

THE Oklahoma Bar JOURNAL

Volume 84 ♦ No. 5 ♦ Feb. 16, 2013

Indian Law

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Oklahoma Lawyers For America's Heroes



Cosponsored with the OBA Military Assistance Committee

Oklahoma Lawyers For America's Heroes started in November 2010 as an initiative to provide legal services to service members and veterans. Since its inception, nearly 2,000 of America's heroes have been provided free legal assistance with an estimated value of \$2 million in legal services. OBA President Jim Stuart is committed to continue to provide legal assistance and access to justice to those who protect our freedoms.

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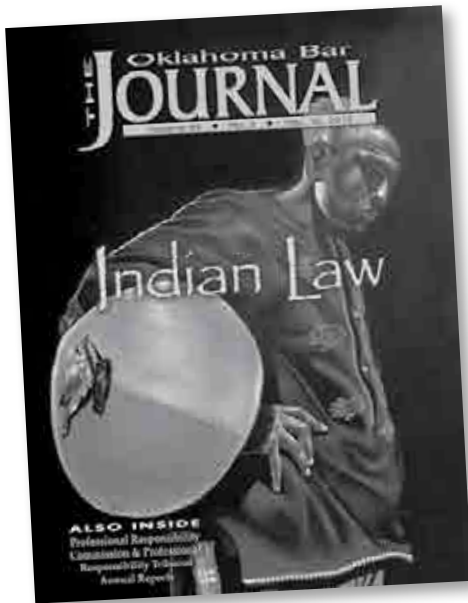
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The Word 'Senior' Takes on New Meaning

By Jim Stuart

In March I will turn 60 years of age, a milestone in any person's life. The word "senior" already appears more often in relation to my name — mail solicitations, discounts, my law firm designation. I still reserve the right to refuse to open the AARP mail. Both Social Security and Medicare will be taken more seriously by me in whatever form they exist. This trend will only continue in my years to come.

After I graduated from law school, my senior law partner, Jim Miller, told me I knew

more law and less about being a lawyer than anyone in the firm. I wasn't sure whether to take this as a compliment, but as a new lawyer any recognition of competency was gladly accepted. Today as I approach this milestone in age I sometimes wonder if now I know more about being a lawyer and less law than anyone in the firm. I still catch myself referring to the 1985 amendments as the "new" probate code.

With good health and a little luck, I hope to practice law at least 10 more years. Under current OBA rules, when I reach 65 years of age I will no longer be

required to complete mandatory continuing legal education as a requisite for my practicing law.

I struggle with any comparison of an earned age exemption or discount with my ethical obligation to continue to provide competent legal services to the public. The MCLE Commission has recently proposed the age exemption be removed from the rules. I support

such a move.

Our clients will be better served, and our association the better for it. I want to encourage those members of our association 65 years and older who regularly practice law, and even more so those who may be considering scaling back, to continue to complete continuing legal education offered through the OBA.

From the Stuart family to yours, I again wish you good health and happiness in 2013.

"The MCLE Commission has recently proposed the age exemption be removed from the rules."



A stylized, handwritten signature in dark ink, appearing to read 'J. Stuart'.

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FEBRUARY 2013

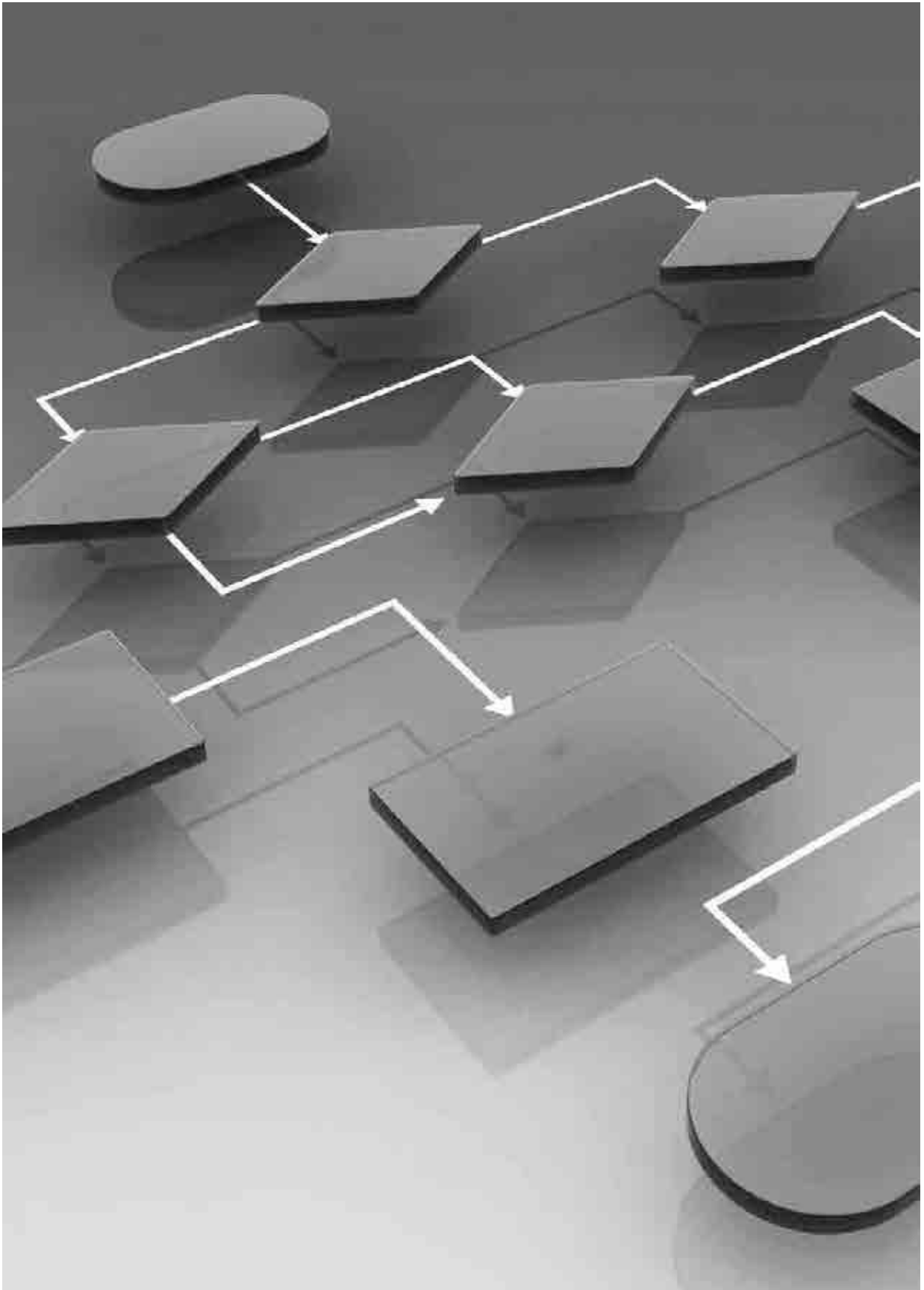
- 18 **OBA Closed** – Presidents Day observed
- 19 **OBA Bench and Bar Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Barbara Swinton 405-713-7109
OBA Civil Procedure and Evidence Code Committee meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact James Milton 918-594-0523
- 20 **Oklahoma Bar Foundation Grants and Awards Committee meeting**; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy 405-416-7070
OBA Law Day Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Richard Vreeland 405-360-6631
OBA Women In Law Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Kim Hays 918-592-2800
- 20-21 **OBA Law-related Education Close-Up program**; 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jane McConnell 405-416-7024
- 21 **Oklahoma Justice Commission meeting; 2 p.m.**; Oklahoma Bar Center, Oklahoma City; Contact Drew Edmondson 405-235-5563
OBA Mock Trial Committee meeting; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with tele-conference; Contact Judy Spencer 405-755-1066
- 22 **OBA Board of Governors meeting with president's summit**; 9 a.m.; Postoak Lodge, 5323 W. 31st St. N., Tulsa; Contact John Morris Williams 405-416-7000
Oklahoma Association of Black Lawyers meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donna Watson 405-721-7776
OBA Rules of Professional Conduct Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Paul Middleton 405-235-7600
- 26 – March 1
OBA Bar Examinations; Oklahoma Bar Center, Oklahoma City;
Contact Oklahoma Board of Bar Examiners 405-416-7075

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

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

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Somerlott v. Cherokee Nation Distributors Inc.

The End of Sovereign Immunity for Subordinate Economic Entities

By Rabindranath Ramana

Subordinate economic entities of Indian tribes are often regarded as “arms of the tribe” and are granted sovereign immunity. For example, in recent years, the 10th Circuit has concluded that a tribe’s operating division (created to engage in the manufacture, sale, and distribution of tobacco) and a tribal economic authority (which owned and operated a casino) were both entitled to sovereign immunity in light of their close relationships with the tribes they served.¹

In the immunity analysis, the key issue is whether the subordinate entity is “analogous to a governmental agency, which should benefit from the defense of sovereign immunity,” or, on the other hand, “more like . . . commercial business enterprise[s], instituted solely for the purpose of generating profits for [its] private owners.”² For Indian tribes, the government agency classification is broader than one might think. The 10th Circuit has recognized that tribal governments may differ from other sovereigns. They “directly control or participate in commercial activities more frequently than other [types of] governments[,] [and] the tribal organization may be part of the tribal government and protected by tribal immunity, even though it may have a separate corporate structure.”³

Under 10th Circuit precedent, the immunity inquiry governing these subordinate entities is case-specific, and the court has seen no need to define the precise boundaries of the governing standard.⁴

Nevertheless, the following factors are relevant: 1) the method employed to create the subordinate entity; 2) its purpose; 3) its structure, ownership and management, including the amount of control the tribe has over the entities; 4) evidence regarding the tribe’s intent to confer immunity; 5) the financial relationship between the tribe and the entity; and 6) the policies underlying tribal immunity and whether those policies are served by granting immunity.⁵

In its recent decision in *Somerlott v. Cherokee Nation Distributors Inc.*,⁶ the 10th Circuit changed the inquiry substantially for a class of subordinate entities — those formed under state law. The court held that an Oklahoma limited liability corporation was not entitled to tribal sovereign immunity — even though it was a wholly owned subsidiary of a tribal corporation that was, itself, wholly owned and regulated by the Cherokee Nation.

Somerlott establishes a bright-line standard for entities formed under state laws that authorize

“The Cherokee Nation exercised substantial control over the CND’s business affairs.”

suits against those entities. The decision also applies a stringent standard for the preservation of issues on appeal. Attorneys who practice Indian law and appellate litigation should note its reasoning and its conclusions.

FACTUAL BACKGROUND

Tina Somerlott worked as a technician for company known as “CND,” which provided chiropractic care at the Reynolds Army Hospital in Fort Sill. CND was wholly owned by Cherokee Nation Businesses, a tribal corporation that itself was wholly owned and regulated by the Cherokee Nation. CND was first formed as an Oklahoma corporation at a time when the Cherokee Nation did not permit the formation of limited liability companies. After the tribe lifted that restriction, CND was converted to an Oklahoma limited liability corporation. CND became a wholly-owned subsidiary of the Cherokee Nation Businesses pursuant to a statute passed by the Cherokee Legislature in 2005.

The Cherokee Nation exercised substantial control over the CND’s business affairs. Members of CND’s board of directors were selected by the Cherokee Nation’s principal chief and confirmed by the nation’s tribal council. CND was required to obtain the council’s approval before entering into certain real estate transactions. In addition, the principal chief was granted the authority to remove CND’s managers with or without cause. Finally, CND officials were required to make monthly accounting reports to the tribal council.

In January 2007, CND terminated Ms. Somerlott’s employment. She filed a grievance with the Equal Employment Opportunity Commission, which recommended settlement but also issued a right-to-sue letter. She then filed a wrongful discharge action against CND in federal district court, asserting claims of gender and age discrimination, and retaliation under Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act.⁷ She alleged that her termination was based on her reporting a sexual liaison between her immediate supervisor and a

coworker, and that the CND had eventually replaced her with a younger employee.

CND filed a motion to dismiss Ms. Somerlott’s complaint, arguing that it was exempt from liability under Title VII and the ADEA. It also asserted that it was a subordinate economic entity of the Cherokee Nation and was therefore entitled to sovereign immunity.

THE FEDERAL DISTRICT COURT’S MULTIPLE-FACTOR APPROACH

The federal district court granted CND’s motion to dismiss, ruling that CND was a subordinate economic entity of the tribe. The court relied primarily on the connection between CND and the economic interests of the nation as a whole. It invoked the 2005 legislation pertaining to CND’s parent corporation — Cherokee Nation Businesses Inc. As set forth in that tribal law, the purposes of the parent corporation were closely tied to the welfare of the nation as a whole — promoting the nation’s economic development and preserving and enhancing profits to be distributed throughout the tribe.⁸ In light of CND’s close connection to the economic interests of the nation, the court reasoned, “extending the Tribe’s sovereign immunity to CND would further federal policies aimed at protecting Indian assets and would also help preserve Cherokee cultural autonomy by protecting and encouraging the Cherokee Nation’s continuing efforts at economic self-sufficiency.”⁹

The court also characterized the 2005 law as a kind of *de facto* reincorporation of CND under tribal law. Although the court acknowledged that CND had been initially formed as an Oklahoma corporation, it concluded that, by establishing a tribally controlled entity (Cherokee Nation Businesses) as CND’s parent corporation, the tribal legislature had sought to ensure that CND would be managed in a manner consistent with the goals of the nation.¹⁰

In addition, the court considered the tribe’s authority over the appointment of CND’s Board of Directors, as well as its oversight of some of CND’s real estate transactions, accounting practices, and personnel decisions. Finally, the court observed that CND’s engaging in business outside of Indian country and employing non-Indians were of no significance to the immunity inquiry. Thus, CND met “most, if not all, of the criteria commonly used by courts in determining whether a tribal commercial enterprise is an arm of the tribe.”¹¹

INCORPORATION UNDER STATE LAW: 10TH CIRCUIT OPINION

Although it affirmed the district court's judgment dismissing Ms. Somerlott's Title VII and ADEA action (because Ms. Somerlott had not adequately preserved the key immunity issue for appellate review), the 10th Circuit rejected the district court's multiple-factor approach.

The court observed that there was a crucial distinction between CND and entities in the other cases that had afforded immunity to subordinate bodies. Here, the court said, despite the tribal legislation pertaining to CND's parent corporation, CND itself was incorporated under state law. Moreover, the state law in question, Oklahoma's Limited Liability Act, provided that a company formed under the statute was "a separate legal entity that could su[e], be sued, complain and defend in all courts."¹²

The court further observed that tribal sovereign immunity was coextensive with the immunity afforded the United States government (though not with the immunity afforded the states). Under federal law, subordinate entities controlled by the federal government, but formed under state law, are not entitled to sovereign immunity. For example, in a 5th Circuit decision from the early 20th century, the court considered the Panama Railroad Company, which the United States owned as its sole shareholder but which had been formed under New York law. The court ruled that the company was a separate entity that could not assert the immunity of the federal government.¹³

The 10th Circuit concluded that it could "identify no reason to depart from this principle here. Accordingly, CND, a separate legal entity organized under the laws of another sovereign, Oklahoma cannot share in the nation's immunity."¹⁴ The multiple-factor approach taken by the district court did not apply.

JUDGE GORSUCH'S CONCURRENCE

With his customary rhetorical flair, Judge Gorsuch concurred. His opinion contains additional reasoning in support of the majority's bright-line standard.

Like the majority, he observed that when the federal government chooses to act through a state-incorporated entity, that entity is subject to suit under the terms set forth in the state's law. Under the common law, he added, the same principle applies to foreign sovereigns that incorporate a business under a state's commercial

laws. Even corporations formed by states are subject to suit, with the exception of certain governmentally-owed, public-purpose corporations. However, in this case, Judge Gorsuch stated there was no indication that such an arm-of-the state public corporation could be created under Oklahoma's Limited Liability Act.

Judge Gorsuch also observed that CND's assertion of immunity was inconsistent with a "foundational feature of corporate law"—that a corporation is a distinct legal entity brought into being by the force of law and "subject to the privileges and responsibilities provided by the sovereign's laws."¹⁵ With regard to CND, that meant that the various features of limited liability corporations were part of "its corporate DNA," including the duty to answer lawsuits in any court.¹⁶

In addition, Judge Gorsuch observed that forming CND as an Oklahoma limited liability company was a choice that the nation had made. Giving effect to that choice, and the resulting surrender of immunity, was entirely consistent with the policies of promoting Indian self-government, self sufficiency, and economic development.

Finally, Judge Gorsuch concluded that the multiple-factor subordinate entity inquiry was not applicable. He wrote, "[T]his court has never applied the subordinate economic entity test to entities incorporated under the laws of the second sovereign. And for good reason. There's no need to. We can easily tell whether an entity like that is 'legally separate and distinct from the tribe' by looking to the laws of the second sovereign. That's what we do when the federal government incorporates under state law. That's what we do when a foreign sovereign incorporates under state law. And that's what we do here."¹⁷

A CAUTIONARY NOTE ON THE PRESERVATION OF ISSUES ON APPEAL

The 10th Circuit's *Somerlott* opinion also provides a cautionary note about preserving issues for appeal. Even though the court determined that the district court had erred in applying the subordinate economic entity test, it further ruled that Ms. Somerlott had failed to adequately raise the argument that established that CND was not entitled to immunity.

The court observed that the majority of Ms. Somerlott's arguments in the district court did not concern immunity at all. Instead, she mainly addressed the question of whether the exemp-

tions for Indian tribes set forth in Title VII and the ADEA applied to CND.

Ms. Somerlott did address sovereign immunity to a limited extent. However, she argued that the immunity question turned on whether CND was a subordinate economic entity of the tribe. In the 10th Circuit's view, that argument was not sufficient to raise the dispositive issue — that CND was a corporation formed under Oklahoma law.

The court acknowledged that, in the district court proceedings, Ms. Somerlott had emphasized CND's status as corporation and a business entity. However, she never argued that this corporate status was determinative. She did not cite Oklahoma's Limited Liability Act. In addition, she did not argue that tribal immunity and federal sovereign immunity were similar or that cases rejecting immunity for corporations formed under state law by the federal government should be applied. Moreover, the argument for immunity that she did make before the district court — that CND's functions were not sufficiently connected to traditional government functions — had been rejected by the United States Supreme Court.¹⁸

In addressing the matter of adequate preservation, the 10th Circuit applied a prior decision that distinguished between a) “a party's challenge to the district court's analysis of the rule” and b) “a challenge to the applicability of the rule itself.”¹⁹ In the prior decision, the appellant had argued to the district court that a case should not have been dismissed under the standards governing *Fed. R. Civ. P. 41(b)*. On appeal, it argued that another provision, *Fed. R. Civ. P. 37*, governed the dismissal inquiry. The 10th Circuit ruled that the issue of dismissal under Rule 37 was not adequately preserved. It was not sufficient that the appellate theory was related to the one presented to the district court. Nor would “a vague and ambiguous” argument to the district court suffice. Under that preservation standard, Ms. Somerlott's argument to the district court that CND was not a subordinate economic entity did not preserve the argument that its incorporation under Oklahoma's Limited Liability Act foreclosed its assertion of immunity.

The 10th Circuit also applied the plain error doctrine, most frequently invoked in criminal cases, but under recent precedent, deemed fitting for civil cases as well.²⁰ The doctrine provides that issues raised for the first time on appeal may only be reviewed for plain error —

that “which affects substantial rights” and which “seriously affects the fairness, integrity, or public reputation of judicial proceedings.”²¹ The burden is on the appellant to establish such error.

Applying the standard to Ms. Somerlott's appeal, the 10th Circuit concluded that, even though the district court had erred in applying the subordinate economic entity analysis and ruling that CND was entitled to immunity, she could not establish that the error affected her substantial rights or the fairness, integrity, or public reputation of judicial proceedings.

Ms. Somerlott did argue that the immunity question was a purely legal one and that it involved “an important question of public policy.”²² She further stated that the case involved an issue of great public importance and that a failure to reverse the district court's decision would result in a “manifest injustice.”²³ In the 10th Circuit's view, those arguments fell short of meeting the plain error standard, particularly the final prong (involving the threat to the integrity, fairness, or public reputation of judicial proceedings).

The court distinguished *Rademacher v. Colorado Ass'n of Soil Conservation Districts Medical Ben. Plan*, which concluded that there were some “most unusual circumstances” in which the court could consider issues raised for the first time on appeal and cited “issues regarding jurisdiction and sovereign immunity” as examples of such circumstances.²⁴ However, the 10th Circuit said, its precedent distinguished between a) new arguments on appeal that would defeat the court's subject matter jurisdiction (e.g., a contention that a defendant found by the district court to be subject to suit was entitled to immunity), and b) new arguments on appeal that would support that jurisdiction.

Here, the court said Ms. Somerlott's argument fell within the second category. She sought to argue that the district court had jurisdiction over CND when that court had erroneously concluded that it lacked jurisdiction because CND was immune. In the 10th Circuit's view, the fact that one defendant — CND — had benefitted from immunity to which it was not entitled may have caused Ms. Somerlott to lose a potentially meritorious claim. However, that result did not establish an injustice or threat to the judicial system beyond the results of her own case. As a result, she could not meet the plain error standard.

CONCLUSION

Under *Somerlott*, the threshold inquiry in assessing a tribally-related entity's immunity concerns the law under which the entity was formed. If formed under state law that authorizes suits against it, an entity's role in furthering a tribe's economic development and self-sufficiency, no matter how significant, will not be sufficient to establish immunity. In forming entities that retain immunity, tribes must look to tribal law rather than state law.

Attorneys who litigate immunity issues should also note the 10th Circuit's rigorous standard for the preservation of issues for appeal. More than general references to immunity and waiver are required. Counsel who do not argue the particular reasons that immunity applies or has been waived will be limited by the plain error standard on appeal.

1. See *Breakthrough Management Group Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173 (10th Cir. 2010); *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008).

2. *Breakthrough Management Group*, 629 F.3d at 1184 (quoting *Gavle v. Little Six Inc.*, 555 N.W.2d 284, 293 (Minn.1996)).

3. *Id.* at 1183-84 (quoting William V. Vetter, *Doing Business with Indians and the Three "S"s: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L.REV. 169, 174 (1994)).

4. *Id.* at 1187.

5. *Id.* at 1187-88.

6. 686 F.3d 1144 (10th Cir. 2012).

7. 42 U.S.C. § 2000e *et seq.*; 29 U.S.C.A. § 621 *et seq.*

8. *Somerlott*, no. CIV-08-429-D, 2010 WL 1541574, at *4-5.

9. *Id.* at *4.

10. *Id.*

11. *Id.* at *5. The district court rendered its decision before the 10th Circuit issued its opinion in *Breakthrough Management Group* 629 F.3d 1173 and therefore did not expressly consider all of the relevant factors set forth there. Instead, the court cited the factors set forth in a federal district court case from Kansas. See *id.* at *3 (quoting *Johnson v. Harrah's Casino Corp.*, 2006 WL 463138, at *4 (N.D. Kan. Feb. 23, 2006)).

12. *Somerlott*, 686 F.3d at 1150 (quoting OKLA. STAT. tit. 18, § 2004(B)(1)).

13. *Id.* at 1150 (discussing *Panama R. Co. v. Curran*, 256 F.768, 771-72 (5th Cir.1919)).

14. *Id.*

15. *Id.* at 1156 (Gorsuch, J., concurring).

16. *Id.*

17. *Id.* at 1158.

18. See *id.* at 1151 (discussing *Kiowa Tribe of Oklahoma v. Mfg. Techs. Inc.*, 523 U.S.751, 757-58 (1998)).

19. See *id.* (quoting *Ecclesiastes 9:10-11-12 Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1141 (10th Cir.2007)).

20. See *Richison v. Ernest Group Inc.*, 634 F.3d 1123 (10th Cir. 2011).

21. *Somerlott*, 686 F.3d at 1151 (citing *Richison v. Ernest Group Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011)). Courts typically describe the standard as involving four elements: whether there was (1) error, (2) that was plain, (3) that affected substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation or judicial proceedings.

22. *Id.*

23. *Id.*

24. 311 F.3d 1567 (10th Cir. 1993).

ABOUT THE AUTHOR



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Prize and Tort Claims Involving Tribal Casinos

The Basics Every Practitioner Should Know

By James M. Burson, Raymond J. Campbell and William R. Norman

Oklahoma Indian tribes operate 114 gaming facilities in Oklahoma, ranging from converted trailer units on gravel lots with a few dozen games to sprawling properties with thousands of games and plush amenities. These facilities cater to thousands of patrons each day. Inevitably, disputes will arise with patrons over mishaps and contested prize winnings. Before rushing to the local courthouse to file a prize or tort claim against a tribal gaming establishment, counsel must have a basic understanding of the law governing the filing of such claims.

TRIBAL GAMING: AN EXTENSION OF TRIBAL SOVEREIGNTY

Although characterized as “domestic dependent nations,” tribal governments exercise the inherent sovereign authority over their members and territories.¹ Both the federal government and the state of Oklahoma recognize tribal governments as sovereign entities whereby states lack jurisdiction over civil actions arising in Indian country against Indians, tribes, or tribal entities.² In fact, Congress conditioned Oklahoma’s statehood on a disclaimer of jurisdiction over Indian country,³ which is memorialized in Oklahoma’s Constitution.⁴ As sovereigns, tribal governments possess the power to define their governmental structure, determine membership, collect taxes, regulate property use and the domestic affairs of their citizenship, and form “their own laws and be ruled by them.”⁵

A tribe’s decision to conduct gaming derives from its inherent authority over its territory. The U.S. Supreme Court upheld the tribes’ authority to conduct and regulate gaming within their own jurisdiction in the landmark case of *Cabazon Band of Indians v. California*.⁶ With tribes’ rights to conduct gaming affirmed, Congress passed the Indian Gaming Regulatory Act of 1988 (IGRA).⁷ Under IGRA, tribes retain exclusive authority to regulate all traditional games (Class I) that are played in connection with tribal ceremonies or celebrations.⁸ Games such as bingo and other similar games (Class II), which are typically offered for play using technological aids which employ entertaining displays, are primarily regulated by tribes with certain minimum standards required by federal law and are overseen by the National Indian Gaming Commission.⁹ Finally, the play of so-called Las Vegas-style games (Class III) is governed by compacts between tribes and

states, setting forth the Class III games permissible for play and the regulatory framework which governs their play.¹⁰ Tribal-state compacts typically include standards for the operation of gaming activities, licensing regulations, fee schedules, patron disputes, and disputes between the tribe and state.

