



# THE Oklahoma Bar JOURNAL

Volume 84 ♦ No. 27 ♦ Oct. 12, 2013

## Appellate Law

### **ALSO INSIDE**

Annual Meeting • OBA Awards • Diversity Committee Awards



Cosponsored by the OBA  
Diversity Committee

# The 2013 OBA Diversity Conference and Awards Luncheon



## October 24

Jim Thorpe Association and Oklahoma  
Sports Hall of Fame Event Center  
4040 North Lincoln Blvd., Oklahoma City, OK

### Featured Speaker: Travis A. Williams, *Gideon's Army*

The new documentary *Gideon's Army* follows a group of young public defenders in the Deep South who contend with low pay, long hours, and staggering caseloads to represent the poor. The film's title comes from the landmark 1963 Supreme Court ruling in *Gideon v. Wainwright* that established the right to counsel to defendants in criminal cases who are unable to afford their own attorneys. Mr. Williams dives deep into the discussion of the deficiencies of the US criminal justice system and what it takes to maintain the passion and commitment to be a public defender.

8:30 a.m.

Registration and Continental Breakfast

9

Public Defenders: The Keepers of Civil Rights

Featured Presenter: Travis A. Williams, *Gideon's Army*

11:00

Break

11:10

**Panel Discussion with Travis Williams**

**Susan Otto**, Federal Public Defender for the Western District of Oklahoma

**James Rowan**, Oklahoma City Criminal Defense Attorney and past Assistant Public Defender with OK County PD's Office

**Sharon Holmes**, Tulsa Criminal Defense Attorney and past Tulsa County Assistant District Attorney

12:00 p.m.

Luncheon & OBA Diversity Awards

1:30

Adjourn

Register online at [www.okbar.org/members/cle](http://www.okbar.org/members/cle)  
and receive a \$10 discount.

**Approved** for 3.5 hours MCLE/0 Ethics. **\$100** for CLE only, **\$40** for luncheon only, **\$120** for CLE and luncheon date. For registrations received within four full business days of the program please add **\$25**. A \$25 fee will be charged for cancellations made within four full business days of the seminar date. For questions or to register by phone, call Renee at 405-416-7029.





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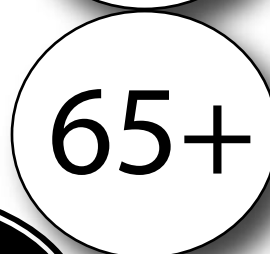
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## THEME: APPELLATE LAW

EDITOR: EMILY DUENSING

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## Service Opportunities Plentiful in Legal Profession

By Jim Stuart

The OBA “Day of Service” was a great success. Oklahoma lawyers statewide took time out from their busy schedules to volunteer their time and talents to local community service projects. Elsewhere in this issue some of those projects are highlighted. Amazing things can happen when we lawyers work together under a common goal. I want to give a special thank you to members of the OBA Young Lawyers Division and Board of Governors as well as to county bar presidents for helping make this a most meaningful event.

The recent OBA/CLE “New Challenges for Nonprofit Organizations”

was held Sept. 26 in conjunction with the Oklahoma Center for Nonprofits, and the bar center was packed with OBA members and nonprofit executives. The presenters were impressive and the topics very informative. There was no registration fee for lawyers who would commit to performing 10 hours of pro bono service to nonprofit organizations. Many lawyers made this commitment. OBA member Mike

Joseph and OBA Educational Programs Director Susan Krug did an excellent job in helping organize this successful event. I hope similar joint projects will continue in the future.

*Amazing things can happen when we lawyers work together under a common goal.*

Don’t forget to register for the Annual Meeting to be held on Nov. 13-15 at the Sheraton Hotel in downtown Oklahoma City. The scheduled events are coming together nicely and I hope you will plan to attend.

I again want to urge all county bars to elect and send representatives to the OBA House of Delegates. Mail or fax your delegate certifications to OBA Executive Director John Morris Williams; P.O. Box 53036, Oklahoma City, OK 73152; 405-416-7001.



President Stuart  
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# EVENTS CALENDAR

## OCTOBER 2013

- 14 **OBA Licensed Legal Intern Swearing In ceremony**; 1:30 p.m.;  
Judicial Center, Oklahoma City; Contact Wanda F. Reece 405-416-7042
- 16 **OBA Women in Law Committee meeting**; 4 p.m.; Oklahoma Bar Center,  
Oklahoma City with teleconference; Contact Kim Hays 918-592-2800 or  
Suzan Bussey 405-525-9144
- 17-19 **OBA Hosts Southern Conference of Bar Presidents**; Skirvin Hilton  
Hotel, Oklahoma City; Contact John Morris Williams 405-416-7000
- 17 **OBA Board of Governors meeting**; 9 a.m.; Oklahoma Bar Center,  
Oklahoma City; Contact John Morris Williams 405-416-7000
- 18 **Oklahoma Black Lawyers Association meeting**; 12 p.m.; Oklahoma  
Bar Center, Oklahoma City; Contact Brittini Jagers 405-314-0611
- OBA Rules of Professional Conduct Committee meeting**; 3 p.m.;  
Oklahoma Bar Center, Oklahoma City; Contact Paul Middleton 405-235-7600
- 21 **OBA Alternative Dispute Resolution Section meeting**; 12 p.m.;  
Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jeffrey Love  
405-286-9191
- OBA Mock Trial Committee meeting**; 5:30 p.m.; Oklahoma Bar Center,  
Oklahoma City with teleconference; Contact Judy Spencer mocktrial@okbar.org
- 22 **OBA Bench and Bar Committee meeting**; 12 p.m.; Oklahoma Bar  
Center, Oklahoma City; Contact Judge Barbara Swinton 405-713-7109
- OBA Board of Bar Examiners Drafting and Grading Seminar**;  
1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Board of Bar Examiners  
405-416-7075
- 23 **OBA Clients' Security Fund Committee meeting**; 2 p.m.; Oklahoma  
Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Micheal Salem  
405-366-1234
- 24 **Second Annual Diversity Conference and Awards Luncheon**;  
9 a.m.; Jim Thorpe Event Center, 4040 N. Lincoln, Oklahoma City; Contact  
Kara I. Smith 405-923-8611
- OBA Work/Life Balance Committee meeting**; 12 p.m.; Oklahoma Bar  
Center, Oklahoma City with teleconference; Contact Sarah Schumacher  
405-752-5565

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

The Oklahoma Bar Association's official website: [www.okbar.org](http://www.okbar.org)

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## Pitfalls in Civil Appellate Practice

By Michael Richie and Barbara Swimley

**T**he purpose of this article is to highlight some common pitfalls and mistakes made by attorneys in civil appeals and to explain how these pitfalls and mistakes can be avoided. The easiest way to avoid pitfalls and mistakes is to read the Oklahoma Supreme Court rules, which can be found at the Supreme Court's website [www.oscn.net](http://www.oscn.net) and at 12 O.S. Chapter 15, Appendix 1. These rules will answer most questions. For other questions, call Ms. Swimley at 405-556-9344 or Mr. Richie at 405-556-9400.

### PITFALLS IN COMMENCING AN APPEAL

#### *Timeliness*

The biggest pitfall in commencing an appeal is missing the **30-day deadline** to file an appeal (the deadline is **20 days** in a workers' compensation case). Most defects can be corrected, but missing the deadline is fatal.<sup>1</sup> The 30-day period is calculated starting with the date of the filing of the order appealed from if the order was mailed within three business days of its filing.<sup>2</sup>

Rule 1.3 of the Oklahoma Supreme Court rules (Okla.Sup.Ct.R.), and 12 O.S. §2006 explain how to calculate time. The first day is excluded, and the last day is included. If the last day falls on a day the Supreme Court clerk's office is closed (weekend or holiday) then the due day is the next business day. Remember, some months have 31 days! Also, the clerk's office is open on Columbus Day, which is a federal holiday, but not a state holiday.

An appeal may be filed by either 1) delivery of the petition in error **and** filing fee (or pauper's affidavit) to the clerk's office, 2) by mailing the petition in error and fee or 3) by sending the petition and fee by third-party commercial carrier. If mailing or third party commercial carrier is used, the instructions set forth in Okla.Sup.Ct.R. 1.4(c) must be followed. If these instructions are not followed, the date of commencement of the appeal will be the date the petition

and cost deposit are received by the clerk, and not the date of mailing.

Failure to comply with rule 1.4(c) results in the dismissal of many appeals as untimely. Don't let your appeal be one of them! If mailing a petition in error, proof of the date of mailing from the post office is required. A postmark date from a privately owned postage meter is not sufficient. If using a third-party commercial carrier, the petition and fee must be delivered to the carrier by the 30-day deadline, and the petition must be delivered to the clerk within three calendar days.

Another common mistake is the failure to include the filing fee (or pauper's affidavit) with the petition in error. A petition in error will not be filed until the entire cost deposit, or a properly executed pauper's affidavit, is received by the clerk. Okla.Sup.Ct.R. 1.23 (b). If a petition is mailed, then the filing fee, or pauper's affidavit must either be included in the envelope, or timely mailed separately for the appeal to be deemed commenced when mailed.<sup>3</sup>

#### *Appealable Order*

The Supreme Court only has appellate jurisdiction to review appealable orders. Appealable orders are judgments, final orders and interlocutory orders appealable by right.<sup>4</sup> A party may also seek review of a certified interlocutory

order.<sup>5</sup> You must have one of these appealable orders before you can appeal.

A judgment is the final determination of the rights of the parties in an action.<sup>6</sup> A final order is defined in 12 O.S. §953 as an order affecting a substantial right in an action when the order determines the action and prevents a judgment.<sup>7</sup> A final order is also one in a multi-party or multi-claim case which disposes of fewer than all of the claims or parties, but where the order expressly states that there is no just reason for delay and expressly directs the filing of a judgment.<sup>8</sup> An interlocutory order appealable by right is one which is listed in 12 O.S. §§952 (b)(2) or 993, or in Okla.Sup.Ct.R. 1.60.

A thorough discussion of whether an order is appealable is beyond the scope of this article. If you are not sure whether an order is appealable, it is better to appeal. If an appeal is dismissed for lack of an appealable order, you can always appeal later, but if an order is final, and you don't appeal within 30 days, you will lose your right to appeal. If an order is an interlocutory order appealable by right, or a certified interlocutory order, you can always appeal that order in a timely and properly brought appeal after judgment.<sup>9</sup>

An appealable order must also be in proper form. The form requirements are set forth in 12 O.S. §696.3. An order prepared in compliance with §696.3 is a jurisdictional prerequisite to the commencement of an appeal.<sup>10</sup> Section 696.2 (D) also lists some documents which are not in proper form, such as court minutes, verdicts, letters from the judge, etc. If you file an appeal from an order which is not in proper form, you will receive an order from the Supreme Court, which will direct you to obtain such an order within a certain time deadline.

### OTHER TIME-RELATED PITFALLS

There are several other time-related pitfalls and common mistakes in appellate practice, which are listed below:

If your client wants to file a counter-appeal from the same order that the appellant has appealed, the counter-petition in error must be filed within **40 days** after the date of the order appealed from.<sup>11</sup> Thus, if you wait until the response to the petition in error is due, which is 20 days after the petition in error is filed, you may be too late to file a counter-appeal.

If your client has an appeal from a judgment pending, and wants to appeal from a post-

judgment order granting or denying an attorney's fee and/or costs, an amended petition in error may be filed in the pending appeal, but it must be filed within **30 days** of the filing of the post judgment order.<sup>12</sup>

In appeals from interlocutory orders appealable by right, all time deadlines are shortened. The notice of completion of record is due within **60 days** of the filing of the order appealed from (not within 60 days of the filing of the appeal).<sup>13</sup> The appellant's brief in chief in such appeals is due in **30 days**, the appellee's answer brief in **20 days** thereafter and the appellant's reply brief in **10 days** after the filing of the answer brief.<sup>14</sup>

Appeals from orders in juvenile cases also have shortened deadlines.<sup>15</sup>

Petitions for *certiorari* to seek review of an opinion of the Court of Civil Appeals must be filed within **20 days** after the date of the filing of the Court of Civil Appeals opinion.<sup>16</sup>

### PITFALLS IN DESIGNATING AND COMPLETING THE RECORD ON APPEAL

Inherent in a decision to appeal from a trial court's order or judgment is the process of designating a record. All parties are required to file either a designation or counter-designation of record.<sup>17</sup> While this paperwork is initially filed with the district court clerk, a copy must also be filed with the clerk of the Supreme Court.<sup>18</sup> Parties often forget the latter.

#### *Introduction*

The purpose of an appeal is to correct legally-cognizable errors made by the trial court in deciding a case. This sounds simple enough but inherent in this concept is the idea that an appeal is not an opportunity to retry a case. The concept further restricts an appellant to designate only items which were considered by the trial court in deciding the case before it. Parties are sometimes inclined to include in their designations items from earlier or related cases which were not part of the record the trial court relied upon to decide the case from which the present appeal is being brought. Do not do that. It is axiomatic that materials not before the trial court cannot be the bases for mistakes allegedly made.<sup>19</sup>

Finally, always remember that it is the *appellant* who is responsible for seeing that the designated and counter-designated record on appeal is timely completed.<sup>20</sup> Often, attorneys

who don't file appeals on a regular basis mistakenly assume that once the designation of record is filed, their responsibility as to its preparation is over. Not so. The inability of the district court clerk to file a notice of completion — indicating that the record on appeal is ready for transmittal — can result in the appeal being dismissed.

*Items Designated for Inclusion in the Record on Appeal*

When deciding what to designate for inclusion in the record on appeal, one should begin with Okla.Sup.Ct.R. 1.300, form 11. Initially, a party must decide which, if any, transcripts are to be ordered and included in the record. It is important that the designating party consult with the court reporter to determine the specific date of the transcript sought. Generally, the transcript will be for a trial, hearing or deposition occurring on a specific date or during a range of days. The mistake made is to designate a transcript by something other than these dates which puts the clerk in the unenviable position of having to guess which transcript to include. This is particularly cumbersome when a proceeding extends over several days and you indicate a transcript for a day in the middle of or before or after the proceeding in issue.

Exhibits to a specific transcript must also be individually designated. Remember the court reporter only files with the district court clerk the exhibits which you have designated. If exhibits were *not* introduced at trial or an attempt to introduce was made but denied and a proffer of proof was not made, then those exhibits are not properly a part of an appellate record.

Parties to an appeal often designate items which have not been filed with the district court clerk causing the inability to complete the record. Additionally, when a party decides to designate pleadings or documents by circling them on a copy of the docket sheet, he/she will often circle items which are merely administrative entries, e.g., minutes. These are often called "free-text" items for which there is no document and, hence, cannot be included in the record on appeal. This can result in the filing of a notice of non-completion with the Supreme Court clerk. Remember, Okla.Sup.Ct.R. 1.33(d) requires the district court clerk to include a copy of the appearance docket with the record on appeal. This docket includes all

**“Please be aware of the type of case from which an appeal is being brought.”**

of the administrative entries which have been made in a case.

In the event a district court clerk cannot complete a record as designated and, hence, file the required notice of completion, it is incumbent upon the appellant to take whatever remedial steps are necessary to secure the record's completion. This may mean an amended designation of record needs to be filed to remove those free-text items which were inadvertently circled. It may mean that the trial judge has to be consulted because the parties cannot agree or the court reporter is not being diligent getting the transcripts prepared. Remember the trial court retains jurisdiction to decide questions regarding preparation of the record on appeal until such time as it is physically transmitted to the Supreme Court.<sup>21</sup>

*Times Within Which to Complete the Record on Appeal*

Please be aware of the type of case from which an appeal is being brought. It is determinative of when the notice of completion of the record on appeal must be filed with the Supreme Court. The following is an illustrative, but not exhaustive, list of when certain notice of completions are due:

- 1) Final judgments or orders — six months from the date of the order or judgment appealed.<sup>22</sup>
- 2) Driver's license appeals — the record has to be filed with the petition in error.<sup>23</sup>
- 3) Juvenile appeals —
  - Juvenile appeals other than adoptions — upon completion but no later than 60 days from the date of the order appealed.<sup>24</sup>
  - Adoptions — upon completion but no later than 30 days from the date that the petition in error is filed.<sup>25</sup>
- 4) Interlocutory orders — within 60 days of the filing of the interlocutory order.<sup>26</sup>

- 5) Workers' compensation award - 45 days from the date the Petition for Review is filed with the Supreme Court.<sup>27</sup>

The bottom line is that all appeals are different and you must familiarize yourself with the Supreme Court rules governing the type of appeal you are bringing.

#### *Records Required in Rule 1.36 Accelerated Appeals*

For appeals brought under the procedure outlined in Okla.Sup.Ct.R. 1.36, the appellant is required to file an original certified copy and four copies of the same. The contents of this record are prescribed by Okla.Sup.Ct.R.1.36(c).

There are two considerations of which parties should be mindful. First, do not present the district court clerk — who must certify your record — with the original and four copies. Either give the clerk a list of the documents you want included in the record and have her/him certify the same or give the clerk one compilation of documents to be included in the rule 1.36 record for certification. In the latter case, the district court clerk will be required to conform every copy presented to that which is on file in the clerk's office as a predicate to certification. If you give the clerk the additional four copies, each copy must also be conformed in order to be certified.

Second, if you represent the appellee in a Rule 1.36 appeal, it would be in your client's best interest if you checked the copy of the record filed with the Supreme Court. While not a frequent happening, there are occasions — especially when the appellant is pro se — that the record will have been highlighted or notes will have been added. It is your obligation — not the clerk's duty — to move to strike the record. If you do nothing, it will be submitted to the court as filed.

### **PITFALLS IN FILING MOTIONS**

Before filing motions in an appeal, read Okla. Sup.Ct.R. 1.6. Okla.Sup.Ct.R. 1.15 governs motions for stay, and Okla.Sup.Ct.R. 1.14 governs motions for costs and fees.

#### *Motions for Extension of Time*

Motions for extension of time are not favored. But, if you file such a motion, it must be filed before the due date! For good cause shown, an extension of up to 20 days to file a brief, and up

to 30 days to complete a record, may be granted.<sup>28</sup> You should file the motion enough in advance of the deadline to give the court time to respond to the motion. Do not call the day after the motion is filed to see if it has been ruled upon!

#### *Motions for Attorney Fees and Costs*

Motions for costs and fees must be filed before the mandate issues. All motions for costs must attach a verified statement of taxable cost items showing that the item has been paid. This statement is required before costs may be taxed.<sup>29</sup> The taxable cost items are listed in Rule 1.14 (A). In order to obtain an attorney's fee for appeal-related services, a party seeking such a fee must provide the court with statutory or decisional authority which would allow such a fee.<sup>30</sup>

#### *Motions for Stay*

There are two types of stay motions. One type requests a stay pending appeal of the enforcement of the order appealed from. This type of stay is governed by Okla.Sup.Ct.R. 1.15. No such stay request will be considered unless the motion states that a stay was sought and denied by the trial court.<sup>31</sup> Emergency stay requests are governed by Okla.Sup.Ct.R. 1.15(c).

A stay of proceedings in an appeal may be sought if the trial judge is required to approve a settlement.<sup>32</sup>

### **CONCLUSION**

Mistakes regarding the filing and prosecuting of an appeal can be avoided if you take the time **before** proceeding to familiarize yourself with the Oklahoma Supreme Court rules. Most errors can be corrected; however, the petition in error's timely filing is a predicate to establishment of the court's jurisdiction. Missing that deadline is fatal. You have a responsibility to your client, the court and yourself to strictly adhere to the procedures and time frames set by the court's rules. Good luck in your appellate practice.

*Authors' Note: The views expressed herein are those of the authors, and do not necessarily reflect those of the Oklahoma Supreme Court. The views of the Oklahoma Supreme Court are expressed in the Oklahoma Supreme Court rules and in the court's published opinions, some of which are cited in this article.*



# DOS AND DON'TS IN APPELLATE PRACTICE

## *Appeals*

### **Do:**

...carefully fill out the petition in error form! This form and the information you include is used by the Supreme Court clerk's office to docket your case. Incorrect information may affect deadlines and notices to the parties. The case style on the petition in error must comply with Rule 1.25 (b) of the Oklahoma Supreme Court rules.

...file your petition in error within the time specified by the Supreme Court rules. The petition in error is a jurisdictional document. If you have not timely secured a certified copy of the judgment or order from which you are appealing and you are running up on your 30-day deadline, file what you have and then file an amended petition in error as soon as possible.<sup>33</sup>

... Note and calendar/tickle all deadlines in the appeal.<sup>34</sup> Note that the time for completing the record and briefing for appeals from interlocutory orders is shorter.<sup>35</sup> This is also true of appeals from decisions of the Workers' Compensation Court<sup>36</sup> and appeals involving juveniles.<sup>37</sup>

... Designate only actual documents for inclusion in the record on appeal. Minutes – posted only to the appearance docket – and other notations may only exist on the trial court's docket. Remember, a copy of the district court appearance docket is included in every record on appeal; hence, there is no need to separately designate these types of items.<sup>38</sup>

... Make arrangements for the transcripts as soon as possible, but no later than the date of filing the petition in error. Make sure that the court reporter has all of the designated exhibits so that they can be filed with the transcripts.

... Check with the district court clerk well before the notice of completion of record is due to make sure that there is no problem with completion of the record. Remember it is the appellant's duty to monitor the preparation of the record on appeal. If there are problems, e.g., getting a transcript, it is the appellant – *and not the district court clerk* – who is required to seek relief from the trial court for the Record's timely completion. Since the filing of the notice of completion triggers the briefing schedule, no Amended Designations of Record should be filed after that event has occurred except under the most exigent of circumstances.

... Make sure that the Rule 1.36 record either consists of certified copies of all documents included, or includes a certification from the district court clerk that all documents are true and correct copies of documents on file in the district court. Most district court clerks prefer that you give them a list of documents that you wish for them to certify. This way they can copy and certify what they actually have on file without having to go through what you have given them page by page.

... Attach a verified statement of costs, which is required by Okla.Sup.Ct.R. 1.14, to all motions for costs. Only those costs listed in Rule 1.14 are taxable in the Supreme Court.

### **Don't:**

... fail to respond to an Order of the Supreme Court within the date specified in the order!

... ask for an extension of time after the due date, unless you did not receive notice of the document (such as the appellant's brief) which triggered the running of the time to take action.<sup>39</sup>

... withdraw trial exhibits until after the time has run to file post trial motions or an appeal.

... fail to properly follow the mailing rule for mailing a petition in error, brief, or Petition for *Certiorari*.

... file one appeal from two separate district court cases unless the cases were consolidated by the district court, or the judge filed a single final order with both case numbers on it.

... designate items from a case other than the one from which you are appealing, unless those items were made a part of the case file and reviewed by the judge before entering the order appealed from.

... designate the **entire** trial court record in a case without first securing leave to do so from the Chief Justice.<sup>40</sup>

... retry your case in the appeal. The purpose of an appeal is to correct errors, not to reargue the facts.

## *Original Actions*

### **Do:**

... read Okla.Sup.Ct.R. 1.191 before you start. This rule explains how to commence an original action.

... bring a notice when you file an original action.<sup>41</sup>

... limit your appendix to only those items necessary to understand the issues raised. The appendix should include the court order which gave rise to the request for extraordinary relief. The appendix should include any state or federal regulations upon which you rely. It is not necessary to include statutes or cases relied upon unless the cases are not published in the national reporter system. The appendix should generally not include briefs filed in the district court.

... remember to include a separate motion for stay if you seek a stay of district court proceedings or orders during the pendency of the original action. State the date of the action you are trying to stop. If you seek an emergency stay (10 days or less), explain why this stay was not sought sooner.

... remember that you should not file an original action unless you are clearly entitled to extraordinary relief and you do not have an adequate remedy at law, such as an appeal.

... state your issues clearly and concisely, and remember to specify the relief you seek.

## Don't:

... file an original action at 4:50 p.m., and expect relief the same day.

... file a voluminous appendix. Remember that your case is only one on a docket of approximately 15 other cases to be decided on conference day.

... string cite.

## Certiorari

### Do:

... attach the Court of Civil Appeals opinion to your petition for certiorari. Attach no other documents.

... make a clear and concise argument, keeping in mind the reasons the court might grant *certiorari*, such as first impression question, split among the divisions of the Court of Civil Appeals, or decision not in accord with specific statutes or Oklahoma Supreme Court cases. If you claim a Court of Civil Appeals' decision is not in accord with a case or statute, be sure to cite and discuss that case or statute. Many times attorneys will recite one of these reasons, but do not actually discuss why their case fits into one of these categories.

### Don't:

... simply repeat the arguments made in your brief on appeal.

... misrepresent the record. If you claim that the Court of Civil Appeals had certain important facts wrong, be sure you are right, because we check.

... try to push the page limit rules by using tiny type (less than 12 point) or by making most of your petition consist of single spaced footnotes using tiny type.

... seek *certiorari* if your only issue is that the trial court decided the facts wrong. You are entitled to only one review of the factual findings.

## FREQUENTLY ASKED QUESTIONS

**Q:** *When I am appealing from a post-judgment order (e.g., attorney fees or new trial) do I need to also attach the underlying judgment to the petition in error?*

**A:** Yes. You must attach all pertinent orders so that appellate jurisdiction can be determined from looking at the petition in error.

**Q:** *Is filing a record on appeal — prepared according to rule 1.36 of the Supreme Court rules (Okla.Sup.Ct.R) — mandatory in all summary judgment cases?*

**A:** Yes. You do not have the option to choose the procedure in cases that fall under Okla.Sup.Ct.R. 1.36. You can request leave to file a brief, but you must file a record.

**Q:** *Can I add an extra three days for mailing the judgment to my 30-day appeal time?*

**A:** No. The three-day rule found in 12 O.S. 2006(D) is not applicable to appeals.<sup>42</sup> Additionally, 12 O.S. 990A does not give a party an extra three days. That statute states that if the judgment is mailed within three days, exclusive of weekends and holidays, then the 30-day time to appeal begins to run from the date of the judgment is filed, not the date of its mailing. Hence, instead of three extra days, you may have as many as six fewer days within which to appeal.

*Q: Can I get an extension of time over the phone?*

**A:** No. You cannot get any relief over the phone. All communications with the Court must be by written motion, petition, application or suggestion, filed in the case and served on opposing counsel.<sup>43</sup>

*Q: Can I get an extension of time to file my brief or complete my record?*

**A:** Maybe. Okla.Sup.Ct.R. 1.6(b) states that motions for extension of time are not favored and not routinely granted. If the requirements of Rule 1.6(b) are followed and specific good cause shown, one extension of no more than 20 days may be granted to file a brief; and one extension of no more than 30 days may be granted to complete the record on appeal. You should not count on being able to get an extension of time.

*Q: Can I get an extension of time to file my appeal or file a Petition for Certiorari?*

**A:** No. Appeal time may not be extended by either the trial or appellate courts.<sup>44</sup> Likewise, the time to file a Petition for Certiorari may not be extended.<sup>45</sup>

*Q: Is an order denying a motion for summary judgment appealable?*

**A:** No.<sup>46</sup>

*Q: How do I obtain judgment on a supersedeas bond?*

**A:** You may file a motion in the Supreme Court before mandate issues.<sup>47</sup> After mandate has issued, you must proceed in the district court.

*Q: How do I obtain a stay pending appeal?*

**A:** The procedure for obtaining a stay of enforcement of a judgment pending appeal is set forth in Okla.Sup.Ct.R.1.15.

*Q: Will my petition in error be deemed filed when mailed if I use a private postage meter?*

**A:** No. In order to commence an appeal on the date of mailing, proof of the mailing date must be from the post office.<sup>48</sup>

*Q: What is the mandate? Do I get a copy of it? Can I get the mandate recalled?*

**A:** The mandate is the document issued by the Supreme Court which signals the conclusion of appellate proceedings and the return of jurisdiction over the matter to the district court.<sup>49</sup> The parties are not sent a copy of the mandate. It is only issued to the district court.<sup>50</sup> The mandate may only be recalled when it is issued through inadvertence, mistake or as the result of fraud.<sup>51</sup>

*Q: How do I add something to the record on appeal? What happens if there is a dispute about what should be in the record on appeal?*

**A:** In cases where the district court clerk prepares the record on appeal (i.e., not summary judgment cases), any disputes about the content of the record or any motions to supplement the record should be addressed to the trial court if the record has not yet been transmitted to the Supreme Court.<sup>52</sup> The record is not transmitted to the Supreme Court until after the briefing has been completed. A record that has been transmitted to the Supreme Court may be amended with leave of the Supreme Court (or the Court of Civil Appeals if the case has already been assigned there). If leave is granted, the request is then made to the trial court, with notice to the opposing party.<sup>53</sup>

*Q: What do we do if the parties settle the case while it is on appeal and the settlement must be approved by the trial judge?*

**A:** The parties should file a joint motion in the Supreme Court for an order staying further proceedings and for leave to proceed before the trial court to secure approval of the settlement.<sup>54</sup>

1. See 12 O.S. §990A.

2. 12 O.S. §990A(B), and *Tidemark Exploration, Inc. v. Good*, 1998 OK 67, 967 P.2d 1194, explain how this rule is applied.

3. *Lear Siegler Services, Inc. v. Nance*, 2001 OK 36, 22 P.3d 1213.

4. 12 O.S. §952(b).

5. See 12 O.S. §952(b)(3) and Okla.Sup.Ct.R. 1.50 et seq.

6. 12 O.S. §681.

7. For examples of judgments and final orders, see Okla.Sup.Ct.R. 1.20.

8. See 12 O.S. §994.

9. 12 O.S. §952 (last paragraph).

10. 12 O.S. §696.2(D).

11. Okla.Sup.Ct.R. 1.27(a).

12. Okla.Sup.Ct.R. 1.26(d).

13. See Okla.Sup.Ct.R. 1.64.

14. See Okla.Sup.Ct.R. 1.65.

15. See Okla.Sup.Ct.R. 1.34(e) and 1.10 (c)(3).

16. See Okla.Sup.Ct.R. 1.179(e).

17. See Okla.Sup.Ct.R. 1.28(a) & (c).
18. See Okla.Sup.Ct.R. 1.28(b) & (c).
19. See *Chamberlin v. Chamberlin*, 1986 OK 30, 720 P.2d 721-724; Okla.Sup.Ct.R.1.33(d).
20. See Okla.Sup.Ct.R.'s 1.33(c), 1.34(a), 1.53 (c), and 1.64.
21. See Okla.Sup.Ct.R. 1.37(a).
22. See Okla.Sup.Ct.R. 1.34(a).
23. See Okla.Sup.Ct.R. 1.34(c).
24. See Okla.Sup.Ct.R. 1.34(e).
25. See Okla.Sup.Ct.R. 1.34(e).
26. See Okla.Sup.Ct.R. 1.64
27. See Okla.Sup.Ct. R. 1.104(d).
28. See Okla.Sup.Ct.R. 1.6 (b)
29. See Okla.Sup.Ct.R. 1.14 (A).
30. See Okla.Sup.Ct.R. 1.14 (B).
31. See 12 O.S. §§990.4, 993 and 994 for the applicable law governing the stay sought.
32. See Okla.Sup.Ct.R. 1.37(a)(10).
33. Okla.Sup.Ct.R. 1.26.
34. See rules 1.10 and 1.34 of the Oklahoma Supreme Court rules for deadlines for completion of record and briefing in appeals from final orders.
35. See Okla.Sup.Ct.R. 1.64 and 1.65.
36. See Okla.Sup.Ct.R. 1.104 and 1.105
37. See Okla.Sup.Ct.R. 1.10(c)(3) and 1.34(e)
38. See Okla.Sup.Ct.R. 1.33(a).
39. See Okla.Sup.Ct.R. Rule 1.6(b).
40. See Okla.Sup.Ct.R. 1.28(b).
41. See the form at Okla.Sup.Ct.R. 1.301, Form No.14.
42. See Okla.Sup.Ct.R. 1.3.
43. Okla.Sup.Ct.R. 1.8.
44. *Bivins v. State ex rel. Oklahoma Memorial Hospital*, 1996 OK 5, 917 P.2d 456.
45. See Okla.Sup.Ct.R. 1.179(e).
46. See *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035.
47. See Okla.Sup.Ct.R. 1.15(d) for the proper procedure.
48. See Okla.Sup.Ct.R.1.4(c) for the complete procedure on mailing.
49. *Cartwright v. Atlas Chemical Industries, Inc.*, 1981 OK 4, 623 P.2d 606.
50. Okla.Sup.Ct.R.1.16.
51. *Brann v. Harris*, 1935 OK 298, 47 P.2d 876.
52. Okla.Sup.Ct.R. 1.32(a).
53. See Okla.Sup.Ct.R. 1.32(b).
54. See Okla.Sup.Ct.R. 1.37(a)(10). See also *Goldman v. Goldman*, 1994 OK 111, 883 P.2d 164.

## ABOUT THE AUTHORS



Mr. Richie received his J.D. from Tulane University School of Law and has been a member of the Oklahoma Bar Association since October 1981. He served on the OBA Title Examination Standards Committee for 10 years and was chairperson of the OBA Real Property Section in 1989. He has worked for the Oklahoma Supreme Court since Jan. 2, 1994. On Sept. 16, 2002, he was appointed clerk of the Appellate Courts of Oklahoma by the Supreme Court — a position which he holds today.



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## Interlocutory Orders Appealable by Right

Michael F. Smith and Alison A. Verret

No one likes to think about, much less plan for, a worst-case scenario. However, your clients' appellate options should be a critical part of your pretrial and trial strategy. There are certain interlocutory, or non-final,<sup>1</sup> orders which are immediately appealable by right without the necessity of waiting for a final judgment.<sup>2</sup> Pursuant to Oklahoma statute and Supreme Court rule, interlocutory orders appealable by right include an order that:

1. Discharges, vacates or modifies or refuses to discharge, vacate or modify an attachment
2. Denies a temporary or permanent injunction, grants a temporary or permanent injunction except where granted at an *ex parte* hearing, or discharges, vacates or modifies or refuses to discharge, vacate or modify a temporary or permanent injunction
3. Discharges, vacates or modifies or refuses to discharge, vacate or modify a provisional remedy which affects the substantial rights of a party
4. Appoints a receiver except where the receiver was appointed at an *ex parte* hearing, refuses to appoint a receiver, or vacates or refuses to vacate the appointment of a receiver
5. Directs the payment of money *pendente lite* except where granted at an *ex parte* hearing, refuses to direct the payment of money *pendente lite*, or vacates or refuses to vacate an order directing the payment of money *pendente lite*
6. Certifies or refuses to certify an action to be maintained as a class action
7. Denies a motion in a class action asserting lack of jurisdiction because an agency of this state has exclusive or primary jurisdiction of the action or a part of the action, or asserting that a party has failed to exhaust administrative remedies, but only if the class is subsequently certified and only as part of the appeal of the order certifying the class action
8. Grants a new trial or opens or vacates a judgment or order<sup>3</sup>
9. Falls within OKLA. STAT. tit. 58, §721 (regarding certain interlocutory probate orders)<sup>4</sup>
10. Falls within the provisions of OKLA. STAT. tit. 15, §817 (regarding certain interlocutory arbitration orders)<sup>5</sup>

Counsel who has received an interlocutory order appealable by right must navigate a different set of appellate rules and procedures. A careful review of the statutes, rules and case law governing appeals of interlocutory orders appealable by right may prevent fatal errors and guide counsel's strategy decisions.

## APPLICABLE OKLAHOMA SUPREME COURT RULES

Appeals involving interlocutory orders appealable by right are governed by Oklahoma Supreme Court rules 1.60 through 1.67 and, by incorporation and to the extent not inconsistent,<sup>6</sup> certain other Supreme Court rules.

The deadlines for appeals from interlocutory orders appealable by right are shorter than those for appeals from final orders. Although the petition in error is due 30 days from the date the order is filed — the same deadline in appeals from final judgments, the answer to the petition in error is due 10 days from the filing of the petition in error, as opposed to the 20 days for answers in appeals from final judgments.<sup>7</sup> Additionally, for example, the trial court's notice of completion of record is due to be filed with the Supreme Court within 60 days of the date the interlocutory order is filed.<sup>8</sup> In appeals from final judgments, on the other hand, the notice of completion of record is due within six months of the date the final judgment was filed.<sup>9</sup> Also, the appellant's brief-in-chief is due to be filed within 30 days of the date the notice of completion of record is filed with the Supreme Court, and not 60 days as is allowed for the brief-in-chief in appeals from final orders.<sup>10</sup> Finally, the appellee's answer brief is due 20 days from the date the brief-in-chief is filed, and not 40 days as is allowed for the answer brief in appeals from final orders.<sup>11</sup>

Counsel should become familiar with the rules governing interlocutory orders appealable by right. Missing a deadline, even inadvertently, can at a minimum be embarrassing and potentially fatal to an appeal.<sup>12</sup> To avoid missing a deadline, appellate practitioners should be aware of the scheduling differences.

### NOT MANDATORY

Appealing an interlocutory order appealable by right may not be part of counsel's strategy. Issues raised in interlocutory orders appealable by right, instead of being appealed immediately, may, in most instances, be appealed after the final judgment is entered.<sup>13</sup> If an interlocutory order appealable by right is not

appealed and the aggrieved party subsequently voluntarily dismisses the litigation, that dismissal terminates the right to appeal from the interlocutory order as there is no final appealable judgment.<sup>14</sup>

If an interlocutory appeal doesn't fit counsel's strategy, a litigant can wait until after a final judgment to raise errors made prior to the entry of the final judgment. However, issues addressed in an interlocutory order appealable by right are not subsumed into a subsequent interlocutory order appealable by right. For example, in *City of Tulsa v. Raintree Estates I Inc.*,<sup>15</sup> the appellant argued that an interlocutory order appealable by right

was subsumed in a later interlocutory order appealable by right. The Oklahoma Court of Civil Appeals held, "we find no authority, and the appellant cites none, permitting a party to delay timely review of an appealable interlocutory decision until a time determined more advantageous to its interest," rendering the order "beyond appellate cognizance at this time."<sup>16</sup>

### ONLY NARROW ISSUES CAN BE RAISED

The issues that can be raised in an appeal of an interlocutory order appealable by right are limited to those issues addressed in the interlocutory order.<sup>17</sup> An appeal of an interlocutory order appealable by right cannot be utilized to raise objections to other interlocutory orders or issues outside the scope of the order that is appealable by right.

### UNAPPEALED ORDERS CANNOT BE THE SUBJECT OF A WRIT

If the deadline passes for filing an interlocutory appeal, counsel should not plan on using a writ as a back-up appellate plan. If there is an order from which an interlocutory appeal by right may be taken but is not, a writ on the issue is not likely to be entertained by the Oklahoma Supreme Court. "[W]hen a remedy by direct appeal is readily available, the Supreme Court will not let its §4 cognizance be invoked. A prerogative writ may not be allowed to function as a substitute for the regular process of appellate review."<sup>18</sup> Thus, if counsel elects not to immediately appeal an interlocutory order appealable by right, that interlocutory order

**“Missing a deadline, even inadvertently, can at a minimum be embarrassing and potentially fatal to an appeal.”**



cannot be the subject of a writ but must be appealed as part of the appeal from the final judgment.

### MOTION FOR NEW TRIAL DOES NOT EXTEND APPEAL TIME

Pursuant to Oklahoma Supreme Court Rule 1.40, a motion for new trial, which normally extends the deadline for filing an appeal from a final judgment, does not operate to extend the deadline to appeal from interlocutory orders that are appealable by right.<sup>19</sup> Applying that rule, the Supreme Court dismissed an appeal of an interlocutory order appealable by right as untimely in *In re Estate of Caldwell*.<sup>20</sup> In that case, the trial court issued an order on Oct. 11, 1983, awarding property to a widow and her minor son.<sup>21</sup> The widow filed a timely motion for new trial, and that motion was overruled on Nov. 15, 1983.<sup>22</sup> She filed a petition in error on Nov. 23, 1983. The Supreme Court of Oklahoma found that the order appealed from was one of a class of interlocutory probate orders that are appealable by right.<sup>23</sup> As such, the 30-day period began on the date the order was entered, and the court rules prevented the extension of that time with the filing of a motion for new trial.<sup>24</sup> The appeal was dismissed for an “incurable jurisdictional defect.” However, the court noted that the appellant would be able to obtain review of the issues after the final decree of distribution was rendered.<sup>26</sup>

### CHARACTERIZATION OF ORDERS

Another issue that may affect case strategy is the possibility that a single order may fall under more than one classification under the statutes or Oklahoma Supreme Court rules. An order may qualify as an interlocutory order appealable by right but may also fall under another category of the Oklahoma Supreme Court rules. For instance, in *In re Estate of A.E. Richardson*,<sup>27</sup> on appeal from a summary judgment regarding whether there was an intentional omission of the decedent’s son in an amendment to a pour-over trust that was executed after the decedent’s will, the Oklahoma Court of Civil Appeals noted that the order appealed from was an interlocutory order in a probate case that was appealable by right.<sup>28</sup> Although Okla.Sup.Ct.R. 1.36, which provides the accelerated appeal procedure for summary judgments, does not provide for briefing on appeal unless ordered by the court, the Supreme Court in *Richardson*, used the rules applicable

to interlocutory orders appealable by right to order briefing under Rule 1.65.<sup>29</sup>

Further, orders that do not fall under one of the appealable categories in name may be considered an interlocutory order appealable by right because of their substance. In *Collier v. Reese*,<sup>30</sup> a trial court order that sealed the record, prohibited dissemination of information and precluded future filing without court approval was treated as an interlocutory order appealable by right.<sup>31</sup> In so doing, the Supreme Court noted that although the motion to seal filed in the trial court was not labeled an injunction and the trial court did not follow the procedure for ruling on an injunction, “the nature of the relief sought and the nature of the relief actually given was injunctive.”<sup>32</sup> As such, the court held that the order was immediately appealable and applied the standard of review for the issuance of a temporary injunction.<sup>33</sup> The Supreme Court has even declared an order that was never journalized by the trial court an interlocutory order appealable by right because it required the plaintiff to post additional security, and the court considered it an order directing the payment of money *pendente lite*.<sup>34</sup>

### CONCLUSION

Appellate options should be a part of every counsel’s strategy. While not exactly a riveting subject matter, interlocutory orders appealable by right should not be ignored in formulating your pretrial and trial strategy. Knowing whether an interlocutory order is appealable by right, and knowing the nuances of the statutes, rules and case law governing interlocutory appeals, will enable you to determine when and how to seek appellate review consistent with your overall litigation strategy.

1. *DLB Energy Corp. v. Oklahoma Corp. Comm’n*, 1991 OK 5, ¶1 n.2, 805 P.2d 657, 600 (defining an interlocutory order “as an order which is not ‘final.’”). The term “final order” is defined as “[a]n order affecting a substantial right in an action, when such order, in effect, determines the action and prevents a judgment, and an order affecting a substantial right, made in a special proceeding or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed, as provided in this article.” OKLA. STAT. tit.12, §953.

2. *DLB Energy Corp.*, 1991 OK 5, at ¶7, 805 P.2d at 660-61 (“An interlocutory order may not be appealed unless: 1) it falls within a class of interlocutory orders appealable by right; or 2) it is certified by the trial court for immediate pre-judgment review because it affects a substantial part of the merits of a controversy.”). A trial court can certify an interlocutory order for immediate appeal pursuant to OKLA. STAT. tit. 12, §952(b). Appeals of certified interlocutory orders are beyond the scope of this article.

3. OKLA. STAT. tit. 12, §993(A)(1) through (8).

4. Okla.Sup.Ct.R. 1.60(h).

5. Okla.Sup.Ct.R. 1.60(h) and (i). Section 817, which allowed immediate appeals of certain arbitration awards, was part of the Uniform Arbitration Act which was repealed in 2005. See SB 873, c. 364, §32 (effective Jan. 1, 2006). Appeals of certain arbitration awards is now

governed by OKLA. STAT. tit. 12, §1879. Oklahoma Supreme Court Rule 1.60(i) has not been modified to reflect those legislative changes.

6. Okla.Sup.Ct.R. 1.67 incorporates the rules in Parts I and II of the Oklahoma Supreme Court rules “when they are consistent with Rules 1.60 through 1.67 inclusive.”

7. Compare Okla.Sup.Ct.R. 1.63 with Okla.Sup.Ct.R. 1.25(c).

8. Okla.Sup.Ct.R. 1.64 (requiring filing of notice of completion of record within 60 days of the filing of the interlocutory order).

