsdale, Ariz., in February.

**Nathan Whatley** presented "Employer Social Media Policies Under Fire" at a meeting of the Enid Society for Human Resource Management in March.

**Joe Walters** presented "Protecting Our Children From Legal Threats" at CORE's 2012 National Conference in Oklahoma City in March.

**Chris Paul** was a featured panelist for "Corrosion and Punishment Forum" presented at CORROSION 2012, sponsored by NACE International in Salt Lake City in March.

**Fred Cornish** presented "The Attorney/CPA Working Relationship" at the Tulsa Chapter of Oklahoma Society of CPAs in March.

**Charlie Plumb** presented "Leave Management - How to Master the FMLA/ADA/Workers Compensation Web" at the HR Hero Virtual Conference in March. He also presented "A Practical Refresher on Hiring and Firing Best Practices" at a Western Oklahoma Human

Resources Presentation in Weatherford in April.

**Bill Freudenrich, Sam Fulkerson, Kathy Neal, Alison Patel, Charlie Plumb, Jim Prince and Sharolyn Whiting-Ralston** were featured presenters at Employer-LINC 2012 "Adventures in HR" employment and employee benefits seminar in Tulsa in April. Mr. Freudenrich, Ms. Patel, Mr. Plumb, Mr. Prince, and Ms. Whiting-Ralston joined **Michael Lauderdale, Tony Puckett, Nathan Whatley and Betsy Wood** in a similar presentation in Oklahoma City, Oklahoma.

**Kathy Neal** presented "Hope for the Best or Prepare for the Worst: HR Best Practices for Hiring & Avoiding Employment Litigation" at the 2012 Oklahoma Human Resources State Conference and Expo in Tulsa in April.

**David A. Walls** was an invited guest panelist at the recent American Subcontractors Association National Business Convention and Forum in San Antonio, Texas.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. 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. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (e.g., Super Lawyers, Best Lawyers, etc.) will not be accepted as announcements (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing, and printed as space permits. Submit news items via email to:

Lori Rasmussen  
Communications Dept.  
Oklahoma Bar Association  
(405) 416-7017  
barbriefs@okbar.org

**Articles for the Aug. 11 Issue must be received by July 16.**

## IN MEMORIAM

**Lonna Marie Adams** of Wagoner died April 18. She was born Sept. 14, 1970, in St. Paul, Minn. She earned her J.D. from the University of Tulsa College of Law in 1996.

**Waldo F. Bales** of Eucha died April 16. He was born Sept. 2, 1922, in Altoona Pa. **He served in the Navy Air Corps during World War II and was stationed in the South Pacific, serving as a gunner on a bomber crew.** He was a 1958 graduate of the

University of Tulsa College of Law. He served as Tulsa's city attorney from 1968 to 1980 and as a member of the city's legal staff for nearly two decades. He left the post in 1980 to become an assistant prosecutor for Ottawa and Delaware counties while managing a small law office in Jay. He later was the general counsel for the Grand River Dam Authority. He was active in the community, including leading a consulting commission for the Magic Empire of

Girl Scouts and coordinating the fundraising drive for the Scouts' new building.

**John Travis Edwards** of Oklahoma City died April 22. He was born Feb. 22, 1927 in Pawhuska. He was a member of the Osage Nation and attended the University of Oklahoma. He earned a law degree from the OU College of Law in 1951. After practicing privately for several years, he joined the law firm that is now Monnet, Hayes, Bullis,

Thompson & Edwards. He served as senior partner of the firm from the mid-1980s until his retirement in 2011. His philosophy on litigation focused on well reasoned advocacy and honest counsel, civility and respect. He helped develop Oklahoma law in many areas, most notably the fiduciary duty owed to mineral owners by oil and gas well operators and the tort of abusing court process. He represented clients on both plaintiff and defense sides, and maintained many professional and personal relationships that began through his practice. His skill as a courtroom attorney led to his induction into the American College of Trial Lawyers. He belonged to numerous professional and civic organizations and was a member of Westminster Presbyterian. Memorial contributions may be sent to the Oklahoma Zoological Society, Bizzell Library Society, Oklahoma College of Law or Osage Nation Foundation.

