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Oklahoma Bar

JOURNAL

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Diversity • Annual Meeting Highlights • Bar Journal 2013 Index



Social Media and Pop Culture: What's Ethics Got to Do with It?

Featured Speaker: Stuart I. Teicher, Esq.

Stuart I. Teicher, Esq. is a professional legal educator who focuses on ethics law and writing instruction. A practicing attorney for 20 years, Stuart's career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Stuart teaches seminars, provides in-house training to law firms and legal departments, and also gives keynote speeches at conventions and association meetings.

Session A: Technethics: Ethical Issues in Social Media and Other New Technologies

- Introduction - What is social media and who's using it?
- Get Involved with Social Media
- Keeping Quiet - Confidentiality and Privilege Issues
- Innovative Use of Social Media
- Advertising and Self Promotion
- A Variety of Other Ethical Danger Zones
- Devices that Transmit and Store Data and Issues "In the Cloud"

The seminar starts at 9 a.m. and
adjourns at 4:15 p.m. For
program details, log on to:
www.okbar.org/members/cle

Session B: What NASCAR, Jay-Z & the Jersey Shore Teach About Attorney Ethics

- Misconduct and Rule 8.4
- Evolving Rules, 1.0, 5.3
- Trends in Rules about Discriminatory Behavior, 8.4
- Misrepresentation, Rules 8.1, 4.1, 3.1
- Advertising & Rules 7.1 & 7.2
- Solicitation & Vulnerabilities Rule 7.3
- The Nobility of the Profession as Set Forth in the Preamble, Scope, and Rules 2.1, 1.8
- The "Grand Troika" of the Ethics Rules Competence, Rule 1.1: Mastering Skills & Substantive Law, Diligence, Rule 1.3, Communication, Rule 1.4
- Bad Personal Behavior and Substance Abuse
- Rebuilding your foundations: recovering billable time, doing your best work
- How to manage technology instead of allowing it to manage you
- Building new virtual and "on demand" staff and attorney structure for decreased costs

Approved for 7 hours MCLE / 7 Ethics for the all day program; 3.5 hours MCLE / 3.5 Ethics for Session A only; 3.5 hours MCLE / 3.5 Ethics for Session B only. TX credit 3 hours MCLE/ 3 ethics for each session. **\$250** for early-bird registrations with payment received at least four full business days prior to the seminar date; **\$150** for Session A or B for early-bird registrations with payment received at least four full business days prior to the seminar date; **\$275** for registrations with payment received within four full business days of the seminar date; **\$175** for Session A or B for registrations with payment received within four full business days of the seminar date.



- TO OUR WONDERFUL VOLUNTEER FACULTY -

THANK YOU

From OBA/CLE

MAKING 2013 A HUGE SUCCESS

On behalf of all of us in the OBA/CLE Department and Brandon in our IT Department, "thank you" to everyone for making our Fall 2013 CLE season a huge success! Being the #1 CLE provider in the state would not be possible without our dynamic, volunteer program planners and faculty. Because of you, our members can always count on accredited programs that are innovative, exciting and entertaining. We appreciate all you do and wish you the merriest of holidays and a happy new year!

Susan K., Heidi, Mark, Renee and Susan C.



DAMAGES

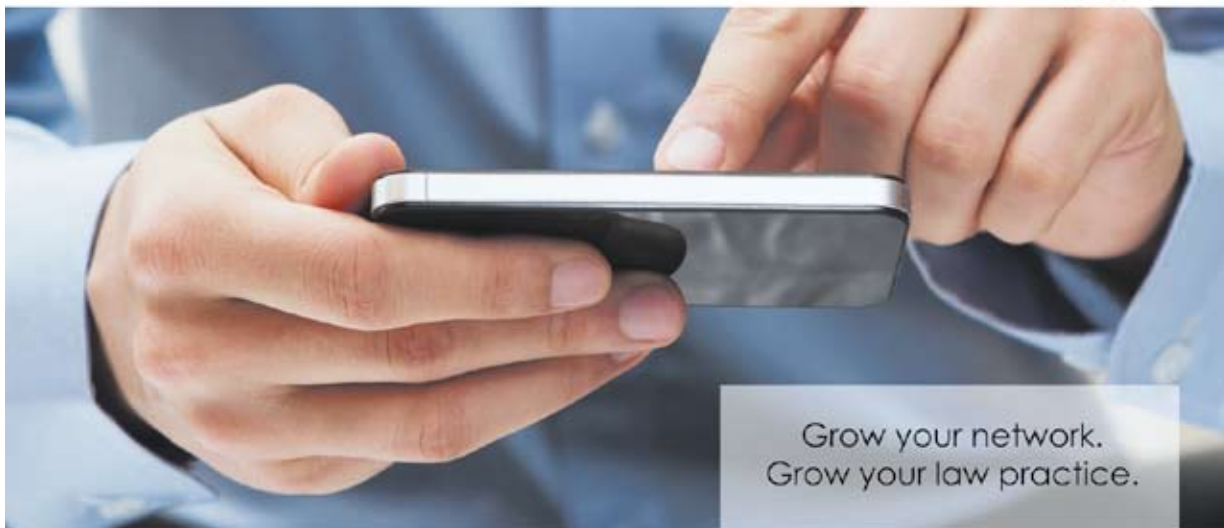
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~ Lela Lawless
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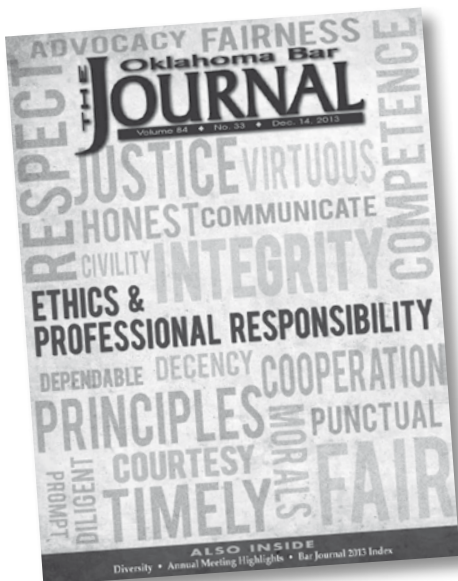


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THEME:
ETHICS & PROFESSIONAL RESPONSIBILITY
EDITOR: JOE VORNDRAN

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Year in Review: What We've Accomplished

By Jim Stuart

My year serving as your bar president is coming to an end, and I would like to reflect on the state of the OBA and what we have accomplished. First you need to know that the financial condition of your bar association remains sound. At the beginning of the year, I stated that we are only stewards of the bar's resources, and I believe the Board of Governors and bar staff have acted responsibly under the common goal of providing quality services to our members and to the public. The improvements to the Oklahoma Bar Center were completed and paid in full without any debt. We have dedicated a substantial amount of OBA resources to upgrading our technology and information systems, which should allow us to provide even better services to our members.

My theme this year has been "Oklahoma Lawyers Giving Back," the vision of which was to identify, recognize and celebrate how Oklahoma lawyers give back to their communities and to the citizens they serve. Under the leadership of the OBA Young Lawyers Division, Board of Governors and county bar presidents (with the assistance of bar staff), we were able to conduct the first OBA Day of Service on Sept. 20-21. I am pleased to report that lawyers in over 50 counties took time from their law practices to donate time and talents toward 57 community and service projects. I am proud of the success of this project — and even more proud to be a member of such a giving professional association.



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

*You have
supported my
vision and
goals during
the year —
and for that I
will be forever
grateful.*

One of the unexpected events which changed not only the bar year but more importantly the lives of citizens in the cities of Moore, Shawnee, Little Axe and El Reno, were the devastating effects of the May tornadoes. Your bar acted immediately to activate its Disaster Response and Relief Committee, and under the leadership of Chairperson Molly Aspan, some 265 lawyers volunteered to give free legal advice to more than 600 tornado victims. My appreciation to the committee members, bar staff and OBA members who once again were called upon and responded to a tragic event.

An ABA initiative that we embraced is the fight to prevent human trafficking, a despicable affront to human decency but one which unfortunately takes place in Oklahoma. Under the leadership of OBA members Jimmy Goodman, Jasmine Majid, and OBA Educational Director Susan Krug, a human trafficking seminar with CLE was presented in May to educate OBA members on how to identify and help combat such illegal activity.

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EVENTS CALENDAR

DECEMBER 2013

- 16 **Oklahoma Indigent Defense System Clinic**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Mark Widell 405-943-6457
- OBA Alternative Dispute Resolution Section meeting**; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jeffrey Love 405-286-9191
- 17 **OBA Bench and Bar Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judge Barbara Swinton 405-713-7109
- 19 **OBA Appellate Law Practice Section meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Collin Walke 405-235-1333
- 20 **Oklahoma Association of Black Lawyers meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Brittini Jagers 405-314-0611
- 24-25 **OBA Closed** – Christmas Holiday Observed
- 30 **Federal Bar Association Oklahoma City chapter meeting**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Rob Ramana 405-609-5442

JANUARY 2014

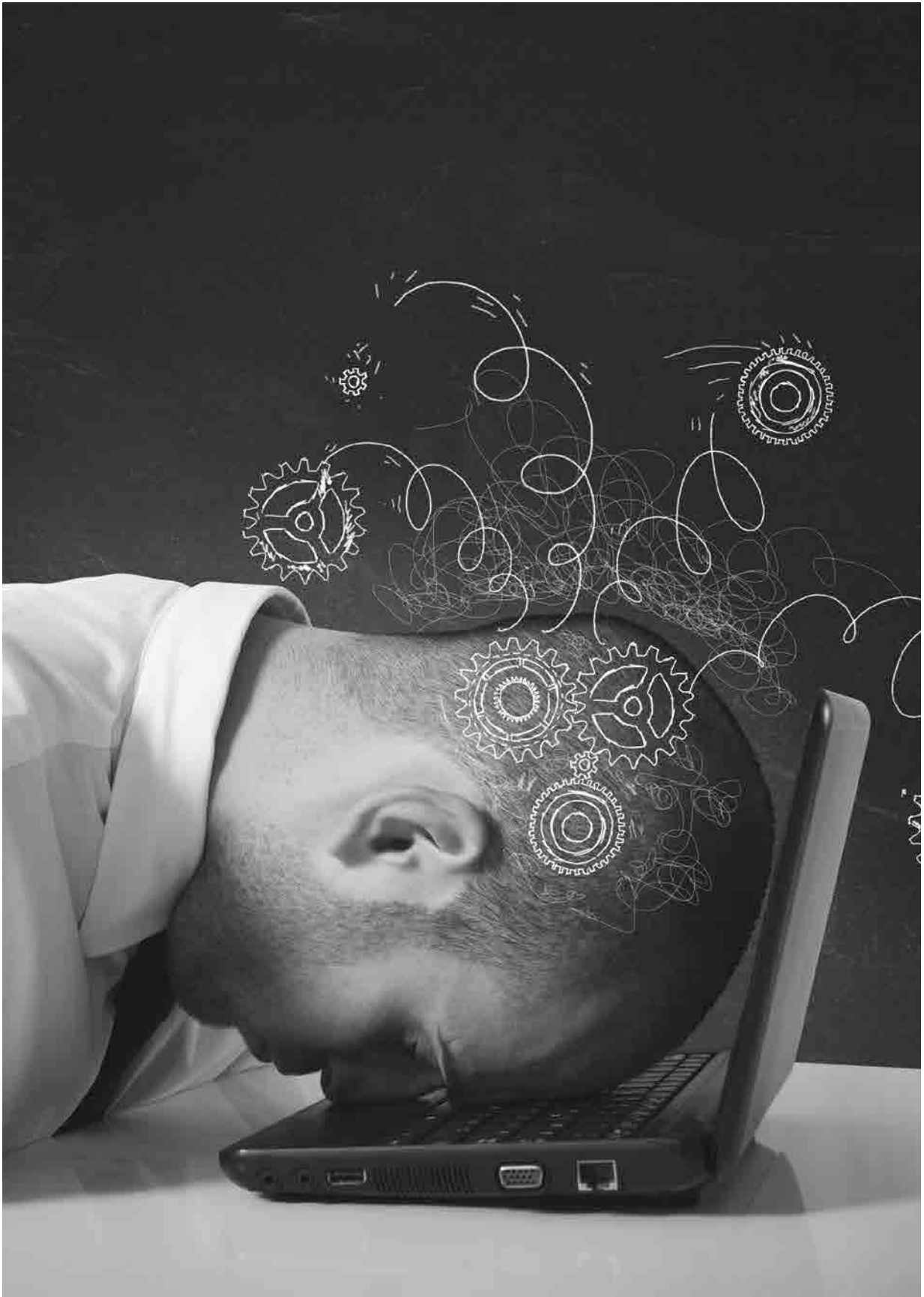
- 1 **OBA Closed** – New Year's Observed
- 7 **OBA Government and Administrative Law Practice Section meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tamar Scott 405-521-2635
- 9 **OBA Leadership Academy Class**; 11 a.m. Oklahoma Bar Center, Oklahoma City; Contact: Heidi McComb 405-416-7027
- OBA Mock Trial Committee meeting**; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Judy Spencer 405-755-1066
- 10 **OBA Board of Governors swearing-in**; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- OBA Law-related Education Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Suzanne Heggy 405-556-9612

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

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

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Reinstatement to the Practice of Law Not as Simple as You May Think!

By Gina Hendryx

After practicing law in Oklahoma for enough years to qualify for reciprocal admission, you decided to test the employment waters in the state to our south and moved to Texas. Never intending to return to Oklahoma, you voluntarily resigned your membership in the Oklahoma Bar Association. Fast forward five, 10 or even 20 years. Maybe that great Texas job isn't so great anymore; your commute to work in downtown Dallas has grown to more than an hour on a "good" traffic day, or aging parents' needs find you traveling north on Interstate 35 every weekend. The decision has been made to return to Oklahoma to live and to practice law. You need only notify the OBA that you are back and you can resume practicing law, right? Wrong! Whether you voluntarily resigned or were administratively stricken, you must make application to the Oklahoma Supreme Court and participate in a reinstatement hearing before being granted a license to return to the practice of law.

The Office of the General Counsel (OGC) investigates applications for reinstatement and represents the OBA in the proceedings before the Oklahoma Supreme Court. In these administrative reinstatement matters, the lawyer has either voluntarily resigned or was stricken from membership for failure to pay dues and/or failure to comply with mandatory continuing legal education (MCLE) requirements. To return to active membership status after being

stricken, the lawyer must comply with the provisions of Rule 11, Rules Governing Disciplinary Proceedings (RGDP), 5 O.S. (2011) ch. 1, app 1-A. Rule 11, RGDP requires a petition for reinstatement to be filed in the Oklahoma Supreme Court setting out specific information pertaining to the applicant's activities since the termination of his right to practice law. The application is then investigated by the OGC and a hearing is scheduled before the Profes-

“The entire reinstatement process can take up to a year from the time the petition is first filed until an opinion is rendered by the Oklahoma Supreme Court.”

sional Responsibility Tribunal (PRT). The burden of proof in a reinstatement matter is upon the applicant. The applicant must show by clear and convincing evidence that he possesses good moral character, that he has not engaged in the unauthorized practice of law since the date of his resignation, that he possesses the competency and learning in the law required for admission to practice law in the state of Oklahoma, and that if reinstated, his conduct will conform to the high standards required of a member of the bar.¹

After the hearing on the petition for reinstatement, the PRT files a report with the Oklahoma Supreme Court with specific findings as to whether the applicant has met his burden of proof. The trial panel's findings and recommendations are advisory in nature and the ultimate decision on a petition for reinstatement rests with the Oklahoma Supreme Court.²

The applicant is responsible for the costs associated with the petition for reinstatement. These costs include the expenses of investigating and processing the application, as well as

the cost of the original and one copy of the transcript.³ Furthermore, the applicant may incur costs of legal representation if he elects to hire counsel to represent him at the hearing. If reinstated, the applicant will be required to pay all outstanding dues and fees. The entire reinstatement process can take up to a year from the time the petition is first filed until an opinion is rendered by the Oklahoma Supreme Court. You should seriously weigh the time and money involved in a reinstatement proceeding prior to voluntarily relinquishing your law license or permitting it to be stricken because you failed to pay your dues or attend to your CLE requirements. Your interests may be better served by remaining an active member of the OBA even though practicing in another state.

1. *In the Matter of the Reinstatement of Swant*, 2003 OK 9, ¶3, 65 P.3d 275.

2. *In the Matter of the Reinstatement of Glynn*, 2013 OK 11, ¶4.

3. Rule 11.1, RGDP.

ABOUT THE AUTHOR



Gina Hendryx is the general counsel for the Oklahoma Bar Association. A licensed attorney for 30 years, she received her J.D. and B.S. degrees from OCU. She supervises a staff of 15 and serves as the association's chief disciplinary counsel. She works with the Professional Responsibility Commission and serves as a liaison to the OBA Board of Governors, OBA committees, the courts, and other local and national entities concerning lawyer ethics issues.



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Standards of Professionalism § 1.2

A lawyer's word should be his or her bond. We will not knowingly misstate, distort or improperly exaggerate any fact, opinion or legal authority, and will not improperly permit our silence or inaction to mislead anyone. Further, if this occurs unintentionally and is later discovered, it will immediately be disclosed or otherwise corrected.

Standards of Professionalism § 2.7

We understand, and will impress upon our client, that reasonable people can disagree without being disagreeable; and that effective representation does not require, and in fact is impaired by, conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious. Ill feelings between clients will not dictate or influence a lawyer's attitude, demeanor, behavior or conduct.

The OBA Professionalism Committee encourages you to review all the standards at <http://bit.ly/14ErsGp>



Ethics

& PROFESSIONAL RESPONSIBILITY

But the Secretary Did It

By Melissa DeLacerda

Lawyers all know the rules of professional conduct and the level of professionalism and competency required to practice law. But what about nonlawyer staff?

Lawyers utilize the services of nonlawyer assistants within their offices, including secretaries, law clerks and bookkeepers. Lawyers also use persons with particular expertise, including accountants, investigators, social workers and engineers, to name a few. Nonlawyers who assist lawyers in the practice of law are usually privy to confidential client information. So do the rules of professional conduct govern those individuals?

Rule 5.3 of the Oklahoma Rules of Professional Conduct sets out the lawyer's responsibility of nonlawyer assistants.

"With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a vio-

lation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The comments to Rule 5.3 provide additional guidance:

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must assure that such assistants receive appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have

legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.”

This rule places the obligation on the lawyer to manage and directly supervise nonlawyers. The lawyer is required to take affirmative steps to ensure that nonlawyers employed or retained by the lawyer or firm conduct themselves in a manner consistent with attorneys professional conduct rules.

Across the country, courts in disciplinary proceedings under Rule 5.3 have shown little sympathy for lawyers who have neglected their managerial or supervisory responsibilities. In Oklahoma the Supreme Court has ruled that the fact that a managing or supervising lawyer is victimized by the nonlawyer’s misconduct does not reduce the lawyer’s culpability under Rule 5.3.¹

The rule requires the lawyer to establish internal policies and procedures designed to provide assurance that nonlawyers will act in a way compatible with the Rules of Professional Conduct, including appropriate instruction and supervision. Ignorance of an assistant’s wrongdoing when a lawyer has failed to establish procedures to ensure that employees in the office act properly and when the lawyer has neglected to supervise their actions is no excuse to a violation of Rule 5.3.² The Oklahoma Supreme Court has held that “the work of lay personnel is done by them as agents of the lawyer employing them. The lawyer must supervise that work and stand responsible for its product.”³

In *State of Oklahoma ex rel Oklahoma Bar Association v. Mayes*,⁴ a lawyer was disciplined for a violation of Rule 5.3 for failing to make reasonable efforts to ensure that a nonlawyer assistant adhered to the lawyer’s professional obli-

“...courts in disciplinary proceedings under Rule 5.3 have shown little sympathy for lawyers who have neglected their managerial or supervisory responsibilities.”

gations. The lawyer was also found to have failed to take reasonable remedial measures. In *State of Oklahoma ex rel Oklahoma Bar Association v. Patmon*,⁵ the lawyer was disciplined for allowing a nonlawyer assistant to routinely sign the lawyer’s name and file court documents without oversight, after the assistant filed a misleading motion.

Some tasks are nondelegable to nonlawyer staff. Those tasks include:

- 1) Establishing a lawyer – client relationship
- 2) Maintaining direct contact with client
- 3) Giving legal advice
- 4) Exercising legal judgment

Maintaining client funds is another nondelegable fiduciary responsibility of the lawyer. While the lawyer may employ nonlawyer assistants such as bookkeepers and accountants to assist in fulfilling this duty, the lawyer is ultimately responsible. In *State of Oklahoma ex rel Oklahoma Bar Association v. Taylor*,⁶ a lawyer was disciplined for ratifying the conduct of his wife/office manager who improperly endorsed a client settlement check. The lawyer must provide adequate training and supervision to ensure that his or her legal and ethical obligations are met. Law firm managers must ensure ongoing oversight of a nonlawyer’s handling of client funds.⁷ With regard to client funds, “there must be some system of timely review and internal control to provide reasonable assurance that the supervising lawyer will learn whether the employee is performing the delegated duties honestly and competently.”⁸ A good faith belief in a trusted employee’s honesty and capability does not make it unnecessary to supervise the employee.⁹

In an overview of disciplinary actions around the country it is clear that Rule 5.3 applies whenever lawyers draw on nonlawyers out-

side the firm for assistance in their law practice. In addition to the in-office personnel the rule covers outside paralegals, outside service providers, foreign legal consultants, marketing consultants, investigators, computer consultants, services that store electronic information, document review services, software providers, interpreters and collection agencies hired to recover unpaid fees. Lawyers must be ever-vigilant to ensure that the basic rules of professional conduct are being safeguarded through nonlawyer employees or agents.

Areas of supervision in which the lawyer remains particularly vulnerable to the nonlawyers conduct include the following areas:

- 1) Confidentiality: Nonlawyers should be instructed not to reveal, even to their closest friends and relatives, any information that is not a matter of public record, including names and identities of clients.
- 2) Conflicts of interest: Nonlawyers should be screened to make sure that work at other firms or for other clients does not create a conflict for the attorney in the representation of his or her clients.
- 3) Dealings with clients: The lawyer must ensure that nonlawyers are supervised in their interactions with clients so that inappropriate or inaccurate advice can be eliminated.
- 4) Marketing activities: The lawyer must instruct any nonlawyers involved in mar-

keting legal services on the ethics rules governing advertising and solicitation. This includes direct solicitation as well as website content.

So if you find yourself relying on the phrase "The secretary did it," you may be in more trouble than you think.

1. *State of Oklahoma ex rel Oklahoma Bar Association v. Martin* 240 P.3d 690 (Okla 2010).
2. *Mahoning County Bar Association v. Lavelle*, 836 N.E.2d 1214 (Ohio 2005).
3. *State of Oklahoma ex rel Oklahoma Bar Association v. Braswell*, 663 P.2d 1228, 1231-2 (Okla 1983).
4. 977 P.2d 9 (Okla 1999).
5. 939 P.2d 1155 (Okla 1997).
6. 4 P.3d 1242 (Okla 2000).
7. *In re Bailey*, 821 A.2d 851, (Del. 2003).
8. *In re Cater*, 887 A.2d 1 (DC 2005).
9. *Id.*

ABOUT THE AUTHORS



Melissa DeLacerda has engaged in the private practice of law in Stillwater since receiving her J.D. with honors from the TU College of Law in 1979. The majority of her years in private practice have been as a solo practitioner with a heavy emphasis in family law. She is the author of *Oklahoma Family Law* (Vol. 4, *Oklahoma Practice Series*.) She currently serves as chairperson for the OBJ Board of Editors and was OBA president in 2003.