9. Okla.Sup.Ct.R. 1.34(a) (record on appeal shall be ready for transmission no later than six months from date of judgment or order appealed).

10. Compare Okla.Sup.Ct.R. 1.65 with Okla.Sup.Ct.R. 1.10(a) (requiring brief-in-chief to be filed within 60 days of the date the notice of completion of record is filed with the Supreme Court).

11. Compare Okla.Sup.Ct.R. 1.65 with Okla.Sup.Ct.R. 1.10(a) (requiring appellee’s answer brief to be filed within 40 days of the date the notice of completion of record is filed with the Supreme Court).

12. See, e.g., *Clay v. Choctaw Nation Care Ctr., LLC*, 2009 OK CIV APP 35, ¶1 n.1, 210 P.3d 855, 856 (where appellant filed its notice of completion of record and brief approximately five months late because it had mistakenly designated the appeal as one from a final order instead of an interlocutory order appealable by right, the court found “no excuse” for the conduct, but “reluctantly” denied the motion to dismiss the appeal in the interest of obtaining a decision on the merits).

13. *State v. One Thousand Two Hundred Sixty-Seven Dollars*, 2006 OK 15, ¶17, 131 P.3d 116, 123; see also OKLA. STAT. tit. 12, §952(b); Okla.Sup.Ct.R. 1.40(f).

14. See, e.g., *Contrez v. O'Donnell*, 2002 OK 67, ¶11, 58 P.3d 759, 762.

15. 2007 OK CIV APP 41, ¶5, 162 P.3d 929, 932.

16. *Id.* at ¶6, 162 P.3d at 932 (footnote omitted).

17. See, e.g., *LaRue v. Noble Independent School Dist. No. 40*, 1997 OK CIV APP 57, ¶¶5-7, 946 P.2d 277, 278-790 (rejecting appellant’s request to address trial court’s findings relating to damages claim which were outside the scope of the interlocutory order appealable by right).

18. *Marshall Oil Corp. v. Adams*, 1983 OK 102, ¶5, 688 P.2d 37, 41-42 (Opala, J. dissenting) (“The May 6 interlocutory injunction is appealable by right. Marshall may not be heard here to complain of it by the use of extraordinary process.” (citation omitted)).

19. Okla.Sup.Ct.R. 1.40(e).

20. 1984 OK 92, 692 P.2d 1380.

21. *Id.* at ¶4, 692 P.2d at 1381.

22. *Id.*

23. *Id.* at ¶5, 692 P.2d at 1381.

24. *Id.*

25. *Id.* at ¶6, 692 P.2d at 1382; see also *Chandler (U.S.A.), Inc. v. Tyree*, 2004 OK 16, ¶9 n.4, 87 P.3d 598, 601 (time to commence an appeal from interlocutory order appealable by right is not extended by motion for new trial); *Williams v. Mullohill*, 1993 OK 5, ¶1, n.1, 846 P.2d 1097, 1099 n.1 (refusing to entertain appellant’s request to treat appeal as one from

interlocutory order appealable by right because it would have been untimely as being more than 30 days after the order’s “rendition”).

26. *Caldwell*, 1984 OK 92, at ¶6, n.8, 692 P.2d at 1382.

27. 2002 OK CIV APP 69, 50 P.3d 584.

28. *Id.* at ¶1 n.1, 50 P.3d at 585.

29. *Richardson*, 2002 OK CIV APP 69, at ¶1 n.1, 50 P.3d at 585.

30. 2009 OK 86, 223 P.3d 966.

31. *Id.* at ¶¶9-11, 223 P.3d at 970-72.

32. *Id.* at ¶11, 223 P.3d at 971-72 (footnotes omitted).

33. *Id.* at ¶11, 223 P.3d at 972.

34. *Ranken Energy Corp. v. DKMT Co.*, 2008 OK CIV APP 61, ¶1 n.1, 190 P.3d 1174, 1175 n.1.

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## Four Rules for the Record in Family Law Cases

By Collin R. Walke

**The problem (hypothetical):** A mother calls a competent lawyer asking if he or she will appeal a custody decision a judge made in an adjoining county. The mother says the judge ruled against her after a two-day trial because the judge was biased, would not let her present her evidence and would only let the father call witnesses. When asked, the mother discloses no court reporter transcribed the trial. The lawyer realizes this mother's appellate hopes are slim without a transcript, but there is always hope.

Appellate courts often refuse to address alleged errors at the trial court level because an attorney failed to properly preserve the issues for appeal. Failure to preserve the record is not limited to the failure to obtain a court reporter. Other examples include: 1) an attorney not making an objection or offer of proof at trial; and 2) filing a motion for new trial that omits all alleged errors.

The unprepared lawyer can damage a client's chances of winning the trial and the appeal. This article reviews what case law, appellate statutes and the court rules teach lawyers about preserving issues for appeal. The article provides four rules assisting family law practitioners in preserving issues for appellate review.

### **RULE 1: MAKE A RECORD.**

The standard of review for factual issues in divorce and custody proceedings is whether the decree is against the clear weight of the evidence.<sup>1</sup> The burden is on the appellant to produce a record sufficient to show that the decision is against the clear weight of the evidence or that the appellant's right to procedural due process has been violated.<sup>2</sup> Therefore, knowledge of

what constitutes the record is key to an appellant's success on appeal.

Rule 1.33(d) of the Oklahoma Supreme Court Rules explains that "the 'entire trial court record' properly designated by a party to the appeal or ordered by the appellate court" is the record on appeal. While the "entire trial court record" consists of: 1) "all papers and exhibits filed in the trial court"; 2) "the reporter's notes and transcripts of proceedings"; and 3) "the entries on the appearance docket in the office of the trial court clerk," this does not mean that every one of these documents in a particular case is part of the record on appeal. "Only those papers filed and exhibits presented to the trial court together with the transcripts **necessary to the appeal** may be included in the record on appeal."<sup>3</sup> Thus, a motion filed with the trial court that has absolutely nothing to do with the issues being appealed should not be included as part of the record on appeal. Moreover, "[m]aterials which were not before the trial court at the time of the decision appealed are not properly part of the record on appeal without order of the trial court or the appellate court."<sup>4</sup>

The above rules are crucial for two primary reasons. First, they impose on the attorney a duty to actually “file” responses and exhibits to pleadings or other motions. It is not only arguably malpractice to fail to respond to a pleading or motion, it hurts your client’s chances of successfully appealing a wrong decision. Second, the rules specifically identify reporter’s notes and transcripts of proceedings as being part of the record. As a practical reality, not every hearing must be transcribed, but an attorney should be cognizant of the fact that hearings of great import, or where there is a significant likelihood that an adverse decision will lead to an appeal, should be transcribed.

In *Fleck v. Fleck*, 2004 OK 39, the Oklahoma Supreme Court refused to review the appellant’s allegations of error because they were not supported by the record. In doing so, the Oklahoma Supreme Court observed that appellant could have preserved the record in three specific ways: 1) asking for a court reporter; 2) submitting a narrative statement; or 3) making an offer of proof. Because appellant “chose to appeal without submitting a record which would support her allegations of error” the “record [was] void of support for appellant’s allegations of error.”<sup>5</sup>

#### *Stenographically Recorded Hearings*

An appeal is initiated by filing a petition in error.<sup>6</sup> The petition in error requires you to identify whether you are providing a copy of the proceedings via stenographic recording or narrative statement.<sup>7</sup> If your chosen method of preserving the record on appeal is stenographic recording, then Rule 1.28 of the Supreme Court Rules explains that “an additional copy of the designation [of record] shall be given to the court reporter, and the cost of preparing the transcript shall be advanced forthwith by the designating party.”<sup>8</sup> Obviously, a stenographic recording of the proceedings should be an attorney’s first choice for making a record on appeal. Accurate stenographic recordings take down the real time statements and events in a courtroom which a narrative statement can almost never replicate.

#### *Narrative Statement*

In *Smith v. Smith*, 1992 OK CIV APP 121, the Oklahoma Court of Civil Appeals held that a trial court committed fundamental error based on a “confusing” narrative statement. In *Smith*, the trial court deprived the appellant of a fair trial by rendering a decision based on incom-

petent evidence. The trial court erred by substituting opening statements for testimony of witnesses.

The Oklahoma Supreme Court Rules provide three distinct instances in which a narrative statement may be made in lieu of a transcript: 1) “if no stenographic report of the evidence or proceedings at a hearing or trial was made”; 2) “if a transcript of the reporter’s notes cannot be prepared”; or 3) if “the judgment involves an involuntary loss of liberty, personal freedom or incarceration and where the appealing party is an indigent.”<sup>9</sup> In those three circumstances a party may prepare a narrative statement.

The narrative statement must be filed with the court clerk and submitted to the opposing party within 10 days of filing the petition in error.<sup>10</sup> The narrative statement must: 1) be sworn to before an officer authorized by law to administer oaths; 2) specifically state that the party is relying on Rule 1.30; 3) inform the opposing party of the deadlines for filing objection or amendments to the narrative; and 4) advise the opposing party of the consequences of failing to object to the narrative or move for an amendment.<sup>11</sup>

In turn, the opposing party has 10 days after receipt of the narrative statement to object or propose amendments.<sup>12</sup> The trial court judge shall determine the propriety of any objections or proposed amendments to a narrative statement and must sign off on the narrative statement. This is true even if both sides agree to the narrative statement.

#### *Offers of Proof*

Aside from having a record of the manner in which the proceedings actually transpired either through stenographic recording or narrative statement, the practitioner must know how to properly preserve a potentially appealable issue within the hearing or trial itself. Simply having a court reporter present taking down all of the things that are said does not necessarily preserve an issue for appeal.

For example, in the case of *Hanger v. Hanger*, 2012 OK CIV APP 26, the Oklahoma Court of Civil Appeals refused to review the wife’s alleged error relating to the trial court’s property division award. The wife argued on appeal that the husband’s statements about his military deployment status during the trial court’s ruling were improperly brought to the court’s attention because the statements were not evi-

“In addition to ensuring that all appealable issues are preserved in a motion for new trial, the practitioner must be certain to include all appealable issues in a petition for *certiorari*.”

dence adduced during direct or cross-examination. The Court of Civil Appeals observed that the wife’s counsel could have objected or requested the opportunity to cross-examine the appellee husband, but she did not. By failing to object, the wife’s attorney failed to preserve the issue for appellate review.

Okla. Stat. tit. 12, §2104(A)(1) explains that a party may not complain of an error admitting evidence unless: 1) a substantial right is affected; and 2) **“a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.”**<sup>13</sup> Nor may a party complain of an error excluding evidence unless: 1) a substantial right is affected; and 2) **“the substance of the evidence was made known to the judge by offer or was apparent from the context within which the questions were asked.”**<sup>14</sup> The practitioner must be aware of this rule and make an offer of proof if the trial court excludes certain evidence. Otherwise, the practitioner may be left without recourse as in the case of *Hanger*.

## **RULE 2: ALWAYS ACT IN SUCH A WAY THAT YOU PRESERVE THE RECORD**<sup>15</sup>

If a litigant believes that the trial court has erred in its ruling, but wants to press the issue in the district court again before seeking appellate review, the practitioner must be extremely cautious in its presentation of the issues in a motion for new trial. In *Sien v. Sien*, 1994 OK CIV APP 159, the Court of Civil Appeals refused to reconsider the trial court’s decision to award the wife “an automobile acquired by husband after separation, without crediting him for debt reduction on the loan.”<sup>16</sup> The court cited to Okla. Stat. tit. 12, §991 and Rule 17 of the Rules for District Courts for the proposition that because husband “failed to raise the issue

in his motion to reconsider before the trial court” the court would not consider the issue on appeal. The court also observed that when “invoking the trial court’s reconsideration, a party must afford the court full opportunity to consider all, not just some, of the errors it allegedly has made, and alleged errors known but not raised are waived.”<sup>17</sup>

Okla. Stat. tit. 12, §991(b) provides that “[i]f a motion for a new trial be filed and a new trial be denied, the movant may not, on the appeal, raise allegations of error that were available to him at the time of the filing of his motion for a new trial but were not therein asserted.” Rule 17 of the Rules for District Courts explains that a motion for a new trial “must contain every ground on which the moving party intends to rely in the trial court.” Reading these two rules in conjunction, it is clear that filing a motion for new trial can be a risky proposition. If you file a motion for new trial and omit a specific ground or error, you may not assert that error on appeal.

In addition to ensuring that all appealable issues are preserved in a motion for new trial, the practitioner must be certain to include all appealable issues in a petition for *certiorari*. Just because you raise an appellate issue with the Court of Civil Appeals, does not mean that you have preserved the issue on appeal to the Supreme Court. As noted in *Barnett v. Barnett*, 1996 OK 60, “[i]ssues preserved on appeal and decided by the appellate court, which are later omitted from the petition for *certiorari*, will not be considered by this court.”<sup>18</sup>

In *Barnett*, the appellant, in his appeal to the Oklahoma Court of Civil Appeals, sought reversal of the trial court’s denial of his request for attorney’s fees. Additionally, the appellant sought his attorney’s fees for the appeal to the Oklahoma Court of Civil Appeals. The Court of Civil Appeals affirmed the trial court’s decision and denied appeal related fees. On petition to the Supreme Court of Oklahoma, the appellant failed to raise the issue of fees. The Supreme Court stated that it was barred from examining that issue under the settled-law-of-the-case doctrine.<sup>19</sup>

## **RULE 3: THERE IS ALWAYS HOPE**

In *Meadows v. Meadows*, 1980 OK 158, husband failed to object to the introduction of certain evidence at trial. However, on appeal, husband argued that the admission of the evidence was “fundamental error.”<sup>20</sup> The Okla-

homa Supreme Court reviewed this issue, presumably, because the argument was that the introduction of the evidence constituted “fundamental error.”

The term “fundamental error” is not subject to precise definition. Generally, fundamental error is error which renders a judgment void. The due process guaranty of the constitution requires, among other things, notice, the right to be heard before a fair and impartial tribunal and the right to confront witnesses, and before a party’s due process rights are violated, it must be shown that the action or error was arbitrary, oppressive and shocking to the conscience of the court.<sup>21</sup>

For the fundamental error to warrant reversal, the error must affect the outcome.<sup>22</sup>

In *Ingram*, the Court of Civil Appeals reversed the trial court’s judgment because the trial court committed fundamental error. The trial court limited the appellant and appellee to 250 minutes between the two litigants (i.e., 125 minutes apiece). In finding that such a limitation was fundamental error, the Court of Civil Appeals observed that the “record shows that husband’s time expired while he was on the stand to testify at which time the trial court stopped further testimony depriving the trier of fact of potentially useful evidence in reaching an impartial decision. Husband’s new trial presentation points to issues concerning specific items of real property that he was unable to present. Thus, husband demonstrated prejudice in the hearing of the motion for new trial.”<sup>23</sup>

In addition to the fundamental error route, the Oklahoma Supreme Court Rules give you two other chances to fix a messed-up record. Rule 1.29 provides that

If the party taking an appeal asserts as a ground for reversal that the evidence is insufficient to support the verdict or judgment, that party need not designate for transcription any of the evidence in the case, but instead may serve on the adverse party a statement specifying the material facts which allegedly were not proved.<sup>24</sup>

The appellee in such a case then has 10 days in which to provide a statement to the court reporter (and other party) designations for transcription those portions of the proceeding that establish the specified facts.<sup>25</sup> This is done at the cost of appellant. If the appellee fails to

designate a responsive record, the appellant may move the appellate court for summary reversal.<sup>26</sup>

Finally, an attorney may also submit a written statement in lieu of a record on appeal. Oklahoma Supreme Court Rule 1.31 explains that if the points of law that are at issue on “appeal can be determined without an examination of [the] trial court’s record,” then the parties can “prepare and sign a statement of the case showing how the questions arose and were decided. . . .” This must be done within 30 days after the filing of the petition in error.<sup>27</sup>

#### RULE 4: CITE TO THE RECORD.

Okla.Sup.Ct.R. 1.11(e)(1) states that “[f]acts stated in the Summary of the Record **must** be supported by citation to the record where such facts occur.” (Emphasis supplied.) According to Okla.Sup.Ct.R. 1.11(j)(1), “[c]itations to a document in the record other than a transcript shall include the name of the document and the pages within the document to which reference is made. . . . Quotations from the record must be accurate and in context, and reference the pages in the record where they appear.”

On several occasions, I have reviewed briefs where the opposing party either did not cite to the record, or cited to some record that was not part of the record on appeal. There have also been situations where it has been difficult to determine what record was being cited to because the abbreviation of the record did not correspond to the actual pleading title. Therefore, accuracy and clarity in citing to the record is essential to an appeal.

#### CONCLUSION

When it comes to appellate law, there are two fundamental mantras: 1) Appeal early and often; and 2) Always make a record. A record is the best way to protect yourself and your client. But remember, if you find yourself in a sticky situation in which no record was made or properly preserved...there’s always hope.

1. See *Kahre v. Kahre*, 1995 OK 133, ¶19 and *Bryan v. Bryan*, 2009 OK CIV APP 77, ¶8.

2. See generally *Fleck v. Fleck*, 2004 OK 39, ¶9 (citations omitted).

3. Okla.Sup.Ct.R. 1.33 (emphasis supplied).

4. Okla.Sup.Ct.R. 1.28.

5. *Fleck v. Fleck*, 2004 OK 39, ¶11.

6. Okla.Sup.Ct.R. 1.23.

7. Okla.Sup.Ct.R. 1.301, Form No. 5.

8. Okla.Sup.Ct.R. 1.28.

9. Okla.Sup.Ct.R. 1.30.

10. Further, “where a transcript of the court reporter’s notes cannot be prepared, this statement shall be filed with the court clerk and submitted to the opposite parties within twenty (20) days after the party



desiring to appeal discovers that the reporter's notes are unavailable or cannot be transcribed." Okla.Sup.Ct.R. 1.30.

11. *Id.*

12. *Id.*

13. Okla. Stat. tit. 12, §2401(A)(1)(emphasis supplied). A "timely objection" is one made contemporaneously with the error. See *Been v. Been*, 2007 OK CIV APP 31, ¶17.

14. Okla. Stat. tit. 12, §2104(A)(2)(emphasis supplied).

15. I stole this rule from Immanuel Kant's categorical imperative. It's always good advice.

16. *Sien v. Sien*, 1994 OK CIV APP 159, ¶34.

17. *Id.* at ¶35 (citations omitted).

18. *Barnett v. Barnett*, 1996 OK 60, ¶13 (citation omitted).

19. *Id.*, at 13

20. *Meadows v. Meadows*, 1980 OK 158, ¶2.

21. *Ingram v. Ingram*, 2005 OK CIV APP 87, ¶11 (citing *Meadows v. Meadows*, 1980 OK 158, ¶7).

22. *Id.*, at ¶14.

23. *Ingram*, at ¶21.

24. Okla.Sup.Ct.R. 1.29.

25. *Id.*

26. *Id.*

27. Additionally, the attorney should set "forth as many of the facts as are essential to a decision on appeal. The statement with a copy of the trial court's decision attached shall be filed with the clerk and submitted to the trial court. The statement together with such additions as the trial court may consider necessary fully to present the questions to be urged, shall be approved by the trial judge or the

judge's successor and shall be certified by the judge as the record on appeal. The designations of record by both parties must state that a statement in lieu of record on appeal is used for the appeal." Okla.Sup.Ct.R. 1.31.

## ABOUT THE AUTHOR



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## Writ Extraordinarily Large

By George Wright

**T**his article is intended as a brief overview of the legal underpinnings of extraordinary writs in the context of Oklahoma state civil appellate jurisprudence.<sup>1</sup> Generally, a writ is a nothing more than a court's written order.<sup>2</sup> Okla. Const., Art. 7, §4, vests all Oklahoma appellate courts with the "...power to issue, hear and determine writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, prohibition and such other remedial writs as may be provided by law...."

A prerequisite to any discussion of extraordinary writs is a juxtaposition of original jurisdiction and appellate jurisdiction. In short, original jurisdiction is the power to be the first court to adjudicate a matter, and appellate jurisdiction is the power to review and revise a decision made by a lower court.<sup>4</sup> As part of its superintending control over all state courts, commissions and boards, the Oklahoma Supreme Court possesses jurisdiction over all cases of law and equity and is empowered to hear cases of first instance.<sup>5</sup> This is "original jurisdiction." However, in the great majority of all cases, the Supreme Court delegates first instance matters to the district courts and reserves its judicial activities to reviewing first instance decisions made by other courts.<sup>6</sup> This is "appellate jurisdiction."

The Supreme Court, beginning early in the state's history, recognized that it is primarily an appellate court.<sup>7</sup> The court explains:

The original jurisdiction of the Supreme Court, when concurrent with that of the district court, is intended primarily as a "stand by" service which it will exercise only when, from the exigencies of the case, great injury will be done by its refusal so to do. A different rule would so flood this court with original actions as to destroy its efficiency as an appellate court.<sup>8</sup>

The Court of Civil Appeals is empowered to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and prohibition, but only in aid of its appellate jurisdiction.<sup>9</sup> In other words, the Court of Civil Appeals may only issue the foregoing writs in order to effectuate its previously issued decisions on appeal or to review a writ issued by a lower court.<sup>10</sup> The Court of Criminal Appeals also has limited jurisdiction to issue writs in aid of its appellate jurisdiction but has no general superintending power over the lower courts.<sup>11</sup> There are also writs which may be issued by the district courts which do not seem to have been entered by an appellate court in an original civil action such as replevin, execution, assistance, garnishment, possession, attachment and ouster.<sup>12</sup> What follows is a brief discussion of each variety of writ employed in Oklahoma state civil appellate jurisprudence and practice.

### WRIT OF CERTIORARI

By far, the least extraordinary writ issued by the Supreme Court is the writ of *certiorari*. The writ of *certiorari* is, in essence, an order from the Supreme Court to a lower court directing the lower court to deliver the record from a case so that the Supreme Court may review that case.<sup>13</sup> In other words, the court issues a writ of *certiorari* as a means to express its intention to exercise its appellate jurisdiction over a matter.<sup>14</sup>

## WRITS OF MANDAMUS AND PROHIBITION

The most common writs which arise out of an exercise of the Supreme Court's original jurisdiction are the writs of *mandamus* and prohibition. These are writs with complementary effects — the former commands an action; the latter forbids an action.<sup>15</sup>

The Supreme Court will not assume original jurisdiction over a matter unless there is no plain and adequate remedy in the ordinary course of the law.<sup>16</sup> However, the election to exercise original jurisdiction does not necessarily mean that the court will issue a writ. At times, the court acts as a court of first instance and rules on the merits of an action. These exercises of original jurisdiction almost always arise in either bar disciplinary matters<sup>17</sup> or in declaratory actions which present facial constitutional challenges to statutory provisions or ballot questions.<sup>18</sup> In these cases, the court issues a judgment rather than a writ.<sup>19</sup>

Further, even in original jurisdiction actions where a writ is in play, the court may ultimately decline to issue a writ.<sup>20</sup> This is because, again, to obtain either writ, the petitioner must show that there is no plain and adequate remedy in the ordinary course of the law. In the case of prohibition, a petitioner must show: 1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; 2) the exercise of said power is unauthorized by law; and 3) the exercise of that power will result in injury for which there is no other adequate remedy.<sup>21</sup> In the case of *mandamus*, the party seeking the writ must: 1) possess a clear legal right to the relief sought; 2) the respondent must have a plain legal duty; 3) the exercise of discretion may not be implicated; and 4) the law provides no adequate remedy.<sup>22</sup> Accordingly, such proceedings usually involve orders contemplated or issued by district courts.<sup>23</sup>

An example of a case in which the court assumed original jurisdiction and issued a writ of *mandamus*, is *World Publishing Co. v. White*, 2001 OK 48, 32 P.3d 835. In *World Publishing*, a newspaper sought the release of juvenile court and law enforcement records relating to a horrific murder case. When trial court declined to release the records to the newspaper, the newspaper petitioned the court for a writ of *mandamus*. The court assumed original jurisdiction and granted a writ of *mandamus* ordering the trial court to release the records because the

records were "open records" under the Open Records Act.<sup>24</sup>

An example of a case in which the court assumed original jurisdiction and issued a writ of prohibition is *Rey v. Means*, 1978 OK 4, 575 P.2d 116. In *Rey*, the guardian of an incompetent person brought suit against the defendant, alleging that the defendant had wrongfully taken funds from the corporation of which the ward was the major stockholder. The guardian issued a subpoena *duces tecum* to the defendant, which the defendant sought to quash on the grounds of her Fifth Amendment privilege against self-incrimination. The trial court declined to quash the subpoena, and the defendant petitioned the court for a writ of prohibition. The court assumed original jurisdiction and issued a writ of prohibition which forbade the trial court from enforcing its order overruling the motion to quash<sup>25</sup> and remanded the matter for an *in camera* hearing to determine whether Fifth Amendment protections were triggered.

More taxonomically interesting are original actions where a petitioner asks that a writ be issued to a body other than a district court, such as a county election board,<sup>26</sup> a board of county commissioners,<sup>27</sup> the Attorney General's Office,<sup>28</sup> the Board of Medical Licensure and Supervision,<sup>29</sup> the Worker's Compensation Court,<sup>30</sup> the Tax Commission,<sup>31</sup> the Court of Criminal Appeals,<sup>32</sup> or even the House of Representatives or state Senate.<sup>33</sup>

The Supreme Court may also issue a writ to enforce an opinion rendered in an exercise of appellate jurisdiction, in fact, the "mandate" issued at the conclusion of an appellate action as a dispositional order to a lower court is technically a "writ of mandate."<sup>34</sup> In a strange tessellation, the court may even assume original jurisdiction to enforce its orders issued in previous original jurisdiction proceedings or to counteract writs issued by lower courts.<sup>35</sup> In other words, the court may issue a writ to enforce a writ or even a writ to quash a writ. These are the rarest birds.<sup>36</sup>

## WRIT OF QUO WARRANTO

An action in the nature of *quo warranto* challenges the right to hold public office or the legal existence of a corporation.<sup>37</sup> The Supreme Court will only assume original jurisdiction to consider granting a writ of *quo warranto* when requested by the attorney general, a district attorney, or a contestant for the office to chal-

lenge the incumbent's title, rather than a private individual, and when the issues raised are *publici juris*, or of great concern to the public at large.<sup>38</sup>

An example of a case in which the Oklahoma Supreme Court assumed original jurisdiction and granted a writ of *quo warranto* is *Nesbitt v. Apple*, 1995 OK 20, 891 P.2d 1235. In *Nesbitt*, J.C. Watts was elected to the Corporation Commission in 1990. During his term, Mr. Watts was elected as a member of the U.S. House of Representatives, and his election was certified in November of 1994. Gov. David Walters appointed Charles Nesbitt to serve as corporation commissioner in Mr. Watts' soon-to-be vacated seat effective Jan. 4, 1995, and Mr. Nesbitt took the oath of office on that day. On Jan. 9, 1995, Frank Keating was inaugurated as governor. That same day, Mr. Watts delivered his resignation letter to Gov. Keating, and Gov. Keating appointed Ed Apple to fill Mr. Watts' vacated seat. The court assumed original jurisdiction and granted a writ of *quo warranto*, ordering that Mr. Apple held the office of corporation commissioner.

The ordinary practitioner will likely never encounter a *quo warranto* action, especially one over which the Supreme Court exercises original jurisdiction. However, the procedural mechanics of such a *quo warranto* action bear a great resemblance to a *mandamus* or prohibition proceeding, the only difference being one of subject matter.

### WRIT OF HABEAS CORPUS

A writ of *habeas corpus* is a writ directed to one person detaining another person, commanding the detainer to produce the detainee at a designated time and place and to do, submit to, and receive whatever the court demands.<sup>39</sup> A petition for writ of *habeas corpus* tests the legality of a person's confinement.<sup>40</sup> It is a collateral remedy and is independent of the legal proceeding under which the detention is sought to be justified but is an inquiry into the legality of the detention itself.<sup>41</sup> The Supreme Court, the Court of Criminal Appeals, the Court of Civil Appeals and the district courts have concurrent original jurisdiction to hear and determine *habeas corpus*.<sup>42</sup> Most *habeas corpus* actions are filed with the Court of Criminal Appeals or the district courts.<sup>43</sup> The Supreme Court and Court of Civil Appeals have sometimes exercised appellate jurisdiction to review a *habeas corpus* action brought on behalf of

**“The ordinary practitioner will likely never encounter a *quo warranto* action, especially one over which the Supreme Court exercises original jurisdiction.”**

another.<sup>44</sup> However, in *State v. Powell*, 2010 OK 40, ¶4, 237 P.3d 779, the Supreme Court held that decisions on a petition for *habeas corpus* may not be reviewed on appeal.<sup>45</sup> It is unclear whether this holding extends to all *habeas corpus* actions or on those regarding a petitioner's own liberty.

At any rate, the Supreme Court will occasionally hear a *habeas corpus* petition as an original action, especially when such a petition arises out of civil matter such as a guardianship or an adoption. For instance, *Brooks v. Baltz*, 2000 OK 73, 12 P.3d 467, a criminal matter which arose out of a civil matter, the petitioner was incarcerated after being convicted of indirect contempt of court for failure to pay child support. However, the petitioner had no notice of the hearing which resulted in the order requiring support payments. The petitioner prayed for a writ of *habeas corpus* in the Supreme Court. The court assumed original jurisdiction and granted the writ, ordering that the warden of the county jail release the petitioner.<sup>46</sup>

In a purely civil matter, *Ex Parte Moulin*, 1950 OK 82, 217 P.2d 1029, Mr. Moulin was the natural father of two children. After Mr. Moulin and the children's mother divorced, Mr. Moulin consented to the children being adopted by the mother's new husband. When the mother and her husband died, the children were placed in their maternal aunt and uncle's care. The maternal aunt and uncle then filed an action in district court seeking both to adopt and to be appointed guardians of the children. Mr. Moulin opposed these actions and filed an original action with the Supreme Court seeking a writ of *habeas corpus*. The Supreme Court exercised jurisdiction, provisionally granted the writ, and referred the matter to the district court for findings of fact and conclusions of law. The district court determined that Mr.



Moulin had only granted a limited relinquishment in favor of the mother's husband, so, upon his death, Mr. Moulin was reinvested with his role as natural father of the children. Upon reviewing the district court's work, the Supreme Court adopted the findings of the district court and issued a writ of *habeas corpus* ordering the maternal uncle to surrender custody of the children to Mr. Moulin.<sup>47</sup>

As with petitions for writs of *mandamus* or prohibition, the Supreme Court is hesitant to exercise original jurisdiction to hear petitions for *habeas corpus* and ordinarily leaves such matters to the lower courts unless the action is quite compelling.

## CONCLUSION

The import here is that a good practitioner must be aware of the existence and function of each procedural tool. If an attorney is displeased with a district court's interlocutory order that is neither certified nor appealable by right, she can either wait until the conclusion of the matter to seek review as part of an appeal of the final order, or she can immediately seek review of the ruling *via* an application to assume original jurisdiction and petition for extraordinary writ. In the appeal, the standard of review is more deferential to the trial court, especially if questions of fact are presented, but the attorney is guaranteed that an appellate court will consider the question. In the original action, if the court assumes original jurisdiction, the issue will be resolved more expeditiously, perhaps saving a great deal of subsequent litigious heartache. Knowing these possibilities allows for better representation.

Finally, while the following semantic tangle is not of pragmatic importance, there is a philosophical difficulty in distinguishing an exercise of original jurisdiction from one of appellate jurisdiction. In most *mandamus* and prohibition proceedings, the court's exercise of original jurisdiction closely resembles an exercise of appellate jurisdiction, in that the Court makes a ruling reactive to an action by a lower court. The party line is that, in an original action which may result in an extraordinary writ, the Supreme Court has determined that a party, usually a trial court, has attempted to exercise unauthorized judicial power, and the Supreme Court effectively brushes that judicial or quasi-judicial party aside and puts on the mantle of a court of first instance and makes the decision itself.

However, say one leaves aside practical considerations like timing and standard of review, and looks only to the act of judging itself. If each proceeding involves the same court, the same parties, and the same issue, what exactly is the difference between reviewing an evidentiary ruling on appeal and issuing a writ which mandates an evidentiary ruling as an exercise of original jurisdiction? For fear of being the patron taking his magnifying glass to the Seurat,<sup>48</sup> I conclude with the concession that ours is not always to reason why.

1. For an explanation of the process of filing and perfecting an original action, please see Edward J. Main's excellent article, "The Perfect(ed) Appeal," 75 *OBJ* 749 (2004). See also Rules 1.190 *et seq.*, Oklahoma Supreme Court Rules, Title 12 O.S. Appx. 1.

2. Black's Law Dictionary, "writ", p. 1640 (8th Ed. 2004). Writs have their origin in England and predate the Norman conquest. Then, an Anglo-Saxon king would use a royal writ to communicate his wishes. The Anglo-Norman writs were Latinized and used far more often. Sir W.S. Holdsworth, *Sources and Literature of English Law* (Clarendon Press 1925); Florence Elizabeth Harmer, *Anglo-Saxon Writs* (Manchester Univ. Press 1952). To see a photograph of an Anglo-Saxon writ, go to [www.medievalwriting.50megs.com/word/writ2.htm](http://www.medievalwriting.50megs.com/word/writ2.htm).

3. See *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶5, 850 P.2d 1069.

4. Black's Law Dictionary, "appellate jurisdiction" and "original jurisdiction", p. 868-869 (8th Ed. 2004).

5. *Miller Dollarhide, P.C. v. Tal*, 2006 OK 27, ¶9, 174 P.3d 559.

6. *Okla. Oncology & Hematology v. US Oncology*, 2007 OK 12, ¶39, 160 P.3d 936.

7. *Keating v. Johnson*, 1996 OK 61, ¶9, 918 P.2d 51.

8. *Keating v. Johnson*, see note 7, *supra*; *Kitchens v. McGowen*, 1972 OK 140, ¶6, 503 P.2d 218; *Jarman v. Mason*, 1924 OK 722, ¶0, 229 P. 459.

9. Rule 1.173, Oklahoma Supreme Court Rules, 12 O.S. Appx. 1.

10. *Daniel v. Daniel*, 2001 OK 117, ¶10 fn. 4 and ¶13, 42 P.3d 863; Rule 1.173, Oklahoma Supreme Court Rules, 12 O.S. Supp. 1997, Ch. 15, App. 1. As to the latter, this power would probably exclude the review of a lower court's decision on a petition for *habeas corpus*. See footnote 45, *infra*.

11. *State ex rel. Henry v. Mahler*, 1990 OK 3, ¶12, 786 P.2d 82, 85; *Hurst v. Pitman*, 1950 OK CR 10, ¶0, 213 P.2d 877.

12. As best as this unprofessional writer could determine. See 12 O.S. §1571 *et seq.*; 12 O.S. §736; 12 O.S. §686; 12 O.S. §1170 *et seq.*; 84 O.S. §275; 12 O.S. 1151 *et seq.*; and 12 O.S. §1485.

13. The word "*certiorari*" is Latin in origin, and may be translated "to be more fully informed." Black's Law Dictionary "*certiorari*" p. 241 (8th Ed. 2004).

14. Because this is a writ coupled to the Supreme Court's exercise of appellate jurisdiction, it is not generally included in a pragmatic discussion of "writs." Although, there is the question of whether the issuance of the writ itself is an exercise of original jurisdiction to enable the exercise of appellate jurisdiction or the issuance of the writ is the first act in an exercise of appellate jurisdiction. As wars have been waged to resolve even less consequential questions, please see, Kurt Vonnegut, *Deadeye Dick* ch. 27 (1982) ("'To be is to do' – Socrates. 'To do is to be' – Jean-Paul Sartre. 'Do Be Do Be Do' – Frank Sinatra").

15. *Compare Johnson v. State ex rel. Dept. of Pub. Safety*, 2000 OK 7, ¶14, 2 P.3d 334, with *Gaylor Enter. Co. v. Thompson*, 1998 OK 30, ¶6, 958 P.2d 128.

16. See e.g. *Miller Dollarhide, P.C. v. Tal*, 2006 OK 27, ¶10, 174 P.3d 559.

17. Rule 1.193, Oklahoma Supreme Court Rules, Title 12 O.S. Appx. 1.

18. See e.g. *Fent v. State ex rel. Department of Human Services*, 2010 OK 2, 236 P.3d 61; *Oklahoma State Chiropractic Indep. Physicians Ass'n v. Fallin*, 2011 OK 102, 290 P.3d 1; *In re. I.P. No. 384, S.Q. No. 731*, 2007 OK 48, 164 P.3d 125; *Edmondson v. Pearce*, 2004 OK 23, 91 P.3d 605; *Ethics Comm'n v. Keating*, 1998 OK 36, 958 P.2d 1250.

19. See *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, ¶6, 850 P.2d 1069 (Supreme Court's superintending control is not limited to the constitutionally specified writs of Okla. Const. Art. 7 §4); *Board of Comm'rs of Harmon County v. Keen*, 1944 OK 243, 153 P.2d 483.

20. See e.g. *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, 64 P.3d 1113; *Barnett v. Klein*, 1998 OK 132, 765 P.2d 777; *State ex rel. York v. Turpen*,

1984 OK 26, 681 P.2d 763; *Groendyke Transport, Inc. v. Cook*, 1979 OK 59, 594 P.2d 369; *Town of Ames v. Wybrant*, 1950 OK 197, 220 P.2d 693.

21. *Cannon v. Lane*, 1993 OK 40, ¶12, 867 P.2d 1235.

22. *Oklahoma Gas & Elec. Co. v. District Court*, 1989 OK 158, ¶8, 784 P.2d 61; 12 O.S. §1451 *et seq.*

23. Because of the discretion available to the appellate courts, Justice Opala's opinions sometimes referred to writs of *mandamus* or prohibition as "prerogative writs." See *Oklahoma Gas & Elec. Co. v. District Ct. of 15th Jud. Dist.*, 1989 OK 158, ¶10, 784 P.2d 61; *Gaylord Entertainment Co. v. Thompson*, 1998 OK 30, ¶6, 958 P.2d 128.

24. Title 51 O.S. §§24A.1 *et seq.*

25. The posture of a writ can sometimes be confusing. In *Rey*, the writ forbade the trial court from enforcing its order overruling the motion to quash. It might seem to be simpler to view the writ as one of *mandamus*, ordering the trial court to quash the subpoena, but the court must respond to the action actually taken by the trial court. Thus, if the court wants to "reverse" a trial's court's negative action (overruling), it must prohibit the trial court from enforcing its order, thus creating a legally correct, if grammatically unpalatable, negation of a negative.

26. *Boevers v. Election Bd. of Canadian Cty.*, 1981 OK 138, 640 P.2d 1333 (Petitioner challenged election results by seeking a writ declaring him the winner. The court assumed original jurisdiction and granted the writ. This was not a writ of *quo warranto*. See notes 37-38, *infra*.)

27. *State ex rel. Blankenship v. Atoka Cty.*, 1969 OK 96, 456 P.2d 537 (Attorney general sought writ of *mandamus* commanding county commissioners to pay salaries of district attorneys per statute. The court assumed original jurisdiction and granted the writ.)

28. *Oklahoma Ass'n of Municipal Att'ys v. State*, 1978 OK 59, 577 P.2d 1310 (Petitioner sought a writ against the attorney general which would vacate an AG opinion. The court assumed original jurisdiction, denied the petition, but overruled the AG opinion.)

29. *Robinson v. State ex rel. Oklahoma State Bd. of Medical Licensure and Supervision*, 1996 OK 145, 916 P.2d 1390 (The court declined to exercise original jurisdiction.)

30. *Frasier & Frasier v. Oklahoma Workers' Compensation Ct.*, 1993 OK 108, 859 P.2d 1098 (Original jurisdiction assumed and writ granted prohibiting worker's compensation court from exercising jurisdiction over a dispute involving allocation of attorney fees among various legal counsel.)

31. *Phillips v. Oklahoma Tax Comm'n*, 1978 OK 34, 577 P.2d 1278 (Petitioner sought a writ prohibiting the OTC from collecting a "use" tax on constitutional grounds. The court assumed original jurisdiction and granted the writ, which it deemed a writ of "injunction.")

32. *Leftwich v. Court of Criminal Appeals*, 2011 OK 80, 262 P.3d 750 (The court declined to exercise original jurisdiction.)

33. *Dank v. Benson*, 2000 OK 40, 5 P.3d 1088 (The Supreme Court declined to exercise original jurisdiction.); *Ethics Comm'n of State of Okla. v. Cullison*, 1993 OK 37, 850 P.2d 1069 (The Supreme Court assumed original jurisdiction but granted declaratory relief rather than a writ.)

34. Sort of a bookend to a writ of *certiorari*. See *Chronic Pain Assoc., Inc. v. Bubenik*, 1994 OK 127, ¶12, 885 P.2d 1358.

35. See *Chronic Pain Assoc., Inc. v. Bubenik*, 1994 OK 127, 885 P.2d 1358. Or see *Spahr v. Swanson*, 1979 OK 86, 596 P.2d 549 (Supreme Court granted a writ of prohibition forbidding a district court from enforcing a writ of *habeas corpus* issued by the district court.) see also *Townsend v. York*, 1974 OK 121, 527 P.2d 594; *State ex rel. Dept. of Corrections v. Powers*, 2005 OK 72, 125 P.3d 1189.

36. Figuratively. Literally, the rarest bird in the world may be the Stresemann's bristlefront (*Merulaxis stresemanni*). [www.birdlife.org/datazone/speciesfactsheet.php?id=5137](http://www.birdlife.org/datazone/speciesfactsheet.php?id=5137). There are believed to be only 15 left.

37. *State ex rel. Board of Regents v. McCloskey Brothers, Inc.*, 2009 OK 90, 227 P.3d 133; 12 O.S. 2001 §§1531-1538. "*Quo warranto*" is a Latin

phrase which may be translated as "by what authority." See Black's Law Dictionary "*quo warranto*" p. 1285 (8th Ed. 2004).

38. *Nesbitt v. Apple*, 1995 OK 20, ¶5, 891 P.2d 1235.

39. *Wilkerson v. Davila*, 1960 OK 63, 351 P.2d 311; 12 O.S. §1331 *et seq.* "*Habeas corpus*" is a Latin phrase which may be translated as "that you have the body." See Black's Law Dictionary "*habeas corpus*" p. 728 (8th Ed. 2004).

40. *State v. Powell*, 2010 OK 40, fn. 4, 237 P.3d 779, (Opala, J. dissenting).

41. *Wilkerson v. Davila*, see note 39, *supra*.

42. *State v. Powell*, 2010 OK 40, 237 P.3d 779.

43. As a general rule, the Court of Criminal Appeals has exclusive appellate jurisdiction over criminal cases unless that jurisdiction is altered by statute. See *Movants to Quash Multicounty Grand Jury Subpoena v. Dixon*, 2008 OK 36, ¶6, 184 P.3d 546.

44. See e.g. *In re. C.A.D.*, 1992 OK 89, 839 P.2d 165; *Roundtree v. Bates*, 1981 OK 77, 630 P.2d 1299; *Application of Price*, 1974 OK 143, 528 P.2d 1107; *In re. NLW*, 2000 OK CIV APP 20, 999 P.2d 448; *Application of Guthrie*, 1990 OK CIV APP 36, 792 P.2d 1197.

45. *Wisener v. Burrell*, 1911 OK 128, 118 P. 999; *Parsons v. Childers*, 1990 OK CR 16, 789 P.2d 243; *Garrett v. Kerner*, 1911 OK CR 253, 115 P. 1027; *Ex parte Kincade*, 1944 OK 245, 151 P.2d 796; *Ex Parte Logan*, 1912 OK 29, 126 P. 800; *Ex parte Johnson*, 1908 OK CR 35, 98 P. 461; *State v. Higgins*, 1943 OK CR 50, 137 P.2d 273.

46. See also *Gamble v. Benton*, 1979 OK 122, 600 P.2d 328 (Supreme Court assumed original jurisdiction and denied petition for writ of *habeas corpus* sought by several inmates on the basis of a DOC rule requiring inmates to be clean-shaven).