**Donald Eugene Gasaway** of Tulsa died on March 21. He was born on Jan. 1, 1937, in Springfield, Mo. He attended the University of Tulsa and received degrees in journalism and law. He had two passions in his life other than his family - the law and officiating. Throughout his 28-year career of practicing as a defense lawyer, he argued successfully before the U.S. Supreme Court three times and served as the president of the First Amendment Lawyers Association. His 50 year officiating career included refereeing high school, college and professional football. He was one of a few chosen to work in the U.S. Football League

and the World Football League. Highlights of his career were working the Blue Bonnet Bowl and the Peach Bowl. During the later part of his life he worked the Arena leagues' first championship game. Online memorials may be left for the family at [www.dillonsmithfuneralhome.com](http://www.dillonsmithfuneralhome.com).

**Alfred J. Holland Sr.** of Paragould, Ark. died April 30. He was born Oct. 23, 1936 in Woodall, Okla. and attended school in Tahlequah. He obtained his law degree from the TU College of Law. **He was enlisted in the U.S. Army and served until his honorable discharge.** In addition to his law practice, he owned his own title company in Missouri. He was a member of the Masonic Temple and was a 32 degree Mason and attained the Shriner degree as well.

**Bert M. Jones Jr.** formerly of Tulsa died the last weekend in April at his home in Minnetonka, Minn. at the age of 79. For more than 40 years, He was a partner and trial lawyer with Rhodes, Hieronymus, Jones, Tucker & Gable in Tulsa. He was a graduate of Will Rogers High School, the University of Oklahoma and OU College of Law, where he was a member of Delta Tau Delta Fraternity. Following graduation, **he served in the U.S. Marine Corp. He was an officer in the USMC Res., attaining the rank of major.** He began his trial career as an assistant district attorney in Oklahoma County from which he joined Rhodes in Tulsa. He was a Fellow in the Oklahoma and Tulsa County Bar Foundations, and a founding Fellow of the American Board of Trial

Advocates (Oklahoma), Defense Research Institute and the Products Liability Advisory Council. He relished his role as mentor and will be remembered for having trained some of Tulsa's best trial lawyers, who strive to continue his traditions today.

**Karin Michelle Kriz** of Lawton died April 25. She was born on April 11, 1961, in Lawton. She graduated from Lawton High School in 1979 and from Oklahoma State University in 1983 with a B.S. in marketing. While attending OSU she was an active member of the Delta Delta Delta sorority. She went on to receive a J.D. from the Oklahoma City University School of Law and graduated *magna cum laude*. She served as an assistant attorney general for the state of Oklahoma until she retired in 2006. She was a lifelong member of First United Methodist Church in Lawton. She was a travel enthusiast and loved going on cruises with her family.

**William J. Manger** of Oklahoma City died April 30. He was born Dec. 23, 1945, in Paterson, N.J., where he grew up and went on to graduate from Eastside High School. He moved to Oklahoma to attend college at OCU where he played baseball for his beloved coach, Paul Hansen. He graduated from Oklahoma City University with a B.S. in 1967, MBA in 1969, and J.D. in 1976. He worked at Lucent Technologies, also known as AT&T or Western Electric for 29 years as an affirmative action manager while practicing law at Foshee and Yaffe. He served on the board of Crimestoppers and on the Board of

Directors at Weokie Credit Union for 31 years and also served many years on the Policy Review Committee. After retiring from Lucent in 1998, he was sworn in as a full-time Oklahoma City municipal judge. In 2003, he became the city's presiding judge. He loved working with the defendants and police officers alike. He was an avid sports fan, trivia nut and collector of sports memorabilia. He had a sense of humor that was second to none and enjoyed every minute of life. In lieu of flowers, the family respectfully requests that donations be made to the OCU Baseball Program or American Heart Association.

**Floyd Kelsey Propps** of Edmond died May 14. He was born July 8, 1950, in Woodward. He graduated from Mangum High School in 1968. For many years, he joined his high school buddies at the annual alumni celebrations as they revived old rock and roll songs with their band, "The Changing Times." He received his bachelor's at Phillips University in Enid, his master's at the University of Oklahoma and in 1990, earned his J.D. at the Oklahoma City University School of Law. He then taught future nursing home administrators in their education program and practiced health care law in Oklahoma and Florida while assisting nursing home owners in obtaining the necessary permits for sales and expansion projects. He loved

his family, enjoyed playing music and had such a unique sense of humor never failing to make people laugh. Memorial donations may be made to the Mangum High School Alumni Scholarship, P.O. Box 8, Mangum, OK 73554.