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What Should I Do With the Transcript Money?

By Jimmy Oliver

There are many times in the representation of a client that the client entrusts the attorney with money to purchase certain services. These services can include filing fees, service fees, transcript purchase costs and expert witness fees. This article studies what the attorney must do with those funds until the services are obtained and if the services are not obtained.

Rule 1.15 of the Oklahoma Rules of Professional Conduct¹ is the first place that the attorney can receive guidance with regard to money for expenses paid by the client. The pertinent sections of Rule 1.15 state:

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the written consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses have incurred.

So the first order of business upon receiving money for the payment of court costs, service of process fees, transcript fees, expert witness fees and the like is to hold it in an attorney trust account, unless the lawyer and the client have agreed to a different type of account. Nevertheless, the funds must always be separately maintained from the attorney's personal funds. Likewise, the funds must remain in the attorney trust account until the services for which they were paid have been obtained.

Therefore, filing fees and service fees cannot be put in the lawyer's operating account. Deposition purchase fees and expert witness fees cannot be put into the lawyer's operating account. They must be held separately in an attorney's trust account.

What can the attorney do with the funds when they are not used for the specific purpose? On occasion the transcript may not be purchased or the expert expenses may not be the amount contemplated by the client and the attorney. Sometimes the attorney fails to expend the funds originally contemplated for expenses.

es. So the question becomes how may the funds be used?

If the services are not obtained, the money may not be applied to the attorney's fees except as authorized by the client. The attorney may not use the funds for a purpose other than that for which it was entrusted. Conversion occurs when a lawyer applies a client's money to a purpose other than that for which it was entrusted to the attorney.²

In a recent disciplinary proceeding the OBA argued that the attorney who took \$1,650 to pay for the purchase of a criminal transcript and failed to do so was required to hold the transcript funds in safekeeping and promptly account for and return the money when the transcript was not purchased. The bar association further argued that the transcript funds should have been held in the attorney's trust account from the time of receipt to the time of return to the client. When the attorney's trust account fell below the \$1,650 during that time span, he had comingled and engaged in simple conversion of those funds in violation of his fiduciary duty.³

In reviewing the degree of discipline imposed upon attorneys for breaches of their fiduciary duties regarding client funds, the Supreme Court has reviewed the misconduct under three levels of culpability: "(1) Comingling; (2) Simple conversion; and (3) Misappropriation."⁴ "The degree of culpability descends from the first to the last."⁵ The Supreme Court in *Johnston* held that "Rule 1.4(b) establishes that simple conversion occurs when an attorney applies a client's money to a purpose other than that for which it was entrusted to him."⁶

In *State of Oklahoma ex rel. Okla. Bar Ass'n v. Moss*,⁷ the Supreme Court set forth numerous cases involving comingling of client funds. In *State of Oklahoma ex rel. Okla. Bar Ass'n v. Miskovsky*,⁸ the court held that where sloppy, neglectful and incompetent record keeping occurred regarding client funds, the act was not considered a theft by conversion but was serious enough to warrant an 18-month suspension from the practice of law.⁹ In the *Moss* case, the court suspended Mr. Moss for two years and one day.

So what are your choices at the end of the representation if the funds have not been spent for their specified purpose? Obviously, the first choice is to refund the funds directly to the cli-

ent. But what if the client owes the attorney legal fees for the representation?

The rules allow the client to authorize the funds being held by the attorney for a specific purpose to be used by the attorney for another purpose, which would include attorney fees. Rule 1.15 ORPC states as follows:

(f) Where funds or other items of property entrusted to a lawyer have been impressed with a specific purpose as to their use, they shall retain that specific character unless otherwise authorized by a client or third person or prohibited by law. Where funds are impressed with a specific purpose, a lawyer may not subject them to a counterclaim, set off for fees, or subject them to a lien.

To accomplish the authorization by the client, the attorney should prepare a written authorization for the client to sign allowing the funds being held for specific services to be used for attorney fees owed instead. The execution of a simple waiver in this situation avoids a violation of Rule 1.15, ORPC.

1. 5 O.S. 2011, ch.1, app. 3-A.

2. *State of Oklahoma ex rel. Okla. Bar Ass'n v. Meek*, 1994 OK 118, 895 P.2d 692, 698 (1994) and *State of Oklahoma ex rel. Okla. Bar Ass'n v. Cummings*, 1993 OK 127, 863 P.2d 1164.

3. *State of Oklahoma ex rel. Okla. Bar Ass'n v. Zimmerman*, 2012 OK 35, 276 P.3d 1022.

4. *State of Oklahoma ex rel. Okla. Bar Ass'n v. Johnston*, 1993 OK 91 ¶21, 863 P.2d 1136; *State of Oklahoma ex rel. Okla. Bar Ass'n v. Funk*, 2005 OK 26, 114 P.3d 427, citing *State of Oklahoma ex rel. Okla. Bar Ass'n v. Parsons*, 2002 OK 72, 57 P.3d 865.

5. *Johnston*, supra.

6. *Johnston* at ¶24.

7. 1990 OK 22, 794 P.2d 403.

8. 1991 OK 88, 824 P.2d 1090.

9. *Miskovsky*, at ¶41.

ABOUT THE AUTHOR



Jimmy Oliver practices law in Stillwater. In addition to family law, he works in the areas of probate, guardianship and criminal defense. After attending OSU, he graduated from OCU School of Law in 2010. He is a member of the Payne County Bar Association and the OBA Family Law and Criminal Law sections. He is a Legal Aid Pro Bono Panel member and a current member of the OBA Leadership Academy. He also volunteers as a board member of The Saville Center, a nonprofit organization that works with the legal system to reduce the trauma of children who have reported abuse.

Five Pointers for Lawyers

Five important tips for those who are just stepping out into the workforce — and some reminders for those of you who have been around a while

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Ethics

& PROFESSIONAL RESPONSIBILITY

Suicide Is Not Painless

By Anonymous

And Job spake, and said, Let the day perish wherein I was born, and the night in which it was said, There is a man child conceived... For now should I have lain still and been quiet, I should have slept: then had I been at rest.

— Job 3:3; 13

Lawyers often deal with those whose life is in crisis. Lawyers routinely wade through floods of grief, anger, bitterness, resentment — some of which inevitably is targeted at the lawyer, regardless of the accuracy of the sentiment. The challenge then is how to walk out of that flood at the end of the day rather than be swept away in its path. And yes, you can be swept away — I nearly was.

After 10 years of practice I found my life in crisis: a crumbling marriage at home, dissatisfied and angry clients at the office and financial difficulties everywhere. I began to shut down. I missed court dates and filing deadlines because I could not force myself to deal with the situation. Bar complaints followed. It got worse from there.

At present, I am no longer a member of the bar. It is my hope that I will one day be able to return to practice, and I have begun that process. Along the way, I have learned an incredible number of life lessons. The learning process has been neither convenient nor enjoyable. Please let me try to share some of those with you so that, hopefully, you can benefit from these experiences as well without having to replicate them.

SUICIDE IS NOT PAINLESS

Regardless of what the famous theme to M*A*S*H may say, suicide is not painless. I personally stared very deeply into this particular abyss a few years ago, almost too deeply. Thankfully, the conclusion I made was that suicide is the most selfish, petty, short-sighted thing one can do. By committing suicide you deflect whatever difficulties you are facing, multiply them, then force them on everyone around you; from the poor soul who must clean up your mortal remains, to the people who must finalize your business affairs, all the way through your parents and loved ones. Those who knew and cared for you, and there are many for each of us, will never quit asking themselves “Why?” and “Is there anything I could have done?” Every memory of you becomes tainted with the suicide, as it becomes impossible not to add those questions into each recollection.

An otherwise happy person does not wake up one morning and decide, “I think I’ll just kill myself today.” Suicidal thinking is a slow-acting toxin that builds up in your mental system. For me, it began in wishing that my problems would just go away. Then it devolved into wishing that

I would just go away, that is, that I would just die. “Someone just put a bullet in my brain,” I’d find myself thinking. Like Job (though I cannot claim the perfection attributed to him) I cursed the day I was born. Some nights I would go to sleep devoutly wishing not to wake the next morning. Suicide was the next ‘logical’ level of thinking. It was during this long and dark time that I came to my realization that taking my own life would mean harming or destroying those I loved. I could accept harm to myself, but ultimately I could not accept the harm that would flow to them.

What followed next was the difficult and humbling process of introspection. I came to realize that my mental state was not normal or natural. I was required to confront the root cause of the problem — in my case, mental illness — and recognize that it would not go away by itself. What has followed has been years of balancing medication, therapy and careful self-examination in order to determine a personal regimen that will allow me to be productive within the parameters of my condition. Along the way I have come to understand a few important points.

MENTAL ILLNESS IS NOT MENTAL WEAKNESS

A lawyer prizes the mind. It is the primary tool in the practice of law. It is the aspect of one’s professional life most on display. Mental illness, then, would seem to be a profession-ending flaw.

Nonsense.

The problem with that line of reasoning is that it assumes mental illness is a defect resulting in mental weakness — that the thought processes and reasoning of someone who has a mental illness are hopelessly impaired. Of course, this line of thought runs counter to human experience. The most immediate example that comes to mind is Abraham Lincoln. It is widely understood he suffered from depression, at the time described as “melancholy.” One would be hard pressed to find a serious critique of the abilities of Lincoln as a statesman, politician or lawyer. It is very likely that other notable figures in history, the legal profession and in our personal lives have suffered unbeknown to us. According to current Centers for Disease Control and Prevention estimates, between 10 and 15 percent of all adults in Oklahoma currently suffer from some form of depression.¹ Assuming that Oklahoma law-

yers fall into that average, approximately 1,750 to 2,625 members of the OBA are dealing with depression. Numerous studies suggest that depression among lawyers runs at a much higher rate than the average population.

Over time, I have arrived at the conclusion that the concepts of mental “health” and “illness” are not subject to the black and white distinction that society often will make. In fact, I have come to the personal conclusion that there are two types of people in this world; those with diagnosed mental illnesses and those with undiagnosed mental illnesses. Knowledge is power. Thus, through having my illness diagnosed, my weakness is also my strength.

The brain is an amazing organ. As the “seat of reason” it can maintain all of the complex functions of the body and, at the same time, provide for object recognition, language, abstract reasoning, creative thought, etc. But, like any other organ, it is susceptible to chemical imbalances and manipulations. A person whose pancreas does not produce enough insulin is prone to develop, or may have, diabetes. I doubt anyone would think that this person “couldn’t hack” sugar and dismiss their abilities to perform a physical task. Rather, it would be recognized that the person has certain medical and dietary needs that, if met, will make that person as capable as any other. Failure to meet these needs would result in the compromise of the person’s physical health.

Similarly, a person whose brain does not regulate serotonin and/or norepinephrine properly may experience clinical depression or bipolar disorder. These disorders affect mood, but not reasoning. While in the grips of an untreated mood disorder a person may make personal choices not in keeping with that person’s normal character. However, if that person is careful to conform to certain medical and emotional behavior standards, they are just as capable of performing mental tasks as any other person.

What evidence would support the idea that a lawyer with a mental illness does not necessarily have a profession-ending flaw in their mental faculties? The same indicators that are there for those who are not diagnosed with a mental illness: four years of college; three years of law school; and passing the bar examination. If a person is capable of the years of preparatory academic work necessary to pass the bar, then

that person possesses the mental faculties to practice. Such a person may need to reinforce that mental ability with appropriate medication and therapy in order to handle the rigors of legal practice, but the underlying ability remains.

It is interesting to note that at least one study shows that students who are academically successful are four times more likely to have or develop bipolar disorder than other, less successful, students.² If we accept the proposition that the legal profession draws upon those who have performed well academically, it would logically follow that lawyers are more likely to suffer from a mental illness. And, indeed, the numbers would appear to support this proposition. We know that lawyers have a much higher depression rate than the average population and a suicide rate that is among the highest of any profession.³

Lawyers Helping Lawyers

Crisis Counseling

The OBA offers all bar members up to six hours of free crisis or short-term, problem-focused counseling. The service is strictly confidential. For help with stress, depression or addiction, call the Lawyers Helping Lawyers hotline to be referred to a counselor in your area. The hotline is available 24 hours a day/7 days a week. Identifying participant information is not made available to the OBA and services are provided through a separate, contracted organization.

If you have a question or request that is not urgent, another option (in addition to the hotline) is to email cabaeas@cabainc.com. Responses to email will take place during regular Monday-Friday business hours.

Hotline Resources

The LHL hotline is answered by a counseling/mental health service. After-hours calls are answered by a licensed mental health professional. Calling the hotline is always the first step to receive help or information.

Call the hotline for:

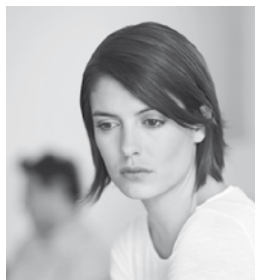
- Crisis response
- Short-term counseling
- Referrals
- Interventions
- Consultations
- Education
- Request for a LHL Committee member mentor
- Help for someone else who has a problem

GET HELP NOW

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SELF-MEDICATION IS SELF-DESTRUCTION

An all too prevalent fellow traveler with untreated mental illness is substance abuse. The pain of mental illness is very real, and one who suffers from such an illness will often attempt to mask it with some combination of alcohol, misused prescription medications or even illegal drugs. The pattern from there is as predictable as the proverbial fall from a cliff; a vicious cycle of misuse, dependency and addiction which only exacerbates the underlying issues. Of course, substance abuse does not necessarily flow from an underlying mental health issue. The results are the same regardless.

As a society as a whole, and as a profession in particular, we are likely to use alcohol to mask emotional pain.⁴ I will never forget my

law school orientation session where we were given a stern 10-minute lecture on the dangers of alcoholism in the legal profession, followed immediately by the announcement of the keg-party mixer that would be held the following day. Social drinking is often seen as a necessary part of the daily practice of law — whether in client relations or in relaxing at the end of the day. And, of course, the more difficult the day has been, the more serious the drinking becomes.

It is time to recognize exactly what this behavior entails. When you take a drink of alcohol to release tension or calm down, you are dosing yourself with a chemical substance to affect your mood. Read that last sentence again. Drinking to find emotional balance is self-medication. What is more, it is self-medication using the least effective and most destructive medicine possible. We would immediately see the folly in the chronic use of alcohol to mask the physical pain of a toothache or some other undiagnosed physical ailment. Recognize that the same is true of your emotional health.

Effective and healthy treatments for mental health issues exist. Often simple ‘talk therapy’ without medication can be tremendously effective. Modern medications, when indicated, can make dramatic changes possible in the life of a mental health sufferer. No therapy or medication is effective, however, until applied.

HELP IS AVAILABLE

The Oklahoma Bar Association sponsors a program called “Lawyers Helping Lawyers.” Note that while the OBA is the parent organization for Lawyers Helping Lawyers, it is administered by CABA Inc., an independent provider of employee assistance programs that deals with mental health and substance abuse issues in a variety of work places and professions. A call to Lawyers Helping Lawyers is NOT a call to the bar. The LHL hotline is available at all times and can be reached at 800-364-7886.

Lawyers Helping Lawyers is not simply “AA for Lawyers.” LHL is an evolving entity, which has expanded over recent years to encompass a spectrum of mental and emotional well-being issues that face lawyers today. I did not use alcohol or drugs at all, and as such felt that LHL had little or nothing to offer me a few years ago when I encountered my difficulties. At that time I may have been correct in that conclusion. This is no longer true. I have seen first-hand the tools that are available to OBA members through LHL that could have helped me to have created a much better result for myself and my clients in that troubled time of my life.

As an OBA member you are eligible for free visits with a counselor through LHL. You also are welcome to attend the discussion groups hosted by LHL in Oklahoma City and Tulsa each month. These discussion groups are a wonderful source of camaraderie and inspiration, regardless of what particular issues may be present in your life. You can ask for assignment to a mentor, a member of the OBA who has personal insight into dealing with issues like those you face. If your finances are such that you do not believe you can afford assistance, you can seek a grant from the LHL Foundation.

HAPPINESS IS A PERSONAL RESPONSIBILITY

Perhaps one of the most difficult life lessons I have learned is that I am responsible for my

own happiness. Sounds simple, right? There is a lot of work behind that simple sentence. It means that I have to be mindful enough of my own situation to identify and change the things that are not making me happy. It means that I do not allow myself to hide these things from myself with alcohol or drugs. It means I must not simply wish things were different, but must roll up my sleeves and make it so.

The same is true for you.

It is possible to operate for long periods of time in a self-destructive manner without hitting rock bottom. “Dysfunction is still functioning, but it is functioning in pain.” That is a truism that I learned from another attendee at a LHL group discussion, and it is one that resounded with me. When she said that, I realized that I indeed functioned at a certain level all those years when I was clinging to failing systems, but I was functioning in pain. Over time, the pain completely overwhelmed my ability to function and I spun out. My plea is that you realize even though you may be functioning, you may be doing so in a sea of pain. If this is true of you, learn from my experience and make the changes now that will save your clients, your family and yourself a multitude of grief.

One of the greatest sources of self-worth, fulfillment and satisfaction can be from your profession. Likewise, it can be one of the greatest sources of frustration, bitterness and depression in your life. If you find you fall more into the latter camp then it is your responsibility to make the changes that will fix the problem. If you need to make changes, I urge you to consider what LHL can do for you.

1. Centers for Disease Control and Prevention. *Current Depression Among Adults — United States, 2006 and 2008*. *MMWR* 2010; 59(38); 1229-1235.

2. MacCabe, J.H. et al. Excellent School Performance At Age 16 And Risk Of Adult Bipolar Disorder: National Cohort Study. *British Journal of Psychiatry*, Vol. 196, February 2010, pp. 109-15.

3. Tyger Latham, Psy.D., Therapy Matters: The Depressed Lawyer, *Psychology Today* (May 2, 2011), <http://www.psychologytoday.com/blog/therapy-matters/201105/the-depressed-lawyer>.

4. Debra Cassens Weiss, “Lawyer Depression Comes out of the Closet”, *ABA| Law News Now*, December 13, 2007, http://www.abajournal.com/news/article/lawyer_depression_comes_out_of_the_closet/.

ABOUT THE AUTHOR

The author is a former member of the OBA who requests anonymity for obvious reasons.

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What Happens After Practice – Tail Coverage

By Alison A. Cave

To appreciate the need for tail coverage or in more proper terminology, “extended reporting endorsement” (ERE), attorneys need to realize professional liability coverage is a claims-made policy and not an occurrence policy. A claims-made policy will provide coverage for alleged actions that occur during the time the policy is in effect — as long as a policy is still in effect covering those prior acts when the claim is made or reported. In other words, the coverage provided in a claims-made policy ends when the coverage terminates.

The significant date in a claims-made policy is the date the claim is made (first reported), not the date the incident occurred. Further, the act has to occur after the policy’s prior acts date. The prior acts date is usually the commencement date of the first professional liability policy purchased as long as there was not a gap in coverage. Professional liability policies afford coverage for one year, and in order for an attorney to have coverage in force at all times a policy must be obtained every year. Continuity of coverage is paramount in claims-made coverage. What attorneys often overlook is the potentially harmful effect brought about by what is normally a substantial interval between the alleged commission of a negligent act and the eventual first assertion of the claim stemming from the alleged negligent act.

A legal malpractice claim does not accrue until the error is discovered or should have been discovered by the client.¹ Remember, for example, a client’s minority tolls limitations

periods or an allegation the attorney fraudulently concealed the cause of action from the knowledge of the client will toll the limitations period. Depending on the facts, the limitations period could be tolled by the doctrine of continuing representation. The attorney’s potential exposure to a claim can sometimes span a number of years before the alleged negligent act gives rise to the claim. The simple fact and perhaps the simple danger is the risk of a claim being asserted long after a claims-made policy has come to an end. As indicated above, it can sometimes be difficult to predict when a client will assert they became aware of a potential negligent act and follow-up on that assertion. Moreover, considerable defense fees can be incurred in defending a claim at a time when the attorney’s disposable income may be proportionally smaller than when the attorney was actively practicing law.

An attorney can only purchase professional liability insurance while in active practice. This

“Another issue arises when the attorney decides to semi-retire and the attorney purchases a policy with reduced limits in order to save on expenses.”

poses a problem for an attorney who is preparing to go into retirement, become a judge, change firms or enter a non-legal profession, as the attorney can no longer purchase coverage if the attorney will no longer actively practice law. The policy affords the option for an ERE (tail coverage) in these situations.

What is an ERE? The purchase of an ERE is not a separate policy, rather the endorsement extends the terms and conditions of the existing policy and allows an additional period of time in which a claim may be reported to the insurance carrier. The purchased endorsement allows the attorney to report claims to the insurer after the policy has expired or been cancelled. It is imperative to note under most ERE provisions, the purchase of the endorsement is not one of supplementary coverage or of a separate and distinct policy. This means no coverage will be available for a negligent act or omission which occurs during the time the ERE is in effect. So, if for example, the attorney retired and then performed some work as a favor for a friend, there would be no coverage for that claim under the ERE.

The attorney should be aware ERE is not just important when an attorney leaves the practice of law for retirement, the judiciary or a non-legal profession, it can be important when an attorney changes law firms. Although the new firm may have a professional liability policy, the policy typically may only provide coverage for claims made while the attorney is a member of the law firm. The new firm's policy may not extend coverage for acts prior to the attorney joining the new firm.

Some attorneys who are leaving the legal profession feel there is no need to purchase ERE when they leave an established law firm. The assumption is the law firm would be named in any lawsuit and would be responsible vicariously for any claim that could be

made. This assumption may or may not be correct depending upon the factual situation presented. If the attorney has any concern about the longevity of the firm or about the likelihood the firm will continue to purchase professional liability coverage, the attorney should opt to purchase an ERE. Remember, no policy in place at the time the claim is made means no coverage.

Another issue arises when the attorney decides to semi-retire and the attorney purchases a policy with reduced limits in order to save on expenses. When the attorney retires, for purposes of the ERE, the attorney will retain the policy limits which were in place on the last policy of the attorney's career. The attorney should consider whether the premium savings on the reduced limits of liability would be worth the potential exposure in retirement. Remember, all claims reported under the ERE will be subject to the available residual limits of the last policy in force and this limit may not be enough coverage. The limits, whatever they are, are for the entirety of the ERE and will be reduced by any defense cost or indemnity payments made on behalf of the attorney.

The period in which an attorney can purchase an ERE is very limited. Most policies allow a 30-day window, which starts running on the effective date of the expiration or termination of the existing policy. This window is the only chance to purchase an ERE. When the time period expires, the opportunity is gone.

The extent of the ERE or more precisely the span of time under which a claim may be reported commonly varies from one-year, three-year or to unlimited reporting periods. The unlimited reporting period would be the most desirable, if available, particularly for attorneys who have written wills or prepared real estate documents during their practice.

Finally, should the unforeseen happen such as the unexpected death or disability of an attorney still in practice, an ERE can still be obtained. If the attorney dies, an ERE can be purchased in the name of the deceased attorney's estate if timely pursued in accord with the policy provisions. A legal malpractice cause of action can be brought after an attorney's death. The right survives resulting in the attorney's estate being named as the defendant.² Attorneys, who by nature exert substantial effort to protect their clients, should exercise the same effort on their own behalf. Best prac-

tices would be for the attorney to have written instructions to alert the heirs to the procedure and need for an ERE to protect the attorney's estate and family.

