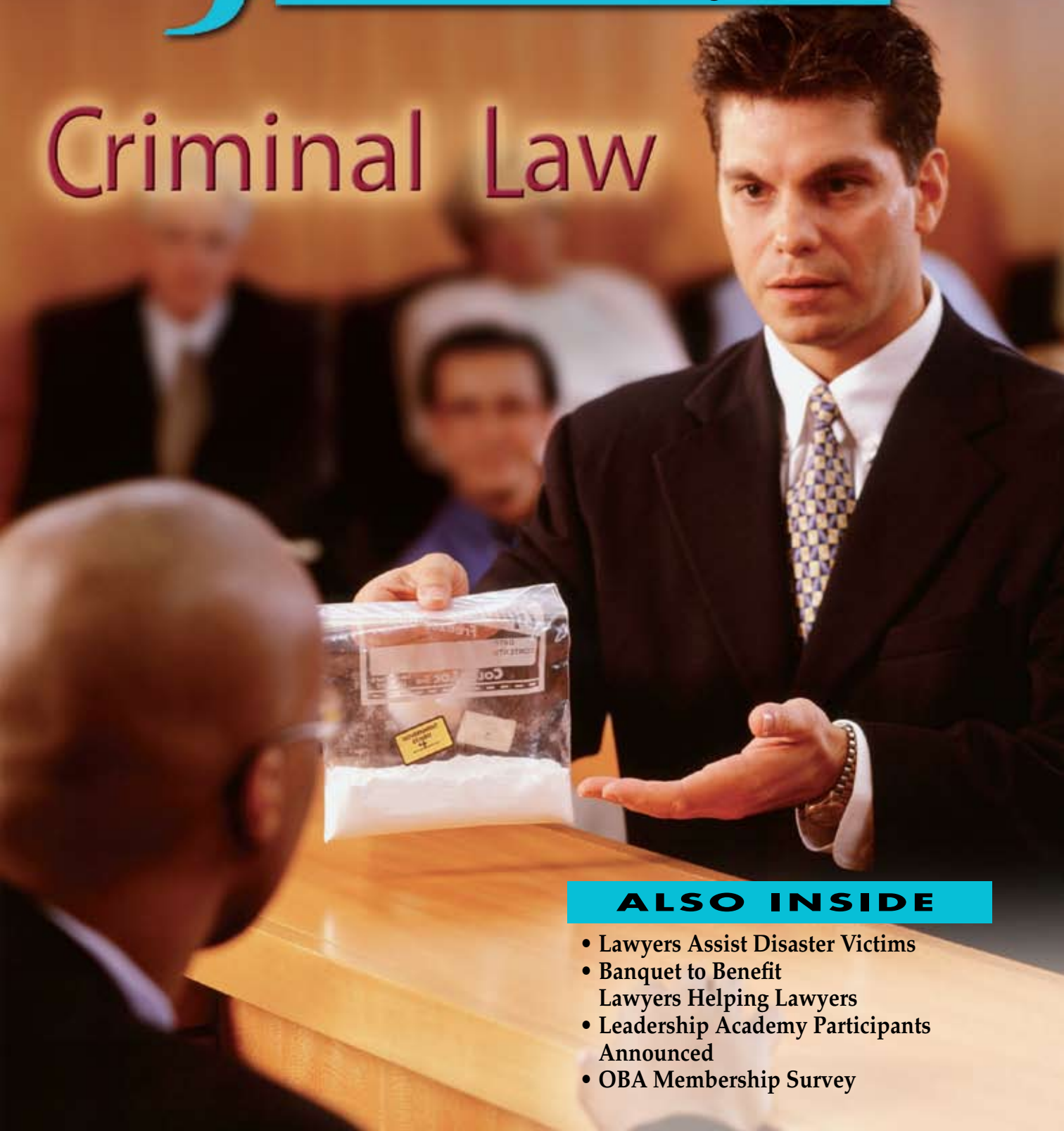


# WITL Oklahoma Bar JOURNAL

Volume 84 ♦ No. 21 ♦ Aug. 17, 2013

## Criminal Law



### ALSO INSIDE

- Lawyers Assist Disaster Victims
- Banquet to Benefit  
Lawyers Helping Lawyers
- Leadership Academy Participants  
Announced
- OBA Membership Survey

2013

# Women in Law Conference

and Mona Salyer Lambert Spotlight Awards Luncheon

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Luncheon Keynote:

**Stacy L. Leeds**, Dean, University of Arkansas  
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Afternoon CLE:

- 1 Modern Slavery in Oklahoma. Presented by Jasmine A. Majid and Craig Williams
- 2 Communicating With the Bench (ethics). Moderated by Representative Kay Floyd, Oklahoma City  
Panel Includes Judge Rebecca Brett Nightingale, Tulsa County District Court, Tulsa  
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Judge Lisa Davis, Oklahoma County District Court, Oklahoma City
- 3 From Typewriters to iPads: How Generational Diversity is Transforming the Workplace.  
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**LET'S TALK**

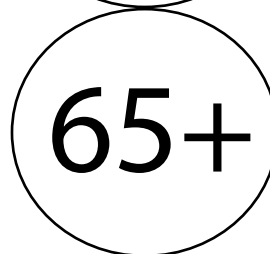
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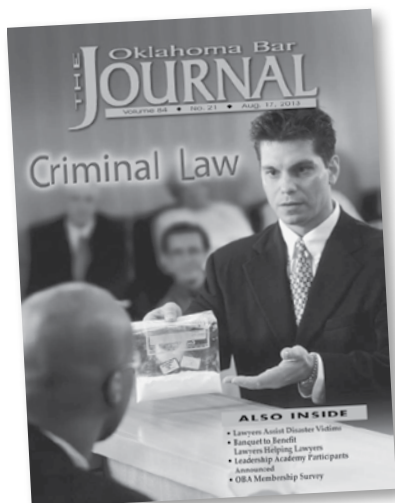


## THEME: CRIMINAL LAW

EDITOR: JANUARY WINDRIX

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## Statewide Service Projects to Give Back

By Jim Stuart

The OBA Day of Service set for Sept. 20-21 is now in its final stages. Lawyers from across the state are planning projects and finding ways in which to give back to their communities. Law firms both large and small, corporate law departments, law schools, legal services organizations and bar leadership, are all needed in order to implement this significant OBA service project.

Coordination of efforts and events is being made through the leadership of the OBA Board of Governors, Young Lawyers Division and county bar presidents. The time to mark your calendars is now. Take a moment to set aside Friday, Sept. 20, or Saturday, Sept. 21, as a day in which to give back.



President Stuart  
practices in Shawnee.  
jim@scdtlaw.com  
405-275-0700

*It's not too late. You pick the community organization to assist.*

Does your county bar have a project planned? Check the list on the Young Lawyers Division page in this issue. If your county is not there, contact your bar president to get something organized. It's not too late. You pick the community organization to assist. I'm expecting more additions to that list, which will soon be posted to [www.okbar.org](http://www.okbar.org) with more details on the projects.

This is the one day (okay, two days) to showcase what we as lawyers do on a regular basis — giving back — and to say thank you to those communities in which we live.

I'm counting on you to be involved in this meaningful statewide project.

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# EVENTS CALENDAR

## AUGUST 2013

- 19 **OBA Alternative Dispute Resolution Section meeting**; 12 p.m.;  
Oklahoma Bar Center, Oklahoma City with teleconference; Contact  
Michael O'Neil 405-232-2020
- OBA Women in Law panelist meeting**; 4 p.m.; Oklahoma Bar Center,  
Oklahoma City; Contact Kim Hays 918-592-2800 or Susan Bussey  
405-525-9144
- 20 **OBA Civil Procedure and Evidence Code meeting**; 3:30 p.m.;  
Oklahoma Bar Center, Oklahoma City and OSU Tulsa, Tulsa; Contact  
James Milton 918-594-0523
- 22 **Oklahoma Bar Foundation Trustee meeting**; 8:30 a.m.; Oklahoma Bar  
Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070
- OBA Work/Life Balance Committee meeting**; 12 p.m.; Oklahoma Bar  
Center, Oklahoma City with teleconference; Contact Sara Schumacher  
405-752-5565
- OBA Professionalism Committee meeting**; 3:30 p.m.; Oklahoma Bar  
Center, Oklahoma City with teleconference; Contact Judge Richard Woolery  
918-227-4080
- 23 **OBA Professional Responsibility Commission meeting**; 9:30 a.m.;  
Oklahoma Bar Center, Oklahoma City; Contact Deadra Goss 405-416-7063
- OBA Section Leaders Council meeting**; 12 p.m.; Oklahoma Bar Center,  
Oklahoma City and OSU Tulsa, Tulsa; Contact Roy Tucker 918-684-6276
- 26 **OBA Juvenile Law Section and CLE Subcommittee joint meeting**;  
3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact  
Tsinena Thompson 405-232-4453
- 28 **OBA Women in Law Committee meeting**; 4 p.m.; Oklahoma Bar  
Center, Oklahoma City; Contact Kim Hays 918-592-2800 or Susan Bussey  
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## SEPTEMBER 2013

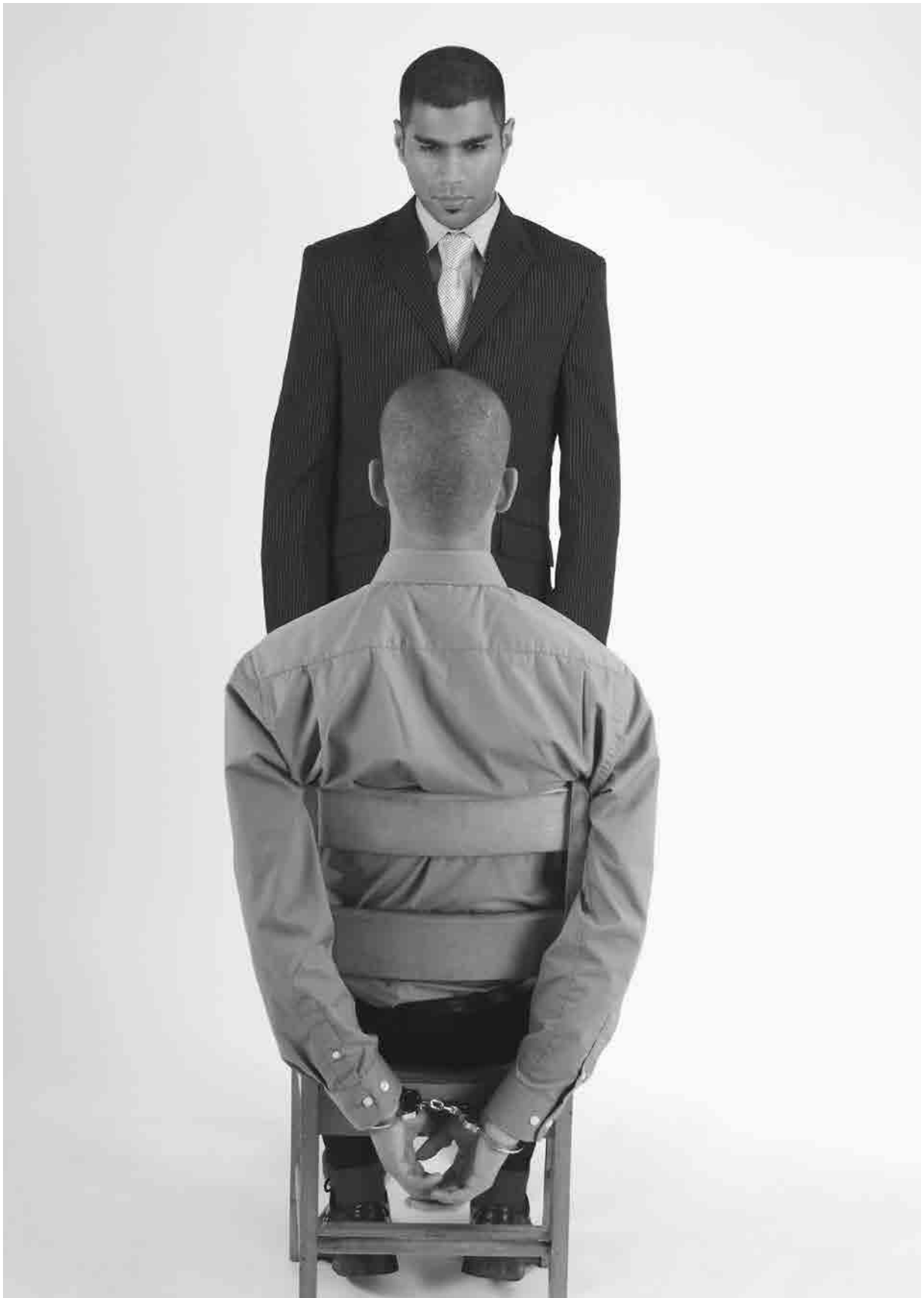
- 2 **OBA Closed** – Labor Day observed
- 5 **OBA Government and Administrative Law Section meeting**; 4 p.m.;  
Oklahoma Bar Center, Oklahoma City with teleconference; Contact Gary Payne  
405-297-2413

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

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## An Overview of Recent Changes in the *Miranda* Doctrine and the Rights to Counsel and Silence

By Scott Rowland

The Fifth Amendment's protections against compelled self-incrimination are nearly as old as the United States Constitution itself, but it was arguably the United States Supreme Court's decision in *Miranda v. Arizona*<sup>1</sup> which gave full force to those protections. Now, almost 50 years after that landmark ruling, a new decision by the court, *Texas v. Salinas*,<sup>2</sup> allows prosecutors in some instances to comment to the jury on the defendant's refusal to answer questions from investigators when that person was neither in custody nor given the *Miranda* warnings. This article will examine *Salinas* and several other right to counsel or right to silence decisions handed down by the Supreme Court in the past few years. Collectively, these cases have quietly brought about significant changes in a criminal suspect's rights to counsel and silence in a very short period of time.

In *Salinas*, the defendant voluntarily accompanied Houston police to the police station and answered questions for almost an hour about a homicide which they were investigating. Officers had requested that he come to the police station "to take photographs and to clear him" as a suspect in the case.<sup>3</sup> During the course of the interview, he voluntarily handed over his shotgun for ballistics testing, but when officers asked if the shotgun shells found at the murder scene would match his shotgun, he declined to answer, "looked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up."<sup>4</sup> After the defendant sat silent for a few moments, the officer asked additional questions which the defendant then answered.

During closing arguments at the defendant's murder trial, the prosecutor mentioned his reaction to the question about the shotgun shells, commenting that an innocent person would have reacted differently, protesting his innocence. Based in part upon this evidence, the defendant was convicted of murder and given a 20-year prison sentence. He objected at trial contending that the prosecution's use of his silence and reaction to the questions violated his rights against self-incrimination under the Fifth Amendment. In rejecting this claim, the Texas Court of Criminal Appeals held that the Fifth Amendment's protections are against compelled self-incrimination, but a person who voluntarily cooperates with police is not being compelled. Thus, a comment by the prosecution on that

person's refusal to answer a specific question does not impermissibly burden their right to remain silent.<sup>5</sup>

Although the Supreme Court accepted the case to resolve the question of whether and when the prosecution may comment upon one's invocation of the right to silence during a voluntary, pre-arrest interview, the plurality opinion in fact dodged that question holding instead that the defendant never explicitly invoked his right to remain silent. Relying upon earlier cases where one who is in custody and given the *Miranda* warnings must unambiguously invoke the right to silence or right to counsel, Justice Alito's opinion, joined by Chief Justice Roberts and Justice Kennedy, applied the same standard to one voluntarily submitting to non-custodial police questioning. "So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation. Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed."<sup>6</sup> Left unanswered by this opinion is whether, had the defendant replied to the question about his shotgun that he wished to terminate the interview and say no more, the prosecution could have used that fact as evidence in its case in chief.

#### **COMMENT ON A DEFENDANT'S SILENCE BEFORE AND AFTER ARREST: CURRENT LAW**

The exact contribution which *Salinas* makes to this body of decisional law is best understood through a quick review of the prior cases. The Supreme Court first held in *Griffin v. California*<sup>7</sup> that a criminal defendant's Fifth Amendment rights are violated by commenting to the jury about his failure to take the witness stand and testify in his own defense. In *Doyle v. Ohio*,<sup>8</sup> the court extended this rule to situations where the defendant invokes the right to silence at the time of arrest, but then chooses to testify at his trial and provide an exculpatory story to the jury. The prosecutor's cross examination of the defendant about his silence after being arrested and after receiving the *Miranda* warnings was held to violate the due process clauses of the Fifth and Fourteenth Amendments.<sup>9</sup> However, the court in a subsequent pair of cases found no violation of one's rights when a defendant is impeached about his silence prior to receiving the *Miranda* warnings, first in *Jenkins v. Anderson*<sup>10</sup> involving a suspect's silence prior to

being arrested, and then two years later in *Fletcher v. Weir*<sup>11</sup> involving a suspect's silence after being arrested but prior to being given the *Miranda* warnings. Note that all of these cases concern impeaching a testifying defendant with his prior silence. *Salinas* marks the first time the Supreme Court has allowed the use of pre-arrest, pre-*Miranda* silence in the state's case-in-chief, regardless of whether the defendant chooses to take the witness stand.

These Supreme Court constitutional cases must be read in conjunction with Oklahoma cases involving the admissibility of pre-arrest silence under the law of evidence. In *Farley v. State*<sup>12</sup> the Court of Criminal Appeals found reversible error where the prosecutor cross examined the defendant about why he did not turn himself in to police upon learning a warrant had been issued for his arrest. Acknowledging that no constitutional violation had occurred under *Jenkins*, the court nonetheless found that because of the various possible explanations for not turning oneself in, the defendant's failure to do so was irrelevant under Section 2401 of the Oklahoma Evidence Code. However, more recent Oklahoma cases have either distinguished or ignored *Farley* and more closely followed the constitutional analysis from the Supreme Court's jurisprudence.<sup>13</sup>

#### **RELATED DEVELOPMENTS IN A DEFENDANT'S RIGHT TO SILENCE/COUNSEL**

To understand the other recent changes in this area of law, it is helpful to recall the three constitutional provisions giving rise to the rights to counsel and silence. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," and it is this right upon which the *Miranda* decision is based. It is triggered by the convergence of custody and interrogation, and is not limited to the specific offense for which the suspect is being detained and/or questioned. The second of these provisions is the Sixth Amendment and its specific right to counsel. This right attaches only upon "the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,"<sup>14</sup> and applies only to the charged offense and no other. Third is the Fourteenth Amendment's Due Process Clause and its requirement that any statement, whether custodial or not, be made voluntarily and not as the result of any undue coercion or any promise or threat.<sup>15</sup> This requirement — that any

statement used against a defendant be voluntary — applies regardless of whether the suspect was in custody.

### THE DEFINITION OF CUSTODY UNDER THE *MIRANDA* DOCTRINE

The essential holding of *Miranda* is that when a suspect is in custody and interrogated, no statement he makes may be used against him in the state's case-in-chief unless he was first advised of his rights and voluntarily waives those rights. Only when these two factors, custody and interrogation, are present are the dictates of *Miranda* triggered. Four of these recent cases involving *Miranda* directly address the issue of when an individual is in custody for purposes of the *Miranda* doctrine.

In *Maryland v. Shatzer*,<sup>16</sup> the court for the first time addressed the issue of whether one who is incarcerated may nonetheless not be in custody for purposes of *Miranda*. In that case, the defendant was serving time in prison when a detective attempted to question him about the sexual abuse of a child which occurred prior to his incarceration. The defendant invoked his right to counsel and the interview was immediately terminated, as is required by *Edwards v. Arizona*<sup>17</sup> holding that once the right to counsel is invoked, police may not reinitiate contact with the defendant unless his attorney is present.

Two and one-half years later a different detective again approached the defendant to question him about the child abuse charges, but this time the defendant waived his rights and answered the detective's questions. The majority opinion held that although he had been incarcerated during the entire relevant time period, there was a break in custody for *Miranda* purposes between the two interrogation sessions because the defendant had been released back into the general prison population.

Shatzer's experience illustrates the vast differences between *Miranda* custody and incarceration pursuant to conviction. At the time of the 2003 attempted interrogation, Shatzer was already serving a sentence for a prior conviction. After that, he returned to the general prison population in the Maryland Correctional Institution–Hagerstown and was later transferred, for unrelated reasons, down the street to the Roxbury Correctional Institute. Both are medium-security state correctional facilities.

...

Inmates in these facilities generally can visit the library each week, have regular

exercise and recreation periods, can participate in basic adult education and occupational training, are able to send and receive mail and are allowed to receive visitors twice a week. His continued detention after the 2003 interrogation did not depend on what he said (or did not say) to Detective Blankenship, and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. The "inherently compelling pressures" of custodial interrogation ended when he returned to his normal life. (citations omitted)

The *Shatzer* decision also settled for the first time how long a break in custody must be before the protections of *Edwards* dissolve, allowing officers to reinitiate contact with the defendant. This issue is treated more thoroughly below.

Two years after *Shatzer*, the court again had occasion to visit the issue of how prison incarceration affects one's custodial status. In *Howes v. Fields*<sup>18</sup> the court refused to adopt a bright-line rule that anytime a prison inmate is separated from the general population for questioning, the encounter is automatically custodial requiring *Miranda* warnings. In that case the inmate was taken to a conference room and questioned for several hours by deputies. He was told more than once he was free to leave and could go back to his cell whenever he wanted, and at one point when he became agitated and began to yell he was told by one of the deputies that if he did not want to cooperate he could leave. In refusing to fashion an absolute rule governing prison interrogations, the court stated:

When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. See *Yarborough*, 541 U. S., at 665. An inmate who is removed from the general prison population for questioning and is "thereafter . . . subjected to treatment" in connection with the interrogation "that renders him 'in custody' for practical purposes . . . will be entitled to the full panoply of protections prescribed by *Miranda*."<sup>19</sup>

Another of the Supreme Court's recent decisions in this area makes clear that one's status as a juvenile must be considered when determining

whether they were or were not in custody at the time of questioning. In *J.D.B. v. North Carolina*,<sup>20</sup> a 13-year-old was taken from his afternoon social studies class and questioned by the school police officer in a conference room without being advised of his rights. Although the Supreme Court has repeatedly stressed that the issue of custody is an objective test which does not depend upon the subjective factors of individual defendants, it nonetheless held that status as a minor should be factored into the equation.

Reviewing the question *de novo* today, we hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case.

...

It is, however, a reality that courts cannot simply ignore.

In *Bobby v. Dixon*,<sup>21</sup> a man suspected in the disappearance of his friend had a chance encounter with police at the police station. The officer administered *Miranda* warnings and attempted to question the suspect about the murder, but the suspect immediately stated he wanted a lawyer and was allowed to go on his way. When officers reinitiated contact about five days later he waived his rights and made a statement. The Sixth Circuit Court of Appeals, applying the rule of *Edwards v. Arizona*, held that because he had once invoked his right to counsel, officers could not seek and obtain a *Miranda* waiver from the defendant without his attorney present. In a *per curiam* opinion, the Supreme Court reversed because the defendant was not in custody during this chance encounter at the police station and therefore *Miranda* did not apply. Thus, the giving of the warnings by the officer and his attempt to invoke the right to silence were both legal nullities, because a defendant cannot anticipatorily invoke his rights prior to the time he is taken into custody.<sup>22</sup>

## INVOKING AND WAIVING THE RIGHT TO SILENCE

One of the more interesting recent changes to this body of law has to do with invoking and waiving one's right to remain silent. In *Berghuis v. Thompson*,<sup>23</sup> a murder suspect was arrested, given the *Miranda* warnings and

declined to sign a form acknowledging he understood his rights. There was conflicting testimony about whether he verbally acknowledged understanding his rights. Police questioned him for about three hours, during which he sat mostly silent except for a one word or short answer to a few questions.

About two hours and 45 minutes into the session, a detective asked the defendant if he believes in God and has asked God to forgive him for murdering the victim, whereupon he got tearful and replied 'yes.' After conviction the defendant on appeal claimed that by remaining silent for a significant period of time, he had invoked his right to silence and that continued questioning by police violated that right. Justice Kennedy provided the fifth vote in a 5-4 ruling holding that simply being silent is not sufficient to invoke one's right to silence; an unambiguous request to remain silent is required in order to invoke the right thus precluding officers from continuing their questioning. Although the court held almost 20 years ago that invoking the right to counsel requires an unambiguous request for a lawyer, the *Berghuis* case is the first time that requirement has been applied to the right to silence.

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S., at 458-459, 114 S.Ct. 2350. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." *Id.*, at 461, 114 S.Ct. 2350. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. See *id.*, at 459-461, 114 S.Ct. 2350; *Moran v. Burbine*, 475 U.S. 412, 427, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

...

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his "'right to cut off questioning.'" *Mosley*, *supra*, at 103, 96 S.



Ct. 321 (quoting *Miranda*, supra, at 474, 86 S.Ct. 1602). Here he did neither, so he did not invoke his right to remain silent.<sup>24</sup>

Also at issue in the *Berghuis* case was whether the defendant had waived his right to remain silent. For the first time ever, the Supreme Court recognized that a waiver of one's right to remain silent need not be expressed but may be implied from evidence that he was advised of the rights, understood them, and then undertook a course of conduct consistent with a waiver such as answering some questions. The court stressed that merely advising a suspect of his rights and then commencing the questioning is not sufficient to find an implied waiver even if the suspect responds with answers; there must be some evidence that he or she understood the rights.

The practical effect of these two holdings from the *Berghuis* case is that when a suspect has been advised of his rights and indicates he understands them, officers may ask questions even if the suspect has not specifically indicated he will waive his rights and even if he sits silently during the initial phase of the questioning. However, to be admissible the statement must still be voluntarily made and not the product of coercion or threats since the Fourteenth Amendment's due process clause applies regardless of custody and regardless of which other rights have been invoked or waived.

## REINITIATING INTERROGATION AFTER RIGHTS ARE INVOKED

The ability of police officers to reinitiate contact with a suspect who has invoked his *Miranda* rights is another area of significant change over the past few years. As noted above, it has long been the rule that when a suspect invokes his right to remain silent or his right to counsel, all questioning must cease. When he has unambiguously invoked his right to silence, police must "scrupulously honor" that request but may return later and attempt to resume the questioning.<sup>25</sup> Conversely, when it is the right to counsel which is invoked, police may not reinitiate that contact until the suspect's lawyer is present.<sup>26</sup>

Because it is the convergence of custody plus interrogation which triggers the protections of *Miranda*, many courts and practitioners have long assumed that police may question a defendant who has properly invoked his right to counsel if that person is released from police custody. However, in *Maryland v. Shatzer*,<sup>27</sup> discussed above for its holding on what consti-

tutes custody, the Supreme Court for the first time ever also set a specific length of time which must pass before police may attempt to question a suspect who has invoked his right to silence and then been released from custody. The court balanced the need for protecting a suspect during custody and its lingering effects against the illogical notion that one who invokes the right to counsel while in custody is forever immunized from police interrogation even after they have been freed from custody.

"It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."<sup>28</sup>

1. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
2. \_ U.S. \_\_\_, No. 12-246 (June 17, 2013)(slip opinion).
3. *Id.* (J. Breyer dissenting at p. 1).
4. *Salinas*, slip op. at p. 2.
5. *Salinas v. State*, 368 S.W.3d 550 (Tex. Ct. App. 2011).
6. *Salinas*, slip op. at p. 12.
7. 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).
8. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).
9. *Doyle*, 426 U.S. at 619.
10. 447 U.S. 231, 100 S.Ct. 2124, 65 L.Ed.2d 86 (1980).
11. 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490 (1982).
12. 1986 OK CR 42, 717 P.2d 111.
13. *See, Guy v. State*, 1989 OK CR 35, 778 P.2d 470; *Royal v. State*, 1988 OK CR 203, 761 P.2d 497; *Lane v. Jones*, 2012 WL 6643095, slip op. p. 4 (No. CIV-12-137 W.D. Ok. 2012).
14. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008).
15. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).
16. 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).
17. 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).
18. \_ U.S. \_\_\_, 132 S.Ct. 1181, 182 L.Ed.2d 17 (2012).
19. *Id.* At 1192.
20. \_ U.S. \_\_\_, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).
21. \_ U.S. \_\_\_, 132 S.Ct. 26, 181 L.Ed.2d 328 (No. 10-1540, (Nov. 7, 2011)).
22. *Id.* At 29.
23. 560 U.S. 370, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).
24. *Id.* At 2260.
25. *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).
26. *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).
27. 559 U.S. 98, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).
28. *Shatzer*, 130 S.Ct. at 1223.

## ABOUT THE AUTHOR



Scott Rowland is a career prosecutor who currently serves as First Assistant District Attorney in the Oklahoma County District Attorney's Office. He frequently lectures throughout the United States in areas of criminal law and criminal constitutional procedure. Mr. Rowland was recently named 2013 Outstanding Prosecutor by the Oklahoma District Attorneys' Association. He is a 1994 graduate *cum laude* of the Oklahoma City University School of Law.

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## The Violence Against Women Reauthorization Act of 2013 and Tribal Criminal Jurisdiction Over Non-Indians

By O. Joseph Williams

On March 7, 2013, President Barack Obama signed into law the reauthorization of the Violence Against Women Act<sup>1</sup> (VAWA) which is a federal law enacted to work toward ending violence against women and to address certain systematic failures in the law and in practice that perpetuate the cycle of violence. There are many tools contained within VAWA to carry out this important objective to address domestic violence throughout the land.

The focus of this article, however, is based on key provisions contained only within the 2013 reauthorization of VAWA that recognizes and acknowledges the inherent right of Indian tribes to criminally prosecute all persons, including non-Indian offenders, who are charged with domestic violence related crimes occurring in Indian country against an Indian victim (the tribal provisions). Although Indian tribes already possess the inherent right to prosecute Indian offenders for certain crimes occurring on Indian country, VAWA's tribal provisions recognize that, in certain limited instances, tribes will also have authority to arrest, prosecute, convict and sentence non-Indians who assault an Indian spouse or dating partner or who violate a protection order in Indian country. This article discusses the current legal scheme that has created the jurisdictional gap in the first place, the background of VAWA and the elements of VAWA's new tribal provisions that will expand the jurisdictional reach for tribes that seek to combat crimes of domestic violence occurring on their tribal lands.

The U.S. Justice Department reports that Indian reservations in the United States have violent crimes that are more than 2½ times higher than the national average.<sup>2</sup> American Indian women are 10 times likely to be murdered, and they are raped or sexually assaulted at a rate four times the national average.<sup>3</sup> More than one in three American Indian women have either been raped or experienced an attempted rape.<sup>4</sup> However, these crimes against Indian women, when committed by a non-Indian in Indian country, would largely go unpunished since: 1) the states do not generally possess criminal jurisdiction for crimes occurring in Indian country that involve an Indian;<sup>5</sup> 2) the federal government would decline to prosecute or fail to conduct any investigation;<sup>6</sup> and 3) the tribal prosecutors and courts do not have criminal jurisdiction over non-Indians. This has created the unfortunate situation where tribal law enforcement and prosecutors may be the first line of defense to protect victims of domestic violence on their tribal lands, but they would not have jurisdiction to prose-

cute these crimes when the offender is non-Indian. VAWA's tribal provisions were designed to address this problem.

VAWA is an important tool in the fight against violence against all women in America. However, the tribal provisions are a significant step forward in closing the jurisdictional gap that results in many non-Indian offenders avoid prosecution and punishment when they commit domestic violence-related crimes against an Indian person on tribal land. There are 38 federally-recognized Indian tribes and nations located within the exterior boundaries of the State of Oklahoma.<sup>7</sup> There are also many pockets of Indian country land located in various parts of Oklahoma, and there are many Indians and non-Indians situated on those lands. For Oklahoma tribes, there are around 22 tribal courts established and existing under the law of the tribe for which it sits. There are also Courts of Indian Offenses established under Title 25 of the Code of Federal Regulations that serve as courts to administer law and order for those tribes who do not have their own court established.<sup>8</sup> Thus, VAWA is significantly relevant to many Indian and non-Indian people in Oklahoma as well as to those Indian tribes who seek to mete out justice for domestic violence crimes occurring on tribal land.

VAWA's tribal provisions are important for various types of legal practitioners in Oklahoma for different reasons. Most importantly, those tribes who choose to take advantage of the tribal provisions must conform their laws and court systems to meet certain requirements in VAWA designed to afford criminal defendants, at a minimum, the same levels of constitutional rights and protections that exist in federal and state courts. For tribal attorneys in Oklahoma, this means that they must become familiar with the requirements in VAWA (and another law addressing the rights of defendants in tribal court, the Tribal Law and Order Act of 2010) to advise their tribal clients on the necessary implementation issues that will have to be followed, e.g., amendments or supplements to the tribal code, modifications to the tribal court system, training for law enforcement officers, judges and court personnel and sources to obtain the necessary funding for these changes. Second, the expansion of criminal jurisdiction by tribes over non-Indians in certain cases means that non-Indians who may now be arrested and charged by an Indian tribe (or a non-Indian who may be summoned by a

tribal government to serve as part of a jury pool) may reach out to local attorneys who, to date, have never had any client matter involving an Indian tribe. Criminal defense attorneys may now be asked to defend non-Indian individuals in tribal courts under tribal law and in accordance with VAWA's tribal provisions. For Oklahoma attorneys who have never had any dealings with Indian tribes or tribal courts, this would be a good time to become familiar with the tribal court, the tribal laws and other necessary elements to provide competent representation for your clients in tribal court. Finally, attorneys who provide general counsel services for state and local governments should also become aware with VAWA's tribal provisions in order to understand the federal law and policy that serve as the basis for Indian tribes being able to now prosecute non-Indians in a limited context under VAWA. Many jurisdictional disagreements and disputes between tribal governments and state and local governments are a result of a lack of understanding or familiarity with the ever-changing contours within the field of Indian law.

## WHAT IS 'INDIAN COUNTRY'?

Since VAWA's tribal provisions apply to domestic violence crimes in Indian country, the first question to answer is "what is Indian country?" The term Indian country is a legal term of art used to describe the geographical territory where the laws of an Indian tribe, plus federal law related to Indian affairs, are applicable.<sup>9</sup> Generally, states do not possess jurisdiction, and state law will not have effect, in Indian country except through a specific grant of jurisdiction under federal law. Indian country is defined in 18 U.S.C. §1151 and includes: 1) all land within the limits of any Indian reservation under the jurisdiction of the United States government; 2) dependent Indian communities, and; 3) all Indian allotments, the Indian titles to which have not been extinguished. Indian country also includes land the title for which is held in trust by the United States for an individual Indian or Indian tribe.<sup>10</sup>

As sovereign governments, Indian tribes maintain the power to exercise at least concurrent criminal jurisdiction over all crimes committed in Indian country by an Indian against the person or property of another Indian.<sup>11</sup> An Indian tribe's criminal jurisdiction, if concurrent with another jurisdiction, would be concurrent with the federal government under several federal statutes defining certain crimes

occurring within Indian country that may be subject to federal prosecution. There are numerous federal statutes and federal court decisions outlining the scope and application of criminal jurisdiction by a tribe, state or the federal government in Indian country depending on the status of the offender (whether Indian<sup>12</sup> or non-Indian), the victim (whether Indian or non-Indian) or if the crime is against property or is otherwise considered a “victimless” crime. For purposes of this article, however, only certain key principles of criminal jurisdiction in Indian country will be covered.