47. See also *Crooks v. District Ct. of the 7th Jud. Dist. of Okla.*, 1978 OK 106, 581 P.2d 897 (Mother of two children who were subject to deprived proceedings in Iowa brought children to Oklahoma, where they were adjudicated as deprived and removed from her custody. Mother filed original action seeking writ of prohibition and *mandamus*. The Supreme Court granted the writ of prohibition, preventing the district court from enforcing its order and ordering that the children be returned to Iowa. The Supreme Court declined to issue a writ of *habeas corpus*); *G.S. v. Ewing*, 1990 OK 1, 786 P.2d 65.

48. Georges Seurat, French pointillist painter whose work much troubled Cameron Frye. See [www.georgesseurat.org](http://www.georgesseurat.org).

49. Alfred, Lord Tennyson, "The Charge of the Light Brigade" (1854), criminally altered.

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## OAPA Appeals: Administering Success

By Jason A. McVicker

The 20th century saw the radical changes in the way Americans live and work. Industrialization confounded lawmakers, judges and the executive branch alike. Administrative agencies developed to fill the gap. By fusing quasi-legislative and quasi-judicial power with executive authority, an administrative agency could solve modern problems more effectively than traditional state actors. Problems like adulterated food and quack doctors were checked by these nascent agencies.<sup>1</sup> Today, regulatory agencies wield titanic power. It is hard to overstate agency influence at the federal level.<sup>2</sup> At the state level, industrial concerns ranging from motor vehicles to agriculture are all subject to agency regulation.<sup>3</sup> State agencies also regulate professions, like podiatrists, perfusionists and polygraph examiners.<sup>4</sup>

The substantial reach of administrative agencies brings them into conflict with all manner of clients. The next step, or last resort, is an administrative appeal. This article specifically addresses the Oklahoma Administrative Procedures Act (OAPA or act), its scope, and its rules for appeals. It is crucial to understand the OAPA even before an agency makes a potentially adverse ruling. Mistakes early in the process can determine the outcome of appeals taken years later. Careful planning can make all the difference.

### THE SCOPE OF THE OAPA

The OAPA provides the default rules for agency proceedings. Yet the OAPA also provides dozens of built-in exemptions.<sup>5</sup> The scope of the act determines how any given appeal may proceed.

The act is conveniently divided into Article I, governing rule-making or quasi-legislative functions, and Article II, controlling hearing requirements or quasi-judicial functions.<sup>6</sup> By default, all agencies or statutorily-created commissions are subject to the OAPA.<sup>7</sup> Local government bodies, including municipalities and some public trusts, are fully exempt.<sup>8</sup> Meanwhile, some administrative agencies are exempt from one or both articles.

Further complicating the issue, some of these exemptions are limited by subject matter. For example, the Department of Corrections and related officials are exempt from Article I only when crafting "internal management procedures."<sup>9</sup> In reality, some subject matter exemptions are so broad they might as well be full exemptions. The Oklahoma Military Department is only exempt from Article I "to the extent it exer-

cises its responsibility for military affairs.”<sup>10</sup> Yet it is hard to imagine a rule the OMD might promulgate that does not fall within the realm of “military affairs.” Nevertheless, the exemption is technically limited.

The scope of an exemption may become an issue for litigation, as in the recent case of *State ex rel. Bd. Of Regents of the University of Okla. v. Lucas*, 2013 OK 14, 297 P.3d 378. That case concerned the scope of the Board of Regent’s qualified exemption from Article II.<sup>11</sup> The board is exempt “except with respect to expulsion of any student for disciplinary reasons.” An OU student involved in some colorful disciplinary problems<sup>12</sup> was prevented from enrolling for one semester.<sup>13</sup> The litigants debated whether this was an “expulsion,” whether the Board of Regents was bound by Article II in that case, and whether the district court had appellate jurisdiction by virtue of the OAPA. The Supreme Court determined that the answer to all of those questions was “no,” rendering the OAPA inapplicable.<sup>14</sup> As *Lucas* illustrates, application of an exemption can have a decisive effect on any given appeal.

There are many exemptions to the OAPA. The sidebar outlines these exemptions, but carefully review the statute to determine where your issue lies.

If the OAPA does not apply to your issue, some other appellate avenue should be available. For example, Corporation Commission actions regarding rates and regulations can be appealed directly to the Supreme Court of Oklahoma.<sup>15</sup> If the agency is exempt from the OAPA, you must consider a different set of procedures and a different body of precedent. This is not to say that OAPA-based case law is irrelevant. Standards of review for administrative decisions are fairly uniform, and OAPA cases may offer some persuasive value.

## CHALLENGING THE AGENCY: ARTICLE I

There are two types of appeals — Article I, governed by §306, and Article II, controlled by §318 *et seq.* It is typically easy to distinguish between the two types of appeals.<sup>17</sup> Article I of the OAPA sets out a series of requirements that must be satisfied to promulgate a new administrative rule. So long as an agency respects formalities, it is very difficult to challenge rule-

making on substantive grounds.<sup>18</sup> Section 306 governs judicial review of rule-making. A plaintiff may seek declaratory judgment in the district court of his domicile or where the rule may be applied.<sup>19</sup> Rules are presumptively valid, but the agency bears the burden of showing the rules were properly promulgated and violate no statutory or constitutional provision.<sup>20</sup> Note that the rule of exhaustion does not apply to judicial review of rule-making.<sup>21</sup>

## CHALLENGING THE AGENCY: ARTICLE II

Exhaustion is generally required for judicial review of adjudication subject to Article II.<sup>22</sup> This means a litigant must pursue every avenue of relief the agency itself offers before going to court. To appeal an adjudication, a petition for review must be filed within 30 days of the offending order. This 30 day deadline is jurisdictional and cannot be waived.<sup>23</sup> However, a request for rehearing, reopening or reconsideration pursuant to Section 317 may extend the time to appeal, potentially providing precious extra days.<sup>24</sup>

In Article II review, the agency itself is a necessary party.<sup>25</sup> “Generally, an administrative decision . . . should be affirmed if it is a valid order and the administrative proceedings are free from prejudicial error to the appealing party.”<sup>26</sup> An agency order can only be reversed for the grounds set out in Section 322; violation of constitutional rights, excess of authority, unlawful procedures, errors of pure law or clearly erroneous evidentiary decisions.<sup>27</sup> An agency decision may also be reversed if it is “arbitrary and capricious.”<sup>28</sup> The district court’s review can be *further* reviewed by the Supreme Court “in the manner and time provided by law for appeal to the Supreme Court from the district court in civil actions.”<sup>29</sup>

Judicial review pursuant to the OAPA is generally the only method of appeal. Attempts to subvert this process typically fail.<sup>30</sup> In one case, a former employee used the Department of Labor’s administrative process to seek over-time compensation from her employer. She exhausted her administrative remedies and ultimately lost. Rather than seek district court review of the DOL decision pursuant to the

**“If the OAPA does not apply to your issue, some other appellate avenue should be available.”**



OAPA, the employee filed a breach of contract action against her former employer, claiming overtime compensation as damages.<sup>31</sup> The Supreme Court applied preclusion doctrine and barred her recovery. The court held that, because the employee had already fully and fairly litigated the issue at the administrative level, the final agency order prohibited further litigation.<sup>32</sup> Note that the employee *could have appealed* the department's decision pursuant to the OAPA.<sup>33</sup> Trying to go around the OAPA doomed her case.

## PRESERVING THE RECORD

Review of an administrative ruling is confined to the record before the agency.<sup>34</sup> It is therefore essential to start creating and preserving the record *before* seeking appellate relief from a district court. In one case, the Oklahoma Alcoholic Beverage Control Board instructed a store owner to move signage that allegedly "indirectly attracted customer's attention to the adjacent liquor store."<sup>35</sup> The store owner challenged this (rather attenuated) accusation. The board held a hearing and ruled the juxtaposition of the sign violated state law. The store owner sought judicial review pursuant to §318 of the OAPA, and the district court rejected the board's decision as "unsupported by sufficient evidence."

On appeal, the Supreme Court reinstated the board's decision. The Supreme Court warned that district courts are confined to the record when reviewing agency rulings and can only reverse a decision based on evidence if the agency's decision is clearly erroneous.<sup>36</sup> The board introduced evidence of a statutory violation at the administrative hearing, but the store owner did not introduce contrary evidence. Failing to introduce evidence *at the administrative hearing* prevented the store owner from making the requisite showing *at the district court*.

Building a record must start early, but it need not be difficult. The record in an individual proceeding includes all sorts of material, including pleadings, motions and offers of proof.<sup>37</sup> When in doubt, consult the OAPA's definition of record and choose the best method (or two) to ensure the information you need is preserved.

## CONCLUSION

The OAPA may seem arcane and technical. Yet the appellate tools it offers regulatory prac-

# Agencies With Exemptions

## Article 1 Exemptions

### Complete:

- Oklahoma Ordnance Works Authority
- Northeast Oklahoma Public Facilities Authority
- Oklahoma Office of Homeland Security
- Board of Trustees of the Oklahoma College Savings Plan
- Institutional governing boards within the Oklahoma State System of Higher Education

### Partial or Qualified:

- Corporation Commission
- Oklahoma Military Department
- Transportation Commission
- Department of Transportation
- Oklahoma State Regents for Higher Education
- Commissioner of Public Safety
- Council on Judicial Complaints
- Department of Corrections
- State Board of Corrections
- County sheriffs and managers of city jails

## Article 2 Exemptions

### Complete:

- Oklahoma Tax Commission
- Commission for Human Services
- Oklahoma Ordnance Works Authority
- Corporation Commission
- Pardon and Parole Board
- Midwestern Oklahoma Development Authority
- Grand River Dam Authority
- Northeast Oklahoma Public Facilities Authority
- Council on Judicial Complaints
- Board of Trustees of the Oklahoma College Savings Plan
- Oklahoma Military Department
- University Hospitals Authority and constituent hospitals and institutions
- Oklahoma Health Care Authority Board
- Administrator of the Oklahoma Health Care Authority
- Oklahoma Office of Homeland Security

### Partial or Qualified:

- Supervisory or administrative agency of any penal, mental, medical or eleemosynary institution
- Board of Regents
- Oklahoma Horse Racing Commission
- Commissioner of Public Safety
- Administrator of the Department of Securities
- Public agencies conducting certain motor vehicle lien hearings

*Source: 75 O.S. §250.4; see also 75 O.S. §250.5 (exempting municipalities, counties, school districts, and other agencies of local government, plus "specialized agencies" performing "essentially local functions.").*

tioners are often more simple and more predictable than those available in other areas of law. The key is to become familiar with the statute. The success or failure of an OAPA appeal begins before the first hearing and luck favors the prepared.

1. The most famous impetus for regulation in twentieth century America was Upton Sinclair's book "The Jungle," which exposed disgusting conditions in the meat packing industry. See Upton Sinclair, *The Jungle* (1906).

2. See R. Shep Melnick, *Power to the People or to the Professionals? The Politics of Mature Regulatory Regimes*, 47 TULSA L. REV. 65 (2011).

3. See, e.g., 47 O.S. §563 (creating the Oklahoma Motor Vehicle Commission); 2 O.S. §§18-300 *et seq.* (authorizing the Oklahoma Wheat Utilization, Research and Market Development Commission).

4. 59 O.S. §135.1 *et seq.* (the Podiatric Medicine Practice Act); 59 O.S. §2051 *et seq.* (the Oklahoma Licensed Perfusionists Act); 59 O.S. §1451 *et seq.* (the Polygraph Examiner's Act). When researching an agency, the Oklahoma Administrative Code, is an invaluable tool. The regulations listed in the Code each provide their statutory authority. The code is available online at [www.oar.state.ok.us](http://www.oar.state.ok.us).

5. The complete list appears at 75 O.S. §§250.4 & §250.5.

6. The legislature inelegantly codified Article 1 as 75 O.S. §250.9 through §308.2, plus 75 O.S. §§ 250.2, 250.6, 250.7, and 250.9. Article 2 consists of 75 O.S. §308 (a) through §323. Both Articles share custody of 75 O.S. §§250, 250.1, 250.3, 250.4, 250.5, and 250.8. See 75 O.S. §250.1.

7. 75 O.S. §§ 250.4 (A) (1) & (B) (1); *Musgrove Mill, LLC v. Capitol-Medical Center Improvement & Zoning Comm.*, 2009 OK 19, ¶5, 210 P.3d 835, 836-37.

8. Nevertheless, "public trusts having the state, or any department or agency thereof, as beneficiary" are expressly subject to the OAPA. 75 O.S. §250.5.

9. See 75 O.S. §250.4 (A) (10).

10. 75 O.S. §250.4 (A) (3).

11. *Id.* at ¶15.

12. *Id.* at ¶2.

13. *Id.* at ¶22.

14. *Id.* at ¶45.

15. Indeed, the Supreme Court is the *only* proper forum for such appeals. OK. CONST. art IX, §20.

16. Concerning standards of review, see Justice John F. Reif, *Judicial Review of Administrative Agency Decisions: A Discussion of Jurisdiction and Standards of Review*, 81 OKLA. BAR J. 102, available at [www.okbar.org/obj/articles10/archived10.htm](http://www.okbar.org/obj/articles10/archived10.htm). It provides the definitive explanation of standards of review in administrative cases.

17. But see *Conoco Inc. v. State Dept. of Health*, 1982 OK 94, 651 P.2d 125 (comparing Article I appeals under §306 with Article II appeals under §318, and discussing the intersection of the two options).

18. For example, a rule cannot be invalidated simply because its impact statement is insufficient or inaccurate. 75 O.S. § 303 (D) (4). Furthermore, reviewing courts are deferential to an agency's interpretation of its own rules and regulations. *In re: Application for Permit to Build Abstract Plant of Great Plains Investments*, 2007 OK CIV APP 113, ¶19, 172 P.3d 237, 241.

19. 75 O.S. §306 (A).

20. 75 O.S. §306 (B).

21. 75 O.S. §306 (D).

22. See e.g. *Conoco, Inc. v. State Dept. of Health*, 1982 OK 94, ¶20, 651 P.2d 125, 132; *Martin v. Harrah Indep. School Dist.*, 1975 OK 154, ¶7, 543 P.2d 1370, 1372 ("It has long been established in Oklahoma that exhaustion of statutory administrative remedies is a jurisdictional prerequisite for resort to the courts").

23. *Transwestern Publishing, LLC v. Langdon*, 2004 OK CIV APP 21, ¶5, 84 P.3d 804, 805-06.

24. See *State Ex. Rel. Okla. Bd. Of Medical Licensure & Supervision v. Pinaroc*, 2002 OK 20, 46 P.3d 114.

25. 75 O.S. §306 (B); see also *Transwestern*, 84 P.3d at 804. In *Transwestern*, the Department of Labor investigated a wage claim and awarded an Employee back pay. The Employer sought judicial review of the decision in district court, but failed to name the Department of Labor as a party to the action. The Court of Civil Appeals held that the Department was a necessary party, and the failure to timely name it in the suit robbed the district court of jurisdiction to hear the case. *Id.* at ¶8.

26. *City of Tulsa v. State ex rel. Public Employees Relations Bd.*, 1998 OK 92, ¶12, 967 P.2d 1214, 1219.

27. See, e.g., *Martinez v. State ex rel. Okla. State Bd. Of Medical Licensure & Supervision*, 1993 OK CIV APP 68, ¶4, 852 P.2d 173, 175.

28. "A decision is 'arbitrary and capricious' if 'willful and unreasonable without consideration or in disregard of facts or without determining principle,' or 'unreasoning . . . in disregard of facts and circumstances.'" *Glover v. Okla. Dept. of Transp.*, 2011 OK CIV APP 62, ¶10, 259 P.3d 872, 876 (citing *State ex rel. Bd. of Trustees of Teachers' Retirement System v. Garrett*, 1993 OK CIV APP 29, ¶6, 848 P.2d 1182, 1183).

29. 75 O.S. §323.

30. *Feightner v. Bank of Okla.*, 2003 OK 20, 65 P.3d 624. But see *Bowen v. State ex rel. Okla. Real Estate Appraiser Bd.*, 2011 OK 86, 270 P.3d 133 (statutory procedures *may* be circumvented in cases that involve a constitutional question, inadequate administrative relief, or threatened or impending irreparable injury).

31. *Id.* at ¶¶5-8.

32. The Court left open the chance that a final order may not have preclusive effect in narrow circumstances, but expressed skepticism about the possibility. *Id.* at ¶¶14, 17.

33. *Id.* at ¶7.

34. Exceptions may exist in "certain cases of alleged irregularities in procedure before the agency." *Pharmcare Okla., Inc. v. State of Okla. Health Care Auth.*, 2007 OK CIV APP 5, ¶10, 152 P.3d 267, 269.

35. *Okla. Alcoholic Beverage Control Bd. v. Burris*, 1980 OK 58, ¶1, 626 P.2d 1316, 1317.

36. *Id.* at ¶16 (citing 75 O.S. §321).

37. 75 O.S. §309.

## ABOUT THE AUTHOR



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# OBA HEALTH LAW SECTION

*Please join us...*

**Wednesday, November 13, 2013**

In conjunction with the OBA Annual Meeting, the Health Law Section will be sponsoring a 6 hour CLE Track on Wednesday, November 13. Kim Holland, former Oklahoma Insurance Commissioner and current Executive Director of State Affairs for Blue Cross and Blue Shield, will be a featured speaker on health care reform from 11-11:50 a.m. See the Annual Meeting Schedule for the times and topics of the other presentations and for registration information.



**12-1 p.m.**

**Networking Lunch and  
Hot Topics Presentations**

**Physician Collaboration – Recent Antitrust Opinion  
on NPHO: Mike Joseph, McAfee & Taft**

**Medicaid and Insure Oklahoma Update –  
Oklahoma Health Care Authority Attorney**

**Health Care Innovation Update – Jan Slater,  
Oklahoma Center for Healthcare Improvement**

**1-1:50 p.m.**

**OBA Health Law Section  
and Oklahoma Health  
Lawyers Association  
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**Networking Cocktail  
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## What Happens Now?

### Weighing Section 2056, the Federal *Anderson* Trilogy Standard and the State Constitutional Right to Trial

By James C. Milton & Travis G. Cushman

Over the past four years, many Oklahoma attorneys have wondered whether Section 2056 of the Oklahoma Pleading Code<sup>1</sup> would forever change Oklahoma summary judgment standards. Section 2056 was enacted in 2009 as part of the Oklahoma Comprehensive Lawsuit Reform Act (CLRA).<sup>2</sup> Until recently, the Oklahoma Supreme Court had remained silent on the role of Section 2056 in summary judgment proceedings. In November 2012, the Oklahoma Supreme Court entered a brief order<sup>3</sup> according “precedential value” to an Oklahoma Civil Court of Appeals opinion, which in turn stated Section “2056 governs the procedure for summary judgment.”<sup>4</sup>

Both the Supreme Court’s order and the Court of Civil Appeals’ opinion left open the important issues of whether Section 2056 changed the standard for summary judgment and whether Oklahoma’s constitutional right to trial permits adoption of the *Anderson* trilogy. Although the CLRA was recently struck down in its entirety on the basis of logrolling, a 2011 amendment to Section 2056 appears to save the statute from the effect of *Douglas v. Cox Retirement Properties Inc.*<sup>5</sup>

Section 2056 sets forth standards for summary judgment in state court proceedings. According to the statute, judgment “should be rendered if ... there is no genuine issue as to any material fact and ... the movant is entitled to judgment as a matter of law.”<sup>6</sup>

At first glance, Section 2056 presents only a superficial change from the previously long-

held standard in Rule 13 that judgment should be rendered if “there is no substantial controversy as to the material facts and ... one of the parties is entitled to judgment as a matter of law.”<sup>7</sup> Substantively, Section 2056 merely substitutes the phrase “genuine issue” for “substantial controversy.”<sup>8</sup> Can this modest change mark a fundamental shift in summary judgment jurisprudence?

#### ENACTMENT OF SECTION 2056

There can be no doubt that, in enacting Section 2056, the Oklahoma Legislature intended to bring the federal summary judgment standard to Oklahoma state courts. The CLRA also contained a cap on non-economic damages, mandatory disclosures regarding proof and computation of damages and more restrictive laws on joint and several liability and pre-judgment interest.<sup>9</sup>



In fact, the critical language of the “reformed” Oklahoma statute borrows substantially from Rule 56 of the Federal Rules of Civil Procedure. The significance of this change derives from a trilogy of decisions announced in 1986 by the United States Supreme Court that fundamentally shifted the federal court standard on summary judgment. Under the *Anderson* trilogy, federal district courts are given greater latitude to consider factors such as who carries the ultimate burden of proof at trial and whether that party has sufficient evidence to meet its evidentiary burden.<sup>8</sup> By contrast, Oklahoma courts historically will not enter summary judgment if the nonmoving party shows the court “any evidence” in support of the elements of its claims.<sup>9</sup>

Some observers believe the enactment of Section 2056 altered the Oklahoma standard to now conform with the federal courts’ friendlier approach toward summary judgment.<sup>12</sup> Indeed, Oklahoma courts routinely look to federal jurisprudence to interpret state laws patterned after their federal counterpart.<sup>13</sup> However, the federal standard for summary judgment is not dictated by the text of the rule itself, but arises from U.S. Supreme Court decisions applying Rule 56. Furthermore, a series of Oklahoma Supreme Court decisions issued in 1998 suggest that Oklahoma’s summary judgment standard is based, in part, on Oklahoma’s constitutionally protected right to trial, thus precluding adoption of the federal standard.

#### STATE AND FEDERAL SUMMARY JUDGMENT STANDARDS BEFORE AND AFTER THE ANDERSON TRILOGY

Prior to the *Anderson* trilogy, the federal standard was much more cumbersome than it is today. To prevail on summary judgment, “a defendant needed to come forward with evidence negating the plaintiff’s case.”<sup>14</sup> Federal courts had also held that “so long as there was the ‘slightest doubt as to the facts,’ a genuine issue of material facts existed within the meaning of Rule 56(c) and summary judgment was inappropriate.”<sup>15</sup> Thus, “[e]ven if the plaintiff’s case was entirely devoid of proof, the defendant could not obtain summary judgment

“...Oklahoma courts historically have required a movant to submit admissible evidence that forecloses any possibility that the nonmovant may establish a claim...”

without proving the nonexistence of an essential element of that case.”<sup>16</sup> Oklahoma courts largely followed this federal jurisprudence.<sup>17</sup>

All of that changed with the U.S. Supreme Court’s adoption of the *Anderson* trilogy in 1986. Following the *Anderson* trilogy, the Oklahoma standard for summary judgment differed sharply from the federal standard.<sup>18</sup>

First, and perhaps most notable for everyday practitioners, the U.S. Supreme Court eased the burden upon the moving party to obtain summary judgment where the nonmoving party bears the ultimate burden of proof at trial. Under the *Anderson* trilogy, the moving party need not submit evidence negating an essential element of his adversary’s claim.<sup>19</sup> Instead, the movant may simply point out that the nonmoving party lacks evidence to establish a claim at trial.<sup>20</sup> The burden then shifts to the nonmovant to show there is a genuine issue for trial.<sup>21</sup>

The U.S. Supreme Court rationalized that nothing in Rule 56, specifically the language “no genuine issue as to any material fact,” required the movant to negate the opponent’s claim.<sup>22</sup> Further, “Rule 56(c), which refers to ‘the affidavits, if any’ (emphasis added), suggests the absence of such a requirement.”<sup>23</sup> Section 2056 contains both the “no genuine issue as to any material fact” and “if any” language; Rule 13 does not.<sup>24</sup>

In contrast, Oklahoma courts historically have required a movant to submit admissible evidence that forecloses any possibility that the nonmovant may establish a claim, irrespective of which party carries the ultimate burden of production at trial.<sup>25</sup> Stated differently, a moving defendant must negate his opponent’s claims, even where the nonmovant will have the ultimate burden of proof at trial.

A corollary to the burden shifting under the *Anderson* trilogy is the effect of a non-movant’s failure to respond to a summary judgment motion. In federal court, a failure to respond is deemed a confession.<sup>26</sup> Not so in Oklahoma state courts, where, in the event of a failure to respond,

"it is still incumbent upon the trial court to ensure that the motion is meritorious."<sup>27</sup>

Second, the *Anderson* trilogy provides that any variation in the underlying standard of proof applicable at trial should be taken into account when viewing the evidence.<sup>28</sup> That is, "the judge must view the evidence presented through the prism of the substantive evidentiary burden."<sup>29</sup> The Supreme Court reasoned that the phrase "no genuine issue of material fact" in Rule 56 necessarily "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."<sup>30</sup> Again, Section 2056 mimics this language; Oklahoma Rule 13, while coming close, does not.<sup>31</sup>

In Oklahoma, the trial judge historically is not permitted to consider a heightened evidentiary standard.<sup>32</sup> For example, a plaintiff must prove a claim of fraud by clear and convincing evidence.<sup>33</sup> When ruling on summary judgment or demurrer, though, the state trial court cannot consider this heightened standard of proof.<sup>34</sup> In Oklahoma courts, a plaintiff may escape summary judgment by offering *any* evidence to support a claim, even if the claim is governed by a heightened standard of proof.<sup>35</sup> But under the federal *Anderson* trilogy standard, for example, "the trial judge ... should consider whether a reasonable factfinder could conclude ... that the plaintiff [can show] actual malice with convincing clarity."<sup>36</sup>

Finally, the *Anderson* trilogy grants a judge reviewing a motion for summary judgment significantly more discretion in weighing the evidence. Now, a federal judge must assess "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law."<sup>37</sup> The rationale is a continuation of the balancing a court must perform to determine whether there exists a "*genuine issue of material fact*."<sup>38</sup> In contrast, the trial judge is not permitted to weigh the evidence in Oklahoma courts.<sup>39</sup>

Although the U.S. Supreme Court found support for the *Anderson* trilogy in the statutory language of Federal Rule 56, the decisions marked a clear shift in summary adjudication standards at the federal level.

## THE OKLAHOMA SUPREME COURT'S APPARENT REJECTION OF THE ANDERSON TRILOGY

In the years following the U.S. Supreme Court's pronouncement of the *Anderson* trilogy, the Oklahoma Supreme Court avoided adoption of the new federal standard,<sup>40</sup> despite Rule 13's recognized similarity to Federal Rule 56.<sup>41</sup> Although the court never adopted a uniform rationale for maintaining Oklahoma's stricter summary judgment standard, two dissents and three majority opinions written by Justice Marion Opala hint that Oklahoma's constitutional right to a jury trial (and the right to trial in equitable proceedings) precludes adoption of the *Anderson* trilogy. Despite Justice Opala's death in 2010, these opinions could reveal how at least some members of the Oklahoma Supreme Court will view the effect of Section 2056 on Oklahoma law.

The first clue as to the Oklahoma Supreme Court's treatment of the *Anderson* trilogy came in the form of an unpublished order issued in 1997.<sup>42</sup> In *Jackson v. Heyman*, the defendant succeeded in overturning a jury verdict in favor of the plaintiff on a fraud claim with a motion for new trial and JNOV. On appeal, one of the primary issues faced by the Court of Civil Appeals was whether the trial court, in granting JNOV, should have applied the clear-and-convincing standard, or whether post-trial motions were governed by the "any-evidence" standard traditionally followed in Oklahoma. The defendants urged the court to adopt the *Anderson* trilogy view that a judge must look through the prism of the underlying burden of proof. In response, the plaintiff argued that a clear-and-convincing standard for a JNOV motion in a fraud case would require the trial judge to take an additional step of weighing the evidence to determine if the evidence at trial rose to the level of the substantive evidentiary burden; the judge would be second-guessing the jury. The additional step, the plaintiff contended, infringed on the plaintiff's constitutional right to a trial by jury, pursuant to Article 2, Section 19 of the Oklahoma Constitution.

The Court of Civil Appeals reversed the JNOV. In its decision, the court noted prior case law prohibiting a judge from considering heightened burdens of proof. The court specifically declined to adopt the *Anderson* trilogy, concluding as follows: "Our supreme court must decide whether *Anderson* has persuaded it to adopt a different view from the one expressed in

[prior jurisprudence].” The defendants completed the invitation to the Oklahoma Supreme Court by filing a petition for writ of *certiorari*. In their request for *certiorari*, the defendants urged the Supreme Court to change the Oklahoma summary judgment standard to follow the *Anderson* trilogy.

On *certiorari*, the Oklahoma Supreme Court issued a clear but subtle answer to the question posed by the defendants and the Court of Civil Appeals. The Supreme Court unanimously denied *certiorari*, allowing the Court of Civil Appeals’ decision to stand. The Supreme Court’s decision to deny *certiorari* was unpublished, and was announced without an opinion explaining the basis for the decision. At the very least, the court’s denial of *certiorari* might reveal that the *Anderson* trilogy does not apply to fraud cases brought in Oklahoma state courts.

In two dissenting opinions filed in 1998, Justice Opala described — at least indirectly — his rationale for voting against *certiorari* in *Jackson*.<sup>43</sup> In both *Williams v. Tulsa Motels* and *Weldon v. Dunn*, the Oklahoma Supreme Court affirmed the trial court’s summary judgment wherein the plaintiff had failed to properly identify supporting material facts and legal issues.<sup>44</sup> Justice Opala’s dissenting opinions go to great lengths to differentiate Oklahoma summary judgment practice from the *Anderson* trilogy.<sup>45</sup> Significantly, Justice Opala described the “inviolable” right to jury trial under Article 2, Section 19 of the Oklahoma Constitution as the source for the standard in Oklahoma.<sup>46</sup> Justice Opala continued: “Because these standards are enshrined in the state constitution, they cannot be abrogated (impaired or abridged) by legislative or judicial action.”<sup>47</sup> Although the two dissents are virtually identical, Justice Hardy Summers joined just one of these two dissenting opinions, “insofar as his opinion relates to Oklahoma summary judgment jurisprudence.”<sup>48</sup>

The attorney reading Justice Opala’s dissenting opinions in these two cases may wonder how much of his analysis is shared by the other members of the court. That question may be answered by three other 1998 decisions — *Shamblin v. Beasley*,<sup>49</sup> *Akin v. Missouri Pacific*

*Railroad Co.*,<sup>50</sup> and *Polymer Fabricating, Inc. v. Employers Workers’ Compensation Association*.<sup>51</sup> These decisions appear to have provided Justice Opala with his first opportunity to speak for the court on his view of the impact of state constitutional law on the summary-judgment standard. In *Akin*, the court reiterated that the moving defendant must negate his opponent’s

claim, as opposed to the *Anderson* trilogy’s allowance that the moving defendant merely point out the absence of proof.<sup>52</sup> However, in these three decisions of the court, Justice Opala did not outline the same detailed analysis between state and federal summary judgment law as he did in his dissenting opinions in *Williams* and *Weldon*. Instead, Justice Opala merely stated that summary judgment “is a method for identifying and isolating non-triable fact issues, not a device for defeating the opponent’s right to trial by jury.”<sup>53</sup>

Importantly, the *Shamblin* decision omits the phrase “by jury.” This appears to have been because *Shamblin* was an action in equity. This is important because the dissenting opinions in *Williams* and *Weldon*, and to a lesser extent the court’s decisions in *Akin* and *Polymer Fabricating*, tied the rejection of federal-court standards to the state constitutional right to jury trial. With *Shamblin*, the Oklahoma Supreme Court extended its rejection of federal summary-judgment standard to equitable actions in which there is no right to a jury.<sup>54</sup> In addition, without much fanfare, the *Shamblin* court identified a state constitutional right to trial in equitable actions.<sup>55</sup>

The otherwise limited nature of these three decisions, though, reveals a great deal about the court’s prevailing view at that time regarding summary adjudication. The summary-judgment standard and analysis found in *Shamblin*, *Akin*, and *Polymer Fabricating* may have been the only portion of Justice Opala’s view on which the remainder of the court could agree. The analysis and discussion that were present in the dissenting opinions in *Williams* and *Weldon*, but absent from the decisions in *Shamblin*, *Akin*, and *Polymer Fabricating*, may have been Justice Opala’s view alone.

“The attorney reading Justice Opala’s dissenting opinions in these two cases may wonder how much of his analysis is shared by the other members of the court.”

Three years later, Justice Kauger penned a dissent similarly expressing concern that the *Anderson* trilogy violates Oklahoma's Constitutional right to trial by jury. After identifying several differences between the federal and state summary judgment standards, Justice Kauger wrote: "The federal approach to summary process has been characterized as the judiciary's intrusion into an area formerly viewed as almost exclusively within the jury's province."<sup>56</sup> Then, citing Article 2 Section 19 of the Oklahoma Constitution, Justice Kauger concluded, "Further, [the federal approach] may adversely impact a civil litigant's constitutional right to jury trial."<sup>57</sup> Justice Opala joined in Justice Kauger's dissent.<sup>58</sup>

As recently as 2002, Justice Opala succeeded in working a brief note into a majority opinion issued by the Oklahoma Supreme Court. The decision identifies a fundamental distinction between federal and state summary adjudication process: "In Oklahoma, the focus of summary process is not on facts a plaintiff might be able to prove at trial (*i.e.*, the legal sufficiency of evidence that could be adduced), but rather on whether the evidentiary material, viewed as a whole, (a) shows undisputed facts on some or all material issues and whether such facts (b) support but a single inference that favors the movant's quest for relief."<sup>59</sup>

Oklahoma legal scholars should be intrigued by the possibility of conflict between state constitutional law and Section 2056 — with its corollaries in federal summary-judgment jurisprudence. State constitutional law arose as a movement in legal scholarship in 1977, with a "clarion call to state courts"<sup>60</sup> by Justice William J. Brennan, Jr.<sup>61</sup> This movement has grown over time, although some have criticized it either based upon disagreement with its results<sup>62</sup> or dissatisfaction with the subjects addressed (sometimes necessarily) by state constitutions.<sup>63</sup> The interrelation between the state constitutional right to trial and the summary judgment standard may not be as popular an issue as many areas of constitutional law, but there can be no doubt that the state right to trial is an individual liberty within the scope of those considered by Justice Brennan in his 1977 essay.<sup>64</sup>

In fact, at least one other state — Texas — has rejected the *Anderson* trilogy under constitutional language virtually identical to Oklahoma's.<sup>65</sup> The Texas Constitution states that "The right of trial by jury shall remain inviolate."<sup>66</sup>

Pursuant to this language, the Texas Supreme Court has rejected shifting the burden of proof onto the non-movant.<sup>67</sup> Further, Alaska,<sup>68</sup> Florida,<sup>69</sup> Idaho,<sup>70</sup> Indiana,<sup>71</sup> Kansas,<sup>72</sup> Kentucky,<sup>73</sup> New Jersey,<sup>74</sup> New Mexico,<sup>75</sup> Oregon,<sup>76</sup> Utah,<sup>77</sup> and Wyoming<sup>78</sup> have all, to some extent, expressly rejected extending the *Anderson* trilogy to their own summary judgment standards. The summary judgment statutes of these states mirror the "no genuine issue as to any material fact" language found in Federal Rule 56 and Section 2056.<sup>79</sup>

### **EROSION OF THE OKLAHOMA SUPREME COURT'S REJECTION OF THE ANDERSON TRILOGY STANDARD**

Both before and after Section 2056's enactment, Oklahoma courts have showed a willingness to update Oklahoma's summary-judgment standard, with the federal-court standard in mind. For instance, in 1999, the Oklahoma Supreme Court found that the First Amendment's free speech protections require a plaintiff defending a motion for summary judgment to present evidence "such that a reasonable jury might find that actual malice had been shown with convincing clarity."<sup>80</sup> This marked a departure from prior Oklahoma law by allowing the judge to consider the underlying burden of proof on the malice element in a defamation claim.<sup>81</sup>

More recently, Tulsa County district judges in at least three proceedings have adopted the *Anderson* trilogy in discussing the standards for summary judgment.<sup>82</sup> It is worth noting that not all trial court decisions find their way onto searchable databases, nor are all summary judgment rulings accompanied by an opinion. It is therefore likely that more Oklahoma trial courts have applied the federal standard.

### **THE OKLAHOMA SUPREME COURT'S TACIT APPROVAL OF SECTION 2056, AND WHAT IT MIGHT MEAN**

On Nov. 19, 2012, the Oklahoma Supreme Court for the first time acknowledged Section 2056's role in summary judgment, albeit in a very subtle and discreet manner. In the years following the passage of Section 2056, the Oklahoma Court of Civil Appeals had referenced Section 2056 on occasion, but the Supreme Court had never ruled on the propriety of doing so. It was therefore not unusual when the Court of Civil Appeals stated that Section "2056 governs the procedure for summary judgment."<sup>83</sup> It was, however, significant when

the Supreme Court, in a 5-4 decision, held that the Court of Civil Appeals opinion “should be accorded precedential value and released for publication.”<sup>84</sup> Perhaps foreshadowing a schism in the court’s future handling of Section 2056, the dissenting justices stated that they “would not give this opinion precedential value.”<sup>85</sup>

The Oklahoma Supreme Court’s tacit approval of Section 2056 speaks volumes in what is left unsaid. The Supreme Court could have ruled Section 2056 wholly unconstitutional for infringing on the right to trial. Alternatively, the Supreme Court could have ruled that, in enacting Section 2056, the Oklahoma Legislature lacked the authority to usurp Rule 13. Instead, the court avoided those issues. By according the Court of Appeals’ decision with precedential value, the Supreme Court at the very least acquiesced to Section 2056’s facial validity. Beyond Section 2056’s facial validity, there remain other issues that could yet surface. The Supreme Court’s order and the Court of Civil Appeals’ decision do not address whether Section 2056’s adoption brings with it the full extent of the federal standard, or whether Oklahoma’s constitutional right to trial prevents this result. These issues will likely be hotly debated.

## CONCLUSION

It is unclear at this point how the Oklahoma Supreme Court ultimately will interpret and apply Section 2056. Oklahoma courts are likely to continue to apply Rule 13 to the extent that it does not contradict Section 2056. As indicated by some of the decisions discussed in this article, the courts have applied portions of Section 2056 where necessary to reach a decision. At some point, though, Oklahoma courts may be required to address, in a more conclusive fashion, whether Section 2056 requires the adoption of the *Anderson* trilogy in Oklahoma, and whether such a result is allowed under Oklahoma constitutional law.

*Authors’ note: Thanks to Mitchell H. Craft, 3L student at OU College of Law, for examination of the Oklahoma Constitution’s requirement for re-enactment of statutes at the time of a statutory amendment.*

1. Okla. Stat. tit. 12, §2056.

2. See 2009 Okla. Sess. Laws 228 §§1, 17.

3. *Brewer v. Murray*, 2012 OK 100, ¶1, 290 P.3d 758, 759.

4. *Brewer v. Murray*, 2012 OK CIV APP 109, ¶5, 292 P.3d 41, 45 (approved for publication by the Oklahoma Supreme Court and accorded precedential value under Okla. R. Civ. P. 1.200(c)(B)).

5. The CLRA, enacted in 2009, was determined unconstitutional in 2013 based on the Oklahoma Constitution’s prohibition against log-rolling. *Douglas v. Cox Retirement Properties, Inc.*, 2013 OK 37, ¶10, 302 P.3d 789, 794. Section 2056 was amended in 2011. 2011 Okla. Sess. Laws 13 §2. It appears that this 2011 amendment may have saved Section 2056 from the *Douglas* decision. The Oklahoma Constitution requires that an amendment to a statute must re-enact the statute. Okla. Const. art. V, §57 (“[N]o law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length.”). The Legislature may have reached the same conclusion. Initially, at least some legislators intended to re-enact Section 2056 during the 2013 Special Session. See Tim Talley, *Lawmakers Seek to Revive Lawsuit Limits*, *The Journal Record*, June 10, 2013, at 1. Special Session House Bill 1024 contained a re-enactment of Section 2056, but was not included in the 23 bills that were passed and signed by the Governor during the Special Session. [legiscan.com/OK/bill/HB1024/2013/X1 (accessed October 4, 2013)].

6. OKLA. STAT. tit. 12, §2056(C).

7. Rule 13 of the Rules for District Courts of Oklahoma.

8. Section 2056 introduces some other changes as well. For instance, practitioners will have noticed that many Oklahoma state court judges now comply with Section 2056(D)’s suggestion that “[i]f summary judgment is not rendered on the whole action, the court should, to the extent practicable, determine what material facts are not genuinely at issue. The court should so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It should then issue an order specifying what facts, including items of damages or other relief, are not genuinely at issue. The facts so specified must be treated as established in the action.” Okla. Stat. tit. 12, §2056(D). (Note the statute’s use of “should” rather than “shall.”) Likewise, the appellate courts have noted the different standard for evidentiary substitutes in Section 2056(E) as compared to District Court Rule 13(C). See *MidFirst Bank v. Wilson*, 2013 OK CIV APP 15, ¶10, 295 P.3d 1142, 1145. This article focuses on the standard of review of summary judgment motions.

9. These other provisions appear to be stricken as unconstitutional. *Douglas*, 2013 OK 37, ¶10, 302 P.3d at 794. Like Section 2056, some of these provisions may have been saved by subsequent amendments.

10. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

11. For an indispensable analysis of the differences between the “no evidence” and “insufficient evidence” standards for pre- and post-trial motions, see William Powers Jr. & Jack Ratliff, *Another Look at “No Evidence” and “Insufficient Evidence,”* 69 Tex. L. Rev. 515 (1991).

12. See, e.g., 1A Charles W. Adams & Daniel J. Boudreau, *Vernon’s Oklahoma Forms 2d, Civil Procedure* 110 (2d ed. Supp. 2012) (introductory comment to Chapter 4B).

13. See *Barnett v. Simmons*, 2008 OK 100, ¶16, 197 P.3d 12; *Payne v. Dewitt*, 1999 OK 93, ¶¶8, 9, 995 P.2d 1088.

14. William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 449 (1991).

15. *Id.*

16. *Id.*; *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153, 157 (1970).

17. See *Kepler v. Strain*, 1978 OK 52, ¶7, 579 P.2d 191, 192; *Reams v. Tulsa Cable Television, Inc.*, 1979 OK 171, ¶¶4-7, 604 P.2d 373, 375-76.

18. See generally Paul J. Cleary, *Summary Judgment in Oklahoma: Suggestions for Improving a “Disfavored” Procedure*, 19 Okla. City U.L. Rev. 251 (1994). Cleary’s 1994 article is a seminal essay providing an in-depth and thorough analysis of the differences between federal and Oklahoma state summary judgment standards.

19. *Celotex*, 477 U.S. at 323.

20. *Id.* at 331.

21. *Id.* at 332.

22. *Id.* at 322-23.

23. *Id.* at 323.

24. See Okla. Stat. tit. 12, §2056; Rule 13 of the Rules for District Courts of Oklahoma.

25. *Hadnot v. Shaw*, 1992 OK 21, ¶25, 826 P.2d 978, 987; *Hargrave v. Canadian Valley Electric Coop., Inc.*, 1990 OK 43, ¶14, 792 P.2d 50, 55.

26. N.D. Okla. L.R. 7.1(C); E.D. Okla. L.R. 14(a); W.D. Okla. L.R. 14(A).

27. *Spirgis v. Circle K Stores*, 1987 OK CIV APP 45, ¶9, 743 P.2d 682, 685 (approved for publication by the Oklahoma Supreme Court, and accorded precedential value under Okla. R. Civ. App. P. 1.200(c)(B)). It remains to be seen whether Section 2056 successfully adopts the federal approach. See Okla. Stat. tit. 12, §2056(E) (“If the opposing party does not ... respond, summary judgment should, if appropriate, be entered against that party.”).