**Jay Samuel Roberts** of Broken Arrow died April 21. He was born Sept. 10, 1924, in Deepwater, Mo. **He served in the Marine Corp in WWII** and later moved to Tulsa where he graduated from the University of Tulsa College of Law. He practiced law for 50 years first with the firm of Church and Roberts and later in private practice.

**E. Gayle Sheridan** of Tulsa died May 1 at the age of 73. He was born Nov. 7, 1938, in Nowata, where he graduated from high school. He received his bachelor's degree from OU and his law degree from the TU College of Law. He and his wife lived in Tulsa for 20 years. He was a labor attorney, having practiced from Texas, Alaska and back to Oklahoma, retiring from Shell Oil Co.

**Regena "Reggie" McNeill Walsh** of Oklahoma City was born May 13, 1964, in Woodward and died April 30. Growing up the family moved to Enid, and she later moved to Stillwater, where she attended Stillwater High School and OSU, graduating in 1987. She graduated from the OU College of Law and practiced law in Oklahoma City until her death.

**Leah Phelps White** of Muskogee died on April 11. She was born May 6, 1971, in Durant. She was a 1989 graduate of Durant High School and has since been honored as a distinguished alumni. She obtained a B.S. in environmental design from the University of Oklahoma College of Architecture in 1994. While attending OU, she was an active member of the Kappa Alpha Theta sorority. In 2004, she received her J.D. from the University of Tulsa College of Law where she was honored Order of the Curule Chair. While attending law school, she was editor-in-chief of the *Journal of International and Comparative Law* and was a Scribes Honorary Society Member. During her legal career, she worked for McKinney & Stringer in Tulsa as well as the international firm of Baker & McKenzie in Dallas. She was very proud that she passed the bar in Oklahoma, Texas and Arkansas. She practiced most recently with the firm of GableGotwals in Tulsa in the area of commercial litigation and real estate transactions. She will be remembered for her laugh, genuine integrity, deep care for others, generosity, work ethic and love of life. Her motto for life was "You choose to be happy." Memorial donations be made to the Growing Grace Fund, c/o Grace Episcopal Church of Muskogee.

## SERVICES

### HANDWRITING IDENTIFICATION POLYGRAPH EXAMINATION

Board Certified      Court Qualified  
Diplomate — ABFE      Former OSBI Agent  
Life Fellow — ACFE      FBI National Academy

Arthur D. Linville (405) 636-1522

INTERESTED IN PURCHASING PRODUCING & NON-PRODUCING Minerals; ORRI; O & G Interests. Please contact: Patrick Cowan, CPL, CSW Corporation, P.O. Box 21655, Oklahoma City, OK 73156-1655; 405-755-7200; Fax 405-755-5555; E-mail: pcowan@cox.net.

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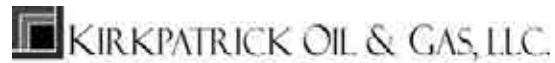
DO YOU OR YOUR CLIENTS HAVE IRS PROBLEMS? Free consultation. Resolutions to all types of tax problems. Our clients never meet with the IRS. The Law Office of Travis W. Watkins PC. 405-607-1192 ext. 112; 918-877-2794; 800-721-7054 24 hrs. www.taxhelpok.com.

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## SERVICES

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## OFFICE SPACE

SPACE AVAILABLE FOR ONE OR TWO attorneys and staff in a professional office building in the Fairview Farm Office Park on N.W. 150th St. between Penn and Western. Easy access to Kilpatrick and I-235 for quick trips to courthouse. Current occupants include owner/attorney and staff and two independent family law attorneys. Ample on-site parking. Common kitchen. Available if needed: phones, fax, Internet, shredding/recycling, copier, postage meter, use of two conference rooms and storage. Contact Jennifer Irish at 405-285-2776 or jenniferirish@coxinet.net.