First, the U.S. Supreme Court in *United States v. McBratney*,<sup>13</sup> held that criminal jurisdiction over offenses committed by a non-Indian against another non-Indian in Indian country is within the exclusive jurisdiction of the states. Under the new tribal provisions in VAWA, this does not change. VAWA does not affirm tribal criminal jurisdiction over non-Indians who commit domestic violence crimes against other non-Indians in Indian country. States would continue to maintain jurisdiction in those instances. Second, until the enactment of the tribal provisions in VAWA, the general rule was that Indian tribes lacked criminal jurisdiction to prosecute a non-Indian who committed a crime within Indian country. This was a result of the U.S. Supreme Court’s decision of *Oliphant v. Suquamish Indian Tribe*,<sup>14</sup> which stated:

[A]n examination of our earlier precedents satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.<sup>15</sup>

Even though there are instances when an Indian tribe may have authority to exercise civil and regulatory jurisdiction over non-Indians, the holding in *Oliphant* regarding the exercise of tribal criminal jurisdiction over non-Indians has not been reversed.

### VAWA TRIBAL PROVISIONS

The Violence Against Women Act is a federal law originally enacted in 1994 as a comprehensive effort to deal with violence against women in this country by combining stronger provisions to hold offenders accountable along with programs to provide services for the victims of violence. VAWA was reauthorized in 2000 and 2005. The VAWA reauthorizations allow funding for such things as additional support services, training for judges and civil legal assistance to

victims of domestic violence, dating violence, sexual assault and stalking.

VAWA focuses on nine specific areas:

- Title I – Enhancing judicial and law enforcement tools to combat violence against women
- Title II – Improving services for victims
- Title III – Services, protection, and justice for young victims of violence
- Title IV – Strengthening America’s families by preventing violence
- Title V – Strengthening the healthcare system’s response
- Title VI – Housing opportunities and safety for battered women and children
- Title VII – Providing economic security for victims
- Title VIII – Protection of battered and trafficked immigrants
- Title IX – Safety for Indian women

The tribal provisions in VAWA are actually amendments to the Indian Civil Rights Act of 1968,<sup>16</sup> a statute that makes many, but not all, of the guarantees of the Bill of Rights applicable to tribal governments.<sup>17</sup> The Indian Civil Rights Act was also amended as recently as 2010 with the passage of the Tribal Law and Order Act,<sup>18</sup> an act designed to enhance the tribes’ abilities and authority to sentence defendants to higher fines and/or lengthier jail time. Since tribes had been limited on the amount of fines and length of jail time they could impose for any crime, the Tribal Law and Order Act was a welcome amendment for those tribal governments who had been working hard to combat increasing levels of crime on tribal land. Both the tribal provisions in VAWA and the sentencing enhancing measures in the Tribal Law and Order Act do require the tribes to comply with certain requirements designed to ensure the criminal defendant is afforded all constitutional rights and protections that they would have in state and federal courts.<sup>19</sup> For some tribes, this will require certain modifications be made to their tribal laws and court systems in order to take advantage of those provisions.<sup>20</sup>

The pertinent provisions of VAWA amending the Indian Civil Rights Act are as follows:

# “...under VAWA, tribes will be able to exercise criminal jurisdiction over non-Indians for crimes of domestic violence...”

1) *In General*: Notwithstanding any other provision of law, in addition to all powers of self-government recognized and affirmed by [other sections of the Indian Civil Rights Act, 25 U.S.C. §§1301 and 1303], the powers of self-government of a participating tribe include the inherent power of that tribe, which is hereby recognized and affirmed, to exercise special domestic violence criminal jurisdiction over all persons.

2) *Concurrent Jurisdiction*: The exercise of special domestic violence criminal jurisdiction by a participating tribe shall be concurrent with the jurisdiction of the United States, of a State, or of both.

....

## 4) *Exceptions*:

A) *Victim and Defendant are both non-Indians*:

i) *In General*: A participating tribe may not exercise special domestic violence criminal jurisdiction over an alleged offense if neither the defendant nor the alleged victim is an Indian.

....

B) *Defendant lacks ties to the Indian tribe*: A participating tribe may exercise special domestic violence criminal jurisdiction over a defendant only if the defendant

i) resides in the Indian country of the participating tribe;

ii) is employed in the Indian country of the participating tribe; or

iii) is a spouse, intimate partner, or dating partner of

I) a member of the participating tribe; or

II) an Indian who resides in the Indian country of the participating tribe.<sup>21</sup>

Therefore, under VAWA, tribes will be able to exercise criminal jurisdiction over non-Indians for crimes of domestic violence,<sup>22</sup> dating violence<sup>23</sup> and for criminal violations of protective orders.<sup>24</sup> However, tribal exercise of criminal jurisdiction will not apply when 1) the criminal conduct occurs outside of Indian country;<sup>25</sup> 2) a crime occurs between two strangers;<sup>26</sup> 3) a crime does not involve an Indian (domestic violence between two non-Indians);<sup>27</sup> 4) the crime is child or elder abuse that does not involve the violation of a protective order;<sup>28</sup> and 5) the defendant lacks ties to the Indian tribe (does not reside or work in Indian country; is not a spouse, intimate partner or dating partner of a tribal member or of an Indian who resides in Indian country).<sup>29</sup>

It is important to understand that, under VAWA, Indian tribes are not *required* to undertake the responsibility of exercising criminal jurisdiction under VAWA's tribal provisions. As explained, in order to exercise criminal jurisdiction over non-Indians under VAWA, Indian tribes will have to comply with providing constitutional rights and protections under the Indian Civil Rights Act, as amended, to offenders in tribal courts as required in VAWA. This may mean that tribes will have to amend or supplement their tribal code and make significant changes to their tribal court system. For whatever reason, a tribe may determine to maintain the status quo and not seek to exercise criminal jurisdiction over non-Indians under VAWA. If a tribe so decides, the criminal jurisdiction of the tribe, state, and federal government in Indian country will remain unchanged.

1. (Pub. L. 113-4, 127 Stat. 54).

2. Timothy Williams, *Higher Crime, Fewer Charges on Indian Land*, *N.Y. Times*, February 20, 2012, available at <http://tinyurl.com/nc2mmvw> (referring to U.S. Dept. of Justice statistics).

3. *Id.*

4. *Id.*

5. See *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them”); see also, e.g., *United States v. Lara*, 541 U.S. 193, 204-05 (2004) (affirming Supreme Court’s “traditional understanding” of each tribe as “a distinct political society, separated from others, capable of managing its own affairs and governing itself”) (quoting *Cherokee Nation v. Georgia*, 30 U.S. 313, 323-24 (1831)).

6. This is not to say that federal authorities are purposefully neglecting responsibility to conduct investigations and prosecute crimes in Indian country. There can be a number of reasons (many times, based on limited resources) that complicate the ability for federal authorities to conduct investigations and file charges on perpetrators who commit certain crimes in Indian country.

7. A complete listing of all federally recognized Indian tribes in the United States can be found in the Federal Register, with the most recent version at 77 F.R. 47868 (Aug. 10, 2012).

8. See Part 11 of Title 25 of the Code of Federal Regulations.

9. The legal history behind the development and codification of the term “Indian country” is beyond the scope of this article; however, suffice it to say, there is a great deal of case law on the subject matter



that provides greater depth and insight into the legal contours of the territorial jurisdiction of Indian tribes. See, e.g., *Indian Country, U.S.A. v. Oklahoma Tax Com'n*, 829 F.2d 967 (10th Cir. 1987).

10. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

11. *United States v. Wheeler*, 435 U.S. 313, 328-329 (1978) (“[t]he conclusion that an Indian tribe’s power to punish tribal offenders is part of its own retained sovereignty is clearly reflected in a case decided by this Court more than 80 years ago, *Talton v. Mayes*, 163 U.S. 376 (1896)”).

12. There are also legal issues that may arise in determining “who is an Indian” for purposes of determining jurisdiction. See, e.g., *United States v. Diaz*, 679 F.3d 1183 (10th Cir. 2012). This is important to know for attorneys working with any federal statute applicable to Indians, although that issue will not be discussed for purposes of this article.

13. 104 U.S. 621 (1882).

14. 435 U.S. 191 (1978).

15. *Id.* at 208.

16. (25 U.S.C. §1301, *et seq.*).

17. The citations herein to the tribal provisions in VAWA will be to the amended section of the Indian Civil Rights Act as amended by VAWA. The tribal provisions start at 25 U.S.C. §1304.

18. (Pub.L. 111-211, 124 Stat. 2258, enacted July 29, 2010).

19. Tribes will have to have laws and court systems in place that will protect the constitutional rights of defendants as described in the Tribal Law and Order Act by providing: effective assistance of counsel; court-appointed counsel at no charge to indigent defendants; law-trained tribal judges who are also licensed to practice law; making tribal criminal laws and rules publicly available, and; recorded criminal proceedings. 25 U.S.C. §1302.

20. Another significant requirement is that tribes provide a jury pool consisting of “a fair cross section of the community” and that does not “systematically exclude any distinctive group in the community, including non-Indians . . .” 25 U.S.C. §1304(d)(3). Therefore, tribes who seek to establish a jury pool will have to modify their codes and establish a system for seeking out potential jurors from the community, including non-Indians. Many non-Indians may be surprised to receive a jury summons from an Indian tribe and may not know what to do if they fail to comply. VAWA does not specifically address this, although Indian tribes do possess certain contempt powers over Indians and non-Indians that may be exercised in certain instances. Issues like this will no doubt be a part of the broader discussion as tribes begin to implement VAWA.

21. 25 U.S.C. §1304 (as codified under amendments in VAWA).

22. The term “domestic violence” is defined in VAWA as:

[V]iolence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a

child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, or by a person similarly situated to a spouse of the victim under the domestic- or family-violence laws of an Indian tribe that has jurisdiction over the Indian country where the violence occurs.

23. The term “dating violence” is defined in VAWA as:

[V]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

24. 25 U.S.C. §§1304(b) and (c).

25. 25 U.S.C. §1304(c)(1) and (2).

26. *Id.*

27. 25 U.S.C. §1304(b)(4)(A).

28. 25 U.S.C. §1304(c)(2).

29. 25 U.S.C. §1304(b)(4)(B).

30. The tribal provisions will not take effect until March 7, 2015, unless tribes modify their laws and court systems in accordance with VAWA and a tribe requests from the U.S. Department of Justice, and is granted, the right to participate in a Pilot Project that will allow that tribe to exercise criminal jurisdiction sooner than March 7, 2015.

## ABOUT THE AUTHOR



Joseph Williams is the founding member of O. Joseph Williams Law Office PLLC located in Okmulgee. He is a 2001 graduate of the Oklahoma City University School of Law and also earned a Masters of Business Administration degree at OCU in 1998. He is a proud member of the Mississippi Band of Choctaw Indians and has been practicing in the area of federal Indian law since graduating from law school in 2001.



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**10. DUTY OF SECRECY:**

- (A) The instructor shall not disclose any of the contents of this agreement, including salary, to a third party (including other employees of the school).
- (B) The instructor shall not disclose any information relating to the contents of lectures and business operation of the school without prior permission of the school. Violation of this portion of the contract will cause the instructor to be responsible to compensate the school for all possible losses suffered by the school.

**11. ADDITIONAL DUTIES:**

- (A) The instructor is required to conduct him/herself in a professional manner and to wear neat attire while at the school. Casual clothing is acceptable, provided that it is neat and clean.
- (B) The following forms of behavior will not be permitted:
- (1) Not following scheduled class timetables and denouncing, counseling, or punishing classes late without the prior approval of the institute director.
  - (2) Conducting class while under the influence of alcohol, tobacco, or any other substance under the influence of illegal drugs.
  - (3) Making sexual advances towards, or engaging in sexual relations with, students or employees of the school.
- (C) The institute shall have the right to terminate the instructor if the instructor violates the contract or fails to perform his or her duties in a professional manner. At least two weeks' termination notice shall be given in each case. In this case, the institute has no obligation to pay any salary or benefits to the instructor.
- (D) The instructor agrees to voluntarily resign from employment before the expiration of the contract. The employee must provide written notice to the institute at least two weeks before resignation.
- (E) In the event of voluntary resignation within 8 months of this Contract period, the salary of salary will be deducted from the Employee's last monthly salary.
- (F) The teacher cannot work for other schools or companies without the consent of the school.
12. Both parties have carefully read this contract. They have agreed to its terms in good faith, and they will attempt to resolve any disputes which may arise in accordance with the terms of the contract, and in a reasonable manner. All disputes which cannot be resolved by the parties to this contract will be resolved through the legal system of Korea in accordance with Korean law.
- I duly agree on the contract stated above;

Signature \_\_\_\_\_

*me*

## Expanded Opportunities for Expungement of Criminal Records

By Zachary Waxman

In his article regarding Oklahoma's expungement law, criminal law practitioner Allen Smallwood remarked, "[t]hough imperfect, Oklahoma's expungement statutes offer at least a chance for an individual to clear his or her record."<sup>1</sup> While far from being flawless, the Nov. 1, 2012, amendments to Okla. Stat. tit. 22 §18,<sup>2</sup> have certainly brought the expungement law closer to "perfection."

### CHANGES TO OKLA. STAT. TIT. 22 §18

The March 12, 2009, version of the statute<sup>3</sup> read as follows:

*Persons authorized to file a motion for expungement, as provided herein, must be within one of the following categories:*

1. *The person has been acquitted;*
2. *The conviction was reversed with instructions to dismiss by an appellate court of competent jurisdiction, or an appellate court of competent jurisdiction reversed the conviction and the district attorney subsequently dismissed the charge;*
3. *The factual innocence of the person was established by the use of deoxyribonucleic acid (DNA) evidence subsequent to conviction, including a person who has been released from prison at the time innocence was established;*
4. *The person has received a full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced;*
5. *The person was arrested and no charges of any type, including charges for an offense different than that for which the person was originally arrested are*

*filed or charges are dismissed within one (1) year of the arrest, or all charges are dismissed on the merits;*

6. *The statute of limitations on the offense had expired and no charges were filed;*

7. *The person was under eighteen (18) years of age at the time the offense was committed and the person has received a full pardon for the offense;*

8. *The offense was a misdemeanor, the person has not been convicted of any other misdemeanor or felony, no felony or misdemeanor charges are pending against the person, and at least ten (10) years have passed since the judgment was entered;*

9. *The offense was a nonviolent felony, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the person has received a full pardon for the offense, the person has not been convicted of any other misdemeanor or felony, no felony or misdemeanor charges are pending against the person, and at least ten (10) years have passed since the conviction; or*

10. *The person has been charged or arrested or is the subject of an arrest warrant for a crime that was committed by another person who has appropriated or used the person's name or other identification without the person's consent or authorization.*

For purposes of this act, “expungement” shall mean the sealing of criminal records. Records expunged pursuant to paragraph 10 of this section shall be sealed to the public but not to law enforcement agencies for law enforcement purposes.

The Nov. 1, 2012, amendment to section 18,<sup>4</sup> made the following additions and changes:

- *The person was arrested and no charges of any type, including charges for an offense different than that for which the person was originally arrested are filed and the statute of limitations has expired or the prosecuting agency has declined to file charges*<sup>5</sup>

- *The person was charged with one or more misdemeanor or felony crimes, all charges have been dismissed, the person has never been convicted of a felony, no misdemeanor or felony charges are pending against the person, and the statute of limitations for refileing the charge or charges has expired or the prosecuting agency confirms that the charge or charges will not be refiled; provided, however, this category shall not apply to charges that have been dismissed following the completion of a deferred judgment or delayed sentence*<sup>6</sup>

- *The person was charged with a misdemeanor, the charge was dismissed following the successful completion of a deferred judgment or delayed sentence, the person has never been convicted of a misdemeanor or felony, no misdemeanor or felony charges are pending against the person, and at least two (2) years have passed since the charge was dismissed*<sup>7</sup>

- *The person was charged with a nonviolent felony offense, as set forth in Section 571 of Title 57 of the Oklahoma Statutes, the charge was dismissed following the successful completion of a deferred judgment or delayed sentence, the person has never been convicted of a misdemeanor or felony, no misdemeanor or felony charges are pending against the person, and at least ten (10) years have passed since the charge was dismissed*<sup>8</sup>

In addition to these changes, the statute also clarifies, arguably with much success, what exactly an expungement means, by providing that an “expungement” under Okla. Stat. tit. 22 §18 (2012), means ...“the sealing of criminal records. Records expunged pursuant to paragraphs 8, 9, 10, 11 and 12 of this section shall be sealed to the public but not to law enforcement agencies for law enforcement purposes. Records expunged pursuant to paragraphs 8, 9, 10 and 11 of this section shall be admissible in any subsequent criminal prosecution to prove the existence of a prior conviction or prior deferred

judgment without the necessity of a court order requesting the unsealing of said records.”

These changes mean expanded opportunities for those individuals with a criminal past. When those records are expunged and sealed, they can move on with their lives and forgo the burden of having a cloud of poor decisions follow them as they attempt to improve their standing and contribute to our society.

The purpose of this article is not to instruct you on how to file for an expungement of a criminal record. The article written by Mr. Smallwood<sup>9</sup> and an additional article written by Stacy Morey and Dave Stockwell<sup>10</sup> both provide excellent explanations of the necessary procedure and forms for this area of practice. Instead, this article will focus on how these changes have affected and will likely continue to affect the practice.

## **EXPUNGING THOSE CASES THAT HAVE BEEN DISMISSED**

As you can see above, the 2009 version of §18 allowed the expungement of criminal records for cases in which all charges were dismissed on the merits,<sup>11</sup> or in those matters that had been dismissed by an appellate court, by a district court after a remand<sup>12</sup> or within one year of the arrest.

What the superseded version of §18 did not account for was the statute of limitations allowing the prosecution to refile a charge against a defendant. This could lead to the awkward situation of having a defendant that seeks to expunge a charge that was dismissed within one year of their arrest, but because of the notice requirements on filing a petition to expunge,<sup>13</sup> the prosecution would just refile (if, for instance, the statute of limitations had not run and they were able to secure a victim or a witness to come back and testify) and even have an active warrant for the defendant at the time of the expungement hearing.

Luckily the Nov. 1, 2012, amendments clarify that issue, allowing an individual to qualify to file for an expungement of a dismissed claim *after* the statute of limitations has run or confirm with the prosecuting agency.<sup>14</sup> This amendment also applies to when an individual was arrested and no charges were ever filed.<sup>15</sup> Furthermore, having the matter “dismissed on the merits” is no longer a requirement, expanding the types of criminal matters that can now be expunged.



Before filing any type of expungement where your client was arrested and no charges were filed or the charges were dismissed, be sure to check the statute of limitations and call and confirm with the prosecuting agency that they will either not refile or have no intention of filing charges. Get this confirmation from the prosecution in writing.

#### THE 'DOUBLE EXPUNGEMENT'

Prior to the November amendments, §18 did not allow one to expunge criminal records for those who had received a deferred sentence. First, some review and clarification is needed. Upon receiving a deferred sentence on a plea agreement or through other means, the judge will withhold a finding of guilt for that individual. Upon the completion of the deferred sentence, that individual will be discharged without a conviction of guilt, and their criminal record will be "expunged" under Okla. Stat. tit. 22 §991c(C), where:

1. *All references to the name of the defendant shall be deleted from the docket sheet;*
2. *The public index of the filing of the charge shall be expunged by deletion, mark-out or obliteration;*
3. *Upon expungement, the court clerk shall keep a separate confidential index of case numbers and names of defendants which have been obliterated pursuant to the provisions of this section;*
4. *No information concerning the confidential file shall be revealed or released, except upon written order of a judge of the district court or upon written request by the named defendant to the court clerk for the purpose of updating the criminal history record of the defendant with the Oklahoma State Bureau of Investigation.*

Not all expungements are equal, and the relief granted under §991c does differ from that found in Okla. Stat. tit. 22 §19. In fact, if your client is receiving a deferred sentence, it is your ethical duty to explain the difference between the two. When discussing the matter with your client, you need to stress the point that the records are not fully sealed, as they would be under §19, and if someone were to run a background check, the individual's record would

**“...if your client had wanted to go to nursing school and is facing a misdemeanor possession charge, they will not likely gain admittance, even if they received a deferred sentence...”**

still show an arrest, though with a note that the case had been dismissed.

If you attempted to file for an expungement under §18 prior to Nov. 1, 2012, for a criminal record that resulted in the case being dismissed subsequent to a successful completion of a deferred sentence, your request for relief would fail. The Oklahoma State Bureau of Investigation would object to your petition, leading the municipality to object, as well as, most certainly, the local district attorney's office. Their reasoning? One, you cannot expunge something that has already been "expunged." Two, the plain language of the statute<sup>16</sup> was clear — only criminal *convictions* could be expunged.

Luckily that has changed. Now, after the November amendments, those who received a deferred sentence for a misdemeanor may have the record completely sealed and expunged under §19, after a two-year wait following their completion of the deferred sentence and the dismissal of their charge.<sup>17</sup> The same now also applies for nonviolent felonies that have been dismissed following a deferred sentence, with the exception that the wait period to file for an expungement is 10 years.<sup>18</sup> These amendments now provide a sort of "double expungement," allowing those records which have been "expunged" under §991c(C) to now be sealed and expunged under §19. There are two points of which to be aware: 1) regarding municipal cases, the petition to expunge such a case needs to be filed with the appropriate district court; 2) this relief is only allowable if the individual does not have any other prior or subsequent convictions and is not currently facing any pending charges.

These two changes are extremely important. For instance, if your client had wanted to go to nursing school and is facing a misdemeanor possession charge, they will not likely gain admittance, even if they received a deferred sentence, simply because the record in some part still exists. It may seem like a long wait for your client, but if you were to file for an expungement after the deferred sentence was discharged, then the record would be com-

pletely sealed under §19, allowing your client to apply to nursing school.

## CONCLUSION

The Honorable John F. Reif stated in his opinion for *State of Oklahoma v. McMahon* that the purpose of the expungement statutes was “to aid those who are acquitted, exonerated, or who otherwise deserve a second chance at a ‘clean record.’”<sup>19</sup> Mr. Smallwood was also correct in stating that Oklahoma’s expungements statutes are far from perfect. However, with the Nov. 1, 2012, additions to §18, Oklahoma has gotten closer to “perfection” with expanded opportunities for those who wish to have both their records expunged and a second chance at life with a *tabula rasa*.

1. “Expungements-Making Sense of Flawed Law,” *Oklahoma Bar Journal*, Vol. 82-No.14, May 14, 2011, page 1261 at page 1266.
2. Okla. Stat. tit. 22 §18 (2012).
3. Okla. Stat. tit. 22 §18 (2009).
4. Okla. Stat. tit. 22 §18 (2012).
5. Okla. Stat. tit. 22 §18(5) (2012).
6. Okla. Stat. tit. 22 §18(7) (2012).
7. Okla. Stat. tit. 22 §18(8) (2012).
8. Okla. Stat. tit. 22 §18(9) (2012).

9. “Expungements-Making Sense of Flawed Law” *Oklahoma Bar Journal*, Vol. 82-No.14, May 14, 2011, page 1261.

10. Expunging Criminal Records under Oklahoma Statutes Title 22 §991c & §18 & 19.

11. Okla. Stat. tit. 22 §18(5) (2009).

12. Okla. Stat. tit. 22 §18(2) (2009).

13. Okla. Stat. tit. 22 §19(B) (2002).

14. Okla. Stat. tit. 22 §18(7)(2012).

15. Okla. Stat. tit. 22 §18(5) (2012).

16. Okla. Stat. tit. 22 §18 (2009).

17. Okla. Stat. tit. 22 §18(8) (2012).

18. Okla. Stat. tit. 22 §18(9) (2012).

19. 1998 OK CIV APP 103 ¶9; 959 P2d 607; 69 OBJ 2920.

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## Document Discovery in a State Criminal Case

By Orval Jones

Procedures for criminal discovery in Oklahoma courts have undergone radical changes since 1990, but the basic tool for collecting documentary evidence, a subpoena *duces tecum*, has remained unchanged since statehood. This article examines the boundaries of document discovery in criminal prosecutions under the Oklahoma Criminal Discovery Code, with particular emphasis on the differences between procedures in civil and criminal cases.<sup>1</sup>

### STATUTORY DISCOVERY FRAMEWORK

The primary procedures for criminal discovery today are found in the Oklahoma Criminal Discovery Code, codified at 21 O.S. 2011 §§2001 and 2002. Upon request, the prosecutor is required to disclose:

- Law enforcement reports made in connection with the particular case
- Names and addresses of witnesses the state intends to call at trial
- Relevant written and recorded statements of those witnesses
- Significant summaries of any oral statements of those witnesses
- Record of prior criminal convictions of the defendant and any codefendant
- Arrest history (OSBI rap sheet/records check) for all listed trial witnesses
- Records of conviction for any witness for whom the defense provides identifying information
- Written and recorded statements made by the accused or a codefendant
- Substance of any oral statements made by the accused or a codefendant
- Reports or statements made by experts in connection with the particular case
- Results of physical or mental examinations and of scientific tests, experiments or comparisons
- Books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial
- Books, papers, documents, photographs, tangible objects, buildings or places which were obtained from or belong to the accused<sup>2</sup>

In addition, "The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment."<sup>3</sup> The prosecutor's obligation to produce information extends to information in the possession of the prosecution office, as well as in the possession of the law enforcement agency who reported to the prosecutor in the particular case and law enforcement agencies who regularly report to the prosecutor, if the



prosecutor should reasonably know that the information exists.<sup>4</sup> In addition there is a continuing duty to disclose: "If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under the Oklahoma Criminal Discovery Code, such party shall promptly notify the other party, the attorney of the other party, or the court of the existence of the additional evidence or material."<sup>5</sup> This duty to supplement discovery responses ends when the trial ends.<sup>6</sup>

The time period for most discovery starts at arraignment and ends 10 days before trial.<sup>7</sup> A motion for discovery can be filed at or after arraignment. "The court may specify the time, place and manner of making the discovery and may prescribe such terms and conditions as are just."

The court is authorized to issue orders compelling discovery, to provide sanctions for failure to comply with discovery obligations and to protect information from disclosure.<sup>8</sup>

In felony cases, two different forms of discovery may be available — the preliminary hearing and the conditional examination. The statute provides, "When the examination of the witnesses on the part of the state is closed, any witnesses the defendant may produce may be sworn and examined upon proper offer of proof made by defendant and if such offer of proof shows that additional testimony is relevant to the issues of a preliminary examination."<sup>9</sup> However, if the prosecutor makes law enforcement reports available for review by the defendant at least five working days prior to a preliminary hearing, then the preliminary hearing will terminate as soon as the court determines that probable cause exists to find that a crime was committed and that the defendant committed the crime.<sup>10</sup>

If the preliminary hearing is terminated before all of the witnesses have testified and a witness thereafter refuses to be interviewed by counsel for the opposing party, either the state or the defendant "may apply for an order that the witness be examined conditionally."<sup>11</sup> The application must be supported by affidavit.<sup>12</sup> By agreement, the examination may be held before a court reporter. Otherwise, the examination must be held before a judicial officer.<sup>13</sup> The resulting examination is a criminal deposition.<sup>14</sup>

Criminal depositions require a court order and can only be conducted pursuant to the stat-

**“The court is authorized to issue orders compelling discovery, to provide sanctions for failure to comply with discovery obligations and to protect information from disclosure.”**

ute. Depositions in criminal cases were unknown to the common law.<sup>15</sup> After a defendant is bound over to stand trial, the conditional examination is the only means to conduct a discovery deposition in a felony case.<sup>16</sup> After judgment and sentence have been entered, statutory criminal discovery will not be permitted.<sup>17</sup> During appeal, the prosecution is only required to provide exculpatory evidence required by the constitution to be provided.<sup>18</sup>

The conditional examination procedure was expanded in 1994 to coincide with restrictions in the procedure for preliminary hearings.<sup>19</sup> These restrictions "eliminated the preliminary hearing as a discovery forum."<sup>20</sup> The preliminary hearing is still a vehicle to compel the attendance of witnesses for examination, even after a grand jury indictment.<sup>21</sup> However, the court cannot require a medical examiner to attend a preliminary hearing because the right of confrontation is very limited at that stage of proceedings.<sup>22</sup>

In order to compel the witness in a criminal case to bring documents to an examination or hearing that has been scheduled before a judge, the defendant can use a subpoena *duces tecum*. "The process by which the attendance of a witness before a court or magistrate is required, is a subpoena."<sup>23</sup> The defendant can obtain subpoenas issued in blank from the court clerk.<sup>24</sup> The subpoena must be in the following statutory form:

Greeting: You are commanded to appear before C.D., a justice of the peace of . . . . .  
... at . . . . . (or the grand jury of the county of . . . . . or the district court of . . . . . county, or as the case may be), on the . . . . . (stating day and hour), and remain in attendance on and call of said . . . . . from day to day and term to term until lawfully discharged, as a witness in a criminal action prosecuted by the State of

Oklahoma against E.F. (or to testify as the case may be).

*Id.*, §708.

If the books, papers or documents be required, a direction to the following effect must be continued in the subpoena:

And you are required also to bring with you the following: (Describe intelligently the books, papers or documents required).

*Id.*, §710. "Service of subpoenas for witnesses in criminal actions in the district courts of this state shall be made in the same manner as in civil actions pursuant to Section 2004.1 of Title 12 of the Oklahoma Statutes."<sup>25</sup>

### SIGNIFICANT DIFFERENCES BETWEEN CIVIL AND CRIMINAL SUBPOENAS

A subpoena in a criminal case can be served upon a witness by any method prescribed for service in a civil case, as provided for in Section 2004.1 of Title 12. However, Section 2004.1 not only provides methods of service in paragraph B, it also provides for the form of a civil subpoena in paragraph A. Unlike a criminal subpoena, the civil subpoena can require a person to provide testimony or to allow inspection of documents at any "time and place therein specified."<sup>26</sup>

The civil procedure provisions of Section 2004.1 allow the court to quash or modify a subpoena if it requires the production of documents "that fall outside the scope of discovery permitted by Section 3226" of Title 12.<sup>27</sup> The scope of civil discovery is much broader than that permitted by the Criminal Discovery Code. *Compare* 12 Okla. Stat. §3226(B)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party ...") *with* 22 Okla. Stat. §2002.

In civil discovery, the attorneys in the case are authorized to issue and sign subpoenas on behalf of the court.<sup>28</sup> There is no parallel provision in the criminal statutes. In civil discovery, the deponent can be a "public or private corporation or a partnership or association or governmental agency."<sup>29</sup> There is no similar provision in the criminal statutes. Criminal subpoena power "does not extend to conducting medical examinations and analyses."<sup>30</sup>

### ALLEN HEARINGS

Prior to the adoption of the Criminal Discovery Code in 1994,<sup>31</sup> the Court of Criminal Appeals in 1990 decided the case of *Allen v. District Court*.<sup>32</sup> In *Allen* the court was asked to issue a writ to direct the district court to grant a defendant's discovery requests. In response, the court engaged in an examination of the history of criminal procedure in Oklahoma and determined that its jurisprudence had "bent the statutory procedure to the present breaking point."<sup>33</sup> The court concluded that there was a "pressing need to fill the gaps" in the discovery framework.<sup>34</sup> The court then adopted a pre-trial discovery procedure that closely resembles the current Criminal Discovery Code adopted four years later. This discovery framework was modified slightly in *Richie v. Beasley*, 1992 OK CR 52, 837 P.2d 479. A hearing requesting pre-trial discovery might still be called an *Allen* hearing even though the statute has replaced the procedure adopted by the court prior to the statutory enactment. After the adoption of the Criminal Discovery Code, the court determined that it would enforce by writ the right to have discovery motions heard and decided in a timely manner.<sup>35</sup>

A recent original proceeding in the Court of Criminal Appeals, in which the court denied relief to the City of Tulsa, illustrates the tension that exists between the statutory forms of criminal discovery and the authority of the district court to fashion discovery orders in particular cases.<sup>36</sup> In the district court, the defendant filed a discovery motion seeking digital and written records showing the exact time of computer database searches conducted by a police officer during a traffic stop of the defendant, as well as radio and other communication traffic related to the officer's search for records in that case.<sup>37</sup> The defendant also issued subpoenas to the Tulsa Police Department, seeking production of the same records.<sup>38</sup> The district court entered an order requiring the city to provide the requested information, finding that the request was "not a mere fishing expedition" and that "the information sought was time and incident specific."<sup>39</sup> The city sought a writ to prohibit the district court from requiring the production of the records, arguing that criminal subpoenas can be used to compel a witness to bring records to trial, but no other type of judicial proceeding.<sup>40</sup> The Court of Criminal Appeals refused to provide extraordinary relief, finding that the district

court was not exercising power that was unauthorized by law or causing an injury for which there is no other remedy.

From this exposition one may conclude that subpoenas can be a tool to extract relevant documentary information from witnesses. However, in order for the form of the subpoena to be authorized by statute, the subpoena should compel an individual witness (not an agency) to bring such documents to a scheduled hearing (not a lawyer's office). The hearing could be an *Allen* hearing that is expressly designed to obtain judicial approval for the scope of the requested discovery. In this manner the Criminal Discovery Code will not be circumvented and the prosecutor will have proper notice that exculpatory material is being sought and will have an opportunity to be heard.

## CONCLUSION

Documents can be obtained before trial in an Oklahoma criminal case, but civil discovery rules in general do not apply. A defendant seeking exculpatory evidence must follow the procedures of the Criminal Discovery Code and obtain judicial approval by stipulation or in an *Allen* hearing in order to obtain records that the prosecutor cannot obtain or will not disclose.

1. This article is the personal work product of the author, and does not necessarily reflect the policies or positions of the Oklahoma City Office of Municipal Counselor or The City of Oklahoma City.

2. *Id.*, §2002(A)(1).

3. *Id.*, §2002(A)(2).

4. *Id.*, §2002(A)(3).

5. *Id.*, §2002(C).

6. *Ramano v. State*, 1996 OK CR 20, 917 P.2d 12.

7. *Id.*, §2002(D).

8. *Id.*, §2002(E).

9. 22 O.S. 2011 §259.

10. 22 O.S. 2011 §258(sixth).

11. *Id.*, §762.1.

12. *Id.*, §763.

13. *Id.*, §766.

14. *Id.*, §769.

15. *Parmeter v. State*, 1963 OK CR 1, 377 P.2d 842, ¶¶16-20.

16. *Reupert v. State*, 1997 OK CR 65, 947 P.2d 198.

17. *Bland v. State*, 1999 OK CR 45, 991 P.2d 1039.

18. *Frederick v. State*, 2001 OK CR 34, ¶207, 37 P.3d 908, citing *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

19. *Lafortune v. District Court*, 1998 OK CR 65, 972 P.2d 868.

20. *Id.*, ¶10.

