

THE Oklahoma Bar JOURNAL

Volume 87 ♦ No. 33 ♦ Dec. 17, 2016

ETHICS & PROFESSIONAL RESPONSIBILITY



ALSO INSIDE

Technology Brings OBA Meetings to Your Desk
Oklahoma Bar Journal 2016 Index



LEGAL RESEARCH

MADE EASIER AND LESS COSTLY

WITH DARLA JACKSON,
OBA PRACTICE MANAGEMENT ADVISOR

DECEMBER 21, 2016

LIVE WEBCAST
NOON - 1 P.M.



1/0

CLE CREDIT: This course has been approved by the Oklahoma Bar Association Mandatory Continuing Legal Education Commission for 1 hour of mandatory CLE Credit per webcast, including 0 hours of ethics. Questions? Call (405) 416-7029.

TUITION: \$50, no discounts.

UPCOMING WEBCASTS

ALL of your required 12 hours of MCLE credit can be received by viewing Live Webcasts, these programs are being "live-streamed" at certain dates and times and **MUST** be viewed on these scheduled dates and times:



Tuesday, December 20
The 10 Keys to Building a
Hyper-Streamlined Law Firm
(1 hour of CLE credit/No Ethics)
Presented by CLEseminars.com

Wednesday, December 21
Don't Be an Outlawyer:
The Ethical Imperative to Follow the Law
(1 hour of Ethics)
Presented by Mesa CLE with Humorist Sean Carter

Wednesday, December 21
Ethical Issues and Implications
of LinkedIn
(1 hour of Ethics)
Presented by CLEseminars.com

Thursday, December 22
Nice Lawyers Finish First
(1 hour of Ethics)
Presented by Mesa CLE with Humorist Sean Carter

Thursday, December 22
A Lawyer's Guide to Using
Professional Coaches
(1 hour of Ethics)
Presented by CLEseminars.com

Tuesday, December 27
The Art of War and Cross Examinations
(1 hour of CLE credit/No Ethics)
Presented by Mesa CLE with Joel Oster

For more information go to: www.okbar.org/members/CLE

LAWPAY[®]

THE WAY ATTORNEYS GET PAID



OKLAHOMA BAR
ASSOCIATION SINCE 1904

Proud Member
Benefit Provider



1.95% & 20¢ per transaction | No swipe required | No equipment needed | \$5-\$20 monthly

The proven payment solution for lawyers.

Managing payments and growing revenue for over 30,000 law firms in the US, LawPay is the only solution recognized by the ABA. Designed specifically for the legal industry, LawPay guarantees complete separation of earned and unearned fees, giving you the confidence and peace of mind your credit card transactions are handled the right way.

LawPay.com/OBA | 866.376.0950



*Experience you respect from
a firm you trust*



ROSENSTEIN FIST & RINGOLD
ATTORNEYS & COUNSELORS AT LAW

Dispute Resolution

J. Douglas Mann and Frederick J. Hegenbart

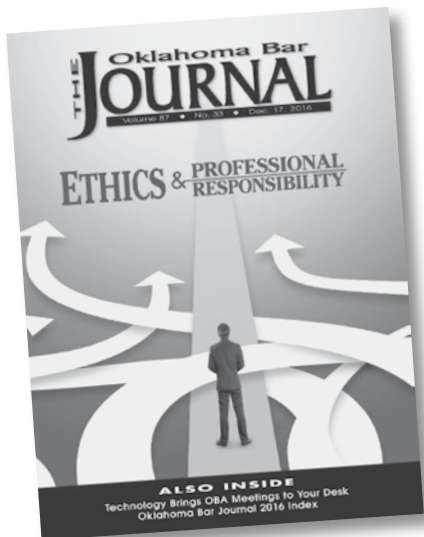
Doug and Fred are AV-rated attorneys with more than 70 years of litigation experience between them. Doug is a seasoned mediator. Fred is an established AAA arbitrator. Their experience in resolving matters through mediation and arbitration ranges from multi-million dollar claims to routine disputes in both the private and public sectors. Trust their decades of legal skill to resolve your toughest cases through an effective, balanced and fair dispute resolution process.

rflaw.com • 525 S. Main, Suite 700, Tulsa, OK 74103 • 918.585.9211

THEME:
**ETHICS & PROFESSIONAL
RESPONSIBILITY**
EDITOR: RENÉE DEMOSS

contents

Dec. 17, 2016 • Vol. 87 • No. 33



FEATURES

- 2503 **LAWYERS BEING SOCIAL: ETHICAL IMPLICATIONS OF PERSONAL SOCIAL MEDIA SITES**
By Timila Rother and Paige Masters
- 2515 **MORE THAN STICKS & STONES ON THE INTERNET: THE ETHICAL DO'S AND DON'TS IN RESPONDING TO NEGATIVE ONLINE REVIEWS**
By John G. Browning
- 2521 **ATTORNEY FEES IN FAMILY LAW CASES**
By Robert G. Spector and Carolyn S. Thompson
- 2531 **LEGAL ETHICS AND FEDERALISM: A NEW BLUEPRINT FOR FEDERAL TRADE COMMISSION ENFORCEMENT ACTION**
By Mbilike M. Mwanfulirtwa
- 2537 **GHOSTWRITING: AN ETHICAL ISSUE IN THE EVOLUTION OF THE LEGAL FIELD**
By Blake M. Feamster
- 2543 **PROFESSIONAL LIABILITY COVERAGE: DON'T TAKE IT FOR GRANTED**
By Steven V. Buckman
- 2547 **ESSENTIAL ETHICS TOPICS EVERY LAWYER NEEDS TO KNOW**
By Joe Balkenbush
- 2551 **REAL-LIFE WAIVERS AND CONFIDENTIALITY ARE NOT AS CLEAR AS THE CODE REQUIRES**
By Carol J. Russo

pg. 2560
OKLAHOMA BAR
JOURNAL 2016 INDEX



DEPARTMENTS

- 2500 FROM THE PRESIDENT
- 2578 FROM THE EXECUTIVE DIRECTOR
- 2579 LAW PRACTICE TIPS
- 2583 ETHICS & PROFESSIONAL RESPONSIBILITY
- 2585 OKLAHOMA BAR FOUNDATION NEWS
- 2588 YOUNG LAWYERS DIVISION
- 2589 EDITORIAL CALENDAR
- 2590 CALENDAR
- 2591 FOR YOUR INFORMATION
- 2593 BENCH AND BAR BRIEFS
- 2594 IN MEMORIAM
- 2596 WHAT'S ONLINE
- 2600 THE BACK PAGE



pg. 2555
NEW TECHNOLOGY
BRINGS MEETINGS
TO YOU

PLUS

- 2555 NEW TECHNOLOGY BRINGS MEETINGS TO YOU
- 2557 LEGISLATIVE MONITORING COMMITTEE REORGANIZES READING DAY
- 2560 OKLAHOMA BAR JOURNAL 2016 INDEX
- 2576 2017 COMMITTEE SIGN-UP FORM

Muchas Gracias

By Garvin A. Isaacs

As I come to the end of my year as president of the Oklahoma Bar Association, I want to thank the people who have helped me during my term.

