THE Oklahoma Bar JOURNAL
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Business Litigation

ALSO INSIDE

- Solo & Small Firm Conference
- Legislative Update
- OBA Day at the Capitol

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Theme:
Business Litigation
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contents

March 15, 2014 • Vol. 85 • No. 8

FEATURES

pg. 588
OBA Day at the Capitol

DEPARTMENTS

pg. 577
Solo & Small Firm Conference

PLUS

Masters of the Oklahoma Bar Association

By Renée DeMoss

It happens before you know it. One minute you're fresh out of law school, and the next, right around your 50th birthday, you are reluctantly pulling that invitation to join the AARP out of your mailbox. Old? Who me? No way!

Aging, however, is an inevitable fact of each of our lives, and the life of our bar association. Between 1997 and 2007, the number of American workers 65 years and older increased by 101 percent. Among the lawyer population, 25 percent were age 55 and older in 1980, but by 2005, the percentage had increased to 34 percent. In the next 10-15 years, Oklahoma is expected to see a significant rise in the number of attorneys over age 65 who are still engaged in the practice of law.

We must provide a system that capitalizes on the experience and energy of our senior lawyers — and treats them with respect and dignity.

OBA members, like other American workers, take a number of different approaches to work and retirement. Some will retire as soon as they are financially able. Others, after 40-50 years of practice, don't want to stop working completely, but also don't want to continue dealing with the details of an active practice, such as tracking hours worked. Others are determined to remain in the work force until death.

Getting older — and the accompanying wealth of experience and knowledge that comes with it — is something to be proud of and put to its highest use. Many senior lawyers can continue to practice with ease. Other active senior lawyers who want to move toward a more leisurely practice have a variety of different ways to use their accumulated legal knowledge.

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Some older lawyers, however, will face issues that could render them unable to continue working and adequately represent their clients. Age-related health problems can cause legal skills to decline, mental acuity to deteriorate, and even affect a lawyer's ability to even recognize that he or she is impaired. In many cases, colleagues, clients, judges and even family members are reluctant to intervene.

The increasing number of Oklahoma lawyers who will work well into their senior years will have an impact on our association, and we must ensure that impact is a positive one. We must provide a system that capitalizes on the experience and energy of our senior lawyers — and treats them with respect and dignity. At the same time, the OBA has a duty to protect the public when older lawyers should step down from active practice but continue to work. Enter the Master Lawyers Section of the OBA.

NEW SECTION PROPOSED

The proposed Master Lawyers Section is designed to explore and develop programs that will enhance and improve the working and retirement lives of senior lawyers, maximize services to their clients and others, and provide a forum for addressing any particular issues that arise. Possibilities include mentoring and pro bono work, assisting attorneys who are winding down their practices and education on substantive areas of law as well as issues unique to senior lawyers.

Thanks to my good friend Ron Main, a premier master lawyer in Tulsa, a petition to create this new section is currently being circulated for signatures, and a working group has been established to explore the many opportunities for the master lawyers of the OBA. I hope you will whole-heartedly support this new OBA section.

Read about the section's potential services and benefits on page 574.

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EVENTS CALENDAR

MARCH 2014

17 **OBA Litigation Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact David VanMeter 405-228-4949

21 **OBA Professional Responsibility Commission meeting**; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Dieadra Goss 405-416-7063

OBA Board of Governors meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

24 **OBA Juvenile Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tsinena Thompson 405-232-4453

25 **OBA Day at the Capitol;** 10 a.m.; Oklahoma Bar Center/Oklahoma State Capitol; Contact John Morris Williams 405-416-7000

Ruth Bader Ginsburg Inn of Court; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donald Lynn Babb 405-235-1611

26 **OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa, Tulsa; Contact Eric Johnson 405-602-3812

OBA Work/Life Balance Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Sarah Schumacher 405-752-5565

27 **OBA Women in Law Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with TU College of Law, Tulsa; Contact Allison Thompson 918-295-3604

28 **Oklahoma Bar Foundation luncheon and meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070

1 **OBA Government and Administrative Law Practice Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Scott Boughton 405-717-8957

3 **OBA Lawyers Helping Lawyers discussion group meeting;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City; RSVP to Kim Reber kimreber@cabainc.com

OBA Lawyers Helping Lawyers discussion group meeting; 6 p.m.; University of Tulsa College of Law, John Rogers Hall, 3120 E. 4th Pl., Rm. 206, Tulsa; RSVP to Kim Reber kimreber@cabainc.com

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

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

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Concurrent 'Alter-Ego' Claims

Oklahoma Leads the Nation in Extending Protection to Shareholders, Officers and Directors

By John D. Stiner

During the past several years, practitioners have devoted significant attention to the fate of the Oklahoma Legislature's efforts at, and the Oklahoma Supreme Court's response to, legislative tort reform. However, few noticed the relatively quiet enactment last year of a statute with far-reaching implications for the officers, directors and shareholders of corporations as well as the members and managers of limited liability companies in Oklahoma. This statute — which appears to be the first in the country to effectively circumvent long-standing judicial interpretations of the language of a substantially identical statute found not only in Oklahoma's General Corporation Act, but also in the corporation codes of many other states — offers strong protection to ownership and management of companies against so-called "piercing the veil" lawsuits.

On Nov. 1, 2013, an amendment to Okla. Stat. tit. 12, §682 went into effect. In current form, Section 682(B) now states:

> No suit or claim of any nature shall be brought against any officer, director or shareholder for the debt or liability of a corporation of which he or she is an officer, director or shareholder, until judgment is obtained therefor against the corporation and execution thereon returned unsatisfied. This provision includes, but is not limited to, claims based on vicarious liability and alter ego. Provided, nothing herein prohibits a suit or claim against an officer, director or shareholder for their own conduct, act or contractual obligation arising out of or in connection with their direct involvement in the same or related transaction or occurrence.

The provision, which effectively stays the filing of "alter-ego" or "piercing the corporate veil" claims also applies to the members and managers of limited liability companies.[1] Corporate attorneys will likely recognize that the first sentence of Section 682(B) is merely a duplication of a statute which has existed in Oklahoma's corporation code for almost 30 years. Okla. Stat. tit. 18, §1124(B) states:

> No suit shall be brought against any officer, director or shareholder for any debt of a corporation of which he is an officer, director or shareholder, until judgment is obtained therefor against the corporation and execution thereon returned unsatisfied.

However, almost a decade ago, in *Fanning v. Brown*,[2] the Oklahoma Supreme Court, *in dicta,* rejected the contention that Section 1124(B) applied to stay "alter-ego" claims, stating:

> Subsection (B) of §1124 must be read in relation to subsection (A). Subsection (A) provides that subsection (B) applies only to claims conferred "by the provisions of the Oklahoma General Corporation Act" which permits officers, directors, and shareholders to be held liable for the debts of the corporation in certain instances.

The Oklahoma Legislature's rejection of *Fanning* is reasonable because it is not altogether clear that, as a matter of statutory interpretation, the *Fanning* court's *in dicta* statement was correct. While Section 1124(A) certainly makes clear that creditors have a cause of action against officers, directors and shareholders when they are otherwise liable under other provisions of the corporation statutes, these liabilities were already effectuated and made clear by those other provisions.[3] Subsection (A) does not, in fact, provide that subsection (B) applies only to liabilities conferred by the corporation statutes. In fact, Section 1124(B) goes further, and outlines when suits may be brought "for *any* debt" (as opposed, for example, to specified statutory liabilities) of the corporation. Given that Section 1124(B) uses the phrase "any debt" and Section 1124(A) merely restates obligations already existing under other provisions of the corporation laws, it would seem that a better rule of statutory interpretation would be that the courts should presume that the Legislature has not done a vain and useless thing.[4]

Section 1124(B) is the Oklahoma analog of Section 325(b) of Delaware's Corporation Code. Like the *Fanning* court, courts in other jurisdictions interpreting Delaware's version have held that subsection (b) must be read in conjunction with subsection (a) and only applies to stay the filing of lawsuits alleging liability based upon the provisions of the corporation statutes.[5] These situations would appear to be extremely limited, including, for example, instances in which shareholders of a dissolved corporation are liable for the company's debt following dissolution not in accordance with statutory procedures,[6] or perhaps liability of a shareholder to extent of the unpaid consideration for shares of the corporation to satisfy the claims of creditors of insolvent companies.[7] Interestingly, it would not, according to *Fanning*, apply to shareholder liability based upon *other* provisions of Oklahoma law, such as management's liability for application of amounts to be held in trust under the lien statutes[8] or as a result of the corporation's failure to pay franchise tax.[9]

In any event, the second sentence of Section 682(B) goes beyond Section 1124(B) and makes abundantly clear that its provisions bar the filing of a lawsuit against the officers, directors or shareholders of a corporation based upon an alter-ego or piercing the veil doctrine until a judgment has been rendered against the corporation and execution returned unsatisfied. And, given its "including but not limited to" language, it would also appear to extend that protection to causes of actions or liabilities arising in other provisions of the Oklahoma Statutes beyond those found in the corporation laws. This statute appears to be the first of its kind and affords broad protections to not only officers, directors and shareholders of domestic corporations but also those of foreign corporations in suits brought in Oklahoma courts. Section 682(B) still allows for suits based upon the personal torts or contractual obligations of shareholders, officers and directors, which is in accord with an existing 10th Circuit interpretation of Section 1124(B).[10]

UNCERTAIN CASE LAW

Given the paucity of any particularized statutory or judicial guidelines for alter-ego claims in Oklahoma beyond factors involving a corporation's liability for the debts of a subsidiary, the Legislature's willingness to effectuate a statutory stay of such actions is understandable. For example, trial courts may be hesitant to dispose of the issue on summary judgment given the Supreme Court of Oklahoma's indication that veil-piercing issues "doubtless gives rise to a fact question."[11] Yet, Oklahoma's Uniform Jury Instructions do not contain a standard jury instruction for determinations of such liability. In fact, the courts across the country are split (despite various judicial observations concerning the "weight of authority") whether a party has a right to a jury on such a claim in the first place.[12] Even more perplexing for the trial court is that while equitable claims should ordinarily be tried by the court, the court may in its discre-

tion submit the issue to a jury when the case involves both legal and equitable claims,[13] or may consider the jury's findings advisory only.[14] To make matters worse, to the extent these issues are submitted to a jury, in the absence of uniform instructions, Oklahoma courts may be persuaded to utilize jury instructions based on rather vague and often inapposite standards.

For example, in *Sautbine v. Keller*,[15] the Supreme Court of Oklahoma recognized that the common-law alter-ego theory in Oklahoma has "been amplified to allow application not only for fraud or wrong, but also in cases where the facts require the court to disregard separate existence of the corporation and shareholders in order to protect rights of third persons and accomplish justice." Other courts have held that it may be utilized "when it is essential in the interest of justice to do so, or where the corporate shield is used to defeat an overriding public policy."[16] For example, courts have disregarded the corporate form of a company that failed to satisfy a Workers' Compensation Court award based on public policy without any finding of the usual alter-ego factors.[17] Indeed, jury instructions may simply recite the non-exhaustive list of factors cited in *Frazier v. Bryan Mem. Hosp. Auth*,[18] which were whether:

> 1) the parent corporation owns all or most of the subsidiary's stock,
>
> 2) the corporations have common directors or officers,
>
> 3) the parent provides financing to its subsidiary,
>
> 4) the dominant corporation subscribes to all the other's stock,
>
> 5) the subordinate corporation is grossly undercapitalized,
>
> 6) the parent pays the salaries, expenses or losses of the subsidiary,
>
> 7) almost all of the subsidiary's business is with the parent or the assets of the former were conveyed from the latter,
>
> 8) the parent refers to its subsidiary as a division or department,
>
> 9) the subsidiary's officers or directors follow directions from the parent corporation and
>
> 10) legal formalities for keeping the entities separate and independent are observed.[19]

These factors, which pertain to the corporation-subsidiary relationship (and, if taken literally, effectively eviscerate it as a reliable method of insulation from liability), stand a significant chance of misinterpretation when applied to closely-held corporations with individual or single-member LLC shareholders. Most notably, the notion of "gross undercapitalization" can be particularly threatening to a relatively new enterprise, which may not have yet realized anything other than losses and could serve to defeat the entire purpose of a corporation — limiting liability in order to promote the infusion of risk capital for commercial enterprise. However, defendants' attempts to obtain clarifying instructions relating to undercapitalization have been refused.[20] Similarly, case law is scant with regard to officer and director liability, with only a brief recitation of the standard set forth in *Preston-Thomas Const. v. Central Leasing*[21] in 1973. On top of all this, the issue may be raised for the first time in post-judgment execution proceedings[22] and the statute of limitations has never served as an effective bar for such claims.[23] Section 682(B), which reduces the alter-ego claim in Oklahoma to what amounts to a purely stand-alone equitable declaration by the court of liability for a previously adjudicated and liquidated debt of the corporation, would seem to make clear that such alter-ego claims are equitable and *not* triable to a jury as a matter of right.

UNANSWERED QUESTIONS

Section 682 does leave some questions unanswered. Perhaps most importantly, it is not inconceivable that the corporation would, prior to judgment and execution, file a voluntary petition under Chapter 7 or Chapter 11 of the United States Bankruptcy Code. Would, for example, a claim against the corporation addressed in a confirmed Chapter 11 plan, render the possibility of an actual judgment, let alone one that remained unsatisfied, a virtual impossibility and thus allow the officers, directors and shareholders to avoid a veil-piercing claim altogether? Would this violate Oklahoma's constitutional right of access to the courts[24] or might it constitute a special law regulating the courts' treatment of a special class of plaintiffs — contract or tort creditors of an alter-ego company?[25] Might this encourage requests for abstention by the bankruptcy court or motions to lift the automatic stay to allow claimants to adjudicate their claim in state court during the pendency of the bankruptcy case, thus slowing the administration of the Chapter 11 case while judgments

against the corporation were pursued not for purposes of establishing and liquidating a claim but rather simply in order to establish the statutory predicate for a subsequent alter-ego lawsuit? Additionally, would the doctrine apply to bar declaratory judgments by insurers under fidelity bonds in which the insurer seeks a declaration that the corporate insured was an alter-ego of a malfeasant officer, director or shareholder, thus precluding liability because the bond did not cover loss resulting from the insured's own wrongdoing? Would the statute serve to preclude judicial determinations of alter-ego allegations in determining whether a party is bound by an arbitration agreement when that determination might be used later in the proceedings for liability purposes?[26] How will the corporation's own indemnification obligations to officers and directors be affected given that by the time any suit is brought against those individuals, by definition, corporate resources will be exhausted? These are all matters that may bear judicial interpretation or subsequent amendment.

"Perhaps the most interesting aspects of Section 682 concern the scope of its application."

There are also unanswered questions regarding the language of the statute. Section 682(C) states:

> Subject to the exceptions provided for in subsection B of this section, any claim against an officer, director or shareholder asserting liability against such officer, director or shareholder for the liabilities of a corporation shall not be tried during the same phase of the proceeding in which the issues of liability with respect to the corporation are tried unless there also exists a claim based upon the conduct or act of the officer, director or shareholder of the corporation arising out of the same or related transaction or occurrence.

This subsection appears superfluous. It is difficult to conceive of a scenario in which a claim against the protected class for the company's debt could be tried simultaneously with a claim against the company for the same liability when subsection (B) already makes clear that no such claim may be brought until judgment has been obtained against the corporation. Perhaps the only reasonable construction of subsections (B) and (C) is that subsection (C) merely clarifies that claims against officers, directors and shareholders for their independent liabilities may indeed be tried in the same proceeding.

Perhaps the most interesting aspects of Section 682 concern the scope of its application. Section 682(D), which extends the statute's protection afforded officers, directors and shareholders of corporations to members and managers of limited liability companies, states: "Members and managers of limited liability companies shall be afforded the same *substantive and procedural* protection from suits and claims as the protections provided to officers, directors and shareholders of a corporation as set forth in subsections B and C of this section." The use of the phrase "substantive and procedural" may be critical in the interpretation of the law's scope. To the extent the statute is considered procedural in nature, then it may also apply to suits in Oklahoma courts brought against the officers, directors and shareholders of not only Oklahoma but also foreign corporations. Moreover, if the statute is considered procedural, would it apply retroactively to lawsuits pending as of its effective date of Nov. 1, 2013?[27] Finally, if considered a substantive matter of corporation law, then it should apply, at least with respect to Oklahoma corporations, in federal court.[28]

Section 682 represents an important step by the Oklahoma Legislature in effectuating the centuries-old policy underlying the corporate entity — limited liability. Potential plaintiffs will, with the benefit of the tolling provisions of Section 682(E), have to first obtain a judgment against the corporation itself and determine whether it may be satisfied before exposing ownership and management to what could be needless litigation expense.

1. Okla. Stat. tit. 12, §682(D)(Supp. 2013).
2. 2004 OK 7 at n.8, 85 P.3d 841, citing *Lone Star Indus., Inc. v. Redwine*, 757 F.2d 1544, 1553 (5th Cir. 1985).
3. *See infra* at n.5 and n.6.
4. *State ex rel. Okla. Dept. of Public Safety v. Gurich*, 2010 OK 56, ¶25.
5. *Pinellas County v. Great Amer. Indus. Group, Inc.*, No. 90 C 5254, 1991 WL 259020 at *3 (N.D. Ill. Dec. 2, 1991); *Shirley v. E & E Trucking Co.*, No. Civ. A 0014-0686, 1987 WL 860828 at *1 (Del. Com. Pl. May 6, 1987);
6. Okla. Stat. tit. 18, §1100.3 (2011).
7. *Id*. at §1043(A). It should be noted, however, that Section 1043(B) seems to contain its own analog to Section 1124(B) with regard to when a suit for such liability may be brought.
8. Okla. Stat. tit. 42, §153(2) (2011).
9. Okla. Stat. tit. 68, §1212(B) (2011).

10. *Okla. Federated Gold & Numismatics, Inc.*, 24 F.3d 136, 141 (10th Cir. 1994).

11. *Frazier v. Bryan Mem. Hosp. Auth.*, 1989 OK 73, ¶16, 775 P.2d 281.

12. *See e.g., Iantosca v. Benistar Admin. Services, Inc.*, 843 F. Supp. 2d 148, 153 (D. Mass. 2012)(holding right to jury trial on alter-ego theory where money judgment, as opposed to declaration, sought); *U.S. v. Vacante*, No. 1:08cv1349 OWW DLB, 2010 WL 2219405 at **3-4 (E.D. Cal. June 2, 2010)(collecting cases and holding that right to jury trial applied where money judgment sought); *but see International Financial Services Corp. v. Chromas Technologies Canada, Inc.*, 356 F.3d 731 (7th Cir. 2004)(finding no right to jury trial on alter-ego claim); *Advanced Telephone Sys., Inc. v. Com-Net Professional Mobile Radio, LLC*, 846 A.2d 1264 (Pa. Super. Ct. 2004)(finding no state constitutional right to jury trial on alter-ego claim); *In re Thorn*, 788 So.2d 140 (Ala. 2000)(finding no right to jury trial on alter-ego claim). It should be noted that in *Maxxum Constr., Inc. v. First Comm. Bank*, 2011 OK CIV APP 84, ¶9, 256 P.3d 1058, the court indicated both that a piercing the veil claim was "purely equitable" and then, in the next sentence, stated that it was "predominantly equitable." In *Puckett v. Cornelson*, 1995 OK CIV APP 72, ¶11, 897 P.2d 1154, the court held that "an action against a corporate officer or shareholder to recover on a corporate debt stands purely in equity."

13. *I.C. Gas Amcana, Inc. v. J.R. Hood*, 1992 OK 119, ¶8, 855 P.2d 597. On the other hand, if the equitable claims are paramount, there is no right to a jury. *Butcher v. McGinn*, 1985 OK 58, ¶8, 706 P.2d 878.

14. *Ray v. Masters*, 1967 OK 159, ¶0, 429 P.2d 991.

15. 1966 OK 29, ¶15, 423 P.2d 447.

16. *King v. Modern Music Co.*, 2001 OK CIV APP 126, ¶17.

17. *Thomas v. Vertigo, Inc.*, 1995 OK CIV APP 45, ¶¶7-10, 900 P.2d 458. Thomas is interesting in that the court seemed to agree to that Section 1124(B) of the corporation statutes indeed barred a claim against an officer, director or shareholder until judgment against the company was returned unsatisfied. *Id*. at ¶12.

18. 1989 OK 73, ¶17, 775 P.2d 281; *see also Gilbert v. Sec. Fin. Corp. of Okla.*, 2006 OK 58, ¶23, 152 P.3d 165.

19. Even factors as vague as "commonality of purpose" have been recognized as applicable. *Pennmark Resources Co. v. State ex rel. Okla. Corp. Comm'n.*, 2000 OK CIV APP 63, ¶16, citing *Oliver v. Farmers Ins. Group of Cos.*, 1997 OK 71, ¶8, 941 P.2d 985.

20. *Gilbert*, 2006 OK 58 at ¶25.

21. 1973 OK CIV APP 10, ¶¶8-9.

22. *Sproles v. Gulfcor, Inc.*, 1999 OK CIV APP 81, ¶¶2-3, 987 P.2d 454.

23. *Boulden v. Colbert Nursing Home, Inc.*, 2011 OK CIV APP 21, ¶17, 249 P.3d 105 ("[S]hareholder liability for a corporation's judgment may be litigated — on a corporate veil or alter-ego theory of recovery — after the statute of limitations on the underlying claim has expired").

24. Okla. Const. Art. II, §6.

25. Okla. Const. Art V, §46.

26. *Carter v. Schuster*, 2009 OK 94, ¶14, 227 P.3d 149.

27. *Walls v. Amer. Tobacco Co.*, 2000 OK 66, ¶24, 11 P.3d 626.

28. *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

ABOUT THE AUTHOR

John D. Stiner is a shareholder with McAfee & Taft in its Oklahoma City office. He practices primarily in the areas of business law; litigation; banking and financial institutions; and business restructuring, workouts and bankruptcy. He has experience litigating a variety of matters in state and federal courts across the country. He is a 1993 graduate of the Edmond A. Walsh School of Foreign Service at Georgetown University and a 1998 graduate of the OU College of Law.


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But It's Mine

The Signer Versus Joint Owner Problem with Bank Accounts

By Brandee Hancock

Imagine this scenario: mom walks into the bank and tells the customer service representative, "I would like to add my son to my bank account so he can help me pay my bills." Without any further conversation, the representative hands the client a new signature card with son on the account. Mom signs it without further examination. It happens all the time.

But what many customers do not know is there are different ways of accomplishing adding son to the account. Suppose mom intended son only to sign checks occasionally to help her out, but the representative misunderstood or didn't understand the available options and the new signature card she signed changed the ownership to joint with rights of survivorship with son, rather than simply adding him as an authorized signer. Now we have a problem.

Mom dies a few years later with a will leaving everything to daughter and son equally. So mom's assets get divied up between daughter and son and everyone lives happily ever after, right? Not so fast.

When a joint owner with rights of survivorship is added to an account, the account becomes exactly that — a joint account with rights of survivorship. A will has no effect on the account until the surviving owner dies, so mom's will doesn't apply because the account is a nonprobate asset at her death. By operation of law, son now gets the money because he's the surviving joint owner. Maybe son is an honest guy and gives his sister her half as mom intended. Or maybe he really needs or wants the money and decides to keep it. The result? Daughter is livid, and rightfully so — her mother's wishes were not met and daughter doesn't get her share of the money. But does she have any rights to pursue half of the account mom intended her to receive?

Joint tenancies are defined in Oklahoma Statutes as an interest "owned by several persons in either real or personal property in equal shares, being a joint title created by a single instrument, will or transfer when expressly declared in the instrument."[1] Four unities are required for joint tenancies: time, title, interest and possession.[2] When a joint tenant dies, title to the whole property vests in the surviving joint tenant and the property is not included in the probate estate of the deceased joint tenant.[3] In Oklahoma, there are two ways to create a joint tenancy: by express language in a written instrument or by "intentionally and intelligently" creating the "essential elements of joint ownership and survivorship."[4]

In *Peyton v. McCaslin*, the Oklahoma Supreme Court found that a constructive trust existed in favor of the decedent's heirs for a bank account clearly designated as a joint tenancy account.[5] Mr. Peyton had a will which divided his estate

between his niece and nephews.[6] Mr. Peyton met Mr. McCaslin, the husband of one of Mr. Peyton's nieces, at the banks where his money was kept.[7] Mr. Peyton destroyed his will, leaving only the list of names and addresses of his heirs, and established joint tenancy accounts with Mr. McCaslin.[8]

During his life, Mr. Peyton generally managed his own finances, but Mr. McCaslin occasionally wrote checks on the joint account and indicated in the signature he was signing on behalf of Mr. Peyton.[9] Mr. McCaslin never used the money in the joint accounts for himself while Mr. Peyton was alive.[10] After Mr. Peyton's death, Mr. McCaslin used the money to pay Mr. Peyton's funeral expenses, inheritance tax and bills and transferred the balance to Mr. McCaslin's own account.[11]

> **"Beyond the practical impact of a beneficiary losing his or her share of an incorrectly designated account, the emotional impact is huge."**

After buying a truck for himself and determining the value of the services he provided to decedent's estate, Mr. McCaslin then offered to divide the remainder among the remaining heirs.[12] The heirs filed suit, alleging the evidence established a constructive trust for their benefit with Mr. McCaslin having only a legal interest.[13] In deposition, Mr. McCaslin stated that Mr. Peyton wanted him to divide the money if any was left, but later denied making the statement.[14]

The Oklahoma Supreme Court agreed with the heirs, finding that the clear weight of the evidence established a constructive trust for the benefit of the heirs, despite the creation of the joint tenancy account between Mr. Peyton and Mr. McCaslin.[15] The court acknowledged that the burden of establishing a constructive trust falls upon the party alleging such trust existed and the evidence must be "clear, unequivocal and decisive."[16]

But in 2011, the Oklahoma Supreme Court appeared to change course.[17] Decedent established a bank account with his nephew, designating the nephew as a joint tenant with rights of survivorship, which was clearly indicated on the signature card.[18] Decedent and his nephew verbally agreed that, during decedent's life, nephew would exercise no control over the account.[19] In accordance with this agreement, nephew made no deposits or withdrawals to the account.[20] The account was not included in the probate estate and the beneficiaries of decedent's will objected to the accounting, alleging the joint tenancy account should be included.[21]

The district court agreed and imposed a constructive trust.[22] But the Oklahoma Supreme Court disagreed, finding that that the record clearly indicated decedent's intent to create a joint tenancy with nephew.[23] The court based its decision on the express language of the signature card, holding that this created an express joint tenancy and contract law controlled.[24] Because the parties' intent was clear from the four corners of the contract, the trial court erred by considering evidence of the parties' intent.[25]

Three justices disagreed, and in a written dissent noted that the court's decision to ignore parol evidence would "eviscerate" the established rulings on the issue.[26] The dissent noted that the district court found decedent intended the money to be used for his expenses during life and to be divided among his will beneficiaries at his death.[27] Because the district court was in the best position to evaluate the evidence, the dissent found clear and convincing evidence existed to establish a constructive trust.[28]

Given the current law, daughter doesn't have much chance of succeeding in a suit to establish a constructive trust and recover her share of the money from the account, particularly if the signature card expressly indicated joint ownership. This scenario could have been avoided entirely if mom's account had been designated correctly.

Beyond the practical impact of a beneficiary losing his or her share of an incorrectly designated account, the emotional impact is huge. The wronged children are likely to be bitter and angry at the child who kept the money. In one case we litigated, the excluded children brought it up every time any decision about the remaining estate needed to be made and they are now barely speaking to the child who received the money. Keep in mind this case had substantial assets and, in the overall scheme, the amount kept by the sibling wasn't significant. But the decision to keep the money created a rift with the siblings that may never be repaired. It was the principle of what was done, not the amount — the siblings simply felt wronged.

Carrying out the client's intent is the key. As practitioners, we should advise estate-planning clients to check the ownership of their bank accounts and make sure it is in line with what they really want. Joint ownership and payable-on-death designations can be an effective estate-planning tool when used properly. Make sure clients understand that a will does not control a quarrel over joint accounts or accounts controlled by payable-on-death designations. Advise the client that adding one child as a co-owner because the client is confident the child will "do the right thing" upon the client's death places that child in a difficult position and is a bad idea. Doing so means the child has complete control over the account and might be tempted to "do the wrong thing." Help the client fully understand the available options and choose the best alternative to accomplish the client's intent.

Customers will often make changes to the account without consulting an attorney, so the duty to inform falls (or should fall) to the bank. We should also advise bank clients to make sure customer service representatives are properly trained to understand the ramifications of joint ownership, payable-on-death designations, and adding authorized signers. It keeps the bank out of later litigation and, more importantly, assists their customers with accomplishing what the customer needs. Have a fact sheet available comparing the features of joint ownership, payable-on-death designations, and authorized signers. Inform customers of the consequences of changing ownership. Make sure they understand that joint ownership of the account or a payable-on-death designation will control, regardless of what the customer's will says. At the end of the day, everyone will be happier.

1. 60 Okla. Stat. Ann. §74.
2. *Shackelton v. Sherrard*, 1963 OK 193, ¶12, 385 P.2d 898, 901.
3. T*oma v. Toma*, 2007 OK 52, ¶11, 163 P.3d 540, 544.
4. *Raney v. Diehl*, 1971 OK 28, ¶18, 482 P.2d 585, 590.
5. *Peyton v. McCaslin*, 1966 OK 4, 417 P.2d 316.
6. *Id*. at ¶2, 417 P.2d at 318.
7. *Id*. at ¶3, 417 P.2d at 318.
8. *Id*.
9. *Id*. at ¶4, 417 P.2d at 319.
10. *Id*.
11. *Id*.
12. *Id*.
13. *Id*. at ¶8.
14. *Id*. at ¶16.
15. *Id*. at ¶14.
16. *Id*. at ¶18.
17. *Estate of Metz*, 2011 OK 26, 256 P.3d 45.
18. *Id*. at ¶2, 256 P.3d at 46.
19. *Id*.
20. *Id*.
21. *Id*. at ¶4, 256 P.3d at 47.
22. *Id*.
23. *Id*.
24. *Id*. at ¶10, 256 P.3d at 49.
25. *Id*. at ¶14, 256 P.3d at 50.
26. *Id*. at ¶1, 256 P.3d at 51.
27. *Id*.
28. *Id*. at ¶5, 256 P.3d at 52.

