

The background of the cover features a man in a black suit standing on a dirt path that splits into two directions. He is seen from behind, with his left hand on his hip and his right hand scratching his head. The landscape is a green field under a cloudy sky. On the left side, there is a large, dark, swirling cloud formation that resembles a storm or a giant hand reaching down.

THE Oklahoma Bar JOURNAL

Volume 85 ♦ No. 33 ♦ Dec. 13, 2014

Ethics & Professional Responsibility

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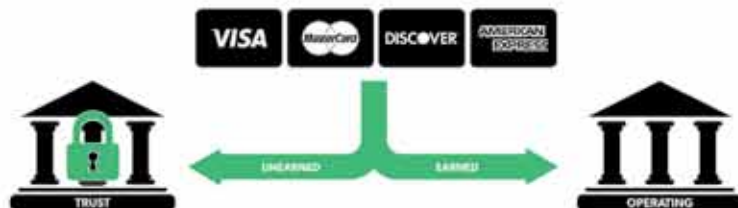
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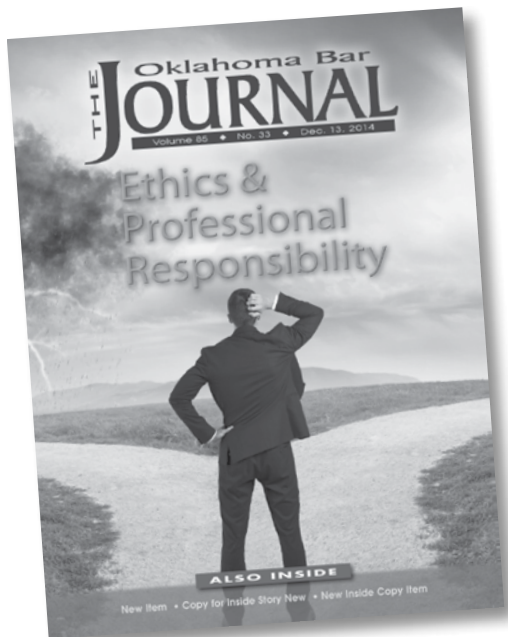


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THEME:
ETHICS & PROFESSIONAL
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An OBA Holiday Letter

By Renée DeMoss

Love them or hate them, we're all familiar with the newsy letters many people love to send around the holidays. In fact, they are so prevalent that you can even find editing suggestions online. "Keep it short, keep it readable, don't brag" are just a few, along with "always mention births, deaths, marriages and moves." Obviously some of those aren't appropriate here, so this holiday letter is limited to a brief recap of the OBA year, and good wishes for 2015.

Dear OBA members,

As another exciting year at the OBA comes to a close, it's time to sit back, reflect and express thanks to all who have helped make 2014 a successful year. As always, first thanks goes to the OBA members who gave me and my incredible Board of Governors the opportunity to represent this bar association in 2014.

We have just completed the OBA 110th Annual Meeting in Tulsa. Although the weather included record cold temperatures, the camaraderie and atmosphere at the Hyatt Regency was warm and hospitable. The OBA CLE Trial College, Jim Calloway's "Tools for Tomorrow's Lawyers" CLE, and the Sean Carter program were extremely well-attended, and free CLE provided by our sections was a hit. The Thursday night party was likewise packed with good people, food and fun.

For many members, including myself, the highlight of the Annual Meeting was the education received from international lawyer and legal futurist, Professor Richard Susskind, about where the practice of law may be headed. Not only was he a fascinating speaker, his message regarding the impact of technology in the legal profession is one that should be heeded by all practicing lawyers.

A particular highlight of 2014 was the determination of OBA members in addressing SJR 21, which would have eliminated the right of OBA members to elect the six lawyer members of the JNC. Another was the OBA's 2014 "Protect Your Courts, Protect Your Rights," campaign delivered in town hall meetings and CLEs across the state.

Particular thanks go to all of the OBA section and committee leaders and members who volunteered their time in 2014; I wish there was space to thank each chairperson individually. A special shout-out also goes to the Law Schools Committee for working with me and our law school deans to revamp the OBA annual school visits and to educate law students on legal job opportunities in smaller Oklahoma communities.

New OBA programs we instituted in 2014 will hopefully have a huge impact in the future. The "Plan Ahead Guidebook" now available on my.OKBar.org provides planning tools such as checklists, forms and other guides, so that all Oklahoma lawyers can protect their clients, staff and families in the event of disability or death, and help our attorneys plan for their futures.

The new Master Lawyers Section has held its first organizational meeting, and is gearing up to provide new programs and opportunities for lawyers over 60. The new Speakers Bureau is now accessible online at speakers.okbar.org. OBA members and the public can use this user-friendly tool to identify lawyers across the state who are willing to make speeches on a variety of legal topics. You will also in 2015 begin to see and hear the fruits of the OBA's involvement, initiated this year, with the Oklahoma's Promise Program, which helps financially underprivileged students continue their studies through college.

Finally, to the more than 300 new lawyers who we welcomed to the OBA during the spring and fall of 2014, please know that you are joining an organization that is in good financial shape, has a beautiful, well-maintained building, and a staff that always keeps your best interests at the forefront. David Poarch will lead the association as 2015 president with intelligence and humor, along with a spectacular Board of Governors. And to all OBA members, never forget that the OBA is here to serve you, and that it also provides you with great opportunities to serve.

Wishing you and yours a wonderful holiday season, and a wonderful 2015.

To all OBA members, never forget that the OBA is here to serve you, and that it also provides you with great opportunities to serve.



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EVENTS CALENDAR

DECEMBER 2014

- 15 **OBA Licensed Legal Intern Swearing-In Ceremony**; 12:45 p.m.; Judicial Center, Oklahoma City; Contact Debra Jenkins 405-416-7042
OBA Licensed Legal Intern Committee meeting; 2:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Candace Blalock 405-238-0143
- 16 **OBA Bench and Bar Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David Lewis 405-556-9611
- 17 **OBA Alternative Dispute Resolution Section meeting**; 11 a.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Jeffrey Love 405-286-9191
- 18 **OBA Women in Law Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Allison Thompson 918-295-3604
- 19 **OBA Access to Justice Committee meeting**; 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Laurie Jones 405-208-5354
OBA Rules of Professional Conduct Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Paul Middleton 405-235-7600
- 24-26 **OBA closed** – Christmas observed

JANUARY 2015

- 1-2 **OBA closed**– New Year's Day observed
- 6 **OBA Government and Administrative Law Practice Section meeting**; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Scott Boughton 405-717-8957
- 8 **OBA Mock Trial Committee meeting**; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066
- 9 **OBA Law-related Education Committee meeting**; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Suzanne Heggy 405-556-9612
OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact M. Shane Henry 918-585-1107

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

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

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Lights, Camera, Bar Action

Ethical Implications of Extrajudicial Statements and Pre-Trial Publicity in Criminal Proceedings

By Elliott C. Crawford and David T. McKenzie

As you and your client exit the courtroom, you are immediately blinded by the lights of news cameras. The herd of reporters that have assembled jockey for position in an attempt to request an interview or, at the very least, ask your client an outrageous question in hopes of eliciting an emotional response. Suddenly, a reporter thrusts a microphone in your client's face, "Sir, why did you do it?" Immediately, you wisely step in front of your client and inform the reporters that all questions and interview requests should be directed to defense counsel.

The microphone is then propelled into your face and the news cameras and reporters now focus on you, "Counselor, the affidavit states that your client admitted to law enforcement that he committed this horrific crime. Also, the prosecutor says that it's an open-shut case and your client will spend the rest of his life behind bars. What say you?"

As you attempt to quickly formulate a response, the following thoughts race through your head:

"My client is innocent. In fact, he's looking at me right now and expecting me to also defend him in the court of public opinion. I need to say something to generate public support for my client."

"The prosecutor's comments about the case were inaccurate. I need to explain to these folks why this is not an open-shut case."

"Finally, I have made the spotlight. This is great advertising and will likely generate more business. What can I say that will reveal my ingenious knowledge of the law and attract more clients?"

"Wait a minute- this case will likely go to trial. What if I say something that has a prejudicial effect? I wonder if the Oklahoma Rules of Professional Conduct address trial publicity. Maybe I should consult the rules before I comment."

If you practice an area of law that involves sensational issues, you will likely encounter the media at some juncture in your career. As such, it's absolutely paramount that practitioners familiarize themselves with the rules pertaining to extrajudicial statements and pre-trial publicity. The purpose of this article is threefold: 1) inform the reader of the nature of the media business and how it interacts with the

law; 2) familiarize the reader with the ethical rules and case law relevant to extrajudicial statements; and 3) provide a practical guide on how to interact and methodically engage the media.

MEDIA AND THE LAW: A LOVE AFFAIR

According to public opinion polls, lawyers consistently rank near the top of the most despised professions in the United States.¹ Yet, by the same token, Americans are also fascinated with attorneys and their clients' causes, a fascination that materializes into movies, television series, newspaper and magazine articles, and frequent coverage on the nightly news. The public is simply enthralled with the topics surrounding our clients' cases — drama, scandal, crime, violence and deviation from social norms. The media has certainly tapped into and contributed to this obsession. Open any newspaper, news magazine, or turn on the nightly news and you will find that a majority of the headlines involve some aspect of the law. In fact, this author's first exposure to the judicial system came via media coverage of the O.J. Simpson trial, perhaps the most publicized criminal trial in American history.

From the initial murders on June 13, 1994, and the Ford Bronco chase on June 17, 1994, to the verdict on October 3, 1995, I was obsessed. Granted, my fixation was an aberration because it stemmed from courtroom dynamics,² but a majority of the public, on the other hand, was obsessed with the theatrics and drama that accompanied the trial. Indeed the media catered to an enthusiastic audience; with ABC, CBS, and NBC giving more airtime to the case than the Bosnian War and the Oklahoma City bombing combined.³

Moreover, "yellow journalism" reared its ugly head and created significant controversy when *Time* published a cover story with O.J. Simpson's mugshot on the cover, in which photo manipulation was utilized to darken Mr. Simpson's photo to make him appear more menacing.⁴

Indeed, the media and the law have a dynamic and, at times, mutually beneficial relationship. First and foremost, the media can only obtain limited information from court documents and by attending court proceedings. Usually the participants with the most information about a case are the attorneys of record. As such, attorneys are able to assist the media by providing in-depth information about a

case, which allows the media to supplement the findings contained in public records or explain what transpired in judicial proceedings. The media reciprocates by investigating and uncovering public scandal, subjecting public officials to intense scrutiny, thereby serving as a form of checks and balances and assisting the ends of justice. As noted by the United States Supreme Court in *Sheppard v. Maxwell*, "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."⁵

Although the media and the law enjoy a mutually advantageous dynamic, both can (and often do) clash. Indeed, both are equally culpable of opportunistic practices that can result in legal consequences. As mentioned above, the media have deadlines and often scramble to put stories together at the last minute to fill airtime or print space. Overzealous and unscrupulous reporters sometimes falsify, misrepresent, omit or sensationalize facts to produce dramatic, eye-catching and newsworthy stories that will attract viewers and increase ratings. Consequently, when the media publishes false information that exposes another to public hatred, contempt, ridicule or disgrace the media subjects itself to civil liability for defamation if said statements result in financial loss or damage to the person's reputation or emotional injury.⁶

Attorneys, by the same token, also subject themselves to legal consequences when they cross the line. Indeed, attorneys typically have dynamic personalities, are very opinionated and possess firm convictions regarding their clients' causes. As such, attorneys often see the media as a platform to promote and generate public support for their clients. However, utilizing the media for such purposes has traditionally been frowned upon. Since the promulgation of the first official code of legal ethics by the State of Alabama in 1887, attorneys have been instructed to exercise caution when making statements to the media. In 1908, the American Bar Association enacted the Canons of Professional Conduct, which also addressed pre-trial publicity:

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned.⁷

In 1964, the Warren Commission issued a report on the assassination of President John F. Kennedy, which also included a recommendation that “representatives of the bar, law enforcement associations, and the news media work together to establish ethical standards concerning the collection and presentation of information to the public so that there will be no interference with pending criminal investigations, court proceedings, or the right of individuals to a fair trial.”⁸ As a result of the commission’s recommendation, the Advisory Committee on Fair Trial and Free Press developed the ABA Standards Relating to Fair Trial and Free Press, which were relied upon by the American Bar Association in enacting Rule 3.6 of the Model Rules of Professional Conduct. A majority of the states have adopted ABA Model Rule 3.6 (some with slight variations), which provides, in part:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.⁹

The evils to be remedied in enacting these rules are obviously the obstruction of justice and violation of a criminal defendant’s right to trial by an impartial jury. Indeed, attorneys are officers of the court and have access to detailed information unknown to the public. Consequently, statements made by lawyers carry a lot of weight and have the potential to influence laymen and prejudice judicial proceedings. Upon first inspection, in order to preserve the defendant’s constitutional rights and uphold the integrity of the judicial process, it may appear entirely logical to prohibit an attorney of record from making any statement during the pendency of the case. However, upon closer inspection, there are other factors that warrant consideration — such as an attorney’s First Amendment rights and the public’s right to be informed on what transpires in the courtroom.

The aforementioned issues indeed present a conundrum that present competing interests. Early ethical rules pertaining to extrajudicial statements, in many states, were vague, ambiguous, and failed to provide attorneys any guidance. Many states responded by amending

and/or developing, within its ethical rules, a list of topics that are permissible and impermissible to discuss. Thus, it appears that attorneys need only consult and become familiar with their state’s ethical rules pertaining to extrajudicial statements before responding to media inquiries. However, as we will see below, familiarizing oneself with the ethical rules and methodically preparing and delivering an extrajudicial statement can still land the attorney in trouble with the bar.

THE CASE OF *GENTILE V. STATE BAR OF NEVADA*

On January 31, 1987, four kilograms of cocaine and approximately \$300,000 in travelers’ checks were reported missing from a safety deposit vault at Western Vault Corporation in Las Vegas, Nev.¹⁰ The theft was highly publicized and created a media frenzy because the drugs and money had been used in a botched undercover operation.¹¹ The initial targets of the investigation were crooked police officers and employees at Western Vault;¹² but as time went on, the Western Vault’s owner, Grady Sanders, became the primary suspect.¹³ Over the course of the next year following the theft, at least 17 articles were written about the heist in major local newspapers, and numerous local television stations provided updates of the investigation.¹⁴ Moreover, law enforcement released various statements to the press; including multiple conspiracy theories and assertions that the police officers had passed polygraph examinations, were no longer suspects, and Mr. Sanders refused to submit to a polygraph examination.¹⁵ As a result of the publicity, Mr. Sanders lost his business and his health began to deteriorate.

Dominic P. Gentile was a criminal defense attorney in Las Vegas, Nev., and was retained to represent Mr. Sanders. Gentile had followed the publicity and made the decision, for the first time in his career, to call a formal press conference.¹⁷ On the evening before the press conference, Mr. Gentile spent several hours researching the State Bar of Nevada’s ethical rules pertaining to pre-trial publicity and extrajudicial statements.¹⁸ During the press conference, Mr. Gentile read a prepared statement that 1) stated that the evidence demonstrated his client’s innocence; 2) asserted that the likely thief was a police detective; and 3) made comments about the credibility of other alleged victims who came forward and claimed that money was missing from their safety deposit

boxes.¹⁹ Mr. Gentile then answered questions from the media.²⁰ However, unlike the police, Mr. Gentile refused to comment on the polygraph examinations; did not mention any confessions, evidence from searches or test results; and Mr. Gentile refused to elaborate upon his comments regarding the credibility of the other alleged victims.²¹ Six months later, Mr. Sanders was tried before a jury and acquitted on all counts.²²

After Mr. Gentile's client was acquitted, the State Bar of Nevada filed a complaint against Mr. Gentile for allegedly violating Nevada Supreme Court Rule 177, which prohibited an attorney from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding."²³ Following the disciplinary hearing, the Southern Nevada Disciplinary Board concluded that Mr. Gentile violated Rule 177 and recommended a private reprimand.²⁴ Mr. Gentile appealed and the Nevada Supreme Court affirmed.²⁵

The United States Supreme Court granted certiorari and reversed. A divided court delivered two separate opinions. In the first opinion, delivered by Justice Kennedy, the court held that Rule 177 was void for vagueness because the safe harbor provision²⁶ failed to provide Mr. Gentile fair notice that he could be disciplined for his extrajudicial statements.²⁷ The court noted that the fact Mr. Gentile was found in violation after studying the rules before he issued his statement demonstrated that Rule 177 created a trap.²⁸ The court also observed that lawyer speech about pending matters involved classic political speech, "speech critical of the exercise of the State's power"²⁹ that "has traditionally been recognized as lying at the core of the First Amendment."³⁰ Further, the court noted, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."³¹

The court also found that the timing of Mr. Gentile's statement was crucial in the determination of possible prejudice and Rule 177's application.³² At the time of his statement, he knew that a jury would not be empanelled for at least six months and any exposure would unlikely result in prejudice, the content fading

from memory long before trial.³³ Mr. Gentile's prediction was accurate. A jury was empanelled without difficulty and not a single juror remembered Mr. Gentile's statement.³⁴

In the second opinion, delivered by Chief Justice Rehnquist, the court held that the more stringent "clear and present danger" test did not apply to attorney speech.³⁵ The court refused to apply the same standard and degree of protection applicable in press cases. The court noted:

Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative.³⁶

Thus, the court ruled that a state may subject attorney speech to a less demanding balancing test, whereby the attorney's First Amendment rights are balanced against the state's legitimate interest in regulating the activity.³⁷ The court concluded that Rule 177's standard of "substantial likelihood of material prejudice" constituted "a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the state's interest in fair trials."³⁸ As such, Rule 177 passed constitutional muster because the rule was designed to protect the integrity and fairness of Nevada's judicial system and imposed narrow and necessary limitations on lawyers' speech.³⁹

OKLAHOMA RULE OF PROFESSIONAL CONDUCT 3.6: TRIAL PUBLICITY

The applicable rules of the Oklahoma Rules of Professional Conduct that address pre-trial publicity and extrajudicial statements are Rules 3.6, 3.8, and 8.2. According to Rule 3.6:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable lawyer would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have an imminent and materially prejudicial effect on the fact-finding process in an adjudicatory proceeding relating to the matter and involving lay fact-finders or the possibility of incarceration.

- (b) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (c) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMITTEE COMMENTS: BALANCING PRESUMPTION OF INNOCENCE AND PUBLIC POLICY

The committee comments to Rule 3.6 provide good insight into public policy and the evils associated with prejudicial, extrajudicial statements. The comments begin by addressing the policy of Rule 3.6, namely safeguarding the presumption of innocence in criminal cases:

Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to litigation in which incarceration may result or lay persons will serve as fact-finders. [I]t is particularly salient with respect to criminal prosecutions. If there were no such limits, the result would be practical nullification of the protective effect of the constitutionally-grounded presumption of innocence⁴⁰

However, the comments also recognize social interests in keeping the public informed about important judicial proceedings:

At the same time, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.⁴¹

'ORDINARILY' ALLOWED

Although not embodied into the text of Rule 3.6, the comments do provide practitioners a

guide as to statements that may or may not be permissible. According to paragraph four of the comments to Rule 3.6, the following matters "will not **ordinarily** violate Rule 3.6(a)":

1. The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
2. The information contained in a public record;
3. That an investigation of the matter is in progress;
4. The scheduling or result of any step in litigation;
5. A request for assistance in obtaining evidence and information necessary thereto;
6. A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and
7. In a criminal case, in addition to items (1) through (6):
 - i. The identity and occupation of the accused;
 - ii. If the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - iii. The fact, time and place of arrest; and
 - iv. The identity of investigating and arresting officers or agencies and the length of the investigation.

PLAYING WITH FIRE

The comments also provide a list of subjects that attorneys should avoid commenting about. According to paragraph five of the comments to Rule 3.6, the following are more likely to have a materially prejudicial effect on a proceeding:

1. In a criminal or civil proceeding:
 - The character, credibility, reputation or criminal record of a party or suspect in a criminal investigation or witness, or
 - The identity of a witness, or
 - The expected testimony of a party or witness.

2. In a criminal case or other proceeding that could result in incarceration:
 - The possibility of a plea of guilty to the offense, or
 - The existence or contents of any confession, admission, or statement given by a defendant or suspect, or
 - A defendant or suspect's refusal or failure to make a statement.
3. The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
4. Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
5. Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create an imminent and material risk of prejudicing an impartial trial; or
6. The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.

OKLAHOMA RULE OF PROFESSIONAL CONDUCT 3.8: SPECIAL RESPONSIBILITIES OF PROSECUTORS

For over 150 years, prosecutors have been characterized as “ministers of justice,” representatives of “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”⁴² As “ministers of justice,” prosecutors are also tasked with the responsibilities of ensuring that criminal defendants are afforded procedural due process and ensuring that guilt is decided upon the basis of sufficient evidence.⁴³ As such, it’s absolutely paramount that prosecutors refrain from making extrajudicial statements that undermine the criminal defendant’s constitutional rights or compromise the integrity of the judicial process. According to Rule 3.8(f), a prosecutor in a criminal case shall:

“... the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.”

except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

As mentioned in the text of Rule 3.8(f), prosecutors must also comply with Rule 3.6 when making extrajudicial statements in a criminal case. Thus, if a prosecutor discloses that a defendant has been charged with a crime, the prosecutor should follow up his/her statement with an explanation that the charge is merely an accusation and the defendant is presumed innocent until and unless proven guilty.

DAMAGE CONTROL: MITIGATING PREJUDICIAL STATEMENTS MADE BY YOUR OPPONENT

How does one respond if an opponent violates Rule 3.6 by making an extrajudicial statement that will likely prejudice a proceeding? Are we forced to sit idly by, watch as our client is dragged through the mud, and pray that *voir dire* will flush out those prospective jurors who remember the statement and were consequently prejudiced? As we saw in *Gentile*, sometimes it’s absolutely necessary to “level the playing field” and nullify prejudicial statements made by another party or another party’s lawyer. As mentioned above, Rule 3.6(b) allows an attorney to negate undue prejudicial statements made by other parties that unduly prejudice the lawyer’s client. However, there are elements that the attorney must satisfy when responding such prejudicial statements:

- 1) Timing: publicity must be recent;

- 2) Effect of the publicity: the publicity creates a substantially undue prejudicial effect;
- 3) Initiated vs. responsive: the publicity cannot be initiated by either the lawyer or lawyer's client;
- 4) Scope: The attorney's responsive statement must be limited to contain only such information reasonably necessary to mitigate the recent adverse publicity; and
- 5) Reasonableness standard: The attorney's response is one that a reasonable lawyer would believe is necessary to protect the client from substantial undue prejudicial effect.

'THAT JUDGE IS AN #!*\$%': DENIGRATING THE JUDICIARY

"Black-robed prosecutor," "defense-friendly judge," "prosecution's little helper" and "bench dullard" — these are just a few terms that circulate around courthouses everywhere. We all have been disenchanted with a judge and/or a judge's ruling. Whether you have been the victim of "judicial hazing," verbal abuse, judicial bias or judicial incompetence, it infuriates and shakes us to our inner core when judges engage in malfeasance or behavior that violates the Oklahoma Code of Judicial Conduct. While some maintain professionalism and rise above the transgression, others viciously strike back by using the media to voice discontentment with the particular judge. However, according to Rule 8.2(a) of the Oklahoma Rules of Professional Conduct:

[A] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In *State ex rel. Oklahoma Bar Ass'n v. Porter*,⁴⁴ the Oklahoma Supreme Court considered a disciplinary matter brought against attorney E. Melvin Porter for criticizing United States District Judge Ralph G. Thompson. After Mr. Porter's client was tried and sentenced by the court, he stated to the media that 1) Judge Thompson "showed all the signs of being a racist," 2) Mr. Porter "never tried a case before him that [Mr. Porter] felt [Mr. Porter] got an impartial trial out of him, and 3) "if [Thomp-

ENGAGING THE MEDIA: A PRACTICAL GUIDE

Responding to media inquiries presents a perplexing conundrum that the practitioner should approach with extreme caution. The following guide provides helpful suggestions on how to effectively (and ethically) engage the media:

Oklahoma Rules of Professional Conduct

First and foremost, the practitioner should become well-versed with the ethical rules applicable to extrajudicial statements and trial publicity. If you have carefully read this article, you are already ahead of the game!

Consult the Client

Before responding to media requests, the practitioner should consult the client and discuss media strategy. The client very well may desire to avoid the media altogether. According to Rule 1.2(a) of the Oklahoma Rules of Professional Conduct, "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." If the client indeed wishes to decline interview requests, the attorney should discuss the need for a contingency plan in case the opponent or opponent's lawyer makes a prejudicial statement that necessitates a response to mitigate adverse publicity.

Do Your Homework

News reporters, like attorneys, have different personalities and agendas. Ask fellow attorneys for scouting reports on the news reporters that frequent the courthouses. What is the reporter's reputation? What angles does he/she take? What is the reporter's interview technique? By doing a little research, you will be able to identify the reporters and media outlets that are trustworthy and those whom are mendacious.

Be Professional and Considerate

Be mindful that you are an extension and representative of the legal profession. Always remain calm and collected, and never engage an unscrupulous reporter who attempts to unnerve you in hopes of eliciting an emotional and "newsworthy" response. Also, be considerate of the reporter's needs and deadlines. If you are unable to immediately comment, obtain the reporter's contact information, ascertain the reporter's deadline and follow through with any promises to timely contact the reporter. In addition, return a reporter's telephone call. If you do not wish to comment, at least extend the common courtesy of returning the reporter's telephone call and explain to the reporter why you are unable to comment. Explain court proceedings, take the time to explain how the legal system works, and assist reporters in obtaining court documents. Be mindful that reporters remember

continued on next page

the attorneys who are helpful, reliable, and those who are inconsistent.

Always Assume You're On the Record

Always assume that your comments are "on the record" and will be disseminated to the public. Never disclose client confidences or information protected by the attorney-client privilege. **Do not even consider going "off the record."** If you need to go "off the record," then you probably should not be talking about the subject in the first place.

Never Say "No Comment"

Such a comment is self-defeating and may imply culpability. Also, the attorney risks relinquishing control over the public's perception of the client. Instead, simply state that you are not currently in a position to comment about the subject and offer to give the reporter a statement in the future.

Body Language

Be cognizant of your body language and remember that your audience is also watching you and your client's non-verbal cues. Maintain eye contact at all times, avoid negative facial expressions, crossing your arms and other gestures (such as pointing and animated use of the hands) which may convey the wrong message or divert the audience's attention from your message. Also, don't be afraid to smile! Finally, in criminal cases, it's very common for an attorney and his/her client to quickly rush past the media with the client's head down or an article of clothing draped over the client's head in an attempt to shield his/her identity. Such non-verbal behavior depicts shame and makes one appear guilty. As such, instruct your client to walk slowly and confidently, chin up, with erect posture and poise that exudes confidence.

Don't Talk Like a Lawyer

Save the legalese for the courtroom, not the public. Keep it simple and be mindful of your audience. Remember that the public generally dislikes and distrusts attorneys. Convolutioned legal jargon only contributes to our tarnished public image.

