

# THE Oklahoma Bar JOURNAL

Volume 86 ♦ No. 5 ♦ Feb. 14, 2015

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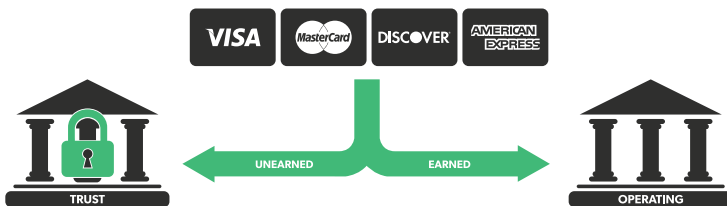
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# 'Great Charter' Exhibit to Visit Capitol

By David Poarch

As 2015 unfolds in the coming months, we all will be called upon to remember and reflect upon the importance of the rule of law as we collectively acknowledge three important anniversaries. Two of these events are uniquely significant to us as Oklahomans — the Oklahoma City bombing 20 years ago and the Supreme Court bribery scandal 50 years ago. The other is a seminal event in the history of the Western world and a concept that we hold dear: that no one is above the law. All are intertwined and of particular significance to us as lawyers.

Next month our association will cosponsor and join with the Oklahoma Secretary of State and others to bring a Magna Carta exhibit to be displayed in the State Capitol building in Oklahoma City as we celebrate its inception 800 years ago.

While much has been said and written about Magna Carta — the "Great Charter," its essence was perhaps best captured by Winston Churchill when he described it as the "fundamental principle [that] government must henceforward mean something more than the arbitrary rule of any man, and custom and the law must stand even above the King."<sup>1</sup>

In the years following its initial presentation in 1215 to England's King John, thrust at him by his barons as a list of demands, and his reluctant acquiescence to its terms under threat of the sword, the Great Charter went through several iterations. But however uncertain its beginnings, through time it has been a critical and fundamental influence on the rule of law, first in England, and from there around the world. The colonists, in our own humble beginnings, invoked Magna Carta in their quest to replace the arbitrary government of King George III with self-rule. It was likewise later the focus of our founding fathers in framing the Constitution, primarily reflected in the Bill of Rights.

The administration of justice by an impartial judiciary has been basic to our concepts of freedom ever since Magna Carta.<sup>2</sup> Without

recourse to impartial judgment the barons had no meaningful recourse, and they revolted. Our own Supreme Court scandal in 1965 is a stark reminder of the dire consequences that can result when this basic concept is forgotten or ignored.

Likewise, our concepts of "due process of law" are directly related to the words "by the law of the land" found in Chapter 39 of the original Magna Carta. "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." The perpetrators

of the 1995 Oklahoma City bombing were brought to justice applying the due process requirements of our Constitution, the basis of which is found in the Great Charter. A just result brought about by the lawful judgment of their peers.

I hope you will join me during 2015 as we remember and reflect upon the origins and importance of the rule of law in the life of our state and nation. Please begin by joining others and take time to visit the Magna Carta exhibit at the State Capitol next month.

*The administration of justice by an impartial judiciary has been basic to our concepts of freedom ever since Magna Carta.*



*David Poarch*

President Poarch  
practices in Norman.  
dpoarch@baileyandporch.com  
405-329-6600

1. 1 Winston S. Churchill, *The Birth of Britain* 253 (1956).

2. *Bridges v. California*, 314 U.S. 252, 282 (1941).

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## JOURNAL STAFF

JOHN MORRIS WILLIAMS,  
Editor-in-Chief  
[johnw@okbar.org](mailto:johnw@okbar.org)

CAROL A. MANNING, Editor  
[carolm@okbar.org](mailto:carolm@okbar.org)

LORI RASMUSSEN,  
Assistant Editor  
[lorir@okbar.org](mailto:lorir@okbar.org)

EMILY BUCHANAN,  
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# Paragraphs and Indentation

## Formatting for Persuasive Writing

*By Collin Walke*

Contrary to that pesky little voice in your head at this very moment, formatting is not a boring topic and is absolutely critical when writing a legal brief. Aside from the technical rule requirements for formatting briefs, which will be discussed in greater detail below, formatting is essential for persuasion. One of the best legal writers I have ever had the privilege of working with has a paper weight on his desk that reads: “Good writing is clear thinking made visible.” Without good formatting, quality content will be lost in the mire of facts, law and argument.

The point of this article is to outline what good formatting looks like. First, the brief must be written in accordance with the formatting rules of your particular court. A brief for the district court of Oklahoma County will look different than a brief for the Western District of Oklahoma. Second, the format of the brief must be laid out so that it assists the reader in understanding your position. Finally, your format should match the needs of the particular brief.

### COURT RULES ON FORMATTING

It honestly astounds me how many attorneys do not write briefs that comply with court rules. Oklahoma County District Judge Bernard Jones strikes briefs that do not comply with court rules. He reasons that “rules are rules,” and as a “steward of the institution of law”<sup>1</sup> it is his obligation to apply the rules, not

to pick and choose which rules are important. The court rules for briefs are not uniform, so you need to make sure that whichever court you are practicing before, you are complying with those rules.

For example, Tulsa County Local District rule CV 18 requires formatting of briefs to comply with Oklahoma Supreme Court rule 1.11(a). In turn, rule 1.11(a) requires 12-point font. By contrast, LCvR7.1 of the Western District of Oklahoma requires 13-point font. While an attorney may consider this a trivial detail, judges notice when attorneys do not comply with court rules.

According to Judge Friot of the Western District of Oklahoma, “Some briefs are hard enough to follow in 13-point type, let alone 10- or 11-point. And when I read a brief that takes liberties with our format requirements (assuming I have not stricken it), it is only

natural to wonder whether the writer of the brief might also be taking liberties with the facts or the law.”<sup>2</sup>

As a result, when you are beginning to write a brief in any jurisdiction in which you have not read the court rules, make sure you do so. The technical differences may be the difference between a judge taking your argument seriously and striking your brief.

### ASSISTING THE READER

If you are writing a brief, clearly there is a purpose. It necessarily follows that you want your reader to understand that purpose. Too often, attorneys will write briefs in one long narrative or without context. This prevents judges (*i.e.*, your audience) from following your argument. Reading brief after brief can be taxing, so your job as a writer should be to make sure that your brief requires as little effort to understand as possible.

The first way to accomplish this goal is by breaking up briefs into smaller chunks that are easier to digest. For example, rule 4 of the district court rules for the state of Oklahoma requires a motion to “specifically state the grounds therefor and the relief or order sought,” contain a statement of facts, and include “a concise brief or a list of authorities upon which the movant relies.”<sup>3</sup> Therefore, every motion should include, at a minimum, the above items, preferably in separate sections.

Legal writing enthusiasts debate about how to include these items in a particular brief, but there are at least two prominent ways. The first is what I will call the “standard method.” The standard method is a brief written in the following order: 1) facts, 2) argument and authorities and 3) conclusion. For example, we have all seen briefs that look like this:

---

**In the District Court for Sky County  
State of Neverland**

John Doe,	)	
Plaintiff,	)	
v.	)	CJ-2017-1999
Jane Roe,	)	
Defendant	)	

**MOTION TO QUASH**

Plaintiff, John Doe, for his Motion to Quash, shows the Court as follows:

**FACTS**

1. Fact 1
2. Fact 2
3. Fact 3

**ARGUMENT AND AUTHORITIES**

**PROPOSITION I. OPPRESSIVE SUBPOENAS SHOULD BE QUASHED.**

Based upon the case of *Casey v. Sunshine Band*, 2017 OK 200, the subpoena should be quashed because it is oppressive.

**CONCLUSION**

The Court should sustain this Motion to Quash.

WHEREFORE, Plaintiff, John Doe, prays that this Court sustain this Motion to Quash.

Respectfully,

---

Lawyer

---

---

**In the District Court for Sky County  
State of Neverland**

John Doe,            )  
    Plaintiff,        )  
v.                    ) CJ-2017-1999  
Jane Roe,            )  
    Defendant        )

**MOTION TO QUASH**

Plaintiff, John Doe, for his Motion to Quash, requests that the Court quash the subpoena issued by Defendant to Plaintiff because:

**SUMMARY OF ARGUMENT**

**PROPOSITION I. OPPRESSIVE SUBPOENAS SHOULD BE QUASHED.**

**CONCLUSION: THE SUBPOENA IS OPPRESSIVE AND SHOULD BE QUASHED.**

**FACTS**

1. Fact 1
2. Fact 2
3. Fact 3

**ARGUMENT AND AUTHORITIES**

**PROPOSITION I. OPPRESSIVE SUBPOENAS SHOULD BE QUASHED.**

Based upon the case of *Casey v. Sunshine Band*, 2017 OK 200, the subpoena should be quashed because it is oppressive.

**CONCLUSION**

The Court should sustain this Motion to Quash.

WHEREFORE, Plaintiff, John Doe, prays that this Court sustain this Motion to Quash.

Respectfully,

---

Lawyer

---

There is nothing wrong with writing a brief in this manner. However, when a lawyer writes a brief like this, the judge reading the brief does not actually know what relief is being sought or why until he or she reaches step two. Meaning, the judge does not understand the facts or appreciate why you are even writing the brief until well into the brief.

The same brief, using a different method, which I call the “up front” method, looks like the example above.

This method has the benefit of telling the court right away what the purpose of the brief

is, what legal theory you are relying upon, and why you should prevail.

Related to broad formatting issues (*e.g.*, putting the propositions up front on the first page versus waiting until later in the brief), a good legal writer will have an eye toward subheadings. Subheadings are helpful because they act as signposts throughout the brief and catch the reader’s eye. A lengthy narrative statement may be written well, but the important details may get lost without subheadings.

Another common mistake is not providing context within the brief itself. This is most commonly seen in response briefs. Take the ficti-



tious motion to quash, above, for example. Within the fact section there are three facts. In his or her response brief, a lawyer may simply state “admitted” or “denied” with regard to those facts. Unless the court has the original motion before it at the exact same time he or she is reading your brief, the court will not know what is being admitted or denied.

Remember, these are motions, not petitions or answers. There is no need to respond exactly in the same format that the other lawyer wrote the original motion. You, the attorney with amazing writing skills, dictate how to respond to the original motion. Instead of simply stating “admitted” or “denied,” you may write something like: “plaintiff’s counsel asserts that the subpoena was issued without sufficient time for compliance and is therefore oppressive. The exact opposite is true.” You do not need to go tit-for-tat with another lawyer on each point.<sup>4</sup>

Good formatting, use of subheadings and providing context all make reading and understanding a brief easier. As a result, serious time and thought should be put into deciding how to present your legal arguments. After all, your client is paying you to be persuasive, not to simply put words on a page.

## DRAFTING A BRIEF ACCORDING TO THE NEEDS OF THE BRIEF

Contrary to popular belief, you were not hired to be verbose, obtuse or prolix. You were hired to be persuasive and get a case resolved. Unnecessary verbiage may increase your billable hour, but it will not necessarily increase your win rate. As a result, you need to make sure that you tailor your brief to the particular needs at that time.

For example, if the motion you are putting forward is a relatively straightforward motion, state the facts, cite the statute, cite an on-point case, and then get out of there. Belaboring points will not make a judge happy.

Cleveland County District Court Judge Thad Balkman says, “Although there are no local district court rules for Cleveland County, we believe that briefs should be just that, brief. We appreciate attorneys that state their arguments succinctly and do not rehash the same points over and over. Remember, there is no need for over-the-top adjectives, you’re not writing for an

entertainment magazine (*i.e.*, leave words like chicanery or shenanigans out of your brief).”<sup>5</sup>

The one exception to the excess or colorful verbiage rule is if your audience likes it. There are some judges in this state that actually enjoy reading Latin and do not mind the occasional “*ipse dixit*” or “*ipso facto*.” If the judge you are appearing before actually enjoys such writing, and you can pepper the Latin in with otherwise entertaining writing, you may actually score points with the court. But beware, a simple motion should never require a complex explanation.

## CONCLUSION

Writing winning briefs is about more than having the facts and/or law on your side. If you fail to follow the rules, your brief may never be read. Moreover, if you fail to present your facts or law in the most favorable light, the salient details may fly right past the judge. Never make the judge search your brief for the right answer. Tell the court in plain English why you deserve to win and then sit back and trust that justice will prevail.

1. Judge Jones likens his strict application of the rules to a quote from the movie *The Contender*. In the movie, one of the main stars refuses to defend allegations made against her based on principle. At the end of the movie, it becomes known that the allegations were false. The character is asked why she did not defend herself against the false allegations and she said: “Principles only mean something when you stick to them when it’s inconvenient.” Similarly, according to Judge Jones, rules only mean something when you stick to them when it’s inconvenient. In-person interview with Judge Bernard Jones, judge of the District Court, Oklahoma County, Oklahoma, (July 29, 2014).

2. Email interview with Judge Stephen P. Friot, judge of the United States District Court for the Western District of Oklahoma (Aug. 29, 2014).

3. Rule 4, Rules for District Courts, 12 O.S. 2001, Ch. 2, App. 1.

4. The obvious exception to this rule is in responding to motions for summary judgment and the material fact allegations. See: Rule 13, Rules for District Courts, 12 O.S. 2001, Ch. 2, App. 1.

5. Telephone interview with Judge Thad Balkman, Judge of the District Court, Cleveland County, Oklahoma (Sept. 4, 2014).

## ABOUT THE AUTHOR



Collin Walke is an attorney with the law firm of Rubenstein & Pitts PLLC. His primary areas of practice are complex business litigation, commercial transactions and appellate law. He has presented CLEs for both the OBA and Oklahoma County Bar Association. Mr. Walke graduated *magna cum laude* from OCU School of Law and received his B.A. in philosophy from OSU.

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# George Orwell's Classic Essay on Writing

## The Best Style 'Handbook' for Lawyers and Judges

By Douglas E. Abrams

Like other Americans, lawyers and judges most remember British novelist and essayist George Orwell (1903-1950) for his two signature books, *Animal Farm* and *1984*. Somewhat less known is his abiding passion about the craft of writing. It was a lifelong passion,<sup>1</sup> fueled (as Christopher Hitchens recently described) by Orwell's "near visceral feeling for the English language."<sup>2</sup>

Orwell's most exhaustive commentary about writing was his 1946 essay, *Politics and the English Language*,<sup>3</sup> which minced no words. "[T]he English language is in a bad way,"<sup>4</sup> he warned. "Debased"<sup>5</sup> prose was marked by "abuse,"<sup>6</sup> "slovenliness,"<sup>7</sup> and a "lifeless, imitative style"<sup>8</sup> that was nearly devoid of "a fresh, vivid, homemade turn of speech."<sup>9</sup> A "tendency . . . away from concreteness"<sup>10</sup> had left writing "dreary,"<sup>11</sup> "ugly and inaccurate."<sup>12</sup> "[V]ague-ness and sheer incompetence," he said, "is the most marked characteristic of modern English prose."<sup>13</sup>

Orwell's 12-page essay diagnosed what he called the "decay of language," and it offered six curative rules.<sup>14</sup> The diagnosis and rules still reverberate among professional writers. More than 65 years later, Judge Richard A. Posner calls the essay "[t]he best style 'handbook'" for legal writers.<sup>15</sup> Nobel Prize-winning economist Paul Krugman recently went a step further, calling the essay a resource that "anyone who cares at all about either politics or writing should know by heart."<sup>16</sup>

If I were a law partner employing young lawyers or a judge employing law clerks, I would add Orwell's essay to a list of reading recommended on the way in. If I were a young lawyer not required to read the essay, I would read it anyway. The entire essay is available for downloading at <http://goo.gl/Oea0wK>.

Orwell stressed that he was dissecting, not "the literary use of language, but merely language as an instrument for expressing and not for concealing or preventing thought."<sup>17</sup> The narrower scope does not deprive legal writers because Justice Felix Frankfurter was right that "[l]iterature is not the goal of lawyers, though they occasionally attain it."<sup>18</sup> Orwell's essay approached language as a tool for clear communication, an aspiration that defines what lawyers and judges do throughout their careers. "The power of clear statement," said Daniel Webster, "is the great power at the bar."<sup>19</sup>

As Orwell's title intimates, the essay included criticism of political writing done by government officials and private observers. The

essay's staying power, however, transcends the political arena. By calling on writers of all persuasions to "simplify your English,"<sup>20</sup> Orwell helped trigger the plain English movement, which still influences legislators, courts, administrative agencies and law school legal writing classes.

This article proceeds in two parts. First I describe how judges, when they challenge colleagues or advocates in particular cases, still quote from Orwell's plea for clear expression and careful reasoning. Then I present Orwell's diagnosis of maladies that plagued contemporary prose, together with his six curative rules and their continuing relevance for today's lawyers and judges.

## TODAY'S JUDGES

### *'Take the Necessary Trouble'*

"[W]ritten English," said Orwell in his essay, "is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble."<sup>21</sup>

In 2012, the United States Court of Appeals for the District of Columbia Circuit quoted this passage in *National Association of Regulatory Utility Commissioners v. United States Department of Energy*.<sup>22</sup> The issue was whether the challenged agency determination violated the Nuclear Waste Policy Act of 1982, and the parties hotly contested the case with hefty servings of alphabet soup.

On page 48 of its 58-page brief, for example, the National Association argued that, "Although DOE has not disclaimed its obligation to dispose of SNF, it is undisputed that DOE currently has no active waste disposal program. . . . The BRC is undertaking none of the waste disposal program activities identified in NWSA §302(d). Its existence therefore cannot justify continued NWF fee collection."<sup>23</sup>

On page 24 of its 60-page brief, the agency countered that "[t]he plain language of the NWSA . . . provides the Secretary [of Energy] with broad discretion in determining whether to recommend a change to the statutory NWF fee. . . . In section 302(a)(2) of the NWSA, Congress set the amount of the NWF fee — which is paid only by utilities that enter into contracts with DOE for the disposal of their SNF and HLW. . . ."<sup>24</sup>

The *National Association of Regulatory Utility Commissioners* panel unanimously struck down

the challenged agency determination. Judge Laurence H. Silberman's opinion quoted Orwell and admonished the parties for "abandon[ing] any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not, and littering their briefs with" acronyms.<sup>25</sup>

Other decisions have also quoted Orwell's call to "take the necessary trouble" to achieve maximum clarity.<sup>26</sup> In *Sure Fill & Seal, Inc. v. GFF, Inc.*,<sup>27</sup> for example, the federal district court awarded attorneys' fees to the defendant on its motion to enforce the parties' settlement agreement. The court criticized both parties' submissions. "Imprecision and lack of attention to detail," wrote Judge Elizabeth A. Kovachevich, "severely dampen the efficacy of Plaintiff's written submission to this Court. Equally unhelpful is Defendant's one sentence, conclusory response that is completely devoid of any substance. Advocates, to be effective, must take the 'necessary trouble' to present the Court with coherent, well-reasoned and articulable points for consideration."<sup>28</sup>

"At times," Judge Kovachevich specified, "the Court was forced to divine some meaning from the incomprehensible prose that plagued Plaintiffs' written objections. Lest there be any confusion, the Court graciously did so even though it could have simply refused to give the faulty objections any consideration at all. The Court would have been equally obliged to treat Defendant's failure to provide meaningful response as a concession of Plaintiffs' objections."<sup>29</sup>

### *'Like Soft Snow'*

Orwell held keen interest in politics, and his 1946 essay attributed "the decadence of our language" partly to political motivation.<sup>30</sup> "Political language," he wrote, "has to consist largely of euphemism, question-begging and sheer cloudy vagueness. . . . [W]ords fall[] upon the facts like soft snow, blurring the outlines and covering up all the details."<sup>31</sup>

This passage appeared in *Stupak-Thrall v. United States*,<sup>32</sup> a 1996 *en banc* decision of the U.S. Court of Appeals for the Sixth Circuit that carried no political overtones. The full court remained evenly divided on the question of whether the plaintiffs' riparian rights may count as "valid existing rights" to which U.S. Forest Service regulations are subject under the federal Michigan Wilderness Act (MWA). The dissenter criticized his colleagues who favored affirmance of the decision below. "The inter-

pretation of the 'valid existing rights' language in Section 5 of the MWA to mean that [plaintiff] has no rights that the Forest Service is bound to respect is a good example of the distortion of language decryd by" Orwell's essay.<sup>33</sup>

## ORWELL'S DIAGNOSES AND CURES

Orwell rejected the notion that "we cannot by conscious action do anything about" the decline of language,<sup>34</sup> believing instead that "the process is reversible."<sup>35</sup> The essay's capstones were his diagnosis of the maladies that afflicted writing, followed by his six curative rules.

### *Diagnosis*

Orwell diagnosed four "tricks by means of which the work of prose-construction is habitually dodged."<sup>36</sup>

"*Dying metaphors.*" The English language, Orwell wrote, sustains "a huge dump of worn-out metaphors" that "have lost all evocative power and are merely used because they save people the trouble of inventing phrases for themselves."<sup>37</sup> He cited, among others, "toe the line," "run roughshod over," and "no axe to grind."<sup>38</sup> To make matters worse, "incompatible metaphors are frequently mixed, a sure sign that the writer is not interested in what he is saying."<sup>39</sup>

"*Operators or verbal false limbs.*" Orwell said that these devices cloud thinking because they "save the trouble of picking out appropriate verbs and nouns, and at the same time pad each sentence with extra syllables which give it an appearance of symmetry."<sup>40</sup> Among the shortcuts he assailed here were replacing simple, single-word verbs with phrases that add little if anything (beginning with "prove to," "serve to," and the like); using the passive voice rather than the active voice "wherever possible"; using noun constructions rather than gerunds (for example, "by examination of" rather than "by examining"); and replacing simple conjunctions and prepositions with such cumbersome phrases as "with respect to" and "the fact that."<sup>41</sup> "The range of verbs is further cut down by means of the '-ize' and 'de-' formations, and the banal statements are given an

appearance of profundity by means of the 'not un-' formation."<sup>42</sup>

"*Pretentious diction.*" Orwell included words that "dress up simple statement and give it an air of scientific impartiality to biased judgments" (such as "constitute" and "utilize"); and foreign phrases that "give an air of cultural elegance" (such as "ancien regime" and "deus ex machina").<sup>43</sup> "Bad writers . . . are always nearly haunted by the notion that Latin or Greek words are grander than Saxon ones," even though "there is no real need for any of the hundreds of foreign phrases now current in English."<sup>44</sup>

"*Meaningless words.*" Here Orwell targeted art and literary criticism, and political commentary. In the former, "words like 'romantic,' . . . 'values,' . . . 'natural,' 'vitality' . . . are strictly meaningless." In the latter, the word "Fascism," for example, had "no meaning except in so far as it signifies 'something not desirable.'"<sup>45</sup>

### *Cures*

Orwell believed that "the decadence of our language is probably curable" if writers would "let the meaning choose the word and not the other way about."<sup>46</sup> He proposed six rules. "These rules sound elementary, and so they are," Orwell wrote, "but they demand a deep change of attitude in anyone who has grown up used to writing in the style now fashionable."<sup>47</sup> The rules are worth contemplation from lawyers and judges who write.

**Rule One: "Never use a metaphor, simile, or other figure of speech which you are used to seeing in print."**

Orwell discussed clichés that might entertain, divert and perhaps even convince readers by replacing analysis with labels. "By using stale metaphors, similes and idioms," he said, "you save much mental effort, at the cost of leaving your meaning vague, not only for your reader but for yourself. . . . People who write in this manner usually have a general emotional meaning . . . but they are not interested in the detail of what they are saying."<sup>48</sup> He urged

**“By using stale metaphors, similes and idioms,” he said, ‘you save much mental effort, at the cost of leaving your meaning vague, not only for your reader but for yourself.’”**



"scrapping of every word or idiom which has outworn its usefulness."<sup>49</sup>

In 2003, concurring Judge Stephen R. Reinhardt of the U.S. Court of Appeals for the 9th Circuit cited Orwell's first rule in *Eminence Capital, LLC v. Aspeon, Inc.*, a securities fraud class action.<sup>50</sup> The court of appeals held that the district court had abused its discretion by dismissing, without leave to amend, the first amended consolidated complaint for failure to state a claim. The panel reiterated, but rejected, the district court's conclusion that the plaintiffs already had "three bites at the apple."<sup>51</sup>

Noting that the district court failed to identify or analyze any of the traditional factors that would have supported dismissal without leave to amend,<sup>52</sup> Judge Reinhardt cautioned against "the use of cliches in judicial opinions, a technique that aids neither litigants nor judges, and fails to advance our understanding of the law."<sup>53</sup> "Metaphors," he explained, "enrich writing only to the extent that they add something to more pedestrian descriptions. Cliches do the opposite; they deaden our senses to the nuances of language so often critical to our common law tradition. The interpretation and application of statutes, rules, and case law frequently depend on whether we can discriminate among subtle differences of meaning. The biting of apples does not help us."<sup>54</sup>

"The problem of cliches as a substitute for rational analysis," Judge Reinhardt concluded, "is particularly acute in the legal profession, where our style of writing is often deservedly the subject of ridicule."<sup>55</sup>

**Rule Two: "Never use a long word where a short one will do."**

This rule placed Orwell in good company. Ernest Hemingway said that he wrote "what I see and what I feel in the best and simplest way I can tell it."<sup>56</sup> Hemingway and William Faulkner went back and forth about the virtues of simplicity in writing. Faulkner once criticized Hemingway, who he said "had no courage, never been known to use a word that might send the reader to the dictionary." "Poor Faulkner," Hemingway responded, "Does he really think big emotions come from big words? He thinks I don't know the ten-dollar words. I know them all right. But there are older and simpler and better words, and those are the ones I use."<sup>57</sup>

Hemingway was not the only writer who valued simplicity. "Broadly speaking," said Sir Winston Churchill, "the short words are the best, and the old words when short are best of all."<sup>58</sup> "Use the smallest word that does the job," advised essayist and journalist E.B. White.<sup>59</sup> In a letter, Mark Twain praised a 12-year-old boy for "us[ing] plain, simple language, short words, and brief sentences. That is the way to write English — it is the modern way and the best way. Stick to it; don't let fluff and flowers and verbosity creep in."<sup>60</sup>

Humorist Will Rogers wrote more than 4,000 nationally syndicated newspaper columns, including ones that spoke about language.<sup>61</sup> "[H]ere's one good thing about language, there is always a short word for it," he said. "Course the Greeks have a word for it, the dictionary has a word for it, but I believe in using your own word for it. I love words but I don't like strange ones. You don't understand them, and they don't understand you. Old words is like old friends — you know 'em the minute you see 'em."<sup>62</sup>

"One of the really bad things you can do to your writing," novelist Stephen King explains, "is to dress up the vocabulary, looking for long words because you're maybe a little bit ashamed of your short ones."<sup>63</sup> "Any word you have to hunt for in a thesaurus," he says, "is the wrong word. There are no exceptions to this rule."<sup>64</sup>

**Rule Three: "If it is possible to cut a word out, always cut it out."**

What if the writer says, "In my opinion it is not an unjustifiable assumption that. . . ."? Orwell proposed a simpler, less mind-numbing substitute: "I think."<sup>65</sup>

This third rule also placed Orwell in good company. "The most valuable of all talents is that of never using two words when one will do," said lawyer Thomas Jefferson, who found "[n]o stile of writing . . . so delightful as that which is all pith, which never omits a necessary word, nor uses an unnecessary one."<sup>66</sup> "Many a poem is marred by a superfluous word," said poet Henry Wadsworth Longfellow.<sup>67</sup> "Less is more," explained British Victorian poet and playwright Robert Browning, wasting no words.<sup>68</sup>

Judges, in particular, can appreciate this short verse by Theodor Geisel (Dr. Seuss), who wrote for children, but often with an eye

toward the adults: “[T]he writer who breeds/ more words than he needs/ is making a chore/ for the reader who reads./ That’s why my belief is/ the briefer the brief is,/ the greater the sigh/ of the reader’s relief is.”<sup>69</sup>

**Rule Four: “Never use the passive where you can use the active.”**

The passive voice usually generates excess verbiage and frequently leaves readers uncertain about who did what to whom. The active voice normally contributes sinew not fat, clarity not obscurity.

Consider the second line of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”

Historians have praised Thomas Jefferson as “a genius with language” whose draft Declaration resonated with “rolling cadences and mellifluous phrases, soaring in their poetry and powerful despite their polish.”<sup>70</sup> Would Jefferson have rallied the colonists and captivated future generations if instead he began with, “These truths are held by us to be self-evident. . . .”?

**Rule Five: “Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.”**

One federal district court advised that legal writers gamble when they “presuppose specialized knowledge on the part of their readers.”<sup>71</sup> In 2008, the U.S. Court of Appeals for the 7th Circuit explained the dangers of presupposition in *Indiana Lumbermens Mutual Insurance Co. v. Reinsurance Results, Inc.*, which held that the parties’ contract did not require the plaintiff insurer to pay commissions to the company it had retained to review the insurer’s reinsurance claims.<sup>72</sup>

Writing for the *Lumbermens Mutual* panel, Judge Posner reported that the parties’ briefs “were difficult for us judges to understand because of the density of the reinsurance jargon in them.”<sup>73</sup> “There is nothing wrong with a specialized vocabulary — for use by specialists,” he explained. “Federal district and circuit judges, however, . . . are generalists. We hear very few cases involving reinsurance, and cannot possibly achieve expertise in reinsurance practices except by the happenstance of having practiced in that area before becoming a judge, as none of us has. Lawyers should understand the judges’

limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English.”<sup>74</sup>

Counsel in *Indiana Lumbermens Mutual Insurance Co.*, Judge Posner concluded, “could have saved us some work and presented their positions more effectively had they done the translations from reinsurancese into everyday English themselves.”<sup>75</sup>

**Rule Six: “Break any of these rules sooner than say anything outright barbarous.”**

Orwell punctuated each of his first five rules with “never” or “always.” Lawyers learn to approach these commands cautiously because most legal and non-legal rules carry exceptions based on the facts and circumstances. Conventions of good writing ordinarily deserve adherence because most of them enhance content and style most of the time. They became conventions based on the time-tested reactions elicited by accomplished writers. Orwell recognized, however, that “the worst thing one can do with words is to surrender” to them.<sup>76</sup> As writers strive for clear and precise expression, they should avoid becoming prisoners of language.

Orwell’s sixth rule wisely urges writers to follow a “rule of reason,” but I would rely on personal judgment and common sense even when the outcome would not otherwise qualify as “outright barbarity.” Good writing depends on sound grammar, spelling, style and syntax, but it also depends on willingness to bend or break the “rules” when advisable to maintain the bond between writer and reader. Within bounds, readers concern themselves more with the message than with what stylebooks say about conventions.

Orwell’s fourth and fifth rules illustrate why good writing sometimes depends on departing from conventions. The fourth rule commands, “Never use the passive where you can use the active.” Look again at the second line from the Declaration of Independence, quoted above. It contains a phrase written in the passive voice (“that they are endowed by their Creator with”). The active-voice alternative (“that their Creator endowed them with”) would not have produced a result “outright barbarous,” but Jefferson would have sacrificed rhythm and cadence. The passive phrase left no doubt about who did the endowing, and two extra words did not slow the reader.

Orwell's fifth rule commands, "Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent." But suppose, for example, that a lawyer or judge wants to write about "causation" in tort law, which would qualify as jargon because the term "causation" does not normally roll off the lips of laypeople. A readership of judges or tort lawyers will connect with the jargon easier than a readership of lay clients, who in turn will connect better than teenage readers in a middle school civics class. To an audience of lawyers who are comfortable with discussing "causation," choosing another word might even cloud or distort legal meaning. A writer uncertain about connecting with the audience can cover bases by briefly defining the term.

This rule of reason grounded in personal judgment and common sense extends beyond Orwell's first five rules to writing generally. For example, when splitting an infinitive or ending a sentence with a preposition would enhance meaning or produce a more fluid style, then split the infinitive or end the sentence with a preposition. Maintaining smooth dialog is more important than leafing through stylebooks that readers will not have leafed through.