21. *State ex rel. Edmondson v. Bass-Jones*, 2004 OK CR 9, 87 P.3d 624.

22. *Office of State Chief Medical Examiner v. Reeves*, 2012 OK CR 10, 280 P.3d 357.

23. *Id.*, §703.

24. *Id.*, §707.

25. *Id.*, §712(A).

26. 12 Okla. Stat. §2004.1(A)(1)(b).

27. *Id.*, §2004.1(C)(3)(a).

28. 12 Okla. Stat. §2004.1(A)(4).

29. 12 Okla. Stat. §3230(C)(5).

30. *Zeigler v. State*, 1980 OK CR 23, ¶20, 610 P.2d 251.

31. Okla. Laws 1994, ch. 292, §§1-2.

32. 1990 OK CR 83, 803 P.2d 1164.

33. *Id.*, ¶2.

34. *Id.*, ¶13.

35. See *Webber v. District Court*, 1995 OK CR 23, 895 P.2d 728.

36. See Order Denying Relief dated June 1, 2012, *City of Tulsa v. Honorable William J. Musseman, Jr.*, No. PR-2012-339, Oklahoma Court of Criminal Appeals (hereinafter "*Musseman*").

37. Discovery Motion to Produce/Notice, filed February 3, 2012, in *State v. Gregory Alan Kilgore*, No. CF-11-3287, *District Court of Tulsa County* (hereinafter "*Kilgore*").

38. Defendant's Response to City of Tulsa's Special Entry of Appearance and Motion to Quash Subpoenas Duces Tecum, filed January 23, 2012, in *Kilgore*.

39. Order of the Court Requiring the City of Tulsa to Comply with Subpoena Duces Tecum, filed March 15, 2012, in *Kilgore*.

40. Petitioner's Combined Application to Assume Original Jurisdiction and Petition for Writ of Prohibition and Brief in Support, at 5, filed April 13, 2012, in *Musseman*.

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Orval Edwin Jones graduated from the OU College of Law in 1984 and has been an assistant municipal counselor for the city of Oklahoma City since 1999. He has previously worked for the state of Oklahoma as general counsel for the Insurance Department and the state of Missouri as an assistant attorney general, and also has been in private practice in both Tulsa and Oklahoma City. He is a member of the OBA Evidence and Civil Procedure Committee.



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## Baxter a ‘Warranted’ New Frontier

By John Paul Cannon

*“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...”*

— Fourth Amendment to the United States Constitution

The Fourth Amendment to the United States Constitution is a cornerstone of liberty and jurisprudence in America; however this famous phrase fell on deaf ears of the United States Supreme Court for 100 years. Until 1914, American courts followed the precepts of English common law that the process of obtaining evidence had nothing to do with its admissibility. The United States Supreme Court held evidence obtained illegally was admissible in several cases prior to 1914. Nonetheless, in a remarkable deviation from precedent the court held in *Weeks v. United States*, 232 U.S. 383 (1914) that the Fourth Amendment provides protection against unreasonable searches and seizures in federal court and that evidence seized without a valid warrant is inadmissible.

### BEFORE THERE WAS GANT

Jan. 16, 1919, the 18th Amendment to the United States Constitution was ratified, creating a prohibition of alcohol across the United States. However, an arguably more important piece of legislation was passed the same year, the National Prohibition Act, also known as the Volstead Act. This act gave prohibition officers the right to search vehicles, boats or airplanes without a warrant if they believed illegal liquor was being transported. In *Carroll v. United States*, 267 U.S. 132 (1925), the court recognized the impracticality of securing a warrant before searching a vehicle, as a vehicle can be easily moved out of the locality or jurisdiction in which the warrant must be sought.<sup>1</sup>

Throughout the course of American legal history certain exceptions to the warrant requirement have developed; among the most contentious, search incident to arrest. This exception stems from English Common Law and became binding precedent in the 1948 United States Supreme Court decision of *Trupiano v. United States*, 334 U.S. 669 (1948). The court held, “a search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest.” *Trupiano* and in effect the meaning of a search incident to arrest was not clarified until 1969, when the Supreme Court decided *Chimel v. California*, 395 U.S. 752 (1969).

The court held the search of an arrestee's immediate control as well as the room an arrestee is found is only permissible to protect two interests: officer safety and the protection of evidence.<sup>2</sup>

Twelve years later, Justice Stewart again drafting for the majority extended the *Chimel* rule to the automobile in the landmark case of *New York v. Belton*, 453 U.S. 454 (1981). The court stated its reading of *Chimel* in progeny indicates the limited dimensions of the passenger compartment of a motor vehicle is analogous to the area surrounding an arrestee as described in *Chimel*. Therefore, as a search incident to arrest an officer may as "a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 458.

For 30 years, *Belton* was the benchmark concerning the warrantless search of motor vehicles. However, after three decades of precedent, which every law enforcement agency in the United States has based its interactions with the motoring public, the court granted certiorari and heard the case of *Arizona v. Gant*. Multiple parties including the United States of America, the American Civil Liberties Union, and multiple states filed *amicus curiae*<sup>3</sup> briefs voicing their differing opinions on how the court should rule.

Courts, legal scholars, law enforcement, and state agencies from around the country have struggled with the uncertainty created by the *Belton* decision. Some courts and theorists have taken a limiting position on the application of *Belton* holding a search incident to arrest is only permissible when three requirements are met: 1) when actually contemporaneous to the suspect's arrest; 2) the suspect is unsecured; and 3) when the arrestee is still in a position to reach the passenger compartment. The majority of state agencies have taken a bright-line approach to *Belton*, pronouncing that if there is an arrest of a motorist, then a search of the passenger compartment may always follow.

On April 21, 2009, the United States Supreme Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), in an attempt to clarify the uncertainty of lower courts application of the *Belton* decision. The court held a broad reading of *Belton* would authorize the search of a recent occupant's vehicle subsequent to every arrest, even when the compartment was inaccessible to the former occupant. Justice Stevens — writing for the 5-4 majority — held this application of *Belton*

would "un-tether the rule from the justification underlying the *Chimel* exception." *Id.* at 1719. Further, a vehicle search incident to arrest is only permissible when an arrestee is unsecured and within reach of the passenger compartment.

*Gant* revolutionized both the application and understanding of *Belton* with one simple phrase. "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment and it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 1723. This maxim was once a policy argument, in Justice Scalia's concurrence in *Thornton*,<sup>5</sup> but is now binding precedent. It is possible in the future, Justice Scalia's position on warrantless searches will become the rule of law and the court will abandon the *Belton* and *Chimel* rationales entirely. For now the court has again attempted to create a uniform approach to issues present in warrantless vehicle searches by defining the role of *Belton*, rather than dismissing it entirely.

Although Justice Stevens was able to secure four other justices' votes for the majority opinion,<sup>6</sup> the fact that a special concurrence was filed by Justice Scalia, as well as two dissenting opinions; one by Justice Alito and one by Justice Breyer, is illustrative of the fact *Gant's* future as binding precedent may be short-lived. Justice Scalia's concurring opinion aptly states the issue to be faced by the United States Supreme Court and all lower courts in the foreseeable future.<sup>7</sup>

## RETROACTIVE APPLICATION OF GANT

In 1986 the United States Supreme Court held in *Griffin v. Kentucky*, 479 U.S. 314 (1986), "newly declared rules of Constitutional criminal procedure are applied to criminal cases pending on direct appeal." Throughout the United States, courts are battling with the decision of whether or not *Gant* is a "newly declared rule of Constitutional criminal procedure" and whether or not to retroactively apply the decision to any or all cases involving a warrantless search incident to arrest.

In some cases the retroactive application of *Gant* would mean declaring prior constitutional law enforcement conduct unconstitutional. The Oklahoma Court of Criminal Appeals was faced with that decision in the case of *Baxter v. State* 238 P. 3d 934 (Okla. Cr. 2010). The *Gant* decision was published while Richard Baxter's case was on direct appeal.

However, Richard Baxter argued to the Court of Criminal Appeals the holding in *Gant* should apply to the warrantless search in his case.

The prosecution raised a patent procedural argument in its responsive brief to Richard Baxter's appeal, retroactively. The United States Supreme Court passed down the *Gant* decision 16 months and two days after Mr. Baxter's trial, and the search the appellant is trying to suppress based on that decision occurred more than two years before the Supreme Court decided *Gant*.

The Oklahoma Court of Criminal Appeals did not accept the state's argument. The court cited *Griffin v. Kentucky*, in which the court held once a new rule is decided, "the integrity of judicial review requires that [Courts] apply that rule to all similar cases pending on direct review." *Griffin v. Kentucky*, 479 U.S. 314, 317 (1986). The Court of Criminal Appeals found the law espoused in *Gant* to be a rule of constitutional criminal procedure and that it should apply to the case at hand.

## **BAXTER AND THE APPLICATION OF GANT**

### *State's Initial Barrier*

Upon the court's determination, *Gant* would apply retroactively to the case on appeal, the court proceeded to describe the initial barrier the prosecution must face before the court would uphold the trial court's determination admitting the evidence discovered as a result of the police's warrantless search of Baxter's car. The Court of Criminal Appeals held, "the State has the burden to show [its] warrantless search falls within a specific exception to the Fourth Amendment warrant requirement." *Burton*, 204 P. 3d 772 (Okla. Cr. 2009).

The prosecution offered specific exceptions to the Fourth Amendment warrant requirement on appeal, ranging from plain view to search incident to arrest. However, prior to turning to the issues concerning the seizure of Mr. Baxter's person and the search of his vehicle, we must turn to the facts and circumstances of his contact with police.

### *Baxter's Story*

Mr. Baxter was stopped on a city street in Tulsa for driving with an expired tag. He was approached by a Tulsa police officer and it was discovered he had a suspended driver's license and was removed from his vehicle. He was

handcuffed, secured in a police officer's patrol unit and placed under arrest for the aforementioned traffic violation. Subsequently, his vehicle was searched and a large quantity of cocaine and ecstasy were found in his vehicle. Mr. Baxter's case proceeded to a jury trial, where the court admitted all evidence discovered in the search of Baxter's car. Subsequently, Mr. Baxter was convicted on eight counts including the traffic violation he was pulled over for and seven other counts ranging up to trafficking in cocaine and ecstasy. The court sentenced Mr. Baxter to 60 years imprisonment and a fine of \$60,000.

Baxter's attorney raised a single petition of error on appeal; the justification police used in searching his vehicle was unconstitutional and, as a result, all evidence discovered should have been suppressed by the trial court. The prosecution argued responsively, based on a bright-line reading of *Belton*, the police did not violate any of Baxter's rights.

However, the Oklahoma Court of Criminal Appeals found Baxter's singular petition of error sufficient to reverse and remand the trial court's verdict. The court based its decision on Justice Stevens' revised application of *Belton* in the case of *Arizona v. Gant*.

### *Plain View*

The first argument raised by the prosecution was that the drugs in Baxter's car were in plain view before the search began, which justified the police conducting a search without first obtaining a warrant. One of the officers on scene testified during trial regarding the drugs found in the center console. He stated, "I could not recall if it was open or shut, but my recollection is that it was not shut." The Court of Criminal Appeals, drawing from this officer's testimony and others from the record, held there was insignificant evidence presented at trial to show the drugs were in plain view prior to police conducting the search.

The court made this determination based on the precedent of *Tucker v. State*, 620 p. 2d 1314 (Okla. Cr. 1980). A case decided in 1980, in which the Court of Criminal Appeals adopted the four requirements for the plain view warrant exception defined by the United States Supreme Court in the 1971 case, *Coolidge v. New Hampshire* 403 U.S. 443 (1971).<sup>8</sup> Applying the *Coolidge* plain view exception, the search in Baxter's case was unconstitutional. The court held the police surpassed the first element by legally being in the position to search that they

were, however the prosecution failed on the second element as insufficient evidence was produced to show the drugs were in plain view prior to police entering Baxter's vehicle.

#### *Probable Cause to Search*

The prosecution's second argument for the validity of the warrantless search of Baxter's car is that probable cause existed to search the car. The prosecution reasoned the combination of the marijuana in Baxter's car, the large amount of cash Baxter's passenger was carrying (\$1208 to be exact) combined with Baxter's passenger's nervous behavior created sufficient grounds for the police to search for illegal materials in Baxter's vehicle. However, the Oklahoma Court of Criminal Appeals rejected the prosecution's argument that probable cause existed.

The police did not present evidence amounting to probable cause for a search. As previously stated the court held the drugs in Baxter's car were not in plain view. An officer on scene testified he had the passenger exit the vehicle so that another officer could search the car; therefore it could not be grounds for probable cause. The only evidence remaining to give rise to probable cause for a search was the large amount of cash in Baxter's passenger's possession; however, the court held the suspicious amount of cash alone was insufficient evidence to find probable cause to search Baxter's car.

#### *Officer Safety*

The third argument raised by the prosecution is that the search of Baxter's car was valid by the rationale of officer safety. However, the Court of Criminal Appeals did not accept that rationale, "[Police are authorized] to search a vehicle incident to a recent occupant's arrest *only* when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719. When the police initiated the search of Baxter's car, he was already in handcuffs and in the back seat of a patrol car. The court held there was no basis to argue the search of Baxter's car was for officer safety, because Baxter did not pose any feasible threat at the time his car was searched.

#### *Search Incident to Arrest*

The fourth argument raised by the prosecution in furtherance of the warrantless search of

**“The court held there was no basis to argue the search of Baxter's car was for officer safety, because Baxter did not pose any feasible threat at the time his car was searched.”**

Baxter's car is that the search was done as incident to Baxter's arrest. At the time police searched Baxter's car, he had been removed from his vehicle, placed in handcuffs and was sitting in the back of a patrol car.

The Oklahoma Court of Criminal Appeals stated, "The only justification in the record for the search is that it was incident to Baxter's arrest." Baxter at ¶4. However, the search in the case at hand falls directly within the scope of *Arizona v. Gant*, a decision, which was published while Mr. Baxter's case was on direct appeal. In *Gant*, the Supreme Court held "police [are authorized] to search a vehicle incident to a recent arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

#### *Exclusionary Rule*

The prosecution's final argument, in the alternative, was the exclusionary rule should not apply to the evidence obtained after the illegal search of Baxter's car due to the attenuation doctrine. The United States Supreme Court held in the case of *Hudson v. Michigan*, 547 U.S. 586 (2006), an unlawful search pursuant to a warrant is distinguishable from the fruits of an unlawful warrantless search. Restated, if there is a sufficient nexus between the illegality and the evidence obtained, the evidence will still be held admissible. The prosecution argued applying Justice Brennan's rule concerning the fruit of the poisonous tree, espoused in *Wong Sun*, even if there were no grounds to search Baxter's car, a sufficient nexus existed between the search and the evidence discovered as a result of that search to make the drugs admissible in trial.<sup>9</sup>

Based on Justice Brennan's opinion in *Wong Sun*, the question of admissibility in the case at

hand comes down to whether the evidence seized is a result of the illegality or there is a sufficient nexus to purge the evidence from the original taint. The Court of Criminal Appeals held there was not. The court held the evidence obtained from Baxter's car was the singular result of the illegal search "without any intervening occurrence which might attenuate the connection between the unlawful search and the evidence and thus dissipate the taint." *Baxter*, 238 P. 3d 934, at 937 (Okla. Cr. 2010).

### *Future Effects of Decision*

The Court of Criminal Appeals set a precedent of protectionism in *Baxter*. The court went beyond the rhetoric of the Supreme Court and set a bright-line rule for the constitutional requirements of warrantless searches involving vehicles. The expansive application of new *Belton*, which allowed for search incident to arrest without any additional evidence, is nothing more than a thing of the past in Oklahoma. Law enforcement from now on must exhibit patent evidence: 1) an arrestee was not secured at the time of the search, 2) the subject could reach the vehicle to acquire a weapon, 3) or it is reasonable to believe evidence of the offense the subject is under arrest for will be found in the vehicle. Although, the Fourth Amendment warrant requirement exception, search incident to arrest has been greatly curtailed by *Gant* and *Baxter*, multiple exceptions to the warrant requirement remain with the same force and breath they have enjoyed for generations. We do not know what the future holds for the other exceptions to the warrant requirement; however, we do know motorists once again have some safe harbor in the privacy of their vehicles and in the heart of the court.

1. In *Carroll v. United States*, 267 U.S. 132 (1925) the court held: It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor...those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search probable cause for believing their vehicles are carrying contraband...*Id.* at 136.

2. In *Chimel v. California*, 395 U.S. 752 (1969), Justice Stewart delivered the opinion of the court, stating:

...It is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. *Id.* at 756.

3. Amicus Curiae: Latin for "friend of the court." A person who is not party to a lawsuit, but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter. Black's Law Dictionary (9th ed. 2009).

4. Justice Stevens' majority opinion in *Arizona v. Gant*, 129 Ct. 1710 (2010) stated the rule for searches incident to arrest as follows:

"We hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719.

5. The majority in *Thornton* suggested a search is justified when it is reasonable to believe evidence relevant to the crime of arrest might be found. *Thornton v. United States*, 541 U.S. 615 (2004).

6. Justices Scalia, Souter, Thomas and Ginsburg.

7. Justice Scalia's concurrence in *Arizona v. Gant*, 129 S. Ct. 1710 (2009) aptly stated the issue the courts will face following the court's decision:

I am...confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect or acceding to what seems to me as the artificial narrowing of those cases adopted by Justice Stevens. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; But the former opens the field to what I think are plainly unconstitutional searches — which is the greater evil. *Id.* at 1725.

8. In *Coolidge v. New Hampshire* 403 U.S. 443 (1971), Justice Stewart, joined by Justices Burger, Harlan, Douglas, Brennan and Marshall held there are certain prerequisites to the legitimate application of the plain view exception to the warrant requirement which are, "(1) The police must legitimately be in a position to obtain the view in order for the seizure to be permitted; (2) the object must be in plain view; (3) the incriminating nature of the article must be readily apparent; and, (4), the discovery of the article must have been inadvertent." *Id.* at 464.

9. Justice Brennan writing for the majority in *Wong Sun v. U.S.*, 371 U.S. 471 (1963), stated:

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" *Id.* at 488.

### ABOUT THE AUTHOR



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## Juvenile Justice: Life and Death

By Doris J. “Dorie” Astle

In less than a decade the United States Supreme Court has decided three significant cases which have radically altered punishment and sentencing for juveniles. These cases address 1) the death penalty for juvenile homicide offenders, 2) life without parole for juvenile non-homicide offenders and 3) mandatory life without parole for juvenile homicide offenders.

Regardless of the sociological or penological perspective of the reader with respect to juvenile sentencing and punishment and the category juveniles under the age of 18, the trend of the court in *justifying* its decisions with respect to juveniles may be perceived as unsettling. These cases demonstrate an expansion in the court's philosophy with respect to its perceived authority supplanting that of federal and state legislatures and the court's role in pronouncing the values of American society. These decisions have also curtailed the role of juries. And the court has taken “support” for its conclusions from international consensus and law.

Each of these cases was decided in the context of the Eighth Amendment of the United States Constitution. The Eighth Amendment is applicable to the states by virtue of the 14th Amendment.<sup>1</sup> The Eighth Amendment provides “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

### CASE 1: *ROPER V. SIMMONS*

In *Roper v. Simmons*<sup>2</sup> the court addressed the question of whether, under the Eighth and 14th Amendments, an offender who was older than 15 but younger than 18 when he committed a capital crime may be sentenced to death. The court previously considered the proposition in *Stanford v. Kentucky* which rejected the argument

that capital punishment was an Eighth Amendment violation for persons under 18.<sup>3</sup>

Christopher Simmons, a 17-year-old student, along with two other juvenile males, hatched a plan to break into a home, tie up the occupant and throw their victim off a bridge. Simmons boasted before the crime that they would get away with it because they were juveniles. Along with one of his companions, Simmons entered the home of Shirley Crook at 2 a.m., switched on a hall light awakening her and entered her bedroom. The two bound Mrs. Crook with duct tape covering her eyes, mouth and hands. They loaded the terrified victim into her own vehicle and drove her to a railroad trestle. Her feet and hands were then hog-tied with electrical wire, her face wrapped in duct tape, and she was — exactly as had been pre-planned — thrown into the waters below where she drowned.

The following day, Simmons was again boasting, this time that he had killed a woman “because the bitch seen my face.”<sup>4</sup> Simmons and his victim had been involved in a prior car accident and were not strangers to each another.

Simmons was arrested, waived his right to an attorney, and confessed. Since he was 17 at the time of the crime, he was not within the criminal jurisdiction of Missouri's juvenile court system.<sup>5</sup> He was tried for murder and other charges as an adult. Jurors were instructed that they *could* take into consideration his age, and prosecution and

defense both addressed his age in closing arguments. The jury returned a guilty verdict. The jury recommended the death penalty which the trial judge accepted.

Simmons' new attorney sought to overturn the conviction and the sentence based in part on Simmons' lack of maturity, impulsiveness and susceptibility to outside influence and manipulation, as well as Simmons' negative home environment, his underperformance as a student and his use of alcohol and drugs. Arguments were heard and the motion denied. The Missouri Supreme Court affirmed.<sup>6</sup> *Atkins v. Virginia*<sup>7</sup> which barred execution of persons with intellectual disabilities under the Eighth and 14th Amendments had not yet been heard. There is no evidence that Simmons was intellectually disabled, so that is *not* his issue on appeal.

Simmons now sought post-conviction relief citing *Atkins*. The Missouri Supreme Court set aside Simmons' death sentence and sentenced him to life without the possibility of parole, probation or release unless granted by the Missouri governor.<sup>8</sup> The Missouri Supreme Court held that since *Stanford*,

"a national consensus has developed against the execution of juvenile offenders, as demonstrated by the fact that eighteen states now bar such executions for juveniles, that twelve other states bar executions altogether, that no state has lowered its age of execution below 18 since *Stanford*, that five states have legislatively or by case law raised or established the minimum age at 18, and that the imposition of the juvenile death penalty has become truly unusual over the last decade."<sup>9</sup>

Citing *Atkins*, the court reiterated the Eighth Amendment guaranteed right against excessive sanctions, and citing *Weems v. United States*,<sup>10</sup> based this right on the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."<sup>11</sup> The court's reasoning in *Weems* is based on the "expansive language in the Constitution," history, tradition, precedent and "the evolving standards of decency that mark the progress of a maturing society" to determine *proportionate* punishment.<sup>12</sup>

The court also considered *Thompson v. Oklahoma*<sup>13</sup> wherein it found, "our standards of decency do not permit the execution of any offender under the age of 16 at the time of the

crime".<sup>14</sup> The court in *Thompson* had considered "civilized standards of decency," the *rarity* of imposition of the death penalty on persons under 16 by juries and employed its "independent judgment" in considering that juveniles "are not trusted with the privileges and responsibilities" society placed in adults thereby making "their irresponsible conduct not as morally reprehensible as that of an adult."<sup>15</sup> *Thompson* considered the death penalty for juveniles ineffective for retribution and deterrence (the two accepted justifications for the death penalty) and noted juveniles are not likely to make a risk-reward analysis.

*Stanford*, a year after *Thompson*, also considered standards of decency. The court counted the number of states which had statutes providing the death penalty for juveniles, found *no* national consensus and "emphatically *re-jected*" the suggestion that the court should bring its own judgment to bear on the acceptability of the juvenile death penalty [internal quotes omitted, emphasis added]."<sup>16</sup>

On the day *Stanford* was decided, the court held in *Penry v. Lynaugh*<sup>17</sup> that "the Eighth Amendment did not mandate a categorical exemption from the death penalty for the mentally retarded." Only two states had ban execution of the intellectually disabled for a capital offense, and those two states "even when added to the 14 states that have rejected capital punishment completely, [did] not provide sufficient evidence at present of a national consensus."<sup>18</sup> The issue arose again in *Atkins* where the court found that "standards of decency have evolved" and "now demonstrate that the execution of the mentally retarded is cruel and unusual punishment".<sup>19</sup> The court relied on "objective indicia of society's standards"<sup>20</sup> evidenced by legislative enactments and state practice. "These [objective] indicia determined that executing mentally retarded offenders has become truly unusual and it is fair to say that a national consensus has developed against it," the court stated.<sup>21</sup>

The *Roper* court states that:

"The *Atkins* court neither repeated nor relied upon the statement in *Stanford* that the Court's independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that the Constitution contemplates that in the end

our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment [internal quotes omitted].” “Mental retardation diminishes personal culpability even if the offender can distinguish right from wrong [internal quotes omitted; emphasis added].”<sup>22</sup>

“Just as the *Atkins* court reconsidered the issue decided in *Penry*, the *Roper* court reconsiders the issue decided in *Stanford*.”<sup>23</sup> The *Roper* court set out to look at “objective indicia of consensus” in determining Simmons’ fate in the “exercise of our own independent judgment, [of] whether the death penalty is a disproportionate punishment for juveniles.”<sup>24</sup>

The court tallied state statutes and found 30 states had rejected the juvenile death penalty (12 had no death penalty at all, and 18 rejected the death penalty for juveniles). Only three states (Oklahoma, Texas and Virginia) had actually executed offenders for crimes committed as juveniles. The court acknowledged that the rate of abolishing the juvenile death penalty (evidenced by the number of states doing so) had been slower than for the intellectually disabled “... yet we think the same consistency of direction of change has been demonstrated.”<sup>25</sup>

The objective indicia of consensus based on rejection of the juvenile death penalty in the majority of states, infrequency of use and a trend toward abolition led the court to conclude that juveniles, just as the intellectually disabled, are “categorically less culpable than the average criminal.”<sup>26</sup>

The court reserves capital punishment to the most serious crimes and the most culpable.<sup>27</sup> The court sees age, i.e. youth, as a *mitigating factor* to be considered in imposing penalty for capital crimes. The Simmons jury had been specifically instructed that they could take into consideration his age. This fact evidently, however, held no sway for either the Missouri Supreme Court or the U.S. Supreme Court.

Juvenile offenders are deemed by the court to not be consistently among the worst offenders. The court bases this on the general lack of maturity, lack of control, and undeveloped sense of responsibility of juveniles all of which can manifest in impetuosity and ill-considered actions and decisions.<sup>28</sup> The court notes that juveniles are more susceptible to negative influences, outside pressures including peer pressure and that “[t]heir character ... is not as

well-formed as that of an adult.”<sup>29</sup> Citing *Thompson*, the court accepts that “their irresponsible conduct is not as morally reprehensible as that of an adult.”<sup>30</sup>

In addressing the juvenile death penalty as a deterrent, the court states that “In general we leave to legislatures the “assessment of the efficacy of various criminal penalty schemes... however, the absence of evidence of deterrent effect is of special concern because the same evidence that renders juveniles less culpable... suggests [also that they] will be less susceptible to deterrence.”<sup>31</sup>

Additionally, the court is concerned that the brutal nature of a crime may overpower mitigating arguments, such as the age of the offender.<sup>32</sup> It does not trust juries in these situations.

The court adopted a *categorical rule* in *Roper* holding that the death penalty for an offender under 18 is a violation of the Eighth Amendment. “It is, we conclude, the age at which the line for death eligibility ought to rest.”<sup>33</sup> The death penalty is “disproportionate punishment for offenders under 18.”<sup>34</sup> And *Stanford* no longer controls on the issue because the objective indicia have changed.<sup>35</sup>

The court furthers its position that the death penalty is disproportionate punishment for offenders under 18 by looking to foreign sources where it “finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”<sup>36</sup> Even though the court says foreign positions are not to be controlling it goes on to say that “...from the time of the court’s decision in *Trop v. Dulles*, the court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of cruel and unusual punishments.”<sup>37</sup>

## CASE 2: GRAHAM V. FLORIDA

*Graham v. Florida*<sup>38</sup> addressed the question of whether, under the Eighth Amendment, a sentence of life without parole for juveniles in non-homicide offenses was cruel and unusual punishment.

Sixteen-year-old Graham committed armed burglary and other crimes. The armed burglary resulted in physical injury (albeit minor) to the manager of the burglarized restaurant, and Graham and his accomplices fled empty handed. Graham pleaded guilty, accepted a plea agreement and was sentenced to three years

concurrent probation with adjudication of guilt left in the balance. Six months later, and a mere 34 days shy of his 18th birthday, Graham broke the terms of probation by possessing a firearm, engaging in criminal acts including home invasion, holding the resident at gunpoint, ransacking the home, locking two people in a closet and associating with other criminals. His probation was revoked.

Graham was adjudicated guilty on the original armed burglary charge. Florida law provided a range of sentence of five years to life. The trial judge had *discretion* to impose a lighter sentence. He imposed the maximum sentence exceeding the prosecutor's recommendation. Since the state of Florida had eliminated its parole system, Graham had no chance of leaving prison.<sup>39</sup>

Graham commenced an Eighth Amendment challenge to the sentence. The trial court failed to act on the motion which was therefore automatically dismissed.<sup>40</sup>

The court held that the Eighth Amendment prohibits sentencing a juvenile to life without parole for non-homicide offenses.<sup>41</sup> "[E]volving standards of decency that mark the progress of a maturing society" were a key part of the court's analysis.<sup>42</sup> That standard of analysis, per the court "...necessarily embodies a moral judgment."<sup>43</sup> And the applications of the standards "change as the basic mores of society change."<sup>44</sup>

In addressing the issue, the *Graham* court cites *Weems* for the precept that "...punishment for crime should be graduated and proportioned to [the] offense."<sup>45</sup> Cases implementing the *proportionality standard* are of two types: 1) those determining if a term of years is unconstitutionally excessive and 2) those in which the court has applied categorical rules prohibiting the death penalty as was the case in *Roper*. Some cases have considered the nature of the offense, as in *Kennedy v. Louisiana*<sup>46</sup> while others have considered characteristics of the offender as in *Roper*.<sup>47</sup> "[P]roportionality is central to the Eighth Amendment."<sup>48</sup>

The analysis in *Graham* of life without parole for the class of persons under age 18 applies the categorical approach utilized in *Roper*, *Atkins* and *Kennedy*.<sup>49</sup>

**“ Since the state of Florida had eliminated its parole system, Graham had no chance of leaving prison. ”**

In those cases which considered categorical rules, the court has looked to "objective indicia of society's standards, as expressed in legislative enactments and state practice[s]" to detect a national consensus against the practice in issue.<sup>50</sup> The court has also looked to controlling precedent and its own independent judgment.

In its analysis of the objective indicia of national consensus, the court finds that six jurisdictions do not allow life without parole for juveniles; seven permit life without parole in homicide cases; and 37 states and the District of Columbia as well as the federal government allow life without parole for juvenile non-homicide offenders in some instances. In considering nationwide statistics, the court cites a study which found that 129 juvenile offenders were serving life without parole sentences for non-homicide offenses. The distribution of those 129 cases was among only 12 jurisdictions. This was taken by the court as strong evidence of the *rarity* of application. The court also considers that many jurisdictions do not prohibit life without parole for juveniles and as in other cases determines that it does not undermine "evidence of a consensus" based on the court's reasoning that it may not have been a deliberate decision on the part of legislators that juveniles might be sentenced to life without parole in non-homicide cases.<sup>51</sup>

The court quoting from *Harmelin v. Michigan*,<sup>52</sup> which case did not involve children, emphasizes that "The Eighth Amendment does not mandate adoption of any particular penological theory." However, "a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."<sup>53</sup> It determines that none of the recognized penological sanctions (retribution, deterrence, incapacitation, and rehabilitation) justify life without parole for juvenile nonhomicide offenders.<sup>54</sup> The court's position is furthered by the nature of juveniles as established in *Roper* — that children are different from adults in terms of their development, perceptions, experiences and therefore, how they are to be treated.

In furtherance, the court points out that life without parole for a juvenile is in fact a much longer (therefore harsher) sentence than life without parole for an adult offender on the simple basis of age at commission of the crimes

and life expectancy. The younger the offender is, the longer the sentence.

"A state is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime ... but must [impose] some meaningful opportunity for release based on demonstrated maturity and rehabilitation. It is for the State ... to explore the means and mechanisms for compliance."<sup>55</sup> The juvenile may still be behind bars for life, but the state cannot make that judgment "at the outset."

As in *Roper*, the *Graham* court looks to international laws and opinion. "Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question ... As we concluded in *Roper* with respect to the juvenile death penalty, 'the United States now stands alone in a world that has turned its face against' life without parole for juvenile non-homicide offenders."<sup>56</sup> The "... overwhelming weight of international opinion against" life without parole for non-homicide offenses committed by juveniles "provide[s] respected and significant confirmation for our own conclusions."<sup>57</sup> And the court refers to the "judgment of the world's nations" as "demonstrat[ing] that the Court's rationale has respected reasoning to support it."<sup>58</sup>

### CASE 3: MILLER V. ALABAMA

In *Miller v. Alabama*<sup>59</sup> the question before the court is whether the Eighth Amendment prohibits a mandatory life sentence without the possibility of parole for juvenile homicide offenders. This court has combined two cases into a single decision in *Miller*.