28. *Anderson*, 477 U.S. at 252.
29. *Id.* at 254.
30. *Id.* at 247-48.
31. See Okla. Stat. tit. 12, §2056; Rule 13 of the Rules for District Courts of Oklahoma.
32. See *Weaver v. Pryor Jeffersonian*, 1977 OK 163, ¶¶35-36, 569 P.2d 967, 973; *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 1977 OK 151, ¶18, 568 P.2d 1273, 1277.
33. See *P.E.A.C.E. Corp.*, 1977 OK 151, ¶18, 568 P.2d at 1277.
34. An exception to this arises in defamation actions, discussed *infra*.
35. Under Oklahoma law, claims are to be submitted to the jury if there is "any evidence," or "a scintilla of evidence" in support of the claim. *Thomason v. Pilger*, 2005 OK 10, ¶16, 112 P.3d 1162, 1167 (discussing standard for directed verdict). See *P.E.A.C.E. Corp.*, 1977 OK 151, ¶18, 568 P.2d at 1277 ("[T]here must be evidence of each element of fraud before the issue may be presented to the jury."). In the context of summary judgment, "[t]he nonmovant must merely present something which shows that when the date of trial arrives, he will have some proof to support his allegations." *Copeland v. Lodge Enters.*, 2000 OK 36, ¶9, 4 P.3d 695, 699 (internal quotations omitted). See also *Barker v. State Ins. Fund*, 2001 OK 94, ¶¶16-17, 40 P.3d 463, 479-80 (Kauger, J., concurring in part and dissenting in part) (citing *Copeland*); *Seitsinger v. Dockum Pontiac Inc.*, 1995 OK 29, ¶16, 894 P.2d 1077, 1082 (citing and quoting *Davis v. Leitner*, 1989 OK 146, 782 P.2d 924).
36. *Anderson*, 477 U.S. at 252.
37. *Id.* at 251-52.
38. *Id.* at 247-48.
39. *Indiana Nat'l Bank v. Dept. of Human Serv.*, 1993 OK 101, ¶10, 857 P.2d 53, 59; *Stuckey v. Young Exploration Co.*, 1978 OK 128, ¶15, 586 P.2d 726, 730.
40. See, e.g., *Hadnot*, 1992 OK 21, ¶25, 826 P.2d at 987; *Spirgis*, 1987 OK CIV APP 45, ¶9, 743 P.2d at 685; *Indiana Nat'l Bank*, 1993 OK 101, ¶10, 857 P.2d at 59 (each maintaining a portion of the Oklahoma summary-judgment standard where the *Anderson* trilogy would have required a different standard).
41. See *Kepler*, 1978 OK 52, ¶7, 579 P.2d at 192; *Reams*, 1979 OK 171, ¶¶4-7, 604 P.2d at 375-76. See also Cleary, *Summary Judgment in Oklahoma: Suggestions for Improving a "Disfavored" Procedure*, 19 Okla. City U.L. Rev. 251, 257 n.40.
42. *Jackson v. Heyman*, Case No. 86,132 (Okla. Civ. App., June 27, 1997) (unpublished) [<http://oklegal.onenet.net/oklegal-cgi/ifetch?okca+20525188766199+F> (accessed April 27, 2013)]. The Supreme Court's docket shows that *certiorari* was denied on October 20, 1997. [[www.oscn.net/applications/oscn/GetCaseInformation.asp?number=86132&db=Appellate&submitted=true](http://www.oscn.net/applications/oscn/GetCaseInformation.asp?number=86132&db=Appellate&submitted=true) (accessed April 27, 2013)]. Co-author James C. Milton worked as an associate on the legal team representing the plaintiffs in *Jackson v. Heyman*.
43. Justice Opala's dissenting opinions do not mention the *Jackson* decision. But, on at least two occasions, Justice Opala publicly explained his view of the significance of the Court's decision in *Jackson*. The first occasion was during a continuing education seminar sponsored by the Tulsa County Bar Association on May 19, 1998. The second occasion occurred later that year, on November 12, 1998, at the annual meeting of the Oklahoma Bar Association Appellate Practice Section. On both instances, Justice Opala stated his view that Oklahoma's constitutionally protected right to a jury trial precluded adoption of the *Anderson* trilogy.
44. See *Williams v. Tulsa Motels*, 1998 OK 42, ¶19, 958 P.2d 1282, 1289-90 (Opala, J., dissenting); *Weldon v. Dunn*, 1998 OK 80, ¶15, 962 P.2d 1273, 1280-81 (Opala, J., dissenting).
45. See *Williams*, 1998 OK 42, ¶¶15-29, 958 P.2d 1282, 1288-92 (Opala, J., dissenting); *Weldon*, 1998 OK 80, ¶¶17-25, 962 P.2d 1273, 1281-83 (Opala, J., dissenting).
46. See *Williams*, 1998 OK 42, ¶¶28-29, 958 P.2d 1282, 1291-92 (Opala, J., dissenting); *Weldon*, 1998 OK 80, ¶¶24-25, 962 P.2d 1273, 1283 (Opala, J., dissenting).
47. *Williams*, 1998 OK 42, ¶28, 958 P.2d 1282, 1292 (Opala, J., dissenting) (citing *Seymour v. Swart*, 1985 OK 9, 695 P.2d 509, 511); *Weldon*, 1998 OK 80, ¶24, 962 P.2d 1273, 1283 (Opala, J., dissenting) (citing *Seymour v. Swart*, 1985 OK 9, 695 P.2d 509, 511).
48. *Williams*, 1998 OK 42, ¶14, 958 P.2d 1282, 1284 (Summers, V.C.J., dissenting).
49. 1998 OK 88, 967 P.2d 1200.
50. 1998 OK 102, 977 P.2d 1040.
51. 1988 OK 113, 980 P.2d 109.
52. *Akin*, 1998 OK 102, ¶9, 977 P.2d 1040, 1044 ("To prevail as the moving party on a motion for summary adjudication, one who defends against a claim by another must either (a) establish that there is no genuine issue of fact as to at least one essential component of the plaintiff's theory of recovery or (b) prove each essential element of an affirmative defense, showing in either case that, as a matter of law, the plaintiff has no viable cause of action.").
53. *Polymer Fabricating*, 1988 OK 113, ¶7, 980 P.2d at 112 (emphasis added). See also *Akin*, 1998 OK 102, ¶7, 977 P.2d at 1043; *Shamblin*, 1998 OK 88, ¶9, 967 P.2d at 1208.
54. See *Shamblin*, 1998 OK 88, ¶9 n.25, 967 P.2d at 1208 (noting that Rule 13 "makes no distinction between legal and equitable actions.").
55. *Shamblin*, 1998 OK 88, ¶9, 967 P.2d at 1208.
56. *Barker v. State Insurance Fund*, 2001 OK 94, ¶17, 40 P.3d 463, 480 (Kauger, J., dissenting).
57. *Id.*
58. *Id.*
59. *Igelhart v. Board of County Commissioners of Rogers County*, 2002 OK 76, ¶7, 60 P.3d 497, 501.
60. Scott R. Bouries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 Geo. Mason L. Rev. 301, 301 (2011).
61. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977). It is worth noting that Justice Opala twice cited Justice Brennan's article — once in a decision for the Court, and once in a dissenting opinion — for the proposition that "U.S. Supreme Court jurisprudence need not be dispositive of questions involving rights guaranteed by state constitutional provisions. States are free to interpret their own due process clauses to afford protection beyond that granted by the federal constitution, even when the state and federal constitutions are similarly or identically phrased." *Messenger v. Messenger*, 1992 OK 27, ¶17 n.42, 827 P.2d 865, 872 n.42; *Southwestern Bell Tele. Co. v. Oklahoma Corp. Comm'n*, 1994 OK 38, ¶26 n.99, 873 P.2d 1001, 1026 n.99 (Opala, J., dissenting).
62. "Those who think of the movement as the product of Justice William Brennan's call for state courts to rediscover their own constitutions are necessarily disappointed whenever they read an opinion reaching a result different from the one Justice Brennan probably would have reached." Randall T. Shepherd, *The Maturing Nature of State Constitution Jurisprudence*, 30 Valparaiso U.L. Rev. 421, 421 (1996).
63. See Hans A. Linde, *What is a Constitution, What is Not, and Why Does it Matter?*, 87 Ore. L. Rev. 717 (2008). In the cited article, Justice Linde discussed the difference between state constitutions and "ordinary laws," suggesting that constitutions should govern the structure of government, and should not contain "rules" that place a "cause of the moment ... beyond the reach of lawmakers elected to represent all the state's people, both voters and nonvoters, and to take responsibility for balancing the state's books." *Id.* at 730.
64. "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." Brennan, *supra* note 61, at 491.
65. *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989).
66. Tex. Const. art. I, §15. See also Tex. Const. art. I, §13.
67. *Casso*, 776 S.W.2d at 556-57. See also *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413, 423 (Tex. 2000).
68. *Moffatt v. Brown*, 751 P.2d 939, 943 (Alaska 1988).
69. *5G's Car Sales v. Florida Dept. of Law Enforcement*, 581 So.2d 212 (Fla.App. 3 Dist. 1991); *Casamassina v. U.S. Life Ins. Co.*, 958 So.2d 1093, 1100 (Fla.App. 4 Dist. 2007).
70. *G&M Farms v. Funk Irr. Co.*, 808 P.2d 851, 855 (Idaho 1991).
71. *Chester v. Indianapolis Newspapers, Inc.*, 553 N.E.2d 137, 141 (Ind. App. 1990); *McNabb v. Mason*, 264 N.E.2d 623, 627 (Ind. App. 1970).
72. *Gorham State Bank v. Sellens*, 772 P.2d 793, 795 (Kan. 1989); *Baumann v. Excel Industries, Inc.*, 845 P.2d 65, 72 (Kan. App. 1993).
73. *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 482-83 (Ky. 1991).
74. *DePrimo v. Lehn & Fink Prods. Co.*, 538 A.2d 461, 463 (N.J. 1987).
75. *Bartlett v. Mirabal*, 999 P.2d 1062, 1070 (N.M. Ct. App. 2000).
76. *Jones v. General Motors Corp.*, 939 P.2d 608, 615-616 (Or. 1997).
77. *Orvis v. Johnson*, 2008 UT 2, ¶16, 177 P.3d 600, 604.
78. *Parker v. Haller*, 751 P.2d 372, 376-377 (Wyo. 1988).
79. Compare Alaska R. Civ. P. 56, Fla. R. Civ. P. 1.510, Idaho R. Civ. P. 56, Ind. R. Tr. P. 56, Kan. Stat. §60-256, Ky. R. Civ. P. 56, N.J. R. Civ. Prac. R. 4:46-2; N.M. R. Civ. P. 3-703, Ore. R. Civ. P. 47, Tex. R. Civ. P. 166a, Utah R. Civ. P. 56, and Wyo. R. Civ. P. 56 with Fed. R. Civ. P. 56 and Okla. Stat. tit. 12, §2056(C).
80. *Herbert v. Oklahoma Christian Coalition*, 1999 OK 90, ¶18, 992 P.2d 322, 328. See also *H.L. Mitchell v. Griffin Television, L.L.C.*, 2002 OK CIV APP 115, ¶8, 60 P.3d 1058, 1061-62.
81. *Weaver*, 1977 OK 163, ¶35, 569 P.2d at 973 ("on a motion by defendant for summary judgment in a libel action, the defendant has the burden of showing there is no issue of actual malice in the case.") (citing *Tagawa v. Maui Publishing Co.*, 427 P.2d 79 (Haw. 1967)). See also



*Johnson v. Black Chronicle, Inc.*, 1998 OK CIV APP 77, ¶17, 964 P.2d 924, 928 (citing Weaver).

82. See *Bank of Oklahoma, N.A. v. PricewaterhouseCoopers, LLP*, No. CJ-2007-816, 2010 WL 749067 (Tulsa Co. Dist. Ct. Jan. 25, 2010); *First Place, LLC v. Wave3 Communications, Inc.*, No. CJ-2008-579, 2010 WL 9039746 (Tulsa Co. Dist. Ct. March 11, 2010); *Freeny v. Wal-Mart Stores*, No. CJ-2011-3202, 2012 WL 7659254 (Tulsa Co. Dist. Ct. July 19, 2012).

83. *Brewer v. Murray*, 2012 OK CIV APP 109, ¶5, 292 P.3d 41, 45 (approved for publication by the Oklahoma Supreme Court, and accorded precedential value under Okla. R. Civ. App. P. 1.200(c)(B)).

84. *Brewer v. Murray*, 2012 OK 100, ¶1, 290 P.3d 758, 758.

85. *Brewer*, 2012 OK 100, 290 P.3d at 759 (Winchester, J., concurring in part and dissenting in part).

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## Tribal Appellate Courts A Practical Guide to History and Practice

By Eugene K. Bertman

The U.S. Department of Justice, Bureau of Justice Statistics conducted a census of more than 92 percent of federally recognized tribes, and found that an estimated 59 percent of tribes had some form of formal, independent judicial system.<sup>1</sup> Although there is no federal law that requires tribes to have appellate courts, of the tribes operating judicial systems, 91 percent have an appellate court.<sup>2</sup> Thus, understanding tribal courts and the tribal appellate process is essential to protecting your clients' rights.

Tribal courts should be approached by the legal practitioner the same as when entering a foreign or separate state jurisdiction. You should thoroughly acquaint yourself with the tribal government's structure by reviewing the tribe's primary legal document — its constitution. This review will reveal whether the tribe has organized a separate and independent judicial branch of government or whether the tribe's legislature has administratively established a court and appellate court by delegation of its quasi-judicial authority.

Tribes that do not have established, independent courts often participate in the Code of Federal Regulation Court, which is also known as the Court of Indian Offenses (CFR Court). Both those that participate in the CFR Court and those that do not may have some judicial functions exclusively handled by the legislative authority or an internal administrative appeals board.

Before we discuss these various forms of tribal appellate courts, a brief outline and scope of tribal court authority is necessary. Power to establish tribal court arises from the Indian tribe's sovereignty as an extension of its general

governmental and political authority.<sup>3</sup> It is only limited by its treaties, federal statutes or lack of tribal laws specifically exercising that reserved authority.<sup>4</sup> Tribal courts are not inferior courts to the federal courts or Oklahoma state courts; therefore, there is no direct appellate review of tribal court decisions in those courts, with the exception of *habeas corpus* violations that may be reviewed in federal district courts.<sup>5</sup>

The U.S. Constitution and Oklahoma Constitution do not apply to Oklahoma Indian tribes;<sup>6</sup> however, that does not mean litigants are without fundamental protections in tribal court. In 1968, Congress passed the Indian Civil Rights Act (ICRA), which closely mirrors the U.S. Bill of Rights. Congress requires tribes to provide the ability "to petition for redress of grievances" and the basic protections of due process, freedom of speech, protection against self-incrimination and other fundamental rights.<sup>7</sup> Additionally, many tribes have adopted substantive laws, statutes and constitutions through their own governmental processes which contain similar protections as those found in the U.S. Bill of Rights.

Under federal law, litigants who wish to challenge the jurisdiction of a tribal court must exhaust their remedies in tribal court before filing such a challenge.<sup>8</sup> Tribal court jurisdiction is a federal question, and federal courts have ruled they have the authority to determine whether a tribal court has jurisdiction in a particular case.<sup>9</sup>

## HISTORY OF INDIAN TRIBAL COURTS

Many, if not all, Indian tribes had diverse court systems prior to European contact. Almost all Indian tribes had some form of dispute resolution process, although those processes were not always similar to the European courts introduced by the colonists.

Among the Indians there have been no written laws. Customs handed down from generation to generation have been the only laws to guide them. Every one might act different from what was considered right did he choose to do so, but such acts would bring upon him the censure of the Nation . . . . This fear of the Nation's censure acted as a mighty band, binding all in one social, honorable compact.

George Copway (Kah-ge-ga-bowh);  
Ojibwa Chief

The basic precept of tribal courts continued until the United States began exerting plenary power over the tribes.<sup>10</sup> At that point in history, the United States effectively abolished many tribal courts or severely restricted their exercise of jurisdiction.

As a result of the United States limiting the existence and recognition of tribal courts, there began to be problems with prosecution of crime in Indian Country. Thus, in 1883, the Department of Interior established the "Courts of Indian Offenses," or "Courts of Federal Regulations" (CFR Courts). These courts function as tribal courts to handle less serious criminal actions and resolve civil disputes among and between tribal members. Major crimes are tried in federal court as Congress had made that policy determination by enactment of the Major Crimes Act of 1885.

CFR Courts are governed by regulations promulgated by the secretary of the interior and are found at Part 11 of Title 25 of the Code of Federal Regulations. The purpose of the CFR Courts was to fill the void left when the federal government adjusted or abolished traditional tribal law and order mechanisms.<sup>11</sup> The CFR Courts were designed to

provide adequate machinery for the administration of justice for Indian tribes in those areas of Indian country where tribes retain jurisdiction over Indians that is exclusive of State jurisdiction but where tribal courts have not been established to exercise that jurisdiction.<sup>12</sup>

Originally, the CFR Courts had only a criminal code. Today, the court handles domestic relations, probate, juvenile cases and other civil cases, in addition to its criminal jurisdiction.<sup>13</sup>

Appeals in the CFR Courts are taken to a panel of CFR judges. The rules for CFR Appeals can be found at Part 11, Subpart H of Title 25 of the Code of Federal Regulations. In addition, Part 11.806 permits the chief magistrate of the CFR appellate division to establish local rules for appeals and operation of the appellate division.

It is important to note that there is no direct appeal to the federal courts or the U.S. Supreme Court from a decision of the CFR Appeals Court. The CFR Court is not a "federal court" pursuant to Article III of the United States Constitution. The power of the CFR Court derives from Congress.<sup>14</sup> Lastly, tribes may only withdraw from CFR Court jurisdiction or transfer that jurisdiction directly to the tribe pursuant to 25 C.F.R. 11.104, which is generally through a Public Law 93-638 contract.

## MODERN TRIBAL COURTS

It was not until 1934, with the passage of the Indian Reorganization Act,<sup>15</sup> that Indian tribes were encouraged by Congress to create or re-establish their own courts and judicial systems. The Indian Self-Determination of Act 1975 affords tribes the opportunity to provide for their own court through federal grants and contracts.<sup>16</sup> In 1978, the U.S. Supreme Court observed "that some Indian tribal courts systems have become increasingly sophisti-

**"...the United States effectively abolished many tribal courts or severely restricted their exercise of jurisdiction."**

cated and resemble in many respects their state counterparts.”<sup>17</sup>

Oklahoma currently has 39 federally recognized tribes operating with 24 tribal courts and nine separate tribes authorizing CFR jurisdiction.<sup>18</sup> Of those tribes operating tribal courts, almost all have established appellate courts. Of the remaining tribes, there is a mixture of CFR Court jurisdiction and quasi-judicial authority vested in its governing body, legislative branch or delegated administrative appeals board.

Most tribes have utilized the services of attorneys to assist them in establishing court procedures and drafting tribal codes. As a result, tribal courts often provide a physical setting similar to that of a federal or state courtroom, and have adopted court rules and appellate procedures that closely resemble those followed by federal courts. Each tribal court typically has rules of admission for practice with local rules readily available from their respective court clerks.

### **TRIBAL APPELLATE COURTS**

Tribal appellate courts may be structured in numerous ways. It is important that the practitioner review all applicable tribal ordinances, laws, codes and rules to properly prepare the record. If those rules and procedures are not readily available online through the tribe’s website, they can often be obtained for the price of copies by calling the tribal government’s administration, tribal secretary or court clerk. Please be aware that the tribal secretary is not an administrative employee, but rather a political office and often the official custodian of the tribe’s records and legislative enactments.

In addition, not all tribal courts are “constitutional” courts, as some are creatures of tribal legislative ordinances or resolutions. Thus, these courts are not always co-equal branches of government and may owe greater fidelity to the legislative branch. Many times, the court function was originally part and parcel of the legislature’s function and was later delegated to the tribal appellate court. On occasion, a tribe’s constitution will vest the legislature with jurisdiction to hear an appeal, not the court. Finally, if the court is not a constitutional court, the legislature can have authority to overrule the tribal appellate court as may be in line with a tribe’s traditional customs.

In preparing briefs for the appeal, finding reported tribal court decisions can be challeng-

ing. More tribes are publishing their case law and opinions on the Oklahoma Supreme Court Network, the Indian Law Reporter,<sup>19</sup> Tribal Court Clearinghouse,<sup>20</sup> and some commercially available sources, like LexisNexis and Westlaw. Many tribes’ decisions may not be published at all, and many may require that you spend quality time in the tribe’s law library or clerk’s office looking for the court’s prior opinions.

In addition to the substantive law, some tribes have enacted specific statutes, not simply rules, governing appellate procedure. Many times the court’s procedure tracks the rules of Federal Appellate Procedure with various changes to meet the needs of the tribe or its customs.

### **INTERNAL TRIBAL ADMINISTRATIVE APPEALS**

In addition to tribal courts, many Indian tribes have a robust administrative process established legislatively by tribal code. Prior to the formation of formal tribal courts, many tribes established an administrative process to handle internal issues, grievances and disputes. Many of these disputes originally dealt with election appeals and employment issues, but quickly the process was adapted to include its economic enterprises and gaming disputes.

It is important for the practitioner to explore the tribal ordinances and codes to understand if a particular case must be appealed to a tribal administrative board. Many times, the administrative board’s decision is final and cannot be appealed to the tribal court or the CFR Court. Thus, it is imperative that the practitioner fully prepare a case before the administrative board as there will not usually be an opportunity to supplement the record at a later date. Failure to admit all of your evidence in the administrative record at the first stage of proceedings may ultimately be fatal in this type of appeal.

### **CLOSING**

Tribes have a range of options in how they set up and operate their judicial systems, and attorneys are understandably reluctant to practice in a foreign jurisdiction. As an unfortunate result, tribal courts can be underutilized or misunderstood.

With a little effort and research diligence, the appellate process should be very familiar to administrative appeals or federal court proceedings. The primary objective is confirming you are in the right appellate tribunal and as in



any appellate practice, having made certain your record below is complete. An inquiry with the tribe's court clerk can steer you to a list of practitioners who often practice in a particular tribal court and who may be invaluable resources in navigating this legal frontier.

1. *Census of Tribal Justice Agencies in American Indian and Alaska Native Tribal Jurisdictions* (CTJA02); Steven W. Perry, Statistician, BJS.
2. *Id.*
3. *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831).
4. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).
5. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).
6. *See Talton v. Mayes*, 163 U.S. 378 (1896).
7. 25 U.S.C. §1302.
8. *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985) and *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987).
9. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316 (2008).
10. *United States v. Kagama*, 118 U.S. 375 (1886).
11. *Felix S. Cohen's Handbook of Federal Indian Law* 333 (Renard Strickland ed., 2d ed. Michie 1982).
12. 25 C.F.R. §11.102.
13. Part 11 of Title 25 of the Code of Federal Regulations.

14. 25 U.S.C. §1311.
15. 25 U.S.C. §461 *et seq.*; also known as the Wheeler-Howard Act.
16. Indian Self-Determination and Education Assistance Act of 1975 (Public Law 93-638); Title 25, U.S.C. §450, *et seq.*
17. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 211-12 (1978).
18. For a complete listing with contact information, please see Tribal Court Clearinghouse; Tribal Courts: [www.tribal-institute.org/lists/justice.htm](http://www.tribal-institute.org/lists/justice.htm).
19. [www.indianlawreporter.org](http://www.indianlawreporter.org).
20. [www.tribalinstitute.org/lists/decision.htm](http://www.tribalinstitute.org/lists/decision.htm).

## ABOUT THE AUTHOR

Eugene Bertman is a partner in the Norman office of McCormick & Bryan PLLC. His practice involves civil trial and appellate litigation. He graduated from OCU School of Law and received his bachelor's degree in accounting from OSU. During law school, he student clerked for Oklahoma Supreme Court Justice Ralph Hodges.

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## Thursday, Nov. 7

*Topic:*

### **Stress Management and the Practice of Law**

*Oklahoma City Location*

**6-7:30 p.m.**

**Office of Tom Cummings**

**701 N.W. 13th St.  
Oklahoma City, OK**

*Tulsa Location*

**7-8 p.m.**

**University of Tulsa**

**College of Law**

**John Rogers Hall**

**3120 E. 4th Pl.**

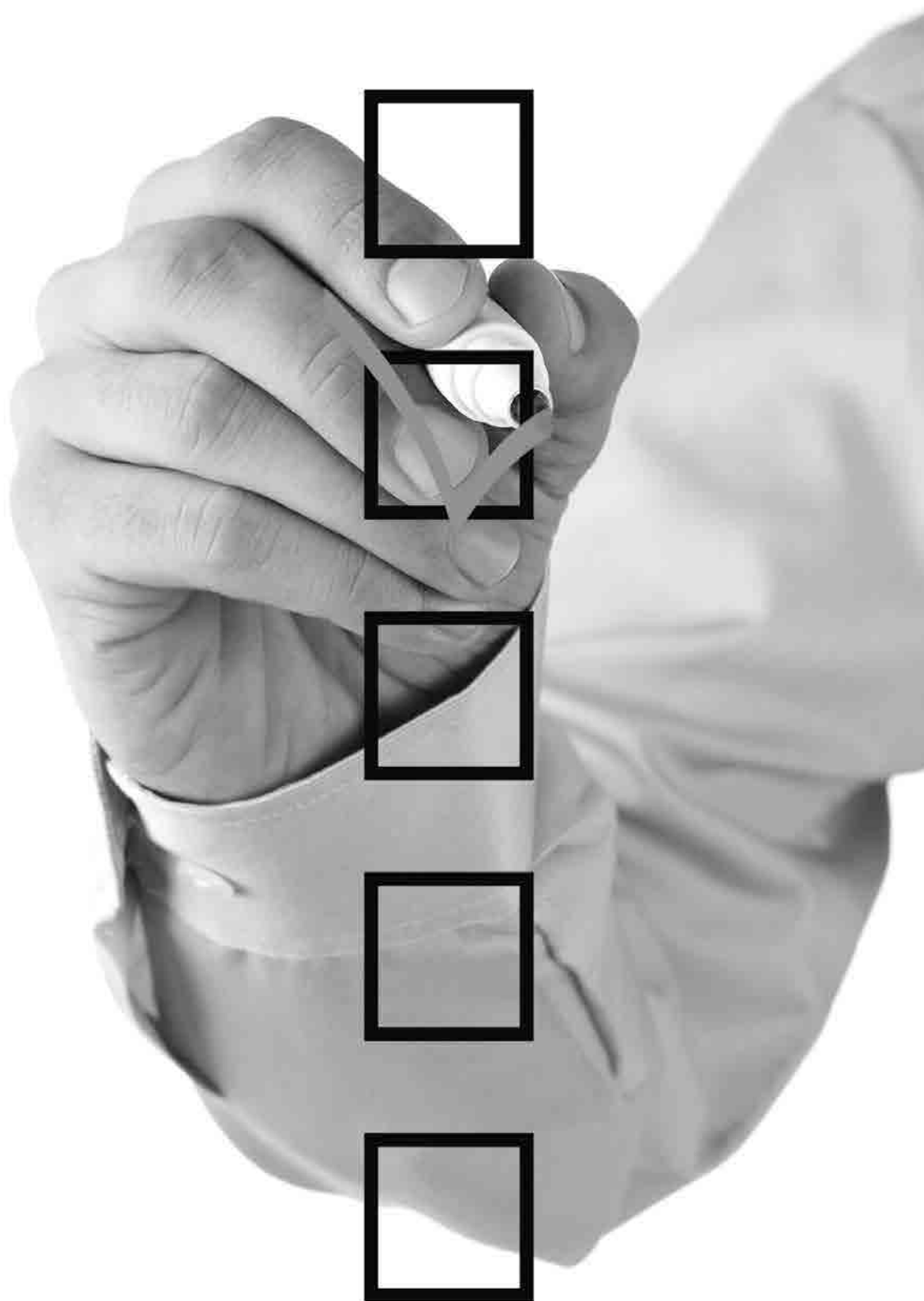
**Rm. 206, Tulsa**

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**Contact Kim Reber @ 405-840-0231 • [kimreber@cabainc.com](mailto:kimreber@cabainc.com)**

## **LAWYERS HELPING LAWYERS DISCUSSION GROUP**





## Federal Appellate Practice Primer

By Sarah Lee Gossett Parrish

**A**ppellate practice is challenging and rewarding. It is, at its very essence, *the final word*. While the outcome is in the capable hands of dedicated jurists, the basis for that outcome is in the hands of appellate counsel. Whether your appeal is taken to the U.S. Supreme Court, the U.S. 10th Circuit Court of Appeals, the Oklahoma Supreme Court or the Oklahoma Court of Civil Appeals, all appeals share at least some common rules. However, if you plan to handle a civil appeal, you must educate yourself concerning the plethora of rules and customs attendant to appellate practice before the particular court that will entertain your appeal.

The 10th Circuit decides appeals within its jurisdiction from federal agencies when authorized by federal law, and from federal courts in six states: Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The court issued about 387 published opinions and 1,076 unpublished opinions per year from 2007 to 2010. During this time, approximately 48 percent of the cases concerned criminal appeals and 52 percent involved civil appeals (excluding prisoner petitions and original proceedings). In contrast, during the October term, 2012,<sup>2</sup> the U.S. Supreme Court has released 39 total merits opinions, reflecting 36 signed opinions after oral argument and three summary reversals. There are 75 total merits opinions expected, with 74 petitions for certiorari granted and set for oral argument.<sup>3</sup>

### PRELIMINARY MATTERS

Prior to filing an appeal, you must first confirm that you have an appealable “judgment” or “final order” and properly calculate the time within which to file your appeal. Federal appellate courts are vested with jurisdiction to review final judgments, decisions subject to pendent

appellate jurisdiction, and certain interlocutory orders.

Rule 54, Fed.R.Civ.P., defines “judgment” for purposes of federal appeals.<sup>4</sup> In addition to the appellate jurisdiction under Rule 54, federal appellate courts may review otherwise non-appealable decisions subject to their pendent appellate jurisdiction, which allows for review of decisions that are “inextricably intertwined with the appealable decision, or [where] review is necessary to ensure meaningful review of the appealable one.”<sup>5</sup> However, “the exercise of pendent appellate jurisdiction is generally disfavored,”<sup>6</sup> and should be used sparingly.<sup>7</sup> “We have ... interpreted ‘inextricably intertwined’ to include only situations where the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal — that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well.”<sup>8</sup>

Federal appellate courts also have interlocutory jurisdiction. Pursuant to 28 U.S.C. §1292, the courts may review interlocutory orders “granting, continuing, modifying, refusing or

dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court” under 28 U.S.C. §1292(a)(1).<sup>9</sup>

Once you have ascertained that you have an appealable judgment or order, timely filing of the appeal is a jurisdictional requirement in the federal appellate courts.<sup>10</sup>

## COMMENCEMENT OF APPEAL

Pursuant to Fed.R.App.P. Rule 3 and 10th Cir. R. 3, an appeal as of right from the U.S. District Courts of the Western, Eastern, and Northern Districts of Oklahoma to the U.S. 10th Circuit Court of Appeals “may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4.” Fed.R.App.P. Rule 4(a) addresses appeal as of right in a civil case and provides, in pertinent part, that “the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.”<sup>11</sup> Appeals by permission and appeals in bankruptcy cases are governed by Fed.R.App.P. Rules 5 and 6, respectively.<sup>12</sup>

Fed.R.App.P. Rule 3(e) states that, “[u]pon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.” Currently, this required fee is \$450.00. Tenth Cir. R. 3.3(B) provides for dismissal of an appeal if, within 14 days after filing the notice of appeal, a party fails to pay the required fees, request an extension of time to pay same, or file a timely motion to proceed without prepayment of fees.<sup>13</sup>

Computations of time in federal appellate courts are governed by Fed.R.Civ.P. Rule 6, which provides that the first day of the event that triggers the period shall be *excluded* and the last day *included*. Rule 6 provides that the period continues to run “if the last day is a Saturday, Sunday or legal holiday.” Deadlines are also extended to the next business day when “weather or other conditions make the clerk’s office inaccessible.”<sup>14</sup>

If there is an outstanding judgment against your client, it is advisable to seek a stay of execution and post a supersedeas bond. This procedure is governed, generally, by Fed.R.App.P. Rules 7 and 8, bond for costs on appeal in a civil case and stay or injunction pending appeal, respectively.<sup>15</sup>

The federal appeals process begins with a notice of appeal and requires a designation of the record on appeal,<sup>16</sup> entries of appearance,<sup>17</sup> and specific form and content relating to briefs.<sup>18</sup> The record on appeal constitutes “(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.”<sup>19</sup> The following may not be included in the record on appeal unless they are relevant to the issues on appeal: appearances; bills of costs; briefs, memoranda and points of authority, except as specified in 10th Cir. R. 10.3(D)(2); certificates of service; depositions, interrogatories and other discovery matters unless used as evidence; lists of witnesses or exhibits; notices and calendars; procedural motions or orders; returns and acceptances of service; subpoenas; summonses; setting orders; unopposed motions granted by the trial court; non final pretrial reports or orders; and suggestions for *voir dire*.<sup>20</sup>

## APPELLATE BRIEFS: FORM AND SUBSTANCE

Considerable attention should be devoted to perfecting your appellate briefs. Notably, the specific form and the content relating to briefs differ in federal and state appellate courts. Attention to detail is incumbent upon any 10th Circuit practitioner. For example, the 10th Circuit requires mandatory certifications concerning privacy redactions, use of virus scanning software, and submissions uploaded to the court’s electronic case file using the court’s internet-based case management/electronic case filing system (CM/ECF) matching hard copies.<sup>21</sup>

In addition to e-filing appellate briefs via the court’s ECF/PACER System, seven paper copies of the brief must be filed with the court within two business days of the ECF filing.<sup>22</sup> While it is not mandatory to mail a paper copy of an appellate brief to opposing counsel, it is advisable to do so as a professional courtesy. Two paper copies of the appendix must be filed with the court clerk within two business days of e-filing an appellate brief, and a paper copy of the appendix must be served on all parties to the appeal.<sup>23</sup> The bottom front cover of an opening or answer brief must include a statement addressing whether oral argument is requested.<sup>24</sup> Other notable requirements relate to the filing of corporate disclosure statements<sup>25</sup> and the color of each appellate brief cover on cross-appeals.<sup>26</sup> Fed.R.App.P. Rule 28 articu-

lates the requirements for briefs in great detail, along with 10th Cir. R. 28. You should become intimately familiar with these rules prior to preparing your appellate briefs.

#### *Present Your Affirmative Case*

As you review the relevant parts of the record on appeal, determine your appellate theme and evaluate how it is related to the lower court decision. You must “present your own affirmative case.”<sup>27</sup> It is insufficient for an appellant to show the lower court erred, because the appellate court may discern other grounds upon which to uphold its decision. If you merely refute your opponent’s argument, victory may still be denied because other grounds may exist to uphold the position.<sup>28</sup> Therefore, the only clear path to appellate victory is to establish your affirmative case, and in so doing, you will expose your opponent’s flaws and the lower court’s errors.

#### *Evaluation of Issues*

As you evaluate what constitutes your own affirmative case, glean from the lower court record each potential issue you may raise in your brief. Draft a short statement summarizing each issue, then ask yourself three questions:

- 1) Did trial counsel properly preserve the issue in the lower court?
- 2) What standard of review applies to your issue or, often, what standards apply to the several components of your issue?
- 3) Was the error prejudicial or harmless?<sup>29</sup>

“It is critical to realize that appellate courts do not sit as ‘super juries’ and are not likely to reverse a jury verdict or even trial court findings on the ground that they are unsupported by the evidence or clearly erroneous.”<sup>30</sup> Accordingly, if you are appealing an adverse judgment, identify legal errors and argue that these errors of law infected the factual determinations, jury instructions or evidentiary rulings.<sup>31</sup> We attorneys are rhetoricians in the grandest sense, masters of “the art of adapting discourse, in harmony with its subject and occasion, to the requirements of a reader or hearer.”<sup>32</sup> Framing the issues is the “most important analytical step in the appellate process.”<sup>33</sup> Given the page limitations, it is far better to brief three issues thoroughly than to present 10 issues unconvincingly. “One has to try to strike the jugular, and let the rest go.”<sup>34</sup>

#### *Standard of Review*

You must identify and argue to the appropriate standard of review to maximize your chances to prevail on appeal. Indeed, some judges consider the standard of review to be the key to appellate decision-making.<sup>35</sup> One Third Circuit judge opined that “[s]tandard of review is the element of appellate advocacy that distinguishes the good appellate advocate.”<sup>36</sup> A Fifth Circuit judge once stated that “[t]he standard of review is the appellate judge’s ‘measuring stick.’”<sup>37</sup>

In truth, the list of issues and their attendant standards of review presented for a federal appellate court’s review would prove endless. It is impossible to present such a compilation. However, some general observations may be made. For example, questions of law are reviewed *de novo*.<sup>38</sup> Issues of procedural law, such as entitlement to a jury trial, are reviewed *de novo*.<sup>39</sup> Issues concerning jurisdiction and issues concerning a district court’s determination of the constitutionality of a punitive damage award are also subject to *de novo* review.<sup>40</sup> When a district court makes nondiscretionary legal determinations based on stipulated facts, federal appellate review is *de novo*.<sup>41</sup>

At the other end of the spectrum, “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”<sup>42</sup> In an appeal from a bench trial, the district court’s factual findings are reviewed for clear error and its legal conclusions are reviewed *de novo*.<sup>43</sup> The appellate review of mixed questions of law and fact will be “under the clearly erroneous or *de novo* standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles.”<sup>44</sup>

#### *Statement of the Facts*

When you prepare a statement of the facts with appropriate references to the record,<sup>45</sup> “you must state facts of the case in your brief as you yourself would wish to read them — the introductory summary first, the details later — in order to get a clear, consecutive, understandable picture of what the case is really about.”<sup>46</sup> Analyze the lower court record through the lens of an appellate court, and use this section to advance your affirmative case without argument or editorial. Indeed, its



“strength lies in selection and juxtaposition,”<sup>47</sup> devoid of emotion.

### *Argument and Authorities*

Conscientiously avoid overstating the facts or the law, because it will damage your credibility and undermine your client’s cause. Moreover, as an officer of the court, you are duty bound to exemplify integrity in every respect. Propositions and headings should be concise and argumentative, but always presented in a respectful and collegial manner. Thoroughly research the issues that you select for your brief, confirm the accuracy of your citations to authorities, and have your brief proofread prior to filing. There are no excuses for negligent errors.

### *Oral Argument*

Oral argument before the 10th Circuit Court of Appeals and the Oklahoma appellate courts is not a matter of right.<sup>48</sup> Should you request and be permitted oral argument, you should do three things:<sup>49</sup>

- 1) Determine whether the appellate court is a “hot” bench; i.e., whether the judges read the briefs prior to argument. While generations ago, many courts were “cold” (judges did not read the briefs before argument), today, most courts are “hot.” Thus, the judges will be familiar with your case and questions will be abundant. Do not assume you have a “clean slate”; you do not.
- 2) Observe oral arguments before the panel (or court) that will hear your case, if possible. You will learn how the judges act during oral argument and will lessen the element of surprise, particularly if there is an aggressive judge before whom you will be arguing.
- 3) Since oral argument is discretionary with the Oklahoma appellate courts and the 10th Circuit, evaluate why the court has granted it. Does your appeal present a first impression issue? Are the briefs unclear? Is there an ideological split on the court concerning the issue(s) in your appeal, for which you must be prepared?

Be sure to complete and return the notice of oral argument that the clerk’s office will send you approximately eight to ten weeks prior to the scheduled argument date. The completed notice advises the court that you have docketed

the date of the argument and will be prepared to present your oral argument at that time. After intensive preparation, a scrimmage with colleagues prior to the scheduled argument date will prove invaluable to your cause.

To ascertain which judges are assigned to your case, check the updated oral argument calendar posted on the 10th Circuit’s web site on the Monday before the oral argument week begins. However, be advised that the court may make last minute changes to panel assignments, even on the day of argument.

For oral arguments set for 9 a.m., always check in for oral argument with the clerk’s office by 8:15 a.m. on the day of your argument, even if it is toward the middle or end of the cases to be argued that particular day. If your argument is scheduled prior to 9 a.m., check in 30 to 45 minutes before the start time. During oral argument, the court rarely allows

**“Conscientiously avoid overstating the facts or the law, because it will damage your credibility and undermine your client’s cause.”**

counsel more than the allotted argument time. Thus, if you ask for additional time, expect that your request will be denied. If you would like a rebuttal period, appellant’s counsel must cease argument prior to the expiration of the allotted time and preserve the remainder of such time for rebuttal. The court will not reserve time for you. Save your demonstrative charts, posters, and other props for district court trials. Appellate judges generally find them unnecessary and inappropriate. Also, do not split oral argument with co-counsel unless it is absolutely necessary. In the event you are unable to answer a question posed by one of the judges at oral argument, you may submit a letter to the clerk under Fed.R.App.P. Rule 28(j) to provide the answer to the question.

William K. Suter, clerk of the United States Supreme Court from 1991 to Aug. 31, 2013, suggests 10 rules for a successful appellate argu-

ment.<sup>50</sup> He has observed over 1300 arguments and listened to a plethora of outstanding advocates, including Judge Robert Bork; Professor Laurence Tribe; David Boies; former Solicitors General Theodore Olson, Kenneth Starr and Seth Waxman; and John Roberts, now Chief Justice Roberts.<sup>51</sup> Briefly, his 10 rules are as follows:

- 1) Observe your judges
- 2) Open well
- 3) Do not read to the judges
- 4) Be precise
- 5) Know the record thoroughly
- 6) Anticipate all possible questions
- 7) Cite cases correctly
- 8) Use arguing second to your advantage
- 9) Avoid most attempts at humor
- 10) Civility is the rule<sup>52</sup>

When the day arrives, approach the lectern as master of your case, be “direct, forthright and candid.”<sup>53</sup> React appropriately, and save a moment to conclude with a statement that champions your own affirmative case. After all, appellate practice allows you and your client an opportunity to have the *final word*.

## Briefing Checklist

*Updated 3/11/2013*

*The checklist below includes all the requirements (in both the Federal Rules of Appellate Procedure and 10th Circuit local rules) for filing a primary brief (please note memorandum briefs, such as those filed on jurisdictional issues, do not need to comply with all of these requirements). For questions, call 303-844-3157.*

- ☐ Is the cover page the correct color (for the required hard copies)?:
- ☐ The appellant's and the first cross-appeal's brief is blue;
- ☐ The appellee's and second cross-appeal's brief is red;
- ☐ The third brief on cross-appeal is yellow;
- ☐ The appellant's reply and the fourth brief on cross-appeal is grey;
- ☐ Amicus and intervenor covers are green.
- ☐ Is the brief in either 13- or 14-point font (14-point font preferred)?<sup>54</sup>
- ☐ Is your brief double-spaced except for quotations and footnotes?<sup>55</sup>

☐ Does the cover page of your brief contain the name of the district of origin and the name of the judge (or agency) who entered the underlying judgment (in addition, have you followed the usual practice of including the district court case number as well)?<sup>56</sup>

☐ Does the cover page of your brief include a statement as to whether or not oral argument is requested?<sup>57</sup> If argument is requested, the brief must contain a statement of reasons why argument is necessary (generally that statement must follow the brief's conclusion).

☐ Is your brief single-sided?<sup>58</sup>

☐ Does the brief contain a corporate disclosure statement if one is required?<sup>59</sup>

☐ Does the brief contain a table of contents, including page references?<sup>61</sup>

☐ Does the brief contain a table of authorities including cases, statutes and other authorities?

☐ Does the brief contain a statement of prior or related appeals (including prior state court matters which may be relevant)?<sup>62</sup> The “prior and related” cases statement should be included following the table of authorities/cases.

☐ If applicable, does your brief include a glossary of terms following the table of cases/authorities?<sup>63</sup>

☐ If you are submitting a primary brief in a case with multiple appellants or appellees, and the parties on that side intend to file separate briefs, have you included a statement (following the table of cases/authorities) stating the reasons a separate brief is necessary?<sup>64</sup> Please note in this regard that even if multiple appellees' briefs are filed the appellant may only file a single reply except upon motion to the court seeking an exemption.<sup>65</sup>

☐ If you are the appellant, does your brief include a jurisdictional statement which satisfies the requirements of the rules?<sup>66</sup>

☐ If you are the appellant, does your brief include a statement of the issues, a statement of the case, a statement of the facts, and a summary of the argument before the actual argument section?<sup>67</sup>

☐ If you are the appellant, does your brief contain an argument section including, for each issue raised, 1) a precise reference, with appendix or record citation to the decision under review,<sup>68</sup> and 2), a statement of the applicable standard of review?<sup>69</sup>

☐ If you are the appellant, does your brief include “a short conclusion stating the precise relief sought”?<sup>70</sup>

☐ If you are the appellee, have you reviewed Fed. R. App. P. Rule 28(b) to determine which parts of the Rule 28 requirements should be included in your brief?

☐ If you are the appellant, is a copy of the decision under review (that is, copies of “all pertinent written findings, conclusions, opinions or orders” including a magistrate’s report and recommendation if applicable) attached to the opening brief?<sup>71</sup> In this regard, appellants/petitioners in social security and immigration cases should take special note of 10th Cir. R. 28.2(A)(3) and (4).