My predecessors as OBA president, **David Poarch** and **Renée DeMoss**, have both given me their opinions and guidance in helping me to understand my responsibilities to the judicial branch of government and as an officer of the court to do my duty to help promote public confidence in the judicial system.

I want to thank my Vice President **Paul Brunton** for the time and effort he has given.

OBA Executive Director **John Morris Williams** explained the politics of our state and how to communicate the needs of our judicial branch to the Legislature.

Debbie Brink, executive assistant, has guided me repeatedly on many bar issues. I can never thank Debbie enough.

The staff of the Oklahoma Bar Association has done a great job in my term as president. **Carol Manning**, director of Communications and her staff, **Mackenzie McDaniel**, **Laura Stone** and **Lacey Plaudis**, worked with intensity and focused on issues that needed to be addressed by the OBA. I am amazed at the impact their efforts have had upon our communications. They have repeatedly helped me to communicate with bar members and presiding judges, and have helped me organize my juror appreciation plaques, posters and certificates I am delivering to courthouses all over the state.



Garvin A. Isaacs

President Isaacs
practices in Oklahoma City.
apacheoklahoma@gmail.com
405-232-2060

My passion for juror appreciation and preserving the right to jury trials was shared by **Al Hoch**, **Richard Vreeland**, **Roy Tucker** and **Jennifer Castillo**. They developed the materials we are using to reinforce that vital message in every Oklahoma courthouse.

Jim Calloway is one of the true experts in digital technology, and his contribution to the Oklahoma bar as director of the Management Assis-

tance Program is one we should never take for granted. Thank you, Jim!

Craig Combs, our director of Administration, has done a great job of keeping us all informed about the bar budget and what we need to do. There is no better money manager anywhere than Craig Combs.

Susan Damron, director of Educational Programs, has done an excellent job in putting together quality continuing legal education programs.

I want to thank Ethics Council **Joe Balkenbush** for his contributions.

Gina Hendryx, **Loraine Farabow**, **Tommy Humphries**, **Debbie Maddox**, **Katherine Smith** and **Steve Sullins** have done a great job monitoring the discipline needed of OBA members.

Our officers and Board of Governors have given their time to keep everyone advised of issues our bar association faces. Thank you **James L. Kee**, **John W. Kinslow**, **Roy D. Tucker**, **James R. Gotwals**, **J.W. Coyle**, **Kaleb Hennigh**, **James R. Hicks**, **Alissa Hutter**, **James R. Marshall**, **Sonja Porter**, **Kevin Sain**, **John M. Weedn** and **Bryon Will**. Your contributions have helped all of us as lawyers join together and promote public confidence in the judicial system.

Now, as I step down as president of the Oklahoma Bar Association on Jan. 1, 2017, and turn the responsibility over to **Linda Thomas**, president-elect from Bartlesville, I vow to all of you I will never quit fighting for the judicial system and our duty as lawyers to uphold public confidence in the judicial system. Thank you for allowing me to serve as your president. Adios, amigos!

*Thank you for
allowing me to
serve as your
president.*

THE OKLAHOMA BAR JOURNAL is a publication of the Oklahoma Bar Association. All rights reserved. Copyright© 2016 Oklahoma Bar Association. Statements or opinions expressed herein are those of the authors and do not necessarily reflect those of the Oklahoma Bar Association, its officers, Board of Governors, Board of Editors or staff. Although advertising copy is reviewed, no endorsement of any product or service offered by any advertisement is intended or implied by publication. Advertisers are solely responsible for the content of their ads, and the OBA reserves the right to edit or reject any advertising copy for any reason.

Legal articles carried in THE OKLAHOMA BAR JOURNAL are selected by the Board of Editors. Information about submissions can be found at www.okbar.org.

BAR CENTER STAFF

John Morris Williams, *Executive Director*; Gina L. Hendryx, *General Counsel*; Joe Balkenbush, *Ethics Counsel*; Jim Calloway, *Director of Management Assistance Program*; Craig D. Combs, *Director of Administration*; Susan Damron, *Director of Educational Programs*; Beverly Petry Lewis, *Administrator MCLE Commission*; Carol A. Manning, *Director of Communications*; Robbin Watson, *Director of Information Technology*; Loraine Dillinder Farabow, Tommy Humphries, Debbie Maddox, Katherine Smith, Steve Sullins, *Assistant General Counsels*

Gary Berger, Debbie Brink, Tony Blasier, Tanner Condley, Cheryl Corey, Nickie Day, Ben Douglas, Diadra Florence, Johnny Marie Floyd, Matt Gayle, Marley Harris, Brandon Haynie, Suzi Hendrix, Misty Hill, Darla Jackson, Debra Jenkins, Jaime Lane, Durrel Lattimore, Mackenzie McDaniel, Renee Montgomery, Sharon Orth, Lacey Plaudis, Tracy Sanders, Mark Schneidewent, Laura Stone, Jan Thompson, Krystal Willis, Laura Willis & Roberta Yarbrough

Oklahoma Bar Association 405-416-7000
Toll Free 800-522-8065
FAX 405-416-7001

Continuing Legal Education 405-416-7029
Ethics Counsel 405-416-7055
General Counsel 405-416-7007
Lawyers Helping Lawyers 800-364-7886
Mgmt. Assistance Program 405-416-7008
Mandatory CLE 405-416-7009
Board of Bar Examiners 405-416-7075
Oklahoma Bar Foundation 405-416-7070

www.okbar.org

THE Oklahoma Bar JOURNAL

Volume 87 ♦ No. 33 ♦ Dec. 17, 2016

JOURNAL STAFF

JOHN MORRIS WILLIAMS
Editor-in-Chief
johnw@okbar.org

CAROL A. MANNING, Editor
carolm@okbar.org

MACKENZIE MCDANIEL
Advertising Manager
advertising@okbar.org

LACEY PLAUDIS
Communications Specialist
lanceyp@okbar.org

LAURA STONE
Communications Specialist
lauras@okbar.org



OFFICERS & BOARD OF GOVERNORS

GARVIN A. ISAACS, President, Oklahoma City; PAUL D. BRUNTON, Vice President, Tulsa; LINDA S. THOMAS, President-Elect, Bartlesville; DAVID A. POARCH JR., Immediate Past President, Norman; JOHN W. COYLE III, Oklahoma City; JAMES R. GOTWALS, Tulsa; KALEB K. HENNIGH, Enid; JAMES R. HICKS, Tulsa; ALISSA HUTTER, Norman; JAMES L. KEE, Duncan; JOHN W. KINSLOW, Lawton; JAMES R. MARSHALL, Shawnee; SONJA R. PORTER, Oklahoma City; KEVIN T. SAIN, Idabel; ROY D. TUCKER, Muskogee; JOHN M. WEEDN, Miami; BRYON J. WILL, Oklahoma City, Chairperson, OBA Young Lawyers Division

The Oklahoma Bar Journal (ISSN 0030-1655) is published three times a month in January, February, March, April, May, August, September, October November and December and bimonthly in June and July by the Oklahoma Bar Association, 1901 N. Lincoln Boulevard, Oklahoma City, Oklahoma 73105. Periodicals postage paid at Oklahoma City, Okla.