At the age of 14 petitioner Jackson and two other boys, one of whom (Shields) had a sawed-off shotgun up his sleeve, set out to rob a video store. Jackson initially remained in the car while the other two entered the store, but he too then entered shortly thereafter. The female store clerk refused to turn over the money and threatened to call police. Shields shot and killed her. The three offenders left empty-handed.<sup>60</sup> Arkansas law allows prosecutors discretion to try a 14 year old as an adult for certain offenses. Jackson was charged as an adult with capital felony murder and aggravated robbery. His motion to remove to juvenile court was denied after consideration of expert testimony and circumstances of the offense. Jackson was convicted and given the mandatory sentence of life without parole.<sup>61</sup>

At age 14, petitioner Miller was hanging out at home with his 14-year-old friend when adult neighbor, Cannon, came to the home to buy drugs from Miller's mother. Miller and his friend followed Cannon to his nearby trailer home. The three smoked marijuana together and played drinking games. Cannon passed out. The boys stole his wallet and \$300. Miller tried to put the emptied wallet back. Cannon awoke and grabbed Miller's throat. The other boy hit Cannon with a baseball bat and Miller then repeatedly hit Cannon with the bat. They covered Cannon's face and left. But they returned and set Cannon's trailer ablaze with two fires in an effort to destroy evidence. Cannon died from the blows to his head and smoke inhalation. Miller's childhood was marked by foster care, an alcoholic, drug-addicted mother and an abusive stepfather, as well as Miller's own use of drugs and alcohol. He had attempted suicide four times, the first at age six. Though initially charged as a juvenile, the prosecutor sought and was granted removal to adult court where Miller was found guilty of murder in the course of arson. The juvenile court had agreed to the transfer after a hearing in which evidence was heard regarding the crime, defendant's mental maturity and his prior juvenile record. Alabama statutes provided that punishment upon conviction for murder in the course of arson was mandatory life imprisonment.<sup>62</sup> The Alabama Court of Criminal Appeals affirmed and ruled that the sentence "was not overly harsh relative to the crime and ... was permissible under the Eighth Amendment."<sup>63</sup>

The *Miller* court took a predictably different view than did the lower courts in holding that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition against cruel and unusual punishments."<sup>64</sup>

The court reiterates the mandate from *Roper* that the Eighth Amendment guarantees a right not to be subjected to excessive sanctions,<sup>65</sup> "... which right flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned'" to offender and offense.<sup>66</sup>

The court again focuses on two lines of precedent regarding proportionate punishment: 1) categorical rules based on culpability in the offense and severity of punishment and 2) a requirement that characteristics of a

defendant and the specific offenses be taken into consideration.<sup>67</sup>

Reiterating *Roper* and *Graham*, the *Miller* court addresses the distinguishing characteristics of juveniles and adults which render juveniles “constitutionally different for sentencing purposes.”<sup>68</sup> It is these differences that “diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”<sup>69</sup>

The holding in *Graham* applied to non-homicide cases; however, the *Miller* court emphasizes that nothing in *Graham* which was “said about children — about their distinctive (and transitory) mental traits and environmental vulnerabilities — is crime-specific.”<sup>70</sup> Mandatory sentencing schemes as applied in *Miller* prevent the sentencer from considering the age of the offender or the characteristics of youth in “assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender [and] [t]hat contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”<sup>71</sup> It lacks proportionality. Quoting *Graham*, it “prevents ... considering a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’”<sup>72</sup> And it conflicts with the requirement for individualized sentencing for the most serious offenses and penalties. The court again in *Miller* analogizes life without parole for a juvenile to a death sentence. It takes away all possibility of rehabilitation and the opportunity for an impetuous, compulsive, irresponsible and immature child to develop a sense of responsibility and maturity and become a productive member of society. Youth is a mitigating factor and must be considered. And the discretion of the trial court in considering the age of the offender must exist at *post-trial* sentencing. It is not sufficient that age was considered at the time of transfer of the offender from juvenile court to adult court.<sup>73</sup>

The *Miller* court also addresses the issue of objective indicia of society’s standards and reiterates that merely counting the number of states which provide for sentences of mandatory life without parole regardless of age of offender is not dispositive.<sup>74</sup> It is not, since “it is impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice).”<sup>75</sup>

*Miller* does “[not] require a categorical bar on life without parole for juveniles”<sup>76</sup> but rather prohibits a *mandatory* sentence of life without parole for juveniles and “...require[s] [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>77</sup>

Even though 29 states and the federal government had statutory provisions for mandatory life without parole for some juveniles in murder cases, the *Miller* court stated,

“...the [*Jackson* and *Miller*] cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime — as, for example, we did in *Roper* and *Graham*. Instead it mandates only that a sentencer follow a certain process — considering an offender’s youth and attendant characteristics — before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham* and our individualized sentencing cases that youth matters for purposes of meting out the law’s most serious punishments. When both of these circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments... We see no difference here... In *Graham*, we prohibited life-without-parole terms for juveniles committing non-homicide offenses even though 39 jurisdictions permitted that sentence... And in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which “less than half” of the “States that permit[ted] capital punishment (for whom the issue exist[ed])” had previously chosen to do so... So we are breaking no new ground in [the two cases combined in *Miller*] [internal citations omitted].”<sup>78</sup>

In order to satisfy the requirements of the Eighth Amendment, discretionary *post-trial* sentencing is what is required by the *Miller* court:

“... *Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles... [otherwise would] violate [the] principle of proportionality, and so the



## Eighth Amendment's ban on cruel and unusual punishment."<sup>79</sup>

### SUMMARY

In summary, the court has held that it is a violation of the Eighth Amendment of the U.S. Constitution to sentence an offender who was *at the time of committing the crime* a juvenile under the age of 18 to 1) the death penalty in homicide cases, 2) life without parole in non-homicide cases and 3) mandatory life without parole in homicide cases. Underlying these holdings is a body of evidence regarding the traits of juveniles and a strong belief in the rehabilitative potential of juvenile offenders with the goal that they have the *opportunity* to become morally responsible members of society.

1. *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (*per curiam*); *Robinson v. California*, 370 U.S. 660, 666-667 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion).

2. *Roper v. Simmons*, 543 U.S. 551 (2005).

3. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

4. *Roper v. Simmons*, 543 U.S. 551, \_\_\_\_ (2005).

5. *Id.* at 557. See Mo. Rev. Stat. §§211.021 (2000) and 211.031 (Sup. 2003).

6. *State ex rel. Simmons v. Roper*, 112 S.W. 3d 397 (2003) (en banc).

7. *Atkins v. Virginia*, 536 U.S. 304 (2002).

8. *State ex rel. Simmons v. Roper*, *supra*, 413.

9. *Id.* at 399.

10. *Roper*, *supra*, at 560. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

11. *Roper*, *supra*, at 560 quoting *Weems v. United States*, 217 U.S. 349, 367 (1910).

12. *Id.* at 561 citing *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958) (plurality opinion).

13. *Id.* at 561 citing *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

14. *Id.* at 818-838.

15. *Id.* at 835.

16. *Roper*, *supra*, at 562 citing *Stanford v. Kentucky*, 492 U.S. 361, 377-378.

17. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

18. *Id.* at 334., cited by *Roper*, *supra*, at 562.

19. *Roper*, *supra*, at 563.

20. *Id.* at 563.

21. *Id.* at 563 quoting *Atkins*, *supra*, at 316.

22. *Id.* at 563 quoting *Atkins*, *supra*, at 312 and 318.

23. *Id.* at 564.

24. *Id.* at 564.

25. *Id.* at 566.

26. *Id.* at 567 quoting *Atkins*, *supra*, at 316.

27. *Id.* at 568 quoting *Atkins*, *supra*, at 319.

28. *Id.* at 569 quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993).

29. *Roper*, *supra*, at 570.

30. *Id.* at 570, quoting *Thompson*, *supra*, at 835.

31. *Roper*, *supra*, at 571.

32. *Id.* at 573.

33. *Id.* at 574.

34. *Id.* at 575.

35. *Id.*

36. *Id.* at 575-578.

37. *Id.* at 575 citing *Trop*, *supra*.

38. *Graham v. Florida*, 560 U.S. \_\_\_\_ (2010), 130 S. Ct. 2011 (2010).

Slip op.

39. *Id.* slip op. at 6 citing Fla. Stat. §921.002(1)(e) (2003).

40. *Graham*, *supra*, slip op. at 6. The First District Court of Appeal of Florida affirmed at 982 So.2nd 43 (2008). The Florida Supreme Court denied review at 990 So.2nd 1058 (2008). The Court granted certiorari at 556 U.S. \_\_\_\_ (2009) (*see Graham* slip op. at 7).

41. *Graham*, *supra*, slip op. at 24.

42. *Id.* slip op. at 7 citing *Estelle v. Gamble*, 429 U.S. 97, 102, (1976) (quoting *Trop*, *supra*, at 101).

43. *Graham*, *supra*, slip op. at 7.

44. *Id.* slip op. at 7 citing *Kennedy v. Louisiana*, 554 U.S. \_\_\_\_, \_\_\_\_ (2008) (slip op. at 8) (quoting *Furman*, *supra*, at 382).

45. *Graham*, *supra*, slip op. at 8 quoting *Weems*, *supra*, at 367.

46. *Graham*, *supra*, slip op. at 9 citing *Kennedy*, *supra*, at \_\_\_\_ (slip op. at 28).

47. *Graham*, *supra*, slip op. at 9-10.

48. *Id.* slip op. at 9.

49. *Id.* slip op. at 10.

50. *Id.* slip op. at 10 citing *Roper*, *supra*, at 563.

51. *Graham*, *supra*, slip op. at 15.

52. *Id.* slip op. at 20 quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991).

53. *Graham*, *supra*, slip op. at 20 citing *Ewing v. California*, 538 U.S. 11, 25 (2003).

54. *Graham*, *supra*, slip op. at 20-23.

55. *Id.* slip op. at 24.

56. *Id.* slip op. at 31 citing *Roper*, *supra*, at 577.

57. *Graham*, *supra*, slip op. at 31 citing *Roper*, *supra*, at 578.

58. *Graham*, *supra*, slip op. at 31.

59. *Miller v. Alabama*, 567 U.S. \_\_\_\_ (2012). Slip op. Certiorari granted *Miller v. Alabama* at 565 U.S. \_\_\_\_ (2011) (No. 10-9646); and *Jackson v. Hobbs* at 565 U.S. \_\_\_\_ (2011) (No. 10-9647).

60. *Miller*, *supra*, slip op. at 2. *Jackson v. State*, 359 Ark. 87, 89, 194 S.W. 3d 757, 759 (2004).

61. Affirmed by the Arkansas Supreme Court. 359 Ark. 87, 194 S.W. 3d 757 (2004). Ark. Code Ann. §5-4-104(b) (1997).

62. *Miller*, *supra*, slip op. at 5-6.

63. *Id.* syllabus slip op. at 1.

64. *Id.* slip op. at 2.

65. *Id.* slip op. at 6 citing *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

66. *Miller*, *supra*, slip op. at 6 quoting *Weems*, *supra*, at 367.

67. *Miller*, *supra*, slip op. at 6-7 citing *Kennedy*, *supra*.

68. *Miller*, *supra*, slip op. at 8 citing *Roper*, *supra*, at 569.

69. *Miller*, *supra*, slip op. at 9.

70. *Id.* slip op. at 10.

71. *Id.* slip op. at 11-12.

72. *Id.* slip op. at 1 quoting *Graham*, *supra*, at \_\_\_\_ (2010) (slip op. at 17, 23).

73. *Miller*, *supra*, slip op. at 27.

74. *Id.* slip op. at 22-23.

75. *Id.* slip op. at 23.

76. *Id.* slip op. at 17.

77. *Id.*

78. *Id.* slip op. at 20-22.

79. *Id.* slip op. at 27

### ABOUT THE AUTHOR



Doris J. "Dorie" Astle earned B.S., M.S., and Ph.D. degrees from Oklahoma State University and her J.D. from the University of Tulsa. She is a former partner with the Tulsa firm of Hall Estill, and is now an associate professor of criminal justice at Southwestern Oklahoma State University.



## DUI Law: A Trial of Tests

By Sonja R. Porter

There was a time when a DUI case was simply described with words like “odor,” “slurred speech,” “red, watery eyes” and “unsteady on his feet.” Walk into a contested DUI case today and you are likely to hear words like “assays,” “clues,” “metabolites,” “GERD,” “partition ratio,” “gas chromatograph mass spectrometer,” “head space,” “anticoagulants,” “ASCLAD” and “ILMO.” Thanks to modern technology and the desire for stronger evidence, the “simple DUI case” has become quite complex. No longer is the opinion of the officer enough as jurors expect to see more conclusive evidence. The purpose of this article is to highlight the main “tests” now used in DUI cases and some of the current issues involved.

### STANDARDIZED FIELD SOBRIETY TESTS

Almost every DUI/APC arrest involves the officer administering, or attempting to administer, one or more field tests approved by the National Highway Traffic Safety Administration (NHTSA). These tests are typically referred to as Standardized Field Sobriety Tests (SFSTs). There is a basic set of three tests: the Horizontal Gaze Nystagmus (HGN), the Walk and Turn (WAT), and the One Leg Stand (OLS). According to the NHTSA manuals, accuracy of the results is improved when all three tests are administered and scored in the *standardized manner* in which the officer was taught. However, some officers forget the specifics of the training, such as how many passes they are supposed to do on the HGN, but will then insist that they conducted the tests the way they were trained. But even then, at best they are not perfect because the scoring is at the discretion of the officer. Add to this that what the officer is taught to score is not what the “untrained” person will care about, such as whether the feet were exactly touching

heel to toe on the WAT or that the suspect pointed his toes down instead of up on the OLS.

### DRE (THE NEXT LEVEL OF SFSTs)

SFSTs were originally designed to be used for evaluating a person thought to be under the influence of alcohol. But what happens when the breath test comes back .00 or the officer suspects impairment of other substances? The answer NHTSA came up with is the DRE, which can stand for “drug recognition expert” or “drug recognition examiner.”<sup>1</sup> These officers are taught that after completing a course that spans a week plus practice in the field, “a trained drug recognition expert (DRE) can reach *reasonably accurate conclusions concerning the category or categories of drugs, or medical conditions, causing the impairment observed* in the subject.”<sup>2</sup> The DRE examination includes taking vital signs such as blood pressure and temperature, measuring the size of the pupils, conducting additional psychophysical tests and asking the suspect about drug use and medical history. At best, the only “opinion” the DRE is allowed to give is whether he believes

the person is under the influence of or impaired by a particular *category* of drug, which often is the same drug the person admitted to be taking. He can also state what he has been taught regarding the effects of certain categories.<sup>3</sup> The goal is to establish a reason to request a blood test to confirm.

SFTSs have been around for a long time, and they are generally accepted nationwide as a means of establishing probable cause. But states vary on the nature of these tests. The NHTSA manuals view the three SFSTs as “scientifically validated,” but the Oklahoma Court of Criminal Appeals says they are not “scientific tests” that require “scientific reliability.”<sup>4</sup>

Shortly after this opinion came out, the Oklahoma Legislature added language to 47 O.S. §11-902 to allow testimony by anyone trained in SFSTs or trained as a “drug recognition expert.”

47 O.S. §11-902(N) now reads (with emphasis added): “*If qualified by knowledge, skill, experience, training or education, a witness shall be allowed to testify in the form of an opinion or otherwise solely on the issue of impairment, but not on the issue of specific alcohol concentration level, relating to the following:*

1. The results of any standardized field sobriety test including, but not limited to, the horizontal gaze nystagmus (HGN) test administered by a person who has completed training in standardized field sobriety testing; or
2. Whether a person was under the influence of one or more impairing substances and the category of such impairing substance or substances. A witness who has *received training and holds a current certification as a drug recognition expert shall be qualified to give the testimony* in any case in which such testimony may be relevant.”

Since the law has changed, this issue has not come up to the court regarding the DRE. Two issues which need to be addressed are: the fact that the statute declares such a witness to be qualified to give testimony about drug impairment when, for example, a pharmacologist

**“SFSTs and DREs are, at best, subjective, which is why all 50 states have implied consent laws that require a person arrested for DUI to submit to a chemical test or risk losing their license.”**

would have to prove his qualifications and be deemed qualified as an expert by a trial court; and whether or not DRE tests are scientific tests needing proper foundation before the results can be admitted as evidence of impairment at trial as opposed to simply a method of establishing probable cause.

Of course, getting in testimony about the SFTSs is one thing, but getting a jury or judge to believe and accept the officer’s opinion as to results is another. In some cases, there is video footage of the field tests, which allows a jury or judge to see the suspect’s actual performance for themselves. Jurors have even been known to try the tests out themselves in the jury room to see how they would perform before judging the defendant’s performance.

SFSTs and DREs are, at best, subjective, which is why all 50 states have implied consent laws that require a person arrested for DUI to submit to a chemical test or risk losing their license. In most states, like Oklahoma, one can be *presumed* to be DUI based on a chemical test result of a blood alcohol content of 0.08 or more because these tests are assumed to be more credible and accurate. Or are they?

## BREATH TESTING

Chemical tests for alcohol and drugs for purposes of DUI prosecutions and implied consent matters are governed by the Oklahoma Board of Tests for Alcohol and Drug Influence (BOT). The rules for the breath tests are found in 40:30-1-1 *et seq.* Before a chemical test can be admissible, the state must show that the test was administered within two hours of arrest and that the rules of the BOT were followed.<sup>5</sup> The rules dictate which testing and simulator devices can be used, the sequence to be followed, the method of reporting the results and the maintenance of the devices. It is the job of the state director of the BOT to see that these rules are carried out and to provide training for operators.

There are only two devices that are currently still approved, but only one is actually used statewide. The Intoxilyzer 8000 is made by CMI Inc., and is currently the device in Oklahoma. Its older cousin, the Intoxilyzer 5000 has

been phased out here in Oklahoma, but is still used in other states. The 8000 is similar but with some notable differences. For example, most of the data entered can be done by scanning the officer's permit card and the subject's driver's license card, which saves time and typing errors. A big difference is that it uses a dry gas canister as a simulator, which can last up to two years, compared to the wet-bath simulator which had to be changed out often. Because of this, the BOT does not allow maintenance by anyone other than the BOT. The BOT trains its operators to "push the green button and follow the prompts" and, if it prints an affidavit, then the test was successfully administered. Operators are also taught that if the device detects certain things, it is programmed to abort the test to prevent invalid results.<sup>6</sup> But like any machine, it is not infallible.

Across the nation, defense lawyers have stopped accepting the number printed and have been successfully attacking the various breath testing devices or the results through cross-examination and expert witnesses who can testify about how the machine can give incorrect results and raise enough doubt so that no longer is a number a given win. When the 8000 first came on the scene, a few states rejected it. In Florida and Arizona, courts have ordered discovery to be produced from CMI to allow defense attorneys an opportunity to challenge, but CMI refuses, and cases have been dismissed as a result. Just this year, the State Police of Pennsylvania have announced they have ceased to do any more evidentiary breath tests in response to a successful challenge to their 5000.<sup>7</sup>

Here in Oklahoma, there have been successful attacks to the admissibility of both the 5000 and now the 8000, alleging the device is not maintained in compliance with the rules of the BOT as required. The most current challenges, first made by Stephen G. Fabian Jr., involves the dry gas canister produced by ILMO and the ability of the state to prove compliance with maintenance. At the time of this writing, a few judges have found insufficient proof of compliance and have not allowed test results to be admitted into evidence. Some of these cases are being appealed.

However, the breath test is not the only chemical test available. If a proper breath testing device is not available, the person cannot give a sufficient breath sample or if other intoxicating

substances are suspected, the officer can request that the person submit to a blood test.

## BLOOD TESTS

Ask a group of ordinary people which test they think is more reliable, and most will likely say a blood test. Whether or not that is true is debatable. What is true is that blood tests cost more in time and money, which is why, in this author's opinion, it is not used as the primary test. Blood test results were less likely to be challenged, but even that is changing. More defense attorneys across the nation have stopped being intimidated by forensic science and have instead, embraced it. One of Oklahoma's own, Josh D. Lee, of Vinita, is now a forensic science co-chairman for the chemistry and the law Division of the American Chemistry Society, and he teaches other attorneys across the nation about chromatography, which is used to test blood and ways to challenge it.

Just like the other tests, blood test results, in order to be admissible, must have been collected and tested in accordance with the rules of the BOT.<sup>8</sup> If the lab is accredited, then it is excluded from the rules as to analysis, but is, of course, required to meet the standards of the accreditation. Accreditation requires record keeping, which can also be subject to challenge.

In recent years, the United States Supreme Court has made decisions in some blood test cases that have created quite a stir in DUI cases nationwide. It began when the court held that to admit the contents of certain documents, such as lab reports, a witness must be called to allow cross-examination about the contents before they can be admitted at trial.<sup>9</sup> Then, most recently, the court addressed the issue of warrantless forced blood draws for DUI cases.

In *Missouri v. McNeely*, 569 U.S. \_\_\_\_ (2013), the court held that the natural dissemination of alcohol in the blood is not a *per se* exigent circumstance that would allow a forced blood draw without a warrant for a DUI case. Missouri law allows for a forced blood draw at a medical facility when the suspect refuses to submit to a test under the implied consent laws. The majority agreed in the result in the case before it, but did disagree as to the reason. Justice Sotomayor, writing the opinion, said there must be a case by case determination as to whether or not an emergency exists to force a blood draw without a warrant. While time can be a factor, it should not be the only factor for every case. Chief Justice Roberts wrote that

more guidance was needed for police officers and, in his opinion, if a warrant could be obtained in the time it took to get the person to the hospital, then the officer must get a warrant. But if the distance is too short or the officer does not get a response to his request in time, then the officer could proceed without a warrant. Justice Sotomayor responded that this would render those arrested closer to an emergency room automatically subjected to a forced blood draw than those farther away. Only Justice Thomas completely dissented because, he claims, evidence disappears with every minute that passes.

Oklahoma does not permit forced blood draws without a warrant except in cases of death or serious bodily injury, so it will be interesting to see what, if any, impact this case has on us, especially in light of Sotomayor's reference to this limited warrantless blood draw in her analysis, but without particular comment in favor or against.

## CONCLUSION

Tests of some type will always be a part of the DUI case. Therefore, it is imperative that the attorneys involved on either side understand the tests if they hope to either effectively submit them or discredit them. There are good resources and classes that are accessible to the attorney who wants to learn more about the tests being used and what is to come. Knowledge is definitely power in a DUI case.

1. NHTSA's Training Manual for DRE, 2002, p. HS 172, R5/02.
2. NHTSA's DRE Training Manual 2002, HS 172, R5/02, p.I-1, emphasis added.
3. See, generally, NHTSA's DRE Training Manual, 2002.
4. DRE Manual, HS 172, R5/02, p. 12, p. # I-1 and *Anderson v. State*, 2010 OK CR 27, 252 P.3d 211, emphasis added, holding that "a scientific foundation for the test was not required as field sobriety tests are not based upon scientific evidence and are not 'a scientific test in the sense it requires a certain scientific reliability', so that neither *Fry*, *Daubert* or any other test establishing reliability or trustworthiness is applicable."
5. 47 O.S. §756 and *Westerman v. State*, 1974 OK CR 151.
6. This author received the training by the BOT and holds a permit as an independent operator of the 8000.
7. See court's opinion in *Commonwealth of Pennsylvania v. Schidlt*, Court of Common Pleas of Dauphin County, PN, NO 2191 CR 2010 and [http://articles.philly.com/2013-02-01/news/36661972\\_1\\_dui-cases-blood-samples-dui-convictions](http://articles.philly.com/2013-02-01/news/36661972_1_dui-cases-blood-samples-dui-convictions).
8. See 47 OS §752.
9. See *Crawford v. Washington*, 541 U.S. 36; *Melendez-Diaz v. Massachusetts*, 557 U.S. \_\_; and *Bullcoming v. New Mexico*, \_\_U.S.\_\_, 131 S. Ct. 2705, 180 L.Ed. 2d 610 (2011).

## ABOUT THE AUTHOR



Sonja R. Porter, aka "the DUI Diva," has a solo practice in Oklahoma City which is primarily focused on DUI defense and expungements. She is a former associate of the DUI defense firm of Fabian & Associates PC and a former Oklahoma County assistant district attorney. She holds permits issued by the Board of Test as an independent specialist of the Intoxilyzer 5000 and as an independent operator of the Intoxilyzer 8000. She has completed the NHTSA training for SFSTs and attends advanced seminars on DUI defense. She has also presented CLEs across Oklahoma.

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## **Legal Aid Services of Oklahoma, Inc. EJW Disaster Legal Corps Fellows Position**

Equal Justice Works and AmeriCorps have partnered together to provide the Disaster Legal Corps Fellowship opportunity to aid the legal needs of disaster victims across the nation. The Disaster Legal Corps (DLC) Fellow will provide civil legal assistance to victims of disasters in Oklahoma, including the recent May 2013 tornadoes.

Two Fellowship positions are available in LASO's newly-created "Disaster Relief Unit" in LASO's Norman, OK law office. Based on Equal Justice Works AmeriCorps guidelines, the term of service will begin in September of 2013 for one year (with a possible renewal). Positions requires completion of NSOPR, state(s), and FBI Fingerprint criminal background checks as well as compliance with all CNCS Federal Regulations throughout the fellowship program.

The AmeriCorps DLC Fellow will:

- 1) Provide direct representation to income eligible disaster victims on issues including, but not limited to, landlord tenant matters, home foreclosures, FEMA issues including recoupment and appeals, problems with homeowner's insurance, problems with health and disability benefits, child support and other family law matters, consumer and medical debt, legal matters related to financial planning, drivers' license reinstatement, and expungement issues. (55%)
- 2) Work with community partner agencies, including case management staff at the unified Disaster Case Management Center to create protocols and facilitate referrals. (15%)
- 3) Develop materials to publicize the project to a variety of audiences. (10%)
- 4) Deliver "Ask a Lawyer" presentations at various locations on legal topics of broad appeal and create educational materials to be shared with host staff statewide. (15%)
- 5) Other administrative tasks related to AmeriCorps and Equal Justice Works program compliance. (5%)

### Qualifications

The Fellow will be required to have excellent oral and written communication skills, as well as interpersonal, organizational and negotiation skills and the ability to work as a team member. Diverse economic, social and cultural experiences and a second language are preferred. The Fellow must be admitted to practice law in the state of Oklahoma and must have graduated from an Equal Justice Works member law school.

**COMPENSATION** is \$38,300 which includes:

- AmeriCorps living allowance of \$24,200
- Supplemental benefits paid by LASO of \$14,100 for housing, student loans, relocation, professional dues, life & disability insurance, and retirement plan expenses.

*Other benefits:*

- \$5,550 AmeriCorps Legal Education Award upon successful completion of service
- AmeriCorps provided childcare assistance
- LASO professional development and training assistance
- Student loan forbearance and interest accrual payment for eligible loans upon successful completion of service
- Participation in Equal Justice Works training opportunities and conferences, as applicable
- LASO fringe benefits, including health insurance (medical, dental, vision, Rx), disability insurance, life insurance, and flex benefit plan

**TO APPLY:** Please send a résumé, cover letter, and a list of three (3) references with mailing and/or email addresses and telephone numbers, law school transcript and legal writing sample to Bud Cowsert, Director of Human Resources, at [Bud.Cowsert@laok.org](mailto:Bud.Cowsert@laok.org).

**Deadline for Application: Sept. 2, 2013**



## Human Trafficking: Beyond *Pretty Woman* and *Huggy Bear*

By Robert Don Gifford

*Pimpin' ain't easy.*

– Big Daddy Kane<sup>1</sup>

### The Runaway

She was nine years old when she ran away for good.<sup>2</sup> Just like other young girls who are “recruited” at malls, nightclubs, schools, group homes, homeless shelters, foster homes, bus stops, parks and even hallways of court buildings,<sup>3</sup> she was 11 when she was first “turned out” to her first “John” by a boyfriend and pimp.<sup>4</sup> She learned to respect the “bottom bitch,”<sup>5</sup> there cannot be any “shame in your game,” and that the “game” is “sold and not told.”<sup>6</sup> She went to parties. She went on the road.

Now at 15, she came to Oklahoma City after a multi-state tour with her pimp and his stable. He set her up in a hotel, fed her and gave her no options.<sup>7</sup> The pimp got her a cell phone with an Oklahoma area code and he advertised her “services” on a popular public website. Like many of these women and children in the sex trade, she has some of the same traits as women who are abused in domestic relationships, i.e., psychologically traumatized and begin to identify with their traffickers, falling victim to Stockholm Syndrome.<sup>8</sup> Finally after an arrest, she realizes she has nowhere to turn. No family, no education and no future. She needs someone to help her navigate the legal minefield and life in general. She needs to know where to turn. She sees you talking to another county inmate at an arraignment. She asks you for help.

### THE SLOW BOAT FROM CHINA

The women came from the same small village in a rural province of China. They arrived in the United States on promises of jobs and a better

life for themselves and the hope to someday bring their families over as well. Once in the United States, they are forced through threats of deportation or harm to their families to continue the slave-wage work in restaurants and massage parlors. They sleep on mattresses in the back-room and eat very little. With the language barriers and control by fear and intimidation, they remain in servitude. Each day they surrender their meager tips and earnings until they have paid their smuggling debts. You eat at this small restaurant once a week and often bring work with you as you enjoy your meal. They assume by your dress and your work, that you are important and smart. One day you find a cryptic note with your bill as they pick up from your meal. They ask for help.

### AFTER THE STORM

On the roofs of storm damaged homes of Oklahoma, in the fields and meat packing plants and on the work crews of lawn maintenance, undocumented Mexican and South American

immigrants work for low wages, no insurance and no future under the threat of calls to law enforcement. If they try to leave, "El Jefe" will withhold their meager paycheck if they attempt to leave their jobs before paying off debts to labor contractors.

## HUMAN TRAFFICKING: THE NEW CRIME DE JOUR

*Fast, I got to find out the secrets of pimping. I really want to control the whole whore. I want to be the boss of her life, even her thoughts. I got to con them that Lincoln never freed the slaves.*

Iceberg Slim<sup>9</sup>

In 1865, the United States first outlawed involuntary servitude,<sup>10</sup> and Congress acted in 1910 to outlaw both white slavery and the interstate transport of females for the purpose of prostitution (Mann Act or the White Slave Traffic Act).<sup>11</sup> Heavyweight Champion Boxer Jack Johnson, Frank Loyd Wright and Charlie Chaplin became some of the more notorious Mann Act prosecutions.<sup>12</sup> Four individuals involved with the running the "Emperor's Club," a prostitution service visited by former governor Elliot Spitzer, were charged with violating the Mann Act. Spitzer was never charged.<sup>13</sup> The sad reality is that pimping can be profitable.<sup>14</sup> One study showed a pimp's "stable" of four prostitutes produced \$632,000 a year.<sup>15</sup>

In 2005, the United States signed the United Nations Convention Against Transnational Organized Crime, which includes protocols regarding human trafficking and smuggling.<sup>16</sup> In 2011, the U.S. Department of Justice announced the Human Trafficking Enhanced Enforcement Initiative to combat human-trafficking threats.<sup>17</sup> The Oklahoma Bar Association and the American Bar Association's Task Force on Human Trafficking under OBA President Jim Stuart and ABA Governor and OBA member Jimmy Goodman are a part of a nationwide initiative to combat human trafficking.

## THE FEDERAL RESPONSE

*Jesus is just a guy who cuts my lawn.*

Gemma, Sons Of Anarchy<sup>18</sup>

In 2000, the Trafficking Victims Protection Act (TVPA), was passed to make human trafficking a federal crime.<sup>19</sup> Before the TVPA's enactment, over 12 million persons were being sold annually into some form of slavery, more than any time in human history.<sup>20</sup> In 2003, the TVPA was specifically amended to include a

civil remedy for trafficked victims.<sup>21</sup> In 2003, up to 20,000 foreign national victims were entering the U.S. every year.<sup>22</sup>

Sex trafficking is defined by the TVPA as the "recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act."<sup>23</sup> Under TVPA, sex traffickers whose victims are between 14 and 17 years of age, face a mandatory minimum sentence of 10 years to life imprisonment.<sup>24</sup> If the child is under the age of 14 or force, fraud or coercion is used, the trafficker faces a mandatory minimum sentence of 15 years to life imprisonment.<sup>25</sup> Only victims of "severe forms of trafficking in persons" are eligible to receive services and benefits under federal and state programs.<sup>26</sup> TVPA defines severe forms of trafficking as commercial sex acts "induced by force, fraud, or coercion," or those in which the person induced is under the age of 18.<sup>27</sup>

## INVOLUNTARY SERVITUDE AND SLAVERY STATUTES

The involuntary servitude and slavery statutes<sup>28</sup> include a prohibition against involuntary servitude and slavery, enticement and peonage.<sup>29</sup> Involuntary servitude requires that a person was held in unlawful service to another for a term through means of coercion. Peonage requires evidence of involuntary servitude along with facts that demonstrate the servitude was linked to a debt owed to another such as paying off a "coyote" for transportation across the U.S. border.

In a "forced labor" prosecution, there must be evidence to show a defendant knowingly, by threats of serious harm to or physical restraint of any person, or by means of abuse or threats of abuse of law or legal process to obtain the labor services of another person. "Serious harm" is defined to include both physical and nonphysical types of harm. Further, the statute applies to threats toward third persons like the family of a victim.

The sex trafficking statute<sup>30</sup> prohibits the recruiting, enticing, harboring, transporting, providing or obtaining a person for commercial sex. That statute further requires proof the defendant knew that force, fraud or coercion would be used to cause the person to engage in commercial sex or knew that the person was under 18 years of age. When there is a minor, there is no requirement to prove force, fraud or coercion. The statute also prohibits a defendant from knowingly benefitting financially or

receiving something of value by participating in a venture that engages in such acts and, like most federal prosecutions, the conduct must affect interstate or foreign commerce.

The TVPA contains additional criminal provisions including the withholding of identification documents in connection with a trafficking offense,<sup>31</sup> trafficking a person into servitude<sup>32</sup> and attempted violations punishable to the same extent as a completed violation.<sup>33</sup> The TVPA also requires mandatory restitution and forfeiture for any violation.

## THE OKLAHOMA RESPONSE

Nationwide, more than half the states in the country have enacted laws to combat human trafficking, punish traffickers and help survivors.<sup>34</sup> In Oklahoma, laws are being amended and added to address issues in trafficking of persons. House Bill (HB) 1067 requires any peace officer who comes into contact with a victim of human trafficking to inform the victim of the emergency hotline number and hand the victim notice of certain rights. HB 1067 also requires if a child may be a victim of human trafficking or sexual abuse, the officer shall notify the Oklahoma Department of Human Services (OKDHS) and the child shall be accepted in OKDHS custody. In another piece of legislation, HB 1508 allows sex trafficking victims to ask courts to clear prior prostitution convictions. In addition, HB 1508 grants the Oklahoma Bureau of Narcotics the ability to issue investigative subpoenas for human trafficking cases. Furthermore, Governor Mary Fallin signed two bills to further protect victims. The first shields all minors from prostitution charges.

Federal government agencies involved in legal actions against traffickers include the FBI, the U.S. Department of Homeland Security (DHS), and the Department of Labor. Included within DHS is the Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE) and U.S. Citizenship and Immigration Services (UCIS, formerly known as INS). The Labor Department includes the Wage and Hour Division as well as the Office of Inspector General. State agencies like the Oklahoma State Bureau of Narcotics and the Oklahoma State Bureau of Investigation, as well as sheriffs' departments, tribal law enforcement and municipal police vice squads have all joined together to fight human trafficking.<sup>35</sup>

Most victims of severe forms of human trafficking do not know that there are national and

state hotlines and that they may be eligible for medical assistance and counseling from the federal or state government due to their status as human-trafficking victims.<sup>36</sup>

## CONCLUSION

*Vivian: That would make you a . . . lawyer.*

*Edward Lewis: What makes you think I'm a lawyer?*

*Vivian: You have that sharp, useless look about you.*

*Pretty Woman*<sup>37</sup>

This year marks the 150th anniversary of the Emancipation Proclamation, and each year, there are up to 300,000<sup>38</sup> youth at risk of commercial sexual exploitation<sup>39</sup> in the United States. While known as the "oldest profession," it is also the youngest, with estimates of domestic underage victims of sex trafficking in the U.S. somewhere between 100,000-200,000.<sup>40</sup> Out of the estimated 450,000 children who run away each year, "one out of every three . . . will be 'lured [[into] prostitution within 48 hours of leaving home.'"<sup>41</sup> Approximately 80 percent of current adult prostitutes began their profession when they were younger than 18.<sup>42</sup> The average age of entry into the industry is between 11 and 14.<sup>43</sup>

Research has provided that nearly 2 million people are trafficked worldwide every year with an estimated 15,000 to 18,000 in the United States. Estimates place the global financial impact of this illicit industry at \$32 billion. Human trafficking can be found in the fields, sweatshops, suburban upper-class homes, on-line escort services and strip clubs. Because of enhanced state and federal criminal statutes, victim-protection provisions, and public awareness as well as sustained dedication to combating human trafficking, the numbers of trafficking prosecutions have increased dramatically.