Sir Winston Churchill, a pretty fair writer himself, reportedly had a tart rejoinder for people who chastised him for sometimes ending sentences with prepositions. "That," he said, "is the sort of arrant pedantry up with which I shall not put."<sup>77</sup>

## CONCLUSION

Lack of clarity, Orwell's major target, normally detracts from the professional missions of lawyers and judges. What Justice William J. Brennan, Jr. called "studied ambiguity"<sup>78</sup> might serve the purposes of legislative drafters who seek to avoid specificity that could fracture a majority coalition as a bill proceeds to a final vote. Studied ambiguity might also serve the purposes of a lawyer whose client seeks to feel out the other parties early in a negotiation. Without maximum clarity, however, written buck-passing may compel courts to finish the legislators' work, or may produce an agreement saddled with misunderstandings.

Similar impulses prevail in litigation. Advocates persuade courts and other decision makers most effectively through precise, concise, simple and clear expression that articulates

why the facts and the governing law favor their clients.<sup>79</sup> Judges perform their constitutional roles most effectively with forthright opinions that minimize future guesswork.

How often today do we still hear it said that someone "writes like a lawyer"? How often do we hear it meant as a compliment? Judge Reinhardt put it well in *Eminence Capital, LLC*: "It is long past time we learned the lesson Orwell sought to teach us."<sup>80</sup>

*Note: This article originally appeared in Precedent, the Missouri Bar's quarterly magazine. Reprinted by permission.*

1. George Orwell, "Why I Write" (1946) ("From a very early age, perhaps the age of five or six, I knew that when I grew up I should be a writer.")

2. Christopher Hitchens, "The Importance of Being Orwell," *Vanity Fair*, Aug. 2012, at 66, 66.

3. George Orwell, "Politics and the English Language," in *Essays on Language and Usage* (Leonard F. Dean & Kenneth G. Wilson eds., 2d ed. 1963).

4. *Id.* at 325.

5. *Id.* at 333.

6. *Id.* at 325.

7. *Id.*

8. *Id.* at 332.

9. *Id.*

10. *Id.* at 330.

11. *Id.* at 334.

12. *Id.* at 325.

13. *Id.* at 327.

14. *Id.* at 336.

15. Richard A. Posner, "Judges' Writing Styles (and Do They Matter?)," 62 U. CHI. L. REV. 1421, 1423 n.8 (1995).

16. Paul Krugman, "Orwell, China, and Me," *N.Y. Times Blogs* (July 20, 2013).

17. Orwell, *supra* note 3, at 335.

18. Felix Frankfurter, "When Judge Cardozo Writes," *The New Republic*, April 8, 1931.

19. Letter from Daniel Webster to R.M. Blatchford (1849), in *Peter Harvey, Reminiscences and Anecdotes of Daniel Webster* 118 (1877).

20. Orwell, *supra* note 3, at 336.

21. *Id.* at 325.

22. 680 F.3d 819 (D.C. Cir. 2012); see Douglas E. Abrams, "Acronyms," 6 *Precedent* 44 (Fall 2012).

23. *Nat'l Ass'n of Regulatory Utility Comm'rs*, Final Brief of Consolidated Petitioners 48, 2011 WL 5479247 (2012).

24. *Nat'l Ass'n of Regulatory Utility Comm'rs*, Final Brief for Respondent 24-25, 2011 WL 5479246 (2012).

25. *Nat'l Ass'n*, 680 F.3d at 820 n.1; see also *Illinois Public Telcomm. v. FCC*, No. 13-1059 (D.C. Cir. March 25, 2014) (*per curiam*) (order striking parties' briefs and ordering submission within two days, of briefs that "eliminate uncommon acronyms").

26. See, e.g., *Delgadillo v. Astrue*, 601 F. Supp.2d 1241 (D. Colo. 2007) (discussing confusion caused by confusing "attorney fees" and "attorney's fees" under the Equal Access to Justice Act); *Anthony A. Gagliano & Co. v. Openfirst, LLC*, 828 N.W.2d 268, 271 n.2 (Wis. Ct. App. 2013) ("acronyms and initials make comprehension more, not less, difficult").

27. 2012 WL 5199670, No. 8:08-CV-882-T-17-TGW (M.D. Fla. Oct. 22, 2012).

28. *Id.* \* 3.

29. *Id.*

30. Orwell, *supra* note 3, at 334.

31. *Id.* at 333.

32. 89 F.3d 1269 (6th Cir. 1996) (*en banc*).

33. *Id.* at 1292 (Boggs, J., dissenting); see also, e.g., *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (*en banc*) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003) ("[W]hatever else Michigan's policy may be, it is not 'affirmative action,'" quoting Orwell's "soft snow" metaphor); *Palm Beach County Sheriff v. State*, 854 So.2d 278 (Fla. Dist. Ct. App. 2003) (quoting Orwell's "soft snow" metaphor and holding that in applying sovereign immunity, there is no distinction between the "reimburse-



ment” and “recovery” to which the plaintiff sheriff said his office was clearly entitled, and the right to “damages” which sovereign immunity precedent rejected); cf. *Quartman v. Martin*, 2001 WL 929949, No. 18702 (Ohio Ct. App. Aug 17, 2001) (in discussion of probable cause, quoting Orwell essay that “[p]olitical language . . . is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind.”)

34. Orwell, *supra* note 3, at 325.
35. *Id.*
36. *Id.* at 327.
37. *Id.* at 327.
38. *Id.*
39. *Id.*
40. *Id.* at 328.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 329.
46. *Id.* at 334, 335.
47. *Id.*
48. *Id.* at 331-32.
49. *Id.* at 334.
50. 316 F.3d 1048 (9th Cir. 2003).
51. *Id.* at 1053.
52. See *Foman v. Davis*, 371 U.S. 178, 182 (1962) (stating the factors).
53. *Eminence Capital*, 316 F.3d at 1053.
54. *Id.* at 1053-54.
55. *Id.* at 1054.
56. A.E. Hotchner, *Papa Hemingway* 69 (1966) (quoting Hemingway).
57. *Id.* at 69-70 (1966) (quoting Hemingway); see also, e.g., Kurt Vonnegut, Jr., “The Latest Word” (reviewing *The Random House Dictionary Of The English Language* (1966)), *N.Y. Times*, Oct. 30, 1966, at BR1 (“I wonder now what Ernest Hemingway’s dictionary looked like, since he got along so well with dinky words that everybody can spell and truly understand.”).
58. Susan Wagner, “Making Your Appeals More Appealing: Appellate Judges Talk About Appellate Practice,” 59 *Ala. Law.* 321, 325 (1998) (quoting Churchill).
59. Max Messmer, “It’s Best to be Straightforward On Your Cover Letter, Resume,” *Pittsburgh Post-Gazette*, Nov. 29, 2009, at H1 (quoting White).
60. Robert Hartwell Fiske, *The Dictionary of Concise Writing: 10,000 Alternatives to Wordy Phrases* 11 (2002); see also, e.g., British Victorian novelist George Eliot (Mary Ann Evans), quoted at Plainlanguage.gov, www.plainlanguage.gov/resources/quotes/historical.cfm (“The finest language is mostly made up of simple unimposing words”); Irish poet William Butler Yeats, *id.* (“Think like a wise man but communicate in the language of the people.”); C.S. Lewis’ *Letters to Children* 64 (Lyle W. Dorsett & Marjorie Lamp Mead eds., 1985 (emphasis in original)) (“Don’t implement promises, but keep them.”). (Don’t say “infinitely” when you mean “very”; otherwise you’ll have no word left when you want to talk about something really infinite.)
61. Mark Schlachtenhaufen, “Centennial Snapshot: Will Rogers’ Grandson Carries On Tradition of Family Service,” *Okla. Publishing Today*, May 31, 2007.
62. Betty Rogers, *Will Rogers* 294 (1941; new ed. 1979) (quoting Will Rogers).
63. Stephen King, *On Writing: A Memoir of the Craft* 110 (2000).

64. Stephen King, “Everything You Need to Know About Writing Successfully: in Ten Minutes” (1986), <http://goo.gl/Q2aNCY>.

65. Orwell, *supra* note 3, at 331.

66. Cindy Skrzycki, “Government Experts Tackle Bad Writing,” *Wash. Post*, June 26, 1998, at F1 (“most valuable,” quoting Jefferson); *The Family Letters of Thomas Jefferson* 369 (E.M. Betts and J.A. Bear, Jr. eds., 1966) (letter of Dec. 7, 1818) (“style of writing”).

67. III *The Works of Henry Wadsworth Longfellow With Bibliographical and Critical Notes and His Life, With Extracts From His Journals and Correspondence* (1886-1891), at 278.

68. Robert Browning, “Andrea del Sarto,” in *Pictor Ignotus, Fra Lippo Lippi, Andrea Del Sarto* 32 (1925); see also, e.g., *Something to Say: William Carlos Williams on Younger Poets* 96 (James E. B. Breslin ed., 1985) (“Everyone who writes strives for the same thing . . . To say it swiftly, clearly, to say the hard thing that way, using few words. Not to gum up the paragraph.”).

69. Richard Nordquist, “We Can Do Better: Dr. Seuss on Writing,” <http://goo.gl/typqRc>.

70. Joseph J. Ellis, *American Creation: Triumphs and Tragedies at the Founding of the Republic* 56 (2007) (genius); Walter Isaacson, *Benjamin Franklin: An American Life* 311 (2003) (rolling cadences).

71. *Waddy v. Globus Medical, Inc.*, No. 407CV075, 2008 WL 3861994 \*2 n.4 (S.D. Ga. Aug. 18, 2008).

72. 513 F.3d 652 (7th Cir. 2008).

73. *Id.* at 658.

74. *Id.*

75. *Id.*; see also, e.g., *Miller v. Illinois Cent. R.R. Co.*, 474 F.3d 951, 955 (7th Cir. 2007) (“much legal jargon can obscure rather than illuminate a particular case.”); *New Medium LLC v. Barco N.V.*, No. 05 C 5620, 2009 WL 1098864 \* 1 (N.D. Ill. Apr. 15, 2009) (Posner, J., sitting by designation as a trial judge) (“All submissions must be brief and non-technical and eschew patent-law jargon. Since I am neither an electrical engineer nor a patent lawyer, . . . the parties’ lawyers must translate technical and legal jargon into ordinary language.”).

76. Orwell, *supra* note 3, at 335.

77. See, e.g., Susan E. Rowe, “Six to Nix: Grammar Rules to Leave Behind,” 67 *Or. St. Bar Bull.* 37 (Nov. 2006).

78. William J. Brennan, Jr., “Some Thoughts On the Supreme Court’s Workload,” 66 *Judicature* 230, 233 (1983).

79. Henry Weihofen, *Legal Writing Style* 8-104 (2d ed. 1980) (discussing these four fundamentals).

80. 316 F.3d at 1054.

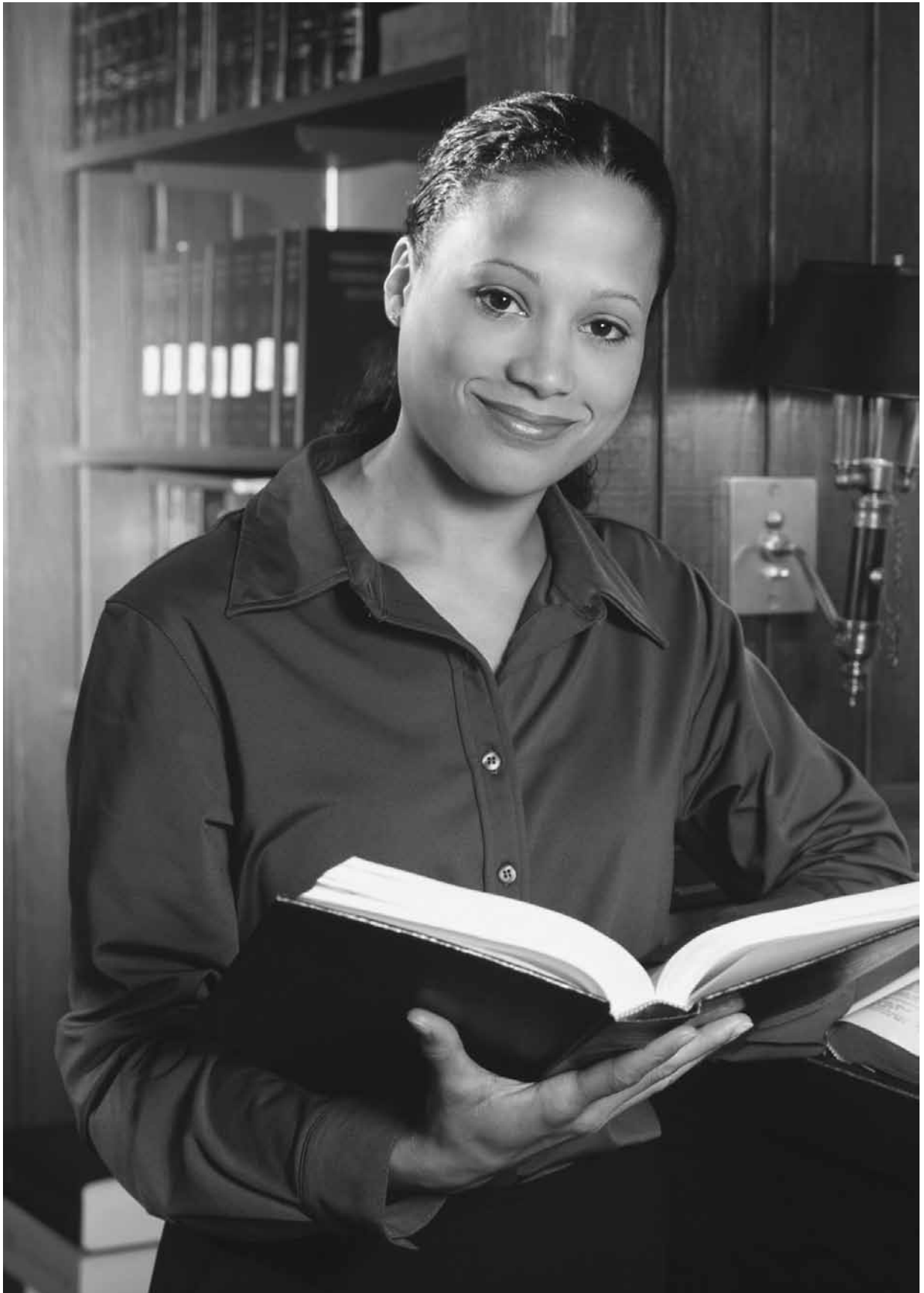
## ABOUT THE AUTHOR



Douglas E. Abrams, a University of Missouri law professor, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles. He earned his J.D. in 1976 from Columbia University School of Law. He may be contacted at 573-882-0307; [abrams@missouri.edu](mailto:abrams@missouri.edu).

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# Legal Writing: From Rough-Hewn to Refined

By Bryan A. Garner

**W**hat's your biggest challenge as a writer? It's figuring out, from the mass of things you might possibly mention, precisely what your points are — and then stating them cogently and with adequate support.

Although this advice might seem obvious, legal writers constantly overlook it. The result is a diffuse, aimless style. And even with your point well in mind, if you take too long to get there, you might as well have no point at all. Only the most highly motivated readers will work to grasp your meaning.

That's where law school comes in. Every law student reads plenty of diffuse writing and is expected to distill the main points from them. You'll read old cases that take forever to make a fairly straightforward point. You'll read law review articles that take 50 pages to say what might be said more powerfully in three. And as you read these things, your incentive for glean- ing their main points will be high: your future in law depends on it. In other words, you will work as hard as any experienced legal reader to break through opaque prose. You'll simply have to.

### LAW SCHOOL READING

Take a California judicial opinion issued just after the turn of the 20th century, a period still heavily represented in casebooks. See if you can follow the point:

And in the outset we may as well be frank enough to confess, and, indeed, in view of the seriousness of the consequences which upon fuller reflection we find would inevitably result to municipalities in the matter

of street improvements from the conclusion reached and announced in the former opinion, we are pleased to declare that the arguments upon rehearing have convinced us that the decision upon the ultimate question involved here formerly rendered by this court, even if not faulty in its reasoning from the premises announced or wholly erroneous in conclusions as to some of the questions incidentally arising and necessarily legitimate subjects of discussion in the decision of the main proposition, is, at any rate, one which may, under the peculiar circumstances of this case, the more justly and at the same time, upon reasons of equal cogency, be superseded by a conclusion whose effect cannot be to disturb the integrity of the long and well-established system for the improvement of streets in the incorporated cities and towns of California not governed by freeholders' charters.

What's the court saying there? In a highly embellished style, it's simply saying, "We made a mistake last time." That's all.

But if you add sentence after sentence to that one — filled with syntactic curlicues — you end up with an impenetrable morass of words. The only readers who will bother to penetrate it are those who are paid, probably handsomely, to do so.

However willing you as a reader might be to pierce through others' obscurity, you as a writer must insist on never putting your own readers to that trouble. On the one hand, then, you'll need a penetrating mind as a reader: you'll need to be able to cut through overgrown verbal foliage. On the other hand, you'll need a focused mind as a writer: you'll need to leave aside everything that doesn't help you communicate your ideas instantly to the reader's mind.

That's the key to becoming an effective legal writer.

Once you have your points in mind — even if they're not fully formed — you're ready to begin. But you're not yet ready to begin writing sentences and paragraphs. You're ready to begin an outline.

### WRITING PROJECTS

Although writers work differently and although you'll experiment with many methods before you settle into certain habits, one thing you'll need is a way of putting down your yet-unformed ideas in some way other than a top-to-bottom order.

It's useful to think of writing as a four-step process. First, you think of things that you want to say — as many as possible, as quickly as possible. Second, you figure out a sensible order for those thoughts; that is, you outline. Third, with the outline as your guide, you write out a draft. Fourth, after leaving the draft aside for a matter of minutes or days or months, you come back and edit it.

The poet and literary critic Betty S. Flowers once named each of these four steps: 1) madman, 2) architect, 3) carpenter and 4) judge. Each of those characters inside your brain has a role to play, and to the extent that you slight any of them, your writing will suffer.

If you believe, for example, that you can "rough out" a draft by simply sitting down and writing it out, you're starting at the carpenter phase. You're asking the carpenter to dream up the ideas, sequence them and verbalize them simultaneously. That's a tall order. People who write this way tend to procrastinate.

If you believe that you can begin with Roman numeral I in an outline, you're still asking a lot: the architect will have to dream up the ideas and sequence them simultaneously. And whatever your I-II-III order happens to be will probably become fossilized in later drafts. Most writers' minds aren't supple enough to allow IV to become I in a later draft, even if it most logically should come first. It's hard to see this if it's already been tagged "IV."

That's why it's so critical to allow the madman to spin out ideas in the early phases of planning a written piece. In a perfect setting, the ideas will come to you so rapidly that it's hard to get them all down as your mind races.

One way of doing this — and of getting yourself into this frame of mind — is to use nonlinear outlining. Among lawyers, the most popular type of nonlinear outline is the whirlybird, or whirligig. It starts out looking like this:

First, you fill in the blank in the center with a shorthand name for your writing project. Then you begin thinking of ideas: the more the better. For every major idea you have, there's a major branch off the center circle. For supporting ideas, try branching off from the main branch. Everything you might want to mention goes into the whirlybird — which has no top and no bottom. You're striving for copious thoughts without

having to worry about getting them in the right order.

Once you've finished a whirlybird — whether it takes you 10 minutes or 10 days — you'll probably find it easy to work the elements into a good linear outline. You'll know all the materials. It will just be a matter of organizing them sensibly.

And once the architect has finished working, the carpenter's job — the one that writers most often procrastinate on — becomes relatively simple. It's just a matter of filling in the blanks. Further, the judge will be able to focus on tiny matters of form, and that's what the character is best suited to. The judge shouldn't be having to think on several levels simultaneously, as happens when not only the citation form but also the overall structure is flawed.

**“Once you’ve finished a whirlybird — whether it takes you 10 minutes or 10 days — you’ll probably find it easy to work the elements into a good linear outline.”**



If you give me a pile of writing samples, I'll critique them according to this paradigm. A writer who allows typos in the final draft needs work on the judge. A writer who uses no headings, and for whom it would be difficult to devise headings once a draft is done, needs work on the architect. A writer whose prose is "correct" but dry and dull needs work on the madman.

Perhaps the most critical phases — because they're the most unpredictable and mysterious — are the first two: madman and architect. They will determine how original and insightful the writing is. But each character must have its time in the lead. What you don't want is to have one dominate so much that the others get squeezed out. The writing will suffer.

So, as you can see, writing well is much more than getting the grammar and spelling right. Those are matters for the judge, who, in the end, will tidy things up. But remember that the judge part of your brain won't contribute many interesting or original thoughts.

#### INCREASED EFFICIENCY

Although you might fear that you wouldn't have time to go through all four phases, try it:

it's one of the surest ways to good writing. In a one-hour span, you might spend 10 minutes on madman, five minutes on architect, 25 minutes on carpenter and 10 minutes on judge — with short breaks in between. That's a great way to spend an hour. But it won't simply happen. You have to plan how you're going to transform nascent, ill-formed thoughts into something you can be proud of.

*Note: This article was first published in the January 2014 (Vol. 42, No. 5) issue of the ABA Law Student Division's Student Lawyer magazine.*

#### ABOUT THE AUTHOR



Bryan A. Garner, distinguished research professor at SMU Dedman School of Law, is the founder and president of LawProse Inc. He is the author of *The Elements of Legal Style* (Oxford), *The Redbook: A Manual on Legal Style* (West), *Legal Writing in Plain English* (Chicago) and many other books on writing and grammar. He is the editor in chief of *Black's Law Dictionary*. He graduated from the University of Texas School of Law in 1984.

## OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

### 2015 Issues

- March  
**Municipal Law**  
Editor: Mark Ramsey  
mramsey@soonerlaw.com  
Deadline: Oct. 1, 2014
- April  
**Law Day**  
Editor: Carol Manning

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

- May  
**Education Law**  
Editor: Judge Megan Simpson  
megan.simpson@oscn.net  
Deadline: Jan. 1, 2015
- August  
**Opening a Law Office**  
Editor: Dietmar Caudle  
d.caudle@sbcglobal.net  
Deadline: May 1, 2015
- September  
**Bar Convention**  
Editor: Carol Manning
- October  
**Family Law**  
Editor: Leslie Taylor  
leslietaylorjd@gmail.com  
Deadline: May 1, 2015
- November  
**President's Topic**  
Editor: Melissa DeLacerda  
melissde@aol.com  
Deadline: Aug. 1, 2015
- December  
**Ethics & Professional Responsibility**  
Editor: Shannon L. Prescott  
shanlpres@yahoo.com  
Deadline: Aug. 1, 2015



## Effective Legal Writing: One Judge's Perspective

By Retired Judge Wayne Alley

**W**hat does a judge want in writings (motions, briefs, applications, reports, proposed orders) filed in his or her cases? There is an easy answer; the judge wants an easy out. The judge wants a clear, simple, substantiated solution to the problem at hand — a solution with which he is comfortable. To this end, consider the following suggestions.

Tell the judge *why*. Except for uncontested applications, such as for extensions of time, both sides typically submit persuasive statutes, cases and secondary authorities in support of their respective positions. Not many positions are “slam dunks.” The judge needs to be educated not merely that the respective authorities are out there, but *why* one set of authorities leads to a better result than the other. The judge shouldn't have to figure it out for him or herself. Included in the concept of a better result are simplicity of future application, achievement of economies, conformity with a general principle such as one's responsibility for the consequences of his or her own conduct; consistency with legislative purpose (e.g., a judge should not be chintzy in construing and applying a remedial statute); minimal disruption of the way things are ordinarily done; and whatever else the imaginative lawyer/author can come up with.

The effective presentation of *why* is positive, emphasizing the benefits that would flow from the adoption of one's position rather than reciting a parade of horrors that might

ensue from the adoption of the opponent's position. Some allusion to the downside of the opponent's position may be helpful, but it shouldn't be dominant in the writing or be patronizing, strained or nit-picky.

Be succinct. My office was a paper mill. Piled up, the writings filed in a typical week would reach a height of 18 to 24 inches. After some bad early experiences, I decided never to be absent for more than a week. Otherwise, the accumulation would have been overwhelming. If you want the judge to stay with you when he or she reads your work, edit, edit, edit. If the judge wants to read a law review article, the judge will go to the library and get one. Whatever you say, say it only once. Repetition doesn't result in a higher degree of understanding. Instead, it numbs the mind and glazes the eyes. Ordinarily, the bulkiest filings are motions for summary judgment and responses thereto, because of attached documents, photographs and deposition excerpts. The lawyer/author should be economical with attachments so that the reader, who is the decision-maker, doesn't drown

in words. Set out only so much of a document or deposition as affects the decision at hand, instead of the entirety. Quotations in the text of a motion or response can be effective of course, but far too often they are far too long. Within a quotation, it is likely that only two or three sentences matter. Have in mind a scene in *Amadeus*, in which the emperor criticizes Mozart's latest composition by telling him, "Too many notes." Perhaps the emperor was not the brightest or the most qualified student of music, but he was, after all, the patron with the purse.

Tell the judge precisely what remedy (or remedies) you seek. For some simple matters, you may be expected to submit a proposed order. Otherwise, you anticipate that an order will be prepared in chambers. Whether you craft the remedial part for the judge's consideration, or expect the judge to be the author, don't leave it to him or her to divine your desires. He should only have to decide "yes" or "no." I found many applications for TROs or preliminary injunctions to be deficient in this respect. The effective advocate lays before the judge a proposal that specifies exactly who is ordered to do or desist from doing exactly what and by when. It is not the judge's office to read your mind trying to figure out what he is supposed to do to solve your problem for you.

Play fair. An effective legal writer has credibility. He or she achieves this by being truthful, accurate and fair. Quotations are verbatim; meanings are not distorted by misleading elisions. Phrases are faithful to the meaning of the paraphrased language. This is particularly important when he informs the judge what a cited case holds. He doesn't present an obiter dictum as a holding. Dicta can be persuasive if precisely on point, but the author should be candid as to what it is. Statutes can be hard to read. A common technique by legal writers, including judges, is to pluck out of a long and convoluted statutory sentence only those words that are operative to the issue at hand, noting the skipped-over words by dots of elision. The writer must be careful not to elide language that hurts the case. It won't do to rationalize that the other guy can clear this up if he or she

is sharp enough to catch the wrongful omission. The other guy's credibility is not the point. I cannot overemphasize that once credibility is lost, the offending lawyer is ever after at a disadvantage.

When there has been a trial, an evidentiary hearing or a deposition resulting in a transcript, fudging on the facts as shown therein in a later brief (or oral presentation for that matter) is fatal to one's credibility as to everything else he is submitting. Keep in mind that the "facts" for this purpose are the words of the transcript and not the circumstances and events to which the transcript pertains.

Pep it up. Direct the judge to the real world by citing news stories, articles and other non-legal materials. The rules of evidence narrowly channelize the presentation of facts at trial, but writing a motion or brief is not so restricted. Recall that legally obliged school segregation by race in Topeka was declared unconstitutional through a 1954 Supreme Court opinion that relied heavily on sociology texts. The unanimous court was persuaded by effective reference to the real world. Get your judge out of the ivory tower.

Be wary of hedging, asking the judge, "Well, if you don't buy my primary position, how about this as a fallback?" In some cases, hedging can't be avoided, but it comes at a cost. It detracts from the persuasive power of the primary position. Sound judgment is key to a decision to hedge, but have in mind the importance of the courage of exclusion.

Finally, a negative: avoid an *ad hominem* attack on opposing counsel unless his or her misconduct is beyond crystal clear. These attacks usually are made in discovery disputes, with (written) dark mutterings about "bad faith" or "fraud on the court." In my cases at least, very few of these were well founded. Look up Rule of Professional Conduct 8.3, which obliges a lawyer to report to proper authority, usually the bar association, certain misconduct done by another lawyer. "Fraud" is certainly included. When an advocate asserts fraud done by his or her opponent, he or she must be prepared to answer the judge's query whether he or she has made

**“An effective legal writer has credibility. He or she achieves this by being truthful, accurate and fair.”**



the requisite report; and, if not, perhaps face a court order to write the bar association and cite the opponent with fraud, providing the factual basis, copy to the judge. Ouch.

#### ABOUT THE AUTHOR




Judge Wayne Alley was born in Portland, Ore. In 1952, he graduated from Stanford University and entered active duty in the U.S. Army. In 1957, he graduated from Stanford Law School and was appointed law clerk in the Oregon Supreme Court. He entered private practice briefly, then reentered the Army. In 1981, he retired early to become dean and professor at OU Law. In 1985, President Reagan appointed him to the U.S. District Court for the Western District of Oklahoma. He is now "Jurist in Residence," pro bono, at OU Law, primarily residing at moot courts and mock trials.

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## Keep It Simple, Stupid

By Melanie Ruhgani

**Y**ou went to law school because you “like to argue.” You imagined yourself standing in front of a jury, brilliantly deconstructing a witness’s story on cross-examination or delivering a killer closing argument. You took classes in trial advocacy, you honed your public speaking skills, and you wore out your DVR watching and re-watching that trial scene from *To Kill a Mockingbird*. You purchased a shiny new black “power suit” to hang in your closet, and you can’t wait to deliver your first opening statement. You are, in short, a new associate.

For most associates, however, the actual practice of law differs dramatically from what we imagined. We spend most of our days in the office, not in court. We talk to our clients and opposing counsel most often through email, not in-person meetings. Jury trials are becoming fewer and farther between, and appellate arguments in this state have nearly vanished. We win our big cases on dispositive motions, not at trial, or we resolve them through settlement. In today’s world of motions practice and mediation statements, written — not oral — advocacy reigns supreme.

As a senior associate, I am often asked what, in my view, is the most important skill for a new associate to develop. My answer is always the same. It is not brilliant cross-examination technique, it is not courtroom presence, and it is not soaring legal oratory (although all are certainly valuable skills in their own right). The single most important tool for success in today’s legal environment is also one of the most basic: **legal writing**.

How, precisely, does a young associate develop this critical skill?

One of the easiest and most effective ways to improve your own writing is to read that of others. Ask around your firm or workplace, find out which lawyers are considered excellent writers, and read their work. Analyze briefs written by prominent appellate advocates, such as now-Chief Justice Roberts, who is often mentioned as one of the best legal writers in the country.<sup>1</sup> And don’t limit yourself to legal writing: read the newspaper, read novels, read poetry. Internalize different styles, find what works, and incorporate that into your own work.

Another easy way to improve your writing is to have — and to use — good writing resources. Every young lawyer should become intimately familiar with Strunk and White’s *The Elements of Style*,<sup>2</sup> Bryan Garner’s *The Winning Brief*,<sup>3</sup> Tom Goldstein’s *The Lawyer’s Guide to Writing Well*,<sup>4</sup> and *The Bluebook*.<sup>5</sup>

Finally, consider following these 10 legal writing tips for young associates:

- 1) *Legal writing is just, well, “writing.”* Stuffey Latin phrases, pretentious formulations

and legal jargon do not good legal writing make. “Wherefore,” “heretofore,” “herein,” “hereto” and the like should “hereinafter” be barred from your briefs. So, too *ad infinitum*, *inter alia* and other Latin phrases most often employed largely to make the author appear smart.

**“I often find that it is easiest to write my briefs in reverse.”**

Don’t just take my word for it. Tom Goldstein and Bryan Garner have each devoted entire treatises to teaching lawyers to write in plain English.<sup>6</sup> And it’s not just these well-respected advocates: a large number of trial and appellate judges recently were asked to compare the persuasiveness of two different writing samples, one written in “legalese” and the other in “plain language.” By a fairly large margin, both sets of judges preferred the “plain language” writing sample to the one in “legalese.”<sup>7</sup>

- 2) *First things first: make use of your introductions.* How many briefs have you seen begin: “Now comes Defendant It Wasn’t Me (IWM), and here presents, by and through its counsel Stodgy and Superfluous LP for its Response to the Document of the Other Side That is So Important It’s the Only Thing Actually Mentioned in This Introduction, states and shows as follows...” There is nothing artful — or even useful — about this traditional introduction to Oklahoma briefs. Instead, use your introduction to tell a story. Set the tone for your brief, highlight your best argument and explain what you want the court to do.
- 3) *First things last.* I often find that it is easiest to write my briefs in reverse. Begin with the conclusion: tell the court what, exactly, you want it to do. With that specific relief in mind, then write the argument section. Once the argument is complete, and it is clear which facts are most legally relevant, then draft the background section. Finally, write the introduction, highlighting your best arguments and most compelling facts, and tying it all together.
- 4) *Show it, don’t tell it.* Beware the overuse of adjectives and adverbs. Telling the court “this argument is absurd” does little: showing the court such absurdity through

specific “what-if” examples is far more effective. Telling the court that “the evidence clearly shows...” helps far less than quotations from the testimony or documents at issue. As the judge I clerked for often said, “if a lawyer describes something as ‘clear,’ it’s almost certain to be as clear as mud.”