Subscriptions \$60 per year except for law students registered with the OBA who may subscribe for \$30 and senior members who may subscribe for \$25; all active members included in dues. Single copies: \$3

Postmaster Send address changes to the Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152-3036.

BOARD OF EDITORS

MELISSA DELACERDA
Stillwater, Chair

LUKE ADAMS, Clinton

RENÉE DEMOSS, Tulsa

PATRICIA A. FLANAGAN
Yukon

AMANDA GRANT, Spiro

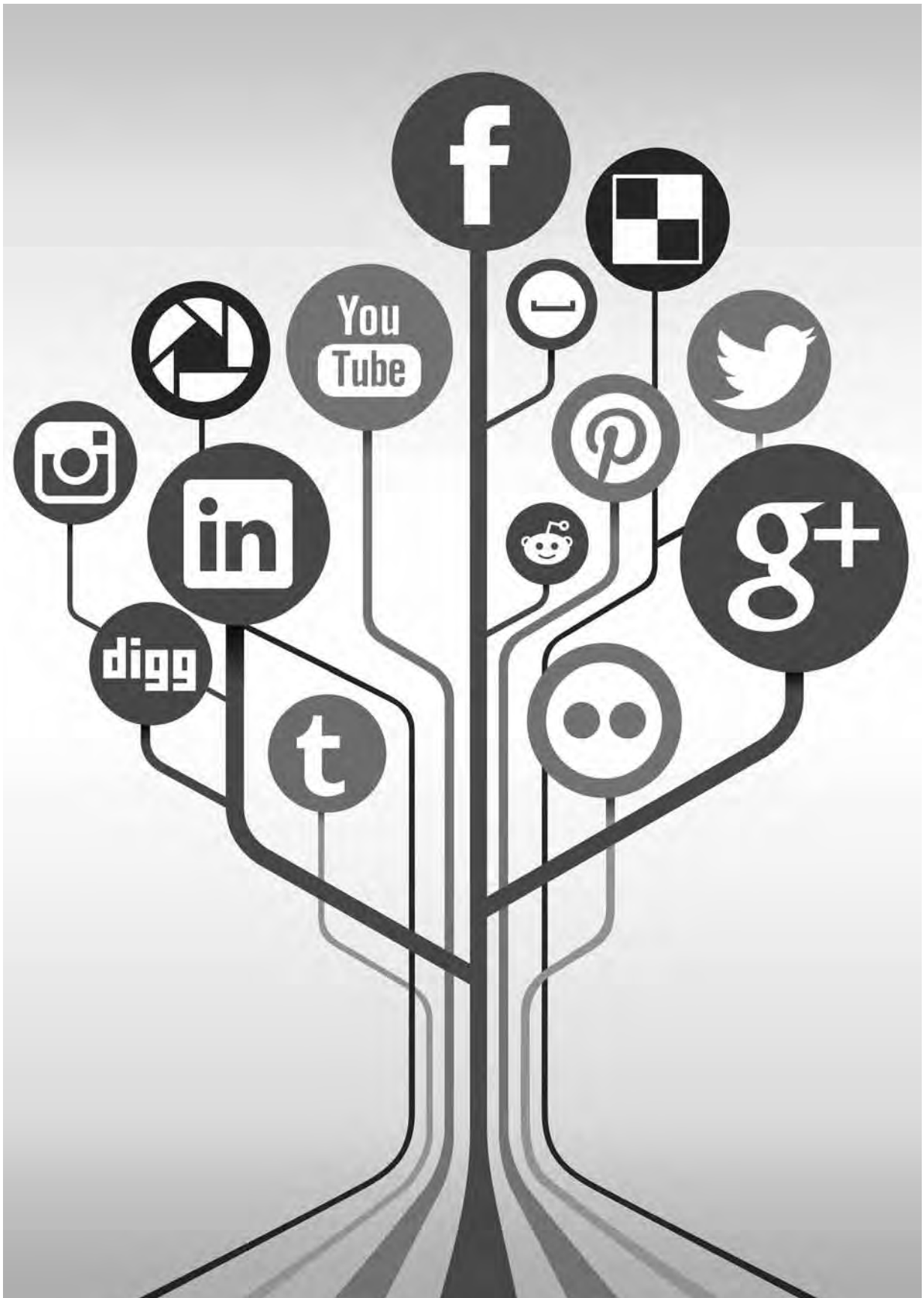
ERIN MEANS, Moore

SHANNON L. PRESCOTT
Okmulgee

MARK RAMSEY, Claremore

LESLIE TAYLOR, Ada

JUDGE ALLEN J. WELCH
Oklahoma City



Lawyers Being Social

Ethical Implications of Personal Social Media Sites

By Timila Rother and Paige Masters

Social media¹ has reunited families² and divided us politically and ideologically.³ It is how many of us learned of the horrific Paris attacks on Nov. 13, 2015, the outcome of the Brexit vote or that the treasured Kevin Durant was leaving the Oklahoma City Thunder. For Oklahomans, it confirms the shaking that awakened us at 2 a.m. was in fact an earthquake and gives us scoring updates when the Sooners or Cowboys are locked in a nail biter and we are too anxious to watch. It enables us to gauge whether we measure up to the high school bully and offers proof that our first love was not “the one.” It has made us more connected, more curious and more vulnerable. It was the mission of the “big three” social media outlets — LinkedIn, Facebook and Twitter⁴ — to build a more connected universe,⁵ and it is safe to say their mission has been accomplished.⁶

Tech guru Erik Qualman tweeted it best, “We don’t have a choice on whether we do social media, the question is how *well* we do it.”⁷ The same is true for the legal profession. Attorneys cannot afford to ignore social media and are arguably bound to embrace it. Part of an attorney’s obligation to deliver “competent representation” involves “keep[ing] abreast of changes in the law and its practice, engag[ing] in continuing study and education and comply[ing] with all continuing legal education requirements to which the lawyer is subject, *including the benefits and risks associated with relevant technology.*”⁸ A lawyer therefore

has “a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.”⁹

The affordability and accessibility of social networking has certainly “level[ed] the playing field,” permitting firms of all sizes to market their services to a global audience.¹⁰ The ethical issues raised by a firm’s specific use of social media to market its legal practice — business advertising — is an article for another day, though many of the issues discussed herein are

pertinent to the issue of law firm advertising. However, this article instead focuses on an attorney's use of his or her individual social media sites, and ethical concerns which may arise from everyday posts or tweets, or even profiles on LinkedIn. In short, this article concentrates on the ethical issues raised by "lawyers being social." The article first analyzes whether the ethical rules even apply to personal social media pages and concludes with a discussion of the ethical perils of which attorneys should be wary in their online networking.