☐ If you are the appellee, and the appellant has not attached the rulings prescribed in 10th Cir. R. 28.2(A) have you done so?<sup>72</sup>

☐ If your brief exceeds 30 pages (if principal or response), or 15 pages (if reply), does it contain, at the conclusion, a certificate of compliance including verification of the applicable type volume limitations?<sup>73</sup> Have you included headnotes, footnotes and quotations in the word count?<sup>74</sup>

☐ Does your brief include, at the end, separate certifications that 1) all required privacy redactions have been made,<sup>75</sup> 2) that the hard copies to be submitted to the court are exact copies of the version submitted electronically,<sup>76</sup> and 3) that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses?<sup>77</sup>

☐ Have you signed the brief (please note electronic signatures are proper under the rule)?<sup>78</sup>

☐ Does your brief include a separate and proper certificate of service?<sup>79</sup>

☐ Is the hard copy of your brief (which you will forward to the clerk’s office) securely bound and will it lie reasonably flat when opened?

☐ Have you made arrangements to have seven hard copies of the brief forwarded to the clerk’s office within two business days?<sup>80</sup> Please note in this regard that the hard copies should be *received* in the clerk’s office in two business days.<sup>81</sup> Two hard copies of any appendix filed must also be submitted.<sup>82</sup>

## Appendix Checklist

*Updated 3/11/2013*

*Applicable in all cases in which retained counsel appears for the appellant — please note it is the responsibility of the appellant to submit the appendix but the appellee may file a supplemental appendix in accord with 10th Cir. R. 30.2(A)(1).*

☐ Generally, does your appendix comply with 10th Cir. R. 30.1(C)(1) through (4) as to form, and have you reviewed and considered 10th Cir. R. 10.3(A) through (E) with respect to content? Counsel filing appendices in social security cases should pay particular attention to 10th Cir. R. 30.1(A)(2).

☐ Does your appendix include, at the beginning, an index (which acts as a table of contents),<sup>83</sup> of all the documents, including in that index page numbers showing where in the appendix the particular documents appear?<sup>84</sup>

☐ Is your appendix paginated consecutively?<sup>85</sup>

☐ Are the documents in your appendix arranged in chronological order according to the filing date, and have you included a copy of the district court’s docket entries as the first document in your appendix?<sup>86</sup>

☐ Is your appendix single-sided?<sup>87</sup>

☐ Is your appendix securely bound and will each volume lie reasonably flat when opened? If necessary, have you divided your appendix into separate volumes to ensure each will lie reasonably flat when opened?<sup>88</sup>

☐ Have you included a certificate of service with your appendix and have you served a copy on other parties to the proceeding?

☐ Have you submitted two hard copies of the appendix to the clerk’s office at the time the hard copies of the brief are submitted (noting the appendix will not be filed electronically)? Please note in this regard that the

hard copies should be *received* in the clerk's office in two business days.<sup>90</sup>

❑ If you have sealed materials as part of your appendix, have you reviewed 10th Cir. R. 30.1(C)(4)? Call the clerk's office with any questions in that regard.

1. 1 *Appellate Practice Compendium* 249 (Dana Livingston ed. 2012).
2. The United States Supreme Court October Term 2012 began on Monday, Oct. 1, 2012, and ended Sunday, Oct. 6, 2013.
3. SCOTUSblog.com, Interim Statistics Pack (May 3, 2013), [www.scotusblog.com/reference/stat-pack](http://www.scotusblog.com/reference/stat-pack).
4. Rule 54(a), Fed.R.Civ.P. defines "judgment" to "include[] a decree and any order from which an appeal lies...." Rule 54(b), Judgment on Multiple Claims or Involving Multiple Parties, provides: "[w]hen an action presents more than one claim for relief — whether as a claim, counterclaim, crossclaim, or third-party claim — or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." See also, 28 U.S.C. §1291, which extends the scope of jurisdiction for federal courts of appeals to "final orders".
5. *Stewart v. Oklahoma*, 292 F.3d 1257, 1260 (10th Cir.[Okla.]2002) (internal quotation omitted).
6. *Armijo ex rel. Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1264 (10th Cir.[N.M.]1998) (internal quotation omitted).
7. *Stewart*, 292 F.3d at 1260.
8. *United Transp. Union Local 1745 v. City of Albuquerque*, 178 F.3d 1109, 1114 (10th Cir. [N.M.] 1999) (internal quotations omitted).
9. See, e.g., *Crowe & Dunleavy, P.C. v. Stidham*, 640 F.3d 1140, 1147 (10th Cir.[Okla.] 2011).
10. See, e.g., *Bowles v. Russell*, 551 U.S. 205, 212, 127 S.Ct. 2360, 2365, 168 L.Ed.2d 96 (2007) ("We have repeatedly held that this statute-based filing period for civil cases is jurisdictional."); *Davis v. Martin Marietta Materials, Inc.*, 2010 OK 78, ¶1, 246 P.3d 454, 455 ("It is well settled in Oklahoma jurisprudence that timely filing of the petition in error commencing the appeal is jurisdictional and failure to file an appeal within the statutory time is fatal, placing the matter beyond this Court's power of review.") (internal citations omitted).
11. Exceptions exist for appeals in which a party is the United States, an agency, officer, or employee. See Fed.R.App.P. Rules 4(a)(1) (B); 4(a)(4) and 4(c). No 10th Circuit Local rule accompanies Rule 4.
12. 10th Cir.R. 5 addresses Reply briefs in support of a petition for permission to appeal.
13. In addition to the 10th Circuit local rules, appellate practitioners are well advised to study the Tenth Circuit Practitioner's Guide and the new briefing and appendix checklists, all of which are available as Adobe PDF and Microsoft Word downloads on the 10th Circuit's web site, [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov). A copy of the checklists also is included at the end of this article.
14. See Fed.R.App.P. 26(a)(3).
15. There is no 10th Circuit rule that accompanies Fed.R.App.P. Rule 7. However, see 10th Cir. R. 8.1, concerning the required showing; 10th Cir. R. 8.2, addressing emergency or *ex parte* motions; and 10th Cir. R.8.3, regarding applications made to a single judge.
16. See Fed.R.App.P. Rule 10; 10th Cir. R. 10; and Okla.Sup.Ct.R. 1.28.
17. See Fed.R.App.P. Rule 46; 10th Cir. R. 46; and Okla.Sup.Ct.R. 1.5(a).
18. See, e.g., Fed.R.App.P. Rules 28, 28.1, 29, 30, 31; 10th Cir. R. 28, 29, 30, 31; and Okla.Sup.Ct.R. 1.11, 1.12.
19. See Fed.R.App.P. Rule 10(a); 10th Cir. R. 10.3.
20. See 10th Cir. R. 10.3(E).
21. See 10th Cir. CM/ECF User's Manual at §III (a), (c), and (b) at 11; 10th Cir. R. 25.5. Always consult the most recent version of the Court's *CM/ECF Users Manual*, located on the Court's web site at [www.ca10.uscourts.gov](http://www.ca10.uscourts.gov). Also, note that the CM/ECF System only accepts documents in Portable Document Format (PDF).
22. See 10th Cir. R. 31.5.
23. See 10th Cir. R. 30.1(D); 10th Cir. CM/ECF User's Manual at §§ II.A(3) at 4-5 & II.D(4)(b) at 9.
24. See 10th Cir. R. 28.2(C)(4). If no oral argument is requested, this should be so stated. If it is requested, a statement of the reasons why it is necessary must follow the brief's conclusion.
25. See Fed.R.App.P. Rule 26.1.
26. See Fed.R.App.P. Rule 28.1(d).
27. Daniel M. Friedman, "Winning on Appeal," in *The Litigation Manual: Special Problems and Appeals* 152 (John G. Koeltl & John Kiernan, eds., 1999).
28. *Id.*
29. James Harris, "Appealing Evidence," in *The Litigation Manual: Special Problems and Appeals* 13- 14 (John G. Koeltl & John Kiernan, eds., 1999).
30. *A Practitioner's Guide to Appellate Advocacy* 184 (Anne Marie Lofaso et al. eds., 2010).
31. *Id.*
32. Bryan A. Garner, "The Language of Appellate Advocacy," citing J.F. Genung, *The Working Principles of Rhetoric* 1 (1901) in *The Litigation Manual: Special Problems and Appeals* 222 (John G. Koeltl & John Kiernan, eds., 1999).
33. *Id.*
34. O.W. Holmes, *Speeches* 77 (1913).
35. 6 Oklahoma Appellate Practice §26:96 at 555 (Harvey D. Ellis, Jr. & Clyde A. Muchmore, eds., ed. 2006).
36. *Id.*, citing Garth, *How to Appeal to an Appellate Judge*, 21 Litigation 20, 22 (Fall 1994).
37. *Id.*, citing Godbold, *Twenty Pages and Twenty Minutes – Effective Advocacy on Appeal*, 30 S.W.L.J. 801, 810 (1976).
38. See, e.g., *Beaver v. Clingman*, 363 F.3d 1048, 1053 (10th Cir. [Okla.]2004), rev'd and remanded by *Beaver v. Clingman*, 363 F.3d 1048 (10th Cir.[Okla.] Apr 06, 2004); cert. granted by *Clingman v. Beaver*, 542 U.S. 965, 125 S.Ct. 27, 159 L.Ed.2d 857; Judgment rev'd by *Clingman v. Beaver*, 544 U.S. 581, 125 S.Ct. 2029, 161 L.Ed.2d 920; on remand to *Beaver v. Clingman*, 139 Fed.Appx. 936 (10th Cir.[Okla.] Jul 13, 2005) (Not selected for publication in the Federal Reporter, NO. 03-6058).
39. *Bowdry v. United Airlines, Inc.*, 58 F.3d 1483, 1489 (10th Cir. [Colo.] 1995).
40. See, e.g., *Williams v. Bowman Livestock Equip. Co.*, 927 F.2d 1128, 1130 (10th Cir.[Okla.] 1991), concerning jurisdictional issues and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (May 14, 2001), concerning review of a district court's determination of the constitutionality of a punitive damages award.
41. *F.D.I.C. v. Kansas Bankers Sur. Co.*, 963 F.2d 289 (10th Cir.[Okla.] 1992).
42. Fed.R.Civ.P. 52(a)(6).
43. *Lippoldt v. Cole*, 468 F.3d 1204, 1211 (10th Cir.[Kan.] 2006) (citations omitted).
44. *Estate of Holl v. Comm'r*, 54 F.3d 648, 650 (10th Cir.1995).
45. See Fed.R.App.P. Rule 28(a)(7).
46. *Effective Appellate Advocacy* 35 (Christopher T. Lutz & Wm. Pan-nill, eds., revised ed. 2004).
47. *Id.* at 36.
48. 1 *Appellate Practice Compendium* 249 (Dana Livingston, ed. 2012).
49. *Id.*
50. William K. Suter, "Ten Rules for a Successful Appellate Argument," *The Public Lawyer* (Vol. 18, No. 1) Winter 2010
51. *Id.*
52. *Id.*
53. 1 *Appellate Practice Compendium* 249 (Dana Livingston, ed. 2012).
54. 10th Cir. R. 32(a).
55. Fed. R. App. P. Rule 32(a)(4).
56. See 10th Cir. R. 28.2(C)(5).
57. See 10th Cir. R. 28.2(C)(4).
58. Fed. R. App. P. Rule 32(a)(1)(A).
59. Fed. R. App. P. Rule 26.1(a)
60. Fed. R. App. P. Rule 28(a)(1).
61. Fed. R. App. P. Rule 28(a)(3).
62. 10th Cir. R. 28.2(C)(1).
63. 10th Cir. R. 28.2(C)(6).
64. 10th Cir. R. 31.3(B).
65. 10th Cir. R. 31.3(A).
66. Fed. R. App. P. Rule 28(a)(4).
67. See Fed. R. App. P. 28(a)(5) through (8).
68. See 10th Cir. R. 28.2(C)(2) and 10th Cir. R. 28.1(A)(appendix citations) or 28.1(B)(record on appeal citations); see also 10th Cir. R. 28.2(C)(3)
69. Fed. R. App. P. Rule 28(a)(9)(B)
70. Fed. R. App. P. Rule 28(a)(10).
71. 10th Cir. R. Rule 28.2(A)(1)
72. See 10th Cir. R. 28.2(B).



73. Fed. R. App. P. Rule 32(a)(7)(B) and (C).  
 74. Fed. R. App. P. Rule 32(a)(7)(B)(iii).  
 75. See 10th Cir. R. 25.5  
 76. See *ECF User Manual*, Section II, Policies and Procedures for Filing Via ECF, Part I(b), pages 11-12  
 77. See *ECF User Manual*, Section II, Policies and Procedures for Filing Via ECF, Part I(c), pages 11-12  
 78. 10th Cir. R. 46.5(A); 10th Cir. R. 46.5(C).  
 79. Fed. R. App. P. Rule 25(C)(1), 25(C)(2), 25(d)(1)(B) and 10th Cir. R. Rule 25.4.  
 80. 10th Cir. R. 31.5.  
 81. See *ECF User Manual*, Section III, Part 5, pages 18-19.  
 82. See the court's appendix checklist for additional information on filing appendices  
 83. See Fed. R. App. P. Rule 30(d)  
 84. 10th Cir. R. 30.1(C)(3).  
 85. 10th Cir. R. 30.1(C)(3).  
 86. 10th Cir. R. 30.1(C)(2).  
 87. See Fed. R. App. P. Rule 32(a)(1)(A) (as made applicable to appendices via Fed. R. App. P. Rule 32(b))  
 88. 10th Cir. R. 30.1(C)(2).  
 89. 10th Cir. R. 30.1(D).  
 90. See *ECF User Manual*, Section III, Part 5, pages 18-19.

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Ms. Gossett Parrish, of counsel at Derryberry & Naifeh, maintains an appellate and litigation practice. She is admitted to the U.S. Supreme Court, 10th Circuit Court of Appeals and Oklahoma's Western, Northern and Eastern District Courts. She is on the Board of Editors for the *ABA Litigation Appellate Practice Journal*, was a law clerk to Judge Lee R. West and Judge William J. Holloway and was staff lawyer to Justice James R. Winchester. She received her J.D. from OU College of Law in 1986.

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## Timing is Everything Post-Judgment Motions and the Time for Appeal in Federal Civil Cases

By Michael L. Brooks & Emily S. Eleftherakis

**T**he old adage that timing is everything holds true when it comes to federal civil appeals. The United States Supreme Court and the 10th Circuit Court of Appeals have long recognized that the filing of a timely notice of appeal in civil cases is both mandatory and jurisdictional.<sup>1</sup> Even a seemingly *de minimis* failure to comply with the prescribed filing deadline will lead to disaster.<sup>2</sup>

Thus, every prospective appeal requires a threshold determination of when the notice of appeal must be filed. The general rule is straightforward enough: under Federal Rule of Appellate Procedure 4(a), a notice of appeal in a civil case in which the United States is not a party “must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.”<sup>3</sup> In many cases, however, at least one party files one or more post-judgment motions. Rule 4(a)(4) governs the effect of such motions on the time to file a notice of appeal. The purpose of this article is to provide practitioners with a basic understanding of the mechanics of Rule 4(a)(4). The article begins with a general overview of the rule. The article then discusses the 10th Circuit’s treatment of some of the thorny issues that can arise under the rule.

### **RULE 4(a)(4): THE BASICS**

Under Rule 4(a)(4)(A), the timely filing of any of the following six motions tolls the time to appeal in a civil case: 1) a renewed motion for judgment as a matter of law under Fed. R. Civ. P. 50(b); 2) a motion to amend or make additional findings of fact under Fed. R. Civ. P. 52(b); 3) a motion for attorney’s fees under Fed. R. Civ. P. 54, but only if the district court

extends the time for appeal under Fed. R. Civ. P. 58; 4) a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e); 5) a motion for new trial under Fed. R. Civ. P. 59; and 6) a motion for relief under Fed. R. Civ. P. 60 if the motion is filed no later than 28 days after the entry of judgment.<sup>4</sup> If a party timely files one or more of these motions, the 30-day appeal time begins to run for all parties from the entry of the order disposing of the last remaining motion.<sup>5</sup> A party need not correctly label the motion or even cite the applicable rule in order for a tolling motion to be effective; rather, a court will look at the timing and substance of a motion to determine whether it falls within Rule 4(a)(4)(A).<sup>6</sup>

Under Rule 4(a)(4)(B), a premature notice of appeal — that is, a notice of appeal filed after the district court announces or enters judgment but before it disposes of a motion listed in Rule 4(a)(4)(A) — is temporarily suspended and becomes effective to appeal the underlying judgment when the order disposing of the last remaining tolling motion is entered.<sup>7</sup> This rule applies even when a party files a notice of appeal before a timely tolling motion.<sup>8</sup> Although a new notice of appeal is not required if a party wishes to appeal only the original judgment, if

a party intends to challenge an order disposing of a tolling motion or a judgment that has been altered or amended upon such a motion, the party must file a new or amended notice of appeal within 30 days from the entry of the order disposing of the last remaining tolling motion.<sup>9</sup> A party is not required to pay an additional fee to file an amended notice of appeal.<sup>10</sup>

#### REQUIREMENT THAT A POST-JUDGMENT MOTION BE TIMELY

As Rule 4(a)(4)(A) makes clear, a post-judgment motion must be “timely” in order to toll the time for appeal. With the exception of rule 60 motions, for which the time limit is set by Rule 4(a)(4)(A)(vi) at 28 days from the entry of judgment, timeliness is governed by the Federal Rule of Civil Procedure under which the motion is made. Under the relevant rules, all of the motions listed in Rule 4(a)(4)(A), except motions for attorney’s fees, must be filed within 28 days of the entry of judgment.<sup>11</sup> Motions for attorney’s fees must be filed within 14 days of the entry of judgment.<sup>12</sup>

Problems can arise when a party needs more time to file a post-judgment motion than allowed by the applicable rule. Under Federal Rule of Civil Procedure 6, “[a] court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), (e) and 60(b).”<sup>13</sup> But what if a party moves for an extension of time to file a motion under one of those rules and the district court improperly grants additional time? The 10th Circuit addressed this issue in *Weitz v. Lovelace Health System, Inc.*<sup>14</sup> There, the district court granted the plaintiff’s request for additional time to file a Rule 59(e) motion, and the plaintiff filed the motion within the new deadline set by the court but outside the time period set forth in Rule 59(e).<sup>15</sup> On appeal, the 10th Circuit held that, because the extension was invalid under Rule 6, the Rule 59(e) motion was untimely and ineffective to toll the time for appeal.<sup>16</sup> The plaintiff invoked the “unique circumstances” doctrine<sup>17</sup> in an effort to save her appeal, but the 10th Circuit ruled that “an extension of time granted by the court but clearly prohibited entirely by the federal rules does not constitute unique circumstances salvaging an untimely notice of appeal.”<sup>18</sup> The court determined that the plaintiff acted unreasonably in relying on an extension of time that the district court lacked authority to grant and explained that attorneys have a duty to ensure

that their requests are not expressly forbidden by the federal rules.<sup>19</sup>

Can a party get around the explicit prohibition of Rule 6 and obtain additional time by filing a skeletal motion within the deadline and supplementing the motion later? The plaintiff in *Allender v. Raytheon Aircraft Co.* attempted to do just that.<sup>20</sup> The plaintiff’s purported Rule 59(e) motion stated, in relevant part, as follows:

Plaintiff moves for an Order pursuant to Rule 59(e) . . . . Petitioner also requests an additional 20 days in which to file a supporting Memorandum and any appropriate affidavit that would be useful to the Court in ruling on this motion.<sup>21</sup>

The 10th Circuit held that the plaintiff’s motion did not toll the time for appeal because it failed to satisfy Federal Rule of Civil Procedure 7(b)(1), which requires a motion to state the grounds for relief with “reasonable specification.”<sup>22</sup> Like the plaintiff in *Weitz*, the plaintiff in *Allender* raised a “unique circumstances” argument premised on the district court’s grant of her request to file the supporting memorandum.<sup>23</sup> Relying on *Weitz*, however, the 10th Circuit concluded that the district court lacked authority to grant the plaintiff additional time to file a proper Rule 59(e) motion.<sup>24</sup> Furthermore, the court determined that because the plaintiff’s “request for additional time was prohibited by the rules, her reliance on the district court’s grant of additional time was not reasonable and d[id] not constitute a ‘unique circumstance.’”<sup>25</sup>

Notably, the *Allender* court’s discussion of an earlier 10th Circuit decision suggests that the plaintiff’s attempt to buy more time to file a fully developed motion might have been successful if the plaintiff had included enough substance to satisfy Rule 7(b)(1) in the initial motion. Specifically, the court distinguished *Grantham v. Ohio Casualty Co.*, where the plaintiffs’ initial Rule 60(b) motion was independently sufficient to toll the time for appeal such that the court did not need to consider the substance of a subsequently filed supporting brief. The court explained that unlike the *Allender* plaintiff’s Rule 59(e) motion, the Rule 60(b) motion in *Grantham* complied with Rule 7(b)(1) by “provid[ing] grounds for relief — namely that the plaintiff ‘needed more discovery in certain areas.’”<sup>26</sup>

In *Martinez v. Carson*, decided just last year, the 10th Circuit addressed a scenario where the

defendants filed a combined Rule 50 and 59 motion that failed to include citations to the trial transcript.<sup>29</sup> The district court denied the motion “without prejudice to re-filing with appropriate citations to the trial transcript.”<sup>30</sup> A month later, the defendants filed an amended motion that included proper citations.<sup>31</sup> Within 30 days of the district court’s denial of the amended motion, the defendants attempted to appeal from the original judgment.<sup>32</sup> The issue before the 10th Circuit was whether the amended motion tolled the time to appeal from the original judgment.<sup>33</sup> The defendants argued that the denial of their first motion without prejudice, combined with an invitation to re-file in the future, rendered the district court’s decision non-final until the district court ruled on the amended motion.<sup>34</sup> The 10th Circuit disagreed. The court explained that a district court may not avoid the strictures of Rule 6 “by dismissing a first post-judgment motion without prejudice and extending an open-ended invitation for the moving party to file an amended motion at some unknown point in the future.”<sup>35</sup> The court noted that the situation might be different “[i]f the district court had clearly reserved decision on the merits of the first post-judgment motion or set a timeline for supplementation.”<sup>36</sup> Because the district court denied the first motion, however, the defendants were required to file a notice of appeal within 30 days of that ruling, and “their later filing of a second, untimely post-judgment motion d[id] not change that deadline.”<sup>37</sup>

Tenth Circuit case law demonstrates that Rule 6 is inflexible and that attorneys should be wary of attempting to manufacture an end-run around the rule. Prudent counsel should always attempt to file a post-judgment motion that is as complete as possible within the time frame set forth in the relevant rule. If counsel cannot avoid the need for supplementation at a later date — for instance, if a necessary transcript cannot be prepared within 28 days of a final judgment — the supplementation must occur before the district court decides the initial motion or it will be ineffective to continue the tolling period.

#### WITHDRAWAL OF A TOLLING MOTION

An issue that has come before the 10th Circuit with surprising frequency over the past few years is the effect of withdrawal of a tolling motion. The seminal case on this issue is *Vanderwerf v. SmithKline Beecham Corp.*<sup>38</sup> There, the Vanderwerfs filed a timely Rule 59(e)

motion eight days after the district court granted summary judgment against them.<sup>39</sup> Despite the passage of seven months and two phone calls to the district judge’s chambers, the district court did not act on the motion.<sup>40</sup> Accordingly, counsel for the Vanderwerfs decided to file a notice of withdrawal of the Rule 59(e) motion and a notice of appeal.<sup>41</sup> This decision turned out to be disastrous. On appeal, the 10th Circuit explained that an order disposing of a Rule 59(e) motion is required to take advantage of the tolling provision of Rule 4(a)(4)(A)(iv).<sup>42</sup> But the Vanderwerfs withdrew their motion without the entry of an order by the district court.<sup>43</sup> The 10th Circuit concluded that the effect of the withdrawal was to leave the record as if the Rule 59(e) motion had never been filed in the first place.<sup>44</sup> As a result, the notice of appeal was six months late.<sup>45</sup> The 10th Circuit acknowledged the severity of its holding and expressed empathy for “parties who are effectively prohibited from filing a notice of appeal because of the inaction of a district court,” but the court determined that it was “hamstrung” by the unambiguous language of Rule 4 and the jurisdictional nature of a timely notice of appeal.<sup>46</sup> Notably, the court provided guidance to future litigants by listing a number of ways in which the Vanderwerfs could have preserved their appeal:

First, the Vanderwerfs could have filed a motion requesting a ruling. Second, they could have continued to wait for a ruling, or sought a writ of mandamus in this court, which, if granted would compel the district court to rule on the Rule 59 motion. Third, they might have filed a motion for an extension of time under Federal Rule of Appellate Procedure 4(a)(5)(A)(ii), provided that they might show good cause or excusable neglect underlying the untimely notice. Fourth, they might have filed a premature notice of appeal that would ripen into a timely notice of appeal when the district court finally ruled. Finally, it seems the best option may have been for the Vanderwerfs to have moved to withdraw the motion, in hopes that the district court would rule on that motion thereby triggering a 30-day period for the filing of a timely appeal.<sup>47</sup>

In *Copar Pumice Co. v. Morris*, the defendants (perhaps unwittingly) found a way to prevent the *Vanderwerf* problem at the outset.<sup>48</sup> There, the defendants filed both a Rule 50(b) motion

and a premature notice of appeal within 30 days of the entry of judgment.<sup>49</sup> Thus, when the defendants later withdrew their Rule 50(b) motion, leaving the record as if the motion had never been filed, the notice of appeal became effective to appeal the judgment.<sup>50</sup> Ironically, however, the defendants' withdrawal of their Rule 50(b) motion resulted in a waiver of their arguments on appeal under the rule that a party may not challenge a district court's denial of a motion for judgment as a matter of law unless the party renews the motion pursuant to Rule 50(b).<sup>51</sup> Consequently, the defendants ultimately fared no better than the Vanderwerfs.

The plaintiff in *De Leon v. Marcos* was more fortunate.<sup>52</sup> In that case, as in *Vanderwerf*, the plaintiff filed a timely Rule 59(e) motion but later filed a notice of withdrawal of the motion and a notice of appeal more than 30 days after the entry of judgment.<sup>53</sup> This series of events prompted the 10th Circuit to enter an order directing the parties to brief the issue of whether the appeal should be dismissed under the holding of *Vanderwerf*.<sup>54</sup> Two days after the entry of the briefing order, the plaintiff returned to the district court and moved for an order disposing of the Rule 59(e) motion pursuant to his notice of withdrawal.<sup>55</sup> Per the plaintiff's request, the district court entered an order deeming the Rule 59(e) motion withdrawn and moot.<sup>56</sup> On appeal, the 10th Circuit held that "the district court's acknowledgment of De Leon's withdrawal was a sufficient disposition of the Rule 59 motion for purposes of Rule 4(a)(4)(A)(iv)."<sup>57</sup> The court noted that the plaintiff's action was "akin to the very type of action we considered a 'best option' in *Vanderwerf*, namely, to move 'to withdraw the motion for Rule 59 relief.'"<sup>58</sup> As a result of the district court's order, "the withdrawn Rule 59(e) motion [was] not treated as though it had never been made," and the plaintiff's notice of appeal ripened under Rule 4(a)(4)(B)(i) when the district court entered its order acknowledging the withdrawal.<sup>59</sup>

*Vanderwerf* reveals that withdrawal of a tolling motion can be catastrophic. The *Vanderwerf* problem should be easily avoidable, however. Litigants who want to withdraw a tolling motion in order to expedite an appeal should file a motion to withdraw in the district court and await a court order authorizing or acknowledging the withdrawal. This approach is much safer than filing a notice of withdrawal and assuming the 10th Circuit will provide an

opportunity to procure an order later, as it did in *De Leon*. Mr. De Leon would have been in the same boat as the Vanderwerfs if the 10th Circuit had decided to act summarily instead of issuing a briefing order. Before withdrawing a tolling motion, litigants should also consider the unfortunate result in *Copar Pumice Co.* and make sure that withdrawal will not amount to a waiver of any arguments on appeal.

## SUCCESSION TOLLING MOTIONS

Parties often file successive tolling motions. For example, a party may file a motion to reconsider the denial of a Rule 60(b) motion challenging the underlying judgment. The law on successive tolling motions appears to be well settled. Only the original motion challenging a judgment tolls the time to appeal from that judgment.<sup>60</sup> Thus, "a motion to reconsider an order disposing of a motion that tolled the running of the time for appeal typically does not again toll the running of the appeal period."<sup>61</sup> This "rule prevents parties from undermining the finality of judgments by repeatedly filing motions that toll the running of the appeal time under Rule 4(a)."<sup>62</sup> Nevertheless, a motion to reconsider the denial of an initial Rule 60(b) motion will toll the time to appeal from the order disposing of the Rule 60(b) motion, as the "motion to reconsider is the first motion that would toll the running of the time for appeal of the denial of [the] 60(b) motion."<sup>63</sup>

The 10th Circuit's recent decision in *Ysais v. Richardson* illustrates how these rules play out in practice.<sup>64</sup> In that case, the district court entered an amended final judgment on Feb. 20, 2009.<sup>65</sup> Mr. Ysais timely filed a motion for reconsideration, which the court treated as a Rule 59(e) motion, on March 1, 2009.<sup>66</sup> On March 28, 2009, the district court denied the motion.<sup>67</sup> On April 6, 2009, Mr. Ysais filed a second motion for reconsideration.<sup>68</sup> The district court did not deny that motion until May 28, 2009; however, on April 29, 2009, Mr. Ysais filed a notice of appeal purporting to challenge all prior orders entered in the case.<sup>69</sup> The 10th Circuit held that the notice of appeal was untimely and ineffective to challenge the amended final judgment because the time to appeal ran 30 days after the district court denied the first motion for reconsideration, or April 27, 2009.<sup>70</sup> The court explained that Mr. Ysais's second motion for reconsideration did not toll the time to appeal from the amended final judgment.<sup>71</sup> The court concluded, however, that the second motion for

reconsideration did toll the time to appeal from the order denying the first motion for reconsideration.<sup>72</sup> Thus, the notice of appeal was timely as to that order.<sup>73</sup>

Successive tolling motions can create confusion. Fortunately, lawyers armed with an understanding of the applicable rules should be able to determine the jurisdictional ramifications of such motions without much trouble.

### SPECIAL PROBLEMS RELATING TO ATTORNEY'S FEES

Motions for attorney's fees under Rule 54 are different from the other types of motions listed in Rule 4(a)(4)(A) because they toll the time for appeal only "if the district court extends the time to appeal under Rule 58."<sup>74</sup> Rule 58 provides that "if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59."<sup>75</sup> Thus, when a party timely files a motion for attorney's fees under Rule 54 and the district court exercises its discretion under Rule 58, the motion for attorney's fees is given the same effect as a Rule 59(e) motion to alter or amend the judgment, which tolls the time to appeal until the district court disposes of the motion.<sup>76</sup>

What happens if a party files both a non-tolling motion for attorney's fees and a tolling motion challenging the district court's judgment? The 10th Circuit addressed this situation in *Budinich v. Becton Dickinson & Co.*<sup>77</sup> There, the plaintiff timely filed both a motion for new trial and a non-tolling motion for attorney's fees.<sup>78</sup> On May 16, 1984, the district court disposed of the motion for new trial but not the motion for attorney's fees.<sup>79</sup> On Aug. 2, 1984, the district court finally ruled on the motion for attorney's fees.<sup>80</sup> The plaintiff then filed his single notice of appeal on Aug. 29, 1984.<sup>81</sup> On appeal, the 10th Circuit concluded that the notice of appeal was untimely and ineffective to challenge the judgment on the merits.<sup>82</sup> The court reasoned that the time to appeal was tolled while the motion for new trial was pending; however, the tolling period did not continue after the court disposed of that motion, even though the motion for attorney's fees remained pending.<sup>83</sup> Accordingly, the plaintiff was required to file his notice of appeal within 30 days of the ruling on the motion for new trial.<sup>84</sup> In a more recent

case, the 10th Circuit made clear that the *Budinich* analysis applies when both sides file motions for attorney's fees but the district court exercises its Rule 58 discretion with respect to only one of the motions.<sup>85</sup>

If a judgment on the merits includes an award of attorney's fees and a party timely files a Rule 59(e) motion directed solely at the award of attorney's fees, does the motion toll the time to appeal from the merits portion of the judgment? The 10th Circuit answered no in *Utah Women's Clinic, Inc. v. Leavitt*.<sup>86</sup> In that case, the district court entered a judgment on the merits that included a provision ordering the plaintiffs to pay costs and attorney's fees to the defendants.<sup>87</sup> The judgment did not set the amount of the fee award.<sup>88</sup> Shortly after the entry of judgment, the plaintiffs filed a Rule 59(e) motion attacking the award of attorney's fees but not the district court's decision on the merits.<sup>89</sup> Several months later, the district court denied the motion and entered an order setting the amount of the fee award.<sup>90</sup> The plaintiffs filed a notice of appeal within 30 days of both orders.<sup>91</sup> On appeal, the 10th Circuit held that the notice of appeal was untimely as to the district court's ruling on the merits because the plaintiffs' Rule 59(e) motion did not toll the time to appeal from that decision.<sup>92</sup> The court reasoned that "costs and attorney's fees normally are collateral to the merits judgment, particularly when the judgment contemplates significant further proceedings concerning costs and attorney's fees."<sup>93</sup> The court also noted that disputes over attorney's fees "should not delay the appeal of the merits."<sup>94</sup> Thus, the court established a bright-line rule that "a Rule 59(e) motion, challenging only the award of costs and attorney's fees, does not toll the time for a merits appeal."<sup>95</sup>

In *Yost v. Stout*, the 10th Circuit extended the rationale of *Utah Women's Clinic* to motions challenging orders denying attorney's fees.<sup>96</sup> There, the district court entered a judgment on the merits and, "[i]n the last sentence of the judgment, ... *sua sponte* ordered the parties to bear their own costs and attorney's fees."<sup>97</sup> Thereafter, the prevailing plaintiff filed a Rule 59(e) motion challenging the district court's denial of fees.<sup>98</sup> The plaintiff argued that the district court should not have ruled on the fee issue until he had an opportunity to file a motion for fees, which would not have been due until 14 days after the entry of judgment.<sup>99</sup> The plaintiff attached a motion for attorney's



fees to his Rule 59(e) motion and requested that the court alter or amend its original judgment to include an award of fees.<sup>100</sup> Several months later, the district court granted the plaintiff's motion but construed it as a motion for attorney's fees under Rule 54(d) and not as a motion to alter or amend the judgment under Rule 59(e).<sup>101</sup> The plaintiff then filed a notice of appeal purporting to challenge the original judgment.<sup>102</sup> On appeal, the 10th Circuit held that the notice of appeal was untimely as to the district court's merits decision.<sup>103</sup> The court first explained that the district court did not exercise its discretion to order that the plaintiff's motion be given tolling effect under Rule 58; therefore, the motion could qualify as a tolling motion only if it could be construed as a Rule 59(e) motion to alter or amend rather than as a Rule 54(d) motion for attorney's fees.<sup>104</sup> Relying on *Utah Women's Clinic*, the court "conclude[d] that the motion concerned only a collateral issue — attorney's fees — and was properly construed as a motion brought pursuant to Rule 54(d) rather than a Rule 59(e) motion."<sup>105</sup> The court reasoned that *Utah Women's Clinic* was "not limited by its logic nor its terms to motions challenging orders granting attorney's fees, that ordinarily would contemplate further proceedings."<sup>106</sup> Instead, the court determined that "*Utah Women's Clinic* applies equally to motions challenging orders denying attorney's fees . . . that do not necessarily call for further proceedings."<sup>107</sup>

Motions relating to attorney's fees can present unique issues that do not exist with the other categories of Rule 4(a)(4)(A) motions. Issues other than those already resolved by the 10th Circuit are certain to arise in the future. As with the other types of tolling motions, however, lawyers who understand the applicable rules should be able to avoid most problems.

## CONCLUSION

Given the prevalence of post-judgment motions in civil litigation, most attorneys who practice in federal court will eventually confront a timing issue under Rule 4(a)(4). Those who take the time to understand the rule should have little trouble when such an issue arises. By contrast, those who fail to familiarize themselves with the rule run the risk of losing an appeal before it even gets started.

1. *Bowles v. Russell*, 551 U.S. 205, 209 (2007); *Alva v. Teen Help*, 469 F.3d 946, 951 (10th Cir. 2006).

2. See *Alva*, 469 F.3d 946 (dismissing appeal *sua sponte* where court's time stamp indicated that notice of appeal was filed six minutes late).

3. Fed. R. App. P. 4(a)(1)(A). Rule 4(a)(7) governs when a judgment or order is "entered" for purposes of Rule 4(a). Issues concerning the application of Rule 4(a)(7) are beyond the scope of this article.

4. Fed. R. App. P. 4(a)(4)(i)–(vi).

5. Fed. R. App. P. 4(a)(4)(A).

6. See *McDonald v. OneWest Bank, F.S.B.*, 680 F.3d 1264, 1266 (10th Cir. 2012) (treating "motion for reconsideration" as a tolling motion made under Rule 59(e) or 60 despite plaintiff's failure to cite either rule; explaining that substance of motion "plainly sought relief from the judgment"); *Warren v. Am. Bankers Ins. of Fla.*, 507 F.3d 1239, 1243–44 & n.3 (10th Cir. 2007) (observing that "the Federal Rules of Civil Procedure do not recognize that creature known all too well as the 'motion to reconsider' or 'motion for reconsideration,'" but explaining that such a motion can generally be construed as a motion made under Rule 59 or 60); see also *Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010) (treating pro se litigant's "letter asserting that he had not received the magistrate judge's report and referencing his prior pleadings that supported his claims" as a post-judgment motion that tolled the time for appeal).

7. Fed. R. App. P. 4(a)(4)(B)(i). Before the 1993 amendments to Rule 4(a), a notice of appeal filed while a tolling motion was pending was treated as a nullity, and a party was required to file a new notice of appeal after disposition of the tolling motion to perfect jurisdiction over an appeal from the original judgment. See *Wagoner v. Wagoner*, 938 F.2d 1120 (10th Cir. 1991); see also Fed. R. App. P. 4 advisory committee's note (1993) (explaining that the prior version of the rule "created a trap for the unwary" by "requir[ing] a party to file a new notice of appeal after the motion's disposition").

8. See *Warren*, 507 F.3d at 1244–45 (holding that timely Rule 59(e) motion suspended notice of appeal even though notice of appeal was filed before motion).

9. Fed. R. App. P. 4(a)(4)(B)(ii); see also *Coll v. First Am. Title Ins. Co.*, 642 F.3d 876, 885–86 (10th Cir. 2011) (holding that denial of plaintiff's post-judgment motion caused premature notice of appeal to ripen and confer appellate jurisdiction over appeal from order dismissing plaintiff's complaint, but concluding that court lacked appellate jurisdiction over appeal from order denying post-judgment motion because plaintiff failed to file second notice of appeal in time); *Laurino v. Tate*, 220 F.3d 1213, 1219 (10th Cir. 2000) (holding that grant of motion to amend caused premature notice of appeal to ripen and confer appellate jurisdiction over appeal from initial judgment imposing sanctions against plaintiff on district court's own initiative, but concluding that plaintiff's failure to file amended notice of appeal deprived court of jurisdiction over appeal from amended judgment directing that sanctions be paid to defendants).

10. Fed. R. App. P. 4(a)(4)(B)(iii).

11. Fed. R. Civ. P. 50(b), 52(b), 59(b), (d), (e).

12. Fed. R. Civ. P. 54(d)(2)(B)(i).

13. Fed. R. Civ. P. 6(b)(2).

14. 214 F.3d 1175 (10th Cir. 2000).

15. *Id.* at 1178.

16. *Id.* at 1178–81.

17. The "unique circumstances" doctrine previously allowed an appellate court to excuse an untimely notice of appeal "where a party ha[d] performed an act, which, if properly done, would [have] postponed[d] the deadline for filing his appeal and ha[d] received specific assurance by a judicial officer that this act ha[d] been properly done." *Id.* at 1179 (internal quotation marks omitted). In 2007, the Supreme Court declared the doctrine "illegitimate," reasoning that courts lack "authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

18. *Weitz*, 214 F.3d at 1180; see also *id.* at 1179 ("By asking the court for an extension that the rules expressly prohibit, the party invite[s] the ensuing error.").

19. *Id.* at 1179–81.

20. 439 F.3d 1236 (10th Cir. 2006).

21. *Id.* at 1240.

22. *Id.*

23. *Id.* at 1241.

24. *Id.*

25. *Id.*

26. 97 F.3d 434 (10th Cir. 1996).

27. *Allender*, 439 F.3d at 1240–41 (citing *Grantham*, 97 F.3d at 435).

28. *Id.* at 1241; see also *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 646–47 (10th Cir. 1991) (holding that motion for new trial was sufficiently specific to satisfy Rule 7(b) and toll the time for appeal where, "[a]lthough plaintiffs' assignments of error [were] made in general terms, they clearly state[d] the particular grounds relied on, namely the trial court's refusal to permit two particular experts to testify").

29. 697 F.3d 1252 (10th Cir. 2012).

30. *Id.* at 1258.

31. *Id.*  
 32. *Id.*  
 33. *Id.*  
 34. *Id.*  
 35. *Id.* at 1259.  
 36. *Id.*  
 37. *Id.*  
 38. 603 F.3d 842 (10th Cir. 2008).  
 39. *Id.* at 845.  
 40. *Id.*  
 41. *Id.*  
 42. *Id.* at 846.  
 43. *Id.*  
 44. *Id.*  
 45. *Id.*  
 46. *Id.* at 848.  
 47. *Id.* (citation omitted).  
 48. 639 F.3d 1025 (10th Cir. 2011).  
 49. *Id.* at 1029.  
 50. *Id.* at 1029–30.  
 51. *Id.* at 1030–32.  
 52. 659 F.3d 1276 (10th Cir. 2011).  
 53. *Id.* at 1279.  
 54. *Id.* at 1279–80.  
 55. *Id.* at 1280.  
 56. *Id.*  
 57. *Id.* at 1282.  
 58. *Id.* at 1281–82 (alteration omitted) (quoting *Vanderwerf*, 603 F.3d at 848).  
 59. *Id.* at 1282.  
 60. *Venable v. Haislip*, 721 F.2d 297, 299 (10th Cir. 1983).  
 61. *Id.*  
 62. *Id.*  
 63. *Id.*  
 64. 603 F.3d 1175 (10th Cir. 2010).  
 65. *Id.* at 1177.  
 66. *Id.* at 1178.  
 67. *Id.*  
 68. *Id.*  
 69. *Id.* at 1178–79.  
 70. *Id.* at 1178.  
 71. *Id.* at 1178–79.  
 72. *Id.* at 1179.  
 73. *Id.*  
 74. Fed. R. App. P. 4(a)(4)(A)(iii).  
 75. Fed. R. Civ. P. 58(e).  
 76. *Yost v. Stout*, 607 F.3d 1239, 1242 (10th Cir. 2010).  
 77. 807 F.2d 155 (10th Cir. 1986) (*per curiam*), *aff'd*, 486 U.S. 196 (1988). *Budinich* was decided before Rule 4(a)(4)(A) was amended to allow a district court to give a motion for attorney’s fees tolling effect. Thus, at the time of *Budinich*, motions for attorney’s fees could not toll the time to appeal from the judgment on the merits. *See id.* at 157–58. The court’s analysis of the dual motion scenario discussed in the text would still apply under the current version of Rule 4(a)(4)(A) if the district court did not order that the motion for attorney’s fees be treated as a Rule 59 motion. In such a situation, the motion for attorney’s fees would be a non-tolling motion just like the motion for attorney’s fees in *Budinich*.  
 78. *Id.* at 157.  
 79. *Id.*  
 80. *Id.*  
 81. *Id.*  
 82. *Id.* at 157–59.  
 83. *Id.*  
 84. *Id.* at 159.  
 85. *See Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1236 n.4 (10th Cir. 2000) (“Defendants contend once the district court ordered that their cross-motion for fees would have the same effect for purposes of Rule 4(a)(4) as a Rule 59 motion, the time period for filing a notice of appeal did not begin to run until all outstanding fee motions were resolved. This contention finds no support in the language of Rule 4(a)(4). Although the time period for filing a notice of appeal does not begin to run until all of the types of motions listed in Rule 4(a)(4) are resolved by the district court, fee motions qualify only if a district court under Rule 58 extends the time for appeal. Here, the district court did not order that resolution of plaintiffs’ motion for fees would extend the time for appeal. Thus, the thirty-day period for filing a notice of appeal began to run upon the resolution of the single outstanding Rule 4(a)(4) motion, i.e., defendants’ cross-motion for fees.” (citation and internal quotation marks omitted)).  
 86. 75 F.3d 564 (10th Cir. 1995).