1. *Stephens v. General Motors Corp.*, 1995 OK 114, 905 P.2d 797, 799.
2. *Loveman v. Hamilton*, 66 Ohio St. 2d 183, 420 N.E.2d 1007-08.

ABOUT THE AUTHOR



Alison Cave is Vice President of Claims for Oklahoma Attorneys Mutual Insurance Company. Ms. Cave began her legal career as a law clerk with Justice Yvonne Kauger of the Oklahoma Supreme Court. She was a law clerk for the Court of Civil Appeals. She has taught legal research and writing/appellate advocacy at Oklahoma City University. She was an associate with Steidley & Neal. She was an associate with Driskill & Jones.

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Can Lawyers Be Luddites?*

Adjusting to the Modification of the ABA Model Rules of Professional Conduct Regarding Technology

By Darla Jackson

Technology affects almost every aspect of the practice of law.¹ In August 2012, the American Bar Association House of Delegates, recognizing the influence of technology, voted to amend the ABA Model Rules of Professional Conduct.² While only Delaware and the Virgin Islands have incorporated these changes into their rules,³ other states such as Massachusetts have begun the process of amending their rules or have established committees to study and make recommendations regarding the changes.⁴ As a result, legal professionals have begun to comment on how the rules changes may affect lawyers in every area and size of practice.⁵ Even those attorneys who have expressed the sentiment that they did not go to law school to learn about technology will “need to know enough [about technology] to be sure they’re not overlooking important issues.”⁶ One solo practitioner and technology consultant has commented that once attorneys have developed enough knowledge to identify important issues, they may “need a colleague or expert they can rely on” to provide additional assistance.⁷ This article focuses on some specific areas in which technological knowledge is necessary, including computer assisted legal research (CALR), e-discovery, courtroom technology and measures to ensure the maintenance of confidentiality. It also offers some suggestions regarding the availability of assistance in gaining these new skills.

MODEL RULE 1.1 AND THE MODIFIED COMMENT

While Model Rule 1.1 regarding attorney competence remains unchanged, the modifi-

cation of Comment 8 to the rule makes it clear that lawyers authorized to practice in a state adopting the new language have an affirmative obligation to acquire and maintain an

* Use of “Luddites” in the title phrase was suggested by review of Debra Cassens Weiss, “Lawyers Have Duty to Stay Current on Technology’s Risks and Benefits, New Model Ethics Comment Says,” *ABA Journal Law News Now* (Aug. 6, 2012 2:46 p.m. CDT), <http://goo.gl/uTkstf>.

awareness and understanding of developments in technology. Comment 8, as modified provides:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.⁸

Christopher Popper, a Delaware attorney, suggests that, based on Delaware's adoption of the new language in Comment 8:

[A] Delaware lawyer is now compelled to at least consider implementing certain types of technology, and whether the benefits of such technology outweigh the risks. One form of technology in that category would be legal research resources ... Research done exclusively through hard copies ... is a[n] extinct exercise in the legal profession. The benefits of cutting edge legal research resources clearly outweigh the apparent lack of any risks associated with this type of technology.⁹

LEGAL RESEARCH

As pointed out by one legal malpractice insurer, "Conduct and competence is the best risk management for avoiding malpractice claims. As the Internet has blossomed as a tool for research and conducting investigations, a lawyer not competent at CALR [computer-assisted legal research] is increasingly at risk for being found negligent when failing to find relevant authority and information on the Internet."¹⁰

The use of keyword searches by inexperienced legal researchers to locate an isolated statutory provision is insufficient. Competent CALR results only when the researcher comprehends the need to understand the context and applicability of a statutory provision.¹¹ CALR researchers need to be aware of section browsing and table of contents functions, which have traditionally been available in print and make it easier for users to develop contextual understanding. Similarly, text searching of case law is not an "adequate" means of identifying legal authority because important decisions may be overlooked by a researcher using this as a sole method of research.¹² Further, because print citation tools are now out of date before they are ever received, there is a growing

demand for access to electronic citator tools. Competent researchers must develop an awareness of the shortcomings of even these electronic citator tools¹³ and how using a table of authorities may help ensure current legal authority is being cited.¹⁴

Where should practitioners go for help with CALR? Law librarians are the experts in legal research and firm or academic law librarians may be able to provide assistance.¹⁵ Premium legal research service providers, such as Bloomberg Law, Lexis and Westlaw provide subscription-based access to treatises and other secondary sources, which provide in-depth legal research and analysis by respected authorities,¹⁶ as well as instruction on how to use their products. Finally, the Oklahoma Bar Association routinely coordinates training for conducting legal research using Fastcase or the Oklahoma Supreme Court Network at the bar association's Annual Meeting.

E-DISCOVERY

Electronic data discovery (EDD), a term often used synonymously with the term e-discovery,¹⁷ is another area often mentioned in recent discussions of technological changes affecting both the practice of law and the evolving ethical rules. Because evidentiary materials are increasingly born digital, e-discovery continues to be an area of growth. Predictive coding is a quickly developing subject in the e-discovery discussions.¹⁸ Predictive coding "is the use of computer algorithms and machine learning to conduct the review of electronically stored information (ESI)."¹⁹

The use of predictive coding has itself been the topic of ethical debate. Howard Sklar, senior corporate counsel at Recomind Inc., a leader in predictive coding services, anticipates that the use of predictive coding will become an ethical obligation.²⁰ Jim Calloway, director of the OBA's Management Assistance Program, suggests that while some anticipate that predictive coding will become an ethical obligation, others predict "ethical and malpractice horrors ahead for any lawyer who dared 'out-source' their duties to machines or non-lawyers."²¹ Yet Mr. Calloway doesn't "really see predictive coding becoming an ethical requirement" because predictive coding will "gain ... more acceptance as a business requirement long before ethics rule-making bodies have a chance to consider it."²²

The debate regarding predictive coding centers on the benefits and risks of the process. The benefits and goals of predictive coding are “accurate, cost-effective and expedited document review.”²³ The cost-effective nature of predictive coding is one of the factors that must also be considered. In determining whether the use of predictive coding is consistent with the requirement of Rule 1.5 that an attorney charge a reasonable fee and not collect an unreasonable amount for expenses, its cost-effective nature would certainly weigh in favor of its use.²⁴ However, while it may be cost-effective, even advocates acknowledge that predictive coding may not always be inexpensive or result in substantial cost savings.²⁵ In fact, while there had been support for use of predictive coding, even in smaller cases,²⁶ at least one court has recognized the limited value predictive coding may have in some cases. The court modified a previous ruling that predictive coding would be used by both parties, acknowledging that because of the small volume of documents the plaintiff would need to review, the “cost of predictive coding (to the plaintiffs) would likely be outweighed by any practical benefit of its use.”²⁷ Notwithstanding, lawyers must understand enough about technology or computer-assisted review and predictive coding to appreciate the benefits and risks.²⁸

Predictive coding is not without risks. It retains significant potential for human error because the “process is only as good as the input criteria, and a missed keyword or key concept could lead to entire categories of relevant or privileged documents being inadvertently missed.”²⁹ Although the potential for human error is also present in a manual review, there is the perception that a manual review permits a greater degree of understanding and control by the reviewing attorneys,³⁰ thereby reducing the risk that complete categories of relevant documents will not be properly identified. Under the Federal Rules of Civil Procedure, there is also the risk of sanctions for failing to produce electronic information.³¹

“Because each courtroom may have different systems, there is no guarantee that new lawyers who have received such training will end up practicing in a courtroom with familiar systems.”

Also of note is the assertion that manual review may be less likely to result in the disclosure of privileged information. Thus, there is room to question whether the use of predictive coding meets the requirement that reasonable steps be taken to protect against the disclosure of privileged material, as well as rectify errors in compliance with Federal Rule of Evidence 502³² and the newly modified Rule 1.6, which is discussed in more detail below.

How can attorneys gain adequate understanding of technology-assisted review and predictive coding? One way to start is by reading some basic text regarding the subject. For example, Reccomind’s *Predictive Coding for Dummies*, may be a starting place.³³ E-discovery treatises, including *Arkfeld on Electronic Evidence and Discovery*,³⁴ also provide an introduction. Additionally, condensed information sources, such as law review articles, on the topic are beginning to become available.³⁵ E-discovery updates, such as that provided by Brett Burney at the 2013 Annual Meeting, and vendor training webinars are also useful sources of information.³⁶

COURTROOM TECHNOLOGY

Even absent the new language in the rules of professional conduct about risks and benefits, some have reasoned that the requirement in Model Rule 1.1 that a lawyer maintain an awareness of changes in the law and its practice establishes a competency obligation for the use of courtroom technology, since use of this technology has become the standard.³⁷ The comments to Rule 1.1 regarding thoroughness and preparation can also be used as support for this position.³⁸ Notwithstanding, there are some unresolved questions and risks associated with the use of courtroom technology that must be considered. It is certainly not unusual for users of technology to experience technical problems. In such cases, should attorneys have the ability to undertake repair or be adequately prepared with a backup to meet their ethical obligations?³⁹ Even if using expensive courtroom technology increases the likelihood of the successful presentation of evidence, is the

acquisition, maintenance and use of such equipment consistent with the duty to keep fees reasonable under Rule 1.5?

Because each courtroom may have different systems, there is no guarantee that new lawyers who have received such training will end up practicing in a courtroom with familiar systems. Therefore it may be advisable to instead adapt already familiar technology to courtroom uses.

The OBA Management Assistance Program provides advice on office and courtroom technology use.⁴⁰ The OBA Law Office Management & Technology (LOMT) Section is another resource addressing mobile system courtroom technology. The 2012 OBA Technology Fair, which was held at the OBA Annual Meeting and sponsored by the LOMT Section, highlighted tools for the "High Tech Trial," featuring applications and Apple products for use in trial presentations. In May 2013, a LOMT listserv was also established to provide a forum for members of the section to request and provide assistance and advice on legal technology and other related matters.⁴¹ Finally, blogs may also explain how mobile devices, including the iPad, can be used with Apple TV, a projector and several applications to create an inexpensive, adaptable and highly-functional mobile system for courtroom presentations.⁴²

MODEL RULES 1.6 AND 4.4

Model Rule 1.6, which deals with the confidentiality of information, has undergone some change as well. The modified Rule 1.6 now includes subsection (c), which states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."⁴³ Comment 18 to Rule 1.6 has also been modified and sets forth the factors to consider in determining if a lawyer has made reasonable efforts to prevent unauthorized access to or disclosure of confidential information.⁴⁴ The ABA Commission on Ethics 20/20 report accompanying the technology-related changes to the Model Rules suggests that the change to Rule 1.6(c) was intended to clarify that lawyers have an ethical obligation not only to not reveal confidential information but to make reasonable efforts to prevent disclosure, such as might occur if the lawyer's network was "hacked" by a third party.⁴⁵

The risk of third-party attempts to access electronically stored confidential information

is increasing. One white paper indicated that law firms are increasingly targeted by cyber criminals and that firms are even more at risk for breach than financial institutions.⁴⁶ Despite reluctance of law firms to confirm the growing number of attacks, reports of security breaches of law firm networks are becoming more frequent.⁴⁷ Under the new rules, lawyers must develop competent knowledge of the risk and of the measures to prevent intrusions.⁴⁸

Similarly, Rule 4.4 and Comment 2 to the rule have been amended to provide for further protections for confidential information maintained as ESI. As modified, Rule 4.4(b) provides: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender."⁴⁹ Comment 2 then emphasizes the inclusion of metadata as confidential information.⁵⁰

The OBA Management Assistance Program as well as the Law Office Management and Technology Section listserv are excellent sources for recommendations for software that can be used to protect confidential client information by removing or "scrubbing" metadata from electronic documents. MAP and LOMT members may also be able to recommend materials or refer lawyers to experts specifically qualified to address security concerns. The ABA has established the Cybersecurity Legal Task Force, initiated programming to help lawyers and firms understand cyber threats,⁵¹ and ABA publications, including the *ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* and *Locked Down: Information Security for Law Firms*, are also offering information about procedures to help firms prevent unauthorized access to confidential client information.⁵²

CONCLUSION

While few jurisdictions have adopted the changes to the Model Rules of Professional Conduct, lawyers must act in anticipation of the changes. In the tightening profession and business of law, it is essential that attorneys "act now, if not to anticipate technological rules, then to match the experience and expectations of . . . technologically competent clients, associates, or staff."⁵³ The recent tech audits instituted by KIA Motors counsel, D. Cassey, are evidence that clients are going to insist on

counsel who can competently work with technology.⁵⁴ Similarly, Bank of America is requiring the outside law firms with which it does business to establish cybersecurity procedures and auditing firm compliance with these procedures.⁵⁵ The modified ethical rules and the expectations of clients seem to go hand in hand. Lawyers can no longer ignore technology and must develop competence with changing technology to meet the both client expectations and adapting ethical standards.

Author's note: Portions of this article were originally published in the Summer 2013 issue of *Law Library Journal*.

1. Christopher C. Popper, "Embracing Technology in the Legal Profession: Technology-Related Changes to the Delaware Lawyers' Rules of Professional Conduct" (April 2, 2013), <http://goo.gl/mFWmT3>.

2. Am. Bar Ass'n, Resolution 105A (Aug. 6-7, 2012), available at <http://goo.gl/F2i4no>. Resolution 105B also addressed changes to the ABA Model Rules of Professional Conduct regarding technology, but those changes are not the focus here.

3. Del. Supreme Court, Order Amending Rules 1.0, 1.1, 1.4, 1.6, 1.17, 1.18, 4.4, 5.3, 5.5, 7.1, 7.2, and 7.3 of the Delaware Lawyers' Rules of Professional Conduct (Jan. 15, 2013), available at <http://goo.gl/m2HLk6>.

4. Massachusetts rules changes have been proposed and comments were to have been submitted by December 2, 2013. Massachusetts Supreme Judicial Court, Notice Inviting Comment: The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct Invites Comments on Proposed Amendments to the Massachusetts Rules of Professional Conduct, www.mass.gov/courts/sjc/comment-request-rules-professional-conduct.html. Other states which have recommendations pending in their Supreme Courts or have study committees established include Alaska, Connecticut, Idaho, Illinois, Maine, Minnesota, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, and Wyoming. E-mail from Natalia M. Vera, Senior Research Paralegal, Center for Professional Responsibility, American Bar Association to Darla Jackson, Director, University of South Dakota Law Library (Aug. 6, 2013 09:44 CST) (on file with author).

5. See, e.g., G.M. Filisko, "Reality Bytes: New Rules Require You to Get with Tech Program — Like It or Not," *A.B.A. J.*, April 2013, at 27.

6. *Id.*

7. *Id.* at 28.

8. Model Rules of Prof'l Conduct R. 1.1 Comment 8 (2012) (added text in bold).

9. Popper, *supra* note 1, at 2.

10. Lawyers Mutual Ins. Co. of Kentucky, "Are You Competent in Computer-Assisted Legal Research - CALR?" *The Risk Manager*, Fall 2011, at 3.

11. See Barbara Bintliff, "Context and Legal Research," 99 *LAW LIBR. J.* 249, 260, 2006 *Law Libr. J.* 15, ¶43; Patrick Meyer, "Law Firm Legal Research Requirements for New Attorneys," 101 *Law Libr. J.* 297, 329, 2009 *Law Libr. J.* 17.

12. Ross Kodner & Jim Calloway, "How (NOT) to Commit Malpractice With Your Computer (and 'The Word Metadata Horror'): Remarks at the Solo and Small Firm Conference" (June 9-11, 2005) (presentation slides available at <http://goo.gl/eGcIm0>).

13. "Bad Law Bot determines negative case history by using algorithms, and that it is not intended to be a complete replacement for a full editorial citator or for reading all later-citing cases ... If a case has been overturned but no court opinion has cited to it yet, Bad Law Bot won't be able to find any citation signal information." Fastcase, "Meet Our Newest Team Member, Bad Law Bot!" Fastcase Blog (n.d.), www.fastcase.com/badlawbot/. See also Carol Levit & Mark Rosch, "Are All Citators Created Equal?" *Internet for Lawyers* (2012), <http://goo.gl/KrEMyx>.

14. See e.g., Alan Wolf & Lynn Wishart, "A Tale of Legal Research: Shepard's and KeyCite Are Flawed (Or Maybe It's You)," *N.Y. ST. B.A. J.*, September 2003, at 24, 30 (discussing how using a table of authorities can assist in overcoming the risk of relying on citator information).

15. Academic law libraries also often provide research guides that will provide written instruction and links to assist with research. Okla-

homa City University Law Library provides such guides called libguides via the internet, <http://law.okcu.libguides.com/index.php>.

16. Ross Kodner & Jim Calloway, *supra* note 12.

17. One e-discovery provider suggests the following meaning of the synonymously used terms: "e-Discovery, ED, Electronic Discovery, EDD, ESI, Electronic Data Discovery—whatever you call it, it's all the same. Whether it's packaged as a product, service, solution or a confusing combination of the three, quite simply put, Electronic Discovery is the collection, preparation, review and distribution of electronically stored information including emails, web pages, word processing files, databases or other ephemeral data that is stored electronically." "E-nough Already," XACT DATA DISCOVERY, www.xactdatadiscovery.com/services-electronic-discovery.asp (last visited Dec. 2, 2013).

18. In 2012, one-third of the ABA Legal Technology Survey respondents indicated that they had used or were using predictive coding; however, of those not yet using predictive coding, 28 percent indicated they would begin to do so in the next 12 months. Barry Murphy, "2012: the Year of Technology-Assisted Review in eDiscovery," *Forbes* (Jan. 17, 2012), <http://goo.gl/y8a75Y>. See also Reginald F. Davis, ed., "Computerized Review on Trial: Predictive Coding on the Rise in Courts," *A.B.A. J.*, April 2013, at 30.

19. Bill Henderson, "Predictive Coding is a Disruptive Innovation that Will Change How Law Is Practiced," *Legal Whiteboard* (Dec. 5, 2012), <http://goo.gl/PKhMnY>. Predictive coding and technology-assisted review (TAR) are terms that are also often used interchangeably, but "Predictive Coding does not equal Automated Review; it is simply one of several techniques to accomplish it." Sandra E. Serkes, "What's the Difference Between Automated Review and Predictive Coding?" *Valora Tech. Blog* (Apr. 4, 2012, 3:00 PM), <http://goo.gl/Hm4LPT>.

20. Debra Cassens Weiss, "Lawyer for E-Discovery Company Predicts Predictive Coding Will Become an Ethical Obligation," *ABA Journal Law News Now* (Dec. 6, 2012, 7:15 A.M. CDT), <http://goo.gl/n7DDCY>.

21. Jim Calloway, "Will Predictive Coding in E-Discovery Become an Ethical Requirement?" *JIM CALLOWAY'S LAW PRACTICE TIPS BLOG* (Dec. 19, 2012), http://jimcalloway.typepad.com/lawpracticetips/electronic_discovery/.

22. *Id.*

23. R. Eric Hutz, "E-Discovery: Using Predictive Coding to Manage E-Discovery Costs and Risks," *Inside Counsel* (Feb. 23, 2012), <http://goo.gl/QT7n0M>.

24. This is similar to the factors that an attorney must consider when determining whether the outsourcing of document review is consistent with the ethical requirements of Rule 1.5. See Danielle S. Fitzpatrick & Elizabeth Jones, "Outsourcing Document Review: Pros, Cons and Ethical Considerations," *Bus. Torts & RICO News*, Spring 2012, at 15.

25. See, e.g., Matt Miller, "Order Highlights Potential Costs of Predictive Coding," *Discover Ready* (March 19, 2013), <http://goo.gl/y5L7Mx>. One technology-assisted review (TAR) platform vendor, Catalyst, has developed an app that is designed to assist attorneys in determining the amount of savings that can be expected by using TAR rather than traditional review methods. Message From Catalyst: Free App Calculates the ROI of Technology-Assisted Review, *ABA Journal Law News Now*, (December 3, 2013), http://www.abajournal.com/advertising/article/free_app_calculates_the_roi_of_technology-assisted_review/.

26. See, e.g., Gary Torgersen, "The Best Litigation Support Software Tools for Predictive Coding," *DSICOVERY* (July 16, 2013), <http://goo.gl/jk8ywZ> (advocating for use of predictive coding in cases with a "relatively small data set of 50,000 documents").

27. Order, *HOA Holdings v. EORHB, Inc.*, C.A. No. 7409-VCL, 2013 WL 1960621 (Del. Ch. May 6, 2013), also available at <http://goo.gl/nlx4nS>.

28. Factors to be considered in the case-by-case analysis of the appropriateness of computer-assisted review or predictive coding include "type of case, sophistication of the parties, document volumes and types, budgets, vendor relations, and the issues to be decided..." Robert Hilson, "Bizarre Delaware Predictive Coding Saga Casts Doubt on New Technology's Viability in Small Cases," <http://goo.gl/h0IZf4>.

29. Hutz, *supra* note 23.

30. *Id.* However, when attorneys are expected to review 80 documents an hour, it is questionable if the potential for human error is actually lessened. Bruce Carton, "Document Review: When 'As Fast as I Can' Doesn't Cut It," *Legal Blog Watch* (Oct. 20, 2009, 09:56 AM), <http://goo.gl/mu2LBP>. See also Nicholas M. Pace & Laura Zakaras, Rand Corporation, "Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery" 97 (2012) (available for download at <http://goo.gl/8xft15>) (concluding that empirical research supports the assertion that predictive coding is as accurate as traditional human review in large-scale projects); Debra Cassens

Weiss, "Is Predictive Coding Better Than Lawyers at Document Review?" *ABA Journal Law News Now* (Jan. 22, 2013, 6:30 a.m. CDT), <http://goo.gl/Y2ERP6>, (noting a *Richmond Journal of Law and Technology* article stating predictive coding identifies about 77 percent of relevant documents, while human reviews find only about 60 percent).

31. See FED. R. CIV. P. 37. However, proposed changes would limit the situations under which sanctions or an adverse jury instruction would be imposed. Debra Cassens Weiss, "Will Federal Discovery Be Streamlined? Proposals Would Limit Depositions, Emphasize Proportionality," *ABA Journal Law News Now* (April 23, 2013, 5:40 a.m. CDT), <http://goo.gl/Rp9gJL>.

32. Hutz, *supra* note 23.

33. *Predictive Coding for Dummies* is available for download after registration at www.recommind.com/accelerate-your-discovery. However, it should be noted that this title has received some criticism for oversimplifying a complex topic.

34. Michael Arkfeld, *Arkfeld on Electronic Evidence and Discovery*, (3rd ed. 2010).

35. See, e.g., Charles Yablon & Nick Landsman-Roos, "Predictive Coding: Emerging Questions and Concerns," 64 S.C. L.Rev. 633 (2013).

36. "Getting it Right the First Time: Training and Certification in Predictive Coding" was sponsored by Recommind in October 2012 and the on-demand video version is available after registration at <http://goo.gl/SLP46P>. The Arizona State University Center for Law, Science & Innovation also offers an Ediscovery and Digital Conference, <http://goo.gl/BhMwWS>.

37. Michelle L. Quigley, "Courtroom Technology and Legal Ethics: Considerations for the ABA Commission on Ethics 20/20," 20 *Prof. Law.*, no. 3, 2010, at 18, 19.

38. *Id.*

39. *Id.*

40. Free phone and in-person consultations with the MAP program staff are available to address courtroom and office technology or management issues. Okla. Bar Ass'n *Management Assistance Program Services*, www.okbar.org/members/MAP/MAPservices.