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777

The Court of Competent Jurisdiction: Is That Your Final Answer?

By Spencer C. Pittman

This article provides a brief historical context and recent developments in tort-claim jurisdictional issues for federally recognized Oklahoma Indian tribes operating under the Oklahoma Model Tribal-State Gaming Compact. This article specifically explores federal and Oklahoma state court statutory interpretations defining "court of competent jurisdiction" under Okla. Stat. tit. 3A §281 and implications for future litigation.

With 33 Indian tribes operating a total of 115 gaming facilities, Oklahoma has been officially named as the number two gaming state in the country. In 2011, Oklahoma Indian casino revenues totaled $3.48 billion, an increase of 7.7 percent since 2010.[1] The gaming sector has been, and will be, a growing industry for Indians. Accordingly, Indian gaming law is constantly in development and has become a popular topic of discussion for both the media and for lawyers who are either defending a tribal gaming client or looking to bring a tort or prize claim against a casino.

The proper jurisdiction for tort claims and prize-related claims arising out of tribal entities and casinos has fluctuated between the tribal courts and state courts over the past two decades, creating ambiguity and confusion.[2] Oklahoma has recently been the center of a substantial transformation in regards to this jurisdictional issue. The fundamental question presenting itself to practitioners is, "when will we receive a final answer?" After nearly a decade of continuous statewide litigation, lawyers can rest assured, for there appears to be a uniform and a conclusive answer. This article serves to inform practitioners of these developments and the final answer as to where to file suit should a client wish to pursue a tort or prize claim against a gaming tribe within the state.

Under the doctrine of sovereign immunity, federally recognized Indian tribes are protected from state suit, have the authority to enact substantive internal law and may enforce their law in their own forums.[3] Unless abrogated by Congress or expressly and unequivocally waived by the tribe, sovereign immunity will prohibit suit against the tribe both on and off the tribe's reservation.[4]

Prior to 1988, gaming in the U.S. was heavily unregulated and Indian gaming operations drastically expanded in size and number. Tribal nations across the country joined in the surge to build and operate bingo halls to reap the benefits from their substantial revenue. In response, states sought exclusive gaming regulatory authority, *e.g.*, taxation of bingo hall revenue, and multiple lawsuits ensued. The

abundance of litigation prompted Congress to take action giving rise to the formulation of the Indian Gaming Regulatory Act (IGRA).[5]

Congress justified the enactment of IGRA by citing the sheer number of Indian tribes operating gaming facilities as a source of revenue, the lack of standards for approval of management contracts involving Indian gaming and vague federal regulation of gaming on Indian lands. Furthermore, IGRA expounds on the necessity to adhere to tribal self-sufficiency and sovereignty.[6] This legislation provides the regulatory and jurisdictional framework for Indian gaming while giving states a limited ability to control the scope and extent of Class III gaming. Class III gaming includes all other forms of gaming that are not included in the scope of Class I gaming (social games for minimal value) or Class II gaming (*e.g.*, bingo or pull-tabs).[7]

The primary effect of IGRA is to authorize compact negotiations between a tribe and a state for gaming purposes. Tribal-state gaming compacts are contractual in nature and must adhere to the procedural requirements of the IGRA under 25 U.S.C. §2710(d). On Nov. 2, 2004, Oklahoma voters approved a referendum enacting a Model Tribal-State Gaming Compact, which served as a pre-approved offer to all federally recognized Oklahoma Indian tribes.[8] Since the adoption of Oklahoma's Model Tribal-State Gaming Compact, 34 individual federally recognized tribes located in Oklahoma have successfully negotiated and ratified this compact.[9]

Virtually all tribal-state gaming compacts across the nation contain a provision for limiting tribes' rights to waive sovereign immunity for tort or prize claims. Part 6 of Oklahoma's Model Tribal-State Gaming Compact requires patrons of enterprise facilities to be given due process when seeking and receiving just and reasonable compensation for torts claims against the tribal gaming facility, resulting in personal or property injury. To ensure compliance with this provision, tribes are required to maintain minimal public liability insurance.[10] In addition, Part 6, subsection C of the Oklahoma Model Tribal-State Gaming Compact requires tribal consent "to suit against the enterprise in a court of competent jurisdiction with respect to a tort claim or prize claim."[11] Oklahoma's Model Tribal-State Gaming Compact fails to define "court of competent jurisdiction," which became the determinative issue of cases thereafter.

Subsequent to the enactment of the Oklahoma Model Tribal-State Gaming Compact, extensive litigation has ensued in the attempt to define "court of competent jurisdiction."[12] The genesis of this litigious battle began with *Bittle v. Bahe*,[13] where the state court found congressional abrogation for dram shop liability claims against Indian tribes and permitted liquor-based tort claims against the tribes to be brought in state court. In 2004 while driving on State Highway 9 in Pottawatomie County, the defendants crossed over the centerline of the highway and collided head-on with the plaintiff resulting in substantial injury and the death of Bahe. In addition to a personal injury suit against Bahe and Tsosie, Bittle also alleged liability against the Absentee Shawnee Tribe Inc., under a theory of dram shop liability for knowingly and excessively serving alcohol to an obviously intoxicated casino patron.[14] Early into the litigation, the tribe filed a motion to quash service of process. The district court found tribal sovereign immunity barred suit against the tribe in state court and dismissed the cause of action against the tribe.[15] After affirmation by the Court of Civil Appeals, Division 3, the Supreme Court of Oklahoma granted *certiorari* review on the issue of tribal sovereign immunity and found:

> The Tribe acknowledged that [18 U.S.C.] §1161 might allow the state to bring an action in state court against the Tribe to enforce the state liquor laws, even though it urged a private party cannot. With this acknowledgment, the Tribe tacitly concedes that Congress intended the Tribe to be subject to state court jurisdiction when it enacted §1161.[16]

Under this assumption, the Supreme Court of Oklahoma ruled that the Absentee Shawnee Tribe's casino acted essentially as a corporation when the tribe applied for and obtained a state license to serve alcoholic beverages for on-premises consumption by casino patrons. Accordingly, the court found this liquor license waived any tribal sovereign immunity to be sued in state court based on alleged violations of liquor-related torts.[17] This result posited a fundamental issue for tribal sovereign immunity. If Oklahoma found congressional abrogation for dram shop liability under *Bittle v. Bahe*, should other tort-based claims subject tribes to state court as well?

Shortly after *Bittle v. Bahe*, three separate tort-based claims were brought in state court against

Oklahoma federally recognized tribes. *Griffith v. Choctaw Casino of Pocola*[18] and *Dye v. Choctaw Casino of Pocola*[19] involved tort-based claims filed in LeFlore County against the Choctaw Casino of Pocola, a gaming facility owned and operated by the Choctaw Nation of Oklahoma. Respectively, the cases involved a casino patron tripping on a flowerbed resulting in injury, and a casino patron being struck by an employee driving a casino shuttle cart in the casino parking lot. *Cossey v. Cherokee Nation Enterprises*[20] involved a tort-based claim in Rogers County against the Cherokee Nation after a casino patron fell backwards in a chair resulting in injury. The district courts for *Griffith, Dye* and *Cossey* ruled that the state court was a "court of competent jurisdiction" and was a proper venue for tort-based claims asserted against the tribes.

Griffith, Dye and *Cossey* reached the Supreme Court of Oklahoma, where the tribes argued that sovereign immunity vested exclusive civil-adjudicatory rights to the tribal courts. The Supreme Court of Oklahoma disagreed and interpreted the language of Okla. Stat. tit. 3A §281, Pt. 6(C)(1) to vest civil-adjudicatory jurisdiction with the state. This holding established proper jurisdiction for tort claims and prize claims against the tribes in any court of competent jurisdiction, including state district courts. For example, the court in *Griffith* found that "[n]othing in the compact provides that patron tort claims are to be adjudicated only in tribal court. Had that been the intent of the tribes and the state, the simple words 'in tribal court only' could have been included in the compact."[21] With the exception of New Mexico[22], Oklahoma has been the only state with a Tribal-State Gaming Compact (out of 24 other states) to permit civil-adjudicatory jurisdiction in the state court.

The tribes sought an alternative avenue to seek relief. Okla. Stat. tit. 31 §281, Pt. 12(2) provides:

> "In the event that either party to this Compact believes that the other party has failed to comply with any requirement of this Compact, or in the event of any dispute hereunder, including, but not limited to, a dispute over the proper interpretation of the terms and conditions of this Compact… either party may refer a dispute arising under this Compact to arbitration … subject to enforcement or pursuant to review as provided by paragraph 3 of this Part by a federal district court… The parties consent to the jurisdiction of such arbitration forum and court for such limited purposes and no other..."

This provision provides a binding dispute resolution clause on the tribe and the state if issues in compact language interpretation arise. On July 20, 2009, the same year as the holdings in *Griffith, Dye* and *Cossey*, the Choctaw Nation and the Chickasaw Nation invoked this arbitration tool against the state of Oklahoma seeking a declaratory ruling on the jurisdictional issue of tort claims and prize claims arising from Class III gaming facilities.[23]

On Aug. 25, 2009, the arbitrator between the nations and the state of Oklahoma issued the arbitration award in favor of the Choctaw and Chickasaw nations. The award explained the Oklahoma Model Tribal-State Gaming Compact did not waive tribal sovereign immunity and state courts did not retain any civil-adjudicatory jurisdiction over non-Indians' tort or prize claims arising out of Indian casinos. While tribal governments have generally been known to have the right to waive sovereign immunity, the waivers must be unequivocally expressed or abrogated by the federal Congress.[24] The Model Tribal-state gaming Compact was found to contain no congressional abrogation of the tribes' sovereign immunities. The arbitration award was subsequently certified in the Western District of Oklahoma. The certification also permitted a permanent injunction against the state of Oklahoma and all appropriate state agents/officials from asserting any civil-adjudicatory jurisdiction over tort or prize claims against the compacted tribes.[25] Various other state gaming tribes have followed the lead of the Chickasaw and Choctaw nations in obtaining similar arbitration awards to keep their tort and prize claim cases out of state court.

The arbitration award and subsequent federal court affirmation should have resulted in the conclusion of the "court of competent jurisdiction" issue. However, practitioners are still attempting to bring tort and prize claims against the both the Choctaw and Chickasaw nations in Oklahoma state courts. These cases have been correctly dismissed due to lack of jurisdiction in compliance with the federal enjoinment.[26]

To address this recurring issue of where to file tort and prize claims against compacted

Oklahoman tribes, the Supreme Court of Oklahoma decided to rehear the issue in light of their previous holdings in *Griffith, Dye* and *Cossey*. In September of 2013, *Sheffer v. Buffalo Run Casino, PTE, Inc.* was presented to the court on appeal from Ottawa County.[27] *Sheffer* involved a personal injury suit following a car accident. Two employees of Carolina Forge had been drinking at the Peoria Tribe of Oklahoma's Buffalo Run Casino on a business trip and collided with the plaintiff's vehicle in their leased rental vehicle. The plaintiffs brought suit against Carolina Forge on the tortious theories of *respondeat superior* and negligent entrustment. They also brought suit against Buffalo Run Casino, the Peoria Tribe of Indians and PTE Inc., under a dram-shop liability theory. The trial court dismissed Buffalo Run Casino, the Peoria Tribe of Indians of Oklahoma, and PTE Inc. based upon tribal sovereign immunity and the aforementioned developments in Oklahoma Indian jurisdictional law.

The Supreme Court of Oklahoma provided an extensive analytical and procedural history on the issue of defining "court of competent jurisdiction" and ultimately held that Oklahoma's Model Tribal-State Gaming Compact is not to be construed as giving the state court civil-adjudicatory jurisdiction. Concurring with the *Choctaw Nation of Oklahoma and Chickasaw Nation* arbitrator, the court found neither congressional abrogation nor tribal waiver of sovereign immunity. In conformity with this holding, the precedential issues presented in *Dye*, *Cossey* and *Griffith* were overruled.[28] Furthermore, the Supreme Court of Oklahoma overruled its holding of *Bittle v. Bahe* and found that the application and receipt of a state liquor license "is nothing more than a promise to comply with state liquor laws, not a voluntary waiver of sovereign immunity for private party lawsuits."[29]

With affirmations by both federal and state courts, the tribal court is now the exclusive "court of competent jurisdiction" for tort and prize claims under the Oklahoma Model Tribal-State Gaming Compact. The uniformity in the state and federal court rulings appear to be the final answer to the jurisdictional question, at least for the near future. Practitioners should not expect to see a material change until Jan. 1, 2020, the date of expiration of Oklahoma's Model Tribal-State Gaming Compacts.[30]

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2. D. Michael McBride III, "Indian Gaming Compacts in Oklahoma: Respecting Tribal Jurisdiction and Enforcing Understanding — A Continuing Role for Class II Gaming," *Indian Gaming* 14 (May 2010).
3. *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751; *Williams v. Lee*, 358 U.S. 217, 223 (1959).
4. *Romanella v. Hayward*, 933 F.Supp. 163 (D. Conn. 1996).
5. 25 U.S.C §§2701-21.
6. To regulate gaming on Indian lands, Pub. L. no. 100-497, 102 Stat. 2467, Sec. 2(3) (1988).
7. 25 U.S.C. §2703(7)(A)(i)-(ii)).
8. State Question No. 712, Legis. Ref. No. 335, approved at the general election held Nov. 2, 2004.
9. Compacted Tribes, oklahoma.gov, available at: http://goo.gl/SUxOoC.
10. Okla. Stat. tit. 3A §281, Pt. 6.
11. Id. at (C)(1).
12. *Griffith v. Choctaw Casino of Pocola, Okla.*, 230 P.3d 488 (Okla. 2009); *Dye v. Choctaw Casino of Pocola, Okla.*, 230 P.3d 507 (Okla. 2009); *Cossey v. Cherokee Nation Enterprises, LLC*, 230 P.3d 488 (Okla. 2009).
13. 230 P.3d 488, 490.
14. *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (Okla. 2008).
15. *See generally* Okla. Stat. tit. 37 §537(A)(2)("No person shall… Sell, deliver or knowingly furnish alcoholic beverages to an intoxicated person…").
16. *Id.* at ¶¶4-5.
17. *Id.* at ¶35; 18 U.S.C. §1161 prohibits the furnishing of intoxicating liquor in Indian country unless the furnishing conforms to both state law where the furnishing occurs and "with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register."
18. 2008 OK 10, at ¶55.
19. *Griffith v. Choctaw Casino of Pocola, Okla.*, 2009 OK 51, 230 P.3d 488 (Okla. 2009).
20. *Dye v. Choctaw Casino of Pocola, Okla.*, 2009 OK 52, 230 P.3d 507 (Okla. 2009).
21. *Cossey v. Cherokee Nation Enterprises, LLC*, 2009 OK 6, 230 P.3d 488 (Okla. 2009).
22. *Doe v. Santa Clara Pueblo*, 141 N.M. 269, 280, 154 P.3d 644 (N.M. 2007).
23. *Class III Gaming Compact Jurisdiction-Related Disputes Jointly Referred to Binding Arbitration by the Choctaw Nation of Oklahoma, The Chickasaw Nation, and the State of Oklahoma, Arbitration Award* (Aug. 25, 2009)(Phillips, Arb.).
24. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).
25. *Choctaw Nation of Oklahoma and Chickasaw Nation v. State of Oklahoma*, No. CIV-10-50-W, 724 F.Supp.2d 1182, 1186 (W.D. Okla. 2010).
26. *Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino*, 508 F.App'x 821 (10th Cir. 2013), cert. denied, 133 S.Ct. 2038 (2013).
27. 2013 OK 77, 315 P.3d 359.
28. *Id.*
29. *Id.* at ¶45 (quoting *Bittle v. Bahe*, 2008 OK 10, 192 P.3d 810 (Okla. 2008)).
30. Okla. Stat. tit. 3A §281, Pt. 15(B).

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Residential Construction Defect Cases in Oklahoma

By Douglas J. Shelton and Brianna Tipton

It's moving day. You and your family are moving into a newly built home designed and constructed just for you. This home has been a dream of yours for years. You love that it smells so fresh and new. You can already imagine the family gatherings, barbeques and quiet nights watching the sunset on the porch.

But shortly after moving in, the roof begins to leak. You notice cracks developing in your walls; water has gotten into the air ducts; the windows drip when it rains and howl in the wind. You can't believe this is happening. This is a brand new home. You realize that your dream home has turned into your worst nightmare.

Because it is new, you know that the problem has to be the construction of the home so you contact your builder. He sympathizes with you, tells you that he is sure the problem is superficial and he sends over his subcontractors. They caulk a few areas, a "band-aid" repair. The problems persist. After multiple calls to the builder and the continuation of the "band-aid" repairs, you realize you are on your own. You hire a structural engineer and he tells you there are numerous building code violations. In the meantime, the builder will no longer return your calls, letters or emails. With every rain, the family is up in the middle of the night putting buckets in the attic and towels around windows. It's beyond stressful. Your spouse continues pressuring you to get something done, but what? It appears the only recourse you have is to hire an attorney to determine who are the responsible parties and get the problems properly repaired. You have now entered the realm of residential construction defect litigation.

POTENTIAL PARTIES

There are several potential parties in a case regarding construction defect. Most commonly, the buyer is the plaintiff. The builder/general contractor is generally the primary defendant. Because most contractors use several different subcontractors, there may be multiple defendants depending on the specific defects. Individual subcontractors may be solely responsible for the defects, but a general contractor has the obligation to oversee the work and therefore, they are almost always included in the suit.

THEORIES OF LIABILITY

There are several theories of liability in which a residential construction defect claim can be brought. These include: breach of contract; breach of express warranty; breach of implied warranty; and negligence, which may encompass common law negligence, negligence *per se*, and accepted work doctrine.

Breach of Contract

The purchase contract, as daunting as it is, must be read. Most, if not all, construction contracts are prepared by a builder or his counsel,

to completely protect and discharge a builder's liability, and often include asking the buyer to waive numerous rights they may otherwise have. Several Oklahoma cases have commented on how important it is for people to read the contracts they sign. "Generally, if a party to a contract can read and has the opportunity to read the contract but fails to do so, he cannot escape its liability."[1] "Regardless of whether [a party] remembers reading the [contract] prior to signing it, [he] cannot escape the conditions of the contract by claiming [he] failed to read it."[2]

What case law stresses is the importance of knowing what rights and obligations a contract confers on the parties. Understanding the contract before it is signed can save everyone a lot of time, effort, money and undue suffering.

Parameters of the Suit with Regard to the Contract

In the *Flint Ridge* case, the Oklahoma Supreme Court held "the purchaser of a home can seek to recover in contract for defects in the structure itself as such defects render the home less than the purchaser bargained for."[3] The court went on to state:

> …where the plaintiff seeks to receive what the builder promised to deliver, or damages to compensate him for structural deficiencies in the final product, the action arises from the contract of sale between the parties and is basically contractual in nature. The purchaser can also seek to recover in tort for injuries sustained due to the contractor's failure to construct the home as a reasonable contractor would.[4]

What *Flint Ridge* tells us is that a homeowner can sue under breach of contract theory for defects in the structure that render the home less than what was bargained for. A recent example of this came about during a case that our firm successfully tried. In part, the plaintiff alleged that he bought the new home expecting it to be in a new and properly working condition. When the home was found to have multiple water intrusions from the sub-floor, windows, roof and walls, the claim was made that this was not what the homeowner believed he was purchasing. During the damages phase of the trial, the plaintiff argued he was entitled to what he had paid for and was expecting — a new, properly functioning home. The jury agreed, finding for the plaintiff.

Flint Ridge also tells us that if a homeowner is injured due to failure of the builder/general contractor to perform the contract as a reasonable contractor would, the homeowner can seek recovery in tort alongside the contractual claim,[5] *see* discussion of negligence theories of liability, *infra*. This gives homeowners two theories of liability under which to hold the builder/general contractor liable for damages to the home or injury to the individual.

Breach of Express Warranty

Generally, building contracts contain a written limited warranty that states the material and workmanship will conform to certain performance standards set out within the contract for a specified amount of time. This is the express warranty. The performance standards set a contractual bar for the workmanship and material and set out the repairs the builder/general contractor will be responsible for.

> Okla. Stat. tit. 12A, §2-313 addresses the creation of an express warranty.
>
> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

The question of the existence of an express warranty is one for the trier of fact.[6]

"In order for an express warranty to exist, there must be an absolute assertion understood by the parties pertaining to the merchandise

sold."[7] "Comment 4 to section 2-313 of the UCC notes that "the whole purpose of the law of warranty is to determine what it is that the seller has in essence agreed to sell."[8] And "recovery under warranty provisions .... applies to losses flowing from the sales contract."[9]

To prove a breach of express warranty, a buyer must prove: 1) existence of the express warranty; 2) the home did not comply with the express warranty; and 3) failure to comply with the express warranty caused damages. A buyer will need to begin by proving the existence of the express warranty. This will often be titled something like "Builder's One Year Limited Home Warranty" in a home purchase contract. Once the existence of the express warranty is established, the next element is proof that the home did not comply with the terms set out in the express warranty. Failure of the builder/general contractor to satisfy the standards or make repairs set forth in the warranty fulfills this element. "It is sufficient if... the evidence shows, either directly or by permissible inference, that the goods were defective in their performance or function or that they otherwise failed to conform to the warranty."[10] The final element is to prove the failure to meet the standards set out in the warranty caused damage. Like any contract, a warranty is negotiable, depending on the willingness of the builder to negotiate off his "usual warranty."

Breach of Implied Warranty

Purchase contracts have implied warranties that operate as a theory of liability if the builder/general contractor fails to construct the home properly. These warranties are not in writing and are above and beyond any written warranty; they are warranties implied by law. In J*eanguneat v. Jackie Hames Constr.*,[11] the Oklahoma Supreme Court found:

> When a builder-vendor sells a new home, he or she impliedly warrants that the new home is or will be completed in a workmanlike manner and is or will be reasonably fit for occupancy as a place of abode, in the absence of an agreement to the contrary, and that such an implied warranty exists as a matter of law, both when the new home being sold is completely constructed, and when, at the time of sale the house is being constructed or is to be constructed.[12]

This is often referred to as the implied warranty of habitability. The court goes on to define "builder-vendor" as:

> A person who is in the business of building or assembling homes designed for dwelling purposes upon land owned by him, and who then sells the houses, either after they are completed or during the course of their construction, together with the tracts of land upon which they are situated, to members of the buying public.[13]

The *Jeanguneat* line of thinking regarding the implied warranties was expanded in *Elden v. Simmons*.[14] The *Elden* court held:

> (1) the duration of the implied warranties of habitability and construction in a workmanlike manner does not necessarily terminate upon transfer of title to the home, and (2) that present owners of a home are not required to have privity of contract with the home builder or manufacturer of a particular component involved, in order to maintain an action for breach of warranty.[15]

The court noted "that requirement of vertical privity as a prerequisite to suit on an implied or express warranty, both under the Uniform Commercial Code and outside the code, is, given today's market structure, an antiquated notion."[16] Essentially, the court held that a subsequent purchaser need not be in privity with the builder-vendor to maintain an action for breach of implied warranties.

However, implied warranties may be disclaimed. Oklahoma courts have held that "to relieve a builder-vendor of its obligation under an implied warranty of habitability, there must be **clear and conspicuous** language evidencing builder's disclaimer of its obligations arising under an implied warranty of habitability."[17] (emphasis added). Many builders now routinely have disclaimers of any implied warranties in their form contracts. By these disclaimers, they attempt to limit any warranty to their already very limited express warranty.

In *Cox v. Curnutt*,[18] the Oklahoma Supreme Court held that privity of contract with the homeowner is required before a subcontractor (as compared to the builder) will be held liable for breach of implied warranties. *Cox* is the current law in Oklahoma and controls when a party will be liable under the theory of breach of implied warranties. So pursuant to *Cox,* there must be some privity of contract for the subcontractor to be liable under the breach of implied warranties theory of liability. But pursuant to *Elden*, the subcontractor may be held liable under implied warranties if it is shown

they are a manufacturer of certain components involved in building of the house. In *Elden*, the eventual homeowners brought a cause of action against the builder/general contractor and the manufacturer of the bricks used in the construction of the home. The bricks were crumbling and falling apart. The court found, as the manufacturer of a component involved in the construction of the home, the brick manufacturer was in the chain of distribution. Under the rationale used by the court in *Old Albany Estates v. Highland Carpet Mills*[19] the court in *Elden* found that since the manufacturer is in the chain of distribution, privity of contract between the ultimate purchaser of the home and the manufacturer of certain components used in construction of the home was not required.

In a nutshell, some warranties are implied in a purchase contract as a matter of law. Since these warranties are implied as a matter of law, if a builder/general contractor does not wish be to be held liable for breach of such warranties, the disclaimer must be stated in clear and concise language. Also, the implied warranties do not necessarily terminate upon transfer of title to a subsequent purchaser. Manufacturers of particular components involved in the construction of the home are also liable under the implied warranties of the contract. Therefore, if a subcontractor qualifies as a manufacturer of certain components used they too will be liable under implied warranties.

Negligence

General Negligence — To establish a claim of negligence, a plaintiff must show that: 1) the defendant had a duty to protect the plaintiff from injury, 2) the defendant failed to properly exercise or perform that duty, and 3) the defendant's failure to properly exercise or perform that duty caused the plaintiff's injury.[20]

The cause of action for negligence does not arise out of any contractual relationship between the parties, therefore the breach of any "duty" is to be defined by common law. The general rule of duty is "a defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous."[21] *Debrel v. Doenges Bros. Ford Inc.*[22] holds that the most important consideration in the question of duty is foreseeability.[23] Clearly, it is "foreseeable" that a builder, or any homeowner, may and usually will, sell the home at some time.

In the area of negligence, the privity of contract requirement was abolished early in the 20th century in the landmark case of *MacPherson v. Buick Motor Co.*[24] and is clearly followed in Oklahoma.[25] In *MacPherson*, the court held that a manufacturer **has a duty** to those who may foreseeably be expected to use his products or to be in the vicinity of such usage to exercise reasonable care in the design and manufacture of those products[26] (emphasis added). In adopting the *MacPherson* approach, the Oklahoma Supreme Court has found that the absence of privity of contract will not bar an injured third party from recovering damages for injuries received as a result of negligent work.[27]

Industry customs exist in the construction industry and it may be appropriate to argue that deviation from such customs may be grounds for a negligence claim. The Oklahoma Supreme *Court, in Sanders v. C.P. Carter Constr. Co.*,[28] wrote:

> The omission of usual and customary precautions may be a matter proper for consideration in determining whether or not conduct was negligent, for, while ordinary prudence may require more precaution than is customary under similar circumstances or in a similar business or occupation, it can hardly require less, and hence a lack of such precaution may fairly be regarded as negligence. The mere fact that a particular thing is done in a manner different from that in which it is customarily done does not show negligence in the absence of any fact showing that the manner in which the act is done is dangerous, although it may be a matter for consideration in determining whether due care has been exercised.[29]

In determining negligence, the standard is due care and such standard is not fixed by custom. Although failure to observe custom may be evidence of negligence, adhering to a custom is never a substitution for due care.[30] A party cannot establish the existence of a custom simply by proving that the act is frequently done.[31] The custom must be "certain, general, uniform and recognized."[32] It must also be notorious and known to all persons involved in the trade or occupation at issue.[33] "It is important to note that in order for a breach of custom to be considered,

the plaintiff must plead and prove that the party to be charged had knowledge of the custom or that the custom is 'notorious, universal and well established.'"[34]

Negligence *Per Se* — "When courts adopt the statutory standard for a cause of action for negligence, the violation of the statute is said to be negligence *per se*."[35] "To establish negligence *per se* on the basis of a statutory violation the party must establish that: 1) the injury was caused by the violation; 2) the injury was of a type intended to be prevented by the statute; and 3) the injured party was of the class meant to be protected by the statute."[36]

Often, city or county adopted building codes will have been violated when you have a defective home and if such a violation causes damages, it may be considered negligence *per se*. "It is a well-settled principle of law in this state that the violation of a statute or city ordinance is negligence *per se* if the other elements of actionable negligence exist."[37] Oklahoma courts have stated in referring to municipal building codes, that a "violation...may, therefore, be negligence *per se*, but only if the violation proximately caused or contributed to the damages at issue."[38] In *Jones*, the court was considering negligence *per se* in the context of the Underground Facilities Damage Prevention Act. The court explained that the act "set standards dealing with the operation, maintenance, or repair of property in much the same way as the rules of the road in the Oklahoma Motor Vehicle Code, 47 O.S.1991, §§11-101, set standards relating to the operation of motor vehicles."[39] The court then compared the negligence *per se* doctrine to building codes, stating, "Municipal building codes perform the same purpose."[40] Therefore, a violation of the building codes may be negligence *per se*. The court continued by stating "the determination of what causal connection, if any, existed...and whether those violations were negligence *per se*, is for the jury."[41]

Accepted Work Doctrine — The accepted work doctrine may limit a builder's responsibility and is relevant in the analysis of liability under the theory of negligence and was discussed by the Supreme Court of Oklahoma in *Pickens v. Tulsa Metro. Ministry*.[42] The court stated:

> The "accepted work doctrine" historically limit[ed] the liability of architects, engineers, contractors, and other members of the construction industry for injuries arising from design or construction defects. In its original form, the accepted work doctrine relieved an independent contractor of liability for injuries to third parties after the contractor had completed the work, and the owner or employer had accepted the work, regardless of the contractor's negligence in completing the project.[43]

"Often, city or county adopted building codes will have been violated when you have a defective home and if such a violation causes damages, it may be considered negligence *per se*."

Pickens goes on to state: "In the area of negligence, the privity of contract requirement was abolished early in the twentieth century in the landmark case of *MacPherson v. Buick Motor Co*.,"[44] However, this case was a products liability case and the standard applied to manufacturers and was not immediately applied to negligence claims against builders and architects. As a response to the criticism that it should be applied to builders and architects, courts began to recognize exceptions to the rule and create modified accepted work doctrines.[45]

Several exceptions to the accepted work doctrine have been established around the country. One exception to the general rule is: if a contractor "willfully creates a condition which he knows to be immediately and certainly dangerous to third persons, who will necessarily be exposed to the danger."[46] Another "firmly established exception to the accepted work doctrine" is that: "liability is imposed after the work has been accepted where a defect is latent or hidden...."[47] For most buyers, the defects, which will cause them the greatest problems, will be hidden, as new homes are usually cosmetically beautiful upon sale.