- 5) *Readability, readability, readability.* Judges are generalists; they read hundreds of pages of briefs a day; and they have little time to trudge through unreadable writing. Help them wherever possible. For example:

Avoid using acronyms. You may be an environmental lawyer who is enmeshed in “ACL,” “AQCR,” “BACT,” “BEJ,” and “NAAQS” on a daily basis, but your judge is not, and she may be stymied — or at least distracted — by such alphabet soup. Instead, spell it out, or create another reference term (“the agency,” “the standard,” or “the act”) which you can use throughout the brief.

Similarly, avoid posture-specific references, such as “Appellant” or “Appellee,” and instead populate your brief with actual people (“Mr. Jones”) or entities (“the bank,” “the company”).

Use bullet points, block quotes or other spacing tools to draw attention to key items.

- 6) *Keep it simple, stupid.* As Woody Guthrie once said, “any fool can make something complicated. It takes a genius to make it simple.” Boil your arguments down to their common-sense first principles. Limit the number of arguments contained in your brief. Include only the relevant facts.
- 7) *Set the tone.* Think about the tone you want to set with your brief. There is no one right tone, and it will vary from case to case and audience to audience. That said, always avoid sarcasm, vitriol and personal attack. It is not helpful. It is not professional. And judges despise it.
- 8) *Beware the “one and done.”* Some lawyers believe that briefs exist in a binary state: written or unwritten. But brief-writing is a process. Start with a working outline.



Then a first draft. Then multiple redrafts. Then take your “final” draft and cut it down, excising wordiness. This process takes time. As a young associate, you must learn to manage your workload so that you are able to invest the time necessary to completing the entire writing process.

- 9) *Proofread.* Nothing makes a judge (or your partners, for that matter) second-guess a young associate’s legal analysis like typos. If an attorney isn’t diligent enough to ensure that her written product is free of grammar or punctuation errors, why should a judge trust that the brief is free of more substantive, legal errors? Proofread your work yourself, and then ask someone else you trust to proofread it as well.
- 10) *Finally, don’t try to sneak things by the court* (or anyone else). A major law firm representing BP in litigation over the Deepwater Horizon oil spill recently got chastised by the court — and lampooned in the national media — for subtly shrinking the line-spacing in its brief to avoid a set page limit. The judge was far from pleased: “The Court should not have to waste its time policing such simple rules — particularly in a case as massive and complex as this. Counsel are expected to follow the Court’s orders both in letter and in spirit. ... Coun-

sel’s tactic would not be appropriate for a college term paper. It certainly is not appropriate here.”<sup>8</sup> Don’t let this be you.

1. Including this one at <http://goo.gl/0k1NNx>, which Supreme Court insiders dubbed the “best brief the Justices had ever seen.”
2. William Strunk Jr. & E.B. White, *The Elements of Style* (4th ed. 1999).
3. Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (2004).
4. Tom Goldstein & Jethro K. Lieberman, *The Lawyer’s Guide to Writing Well* (2d. ed. 2002).
5. The Bluebook: A Uniform System of Citation (Columbia Law Review Ass’n et al. eds., 19th ed. 2010).
6. See *supra* n. 3, 4.
7. See Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 J. Legal Writing Institute 183 (2010), available at <http://goo.gl/sLkBXu>.
8. See order, *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico*, Case No. 10-md-02179-CJB (E.D. La., Sept. 15, 2014).

#### ABOUT THE AUTHOR



Melanie Wilson Rughani is a senior associate at Crowe & Dunlevy PC and focuses her practice in appellate law. Ms. Rughani graduated in 2007 from the University of Virginia School of Law, where she was a member of the Order of the Coif and served as executive editor of the *Virginia Law Review*. She has also served as a law clerk to Judge Kenneth F. Ripple, U.S. Court of Appeals for the 7th Circuit.

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# Legal Research Tips for Practitioners

By Sabrina A. Davis

**T**he Oklahoma City University School of Law completed its move to downtown in January 2015, and we are excited to be closer to the legal action of the city and about the opportunities to connect more frequently with the attorneys. For example, the reference librarians who teach legal research classes at the law school plan to offer CLEs on legal research topics once things settle down from the move.

As we tell our law students, the ability to conduct legal research is an essential skill for practicing law; and the better they are at it, the more in-demand they will be. However, the nature of legal research has changed greatly over the past 15 years, and it will continue to do so as we increasingly transition away from print and to electronic resources. As law librarians, it is our job to keep up with the trends in legal research so that we can share that information with our students and faculty. And in this article, my goal is to impart some of that essential knowledge to you. But knowledge alone is not sufficient for improving legal research skills; you also have to practice by exploring the different research platforms and thinking critically about your search techniques. So, here we go!

### RESEARCH STRATEGY

With all of the online and print resources available for legal research today, it is important to have a well-thought-out strategy to research effectively and efficiently. Below is a basic, five-step process for keeping your research on track. But although the steps are

numbered, legal research is not generally such a straightforward practice. Keep in mind that you will likely have to repeat steps multiple times and not necessarily in the same order.

#### *Step 1: Plan ahead*

- Take notes on your sources as you go.
- Pay attention to which search terms and strategies are helpful and which are not.
- Keep track of full citation information.

#### *Step 2: Analyze the problem*

- Determine the jurisdiction.
- Identify the legal issues.
- Identify any relevant facts.

#### *Step 3: Generate research terms*

- Identify keywords to search for based on your legal issues and facts.
- Think of alternative words and phrases: synonyms and antonyms; broader and narrower terms; related concepts.
- Consider different types of terms and connectors (Boolean) searches.

**Become familiar with the rules of different search engines.** (Hint: Look for a help section.)

**Basic connectors** (and, or, not)

**Proximity connectors** (/p, /s, /10)

**Other options** (root expander, automatic pluralization, phrases, parentheses, etc.)

- Resources: Legal dictionary, legal thesaurus, *Words and Phrases*

*Step 4: Begin researching*

- Look for annotated sources; they can do a lot of research for you by identifying relevant cases, statutes, regulations and secondary sources.
- Determine the best source for your research problem.

**Is it an unfamiliar area of law?** Start with secondary sources (*e.g.*, legal encyclopedias, American law reports, legal treatises, restatements, legal periodicals, etc.) to get an overview of your topic and learn its terms of art.

**Is there a statute on point?** If not, proceeding to case law will probably be best.

**Is there a case at the center of a controversy?** Look up the case and follow its history and citing references.

**Do you need to locate legislative history of a statute?** See the following Oklahoma City University law library's research guides: *Federal Legislative History*<sup>1</sup> and *Oklahoma Legal Research — Oklahoma Constitution, Statutes, & Legislation*.<sup>2</sup>

**Are administrative regulations at issue?** See the Oklahoma City University law library's research guide, *Administrative Law*.<sup>3</sup>

**Are you looking for current or historical law?** Contact a reference librarian if you need assistance locating older versions of statutes, regulations, or historic case law. (See Section IV below.)

- Use your research terms from *Step 2* by looking for them in indexes or including them in online searches.

*Step 5: Analysis of research*

- Read your research findings.
- Evaluate:

**Have you found an answer?** If yes, great! If no, keep on trucking...

**Have you found additional issues to research?** Repeat the necessary steps for the new issues.

**Is it time to stop?** Yes, when all of your efforts repeatedly turn up the same results.

**Do you need help figuring out what to do next?** Talk it over with a supervisor, colleague, or reference librarian.

**For all relevant results — is this still good law?** KeyCite or Shepardize. The Oklahoma City University law library has a designated public computer terminal with Shepard's, available for anyone to use.

## ONLINE DATABASES: GENERAL TIPS

There are many legal databases available, both free and subscription-based. These databases have certain similarities and differences that are important for a legal researcher to know. First, all databases have these features in common: 1) search engines that usually offer basic and advanced options; 2) ways to limit searches and/or filter results; 3) some finding aids to help the researcher locate relevant documents; and 4) a help option.

If researchers take some time up front to learn the rules of their most commonly used search engines, this can save a lot of time and frustration during the actual research process. Look for help screens or documents to identify the types of searches allowed for a particular search engine.

Some of the key differences between databases that researchers should be aware of include: 1) coverage varies by both types of documents and date ranges; 2) the existence and extent of annotations and other editorial enhancements; 3) the types and number of finding aids available; and 4) types of advanced search options available. Efficient researchers will take time to examine these features to see which database will be most useful for their particular research questions.

*General search tips:*

- Look for popular name tables, indexes, search tips, tables of contents and other finding aids.
- Get in the habit of narrowing results by jurisdiction so that you do not waste time on inapplicable search results.



- There are usually multiple ways to locate the same information, but some ways are more effective and efficient. Explore your options.
- Open results in new tab/window so you do not waste time backtracking to your earlier screens.
- Familiarize yourself with the resources available within the database(s) to which you have access at your job, but also know where you can get the same documents for free if applicable (e.g., Bloomberg has some helpful agency materials, but most of these should be on the agencies' web-sites).
- Learn shortcuts – research alerts, saving documents, sharing folders, etc.

#### THE OKLAHOMA STATE COURTS NETWORK (OSCN)<sup>4</sup>

OSCN is a very useful, free resource for conducting legal research in Oklahoma. This section briefly highlights some of its more valuable resources: the “Court Dockets” tab, the “Legal Research” tab and The Citationizer.

Under the “Court Dockets” tab,<sup>5</sup> several different search options are available for finding both the daily court hearings and case dockets. First, there are seven ways to review the daily dockets: 1) by judge, 2) by type of case, 3) by type of case and judge, 4) by event type, 5) by event type and judge, 6) by event in a type of case in front of a specific judge and 7) by county. Once you pull up the daily docket you want, hyperlinks direct you to case dockets where available.

Second, there is an option to search for a specific case docket with the case number and the county (or appellate) in the left-hand sidebar. For help on conducting docket searches, visit <http://goo.gl/RvPzqj>. As of Feb. 2, 2015, case dockets were available for 18 counties.<sup>6</sup> For case dockets from other counties, attorneys should consult on-demand court records (ODCR).<sup>7</sup>

The “Legal Research” tab provides access to numerous primary and secondary legal sources for both Oklahoma and the federal government. The Oklahoma section includes appellate case law, statutes, session laws, the administrative

code and register, the state constitution, court rules (including e-filing rules), attorney general's opinions, Oklahoma Uniform Jury Instructions, links to legal forms and several other resources. The federal section includes links to case law, courts, the U.S. Code and the U.S. Constitution.

A researcher can browse all of the document collections or run advanced searches in one or multiple collections. OSCN's sophisticated search engine allows not only simple Boolean operators, but also wildcard characters, root expanders and special types of searches that locate homonyms, synonyms and commonly misspelled words.<sup>8</sup> These advanced search options are incredibly valuable, especially in a free database like OSCN.

OSCN also offers **The Citationizer**, a citator for both cases and statutes. A citator is a tool that indicates subsequent actions that may affect whether the case or statute is still good law, but it can also assist a legal researcher in locating additional sources on his or her legal issue. The most well-known citators are KeyCite from Westlaw and Shepard's from Lexis.

The Citationizer is less comprehensive than KeyCite and Shepard's in two key ways. First, it only gives the depth of treatment in subsequent cases (e.g., cited, discussed, discussed at length) and does not indicate the type of treatment (i.e., positive, neutral, negative) so you have to examine each case to determine if it negatively affects the original case holdings. Second, the results are limited to state cases from Oklahoma, Utah and Wyoming, and attorney general opinions from Oklahoma; however, that may be sufficient depending on the situation. One caveat about relying solely on The Citationizer to determine if your case or statute is still good law: many judges will not accept it as a replacement for KeyCite or Shepard's, so you should use one of these citators to make sure you cover all of your bases. The Citationizer also has a Table of Authority function, which lists cases and statutes cited by a particular case.

“A citator is a tool that indicates subsequent actions that may affect whether the case or statute is still good law...”

## OKLAHOMA CITY UNIVERSITY LAW LIBRARY RESOURCES

### *Reference Librarians*

The four reference librarians at the Oklahoma City University School of Law have both a J.D. and a master's degree in library science. They are available to answer questions about conducting legal research and locating legal information using a variety of sources. A reference librarian is typically available Sunday through Friday during the fall and spring semesters; reference hours may fluctuate during summer. To contact a reference librarian, visit our *Meet the Librarians & Staff* webpage.<sup>9</sup>

### *Research Guides*

The law library currently maintains almost 70 research guides, known as LibGuides, which are online.<sup>10</sup> There are also patron user guides (e.g., *Library Services and Policies* and *Searching the Law Library Catalog*). Some of the most useful guides for practitioners include:

**Legal practice guides:** *Practice Resources*, *Form Books and Drafting Resources*, and *Mental Health Resources for Law Students and Lawyers*

**General research instruction:** Oklahoma legal research, case law, statutory research — federal and state, federal legislative history, administrative law, secondary sources, citators, free/low-cost legal research on the Internet and fact finding on the Internet.

**Research in specific areas of law (sample only, many more available):** bankruptcy, criminal law and procedure, disability law, elder law, environmental law research, family law research, health law, military justice, Native American law, Second Amendment, wills, trusts and estate planning, *et al.*

### *Practice Resources*

In addition to the LibGuides, the law library also has various form books, practice manuals, and treatises on specific areas of law available for attorneys to use. For example, we have the 2005 CLE forms from the OBA in print. Using the public computers also provides free access to Shepard's and several databases including

*BNA Reports*, the *Environmental Law Reporter*, *Foreign Law Guide*, *HeinOnline*, *LoisLaw*, *ProQuest Congressional*, interdisciplinary EBSCO databases and many more. *HeinOnline* is particularly useful for finding historical materials and law journal articles, whereas *LoisLaw* has numerous treatises, forms, and checklists available.

### *Finding and Checking Out Books*

Oklahoma City University Law alumni have lifetime checkout privileges from the law library; alums simply need to update their accounts to begin borrowing books. Non-alum attorneys may register for membership using their Oklahoma bar number. Registration is available online<sup>11</sup> and in person at the circulation desk. See the *Library Services and Policies Guide*<sup>12</sup> for library hours and checkout limits.

To locate books, search the law library's online catalog<sup>13</sup> for books and other collection items. Comprehensive instructions on using the catalog are available on the *Searching the Law Library Catalog LibGuide*.<sup>14</sup>

1. <http://goo.gl/EWCr7A>
2. <http://goo.gl/v90f1I>
3. <http://goo.gl/uvHIuy>
4. [www.oscn.net](http://www.oscn.net)
5. <http://goo.gl/4Nwl0K>
6. For current information, see Scope of the Dockets Database at <http://goo.gl/jZQYoF>.
7. at <http://www1.odcr.com/>
8. See *Search Help* at <http://goo.gl/muK6BZ>.
9. <http://goo.gl/eEPYSE>
10. <http://goo.gl/neBqJ7>
11. <http://goo.gl/4gyIC0>
12. <http://law.okcu.libguides.com/servicesandpolicies>
13. <http://lawlibdb.okcu.edu/>
14. <http://law.okcu.libguides.com/catalog>

### ABOUT THE AUTHOR



Sabrina Davis is a reference librarian at Oklahoma City University School of Law. She received both her J.D. and library science degrees from The University of Arizona. Ms. Davis is currently the associate editor of technical services law librarian and is on the Board of Editors for *Legal Reference Services Quarterly*. She practiced family law in Tucson, Ariz., and conducted national research on court reforms in child abuse and neglect court proceedings.



# ANATOMY FOR LAWYERS

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The neck bone's connected to the back bone, and the shoulder bone's connected to the arm bone. You know that much — but to efficiently, elegantly and effectively handle a back or knee injury case (by far the largest category of personal injury, worker's comp and disability claims), or a shoulder injury case (accounting for the most time lost from work), you need enhanced knowledge and skills. Sam Hodge is your most effective guide to achieving them. In plain-English, and with a sharp focus on the challenges you face in your law practice, Sam covers handling back, shoulder, hand and knee injury cases. He makes practical, case-clarifying sense of complicated medical injuries, terms and conditions. He provides the essential tools that you need to properly evaluate and articulate your case to make it persuasive to 1) your client, 2) opposing counsel 3) the judge and, if need be, 4) the jury. Illustrated with vivid photos and detailed video, ANATOMY FOR LAWYERS carefully and thoughtfully covers all of the details you need to know — including the parts of the body most susceptible to injury (and how those injuries most often occur). You'll discover how diagnoses are made, and learn the practical details of medical tests and surgical procedures from the unique perspective of a very successful lawyer. Your ability to evaluate cases and to prosecute or defend them will be immeasurably enhanced in one dynamic, entertaining and information-packed day. Discover why bar associations, law firms, insurance companies and government agencies consistently call on Sam Hodge to diffuse the inherent mystery of medical cases. Put his unique expertise, dynamic experience and very special teaching gift to work in your practice!

This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6.5 hours of mandatory CLE credit, including 0 hour of ethics.

**TUITION:** \$250 for early-bird registrations with payment received at least four full business days prior to the seminar date; \$275 for registrations with payment received within four full business days of the seminar date. To receive a \$10 discount for the live onsite program, register online at <http://www.okbar.org/members/CLE>. The program will also be webcast. The webcast only has been approved for 5.5 hours of MCLE CLE credit, including 0 hours of ethics of Texas credit.

The program will be also be webcast. Note: Tuition for webcast varies from live program tuition.

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# Appellate Brief Writing

## What Not to Do

By Tamala Boyd

The author Isabel Allende said, “Write what should not be forgotten.” Of course, she was speaking about writing fiction, but the quote also fits perfectly within the realm of legal writing — especially when you are writing for a court like New York’s Appellate Division, First Department, quite easily one of the busiest courts in the country. The First Department handles approximately 3,000 appeals, 6,000 motions and 1,000 interim applications each year. Unlike many other intermediate appellate courts, the First Department has broad powers to review questions of both law and fact, and to make new findings of fact. With few exceptions, appeals to the Court of Appeals are by permission only; the First Department, along with the other three Appellate Departments, is the court of last resort in the majority of its cases.

Until recently, I was a principal appellate court attorney in the First Department’s Law Department. The Law Department includes the chief and deputy court attorneys, a group of supervisors, attorneys who primarily do motions and applications, and a team of court attorneys with varying degrees of experience and expertise. Court attorney titles range from “appellate” at the junior level to “principal,” the most senior. While, generally speaking, all court attorneys research and analyze legal issues and questions for the court and perform other related duties as assigned, such as motions and applications, more senior court attorneys tend to work on more complex legal issues with little to no direct supervision.

In my time as a principal appellate court attorney, I worked on hundreds of appeals, read close to a thousand briefs, and pored over a mind-boggling number of records. Significantly, while court attorneys are not the first people to look at your briefs (that would be the wonderful people in the clerk’s office), they are the first to truly scrutinize your submissions, parse the various sections, and evaluate your arguments. Moreover, as one of the people charged with producing detailed, often lengthy, reports based upon a review of your materials and the court attorney’s own independent legal research, I feel confident in saying that court attorneys probably care the most about the quality of your work product.

With that background, you understand that when I borrow from Ms. Allende and say to you, "Write only what you want us to remember," I know from whence I speak. And while I do not presume to speak for every court attorney working in the First Department, much of the advice given below finds support among those with whom I have spoken.<sup>1</sup>

Because there is a rich variety of offerings available covering what you should do when drafting an appellate brief, I thought it might be most useful to tell you, from a court attorney's perspective, what not to do. What are the things that made my heart skip a beat with despair; lay my head down on my desk and cry; scroll back to the cover page to see who submitted the brief; run for the nearest window, shredder or fire pit and — well, you get the point. So, appellate brief, section by section, here is my list of what not to do.

### **PRELIMINARY STATEMENT**

A preliminary statement should, ideally, not

1) take up any significant portion of your page count;

2) contain any facts or argument.

The purpose of a preliminary statement is to give the reader a concise rendering of the case. It should identify the party, the order being appealed from, why the appeal was taken and the result sought. It is helpful to include the order entry date and the judge who rendered the decision. While it is perfectly fine to include a short preview of your case (think of a 30-second advertisement), it is not okay for this to be part and parcel of your factual recitation or argument.

Now, you are perfectly welcome to submit a preliminary statement that goes on for five or more pages. Just do so with the knowledge that you may have set the tone for the reception of the remainder of your brief.

### **QUESTION PRESENTED**

For reasons I fail to understand, some parties seem to believe that the more questions they can present, the better their chances on appeal. Allow me to disabuse you of that notion. Try the following exercise. Close your eyes and imagine the following scenario: I have just put the finishing touches on a 50-page report. Your appeal is the second of the week, and there is a third waiting. I open your brief, flip to the questions presented, and find 12 of them. What

do you suppose I am feeling? If your answer is "impressed by my ingenuity," you're wrong.

Questions presented should not

1) contain numerous subparts;

2) contain argument;

3) disparage the lower court; or

4) be contrived, or otherwise lacking in any bases in the law.

While there is no magic number for how many questions presented are appropriate, rarely did I encounter a situation where more than five or six questions, stated in one or two pages, proved insufficient. If you find your questions presented section running longer than that, consider examining whether you have sufficiently parsed your case and understood your viable legal issues. Go over your questions presented to be certain that you are not using them as an opportunity to make factual arguments or answer legal questions. Bottom line: resist the urge to overstate the complexity of your case, because doing so adds nothing.

### **STATEMENT OF FACTS**

The statement of facts should be just that — a statement of facts — not an attorney's characterization of those facts. Moreover, a statement of facts should not:

1) Be in a personal relationship with adjectives, italics, underlining or exclamation points.

2) Obscure facts, especially in criminal cases. If I sensed that counsel was obscuring facts, that person's arguments would begin to lose credibility.

3) Underutilize correct citations to the record. Nothing would send me to your adversary's brief faster than a statement of facts with no citations to the record or with citations that were mostly incorrect. I once received an opening brief where every citation in the first 13 pages was wrong. And not just a little off, but completely wrong. Although I muddled through, I also counted the errors and dropped a footnote to the judges about the unreliability of that party's papers. Suffice it to say, my initial understanding of the case came not from the brief of the party who had instituted the appeal but from the better-drafted and error-free respondent's brief.

4) Cite to portions of the record that do not actually support the statement for which it was cited. Or, worse still, cite to portions of the record that contradict the statement. Do that and not only do you lose credibility, but if you win, you do so only in spite of yourself.

5) Characterize the facts. Example of a factual statement: "Witnesses at the scene identified the car as a green Mercedes Benz." Example of a characterization: "The speeding car that plastered plaintiff all over the sidewalk was a flashy green luxury vehicle." You get the point.

6) Pull "facts" exclusively from an attorney's affirmation. More specifically, on a motion to dismiss, facts should come almost exclusively from the complaint. On a motion to dismiss on the documents, facts should come from those documents. On summary judgment, facts can come from the record generally, but you should take care that your facts are not contradicted by other record evidence because, I assure you, most court attorneys check. And, dare I say it again? When the record contradicts your characterizations, you lose credibility.

7) List every single fact there is to know about every single aspect of your case. Although it is called a "statement of facts," you should think of it more as a "statement of relevant facts." This is not an invitation to obscure those facts that go against you. This is merely to say that if you are appealing only certain aspects of an order, you need include only those facts that are relevant to what is being appealed. Example: forcing me to read a long recitation of your client's injuries when the threshold issue was one of liability did not make me feel sorry for your client. It just made me tired. In short, "show, don't tell." Show the reader where in the record your facts originated and where they are supported. Be brutal in both your brevity and clarity. But don't fret. Remember, you have an entire section in which to let the reader know exactly what you think of those facts. Which brings me to...

## ARGUMENT

I have always considered the argument section to be the meat and potatoes of the entire appeal. This is where you get to be the super lawyer. This is where your case comes to thrive or to die a slow, painful death. Here are some

of the things that can help it along its path to the grave:

1) *Not knowing, or simply not considering, the procedural posture of your case.* It matters whether an appeal is taken from a motion to dismiss, summary judgment or a trial on the merits. And nothing made me want to bang my head against the wall more than an attorney who wanted to wax nostalgic about failures of proof and material issues of fact when the appeal was taken from the denial of a motion to dismiss.

2) *Not knowing the standard of review for the issues on appeal.* This is especially true where an appeal is taken from an arbitration award, or from an Article 78 proceeding.

3) *Refusing to acknowledge that "motion to dismiss" is not the equivalent of "free-for-all."* Yes, you get the benefit of the doubt, but no, the reader is not obliged to abandon his or her common sense. To wit, the sky does not become green because it says so in the complaint, and if you try to tell the court that it does, you begin to lose credibility.

4) *Failing to cite authority from the appellate department presiding over your matter.* The First Department is not bound by the decisions of her sister departments, and it is not uncommon to find wildly divergent views. It made my job more difficult if a brief had citations only to, or primarily to, cases from other appellate departments, especially if I knew from previous experience, or discovered from my own independent research, that there was ample First Department authority on the issue. Citations to cases from other appellate departments is even more off-putting when the First Department authority an attorney fails to cite contradicts the authority cited.

Note also that the appellate departments are not bound by federal court decisions or by federal law, even if the federal court at issue sits in New York State. Be especially careful that the federal cases you cite are actually interpreting New York state law (keeping in mind that the Second Circuit covers more than just New York). And, if the only case you can find to support your argument is from the middle district of east-west Arkansas, perhaps you should rethink your argument.

“... on a motion to dismiss, facts should come almost exclusively from the complaint.”

This is not to say you should never cite cases from the other departments or jurisdictions. For example, if there is no precedent in the First Department, or you would like to argue that another court's resolution of an issue is more persuasive, by all means do so. But in so doing, do not ignore the First Department (or other appropriate appellate department) cases that do exist.

5) *Forcing the reader to guess your argument or the legal basis of your claim.* While stating an argument seems so basic, it is astounding how many briefs fail to do so — probably because the attorney has lived with the issues for so long, they just seem obvious. Although most court attorneys will eventually figure it out, it will help if your argument is stated clearly and succinctly at the beginning of the appropriate section, along with the point of law upon which the argument is premised.

6) *Ignoring contrary authority.* Do not ignore it; distinguish it. If you cannot distinguish it, rethink your argument. In all cases, however, you should at least acknowledge it.

7) *Ignoring your adversary's arguments and counterarguments.* The respondent should address each of the appellant's arguments, no matter how unworthy those arguments might seem. Think of it this way: appellant's arguments are what brought you to the court, and it is a colossal waste of everyone's time for those arguments to be ignored, especially since the court attorney must address them, whether or not you do. You don't want that. Conversely, the appellant should address each of the respondent's counterarguments because, again, the court attorney will.

8) *Using exaggeration and extreme hyperbole.* Keep underlining, exclamation points, bold and italics to a bare minimum.<sup>2</sup> If you need those things to make your point, you probably haven't got much of one.

9) *Insulting the lower court.* I will not soon forget reading in a brief that a lower court decision "lacked intellectual rigor." Hmmm. What was that party saying about the First Department panel considering the case, should it agree with the decision being appealed? And yes, the panel did agree. You should probably resist the urge to insult the lower court and, thereby, risk insulting the panel deciding your appeal.

10) *Engaging in ad hominem attacks on opposing counsel or the opposing party.* I did not care how much you disliked your adversary; I cared only whether you had a viable claim or defense. In most instances, excess emotion and hyperbole were correlated negatively to facts and good advocacy.

11) *Employing a "kitchen sink" theory on appeal.* You should think long and hard about including anything but relevant, viable issues in your brief. Generally speaking, if you cannot come up with a legal reason why the court below failed you, you probably have no viable issues on appeal. Similarly, if your brief presses only extraneous legal theories — *i.e.*, implied covenant of good faith and fair dealing; multiple equitable contractual theories, especially where there is an express contract; unjust enrichment; or conversion — perhaps some rethinking is in order.

12) *Citing cases for propositions of law that are not actually supported by those cases.* Read the cases you cite. Understand the cases you cite. When I reviewed a case cited in a brief only to discover that it either: a) did not support the argument for which it was cited, or worse b) supported the opposite argument, that party lost credibility.

13) *Making citation errors.* I had a very short amount of time in which to produce a lot of work, I was not going to spend that time trying to figure out what you meant to type. Check your citations and use a format that includes all relevant information, *i.e.*, the decision year. New York cases should be cited from the official reports, if reported, and should include the court and the year. So, for example, I liked to see this: (*Kasachkoff v. New York*, 107 AD2d 130 [1st Dept 1985]); but not this: (*Kasachkoff v. New York*, 107 A.D.2d 130, 485 N.Y.S.2d 992).<sup>3</sup>

14) *Making up quotations or misusing quotations marks.* I once encountered a quotation that was a case winner. It perfectly stated a point of law, was from this court, and was from a decision published the previous year. I pulled up the opinion, which turned out to be only two paragraphs long. One of those paragraphs was the decretal. Uh-oh .... The second paragraph bore no relation to the quoted language. Curious, I performed a full database search, hoping to find the paragraph somewhere, anywhere — even in a law review article. The quote did not exist. Please don't do that.

15) *Submitting records containing illegible copies of important documents, i.e., the decision for review and notice of appeal.* If I could not read it, it was of no use to me.

Some other things that, while not necessarily sufficient to put your brief on life support, should be avoided to the extent possible:

1) *Putting citations in footnotes.* You are not journal writing, and it was both annoying and inconvenient to have to search through footnotes to find a citation that should have been placed after the proposition for which it was cited. It was especially annoying when footnotes began to contain nothing but “*id.s*,” “*supras*” and “*infras*.”

2) *Overutilizing footnotes.* Footnotes should be used to deliver information that, while not directly relevant, is still notable. To that end, footnotes should generally not drone on for multiple paragraphs across multiple pages.

3) *String citing cases for general points of law, i.e., the summary judgment standard.* Believe me when I tell you that there is not a person in the courthouse who does not know the summary judgment standard. If you feel compelled to state it, one or two case citations will take you farther than six. Any more than that and the only thing you accomplish is padding your table of authorities.

4) *String citing cases without using pin cites or parentheticals.* You should avoid string citing at all, to the extent possible. But if you must do so, please tell the reader why he or she should care.

5) *Attaching exhibits to your brief.* Most of the court attorneys I knew used PDF versions of your documents and attachments are not scanned with your briefs. So you should put your exhibits in the record, where they belong.

6) *Including excessive volumes of records.* Ask yourself whether 22 volumes of records are actually necessary. For example, if the only issue on your appeal is whether the lower court used the proper standard of review, you do not need to include the transcripts of every deposition taken in the case. Conversely, if your entire argument hinges on the court’s misconstruing of facts, you should offer more than your client’s affidavit. In most cases, you should include the complaint. It helps if your files are all searchable.

7) *Submitting sloppy, non-paginated records.*

8) *Using reply briefs for information dumps or regurgitation of arguments already made in the opening brief.* Doing so is a missed opportunity and, frankly, a waste of your time.

9) *Failing to proofread your work product.* I have seen it all. Too much punctuation; no punctuation at all; sentences that drop off mid-thought; pasted-in sections wherein the attorney forgot to change the client’s name.... All of these things could be avoided with one careful proofread. It is folly not to do so.

10) *Submitting a 70-page brief or requesting an enlargement to submit an 80-page brief.* In my experience, it is rare that a 70-page brief proves either necessary or useful. Even in the most complex commercial appeals (which was primarily what I handled), 50 pages was sufficient, with 60 being an upper limit. If your brief is running longer than that, perhaps it can be streamlined by instituting a few of the suggestions listed above.

In closing, I leave you with one final thought by a master of words, Dr. Seuss: “[T]he writer who breeds more words than he needs is making a chore for the reader who reads.”

Here’s wishing you happy writing, but bountiful editing!