MODEL TRIBAL GAMING COMPACT

In 2004, Oklahoma's executive branch and tribal representatives negotiated the Model Tribal Gaming Compact.¹¹ The compact authorizes the play of certain Class III games and provides that tribes agree to a limited waiver of sovereign immunity for prize and tort claims made against gaming facilities by patrons of such games. Claimants are required to adhere to and exhaust the tribal administrative process as set forth in the compact.¹² While the limited waiver permits claimants to sue tribal gaming facilities in a "court of competent jurisdiction," nothing in the compact "shall alter existing tribal, federal or state civil adjudicatory or criminal jurisdiction."¹³ Because state courts lacked jurisdiction over claims against tribes arising in their jurisdictions prior to the compact,¹⁴ negotiators had not intended the phrase "court of competent jurisdiction" to include state courts.¹⁵ Nonetheless, some casino patrons began to file their tort claims against various tribes and their casinos in state court over the objections of the tribes. The matter of state court jurisdiction over such claims eventually made its way to the Oklahoma Supreme Court, arbitration, and then federal court.

TRIBAL RESPONSE TO THE STATE'S ASSERTION OF JURISDICTION

On January 20, 2009, the Oklahoma Supreme Court issued the first of three opinions on whether state courts have jurisdiction over tort actions arising under the Compact.¹⁶ In *Cossey v. Cherokee Nation Enterprises LLC*, the Supreme Court held that state courts are "courts of competent jurisdiction" and ultimately have the authority to hear personal-injury actions brought by non-Indian patrons against tribal gaming facilities.¹⁷ Later, in June 2009, the Supreme Court issued

two decisions in the companion cases of *Griffith v. Choctaw Casino of Pocola* and *Dye v. Choctaw Casino of Pocola*¹⁸ and reached the same conclusion as held in *Cossey*.

Tribes generally viewed these decisions as highly injurious to tribal sovereignty and a violation of the compact's terms. They also feared a dramatic increase in frivolous personal-injury, property-damage, and prize-claim lawsuits against tribal gaming enterprises in state court, and rightly so. In the course of and subsequent to the decisions in *Cossey*, *Griffith* and *Dye*, there were a number of similar tort claims filed in state courts.²⁰ Some tribes were able to remove state

tort actions to federal court and obtain favorable decisions on the question of jurisdiction.²¹ Other tribes chose to pursue arbitration as provided for in the compact.²²

Part 12 of the compact provides that compacted tribes or the state may seek binding arbitration to resolve a compact dispute such as the proper interpretation of the terms and provisions of the compact.²³ The Choctaw and Chickasaw Nations initiated arbitration with the state, and were able to obtain a favorable award finding that the two tribes' judicial forums have exclusive jurisdiction over compact-based prize and tort claims.²⁴ Pursuant to the compact, the tribes

were able to obtain a federal order that permanently enjoined state courts from hearing prize and tort claims arising at their tribal gaming enterprises.²⁵

Similarly, a number of other tribes won arbitration awards against the state and successfully obtained orders from the United States District Court for the Western District of Oklahoma on the same question of proper jurisdiction.²⁶ The Cherokee, Comanche, Delaware and Osage Nations and the Wichita and Affiliated Tribes of Oklahoma were able to obtain federal court orders enjoining state courts from exercising jurisdiction over compact-based prize and tort claims.²⁷ While it is somewhat unclear whether the federal declaratory and injunctive relief that are provided to the tribes will be extended to protect all compacted tribes in Oklahoma, the legal issues are exactly the same.

“While the limited waiver permits claimants to sue tribal gaming facilities in a ‘court of competent jurisdiction,’ nothing in the compact ‘shall alter existing tribal, federal or state civil adjudicatory or criminal jurisdiction.’”

PRACTICAL TIPS

Attorneys representing prize or tort claimants in actions against tribes and tribal casinos should be aware — at least with respect to claims made against the aforementioned tribes — that the state courts have been enjoined from hearing such actions. To avoid needless litigation, counsel with a potential prize or tort claim under the compact should contact the specific gaming facility or tribe's gaming commission for information on its specific procedure for resolving the claims. They should also check for any applicable rules governing practicing in the tribe's forums. Tribal forums on these matters can range from informal settings to formal courtroom hearings. Most involve a combination of informal discussions with casino management to resolve the matter amicably and escalate to administrative hearings and eventual tribal court proceedings.

At a minimum, however, the compact provides:

1) That tort claim remedies shall not exceed \$250,000 for any one person, \$2,000,000 for any personal-injury occurrence, and \$1,000,000 for any property-damage occurrence;²⁸

2) That prize claim remedies shall not exceed an amount that the claimant can prove he or she is entitled;²⁹

3) A prize claim notice must be filed within 10 days of the event that is the alleged basis for the claim. A tort claim notice must be filed within one year of the event which allegedly caused the loss, but if not filed within the first 90 days, is automatically reduced by 10 percent;³⁰

4) If filed with the tribe's gaming commission, the commission must forward a copy of the prize or tort claim notice to the tribe and the state compliance agency within 48 hours of filing;³¹

5) Both the prize and tort claim notice be signed by the claimant;³² and

6) The tribe must promptly review, investigate, and decide the matter

a) For prize claims, if not resolved within 72 hours from time of filing, the tribal gaming commission must immediately notify the State in writing that the claim is unresolved. Any portion of a prize claim which is unresolved will be denied

if the tribe fails to notify the claimant in writing of its approval within 30 days of the filing date, however, the parties may agree to an extension to resolve the claim,

b) For tort claims, any portion of the claim that is unresolved will be considered denied if the tribe fails to notify the claimant in writing of its approval within 90 days of the filing date, however, the parties may agree to an extension to resolve the claim.³³

Under the compact, a tribe's limited waiver of sovereign immunity for prize and tort claims will only remain effective when a claimant first exhausts the tribal administrative process. The basics regarding the background and procedures for this process are outlined above. Still, practitioners are advised to familiarize themselves with the process' details before filing a prize and tort claim. Contacting the tribe's gaming facility or gaming commission on such matters may also prove beneficial, and it is also recommended that practitioners unfamiliar with practice in tribal settings seek out assistance from an Indian law practitioner.

1. *Oklahoma Tax Commission v. Citizen Band, Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991), citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

2. Const. art. I, §8 (the Indian Commerce Clause of the U.S. Constitution gives Congress the plenary authority over Indian tribes and Indian country and divests the state authority over Indian commerce and Indian tribes).

3. Okla. Enabling Act §§1, 2, 34 Stat. 267 (1906).

4. Okla. Const. art. I, § 3.

5. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

6. 480 U.S. 202 (1987).

7. Pub. L. No. 100-497, 102 Stat 2467 (Oct. 17, 1998) (codified at 18 U.S.C. §§1166-1168, 25 U.S.C. §§2701-2721).

8. 25 U.S.C. §2710(a).

9. 25 U.S.C. §§2706, 2710(b)(d) (The National Indian Gaming Commission is an independent federal agency within the Department of Interior with the authority to promulgate rules to enforce IGRA, impose civil fines, approve tribal gaming ordinances, monitor compliance, and oversee management contracts of tribal gaming facilities).

10. 25 U.S.C. § 2710(d).

11. 3A O.S. §281. The Model Compact became subject to a statewide referendum as State Question No. 712, which was overwhelmingly passed by Oklahoma voters. Legis. Ref. No. 335.

12. Compact pt. 6(A), (C).

13. Compact pts. 6(C), 9.

14. See *Williams v. Lee*, 358 U.S. 217, 223 (1959).

15. See Application of Scott Meacham for Leave to File Statement, *Dye v. Choctaw Casino of Pocola*, No. 104,737 (Okla. filed May 15, 2008); Brief of Amici Curiae Brad Henry and Scott Meacham 1-6, *Cossey v. Cherokee Nation Enterprises LLC*, No. 105,300 (Okla. filed March 9, 2009); *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51 ¶¶ 3, 230 P.3d 488, 500 ¶ 3 (Kauger, J. concurring in part dissenting in part).

16. *Cossey v. Cherokee Nation Enterprises LLC*, 2009 OK 6, 212 P.3d 447 (Jan. 20, 2009); *Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488 (June 30, 2009); *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507 (June 30 2009).

17. *Cossey*, 2009 OK 6, 212 P.3d 447 (Jan. 20, 2009).

18. 230 P.3d 488 (June 30, 2009).

19. 230 P.3d 507 (June 30, 2009).

20. See, e.g., *White v. Osage Million Dollar Elm Casino of Tulsa, et al.*, No. CJ-2009-248 (Osage Co. Dist. Ct. filed Dec. 31, 2010); *Crocker v.*

Border Town Casino & Bingo, No. CJ-09-485 (Ottawa Co. Dist. Ct. filed August 21, 2009).

21. See, e.g., *Harris v. Muscogee (Creek) Nation*, No. 11-CV-654-GKF-FHM (N.D. Okla. June 18, 2012); *Santana v. Muscogee (Creek) Nation*, No. 11-CV-782 JHP PJC (N.D. Okla. Dec. 22, 2011); *Muhammad v. Comanche Nation Casino*, No. CIV-09-968-D (W.D. Okla. Sept. 28, 2010).

22. Compact pt. 12.

23. *Id.*

24. See Arbitration Award, Class III Gaming Compact Jurisdiction Related Disputes Jointly Referred to Binding Arbitration by the Choctaw Nation of Oklahoma, the Chickasaw Nation and the state of Oklahoma (Aug. 25, 2009) available at <http://turtletalk.files.wordpress.com/2010/01/choctaw-chickasaw-oklahoma-arbitration-decision.pdf>.

25. *Choctaw Nation of Oklahoma et al. v. State of Oklahoma*, No. CIV-10-50-W (W.D. Okla. June 29, 2010).

26. See, e.g., *Comanche Nation, et al. v. State of Oklahoma*, No. CIV-10-1339-W, (W.D. Okla. Dec. 28, 2010); *Cherokee Nation v. State of Oklahoma*, No. CIV-10-979-W, (W.D. Okla. Nov. 22, 2010); *Eastern Shawnee Tribe of Oklahoma v. State of Oklahoma*, No. CIV-10-459-W, (W.D. Okla. June 28, 2010).

27. The Eastern Shawnee obtained a declaration and a federal court order confirming the state had no jurisdiction over Compact based tort claims, however, no permanent injunction was sought, and, thus never issued by the court.

28. Compact pt. 6(A)(1).

29. *Id.* at 6(B)(2).

30. *Id.* at 6(A)(4), (B)(3).

31. *Id.* at 6(A)(5), (B)(4).

32. *Id.* at 6(A)(7), (B)(6).

33. *Id.* at 6(A)(8), (B)(7)-(10).

ABOUT THE AUTHORS



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Mr. Norman joined Hobbs Straus in 1994 and became a partner in January 2000. His practice includes advocating for tribal interests in federal and state legislation and rulemaking, and with agency decision-makers, in gaming, taxation, and transportation. Mr. Norman, of Muscogee (Creek) descent, is a member of the Oklahoma Indian Bar Association and served on the board of the Oklahoma Indian Legal Services. He received his J.D. from the University of Oklahoma in 1992.

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Tribal Sovereign Immunity

In What Forum and Under What Circumstances May a Tribe Be Sued?

By Conor Cleary

One of the most common and vexing issues facing Indian tribes, their business partners and the attorneys that represent them is in what legal forum and under what circumstances a tribe and its commercial entities may be sued. On the one hand, the sovereign authority that Indian nations enjoy must be respected and protected by immunity from suit, but on the other, there is a concern among individuals, state and local governments, and corporate entities that this immunity will leave them unable to seek adequate legal redress against tribes. Adding to this concern, or perhaps because of it, is a patchwork of (not always consistent) court cases involving complex situations in which tribes may have waived or Congress abrogated their immunity. What follows is a brief explanation of the doctrine of tribal sovereign immunity and how it functions in two of the most common contexts in which it is likely to be encountered — breach of contract and tort lawsuits.

FUNDAMENTAL PRINCIPLES

Sovereign immunity is a “government’s immunity from being sued in its own courts without its consent.”¹ As a sovereign entity, a government exercises control over its territory and has the authority to enact laws regulating conduct occurring within its borders. To maintain the “superiority of power”² that this sovereignty implies, a “close and necessary relationship”³ exists between a government’s sovereignty and its immunity from suit, an immunity which is “central to sovereign dignity.”⁴ “The immunity of a truly independent sovereign from suit . . . has been enjoyed as a matter of absolute right

for centuries”⁵ and both the federal government and the states enjoy immunity from suit.⁶

Similarly, as “domestic dependent nations,” tribal governments exercise inherent sovereign authority over their members and territories.⁸ Like the federal government and states, a tribe’s inherent sovereignty “gives rise to the immunity from private suit in order to protect the dignity of the sovereign.”⁹ As a result, suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.¹⁰ This tribal immunity applies regardless of where the tribal activity at issue occurs and whether the tribal activities at issue are governmental or commercial in nature.¹¹

CONTRACTS

Since the early 1960s, the federal government has adhered to a policy of self-determination with respect to Indian tribes to promote economic development.¹² Indian tribes control nearly 56 million acres of land and natural resources which have allowed tribes to “rebuild their economic base” through industries like tourism and agriculture.¹³ “Tribes have also developed a wide variety of businesses, including manufacturing, retail, technology, banking, and gaming.”¹⁴ As a result, tribes increasingly find themselves negotiating and executing contracts with non-Indian partners to further economic development in Indian Country.

As a general rule, a tribe may not be sued for breach of a contract between the tribe and a non-Indian individual or corporate entity. In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the manufacturing company sued the Kiowa Tribe in state court to recover on a promissory note executed by the tribe. The tribe executed the note in Indian Country, but delivered it to the manufacturing company in Oklahoma City, outside the tribe’s jurisdiction.¹⁵ The note also obligated the tribe to make its payments to the manufacturing company in Oklahoma City.¹⁶ The tribe filed a motion to dismiss based on its sovereign immunity, which the district court denied. After the Oklahoma Court of Civil Appeals affirmed the district court’s judgment and the Oklahoma Supreme Court declined to review the judgment, the U.S. Supreme Court granted certiorari and reversed. In its opinion, the court held that sovereign immunity bars a lawsuit against a tribe for breach of contract.¹⁷ Moreover, the fact that the tribe delivered the promissory note and made payments to the manufacturing company in Oklahoma City and not in Indian Country was of no moment. The Supreme Court declined to “confine immunity from suit to transactions on reservations” and held that tribal sovereign immunity applies regardless of where the tribal activity occurs and whether the activity is governmental or commercial in nature.¹⁸

ARBITRATION CLAUSES AND THE WAIVER OF SOVEREIGN IMMUNITY

Of course, a tribe may be sued on its contracts if the contract contains a waiver of the tribe’s sovereign immunity.¹⁹ Sovereign immunity “may discourage certain entities from wanting to do business with tribes,”²⁰ and, often, in negotiating a contract, a tribe will

agree to a provision waiving its sovereign immunity to entice the other party to the contract to accept it.²¹ However, although a tribe’s waiver of its immunity must be clear,²² no magic words are required to effectuate a waiver,²³ and courts may consider the tribe to have waived its immunity, even if the tribe did so inadvertently. For example, in *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, the U.S. Supreme Court considered whether a tribe waives its immunity from suit in state court when it agrees to arbitrate disputes relating to a commercial contract governed by state law.

In *C&L Enterprises*, the Citizen Band Potawatomi Indian Tribe contracted with C&L Enterprises for the installation of a new roof on a building owned by the tribe off the reservation. The contract contained an arbitration clause specifying that “[a]ll claims or disputes between [C & L] and [the tribe] arising out of or relating to the Contract, or the breach thereof, shall be decided by arbitration.”²⁴ The arbitration clause provided that enforcement of an arbitration award would be in any court having jurisdiction thereof.²⁵ The contract also contained a choice-of-law clause providing that it would be governed by Oklahoma law.²⁶ Before C&L began installing the new roof, “the Tribe decided to change the roofing material[,] . . . solicited new bids and retained another company to install the roof.”²⁷ C&L submitted a demand for arbitration. The tribe, asserting the defense of sovereign immunity, refused to participate in the arbitration.²⁸ The arbitrator rendered an award for C&L, which then attempted to enforce the award in state court. After initially affirming the award,²⁹ the Oklahoma Court of Civil Appeals ruled the tribe was immune from suit on commercial contracts and had not expressly waived its immunity by agreeing to the arbitration clause.³⁰ After the Oklahoma Supreme Court declined review, the U.S. Supreme Court granted certiorari and reversed.

The U.S. Supreme Court reasoned that the tribe agreed to arbitrate any disputes under the contract and to the enforcement of any arbitration award in a court having jurisdiction. Further, because the contract contained an Oklahoma choice-of-law provision, Oklahoma’s Uniform Arbitration Act (OUAA) applied to the contract and arbitration clause between the tribe and C&L.³¹ Pursuant to the version of the OUAA then in effect, a court of competent jurisdiction in Oklahoma could enforce arbitration awards.³² The Supreme Court ruled that

the Oklahoma district courts were courts of competent jurisdiction for the enforcement of arbitration awards.³³ As a result, by agreeing to arbitration and to the application of Oklahoma law, the tribe waived its sovereign immunity and agreed to submit itself to arbitration and be bound by the enforcement of the arbitration award in Oklahoma state court.³⁴

TORTS

Another common issue presented by increased interaction between tribes and non-Indians is if and where a tribe may be sued for tortious injuries caused by non-Indians. The general sovereign immunity rule applicable to breach of contract disputes also applies to tort suits as well.³⁵ That is, absent a waiver or abrogation of the tribe's immunity, a tribe enjoys immunity from claims against it based in tort. In *Seneca Telephone Company v. Miami Tribe of Oklahoma*, the Oklahoma Supreme Court held that a tribe may not be sued for its tortious activity occurring on Indian land, unless the tribe has waived or Congress has abrogated its immunity.³⁶ There, the Shawnee Tribe hired the Miami Tribe to perform excavation work on the Shawnee Tribe's land. During the excavation, the Miami Tribe damaged the underground telephone lines of Seneca Telephone Company. Seneca brought a negligence action against the Miami Tribe.³⁷ The Oklahoma Supreme Court sided with the Miami Tribe, reversing the opinions of the trial court and court of appeals, and concluding the Miami Tribe's sovereign immunity barred Seneca's negligence action. Relying on the Supreme Court's ruling in *Mfg. Technologies*, the court explained that "'an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.'"³⁸ Although admitting its ruling seemed unfair, the court explained that it was up to Congress to abrogate the tribe's immunity in this situation, and that until then, "[b]usinesses act at their own peril when dealing with tribes."³⁹

TORT CLAIMS AT CASINOS

Many injuries suffered by non-Indians occur when non-Indians visit the many casinos Indian tribes now operate in the United States. In 2011, Indian tribes operated more than 420 gaming facilities across the United States, producing approximately \$27.2 billion in revenue.⁴⁰ Tort claims based on injuries at casinos require a more nuanced sovereign immunity analysis because the tribal-state compacts allowing casino gambling in Oklahoma waive a tribe's sovereign immunity with respect to tort claims.

As will be seen below, however, this waiver only allows suit against a tribe in tribal court, not state or federal court.

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA). It divides gaming into three classes: Class I games are social games with nominal or no monetary prizes, and are entirely regulated by tribes. Class II gaming consists of games of chance, like bingo, and are regulated by tribes pursuant to tribal ordinances approved by the National Indian Gaming Commission. Class III gaming includes all games not included in Classes I or II. It includes casino-style games like slot machines, blackjack, craps and roulette. Before a tribe may conduct Class III gaming in its casino, the state must legalize Class III-style games, and the state and tribe must negotiate a tribal-state compact that is then approved by the secretary of the interior.

In 2004, Oklahoma voters approved States Question 712 which allowed Class III gaming in the state. It also included a model gaming compact which tribes may accept on a take-it-or-leave-it basis. The model compact provides that the tribe "consents to suit on a limited basis with respect to tort claims."⁴¹ Such suits will be heard "in a court of competent jurisdiction"⁴² and only if the claimant has first complied with a number of tribal administrative remedies.⁴³ Although it is indisputable that the compact allows an injured casino patron to bring a negligence action against the tribe, the compact does not specify *where* the tribe may be sued — it only states that a suit may be brought "in a court of competent jurisdiction." Must the patron sue the tribe in tribal court? Or may he also file suit in state court?

In 2009, the Oklahoma Supreme Court considered three cases, each involving a non-Indian injured while visiting a tribe's casino and subsequently suing the tribe in state court. In a series of fractured opinions,⁴⁴ the Oklahoma Supreme Court ruled that the term "court of competent jurisdiction" includes the Oklahoma district courts. In each of the opinions, the court reasoned that the compact does not define the term "court of competent jurisdiction" and "nothing in the compact provides that patron tort claims are to be adjudicated only in tribal court."⁴⁵ In the court's eyes, "the simple words 'in tribal court only' could have been included in the compact" to guarantee that the term "court of competent jurisdiction" was understood to only allow tort suits against

a tribe in tribal court.⁴⁶ The failure to include such limiting language meant that both tribal and state courts were appropriate forums for adjudicating tort suits against tribes by non-Indian casino patrons.

In light of these rulings, the Choctaw and Chickasaw Tribes demanded arbitration⁴⁷ with the state of Oklahoma and sought a declaratory ruling that the compact does not waive a tribe's sovereign immunity with respect to a tort claim brought in state court. An arbitrator ruled in favor of the tribes and the U.S. District Court for the Western District of Oklahoma enforced the arbitration award, issuing a permanent injunction preventing Oklahoma state courts from hearing tort suits brought by non-Indian patrons injured at tribal casinos.⁴⁸

Subsequent rulings by other Oklahoma federal district courts have reached the same conclusion.⁴⁹ Each of these federal cases criticized the Oklahoma Supreme Court's rulings in *Cossey*, *Griffith* and *Dye*. The opinions noted that although the compact waived the tribe's immunity for tort suits arising out of gaming operations, the compact also provided that it "shall not alter tribal, federal or state civil adjudicatory or criminal jurisdiction."⁵⁰ Without an affirmative waiver of tribal immunity in state court, the compact's use of the term "court of competent jurisdiction" could not overcome IGRA's "strong policy of promoting tribal self-government . . . [which] rests on the premise that 'Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.'"⁵¹

On Jan. 29, 2013, the 10th Circuit affirmed the district court's decision in *Santana*,⁵² concluding "[n]othing in . . . the compact unequivocally waives [a tribe's] immunity to individual civil tort suits in Oklahoma state court."⁵³ Embracing the reasoning of the district court cases discussed above, the court noted that the compacts state that they do not alter tribal, federal or state jurisdiction, and as a result "the phrase 'court of competent jurisdiction' refers to tribal courts—not state courts—because state courts 'have no authority over conduct by a tribal entity occurring on tribal land unless such authority is expressly granted to them.'"⁵⁴ The result of these federal opinions is that non-Indian casino patrons must sue the tribes in tribal court if they want to recover tort damages.⁵⁵

CONCLUSION

Although the doctrine of tribal sovereign immunity is sometimes difficult to navigate by Indian tribes, potential tribal business partners, and Indian law practitioners alike, the general rule of tribal sovereign immunity is straightforward: a tribe is immune from suit unless Congress abrogates the immunity or the tribe clearly waives it. To avoid the harsh and potentially unfair effects that sovereign immunity may cause, those dealing with tribes should negotiate clear waivers with tribes at the outset to preserve their ability to seek recourse against the tribe.

1. *Black's Law Dictionary* 766 (8th ed. 2004).

2. 1 W. Blackstone, *Commentaries on the Laws of England* 235 (1765).

3. *Alden v. Maine*, 527 U.S. 706, 715 (1999).

4. *Id.*

5. *Nevada v. Hall*, 440 U.S. 410, 414 (1979).

6. See *United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued."); *Alden v. Maine*, 527 U.S. 706 (1999) ("[T]he States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today.").

7. *Cherokee Nation v. Georgia*, 5 Pet. 1, 30 U.S. 17. Although Indian tribes are no longer "possessed of the full attributes of sovereignty," *United States v. Kagama*, 118 U.S. 375, 381 (1886), they nevertheless maintain "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945)).

8. *Okla. Tax Comm'n v. Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991).

9. *Bittle v. Bahe*, 192 P.3d 810, 819 (Okla. 2008).

10. *Okla. Tax Comm'n v. Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991) (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 436 U.S. 58 (1978)); see also *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.") (citations omitted).

11. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 755 (1998) (citations omitted).

12. Cohen's *Handbook of Federal Indian Law* 1279 (2005 ed.).

13. *Id.*

14. *Id.*

15. *Mfg. Technologies*, 523 U.S. at 753-54.

16. *Id.* at 754.

17. *Id.* at 760 ("Tribes enjoy immunity from suits on contracts[.]").

18. *Id.* at 755.

19. See fn. 10, *supra*.

20. *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, 1998 OK 128, ¶10, 975 P.2d 442, 445.

21. Cohen's *Handbook of Federal Indian Law* 1285 (2005 ed.) (footnote omitted) ("Tribes, like governments generally, have used limited waivers of tribal immunity as means of stimulating economic development."). Moreover, even if a tribe does not contractually waive its immunity at the outset, it may conclude that it is not worth the potential harm to its reputation in its local community (and the resulting business opportunities) by asserting its immunity as a defense to a lawsuit. See S. Chloe Thompson, "Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know," 49 Washburn Law Journal 661, 705 (2010) ("If the [tribe] develops a reputation for living up to its obligations, vendors will undoubtedly feel more comfortable contracting with it. Moreover, vendors who have had favorable experiences with the business in the past will much more easily agree to enter into future contracts under the tribal business's terms.").

22. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

23. *Id.* at 420.

24. *Id.* at 415.

25. *Id.* The arbitration clause also specified that it was governed by the American Arbitration Association Rules for the construction indus-

try and under those Rules, an arbitration award may be entered in any federal or state court having jurisdiction thereof. *See id.* (quoting American Arbitration Association, "Construction Industry Dispute Resolution Procedures," R-48(c) (Sept. 1, 2000)).

26. *Id.*

27. *Id.* at 416.

28. *Id.*

29. The Court of Civil Appeals initially affirmed the arbitration award on the grounds that the contract was between an Indian and non-Indian and was executed outside Indian Country. The tribe appealed to the U.S. Supreme Court. While its petition for certiorari was pending, the Supreme Court decided *Kiowa Tribe v. Mfg. Technologies, Inc.*, 523 U.S. 751, 760 (1998), which held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." In light of this ruling, the Supreme Court remanded the case back to the Court of Civil Appeals.

30. *Id.* at 417.

31. *Id.* at 419 ("By selecting Oklahoma law to govern the contract, the parties have effectively consented to confirmation of the award 'in accordance with' the Oklahoma Uniform Arbitration Act.") (citing Okla. Stat. tit. 15, §802.A (1993) (repealed) ("This act shall apply to . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties.")) (internal citation omitted). In 2005, Oklahoma repealed the version of the Uniform Arbitration Act in effect at the time *C&L Enterprises* was decided. However, the new version of the OUAA contains similar language. *See* Okla. Stat. tit. 12, §1857(A) (2006) ("An agreement contained in a [contract] to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable . . .").

32. *Id.* (citing Okla. Stat. tit. 15, §802.B (repealed)). Oklahoma's latest version of the OUAA contains similar language. *See* Okla. Stat. tit. 12, §1877(A)-(B) ("A court of this state having jurisdiction over the controversy and the parties may enforce an agreement to arbitrate. An agreement to arbitrate providing for arbitration in this state confers exclusive jurisdiction on the court to enter judgment on an award under the Uniform Arbitration Act.").

33. *Id.*

34. Some have criticized the court's holding in *C&L Enterprises* that the tribe waived sovereign immunity. The contract did not contain an express waiver of sovereign immunity. Instead, the court arrived at the conclusion by implication, harmonizing the tribe's agreement to arbitrate the dispute with the Oklahoma choice-of-law clause which resulted in the application of the Oklahoma Uniform Arbitration Act, which, in turn, provided for enforcement of arbitration awards in Oklahoma state court. The court addressed this argument in its opinion, however, reasoning that "[t]he waiver . . . is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that." *Id.* (citing *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656, 660 (7th Cir. 1996) (Posner, J.)). In his opinion in *Sokaogon*, Judge Posner characterized the argument that the contract would have to expressly say the tribe waived sovereign immunity as "paternalistic" and "condescending." *Sokaogon*, 86 F.3d at 659-60.

35. *See Tribal SmokeShop v. Alabama-Coushatta Tribes*, 72 F.Supp.2d 717, 719 (E. D. Tex. 1999) ("Nothing in [*Mfg. Technologies*] could be construed to limit sovereign immunity to contractual claims The court made no distinction between tort and contract claims in applying sovereign immunity."); *Redding Rancheria v. Superior Court*, 105 Cal. Rptr.2d 773, 777 (Cal. App. 2001) ("Tort suits are not excepted from the general immunity rule.") (citing *Mfg. Technologies*, 523 U.S. at 758)).

36. 253 P.3d 53, 56 (Okla. 2011).

37. *Id.* at 54.

38. *Id.* at 55 (quoting *Mfg. Technologies*, 523 U.S. at 754).

39. *Id.* at 55-56. The Oklahoma Supreme Court's ruling in *Bittle v. Bahe*, supra note __, is not to the contrary. There, the Court ruled a tribe was not immune from a suit based on dram shop liability because Congress had authorized the states to regulate the sale of liquor and expressed an intent that state regulations would apply to tribal liquor transactions. *See Bittle*, supra note __, at 817-19 (citing *Rice v. Rehner*, 463 U.S.713 (1983)). The telephone company in *Seneca* argued that, because Congress had allowed state regulation of telecommunications activities, Oklahoma's Underground Facilities Damage Prevention Act (UFDPA) applied to the Miami Tribe's damaging of Seneca's telephone lines. *See Seneca*, 253 P.3d at 54-55 (citing Okla. Stat. tit. 63, § 142.9a(B) (providing that any excavator who damages underground telephone lines is liable for negligence)). *Seneca* distinguished *Bittle*, explaining that "the Tribe was not engaged in any telecommunication activity. . . [but] was engaged in excavation work." *See id.* at 56-57. As a result, the

UFDPA did not apply and sovereign immunity barred Seneca's negligence action. *See id.* at 57.

40. National Indian Gaming Commission Gaming Revenue Report (2011), accessible at www.okbar.org/s/gamingrevenues (last accessed Jan. 25, 2013).

41. Model Tribal Gaming Compact, Part 6(A)(2), accessible at www.okbar.org/s/modelcompact (last accessed Jan. 25, 2013). Tribes also waive their sovereign immunity with respect to "prize claims." *See* Part 6(B)(2).

42. *Id.* at Part 6(C).

43. For example, the claimant must "deliver[] . . . a valid and timely written tort claim notice to the [Tribe]." *See id.* at Part 6(A)(9)(a). The claim must be delivered to the tribe within one year of the alleged tortious conduct or it is forever barred. *See id.* at Part 6(A)(4). The claim must also include "the date, time, place and circumstances of the incident upon which the tort claim is based, the identity of any persons known to have information regarding the incident, including employees or others involved in or who witnessed the incident, the amount of compensation and the basis for said relief; the name, address and telephone number of the claimant, and the name, address and telephone number of any representative authorized to act or settle the claim on behalf of the claimant." *Id.* at Part 6(A)(6).

44. *See Griffith v. Choctaw Casino of Pocola*, 2009 OK 51, 230 P.3d 488; *Dye v. Choctaw Casino of Pocola*, 2009 OK 52, 230 P.3d 507; *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 212 P.3d 447.

45. *Griffith*, 230 P.3d at 496

46. *Id.*

47. The compact contains a "Dispute Resolution" section allowing a party to the compact to refer any dispute arising under the compact — including those involving "the proper interpretation of the terms and conditions of this Compact" — to arbitration. *See* Compact, Part 12(2).

48. *Choctaw Nation v. Oklahoma*, 2010 WL 5798663 (W.D. Okla. Jun. 29, 2010).

49. *See Harris v. Muscogee (Creek) Nation*, 2012 WL 2279340 (N.D. Okla. Jun. 18, 2012); *Santana v. Muscogee (Creek) Nation*, 2012 WL 896243 (N.D. Okla. Mar. 15, 2012); *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568 at *10 (W.D. Okla. Oct. 27, 2010) ("Nothing in the Compact permits an inference that the tribe intended 'a court of competent jurisdiction' to include state courts. Parts 5 and 6 of the Compact specifically provide for the application of tribal rules and regulations to tort claims by casino patrons against the tribal gaming enterprise, and those regulations limit actions to tribal court.").

50. Compact, Part 9.

51. *Muhammad*, 2010 WL 4365568 at *9-*10 (quoting 25 U.S.C. §2701).

52. *See supra* note __.

53. *Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino*, 2013 WL 323223 at *2 (10th Cir. Jan. 29, 2013)

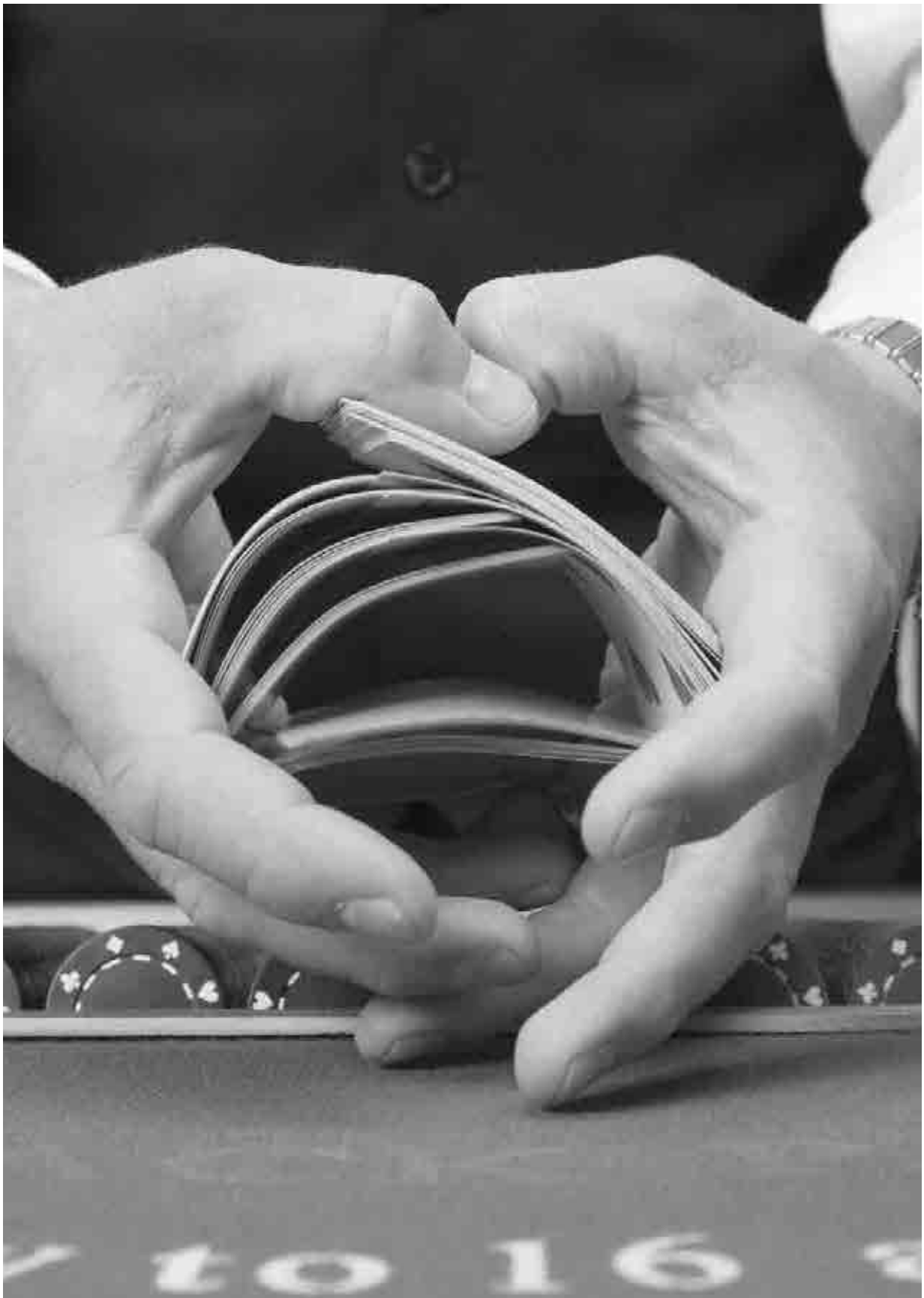
54. *Id.* (quoting *Muhammad*, supra note __, at *9, and citing *Harris*, supra note __, at *4; *Choctaw Nation*, supra note __, at *4).

55. *See id.* at n.1 ("We recognize the Oklahoma Supreme Court has ruled in plurality decisions that Oklahoma state courts are courts of competent jurisdiction to exercise civil adjudicatory authority over non-Indian tort claims brought against tribal casinos. We are not bound by the plurality opinions in these cases, however, because federal law, federal policy, and federal authority are paramount in the conduct of Indian affairs in Indian Country.") (internal citations and quotation omitted).

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Lake of the Torches

An Ongoing Saga in Indian Gaming Lending

By Bryan J. Nowlin

On Jan. 11, 2010, the world of Indian gaming finance was upended by the U.S. District Court for the Western District of Wisconsin's decision in *Wells Fargo Bank, N.A. v. Lake of The Torches Economic Development Corp.*¹ That decision, which voided a \$50 million dollar bond indenture, if upheld in its entirety would leave no recourse at law for the bond holders to realize upon their collateral. Indian gaming finance in Oklahoma is vital to the state due to the number of tribes, number of gaming facilities and opportunities for gaming facilities within this state. Therefore, any decision and the rationale that that could throw out a large-scale financing transaction is of special interest to tribal leaders and the gaming industry in Oklahoma. While the initial shock of the decision has certainly worn off with time, the decision did not provide certainty as to which loan agreements may or may not constitute void, and hence unenforceable, contracts. Interestingly in the above cases, Wells Fargo Bank, the named plaintiff, serves as trustee under the bond indenture and had no role in structuring the financing for the casino development. The bank immediately appealed upon receiving the quick ruling that the bond indenture was unenforceable, and the Seventh Circuit then affirmed the district court's primary holding, namely that the bond indenture was void *ab initio*. But, the appellate court held that the bond holders might be able to seek some unspecified equitable relief.

Voiding a \$50 million transaction does not occur every day. In fact, most of the time there would be no publicity pertaining to such a ruling due to the arbitration clauses found within most loan agreements with tribal gaming operations. These arbitration clauses also serve as an independent waiver of sovereign immunity by the tribe, assuming that the agreement is validly executed by a tribal authority with the ability to waive sovereign immunity.² Many of these arbi-

trations remain private, which means there is little case law on the regulatory hurdles of lending to the Indian gaming industry. *Lake of the Torches* is rare in that it has played out in the courts and been subject to multiple published legal opinions. The litigation is ongoing and enlightening.

When the Indian Gaming Regulatory Act (IGRA) became law in 1988, it sought to promote the economic development of Indian tribes by

regulating Indian gaming. Federal law and regulations are intended to ensure that tribes, and not outsiders, are the primary beneficiaries of Indian gaming.³ To that end, IGRA required that Indian tribes, and not outsiders, are to control and manage casinos in Indian Country.⁴ In *Lake of the Torches*, the federal courts had thus far voided the bond indenture (and the ability of the bond holders to realize upon their investment) because the document was an unapproved management contract. Because Indian tribes and gaming facilities are to be protected from nefarious influence and to ensure a level playing field as a trustee, the federal government requires that all contracts which provide for total or partial management of an Indian casino to be approved by the chairperson of the National Indian Gaming Commission.⁵ An unapproved management contract is void.⁶ While the policy itself is relatively straightforward, the devil of compliance is in the details. Intent is not relevant, as nearly every agreement for which NIGC approval is not sought will boldly declare on its face that it is not a management contract. A loan that neither party intended to provide for management of a casino is capable of being held void as an unapproved management contract.

Neither the text of IGRA nor federal regulations provide a comprehensive definition of what is and what is not a management contract. The regulations define a management contract as, “any contract, subcontract, or collateral agreement between an Indian tribe and a contractor... if such contract or agreement provides for the management of all or part of a gaming operation.” Management is itself undefined. However, the regulations define a management official as any person, “who has authority . . . [t]o set up working policy for the gaming operation.”⁷ In 1994 the NIGC issued advice stating that management comprises many activities such as “planning or-ganizing, directing, coordinating, and controlling.”⁸ The NIGC further explained that, “the performance of any one of such activities with respect to all or part of a gaming operation constitutes management for the purpose of determining whether any contract or agreement for the performance of such activities is a management contract that requires approval.”⁹ Specific

examples range from the appointment of third-party receiver, the approval of operating expenses, to a pledge of net gaming revenues.¹⁰ Even the mutual selection of an auditor, which by definition is limited on the tribe’s ability to choose the auditor of its choice, constitutes management of part of the casino.¹¹

Naturally, gaming investors and their counsel can be creative in hiding management contracts. For that reason, a management contract may be found within a series of agreements.¹² Any agreement or series of agreements, such as lending facility agreements, may be determined to be a management contract when the agreements give third parties the authority to set policy for an Indian casino.¹³ Congressional and regulatory guidance remains sparse, as noted by the Seventh Circuit itself.¹⁴ The regulations, however, are deemed sufficient by the courts.¹⁵ In addition, the NIGC offers a free and confidential review process whereby the general counsel’s office will issue an opinion as to whether or not a submitted document constitutes a management contract requiring the chairperson’s approval.¹⁶

Perhaps more troublesome for potential casino lenders is the reality that a potential for management of a casino is sufficient to convert an otherwise inoffensive loan into an unapproved management contract. The 10th Circuit explicitly in *First Am. Kickapoo* rejected the argument “that a contract is only a management contract if it confers rights rather than opportunities to manage.”¹⁷ The reality remains that lenders require security for a loan to ensure that it is repaid. Uncertainties as to repayment typically lead to higher interest rates. Common sense dictates that the greater security, the lower the interest rate available. The 7th Circuit in *Lake of the Torches* held that a number of provisions which become operative in the event of default rendered that bond indenture to be a management contract.¹⁸ Contingent management still constitutes management of an Indian casino.

The NIGC Office of General Counsel maintains that the pledge of gross gaming revenues without limitation allows for potential management of a casino. As explained by then-Acting General Counsel Penny Coleman, “We

“ Naturally, gaming investors and their counsel can be creative in hiding management contracts. ”

take this position because in the event of default, a party with a security interest in a gaming facility's gross revenues has the authority to decide how and when operating expenses at the gaming facility are paid, which is itself a management function. Furthermore, a party that controls gross revenue potentially can control everything about the gaming facility by allocating or putting conditions on the payment of operating expenses. Therefore, agreements with such a security interest constitute management contracts that are void unless and until they are approved by the chairman of the National Indian Gaming Commission."¹⁹ The NIGC has approved limiting language to be used in loan agreements to eliminate this concern and ensure that the pledge of revenues does not lead to management of the gaming facility.²⁰

An unapproved management contract is void *ab initio*. While severability clauses are common in all contracts, such clauses cannot be given effect in a void management contract. A void management contract is not a contract at all, and none of its provisions, including a severability clause, were ever lawfully agreed by the parties.²¹ There simply are no clauses to enforce, including the severability clause.²² The waiver of sovereign immunity likewise fails. And without the waiver of immunity, a tribe's gaming entity or the tribe itself, cannot even be hauled into court. The tribe is also at risk. When the NIGC finds that a tribe allowed a casino to operate under an unapproved management contract, it may close the facility and enforce penalties.²³

What remains unclear from the 7th Circuit's opinion is whether a lender may recover funds on a void lending contract under any equitable cause of action. Sovereign immunity bars both actions at law and equity.²⁴ However, the panel held that Wells Fargo should be allowed to amend its complaint before the case could be dismissed with prejudice for lack of subject matter jurisdiction. The court held:

"In sum, on remand, the district court should grant Wells Fargo's motion for leave to file an amended complaint insofar as it states claims for legal and equitable relief in connection with the bond transaction. The court should then address whether Wells Fargo's standing to seek such relief on behalf of the bondholder survives the voiding of the Indenture. It should proceed to address whether the transactional docu-

ments, taken alone or together, evince an intent on the part of the Corporation to waive sovereign immunity with respect to claims by Wells Fargo on its own behalf and, if it has standing to do so, on behalf of the bondholder."²⁵

What happened next in the federal litigation provides little help to anyone. Wells Fargo did file its amended complaint, but that amended complaint attempted to add parties to destroy the diversity jurisdiction of the federal court. In the words of Judge Randa, "It isn't very often that a case comes before the court in which both parties want the case to be dismissed, albeit for different reasons."²⁶ The district court then entered an order to show cause why Wells Fargo should not be sanctioned. While it did persuade the court of a good faith basis to join new parties to the suit, Wells Fargo ultimately changed tack and filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41. The voluntary dismissal, filed on June 28, 2012, may have achieved the lender's goal of preventing a ruling on the merits of the bond indenture, or at least delaying a final ruling for when the tribe brings suit. (If not preclusive, any future court reviewing the bond indenture will likely find the 7th Circuit's opinion highly persuasive.).

Under Oklahoma law it is apparent that a party should not be able to recover on an unjust enrichment theory under a contract that is void for public policy.²⁷ Any person claiming an equitable right to recover for evading NIGC scrutiny surely would qualify for unclean hands.²⁸ "Courts have long recognized that Indian tribes possess common law immunity from lawsuits."²⁹ Furthermore, "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation,"³⁰ because "sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits."³¹ Put more directly, the disappearance of a sovereign immunity waiver along with all clauses in a contract render recovery, even under equitable causes of action, highly unlikely.

The result of the *Lake of the Torches* saga will still not be known for some time. Despite the dismissal, litigation continues in new lawsuits filed by the bond holders in state court as noted by Judge Randa's March 30, 2012, order, and in the Western District of Wisconsin itself

where a new lawsuit was filed against the Lake of the Torches Economic Development Corporation regarding the debt evidenced by the bonds but without Wells Fargo as a named plaintiff.³² The lessons to be learned remain unclear, but it is certainly a cautionary tale.

Counsel representing both tribes and lenders must be mindful of the NIGC's position regarding gross revenues and other management features which become operative upon default. Counsel should also be prepared to recommend and to use the NIGC's review process which at no expense will review a proposed contract and issue a yea or nay opinion on its management features. Finally, on the litigation front, counsel should advise both lenders and tribes that nothing is absolutely certain regarding the insertion of a management contract issue into a dispute. However, counsel for a tribe should not cower from raising the issue. It may seem counterintuitive to many, but a tribe who has signed an unapproved management contract even though it receives loan proceeds, has still been wronged. Tribes are entitled to the protections attendant with NIGC review. The NIGC's role as a regulator of gaming in Indian Country is part of the United States government's trust responsibility. That some lenders believe it is unconscionable that a tribe may be able to free itself from a loan, miss the point of the regulations which aim to ensure that tribal members, and not outsiders, are the primary beneficiaries of Indian gaming revenues. Indian gaming should remain an Indian resource. Tribes are entitled to this protection. Those lenders and investors who wish to comply face a complicated but not an impossible task of compliance.

1. *Wells Fargo Bank, N.A. v. Lake of The Torches Economic Development Corp.*, 677 F.Supp.2d 1056, 1061 (W.D. Wis. 2010), affirmed in part and rev'd in part, 658 F.3d 684, 702 (7th Cir. 2011).

2. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998) (holding arbitration clause also itself serves as a waiver of sovereign immunity); *See also, Dilliner v. Seneca-Cayuga Tribe*, 2011 OK 61, 258 P.3d 516 (holding a purported sovereign immunity waiver's validity must be determined in accord with tribal law).

3. 25 U.S.C. §2702(2).

4. *Wells Fargo Bank, N.A. v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684, 695 - 700 (7th Cir. 2011) (IGRA's management contract provisions exist "to ensure that the tribes retain control of gaming facilities set up under the protection of IGRA and of the revenue from these facilities."); *Casino Res. Corp. v. Harrah's Entertainment, Inc.*, 243 F.3d 435, 438 fn.3 (8th Cir. 2001) ("IGRA recognizes a tribe's authority to enter into contracts for the management and operation of an Indian gaming facility by an entity other than the tribe or its employees, so long as certain requirements are satisfied and subject to approval by the Chairman of the National Indian Gaming Commission.").

5. 25 U.S.C. §2710(d)(9) and 2711(a)(1).

6. 25 C.F.R. §533.7.

7. 25 C.F.R. §502.19.

8. NIGC Bulletin 1994-5, available at www.nigc.gov/Reading_Room/Bulletins/Bulletin_No_1994-5.aspx.

9. *Id.*

10. *Wells Fargo Bank, N.A., v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir. 2011).

11. *In re the March 26, 2008 disapproval of a management contract between New Gaming Systems Inc. and the Sac & Fox Nation of Oklahoma*, Final Order, National Indian Gaming Commission (May 22, 2008).

12. *See, e.g., United States ex rel Bernard v. Casino Magic Corp.*, 293 F.3d 419, 424-25 (8th Cir. 2002) (series of agreements that gave the contractor "a percentage ownership interest in the tribe's indebtedness" and "mandated the tribe's compliance" with the contractor's recommendations is a management contract).

13. *Id.*

14. *Lake of the Torches*, 658 F.3d at fn 17.

15. *New Gaming Systems v. NIGC*, Order at p. 10, 08-CV-698-HE (W.D. Okla. Sept. 13, 2012) (affirming NIGC decision regarding management contract and rejecting challenge to enforceability of regulations for vagueness).

16. Judge Randa noted, "Given the size of the transaction and the complicated nature of the regulatory scheme, it is a bit surprising that Wells Fargo did not insist upon NIGC review and approval." *Lake of the Torches*, 677 F.Supp.2d at 1062. To be fair, Wells Fargo was not involved in the drafting and negotiation of the bond indenture and therefore was unlikely to have been in a position to insist upon an NIGC declination letter. Review letters may be viewed at www.nigc.gov/Reading_Room/Management_Review_Letters.aspx.

17. 412 F.3d at 1175; *Lake of the Torches*, 677 F.Supp. 2d at 1060-1.

18. *Wells Fargo Bank, N.A., v. Lake of the Torches Economic Development Corp.*, 658 F.3d 684 (7th Cir. 2011).

19. Acting General Counsel Penny Coleman to Kent Richey, Jan. 23, 2009 available at: www.okbar.org/s/nigc (last accessed Jan. 25, 2013).

20. "Notwithstanding any provision in any Loan Document, none of the Lending Parties shall engage in any of the following: planning, organizing, directing, coordinating, or controlling all or any portion of the Borrower's gaming operations (collectively, "Management Activities"), including, but not limited to..." *Id.*

21. *First Am. Kickapoo*, 412 F.3d at 1176 (an unapproved management contract "does not become a contract").

22. *See Lake of the Torches*, 677 F.Supp. 2d at 1061 n. 3.

23. 25 U.S.C. §2713.

24. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-9 (1978) (holding sovereign immunity bars suit against tribe for declaratory and prospective injunctive relief).

25. *Lake of the Torches*, 658 F.3d at 701-2 (7th Cir. 2011).