41. Using the lomt@okbar.org address, members of the OBA Law Office & Management Technology Section can post questions and responses to the site.

42. Peter Summerill, "iPad Wireless Presentation," *MacLitigator* (Oct. 16, 2011), <http://goo.gl/Z2hEzy>.

43. Model Rules of Prof'l Conduct R. 1.6(7)(c).

44. Comment 18, as modified, provides in pertinent part:

The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.

Id. comment 18.

45. The report provides:

The proposal identifies three types of problems that can lead to the unintended disclosure of confidential information. First, information can be inadvertently disclosed, such as when an email is sent to the wrong person. Second, information can be accessed without authority, such as when a third party "hacks" into a law firm's network or a lawyer's email account. Third, information can be disclosed when employees or other personnel release it without authority, such as when an employee posts confidential information on the Internet. Rule 1.6(c) is intended to make clear that lawyers have an ethical obligation to make reasonable efforts to prevent these types of disclosures, such as by using reasonably available administrative, technical, and physical safeguards.

Am. Bar Ass'n Comm'n on Ethics 20/20, Report to the House of Delegates: Resolution 105A, app. to Resolution amending Rule 105A, at (August 2012), available at <http://goo.gl/6vXs0o> [hereinafter ABA Report].

46. Pricewaterhousecoopers, *Safeguarding your Firm from Cyber Attacks 3* (2012), available at <http://goo.gl/9jAsUR>.

47. Al Saikali, "Law Firms: How Are You Securing Your Clients' Information?" *Data Security L.J.*, <http://goo.gl/js6ac6> (discussing

numerous instances of cyber-attacks on law firms in 2011 and the ethical concerns involved).

48. Some firms have also begun to purchase cyber liability coverage from malpractice insurers. Oklahoma Attorney Mutual Insurance Company began to offer cyber liability and data breach endorsements to their policy holders. "OAMIC Cyber Liability and Data Breach Endorsement," Okla. Attorney Mutual Ins. Co., <http://goo.gl/QZ4PGS> (last visited Dec. 3, 2013).

49. MODEL RULES OF PROF'L CONDUCT R. 4.4(b).

50. Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer. *Id.* comment 2.

51. See, e.g., Am. Bar Ass'n, "Cyber Threats and Network Security Countermeasures: Keeping Your Intellectual Property and Secrets Safe," <http://goo.gl/SlcoEi>.

52. See e.g., Jody R. Westby, "Cybersecurity & Law Firms: A Business Risk," *Law Practice* (July/August 2013), <http://goo.gl/Xkd2AI>; recommending Sharon Nelson, David Ries, John Simek, Locked Down: Information Security for Law Firms (2013); Jill D. Rhodes & Vincent I. Polley, *The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals* (2013).

53. Joseph Jacobson & Robert A. "Tony" Ray, "Ethics Compliance Pushes Senior Lawyers into Canyon of Technological Divide," 76 *Tex. B. J.* 123, 125 (2013), <http://goo.gl/w0QbEX>.

54. Martha Neil, "Asked to Demonstrate Computer Skills, 0 of 9 Law Firms Passed In-house Hiring Test," *ABA Journal Law News Now* (May 23, 2013, 7:40 AM CDT), <http://goo.gl/4puZB0>.

55. Catherine Dunn, "Outside Law Firm Cybersecurity Under Scrutiny," *Corporate Counsel* (June 6, 2013), <http://goo.gl/UqhFI4>.

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We celebrated Law Day, the 150th Anniversary of the Emancipation Proclamation and the 50th Anniversary of Martin Luther King's "I Have a Dream" speech in Washington, D.C. The OBA Diversity Committee held its annual conference and awards luncheon, which recognized well deserving OBA members and pioneers who have led the way for equality and diversity. There is still work to be done to make ours a more diverse bar.

We had another successful Oklahoma Lawyers Helping Lawyers banquet and auction, and we were again able to raise money to assist our fellow OBA members who suffer from depression, addictions and mental health disorders. I can think of no other more important service we provide to our bar members and to the public than Lawyers Helping Lawyers. I ask for your continued support.

The OBA is a member of the Southern Conference of Bar Presidents, composed of 17 southern states and the U.S. Virgin Islands. Every year the annual conference is held in one of the member states. This year was the year Oklahoma hosted the event. A total of 137 bar presidents, presidents-elect, past presidents and bar executives came to Oklahoma City on Oct. 17-19. OBA Past Presidents Melissa DeLacerda, Cathy Christensen, Deb Reheard and David Petty worked hard along with bar staff members to accomplish what became a fantastic and memorable Oklahoma conference. The OBA benefits from membership in this conference. Members regularly share their states' experiences on the common issues and problems facing lawyers and the practice of law, such as judicial independence and funding, the effects of an aging bar and changes in how we provide legal services to the public.

APPELLATE JUDICIAL SELECTION

One issue of vital importance to the health of our judicial system, and one which must continue to be addressed, is an attack on how we select our Oklahoma appellate judges. In 1967 following an unfortunate scandal on our Supreme Court, the OBA came to support a new system based primarily on the Missouri Plan, a fair and impartial method of selecting appellate judges. It was (and is) a system not based on political views or the ability to raise large sums of campaign money, but rather a Judicial Nominating Commission composed of lawyers and a majority of non-lawyers, from different geographical parts of the state, which through a methodical vetting process submits three names of qualified Oklahoma lawyers for selection of one by the governor. This Judicial Nominating Commission format and process has worked, effectively taking partisan politics out of the selection process.

Now we are confronted by an attack on this method of appellate selection, with the possible return of direct political influence in the judicial selection process. I believe as members of the bar we have an obligation to educate the public on how we select appellate judges and why the current Judicial Nominating Commission system works. Be aware that 2014 could be a watershed year. I urge your participation and support.

This has been a special year for me and my family. You have supported my vision and goals during the year — and for that I will be forever grateful. I feel good about what we have accomplished and the direction in which we are headed. The OBA is in good hands with President Renée DeMoss and President-Elect David Poarch. Thank you again for your friendship, kindness and support. Kathy and I wish only the best for you in the coming year.



Looking Into the Crystal Ball

Advance Waivers of Future Conflicts

By Mark Kimball Blongewicz

A modern necessity of the business and ethics of law firms is the resolution of conflicts of interest, a process that can often become the source of difficult problems for practicing attorneys. That is particularly true when they seek waivers in advance for potential conflicts that, while they may be anticipated, do not yet exist. The ability to foresee and address what specific conflicts may arise in the future can be a critical component in the success of advance conflict waivers.

This article will focus on three key issues: 1) a description of advance waivers and their use in practice; 2) the challenges associated with the use of advance waivers; and 3) a discussion of several recent cases regarding advance waivers.

WHAT IS AN ADVANCE WAIVER?

Rule 1.7(a)¹ of the Oklahoma Rules of Professional Conduct (ORPC) states that, except as provided in Rule 1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- The representation of one client will be directly adverse to another client; *or*
- There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.²

Under the ORPC, clients may give consent to be represented by a firm in many instances,³ despite the existence of a conflict. Informed consent to a conflict is often referred to as a "waiver" of the conflict. Rather than simply wait for conflicts to arise and then seek waivers, many firms now seek "advance waivers" of future conflicts of interest.⁴ These advance waivers increasingly are necessary for law firms with extensive practices because the conflict of any one lawyer in a firm is imputed to every lawyer in the firm.⁵

Advance waivers are expressly discussed in Comment 22 to Rule 1.7. Comment 22 states:

Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that

might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if a client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent will ordinarily be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent will ordinarily be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under paragraph (b).

In general, in order to promote the interests of the client and counsel, an acceptable advance waiver should:

- Advise the client of his right to consult with independent counsel regarding the waiver.
- Explain the risk that counsel may not be able to exercise professional judgment fully in the client's interest.
- Advise the client of the potential consequences that may arise in the event of an actual conflict, including that counsel may need to withdraw, which may result in increased expenses and delay.
- Assure the client that all non-public, sensitive proprietary or other confidential information will remain confidential and in particular will not be accessible by lawyers at the firm who may handle matters of other clients that represent a conflict.
- Guarantee that no lawyers on the client's matter will work on matters that represent a conflict to the client.
- Explain to the client the nature of the conflicting matters and the steps taken to maintain confidentiality.⁶

In addition, commentators have suggested the following additional items as helpful for effective advance waivers: 1) The waiver, if contained in an engagement letter, should be conspicuous; 2) include a commitment from the lawyer to establish internal ethical screens; 3) the waiver is actually signed by the client; 4) do not seek to waive non-waivable or extreme conflicts; 5) include limits on the specific parties or type of matters to which it applies; 6) address existing conflicts and any specific ones that are foreseen; 7) define related and unrelated matters; and 8) specify when and how the waiver will terminate.⁷

Identifying and including specific adverse clients and specific matters that may arise will increase a practitioner's ability to predict and obtain a favorable ruling if the advance waiver is challenged. Counsel will need to strike a balance as to the specificity of the waiver in consideration of the facts of each case and the duty of confidentiality owed to all clients. Accordingly, each proposed advanced waiver should be tailored to the specific circumstances presented.

SEEKING PREDICTABILITY: CHALLENGES AND EFFECTIVENESS

There are several challenges of using advance waivers in practice. While academics and bar associations have focused on advance waivers from a litigation standpoint (*i.e.*, when are advance waivers valid and enforceable), many practitioners are left without much guidance on the business aspects of seeking such waivers. Questions arise such as how insistent the lawyer should be about the waiver and how much should be disclosed to meet the informed consent standard while, at the same, protecting confidentiality.

Many in-house attorneys who review and consider advance waiver requests resist the inclusion of an advance waiver in an engagement letter, especially a blanket advance waiver. Clients also want predictability when they consider advance waiver requests. When resisting such requests, they often point to business reasons related to what they consider unpredictable and undesirable outcomes such as the possibility of providing an advantage to a competitor or the risk of inadvertent disclosure of sensitive information. If the client does not want to consent to a blanket advance conflict waiver, alternative language may be used that requires the client to review conflicts as they

arise on a case-by-case basis and not to withhold consent in bad faith.

Additionally, there have been an increasing number of challenges to the validity of advance waivers in litigation. The question of what exactly constitutes informed consent in the particular circumstances at issue lies at the heart of almost every aspect of the advance waiver debate. Broadly speaking, waivers may be either general or specific with regard to either parties or subject matter. Thus there are four typical kinds of advance waivers:⁸

- a) specific party, specific matter;
- b) specific party, general matter;
- c) general party, specific matter; and
- d) general party, general matter.

A waiver that is specific in both client and matter would be the easiest to demonstrate the existence of informed consent if challenged, whereas a general party, general matter waiver would obviously be the most difficult. The difficulty in dealing with broad general advanced waivers has led to little consistency in how courts, academics, practitioners, and bar associations handle advance waivers, if they are even addressed at all.⁹ The Restatement of the Law (Third) does not rule out advance conflict waivers but says that they are:

subject to special scrutiny, particularly if the consent is general. A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.

On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.¹⁰

The Restatement notes that if a material change in expectations that formed the basis of the informed consent subsequently occurs, the change must be brought to the attention of the client and new informed consent obtained.¹¹ It further provides that a client may revoke its consent.¹²

In 2002 the ABA Model Rules of Professional Conduct (Model Rules) were updated and Comment 22 added to address the use of advance waivers. First, Comment 22 emphasized that the primary issue with advance waivers is the sufficiency of the client's informed consent.¹³ Second, it took the position that a client agreeing to a general subject matter waiver will tend to lack sufficiently informed consent.¹⁴ Third, it suggested a few client characteristics, often summarily referred to as client "sophistication," that might increase the informed nature of the waiver.¹⁵ The Model Rules also provide that clients are generally free to revoke consent to a conflict of interest, but the effectiveness of the revocation as to other clients depends on an analysis of various factors.¹⁶ As noted earlier, Oklahoma has adopted Comment 22 into its Rules of Professional Conduct.¹⁷

Comment 22 is vague on the issue of general subject-matter advance waivers. While it states that they will ordinarily be invalid, depending on the sophistication and the independent representation of the client, it may be found that there was valid consent.¹⁸ ABA Formal Opinion 05-436 interpreted Comment 22 as "supporting the likely validity of an 'open-ended' informed consent if the client is an experienced user of legal services," and particularly if the client had the opportunity for representation by independent counsel in connection with the waiver.¹⁹

The District of Columbia Bar Association's Legal Ethics Committee has gone even further. In the District of Columbia, advance waivers are valid, but they must comply with the standards of informed consent.²⁰ An advance waiver by a client who has independent counsel is presumptively valid.²¹ The lawyer must make full disclosure of facts of which she is aware and she cannot seek a general waiver when she knows of a specific impending adverse situation unless that specific instance is also disclosed.²² If a lawyer cannot disclose the adverse circumstance to one client because of a duty to maintain confidentiality of another client's information, the lawyer simply cannot seek the advance waiver.²³ The less specific the circum-

stances considered by the client and the less sophisticated the client, the less likely that advance waiver will be valid.²⁴ The District of Columbia Bar Association has decided that no advance waiver of conflicts will be valid in matters substantially related *even if* it is reviewed by independent counsel.²⁵

In Formal Opinion 2006-1, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics acknowledged that:

[a] law firm may ethically request a client to waive future conflicts *if* (a) the law firm makes appropriate disclosure of, and the client is in a position to understand, the relevant implications, advantages, and risks, so that the client may make an informed decision whether to consent, and (b) a disinterested lawyer would believe that the firm can competently represent the interests of all affected clients.²⁶

What is interesting about this opinion is that it leaves the door open to advance waivers of conflicts in substantially related matters so long as the attorney safeguards each “client’s confidences and secrets and . . . ensure[s] that those confidences and secrets are not used to the respective client’s disadvantage.”²⁷ This treatment of substantially related matters stands in contrast to the District of Columbia Bar Opinion which does not allow waivers in those situations.

INCREASING PREDICTABLE OUTCOMES: RECENT DECISIONS

The United States District Court for the Northern District of Texas decided a case earlier this year, holding a general advance waiver as to both client and subject-matter was valid when it was signed by a sophisticated client’s in-house counsel in a matter that was not substantially related to the matter for which the firm previously represented the client.²⁸ The court applied the stricter Model Rules rather than the more permissive Texas state ethics rules. Even so, the court concluded that when a sophisticated client is represented by independent counsel, the consent given to a general advance waiver may be considered “informed.”³⁰

The circumstances surrounding the case were as follows: Galderma retained the law firm Vinson & Elkins (V&E) in 2003 for advice on employment and benefit issues.³¹ The firm sent Galderma an engagement letter with an ad-

vance waiver included, which was agreed to and signed by Galderma’s general counsel.³²

We understand and agree that this is not an exclusive agreement, and you are free to retain any other counsel of your choosing. We recognize that we shall be disqualified from representing any other client with interest materially and directly adverse to yours (i) in any matter which is substantially related to our representation of you and (ii) with respect to any matter where there is a reasonable probability that confidential information you furnished to us could be used to your disadvantage. You understand and agree that, with those exceptions, we are free to represent other clients, including clients whose interests may conflict with ours in litigation, business transactions, or other legal matters. You agree that our representing you in this matter will not prevent or disqualify us from representing clients adverse to you in other matters and that you consent in advance to our undertaking such adverse representations.³³

In 2012 Galderma, represented by other firms, filed a patent infringement suit against Actavis, a long time client of V&E.³⁴ Upon learning of Galderma’s suit, V&E decided to terminate their attorney-client relationship with Galderma and represent Actavis in this suit. Galderma moved to disqualify V&E from representing Actavis.³⁵ The court denied that motion.

In its analysis the *Galderma* court separated the question of informed consent into two inquiries:³⁶

1. Is the information the law firm disclosed adequate for a client to form informed consent; and
2. If so, is the disclosure adequate for the particular client.

The court relied on Model Rule 1.0(e) to answer the first inquiry and identified the following three factors as critical to its analysis of the advance waiver:³⁷

1. Agreement to a proposed course of conduct;
2. Explanation about the material risks involved in waiving future conflicts; and
3. Communication of adequate alternatives to the proposed course of conduct.

In the situation before it, the *Galderma* court concluded that all three of those factors weighed in favor of finding informed consent. The waiver identified a course of conduct: V&E had broad freedom to represent clients that would result in conflicts of interest, except in cases that are substantially related to the work done for Galderma.³⁸ The waiver explained the risk: V&E could represent a client directly adverse to Galderma.³⁹ Finally the waiver identified an alternative: Galderma could choose to retain other counsel rather than V&E.⁴⁰ With these three factors satisfied, the court found that this waiver may be adequate in some situations to find informed consent.⁴¹

The second part of the analysis is whether in this particular case V&E's disclosures were adequate for Galderma. Relying on Comment 22 to Rule 1.7, the specific factors relevant to this question used by the court included the client's level of sophistication and its use of counsel independent of the firm issuing the waiver.⁴² The court noted that it makes no difference if the review of the waiver comes from an independent lawyer in the client's own legal department or from outside independent counsel.⁴³ Informed consent is an objective standard to establish if there was adequate disclosure and understanding, it does not require the client to actually intend to consent to the future conflicts that ultimately happen.⁴⁴

Galderma distinguished a contrary decision reached by a New Jersey federal court in *Celgene Corp. v. KV Pharm. Co.*,⁴⁵ a case with similar facts. The advance waiver in *Celgene* specifically outlined that the firm could participate in litigation that was directly adverse to the client.⁴⁶ Even though the waiver was reviewed and signed by the client's general counsel, the court in *Celgene* held that that was not sufficient and relied on New Jersey's stricter "full disclosure and consultation" standard that requires lawyers to inform clients of the specific details of all foreseeable areas of conflict even if they are already sophisticated.⁴⁷ In contrast to this, the court in *Galderma* noted that the Model Rules do not require additional consultation when a client is already aware of sufficient information required for informed consent.⁴⁸ Additionally, the court disagreed that an advance waiver needs to identify specific subject matters or adverse clients.⁴⁹ While that information may be helpful for proving informed consent, it is not required under *Galderma*. The *Galderma* court was careful to note that although the general

language used in the advance waiver would not be adequate in many cases, in this case it was adequate because of the client's high level of sophistication in legal matters and the use of large law firms, as well as the fact that the client's general counsel had signed the waiver.⁵⁰ This decision strengthens the value of advance waivers in Texas and may serve as a model for other courts applying the Model Rules.⁵¹

Another recent decision, *Macy's Inc. v. J.C. Penney Corp. Inc.*,⁵² upheld a trial court order which declined to disqualify Jones Day from its representation of Macy's in contract interference litigation against another firm client, J.C. Penney, based on an advanced conflict waiver signed by J.C. Penney when it had asked Jones Day to represent it in connection with some Asia trademark matters.⁵³

In defending against J.C. Penney's efforts to disqualify it, Jones Day relied on the express language of an engagement with J.C. Penney which addressed future conflicts of interest.⁵⁴ The engagement letter explained that Jones Day might represent other clients against J.C. Penney in litigation so long as those matters were not substantially related to any of our other engagement on behalf of J.C. Penney.⁵⁵ *Id.* Further, the letter sought confirmation that J.C. Penney would not attempt to disqualify Jones Day based on its representation of J.C. Penney and that J.C. Penney had been advised of and affirmatively waived any conflicts related to Jones Day's representation of it.⁵⁶ *Id.* In addition Jones Day cited New York City Formal Ethics Op. 2006-1 (2006), which specified that a law firm may seek an advance waiver from a client, even in the same matter.⁵⁷

The fact is that "Jones Day informed [Macy's] about potential conflicts, and [Macy's] waived its right to protest thereto."⁵⁸ Also emphasized by the appellate court was language in the engagement letter noting that other Jones Day clients may be business competitors of J.C. Penney with contrary business interests who might retain Jones Day in litigation or transactions "in which such client's interests are or potentially may become adverse to J.C. Penney's interests."⁵⁹ It was important to the court that the engagement letter expressly explained that Jones Day could not represent J.C. Penney unless it confirmed in writing that it was agreeable to such an arrangement and agreed to waive any conflict.⁶⁰ Finally, the court also noted that the engagement letter contained the following language: "Note that your instruct-

ing us or continuing to instruct us on this [Asia trademark] matter will constitute your full acceptance of the terms set out above and attached.”⁶¹ It had been undisputed that Jones Day continued to represent J.C. Penney on the Asia trademark issues after the engagement letter.⁶² Therefore, the court concluded that J.C. Penney had “accepted the terms of the agreement, including waiver of the alleged conflict at issue.”⁶³

If *Galderma* and *Macy’s* establish a permissive view of advance waivers then *McKesson Information Solutions, LLC v. Duane Morris, LLP*⁶⁴ sets the other end of the spectrum. Not only does this decision discuss the validity of an advance waiver, it also addresses choice of law for ethics rules, when two representations are substantially related, and when representing a corporate parent also results in representation of a corporate affiliate.⁶⁵ In *McKesson*, Duane Morris was substituted as lead counsel representing two individuals in an AAA arbitration proceeding brought against McKesson Information Solutions, LLC. At the same time, Duane Morris was also representing two other McKesson affiliates in a separate bankruptcy action. In connection with its representation of the McKesson entities in the bankruptcy matter, Duane Morris had sent an engagement letter to its client. That letter had not only sought to distinguish between various McKesson entities, but it included an advance conflict waiver.

After first undertaking a detailed factual analysis of the relationship between the various McKesson entities and concluding that they should be viewed as a single entity for conflicts purposes, the court evaluated the language in the engagement letter which Duane Morris sought to enforce as an advance waiver. It read:

Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representing parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson.

We agree, however, that McKesson’s consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson’s material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson.⁶⁶

McKesson brought a separate action in Georgia state court for the specific purpose of disqualifying Duane Morris from its representation of the individuals in the arbitration. In defending against disqualification, Duane Morris relied on the advance waiver provisions in its engagement letter. In evaluating the enforceability of the waiver specifically, the *McKesson* court held the waiver was “inadequate and thus invalid as a matter of Georgia law because it [was] not a knowing waiver that identifie[d] the specific adverse clients and details of adverse representation.”⁶⁷ Because the waiver did not “refer to any particular parties or circumstances under which adverse representation would be undertaken,” the client “could not have reasonably anticipated that [Duane Morris] would actually consider representation of the Smiths in the concurrent action where the adverse party [was] attacking McKesson Corporation products and accusing it of fraudulent conduct.”⁶⁸ To support its holding the court quoted *Worldspan L.P. v. The Sabre Group Holdings, Inc.*⁶⁹ In *Worldspan*, the waiver stated that it applied to an “adverse matter” and the court concluded that language was not sufficiently explicit to cover adverse litigation.⁷⁰ Both the *Worldspan* and the *McKesson* decisions have been heavily criticized by practitioners and academics, but they both remain good law in Georgia, at least.⁷¹

CONCLUSION

Advance waivers serve as a useful tool for firms with expansive practices. They can mitigate the risk of disqualification and set the expectations of clients, but several courts have seen them as abusive tools to enhance firm profits at the expense of the reputation of the profession. The few cases that address the issue

of advance waivers highlight the need to be aware of the “sophistication” of the client and to consider what matters courts may find to be “substantially related.” While some courts have held that waivers that are general in both subject matter and client are valid, other courts have taken a very harsh view of such waivers. Based on the aforementioned cases and ethics opinions, the standard for the use of advance waivers in practice remains less than completely clear. However, predicting a successful outcome with an advance waiver can be hopefully enhanced by using some of the suggestions mentioned here.