*Note: Reprinted with permission from New York State Bar Association Journal, February, 2014, Vol. 86, No. 2 published by the New York State Bar Association, One Elk St., Albany, NY, 12207.*

1. I feel compelled to reiterate that I do not speak for the court, any other court attorney or the justices. This article contains my advice, based upon my own experiences and observations after three years as a principal appellate court attorney with the First Department.

2. For formatting rules, see the Appellate Division, First Department Rules, Section 600.10, titled “Format and Content of Records, Appendices and Briefs.”

3. See the *New York Official Reports Style Manual*.

## ABOUT THE AUTHOR

Tamala Boyd is an associate general counsel with the New York City Department of Consumer Affairs. She began her legal career in private practice with the New York City law firm Simpson Thacher & Bartlett LLP as a general litigation associate. She then spent three years as a principal appellate court attorney with the Appellate Division, First Department. Ms. Boyd earned her law degree from Duke Law School.





# Better Living With Citations

By Jason McVicker

**L**itigators are forever trying to show that the law is on their side. To do this, a litigator must first show what the law *is*. A good citation serves both purposes, informing the court of the pertinent legal standard and persuading the court to rule in your client's favor. In contrast, a lousy citation can annoy the court, arm your opponent and even breach the rules of ethics.

Opinions vary on the “correct” way to cite. Just as self-styled grammar police will never agree on the use of commas,<sup>1</sup> citation sticklers have downright emotional opinions about format. Courts fan the flames of conflict with disparate rules and pet peeves of their own. Compare these citations.

*Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, 302 P.3d 789.

*Douglas v. Cox Ret. Props., Inc.*, 2013 OK 37, ¶12, 302 P.3d 789, 794.

*Douglas v. Cox Retirement Properties., Inc.*, 302 P.3d 789, 794 (Okla.2013).

*Douglas v. Cox. Ret. Props., Inc.*, 302 P.3d 789, 793-94 (Okla.2013).

These citations have all appeared in the opinions of state and federal courts.<sup>2</sup> They all cite the same authority for the same proposition. They all comply with applicable rules. But the variations are obvious. The first two examples are from Oklahoma state courts, which mostly follow the public domain citation format, pursuant to Oklahoma Supreme Court Rule 1.200(f). The second two examples are from federal courts. Federal courts generally hew to the *Bluebook* citation format.

Which is “better”? This article does not seek to wade into that conflict, which probably cannot be settled by mortal efforts. The precise mechanics of citation are best addressed by reference to Oklahoma Supreme Court rules,<sup>3</sup> or the famous *Bluebook*.<sup>4</sup> Now in its 19th edition, the *Bluebook* is a mainstay of law schools and court chambers. Published by the Harvard Law Review Association, it provides numerous examples and explanations for format, along with more rules and exceptions than most people ever care to read. Consider this merely a list of best practices, as gleaned from sticklers of all stripes.

## BEST PRACTICES

### *When to Cite*

Provide a citation to directly support a proposition, to identify the source of a quote or to identify an authority discussed in the text.<sup>5</sup> Practitioners may remember the IRAC paradigm from law school (issue, rule, application and conclusion). Your **rule** should almost certainly be supported with a citation. Courts are not impressed with unsupported assertions of law.<sup>6</sup> Moreover, failing to cite an authority may signal weakness to your reader, who will surmise that no authority supports your argument.

Do not cite 10 cases when one will do. Consider a motion for summary judgment. Summary judgment should be granted “where there is no substantial dispute as to any material fact, and it appears that one party is entitled to summary judgment as a matter of law.”<sup>7</sup> This simple rule is familiar to all litigators and judges. It is easily expressed in a single sentence, with a citation to a single case.<sup>8</sup> Yet some motions include vast swathes of briefing on this standard, citing numerous cases that merely restate the rule in slightly different ways. These citations are wasted space that encourage the reader to start skipping through your brief.

### Signals

Citations can be supported by signals like *see* and *accord* to clarify why the authority is cited. *See* is appropriate when the authority indirectly supports the proposition, but some inferential step is required.<sup>9</sup> *See* is not, however, an invitation to stretch or misrepresent authority. Consider this hypothetical scenario. You seek the entry of a blanket protective order in a civil case. Your opponent opposes a protective order, and states in his brief:

Courts generally disfavor protective orders. *See United Phosphorus Ltd. v. Fox*, No. 03-2024-JWL, 2003 WL 21241847 (D. Kan. 2003).

Yet the *United Phosphorus* court actually disfavored “umbrella protective orders,” as distinguished from “blanket protective orders.” In fact, the decision sings the praises of blanket protective orders just like the one you have requested. At best, your opponent’s citation fails to accurately represent the court’s analysis. He has handed you a weapon to use in your response brief.

Too often, *see* is a red flag that the authority cited does not stand for the proposition stated. Putting *see* in front of a citation does not mean that anything goes. A citation must still accurately portray the authority it purports to reference. Aside from the moral and ethical problems presented, this type of inaccuracy costs the author credibility.

Other signals can be used to bolster citations. *E.g.* is used when lots of authority supports a position, while *see generally* indicates the presence of background material.<sup>10</sup> *Accord* should be used where two authorities agree with each other, while *contra* should be used where two

authorities disagree. Parenthetical information should be used to supplement the use of signals if their purpose is unclear.

### What Authority to Cite

Binding authority is ideal, but unfortunately the Supreme Court has not published decisions dealing with every possible issue. Non-binding authority is therefore a necessary evil. Remember that not all authorities are created equal. Secondary sources, like the *Corpus Juris Secundum*, should be cited only sparingly, if at all.

Foreign authority can be cited for persuasive value, but it may hurt more than it helps. If you cite an intermediate appellate decision from a military court, for example, your opponent is going to have an easy time distinguishing the case and zing you for citing such an obscure authority. The most critical exception to the rule is federal case law interpreting the Federal Rules of Civil Procedure. Oklahoma courts are authorized to look to federal authority when interpreting analogous Oklahoma statutes, especially in the Pleading Code and the Discovery Code.<sup>11</sup>

Litigators often cite Court of Civil Appeals (COCA)<sup>12</sup> decisions the same way they cite Supreme Court of Oklahoma decisions. Rule 1.200(d)(2) of the Oklahoma Supreme Court rules, however, provides that unless a COCA decision is approved for publication by the Supreme Court, it is merely persuasive authority. This may be a meaningless distinction in practice; a trial judge that ignores the will of an appellate court does so at her own peril. Nevertheless, COCA opinions should not generally be presented as mandatory authority in state court. Similarly, while federal courts sitting in diversity are supposed to apply Oklahoma law as announced by the Supreme Court of Oklahoma, they may choose not to follow COCA decisions.<sup>13</sup>

### Textual Citations

Do citations belong in footnotes or in the discussion portion of your brief? Luminary Bryan Garner says that biographical information like reporter numbers should be relegated to footnotes.<sup>14</sup> He has a point. Long citations are hideous and unwieldy, and they encourage the reader to skim.<sup>15</sup> Mr. Garner’s opponents counter that textual citations make it easy to see the strength of authority. The issuing court and year of the case are right there, dispensing with the need to shuffle through footnotes. Similar-

ly, more and more judges are viewing briefs on tablets, at least at the federal level, and footnotes translate poorly on tablets.

Most importantly, the main proponents of textual citations are *judges* – including members of the U.S. Supreme Court.<sup>16</sup> These people tend to get what they want. There is no “correct” answer to the question, but tradition dictates that textual citations should be used. How does this work out in Oklahoma? The Supreme Court does it both ways, which is really not that bad.<sup>17</sup>

### String Cites

A string cite is a list of two or more authorities offered for the same principle or assertion, usually separated by semicolons. You shouldn’t use them. Most judges don’t particularly like string cites, which is reason enough to avoid them.<sup>18</sup> Yet lawyers love them. Why? Perhaps they want to show off how smart they are and how much research they have done. This is not a good enough reason to use a string citation.

If you simply cannot help yourself, use a short parenthetical to explain why each case in the string is significant or distinguishable. In *Tansy v. Dacomed*,<sup>19</sup> the Supreme Court adopted a new affirmative defense in medical device cases. In so doing, the court examined decisions from several sister states. This examination is a long string citation; each citation is accompanied by a short parenthetical identifying the medical device at issue. This is a good example of the technique; the parentheticals add context to an otherwise superfluous string of information.

### CONCLUSION

There is more to citation than just a name and a reporter number. Techniques like signal usage can add nuance and clarity to any brief. Avoiding over-citation, under-citation or inaccurate citation can make the difference between victory and defeat.

1. See Lynne Truss, *Eats, Shoots & Leaves* 84 (2003) (“There are people who embrace the Oxford comma and people who don’t, and I’ll just say this: *never* get between these people when drink has been taken.”)

2. *Ballard v. Tulsa Pain Consultants, P.C.*, 2013 OK 61, ¶2, 304 P.3d 746, 746; *Day v. State*, 2013 OK CR 15, ¶3, 316 P.3d 931, 932; *Hobbs v. Rui Zhao*, No. 13-CV-0673-CVE-FHM, 2014 WL 47938, at \*1 n. 1 (N.D. Okla.); *Courtney v. Oklahoma ex rel., Dep’t of Pub. Safety*, 722 F.3d 1216, 1228 n. 4 (10th Cir. 2013).

3. Rule 1.11(l) of the Oklahoma Supreme Court Rules requires citations to opinions of the Oklahoma Supreme Court and the Court of Civil Appeals to comply with Rule 1.200(c), (d), and (e). Furthermore, citations to United States Supreme Court decisions must be to the United States Reports, and other decisions may be cited either by the national reporter system or otherwise as practical.

4. The *ALWD Citation Manual* is also an option. For years, renegade legal-writing professors have advocated ALWD as a saner alternative to the byzantine Bluebook. To its credit, ALWD is more uniform and elegant. Unfortunately, Bluebook is far more popular.

5. *The Bluebook: A Uniform System of Citation* 54 (Columbia Law Review Ass’n et al. eds., 19th ed. 2010) [hereinafter Bluebook].

6. *McDonald v. Humphries*, 1990 OK 51, ¶2 n. 4, 810 P.2d 1262, 1264 n. 4.

7. *Scott v. Archon Group, L.P.*, 2008 OK 45, ¶8, 191 P.3d 1207, 1209-10 (citations omitted).

8. If you are opposing summary judgment, it is more persuasive to cite a case where summary judgment was reversed. See *Brewer v. Murray*, 2012 OK CIV APP 109, ¶5, 292 P.3d 41, 45 (“summary judgment may only be granted if the movant is entitled to judgment as a matter of law and if appropriate. Only if the court should conclude that there is no material fact in dispute and the law favors the movant’s claim or liability-defeating defense is the moving party entitled to summary judgment in its favor.”) (citations and quotations omitted). The standard is the same, but the phrasing is more friendly to the defending party.

9. *Bluebook*, *supra* note 6, at 54.

10. *Id.*

11. *Crest Infiniti, II, LP v. Swinton*, 2005 OK 84, ¶22, 126 P.3d 1232, 1238.

12. Is it proper to call the Court of Civil Appeals COCA? There are hundreds of published Oklahoma decisions referring to the Court of Civil Appeals as COCA, mostly in recent years, and a majority of the current Supreme Court Justices have used the abbreviation in at least one published decision.

13. *Hillgoss v. Robertson*, No. CIV-10-1001-A, 2012 WL 1299328, at \*10 (W.D. Okla. 2012); see *Commonwealth Prop. Advocates, LLC v. Mortgage Elec. Registration Sys., Inc.*, 680 F.3d 1194, 1204 (10th Cir. 2011).

14. See, e.g., Bryan Garner, “Textual citations make legal writing onerous, for lawyers and nonlawyers alike,” *ABA Journal* (Feb. 1, 2014) [www.abajournal.com/magazine/article/textual\\_citations\\_make\\_legal\\_writing\\_onerous\\_for\\_lawyers\\_and\\_nonlawyers/](http://www.abajournal.com/magazine/article/textual_citations_make_legal_writing_onerous_for_lawyers_and_nonlawyers/).

15. *Id.* This is the same reason why block quotations are disfavored. See Mark Herrmann, *The Curmudgeon’s Guide to Practicing Law*, 7-8 (2006) (“If you feel compelled to include a block quotation in a brief, assume that the judge will not read it”).

16. *Id.*; see also Rich Phillips, “The Great Footnote Debate (A Response to Bryan Garner),” *Texas Appellate Watch* (Jan. 28, 2014) [www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html](http://www.texasappellatewatch.com/2014/01/the-great-footnote-debate-a-response-to-bryan-garner.html).

17. See e.g. *Edwards v. City of Sallisaw*, 2014 OK 86, \_\_ P.3d \_\_ (mixing and matching textual and non-textual citations).

18. Mark Cooney, “Stringing Readers Along,” *Michigan Bar J.*, December 2006, at 44.

19. *Tansy v. Dacomed Corp.*, 1994 OK 146, ¶11, 890 P.2d 881, 885. This case is also useful whenever dealing with “unavoidably unsafe products,” or whenever you feel self-pity and want a healthy dose of perspective. See *id.* at 881 (“Plaintiff’s penile implant failed and had to be surgically removed.”).

### ABOUT THE AUTHOR



Jason McVicker is an associate at McAfee Taft in Tulsa. His practice focuses on complex litigation and representing manufacturers and restaurants. He graduated from the University of Tulsa in 2008, and earned his J.D. from the University of Tulsa College of Law in 2012.

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# Clarifying Oklahoma's Marketable-Product Royalty Rule

By John Burritt McArthur

Oklahoma is a leading oil and gas producing state and has been for over a century. Not surprisingly, the Oklahoma Supreme Court is one of the country's most influential oil-and-gas courts.<sup>1</sup> One area in which it is a leader involves the "marketable product" or "marketable condition" rule. This rule concerns whether mineral lessees can deduct from royalty payments a proportionate share of their cost for activities performed after oil and gas reach the surface. The court has held that unless a lease expressly allows specific deductions, the lessee has to put oil and gas into a marketable condition at its own expense.<sup>2</sup> This is part of the implied "duty to market." Lessees can deduct costs incurred after achieving marketability unless the lease says otherwise.

Unfortunately, this standard continues to confuse parties and lower courts.

## **COURTS HAVE NOT BEEN APPLYING OKLAHOMA'S CLEAR STANDARD CONSISTENTLY**

Oil and gas states are divided over the marketable-product issue. Like Oklahoma, the other leading marketable-product jurisdictions — Colorado, West Virginia and Kansas, as well as Arkansas, most likely New Mexico, Alaska (at least for most producing acreage), Virginia, and the federal government (the largest owner of reserves in the country by far) — follow versions of the rule while Nevada, Wyoming and Michigan have marketable-product statutes.<sup>3</sup> In contrast, Texas and Louisiana reject the marketable-product rule and have been joined by, or are somewhat likelier to be joined by, the courts of Kentucky, Mississippi, Montana, Pennsylvania, North Dakota, Utah and California.<sup>4</sup>

Oklahoma is a marketable-product state, but some courts have not fully applied its rule that way. In 2013, for instance, in *Chieftain Royalty Co. v. XTO*, the 10th Circuit vacated and remanded a certified Oklahoma gas royalty class for further consideration of two issues: 1) whether the leases might contain terms negating the duty to market that would prevent certifying a common-question class action and 2) whether when gas becomes marketable can be decided on a common basis.<sup>5</sup> *Chieftain* joined a same-day decision that misapplied Kansas law in *Wallace B. Roderick Revocable Living Trust v. XTO*.<sup>6</sup> In June, the Oklahoma Supreme Court disapproved and removed from publication a state court of appeals decision that reversed certification of a marketable-product class in *Fitzgerald v. Chesapeake Operating Inc.*<sup>7</sup> Although the Supreme Court did not explain why it took this action, it presumably had concerns about the court of appeals' fidelity to the Oklahoma rule.<sup>8</sup>

Lessees continue to jockey to overturn the Oklahoma standard. Two recent articles in this journal urging changes that would largely abandon Oklahoma's standard reflect the ongoing producer resistance.<sup>9</sup>

The turbulence over Oklahoma's marketable-product rule unfortunately, and unnecessarily, increased this past November when the Supreme Court reversed and remanded three summary judgment orders in *Pummill v. Hancock Exploration LLC*.<sup>10</sup> The author of the recent articles in this journal is lead counsel for the *Pummill* appellants. The added turbulence lies in the court's failure to explain in *Pummill* why remand was necessary (just as it failed to explain its decision to refuse certiorari but withdrew the court of appeals decision from publication in *Fitzgerald*). It professed to act because "facts which could affect the resolution" of the orders "need to be addressed before the factfinder — the district court."<sup>11</sup> Yet it did not support that assertion by saying anything about the substance of Oklahoma law, identifying whatever factual issues it might think need elaboration or casting any doubt on Oklahoma's well-established marketable-product rule.

This article discusses that rule as well as what the remand in *Pummill* likely does and does not mean.

## OKLAHOMA'S BROAD MARKETABLE-PRODUCT RULE

The first summary judgment order in *Pummill*, on "Lease Language," addresses a legal question: whether the terms "market price at the well" or "gross proceeds at the prevailing market rate" negate or abrogate the marketable-product rule "in any way." The order granted partial summary judgment to plaintiffs without distinguishing off-lease from on-lease services, no surprise when appellants' primary argument on this issue below was that Oklahoma applies an at-the-well standard, not that the state draws a significant cost-deduction line at the lease boundary.<sup>12</sup>

On appeal, appellants made a more specific on- or off-lease argument. They told the Supreme Court that Oklahoma never has addressed the implied deductibility of costs under a "market price at the well" lease *for services rendered off the lease*, claiming this as a question of first impression.<sup>13</sup> Plaintiff Ethel Pummill has a "market price at the well" lease.<sup>14</sup>

The trial court's order, which demonstrates that the leases do not negate the duty to market under Oklahoma law, includes a detailed analysis of relevant precedent.<sup>15</sup> In Oklahoma, authorization to deduct marketability costs has to be "spelled-out in the oil and gas lease" and must be "provide[d] specifically."<sup>16</sup> The order traces the requirement of such clear expression in part to the "longstanding principle in Oklahoma" that leases are construed against the lessee<sup>17</sup> and rejects the position that Oklahoma applies a wellhead-centric marketability standard.<sup>18</sup>

The trial court ruled on both leases at issue, thus rejecting the argument that Ms. Pummill's "market price at the well" lease or Mabel Parrish's "gross proceeds at the prevailing market rate" lease negates Oklahoma's marketable product rule. Appellants did not make an argument specific to the wording of "gross proceeds" to the trial court or the Supreme Court.<sup>19</sup>

*Chieftain* and *Roderick*, (unlike *Pummill*) both class cases, also turn in part on legal aspects of the duty to market; but in each case the lessee, XTO, raised the standard lessee class-action complaint that so many individual differences divide the class leases that a class cannot be certified. In *Chieftain*, XTO argued that a sample 732 of 14,300 class leases displayed 86 material variations in lease terms, "many of which" allegedly "'expressly allow XTO to deduct the costs it incurs.'"<sup>20</sup> The trial court found commonality even though XTO alleged this many variations because XTO paid all class members the same way.<sup>21</sup>

The 10th Circuit remanded *Chieftain* in part because the lower court should have considered variations in lease language, not just payment practices.<sup>22</sup> It also tellingly noted that even had the court reviewed lease terms, it only had a sample containing "a fraction" of all class leases before it.<sup>23</sup>

In *Roderick*, which involved a much smaller group of 650 leases, the trial judge did analyze the class leases, reviewing a 20 percent sample. He found that under Kansas law, none negated the marketability duty.<sup>24</sup> Yet the 10th Circuit remanded *Roderick*, too, because the class had not "affirmatively demonstrate[d]" commonality. The class apparently had to find a way to present all lease terms, including those outside the sample, for court review. The trial court's failure was in not "consider[ing] whether language *within the four corners of each lease* would

need to be examined individually.”<sup>25</sup> The holding implies that the unsampled leases are a *terra incognita* with no one having any idea what terms lurk within.

#### *The Pummill Negation and Off-Lease Arguments*

On appeal, the *Pummill* appellants denied that Oklahoma has a broad marketable-product rule by emphasizing the lease boundary. They argued that Oklahoma’s rule is limited to services provided on the lease,<sup>26</sup> which ordinarily hosts a small part of the services needed to make gas marketable. The most important field services, including gas processing, substantial gathering, marketing and, often, at least some compression and dehydration, generally occur off the lease. Appellants’ position would sharply narrow the Oklahoma rule by limiting it to on-lease services. Indeed, it would emasculate the rule. Oklahoma’s standard would be only somewhat broader than, and not all that different from, a Texas-type at-the-well rule that the court has long rejected. Appellants’ advocacy for such a rule is illustrated by their heavy reliance upon precedent from jurisdictions that follow the Texas rule.<sup>27</sup> Their effort to limit the marketable-product rule to the space between the well-head and the lease line relies on a geographic line not mentioned in the royalty clause.

Oklahoma law does not support this lease/offlease distinction. In Oklahoma, under the state’s articulated marketable-product rule, the most common lease terms — market-value,<sup>28</sup> proceeds, and two-prong terms — do not authorize deductions for services needed to make oil and gas marketable. This is so even when the royalty term is “at the well” and the services are performed downstream and off the lease.

In 1993 in *Wood v. TXO*,<sup>29</sup> interpreting a “market price at the well” term, the Oklahoma Supreme Court held that compression is needed to make gas marketable and its costs are not deductible for that reason. It emphatically rejected standards based on a “production/post production” distinction, including those that allow deductions for all after-the-well “enhancement” services under what the court rightly calls the Texas/Louisiana approach.<sup>30</sup> Instead the court sided with jurisdictions that “do not allow the lessee to deduct compression costs,” an approach it tied to Kansas and Arkansas law, and rejected the “different approach or interpretation” of Texas and Louisiana courts.<sup>31</sup> It found making oil and gas

marketable necessary to complete “production,”<sup>32</sup> which always is the lessee’s obligation. The court broadly stated that the lessee’s duty to market includes “the cost of preparing gas for market.”<sup>33</sup> Although the compression that generated the challenged costs occurred on the lease, the *Wood* decision does not base its reasoning on the location of the services.<sup>34</sup>

The next year, in *TXO v. Commissioners of the Land Office*, the court barred TXO from deducting compression, dehydration and gathering costs under state leases that required TXO to deliver state oil “without cost into pipelines” or, alternatively, to pay the state “the market value thereof.”<sup>35</sup> The court largely followed *Wood* in its analysis, and made no effort to discuss where TXO actually provides the services. Gathering commonly occurs at least in part off the lease, and the court’s failure to limit the rule to on-lease services suggested a broader rule.<sup>36</sup>

In 1998, just a few years later, in *Mittelstaedt v. Santa Fe Minerals*<sup>37</sup> the court held, consistent with these two prior decisions, that “transportation, compression, dehydration and blending costs” are not deductible under a gross proceeds lease when these services are needed to make gas marketable.<sup>38</sup> Answering a certified question, the court held that deductibility depends upon whether the gas already was marketable or the services were performed to make it so. In doing so, it rejected the idea that costs automatically can be deducted just because a service is performed off the lease.

The various *Mittelstaedt* services were performed off the lease before the gas entered the purchaser’s pipeline.<sup>39</sup> The court claimed that this contrasted with *Wood* and *CLO*, which it said (without support, in the case of *CLO*) involved services rendered on the lease, and it seems to have treated the “leased premises” as synonymous with “at the well.”<sup>40</sup> With this background, *Mittelstaedt* confirms — as *Wood* and *CLO* already indicated to careful readers — that the lease boundary does not determine deductibility in Oklahoma.

The court held that what it treated as on-lease holdings in *Wood* and *CLO* do not mean that “costs incurred after severance at the well-head are necessarily shared by the lessors.”<sup>41</sup> Having reaffirmed the traditional rule for on-lease services “at the wellhead or leased premises,” the court discussed off-lease services. It mentioned that custom and usage help determine the scope of the duty<sup>42</sup> and, when describ-

ing “field processes” as services that customarily are applied to make gas marketable, mentioned processes that often are applied off the lease:

It is common knowledge that raw or unprocessed gas usually undergoes certain field processes necessary to create a marketable product. These field activities include, but are not limited to, separation, dehydration, compression, and treatment to remove impurities.<sup>43</sup>

The court’s reference to “field” processes is significant. These processes are mid-stream services provided between the well and the tailgate of the processing plant to prepare gas for sale into and shipment on mainline, usually interstate, gas pipelines.

With this predicate in place, the court explained that “[w]e decline to turn compression costs into costs paid by the royalty interest merely by moving the location of the compression off the lease.”<sup>44</sup> It distinguished non-deductible costs of transporting gas “off the lease to a point where its constituents are changed” — the traditional gathering and movement to a processing plant — from the presumably deductible costs of added compression that thereafter pushed the gas into the buyer’s pipeline.<sup>45</sup>

This analysis defines two categories of cost. One contains what the court has called production costs, “which are never allocated” and which the court seems to have viewed as on-lease costs. The second contains “post-production” costs for off-lease services that may or may not be deductible, depending upon whether they are “necessary to make a product marketable, or...within the custom and usage of the lessee’s duty to create a marketable product...”<sup>46</sup> The reference to custom and usage confirms that the cost of field processes, which lessees customarily treat as needed to make oil and gas marketable, generally will not be deductible in Oklahoma in any location.

The primacy of the lessee’s marketing duty thus has been decided in Oklahoma for “market price at the well” (and market value) leases, too, because neither the lease line nor the term “at the well” determines deductibility under the Oklahoma trilogy. What happens to off-lease service costs in Oklahoma today depends upon whether the services are needed to make minerals marketable.

The holding that lease boundaries do not determine deductibility is consistent with the Kansas rule, an approach the Oklahoma Supreme Court “[chose] to follow” (along with Arkansas’s) in *Wood* and endorsed again in *Mittelstaedt* along with the parallel Colorado rule.<sup>47</sup> The Kansas Supreme Court rejected any on-lease/ off-lease distinction in *Schupbach v. Continental Oil Co.*<sup>48</sup> It has held that the happenstance of where a lessee puts service facilities, and whether it concentrates them in a downstream location in order to achieve economies of scale for its own benefit, does not affect their deductibility from the royalty payment.<sup>49</sup> Prudent steps to save the lessee money by lowering unit costs do not change the deductibility of services vis-à-vis the royalty owner. Colorado holds that the costs of making a product marketable are those of putting it in a proper condition and location, similarly rejecting the idea that a term like “at the well” or the lease line limits this duty.<sup>50</sup> West Virginia, the other leading marketable-product jurisdiction, also has adopted its rule over “at the well” language.<sup>51</sup>

The Oklahoma rule is very clear. Oklahoma does not carve out different deduction rules for the most common royalty clauses. It applies the same marketability rule to market value and proceeds leases and variants thereof. Oklahoma’s rule is not an ineffectual no-deduction rule that ends “at the well” or at the lease boundary.

#### *The Chieftain Many-Material-Differences Argument*

The Oklahoma Supreme Court pointed out in its trilogy that the lessee could have made specific costs deductible but did not, thus indicating that absent express allowance in the lease, costs of services needed to make minerals marketable are not deductible in Oklahoma.<sup>52</sup> Lessees wanting to deduct field-service costs must say so in the lease. In the face of this broad rule, *Chieftain* and its progeny misinterpret Oklahoma law when they assume that unreviewed leases are likely to be filled with novel, material variations that negate the implied duty to market.

Postulates of materially different lease terms under Oklahoma law, as in *Chieftain*, also ignore the commonality of ordinary royalty payment terms. American oil-and-gas leases do not display countless material variations. Parties traditionally use form leases drafted by industry



groups, particularly versions of “Producers 88” leases.

Time will tell whether the shale boom alters the balance of negotiating power in a way that produces more detailed leases. Thus far, the oil and gas royalty payment clause (sometimes “clauses,” when the lease separates the oil payment clause from the gas payment clause) is quite short. And, most significantly, almost all royalties are paid on a limited variation of proceeds or market value terms, with some leases using a “two-prong” combination of these terms. Leases traditionally do not mention deductions specifically. The court’s deduction trilogy shows that in Oklahoma, as already discussed, these common terms do not authorize deduction of marketability costs.

Speculation that unsampled leases might negate the duty to market, as the 10th Circuit implied in *Chieftain* and expressly speculated in *Roderick*, are at odds with the Oklahoma rule. Nothing the 10th Circuit said gives any reason to believe there is a reasonable likelihood of the vast majority of unsampled Oklahoma leases in *Chieftain* (or the Kansas leases in *Roderick*) containing language that negates the marketable-product responsibility. The court may have remanded *Chieftain* to be sure the trial court found no negation even after reviewing the leases, but in general assumptions of material variation (particularly if a sample has shown no negation, as in *Roderick*) are unwarranted.

Because leases generally do not vary on deductions under Oklahoma law, courts should allow sampling in class cases to test whether material variations exist. In *Roderick*, the 10th Circuit proposed that leases can be “classif[ied by] lease type”<sup>53</sup> and may have remanded that Kansas case only because the record did not show whether its sample is representative. If courts do find significant variation, they can require more analysis. But it would be irrational for modern courts, which encourage sampling as a reliable technique for structuring document production, to refuse to allow reasonable lease sampling.

If a defendant can show that leases vary widely *and* that many leases negate the duty to market, it should fight certification. But if only one or a handful of leases negate the duty to market — and negation rarely is seen — the proper remedy is to exclude those leases from the class definition.

Finally, if the *Pummill* trial court got it right on the failure to negate and the irrelevance of the lease boundary, why did the Oklahoma Supreme Court remand the order on lease language? This is not a class case and the two leases were before the trial court; it discussed their terms as well as Oklahoma law, so the remand cannot involve unread leases as in *Chieftain* and *Roderick*. The re-mand certainly should not mean that the trial court is wrong on the law. It provided a thoughtful and thorough legal analysis supporting its holdings. If the Supreme Court disagreed with these conclusions of law, the proper step surely was to grant certiorari, reverse and issue a reasoned decision explaining where the trial court is wrong.

The Supreme Court may have found it simplest to remand all three summary judgment orders rather than take the time to distinguish the various issues before it. The appellants encouraged just such a global treatment by glossing over differences between the summary judgment rulings on a key argument: the first issue in their petition for writ of certiorari claims that the trial court

improperly decided disputed fact issues as if that alleged problem mars all of the orders below.<sup>54</sup> The Supreme Court may have been persuaded by this argument, even though the challenged reference to fact assumptions only appears in one order and none of the orders turns on disputed facts. Or it may be that even on the legal issues of negation and on/off-lease, the Supreme Court wants the fullest record possible so that it can best explain any clarifying decision, even if it intends to affirm the present rule. Indeed, it may be that the court gave no true explanation for its treatment of *Fitzgerald* or *Pummill* because it did not feel that it was presented with a record sufficiently detailed to support articulation of Oklahoma’s marketable-product rule.

“The Supreme Court may have found it simplest to remand all three summary judgment orders rather than take the time to distinguish the various issues before it.”

Ultimately, appellants' complaint about "lease language" is based on the legal argument that Ms. Pummill's "market price at the well" lease authorizes deductions of costs for all off-lease services under Oklahoma law. That is a pure legal argument, one that is inconsistent with *Wood's* holding on "market value at the well" leases, *CLO's* broad inclusion of gathering in nondeductible services, the lack of any locational limit in either decision, and *Mittelsstaedt's* express holding that moving services downstream does not change their deductibility as well as the Supreme Court's endorsement of an Arkansas, Kansas and Colorado approach and its longstanding rejection of the Texas/Louisiana approach. Under Oklahoma law, the lease line does not limit the implied marketable-product rule.

#### **THE POINT OF MARKETABILITY BEGINS WITH SALES PROCEEDS AND SHOULD CONFORM TO DUTY TO MARKET-COMPLIANT BEST PRICES**

A second issue that has caused confusion is what marketability means under Oklahoma law.

Strictly speaking, the *Pummill* appellants did not contest a finding on marketability because the trial court did not make one. The lower court stated in one of its orders that marketability was not before it on summary judgment and would have to be decided later.<sup>55</sup> Nothing in appellants' briefing to the Supreme Court demonstrates otherwise.<sup>56</sup> Instead, on marketability, they argued that anyone's sales to a "first purchaser" (even, apparently, unrelated third parties' sales) at the well can prove that their gas is "marketable" at the well.<sup>57</sup> Under this theory, appellants want their gas treated as marketable at the well even though they never sold it there. They want to piggyback on sales independent of their own transactions.