Short and Sweet

In order to keep the attention of its audience, media outlets often utilize "sound bites," which are short pieces taken from a longer interview. As such, your comments will likely be limited to 15-20 seconds. Thus, be concise and get right to the point.

Review Prior to Publication

If your statements will be disseminated via the Internet or print publication, request to review your quotes prior to submission to check for errors and omissions.

continued on next page

son] wants to practice his racism that way that's his business."⁴⁵

District Judge Ralph G. Thompson responded by filing a grievance against Mr. Porter.⁴⁶ During the hearing before the Professional Responsibility Trial Panel, Mr. Porter admitted to making the statements and asserted that his remarks were truly descriptive and accurate of the official conduct of Judge Thompson.⁴⁷ The OBA did not attempt to refute Mr. Porter's argument and failed to demonstrate that Mr. Porter's statements were either false or made in bad faith.⁴⁸ After hearing, the Professional Responsibility Trial Panel found that Mr. Porter violated D.R. 1-102(A)(5) and (6) (predecessor to Rule 8.2), which prohibited an attorney from engaging in conduct "that is prejudicial to the administration of justice" and "that adversely reflects upon his fitness to practice law."

The Oklahoma Supreme Court refused to impose discipline. First the court noted that in cases where attorneys criticize members holding judicial office, the court carefully examines the nature of the accusation and whether there is any evidence of falsity or bad faith.⁴⁹ The court further stated:

This Court's concern for the protection of the exercise of the rights of free speech is a thread that runs from an early time in this state in consideration of proceedings to discipline attorneys for remarks critical of the judiciary and those holding the judicial office. The law of Oklahoma has shown concern from the earliest times with the balance between a citizen's duties as an attorney and his right to speak freely on matters of public concern accorded to all people under our constitutional system of government. Thus one finds the Court examining questioned statements for false and malicious or bad faith misstatements without explicitly stating the fact that falsity was a necessary showing prior to disciplining an attorney.⁵⁰

Moreover, the court recognized that although it's entirely permissible for an attorney to criticize the law or "the wisdom and efficacy of the rules of law which control the exercise of judicial power," attacking the "motivation, integrity or competence of a judge whose responsibility it is to administer the law" may subject the lawyer to discipline.⁵¹ Interestingly, the court also noted the counterpart to the right to

speaking — the right of the listener to receive free flow of information:

It is well established that the constitution protects the right to receive information and ideas. The right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences is crucial, for it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.⁵²

In fact, the court stated that the focus of its opinion was not necessarily an attorney's First Amendment rights, but "the public's right to receive information from a class of persons most intimately familiar with the administration of the judiciary."⁵³ In addition, the court stated that any restriction directed at speech related to the process of self-government will be subjected to strict scrutiny.⁵⁴ Thus, the state may prevail only upon showing 1) a compelling state interest and 2) the prohibition is narrowly tailored to avoid unnecessary abridgment of the right of free speech.⁵⁵ Again, the dispositive issue of whether the attorney's criticizing remark is protected by the First Amendment is falsity. As noted by the court, false speech does not enjoy First Amendment protection.⁵⁶ Indeed, the state has an interest in suppressing false statements of fact made about the judiciary:

Disseminating false statements of fact in reference to the judiciary can be prejudicial to the administration of justice and is properly a subject for discipline Misinformation from the Bar is detrimental to the public weal for the same reason that the access to information from that source may not be impeded. Members of the Bar possess, and are perceived by the public as possessing, special knowledge of the workings of the judicial branch of government. Critical remarks from the Bar thus have more impact on the judgment of the citizen than similar remarks by a layman would be calculated to have.⁵⁷

The court held that discipline was not warranted because the record failed to show falsity, thus Mr. Porter's statements were protected by the First Amendment.⁵⁸ However, the court also recognized that although Mr. Porter's statements were constitutionally permissible, they were nonetheless disrespectful, insolent,

Lay Down the Ground Rules

If you are able to schedule an interview with a reporter, lay down the ground rules ahead of time so that the interview will go smoothly. It's mutually beneficial to brief the reporter on the topics/issues that are "fair game" or "out of bounds." In fact, we recommend that the practitioner provide the reporter a copy of paragraphs four and five of the committee comments to Rule 3.6 of the Oklahoma Rules of Professional Conduct, which will allow the reporter to take note of those subjects that are "likely to have a materially prejudicial effect" and craft his/her questions accordingly. A good reporter will appreciate your assistance, efficiency and respect of the reporter's time.

and improper. The court concluded by offering words of wisdom to members of the bar:

[I]t is necessary to remind the profession that First Amendment license to comment is broader than the traditional correct demeanor expected of an officer of the court. Nothing said in this opinion changes those expectations. Remarks of the sort being now considered are indeed disrespectful, exhibiting a definite lack of the polish expected of the true professional and they remain uncondoned. It is expected that counselors will maintain the honor of the profession and the decorum properly expected of an officer of this court. Nothing less than precisely proper decorum and conduct is expected by this Court of members of the Bar.⁵⁹

CONCLUSION

As mentioned in our introduction, if you practice an area of law that involves sensational issues, such as criminal law, there's a strong likelihood that you will encounter the media at some point in your career. As such, you must be prepared to put your best foot forward. Perhaps there is no other area of law where clients stand more to lose than criminal law. Indeed, the presumption of innocence and right to trial by an impartial jury are fundamental rights that are closely safeguarded by our legal system. By the same token, the government and its "ministers of justice" are also entitled to a fair shake. Therefore, remain cognizant of the influence your statements carry merely by your status as an attorney and the fact that criminal jury trials are the most sensitive to extrajudicial speech.⁶⁰ While we enjoy a

First Amendment right to make extrajudicial statements, that right is not unfettered.

Finally, be mindful of the media's main objective of attracting viewers, increasing ratings and generating advertising revenue. An overzealous reporter cares only for a good story, irrespective of your license to practice law and the oath you swore to uphold. Remember that the media is not a tool or platform to promote your own self-interests. Thus, when the bulbs start flashing and the cameras are rolling, it's our hope that you will remember that the practice of criminal law is a noble calling that carries significant responsibility and comes with grave consequences for indiscretion.

1. Marc Galanter, "The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse," 66 U. CINN. L. REV. 805, 809 (1998).

2. I was simply fascinated with the various objections made by the attorneys, the rulings made by the judge, and how direct and cross-examinations were performed. Yes, I was a nerd.

3. Richard Huff, "Simpson Story Ran Up Record Network News Airtime," N.Y. DAILY NEWS, October 5, 1995.

4. Nancy Gibbs, "O.J. Simpson: End of the Run," TIME, June 27, 1994.

5. 384 U.S. 333, 350 (1966).

6. 12 O.S. § 1441.

7. ABA CANONS OF PROF'L ETHICS Canon 20 (1908).

8. Report of the President's Commission on the Assassination of President Kennedy (1964), quoted in Ainsworth, "Fair Trial-Free Press," 45 F.R.D. 417 (1968).

9. MODEL RULES OF PROF'L CONDUCT R. 3.6.

10. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1039 (1991).

11. *Id.* 1039-40.

12. *Id.* at 1040.

13. *Id.*

14. *Id.* at 1042.

15. *Id.* at 1041.

16. *Id.* at 1043.

17. *Id.* at 1042.

18. *Id.* at 1043.

19. *Id.* at 1045.

20. *Id.* at 1033.

21. *Id.* at 1044.

22. *Id.* at 1033.

23. *Id.*

24. *Id.*

25. *Id.*

26. (Rule 177(3))

27. *Id.* at 1048.

28. *Id.* at 1051.

29. *Id.* at 1034.

30. *Id.* at 1035.

31. *Id.* (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980))

32. *Id.* at 1044.

33. *Id.*

34. *Id.* at 1047.

35. *Id.* at 1075.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Okla. R. Prof. Cond. 3.6, comm. cmt. 1.

41. *Id.*

42. *Berger v. United States*, 295 U.S. 78, 88 (1935).

43. Okla. R. Prof. Cond. 3.8, comm. cmt. 1.

44. 766 P.2d 958

45. *Porter*, 766 P.2d at 961.

46. *Id.* at 960.

47. *Id.* at 961.

48. *Id.* at 968.

49. *Id.* at 962.

50. *Id.* at 963.

51. *Id.* at 965.

52. *Id.* at 967.

53. *Id.* at 969.

54. *Id.* at 968.

55. *Id.*

56. *Id.* at 969.

57. *Id.*

58. *Id.* at 970.

59. *Id.*

60. Okla. R. Prof. Cond. 3.6, comm. cmt. 6.

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Both authors received the Golden Quill Award for this article at the 2014 OBA Annual Meeting.

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Tayna Jones, Office of the Public Defender of Ok. Co., Oklahoma City

Ethics Advisor and Trial Techniques Presenter

Garvin Isaacs, Garvin A. Isaacs, Inc., Oklahoma City

Oklahoma Criminal Defense Lawyers Association Clarence Darrow Recipients present: The Mock Jury Trial of the *State of Oklahoma v. Billy Michael Thompson*

On Tuesday August 17, 2010, Billy Thompson was at his home when drunken guests arrived. Manuel Sanchez, Jose Padilla, Max McIntire, and David Hedspeth sat outside Billy's home, drinking and smoking marijuana. Jose Padilla had a cigar that everyone was sharing. Billy was heavily intoxicated (as were the others), and had possession of the cigar. Jose then demanded the cigar back. Billy refused, and Jose took the cigar from Billy. Billy got angry, and punched Jose in the face in order to get the cigar back. Max saw Billy hit wheelchair-bound Jose, and took offense to Billy's actions. Max savagely beat Billy on two separate occasions that evening. Billy yelled at all of the guests to leave his property, and retreated into his home to retrieve a knife to defend himself.

Billy walked back out of the house, into his front yard and proceeded down his driveway with knife in hand to make sure all the guests were gone. As Billy got to the side of his house, he was attacked for a third time by Max McIntire and Manuel Sanchez. Billy fatally stabbed Manuel Sanchez, and wounded Max McIntire. Little did Billy know, this is when his real nightmare would begin. Billy was arrested for Murder in the First Degree, and nearly two years after his arrest, Billy proceeded to trial in which he was convicted and given a sentence recommendation by the jury of Life imprisonment, and seven years for the stabbing of Max McIntire. This verdict was ultimately set aside.

A new trial date was set, and new Defense Attorneys were appointed to represent Billy. And now the trial for Billy Thompson's life begins. . . .

Prosecution Team:

Cindy Viol, 2009 Clarence Darrow Award Recipient, Oklahoma City
Al Hoch, Jr., 2009 Clarence Darrow Award Recipient, Oklahoma City

Defense Team:

David B. Autry, Anderson & Scheitzach; 1989 Clarence Darrow Recipient, Oklahoma City

John Barry Albert, 1994 Clarence Darrow Award Recipient, Oklahoma City

David McKenzie, Office of the Public Defender of Ok. Co.; 1997 Clarence Darrow Recipient, Oklahoma City

C. Merle Gile, C. Merle Gile Inc., P.C., 1990 Clarence Darrow Recipient, Oklahoma City

Robert Ravitz, Public Defender of Ok. Co.; 1996 Clarence Darrow Recipient, Oklahoma City

J.W. Coyle, III, 1995 Clarence Darrow Recipient, Oklahoma City

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The Care and Keeping of our Profession:

Why You Should Want to Comply with Rule 8.3

By Austin T. Murrey

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."¹

The practice of law, as most of us were told in law school, is one of the three so-called "learned professions." Aside from their historical reputations for requiring serious study in order to practice, a notable feature of all three is that they, unlike almost any other professional population, are self-policing. That is, our own practitioners set and maintain ethical standards and practices. An important consequence of this is that those same practitioners are charged with the duty of enforcing those standards and detecting their infringement. Wall Street has the Securities and Exchange Commission, tradesmen have the Consumer Protection Bureau, but we have only ourselves. Very few of us took up the law just for the chance to police our peers, but as it turns out, it comes with the territory.

Rule of Professional Conduct 8.3 creates the affirmative duty of all attorneys to report the ethical misconduct of their fellows. I want to discuss two questions regarding this duty to report: first, *When must you?* This is not quite as clear as it first seems. Second, and more important, *Why should you?* At some point, most attorneys have had, or will have, to decide

whether or not to report some less-than-upstanding behavior of a fellow practitioner; it's also odds-on that most ethical breaches are not formally reported to the bar association. This is an untenable state of affairs for any self-policing group that would wish to remain self-policing — if the legal profession does not regulate itself, there is the risk that the right to self-regulate will be lost.² In the fullness of time, something has to give.

ETHICAL REPORTING: A BRIEF HISTORY

A written code of ethics for the legal profession is a comparatively recent development. The first such code adopted by the American Bar Association was known as the Canons of Professional Ethics, taken up in 1908.³ For the next 61 years, there was no affirmative duty to report misconduct, since the canons framed the responsibility to self-police in terms of what attorneys "should" do, rather than what they must do. In 1969, the ABA adopted a new ethical code, the Model Code of Professional Responsibility (MCPR). Disciplinary Rule 1-102 of the MCPR prohibited violation of any disciplinary rules, illegal or dishonest conduct

and conduct that subverted justice or reflected poorly on an the attorney's fitness to practice law.⁴ This was immediately followed by the first appearance of a mandate to report unethical conduct known to an attorney: "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."⁵ What before was discretionary now was mandatory.

Predictably, enforcement of MCPR 1-103 was unfeasible because, by its wording, it required reporting of all misconduct, no matter how venial. For this and a number of other reasons, the MCPR was discarded by the ABA in favor of the Model Rules of Professional Conduct in 1983.⁶ These rules included a more limited, more enforceable reporting requirement: "A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that *raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects*, shall inform the appropriate professional authority."⁷ This language was adopted as Oklahoma's Rule of Professional Conduct (ORPC) 8.3 in 1988. There remained an affirmative duty to report misconduct, but it was circumscribed by the qualification that only such misconduct as would raise a substantial question as to the fitness of the other lawyer was required to be reported. This relieved attorneys of the burden of making a formal report of every minor infraction they might discover — a burden that presumably few were willing to shoulder anyway.

As the duty to report misconduct is itself a mandate of the ethical rules, there is always the possibility of disciplinary action against lawyers who are found to have known of misconduct, and failed to report it. At least in theory, right? No one is actually disciplined just for failing to report... right?

HIMMEL AND DISCIPLINE UNDER RULE 8.3(A)

There is some perception that Rule 8.3 is a "second-class" ethical rule: not of the same standing as those prohibiting, *e.g.*, conflicts of interest or candor to the tribunal and not serious enough to trigger discipline on its own. This, however, is not the position that the courts take. The first reported case⁸ of an attorney being disciplined solely for failing to report another's misconduct was *In re Himmel*,⁹ a case arising out of Illinois that made great

waves in the legal community.¹⁰ In 1986, the Illinois Attorney Registration and Disciplinary Commission (ARDC) charged Mr. Himmel in a disciplinary proceeding with violating the Illinois Code of Professional Responsibility Rule 1-103(a), analogous to the ABA's Model Code rule discussed above.

The allegation concerned Mr. Himmel's representation of a client, Ms. Forsberg, against her former attorney who she claimed had fraudulently converted some \$23,000 obtained in a settlement. Mr. Himmel discovered that the money had indeed been converted by the former attorney, John Casey, and negotiated a \$75,000 settlement between the two, of which he stood to earn \$17,000.¹¹

Mr. Himmel never reported Mr. Casey's mishandling of client funds to the Illinois ethical authorities largely, as he claimed, because his client instructed him that she "simply wanted her money back," and she specifically instructed him to take no further action against Mr. Casey.¹² Nevertheless, the ARDC proceeded against Mr. Casey on its own initiative, and Mr. Casey eventually consented to disbarment.

Two months later, the ARDC initiated disciplinary proceedings against Mr. Himmel for failing to report Mr. Casey's misconduct. Later that year, the hearing board found he had violated Rule 1-103(a), but recommended only a private reprimand.¹³ The ARDC appealed the hearing board's decision, and the case made its way to the Illinois Supreme Court. The *Himmel* court took a much dimmer view of the failure to report than had the hearing board.

The court flatly rejected the proffered defense that Mr. Himmel's client had directed him not to report the misconduct, noting, "A lawyer may not choose to circumvent the rules by simply asserting that his client asked him to do so,"¹⁴ and that "[w]e are particularly disturbed by the fact that respondent chose to draft a settlement agreement with Mr. Casey rather than report his misconduct."¹⁵ The court, citing that "[w]hen determining the nature and extent of discipline to be imposed, the respondent's actions must be viewed in relationship 'to the underlying purposes of our disciplinary process, which purposes are to maintain the integrity of the legal profession, to protect the administration of justice from reproach, and to safeguard the public,'"¹⁶ then levied a suspension from the practice of law for one year. This order was meant to convey to the entire bar

that “[t]his failure to report resulted in interference with the Commission’s investigation of Casey, and thus with the administration of justice,”¹⁷ and so could not be taken lightly.

Another case wherein an attorney was disciplined solely for failing to report the wrongdoing of another is *In re Condit*.¹⁸ In this case also, the disciplined party had represented a client in a claim against a previous attorney; here, it was one who had allegedly aggrieved the client by committing legal malpractice, conversion, embezzlement, fraud, and all amid a conflict of interests.¹⁹ Mr. Condit negotiated a settlement with the accused attorney, Mr. Eldridge, who then breached the agreement. Mr. Condit then sued him on his client’s behalf. The response from Mr. Eldridge’s lawyers came in the form of an ethical complaint against Mr. Condit for failing to report Mr. Eldridge’s conduct, and violating Rule 8.3(a). Mr. Condit entered into an agreement with the Arizona State Bar to accept a public censure, which the state Supreme Court approved.²⁰

Although this case did not result in suspension or disbarment, this should not be mistaken for the Arizona court considering the matter to be a trivial one. The court felt constrained by the particular procedural posture of the case, and the fact that so much time had elapsed between the failure to report and the disciplinary action.²¹

Even after disciplinary proceedings, a refusal to report misconduct known to the attorney can result in professional sanctions. State courts have been known to deny applications for reinstatement from suspended or disbarred lawyers on the grounds that they would not, even at that time, reveal what they knew about other attorneys’ misconduct.

In *In re Borders*,²² the disbarred attorney had, despite being offered immunity, refused to testify about the attempted bribery of a U.S. district judge. At his reinstatement hearing, he offered various reasons for his refusal to testify, but still would not give information about the bribery. The *Borders* court declined to reinstate him, finding that the lawyer’s “election to stonewall”²³ the investigation of that very serious offense reflected poorly on his present character.

Similarly, in *In re Anglin*,²⁴ the attorney applying for reinstatement would not give the identity of another lawyer who had participated in the theft of securities. His application was

denied, and the court focused their discussion on his violation of his duty to report professional misconduct. The opinion clearly reflected the offense taken by the court at the applicant’s refusal to do his ethical duty, concluding that, “[b]ecause petitioner continues to express a belief in a code of personal conduct that is inconsistent with a portion of our Code of Professional Responsibility, we are not convinced that he has been fully rehabilitated and is currently fit to practice law.”²⁵

A little closer to home, Oklahoma courts have had more than one case involving violations of Rule 8.3 come before them in recent years. Some readers will be familiar with the circumstances of *State ex rel. Oklahoma Bar Ass’n v. Ogle*,²⁶ which centered around attorneys procuring, by means of a bribe, the absence of a police officer from a hearing before the Department of Public Safety.²⁷ It is worthwhile to note that Mr. Ogle was also found to have violated Rule 8.3(a) for failing to report the conduct of other members of his firm. The Supreme Court ordered him suspended for two years and a day.

In *State ex rel. Oklahoma Bar Ass’n v. Jones*,²⁸ the court accepted Mr. Jones’s resignation pending disciplinary proceedings for violating, among others, Rule 8.3.

In an unusual opinion, the U.S. District Court in the Northern District of Oklahoma took an active role in enforcing Rule 8.3 in *State Farm Mut. Auto. Ins. Co. v. Dowdy ex rel. Dowdy*.²⁹ In it, plaintiff’s attorney alleged in a motion that defense counsel made a statement in a deposition that violated the Oklahoma Rules of Professional Conduct. The statement was this:

Def. Counsel: Well, I think you’re being unfair to the witness and you’re doing it intentionally. You’re trying to cheat, and my job is (sic) cheat — your job is to do that and my job is to stop that from happening. I mean, that’s just how it is.³⁰

Citing a number of the ORPC that either state or imply that attorneys are not to cheat, but are instead charged with being trusted advisors, counselors, officers of the court and promoters of justice, the court found “that counsel[s] statement violates the letter and the spirit of the Oklahoma Rules of Professional Conduct. Nationwide, hundreds of lawyers and their professional associations dedicate themselves to educating the public and to improving the legal profession’s improperly tarnished reputation for dishonesty and deceit. That attorney’s

comments do a great disservice to that effort.”³¹

The court then declared that, since Rule 8.3 requires that lawyers, including the courts, report violations, “the appropriate action by this Court is to forward a copy of this Order, along with the Motion, Response Brief, and Reply Brief, to the office of the Oklahoma Bar Association to the attention of the Ethics Counsel for review and discipline as warranted.”³² Undoubtedly, the *State Farm* court followed Rule 8.3(a) to the letter, and put attorneys in the northern district on notice that such behavior would not be tolerated in litigation there.

WHEN MUST I REPORT?

As discussed earlier, the first incarnations of the aspirational standard, and later the affirmative duty, to report the misconduct of others were worded so as to be practically unenforceable. The modern Rule 8.3(a) is more circumspect, and includes two elements that serve to define and limit the set of cases in which such reporting is ethically mandated.

Knowledge

Reporting is only required of a “lawyer who knows that another lawyer has committed a violation.”³³ While the official comments to Rule 8.3 do not explain the knowledge requirement, other than to repeat it, courts in other jurisdictions have undertaken to give it a more definite meaning. A good restatement of this is that “[t]he supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred.”³⁴ This sets the standard as an objective one, which, it will be seen, it must be. The objective “reasonable lawyer” standard prevents bar members from claiming sanctuary in feigned naiveté, or by suppressing their common sense, or in some utterly inadequate explanation by the wrongdoer. It has been held that the lawyer considering whether or not he is bound to report another cannot turn a blind eye to reality.³⁵

In *Attorney U v. Mississippi Bar*, Attorney U had been told of a prohibited fee splitting arrangement between another attorney and an outside party. This information was unsworn, uncorroborated, and its trustworthiness was

“Reporting is only required of a ‘lawyer who knows that another lawyer has committed a violation.’”

not established in the record before the court. Furthermore, the outside party denied the existence of such an agreement.³⁶ Under these facts, the court found that “the proof falls short of that necessary to demonstrate by clear and convincing evidence that Attorney U had sufficient evidence before him such that any reasonable lawyer would have formed a firm opinion that the conduct alleged by his client had in fact occurred.”³⁷

It seems that “knowledge” has to rest on something more than a 50/50 probability that the conduct had occurred, but in order to be effective, the rule must mandate reporting of incidents for which there is something less than proof beyond a reasonable doubt. Naturally, it comes down to the use of professional judgment,³⁸ but this judgment must be employed, not in order to find justification for *not* reporting, but with an eye toward upholding the purpose of the rules, which is to protect the public and scrupulously guard the integrity of our profession.³⁹

Substantial Question of Fitness

In addition to the knowledge requirement, reporting misconduct is only mandatory in such a case as “raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”⁴⁰ “Substantial” denotes a material matter of clear and weighty importance.⁴¹ This is not much to go on as a working definition, but it is clear that it refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.⁴²

That the known conduct of another lawyer may be a substantial violation of one of the Rules of Professional Conduct is not quite enough to trigger the mandatory reporting requirement. The conduct must raise a substantial question as to the lawyer’s honesty or fitness to practice. Now, the reader may rightly respond that just about anything that constitutes a “substantial violation” of any of the ORPC would raise such a question, and that may indeed be a good rule of thumb. However, it may also surprise the reader to learn what other behavior indicates, in the eyes of the courts, a problem of dishonesty or unfitness sufficient to warrant professional discipline.

Nearly all criminal acts will require reporting under Rule 8.3.⁴³ The reasoning, presumably, is that the willingness of those charged with upholding and practicing in the law to break it does not reflect well on their professional commitments or on the legal community as a whole. It remains a somewhat open question whether those crimes which are commonly considered the most petty, *e.g.*, public intoxication,⁴⁴ disturbing the peace by loud noise,⁴⁵ etc., would raise a substantial question of the person's fitness to practice. In *In re Davis*,⁴⁶ the Delaware Supreme Court decided that the respondent's public intoxication, which led to him inadvertently exposing himself while he changed out of a bathing suit, reflected badly on his judgment, but was "not the type of moral turpitude for which respondent should be professionally answerable."⁴⁷ Oklahoma has left the door open to such offenses being the proper subject of discipline. In *State ex rel. Oklahoma Bar Ass'n v. Moon*,⁴⁸ the Oklahoma Supreme Court found that "A conviction for driving a motor vehicle while under the influence of intoxicating liquor does not facially show a lawyer's unfitness to practice law. Nevertheless, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to an attorney's legal obligations."⁴⁹ It should be noted that even though this was the holding, Mr. Moon was given a public reprimand and a suspension of two years and a day which was deferred subject to certain terms.

Other acts which have been specifically found to involve either moral turpitude or evidence of unfitness to practice include:

- Possession of cannabis (misdemeanor);⁵⁰
- Failure to file state tax income tax returns (misdemeanor);⁵¹
- Tampering with a jury list (not a criminal offense);⁵²
- Nearly any type of fraud, embezzlement or theft

The brand of dishonest or fraudulent conduct which may be most familiar to many readers, since it is a litigated issue in so many cases, is overbilling.⁵³ A lawyer who unreasonably pads his billable hours or charges an unreasonable rate for the work done shows that he is ready and willing to exploit his position of trust with his client for personal gain. At bottom, this is nearly indistinguishable from

the misappropriation of client funds, and there can be little doubt that this behavior calls into question the attorney's honesty and fitness for the practice of law.⁵⁴

Finally, engaging in any sort of conduct prejudicial to the administration of justice should raise such a question as well. Actual harm to the legal process need not even occur, mere potential harm is enough to constitute misconduct, and therefore to trigger the reporting requirement.⁵⁵ This can encompass sins of omission such as failing to pay a court reporter's fees. In *In re Disciplinary Action Against Haugen*, it was held that this conduct was prejudicial to the administration of justice, and "reflects adversely on the attorney's commitment to protecting the rights of others, thereby reflecting adversely on his fitness to practice law."⁵⁶ Even conduct in an attorney's private life outside his practice may constitute misconduct which must be reported.⁵⁷

For a more in-depth analysis of mandatory reporting, see Douglas R. Richmond, "The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation."⁵⁸

WHY SHOULD I REPORT?