1. Rule 1.7(a), Okla. R. Prof. Cond., 5 O.S. App. 3. The Oklahoma Rules of Professional Conduct will be referred to and cited herein as the “Rule,” “Rules” or ORPC.”
2. Rule 1.7(a)(1-2).
3. Rule 1.7(b)(1)-(4) provides that to effect such a waiver the lawyer must reasonably believe that the lawyer can competently and diligently represent any conflicting clients; the conflicting representation must not be otherwise prohibited by law; the conflict must not put the lawyer on both sides of the same litigation or proceeding; and the consent must be “informed” and confirmed in writing.
4. Advance waivers are sometimes referred to as “prospective waivers” of conflicts of interest.
5. See Rule 1.10.
6. See PLC US Federal Litigation 6-521-3395.
7. See “A ‘Safe Harbor’ for Future Conflicts Waivers,” 29 Law. Man. on Prof. Conduct (ABA/BNA) No. 18 at 385-387, (June 19, 2013).
8. See 22 Geo. J. Legal Ethics 97, 98.
9. See William Freivogel, “Freivogel on Conflicts,” www.freivogelonconflicts.com (stating that with regard to advance waivers, “any number of things can result in such a waiver not being enforceable”).
10. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, §122, cmt. d (2000).
11. *Id.*
12. See *id.* §122, cmt. f (explaining that after a client revokes consent, the lawyer’s continued representation of others is dependent on “whether the client was justified in revoking the consent ... and whether material detriment to the other client or lawyer would result”).
13. Model Rules R. 1.7 cmt. 22.
14. *Id.*
15. *Id.*
16. Model Rules R. 1.7 cmt. 21.
17. *In re Application of the Okla. Bar Ass’n to Amend the Rules of Prof’l Conduct*, 2007 OK 22 (Okla. 2007).
18. Model Rules R. 1.7 cmt. 22.
19. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 05-436 (2005).
20. District of Columbia Bar Legal Ethics Comm., Op. 309 (2001).
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Ass’n of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-01, 2006 WL 1662501, at *5 (2006) (emphasis added).
27. *Id.*; See *Pa. Bar Ass’n Ethics Digest*, 28 PA. LAW. 53, 57 (2006) (stating that a law firm may act “adversely to the client on matters substantially related to the law firm’s representation . . . of sophisticated clients”).
28. *Galderma Labs., L.P. v. Actavis Mid Atl. LLC*, 2013 U.S. Dist. LEXIS 24171 (N.D. Tex. 2013).
29. *Id.* at 12.

30. *Id.* at 42.
31. *Id.* at 3.
32. *Id.* at 4.
33. *Id.*
34. *Id.* at 5.
35. *Id.*
36. *Id.* at 19-20.
37. *Id.* at 20.
38. *Id.* at 21-4.
39. *Id.* at 24-5.
40. *Id.* at 25-7.
41. *Id.* at 28.
42. *Id.* at 29-30.
43. *Id.* at 33.
44. *Id.* at 34-5.
45. 2008 U.S. Dist. LEXIS 58735 (D.N.J. July 28, 2008).
46. *Id.* at 2.
47. *Id.* at 33; see N.J. Supreme Ct. Advis. Comm. on Prof. Ethics, Opinion 679 (1995).
48. *Galderma* at 39.
49. *Id.* at 38.
50. *Id.* at 41.
51. See “Advance Conflicts Waiver in Retainer Allows Firm to Represent One Client Against Another,” 29 Law. Man. Prof. Conduct (ABA/BNA) No. 5 at 114 (Feb. 27, 2013) (discussing the *Galderma* decision).
52. N.Y. Sup. Ct. App. Div., 1st Dep’t, No. 10486 N, 2013 NY Slip Op. 04891 (June 27, 2013).
53. *Id.* at *1.
54. “Broad Future Conflict Waiver Saves Firm From Disqualification,” N.Y. Court Concludes, 29 Law. Man. Prof. Conduct (ABA/BNA) No. 14 at 393 (July 3, 2013) (hereafter “Broad Waivers”).
55. *Id.*
56. *Id.*
57. “Broad Waivers,” 29 Law. Man. Prof. Conduct No. 14 at 394 (a copy of the relevant portions of the Jones Day engagement letter can also be found here).
58. *Macy’s Inc. v. J.C. Penney Corp. Inc.* at *1.
59. *Id.*
60. *Id.*
61. *Id.* at *2
62. *Id.*
63. *Id.*
64. No. 2006-CV-121110 (Ga. Super. Ct., Nov. 8, 2006).
65. *Id.*
66. *Id.* at 10-1.
67. *Id.* at 11.
68. *Id.*
69. 5 F. Supp. 2d 1356 (N.D. Ga. 1998) (waiver failed to mention litigation and too remote in time; court seemed highly skeptical of such waivers).
70. *Id.* at 1360.
71. See Richard W. Painter, “Advance Waiver of Conflicts,” 13 Geo. J. Legal Ethics 289, 307 (2000) (“hardly any advance waiver would meet the criteria for specificity that Judge Moye demanded”); See also 38 St. Mary’s L.J. 859, 912.

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The High Price of an Unethical Decision

By Robert Samuel Kerr IV

Some argue an individual is born with the ability to tell right from wrong; others argue this ability is learned, and others argue that the truth lies someplace in the middle. It is my personal belief that there are acts we inherently know are wrong, and that I, along with almost all of those taking the time to read this, have the knowledge and ability to make the ethical choice when they are faced with the next important decision in the course of their legal career. I had all the necessary tools required to make the right decisions, but I ignored what I knew to be the correct option, and now I must face the consequences — the full extent of which are still unknown.

I hope this article will help others to learn from my mistake. I hope to press upon all who read this article, or will listen to my story, that there are resources to consult if you find yourself in a compromising position where you are tempted to take an unethical action. I also want my readers to understand that even if you fail to make the correct decision initially, it is never too late to begin making the right decisions. The sooner you reverse course after making the wrong decision, the better.

'WHAT NEEDS TO HAPPEN IS...'

"What needs to happen is..." Those five words changed my life as dramatically as any uttered in my direction. Even worse, those five words changed my immediate family's life forever, as my inability to maintain an ethical

course of action caused my family to become innocent victims of my actions. My series of poor decisions is all the more frustrating because I knew what I was being asked to do was wrong, yet I proceeded down the wrong path anyway. Those five words, and the further instructions which followed, led to my taking part in a conspiracy which saw a police officer receiving money to not show up for a client's Department of Public Safety driver's license revocation hearing. Six years of anguish and uncertainty has followed me and my family, and even as I write this article that anguish continues and is not wholly resolved.

Why did I, and why might other young lawyers, ignore the innate sense that what they are being asked to do is wrong and proceed accordingly? Who is best to consult for advice and

how should one proceed if asked to place their legal career in peril?

Young lawyers, be warned — a firm partner, senior attorney, supervising attorney, mentor, friend or relative, the figures you look to for guidance, may lead you to make career-ending decisions. In my personal experience, the man who spoke those five words was all of these things to me at the time. I was led astray by a man I looked to for guidance. Please don't mistake my explanation as an excuse, but rather a word of caution to other young lawyers who may find themselves in a similar position. "He told me to" is no excuse for a young lawyer to violate his oath.

Recognizing that a requested action is unethical is the easy part. The most arduous task, when faced with a career-compromising request, is reacting correctly, ethically and legally. Knowing your course of action is wrong does no good if you do not ultimately follow through and make the right choices. It is at this stage of the decision-making process that I began to stray from my moral compass. I can blame it on my youth, my strong desire to impress my mentor or my faith that he would not lead me down the wrong path. However, the bottom line is this — I knew my actions were wrong, but I still failed to act ethically.

A young lawyer must take advantage of all available tools which will help him make the correct decisions. Colleagues, contemporaries, family members and the Oklahoma Bar Association are available and should absolutely be consulted when a young lawyer is struggling with an ethical decision. I consulted none. Had I consulted even one of these suggested confidants, I know my privilege to practice law would not be in jeopardy.

Legal colleagues and contemporaries are an invaluable source of support. They are lawyers who you can consult with the protection of attorney-client privilege, and their time or experience in the profession will be commensurate with your own. Legal contemporaries will very likely provide advice and feedback which mirrors your own initial internal position on the unethical request from a superior. A handful of peers with whom I attended law

“The most arduous task, when faced with a career-compromising request, is reacting correctly, ethically and legally when doing so is difficult.”

school have become my close friends and confidants in my personal life. I severely regret not allowing this sentiment to carry over into my professional life.

Family is another source of support for a young lawyer. A spouse, sibling, parent or other family confidant will be in a good position to offer unbiased, objective advice regarding how the request from a superior is likely to affect the familial unit and

will always have your best interest at heart. A young lawyer's family will not only serve as a good sounding board but will be in the very best position to opine as to how actions could potentially affect the family — and remind the lawyer that facilitating the request could jeopardize the young lawyer's law license, ability to earn a living and reputation in the legal community, as well as the community at large. Personally, and with the benefit of hindsight, I know that my wife would have counseled me to run, not walk, away from the request made of me. One five-minute conversation with my wife would have ended my participation in unethical actions.

The OBA has an open door for lawyers seeking ethical advice. I advise all young lawyers to use this avenue when needed. The bar association will provide counsel based on hard facts as well as legal and ethical guidelines required of a member of the legal community. There is no better entity than the one that works in concert with the Oklahoma Supreme Court as it relates to lawyers' ability to continue the privilege of the practice of law in the state of Oklahoma.

Young lawyers who seek the counsel and advice from colleagues, family or the OBA are placing themselves in the best position to solidify their own internal feelings regarding the action requested of them. I, to my great regret, sought counsel from none of these confidants; therefore, I find myself in a very unique position to discuss the very real tangible consequences suffered when making the wrong decision. I took unethical actions. As a result, great — and to some extent irreparable — damage has been done to my reputation, my professional career, and my immediate family.

LIVING WITH THE CONSEQUENCES

My reputation in the legal community, the business community and the general community at large will never be the same. I have had to, and will forever continue to, try to repair my reputation and to legitimize myself. I find myself concerned that someone who meets me or hears my name will immediately associate me with the incident that gives rise to this article, and therefore believe that I am inclined to cut corners, break laws and consider myself above the rules. Who wants to deal with being considered a “corner cutter” or worse yet, someone who considers himself “above the law”?

Young lawyers or entrepreneurs fresh from law school have plenty of obstacles in their way without the concern of whether their professional reputation is intact. Young lawyers know that, despite popular notions to the contrary, lucrative jobs are not handed to them at the same time they walk across the stage at graduation. Success comes to most by way of hard work, determination and a reputation that backs up and substantiates those qualities to form a tripod of success. While I am a hard worker and very determined, I no longer have an unsullied professional reputation. Therefore, my professional tripod is, at best, lacking a stable third leg. Young lawyers need to avoid, at all cost, placing themselves in a similar position of instability.

From reputation flow consequences to a young lawyer’s professional career. In the law, there exists an even more heightened responsibility to always do what is right, ethical and legal. Lawyers will be held to a higher standard. When you engage in activities that bring your reputation into question, you must be prepared to lose your job and be forced to start anew. Personally, my actions resulted in my leaving the practice of law, instantly leaving

uncertain the way in which I made my living, fed my family and attempted to make my professional mark.

When I left the practice of law in 2007, I found myself emotionally and financially unstable. I had lost a piece of my identity as well as my ability to provide for my family. I was forced into a new career, wherein I did not have the knowledge, skill set or ability to make the money my family needed me to make to survive on our own. It has taken years to establish myself within my new industry. Trust me

when I offer that it has been a very scary journey, full of sleepless nights; however, hindsight being 20/20, I am much happier and optimistic about my future than I have ever been.

The worst consequences have been suffered by my family. This is because my family is completely blameless and devoid of fault. I failed to follow the advice I offer in this article, and did not consult them, yet made a series of decisions which affected them and will continue to affect them in the future.

My wife was forced to live in the community amongst the whispers and rumors swirling about me and my involvement in an illegal and unethical situation. Marriage is hard enough without such concerns. My children may one day be asked by their peers about their father’s actions. When they reach an appropriate age, I will provide my children with the facts surrounding my situation so they have the requisite information to adequately and accurately reply to such inquiries about their father’s past. Again, childhood and adolescence are challenging enough without parents adding such difficulties. I will never forgive myself for the unnecessary consequences my family has endured and will continue to face as a result of my poor decisions.

Have an ethics question?

Contact OBA Ethics Counsel Travis Pickens

- It’s a free member benefit.
- Inquiries are confidential.
- Most questions can be answered over the telephone.
- Questions are also accepted in writing and via email.
- More information at www.okbar.org/members/EthicCounsel.aspx

405-416-7055

800-522-8065

ethicscounsel@okbar.org

Young lawyers, please accept my advice and learn from my mistakes. If asked to engage in acts that you are not comfortable with or believe to be unethical and in direct violation of the Oklahoma Rules of Professional Conduct, stick to your guns and take all necessary actions to remove yourself from harm before it is too late. This may be more difficult than one would think. Senior or supervising attorneys are individuals we want to impress. These attorneys hold the key to the upward mobility all attorneys aspire to achieve and making the decision to refuse to comply with an unethical request from them is much more difficult than it should be.

Young lawyers who find yourselves being led by your superiors to act in a way that is unethical, illegal and in violation of their oath: please consider my story. Listen to your instincts and to the advice of your family and peers, even if it means jeopardizing your relationship with your superior or mentor. Believe me when I say that the consequences of an ethical decision are minuscule compared to those of an unethical action. All this being said, we are human. It is our nature to make mistakes. Perhaps you have already acted unethically. Perhaps, despite my warning, you will make a poor decision in the future. It is never too late to start doing the right thing, and the sooner you start ameliorating the situation you have placed yourself in, the better your chances of mitigating the consequences to which your actions have left you vulnerable. The truth may not always set you free; however, it will leave you feeling much better about the difficult and career-compromising situation in which you have placed yourself. Most importantly to me is that by coming clean to all pertinent parties — myself, my family and all law enforcement agencies involved — I placed myself in the best possible state of mind to deal with ramifications of my actions. I can only imagine the personal hell one would be in if they suppressed the truth and were unwilling or unable to be honest with themselves, their family and others.

“What needs to happen is...” are words that will forever haunt me. I knew what was being requested of me was wrong, but I failed to proceed accordingly. What needed to happen is now so much clearer in hindsight, but I chose the wrong course of action. I have paid significant consequences and the enormous question of whether I am allowed the privilege to continue practicing law remains undecided. I

implore you to take my advice seriously, and I hope that no one reading this article ever finds themselves in a similar place in their personal or professional lives.

ABOUT THE AUTHOR



R. Sam Kerr IV is a native to Oklahoma City. He received a Bachelor of Arts in letters from the University of Oklahoma in 2002. He graduated from the University of Oklahoma College of Law in 2006. He went on to practice criminal defense law for one year. He began a career in the oil and gas industry in 2007, and continues to work in the industry.



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Diversity: What Does It Mean and Why Does It Matter?

By Kara I. Smith

As chair of the OBA's Diversity Committee, I have come to better understand that diversity means different things depending on whom you ask. While the committee is charged with educating and creating opportunities where it may contribute to fostering and promoting diversity and inclusion within the legal profession, the meaning is different to various committee members.

In 2012, the committee decided to create a new opportunity. With the support of Past President Cathy Christensen and OBA leadership, it initiated its annual Ada Lois Sipuel Fisher Diversity Awards and Diversity CLE Conference. The committee applauds and thanks OBA President Jim Stuart, incoming 2014 OBA President Renée DeMoss and OBA leadership for continuing to support the committee and its annual event that seeks to recognize those who are fostering and championing diversity.

This is only the first step in embarking upon new ways to engage the members of the OBA regarding diversity. The committee does not intend to stop and plans to develop new methods of being a resource to OBA members in the area of diversity and inclusion.

During my time within committee leadership, I have been challenged in reevaluating my own perceptions about diversity and inclusion — whether the differences in the meaning among us are pros or cons, or just what diver-

sity is supposed to be, diverse. The Society of Human Resource Management (SHRM) defines diversity as "the collective mixture of differences and similarities that includes individual and organizational characteristics, values, beliefs, experiences, backgrounds, preferences and behaviors." SHRM also defines inclusion as "the achievement of a work environment in which all individuals are treated fairly and respectfully, have equal access to opportunities and resources, and can contribute fully to the organization's success."

WITHIN THE LEGAL PROFESSION

One may ask how you would apply this diversity and inclusion concept to the legal profession. I invite you to think of it from the internal perspective of diversity within the

legal profession being: having law students, lawyers and judges who are a collective mixture of differences and similarities in their characteristics (physical and non-physical), values, beliefs, experiences, backgrounds, preferences and behaviors. An inclusive legal profession is one that affords fair, respectful and equal access to

opportunities and resources which enable such diverse persons to contribute to the success of the profession itself.

While I have attempted to give diversity a meaning, the truth is that there is no *one* way to define diversity or inclusion, as diversity and inclusion within the legal profession is also



equal to the inclusion of all persons within all aspects of the legal profession, while also cultivating *within* our profession a positive commitment to accepting, respecting and valuing diverse individuals.

WHY DOES DIVERSITY MATTER?

In the American Bar Association's *Diversity in the Legal Profession: Next Steps* (April 2010), it states that "a diverse legal profession is more just, productive and intelligent because of diversity, both cognitive and cultural, and often leads to better questions, analyses, solutions and processes."

This report also articulates four rationales for diversity in the legal profession, which are: 1) A diverse bar and bench creates greater trust in the mechanisms of government and rule of law; 2) Business entities are rapidly responding to the needs of global customers, suppliers, and competitors and clients expect and at times there exists a demand for lawyers who are culturally and linguistically proficient; 3) Individuals with law degrees often give rise to civic leadership positions, therefore access to the profession must be broadly inclusive and 4) Our demographic changes call for a diverse legal profession, as the nation's racial/ethnic populations change. The Census Bureau projects that the United States will be a "majority minority" country by 2042.

Thank you to all the members of the Diversity Committee for your support and dedica-

tion. It has been a pleasure to serve as your chair!

Ms. Smith is deputy general counsel for the Oklahoma Office of Management and Enterprise Services and is OBA Diversity Committee chairperson. She can be reached at kara.smith76@gmail.com.

More Information on Diversity and Inclusion in the Legal Profession

**Institute for Inclusion in the Legal Profession
State of Diversity**
www.theiilp.com/StateofDiversity

ABA Compilation of Diversity Resources
<http://goo.gl/tuFAMj>

ABA Diversity Plans & Resources
<http://goo.gl/rStfRO>

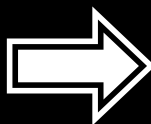
SHRM Diversity Initiatives
<http://goo.gl/Ygvom8>

**The Association for Legal Career
Professionals (NALP) Diversity
Best Practices Guide**
<http://goo.gl/koRWpH>

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www.nalp.org/diversity?s=diversity

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The Articulate Attorney: Public Speaking for Lawyers

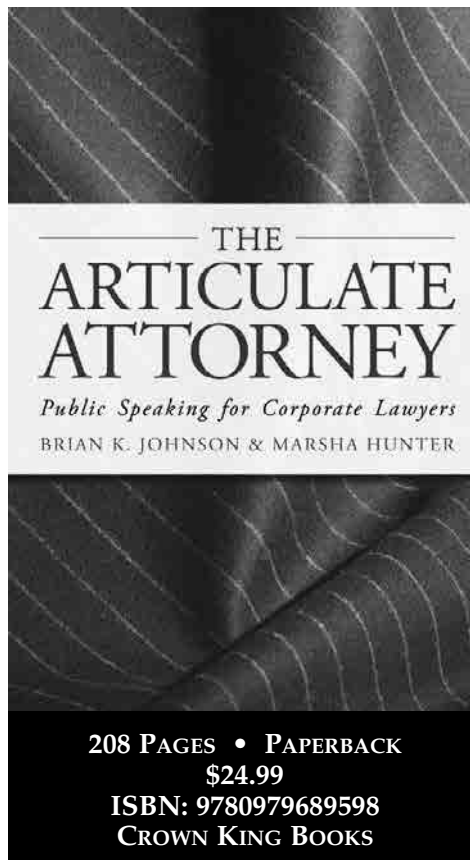
Second Edition

By Brian K. Johnson and Marsha Hunter

Reviewed by Mark H. Ramsey

Whether you are a litigator who spends some part of most days in the courtroom, or you are a transactional attorney who is called on to speak in public only rarely, *The Articulate Attorney* is a helpful guide to improving your verbal communications and — presumably — your success. First published in 2010, the 2013 Second Edition promises to be a helpful guide for attorneys whether opening or closing in court, explaining legal concepts in the boardroom or merely participating in a PTA meeting.

Brian K. Johnson and Marsha Hunter have been affiliated with the National Institute for Trial Advocacy for many years. Together they have written a helpful and readable guide for improving the way lawyers speak in public. Working with the United States Department of Justice National Advocacy Center, Mr. Johnson has trained all new assistant United States attorneys for the past decade. Working exclusively with attorneys, Ms. Hunter teaches persuasion and public speaking with an emphasis on human factors, which she describes as “the science of



human performance in high-stakes environments.”

Even if you are a terrific public speaker, *The Articulate Attorney* will be of interest to you because it explains how you are able to do the things you do so well, which may allow you to improve even more. For example, it is no surprise that public speaking involves not only interesting subjects, well prepared, but boring subjects which must be prepared in a hurry. Enhancing the speaker’s delivery is the goal through such devices as control of the speaker’s body, including posture, breathing, gestures and expressions.

Johnson and Hunter break down each of the physical elements of public speaking and explain the science behind each, along with the

reasons they are important both to speaker and audience. We all know intuitively or from experience that a speaker’s gestures can be distracting, and we all know that controlling such distractions can make a presentation effective and successful or inept and disastrous. *The Articulate Attorney* explains how and why that is so, and

offers helpful suggestions for controlling gestures, overcoming bad habits and maximizing the benefits of useful gestures.

In much the same way, the authors explain how adrenaline can affect one's perception of time thereby causing one to hurry unnecessarily, and how public speakers can control nervousness and excitement to improve their performance.

Physiology is not the only focus. The authors also provide helpful explanations to assist with "thinking on your feet," organizing and arranging your thoughts and avoiding traps and pitfalls in preparing presentations.

Other tips address organization and structure. Most writers and public speakers know that the


first and last parts of both written and spoken presentations are the most powerful. This book explains why that is so, and offers strategies for creating more "firsts" and "lasts" in a presentation by encouraging use of separate topics and sub-topics with clear markers for each.

There is also a chapter on how to practice the techniques discussed in the book, which most will likely find uncomfortable to do, along with appendices that contain helpful checklists.

Nevertheless, this book offers the reader who wishes to become *The Articulate Attorney* tools which will likely improve even the occasional public speaker's performance.

Mr. Ramsey practices in Claremore and is a Board of Editors member.

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OBA 109th Annual Meeting

CLE

Attorneys attended several educational multi-track CLE sessions on Wednesday and the Plenary session on Thursday, which featured a panel with several well-known attorneys, including Annual Luncheon speaker José Baez.



PRESIDENT'S LEGAL SUPERHEROES RECEPTION

This year's President's Reception, held Wednesday evening, was an homage to you — Oklahoma's legal superheroes.



ANNUAL LUNCHEON

On Thursday, OBA and President's Awards were presented to several of Oklahoma's legal superheroes. Following the awards presentation, Florida attorney José Baez spoke about "Why Casey Anthony was Found Not Guilty." The presentation on his high-profile case, complete with a photo slideshow of the evidence and step-by-step explanations of the court's decisions, received a standing ovation.