Appellants did furnish the trial court with opinions from experts who identified sales that, they claimed, prove viable wellhead markets.<sup>58</sup> Yet this should not affect the summary judgment issues, which concerned issues of law and left marketability for later. Moreover, appellants' third-party-seller, first-purchaser argument might be valid for market-value leases under a Texas approach, but it is not accepted in Oklahoma.

The 10th Circuit remanded *Chieftain* (and *Roderick*) on marketability too. In *Chieftain*, XTO claimed that the gas markets varied from

well to well. All this even though XTO never went out, surveyed sales in the field and paid royalties based on averages of any surrounding wellhead-specific sales. The lessors, in contrast, argued that no class gas was marketable at the well.<sup>59</sup>

This sounds like a common methodological dispute over the correct way to measure gas markets. Yet the 10th Circuit assumed that the point of marketability might differ by well; if so, the differences might present too many individual issues; and it remanded for the court to consider the market in more detail.<sup>60</sup> The *Fitzgerald* court of appeals treated marketability as an individual question too. Indeed, at times it went beyond *Chieftain* and assumed that costs *will* vary at least by field and by Chesapeake's sales contract, rather than that a jury *might* find that they vary.<sup>61</sup> This may be one of the reasons the Oklahoma Supreme Court had the appellate decision withdrawn from publication.

In modern gas systems, markets rarely vary by well. Wells are connected to large gathering networks. Gas usually has to be dehydrated and compressed, enters small gathering pipes that usually run off the lease, is commingled as it enters those pipes, moves to processing plants where it may also receive added compression and dehydration, is processed and sometimes treated, and then sold as dry gas and, separately, liquids. Individual gas molecules lose their separateness as soon as they enter the gathering line. Most sales are made into mainline pipelines located near the outlet of processing plants. The best-price "market" for this gas almost always is the active, robust market after processing.

The fact that downstream services are needed to make gas marketable in the usual case is widely recognized. The *Mittelstaedt* court called it "common knowledge that raw or unprocessed gas usually undergoes certain field processes necessary to create a marketable production."<sup>62</sup> These processes include "separation, dehydration, compression, and treatment to remove impurities . . . ."<sup>63</sup> The 10th Circuit has explained that, to seek market value for unprocessed gas "at the well," the "producers sell refined natural gas and NGLs at the tailgate of the processing plant (*i.e.*, after processing) to establish a base sales amount..."<sup>64</sup>

Lessees commonly dispute the point at which gas becomes marketable in Oklahoma and in

other marketable-product states. A primary reason to do so in Oklahoma is that the Oklahoma Supreme Court has not formally linked the duty to market's price duty to the deduction rule flowing from the same covenant. A lessee has an implied duty to get the best price reasonably possible in all producing states, and that price no longer is commonly found near the well.<sup>65</sup>

In addition, the Oklahoma Supreme Court has muddled the water on what marketability requires because it has superseded its own older, pre-deregulation language in *Johnson v. Jernigan*,<sup>66</sup> yet paradoxically still cites that decision approvingly. *Jernigan* contains language that, on its own, appears to suggest that deductions may be tied to lease boundaries, as if deductibility may be barred categorically but only for on-lease services, and that off-lease gas movement is "transportation" that usually can be deducted.<sup>67</sup>

It is notable that *Jernigan* was decided in 1970. The period is in the heart of the regulated gas era. Sales commonly did occur at the well at that time. The buyers generally were interstate pipeline companies. In *Jernigan* itself, however, there was no market at the well, and the sales occurred at a "distant" market 10 miles away. Ruling on a "gross proceeds at the prevailing market rate" lease, *Jernigan* treated "gross proceeds" as barring only deduction of costs incurred within lease boundaries.<sup>68</sup> This is a decision that would not be reached in other marketable-product jurisdictions and is certainly inconsistent with the Oklahoma trilogy. *Jernigan* does not discuss marketable-product theories or implied duties of any sort, nor does it address how it would have ruled on the field services that typically are applied before the point of what industry parties call transportation.

In addition to not acknowledging where it subsequently has limited *Jernigan*, the court unfortunately has used the term "enhancement" to describe services that make gas marketable when other marketable-product jurisdictions use it to describe post-marketability field services.<sup>69</sup>

In spite of vestiges of *Jernigan*, *Mittelstaedt*'s holding that it is "common knowledge" that raw, unprocessed gas usually needs to be processed to become marketable indicates that costs of "separation, dehydration, compression, and treatment," processing costs and any other field services usually will not be deduct-

ible even if rendered off-lease. *Wood* may have presented a dispute over the cost of on-lease services and *CLO* not indicate where its three contested services occurred.<sup>70</sup> Against that background, *Wood*'s quote of a Colorado case on compression as a "necessary step" in marketability, its portrayal of low-pressure risks as falling on the lessee,<sup>71</sup> and XTO's admission in *CLO* that compression, dehydration and gathering deductions were needed to make gas marketable<sup>72</sup> support the view that on-lease costs are categorically not deductible in Oklahoma.

In contrast, when it comes to off-lease service costs, *Mittelstaedt* takes a factually variable approach. It assumes that there may be field services performed after gas is marketable and that the resulting costs are deductible (at least, as long as the lessee proves the costs are reasonable and the services increase gas value proportionately).<sup>73</sup> Thus Oklahoma does not classify deductibility of off-lease field services categorically.<sup>74</sup> In Oklahoma, off-lease services are not deductible most of the time but it is because they make oil and gas marketable, not because they are part of inherently nondeductible "production." For these costs, after *Mittelstaedt* deductibility is a fact question. The court has not addressed whether even on-lease services now fall under this factual standard, as opposed to being categorically nondeductible.

The court has moved past *Jernigan* (as have natural gas markets) and any lease/off-lease distinction. It is true that even *Mittelstaedt* at one point described part of the lessee's duty as producing a marketable product "at the well-head or leased premises."<sup>75</sup> But the Oklahoma trilogy does not suggest that lease boundaries should be important. In *Mittelstaedt*, the court held that "field processes" (not just lease processes) often are necessary to create a marketable product,<sup>76</sup> that moving services off the lease does not magically transform their costs into deductible costs, and that — despite *Jernigan* — even transportation costs cannot be deducted when related to making a product marketable.<sup>77</sup> Moreover, gathering, which the court barred from deduction in *CLO*, usually extends off the lease.

Under industry practice, a benchmark that *Mittelstaedt* holds informs Oklahoma's marketing duty,<sup>78</sup> gathering is a distinct function from transportation, indeed often is housed in a separate field-service or "midstream" division or affiliate.<sup>79</sup> Industry parties routinely

describe field services as creating a “marketable” product.

Because *Jernigan* does not discuss gathering and its deductibility, but instead only “transportation” to a “distant” market, it is facially reconcilable with *CLO*’s treatment of gathering — in-field movement of gas to the plant — as nondeductible. Logical reconciliation aside, though, the court has left confusion by repeatedly citing *Jernigan* approvingly. To the extent that *Jernigan* takes a Texas/Louisiana approach to the deduction line but moves it from the wellhead to the lease boundary, *Wood*, *CLO* and *Mittelstaedt* overrule it; just as the Kansas, Arkansas and Colorado law cited so approvingly (indeed, largely adopted) by the Oklahoma Supreme Court rejects it. The Oklahoma Supreme Court has rejected any idea that the costs of gathering and even what it has called transportation always are deductible, as would be the case under almost all leases in Texas and Louisiana. In today’s industry, the point of marketability usually is after nondeductible field services including gathering and processing.

In most cases, efforts to claim that isolated sales in the field set the “market value” of gas collected by a single lessee into a large gathering system will face one or more of four problems. First, when the lessee sells downstream to satisfy the best-price requirement, that sales price establishes market value for those sales under Oklahoma law. The Oklahoma Supreme has held that for price purposes, *ceteris paribus*, the lessee’s proceeds provide the price under a market value lease (as it of course ordinarily does under a proceeds lease).<sup>80</sup> In Oklahoma and similar jurisdictions, then, unlike Texas and jurisdictions that follow its lead on this issue, one does not look beyond the lessee’s good-faith, arm’s-length, best-price sale to find market value. And insistence that a localized wellhead market price exists is an odd posture anyway for the *Pummill* appellants, whose sales are always beyond the plant.<sup>81</sup> It would be illogical to treat the wellhead or lease, where prices paid (if any are paid) usually are not the best prices available and would breach the duty to market if used in royalty payments, as the point where oil and gas are marketable.

Second, prices paid on small volumes of gas almost never are the best prices for the larger packages of gas that major lessees commingle in their gathering systems and sell in bulk packages. Large volumes should draw premi-

um prices. These high-volume sales are not comparable to isolated wellhead sales.

Third, a market normally requires the existence of multiple buyers and sellers.<sup>82</sup> That requisite often is lacking for wellhead sales. Isolated sales of small volumes of gas do not create a “market,” nor should one or more affiliate “transfers” or “sales,” which should have to be validated by independent sources of value.<sup>83</sup> In the ordinary gas field, the first marketable gas will be pipeline-ready gas (and the separated liquids stream) emerging at the outlet of a processing or treating plant.

The fact that index prices based on sales at downstream outlets of processing plants are widely published, while wellhead prices are not, is a sign that these downstream sales points present market transactions to which this industry looks for evidence of market value. This is today’s customary value. The industry does not look to occasional, nontransparent sales in the vicinity of scattered wellheads. Indeed, even in Texas and states following its at-the-well rule, lessees do not really conduct surveys of wellhead prices, browbeat their competitors into disclosing their confidential sales prices, and then calculate volume-weighted average well prices to pay royalties using these nearby sales. They almost always pay on their own downstream sales after “net-backing” costs if the jurisdictions allow those deductions, or at least use the downstream index price as the base price.

Finally, local sales generally do not offer the best price even if they emerge from a setting with multiple local buyers and sellers and volume premiums are unavailable downstream. If the plant outlet at or near a mainline pipeline inlet is the first location with anything resembling a market, as it often is, many cases will come out correctly even without reference to where the best price is located. Local prices are not likely to be the best prices possible even if isolated buyers and sellers make deals at the wellhead. But the Oklahoma Supreme Court will end a lot of wasteful, unnecessary litigation if it links the best-price portion of the duty to market to its deduction analysis. These duties need to be linked to achieve the duty to market’s purpose.

Producers may claim that a few sales near the wells prove “market value.” They may even say that gas is in a “marketable condition” even when no buyers at all (or only one

gatherer) are nearby. Yet competent natural gas companies rarely sell gas at the well today. It makes no sense that a price that would breach the duty to market, a price at which the defendant itself has decided not to sell, could establish that gas is marketable in a way that satisfies the same implied duty.

The location of the best price has moved. In the decades before gas deregulation in the late 1980s and early 1990s, including in 1970 when *Jernigan* was decided, the best price often was a regulated “field” price that pipeline buyers paid at the well. With deregulation, gas marketing, and the best prices, shifted downstream.<sup>84</sup> Any realistic definition will reflect that change.

If a lessor can secure internal company investment analyses concerning field services and marketing, these documents are likely to justify field services as needed to make oil and gas marketable.<sup>85</sup> This is a straightforward recognition of the fact that in the modern deregulated natural gas market, marketable gas is processed gas, not raw gas at the well.<sup>86</sup>

In *Parry v. Amoco*,<sup>87</sup> Judge Dickinson, a Colorado district court judge, held a bench trial on gas marketability in August 2002, significantly after natural gas deregulation. His decision well illustrates common marketability issues. *Parry* concerns Colorado conventional and coal-seam gas in the San Juan Basin. Judge Dickinson described a standard for marketability under Colorado law that includes availability of marketing outlets and noted that a single sale does not conclusively establish the existence of a market.<sup>88</sup> He distinguished the wellhead sales in the record from true market transactions: 90 percent were internal affiliate transactions, most of the rest isolated sales for local use including distribution for field use, captive sales, and other unrepresentative transactions (some were sales the defense team had arranged, as if lawyers can create gas markets for purposes of litigation!)<sup>89</sup> He ultimately concluded that, after deregulation, San Juan Basin gas “is market-

able, both as to physical condition and location, only after gathering, compression, treatment and delivery to the inlet for the interstate pipeline.”<sup>90</sup> This is the situation in most gas fields.

The Oklahoma Supreme Court can clarify that producing a marketable product means producing oil and gas that satisfies the best price requirement. If the issue comes up in a class case, it should affirm certification because this issue of the nature of the market will be common across all lessors.

## TWO RELATED PUMMILL ISSUES

The nature of a state’s marketable-product rule and what marketability means are the two main questions that appear in almost every marketable-product dispute. But *Pummill*, a “rich” case in terms of legal issues, raises two<sup>91</sup> related issues. Both involve theories that, if adopted, would achieve an end run around Oklahoma’s marketable-product rule.

### POP/POI Arguments.

First, the *Pummill* appellants argue that if they hire a third-party field-service company to make their gas marketable and let the company keep a share of the gas or revenue stream rather than paying it a cash fee, they only owe royalty on the reduced gas or revenue stream.<sup>92</sup> Cimarex, the Operator, most recently has been selling post-processing residue (dry) gas and liquids on behalf of appellants downstream of third-party Enogex’s processing plant and paying a cash fee for gathering, compression, and transportation as well as allowing free use of needed fuel. It has not deducted the cash fees or fuel used in operations that occur before gas processing in its royalty computations, although its summary judgment position is that it could and that its “conservative” forbearance has been voluntary.<sup>93</sup> But Cimarex has a separate processing contract with Enogex and it deducts processing costs from its payments to Pummill and Parish, the plaintiffs.<sup>94</sup>

This is the issue upon which the trial court, in granting partial summary judgment, made the unfortunate statement that it was “assuming (without deciding)”<sup>95</sup> that at least some of the

“The nature of a state’s marketable-product rule and what marketability means are the two main questions that appear in almost every marketable-product dispute.”



deducted services were needed to make gas marketable. The court's "form of contract" order is actually on a pure question of law — whether outsourcing services and paying in kind rather than cash or on a discounted index price makes services deductible — and did not require it to resolve fact issues. But the Supreme Court certainly wants a full fact record on where this gas is marketable before ruling on the issue.

In other areas the Oklahoma Supreme Court has rejected the elevation of form over substance. It has done so in rejecting affiliate contracts unless they are tied to true market transactions, and in denying that moving marketability services off the lease suddenly makes their costs deductible. It should not reverse its approach, abandon its practical reason and suddenly elevate form over substance by giving lessees a green light to deduct all services as long as the "payment" is in gas rather than a fee for services, or because a field-service company incorporates payment into a discounted index price.<sup>96</sup> Lessees then would fully control whether costs are deductible or not merely by how they structure service contracts. Were the court to agree with appellants, Oklahoma lessees could make all field services deductible as long as they use POP or POI contracts instead of straight cash payments. Lessees providing services themselves would suddenly contract with third parties to benefit from this position.

### *Free Use Argument*

The *Pummill* appellants separately argue that because the leases have a "free use" clause for gas "produced on said land for its operations thereon,"<sup>97</sup> gas used for field services is free to them and not royalty bearing. They say that it does not matter where the gas is used as long as it is used for gas produced on the land, a location-free reading that has some similarity to the court's holding that deductibility does not turn on where services are performed. This is another way of saying that the lessee should be allowed to deduct all gas used in making gas marketable from volumes used in royalty computations wherever it is used.

Appellants cite the free-use clause to argue that deduction of any fee Enogex takes in kind for downstream operations as long as the use pertains to plaintiff's gas is expressly permitted by the lease. Like their POP/POI argument, so their free use argument would create an

exception that could swallow most of the marketable-product rule. The trial court's summary judgment for plaintiffs on this issue relied on narrower, more specific language about off-lease uses that, as in many leases, requires payment of royalty on all gas "used" off the premises.<sup>98</sup> This express language installs a locational limit on free use. Appellants barely addressed the language in their supreme-court briefing.<sup>99</sup> So it is unlikely that they will prevail on their free-use contention under these lease terms.

### **TIME TO CLARIFY THE LAW?**

If the Oklahoma Supreme Court faces another appeal in *Pummill* or in a similar case, it will have the opportunity to confirm its longstanding rule on deductions and to clarify the meaning of marketability as discussed in these pages.

1. Among the court's influential royalty decisions are the affiliate and best-price holdings in *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1275 (Okla. 1981) and *Howell v. Texaco*, 112 P.3d 1154, 1160 (Okla. 2005) (citations omitted); the development standard for new pools and formations in *Mitchell v. Amerada Hess Corp.*, 638 P.2d 441, 450 (Okla. 1981); the drainage rule in *Dixon v. Anadarko Production Co.*, 505 P.2d 1394, 1396 (Okla. 1973); the ruling on installing market connections in *McVicker v. Horn, Robinson & Nathan*, 322 P.2d 410, 413-16 (Okla. 1958); and the marketable-product decisions discussed in text.

2. See *Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203 (Okla. 1998).

3. For a discussion of states adopting marketable-product rules, see Mr. McArthur's JOHN BURRITT MCARTHUR, OIL AND GAS IMPLIED COVENANTS FOR THE TWENTY-FIRST CENTURY: THE NEXT STEPS IN EVOLUTION 237-65 (ch. 6.D.1)(Sept. 2014).

4. For states rejecting a marketable-product rule, see *id.* at 265-75 (ch. 6.D.2).

5. 528 Fed. Appx. 938, 941-44 (10th Cir. 2013)(not for official publication).

6. 725 F.3d 1213 (10th Cir. 2013). The case began as a single two-state class, but later was divided into two classes, one for each state. *Roderick*, 725 F.3d at 1215 n.1.

7. Cause No. 111,566 (Okla. Civ. App. Feb. 14, 2014), *cert denied, intermediate decision withdrawn from publication sub nom. Fitzgerald Farms, LLC v. Chesapeake Operating, Inc.* (Okla. June 2, 2014).

8. See *infra* notes 25, 61 & accompanying text.

9. Richard Noulles, "What Is Required for Gas to be a Marketable Product in Oklahoma?" (March 2014), available at <http://www.okbar.org/members/BarJournal/archive2014/OBJ852Noulles.aspx>; Richard Noulles, "Post-Production Movement of Natural Gas in Oklahoma: Is it Gathering? Transportation? Or Somewhere in the Mittelstaedt?" 3, 5 (April 2011), available at <http://www.okbar.org/members/BarJournal/archive2011/AprArchive11/obj8211Noulles.aspx>.

10. *Pummill v. Hancock Exploration LLC* [hereinafter *Pummill*], Cause No. 111,096 (Okla. S. Ct. Nov. 17, 2014)(order reversing and remanding [hereinafter Supreme Court Remand Order]).

11. *Id.* at 2.

12. For appellants position on summary judgment and its emphasis on the well, not an on-off lease distinction, see Defendants' Response to Opposition to Plaintiffs' Amended Motion for Summary Judgment 24-31, *Pummill*, Cause No. CV-2011-82 (district court, Grady county, June 1, 2012). The court of appeals affirmed without substantive discussion. Order, *Pummill*, Cause No. 111,096 (Okla. Ct. App. June 27, 2014), *rev'd and remanded*, Supreme Court Remand Order, *supra* note 10.

13. Petition for Writ of Certiorari 2, *Pummill*, Cause No. 111,096 (Okla. S. Ct. July 16, 2014)(calling off-lease issue one of "first impression"), 7-8 (same); Reply in Support of appellants Petition for Writ of Certiorari 3-4, *Pummill*, Cause No. CV-2011-82 (Okla. S. Ct. Aug. 11, 2013)(same).

Appellants also argued that the trial court had erred by construing disputed facts in favor of plaintiffs, a summary judgment no-no. The trial court statement on which they relied, that it was "assuming (with-

out deciding)” that “some or all” of the services were needed to make the gas marketable, was made in the “Form of Contract” ruling on use of a “percentage of proceeds” or “percentage of index” sales contract. Summary Judgment Issue II – Form of Contract 11, *Pummill*, Cause No. CV-2011-82 (district court, Grady County, Okla. Aug. 24, 2012)(granting partial summary judgment that entering POP and POI contracts rather than cash fee arrangement for gathering does not “change the amount of royalty due” – does not authorize deductions). Appellants glossed over the narrow scope of this clarifying comment in their Petition, which presented the allegedly erroneous decision of disputed facts in the plaintiffs’ favor as a separate, overarching point of error affecting all summary judgment orders. Petition for Writ, *supra*, at 1, 4-6.

14. Appellants’ off-lease argument is purely about Pummill’s “market price at the well” lease; they do not discuss Parrish’s “gross proceeds at the prevailing market rate” lease. Petition for Writ, *supra* note 13, at 7-9; Reply, *supra* note 13, at 3-4. Reflecting Appellants’ emphasis on just one of the two leases, when the trial court described Appellants’ specific argument, it discussed their “market price at the well” argument. Summary Judgment Issue I – Lease Language, at 5, *Pummill*, Cause No. CV-2011-92 (district court, Grady County, Okla. Aug. 6, 2012)(granting partial summary judgment that lease language does not negate or abrogate marketable-product rule).

15. Summary Judgment Issue I, *supra* note 14, at 11.

16. *Id.* at 3-7, *esp. id.* at 4(citing *Mittelstaedt v. Santa Fe Minerals, Inc.*, 954 P.2d 1203, 1205 (Okla. 1998); *Wood v. TXO Prod. Corp.*, 854 P.2 880 (Okla. 1992)).

17. *Id.* at 4 (citing *Probst v. Ingram*, 373 P.2d 58, 62 (Okla. 1962)).

18. Compare Defendants’ Response, *supra* note 12, at 24-31, *Pummill*, Cause No. CV-2011-82 (district court, Grady county, June 1, 2012).

19. See *id.* at 21-27; Petition for Writ, *supra* note 13, at 7-9; Reply, *supra* note 13, at 3-4. Even the headings of Appellants’ briefs in the Supreme Court limit this argument to Pummill’s “market price at the well” lease. Petition for Writ, *supra* note 13, at 7; Reply, *supra* note 13, at 3.

20. *Chieftain*, 528 Fed. Appx. at 940-41.

21. *Id.* at 941-42. For the trial court’s reasoning, see *Chieftain Royalty Co. v. XTO*, 2012 WL 1231837, slip op. at \*\* 4-5 (E.D. Okla. 2012), *rev’d and remanded*, 528 Fed. Appx. 938 (10th Cir. 2013). To the extent that the trial court believed that it did not have to analyze individual issues before certification because of the common payment practice, slip op. at \*5, saying this even while conceding that individual lease terms ultimately would have to be analyzed to decide whether any lease abrogated the duty to market, *id.*, the 10th Circuit was correct to reverse and remand on that issue.

22. *Chieftain*, 528 Fed. Appx. at 942-43.

23. *Id.* at 942.

24. *Roderick*, 725 F.3d at 1215-18.

25. *Id.* at 1218-19 & n. 4 (italics in original; boldface added). The Oklahoma Supreme Court may have withdrawn the *Fitzgerald* court of appeals decision in part for raising objections that should not have derailed class treatment of most of the class leases. The court of appeals may have focused primarily on class counsel’s statement that “he and Chesapeake would have to litigate the meaning of the various lease terms,” *Fitzgerald* Court of Appeals Order, *supra* note 7, at 10 – a concession that suggests he did not adequately explain how the actual variation in class royalty-clause terms does not negate the implied duty. But the court seems to have exaggerated the import of a single lease that apparently did authorize deductions, and of some leases that are subject to a pooling order. *Id.* at 10-11. These last two points might affect class definition, but should not be bases for denying certification altogether.

26. Petition for Writ, *supra* note 13, at 6 n.6, 7-9; Reply, *supra* note 13, at 3-4.

27. That the *Pummill* Appellants are really arguing for a Texas-type rule can be seen by the cases they cited in their Petition for Writ, *supra* note 13, at 9 n.8, as well as before the trial court, Defendants’ Response, *supra* note 12, at 22-23. Their true substantive argument is that the court should abandon the path it set out on in 1993 with its decision in *Wood v. TXO*, 854 P.2d 880 (Okla. 1993), a case discussed next in text.

28. The *Pummill* lease is a “market price” at the well lease, not a “market value” lease, but courts (and the industry) generally use the two terms interchangeably. See, e.g., *J.M. Huber Corp. v. Denman*, 367 F.2d 104, 107 n.5 (5th Cir. 1966), *cert. denied*, 352 U.S. 971 (1967).

29. 854 P.2 880 (Okla. 1993).

*Wood* came over two decades after *Johnson v. Jernigan*, 475 P.2d 396 (Okla. 1970), a case that fits poorly with the trilogy that followed. Even though interpreting a “gross proceeds” lease, the *Jernigan* court seemed to distinguish costs for moving gas on the lease from “transportation” off the lease. *Id.* at 399. To the extent that its transportation holding draws a line on deductibility at the lease line, little different from the Texas-type rule, and does not distinguish gathering from transporta-

tion, *Jernigan* is inconsistent with the Oklahoma Supreme Court’s deduction decisions starting with *Wood*.

30. *Wood*, 854 P.2d at 881. Having described this production/post production Texas/Louisiana approach, the court held, “We reject this analysis in Oklahoma.” *Id.*

31. *Id.* at 881-83, *esp. id.* at 882 (“We choose to follow the holdings of the Kansas and Arkansas courts.”).

32. In *Wood*, the court sided with authorities who agree there is no “production” without all needed marketing services. *Id.* at 881. For support for the marketable-product rule by the scholar who has been most influential on implied-covenant law, including in Oklahoma, see MAURICE MERRILL, *THE LAW RELATING TO COVENANTS IMPLIED IN OIL AND GAS LEASES* 214-15 (2nd ed. 1940)(citations omitted).

33. *Wood*, 854 P.2d at 882 (“In our view, the implied duty to market means a duty to get the product to the place of sale in marketable form.”).

34. *Wood* did not limit deductibility to the lease, but at least costs incurred on the lease seem categorically for the lessee alone under *Wood*. *Wood* cites *Johnson v. Jernigan*, 475 P.2d 396 (Okla. 1970), for the proposition that expenses beyond the lease must be shared, but only in a discussion of “transportation,” *Wood*, 854 P.2d at 881 (citation omitted). As shown in note 29 *supra*, *Johnson v. Jernigan* appears to use the Texas/Louisiana approach that *Wood* rejects. The industry ordinarily distinguishes between field-area gathering, which is movement to a processing plant where gas is put in marketable condition, and transportation, a mainline service in larger pipes that occurs beyond that location.

*Wood* has a lease-based oil predecessor. In *Clark v. Slick Oil Co.*, 211 P. 496 (Okla. 1923), the lease was a 1911 lease covering certain property in the giant Cushing field. The oil royalty clause required lessee Slick Oil Company to deliver “to the credit of” the royalty owners its one-eighth share of the oil “free of cost, in the pipeline to which [the lessee] may connect the well or wells, . . .” *Id.* at 497. The dispute concerned deliveries during part of 1914 and 1915, a time when oil production was so flush that Slick Oil claimed to have been unable to secure a pipeline connection and instead to have had to store the oil. *Id.* at 497-98.

Although the case primarily concerned Slick Oil’s argument that Clark’s acceptance of a posted price for a time modified the lease, removing the “free of cost, in the pipeline” language, the facts gave the court an opportunity to discuss who bears the costs of paying to store oil and make it marketable. Slick Oil argued that the modified contract made Clark bear these costs. Instead, the court held, “[i]t was just as much a part of the duty of the defendant [lessee Slick Oil] under the contract to prepare this oil for market so that it would be received by the pipe line company as it was its duty to pump the oil from the wells or drill the wells.” *Id.* at 501. This is a contract-based holding on common oil royalty language that parallels the later implied decisions for natural gas.

35. 903 P.2d 259, 261-62 (Okla. 1994).

36. *Id.* at 262-63 (again rejecting Texas/Louisiana approach that costs of moving gas from wellhead to point of sale are deductible). Although the court did not discuss the location of the pipelines in *CLO*, nor focus on where the challenged services including gathering were provided, it did cite the *Williams & Meyers* definition that gathering is the process of moving gas from the wellhead to the pipeline buyer’s “principal transmission system,” *id.* at 262 (citation omitted), *not* just until connected to some small on-lease system.

37. 954 P.2d 1203 (Okla. 1998).

38. *Id.* at 1204-10.

39. *Id.* at 1205.

40. See, e.g., the discussion in *Mittelstaedt* that seems to equate the two locations: “We said that the lessee must make the gas available to market on the leased premises (wellhead),” *id.* at 1206, even though the lease almost always is a significantly larger area than the wellhead.

41. *Id.* at 1208.

42. *Id.*

43. *Id.*

44. *Id.* at 1210.

45. *Id.*

46. *Id.* at 1209.

47. The *Mittelstaedt* court cited its statement in *Wood* that it follows the approach in Kansas and Arkansas, see *supra* note 31 & accompanying text, and then added that it agrees with both the Kansas decision *Sternberger v. Marathon Oil Co.*, 894 P.2d 788 (Kan. 1995) and the Colorado decision *Garman v. Conoco*, 886 P.2d 652 (Colo. 1994). *Mittelstaedt*, 954 P.2d at 1207-08. The only false note in *Mittelstaedt* on other states’ law is its quite incorrect, unnecessary assertion that the Kansas reasoning is “consistent” with *Johnson v. Jernigan*. *Id.* at 1207.

48. 394 P.2d 1, 4-5 (Kan. 1964).

49. The *Schupbach* dispute was over compression costs. Lessee Continental Oil separated gas on its leases and transported it to a central compressor station built off the Schupbach lease in order to compress gas from multiple leases. *Id.* at 5. The court held that the off-lease location of the compressing did not make the costs deductible:

[Continental Oil] constructed its compressor station at a central location on one of its leases and commenced compressing the gas from its adjoining leases in the area . . . [T]he fact that the compressor station was constructed under a business lease on the Newkirk section is of little consequence.

*Id.* The court noted that Continental did not consult the royalty owners on the location, size, or number of stations. *Id.*; see also *Gilmore v. Superior Oil Co.*, 388 P.2d 602, 606 (Kan. 1964). The Kansas Supreme Court observed earlier that year in another decision about this kind of arrangement that the lessee's choice to use a single large compressor station instead of small compressors at the mouth of each well does not change the deduction equation. *Gilmore*, 388 P.2d at 604.

50. For this holding, see *Rogers v. Westernman Farm Co.*, 39 P.3d 887, 905 (Colo. 2001) ("In looking to the first-marketable product rule for guidance in defining marketability, we must look to the practical implications of such a rule. In defining whether gas is marketable, there are two factors to consider, condition and location. First, we must look to whether the gas is in a marketable condition. . . . Second, we must look to location, that is, the commercial marketplace, to determine whether the gas is commercially saleable in the oil and gas marketplace").

51. For the leading West Virginia decisions, see *Wellman v. Energy Resources, Inc.*, 557 S.E.2d 254 (W. Va. 2001) and *Estate of Tawney v. Columbia Natural Resources, LLC*, 663 S.E.2d 22 (W. Va. 2006).

52. See *Wood*, 854 P.2d at 881, 883, cited in *CLO*, 903 P.2d at 261 and *Mittelstaedt*, 954 P.2d at 1207. This conclusion that lessees need to say so explicitly in the lease if they intend to deduct post-production costs of marketability accords with Professor Merrill's view. It is Merrill who also emphasized that any right to take deductions must be very clearly stated: " . . . it is erroneous to read into the royalty clauses stipulations concerning the cost of marketing and preparation which are not specifically expressed." MERRILL, *supra* note 32, at 216.

53. *Roderick*, 725 F.3d at 1219.

54. On Appellants' global use of its "assuming (without deciding)" argument, see *supra* note 13 & accompanying text.

55. Summary Judgment Issue II, *supra* note 13, at 10.

56. See generally Petition for Writ, *supra* note 13; Reply, *supra* note 13.

57. Petition for Writ, *supra* note 13, at 6-7. It is a mistake to read *Tara v. Petroleum Corp. v. Hughey* as authorizing the lessee to pay just any first-purchaser's price, as Appellants do; the first purchaser has to pay the "best price and term available to the producer at the time. . . ." *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1273 (Okla. 1981).