Oklahoma is one of the states that still adhere to a modified accepted work doctrine and the abovementioned exceptions are recognized in this state. Therefore, the general rule in Oklahoma is that once a job is accepted by the owner, the contractor is not subject to liability

for injuries to a third party injured by a defective condition, unless the contractor willfully creates a condition he knows to be immediately and certainly dangerous to third persons who will be exposed to the danger, or the defect is latent or hidden. The modified accepted work doctrine may operate to shield some subcontractors from liability under a negligence theory of liability.

DEFENSES

There are a number of defenses the builder/general contractor and subcontractors may assert in this type of case. Several defenses come from common law while others come from statutes, or arise from the specific facts of each case. They include but are not limited to: general and specific denials of breaches of contract, warranty or negligence; comparative/contributory negligence on the part of the buyer; damages resulted from the responsibility of a third party over whom they had no direction or control; failure to mitigate damages; the accepted work doctrine; the right to repair act; and the express terms and provisions of the written warranty agreement bar the claim.

The Right to Repair Act

The Notice of Opportunity to Repair Act is found in Okla. Stat. tit.15, §765.5-765.6. This act allows, but does not mandate, the inclusion of a contractual provision that requires homeowners to notify a contractor about construction defects before filing a lawsuit. If such a provision is included in the contract the homeowner is required to: 1) provide the contractor a "written notice of construction defects" and 2) allow the contractor to inspect the defects and present a written response with an offer to repair or compensate for the defects within 30 days after receipt of the notice of defects. The homeowner shall not file suit until the conditions have been met. If the conditions have been satisfied the homeowner may then "seek remedies against the contractor as provided by law." This may serve as a defense for a builder/general contractor if the contract contains the clause and a buyer does not comply.

DAMAGES

Rescission

Rescission of contract restores the contracting parties to the positions they would have occupied if no contract had ever been formed. The process and reasons available for asking for contract rescission are found in title 15 of the Oklahoma statutes. Okla. Stat. tit. 15, §233 states the reasons rescission may be sought. And Okla. Stat. tit 15, §233A states: "Where the action....is timely brought for relief based on the theory of rescission....**service of a pleading on the adverse party shall be deemed sufficient notice** of rescission and of an offer to restore the benefits received under the contract" (emphasis added). And, Okla. Stat. tit. 15, §235 states that rescission, when not effected by consent, can be accomplished only by the use of reasonable diligence on the part of the party rescinding to rescind promptly, upon discovering the facts which entitle him to rescind and he must restore to the other party everything of value he has received under the contract or offer to restore the same.

Actual Damages — Property: Cost of Repair/Diminished Value

By far the most common damages awarded in a construction defect case are actual damages. If the damages are repairable, actual damages awarded usually equal the reasonable cost of repairs. This allows the buyer to hire someone else to satisfactorily complete the work the builder/general contractor may have been negligent in executing.

Any damages specifically excluded by express limited warranties or the purchase contract are not available under the theories of breach of express warranty and breach of contract. If the purchase contract contains a section that specifically excludes a specific damage, the buyer waives their right to those damages when they sign the contract.

Diminished value is another form of damages available to the buyer. "Diminished value" means the difference between the market value of the property immediately before being damaged and its market value after repairs have been or would be made.[48]

A determination of the proper **measure** of damages is a question of law for the court. However, the **amount** of damages is a question of fact, usually for the jury or judge to determine. If the damages are repairable, the court should determine as a matter of law that the proper measure of damages is the reasonable costs of repair. *Smith v. Torr*[49] states that the measure of damages for the breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby,

which, in the ordinary course of things, would likely result therefrom. In the cases of *Weibener v. Peoples*[50] and *Stewart v. Riddle*,[51] the court has clearly announced the ruling to be applied under this statute as to the measure of damages for defects in the construction of a building. It is clear that where the evidence supports a finding that the defects could be remedied by repair the measure of damages is the reasonable cost thereof.

That the measure of damages is a matter of law is well established by the courts.[52] Should the court make this determination prior to trial, it will streamline the trial, and save a substantial amount of court time, as well as attorney time for all parties.

Attorney Fees

In a construction defect involving a breach of express warranty the prevailing party is statutorily entitled to attorney's fees pursuant to Okla. Stat. tit.12, §939:

> In any civil action brought to recover damages for breach of an express warranty or to enforce the terms of an express warranty made under Section 2-313 of Title 12A of the Oklahoma Statutes, against the seller, retailer, manufacturer, manufacturer's representative or distributor, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, which shall be taxed and collected as costs.

The Legislature's use of the word "'shall' is a word of command or mandate, with a compulsory and peremptory meaning. It denotes exclusion of discretion and signifies an enforceable duty."[53]

CONCLUSION

A construction defect case is one that is so multifaceted it could actually be considered and tried as several different cases. To the jury, these cases are important, as most members have at one time bought or considered buying a home. Also, because it is often the most expensive purchase they will ever make, it is one of those issues they hope to never have to encounter. These cases, although in-depth and time consuming, are interesting and viable. While our state's population and therefore the need for new housing, has been growing, we are seeing more and more "builders" come on the scene.

General contractors are not licensed at the state level in Oklahoma. This further perpetuates the construction defect claims. In addition, more and more, contractors are becoming legally savvy. They know the loopholes which can reduce or release them from liability and they rely on the fact that their buyer will usually not read the fine print or even if they do, will not be willing to walk away from their dream home in order to initiate a change in contract. What contractors can't do, however, is slip by all the various laws set in place to protect homebuyers. Standardized building codes have gone a long way in giving consumers a foundation upon which to build their cases.

Because of all the noted issues, these cases will continue to appear on court dockets. The more the legal field familiarizes themselves with this type of litigation and in turn, successfully argues them, the safer our friends and neighbors will be.

1. *First Nat'l Bank & Trust Co. of El Reno v. Stinchomb*, 1987 OK CIV APP 1, ¶9, 734 P.2d 852, 854 (Okl. App. 1987).
2. *Thompson v. Peters*, 1994 OK CIV APP 97, ¶4, 885 P.2d 686, 688 (Okl. App. 1994).
3. *Flint Ridge Dev. Co., v. Benham-Blair and Affiliates, Inc.*, 1989 OK 48, ¶11, 775 P.2d 797, 801 (Okla. 1989).
4. *Id*. at 797.
5. *Id*. at 800-801.
6. *Scheirman v. Coulter*, 1980 OK 156, 624 P.2d 70 (Okla. 1980).
7. *Id*. at 72.
8. *Waggoner v. Town* 1990 OK 139, ¶7, 808 P.2d 649, 652 (Okla. 1990).
9. *Id*. at 652, quoting *Moss v. Polyco, Inc*., 1974 OK 53, 522 P.2d 622 at 625-26 (Okla. 1974).
10. *Osburn v. Bendix Home Sys*., 1980 OK 86, ¶7 613 P.2d 445, 448 (Okla. 1980).
11. 1978 OK 31, 576 P.2d 761 (Okla. 1978).
12. *Id*. at 764.
13. *Id*. at 762 n.1.
14. 1981 OK 81, 631 P.2d 739 (Okla. 1981).
15. *Id*. at 742.
16. *Id*.
17. *Bridges v. Ferrell*, 1984 OK CIV APP 19, 685 P.2d 409 (Okl. App. 1984).
18. 1954 OK 150, 271 P.2d 342 (Okla. 1954).
19. 1979 OK 144, 604 P.2d 849 (Okla. 1979).
20. *Jones v. Mercy Health Ctr., Inc*., 2006 OK 83, 155 P.3d 9, (Okla. 2006); *Akin v. Missouri Pac. R. Co*., 1998 OK 102, 977 P.2d 1040, (Okla. 1998).
21. *Baine v. Oklahoma Gas & Elec. Co*., 1992 OK CIV APP 140, ¶9, 850 P.2d 346, 348 (Okl. App. 1992).
22. 1996 OK 36, 913 P.2d 1318 (Okla. 1996).
23. *Id*. at 1321.
24. 11 N.E. 1050 (Ct. App. 1916).
25. *See: Pickens v. Tulsa Metro. Ministry*, 1997 OK 152, 951 P.2d 1079 (Okla. 1997).
26. *Id*.
27. *Id*. at 1088.
28. 1952 OK 153, 244 P.2d 822 (Okla. 1952).
29. *Sanders* 244 P.2d at 825, quoting, 65 C.J.S., Negligence § 16(b) and (c).
30. *Sanders* at 825, quoting, *Owen v. Rheem Mfg. Co*., 83 Cal. App. 2d 42, 187 P.2d 785 (4th Dist. 1947).
31. *Sanders* at 825-26.
32. *Id*. at 826.
33. *Id*.

34. *Id*. citing, *Long v. Rudd*, 1939 OK 338, 94 P.2d 249 (Okla. 1939), *Neal Gin Co. of Marietta v. Tradesmen's Nat. Bank of Oklahoma City*, 1925 OK 564, 239 P. 615 (Okla. 1925), *Talbot v. Mattox, Dawson & Posey Realty Co.*, 1910 OK 163, 109 P. 128 (Okla. 1910).

35. *Busby v. Quail Creek Golf and Country Club*, 1994 OK 63, 885 P.2d 1326 (Okla. 1994).

36. *Id*. at 1326.

37. *Spencer v. Holt*, 1921 OK 300, 200 P. 187 (Okla 1921).

38. *Jones v. Oklahoma Natural Gas Co.*, 1994 OK 89, ¶18, 894 P.2d 415, 420 (Okla. 1994).

39. *Id*. at 415.

40. *Id*.

41. *Id*.

42. 1997 OK 152, 951 P.2d 1079 (Okla. 1997).

43. *Id*. at 1087

44. *Id*.

45. *Id*. 1088.

46. *Id*. at 1088 n.47.

47. *Id*. at 1088.

48. *See Brennen v. Aston*, 2003 OK 91, 84 P.3d 99 (Okla. 2003); OUJI Instruction No. 4.14; *Ellison v. Walker*, 1955 OK 86, 281 P.2d 931 (Okla. 1955); and *Keck v.Bruster*, 1962 OK 35, 368 P.2d 1003 (Okla. 1962).

49. 1957 OK 73, 310 P.2d 378 (Okla. 1957), interpreting Okla. Stat. tit.23, §21.

50. 1914 OK 397, 142 P. 1036 (Okla. 1914).

51. 1919 OK 279, 184 P. 443 (Okla. 1919).

52. *See, Winemiller v. Lorton*, 1926 OK 600, 249 P. 406 (Okla. 1926), *Bowles v. Brown*, 1940 OK 255, 102 P.2d 837 (Okla. 1940), and *Commercial Drilling Co. v. Kennedy*, 1935 OK 232, 45 P.2d 534 (Okla. 1935).

53. *Shadoan v. Liberty Mut. Fire Ins. Co.*, 1994 OK CIV APP 182, ¶14, 849 P.2d 1140, 1144 (Okl. App. 1994).

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Mind Your Business… Records:

Advising Small Business Clients on Maintaining Thorough Business Records

By Jeremy E. Melton

Oklahoma small businesses "represent 97.2 percent of all employers and employ 54.3 percent of the private-sector labor force. Small businesses are crucial to the fiscal condition of the state and numbered 332,998 in 2010."[1] From 2007 to 2010, Oklahoma small businesses — businesses with 500 or fewer employees — represented all of the state's net new jobs, despite Oklahoma's then overall weak employment situation.[2]

"Most of Oklahoma's small businesses are very small as 78.5 percent of all businesses have no employees, and most employers have fewer than 20 employees."[3] According to the United States Census Bureau's statistics of U.S. businesses annual data, as of 2010 there were 62,205 Oklahoma businesses with fewer than 20 employees per firm.[4] Given the significance of small businesses in the Oklahoma economy, it is likely that a large percentage of Oklahoma attorneys will someday advise a small business client, regardless of the attorneys' areas of practice.

This article is intended for general practitioners who encounter small business clients. Particularly, this article is meant for attorneys who render business formation services to clients, only to watch the clients venture into the business world without so much as an afterthought for proper and thorough recordkeeping. Because small businesses are vital to the state's economy,[5] it is imperative that attorneys counsel small business owners to maintain thorough business records. It is important to discuss shareholder inspection, challenges to corporate action and evidentiary issues with clients before they enter the business fray.

RECORDS YOUR CLIENT SHOULD KEEP

There are many records that should be generated during the lifetime of a business entity if a client is properly operating the same. Although the specific records required to be kept will vary depending on the business form utilized by a client, as used herein "business records" and "corporate records" generally refer to, but are not limited to, those records that reflect the creation, ownership, control, management and operation of the entity.[6] Business records that should be stored in corporate books include:

- File-stamped copies of organizational certificates, such as certificates of incorporation, articles of organization, certificates of limited partnership and statements of qualification;
- Executed governance documents such as bylaws, partnership agreements and operating agreements;

> **Another instance in which the client will need to produce accurate business records is in the event of a challenge to corporate action,...**

- Stock certificates, share certificates or other ownership certificates as well as current and past transfer or membership ledgers;
- Minutes of annual and special meetings;
- Consent approvals;
- Cross-purchase and redemption agreements and other restrictions on transfers of interests, if applicable;
- Authorizations of director, member or partner actions;
- Borrowing resolutions and debt restrictions, if applicable;
- Proof of annual filings and payment of annual fees;
- Miscellaneous business forms and permits; and
- If relevant, employment contracts.

In addition to the foregoing, important business records that the client should maintain include such items as balance sheets, general ledgers, disclosures, tax filings, other financial documents, bank statements and check registers. All records maintained by clients should be kept current and reflect when any changes are made to the entity, including changes in ownership, management and operation.

SHAREHOLDER AND BONDHOLDER DEMANDS OF INSPECTION

Should a small corporate client determine to raise capital through the issuance of stock, then the client's stockholders will have a right to inspect the company's corporate records under the Oklahoma General Corporation Act.[7] The stockholders will have the right to inspect the company's "stock ledger, a list of shareholders, and its other books and records . . . ."[8] Improperly stored corporate records could give rise to shareholder claims that the failure to maintain records amounts to a breach of duty on the part of the corporation, and that breach of duty could give rise to the shareholder's petition for a writ of mandamus.[9] Further, if records are poorly maintained, it is conceivable that shareholders may bring additional claims, including fraud, based on the theory that poor record-keeping amounts to the fraudulent concealment of information.

In the event a client obtains capital through bonds or loans, then the client's bondholders or debenture holders may claim a similar right of inspection by virtue of the company's certificate of incorporation, loan instruments or other issued obligations.[10] Also, the bondholders and debenture holders may receive the same inspection rights as client's shareholders under the General Corporation Act.[11] Failure to produce business records in this context can lead to litigation and possible default under the terms of the various instruments.

CHALLENGED CORPORATE ACTION AND PIERCING THE CORPORATE VEIL

Another instance in which the client will need to produce accurate business records is in the event of a challenge to corporate action, particularly if the challenge seeks to pierce the corporate veil of the client's company. If a plaintiff seeks to hold a director or officer personally liable for a corporate action, then the plaintiff will need to "demonstrate[e] that some injustice or inequity will result from recognition of the corporate entity."[12] Factors considered by courts in deciding whether to disregard the corporate form include:

> (1) whether a corporation is operated as a separate entity; (2) commingling of funds and other assets; (3) **failure to maintain adequate corporate records or minutes;** (4) the nature of the corporation's ownership and control; (5) absence of corporate assets and undercapitalization; (6) use of a corporation as a mere shell, instrumentality or conduit of an individual or another corporation; (7) **disregard of legal formalities** and the failure to maintain an arms-length relationship among related entities; and (8) diversion of the corporation's funds or assets to noncorporate uses"[13]

While the issue of corporate records is only one part of the veil-piercing analysis, it is a relevant factor because of the overlap between it and the other factors. For example, keeping records such as minutes of director and officer meetings demonstrates observance of corpo-

rate formalities. Given the intertwined nature of these factors, the negative analysis of one factor will likely include a negative result as to another factor and therefore increase the likelihood of disregarding the corporate form.

EVIDENCE

Properly kept business records will be a valuable evidentiary tool in rebutting shareholder actions, challenges to corporate acts and litigation against directors and officers of a client's corporation. Assume, for example, that a shareholder has challenged a client's corporate action and the only sources of evidence for this challenge are the shareholder's testimony and the client's business records. If the business records are offered to rebut the shareholder's testimony, they would be offered to prove the truth of the matters asserted in the same; and absent an exception, admission would be prohibited by the hearsay rule.[14] Fortunately, the Oklahoma Evidence Code provides the business records exception to the hearsay rule.[15]

So long as the client's business records were "made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the record, all as shown by the testimony of the custodian or other qualified witness or by certification," then the client will be permitted to offer its business records in its defense.[16] In order for a client's records to fall within the business records exception to the hearsay rule, the clients should keep regular records of regular business activities as the activities occur.[17]

In addition to meeting the exception to the hearsay rule, the records will be self-authenticating if they are properly executed and acknowledged.[18] Pursuant to OKLA. STAT. tit. 18 §1007, an instrument is properly executed if done:

> a. by the chair or vice-chair of the board of directors, or by the president, or by a vice-president, and attested by the secretary or an assistant secretary; or by officers as may be duly authorized to exercise the duties, respectively, ordinarily exercised by the president or vice-president and by the secretary or an assistant secretary of a corporation,
>
> b. if it appears from the instrument that there are no such officers, then by a majority of the directors or by those directors designated by the board,
>
> c. if it appears from the instrument that there are no such officers or directors, then by the holders of record, or those designated by the holders of record, of a majority of all outstanding shares of stock, or
>
> d. by the holders of record of all outstanding shares of stock.[19]

The executed instruments will be properly acknowledged if the acknowledgment is done by the signatory before a notary or where signature "constitute[s] the affirmation or acknowledgment of the signatory, under penalty of perjury, that the instrument is his or her act and deed or the act and deed of the corporation, as the case may be, and that the facts stated therein are true."[20] If the foregoing criteria are met, the records will be self-authenticated pursuant to OKLA. STAT. tit. 12 §2902.[21] As soon as the business records exception is satisfied, the records may be presented and the court will not be limited to only testimony of the parties in resolving the dispute.

Finally, if the foregoing is insufficient to catch a client's attention, consider issues of divorce and bankruptcy. In complex divorce actions where a business interest held by one spouse represents the bulk of the potential marital estate, in order to claim the interest as separate property and therefore not subject to division, the client must prove that the business was created prior to the marriage or it was created with capital that was owned by that spouse prior to the marriage.[22] But even then, the enhanced value of the business during the course of the marriage may be subject to division, and it is necessary to determine if the spouse's efforts or market factors led to the increase in value and what portion thereof might be marital property.[23] Examination of business records is highly important in determining what role, if any, a spouse had in the increase in value, as well as identifying the actual decision makers within the business.

Regarding bankruptcy, a court may deny the discharge of a Chapter 7 debtor if "the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circum-

stances of the case . . . ."[24] In the matter of *In re Hoblitzell*, the court found that the defendant completely failed in his disclosure obligations.[25] Relevant to the court's determination was the complete lack of records:

> When challenged regarding [defendant's lack of records] on cross examination, he stated that he was not a 'detail' person. The defendant's failure to keep records goes beyond mere inattention to detail. His failure to keep and preserve basic records such as bank statements, as well as his failure to make complete and accurate disclosure in his schedules and the statement of financial affairs, was not only unreasonable, it betrays a deliberate attempt to hinder and delay the trustee in his efforts to investigate the defendant's financial affairs.[26]

The court's decision suggests that while business owners need not be meticulous in maintaining corporate records, some basic level of active recordkeeping is required.

CONCLUSION

While the foregoing is not an exhaustive list of the benefits of maintaining thorough business records, it should be enough information for the general practitioner to begin a dialogue and ensure that clients are aware of their obligations. If such conversations take place, attorneys may mitigate potential issues later in the life of the business entities they help create.

1. *Small Business Profile: Oklahoma*, U.S. Small Business Administration, Office of Advocacy (February 2013), available at www.sba.gov/sites/default/files/ok12.pdf.

2. *Id*.

3. *Id*.

4. *Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States and States, Totals: 2010*, United States Census Bureau, Statistics of U.S. Businesses (October 2012), available at www2.census.gov/econ/susb/data/2010/us_state_totals_2010.xls.

5. *Id*.

6. *Compare* OKLA STAT. tit. 54 §1-403(a), which requires that a partnership "keep its books and records, **if any**," (emphasis added) and OKLA STAT. tit. 18 §2021(A), which states that limited liability companies must keep:

> 1. A current and a past list of the full name and last-known mailing address of each member and manager;
> 2. Copies of records that would enable a member to determine the relative voting rights of the members;
> 3. A copy of the articles of organization, together with any amendments thereto;
> 4. Copies of the limited liability company's federal, state and local income tax returns and financial statements, if any, for the three most recent years . . . ;
> 5. Copies of any effective written operating agreements and all amendments thereto and copies of any written operating agreements no longer in effect; and
> 6. Unless provided in writing in an operating agreement, a writing setting out:
>
> a. the amount of cash and a statement of the agreed value of other property or services contributed by each member and the times at which or events upon the happening of which any additional contributions agreed to be made by each member are to be made, and
>
> b. the events upon the happening of which the limited liability company is to be dissolved and its affairs wound up, and
>
> c. any other information prepared pursuant to a requirement in an operating agreement.

7. OKLA STAT. tit. 18 §§1001-1144, 1065(B)(1).

8. *Id.*

9. For a discussion of the applicability of mandamus, *see Fears v. Cattlemen's Inv. Co.*, 1971 OK 22 ¶¶ 31-32, 483 P.2d 724.

10. OKLA STAT. tit. 18 §1066.

11. *Id*.

12. *U.S. v. Van Diviner*, 822 F.2d 960, 965 (10th Cir. 1987) (citing *Cunningham v. Rendezvous, Inc.*, 699 F.2d 676, 680 (4th Cir.1983); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757, 764 (9th Cir.1981); *Capital Telephone Co. v. FCC*, 498 F.2d 734, 738 (D.C.Cir.1974).

13. *U.S v. Van Diviner*, 822 F.2d at 965 (internal citations omitted) (emphasis added).

14. OKLA STAT. tit. 12 §2801-2802.

15. OKLA STAT. tit. 12 §2803.

16. *Id*.

17. *Id*.

18. OKLA STAT. tit. 18 §1007(A)(2)-(B), 12 OS 2902, (8)-(9), (11)(a).

19. OKLA STAT. tit. 18 §1007(A)(2).

20. OKLA STAT. tit. 18 §1007 (B).

21. OKLA STAT. tit. 12 §2902, (8)-(9), (11)(a) ("8. Records accompanied by a certificate of acknowledgment under the hand and the seal of a notary public or other officer authorized by law to take acknowledgments; 9. Commercial paper, signatures thereon, and related records to the extent provided by general commercial law; . . . 11. The original or a duplicate of a domestic record of acts, events, conditions, opinions, or diagnoses if: a. the document is accompanied by a written declaration under oath of the custodian of the record, or other qualified individual that the record was made, at or near the time of the occurrence of the matters set forth by or from information transmitted by a person having knowledge of those matters; was kept in the course of the regularly conducted business activity; and was made pursuant to the regularly conducted activity . . . .").

22. OKLA STAT. tit. 43 §121(B), *Spencer v. Spencer,* 1947 OK 243 ¶8, 184 P.2d 761

23. *Thielenhaus v. Thielenhaus*, 1995 OK 5 ¶ 9, 890 P.2d 925.

24. 11 U.S.C. §727(a)(3).

25. *In re Hoblitzell*, 223 B.R. 211, 216 (Bankr. E.D. Cal. 1998).

26. *Id*.

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Doing Business in Indian Country

The Legal Issues That May Arise When Conducting Business With Indian Tribes and Tribal Business Entities

By O. Joseph Williams

A recent analysis addressing the economic impact of Oklahoma's 38 federally-recognized Indian tribes revealed that tribal businesses and enterprises contributed $10.8 billion to the state's economy in many direct and indirect ways.[1] Tribes are regularly engaging in various business activities for the purpose of raising revenue to help fund tribal governmental programs and services for the benefit of tribal members and the local community. These commercial-like activities may be in the form of casinos, hotels, retail stores, gas stations, smoke shops, grocery stores and convenience stores. Further, the growth and development of tribal traditional governmental functions such as tag offices, hospitals, clinics, courts, housing, elder care, food distribution and other similar governmental functions help create jobs and spur economic growth in many areas of the state.

Not surprisingly, these activities attract many customers and patrons to tribal businesses and enterprises and, just like in the non-Indian world, disputes can arise that may result in litigation with the tribal government or tribal business enterprise. Litigation involving an Indian tribe or involving business activities that occur in Indian country can bring about a myriad of legal twists and turns. The lawyer who seeks to represent a client in this type of situation will have to turn to tribal law, federal law and, in some cases, state law[2] to competently represent the client in such matters.

The intent of this article is to provide the legal practitioner with certain basic principles involving the body of law termed "federal Indian law" and how those principles apply in the business litigation context. These principles will be applicable whether your client seeks to do business with an Indian tribe, is seeking to conduct business activities in a tribe's Indian country (whether conducting such activity with a tribe or not), wants to sue a tribe or tribal entity, or is being sued by a tribe or tribal entity.

One important question that must first be addressed is "what is an Indian tribe?" In the business context, this question is significant since an individual or entity seeking to conduct business with an Indian tribe should want to know what sort of legal entity is an Indian tribe, and what is a tribe's source of power and authority to conduct business? As governments that pre-exist the United States government, Indian tribes retain inherent powers of sovereignty that have not been extinguished.[3] Generally, Indian tribes retain all "aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[4] Tribes are capable of establishing their own laws and regulations governing their tribal members, territory and governmental operations.[5] In exercising these sovereign powers of self-government, the tribes are fully able to engage in business affairs with non-Indian individuals or entities, both in and outside of tribal territories.

"Generally, states do not possess jurisdiction, and state law will not have effect, in Indian country except through a specific grant of jurisdiction under federal law."

INDIAN COUNTRY AND TRIBAL LAWS

In the field of Indian law, the term "Indian country" has significant implications and is a legal term of art used to describe the geographical territory where the laws of an Indian tribe, plus federal law related to Indian affairs, are applicable.[6] Generally, states do not possess jurisdiction, and state law will not have effect, in Indian country except through a specific grant of jurisdiction under federal law. Indian country is defined in 18 U.S.C. §1151 and includes: 1) all land within the limits of any Indian reservation under the jurisdiction of the United States Government; 2) dependent Indian communities; and 3) all Indian allotments, the Indian titles to which have not been extinguished. Indian country also includes land for which the title is held in trust by the United States for an individual Indian or Indian tribe.[7]

Tribal laws will vary from tribe to tribe and may be based on a tribe's constitution, code of laws, resolutions and ordinances. Like the relationship between the United States Constitution and federal and state law, many tribes have their own constitutions as the supreme governing law from which all other tribal law must flow. Some tribal constitutions establish a three branch government similar to the United States and state government; however, other tribes' constitutions may recognize the entire tribal membership as constituting the supreme governing body of the tribe with day-to-day activities under the authority of an elected business committee. A tribal constitution should be reviewed by the lawyer representing a business client since it may contain critical provisions governing the tribe's sovereign immunity, the powers of certain tribal officials to engage in business on behalf of a tribe and general powers of the tribal government.

A tribe's governing body may enact tribal codes over a variety of subject matters including business matters and dispute resolution options in tribal courts or other forums. Many tribes have adopted business-related codes similar to state codes in an effort to provide consistency and familiarity for those non-Indians who seek to conduct business with tribes yet are unfamiliar with laws applicable to tribes. For example, the Muscogee (Creek) Nation, a tribe headquartered in Okmulgee, has enacted a corporation code for anyone seeking to establish a corporation or limited liability company under tribal law. The Creek Nation also has a Uniform Commercial Code with provisions similar to the state version. Many tribes have begun to put their tribal constitutions, code of laws and other legislative enactments on tribal websites for easy access by anyone.[8] There are also other sources on the Internet that make research into tribal laws easier and very accessible.[9]

TRIBAL SOVEREIGN IMMUNITY

Probably the most common issue in the realm of business litigation involving an Indian tribe is the principle of tribal sovereign immunity. As a matter of federal law, an Indian tribe is not subject to suit in any forum unless Congress has unequivocally authorized the suit or the tribe has clearly and expressly waived its immunity.[10] Tribal sovereign immunity generally extends to tribal officials in their official capacities and applies both in commercial and noncommercial contexts. Further, tribal sovereign immunity will protect the tribe from suit

even if the activity in question occurs off of tribal land.

For anyone seeking to conduct business with an Indian tribe or tribal business entity, there will be a need to determine what rights and remedies exist in case the business or activity results in a dispute between the parties. Choice of law provisions or general venue selection clauses will be meaningless if the party is seeking to assert a claim in any forum against a tribe or tribal entity without a clear and express waiver of tribal sovereign immunity. Usually, a review of the tribe's constitution and laws will determine the proper method and process for securing a waiver of tribal sovereign immunity. Some tribal laws will require waivers of tribal sovereign immunity to be approved by a certain governmental authority in every instance. Some tribal laws will delegate an entity of the tribe (most often, the business arm of the tribe) with the authority to enter into contracts waiving tribal sovereign immunity without formal approval by the tribe's governing body. In such instances, the waiver of sovereign immunity may be limited to assets of the business entity of the tribe and not the assets of the tribe itself. The critical role for the attorney in these instances is to understand the limits of a waiver of immunity. Since the tribe is cloaked with sovereign immunity, its ability to "open the door" and waive its immunity is a powerful thing. The waiver of immunity may be limited to only arbitration, mediation or tribal court resolution. If the parties are able to negotiate the terms of the waiver to adjudicating a dispute in a forum and under a law satisfactory to both parties (and assuming such a waiver is not inconsistent with tribal law or the authority of the non-Indian party), then that is the waiver of immunity language that should be reflected in the parties' contract. Again, refer to the law of the tribe to understand these parameters.