BOOK SIGNING

Following the luncheon, Mr. Baez did a book signing for his work, "Presumed Guilty." In addition to getting books autographed, meeting attendees were able to chat and get their photos taken with the Florida attorney.



OBA SECTIONS PRESENT THE BEST OF OKLAHOMA: ART, MUSIC, FOOD AND WINE

The Thursday evening cocktail party, sponsored by the OBA sections, featured local art, music, food and wine. Pianist Tommy Nix entertained the crowd, and more than 20 local artists displayed their spectacular work.



PRESIDENT'S BREAKFAST

The guest for Friday morning's president's breakfast was classical conductor, musician and music teacher, José Luis Hernandez-Estrada. Hernandez-Estrada brought some of his young students along to entertain the crowd while they enjoyed their meal.



GENERAL ASSEMBLY AND HOUSE OF DELEGATES

Several OBA awards were presented at this event, followed by voting on resolutions and a contested election between Member-at-Large candidates Deirdre Dexter and Jon Starr.



*View the rest of the photos at
www.tinyurl.com/photohighlights*





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Naughty or Nice?

By John Morris Williams

When I learned that the theme of this issue was Ethics and Professional Responsibility, I knew it was territory best suited for the General Counsel, Ethics Counsel and the Professional Responsibility Commission. Of course, the Professional Responsibility Tribunal and ultimately the Oklahoma Supreme Court determine these issues. Fortunately, these positions are filled with able and capable people who at times have to deal with some unpleasant business. That is the naughty part and I am thankful that I get to deal more with the nice.

This year has been a fast and fun time. Certainly in the nice category are President James T. "Jim" Stuart and his absolutely perfect wife, Kathy. Our year of "Stuartship" is a reflection of Jim's personal and professional life. Every year I learn or have affirmation of something important from the OBA president. Jim Stuart affirmed that doing the right thing in a courteous, professional and kind manner always wins the day. Thank you, Jim and Kathy, for your service and friendship.

It was nice to have so many attend our Solo and Small Firm Conference this year. We are looking forward to a change in venue. In 2014 we will be in Tulsa at the Hard Rock Hotel

and Casino. Recently, on a trip to that part of the state I went and checked out the facilities. What I saw looked really nice. We will be doing promotion after the first of the year. Look for the details and sign up!

This year we are learning a good amount about preventing human trafficking. Until we did some programming in this area, I had no idea about this horrible situation. The nice part

“...it was nice to see old friends, do association business and have a bit of fun.”

is that President Stuart and other OBA volunteers brought this subject to the fore and educated our members on what cannot be described any other way than human slavery.

The OBA day of service was another really nice part of the year. At least 50 counties and hundreds of OBA members gave of their time. The even nicer part of this event was that many of the OBA members who participated added this

event to the countless hours they already donate to their community. We have heroes among us in large supply! Thank you OBA members who everyday change the world for good.

Once again, we held the Lawyers Helping Lawyers banquet and fundraiser. Nice work Past President Cathy Christensen for your continuing work and support! The LHL Foundation and Lawyers Helping Lawyers Assistance Program Committee are just full of nice people doing good work.

As always, at the Annual Meeting it was nice to see old friends, do association business and have a bit of fun. Next year, we are going back to Tulsa. The meeting will be a day shorter and we are working on a new look and feel for the meeting. I can promise that President-Elect Renée DeMoss will give us all a nice welcome to Tulsa and plan a terrific meeting.

We embarked on a big journey to update our technology with the goal of giving OBA members a nicer online experience. At the current time we are in the implementation phase. We are planning for a spring roll out. As with all things technology, it takes longer, it costs more, and between planning and implementation something newer, faster and

better comes along. One really nice thing in this area that gives me comfort is our hard-working and tech savvy Technology Committee chaired by Past President Gary Clark. Thank you Gary and committee.

One of the nicer things I get to do is work with the OBA staff. They are nice people who care deeply about the association and the work they do. I am thankful for them not only as the executive director, but

also as an OBA member. There are a zillion other nice people and good results that I could write about this year. The space allowed and your good humor are both exhausted by now, I am sure. So....

As we bring the year to a close, things look pretty good. We have a great Board of Governors and very good group of OBA members who volunteer their time freely. The OBA ends the year with our finances in good shape, facilities in good

repair and talented and strong leadership ready to go in 2014. Nice!

The nicest of holiday wishes to you and yours.



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

FREE CLE

Call 405.249.5129 (a local call in the OKC metro)

An Introduction to Practice: The United States Bankruptcy Court, Chapter 7

Hours of CLE: The course offers six and one half (6.50) hours of continuing legal education credit upon its completion, including one (1.00) hour of ethics.
Monday, December 16, 2013.
Monday, January 6, 2014.

An Introduction to Practice: The United States Bankruptcy Court, Chapter 13

Hours of CLE: The course offers six and one half (6.50) hours of continuing legal education credit upon its completion, including one (1.00) hour of ethics.
Tuesday, January 7, 2014.

An Introduction to Practice: The United States Tax Court

Hours of CLE: The course offers six and one half (6.50) hours of continuing legal education credit upon its completion, including one (1.00) hour of ethics.
Wednesday, January 8, 2014

IRS Offers-in-Compromise and Collection Alternates

Hours of CLE: The course offers six and one half (6.50) hours of continuing legal education credit upon its completion, including one (1.00) hour of ethics.
Tuesday, December 17, 2013
Thursday, January 9, 2014

An Introduction to Individual Taxation

Hours of CLE: The course offers six and one half (6.50) hours of continuing legal education credit upon its completion, including one (1.00) hour of ethics.
Wednesday, December 18, 2013
Friday, January 10, 2014

Location: Call for the location and directions. All courses are held in Oklahoma City, Oklahoma.

CLE Credit: These courses have been approved by the Oklahoma Bar Association Continuing Legal Education Commission for mandatory CLE credit.

Tuition: These CLE courses and their accompanying materials are free. Attendees are neither solicited nor expected to make a contribution of volunteer time or money. This course is sponsored by the Low Income Taxpayer Clinic at OILS.

Cancellation Policy: Cancellations will be accepted at anytime.

Enrollment: Call 405.249.5129 (a local call in the OKC metro) and request course enrollment. Walk-ins are welcome. Bring your colleagues.

Speech Recognition – It Really, Really Works

By Jim Calloway

Interacting with a computer by verbal commands has long been a staple of science fiction from *Forbidden Planet*'s Robby the Robot to *2001: A Space Odyssey*'s HAL 9000.

Speech recognition has improved greatly over the years. It has been a usable tool for some time now. The last few months, it has worked for me much better than ever before. Often a relatively small thing can make a big difference. I decided to cover speech recognition this month because I hope that some of you may benefit and start using speech recognition more effectively yourself after you hear about the small change that made such a difference for me — especially if you are not a speedy typist.

I wrote about speech recognition for lawyers previously in a Feb. 12, 2011, *Oklahoma Bar Journal* article titled "Speech Tools for Lawyers in 2011,"¹ and in a Sept. 2, 2006, *Oklahoma Bar Journal* article titled "'Computer, Can You Hear Me Now?' One Lawyer's Surprisingly Positive Experience with Speech Recognition Software."²

In the 2011 article, I wanted to make readers aware that Dragon NaturallySpeaking 10 was greatly improved over the earlier versions. I also wanted

to report on the Dictamus app that allowed an iPhone to function like the hand-held recorders that many lawyers have used, with playback and rewind features. I mentioned that there were several virtual transcription services where raw dictation could be emailed for an individual to transcribe it. I also noted that I had never really liked using headsets, and the Samson Go Mic was working better for me than a headset.



Blue Snowball Microphone

But there have been several developments since then. The Dictamus app (by JOTOMI GmbH) is now available for Android phones in the Google Play Store as well as for iPhone and iPads in the iTunes store. (The Android

version is 1.1.6 and has only received 11 reviews to date. So there may be updates ahead.)

Dragon NaturallySpeaking Premium is now in Version 12 at www.nuance.com. The premium version costs \$199.99, but when I checked the website it was on sale for \$149.99. I had recently received an email solicitation as a current owner to purchase an additional copy for \$99.99. When version 12 is installed and allowed to check for upgrades, it will be upgraded to version 12.5 at no extra cost. It remains my strong recommendation to buy the premium version and not the lesser home edition or the more expensive professional or legal editions.

But my great, new personal upgrade was quite unintentional. Sharon Nelson and I have been recording our *Digital Edge: Lawyers and Technology* podcast since 2007.³ This year our host for the podcast was changed to the Legal Talk Network (LTN).⁴ The fine folks at LTN wanted better audio quality from my side of the podcast, and after I failed to respond to their hints to buy a better microphone, a package from LTN was delivered to me containing a Blue Snowball microphone⁵ and something called a pop diffuser⁶ to place between me and

the microphone. The podcast sound quality did improve.

I was quite pleased with my new acquisition — a professional-looking microphone on a tripod. I decided to try using my new microphone with DragonDictate NaturallySpeaking. To me, the results were amazing. First of all, my accuracy seemed to improve. It was already very accurate, but I believe that the larger, higher quality microphone caused some improvement. But the primary improvement was that I was able to dictate more conveniently and so I dictated more frequently.

I had been using my Samson Go Mic. I would park it clipped to the top of my laptop screen and pick it up and hold it close to my mouth to use for dictation, so I often wouldn't use it for a shorter email (and I often still don't dictate short emails). When I would use the laptop for a county bar presentation or take it home to do some work, I often would be in a hurry upon my return and not set up the Samson Go Mic, so I would revert back to my old habits.

DragonDictate NaturallySpeaking has this really nice feature — you can leave it on all day. When you don't want to use the software, you tell it to "go to sleep." When you want to use the software, you tell it to "wake up," and you can start dictating. So without having to load software or grab the microphone, I can just turn to my laptop, give the "wake up" command and start dictating. If I get a phone call or just want to think for a moment, I can tell it to "go to sleep" as often as I wish. Your office may be noisier than mine, and this may not work

as well for you, but I can now easily dictate with the microphone sitting two feet away from me.

I'm not endorsing this particular microphone or approach. As the saying goes, your mileage may vary. But I'm very grateful to the folks at Legal Talk Network and was actually a bit surprised when a Google search informed me that this microphone only costs about \$50.



Samson Go Mic

USING DRAGONDICTATE NATURALLYSPEAKING

First of all, I have been using it for years, and so a lot of the commands are pretty natural for me. But any lawyer should be able to pick them up in an hour or so. For example, when it gets a word wrong, I merely tell it to correct that word and it presents me with a menu of alternatives. Usually the word I intended to use is the first one on the list, and I am able to substitute that word by saying "choose one." Rarely is the word not on the list, but if it is not, I can spell it and it will add that word to its vocabulary associated with the way I spoke the word.

Training with DragonDictate NaturallySpeaking is pretty simple. You just read a few

paragraphs; but it is critical that you allow the software to review your documents and the sent items in your email program on your computer, so that it learns what types of words you use. The very first time I used the word TECHSHOW, Dragon knew to put it in all capital letters. It also got a bunch of scarcely used technology terms correct the first time I used them because it had reviewed my writings on my computer. But I had certainly never used the word "diffuser" before and it got it right the first time when I was dictating this column.

I can dictate a phrase like a book title and then tell it to select the entire phrase and say "cap that." It will then capitalize the first letters of all the words selected; yet it "magically" knows not to capitalize words like "of" and "the."

Two monitors are much better for using Dragon NaturallySpeaking because the toolbar does take up a little real estate at the top of the screen. The Dragon sidebar is also very helpful for beginners, but you will probably want to keep it minimized most of the time as it also takes up quite a bit of space.

Be assured that you will make mistakes and at some point you will forget to tell it to "go to sleep," and you will find an entire telephone conversation transcribed into the middle of a brief or contract. If someone else is in the room and they begin talking, you may find that you don't get any meaningful results at all from dictation.

continued on next page

IMPORTANT TIPS

- 1) Make backup copies of your individual speech user profiles frequently. We are all familiar with the need for good backup processes. But with speech recognition software, it constantly updates the profile. At some point, if your recognition accuracy decreases greatly, you may just want to restore the profile from a couple of months previously.
- 2) Make a different profile for every setting. If you have a laptop and take it home to do dictation, you will want to set up a separate profile. Mine is "Jim at home." The acoustics for different rooms will, in my experience, confuse the software and decrease accuracy. If you find yourself dictating in an unfamiliar or one-time location, then when you close the software, be sure and tell it **not** to update the user profile.
- 3) Likewise, if you had a head cold one day or just have a day of poor dictation accuracy, tell it **not** to update the user profile at the end of the day when you turn it off. There is no reason to update with what may be bad data.
- 4) Dragon NaturallySpeaking is a resource hog. If

leaving it on all the time impacts your computer's performance, you may need to add more memory or buy a nice new computer.

- 5) Proofreading a speech recognition-generated document is a bit different than normal proofreading. There are no misspelled words, but there will be a few words inserted that sound like what you said. Sometimes they are harder to pick out.

There is a lot more to this software than I am covering here. I wanted this column to be short and readable.

I do think all of us are going to be using speech recognition a lot more in the future. Many lawyers tell me how they love using Siri to dictate short emails and text messages on their iPhones. I still frequently do voice searches on my iPhone with the Google app, even though my family has requested me not to do that around them in public because "it is just embarrassing."

The Google Chrome browser will now respond to an "Ok Google" voice command to do Google searches thanks to a new "Voice Search Hotword extension" that's available to download now from the Chrome web store.⁷ You can also use it to set reminders and do a few other things. It is

handy to have a quality microphone easily available for that purpose as well.

I wouldn't want you to get the wrong idea about my Samson Go Mic. While I do not use it to do dictation anymore, it is still a handy item for my traveling computer bag as a backup microphone for the headset.

But for me the bottom line is that I have a great new "toy" that has improved my productivity – and it's not even Christmas yet!

If you decide to try the Snowball microphone, feel free to share your results with me by email.

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. It's a free member benefit!

1. 82 *Oklahoma Bar Journal* 389 (Feb. 12, 2011) <http://tinyurl.com/kv7s38j>.

2. 77 *Oklahoma Bar Journal* 2485 (Sept. 2, 2006).

3. I had forgotten that the first edition of the podcast actually covered speech recognition. It is still online at http://www.americanbar.org/content/dam/aba/multimedia/law_practice_management/200710_digital-edge-speech-recognition.mp3.

4. <http://legaltalknetwork.com/>

5. http://reviews.cnet.com/microphones/blue-microphones-snowball-professional/4505-6469_7-33769467.html

6. I only use the pop diffuser for podcasting, not for dictation.

7. <https://chrome.google.com/webstore/detail/google-voice-search-hotwo/bepbmhgboaolgfdajaanbcjnmhnmhfn>

A Time of Transition

By Travis Pickens

It is a time of transition in our profession in so many aspects — technology, court filings and discovery, communications, advertising, models of law practice, multi-jurisdictional and multi-national practices and so on. Some young lawyers may see this as interesting and exciting; some older lawyers may see this as far less interesting and perhaps threatening.

And as changes come, the laws of lawyering will change as well. It is important to be aware of what our Supreme Court may ultimately consider as potential changes to our own *Oklahoma Rules of Professional Conduct*.

First, some background. In 2009, anticipating the rapid rate that technology and globalization would transform the practice of law, then ABA President Carolyn Lamm charged a newly formed “Ethics 20/20” panel with looking at the Model Rules of Professional Conduct to determine what changes should be made to the rules and related comments. After a three-year study, the panel returned with resolutions for the ABA House of Delegates, which reviewed them and passed changes in August 2012 and February 2013. The changes to the ABA Model Rules of Professional Conduct are now being reviewed by the OBA Rules of Professional Conduct Committee to determine

“Competence was changed to make it clear that a lawyer’s duty includes staying abreast of technology changes...”

what changes should be proposed for adoption in Oklahoma.

Here is a quick summary of some changes in the ABA model rules that should be of interest to all lawyers — those pertaining to attorney competence and confidentiality.

COMPETENCE

Comment 8 of Rule 1.1

Competence was changed to make it clear that a lawyer’s duty includes staying abreast of technology changes as well as the related benefits and risks to our legal practices.

That sounds reasonable, but some say no change is necessary because such knowledge is an implicit factor in determining competence. Others say it is time to embrace not the future, but the present, and explicitly eliminate the tired excuse of ignorance of any technological tools more advanced than a fountain pen and legal pad.

CONFIDENTIALITY

Rule 1.6

Confidentiality of Information was changed to add that a lawyer “shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.” Comment 16 (now 18) was changed to identify factors to determine “reasonableness,” such as sensitivity of the information and the associated cost of the precautions.

This was done in acknowledgement of new ways, constantly and rapidly developing, to store and use information and documents. One such way is cloud computing, the focus of several recent ethics opinions in other states. Expect a cloud computing ethics opinion to be issued in Oklahoma sometime in 2014.

Rule 1.6 was also changed to provide further directions as to how and what merging firms or a lawyer moving to a new firm could disclose to address the conflicts of interest that may be created by the move or merger and to allow that information to be shared prior to the move in order to avoid an expensive and client-damaging mistake. Two new comments were added, explaining that disclosure should include the identity of the persons or entities, a brief summary of the

general issues involved and whether the matter is ongoing, nothing more. Regardless, the disclosures should not be made if the attorney-client privilege would be compromised or the client otherwise prejudiced.

As tempting as it may be to pretend that the changes now are more dramatic and rapid than in years past, I am not sure that is true. Every time in the modern age is a "time of transition." The first law office I worked for in 1983 still had "mag card" memory typewriters. That is a long way from a pocket-sized smart phone/computer with a voice-recognition app.

IMPUTATION OF CONFLICTS

Rule 1.10 Imputation of Conflicts of Interest: General Rule was amended to allow screening when a lawyer moves from one private law firm to another. Provided that the attorney's new firm follows the screening procedures listed in the new rule (no access by, no participation by and no fee to the lawyer), the new firm does not need the former client's consent. The former client must be notified and afforded an opportunity to confirm compliance, a review procedure before a tribunal must be available and the new firm and the lawyer must certify as to compliance.

Most say this rule change has been a long time coming. They point out that increased lawyer mobility occurs with every generation of lawyers, and the career opportunities of many lawyers — both younger and older — are being needlessly stymied, especially troubling in economic downturns. Further, former government lawyers have enjoyed the career benefits of screening procedures when moving into private practice for years; it is time for lawyers in private practice to have those benefits as well.

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

What was your favorite issue of the Oklahoma Bar Journal this year?

Tell us on Facebook!

www.facebook.com/oklahomabarassociation



Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Monday, Oct. 7, 2013.

COMMUNICATIONS COMMITTEE RECOMMENDATION TO UTILIZE EXCESS FUNDS

Committee Chair Dick Pryor via telephone reviewed the committee's recommendation to utilize funds designated for consumer topic pamphlets accumulated over several years to equip the OBA Communications Dept. with the ability to produce videos. The committee had submitted an itemized list of items needed. When asked about staff's ability to produce video, Communications Director Manning said despite the department's heavy workload that video is quickly becoming the preferred communication medium, and the department needed to make time to create videos for the OBA website. Administration Director Combs clarified that the excess funds were currently available. The board approved the expenditure of up to \$20,282 to purchase the items needed for video production. Governor Smith said he thought there is still a need for the printed consumer pamphlets, and he asked the Communications Committee not to eliminate them completely.

REPORT OF THE PRESIDENT

President Stuart reported he attended the September board meeting, Board of Governors

Day of Service project in Oklahoma City, Pottawatomie County Day of Service project at Youth & Family Resource Center in Shawnee, Women in Law Conference luncheon at UCO, swearing in of new OBA lawyers, Tulsa County Bar Association 110-year celebration, Southern Conference of Bar Presidents planning meeting, Annual Meeting planning meeting and human trafficking seminar meeting. He also did a TV interview with OETA regarding law schools.

REPORT OF THE VICE PRESIDENT

Vice President Caudle reported he participated in the September board meeting, joint OBA/OBF Day of Service Project at Love Link Ministries in Oklahoma City, OBF-sponsored dinner event in Emerson Hall for OBA governors, OBF Trustees and staff, Day of Service project in Lawton for District Nine and Southwest Oklahoma Legal Aid at the New Directions Women's Shelter, Board of Editors meeting in Stillwater and Clients' Security Fund Committee meeting. He also assisted Governor Meyers in coordinating the planned board meeting in Lawton, which had to be cancelled.

REPORT OF THE PRESIDENT-ELECT

President-Elect DeMoss reported she attended the board's September meeting, Day of Service projects, Tulsa County Bar Association open house and dinner event for its

110th anniversary celebration, Women in Law Conference, Women in Law Committee meet and greet in Tulsa, joint dinner event with the OBF, OBA Litigation Section meeting, TCBA Legally Pink event, OBA Budget Committee meeting, OBA Diversity Committee event planning and sponsor-seeking, OBA Law Schools Committee meeting and planning meetings for 2014.

REPORT OF THE PAST PRESIDENT

Past President Christensen, unable to attend the meeting, reported via email she attended the September board meeting and Day of Service project in Oklahoma City. She met with an ABA advisor on a project contemplated by President-Elect DeMoss, continued planning for the SCBP and worked with Executive Director Williams on LRE projects.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended or participated in the Board of Governors service project at Love Link Ministries, Oklahoma County Bar Association service project, meeting with Family Law Section to discuss trial college, planning meeting for Southern Conference of Bar Presidents meeting, Tulsa County Bar Association 110-year celebration, swearing-in of new lawyers, Supreme Court conference regarding amendment of Rules Creating and Controlling the Oklahoma Bar

Association and Rules Governing Discipline relating to conflicts of interest of members of the Board of Governors, Professional Responsibility Commission members and Professional Responsibility Tribunal members, staff meetings regarding the new association management system and 50-year membership pin reception for Phil Hurst in Sulphur. He also reported the Supreme Court approved the rule changes as submitted.

BOARD MEMBER REPORTS

Governor Dennis reported he participated in planting trees in the Big Peoples Park in Antlers, which was the Pushmataha County Day of Service project. **Governor Drummond** reported he attended the Oklahoma County Bar Association's service event at the Children's Center in Bethany and the Sulphur event at the new Artesian Hotel honoring Phil Hurst for 50 years of OBA membership. He attended the swearing in of new lawyers as a board member but also to observe the oath taken by his daughter, Joy Tate. He also prepared the Legal Ethics Advisory Panel annual report. **Governor Farris** reported he attended the Tulsa County Bar Association board meeting and helped with a Day of Service project by building memorial flag boxes for families of deceased servicemen. **Governor Gifford** reported he participated in Oklahoma County Bar Association Day of Service planning meetings in addition to attending the Oklahoma County board of directors meeting and Day of Service work session. **Governor Hays** reported she attended the September Board of Governors meeting, joint OBA/OBF Day of Service project at Love Link Ministries in Oklahoma City, OBF- spon-

sored dinner at Emerson Hall, OBA Professionalism Committee meeting for which she prepared the minutes, Tulsa County Bar Association 110-year celebration open house and party, TCBA "Legally Pink" rally and TCBA board of directors meeting for which she presented a report on Board of Governors activities. She participated in planning for the Women in Law Conference and OBA Family Law Section Annual Meeting seminar. She also conducted the Women in Law Conference and prepared the OBA Family Law Section budget report. **Governor Jackson** reported he attended the September board meeting, Garfield County Bar Association monthly meeting and participated in the Board of Governors Day of Service project. **Governor Meyers** reported he attended the September board meeting, Comanche County Bar Association meeting and the county bar's Day of Service activities. He also worked on plans for hosting the board for a meeting in Lawton, which was cancelled because of the U.S. government shutdown. **Governor Pappas** reported she attended the September board meeting, September Payne County Bar Association meeting and Women in Law Conference. She went back to stripe The Emerson School parking lot on the north side of building, which was originally planned for Day of Service but got rained out. **Governor Parrott**, unable to attend the meeting, reported via email she participated in the Oklahoma County Bar Association Day of Service planning meetings, coordinated the Children's Center project, attended the work session at the center, helped arrange the Board of Governors service project at Emerson School and worked at Love

Link Ministry in a joint project with the OBF Foundation. Governor Smith reported he attended the September Board of Governors meeting. **Governor Stevens** reported he attended the September board meeting, OBA budget meeting, October Cleveland County Bar Association meeting, Board of Governors Day of Service project, joint OBF-BOG dinner and the county bar's Day of Service project, which was a blood drive for the Red Cross. **Governor Thomas** reported she participated in the Washington County Bar Association Day of Service project. Scott Buhlinger presented a program to inform seniors about the importance of having some basic documents in their estate and long-term plan. She said 13 lawyers committed to providing follow-up services with free 30-minute personalized office consultations and drafting documents unique to each senior in attendance.