APPLICATION OF THE MODEL RULES OF PROFESSIONAL CONDUCT

The beginning question is whether an attorney's personal social networking site is subject to the Rules of Professional Conduct. Authorities suggest that the rules do govern personal networking sites, at least to some extent. On one end of the spectrum are jurisdictions that abide by the notion that their rules of professional conduct "apply to attorneys' use of social media, regardless of the purpose for such use."¹¹ This view comports with the preamble to the Oklahoma Rules of Professional Conduct, which provides that "[a] lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."¹² Other jurisdictions decline to regulate sites that are used strictly for social purposes, finding that the rules are applicable only when the pages are used to promote the lawyer or firm.¹³ Whether a personal social media site is used to promote the lawyer will be the difficult question in those jurisdictions. Basic profile information on Facebook or LinkedIn establishing that the person posting is an attorney may open the door for even innocuous posts — such as commenting on the attorney's day at work — to be considered promotion of the attorney. Thus, the applicability of the ethics rules to an attorney's use of personal social media when it includes any discussion of an attorney's status as an attorney appears likely in most states, including Oklahoma.

The Rules of Professional Conduct have not kept pace with the technology, providing little guidance on how to handle issues unique to social media, such as multijurisdictional concerns and the potential for engaging in the unauthorized practice of law. Some are calling on the ABA to create a new model rule specific to social media use to "[fill] the vacuum of guidance" and spur states to do the same.¹⁴

Due to the ever-changing nature of digital technology, others believe an amendment to the model rules would be impracticable and unnecessary, as the current rules cover any issue that may arise.¹⁵ As Elefant and Black recognized, "social media changes the media of lawyer communications, not the message."¹⁶ To compensate for the lack of direction from state ethics rules, some states have published guidelines to "assist lawyers in understanding the ethical challenges of social media."¹⁷ Until the ABA or Oklahoma Supreme Court addresses the collision of social media with the practice of law, attorneys are subject to the rules as currently written.

ETHICAL PERILS OF PERSONAL SOCIAL MEDIA

Advertising and Solicitation

Depending on the content of the message, an attorney's personal tweet, Facebook post or LinkedIn profile may be considered advertising regulated by the Rules of Professional Conduct. The State Bar of California has made clear that "[t]he restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in the social media setting."¹⁸

The rules enable attorneys to "advertise services through written, recorded or electronic communication, including public media."¹⁹ Defined, in part, as involving "an active quest for clients," Rule 7.2 permits public dissemination of limited information about a lawyer, including, generally, contact information, services and fee information.²⁰ The rules recognize the value in lawyer advertising, noting that "[t]o assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns,"²¹ and specifically acknowledge that "electronic media, such as the internet, can be an important source of information" to achieve those means.²²

Attorney advertisements are strictly scrutinized and regulated; the rules ban "false or misleading communication[s] about [a] lawyer or the lawyer's services."²³ "A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading."²⁴

Even a truthful statement can be misleading “if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer’s services for which there is no reasonable factual foundation.”²⁵ Further, any communication made pursuant to Rule 7.2 must “include the name and office address of at least one lawyer or law firm responsible for its content.”²⁶

The rules also regulate solicitation, distinct from advertising. Attorneys may not make direct contact with prospective clients to solicit employment, whether in person, on the phone or through real-time electronic communications, “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”²⁷ Direct contact is permitted if the person contacted is a lawyer or a family member, close personal friend or former or present client.²⁸ Rule 7.3(a) recognizes the “potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services” and is designed to mitigate “the possibility of undue influence, intimidation, and overreaching.”²⁹ A lawyer is otherwise allowed to solicit clients through written, recorded or electronic communication, as long as the communication complies with Rules 7.1 and 7.2 and includes the words “advertising material.”³⁰

Where do social media posts, which are virtually never flagged as “advertising material,” fit into this analysis? Considering the broad language of Rules 7.2 and 7.3, even the most innocent of posts or tweets could invoke the rules, such as posts concerning an attorney’s success at a hearing or receipt of a recognition for his or her legal services. Facebook or LinkedIn profiles must accurately portray the attorneys’ work experience and areas of practice; attorneys must “avoid use of social media to convey false expectations about results or nonverifiable information.”³¹ For example, the New York County Lawyers Association Professional Ethics Committee has opined that while LinkedIn profiles containing information about a lawyer’s education and work history do not constitute attorney advertising, information concerning areas of practice or certain skills and endorsements do.³² Additionally, because the Facebook Chat feature allows friends to communicate in real time, an attorney would likely be prohibited by the solicitation rules from making contact with potential clients using Facebook Chat, if he or she were moti-

vated by pecuniary gain.³³ However, since posting on someone’s Facebook wall or sending them a private message is more akin to email and not accomplished in “real time,” these methods of solicitation are presumably permissible under Rule 7.3, provided they include the “advertising material” disclosure.³⁴ Below are types of posts that may be considered advertising and create ethical issues for attorneys’ personal use of social media.

Creating Unjustified Expectations. Attorney postings about a recent victory — a trial victory or the closing of a big deal — may violate Rule 7.1 by creating unjustified expectations to his or her social media followers.³⁵ The comments to the Oklahoma rules explicitly recognize that an advertisement that touts a lawyer’s achievements on behalf of a client could run afoul of Rule 7.1 if presented in such a way as to lead the reader to believe that the lawyer could obtain for him the same or similar re-sult.³⁶ The outcome of a particular matter is the product of a variety of factors and is difficult to describe in a single advertisement,³⁷ and the results in one instance are not a good predictor of the likely results in another.³⁸

The rules therefore recommend that advertisements reporting an achievement include a disclaimer to help negate the likelihood of unjustified expectations or misleading a prospective client.³⁹ But sometimes a disclaimer may be insufficient. The North Carolina State Bar has opined that statements on a firm’s website that the firm was “enormously successful” and “consistently obtaining verdicts and settlements” were misleading despite a disclaimer that past successes should not be construed as a representation of success in the future.⁴⁰ In Oklahoma, if an attorney wishes to advertise specific amounts awarded by jury verdicts or negotiated in settlements, he or she *must* include a “disclaimer that the list or itemization was not to infer the probability of success for any prospective client in regard to any particular case and that each case stands on the individual merits of each case.”⁴¹ Further, “[t]he disclaimer must be presented in the same manner and with the same emphasis as the statement to which it applies.”⁴² Communications disclosing settlement amounts must also contain language stating the settlements “are the result of private negotiations between the parties involved that may be affected by factors other than the legal merits of a particular case.”⁴³

Social media does not lend itself to disclaimers (particularly Twitter with its 140-character limit) or labeling as advertisement. Further, posts of success do not have the same effect when followed by “past results afford no guarantee of future results and every case is different and must be judged on its own merits.” The State Bar of California Standing Committee on Professional Responsibility and Conduct is not sympathetic, noting that while including disclaimers may be “overly burdensome, and destroy the conversational and impromptu nature of a social media status posting. The Committee is of the view ... that an attorney has an obligation to advertise in a manner that complies with applicable ethical rules. If compliance makes the advertisement seem awkward, the solution is to change the form of the advertisement so that compliance is possible.”⁴⁴