26. *Wells Fargo v. Lake of the Torches*, Decision and Order, 09-CV-768 (W.D. Wis. March 30, 2012).

27. To hold otherwise would run the precarious position of allowing a drug dealer's investors to seek redress through the courts despite the illegal aims of their business.

28. *Tulsa Torpedo Co. v. Kennedy*, 1928 OK 383, 268 P. 205.

29. *Santa Clara Pueblo*, 436 U.S. at 58.

30. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Berrey v. Asarco Inc.*, 439 F.3d 636, 643 (10th Cir. 2006) (holding that federally recognized Indian tribes possess immunity from suit in federal court).

31. *Enahoro v. Abubakar*, 408 F.3d 877, 880 (7th Cir. 2005) (quotation omitted).

32. *See Complaint, Saybrook Tax Exempt Investors, et al. v. Lake of the Torches*, 12-CV-255 (W.D. Wis. filed April 9, 2012).

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When One Trust Isn't Enough

Why AIPRA Should Be Revised to Allow Testators to Create Testamentary Trusts for Trust Lands

By Rhonda McLean

Those who prepare wills for owners of Indian trust lands know that each client feels strongly about the preservation of their historic lands. Each believes it to be his or her responsibility to ensure that every succeeding generation has the same opportunity to benefit financially, emotionally and spiritually from the lands passed on through the ancestry. Part of that responsibility is the careful selection of who should receive the trust lands, and the consequences of leaving such lands to a minor or incompetent child or grandchild.

Our client Mary is divorced and owns an interest in a tract of trust land located in Oklahoma. Mary has one daughter, Sheila, who is a minor. Mary wants to make a will to ensure that her interest in the trust lands stays within her family, and does not revert back to her tribe.¹ Also, Mary desperately wants Sheila to be taken care of. What if Mary wanted to leave all of her trust lands to Sheila, but does not want Sheila's father to have access to or benefit from the lands?

MINOR CHILDREN AND DOMESTIC ABUSE

At this point, we have to explain to Mary that she can name a guardian over Sheila in her will; however, there is no guarantee that the court will honor that wish, and Sheila's father could become her guardian. In Oklahoma, it is settled law that upon the death of one parent, there is a presumption of custody or guardianship granted to surviving biological parent. In 1982, the Supreme Court of Oklahoma in *Buxton v. Wilson*²

ruled that when undisputed evidence before the trial court establishes that a parent is competent to transact his own business and is not otherwise unsuitable or disqualified under existing law, that parent has a prior right to be appointed guardian of his children's estates.

What if in our case Mary left Sheila's father because he was abusive? In the case of domestic violence, Oklahoma has a presumption against custody where the parent has been convicted of domestic violence. 43 Okla. Stat. §109 provides, in part:

In every proceeding in which there is a dispute as to the custody of a minor child, a determination by the court that domestic violence, stalking, or harassment has occurred raises a rebuttable presumption that sole custody, joint legal or physical custody, or any shared parenting plan with the perpetrator of domestic violence, harassing or stalking behavior is detrimental and not

in the best interest of the child, and it is in the best interest of the child to reside with the parent who is not a perpetrator of domestic violence, harassing or stalking behavior.

No Oklahoma cases have been reported wherein the court addresses how the presumption against custody for domestic violence is balanced with the presumption that at the death of one parent, the surviving parent is presumed to be the guardian. So the question remains: If one parent is convicted of domestic abuse against the other parent, and the abused parent dies, does the abusive parent have a presumption of custody and/or guardianship?

If appointed as Sheila's guardian, Sheila's father will have the same access to the trust property that Mary herself had before she died. Mary's next question is: How do I leave my trust property to Sheila without risking Sheila's father having control of the property?

INCOMPETENCY

It is not uncommon for a client to wish their property to be devised to an incapacitated family member. Just like the minor children discussed above, the drafter must explain to the testator that upon the client's death, the incompetent devisee's guardian will have access to the trust property just as the client does. For some clients this is not an issue, and the client is comfortable with that arrangement. However, for some clients this creates a real dilemma because for one reason or another, the client does not trust the guardian and does not want the guardian to exercise any kind of control or decision making over the trust property. Once again the drafter is asked: How do I make sure the incompetent devisee benefits from our ancestral lands but prevent the guardian from being able to diminish the incompetent's interest?

FINANCIAL EXPLOITATION

Not limited to physical violence, testators are also concerned about financial exploitation of minor children. There has been a recent trend in identity theft by parents, including using the Social Security numbers of minor children to set up fraudulent accounts that the victims might not discover for years.³ In Minnesota, a mother was convicted of theft by temporary control for gambling with funds intended to be deposited in her daughter's trust fund account.⁴ In Ohio, a mother pleaded guilty to theft and forgery after

“... for some clients this creates a real dilemma because for one reason or another, the client does not trust the guardian and does not want the guardian to exercise any kind of control or decision making over the trust property.”

stealing more than \$300,000 from her minor son's medical malpractice settlement.⁵

A NOT-SO-SIMPLE SOLUTION

If Mary did not own trust lands, the answer would be simple. Mary would be advised to leave her interest in her lands to a trust, giving her the flexibility to name a person other than the guardian to exercise control over the lands and allowing her to place as many or as few restrictions on the trustee as she wishes. However, for the reasons discussed below, since Mary owns an interest in Indian trust lands, this is not an option.

In creating her testamentary trust, Mary has the ability to designate at what point she wants the trust to terminate, and the trust property to be distributed to Sheila.⁶ If she were to so choose, Mary could delay distribution of the property to Sheila until she reached a more mature age, for example 30 or 35. If the property is distributed to Sheila at Mary's death (under the supervision of Sheila's guardian), Sheila will obtain full control of the property at the termination of the guardianship, which will happen automatically when Sheila reaches the age of majority.⁷

The American Indian Probate Reform Act⁸ (AIPRA) applies to probates of wills for decedents who died after June 20, 2006.⁹ AIPRA allows for a testator to devise his interest in Indian trust lands to “eligible heirs:”

- 1) any lineal descendant of the testator;
- 2) any person who owns a preexisting undivided trust or restricted interest in the same parcel of land;
- 3) the Indian tribe with jurisdiction over the

interest in land; or

4) any Indian;¹⁰

in trust or restricted status.¹¹

Any land that is not devised as listed above may only be devised as a life estate to any person (with restrictions on who the remainder can be devised to) or as a *fee interest without federal restrictions against alienation to any person who is not eligible to be a devisee under clause 4* (above).¹²

AIPRA allows tribes to pass, with the approval of the secretary of the interior,¹³ certain codes that alter how trust property is passed through probate. For example, a tribe can enact a probate code that differs from how a person's land will be inherited if that person dies without a will.¹⁴ Additionally, certain tribes can enact a code that allows for a testator to leave his land to certain parties in fee,¹⁵ thus removing the trust protection from the land.

However, the amount of autonomy the tribe has in enacting its code is limited. For example, a tribe cannot enact a code that prohibits the devise of interest in trust or restricted land to an Indian lineal descendant of the original allottee or an Indian who is not a member of the Indian tribe with jurisdiction over such an interest unless certain requirements are met.¹⁶ Further, there is no authorization in AIPRA that allows a tribe to enact a code allowing a testator to leave his interest in trust lands to a testamentary trust for the benefit of an Indian heir.

Because AIPRA does not specifically allow testators to devise their interest in their Indian trust lands to a testamentary trust, some practitioners fear that any such attempt in a will would cause the testator's interest to fall out of Indian trust status, thereby subjecting the interests to state and federal taxation. Additionally, once the lands fall out of Indian trust status, the individual beneficiaries of the Indian trust lands are no longer afforded the protections consequential to the trust status. For Mary, having the lands fall out of trust status is not a risk she is willing to take.

If an attorney were to write an Indian will devising the property to a testamentary trust, it is possible that the court would interpret that provision as invalid and declare it void. In that event, AIPRA dictates that because the clause is void, the land will pass under the appropriate intestacy law.¹⁷ If the applicable tribe has enact-

ed an approved tribal probate code¹⁸ the decedent's interest will pass under that code. If there is not an applicable tribal probate code, the decedent's interest will pass under AIPRA, based on the decedent's percentage ownership of the tract. In either event, a practitioner should be aware that the intestacy law is likely different from the Oklahoma intestacy law.¹⁹

Back to our client Mary, regardless of whether her lands pass under AIPRA or a tribal code, neither option will protect her assets from potentially being reachable by Sheila's father if Sheila were to inherit the lands while she was still a minor. Neither would she have any control over who can manage the interests if Sheila were to inherit the lands while incompetent.

CONCLUSION

Native American testators should be allowed to devise their interests in their properties in the way that they and their attorneys deem best for their situation. Limitations on who can inherit trust property, and particularly limitations on the management of that trust property, only serve to further frustrate the problems facing the Native American population. Without congressional intervention and an amendment to AIPRA that allows for testamentary trusts to protect minors and incompetents, the hands of people like Mary continue to be tied.

1. See discussion *infra* regarding the American Indian Probate Reform Act.

2. *Buxton v. Wilson*, 654 P.2d 1048 (Okla. 1982). See also OKLA. STAT. tit. 58 §769 (1971), renumbered as OKLA. STAT. tit. 30 §2-106.

3. Melody Hobson and Laura Zaccaro, "America's Money: Parents Stealing Kids' Identities in Alarming Trend," www.okbar.org/s/moneykids, (accessed Jan. 22, 2013) and Huffington Post, "Some Parents Are Now Stealing Their Children's Credit", www.okbar.org/s/creditkids, (accessed Jan. 22, 2013).

4. *State of Minnesota v. Franklin*, 692 N.W.2d 82 (Minn. Ct. App. 2005) review denied (April 19, 2005).

5. *State of Ohio v. Rhinebolt*, 2008 Ohio 6218.

6. "Such express trusts shall be limited in the duration thereof either to a definite period of not to exceed twenty-one (21) years, or to the period of the life or lives of the beneficiary or beneficiaries thereof in being at the time of the creation of the trust. The instrument creating the trust shall specify the period of duration thereof within the limitations herein provided." OKLA. STAT. tit. 60 §172.

7. OKLA. STAT. tit. 30 §2-114.

8. 118 Stat. §1773 (2004).

9. Douglas Nash and Cecelia Burke, *Passing Title to Tribal Land and Federal Probate of Native American Estates* (Dec. 8, 2006).

10. 25 U.S.C.A. §2201 (2008) defines Indian as follows:

(A) any person who is a member of any Indian tribe, is eligible to become a member of any Indian tribe, or is an owner (as of the date of enactment of the American Indian Probate Reform Act of 2004) of a trust or restricted interest in land;

(B) any person meeting the definition of Indian under the Indian Reorganization Act (25 U.S.C.A. 479) and the regulations promulgated thereunder; and

(C) with respect to the inheritance and ownership of trust or restricted land in the State of California pursuant to section 207, any person described in subparagraph (A) or (B) or any person who owns a trust or restricted interest in a parcel of such land in that State.

11. 25 U.S.C.A. § 2206(b)(1)(A) (2008).

12. 25 U.S.C.A. §2206(b)(2)(A)(ii) (2008) (emphasis added).
13. 25 U.S.C.A. §2205(b)(1) (2005).
14. 25 U.S.C.A. §2205(a)(1) (2005).
15. 25 U.S.C.A. §2206(b)(2)(B)(ii)(I) (2008).
16. 25 U.S.C.A. §2205(a)(3) (2005).
17. 25 U.S.C.A. §2206(b)(4) (2008) and 25 U.S.C.A. § 2206(h)(6) (2008).
18. 25 U.S.C.A. §2205.
19. OKLA. STAT. tit. 84 §213.

ABOUT THE AUTHOR



Rhonda McLean is an associate with Andrews Davis PC in Oklahoma City. Her practice focuses on oil and gas matters and she has experience in matters involving Indian lands. She is a member of the Ruth Bader Ginsburg Inn of Court, Mineral Lawyers Society, Central Oklahoma Mensa, Phi Delta Phi and Order of the Barristers. She received her J.D. degree and American Indian Law certificate in 2011 from the OCU School of Law.

OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

2013

- **March**
Technology
Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: Oct. 1, 2012
- **April**
Law Day
Editor: Carol Manning
- **May**
Estate Planning & Probate
Editor: Pandee Ramirez
pandee@sbcglobal.net
Deadline: Jan. 1, 2013
- **August**
Criminal Law
Editor: January Windrix
janwindrix@yahoo.com
Deadline: May 1, 2013
- **September**
Bar Convention
Editor: Carol Manning
- **October**
Appellate Law
Editor: Emily Duensing
emily.duensing@oscn.net
Deadline: May 1, 2013

- **November**
Raising the Bar: Lawyers Who Make a Difference
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2013
- **December**
Ethics & Professional Responsibility
Editor: Joe Vorndran
joe@scdtlaw.com
Deadline: Aug. 1, 2013

2014

- **January**
Meet Your OBA
Editor: Carol Manning
- **February**
Alternate Dispute Resolution
Editor: Judge Megan Simpson
megan.simpson@oscn.net
Deadline: Oct. 1, 2013
- **March**
Business Litigation
Editor: Mark Ramsey
mramsey@soonerlaw.com
Deadline: Oct. 1, 2013

- **April**
Law Day
Editor: Carol Manning
- **May**
Diversity in the Law
Editor: January Windrix
janwindrix@yahoo.com
Deadline: Jan. 1, 2014
- **August**
Children and the Law
Editor: Sandee Coogan
scoogan@coxinet.net
Deadline: May 1, 2014
- **September**
Bar Convention
Editor: Carol Manning
- **October**
Health Care
Editor: Emily Duensing
emily.duensing@oscn.net
Deadline: May 1, 2014
- **November**
President's Topic
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Aug. 1, 2014
- **December**
Ethics & Professional Responsibility
Editor: Judge Allen Welch
allen.welch@oscn.net
Deadline: Aug. 1, 2014

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

Committee Reviews Proposed Legislation

Bar Members Urged to Attend Day at the Capitol

By *Duchess Bartmess*

Again this year, a group of interested bar members met to review bills and joint resolutions introduced in both the House and Senate for the purpose of recommending measures that should be monitored throughout the session by the OBA Legislative Monitoring Committee. Appropriation bills, sunset bills, bills addressing issues regarding state retirement systems, and measures that do not have significant legal impact such as naming bridges and roads were not reviewed.

At the beginning of each new Legislature, the number of subcommittees created and the subject areas to be addressed by the various subcommittees are established.

For both sessions of the 54th Oklahoma Legislature, the 15 subcommittees of the Legislative Monitoring Committee are:

- Children & Family Law
- Civil Law & Procedure
- Commercial Law, Business Entities, Insurance & Contracts
- Constitutional Law
- Courts, Judiciary & Attorneys
- Criminal Law & Procedure
- Education — Common and Higher



- Energy, Oil, Gas, Minerals, Environment & Natural Resources
- General Government — Local & State
- Probate, Guardianship & Trusts
- Public Health, Safety & Welfare
- Real Property, Landlord & Tenant
- Revenue & Tax
- Transportation & Motor Vehicles
- Workers' Compensation

Of the nearly 2,500 measures introduced, more than 400 have been designated of significance for review and analysis. The committee's primary mission continues to be to inform bar members of pending legislation of significance to the practice of law in Oklahoma and to provide assistance to members

of the Legislature to produce clear, constitutional, technically accurate laws for the state of Oklahoma that are void of unintended consequences. Summaries of the bills being monitored (and the status of each) can be found on the OBA website at www.okbar.org/s/billssummaries. This information is updated weekly. For the most current status of a bill, go to the Legislature's website at www.oklegislature.gov.

Therefore, in furtherance of the committee's mission, efforts will be increased to work with other bar committees and sections, as appropriate, for an even more comprehensive analysis of the significant measures assigned to subcommittees.

The OBA has five bills on its legislative agenda, passed by the House of Delegates in November. Read Executive Director John Morris Williams' article in this issue for information on those bills.

Members are invited to communicate with the committee for information regarding pending measures or to provide comments or assistance to the committee in its efforts on behalf of OBA members.

DAY AT THE CAPITOL

All members are encouraged to come to Oklahoma City to participate in OBA Day at the Capitol, March 12. This is a great opportunity to speak to your legislators in person about important issues. The OBA is providing a free lunch that day, but you need to RSVP.

Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee. She can be reached at duchessb@swbell.net.

OBA DAY at the CAPITOL

**Tuesday, March 12, 2013
Oklahoma Bar Center**

- 11 a.m. Welcome
Jim Stuart
OBA President
- 11:05 a.m. Issues from the Speaker's Office
Rick Rose
- 11:15 a.m. Bills of Interest to the Judicial Conference
Judge James B. Croy
- 11:30 a.m. Bills of General Interest
Thad Balkman
- 11:45 p.m. Break for Lunch*
- 12:00 p.m. Defense Issues
Grady Parker
- 12:15 p.m. Plaintiff Issues
Speaker TBA
- 12:30 p.m. Criminal Law Issues
D. Michael Haggerty II
- 12:45 p.m. OBA Bills
John Morris Williams
OBA Executive Director
- 1 – 3 p.m. Adjourn and Meet with Legislators
at the State Capitol

*Please RSVP if attending lunch to:
debbieb@okbar.org or
call 405-416-7014; 800-522-8065



Save a tree.

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issues electronically at
<http://myokbar.org/>



**ANNUAL REPORT OF THE
PROFESSIONAL RESPONSIBILITY COMMISSION
AS COMPILED BY THE
OFFICE OF THE GENERAL COUNSEL OF THE
OKLAHOMA BAR ASSOCIATION**

January 1, 2012 through December 31, 2012

SCBD No. 5695

(Filed with Oklahoma Supreme Court, February 1, 2013)

Pursuant to the provisions of Rule 14.1, Rules Governing Disciplinary Proceedings (RPDP), 5 O.S. 2011 Ch. 1, App. 1-A, this is the Annual Report of grievances and complaints received and processed for 2012 by the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

THE PROFESSIONAL RESPONSIBILITY COMMISSION

The Commission is composed of seven persons — five lawyer and two non-lawyer members. The attorney members are nominated for rotating three-year terms by the President of the Association subject to the approval of the Board of Governors. The two non-lawyer members are appointed by the Speaker of the Oklahoma House of Representatives and the President Pro Tempore of the Oklahoma Senate, respectively. No member can serve more than two consecutive terms. Terms expire on December 31st at the conclusion of the three-year term.

Lawyer members serving on the Professional Responsibility Commission during 2012 were Melissa Griner DeLacerda, Stillwater; Angela Ailles Bahm, Oklahoma City; William R. Grimm, Tulsa; Jon K. Parsley, Guymon; and Stephen D. Beam, Weatherford. Non-Lawyer members were Tony R. Blasier, Oklahoma City;

and Debra Thompson, Carney. Melissa Griner DeLacerda served as Chairperson and Tony R. Blasier served as Vice-Chairperson. Commission members serve without compensation but are reimbursed for actual travel expenses.

RESPONSIBILITIES

The Professional Responsibility Commission considers and investigates any alleged ground for discipline, or alleged incapacity, of any lawyer called to its attention, or upon its own motion, and takes such action as deemed appropriate, including holding hearings, receiving testimony, and issuing and serving subpoenas.

Under the supervision of the Professional Responsibility Commission, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the General Counsel by grievance or otherwise, and reports to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel. The Professional Responsibility Commission then determines the disposition of grievances or directs the instituting of a formal complaint for alleged misconduct or personal incapacity of an attorney with the Oklahoma Supreme Court. The attorneys in the Office of the General Counsel

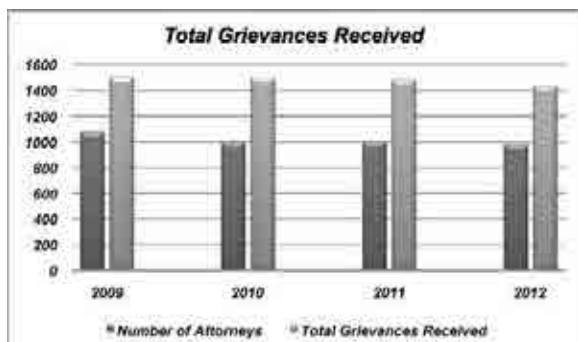
prosecute all proceedings under the Rules Governing Disciplinary Proceedings, supervise the investigative process, and represent the Oklahoma Bar Association at all reinstatement proceedings.

VOLUME OF GRIEVANCES

During 2012, the Office of the General Counsel received 279 formal grievances involving 181 attorneys and 1149 informal grievances involving 891 attorneys. In total, 1,428 grievances were received against 979 attorneys. The total number of attorneys differs because some attorneys received both formal and informal grievances. In addition, the Office handled 493 items of general correspondence, which is mail not considered to be a grievance against an attorney.

On January 1, 2012, 251 formal grievances were carried over from the previous year. During 2012, 279 new formal grievances were opened for investigation. The carryover accounted for a total caseload of 530 formal investigations pending throughout 2012. Of those grievances, 273 investigations were completed by the Office of the General Counsel and presented for review to the Professional Responsibility Commission. Therefore, 257 investigations were pending on December 31, 2012.

The time required for investigating and concluding each grievance varies depending on the seriousness and complexity of the allegations and the availability of witnesses and documents. The Professional Responsibility Commission requires the Office of the General Counsel to report monthly on all informal and formal grievances received and all investigations completed and ready for disposition by the Commission. In addition, the Commission receives a monthly statistical report on the pending caseload. The Board of Governors is advised statistically each month of the actions taken by the Professional Responsibility Commission.



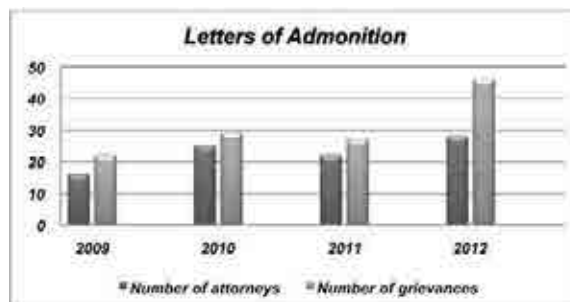
DISCIPLINE BY THE PROFESSIONAL RESPONSIBILITY COMMISSION

1. Formal Charges. During 2012, the Commission voted the filing of formal disciplinary charges against 12 lawyers involving 29 grievances. In addition, the Commission also oversaw the filing of nine Rule 7 matters filed with the Chief Justice of the Oklahoma Supreme Court.

2. Private Reprimands. Pursuant to Rule 5.3(c) of the Rules Governing Disciplinary Proceedings, the Professional Responsibility Commission has the authority to impose private reprimands, with the consent of the attorney, in matters of less serious misconduct or if mitigating factors reduce the sanction to be imposed. During 2012, the Commission issued private reprimands to 20 attorneys involving 30 grievances.



3. Letters of Admonition. During 2012, the Commission issued letters of admonition to 28 attorneys involving 46 grievances cautioning that the conduct of the attorney was dangerously close to a violation of a disciplinary rule wherein the Commission believed warranted a warning rather than discipline.



4. Dismissals. The Commission dismissed 166 grievances where the investigation revealed lack of merit or loss of jurisdiction over the respondent attorney. Loss of jurisdiction included the death of the attorney, the resignation of the attorney pending disciplinary proceed-

ings, a continuing lengthy suspension or disbarment of the respondent attorney, or due to the attorney being stricken from membership for non-compliance with MCLE requirements or non-payment of dues.

5. Diversion Program. The Commission may also refer respondent attorneys to the Discipline Diversion Program where remedial measures are taken to ensure that any deficiency in the representation of a client does not occur in the future. During 2012, the Commission referred 30 attorneys to be admitted into the Diversion Program for conduct involving 53 grievances.

The Discipline Diversion Program is tailored to the individual circumstances of the participating attorney and the misconduct alleged. Oversight of the program is by the OBA Ethics Counsel with the OBA Management Assistance Program Director involved in programming. Program options include: Trust Account School, Professional Responsibility/Ethics School, Law Office Management Training, Communication and Client Relationship Skills, and Professionalism in the Practice of Law class. In addition to one or more of these instructional classes, the following resources can be made a part of the individual's Diversion Program Agreement: Management Assistance Program Office Review, Lawyers Helping Lawyers Assistance Program, Medical/Psychological Monitoring and Mentor/Peer Referral. Instructional courses are taught by OBA Ethics Counsel Travis Pickens and OBA Management Assistance Program Director Jim Calloway.

As a result of the Trust Account Overdraft Reporting Notifications, the Office of the General Counsel is now able to monitor when attorneys encounter difficulty with basic accounting procedures and management of their IOLTA accounts. Upon recommendation of the Office of the General Counsel, the Professional Responsibility Commission may place those individuals in a tailored program designed to address basic trust accounting procedures.

2012 Attorney Participation in Diversion Program Curriculum

Law Office Management Training:	17 Attorneys
Communication and Client Relationship Skills:	19 Attorneys
Professionalism in the Practice of Law:	3 Attorneys
Professional Responsibility/Ethics School:	17 Attorneys
Client Trust Account School:	12 Attorneys

SURVEY OF GRIEVANCES

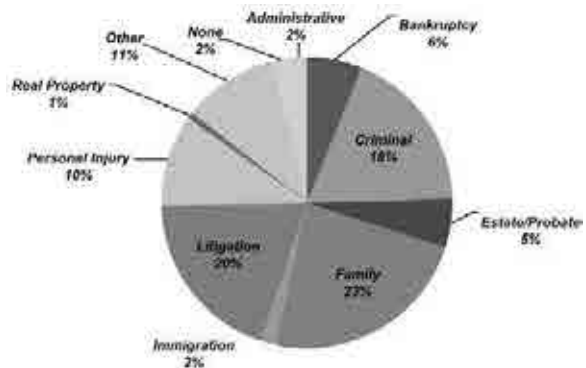
In order to better inform the Supreme Court, the bar and the public of the nature of the grievances received, the numbers of attorneys complained against, and the areas of attorney misconduct involved, the following information is presented.