This has served so far to give the reader some insight into what the ORPC require in the arena of reporting misconduct. I would like to turn now to the equally important issue of why attorneys should want to make ethical reports, rather than to hold their tongues. To begin with, let me say that there is much more at stake than the childhood fear of being labeled a tattletale, or any petty sense of satisfaction from seeing a rival receive a dressing down. Much higher ideals are at issue, and I hope that in the end the reader will agree that it involves a good deal of recklessness to keep quiet about known misconduct.

It should be said at the outset that no recourse to a "code of silence" will avail an attorney in matters of professional ethics, nor should it. In the *Anglin* case discussed above, the court denied Mr. Anglin's reinstatement in large part because he professed an adherence to a code of silence and his own "moral" (as he termed it) compass.⁵⁹ The court was clearly offended at this perverse ethical reasoning, and found him unfit to practice in virtue of it.⁶⁰ Any attorney inclined to follow such a code should bear in mind that it is a conscious choice to protect wrongdoers and to thwart the self-regulation,

and thus the professional hygiene, of the legal community of which they are a part.

The Public is at Risk

It should be borne in mind that lawyers who choose not to report the misconduct of other lawyers, whether or not it is strictly required by Rule 8.3, do so at some considerable risk. She who keeps her silence does not bear the risk; it will be borne by the public, who are in no position to protect themselves from an attorney for whom there is no record of misconduct. Such a record can only ever be established by a conscientious attorney coming forward to give what information she knows.

The practice of law entails the shaping of our clients' lives in profound and lasting ways. It may be the right to see their own child that hangs in the balance, an attempt to recover damages for a debilitating injury, the ability to keep their home, or their very freedom; every one of these causes deserves to be represented by a decent and trustworthy advisor. The hard fact is that not all attorneys are decent and trustworthy. The public does not know beforehand which are to be trusted, and which are to be avoided. As a self-regulating profession, part of our responsibility is to police our own. If we don't, it is a statistical certainty that some of these life-altering cases will be placed in the hands of an attorney who is not only unworthy of the honor, but will mishandle it, will cost the client dearly, will collect a significant fee for it, and will ultimately degrade the dignity and public esteem of the legal profession.

Even if a report of misconduct would not have had such an attorney as this suspended or disbarred, a wary client could at the very least have made inquiries and discovered past disciplinary proceedings, at least those not of a confidential nature. To let lawyer misconduct pass unreported is to rob the public of the chance to be forewarned in this way, and of the ability to protect themselves from an attorney from which none of his fellow practitioners could be bothered to protect them.

This leads to a point that needs mentioning, despite the fact that it is likely to arouse rather more anxiety than the idea of reporting one's peers — lawyers are required to report knowledge of a *judge's* ethical violations.⁶¹ This obligation covers judicial transgressions of both the Code of Judicial Conduct⁶² and, since judges are Oklahoma lawyers, the ORPC. The canons of judicial conduct require compliance

with the law⁶³ and behavior that promotes confidence in the integrity of the bench,⁶⁴ so nearly all of the information above that concerns what may constitute attorney misconduct should apply to judges as well.

Admittedly, the stakes are higher when it comes to reporting the bad behavior of judges: it becomes even more important to do so, since judges wield greater power over the outcome of cases than do attorneys; on the other hand, an attorney so placed as to know of a judge's misconduct is likely to have future cases in that same court. Retribution is a common concern, one that often silences would-be whistleblowers. However, lawyers may avail themselves of Rule 2.11 of the judicial code, which states that "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned,"⁶⁵ and any judge would be hard-pressed to show that it was unreasonable to question his impartiality toward an attorney who had recently made an ethical complaint against him. A refusal to recuse may be appealed to the ranking judge of the county or the presiding judge of the judicial district; failing that, a motion to recuse may be presented to the appropriate appellate court for mandamus relief.⁶⁶ And, of course, any blatant retribution would appear to offend the Code of Judicial Conduct's requirements of impartiality and fairness. Given these means of protection, the bar should shed the common perception that to dare to speak up against a judge is to be run out of that county courthouse on a rail. It is an unpleasant, but necessary, part of our profession, and we must have the courage of our convictions.

Unethical Attorneys Lead to Bad Outcomes for Clients

Most of us know at least one attorney who we feel cannot be taken at his word. Often this will be so because that attorney is known or strongly suspected to have lied in the course of a previous case. When we have cases with such unreliable opposing counsel, settlement or potential agreed orders are made nearly impossible if they would require us to take the attorney's word for any matter of consequence.

This is obviously bad for the clients. Lack of cooperation between attorneys is a virtual guarantee of increased litigation. More litigation, it will come as no surprise, often leads to increased emotional trauma for clients and a tendency toward competition for competition's

sake and zero-sum mentality in both clients and attorneys, whereby compromise becomes even more difficult to find. If nothing else, more litigation will cost both clients more in attorneys' fees. Increased ability of attorneys to trust one another can only lead, in the aggregate, to better outcomes for clients, and there is no external obstacle to this — it only depends on our own professional culture. This vision of the profession is attainable; it requires only that we collectively demand accountability from ourselves and one another.

A Short Digression in the Opposite Direction

There is one arena in which there are actually far too many accusations of professional misconduct. According to the 10th Circuit Court of Appeals, claims of ineffective assistance of counsel were raised 7,972 times in federal courts and 12,090 in state courts *only in the years between 1984 and 1995*.⁶⁷ The sentiment of the court in *Miles v. Dorsey* is well put:⁶⁸

We recently observed in a unanimous en banc opinion that we are troubled by how often we must confront meritless ineffective assistance of counsel claims...We therefore remind counsel of the gravity of the claim.

An ineffective assistance of counsel claim implies a damaging allegation — i.e., it asserts that an attorney acted with such an appalling absence of professional competence “that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Simply put, an ineffectiveness claim alleges counsel committed disciplinable professional misconduct. In the absence of facts that indicate “counsel’s representation fell below an objective standard of reasonableness,” counsel should not use the claim to scrutinize every criminal representation and conviction that does not terminate in an acquittal. Indeed, the Court has observed that we must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” in order “[t]o counteract the natural tendency to fault an unsuccessful defense.” In our experience, “[a]n attorney who accepts a criminal defense which does not lead to an acquittal is virtually assured a later accusation of ineffectiveness.” Because an allegation of ineffectiveness broadcasts a professionally damaging message, counsel should

consider whether the facts truly merit an ineffectiveness claim, or if they merely demonstrate the Court’s maxim that “[t]here are countless ways to provide effective assistance in any given case.”⁶⁹

ORPC Rule 3.1 forbids the assertion of any issue without a basis in law and fact.⁷⁰ Given this requirement and those of Rule 8.3(a), *every single allegation* of ineffective assistance should be accompanied with an ethical complaint alleging, at the least, a violation of the requirement of professional competence.⁷¹ Clearly the inability to provide the minimum level of representation required by the 6th Amendment calls into question the trial counsel’s fitness to practice. If the appellate attorney is not prepared to make such a report, then he should carefully consider whether he is making a frivolous and slanderous claim.

THE CULTURE CAN BE CHANGED

Mere hours before these lines were written, I talked to an attorney who had witnessed gross abuse of a client by another lawyer. The witness recognized that he had a duty to report the abominable misconduct, but stated, only half seriously, that probably another of the witnesses would report it, so he need not.

I believe this response is entirely typical. Instead of receiving the much-needed public disapprobation from his peers, the abusive lawyer walked away with what amounted to tacit approval, virtually assuring that the conduct will be repeated with other clients. “An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.”⁷²

There may be a number of reasons why attorneys do not take the time to report misconduct, even when it is so blatant, but I suspect one is the belief that ethical reporting won’t really change anything. This belief is in error. Sociologists have studied the effects of dissenters in cultures of immorality, and the findings are a cause for optimism. The experiments have shown that when only one research assistant spoke up against the administration of painful shocks to others, about 35 percent of subjects joined in the defiance. When two spoke up, the rate of subjects who were willing to join them surged to 90 percent.⁷³ Obviously, having allies is highly effective in encouraging speaking up within a climate of wrongdoing or organizational silence.⁷⁴

The application to our profession is apparent enough: if unethical behavior in our peers is only reported occasionally, then the common perception is, rightly, that “it’s not done.” However, if it becomes a matter of course for each of us to report such misconduct as comes to our attention, then the culture can become one of accountability and unflinching integrity. All it would take to get from here to there is for each member of the Bar to faithfully do her duty to report the misconduct of others, conduct which ultimately brings disrepute to the entire profession. We can manage that.

1. Oklahoma Rule of Professional Conduct 8.3(a), Tit. 5, App. 3-A.
2. Kathryn W. Tate, “The Boundaries of Professional Self-Policing: Must a Law Firm Prevent and Report a Firm Member’s Securities Trading on the Basis of Client Confidences?,” 40 U. KAN. L. REV. 807, 811 (1992).
3. See Ronald D. Rotunda, “The Lawyer’s Duty to Report Another Lawyer’s Unethical Violations in the Wake of Himmel,” 1988 U. Ill. L. Rev. 977, 978 (1988).
4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A) (1969).
5. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1969).
6. MODEL RULES OF PROFESSIONAL CONDUCT, Chair’s Introduction.
7. MODEL RULES OF PROFESSIONAL CONDUCT 8.3 (1983).
8. Douglas R. Richmond, “The Duty to Report Professional Misconduct: A Practical Analysis of Lawyer Self-Regulation,” 12 Geo. J. Legal Ethics 175 (1999).
9. *In re Himmel*, 533 N.E.2d 790 (Ill. 1988).
10. Michael J. Burwick, Note, You Dirty Rat!! Model Rule 8.3 and Mandatory Reporting of Attorney Misconduct, 8 Geo. J. Legal Ethics 137 (1994) (stating that the *Himmel* decision “rocked the legal community, not only in Illinois, but around the nation”).
11. *Himmel*, 533 N.E.2d 790.
12. *Id.*
13. *Id.*
14. *Id.* at 793.
15. *Id.* at 796.
16. *Id.* at 795, *In re LaPinska*, 72 Ill.2d 461, 473 (1978).
17. *Himmel* at 795.
18. No. SB-94-0021-D (Ariz. Mar. 14, 1995).
19. *Id.* at 2.
20. See *id.* at 5 (ruling, “We therefore approve the agreement for discipline by consent and publicly censure Lawrence Condit for violating ER 8.3”).
21. Richmond, *supra* at 183; *In re Condit*, SB-94-0021-D (Ariz. Mar. 14, 1995) at 4 (discussing the uniqueness of procedural posture and the potential need for more information).
22. 665 A.2d 1381 (D.C. 1995).
23. *Id.* at 1385.
24. 524 N.E.2d 550 (Ill. 1988).
25. *Id.*
26. 2013 OK 78, 318 P.3d 1099 (not released for publication in permanent reporters at time of writing).
27. *Id.* at ¶ 2.
28. 1997 OK 159, 952 P.2d 525.
29. 445 F.Supp.2d 1289 (N.D. Okla., 2006).
30. *Id.* at 1295.
31. *Id.* at 1296.
32. *Id.* at 1297.
33. Oklahoma Rules of Professional Conduct 8.3(a) (emphasis added).
34. *Attorney U v. Mississippi Bar*, 678 So. 2d 963, 972 (Miss. 1996).
35. N.Y.C. Bar, Formal Op. 1990-3.
36. *Attorney U* at 972.
37. *Id.*
38. Oklahoma Rules of Professional Conduct 8.3(a), Comment 3.
39. *State ex rel. Oklahoma Bar Ass’n v. Bolton*, 904 P.2d 597, 602 (Okla. 1995); *State ex rel. Oklahoma Bar Ass’n v. Donnelly*, 848 P.2d 543, 545

(Okla.1992); *State ex rel. Oklahoma Bar Ass’n v. Colston*, 777 P.2d 920, 925 (Okla.1989); *State ex rel. Oklahoma Bar Ass’n v. Moss*, 682 P.2d 205, 207 (Okla.1983).

40. Oklahoma Rules of Professional Conduct 8.3(a).
41. Oklahoma Rules of Professional Conduct 1.0 – Terminology.
42. Oklahoma Rules of Professional Conduct 8.3(a), Comment 3.
43. Richmond, *supra* at 190.
44. 37 O.S. § 8.
45. 21 O.S. § 1362.
46. 43 A.3d 856 (Del., 2012).
47. *Id.* At 896.
48. 2012 OK 77 (Okla., 2012) (not released for publication in permanent reporters at time of writing).
49. *Id.* at ¶ 34.
50. *State ex rel. Oklahoma Bar Ass’n v. Denton*, 598 P.2d 663, 1979 OK 116.
51. *State ex rel. Oklahoma Bar Ass’n v. Gann*, 895 P.2d 726, 1995 OK 48.
52. *State ex rel. Oklahoma Bar Ass’n v. Haworth*, 593 P.2d 765, 1979 OK 34.
53. Richmond, *supra* at 192.
54. See, in general, Oklahoma Rules of Professional Conduct 1.5; See also State Bar of Ariz., Comm. on Rules of Professional Conduct, Op. 94-09, at 7 (1994) (discussing the charging of excessive fees).
55. See *In re Morris*, 953 P.2d 387, 392 (Or. 1998) (discussing identical language in Model Code DR 1-102(A)).
56. 543 N.W.2d 372, 375 (Minn. 1996).
57. See *In re Disciplinary Action Against Shinnick*, 552 N.W.2d 212, 214 (Minn. 1996) (holding in dicta, “discipline is appropriate in some cases in which attorneys engage in misconduct outside of the practice of law”); *State ex rel. Nebraska State Bar Ass’n v. Johnston*, 558 N.W.2d 53, 56 (Neb. 1997) (concluding “any conduct which tends to bring the ... legal profession into disrepute, constitutes grounds for suspension or disbarment”); *In re Howard*, 673 A.2d 800, 802 (N.J. 1996) (stating that “any misconduct, whether professional or private, that reveals a lack of good character essential for an attorney constitutes a basis for discipline”).
58. 12 Geo. J. Legal Ethics 175 (1999).
59. 524 N.E.2d 550 (Ill. 1988).
60. *Id.*
61. Oklahoma Rules of Professional Conduct 8.3(b).
62. Okla. Stat. Ann. Tit. 5, Appendix 4.
63. Oklahoma Code of Judicial Conduct, Rule 1.1.
64. Oklahoma Code of Judicial Conduct, Rule 1.2.
65. Oklahoma Code of Judicial Conduct, Rule 2.11.
66. Rules for District Courts of Oklahoma, Rule 15.
67. *Miles v. Dorsey*, 61 F.3d 1459 (C.A. 10th Cir., 1995) at FN 15.
68. *Id.*
69. *Id.* at 1478 (internal citations omitted).
70. Oklahoma Rules of Professional Conduct 3.1.
71. Oklahoma Rules of Professional Conduct 1.1 (“Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”)
72. Oklahoma Rules of Professional Conduct 8.3, Comment 1.
73. Stanley Milgram, Liberating Effects of Group Pressure, 1 *Journal of Personality and Social Psychology*, 127-134 (1965).
74. Neil Hamilton & Verna Monson, “The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law,” 24 Geo. J. Legal Ethics 137 (2011).

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Ethics

& PROFESSIONAL RESPONSIBILITY

Beyond Minimally Ethical Conduct to Professionalism and Civility: ‘Can’t We All Just Get Along?’

By Gary C. Clark

Have you ever been opposite a lawyer who made the practice of law unnecessarily unpleasant? The purpose of this article is to explore the behaviors we wish every lawyer would exhibit as a professional, rather than conduct which exposes a lawyer to discipline under the Rules for Professional Conduct.¹

STATUS OF PROFESSIONALISM AND CIVILITY

For many years, there have been increasing concerns both nationally and locally about the erosion of professionalism or civility among lawyers.

As far back as 1986, the American Bar Association determined that “lawyers’ professionalism may well be in steep decline.”²

In 1998, the late John S. Athens, an outstanding mentor who was a zealous advocate, yet always professional and civil, raised the alarm about the “decline of professionalism” among some lawyers.³ Mr. Athens lamented the change of the practice of law from a profession to a business, pointing to advertising, the emphasis on making money and slavish application of billable hours as examples of the deleterious effects of the transformation.

POSSIBLE CAUSES OF THE DECLINE

As we ancient lawyers recall, and younger lawyers have no doubt read about, the United States Supreme Court’s 5-4 decision in *Bates v. State Bar of Arizona*⁴ held that lawyers could not

be prohibited from advertising. For many of us, this decision was a significant factor in changing the practice of law from a true profession to a business. This is true even though the vast majority of lawyers either do not advertise or have dignified advertising. In order to attract clients, some lawyers seem to have concluded it is important to claim to be and to act like a “junkyard dog.” Unfortunately, the perception of the public from many of the advertisements and word-of-mouth declarations is that lawyers are more interested in making money than they are in their client’s welfare. Thus, there is the additional adverse effect of lawyers losing the trust of the public. Lawyers are near the bottom of trusted occupations, but at least we can be grateful for reporters, car salespersons, politicians and lobbyists who fall below us.

Other possible causes of incivility include the focus of law school education on disciplinary rules, but omission of civility expectations and the lack of mentorship for young lawyers “hanging out a shingle,” explaining how to behave professionally not just ethically.

It may even be that email and text messaging have contributed to the problem. How many of us type a quick response to an email or text without giving it the same thought and review we would a letter? It may be the response is not intended to be rude or curt, but is read that way by the recipient because of its brevity and unclear meaning. The recipient may then fire back with a tit-for-tat reply. Once the war of words has started, it may be hard to stop; and, in fact, it may spill over into other aspects of a case.

Retired Oklahoma County District Court Judge Vicki Robertson recently noted some of the problems created by emails and texts:

Civility has been profoundly affected by [emails and texts]. There is very little personal contact between attorneys. . . . They just communicate with their cell phones/tablets using emails and texts. In doing so, they are often curt, misleading, and snide. Even worse, abusive communication is quite often attached to Motions for the Judge to see.

The *Wall Street Journal* has weighed in on lawyer incivility and notes that others also lay the blame on the impersonal nature of emails and texts as a means of communication:

Some blame email, and the decline of face-to-face interactions among lawyers in big cities, where sparring attorneys rarely encounter foes at their kids' weekend soccer game.

"You don't do this to people you know," said San Francisco lawyer William B. Smith, also a co-chairman of the trial lawyers' civility committee. "Now it's people sitting behind computers doing nasty things to each other."⁵

Beyond making the practice of law downright unpleasant, uncivil behavior by lawyers results in such things as increasing legal costs due to constant unnecessary disputes, delaying the ultimate resolution of the legal issues and declining confidence in the legal profession and the legal system.

Steven Barghols, who mediates many cases each year and thus works with many lawyers, speaks highly of the professionalism of the great majority of them:

In my ADR practice, I work with more than one thousand lawyers each year. In considering their court filings and inter-counsel communications, I always evaluate the

quality of their professionalism — specifically, how they have acquitted themselves, with each other, during the course of their litigation. I find that easily 95% of the lawyers with whom I work have interacted with their opposing counsel in a civil and courteous manner. They make me proud to be a lawyer. The other 5%, however, suffer in this regard, most likely because they never had a mentor show and teach them how a lawyer acts in dealing with other lawyers. The Standards of Professionalism do exactly that — show lawyers how to treat each other. The Standards serve as a reminder that a lawyer's professionalism benefits the client's interests and furthers the administration of justice in our courts.

DEFINING PROFESSIONALISM/CIVILITY

What exactly is "civility"? The definition I like best is one created by Robert's Fund, a private foundation dedicated to increasing civility among lawyers. It not only defines civility but recognizes some of the positive aspects of behaving civilly:

Civility is more than politeness, compassion, and integrity. Civility is a set of attitudes, behaviors, and skills that call upon us to respect others, to remain open-minded, and to engage in honest and constructive discourse. This enables us to reduce transaction costs and realize better results. Civility benefits business by creating satisfied clients and reducing costs. It benefits the practitioner by reducing stress and promoting healthy relationships. And civility promotes justice by de-escalating conflict and inspiring pro bono service. We behave civilly by actively listening to others, by understanding our own biases and assumptions, and by treating others as we would like to be treated. In order to understand our inherent biases, we need to engage in difficult but necessary conversations about race, gender, otherness, and values. Civility [sic] calls upon us to advocate effectively without losing our humanity.⁶

EFFORTS TO ADDRESS THE RISE IN INCIVILITY

Almost 40 states have adopted some form of statement on professionalism or civility.⁷ The OBA Board of Governors adopted The Lawyer's Creed in 1989 which addressed some very basic principles regarding lawyer behavior and which was amended in 2008 to incor-

porate by reference, the Standards of Professionalism (which had been adopted by the Board of Governors in 2002):⁸

I recognize that my conduct is not governed solely by the Code of Professional Responsibility, but also by standards of fundamental decency and courtesy. Accordingly, I will endeavor to conduct myself in a manner consistent with the Standards of Professionalism adopted by the Board of Governors.

The standards were crafted to “represent the level of behavior we expect from each other and the public expects from us in our dealings with the public, the courts, our clients and each other.” However, as made clear in the preamble, they were not “intended to be used as a basis for discipline . . .”

THE STANDARDS OF PROFESSIONALISM

Let’s look at a select few of the provisions of the standards (and it wasn’t easy eliminating many of them).

a) Expectations Regarding the Public.

Among our responsibilities to the public, listed in section 1.6, is that “[o]ur conduct with clients, opposing counsel, parties, witnesses, and the public will be honest, professional and civil.” Take a minute to reflect on that. Given the daily pressures of our practices, that is not always as easy as it sounds. But isn’t it what we would want people to say about us when we aren’t around?

b) Expectations Regarding Our Clients.

With respect to our clients, some important expectations are:

2.1 We will be loyal and committed to our client’s lawful objectives, but will not permit our loyalty to interfere with giving the client objective and independent advice.

2.5 We will reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect a client’s lawful objectives.

2.6 We will advise our client, if necessary, that the client has no right to demand that we engage in abusive or offensive conduct and that we will not engage in such conduct.

2.7 We understand, and will impress upon our client that reasonable people can dis-

agree without being disagreeable; and that effective representation does not require, and in fact is impaired by, conduct which objectively can be characterized as uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious. Ill feelings between clients will not dictate or influence a lawyer’s attitude, demeanor, behavior or conduct.

c) Expectations Regarding Our Dealings with Other Lawyers.

From my observations, most of the issues concerning uncivil behavior seem to arise between lawyers engaged in litigation. It is no wonder a large number of the standards address litigation matters. While all of them are important, here are a few to draw to your special attention:

3.1 Communications with Adversaries

a. We will be civil, courteous, respectful, honest and fair in communicating with adversaries, orally and in writing.

e. Unless specifically permitted or invited by the court, copies of correspondence between counsel will not be sent to a judge or administrative agency.

I imagine most of us have received communication from another lawyer that was rude or discourteous. Our reaction is probably not good. Hopefully we have not responded in kind (or surely not been the instigator); but, depending on the level of severity of the rude behavior, our day was probably not nearly as pleasant or productive for a period of time. As noted by Judge Robertson above, a pet peeve mentioned by judges is receiving copies of correspondence between lawyers attached to motions.

Without doubt, lawyer interaction in litigation is very heavily weighted toward discovery. We are given a simple standard that, if followed, would eliminate many motions to compel and motions for sanctions. Section 3.2(a) of the standards provides a “reasonable effort should be made to conduct discovery by agreement.”

With respect to depositions, Section 3.2(b)(2) provides we should: give “reasonable consideration . . . to accommodating schedules of opposing counsel and the deponent (both professional and personal schedules) . . . [and] consult with opposing counsel before schedul-

ing any deposition.” A lawyer who is consulted about scheduling a deposition should respond no later than the next business day.

One standard all too often violated is Section 3.2(13) concerning depositions: “We will not engage in any conduct during a deposition which would not be allowed in the presence of a judicial officer, including disparaging personal remarks or acrimony toward opposing counsel or the witness, as well as gestures, facial expressions, audible comment, or other manifestations of approval or disapproval during the testimony of the witness.”

Although the temptation may be there because the question seems poorly phrased, irrelevant or repetitive, such misbehaviors reflect more on the person engaging in them than opposing counsel.

Document requests, interrogatories and requests for admission are also an area where conflicts frequently arise. If we abide by Section 3.2(c) and (d) of the standards, those conflicts could be greatly reduced:

c. Document Requests

(1) We will limit requests for production of documents to materials reasonably believed to be needed for the prosecution or defense of an action; and requests will not be made to annoy, embarrass or harass a party or witness, or to impose an undue burden or expense in responding.

(3) When responding to unclear document requests, receiving counsel will make a good-faith effort to discuss the request with opposing counsel to clarify the scope of the request.

d. Interrogatories and Requests for Admissions

(1) We will exercise discriminating judgment in using written discovery requests, and will not use them to annoy, embarrass or harass a party or witness, or to impose undue burden or expense on the opposing party or counsel.

“... we are expected to be ‘punctual and prepared for all appearances so that conferences, hearings and trials may commence on time...’ ”

(2) We will read and respond to written discovery requests in a reasonable manner designed to assure that answers and admissions are truly responsive.

We all have had times where, because of the exigencies of other matters in our practices, additional time is needed to properly respond to discovery requests. Isn't it a relief to have opposing counsel agree to your reasonable request for additional time without a hassle? Section 3.4 of the standards says that is just what should happen: “We will agree, consistent with existing law and court orders, to reasonable requests for extensions of time when the legitimate interests of our clients will not be adversely affected.”

As a very new lawyer, I learned a valuable lesson from then Special Judge Daniel Boudreau (now retired Supreme Court justice). I presented him a proposed default judgment. Instead of just signing it after I showed him the petition and proof of service, he asked if there was a lawyer involved, and whether I had contacted him/her. As it happened there was no lawyer to my knowledge (but I hadn't really given that much thought beforehand). Judge Boudreau's question caused me to realize that the mere fact that a default judgment might be “technically” allowed, does not mean that it should necessarily be requested or granted if a lawyer is involved for the defaulting party.

Section 3.8 of the standards provides we “will seek a default judgment in a matter in which an appearance has been made or where it is known that the defaulting party is represented by a lawyer with respect to the matter, only after giving the opposing party sufficient advance written notice to permit cure of the alleged default.” In truth, almost all such defaults are vacated pursuant to 12 O.S. 2011 §1031.1. Following this standard avoids the waste of time and embarrassment to the lawyer — which could be you!

d) Expectations Regarding Our Actions with the Courts

Among other things, in our dealings with the courts and administrative agencies, we are expected to be “punctual and prepared for all appearances so that conferences, hearings and

trials may commence on time,”⁹ and we “will not knowingly mischaracterize, misquote, miscite facts or authorities or otherwise engage in conduct which misleads the court or agency.”¹⁰ Surely we don’t need to be reminded that we are expected “to speak and write civilly and respectfully” to the court or agency,¹¹ yet I imagine we have all seen it happen on a few occasions.

The standards were also adopted by the Oklahoma Judicial Conference in 2002. Several standards refer to the judge’s responsibilities to litigants and lawyers. Foremost among these is the admonition to “be courteous, respectful and civil to lawyers, parties and witnesses. We will maintain control of the proceedings, recognizing that we have both the obligation and the authority to ensure that all proceedings are conducted in a civil manner.”¹² On occasion, the time pressures and circumstances, e.g., *pro se* parties, can make this difficult for a judge, but it is a critical skill because respect for and trust in the judiciary can suffer when the public sees a judge lose his/her temper.