58. Defendants' Response, *supra* note 12, at 8, 16-17, 31 n.9.

59. *Chieftain*, 528 Fed. Appx. at 940-41.

60. *Id.* at 943; see also *Roderick*, 725 F.3d at 1219.

61. In *Fitzgerald*, the court of appeals found that marketability implicated individual questions. *Fitzgerald*, slip op. at 11-12. But it went beyond that. While at one place it stated that different services from a particular well "may or may not be necessary and may or may not be charged to the lessor," *id.* at 11 (emphasis added), thus appearing to merely present this as an open, disputed fact issue, elsewhere it stated that the amount of deductions "is affected by the services necessary to make gas from a particular well or gathering system marketable" and that "deductions will vary depending on the field and [lessee's] sales contract. . . ." *id.* at 11, 13 (emphasis added), in this way seemingly adopting Chesapeake's position on this issue. The precise amount that different services cost may vary across this 75,000-lease, 1,100 field class (or it may not: lessees often charge a postage-stamp rate), but the amount of costs usually are undisputed. They ordinarily can be taken from computerized lessee records. The fight is over the point of deductibility, a point in the chain of field services that need not vary by well, field, or sales contract.

62. *Mittelstaedt*, 954 P.2d at 1208.

63. *Id.*

64. *Abraham v. BP*, 685 F.3d 1196, 1200 (10th Cir. 2012) (citation omitted).

65. MCARTHUR, *supra* note 3, ch. 6.B. Texas is a partial exception. See *id.* ch. 6.C.

66. 475 P.2d 396 (Okla. 1970).

67. This confusion has its roots in the court's failure to describe the change that *Wood* and its successors made from the standard in *Jernigan*.

68. *Jernigan*, 475 P.2d at 398; for more discussion of *Jernigan*, see *supra* note 29.

69. *Mittelstaedt*, 954 P.2d at 1205 (discussing operations "required to make the gas marketable" as "enhancement" operations). Compare the use of "enhance" in *Garman v. Conoco*, 886 P.2d 652, 660-61 (Colo. 1994 en banc).

70. In *Mittelstaedt*, the court discussed the CLO services as compression and dehydration, which is called "enhancement operations," and claimed that they took place at the wellhead. 954 P.2d at 1205. Yet CLO involved three services, compression, dehydration, and gathering, not just two, and the CLO decision does not indicate where any of the services took place or rely on their location. (The *Mittelstaedt* court may have been thinking of the paragraph stating that the sale occurred at the mouth of the well, a statement in CLO that is part of its discussion of *Wood*, CLO, 903 P.2d at 261. One factor making confusion likely is that TXO is the lessee in both *Wood* and CLO, so references to TXO have to be examined carefully before deciding which case the CLO court is referring to.). CLO does discuss dehydration and gathering as services applied before the purchaser's pipeline, *id.* at 262, but only abstractly, and with no indication of where the pipeline or services came in CLO.

71. *Wood*, 854 P.2d at 881-82 (citation omitted).

72. CLO, 903 P.2d at 262.

73. *Mittelstaedt*, 954 P.2d at 1209.

74. For the claim that Oklahoma (as well as Kansas) classifies cost deductibility categorically by function as a matter of law, see Owen Anderson, "Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically?" Part II, 37 *Nat. Res. J.* 611, 664-65 (1997). Anderson's article was published the year before *Mittelstaedt* issued, so it is understandable why he construed Oklahoma law this way. He did not have the court's factual treatment of off-lease services before him.

75. *Mittelstaedt*, 954 P.2d at 1208.

76. *Id.*

77. *Id.* at 1210.

78. One author has noted the tension between CLO's holding and its statement of support for *Jernigan*, claimed that a "strong argument can be made" in Oklahoma that nondeductible gathering is limited to on-lease gathering, but realistically conceded that Oklahoma law may make gathering nondeductible even when off the lease, Noulles, "Post-Production Movement," *supra* note 9, at 3, 5, as Oklahoma surely does in most situations.

The Oklahoma Supreme Court also would do well to clarify that in general, a "gross proceeds" lease, even if at a "prevailing market rate," requires gross proceeds without deduction. For a recent mainstream decision on what the term "proceeds" means, see the Kansas Supreme Court decision in *Hockett v. Trees Oil Co.*, 251 P.2d 65, 71-72 (Kan. 2011). In 1970 it may have been correct that in the field in *Jernigan*, a "market rate" was "the rate at which gas is commonly sold in the vicinity of the well," *Johnson v. Jernigan*, 475 P.2d 396, 398 (Okla. 1970), and that local sales determined the "market rate." But since gas deregulation, there are many fewer sales at the well and the "market rate" or going rate for natural gas is the rate paid at downstream, after-the-plant locations, often with a premium for large volumes of gas. Moreover, Oklahoma rejected the idea that "market value" is a separate value from "proceeds" in *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269 (Okla. 1981) (see *supra* note 80 *infra*).

79. On gathering generally, see *Mittelstaedt*, 954 P.2d at 1208. For a contrary argument that gathering should be treated as indistinguishable from, and an integral part of, mainline transportation, see Noulles, "Post-Production Movement," *supra* note 9, at 4.

80. In *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1272-75 (Okla. 1981), Oklahoma rejected the Texas rule in TXO *v. Vela*, 429 S.W.2d 866 (Tex. 1968), that market value requires an analysis of market transactions outside the lessee's sales. In Oklahoma the lessee's sales set market value in the ordinary case. The author has criticized the Texas rule and the edifice the Texas Supreme Court has built upon it in John Burritt McArthur, "A Minority of One? The Reasons to Reject the Texas Supreme Court's Recent Abandonment of the Duty to Market in Market-Value Leases," 37 *Texas Tech. L. Rev.* 271 (2005).

81. On how Appellants sold their gas, see their description in Petition for Writ, *supra* note 13, at 2-3; and the trial court's very detailed factual explanation of the deductions taken by Operator Cimarex on behalf of Appellants and how those deductions changed in Summary Judgment Issue II, *supra* note 13, at 3-4, 6-9.

82. *Jernigan*, 475 P.2d at 398 ("Market rate implies the existence of a free and open market of supply and demand where there are willing sellers and buyers.").

83. In *Howell v. Texaco*, 112 P.3d 1154, 1160 (Okla. 2005), the Oklahoma Supreme Court, citing *Tara Petroleum Corp. v. Hughey*, 630 P.2d 1269, 1275 (Okla. 1981), articulated the rule that "[w]henver a producer is paying royalty based on one price but it is selling the gas for a higher price, the royalty owners are entitled to have their payments calculated based on the higher price" and added that "[w]e hold that an intra-company gas sale cannot be the basis for calculating royalty payments." It is hard to believe the court really meant to disqualify every intra-company value, because companies might use a true mar-

ket value or their proceeds in arms-length sales, to set internal prices. The court's point presumably is that there needs to be an independent source of value for the royalty. It cannot be that two employees of the same company sitting in a room and agreeing upon an internal price or, worse, as happens more than one would expect, one person acting for both companies simply filling in a price or price formula, is what courts mean when they talk about market transactions.

84. Mr. McArthur has summarized the history of gas deregulation in "Antitrust in the New [De]Regulated Natural Gas Industry," 18 *Energy L. Jo.* 1, 17-32 (1997). For a contrary view, arguing that the locus of gas deductions should be the well even if markets now are downstream of that point, see Noulles, "What Is Required?," *supra* note 9, at 3-4.

85. For samples, see the industry documents described by Judge Dickinson in *Parry v. Amoco*, 2003 WL 23306662, slip op. at \* 16 (Colo. D. Ct. Oct. 6, 2003).

86. A number of authorities have noted the lack of merit in efforts to value oil or gas based on isolated local sales. Justice Roberts, before he became Chief Justice of our highest court, held in a coal-seam deduction case involving federal leases that it makes little sense for sales of lesser volumes to control treatment of the much larger downstream sales, *Amoco v. Watson*, 410 F.3d 722, 730 (D.C. Cir. 2005), *aff'd on other grounds sub nom. BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006), the larger sales being into an interstate market that usually is the reason the field was developed in the first place. For older federal precedent, see the discussion distinguishing "'marketing'" from "merely selling" in *California Co. v. Udall*, 296 F.2d 384, 387-88 (D.C. Cir. 1961)). It is in this sense that it was rational for a Colorado jury in *Rogers v. Westerman* to find that even if gas sold at the well was marketable there, the remaining unsold gas was not. *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 894 (Colo. 2001). Judge McAnanay, of the Kansas court of appeals, has wisely pointed out that given that "there is some point on every [demand curve] where somebody would be willing to pay for the item," the idea of an abstract marketability is "superfluous." *Fawcett v. Oil Producers, Inc.*, 306 P.3d 318, 327 (Ct. App.) (McAnanay, J., concurring), *rev. granted* (Kan. S. Ct. Dec. 27, 2013). Indeed, without some definition, the idea is meaningless if any sale at all, at any price, establishes that a product is marketable.

In contrast, the idea that "[g]as can be marketable at the well if the gas is of a type commonly sold in the vicinity of a well," Noulles, "What Is Required?," *supra* note 9, at 5, even if no sale occurs there, encourages basing value on hypothetical instead of actual sales.

87. 2003 WL 23306663 (Colo. D. Ct. Oct. 6, 2003).

88. *Id.* at ¶¶9-12 (citing *Rogers v. Westerman Farm Co.*, 29 P.3d 887, 905-12 *passim*).

89. *Id.* at ¶¶14-20.

90. *Id.* at ¶19.

91. Appellants did not maintain their fourth point of error, concerning statutory interest, so the Supreme Court did not address it. Supreme Court Remand Order, *supra* note 10, at 2.

92. Petition for Writ, *supra* note 13, at 2, 9-10; Reply, *supra* note 13, at 4.

93. In their summary judgment response, Appellants claimed that Cimarex "[s]ince its creation in 2002" had followed a "conservative" policy of not deducting most field service costs. Defendants' Response, *supra* note 12, at 9, 13-14.

94. The arrangement between Cimarex and Enogex was complex, changing as it did in the middle of the class period, but it was undisputed and the trial court put it in the record in its Issue II summary judgment order. For the Cimarex/Enogex gathering and processing arrangements before May 2008, see Summary Judgment Issue II – Form of Contract, *supra* note 13, at 6-7. Cimarex, acting for all Appellants, once had deducted all of the fees it was charged, but in 2012 it notified the court that it would refund the cash fees and the fuel gas fee, leaving aside only a 5% deduction of the gas heating value and the NGL value. *Id.* at 7-8. It contracted separately with Enogex for prepro-

cessing services and for processing. For the period beginning in May 2008, Cimarex retained its preprocessing "Service Agreement" with Enogex and absorbed the fees itself, but Enogex still received the liquids "uplift." *Id.* at 8. In February 2012, Cimarex changed the processing arrangement so that Enogex now paid it on NGL value, but minus a cash fee and gas used as fuel in the processing plant. *Id.* at 8-9. Cimarex charged these new fees proportionately to the royalty owners. *Id.* at 9. Appellants claimed that beginning in April 2012, they began sharing revenues on their NGL sales with Plaintiffs. Defendants' Response, *supra* note 12, at 9-10.

95. See *supra* note 13.

96. *Pummill* is a bad case for Appellants to raise a POP issue. They never sold their gas at the well. Instead, they hired the midstream company Enogex to compress, partially dehydrate, gather, process, further dehydrate, and further compress their gas before it is turned over to the Operator, Cimarex, one of Appellants, at the tailgate of the processing plant. Summary Judgment Issue II, *supra* note 13, at 3-4. Cimarex then sold the gas on behalf of Appellants. One isolated lessee, Bloch Petroleum LLC, did sell its gas to Enogex at the well on a "percentage of proceeds" basis, but it settled with the lessors by paying them full damages and admitted in its Answer that it did not dispute the plaintiffs' factual allegations or their legal position. *Id.* at 4-6. Apparently because of sales like Bloch's, Appellants called Enogex's pipeline a "purchaser's" pipeline, Petition for Writ, *supra* note 13, at 7 n.6, even though they did not sell any of their gas into that pipeline, which was used to provide marketability services to them.

97. Petition for Writ, *supra* note 13, at 9-10; Reply, *supra* note 13, at 4.

98. The Parrish lease requires payment from each gas well on "all gas used off the premises"; the Pummill lease on all gas "used off the premises, or used in the manufacture of any products therefrom . . ." Summary Judgment Issue III – Fuel Gas (Aug. 24, 2012) (granting partial summary judgment that Defendants owe royalties on gas used in gathering systems and in the plant). "Manufacture" is older language used to describe processing.

99. Appellants did not mention the "used off the lease clause" in their initial brief. See Petition for Writ, *supra* note 13, at 9-10. In their Reply, they claimed that the clause would not apply to off-lease use "by a third party purchaser." Reply, *supra* note 13, at 4, a position that seems odd when Enogex was acting as a field-service company to them, not as a third-party purchaser, and it was using the gas on their behalf.

## ABOUT THE AUTHOR



John McArthur is based in Berkeley, Calif. and is licensed in Texas, California and Alaska. He has handled energy and other commercial cases for 31 years. He has served as arbitrator and expert in many oil and gas cases. Mr. McArthur has a Ph.D from the University of California (Berkeley) and received his J.D from the University of Texas School of Law. He has published many articles on legal and economic aspects of the oil and gas industry.

# OBA Pilot Project to Reach Out to Less Advantaged Students

By Lori Rasmussen

“Who wants to be a millionaire?” is the theme of a brand new OBA outreach effort targeting students likely to have trouble paying for college. The theme highlights the statistic showing workers with a college degree make on average up to \$1 million more in their lifetimes than those with a high school-only education. The project consists of concentrated efforts to promote the Oklahoma’s Promise scholarship program, which offers free college tuition to qualifying students.

The promotion project was conceived by Supreme Court Justice Tom Colbert, and its development began under 2014 OBA President Renée DeMoss. 2015 President David Poarch has identified it as one of his top agenda items during his leadership year.

“Fostering higher education among our state’s citizens is an important mission for the bar,” said Mr. Poarch. “An educated populace is more likely to understand our system of government, including its three distinct branches. Our fair and impartial judicial system depends on the preservation of an independent third branch and on citizens who grasp its importance.”

The Oklahoma’s Promise program is administered by the state Regents for Higher Education. Requirements are straightforward: A student’s family income may not exceed \$50,000 per year. Students must enroll in eighth, ninth or 10th grade and must maintain a 2.5 GPA. They must also stay out of trouble and take the required college prep classes.

The bar’s pilot project will provide detailed information about Oklahoma’s Promise to targeted students. Four schools with low partici-



pation in Oklahoma’s Promise were identified and selected as the sites for school assemblies where the benefits and requirements of Oklahoma’s Promise will be explained. The OBA has partnered with the Oklahoma City Thunder and Sonic Corp. to expand the project’s

appeal. Students who attend the assemblies will receive an officially licensed OKC Thunder backpack. The backpacks will be filled with information for the parents along with a program application. Once a student has signed up, his or her family will receive a \$20 Sonic gift card.

“We are also partnering with our county bar associations to make this program a success,” said Mr. Poarch. “Completing necessary paperwork and providing tax information can often be a daunting challenge for families. Volunteers from the local bars will be on hand during





parents' rights to assist with the process. Lawyer participation will ensure that these kids get enrolled in the program and get on track for education and career success."

Assemblies are currently scheduled at Clinton Middle School, Seminole Middle School and Douglass Mid-High in Oklahoma City. A date will be set soon for a presentation at Tulsa Central Junior High School. Bar leaders and school personnel will be making presentations to students; volunteer lawyers will be needed to work with parents to assist with signup.

Though the project is currently planned for just four cities, its success will determine whether it should be expanded statewide. Because the bulk of the funds to implement the project are coming from corporate donations, the bar's financial commitment is low — but huge dividends could result.

"When students complete college, they are far less likely to be involved in drugs or crime," said Mr. Poarch. "They are far more likely to raise their families in healthy environments. They get involved in their community. Everyone wins."

*Ms. Rasmussen is OBA assistant communications director.*

## Volunteer Opportunities

Volunteer lawyers will be needed to assist parents with sign up at the following dates and locations:

Feb. 17 from 4-7 p.m. at Clinton Middle School; contact Luke Adams, 580-323-3964.

*Thanks to those Custer Country Bar members who have already signed up!*

*Andy Carruth  
Juan Garcia*

*Richard Phillips  
Judge Jill Weedon*

March 3 from 5:30-8 p.m. at Douglass Mid-High; contact Debbie Gorden, executive director, Oklahoma County Bar Association, 405-236-8421.

March 9 from 4-7 p.m. at Seminole Middle School; contact Seminole County Bar Association President Vic Kennemer, 405-257-3304.

Date to be determined at Tulsa Central Junior High — contact Kevin Cousins, executive director, Tulsa County Bar Association, 918-584-5243.

## Save the Date!

### OBA Solo & Small Firm Conference

### June 18-20, 2015



# Legislative Monitoring Committee Kicks Off Its Efforts

By *Duchess Bartmess*

The first session of the 55th Oklahoma Legislature has begun its work, and the Legislative Monitoring Committee is beginning its work. In excess of 2,000 bills and joint resolutions that can potentially become law have been introduced for consideration and action during this session.

All introduced measures are not necessarily of significance to the practicing Oklahoma lawyer. The criteria for review of proposed legislation remains clarity of language, compliance with constitutional mandates and concerns regarding potential unintended consequences. The Legislative Monitoring Committee tracks only those measures recommended to them. Only those measures which will have the full force and effect of law are considered. The introduced measures which will not be reviewed and tracked without special request are:

- simple resolutions
- concurrent resolutions
- measures naming roads, bridges and highways
- appropriations and budget measures
- sunset measures and
- state retirement systems measures.

The recommendations are based on the significance of the bill or joint resolution to the practice of law and the administration of justice.

The bulk of recommended measures that will be reviewed and tracked during the session



came from the participants in OBA Legislative Reading Day. This year that meeting was held on Saturday, Jan. 31. The meeting was attended by Legislative Monitoring Committee members, committee and section members and other interested OBA members. As with past meetings, the purpose was to recommend which introduced bills and joint resolutions should be reviewed and tracked by the Legislative Monitoring Committee.

It was a very productive meeting. Several of the participants commented that they received new and helpful information on the legislative process and the importance of following significant legislation as it progresses through the legislative process. In addition to being a part of the decision-making process regarding bills and joint resolutions to be read, reviewed and tracked throughout the session, participants were provided with lunch and received CLE credit.

Each year a number of lawyers interested in potential new laws or changes to existing laws take the time and opportunity to participate in this hands-on meeting. Participants worked in small groups by general area of practice. The groups were divided into general categories that correspond to the committee's subcommittees, which are:

Business Law Issues  
Civil Law Issues

*continued on the next page*

Criminal Law Issues  
Family Law Issues  
General Government Issues  
Natural Resources Issues  
Property Law Issues.

This article was written two days after the Legislative Reading Day, so the lists of measures to be reviewed and tracked by the Legislative Monitoring Committee were not completed. However, the following introduced measures are a sampling of the introductions which serve to demonstrate the wide range of subject areas being considered this session and reviewed by the OBA Legislative Reading Day groups.

**SB 768** Repeals provisions in Title 74, State Government, which established an advisory committee to the Legislature and the governor designated commissioners of the state of Oklahoma to the National Conference of Commissioners on Uniform State Laws.

**SJR 28** Adds a new section 7A to Article 23 of the Oklahoma Constitution, Miscellaneous, limiting recovery of damages or claims against an insurer for liability for motor vehicle accidents if claimant is not in compliance with the compulsory insurance law.

**HB 1056** Adds two new sections of law to Title 18, Corporations, creating a "Shareholders Bill of Rights Act."

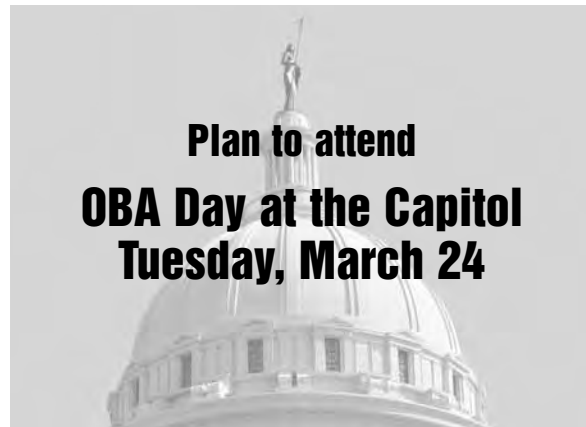
**HB 1119** Adds a new section of law to Title 36, Insurance, relating to title insurance creating definitions relating to recording and release of mortgages.

**HB 1050** Amends section 753 of Title 47, Motor Vehicles, to require court order before person under arrest refusing to submit to test for determining alcohol concentration in breath or blood except in cases of serious personal injury or death.

**HB 2199** Adds a new section to Title 12, Attorneys and State Bar, titled "Lawyers Right to Work Act."

### **MORE INFORMATION ON PENDING BILLS**

Based on recommendations from the Legislative Monitoring Committee and other OBA Reading Day volunteers, two lists containing short bill summaries have been compiled and are available online at [www.okbar.org/member/Legislative](http://www.okbar.org/member/Legislative). A Sampling of Pending Legislation contains 62 bills of general interest



and a Watch List contains 505 bills. The watch list will be updated weekly. Plus, coming soon are shorter lists focused on practice areas.

Both lists are informational only and are not a statement of support or opposition for any items. The lists are not intended in any way to be a statement of OBA policy or to be inclusive of every issue that might affect the practice of law in Oklahoma.

Also on the OBA's legislative report webpage are links to the Legislature's website to track bills and how to contact your legislators.

### **OBA DAY AT THE CAPITOL**

Even if you were unable to attend the 2015 Legislative Reading Day, there are still opportunities to become informed on pending legislation. All OBA members are encouraged to come to Oklahoma City to participate in OBA Day at the Capitol on Tuesday, March 24.

This is a great opportunity to meet and speak to your senator and representative regarding issues important to you. Lunch will be provided at the bar center for attendees. An RSVP is required. Email [debbieb@okbar.org](mailto:debbieb@okbar.org) or call Debbie Brink at 405-416-7014; 800-522-8065 to add your name to the list. So, put this date on your business calendar and come and participate — let your voice be heard.

### **ABOUT THE AUTHOR**



Ms. Bartmess practices in Oklahoma City and chairs the Legislative Monitoring Committee. She can be reached at [duchessb@swbell.net](mailto:duchessb@swbell.net).

# Legislature Files New Measures to Change or Eliminate the Judicial Nominating Commission

By John Morris Williams

On New Year's Eve in 1879 Thomas Edison unveiled his version of the incandescent light bulb. This invention had a profound effect on the world. Edison's light bulb was the first source of dependable light that did not include an open flame. The story gets complicated after that, with the development of power grids, generating plants, electric transmission lines and the debate of direct current versus alternating current. A single invention, a good idea, has had profound results. It started as a means to bring a little light into the world — and ended up with most of the world being wired and using that wiring for many other things besides powering a light bulb.

In 1967 the people of Oklahoma were introduced to a new concept. After three years of struggle and debate, the concept of taking elections and politics out of our courts was put to the people. While the result left trial judges on the ballot for popular elections, at least they were non-partisan. A single innovation, a good idea, has had profound results. The creation of the Judicial Nominating Commission started as a means to clean up a bribery and corruption scandal and ended up creating a judicial selection system for our highest



**“The very touchstone of our democracy is under attack.”**

courts that has the greatest safeguards against public corruption.

The best safeguard against public corruption is picking the right people. The JNC for close to 50 years has done a pretty

good job of selecting people of integrity to serve on our highest courts. Those who wish to eliminate or politicize the JNC have no regard for the quality of the applicants. There is an assumption that if one can campaign well enough or has enough political capital, that person can be a qualified judge or justice.

The obtaining of the bare qualifications to be a judge or justice does not make one the most qualified. Edison did not invent electricity. What he possessed was the innate problem-solving ability to create a device to shed some light without burning down the house. The purpose of the JNC is to select the most qualified applicants who possess the ability to shed some light on serious legal issues without regard to politics and politicians. To have it any other way would create a device that surely would burn down the house of justice and the Constitution.

Yes, I mentioned the Constitution. Both the United States and Oklahoma Constitutions contain a due process clause. Countless opinions have affirmed that the primary touchstone of due process is a fair hearing. A fair hearing does not mean a perfect hearing. It does not mean a hearing where an error may not

*continued on the next page*

be made. A fair hearing is a hearing that when you walk into the courtroom, the facts and the law will be heard and a decision reached based upon those two things and nothing else. I would submit that a decision influenced by campaign contributions, or threats of retribution or promises of large contributions in the next popular election, is not a fair hearing. Yes, I said it. The very touchstone of our democracy is under attack.

I have read the reports and the transcripts of the Oklahoma Supreme Court scandal of the 1960s. None of those who pro-

pose to change and politicize our system have done so. It appears that the result is so clearly desired that the facts and the law do not matter. The law requires a fair hearing. The facts show that bribes disguised as "campaign contributions" resulted in the biggest judicial scandal in the history of the United States. The facts show that since we stopped having contested appellate judge elections, we stopped having judicial bribes at that level.

### **IRONY EXISTS**

There is a certain irony that in a place blessed with natural gas,

that all our homes are illuminated by electric light bulbs. Somehow everyone learned that open flames are more apt to burn down the house. There is an even greater irony that the place that experienced the greatest judicial scandal in the history of our nation wants to return to the open flame of a politicized judiciary.



To contact Executive Director Williams, email him at [johnw@okbar.org](mailto:johnw@okbar.org).

## **Traveling Tribal Judge Specialty Court**

The Kaw Nation is seeking candidates for a part-time Specialty Court Judge, who will preside over cases involving domestic violence and sexual assault cases.

Qualifications for this position include:

Juris Doctorate from an accredited law school, together with an additional three years related experience is required. Qualified candidates will have the ability to identify, interpret and apply legal principles and precedents to difficult legal problems and must be able to concisely and accurately communicate, both orally and in writing. Candidates must have judicial experience handling domestic violence and sexual assault cases. The successful candidate will be required to learn tribal laws and customs unique to the Kaw Nation and must be able to establish and maintain an effective working relationship with others. Candidates must be a member in good standing of the bar of the Supreme Court of the United States, or of any United States Court of Appeals, or of any District Court of the United States, or a member in good standing of the bar of the highest court of any state of the United States and need not be a citizen of the Kaw Nation.

Background checks and drug tests will be administered. Candidates must have a valid driver's license, malpractice insurance and the eligibility to be insured under by the Kaw Nation's insurance policies is required.

Applications can be found at [http://kawnation.com/?page\\_id=151](http://kawnation.com/?page_id=151) or contact Human Resources at the Kaw Nation, (580) 269-2552 for a list of documents required for consideration.

Position is open until filled.



# Uniformity vs. Creativity

By Jim Calloway

COMES NOW the writer, and for his February Law Practice Tips column in the *Oklahoma Bar Journal* alleges and states as follows.

That is lawyer-speak for “Greetings.” I recall during law school when I was working for a law firm, I asked an experienced lawyer why we started all pleadings with “COMES NOW the Defendant” when the pleading already had a title like “Defendant’s Motion for Summary Judgment.” The response, which will surprise no lawyer, was some version of because that is how it has always been done.

I understand that many lawyers now omit “COMES NOW” from their pleadings. But I also note that it took a court rule change to get lawyers to stop using legal size paper for their pleadings in Oklahoma courts.

The study of law involves great focus on legal precedent. The late University of Oklahoma professor Dwight Morgan in my civil procedure class described the law as a great bird flying forward that only navigates by looking backward. I’ve quipped before that only works if there’s not a new wall in front of the bird. Certainly good lawyers look forward as well as backward.

But sometimes our zeal for perfection and protecting our client’s interest can lead to interesting results. Let some

judge somewhere in the dicta of a dissenting appellate opinion suggest that the omission of a certain word would change the result and, over the next several months, that particular word will find its way into more and more documents drafted by lawyers. That it was the dissent really does not matter because we lawyers all wonder if that thought could turn into a majority opinion somewhere someday.

“...sometimes  
our zeal for  
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interesting  
results.”

So we lawyers find ourselves in the position of using three or four words when perhaps one would do. You know the examples well.

- “grant, bargain, sell and convey”
- “give, devise and bequeath”

This is not to suggest any of those words should now be omitted. That is a substantive

law issue and I am not commenting on it. (See? I do it, too.)

The perfectly good rationalization is “what harm can an additional word meaning essentially the same thing inserted into a series do?” But the same thought can then apply to adding a few additional clauses or sentences. Fast forward several years and a contract that some say “should” only be a few pages becomes a 20-page contract and the costs of several lawyers and client representatives reviewing the contract carefully is an expense which has now increased. The lawyers properly point out that the more detailed the contract the better it protects the parties to the contract.

But we have to recognize a competing value today is appreciation of brevity and the ongoing time-management challenges that both lawyers and clients feel. How many times have you found an article of interest but only made time to read the opening executive summary?

Lawyers’ creativity is unbounded when negotiating a deal, but when the documents are prepared, they are unlikely to be so creative. Following the standard path and using the traditional language protects everyone against an unforeseen outcome.

In a blog post last summer, I asked, “What if the clients

decided to provide the templates for their legal work?"<sup>1</sup> That thought grew out of a resource posted online by the National Venture Capital Association. They made their model legal documents for venture capital financing freely available for anyone to download and use. Among these are certificate of incorporation, indemnification agreement, investor rights agreement, management rights letter, model legal opinion, right of first refusal and co-sale agreement, and stock purchase agreement.

As the NVCA noted on their webpage at the time:

"By providing an industry-embraced set of model documents which can be used as a starting point in venture capital financings, it is our hope that the time and cost of financings will be greatly reduced and that all principals will be freed from the time-consuming process of reviewing hundreds of pages of unfamiliar documents and instead will be able to focus on the high level issues and trade-offs of the deal at hand."<sup>2</sup>

Their point is simple. If everyone in the venture capital community started from these forms, they would be much easier to read and review for everyone. One could see a time when negotiations also would be made more efficient by everyone starting with the same document. (e.g. "We propose to modify standard paragraph 14 by adding X and Y.")

This type of uniformity could save this client community a lot of money. It also could decrease revenues for the law firms that did this type of work on an hourly basis. But if that decrease was from reducing the

hours that lawyers spend in repetitive proofreading, certainly many lawyers would make that tradeoff.

Somewhere at least one law firm no doubt responded to the NVCA standard template forms by saying "We're not doing that. We can only guarantee the quality of our work and our representation of you by using our processes, not by filling in the blanks on forms provided by others." Interesting discussions no doubt followed. But certainly lawyers contributed to those templates from NVCA.

### UNIFORMITY CAN BE A GOOD THING

So you may ask what does this mean for you? Your clients are not going to create any online template sharing group and ask you to participate.

Many solo and small firm lawyers enjoy not being a part of a larger enterprise because

they feel they can have more freedom and be more creative. But let me share with you one of the most common complaints I hear from law firm staff, working in law firms of all sizes. It is about the lack of uniformity. They don't necessarily use that word but they mention the concept to me repeatedly.

- "We have to set up the files one way when they are Bob's clients and a totally different way when they are Fred's clients."
- "We can't cross train anybody to cover for vacation or illness because Mary insists that her matters be handled differently than everyone else in the law firm."
- "Jim doesn't handle a certain type of matter frequently, but when he does we have to go search in his

## OBA MAP Online Reading Recommendations

My column in the January/February *Law Practice* magazine is titled "It's Time to Love Technology." And, for lawyers, it really, really is. <http://goo.gl/nLHq31>

Also of great interest in that issue of *Law Practice* magazine is "11 Tips on How to Cease Representing a Troublesome Client" by legal ethics guru Michael Downey. <http://goo.gl/SS8Uvo>

"Five Thoughts on the Future for Solo and Small Firm Lawyers" was my contribution to Attorney at Work's "Friday Five" series. Surely every lawyer understands the need to think about and plan for the future. <http://goo.gl/cG2Ju9>



"Facing up to the challenge: It's time to prepare law students for their profession" is the title of a provocative piece in the *ABA Journal's* "The New Normal" section. The author, Michael Roster, is a former managing partner of Morrison & Foerster's Los Angeles office and co-chair of the firm's financial institutions practice group worldwide. <http://goo.gl/Md0l5d>

old files because he wants things done differently than everyone else in the law firm."