Total membership of the Oklahoma Bar Association as of December 31, 2012 was 17,232 attorneys. The total number of members include 11,843 males and 5,389 females. Formal and informal grievances were submitted against 979 attorneys. Therefore, less than six percent of the attorneys licensed to practice law by the Oklahoma Supreme Court received a grievance in 2012.

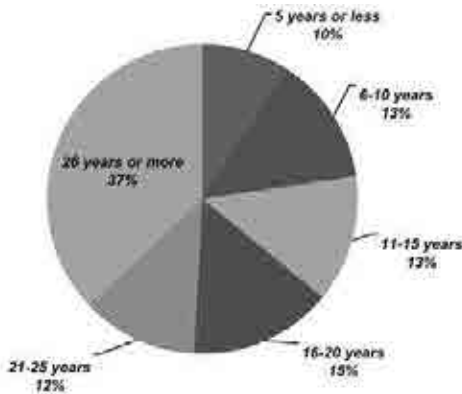
A breakdown of the type of alleged attorney misconduct alleged in the 279 formal grievances received by the Office of the General Counsel in 2012 is as follows:



Of the 279 formal grievances, the area of practice is as follows:



The number of years in practice of the 181 attorneys receiving formal grievances is as follows:



The largest number of grievances received were against attorneys who have been in practice for 26 years or more. Considering the total number of practicing attorneys, the largest number have been in practice 26 years or more.

Of the 279 formal grievances filed against 181 attorneys in 2012, 87 are attorneys in urban areas and 90 attorneys live and practice in rural areas. Four of the grievances were filed against attorneys licensed in Oklahoma but practicing out of state.

DISCIPLINE IMPOSED BY THE OKLAHOMA SUPREME COURT

In 2012, 25 disciplinary cases were acted upon by the Oklahoma Supreme Court. The Court consolidated three of those cases and the public sanctions are as follows:

Disbarment:

Respondent	Effective Date
William Louis Clark, Jr.	04/09/12
Michelle Renee Rowe	10/23/12

Resignations Pending Disciplinary Proceedings Approved by Court: (Tantamount to disbarment)

Respondent	Effective Date
Dane Thomas Wilson	02/09/12
Joshua Todd Welch	04/19/12
Rohit Chandra Sharma	06/11/12
Tammy LaVerne Bass-LeSure	09/10/12
Christopher H. Cox	09/10/12

Disciplinary Suspensions:

Respondent	Length	Effective Date
Amy Lynn McTeer	Interim	02/14/12
Thomas Prade Bellamy	2 years + 1 day	03/06/12
G. Wayne Olmstead	Rule 7 Interim	03/12/12
G. Wayne Olmstead	1 year	03/12/12
Tammy Bass-LeSure	Rule 7 Interim	03/12/12
James Albert Conrady	2 years + 1 day	04/03/12
Joshua Todd Welch	Rule 7 Interim	04/19/12
Robert Samuel Kerr IV	Rule 7 Interim	04/19/12
Robert Samuel Kerr IV	2 years + 1 day	04/19/12
J. David Ogle	Rule 7 Interim	08/22/12
Christian Rollow Haave	2 years	11/06/12
Lewis B. Moon	Rule 7 Interim	11/08/12
N. Franklyn Casey	2 years + 1 day	11/13/12
Lawrence A.G. Johnson	6 months	11/13/12
Jonna Lynn Reynolds	2 years + 1 day	11/20/12
Jon Edward Brown	Rule 7 Interim	12/03/12
Nathaniel Soderstrom	Rule 7 Interim	12/03/12

Public Censure:

Respondent	Effective Date
Miles C. Zimmerman	04/17/12
Andrew Raymond Townsend	05/08/12
John Brandon Hill	06/26/12
Michael Joseph Corrales	06/26/12
Lewis B. Moon	09/18/12

Dismissals:

Respondent	Effective Date
Howard, Joseph T.	09/17/12
Roberts, David Michael	11/26/12

In addition to the public discipline imposed in 2012, the Court also issued the following non-public sanctions:

Interim Suspension:

Respondent	Length	Effective Date
Rule 10 Confidential	Interim	06/11/12

There were 19 attorney discipline cases pending with the Supreme Court of Oklahoma as of January 1, 2012. During 2012, 14 new formal complaints, nine Rule 7 Notices and three Resignations Pending Disciplinary Proceedings were filed and two complaints were remanded back to the Professional Responsibility Tribunal for a total of 47 cases filed and/or pending during the year. On December 31, 2012, 22 cases remained pending before the Oklahoma Supreme Court.

REINSTATEMENTS

There were nine active reinstatement cases filed with the Oklahoma Supreme Court as of January 1, 2012. There were eight new petitions for reinstatement filed in 2012. In 2012, the Supreme Court approved nine reinstatements, dismissed one and three were withdrawn. On December 31, 2012, there were four petitions for reinstatement filed and pending before the Oklahoma Supreme Court.

TRUST ACCOUNT OVERDRAFT REPORTING

The Office of the General Counsel under the supervision of the Commission has implemented the Trust Account Overdraft Reporting requirements of Rule 1.15(j), Oklahoma Rules of Professional Conduct, 5 O.S. Supp. 2008, ch. 1, app. 3-A. Trust Account Overdraft Reporting Agreements have been submitted by and approved for depository institutions. In 2012, 184 notices of overdraft of a client trust account were received by the Office of the General Counsel. Notification triggers a general inquiry to the attorney requesting an explanation for the deficient account. Based upon the response, an investigation may be commenced. Repeated overdrafts due to negligent accounting practices have resulted in referral to the Discipline

Diversion Program for instruction in proper trust accounting procedures.



UNAUTHORIZED PRACTICE OF LAW

Rule 5.1(b), Rules Governing Disciplinary Proceedings, 5. O.S. 2001 Ch. 1 App. 1-A, authorizes the Office of the General Counsel to investigate allegations of the unauthorized practice of law (UPL) by non-lawyers.

REQUESTS FOR INVESTIGATION

In 2012, this office received 41 complaints for investigation of the unauthorized practice of law. The Office of the General Counsel fielded many additional inquiries regarding the unauthorized practice of law that are not reflected in this summary.

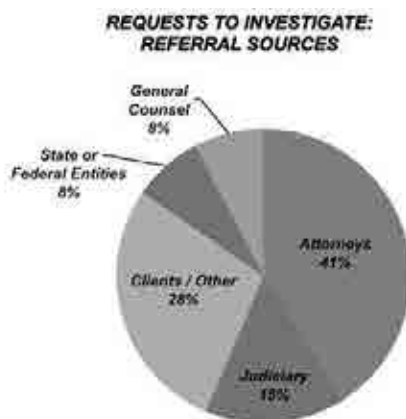
PRACTICE AREAS

Allegations of the unauthorized practice of law encompass various areas of law. Most complaints concern individuals assisting pro se litigants in divorce actions. In the chart below, the "General Practice" category denotes non-lawyer individuals that advertise or allegedly perform legal services relating to family law, criminal law (including appellate relief), civil rights, guardianships, small claims, wills, trusts, estate matters, business entities, property issues and name change petitions. The remaining categories are reserved for non-lawyer individuals that advertise or allegedly perform legal services in a specific area of law.



REFERRAL SOURCES

Requests for investigations of allegations of the unauthorized practice of law stem from multiple sources. Oklahoma attorneys and attorneys from other jurisdictions are the most frequent source for requests for investigation. Judicial referrals, requests from State and Federal agencies, harmed members of the public, the Professional Responsibility Commission and the Office of the General Counsel also report alleged instances of individuals engaging in the unauthorized practice of law.



RESPONDENTS

Most requests for investigation into allegations of the unauthorized practice of law concern paralegals (or paralegal firms) and non-lawyers. For purposes of this summary, the category "non-lawyer" refers to an individual who does not advertise as a paralegal, but performs various legal tasks for their customers. Recently, most "non-lawyers" claim to have expertise in the foreclosure process. The "Former Lawyers" category includes lawyers who have been disbarred, stricken, resigned their law license pending disciplinary proceedings or otherwise



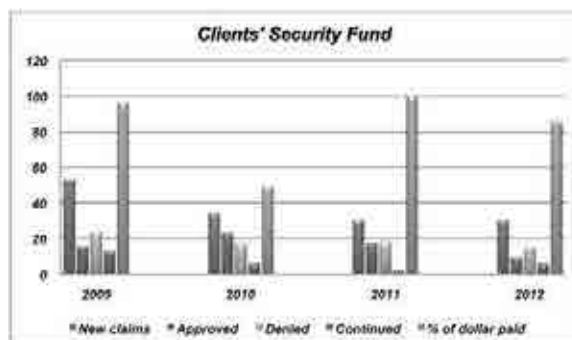
voluntarily surrendered their license to practice law in the State of Oklahoma.

ENFORCEMENT

In 2012, this office sent 10 cease and desist letters after investigation determined that that unauthorized practice of law was occurring. Of the 10 cases, seven resulted in resolution where the conduct ceased.

CLIENTS' SECURITY FUND

The Clients' Security Fund was established in 1965 by Court Rules of the Oklahoma Supreme Court. The Fund is administered by the Clients' Security Fund Committee which is comprised of 17 members, 14 lawyer members and 3 non-lawyers, who are appointed in staggered three-year terms by the OBA President with approval from the Board of Governors. The Fund furnishes a means of reimbursement to clients for financial losses occasioned by dishonest acts of lawyers. It is also intended to protect the reputation of lawyers in general from the consequences of dishonest acts of a very few. The Board of Governors budgets and appropriates \$100,000.00 each year to the Clients' Security Fund for payment of approved claims. In years when the approved amount exceeds the amount available, the amount approved for each claimant will be reduced in proportion on a prorata basis until the total amount paid for all claims in that year is \$100,000.00. In 2012, the amount approved for each claimant was reduced by 14 percent. The Office of the General Counsel provides staff services for the Committee. In 2012, the Office of the General Counsel investigated and presented to the Committee 30 new claims. The Committee approved 9 claims, denied 15 claims and continued 6 claims into the following year for further investigation.



CIVIL ACTIONS (NON-DISCIPLINE) INVOLVING THE OBA

The Office of the General Counsel has represented the Oklahoma Bar Association in the following civil (non-discipline) matters during 2012:

1. *State of Oklahoma ex rel. Oklahoma Bar Association v. Mothershed*, Oklahoma Supreme Court, SCBD 4687.
 - *Mothershed v. State of Oklahoma ex rel. Oklahoma Bar Association*, Tenth Circuit Court of Appeals, Case Number 11-6329 (appeal from United States District Court for the Western District of Oklahoma Case No. CIV-10-199-F). On December 12, 2011, Mothershed filed a Docketing Statement, Entry of Appearance, Motion for Summary Reversal and Application for Electronic Filing. The motions were *denied* on February 29, 2012. The mandate was issued on March 22, 2012.
 - *Mothershed v. Justices of the Supreme Court of Oklahoma, et al.*, United States District Court for the District of Arizona, Case No. CIV-12-0549-PHX-FJM, filed March 15, 2012. Dismissed for lack of personal jurisdiction, *Rooker-Feldman*, Fed. R. Civ. P. 8, etc. on June 27, 2012.
 - *Mothershed v. Justices of the Supreme Court of Oklahoma, et al.*, Ninth Circuit Court of Appeals, Case Number 12-16671, filed July 31, 2012. Order granting summary affirmance entered October 19, 2012. Petition for Rehearing *denied* on December 18, 2012.
 - *Mothershed v. Justices of the Supreme Court of Oklahoma, et al.*, United States Supreme Court, Case Number 12-8347. Petition for Writ of Certiorari transmitted to the OBA on January 15, 2013.
2. *Gather v. OKARNG, et al.*, United States Supreme Court, Case No. 11-7176:
 - *Gather v. OKARNG, et al.*, United States Supreme Court, Case No. 11-7176, docketed November 3, 2011. (Appeal from United States District Court for the Western District of Oklahoma, Case No. CIV-11-260-F, filed March 10, 2011. Dismissed May 18, 2011. Gather filed Notice of Appeal, Tenth Circuit Court of Appeals, Case No. 11-6212, denied August 19, 2011) Petition for Certiorari *denied* January 9, 2012.
 - *Gather v. OKARNG, et al.*, United States District Court for the Western District of Oklahoma, Case No. CIV-12-166, filed February 14, 2012. *Dismissed* February 16, 2012. Transmitted notice of appeal.
 - *Gather v. OKARNG, et al.*, United States District Court for the Western District of Oklahoma, Case No. CIV-12-208, filed February 23, 2012. *Dismissed* February 27, 2012.
 - *Gather v. OKARNG, et al.*, Tenth Circuit Court of Appeals, Case No. 12-6048, filed February 24, 2012 (appealing dismissal of CIV-12-166). *Dismissal affirmed* May 7, 2012.
 - *Gather v. OKARNG, et al.*, United States Supreme Court. Case No. 12-6118, filed May 22, 2012. OBA filed Waiver of Reply to initial petition. Certiorari denied November 13, 2012. Gather has filed two additional petitions for rehearing. Rehearing *denied* January 14, 2013.
3. *Kerchee et al. v. Smith et al.*, Western District of Oklahoma Case No. CV-11-459-C, filed April 26, 2011. The Kerchees filed suit against approximately 40 defendants, including the OBA, Loraine Farabow, John M. Williams and others [OBA Defendants]. *Dismissed* against OBA defendants on November 21, 2011. Final Judgment entered February 1, 2012.
 - *Kerchee et al. v. Smith et al.*, Tenth Circuit Court of Appeals, Case No. 12-6080, filed March 28, 2012. OBA Defendants filed Motion to Dismiss for lack of appellate jurisdiction and Answer Brief. *Pending*.
4. *State of Oklahoma ex rel. Oklahoma Bar Association v. Metcalfe*, Pontotoc County Case No. CV-2010-163. (Unauthorized Practice of Law). Temporary Injunction in effect.
5. *Antone Lamandingo Knox v. Hendryx*, Oklahoma Supreme Court Case No. MA-110,182, filed December 9, 2011. Petitioner's Application for Writ of Mandamus and Application to Assume Original Jurisdiction was *denied* on January 17, 2012.
6. *Charles Fields v. Oklahoma Bar Association*, Oklahoma Supreme Court Case No. MA-110264, filed January 5, 2012. Petition for Writ of Mandamus filed. The OBA filed its response on January 23, 2012. Application to Assume Original Jurisdiction was *denied* on February 13, 2012.

7. *Pemberton v. Melissa DeLacerda*, Oklahoma County Case No. CV-2012-158, filed January 1, 2012. *Dismissed* February 6, 2012.
 - *Pemberton v. DeLacerda*, Oklahoma Supreme Court Case No. MA-110441, filed March 2, 2012. Application to Assume Original Jurisdiction *denied*. OBA filed response to Petition in Error. Consolidated with Case Nos. 110,169 and 110,968 and assigned to the Court of Appeals when at issue on August 22, 2012. *Pending*.
8. *Deutsche Bank National Trust v. Steven Angel et al.*, Logan County Case No. CJ-2012-193. Served on OBA on July 9, 2012. Answer filed disclaiming interest in suit. *Dismissed* as party July 12, 2012.

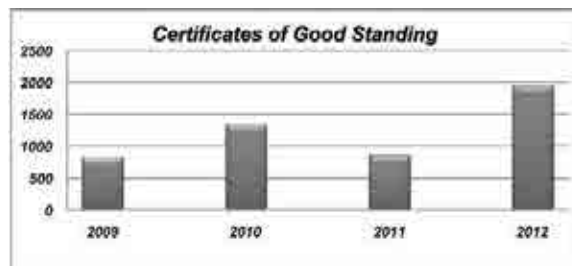
ATTORNEY SUPPORT SERVICES

In 2012, the Office of the General Counsel processed 563 new applications, 474 renewal applications and \$15,950.00 in renewal late fees submitted by out-of-state attorneys registering to participate in a proceeding before an Oklahoma Court or Tribunal. Out-of-State attorneys appearing pro bono to represent criminal indigent defendants, or on behalf of persons who otherwise would qualify for representation under the guidelines of the Legal Services Corporation due to their incomes, may request a waiver of the application fee from the Oklahoma Bar Association. In 2012, the Office of the General Counsel also processed 3 waiver requests of the application fee. Certificates of Compliance are issued after confirmation of the application information, the applicant's good standing in his/her licensing jurisdiction and payment of applicable fees. All obtained and verified information is submitted to the Oklahoma Court or Tribunal as an exhibit to a "Motion to Admit Pro Hac Vice."



Certificates of Good Standing

In 2012, the Office of the General Counsel prepared 1940 Certificates of Good Standing/Discipline History at the request of Oklahoma Bar Association members. There is no fee to the attorney for preparation of same.



ETHICS AND EDUCATION

During 2012, the General Counsel, Assistant General Counsels, and the Professional Responsibility Commission members presented more than 40 hours of continuing legal education programs to county bar association meetings, attorney practice groups, OBA programs, law school classes and various legal organizations. In these sessions, disciplinary and investigative procedures, case law, and ethical standards within the profession were discussed. This effort directs lawyers to a better understanding of their ethical requirements and the disciplinary process, and informs the public of the efforts of the Oklahoma Bar Association to regulate the conduct of its members. In addition, the General Counsel was a regular contributor to The Oklahoma Bar Journal.

RESPECTFULLY SUBMITTED this 1st day of February, 2013, on behalf of the Professional Responsibility Commission and the Office of the General Counsel of the Oklahoma Bar Association.

/s/ Gina Hendryx
General Counsel
Oklahoma Bar Association



PROFESSIONAL RESPONSIBILITY TRIBUNAL ANNUAL REPORT

2012

SCBD No. 5966

The Professional Responsibility Tribunal (PRT) was established by order of the Supreme Court of Oklahoma in 1981, under the Rules Governing Disciplinary Proceedings, 5O.S. 2001, Ch. 1, App. 1-A (RGDP). The primary function of the PRT is to conduct hearings on complaints filed against lawyers in formal disciplinary and personal incapacity proceedings, and on petitioners for reinstatement to the practice of law. A formal disciplinary proceeding is initiated by written complaint which a specific is pleading filed with the Chief Justice of the Supreme Court. Petitioners for reinstatement are filed with the Clerk of the Supreme Court.

COMPOSITION AND APPOINTMENT

The PRT is a 21-member panel of Masters, 14 of whom are lawyers and 7 whom are non-lawyers. The lawyers on the PRT are active members in good standing of the OBA. Lawyer members are appointed by the OBA President, with the approval of the Board of Governors. Non-lawyer members are appointed by the Governor of the State of Oklahoma. Each member is appointed to serve a three-year term, and limited to two terms. Terms end on June 30th of the last year of a member's service.

Pursuant to Rule 4.2 of the Rules Governing Disciplinary Proceedings (RGDP), members are required to meet annually to address organizational and other matters touching upon the PRT's purpose and objective. They also elect a Chief Master and Vice-Chief Master, both of

whom serve for a one-year term. PRT members receive no compensation for their services, but they are entitled to be reimbursed for travel and other reasonable expenses incidental to the performance of their duties.

The lawyer members of the PRT who served during all or part of 2012 were: Jeremy J. Beaver, McAlester; Dietmar K. Caudle, Lawton; Lorenzo Thurmond Collins, Ardmore; Patrick T. Cornell, Clinton; Joe Crosthwait, Midwest City; Deirdre Dexter, Sand Springs; Luke Gaither, Henryetta; Tom Gruber, Oklahoma City; Cody B. Hodgden, Woodward; William G. LaSorsa, Tulsa; Susan B. Loving, Edmond; Kelli M. Masters, Oklahoma City; Stephen R. McNamara, Tulsa; Mary Quinn-Cooper, Tulsa; F. Douglas Shirley, Watonga; Louis Don Smitherman, Oklahoma City; Neal E. Stauffer, Tulsa; and James M. Sturdivant, Tulsa.

The non-lawyer members who served during all or part of 2012 were: Steven W. Beebe, Duncan; Norman Cooper, Norman; Christian C. Crawford, Stillwater; James Richard Daniel, Oklahoma City; Kirk V. Pittman, Seiling; Bill Pyeatt, Norman; Susan Savage, Tulsa; John Thompson, Nichols Hills; and Mary Lee Townsend, Tulsa. As of December 31, one non-lawyer member vacancy existed.

The annual meeting was held on June 30, 2012, at the Oklahoma Bar Association offices. Agenda items included a visit by the General Counsel,¹ recognition of new members and members whose terms had ended, and discus-

sions concerning the work of the PRT. Patrick Cornell was elected Chief Master and Lorenzo Collins was elected Vice-Chief Master, each to serve a one-year term.

GOVERNANCE

All proceedings that come before the PRT are governed by the RGDP. However, proceedings and the reception of evidence are, by reference, governed generally by the rules in civil proceedings, except as otherwise provided by the RGDP.

The PRT is authorized to adopt appropriate procedural rules which govern the conduct of the proceedings before it. Such rules include, but are not limited to, provisions for requests for disqualification of members of the PRT assigned to hear a particular proceeding.

ACTION TAKEN AFTER NOTICE RECEIVED

After notice of the filing of a disciplinary complaint or reinstatement petition is received, the Chief Master (or Vice-Chief Masters if the Chief Master is unavailable) selects three (3) PRT members (two lawyers and one non-lawyer) to serve as a Trial Panel of Masters. The Chief Master designates one of the two lawyer-members to serve as Presiding Master. Two of the three Masters constitute a quorum for purposes of conducting hearings, ruling on and receiving evidence, and rendering findings of fact and conclusions of law.

In disciplinary proceedings, after the respondent's time to answer expires, the complaint and the answer, if any, are then lodged with the Clerk of the Supreme Court. The complaint and all further filings and proceedings with respect to the case then become a matter of public record.

The Chief Master notifies the respondent or petitioner, as the case may be, and General Counsel of the appointment and membership of a Trial Panel and the time and place for hearing. In disciplinary proceedings, a hearing is to be held not less than 30 days nor more than 60 days from date of appointment of the Trial Panel. Hearings on reinstatement petitioners are to be held not less than 60 days nor more than 90 days after the petition has been filed. Extensions of these periods, however, may be granted by the Chief Master for good cause shown.

After a proceeding is placed in the hands of a Trial Panel, it exercises general supervisory control over all pre-hearing and hearing issues. Members of a Trial Panel function in the same manner as a court by maintaining their independence and impartiality in all proceedings. Except in purely ministerial, scheduling, or procedural matters, Trial Panel members do not engage in *ex parte* communications with the parties. Depending on the complexity of the proceeding, the Presiding Master may hold status conferences and issue scheduling orders as a means of narrowing the issues and streamlining the case for trial. Parties may conduct discovery in the same manner as in civil cases.

Hearings are open to the public and all proceedings before a Trial Panel are stenographically recorded and transcribed. Oaths or affirmations may be administered, and subpoenas may be issued, by the Presiding Master, or by any officer authorized by law to administer an oath or issue subpoenas. Hearings, which resemble bench trials, are directed by the Presiding Master.

Respondents in disciplinary hearings or incapacity proceedings and petitioners in reinstatement proceedings are entitled to be represented by counsel.

TRIAL PANEL REPORTS

After the conclusion of a hearing, the Trial Panel prepares a written report to the Supreme Court. The report includes findings of facts on all pertinent issues, conclusions of law, and a recommendation as to the appropriate measure of discipline to be imposed or, in the case of a reinstatement petitioner, whether it should be granted. In all proceedings, any recommendation is based on a finding that the complainant or petitioner, as the case may be, has or has not satisfied the "clear and convincing" standard of proof. The Trial Panel report further includes a recommendation as to whether costs of investigation, the record, and proceedings should be imposed on the respondent or petitioner. Also filed in the case are all pleadings, transcript of proceeding, and exhibits offered at the hearing.

Trial Panel reports and recommendations are advisory only. The Supreme Court has exclusive jurisdiction over all disciplinary and reinstatement matters. It has the constitutional and non-delegable power to regulate both the practice of law and legal practitioners. Accordingly, the Supreme Court is bound by neither the

findings nor the recommendation of action, as its review of each proceeding is *de novo*.

ANNUAL REPORTS

Rule 14.1, RGDP, requires the PRT to report annually on its activities for the preceding year. As a function of its organization, the PRT operates from July 1 through June 30. However, annual reports are based on the calendar year. Therefore, this Annual Report covers the activities of the PRT for the preceding year, 2012.

ACTIVITY IN 2012

At the beginning of the calendar year, 2 disciplinary and 2 reinstatement proceedings were pending before the PRT as carry-over matters from a previous year. Generally, a matter is considered "pending" from the time the PRT receives notice of its filing until the Trial Panel report is filed. Certain events reduce or extend the pending status of a proceeding, such as the resignation of a respondent or the remand of a matter for additional hearing. In matters involving alleged personal incapacity, orders by the Supreme Court of interim suspension, or suspension until reinstated, operate to either postpone a hearing on discipline or remove the matter from the PRT docket.

In regard to new matters, the PRT received notice of the filing of 26 disciplinary complaints and 9 reinstatement petitions. Trial Panels conducted a total of 38 hearings; 29 in disciplinary proceedings and 9 in reinstatement proceedings.

On December 31, 2012, a total of 11 matters, 10 disciplinary and 1 reinstatement proceedings, were pending before the PRT.

CONCLUSION

Members of the PRT demonstrated continued service to the Bar and the public of this State, as shown by the substantial time dedicated to each assigned proceeding. The members' commitment to the purpose and responsibilities of the PRT is deserving of the appreciation of the Bar and all its members, and certainly is appreciated by this writer.

Dated this 9th day of January, 2013.

PROFESSIONAL RESPONSIBILITY
TRIBUNAL

/s/ Patrick T. Cornell
Patrick T. Cornell, Chief Master

1. The General Counsel of the Oklahoma Bar Association customarily makes an appearance at the annual meeting for the purpose of thanking members for their service and to answer any questions of PRT members. Given the independent nature of the PRT, all other business is conducted in the absence of the General Counsel.