Representations of Expertise or Specialization. Labels such as “expert” or “specialist” lend themselves to social media posts and raise the prospect of violating Rule 7.4. Rule 7.4 prohibits an attorney from stating or implying that he or she “is certified as a specialist in a particular field of law,” unless the lawyer is a patent attorney or practices admiralty law.⁴⁵ It is permissible for an attorney who is certified as a specialist by the licensing authority of another state⁴⁶ to communicate that fact in Oklahoma, as long as such communication is in accordance with the rules and requirements of that state’s licensing authority and the lawyer notes that such certification is not recognized by the Oklahoma Supreme Court.⁴⁷

However, a lawyer is permitted “by advertisement or otherwise, [to] communicate the fact that the lawyer does or does not practice in particular fields of law or limits his practice to or concentrates in particular fields of law;”⁴⁸ the line between such statements and the implication of being a certified specialist is thin. The comments to Rule 7.4 state, “[w]hile th[e] Rule contains no *per se* prohibition against a lawyer stating that the lawyer is a ‘specialist,’ practices a ‘specialty,’ or ‘specializes in’ particular fields, statements to this effect (like all communications concerning a lawyer’s services) are subject to the ‘false or misleading’ stan-

dards set out in Rule 7.1.”⁴⁹ In this connection, it must be recognized that a lawyer who asserts himself as a specialist is not merely identifying the fields of the lawyer’s practice, but is also claiming to have a more than average level of knowledge, skill and experience in those fields. As a result, overzealous expressions of expertise in certain practice areas on individual social media sites may go beyond what the rule permits.

At one time, LinkedIn included a heading for “specialties,” but it changed this feature, at least in part, in response to ethical advertising concerns posed by The Florida Bar and other bar associations.⁵⁰ Nonetheless, LinkedIn still contains a category for “Featured Skills,” which opens the door for attorneys to suggest or imply they are “experts” or “specialists” based on the skills included.⁵¹

“Labels such as ‘expert’ or ‘specialist’ lend themselves to social media posts and raise the prospect of violating Rule 7.4.”

Comparisons to the Services of Other Lawyers. The Rules of Professional Conduct frown upon unsubstantiated comparisons of a lawyer’s services with those of other lawyers, noting that such communications “may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.”⁵² Such comparison advertisements are even more restricted in some states and completely banned in others.⁵³ Even statements that make no mention of

another firm or attorney, such as “we do it well” or “most effective legal services,” may fall within the realm of unsubstantiated comparisons, subjecting attorneys to discipline.⁵⁴ In fact, The Mississippi Bar has opined that an attorney’s advertisement that he would donate part of his legal fees to children’s charities is a type of comparison ad, which indicates “that the lawyer or law firm is more charitable than other lawyers or law firms and, thus, better or more honest” — information that cannot be factually substantiated, “similar to a communication that a lawyer or law firm is ‘the best,’ ‘one of the best,’ or ‘one of the most experienced’ in a particular field of law.”⁵⁵ Such posts may pass scrutiny if accompanied by a disclaimer or qualifying language to mitigate public misperception.⁵⁶

Significantly, posts indicating that the attorney has been ranked by a nationally recognized peer-review organization, such as Best Lawyers in America or Super Lawyers, are likely to be deemed comparison advertisements. While Oklahoma has not considered whether such statements violate the existing ethical rules, ethics tribunals in other jurisdictions have.

New Jersey banned such communications, finding that “advertisements describing attorneys as ‘Super Lawyers,’ ‘Best Lawyers in America,’ or similar comparative titles, violate[d] the prohibition against advertisements that are inherently comparative in nature, RPC 7.1(a)(3), or that are likely to create an unjustified expectation about results, RPC 7.1(a)(2).”⁵⁷ The state Supreme Court later struck down the prohibition on constitutional grounds.⁵⁸ Thereafter New Jersey amended its version of Rule 7.1 to provide that “[a] communication is false or misleading if it: ... compares the lawyer’s services with other lawyers’ services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: ‘No aspect of this advertisement has been approved by the Supreme Court of New Jersey.’”⁵⁹ The New Jersey Committee on Attorney Advertising has since issued a “Notice to the Bar,” emphasizing that a lawyer may not state that he or she is *a* Super Lawyer or *the* Best Lawyer, only that he or she is listed by the lawyer review publication called *Super Lawyers* or *The Best Lawyers in America*.⁶⁰ The committee suggested that the following statement would comply with Rule 7.1:

Jane Doe was selected to the 2016 Super Lawyers List. The Super Lawyers list is issued by Thomson Reuters. A description of the selection methodology can be found at www.superlawyers.com/about/selection_process_detail.html. No aspect of this advertisement has been approved by the Supreme Court of New Jersey.⁶¹

Other states have followed New Jersey’s lead in regulating statements concerning an attorney’s inclusion in ranking publications, though most appear less restrictive.⁶² For example, the Virginia Standing Committee on Lawyer Advertising and Solicitation has opined that a lawyer may advertise that he or she has been listed in *The Best Lawyers in America* or a similar publication but warns against making mislead-

ing statements concerning what the award means.⁶³ It is permissible to explain to nonlawyers that inclusion in the publication means the lawyer “is among those lawyers ‘whom other lawyers have called the best,’” but statements such as “‘since I am included in the book, that means I am the best lawyer in America,’” are not permissible.⁶⁴ In addition, the committee required that in the event the lawyer is removed from the list, he or she must accurately state the year or edition in which the lawyer was listed.⁶⁵

Policing Testimonials and Endorsements.

Some of the best advertisements are those authored by the clients and colleagues of the attorney, and social media has made such endorsements easy. While the rules do not prohibit client testimonials and endorsements, they still are subject to Rule 7.1, and unfortunately attorneys are not excused from the rule if a client or friend does the bragging for them. Several jurisdictions have issued opinions obligating attorneys to police their social media sites for misleading endorsements. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has opined that “although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney’s social networking websites, an attorney (1) should monitor his or her social media networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements.”⁶⁶ “For example, if a lawyer limits his or her practice to criminal law, and is ‘endorsed’ for his or her expertise on appellate litigation on the attorneys’ LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page.”⁶⁷ Thus, posts that do not originate with the attorney may nonetheless remain the responsibility of the attorney under the rules if it would appear the attorney is endorsing it or knows that it is incorrect and does not correct it.⁶⁸

Multijurisdictional Issues and the Unauthorized Practice of Law

An issue tied to advertising and solicitation, but that gives rise to unrelated ethical concerns as well, is the multijurisdictional influence of social networking sites. A lawyer’s sites can be viewed around the world and reach audiences in jurisdictions in which the lawyer is not authorized to practice. Can an attorney be dis-

ciplined in states in which he or she is not licensed because his or her social media post reaches that state? The Rules of Professional Conduct provide minimal guidance.⁶⁹