Nonprofit organizations, such as the Trinity Legal Clinic of Oklahoma, Catholic Charities Archdiocese of Oklahoma City, DaySpring Villa in Sand Springs, the Native Alliance Against Violence as well as federal and state agencies consistently focus on human trafficking to raise awareness and ensure that victims get the services they need.

If you have information related to sex trafficking call the National Human Trafficking Resource Center at 1-888-373-7888 or visit the website for more information. As a member of the bar and an officer of the court, do not turn

a blind eye when you see them on the street, in the hotel lobby, sleeping on the garage floor of that house you drive by, etc. Pick up the phone and call. To quote Sean Connery's character Jim Malone in his challenge to Elliot Ness in the 1937 film *The Untouchables*, "What are you prepared to do?"<sup>45</sup>

1. Big Daddy Kane, *Pimpin' Ain't Easy*, on IT'S A BIG DADDY THING (Cold Chillin'/Warner Brothers 1989) with a sampling of *Do the Funky Penguin* by Rufus Thomas.

2. "She" is a real person and her identity is protected due to privacy, current litigation, and hope for her future.

3. Polaris Project, Domestic Sex Trafficking: The Criminal Operations of the American Pimp 1, available at <https://na4.salesforce.com/sfc/play/index.jsp?oid=00D300000006E4S&d=6FuMhnn2HQpD2dARadzU1Ow7p6l%3D&viewId=05H60000000JDnk&v=068600000008UtA> (last visited Nov. 23, 2011) (quoting Iceberg Slim, a local pimp).

4. Milner, C.A., & Milner, R.B. (1972). *Black players*. Boston, MA: Little, Brown.

5. The term "bottom bitch" or just "bottom" refers to a pimp's "most senior prostitute, who often trains new prostitutes and collects their earnings until they can be trusted." *United States v. Brooks*, 610 F.3d 1186, 1196 (9th Cir. 2010).

6. Celia Williamson & Terry Cluse-Tolar, *Pimp-Controlled Prostitution: Still an Integral Part of Street Life*, 8 Violence Against Women 1074, 1078-88 (2002).

7. See Janice G. Raymond & Donna M. Hughes, Coalition Against Trafficking in Women, Sex Trafficking of Women in the United States: International and Domestic Trends 50 (March 2001), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/187774.pdf> (noting that "[pimps'] methods are to befriend women, create emotional and/or chemical dependencies, and then convince them to earn money for the pimp in prostitution.").

8. The Stockholm Syndrome <http://medical-dictionary.thefreedictionary.com/Stockholm+Syndrome>.

9. Polaris Project, Domestic Sex Trafficking: The Criminal Operations of the American Pimp 1, available at <https://na4.salesforce.com/sfc/play/index.jsp?oid=00D300000006E4S&d=6FuMhnn2HQpD2dARadzU1Ow7p6l%3D&viewId=05H60000000JDnk&v=068600000008UtA> (last visited Nov. 23, 2011) (quoting Iceberg Slim, a local pimp).

10. U.S. Const. Amend. XIII §1.

11. 18 U.S.C. §2421, The Mann Act (amended in 1986 and 1998).

12. Eric Weiner, The Long, Colorful History of the Mann Act, PR (March 11, 2008), <http://www.npr.org/templates/story/story.php?storyId=88104308>.

13. See Sentencing Memorandum (Doc. 64) authored by Joseph L. Wells in *United States v. Turner*, Case No. CR-13-25-C (Western District of Oklahoma).

14. Moira Heiges, Note, From the Inside Out: Reforming State and Local Prostitution Enforcement to Combat Sex Trafficking in the United States and Abroad, 94 *Minn. L. Rev.* 428, 434 (2009).

15. Polaris Project at 4.

16. <http://www.unodc.org/unodc/en/treaties/CTOC/>.

17. U.S. Dept. of Justice, Office of Public Affairs. Feb. 1, 2011.

18. *Sons of Anarchy*, Season 1, Episode 12 "The Sleep of Babies"

19. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. §7101).

20. U.S. Department of State, 2005 Trafficking in Persons Report, available at <http://www.state.gov/j/tip/rls/tiprpt/2005/46606.htm>.

21. 18 U.S.C. §1595.

22. Trafficking Victims Protection Reauthorization Act of 2003, H.R. 2620, 108th Cong. (2003), available at <http://www.state.gov/documents/organization/28225.pdf>. This number has since been amended in the 2006 Trafficking in Persons report to be 14,500 to 17,500, available at <http://www.state.gov/j/tip/rls/tiprpt/2006>.

23. Trafficking Victims Protection Act, 22 U.S.C. §7102(9) (2006).

24. 18 U.S.C. §§1591(b)(2), 3559(a)(1), 3571(b)(3) (2006).

25. *Id.* §§1591(b)(1), 3559(a)(1), 3571(b)(3).

26. 22 U.S.C. §7105(b)(1)(A) (2006).

27. *Id.* §7102(8)(A) (2006).

28. 18 U.S.C. §§1581-1584 (2000).

29. *United States v. Kozminski*, 487 U.S. 931, 952 (1988) (requires very specific forms of coercion limited to physical force or restraint, threats of physical force or restraint, or threats of legal coercion tantamount to incarceration.).

30. 18 U.S.C. §1591.

31. 18 U.S.C. §1592.

32. 18 U.S.C. §1590.

33. 18 U.S.C. §1594.

34. Polaris Project, [www.polarisproject.org](http://www.polarisproject.org).

35. 8 USC §1101(a)(15)(T)(i)(III).

36. [www.polarisproject.org](http://www.polarisproject.org); <http://www.dhs.gov/human-trafficking-victim-assistance-program>.

37. *Pretty Woman* (Touchstone Pictures 1990).

38. See Richard J. Estes & Neil Alan Weiner, The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico 142 (2001), available at [http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf).

39. See Cheryl Hanna, *Somebody's Daughter: The Domestic Trafficking of Girls for the Commercial Sex Industry and the Power of Love*, 9 Wm. & Mary J. Women & L. 1, 10-17 (2002).

40. Richard Estes & Neil Alan Weiner, The Commercial Sexual Exploitation of Children in the U.S., Canada and Mexico, University of Pennsylvania, 2002, available at [http://www.sp2.upenn.edu/restes/CSEC\\_Files/Complete\\_CSEC\\_020220.pdf](http://www.sp2.upenn.edu/restes/CSEC_Files/Complete_CSEC_020220.pdf).

41. See Birkhead, *supra*, at 1060-61 (identifying the youth most at-risk for sex exploitation as "including runaways, throwaways, victims of physical or sexual abuse, drug users and addicts, homeless youth, female gang members, transgender street youth, and unaccompanied minors who enter the United States on their own"). Tamar R. Birkhead, The "Youngest Profession": Consent, Autonomy, and Prostituted Children, 88 *Wash. U. L. Rev.* 1055, 1061 (2011).

42. *Id.*

43. *The Untouchables* (Paramount Pictures 1987).

## ABOUT THE AUTHOR



Robert Don Gifford serves on the OBA Board of Governors and is an Assistant United States Attorney in Oklahoma City serving as the Human Trafficking Coordinator for the Western District of Oklahoma. The views expressed herein are those of the author and do not necessarily reflect those of the Department of Justice.



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## Thoughts on the Plea Bargain Process in Oklahoma

### Ethics, Philosophy and Strategic Approaches

By Jim Drummond

**T**he Oklahoma Court of Criminal Appeals decision in *Malone v. State*<sup>1</sup> hugely impacts criminal justice in Oklahoma. In this 3-2 decision, the court withdrew an earlier opinion to the contrary in the same case and held that there is no right for a defendant to present mitigating evidence in a jury trial unless it is a capital trial,<sup>2</sup> though the non-capital defendant may do so in a bench trial. However, the prosecution may of course present evidence of prior convictions to the jury, as well as prior uncharged acts necessary to maintain its burden of proof.<sup>3</sup>

In other words, the only defendants entitled to individualized sentencing are those for whom the prosecution seeks the penalty of death. Everyone else is subject to any disproportionate sentence that does not “shock the conscience of the court.”<sup>4</sup>

What does this mean for the plea bargaining process? It essentially means that any mitigation of the crime charged must persuade the prosecutor, not the impartial judge or unbiased jury. It also means defendants who might be less culpable, in fact, than as they are charged may plead guilty when they are either innocent or less culpable, because their cases will go to a jury without the opportunity to present evidence in mitigation of their crime. Of course defenses such as duress are still defenses to the *mens rea* element of the crime; but unless the penalty sought is death, there is no right to let a jury know about traumas the defendant has suffered, such as childhood abuse or mental health issues.

Both the state and the defendant have a right to a jury trial. Where there are strong mitigating factors, therefore, an aggressive prosecutor may certainly decide not to waive jury trial even if the defendant wishes to be able to present mitigation to the judge as sole sentencer. A judge cannot modify the sentence recommended by the jury, unless the judge is allowed to sentence either by both parties waiving a jury or abdication by the jury of its power to recommend a sentence, which is so rare as to be disregarded.<sup>5</sup>

Roughly 95-97 percent or more of all state cases are settled by plea bargain.<sup>6</sup> In the federal courts it is 95 percent.<sup>7</sup> Last year the U.S. Supreme Court, Justice Kennedy writing for the majority, said in *Missouri v. Frye*<sup>8</sup>:

To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Scott & Stuntz,

"Plea Bargaining as Contract," 101 *Yale L.J.* 1909, 1912 (1992). See also Barkow, "Separation of Powers and the Criminal Law," 58 *Stan. L.Rev.* 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

An increase in 10 percent, or even 5 percent, of cases going to a jury could well cripple the criminal justice system, overwhelming prosecutors, defenders and dockets.<sup>9</sup> What this has created is the world's most imprisoning country per capita. At the beginning of 2010 the United States incarcerated 743 adults per 100,000 population, for a total well over 2 million adults. Nearly 5 million more were on probation or parole. Russia was second in the world at 577 per capita.<sup>10</sup> Among the U.S. states, Oklahoma has ranked as high as fourth — and first for women.<sup>11</sup>

But this is not a labor union issue wherein uniting against authority is likely to increase the power of all defendants to get individualized sentencing. Lawyers cannot ethically advise their clients to join in a mass effort to refuse plea bargains and thus cripple the system. Lawyers represent individuals, not groups. This will be discussed further below, but it is important to observe that there may well be a connection between the plea bargaining system and our nation's world-highest rate of incarceration.

Because prosecutors are usually *de facto* sentencers, and because their sworn duty is also to protect the public as well as to accomplish justice, they often experience crosscurrents of motivations: let the punishment fit the crime but take no chances on further harm to society. Defenders are also subject to conflicting motivations: taking a tough and vigorous motion practice approach in non-capital cases, working the DA harder may help the current client, but may result in worse offers to future clients who have "caught-red-handed" cases. Argu-

ably, the resulting system is one which has devolved into an exercise in game theory, and the literature is replete with game theory analyses of criminal justice. A plea bargain is a contract<sup>12</sup> under the law, but some argue it is often a contract of adhesion.

## THE UNINTENDED RESULTS OF PLEA BARGAIN JUSTICE

Martin Yant, a nationally known journalist and investigator, refers to the plea bargain system as coercive:

Even when the charges are more serious, prosecutors often can still bluff defense attorneys and their clients into pleading guilty to a lesser offense. As a result, people who might have been acquitted because of lack of evidence, but also who are in fact truly innocent, will often plead guilty to the charge. Why? In a word, fear. And the more numerous and serious the charges, studies have shown, the greater the fear. That explains why prosecutors sometimes seem to file every charge imaginable against defendants.<sup>13</sup>

There are several types of plea bargaining. In "charge bargaining," a defendant pleads to a less serious charge, which has only to fit some part of the actual facts such that the defendant's allocution truthfully encompasses the crime charged to the judge's satisfaction.

In "count bargaining," the defendant pleads guilty to one or more counts while one or more other counts are dismissed. Usually (and as is really ethically necessary to urge from a defender's standpoint) the bargain includes the proviso that the sentences for each count pled are to run concurrently. In "sentence bargaining," there is an agreement as to what the sentence should be; if the judge feels differently, the plea bargain is voidable by the defendant.

In "fact bargaining," the parties agree that they will stipulate to certain facts which will affect sentencing, e.g., the quantity of drugs for which the defendant is responsible or the defendant's importance of role in a conspiracy. In state charges, the prosecutor may now waive "Page 2" enhancements for prior crimes.

Thus there are many tools in the belt of the bargainer. Always in the back of the bargainer's mind is the uncertainty of what a jury will do, and how strapped for time the lawyers are. The resulting outcome, as a result, is frequently not ideal. This is well illustrated by the classic

exercise in game theory called “The Prisoner’s Dilemma.” The situation is that two defendants who committed a crime together are caught and arrested, and held incommunicado from one another. Each is offered the same deal: if one confesses and the partner does not, the confessor gets six months and the non-confessor gets five years. If neither confess both get one year. The loser in the snitch race gets five years. How can either trust the other? So both confess and both get three years, whereas if they had clammed up, they each would get only one year. This was re-ferred to in an illustrative cartoon by [livingeconomics.org](http://livingeconomics.org) as “individually smart, collectively dumb.”<sup>14</sup> The video is available at <http://goo.gl/DFDG9>.

As endnote 14 indicates, in real life it is not a game for the individual defendant, who may or may not behave altruistically in the situation against their own interest. In game theory models, logically the two individuals will betray each other continuously. But game theorists do “not claim ... that real *human players* will actually betray each other continuously. In an infinite or unknown length game there is no fixed optimum strategy...”<sup>15</sup>

For the prosecution, the dilemma is the mandate to seek justice for victims and survivors as well as to protect society, in conflict with the need to dispose of cases, as well as the conflict between the natural impetus to obtain convictions and the need to ensure that real justice is done for the defendant. For the defender, the dilemma is the need to represent vigorously and hold the prosecution’s feet to the hottest fire possible, in conflict with the need to preserve the defender’s utility to future clients whose fate depends on his negotiation skills and relations with prosecutors. For the innocent accused, the dilemma is whether to roll the dice or to plead guilty when really innocent, to avoid a much harsher sentence.

For the culpable accused, the dilemma is whether to snitch on co-defendants, a decision informed not only by sentence harshness but by whether this will expose the defendant to danger in prison. As one of the author’s federal clients once explained to him, the client needed the pre-sentence investigation report to be free of

**“For the prosecution, the dilemma is the mandate to seek justice for victims and survivors as well as to protect society...”**

any reflection that the client had placed blame on any co-defendants, because his gang members would demand to see that report on his return to prison.

What is clear is that the first snitch to the trough often (but not always) wins the lion’s share of sentencing or charging benefits. In drug conspiracy cases this sometimes means the ring-leader who is smart enough to cooperate instantly — to understand the need to give up his partners and subordinates. In many federal drug conspiracy cases everyone cooperates and

pleads guilty, but the sentences are determined primarily by the sentencing guidelines after fact bargaining regarding quantities of drugs.

A recent study (2012, draft) attempted to re-create a real-life controlled plea bargain situation, rather than merely asking theoretical responses to a theoretical situation — a common approach in previous research. It placed subjects in a situation where an accusation of academic fraud (cheating) could be made, of which some subjects were in fact by design actually guilty (and knew this), and some were innocent but faced seemingly strong evidence of guilt and no verifiable proof of innocence. Each subject was presented with the evidence of guilt and offered a choice between facing an academic ethics board and potentially a heavy penalty in terms of extra courses and other forfeits, or admitting guilt and accepting a lighter “sentence”. The study found that as expected from court statistics, around 90 percent of accused subjects who were in fact guilty chose to plead. It also found that around 56 percent of subjects who were in fact innocent (and privately knew it) also plead guilty, for reasons including avoiding of formal quasi-legal processes, uncertainty, possibility of greater harm to personal future plans or deprivation of home environment due to remedial courses. The authors stated:

Previous research has argued that the innocence problem is minimal because defendants are risk-prone and willing to defend themselves before a tribunal. Our research, however, demonstrates that when study participants are placed in real, rather than hypothetical, bargaining situations and are presented with accurate information

regarding their statistical probability of success, just as they might be so informed by their attorney or the government during a criminal plea negotiation, innocent defendants are highly risk-averse.<sup>16</sup>

The goals of corrective rehabilitation and deterrence seem to have been lost in this elaborate shuffle. There is evidence that harsher sentences and the death penalty do little in the way of deterrence,<sup>17</sup> and that in fact longer sentences which expose the offender to more prison culture actually increases recidivism; and some prosecutors including former Attorney General Drew Edmondson have acknowledged that obtaining an acceptable outcome for victims and survivors drives the bargaining process, regardless of deterrent effect. Our corrections system, in the meantime, is overwhelmed and underfunded. Rehabilitative programs are starved. Oklahoma prison guards who face daily dangers make so little money (starting pay is \$11.83 per hour) that some 30 percent of prison employees with families qualify for food stamps.<sup>18</sup>

Arguably, then, plea bargaining as a system is coercive and crude as a driving tool in criminal justice. It arguably is, further, the driving force behind the fact that the freest country on earth has more people in prison per capita than any country on earth. As early as 1978, when our incarceration figures were a fraction of current figures, Yale Law professor John Langbein commented:

There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive. Like the medieval Europeans, the Americans are now operating a procedural system that engages in condemnation without adjudication.

## REAL STRATEGY CONSIDERATIONS FOR THE PRESENT

Nonetheless, both prosecutors and defenders have to live in the now, and the dilemmas do not disappear because the author does not like the system. In every case, different negotiation strategies may apply best to a particular case. A Missouri prosecutor, Joseph W. Vanover, wrote on the differing strategies of competitiveness and cooperation:

The competitive strategy “seeks to force the opposing party to a settlement favorable to the negotiator by convincing the opponent that his case is not as strong as previously thought and that he should settle the case.” One tactic employed by such negotiators is to open with a high initial demand. In the criminal setting, this is most apparent when a prosecutor “throws the book” at a defendant by charging crimes more severe than a reasonable jury would support and crimes so trivial and numerous that defense counsel knows the prosecutor will not pursue them to conviction. Throughout the negotiations on a single case, competitive negotiators limit the disclosure of information on the facts of the case and do not reveal their preference and expectation of an outcome. Because the primary objective is to “win” and to force the opponent to “lose,” the few concessions that are made are minor. Further, threats and arguments are often used to reach a favorable settlement. Finally, a competitive negotiator will employ false issues and feign commitment to positions that may be compromised without consequence.

In contrast to competitive negotiators, cooperative negotiators “make concessions to build trust in the other party and encourage further concession on his part.” Such negotiators open with a moderate bid that is barely acceptable to the opponent. When the opponent opens with such a bid, the two negotiators “should determine the midpoint between the two opening bids and regard it as a fair and equitable outcome.” [citations and footnotes omitted]<sup>19</sup>

Obviously, from a defender’s standpoint, the relative merits of competitive and cooperative strategies depend in part on the strength of the prosecution’s case and the strength of the defender’s defense. But it also depends on the objectives of the prosecutor and defender which may have little to do with the client’s own interests. As Vanover points out, the prosecutor may take a hard line occasionally on a minor case, and force it to trial, just to show passion for justice and that he is a bit “crazy” at times:

To gain better negotiating position, however, the prosecutor may follow through on what is believed by the defense bar as an idle and irrational threat to take a minor case to trial. As one prosecutor put



it, “if the defense lawyers think the prosecuting attorney is a little crazy and will spend a ton of money on a case, then the prosecutor’s threats won’t be idle and the defense lawyers will agree to a settlement earlier.”<sup>20</sup>

It is axiomatic that a lawyer’s readiness to go to trial and thoroughness are a factor in plea negotiations. Similar to a prosecutor’s more complex stratagem just illustrated, a defense lawyer may decide to try to take a high profile case to trial no matter what, partly in order to enhance his future credibility with prosecutors. Vanover’s conclusions are illustrative of how plea bargaining may lose sight of the interests of the public AND of the individual client:

Choosing the best strategy to use becomes complicated when the maximum utility resulting from a series of negotiations is not achieved through the use of the optimal strategy for each singular negotiation. In this situation defense lawyers face an ethical dilemma: should a defense attorney employ the optimal negotiation strategy for the present plea negotiation despite the fact that it will be detrimental to future negotiations with a particular prosecutor or in a particular jurisdiction? In other words, should a defense attorney sacrifice his ability to serve future clients by vigorously serving the interests of his present client?

On the other side of the negotiation process, prosecutors may neglect the interests of the public if they lose sight of the effect a particular negotiation will have on future negotiations by submitting to caseload pressure and granting concessions when threatened by defense counsel with a costly, hard-fought court battle. Similarly, prosecutors, at times, should make an apparently irrational decision to pursue a case by expending excessive amount of time and effort to favorably adjust defense bar expectations. Whatever the situation, it is important to understand that what appears to be a good decision today may turn out to be a bad decision tomorrow.

Ethical rules require absolute diligence by defenders in representing the interests of the individual client. It seems patently wrong for defenders to sacrifice the best interests of an individual client in order to preserve reputation or future effectiveness in negotiations. But

in a system wherein the plea bargain process so dominates the criminal justice landscape, can any defense lawyer afford to overlook the forest of future clients and focus only on the tree she represents now?

Fortunately, one imagines, most criminal cases are not whodunits. In the vast majority of criminal cases, the issue is not innocence but rather degree of culpability coupled with criminal history. This author has thus found that the best approach to negotiation involves a recipe combining the competitive and cooperative approaches, starting with a cooperative assumption that the opposing party will be reasonable. It is never wise to assume that a prosecutor’s reputation for being hard-line or unreasonable will be unvarying. In one of the author’s cases, a supposedly intractable and aggressive prosecutor of broad reputation looked at the quantities of a drug distribution case, second offense with a large quantity of marijuana involved, slam-dunk 12-page DEA probable cause affidavit, and ultimately moved from 10 years incarceration to eight years probation on the background equities. That client made an absolutely successful turnaround. The author counts that outcome as no less a victory than many jury verdicts of acquittal.

A defender can negotiate cordially from a position of strength by accurately reflecting to the prosecutor the strength and weaknesses of both sides’ cases. This approach often enhances credibility far more than bluster or attempts to paw the earth. In every case, the defender must balance the approach taken to negotiation keeping foremost in mind the interests of the client served, while recognizing when a cooperative approach will be more or less effective with any particular prosecutor. One cannot purge game theory from the plea bargaining process, but one can play the game ethically in every situation with a clear focus on the forces at work.

Prosecutors may have the temptation to overcharge either in number of counts or in degree of crime in order to force a plea agreement:

“[T]he scarcity of prosecutorial resources, and the corresponding inability to prosecute all cases, creates an inherent motivation to overcharge defendants during plea negotiations. . . . However, for the plea-bargaining process to serve the public fairly, it must be implemented with careful discretion, particularly when evaluating

who should be charged and what should be charged, to fairly and accurately reflect the criminal conduct involved. If compromised, the potential for injustice and the specter of coercive plea bargaining move front and center.”<sup>21</sup>

Prosecutors must have the courage to charge fairly and put in proper balance public or victim cries for retribution with the mitigating and aggravating circumstances, and should avoid iron-clad “policies” for every crime. A former Oklahoma prosecutor, Jon Lagerberg, once said to the author that he would much rather have a skilled and diligent defense attorney opposing him than a lax or unskilled attorney; it made his job much simpler and easier. As a defense attorney I can attest to the same as to prosecutors; I have found that the best negotiations and trial processes occur with responsible, ethical, vigorous prosecutors who have the confidence to do the right thing and administer justice.

That said, the social and political consequences of plea bargaining processes need strong examination by the public and by legislators. While the likelihood of this is not apparent, the interests of justice would be served by implementing rules that require more individualized sentencing in non-capital cases, and by organized ethical and proportionated oversight of the bargaining process. The idea that the right to a trial effectively answers objections to defects in the plea process is explicitly rejected by the U.S. Supreme Court.<sup>22</sup> The “shocks the conscience” standard was rejected in Michigan, and should be replaced here by proportional considerations, because a state with mandatory jury sentencing must be better able to account for inflamed passions which may make a sentence disproportionate. *Malone v. State*, *supra*, endnote 1, should be revisited in light of the Oklahoma Constitution, and mitigation should be allowed in non-capital jury trials as Judge Chapel urged. We need to reallocate federal resources away from drug enforcement and toward rehabilitative correctional programs that work, to the point of decriminalizing some drug offenses and treating others as psychological and medical problems. Finally, a set of ethical guidelines applicable to both prosecutors and defenders should be developed and specifically tailored for the plea bargaining process, with ethical accountability oversight. The Oklahoma Academy approved such a program, in its 2008 report focusing on corrections,<sup>23</sup> but few of its recom-

mendations presented to the Legislature were ever adopted. It is past time to evolve beyond the primitive “hug-a-thug,” to take note of Mental Health Commissioner Terri White’s approach to mental health issues in the criminal justice system, as reflected in her seminal proposal presented to the Oklahoma Academy in 2008, “Our Plan to be Smart on Crime.”<sup>24</sup>

In the interim, if this is an interim rather than a permanent state of affairs, the plea bargain system of justice needs careful scrutiny. It is a fact that prosecutors, defenders and judges, not to mention the accused, have a lot to gain by such scrutiny.

1. 2002 OK CR 14, 58 P.3d 208.

2. *Lockett v. Ohio*, 438 U.S. 586 (1978) held that in capital cases the Eighth and Fourteenth Amendments require “individualized consideration of mitigating factors.” However, the plurality in *Lockett* said: “We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.... Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.” *Walton v. Arizona*, 497 U.S. 639, 682, 110 S. Ct. 3047, 3072, 111 L. Ed. 2d 511 (1990) overruled by *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

3. *Burks v. State*, 1978 OK CR 10, 594 P.2d 771, 775.

4. *Rea v. State*, 2001 OK CR 28, 34 P.3d 148, 149: “Appellant further suggests that we abandon our “shock the conscience” standard of sentence review in favor of a “proportionality” standard, citing *People v. Milbourn*, 435 Mich. 630, 461 N.W.2d 1 (1990), as support. We decline to do so.” As the *Milbourn* court noted, *id.* at 2, the “preeminent requirement” in fashioning proper appellate review of sentences is to respect and give purpose to the sentencing scheme promulgated by the legislature. Legislatures, not courts, define punishment. *State v. Young*, 1999 OK CR 14, at ¶26, 989 P.2d 949. Oklahoma law permits the sentencing body (judge or jury) to impose a sentence anywhere within a specified statutory range. Given that our state Legislature has afforded such broad discretion to the sentencer, our “shock the conscience” standard provides an appropriate scope of review.” Judge Chapel’s vigorous partial dissent that this is so subjective as to be “no standard at all” is worth reading. *Id.* at 150 *et seq.*

5. 22 O.S. §973-975: “After a plea or verdict of guilty in a case where the extent of the punishment is left with the court, the court, upon the suggestion of either party that there are circumstances which may be properly taken into view, either in aggravation or mitigation of the punishment, may in its discretion hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.” *Okla. Stat. Ann.* tit. 22, §973. “No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court or member thereof in aggravation or mitigation of the punishment, except as provided in the last two sections.” *Okla. Stat. Ann.* tit. 22, §975 (West).

6. Michael M. O’Hear, “Plea Bargaining and Procedural Justice,” 42 *GA. L. REV.* 407, 409 (2008).

7. In the year 2000, over 95 percent of cases involving federal convictions were settled through the entry of a guilty plea. Bureau of Justice Statistics, U.S. Dept. of Justice, *Compendium of Federal Justice Statistics 2000*, 51, 59 (2000). Indeed, as observed by Ronald Wright and Marc Miller, professors of law at Wake Forest University and Emory University respectively, the criminal justice system’s dependence upon the guilty plea structure has greatly increased in recent years:

The proportion of guilty pleas has been moving steadily upward for over 30 years, and has seen a dramatic increase of over 11 percentage points just in the past 10 years, from 85.4 percent in 1991. Indeed, the aggregate national guilty plea rate in federal cases remained under 92 percent until 1997, in line with the rough national norm for all criminal systems of about 90 percent; it is only in the past five years that we have witnessed the rise to a bizarrely high plea rate. In some districts now, the percentage of convictions attributable to guilty pleas reaches over 99 percent.

Ronald Wright & Marc Miller, “Honesty and Opacity in Charge Bargains,” 55 *Stan. L. Rev.* 1409, 1415 (2003) (citation omitted).

8. 132 .Ct. 1399, 1407 (3/21/2012).

9. However, Alaska has banned plea bargaining since 1975. In 1991, an unofficial study funded by the Alaska State Justice Institute found that the ban on plea bargaining had not caused gridlock. [www.ajc.state.ak.us/Reports/plea91Exec.pdf](http://www.ajc.state.ak.us/Reports/plea91Exec.pdf).

10. See [www.wikipedia.org/wiki/Incarceration\\_in\\_the\\_United\\_States](http://www.wikipedia.org/wiki/Incarceration_in_the_United_States).

11. "Oklahoma, in fact, has ranked No. 1 for per capita incarceration of women for years and, according to the latest figures from the Department of Justice, Oklahoma ranks fifth highest in the nation in its overall incarceration rate per capita. With a population of 3.6 million, we have more than 25,000 people behind bars." *Tulsa World*, 12/20/2008: <http://goo.gl/XS5bK>.

12. *Puckett v. United States*, 556 U.S. 129, 137 129 S.Ct. 142, 1430 (2009).

13. Yant, Marvin: *Presumed Guilty*, Buffalo, N.Y., Prometheus Books 1991, at 172.

14. The Wikipedia entry on the prisoner's dilemma poses a slightly different scenario, and also observes that real people behave more cooperatively and altruistically than their self-interest in a game would indicate: "In this classic version of the game, collaboration is dominated by betrayal; if the other prisoner chooses to stay silent, then betraying them gives a better reward (no sentence instead of one year), and if the other prisoner chooses to betray then betraying them also gives a better reward (two years instead of three). Because betrayal always rewards more than cooperation, rational self-interested prisoners would betray their counterparts, and the only possible outcome for two rational self-interested prisoners is for them to betray each other. The interesting part of this result is that pursuing individual reward logically leads the prisoners to both betray, but they would get a better reward if they both cooperated with each other to stay silent. In reality, humans display a systematic bias towards cooperative behavior in this and similar games, much more so than predicted by simple models of "rational" self-interested action." <http://goo.gl/ZuAlu>.

15. *Id.*

16. [http://en.wikipedia.org/wiki/Plea\\_Bargain](http://en.wikipedia.org/wiki/Plea_Bargain) Quoting Edkins & Dervan: "The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem," draft, 2012.

17. See Jeffrey Zilkowsky's commentary at <http://goo.gl/t40lu>.

18. "The employees of the Department of Corrections (DOC) deserve a pay raise. Thirty percent of them qualify for food stamps, and 85 percent qualify for the federal free and reduced school lunch program." Sean Wallace, executive director of Oklahoma Corrections Professionals, column in the *Oklahoma Gazette*, 3/27/2013. <http://goo.gl/E9hqJ>.

19. Vanover, Joseph W. (1998), "Utilitarian Analysis of the Objectives of Criminal Plea Negotiation and Negotiation Strategy Choice," 1998, *J. Disp. Resol.*, p. 183, at 184.

20. *Id.* at 191-192.

21. Caldwell, H. Mitchell (2011), "Coercive Plea Bargaining: the Unrecognized Scourge of the Justice System," 61 *Catholic Law Review* 63, at 63 and 65.

22. *Missouri v. Frye*, *supra*, at 1407.

23. [http://okacademy.org/PDFs/08Final\\_Findings.pdf](http://okacademy.org/PDFs/08Final_Findings.pdf).

24. <http://okacademy.org/PDFs/2008-research.pdf> At 127. This entire 160-page report needs to be revisited by any concerned advocate or citizen.

## ABOUT THE AUTHOR



Jim Drummond practices criminal defense in Norman, handling trials and appeals in federal and state courts. Previously he has worked as a state and federal public defender. He is currently panel coordinator for the OBA Legal Ethics Advisory Panel. He was the inaugural chairperson of the OBA Criminal Law Section, and also serves on the boards of the Oklahoma Criminal Defense Lawyers Association and the Oklahoma County Criminal Defense Lawyers Association. He was a member of the Oklahoma Sentencing Commission from 2001-2006.

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# Oklahoma Attorneys Answer the Call of Storm Victims

By Jarrod Houston Beckstrom

Legal issues resulting from the May storms kept the Oklahoma Bar Association's free legal advice hotline ringing, and OBA volunteer attorneys answered the call. Over the course of June and July, demand for the hotline and service has tapered off, leading to the service being concluded on Aug. 1, 2013.

Victims in 19 counties were eligible to receive free legal advice and while intake for the program ended on Aug. 1, volunteer attorneys continue to work with victims who have previously requested advice.

## **MUCH HAS BEEN AND WILL BE DONE**

Since the OBA enacted its disaster relief program in late May (in cooperation with the Federal Emergency Management Agency) over 600 storm victims have been paired with 265 volunteer OBA attorneys to address a wide array of legal problems related to recovery. Thirteen cases are open, meaning the attorney and victim are still working towards a resolution.

Victims of the May tornadoes and subsequent flooding in Caddo, Canadian, Cleveland, Comanche, Creek, Garfield, Grant, Greer, Kiowa, LeFlore,

Lincoln, Logan, McClain, Okfuskee, Okmulgee, Oklahoma, Pawnee, Payne and Pottawatomie counties were eligible to receive legal advice from OBA volunteers.

In addition to the OBA hotline, Legal Aid Services of Oklahoma Inc. and OBA volunteers were boots on the ground at relief centers in Moore, El Reno, Shawnee, Little Axe and Midwest City, allowing storm victims to receive immediate face-to-face legal advisement. Attorneys staffed the centers from May 23 to when the last center closed on July 3.

## **ANSWERING THE CALL**

OBA President Jim Stuart of Shawnee commended the work and diligence of the bar association's volunteers, saying, "I'm incredibly proud of the OBA attorneys who have volunteered their unique skillset and experience to help disaster victims in the wake of these storms."



# DISASTER RELIEF

## **ATTORNEYS ON THEIR SIDE**

With the tremendous amount of destruction that came with back-to-back record-breaking storms, many of the issues OBA volunteers assisted with involved property loss, mortgages and landlord/tenant issues.

For example, a Cleveland County man's rented apartment was hit by the May 20 tornado. Just days after the storm, he received a termination of lease notice from his landlord informing him he would be required to remove all of his belongings from the apartment and less than a week to do so. With the help of an OBA volunteer attorney, he was informed of his rights as a tenant, resolved his issues and was able to find new housing.

Some storm victims had loose ends when the storm hit, leaving them with a complex legal mess and little or no documentation intact.

One family was hit twice with tragedy. First, a man's father died on May 18 and two days later, his recently deceased father's home was destroyed in the Moore tornado. The family came to find out that insurance on the home had lapsed and taxes were owed on the home. Understandably, there were many legal questions that needed answers. An OBA attorney is helping that family through that process.

Some victims simply don't want to be taken advantage of. For example, one woman called the OBA hotline seeking advice to ensure she was treated fairly by contractors and insurance adjustors. Small things like that can make a big difference in a family's life for years to come.