STRATEGIES TO IMPROVE CIVILITY

Essentially, all practitioners need to embrace the standards as a set of universal values that we all share. How do we accomplish that? A significant element of reaching that awareness is we realize it is not good business to behave uncivilly.¹³

A good first step would be to have our law schools emphasize the standards as an important part of the curriculum.

Mentoring young lawyers is a critical element of helping them learn the right way to practice law. Without having anyone tell them otherwise, it is not hard to understand why they might just send a notice setting a deposition in accordance with the federal or Oklahoma rules without conferring with opposing counsel.

We should provide ethics credit for continuing legal education on the standards, either as a stand-alone seminar or portion of an ethics seminar.

Another strategy that may be hard for many of us is to inform lawyers when they fall short of the expectations set forth in the standards. Although awkward, if handled properly and not in a judgmental way, offending lawyers might think twice before engaging in the same conduct in the future.

Oklahoma’s Oath of Attorney has not been revised since adopted in 1910:

You do solemnly swear that you will support, protect and defend the Constitution of the United States, and the Constitution of the State of Oklahoma; that you will do no falsehood or consent that any be done in court, and if you know of any you will give knowledge thereof to the judges of the court, or some one of them, that it may be reformed; you will not wittingly, willingly or knowingly promote, sue, or procure to be sued, any false or unlawful suit, or give aid or consent to the same; you will delay no man for lucre or malice, but will act in the office of attorney in this court according to your best learning and discretion, with all good fidelity as well to the court as to your client, so help you God.

Some states, such as Illinois, have established formal bodies whose charge is to improve civility. The effect of those bodies is yet to be determined.

MANDATING CIVILITY

A strategy that seems to be gathering steam in several states is to mandate civility. Arkansas, California, Florida, New Mexico, South Carolina and Utah have modified their lawyers’ oaths to include a pledge of civility.¹⁴

For example, the South Carolina oath was modified in 2003 to include the following pledge: “To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.”¹⁵

Does adding civility language to the oath of a lawyer really matter? Well, the Supreme Court of South Carolina has held that it does in *In the Matter of Anonymous Member of the South Carolina Bar*. After a lawyer sent an “intemperate” and irrelevant email to another lawyer that alluded to the possible drug dealings by the daughter of the receiving lawyer, the recipient filed a complaint and a hearing panel determined the offending lawyer had violated a rule that deals with admission to the bar and the oath. The lawyer received a private caution and finding of minor misconduct. The Supreme Court upheld the findings and sanction over the objection that the rule was overbroad and vague. The court majority went on to say that

future similar transgressions by lawyers might lead to a public sanction.¹⁶

Whether Oklahoma should follow suit by amending our attorney oath is an interesting question.¹⁷ Ideally, we want lawyers to behave civilly because it is the right thing to do and is in the overall best interest of their clients. As Mr. Barghols has observed above, almost all lawyers are professional and civil. But what about the small number of lawyers who are consistently discourteous and unprofessional? I feel confident that most lawyers would gladly promise to be civil in their relationships with the public, their clients, fellow lawyers and the courts. At the very least, it is worth exploring. If a revised oath were to be required of new lawyers, we current practitioners should also commit ourselves to the new oath.

CONCLUSION

We are all busy and time is a precious resource, but please make time in the next couple of weeks to read through the entire standards again. It only takes about 15 minutes (I timed it). Frankly, some of it may seem too obvious for discussion. Yet, it does not hurt to remind ourselves of the kinds of things we should all aspire to do, each and every day. I am firmly convinced the result will be that we enjoy the practice of law more, unnecessary litigation expenses will be reduced and our clients, the courts and the public in general will hold us in higher esteem. And maybe we could feel a little more like Atticus Finch at the end of the day.

1. Oklahoma Rules of Professional Conduct, 5 O.S. 2011, Appendix 3-A.
2. American Bar Association Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* 7 (1986).
3. 69 O.B.A.J. 1068 (1998).
4. 433 U.S. 350 (1977).
5. <http://goo.gl/De7NkL>.
6. <http://www.robertsfund.org/about/>.
7. <http://goo.gl/4B9rJy>.
8. The Standards of Professionalism were drafted by Steven Barghols, Harry Woods and the author, drawing a number of ideas from other professionalism codes.
9. Section 4.2, Oklahoma Rules of Professional Conduct.
10. Section 4.5, Oklahoma Rules of Professional Conduct.
11. Section 4.1, Oklahoma Rules of Professional Conduct.
12. Section 5.1, Oklahoma Rules of Professional Conduct.
13. "Civility is Good Business," *Washington State Bar News* 34 (June 2011).
14. <http://goo.gl/1Uzgy5> and <http://goo.gl/wGFSnj>.
15. <http://goo.gl/w0CSyQ>.
16. <http://goo.gl/ft67CD>.
17. The Oath of Attorney, 5 O.S.2011 §2.

ABOUT THE AUTHOR



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The Role of Attorney Ethics When Serving in a Non-Attorney Role

By Ellen Buettner

I am often asked whether I am glad that I went to law school. Serving in a non-attorney role, the question makes sense to some extent — I do not *need* a law license to do what I do. There are many people with law degrees who for a variety of reasons have found occupations outside the practice of law. While we are not actively practicing law, our co-workers and those we serve often know that we are licensed attorneys. Consequently, our actions are often construed as a reflection on the legal community. Therefore, it is important we understand and appreciate the fundamental ethical principles behind the official Rules of Professional Conduct in guiding our everyday professional interactions.

I serve as the assistant director of operations for the Oklahoma Department of Mental Health and Substance Abuse Services. Is this the job I thought I would have as I sat through my corporate tax course in law school or even as I was studying torts for the bar exam? Not in the slightest. Am I incredibly grateful to be where I am? Absolutely — Grateful not only for my passionate coworkers and supportive leaders, but for the chance to use my education and training to support an organization that truly makes a difference in the lives of Oklahomans. However, this opportunity is not just limited to those in the public sector. The work we engage in throughout various private industries and sectors — oil and gas, health-care, education, construction and development, to name a few — also provide valuable services to the community. Our legal education, training and ethical standards can help

shape our professional roles in order to further the missions of our organizations.

While we all spent time studying professional legal ethics in law school and in preparing for our licensing exams, the concept of *protecting the integrity* of the legal profession is not a phrase that we discuss often. We celebrate the wins, settlements, successful transactions and advocacy that lawyers perform every day in our various practices, but we also engage, unfortunately, in a certain *schadenfreude* of our community; for example, making personal attacks on one another, criticizing political activism, or engaging in gossip regarding struggles we face with family or friends. When we engage in the latter, we forget we are part of the same community. We have different backgrounds and different types of practices. Dif-

ferent types of clients and different accountabilities. But we are the same.

A licensed attorney certainly avails him or herself of the Oklahoma Rules of Professional Conduct and there are specific regulations related to attorneys serving in a nonrepresentational role or attorneys not active in the practice of law. For example, “a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.”¹ Further, Comment 5 to Rule 8.4 of the Oklahoma Rules of Professional Conduct speaks to the enhanced ethical standards for lawyers who hold public office or other positions of private trust.²

However, the Oklahoma Code of Professional Responsibility can also help guide relationships and interactions with co-workers, customers and colleagues when serving in a non-attorney role. This article is not meant to propose revising the definitions of “client” or “representation” to extend prescribed legal ethics to every professional interaction we have simply by virtue of holding a law license. This article is also not a commentary on the application of the Rules of Professional Conduct to quasi-legal, yet non-attorney roles (e.g., compliance officers). Rather, this article provides an ethical framework for professional interactions based upon the fundamental *principles* underlying the Rules of Professional Conduct regarding competence, communication, conflict of interest, confidentiality, counseling, and responsibilities of supervisors and managers.

COMPETENCY

Rule 1.1 of the Oklahoma Rules of Professional Conduct states that a “lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Professional ethics can be a significant motivator in improving knowledge and expertise in practice. A recent study highlighted that a “love of the profession and its distinctive characteristics, philanthropy, an awakened conscience, and self-assessment will ultimately lead to a heightened sense of responsibility.”³ Competency does not simply come from day-to-day experience and CLE seminars — it requires a personal motivation to learn and to be accountable for the services we provide.

Ethical standards are meant to protect our clients and customers, as well as our professional image.⁴ Regardless of the professional field we serve, we have an obligation to proactively pursue our professional development in order to provide the highest quality of services to those who rely on us.

Knowing information is only half the battle. Competence also means *demonstrating* technical and professional ability.⁵ This is the only way to build productive relationships with clients, co-workers, customers and the public at large. By consistently demonstrating competent performance, we build confidence with those we serve. Further, when serving in a non-attorney role, competency often means demonstrating good business sense; taking into account the impact that a course of action will have on an individual, organization or policy initiative. This concept is reflected in Rule 2.1 of the Oklahoma Rules of Professional Conduct, which states that “in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to a client’s situation.”

One of the benefits of our legal training is that we possess the ability to evaluate an argument or proposal from several different perspectives and to consider the short- and long-term consequences of our decisions. Further, coworkers, customers and colleagues often seek guidance regarding nontechnical aspects of operations, considering big-picture implications for our actions and decisions. Especially when serving in a management role, success requires high levels of conceptual skills due to the need for analysis of resource allocation, organizational planning and the ability to anticipate future events and consequences. Further, a manager may have responsibility for coordinating many interdependent functions, which requires him or her to make more abstract or complex decisions, rather than those that relate to the specific, technical aspects of the organization.⁶ Our legal training prepares us for this task.

COMMUNICATION

While competency is necessary in carrying out professional functions, effective communication is essential to maintaining productive professional relationships. Rule 1.4 of the Okla-

Oklahoma Rules of Professional Conduct requires a lawyer to:

- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required;
- 2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- 3) keep the client reasonably informed about the status of the matter;
- 4) promptly comply with reasonable requests for information; and
- 5) consult with the client about any relevant limitation on the lawyer's conduct...⁷

In whatever role we serve, we must provide those who rely on us for guidance with the information necessary for them to make informed decisions. While we often focus on the *outcome* of a particular course of action, it is also important to consider the *process* that our clients and customers experience. Timely and accurate communication is not just an ethical principle — it is basic customer service. Cultivating professional relationships involves a constant effort to maintain open channels of communication, which helps create an environment where co-workers, customers and colleagues know that they can rely on you to communicate as often and as clearly as necessary to carry out a purpose or project.

Effective communication also requires one to be solution-oriented. To simply present the facts or rule of law regarding a situation only provides the person you are serving with part of the information. One of the greatest benefits of our legal training is that we do not see the world in black and white. The ability to approach a problem or conflict from varying perspectives provides us with the cognitive tools to present a full analysis of the issue and to offer options, which provides greater opportunity for effective counseling and decision making.

CONFLICT OF INTEREST

A lawyer must act with independent judgment in his or her client relationships.⁸ The Oklahoma Rules of Professional Conduct also extend this principle to certain relationships even when one no longer serves in an attorney

role.⁹ As discussed above, while there are specific, prescribed guidelines regarding conflicts of interest in client interactions (current and former), we should still consider the underlying principles behind these rules to help guide us in making ethical decisions regarding what we *should* do in our everyday professional interactions; rather than simply what is required of us in a traditional attorney-client representation. Focusing on *situations* forces us to focus on rules (i.e., what not to do). No matter how many rules we have for acceptable behavior, there will inevitably be some loopholes. Instead, we should focus on what we are trying to protect or prevent.

There are several aspects of a professional relationship that the conflict of interest principle serves to protect when serving in a non-attorney role, whether with customers, co-workers, management or external colleagues. As a general ethical principle, all employer-employee relations bear some special relationship of trust. Organizations should provide opportunities for employees to enjoy work and build positive relationships; however, we must avoid dual relationships by establishing and maintaining boundaries, which requires a thoughtful understanding of the specific roles we carry out in our organizations. For example, a human resources (HR) professional should recognize the potential conflict of interest when a family member or loved one becomes the subject of a workplace investigation regarding which the HR professional would normally provide guidance to decision-makers. Additionally, an employee in a management role should, at the very least, disclose a previously existing relationship when providing input regarding a potential candidate for employment. Recognizing and avoiding potential or existing conflicts of interest protect not only the parties involved, but also the reputation of the organization.

CONFIDENTIALITY

We are also accountable for the responsible use of information. Rule 1.6 of the Oklahoma Rules of Professional Conduct states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation" or unless otherwise permitted in certain prescribed situations.¹⁰ This fundamental principle contributes to the special relationship of trust that is held between an attorney and a client, which also includes effectively communicating

those situations where information may need to be revealed.

The Oklahoma Rules of Professional Conduct require licensed individuals to maintain confidentiality of certain information in certain situations regardless of if that person is currently practicing (e.g., duties to former clients).¹¹ Further, there are numerous state and federal laws regarding the confidentiality of certain information (e.g., HIPAA). Again, the purpose of this article is not to propose that every interaction within an organization should be kept confidential simply because an employee holds a law license. However, the fundamental principle of keeping certain information confidential when appropriate should be considered when serving in a non-attorney role, even when there is no statutory obligation to do so. Trust and loyalty help to create the foundation upon which productive professional relationships are built. Further, positive supervisor-subordinate relationships are often characterized by high levels of trust, continuous emotional support, and opportunities for recognition, which are also influenced by the frequency and openness of communication.¹² For example, subordinates must know that they can trust supervisors to keep certain information confidential when discussing performance evaluations or personal development goals.

Regarding the release of information, communication can be a valuable tool to keep others informed and to provide guidance regarding processes or potential consequences, but we should resist the temptation to use information as a weapon. "The sense of omniscience results from having available at one's disposal essentially any knowledge one might want . . . [t]he sense of omnipotence results from the extreme power one yields."¹³ We must value trust and avoid opportunities for exploitation and undue influence by safeguarding the information we hold, only revealing information when appropriate. This is not to say that it is unethical to be strategic in our communications; for example, as it relates to the timing or wording of information (e.g., press releases).

“The Oklahoma Rules of Professional Conduct require licensed individuals to maintain confidentiality of certain information in certain situations regardless of if that person is currently practicing...”

Ethics standards should not inhibit advocacy; they should enhance it. As such, we should consider the appropriateness of such a release in terms of the accuracy of our statements and the potential consequences to the subject and speaker.

RESPONSIBILITY OF MANAGERS AND SUPERVISORS

Rule 5.1 of the Oklahoma Rules of Professional Conduct states that attorneys with “managerial authority in a law firm” shall make “reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Rule 5.1 further states that a “lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.”

Attorneys are natural leaders. Our training prepares us to advise, counsel, negotiate and influence those around us. As such, we must appreciate the power and opportunity that we hold in shaping the culture of our practices and organizations. From an ethics perspective, we should enhance our ability both to *recognize* and to *learn* from mistakes and failures.¹⁴ Managers should learn to recognize signs of trouble from subordinates.¹⁵ It is important for those serving in supervisory roles to realize that in organizations with formal hierarchical structure, employees may be hesitant to communicate mistakes or bad news to a superior for several potential reasons, including expecting harm to themselves, regarding the supervisor as being more accountable, questioning their own expertise on the matter, or expecting the supervisor to ignore the issue.¹⁶ Subordinates are also unlikely to be *direct* in their communication of a negative issue to a superior, further emphasizing the need for those in management to recognize the signs of when to step in.¹⁷

Those in management and supervisory roles must institute a culture of mindfulness and psychological safety in which employees

(attorney and non-attorney) recognize the “big-picture” impact of operational successes and failures, encouraging managers to stay close to the front-line operations in order to monitor developing situations.¹⁸ Organizations should strive to create meaningful frameworks for communication in which employees experience supportive social influence to ensure the effective transfer of information and, more importantly, shared meaning, leading to more productive communication and organizational learning.¹⁹

CONCLUSION

Being “ethical” does not mean that we are perfect. It means that we realize and accept our imperfections and learn from our mistakes. We should use our legal training to guide our interactions with each other and to contribute to the interest of justice and fairness. We should challenge each other to be better and celebrate dissent as a vehicle to gain new knowledge and different perspectives — but we should not abuse the positions we hold. We should treat each other with dignity and respect. That is the role of a community. Am I glad I went to law school? The answer is always “Yes.” I hope you are too.

1. Okla. Rules of Professional Conduct, Preamble and Rule 8.4.

2. Okla. Rules of Professional Conduct, Rule 8.4, Comment 5. “Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer’s abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.” See also Okla. Rules of Professional Conduct, Rules 1.12, 2.4, and 8.4.

3. Vanaki, Z. (2009). “Professional Ethics: Beyond the Clinical Competency,” *Journal of Professional Nursing*, 25(5), 285-291.

4. 15 Geo. J. Legal Ethics 915.

5. Bartolome, F. (1993). “Nobody Trusts the Boss Completely — Now What?” *Harvard Business Review. The Articulate Executive: Orchestrating Effective Communication* (pp. 3-16). Boston, MA: Harvard Business School Publishing Corporation.

6. Yukl, G. (2010). *Leadership in Organizations* (7th ed.). Upper Saddle River, NJ: Pearson Education, Inc.

7. Okla. Rules of Professional Conduct, Rule 1.4.

8. Okla. Rules of Professional Conduct, Rule 1.7.

9. See Okla. Rules of Professional Conduct, Rules 1.9 and 1.11.

10. See Okla. Rules of Professional Conduct, Rules 1.6.

11. See Okla. Rules of Professional Conduct, Rules 1.6 and 4.1.

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Honesty, Integrity and Civility

Three Pillars of Professionalism

By Frederick K. Slicker

In late December 2013, the American Bar Association Standing Committee on Professionalism published “Essential Qualities of the Professional Lawyer,”¹ (*Professional Lawyer*). *Professional Lawyer* recognized that there is no single universally accepted definition of professionalism. Indeed, “there is no consensus on the constituent pieces of professionalism — an amorphous concept...”² We tend to define professionalism by listing the “constituent pieces” or characteristics that are found in lawyers we respect. On April 20, 2006, the Oklahoma Bar Association Board of Governors adopted the following definition: “Professionalism for lawyers and judges requires **honestly, integrity, competence, civility** and public service.” (Emphasis added.) This definition demonstrates that honesty, integrity and respect for others form the bedrock upon which professionalism rests.

HONESTY AND INTEGRITY

Honesty and integrity are often used interchangeably and are inextricably bound together. “Honesty” means being truthful, sincere, upright and fair. Honesty means speaking and writing without spinning the truth, without misrepresenting the truth and without omitting statements needed to avoid misleading or embellishing the truth. Opposites of honesty are dishonesty, deceit and fraud. An old Jewish proverb says, “A half truth is a whole lie.” Honesty is more than not lying; Honesty also means truthful living. Lao Tzu said, “Be honest to those who are honest to you, and be honest to those who are not honest. Thus honesty is attained.”

An anonymous writer once wrote, “Honesty is the first chapter in the book of wisdom.”

“Integrity” is like honesty. “Integrity” means being truthful, morally correct, virtuous, righteous, trustworthy, a person of conscience. “Integrity” is doing the right thing, even when it is hard, even when it is strongly opposed by your friends and even if no one else sees you or knows. Opposites of integrity are dishonesty, corruptness and wickedness. Abraham Lincoln is quoted as saying: “I am not bound to win, but I am bound to be true. I am not bound to succeed, but I am bound to live up to what light I have.” Marcus Aurelius is quoted as saying: “If it is not right, do not do it. If it is not

true, do not say it.” In my personal case, if my dad would not approve of it, then I should not do it.

The OBA’s definition of professionalism does not make any specific reference to the Oklahoma Rules of Professional Responsibility (Rules),³ the minimum standards of conduct for lawyers. Nonetheless, the Rules make clear that the first and highest duty of every lawyer is to be honest.

Rule 1.2(d) prohibits lawyers from assisting or counseling a client to engage in **criminal or fraudulent conduct**.

Rule 3.3 provides that a lawyer shall not: 1) “knowingly make a **false statement of fact or law** to a tribunal or **fail to correct a false statement** of material fact or law previously made to the tribunal by the lawyer;”... or 3) “offer evidence the **lawyer knows to be false**.”

Rule 3.4(b) provides that a lawyer shall not “**falsify evidence**, counsel or assist a witness to **testify falsely**.”

Rule 4.1 provides that a lawyer shall not knowingly: “(a) make a **false statement of material fact or law to a third person**; or “(b) **fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act** by a client unless disclosure is prohibited by Rule 1.6 [attorney-client privilege].”

Rule 7.1 provides in part that a “lawyer shall not make a **false or misleading communication about the lawyer or the lawyer’s services**. A communication is false or misleading if it contains a **material misrepresentation of fact or law**, or omits a fact necessary to make the communication considered as a whole not **materially misleading**.”

Rule 8.1 provides that an applicant for admission to the bar shall not “(a) **knowingly make a false statement of material fact**; or (b) fail to disclose a fact necessary to correct a misapprehension.”

Rule 8.2 provides that a lawyer shall not “make a statement that the lawyer **knows to be false or with reckless disregard as to its truth or falsity** concerning the qualifications or integrity of a judge.”

Rule 8.4 states that it “is professional misconduct for a lawyer to: (b) commit a criminal act that reflects adversely on the lawyer’s **honesty**,

trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving **dishonesty, fraud, deceit or misrepresentation**.” (emphasis added). Comment 2 expands **Rule 8.4** further by providing that even “truthful statements that are misleading are also prohibited by this Rule.”

Read literally, a **Rule 8.4** violation occurs when the false or fraudulent or deceitful statement is made, even if no one acts on it, even if no one is hurt or damaged by it and even if the statement is not essential, material or even relevant in the context. At a football tail gate, one lawyer was asked by another lawyer what he was working on at the office. The first lawyer responded that he was working on closing a \$50 million loan, when in fact the actual loan was to be only \$5 million, even though the lending documents provided for future draws up to \$50 million. Is the lawyer’s statement a violation of **Rule 7.1** and/or **Rule 8.4**? Does it matter that the statement was made in a social setting and not at the office or at the courthouse? Does it matter that the statement was made to another lawyer and not a potential client? Does it matter that no one was damaged by the statement?

The lawyer has a special duty of candor to the courts. The lawyer has an affirmative duty to correct misstatements of fact or law made by the lawyer, even if doing so may hurt the client’s position.⁴ The lawyer is obligated to: 1) correctly characterize the client’s position; 2) correct statements previously made by the lawyer which are not literally true or are materially misleading; 3) to correct misquoted case law; and 4) to not withhold case law in the court’s jurisdiction which is contrary to the client’s position. See **Rule 3.1**.⁵ In no case is the lawyer permitted to offer false evidence or assist or advise the client to testify falsely or assist or counsel a client to commit a crime or fraud. See **Rule 3.4(b)**.⁶ But does the lawyer in a civil case have a duty to disclose facts contrary to the client’s position when neither the court nor the opponent has asked for disclosure of those facts?

Like all rules, the duty of honesty is not without exceptions. A defense counsel has no duty to disclose client confidences in a criminal case, since the client has a constitutional right not to incriminate himself and has a right of confidentiality from his lawyer. An exception to the duty to tell the truth (and not withhold facts necessary for the truth to be known) occurs when disclosure may conflict with the lawyer’s

duty of confidentiality under **Rule 1.6**. There are several exceptions to the lawyer's duty of confidentiality listed in **Rule 1.6**, such as when the client has brought a claim against the lawyer. When the duty of confidentiality under **Rule 1.6**, however, collides with the lawyer's duty under **Rule 8.4**, the conflict is resolved by the lawyer using judgment and experience. There are times when the lawyer may withhold information even from the client, when, for example, disclosure could be harmful to the client's health or safety.⁷

In commercial negotiations, the duty of honesty is softened for estimates of price or value or expressions of opinion and other similar statements generally understood not to be statements of fact. These types of statements do not violate the Rules, even if the lawyer knows the statements to be false. *See* Comment 1 to **Rule 8.4**.⁸ Great care needs to be exercised by the lawyer to avoid possible misconduct. For example, can a lawyer express an opinion that the property offered for sale is worth \$1 million, when the lawyer knows facts which would reduce the value to less than \$500,000? Would it be acceptable if the lawyer stated that the \$1 million value is the lawyer's opinion only, when the lawyer believes the property to be worth only \$500,000? Is it an acceptable negotiation practice for the lawyer to state that "my client will take not one penny less than \$1 million," when the lawyer knows that the client would readily accept less?

Another example occurs where a client's interest in confidentiality may be adverse to the lawyer's duty to disclose client secrets where the lawyer is helping the client prepare a disclosure document to obtain a license or financing. Suppose the lawyer is asked to prepare a private offering memorandum for a client who is insolvent, that is, unless the offering is successful, the client cannot pay its debts as they become due. Is there a legal, professional or moral duty for the lawyer to disclose client's insolvency when the client refuses to permit the disclosure? Is the lawyer required or even permitted to prepare the disclosure document if the client refuses to disclose its insolvency? Insolvency seems to be material when seeking funding. Who decides if a fact of insolvency is material or not? Must the disclosure be highlighted on the cover page as a risk factor or can the disclosure be buried in a footnote on the last page of a 200 page prospectus? The client argues that disclosure would violate attorney-

Professionalism Dos and Don'ts

"10 things that lawyers do that annoy clients the most"^{*}

1. Not returning phone calls
2. Making clients wait in reception
3. Lack of civility and respect for others
4. Name dropping
5. Not explaining legal jargon
6. Not meeting promised deadlines
7. Not delivering a promised result
8. Not communicating for long periods
9. Not being prepared
10. Sending a large invoice without warning or explanation

^{*} Adapted from *The Busy Lawyer's Guide to Success* by Reid F. Trautz and Dan Pinnington.

client confidentiality. **Rule 1.6** permits but does not require a lawyer to disclose the client's secret, even if this fact was disclosed to the lawyer in an attorney-client setting. In this case, I believe the lawyer is compelled to disclose the insolvency of the client, even over the client's adamant objection, in order to prevent a material misrepresentation and fraud upon the prospective investor. *See* **Rule 1.2** and **Rule 4.1**, which prohibit the lawyer from aiding or assisting the client in committing a crime or a fraud.

Every one of the Rules of Professional Responsibility set forth above are **mandatory** and not permissive. Violation of any of these Rules can subject the lawyer to professional discipline, including disbarment, and may even result in civil damages and/or criminal sanctions.

Professionalism means much more than compliance with the Rules and avoiding professional punishment under the Rules. Honesty and integrity are not restricted to compliance with the Rules. The **Lawyer's Creed**⁹ adopted by the OBA Board of Governors on Nov. 17, 1987, provides the lawyer will be guided by a "fundamental sense of integrity and fairness;" and that the "lawyer's word is his or her bond."