A party seeking to bring suit in a federal court against an Indian tribe, even if there is a valid waiver of tribal sovereign immunity in place, must still comport with the legal principles of federal jurisdiction. Generally, the bases for federal jurisdiction are federal question jurisdiction (28 U.S.C. §1331) and diversity jurisdiction (28 U.S.C. §1332). However, an Indian tribe is not considered a citizen of any state for purposes of diversity jurisdiction,[11] so federal court jurisdiction will not be available to litigate a business contract with an Indian tribe on the basis of diversity, and general business litigation over contractual disputes will not be considered a federal question. With no other bases for federal jurisdiction, such business disputes will have to be litigated in another forum (if any other forum is available). If a party has obtained a waiver of tribal sovereign immunity for only federal court,[12] then the non-Indian party is likely out of options if that party is seeking to litigate the dispute.

TRIBAL COURT EXHAUSTION RULE

In both business contexts and nonbusiness contexts, federal law and policy recognize and apply the role of comity to require disputes arising in Indian country to first be heard, and with remedies exhausted, in the tribal courts. This is referred to as the "tribal court exhaustion rule." The U.S. Supreme Court first considered this issue and required the exhaustion of tribal remedies in the case of *National Farmers Union Insurance Co. v. Crow Tribe of Indians*.[13] The exhaustion principle outlined in the *National Farmers* case and a subsequent decision by the U.S. Supreme Court in *Iowa Mutual Insurance Co. v. LaPlante*[14] stressed that exhaustion of tribal court remedies would be consistent with the federal policy and commitment to tribal self-government. If litigation is initiated in the tribal lower court, the tribal court exhaustion rule would require all appeals in the tribal courts to be exhausted as well before any federal action may commence.

Even in those business situations where the parties have negotiated a contract that requires litigation in a state or federal court, any challenge by the tribe or tribal entity may result in having to first adjudicate the challenge (not necessarily the merits of the parties' dispute) in the tribal courts. For example, a business contract with a tribe or tribal business entity that includes a waiver of immunity for state court adjudication may be subject to challenge in the tribal court, first, if it is later determined that the contract was not validly approved or the waiver approval was deficient under tribal law. When a dispute arises with a tribe or is based on business activity occurring in Indian country, principles of tribal self-government would dictate that the tribal court be given the first opportunity to examine and interpret its laws as to the validly of the parties' agreement. There are some exceptions to the tribal court exhaustion rule,[15] and there are conflicting federal court decisions from various circuits when applying the exhaustion rule, so additional

legal research for any particular situation or set of facts will be necessary.

CONCLUSION

The issues outlined in this brief article certainly do not cover all the many nuances that may arise when conducting business in Indian country. The contours of federal Indian law are constantly evolving and shifting based on rulings and interpretations of existing law from the federal courts. Since many principles of federal Indian law are based on the federal common law, the landscape may change often, especially as the development and growth of tribal business interests expand beyond tribal borders. Thus, it becomes very important for lawyers representing both tribal and nontribal interests to recognize the significance of this area of law in the business world, both now and in the future.

1. A copy of the economic impact analysis released by Oklahoma City University's Steven C. Agee Economic Research & Policy Institute can be found at http://tinyurl.com/mb6xwj2.

2. Generally, the laws of the state are not applicable to tribes and activity occurring in Indian country; however, some tribal codes permit the use of state law provisions in tribal court when there are no tribal or federal laws applicable to a situation.

3. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (describing Indian tribes as "separate sovereigns pre-existing the Constitution" and "retaining their original natural rights in matters of local self-government").

4. *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

5. *Williams v. Lee*, 358 U.S. 217 (1959).

6. The legal history behind the development and codification of the term "Indian country" is beyond the scope of this article; however, suffice it to say, there is a great deal of case law on the subject matter that provides greater depth and insight into the legal contours of the territorial jurisdiction of Indian tribes. *See, e.g., Indian Country, U.S.A. v. Oklahoma Tax Com'n*, 829 F.2d 967 (10th Cir. 1987).

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

8. For example, the following tribal laws are available on tribal websites: Muscogee (Creek) Nation: http://tinyurl.com/lnx2l5k; Cherokee Nation: https://cherokee.legistar.com/Legislation.aspx; Seminole Nation: http://sno-nsn.gov/government/codeoflaws; Chickasaw Nation: www.chickasaw.net/Our-Nation/Government/Chickasaw-Code.aspx; Choctaw Nation: www.choctawnation.com/government/tribal-court.

9. A very good source for researching tribal codes and constitutions around the country can be found at the website for the Tribal Court Clearinghouse at: www.tribal-institute.org.

10. *Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 757 (1998).

11. *See Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); however, there may be a different outcome if the tribal business entity is incorporated under state law and conducts its business outside of Indian country.

12. This can happen in those situations where the non-Indian party is unfamiliar with the law recognizing that Indian tribes are not considered citizens of any state and relies on diversity as the basis of federal jurisdiction in a dispute resolution clause used with other non-Indian entities.

13. 471 U.S. 845, 855-57 (1985).

14. 480 U.S. 9 (1987). The *LaPlante* decision was an expansion by the U.S. Supreme Court of the tribal exhaustion rule to cases brought under the federal diversity statute.

15. The exceptions to tribal court exhaustion includes when the assertion of tribal jurisdiction is motivated by a desire to harass or is in bad faith, when the action "patently" violates "express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers Union*, 471 U.S. at 856 n.21.

ABOUT THE AUTHOR

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The New Administrative Workers' Compensation System

By K. David Roberts

Introduction. On May 6, 2013, Gov. Fallin signed one of the most historic pieces of legislation ever passed in Oklahoma. A new administrative system was created for the handling of workers' compensation claims. The new administrative system is as a result of four different acts found in Senate Bill 1062 (2013): The Administrative Workers' Compensation Act,[1] Workers' Compensation Court of Existing Claims,[2] Oklahoma Employee Injury Benefit Act,[3] and the Workers' Compensation Arbitration Act.[4] These four acts are now found in newly created Title 85 A.

Title 85 had previously governed all Oklahoma workers' compensation claims. Now it only governs claims that arise before Feb. 1, 2014.

Effective date of the act. The new legislation will apply to all injuries and occupational diseases that occur on and after Feb. 1, 2014.[5] The time delay is necessary because time is needed in order to set up a new administrative system to deal with workers' compensation claims that arise on and after Feb. 1, 2014.

After Feb. 1, 2014, there will be dual systems to govern workers' compensation claims. The old Workers' Compensation Court system will be retained to administer claims that arise before Feb. 1, 2014.[6] The new system will be governed and administered by the Oklahoma Workers' Compensation Commission for all claims that arise on and after Feb. 1, 2014.

The new system will be an administrative system. The old court-of-record system will be governed by the Workers' Compensation Court of Existing Claims, the new name given to the old Workers' Compensation Court.

Immunity retained. As was the case under the old law, once an employer complies with the act and provides the required coverage[7] to its employees, the employer will be immune from any suit or claim that the employee might have made in district court for a job-related injury. The only remedy available to the employee will be under the act.[8] The law regarding the immunity of the employer will essentially be the same as it has been since workers' compensation was introduced in Oklahoma.

There is a new provision regarding any operator or owner of an oil or gas well or other operation for exploring for, drilling for or producing oil and gas. The owner or operator will be deemed to be the intermediate or principal employer and therefore immune from any district court action or any claim of any employee of any employer providing services.[9] This immunity is extended to the operator if it has complied with the provisions requiring coverage under the act.[10] This provision is very simi-

lar to a provision of the Texas Workers' Compensation Act.

Vertical immunity will be retained.[11] The act specifically provides that the act does not abrogate the loaned servant doctrine.[12]

The old Workers' Compensation Court is renamed the Workers' Compensation Court of Existing Claims.[13] This renamed court will hear all claims that arise before Feb. 1, 2014.[14] The date of the employee's injury will be deemed as the date the claim arose.[15] The act specifically provides that benefits for a single-event injury will be determined by the law in effect at the time of the injury. Cumulative trauma injuries will be determined by the law in effect at the time the employee knew or reasonably should have known that the change of physical condition was related to work activity (also called date of awareness).[16] Benefits for death will be determined by the date of death.[17] The Court of Existing Claims will handle old claims that pre-date Feb. 1, 2014 under the "old law" that applies to those claims.

The current judges of the Court of Existing Claims will serve out the remainder of their terms.[18] As the terms expire, their judicial positions will be eliminated.[19] Four of the current judicial terms expire on July 1, 2014. These judges will not be replaced. The court will have six judges until July 1, 2016, at which time two more judicial terms will expire. This will leave four judges who will serve until their terms expire July 1, 2020.[20]

If necessary, the new Workers' Compensation Commission may assign administrative law judges to handle the dockets of the Court of Existing Claims.[21] This provision is designed to address the handling of "old claims" that will be subject to being handled by fewer judges.

The new Workers' Compensation Commission.[22] The governor, subject to confirmation of the Senate,[23] will appoint three commissioners who will have the exclusive responsibility and duty to carry out all of the provisions of the act.[24] There is no requirement that they be attorneys. The only requirement is that they must have been involved in the workers' compensation field for at least three years.[25] The commission will be vested with total subject matter jurisdiction over all claims filed in accordance with the new act[26] and will have full power and authority to determine all questions in relation to claims for compensation under the act.[27]

The commissioners will serve six-year terms with the terms initially staggered so the changes of commissioners will be limited to one every two years. They will be paid the same as a district judge.[28] The governor will appoint one of the commissioners to be the chairman of the commission.[29]

Duties of the commission will be to:

- Adopt rules of procedure for administrative hearings.[30]
- Hear appeals from decisions of the administrative law judges[31]
- Conduct hearings.[32]
- Appoint administrative law judges who will conduct administrative hearings.[33]
- Prescribe rules governing the legal and non-legal representation of employees, employers, and carriers.[34] Non-lawyers will be allowed to represent parties before the commission.
- Hire employees and incur necessary expenses to administratively run the commission.[35] This will include examiners, investigators, medical examiners, clerks, court reporters and other necessary employees.[36]
- Hear and approve compromise settlements.[37]
- Hear and determine claims concerning disputed medical bills.[38]
- Require the employee to submit to examination by an independent medical examiner chosen by the commission if they think it to be appropriate.[39]
- Exercise exclusive jurisdiction to hear retaliatory discharge claims.[40] It can award up to $100,000[41] for such claims in addition to costs and attorney fees.[42]
- To hear court *en banc* appeals from the Court of Existing Claims.[43]

Duties of the chairman of the commission will be to:

- Supervise the administrative work of the administrative law judges.[44]
- Employ an administrative staff for the commission.[45]

- Along with the rest of the commission members, monitor own-risk, self-insurer, and group self-insurance programs.[46]

Duties of the administrative law judges[47] will be to:

- Hear and determine claims for compensation.[48]
- Conduct hearings and undertake investigations.[49]
- Make judgments, decisions, and determinations as required by the rules or judgments of the commission.[50] Their decisions must be issued within 30 days of the submission of a case before them.[51]
- Hear challenges to arbitration agreements. [52]
- Assume duties of the Court of Existing Claims if it becomes necessary as that court winds down.[53]

Hearings before the commission. The employer is required to provide workers' compensation benefits for "clean claims" (as defined by the act) within 30 days of the receipt of the employer of the claim. A "clean claim" is defined by the act as a claim that has no defect or impropriety, including a lack of any required substantiating documentation, or any particular circumstance requiring special treatment that might impede prompt payment.[54]

If the employer desires to contest an employee's right to compensation benefits, it must give notice to contest the claim to the employee within 15 days following their receipt of notice of the claim.[55] If the employer is unable to obtain the necessary information to accept or deny the claim within 15 days, it may request an extension of time from the commission before filing a response.[56]

The commission is directed to conduct a preliminary conference designed to provide the employee a chance to confer with a legal advisor on staff with the commission. This is designed to facilitate the resolution of all issues without the expense of litigation and the need for payment of attorney fees by either party.[57] Under certain circumstances, the preliminary conference can be held in the county where the injury occurred.[58]

Once the employee files a claim for compensation with the commission, an administrative law judge will be assigned the claim upon application for hearing filed by either party.[59] The commission must give notice to the employer of the filing of a claim for compensation benefits by the employee.[60] Once either party applies for a hearing, the parties will be given 10 days' notice of a hearing to be held in Oklahoma City or Tulsa.[61]

The administrative law judge then must conduct an administrative hearing. The judge will not be bound by technical or statutory rules of evidence.[62] The act anticipates that medical evidence will be presented by written reports although there is a provision that medical testimony can be taken by deposition.[63] Both parties are allowed to take the deposition of any witness in a manner to be determined by the commission with its new rules.[64]

The administrative law judge is required to issue an award or order resolving all issues.[65] The standard for the judge's decision is that the party having the burden of proof on any issue must establish proof by a preponderance of evidence.[66]

Appeals may be taken from an order of the administrative law judge directly to the commission.[67] The commission may reverse or modify the decision if it determines that the decision was against the clear weight of the evidence or contrary to law.[68]

If an award or order of the commission has not been paid by the employer, there is a procedure for the commission to certify the award or order to the district court for enforcement.[69]

Appeals from the commission may be taken to the Supreme Court.[70] The Supreme Court may reverse the finding of the commission in accordance with a laundry list of standards of review contained in the new act.[71] These considerations are an attempt by the Legislature to dictate the standard of review to the Oklahoma Supreme Court. Appeals to the Supreme Court must be filed within 20 days of the date of the order of the commission.[72]

All hearings, including any hearing involving the commission, must be stenographically reported.[73] The act provides that the commission will be responsible for the preparation of a record of all hearings and other proceedings before it.[74]

Neither party to the administrative hearing must be represented by an attorney. Evidence may be presented by any party authorized in writing to act on behalf of either party.[75]

The commission and the administrative law judges operating under the supervision of the commission may issue subpoenas and require third parties such as medical providers, the parties to the case, and others to produce documents, and allow depositions to be taken.[76]

Methods for the employer to secure coverage for its employees.[77] Compliance and the securing coverage for employees is required of employers under the act. The employer may:

- Purchase a workers' compensation insurance policy from a licensed carrier.[78]
- Provide guaranty insurance as defined by the act.[79]
- Become an own-risk employer by complying with rules of the commission.[80]
- Become a member of a group self-insurance association that has complied with the rules of the commission.[81]
- Comply with the opt-out provisions described in the following section.

The employee cannot waive his or her right to compensation under the act.[82] Nor can the employee be required to pay any of the premiums for coverage under the act.[83] Failure to secure workers' compensation coverage for employees will result in onerous penalties to the employer.[84]

Opt-Out provisions.[85] The opt-out provisions of the new legislation are contained in the "Oklahoma Employee Injury Benefit Act."[86] It allows "qualified employers"[87] to have an alternative method of complying with the act and providing benefits under a brand-new system.[88] If the employer desires to be exempt from the Administrative Workers' Compensation Act, it must establish a "benefit plan,"[89] pay the insurance commissioner $1,500, notify its employees that it does not carry workers' compensation insurance and give notice to the Insurance commissioner of its desire to elect to become a qualified employer.[90]

The insurance commissioner is given the power and responsibility of regulating qualified employers and the duty to ensure that such employers have complied with the opt-out provisions of the act.[91]

Qualified employers must give notice to its employees that it does not carry workers' compensation insurance coverage, that it is a qualified employer and has opted out of the system.[92] Compliance with this notice provision may be made by posting such notice at conspicuous locations at the qualified employer's places of business in the form, content and manner of delivery required by the insurance commissioner.[93]

The benefit plan must provide for payment of the same forms of benefits included in the act for most benefits under the act.[94] This includes temporary total disability, temporary partial disability, permanent partial disability, vocational rehabilitation, permanent total disability, disfigurement, amputations, death benefits, and medical benefits.[95] Medical management, dispute resolution and other provisions of the act do not apply to opt-out benefit plans.[96]

Settlements are allowed under the plans.[97] But many of the provisions of the act such as suspension and termination of benefits, medical management, and dispute resolution are not applicable to opt-out plans.[98] The opt-out employer will have extraordinary discretion in designing benefits and managing claims.

These plans were initially designed for large employers who desired to self-insure and opt-out of the system, but the act also allows for the employer to contract with a licensed insurance carrier to opt-out of the system.[99] For those employers who desire to self-insure, the act provides for onerous provisions relating to furnishing satisfactory proof to the insurance commissioner of the ability to pay benefits.[100]

In the event that the opt-out plans are held to be unconstitutional by the Oklahoma Supreme Court, the act provides that the employer retains immunity and has 90 days from any final decision to secure other compliance with the act.[101]

How a claim works under the opt-out system.[102] If an employee makes a claim against the employer under the plan, the employer has 15 days to accept or deny the claim.[103] If denied, the employer must explain why the claim was denied and advise the employee how to appeal the decision.[104] If the claim is denied, the employee may then appeal to a three-person committee composed of employer representatives. The committee may request any additional information it deems necessary to make a decision, including have the employee submit to a medical exam. The committee has 45 days to make its decision.[105]

If the committee has continued to deny any part of the employee's claim, the employee may, within one year of the decision of the committee, petition the commission sitting en banc to review the employer's decisions.[106] It should be noted that the employee does not have access to the commission for up to 60 days from the date a claim was made. If an appeal is made to the commission, the commission is required to give the parties 10-day notice of the hearing that it must schedule. The commission must issue its ruling within 20 days of the submission of the case before it.

If the decision is unfavorable to either party, an appeal may be filed with the Supreme Court in 20 days.[107] The act provides for a laundry list of standards of review that may be used by the Supreme Court in considering any appeal.[108]

The ultimate legal question concerning the opt-out system is how much discretion will be given to the employer in defining what injuries are covered and what kind of medical management program the employer might institute.

Use of independent medical examiners.[109] The commission is mandated to create and maintain a list of independent medical examiners.[110] It may use them as it thinks necessary in any medical situation, such as surgery, that might come before the court.[111] All of the previous rules and procedures under the old law have been retained.

Medical case management.[112] Medical case management is encouraged under the act. "Case managers," as defined by the act,[113] may be ordered by the commission to either the employee or employer in situations where the employee is not subject to a certified workplace medical plan or where the employer has not already hired a case manager.[114]

Temporary total disability.[115] Under Oklahoma law, the injured employee is entitled to receive weekly income benefits payments (termed temporary total disability or TTD) while undergoing medical treatment and is not able to work.[116] Under the old law, the employee was entitled to recover 70 percent of his average weekly wage with a limitation that the weekly payments could not exceed 100 percent of the state's average weekly wage.[117] For example, if the employee was injured before Oct. 31, 2012, the employee could receive up to $735 per week provided his average weekly wage was over $1,000 per week. These benefits could last up to 156 weeks.[118] The employee could

"Under Oklahoma law, the injured employee is entitled to receive weekly income benefits payments..."

receive up to 104 weeks of temporary total disability and up to an additional 52 weeks if proper proof was shown.[119]

Under the new act, the employee can receive 70 percent of his average weekly wage,[120] but is limited to a maximum of 70 percent of the state's average weekly wage. This would result in a new maximum benefit of $515 per week. This will be a reduction of 30 percent of the temporary total disability benefits that the employee could have recovered under the old act.

If an employer wishes to terminate temporary total disability payments that are being made to the employee and the employee has not returned to work, the employer must give notice to the employee. If the employee files an objection within 10 days, the commission must set the matter for hearing within 20 days for a determination to see if temporary total disability will be reinstated.[121]

As was the case under the old law, no temporary total disability may be payable while the employee is receiving unemployment benefits.[122]

Official Disability Guidelines (ODG).[123] The ODG, published by the Work Loss Data Institute, will be recognized as the primary standard of reference for determining the frequency and extent of medical services, including prescription medication,[124] to be rendered to the employee under the act.[125] The ODG guidelines will not act as a requirement or mandate, but it is anticipated that they will be used in nearly all situations. Under the old law, the ODG guidelines are mandatory for all parts of the body except the spine. The length of medical treatment will, as was the case under the old act, determine the length of temporary total disability.

Choice of treating physician. Under the new act, the employer has the right to choose the treating physician and the corresponding responsibility to provide the employee with

appropriate medical treatment.[126] If the employer fails to provide medical treatment within five days of notice of the injury, the employee may choose the treating physician.[127]

If the employee is dissatisfied with the treating physician chosen by the employer, the commission has the power to grant one change of the treating physician. The employer will submit three physicians. The employee must then choose the replacement treating physician from the list provided by the employer.[128] This is a big change from the old act.

Medical treatment. The act provides that the commission will have sole and exclusive subject matter jurisdiction over claims and charges for medical treatment provided under the act.[129] As was the case under the old act, the district court will not have jurisdiction over any bill for medical treatment incident to a job-related injury. The employer as well as any medical provider may submit any dispute regarding medical charges to the commission.[130] The medical provider may not pursue payment of its medical bill until there is a final determination made by the commission regarding compensability.[131] If the claim is found to be compensable, the commission will have sole and exclusive jurisdiction over the medical bill. If the claim is not found to be compensable, the district court will have jurisdiction.

The employer, as was the case under the old law, is required to pay 100 percent of the employee's medical expenses, subject to the fee schedule, with no maximum limits on the amounts payable.[132] As noted above, the ODG will be recognized as the primary standard for the rendition of medical treatment.[133]

The act provides for various circumstances where the employer is not responsible for medical treatment or temporary total disability for missed appointments by the employee.[134]

Soft tissue injuries.[135] Compensation for nonsurgical soft tissue injuries will not exceed eight weeks of temporary total disability.[136] If the employee is treated with an injection or injections, such employee can be entitled to an additional eight weeks of temporary total disability.[137] If surgery is recommended, the commission may order an additional 16 weeks of temporary total disability with certain restrictions.[138]

Brain disorders, spinal cord disorders, and other such conditions are specifically excluded from the act's definition of "soft tissue injuries."[139]

Hernias.[140] The employee is entitled to six weeks of temporary total disability benefits for a hernia injury. If the employee refuses a recommended hernia operation, the total benefits payable are 13 weeks.[141] The act provides for new proof requirements in order to make recovery for a hernia injury.[142]

Mental injuries.[143] The act does change the law relative to compensability of mental injuries. A mental injury is not a compensable injury unless it was caused by a physical injury arising out of the employment. This provision does not apply to any victim of a crime of violence.[144] Any claim for mental injury must conform to the *Diagnostic and Statistical Manual of Mental Disorders*.[145]

The act provides that the employee is limited to 26 weeks of disability benefits for mental injuries unless it can be shown by clear and convincing evidence that benefits should continue for a total of 52 weeks.[146]

Heart attacks and strokes.[147] The act provides for the standard of evidence necessary to recover in heart attack and stroke claims. A heart attack, stroke or similar incident is only compensable if the employment was the major cause of the incident.[148]

In order to recover benefits for these incidents, the employee must show that the incident was precipitated by extraordinary and unusual circumstances in comparison to the employee's usual work or was caused by an unusual and unpredicted event.[149] Mental or physical stress may not be considered under the new act in determining whether the employee has met the necessary burden of proof.[150] The writer is unaware whether there is stress other than mental stress or physical stress.

Permanent partial disability.[151] The determination of permanent partial disability will be the sole responsibility of the commission through its administrative law judges.[152] As was the case under the old law, each party may submit a report of an evaluating physician regarding the issue of permanent partial disability.[153] Any award for permanent partial disability must be in accordance with the current edition of *Guides for the Evaluation of Permanent Impairment* promulgated by the American Medical Association (now the 6th Edition).[154]

There are new limitations on the nature of permanent partial disability that may be awarded. First, the maximum number of weeks that can be awarded is 350 weeks rather than the old law that provided for 500 weeks. This is a reduction of 30 percent as compared to the old law.[155] For example, an award of 10 percent to the body under the old law would allow up 50 weeks of permanent disability ($16,150). Under the new act, 10 percent to the body would amount to 35 weeks of permanent disability ($11,305). The maximum rate that can be awarded for permanent partial disability is capped at $323 per week.[156]

Second, unless the employee and employer come to a settlement agreement regarding permanent partial disability, the payment of any award for permanent partial disability is deferred and under some circumstances is reduced if the employee has returned to work for the employer or has returned to an equivalent job.[157]

Permanent partial disability cannot be awarded to a body part for which no medical treatment was rendered.[158]

The amount of permanent disability awarded is then reduced by 70 percent of the employee's average weekly wage for each week he works in his pre-injury or equivalent job.[159] If the employer terminates the employee or the position offered is not the pre-injury or equivalent job, the remaining permanent partial disability award will be paid to the employee in a lump sum.[160] If the employee refuses an offer to return to his pre-injury or equivalent job, the award of permanent partial disability is deferred and reduced as outlined above.[161] Settlement agreements will not be subject to the deferral provisions.[162]

If the employee was represented by an attorney at a contested permanent partial disability hearing, the attorney fees are calculated on the permanent partial disability at the time of the award, not in accordance with any deferral.[163]

As was the case before the new act, any award of permanent partial disability must be over and above any pre-existing disability.[164]

The physician advisory committee is directed to recommend changes to the evaluation of permanent disability. If such changes are adopted by the commission, they must be submitted to the governor and the Legislature for approval.[165]

Vocational rehabilitation benefits.[166] The new act encourages vocational rehabilitation. Any employee eligible for permanent partial disability will be entitled to vocational rehabilitation benefits.[167] The act mandates that the commission hire or contract with a vocational rehabilitation director to oversee the rehabilitation program of the commission.[168] The director will oversee all employee rehabilitation efforts and may assign work out to private vocational counselors.[169]

The act provides a list of situations where there will be a presumption in favor of ordering vocational rehabilitation services.[170]

The act provides for a much needed change in connection with vocational benefits. Now the administrative law judge can order vocational changes even though the employee is temporarily totally disabled and under active medical care.[171] The employee does not have to wait to be vocationally rehabilitated until medical treatment has been completed.[172]

As was the case under the old act, vocational rehabilitation benefits may be awarded for up to 52 weeks and may be extended an additional 52 weeks under certain circumstances.[173] As was the case under the old act, the employee may receive weekly benefits at the previously established temporarily total disability rate while undergoing vocational rehabilitation.[174]

There is a new provision that allows the employer, under certain circumstances, to deduct the tuition it has paid from a later permanent disability award.[175]

Permanent total disability benefits.[176] The new act retains the old statutory definition of permanent total disability. Permanent total disability must be based on objective findings. It is defined as the inability to earn wages in any employment, for which the employee may become physically suited and reasonably fitted by education, training, experience or vocational rehabilitation.[177] The statute also defines permanent total disability as the loss of both hands, both feet, both legs, and both eyes or any two thereof.[178]

An employee found to be permanently and totally disabled will be entitled to receive up to 70 percent of the employee's average weekly wage, not to exceed the state's average weekly wage.[179] Unlike permanent partial disability, there will be no cap on the state's average weekly wage. The state's average weekly wage

will be determined by the original accident or injury date.

Permanent total disability may be awarded in situations where temporary total disability has been exhausted even though the employee has not reached maximum medical improvement.[180] The weekly benefits are in addition to the requirement that the employer provide maintenance medical benefits to the claimant as well as a lifetime requirement for prosthetic devices.

Amputations and permanent loss. The act retains the provisions of the old law relating to amputations and loss of vision[181] in a laundry-list fashion.[182] For example, the employee will receive 275 weeks of permanent partial disability payments for a leg amputated at the knee or between the knee and the hip.[183]

The new act provides that the weekly calculation is based on 70 percent of the employee's average weekly wage, not to exceed $323 per week.[184] In the leg amputation cited above, the employee would be entitled to $88,825. Had the accident occurred between Nov. 1, 2009, and Aug. 26, 2010, the maximum recovery would have been $98,725.[185] This would represent a reduction in benefits of 10 percent.

Restrictions on medical maintenance. No continuing medical maintenance will be awarded under the new act once the employee has reached the full benefit of conservative medical management unless such treatment is recommended by the treating physician or an independent medical examiner chosen by the commission.[186]

Disfigurement. The employee may receive up to $50,000 in benefits for disfigurement.[187] Such benefits cannot be awarded until 12 months after the original injury date and cannot be awarded to any body part that was awarded permanent partial disability.[188]

Death benefits.[189] Lump sum benefits payable to spouses, children, and others payable as a result of the employees' death arising out of and in the course and scope of employment are changed from the old law.[190] Funeral expenses have been raised to $10,000 from the previous $8,000.[191] The distribution and calculation of weekly income benefits changed from the old law.[192] Lump sum benefits are slightly changed.[193] Within a few weeks, the Court of Existing Claims and the commission will both be issuing separate handbooks that will show the new benefits as compared to the old benefits.

Unemployment benefits. As was the case under the old law, the employee cannot recover temporary total disability while receiving unemployment insurance benefits.[194]

Statute of limitations.[195] The time in which to file some claims has been shortened. Unless the employee has received temporary total disability payments or medical attention provided by the employer, the employee must file the claim within one year of the date of injury rather than the old two-year period.[196] If temporary total disability is paid, the claim must be filed within one year of the last payment or two years from the date of the injury, whichever is greater.[197]

Occupational disease claims must be filed within two years of the last injurious exposure to the hazards of the disease.[198]

Once a claim is filed, a request for hearing must be filed within six months or the claim will be dismissed with prejudice.[199] This provision was rarely, if ever, used under the old law. It is hoped that this provision will not be used under the new act in situations where the employer and employee are having no disputes and benefits are being provided.

Death claims must be filed within one year of the date of death rather than the two-year period allowed under the old law.[200]

Final settlements.[201] The new act allows for joint petition settlements (final settlements).[202] A record of the joint petition must be made by an official commission reporter.[203]

Re-opening of claims.[204] The effects of aging cannot be considered in determining whether there has been a change of physical condition.[205] A request for change in benefits based upon a change of condition must be made within 6 months of an award, rather than the old law that provided for a three-year statute of limitations.[206]

Changes in provisions regarding attorneys.[207] The act specifically allows anyone to appear on behalf of either the employee or employer.[208] The only requirement for representation is that proof of representation is in writing and filed with the commission.[209] The act specifically provides that fees for legal services rendered in a claim shall not be valid unless approved by the commission.[210] This writer

assumes that this provision applies to both the employee and employer.