Proceeding Type	Pending Jan. 1, 2012	New Matters In 2012	Hearings Held 2012	Other Dispositions	Pending Dec. 31, 2012
Disciplinary	9	26	29	22	10
Reinstatement	2	9	9	12	1

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For more info: Julie Montgomery 405-235-5553 or jmontgomery@gablelaw.com



Oklahoma City
Chapter

2013 Celebrations Gearing Up

Thursday, May 2, is set for 'Ask A Lawyer' Day

Law Day 2013 is underway! The annual Ask A Lawyer TV show is in production, the art contests have been judged, and county bar associations should begin planning events now.

Why is Law Day such a big event? This national celebration began right here in Oklahoma in the 1950s. This day is set aside every year to celebrate the freedoms, rights and responsibilities we enjoy because of our unique legal system. In addition to the opportunity for educational outreach, Law Day gives Oklahoma lawyers the chance to participate in a large-scale community service event designed to enhance the image of the legal profession while providing assistance to those who need help with legal questions. Participation in Law Day activities is a win/win!

So, mark your calendars now! Thursday, May 2 is the day Law Day will be observed in Oklahoma this year. The TV show will air on OETA stations across the state from 7–8 p.m. Counties hosting Ask A Lawyer call-in events are asked to be available to take calls during this hour for maximum publicity of this community service event.

Thanks to those counties that have already submitted the name of their Law Day chairperson:

Bryan: Jimmy Speed

Carter: Brad Wilson

Cherokee: Marena Doolittle

Cimarron: Judge Ronald Kincannon

Cleveland: Sandee Coogan, Alissa Hutter, Bethany Stanley, Peggy Stockwell and Rebekah Taylor, co-chairs

Comanche: Rob Rochelle

Custer: Judge Jill Weedon and Judge Donna Dirickson, co-chairs

Dewey: Judge Rick Bozarth

Garfield: Kaleb Hennigh

Grant: Judge Jack Hammontree

Greer: Tabitha Mills

Hughes: Judge Timothy Olsen

Kay: William Oldfield

LeFlore: Jolyn Belk

Mayes: Emily Crain

McCurtain: Kevin Sain

McIntosh: Brendon Bridges

Muskogee: Robert Duncan III

Oklahoma: Lauren Barghols Hanna, chair; Curtis Thomas, vice chair

Ottawa: John Weedn and Jennifer Ellis, co-chairs

Payne: Brandon Meyer

Pontotoc: Christine Pappas

Roger Mills: Pat Versteeg

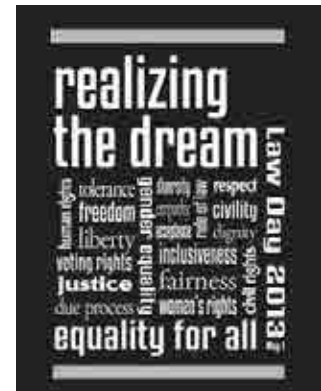
Seminole: Judge Timothy Olsen and Jack Cadenhead, co-chairs

Texas: Vonda Wilkins

Tulsa: Kimberly Moore-Waite

Wagoner: Richard Loy Gray Jr.

Washita: Skye Shepard-Wood



Is your county missing from this list? Please submit the name of your Law Day chairperson as soon as possible to Lori Rasmussen, OBA Law Day coordinator, lorir@okbar.org, 405-416-7017.

2013 Legislative Session Begins

By John Morris Williams

It is that time of year, again. The 2013 legislative session began on Monday, Feb. 4. This year there are nearly 3,000 measures filed. On Saturday, Jan. 26, an impressive number of OBA members attended an all-day legislative reading day. Thanks to Legislative Monitoring Committee Chair Duchess Bartmess for leading us through the day. It is a long process to get through all the bills; however, it is much worth the effort. Although I read through all the bill summaries and many of the bills, there were still several bills of interest that we identified beyond my initial list. If you have not attended the reading day, I highly recommend it.

The list of "bills of interest" is on our website at www.okbar.org/s/billsummaries and updated weekly. As of now, we have more than 400 bills on the list. As usual, the list will get shorter as the session progresses. My guess right now would be that we will end the session with 30-40 of the identified bills actually being passed. It is called the legislative process for a reason. Many bills will not be heard in committee, multiple bills on the same subject will be consolidated into a singular bill, some bills will be rejected by the opposite house from which it was filed and die in confer-



ence committee, and some will be vetoed by the governor. With this many variations it is important to keep an eye out in all directions.

At this time the OBA has five bills on its legislative agenda. These are bills passed by the House of Delegates. The OBA does identify numerous bills that might be of interest to our members. A bill identified as being "of interest" does not mean that the OBA has a position on the bill. It simply means that bar members might want to watch the legislation to see how it is progressing in the session.

The OBA bills on the legislative agenda are:

HB1086 An act relating to civil procedure; amending 12

O.S. 2011, Section 2502, which relates to attorney-client privilege; modifying term; and providing an effective date.

SB0392 An act relating to administrative tax hearings; creating the State Office of Administrative Tax Hearings.

SB0414 An act relating to discovery; amending 12 O.S. 2011, Section 3237, which relates to failure to make or cooperate in discovery; clarifying persons to be designated by certain entities.

SB0415 An act relating to depositions; amending 12 O.S. 2011, Section 3232, which relates to use of depositions in court proceedings.

SB0416 An act relating to privileged disclosure; amending 12 O.S. 2011, Section 2502,

which relates to attorney-client privilege; stating effect of certain agreement on specified parties.

The OBA bylaws restrict the legislative agenda to include bills that have a narrow focus on the practice of law and the courts. During the time that the House of Delegates is not in session, the OBA Board of Governors can take a position on pending legislation that meets within the confines of the bylaws. Only bills that are on the legislative agenda or acted upon by the Board of Governors can be represented as the OBA having a position. Of course, this does not prohibit OBA members from speaking with legislators on

their own accord. Often we have members with opposing views on a bill, and it can be helpful to legislators to hear those diverse views to be better educated on the issue.

OBA DAY AT THE CAPITOL

Lastly, on March 12, 2013, the OBA will have its annual Day at the Capitol. This year we have an impressive list of speakers lined up, and lunch will be provided. You'll find specific details for the day in this *Oklahoma Bar Journal* and at www.okbar.org. I hope you can attend. We have scheduled the program to start late morning and end mid afternoon to accommodate out-of-town

members. As of now, we also have several legislators who have notified us that they will be joining us for lunch. As always, there are important issues affecting the practice of law and the administration of justice. I encourage you as a public citizen to attend the Day at the Capitol and let your opinions be heard.



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

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The Stress-Free Law Practice

By Jim Calloway

Many of you saw the title of this column and began to read it, thinking either, “That is absolutely impossible,” or “Yes, I want that.” This column will address both of those opposing expectations.

I am fairly certain that a completely stress-free law practice is not possible, any more than stress-free life is possible. Certainly there are practice areas for lawyers that lead to more stress than others. Surely a murder trial or a contested family law custody case would be more stressful than a practice limited to doing only residential title opinions (of course, that may just be something we assume because we’ve never had to tell a couple their new dream home has so many encroachments and title defects that making the title marketable could take months if it’s even possible).

Not all stress is bad for you. Good trial lawyers get excited and amped up for a big trial just like athletes do for a big game. The “fight or flight” adrenaline rush was critical for our ancestors to survive and still comes in handy today, even though we do not live in caves or the jungle. But chronic stress is a chronic problem for many lawyers. It seems to be inherent in the practice of law. We set up shops that invite people to bring in their problems — and not the easy or

“Death by suicide among lawyers is six times the suicide rate of the general population...”

simple ones either. We take on their worst problems that often deal with their most important and emotional issues, be it a potential loss of freedom, health, financial security or family relationships. A typical client is often unhappy about

This is good for dispassionate examination of a challenging problem. It is probably not the best method for dealing with personal stress.

The results of such chronic stress are as tragic as they are predictable.

Death by suicide among lawyers is six times the suicide rate of the general population, making it the third leading cause of death among lawyers after cancer and cardiac conditions.¹ A quality-of-life survey conducted by the North Carolina Bar Association in 1991 reported that almost 26 percent of the bar’s members exhibited symp-



having the problem *and* unhappy about having to pay a lawyer to take care of the problem.

Lawyers are trained to focus on logic and set aside emotion.

toms of clinical depression.² A Johns Hopkins University study found that among over 100 occupations studied, lawyers were three times more likely to suffer from clinical

depression than any other profession.³ Alcohol and drug dependency rates among lawyers are around double the rate of the general population.⁴

Just reading the data is a bit depressing. But it also rings true with our anecdotal experiences. Most lawyers who have been in practice for a length of time have known a lawyer lost to suicide. Most lawyers sometimes have bad days and professional situations that are miserable and sometimes seem unbearable. Almost every lawyer has had a conversation or phone call that included more anger than seems reasonable for the situation.

Recognizing the potential problem is, as the cliché goes, half the battle. To learn about coping with stress, I talked with licensed professional counselor Rebecca R. Williams, who coordinates Lawyers Helping Lawyers (LHL) services for the OBA.

Although I was focused on the long-term effect of stress on a veteran lawyer, she reminded me that new attorneys are also particularly vulnerable as they step onto the playing field, often without mentoring or support, and with the unrealistic belief they should have all the answers.

Can stress become a lifestyle or work culture? It absolutely can, according to Ms. Williams. In many pockets of the legal profession, excessive work hours and intense caseloads are the norm. The risk of appearing weak or incapable lessens the likelihood of someone reaching out for help or support and increases the chances of a particular stress phase turning into an anxiety disorder, depression or substance abuse problem.

Attend Monthly Discussion Groups

The OBA Lawyers Helping Lawyers Assistance Program Committee hosts a series of monthly meetings led by an LHL Committee member. The small group discussions, held in both Oklahoma City and Tulsa on the same day, are intended to give group leaders and participants the opportunity to ask questions, provide support and share information with fellow bar members to improve our lives – professionally and personally.

2013 Meeting Dates and Topics

Mar. 7 – The Emotional Challenges of the Solo Practitioner
Apr. 4 – Depression, Anxiety and the Practice of Law
May 2 – Care-giving: Challenges and Resources
June 6 – The Challenges of Work, Relationships and Parenting
Aug. 1 – The Challenges of Coping with the Loss of a Loved One
Sept. 5 – Coping with the Challenges of an Addicted Loved One or Colleague
Oct. 3 – Practicing While Sick or Injured
Nov. 7 – Stress Management and the Practice of Law
Dec. 5 – Tips that Work - Maintaining Healthy Relationships

Time: 7 – 8:30 p.m.

Locations:

Office of Tom Cummings 701 N.W. 13th Street Oklahoma City	The Street Law Firm 400 S. Boston Ave., Suite 1100W Tulsa
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Snacks will be provided. Meetings are free and open to all OBA members. RSVPs are encouraged to ensure there is food for all. Please e-mail Kim Reber, kimreber@cabainc.com, to reserve your spot.

Here are some of her ideas related to stress management.

Be aware of the symptoms listed below:

- Isolation from colleagues, friends or family
- Feelings of being overwhelmed
- Feelings of inadequacy
- Not adhering to set work hours
- Losing sight of a realistic caseload
- Difficulty turning down work
- Letting your work schedule derail your plans for physical activity
- Difficulty organizing and concentrating
- Resistance to asking for help or support
- Avoiding certain clients or files
- Increased alcohol substance use
- Increase in time spent on non-productive, non-billable tasks such as Internet surfing or an unhealthy relationship

To cope with stress, consider these recommendations from Ms. Williams:

- Keep something to look forward to every week that involves being around other people.
- Attend the monthly LHL discussion group, if only to have a sandwich and listen. See the schedule of meetings accompanying this article.
- Hire someone temporarily to help organize your space and files.
- Incorporate 15 minute activity breaks during the work day to walk around the parking lot or run up a flight of stairs.
- Promote and encourage laughter.
- Meditate daily or simply slow down your breathing and focus on one thing or concept only, for several minutes, several times a day.
- When you feel stress and anxiety, take a few deep breaths and think about all of the good things about your practice and life. This challenge will pass, as have other previous ones.
- Schedule fun and recreation on your calendar weekly.
- Participate in frequent new experiences with your partner, friends or colleagues.

- Talk about your feelings regularly with someone you trust.

- Schedule a quitting time. Sometimes long work days are required, but we all have to acknowledge we are not as effective and sharp in our 10th working hour of the day as in our first.

- Personal consultation is as important as professional consultation, so identify mentors and others for your personal support.

- Remember there are some potential clients too challenging for you to represent. Sometimes there is just a personality conflict. Everyone is entitled to a lawyer, but not everyone is entitled to you.

Don't take on too much at one time. Every lawyer has had to deal with the temptation of taking on a new client when they are already overloaded. Deep inside we can sometimes hear a voice of insecurity that if we turn away this new client, we may soon not have enough work to do. But you do a disservice to yourself, your family and your potential new client if you take on more than you can comfortably handle.

The above observation is one part of a life skill that many lawyers must exercise more often — saying “no” gracefully

and firmly. It is better to do a few volunteer and community activities well than to give half attention to many.

Don't forget that OBA members can get free professional counseling. The Lawyers Helping Lawyers Hotline is available 24 hours a day at 800-364-7886.

Being a lawyer is an honor. This is a great profession. Not everyone gets to help people with their most important problems. But to take care of your clients, you have to take the time to take care of yourself first. Lawyers are often very self-sacrificing. Maybe this is the time for you to dial back on the self-sacrifice and focus on having a long and healthy law practice.

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. Lawyer Suicide and Resources for Managing Stress, the North Carolina Lawyer Assistance Program, www.okbar.org/s/lawyer-stress.

2. Ted David, “Can Lawyers Learn to Be Happy?” 57 No. 4 Prac. Law 29 (2011).

3. *Id.*

4. Alcoholism and Drug Dependency in the Legal Profession www.illinoislap.org/alcohol-and-drug-abuse.

New Form Book is Here!



Need forms? The OBA/CLE Department is now selling their 2013 Form Book to OBA members who are interested. Topics covered by the forms include, but are not limited to, the following areas of the law:

- **Auto Accidents • Bankruptcy • Business/Corporate Law**
- **Civil Procedure • Employment • Estate Planning • Real Property**
- **Social Security • And many more!**

Family law forms are available from the Family Law Section. Purchase at <http://bit.ly/VxILVo> or visit www.okbar.org/cle for a link.

Oklahoma's Lawyer Discipline Process

By Gina Hendryx

In this issue of the *Oklahoma Bar Journal*, you will find the 2012 annual reports of the Professional Responsibility Tribunal (PRT) and the Professional Responsibility Commission (PRC). The PRT is the panel of masters who conduct hearings on formal complaints filed against lawyers and on applications for reinstatement to the practice of law. The panel consists of 21 members, 14 of whom are active OBA members in good standing and seven members who are nonlawyers.

When a formal complaint or application for reinstatement is filed, the presiding master of the PRT selects three members from the panel to preside over the discipline hearing. At the conclusion of the hearing, the trial panel files a written report with the Oklahoma Supreme Court that includes findings of fact on all pertinent issues and conclusions of law and a recommendation as to discipline. In 2012, the PRT conducted a total of 38 hearings that included 29 discipline matters and nine reinstatement proceedings.

The PRC considers and investigates any alleged ground for discipline or alleged incapacity of any lawyer. The commission consists

“Considering the total membership, less than 6 percent of the licensed attorneys in the state of Oklahoma received a complaint last year.”

of seven members, five of whom are active members in good standing of the OBA and two nonlawyers. Under the supervision of the PRC, the Office of the General Counsel investigates all matters involving alleged misconduct or incapacity of any lawyer called to the attention of the general counsel. The PRC determines the disposition of all formal grievances.

The Office of the General Counsel received 1,149 complaints involving 891 attorneys in 2012. This compares to 1,214 complaints involving 999 attorneys in 2011. Complaints must be in writing and signed by the complainant. No anonymous complaints are processed. At the end of 2012, the OBA membership was 17,232. Considering the total

membership, less than 6 percent of the licensed attorneys in the state of Oklahoma received a complaint last year. Of the grievances reviewed in 2012, 273 were referred for formal investigation.

TWO PRACTICE AREAS RISK MORE GRIEVANCES

It is always instructive to review which practice areas of law receive the most grievances and what types of complaints are routinely lodged against attorneys. It was not surprising to learn that 41 percent of the complaints in 2012 were in matters relating to criminal law and family law representations. And, this was not an aberration. Year after year, these two areas of practice consistently receive the most complaints. While still disconcerting especially if these are your two primary areas of practice, it is understandable given the nature of the legal needs facing a criminal defendant or family law litigant.

There are arguably no other areas of law wherein the parties find themselves with more at risk albeit either loss of liberty or family. What was up from past years was the number of complaints received based upon conduct occurring in a “litigation”

matter. In 2012, 20 percent of the grievances complained of some rule violation during the litigation process. This is an increase of 3 percent over 2011.

MOST COMMON COMPLAINT

The primary complaint lodged against Oklahoma attorneys continues to be client/file neglect. Nearly one out of every two grievances filed with the Office of the General Counsel alleges dissatisfaction due to the attorney's failure to respond to client inquiries or the delay in moving the matter to conclusion. In 2012, 44 percent of

grievances received were categorized as "neglect" complaints followed by 11 percent based upon the personal behavior of the attorney and 7 percent alleging some form of misrepresentation by the lawyer.

In addition to attorney grievances and reinstatement proceedings, the Office of the General Counsel increased its investigations in 2012 of allegations of the unauthorized practice of law. More than 40 requests to review these practices were acted upon in 2012. This represents a 100 percent increase in the number of UPL referrals to the Office of the General Counsel over 2011.

The majority of referrals came from lawyers and judges concerned about the increase in nonlawyers engaging in the practice of law.

The reports set forth in detail the day to day workloads of the PRT, PRC and Office of the General Counsel. Whether investigating discipline matters, prosecuting the unauthorized practice of law or representing the OBA in nondiscipline matters, these entities work together to promote the practice of law while protecting the public.

Ms. Hendryx is OBA general counsel.

OKLAHOMA CHILD SUPPORT SERVICES,
a division of the Oklahoma Department of Human Services
Announcement 13- C019BU

ATTORNEY IV, Oklahoma OCSS III

OKLAHOMA CHILD SUPPORT SERVICES is seeking a full-time attorney for our Midwest City District Office located at 9901 S.E. 29th Street Midwest City Oklahoma 73130. The position involves negotiation with other attorneys and customers as well as preparation and trial of cases in child support related hearings in district and administrative courts. In addition, the successful candidate will help establish partnership networks and participate in community outreach activities within the service area in an effort to educate others regarding our services and their beneficial impact on families. In depth knowledge of family law related to paternity establishment, child support, and medical support matters is preferred. Preference may also be given to candidates who live in or are willing to relocate to the service area.

Active membership in the Oklahoma Bar Association is required. This position has alternate hiring levels. The beginning salary is at least \$40,255.08 annually with an outstanding benefits package including health & dental insurance, paid leave & retirement. Interested individuals must send a cover letter noting announcement number # **13 - C019BU**, an OKDHS Application (Form 11PE012E), a resume, three reference letters, and a copy of current OBA card to: Department of Human Services, Human Resource Management Division, Box 25352, Oklahoma City, OK 73125 or email the same to jobs@okdhs.org. OKDHS Application (Form 11PE012E) may found at www.okdhs.org/library/forms/hrmd. Applications must be received no earlier than 8:00 am on February 15, 2013 and no later than 5:00 pm on March 1, 2013. For additional information about this job opportunity, please email Stephanie.Douglas@okdhs.org.

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Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Dec. 14, 2012.

PRESENTATION

Vice President Stockwell presented a gift from the board members to President Christensen.

REPORT OF THE PRESIDENT

President Christensen reported she attended the Judicial Conference reception and dinner with Supreme Court and Court of Criminal Appeals members, Annual Meeting including House of Delegates and General Assembly, Law School for Legislators, technology committee meeting, OCU pro bono awards luncheon and a 60-year membership pin presentation in Nowata. She participated in conversations and emails regarding OBA technology, moderated the Professionalism Symposium and moderated the CLE seminar on foreclosures sponsored by the Oklahoma Office of the Attorney General in Tulsa.

REPORT OF THE PRESIDENT-ELECT

President-Elect Stuart reported he attended Annual Meeting, Law School for Legislators, Communications Committee meeting, Clients' Security Fund meeting, technology committee meeting and Oklahoma County Bar Association holiday party. He presided over the House of

Delegates, moderated the Mortgage Modification CLE seminar in Oklahoma City, worked on OBA committee appointments, presented the OBA budget to the Supreme Court and participated in conversations and emails regarding bar technology.

REPORT OF THE PAST PRESIDENT

Past President Reheard reported she attended the Judicial Conference reception and dinner with Supreme Court and Court of Criminal Appeals members, and Yellow Ribbon pre-deployment event for the Oklahoma National Guard 1220 Engineering Unit with Muskogee County Bar Association members. At the Annual Meeting she hosted the past presidents dinner, moderated the panel on judicial selection, moderated the joint meeting of the Military Assistance Committee and Military and Veterans Law Section and attended the General Assembly and House of Delegates. She noted this was her last board meeting after seven consecutive years of service.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Annual Meeting events including the House of Delegates and House of Delegates committees, numerous meetings and conversations with software vendors regarding association management software, tech-

nology governance meeting, staff holiday lunch, staff directors meeting, Law School for Legislators, Bar Association Technology Committee meeting, Tulsa County holiday party and professionalism symposium. He had a meeting with CoreVault representatives regarding computer backup and services provided and with the Supreme Court on a new online filing system. With President-Elect Stuart, he presented the OBA budget to the Supreme Court.

BOARD MEMBER REPORTS

Governor DeMoss reported she attended OBA Annual Meeting events including the House of Delegates and Litigation Section meeting, Law Schools Committee meeting, November board meeting and Tulsa County Bar Association Christmas party. She moderated the CLE plenary session and presented the OBA award to the outstanding senior student at the OU alumni luncheon. **Governor Devoll** reported he attended the OBA Annual Meeting and related events, judicial reception for Justice Taylor, dinner with the appellate court judges and justices, November board meeting and November Garfield County Bar Association meeting. He said he has enjoyed his three years on the board. **Governor Hays** reported she attended the judicial reception, dinner with Supreme Court members, Tulsa County Bar Association Christmas party and TCBA Law Week meeting.

At the OBA Annual Meeting she participated in meeting events including the November board meeting, OBA Family Law Section Annual Meeting and House of Delegates. She hosted the New Mexico Bar Association president-elect during Annual Meeting activities. She also communicated with OBA FLS leadership regarding the end of year and plans for 2013. **Governor Pappas** reported she attended the judicial reception and dinner with Supreme Court members, Annual Meeting events and November board meeting.

Governor Parrott reported she attended the judicial reception and dinner with Supreme Court members, Annual Meeting events including the General Assembly and House of Delegates, and November board meeting. **Governor Poarch** said he has enjoyed the camaraderie and hard work during his three years as a board member. **Governor Rivas** reported he attended OBA Annual Meeting events, November board meeting and Grady County Bar Association meeting. **Governor Shields** reported she attended the judicial reception and dinner with Supreme Court members, OBA Annual Meeting events, November board meeting and Oklahoma County Bar Association meeting and Christmas party. She said she has enjoyed her three years of service on the board. **Governor Smith** reported he attended dinner with Supreme Court members, Annual Meeting events and the November board meeting. **Governor Thomas** reported she attended the judicial reception and dinner with Supreme Court, Oklahoma Fellows for American Bar Foundation annual meeting and breakfast and November

Board of Governors meeting. At the OBA Annual Meeting she attended the YLD friends and fellows reception, president's tailgate party, OBA annual luncheon, president's leadership breakfast, At the Hop and YLD rockin' recognition event, General Assembly, House of Delegates, reception in honor of OBA Joe Stamper Distinguished Service Award winner Melissa DeLacerda and various meetings. She also served on the OBA Annual Meeting Credentials Committee.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Kirkpatrick reported she attended the judicial reception and dinner with Supreme Court members, November Board of Governors meeting and OBA ethics musical meetings/rehearsal. She conducted the November YLD meeting, participated in OBA Annual Meeting events and participated in has beens party planning discussions. She said that she has enjoyed her year on the board and has benefited greatly from the experience.

SUPREME COURT LIAISON REPORT

Justice Kauger thanked President Christensen for her support of the judiciary during the recent elections and said 2012 has been a great year for the OBA under President Christensen's leadership.

COMMITTEE LIAISON REPORTS

Governor Hays reported the Communications Committee hosted a successful OBA CLE webinar and the Law Day Committee is working hard on the upcoming Ask A Lawyer TV show.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the Professional Responsibility Commission will hold its final meeting of the year this afternoon. Commission members at their personal expense hosted general counsel staff members and their spouses/guests for dinner at a Bricktown restaurant last night. A written status report of the Professional Responsibility Commission and OBA disciplinary matters for November 2012 was submitted for the board's review.

TECHNOLOGY REPORT

Executive Director Williams reported initially there were concerns about Avectra and contract issues; however, the company made concessions, and the Bar Association Technology Committee reaffirmed its approval at a recent meeting. He also said the committee approved the purchase of a case management software for the Office of the General Counsel, and the next step is to negotiate a contract.

NEW JUVENILE LAW SECTION PROPOSED

Executive Director Williams reported spokesperson Tsinena Thompson was ill and could not make the meeting. He reviewed the purpose of the proposed section and confirmed a petition with the required number of signatures had been submitted. A question was asked about potential overlap with the Family Law Section, and it was determined there was not a conflict. The board voted to approve the creation of the Juvenile Law Section. It was suggested that new section leaders be

coached on the OBA budget procedures.

PROPOSED LABOR AND EMPLOYMENT LAW SECTION BYLAW AMENDMENTS

Section Chair-Elect Adam Childers reviewed the proposed changes to the section bylaws. President Christensen noted that language in Article 3.2 would need to be changed regarding the preparation of the annual proposed section budget, which is due to the OBA by Aug. 1. Mr. Childers said the section would be open to the needed change. President Christensen complimented the section on its activity this year. The board approved the section bylaw amendments with the addition of the amendment requested by the board.