Honesty and integrity are also key concepts in the **Standards of Professionalism**¹⁰ adopted by the OBA Board of Governors on Nov. 20, 2002. The following standards make specific reference to the lawyer's duty of honesty and integrity:

1.2 – In dealing with the public, “the lawyer’s word should be his or her bond. We will **not knowingly misstate, distort or improperly exaggerate any fact**, opinion or legal authority and will not improperly permit our silence or inaction to mislead anyone.” See also 1.8.

3.1 – In dealing with other lawyers, “we will be civil, courteous, respectful, **honest** and fair...”

4.5 – In dealing with courts and administrative agencies, “we will never **knowingly misrepresent, mischaracterize, misquote, miscite facts or authorities, or otherwise engage in conduct which misleads the court or agency.**” (Emphasis added.)

Unlike the Rules, the creed and the standards are voluntary and aspirational, not mandatory codes of professional conduct. Violation of the creed and/or the standards in and of itself cannot result in professional punishment, unless accompanied by a violation of the Rules.

Lawyers often face ethical challenges from their own clients. Acting ethically and truthfully requires the lawyer not just to profess to be bound by an internalized moral code but also to act consistent with it. Lawyers are not judged by their words but by their actions. Clients often expect their lawyer do what it takes to win, even if the lawyer has to spin or distort or falsify facts to do so. Clients want to win; and they do not care how their lawyers do it. Clients want to win, whether or not their lawyer acts with integrity or honesty and whether or not their lawyer professes to follow a high moral code or principles of virtue.¹¹

The core values of honesty and integrity should not be sacrificed on the altar of winning at all costs. Winning is critically important for the client and for the lawyer. But winning dishonestly or by cheating is never worth the

price. The victory is tainted for the client, and the lawyer's reputation and professional standing will be damaged beyond repair. Sacrificing fundamental values of fairness, honesty, integrity and truth for the sake of a temporary success will never mean true “victory.”¹² There is a right way to achieve every lawful goal, and there is no right way to achieve an unlawful result.

Living a life based upon honesty and integrity advances the client's best interests and justifies the public's trust and confidence in the legal profession. The professional lawyer is worthy of the public's trust, because the professional lawyer's life reflects a shared value system based upon honesty, integrity and trustworthiness, a commitment to technical competence and a strong sense of service to others and to the community.¹³

Honesty and integrity together are two pillars upon which professional lawyering is based. Honesty and integrity are more than mere virtues: They are professional imperatives.

CIVILITY

One of the five pillars in the OBA's definition of professionalism is civility. “Civility” means treating others fairly and with respect, courtesy and decency. “Civility” means being courteous, kind and cooperative. “Civility” means not being rude, offensive, insulting, vulgar, coercive, overly confrontational, abusive, abrasive, humiliating, harassing or disruptive. *Professional Lawyer* calls civility the “cornerstone of professionalism.”¹⁴

Civility toward the adversary does not mean agreement with the opponent's position. Resolving disagreements is the business of the legal profession. But disagreement does not have to be disagreeable. Problem-solving is best achieved by adversaries treating their opponents with respect, rather than by using bully tactics. Professional lawyers take exception to positions without attacking the persons who express those positions. Civility compels lawyers to show respect to their adversaries, to the courts and to the public.

Civility as a code of conduct is expressed best by the Golden Rule. The Golden Rule is a uni-

“To paraphrase Lao Tzu, treat those who respect you with respect and treat those who do not respect you with respect.”

versally accepted moral code of conduct for all people in virtually every culture throughout the history of man. It is especially true for lawyers, since lawyers have the privilege of acting for others in the resolution of disputes. Do to others what you expect others to do to you and do not do to others what you do not want others to do to you. Act with respect, and your opponents will respond respectfully. Act like a jerk, and you will likely get jerked around. Tell the truth, and your opponents will respond truthfully. Lie and you will never enjoy a reputation for personal or professional integrity. To paraphrase Lao Tzu, treat those who respect you with respect and treat those who do not respect you with respect. Thus, mutual respect is established. You get back what you put out.

Civility may be the foundation upon which professionalism rests, but the word “civility” does not appear in any of the Rules. However, civility is inherently in and is the essence of all the Rules. Likewise, the Golden Rule is not mentioned in any of the Rules, but again the concept expressed by the Golden Rule is the essence of all the Rules.

Generally, conduct that is rude, offensive, insulting or sarcastic is not prohibited by the Rules except in very rare cases. For example, **Rule 3.5(3)** prohibits a lawyer from communicating with a juror “if the communication involves misrepresentation, **coercion, duress or harassment;**” and **Rule 4.4(a)** provides that a lawyer shall not engage in conduct “for **no substantial purpose other than to embarrass, delay or burden a third person.**” (Emphasis added.) Being nice is not compelled by the Rules, and being inconsiderate, unkind or disrespectful is not professionally punishable by the Rules. It is not a violation of the Rules to be mean or to act like a jerk. A lawyer cannot be disbarred or professionally sanctioned just because the lawyer is rude or disagreeable or disrespectful.

Even so, civility forms one pillar upon which professionalism rests. The creed highlights the importance of acting with civility, by stating that the lawyer: 1) will be guided by a fundamental sense of fair play; 2) will not abuse the legal system or act in an arbitrary manner; 3) will not harass or bully; 4) will act with decency and courtesy; 5) will be punctual; 6) will cooperate with opposing counsel; 7) will not employ offensive or rude behavior; and 8) will act with respect and civility. The standards contain a list of specific examples of civility,

especially in the context of litigated matters, as follows:

1.2 – In dealing with the public, the lawyer will be “honest, professional and civil.”

1.10 – In dealing with the public, the lawyer will not “engender bias” by reason of a “person’s race, color, national origin, ethnicity, religion, gender, sexual orientation or disability.”

2.6 – In dealing with clients, the lawyer will not “engage in abusive or offensive conduct...”

2.7 – In dealing with clients, the lawyer will not be “uncivil, rude, abrasive, abusive, vulgar, antagonistic, obstructive or obnoxious.”

3.1(a) – In dealing with opposing counsel, the lawyer will be “civil, courteous, respectful, honest and fair...”

3.2(a) – In discovery, the lawyer will not use “scheduling to harass counsel or generate needless expenses.” *See also* 3.2(b)(2).

3.2(b)(1) – In depositions, the lawyer will be accommodating in scheduling matters.

3.2(b)(6) – In depositions, the lawyer will not “abuse others or indulge in offensive conduct directed to other counsel, parties or witnesses” and will “refrain from disparaging personal remarks or acrimony toward” others. *See also* 3.2(b)(13).

3.2(c)(1) – In document requests, the lawyer will not make requests to “annoy, embarrass or harass a party...”

3.3(a) – In scheduling, the lawyer will act with “civility and courtesy...”

3.3(c) – In scheduling, the lawyer will not withhold consent unreasonably.

3.4(b) – In scheduling, the lawyer will agree to reasonable requests for extensions.

3.4(c) – In scheduling, the lawyer will agree “as a matter of courtesy to the first request for extension.”

3.6(a) – In dealing with non-parties, the lawyer will be “civil, courteous and professional.”

3.6(b) – In dealing with non-parties, the lawyer will “not annoy, humiliate, intimidate or harass the individual.” *See also* **Rule 4.1, Rule 4.4 and Rule 8.4.**

3.10(e) – In business transactions, the lawyer will “mark all requested changes and revisions.”

Top Ten Professionalism Tips

1. Be Honest in ALL Things

Make your word be your bond.
Your clients expect it.
Your adversaries desire it.
Your judge depends upon it.
The Rules of Professional Conduct require it.
The Rule of Law is based upon it.

2. Be an Effective Communicator

Get an engagement letter.
Agree upon the scope of your work.
Explain how your fees are determined.
List what expenses are to be reimbursed by the client.
Explain legal jargon.
Make sure your client understands. If not, explain again.
Listen to your client's questions, concerns and complaints.
Seek your client's buy in of your tactics and strategy.
Keep your client informed.

3. Be Competent

Be prepared.
Learn the facts, especially those that your client does not provide.
Understand the applicable law, rules and regulations.
Focus on achieving your client's goals and interests.
Fight aggressively but fairly.
Compromise trivial desires to obtain substantive solutions.

4. Be Respectful

Treat others with respect.
Do to others what you expect to be done to you.
Do not do to others what you do not want done to you.
Do not retaliate with disrespectful conduct.

5. Be Responsive

Return your client's calls promptly.
Answer your client's questions thoroughly.
Copy your client on all correspondence and filings.
Keep your client informed.

4.1 – In dealing with courts, the lawyer will “speak and write civilly and respectfully.”

4.4 – In dealing with courts, the lawyer will “not bring disorder or disruption to a proceeding.”

4.5 – In dealing with courts, the lawyer will “never knowingly misrepresent, mischaracterize, misquote, or miscite facts or authorities.”

4.8 – In dealing with the court's staff, the lawyer will speak civilly and respectfully.

4.9 – In written materials submitted to the court, the lawyer will be “factual and concise, accurately state current law, and fairly represent the party's position without unfairly attacking the opposing party or opposing counsel.”

4.9 (d) – In written materials submitted to the court, the lawyer will “avoid disparaging the intelligence, ethics, morals, integrity, or personal behavior of the opposing party, counsel or witness ...”

Almost from the earliest days of law school, lawyers are taught to be zealous advocates for their clients. Indeed, the Preamble to the Rules states that one duty of a lawyer is to be a zealous advocate for his or her clients. There is a natural tension between being a zealous advocate, on the one hand, and being a civil, courteous and respectful lawyer, on the other hand. It is believed by some that acting with respect toward your opponent is a sign of weakness, not of strength. The duty of a lawyer to zealously represent the client (found in the Preamble to the Rules) does not give the lawyer license to misrepresent facts or employ false or deceptive practices, even if intended to benefit the client. The lawyer is required to represent the client with honesty and without deceit or trickery.¹⁵

Contrary to popular belief, the empirical data demonstrates that your client's interests are far better served when you act with respect and civility toward your opponents than when you are rude or abrasive or personally offensive. The evidence reveals that lawyers who act with civility and respect toward others are 1) far more effective by achieving better results for their clients; 2) far more efficient in reaching those results, 3) have better reputations with their clients and the judiciary and 4) live a far more satisfied life.¹⁶

The *Professional Lawyer* lists the following practical reasons why lawyers should act with

civility and respect toward their clients, their opponents, the courts and the public: 1) Incivility usually backfires, 2) being overly confrontational costs the client more money and takes more time than being civil, 3) judges tend to side with the lawyer who demonstrates respect to others, 4) and clients do not like rude, inattentive or offensive lawyers.¹⁷ Indeed, "Very often the best way forward for even the most egotistical, self-interested and self-absorbed lawyers and their egotistical, self-interested and self-absorbed clients is through, rather than around, civility."¹⁸

Honesty, integrity and civility are the principal pillars of professionalism. The privilege of practicing law requires that lawyers act with professionalism. Lawyers who act with honesty, integrity and civility enhance the public's confidence in the legal system.

The professional lawyer is honest and truthful with the client, the opponents and the courts. The professional lawyer lives by a high moral code professionally and personally. The professional lawyer does the right thing for the right reason. The professional lawyer often sacrifices personal self-interest to further the interests of his or her clients. The professional lawyer treats others with respect, courtesy and civility.

Professionalism is the duty of every lawyer, because professionalism is the right thing to do, because lawyers are the guardians of the Rule of Law; and because the Rule of Law is the glue which holds our American way of life together. Nothing more than professionalism is expected from each lawyer, and nothing less is acceptable.

CONCLUSION

As a former chairman of the Tulsa County Bar Association Grievance Committee for two years and a member of that committee for many years, I have reviewed hundreds of grievances filed against Oklahoma lawyers. Almost every grievance includes the following:

1. My lawyer does not return my phone calls.
2. My lawyer does not keep me informed.
3. My lawyer charges me too much.
4. My lawyer does not treat me with respect.

Lawyers can eliminate the most annoying complaints of clients and avoid meritorious grievances by embracing and following the core values of professionalism. Those core val-

6. Be Responsible

Evaluate your client's objectives honestly.
Be realistic in assessing your client's goals and objectives.
Do not exaggerate your client's chances.
Do not promise victory.
Do what you say when you say.
Do not promise unrealistic deadlines.
Meet deadlines promised or explain why.

7. Be a Problem-Solver

Look for solutions, not delays.
Focus on shared interests, rather than hard legal positions.
Consider and evaluate all the alternative solutions.
Be creative in furtherance of your client's interests.

8. Be Available

Make time for your clients.
Establish parameters with your client for your availability.
Be flexible to meet your client's circumstances.
A great lawyer that is not available is not useful to the client.

9. Be Civil

Eliminate your rude, abusive and insensitive language and conduct.
Avoid humiliating or condemning comments.
Do not engage in name calling.
Attack positions, not people.
Eliminate Rambo, take-no-prisoner tactics.

10. Be a Peace-Maker

Seek the Truth.
Press for peaceful solutions.
Become an instrument of peace.

ues are honesty, integrity, competence, civility and service.

Lawyers play a variety of vital roles for their clients, including being the client's advisor, teacher, advocate, negotiator, conciliator, mediator, problem-solver and representative. But lawyers are also officers of the court, public citizens and indispensable participants in furtherance of the Rule of Law. Being a lawyer is a privilege, not a right. That privilege carries with it the requirement to act for the client and

for the society at large in a professional manner. When one lawyer fails to act with professionalism, the entire legal profession suffers. Lawyers who practice professionalism and thereby bring sunshine to others cannot avoid living in the light themselves.

1. Paul Haskins, editor.
2. *Professional Lawyer*, p. xxvi.
3. 5 OK Stat. Ch. 1, App. 3-A.
4. See Rule 3.3 (*Professional Lawyer*, p. 130).
5. See Rule 3.1.
6. See Rule 3.4(b).
7. *Professional Lawyer*, p. 132-33.
8. See Comment 1 to Rule 8.4.
9. www.okbar.org/members/ethicscounsel/lawyerscreed.
10. www.okbar.org/members/ethicscounsel/standards professionalism.
11. *Professional Lawyer*, p. 128.
12. *Professional Lawyer*, p. 15.
13. *Professional Lawyer*, p. 15.
14. *Professional Lawyer*, p. 35.
15. *Professional Lawyer*, p. 136; see **Rule 8.4 (b)** and **Rule 8.4 (c)**.
16. *Professional Lawyer*, p. 46.
17. *Professional Lawyer*, p. 51-53.
18. *Professional Lawyer*, p. 51.

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Ethics & PROFESSIONAL RESPONSIBILITY

Take Charge of Your Own Economy

By Cynthia Sharp

"Can anybody remember when the times were not hard, and money not scarce?"—

Ralph Waldo Emerson

We live and practice in challenging economic times. The media keeps us well informed as to the high rate of unemployment as well as the increase in mortgage foreclosures and inundates the airwaves and e-waves with predictions of doom and gloom. At the national level, our recourse is limited to our right to vote and voice our concerns to elected officials. Although this is a significant right and responsibility, our ultimate ability to influence global and national economic policy is restricted. On the other hand, each of us is able to exert control over our own personal financial futures so long as we are armed with the requisite knowledge and wisdom. Remember that *your* economy is *not* the global economy.

Over a span of almost 30 years in private practice, I discussed personal finances in painstaking detail with thousands of individuals and families in my capacity as an estate planning and elder law attorney. What intrigued me was the financial disparity that existed among people in similar circumstances. This wealth gap likewise exists among attorneys who have had similar opportunities. Class reunions make this quite apparent. Some people in your law school class are well off while others struggle. Obviously, the professional choices that we make dictate our income potential. Yet there are those who have made lots of money while accumulating meager assets and there are those who have earned significantly less but are well on their way to retirement.

Many factors influence the amount of wealth that one accumulates. Certainly, luck can play a part. Some acquire wealth through inheritance or marriage; however, they do not represent the majority. Sixty-nine percent of respondents to a 2008 poll conducted by PNC Wealth Management accumulated the bulk of their financial holdings through work, business ownership or investments, whereas a meager 6 percent acquired wealth by inheriting it. An additional 25 percent have prospered through a combination of inheritance and personal earnings.

By and large, I have observed that people who have "done well" and are "living the dream" share three common characteristics: First, they are financially literate, having committed to an ongoing education with respect to

investment and money management principles. Second, emotional maturity and wisdom guides them in their decision-making process. Third, they heed advice given to them by financially astute mentors.

The principles outlined in this article are geared toward those who do not have a sizable inheritance on the horizon or who are not yet financially independent. Although many will find the following six suggestions to be familiar, most have not applied them with persistence and consistency to their own lives.

ASSESS YOUR FINANCIAL HEALTH

An analysis of financial health begins with determination of net worth and a review of your credit report and credit score. Although the bleak or disappointing truth may be difficult for those who have experienced setbacks, facing objective reality is indeed the first step to taking control of the reins of your personal economy.

Worksheets to determine net worth are readily available. Although the calculation is simple (financial assets less liabilities equals net worth), the “legwork” requires an investment of a little time and effort, which is an obstacle to some. Recalculating the figure on a quarterly basis is indeed a proactive approach. As your net worth increases, your confidence builds and you will be inspired to continue with your positive course. A decline in a given quarter may evoke negative feelings, but you will be in a position to quickly adjust your course if the current strategy is not proving effective.

Your credit report and credit score are relied on by lenders, landlords, insurance companies and even employers to determine your credit worthiness. The adverse consequences of a poor credit rating include denial of loan applications, increased interest rates and higher car insurance premiums.

Most credit scores (commonly referred to as FICO scores) are calculated by software developed by Fair Isaac Corporation and range between 350 (extremely high risk) and 850 (extremely low risk). The factors used to arrive at the FICO score include payment history, amount of debt, and length of credit history. Credit score can be improved over time by making payments on time and reducing debt.

Under the Fair Credit Reporting Act (FCRA), each of the three major reporting companies (Equifax, Experian and TransUnion) is required

to provide an annual free copy of a consumer’s credit report upon request. Reports from all three can be obtained through the website www.annualcreditreport.com. Errors on credit reports may be disputed by contacting either the credit bureau or the organization that provided the incorrect information to the credit bureau.

SET SPECIFIC FINANCIAL GOALS

Whether the objective is to fund retirement, get out of debt, buy a vacation home or send the kids to college, it must be set forth *in writing* with specificity. First, project the exact amount that you need. Second, determine the date by which you must accumulate the required resources. Third, establish benchmarks and concrete criteria so that you can measure your progress on a quarterly basis. Fourth, adjust along the way as necessary.

In the words of the French writer and aviator Antoine de Saint-Exupéry, “A goal without a plan is just a wish.”

DEVELOP BUDGETARY DISCIPLINE

Some agree with Oscar Wilde that “Anyone who lives within their means suffers from a lack of imagination.” On the other hand, meeting your savings goals requires you to live below your means.

The budget process seems simple; yet, according to the 2012 Consumer Financial Literacy Survey, more than half of the adults surveyed had not established a household budget.¹ Information regarding the mechanics of setting up a budget along with basic budget worksheets are readily accessible through a number of Internet resources. The process involves recording all sources of income and listing all expenses (whether incurred monthly or otherwise). The expense side should include the amount needed to be set aside to meet long- and short-term financial goals discussed above. After subtracting expenses from income, there will either be a deficit or surplus. If you have a deficit, you need to either make more money (a topic beyond the scope of this article) or reduce expenses. Enhancing net worth by adjusting lifestyle can pose a huge challenge; however, it becomes more palatable when you maintain the perspective that the long-term financial goal is more important than short-term gratification. If you have a surplus, save it!

DO NOT CARRY BALANCES ON CREDIT CARDS

Credit cards offer a convenient method by which to make and keep track of expenditures. Besides, it is fun to cash in on the accumulated points. However, their double-edged allure is apparent to those who use them to live an otherwise unaffordable lifestyle. Responsibility for monthly payments can continue for years after the items purchased are discarded or extravagant restaurant meals are enjoyed.

Example: Joe Lawyer and his family decide they deserve a vacation. Because he is barely making ends meet, he charges \$5,000 on his Visa card knowing that he can squeeze \$150 per month out of the budget to pay the debt. Presuming an 11 percent rate of interest, he will make his final payment about three and one-half years after the vacation, and the actual cost of the trip will be \$6,000 (the interest payments total \$982.62).

As a general rule, if you can't pay the credit card bill at the end of the month, don't incur the charge. If you have already incurred significant credit card liability, commit *now* to a plan to satisfy the debt no matter how overwhelming it may seem.

A number of online calculators are available that will assist you in establishing realistic goals. Tempting as it may be, I do not recommend taking out a home equity loan to consolidate outstanding credit card debt.

Example: Presume that Sally Barrister has an outstanding balance of \$35,000 in credit card debt at 15 percent interest. If her goal is to eliminate the debt in four years, she would need to pay \$974.08 every month.

MINIMIZE INVESTMENT MISTAKES

Having money to invest for the future presents its own set of challenges. The objective is to enjoy reasonable return on the asset (whether through appreciation or income) as opposed to losing your proverbial shirt.

Make sure that you get your education from an unbiased source. Many financial planners look out for the client's best interest and make recommendations accordingly. However, some present biased information to guide the client into a product from which the planner will receive a high commission.

Along that same line, beware of doing business with people who suggest that you invest

in deals that will generate a huge return on your funds in a relatively short period. Remember, "If it sounds too good to be true, it probably is." Living by this precept can save you some headaches.

I have personally witnessed several clients and friends who were persuaded to mortgage their homes to invest in ponzi operations, highly leveraged real estate deals (now underwater), and risky tax shelters. Many of these "opportunities," if not most, went south and sour. The investors were saddled with the sting and burden of expensive mistakes. If you do not understand how the investment works (including the purported tax benefits), keep your money for another opportunity — which will certainly come along.

ESTABLISH OPEN FINANCIAL COMMUNICATION IN RELATIONSHIPS

It's difficult enough to accomplish financial success on your own without taking into account the values and expectations of a spouse or significant other. Ideally, you will be in harmony in all aspects of your relationship—including financial. However, the chances of finding a romantic partner with whom you are in complete agreement on money issues is highly unlikely, if not impossible. According to a recent survey conducted by Harris Interactive on behalf of the American Institute of Certified Professional Accountants, American couples argue about financial issues more than any other issues, including child rearing and division of household chores.²

Although some couples opt to live separate financial lives, most are intertwined — at least to some extent. Establishing a strong communication process with respect to finances will go a long way toward prevention of relationship discord as a result of financial disagreements. Money discussions may not be not romantic, but money disagreements are even less so. The following tips should prove helpful:

- 1) Strong relationships are founded on full disclosure with respect to all aspects of life. Before the marriage or other commitment, make sure that you exchange the following information regarding your respective incomes, assets, and liabilities. (Couples entering into prenuptial arrangements are required to exchange this information.) The thorough couple will compare credit reports and credit scores. It is better to reveal a poor credit history now

rather than later, when you are trying to make a joint purchase with your partner.

- 2) Clearly allocate responsibility with respect to the administrative aspect of money management and accumulation goals.
- 3) Have a regularly scheduled “business meeting” (at least quarterly) to discuss short- and long-term goals, savings, cash flow and spending issues.
- 4) Do not deceive your mate about finances. The Harris Interactive survey cited above revealed that three in 10 adults who are married or living with a partner admit to potentially deceitful behavior about money.

Note: An earlier version of this article was published in the January/February 2013 (Vol. 30, No. 1) issue of GP SOLO, a publication of the American Bar Association.

1. tinyurl.com/bne3gll
2. tinyurl.com/92blucg

ABOUT THE AUTHOR



Cynthia Sharp is director of attorney development at The Sharper Lawyer, an attorney business coaching entity, located in Philadelphia, Penn. She previously practiced law for nearly 30 years. She is the author of *The Lawyer's Guide to Financial Planning* (ABA Book Publishing).

She is a 1981 graduate of the Georgetown University Law Center and earned an LL.M. (taxation) from NYU School of Law in 1982.

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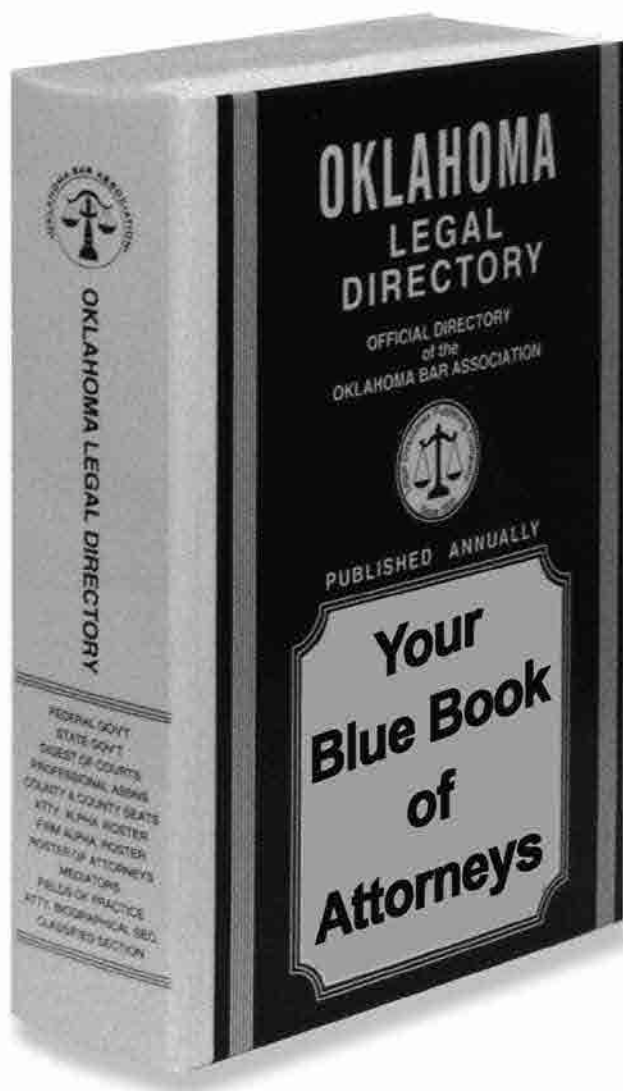


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‘Of Counsel’ Agreements

Does It Mean What You Think It Means?

By Deborah Reed

At first glance, the title “of counsel” sounds like someone a firm uses as a resource and vice versa, more of an arms-length relationship. Titles such as staff attorney, associate, partner and even shareholder, seem more clearly defined. “Of counsel” most definitely does not sound like someone who is a regular part of a law firm. However, the definition provided by American Bar Association says it’s closer than it sounds. In Formal Opinion 90-357, the ABA Standing Committee on Ethics and Professional Responsibility says the use of the title is only permissible to identify a relationship of a lawyer or law firm with another lawyer or firm **“...as long as the relationship between the two is a close, regular, personal relationship and the use of the title is not otherwise false or misleading.”**¹

DEFINING THE TITLE

The ABA previously addressed this issue six times informally between 1963 and 1972. It has only twice addressed it formally, in 1972 and in 1990. The committee’s reason for addressing it is to conform with the ABA Model Rules of Professional Conduct (Model Rules). Even though there is no mention of the term “of Counsel” in the Model Rules, Rule 7.1 states **“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”** The ABA opinion cites Model Rule 7.5(a) regard-

ing a lawyer’s use of firm name and letterhead. The Oklahoma Bar Association Standards of Professionalism also require lawyers to refrain from making statements which are misleading.²

PROPER USE OF TITLE

The ABA opinion further identifies four principal types of relationships for which the “of counsel” designation is proper — a part-time practitioner, a retired partner, a probationary partner-to-be, and a lawyer whose status is higher than that of an associate, but who has no expectation of becoming a partner in the firm.³ What is implied but not clearly stated in the ABA opinion is well illustrated in a recent ABA article on job titles in the legal industry.