A lawyer licensed in Oklahoma is subject to discipline in the state, regardless of where the lawyer's conduct occurs.⁷⁰ A lawyer not admitted to practice in Oklahoma may still be subject to disciplinary authority in the state "if the lawyer provides or offers to provide any legal service" in Oklahoma.⁷¹ A conservative interpretation of the rule may suggest that attorneys who are not licensed in Oklahoma may be subject to Oklahoma's ethics rules by the simple fact that their social media posts are available in Oklahoma, and thus, an Oklahoma resident viewing the lawyers' pages may believe the attorneys are "offering to provide legal services" in the state. We have found no authority that has gone that far in applying Rule 8.5.⁷²

However, at a minimum, if the lawyer actively directs or targets his or her message to other states he or she is likely to be subject to the rules of that state.⁷³ That leaves open to debate what it takes to direct or target the message to the residents of other states. California has recommended its attorneys take the following steps on their websites to avoid any misperception that they are advertising in other jurisdictions: "1) an explanation of where the attorney is licensed to practice law, 2) a description of where the attorney maintains law offices and actually practices law, 3) an explanation of any limitation on the courts in which the attorney is willing to appear, and 4) a statement that the attorney does not seek to represent anyone based solely on a visit to the attorney's website."⁷⁴ Otherwise their pages may be considered misleading or deceptive in violation of Rule 7.1.⁷⁵

Complying with the ethics rules can be particularly trying for an attorney licensed in multiple states, as an attorney is subject to the disciplinary rules of each state in which he or she is admitted.⁷⁶ The West Virginia Disciplinary Board recommends adhering, for all purposes, to the most restrictive standards among the jurisdictions in which the attorney is admitted.⁷⁷ This could be confusing and time-consuming, as many states have filing and disclosure requirements that do not exist in Oklahoma, which apply equally to social media advertising.⁷⁸

In addition to falling under the ambit of other states' disciplinary rules, communications transmitted via social media may expose an attorney to allegations the attorney has engaged in the unauthorized practice of law.⁷⁹ Under Rule 5.5(b) of the Oklahoma Rules of Professional Conduct, a lawyer who is not admitted to practice in the jurisdiction cannot "establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in th[e] jurisdiction."⁸⁰ "The definition of the practice of law is established by law and varies from one jurisdiction to another."⁸¹ Some states have held that advertising legal services in a jurisdiction in which the lawyer is not licensed constitutes the unauthorized practice of law, subjecting lawyers to civil or even criminal liability.⁸² Connecticut statute forbids those who are not admitted to practice in the state from "assum[ing], us[ing] or advertis[ing] the title of lawyer, attorney and counselor-at-law ... or an equivalent term, in such manner as to convey the impression that he or she is a legal practitioner of law" in Connecticut.⁸³ Persons who violate the law may be found guilty of a class C or D felony.⁸⁴

Similar to extra-jurisdictional practice issues, posts that reach jurisdictions other than that in which the attorney is admitted to practice — which is virtually all social media posts — may include a disclaimer stating the jurisdictions in which the attorney is admitted and disclaiming the intent to practice law in any other state.⁸⁵

Inadvertent Formation of Attorney-Client Relationship

The occasional telephone call from close friends and family who know you are a lawyer has now expanded to online requests for advice from distant relatives and high school acquaintances via Facebook or other networking sites. The global reach of social media has created a vast pool of potential clients, raising concerns that electronic exchanges may inadvertently create an attorney-client relationship. A Facebook "friend" may divulge confidential information via private message before an attorney has a chance to advise against it or, even more concerning, reveal confidential information by seeking counsel publicly through a comment on a Facebook post or blog entry.⁸⁶ An attorney's involuntary receipt of confidential information from a person seeking legal advice via the web may also create a conflict of interest

with the attorney's current client. Under the Rules of Professional Conduct, "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client" is barred from "represent[ing] a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter," unless the affected client and prospective client give informed, written consent.⁸⁷ And unless the disqualified lawyer can be properly screened, "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter."⁸⁸

According to the Restatement (Third) of Law Governing Lawyers, "[a] relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide services."⁸⁹ The majority of bar associations to analyze whether attorney-client relationships were created through electronic communications have concluded that "[u]nilaterally communicating information to a lawyer [by e-mail or through a web site] does not necessarily create a lawyer-client relationship..."⁹⁰ The Oklahoma Rules of Professional Conduct appear to be in accord.⁹¹ But if the attorney responds and offers "cyberadvice," "the attorney must be aware of the prospective client's reasonable reliance on the attorney to provide competent and complete legal services."⁹² If an attorney-client relationship is not intended, the social media communication may help manage the prospective clients' expectations by stating that the attorney is not providing legal advice and does not intend to create an attorney-client relationship.

Unauthorized Disclosure of Confidential Information

Social media posts by an attorney about a matter also create the possibility of disclosing

client information. "The fundamental principle in the lawyer-client relationship is that, in absence of the client's informed consent, the lawyer must not reveal information *relating to the representation*..."⁹³ The confidentiality rule is broader than the attorney-client privilege, as it "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."⁹⁴ Attorneys are obligated to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."⁹⁵ The rules apply to social media communications and communications made on a lawyer's website or blog.⁹⁶ "Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege."⁹⁷

“An Illinois assistant public defender violated these rules when she took to her blog to vent about ‘her difficult clients and clueless judges.’”

Posts "as innocuous as where a client was on a certain day" may fall within Rule 1.6's prohibition.⁹⁸ The mere fact that an attorney represents a certain client may be considered confidential; therefore, attorneys may not disseminate the names of clients regularly represented, without their consent.⁹⁹ Even if one does not disclose the name of the client, a post may violate Rule 1.6 if the client's identity can be ascertained from the content of the post, as the prohibition against revealing information relating

to the representation of a client "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."¹⁰⁰

An Illinois assistant public defender violated these rules when she took to her blog to vent about "her difficult clients and clueless judges."¹⁰¹ She was fired from her job and disciplined by the Illinois State Bar Association in part for describing her clients in a way that could identify them, referring to their first names, a derivative of their name or their jail identification numbers.¹⁰² Her blog also revealed that she neglected to inform a judge that her client was taking methadone, leading to

accusations of failure to rectify a fraud on the court, as well as ethical violations for her lack of candor to the tribunal.¹⁰³ The Illinois Supreme Court suspended the lawyer for 60 days, and since she was also licensed in Wisconsin, a disciplinary action resulted in a 60-day suspension to practice law there as well.¹⁰⁴ Though an extreme example, multitudes of less extreme posts are made, which may nudge up against or cross what is permitted.

CONCLUSION

Being personally social through the use of social media is unique for lawyers. Most other social networkers may share their day via a post, rant about their grievances, brag about their professional achievements or respond to the woes of friends without worry that they are violating the rules of their profession or creating relationships beyond that of “friend.” However, a growing body of law suggests that attorneys’ personal social networking sites are subject to scrutiny for compliance with the Rules of Professional Conduct. Thus, the law appears to require that attorneys take the same care in communications through their personal social media as they do with their business communications.