87. *Id.* at 566.  
 88. *Id.*  
 89. *Id.*  
 90. *Id.*  
 91. *Id.*  
 92. *Id.* at 567–69.  
 93. *Id.* at 567.  
 90. *Id.* at 569.  
 90. *Id.* at 567.  
 96. 607 F.3d 1239 (10th Cir. 2010).  
 90. *Id.* at 1241.  
 90. *Id.*  
 90. *Id.*  
 100. *Id.* at 1241–42.  
 101. *Id.* at 1242.  
 102. *Id.*  
 103. *Id.* at 1242–44.  
 104. *Id.* at 1242–43.  
 105. *Id.* at 1243.  
 106. *Id.*

107. *Id.* Although the 10th Circuit has not directly addressed the issue, it is likely that the rules established in *Utah Women’s Clinic* and *Yost* would not apply if the award of attorney’s fees were not actually collateral to the merits of the case. For example, if attorney’s fees constituted compensatory damages for a particular cause of action, a motion attacking the award of fees should be deemed a challenge to the merits and should toll the time for appeal. *Cf. N. Am. Specialty Ins. Co. v. Corr. Med. Servs., Inc.*, 527 F.3d 1033, 1038–39 (10th Cir. 2008) (explaining that issue of attorney’s fees is not collateral to the merits of a case “where attorney’s fees are inseparable from the merits of plaintiff’s claim”; concluding that judgment was not final where attorney’s fees represented compensatory damages for breach-of-contract claim and district court had not yet determined amount of fees (internal quotation marks omitted)).

## ABOUT THE AUTHORS



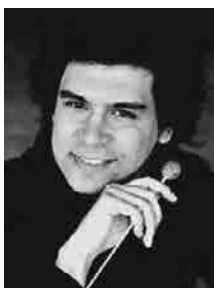
Mr. Brooks is an associate attorney at the Oklahoma City law firm Hartzog Conger Cason & Neville. His practice focuses on litigation and appeals. Mr. Brooks previously served as a law clerk to Judge David M. Ebel of the United States Court of Appeals for the 10th Circuit. Mr. Brooks received his J.D. from the University of Oklahoma College of Law, where he ranked first in his class and served as editor-in-chief of the *Oklahoma Law Review*. Mr. Brooks can be reached at mbrooks@hartzoglaw.com.



Ms. Eleftherakis is a third-year law student at Oklahoma City University School of Law. She served as a 2012 and 2013 summer associate with the firm Hartzog Conger Cason & Neville and will join the firm as an associate attorney in 2014. Ms. Eleftherakis currently works as a research assistant at OCU School of Law, serves as a staff member on the *Oklahoma City University Law Review* and is a member of OCU Merit Scholars.

# Annual Meeting HIGHLIGHTS

## Leadership Breakfast speaker announced



*José Luis  
Hernandez-  
Estrada*

This year, top off your annual meeting experience at the President's Breakfast. The guest for this event is José Luis Hernández-Estrada, classical conductor and musician, author and mentor who uses music to improve the lives of children in the Oklahoma City area. He is the executive director of El Sistema Oklahoma and teaches social action through music at

the Oklahoma City University Wanda L. Bass School of Music. Mr. Hernández-Estrada, who is still in his twenties, guest-conducts for professional as well as youth orchestras in the United States and Mexico. In addition to his speech at the breakfast, he will be bringing along a few of his students to perform for the group. Breakfast with the OBA president on Friday morning is a longstanding tradition where the OBA president puts on a unique program reflecting his or her interests. The breakfast is from 7:30 – 9 a.m.; cost is \$25.

## OBA Sections Present The Best of Oklahoma: Art, Music, Food & Wine



*Tommy Nix*

Classier than a Bruce Wayne cocktail party, this OBA section-sponsored event highlights the best of Oklahoma. If you love local, this is the place to be on Thursday evening! This event features local pianist Tommy Nix, who is the favored entertainer at the Governor's Mansion. Mr. Nix has been entertaining crowds in the Oklahoma

City area for more than 30 years. He will have CDs available for purchase at the event. More than 20 local artists and galleries will also be showing their work. Many of these artists are well-known throughout the state and have shown their artwork in New York, California and New Mexico. Art will be available for purchase at the event. Unwind

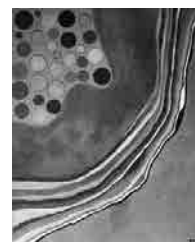


*Artwork by Barbara Scott*

from the day, meet and mingle with section leaders, and enjoy succulent hors d'oeuvres and incredible Oklahoma wines, presented by the Oklahoma Grape Industry Council.



*Artwork by Nick Hermes*



*Artwork by  
Betty Refour*

## President's Legal Superhero Reception



Not all superheroes have super powers in the traditional sense. Regular folks like Atticus Finch and Perry Mason proved to have powers of their own — astonishing integrity, spectacular honesty and a powerful work ethic — which are traits even more important than flying or honing in on Spidey senses. This year's President's Reception celebrates these legal superheroes with hors d'oeuvres, a cash bar and the chance to mingle with other OBA avengers. Reception is from 7 – 9:30 p.m., and attendance is included in registration fee. Bring a sidekick for no additional cost. Each person attending receives two beverage tickets.

### Annual Luncheon

Florida attorney Jose Baez will serve as the keynote speaker during the Annual Luncheon. As lead defense counsel in the case of Florida v. Casey Anthony, Mr. Baez upheld his professional responsibility to ensure effective counsel for his client, no matter how unpopular the accused party may be. Mr. Baez, who also teaches a class in trial techniques at Harvard Law School, shares his unique insight on the topic of "Why Casey Anthony was Found Not Guilty." The OBA will honor its own superheroes when OBA awards are presented during the Annual Luncheon, which takes place from noon - 1:45 p.m. on Thursday, Nov. 14. Cost is \$35 with Annual Meeting registration. Seating is limited, so register early!



Jose Baez

### Leadership Academy

During Annual Meeting, the 25 participants of the fourth annual OBA Leadership Academy will



attend a session aimed at developing the association's future leaders. On Thursday, Nov. 14 from 2 – 5 p.m., attendees will learn about the how the OBA works, listen to insight from former academy participants, and find out more about the Lawyers for Heroes program, Wills for Heroes, Law Day and the ABA. Social events are also planned for Wednesday and Thursday evening. On Friday morning, the Leadership Class will serve as tellers for the Board of Governors elections during the House of Delegates. Annual Meeting registration is encouraged, but not required for Leadership Academy participants.

### General Assembly & House of Delegates

The important business of the association will be conducted Friday, Nov. 15 beginning at 9 a.m. Resolutions will be voted upon, leaders will be elected and awards will be presented. Do not miss your chance to participate in the governance of your professional association. County bar presidents need to submit the names of delegates and alternates ASAP to OBA Executive Director John MorrisWilliams. The delegate certification form is online at [www.okbar.org/members/DelegateCert](http://www.okbar.org/members/DelegateCert). Either mail the form to Mr. Williams at OBA, P. O. Box 53036, Oklahoma City, OK 73152-3036, or fax to 405-416-7001.

### Registration

This year, team up with the other OBA Defenders of Liberty at their Oklahoma City Sheraton Hotel headquarters. Your registration fee includes Wednesday and Thursday super-powered breakfast in the top-secret hospitality area and Wednesday evening's President's Legal Superhero Reception. Wednesday and Thursday afternoon, if you need a break from fighting injustice, break treats will be available in the hospitality area. Fee also includes Thursday evening's OBA Sections event — The Best of Oklahoma: Art, Music, Food & Wine, a chocolate convention gift and Vendors Expo. Cape and mask are optional. Register using the form found on page 2151 or online at [www.amokbar.org](http://www.amokbar.org).

Questions? Contact Mark Schneidewent at 405-416-7026 or [marks@okbar.org](mailto:marks@okbar.org).

# Annual Meeting

## 2013 OBA Award Presentations

Congratulations to the following individuals who will be receiving OBA awards during the Annual Meeting. Expanded information about the award recipients will be published in the Nov. 2 *Oklahoma Bar Journal* and online at [www.amokbar.org/awards](http://www.amokbar.org/awards). Below is a list of this year's winners and the event at which they will receive their award.

### Law School Luncheons Wednesday, Nov. 13

#### **Outstanding Senior Law School Student Award**

OCU – Taylor Robertson, Dallas, Texas

OU – Selby P. Brown, Oklahoma City

TU – Diane Hernandez – Denver, Colo.

### Annual Luncheon Thursday, Nov. 14

#### **Earl Sneed Award**

for outstanding continuing legal education contributions

Donna J. Jackson, Oklahoma City

D. Kenyon Williams Jr., Tulsa

#### **Award of Judicial Excellence**

for excellence of character, job performance or achievement while a judge and service to the bench, bar and community

Judge Clancy Smith, Tulsa/Oklahoma City

#### **Liberty Bell Award**

for non-lawyers or lay organizations for promoting or publicizing matters regarding the legal system  
 Women's Service and Family Resource Center of El Reno

#### **Joe Stamper Distinguished Service Award**

to an OBA member for long-term service to the bar association or contributions to the legal profession  
 Steven Barghols, Oklahoma City

#### **Alma Wilson Award**

for an OBA member who has made a significant contribution to improving the lives of Oklahoma children  
 Ben Loring, Miami

#### **Neil E. Bogan Professionalism Award**

to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession  
 Reid E. Robison, Oklahoma City

#### **John E. Shipp Award for Ethics**

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

#### **Fern Holland Courageous Lawyer Award**

to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession  
 Albert J. Hoch Jr., Oklahoma City  
 David Prater, Oklahoma City  
 Micheal Salem, Norman

#### **President's Award**

(to be announced)

## **General Assembly**

### **Friday, Nov. 15**

#### **Outstanding County Bar Association Award**

for meritorious efforts and activities  
*Comanche County Bar Association*  
*Osage County Bar Association*

#### **Hicks Epton Law Day Award**

for individuals or organizations for noteworthy  
Law Day activities  
*Custer County Bar Association*  
*LeFlore County Bar Association*

#### **Golden Gavel Award**

for OBA Committees and Sections performing with a  
high degree of excellence  
*Lawyers Helping Lawyers Committee*

#### **Outstanding Young Lawyer Award**

for a member of the OBA Young Lawyers Division for  
service to the profession  
*Jennifer Castillo, Oklahoma City*

#### **Outstanding Service to the Public Award**

for significant community service by an OBA  
member  
*Molly Aspan, Tulsa*  
*Linda Scoggins, Oklahoma City*

#### **Award for Outstanding Pro Bono Service**

by an OBA member  
*William J. Doyle, Tulsa*  
*Gaylene McCallum, Bartlesville*

#### **Golden Quill Award**

best *Oklahoma Bar Journal* article (selected by  
Board of Editors)  
*Doris J. Astle, Shawnee*  
*Duane Croft, Norman*

#### **President's Award**

(to be announced)

### **Enhance the Knowledge, Skill, and Expertise You Provide Your Aging Clients!**

2013 Alzheimer's Association  
Education Conference



**4.0 Hours of  
Approved CLE  
Credits**

Program Educator:  
Jerry Shiles, Elder Law  
Attorney for  
Parman & Easterday

**Date & Time:** Nov 6th, 8:00 - 1:00 p.m.  
**Location:** Reed Conference Center  
**Fee:** \$65, breakfast and lunch provided

To learn more and to register, please visit  
[alz.org/Oklahoma](http://alz.org/Oklahoma) or call 405.319.0780

alzheimer's  association®



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your myokbar account.**

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# OBA Governance

## 2014 Transitions

### 2013 President

**James T. Stuart, Shawnee**



James T. Stuart is a partner in the Shawnee firm of Stuart, Clover, Duran, Thomas & Vorn-dran, practicing in estates and trusts, real property, oil and gas, banking, and commercial law and litigation. He graduated from Central State University in 1975 and received his J.D. from the University of Tulsa College of Law in 1978. Mr.

Stuart served on the OBA Board of Governors from 2008 to 2010, and was previously a director of the OBA Young Lawyers Division. He has served on the OBA Access to Justice, Awards, Audit, Budget and Communications Committees, and he was also a member of the Board of Editors of the *Oklahoma Bar Journal* from 2005 to 2010. He was appointed to the OBA Administration of Justice Task Force. He served on an Oklahoma Court of Appeals temporary panel in 1991 by Supreme Court appointment, and he is a Supreme Court justice of the Absentee Shawnee Tribe of Indians. He was a business law instructor at Oklahoma Baptist University. He is a past president of the Pottawatomie County Bar Association and is a member of the Oklahoma and American Bar Associations. He has been a multi-term delegate to the OBA Annual Convention. He was a director of Legal Aid of Western Oklahoma Inc. He is an OBF and ABF Fellow. Mr. Stuart was an initial organizer of Leadership Oklahoma and was a member of its Class IV. He is currently a trustee of the UCO Foundation. He has been on the boards of numerous Shawnee civic affairs and service organizations. He is a member of the Oklahoma Baptist University-Shawnee Advisory Board and a contributing member of the *Shawnee News-Star* editorial board. He and his wife, Kathy, have three daughters.

### 2014 President

**Renée DeMoss, Tulsa**



Renée DeMoss is a shareholder in the Tulsa law firm GableGotwals. She graduated *summa cum laude* from Oklahoma City University and received her J.D. from the University of Oklahoma College of Law in 1984 with honors. Her area of practice focuses on commercial litigation, ERISA, insurance law and general

business matters. She has actively been involved with and held offices in numerous organizations throughout her career, including serving as president of the Tulsa County Bar Association, the Tulsa County Bar Foundation, and the Oklahoma Bar Foundation. She currently serves on the OBA Board of Governors. Ms. DeMoss has served as chair of the TCBA Membership, Law Day and Lawyer Referral Service Committees. She has been actively involved with the Long Range Planning, Nominations and Awards, Legal Aid/Pro Bono and Community Outreach Committees. She has also served on the OBA Budget, Rules and Bylaws, Professionalism and Law School Committees. She served on the Board of Directors of the National Conference of Bar Foundation and Oklahoma Attorney Mutual Insurance Co., and is a member of the American Inns of Court, Council Oak Chapter. She received the OBF President's Award in 2003, the Mona Lambird Spotlight Award in 2007, OBA Alma Wilson Award in 2008 and the OBA Hicks Epton Law Day and ABA Outstanding Law Day Awards in 1999. Ms. DeMoss also received the TCBA President's Award in 1993, 1999, 2000 and 2010, and received the TCBA Golden Rule Award in 2011. Ms. DeMoss was recognized by the *Journal Record* in 2010 for the Women of the Year Award and in 2011 for Leadership in the Law.

## 2014 NOMINEES

### President-Elect

**David A. Poarch Jr., Norman**



Mr. Poarch currently practices with the firm of Bailey and Poarch in Norman, where he is engaged in real estate, probate and estate planning, as well as a variety of litigated matters. Mr. Poarch was born in Oklahoma City, grew up in the San Francisco Bay area and returned to Oklahoma for college and law school. Following his discharge from the U.S. Army in 1969, which included service in Vietnam as a combat medic with the 1st Cavalry Division in 1967, he received his bachelor's degree in 1973 from UCO in Edmond. He then graduated OU Law in 1977. He began his legal career as an assistant United States attorney in Oklahoma City, followed by private practice with law firms in Oklahoma City and Norman. He served as in-house general counsel and chief operating officer for a private financial services business acquired by a Fortune 500 company, and then as the assistant dean for external affairs at OU College of Law, where he served from 1997 until his retirement in 2011. While there, he directed the office of career development for law students; oversaw CLE programs for lawyers and judges and supervised the training and certification of paralegals. In addition, he taught introductory law classes to entering 1L law students, practical skills classes to second- and third- year law students and coached the law school's national trial teams in competitions. He is a member of the Oklahoma, Cleveland County and American Bar Associations as well as a past and present member of several other local bar associations. Mr. Poarch has served twice as an OBA Board of Governors member, from 2001-2003 and from 2010-2012. He is an elected member of the American Law Institute of the ABA and a fellow of both the American Bar Foundation and the Oklahoma Bar Foundation. He also serves as a member of the executive committee and master of the Luther Bohanon chapter of the American Inns of Court in Oklahoma City. In addition, he is the part-time presiding judge of the Norman Municipal Court. Mr. Poarch and his wife, Teana, live in Norman.

### Vice President

**Susan S. Shields, Oklahoma City**



Ms. Shields is a shareholder with McAfee & Taft and practices in the areas of estate and family wealth planning, estate and trust administration, business planning and charitable organizations. She earned her B.A. with honors from Stanford University in 1986 and her J.D. from the UCLA School of Law in 1989. She is a member of the

Oklahoma, Oklahoma County, California and American Bar Associations. She currently serves as president of the Oklahoma Bar Foundation. She is also currently a member of OBA Women in Law and OBA Budget Committees. Ms. Shields is a fellow of the American College of Trust and Estate Counsel and is a member of Oklahoma City Estate Planning Council and the Oklahoma Medical Research Foundation Planned Giving Council. From 2009-2012, Ms. Shields served as OBA Board of Governors Trustee. She is former chair of the OBA Estate Planning, Probate and Trust Section and former member of OBA Legal Ethics Committee. In both 2005 and 2010, she was a finalist for *The Journal Record* Woman of the Year Award. She previously served as director for both SpiritBank and Oklahoma Center for Non-Profits. In 1993, Ms. Shields received the Outstanding Pro Bono Lawyer Award from Legal Aid of Western Oklahoma; and in 2005, she received the OBA Earl Sneed Award. She will serve as director of Oklahoma County Bar Association from 2014-2016 and has been a frequent speaker on a variety of estate planning, probate and non-profit topics for OBA CLE seminars and at other seminars. She has also served as adjunct professor in estate planning at the OU College of Law.

## **Supreme Court Judicial District Two**

### **Kevin T. Sain, Idabel**



Mr. Sain is a sole practicing attorney in the areas of personal injury and wrongful death in Oklahoma and Arkansas. Mr. Sain received his law degree in 1998 from the Oklahoma City University School of Law and has been admitted to the Eastern District of Oklahoma, Eastern and Western Districts of Arkansas and Eastern District of Texas

federal courts. He has served as president of the McCurtain County Bar Association since 2005 and is a member of the Oklahoma Bar Association, Oklahoma Association for Justice and the Arkansas Trial Lawyers Association. He and his wife, Krista, have two sons, Kolton and Karson, and they reside in Idabel. Mr. Sain is devoted to serving the citizens in this area, not only through his law practice, but also as an active participant in his community. He is a licensed auctioneer and has led numerous charity auctions for individuals, churches and other organizations, including Oklahoma City University School of Law and the Oklahoma Bar Association's Lawyers Helping Lawyers program. He was instrumental in forming the Idabel Warrior Club, which benefits children of all ages. In 2013, he received the Oklahoma Education Association Glenn Snider Human Relations Award for his dedication and support of Idabel Public Schools.

## **Supreme Court Judicial District Eight**

### **James R. Marshall, Shawnee**



Mr. Marshall is a partner at Henson & Marshall PLLC in Shawnee. His main areas of practice include estate planning, real property and commercial law. He and his wife, Karen Henson, have practiced law together in Shawnee since 1983 and have two adult children, Kimberly and Scott. Mr. Marshall was born into a military

family in 1950 in Germany, and graduated from Baumholder American High School in Baumholder, Germany in 1968. He received his undergraduate degree from OU in 1972, where he was a member of Phi Beta Kappa, and he received his master's degree in 1976 from Creighton University. He then obtained his law degree from the OU College of Law in 1979, where he was an editor on the *Oklahoma Law*

*Review*. Mr. Marshall is a former U.S. Air Force Military Intelligence Officer. After graduating law school, he served as an active duty Air Force JAG from 1979 to 1983. He continued his service as an Air National Guard judge advocate from 1983 through 2006, retiring as a brigadier general. During that time he served as senior ANG judge advocate at Air Mobility Command and Air Combat Command, overseeing Air National Guard attorneys in those commands, worldwide. He provided oversight post-September 11, 2001, in those commands on issues including training, mobilization, deployment, and operational law. Mr. Marshall is involved at the national and community level, serving as a trustee of the Air Force Judge Advocate General's School Foundation and is a past president of the Pottawatomie County Bar Association, past president and current member of the Shawnee Lion's Club and a former district chairman of the Boy Scouts.

## **Supreme Court Judicial District Nine**

### **John W. Kinslow, Lawton**



Mr. Kinslow was born in Okemah and raised in Cromwell, Wewoka and Shawnee. He graduated from Shawnee High School in 1959, Oklahoma Baptist University in 1963 and the OU College of Law in 1965. He has practiced law in Tulsa, Oklahoma City and Lawton. Mr. Kinslow taught one year at Baylor University Law School and

also served in the Judge Advocate General's Corps of the U.S. Army. He has also served as chair of the OBA Clients' Security Fund and president of the Comanche County Bar Association. Mr. Kinslow is married to Carolyn Lindsey Kinslow, who is director for the Cameron University Center of Writers. Mr. Kinslow has four children, Andrew, Matthew, Rebecca and Philip, and two grandsons, Ethan and Dail. He has authored numerous law articles and his hobbies include stone carving, photography, hiking and camping, studying and speaking about Oklahoma history and hanging out with the grandsons. He is an active leader in the Lawton community and in his church.

## CONTESTED ELECTION

### Member-at-Large Deirdre O'Neil Dexter, Sand Springs



Ms. Dexter has practiced law in the Tulsa area since 1984, after graduating from the OU College of Law. Ms. Dexter serves as an arbitrator, special master/discovery referee and mediator and also represents clients in employer-employee disputes. Ms. Dexter is an active member of the Tulsa County Bar Association and served on the board and executive committee for many years in a variety of capacities, including as president of the TCBA in 2009-2010. She is a member of the Tulsa County Bar Foundation Board of Directors and served as president in 2012-2013. She has also served as Tulsa County Law Day chair, Bench & Bar Committee chair and Children & the Law chair. She has served as vice-chair and chair of the OBA Women in Law Committee in 2011 and 2012, the OBA Awards Committee in 2013 and is currently a member of the OBA Professional Responsibility Tribunal. Ms. Dexter has also served on the Oklahoma Bar Foundation and is a Fellow of both the OBF and the TCBF. She is a former trial judge in Tulsa County and has served as city attorney for the city of Tulsa. She has presented continuing legal education topics on ethics and various employment law and litigation topics. Ms. Dexter received the Mona Salyer Lambird Spotlight Award in 2009.

### Jon D. Starr, Tulsa



Mr. Starr has practiced law in Tulsa for 22 years. He received his bachelor's from Oklahoma State University where he was president of the Student Government Association. He received his J.D. from the OU College of Law in 1991 with distinction and served as class president. He has tried more than 100 cases to jury verdict, made oral

arguments before the Tenth Circuit Court of Appeals and does work as a mediator and arbitrator with Mediators and Arbitrators of Oklahoma. He has served as Chairperson of the OBA Insurance Law Section for eight years. He has helped organize as well as speak at numerous CLE programs. He provides regular "new case law alert" emails for the OBA Section members. Mr. Starr is an advocate with the American Board of Trial Advocates. He has served as a board member and president of the Oklahoma Association of Defense Counsel, the Oklahoma representative to the Defense Research Institute for three years and as a faculty member for the International Association of Defense Counsel Trial Academy at Stanford University. He has authored three scholarly articles that have been published in the *Oklahoma Bar Journal*, including "Attorney Lien Claimed: Is it Worth Paper it is Written On?," "Some Major Points about Minor's Claims," and "Overview of Oklahoma Automobile Insurance Law." Mr. Starr also serves on the board of Plumblin Ministries Inc., a Christian counseling ministry, and is an active member of Church on the Move in Tulsa.

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Your source for OBA news.



At Home



At Work



And on the Go

# OBA Nominating Petitions

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

## OFFICERS

### PRESIDENT-ELECT

**DAVID A. POARCH JR., NORMAN**

Nominating Petitions have been filed nominating David A. Poarch Jr. for election of President Elect of the Oklahoma Bar Association Board of Governors for a one-year term beginning Jan. 1, 2014.

A total of 203 signatures appear on the petitions.

Nominating Resolutions have been received from the following counties: Cleveland, Garfield, Love and Pottawatomie

### VICE PRESIDENT

**SUSAN S. SHIELDS, OKLAHOMA CITY**

Nominating Petitions have been filed nominating Susan S. Shields for election of Vice President of the Oklahoma Bar Association Board of Governors for a one-year term beginning Jan. 1, 2014.

A total of 136 signatures appear on the petitions.

## BOARD OF GOVERNORS

### SUPREME COURT JUDICIAL DISTRICT No. 2

**KEVIN T. SAIN, IDABEL**

Nominating Petitions have been filed nominating Kevin T. Sain for election of Supreme Court Judicial District No. 2 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2014.

A total of 35 signatures appear on the petitions.

Nominating Resolutions have been received from the following county: McCurtain

### • SUPREME COURT JUDICIAL DISTRICT No. 8

• **JAMES R. MARSHALL, SHAWNEE**

• Nominating Petitions have been filed nominating James R. Marshall for election of Supreme Court Judicial District No. 8 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2014.

• A total of 29 signatures appear on the petitions.

• A Nominating Resolution has been received from the following county: Pottawatomie

### • SUPREME COURT JUDICIAL DISTRICT No. 9

• **JOHN W. KINSLOW, LAWTON**

• Nominating Petitions have been filed nominating John W. Kinslow for election of Supreme Court Judicial District No. 9 of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2014. A total of 44 signatures appear on the petitions.

### • MEMBER-AT-LARGE

• **DEIRDRE O'NEIL DEXTER, SAND SPRINGS**

• Nominating Petitions have been filed nominating Deirdre O'Neil Dexter for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning Jan. 1, 2014.

• A total of 170 signatures appear on the petitions.

• **JON D. STARR, TULSA**

• Nominating Petitions have been filed nominating Jon D. Starr for election of Member at Large of the Oklahoma Bar Association Board of Governors for a three-year term beginning January 1, 2014.

• A total of 69 signatures appear on the petitions.

# Annual Meeting House of Delegates

Dear County Bar Presidents:

Thank you to the County Bar Presidents of:

Adair, Alfalfa, Beaver, Beckham, Bryan,  
 \*\*Canadian, Carter, Cherokee, Choctaw, Cleve-  
 land, Coal, Comanche, Cotton, \*\*Craig, Creek,  
 Custer, Dewey, Ellis, Garfield, Garvin, Grady,  
 Grant, Harper, Johnston, Kay, Kingfisher, Kiowa,  
 LeFlore, Logan, Love, Mayes, McClain, McCurtain,  
 McIntosh, Muskogee, Noble, Oklahoma, Ottawa,  
 Pawnee, Payne, Pittsburg, Pontotoc, Pushmataha,  
 Rogers, Seminole, Texas, Tulsa, Wagoner, Wash-  
 ington, Washita, Woods and Woodward counties  
 for submitting your delegate and alternate selec-  
 tions for the upcoming OBA Annual Meeting.  
 (\*\*Reported, awaiting election)

Listed below are the counties that have not sent  
 their delegate and alternate selections to the offices  
 of the Oklahoma Bar Association as of **Sept. 18,  
 2013**. Please help us by sending the names of your  
 delegates and alternates now. *In order to have your  
 delegates/alternates certified, mail or fax delegate  
 certifications to OBA Executive Director John Morris  
 Williams, P.O. Box 53036, Oklahoma City, OK  
 73152-3036, or fax 405-416-7001.*

Atoka	Jackson	Okmulgee
Blaine	Jefferson	Osage
Caddo	Latimer	Pottawatomie
Cimarron	Lincoln	Roger Mills
Delaware	Major	Sequoyah
Greer	Marshall	Stephens
Harmon	Murray	Tillman
Haskell	Nowata	
Hughes	Okfuskee	

- In accordance with the Bylaws of the Oklahoma
- Bar Association (5 OS, Ch. 1, App. 2), "The
- House of Delegates shall be composed of one del-
- egate or alternate from each County of the State,
- who shall be an active or senior member of the
- Bar of such County, as certified by the Executive
- Director at the opening of the annual meeting; pro-
- viding that each County where the active or senior
- resident members of the Bar exceed fifty shall be
- entitled to one additional delegate or alternate for
- each additional fifty active or senior members or
- major fraction thereof. In the absence of the elect-
- ed delegate(s), the alternate(s) shall be certified to
- vote in the stead of the delegate. In no event shall
- any County elect more than thirty (30) members to
- the House of Delegates."

- "A member shall be deemed to be a resident, ...
- of the County in which is located his or her mailing
- address for the Journal of the Association."

## RESOLUTION DEADLINE

- OBA Bylaws Ch. 1, App. 2, Article VIII, Sec.
- 6 state "Before a proposal to place a measure
- upon the Legislative Program or to endorse it in
- principle is submitted to vote, by any method, it
- shall be published in at least one issue of the
- Journal of the Oklahoma Bar Association and
- posted on the OBA website, prior to the begin-
- ning of the Annual Meeting, together with a
- notice that it will be submitted to vote, specifying
- date, time, place and manner." A proposal must
- be sent in bill format to Executive Director John
- Morris Williams by Monday, Nov. 4, 2013, for
- publication in the *Oklahoma Bar Journal* Nov. 9,
- 2013, issue. **For resolutions to receive a**
- **recommendation from the Board of Gover-**
- **nors, a proposal must have been received**
- **by Sept. 25, 2013. For resolutions to be**
- **published in the official General Assembly**
- **& House of Delegates publication, a pro-**
- **posal must be received by Oct. 28, 2013.**



	<b>Juvenile/Criminal Law Track</b> Qualifies for 6 hrs. juvenile law training per 10 A.O.S. Sec. 1-8-10(B)1 Ben Brown Gail Stricklin	<b>Health Law Track</b>  Cori Loomis	<b>Recent Developments</b>  Travis Pickens	<b>Technology Track</b>  Jim Calloway
<b>9-9:50</b>	<b>Fundamentals of the Indian Child Welfare Act (ICWA)</b>  Kelly Stoner	<b>2013 A Year in Review A Fast and Furious Review of This Year's Top Developments</b> cosponsored by the Health Law Section  Karen Rieger Cori Loomis		<b>PDF Tips and Tricks That Will Change Your Practice</b>  Bret Burney Jim Calloway
<b>10-10:50</b>	<b>The Trauma Informed Attorney</b>  Jackie Steyn	<b>Licensure Board Issues: Update on Rules and Navigating Disciplinary Proceedings</b>  Kim Stevens, RN, JD Elizabeth Scott	<b>Criminal Law Update</b>  Barry Derryberry Andrea Miller	<b>How to Use Technology to Market Your Law Practice</b>  Bret Burney Jim Calloway
<b>11-11:50</b>	<b>Best Practices for Show Cause Hearing: Balancing Needs of Child with Rights of Parents</b> Panel TBD Judge Warren Hollis officiating	<b>Health Care Reform Update</b>  Kim Holland <i>Session sponsored by Oklahoma Health Lawyers Association</i>	<b>Family Law Update</b>  Professor Robert G. Spector	<b>iLitigate on an iPad</b>  Bret Burney Jim Calloway
<b>2-2:50</b>	<b>Ethics</b>  Ben Brown Tsinena Thompson	<b>Advanced Stark and AKS Compliance: Case Studies and Hypotheticals</b> Elizabeth Tyrrell Greg Frogge Pat Rogers	<b>Employment Law Update</b>  David Strecker	<b>50 Hot Technology Tips in 50 Minutes</b>  Bret Burney Jim Calloway
<b>3-3:50</b>	<b>Expungement</b>  Dave Stockwell	<b>HIPAA and Health Information Exchange: Big Data, Big Issues</b>  Teresa Burkett	<b>Insurance Law Update</b>  Rex Travis	<b>21st Century Ethics and Technology – Cloud Services and Mobile Devices (Ethics)</b>  Bret Burney Jim Calloway
<b>4-4:50</b>	<b>DUI</b>  Charles Sifers	<b>Health Care Litigation Update: Impact of Oklahoma SCT Decision on Lawsuit Reform and Provider Liability</b>  John Wiggins	<b>Civility Matters (Ethics)</b>  Bill Grimm Dan Folluo John Woodard Gary Homsey G. Calvin Sharpe Ed Cunningham J. Michael Gassett	<b>50 Hot Technology Tips in 50 Minutes</b>  Bret Burney

# Program of Events

*All events will be held at the Sheraton Hotel unless otherwise specified.  
 Submit meeting room and hospitality suite requests to Craig Combs at [craigc@okbar.org](mailto:craigc@okbar.org).  
 Submit meeting program information to Lori Rasmussen at [lorir@okbar.org](mailto:lorir@okbar.org).*

## WEDNESDAY, NOVEMBER 13

Oklahoma Fellows of the  
American Bar Foundation ..... 7:30 – 9 a.m.

OBA Registration ..... 8 a.m. – 5 p.m.

OBA Hospitality ..... 8 a.m. – 5 p.m.

Board of Bar Examiners ..... 8:30 – Noon

OBA/CLE Seminar ..... 9 – 11:50 a.m.

*See seminar program for speakers  
and complete agenda*

Health Law  
 Juvenile/Criminal Law  
 Recent Developments  
 Technology

OU College of Law  
 Alumni Reception  
 and Luncheon ..... Noon – 1:30 p.m.  
*Skirvin Hotel*

OCU School of Law  
 Alumni Reception  
 and Luncheon ..... Noon – 1:30 p.m.

TU College of Law  
 Alumni Reception  
 and Luncheon ..... Noon – 1:30 p.m.

OBA Health Law  
 Section Luncheon ..... Noon – 1:30 pm

OBA Criminal Law Section  
 Luncheon ..... Noon – 1:30 pm

OBA Board of Governors Meeting ..... 2 – 4 p.m.

Legal Ethics Committee ..... 4:30 – 6 p.m.

OBA Health Law Section Reception ..... 5 – 6 p.m.

President's Legal Superheroes  
 Reception ..... 7 – 9:30 p.m.  
*(Free for everyone with  
meeting registration)*



## THURSDAY, NOVEMBER 14

OBA Lawyers Helping Lawyers  
 Assistance Program Committee ..... 7:30 – 9 a.m.

American College of  
 Trial Lawyers ..... 8 – 9:30 a.m.

American College of Trust  
& Estate Counsel.....8 – 9:30 a.m.

OBA Registration ..... 8 a.m. – 5 p.m.

OBA Hospitality..... 8 a.m. – 5 p.m.

OBA Family Law Section ..... 8 a.m. – 5:15 p.m.

Annual Insurance, Tort &  
Workers' Compensation  
Update ..... 8:30 a.m. – 4:30 p.m.

OBA Credentials Committee.....9 – 9:30 a.m.

OBA/CLE Plenary Session .....9 – 11:40 a.m.

CLE Commission .....9:30 – 10:30 a.m.

OBA Rules and Bylaws  
Committee..... 10 – 10:30 a.m.

OBA Resolutions Committee ... 10:45 – 11:45 a.m.

OBA Annual Luncheon  
for Members, Spouses  
and Guests.....Noon – 1:45 p.m.  
(\$35 with meeting registration)

Featuring:



**Jose Baez**  
The Baez Law Firm  
Coral Gables  
& Orlando, Fla.

TOPIC: *Why Casey Anthony was Found  
Not Guilty*

OBA Law Schools Committee .....2 – 3 p.m.

OBA Board of Editors.....2 – 3:30 p.m.

OBA Bankruptcy and  
Reorganization Section.....2 – 4 p.m.

Oklahoma Criminal Defense  
Lawyers Association .....2 – 4 p.m.

OBA Real Property Law Section.....2 – 4 p.m.

OBA Leadership Academy .....2 – 6 p.m.

OBF Executive Committee .....2:30 – 3:30 p.m.

OBA Law Office Management  
and Technology Section.....4 – 6 p.m.

OBF Fellows Reception .....5:30 – 7 p.m.

OBA Energy and Natural  
Resources Law Section.....6:30 – 7 p.m.

OBA Sections Present –  
The Best of Oklahoma:  
Art, Music, Food & Wine.....7 – 9 p.m.  
(Annual Meeting registration not required  
for admission)



Artwork by Nick Hermes

## FRIDAY, NOVEMBER 15

President's Breakfast .....7:30 – 9 a.m.  
(\$25 with meeting  
registration)

Oklahoma Bar Association  
General Assembly.....9 – 10 a.m.

Oklahoma Bar Association  
House of Delegates ..... 10 a.m. – Noon  
*Election of Officers & Members  
of the Board of Governors  
Approval of Title Examination Standards  
Resolutions*



# 2013

## OBA ANNUAL MEETING REGISTRATION

Please complete a separate form for each registrant.

Name \_\_\_\_\_

Email \_\_\_\_\_

Badge Name (if different from roster) \_\_\_\_\_ Bar No. \_\_\_\_\_

Address \_\_\_\_\_

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

Name of Non-Attorney Guest \_\_\_\_\_

Please change my OBA roster information to the information above. ☐ Yes ☐ No

### Check all that apply:

- ☐ Judiciary ☐ OBF Past President ☐ OBA Past President
- ☐ YLD Officer ☐ YLD Board Member ☐ YLD Past President
- ☐ Board Bar Examiner ☐ OBF Fellow
- ☐ 2013 OBA Award Winner ☐ Heroes Program volunteer
- ☐ Delegate ☐ Alternate ☐ County Bar President:

County \_\_\_\_\_

### ☐ **YES! Register me for the 2013 Annual Meeting, November 13-15 in OKC. Registration fee includes:**

Wednesday & Thursday continental breakfast in hospitality area

President's Reception • Wednesday & Thursday afternoon break treats in hospitality area

OBA Sections Present The Best of Oklahoma: Art, Music, Food & Wine

Chocolate convention gift • Vendors Expo

☐ MEMBER: ☐ \$60 through Oct. 21; \$85 after Oct. 21 .....\$ \_\_\_\_\_

☐ NEW MEMBER (Admitted after Jan. 1, 2013): ☐ Free through Oct. 21; \$25 after Oct. 21 ...\$ \_\_\_\_\_

### REGISTER

☐ **BY MAIL** with payment or credit card information to:  
OBA Annual Meeting  
P.O. Box 53036  
Okla. City, OK 73152

☐ **FAX** with credit card information to:  
(405) 416-7092

☐ **ONLINE** at [www.amokbar.org](http://www.amokbar.org)

**CANCELLATION POLICY** - Full refunds will be given through Nov. 6, 2013. No refunds will be issued after that date.

## HOTEL ACCOMMODATIONS:

Fees do not include hotel accommodations. For reservations call Sheraton Hotel at 405-235-2780.  
Call by Oct. 21 and mention "Oklahoma Bar Association 2013" for a special room rate of \$102 per night.  
To make reservations online, visit [www.starwoodmeeting.com/Book/OKBarAssociation2013](http://www.starwoodmeeting.com/Book/OKBarAssociation2013)  
For hospitality suites, contact Craig Combs at 405-416-7040 or email: [craigc@okbar.org](mailto:craigc@okbar.org).

### I will be attending the free event(s) included in my registration fee:

- ☐ Wednesday President's Reception
- ☐ OBA Sections Present The Best of Oklahoma: Art, Music, Food & Wine

### I will be attending the following ticketed events in addition to my registration fee:

- ☐ Wednesday: CLE Multitrack only, 6 MCLE hours (\$125 through Oct. 21; \$150 after Oct. 21; \$25 for new members through Oct. 21; \$50 after Oct. 21) ..... \$ \_\_\_\_\_
- ☐ Wed. & Thurs.: CLE Multitrack and Plenary 9 MCLE hours (\$175 through Oct. 21; \$200 after Oct. 21; \$50 for new members through Oct. 21; \$75 after Oct. 21) ..... \$ \_\_\_\_\_
- ☐ Thursday: CLE Plenary only, 3 MCLE hours (\$75 through Oct. 21; \$100 after Oct. 21; \$25 for new members through Oct. 21; \$50 after Oct. 21) ..... \$ \_\_\_\_\_
- ☐ Thursday: Annual Luncheon (\_\_\_\_\_ number of tickets @ \$35 each) ..... \$ \_\_\_\_\_
- ☐ Friday: President's Breakfast (\_\_\_\_\_ number of tickets @ \$25 each) ..... \$ \_\_\_\_\_

### I will be attending the following ticketed events that do NOT require Annual Meeting registration:

- ☐ Wednesday: Law School Luncheon ☐ OCU ☐ OU ☐ TU  
(\_\_\_\_\_ number of tickets @ \$35 each) ..... \$ \_\_\_\_\_

**TOTAL COST (including front and back page of Registration Form) \$ \_\_\_\_\_**

## PAYMENT OPTIONS:

- ☐ Check enclosed: Payable to Oklahoma Bar Association
- Credit card: ☐ VISA ☐ Mastercard  
☐ Discover ☐ American Express

Card # \_\_\_\_\_ Exp. Date \_\_\_\_\_

Authorized Signature \_\_\_\_\_

## QUESTIONS?

Contact Mark Schneidewent  
at 405-416-7026; 800-522-8065  
or [marks@okbar.org](mailto:marks@okbar.org).

# 2013 Mona Salyer Lambird Spotlight Award Recipients

By Deborah J. Bruce

Since 1996, the Spotlight Awards have been given annually to five women who have distinguished themselves in the legal profession and who have lighted the way for other women. In 1998 the award was renamed to honor the late Mona Salyer Lambird, the first female president of the Oklahoma Bar Association, and one of the award's first recipients. The award is sponsored by the OBA Women in Law Committee. Each year all previous winners nominate and select the current year's recipients. A plaque bearing the names of all recipients hangs in the Oklahoma Bar Center in Oklahoma City. The 2013 recipients are:

## Leslie V. Batchelor

Leslie V. Batchelor is president and co-founder of the Center for Economic Development Law, which focuses on the representation of local governments in major development activities. Ms. Batchelor is nationally recognized for her expertise in public-private partnerships, tax increment financing techniques and other



redevelopment and financing strategies. Among her major projects are the Skirvin Hotel restoration, the Dell Computer campus on the Oklahoma River, the Devon Tower and the John Rex Elementary School. A native of Oklahoma City, she served as a senior official in the Justice Department from 1997-2000, including as deputy associate attorney general and counsel to Attorney General Janet Reno. Since returning to Oklahoma, she has served as the leader of a number of civic and professional organizations, including chair of the Urban Land Institute for Oklahoma, president of the Oklahoma County Bar Foundation and president of Historic Preservation, Inc. She is a member of the board of visitors of the University of Oklahoma Honors College and the board of directors of i2E.

## Gayle Freeman Cook

For the past 32 years, Gayle Freeman Cook has been an attorney/partner with Monnet, Hayes, Bullis, Thompson & Edwards. Her practice emphasis is in trusts, estates and succession planning, as well as corporate trustee distributions of oil, gas, mineral and leasehold assets in numerous states. She formerly served as law clerk to Presiding Judge Tom R. Cornish, Court of Criminal Appeals. She also served as a law clerk to Supreme Court Justice Don Barnes. Ms. Cook is a frequent speaker for the bar association and other entities on a variety of estate planning and probate topics. She is a member of

the OBA and the Oklahoma County Bar Association where she has served on so many committees space does not permit their mention. She was one of 10



attorneys selected for Oklahoma Medical Research Foundation's Planned Giving Council. She has served on the board of directors of Lyric Theater of Oklahoma since 1978. She is a charter member and master of the bench for the Robert J. Turner American Inn of Court. In 2013 she was named a top-rated attorney in the *Distinctly Oklahoma* magazine.

## Ann Domin

Ann Domin began her professional career as a police officer for the Tulsa Police Department. After obtaining her law degree, she worked at Indian Nations Council of Governments (INCOG) as legal advisor. INCOG is a regional governmental planning agency covering five Oklahoma counties. It provides transportation, environmental, public safety, community, economic development, aging and





land use planning services to its many municipal and county members. She joined the Tulsa County District Court as its court administrator in 2000 where she worked with judges and court staff to ensure that the courts ran smoothly. In 2008, she went back to INCOG as the deputy director responsible for administrative functions. Ms. Domin is a member of the OBA and the Tulsa County Bar Association where she has served as a board member, treasurer and chair of the Bench and Bar Committee. She serves as a board member and chair of the Governance Committee of the Hillcrest Institutional Review Board and the Family Safety Center. She also serves as vice president of the board of the Community Service Council of Metropolitan Tulsa.