The article clearly shows the title to be a senior job title, one step down from partner and shareholder, on a level with senior attorneys and other counsel.⁴

Senior level positions are not usually viewed as part-time positions, but clearly there is room for this in the legal profession when considering that elected officials are often lawyers. In addition to government officials, the opinion reminds us that retired judges may also desire to be associated with a law firm, but may not want to return to full-time lawyering. This part-time flexibility could also extend to a lawyer who is a single parent and requires a flexible schedule that allows for more time with children, and there are far more reasons a lawyer would opt for a part-time position that offers the dignity of a senior title.

The use of the “of counsel” designation for retired partner is only allowable if the partner remains associated with the firm and available for occasional consultation.⁵ These two caveats keep the relationship close, regular and personal.

As a designation for probationary partners-to-be, the title offers firms a low-risk way of attracting partner-quality talent because it allows a firm to refrain from promoting a senior attorney whose partner potential is never reached. The attorney doesn’t lose any status, yet never attains the level of partner.

The opinion also acknowledges that some high potential attorneys have no desire to take on the responsibilities of being partner in a law firm. These attorneys are usually hired for a specialized skill or experience, personal contacts or other qualities that are of value to the firm.

When dealing with lawyers in the latter two categories, both sides to the agreement must keep in mind that just as in any other business, it is the conduct of the parties that will determine the existence of a partnership.⁶

MANAGING THE OF COUNSEL RELATIONSHIP

Perhaps the largest difference between the two formal opinions issued by the committee is

the permissibility of multiple of counsel relationships.⁷ A lawyer could foreseeably be of counsel to more than one or two firms, but both lawyer and law firm must take care and proceed cautiously. Just as individual lawyers from one firm face an ethical dilemma when confronted with the possibility of representing opposing parties to the same lawsuit, so does the of counsel lawyer and his associated law firm(s). The more formal relationships a lawyer or firm has established, the higher the likelihood of being conflicted out of a case.

The Oklahoma Supreme Court has stated, “...it is principally a lawyer’s responsibility when undertaking a representation to settle questions regarding possible conflicts of interest...”⁸

“Senior level positions are not usually viewed as part-time positions, but clearly there is room for this in the legal profession when considering that elected officials are often lawyers.”

The general rule of imputed disqualification is found in the Oklahoma Rules of Professional Conduct Rule 1.10.⁹ The general rule says that while lawyers are associated in a firm, none of them may represent a client that any one of the associated attorneys would be prohibited from representing on their own. Without the close, regular and personal relationship required under the ABA formal opinion, lawyers would be unlikely to share the information necessary to ensure they were not representing a client any of the other lawyers would be prohibited from representing.

As previously alluded to, an of counsel relationship may also exist between firms. The opinion notes that a firm may present itself as “associated” or “affiliated” with other firms. This type of relationship falls under the same umbrella as the individual of counsel attorney.¹⁰

There are multiple cases nationwide that would advise against establishing a formal relationship with an attorney or law firm with which one does not have close, regular and personal relationship. In her book, *Of Counsel: A Guide for Law Firms and Practitioners*, author Jean L. Batman brings attention to the case of *Staron v. Weinstein*.¹¹ In this case, lawyer Sheldon G. Weinstein missed the statute of limitations deadline for his client Mariuz Staron. At the start of Mr. Weinstein’s representation of Mr. Staron, Mr. Weinstein had an of counsel

relationship with a law firm. When that relationship was terminated less than a year later, the law firm attempted to contact all of Mr. Weinstein's clients to inform them of the terminated relationship. The law firm was unaware of the *Staron* case and therefore did not contact Mr. Staron. When Mr. Staron sued Mr. Weinstein for malpractice, the law firm was also held liable, even though the of counsel relationship had been terminated before Weinstein missed the deadline. In making this determination, the court said the firm became counsel for Mr. Staron through the retainer agreement, which was printed on letterhead that contained the name of the law firm, which was enough to give Weinstein apparent authority to act on behalf of the law firm. The firm should have been well aware of all Mr. Weinstein's clients and their issues.

ADVANTAGES TO THE OF COUNSEL RELATIONSHIP FOR FIRMS AND SOLOS

There are some notable advantages to an of counsel agreement for lawyers and firms that maintain the required close, regular and personal relationship. For the law firm, the most obvious advantage is usually lower overhead because the of counsel attorney may be treated as a contractor, which usually means little or no benefits, depending on the contract. Some attorneys would gladly trade full benefits for flexibility and a degree of autonomy. Negotiating terms allows for a better fit for both firm and solo practitioner.

For solo practitioners, being associated with a larger firm may have more advantages than are at first apparent. While it's true that larger firms have an established reputation that may help the solo practitioner bring in new clientele, the association with the firm may also protect the solo practitioner from friends and family members who expect reduced fees or pro bono services because of the familial relationship. Depending on the terms of the contract, a solo practitioner may be limited in the hours she can offer reduced rates or pro bono services. The solo practitioner may also benefit by having an arrangement to perform services for the regular clients of the firm, business which could fill in the gaps faced by most solo practitioners when business is slow. This type of arrangement gives the larger firm another lawyer without the pressure of ensuring that lawyer always has work and hours to bill.

Another great benefit for solo practitioners who are of counsel to a larger firm is that the firm typically takes over billing and collections, as well as other administrative duties. This frees the solo practitioner to focus more on the practice of law, less on the business aspect of running a law practice.

SAMPLE TERMS FOR AN OF COUNSEL AGREEMENT

In a relationship as a contractor, the solo practitioner would expect to receive IRS form 1099 at the end of the year. However, the clauses covering compensation may also be termed so that the solo practitioner is paying the law firm for services. In this type of agreement, the solo practitioner would also issue IRS form 1099 to the law firm. Here is an example of how this type of arrangement would be listed in a contract. This compensation clause also includes sample language for contingency fee matters.

Compensation:

- a) For clients or matters that lawyer originates and for which she is principally responsible, The firm shall retain a rate equal to [percentage] of the rate that lawyer's time is charged to such client or matter as compensation for services provided to lawyer.
- b) For clients or matter that the firm originates and for which lawyer is not principally responsible, the firm shall retain all fees minus a rate equal to the standard rate the firm has set for compensation for associates for such work, as compensation for services provided to lawyer.
- c) With regard to contingency fee matters or other matters for which it has been agreed with the client that billing will be at the conclusion of the matter, the firm will receive compensation in amount equal to an agreed upon percentage and the remainder will be paid to lawyer at such time as the matter is concluded. Except for fees related to clients and matters the lawyer originates and for which she is principally responsible, her portion shall not be contingent upon the payment of the bill or receipt of fees by the firm.

The best of counsel arrangements are typically long-term contracts based on established

relationships. Even so, it is a good practice for of counsel agreements to be for no longer than one year, so they are revisited on a regular basis. Annual contract negotiations offer an opportunity for performance review by both parties. Even more importantly, it would be a time for an assessment of the relationship to determine if it is still close, regular and personal enough to meet the requirements of the ABA opinion.

An effective agreement would clearly define the relationship of the parties to ensure it is an of counsel relationship, not a *de facto* partnership. Firms may establish an of counsel relationship because the partners of the firm want the input of the lawyer in major decisions. The of counsel lawyer may eventually become a partner to the firm under a different agreement. If the lawyer is to be retained in a decision-making capacity the agreement should clearly state that the lawyer will not be required to contribute capital to the firm, will not have formal voting rights at partnership meetings, and will not share in the profits and losses of the firm.¹²

The duties of the firm must be clearly stated. It is fine to state that the firm will make staff available to the lawyer, but it would be better to clearly define what that support will be and who will decide when support is required. For example:

Support:

- a) With regard to any client or matter originated by lawyer, the firm will assign such attorneys and other staff personnel to assist lawyer as may be necessary. The assignment of personnel to such matters shall be at the discretion of the firm, upon consultation with lawyer, and be based on the availability, qualifications, abilities and experience of such attorneys or other staff personnel.

It is also advisable to include a statement of any additional incentive for the firm to provide support services to the lawyer, such as the statement below.

- b) Any fees collected from client for these support services shall be retained by the firm.

Different lawyers will desire different benefits, but they must all be clearly stated in the agreement. It is also advisable to state all the

benefits the firm offers to regular employees, and note which are not provided under the agreement. For example, if the lawyer's health-care is covered by a spouse, the agreement should specifically state that healthcare insurance is not provided under this agreement.

As an incentive to retain the of counsel lawyer, a firm may decide to offer some benefits unique to the needs of lawyers, such as:

- Payment or reimbursement for bar dues or other professional associations in which the firm requests lawyer to attain membership;
- Payment of lawyer's professional liability insurance;
- Reimbursement of up to a certain amount each year for miscellaneous professional expenses including but not limited to continuing legal education, marketing opportunities, seminars and conferences.

The list of incentives and special request items that may be included in an agreement are limited by the same statutes governing any other contract.

Another requirement emphasized by the ABA opinion, is that the relationship must be clear, clearly defined between the parties and clearly stated to clients and the legal community. Because it is common for this relationship to exist for the purpose of a long-term association between firms or lawyers in different states, the ABA also says jurisdictional limitations must be clearly stated.¹³

CONCLUSION

The of counsel arrangement offers flexibility and a degree of accountability for solo practitioners. It also offers firms a low-risk alternative for employing additional lawyers with less overhead expense than regular employees. Abiding by the requirements of the ABA and OBA for this type of relationship ensures all lawyers involved are fairly representing themselves to the public and staying within the ethical boundaries that govern our profession. Ethical boundaries must be respected if we are to be the gatekeepers of justice.

1. American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, opening paragraph.

2. Oklahoma Bar Association Standards of Professionalism Section 1.8.

3. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, page 2.

4. "The Job Name Game" by G.M. Filisko; *ABA Journal* January 2014, volume 100, pages 27-28.

5. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, page 2.

6. Batman, Jean L., Harold G. Wren, Beverly J. Glascock. *Of Counsel, A Guide for Law Firms and Practitioners*, Fourth Edition. Chicago: American Bar Association, 2013. Print. Pp. 87-88.

7. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, page 3.

8. *Fern Alice TOWNE, Petitioner-Appellant, v. Carol Ann HUBBARD, Honorable Judge of the District Court, Oklahoma County, 7th Judicial District, Respondent v. Cindy Munkres and Gerald E. Kelley, Appellees. In the Matter of the Guardianship of Fern Alice Towne*, 3 P.3d 154 (OK 2000).

9. 5 O.S. §Rule 1.10.

10. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, page 3.

11. Batman at page 117.

12. Batman at page 90.

13. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 90-357, paragraph 2.

ABOUT THE AUTHOR



Deborah Reed joined the Tulsa-based Greuel Law Firm in 2012. Her areas of practice include corporate law (profit and non-profit), real property and Native American law. She holds a J.D. from the TU College of Law with a certificate in Native American law. Prior to her legal career, she worked in Central Asia and the Middle East as an international development consultant, with an emphasis on women's empowerment in Muslim societies, including post-conflict regions.



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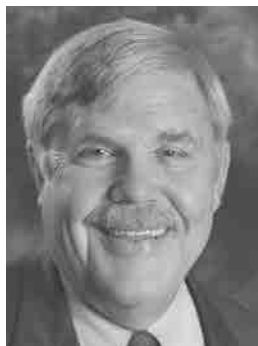
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CLE

The CLE format was a little different this year, with Tools for Tomorrow's Lawyers on Wednesday before the Annual Meeting. Thursday was the OBA Trial College and a day-long presentation by Sean Carter – "Tee Hee! A Funny CLE!" on Thursday. CLE continued Friday with the President's Breakfast, including a panel discussion featuring our Annual Meeting Luncheon speaker, Richard Susskind.



Three-Part Celebration

Thursday evening's Three-Part(y) celebration was a hit! What started as a laid-back cocktail party with holiday shopping and a photo booth, slowly evolved to a full-blown party - complete with rockin' Oklahoma City-based band, The Stars.



President's Breakfast

Friday morning's President's Breakfast, an Annual Meeting tradition, sold out this year. The event featured panel speakers, legal futurist Richard Susskind of The University of Strathclyde Law School in Glasgow, Scotland, OU College of Law Professor Connie Smothermon and Jody Nathan of Stauffer & Nathan in Tulsa. The panel discussed changes in the legal profession. The program was moderated by OBA MAP Director Jim Calloway.



General Assembly and House of Delegates

Several OBA awards and the Friends of Justice awards were presented at the Friday morning General Assembly, followed by elections of next year's officers at the House of Delegates.





Annual Luncheon

During Friday's Annual Luncheon, OBA President Renee DeMoss wrapped up the awards presentations, and Richard Susskind captivated the crowd with his predictions for the future of the legal profession.



President's Award Winners

From left are Alison Cave, Susan Shields, Ron Main, President Renée DeMoss and Deirdre Dexter. Also honored was the OBA Communications Department.



Book signing

Following the luncheon, Mr. Susskind autographed copies of his book, *Tomorrow's Lawyers*, and posed for photos with fans.



OBA Launches One-of-a-Kind Speakers Bureau

By Gary C. Clark

Part of the stated mission of the Oklahoma Bar Association is to foster public service among our state's legal community, and one of the most important ways our bar members can serve the public is through education on law-related topics. That's why OBA President Renée DeMoss asked me to manage the creation of the new OBA Speakers Bureau, an automated online service that connects schools and civic clubs with lawyers who can speak on a number of important topics and issues.

The creation of the OBA Speakers Bureau was a priority item for President DeMoss, who made public education a key component of her presidential year. The bureau's web-based platform, developed in conjunction with the OBA IT Department, makes it unique.

"To our knowledge this is the only online automated speakers bureau offered by a bar association in the United States," Ms. DeMoss said. "It's an easy way for bar members to use their individual skills to educate the public about various aspects of the law. In the process, it will enhance the image of lawyers."

VOLUNTEERS NEEDED

Before launching the Speakers Bureau to the public, we need as many volunteers as we can get to ensure that those who come to the site are able to

find a speaker. Lawyers may indicate which county or counties they are willing to go for presentations.

The website is currently active for lawyers to volunteer to speak on one or more of the 56 topics. A few examples of the

topics intended for civic clubs include: adoption, bankruptcy, buying and selling real estate, dissolution of marriage, estate planning, oil and gas law, starting a business, traffic court and when do you need a lawyer. Some of the topics for schools include: Bill of Rights, consumer rights, family law, juvenile justice system, texts and social media, and understanding the courts and legal system.

To volunteer, simply go to speakers.okbar.org, click on the "Members" button. On the next screen, type in your OBA ID number in the first box, your PIN in the second box, then click "Log on."

On the following screen, click on the "Edit" tab (upper right part of the form). Your basic membership information should appear at the top of the screen. Click on the box of each topic you would be willing to speak about, both for civic clubs and schools. Then click on the coun-

ty for which you would speak. If you are willing to speak in additional counties, hold down the "CTRL" key and click on any additional counties. Click the box for one or two methods of contacting you (email, phone, etc.). Press "submit."

**Become a speaker in your community.
Go to speakers.okbar.org to sign up.**

A "Resources" tab takes you to resources for some of the topics. If you develop other resources and are willing to share them, please email the document(s) to Robbin Watson at robbinw@okbar.org to be posted to the resources page.

OBA staff will be more than happy to assist you as we launch this important new public outreach program. As always, it is the strength of our membership that will lead to this program's success. Sign up today!

ABOUT THE AUTHOR



Gary C. Clark serves on the OBA Technology Committee. He is senior vice president and general counsel for

Oklahoma State University. He served as OBA president in 2002.

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- Communications
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- Law Day
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- Lawyers Helping Lawyers Assistance Program
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- Legislative Monitoring
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- Military Assistance
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- Professionalism
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- Solo and Small Firm Conference Planning
- Strategic Planning
- Uniform Laws
- Women in Law
- Work/Life Balance

LEGAL UPDATES 2014

Dec. 18 & 19
Tulsa, OK
OSU-TULSA
700 N. GREENWOOD

Day 1 Moderator: Susan Krug,
OBA Director of Educational Programs,
Oklahoma City

Day 1

Day 2 Moderator: Travis Pickens,
OBA Ethics Counsel, Oklahoma City

- 1 Bankruptcy Law Update. Presented by Sam G. Bratton II, Doerner Saunders Daniel & Anderson, Tulsa
- 2 Labor and Employment Law Update. Presented by David E. Strecker, Strecker & Assoc. in Tulsa and Michael Lauderdale, McAfee & Taft in Oklahoma City
- 3 Health Law Update. Presented by Karen S. Rieger, Crowe & Dunlevy in Oklahoma City and Cori H. Loomis, Crowe & Dunlevy in Tulsa
- 4 Criminal Law Update. Presented by Barry L. Derryberry, Federal Public Defender, Tulsa
- 5 Oklahoma Tax Law Update. Presented by Sheppard Miers, GableGotwals in Tulsa and Kevin Ratliff, Hartzog Conger Cason & Neville in Oklahoma City
- 6 Ethics. TBD

Day 2

- 1 Business and Corporate Law Update. Presented by Gary Derrick, Derrick and Briggs, LLP, Oklahoma City
- 2 Real Property Update. Presented by Kraettli Epperson, Mee Mee Hoge & Epperson, PLLP, Oklahoma City
- 3 Family Law Update. Presented by Professor Robert Spector, University of Oklahoma College of Law, Norman
- 4 Estate Planning & Probate Law Update. Presented by Stephanie Chapman, McAfee & Taft, Oklahoma City
- 5 Law Office Management and Technology Update. Presented by Jim Calloway, Director of Management Assistance Program, OBA, Oklahoma City
- 6 Ethics Update 2014. Presented by Travis Pickens, Ethics Counsel, OBA, Oklahoma City

CREDIT:

Approved for 12 hours MCLE/ 2 Ethics for both days. 6 hours MCLE/
1 ethics for Day 1; 6 hours MCLE/ 1 ethics for Day 2. TX credit 5 hours MCLE/ .75 ethics each day.

TUITION:

\$275 (both days), \$150 (Day 1 or Day 2), for early-bird registrations received with payment at least four full business days prior to the seminar date; \$300 (both days), \$175 (Day 1 or Day 2), for registrations received within four full business days of the seminar date. Texas credit for live webcast only.

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85 26 2089 10/04/2014

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85 33 2649 12/13/2014



Last One of the Year

By John Morris Williams

Last Board of Governors meeting, last CLEs, last financials and last article — this time of year I look in the rearview mirror a bit. The reflection is never a true perspective and it is limited. So forgive me for my limited and self-restricted view of the past year. In short, it was a good year, with a great president and a great Board of Governors serving a great membership.

I do not have sufficient words of gratitude for President Renée DeMoss. Being president this year has required a tremendous time commitment. As with any year as president of our association, the year you plan and the year you get are often very different. I bet Renée can attest to that. Thank you President Renée DeMoss for your tireless and dedicated service to the OBA!

The legislative session offered a bit of excitement and a great opportunity to revisit and reaffirm the association's dedication to a fair and impartial judiciary. I am proud of the work of our elected leaders and our members who reached out to members of the Legislature to educate and inform on this important issue.

This year brought new ideas in many forms. One program that was undertaken was the intensive appellate practice course that was conducted at the Oklahoma Judicial Center. Many thanks to President DeMoss,

Alison Cave and Susan Krug for great work on this. Justice Edmondson and Judge Lewis who said "yes" to me in a weak moment were invaluable to the success of the program.

“This year brought new ideas in many forms.”

We had a new venue for the Solo & Small Firm Conference this year. I was nervous. For me personally, this turned out to be one of best conferences ever. The Choctaw Casino in Durant continues renovations. So, it looks like we are back to the Hard Rock in Tulsa at least another year. Now that I have experience with that venue, I am less nervous and more excited about a repeat.

The new OBA Master Lawyers Section was launched. Almost 60 percent of our membership is over age 50. Thus, this section should be well joined and very active. Along those lines the new guide for transition and succession planning is now available and an insert will be in the bar dues statement giving more detail. Please look for that. We have looked at doing that

for some time and President DeMoss made it happen this year.

In addition to many other great things, the Annual Meeting took on a new format and offered about the best speaker we have ever had. The first County Bar Association Presidents Forum was held and the turnout was exceptional. Many thanks to the county bar associations who sent an officer or representative. Without active county bar associations the goals of the OBA are often times not achievable. Also, in December we will have the Professionalism Symposium. This program is outstanding, and everyone should attend.

This rearview review look, due to space restrictions, leaves out many other great happenings and events. None of these great things would have happened without a great team. I want to express my gratitude to our officers, governors, countless volunteer members and the staff for what has been an exceptional year. Warmest wishes to each of you as we enter the holiday season.



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

A Little of This, A Little of That Things Lawyers and Law Firms Should Do Soon

By Jim Calloway

Last month in this space I wrote a Law Practice Tips column titled "Thinking about Tomorrow" which encouraged, among other things, Oklahoma lawyers to attend our annual meeting and hear famed futurist Richard Susskind discuss his view of the future of law.

This month's column will cover a wide variety of topics briefly. Hopefully some of you will have a bit of downtime during the next couple of months, so I am passing along some projects for your law firm to incorporate in addition to some other online reading material.

YOU REALLY NEED A PASSWORD MANAGER

This is really on your must-do list. As I've written in this space before, computer security today means lengthy complex passwords that are difficult to remember. Using a password manager to keep track of them (and to generate incredibly long, complex passwords) is becoming a mandatory part of your cybersecurity protocols.

Although these tools have a long history of good performance and security, malware designers are targeting these password keepers and trying to break the master password.

This is concerning. *SC Magazine* has an article about the latest attempted compromises of password managers by cyber criminals at <http://goo.gl/9vt9wT>.

“...malware designers are targeting these password keepers and trying to break the master password.”

Of the three targeted products mentioned, I am aware that several lawyers use Keep-*Pass* because it is free. This month, I am removing Keep-*Pass* as a good option for lawyers and won't be listing it in my presentations on this topic in the future.

The bottom line for me is password keepers are serious business and even though there are great freeware options for other types of programs, I think we want paid "staff" protecting our passwords and available

there on the job to act if there ever is an issue. This may be either a group of programmers doing this to make money or a traditional business model with employees showing up for a paycheck. I want someone there who will be in a position to drop everything and respond immediately when there is a rumor of an attack or vulnerability, not a "hobby" open-source coder who thinks "wow, I wonder what the code looks like for that exploit? Let's get the guys together tonight (after the day job is over) and order pizza and check it out."

For that to work I have to be paying money into the product. LastPass Premium is only \$12 per year, but you can go to <https://lastpass.com> and see how professional their website looks with employment opportunities and a physical location posted. The person I know who is most knowledgeable (and most paranoid) about such things uses eWallet www.iliunsoft.com/ewallet/catalog. Another popular product is 1Password, found at <https://agilebits.com/onepassword>. The iPhoneJD review of 1Password may be found at <http://goo.gl/ifdtZr>.

So my thought today is sometimes paying for something is a

better bargain than obtaining it for free. (And how many times have you said the same thing to others about paying for legal services?)

MULTI-FACTOR AUTHENTICATION – PRO AND CON

While a password manager is a simple and convenient method to have better Internet security for your personal accounts, multi-factor authentication provides even more security. Now many sites allow one to set up this type of additional security. Typically the way this works is you enter your username and password to log into the site and then a code is sent to your mobile phone by text. Type in the code and you are good to go. It takes a little bit longer to accomplish this, but the benefit is that even if the site is hacked and all usernames and passwords stolen, evildoers will still not be able to breach your account because they won't have your cell phone to receive a text message. The problem is, of course, the extra time involved and the fact that if you ever leave your cell phone at home or if it loses its charge, you cannot get into these websites without a lot of additional steps.

The ABA Law Technology Today blog recently had dueling posts on whether MFA is a good thing. Reading both will give you a better idea of whether this is right for you. Take a look at "Multi-Factor Authentication Isn't Ready for Mainstream" by Craig Huggart at <http://goo.gl/BCwwLR> and "Multi-Factor Authentication is Effective and Easy to Use" by Andrew B. Stockment at <http://goo.gl/PfKH2J>.

PODCASTS – LISTEN UP

I am of the generation that would still rather read than watch a video if I'm trying to learn most types of information. (How to do X with a software product is a notable exception where a video can be quite helpful.) I've been known to quickly leave a webpage when I determine the information I thought was there is all provided by video with no text to read. Part of this is because I can scan and skip to the important part of a written article, while with a video or audio I have to watch or listen to the entire thing in most cases.

But podcasts in audio format can actually allow you to make better use of your time if you know how to set them up to listen to them while driving, bike riding, exercising or just resting your eyes.

So I have a "must listen" podcast for you: "The Fundamentals of Podcasts: Listening and Subscribing" from The Kennedy-Mighell Report with Dennis Kennedy and Tom Mighell. You can listen from your computer at <http://goo.gl/vPXB7R> and learn how to subscribe to podcasts and listen to them on your mobile device of choice. They also include some of their preferred podcasts and there are links to all of them on this webpage.

Another "must listen" podcast for the holiday season is our annual Digital Edge podcast "Tis the Season: Tech Toys for the Holidays 2014" at <http://goo.gl/5B3qRw>. Sharon Nelson and I have some fun suggestions that we think will be of interest to you. Some are truly great gift ideas and some are just fun tech toys, like the drone that one can wear on their wrist and send it out like

a boomerang to take a selfie photo and return to you.

CLIENT PORTALS

One of the great features of cloud-based practice management solutions for lawyers is that they allow a lawyer to set up online client document repositories. While lawyers are understandably cautious about security and privacy of Internet-based services, they should also understand that email is completely insecure. More law firms are opting for providing their clients a secured website to log in and view or download the documents the lawyers want to share with their clients.

North Carolina family lawyer Lee Rosen shares in his blog post, "How to Set Up a Client Portal," why he thinks client portals are critical. He also discusses the way he used NetDocuments to set up this service for his firm's clients. Check it out at www.divorcediscourse.com/setting-client-portal/

FORMAT PAINTER IN MICROSOFT WORD

Recently there was a discussion on OBA-NET that included one lawyer complaining about the difficulty of formatting documents in Microsoft Word.

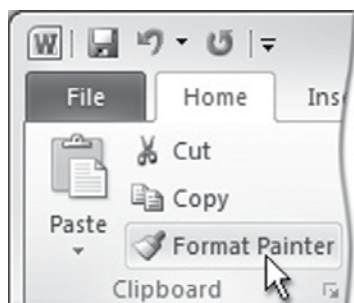
Some of this frustration can be remedied by the use of Microsoft Word's Format Painter. This tool is very easy to use and allows you to apply the format in one part of a document very easily to another part of a document. Here is how.