1. The term “social media is an umbrella term that encompasses the various activities that integrate technology and social interaction. It’s also a fancy way to describe the zillions of conversations that people are having online 24/7.” Carolyn Elefant and Nicole Black, *Social Media for Lawyers: The Next Frontier* 3 (2010) (quoting Marta Kagan, *What ... is Social Media: One Year Later* (2009)).

2. See e.g., Eric Baculinao and Ed Flanagan, “Facebook Discovery Helps Kentucky Family Reunite Disabled Chinese Sisters,” *NBC News*, Aug. 16, 2016, www.nbcnews.com/news/world/lumpkins-family-kentucky-finds-adopted-daughter-s-long-lost-sister-n630871.

3. See e.g., Darren Samuelsohn, “Trump and Clinton Wreck Facebook Friendships: The Social Network Has Become the Vehicle for 2016 Vitriol, and Is Ruining Relationships in the Process,” *Politico*, Aug. 19, 2016, www.politico.com/story/2016/08/donald-trump-hillary-clinton-facebook-friendships-227175.

4. Elefant and Black, *supra* note 1, at 28 (categorizing LinkedIn, Facebook and Twitter as the “big three” social media networks due to “their high traffic numbers and, more importantly, their diverse user base”).

5. Facebook, “Our Mission,” newsroom.fb.com/company-info (last visited Oct. 28, 2016) (“Founded in 2004, Facebook’s mission is to give people the power to share and make the world more open and connected. People use Facebook to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them.”); Twitter, “It’s What’s Happening,” about.twitter.com/company (last visited Oct. 28, 2016) (“Our mission: To give everyone the power to create and share ideas and information instantly, without barriers.”); LinkedIn, “About Us,” www.linkedin.com/about-us?trk=uno-reg-guest-home-about (last visited Oct. 28, 2016) (“Our mission is simple: To connect the world’s professionals to make them more productive and successful. When you join LinkedIn, you get access to people, jobs, news, updates, and insights that help you be great at what you do.”).

6. In 2011, the Illinois State Bar Association president commented that “[i]f Facebook were a nation, it would be the third largest in the world.” Helen W. Gunnarsson, “Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically,” 99 *Ill. B.J.* 500 (2011).

7. Erik Qualman, @equalman (Nov. 13, 2014, 6:55 p.m.) (emphasis added).

8. Okla. Rules of Prof’l Conduct R. 1.1 Cmt. 6 (emphasis added).

9. N.Y. State Bar Ass’n, Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar at 3 (June 9, 2015) (hereinafter “N.Y. Bar Social Media Ethics Guidelines”).

10. Elefant and Black, *supra* note 1, at 10.

11. W. Va. Lawyer Disciplinary Bd. Legal Ethics Op. 2015-02 (2015) (hereinafter “W. Va. Legal Ethics Op. 2015-02”); see also Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility Op. 2014-300 (2014) (“Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.”).

12. Okla. Rules of Prof’l Conduct, Preamble, §5 (emphasis added); Model Rules of Prof’l Conduct, Preamble, §5.

13. The Fla. Bar Standing Comm. on Advertising, Guidelines for Networking Sites (Nov. 9, 2016) (hereinafter “Fla. Bar Guidelines for Networking Sites”); N.Y. Social Media Ethics Guidelines, *supra* note 9, at 5 (“A lawyer’s social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules. Hybrid accounts need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.”); State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct Op. 2012-186 (2012) (hereinafter “Cal. Bar Op. 2012-186”) (“Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a ‘communication’ within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) ‘advertising by electronic media’ within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act.”); Cf. *Hunter v. Va. State Bar ex rel. 3rd District Comm.*, 744 S.E.2d 611, 621 (Va. 2013) (concluding that attorney’s blog posts discussing his clients’ case results constituted “potentially misleading commercial speech” that could be regulated by the Virginia State Bar).

14. Christina Parajon Skinner, “The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short,” 63 *S.C. L. Rev.* 241, 271 (2011).

15. Elizabeth Colvin, note, “The Dangers of Using Social Media in the Legal Profession: An Ethical Examination in Professional Responsibility,” 92 *U. Det. Mercy L. Rev.* 1, 22 (2015).

16. Elefant and Black, *supra* note 1, at 169.

17. N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 1. The Commercial Litigation Section of the New York State Bar Association was quick to note that the guidelines were not meant to serve as “best practices,” as the “world of social media is a nascent area that is rapidly changing and ‘best practices’ will continue to evolve to keep pace with such developments.” *Id.* See also Fla. Bar Guidelines for Networking Sites, *supra* note 13.

18. Cal. Bar Op. 2012-186, *supra* note 13.

19. Okla. Rules of Prof’l Conduct R. 7.2(a).

20. See *id.* Cmt. 2.

21. *Id.* Cmt. 1.

22. *Id.* Cmt. 3.

23. Okla. Rules of Prof’l Conduct R. 7.1.

24. *Id.*

25. *Id.* Cmt. 2.

26. Okla. Rules of Prof’l Conduct R. 7.2(c).

27. Okla. Rules of Prof’l Conduct R. 7.2(a).

28. Okla. Rules of Prof’l Conduct R. 7.2(a)(1)-(2).

29. *Id.* Cmt. 1.

30. Okla. Rules of Prof’l Conduct R. 7.2(c).

31. Elefant and Black, *supra* note 1, at 170.

32. N.Y. County Lawyers Ass’n Prof’l Ethics Comm. Op. 748 (2015) (hereinafter “N.Y. County Lawyers Ethics Op. 748”).

33. Fla. Bar Guidelines for Networking Sites, *supra* note 13; N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 5 (“Invitations sent directly from a social media site via instant messaging to a third party to view or link to the lawyer’s page on an unsolicited basis for the purpose of obtaining, or attempting to obtain, legal business must meet the requirements for written solicitations under Rule 4-7.18(b), unless the recipient is the lawyer’s current client, former client, relative, has a prior professional relationship with the lawyer, or is another lawyer.”); *id.* at 10-11 (“Due to the ‘live’ nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not ‘solicit’ business from the public through such means. If a potential client initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request.”).

34. N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 11 (“Emails and attorney communications via a website or over social media platforms, such as Twitter, may not be considered real-time or interactive communications.”).

35. Okla. Rules of Prof’l Conduct R. 7.1; Model Rules of Prof’l Conduct R. 7.1. See State Bar of Cal. Standing Comm. on Prof’l Responsibility and Conduct Op. 2012-186 (2012) (opining that a post stating “[a]nother great victory in court today! My client is delighted. Who wants to be next?” may be presumed to violate rule prohibiting guarantees, warranties or predictions regarding the result of the representation because it “expressly relates to a ‘victory,’ and could be interpreted as asking who wants to be the next victorious client”).

36. Okla. Rules of Prof’l Conduct R. 7.1 Cmt. 3.

37. Va. State Bar Standing Comm. on Lawyer Advertising and Solicitation Op. 1750 (2008) (hereinafter “Va. Bar Op. 1750”). See also *In re Anonymous*, 689 N.E.2d 442, 443 (Ind. 1997) (reasoning that by stating in an ad that a firm “offer[ed] the track record and resources you need to win a settlement,” the firm’s message was likely to create the unjustified expectation that similar results could be obtained in every claim or case they were hired to handle, without reference to the specific factual and legal circumstances of the particular claims or cases.).