#### **Karen E. Langdon**

Since 2005, Karen Langdon has served Legal Aid Services of Oklahoma in Tulsa as the pro bono coordinator. She has had a wide and varied legal career including assistant general counsel for BlueCross BlueShield of Oklahoma law clerk to U.S. Magistrate John Leo Wagner, interim assistant dean for the TU School of Law and has practiced as an



associate for several Tulsa law firms including Riggs, Abney, James R. Gotwals and Marsh & Armstrong. She is active with both the OBA and Tulsa County Bar Association. She was an administrator for the Council Oak Chapter of the American Inn of Court. Ms. Langdon was in the Leadership Tulsa Class 21 and Leadership Oklahoma Class 11. She first published an article for the *Oklahoma Bar Journal* in 1987 and has written many articles since. She was awarded the OBA's Golden Quill Award. She also shared her expertise by teaching at several Tulsa colleges. She was named to the TU College of Law Hall of Fame, was a nominee for the Leadership Tulsa Paragon Award and was the recipient of the TCBA Golden Rule Award. In three different years, Ms. Langdon was recognized as *The Journal Record* Woman of the Year.

#### **Dynda Rose Post**

Since 1995, Dynda Post has been the district judge for Mayes, Craig and Rogers counties. Previously she has served as a special judge, assistant district attorney and city attorney. She is a registered member of the Cherokee Tribe. Her activities and hon-



ors take up several single spaced pages. She has served as president of both the Mayes and Rogers county bar associations. She has served on the executive board of the Oklahoma Judicial Conference, the Criminal Recodification Task Force, the Juvenile Law Task Force, the Juvenile Justice Committee and the Child Abuse Prevention Task Force. She has been a continuous instructor for OBA/CLE, the D.A.'s Association, Council on Law Enforcement Education and Training, Oklahoma Foster Parents, the Court Appointed Special Advocate Association (CASA), the New Judges Academy and the Oklahoma Judicial Conference. She has served as president and judge master for the Council Oak Chapter, American Inns of Court. Judge Post was named the Oklahoma Judge of the Year by CASA, the Community Advocate for Children by the Cherokee Nation, the Judge of the Year by Bikers Against Child Abuse and was the recipient of the OBU Profile in Excellence Award from her alma mater.

*Ms. Bruce is a member of the OBA Women in Law Committee.*

# Diversity Committee to Present Annual Awards

By Kara I. Smith

## OBA Diversity Conference Oct. 24 • 9 a.m. – 1:30 p.m. Jim Thorpe Event Center, Oklahoma City

The Diversity Committee, with the support of OBA President Jim Stuart, will again be recognizing individuals and organizations that promote diversity efforts and call attention to the need for tolerance and diversity awareness.

With the sponsorship of the OBA/CLE Department, the committee is set to host its second annual Diversity Awards Luncheon and CLE. The event will feature Travis A. Williams, a young attorney featured in the HBO documentary film *Gideon's Army*, who has worked as a public defender for more than five years. *Gideon's Army* follows a group of young public defenders in the Deep South who contend with low pay, long hours and staggering caseloads to represent the poor. Mr. Williams will be the keynote presenter at the CLE where he will dive deep into the discussion of the deficiencies of the American criminal justice system and what it takes to maintain the passion and commitment to be a public defender.

Following his presentation, Mr. Williams will participate in a panel discussion focusing on the Oklahoma perspective

on these topics. Also participating are Susan Otto, federal public defender for the Western District of Oklahoma; James Rowan, Oklahoma City criminal defense attorney and past assistant public defender in Oklahoma County; and Sharon Holmes, Tulsa criminal defense attorney and past Tulsa County assistant district attorney.

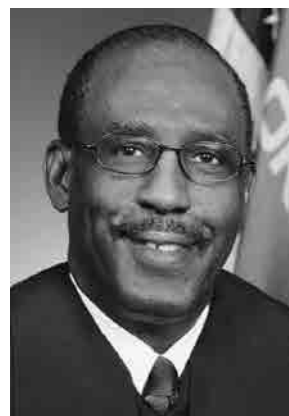
The event will conclude with the Diversity Awards Luncheon beginning at noon. Six individuals and organizations will be honored with Ada Lois Sipuel Fisher Diversity Awards in recognition of their efforts in promoting diversity in Oklahoma.

This event will be held Oct. 24 at the Jim Thorpe Association and Oklahoma Sports Hall of Fame Event Center, 4040 N. Lincoln Blvd., Oklahoma City. Registration opens at 8:30 a.m., and the conference begins at 9 a.m. Cost for the CLE and the luncheon is \$120; attending the luncheon only is \$40. An extra \$25 will be added beginning Oct. 18. More details and online registration are available at [www.okbar.org/members/CLE/2013/2013DiversityConf](http://www.okbar.org/members/CLE/2013/2013DiversityConf).

### ADA LOIS SIPUEL FISHER DIVERSITY AWARD RECIPIENTS

*Member of the Judiciary:*

**Justice Tom Colbert**



On Jan. 1, 2013, Justice Tom Colbert made Oklahoma history by becoming the first African-American to serve as chief justice of the Oklahoma Supreme Court. He also holds the distinction of being the first African-American vice-chief justice of the Oklahoma Supreme Court and the first African-American to serve on the court. Before his ascension to the high court, he was the first African-American to serve on the Oklahoma Court of Civil Appeals and was also

elected by his fellow judges to serve as chief judge of that court. He is a frequent speaker to all levels of education. He also participates in a summer reading program for children as well as a mentoring program for young men that includes track and field instruction.

*Attorneys:*

### **Melvin C. Hall**



Melvin C. Hall of Oklahoma City is a shareholder with the Riggs Abney Law Firm and has dedicated his career to the study, education and protection of human rights. He concentrates his practice on employment law and federal civil litigation. In addition to his law practice, Mr. Hall is a frequent speaker and lecturer on employment law and civil rights issues. He is an adjunct professor at the University of Oklahoma teaching classes regarding employment law and the civil rights movement. He has received numerous awards and honors, including the A.C. Hamlin Tribute of Appreciation and Commendation from the Oklahoma Legislative Black Caucus. The University of Oklahoma and Langston University have created scholarships in his name that are awarded annually to students who exemplify lead-

ership and aspire to become lawyers. He has received the Trailblazers Award from the University of Oklahoma Black Alumni Society and the Distinguished Alumnus Award from Langston University.

### **Danny C. Williams Sr.**



Danny C. Williams Sr. is the U.S. attorney for the Northern District of Oklahoma. He was nominated by President Barack Obama on March 29, 2012, to serve as the top federal law enforcement official in the Northern District. Mr. Williams is committed to the creation of a vibrant, diverse working environment. He has been honored by the Black Lawyer's Association, the University of Tulsa and a number of other organizations for his accomplishments and the new vigor and enthusiasm he has brought to the U.S. Attorney's Office. His uncle, Judge Carlos Chappelle, first persuaded him to come to Tulsa and attend the University of Tulsa Law School. Though he was discouraged by the display of pictures of all law students — which exhibited a lack of diversity amongst his peers — Mr. Williams persevered. And not only did he make his way through law school, he prospered, making lifelong connections and bringing the kind of

diversity he wanted to see to the legal community in Tulsa.

*Businesses/Organizations*

### **Fellers Snider**



The Fellers Snider law firm, with offices in Oklahoma City and Tulsa, has demonstrated a commitment to cultivating a workplace that promotes diversity and inclusion. The law firm believes diversity in backgrounds, experiences and ideas enrich its workplace experience and enhances the quality of the professional services it provides to its clients. By recruiting, retaining, developing and promoting a diverse group of lawyers and staff, the firm advances the interests of its clients, practice and the legal profession. It is dedicated to providing opportunities wherein attorneys and staff can reach their fullest potential.

### **Muscogee (Creek) Nation Family Violence Prevention Program**



The Muscogee (Creek) Nation Family Violence Prevention Program is recognized because it is an extraordinary group dedicated to working around the clock to assist any victim of family violence within their jurisdiction. They are available 24 hours a day, providing services such as relocation and transportation assistance, assistance filing protective orders and provid-

ing legal representation when necessary. They provide equipment and training to law enforcement to better enable them to respond to and investigate crimes. The program also focuses on education and prevention of domestic violence through awareness programs in schools. Program staffers recently participated in efforts to advocate the passage of the Violence Against Women Reauthorization Act. This act strengthens the protection provided to women who are victims of domestic violence. In addition to sup-

port rallies, the group organized a 36-mile relay run to urge Congress to renegotiate provisions in order to add protection for minority victims.

#### Oklahoma Policy Institute



**OKPOLICY.ORG**

Oklahoma Policy Institute

Oklahoma Policy Institute (OK Policy) is a non-partisan think tank that was launched in early 2008. It grew out of work previously conducted out of the public policy department of Community

Action Project of Tulsa County. OK Policy promotes adequate, fair and fiscally responsible funding of public services and expanded opportunity for all Oklahomans by providing timely and credible information, analysis and ideas. It is the mission of OK Policy Institute to promote prosperity for all Oklahomans no matter their background or socioeconomic status. OK Policy focuses on five policy areas – immigration, education, budget and taxes, asset opportunity, healthcare and criminal justice reform.

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

Tell us on Facebook!

[www.facebook.com/oklahomabarassociation](http://www.facebook.com/oklahomabarassociation)



# OBA Day of Service Reaches Across the State

Because of the OBA Day of Service, a police officer in Stillwater now has a will that protects his family and their assets should the unthinkable happen. A Tulsa infant in crisis received much-needed baby formula. A senior citizen in Bartlesville knows how to protect herself from predatory Internet scams targeting the elderly. These acts of kindness were carried out by Oklahoma attorneys in response to President Stuart's call to give of themselves and serve.

President Stuart and the YLD tirelessly encouraged bar leaders all over the state to take part in the first-ever OBA Day of Service that took place on Sept. 20-21.

The project's goal was simple: Get attorneys into the community and have them give back, no project too big or too small. Fifty-seven projects in 52 counties involving 60 county bars, law firms, law schools and other legal groups were carried out in association with the OBA Day of Service.

Project beneficiaries ran the gamut. Infants in crisis, the elderly, special need students, veterans, first responders, families struggling with hunger, abused women, victims of sex trafficking and at-risk students, to mention a few, are all just a little bit better off because of the Day of Service.

And so is the profession as a whole.

Attorneys are sometimes (maybe often) perceived publicly as greedy or intimidating. But when attorneys give selflessly and serve, negative impressions change. It's our hope that the OBA Day of Service inspired continued service to local communities and those in need. If it improved the image of attorneys in the

process, great. But that's not the reason to serve.

Hefty caseloads, family commitments, an ever-lengthening list of things you should do, they eclipse charitable intents. But service enriches lives of the served and the serving. As Sir Winston Churchill put it, "We make a living by what we get, but we make a life by what we give."





*Logan County Volunteers at Guthrie Animal Shelter*



*Pittsburg County bar members conduct a trash pick up*



*Payne County bar members prepare wills for first responders in Stillwater.*



*President Stuart took on the pallet jack at Love Link Ministries and won!*



*Mayes County Bar Supply Drive for Infants and Children - Emily Crain of Mayes County collects items for a youth drive*



*Governors Nancy Parrott, D. Scott Pappas and Linda Thomas prepare materials for the Emerson Alternative School in Oklahoma City.*



*Bar Association and Foundation leaders volunteer at Love Link Ministries in Oklahoma City.*



# The Value of Membership Regardless of Location or Vocation

By John Morris Williams

We are blessed to have among our membership many out-of-state members. We also have many members who are not engaged in the daily practice of law. It is the desire of the OBA to provide value to each of our members, including those far from home and not engaged in the daily practice of law. We appreciate and value the membership of all our members regardless of location or vocation.

The latest surveys and studies of new lawyers indicate that practical “how to” advice and programs are of high value. We offer that. Our Management Assistance Program offers practical seminars, brief consultations and intense office reviews. That department has a blog and also has a website presence. Many of those services are available regardless of location or vocation.

All OBA members receive at least 37 publications a year, monthly E-News and the informative CLE magazine. In addition, we continue to build our online CLE catalog and improve our online systems to do everything from paying dues to checking MCLE credits. Regardless of your location, we are working hard to reach out to you.

Our Lawyers Helping Lawyers Assistance Program and

foundation are available 24/7/365 to help OBA members regardless of location or vocation. I personally have worked with out-of-state bar associations with whom we share common members. Our 24-hour toll free number, 800-364-7886, staffed by mental health and substance abuse professionals, provides a safe, confidential and professional resource to *all* OBA members.

“Above all, we want to give you good value for your membership.”

This service provides free telephone assistance and up to six hours of free counseling regardless of location or vocation.

All OBA members have access to free online legal research. Fastcase is as easy as signing in right off the OBA website home page. There is unlimited time usage. No worrying about running up a large search fee or multiple sign in then sign out to escape the toll running if you have to take a

call or a personal break. If you have an Internet connection; it is fast and free without regard to your location.

Need to pay your dues, check MCLE credit and schedule an online course? Just go to [www.okbar.org](http://www.okbar.org) and sign into “my.OKBar.org,” and it’s all there for you to do. In the coming months we will be reworking all these systems. I apologize now for any hiccups. I promise when we are through you will have a faster and more streamlined system — regardless of location.

It is the desire of the Oklahoma Bar Association to provide you with good service regardless of your practice needs and your location. You might also want to look at other member benefits and the helpful information we have online. Above all, we want to give you good value for your membership. I sincerely appreciate your membership, and I always want to hear from you and any ideas that you have to help us give even greater value for your membership.



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

# The Seven Deadly Sins of Opening a New Solo Law Practice

By Jim Calloway

Director, OBA Management Assistance Program

We offered our Opening Your Law Practice class in Tulsa and Oklahoma City in October. Those in attendance included many who had just taken the oath of attorney a few days before as well as those who had been in practice for some time. This free class included lunch provided by Oklahoma Attorneys Mutual Insurance Company and a presentation on professionalism by Oklahoma Court of Criminal Appeals Presiding Judge David Lewis.

Our next edition of Opening Your Law Practice will be held at the Oklahoma Bar Center on April 29, 2014.

Since that subject is on my mind, it seemed like a good idea to cover that topic in this month's *Oklahoma Bar Journal* with the seven deadly sins of opening a new solo law practice.

## **1. No clients**

The practice of law is an esteemed profession, but a law firm is a business with revenue, expenses and the expectation of making a profit. A business cannot exist without customers nor can a law firm without clients. This does not mean you cannot open your law firm without know-

ing where your clients will come from. If that were the case, many would not open. But it does mean that client development will be your highest, urgent priority for you to become a success. A website is critical so you can print the address on business cards and stationery. You must send out formal announcements of your new practice to everyone that would appreciate the announcement. You must introduce yourself to local lawyers and business people, as well as judges at the courthouse. This is not a time to be shy or to wait patiently.

## **2. Too much overhead**

Pay close attention to the amount you have each month as overhead. You should also keep a list of other annual and irregular financial obligations. You personally may have to do a lot of things you would rather not have to do instead of paying for them, like cleaning the office. As your revenues grow, you can revisit these items later. But in the early stages, every dollar you do not pay in overhead is a dollar you can take home (or at least not add to your debt load.)

## **3. Taking on work you cannot do or support**

Do not let the need to have new clients tempt you into taking on matters that you cannot handle either because of resources or experience. You want a sustainable business and you do not need dissatisfied clients or grievances sent to the OBA General Counsel. Certainly there will be things you have to learn, but make sure that you are within the capabilities of a new solo lawyer. If a matter seems attractive to handle, but you do not believe you can handle it, ask the prospective client for some brief time to do some research and talk to lawyers that handle these types of matters. Maybe you will find a lawyer willing to team with you and show you how it is done. You may get a fee that is substantially less than handling it alone, but the client will get great service and you will also get a great learning experience.

## **4. Not paying enough attention to finances and financial reports**

Today you cannot run your practice just by looking at your checkbook register and billing records. You need to

prepare monthly financial reports (if not more frequently) and look ahead for several weeks at what expenses are on the horizon. You need to know what clients are falling behind on their obligations. There is a lot more to practicing law than just making money. But if you are not either making money or making good progress toward making money, then you will not be practicing law for long. We have many successes for our clients, but remember that for most types of businesses the bottom line is the measure of success. Do not let your many victories in other areas distract you from paying close attention to all of your financial details.

### **5. Failing to focus on technology**

Many lawyers actively detest technology. Others view it as a necessary evil. Some even claim that they cannot master it. (I recall once calling a lawyer on this assertion, pointing out that the things he had to learn to try medical malpractice cases were much more complicated than training on law office technology.) A lawyer who is in an established law practice may rely on law office staff who understand technology or “old school” systems that still function well. But a brand new solo, particularly a young lawyer who intends to practice for many years into the future, must develop personal technology skills and pay attention to the powerful trends impacting the legal profession that are fueled by technology. Invest in your law

firm technology processes for returns in the future.

There are many free online resources to learn about law office technology. In my column in the Aug. 17, 2013 *Oklahoma Bar Journal* “Big Ideas Can Come in Small Packages” [tinyurl.com/q5sg724](http://tinyurl.com/q5sg724). I discussed subscribing to *Law Practice* magazine via app for less than \$20 per year. Other free resources include *Law Technology Today* [www.lawtechnologytoday.org](http://www.lawtechnologytoday.org), *Law Practice Today* [www.americanbar.org/groups/law\\_practice.html](http://www.americanbar.org/groups/law_practice.html), TechnoLawyer (free subscription required for email newsletters) [blog.technolawyer.com/](http://blog.technolawyer.com/), my blog [jimcalloway.typepad.com/](http://jimcalloway.typepad.com/) and the numerous technology blogs listed in the American Bar Association’s list of legal technology blogs at [www.abajournal.com/blawgs/topic/legal+technology](http://www.abajournal.com/blawgs/topic/legal+technology).

### **6. Failing to focus on limited practice areas**

Learn to do several things well first. Devote the research time to develop deep expertise. Even lawyers who have a general practice in small Oklahoma county seat towns focus mainly on doing several things rather than attempting to do everything.

### **7. Failure to build client-friendly systems (It is all about the clients, after all.)**

It is no longer enough today to just do good legal work for clients. Today, as I told the attendees at the programs, you must do good legal work while at the same time maintaining good communications with clients. In the pre-Inter-

net days, a two- or three-day turnaround of information was exceptionally fast. Now people can receive an email reply from the other side of the world in less than a minute. Their expectations have changed. Make certain at the initial interview you try to give your client reasonable expectations of how the judicial process works, for example, and why you cannot always return your phone calls as quickly as you like. But at the same time strive to build systems where you can return your phone calls timely. Make sure that clients understand your staff is there to assist them and answer their questions when you are not available. Keep clients informed of the progress of their matter.

## **CONCLUSION**

Seven deadly sins was a great catch phrase to summarize some of the high points of the Opening Your Law Practice programs. Our members generally do a great job representing their clients. In fact, the lawyers we work with are more often qualified for the title saints than sinners. They often leave their warm homes at night to go assist clients when called. They sacrifice much time to make certain clients matters are handled appropriately, even if it involves working late at night.

*Mr. Calloway is director of the OBA Management Assistance Program. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or [jimc@okbar.org](mailto:jimc@okbar.org). It's a free member benefit!*

# Russian Law School Makes Special Appearance at Oklahoma Bar Center

By Gina Hendryx

The OBA General Counsel's office had the unique opportunity to participate in a discussion of practices and procedures with a delegation of law professors from Lobachevsky Nizhny Novgorod State University Law in Nizhny Novgorod, Russia. The law professors were participants in the international exchange Open World Program - Rule of Law. Host judges for the program were District Judge Stephen F. Friot and Magistrate Suzanne Mitchell of the United States District Court for the Western District of Oklahoma.

During their stay in Oklahoma, the Russian law school faculty members got a first-hand look at the state's legal education system, state and federal courts and our attorney regulation system.

During their visit to the OBA, participants were instructed on our procedures for licensing, educating and disciplining attorneys. The delegation had the opportunity to view a continuing legal education program in progress as well as attend a presentation on the attorney discipline system and procedures. Similarities with attorney regulation in their home country were discussed where comparable rules of professional

conduct are implemented to regulate attorney conduct.

Program participants included assistant professors Tatyana Aleksanova and Mariya Grigoryeva; associate dean for student affairs, Yuliya Orlova; vice dean for research and associate professor, Valentina Serua; and associate professor, Igor Sennikov.

The group was accompanied by their translators, Judge Friot and Sheila Sewell, chief deputy court clerk, U.S. Bankruptcy Court for the Western District of Oklahoma.

*Ms. Hendryx is OBA General Counsel.*



# Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Aug. 16, 2013.*

## REPORT OF THE PRESIDENT

President Stuart reported he made OBA appointments, went on the OBA Alaskan cruise for which he presented CLE and worked on OBA Annual Meeting and Southern Conference of Bar Presidents planning. He presided over the SCBP meeting held in conjunction with the ABA meeting in San Francisco. He attended the SCBP reception in San Francisco and served as a delegate at the ABA House of Delegates.

## REPORT OF THE VICE PRESIDENT

Vice President Caudle reported he attended ABA, NCBP and NCBF conferences in San Francisco, OBA Clients' Security Fund meeting and Comanche County Bar Association luncheon. He also assisted in coordinating plans for the Lawton October meeting and has-been party, assisted District Nine young lawyers for September Day of Service program and reviewed a Board of Editors article in preparation of the September meeting.

## REPORT OF THE PRESIDENT-ELECT

President-elect DeMoss reported she attended the July Board of Governors meeting, annual ABA meeting as an OBA

delegate and National Conference of Bar Presidents meetings as president-elect. She met with Oklahoma law school deans and OBA Law Schools Committee members, worked with the Diversity Committee on its program and worked on speakers for upcoming litigation section seminars.

## REPORT OF THE PAST PRESIDENT

Past President Christensen reported she attended the Bench and Bar Committee meeting. She worked on the Lawyers Helping Lawyers banquet and auction, helped fellow has-beens to coordinate the October meeting and worked on SCBP events and planning for the upcoming meeting in Oklahoma City.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended NABE and NCBP meetings, YLD board meeting in Tulsa, multiple meetings on new technology initiatives, meeting with President-elect DeMoss and Law Schools Committee leadership and law school deans, staff directors meetings and staff budget meeting for 2014 budget.

## BOARD MEMBER REPORTS

**Governor Farris** reported he made a presentation to the Tulsa Chapter of NALS and attended the ABA House of Delegates meeting in San Francisco as the Tulsa County Bar

Association delegate. **Governor Gifford** reported he attended the Oklahoma County Bar Association board of directors meeting and OCBA planning session for OBA Day of Service. He also wrote a human trafficking article for the *Oklahoma Bar Journal*. **Governor Hays** reported she attended the July Board of Governors meeting, conducted the Women in Law Committee meeting, participated in conference planning, attended the OBA Family Law Section monthly meeting, prepared and presented the section budget report, prepared the section's 2014 budget, participated in the OBA Strategic Planning Finance Subcommittee meeting by phone, communicated with OBA FLS leadership regarding the Annual Meeting and communicated with the YLD regarding the OBA Day of Service. **Governor Jackson** reported he attended the July Board of Governors meeting and Garfield County Bar Association monthly meeting. **Governor Meyers** reported he attended by teleconference the Licensed Legal Internship Committee meeting, worked to coordinate the upcoming has-been event in Lawton, attended the Comanche County Bar Association meeting and chaired the Audit Committee meeting to review the OBA's 2013 audit. **Governor Pappas** reported she attended the July Board of Governors meeting, has-been planning meeting and July PCBA meeting. She also worked on the invitation list and date for the has-been party, has-been

gift and has-been musical review. **Governor Parrott** reported she attended the conference with the deans of OCU, OU and TU law schools, Oklahoma County Bar Association board of directors meeting, planning session for the Oklahoma County Day of Service, visited possible places for OCBA member service and participated as a group leader for OCU's introduction to professionalism seminar for first-year law students. **Governor Smith** reported he attended the Muskogee County Bar Association meeting. **Governor Stevens** reported he attended the July Board of Governors meeting, Rules of Professional Conduct Committee meeting and Cleveland County Bar Association meeting.

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

Governor Vorndran, unable to attend the meeting, reported via email he attended the Board of Governors meeting, July YLD board of directors meeting, YLD networking event in Tulsa, YLD bar exam survival kit assembly and distribution, YLD executive committee conference call and budget meeting, ABA YLD annual meeting in San Francisco, ABA YLD House of Delegates, ABA annual meeting, OBA delegate dinner and ABA House of Delegates.

#### **2013 AUDIT REPORT**

As Audit Committee chairperson, Governor Meyers reviewed what took place at the committee meeting with the auditors. He reported the Audit Committee recommends approval of the audit report. Stacey Vascellaro, with Smith, Carney & Co., reviewed the report and said the audit firm concludes financials were presented fairly and that generally

accepted accounting principles are being followed. The board voted to accept the audit report.

#### **COMMITTEE LIAISON REPORTS**

Governor Hays reported the Family Law Section will be an Annual Meeting sponsor. She said the Women in Law Conference will take place Sept. 27, and sponsorships are still available. On Oct. 4 the Tulsa County Bar Association is participating in a Think Pink event and celebrating its 110th anniversary with an open house and evening dinner dance at the Mayo Hotel. Past President Christensen reported the Lawyers Helping Lawyers banquet is coming together.

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

General Counsel Hendryx reported the Professional Responsibility Commission annually takes off for two months, and no meeting was held in July. A written status report of OBA disciplinary matters for July 2013 was submitted for the board's review.

#### **DISTRICT 5 VACANCY**

President Stuart reminded board members that Governor Coogan was in the first year of a three-year term. The person appointed to the vacancy will fill the remainder of her term. He reported eight people expressed interest and submitted résumés in response to the *Oklahoma Bar Journal* notice.

#### **EXECUTIVE SESSION**

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

#### **DISTRICT 5 APPOINTMENT**

The board voted to appoint Norman attorney Jim Drummond to the Board of Governors vacancy.

#### **RESOLUTION NO. 1: PROPOSED AMENDMENT TO MCLE RULES**

President Stuart reviewed the proposal that will be submitted to the House of Delegates. Discussion followed. The board tabled action until the September meeting.

#### **FORENSIC REVIEW BOARD NOMINEES**

The board voted to submit the names of Adam Panter, Shawnee, and Virginia Henson, Norman, as possible appointees, in addition to Michael Segler, Yukon. The governor will select one person to appoint to the Forensic Review Board.

#### **BOARD OF EDITORS APPOINTMENT**

The board appointed Erin L. Means, Moore, to the Judicial District 5 position on the Board of Editors, formerly held by Sandee Coogan. The appointment is subject to confirmation that Ms. Means is willing to serve. It was noted that Ms. Means previously served on the board, but had to resign when she moved out of another district. The term will expire Dec. 31, 2015.

#### **OBF TRUSTEE APPOINTMENTS**

The board confirmed President Stuart's appointments of Deanna L. Hartley, Ada, and Patrick O'Hara Jr., Edmond, as Oklahoma Bar Foundation Trustees.



## DAY OF SERVICE PROGRESS REPORT

Governor Pappas reported she had contacted Emerson School and obtained a list of needed items. Governor Parrott reported she also contacted the school, and school officials indicated they would appreciate lines in their parking lot being repainted. The board decided

to move up the time of its September meeting and to come to the meeting dressed to work on the service project. It was reported there are currently 30 projects planned in 27 cities across the state.

## NEXT MEETING

The Board of Governors met at the Oklahoma Bar Center in

Oklahoma City on Sept. 19 and on Oct. 7, 2013. A summary of those actions will be published after the minutes are approved. The next board meeting will be held at 2 p.m. on Wednesday, Nov. 14, 2013, at the Sheraton Hotel in Oklahoma City in conjunction with the OBA Annual Meeting.

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# 2013 OBF Grant Awards

By Susan B. Shields

On Aug. 22, I had the pleasure of attending an all-day meeting of the Oklahoma Bar Foundation's Grants and Awards Committee. At this meeting, the committee, under the able leadership of Judge Millie Otey, interviewed applicants for 2013 OBF grants. This annual meeting always proves to be one of the most gratifying experiences as an OBF Trustee. It is impossible to sit through the grants and awards meeting without being overwhelmed by the generosity of the many Oklahoma lawyers and laypersons dedicated to bettering the lives of those less fortunate. Endeavors such as those represented by these grant applicants should make us all proud to be members of the Oklahoma bar. The services provided by grant applicants fall into three broad categories: legal services, law-related education and support for victims – including children – of physical and emotional violence. The grantee charitable organizations provide services in every corner of the state. The grant process involves a thorough evaluation of grant proposals by the OBF Grants and Awards Committee and a unanimous approval of the committee's recommendations by OBF trustees. The trustees are pleased to announce this year's OBF grants, which follow:

## Oklahoma Bar Foundation 2013 Grant Awards

### YMCA Oklahoma Youth & Government Program

*Youth Model Legislative Day at the Capitol and the new ABA National Judicial Competition*

**\$3,600**

### Senior Law Resource Center

*Law student elder law legal service, educational outreach program*

**\$10,000**

### Center for Children & Families

*Free Divorce Visitation Arbitration Program for court-ordered services for children in Cleveland and surrounding counties*

**\$10,000**

### Family & Children's Services Inc.

*Tulsa County Family Court Program, funding towards support of the family resource coordinator at the courthouse*

**\$4,000**

### William W. Barnes Children's Advocacy Center

*Child abuse training and response programming in Rogers, Mayes and Craig counties*

**\$4,000**

### Community Crisis Center Inc.

*Ottawa County victims' court advocate services*

**\$5,000**

### Teen Court Inc.

*Comanche County first offenders peer program for positive resolution of misdemeanor offenses and substance abuse plus conflict resolution/ anger management*

**\$12,500**

### Domestic Violence Intervention Services/Call RAPE Inc.

*Tulsa and Creek counties to fund court advocate for delivery of civil legal services to low-income survivors of domestic and sexual violence*

**\$11,000**

### Legal Aid Services of Oklahoma Inc.

*Operation expense funding to provide access to justice legal services for low-income and elderly Oklahomans statewide*

**\$135,235**

### Marie Detty Youth & Family Services Center

*Funding for domestic violence/ sexual assault victims' court advocate providing services in a six county area*

**\$12,000**

### OILS, Low Income Tax-Payer Legal Clinic

*Statewide legal clinic in the provision of legal tax services to low-income persons*

**\$5,000**

Family Shelter of Southern  
Oklahoma Inc.

*Funding for provision of a  
Carter County victims advocate*  
**\$3,000**

TU Boesche Legal Clinic,  
Immigrants Rights Project

*Legal education program for legal  
services to vulnerable non-citizen  
residents of Oklahoma while pro-  
viding TU law students with  
educational & professional devel-  
opment opportunities, Tulsa  
County & eastern Oklahoma*  
**\$4,000**

Tulsa Lawyers for Children  
Inc.

*Support for staff cordination of  
attorney pro bono legal services  
for deprived children in Juvenile  
Court and representation at emer-  
gency show cause hearings in  
Tulsa County*  
**\$25,000**

Oklahoma Lawyers for  
Children Inc.

*Support for staff cordination of  
attorney pro bono legal services  
for deprived children in Juvenile  
Court and representation at emer-  
gency show cause hearings in  
Oklahoma County*  
**\$40,000**

OBA-YLD Oklahoma High  
School Mock Trial Program

*Overall program operational sup-  
port of the law-related educational*

*program for students statewide  
through to national competition*  
**\$46,600**

**Total 2013 OBF Grant Awards  
Approved**  
**\$332,135**

## TRIBUTES AND MEMORIALS

Tribute and Memorial Gifts offer a simple and meaningful way to honor people who have played an important role in your life or whose accomplishments you would like to recognize. Graduating from law school, passing the bar, marking a milestone birthday, celebrating a colleague's retirement are just some of the many occasions for which making a tribute gift to the Oklahoma Bar Foundation can be especially meaningful for you and the person you wish to honor or for the family and friends of the person you wish to remember. A Memorial gift in lieu of flowers is a fitting way to express your feelings and honor a departed friend, colleague or loved one.

Tributes and memorials gifts are a great way to acknowledge the people you care about while helping to ensure that low-income and disadvantaged Oklahomans can access the legal advice and

assistance they need or that school children learn about rights, responsibilities and the rule of law.

The OBF will send the person you designate a card notifying them that you made a special remembrance gift in their honor or in memory of a loved one to help the OBF continue working to make Oklahoma a fairer and better place for everyone. Gifts will be used in meeting the on-going mission of the Oklahoma Bar Foundation, Lawyers Transforming Lives through the advancement of education, citizenship and justice for all.

Make your Tribute or Memorial Gift today at:  
[www.okbarfoundation.org/make-a-contribution](http://www.okbarfoundation.org/make-a-contribution).

Or if you prefer, please make checks payable to: Oklahoma Bar Foundation P. O. Box 53036 Oklahoma City OK 73152-3036

E-mail: [foundation@okbar.org](mailto:foundation@okbar.org). Phone: 405-416-7070

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

*Ms. Shields is OBF president and can be reached at [susan.shields@mcafeetaft.com](mailto:susan.shields@mcafeetaft.com)*

***Join OBF today!***  
**[www.okbarfoundation.org](http://www.okbarfoundation.org)**

# OBF by the Numbers

OBF Fellows celebrate the of the program during the Annual Meeting this year, 1978-2013.

**35<sup>th</sup>**  
Anniversary

Your Oklahoma Bar Foundation is

**67** years strong. Founded in 1946 by lawyer members of the Oklahoma Bar Association, the OBF is a proven charitable organization. The OBF is the 3rd oldest bar foundation in the U.S.

The OBF Court Grant Program was established in 2009 through a generous *cy pres* award with receiving OBF court grant funding for technology equipment and other improvements since establishment of the innovative new program.

**44**  
counties

Roughly **90,000** Oklahomans

were helped by programs and projects receiving funding from the OBF last year, with over **3,000** pro bono volunteers helping to enhance the benefits provided by OBF grant dollars.

A **26** - member Board of Trustees and a YLD representative trustee govern the Oklahoma Bar Foundation.

**8** Law students will receive OBF scholarship funding this year at all three law schools in Oklahoma.

**13** OBF Court Grant Awards were made this year to help Oklahoma District and Appellate Courts.

**1,663** is the number of OBF Fellow participants, which make up only 10.3% of the total OBA membership. Please join today at [www.okbarfoundation.org](http://www.okbarfoundation.org)!

**30** programs or projects will receive OBF grant funding during 2013.

**\$332,135**

is the 2013 OBF Grant Award total plus an additional \$89,375 in 2013 OBF Court Grants and \$40,800 in scholarship awards. This year OBF was able to grant 56.5% of the total amount requested by returning applicants.

**\$11,062,362**

in total Oklahoma Bar Foundation grant awards since inception, with \$10.5 million being given over the past 35 years. Fellows are the lifeblood of the Oklahoma Bar Foundation. Join the OBF Fellows today as an individual Fellow or through the new OBF Community Fellows for organizations and groups.

# Pro Bono Work as a Moment of Understanding

By A. Daniel Woska

My first venture into pro bono work was in 1984 after six years in private practice. I called and requested a referral from Legal Aid of Western Oklahoma, and so began my personal adventure into providing legal assistance to a person unable to afford legal help. The following is generally what transpired on my maiden voyage in public service.

The receptionist up front buzzed my office and said, "Your 10 a.m. appointment is here."

"Mr. Harper?" I asked.

The receptionist replied, "Yes."

As I got out of my chair, put on my blazer and walked up to the front of the office, my mind was imagining what would unfold in my first pro bono assignment.

I entered the reception area and saw my new client, Mr. Harper, to my right dressed in a coat and tie and drinking a cup of coffee provided by the receptionist.

After thanking the receptionist and introducing myself to Mr. Harper, I re-entered and headed left down the hallway with Mr. Harper close behind.

When I arrived at my doorway, I stopped and allowed Mr. Harper to go in first and sit down. I quietly shut the door as I went in, walked behind my desk and sat down. Mr. Harper and I then stared at each other for a moment or two.

He placed his coffee on the table beside him, pulled some folded papers out of the pocket of his suit coat and handed them over to me. I took the papers, looked them over for a few minutes and realized that Mr. Harper had been sued in a civil action involving a car wreck. I then spoke to Mr. Harper and asked him to tell me what happened and how I might be able to help him.

Before getting into the details and reasons for his visit, Mr. Harper looked at me curiously and asked, "Are you Japanese?"

A bit surprised, I said, "No, I am probably Polish, why do you ask?"

Mr. Harper quickly said, "Woo-saka sounds Japanese to me."

After a moment of surprise, I corrected his pronunciation and said, "Woska, not Woo-saka, is the way to pronounce

my last name." We both began to laugh and the ice was broken.

Mr. Harper and I met as strangers that day, but became good friends who spoke often and enjoyed each other's company for many years until he died.

Mr. Harper worked for a long time as a maintenance man for Boeing until he retired at age 65. When I met him he was about 75. I provided representation for him, helped him ultimately obtain a successful conclusion to the litigation and learned that pro bono work provided me a much greater reward than just the general experience of helping someone of limited financial means.

Mr. Harper taught me about dignity. He taught me that struggling financially in life did not mean that a person could not be happy and enjoy life. Mr. Harper was a man who showed me that success should not just be measured in dollars and cents.

He allowed me to understand that a college education and a law degree by themselves did not make me a better human being. It was how I used my education and what I

did with my education that mattered. If I chose to monetize my legal career and cherish only that which was economically ascertainable, I would miss many important opportunities to meet and experience life with Mr. Harper and all of the people I represented on a pro bono basis after him.

My experience with Mr. Harper has been repeated many times since with many different pro bono referrals. All of these pro bono cases and all of the people I have represented have brought a sense of joy to my life as a

lawyer. In my mind's eye, Mr. Harper impacted me personally in so many ways it is hard to explain. It is probably best to describe Mr. Harper as the man who bestowed a bit of his personal dignity on me.

*Mr. Woska is a member of the Access to Justice Committee and practices in Edmond.*

## Print or Electronic?

***You now have a choice.***

Continue receiving your printed *Oklahoma Bar Journal* court issues (two per month) in the mail – **or** receive an e-mail with a link to the electronic version instead. Mailed copies stop. There's no dues reduction, but you save some trees.

If you want the electronic version of the court issues and didn't indicate that on your dues statement go online to <http://my.okbar.org/Login> and sign in. Click on "Roster Info" to switch to electronic. Be sure your e-mail address is current.

***Want the print version?***  
***No need to do anything.***





# Day of Service and 2014 YLD Leadership

By Joe Vorndran

## Thank You

This month, I simply wanted to take the opportunity to thank each person who made the OBA Day of Service such a success. From every member of the Board of Governors and the YLD Board of Directors to each lawyer who rolled up their sleeves and participated. Finally, we all need to thank the OBA staff for their tireless efforts to organize and promote this wonderful event. As is the case with everything we do, the OBA Day of Service would not have been as successful or well publicized without our wonderful staff. I know each of our communities has been improved by our efforts, and hopefully our professional bond strengthened. The YLD will continue to sponsor an annual day of service in the coming years. Hopefully those who participated this year will continue to do so, and those who missed the opportunity will join us next year.

## Exercise Your Right - Vote for 2014 YLD Leadership

The YLD again has a full slate of candidates running for Board of Directors positions, so let your voice be heard and exercise your right to vote!

Elections will again be conducted electronically. YLD members will receive an email from the OBA with your ballot attached. The email address used is the one currently on file with the OBA. If you do not have a current email address on file, you can access a paper-based ballot on the YLD website, [www.okbar.org/yld](http://www.okbar.org/yld).

Your OBA number is required to identify you as a qualified voter, and your address on file with the OBA will be used to determine your district. Elections are conduct-

ed based on Oklahoma judicial districts, and you may only vote for officers, candidates for election in your district and at-large candidates. Nonconforming ballots will be stricken.

All ballots must be submitted to the Nominating Committee by 5 p.m. on Thursday, Nov. 7, 2013. Election results will be announced at the YLD Annual Meeting held in Oklahoma City on Thursday, Nov. 14, 2013 at 6 p.m. in conjunction with the OBA Annual Meeting.

If you have any questions, please contact Nominating Committee Chairperson, Jennifer Heald Castillo, at [jcastillo@hallestill.com](mailto:jcastillo@hallestill.com).

*Mr. Vorndran practices in Shawnee and serves as the YLD chairperson. He can be reached at [joe@sdtlaw.com](mailto:joe@sdtlaw.com).*



OBA President Jim Stuart (far left) thanks OBA YLD members for their Day of Service volunteer efforts at Love Link Ministries in Oklahoma City. YLD members (from left of President Stuart) are Jeff Trevillion, Gabe Bass, YLD Chair Joe Vorndran and Immediate Past Chair Jennifer Castillo.

## 2014 Leadership

*The following individuals automatically hold the following positions for 2014.*



**Kaleb Hennigh**  
*2014 Chair*

Mr. Hennigh is a founding partner at Ewbank, Hennigh and McVay PLLC in Enid. Mr. Hennigh was born and raised near Laverne, a small community near the panhandle. He received a bachelor's degree in agricultural communications from Oklahoma State University, a J.D. from the University of Oklahoma College of Law and an LL.M. in agricultural law from the University of Arkansas School of Law.

During his time at the University Of Oklahoma School of Law, Mr. Hennigh was awarded the Kelly Beardslee award for his work with the OU Criminal Law Clinic. While working to obtain his LL.M., he served as a graduate assistant at the National Agricultural Law Center, where he conducted extensive research on multiple issues within agricultural law and drafted his thesis on the new national animal identification system and the application of FOIA laws.

Upon completing his LL.M., Mr. Hennigh remained in northwest Arkansas working as an associate attorney in an

intellectual property law firm. There he worked with several agricultural corporations regarding intellectual property protection and helped establish an agricultural bankruptcy practice, which received regional recognition for its efforts in assisting immigrant farmers.

Mr. Hennigh and his family returned to Enid in early 2007 where he served as an associate attorney and later a partner in a regional law firm where he expanded his practice and focus on estate planning, asset protection and bankruptcy liquidation and reorganization. He continues his practice on asset protection, estate planning, real estate transactions, bankruptcy, corporations, wind energy and leases and other issues within the agricultural industry.

Mr. Hennigh, his wife, Jennifer, and their two sons, Karsen and Jase, reside in Enid. Mr. Hennigh has served on the OBA YLD Board of Directors for the past six years in various roles, including Secretary (2011), Treasurer (2012) and Chair Elect (2013).



**Joe Vorndran**  
*Immediate Past Chair*

Mr. Vorndran is a partner with the Shawnee law firm of

Stuart, Clover, Duran, Thomas & Vorndran LLP. His practice is focused on general civil litigation, corporate law and municipal law. Mr. Vorndran received his B.A. from the University of Oklahoma in May of 2003, where he was a member of the OU Scholars program, Order of Omega Honor Fraternity and numerous other campus committees. He received his J.D. from the University of Oklahoma College Of Law in May of 2006, where he was a class representative, on the Dean's Council and a member of the SBA Board of Governors. He was admitted to practice law before all Oklahoma state courts in September of 2006.

Mr. Vorndran served as the District Eight representative for the YLD Board of Directors from 2006-2011, YLD Treasurer in 2011, YLD chair-elect in 2012, chairperson of the YLD Children and the Law Committee in 2012 and chairperson of the YLD in 2013. He is an active volunteer for the Oklahoma Bar Foundation Mock Trial Program. Mr. Vorndran attended the 2007 OBA Leadership Conference and was a delegate to the 2009-2010 OBA Leadership Academy. He is also on the Board of Editors for the *Oklahoma Bar Journal* and is a member of the Pottawatomie County Bar Association, having served as President from 2007-2009. He is a member of the American Bar Association, and an OBF Fellow. In 2008, he received the District 5 Child Abuse Prevention Task Force "Child Advocate of the Year" Award. Mr. Vorndran also serves on the Board of Directors for Gateway to Prevention and Recovery and the Shawnee Drop-out Retention Foundation.