- "We have five lawyers in the firm and so we have to use five different forms as the starting point for drafting a relatively routine document."
- "Deadlines and timelines for legal assistants are completely different for similar projects, depending on the lawyer."

Sound familiar? It sounds familiar to every law firm consultant and many law firm administrators.

Pam Woldow and Doug Richardson co-authored the book *Legal Project Management in One Hour for Lawyers* for the American Bar Association. They recently did a blog post titled "LPM for Associates: The View from Ground Level."<sup>3</sup> They included the observation that one of the major frustrations that law firm associates experience is "the need for every partner to have things done in his or her own unique way. In the workshops, associates reported frequent false starts, do-overs, write-downs and dressing-downs resulting from a lack of consistency in how their work is assigned, managed and measured. They loved the uniformity (of even some of the basic steps) that LPM (legal project management) can offer."<sup>4</sup>

If your law firm suffers from the "every lawyer does it differently" syndrome, it is time to start the road to standardiza-

tion. There is simply no reason for client files to be set up and managed differently for each individual lawyer. You are missing out on one of the benefits of being in a law firm by not standardizing. There may be very good reasons for client file setup to differ for different types of legal matters. But even then there should be some standardization. It's in your best interest for every staff person to be able to assist any lawyer in an emergency.

If there are different basic internal forms used as document drafting starting points, then it is time to start ironing out those differences. Differences in substantive provisions should be discussed and resolved, leaving the final work product as the best that all of the lawyers combined have to offer your clients.

This may sound like a small thing and a low priority. But it is really quite significant. The future of law firms involves better legal project management and process improvement. Automating repetitive tasks is one way to improve efficiency, and law firms will find themselves involved in automation projects. You cannot afford to set up five different pathways of automation when only one is needed.

Recently the LexisNexis Business of Law Blog profiled OBA Law Office Management and Technology Section Chair Cheryl Clayton who practices in Noble. The profile outlined Ms. Clayton's incorporation of the LexisNexis practice management solution TimeMatters into

her practice. The title of the profile was "Why Being Brutal is Best: A Solo Attorney on Efficiency"<sup>5</sup> and the theme was that small firm lawyers have to be brutal in their pursuit of efficiency. I couldn't agree more. You want to take time while counseling your clients and when making important strategic decisions. But lawyers should be brutally efficient with office information processing and managing client data.

Automating and improving day-to-day operations should free the lawyer to have more time to communicate with the clients and to focus the lawyer's expertise on the high value work of creatively solving problems for the client.

Uniformity can sometimes be the antithesis of creativity. But done correctly in a law firm setting having uniform policies, procedures and documents, uniformity can improve your creativity and improve the legal services delivered to the client.

And it might start with something as simple as a group decision on whether the firm keeps COMES NOW or jettisons it.

*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](mailto:jimc@okbar.org). It's a free member benefit!*

1. <http://goo.gl/yT7CVu>

2. *Id.*

3. <http://goo.gl/b8T6Ys>

4. *Id.*

5. <http://goo.gl/qSuAdX>

# Ethics Highway 1

By Travis Pickens

As Oklahoma lawyers, I promise each of you has the gift of lawyering. It is too long and arduous a process to become a lawyer for you not to possess a unique set of skills and intelligence. I have been in this job five and a half years and spoken to thousands of lawyers, and not once have I come away with the sense that the lawyer somehow fooled the law schools' admissions officers or our Board of Bar Examiners.

Lawyers don't go to law school to become criminals. A professional life is a long slog, and we must perform at a very high level for an extended time, typically several decades, often with some very difficult clients. Unsurprisingly, I have seen several lawyers lose their way and it is often because of this that their names end up at the top of a case before the Oklahoma Supreme Court in a disciplinary proceeding. They are of course not bad people; typically, they are exceptionally good people. They were excellent students and were examined as to character and fitness before they were granted a license. They have the skills to be lawyers — even great lawyers — but the difficult path of the practice, with seeming perfection the standard and near-perfection the best one can expect, along with other factors, often pulls them into trouble over time. Note how most

of the disciplinary cases are the result of middle-aged behavior and thinking after a few hard crunching decades in the world, not that of a new lawyer. As time goes on, many of us face addictions, anxieties, disappointments, depressions, reversals, indiscretions, frustrations, infuriations and other traps that are along the dangerous winding road of a professional life.

Indeed, a lawyer's life is often like California's Highway 1; there are miles of stunning ocean vistas framed by water-painted beaches and a luminous sky, but to see it you must hew to a zig-zagging two-lane road with no shoulder along the edges of steep cliffs towering above jagged rocks and crashing waves hundreds of feet below.

The important thing to remember on our shared highway of professional life is that because of what you have accomplished and who you are as a person, you deserve to be here. Remember also that the most difficult challenge after you are licensed, and it is difficult, is to maintain the right state of mind over the entirety of your career. To do that, you must be ever vigilant, but you must relax enough to enjoy the drive. You must see the Rules of Professional Conduct as rules for success, not a limitless

set of school zones and speed traps. You must trust that the Office of General Counsel and our Supreme Court are looking first to protect the public, not take away your license. You must choose well your fellow travelers, your colleagues and your clients. You must pull over at times to savor what you are passing through; it is often a gorgeous view. And when you arrive at your destination many, many miles and cases hence, you will have been on a journey that very few others are privileged to have. Safe travels.

*Editor's note: Travis Pickens resigned as OBA ethics counsel in January and has returned to private practice. The position is currently vacant.*

## ABOUT THE AUTHOR



Travis Pickens is a lawyer in private practice in Oklahoma City. He served as OBA ethics counsel from August 2009 – January 2015. He has served as co-chair of the OBA Work/Life Balance Committee and as vice-chair of the Lawyers Helping Lawyers Assistance Program Committee. He is a 1984 graduate of the OU College of Law.

# Meeting Summary

*The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Dec. 12, 2014.*

## HONORED FOR SERVICE

President DeMoss recognized guests Stephen Beam and Melissa DeLacerda for their six years of service on the Professional Responsibility Commission during which time a new general counsel was hired and the diversion program was created. Before this meeting they attended their final PRC meeting, at which they received plaques honoring their service. President DeMoss noted they served during a tumultuous time on the commission, and their leadership added stability to the PRC. Board members clapped and gave them a standing ovation.

## REPORT OF THE PRESIDENT

President DeMoss reported she attended the November board meeting, OBA Annual Meeting, Tulsa County Bar Association reception at which she was honored, president's breakfast, OBA General Assembly, House of Delegates, OBF reception, Annual Meeting luncheon, first meeting of the new Master Lawyers Section, OBA Law Schools Committee meeting, meetings on legislative/judicial issues, women in law Tulsa gathering and Professionalism Symposium. She made a presentation to county bar presidents at the

Annual Meeting and prepared an application to the Supreme Court regarding the Clients' Security Fund.

## REPORT OF THE VICE PRESIDENT

Vice President Shields reported she attended the OBA Annual Meeting, president's breakfast, annual luncheon, OBA House of Delegates, Oklahoma County Bar Association December board meeting and OCBA holiday party. She also finalized materials for the "Planning Ahead Guide" and dues statement insert, in addition to working on a bar journal article with Ethics Counsel Travis Pickens on that topic.

## REPORT OF THE PRESIDENT-ELECT

President-Elect Poarch reported he attended the OBA Annual Meeting, first meeting of the new Master Lawyers Section, presentation to county bar presidents and meetings on legislative/judicial issues. He also interviewed legislative consultant candidates and presented the proposed 2015 budget to the Supreme Court for its approval.

## REPORT OF THE PAST PRESIDENT

Past President Stuart reported he attended the November board meeting and Professionalism Symposium. He also worked on arrangements for the board's has been party.

## REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Annual Meeting functions, House of Delegates, General Assembly, OBA staff luncheon and monthly celebration, meetings on judicial and legislative issues, meetings with Seminole and Clinton Public Schools superintendents regarding the Oklahoma's Promise project, staff directors meeting, Bar Association Technology Committee meeting, phone conference with Diversity Committee leadership, Supreme Court conference on the 2015 OBA budget, Supreme Court technology group meeting and Oklahoma County Bar Association holiday party.

## BOARD MEMBER REPORTS

**Governor Dexter**, unable to attend the meeting, reported via email she attended the OBA Annual Meeting, Tulsa County Bar Association reception honoring President DeMoss, OU law school luncheon, president's breakfast, annual luncheon, OBA House of Delegates and TCBA holiday party. **Governor Gifford** reported he attended the November board meeting, OBA Annual Meeting, Section Leadership Council meeting, November Tulsa County Bar Association reception for President DeMoss, Oklahoma County Bar Association Christmas party and Oklahoma



County Criminal Defense Attorneys Christmas party. He gave a report to the Oklahoma County Bar Association board of directors regarding OBA matters. **Governor Hays** reported she attended the OBA Annual Meeting, General Assembly, House of Delegates, OBF reception, Annual Meeting luncheon, OBA Family Law Section Annual Meeting at which she received the Chair Award, OBA FLS Trial Advocacy planning meeting and Section Leadership Council meeting at which she was elected 2015 vice chair. She reported to the Tulsa County Bar Association board of directors regarding OBA Board of Governors matters. She participated in OBA FLS CLE planning and in the government relations interview process. She met with the Women in Law Committee vice chair to start 2015 planning. **Governor Jackson** reported he attended the OBA Annual Meeting, Tulsa County Bar Association reception honoring President DeMoss and Garfield County Bar Association meeting. He also toured the new OCU law school. **Governor Kinslow** reported he attended the Clients' Security Fund and Member Services Committee meetings. **Governor Knighton** reported he attended the November board meeting, reception for President DeMoss, OBA Annual Meeting, December Cleveland County Bar Association meeting and Cleveland County District Court Legislative-Judicial Summit. **Governor Marshall** reported he attended the November board meeting, November Tulsa County Bar Association reception for President DeMoss, various OBA Annual Meeting events including section meetings, General

Assembly, president's breakfast and annual luncheon. He also attended the Professionalism Symposium. **Governor Parrott** reported she attended the OBA Annual Meeting, November board meeting, TCBA reception for President DeMoss, Oklahoma Bar Foundation Fellows reception, Law Schools Committee meeting, OCU alumni luncheon at which she presented the OBA award to the outstanding senior law student, president's breakfast, annual luncheon, General Assembly and House of Delegates. **Governor Sain** reported he attended the McCurtain Memorial Hospital Foundation board meeting, McCurtain County Bar Association luncheon, November Board of Governors meeting, OBA Annual Meeting and Warrior Club meeting. **Governor Smith** reported he attended the November board meeting, November Oklahoma Bar Foundation reception, OBA Annual Meeting and Professionalism Symposium. **Governor Stevens** reported he attended the November Board of Governors meeting, OBA Annual Meeting, OBF reception, General Assembly, House of Delegates, December Cleveland County Bar Association meeting, Cleveland County Bar Association legislative luncheon and Cleveland County Bar Association Christmas party. **Governor Thomas**, unable to attend the meeting, reported via email she attended the November board meeting, OBF reception, president's reception, Oklahoma Fellows of ABF dinner, Credentials Committee meeting, Section Leaders Council meeting, TU law school luncheon at which she presented the OBA Outstanding Senior Student Award, Three-Party Celebra-

tion evening event, president's breakfast, House of Delegates at which she served as a Washington County delegate and as chair of the Tellers Committee, OBA annual luncheon and various hospitality suites and events at the OBA Annual Meeting.

## YOUNG LAWYERS DIVISION REPORT

Governor Hennigh reported the YLD held its last meeting of the year at the OBA Annual Meeting. At the meeting President DeMoss and Governor Hays were honored as YLD Fellows. He said the Kick It Forward program has been launched and is receiving attention from the ABA.

## REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported no litigation against the OBA is pending. The Professional Responsibility Commission held its last meeting for 2014 this morning. Oklahoma City lawyer Angela Bahm was elected chair, and non-lawyer Tony Blasier of Oklahoma City was reelected vice-chair. A written report of PRC actions and OBA disciplinary matters for October was submitted to the board for its review.

## BOARD LIAISON REPORTS

Governor Kinslow reported the Member Services Committee heard a proposal from Meridian One for a change to its contract regarding the UPS member benefit, and the committee declined to recommend a change. Executive Director Williams reported the Diversity Committee is considering holding a retreat early next year to reexamine the scope of its efforts. Executive Director Williams reported the Bar

Association Technology Committee is looking at software for MCLE and has received requests for proposals. One bidder, the Pennsylvania CLE Board, an organization separate from the state bar association, has developed its own MCLE software. The committee has authorized the expenditure of \$5,000 plus expenses for the bidder to send representatives to the OBA to review Oklahoma's MCLE process and evaluate whether their software is a good fit for the OBA.

### **PROPOSED AMENDMENTS TO GUIDE FOR COMMITTEES AND SECTIONS**

Section Leaders Council Chairperson Roy Tucker introduced Taxation Law Section Chair Abby Dillsaver and Intellectual Property Section Chair Barbara Krebs Yuill. Mr. Tucker said the council was proposing two changes to the Guide for Committee and Section: 1) to increase the amount of money retained in a section's contingency fund, and 2) to increase the amount of excess funds a section may accumulate over a three-year period. Mr. Tucker said the changes will make it easier for a section to accumulate more funds over several years for a large event or project. The current procedure for identifying and notifying sections out of compliance was reviewed. The board approved the amendments.

### **PROPOSED AMENDMENTS TO TAXATION LAW SECTION BYLAWS**

Section Chair Abby Dillsaver said the section is requesting changes to its bylaws because geographic requirements for officers have become too rigid

for volunteers willing to serve. She said the other change requested is to provide more flexibility in voting. The board approved the proposed amendments.

### **DISTRICT ATTORNEYS COUNCIL APPOINTMENT**

The board approved President DeMoss' recommendation to appoint John Wampler, Duke, to complete the unexpired term of Dennis A. Smith, whose term expires June 30, 2015.

### **2015 APPOINTMENTS**

The board approved the following appointments as recommended by President-Elect Poarch:

Board of Editors – Reappoint Melissa DeLacerda, Stillwater, as chairperson, term expires 12/31/15; reappoint Mark Ramsey, Claremore, District 1; appoint Amanda Grant, Spiro, District 2, and Renée DeMoss, Tulsa, District 6, as associate editors, terms expire 12/31/2017.

Clients' Security Fund – Reappoint Micheal Salem, Norman, as chairperson, and William Brett Willis, Oklahoma City, as vice chairperson, terms expire 12/31/2015. Attorney members – Reappoint Micheal Salem, Norman, Lincoln Clay McElroy, Oklahoma City, Luke Gaither, Henryetta, and James Von Murray, Stillwater, terms expire 12/31/17. Reappoint Janice Stotts, McLoud, as a lay member, term expires 12/31/17.

MCLE Commission – Reappoint Jack L. Brown, Tulsa, as chairperson, term expires 12/31/2015; reappoint M. Courtney Briggs, Oklahoma City, term expires 12/31/2017; appoint Claire Carter Bailey,

Norman, and Gale Graham Allison, Tulsa, terms expire 12/31/2017.

Oklahoma Indian Legal Services – Reappoint Tyson E. Branyan, Cushing, Casey R. Ross, Oklahoma City, and Julie Strong, Clinton, terms expire 12/31/2017.

Professional Responsibility Commission – Appoint Linda S. Thomas, Bartlesville, and Rick R. Sitzman, Oklahoma City, terms expire 12/31/17.

Court on the Judiciary – Appellate Division – Reappoint Betty Outhier Williams, Muskogee, term expires 3/1/2017.

Court on the Judiciary – Trial Division – Reappoint William Brad Heckenkemper, Tulsa, term expires 3/1/2017.

### **CLIENTS' SECURITY FUND**

The board voted to return to discussion of Clients' Security Fund reimbursements that was tabled at the November meeting. The board approved the claims and amounts recommended by the Clients' Security Fund Committee in the handout provided – totaling \$257,118.35 to be paid to 28 claimants. Funding above the annual cap of \$100,000 came from a one-time special allocation from the Clients' Security Fund permanent fund as approved by the Supreme Court. CSF Chair Micheal Salem reported restitution totaling \$3,017 was paid this year. He said a new OBA task force to be appointed will review similar permanent funds across the United States and consider whether to submit a recommendation to increase the annual \$100,000 maximum to the House of Delegates. He noted the ABA Standing Committee on Client

Protection is a source of national information. He said that he, along with committee members Dan Sprouse and John Kinslow, would be willing to serve on the task force. The board approved the distribution of a news release announcing the reimbursement of funds to clients.

#### **REQUEST TO AMEND LHL ASSISTANCE PROGRAM MISSION STATEMENT**

President DeMoss reported the Tulsa County Bar Association sent a letter requesting the OBA expand the mission of the Lawyers Helping Lawyers Assistance Committee to include addressing the need for interventions to assist senior lawyers who may be practicing beyond their time of competence. She said no action will be taken on the request.

#### **OBA 2015 STANDING COMMITTEE LEADERSHIP AND BOARD OF GOVERNORS LIAISONS**

President-Elect Poarch presented a list of bar members he has appointed as committee chairs and vice chairs in addition to board member assignments as liaisons.

#### **YLD LIAISONS TO OBA STANDING COMMITTEES**

YLD Chair-Elect LeAnne McGill submitted a list of YLD members she has appointed to serve as liaisons to OBA committees.

#### **COURTFACTS.ORG CAMPAIGN MARKETING REPORT**

Communications Director Manning reviewed the results of efforts to communicate to voters information about

the judges on the statewide retention ballot and links to websites of judicial election candidates at [courtfacts.org](http://courtfacts.org). About \$12,500 was spent on the campaign that reached more than 1 million people.

#### **OBA SPEAKERS BUREAU**

President DeMoss briefed board members about the new website the OBA has created to make it easier for Oklahoma schools and civic groups to find lawyers to speak on a variety of topics. The first step in the program is to encourage OBA members to sign up online at [speakers.okbar.org](http://speakers.okbar.org) as potential speakers in their county. Once lawyers have signed up, the website will be promoted to the public, who can contact the lawyers who have identified they are available to speak.

#### **OKLAHOMA'S PROMISE**

Executive Director Williams reported he recently met with the Seminole Schools superintendent about participating in the promotion of the Oklahoma's Promise program. The superintendent has volunteered to be the district point person.

#### **APPOINTMENTS**

President-Elect Poarch announced the appointments of:

Audit Committee – Appoint Glenn Devoll, Enid, as chairperson, term expires 12/31/2015; appoint as members James R. Gotwals, Tulsa, and Roy D. Tucker, Muskogee, terms expire 12/31/2017.

Board of Medicolegal Investigations – Appoint James T. Stuart, Shawnee, term expires 12/31/2015.

Investment Committee – Reappoint M. Joe Crosthwait Jr., Midwest City, as chairperson and Kendra M. Robben, Oklahoma City, as vice chairperson, terms expire 12/31/2015; reappoint Stephen Beam, Weatherford, Chuck Chesnut, Miami, Judge Mike DeBerry, Idabel, O. Chris Meyers, Lawton, Alan Souter, Tulsa, Jerry Tubb Jr., Oklahoma City, and Harry Woods, Oklahoma City, terms expire 12/31/2017.

Legal Ethics Advisory Panel – Reappoint Steven Balman, Tulsa, as panel coordinator, term expires 12/31/2015; reappoint Timila Rother, Oklahoma City, John Hermes, Oklahoma City, and Micheal Salem, Norman, as Oklahoma City panel members, terms expire 12/31/2017; and reappoint Lynnwood Moore, Tulsa, John R. Woodard III, Tulsa, and Allen E. Mitchell, McAlester, as Tulsa panel members, terms expire 12/31/2017.

Commissioner of The National Conference on Uniform State Laws – To submit the name of Rusty Neal LaForge, Oklahoma City, for consideration and possible reappointment by the governor to an additional four-year term.

#### **NEXT MEETING**

The Board of Governors met Jan. 15, 2015, via telephone conference call. A summary of those actions will be published after the minutes are approved. The next board meeting will be Friday, Feb. 20, 2015, at the Oklahoma Bar Center.

# Research Designed to Take OBF to the Next Level

*By Jack L. Brown*

Legal research is an integral part of a lawyer's daily life, used to inform the lawyer on how to advise clients, negotiate with opposing counsel, or persuade a judge or jury. The importance of legal research can often be seen in the many comical goofs found in literary masterpieces and Hollywood films, even the beloved Atticus Finch could have benefited from a little research in his defense of Tom Robinson (ahem, a motion for change of venue).

Legal research is the backbone of all good lawyering and forms the analytical foundation for any case or issue being worked on. Given the importance of research, the OBF started this year with a little researching of its own by conducting a feasibility study which assessed the potential for the development and implementation of an annual fundraising program. The goal of the study is to provide a good foundation upon which the OBF can build and develop an action plan.

The study was conducted last month by OBF consultant, Dennis Dorgan, who performed a series of interviews with various members of the OBF, OBA and other organizations impacted by OBF grants. Mr. Dorgan, through these conversations,

uncovered many good ideas from OBF members on fundraising, potential barriers to success and generated enthusiasm for the project. The end result is a written feasibility report that will summarize the consensus and differences from these conversations and will provide the OBF with guidance on how to proceed with its development program.

The feasibility study will also assist the OBF with providing objectives and direction for the new OBF development director. This position has been advertised and candidates should submit their resumes and supporting materials to the search committee chaired by OBF board member and former OBA President Stephen Beam. Interested candidates should refer to the OBF News Section of the OBF website ([www.okbarfoundation.org](http://www.okbarfoundation.org)) for additional information on the position and how to apply. The committee will screen all applicants, conduct interviews and make their recommendations to the OBF Board of Trustees.

Finally, the feasibility study will establish the framework for OBF board members and staff to develop a comprehensive fundraising plan of action. A board retreat has been scheduled for March 26-27 at Postoak Lodge, just outside of Tulsa to

create the important new plan. The retreat facilitators will be Mr. Dorgan and our new development director. The plan will establish goals and methods to achieve them. The OBF is very fortunate to have a highly skilled and dedicated board and staff to undertake this ambitious program. The OBF grants program works with charitable organizations statewide that are involved in public service work. Some of the key recipients from this development plan will be the poor, elderly, abused women and children, and school children in need of assistance.

The OBF challenges all Oklahoma lawyers to do their part to assist the OBF in its development efforts. One of the best ways to meet this challenge is to become an OBF Fellow or Benefactor Fellow. It's as easy as clicking the OBF website or by calling OBF at 405-416-7070. We look forward to your participation in the OBF.

## ABOUT THE AUTHOR



Jack L. Brown practices in Tulsa and serves as OBF president.

He can be reached at [jbrown@jonesgotcher.com](mailto:jbrown@jonesgotcher.com).

## OBF WELCOMES NEW COMMUNITY FELLOWS

OBF welcomes our newest OBF Community Fellows — LexisNexis during November and the Crowe & Dunlevy law firm during December — both at the supporter tier. For those wishing to join these and other OBF Community Fellows, please find out more and join at [www.okbarfoundation.org](http://www.okbarfoundation.org).



*OBF Past President Dietmar K. Caudle and Executive Director Nancy Norsworthy welcome LexisNexis Territory Manager Gayla Reeder to the OBF Community Fellows program.*

**LexisNexis** believes that when you put information and technology into the right hands, you give people the power to shape the world. LexisNexis cares deeply about adhering to the highest standards of conduct and giving back to the communities they serve. Becoming a member of the OBF Community Fellows aligns with those beliefs, and the OBF and LexisNexis look forward to a partnership that will help to make our justice system more efficient as we strive to make access a reality for Oklahomans in need of law-related services.

**Crowe & Dunlevy** has always taken to heart the professional responsibility of lawyers and law firms to make meaningful contributions to public interest legal services. In addition to the dedication of time and effort, members of the firm have been longtime contributors to the Oklahoma Bar Foundation. Crowe & Dunlevy has been instrumental in many past endeavors of the OBF and the OBF is pleased to welcome Crowe & Dunlevy as an OBF Community Fellow.



*OBF Executive Director Nancy Norsworthy, President Jack L. Brown, Past President Dietmar K. Caudle and OBA President David Poarch welcome Tanya S. Bryant of Crowe & Dunlevy to the OBF Community Fellows Program.*

**Please join the OBF**



Please visit **WWW.OKBARFOUNDATION.ORG** for additional information on the OBF resource development & communications director position and to learn more about the OBF Community Fellow Program.



## OBF Fellow and Community Fellow Enrollment Form

Name, Group name, Firm or other affiliation \_\_\_\_\_

Mailing and Delivery address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Phone \_\_\_\_\_ Email \_\_\_\_\_

### FELLOW ENROLLMENT ONLY

☐ Attorney ☐ Non-attorney

- |   |  |
|---|--|
| <input type="checkbox"/> I want to be an OBF Fellow now – Bill me later   | <input type="checkbox"/> \$100 enclosed and bill annually  |
| <input type="checkbox"/> Total amount enclosed \$1,000  | <input type="checkbox"/> New lawyer 1st year, \$25 enclosed & bill annually as stated  |
| <input type="checkbox"/> New lawyer within 3 years, \$50 enclosed and bill annually as stated   | <input type="checkbox"/> I want to be recognized at the higher level of Sustaining Fellow and will continue my annual gift of \$100<br>(initial pledge should be complete) |
| <input type="checkbox"/> I want to be recognized at the highest Leadership level of Benefactor Fellow and annually contribute at least \$300<br>(initial pledge should be complete) | <input type="checkbox"/> My charitable contribution to help offset the Grant Program Crisis  |

### COMMUNITY FELLOW ENROLLMENT ONLY

☐ OBA Section or Committee ☐ Law firm/office ☐ County Bar Association ☐ IOLTA Bank  
☐ Corporation/Business ☐ Other Group

Choose from three tiers of OBF Community Fellow support to pledge your group's help:

- |                    |                            |
|--------------------|----------------------------|
| \$ _____ Patron    | \$2,500 or more per year   |
| \$ _____ Partner   | \$1,000 - \$2,499 per year |
| \$ _____ Supporter | \$250 - \$999 per year     |

Signature and Date \_\_\_\_\_ OBA Bar # \_\_\_\_\_

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# There is Much Work to Be Done

By Michael W. Speck

In March 2014 the Oklahoma Supreme Court issued an order establishing the Oklahoma Access to Justice Commission (OAJC).<sup>1</sup> In establishing the OAJC, the court found that “(m)any low income Oklahomans are unable to receive full representation on civil legal matters; inadequate funding and well-intentioned but uncoordinated efforts stand in the way of a fully integrated civil legal-services delivery system.”<sup>2</sup> The court further found that there was a clear need to fill in existing gaps in statewide delivery system, and that the efforts by various organizations doesn’t eliminate a need for leadership in the planning of comprehensive legal services in the state, a role which logically rests with the court.<sup>3</sup>

Just a few months later the Oklahoma Supreme Court appointed the members to the OAJC: Justice Douglas L. Combs, Oklahoma Supreme Court; Judge Bernard Jones, Oklahoma County district judge; Judge Rick Bozarth, Dewey County associate district judge; attorneys David Riggs, Michael Figgins and Barbara Smith, and Chief Geoffrey Standing Bear, Osage Nation.<sup>4</sup> Pursuant to 2014 OK 16, these OAJC members are required to:

1) identify and assess current and future needs for access to

justice in civil matters by low-income Oklahomans;

2) develop and publish a strategic plan for statewide delivery of civil legal services to low-income Oklahomans;

3) foster the development of a statewide integrated civil legal-services delivery system;

“...the August order identifying the accomplished members of the OAJC went apparently unnoticed by the public it serves.”

4) work to increase resources and funding for access to justice in civil matters and to ensure that the resources and funding are applied to the areas of greatest need;

5) work to maximize the wise and efficient use of available resources, including the development of local, regional, and statewide coordination systems and systems

that encourage the coordination or sharing of resources or funding;

6) develop and implement initiatives designed to expand civil access to justice;

7) work to reduce barriers to the justice system by addressing existing court rules, procedures and policies that negatively affect access to justice for low-income Oklahomans; and,

8) monitor the effectiveness of the statewide system and services provided and periodically evaluate its progress in fulfilling the civil legal needs of low-income Oklahomans.

## MEDIA ATTENTION

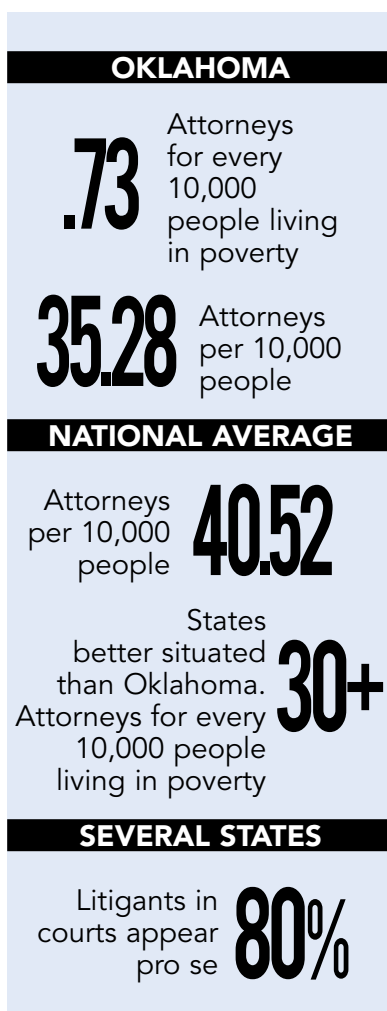
The March 13, 2014, order establishing the OAJC received some attention from the press.<sup>5</sup> However, the August order identifying the accomplished members of the OAJC went apparently unnoticed by the public it serves. The goals for the OAJC seek to improve the common good of Oklahomans, a matter that clearly deserves ongoing coverage by the fourth branch of the state government. If the enormity of the challenge faced by the OAJC was better understood by the public, ongoing coverage would be demanded.

The efforts of the many men and women in various organizations notwithstanding (and

not herein minimized in the least), there is much work to be done in improving the access to justice for Oklahomans. Oklahoma ranked 50th in the composite index set forth in the 2014 Justice Index compiled by National Center for Access to Justice (NCAJ).<sup>6</sup> The NCAJ 2014 Justice Index (NCAJ Index) was the subject of a November 2014 story by the *Muskogee Phoenix*,<sup>7</sup> which made no mention of the OAJC.

The NCAJ is a project of the Cardozo School of Law. The NCAJ Index is “a snapshot of the degree to which certain selected best practices for ensuring access to the civil and criminal justice systems have been adopted across the country.”<sup>8</sup> It “shows the number of these attorneys for every 10,000 people in poverty in each state” as well as “the number of all attorneys per 10,000 people (‘not in poverty’) in each state.”<sup>9</sup> Data on the support systems provided to pro se litigants, persons with disability and “on the presence in state courts of such key systems as reliance on ‘certified’ interpreters” and the provision of court forms translated into languages other than English” for those people with limited English proficiency.<sup>10</sup>

According to the NCAJ Index, Oklahoma has 0.73 attorneys for every 10,000 people living in poverty and 35.28 attorneys per 10,000 people. The national average for attorneys per 10,000 people was reported as 40.52. As to the number of attorneys for every 10,000 people living in poverty, more than 30 states are better situated than Oklahoma. Six states and the District of Columbia (a statistical outlier as to attorneys in the population) have more than 2.0 attor-



neys for every 10,000 people living in poverty.<sup>11</sup>

The NCAJ reports that more than 80 percent of the litigants in the courts of the various states appear pro se “in matters as important as evictions, mortgage foreclosures, child custody and child support proceedings, and debt collection cases.” Therefore, NCAJ’s recommendation that making the courts user-friendly is imperative is unlikely to meet with objection.<sup>12</sup> Identifying and implementing the reforms to accomplish this goal are a more complicated matter.

In assessing the efforts by the various states to assist litigants in finding representation

or assisting them as pro se litigants, the NCAJ asked questions including:

Is there a statute, rule of professional conduct or other guidance document authorizing the provision of unbundled or limited scope legal services?

Does the state provide (or the courts allocate) funding for court-based programs (self-help centers or other structures) to assist under-represented persons?