Fees for the attorney representing the employee cannot exceed 10 percent of temporary total disability, 10 percent of the value of any vocational rehabilitation services recovered,[211] and 20 percent of any permanent partial disability recovered.[212] In the event that the employer has made a written offer of settlement, the attorney can only recover 30 percent of the difference between the offer and the award of the court.[213] There is no provision that allows the attorney for the employee to recover expenses incurred in connection with the prosecution of the claim, including the expense of obtaining a medical report or other similar expenses in support of the claim for benefits. The recovery of such expenses was allowed under the old law.

> **Certified workplace medical plans will continue to be regulated by the state commissioner of health in the same manner as under the old law.**

The commission may award attorney fees to the employee's attorney only on "controverted" claims[214] defined by the act. A "controverted claim" is defined as a contested hearing over whether there has been a compensable injury or whether the employee is entitled to temporary total disability, temporary partial disability, permanent partial disability, permanent total disability or death benefits.[215] A request for a change of physician will not trigger the definition of "controverted" claim.[216] In the event that such a request is made, the attorney fee for the successful change of physician will be $200.[217]

Certified workplace medical plans.[218] The rules and provisions regarding certified workplace medical plans are much the same as the old law.[219] The employer may directly contract with a CWMP after giving its carrier 60-day notice of its intention to directly contract with a CWMP.[220]

As was the case under the old law, there is an incentive for the employer to use a CWMP. If the employer is not experience-rated when it participates in a certified workplace medical plan, its workers' compensation insurer must grant a 10-percent premium deduction.[221]

Certified workplace medical plans will continue to be regulated by the state commissioner of health in the same manner as under the old law.[222]

New alternative dispute resolution and mediation provisions.[223] The commission is directed to develop an alternative dispute resolution program[224] and to appoint a commission mediator to conduct informal sessions to attempt to resolve assigned disputes.[225] In situations where the employee does not have an attorney, the commission mediator is directed within 30 days to have an informal mediation between the parties regarding issues such as closed-end periods of temporary total disability where the employee has returned to work, medical benefits, reimbursement of travel and medical treatment.[226]

While mediation remains voluntary, informal, and nonbinding, it is encouraged by the act.[227] As before, mediations remain confidential.[228]

The commission is directed to certify private attorneys and non-attorneys as mediators. The private certified mediator must have five years of experience in the area of workers' compensation.[229]

New subrogation provisions.[230] The act provides for a new schematic for the subrogation recovery by the employer and insurance carrier against third-parties who have caused the injury to the employee. Although not specifically addressed in the act, all entities such as self-insureds, group associations, opt-out entities and all who have been authorized to underwrite workers' compensation claims and have paid such claims will be given the benefit of the new subrogation provisions.

Under the old law, the employer was subject to the distribution of benefits by the trial judge if a settlement against a third party was less than the amount of benefits paid by the employer until the date of the settlement. If the third-party settlement was for more than the amount of benefits paid, the employer was limited to the formula pronounced by the Supreme Court in the case of *Prettyman v. Halliburton*. The employer was then allowed to offset any future benefits payable to the employee against the

net recovery by the employee in the third party settlement.

The new scheme provides that the employer is entitled to two-thirds of the recovery from a third party after a deduction for reasonable fees and costs of the litigation whether the settlement was for more or less than the subrogation claim of the employer/insurance carrier.[231] The recovery by the employer not only includes the money paid by the employer to the date of the settlement, but also includes the amount to be paid (reserved) on an open claim that has not been settled.[232] The act does not address whether the district court where a third party case is filed or the commission has jurisdiction to determine whether the reserve on a case claimed by the employer or insurance carrier is reasonable.

The employer is allowed to file suit against the third party in its own name.[233] But the act addresses the normal situation where the employee first files suit. In that event, notice must be given the employer. The employer then must be allowed to intervene in the employee's lawsuit.[234]

Once the employer recovers all it has paid or to be paid, the employee will be entitled to the remainder of the recovery.[235]

Under the old law, the employer was not entitled to make any recovery against an uninsured motorist or underinsured motorist policy. The act provides that the employer is entitled to maintain a third party action against the employer's uninsured motorist coverage or under insured motorist coverage.[236] No such recovery was allowed under the old act.

Prime contractor and subcontractor liability.[237] An immediate employer of an employee is required by the act to provide coverage under the act to all its direct employees[238] unless:[239]

- The employer is subject to a federal workers' compensation act.
- The employer is in the business of agriculture or horticulture and had a payroll of less than $100,000 in the preceding calendar year.
- The employee is a participant in a work or training program administered by the Department of Human Services.
- The employee is employed by an employer who has five or fewer, all of whom are related by blood or marriage to the employer, if the employer is a natural person or a general or limited partnership or an incorporator of a corporation if the corporation is the employer.
- Certain employees employed in a youth sports league and certain people performing voluntary services.
- The employee is a licensed real estate agent paid on a commission basis
- Certain owner-operators who own or lease a truck-tractor or truck for hire.
- Certain operators of drive-away operations regarding a tow vehicle.
- Domestic workers in a private home or household who had an annual payroll of less than $50,000 in the preceding calendar year.

Any employer may waive these exceptions and provide coverage to its employees.[240]

The immediate employer is required to provide coverage to its employees under the act.[241] If the immediate employer fails to secure compensation required by the act, the prime or principal contractor that contracted with the immediate employer will be liable for providing coverage to the employee unless there is an intermediate employer who has coverage. In that case, the intermediate employer will be responsible to provide coverage to the employee.[242]

If the intermediate or prime contractor is forced to provide coverage because the immediate employer failed to provide coverage, it will have a lien against any monies due or to become due to the immediate employer.[243] This would be in addition to any remedy it might have against the immediate employer in district court for damages not associated with workers' compensation obligations.

Additional provisions address the liability of the prime contractor when the principal employer has presented a certificate of noncoverage.[244] The commission will be vested with the power to issue certificates of noncoverage.[245]

Workers' compensation counselor or ombudsman program.[246] The new act provides for an expansion of the worker compensation/ombudsman program. The act specifically states that the purpose of the expanded program is to assist injured workers through the

system without the necessity of retaining legal representation.[247] The ombudsman is directed to provide information to injured workers, investigate complaints, and communicate with employers, insurance carriers, self-insureds and health providers. The ombudsman program will be required to provide workshops for employers and medical providers.[248]

New retaliatory discharge provisions.[249] The act vests the commission, rather than district court as was the case under the old law, with the exclusive subject matter jurisdiction to hear claims from employees who claim that the employer has discriminated or retaliated against them because the employee filed a claim under the act or hired a lawyer for representation under the act.[250]

The commission may award up to $100,000.[251] The prevailing party will be entitled to recover costs and a reasonable attorney fee.[252]

The act also provides that the employer may not discharge the employee for the sole reason that the employee was absent from work while temporarily disabled or for any purpose to avoid payment of temporary total disability to the injured employee.[253] The employer is not required to rehire or retain an employee who, after temporarily total disability has been exhausted, is determined by a physician to be physically unable to perform his or her assigned duties or situations where the position is no longer available.[254]

Medical fee schedule. The new act provides that the commission must conduct a review of the medical fee schedule at least every two years and consider whether it will recommend changes to the Legislature.[255] Any change to the fee schedule must be approved by the Legislature.[256] The commission is given various benchmarks to use in recommending adjustments to the fee schedule.[257] Various limits on medical procedures, medical equipment, and prescriptions as well as stop-loss provisions are provided for in the act.[258]

The commission retains exclusive jurisdiction to resolve fee schedule disputes.[259]

Multiple Injury Trust Fund provisions.[260] The act provides that the employee will receive compensation for permanent total disability if the injury received in his most recent accident if combined with any previous disability renders the employee permanently and totally disabled. The employer will only be liable for the degree of disability that would have resulted from the last injury as if there had been no pre-existing impairment. The Multiple Injury Trust Fund will be responsible for total permanent disability only when the permanent partial disability awarded to the employee when added to any pre-existing disability of the employee results in the employee being totally and permanently disabled.[261]

Claims against the Multiple Injury Trust Fund must be filed within two years of the date of the last order for permanent partial disability.[262]

The act provides for assessment of carriers, self-insurers, group associations and CompSource Oklahoma for the funding of the Multiple Injury Trust Fund.[263] The commission will administer the fund.[264]

Physicians advisory committee.[265] The act retains the nine-person physicians advisory committee appointed by the governor, speaker of the House, and president pro tempore of the Senate.[266] The committee is given the responsibilities to:

- Review treatment inappropriate and unnecessary treatment, procedures, and any abuse practice or inappropriate method or billings.[267]
- Make recommendations regarding any abusive practice by health providers.[268]
- Make recommendations regarding acceptable deviations from the American Medical Association's "Guides to the Evaluation of Permanent Impairment."[269]
- Address and make recommendations regarding any protocols not addressed by the ODG.[270]
- Make recommendations regarding all manner and means of medical issues, including injury causation and apportionment.[271]

Advisory council on workers' compensation.[272] The advisory council will have nine members — three appointed by the governor, three appointed by the speaker and three appointed by the president pro tempore.[273] The governor's appointments will include both the chairman and vice chairman of the council.[274] Among other duties, the advisory council is directed to review Oklahoma treatment guidelines,[275] provide oversight of the independent medical examiners[276] and review and analyze

all aspects of the system, the work done by the commissioners and study trends in the field of workers' compensation.[277]

The advisory council is to meet at least quarterly[278] and submit its findings on an annual basis to the governor, speaker, president pro tempore and the chief justice of the Supreme Court.[279]

Recovery of fees for services by medical providers.[280] The commission retains subject matter jurisdiction regarding medical expenses incurred by the employee for any work related injury. Just like the old law, the district court has no jurisdiction regarding such expenses if the commission finds the medical treatment to be as a result of an on-the-job injury.[281]

Medical providers will be allowed to voluntarily contract with the attorney for the employer to recover disputed medical charges.[282] This writer assumes that the commission will allow medical providers to contract with whomever they want to contract, not just the attorney for the employer.

Disclosure of medical records. Medical providers who render treatment to employees covered by the act must permit the copying of their medical records and furnish full written information to the commission.[283] This writer recommends that the party requesting such records obtain a release from the employee that complies with HIPPA.

The Workers' Compensation Arbitration Act (WCAA).[284] The WCAA applies to arbitration agreements made on and after Feb. 1, 2014.[285] The WCAA only applies to employees covered by the act.[286]

The paramount issue regarding the WCAA is whether the employer may force the employee to arbitrate the employee's claim when the employee does not desire to arbitrate her claim. If so, it would deny the employee access to the judicial system. Moreover, most employees do not have the expertise to fight with an employer in an arbitration proceeding. Very few employees have the money to pay for an attorney and incur the associated costs of an arbitration proceeding. Such costs and attorney fees are not generally recoverable under the WCAA,[287] although the employer must pay the fees and expenses of the arbitrator.[288]

The WCAA provides that an administrative law judge may hear and determine challenges to an agreement to arbitrate.[289] An aggrieved party may appeal such decision to the commission.[290]

The arbitrator may hold a pre-hearing conference, decide cases on a summary disposition, subpoena witnesses, and permit discovery, including depositions.[291] The arbitrator may award all benefits allowable under the act.[292]

Final decisions of an arbitrator may only be appealed to the district court.[293]

Other provisions. The new legislation provides for:

- Fees and costs under the new system,[294]
- The Self-Insurance Guaranty Fund,[295]
- The Oklahoma Option (Opt-Out) Insured Guarantee Fund,[296]
- Insurance policies with deductibles paid by the employer,[297]
- Funding of the new system,[298]
- The formation of group self-insurance associations,[299]
- Own risk employers,[300]
- Fraud provisions,[301]
- Occupation diseases,[302]
- New provisions regarding asbestosis and silicosis,[303]
- Reporting requirements of employers who have claims submitted against them,[304]
- Methods for public entities to comply with the act,[305]
- New provisions for compensation payable to alien non-residents,[306]
- An employee who is incarcerated is not eligible to receive medical or disability benefits under the act,[307] and
- Advance payments and payment of full wages with a method of recoupment of such payments.[308]

The act also gives the employer the capability of off-set or reduction in an amount equal to, dollar-for-dollar, the amount of benefits the injured employee has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan, a group disability policy, a group loss of income policy, a group accident, health, or accident and health

policy or a group hospital or medical services contract. The reduction will not apply if the injured employee has paid for the policy.[309]

It is assumed that Medicare and Medicaid will have to be paid back for any medical benefits they have provided in situations where the medical treatment was in connection with a job-related injury.

The new legislation also provides that by July 1, 2014, the commission, with the assistance of the insurance commissioner, will implement an electronic data interchange system that provides relevant data concerning the Oklahoma Workers' Compensation System and the delivery of benefits to injured workers.[310] Within 30 days of the effective date of the act, the governor must name five people to serve as the Oklahoma workers' compensation electronic data interchange advisory committee.[311]

1. 85A O.S. §1-167; *See* 85A O.S. §3.
2. 85A O.S. §400; Old law *see* 85 O.S. §303.
3. 85A O.S. §107-120.
4. 85A O.S.§121-149.
5. 85A O.S. §172; *See* §400; §3.B.1.; *See* also 85A O.S. §45; Old law *see* 85 O.S §315.
6. 85A O.S. §400.
7. 85A O.S. §35.
8. 85A O.S. §5.
9. 85A O.S. §5 A.
10. 85A O.S. §5; §33.
11. 85A O.S. §5 E. F.
12. 85A O.S. §5 G.
13. 85A O.S. §400 A.
14. 85A O.S. §400 A.
15. 85A O.S. §400 L.
16. 85A O.S. §45 G.; *See* §400.
17. 85A O.S. §45 G.
18. 85A O.S. §400 A..
19. 85A O.S. §400 A.
20. 85A O.S. §400 A.
21. 85A O.S. §400 A.
22. 85A O.S. §19.
23. 85A O.S. §19 B.
24. 85A O.S. §19 C.
25. 85A O.S. §19 B.
26. 85A O.S. §27; *See* 85A O.S. §19 C.; 85A O.S. §326.
27. 85A O.S. §27 A.B.C.
28. 85A O.S. §19 B.
29. 85A O.S. §19 C.
30. 85A O.S. §19 C.; *See* 85A O.S. §70 and §111 .
31. 85A O.S. §78.
32. 85A O.S. §27 A.B.: *See* 85A O.S. §73 and §75.
33. 85A O.S. §20 A.1.; *see* §21 D. and §22 B. and §71.
34. 85A O.S. §20 A.4.; 85A O.S. §22 A.1.
35. 85A O.S. §22.
36. 85A O.S. §22 A.1.b.; 85A O.S. §2.a.
37. 85A O.S. §22 C.1.
38. 85A O.S. §22 B. 6.
39. 85A O.S. §53.
40. 85A O.S. §7 A.B.
41. 85A O.S. §7 C.
42. 85A O.S. §7 D.
43. 85A O.S. §400 J.
44. 85A O.S. §19 E.1.
45. 85A O.S. §19 E.2.
46. 85A O.S. §22 B. 2. 3.
47. 85A O.S. §72; 85A O.S. §27.
48. 85A O.S. §22 D.; §72 A.
49. 85A O.S. §22 D.; and §71 B.C.; §72 A.
50. 85A O.S. §22 D.; §72 A.
51. 85A O.S. §27 A.
52. 85A O.S. §27.
53. 85A O.S. §27 B.3.
54. 85A O.S. §85.
55. 85A O.S. §86 A.B.
56. 85A O.S. §86 B.
57. 85A O.S. §70.
58. 85A O.S. §70 1.
59. 85A O.S. §71 B.
60. 85A O.S. §71.
61. 85A O.S. §71 B.4.
62. 85A O.S. §71 C.; 85A O.S. §72 A.1.; §75.
63. 85A O.S.§72 C.2.a.; §72 A.1.
64. 85A O.S. §75.
65. 85A O.S. §71 D.; 85A O.S. §72A.4.;§72 B.5.
66. 85A O.S. §72 A.3.
67. 85A O.S. §78 A.; Old law *see* 85 O.S. §340.
68. 85A O.S. §78 A.
69. 85A O.S. §79; Old law *see* 85 O.S.§346 A.
70. 85A O.S. §78.
71. 85A O.S. §78 C.1-8.
72. 85A O.S. §78 C.
73. 85A O.S. §72 B.1.a.and C.1.
74. 85A. O.S.§72 B.1.b.
75. 85A O.S. §71 C.1.
76. 85A O.S. §71, 72,73,75.
77. 85A O.S. §38 A. 1.; Old law *see* 85 O.S. §351.
78. 85A O.S. §38 A.2.; §42; Old law *see* 85 O.S. §356.
79. 85A O.S. §36 A. 2.
80. 85A O.S. §36 A.3.
81. 85A O.S. §36 A.4.
82. 85A O.S. §8 A.; Old law *see* 85 O.S. §413 B.
83. 85A O.S. §9; Old law *see* 85 O.S. §349 A.
84. 85A O.S. §40; Old law *see* 85 O.S. §352-354.
85. 85A O.S. § 200-213.
86. 85A O.S. §200.
87. 85A O.S. §201 A.8.
88. 85A O.S. §202, 209.
89. 85A O.S. §201 A.1.
90. 85A O.S. §202 C.D.E.F.G.I.
91. 85A O.S. §202-203.
92. 85A O.S. §202 H.
93. 85A O.S. §203 I.
94. 85A O.S. §203 B.; 85A O.S. §45-47.
95. 85A O.S. §203B.
96. 85A O.S. §203 B. .
97. 85A O.S. §203 C.
98. 85A O.S. §203 C.; §203 B.
99. 85A O.S. §204 A.B.
100. 85A O.S. §204 B. 3.
101. 85A O.S. §219 B.;85A O.S. §213 (B) §204 B.2.;C-I.
102. 85A O.S. §211 (I).
103. 85A O.S. §211 A.
104. 85A O.S. §211 A.
105. 85A O.S. §211 B. 4.
106. 85A O.S. §211 B. 5. 6. 7.
107. 85A O.S. §211 B. 7.
108. 85A O.S. §211 b. 7.
109. 85A O.S. §112.
110. 85A O.S. §112.
111. 85A O.S. §112 .
112. 85A O.S. §113; Old Law *see* 85 O.S. §330.
113. 85A O.S.§2. 3.; §113.
114. 85A O.S. §113.
115. 85A O.S. §45; 85A O.S. §113; Old law *see* 85 O.S. §332.
116. 85A O.S. §45 A.1.2.
117. 85A O.S. §59; Old law *see* 85 O.S. §331.
118. Old Law 85 O.S. §332.
119. 85A O.S. §5 A.1.
120. 85A O.S. §59.
121. 85A O.S. §45 A.2.
122. 85A O.S. §49; Old law *see* 85 O.S. §332 (P) .
123. 85A O.S. §16; *See* 85A O.S. §17 C.
124. 85A O.S. §16 B.
125. 85A O.S. §16 A.
126. 85A O.S. §16; *See* §50; 85A O.S. §56.; Old Law *See* 85 O.S. §326.
127. 85A O.S. §50 B.
128. 85A O.S. §56 B.
129. 85A O.S. §50 H.4.;85A O.S. §18; *See* §16.
130. 85A O.S. §55; *See* §16.
131. 85A O.S. §18.

132. 85A O.S. §51; *See* §16; Old law *see* 85 O.S. §326-327.
133. 85A O.S. §51.
134. 85A O.S. §57; §45; Old law *see* 85 O.S. §327.
135. 85A. O.S. §62; Old law *see* 85 O.S. §332 (K) (L) (M).
136. 85A O.S. §62 A.
137. 85A O.S. §62 A.
138. 85A O.S. §62 A.
139. 85A O.S. §62 B.1.2.
140. 85A O.S. §61: Old law 85 O.S. §333 (E).
141. 85A O.S. §61; §54.
142. 85A O.S. §61.
143. 85A O.S. §13; Old law *see* 85 O.S. §308 (10) (f).
144. 85A O.S. §13 A.
145. 85A O.S. §13 A. 2; *See* 85A O.S. §17 C.
146. 85A O.S. §13 B.
147. 85A O.S. §14; Old law *see* 85 O.S. §308 (10) (b).
148. 85A O.S. §14 A.
149. 85A O.S. §14 B.
150. 85A O.S. §14 B.2.
151. 85A O.S. §45 C.; Old law *see* 85 O.S. §308 (35); 85 O.S. §333.
152. 85A O.S. §45 C.1.
153. 85A O.S. §45 C.1.
154. 85A O.S. §45 C.1.
155. 85A O.S. §45 C. 8.; Old law *see* 85 O.S. §333 (B).
156. 85A O.S. §45 C.4.
157. 85A O.S. §43 C. 5.
158. 85A O.S. §45 C.2.
159. 85A O.S. §45 C.5.
160. 85A O.S. §45 C.5.
161. 85A O.S. §45 C. 5.
162. 85A O.S. §45 C. 5.
163. 85A O.S. §45 C. 5. d.
164. 85A O.S. §45 6.B.1.
165. 85A O.S. §60 B.
166. 85A O.S. §45; Old law *see* 85 O.S. §328.
167. 85A O.S. §45 C.10.
168. 85A O.S. §45 E.1.
169. 85A O.S. §45 E.2.
170. 85A O.S. §45 E.3.
171. 85A O.S. §45 E.4.5.
172. 85A O.S. §45 E.5.
173. 85A O.S. §45 E.6.
174. 85A O.S. §45 E.8.
175. 85A O.S. §45 E.8.
176. 85A O.S. §45; Old law *see* 85 O.S. §336.
177. 85A O.S. §2. 35.
178. 85A O.S. §2. 35.
179. 85A O.S. §45 D.
180. 85A O.S. §45 D.1.
181. 85A O.S. §46 E.1.2.
182. 85A O.S. §46 A.C.D.E.
183. 85A O.S. §46 A.3.
184. 85A O.S. §6 B.
185. *See* old law 85 O.S. §333 F,1.
186. 85A O.S. 50 D.; Old law *see* 85 O.S. §326.
187. 85A O.S. §45 F.1.; Old law *see* 85 O.S. §334.
188. 85A O.S. §45 F.2.3.
189. 85A O.S §47; 85A. O.S. §11; Old law *see* 85 O.W. §337.
190. 85A.O.S. §47; Old law *see* 85 O.S. §337 (A) (13); (A) (3); (A) (5) (6) (E).
191. 85A O.S. §47 C.5.
192. 85A O.S. §47 2.3.4.; 85 O.S. §337 (C).
193. 85A O.S. §47 C.3.
194. 85A O.S. §49; Old law *see* 85 O.S. §332 (P).
195. 85A O.S. §69; Old law *see* 85 O.S. §318.
196. 85A O.S. §69 A.1.
197. 85A O.S. §69 B.1.
198. 85A O.S. §69 A.2.a.
199. 85A O.S. §69 D.
200. 85A.O.S. §69; Old law *see* 85 O.S. §318.
201. 85A O.S. §87; 85A O.S. §115 A.; Old law *see* 85 O.S. §337, §339.
202. 85A O.S. §87; 85A O.S. §115; Old law *see* O.S. §337 (K), §339.
203. 85A O.S. §115.
204. 85A O.S. §69 B.C., §80; Old law *see* 85 O.S. §318 (F).
205. 85A O.S. §80 D.
206. 85A O.S. §80; Old law *see* 85 O.S. §318 (F).
207. 85A O.S. §82; Old law *see* 85 O.S. §343.
208. 85A O.S. §71 C.1.
209. 85A O.S. §83; §71.
210. 85A O.S. §82 A.1.a.
211. 85A O.S. §82 A.1.b.(4); Old law 85 O.S. §343 (F) does not allow recovery of attorney fees.
212. 85A O.S. §82 A.1.a.; *see* 85A O.S. §210 A. 3.
213. 85A O.S. §82 A.1.b.
214. 85A O.S. §82 O.S. §A.1.b.c.
215. 85A O.S. §82 O.S. §A.1.c.
216. 85A O.S. §82 A.1.c.
217. 85A O.S. §82 A.1.b.(3).
218. 85A O.S. §64.
219. 85A O.S. §56; 85A O.S.§64.
220. 85A O.S. §64 D.
221. 85A O.S. §64 E.
222. 85A O.S. §64.
223. 85A O.S. §110; Old law *see* 85 O.S. §321.
224. 85S O.S. §110 A.
225. 85A O.S. §22 C.9.
226. 85A O.S. §110 D.
227. 85A O.S. §110.
228. 85A O.S. §110 F.
229. 85A O.S. §110 G.
230. 85A O.S. §43; Old law *see* 85 O.S. §348.
231. 85A O.S. §43 A.2.; Old law *see* 85 O.S. §348 and cases interpreting same .
232. 85A O.S. §43 A.1.c.
233. 85A O.S. §43 B.
234. 85A O.S. §43.
235. 85A O.S. §43 B.3.
236. 85A O.S. §43 B.4.
237. 85A O.S. §5; 85A O.S. §36 E; Old law *see* 85 O.S. §348.
238. 85A O.S. §3.
239. 85A O.S. §2.18.b.
240. 85A O.S. §37.
241. 85A O.S. §35-37; §40.
242. 85A O.S. §36-37.
243. 85A O.S. §33.
244. 85A O.S. §33; *See* 85A. O.S. §36 C.
245. 85A O.S. §36 C. D.
246. 85A O.S. §109; Old law *see* 85 O.S. §320.
247. 85A O.S. §109 A.
248. 85A O.S. §109 B.D.
249. 85A O.S. §7.
250. 85A O.S. §7 B.; Old law *see* 85 O.S. §341.
251. 85A O.S. §7 C.
252. 85A O.S. §7 D.
253. 85A O.S. §7 E.
254. 85A O.S §7 F.
255. 85A O.S. §50 H.1.
256. 85A O.S. §50 H.1.
257. 85A O.S. §50 H.3.
258. 85A O.S. §50 H.3.
259. 85A O.S. §55 A.; Old law *see* 85 O.S. §327.
260. 85A.O.S. §30-34; Old law *see* 85 O.S. §402-403, §406.
261. 85A O.S. §32 A.
262. 85A O.S. §33 A.
263. 85A O.S. §31, §29; Old law *see* 85 O.S. §403.
264. 85A O.S. §31-32.
265. 85A O.S. §17; Old law *see* 85 O.S. §373.
266. 85A O.S. §17 A. 1.2.3.
267. 85A O.S. §17 B.1.
268. 85A O.S. §17 B.2.
269. 85A O.S. §17 B.3.; *See* also 85A O.S. §60.
270. 85A O.S. §17 B.4.
271. 85A O.S. §17 B.6.
272. 85A O.S. §121.
273. 85A O.S. §121 B.1.2.3.
274. 85A O.S. §121 F.
275. 85A O.S. §121 L.
276. 85A O.S. §121 K.
277. 85A O.S. §121 J.
278. 85A O.S. §63 H.
279. 85A O.S. §121 J.
280. 85A O.S. §18 A.
281. 85A O.S. §18.
282. 85A O.S. §82 A.4.; *See* 85A O.S. §64; Old law *see* 85 O.S. §328.
283. 85A O.S. §58.
284. 85A O.S. §300-328.
285. 85A O.S. §303.
286. 85A O.S. §301.
287. 85A O.S. §316, §321, §325 .
288. 85A O.S. §321.
289. 85A O.S. §326.

290. 85A O.S. §327.
291. 85A O.S. §315, §317.
292. 85A O.S. §321.
293. 85A O.S. §327-328.
294. 85A O.S. §58; Old law *see* 85 O.S §308, §370.
295. 85A O.S. §96 §28; §100, §205; Old law *see* 85 O.S. §407, §361-364.
296. 85A O.S. §205.
297. 85A O.S. §91; §95.
298. 85A O.S. §260,§264,§28,§207,§260,§266, §29; *See* §129 of House bill 301 (2013).
299. 85A O.S. §103; §123.
300. 85A O.S. §111; §204; §206-207.
301. 85A O.S. §6; Old law *see* 85 O.S. §410 and 21 O.S. §1663.
302. 85A O.S. §65, §67-68; Old law *see* 85 O.S. §316, §318 (F), §323 (A), §323 (B).
303. 85A O.S. §66; Old law *see* 85 O.S. §316, *See* 85A O.S. §69.
304. 85A O.S. §63.
305. 85A O.S. §107.
306. 85A O.S. §11.
307. 85A O.S. §9; Old law *see* 85 O.S. §332 (I); §336 (B).
308. 85A O.S. §89; Old law *see* 85 O.S. §345 (E).
309. 85A O.S. §44 A.
310. 85A O.S §101 B.; *See* 85A O.S. §25.
311. 85A O.S.§101 C.

ABOUT THE AUTHOR

Kenneth David "Dave" Roberts practiced in Oklahoma City and focused his practice on workers' compensation. He passed away on Jan. 6, 2014. This article was published posthumously.

Proposed OBA Master Lawyers Section: Services and Benefits

A petition to create the OBA Master Lawyers Section for senior lawyers is currently being circulated. Be sure to read the Message from the President from Renée DeMoss in this issue to learn more about the need and purpose of this proposed section. Below are proposed services and benefits.

1. Provide assistance to lawyers who need temporary help due to sickness, injury or other emergency.
2. Provide assistance to help close practices and serve clients of disabled or deceased lawyers.
3. Provide assistance to monitor compliance of disciplined lawyers.
4. Provide mentorship to law students and new practitioners on an individual or group basis.
5. Provide programs for successful retirement planning and CLE programs specifically designed for lawyers of retirement age.

6. Provide a forum for senior lawyers to discuss common issues, problems and solutions in their practices and daily lives.
7. Provide courts with assistance to *pro se* litigants.
8. Provide assistance to Legal Aid and other voluntary legal clinics, such as research, client and witness interviews and case preparation.
9. Serve as arbitrators or mediators for local disputes or attorney fee disputes.
10. Provide assistance for nonprofit organizations needing help with tax or other legal matters.
11. Serve as speakers on legal topics for community groups, such as schools and churches.
12. Serve as speakers at bar association, committee and section events.
13. Write articles for and assist with the *Oklahoma Bar Journal.*
14. Provide assistance for bar association legal service programs such as Ask A Lawyer and lawyer referral services and programs such as Law Day.
15. Create and staff a Citizens Law School, where community members can attend classes taught by lawyers on subjects such as wills, family law and consumer law.