## HISTORY OF HELPING

Providing legal assistance to victims of disasters is, unfortunately, nothing new to the OBA. In the last 18 years, the OBA has enacted its disaster response plan seven times,

including various storms and tornadoes as well as the 1995 terrorist attack on the Alfred P. Murrah Federal Building. Other bar associations have even modeled their disaster assistance plans after the OBA's.

## HEROES BEHIND THE SCENES

The OBA's disaster assistance program doesn't just happen, it involves many moving parts

including contacting storm victims, recruiting volunteers and ensuring proper procedures are followed and so on. A great deal of coordination between FEMA, the OBA and Legal Aid Services of Oklahoma, among others must occur. Many OBA attorneys compassionately answered the call, but a few deserve special recognition.

Tulsa lawyer Molly Aspan of Hall, Estill, Gable, Golden & Nelson, PC, served as liaison between FEMA and the OBA. In that difficult and complex role coordinating efforts with an enormous national organization, Ms. Aspan performed at a very high level, serving as an incredible ambassador for both her state and the OBA. Additionally, OBA Disaster Relief coordinator Jacob Jean of Edmond was brought on shortly after the Moore tornado and worked diligently to pair victims with volunteer attorneys whose practice area was relevant to the victim's needs.

OBA members can and should all take pride in their association's response to the May tragedies.

*Mr. Beckstrom is an OBA communications specialist.*



*Richard Vreeland (left) and Charles Wetsel at a disaster relief center.*

## OBA DISASTER RELIEF

*By the numbers.*

**Cases submitted to the OBA: 619**

**174 Landlord/Tenant issues**

**Insurance issues: 139**

**26 Contract/Contractor problems**

**Volunteers: 265**

**41 Consecutive days attorneys staffed relief centers**

**Number of relief centers staffed: 5**

# Argus Hamilton to Perform at LHL Cornerstone Banquet II

By Lance Schneider

Once again, the OBA Lawyers Helping Lawyers (LHL) Assistance Program and the OBA Work/Life Balance Committee will join forces, presenting the Second Annual Cornerstone Banquet and Auction on Tuesday, Sept. 10. Oklahoma's own Argus Hamilton will perform at the event for an evening of "all laughs and no liquor."

Mr. Hamilton was honored by Oklahoma Gov. Brad Henry as the official comedian of the Oklahoma Centennial and was dubbed the "The Will Rogers of the Baby Boom" by Robin Williams. Millions of readers and radio listeners enjoy his daily humor column, now in its second decade. For one unforgettable evening, Mr. Hamilton will join OBA members as we raise money to support the assistance programs that help OBA members struggling with addiction, alcohol or drug abuse, and mental health issues including depression.



Let's face it. The practice of law can be hard work as a business and demanding as a profession. Sometimes pressure takes its toll on OBA members. Maybe it took its toll on you, your law partner or a friend. Many days, attorneys are at odds not only with the opposing party, but also with clients, staff and the court. Some OBA members may retreat to their homes and face different but equally difficult issues.

The Lawyers Helping Lawyers Assistance Program and the LHL Foundation offer numerous services including consultations, crisis stabilization, interventions, education, anonymous support groups, peer support services, free counseling services, mentoring and financial assistance to OBA members. All calls to Lawyers Helping Lawyers are confidential and free.

These programs offer assistance to OBA members when they need it. Now, LHL needs your help and generosity. As the old slogan goes, "the life or practice that you save may be your own."

The Second Annual Cornerstone Banquet presents an opportunity to assist our colleagues and increase overall awareness of these issues in the legal profession. This event is an opportunity to give back to the larger Oklahoma community



*Argus Hamilton*

by seeking to curb the negative impact of attorney impairment on clients and the public.

Doors open at 5 p.m. for a silent auction from 5:30 to 6:30 and a seated dinner and live auction beginning at 6:45. One hour of MCLE credit is provided with the cost of your ticket. A mere \$50 ticket promises you the most fun you've ever had for MCLE in Emerson Hall! Guest tickets for non-lawyers and those who don't need MCLE are only \$30.

Join Argus Hamilton and your brothers and sisters of the OBA on Sept. 10 to learn why you should "Pass the Bar — Every Chance You Get!" Order your tickets now by using the form on page 1622 — if you miss this evening, it won't be funny!

*Mr. Schneider practices in Kingfisher. He is a Lawyers Helping Lawyers Assistance Program member and LHL Foundation director.*



# 10 LHL Facts

1

The OBA Lawyers Helping Lawyers Assistance Program is a **FREE**, *confidential* assistance program providing consultation, referral, intervention, and crisis counseling for lawyers and judges

4

Assistance to affected lawyers often prevents future ethical violations, thereby reducing the number of disciplinary actions

5

The LHL Foundation is promoted and facilitated by the LHL Assistance Program

The work of the program contributes to the protection of the public and the improvement of the integrity and reputation of the legal profession

2

6

The LHL Foundation is funded solely by gifts, grants and contributions



3

The missions of LHL are to **PROTECT** the interests of clients, litigants and the general public from harm caused by impaired lawyers or judges; to **ASSIST** impaired members of the legal profession to begin and continue recovery; and to **EDUCATE** the bench and bar to the causes of and remedies for impairments affecting members of the legal profession

7

Age groups of those seeking assistance are **53-55%** between ages 25 and 45; **45-46%** between ages 46 and 65; **0-1%** over 60 years old

To date, issues addressed include

- alcohol and drug-related issues
- mental health • marital conflict
- financial distress
- performance productivity
- cognitive impairment • stress
- eating disorder and domestic abuse

8

9

Members of the assistance program and the foundation give presentations to University of Tulsa, University of Oklahoma and Oklahoma City University law students, county bars, law firms and interest groups

Self-referrals remain the largest source of referrals at **75%**

Other referral sources include judges, OBA staff, Board of Bar Examiners, law firm leadership, colleagues and the OBA Professional Responsibility Tribunal

10



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If you or someone you know needs assistance, visit  
[www.okbar.org/members/LawyersHelpingLawyers](http://www.okbar.org/members/LawyersHelpingLawyers)

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Contribution: Reserved premium seating  
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program and signage at event

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Signature \_\_\_\_\_

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

\_\_\_\_ KEYSTONE sponsor - \$2,500 Contribu-  
tion: Reserved premium seating for four  
seats at table of eight; Name recognition  
in program and signage at event

Table name (if applicable) \_\_\_\_\_

\_\_\_\_ MARBLE sponsor - \$1,000 Contribution:  
Reserved seating for three seats at table  
of eight; Name recognition in program

Name & OBA No. \_\_\_\_\_

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Reserved seating for two seats at table  
of eight; Name recognition in program

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Fair market value of reservations is \$30 per person.*

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PO Box 53036, Oklahoma City, OK 73152  
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405-416-7000; 800-522-8065**

# Oklahoma Attorneys Selected for Leadership Academy

Oklahoma Bar Association  
2014 Leadership Academy



The Oklahoma Bar Association announces the 25 participants of its fourth annual OBA Leadership Academy class selected from applicants throughout the state.

"The Oklahoma Bar Association's Leadership Academy is about preparing those who want to serve our profession, our bar and our state. The academy is the perfect forum to recognize and celebrate lawyers who volunteer, serve and give of themselves," said OBA President Jim Stuart of Shawnee.

The OBA Leadership Academy will offer five sessions set to begin in September 2013. The academy will conclude in April 2014.

## ABOUT THE LEADERSHIP ACADEMY

Originating from the OBA's Leadership Conference in 2007, the academy is aimed at developing the future leaders of the OBA by giving Oklahoma attorneys training in the core principles of effective leadership and how to communicate, motivate and succeed in their legal careers and also as community leaders.

The academy class will participate in sessions led by experienced leaders from various backgrounds including military officers, former OBA presidents, leadership experts and high profile public officials.

## OBA LEADERSHIP ACADEMY PARTICIPANTS

### Enid

Christopher Trojan,  
Solo Practitioner

### Jenks

Lloyd Landreth of  
Landreth Law Firm PLC

### McAlester

Blake Lynch of Wagner and  
Lynch PLLC

### Norman

Thad Balkman of Thad  
Balkman, Attorney at Law

### Oklahoma City

Mary Caldwell of Miller Dollarhide PC; Adam Christensen of Christensen Law Group; Tai Chan Du of Tai C. Du PC; Matthew Felty of Lytle, Soule & Curlee PC; Stephanie Jackson of Jackson Law Firm PLLC; Brittini Jagers of Jagers & Johnson PLLC; Jennifer Prilliman of Oklahoma City University; Ashley Rahill of Cathy

Christensen & Associates PC; Craig Regens of the Office of the Attorney General; Kara Smith of the Oklahoma Office of Management and Enterprise Services; Cullen Sweeney of the Tenth Circuit Court of Appeals; Jennifer Tupps of the Oklahoma Department of Transportation; and Diana Vermeire of Gable Gotwals

### Okmulgee

Sarai Geary of Muskogee  
(Creek) Nation

### Skiatook

Sheree Hukill of P&S  
Legal Advocacy PLLC

### Stillwater

Jimmy Oliver of the Law Office  
of Melissa DeLacerda

### Tulsa

Maureen Johnson of Jarboe Law Firm PC; Jason McVicker of Atkinson Haskins; Scott Morgan of Moyers, Martin, Santee & Imel LLP; Cesar Tavares of Gable Gotwals; and Lorena Rivas Tiemann of Sobel & Erwin PLLC

More information about the Leadership Academy is available on the OBA website at [www.okbar.org/members/leadership](http://www.okbar.org/members/leadership).

# 2013 OBA Member Survey Results Now Available

*By John Morris Williams*

The Member Survey Task Force has completed its work and now presents the 2013 member survey for the Oklahoma Bar Association. The 2013 survey varies in method and reporting from prior membership surveys. In the past, the OBA has surveyed the membership every 10 years at considerable expense. The task force submitted request for proposals to a number of entities that conduct membership surveys for organizations. The cost range was dramatic, and the task force chose the less expensive electronic survey offered by the American Bar Association Division for Bar Services.



The ABA survey has been utilized by a number of states. It differs from previous member surveys in that it is not a “scientific” survey based upon a random number of select contributors. The survey this year was sent to 15,807 members with email addresses on March 19 and was closed in May 2013. A total of 1,792 responses were received, yielding an 11 percent overall response rate. Not all responders answered every question.

The information provided gives guidance and can help identify trends and member satisfaction. The task force expressed a desire for more frequent and targeted surveying in the future. Due to the lesser expense of electronic surveying, this new model is achievable without significant cost to the OBA. Much appreciation is to be shown to those who responded. We hope that you will take some time and review the survey results. It is also our hope that in the future you will respond to smaller and more targeted surveying. The OBA is a member organization, and your opinion is needed and appreciated to help us better serve you, our members.

*Mr. Williams is OBA executive director.*

***We promised those who took  
the time to complete the  
survey a chance to win a  
\$500 Apple gift card.***

***And the winner  
is Oklahoma City  
attorney Mack Martin.***



**The OBA Member Survey  
results are in.**

**We asked.**

**You told.**

**Here's what we learned.**

**View the survey results  
online at**

**[www.okbar.org/  
members/Members/  
Governance/  
2013MemberSurvey](http://www.okbar.org/members/Members/Governance/2013MemberSurvey)**

## **Survey Highlights**

**Practice Information** – 77 percent of respondents practice law full-time; 10 percent practice part-time and 12 percent are employed, but not in the practice of law.

**Oklahoma Bar Association Services** - Respondents were asked to rate the importance of OBA services to them. The five services rated highest were:

- Continuing legal education (80 percent rated very important; 17 percent rated somewhat important)
- Professional discipline (76 percent rated very important; 14 percent rated somewhat important)
- OBA E-News (32 percent rated very important; 49 percent rated somewhat important)
- Opportunities for public service (31 percent rated very important; 47 percent rated somewhat important)
- Practice assistance management (37 percent rated very important; 37 percent rated somewhat important)

**Bar Association Communications** – Respondents feel email updates are the most effective way to share information with them

**Oklahoma Bar Journal** – 92 percent of respondents indicate they read the *Oklahoma Bar Journal*, up from 80 percent in 1992.

**Challenges Facing Your Practice** — Respondents ranked these issues the highest:

- Keeping current in the law
- Earning a living
- Providing good service to my clients with limited time
- Balancing work and personal life/family
- Keeping up with and using technology



## PHOTO HIGHLIGHTS

# Sovereignty Symposium 2013

**OKLAHOMA CITY • JUNE 5-6**



*Oklahoma Supreme Court Chief Justice Tom Colbert welcomes participants to the Sovereignty Symposium during the opening ceremony.*



*Winston Scambler makes a presentation to Retired U.S. Supreme Court Justice Sandra Day O'Connor.*



*From left Oklahoma Supreme Court staff attorney Barbara Kinney, Annabelle West and Justice O'Connor during the symposium.*



*From left Gayleen Rabakukk, author of Art of the Oklahoma Judicial Center; Justice O'Connor; and Neil Chapman, photographer of Art of the Oklahoma Judicial Center during a reception at the Oklahoma Judicial Center.*



*Sovereignty Symposium Board of Directors President Alison Cave presents the 2013 Sovereignty Symposium Hargrave Prize for Best Faculty Writing to Mike McBride during the Sovereignty Symposium opening ceremony. Seated is Retired Oklahoma Supreme Court Justice Rudolph Hargrave, for whom the award is named.*



*Oklahoma City University President Robert Henry visits with Justice O'Connor during the symposium.*

*Oklahoma Supreme Court Justice Noma Gurich and Vice-Chief Justice John Reif at the symposium.*



*From left Oklahoma Court of Criminal Appeals Vice Presiding Judge Clancy Smith; Justice O'Connor; Oklahoma Court of Civil Appeals Judge Jane Wiseman; and Justice Noma Gurich at the symposium.*





*Gov. Mary Fallin welcomes the audience to the Sovereignty Symposium Opening Ceremony.*



*"A Fair, Impartial and Independent Judiciary" was the topic of a panel discussion during the symposium. Speaking were (from left) Phil Lujan, presiding judge, Citizen Potawatomi Nation Tribal Court; Bruce Fisher, administrative programs officer, Oklahoma Historical Society; OBA Immediate Past President Cathy Christensen; Council on Judicial Complaints General Counsel Terry West; and Tom Walker, appellate magistrate of the Court of Indian Offenses for the Southern Plains Region.*

*Justice Steven Taylor (left) and Justice Joseph Watt of the Oklahoma Supreme Court visit during the symposium.*



*Oklahoma Court of Criminal Appeals Presiding Judge David Lewis (left) greets Oklahoma Sen. Al McAffrey at a luncheon.*

*All photos by Stuart Ostler*



# Business and Commercial Litigation in Federal Courts, Third Edition

Robert L. Haig, Editor-in-Chief

Reviewed by Robert Duran

There are few areas of the law more complex and demanding than business and commercial litigation in federal court. Most practitioners in this niche also find it to be highly remunerative. For those specialists, the ABA's *Business and Commercial Litigation in Federal Courts* is invaluable. For the rest of the bar, the anthology is accessible, informative and, in the event you find yourself with a business case in federal court, indispensable.

*Business and Commercial Litigation in Federal Courts* is unique among legal reference books. Its third edition is comprehensive by any measure, containing 130 chapters spread across 11 volumes and more than 12,000 pages of material. Yet notwithstanding its depth and breadth, it is both readable and accessible, complete with a detailed index that makes locating any topic quick and easy. Moreover, the collection combines exhaustive treatment of the multivarious procedural rules of the federal system with timely and relevant attention to the substantive legal issues that often accompany each procedural *milieu*. The result



**12,742 pages; hardcover plus CD-ROM; \$1,351 published by Thompson Reuters/West and the ABA Section of Litigation (2011-2014)**

is astounding — this is the federal commercial litigator's bible.

The collection is organized by chapters, each of which represents a particular topic that is germane to commercial federal practice. The first 57 chapters address the complete life cycle of a federal business case, through a chronological discussion from cradle (subject matter jurisdiction) to grave (enforcement of judgments). Thereafter, the remaining chapters deal with a wide range of issues and topics that appear to completely cover the federal legal waterfront.

Within each chapter, the authors discuss rules, issues and topics in narrative fashion, complete with extensive footnotes, current case annotations and references to other materials such as forms and further research sources.

The third edition represents several important additions to and improvements over previous iterations of the series. At the outset, the third edition expanded the number of chapters from 96 to 130 and the number of volumes from eight to eleven. Examples of new topics included in the third edition include internal investigations; comparison with commercial litigation in state courts; coordination of litigation in state and federal courts; international arbitration; crisis management; pro bono; regulatory litigation with the SEC; derivatives; medical malpractice; reinsurance; consumer protection; immigration; executive compensation; prior restraint on speech; white collar crime; administrative agencies; government contracts; tax; project finance and infrastructure; sports; entertainment; and information technology. In addition to the new chapters,

the third edition also substantially revised and updated the pre-existing 96 chapters. The third edition also boasts a soft-sided index which includes multiple references to each form, checklist, case and topic contained in the series. The index will be reprinted annually so that it will address new matters included in the anticipated pocket parts.

At the end of the day, *Business and Commercial Litigation in Federal Courts* represents a herculean undertaking and accomplishment, with nuanced and informed contributions from 251 accomplished authors from the bench, bar and *academe*. It is a “must have” resource for any firm and/or attorney specializing in federal court commercial

and business litigation. This compilation is a revelation in its field, representing a rarity in the law: a comprehensive treatment of a daunting topic that is readable, accessible and, most of all, useful.

*Mr. Duran practices in Shawnee and was recruited by the Board of Editors to write this review.*



2013 ANNUAL BOILING SPRINGS LEGAL INSTITUTE | TUESDAY, SEPTEMBER 17, 2013  
BOILING SPRINGS STATE PARK, WOODWARD, OK  
SPONSORED BY THE WOODWARD BAR ASSOCIATION

**8:00am - 8:45am** : Registration, Coffee & Doughnuts

**9:00am - 9:50am** : Rex Travis - How to Not Share Your Clients' Money and Not Get Into Trouble

**10:00am - 10:50am** : Justice John F. Reif - Ethics

**11:00am - 11:50am** : Attorney General Scott Pruitt - A Primer on the Mortgage Settlement

**12:00pm - 1:00pm** : Barbeque Lunch (Included in Registration Fee)

**1:00pm - 1:50pm** : Jon Ford - Practicing Collaborative Law in Family Disputes

**2:00pm - 2:50pm** : Kraettli Epperson - Update on Oklahoma Real Property Title Authority

**3:00pm - 3:50pm** : Brian K. Morton - DUI and Revocation of Driving Privileges in Oklahoma

**3:50pm - 5:00pm** : Social Hour

**5:00pm - 7:00pm** : Steak Dinner (Included in Registration Fee) & Recognition of Honored Guests

Approved for Continuing Legal Education of 6.0 hours (including 1 hour of ethics). **Registration fees: \$175.00 for pre-registrations received prior to the Institute date; \$200.00 for walk-in registration. Lunch, Dinner and materials included in Registration Fee.** Pre-registration is required for lunch and dinner. Cancellations will be accepted at any time prior to the Institute date; however, a \$50.00 fee will be charged for cancellations made within three (3) days of the Institute date. No requests for refunds of cancellations will be considered after the date of the Institute.

#### 2013 Boiling Springs Legal Institute Registration Form

Full Name \_\_\_\_\_ Firm Name \_\_\_\_\_

Address \_\_\_\_\_

E-mail \_\_\_\_\_ Phone \_\_\_\_\_ Fax \_\_\_\_\_

OBA Member? \_\_\_\_\_ OBA Number (for CLE credit) \_\_\_\_\_

I will be unable to attend the seminar. Please send materials only. \_\_\_\_\_ (\$50.00)

Do you plan to stay for the Evening Social Hour and steak dinner? Yes \_\_\_\_\_ No \_\_\_\_\_

*\*Please note that the Boiling Springs Golf Course will be open on September 17, 2013.*

Please make check payable to the Woodward Bar Association and mail this form with check to Erin N. Kirksey, Woodward Bar Association, P.O. Box 529, Woodward, OK, 73802. For more information, please call Erin N. Kirksey at 580.256.5517.

# 2014 OBA Board of Governors Vacancies

**Nominating Petition deadline: 5 p.m. Friday, Sept. 13, 2013**

## OFFICERS

### President-Elect

Current: Renée DeMoss, Tulsa  
 Ms. DeMoss automatically becomes  
 OBA president Jan. 1, 2014  
 (One-year term: 2014)  
 Nominee: **Vacant**

### Vice President

Current: Dietmar Caudle, Lawton  
 (One-year term: 2014)  
 Nominee: **Vacant**

## BOARD OF GOVERNORS

### Supreme Court Judicial District Two

Current: Gerald C. Dennis, Antlers  
 Atoka, Bryan, Choctaw, Haskell, Johnston, Latimer,  
 LeFlore, McCurtain, McIntosh, Marshall, Pittsburg,  
 Pushmataha and Sequoyah counties  
 (Three-year term: 2014-2016)  
 Nominee: **Vacant**

### Supreme Court Judicial District Eight

Current: D. Scott Pappas, Stillwater  
 Coal, Hughes, Lincoln, Logan, Noble, Okfuskee,  
 Payne, Pontotoc, Pottawatomie and Seminole  
 counties  
 (Three-year term: 2014-2016)  
 Nominee: **Vacant**

### Supreme Court Judicial District Nine

Current: O. Chris Meyers II, Lawton  
 Caddo, Canadian, Comanche, Cotton, Greer,  
 Harmon, Jackson, Kiowa and Tillman counties  
 (Three-year term: 2014-2016)  
 Nominee: **Vacant**

### Member-At-Large

Current: Robert S. "Bob" Farris, Tulsa  
 (Three-year term: 2014-2016)  
 Nominee: **Vacant**

## Summary of Nominations Rules

Not less than 60 days prior to the Annual Meeting, 25 or more voting members of the OBA within the Supreme Court Judicial District from which the member of the Board of Governors is to be elected that year, shall file with the Executive Director, a signed petition (which may be in parts) nominating a candidate for the office of member of the Board of Governors for and from such Judicial District, or one or more County Bar Associations within the Judicial District may file a nominating resolution nominating such a candidate.

Not less than 60 days prior to the Annual Meeting, 50 or more voting members of the OBA from any or all Judicial Districts shall file with the Executive Director, a signed petition nominating a candidate to the office of Member-At-Large on the Board of Governors, or three or more County Bars may file appropriate resolutions nominating a candidate for this office.

Not less than 60 days before the opening of the Annual Meeting, 50 or more voting members of the Association may file with the Executive Director a signed petition nominating a candidate for the office of President-Elect or Vice President or three or more County Bar Associations may file appropriate resolutions nominating a candidate for the office.

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

See Article II and Article III of OBA Bylaws for complete information regarding offices, positions, nominations and election procedure.

Elections for contested positions will be held at the House of Delegates meeting Nov. 15, during the Nov. 13-15 OBA Annual Meeting. Terms of the present OBA officers and governors will terminate Dec. 31, 2013.

Nomination and resolution forms can be found at [www.okbar.org/members/bog/bogvacancies](http://www.okbar.org/members/bog/bogvacancies).

# What is Going on at the OBA?

*By John Morris Williams*

That is probably the question I am most frequently asked. Believe me there is always something going on. It is increasingly harder to schedule rooms and meetings due to our very active committees, sections and task forces. Additionally, the Oklahoma Bar Foundation, Lawyers Helping Lawyers Foundation and a number of other groups comprised of OBA members utilize our facilities. So, in short, there is almost always something going on at the OBA!

On the bigger scale we are in the planning phases for hosting the Southern Conference of Bar Presidents, OBA Day of Service and the OBA Annual Meeting. The Annual Meeting will be held on Nov. 13, 14 and 15 in Oklahoma City at the downtown Sheraton Hotel. Mark your calendar now! In addition to great speakers and excellent CLE, the OBA sections will be spotlighted. We are hoping for a special opportunity for all section members to come together for some big time fun. Also, another event taking place next month is the Lawyers Helping Lawyers banquet on Sept. 10. There's a story with all the details in this issue.

## **MEMBER SURVEY**

In July we received the final product of our member survey.

As we noted when we published the survey, we did it a bit different this time. The task force that worked on conducting the survey decided to use our familiar format but decided to utilize email to distribute the survey to all OBA members who had provided the OBA an email address. Approximately 1,800 members responded, and there were some good "take aways" from the responses. In the future the OBA will be conducting smaller, more targeted surveys. I hope that you will take a few minutes to answer the next survey. We are a member organization, and we really want to know what you think and how we can better serve you.

## **DAY OF SERVICE**

Sept. 20-21, 2013, is the scheduled OBA Day of Service. Like some holidays, this will most likely be more of a season than a day. The Young Lawyers Division and the Board of Governors are heavily involved in the planning and implementation of this event. Each county has been assigned a contact person, and the planning is well underway. In this year of "Stuartship" I hope you will give at least one day to public service beyond your usual contributions. This should be a fun and productive day for all of you who give so much.

I cannot believe that summer is coming to an end so quickly. Since I have to meet a publication deadline in advance of the actual printing, even more of it is gone by the time you read this. In reflection, it has been a summer of devastation and disaster, compassion and giving — and hopefully, rebirth and rebuilding following the tornadoes. More than 260 OBA members volunteered and helped hundreds of disaster victims with free legal services. Much thanks to Molly Aspen who chairs the OBA Disaster Response and Relief Committee. Oklahoma lawyers truly are Oklahomans! I am proud of you, the people I work for, and proud to be part of the ranks of such a compassionate and giving profession.

So, that is what is happening at the OBA. I hope that you will be as much a part of all that is happening as your schedule will allow. May the coming fall season bring you a winning team, happy family gatherings and some special memories as we gather for the Day of Service and the Annual Meeting.



*To contact Executive Director Williams, email him at [johnnw@okbar.org](mailto:johnnw@okbar.org)*



# Big Ideas Can Come in Small Packages

By Jim Calloway

This month I'm going to claim a point of personal privilege to tell you about something big that I have worked on. There is a valuable payoff included for each of you. You'll get a free gift. After you have taken advantage of your free gift, you may not feel like it was entertaining or amusing. But hopefully you will feel that it was of value.

As a part of my work, I have been an active member of the American Bar Association Law Practice Management Section. Over the years, I have served in various roles in the LPM section, including serving on its council and chairing the ABA TECHSHOW. Chairing ABA TECHSHOW was certainly a huge amount of work and an honor. But my latest "big" project with the ABA LPM was, again, a huge amount of work, but is also a different type of honor because I able to be a part of a team who delivered a very interesting result to the Oklahoma Bar Association members as well as lawyers across the country.

Many months ago I was selected to be the guest co-editor of the inaugural July/August 2013 Big Ideas issue of *Law Practice* magazine, along with my friend and colleague John Simek, vice-president of

Sensei Enterprises Inc. I had done the magazine guest editor duty before, but this time I had no idea how this project would grow in scope.

We asked many of the leading thought leaders in law practice from the U.S. and Canada to participate in the Big Ideas issue, and we got great responses. They wrote articles. They granted interviews. They shared their wisdom. Collectively they gave us many thought-provoking and provocative ideas about the future of our profession. You will not agree with everything you read. These experts do not all agree with each other in every way.

Famed legal futurist Richard Susskind, who wrote *The End of Lawyers?: Rethinking the Nature of Legal Services* wrote our cover story, with the same title as his new book *Tomorrow's Lawyers*.

Other features include:

- "The Innovation Imperative: Adapt or Die?" by Erik

Mazzone, featuring Jordan Furlong and Bruce MacEwen

- "Brainstorming Your Future: A Forward-Thinking Lawyers' Roundtable" by Jim Calloway and John Simek

- "A Big Idea for BigLaw? Just One Word: Strategy" by Michael J. Ostermeyer

- "Venture Capital Investments in Legal Services" by Mary E. Vandenack

- "Big Data: Big Pain or Big Gain for Lawyers?" by Sharon D. Nelson and John W. Simek

- "As the World Goes Mobile, Is Your Marketing Up to Speed?" by Robert J. Ambrogi

- "Cybersecurity & Law Firms: A Business Risk" by Jody R. Westby

- My column, "Practice Management Advice: The Small-Firm Lawyer Considers Big Ideas" by Jim Calloway

**BIG IDEAS BEGIN HERE**  
Download the Big Ideas Issue,  
Now Available on the  
Law Practice LP App.



- “Virtual Law Firms: The Next Iteration” by Chad E. Burton

- “Taking the Lead: Carrots & Sticks” by Linda Klein

**So here’s the free part.** After the magazine was finished,

some of the LPM section officials decided this issue should be widely distributed and so they decided to make the mobile edition of this magazine free via mobile publishing on the *Law Practice* magazine app. (Normally issues via the app

are only free to *Law Practice* magazine subscribers and the cost for others is \$19.99 for the annual subscription to the magazine or \$4.99 for a single issue.) This issue only is a free download for anyone who has an Apple or Android device with the free *Law Practice* magazine app. There is a lot to read so getting the free issue via app at your app store makes it really convenient to read on your mobile device. I’m sure LPM hopes this encourages you to subscribe for a year. They also decided to give out free physical copies of this magazine to all of the attendees at this month’s ABA Annual Meeting in San Francisco.

If you don’t want to bother with the app, you can read the articles online at <http://tinyurl.com/p7mwqkc>.

You may have already seen a notice about this in the OBA E-news, my Law Practice Tip blog or an OBA section electronic mailing list. I’m trying hard to get the word out to our members because this is not just doom and gloom (although there is some of that), but includes a lot of ideas and suggestions. My best law practice tip this month really is to read this magazine “cover to cover” in whatever format you prefer.

So enjoy your freebie and feel free to let me know what you think.

*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!*

### **New Republic Article Focuses on “Big Law” Troubles**

*The New Republic’s* controversial cover story, “The Last Days of Big Law — You Can’t Imagine the Terror When the Money Dries Up,” certainly created a lot of buzz when it was published on July 21. The story focuses on recent troubles at very large law firms. The author, Noam Scheiber, is not a lawyer (although he was named a Rhodes Scholar.) He writes from the perspective of an economist and outlines the business model of the very largest firms:

“There are currently between 150 and 250 firms in the United States that can claim membership in the club known as Big Law, the group of historically profitable firms that cater to the country’s largest corporations. The overwhelming majority of these still operate according to a business model that assumes, at least implicitly, that clients will insist upon the best legal talent instead of the best bargain for legal talent.”

It is likely that those who champion those firms would not have reacted so strongly had he left it at that. But he continued:

“That assumption has become rickety. Within the next decade or so, according to one common hypothesis, there will be at most 20 to 25 firms that can operate this way — the firms whose clients have so many billions of dollars riding on their legal work that they can truly spend without limit. The other 200 firms will have to reinvent themselves or disappear.”

Whether that prediction becomes true is obviously left for the future.

But reading Mr. Scheiber’s long, detailed and well-researched story will be of interest to many lawyers at law firms of all sizes as a historical record if nothing else.

The article is freely available online at <http://tinyurl.com/m9vm7j2> He also wrote a follow-up piece in response to the negative feedback. “Yes, Big Law Really is Dying — Dear Lawyer: It’s Not You, It’s Your Profession,” online at or <http://tinyurl.com/kou8kcm>.

One thing that is for certain is that *The New Republic* had a lot more readers from the legal profession that week than usual.

# Synopsis of Select 2013 Attorney Discipline Decisions by the Oklahoma Supreme Court

By Katherine M. Ogden

The Oklahoma Supreme Court exercises exclusive, original jurisdiction in lawyer disciplinary proceedings. In deciding whether discipline is warranted and what sanction, if any, is to be imposed for alleged professional misconduct, the court conducts a full-scale, non-deferential, *de novo* examination of all relevant facts. The court has repeatedly adhered to the proposition that the disciplinary process is designed not to punish the delinquent lawyer, but to safeguard the interests of the public, those of the judiciary and the legal profession.

Below is a summary of select attorney discipline cases decided by the Oklahoma Supreme Court this year to date:

- *State ex rel. Oklahoma Bar Association v. Robert Bradley Miller*, 2013 OK 49. This disciplinary proceeding stemmed from Mr. Miller's professional misconduct during events before, during and after two capital murder trials which he prosecuted as an assistant district attorney for the Oklahoma County District Attorney's Office. The court found, among other misconduct, Mr. Miller abused the

subpoena and judicial process, obstructed access to evidence and failed to disclose negating or mitigating evidence resulting in violations of Rules 3.4(a) (unlawfully obstructing another party's access to evidence), 3.8 (timely disclosing evidence), 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Oklahoma Rules of Professional Conduct (ORPC). The court considered comparative disciplinary matters, the time span of the conduct in relation to the disciplinary proceeding, Mr. Miller's cooperation with the process and lack of prior discipline and suspended him for 180 days and imposed \$12,834 in costs.

- *State ex rel. Oklahoma Bar Association v. Christopher Mark Cooley*, 2013 OK 42. This Rule 7, Rules Governing Disciplinary Proceedings (RGDP) summary discipline proceeding arose from Mr. Cooley entering pleas of guilty on the felony charges of false declaration of ownership (59 O.S. 2011 §1512) and falsely personate another to create liability (21 O.S. 2011 §1531.4) in two separate criminal matters. The district court deferred his sentencing date

for a period of five years until Feb. 5, 2018, in both cases to run concurrent to each other. The court found Mr. Cooley's guilty pleas to felonies involving intentional dishonesty for personal gain facially demonstrated his unfitness to practice law. The court suspended him from the practice of law for the duration of the deferred sentencing. He may thereafter seek reinstatement of his license to practice law pursuant to Rule 11, RGDP.

- *State ex rel. Oklahoma Bar Association v. Joan Godlove*, 2013 OK 38. This disciplinary proceeding arose out of Ms. Godlove's multiplicative, frivolous filings in two trust matters. The court found Ms. Godlove repeatedly failed to provide competent representation, failed to act with reasonable diligence, failed to act in good faith, asserted issues and claims which were frivolous, failed to make reasonable efforts to expedite litigation, was less than candid with the court when she continuously filed repeated actions regarding the same issue which had already been determined by a final order, not keeping her address current with the court and

opposing counsel, and by failing to appear and prosecute motions that she had filed. The court further found she knowingly disobeyed an order of the court, made numerous irrelevant and frivolous discovery requests and completely disregarded her obligations to respond to inquiries in the disciplinary proceeding. The court noted Ms. Godlove not only overstepped the fine line between zealous advocacy and harassing, frivolous litigation, but “trampled it.” *Godlove* at ¶27. The court found she violated Rules 1.1, 1.3, 3.1, 3.2, 3.3, 3.4, 8.1 and 8.4(a) and (d), ORPC and Rule 5.2, RGDP. The court disbarred her and ordered her to pay \$1,994.76 in costs.