### Office Spaces – MidTown Law Center

Historic atmosphere in restored 1926 building for solo or small firm lawyers. Rent includes: phone, fax, long distance, Internet, parking, library, kitchen privileges, on site storage, two conference rooms and receptionist. Enjoy collegiality with civil/trial/commercial attorneys  
**405-229-1476 or 405-204-0404.**

FOR LEASE MIDTOWN CLASS A EXECUTIVE OFFICE SPACE: 136 NW 10th, OKC. Two office suites including 3,100 and 3,500 sq. ft, each with separate full kitchens, 10 ft ceilings, granite counter tops and very nice finishes. Totally renovated. Free parking. 16.50 / sq. ft. 405-246-8160 (Ask for Chad Elmore) achadeltmore@me.com, www.chadeltmore.com.

EXECUTIVE SUITES FOR LEASE: Beautifully restored building in Downtown/Midtown OKC Arts District. Walking distance to county and federal courthouses. Reception, phone, Internet, cable TV, copy/fax/scanner, free parking. Secretarial suites available. Case sharing opportunities with six practicing attorneys. 405-272-0303.

OFFICE SPACE FOR RENT. 1 block north of federal courthouse; free parking, receptionist and conference room, kitchenette are included. Please call 405-239-2454.

## POSITIONS AVAILABLE

NELSON ROSELIUS TERRY & MORTON is seeking an attorney with 0-5 years experience in civil trial practice, insurance litigation and insurance coverage. Submit resume, cover letter and writing sample to Derrick DeWitt at P.O. Box 138800, Oklahoma City, OK 73113.

LARGE AV-RATED DOWNTOWN TULSA CIVIL LITIGATION firm seeking a qualified associate attorney with 2-4 years experience. Position requires excellent legal research and writing, and litigation skills. Excellent academic and professional credentials required. Law journal experience preferred. Send cover letter and resume to "Box O," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

ASSISTANT DISTRICT ATTORNEY – District 23 has an immediate opening for an experienced assistant district attorney in the Chandler office. The applicant must have prosecution experience. This is a position that will require excellent communication and leadership skills. Organization and time management are crucial. Highly competitive salary will reflect the experience and responsibility level of the position. To apply, forward a resume to District Attorney Richard L. Smothermon, 331 N. Broadway, Shawnee, OK 74801.

DOWNTOWN OKC/MID-SIZE LAW FIRM seeking experienced paralegal/legal assistant (4+ yrs) for an insurance defense practice. Must have good communication, computer and organization skills. Competitive salary and benefits. Send resume to "Box P," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

SMALL AV-RATED CANADIAN COUNTY LAW FIRM seeking contract/associate attorney with 2-5 years experience in civil litigation, brief preparation and research. Applicants must have good communication and writing skills, be organized and motivated. Salary based on experience and motivation. Send resume, references and salary requirements to "Box Y," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

PARALEGAL/LEGAL SECRETARY IS WANTED for full-time project work in Oklahoma. Position requires the qualified candidate to work in a team environment in the document support function. This includes database management and reporting, document preparation, and other administrative support functions. Candidate must have experience with land documents and title reports, databases and high proficiency with MS Office Suite. Previous experience with accounting tracking a plus. EOE. Benefits offered. Please email resumes to Andy@coatesfieldservice.com.

FULL TIME POSITION AS ASSOCIATE ATTORNEY for large Tulsa law firm. Must be fluent in Spanish, have a broad knowledge of the law and good telephone skills. Send resumes to: Human Resources Dept., P.O. Box 1046, Tulsa, OK 74101.