LEGAL ETHICS ADVISORY OPINION

Legal Ethics Advisory Panel member David Butler reported the panel was not able to get a two-thirds vote on the question under consideration, so the issue was being presented to the Board of Governors for its review. Mr. Butler presented the majority opinion and gave board members a hand-out that shows a punctuation error in the statute. Panel Coordinator Jim Drummond presented the minority opinion. Panel member Micheal Salem made a comment regarding Rule 7.3. The board approved the majority opinion with the change of language that needed to be amended and the addition of a case citation. President Christensen thanked the panel members for their work.

OKLAHOMA BAR JOURNAL 2013-2014 CONTRACT

Communications Director Manning reviewed the procedure she used to solicit bids for the design, printing and mailing of the *Oklahoma Bar Journal*. Although she received several inquiries about the job, she reported only one bid was received and that was from the current vendor, Printing Inc. of Oklahoma City. She reviewed changes in pricing from the current contract. The board approved the two-year contract with Printing Inc.

CLIENTS' SECURITY FUND REPORT

Clients' Security Fund Chair Micheal Salem reported the committee met four times during the year and approved nine claims for \$198,330, which would have to be prorated by 86 percent to reduce the claims to \$100,981.17, which is the amount available for distribution. He asked the board to approve the committee's recommendation. He also thanked General Counsel Gina Hendryx and staff liaison Manni Arzola for their assistance. The board approved the committee's recommendation and voted to disburse the funds. President Christensen said she heard rave reviews about the efficient work of the group from a layperson who serves on the committee. The board authorized the release of a news release that would be approved by the president and the committee chairperson.

INVESTMENT POLICY AMENDMENTS

Administration Director Combs said the Investment Committee met and recommends updates to the current policy. He reviewed the proposed changes, which are

minor housekeeping issues. The board approved the amendments. President Christensen pointed out the policy encourages the utilization of Oklahoma banks if rates are comparable.

COMMISSION ON CHILDREN & YOUTH

The board voted to submit the additional name of Todd Pauley, Oklahoma City, to the governor for consideration as an appointment to the commission. Additional names approved previously by the board and submitted are Judge Lisa Hammond, Oklahoma City; Tsinena Bruno-Thompson, Oklahoma City; and Susan D. Williams, Watonga – term expires 12/31/14.

COMMUNICATIONS COMMITTEE FUNDING

Communications Director Manning reported the Communications Committee is working on recommendations for spending funds carried over from previous years, but producing a CLE seminar for the OBA prevented them from completing the task. They request the excess funds be carried over for another year. The board approved the carry-over of the committee funds.

ATTORNEY GENERAL FUNDING FOR OFFICE OF THE GENERAL COUNSEL AND HEROES PROGRAM

Executive Director Williams reported the funding from the Office of the Attorney General came late in the year and will be used in 2013. The board approved the carryover of funds from the Office of the Attorney General.

APPOINTMENTS

The board approved President-Elect Stuart's recommen-

dations for the following appointments:

Board of Editors - Appoint Judge Megan Simpson, Buffalo, as an associate editor from District 4 to replace Erin Means, term expires 12/31/15.

MCLE Commission – Appoint Jack Brown, Tulsa, to replace Richard J. Phillips and Margaret Hamlett, Tulsa, to replace Richard Ogden, terms expire 12/31/15.

JUDICIAL NOMINATING COMMISSION

The board approved President Christensen's recommendation to appoint Deborah A. Reheard, Eufaula, to replace

Weldon Stout who has resigned, term expires 10/01/17.

OBA 2013 COMMITTEE LEADERSHIP AND BOARD LIAISONS

President-Elect Stuart presented a list of committee chairpersons, vice chairperson and assignment of board members as liaisons to the committees.

YLD LIAISONS TO OBA STANDING COMMITTEES

YLD Chair-Elect Vorndran presented a list of Young Lawyers Division members who will serve as OBA committee liaisons. President-Elect Stuart

said the goal is active participation of YLD members on all committees.

EXECUTIVE SESSION

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

NEXT MEETING

The Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Jan. 11, 2013. A summary of those actions will be published after the minutes are approved. The next board meeting will be held Friday, Feb. 22, 2013, at Post Oak Lodge in Tulsa.

MEDIATION TRAINING

Now's your chance to be equipped with skills needed to provide professional mediation services. Both courses meet the training requirements of the Oklahoma District Court Mediation Act and are **approved for MCLE credit by the Oklahoma Bar Association** (including 1-2 hrs/ethics credit). Courses combine lecture, discussion groups, case studies, role-play, and demonstrations. Both courses also provide marketing strategies for launching a successful mediation practice. Class sizes are limited to 20 people.

40 HOUR OKLAHOMA FAMILY & DIVORCE MEDIATION TRAINING *40 Hrs/MCLE, Incl. 2 Hrs/Ethics

This training includes an examination of Oklahoma family law and its impact upon the mediation of domestic subjects such as divorce, property division, custody, visitation, grandparent and elder care issues.

Oklahoma City - April 3-6, 2013
Tulsa - May 15-18, 2013

24 HOUR OKLAHOMA CIVIL, COMMERCIAL & EMPLOYMENT MEDIATION TRAINING *24 Hrs/MCLE, Incl. 1 Hr/Ethics

The course explains, illuminates, and provides necessary skills for successful mediations, with emphasis on personal injury litigation, commercial issues, business partnerships, and workplace discrimination issues.

Oklahoma City - February 20-22, 2013 | May 22-24, 2013

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Our Grantees Are What We Are All About

By Susan B. Shields

We are well into 2013 and have all (hopefully) fully recovered from the end of 2012, with our holiday and year-end festivities, the dangers of the fiscal cliff and the debt crisis still to be addressed.

Another “crisis” said to be facing our country is the enormous need for pro bono service from lawyers. It is estimated that the legal needs of more than 80 percent of Americans with limited income are currently unmet. That is a crisis that the OBF, and every OBF supporter, directly helps to improve.

OBF Fellows dues and other sources of financial support provide funding each year for pro bono domestic violence

intervention services and for victim advocates who help Oklahomans live safely and free from abuse. OBF grantees, the Family Shelter of Southern Oklahoma and Domestic Violence Intervention Services of Tulsa and Creek Counties (DVIS) are several successful programs.

OBF grants also support programs, such as the Youth Legislative Day at the Capitol, that encourage Oklahoma students to learn more about the American democratic process. Through funding from the OBF, these projects designed to aid students in learning more about the laws and our legal system have proven beneficial to students across the state.

Each new year, the Oklahoma Bar Foundation looks forward with optimism and enthusiasm to the work that will be accomplished. A new year is also, however, a time to reflect upon past successes and to remind ourselves about the purposes of our bar foundation. The financial support of Oklahoma lawyers and others is so very important in helping to meet the funding needs of OBF grantees. These people work every day to achieve access to justice and to advance legal education and the science of jurisprudence. Thank you for your support!

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

SUCCESS STORIES...

Rena¹ is a 30-year-old mother of three, a cancer survivor and a victim of numerous incidents of domestic abuse. In 2010, Rena became involved with an abusive and vicious man, Stanley. One day, Rena woke from a nap to find Stanley standing over her with a knife laughing uncontrollably. He had locked the children outside before waking her. This same man

had previously abused other women. The victim advocate from the Family Shelter of Southern Oklahoma worked with Rena and continued to work with law enforcement and all of Stanley's victims. Thanks to the services provided by the Family Shelter and the funding provided by the Oklahoma Bar Foundation, Rena was able to develop a safety plan, find a

home and find a job; and Stanley's parole has now been revoked. He is facing incarceration for up to 30 years. Rena is receiving counseling for herself and her children and has been able to return to school. Rena now speaks at candlelight vigil ceremonies to encourage other victims to seek legal action that will bring changes to their lives.

continued on next page

SUCCESS STORIES cont.

Sally came to the DVIS office after her husband beat her. Ken “just snapped” one evening and attacked her in their home while she held their young child. After the attack, Ken went into another room and sat on the couch until the police arrived and took him into custody. Ken pled guilty on the criminal charges and agreed, as part of his sentencing, to consistently take his prescribed medication and to be monitored by the courts. This monitoring provided great comfort to Sally, and after settlement negotiations between the DVIS office and the husband’s attorney, the parties were able to reach an agreed settlement. An emergency protective order was in place while this case was pending and the client has reached a point where she now feels safe and is willing to dismiss her protective order with the resolution of the divorce.



Mark suffers from cerebral palsy. He came to DVIS Legal Services for a divorce in 2009 after being battered by his wife, Patty. He and his wife have a young child. For months Mark had been staying with Patty in hopes of protecting his only child from the convicted child molester that Patty was associating with. After learning of this, the DVIS attorney contacted a probation officer and informed her that a convicted molester was around a child. That problem was solved. DVIS was able to get temporary orders that gave Mark child custody and to establish supervised visits for the mother. The case is still ongoing, but this was a giant victory for Mark.

1. All names have been changed for confidentiality.

YOUTH LEGISLATIVE DAY AT THE CAPITOL TESTIMONIALS FROM CHEYENNE MIDDLE SCHOOL

“ This program is key in teaching children about government. It teaches you how to write and review bills. You also learn how it feels to be patient, work in legislature, and keep composure. I was honored to attend and compete to pass a bill my partner and I wrote. All the debating and open discourse in such little amount of time was exciting! Thank you again, and please keep the program running! – Jayzen ”

“ My Youth and Government experience is one I will remember forever. I really enjoyed going to the Capitol and working in the small committees. We learned about our Legislature, voted in small groups to eliminate bad bills and learned about motions. After voting away the poor bills, we recessed, ate lunch and then proceeded to the Senate Chamber. Here, we debated all of the bills that advanced through the committees. It was amazing. – Cameron ”

“ April 1, I had a chance to be a senator. Youth from all over Oklahoma came to announce the bills they had written, which all covered different topics: from healthy food in schools to protecting endangered animals in Oklahoma. Youth and Government gives you a chance to be a senator and teaches respect, maturity and how to make new friends. My experience at Youth and Government was amazing. I would recommend it to everybody. – Jason ”

- To become a Fellow, the pledge is \$1,000 payable within a 10-year period at \$100 each year; however, some may choose to pay the full amount or in greater increments over a shorter period of time.

- The OBF offers lesser payments for newer Oklahoma Bar Association members:

■ **First-Year Lawyers:** lawyers who pledge to become OBF Fellows on or before Jan. 2, of the year immediately following their admission may pay only \$25 per year for two years, then only \$50 for three years, and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.

■ **Within Three Years:** lawyers admitted three years or less at the time of their OBF Fellow pledge may pay only \$50 per year for four years and then at least \$100 each year thereafter until the \$1,000 pledge is fulfilled.

- Sustaining Fellows are those who have completed the initial \$1,000 pledge and continue their \$100 annual contribution to help sustain grant programs.

- Benefactor Fellow is the highest leadership giving level and are those who have completed the initial \$1,000 pledge and pledge to pay at least \$300 annually to help fund important grant programs. Benefactors lead by example.



FELLOW ENROLLMENT FORM

☐ Attorney ☐ Non-Attorney

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

Firm or other affiliation: _____

Mailing & delivery address: _____

City/State/Zip: _____

Phone: _____

E-Mail Address: _____

The Oklahoma Bar Foundation was able to assist 25 different programs or projects during 2012 and 26 in 2011 through the generosity of Oklahoma lawyers – providing free legal assistance for the poor and elderly; safe haven for the abused; protection and legal assistance to children; law-related education programs; other activities that improve the quality of justice for all Oklahomans. The Oklahoma Bar legend of help continues with YOU.

_____ I want to be an OBF Fellow **now**
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_____ \$100 enclosed & bill annually

_____ Total amount enclosed, \$1,000

_____ *New Lawyer 1st Year*, \$25 enclosed
& bill Annually as stated

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

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

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leadership level of **Benefactor
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American Indian Wills Clinic Provides Development of Practical Skills through Service

By Casey Ross-Petherick

Oklahoma City University School of Law is home to the Jodi Marquette American Indian Wills Clinic. The clinic provides will drafting services to American Indians in Oklahoma who own an interest in trust or restricted American Indian land. Through the clinic, law students earn academic credit working with clients to draft estate planning documents, while under the direct supervision of the licensed attorney clinical professor.¹

There are 38 federally recognized tribal governments within the state of Oklahoma. Over 330,000 of Oklahoma's citizens are American Indian or Alaska Native.² Nearly 1.1 million acres of land within Oklahoma are held in Indian status.³

FEDERAL LAW FOR AMERICAN INDIAN ESTATES

In 2004, Congress passed the American Indian Probate Reform Act.⁴ This act amended the Indian Land Consolidation Act to create new procedures for the administration of American Indian land estates,⁵ specifically setting forth the intestate succession law, wills requisites and probate proce-



Oklahoma City University law students Zach Reams (left) and Darren Ferguson review a case file during their American Indian Wills Clinic class.

“Over 330,000 of Oklahoma's citizens are American Indian or Alaska Native.”

dures that are to be followed. The act was passed to eliminate confusion among various state laws, to reduce fractionalization of Indian land inter-

ests and to create incentives for individual landholders to engage in estate planning. The act also expands the testamentary powers of individual landholders to dispose of property without compromising the land's Indian status.

HISTORY OF SERVICES

Oklahoma City University School of Law began providing wills services to American Indians in Oklahoma during the 2009 calendar year. The Wills Services Project received funding through a generous

grant from the Oklahoma Bar Foundation in the amount of \$20,000 for the 2009 calendar year, and in that initial year, the project completed 66 wills.

In 2010, OCU opened the Jodi Marquette American Indian Wills Clinic. The clinic was made possible through an anonymous donation of \$250,000, which was directed to continue and expand the services offered under the initial OBF grant. This generous donation will sustain the clinic through the 2013 calendar year.

The course has become a popular choice for students

seeking to enhance their professional skills; more than 50 students have completed the American Indian Wills Clinic. Since the clinic's inception in January 2010, legal services have been provided to hundreds of clients, completing over 300 wills.

While the clinic provides a wonderful service to clients who might not otherwise be able to afford this specialized legal representation, the bigger benefit is realized by the students who develop their practical skills and substantive knowledge through the clinical experience.

Fundraising efforts are now underway to sustain the clinic beyond the term of the initial gift. For more information, please contact me at 405-208-5312 or by email at crosspetherick@okcu.edu.

Ms. Ross-Petherick is a professor at Oklahoma City University School of Law.

1. Professor Casey Ross-Petherick, J.D., M.B.A. (*Cherokee*) serves as the clinical professor for the American Indian Wills Clinic.

2. <http://quickfacts.census.gov/qfd/states/40000.html>.

3. www.fs.fed.us/people/tribal/tribexd.pdf.

4. Public Law 108-374.

5. AIPRA does not apply to Restricted Property Allotments of the Five Civilized Tribes, or the Osage Allotments.

Executive Director Search

The Tulsa County Bar Association
and
Tulsa County Bar Foundation
are seeking candidates
for the position of
Executive Director.

Details on the position
and the application
are available at
www.tulsabar.com



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You May Be a Member and Not Realize It

By Joe Vorndran

I am often asked, “Who can participate in the Young Lawyers Division, and what does YLD do?” The simple answer is that all members of the Oklahoma Bar Association who are in good standing and who were admitted to practice law (for the first time) within the past 10 years are automatically YLD members. The YLD provides an avenue for Oklahoma’s young lawyers to work on bar-related and public service-related projects.

While this succinct answer is very accurate, it does not tell the whole story.

The YLD is many things to many people. To the bar association as a whole, the YLD is the farm system — training and developing bar leadership for the future. To the Board of Governors and various OBA committees and sections, the YLD is an important partner that provides

time and passion to a wide range of projects and initiatives. To communities throughout the state, the YLD is a resource for public service and community improvement projects. To young lawyers, the YLD provides leadership

training, networking, business development, and the opportunity to have an important voice in our association.

The YLD has played an important role in my development as a lawyer and has provided me with opportunities and relationships that will serve me long after I enter the ranks of the “old” lawyers division.

I want to take this opportunity to encourage those young lawyers who may be thinking about becoming involved to log into MyOKBar and sign up for a committee, and watch the bar journal for upcoming YLD events. As always, please feel free to contact me directly with any questions and thank you for this opportunity to serve.

Mr. Vorndran is YLD chair and practices in Shawnee. He can be reached at joe@scdtlaw.com.

If you...

- are a member of the OBA
- are in good standing
- were admitted to practice law within the last 10 years
- are interested in public-service projects
- want to become more involved with the OBA

We need your help!

Sign up for a committee at my.okbar.org. Visit www.okbar.org/members/yld for more information.

February

- 18 OBA Closed** – Presidents Day observed
- 19 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Barbara Swinton 405-713-7109
- OBA Civil Procedure and Evidence Code Committee meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact James Milton 918-594-0523
- 20 Oklahoma Bar Foundation Grants and Awards Committee meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact: Nancy Norsworthy 405-416-7070
- OBA Law Day Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Richard Vreeland 405-360-6631
- OBA Women In Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Kim Hays 918-592-2800
- 20-21 OBA Law-related Education Close-Up program;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Jane McConnell 405-416-7024
- 21 Oklahoma Justice Commission meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Drew Edmondson 405-235-5563
- OBA Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066
- 22 OBA Board of Governors meeting with president's summit;** 9 a.m.; Postoak Lodge, 5323 W. 31st St. N., Tulsa; Contact John Morris Williams 405-416-7000
- Oklahoma Association of Black Lawyers meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donna Watson 405-721-7776
- OBA Rules of Professional Conduct Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Paul Middleton 405-235-7600
- 26 – March 1**
- OBA Bar Examinations; Oklahoma Bar Center,** Oklahoma City; Contact Oklahoma Board of Bar Examiners 405-416-7075



March

- 1 OBA Section Leaders Council meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Roy Tucker 918-684-6276
- 5 OBA Government and Administrative Law Practice Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tamar Scott 405-521-2635
- 6 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Tulsa County Bar Center, Tulsa; Contact Kara Smith 405-923-8611
- 7 OBA Heroes Bootcamp;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Susan Damron Krug 405-416-7028
- OBA Lawyers Helping Lawyers discussion group meeting;** 7 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City; RSVP to Kim Reber kimreber@cabainc.com
- OBA Lawyers Helping Lawyers discussion group meeting;** 7 p.m.; The Street Law Firm, 400 S. Boston Ave, Ste. 1100 W., Tulsa; RSVP to Kim Reber kimreber@cabainc.com

OBA Family Law Section Gives Back

The OBA Family Law Section and its members recently donated more than \$1,800 to Emergency Infant Services of Tulsa. The nonprofit organization meets the basic needs (such as formula, milk, food, diapers, medicine, clothing and furniture) of infants and children under five whose families are in crises or emergency situations. EIS also partners with local hospitals and other nonprofit groups to assist with other items to keep infants safe.



**Oklahoma
Lawyers
for Children**

Looking for an Opportunity to Serve the Community?

Oklahoma Lawyers for Children will be the beneficiary of the 2013 Redbud Classic to be held in Nichols Hills on April 6-7. As the beneficiary, OLFC must provide all of the volunteers to staff and promote the various racing events, including the USATF-sanctioned 5K and 10K. Those interested in volunteering may contact OLFC at 405-232-4453. To register or learn more about the event, visit www.redbud.org.



Diversity Scholarships Offered

Fellers Snider, with offices in Oklahoma City and Tulsa, has established diversity scholarships for students studying at the three Oklahoma law schools.

Firm representative Brent Johnson said, "The benefits to both clients and employees of a diverse and inclusive firm, including varied perspectives, alternative methodologies and creative solutions, are tremendous. As a firm, Fellers Snider recognizes this, and we want to encourage students to do the same."

Scholarships in the amount of \$3,000 each are available to first- and second-year law school students at OCU, OU and TU. They will be awarded in the spring.

Lawyers Encouraged to Devote Time, Talent to Serving Communities in 2013

OBA President Jim Stuart is encouraging all Oklahoma lawyers and law firms to make giving back a top priority. During 2013, the *Oklahoma Bar Journal* is supporting this effort by spotlighting those lawyers and law firms who give of their time, talent and financial resources to make their communities a better place. Have a great story or photos to share? Email Lori Rasmussen at lorir@okbar.org.

Connect With the OBA Through Social Media

Have you checked out the OBA Facebook page? It's a great way to get updates and information about upcoming events and the Oklahoma legal community. Like our page at www.facebook.com/oklahomabarassociation. Young lawyers and new admittees can also check out all the happenings at www.facebook.com/OBAYLD.



OBA Board of Editors Seeks Criminal Law Authors

January Windrix is the editor for an upcoming issue devoted to criminal law, and she is looking for articles. Articles are due before May 1. Contact her at janwindrix@yahoo.com if you are interested. Also, the *Oklahoma Bar Journal* is always looking for short humorous or inspiration stories for its Back Page, and submission details are available at www.okbar.org.

Holiday Hours

The Oklahoma Bar Center will be closed Monday, Feb. 18, in observance of Presidents Day.



OBA Member Resignation

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

Francine Jackson Barton
OBA No. 20587
923 Harvard St.
Houston, TX 77008

Velma Boedt
OBA No. 11766
53708 W. 231st St. South
Depew, OK 74028

John Wesley Caldwell Jr.
OBA No. 1424
P.O. Box 1405
Fairacres, NM 88033-1405

Michelle May Carter
OBA No. 18543
14221 S. Urbana Avenue
Bixby, OK 74008

Jennifer Leigh Flexner
OBA No. 20055
3335 S. Yorktown Ave.
Tulsa, OK 74105

Benjamin Samuel Labow
OBA No. 20081
855 N. Detroit St.
Los Angeles, CA 90046-7607

Daniel Patrick Lennington
OBA No. 21577
680 N. Heatherstone Drive
Sun Prairie, WI 53590

Gary Dale Madison
OBA No. 5619
P.O. Box 172
Sullivans Island, SC 29482

Linda F. Martin
OBA No. 17180
3046 Creekview Drive
Grapevine, TX 76051

Philip Dailey Morgan
OBA No. 16557
Two Alliance Center
3560 Lenox Road N.E.,
Suite 1400
Atlanta, GA 30326

Susan Lynne Mullins
OBA No. 11684
4808 Kathy Lynn Drive
Norman, OK 73072

Lori Ann Sharpe
OBA No. 15837
338 Shadow Creek Drive
Brentwood, TN 37027

Kudos

Edmond attorneys **Johnny Beech** and **Tim Reese** were recently recognized for outstanding alumni volunteer service provided to Tau Kappa Epsilon fraternity chapters in Oklahoma. Mr. Beech serves as advisor for the fraternity's chapter at Southwestern Oklahoma State University, and Mr. Reese works with undergraduates at the University of Central Oklahoma.

The Oklahoma Association of Defense Counsel approved their 2013 officers and directors at their recent annual winter meeting. Association members approved the following slate: President **Malinda Matlock**, President Elect **Jennifer Annis**, Immediate Past President **Nathan E. Clark**, Vice President **Angela Ailles-Bahm**, Treasurer **Jim Secrest III**, Secretary **Carrie Palmer** and DRI State Representative **Jeromy Brown**. Members of the association's board of directors are **Jason Glass**, **Leslie Lynch**, **Pete Serrata III**, **W. Joseph Pickard**, **Lindsay McDowell**, **Eric Begin**, **Steve Johnson**, **Randy Long** and **Christopher Wills**.

Armore attorney **Robert A.D. Long** has been appointed to the Board of Bar Examiners representing the Fifth Judicial District of Oklahoma. From 2004 to 2012, he served as served as an associate examiner on the board. He is partner in the Fischl,

Culp, McMillin, Chaffin, Bahner & Long law firm, and he is a 1978 graduate of the OU College of Law.

Tulsa lawyer **Dean Luthey** has been elected a general member of the International Masters of Gaming Law. The organization is an international, invitation-only society of general member private practice lawyers and associate member gaming regulators, accountants, consultants and in-house counsel. General members, who have achieved recognition in gaming matters over a lengthy period of years, are elected through a highly selective and rigorous process.

On The Move

Lee Slater has been named Executive director of the Oklahoma Ethics Commission, and **Debbie Maddox** accepted the position of the commission's general counsel. Mr. Slater has practiced in the areas of campaign finance and lobbyist regulations, and he is a former secretary of the Oklahoma Election Board. He is a former newspaper journalist and a 1988 graduate of the OCU School of Law. Ms. Maddox most recently served as OBA assistant general counsel. Prior to that, she practiced criminal and family law. She also served for 11 years as a lawyer in the Oklahoma Indigent Defense Sys-

tem. She is a 1989 graduate of the OU College of Law.

Logan & Lowry LLP, with offices in Vinita and Grove, announces **Michael T. Torrone** is now a partner in the firm. He practices in various areas including health, rural electric cooperative and Indian law, as well as civil litigation, trial practice and appellate practice. He received his bachelor's degree from Pennsylvania State University in 2004 and his J.D. from the TU College of Law, graduating with honors, in 2007.

Oklahoma City attorney **Tim Rhodes** was recently sworn in as Oklahoma County's seventh district court clerk. A longtime deputy court clerk, he was elected to office in August 2012 after winning the primary runoff election with nearly 60 percent of the vote. He attended OCU School of Law and is a 1990 graduate of the OU College of Law.

The board of directors of McAfee & Taft have elected **Richard D. Nix** to lead the firm for a third consecutive three-year term, a first in the firm's history. Since Mr. Nix began serving as managing director in 2007, the firm's milestones include the opening of a Tulsa office, the acquisition of nationally regarded boutique litigation firm, the expansion of the firm's niche areas of expertise, and the addition of more than 50 lawyers. He joined the firm in 1985 after graduating from the OU College of Law and later led the firm's

Employee Benefits Group. He was elected to the firm's board of directors in 2005 and served two years before taking the reins as managing director. The firm's shareholders have also elected **Robert L. Garbrecht** as the newest member of its board of directors. He is a commercial transactions attorney who principally practices in the areas of business acquisitions, finance, real estate, and state and local taxation law. Prior to his election to the firm's board, he served as leader of its Real Estate Group.