LITIGATION Section

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Whitney Eschenheimer, Co-Chairperson

Jake Krattiger, Budget Officer

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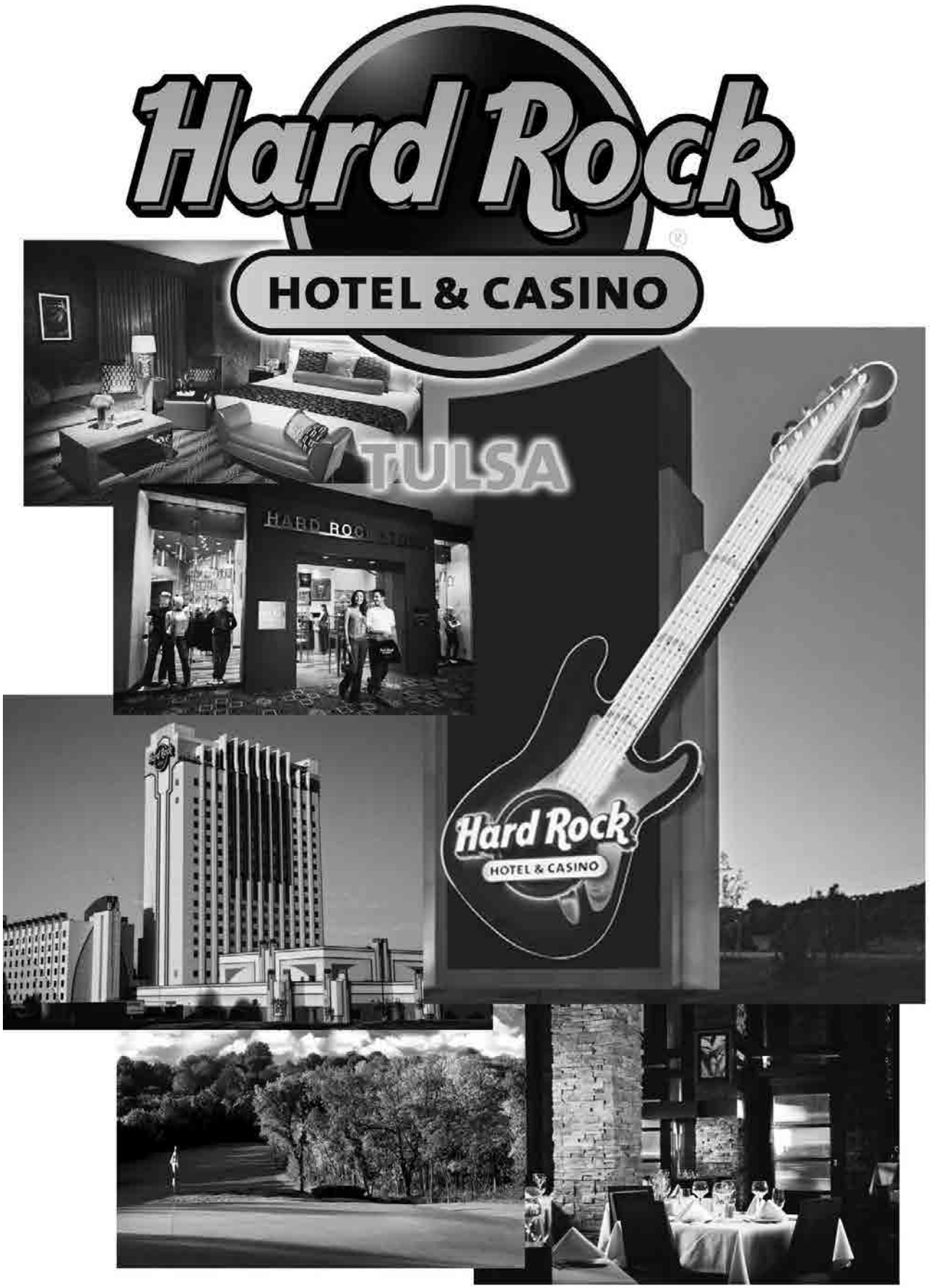
To join:

Go to www.okbar.org/members/sections and download the section members registration form. Complete the form and send in the annual dues.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Rocking on Tulsa Time!

2014 OBA Solo & Small Firm Conference and YLD Midyear Meeting

By Jim Calloway

The 2014 OBA Solo & Small Firm Conference will be coming to the Hard Rock Casino Resort Tulsa June 19-21, 2014. It all begins with the OBA Open Golf Tournament at the beautiful Cherokee Hills Golf Club on June 19. And by "open," we mean open to all lawyers, regardless of practice setting or whether you are attending the Solo & Small Firm Conference. Review the golf information accompanying this article and sign up now.

Bryan M. Simms is our featured conference guest this year. He is a founder of Simms Law Firm Ltd. of Naperville, Ill. where he concentrates his practice in the areas of commercial litigation and civil appeals. Mr. Simms contributes regularly to TechnoLawyer[1] and was recognized as the 2005 TechnoLawyer of the Year. He blogs regularly about the intersection of law practice and technology at www.theconnectedlawyer.com. His plenary session will be "How I Leverage Technology to Improve My Solo Practice." He will also be on our "60 Tips in 60 Minutes" panel and will teach a session on remote access to the law office.

Our Saturday morning session on legal ethics will be taught by Oklahoma Supreme Court Vice Chief Justice John F. Reif and OBA General Counsel Gina Hendryx. This program promises to include a lively discussion with lots of give and take.

Oklahoma City lawyer Jeffrey Taylor has gained a lot of fame blogging as The Droid Lawyer™ and is one of our three Solo & Small Firm Conference presenters who will also be speaking at ABA TECHSHOW™ 2014. He will be teaching about "The Google-Powered Law Office" and giving tips on our "60 Tips in 60 Minutes" panel.

This year I will be talking about a topic that I view as critical for the legal profession and particularly solo and small firm lawyers, "Document Assembly for Everyone – Incorporating it Into Your Work Flow" as well as giving tips on the 60 tips panel.

Fastcase, the legal research service free to OBA members, is sending its trainer Josh Auriemma to teach us about "Getting the Most out of Fastcase for Your Legal Research." This training session will be presented on both Friday and Saturday.

"Lying, Cheating and Stealing in Automobile Dealing" is the provocative title of a presentation by lawyers David Humphreys and Luke Wallace. Many lawyers receive inquiries about car deals gone bad, and this will be a great chance to learn which type of these problems has a legal remedy.

The OBA Young Lawyers Division Midyear Meeting will be held in conjunction with the conference. While we believe all of the conference programming is great for young lawyers, we especially want to encourage them to attend my program on "The

JUNE 19-21 2014 • HARD ROCK HOTEL & CASINO • TULSA, OK

"Get more information on the OBA Solo & Small Firm Conference website at www.okbar.net/solo."

Initial Client Interview" and a program that was requested last year, "Working with DHS on Family Law Matters" with DHS/Child Support Services lawyer Amy Page.

Several years ago, the program "Social Media, Internet and Email Evidence at Trial: Admissibility of Electronic Evidence" with OBA Family Law Section Chair Shane Henry might have sounded like a program just for family law practitioners, but now it seems that this type of evidence is involved in all sorts of litigation matters in addition to its increasing frequency in family law cases.

Worried about e-filing in state courts? How will this change impact your practice? Get the latest information about the state of state court e-filing from Debra Charles, general counsel of the Administrative Office of the Courts.

OBA President-Elect David Poarch will talk about estate-planning needs for the client who says "I Just Want a Will."

Sending a demand letter to collect a debt is not nearly as simple as it once was. "Ins and Outs, Tricks and Traps of the Fair Debt Collection Practices Act" will be taught by David Cheek.

Staying current on changes in the law is always a challenge and this year we offer a program to do just that: "Legislative Update – What's New This Year?" with a panel moderated by Noel Tucker.

In addition, Dale L. Astle will give us "Oklahoma Real Estate Law Update." Dale is president of American Eagle Title and Abstract and General Counsel of American Eagle Title Insurance Company.

There is much, much more. "Juvenile Delinquency Law: The Latest and Greatest Things Every Kid Defender Should Know" will be presented by Adam Barnett, Tulsa County assistant public defender. "Expungement Law: It's As If It Never Happened… or IS IT?" will be taught by Jimmy Bunn, chief legal counsel at Oklahoma State Bureau of Investigation. "Stress and the Solo/Small Firm Lawyer" will be covered by OBA Ethics Counsel Travis Pickens and Rebecca Williams.

Sometimes it is important to know what you don't know. Even the lawyer who intends to never handle an immigration law matter will benefit from "Immigration Law for the General Practitioner," taught by Lorena Rivas Tiemann.

Participation in our children's activities has declined over the years, so this year rather than hosting any organized children's activities, we are directing everyone to the Tulsa Zoo, 12 miles and about a 15-minute drive away. The Tulsa Zoo is offering a 40 per-

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cent discount on admission for our conference attendees who purchase tickets in advance online. Details will be provided to all who register for the conference. The zoo's daily activities are online at www.tulsazoo.org/visit/daily.

Child or family registration for the Solo & Small Firm Conference still allows for those guests to have meals with the other conference attendees.

The Hard Rock Casino Resort features rock memorabilia, beautiful rooms and suites and several varied entertainment venues, as well as gaming.

As always, there will be a goodie bag with interesting gifts for attendees and information from our sponsors. There will lots of door prizes.

We hope to see you at the OBA Solo & Small Firm Conference. Use the form accompanying this article to register or register online at www.okbar.net/solo and the separate form to register for the golf tournament.

Reserve your room by calling 1-800-760-6700 and using the Block Code OKBAR2014. The conference rate is $122 for a standard room.

1. www.technolawyer.com

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!

OKLAHOMA BAR ASSOCIATION

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&YLD MIDYEAR MEETING

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	CIRCLE ONE
EARLY ATTORNEY REGISTRATION (ON OR BEFORE JUNE 5, 2014)	$200
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NO DISCOUNTS. CANCELLATIONS WILL BE ACCEPTED AT ANYTIME ON OR BEFORE JUNE 5, 2014 FOR A FULL REFUND : A $50 FEE WILL BE CHARGED FOR CANCELLATIONS MADE ON OR AFTER JUNE 6, 2014. NO REFUNDS AFTER JUNE 11, 2014. CALL 1 (800) 760-6700 FOR HOTEL RESERVATIONS. REFER TO OKLAHOMA BAR ASSOCIATION WHEN RESERVING ROOM AND/OR BLOCK CODE OKBAR2014.

OBA SOLO & SMALL FIRM CONFERENCE

JUNE 19-21 2014 • HARD ROCK HOTEL & CASINO • TULSA, OK

DAY 1 • Thursday June 19			
3 - 6:30 p.m.	**Conference Registration** (Sequoyah Foyer North)		
6:30 p.m.	**Dinner** (Sky Room, 18th Floor)		
DAY 2 • Friday June 20			
8:25 a.m.	**Welcome** OBA President Renée DeMoss		
8:30 – 9:30 a.m.	**60 Tips in 60 Minutes** Bryan Simms, Jeffrey Taylor and Jim Calloway		
9:30 a.m.	**Break**		
9:40 – 10:35 a.m.	**How I Leverage Technology to Improve My Solo Practice** Bryan Simms		
10:35 a.m.	**Break**		
10:45 - 11:50 a.m.	**Estate Planning: "I Just Want a Will"** David Poarch, OBA President-Elect	**The Initial Client Interview** Jim Calloway	**Juvenile Delinquency Law: The Latest and Greatest Things Every Kid Defender Should Know** Adam Barnett, Tulsa County Assistant Public Defender
11:50 a.m. - 12:45 p.m.	**LUNCH** *(Included in Seminar Registration Fee)*		
12:45 - 1:45 p.m.	**E-Filing in Oklahoma State Courts** Debra Charles, General Counsel Administrative Office of the Courts	**Ins and Outs, Tricks and Traps of the Fair Debt Collection Practices Act** David Cheek	**Getting the Most Out of Fastcase for Your Legal Research** Josh Auriemma – Fastcase (Will be repeated Saturday)
1:45 p.m.	**Break**		
2 - 3 p.m.	**Legislative Update – What's New This Year?** Noel Tucker, Moderator Panel TBA	**Immigration Law for the General Practitioner** Lorena Rivas Tiemann	**Working with DHS on Family Law Matters** Amy Page, Managing Attorney Office of Impact Advocacy and Legal Outreach, DHS/Child Support Services
Approved for 12 hours MCLE / 1 Ethics			

DAY 3 • Saturday June 21			
8:25 a.m.	**Welcome** OBA Executive Director John Morris Williams		
8:30 – 9:20 a.m.	**Legal Ethics for the Solo and Small Firm Lawyer** Oklahoma Supreme Court Vice Chief Justice John F. Reif and OBA General Counsel Gina Hendryx		
9:20 a.m.	**Break**		
9:30 – 10:20 a.m.	**Document Assembly for Everyone – Incorporating it Into Your Work Flow** Jim Calloway		
10:20 - 10:45 a.m.	**Break** (Hotel check out)		
10:45 - 11:35 a.m.	**Social Media, Internet and Email Evidence at Trial: Admissibility of Electronic Evidence** Shane Henry	**Lying, Cheating and Stealing in Automobile Dealing** David Humphreys and Luke Wallace	**Expungement Law: It's as if it Never Happened… or IS IT?** Jimmy Bunn, Chief Legal Counsel at Oklahoma State Bureau of Investigation
11:35 a.m.	**LUNCH** *(Included in Seminar Registration Fee)*		
12:30 – 1:20 p.m.	**Stress and the Solo/Small Firm Lawyer** Travis Pickens and Rebecca Williams	**Remote Communications: Practicing from a Coffee Shop or other Remote Location** Bryan Simms	**Oklahoma Real Estate Law Update** Dale L. Astle
1:20 p.m.	**Break**		
1:30 - 2:20 p.m.	**Getting the Most Out of Fastcase for Your Legal Research** Josh Auriemma – Fastcase (Repeat of Friday's Program)	**The Google-Powered Law Office** Jeffrey Taylor	**Top Ten Rules for Oklahoma Appeals** Jody Nathan
2:20 p.m.	**Break**		
2:30 - 3:20 p.m.	**What's Hot & What's Not in Management & Technology** Bryan Simms, Jeffrey Taylor, Jim Calloway and Jody Nathan		

OBA OPEN FOUR PERSON SCRAMBLE

CHEROKEE HILLS GOLF CLUB - THURSDAY, JUNE 19, 2014

COST: $55 PER PERSON - 1:30 SHOTGUN START

(INCLUDES GREEN FEE, CART, RANGE BALLS, MEMBER PRICING IN PRO SHOP)

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*THERE MUST BE ONE ATTORNEY PER TEAM.

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*LIMITED TO FIRST 72 GOLFERS.

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"Judge Stuart exemplifies the integrity and honesty that make a great judge. He is fair, impartial, and knowledgeable about the law. Judge Stuart has a work ethic that is second to none. Oklahoma County is exceptionally well-served by Judge Stuart."

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"Judge Stuart is the epitome of good temperament and scholarly work. He should be retained in office."
– Kent Myers

Committee to Elect Judge Roger Stuart
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Legislative Update

By Duchess Bartmess

The first significant deadline for legislative measures to survive and to be considered still "alive" has passed. The OBA's original list of nearly 500 legislative measures of significance to watch was developed as a result of the work of the Legislative Monitoring Committee Saturday reading group, and this first deadline reduced that number considerably.

In addition, as reported earlier, only 10 of the more significant bills of interest for OBA members will be discussed here. The purpose of this change in procedure is to encourage each bar member to take the abbreviated information reported here and look at the bill or joint resolution that may have an impact on your practice and clients.

As a reminder to those bar members familiar with the work and reporting of the committee, general appropriation measures, measures with no significant legal application such as naming roads, bridges and buildings, and sunset measures are not considered for review. An OBA member who has a significant practice before various state agencies, boards or commissions is encouraged to check the Oklahoma State Legislature website at www.oklegislature.gov for the status of the sunset measures of interest making their way through the legislative process.

The following 10 legislative measures include both amendatory provisions and completely new provisions. They are presented here to provide information on significant issues which the bar and the committee believe should be of interest to every OBA member. Also, to make it easier for readers who are not familiar with words and terms unique to the legislative process, definitions are provided here.

DEFINITIONS

Committee substitute — Revised version of legislation proposed for consideration or adopted by a committee.

Engrossment — The preparation of the official copy of a measure passed by the house of origin containing the proper endorsement of that house and including all adopted committee and floor amendments, the measure is then forwarded to the opposite house for its consideration. Any amendments made in the opposite house are likewise engrossed and returned to the house of origin for consideration.

First reading — The measure is introduced and its title is read for the first time.

General order — An order of legislative business in which the house considers bills and joint resolutions that have been reported out of committee. Under general order, measures are subject to debate and amendment.

Introduction — The filing of a measure for consideration by the Legislature. A measure is considered introduced upon first reading and is assigned a number in the house of origin at that time.

Strike the title — To change the title of a bill to a few words that are briefly descriptive but constitutionally unacceptable. The major intent of this action is to ensure that the bill will go to a conference committee. Any legislation being reported out of a house committee with the exception of the Appropriations and Budget Committee, must have a full title.

BILLS WORTH YOUR ATTENTION

HB 2405 Amends definition of "tort" in the Governmental Tort Claims Act by specifying laws which constitute a "legal wrong;" and specifically limits liability of the state or political subdivision. As of Feb. 18, the Committee Substitute Engrossed bill was sent to the Senate and was introduced in the Senate. It should also be noted that SB 1503 amends the same section of the Governmental Tort Claims Act. Both bills alter the definition of "tort." The Senate bill adds to the list of exemptions from liability. This bill has a stricken title. As of Feb. 18, it is on general order in the Senate.

HB 2536 Adds two new sections of law regarding legal custody of a child; authorizes limited delegation of custody through power of attorney to delegate custody with specified limitations; adds additional exemption to the Oklahoma Child Care Facilities Licensing Act; makes exception to responsibilities of person receiving custody of a child; and provides exception to limits on placement in foster care. As of March 10, this bill was referred to engrossment for sending to the Senate.

HB 2731 Adds a new assault and battery provision and penalty to Title 21 to include conditions of the victim for the law to be applicable and the capturing image of such acts as being also prohibited; also adds definition of significant injury; and adds the same provision to the Youthful Offender Act to be included in the list of offenses that mandate youthful offender status. As of Feb. 26, the committee substitute is on general order in the House.

HB 2790 Amends probate procedure by adding a new requirement to the elements for petition for summary administration; authorizing court without a hearing to issue letters of special administration; alters requirements for notice to creditors and notice of hearing; and alters publishing time frames. As of Feb. 27, the committee substitute engrossed bill was sent to the Senate and was introduced in the Senate.

HB 3368 Adds five new sections of law creating the "Vehicle Condition Disclosure Act;" provides methods by which seller can limit recovery for defect by purchaser of a vehicle; authorizes the option for a seller to provide a disclaimer statement meeting specific statutory requirements; mandates Department of Public Safety to provide statement form; sets limits on civil actions to recover and type of recovery allowed; and specifies conditions relating to liability of seller if disclosure statement provided. As of Feb. 26, the bill is on general order in the House.

SB 1475 Changes the responsibilities of court-appointed fiduciary reporting requirements; alters termination provisions and makes notice of revocation requirements. As of March 6, the engrossed bill was sent to the House for introduction and first reading.

SB 1600 Adds to the locations where an officer with probable cause may, without a warrant, arrest a person involved in an accident who is under the influence of alcohol, intoxicating liquor or a controlled dangerous substance. As of Feb. 27, the engrossed bill was sent to the House for introduction and first reading.

SB 1897 A new statutory provision mandating automatic retirement of all justices and judges on the state when the total of years of service and age equals 80; the title has been stricken. As of Feb. 24, the bill is on general order in the Senate.

SB 1993 Creates a new statutory responsibility for support and education by the mother of a child born out of wedlock; modifies procedures relating to establishment of paternity of the child; includes new language to make each parent responsible for support of child; modifying provisions relating to responsibilities of parent whose rights have been terminated and as to child if adopted. As of Feb. 18, the bill is on general order in the Senate.

SB 2089 This bill was introduced as a shell bill; the committee substitute adds requirement that a landlord of a multifamily dwelling of more than four families shall maintain public safety and protection from habitual gang or drug activity; defines "habitual gang or drug activity;" adds authority of tenant to bring suit for failure to provide such safety and protection; grants district attorney authority to prosecute landlord; district attorney given discretionary authority to distribute funds recovered among

tenants and district attorney gang and drug-related task force. As of Feb. 27, the engrossed committee substitute was sent to the House for introduction and first reading.

The next report will contain a quick status update on these measures, and discussion of 10 different measures...so stay tuned.

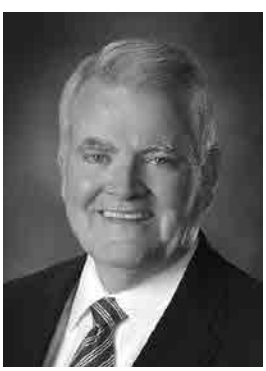
OBA DAY AT THE CAPITOL

Remember, Tuesday, March 25, is the day all bar members are encouraged to come to Oklahoma City and speak to their legislators. Presentations will take place that morning at the Oklahoma Bar Center, and a free barbeque lunch will be served — but you need to RSVP. You'll find the agenda in OBA Executive Director John Morris Williams' article on page 588 or look for the story on www.okbar.org. The information on how to RSVP is also there.

ABOUT THE AUTHOR

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

Robert D. Dennis Retirement Ceremony



March 31 • 2 p.m.
United States Courthouse Ceremonial Courtroom #301
200 NW 4th Street • Oklahoma City, OK

United States District Court Clerk Robert D. (Bob) Dennis is retiring on April 1, 2014 after 41 years of federal service, 28 of which were spent as Clerk of the United States District Court for the Western District of Oklahoma. Mr. Dennis served as the local chapter president of the Federal Bar Association, served on the Judiciary's District Clerks Advisory Group and participated with the USAID judicial reform project in Jakarta, Indonesia. In 1996, Mr. Dennis received the Director's Award for outstanding leadership for his role in the aftermath of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City.

Mr. Dennis received his B.S. in forestry from OSU in 1967 and his J.D. from OCU School of Law in 1973. Prior to becoming the court clerk in 1985, Mr. Dennis served as an Assistant United States Attorney for the Western District of Oklahoma, District Counsel for the United States Small Business Admini-stration and Assistant General Counsel at the Oklahoma Department of Public Safety. He also had a distinguished military career concurrently with his full-time civilian jobs. He retired in 1995 from the military reserves as a lieutenant colonel.

Mr. Dennis is a recipient of several prestigious awards. In his retirement, he is looking forward to traveling, strumming his guitar, mountain hiking, reading and spending time with friends and family, especially his two grandchildren. He also plans to continue public service as evidenced by his working this summer at Roosevelt Lodge in Yellowstone National Park.

Day at the Capitol is Almost Upon Us

By John Morris Williams

March 25 is our slated Day at the Capitol. We have some great speakers, free lunch and an opportunity to go to the Capitol and visit with members of the Oklahoma Legislature. We will assemble at the Oklahoma Bar Center at 10 a.m. and will have a few presentations and lunch.

As of now, only a couple of bills relating to the tenure and selection of judges are active. Also, there are three proposed constitutional amendments that are carryovers from last year that remain alive.

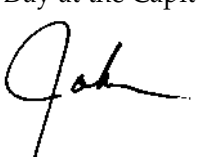
If passed, SB 1897 would require all judges to retire when their age and years of service added together equal 80. This bill at the time of this writing has passed out of committee in the Senate.

SB 1988 would change the way lawyer members of the Judicial Nominating Commission are selected. If this bill becomes law, the JNC lawyer members would be appointed by the speaker of the House and the president pro tem of the Senate. This would eliminate the election of six members of the Oklahoma Bar Association by members of the association. This bill has passed out of committee and is pending a full vote of the Senate.

Although there were several bills introduced in the House that would have affected the selection and tenure of the judiciary, none of them were heard in committee before the deadline for them to be heard.

The new speaker of the House of Representatives has named Rep. Aaron Stiles to chair the House Judiciary Committee. Rep. Stiles is an OBA member practicing in Norman and is the immediate past vice chair of the committee. Rep. Terry O'Donnell has been named the new committee vice chair. Rep. O'Donnell is also an OBA member and practices in Tulsa. Congratulations to both of them!

There are still many days left in the session and many bills that relate to the practice of law and the clients you serve. Please mark your calendar and come be with us at our Day at the Capitol.



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

OBA DAY AT THE CAPITOL

Tuesday, March 25, 2014
Oklahoma Bar Center

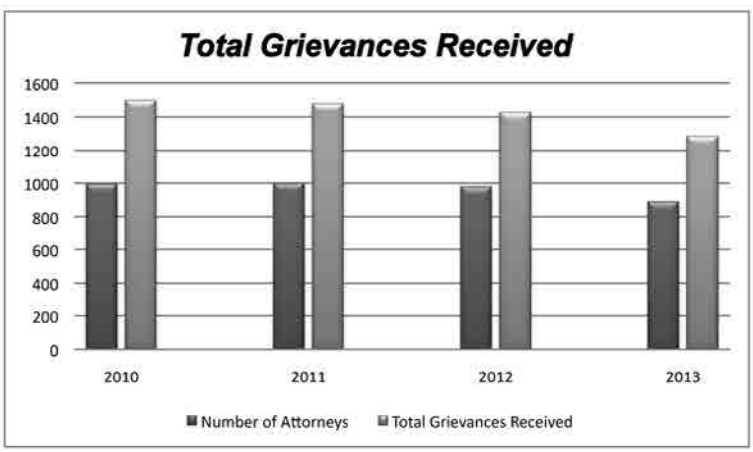
10 a.m.	Registration
10:30 a.m.	Welcome and Town Hall Meeting Update Renée DeMoss OBA President
10:45 a.m.	Bills of Interest to Trial Courts Judge James Croy Oklahoma Judicial Conference
11 a.m.	Civil Procedure & Evidence Bills Jim Milton OBA Civil Procedure and Evidence Committee
11:15 a.m.	Criminal Law & Procedure Bills Trent Baggett District Attorneys Council
11:30 a.m.	Family Law Bills Phil Tucker OBA Family Law Section
11:45 a.m.	Bills of Interest to the Judiciary Mike Evans Administrative Office of the Courts
Noon	Lunch
12:45 p.m.	Talking to Legislators and Instructions for the Day John Morris Williams OBA Executive Director
1 p.m.	Adjourn and Meet with Legislators at the State Capitol

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

Bar Complaints Decrease in 2013

By Gina Hendryx

During 2013, the Office of the General Counsel received 230 formal grievances involving 163 attorneys and 1,055 informal grievances involving 797 attorneys. In total, 1,285 grievances were received against 890 attorneys. In comparison, the previous year a total of 1,428 grievances were received involving 979 attorneys. After holding steady for the past three years, grievances were down approximately 6 percent in 2013 over the previous year.

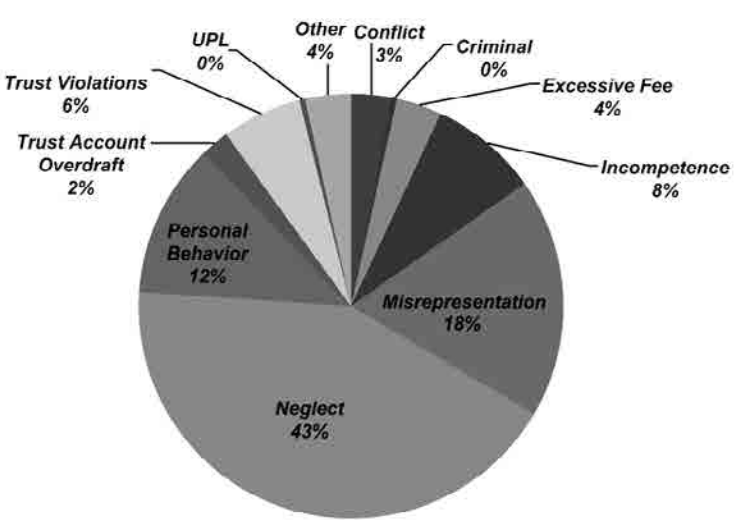


This trend is reflected nationally with a majority of jurisdictions reporting similar decreases. However, discipline complaints tend to be cyclic and spikes are not uncommon when you receive multiple complaints against one attorney. It is not unusual for an attorney to receive multiple grievances in a single year. This can be due to a myriad of factors including illness, substance abuse, depression or stress.

The primary complaint lodged against attorneys continues to be a lack of diligence in representing the client. These issues are reflected as "neglect" and include failure to return phone calls, emails, texts, etc.; failure to keep the client informed of the status of the representation, delay in bringing the matter to a conclusion, and missing court dates and deadlines. This allegation of attorney misconduct accounted for 43 percent of the formal grievances received in 2013, 44 percent in 2012 and 43 percent in 2011.

The 2013 Annual Report of the Professional Responsibility Commission can be viewed at www.okbar.org/members/GeneralCounsel/annualreport.

Ms. Hendryx is the OBA general counsel.