## POSITIONS AVAILABLE

LITIGATION FIRM WITH OFFICES IN DALLAS, TULSA AND OKLAHOMA CITY seeks two to three experienced litigators for the firm's Tulsa and Oklahoma City offices. New hires will be located in downtown Tulsa and downtown Oklahoma City. The firm is a litigation firm with a broad client base and a strong, growing presence in Oklahoma and Texas. The law firm recently was recognized as one of the 40 fastest growing companies in eastern Oklahoma, and the only law firm on the list. The firm seeks attorneys with 4 to 7 years of experience or more in litigation. Those seeking a top litigation environment in which to mentor and be mentored are encouraged to inquire. Salary is above the norm when compared with commensurate job opportunities. Please send resume to "Box C," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

MAGELLAN'S LEGAL DEPARTMENT IS SEEKING an experienced attorney. The ideal candidate will have preferably 5-15 years of legal experience. The position will primarily focus on commercial transactions counseling, negotiation and documentation; will provide legal counsel and guidance regarding contract matters, right-of-way issues as well as acquisitions and divestitures; will also be responsible for managing the resolutions of disputes related to transactional work; may assist with FERC and other regulatory matters. Apply online at [www.magellanlp.com](http://www.magellanlp.com) or send resume to [lynn.somerville@magellanlp.com](mailto:lynn.somerville@magellanlp.com).

TITLE ATTORNEY IS WANTED for full-time project work in Oklahoma. Position requires the qualified candidate to review title reports for the purpose of right of way acquisition for various projects located within Oklahoma. Candidate must be proficient with Oklahoma land title and MS Office Suite. EOE. Employee benefits offered. Please email resumes to Andy@coatesfieldservice.com.

LEGAL ASSISTANT NEEDED FOR EDMOND law firm. Experience in family law and litigation preferred. Please send resume via email to [lholkum@lldlaw.com](mailto:lholkum@lldlaw.com) or by mail to Lester, Loving & Davies, P.O. Box 7422, Edmond, OK 73083.

FULL-TIME RECEPTIONIST NEEDED for an Oklahoma City AV-rated law firm. Receptionist must have professional appearance, excellent communication skills and be familiar with Microsoft Word. Light typing is required. Knowledge of Excel spreadsheets is preferred but not required. Send resume, references and salary requirements to [rfitzgerald@whittenburragelaw.com](mailto:rfitzgerald@whittenburragelaw.com).

OKC AV FIRM SEEKS ASSOCIATE with a minimum of three years experience. The attorney must be a motivated self-starter. The position allows the attorney to handle his or her caseload with supervision. Law firm desires an associate with experience in insurance defense and insurance subrogation. Deposition experience helpful. Send resume and salary requirements to "Box F," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.



## POSITIONS AVAILABLE

LESTER, LOVING & DAVIES PC, an AV-rated law firm, seeks an associate with minimum 0-2 years litigation experience. Send resume to Lester, Loving & Davies PC, 1701 South Kelly Ave., Edmond, OK 73013.

GEICO STAFF COUNSEL — LAW OFFICES OF MICHAEL H. GITHENS, is seeking an attorney with 2-6 years of experience in insurance defense and/or personal injury practice. The attorney will be expected to handle a caseload including research, drafting pleadings and motions, attending depositions, mediations, court appearances and trial. The applicant must be admitted to practice in the state of Oklahoma and be willing to travel throughout the state. Good organizational, communication and computer skills are required. Please fax resumes to 405-242-6401 or email to mgithens@geico.com.

MUNICIPAL JUDGE: The City of Oklahoma City seeks full-time municipal judge. Must be a resident of Oklahoma City with a minimum of four years experience in state as a licensed, practicing attorney. Additional requirements listed in application. Pick up and return application to Department of Court Administration, 700 Couch Drive, Oklahoma City, OK 73102. Direct all inquiries to Court Administrator Stacey Davis at 405-297-2780. Applications will be accepted until 5 p.m. May 28, 2012.

## POSITION WANTED

EXPERIENCED LAWYER SEEKING PT POSITION in appellate or administrative (immigration, SSA) or other areas, while upstarting own practice. Bilingual Spanish; Interpretation Translation. Prefer congenial, fun atmosphere in OKC or surrounding area. Salary negotiable. Contact okclawyer4hire@gmail.com.

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COMPREHENSIVE OKLAHOMA LAW LIBRARY FOR SALE: A working practitioner's essentials: Oklahoma Reports Volumes 1 thru 198, except 2 volumes. Complete sets of Oklahoma Decisions, Oklahoma Statutes Annotated w/index and Oklahoma Digest all up to date with current pocket parts. Price: \$9,640 (482 volumes x \$20 volume); 237 volumes of Oklahoma Law Review 1950 thru Fall 2011. Price: Make offer. Telephone: Office 1-580-628-3581; Home 1-580-628-2437.