• *State ex rel. Oklahoma Bar Association v. Alexander Bednar*, 2013 OK 22. This reciprocal disciplinary action was filed after Mr. Bednar resigned pending disciplinary proceedings in the U.S. District Court for the Western District of Oklahoma and his suspension from the U.S. 10th Circuit Court of Appeals for a minimum of one year. The basis for the federal disciplinary action arose from an alleged pattern of neglect,

attempted intimidation and intimidation of witnesses, unlawful obstruction of another party’s access to evidence, requesting a person to not voluntarily provide relevant evidence to a party, intentionally filing misleading documents with the court and a continuous pattern of disregard of local rules. The court found Mr. Bednar’s actions violated Rules 1.1, 1.3, 3.2, 3.3, 3.4(a)(f) and 8.4(c)(d), ORPC and Rule 1.3, RGDP and suspended him from the practice of law for one year and ordered him to pay \$2,662.78 in costs.

• *State ex rel. Oklahoma Bar Association v. LaGailda Barnes*, 2013 OK 19. This disciplinary action arose out of Ms. Barnes’ conversion of client funds. The court found that she did not intend to permanently deprive her client of the funds in question and acted with diligence to secure a loan to repay the client in full, with interest. Ms. Barnes acknowledged the seriousness of her wrongdoing and took full responsibility for her actions. The court found Ms. Barnes violated Rules 1.15 and 8.4(c), ORPC and Rule 1.3, RGDP. She was suspended from the practice of law for

two years and ordered to pay \$960.47 in costs as a condition of reinstatement upon the completion of her suspension.

• *State ex rel. Oklahoma Bar Association v. Lewis B. Moon*, 2013 OK 7. Mr. Moon had been previously disciplined by a public censure and deferred suspension of two years and one day with conditions for alcohol-related misconduct. Shortly thereafter, proceedings were initiated based on an alleged incident where Mr. Moon represented himself as a police officer and discharged firearms while intoxicated and another incident where he became intoxicated and attempted to extort money from, assaulted and battered another attorney, and threatened bodily harm to the attorney and his children. The court found Mr. Moon’s actions were dishonest, deceitful, misleading and an embarrassment to the legal profession and the court. In finding Mr. Moon went well beyond violating his previous suspended discipline sentence, the court disbarred him and ordered him to pay \$2,415.79 in costs.

*Ms. Ogden is an OBA assistant general counsel.*



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# Meeting Summaries

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, April 19, 2013.*

## REPORT OF THE PRESIDENT

President Stuart reported he attended the Postoak retreat, OBA Day at the Capitol, OETA Festival, Oklahoma Justice Commission press conference at the state Capitol, Southern Conference of Bar Presidents planning meetings and OBA Annual Meeting planning. He participated in meetings to create a Human Trafficking Task Force. He also gave the welcome at the OBA Boot Camp, filmed a segment for the Law Day Ask a Lawyer TV show, made committee appointments, presented 50-60 year member certificates at the Washington County Bar Association meeting and Pottawatomie County Bar Association reception, served as a panel member for the OBA/CLE "Liar Liar" movie night presentation and monitored pending legislation.

## REPORT OF THE VICE PRESIDENT

Vice President Caudle reported he attended the Communications Committee meeting, Clients' Security Fund meeting, monthly Comanche County Bar Association CLE/ luncheon and various Law Day planning functions.

## REPORT OF THE PAST PRESIDENT

Past President Christensen, unable to attend the meeting, reported via email she attended the Postoak retreat, Southern Conference of Bar President committee meetings, Law-related Education Committee meeting and Oklahoma County Bar Association Bench and Bar Conference.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended numerous meetings relating to the Legislative agenda, a Dobson Communications presentation on its new business model, High School Mock Trial Program finals, OBA Day at the Capitol, OETA Festival, ABA Bar Leadership Institute, monthly staff celebrations, Annual Meeting planning meetings, OCU open house for its new downtown location and Muskogee County Bar Association dinner.

## BOARD MEMBER REPORTS

**Governor Coogan** reported she attended the Cleveland County Bar Association luncheon/CLE in March and April, CCBA executive board meetings in February and March, planning committee meeting for Law Day activities and CCBA "Justice is Sweet" event. **Governor Farris** reported he attended the Postoak retreat, OBA Day at the Capitol, Tulsa County Bar Association board meeting, OBA Work/Life Balance Committee

meeting and TCBA past presidents' luncheon. **Governor Gifford** reported he attended the Postoak retreat and Oklahoma County Bar Association Board of Directors meeting. He was one of the presenters at the OBA CLE Boot Camp. **Governor Hays** reported she attended the board retreat at Postoak Lodge, OBA Section Leaders Council meeting, OBA Professionalism Committee meeting, Solo and Small Firm Planning Committee meeting, OBA Family Law Section executive planning meetings, Tulsa County Bar Association Family Law Section meeting, TCBA Law Week Committee meeting, TCBA Golf Committee and OBA FLS monthly meetings, at which she presented the budget report. She also co-chaired two Women in Law Committee meetings, participated in Women in Law Committee speaker research and planning, communicated with the OBA Law Day Committee, assisted in planning with OBA FLS leadership for a future Trial Advocacy Institute and communicated the Board of Governors report at two TCBA Board of Directors meetings. **Governor Jackson** reported he attended the Garfield County Bar Association monthly meeting. He also worked on the county bar's Law Day events including the Ask A Lawyer free legal advice. **Governor Meyers** reported he attended the Postoak retreat, Comanche County Bar Association meeting and the county bar Law Day planning meeting. **Gover-**

**nor Pappas**, unable to attend the meeting, reported via email she attended the board's retreat, February and March Payne County Bar Association meetings, Section Leaders Council meeting and Logan County Bar Association meeting. She also interviewed an attorney for a future *Oklahoma Bar Journal* article, spoke to one of four YLD representatives for the September Day of Service, worked on contacting the other three representatives and wrote to her 10 county bar association presidents regarding the OBA Day of Service.

**Governor Parrott** reported she attended the Postoak retreat, two Oklahoma County Bar Association Board of Directors meetings, two OCBA Awards Committee meetings, Law Day Committee meeting, reception, open house and tour of the new OCU law school building, Oklahoma County Youth Services Gala honoring the county bar and its Community Service Committee and training for Justice Sandra Day O'Connor iCivics program. **Governor Thomas** reported she attended the March and April Washington County Bar Association meetings in addition to the WCBA reception in honor of 50- and 60-year members, at which Presiding Judge David Lewis and President Stuart presented service pins and certificates to five members.

#### **REPORT OF THE YOUNG LAWYERS DIVISION**

Governor Vorndran reported he attended the Postoak retreat, Pottawatomie County Bar Association meeting and a YLD executive meeting. He reported the YLD board will vote on the proposed revised budget at its meeting tomorrow. He encouraged board members to attend the April

25 receptions for new lawyers in Tulsa and Oklahoma City.

#### **COMMITTEE LIAISON REPORTS**

Governor Hays reported the Women in Law Committee will hold its annual conference on Sept. 27 at the George Nigh Center on the University of Central Oklahoma campus. She also reported the Tulsa County Bar Association will hold an all-day celebration of its 110th anniversary on Oct. 4, 2013. She also reported the Law Day Committee has finished the Ask A Lawyer TV show that will air May 2. Vice President Caudle reported the Communications Committee will hold a joint meeting with the Law Day Committee. Governor Parrott reported she attended an iCivics training for lawyers on how to utilize iCivics programs in schools, and she encouraged others to take advantage of the training.

#### **REPORT OF THE SUPREME COURT LIAISON**

Justice Kauger reported 165 bar members attended the most recent movie night CLE at the Oklahoma Judicial Center. She said "Legally Blonde" was the next movie to be shown, and the panel discussion will be moderated by Past President Christensen. A classic movie to be shown in the fall will be "Inherit the Wind." She also said her office is working on Sovereignty Symposium, which will feature U.S. Retired Justice Sandra Day O'Connor as a keynote speaker. Justice Kauger reported another piece of artwork will soon be unveiled at the judicial center.

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

General Counsel Hendryx briefed the board on the status

of cases against the OBA. She said there are two new matters being monitored. In department staffing news, she reported Assistant General Counsel Deborah Maddox resigned to accept another position, and Steven Sullins has been hired to fill the vacancy. Written status reports of the PRC and OBA disciplinary matters for February and March 2013 were also submitted for the board's review.

#### **OKLAHOMA JUSTICE COMMISSION**

Commission Chair Drew Edmondson reviewed the purpose of the commission, and copies of the final report were handed out. The report contains many recommendations in a variety of areas. Mr. Edmondson reported that proposed state legislation regarding access to DNA testing looked like it would be passed, which would accomplish one of the recommendations. He said that even though the commission will expire with the submission of the final report, commission members are committed to submitting an annual report each year documenting progress on its recommendations. President Stuart commended Mr. Edmondson for his leadership and work of the commission. The board voted to issue a resolution of appreciation to each commission member.

#### **OBA REIMBURSEMENT POLICY**

President Stuart said changes to the policy have been discussed previously. The OBA's policy was compared to state and federal policies. It was suggested that reimbursement policies of other mandatory state bar associations be reviewed. The board voted to form a task force to review



other policies and to make a proposal at the June meeting. Task force members will be President-Elect DeMoss and Governors Hays, Meyers, Parrott, Smith and Vorndran. They will determine who will chair the task force. General Counsel Hendryx will serve as staff liaison.

#### **AWARDS COMMITTEE RECOMMENDATIONS**

President Stuart reported the Awards Committee is recommending the definitions of the Outstanding Service to the Public Award and the Award for Outstanding Pro Bono Service be expanded to allow the option for the recipient to be a bar-related entity and not exclusively an individual. All other awards would remain the same. The board approved the committee's recommendations.

#### **JUDICIAL NOMINATING COMMISSION ELECTION PROCEDURE**

Executive Director Williams reviewed the procedure for electing members to the JNC that has been used in the past. The board approved the procedures.

#### **OKLAHOMA DOMESTIC VIOLENCE FATALITY REVIEW BOARD**

The board approved President Stuart's recommendation to nominate Cindy Pichot, Noble; Heather Cline, Oklahoma City; and Karen Pepper-Mueller, Oklahoma City, to the attorney general for consideration for one appointment to the review board.

#### **TECHNOLOGY PROJECTS**

IT Director Watson reported the new OBA website will go live May 8, and she showed them a preview of the new design and organization. She also reported a new telephone

system will be installed the first or second week in May. She said we will need to migrate the systems one evening, but the downtime will be minimal.

#### **LAW DAY**

Communications Director Manning updated board members on preparations for the Ask A Lawyer TV show and the statewide free legal advice that will both take place on May 2.



*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, May 17, 2013.*

#### **REPORT OF THE PRESIDENT**

President Stuart reported he attended the Muskogee County Bar Association dinner in Muskogee, Tulsa County Bar Association luncheon, Tri-County (Choctaw, McCurtain and Pushmataha) Bar Association dinner in Idabel, Oklahoma County Bar Association luncheon in Oklahoma City, Pittsburg County Bar Association dinner in McAlester, charity golf tournament, Payne County Bar Association dinner in Stillwater and Finance Subcommittee of the OBA Strategic Planning Committee meeting in Oklahoma City. He presented 50-year membership pins at the Lincoln County Bar Association dinner in Chandler, Seminole County Bar Association luncheon/CLE seminar and Pottawatomie County Bar Association event. He spoke at the new attorney swearing-in ceremony in Oklahoma City, gave the welcome at the human trafficking CLE in Oklahoma City and gave a Law Day speech at the Seminole County Bar Association luncheon in Wewoka.

#### **REPORT OF THE VICE PRESIDENT**

Vice President Caudle reported he attended the Comanche County Bar Association Law Day luncheon, barbecue and golf tournament, Payne County Bar Association Law Day dinner event at the Stillwater Country Club, Comanche County "Ask a Lawyer" Law Day event and April Board of Governors meeting. He noted that OBA Day of Service is gaining attention.

#### **REPORT OF THE PRESIDENT-ELECT**

President-Elect DeMoss reported she attended the April Board of Governors meeting, Tri-County Bar Association Law Day dinner in Idabel, Payne County Bar Association Law Day dinner in Stillwater, Tulsa County Bar Association Law Day luncheon, TCBF/TCBF Capital Campaign Steering Committee meeting, OBA human trafficking CLE seminar and Strategic Planning Committee Finance Subcommittee meeting. She also participated in planning on budget issues.

#### **REPORT OF THE PAST PRESIDENT**

Past President Christensen reported she attended the Payne County Bar Association Law Day dinner, OU alumni luncheon honoring Justice Colbert and Judge Lewis, Law-related Education Committee meeting, LRE subcommittee meeting to develop "Lawyers in the Classroom" and Finance Subcommittee of the OBA Strategic Planning Committee meeting. She also worked on planning for the Southern Conference of Bar Presidents meeting.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the swearing in of new lawyers, Tulsa County Bar Association Law Day luncheon, Oklahoma County Law Day luncheon, Tri-County Bar Association Law Day dinner, Muskogee County Bar Association dinner, Comanche County Bar Association Law Day picnic, Pittsburg County Bar Association Law Day dinner, Payne County Bar Association Law Day dinner, monthly staff celebration, staff directors meeting, Strategic Planning Finance Subcommittee meeting, portion of the human trafficking CLE seminar, Diversity Committee meeting and Bar Association Technology Committee meeting. He presented CLE at the Seminole County Bar Association Law Day luncheon and attended a meeting with Supreme Court MIS personnel regarding training for the unified case management system.

## BOARD MEMBER REPORTS

**Governor Farris** reported he attended the Tulsa County Bar Foundation Capital Campaign meeting, Tulsa County Bar Association Law Day luncheon, OBA human trafficking CLE in Oklahoma City and Finance Subcommittee of the OBA Strategic Planning Committee meeting in Oklahoma City. He gave free legal advice for the "Lawyers in the Library" TCBA Law Week project at the Kendall-Whittier Library, gave a presentation at the Legal Aid Services of Oklahoma CLE held at OSU Tulsa and gave free legal advice for the TCBA Law Week "Call A Lawyer" project. **Governor Gifford** reported he presented a session on the federal

response at the OBA human trafficking CLE seminar, participated in the listserv of the Military and Veterans Law Section and participated in discussions on OBA-Net. He attended the April Board of Governors meeting. **Governor Hays** reported she attended the OBA Professionalism Committee meeting for which she prepared the minutes, Tulsa County Bar Association Board of Directors meeting at which she presented a Board of Governors report, TCBA Family Law Section meeting, Women in Law Committee meet and greet social event, TCBA Golf Committee meeting, TCBA Law Day Luncheon and by phone the OBA Strategic Planning Committee's Finance Subcommittee meeting. She chaired the OBA Family Law Section monthly meeting at which she presented the budget report, co-chaired the Women in Law Committee meeting, participated in Women in Law Committee planning and communicated with OBA Family Law Section leadership regarding FLS Trial Advocacy Institute planning. **Governor Jackson** reported he attended the monthly Garfield County Bar Association meeting, county bar committee meeting and the April Board of Governors meeting. **Governor Meyers**, unable to attend the meeting, reported via email he attended the Tri-County Bar Association Law Day dinner in Idabel, swearing-in ceremony for new attorneys that included his son, Comanche County Bar Association Law Day dinner, Comanche County Bar/Fort Sill SJA Law Day golf tournament and Ken Sue's cookout. **Governor Parrott** reported she attended the April board meeting, OBA human trafficking seminar, Oklahoma County Bar Associa-

tion board meeting, Oklahoma County Awards Committee meeting and the OCBA Law Day luncheon. **Governor Smith** reported he attended the Muskogee County Bar Association banquet and April Board of Governors meeting. **Governor Thomas** reported she attended the Washington County Bar Association meeting and April Board of Governors meeting. She noted that she met the deadline for submitting her assigned bar journal article about a lawyer in her district to Melissa DeLacerda.

## REPORT OF THE YOUNG LAWYERS DIVISION

Governor Vorndran reported he chaired the April YLD Board of Directors meeting and spoke at the swearing-in ceremony. He attended the April Board of Governors meeting, Pottawatomie County Bar Association meeting, Seminole County Bar Association Law Day luncheon, Pottawatomie County Ask A Lawyer event and PCBA Law Day golf tournament. He reported the division held a reception following the swearing in and receptions for new attorneys in Oklahoma City and Tulsa. The YLD is gearing up for its midyear meeting at the Solo and Small Firm Conference, and he described events that would be taking place at the conference. Work on the OBA Day of Service Sept. 20 and 21 is already underway. Communications Director Manning was asked to write a letter for board members to use to encourage participation in the statewide community service event. President Stuart will send letters soon to county bar presidents asking them to designate a project in their counties. Law schools and inns of court will also be invited to take part.

## REPORT OF THE SUPREME COURT LIAISON

Justice Kauger displayed the Sovereignty Symposium poster and said U.S. Supreme Court Justice Sandra Day O'Connor will be the keynote speaker at the symposium. Justice Kauger reported the movie night CLEs are gaining popularity and attendance is up. She also said she has been working on a new court brochure that will be printed and available online. It is her goal to add biographies of trial judges to the oscn.net website.

## COMMITTEE LIAISON REPORTS

Governor Hays reported the speaker for the Women in Law Conference has been confirmed. She said the Tulsa County Bar Association Bench and Bar Committee will organize a Think Pink event Oct. 8 for which judges will wear pink robes, associated with breast cancer awareness/prevention. She announced the TCBA has selected Kevin Cousins as its new executive director to succeed Sandra Cousins, who is retiring. She said the county bar is working on a new website and will hold its annual luncheon Aug. 22. She reported the Family Law Section is moving its Trial Advocacy Institute to 2014.

## REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx briefed the board on the status of cases against the OBA.

## LAW DAY REPORT

Law Day Committee Co-Chair Richard Vreeland reviewed the committee's activities and results achieved with assistance from the OBA Communications Department.

The board was provided with a written report, and Mr. Vreeland used a PowerPoint presentation to share additional information. He reported participation in the contests for students pre-K through 12th grade was down 9 percent, and he described how the contests were promoted. The ceremony for first-place contest winners with Chief Justice Colbert was very successful. He called board members' attention to the April *Oklahoma Bar Journal* Law Day theme issue that showcased the winning contest entries. He outlined the Ask A Lawyer TV show segments produced with OETA and shared that OETA gave the show rave reviews, saying it was one of the best shows ever. Reports on the number of calls for the state-wide Ask A Lawyer free legal advice project are still coming in, but total calls will be more than last year. This was the OBA's 35th year to offer this community service, and more county bars participated this year than in 2012. Mr. Vreeland reviewed the promotion efforts that were expanded this year to make the public aware of the toll free phone number for the free legal advice. The increased efforts did produce results. He answered questions, and Communications Department Assistant Director Lori Rasmussen was recognized for her work in coordinating the Law Day project. The Law Day Committee and OBA Communications Department were thanked for their hard work in making the annual event a success.

## APPLICATIONS TO SUSPEND OBA MEMBERS

President Stuart reminded board members that sending a recommendation to the Supreme Court to suspend

members for failure to pay 2013 dues and for noncompliance with 2012 mandatory continuing legal education requirements is an annual task. Executive Director Williams said the lists of names will change as members comply. The board approved the recommendations as submitted subject to the removal of bar member names when they come into compliance.

## APPLICATIONS TO STRIKE OBA MEMBERS

Executive Director Williams explained to board members the difference between suspending bar members and striking names from membership rolls. The board approved the recommendations to strike names of members for failure to pay 2012 dues and for noncompliance with 2011 mandatory continuing legal education requirements.

## PROFESSIONAL RESPONSIBILITY TRIBUNAL APPOINTMENTS

The board approved President Stuart's recommendations to reappoint William LaSorsa, Tulsa, and appoint Charles M. Laster, Shawnee, to three-year terms on the PRT. Their terms will expire June 30, 2016. President Stuart noted there are three more positions to fill. Board members were asked to submit suggestions.

## BUDGET COMMITTEE APPOINTMENTS

The board approved President-Elect DeMoss' recommendations to appoint to the Budget Committee: President Stuart, Past President Christensen, Governor Meyers, Governor Parrott, Governor Stevens, Governor Thomas,

Governor Vorndran, Judge Richard Woolery, Sapulpa; Glenn Devoll, Enid; Phil Frazer, Tulsa; John Heatly, Oklahoma City; David Poarch, Norman; and Susan Shields, Oklahoma City.

## **REIMBURSEMENT TASK FORCE**

The task force will meet next week to continue work reviewing the OBA reimbursement policy.

## **OBA HUMAN TRAFFICKING CLE**

It was noted the seminar was well attended and attracted media attention. The presentations, which included Governor Gifford, were very good. Corporate and law firm support allowed the registration fee to be lowered, which helped increase attendance.



*The Oklahoma Bar Association Board of Governors met at the Choctaw Casino Resort in Durant in conjunction with the Solo & Small Firm Conference on Friday, June 21, 2013.*

## **REPORT OF THE PRESIDENT**

President Stuart reported he participated in various conferences and email correspondence on activating OBA disaster relief services, Section Leaders Council meeting, joint Communications, Law Day and LRE Committee meeting, Solo & Small Firm Conference planning meeting, Lawyers Helping Lawyers planning meeting, OBA Annual Meeting planning meeting and welcome at the Sovereignty Symposium. He also attended the Louisiana and Arkansas bar association annual meetings. At the Louisiana meeting, they presented him with a check for

disaster relief in Oklahoma. He said he has received numerous emails from other bar association presidents regarding disaster assistance.

## **REPORT OF THE VICE PRESIDENT**

Vice President Caudle reported he attended meetings of the Board of Governors, Comanche County Bar Association, Board of Editors in Oklahoma City and Oklahoma Fellows to the ABA. He participated in a tour of the Oklahoma Judicial Center conducted by Justice Kauger and attended the memorial service for Governor Sandee Coogan. He also submitted his article for the November *Oklahoma Bar Journal*, worked on plans for OBA Day of Service and started planning discussions with other board members for the January has beens party.

## **REPORT OF THE PRESIDENT-ELECT**

President-Elect DeMoss reported she attended the May Board of Governors meeting, reimbursement policy review subcommittee meeting, Section Leaders Council meeting, joint Communications/Law Day Committee/LRE meeting, Litigation Section meeting and OAMIC meeting. She worked on the reimbursement policy draft, participated in OBA disaster relief planning and participated on the committee selecting a Tulsa County special judge. She also worked on 2014 OBA budget matters.

## **REPORT OF THE PAST PRESIDENT**

Past President Christensen reported she attended a Law-related Education Committee meeting, joint Communications/Law Day Committee/LRE meeting, Lawyer in the Classroom subcommittee

meeting and memorial service for Governor Coogan. She participated in a Sovereignty Symposium panel discussion, presented the 2013 Sovereignty Symposium Friend of the Court Award, participated in SCBP planning, met with a Lawyers Helping Lawyers subcommittee to plan the 2013 Cornerstone Banquet, moderated movie night for "Legally Blonde," participated in OBA disaster relief planning, volunteered in Moore, spoke to victims about the OBA Disaster Relief Program and concluded litigation for an OBA hero that has lasted over two years. She encouraged board members volunteering in disaster areas to obtain OBA fliers about the free legal assistance and hand them out.

## **REPORT OF THE EXECUTIVE DIRECTOR**

Executive Director Williams reported he participated in the disaster relief teleconference in addition to numerous calls and emails, did a 30-minute TV interview for disaster relief, meeting with FEMA regional manager, staff directors meeting, monthly staff celebration, Section Leaders Council meeting, conducted staff evaluations, spoke at the OBA Hatton Sumner's Institute, met with a designer regarding artwork for the bar center west wing, legislative update webcast meeting, conference call with Inreach regarding online CLE services and attended the Solo & Small Firm Conference and Sheep Creek event.

## **BOARD MEMBER REPORTS**

**Governor Farris**, unable to attend the meeting, reported via email he attended the Tulsa County Bar Association board meeting. **Governor Gifford** reported he attended the

May Board of Governors meeting, Oklahoma County Bar Association board of directors meeting, Section Leaders Council meeting and service celebrating the life of Governor Sandee Coogan. He presented the session, "Federal Response to Human Trafficking" at the OBA CLE seminar on human trafficking. **Governor Hays** reported she attended the May Board of Governors meeting, OBA Professionalism Committee meeting for which she prepared the minutes, OBA Family Law Section monthly meeting for which she prepared and presented the budget report, Tulsa County Bar Association Board of Directors meeting at which she presented a report on OBA matters and OBA Family Law Section executive planning meeting. She also conducted the Women in Law Committee meeting and participated in conference planning, participated in Solo & Small Firm Conference planning and studied various reimbursement policy alternatives. **Governor Jackson** reported he attended the May Board of Governors meeting and Garfield County Bar Association monthly meeting. **Governor Meyers** reported he worked on his unsung hero *Oklahoma Bar Journal* article, studied various reimbursement policy alternatives, attended the Comanche County Bar Association meeting and volunteered for tax section aid to tornado victims. **Governor Pappas**, unable to attend the meeting, reported via email that she attended the Payne County Bar Association monthly meeting and Section Leaders Council meeting. **Governor Parrott** reported she attended the memorial service for Governor Coogan and the Oklahoma County Bar Association board of directors meeting. **Governor Smith** reported

he attended the May Board of Governors meeting and subcommittee meeting reviewing the OBA reimbursement policy. **Governor Stevens** reported he attended the May Board of Governors meeting. **Governor Thomas** reported she attended the May Board of Governors meeting, Washington County Bar Association monthly meeting and service celebrating the life of Sandee Coogan. She reviewed the OBA membership survey results and participated in an initial planning session for OBA Day of Service.

### REPORT OF THE YOUNG LAWYERS DIVISION

Governor Vorndran reported the YLD has been busy working on several CLE programs geared toward young lawyers as well as organization and planning related to OBA Day of Service. A joint meeting of the YLD and OBA board will be held immediately following this board meeting to coordinate plans for Day of Service in each district. He also said the division attempted its first virtual meeting in May and encountered some technical issues, but decided overall it can be an effective method by which to conduct short meetings.

### COMMITTEE LIAISON REPORTS

Governor Hays reported the Women in Law Conference theme this year will be communication and include a session on human trafficking. The committee is currently recruiting sponsors for the event. She also reported that Ken Williams has been elected Tulsa County Bar Association president-elect, who will follow Jim Hicks as president. Governor Thomas reported the deadline to submit applications for the

next OBA Leadership Academy is July 1, and she encouraged board members to urge someone in their counties to apply. Educational Programs Director Krug has organized the programming. Past President Christensen reported a Lawyers Helping Lawyers subcommittee met and is planning a second fund-raising banquet for the foundation on Sept. 10 at the bar center. Key-note speaker will be comedian Argus Hamilton, Oklahoma City native. She asked board members who have vacation homes to donate the use of them for the banquet auction and to ask friends with vacation homes to donate. Those items were popular last year.

### DISASTER ASSISTANCE REPORT

President Stuart reported that Tulsa attorney Molly Aspan, Disaster Response and Relief Committee chairperson, deserves kudos for her work on leading the OBA's efforts in response to Oklahoma's devastating severe weather. She has been asked by the ABA to present a session on how to deal with disasters. Executive Director Williams reported current stats were nearly 300 requests for legal assistance from victims and more than 250 lawyers who have volunteered to help.

### REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx explained the details of the report that is submitted monthly. Written status reports of the PRC and OBA disciplinary matters for May 2013 were submitted for the board's review. She said the calendar year for the Professional Responsibility Tribunal ends June 30 and will hold its annual meeting next Tuesday.

The event will welcome new members and thank out-going members for their service. Additional vacancies still need to be filled.

### **REIMBURSEMENT POLICY**

President-Elect DeMoss reported the subcommittee has met. She said Executive Director Williams was helpful in gathering other state bar policies, and a draft of a revised OBA policy has been created and revised. Work continues on the draft. The subcommittee will meet again at this conference, and plans are to submit a proposal at the next meeting.

### **OBA CLE 2012 ANNUAL REPORT**

Educational Programs Director Krug reported continuing legal education revenue fell short of projections, but expenses were also down, and the result was net revenue of nearly \$58,000. Evaluations show OBA programming is considered to be high quality with the majority of participants rating speakers and materials as "excellent." As expected, the demand for electronic CLE (audio programs, on-demand and CLE-to-go seminars, webcasts and webinars) remained strong, and live program attendance decreased. Videocasts were added in 2012, and the OBA partnered with the Office of the Attorney General to provide mortgage foreclosure CLE. She said competition remains a factor with the number of MCLE providers increasing by more than 50 last year. When asked about trends, she said webcasts have been popular but so was a live seminar on a good topic like human trafficking with sponsors to bring down registration costs. She said the department

is not printing binders anymore to reduce expenses and instead is sending materials electronically in advance. Upon request printed materials are available for \$25; other bar associations charge much more. It was noted Ms. Krug recently celebrated her first anniversary working for the OBA, and she was thanked for doing a good job.

### **NEW MEMBER BENEFIT PROPOSAL**

Member Services Committee Chairperson Sarah Schumacher reported the committee recommends the board approve a vendor relationship with WordRake, a software that edits Microsoft Word documents suggesting changes to accept or reject to create clear and concise documents by eliminating useless words and phrases. OBA members would receive a 10 percent discount, and the OBA would receive a 5 percent payout on purchases. The board authorized Executive Director Williams to negotiate the three-year contract to offer WordRake as an OBA member benefit.

### **PROFESSIONAL RESPONSIBILITY TRIBUNAL APPOINTMENTS**

The board approved President Stuart's recommendation to appoint Mike Edward Smith, Oklahoma City, to a three-year term on the PRT. The term will expire June 30, 2016. President Stuart noted there are two more positions to fill.

### **VACANCY OF SUPREME COURT DISTRICT 5 POSITION**

President Stuart stated that the procedure to fill the Board of Governors vacancy created with the death of Governor

Sandee Coogan is that it would be a Board of Governors appointment. Possible candidates were discussed.

### **JUDICIAL NOMINATING COMMISSION ELECTION**

Executive Director Williams reported the deadline for submitting ballots is June 21, and ballots will be counted on Monday. He reviewed the procedure.

### **ANNUAL MEETING**

Executive Director Williams shared an idea for a new social event at the Annual Meeting that would involve participation of OBA sections. He reported work continues on confirming a luncheon speaker. He also described efforts to get sections more involved in the CLE programming. President Stuart shared his recent experiences at the Louisiana and Arkansas annual meetings, which were both well attended. He noted both meetings involved participation of judicial members. It was suggested that more judges be asked to be presenters at the OBA meeting and that topics identified by OBA members as important in the recent member survey should be considered for Annual Meeting CLE programs. Other ideas were to issue an invitation to county bar presidents for a special meeting and to schedule more events on Friday afternoon.

### **NEXT MEETING**

The Board of Governors met at the Oklahoma Bar Center in Oklahoma City on July 19, 2013 and Aug. 16, 2013. A summary of those actions will be published after the minutes are approved. The next board meeting will be held at 1:30 p.m. on Thursday, Sept. 19, 2013, at the Oklahoma Bar Center.



# OBF Awards Grants to District Courts Across the State

By Susan Shields

At its July meeting, the Oklahoma Bar Foundation Board of Trustees was pleased to approve court grant awards for 2013 benefitting 13 district courts across Oklahoma totaling \$89,375. These awards were recommended by the OBF's grant committee, chaired by Judge Millie Otey, which worked diligently to review the court grant award applications submitted and to interview representatives of the prospective grantees.

The Oklahoma Bar Foundation District and Appellate Court Grant program is unique in that it is targeted to provide specific funding for technology, capital improvements and extraordinary expenditures for Oklahoma district and appellate courts in order to promote the administration of justice in our court system. The Court Grant Fund guidelines define the phrase "capital improvements and extraordinary expenditures" to include improvements to courtrooms such as audio/visual equipment, computer equipment, court reporting equipment (including equipment for "real time" reporting), other furniture and fixtures and extraordinary expenditures made necessary for the proper administration of complex litigation, such as class

actions. The Court Grant Program was established in 2009 and is funded through a series of *cy pres* awards directed to the OBF.

The 2013 OBF court grants were awarded to the following district courts:

- **District Court of Cimarron County:** Funding to provide a multi-channel digital court recording system and sound system equipment to enable the court reporter to perform off-site transcriptions without being present at court proceedings, with one court reporter being shared by five counties. \$6,766
- **District Court of Beaver County:** Funding to provide two multi-channel digital court recording systems and sound system equipment so the court reporter will be able to do off-site transcriptions without being present at court proceedings, with one court reporter being shared by five counties. \$13,531
- **District Court of Caddo County:** Funding to provide courtroom audio and video technology equipment. \$8,656
- **District Court of Cotton County:** Funding to provide one court reporting system to replace outdated system to be used by a court reporter shared between two counties. \$5,197
- **District Court of Jefferson County:** Funding to provide one court reporting system to replace outdated system to be used by a shared court reporter between two counties. \$5,197
- **District Court of Jackson County:** Funding to provide courtroom video and projector equipment. \$4,889
- **District Court of Kay County:** Funding to provide hearing assist devices for two courtrooms and lighting devices for three courtrooms to complete a prior funded technology project. \$2,755
- **District Court of McCurtain County:** Funding to provide courtroom video arraignment and sound system technology equipment. \$8,222
- **District Court of Nowata County:** Funding to provide audio and visual technology equipment for the main courtroom of the courthouse. \$9,199
- **District Court of Oklahoma County:** Funding to

provide four public access computers and software for creation of a new public media center. (Six public access computers and software were provided by a prior court grant award). \$7,415

• **District Court of Pontotoc County:** Funding to provide one court reporting system and portable digital recorders. \$5,695

• **District Court of Rogers County:** Funding to provide three automated projectors for three third floor level courtrooms. \$7,000

• **District Court of Washington County:** Funding to provide audio and visual technology equipment for the main courtroom. \$4,853

A total of approximately \$360,000 has been awarded to district and appellate courts in 33 different Oklahoma counties since the court grant program was established in 2009. These court grants meet the critical needs of our court system for items not normally funded through existing budgetary channels.

In addition to the court grant awards made since 2009, over the last 30 years the Oklahoma Bar Foundation has also awarded more than \$10 million to Oklahoma law-related nonprofits. The OBF is the primary grant-making organization in Oklahoma supporting law-related services and education, providing a funding umbrella for many diverse law-related programs and projects. The OBF provides funding for free legal assistance for the poor and elderly, safe haven for the

abused, protection and legal assistance for children, public law-related education programs, including programs for school children, and other activities that improve the quality of justice for all Oklahomans. The public purpose OBF law-related grant awards will be approved in a separate grant cycle later this year.

For more information on the Oklahoma Bar Foundation and the process to make application for future court or public purpose law-related grants, visit our website at [www.okbarfoundation.org](http://www.okbarfoundation.org) or feel free to contact Executive Director Nancy Norsworthy, at 405-416-7070 or visit with one of our OBF Officers or Trustees.

*Ms. Shields is OBF president and can be reached at [susan.shields@mcafeetaft.com](mailto:susan.shields@mcafeetaft.com).*

## Tributes and Memorials

Tribute and Memorial Gifts offer a simple and meaningful way to honor people who have played an important role in your life or whose accomplishments you would like to recognize. Graduating from law school, passing the bar, marking a milestone birthday, celebrating a colleague's retirement are just some of the many occasions for which making a tribute gift to the Oklahoma Bar Foundation can be especially meaningful for you and the person you wish to honor or for the family and friends of the person you wish to remember. A Memorial gift in lieu of flowers is a fitting way to express your feelings and honor a departed friend, colleague or loved one.