You can use the **Format Painter** on the **Home** tab to apply text formatting and some basic graphics formatting, such as borders and fills.

- 1) Select the text or graphic that has the formatting that you want to copy.

Note: If you want to copy text formatting, select a portion of a paragraph. If you want to copy text and paragraph formatting, select an entire paragraph, including the paragraph mark.

- 2) On the **Home** tab, in the **Clipboard** group, click **Format Painter**.



The pointer changes to a paintbrush icon.

Note: Double-click the Format Painter button if you want to change the format of multiple selections in your document.

- 3) Select the text or graphic that you want to format.
- 4) To stop formatting, press ESC.

You can share these instructions with everyone in your law office by sending them the following link: <http://goo.gl/i5joz4>

PROFESSOR SUSSKIND SPEAKS TO OKLAHOMA LAWYERS

I think it is fair to say that the audience at the 2014 OBA Annual Luncheon were generally very impressed with Professor Susskind's address at our event. To say he was thought-provoking is an understatement.

For those of you who missed Professor Susskind's address or want to hear more, check out a

video of his recent presentation on artificial intelligence as it impacts the law. It was given at Reinvent Law NYC 2014, and it's available online at <http://goo.gl/3yixtq>.

I will also again encourage Oklahoma lawyers to read his book *Tomorrow's Lawyers*.

The future of law and the future of the legal profession is a topic that both inspires and terrifies many in the legal profession. But we should approach the challenges of change by study, problem-solving and mastery of new skills. That approach is certainly in line with the best traditions of the legal profession.

Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help resolving a management dilemma? Contact him at 405-416-7008, 800-522-8065 or jimc@okbar.org. It's a free member benefit!

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At Home



At Work



And on the Go

‘Planning Ahead Guide’ Completed and Posted to Bar Website

By Susan Shields and Travis Pickens

At the direction of OBA President Renée DeMoss, the “Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity,” was recently completed by a working group of attorneys selected by President DeMoss. The handbook and forms were adapted from a similar publication authored by the Oregon State Professional Liability Fund, which generously provided access to the OBA so long as the book is used by bar members for their own benefit and not sold or distributed for profit. You will find it on the OBA website by logging onto my.OKBar.org and clicking on the “Attorney Transition Planning Guide” link.

With the baby boomer generation of lawyers getting ever closer to retirement, it is essential that each lawyer in our bar have a transition plan. Approximately 50 percent of the current bar membership is composed of lawyers age 50 and older. Perhaps due to this fact, the offices of Ethics Counsel and General Counsel are receiving an increased number of calls from loved ones or clients of lawyers who have either died, often suddenly, or become disabled and are no longer able to practice. Typically, the lawyer has not adequately prepared for this



possibility. Even when the lawyer is a member of a firm or legal department, the transition from such a situation is not always smooth, and the confusion can be especially acute if the lawyer is in solo practice. No lawyer knows everything about the practice of the lawyer in the next office or building.

This “Planning Ahead Guide” has been created with the hope that it will assist all Oklahoma lawyers, especially those in solo practice, to plan for the succession or winding down of their practices, just as they would hopefully plan for their personal estates. The failure to plan not only puts clients in temporary jeopardy, but can add another layer of stress to an unprepared, despondent family, who are often not equipped or motivated to deal with such a situation.

The new planning guide is in place to help you start this important process now. You can make the forms and check-

lists your own, and the guide gives you a perfect place to start. The OBA urges you to start your planning today to protect your valued clients, staff and family.

ABOUT THE AUTHORS



Susan B. Shields serves as OBA vice president, and she was the 2013 Oklahoma Bar Foundation president. She is a shareholder with the McAfee & Taft Law Firm in Oklahoma City.

Travis Pickens is OBA ethics counsel. Have an ethics question? It's a member benefit, and all inquiries are confidential. Contact him at travisp@okbar.org or 405-416-7055; 800-522-8065. See tips from the OBA Ethics Counsel at www.okbar.org/members/EthicsCounsel.

Meeting Summaries

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Friday, Sept. 26, 2014.

REPORT OF THE PRESIDENT

President DeMoss reported she participated in a meeting with District Attorneys Council leadership, meeting with Chief Justice Colbert on the Oklahoma's Promise Program and Law Schools Committee visit to OU in Norman. She attended the luncheon, reception and dinner for U.S. Supreme Court Justice Sotomayor, joint board dinner with the OBF, Professionalism Committee Symposium planning meetings, Women in Law Committee seminar for which she assisted in planning and recruiting sponsorships and attended the Oklahoma County Bar Association meeting. She welcomed new admittees to the Oklahoma bar at the swearing-in ceremony, wrote a bar journal article, gave CLE presentations to the Mayes County Bar Association and at the Boiling Springs Institute, filmed a segment for the OBF video and gave the welcome at the OBA human trafficking seminar. She worked on planning for the new OBA Master Lawyers Section, Annual Meeting planning and preparation, and Trial College programming.

REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the Budget Committee meeting, meetings with President DeMoss and Ethics Counsel Travis Pickens regarding a lawyer transition working group for which she worked on drafting Oklahoma materials, Oklahoma County Bar Association meeting and joint dinner with the OBF.

REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended budget planning sessions with OBA staff members, met with the Budget Committee to finalize the 2015 budget for publication and submission to the Supreme Court for its approval, attended the Cleveland County Bar Association and Bench and Bar Committee meetings and OBF/OBA dinner. He also spoke to an OU law school class about the practice of law.

REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the TU law school reception for President DeMoss, Budget Committee meeting and joint board dinner with the OBF. He worked on plans for the past presidents dinner.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended the Budget Committee meeting, OBA staff celebration and joint OBA OBF dinner. He participated in a meeting with President DeMoss and Chief Justice Colbert regarding the Oklahoma's Promise Program, a meeting with Chief Justice Colbert, Oklahoma Regent of Higher Education Chair Mike Turpen and Chancellor Glen Johnson regarding the promise program and a meeting with District Attorneys Council leadership.

BOARD MEMBER REPORTS

Governor Dexter, unable to attend the meeting, reported via email she attended the August board meeting, Budget Committee meeting, Awards Committee meeting and Creek County Bar Association meeting. She wrote an *Oklahoma Bar Journal* article about the 2014 Mona Salyer Lambird Spotlight Award recipients and for the November theme issue. **Governor Gifford** reported he attended the Oklahoma County Bar Association board of directors meeting, OBA Board of Governors/Oklahoma Bar Foundation joint dinner, Military and Veterans Law Section directors meeting, reception at TU law school honoring OBA President DeMoss, August Board of Governors meeting in Tulsa and the Federal Bar Associa-

tion's Brown Bag series with a discussion from Magistrate Judge Suzanne Mitchell. He also presented at the Modern Day Slavery in Oklahoma CLE seminar and at OCU law school's Military and National Security Law Student Association seminar. **Governor Hays** reported she attended the August Board of Governors meeting, University of Tulsa College of Law reception for President DeMoss, OBA Family Law Section Trial Advocacy Institute as a mentor, OBA FLS Annual Meeting Planning Committee meeting, Creek County Bar Association meeting, reception for Justice Sotomayor, OBF/OBA dinner, OBA FLS executive planning session, Tulsa County Bar Association Family Law Section meeting, Women in Law Committee meeting by phone and OBA FLS Trial Advocacy Institute 2015 planning retreat. She also communicated with the Professionalism Committee regarding CLE planning. **Governor Kinslow** reported he has been working on arrangements for the October Board of Governors meeting in Lawton. He shared the details of the planned activities in Lawton, including lunch with the Comanche County Bar Association. **Governor Knighton** reported he attended the Cleveland County Bar Association meeting. **Governor Marshall** reported he attended the reception for President DeMoss at the TU law school, Board of Governors meeting in Tulsa, Justice Sotomayor presentation at OCU law school and joint OBF dinner. **Governor Parrott** reported she attended the Supreme Court swearing-in ceremony for new admittees, participated in the Budget Committee meeting by telephone, studied nomina-

tions for OBA awards and attended the meeting to select award winners. She also attended the reception for President DeMoss, joint meeting/dinner with the Oklahoma Bar Foundation and OBA Law Schools Committee breakfast meeting, visit with faculty members and presentation regarding small-town practice to students at the OU College of Law. **Governor Sain** reported he attended the reception honoring President DeMoss at the Tulsa law school, Board of Governors meeting in Tulsa, McCurtain County Bar Association meeting and McCurtain Memorial Hospital Foundation board meeting. **Governor Smith** reported he attended the August Board of Governors meeting and joint dinner with the Oklahoma Bar Foundation. **Governor Thomas**, unable to attend the meeting, reported via email that she attended the TU law school reception for President DeMoss, participated by telephone in the Budget Committee meeting and attended the Washington County Bar Association monthly meeting.

YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported five YLD board members attended the swearing-in reception and made good contacts, including several new lawyers who expressed willingness to get involved. He said the division will soon be holding elections, and there is a good selection of candidates.

SUPREME COURT LIAISON REPORT

Justice Winchester, unable to attend the meeting, reported via email that the Supreme Court hosted a luncheon at the

Oklahoma Judicial Center honoring U.S. Supreme Court Associate Justice Sonia Sotomayor. Supreme Court justices, Court of Criminal Appeals judges, Court of Civil Appeals judges and tribal leaders had the opportunity to hear her thoughts about serving on our nation's highest court.

BOARD LIAISON REPORTS

Governor Hays reported the Women in Law Committee will kickoff activities Oct. 2 by participating in the Legally Pink Party to promote breast cancer awareness in Tulsa. The committee will hold its CLE seminar the following day at the TU College of Law and at the conclusion honor five women as Mona Lambird Spotlight Award winners. She shared the names of award recipients. She reported the Professionalism Committee will hold its symposium Dec. 12. Governor Parrott reported the Law Schools Committee breakfast meeting at the OU College of Law was productive. Vice President Shields reviewed highlights of the Oct. 16 Diversity Conference in Oklahoma City. ABA President-Elect Paulette Brown will be the keynote speaker and will arrive a day early to visit the Boys and Girls Club and meet with law school students. President-Elect Poarch reported the Budget Committee approved the proposed budget, which will be published in the Oct. 4 bar journal. He also said the Bench and Bar Committee is focusing on the upcoming legislative session and looking at judicial evaluations conducted in other states. The committee has submitted a 2015 budget funding request for a video project. President DeMoss reported

she visited with Law-related Education Coordinator Jane McConnell, and the LRE Committee's pilot program in nine counties is going well.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the OBA has one case currently in litigation; however, it is anticipated the case will be dismissed.

AWARDS COMMITTEE RECOMMENDATIONS

Awards Committee Chair Leslie Lynch reported the committee received more than 50 nominations of Oklahoma lawyers doing great work worthy of an award. She said the committee received two nominations for the Liberty Bell Award; however, neither organization fit the criteria. The committee recommends that the award not be presented this year. The board approved the Awards Committee recommendations for OBA awards to be presented at the Annual Meeting.

INVESTMENT COMMITTEE REPORT

Investment Committee Chair Joe Crosthwait reported the committee had several spirited discussions about the OBA investment policy, and he was at the board meeting to share the minority opinion of those discussions. Committee member Alan Souter reviewed the majority opinion of committee members. Executive Director Williams and Administration Director Combs were asked their opinions, which they shared. President DeMoss asked the committee to go back and develop specific recommendations, including dollar amounts. Mr. Crosthwait said the committee would find

it helpful if information on the long-range need for reserves was shared, which would provide the committee with more background on which to base its recommendations. The Investment Committee was thanked for its work.

PROPOSED OBA MASTER LAWYERS SECTION

President DeMoss reported Tulsa lawyer Ron Main has gathered sufficient signatures to form a new section and has drafted bylaws for the board's consideration. Membership will be open to OBA members in good standing who have been licensed to practice law for at least 30 years or who are age 60 or above. Annual dues will be \$20. The purpose of the section would include encouraging and maximizing participation of senior lawyers in the operation and betterment of the OBA, promoting interests of section members, executing programs, publications and activities, mentoring lawyers, serving as a resource for retirement planning, expanding opportunities for contributions by section members to the community and coordinating activities with local Oklahoma bar associations. The board approved the creation of the section and its bylaws. It was noted a change to Article III, Section 3 was needed from officers serving two-year terms to one-year terms.

The Oklahoma Bar Association Board of Governors met at the Apache Casino Resort in Lawton on Friday, Oct. 24, 2014.

APPRECIATION EXPRESSED

Board members thanked Governor Kinslow for his work in setting up the special Comanche County activities

organized as part of the Board of Governors meeting. Governor Kinslow said he shares the credit with former Governor Chris Meyers for the event planning.

REPORT OF THE PRESIDENT

President DeMoss reported she attended Southern Conference of Bar Presidents meetings, OBA Diversity Conference and luncheon, Women in Law Committee seminar, Women in Law Committee meet and greet event in Tulsa, Mona Salyer Lambird Spotlight Awards reception, planning meetings for 2014 Annual Meeting, Tulsa County Bar Association Legally Pink event and meetings on the Oklahoma's Promise program. She prepared the *Oklahoma Bar Journal* president's article, wrote a bar journal article on social media, did planning for the OBA sponsorship of Tulsa County judicial debates and upcoming Litigation Section Trial College and participated in Transitions Task Force planning.

REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the Oklahoma County Bar Association board of directors meeting, OBA Diversity Committee meeting and OBA Diversity Conference luncheon. She led the working group committee meeting on lawyer transition issues and revised materials for publication on the OBA website.

REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended the OBA/OBF joint board dinner, September board meeting, Conference of Southern Bar

Presidents meeting and OBA Diversity Committee Conference. He continued work on the proposed 2015 OBA budget, including the public meeting.

REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the Southern Conference of Bar Presidents, diversity luncheon and worked on planning for the board has been event.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended a meeting with Lawyers Helping Lawyers Assistance Program co-chairs, Southern Conference of Bar Presidents meeting, various meetings on the Oklahoma's Promise program, OBA Diversity Conference, budget hearing, planning conference with President-Elect Poarch, Women in Law Committee seminar and reception, Young Lawyers Division Board meeting and monthly staff celebration.

BOARD MEMBER REPORTS

Governor Dexter reported she attended the Women in Law reception for 2014 Spotlight Award recipients and presented the awards to them. She also attended the Tulsa County Bar Association Long-Range Planning Committee meeting, Tulsa County Bar Foundation board of trustees meeting, Creek County Bar Association meeting and League of Women Voters/OBA Judicial Candidate Forum. **Governor Gifford** reported he attended the September Board of Governors meeting, September Oklahoma County Bar Association board of directors meeting, joint

OBA/OBF dinner and NAACP president's speech at the Oklahoma Bar Center. **Governor Hays** reported she attended the September Board of Governors meeting, Women in Law Committee seminar, Mona Salyer Lambird Awards reception, kick-off event for the Tulsa County Bar Association "Think Pink" breast cancer awareness, OBA Family Law Section Annual Meeting Planning Committee meetings, OBA FLS executive planning session, OBA FLS meeting for which she prepared the budget report, TCBA Family Law Section meeting, OBA FLS leadership retreat, League of Women Voters/OBA Judicial Candidate Forum, TCBA Long-Range Planning Committee meeting and Tulsa County District Court reception for the new Integrated Domestic Violence Court. She communicated with the Professionalism Committee regarding CLE planning, made preparations for the OBA FLS celebration of the OBA Golden Gavel Award, did Annual Meeting event planning and gave a report to the TCBA board of directors regarding OBA matters. **Governor Jackson** reported he attended the Garfield County Bar Association meeting. **Governor Kinslow** reported he participated in the Clients' Security Fund meeting and has been helping organize the Lawton Board of Governors events. **Governor Knighton** reported he attended the September Board of Governors meeting, October Cleveland County Bar Association meeting, joint OBA/OBF board dinner and NAACP Justice Tour. **Governor Marshall**, unable to attend the meeting, reported via email he attended the joint OBA/OBF board dinner and September Board of

Governors meeting. **Governor Parrott** reported she attended the September Board of Governors meeting and participated in the joint dinner with Oklahoma Bar Foundation members. She also studied the proposed OBA budget. **Governor Sain** reported he attended the McCurtain County Bar Association monthly meeting. **Governor Smith** reported he attended the Muskogee County Bar Association meeting, OBA/OBF dinner and September Board of Governors meeting. **Governor Stevens** reported he attended the September Board of Governors meeting, October Cleveland County Bar Association meeting, county bar blood drive and joint OBA/OBF dinner. **Governor Thomas** reported she attended the Women in Law Committee seminar and reception, Family Law Section monthly meeting, Access to Justice Committee meeting and Washington County Bar Association monthly meeting.

SUPREME COURT LIAISON REPORT

Justice Winchester reported the court is hosting the annual dinner with the Board of Bar Examiners at the Oklahoma Judicial Center this evening. He also reported the court heard oral argument in *Fent v. Fallin* and on Nov. 5 will hear oral argument for *Pummill and Parrish v. Hancock Exploration*.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported the OBA has one case currently in litigation that is still active.

BOARD LIAISON REPORTS

Vice President Shields reported the OBA Diversity Conference was well attended

and keynote speaker ABA President-Elect Paulette Brown was dynamic. President DeMoss added the CLE seminar was very good. Governor Kinslow reported the Clients' Security Fund was going to recommend claims this year in excess of \$400,000. He said the committee is going to request the current annual cap of \$100,000 be increased. Governor Thomas reported she had shared with board members via email a very detailed report on the Access to Justice Committee, which is putting together a catalog of pro bono legal services in Oklahoma by county. She asked board members to review the list and to report any pro bono agencies missing to the committee chairperson. Governor Parrott reported the Bench and Bar Committee is thoroughly reviewing every judicial evaluation conducted by state bar associations. Governor Smith reported the Work/Life Balance Committee is planning a future CLE seminar. Governor Hays encouraged board members to attend the Professional-

ism Committee's symposium in December. She said the Family Law Section will hold its seminar on Wednesday, Nov. 12, in Tulsa.

PROPOSED 2015 OBA BUDGET

President-Elect Poarch reviewed highlights of the budget, which included major expenses for Bar Center air conditioning and technology. He reported no one attended the public meeting, and no inquiries have been received. Questions were asked, and discussion followed. The board approved the proposed 2015 OBA budget and to submit it to the Supreme Court for its consideration.

OUT-OF-STATE STAFF TRAVEL

The board voted to ratify the email vote approving travel by MCLE Coordinator Beverly Petry Lewis to Kansas to view possible MCLE software.

OKLAHOMA'S PROMISE

President DeMoss said one of her goals as president is to

support the Oklahoma's Promise program, which promises free college tuition to deserving students whose parents meet income guidelines. Promoting the program and increasing the number of participants is also a goal shared by Supreme Court Chief Justice Colbert. Meetings have been held with the superintendents of the Tulsa and Oklahoma City public schools. Executive Director Williams is working on recruiting possible sponsors. A report will be presented next month.

NEXT MEETING

The Board of Governors met Nov. 12, 2014, at the Hyatt Regency Hotel in Tulsa in conjunction with the OBA Annual Meeting and Dec. 12, 2014, at the Oklahoma Bar Center in Oklahoma City. A summary of those actions will be published after the minutes are approved. The next board meeting will be Thursday, Jan. 15, 2015, via phone conference.

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2014: A Year of Challenges Successfully Accomplished

By Dietmar K. Caudle

When I began my year as your OBF President, certain immediate challenges quickly surfaced. The critical IOLTA income was jeopardized by banks reporting their interest rate paid on lawyer's trust accounts would be drastically reduced from 2013, even though federal fund rates had not changed. The OBF Executive Committee went into action, and meetings with our flagship bank were initiated. A

better rate was negotiated, and that crisis was averted. The OBF theme of "Lawyers Changing Lives" came through loud and clear. The good deeds of charitable contributions, however, are perpetual and your contributions are invaluable. We need your help each year to be able to help Oklahomans in need.

This past year saw the successful evolutions of the Community Fellow program. Law firms, IOLTA banks, the Chickasaw Nation Foundation, LexisNexis and several Oklahoma Bar Association sections all became Community Fellows. Lawyers and laymen alike recognized that the one-stop OBF umbrella of charitable giving through tax exempt contributions helps to fulfill their need to give back to the community. The OBF Board of Trustees subsequently approved \$457,681 in regular grant awards and court grant awards. The predictable result was that more than 56,000 Oklahoma lives were changed through OBF grant programs and projects, with tens of thousands more affected each year — illustrating that your donations accomplish a great deal.

Finally, 2014 provided the OBF video story. This short 10-minute presentation is com-



elling to see because it vividly shows the OBF at work and actual recipients of law-related services tell how OBF grant dollars have changed their lives — they can never thank the lawyers enough. The daily updated OBF website lists current events and outlines the ways you may choose from the OBF Fellows umbrella of charitable giving today.

The OBF mission has not changed and the work we do is still desperately needed. With your continued generous support, the OBF funding provides:

How You Can Help

- ✓ Join the OBF Fellows Program for Individuals
- ✓ Become an OBF Community Fellows for Groups and Organizations
- ✓ Designate OBF for *Cy Pres* Awards
- ✓ Include OBF in Wills and Estate Planning
- ✓ Make OBF Tribute and Memorial Gifts
- ✓ Participate in the IOLTA Program
- ✓ Make General Charitable Contributions to the Oklahoma Bar Foundation at www.okbarfoundation.org

- Free legal assistance for poor and elderly Oklahomans
- Safe haven for the abused
- Protection for legal assistance for children
- Public law-related education programs including Oklahoma school children
- Other activities that improve the quality of justice for all Oklahomans

The OBF is the charitable heart of the Oklahoma Bar Association. With the assistance of OBA President Renée De-Moss, the OBA and the OBF have rallied together through joint events in relaying the message that the OBF changes lives for the better.

I am reaching out to you today to ask you to help because your charitable gift has the power to transform the lives of those in crucial need of law-related services. The cause is important to lawyers, law firms and Community Fellows. If you are unclear as to your status as a Fellow, wish to upgrade your Fellow status, or simply want to make a gift to the OBF, please call our OBF office at 405-416-7070 or email foundation@okbar.org. You can simply check our OBF website at www.okbarfoundation.org to be able to give at any hour of the day or night.

When lawyers give their time and money, great things will happen! Will you answer my call for help by sending the best December gift that you

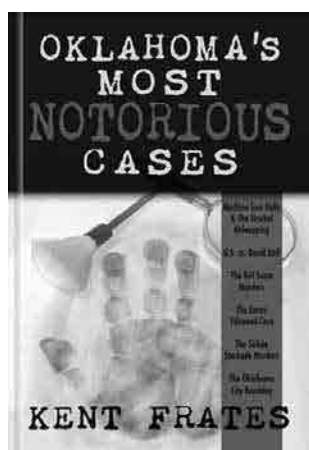
possibly can to the OBF today! **We cannot succeed without your help.** Please remember that we cannot receive if we do not ask.

Thank you for allowing me to lead a fantastic group of Board of Trustees and OBF staff members. Your future OBF leadership is in good hands with Jack L. Brown from Tulsa as your incoming President.

ABOUT THE AUTHOR



Dietmar K. Caudle practices in Lawton and serves as OBF President. He can be reached at d.caudle@sbcglobal.net.



Gift Idea

Oklahoma's Most Notorious Cases

By Kent Frates

A portion of book proceeds goes toward OBF grant programs.

This book highlights some of Oklahoma's most infamous cases. Chapters include:

- **The capture and conviction of Machine Gun Kelly**
This marked the FBI's first major victory helping transform the Bureau into a law enforcement juggernaut.
- **Governor David Hall**
Governor David Hall's meteoric rise and fall played out during the Watergate era when public corruption captured the headlines throughout the nation.
- **Girl Scout Murders**
Never solved, the killing of three young Girl Scouts in 1976 led to the trial of Gene Leroy Hart, a modern day Cherokee outlaw who was hard to catch and impossible to convict.
- **Karen Silkwood**
An unlikely battle between Karen Silkwood, an obscure employee, and Kerr McGee, Oklahoma's biggest corporation, influenced the nuclear power industry worldwide.
- **Sirloin Stockade Killings**
At the time, the killing of six innocent restaurant employees was Oklahoma's biggest mass murder. The crime was only solved by exceptional police work and the bizarre personality of the killer.
- **Oklahoma City Bombing of the Murrah Building**
Killing 168 people, wounding hundreds more and destroying millions of dollars in property is still the most heinous act of terrorism committed in the U.S. by an American citizen.

Oklahoma's Most Notorious Cases now available through the Oklahoma Bar Foundation, located at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., Ste. 204, Oklahoma City, OK 73105, or by calling 405-416-7000. Cost: \$26 plus shipping and handling if mailed



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Mailing and Delivery address _____

City/State/Zip _____

Phone _____ Email _____

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| ___ Total amount enclosed \$1,000 | ___ New lawyer 1st year, \$25 enclosed & bill annually as stated |
| ___ New lawyer within 3 years, \$50 enclosed and bill annually as stated | ___ I want to be recognized at the higher level of Sustaining Fellow and will continue my annual gift of \$100
(initial pledge should be complete) |
| ___ I want to be recognized at the highest Leadership level of Benefactor Fellow and annually contribute at least \$300
(initial pledge should be complete) | ___ My charitable contribution to help offset the Grant Program Crisis |

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☐ Corporation/Business ☐ Other Group

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THANK YOU FOR YOUR GENEROSITY AND SUPPORT!

A Look Back

YLD Instrumental in Association's 2014 Accomplishments

By Kaleb Hennigh

What an incredible year! First, I want to congratulate President DeMoss and the rest of the Board of Governors for a great year of service and leadership. Our profession faced and overcame several legislative attempts to politicize the manner of selecting our judiciary. I know that President DeMoss had many goals she originally sought to accomplish at the beginning of her year that took a backseat to organizing our association and establishing a collaborative plan to address, educate and motivate our elected officials in an effort to overcome these legislative threats.

Many of our association's young lawyers were instrumental in assisting President DeMoss and our leadership in contacting and educating our own elected officials to ensure Oklahoma maintained an impartial judiciary, and I thank you all for that commitment.

Second, I believe our association thrives because of committed professionals taking time from their ongoing practice to serve the interests of all Oklahoma legal practitioners. Throughout the past year during my travels as OBA Young Lawyers Division chairperson, I shared goals, ideas and visions with other young lawyers. While engaging leaders from

young lawyer divisions from across this nation and in some instances other countries, one of the most prominent points of my discussion was the overwhelming support the OBA YLD receives from the governing body of our association.

“I believe our association thrives because of committed professionals taking time from their ongoing practice to serve the interests of all Oklahoma legal practitioners.”

Fellow young lawyers, we should never take for granted the support we receive from the Board of Governors and the assistance the OBA staff provides. As young professionals I encourage you to remain vigilant in establishing and maintaining a viable working relationship with the Board of Governors and continue to find ways to remain engaged with the leaders of our association.

Finally, I personally want to thank all of the officers and Board of Directors members

who served alongside me during my year at the helm of the YLD. My years as a young lawyer are coming to a close, and I couldn't have imagined a better way to end it than serving as your chairperson.