Abel, Ed
Abel, Luke
Able, Dacia
Acuna, Mariano
Adams, Ellen
Ahrend, Jennifer
Ailles, Angel
Albert, Victor
Armstrong, Harold
Austin, Jon
Autrey, Joni
Bailey, Sharon
Baker, Brandon H.
Barghols, Steve
Beech, Johnny
Beeler, Jeff R.
Bernhardt, Patti
Bialick, Mark
Bishop, Kelly
Blacklee, Charlotte G.
Blankenship, J. W.
Block, Denise
Bosley, Ann L.
Bottom, Monty
Bowers, Brock
Bowersox, Elizabeth
Bowman, Andrew M.
Branesky, Joanne
Branscum, David A.
Brewer, Mike
Bromer, Thomas
Brooks, Michael
Brown, Carey
Brown, Glenda
Bruening, Brandee
Buchanan, Brandon
Buergler, Whitney E.
Burnett, LeAnne
Burstein, Daniel R
Butler, David
Butler, Staci
Butts, Ben
Caldwell, Kim
Campbell, James A.
Carpenter, Laura
Carson, Joe
Caruso, Toni
Cheney, James M.
Childres, Anthony T.
Christensen, Adam
Christensen, B. Gail
Christensen, Cathy
Christensen, Clay
Christensen, Wade
Clark, Curtis
Clark, Steven
Clemens, R. Lyle
Clutts, Sarah
Coldwell, Pam
Coleman, W. Chris
Combs, Eric
Conrad, Candice
Cook, Lance C.
Cooper, Tom
Corbyn, George
Cox, Angie
Croll, Billy
Crooks, Michael
Cutaia, Amber
Damnianoska, Trena
Daniel, Daneille
Daniel, Thomas J.
Dansby, Janice
Dauphin, Lisa
Davies, Shannon
Davis, Jackie
Davis, Kenny
Davis, Steven C.
Dawson, Jack
Day, Jerry
DeGiusti, Anthony
Delijans, Ryan
Denney, Cheryl
Denton, Penny L.
Derryberry, Darren
Derryberry, Larry
Dishman, Jodi
Diver, Heidi
Donchin, David
Dougtry, Stefan
Dragos, Kelly
Dunagan, Sidney G.
Dunn, Judy
Durbin, Jerry
Edem, Emmanuel
Ellis, Ronnie
Ensinger, Derek
Evans, Tristin
Evans, Valerie Michelle
Fagala, Lauren
Fennell, Angie
Fiebiger, Karissa
Fields, Roberta
Fischer, Amy Sherry
Folger, Mark
Ford, Michael R.
Fortune, Diana S.
Fraley, Jerry
Freedman, George
Fugilt, F. Andrew
Gaither, Lynn
Gardner, Lawn B
Gayer, Cody Neil
Geister III, Charles E.
Giles-Caison, Lisa
Gilley, Sandy
Gleim, Kristi
Glover, Samuel J.
Godinez, Dearra
Goeres, Dawn M.
Goldman, Edward
Goodman, Jimmy
Gorden, Cara
Gordon, Kevin
Gossett Parrish, Sarah L.
Gravitt, Nancy
Gray, Elizabeth
Gridley
Grotta, Jeff
Gruber, Tom
Gunn, Andy
Guzzy, J. Christin
Haley, Alex
Hall, Adam
Hampton, Joe M.
Hanan, Jason
Hance, Sarah
Harris, Karen
Hart, Philip
Heatly, John
Henderson, Robert W.
Hermes, John N.
Higginbotham, Bobby
Hill, Frank D.
Hiltgen, Cary E.
Hitt, Brion
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Holmes, Laura L.
Holtz, Gina
Homsey, Gary B.
Hopkins, Tyler
Houston, Mary
Howell, James F.
Howell, T. P.
Huff, Glen
Huff, Lon
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Irish, Jennifer
Jamshidi, Shane
Jett, Travis
Johnson, Jennifer
Johnson, Steve
Jones, Cody B.
Jones, Jake
Jones, William M.
Jordan, Courtney
Kalsu, J. Robert
Kay, Lauren
Kearney, David L.
Kelley, Gerald E.
Kelley, Jo A.
King, Eric R.
King, Jim
Kolker, Paul
Krathigo, Jake
Larby, Nick
LaRean, J. Leslie
Larimore, James K.
Lawrence, James K.
Leffel, Lance E.
Leigh, Chris
Leonard, Ryan
LePoint, Janelle
Lester, Andy
Lindsey, Lauren
Lopez, Fernando
Loving, Susan
Lynch, Leslie L.
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Maloan, Michael T.
Manning, Ashley S.
Margo, Robert
Marrs, Pete
Martin III, Matthew D.
Masters, Paige
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McAlister, Karla
McAlister, Lloyd G.
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McCune
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Metheny, Steve
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Miles, Suzanne
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Mitchell, Jeffrey
Mitchell, Kara
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Moore, Jody
Mullen, John E.
Mullins, Glen
Munda, Benjamin
Murphy, Brooke S.
Murray, Todd A.
Naifeh, Robert
Nevard, Donald B.
Nguyen, Angela
Nice, R. Blaine
Nicklas, Cara S.
Ogletree, L. Earl
O'Rear, Michael
Ottoway, Larry
Oubre, Zach
Parke, Lindsey
Patton, Blake
Paysinse, Megan
Pearson, Jackie
Perry, Jessica
Peterson, Brenda
Pierce, Amy J.
Pignato, Jerry
Plourde, Ross
Pool, Hillari
Portmen, John
Powell, Ashley
Powell, Courtney D.
Powell, Robert P.
Price, Beth
Pritchett, Jr., E. Edd
Puckett, Tony G.
Ramblin, Kathaleen
Ratliff, Kevin
Redman, Caleb
Reed, Brenda
Remillard, Carri
Reneau, Dale
Renegar, Erin
Rice, Douglas A.
Roberson, Brad
Robert D. Baron
Roberts, John
Robertson, Rob
Roduner, Kathleen
Rogers, Jason
Rogers, Patricia A.
Rooney, Erin J.
Rowland, Geremy
Rupert, Kurt
Rush, Sherry
Sampson, Megan
Sanders, Staria
Sayder, Thomas B.
Schoenhals, Jonathan
Schwoerke, Nedra
Scott, Elizabeth A.
Sepkunitz, Jerome S.
Sewell, Randy
Shadid, Randel
Sharpe, Anden
Shears, John
Sheilds, Susan
Sherman, J. T.
Short, Susan A.
Shuler, Shalene
Spencer, Mark
Standard,Matt
Stanford II, A. Ainslie
Stewart, Leasa M.
Stinson, Sheila
Stipe, Amy
Stockwell, Debi
Stonecipher, Mark K.
Stringer, N. Martin
Strong, Roger A.
Sublett, Scott C.
Sullivan, David
Sullivan, Kelsie M.
Sweet, Kyle
Swinney, Lorna
Tait, Jr., Albert L
Taylor, Martha H.
Thach, Sophia
Thom, Michael W.
Thompson, Carol A.
Thompson, John M.
Thompson, R. Scott
Timberlake, Sarah J.
Tinney, Mike
Tolbert, Mary
Tran, Kelly
Tran, Kim
Trautmann, Victor
Travis, Rex
Trudgeon, Jon H.
Turner, J. Eric
Turner, Jacqueline
Van Meter, David W.
Van Meter, Kelly, non-attorney
Vanhooser, Lindsey
Vaughn, Carrie
Vincent, Evan
Walding, Andrew L.
Walker, L. Mark
Walker, M. Kevin
Walsh, Micky
Walters, Joseph
Ward, C. Todd
Warner, Kimberly K.
Watts, Charles J.
Watts, Ellen Martin
Weathers, Sabre
Webb, Drew D.
Weller, Julie
Whatley, Nathan
White, Amy D.
Wiggins, John
Willett, David
Williams, Kimberly
Williams, Robert
Willis, Brett
Wilson, Ryan
Winter, Chip
Womack, Greg
Wood, Elizabeth
Woody, C. Russell
Wotham, Michelle
Young, Lori
Zelbst, John P.

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How the OBF Operates and Who Makes the Decisions

By Dietmar K. Caudle

The Oklahoma Bar Foundation has operated as a successful IRS code 501(c)(3) nonprofit corporation for 68 years by raising and distributing funds to worthy, vetted organizations that provide law-related services to Oklahoma citizens who otherwise could not afford them. The OBF is the third oldest bar foundation in the nation, founded in 1946 by a group of Oklahoma lawyers. Your OBF has awarded more than $11 million to Oklahoma grant programs that fall within the law-related mission of the OBF. All of Oklahoma's 77 counties and many of its citizens have benefitted from OBF grants.

HOW DECISIONS ARE MADE

Grants fall into two types: regular OBF grants, for law-related charitable programs and projects, and the OBF Court Grant Program, designed to benefit Oklahoma district and appellate courts for technology expenditures not funded through existing sources. Funding for grants is derived from donations from lawyers and other concerned supporters of the law who are Fellow members and the Community Fellows Program for organizations and groups. Additional funding comes from statewide *cy pres* awards, IOLTA interest from lawyer trust accounts and interest earned on investments. Periodically the OBF will receive charitable donations from other foundations, testamentary bequests from estates or simply donations from individuals who recognize the law-related good deeds achieved through the OBF.

The newest category of OBF Fellows is the Community Fellow Program for non-individuals. The OBF has been energized by OBA sections such as the Family Law Section and most recently the Litigation Section who have quickly become Community Fellows. Law firms include the Garrett Law Center of Tulsa and most recently Bass Law of Oklahoma City and El Reno. Our flagship financial institution, Bank of Oklahoma, is the newest Community Fellow. Community Fellow participation adds to available grant funds.

Both the OBF and the OBA select lawyer candidates from across the state to serve on the Board of Trustees. This 26-member body makes decisions which affect the funding,

OBF Honors Two Community Fellows

Bank of Oklahoma is the first Oklahoma financial institution honored for going above and beyond eligibility requirements to unite with the Oklahoma Bar Foundation and lawyers by taking a leadership role in helping to provide much needed law-related services to needy Oklahomans. BOK has continuously offered premium services and IOLTA rates to ensure more funding is available for critically needed legal services throughout the state. IOLTA trust accounts with the BOK produce increased revenue through the premium rates offered to attorneys and law firms. The bank has worked with Trustees to further develop investment mechanisms throughout the downturn in the economy. BOK is an honored member of the new OBF Community Fellows Program at the highest recognition level of Patron.

continued on next page…

Accepting the Community Fellow Award from President Dietmar K. Caudle on behalf of the Bank of Oklahoma is Senior Vice President of BOK Financial Ellen D. Fleming and portfolio managers Kris Neuhold and Joe Ray.

Bass Law, with offices in Oklahoma City and El Reno, focuses on serving the needs of clients in the areas of litigation, business planning, estates and trusts, real estate, and oil and gas matters. Operations Director and attorney Gabe Bass states, "Our firm strives to provide legal solutions to help good people solve problems and achieve goals in business and in life, and being an OBF Community Fellow helps our firm to better fulfill this philosophy. Bass Law challenges all law firms and community-minded organizations to become active members of the OBF Community Fellows program so that more Oklahomans will receive vital law-related services." Bass Law is an honored member of the new OBF Community Fellows Program at the highest recognition level of Patron.

Accepting the OBF Community Fellow Award from President Dietmar K. Caudle on behalf of Bass Law is A. Gabriel Bass.

investment of the funding and, ultimately, awards of the meritorious OBF grants. Each designated Trustee is a volunteer and a fiduciary for the OBF. The foundation offices are located on the second floor of the Oklahoma Bar Center and members are invited to visit the OBF offices whenever you are in the building.

Each year, the president designates certain committee and task force assignments to ensure the mission of the OBF is being observed. A discussion of current task force committees for 2014 is included in this article, and the standing OBF committees will be the subject of an upcoming bar journal article. The newly formed OBF Video Story Task Force, the IOLTA Task Force, the External Relations Task Force and the Long Range Planning Task Force comprise our 2014 OBF task forces.

The **OBF Video Story Task Force** is co-chaired by Jennifer Castillo and Roy Tucker. The task force is charged with producing a video which will depict OBF grantees and their success stories, as well as interweaving the OBF story with those we fund. The ultimate objective is to educate Oklaho-

2014 Oklahoma Bar Foundation Board of Trustees: *(Seated from left) Executive Director Nancy Norsworthy; Past President Susan B. Shields, Oklahoma City; President Dietmar K. Caudle, Lawton; Vice President Millie Otey, Tulsa; and Secretary/Treasurer Kevin R. Donelson, Oklahoma City. Trustees: (standing from left) OBA President Renée DeMoss, Tulsa; OCU School of Law Dean Valerie Couch, Oklahoma City; A. Gabriel Bass, Oklahoma City; Jeffery D. Trevillion, Oklahoma City; Briana J. Ross, Tulsa; OBA President-Elect David A. Poarch Jr., Norman; Alan Souter, Tulsa; Roy D. Tucker, Muskogee; Steven L. Barghols, Oklahoma City; Brandon P. Long, Oklahoma City; Stephen D. Beam, Weatherford; Jennifer M. Castillo, Oklahoma City; Guy P. Clark, Ponca City; Kara I. Smith, Oklahoma City; Amber Peckio Garrett, Tulsa; Brett D. Cable, McAlester; Donna L. Smith, Vinita; G. Patrick O'Hara Jr., Edmond; and Deanna Hartley Kelso, Ada. Not photographed: OBF President-Elect Jack L. Brown, Tulsa; Tanya S. Bryant, Oklahoma City; and OBA Executive Director John Morris Williams, Oklahoma City.*

ma lawyers and the public about what the OBF represents and how everyone can become involved.

The newly formed **IOLTA Task Force** is co-chaired by Gabe Bass and Alan Souter. Their task is to monitor competing IOLTA rates and recommend ways to increase IOLTA bank rates to become more favorable to the OBF and the work we accomplish as a result of this funding. The task force will visit with banks across the state and prepare a report with recommendations to the Board of Trustees.

The **External Relations Task Force** is chaired by former OBA President Stephen Beam, and the mission is to explore enhancement of OBF relationships with the OBA, law schools, courts and the banking community to enhance public perception of the OBF, lawyers and the legal community as a whole. The task force provides a written report of recommendation to the Board of Trustees which includes updates to action plans and implementation of those plans.

The **Long-Range Planning Task Force** chaired by Judge Millie Otey recommends a three- to-five-year strategic plan which will guide the OBF in its mission to provide law-related charitable funding and to educate the public about the law. The task force explores the foreseeable future of the OBF and lays out yearly plans which the OBF intends to encompass as it works towards attainment of the strategic plan. The ultimate objective is to document future guidelines for the Board of Trustees.

All of the current OBF task forces have one special purpose, which is to make the OBF the best it can be. With your assistance as an OBF Fellow and the assistance of groups you belong to as Community Fellows, the OBF dream of changing Oklahoma lives will be achieved.

ABOUT THE AUTHOR

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

Tributes and Memorials

A simple and meaningful way to honor those who have played an important role in your life or whose accomplishments you would like to recognize. The OBF will notify your tribute or memorial recipient that you made a special remembrance gift in their honor or in memory of a loved one.

Help the OBF meet its ongoing mission - lawyers transforming lives through the advancement of education, citizenship and justice for all.

Make your tribute or memorial gift today at:
www.okbarfoundation.org/make-a-contribution

Or if you prefer, please make checks payable to:

Oklahoma Bar Foundation P. O. Box 53036 Oklahoma City OK 73152-3036
Email: foundation@okbar.org • Phone: 405-416-7070

Planning for Disability and Special Needs

Sponsored by the Heritage Trust Company
& a Private Foundation in Honor of Justice Marion Opala

Program Planner/Moderator:
Donna J. Jackson, Donna J. Jackson, Attorney at Law, PC, Oklahoma City

Topics Covered

1. Disability and Special Needs Provisions That Every Estate Planner and Elder Law Attorney Needs to Know: How Trustees Approach the Provisions
2. Case Law Update and Discussion of Attorney Fees
3. Special Needs Planning and the Affordable Care Act: Planning has Changed!
4. Medicare Set Aside Trust
5. Ethical Issues: When Lawyers Become Disabled or Die!
6. Reception following adjournment.

The seminar starts at 9:00 a.m. and adjourns at 3:15 p.m.
For program details, log on to:
www.okbar.org/members/cle

This program will be webcast. For details, visit oba.peachnewmedia.com
Note: Tuition for webcast varies from live program tuition.

Approved for 6 hours MCLE / 1 Ethics. 5 hours TXMCLE/.75 ethics
$150 for early-bird registrations with payment received at least four full business days prior to the seminar date; **$175** for registrations with payment received within four full business days of the seminar date.

Receive a $10 live program discount by registering online at www.okbar.org/cle

Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Sheraton Hotel in Oklahoma City on Saturday, Jan. 11, 2014.

REPORT OF THE PRESIDENT

President DeMoss reported she attended the December board meeting, Board of Governors holiday gathering, new board member orientation, OAMIC meeting, swearing-in ceremony and planning meetings for Women in Law Committee and Law Schools Committee. She spoke at the OCU law school graduation, wrote the *Oklahoma Bar Journal* president's article, made additional OBA and committee Board of Governors liaison appointments and worked on planning for 2014 OBA events and projects. She thanked Past President Stuart for making 2013 an outstanding year.

REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the December board meeting, training for new board members, Oklahoma County Bar Association December meeting and holiday reception.

REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the December board meeting, holiday party and assisted in the transition to a new president. He received a card from a state bar president, who said the Southern Conference of Bar Presidents meeting in Oklahoma City was the highlight of his presidential year.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended an OBA staff meeting, planning conferences with President DeMoss and a meeting with OBF officers and Bank of Oklahoma representatives regarding rate changes.

BOARD MEMBER REPORTS

Governor Dexter reported she attended the ABA training relating to issues involving the judiciary, the December board meeting, orientation for new board members and the Tulsa County Bar Association Bench and Bar Committee meeting. **Governor Gifford** reported he attended the Oklahoma County Board of Directors meeting and was a CLE presenter at the "Tenth Circuit Year in Review" for the Federal Bar Association. He said his term as Military and Veterans Law Section chairperson has ended, but wanted to remind board members the OBA is planning another CLE seminar for Heroes Project volunteers soon. **Governor Hays** reported she attended the December board meeting, board Christmas party and OBA Family Law Section monthly meeting for which she prepared and presented the budget report. She communicated with OBA FLS leadership regarding end of year activities and 2014 planning and communicated with Women in Law Committee leadership for 2014 planning. **Governor Jackson** reported he attended the December board meeting and Garfield County Bar Association Christmas party. **Governor Smith** reported he attended the December board meeting and holiday party. **Governor Stevens** reported he attended the December board meeting and Cleveland County Bar Association Christmas party. **Governor Thomas** reported she attended the December board meeting, board Christmas party and Washington County Bar Association Christmas party. She participated in a planning meeting for the newly formed Young Professional Ladies group in Bartlesville. Its primary focus is to provide adult women mentors for young high school women and to guide them to become responsible individuals by teaching positive character traits, career development, leadership and life skills so they can make ethical choices and achieve their full potential.

YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported the YLD orientation will be held next Saturday at the Oklahoma Bar Center. He reminded board members they are always invited to YLD activities. He said he is working to confirm meeting dates for the coming year. He

attended the December Board of Governors meeting and training for new members.

COMMITTEE LIAISON REPORTS

Governor Hays reported the Tulsa County Bar Foundation participated in a community service project, Santa Brings a Lawsuit, which is a professional clothing drive designed to help people have the proper attire as they try to establish themselves in a professional career. They also teamed up with Lawyers Fighting Hunger to raise money for the less fortunate for the holiday season. Turkeys and other food items for a traditional Thanksgiving dinner were handed out. A total of $4,700 was donated for the food drive. She also said the OBA Family Law Section held its first meeting of the year yesterday and will be donating $2,000 to the Lawyers Helping Lawyers Foundation and $675 to the YLD to help fund the items for the bar examination survival kit the division puts together and distributes to students taking the exam.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx passed out a handout giving the board an update on litigation against the OBA. She reported all cases are a result of disciplinary actions and nothing is active at this time.

CHILD DEATH REVIEW BOARD

The board approved President DeMoss' recommendation to nominate Gail Stricklin, Oklahoma City, M. Courtney Briggs, Oklahoma City, and Judge Deborah C. Shallcross, Tulsa, to the Child Death Review Board for its selection of one board member. It was noted the board is set to expire July 1, 2014, and pending legislative re-enactment the term will expire in 2017.

PROFESSIONAL RESPONSIBILITY TRIBUNAL

The board approved President DeMoss' recommendation to appoint Gerald L. Hilsher, Tulsa, to replace Governor Dexter on the PRT. The term will expire June 30, 2015.

BOARD OF EDITORS

The board approved President DeMoss' recommendation to appoint Shannon Lee Prescott, Okmulgee, as an associate editor to represent District 7 on the Board of Editors. The term will expire Dec. 31, 2016.

CLIENTS' SECURITY FUND COMMITTEE

The board approved President DeMoss' recommendation to appoint P. Luke Adams, Clinton, to the Clients' Security Fund Committee.

BOARD OF GOVERNORS LIAISONS TO OBA COMMITTEES

President DeMoss shared a list of committees and the board members assigned to serve as liaisons. She encouraged board members to stay on top of committee activities.

LEGAL ETHICS ADVISORY PANEL (OKC PANEL)

President DeMoss appointed Leasa M. Stewart, Oklahoma City, to the Oklahoma City panel. The term will expire Dec. 31, 2016. The panel will be losing Governor Drummond, who is moving to Texas. He explained how the panel operates.

UNIFORM LAW COMMISSION

President DeMoss will submit the names of Ryan Timothy Leonard, Oklahoma City, and Don Gardner Holladay, Oklahoma City, to the governor for consideration of one appointment to the commission (formerly known as the National Conference of Commissioners on Uniform State Laws). The term will expire June 1, 2017.

NEXT MEETING

The Board of Governors met on Feb. 28, 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 at 10 a.m. Friday, March 21, at the Oklahoma Bar Center.

Rethinking Delivery of Legal Services: Medical-Legal Partnership Model

By Teresa Rendon

When physicians think about attorneys, the first thing that may come to mind is medical malpractice. When attorneys think about doctors, they may envision them as witnesses in a tort or social security case. The medical-legal partnership approach views both these professionals as partners improving patient/client well-being. Dr. Barry Zuckerman, Boston medical school professor and creator of the medical-legal partnership model, saw the need for cures to patient ills that exceeded the gloved grasp of the medical world.

Children living in apartments squirming with roaches needed both medical and legal assistance. Immigrant women cowering in a chaotic and stressful atmosphere where domestic violence raged, needed more than treatment for their injuries. Disappointed applicants being denied Social Security benefits based on disability longed for legal representation in addition to a doctor's well-written report. The legal profession has its own cures for remedying uninhabitable rental housing, protecting victims of domestic violence and representing clients in government agency hearings. This manner of thinking is the basis for the medical-legal partnership design which coordinates the efforts of attorneys and medical professionals working with the same populations.

> **"Every year throughout the nation, medical-legal partnerships impact the lives of an estimated 54,000 children, elderly, veterans and patients with chronic illnesses."**

Every year throughout the nation, medical-legal partnerships impact the lives of an estimated 54,000 children, elderly, veterans and patients with chronic illnesses. Proliferating around the U.S., the medical-legal model dots the national map in 125 hospitals, 123 government health centers, 99 health centers, 26 medical schools, 36 Legal Aid offices and 34 law schools. Legal Aid Services of Oklahoma Inc. boasts four such programs in the Sooner state, the newest one being a project linking Legal Aid and Variety Care. Variety Care is a non-profit community health center consisting of four rural and six metro-area clinics whose mission is to provide quality affordable healthcare to individuals having difficulty. This fledgling project commenced in April 2013 and has already made a difference in the lives of its patient/clients.

Lorena was referred by Variety Care doctors. She and her husband, Gerardo, took their three children to Variety Care to be treated for severe flea bites which peppered their arms and legs causing itching and fever. During the physician's interview, Lorena and Gerardo told their story of having put down a deposit on a rental home and then returning to move in. As they, children in tow, began by putting some of their belongings in the garage, the children started to complain of being bitten by something. Lorena and Gerardo soon realized that the garage was jumping with fleas. The first thing they tried to do was get their security deposit returned to them, a gesture that was met with derision by the landlord. Their second action was to run to

Variety Care. The clinic's onsite Legal Aid attorney was able to speak to them in their own language and get the deposit returned. Gerardo and Lorena were then able to rent a flea-free dwelling.

Alice was a stressed grandma with a seemingly insurmountable problem. She had four of her 10 grandchildren with her because the children's parents were living in chaotic, drug-filled lifestyles. She understood through talking to DHS workers that if she did not take the children, the state would. Summer was waning, and the children were as eager to start school as Alice was to have a break. The local school, however, had other ideas. The principal flatly turned them away, adamant that the parents would have to enroll their own kids or that Alice would have to get a guardianship of the foursome. During the children's routine physicals, Alice learned that legal help was available to her at Variety Care. There she not only got the kids ready for school with their required shots, but she also obtained guardianship of her grandchildren so that they could all return to school. Legal Aid to the rescue again.

Latonda, a Variety Care patient with hypertension and diabetes, was worried about her debt situation. She had one creditor call her and speak extremely disrespectfully to her demanding that she pay up or they would take her house. Latonda, after her check-up with the Variety Care doctor, was channeled to the Legal Aid attorney who told her she was collection-proof because she had no property and no income. The attorney also got Latonda's credit history corrected to remove one debt that wasn't even hers.

I am the Legal Aid attorney responsible for the medical-legal partnership between Legal Aid Services of Oklahoma and Variety Care. As a 20-year veteran of Legal Aid. I believe that one key to this project's success is the close relationship being developed with the medical professionals. Another key is the fact that patients at Variety Care are made to feel at home and trust and respect their doctors and other healthcare professionals. Patients are more likely to listen to their doctors when they recommend a visit with the embedded attorney. Thus, doctors and lawyers link arms and strive to improve the lives of needy Oklahomans.

Sources:

www.medical-legal partnership.org/movement

Tobin Tyler, Elizabeth *et al.*, editors, *Poverty, Health and Law: Readings and Cases for Medical-Legal Partnership*, Carolina Academic Press, Durham, North Carolina, 2011.

ABOUT THE AUTHOR

Teresa Rendon, third generation Oklahoman and enrolled member of the Cherokee Nation, has been an attorney at Legal Aid Services of Oklahoma Inc. for more than 20 years. The Oklahoma City University School of Law graduate is also an adjunct professor in OCU´s Justice Studies Department and has lived, worked and studied in Spain, Mexico, Brazil, Singapore and Nicaragua.

Lessons Learned from Scandal

By Kaleb Hennigh

"Those who fail to learn from history are doomed to repeat it," Sir Winston Churchill's timeless words over the years have been used, perhaps overused, by politicians, teachers, businessmen and others encouraging people to learn from past mistakes to ensure former transgressions are not repeated. These words have been spoken numerous times throughout my life whether in school, professional workshops, by opposing counsel, to opposing counsel, and now I've managed to incorporate it into this segment of the *Oklahoma Bar Journal* designed to provide updates and insight as to the ongoing activity of the OBA Young Lawyers Division. It is relevant to so many things in life, as it is here, and certainly no lecture needs be given to this audience. After all, our profession requires us through jurisprudence to know the theory and history of the laws which we navigate our clients through on a daily basis.

When President DeMoss tasked the OBA Board of Governors and sought the assistance of the YLD to educate the public about Oklahoma's process of selecting judges and the Judicial Nominating Commission, I believe this quote in fact was incorporated again. However, this time I wasn't sure I had either the knowledge or historical perspective to completely understand and appreciate the incorporation of the JNC to the Oklahoma judicial selection process. So I followed the advice of a fellow governor on our board and went to the source, the late Judge William A. Berry, retired justice and former chief justice of the Oklahoma Supreme Court via his book *Justice for Sale, The Shocking Scandal of the Oklahoma Supreme Court.*

> **"I think we have a responsibility to help educate those in our community about our judiciary and the manner in which they are appointed and elected."**

My eyes were opened to the story of the sordid events of a few corrupt judges who failed to follow judicial canons and allowed political pressures, influences and flat out cash bribes to corrupt Oklahoma's judicial process at its highest level. I learned about how these bad actions were brought to the public's attention and why our judicial and legislative predecessors sought a method to ensure it never happened again. The Oklahoma Supreme Court scandal of the 1960s wasn't that long ago in our history. The change to Oklahoma's Constitution in 1967, the ultimate implementation of the JNC in 1969, and incorporation of merit retention ballots are all a direct result of the scandal and Oklahoma's answer to finding and maintaining qualified judges to help ensure our justice system maintains the integrity and stability that is required.

It is not necessary for all of you to jump on Amazon, search for Justice Berry's book and dive into his story to learn about the scandals and corruption outlining the disgrace of three Supreme Court judges and the fall of a legal family (although I recommend it), but it is important as practitioners to understand how our judicial nominating process works. We are all stewards of our profession and need to have answers when friends, colleagues and community and civic leaders come to us with questions about upcoming Oklahoma House or Senate bills calling for changes to our judicial selection process.

Oklahoma attorneys must have perspective and a working knowledge of merit retention and the JNC to provide answers to those who might

be looking to vote one way or another or who have questions for their senator or congressman. I think we have a responsibility to help educate those in our community about our judiciary and the manner in which they are appointed and elected. Now I'm not advocating for one bill or another, nor do I believe our current judicial selection process couldn't use some improvement, I'm simply encouraging you to learn more and publicly share this process.

TO LEARN MORE

To learn more about how judges are selected in Oklahoma or to obtain some facts about judicial selection, I encourage you to visit www.courtfacts.org and also check to see if the Oklahoma Bar Association has scheduled a judicial town hall in your county.

ABOUT THE AUTHOR

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

John R. Justice (JRJ) Student Loan Repayment Program for Public Defenders and Prosecutors

The Oklahoma District Attorneys Council (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of $52,286.40 to be divided among eligible **full-time public defenders and prosecutors** who have outstanding qualifying federal student loans.

For more information about the JRJ Student Loan Repayment Program and how to apply go to http://www.ok.gov/dac/. Scroll down to "Newsroom and Links" and click on the "John R. Justice Student Loan Repayment Program" link. **Applications will be available online on March 5, 2014.** Completed application packets must be submitted to the DAC and postmarked no later than **April 11, 2014**.

NOTICE OF BANKRUPTCY JUDGE VACANCY WESTERN DISTRICT OF OKLAHOMA

The U.S. Court of Appeals for the Tenth Circuit is seeking applications for a bankruptcy judgeship in the Western District of Oklahoma. Bankruptcy judges are appointed to 14-year terms pursuant to 28 U.S.C. §152. The position is located in Oklahoma City.

A copy of the full public notice and application can be obtained from the Tenth Circuit website at www.ca10.uscourts.gov under "Jobs" or by calling the Office of the Circuit Executive at 303.844.2067 and asking to speak with Judicial Resources.

Applications must be received on or before March 28, 2014.