## POSITIONS AVAILABLE

### GENERAL COUNSEL

A leading provider of workers' compensation insurance to Oklahoma businesses is seeking a licensed attorney to serve as Chief Legal Officer/General Counsel. We are a customer service driven employer and take pride in hiring motivated professionals who are excited about making a difference for Oklahoma businesses. We are committed to providing a work environment that cultivates growth and productivity for our employees.

The successful candidate must meet the following requirements:

- Juris Doctorate
- Above average academics
- Active membership in the Oklahoma Bar Association

Seven (7) years experience in the practice of law, three years of which must have been in the practice of insurance law.

Preference will be given for experience in the following areas:

- Experience as a general counsel, assistant or associate general counsel, managing partner or managing member of a law firm and supervising work of other attorneys
- Workers' Compensation experience
- Litigation management
- Contracts
- Tracking and management of legislation

We provide a professional working environment and an excellent benefit package that includes paid vacation, sick leave, paid holidays, health, dental and life insurance. Annual salary range is \$90,000 - \$105,000. **EEO/AA Employer.** Send resume to Box D, Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

# What's In a Name?

By D. Sharon Gentry

Life can be unnecessarily complicated for those of us who go by our middle names. My full name is Dorothy Sharon Gentry. I have always been called by my middle name, "Sharon." I did not make that choice. My parents did. Apparently, my mother, (whose name was Dorothy), liked the name "Sharon," which happened to be the name of a character in a book that she read during her pregnancy. When it came time to actually name me, my parents had not selected a middle name. My dad suggested that my middle name should be "Dorothy." However, the two names did not really *flow* together in that order. So, it was decided that "Dorothy" would be my first name and "Sharon" would be my middle name. But because "Sharon" was their name of choice, they called me "Sharon" — and so did everyone else.

All during childhood and adolescence, I was known as "Sharon." After graduation from high school, things changed. When I got my Social Security card, I had to identify myself as follows: *Last name, first name, middle initial*. That meant I was now "Dorothy S. Gentry." Of course, I had never gone by the name of "Dorothy" (even my driver's license was in the name "Sharon Gentry.") I did not think of myself as a "Dorothy." Actually, most of my friends and relatives did

not even know that "Dorothy" was my first name. They assumed it was "Sharon."

Later, I found that documents of all types required the "*Last name-first name-middle initial*" formula. As a result, my frustrations continued. Everything required the same formula — school records, job applications, medical forms and credit card applications. Once, I tried to outwit the system by listing myself as "D. Sharon Gentry" on a form, using "D." as my first name and "Sharon"

as my middle initial. Unfortunately, the system did not budge. The documents came back with the name of "Sharon D. Gentry." So, now I had an alias.

I have also tried using just "D.S. Gentry," or my full name, "Dorothy Sharon Gentry." But, "Dorothy Sharon Gentry" is a long name, and people who read it assume that I go by my first name, and call me "Dorothy" anyway. I have even tried putting quotes around "Sharon," or underlining it, to indicate that I wished to be called "Sharon." But mostly, the hints are ignored.

After all these years, I am still struggling to explain that I go by my middle name and wish to be called "Sharon." Invariably, I get the question, "Oh. Don't you like the name Dorothy?" Actually, I think "Dorothy" is a fine name — it's just not *my* name. My name is "Sharon." "Dorothy" was my mother's name, and while I am very proud to have that name, I do not want to be called "Dorothy."

So, *please* parents. Don't name your child "John Andrew" with the intention of calling him "Andy" or "Drew." Just call him "John" or make "Andrew" his first name. It will make life less complicated for him.