COMMITTEE LIAISON REPORTS

Governor Hays reported the Women in Law Conference was well attended, and she announced the Mona Lambird Spotlight Award recipients. She reported TU has offered to host the event in Tulsa next year. She said the Professionalism Committee is running ads in the *Oklahoma Bar Journal* reminding members of the rules that must be followed. She said the committee plans to hold a symposium next year. She shared details about the "Legally Pink" events held in Tulsa County this year and said it was their goal to conduct events promoting breast cancer awareness on the first Friday in October every year and to expand the idea to other county bar associations. Governor Drummond reported a Legal

Ethics Advisory Panel special committee is meeting regarding a pending opinion on cloud computing. Another pending opinion is regarding military representation. He said the panel is also working on giving bar members better access to legal ethics opinions.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the Supreme Court unanimously approved the amendments to rules relating to conflicts of interest of members of the Board of Governors, Professional Responsibility Commission and Professional Responsibility Tribunal representing a lawyer in proceedings

of the PRT and PRC. She also reported new case management software will be implemented in the Office of the General Counsel within the next 30-60 days. She said the majority of district attorney offices and tribal courts are using this same software.

INSURANCE

Executive Director Williams reviewed the history of the OBA's relationship with Beale Professional Services. He explained that the trust will cease to exist at the end of the year as a result of health care changes and that a new exchange will be created for OBA members. Aetna is no longer providing that coverage.

UPCOMING EVENTS

President Stuart reminded board members that the Board of Governors swearing-in ceremony has been set for Friday, Jan. 10, 2014.

NEXT MEETING

The Board of Governors met at the Sheraton Hotel on Nov. 13, 2013, and at the Oklahoma Bar Center in Oklahoma City on Dec. 13, 2013. A summary of those actions will be published after the minutes are approved. The next board meeting will be held Saturday, Jan. 11, 2014, at the Sheraton Hotel in Oklahoma City.



Oklahoma Workers' Compensation Court

1915 North Stiles Avenue · Oklahoma City, OK · 73105
210 Kerr State Office Building, 440 South Houston · Tulsa, OK · 74127
405-522-8600 · OKC918-581-2714 · TU · 800-522-8210 · In-state Toll Free

NOTICE OF PUBLIC HEARING ON PROPOSED CHANGES TO WORKERS' COMPENSATION COURT RULES

The Oklahoma Workers' Compensation Court invites public input on proposed changes to its Court rules. The Court will hold a public hearing per 85 O.S., Section 303(D) **on Wednesday, December 18, 2013 at 2:30 p.m. at the Workers' Compensation Court's Tulsa location, 210 Kerr State Office Building, 440 South Houston, Tulsa, Oklahoma.**

All comments and suggested revisions (including a brief statement of need and proposed wording) should be submitted in writing to Judge Owen T. Evans, Workers' Compensation Court, 210 Kerr State Office Building, 440 South Houston, Tulsa, Oklahoma 74127 or to Tish Sommer, Special Counsel, Workers' Compensation Court, 1915 North Stiles Avenue, Oklahoma City, Oklahoma 73105; or sent electronically to CourtRulesComments@owcc.state.ok.us. Written comments will be accepted by the Court until 5:00 p.m. on **December 17, 2013.**

Copies of the proposed rules changes are available for viewing at the Workers' Compensation Court's offices in Oklahoma City and Tulsa. The proposed changes also are available online at:

www.owcc.state.ok.us/Whats_new.htm

A Letter of Gratitude

Dear Oklahoma Bar Foundation Fellows, Community Fellows and friends:

The holiday season is a time of celebration, reflection and appreciation for family, friends, clients, colleagues and our legal profession. As I reflect on my year as president of the Oklahoma Bar Foundation, one word comes to mind: gratitude. I am grateful for my year as OBF president and have appreciated the opportunity, alongside the other OBF executive officers and Board of Trustees, to fulfill the OBF mission — lawyers transforming lives through the advancement of education, citizenship and justice for all.

Throughout 2013, the OBF attained many milestones. This past year, the OBF celebrated its 67th anniversary, making it the third oldest bar foundation in the United States. This year also marked the 35th anniversary of the

OBF Fellows Program, first introduced at the OBA Annual Meeting in 1978. Since that time, the endowment of the OBF has grown significantly through the implementation of mandatory interest on lawyer trust accounts (IOLTA) in 2004, annual Fellow contributions and other donations. In addition, in 2013 the Court Grant Program, which was started in 2009 through a *cy pres* award, celebrated five years of grant-making with total court grants awarded to 31 Oklahoma district courts for courtroom computers, sound systems, Wi-Fi, video systems, court-reporting and other technology equipment.

This past year also marked the completion of the OBF's multi-year project to launch its new website, www.okbarfoundation.org. The website allows online contributions to the OBF, online payment of Fellow dues and contains up-to-date information about the

OBF and its programs. Please take a moment to review and bookmark the website on your computer.

As lawyers in our state are aware, IOLTA revenues flow directly to the OBF and historically have been a major source of funding for the foundation. In the height of higher interest rates on lawyer trust accounts, IOLTA revenues in the mid-2000s provided the OBF with the opportunity to make grants to law-related charities across the state, totaling more than \$1 million annually.

With the extended low-interest rate environment predicted by the Federal Reserve to remain near zero through the end of 2014, the IOLTA revenues for the OBF are down more than 80 percent. The fallout from this reduction in funding has resulted in OBF grants totaling around \$460,000 this year —



The Oklahoma Bar Foundation honors The Garrett Law Center of Tulsa (left) and the OBA Family Law Section with the very first prestigious new 2013 OBF Community Fellow Patron plaques during the OBA Annual Meeting.

including court grants and scholarships. Grants are down from the high of over \$1 million in 2007.

To maintain charitable support our grantees rely on to meet the growing demands for law-related services, the OBF has worked to identify new sources of fundraising. These efforts by the OBF board led to the 2013 inception of the OBF's Community Fellows Program for county bar associations, law firms, OBA sections, banks, corporations and other organizations. The program gives non-individual donors the ability to participate collectively as a group and receive recognition as an annual Community Fellow. The pro-

gram has three levels of giving: Patron (\$2,500 or more per year); Partner (\$1,000 - \$2,499 per year) and Supporter (\$250 - \$999 per year). We believe the Community Fellows Program will grow to become one of the stalwart components of the OBF budget in future years through the generous support of our numerous organizational partners who are signing up to work with the OBF to achieve its mission.

What is true about families in general is also true about the Oklahoma Bar Foundation and the Oklahoma Bar Association...*we are better together*. The OBF is the charitable arm of the OBA; and every year, the OBF and OBA work collab-

oratively on many programs. The OBA and OBF share a building, but also so much more, and the OBF is grateful for its long and continuing relationship with the OBA. Many OBF Trustees are current or former officers, Board of Governors members or active OBA committee members.

Further, the OBF and OBA staff members, headed by the OBF's dedicated, experienced and wonderful executive director, Nancy Norsworthy, and the OBA's executive director, John Morris Williams, work hard to keep both boards on track to fulfill our missions. In September, the OBF Board of Trustees and the OBA

Tributes and Memorials

A simple and meaningful way to honor those who have played an important role in your life or whose accomplishments you would like to recognize.

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 notify your tribute or memorial recipient 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.

Help the OBF meet its ongoing mission - 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

Or if you prefer, please make checks payable to:

Oklahoma Bar Foundation P. O. Box 53036 Oklahoma City OK 73152-3036

Email: foundation@okbar.org • Phone: 405-416-7070

The OBF respects the privacy of donors and will not sell or share your personal information.

Board of Governors jointly participated in the OBA Day of Service project in support of President Stuart's "lawyers giving back" initiative, which was followed by a joint meeting and dinner for our boards. The OBF is the charitable heart of the OBA, and a "lawyer giving back" is what every Fellow of the OBF does each time he or she writes a donation check. Together the OBF and the OBA, along with our members, Fellows and friends, can achieve more than either organization ever could alone.

Finally, a significant benchmark achievement for the OBF in 2013 was surpassing the \$11 million threshold for total grants made since the OBF came into existence. *Take a moment to think about that.* Over the course of its history the OBF — through the dollars donated by lawyers like you

and me — has given away over \$11 million dollars to organizations like Legal Aid, Oklahoma Lawyers for Children, Tulsa Lawyers for Children, teen court, domestic violence support and counseling organizations, mock trial competitions and many others. We estimate that OBF grants impact the lives of more than 90,000 Oklahomans each year; meaning that over the course of OBF's history of grant-making, the lives of millions of Oklahomans have been touched and improved. Lawyers and Fellows, acting in partnership through the OBF, make a difference!

I hope the OBF makes you proud to be a part of the Oklahoma bar. If you are not currently an OBF Fellow, please join over 1,700 Oklahoma lawyers by becoming a Fellow. If you have completed your ini-

tial pledge as a Fellow, please become a Sustaining or Benefactor Fellow, and continue your support for the OBF's charitable causes of promoting justice, providing law-related services and advancing public awareness and a better understanding of the law.

Thank you for a great year and best wishes from the Oklahoma Bar Foundation for a healthy and prosperous 2014.

With gratitude,



Susan B. Shields
2013 OBF President

Ms. Shields is OBF president and can be reached at susan.shields@mcafeetaft.com.



2013 OBA Board of Governors and OBF Board of Trustees complete its Day of Service Project during September.



Give online at www.okbarfoundation.org or send checks payable to Oklahoma Bar Foundation, P.O. Box 53036, Oklahoma City, OK 73152-3036

End Nears for Another Successful Year

By Joe Vorndran

The holiday season is upon us, as is the time of year when we all begin to evaluate the successes and failures of the previous 11 months. I hope that each of you finds that the good far outweighs the bad and is able to look toward 2014 with renewed vigor. As I conclude my time as chair of the YLD, this process is particularly bittersweet. While I am somewhat relieved to regain a significant portion of my time, there is no doubt that I will miss the position — particularly the daily interaction with the OBA and my fellow young lawyers. It has been a wonderful ride, and it is with great pride that I report that the YLD enjoyed great success again this year.

When President Stuart announced that community service would be the focus of his year as OBA president, YLD leadership decided very quickly that our concentration would be to assist in this very important statewide initiative. I am happy to report that the OBA Day of Service was a huge success and would not have been possible without the countless hours of hard work provided by YLD members. I want to personally

thank each of you who participated in this event.

In addition, the YLD continued its annual projects geared toward welcoming new lawyers to the profession. The YLD once again prepared and passed out bar exam survival kits to everyone taking the bar exam, provided a reception immediately following each

“It has been a wonderful ride, and it is with great pride that I report that the YLD enjoyed great success again this year.”

swearing-in ceremony and hosted multiple networking events for young lawyers throughout the state.

These accomplishments are the result of the hard work of many, and I would be remiss if I did not thank some of them by name: The YLD Board of Directors, who showed amaz-



2013 YLD Chair
Joe Vorndran

ing flexibility and grace as we maneuvered through some early challenges; Brandi Nowakowski for her efforts in coordinating the OBA Day of Service; President Jim Stuart for his unwavering support; John Morris Williams for his steadying advice; and last but not least, Jennifer Castillo, Kaleb Hennigh and LeAnne McGill for their counsel, encouragement and friendship. I will be forever grateful to each of these persons and to the OBA for the opportunity that I have been given to serve the YLD.

Mr. Vorndran practices in Shawnee and serves as the YLD chairperson. He can be reached at joe@sdtlaw.com.

Lawyers Devote Time, Talent to Service in 2013

During 2013, OBA President Jim Stuart has made it his priority to encourage all Oklahoma lawyers and law firms to give back to their communities. Two recent large-scale projects demonstrated the warmth and generosity of OBA members during the holiday season.

Lawyers Fighting Hunger, for the fourth year in a row, brought together 60 different law firms and other community groups to help less fortunate Oklahomans. This year, the group raised more than \$70,000 to purchase frozen turkeys for low-income Oklahomans. More than 5,000 families in Oklahoma City, El Reno, Mustang and Norman received Thanksgiving turkeys and food boxes to complete their holiday meal.

In Shawnee, the West Law Firm donated hundreds of coats to those in need through a partnership with the local Salvation Army. The coats will be desperately needed during the upcoming winter season, with temperatures expected to often plunge below freezing over the next few months. Since the coat program's inception in 2009, more than 600 coats have been given to those in need. The program was the subject of a recent feature story in the *Shawnee News-Star*.

Although the OBA's 'Year of Stuartship' concludes this month, it is hoped that OBA members will continue to be inspired by the goodwill and big hearts of the lawyers who served their communities so well in 2013.



Volunteers Critical to OBA Success

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



OBA members David Bernstein, Noble McIntyre and Kara McBride along with several Norman firefighters distribute turkeys to needy families at the Bernstein Law Office on Nov. 22, one of five turkey giveaways that took place in November.

Shawnee lawyer Brad West (left) and Donna Rogers present the West Law Firm's donation of hundreds of winter coats to Shawnee-area Salvation Army Lieutenants Elaine and Philip Canning. Photo credit: Ed Blochowiak, Shawnee News-Star.

OBA Holiday Closings

The Oklahoma Bar Center will be closed Tuesday, Dec. 24, and Wednesday, Dec. 25, for the Christmas holiday. In addition, the bar center will close Wednesday, Jan. 1, 2014, for the New Year's holiday.



Heroes Program Celebrates Third Anniversary

The Oklahoma Lawyers for America's Heroes Program celebrated its third anniversary on Veterans Day and is still going strong. Take a look at how we are doing, and sign up to assist an Oklahoma service member at www.okbar.org/heroes/volunteer.



New OBA Board Members to Take Oath

Nine new members of the OBA Board of Governors are set to be sworn in to their positions Jan. 10, 2014, at 10 a.m. in the Supreme Court Ceremonial Courtroom at the State Capitol. Officers set to take the oath and their new positions are Renée DeMoss, Tulsa, president; David Poarch, Norman, president-elect; and Susan S. Shields, Oklahoma City, vice president.

To be sworn into the Board of Governors to represent their judicial districts for three-year terms are John W. Kinslow, Lawton; James R. Marshall, Shawnee; Kevin T. Sain, Idabel; and Deirdre O'Neil Dexter, at large, Sand Springs.

To be sworn into one-year terms on the board are Jim Stuart, Shawnee, immediate past president; and Kaleb Hennigh, Enid, Young Lawyers Division chairperson.



MCLE Deadline Approaching

Dec. 31 is the deadline to earn any remaining MCLE credit you need for 2013 without having to pay a late fee. Not sure how much credit you still need? You can view your MCLE transcript online at my.OKBar.org. You can also pay dues online and register for any CLE you still need. Check out great fall offerings at www.okbar.org/members/CLE! If you have questions about your credits, email mcle@okbar.org.



Lawyers Helping Lawyers Resources Available for OBA Members

Relaxation is something everyone can use after the hectic holiday season and lawyers are no exception! Make plans to attend one of the Jan. 2, 2014, meetings of the monthly Lawyers Helping Lawyers discussion groups, when “Mindfulness/Relaxation” will be the featured topic. The discussion groups take place in Oklahoma City and Tulsa the first Thursday of each month. Each meeting 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 to Kim Reber, kimreber@cabainc.com, are encouraged to ensure there is food for all.

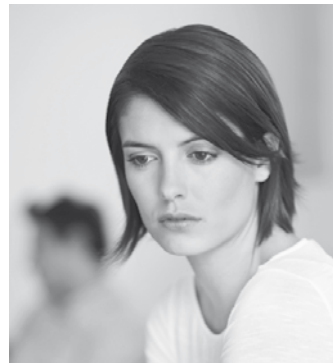
Is holiday stress or any other mental health or substance abuse issue already taking a toll? Help is just a phone call away. The OBA crisis counseling hotline is open 24 hours a day, seven days a week. All calls are strictly confidential. Call toll free 800-364-7886.

GET HELP NOW

Depression • Addictions • Relationships

800.364.7886 day or night

All calls are kept strictly confidential



Relocation Notice

The U.S. Attorney’s Office in Muskogee has relocated and all correspondence should be sent to:

U.S. Department of Justice
United States Attorney’s Office
Eastern District of Oklahoma
520 Denison Ave.
Muskogee, OK 74401

OBA Member Reinstatement

The following member of the OBA suspended for nonpayment of dues or noncompliance with the Rules for Mandatory Continuing Legal Education has complied with the requirements for reinstatement, and notice is hereby given of such reinstatement:

Mark Edward Heidenreiter
OBA No. 22591
9728 S. 70th E. Ave.
Tulsa, OK 74133

OBA Member Resignations

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

Michael Joe Stancampiano
OBA No. 8549
241 Bluebird Lane
Bayfield, CO 81122

Patrick Welsh Willison
OBA No. 9706
1509 Jefferson St.
Paducah, KY 42001

Daniel Thomas Zemke
OBA No. 20381
Law Office of Daniel T. Zemke
P. O. Box 2603
Telluride, CO 81435

Marc R. Stimpert
OBA No. 18147
201 Spear Street, Suite 1100
San Francisco, CA 94105

Kudos

Mary Ellen Ternes, a shareholder with McAfee & Taft, has been elected by the Fellows of the American College of Environmental Lawyers to its board of regents for a three-year term. The ACEL is a professional association of lawyers drawn from private practice, academia, government and not-for-profit organizations who have practiced in the field of environmental law for at least 15 years.

The ABA recently appointed Crowe & Dunlevy attorney **André Caldwell** to the Leadership Fellows Program of its Section of Litigation for the 2013-14 year. The program provides lawyers in underrepresented groups with opportunities to participate in leadership roles within the section of litigation. As a leadership fellow, Mr. Caldwell will be working in a leadership capacity in the Trial Evidence Committee and Diversity and Inclusion Committee.

Gov. Mary Fallin has appointed **Robert H. Gilliland Jr.**, a trial lawyer with McAfee & Taft, to serve on the newly created Oklahoma Workers' Compensation Commission. The three-member commission, which was established following the passage of the state's land-

mark workers' compensation reform law, is responsible for overseeing Oklahoma's new administrative system that goes into effect Feb. 1, 2014. Gilliland was appointed to a four-year term, effective Nov. 6, 2013.

The OCU School of Law recognized several bar members with alumni awards. **William J. "Bill" Shdeed** received the Justice Marian P. Opala Award of Lifetime Achievement and **Vicki Z. Behenna** was honored with the Distinguished Law Alumna award. The law firm of Pierce Couch Hendrickson Baysinger and Green LLP received the Law Firm Mark of Distinction.

Assistant U.S. Attorney for the Western District of Oklahoma, **Robert Don Gifford**, has been named the OBA Criminal Law Section 2013 Professional Advocate of the Year as a prosecutor. The award for the prosecutor of the year is recommended by the defense bar.

Sharon Voorhees has been reappointed by Gov. Mary Fallin as a commissioner for the Oklahoma Community Service Commission. The commission administers the funds for AmeriCorps in the State of Oklahoma. Ms. Voorhees has served as a commissioner since 2002. She was elected commission chair and served in that capacity for the year 2013, and was re-elected to serve as chair for the year 2014.

On The Move

Thad Balkman has been appointed by Gov. Mary Fallin as Cleveland County district judge, taking over for the remainder of Judge Tom Lucas' four-year term. Judge Balkman will be on the ballot for a four-year term in 2014.

Heron, Fox & Trout PC announces **Patrick R.B. Sherry** has been made partner in the firm. Mr. Sherry's practice focuses on general civil litigation defense with an emphasis on healthcare defense. He graduated from Georgetown University Law Center in 1999.

Karl F. Hirsch, John R. Morris and Donald F. Heath Jr. announce the formation of a new law firm, Hirsch, Morris & Heath PLLC, located at 100 Park Ave., Suite 400, Oklahoma City. The main focus of the firm is within the oil and gas industry with additional emphasis in federal and civil litigation, general corporate business, real estate, trusts and wills. Mr. Hirsch graduated from the OU College of Law in 1978 and focuses his practice on oil and gas, natural resources and real estate. Mr. Morris received his J.D. in 1980 from OU and focuses his practice on commercial and oil and gas litigation. Mr. Heath earned his J.D. from OU in 1982 and focuses his

practice on oil and gas title examinations and oil and gas transactions.

Rebekah L. Guthrie and **Lorena Rivas Tiemann** announce the opening of their new office, Law Offices of Guthrie & Rivas PLLC, located at 2326 S. Garnett Road, Suite F, Tulsa. They practice primarily in the area of immigration and may be reached at 918-949-3565.

Titus Hillis Reynolds Love Dickman and McCalmon announces **Alex F. Trinidad** and **Casper J. den Harder** have joined the firm as associates. Mr. Trinidad holds a B.S. in business administration from OSU and earned his J.D. from OU. Mr. den Harder holds a B.A., M.S. and J.D. from TU. He was an editor of the *Tulsa Law Review* and was awarded the Order of the Barristers and the Order of the Curule Chair.

Pray Walker announces **William B. Jones** and **Kaycee R. Spears** have joined the firm as associates. Mr. Jones will practice in the areas of business, corporate, real estate and labor and employment law. He holds a J.D. from Notre Dame Law School where he served as editor of the *Notre Dame Journal of Legislation* and the *Journal of International and Comparative Law*. Ms. Spears will focus her practice on energy law and oil and gas title examinations. She is a graduate of the OU College of Law where she received numerous awards including the American Jurisprudence Award in legal research and writing.

Crutchmer & Barnes announces that **Grayson M. Barnes** and **Jaklyn K.**

Garrett have joined the firm as associate attorneys. Mr. Barnes earned his J.D. from the OU College of Law in 2013 where he was listed on the dean's honor roll and received the American Jurisprudence award for Professional Responsibility. While in law school, he attended the Summer Oxford Program and worked in the OU legal clinic. He graduated with a B.B.A. from OU in 2010. His practice will focus on oil and gas law. Ms. Garrett earned her J.D. from the OU College of Law in 2013 where she served as business development editor for the *American Indian Law Review*. She is a member of Phi Delta Phi and the Order of the Coif. She is a recipient of the American Jurisprudence Awards for torts I, torts II, constitutional law, litigation skills, insurance law, civil clinic, American legal history and the Larry Siria Community Service Award. She graduated *summa cum laude* with a B.A. in letters in 2010 from OU and was a member of Phi Beta Kappa Honor Society. Her practice will focus on oil and gas law and title examination.