McAfee & Taft announces that corporate attorney **Richard D. Johnson** has joined the firm. His practice is focused on business and commercial transactions, including oil and gas law, mergers and acquisitions, real estate law and *ad valorem* matters, contract drafting and negotiations, corporate and securities, and business entity selection and formation. As part of his oil and gas practice, he represents exploration, production and midstream energy companies in a broad range of matters, including asset sales and acquisitions, lease negotiations, title opinion review and drafting, and the preparation of joint operating agreements, marketing agreements, equipment leases and other contracts. He is also a CPA. He earned his J.D., MBA and bachelor of accountancy degrees from OU.

Lester Loving & Davies Law Firm of Edmond announces **Sarah Clutts** has joined the firm as an associate. Her areas of practice include family, employment, estate planning, and general and complex litigation. She graduated *summa cum laude*

from OCU School of Law in 2012 and graduated with honors from Minot State University, part of the University of North Dakota system in 2008.

Rania A. Nasreddine has been named a shareholder with GableGotwals in the Tulsa office. She has been an associate with the firm since 2005. Her commercial litigation experience includes representing several major energy clients in Texas, New Mexico and Oklahoma, as well as assisting with complex contractual issues. Her transactional practice includes constructing and negotiating leases including real estate, oil and gas, and frac sand, as well as assisting small businesses with general legal issues. She received her J.D. from the OU College of Law and her B.A. in economics and political science from Emory University.

Phillips Murrah PC announces **Jasmine A. Majid** has joined the firm in its Oklahoma City office and will launch its immigration practice. She previously worked in Washington, D.C., as director of agency liaison and policy analyst with federal agencies responsible for implementing immigration laws in the United States. She has also worked to develop pro bono public service projects aimed at assisting immigrants facing legal and healthcare challenges. She is a 1995 graduate of the Temple University School of Law.

Doerner, Saunders, Daniel & Anderson LLP has named **David H. Herrold** as its new managing partner in its Tulsa office. The firm has also named **N. Lance Bryan**, **Tom Q. Ferguson** and **Linda**

Crook Martin to the firm's executive committee. Mr. Herrold is an experienced trial attorney who practices primarily in the areas of commercial litigation, fiduciary liability and bankruptcy-related matters. His practice also involves state and federal appeals, commercial disputes, banking law/lender liability, creditor's rights, admiralty/maritime issues and commercial law and contracts. Mr. Bryan is an experienced litigator whose practice covers a variety of business-related disputes in state and federal courts, including defense of business tort and breach of contract actions, construction claims, and defense of electric utilities in significant property damage and personal injury claims. Mr. Ferguson's practice emphasizes civil and commercial litigation and includes gas contracts, general oil and gas, intellectual property and trade secrets, antitrust, fiduciary duty, and other commercial tort, contract and statutory claims. Ms. Martin practices in the area of environmental law and water law, with more than 25 years of experience in both litigation and regulatory matters, including hazardous waste, natural resources, Superfund and water quality.

The GableGotwals law firm has announced its 2013 slate of officers and directors. Tapped to serve as officers are **David Keglovits**, Tulsa, chair and CEO; **Sid Swinson**, Tulsa, president; **Richard Carson**, Tulsa, secretary; and **Dale Cottingham**, Oklahoma City, treasurer. Serving as directors are **Terry Ragsdale**, Tulsa; **Rob Robertson**, Oklahoma City; **Scott Rowland**, Tulsa; and **Amy Stipe**, Oklahoma City.

Oklahoma Assistant Attorney General **Megan Tilly** has been named the new chief of the multicounty grand jury, which investigates criminal matters in all 77 Oklahoma counties and handles matters of state interest as well as assists local law enforcement. She is a 2009 graduate of the OU College of Law. As chief, Ms. Tilly replaces Charles S. Rogers, who recently was promoted to senior assistant attorney general.

Fellers Snider announces that associates **McKenzie Anderson** and **David Woodral** have become shareholders in the firm. Ms. Anderson handles complex commercial litigation including bankruptcy and related recovery actions based on financial fraud and malfeasance, consumer class actions, and various types of business disputes. She earned her J.D. from the University of Chicago Law School and graduated *summa cum laude* from Emory University with a B.A. in economics and Russian. Mr. Woodral, a registered patent attorney, has a practice focused on intellectual property law. He has a B.S. in computer engineering and deals with procurement and enforcement of intellectual property rights across a wide variety of technologies ranging from electrical and computer innovations to complex mechanical devices, chemistry, and biotechnology. He graduated from Washington University School of Law in St. Louis.

Pierce Couch Hendrickson Baysinger & Green LLP announces **Jason A. Robertson** has become a partner. He practices in the Tulsa office in the areas of insurance defense

law, medical malpractice and premises liability. The firm also announces **Jake G. Pipinich** has joined the Tulsa office as an associate practicing in the areas of insurance defense, personal injury, medical malpractice, employment law and general civil litigation. He graduated *cum laude* from OCU Law School in 2009. In addition, **Hailey Hopper**, **Jessica Speegle** and **Raegan Sifferman** have joined the firm as associates. Ms. Hopper practices in the areas of general civil litigation and insurance defense law. She received her B.A. in advertising from Pepperdine University in 2008 and her J.D. from the OU College of Law in 2012. Ms. Speegle's practice areas also include general civil litigation and insurance defense law. She received her B.A. in political science and history from Southwestern Oklahoma State University, graduating *magna cum laude* in 2008. She received her J.D. from the OU College of Law in 2012. Ms. Sifferman's practice area is workers' compensation defense. She received her B.A. in psychology in 2009 from Drury University in Missouri, graduating *magna cum laude*. She received her J.D. from OCU of Law in 2012.

Crowe & Dunlevy recently announced the addition of **Mark A. Craige** as a director in the firm's Tulsa office, focusing his practice on bankruptcy, insolvency and creditor's rights. He has engaged in private practice since 1982 and has focused on bankruptcy, insolvency and commercial litigation since 1986. He most recently served as director of MorrelSaffaCraige PC. He received his J.D. from the TU College of Law.

Deirdre O. Dexter is pleased to announce the formation of Deirdre Dexter PLLC. Her practice will include alternative dispute resolution, including arbitration and mediation, where she has extensive experience arbitrating and mediating employment, commercial and civil rights matters. She also will continue to represent clients in connection with employment law matters before administrative agencies and courts, as well as advise employers regarding day-to-day human resources issues such as terminations, investigations, training, handbooks, policies and procedures. She is a 1984 graduate of the OU College of Law. She can be reached at P.O. Box 220, Sand Springs, 74063; 918-607-2766.

KWayne Lee announces the opening of Wayne Lee Law located at 204 E. Grand, Ponca City, 74601. He will practice primarily in the areas of workers' compensation, injury law and Social Security disability. He may be reached at kwaynelee@sbcglobal.net; 580-762-5553.

Rubenstein & Pitts PLLC is pleased to announce **Aaron C. Parks** has joined the firm as an associate. He practices in the areas of civil and business litigation, real estate, corporate law and nonprofit organizations. He received his J.D. with distinction from the OU College of Law in 2010.

Joshua Franks and **Ashley Hodges** have joined the public accounting firm of HoganTaylor in its state and local sales and use tax practice. Both will be responsible for researching legal precedence and statutory language and regulations in assisting

corporate clients in SALT defense work and consulting with clients in oil and gas, manufacturing and health care industries. Both are honors graduates of the TU College of Law.

At The Podium

David A. Trissell recently delivered remarks at a workshop, "Legal Perspectives on Resilience in Disaster Regulation," at the University of Antwerp, Belgium. He discussed the strategic development of resilience policy in the U.S., and provided examples of U.S. laws and regulations aimed at developing resilience practices within both the government and private sectors. He is a 1992 graduate of the OU College of Law.

Kevin Kuhn of Denver presented "The Trial Lawyer's Perspective on Judicial Conduct and Misconduct" at a recent judicial ethics trainings session for administrative law adjudicators. He is a 1977 graduate of the OU College of Law.

Sharisse O'Carroll presented a three-hour seminar on "Ethical Considerations in the Practice of Law" at the recent International MCLE London Fair held in England. Delegates attending the two-day fair were from various countries including Australia, England, France and Russia. Her topic was titled "The Ethics of Reciprocity, Autonomy Versus Benevolence," a review and consideration of legal ethics challenges which cross boundaries — jurisdictional, moral and ethical.

Sherri K. Anderson of Tulsa participated in a panel discussion on "Representation in Connection with an IRS Audit" during the American Association of Attorney-Certified Public Accountants' recent Southwest Regional Education Conference in Austin, Texas. She is a 2004 graduate of the TU College of Law.

Luke Wallace and **David Humphreys** recently presented in Oklahoma City and Tulsa on the topic of "Taking the Offense When Defending Homeowners in Foreclosure." The presentations were part of the CLE seminar "Mortgage Modification and Foreclosure: A Free Primer for Oklahoma Attorneys on

Assisting Oklahomans Facing Mortgage-Related Issues" co-sponsored by the Oklahoma Attorney General's Office.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (e.g., *Super Lawyers*, *Best Lawyers*, etc.) will not be accepted as announcements (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing, and printed as space permits.

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

Articles for the March 16 issue must be received by Feb. 19.



Thomas A. Bamberger of Eldon died Oct. 2, 2011. He was born May 28, 1926, in Massillon, Ohio. **He served in the U.S. Navy in the South Pacific during World War II and in the U.S. Air Force stateside during the Korean Conflict.** He was a trial lawyer who served 12 years in the state Legislature, advocating for civil rights, the disabled, and the disadvantaged. He spent the last 30 years of his life ranching in Cherokee County. He taught government in Mexico and at the Flaming Rainbow University in Tahlequah, and he was devoted to his family.

Alan Ray Carlson of Bartlesville died Feb. 2. He was born June 29, 1947, in Alva, where he graduated from high school. He earned a B.S. in industrial engineering with honors from OSU and a J.D. from the TU College of Law in 1973. He practiced law with the Garrison, Brown and Carlson law firm from 1974 to the present. He was a member of many professional organizations and was a highly regarded speaker lecturing in Oklahoma and other venues throughout the U.S. He was a recipient of the Oklahoma Trial Lawyers Certificate of Meritorious Service. He was an avid outdoorsman who loved to fish and hunt quail. Memorial contributions may be made to the American Cancer Society or the American Heart Association.

Charles W. Casey of Ponca City died Dec. 15, 2012. He was born March 19, 1932, in Ponca City, graduating from high school there in 1950. He attended OU, study-

ing business and law. **His studies were interrupted by his service in the U.S. Army, where he served 16 months at the Korean Demilitarized Zone after the Korean Conflict, retiring a captain.** He returned to the OU College of Law, graduating in 1958. He returned to Ponca City and became an associate of Sen. Roy Grantham. They became partners and practiced law together until Sen. Grantham's death. Mr. Casey continued practicing law until 2011. His true passion was to help build a better Ponca City, raising money and devoting time to numerous civic and charitable causes. A longtime member of First Presbyterian Church, he served as elder, trustee and deacon and loved to sing in the choir. In 1980, he was selected Outstanding Citizen by the Chamber of Commerce. Memorial contributions may be made to Hospice of North Central Oklahoma, the Poncan Theatre or Marland Children's Home.

Benjamin "Sonny" Demps Jr., of Port Charlotte, Fla., died Jan. 12, 2013. He was born in Harlem, N.Y., on Jan. 5, 1934. **He served in the U.S. Air Force.** He was an air traffic controller who served as director of the FAA Academy in Oklahoma City while he earned a law degree from OCU School of Law. He later served as director of the Mike Monroney Aeronautical Center in Oklahoma City as well as in Brussels, Belgium, as the FAA director of Europe, Africa and the Middle East. He served in the Oklahoma governor's cabinet as secretary of health and human services and

director of Oklahoma DHS; and later as superintendent of schools in Kansas City, Mo. In retirement he enjoyed sailing, dancing, traveling and listening to music of all varieties.

Judge Willard L. Driesel Jr. of Broken Bow died Dec. 29, 2011. He was born Dec. 7, 1953, in Ponca City and had lived in McCurtain County since 1986. His background includes several years in law enforcement, including serving as an Oklahoma City police officer. He graduated from the OU College of Law in 1985. He was a prosecutor for McCurtain, Pushmataha and Choctaw counties, then went on to become a district judge for that area. He was selected presiding judge in the nine counties that made up southeastern Oklahoma. He was also appointed to serve on the Trial Court of the Judiciary. He established the first drug court in his area, and the McCurtain County Drug Court has been used as a model by other counties and judges who have established similar programs. He was an active member of Faith Christian Center. Memorial donations may be made to the Willard Driesel Scholarship Fund at the Idabel National Bank.

James Richard Faling Jr. of Frisco, Texas, died Jan. 24. He was born July 27, 1963. He was a 1992 graduate of the OCU School of Law. Memorial donations may be made to PSC Partners for the Cure.

Retired Oklahoma Supreme Court Justice Ralph Hodges died Jan. 16. He was born Aug. 4, 1930, in Anadarko, where he graduated

from high school in 1948. He graduated from Oklahoma Baptist University in 1952 and received his law degree from OU College of Law in 1954. He was in private practice in Durant from April of 1954 until January of 1957 when he became the Bryan County Attorney. After serving in that capacity for two years, he was elected district judge in 1958 and was re-elected in 1962. He served until his appointment to the Oklahoma Supreme Court by Gov. Henry Bellmon on April 19, 1965. At the age of 34, he was the youngest justice to serve on the court since statehood. He was retained by voters until his retirement in 2004. He served two terms as chief justice: the first in 1977-78 and the second in 1993-94. He was named Outstanding State Appellate Jurist by the Association of Trial Lawyers of America in 1977. He also served on the Board of Trustees for Oklahoma Baptist University from 1968 until 1971. Memorial contributions may be made to the OU College of Law Endowed Scholarship and Memorial Fund or to Free to Live Animal Sanctuary of Edmond.

Kay Elizabeth Huff of Santa Clara, Calif., died Jan. 1. She was born in Oklahoma City on Aug. 12, 1942. In 1961, she was the first woman from Oklahoma to be arrested during the Freedom Rides in Jackson, Miss. Her commitment to social justice and civil rights led to a law degree from the OU College of Law. She was elected the first female prosecutor in Cleveland County. Ultimately, she moved to California, where she became an assistant district attorney in Santa Rosa, work-

ing as an advocate for abused women and children.

Richard S. Karam of Edmond died April 15, 2012. He was born in Oklahoma City on June 9, 1932, and graduated from Classen High School. **He served in the U.S. Marine Corps from July 1950 through March 1952 during the Korean Conflict.** He graduated from OSU in 1956. He worked for the IRS, serving as an internal revenue agent while attending OCU School of Law, graduating in 1964. He practiced law in Enid until his retirement in 1990. During retirement, he continued his lifelong interest in sailing his sailboat at Lake Hefner. He also played the tuba with local bands and his church orchestra.

Retired Special District **Judge Allen Klein** of Tulsa died Jan. 7. He was born Sept. 5, 1931, in Germantown Pa., attended Penn State University and graduated with a degree in electrical engineering. He attended Lehigh University, earning an MBA Degree. His business career led him to Tulsa, where he earned a J.D. from the TU College of Law. He began his career with a private law firm, and was appointed special district judge in 1981. He ranked first in longevity and retired after 30 years on the bench in December 2011. He was also an accomplished runner and competed in numerous races throughout the United States. He completed the 15K Tulsa Run in October 2012, finishing second in the over 80 age group.

Patti J. Laird of Tulsa died Jan. 1. She was born Feb. 1, 1938, and graduated from Will Rogers High School in

1956. She earned her bachelor's degree from TU in 1961 and her J.D. from the TU College of Law in 1970. Memorial contributions may be sent to St. Bede's Episcopal Church of Cleveland, Okla.

Warner Lovell Jr. of Norman died Jan. 17. He was born April 12, 1944, in Fort Worth, Texas, and he grew up in Long Beach, Calif. He earned a B.A. in journalism from OU in 1966 and a J.D. from the OU College of Law in 1970. He practiced law for the next 41 years, concentrating in family law. He was a sole practitioner from 1988 until his retirement in 2011, and he was also of counsel to the Able Law Firm. Twice he argued orally before the Oklahoma Supreme Court on cases which successfully established new precedent, one of which had national implications. He was an avid traveler who visited four continents and numerous islands. Memorial donations may be made to McFarlin Foundation, McFarlin Memorial United Methodist Church of Norman.

Franks **Medearis** of Muskogee died Jan. 13. He was born March 11, 1967 in Tahlequah, where he graduated from high school. He was a 1989 graduate of Northeastern State University and earned a J.D. in 1992 from the TU College of Law. His career of public service began as an assistant district attorney for Cherokee, Wagoner and Adair counties and subsequently as a staff attorney for the Chapter 13 bankruptcy trustee in Muskogee. He also served as a staff attorney for Legal Aid Services of Oklahoma and as the city attorney for Muskogee. He volunteered for sever-

al community and civic organizations including those serving abused women and children and other vulnerable citizens. He was also involved in community theater and was a frequent actor in local productions. Among his survivors is his brother, OBA member Park Medearis of Tahlequah. Memorial donations may be made to Kid's Space of Muskogee or Growing Grace Fund at Grace Episcopal Church of Muskogee.

George Eugene Peabody Jr. of Oklahoma City died Sept. 29, 2011. He was born Oct. 3, 1922, in Kennekuk, Kan. **He served in the U.S. Army during World War II at the Battle of the Bulge.** He graduated from Washburn University in 1956. He served as the assistant district attorney for the state of Kansas. He was a member of the Masonic Lodge, Abdallah Shrine, and the Metropolitan Baptist Church in Oklahoma City.

Randall Scott Pickard of Tulsa died Jan. 26. He was born Sept. 28, 1958, in Orange, Calif. and graduated from the O.W. Coburn School of Law at Oral Roberts University in 1983. He practiced law in Tulsa for 30 years and was of counsel with the Drummond Law Firm. He was a member of Providence Orthodox Presbyterian Church in Tulsa, to which memorial contributions may be made.

Richard E. Vernor of Lady Lake, Fla., died July 7,

2011. He was born Aug. 24, 1918, in Muskogee and established residence in Falls Church, Va., in 1954. **He served in the U.S. Marines and the U.S. Navy, receiving the Combat Medal for his service in the South Pacific during World War II.** As an attorney, he served as associate general counsel for the American Council of Life Insurers. He was also a member of the District of Columbia Bar Association. He was a member of the Patrol Craft Sailors Association and a long-serving volunteer counselor for Haven of Northern Virginia, to which memorial donations may be sent.

Rodney D. Watson, who practiced law in Norman most of his adult life, died Jan. 6. He was born Aug. 20, 1953, in Altus, graduating from Lawton Eisenhower High School in 1971. He attended the U.S. Air Force Academy from 1971 to 1973, transferring to OU where he graduated with a B.S. in political science in 1975. He graduated from the OU College of Law in 1983. He was an active member of the Cleveland County Bar Association. He enjoyed traveling, films, fishing, hunting, music, biking and spending time with family and friends.

Steven Lyle Yeager of Edmond died Jan. 17. He was born in Oklahoma City June 9, 1949 and was a graduate of Harding High School. He worked for the Chickasha

and Edmond police departments. He earned his bachelor's degree in accounting from Central State University and his J.D. from OCU School of Law in 1993. He had a 35-year career in the petroleum land business, working as a landman and most recently as an oil and gas attorney in Oklahoma City. Memorial contributions may be made to the Oklahoma Humane Society in the name of his beloved chocolate Labrador retrievers, Gertrude and Gustav Yeager.

Miles Christopher Zimmerman of Chandler died Dec. 26, 2012. He was born March 3, 1949, in Topeka, Kan. He grew up in Lawrence, Kan., obtained his bachelor's degree from the University of Missouri at Kansas City and graduated from the University of Arkansas Law School in 1976. He was an agent and the first legal officer of the OSBI, served as the district attorney for the 23rd Judicial District (Pottawatomie and Lincoln counties) 1991-1996, and was in private practice as an attorney in Meeker and Chandler. He was an Oklahoma Bar Foundation Fellow and was very proud of his work with the Oklahoma Lawyers for America's Heroes program. He was also a member of the AF&AM Masonic Lodge #269, loved coaching little league football in Meeker and was passionate about ranching. Survivors include his wife, OBA member Stephanie Mather.

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The Last Laugh

By Retired Judge David Barnett

In fall, 1966, I was a third-year student at Oklahoma State University and was getting nowhere fast in my pursuit of a degree. I had developed some slovenly habits and was not working hard enough to be in danger of ever graduating. However, something happened to me during finals week that changed my outlook on life.

I had just taken a management class final and was sure that I flunked not only the test, but also the course. As I left the classroom building, I bumped into Kay Hubbard, a friend I had graduated from high school with. She was on her way to take a final, but had a few minutes to get coffee. We traipsed over to the student union.

I remember that, during the course of our enjoyable conversation, I decided I would marry Kay. Some say that I had instantly fallen in love, but I had known her for several years, and was probably already in love with her. I just did not realize it until that moment. In any event, she was not instantly smitten in the same way, and it took me several weeks to convince her that she loved me too.

A few days after our coffee date, we were both in the wedding of two of our high school classmates. During the reception, several of the groom's other friends and I decorated the newlyweds' car.



“I think that was when she realized how serious I was about her.”

This impressed Kay as being less than genteel, and she gave me a mild rebuke for being so mischievous. She

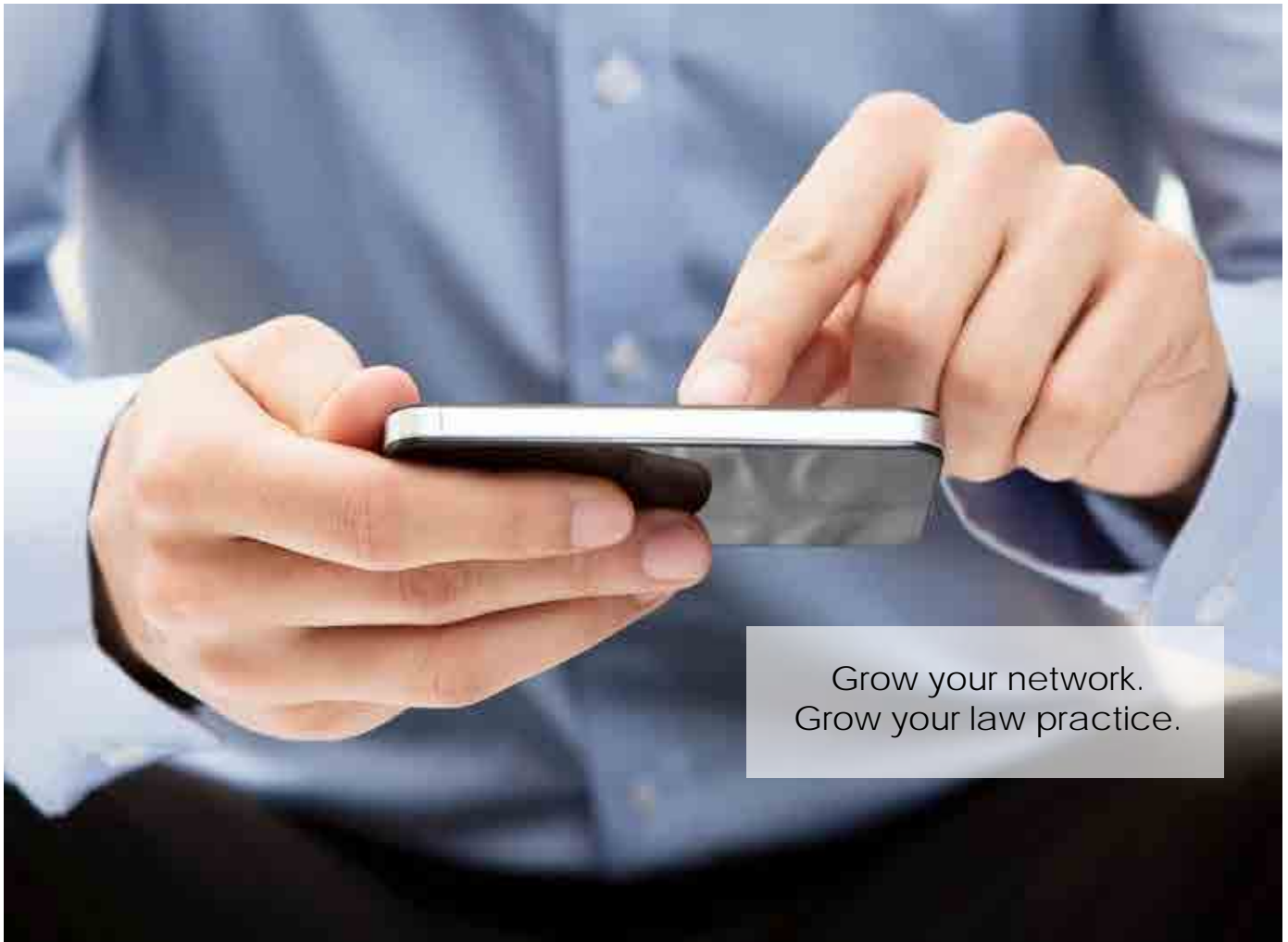
then said, “David Barnett, when you get married, I’m going to be there, and I’ll be laughing at you.”

As soon as school started for the second semester, I called Kay and asked her to go with me to an OSU wrestling match. Although she had never seen collegiate wrestling, she very graciously accepted, and we had our first date. Shortly after Valentine’s Day, I took Kay to meet my family. I think that was when she realized how serious I was about her. Before long, she developed similar feelings for me. Our relationship blossomed very quickly, and we formally announced our engagement in the spring.

August 11, 1967, Kay kept her promise to attend my wedding, but not in the way she had anticipated earlier that year. You see, I had the last laugh, as I claimed her as my lovely bride. I’ve made a great many snap decisions in my life, but none have turned out as well as the one made during finals week, 1966. After 45 years of marriage, I love her infinitely more than I did then.

Retired Judge Barnett lives in Frederick.

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