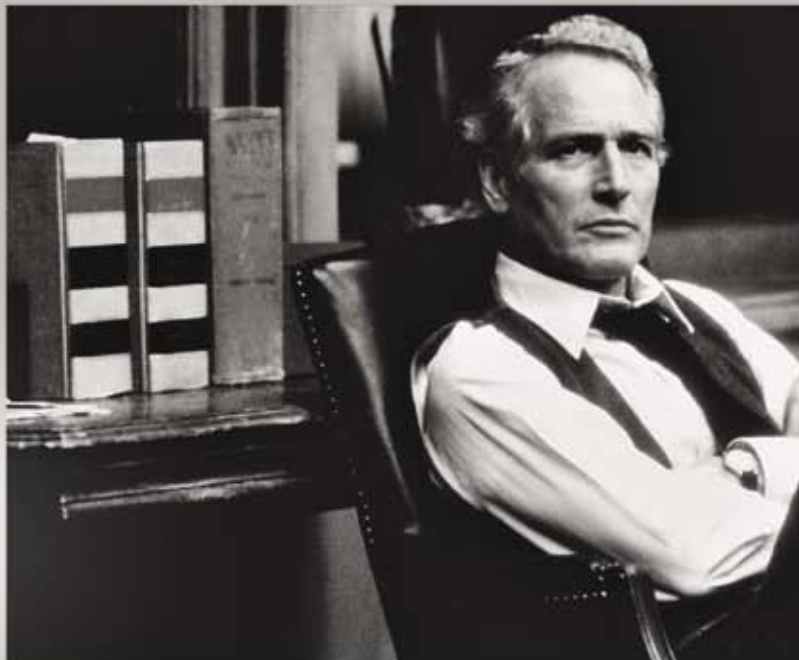
*Ms. Gentry practices in Oklahoma City.*



“Unfortunately, the system did not budge. The documents came back with the name of ‘Sharon D. Gentry.’ So, now I had an alias.”

# The OBA Movie Club: The Verdict

**June 5, OKC**  
Oklahoma Judicial Center,  
2100 N. Lincoln Blvd.



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

**5 p.m.**

Optional self-tour of the Oklahoma Judicial Center

**5:30**

Registration and networking dinner

**6**

**Movie showing: The Verdict**

The Verdict is a 1982 courtroom drama film which tells the story of a down-on-his-luck alcoholic lawyer who pushes a medical malpractice case in order to improve his own situation, but discovers along the way that he is doing the right thing.

Since the lawsuit involves a woman in a persistent vegetative state, the movie is cast in the shadow of the Karen Ann Quinlan case.

The movie stars Paul Newman, Charlotte Rampling, Jack Warden, James Mason, Milo O'Shea, and Lindsay Crouse.

**8:10**

Break

**8:20**

A Panel Discussion

**Moderator**

Garvin Isaacs, Garvin A. Isaacs Inc., Oklahoma City

**9:10**

Adjourn



## Planner/Moderator:

**Credit:** Approved for 3 hours MCLE/ 3 Ethics.

**Tuition:** \$100 for early-bird registrations with payment received at least four full business days prior to the seminar date; \$125 for registrations with payment received within four full business days of the seminar date. \$25 non-OBA member guests.

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



# Local Government Law

May 31, OKC - Oklahoma Bar Center, 1901 N. Lincoln Blvd.  
June 1, Tulsa - Renaissance Hotel, 6808 S. 107th East Ave.



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

8:30 a.m.

Registration and Continental Breakfast

9

Introduction to Dealing with Cities and Towns

Diane Pedicord, General Counsel, Oklahoma Municipal League, Oklahoma City

9:50

Break

10:00

Interacting with Public Schools

Stephanie J. Mather, Center for Education Law, Oklahoma City

10:50

Open Meeting/Open Records Acts of Oklahoma

Matthew J. Love, Law Office of Margaret McMorro-Love, Oklahoma City

11:40

Networking lunch (included in registration)

12:10 p.m.

Public Financing Arrangements: TIFs and Bonds

Wiley L. Williams Jr., Assistant Municipal Counselor, City of Oklahoma City, Oklahoma City

1

Claims Against Government Entities: Tort Claims, Qui Tam Actions and Suits Under 42 U.S.C. §1983

Margaret M. Love

1:50

Break

2

Eminent Domain/Inverse Condemnation Actions

TBD

2:50

Adjourn

## Planner/Moderator:

Margaret M. Love, Law Office of Margaret McMorro-Love, Oklahoma City

Credit: Approved for 6 hours MCLE/ 0 Ethics.

Tuition: \$150 for early-bird registrations with payment received at least four full business days prior to the seminar date; \$175 for registrations with payment received within four full business days of the seminar date.

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