Phillips Murrah announces **Nicholle Jones Edwards** has joined the firm and will chair its new family law practice. Ms. Edwards, along with family law attorneys Robert Campbell and Kenneth Tillotson, will complement the firm's tax and estate planning practice areas, expanding the firm's capacity to resolve personal legal matters. Her practice focuses on family law with an emphasis in representing clients in divorce, asset valuation and custody matters, and was most recently a partner with the Oklaho-

ma City law firm of Mullins, Hirsch, Edwards, Heath, White & Martinez PC. She has served as the co-chair of the Oklahoma County Bar Association's Family Law Section and is a speaker on family law issues.

Charles T. Plake and **Monica A. Plake** announce the opening of their law practice, Mountain West Business Law PC, located in Estes Park, Colo. Mr. Plake is a Tulsa native and a 1993 graduate of the TU College of Law. He has previously held senior in-house positions at the Williams Co., WilTel Communications and the John Zink Cos., and continues to serve as the outside general counsel for Zeeco Inc. Mr. Plake's private practice focuses on the areas of commercial transactions and business organization, construction law, real estate and international law. Ms. Plake is a 1997 graduate of the TU College of Law and has held senior in-house positions at both the Williams Co. and Magellan Midstream Partners. Her primary practice areas are commercial transactions, trademark registration, intellectual property licensing, software agreements and labor and employment law. Mr. and Ms. Plake are licensed to practice law in both Oklahoma and Colorado, and the firm will service individual and business clients in Oklahoma and the northern Colorado and Denver metro areas. The firm is located at 1204 Graves Ave., Estes Park, Colo., 80517, and the web address is www.mtnwestlegal.com. Mr. and Ms. Plake can be reached at 970-557-4040 or at info@mtnwestlegal.com.

Christopher S. Heroux has joined the national law firm Kutak Rock LLP as of counsel in the firm's Denver office. He will continue to focus his practice in the areas of oil and gas, mining, commercial real estate and general business transactions. He can be reached at 1801 California St., Suite 3000, Denver, Colo., 80202 or by telephone at 303-297-2400.

Mulinix Ogden Hall & Ludlam PLLC announces the addition of **Rand C. Eddy** as of counsel with the firm and **Andrew Ralph Harroz, Collin R. Walke, William R. Pace** and **Alyson T. Gildner** as associates. Mr. Eddy graduated from Franklin and Marshall College in 1983 and holds a J.D. from the OCU School of Law where he served as an editor on the *OCU Law Review*. He has been a county and federal assistant public defender, assistant city attorney and private practitioner. His practice focuses on employment law, business/contract litigation, civil rights and criminal defense. He is a master in the Ruth Bader Ginsberg Inn of Court. Mr. Harroz completed his undergraduate studies at OU in 2006 and graduated from the OU College of Law in 2009. He has focused his practice in the areas of business litigation, the formation of business entities, real estate transactions and various other commercial contracts. Mr. Walke's practice is focused in the areas of business litigation, family law, estate and business planning and personal injury. He is currently the chair of the OBA Appellate Section and OBA Solo Small Firm Conference Committee. He is a graduate

of the OBA Leadership Academy. He graduated with a B.A. in philosophy from OSU, and graduated *magna cum laude* from the OCU School of Law. Mr. Pace joined the firm in 2013. He completed his undergraduate studies in finance at OU in 2008 and earned his law degree from OCU in 2012. He was a member of the Phi Delta Phi honors fraternity, president of the Corporate Law Association and was on the dean's honor roll. He is currently a member of the Oklahoma City Mineral Lawyers Society, Oklahoma City Association of Professional Landmen and the Robert J. Turner Inn of Court. He focuses his practice in the areas of commercial litigation and transactions, real estate litigation and transactions, oil and gas law, wills trusts and estate and business planning. Ms. Gildner received her B.A. in legal studies from the University of Central Florida in 2003. She served in the United States Air Force from 2005 to 2009 and was stationed at Tinker Air Force Base. During her enlistment, she completed an A.A.S. in Air and Space Operations Technology from the Community College of the Air Force in 2008. She then obtained her master's in human relations degree in 2011. Thereafter, she received her J.D. from OU in 2012, where she was a member of the *Oklahoma Law Review*. In 2013 she earned her master of laws degree in energy, natural resources, and Native American law from OU. She concentrates her practice in the areas of renewable energy law, natural resources and agriculture law, American Indian law, civil litigation,

insurance, probate and guardianships.

McAfee & Taft announces that healthcare lawyer **Lesley Ford Richer** has joined the firm's Tulsa office. Ms. Richer's practice encompasses a broad range of administrative and regulatory compliance matters, healthcare transactions, business consulting and related litigation. Her clients include hospitals and hospital systems, physician groups, mental health and long-term care facilities and individual healthcare professionals. Prior to joining McAfee & Taft, she worked in private practice for more than 10 years, much of it devoted to the healthcare industry. She has also previously served as president of the Oklahoma Health Lawyers Association. Ms. Richer earned her law degree from Southern Methodist University, where she served as the articles editor of the *Computer Law Review and Technology Journal*. She holds a bachelor's degree from the University of Notre Dame.

Don Herring and **Roe Simmons** announce the formation of Herring Simmons, a full service law firm located at 101 E. Hurd, Suite E in Edmond. Mr. Herring is a 1990 graduate of the OU College of Law. He will continue to practice in the areas of criminal law in state and federal courts, personal injury, family law and oil and gas. Mr. Simmons is a 2002 graduate of OCU School of Law where he served as the articles editor for the *OCU Law Review*. He will continue to practice in the areas of family law, corporate and business law, estate planning,

civil litigation, juvenile law and criminal law. The firm's telephone number is 405-562-4205, and the fax number is 405-562-4301.

The Oklahoma City law firm of **Michael Brooks-Jiménez PC** announces the opening of its new Tulsa office. The Tulsa branch is now located at 10802 E. 31st Street, Suite A, Tulsa. Originally founded in 1998, Michael Brooks-Jiménez and the lawyers who make up his team are fluent in English and Spanish. The firm specializes in immigration law, personal injury, criminal defense and workers' compensation.

Michael Brooks-Jimenez PC announces that **Alberto Franco** has joined the firm as an associate. Mr. Franco graduated with a B.S. in business administration from the University of Illinois at Chicago and received his J.D. from the TU College of Law. For the past six years, Mr. Franco worked for a law firm in Tulsa specializing in civil litigation, insurance defense and serious personal injury and workers' compensation matters. His practice will include an emphasis on the Tulsa area's Hispanic population in the areas of personal injury, workers' compensation, criminal defense and immigration. His new office address is 10802 E. 31st Street, Suite A, Tulsa.

Hall Estill announces **Kristen Evans** has joined the firm's Tulsa office. Ms. Evans is a litigation attorney who primarily focuses on trial and appellate motion practice in healthcare, products liability, medical malpractice, employment and insurance bad faith cases. While in law school,

she served on the editorial board for the *Oklahoma Law Review* and was the recipient of the Salem Civil Rights Award and Scholarship. She received her J.D. with honors, from the OU College of Law in 2010 and holds a bachelor's degree from OU.

At The Podium

Eric L. Johnson of the Oklahoma City office of Hudson Cook LLP spoke at the AutoStar Innovate 2013 Conference in Ft. Worth on Sept. 24. His topics were "What is a Compliance Management System & Why You Need One Now" and "Other Than the CFPB, What Else is Going On?" Mr. Johnson also spoke at the CreditRe Vehicle Related Protection Products Conference in Grapevine, Texas on Oct. 31. His topic was "Aftermarket Products and the Consumer Financial Protection Bureau's Expectations with Respect to Vendor Management."

T. Douglas Stump of T. Stump & Associates, an Oklahoma City attorney and President of the American Immigration Lawyers Association, was a guest speaker for Office of the Citizenship and Immigration Services Ombudsman's Third Annual Conference on Oct. 24 at the National Archives in Washington, D.C., titled "Government and Stakeholders Together: Improving Immigration Services." He presented a discussion on provisional unlawful presence waivers

and policy considerations impacting adjudication standards. He served on a panel with representatives from the U.S. Citizenship and Immigration Services and U.S. Department of State. He previously made a presentation for the Second Annual Rocky Mountain Immigration Law Conference on Oct. 17 addressing legislative developments in Washington, D.C., on immigration law and recent processing issues for family and business immigration practitioners. He also presented a paper, "Advanced Practice Tips for Provisional Waivers and Traditional Unlawful Presence Waivers," and lead a discussion on "Hot Topics, Legislative and Administrative Updates" at the American Immigration Lawyers Association Conference in Anaheim, Calif., in early November.

District Judge **Kurt Glassco** of Tulsa and Pawnee counties, recently presented "The Trial of a Criminal Case" to the Tulsa Police Academy 2013 class. The officers spent the morning observing arraignments, a preliminary hearing and a first-degree murder trial in Judge Glassco's courtroom. The judge lectured at the academy in the afternoon. The curriculum was approved by the Council on Law Enforcement Education and Training for the basic police academy. Judge Glassco previously participated in a panel discussion on intergovernmental law enforcement agreements between Native American tribes, municipalities and county governments at the Sovereignty Symposium in Oklahoma City this summer.

Sharon Voorhees presented "A Case Study in Ethics for Probate" to the South Oklahoma City Lawyer's Association last month. Ms. Voorhees is currently secretary of the association and was elected vice president for 2014. Ms. Voorhees is a partner in Shelton Voorhees Law Group and has a general civil practice, including appeals.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA mem-

bers 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

Articles for the Jan. 18 issue must be received by Dec. 16.

IN MEMORIAM

George Wendell Cathey died Oct. 15, 2013. He was born Dec. 1, 1938, in Durant. He graduated from Classen High School in 1957 in Oklahoma City. He attended Kemper Military School and Junior College where he earned letters in football and track. He received his undergraduate degree and J.D. from OU and was admitted to practice law in Oklahoma in 1967. **He was a member of the National Guard, Air Force Reserve, Advisory Board of Directors of the Oklahoma Trial Lawyers Association, Fellow of the Oklahoma Bar Foundation, Phi Lambda Epsilon, Kappa Alpha Order, 32nd degree Mason, Little Dixie Shrine Club and the First Baptist Church in Durant.** He was appointed to serve by the Oklahoma Supreme Court as a judge of the Court of Appeals Temporary Division 172 in 1982. He taught business law at Southeastern Oklahoma State University and actively practiced law as a trial lawyer for more than 46 years. During his practice of law he represented people in civil and criminal

cases. He liked horse racing and started going to the horse races in Hot Springs, Ark., in 1954 and continued for more than 50 years. He was a scuba diver, learned to fly when he was 59 years old, played golf at the Old Course and at Carnoustie in Scotland. He enjoyed life to the fullest and he had a great life. Memorial contributions may be made to the First Baptist Church, Durant, Oklahoma or a charity of your choice.

Craig Hyett Carter died Nov. 5, 2013, in Tulsa. He was born Nov. 30, 1971, in Clovis, N.M. He graduated from TU in 1997 and formed Carter Law Office in Tulsa one year later in 1998.

Glenn Edward Davis died Nov. 8, 2013. He was born on May 27, 1938, in Flushing, N.Y. He received his education in Union County, N.J., at Jonathan Dayton Regional High School where he graduated in 1956. He attended Muhlenberg College in Allentown, Pa., where he earned a degree in sociology. He attended Rutgers Law School in Newark, N.J., where he

received his J.D. and served as the associate editor of the *Rutgers Law Review* from 1961 to 1963. **He was drafted into the U.S. Army where he served until receiving his honorable discharge.** He was employed with the Joseph Doran Law Firm in Trenton, N.J., and was then employed with Gulf Oil Company in Philadelphia from 1970 until 1977. Mr. Davis came to Bartlesville in 1977 as a corporate attorney in pipeline and maritime law for Phillips Petroleum Co. Following his retirement from Phillips in 1994, he opened the Glenn E. Davis law firm in Bartlesville and was a public defender in Osage and Pawnee counties since 1998. Mr. Davis served as president of the Bartlesville Civic Ballet. He was also an active volunteer for Big Brothers Big Sisters. He held an honorary engineering degree from New Mexico State University, taught a legal class at Oklahoma Wesleyan University, was the first male Girl Scout Troop Leader of Troop # 267 in Bartlesville, a Y Indian Guide and an avid jogger and astronomer. He was a member

of the St. Luke's Episcopal Church. In lieu of flowers a memorial has been established for Polycystic Kidney Disease Research and memorial contributions may be sent to the National Kidney Foundation, 10600 S. Pennsylvania Ave, Suite 16-144, Oklahoma City, 73170-4256.

J. C. Fishburn died Nov. 6, 2013. He was born on Feb. 27, 1925, in Moore. He attended Moore Public Schools and continued his education at OSU. He received his J.D. at the OCU School of Law in 1963. He was employed as an attorney at the Oklahoma State Employment Security Administration where he retired after 20 years of service. He was a member of Southern Hills Baptist Church and Sertoma. **Mr. Fishburn served in the U.S. Army, Company A, 519th Military Police Battalion. He served from July 21, 1944, to Aug. 12, 1946. He was awarded the Combat Infantryman Badge on April 1, 1945. He also received the Asiatic-Pacific Campaign Ribbon with one Bronze Star and one Arrowhead, the Philippine Liberation Ribbon with one Bronze Star, Good Conduct Medal, Army Occupation Ribbon (Japan), Victory Ribbon with three Overseas Service Bars and the Honorable Service Lapel Button.**

Richard Weldon Freeman Sr. died Oct. 25, 2013. He was born Nov. 27, 1931, in Oklahoma City. After graduating from Classen High School in 1949, he attended Austin College in Sherman, Texas. **He served in the United States Air Force during the Korean Conflict and trained at Syracuse Universi-**

ty as a Russian linguist for the Air Force. Later, after receiving a B.A. from OU and a J.D. from the OCU School of Law, he practiced law in a partnership with Leamon Freeman for many years in Oklahoma City. In 1985, he was appointed as a special judge for the Oklahoma County District Court before he was elected as a district judge in 1986. After retiring from the bench in 1999, he enjoyed some of the best years of his life on the farm he purchased near Cashion. There, he led the leisurely life of a part-time farmer enjoying his cattle, his beagles, his grandchildren and great-grandchildren. Memorial contributions can be made to Mercy Hospice or the American Cancer Society in lieu of flowers.

Jerry Lane Gunter died Oct. 31, 2013. He was born July 16, 1959, in Monroe, La., and received his B.A. from North Eastern Louisiana University and also received a degree from Rhema Bible college in 1984. In 1996, he earned his J.D. from TU. He was a preacher in Iowa and had a traveling ministry. In his legal practice, he focused on bankruptcy and worked at the Tulsa law firm Winters & King Inc. He enjoyed playing golf, hiking, working out, eating ice cream, watching football, Sci Fi and going to the movies. Jerry had a passion for helping people. Memorial contributions may be made to the Pancreatic Cancer Action Network, 1500 Rosecrans Ave., # 200, Manhattan Beach, Calif., 90266, or the Rhema Bible Church Building Fund, 1025 E. Kenosha, Broken Arrow, 74012.

Hal L. Hefner died Thursday, Nov. 21, 2013. He was born July 3, 1925, in Vian. Shortly after graduating high school in Wagoner in 1943, **he joined the U.S. Navy and served three years during World War II.** After the war, he attended the School of Pharmacy at OU, where he graduated in 1949. In 1952, he moved to Henryetta and purchased Hefner Drug, which he owned and operated for 19 years. In 1972, he moved to Oklahoma City when he was appointed purchasing director for the State of Oklahoma. He also attended the OCU School of Law, obtaining a J.D. in 1976. **Mr. Hefner continued to have an active military career. In 1953, he was commissioned as an officer in the 45th Infantry Division of the Oklahoma Army National Guard. He advanced through the officers' ranks, spending the last five years of military service on active duty on the staff and faculty of the U.S. Army War College in Carlisle Barracks, Pa. He retired as a Brigadier General in 1980.** Following his military retirement, Mr. Hefner was employed in the legal division of the Oklahoma Tax Commission, from which he retired in 1986. He then served the next eight years in private law practice and as municipal judge for Collinsville. He was an active member for years in the United Methodist Church in Henryetta, Owasso and Midwest City where he taught Sunday school and served on many of the church's boards and committees. Memorial contributions may be made to The Salvation Army, Wickline United Methodist or a charity of your choice.

Frank Hesketh Jaques II died Nov. 11, 2013. He was born Nov. 8, 1934, in Oklahoma City. He graduated from Ada High School in 1952 and went on to the University of Oklahoma, where he earned a bachelor's degree in political science in 1956. Mr. Jaques completed his senior year of undergraduate studies and his first year of law school simultaneously, graduating Phi Beta Kappa from the OU College of Law in 1958. While at OU, Mr. Jaques was a member of the Lambda Chi Alpha fraternity. He was also a member of the Air Force ROTC. Following graduation and acceptance by the bar, **Mr. Jaques served in the U.S. Air Force judge advocate general's office from 1958-1960.** He practiced law in Ada for 53 years and served on the Oklahoma Board of Bar Examiners for 35 years. He was a co-founder of Pre-Paid Legal. He was a member of the First Presbyterian Church. Memorial contributions may be made to the First Presbyterian Church, 301 E. Kings Road, Ada, 74820.

Jack Taylor Massey died Nov. 18, 2013. He was born May 7, 1927, in Frederick and lived in Tipton until he was seven years old, when he moved to a farm south of Elk City. Following graduation from St. John's Military Academy in 1945, **he entered the Navy's one-year radar technician program.** After being discharged, he entered the University of Oklahoma where he became a member of the Beta Theta Pi fraternity. Upon graduation with a degree in business, he entered the life insurance business. He returned to OU and received his law degree in 1957. While

attending law school he sold life insurance and completed all the requirements for the Chartered Life Underwriter designation in 1956. He was a member of various professional organizations. He joined United Founders Life Insurance Company in 1963 and served as executive vice president and corporate secretary of the company and its various subsidiary companies, as well as serving on the board of directors of all the companies. He was as an active member in Nichols Hills United Methodist Church, serving on numerous committees as well as treasurer for many years. He became active in leadership positions in scouting and served as scoutmaster of Troup 193. He was a member of the Beacon Club, Quail Creek Golf and Country Club and the Oklahoma City Boat Club. He enjoyed sailing, hunting and fishing. Memorial contributions may be made to Nichols Hills United Methodist Church or to Epworth Villa.

Albert Ray Matthews died Nov. 30, 2013. He was born Dec. 15, 1930, in Brush Hill and attended school in Onapa. **Al joined the United States Air Force on Jan. 10, 1951.** He graduated from OSU in 1957. In 1960, he graduated with a law degree from OU. He began his law practice in Muskogee in 1960 and his legal career spanned 50 years. Practicing law remained his first passion throughout his life because he loved helping people. He was a member of the Bedouin Shrine and also served as potentate in 1971. He also served on the Muskogee School Board, Muskogee Fair Board and Muskogee Roundup Club. His second

passion was rodeo. He was a Senior Pro Rodeo Association world champion calf roper and was inducted into the Senior Pro Rodeo Hall of Fame in 2002. The Senior Pro Rodeo Association had to keep adding age brackets because he wouldn't quit roping. In the 70 and over bracket, he won the break away roping competition in Hamilton, Mont., with a 2.7 at the age of 80. Above all of his passions, spending time with his family was first and foremost.

Benjamin Lee McCullar died Oct. 30, 2013. Born Dec. 13, 1953, Mr. McCullar was a lifelong resident of Shawnee attending Washington Elementary School and graduating from Bethel High School. He loved music and was an accomplished musician playing both the piano and guitar. In his youth, he assisted his father, Doyle McCullar, in the family construction business before receiving a bachelor's degree in liberal studies with distinction from OU in 1989. He came to his professional calling and passion in life — the law — as an adult graduating with his J.D. from OU in 1992. After his admission to the bar, he worked as public defender representing capital murder defendants and their appeals until he entered private practice in 1996. He continued in private practice for 17 years. He was the city attorney for Meeker, past attorney for Tecumseh, the Tecumseh Growth and Development Authority and served the City of Maud for over 10 years.

John A. "Jack" O'Toole died Dec. 6, 2013. He was born Oct. 13, 1924, in St. Paul,

Minn., grew up in Duluth, Minn., and was a talented athlete participating in soccer and basketball. **He was a Naval Aviator in World War II serving aboard the aircraft carrier USS Antietam at the time of the Japanese capitulation in 1945.** After the war, he eventually moved his family to Tulsa where he worked for American Airlines and later, Farmers and Kemper insurance companies as an insurance adjuster during the day while attending the University of Tulsa in the evening. He graduated TU in 1951 and earned his J.D. from TU in 1953. In 1955, after passing the bar exam he moved his family to Oklahoma City and began his 50-year law career. His legal career included work as a trial attorney and serving as a special assistant U.S. attorney for civil matters with the Small Business Administration for 11 years. His passions were flying, golf and family. He served as president of Twin Hills Golf and Country Club, Christ the King PTA and Bishop McGuinness High School Booster Club. He was a friend of Bill W. for the last 29 years of his life. Memorial contributions can be made to The First Tee of Oklahoma City or the Western Foundation.

Timothy Charles Roberts died on Nov. 16, 2013. He was born Dec. 20, 1958, in El Reno. He graduated from El Reno High School in 1977 and from UCO in 1986 with a degree in criminal justice. He graduated from the OCU School of Law in 1990 and was admitted to the bar in 1991. He worked for the Canadian County Sheriff's Office from 1980 to 1991, where he received the American Jail Association's Jail Administrator of the Year award in 1988. Upon completion of law school, he worked as a supervisory attorney for the Federal Bureau of Prisons from 1991 to 2005, until his health forced him to retire. While working for the Bureau of Prisons, he received the prestigious John Marshall Award, presented by Attorney General Janet Reno in Washington, D.C., in 1996. The award was for his support of litigation resulting from his position at the United States Penitentiary in Leavenworth, Kan. Fishing was a lifelong passion, and his collection of fishing rods and reels was substantial. Above all else, Tim was a devoted father and husband. Memorial contributions may be made to the American Cancer Society.

Stephen West Smith died Nov. 15, 2013. He became the third generation to practice law in Okmulgee County following in the footsteps of his grandfather E.W. "Cyclone" Smith and his father Ernest Smith. Born May 16, 1946, he graduated from Henryetta High School in 1964. While in high school, he achieved the rank of Eagle Scout and while practicing law became a member of the Advancement Committee of the Boy Scouts Executive Council. He received his B.A. in history from OU in 1968 and his J.D. from the OU College of Law in 1971. He served as an assistant district attorney in Okmulgee from 1971 to 1975. He opened a solo practice in Okmulgee in 1975. In 1977 he left Okmulgee to join his family's law firm in Henryetta until his death. He was a long-time member of the Okmulgee First United Methodist Church, Masonic Lodge, Shriners and the Rotary Club. In Henryetta he was a past president of the Lions Club and a member of the Chamber of Commerce. He was a member of the National District Attorneys Association and the American Trial Lawyers Association. He served as Henryetta city attorney for 15 years and recently he was recognized for 50 years of achievement practicing law in Oklahoma.

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to unwind and unravel stories told,
this attorney she had a heart of gold.

A little girl suffered and her daddy too,
all because of stories that were not true,
but this attorney with a heart of gold,
used her talents to make them unfold,
many thought the stories were true,
but she turned countless rocks to see.

They say no attorney has a heart of gold,
most think them thieves the truth be told,
this lady worked and toiled without pay,
daddy's little girl had been taken away,
the daddy thought justice was just a dream,
until the attorney with a heart of gold,
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