March

17 **OBA Litigation Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact David VanMeter 405-228-4949

21 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Dieadra Goss 405-416-7063

OBA Board of Governors meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

24 **OBA Juvenile Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tsinena Thompson 405-232-4453

25 **OBA Day at the Capitol;** 10 a.m.; Oklahoma Bar Center/Oklahoma State Capitol; Contact John Morris Williams 405-416-7000

Ruth Bader Ginsburg Inn of Court; 5 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donald Lynn Babb 405-235-1611

26 **OBA Financial Institutions and Commercial Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City and OSU Tulsa, Tulsa; Contact Eric Johnson 405-602-3812

OBA Work/Life Balance Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Sarah Schumacher 405-752-5565

27 **OBA Women in Law Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with TU College of Law, Tulsa; Contact Allison Thompson 918-295-3604

28 **Oklahoma Bar Foundation luncheon and meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Nancy Norsworthy 405-416-7070

April

1 **OBA Government and Administrative Law Practice Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Scott Boughton 405-717-8957

3 **OBA Lawyers Helping Lawyers discussion group meeting;** 6 p.m.; Office of Tom Cummings, 701 NW 13th St., Oklahoma City; RSVP to Kim Reber kimreber@cabainc.com

OBA Lawyers Helping Lawyers discussion group meeting; 6 p.m.; University of Tulsa College of Law, John Rogers Hall, 3120 E. 4th Pl., Rm. 206, Tulsa; RSVP to Kim Reber kimreber@cabainc.com

4 **OBA Board of Bar Examiners meeting;** 9 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Oklahoma Board of Bar Examiners 405-416-7075

OBA Alternative Dispute Resolution Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Jeffrey Love 405-285-9191

8 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Ruth Addison 918-574-3051

Licensed Legal Intern meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Candace Blalock 405-238-0143

11 **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

12 **OBA Young Lawyers Division meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Kaleb Hennigh 580-234-4334

14 **Licensed Legal Intern Swearing-In Ceremony;** 12:45 p.m.; Judicial Center, Oklahoma City; Contact Wanda Reece 405-416-7000

15 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Judge David B. Lewis 405-556-9611

16 **OBA Law-related Education Attorneys in the Classroom training;** 10:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Suzanne Heggy 405-556-9612

OBA Clients' Security Fund Committee meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Micheal Salem 405-366-1234

18 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Contact Dieadra Goss 405-416-7063

OBA Access to Justice Committee meeting; 10 a.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; 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

22 **New Admittee Swearing-In Ceremony;** Supreme Court Courtroom; Contact: Board of Bar Examiners 405-416-7075

OBA Communications Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Dick Pryor 405-740-2944

23 **OBA Work/Life Balance Committee;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Sarah Schumacher 405-752-5565

24 **OBA Leadership Academy graduation;** 2 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Heidi McComb 405-416-7027

25 **OBA Board of Governors meeting;** 3 p.m.; Idabel Chamber of Commerce, 7 SW Texas St., Idabel; Contact John Morris Williams 405-416-7000

Lawyer Helping Lawyers Assistance Program Foundation and Committee meeting; 12 p.m; Oklahoma Bar Association, Oklahoma City with teleconference; Contact Hugh Hood 918-856-5373

OBA Juvenile Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tsinena Thompson 405-232-4453

29 **OBA Women in Law Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with University of Tulsa College of Law, Tulsa; Contact Allison Thompson 918-295-3604

Town Hall Discussion to Increase Public Understanding of Courts

Second meeting: Thursday, March 27
Custer County Courthouse, Arapaho • 5:30 p.m. • Public invited

The OBA is continuing its public education initiative aimed at directly engaging Oklahomans to promote understanding of the third branch of government as well as the judicial selection process in our state. The next town hall meeting will be cosponsored by the Custer County Bar Association and will take place Thursday, March 27, at the Custer County Courthouse in Arapaho. The event begins at 3:30 p.m. with up to two hours of CLE focused on ethics as well as judicial selection issues. At 5:30 p.m. lawyers are invited to stay as the informal public discussion and reception begin. The event will be attended by bar and civic leaders as well as members of the judiciary. Guests are encouraged. Non-lawyers are encouraged to RSVP to info@courtfacts.org, and more information is available at www.courtfacts.org.

The OBA partnered with the Canadian County Bar Association for its first public town hall meeting. The discussion and CLE took place in El Reno in February and was well attended by both lawyers and laypersons.

Suzanne Heggy of Yukon, OBA President Renée DeMoss of Tulsa and former JNC member Kimberly Fobbs of Tulsa served as speakers during the town hall meeting.

Leadership Academy

The fourth OBA Leadership Academy recently held its last session, which focused on diversity, inclusion and community service. The evening painting activity showcased the diversity and uniqueness of this special group of future bar leaders. The class will graduate April 24.

Holland Hall Upper School Wins Mock Trial Championship

Holland Hall Upper School Red Team defeated Clinton High School Gold Team in the final round of competition to claim the 2014 Oklahoma High School Mock Trial Championship. The final round was held March 4 at the OU Law Center in Norman. The two teams argued a case that focused on a first-degree murder of a high school student by a classmate. Teams are paired with volunteer attorney coaches; Holland Hall's team is coached by Michon Hughes and Clint Hastings, while Clinton's attorney coach is Judge Jill Weedon.

"Holland Hall hasn't competed in over a decade," said Ms. Hughes. "We started in early November and Clint and I realized we had a special group of students who think quickly on their feet, so it was up to us to teach them evidence and trial procedure. They wanted to work every chance they could, which kept us very busy in addition to running our private practices. We fielded two teams, and each team worked ridiculously hard. I'm immensely proud of both of them!"

Holland Hall Red Team celebrates its first-place win in the Oklahoma High School Mock Trial Championship.

Holland Hall, a private preparatory school in Tulsa, is now preparing to represent the state at the national competition to be held in Madison, Wis., in May.

OBA President Renée DeMoss of Tulsa said, "These students were obviously very prepared for this competition and will represent Oklahoma with confidence and poise at nationals. This program is important because it presents these students with an insider's view of the workings of our legal system and increases public understanding of the functions of the third branch of government."

The Mock Trial Program is sponsored and funded by the OBA Young Lawyers Division and the Oklahoma Bar Foundation. Nearly 400 judges and attorneys volunteered their time to work with mock trial teams as coaches and to conduct the competitions. Melissa Peros of Oklahoma City serves as YLD Mock Trial Committee chairperson.

Free Discussion Groups Available to OBA Members

"Maintaining a Strong Recovery Program" will be the topic of the April 3 meetings of the Lawyers Helping Lawyers discussion groups in Oklahoma City and Tulsa. Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. Note that the time for the Tulsa meeting has changed. The new meeting time is 6 – 7:30 p.m. at the TU College of Law, John Rogers Hall, 3120 E. 4th Place, Room 206. In Oklahoma City, the group meets from 6 – 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th Street. 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.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

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!

OBA Members Raise Funds for OETA

OBA volunteers staffed the phone banks at the OETA Festival on March 11, when members called in and donated $7,027 to the state's public television affiliate. President Renée DeMoss of Tulsa presented a check to the station, which partners with the bar association to produce the annual Ask A Lawyer TV show.

The amount donated keeps the OBA at the "Underwriting Producers" donor level which ensures the association's generosity is recognized in OETA's monthly "Odyssey" publication. Many thanks to all those who contributed financial contributions as well as to the 19 OBA members and staff who volunteered:

From left, OBA Executive Director John Morris Williams, OBA President Renée DeMoss, OBA member and OETA spokesperson Kimberly Brasher, and OETA on-air host B.J. Wexler helped bar leaders raise more than $7,000 to support public television during OETA Festival 2014 pledge drive.

John Claro
Craig Combs
Jerrod Geiger
Samuel Glover
Annette Jacobi
Greg James
Mark Koss
Marty Ludlum
Ernest Nalagan
Ed Oliver
Robert Powell
Jennifer Prilliman
Charles Rouse
Ricki Sonders
2013 OBA President Jim T. Stuart
Elizabeth Tennery
Ian Tennery
Mary Travis
Richard Vreeland

OBA Member Resignations

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

Velma Marie Andregg
OBA No. 10191
1421 S. Urbana Ave.
Tulsa, OK 74112

Cindy Louise Baker
OBA No. 10723
Route 1, Box 509
Cashion, OK 73016

Brandy Kearney Chambers
OBA No. 17536
1708 Morningside Drive
Garland, TX 75042

Ian Ross Fried
OBA No. 21911
3640 Old Denton Rd., No. 1305
Carrollton, TX 75007

Erin M. Joe
OBA No. 17653
P.O. Box 702287
Dallas, TX 75370

Jonathan Paul Morgan
OBA No. 14427
Morgan Rose LLC
416 Hungerford Dr., Ste. 233
Rockville, MD 20850

Eugene S. Peck
OBA No. 10433
2555 Grand
Kansas City, MO 64108

William H. Penney
OBA No. 10167
5945 Zinnia Court
Arvada, CO 80004

Mark Pennington
OBA No. 10926
8319 McNeil Street
Vienna, VA 22180

Gary Wayne Sleeper
OBA No. 8297
6100 Ohio Dr., Apt. 1512
Plano, TX 75024-2625

Jason Dean Smith
OBA No. 20335
1952 N. East Ridge
Strafford, MO 65757

Aaron Reed Triplett
OBA No. 21440
4705 Old Scioto Trail
Portsmouth, OH 45662

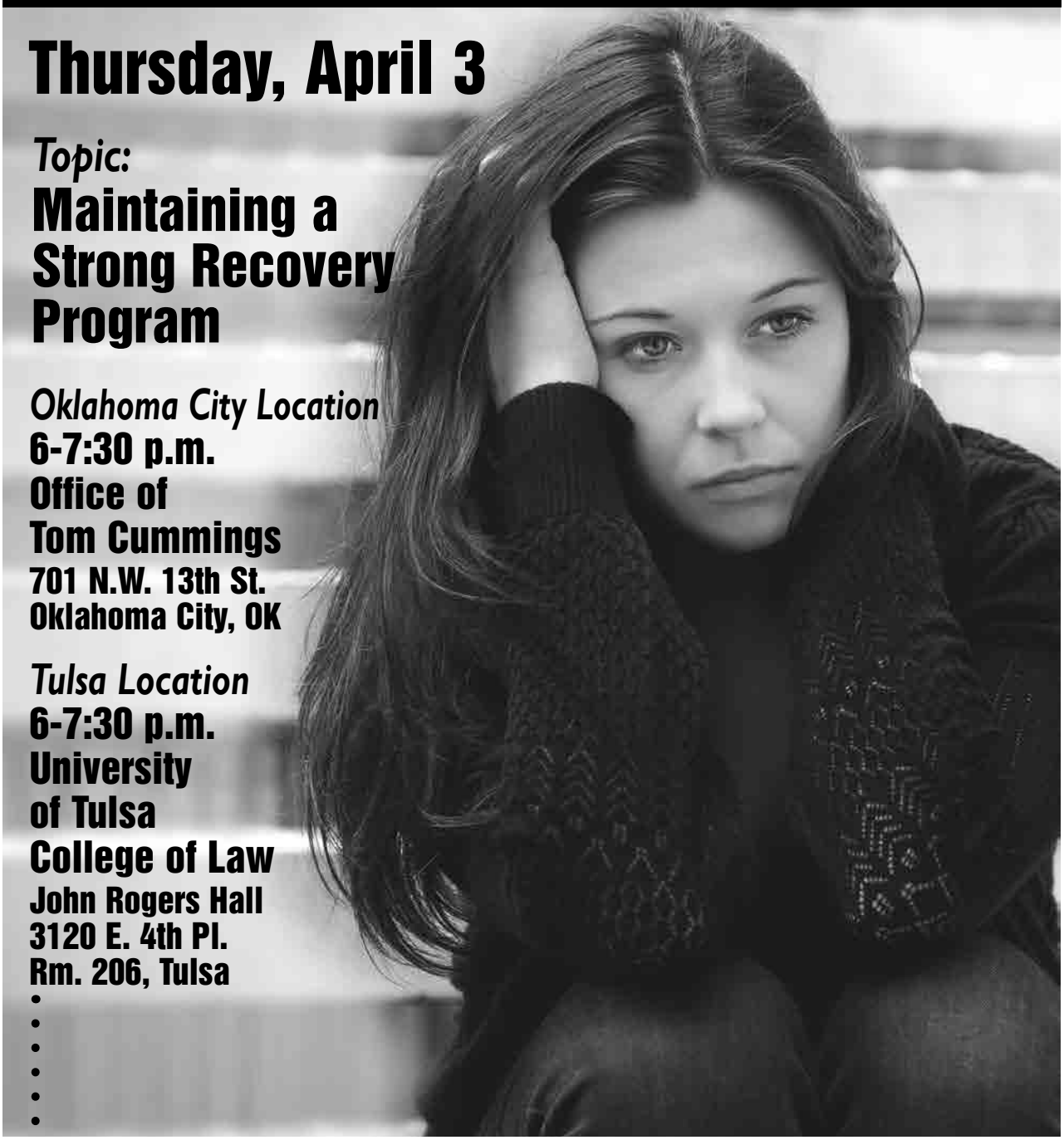
Robert Duane Wilson
OBA No. 11574
P.O. Box 896
Arkansas City, KS 67005

OBA Member Reinstatement

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

Roma René Frolich
OBA No. 15767
5301 S.E. 104th Street
Oklahoma City, OK 73165

You are not alone.



Thursday, April 3

Topic:
Maintaining a Strong Recovery Program

Oklahoma City Location
6-7:30 p.m.
Office of Tom Cummings
701 N.W. 13th St.
Oklahoma City, OK

Tulsa Location
6-7:30 p.m.
University of Tulsa College of Law
John Rogers Hall
3120 E. 4th Pl.
Rm. 206, Tulsa

Contact Kim Reber @ 405-840-0231 • kimreber@cabainc.com

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

Connect with the OBA through social media.

Like us on Facebook
www.facebook.com/oklahomabarassociation

Follow us on Twitter
www.twitter.com/oklahomabar

Kudos

Foliart, Huff, Ottaway & Bottom announces that **Amy Sherry Fischer** was elected president of the Foundation of the International Association of Defense Counsel. The foundation aims to educate the public on current litigation issues and support the integrity of legal systems globally.

The Baptist Foundation of Oklahoma has elected Crowe & Dunlevy attorney **Julie Stanley** to serve on its board of directors until 2016. Ms. Stanley will be serving on the audit committee and the estate stewardship and promotion committee during her term.

Gerald Hilsher of McAfee & Taft was elected chairman of the Oklahoma Scenic Rivers Commission. Mr. Hilsher has served as an OSRC commissioner since his appointment by Gov. Frank Keating in 1998, including reappointments by Gov. Brad Henry and Gov. Mary Fallin. The OSRC's mission is to protect the Illinois River, Barren Fork Creek and Flint Creek in northeast Oklahoma.

Katheleen Guzman, professor at the OU College of Law, has been named a 2014 Medal for Excellence winner by the Oklahoma Foundation for Excellence. The Oklahoma Foundation for Excellence, founded by David Boren, recognizes and encourages academic excellence in Oklahoma's public schools.

Don Nicholson II and **D. Kent Myers** were among 52 Oklahoma mentors honored during the second annual Oklahoma Mentor Day, sponsored by the Oklahoma Foundation for Excellence and the David and Molly Boren Mentoring Initiative. The Boren Mentoring Initiative began in 2006 to promote the growth and development of youth mentoring programs in Oklahoma.

Wewoka attorney **Glenn J. Sharpe** was recently reappointed as Seminole Nation Gaming Commissioner at the nation's general council meeting in March.

On The Move

James C. Daniel announces the formation of Mediation Services for Northeastern Oklahoma. Mediation Services will primarily serve the region of Delaware and adjoining counties. Mr. Daniel can be contacted at P.O. Box 630, Disney, OK, 74340, by phone at 918-625-8962 or by email chris_daniel1951@yahoo.com.

United States Beef Corporation announced that **Lynn Conard** has been promoted to vice president of development and real estate counsel. Ms. Conard holds a bachelor's degree from OSU and a J.D. from TU.

The shareholders of Fellers Snider elected **Brent M. Johnson** as the firm's next president. Mr. Johnson joined the firm in 1996, and has served on the firm's executive committee for the past five years.

The U.S. Senate confirmed former Oklahoma Congressman **Brad Carson** as the undersecretary of the U.S. Army. Mr. Carson previously served as general counsel to the Department of the Army and Department of Defense.

Ball Corp. promoted **Jan (Gaddis) Rodriguez** to assistant general counsel and assistant corporate secretary. Ball Corp. is a Fortune 500 company headquartered in Broomfield, Colo.

Bart Fite was reappointed as municipal judge for the City of Muskogee and as district judge for the Cherokee Nation. Mr. Fite practices with the Fite Law Firm in Muskogee.

Crowe & Dunlevy announces that **Mary Ellen Ternes** has joined the firm's environmental, energy and natural resources group and its litigation and trial practice group. She holds a bachelor's degree in chemical engineering from Vanderbilt University and a J.D. from the University of Arkansas at Little Rock where she graduated with high honors in 1995.

E. Terrill Corley & Associates announces that **Scott Allen** has joined the firm. His practice will focus on medical malpractice, personal injury, wrongful death and general negligence.

Fellers Snider announces that **Philip R. Feist** and **Fred H. Holmes** have joined the firm's Tulsa office. Mr. Feist is an estate planning attorney who is also licensed to practice in California, Florida, Kansas, Texas and the U.S. Virgin Islands. Mr. Holmes rejoins the firm as an of counsel attorney after working as an intellectual property counsel for a lighting product developer and manufacturer in California.

Rischard Law PC announces that **Daniel V. Carsey** has joined the firm. Mr. Carsey graduated from the TU College of Law with highest honors in 2005. Prior to joining the firm he clerked for Judge Earl S. Hines at the U.S. District Court for the Eastern District of Texas, and practiced with Conner & Winters. His practice will focus on business litigation with an emphasis on employment, energy, insurance, debt collection, foreclosure, bankruptcy and insolvency.

At The Podium

UCO professor **Marty Ludlum** recently spoke to students at Arcada University in Helsinki, Finland. His presentations were "International Trade Regulations," "Intercultural Trade," "The EU from America's Perspective" and "Establishing a Business in the USA."

Paul Catalano, of Humphreys Wallace Humphreys PC, recently presented "Foreclosure Defense and Modifications after the Financial Crisis" to the Mayes and Rogers county bar associations.

Kevin Kuhn, of Trigg O'Donnell LLP, presented "(Lead Us Not Into) Temptations: The Rules of Professional Conduct" at the Catholic Lawyers Guild of Colorado Seminar. He also presented "How Both Sides of the Bar Can Be More Cooperative in Discovery" to the Colorado Defense Lawyers Association and Colorado Trial Lawyers Association. Additionally, he presented "Choosing Your Audience: How to Decode, Decipher and Enlighten Complete Strangers During Jury Selection" to the American College of Trial Lawyers and the Colorado Bar Association's "Winning Trial Tactics of 2013."

Emmanuel Edem, partner in the Oklahoma City law firm of Norman & Edem, presented "Direct Examination of Expert Witnesses in a Medical Negligence Case" at the Mid-Winter Convention of the American Association for Justice held in New Orleans. Mr. Edem focuses his practice on civil litigation, with emphasis on medical negligence, serious personal injury, wrongful death and financial crimes.

Paul R. Foster of Norman presented "Legal Boundaries of the Regulatory Application of Dodd Frank" to the Community Bankers Association of Oklahoma at its Winter Leadership Conference in Lake Tahoe, Nev. Mr. Foster also moderated a panel of bank regulators from the Federal Reserve, the FDIC and the OCC which discussed the current status of Oklahoma banks within national industry trends as well as upcoming issues to be emphasized in bank exams in the next 12 to 24 months.

Eric L. Johnson of the Oklahoma City office of Hudson Cook LLP, spoke recently at the 2013 Banking and Commercial Law Update in Oklahoma. His topic was "CFPB Updates for the Banking Lawyer." Mr. Johnson also presented "Current Consumer and CFPB Issues for the Community Banker" at the 2014 Community Bankers Association of Oklahoma's Winter Leadership Conference in Lake Tahoe, Nev.

How to place an announcement: The *Oklahoma Bar Journal* welcomes short articles or news items about OBA members and upcoming meetings. If you are an OBA member and you've moved, become a partner, hired an associate, taken on a partner, received a promotion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees, and county bar

associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (*e.g., Super Lawyers, Best Lawyers*, etc.) will not be accepted as announcements (Oklahoma-based publications are the exception.) Information selected for publication is printed at no cost, subject to editing, and printed as space permits.

Submit news items via email to:

Jarrod Beckstrom
Communications Dept.
Oklahoma Bar Association
405-416-7084
barbriefs@okbar.org

Articles for the April 12 issue must be received by March 24.

IN MEMORIAM

Larry Dean Barnett of Oklahoma City died Sept. 23, 2013. He was born March 6, 1949, in Beaver. He received his J.D. from OCU in 1974. Memorial contributions may be made to the Charcot-Marie-Tooth Association, P.O. Box 105, Glenolden, PA, 19036.

Harold T. Garvin died Feb. 15, 2014. Mr. Garvin was born Feb. 10, 1920, in Walters. He earned his bachelor's degree from OU in political science in 1941 and received his J.D. from OU in 1943. **He was a first lieutenant in the U.S. Army and during World War II he served in Gen. Patton's 3rd Army in France. He fought in the Battle of Northern France, the Battle of the Bulge, the Battle of the Rhineland and the Battle of Central Europe**. Upon returning home he served as Stephens County judge before being elected to the Legislature where he served for 14 years in the state Senate. He was on the Board of Regents for Oklahoma Colleges and was actively involved in the Duncan community. Memorial contributions can be made to All Saints' Episcopal Church, 809 W. Cedar St., Duncan, OK, 73533.

Robert "Bob" Lee Gregory died Feb. 8, 2014. He was born March 15, 1927, in Enid. After graduating from Enid High School, **he joined the U.S. Navy and attended the Naval School Great Lakes in Chicago**. He earned master's and J.D. from OU, graduating in 1950. He practiced law with the late Harry O. Glasser and later became a municipal judge for Garfield County where he served for 25 years. He was named Jaycee of the Year in 1959 and was active in the Enid AMBUCS Club and received two lifetime achievement awards from the Garfield County Bar Association. He enjoyed traveling and was an avid OU Sooner fan. Memorial contributions can be made to St. Paul's Lutheran Church and School.

James Jeffrey "J.J." Jackson of Las Vegas, Nev., died Feb. 28, 2014. Born Oct. 31, 1958, in Tulsa, he graduated from the OU College of Law in 1986. He served as a public defender and worked for district attorneys in Texas and Nevada. He was named juvenile master and associate municipal court judge for Carson City and also served as Nevada chief public defender.

Retired Judge **James Laughlin** died Feb. 10, 2014. He was born Oct. 11, 1927. After high school **he served in the U.S. Navy** before attending Oklahoma Baptist University for his undergraduate studies. He attended the OU College of Law where he wrote for the *Oklahoma Law Review*. He was a recipient of the Logan Scholarship and graduated in 1953. He was in private practice until 1975 and served as part time federal magistrate for Bartlesville District for four years. He retired in 1983. In retirement he enjoyed fishing and vegetable gardening. Memorial contributions can be made to the Rivercross Hospice, 3723 S.E. Frank Phillips Blvd., Bartlesville, OK, 74006.

John D. Luton died Jan. 30, 2014. He was born Oct. 11, 1922, in Miami. He graduated from Oklahoma A&M and **served in the Army Air Corps during World War II. He was an aerial gunner on a B-17, and served a full combat tour of duty in the European Theatre of Action. He was awarded the Air Medal with Six Oak Leaf Clusters and other combat duty awards**. Upon his discharge he attended OU where he earned his J.D. in 1950. He started practicing law in Muskogee in 1950 and was elected Muskogee County attorney in 1959. He was elected to the Oklahoma State Senate in 1964 and served 24 years in the legislature. He was a member of the First United Methodist Church, president of the Noon Lions Club and state president of the Oklahoma Jaycees. He was a member of the Masonic

Lodge, York Rite Lodge, American Legion, VFW, Disabled American Veterans, The Shrine, Jesters and the Odd Fellows Lodge. Memorial contributions can be made to First United Methodist Church, 600 E. Okmulgee, Muskogee, OK, 74403 or the American Diabetes Association.

Enrico "Rick" J. Romano of Oklahoma City died Dec. 18, 2013. He was born Feb. 14, 1924, in Longano, Italy. At the age of two he was brought to the United States and raised in Norristown, Pa. **He joined the U.S. Army infantry at the age of 19 and then served as a radio operator and gunner.** He earned his J.D. from OCU in 1957. After receiving his law degree, he worked as a corporate general counsel before entering private practice in the 1960s. After working as a partner at two firms, he began his own firm, which his son, Rick E. Romano, joined in 1983. He enjoyed weekends at Lake Eufaula, spending time with his family friends, golfing, playing cards or simply cooking a big Italian dinner for loved ones. Memorial contributions may be made to Russell-Murray Hospice, 221 S. Bickford Ave., El Reno, OK, 73036.

Arthur E. Rubin died Feb. 2, 2014. He was born Dec. 5, 1921, in Fairland, but lived most of his life in Tulsa. **He served in the Army Air Corps during World War II in the Philippines and Japan, and he left the service as captain of the officer's branch of the 5th Air Force**. After his service he attended OU and earned his J.D. in 1950. He practiced for many years with GableGotwals and James R. Gotwals Associates. He was a dedicated member of the Republican Party. He was an avid gardener and bird enthusiast, and he even bred endangered trumpeter swans for release in the wild and worked to reintroduce wild turkeys to Turkey Mountain. Memorial contributions may be made to Saint Simeons Episcopal Home in Tulsa.

Stephen Paul Sniegiecki of Antlers died Jan. 28, 2014. He was born on May 12, 1952, Cambridge, Mass. He earned a B.A. in English literacy from Bridgewater State University, science and hotel management degrees from Northeastern Massachusetts State University and a J.D. from TU. He was a trial attorney, worked for Legal Aid Services of Oklahoma and was a trial advocate for the Oklahoma Indigent Defense System. Mr. Sniegiecki also served as municipal judge for Wright City, Clayton and Rattan. He was a Red Sox fan, a golfer, a cribbage player and he enjoyed culinary arts. Memorial contributions can be made to the American Cancer Society.

Fourteen LinkedIn Tips for 2014

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Fenton, Fenton, Smith, Reneau, & Moon announces that Clayton W. Cotton has joined the firm as an associate. Mr. Cotton graduated with distinction from Oklahoma State University in May 2009, earning a bachelor of science degree in business administration, accounting. He earned his Juris Doctor degree from the University of Oklahoma College of Law, where he served as Assistant Note and Comment Editor of the *Oklahoma Law Review*. Mr. Cotton will practice in the firm's litigation division.

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Cross Examination

By Michael J. Blaschke

Pilate said to him, "So you are a king?" Jesus answered, "You say that I am a king. For this I was born, and for this I have come into the world, to bear witness to the truth. Every one who is of the truth hears my voice." Pilate said to him, "What is truth?" – John 18: 37-38

For lawyers who conduct trials, it is considered a "Holy Grail" moment. I once had an "effective" cross examination. In the ways lawyers talk and act, that word "effective" speaks volumes. It not only means we have taken a hostile witness or someone on the other side and succeeded with them, it means we have gotten from them the "answers" we want.

All lawyers will know why I put the word "answers" in quotation marks, for cross examination, really, is not about getting answers. Perry Mason moments of breaking down a witness and having them confess on the stand never happen. The real "answer" we want is one that makes the witness look like he or she is not to be believed. We call it credibility. To have the witness lose credibility is the hallmark of effective cross examination. In part.

The other part is that you have to do it nicely. That may sound strange to lay people who perceive courtroom work as legal savagery, but it is true. Juries and jurors are always different of course, except they share one common trait: they are human. Generally people do not like some shark of a lawyer making someone look bad if they do it in a nasty or contemptuous style. It is just human nature to feel that way, and so the careful lawyer tries to conduct himself in a positive manner. Many a case has been lost because a jury simply did not like a lawyer.

My moment came in what was, at the time, the trial of my career. I was representing a tiny, underfunded company against a huge one represented by one of the largest law firms in the world. It did not help that the trial judge was not particularly enamored with our theory of the case. Impossible odds. A struggle up a legal Everest. Exactly the kind of David versus Goliath battle that makes my heart sing. Lost causes are sometimes the most worthy ones to fight.

But we had not lost yet. The cross examination of the defendant's key witness, one of the company's 22 vice presidents, was left before closing argument and the jury's deliberation. I was certainly prepared and we did have a little better story, so I had the ammunition to make the witness look a little silly. Instead, I tripped him up not with just his inconsistencies but with kindness and humility.

At the end he was stuck in a trap, a trap I had baited only with sincerity. At the end he was taking long, slow looks back at the judge as if to say "Help me!" This, as you might guess, does not look good. At the end a close observer could see the beginnings of tears, tears for which I could not be blamed in any way.

And we won. I will never know for sure if my cross was the reason because we did have a good story, but it was clearly instrumental. The whole case turned on that testimony. Against those impossible odds we had scaled our Everest. David won again. I assure you a celebration ensued.

There was a shadow over my celebration, however. On what should have been a very good career day, a feeling kept intruding. You see, I did not like it. I did not like what I had been required to do. I had to work pretty hard to ward off my own tears as the witness struggled with his. I do not like hurting someone's feelings or making them look bad, regardless of the cause. Do these ends really justify these means? Many will say that service to others, service to clients, does justify an effective cross and perhaps that is right.

All I know is that it hurt to hurt someone else. I am committed to my career but I do not relish my next opportunity to conduct an "effective" cross examination. As a result I will never be feared in a courtroom as I lack the "killer instinct." Other lawyers will never speak of me and my technique with appreciation. I will never be Clarence Darrow.

And that's alright.

Mr. Blaschke practices in Oklahoma City.

PROGRAMS

April 3
Tulsa, OK
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April 4
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Program Planners/Moderators: **David T. McKenzie,** Oklahoma County Public Defender's Office, OKC
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Emilie Kirkpatrick, M.K. Bailey Law Offices, OKC
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Topics Covered

1. Preparing for Battle: How to Get Ready to Destroy a Witness! (with ethical discussion)
2. Voir Dire to Opening Statement to Cross-Examination: How Not To Just Throw Objects at The Wall To See What Sticks (with ethical discussion)
3. The Professional Liar - How to Seek and Destroy the Expert Witness
4. Impeachment: The Law and All the Law! And Dealing With a Difficult Judge (with ethical discussion)
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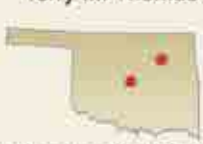

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