Tributes and memorials gifts are a great way to acknowledge the people you care about while helping to ensure that low-income and disadvantaged Oklahomans can access the legal advice and assistance they need or that school children learn about rights, responsibilities and the rule of law.

The OBF will send the person you designate a card notifying them that you made a special remembrance gift in their honor or in memory of a loved one to help the OBF continue working to make Oklahoma a fairer and better place for everyone. Gifts will be used in meeting the on-going mission of the Oklahoma Bar Foundation, Lawyers Transforming Lives through the advancement of education, citizenship and justice for all.

**Make your Tribute or Memorial Gift today at:**  
**[www.okbarfoundation.org/make-a-contribution](http://www.okbarfoundation.org/make-a-contribution)**

Or if you prefer, please make checks payable to:

Oklahoma Bar Foundation

P. O. Box 53036

Oklahoma City OK 73152-3036

E-mail: [foundation@okbar.org](mailto:foundation@okbar.org) Phone: (405) 416-7070

All contributions to the OBF are tax-deductible to the extent permitted by IRS.  
The OBF respects the privacy of donors and will not sell or share your personal information.





# OKLAHOMA BAR FOUNDATION

## 2013 OBF Community Fellow Enrollment Form

### UNITE TO PROVIDE HELP FOR THOSE IN NEED AS AN OBF COMMUNITY FELLOW

☐ OBA Section or Committee ☐ Law Firm/Office ☐ County Bar Assoc. ☐ IOLTA Bank ☐ Corporation/Business ☐ Other Group

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

Contact: \_\_\_\_\_

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

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

Phone: \_\_\_\_\_ E-Mail: \_\_\_\_\_

**The OBF Community Fellows is a new benevolent program of the Oklahoma Bar Foundation allowing organizations and groups to unite with individual lawyers who are OBF Fellows to support a common cause: *The promotion of justice, provision of law-related services, and advancement of public awareness and better understanding of the law.***

#### The OBF Provides Funding For:

- Free legal assistance for the poor and elderly
- Safe haven for the abused
- Protection and legal assistance for children
- Public law-related education programs, including programs for school children
- Other activities that improve the quality of justice for all Oklahomans

***OBF NEEDS YOUR HELP TO  
SERVE OKLAHOMANS  
IN NEED!***

**GIVE TODAY AT  
[WWW.OKBARFOUNDATION.ORG](http://WWW.OKBARFOUNDATION.ORG)**

### Choose from three tiers of OBF Community Fellow support to pledge your group's help:

\$ \_\_\_\_\_ **Patron** \$2,500 or more per year

\$ \_\_\_\_\_ **Partner** \$1,000 - \$2,499 per year

\$ \_\_\_\_\_ **Supporter** \$250 - \$999 per year

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

Print Name & Title: \_\_\_\_\_

OBF Sponsor: \_\_\_\_\_

Please kindly make checks payable to: Oklahoma Bar Foundation P O Box 53036 Oklahoma City OK 73152-3036

Phone: (405) 416-7070 • E-Mail: [foundation@okbar.org](mailto:foundation@okbar.org)

**Thank you for your generosity and support!**

# OBA Day of Service Closer Than You Think

By Joe Vorndran



Procrastination is an enemy of every professional, but for me and many of the lawyers I know, it has taken on arch-nemesis status. Tomorrow always seems more open and less treacherous than the day at hand, and before you know it you are up on a deadline and yesterday doesn't seem quite so hectic. It is my sincere hope that the frequent reminders about the OBA Day of Service have prompted you to identify the project in your area that you will be participating in, but I suspect many of you still see this as a future task buried on a list by more

pressing matters. Whether we are ready for it or not, the OBA Day of Service is Sept. 20-21 and county bars, law firms, law schools and businesses across the state are gearing up for this important initiative.

The Young Lawyers Division has always served as the community service arm of the OBA and as such it is incumbent upon our membership to contribute our passion and energy to these worthwhile projects. I am frequently asked what is the best way to get involved with the YLD, and my answer is always

## Counties and Groups Planning OBA Day of Service Projects\*

Alfalfa County Bar Association  
Beaver County Bar Association  
Canadian County Bar Association  
Comanche County Bar Association  
Cimarron County Bar Association  
Cleveland County Bar Association  
Garfield County Bar Association  
Grant County Bar Association  
Haskell County Bar Association  
Latimer County Bar Association  
LeFlore County Bar Association  
Logan County Bar Association  
Major County Bar Association  
Mayes County Bar Association  
McIntosh County Bar Association  
Noble County Bar Association  
OKLAHOMA COUNTY  
OCU School of Law  
Oklahoma County Bar Association  
OU College of Law  
Payne County Bar Association  
Pittsburg County Bar Association  
Pontotoc County Bar Association  
Pottawatomie County Bar Association  
Pushmataha County Bar Association  
Sequoyah County Bar Association  
Texas County Bar Association  
TULSA COUNTY  
TU College of Law  
Tulsa County Bar Association  
Woods County Bar Association  
Woodward County Bar Association

*\*Information current as of Aug. 15, 2013.*

the same — show up, roll up your sleeves and participate. The OBA Day of Service is a perfect opportunity to do just that.

#### HOW TO GET INVOLVED

Organizers within the Board of Governors and YLD have been working tirelessly to identify and coordinate each project to be undertaken, but there are still counties that

have not reported and planning that needs to be done. If you have not been contacted by someone in your area, reach out. If you are in a rural area, devise your own project or participate in one in a neighboring county. Please engage yourself in this opportunity for service and fellowship within our respective communities. If you have any questions about how to best

get involved, please contact the YLD Community Service Committee Chairperson Brandi Nowakowski at [brandi.nowakowski@thewestlawfirm.com](mailto:brandi.nowakowski@thewestlawfirm.com) and she will direct you to a project or contact in your area.

*Mr. Vorndran practices in Shawnee. He can be reached at [joe@scdtlaw.com](mailto:joe@scdtlaw.com).*

Sept. 20-21

Day of Service

Project submissions due Aug. 26

To submit your county's Day of Service project, email Brandi Nowakowski at [bnowakowski@thewestlawfirm.com](mailto:bnowakowski@thewestlawfirm.com)



## NEW OBA MEMBER BENEFIT

# WORDRAKE.

## THE FIRST EDITING SOFTWARE FOR LAWYERS

Have you ever felt that your writing could ~~stand to~~ benefit from a little ~~bit of~~ editing? Do you ~~often find yourself relying~~ rely on “legalese” to make your point? WordRake may be the solution for you.

Free three-day trial • 10 percent discount for OBA members • Coupon code OKBAR

[www.okbar.org/news/Recent/2013/WordRake.aspx](http://www.okbar.org/news/Recent/2013/WordRake.aspx)

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## OKLAHOMA BAR JOURNAL



- Current issues
- Archives
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- Submissions
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*Bookmark it!*

[www.okbar.org/members/BarJournal.aspx](http://www.okbar.org/members/BarJournal.aspx)

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## JIM CALLOWAY'S LAW PRACTICE TIPS

Essential tips about law practice management, Internet and technology, written by OBA Management Assistance Program Director and tech guru, Jim Calloway.

[www.jimcalloway.typepad.com](http://www.jimcalloway.typepad.com)



## GET BALANCED

Tips for healthy living, fun apps, travel destinations and more to enhance your work/life balance

[www.okbar.org/members/WorkLifeBalance/Tips.aspx](http://www.okbar.org/members/WorkLifeBalance/Tips.aspx)



## PRODUCT REVIEWS

Mini reviews of legal apps and products by the ABA Business of Law Section, featuring Oklahoma's Droid Lawyer, Jeffrey Taylor

[tinyurl.com/ABATechTips](http://tinyurl.com/ABATechTips)

[www.thedroidlawyer.com](http://www.thedroidlawyer.com)



## CONNECT

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[www.twitter.com/oklahomabar](http://www.twitter.com/oklahomabar)







*Michael C. Mordy*



*Peggy Stockwell*

### **JNC Elections Results Announced**

Congratulations to attorneys Michael C. Mordy of Ardmore and Peggy Stockwell of Norman, who have been elected by their fellow lawyers to serve on the state's Judicial Nominating Commission. Each will serve as one of six lawyers on the 15-member commission, which plays a key role in the selection of Oklahoma judges. More information about the newly elected commissioners is available at [www.okbar.org/news/Recent/2013/JNCElectionResults.aspx](http://www.okbar.org/news/Recent/2013/JNCElectionResults.aspx).

### **This Will Affect the Way You Practice Law! – New Amendments to Rules for E-Filing in Oklahoma Courts**

Amendments to Oklahoma Supreme Court Rules and District Court Rules have been posted to [www.oscn.net](http://www.oscn.net). These amendments are related to e-filing in Oklahoma courts and affect every practitioner in Oklahoma. Be sure to take a look at this information — failure to comply with any rule or order of the court could have negative consequences for your client or cause. Supreme Court information can be located at [www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=470696](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=470696), and district court information is at [www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=470708](http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=470708).

### **Interest on Judgments Notice Amended**

Due to a recent decision by the Oklahoma Supreme Court regarding *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, in which the Comprehensive Lawsuit Reform Act of 2009 (Laws 2009, HB 1603, c. 228), was deemed unconstitutional, interest rates on judgments have been amended effective upon mandate issued July 1, 2013. More recent changes in legislation mean the interest rates will change again effective Nov. 1, 2013. To see the explanation of current interest rates on judgments visit <http://goo.gl/3hLjIE> or see (July 13, 2013) 84 OBAJ 1357.



*Jose Baez*

### **Annual Meeting Luncheon Speaker Selected**

Florida defense attorney Jose Baez will discuss “Why Casey Anthony Was Found Not Guilty” during the Annual Luncheon to be held in conjunction with the OBA 2013 Annual Meeting, set for Nov. 13-15 at the Sheraton Hotel in downtown Oklahoma City. Make plans to attend now! All the details and event highlights will be available in the Sept. 14 *Oklahoma Bar Journal*.

### **Free LHL Discussion Groups Available to OBA Members**

“Coping with the Challenges of an Addicted Loved One or Colleague” will be the topic of the Sept. 5 meetings of the Lawyers Helping Lawyers discussion groups in Oklahoma City and Tulsa. Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. In Oklahoma City, the group meets from 6-7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th Street. The Tulsa meeting time is 7-8:30 p.m. at the TU College of Law, John Rogers Hall, 3120 E. 4th Place, Room 206. There is no cost to attend and snacks will be provided. RSVPs are encouraged to ensure there is food for all.

## Bar Center Welcomes Law Students From China

The OBA welcomed nearly two dozen special guests in July when students and professors from several university law schools in China paid a visit to the bar center. The students were in Oklahoma City attending the OCU School of Law Certificate in American Law Program. The program, which consists of four weeks of legal coursework and a mock trial, provides an extensive background on the American legal system for the participating Chinese students.



This four-week certification program, which began in 2007, grew from a partnership between OCU School of Law and Nankai University School of Law. It has since expanded to include several other Chinese universities.

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## New Member Benefit: WordRake Editing Software for Lawyers



Have you ever felt that your writing could stand to benefit from a little bit of editing? Do you rely on "legalese" to make your point? WordRake may be the solution for you. Developed for lawyers, the

software provides editing suggestions for clarity and brevity. WordRake instantly edits documents right in Microsoft Word, suggesting changes that eliminate unnecessary words and phrases. A new partnership with WordRake means OBA members receive a 10 percent discount on the product.

Visit [www.wordrake.com](http://www.wordrake.com) to check it out or download a free three-day trial. The MS Word add-in is easy to install, and annual licensing plans offer increased saving based on subscription duration. When you purchase, enter coupon code OKBAR on the final purchase page to receive the special OBA member discount.

Says OBA member Jarod Morris of Oklahoma City who uses the product, "I 'raked' a motion that I'm about to file and love it. I bought it and use it all the time, and it's worth every penny. I've noticed things with my writing that I didn't notice before. I recommend it for everyone who will not file briefs in opposition to mine."



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## OBA to Celebrate Constitution Day and Freedom Week 2013

The OBA Law-related Education Committee invites you to observe this year's Constitution Day, Sept. 17; and Freedom Week, Nov. 11-15. As lawyers, you have a unique responsibility to promote civics education among the public, particularly relating to information about the third branch of government. Check out [www.okbar.org/public/LRE/LREConstitutionDay.aspx](http://www.okbar.org/public/LRE/LREConstitutionDay.aspx) to see resources you can share with your local schools and civic groups.



*Members of the TCBF gather items for the Tulsa Day Center for the Homeless. From left: Talia Campbell, Shelley Holmes, Meredith Lindaman, Kevin Cousins, Jennifer Waeger, Matt Farris*

## Tulsa Lawyers Sponsor Household Item Drive

The Tulsa County Bar Foundation Community Outreach Committee recently sponsored a household item drive benefitting residents of the Tulsa Day Center for the Homeless. The committee assembled 50 “housewarming” kits valued at \$125 each to provide assistance and support to homeless families and individuals in making the transition to their own homes or apartments.

## Governor Appoints Laypersons to PRT

Gov. Mary Fallin has appointed four non-lawyers to serve on the Professional Responsibility Tribunal, the panel of masters charged with conducting hearings on formal complaints filed against Oklahoma lawyers. The new appointees are James W. Chappel, Norman; Linda C. Haneborg, Oklahoma City; Kirk V. Pittman, Seiling; and Mary Lee Townsend, Tulsa.

Mr. Chappel is a community affairs manager for OG&E Energy Corp. Ms. Haneborg is the principal/owner of Linda Haneborg Associates, a public relations firm. Mr. Pittman is the president/CEO of First National Bank of Seiling, and Ms. Townsend is a retired University of Tulsa professor.

The PRT consists of 21 members, seven of whom must be non-lawyers appointed by the governor. The remaining 14 must be active OBA members in good standing. Members are appointed on rotating terms of three years expiring on June 30 of the given year. All masters serve without compensation except for reimbursement for travel and other incidental expenditures incurred in connection with the performance of their duties.

PRT non-lawyer members rotating off the panel this year are Norman Cooper and John Thompson. Mr. Pittman and Ms. Townsend are being reappointed to the panel.

## Lawyers Encouraged to Devote Time, Talent to Serving Communities in 2013

OBA President Jim Stuart is encouraging all Oklahoma lawyers and law firms to make giving back a top priority. During 2013, the *Oklahoma Bar Journal* is supporting this effort by spotlighting those lawyers and law firms who give their time, talent and financial resources to make their communities a better place. Have a great story or photos to share? Email Lori Rasmussen at [lorir@okbar.org](mailto:lorir@okbar.org).

## Aspiring Writers Take Note

We want to feature your work on “The Back Page.” Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry is an option too. Send submissions no more than two double-spaced pages (or 1 1/4 single-spaced pages) to OBA Communications Director Carol Manning, [carolm@okbar.org](mailto:carolm@okbar.org).



## Holiday Hours

The Oklahoma Bar Center will be closed Monday, Sept. 2 in observance of Labor Day.

# Kudos

**D**Michael McBride III has been appointed to the Greater Tulsa Area Indian Affairs Commission. The commission aids in the preservation of cultures of Indian people and enhances and promotes educational opportunities among Indian citizens. Additionally, at the Oklahoma Supreme Court's Sovereignty Symposium he was presented with the inaugural Justice Rudolph Hargrave Prize for the outstanding scholarly article from a faculty member. His article, "Fifty Shades of Regulation: A Survey of Internet Gaming Issues in Indian Country and a Framework for Future Development," examines the state of iGaming in the U.S. and how regulation has progressed and will continue to develop.

**C**Russell Woody graduated from the Leadership Oklahoma City program, a 10-month series of classes focusing on various community issues.

**R**on Ricketts of Gable-Gotwals has been inducted as a fellow in the Academy of Court Appointed Masters, the only Oklahoma attorney admitted to the academy.

**C**hristopher S. Heroux, founder of Heroux Partners PLLC, has been named to the 2013 Tulsa Power Attorneys & Legal Profession-

als by the Tulsa Business & Legal News.

**J**immy K. Goodman of Crowe & Dunlevy recently received the *Journal Record's* Leadership in Law award, which recognizes Oklahoma's outstanding leaders in the field of law who are doing valuable community service.

**L**auren Austin Thomas, Assistant district attorney and managing attorney for Payne and Logan counties district attorney's child support divisions, was named 2013 attorney of the year during the Oklahoma Child Support Enforcement Association's annual training conference and awards presentation.

**M**ike Redman of Neuens Mitchell Freese, PLLC, was recently elected to the American Civil Liberties Union, Oklahoma Chapter board of directors.

**A**rdmore attorney, Gary W. Farabough of Pasley, Farabough and Mouledoux, has been nominated by the mayor and city commissioners to serve a three-year term as a trustee on the Ardmore Development Authority Trust Board. The authority has the power to build, lease, own, buy, sell and otherwise deal in activities that benefit industrial development for Ardmore.

**F**ormer OBA President Tony Massad received the Oklahoma Supreme Court's Sovereignty Symposium Award in recognition of the Frederick attorney's contributions as an advocate for judi-

cial reform legislation that led to a modified plan for the selection of appellate judges.

**O**klahoma City attorneys Nick Harroz and Mike Voorhees have been elected chairman and vice chairman, respectively, of the Oklahoma City Board of Adjustment for a one year term from 2013-2014.

**E**sther Roberts Bell, CEO and founder of Global Intellectual Property Asset Management PLLC, has been named a finalist in the 29th annual YWCA Tribute to Women awards for her efforts towards equality, empowerment and transformation.

**D**avid Hickens received the NASA Johnson Space Center (JSC) Director's Commendation Award for outstanding leadership and management of the JSC Environmental Affairs Program. Additionally, at the Environmental Protection Agency Region 6 Federal Facilities Conference in Dallas, Mr. Hickens was awarded the Green Challenge National Award for success in achieving significant waste reductions at the JSC.

**A**ssistant Attorney General Jennifer Miller has been selected to the board of directors for the Association of Government Attorneys in Capital Litigation. Ms. Miller serves as chief of the Attorney General's office Criminal Appeals Unit.

**O**sage County District Judge M. John Kane of Pawhuska was recently elected as the president of the



Oklahoma Judicial Conference at its annual meeting in Norman. The conference supervises the education and training of members of the judicial branch of the state government and assists the Supreme Court and legislature in analyzing the needs of the trial courts.

## At The Podium

**Eric L. Johnson** recently moderated "Compliance: The General Counsel Perspective" at the Auto Finance Risk Summit in Dallas. Mr. Johnson also presented "Tricks and Traps of Auto Finance" at the Counselor Library's 2013 Consumer Financial Services Conferences in Annapolis, Md., "Hot Regulatory Issues" at the Credit Union Association of Oklahoma's annual meeting in Norman and "The Consumer Financial Protection Bureau" at the Graduate School of Banking of Louisiana State University in Baton Rouge, La.

**Keith D. Magill** presented "Oklahoma Estate Planning" at the Oklahoma Good Sam "Spring Samboree" at the Oklahoma Exposition Center in Shawnee.

**Jan S. Dumont** of Riggs Abney recently presented to 75 area employers regarding "Pay or Play" under the Affordable Care Act in Ardmore.

**U**CO professor **Marty Ludlum** recently presented on "Recent Events in Employment Law" to the Texas Funeral Directors Convention in Austin, Texas.

**Mike Turpen** of Riggs Abney Neal Turpen Orbison and Lewis recently spoke at the Oklahoma District Attorneys Association training conference in Oklahoma City concerning victims' issues, trial tactics and special tips to help district attorneys improve their office.

**Faith Orlowski** of Sneed Lang PC presented "The Ethics of Third Party Use of Oil and Gas Title Opinions" and "How Do We Cloud Title — Let Me Count the Ways" to the Mid-American Association of Division Order Analysts in Wichita, Kan.

**Matthew D. Stump** recently served on a panel at the 2013 American Immigration Lawyers Association (AILA) Annual Conference in San Francisco. He spoke about the U.S. Department of Labor's Foreign Labor Certification process. Mr. Stump also served as vice-chair of AILA's Vermont Service Center (VSC) Liaison Committee. VSC is a major service center of U.S. Citizenship and Immigration Services and the U.S. Department of Homeland Security.

**McAfee & Taft** litigator **Mark Christiansen** will present "Litigation Update on Recent Court Decisions Resolving Issues Under Oil and Gas Industry Contracts" at the American Conference Institute's forum on oil & gas litigation in Houston on Sept. 12.

## On The Move

**S**need Lang PC announces that **Douglas L. Inhofe, J. David Jorgenson** and **Richard E. Warzynski** have joined the firm. Mr. Inhofe has joined the firm of counsel. He is a 1971 graduate of Cornell Law School and practices primarily as a trial lawyer and as counsel on appeal. His experience includes lender liability, securities questions, construction disputes, products liability, employment discrimination and other business litigation matters. Mr. Jorgenson has joined the firm of counsel. He is a 1978 graduate of the University of Texas Law School and practices primarily as a trial lawyer and as counsel on appeal. He has experience in oil and gas litigation, defense of individual and class action royalty owner claims, gas balancing disputes and pricing claims, and in other business tort and contract litigation. Mr. Warzynski has associated with the firm. He graduated from TU College of Law in 1991. His practice includes general litigation, employment law, personal injury, products liability and insurance litigation.

**S**molten, Smolten & Roytman PLLC announces that **Gregory Bledsoe, Ray Yasser** and **Steven A. Novick** have joined the firm of counsel. Mr. Bledsoe's practice will focus on plaintiff's employment-related litigation including discrimination, wrongful discharge and claims under the Fair Labor Standards Act as well as civil rights including

first amendment and police misconduct claims. He will also continue to advise small businesses and individual defendants involved in employment and civil rights disputes. He holds a J.D. from TU. Mr. Yasser was most recently a law professor at TU, with an academic background in sports law, Title IX issues and torts. He had been at the university since 1975 before joining the firm. Mr. Yasser holds a bachelor's degree from the University of Delaware and earned his J.D. at Duke. Mr. Novick's practice focuses on plaintiff's employment matters, disability rights, plaintiff's civil rights cases and plaintiff's personal injury. Prior to joining the firm, he spent 18 years with Oklahoma Legal Aid and two years as Oklahoma Disability Law Center director. He also has 20 years of private practice experience. Mr. Novick holds a J.D. from OU.

**H**all Estill announces **Stephen E. Hale** has joined the firm's Tulsa office as a shareholder. Hale has practiced exclusively in family law for 15 years with an emphasis on parent coordination and guardian *ad litem* work. Mr. Hale holds a J.D. and a master's degree from TU as well as a bachelor's degree from OSU.

**J**ames Wylie has joined the Consumer Financial Protection Bureau's Office of Regulations in Washington D.C., where he will work on federal regulations dealing with consumer financial protection laws. He was previously a trial lawyer for the U.S. Department of Housing and Urban Development where he served as a trial attorney

in the fair housing division, litigating cases on behalf of victims of housing discrimination and dealing with fair housing, civil rights and administrative law. He holds a B.A. from TU and earned his J.D. from OU in 2008.

**R**obert S. Jackson announces the opening of his solo practice in Oklahoma City. His practice will focus on criminal and family law. He worked previously as an assistant federal public defender in the Western District of Oklahoma. As a public defender, he practiced *habeas corpus* litigation in Oklahoma's federal district courts, the 10th Circuit Court of Appeals and the United States Supreme Court. He holds a B.A. in economics from the University of Texas and earned his J.D. from OU in 2008.

**K**elly Comarda has joined Hall Estill's Tulsa office as an associate. His practice focuses on litigation in health-care and medical malpractice. He is a graduate of the University of Arkansas School of Law and holds a bachelor's degree from Tulane University.

**D**ean Couch has joined GableGotwals as an of counsel attorney in the firm's Oklahoma City office. His practice will focus on water law and the complex issues surrounding rights, access and management of this natural resource. Mr. Couch served for almost 30 years as the general counsel of the Oklahoma Water Resources Board. He holds a J.D. from OU and a B.A. from Central State University.

**R**. Charles Wilkin III and **R. Kurston P. McMurray** announce the formation of

Wilkin/McMurray PLLC. Mr. Wilkin holds a J.D. and B.A. from the University of Arkansas, graduating *magna cum laude* from both undergraduate and law school. His practice area includes employment and labor law, complex commercial litigation, class action defense and general business litigation. He is licensed to practice law in Kentucky, Tennessee and Texas, in addition to Oklahoma. Mr. McMurray graduated with honors from TU College of Law and holds a B.A. in business administration and finance from San Diego State University. He has practiced in Tulsa since 1998 and his practice focuses on banking and commercial law, business law, business transactions, civil litigation, contracts, real estate, foreclosure, collections and construction law.

**R**obert P. Skeith and **Raudra K. Hamilton** have joined the recently formed Wilkin/McMurray PLLC. Mr. Skeith graduated with honors from TU College of Law and also attended TU for his undergraduate studies. He has practiced law in Tulsa since 1994 and his practice focuses on banking, business transactions, collections, appellate practice, commercial litigation and real estate. Ms. Hamilton graduated with highest honors from the University of Arkansas law school and earned her B.A. *magna cum laude* in English from Hendrix College. She has practiced in Tulsa since 1998 and her practice focuses on employment law. She is also licensed to practice in Arkansas.

**R**iggs Abney Neal Turpen Orbison and Lewis announces the purchase of



the office building at 528 NW 12th (12th and Dewey) as the new home of its Oklahoma City office. The firm plans to renovate the building and anticipates moving in January 2014.

**Reginald O. Smith** was promoted to the rank of Commander (O-5), U.S. Public Health Service on July 1, 2013. Presently, he works in the Health Resources Services Administration in the U.S. Department of Health and Human Services.

**Kelley N. Feldhake** announces the formation of Feldhake Law. Her practice focuses on family law and guardianships. She graduated with distinction from OU with a B.A. in political science and holds a J.D. from TU.

**Ainslie Stanford** and **Michael Crooks** announce the opening of their new law firm, Crooks Stanford PLLC. Mr. Stanford has spent the last several years as a partner at Corbyn Hampton, while Mr. Crooks has been the managing partner at the Crooks Law Firm. Mr. Crooks will continue his practice of advising individual,

corporate and transactional participants and stakeholders in a broad array of mergers, acquisitions and other transactional-based work. Mr. Stanford will continue to focus his practice on representing corporate entities and individuals in a wide variety of litigated matters. The firm can be reached at 405-285-8588 or via the firm website at [www.crooksstanford.com](http://www.crooksstanford.com).

**Doerner, Saunders, Daniel & Anderson LLP** announces **Michael Linscott** has joined the firm's Tulsa office. His practice focuses on complex litigation including business disputes such as breach of contract and fiduciary duty claims, insurance coverage, contract and bad faith claims, securities, arbitrations, construction cases, intellectual property matters and collection disputes. He will also provide general business counseling on logistics and acquisitions as well as prelitigation advice and strategy for companies. He is a 1991 graduate of TU College of Law where he served as managing editor of the *Tulsa Law Journal* and is a member of the

Order of the Curule and Order of Barristers.

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:  
Jarrod Beckstrom  
Communications Dept.  
Oklahoma Bar Association  
(405) 416-7084  
[barbriefs@okbar.org](mailto:barbriefs@okbar.org)

**Articles for the Sept. 14 Issue must be received by Aug. 19.**



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myokbar account.**


**Then click on the  
"Find a Lawyer" Link.**

**Joseph Francis Clark Jr.** died July 16. He was born on Jan. 20, 1949, and graduated from Cascia Hall Preparatory School and went on to attend Villanova University for his undergraduate studies. He earned his J.D. from TU and was admitted to the bar in 1974. He was a partner at Clark and Warzynski, with his practice focusing on ERISA law and insurance cases. Mr. Clark was a member of the Christ the King Parish and the Knights of Columbus, Council 1104. He was a past grand knight and a 4th degree knight. Memorial contribu-

tions can be made to Christ the King Parish in Tulsa.

**Maynard Ungerman** died July 27. Born in Topeka, Kan., on Dec. 5, 1929, he grew up in Tulsa, graduating from Will Rogers High School in 1947. He graduated *cum laude* from Stanford University and earned his J.D. from Stanford University Law School in 1953. He served on the *Stanford Law Review* Board of Editors. **He served in the Air Force JAG Corps** and eventually joined his father's law firm. He was appointed as a special master of the Oklahoma Supreme Court, assisting

the court to write public opinions. In 1982, he was appointed as a judge to the Oklahoma Court of Appeals by the Oklahoma Supreme Court. He co-founded the nonprofit "Neighbor for Neighbor," and was recognized as Volunteer of the Year by the organization in 2009. He was also involved with the Community Service Council of Tulsa and the Day Center for the Homeless, among various other honors for his service work. He was known for his civil rights work in Tulsa throughout the 1960s and was a member of the Congress on Racial Equality.




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# In Remembrance



## *Sandee Coogan*

*Oct. 2, 1950 – May 22, 2013*

*The OBA Board of Editors honors the life of its fellow editor, whose many contributions to the Oklahoma Bar Journal, Oklahoma Bar Association, Cleveland County Bar Association and to the practice of law will long be remembered.*

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KOZENY & MCCUBBIN, L.C. is seeking an experienced Attorney for our Edmond, OK office. The Associate Attorney is responsible for providing legal services, transactional and legal research and for advising the Company of legal rights and responsibilities regarding client matters. We are a "paperless" office and candidates must be comfortable learning new systems, using file management software and working in multiple systems. Minimum requirements: 10 years' experience in OK foreclosure (including confirmation, redemption and ratification matters), bankruptcy, loss mitigation, eviction and default-related litigation; OK License active and in good standing; willingness to obtain additional licensures; Experience using LexisNexis or other relational databases; Outstanding verbal and written communication skills; Professional demeanor; excellent analytical and problem solving skills; Flexibility to adapt to ever-changing business environment; Must work with minimal supervision and demonstrate appropriate initiative when making decisions; Excellent time-management, organization and communication skills; Ability to handle a high-volume of work effectively. Full time, Monday – Friday. Benefits: medical, dental, vision, life, 401k, paid holidays, paid time off, voluntary ancillary benefits. Final candidates for this position will be required to pass pre-employment drug-screening, credit and criminal background checks, and education / credential verification. Kozeny & McCubbin, L.C. is an Equal Opportunity Employer dedicated to workforce diversity. Kozeny & McCubbin, L.C. is an AV rated law firm Apply online only at <https://home.eease.adp.com/recruit/?id=5844091>.

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**THE CITY OF OKLAHOMA CITY IS CURRENTLY ACCEPTING APPLICATIONS** for an Assistant Municipal Counselor II. This position is located in the Trust, Utilities and Finance Division of the Office of the Municipal Counselor and applicants must be licensed to practice law in Oklahoma State courts and eligible for admission in the U.S. District Court for the Western District of Oklahoma. Experience in municipal, public trust, public construction contracting, land transaction, commercial leasing, public financing, grants administration, airport, oil and gas and/or environmental law is desirable. This position will predominately provide legal representation to the Oklahoma City Airport Trust and its staff, including the Director of Airports, and will focus upon the architectural, engineering, construction, and development activities of the three airports the Trust operates and manages for the benefit of the City. Applications and resumes will be accepted through August 23, 2013. Apply online at <http://www.okc.gov/jobs>. Additional information may be obtained at Jobline: 405-297-2419 or TDD (Hearing Impaired) 405-297-2549. EEO.

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Jeremy E. Melton joins Gungoll, Jackson, Box & Devoll, P.C. as an  
associate attorney.

Melton grew up in Stroud, Oklahoma, where his family's  
involvement in the oil and gas industry sparked his interest in studying  
energy law. He earned his undergraduate degree from Oklahoma State  
University before graduating in 2009 from the University of Tulsa  
College of Law, where he was Articles Editor for the Energy Law  
Journal.

His professional career includes working for a Tulsa firm handling  
business and employment law and later providing title examination  
and legal services for Chesapeake Energy Corporation. He is a member  
of the Oklahoma City Mineral Lawyers Society.

He specializes in oil and gas litigation, title examination and general  
civil litigation.

Melton lives in northwest Oklahoma City, where he enjoys outdoor  
activities including running, cycling, hunting and fly fishing. He also  
enjoys trying out new recipes with his wife, who works for a food  
service distributor. The couple is expecting their first child in September.

He can be reached at the firm's Oklahoma City office.

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# Adventures in Work/Life Balance

By Linda Redemann

When I was a very new lawyer, I lived on an acreage west of Skiatook and commuted to the offices of Rhodes, Hieronymus, Holloway and Dobson in downtown Tulsa. One beautiful spring morning I carried my briefcase, my 2-year-old and his diaper bag to the car. I was dressed in the appropriate court attire for female lawyers in those days of a skirt suit, nylon stockings and heels.

As I started to back out, I noticed that my horse, Joe, was standing beside the driveway staring at me from the wrong side of the pasture fence. (Doesn't everyone who fulfills their dream of moving from the city to the country, immediately get a horse?) I pulled back into the driveway and opened the rear car door so I could keep an eye on my son, Tyler. I had to be in court at 9 a.m. and had no time to



find or deal with the breach in the fence. I quickly decided that Joe would have to spend the day in the barn corral. Luckily, instead of playing his usual game of "catch me if you can," Joe came right to me. I left my heels on the driveway and led Joe through the muck, muck, muck to the barn. After securing Joe

in the corral, I used the garden hose to rinse my feet and ankles.

My feet were mostly dry by the time I reached Tulsa. I stepped back into my heels as I dropped my son at day care. He didn't seem to mind the lightning speed drop-off after his exciting morning. I walked into the courtroom just as the judge was calling my case on a disposition docket for the second and last time! I made my announcement and returned to my office feeling pretty proud of myself for making it through the morning unscathed in spite of the early morning crisis. I wasn't feeling quite so smug when later that afternoon, my secretary stuck her head in my office exclaiming, "What is that awful smell?"

*Ms. Redemann practices in Tulsa.*



Planner/Moderator: **Jim Priest**  
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- 2 Sex in the workplace: Whether it's consensual or coerced, sex in the workplace happens. This topic covers recommendations to management as well as male and female workers about dealing with sexual and romantic issues in the workplace, including policies on dating, harassment, consent forms and waivers. Presented by Paul Ross
- 3 Sex pay disparity and the glass ceiling: This topic deals with the Equal Pay Act, gender equity and glass ceiling cases including recommendations on how to handle such cases from a plaintiff and defense perspective. Presented by Leah Avey
- 4 Pregnancy discrimination: Are these cases still around? You bet. This topic will update you on the latest successful and unsuccessful cases under the PDA. Presented by Vic Albert
- 5 Lawyers and workplace sex: How to lose your law license by throwing caution to the wind. A review of complaints and suits against lawyers relating to taking advantage of employees and clients. (ethics credit) Presented by Gina Hendryx
- 6 Dealing with powerful predators: Lawyers are often called in to deal with powerful predators in the workplace. How do you handle cases involving potentially volatile, high ranking officials who must be de-fanged and ousted? This topic will provide recommendations for handling these cases safely and effectively. Presented by Jim Priest and Lori Engel

For program details and to register, log on to:

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