## UNCONTESTED ELECTIONS

*The following persons have been nominated. They are running uncontested and will be declared elected at the Annual Meeting of the OBA YLD.*



**LeAnne McGill**  
*Chair-Elect*

Ms. McGill is a partner with the Edmond law firm of McGill & Rodgers, where her practice focuses on all areas of family law. She has been active in the OBA YLD since 2006, currently serving as the treasurer of the division and is in her fourth term as a director for District 3. Ms. McGill is the co-chair of the New Attorney Orientation Committee, which is responsible for preparing and passing out bar exam survival kits to those taking the bar exam each February and July. This committee is also responsible for the refreshments at the swearing-in ceremonies and planning the "Welcome to the Bar" celebrations each April and September. In addition, she has served as the Publications and Website Committee chair, has participated in Wills for Heroes, Serving our Seniors and Done in a Day Community Service projects and has

provided pro bono time to service members through the Military Assistance Program.

Ms. McGill has also served on the Oklahoma County YLD Board of Directors for the last six years. As a director for the OCBA YLD, she has held numerous positions, including serving as the chair for the Harvest Food Drive committee and the Chili Cook-off committee. These two committees work together to donate in excess of \$20,000.00 to the Regional Food Bank each fall.

Aside from her participation in the YLD, she is active in the OBA Family Law Section and has served on several OBA committees including the Mentoring Task Force, the Law Day Committee and the Women in Law Committee. Ms. McGill is a graduate of the inaugural 2008-2009 OBA Leadership Academy, the 2007 OBA Leadership Conference, is an Oklahoma Bar Foundation Fellow and served as the first chair of the OBA Law Student Division.

Ms. McGill has been active in the American Bar Association, having held several positions within the organization, including two terms as the national secretary treasurer of the ABA Law Student Division and one term as the national pro bono committee co-chair for the Law Student Division. She has served on the ABA YLD Programming Team and as chair of the ABA YLD Access to Justice Committee.

Ms. McGill received her B.A. in English and political science from Oklahoma State University in 2003 and her J.D. from Oklahoma City University School of Law in 2006. In addition to bar activities, she has served on the OCU Law

Alumni Association Board of Directors and is an active member of the Ginsburg Inn of Court, EWF International, Edmond Women's Club and the Edmond Family Counseling Board of Directors. Ms. McGill has been honored as a Top 20 under 40 by the *Edmond Sun* and a Top 40 under 40 by *OKCBiz* magazine. She is also graduate of Class XXVI of Leadership Edmond and volunteers with the American Cancer Society and the Salvation Army.



**Bryon J. Will**  
*Treasurer*

Mr. Will is a solo practitioner in The Law Office of Bryon J. Will PLLC. He is a third-generation Oklahoman born and raised in Morrison. He graduated from Oklahoma State University with a bachelor's degree in animal science and began his career as a sales representative for an animal health supply company and a broadband Internet vendor, later working for Bank of Oklahoma. He earned his M.B.A. at the University of Central Oklahoma and his J.D. at Oklahoma City University School of Law. During law school, he earned his Oklahoma legal intern's license and worked for the Oklahoma County District Attorney's office. He later took an internship with Haupt Brooks Van-

druff Cloar. Mr. Will currently practices in real estate, oil and gas, estate planning, probate, elder law and long-term care planning, business transactions and bankruptcy. He is admitted to practice before the Supreme Court of Oklahoma and the U.S. District Court for the Western District of Oklahoma. He is a member of the Oklahoma Bar Association, Oklahoma County Bar Association, American Bar Association, National Academy of Elder Law Attorneys and a Fellow of Oklahoma Bar Foundation. He is currently an associate with the Ruth Bader Ginsburg American Inn of Court and was formerly an associate member of the William J. Holloway American Inn of Court. Currently he is serving on the Oklahoma Bar Association Young Lawyers Division Board of Directors as a Member At-Large where he also served as chairman of the Seniors Committee and is currently serving as co-chairman of the CLE Committee. Bryan was a graduate of the Oklahoma Bar Association Leadership Academy class of 2011-2012.



**Matt Mickle**  
*Secretary*

Mr. Mickle practices at Mickle-Rainblot Law Offices in Durant, where he handles criminal law cases, transactions for business entities and

performs title examinations. He received a Bachelor of Business degree from the University of Oklahoma and his law degree from Oklahoma City University School of Law. Mr. Mickle is an active member of the Bryan County Bar Association, the Durant Area Chamber of Commerce and the Durant Main Street Board. Matt is currently serving as an at-large rural director on the OBA YLD Board of Directors.



**Blake Lynch**  
*District Two*

Mr. Lynch, partner of the newly formed Wagner and Lynch PLLC, has offices in Pittsburg and Latimer counties and practices throughout southeast Oklahoma. A 2009 graduate of the University of Oklahoma College of Law, he has maintained a general practice while also benefitting his community. He has served in multiple county bar roles and was president of the Pittsburg County Bar when it was named Outstanding County Bar of the Year. Additionally, he has put on an annual 5K benefitting the PAWS organizations of Pittsburg and Latimer counties as well as the local Girl Scouts and Community Food Bank. This year, in addition to starting a new practice, he was accepted into the Oklahoma Bar Association's Leadership Academy.

He has served in the Young Lawyers Division for the last two years. Most importantly, he and his wife, Amanda, will be parents for the first time in March!



**Dustin Conner**  
*District Four*

Mr. Conner is an associate attorney for Gungoll, Jackson, Box and Devoll P.C., located in that firm's Enid office. He started with Gungoll Jackson in August 2011. A native of Garber, Mr. Connor graduated from Oklahoma State University with a B.S. in agribusiness in 2006. He attended the Oklahoma City University School of Law where he received his J.D. with honors in 2011. While at OCU he was a member of the Phi Delta Phi honor fraternity. His practice areas include oil and gas title and litigation, agriculture law, civil litigation and estate planning.

Mr. Connor has been deeply involved in the Oklahoma 4-H program since childhood. In 2002-2003, he served as state president of that organization and is currently serving as a Garfield County 4-H Foundation board member and is the leader and coach for the Garfield County 4-H shooting sports program. Mr. Conner is on the board of directors for the Enid A.M. Ambucs, is a member of Leadership Greater

Enid, Class XXIII and is also a member of the St. Paul's Lutheran Church, where he serves on the school board for the St. Paul's Lutheran School. He and his wife, Brittany, were recently blessed with a beautiful daughter, Averly, in June. In his spare time, Mr. Conner enjoys spending time with his family, hunting, trapshooting and attending sporting events.



**Rachel Gusman**  
*District Six*

Ms. Gusman joined the Graves McLain firm as an associate attorney after earning her J.D. with honors from the University of Tulsa College of Law. While pursuing her law degree, Gusman earned three prestigious CALI awards for excellence in academic achievement. Ms. Gusman is a tireless worker for her clients' rights and concentrates her practice in areas of medical negligence, catastrophic motor vehicle accidents, personal injury, vaccine injuries and civil litigation.

Ms. Gusman, along with other attorneys of Graves McLain law firm, volunteers her time to various community and charitable organizations like "Lawyers Against Hunger" and "Tulsa Lawyers for Children," which handle deprived children cases and represent minors who are

adjudicated deprived and are in the custody of the Department of Human Services.

Ms. Gusman also volunteers with the Live Local, Give Local Tulsa Anti-Hunger Campaign and has raised money for the Lawyers Against Hunger spring and Thanksgiving drives. She is active in the Tulsa County Bar Association.



**Brandi Nowakowski**  
*District Eight*

Ms. Nowakowski is an associate with The West Law Firm in Shawnee. Her practice is focused on general civil litigation with an emphasis in personal injury, products liability law and class actions. She, her husband, Chris, and their two sons, Ethan and Zachary, reside in Shawnee.

She received her B.B.A. in management from the University of Oklahoma, where she graduated *magna cum laude* in May 2006. She received her J.D. from the University of Oklahoma College of Law in May 2010 and was admitted to the practice of law before all Oklahoma state courts in September 2010.

Ms. Nowakowski has actively served on the Young Lawyers Division Board of Directors since January 2012 and has been selected as a YLD star of the quarter. In addition

to her director position on the board, she currently serves as the 2013 YLD community service chairperson. As such, she was responsible for coordinating the 2013 OBA Day of Service activities throughout Oklahoma. She greatly enjoyed working with the many attorneys who made this event a huge success!

Ms. Nowakowski has also been an active member of the OBA Law Day Committee in 2012 and 2013. Additionally, she has been selected to serve on the Credentials Committee for the annual OBA House of Delegates meeting for both 2012 and 2013. She would be honored by the opportunity to continue serving the young lawyers of Oklahoma and the entire bar through the YLD Board of Directors.



**Nathan Richter**  
*At-Large Rural*

Mr. Richter is currently employed as an associate attorney at the Denton Law Firm in Mustang. He was born in Oklahoma City and was raised in Piedmont and Mustang. He attended Mustang Schools and graduated in 1996. Mr. Richter attended East Central University from 1996 to 1998 and graduated from the University of Oklahoma in 2000. He served in the Oklahoma Army National Guard

from 2000 to 2010 and was honorably discharged as a captain (0-3), 13A - field artillery. While serving, he attended Oklahoma City University School of Law and received his law degree in December of 2007. In 2008, Mr. Richter was admitted to practice before all Oklahoma courts, the U.S. District Court for the Western of Oklahoma; U.S. Bankruptcy Court for the Western and Eastern Districts of Oklahoma.

Mr. Richter is an active member of the Oklahoma Bar Association, the Canadian County Bar Association, the Oklahoma Association for Justice, the Robert J. Turner Inn of Court and the National Employment Lawyers Association. He is a Fellow of the Oklahoma Bar Foundation and has served on the OBA YLD Board of Directors since 2011.

He and his wife Kristin attend Lakehoma Church of Christ with their two children.

## CONTESTED ELECTIONS

*The following persons have been nominated and are running contested for the following positions. Results will be announced at the YLD Annual Meeting.*

### **Bryon Will**

*District Three and At-Large*

See photo and biographical information on page 2174.



### **Justin Meek**

*District Three and at-Large*

Mr. Meek graduated from Oklahoma State University and Oklahoma City University School of Law. He joined Bass Law in 2011 and is the director of the litigation group. Mr. Meek is an experienced trial lawyer with a focus on matters involving insurance law, personal injury and torts. He also represents clients in business transactions and contract disputes.

Mr. Meek is a member of the Oklahoma Bar Association, the Oklahoma County Bar Association and the William J. Holloway Inn of Court. He previously served as an at-large director on the OBA YLD Board of Directors in 2013.



### **Lane Neal**

*District Three and At-Large*

Mr. Neal, a Lawton native, is currently an associate with McAtee & Woods PC in Oklahoma City. His practice is focused primarily on civil litigation. Additionally, he represents clients in criminal matters and before administrative boards. Prior to joining McAtee & Woods, he was an assistant district attorney for the Oklahoma County District Attorney's office. During law school, Mr. Neal was a member of Phi Delta Phi, a note editor for the *American Indian Law Review* and a member of the ABA and AAJ competitions teams. He is a member of the Oklahoma County Bar Association and is a Fellow of the Oklahoma Bar Foundation. He is an associate in the Luther Bohanon Inn of Court and a 2010 graduate of the OBA Leadership Academy. Mr. Neal has served as a District 3 representative to the OBA YLD Board of Directors since 2010. He is also a member of the OBA Bench & Bar Committee. He is admitted to practice in Oklahoma, the U.S. District Court for the Western District and Northern Districts of Oklahoma.





**Faye Rodgers**  
*District Three and At-Large*

Ms. Rodgers is a partner with the Edmond law firm of McGill & Rodgers, where her practice focuses primarily on family law. She has been an active volunteer in the OBA YLD since 2010, named a Fellow of the YLD in 2011 and was appointed as a board member in 2012 for District 3. She has participated in numerous activities including preparing and passing out bar exam survival kits, serving refreshments at the swearing-in ceremonies and attending the "Welcome to the Bar" celebrations each Spring and Fall. In addition, she has participated in Wills for Heroes, Serving our Seniors and Day of Service projects and has provided pro bono time to service members through the Military Assistance Program.

Ms. Rodgers has also served on the Oklahoma County YLD Board of Directors for the last four years. As a director of

OCBA YLD and treasurer for the past two years, she has worked to help raise money for the Regional Food Bank and other charitable organizations by participating in the annual Harvest Food Drive and Chili Cook-off.

She received her B.A. in speech communications from Texas A&M University in 2003, her J.D. from Oklahoma City University School of Law in 2006 and her masters of business from the University of Central Oklahoma in 2009. In addition to bar activities, she is an active member of the Ginsburg Inn of Court and serves on the Board of Directors for Edmond Family Counseling and Oklahoma Lawyers for Children.



**Eric Davis**  
*District Three and At-Large*

Mr. Davis is an assistant general counsel for the Public Utility Division of the Oklahoma Corporation Commission.

Prior to OCC, he worked at the Oklahoma Tax Commission and Legal Aid Services of Oklahoma Inc. In addition, he clerked two years for Vermont trial judges.

He graduated *summa cum laude* from OSU in 2005 where he was named the political science department "outstanding senior." In 2008 he received his J.D. from Michigan Law School. In law school he attained the highest overall grade in his legal practice section and served in a graduate assistant role (senior judge) for the legal practice program during his 2L and 3L years. Mr. Davis was also elected the managing editor for the *Michigan Journal of Race & Law*.

His past community involvement includes being a big brother for Big Brothers Big Sisters in Vermont. He was also a member of the board of directors of Teen Court, an alternative sentencing program for youth offenders in Lawton. He is a 2012 graduate of the OBA Leadership Academy.

# The OBA Needs YOU – Join an OBA Committee Today

Our association depends on you – its members – to make good things happen in our profession and in our communities. We accomplish so much through the work of OBA committees, and I'm encouraging you to get involved in 2014 – we need YOU! Through telephone participation or videoconferencing from Tulsa, you can attend meetings from virtually anywhere, including while sitting at your own desk.

The easiest way to sign up is to go online at [www.okbar.org](http://www.okbar.org). Just scroll down to the bottom of the page, and under "Members," click on "Join a Committee." Or if you prefer paper, fill out this form and mail or fax as set forth below. I will be making committee appointments soon, so please sign up by Dec. 2, 2013. I look forward to working with you in 2014!



Renée DeMoss, President-Elect

## Standing Committees

- |                                     |  |   |
|-------------------------------------|--|---|
| • Access to Justice                 | • Diversity                                  | • Paralegal                               |
| • Awards                            | • Group Insurance                            | • Professionalism                         |
| • Bar Association Technology        | • Law Day                                    | • Rules of Professional Conduct           |
| • Bar Center Facilities             | • Law-related Education                      | • Solo and Small Firm Conference Planning |
| • Bench and Bar                     | • Law Schools                                | • Strategic Planning                      |
| • Civil Procedure and Evidence Code | • Lawyers Helping Lawyers Assistance Program | • Uniform Laws                            |
| • Communications                    | • Legal Intern                               | • Women in Law                            |
| • Disaster Response and Relief      | • Legislative Monitoring                     | • Work/Life Balance                       |
|                                     | • Member Services                            |   |
|                                     | • Military Assistance                        |   |

Note: No need to sign up again if your current term has not expired. Check [www.okbar.org/members/committees/](http://www.okbar.org/members/committees/) for terms

Please Type or Print

Name \_\_\_\_\_ Telephone \_\_\_\_\_

Address \_\_\_\_\_ OBA # \_\_\_\_\_

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

FAX \_\_\_\_\_ E-mail \_\_\_\_\_

Committee Name

1st Choice \_\_\_\_\_

2nd Choice \_\_\_\_\_

3rd Choice \_\_\_\_\_

Have you ever served  
on this committee?

☐ Yes ☐ No

☐ Yes ☐ No

☐ Yes ☐ No

If so, when?  
How long?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

☒ Please assign me to ☐ one ☐ two or ☐ three committees.

Besides committee work, I am interested in the following area(s):

\_\_\_\_\_

Mail: Renée DeMoss, c/o OBA, P.O. Box 53036, Oklahoma City, OK 73152

Fax: (405) 416-7001

# October

- 14 OBA Licensed Legal Intern Swearing In ceremony;** 1:30 p.m.; Judicial Center, Oklahoma City; Contact Wanda F. Reece 405-416-7042
- 16 OBA Women in Law Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Kim Hays 918-592-2800 or Suzan Bussey 405-525-9144
- 17-19 OBA Hosts Southern Conference of Bar Presidents;** Skirvin Hilton Hotel, Oklahoma City; Contact John Morris Williams 405-416-7000
- 17 OBA Board of Governors meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- 18 Oklahoma Black Lawyers Association meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Brittini Jagers 405-314-0611
- OBA Rules of Professional Conduct Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Paul Middleton 405-235-7600
- 21 OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Jeffrey Love 405-286-9191
- OBA Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer [mocktrial@okbar.org](mailto:mocktrial@okbar.org)
- 22 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Judge Barbara Swinton 405-713-7109
- OBA Board of Bar Examiners Drafting and Grading Seminar;** 1 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Board of Bar Examiners 405-416-7075
- 23 OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Micheal Salem 405-366-1234



- 24 Second Annual Diversity Conference and Awards Luncheon;** 9 a.m.; Jim Thorpe Event Center, 4040 N. Lincoln, Oklahoma City; Contact Kara I. Smith 405-923-8611
- OBA Work/Life Balance Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Sarah Schumacher 405-752-5565
- OBA Rules of Professional Conduct Subcommittee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Paul Middleton 405-235-7600
- OBA Professionalism Committee meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge Richard Woolery 918-227-4080

25 **OBA Lawyers Helping Lawyers Assistance Program Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact O. Clifton Gooding 405-948-1978

28 **OBA Juvenile Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tsinena Thompson 405-232-4453

29 **OBA Communications Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and Doerner Saunders, Williams Center Tower II, Two West Second Street, Suite 700, Tulsa; Contact Dick Pryor 405-841-9260

## November

1 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Dieder Goss 405-416-7063

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

7 **OBA Lawyers Helping Lawyers discussion group meeting;** 6 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.; University of Tulsa College of Law, John Rogers Hall, 3120 E. 4th Pl., Rm. 206, Tulsa; RSVP to Kim Reber kimreber@cabainc.com



8 **OBA Law-related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Suzanne Heggy 405-556-9612

11 **OBA Closed** – Veterans Day Observed

13-15 **OBA Annual Meeting;** Sheraton Hotel, Oklahoma City

20 **Ruth Bader Ginsburg Inn of Court;** 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donald Lynn Babb 405-235-1611

21 **OBA Appellate Law Practice Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Collin Walke 405-235-1333

27 **OBA Clients' Security Fund Committee meeting;** 2 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Micheal Salem 405-366-1234

28-29 **OBA Closed** – Thanksgiving Observed

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### **Maddox Returns to OBA**

Attorney Debbie Maddox has returned to the OBA as assistant general counsel. Ms. Maddox worked in the Office of General Counsel from 2009 until February of this year, when she accepted a position as general counsel for the Oklahoma Ethics Commission. Prior to joining the OBA she was a solo practitioner in Norman for five years. She also served for 11 years with the OIDS Capital Trial Division. Ms. Maddox is a 1989 graduate of the OU College of Law.

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*Debbie Maddox*

### **TCBA Goes “Legally Pink” in October**

Breast cancer awareness is the focus of “Legally Pink,” an annual service project of the Tulsa County Bar Association Bench and Bar Committee. Judges in pink robes and pink law enforcement vehicles are just a few of the ways the committee reminds women that education and early detection save lives.



A kickoff event was held at the Tulsa County Courthouse Oct. 4 in partnership with Turn Tulsa Pink, Oklahoma Project Woman and many other sponsors. The event is just one more example of the many ways Oklahoma lawyers give back to their communities.

*Tulsa County District Judge James Caputo sits atop a Sheriff's Dept. horse during the Legally Pink event at the Tulsa County Courthouse. Tulsa county judges wear pink robes for breast cancer awareness during the month of October.*

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### **Member Benefit Update – New at Fastcase: Annotated Oklahoma Statutes**

Online legal research provider Fastcase has improved coverage for OBA members by releasing a new annotated version of the Oklahoma Statutes. To find annotations, browse to the bottom of a statute section that has been cited in judicial opinions, and you'll see a list of citing cases, along with their decision dates and number of citations to each. And as with search results, you can sort the citing cases by date or by authoritativeness. It's one more way that Fastcase is working to meet the needs of our members.



### **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 better their communities. Have a great story or photos to share? Email Lori Rasmussen at [lorir@okbar.org](mailto:lorir@okbar.org).

## 2014 Mock Trial Season Gearing Up

More than 200 students and their teachers attended a recent OBA High School Mock Trial program workshop at the Oklahoma Bar Center. Seven schools will be first-time participants in the program this year.

Students learned the ins and outs of mock trial competition, including organization of materials, rules of evidence, trial elements such as opening statements, direct and cross examination, and presentation skills.

OBA High School Mock Trial Committee member Jennifer Bruner took charge of organizing the workshop. She also served as a presenter along with Committee Chair Melissa Peros, Christine Cave, Julie Austin, Marsha Rogers, Tai Du and Joe Carson.

Many volunteer opportunities are available in the OBA High School Mock Trial program. To get involved, contact coordinator Judy Spencer at [mocktrial@okbar.org](mailto:mocktrial@okbar.org).



*Oklahoma City attorney and mock trial alum Tai Du talks to students about program specifics during the recent workshop at the bar center.*

### Aspiring Writers Take Note

We want to feature your work on "The Back Page." Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry is an option too. Send submissions no more than two double-spaced pages (or 1 1/4 single-spaced pages) to OBA Communications Director Carol Manning, [carolm@okbar.org](mailto:carolm@okbar.org).



### Free Discussion Groups Available to OBA Members

"Stress Management and the Practice of Law" will be the topic of the Nov. 7 meetings of the Lawyers Helping Lawyers discussion groups in Oklahoma City and Tulsa. Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. In Oklahoma City, the group meets from 6 – 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th Street. The Tulsa meeting time is 7 – 8:30 p.m. at the TU College of Law, John Rogers Hall, 3120 E. 4th Place, Room 206. There is no cost to attend and snacks will be provided. RSVPs are encouraged to ensure there is food for all.

### OBA Member Reinstatement

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

Melissa Ann Lipe  
OBA No. 19437  
2201 Outabounds Way  
Edmond, OK 73034

# Kudos

**Stephen E. Reel**, Oklahoma Municipal Assurance Group general counsel, has been inducted into the 2013 Oklahoma Hall of Fame for City and Town Officials.

# On The Move

**Larry V. Simmons** announces the opening of his private practice in Tulsa. His practice areas include municipal law, civil rights and discrimination, labor and employment, personal injury and wrongful death as well as criminal law. He has 30 years of experience as a government trial lawyer representing the cities of Tulsa and Stillwater. Mr. Simmons holds a J.D. from TU, an M.A. in public administration from OSU and a B.A. in political science from USAO. His new office address is Suite 2820, 401 S. Boston, Tulsa. He can be reached by phone at 918-694-3040.

**Ed Evans** — who most recently served as chief hearing officer for the Oklahoma Employment Security Commission — joined the Social Security Administration's Office of Disability

Adjudication and Review as an administrative law judge.

**Crowe & Dunlevy** announces the addition of **Allison Osborn** as an associate in the firm's Tulsa Office. Ms. Osborn joins the litigation and trial practice group, concentrating her practice in business and complex litigation matters. She earned her B.A. in political science from Notre Dame and holds a J.D. from OU where she was on the dean's honor roll and received the Norris Fellowship, the American Jurisprudence Awards for Legal Research and Writing Property and the Ray Teague Memorial Scholarship.

**Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco** announces **Rachael F. Hughes** has joined the firm as an associate. Ms. Hughes graduated with highest honors from the TU College of Law in 2013. Ms. Hughes served as editor in chief of the *Tulsa Law Review* and was a member of the Board of Advocates. She received CALI awards in Constitutional Law I, Evidence, Decedents' Estates and Trusts and Tribal Government. She was also awarded the Order of the Curule Chair. Ms. Hughes received her B.A. in history with minors in English and Spanish from OSU in 2008. She currently practices in the areas of appellate advocacy and civil litigation.

**First American Title Insurance Company** recently named **Monica Amis Wittrock** as senior vice president. Ms. Wittrock will be

responsible for oversight of operations in seven states in the central part of the country. Ms. Wittrock earned her J.D. from OU in 1982.

**Timothy J. Synar** and **Hayley V. Potts** have joined M.K. Bailey Law Offices in Oklahoma City. Mr. Synar is a civil litigation attorney and has joined the firm as of counsel. His focus is on business litigation, construction law, catastrophic injury and civil appellate practice. Ms. Potts has joined the firm as an associate attorney. She has a law degree from her native England in addition to her recent J.D. from OCU. Ms. Potts will focus on criminal defense and family law.

**Hartzog Conger Cason & Neville** is pleased to announce that **Brad Madore** and **Ashley Powell** have joined the firm as associates. Madore ranked first in his class at the OCU School of Law, won the Excellence of Technical Editing Award for his work on the *OCU Law Review*, served as a member of the Holloway Inn of Court and received 10 CALI Excellence for the Future Awards. He received his bachelor's degree in biology from Boston University with a minor in computer science. Prior to attending law school, he worked 10 years for an industrial distribution company, which he left as a vice president. Madore's practice areas include business transactions and ongoing representation of business clients, securities law, employment law and real estate law. Ms. Powell



graduated with highest honors from the OU College of Law where she was named outstanding senior law student, was assistant articles editor for the *Oklahoma Law Review* and served as director of the Dean's Council. She was a member of the Ruth Bader Ginsburg American Inn of Court and was on the dean's honor roll for four semesters. Powell holds a B.S. in political science from OSU, where she served as Student Government Association secretary.

The law firm of Pignato, Cooper, Kolker & Roberson announce **Lauren D. Fagala** and **Megan A. Winter** have joined the firm as associates. Ms. Fagala and Ms. Winter are both 2013 graduates of OU College of Law and will practice in the areas of insurance coverage disputes and general insurance defense.

**Doerner, Saunders, Daniel & Anderson** announces **Destyn Stallings** has joined its Tulsa office as an associate. Ms. Stallings graduated with honors from the TU College of Law where she served as Student Bar Association delegate, was a member of the Board of Advocates, Women's Law Caucus, Federalist Society and Phi Delta Phi legal society. She was also an extern in the Tulsa County District Court for Judge Linda Morrissey and served as the *Tulsa Law Review* editor.

**Henson & Marshall** in Shawnee announces that **Drew O'Gwynn** has joined the firm as an associate attorney. Mr. O'Gwynn is a 2013 graduate of the OU College of Law where he graduated with honors.

The law firm of Norman Wohlgemuth Chandler & Jeter announces that **Valery O. Giebel** has joined the firm as an associate. Ms. Giebel earned her J.D. with highest honors from TU in 2013. During law school, Ms. Giebel served as executive officer for Phi Delta Phi and Women's Law Caucus. She is a member of the National Bar Association of the Cherokee Nation. Ms. Giebel graduated with a B.S., *cum laude*, from Virginia Commonwealth University. Ms. Giebel's practice will focus on complex civil litigation, natural resource law, energy and federal Indian law.

## At The Podium

**Paul R. Foster** of Paul Foster Law Offices, P.C., of Norman was a featured speaker at the recent Community Bankers Association of Oklahoma annual convention in Oklahoma City. Mr. Foster coordinated and moderated the presentation of the federal bank regulatory panel consisting of regulators from the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Federal Reserve. The presentation covered areas of current regulatory emphasis for banks including capital requirement changes, the tenor of beltway treatment of community banks, mineral interest ownership restrictions and forecasts of

trends in interest rate risk in the current rate environment.

**Jim Banowsky** spoke on "Software Patents" at a joint European-Singapore Patent Office conference in Singapore in August. In October, he will present on "European and U.S. Courts and Modern Technology" in Kiev, Ukraine at a conference sponsored by the All European Academy and the Max Planck Society for the Advancement of Science. Mr. Banowsky, formerly of Norman, is an attorney with Microsoft Corp., and he deals with international intellectual property issues. He has been an OBA member since graduating from the OCU School of Law in 1993.

**UCO Professor Marty Ludlum** recently presented a continuing education seminar to the Louisiana Funeral Directors Association in New Orleans. His presentation was titled "Booster Shot of Employment Law Changes."

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

editing, and printed as space permits.

Submit news items via email to:  
Jarrod Beckstrom  
Communications Dept.

Oklahoma Bar Association  
405-416-7084  
barbriefs@okbar.org

*Articles for the Nov. 2  
Issue must be received by  
Oct. 18.*

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## IN MEMORIAM

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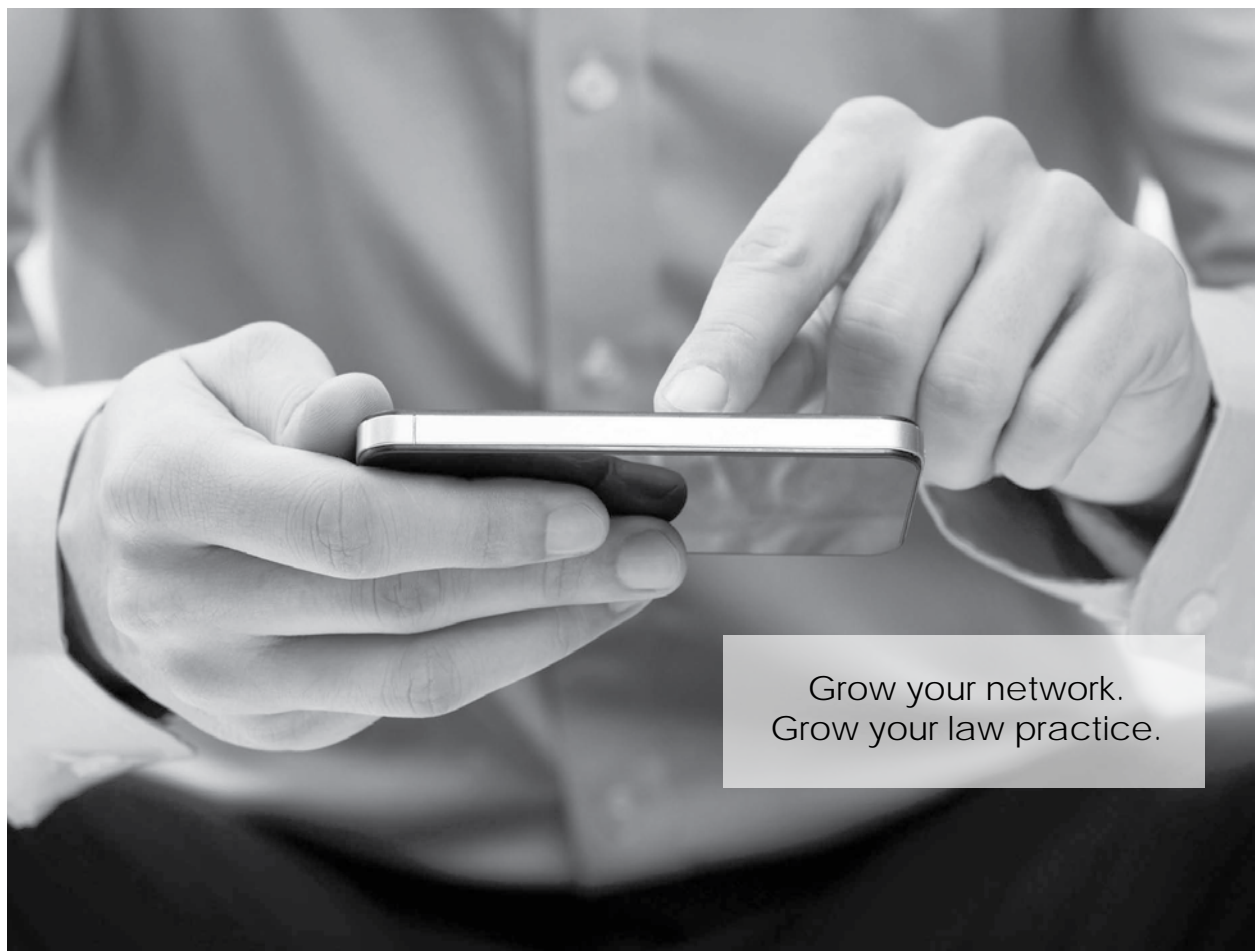
**C**hester Randall “Randy” Jones of Tahlequah died Sept. 29. He was born on Nov. 15, 1950, in Sallisaw. **He joined the U.S. Navy in 1971 and served two years active duty and four years in the reserves.** After his service, he attended OU, earning his J.D. in 1981. He was in private practice for 27 years. He collected baseball cards, was an avid reader and was a Texas Rangers fan. He was known as a quiet and thoughtful

**B**encile H. Williams Jr. died Sept. 20 in Jenks. Born in Oct. 30, 1931, **he was a Korean War veteran** and a member of the Tulsa County Bar Association. He graduated from the TU College of Law in 1962.

**J**ames “Jamie” Reed Wolfe died Sept. 7 in Hugo. He was born July 18, 1944, in Wynnewood. After graduating from Hugo High School, **he served in the U.S. Army as a member of the 173rd Airborne Brigade Separate in**

**South Vietnam.** He earned his bachelor’s degree from OU and received his J.D. from OCU in 1974. Mr. Wolfe served as Choctaw County associate district judge from 1980 – 1992, served as Pushmataha County assistant district attorney for eight years and Choctaw County associate district judge from 2007 until his death. He also served as chief justice for the Choctaw Nation of Oklahoma for 25 years. Memorial contributions can be made to a charity of your choice.

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# Annual Meeting

## Hotel info

Fees do not include hotel accommodations. Make your reservations by Oct. 21 for a reduced rate!

[www.amokbar.org/home](http://www.amokbar.org/home)



## Registration

*Register by Oct. 21 to receive the early-bird rate!*



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## Events

Get the details on Wednesday evening's President's Legal Superhero Reception, Thursday evening's OBA Sections event and the Friday morning President's Breakfast

[www.amokbar.org/events](http://www.amokbar.org/events)

## Award Winners

Let's give a hand to this year's award winners! Find out who the winners are and when each winner will receive their award

[www.amokbar.org/awards](http://www.amokbar.org/awards)

## Elections

Get to know the candidates for next year's officers and Board of Governors

[www.amokbar.org/barbusiness/elections](http://www.amokbar.org/barbusiness/elections)

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Dale McDaniel, CPA, [rdmcdaniel@jmgglobal.com](mailto:rdmcdaniel@jmgglobal.com),  
405-359-0146.

**INSURANCE EXPERT** - Michael Sapourn has been qualified in federal and state courts as an expert in the Insurance Agent's Standard of Care, policy interpretation and claims administration. An active member of the Florida Bar, he spent 30 years as an Insurance agent and adjuster. He is a member of the National Alliance faculty, a leading provider of education to agents. Call 321-537-3175. CV at [InsuranceExpertWitnessUS.com](http://InsuranceExpertWitnessUS.com).

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**TREE DAMAGE, CONSULTING ARBORIST,** expert witness, tree appraisals, reports, damage assessments, herbicide damage, hazard assessments, all of Oklahoma and beyond. Certified arborist, OSU horticulture alumni, 23 years in business. [BillLongArborist.com](http://BillLongArborist.com); 405-996-0411.

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## POSITIONS AVAILABLE

LAW FIRM SEEKING ASSOCIATE ATTORNEY in downtown Oklahoma City, with 3-10 years experience in Indian Law and litigation, with a commitment to representing tribes and tribal organizations. Preference will be given to attorneys with demonstrated experience and/or education in American Indian Law. Applicant must be licensed to practice in at least one jurisdiction; membership in good standing in the Oklahoma Bar is preferred, if not a member of the Oklahoma Bar, the applicant must pass the Oklahoma Bar within 15 months. Applicant should possess excellent analytical, writing and speaking skills and be self-motivated. Compensation commensurate with experience. Excellent benefits. Please submit the following required documents: a cover letter that illustrates your commitment to promoting tribal government and Indian rights, current résumé, legal writing sample, proof of bar admission, and contact information for three professional references to: legalapplications@yahoo.com.

KIRK & CHANEY, a mid-size AV downtown OKC firm, seeks experienced attorney to handle a diverse civil litigation practice, including complex civil litigation and family law matters. Salary is commensurate with experience. Please send résumé, law school transcript and two writing samples to Kirk & Chaney, Attn: Ms. Chris Leigh, 101 Park Avenue, Suite 800, Oklahoma City, OK 73102.

SENIOR LEVEL LITIGATION ATTORNEY wanted for new Tulsa office of an expanding national insurance defense firm. Candidate should have a minimum of 12 years experience in litigation and must demonstrate strong client relations skills. Construction defect, professional liability, employment, bad faith and personal injury defense work helpful. Compensation package will reward skills, experience and existing relationships. Additional information may be found at [www.helmsgreene.com](http://www.helmsgreene.com). We would also consider a small litigation team. Please direct inquiries to Steve Greene at [sgreene@helmsgreene.com](mailto:sgreene@helmsgreene.com) or 770-206-3371.

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EMPLOYMENT SPECIALIST: OK Dept of Mental Health & Substance Abuse Services is looking to hire dedicated HR professional. Responsibilities involve completion of various advanced level HRM activities, personnel actions & application of laws, rules & standards related to HR & payroll. In add. to standard HRM processes, this pos. will specialize in employment law & will act as primary contact w/legal, processing all agency disciplines. Reqs: bachelor's degree & 4 yrs of technical HRM experience to include: job analysis, position classification, wage/salary, benefit administration, recruitment, payroll administration, or accounting; OR An equivalent combination of education and experience. \$40,000 - \$50,000 Preference will be given to applicants w/experience in one or more of the following: Public sector discipline process & related issues (e.g., MPC and Grievance processes): Proficient in legal issues affecting disciplines & terms (e.g., EEO; ADA; ADEA; Retaliation/Whistleblower): Experience in reviewing & drafting organizational policy. Applicants applying for this position should submit writing sample related to one of the issues described above. ODMHSAS offers excellent benefit & retirement packages; send résumé with cover letter and writing sample referencing job title & 2014-14 CO to [humanresources@odmhsas.org](mailto:humanresources@odmhsas.org) Reasonable accommodation to individuals with disabilities may be provided upon request. Application period: 10/2/13 - 10/18/13. EOE.

THE DEPARTMENT OF HUMAN SERVICES, Office of General Counsel is seeking qualified applicants for an Assistant General Counsel position. The successful applicant will provide legal representation in Children's services area, including matters relating to day care licensing, adoption and child welfare. The attorney must have at least three years' experience. Salary based on qualifications and experience. Excellent state benefits. Send résumé, references and writing samples to: Retta Hudson, Office Manager, Office of General Counsel, Dept. of Human Services, PO Box 25352, Oklahoma City, OK 73125-0352. Only writing samples less than one year old will be received.



## POSITIONS AVAILABLE

AV RATED MIDTOWN OKLAHOMA CITY FIRM seeks associate 4-7 years experience. Very busy, fast-paced insurance defense office offering competitive salary, health/life insurance, Simple IRA, etc. Candidates with strong academic background, practical litigation experience and excellent writing skills, please send a cover letter, résumé and writing samples via email to Hrsearch029@yahoo.com.

NORTHWEST OKC AV-RATED LAW FIRM has immediate position available for an associate attorney with 3-5 years experience in the general civil business practice area with an emphasis in civil litigation. Must have experience with pretrial discovery and motion practice. Must have excellent research and writing skills. Submit a confidential résumé with salary requirements, references and writing sample to "Box Z," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.



### Assistant General Counsel

The responsibilities of this position will include assisting in management of legal functions surrounding commercial lending, including documentation of new commercial loans and assisting with collection activities for special assets.

The qualified candidate will possess a law degree and must have 3-5 years of legal experience in commercial lending activities, including new loan documentation and/or commercial loan collection activities with a law firm or financial institution. Candidate must be licensed in Oklahoma or be willing to pursue same immediately. The successful candidate will have excellent academic credentials, strong drafting, negotiation and oral communication skills and must possess the ability to manage large numbers of projects simultaneously in a variety of legal areas. The candidate must be able to work under pressure and have good judgment and the ability to identify potential legal issues. Good writing, research and communication skills are required.

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## POSITIONS AVAILABLE

NW OKLAHOMA CITY LAW FIRM seeks a full time associate attorney with at least four (4) years litigation experience. Must be self-motivated, organized and able to handle caseload independently. Strong analytical writing and oral advocacy skills are required. The firm's practice concentrates primarily on general civil litigation and business litigation. Résumés should be sent to Cheek & Falcone PLLC, Attn: Angela Hladik, 6301 Waterford Blvd., Suite 320, Oklahoma City, OK 73118 or [ahladik@cheekfalcone.com](mailto:ahladik@cheekfalcone.com). All applications will remain confidential.

FAST-PACED AV RATED civil litigation firm in OKC seeks associate attorney with 0-2 years' experience. Must be a self-starter and self-motivated with outstanding research and writing skills. This position requires someone with a professional appearance, excellent social skills and a superb work ethic. Attorney will work with managing partner on nursing home abuse, construction defect, insurance defense, and other complex civil litigation cases. Please submit résumés, law school transcript, and writing sample to [djs56@cox.net](mailto:djs56@cox.net).

NORTHWEST OKLAHOMA CITY FIRM HAS A POSITION AVAILABLE for an Oil & Gas Title Attorney Trainee with some experience writing Ownership Reports and/or Title Opinions. The candidate may be a Landman (but must have a J.D. degree) or be a practicing Attorney. Ideally the candidate will have HBP experience (i.e., able to examine Working Interest title and calculate Net Revenue Interests) and can begin work immediately. Send résumé and relevant writing sample to [oilandgasattorney@cox.net](mailto:oilandgasattorney@cox.net).

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# May All Your Days Be Circus Days

By Jerry Sokolosky

It was 1975. The receptionist buzzed me saying a caller named Larry was on the line. "He says he owns a circus and needs a lawyer." I took the call.

Larry asked if I had any circus experience. Thinking it was a prank call I said "I served two terms in the Oklahoma Legislature. Would that count?" He said from what he had read, it would. Larry wanted me to get him the cheap circus truck tags. At that time, a circus could sign an affidavit that they traveled no more than 8,000 miles per year and could buy 18 wheeler tags for \$50. This was a courtesy of the late Senator Gene Stipe for his circus friends in Hugo.

Larry came by the next day, neatly dressed, intelligent and well-spoken. In the meantime I had checked the statutes and was able to assure him that I could handle getting the cheap tags.

After concluding our business, we visited casually about the circus business. I immediately determined that we had a communication problem. For instance, Larry said his show was fairly profitable and he was able to make "the nut" even in the smaller towns. However he was having trouble with "butchers" swinging with the "garbage" money and on occasion "townies" harassing the "lot lice."

Since there are a number of circuses wintering in Oklahoma, there is the possibility that an Oklahoma lawyer might be asked to represent a circus. So, as a public service to the Oklahoma bar, I

have prepared the following circus slang glossary.

**Making the nut** — In the nineteenth century, the circus traveled by horse-drawn wagons. If a show



had bad business in a town and went on to the next, they would find a shopkeeper who would sell them ice, food, grain and hay on credit. The transaction would be secured by giving the shopkeeper the axle nut from the left front wheel of the lead wagon, to be returned when the bill was paid.

**Butchers** — Vendors who sell popcorn, snow cones and cotton candy in the seats. Historically, hot dogs were sold wrapped in lightly waxed butcher paper.

**Lot lice** — The employees' children; **Townies** — Uninvited ruffians who hang around the lot; **Garbage** — Vinyl toys sold during the **Blow off** — The end of the show when the audience is leaving; **Swing with** — Steal something and leave the show; **Joints** — Stands where popcorn, sodas and cotton candy are sold; Not to be confused with a **Notch Joint** — The local house of pleasure; **Clown alley** — Where the clowns dress and apply their make-up; **Donikers** — Bathroom facilities for circus patrons; **Bulls** — Male and female elephants; **Cutting up jackpots** — Sitting around telling circus stories. Some true, some not so true; **First of May** — A new employee or performer. Years ago circuses would begin their route with a blessing on May first.

**Caveat:** Never confuse a circus with a carnival. Circus performers are usually well-educated, sober and finely tuned athletes. They consider "carnies" to be something less.

Larry and I became good friends and when he semi-retired, we bought a small Shrine circus touring the central United States. Great fun. At least for a couple months each year I didn't have to worry about being late for motion docket.

I hope everyone is making the nut. May all your days be circus days.

*Mr. Sokolosky practices in Oklahoma City.*

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