Is there a statute, rule or other document establishing the obligation of the court to communicate with people who have little or low literacy in one or more types of cases?

Additional questions are included to identify the methods for implementing the policies identified above.<sup>13</sup> According to the data collected by the NCAJ, the efforts of Oklahoma’s courts are minimal. As a consequence, Oklahomans may well find their courts less than user friendly.

### EXTRA HURDLES FOR PEOPLE WHO SPEAK LITTLE ENGLISH

For those Oklahomans who have limited proficiency in English, the problem may well be far worse. The Oklahoma Supreme Court is aware of this issue. In June 2014 the court issued an order approving examinations and interim reciprocity and provisional qualifications of Oklahoma courtroom interpreters. In an unpublished (*i.e.* subject to revision or withdrawal) order 2014 OK 45, the court wrote that it “is committed to ensuring equal access to justice for all individuals regardless of their ability to communicate in the spoken

English language.” Finding that spoken language interpreters “play an essential role in ensuring due process and helping court proceedings function efficiently and effectively” the court ordered rules 1 - 9 in a new appendix II to Chapter 23 of Title 20 of the Oklahoma Statutes as “interim rules until permanent rules may be established.”<sup>14</sup> In 2014 OK 40 the court set forth rules which implement the policy of the Oklahoma Supreme Court that, “whenever possible, any court proceeding interpreted by a non-certified foreign language interpreter shall be audio taped and the recording shall be made an official part of the record as required.”<sup>15</sup>

No information was reported to the NCAJ as to Oklahoma’s ongoing efforts to improve court access for Oklahomans with limited English proficiency. Therefore Oklahoma’s unsettling ranking of 50th on the NCAJ index likely doesn’t reflect the reality in Oklahoma’s courtrooms. Which is not to say that there isn’t a great deal of work to be done, including but not limited to the provision of resources like spoken language interpreters.

The final element of the NCAJ Index focuses upon “those who cannot see, hear, speak or otherwise navigate a courthouse” and “those with emotional and cognitive challenges that make it difficult for them to participate in their own cases.” Noting that access to justice for these citizens “depends on support from the justice system,”<sup>16</sup> the NCAJ ranked Oklahoma 44th overall. Indiana failed to provide data for the Index. Therefore Oklahoma courts might well rank 45th among the 50 states in

efforts to provide the support its disabled citizens deserve.

The Oklahoma judiciary is aware that many Oklahomans are underrepresented and that the inadequately funded, and uncoordinated efforts, while well intentioned, are no replacement for an integrated civil legal services delivery system. Assessing the assets, and limitations, of the current legal services delivery systems is a critical step in improving access to justice for Oklahomans. Further steps to address the various shortcomings are already underway. Improving electronic access to Oklahoma courts through initiatives like the Oklahoma Unified Case Management System, providing language interpreters and audio recordings of proceedings and expanding and further publicizing forms for pro se litigants are among the many steps the courts can take to improve access. The NJAC Index has, in its questions submitted to the states, identified other strategies, such as allowances for limited legal representation or resources like self-help centers. Other novel approaches, like New York’s Navigators or Washington’s Triple LTs, should also be considered.<sup>17</sup>

Equal access of the state’s citizens to their courts is a prerequisite to justice for all Oklahomans. The Oklahoma Supreme Court, in forming the OAJC, has begun efforts to fully meet the court’s obligation to provide, and lead, a system of comprehensive legal services. It appears from the information discussed herein that the OAJC has a lot of work ahead. Although the fourth branch has all but ignored the problem to date, the judiciary and the bar,

through the OAJC is taking up the challenge.

1. See 2014 OK 16.
2. *Id.*
3. *Id.*
4. See 2014 OK 75.
5. See <http://goo.gl/FaonjG>.
6. See [www.justiceindex.org/findings](http://www.justiceindex.org/findings).
7. See <http://goo.gl/ogkK83>.
8. See [www.justiceindex.org/findings/#sthash.d862tcA8.dpuf](http://www.justiceindex.org/findings/#sthash.d862tcA8.dpuf).
9. See [www.justiceindex.org/methodology/#sthash.TVx81BkZ.dpuf](http://www.justiceindex.org/methodology/#sthash.TVx81BkZ.dpuf).
10. *Id.*
11. See [www.justiceindex.org/findings/attorney-access](http://www.justiceindex.org/findings/attorney-access).
12. See <http://goo.gl/7WDah4>.
13. *Id.*
14. See 2014 OK 45 and [www.oscn.net/static/forms/aoc\\_forms/interpreter.asp](http://www.oscn.net/static/forms/aoc_forms/interpreter.asp).
15. See 2014 OK 40.
16. See <http://goo.gl/ckieOz>.
17. See <http://goo.gl/ULmsVY> and <http://goo.gl/RC4U1t>. The June 2013 edition of *Tulsa Lawyer* included an article by myself and Christina Smith titled, “Paralegals and the Access to Justice: Washington’s Limited License Legal Technicians Give Us Food for Thought” wherein we summarized Washington’s Limited License Legal Technician (WA Triple LT) rules and posed the following questions in regard to the role paralegals might play in improving access to justice

- 1) What extent, if any, is a secondary market of unregulated, untrained, unsupervised legal practitioners serving presently unmet legal needs; 2) How can paralegals further assist the bench and the bar in providing affordable legal services and greater access to the legal system to the public; and 3) Can paralegals play a role in making the practice of law an economically viable profession for attorneys entering a very competitive profession.

In the “Authorized Practice” by Robert Ambrogi, published in *The American Bar Association Journal*, Vol. 101 No. 1, Jan. 2015, Mr. Ambrogi discusses the WA Triple LT and similar efforts (or studies of same) in other states such as the aforementioned New York Navigators.

## ABOUT THE AUTHOR



Michael Speck holds a B.A. and M.A. in philosophy from OU and a J.D. from Southern Illi-

nois University’s School of Law. After 10 years of civil litigation in Oklahoma City and nine years of adjunct instruction at Rose State College, he is on the faculty at Tulsa Community College as the Program Coordinator of the Paralegal Studies Program.



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# Top 5 Reasons You Should Get Involved with the YLD

By LeAnne McGill

**1** **It's easy.** If you have been practicing law for less than 10 years, you are already a member of the YLD. See how easy that was? Want to become an active member of the YLD? Consider joining a committee. Come to our monthly board meetings. Form a team for this year's Kick It Forward kickball tournament. Join us in our annual Day of Service this fall. The options are endless. Thinking about a leadership role in the YLD? It is never too early to start planning your campaign to become a member of the Board of Directors or even division chair.

**2** **It opens doors.** The YLD is a great way to network with lawyers from across the state. Not only can it be a significant referral source, it can also lead to exciting new career opportunities. You will have many chances to talk with the leaders of the OBA and get to know talented attorneys from across the state. You will have access to a wealth of experience and knowledge from lawyers who are excited and eager to help the future of the profession in any way they can.

**3** **It's free.** Your membership in the YLD does not cost you anything beyond your regular

annual bar dues. The YLD is funded from the general revenue of the bar association and does not collect dues like the various sections. So that means you are already paying for the benefits of the YLD. All that is left is for you to cash in on those benefits. You can't get a better deal than free, right?

**4** **It's about community.** The YLD is often referred to as the community service arm of the bar association. And that is a moniker that we take seriously. Whether we are serving the legal community or the places where we live and work, each year the YLD plans and participates in projects aimed at giving back. In years past, we have planted flowers at homeless shelters, sorted food at food banks, cleaned storage rooms at libraries, fed animals at animal shelters and many other worthy projects. This year in addition to our annual Day of Service, we are also planning a fundraiser kickball tournament in August to raise money for the Kick It Forward program. And we are always open to new ideas. If you have a project you would like us to consider, let us know.

**5** **It's Fun.** Yes, we do a lot of good things for the communities in which we live and work as well

as the bar association as a whole. But we also have some serious fun. An important part of the YLD is forming lifelong friendships with attorneys who will be there celebrating with you when you retire. Because of that goal, we want you to enjoy the time you spend working on our projects. There is always time to socialize and get to know one another better while we are carrying out the worthy projects of the bar association. And hey, who couldn't use a break from the busy schedules and daily demands of the legal profession. We can definitely help add a little more fun to your life.

Now you know the top five reasons why you should be involved with the YLD. Joining is effortless, it won't cost you anything, we give back to the community, it helps widen your network, and we guarantee you a good time. So, what are you waiting for? Your chance to participate is only for a limited time. Email me to get started.

## ABOUT THE AUTHOR



LeAnne McGill practices in Edmond and serves as the YLD chairperson. She may be contacted at [leanne@mcgillrodriguez.com](mailto:leanne@mcgillrodriguez.com).

## February

- 16 OBA Closed** – Presidents Day observed
- 17 OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David Swank 405-325-5254
- OBA Licensed Legal Intern swearing in;** 12:45 p.m.; Oklahoma Judicial Center, Oklahoma City; Contact Debra Jenkins 405-416-7042
- 18 OBA Law-related Education Close Up;** 8:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Suzanne Heggy 405-556-9612
- OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with phone conference; Contact Trisha Archer 918-619-9191
- Ruth Bader Ginsburg Inn of Court;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Donald Lynn Babb 405-235-1611
- 19 OBA Law-related Education Close Up;** 8:30 a.m.; Oklahoma Bar Association; Contact Suzanne Heggy 405-556-9612
- OBA Mock Trial Committee meeting;** 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066
- 20 OBA Board of Governors meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000
- OBA Access to Justice Committee meeting;** 10 a.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Laurie Jones 405-208-5354
- OBA Rules of Professional Conduct Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Paul Middleton 405-235-7600
- 21 OBA Title Examination Standards and OBA Real Property Section joint meeting;** 9:30 a.m.; Stroud Conference Center, 218 W. Main St., Stroud; Contact Jeff Noble 405-942-4848
- OBA Young Lawyers Division board meeting;** 10 a.m.; Tulsa County Bar Center, Tulsa; Contact Leanne McGill 405-285-8048

- 24-27 OBA Bar Examinations;** Oklahoma Bar Center, Oklahoma City; Contact Oklahoma Board of Bar Examiners 405-416-7075
- 27 OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007
- 27 OBA Environmental Law Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Betsey Streuli 405-702-7147



## March

- 3 OBA Government and Administrative Law Practice Section;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact John Miley 405-557-7146
- 6 OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with OSU Tulsa, Tulsa; Contact Jeffrey Love 405-286-9191
- 10 OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tiece Dempsey 405-524-6395
- 11 OBA Women in Law Committee meeting;** 3 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Kimberly Hayes 918-592-2800



**Let Your Voices Be Heard! - OBA Day at the Capitol: March 24**

Don't miss this year's OBA Day at the Capitol set for Tuesday, March 24. The agenda will feature speakers commenting on pending legislation – some of which, if passed, could significantly impact your practice. We also will have remarks from the judiciary and bar leaders and lunch will be provided before we go over to the capitol for the afternoon. Check [www.okbar.org](http://www.okbar.org) for more updates.

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**ABA TECHSHOW 2015 – Register Now!**

ABA TECHSHOW 2015 is set for April 15-18, 2015, at the Chicago Hilton. The OBA is an event promoter for ABA TECHSHOW, which means our members can save by using the OBA EP code TECHSHOWEP15. Check out the full line-up of the

50 CLE sessions focused on the latest technology trends. Register online at [www.techshow.com](http://www.techshow.com) using the event promoter registration form. The faculty members this year include OBA members Jim Calloway and Jeffrey Taylor.

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**Board Swearing In Photo Gallery Now Online**

New OBA officers and board members were sworn into their positions during a ceremony at the State Capitol on Jan. 16. A photo gallery from the ceremony is online at [www.okbar.org/members/PhotoGallery](http://www.okbar.org/members/PhotoGallery).



## LHL Discussion Group Hosts Upcoming Meetings

The Lawyers Helping Lawyers monthly discussion group will meet March 5 when the topic will be "Stress Management and the Practice of Law." Each meeting, always the first Thursday of each month, is facilitated by committee members and a licensed mental health professional. The group meets in from 6 – 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St. Oklahoma City. 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.

- *Interested in forming a discussion group in Tulsa? Contact Hugh Hood: 918-747-4357.*

## LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

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### OBA Member Resignations

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

John Frederick Cooper  
OBA No. 1894  
4096 40th Street S.  
St. Petersburg, FL 33711

Mitchell Hugh De Zeeuw  
OBA No. 12265  
5203 El Cerrito Dr., Apt. 217  
Riverside, CA 92507

Robert Dale Ganstine  
OBA No. 3232  
414 Brooks Station Lane  
Brooks, KY 40109-5124

Jason Mathias Gardner  
OBA No. 31065  
1006 E. 300 North  
Provo, UT 84606

Michael John Hester  
OBA No. 4162  
P.O. Box 9  
Overbrook, OK 73453

Gregory Rex Maynard  
OBA No. 5825  
269 Camden Hills Drive  
Montgomery, TX 77356

Robert J. McCarthy  
OBA No. 18892  
P.O. Box 1570  
Polson, MT 59860

Christopher Lee Meazell  
OBA No. 21463  
1619 Hyde Avenue  
Winston-Salem, NC 27104

Valli Jo Rallis  
OBA No. 19987  
2801 Shortgrass Rd., Apt. 340  
Edmond, OK 73003-3226

Bryan Dale Slabotsky  
OBA No. 16894  
District Attorney's Office  
100 W. Mulberry  
Kaufman, TX 75142

Robert C. Tilghman  
OBA No. 9017  
1308 Larchmont Lane  
Nichols Hills, OK 73116

Donald Wesley Towe  
OBA No. 11550  
2999 Edgemont Drive  
Clarksville, TN 37043

Patricia Jeannine Tubb  
OBA No. 13124  
2861 N.W. 21st Street  
Oklahoma City, OK 73107

Judy Ann Tuggle  
OBA No. 15060  
360 Nueces St., #2609  
Austin, TX 78701



### 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/OklahomaBar](http://www.facebook.com/OklahomaBar) Association. And be sure to follow @OklahomaBar on Twitter!



## Kudos

The Oklahoma City Human Resources Society recently presented Crowe & Dunlevy attorney **Leonard Court** with the 2014 HR Legend Award for his commitment to the organization. Mr. Court is one of three Oklahoma attorneys to be inducted.

**Jake Jones**, partner with Kirk & Chaney in Oklahoma City, has been inducted into the Oklahoma Chapter of the National Academy of Distinguished Neutrals for 2015. Membership is limited to mediators and arbitrators who are well established as trusted neutrals within the legal community and is by invitation only. Mr. Jones, mediating cases since 1993, joins only four other Oklahoma mediators inducted into the academy.

## On The Move

GableGotwals welcomes **Steven J. Adams**, **Ryan A. Pittman**, **John D. Russell** and **Jay P. Walters** as attorneys with the firm. Mr. Adams' practice will focus on litigation in energy, class actions and insurance law. He graduated from the TU College of Law in 1979. Mr. Pitt-

man will focus on energy law; he earned his J.D. from the TU College of Law in 2012. Mr. Russell's practice will focus on complex commercial litigation and white-collar crime. He graduated from the OU College of Law in 1988. Mr. Walters will focus on energy, appellate, class actions, insurance, antitrust and Indian law. He received his J.D. from the George Washington University Law School in 1996.

**Conner & Winters LLP** has named four attorneys as partners of the firm: **Matthew J. Allen**, **Daniel E. Gomez**, **Angela L. Smoot** and **Christopher R. Wilson**. Mr. Allen concentrates his practice in oil and gas conservation matters before the Oklahoma Corporation Commission. He received his J.D. from the OU College of Law in 2007. Mr. Gomez practices primarily in the areas of American Indian/Native American law, insurance, business litigation and bankruptcy. He graduated from Southern Methodist University in 2008. Ms. Smoot is a litigation attorney who practices primarily in the area of family law. She received her J.D. from the TU College of Law in 2004. Mr. Wilson practices primarily in the areas of mergers and acquisitions, securities regulation, general corporate matters, and banking and finance. He earned his J.D. from the TU College of Law in 2008.

**Jeremiah L. Buettner**, **Joel A. Bulleigh**, **Wagner R. Dias da Silva**, **Lauren**

**Barghols Hanna**, **Michael F. Smith** and **Christina M. Vaughn** have been elected shareholders at McAfee & Taft. Mr. Buettner is a trial lawyer whose practice covers a wide range of complex civil litigation matters, including environmental law, intellectual property disputes, business torts, healthcare law, and insurance disputes. Mr. Bulleigh is an aviation attorney who represents local, national and international clients in transactions involving the buying, selling, leasing and financing of aircraft. Mr. Dias da Silva is a corporate lawyer whose practice encompasses the areas of mergers and acquisitions, divestitures, public and private securities offerings, and transaction financing. Ms. Hanna is a trial lawyer whose state and federal litigation practice is focused on general civil litigation, particularly in the areas of energy and water rights, and on the representation of management exclusively in all phases of labor and employment law. Mr. Smith is a trial and appellate lawyer whose practice is concentrated on defending manufacturers and other suppliers and distributors of products, including automobiles, pharmaceuticals and medical devices. Ms. Vaughn is a trial lawyer whose civil litigation practice encompasses a broad range of disputes, including those involving breach of contract, business torts, oil and gas, environmental, anti-trust and class actions.

**McAfee & Taft** has elected **Richard D. Craig**, **Michael J. LaBrie** and **Scott D. McCreary** to its 2015 board of directors. Mr. Craig is a tax attorney whose practice includes wealth transfer tax planning, corporate, individual and partnership taxation, tax and corporate aspects of business transactions and the litigation of tax matters in both state and federal courts. Mr. LaBrie's practice focuses on intellectual property law, including patent, trademark and copyright law and related litigation. Mr. McCreary is an aviation attorney who represents local, national and international clients in connection with matters involving the buying, selling, leasing and financing of aircraft.

**Glen L. Dresback** announces the opening of the Dresback Law Office at 211 S. Broadway, Cleveland, 74020. His practice focuses on criminal, family and domestic law and estate law. Dresback most recently was an assistant district attorney in Mayes County and had a previous practice in Altus. He will be accepting cases in and around Pawnee, Osage, Rogers, Mayes and Tulsa Counties. The office can be reached by calling 918-358-5723 or by fax at 918-358-5724.

**Phillips Murrah** announces that attorneys **Nicholle Jones Edwards**, **Jason M. Kreth**, **Candace W. Lisle** and **Jennifer Miller Ventura** have been elected as new directors. Ms. Edwards focuses on family law, general civil litigation and appellate matters. Mr. Kreth is a commercial litigator who represents financial institutions. Ms. Lisle is a litigation attorney with an

emphasis in the representation of financial institutions in mortgage and commercial loan litigation and lender liability. Ms. Ventura practices in the firm's labor and employment practice group.

**Richardson Richardson Boudreaux** of Tulsa announces that **Jason C. Messenger** has been named a partner in the firm. Mr. Messenger has been associated with the firm since 2006 where he practices in civil litigation. He received his J.D. in 2003 from the TU.

**Norman Wohlgemuth Chandler & Jeter** of Tulsa has announced that the name of the firm is now **Norman Wohlgemuth Chandler Jeter Barnett & Ray**.

**John Stiner** has joined the Oklahoma City law firm of **Brown & Gould PLLC**. Mr. Stiner represents plaintiffs and defendants in business litigation, including high value commercial real estate litigation, mortgage foreclosures and workouts, franchise termination litigation, insurance disputes, trust matters, and business torts. Prior to joining Brown & Gould, he was a shareholder at **McAfee & Taft**.

**Crowe & Dunlevy** recently announced the hiring of **Erin Potter Sullenger**, **Cullen D. Sweeney** and **Meredith W. Wolfe** as associates in the firm's Oklahoma City office. Ms. Sullenger is a member of the firm's environmental, energy and natural resources and litigation and trial practice groups. She received her J.D. from the TU College of Law. Mr. Sweeney is an associate in the appellate and litigation and trial practice groups. He earned his J.D.

from the OU College of Law. Ms. Wolfe is a member of the firm's litigation and trial, banking and financial institutions and bankruptcy and creditor's rights practice groups. She also received her J.D. from the OU College of Law.

**Trey Tipton** has been named partner at the firm **Blaney and Tweedy PLLC** of Oklahoma City, which will now be known as **Blaney Tweedy & Tipton PLLC**. In addition, the firm announces the hiring of **J. Scott Henderson**. Mr. Tipton's practice focuses on business, commercial and real estate law. Mr. Henderson's litigation practice is focused on business, commercial and general litigation. Mr. Tipton and Mr. Henderson both graduated from the University of Oklahoma College of Law in 2005.

**Miller & Johnson PLLC** welcomes **Marc Walls** to the firm as a civil litigation attorney. Mr. Walls was a staff attorney at State Farm for the past 18 years and currently serves on the OBA Civil Procedure and Evidence Code Committee. He received his law degree from OCU School of Law in 1980.

**OBA** members **Scott Luna** of Luna & Luna LLP in Plano, Texas, and **Ray Dixon** of the Underwood Law Firm in Amarillo, Texas, announce the two firms have joined together for an expanded presence in the areas of real estate and education law. The combined firms will retain the name Underwood Law Firm and maintain a presence in several locations throughout Texas.



## At The Podium

**K**arl Rysted, student legal aid attorney at New Mexico State University, was a guest speaker at the Associated Students of NMSU Judicial Branch "Professions in Law" speaker series. He spoke in a roundtable on getting into and surviving law school and the variety of career options for attorneys. He is a 1992 graduate of the OCU School

of Law and served as an adjunct professor there for two years.

**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.

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Submit news items via email to:

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*Articles for the April 18 issue must be received by March 16.*

## IN MEMORIAM

**D**avid James Alexander of Houston, Texas, died Dec. 14, 2014. He was born in New Orleans, La., on June 26, 1955. He was a graduate of Louisiana State University, earning a B.S. in biochemistry, and earned a J.D. from Loyola School of Law in 1981. **He served in the U.S. Air Force as a judge advocate general in Enid, and he later trained as a weapons controller, fulfilling foreign assignments with AWACS.** He began his patent law career in Oklahoma City as a patent agent with Dunlap, Coddling, Peterson and Lee and ultimately served as chief patent counsel with Total Petrochemicals USA in Houston.

**B**illy Rex "B.R." Beasley of Claremore died Jan. 3. He was born Aug. 29, 1934, in Tulsa. After receiving his degree in business administration from the University of Tulsa in 1957, he worked as a buyer for North American Rockwell. He received his J.D. in 1967 from the TU College

of Law and began his legal career as an assistant district attorney. In 1971, he became an assistant district attorney in McAlester, and in 1973 he was appointed as associate district judge for Tulsa County until his retirement in 2000. He initially presided over a civil docket, but moved in the early 1980s to the juvenile division where he served as the chief juvenile judge. He was instrumental in establishing CASA (Court Appointed Special Advocates) in Tulsa County, and his efforts were recognized with a personal visit by first lady Nancy Reagan. In the late 1980s, he transferred from the juvenile division to the criminal division in Tulsa County, where he presided over many high profile cases. Memorial donations may be made to Will Rogers United Methodist Church.

**A**ndrew Jordan Haswell Jr. of Oklahoma City died March 16. He was born on July 3, 1937. He graduated

from Princeton University, attended Yale Divinity School for one year and then received his J.D. from Harvard Law School in 1963. He began his legal career as an assistant district attorney in Oklahoma County and later established a private practice concentrating in tax, bonds and estate planning. He worked with economic development councils in communities across Oklahoma to obtain funding to start small businesses. Donations may be made to the Oklahoma City Foundation, Class of 1955 Fund; or to the OU Foundation, Center of Child Abuse and Neglect.

**K**aren Marie Noller of Arlington, Va., died Dec. 9, 2014. She was born Aug. 24, 1959, in West Lafayette, Ind., and grew up in Stillwater. She earned a bachelor's degree in journalism from OSU, then her J.D. from the OCU School of Law in 1995. At the time of her passing she was working as a contract attorney in Washington, D.C. She loved

cooking for friends, singing, going on adventures, praying, serving others, her cats, biking and swimming. She was an active member of McLean Bible Church in Vienna, Va. Memorial donations may be made to Rivendell House, 1232 Martha Custis Drive, Alexandria, Va., 22302.

**Jeffrey Lee “Jeff” Romine** of Tulsa died May 17, 2014. He was born on Feb. 17, 1955, in Pryor and spent his youth in Okmulgee, graduating from Okmulgee High School in 1973. He attended OU, graduating with an accounting degree. He earned a J.D. from TU College of Law in 1981. He worked for several years at a local accounting firm before he launched his own accounting practice which he grew and ran for 27 years. In January 2013 he joined Briscoe, Burke and Grigsby LLP. He was an avid outdoor sportsman who also enjoyed photography and writing stories about his children. Memorial donations may be made to the Cancer Research Institute via [www.cancerresearch.org/giving-to-cri/honor-memorial-giving](http://www.cancerresearch.org/giving-to-cri/honor-memorial-giving).

**George E. Sneed** of Austin, Texas, died Jan. 5. He was born on Nov. 28, 1941, in Los Angeles. **He joined the U.S. Marine Corps at age 17 and served with the Naval Security Group at Kami Seya, Japan, from 1959 to 1962. He received an honorable discharge with the rank of corporal in 1962.** He later attended the University of Texas at Arlington, graduating with a degree in history and a second major in English and a minor in philosophy. He became the director of operations control for United Transports in 1980. After United was purchased by another company, he resigned and enrolled in the OCU School of Law. He worked his way through law school as a research assistant for Justice Doolin of the Oklahoma Supreme Court and Judge Parks of the Oklahoma Court of Criminal Appeals. He graduated in 1988 and practiced oil and gas law until he became the general counsel for the Oklahoma Department of Commerce in 2001.

**John Gerald Sullivan** of Norman died Jan. 16. He was born Dec. 5, 1923, in

Barnsdall. **He proudly served his country during WWII in the United States Army 698th Petroleum Engineers. He received battle stars for Normandy, Northern France, Rhineland and Central Europe.** He later wrote the history of his service in the book, “Fuel to the Troops.” Upon his return from service in December 1945, he attended OU, graduating from the OU College of Law in 1950. He worked for Farmers Insurance Group for 21 years and went on to be the regional manager for the Midwest and Southeast for the Truck Insurance Exchange. He started Commercial Insurance Services in 1977 which later insured 12 percent of the full truck-load traffic in the United States. The business was sold in 2004. He was very active in business and community throughout his life. He helped lobby the Cerebral Palsy Institute into existence in 1948 as part of his interest in veteran’s affairs. He also served 16 years as Oklahoma Ombudsman for the Employer Support of the Reserve and Guard.



## Five Thoughts on the Future

Jim Calloway shares five thoughts on the future for solo and small firm lawyers.



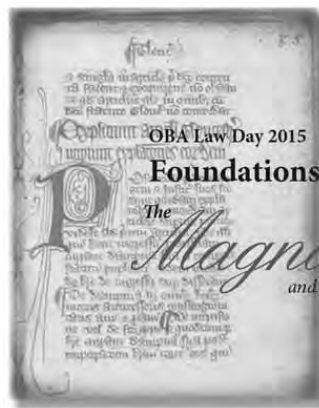
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## Social Media for Lawyers

Not familiar with Facebook or Twitter? Have a LinkedIn account but not sure how to use it? Check out this practical guide to social media.

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## Gear up for Law Day

It's not too soon to start planning your county's Law Day activities! Here you'll find a few project ideas and ways to promote your events.

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THE LEFLORE COUNTY DISTRICT ATTORNEY'S OFFICE is seeking an Assistant District Attorney for its Poteau Office. Responsibilities include the criminal prosecution of all felony and misdemeanor cases, provide advice to local law enforcement and county officials, and perform other duties as assigned. Salary DOE. Applicant must have a J.D. from an accredited law school; legal experience in criminal law and prior courtroom experience preferred. Must be member of good standing with the Oklahoma State Bar. Applicants may submit a résumé, postmarked no later than FEBRUARY 27, 2015, to the following address: District Attorney's Office, 100 S. Broadway, Room 300, Poteau, OK 74953, 918-647-2245, Fax: 918-647-3209.

CATHOLIC CHARITIES seeks an attorney to work with clients in the Immigration Legal Services program. Applicants must have a J.D. and be admitted to practice in any state or U.S. territory. Bilingual applicants are encouraged to apply. Send cover letter, résumé and salary history to Human Resources, 1501 N. Classen Blvd, OKC, 73106. EOE.

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# Let's Just Get Along

By Jim Webb

Reform is a frequently used word. We freely invoke this word when it strikes us as expedient. But what does “reform” really mean? Is it reorganization? Restructuring? Refining? All of the above? None of the above?

“Reform” is a word we should never use recklessly, because the word — in its purest sense — means to change something because it is corrupt or wrong.

As we head into another legislative session in Oklahoma, we will undoubtedly hear about various “reforms” that are claimed to be needed. Yes, there are certainly instances where lawmakers must step in to truly reform areas of our government that are struggling to carry out their duties and meet their mission. We saw that happen relatively recently, when the Legislature played a vital role in improving the operations of the Department of Human Services, an agency plagued for many years with woefully insufficient funding and staffing to address the serious issues faced by Oklahoma’s at-risk children. That effort took cooperation amongst all three branches of our government.

What we witnessed last year was anything *but* cooperation between two of those branches, the Legislature and the judiciary. In fact, we witnessed almost open warfare between the two. I am not placing blame. Presumably, there is blame to spread all around. One thing is clear, though. Absolutely *nothing*

positive for Oklahoma will come out of this fight if it continues in 2015. We will all pay the price.

Think back with me to high school civics — a long, long time ago for some of us! Our system of government relies on checks and balances. Operating as intended, this allows each of the three co-equal branches to appropriately limit — or “check” — the powers of the other branches, thereby ensuring the proper “balance” of power amongst the branches.

James Madison taught us (in The Federalist No. 51) the “legislative authority necessarily predominates” in our system of government. Similarly, in his *Commentaries on American Law*, James Kent said it this way:

“The power of making laws is the supreme power in a state, and the department in which it resides will naturally have such a preponderance in the political system, and act with such mighty force upon the public mind, that the line of separation between that and the other branches of the government ought to be marked very distinctly, and with the most careful precision.”

Inter-branch governmental disputes absolutely will happen. That is inherent in checks and balances. Particularly when it comes to the Legislature and the judiciary, however, it is vital that restraint be shown in the relationship between the two branches.

The judicial branch was designed to be absent of politics as much as possible. We can debate all day about the prevalence or absence of judicial activism. However, when you cut through the fog, it is imperative that we take every possible step to make certain our judges can make their decisions based on the facts, the law — and absolutely nothing else.

This year we will apparently once again see proposals that are designed to allow the legislative and executive branches to directly impact the judiciary. Ladies and gentlemen, please let us not forget the past. In 1969, Oklahoma voters approved amendments to the state constitution to take party politics and potential corruption out of the judicial-selection process following a terribly embarrassing political scandal. Oklahoma has come a long way. Now is not the time to reverse that progress.

Oklahomans are best served when the branches of government work together to preserve democracy and ensure equal access to a fully funded judicial system. My hope for all of us is that we will see collaboration and cooperation between the branches during the upcoming legislative session.

*Mr. Webb serves as Oklahoma County Bar Association president.*

*This article, published in the January 2015 Briefcase, is reprinted with permission from the Oklahoma County Bar Association.*





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*Ruth Mattson* practices in Boston, Massachusetts, with Alexander Bove; Bove is the editor of *Asset Protection Strategies* published by the American Bar Association, and author of the recently-released *Trust Protectors: A Practice Manual with Forms*.


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This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 6 hours of mandatory CLE credit, including 1 hour of ethics. This course has been approved for 5 hours of Texas mandatory CLE credit, including .75 hours of ethics. This course has been submitted to the Florida Bar for accreditation. This course has also been recommended for 6 hours of CPE credit, including 1 hour ethics (no prerequisites are necessary). This course has been submitted for accreditation approval by the Oklahoma Insurance Department for agent and adjuster credit and the Certified Financial Planners Board for continuing education and ethics. The Revocable Asset Preservation Trust – New Planning Horizons from Oklahoma has been submitted to ICB for CE credit review and is pending approval. Once we receive notification of the credit approval, we will notify attendees/participants.





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