My law partners have endured my absences over the past years and accepted my role and responsibilities to this organization, so I thank Andrew Ewbank and Dalen McVay for their commitment to our clientele and their dedication to our community in my absence. I know the hard work of so many directors, liaisons and officers led to another successful year for the OBA YLD, and I thank each of you for your commitment as well as the commitment of your colleagues, co-workers and partners who have allowed you the time to dedicate to this division.

'KICK IT FORWARD' LAUNCHES IN 2014

The OBA YLD took the lead this year in developing the "Kick it Forward" program to assist lawyers who may be struggling to pay their bar dues for a variety of reasons. **If you need to apply for financial assistance through the program, the application deadline is Dec. 31.** Use the application form available at www.tinyurl.com/KickItForward. If you

wish to donate, simply choose the donation option on your OBA dues statement. See the next page for more information about how this innovative program works.

I want to wish the YLD and the incoming officers and directors the best of luck throughout the upcoming years, and I am certain that the newly elected leadership will serve this division well. Most importantly I want to thank you all for the memories created and friendships established not only this year, but throughout my years of service to the YLD, as I will certainly cherish them all. Be Great!

ABOUT THE AUTHOR



Kaleb Hennigh practices in Enid and serves as the YLD chairperson. He can be contacted at

hennigh@northwestoklaw.com.

YLD Election Results Announced

Congratulations to the officers and members who will serve on the YLD Board of Directors in 2015

Officers

2015 Chair LeAnne McGill, Edmond
Chair Elect Bryon Will, Oklahoma City
Treasurer Lane Neal, Oklahoma City
Secretary Nathan Richter, Mustang
Immediate Past Chair Kaleb Hennigh, Enid

Directors

<i>District 1</i> Aaron Pembleton, Nowata	<i>District 6</i> Maureen Johnson, Tulsa
<i>District 2</i> Blake Lynch, McAlester	<i>District 7</i> Alex Wilson, Park Hill
<i>District 3</i> Sarah Stewart, Oklahoma City	<i>District 8</i> Brandi Nowakowski, Shawnee
<i>District 3</i> Lane Neal, Oklahoma City	<i>District 9</i> Grant Sheperd, Lawton
<i>District 3</i> Faye Rodgers, Edmond	<i>At Large</i> Robert Bailey, Norman
<i>District 4</i> Dustin Conner, Enid	<i>At Large</i> April Moaning, Oklahoma City
<i>District 5</i> Allyson Dow, Norman	<i>At Large</i> Eric Davis, Oklahoma City
<i>District 6</i> Rachel Gusman, Tulsa	<i>At Large</i> Justin Meek, Oklahoma City
<i>District 6</i> Brad Brown, Tulsa	<i>At Large Rural</i> Matt Sheets, McAlester
	<i>At Large Rural</i> Nathan Richter, Mustang



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Program

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- ❶ Look for the donation line on your dues statement.
- ❷ Mail a check payable to the OBA, PO Box 53036, Oklahoma City, OK 73152. Include program name on the lower left corner of the check.
- ❸ Donate online (coming soon).

Apply for assistance.

Application deadline: Dec. 31, 2014

See website for eligibility requirements and application form.

Applicants are asked to write an essay of 250 words or less sharing why you believe you should be selected as a recipient.

Applications will be reviewed by a committee, and selected recipients will be notified by Jan. 31, 2015.

December

- 15 OBA Licensed Legal Intern Swearing-In Ceremony;** 12:45 p.m.; Judicial Center, Oklahoma City; Contact Debra Jenkins 405-416-7042
- OBA Licensed Legal Intern Committee meeting;** 2:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Candace Blalock 405-238-0143
- 16 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judge David Lewis 405-556-9611
- 17 OBA Alternative Dispute Resolution Section meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Jeffrey Love 405-286-9191
- 18 OBA Women in Law Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Allison Thompson 918-295-3604
- 19 OBA Access to Justice Committee meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Laurie Jones 405-208-5354
- OBA Rules of Professional Conduct Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Paul Middleton 405-235-7600
- 24-26 OBA closed** – Christmas observed

January

- 1-2 OBA closed-** New Year's Day observed
- 6 OBA Government and Administrative Law Practice Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Scott Boughton 405-717-8957
- 8 OBA Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066
- 9 OBA Law-related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Suzanne Heggy 405-556-9612
- 15 OBA Family Law Section meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact M. Shane Henry 918-585-1107
- 15 Supreme Court Swearing In Ceremony;** 1:30 p.m.; Supreme Court Courtroom, State Capitol, Oklahoma City; Contact Office of the Chief Justice, 405-556-9100
- OBA Board of Governors meeting;** 3 p.m.; phone conference; Contact John Morris Williams 405-416-7000
- OBA Young Lawyers Division Kick it Forward meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Kaleb Hennigh 580-234-4334
- 16 OBA Board of Bar Examiners meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Oklahoma Board of Bar Examiners 405-416-7075



- 19 OBA Closed** – Martin Luther King, Jr. Day Observed
- 23 Oklahoma Bar Foundation Executive Committee meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070
- Oklahoma Bar Foundation Trustee orientation, lunch and meeting;** 11 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070
- 28 Ruth Bader Ginsburg Inn of Court;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donald Lynn Babb 405-235-1611



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Supreme Court Ceremony Set

All OBA members are invited to a swearing-in ceremony for Oklahoma Supreme Court Justice John F. Reif as he takes the oath of office to serve as the court's chief justice for 2015 and 2016. Justice Douglas Combs will also be sworn in as vice chief justice during the ceremony which is set for 1:30 p.m., Thursday, Jan. 15, 2015, in the Supreme Court Ceremonial Courtroom, Second Floor, Oklahoma State Capitol. A reception will immediately follow the ceremony.

Justice Reif, who represents Supreme Court Judicial District 1, was appointed to the court in October 2007 by Gov. Brad Henry. He previously served 23 years on the Court of Civil Appeals. He started his judicial service in February 1981 as a special district judge for the 14th Judicial District in Tulsa County.

Justice Combs, of District 8, has served on the court since January 2011. He served as a special judge and district judge for Pottawatomie County from January 1995 until his appointment to the Oklahoma Supreme Court. He is a 1976 graduate of Oklahoma City University School of Law.



Justice John F. Reif



Justice Douglas Combs



OBA Women in Law Committee Teams Up For Holiday Giving

Each year Lawyers Fighting Hunger gives away thousands of turkeys to families in need during the Thanksgiving holiday. This year members of the OBA Women in Law Committee partnered with Lawyers Fighting Hunger to provide a day's worth of diapers and baby food in addition to Thanksgiving meals given to each sponsored family.

Visit www.LawyersAgainstHunger.com to volunteer or donate to the ongoing effort.

Women in Law Committee members Erin Potter Sullenger (left) and Leslie Lynch collect diaper and baby food donations for this year's Lawyers Fighting Hunger Thanksgiving campaign.

Got Holiday Packages to Ship? OBA Members Save Money!

Through the OBA, you can save on shipping with UPS. Take advantage of discounts of up to 34 percent, plus 50 percent off select services for up to four weeks after you enroll! Save on a broad portfolio of shipping services, including air, international, ground and freight services.

To enroll and start saving, visit savewithups.com/oba or call 1-800-MEMBERS (800-636-2377), M-F, 7 a.m. – 5 p.m. CST.



LHL Discussion Groups Host Upcoming Meetings

The Lawyers Helping Lawyers monthly discussion group will take a break in January and meet next Feb. 5, 2015, when the topic will be "Practicing While Sick or Injured." Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. There is no cost to attend and snacks will be provided. RSVPs to Kim Reber; kimreber@cabainc.com, are encouraged to ensure there is food for all.

- Note: All Tulsa meetings have been postponed until further notice.
- Oklahoma City meeting time: 6 – 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th Street.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

New OBA Board Members to Take Oath

Nine new members of the OBA Board of Governors are set to be sworn in to their positions Jan. 16, 2015, at 10:30 a.m. in the Supreme Court Ceremonial Courtroom at the State Capitol. Officers set to take the oath are David A. Poarch Jr., Norman, president; Garvin Isaacs Jr., Oklahoma City, president-elect; and Glenn Devoll, Enid, vice president.

To be sworn into the Board of Governors to represent their judicial districts for three-year terms are James R. Gotwals, Tulsa; Roy D. Tucker, Muskogee; John Weedn, Miami; and Sonja R. Porter, at large, Oklahoma City.

To be sworn into one-year terms on the board are Renée DeMoss, Tulsa, immediate past president; and LeAnne McGill, Edmond, Young Lawyers Division chairperson.

MCLE Deadline Approaching

Dec. 31 is the deadline to earn any remaining MCLE credit you need for 2014 without having to pay a late fee. Not sure how much credit you still need? You can view your MCLE transcript online at my.OKBar.org. You can also pay dues online and register for any CLE you still need. Check out great fall offerings at www.okbar.org/members/CLE! If you have questions about your credits, email mcle@okbar.org.

OBA Member Resignations

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

Lisa Karen Gold
OBA No. 19663
2317 42nd Avenue E
Seattle, WA 98112

Michael Charles Murphy
OBA No. 6529
446 S. Jamestown
Tulsa, OK 74112



OBA Holiday Hours

The Oklahoma Bar Center will be closed Dec. 24-26 for the Christmas holiday. In addition, the bar center will close Thursday and Friday, Jan. 1-2, 2015, for the New Year's holiday.

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.



Connect With the OBA Through Social Media

Have you checked out the OBA Facebook page? It's a great way to get updates and information about upcoming events and the Oklahoma legal community. Like our page at www.facebook.com/OklahomaBarAssociation. And be sure to follow @OklahomaBar on Twitter!



Kudos

Oklahoma City lawyer **Elizabeth K. Brown** has been named to the National Stripper Well Association Board of Directors. She also has served on the Oklahoma Independent Petroleum Association Board of Directors since June 2013. Ms. Brown practices with the firm of Phillips Murrah PC.

Walter Echo-Hawk, an attorney with Crowe & Dunlevy in Oklahoma City, recently received the President's Award from the International Association of Official Human Rights Agencies for his commitment to human rights. Mr. Echo-Hawk has focused his practice in the area of human rights attorney since 1973.

Jeff W. Kline, associate attorney at Bays Law Firm PC, was named as a 2014 Forty Under 40 recipient by the *Oklahoma Gazette* and *okc.BIZ*. He was also named a Thirty Under 30 recipient by *iON Oklahoma Online*.

Tulsa Lawyers for Children recently announced its 2015 Board of Directors. OBA members elected to serve as officers include **William C. McLain**, president; and **Gwendolyn Clegg**, secretary. Board members also include **Mary Bullock**, **Fred H. DeMier**, **Steven G. Heinen**, **David H. Herrold**, **Lucia L.**

Lewis, John Matheson, Anne B. Sublett and Alison Wade.

The American College of Bankruptcy has announced that Crowe & Dunlevy attorney **William H. Hoch** of Oklahoma City will be inducted as a fellow of the college on March 13, 2015, in Washington, D.C. Mr. Hoch joins a list of only six Oklahoma members, including Mark A. Craig, also of Crowe & Dunlevy.

Several OBA sections recognized members with awards during the recent Annual Meeting in Tulsa. Honored by the Energy and Natural Resources Law Section was outgoing section Chairperson **Bradley A. Gungoll** of Oklahoma City. The Taxation Law Section recognized three of its members for outstanding contributions: **Sheppard F. "Mike" Miers Jr.**, Tulsa; **Marjorie L. Welch**, Norman; and **Alan G. Holloway**, Oklahoma City. The Criminal Law Section honored **Cortnie Siess**, Chickasha, Prosecutor Advocate of the Year; **Jennifer P. Austin**, Norman, Prosecutor Advocate of the Year; **William Campbell**, Oklahoma City, Defense Attorney Advocate of the Year; **Suzanne McClain Atwood**, Oklahoma City, Founder's Award; **Bob Ravitz**, Oklahoma City, Founder's Award; **Peter Astor**, Sapulpa, Courageous Attorney Award; and **Wayne Woodyard**, Pawhuska, Courageous Attorney Award. Honored by the Family Law Section were **Linda Pizzini**,

Oklahoma City, Outstanding Family Law Attorney and FLS Chair Award 2014; **Carol Swenson**, Tulsa, Outstanding Family Law Guardian *ad Litem*; **Judge Lori Walkley**, Norman, Outstanding Family Law Judge; **James R. Gottwals**, Tulsa, Outstanding Family Law Mediator; **Shane Henry**, Tulsa, 2014 Family Law Section Chair; **Michelle Smith**, Oklahoma City, 2015 Family Law Section Chair; **Kimberly Hays**, Tulsa, FLS Chair Award 2014; **Amy Page**, Tulsa, FLS Chair Award 2014; and **Tamera Childers**, Tulsa, FLS Chair Award 2014.

The Oklahoma Criminal Defense Lawyers Association presented Oklahoma City attorney **John W. Coyle** with the Lord Thomas Erskine Award during the OBA Annual Meeting. The lifetime achievement honor is named after the famed British lawyer. Mr. Coyle was recognized by his peers for his willingness to take on unpopular cases, his devotion to fighting for every client's constitutional rights and his commitment to advocacy on behalf of his clients.

On The Move

Scott T. Banks announces the opening of his firm, Banks Law PLLC, located at 115 S. Peters, Suite 8, Norman, 73069. Mr. Banks focus-

es on family law, civil litigation, estate planning and tax disputes. He can be reached at 405-990-7112.

Jennifer Ivester Berry of Oklahoma City has joined Phillips Murrah's Transactional Practice Group as an of-counsel attorney. She counsels developers, commercial and institutional lenders and others involved in the purchase, sale, construction, leasing and financing of commercial real estate. Prior to the move, Ms. Berry was a director for Crowe & Dunlevy and served as an adjunct professor at her alma mater, the OCU School of Law. Phillips Murrah also added **Amy D. White** to the firm's Litigation Practice Group as an of counsel attorney. Her practice focuses on business and commercial litigation in the area of product liability defense. Prior to joining the firm, she worked for McAfee & Taft.

Doerner, Saunders, Daniel & Anderson has added **Tamera Childers, Anthony Liolios** and **Becky Stanglein** to its Tulsa office. Ms. Childers joins the firm's family law practice and also works in civil and commercial litigation. A 2003 graduate of the TU College of Law, she also serves as a municipal court judge for the city of Bixby. Mr. Liolios focuses on general litigation, Native American law and bankruptcy-related matters. He graduated from the TU College of Law in 2014. Ms. Stanglein practices in the areas of labor and employment law and will join the firm's employment practice group. She graduated from Washington and Lee University.

Farrar & Farrar announces that **Rachel Lynne Farrar** has joined the Tulsa firm as an associate attorney. She represents the third generation to continue the family firm. She will assist with the firm's established workers' compensation and personal injury clients and has interests in the areas of family and criminal law. Farrar previously interned with Judge Doris L. Fransein in the Juvenile Division and with the Tulsa County Public Defender's Office. She graduated from the University of Tulsa College of Law in 2014.

The Oklahoma City law firm of Walker, Ferguson & Ferguson announces that **Clay G. Ferguson** and **Brian P. Kershaw** have joined the firm as associate attorneys, both practicing in the area of insurance defense litigation. Mr. Ferguson earned his law degree from the OU College of Law in 2014. Mr. Kershaw graduated from the TU College of Law in 2014.

Edmond law firm Hartsfield & Egbert PLLC is pleased to announce **Austin E. Goerke** has joined the firm as an associate. Mr. Goerke will focus on oil and gas title examination and related litigation. He is a 2014 graduate of the OCU School of Law and is currently working toward his petroleum landman certification at the OCU Meinders School of Business.

Spencer T. Habluetzel has joined the Oklahoma City firm of Pignato, Cooper, Kolker & Roberson as an associate. Mr. Habluetzel is a 2014 graduate of the OCU School of Law. He will practice in the area of general insurance defense.

The Tulsa law firm of Norman Wohlgemuth Chandler & Jeter announces that **Emily Payne Kosmider** has joined the firm as an associate, focusing on complex civil litigation. She graduated from the OU College of Law in 2014.

The Tulsa City Attorney's Office announces that **Paige McLaughlin** has joined the office as a municipal court prosecutor. A native of Clinton, Ms. McLaughlin graduated from the OCU School of Law in 2014.

Taos Smith and **Betsy Ann Brown** have joined the Smalley Law Firm, which has relocated their offices to 305 E. Comanche in Norman. Mr. Smith focuses his practice on criminal defense and litigation. Ms. Brown continues to practice all areas of family law and appellate work.

Matthew B. Wade has joined Abel Law Firm. He will focus his practice on personal injury litigation. He graduated from the OU College of Law in 2005.

Ashley Weyland of Oklahoma City has joined the Busset Law Firm as an associate. Her practice will include criminal law, civil litigation and domestic law. She graduated from the OU College of Law in 2014.

David Donchin has been appointed as managing partner at the Oklahoma City firm of Durbin, Larimore & Bialick. Since joining the firm in 1988, Mr. Donchin's litigation practice has involved insurance law, complex litigation, personal injury law, products liability, employment law, environmental law and medical malpractice. In

addition to his law practice, he has served as an adjunct professor at his alma mater, the OU College of Law, and as a member of the faculty of the Southern Region of the National Institute of Trial Advocacy.

Fellers Snider recently welcomed **Derek H. Ross** to its litigation practice in Oklahoma City, where his practice will focus on election and campaign finance law, civil litigation and white collar criminal defense. He joins the firm after serving a year as a judicial law clerk for Judge Joe Heaton. Mr. Ross graduated with distinction from the OU College of Law in 2013.

DeBee Gilchrist PC of Oklahoma City announces that **Martin J. Howell** has become associated with the firm. He received his B.B.A. in finance from OU and his J.D. from the OU College of Law in 2013. He joins the firm's aviation practice and will be focused on transactional matters relating to aircraft title, purchase, registration, finance and leasing. Prior to joining the firm, Mr. Howell worked for a Fortune 500 oil and gas company.

At The Podium

Cherokee Nation Secretary of State **Chuck Hoskin Jr.** of Vinita recently spoke at the First World Conference on Indigenous Peoples at the United Nations headquarters in New York City. Hoskin was among 28 North American indigenous delegates selected to attend the opening meeting and spoke in a roundtable on implementation of the U.N. Declaration on the Rights of Indigenous Peoples.

Herbert Joe, managing partner of Yonovitz & Joe LLP of Dallas, was guest speaker at the 12th Annual Forensics Seminar in Dallas. His topics were "Forensic Analyses of Audio Evidence" and "Forensic Analyses of Video Evidence."

Kevin Kuhn of Denver recently presented at the Colorado Bar Association and Colorado Chapter of the American College of Trial Lawyers' CLE seminar, "Winning at Trial 2014: Skills and Tactics." He spoke on the topics of "Jury Selection: How to Decode, Decipher and Enlighten Complete

Strangers" and "Ethics: Jurors and Social Media (Panel Presentation) – Implications of ABA Formal Opinion 466 ('Lawyer Reviewing Jurors' Internet Presence')." He is a 1977 graduate of the OU College of Law.

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

Submit news items via email to:

Lori Rasmussen
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the Jan. 17, 2015, issue must be received by Dec. 22.

IN MEMORIAM

James P. Cates of Oklahoma City died Oct. 22. He was born Aug. 14, 1964, in Checotah and attended high schools in Japan and Montana. He earned his B.A. in political science in 1986 and his J.D. in 1989 from the University of Oklahoma. After completing his education, he went to work for Baer, Timberlake, Coulson & Cates PC in Oklahoma City, becoming a partner in 1998. He was an avid sports fan, especially if it was Sooner football or the Oklahoma City Thunder. He loved to travel and his trips encompassed many countries, and he is remembered for his humor and enthusiasm. Memorial contributions may be made to a scholarship fund that has been created in his name through the University of Oklahoma Foundation.

William (Bill) H. Dodson Sr. of Sallisaw died Sept. 27. He was born May 19, 1950, in Oklahoma City. He graduated from OSU and moved to Los Angeles to attend law school at Southwestern Law School. He returned to Oklahoma and began practicing

law in Oklahoma City, eventually relocating to eastern Oklahoma to engage in private practice. He was a member of Elim Full Gospel Church. He loved to hunt, fish and read. Memorial contributions may be made to Sequoyah Memorial Home Health & Hospice of Sallisaw.

Kenneth J. "Kenny" Kelly of Guymon died Nov. 1. He was born on Jan. 15, 1951, in Perryton. Prior to becoming an attorney, he was a part owner of the Chevrolet dealership in Perryton. Throughout his life he was also a part-time farmer. He graduated from West Texas A&M University with a degree in business. Later, he returned to school and received his law degree from Texas Wesleyan University. He was a member of the First Christian Church of Perryton where he served as deacon. He was also a member of Kiwanis Club of Guymon and the Texas County Bar Association. He was a former member of the Perryton/Ochiltree Chamber of Commerce where he served as president and Texas Auto-

mobile Dealers Association. Memorials may be made to Smithlawn Home and Adoption Agency, 711 76th St., Lubbock, Texas, 79404.

Judith A. "Judi" McCoy of Tulsa died Oct. 25. She was born April 22, 1952, in Pocatello, Idaho and received a dual B.A./B.S. degree in philosophy and psychology from the University of Utah. After graduating with highest honors from the TU College of Law, she joined the Conner & Winters law firm in 1980. She focused her practice in the areas of securities regulation, corporate and partnership law. After leaving the firm in 1996, she refocused her time on pro bono representations, charitable and community work. She was an avid traveler and outdoorswoman, enjoying fly fishing, canoeing, backpacking, skiing and scuba diving all over the world. She also greatly enjoyed her volunteer involvement with the Community Food Bank of Eastern Oklahoma, to which memorial donations made be made.

New Year's Resolutions

Have you decided your resolutions for next year? Here are five New Year's resolutions that will help you grow your practice



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Wrap up 2014

Enroll in last-minute CLE, pay dues, check your credits, join a section and more



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Tech Toys for the Holidays



Jim Calloway and his podcast partner Sharon Nelson searched far and wide for the most fun new gadgets and e-devices

<http://jimcalloway.typepad.com/>

Get fit in 2015

Check out Oklahoma's fitness calendar and start planning your health goals for next year

<http://www.oksportsandfitness.com/event-calendar.php>



Stress Relief over the Holidays

The holidays can be a stressful time. Here are several tips on coping with stress and depression during what can be a taxing time.

<http://goo.gl/KTA0v4>



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POSITIONS AVAILABLE

THE OKLAHOMA BAR ASSOCIATION Heroes program is looking for several volunteer attorneys. The need for **FAMILY LAW ATTORNEYS** is critical, but attorneys from all practice areas are needed. All ages, all counties. Gain invaluable experience, or mentor a young attorney, while helping someone in need. For more information or to sign up, contact Gisele Perryman, 405-416-7086 or heroes@okbar.org.

LEGAL ASSISTANT wanted to assist attorney with busy caseload in Oklahoma City law office. Send replies with résumé and salary requirements to "Box GG," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.



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POSITIONS AVAILABLE

GENERAL COUNSEL OKLAHOMA PUBLIC EMPLOYEES RETIREMENT SYSTEM. The Oklahoma Public Employees Retirement System (OPERS) is seeking applications for the position of General Counsel. The individual in this position will serve as the primary legal counsel to the agency and the Board of Trustees. OPERS is a state agency that administers four retirement plans for approximately 81,000 state and local government employees, elected officials, and state judges. A fifth retirement plan will open to new state employees on November 1, 2015. The General Counsel represents the agency in all civil litigation including administrative hearings and appeals unless outside counsel is employed. The General Counsel provides legal advice, develops administrative rules, and drafts contracts. The General Counsel advises the Executive Director and the Board of Trustees on all legal issues. To be considered, an individual must have a J.D. degree and be a member in good standing of the Oklahoma Bar Association. This individual must have at least five years of experience as a practicing attorney, and must be able to effectively communicate verbally and in writing. Excellent legal research and writing skills are required. It is desirable that the individual have knowledge of legal principles relating to public retirement entities and state agencies. Salary will be commensurate with relevant experience. To apply, send an OPERS employment application (www.opers.ok.gov/jobs), a résumé and a cover letter by email: dbyrd@opers.ok.gov; FAX: 405-848-5964; or mail to OPERS, ATTN: HR Manager, 5801 Broadway Ext., Suite 400, Oklahoma City, OK 73118. To ensure full consideration, applications should be received by 5:00 p.m., Monday, January 5, 2015. Equal Opportunity Employer.

OKC MIDTOWN LAW FIRM seeking attorney with 2 plus years experience in Family Law. Looking for applicants with strong communication skills, good work ethic, motivated and comfortable in courtroom. Compensation is based on experience and includes benefits. Please reply to "Box S," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

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The Kindness of Strangers

By Carolyn Smith

Several years ago at the Naples train station, a slight older gentleman approached. Did we have our tickets? Did we know how to punch them? Did we need anything? As we thanked him and said we were fine, he broke into tears. "Thank YOU," he said. "Thank you, America. You gave me my life. You gave me my country. You gave me my freedom." With that said, he walked away.

At a small store in Aknaszlatina, Ukraine, three jolly gold-toothed ladies were delighted that my husband knew a smidgen of Russian. It became evident that they intended to give, not sell, us some booze. Except we don't drink alcohol. "Bez alkohol," he said repeatedly, but they didn't seem to understand, or they didn't want to understand. "Try this one. Beer is OK — beer has no alcohol." We left their store laden with six liters of various soft drinks and warm hearts.

In Romania, the bus came on time, but the driver solemnly announced, "Bus full. Maybe tomorrow." Plan B was a train that would get us to Sighetu late at night, and we had no room reservation. Our seat mate overheard us and said, "Get off with me. Spend the

night in my village, ride the scenic lumber train tomorrow morning, then go on to Sighetu." He didn't just drop us off. He checked us into a hotel and had dinner with us. The nar-



row-gauge steam train into the mountains was an adventure to be remembered.

We met another kind Romanian on a very cold, windy hike on the high Bucegi plateau. It was getting late, beginning to snow, and there was already too much snow between us and the hut that was our destination. It was

going to be a long night. But our fellow hiker said, "Come with me. Another hut is open but cannot serve food." Before we sank gratefully into warm beds, we shared the snacks in our packs.

The next day as we walked together 17 miles down to Sinaia, passing fresh bear tracks along the way, we learned that our new friend was shot at age 18 in the uprising against Ceausescu. Later, we stood in the Bucharest square where Ceausescu gave his last speech, covered with chill bumps as we listened to first-hand recollections of that eventful day.

These experiences are not unusual in our travels. If space permitted, I could recount many more. Religion is irrelevant. Culture is irrelevant. Language is irrelevant. Our friends and family express concern for our safety as we venture into strange places with few plans or language skills, but we contemplate — if a stranger from a foreign country were to arrive in any town in Oklahoma, would he be treated well? We like to think so. Our travels have taught us that the kindness of strangers is a worldwide phenomenon.

Ms. Smith is retired from private practice and lives in Ponca City.



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