38. Va. Bar Op. 1750, *supra* note 37 (“An attorney could accurately cite in advertising a verdict of one million dollars, yet the public would plainly be deceived if the verdict were obtained under circumstances in which the offer prior to trial had been two million dollars. The same advertisement would be similarly deceptive if the one million dollar verdict were obtained against an uncollectible defendant, under circumstances in which the case was lost as to a collectible co-defendant who had made a substantial offer prior to trial.”).

39. Okla. Rules of Prof’l Conduct R. 7.1 Cmt. 3. While a disclaimer is merely recommended and not mandatory in Oklahoma, other states require a disclaimer when advertising results. See e.g., Mo. Sup. Ct. Rules of Prof’l Conduct R. 4-7.1(c) (providing that an advertisement cannot proclaim results obtained on behalf of clients, such as the amount of a damage award or the lawyer’s record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits); Mont. Rules of Prof’l Conduct R. 7.1(c) (same); Nev. Rules of Prof’l Conduct R. 7.2(i) (providing that if an advertisement contains any reference to past successes or results obtained, it must contain a disclaimer that past results do not guarantee, warrant, or predict future cases.); N.Y. Rules of Prof’l Conduct R. 7.1(d)-(e) (providing that advertisements containing statements that are reasonably likely to create an expectation about results the lawyer can achieve must be accompanied by a disclaimer that “[p]rior results do not guarantee a similar outcome”); Va. Rules of Prof’l Conduct R. 7.1(b) (requiring that communications advertising specific or cumulative case results include a disclaimer that “(1) puts the case results in a context that is not misleading; (2) states that case results depend upon a variety of factors unique to each case; and (3) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer”).

40. N.C. Ethics Op. 2000-1 (2000).

41. Okla. Bar Ass’n Ethics Op. 320 (2004).

42. *Id.*

43. *Id.*

44. Cal. Bar Op. 2012-186, *supra* note 13.

45. Okla. Rules of Prof’l Conduct R. 7.4(b); Model Rules of Prof’l Conduct R. 7.4(d).

46. For example, under the Texas Disciplinary Rules of Professional Conduct, a lawyer who has been awarded a certificate of special competence by the Texas Board of Legal Specialization “may state with respect to each such area, ‘Board Certified, area of specialization — Texas Board of Legal Specialization.’” Tex. Disciplinary Rules of Prof’l Conduct R. 7.04(b)(2)(i).

47. Okla. Rules of Prof’l Conduct R. 7.4(b)(4).

48. Okla. Rules of Prof’l Conduct R. 7.4(c).

49. *Id.* Cmt.

50. See Julie Kay, “LinkedIn to Change Setting in Response to Florida Bar Concerns,” *Miami Daily Bus. Rev.* (Dec. 31, 2013).

51. New York County Lawyers Ass’n Prof’l Ethics Comm. Op. 748 (2015) (suggesting that lawyers avoid inputting information under the LinkedIn heading “specialties,” while opining that information included under the headings “skills” or “experience” did not run afoul of the ethics rules); N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 7 (“Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms ‘specialist,’ unless the lawyer is certified by the appropriate accrediting body in the particular area.”); N.Y. State Bar Ethics Op. 972 (2013) (concluding that “a lawyer or law firm listed on a social media site may ... identify one or more areas of law practice [but] to list those areas under a heading of ‘Spe-

cialties’ would constitute a claim that the lawyer or law firm ‘is a specialist or specializes’ in a particular field of law”).

52. Okla. Rules of Prof’l Conduct R. 7.1 Cmt. 3.

53. Ala. Rules of Prof’l Conduct R. 7.2(e) (“No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers.”); N.J. Rules of Prof’l Conduct R. 7.1(a)(3) (providing that an advertisement that compares the lawyer’s services to another lawyer’s services must state the name of the comparing organization and include the following disclaimer in a readily discernable manner: “No aspect of this advertisement has been approved by the Supreme Court of New Jersey.”).

54. *In re Wells*, 709 S.E.2d 644, 647 (S.C. 2011) (reprimanding attorney for displaying statements on website, such as “best attorney available” and “most effective legal services” which compared his firm’s services to other law firms in ways that could not be substantiated); *Medina County Bar Ass’n v. Grieselhuber*, 678 N.E.2d 535, 537 (Ohio 1997) (finding that attorney’s advertisements, which included statement “We Do It Well,” violated rule prohibiting lawyer from making unverifiable statements).

55. Miss. Bar Ethics Op. 256 (2013).

56. Okla. Rules of Prof’l Conduct R. 7.1 Cmt. 3.

57. *In re Opinion 39 of Comm. On Attorney Advertising*, 961 A.2d 722, 724 (N.J. 2008).

58. *Id.* at 731 (adopting Special Master’s analysis and conclusion that “state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine”).

59. N.J. Rules of Court R. 7.1(a)(3).

60. N.J. Comm. on Attorney Advertising, “Notice to the Bar: Attorney Advertising of Awards, Honors, and Accolades that Compare a Lawyer’s Services to Other Lawyers’ Services — Reminder from the Committee on Attorney Advertising,” (May 4, 2016), www.judiciary.state.nj.us/notices/2016/n160518a.pdf.

61. *Id.*

62. The Connecticut Statewide Grievance Committee has found that “the fact that one has been selected as a ‘Super Lawyer’ ... leads to no other conclusion than the lawyer is superior to those lawyers not selected,” and is therefore “potentially misleading because it creates an unjustified expectation as to the lawyer’s ability to achieve particular results and amounts to an unsubstantiated comparison of the ‘Super Lawyer’s’ ability to the ability of one who is not a ‘Super Lawyer’ in violation of Rule 7.1.” Conn. Statewide Grievance Comm. Op. 07-00188 (2007). To alleviate confusion, the committee opined that any statement that the lawyer has been designated a “Super Lawyer” should be accompanied by a disclaimer, stating the edition of the magazine in which the lawyer was included and detailing the “particularities of the selection process” as well as the “specific empirical data regarding the selection process.” *Id.* A simple link to the Super Lawyers website will not do. *Id.* See also Alaska Bar Ass’n Ethics Op. 2009-02 (2009) (“Lawyers and law firms may refer to a listing in *Super Lawyers, Best Lawyers*, or another commercial professional ranking so long as the reference includes the publication name, date, and the practice area, if one was specified, in which the lawyer was ranked or selected.”); Del. State Bar Ass’n Comm. on Professional Ethics Op. 2008-2 (2008) (opining that a Delaware lawyer may include the designation of “Super Lawyer” or “Best Lawyer” in an advertisement or communication, provided that the lawyer states only that he or she was included in the list of “Super Lawyers” or “Best Lawyers” by the publication, notes the area of practice for which he or she was recognized, refrains from presenting the designation in a light that implies he or she is superior to another member of the Delaware Bar and references the listing publication and year); State Bar of Mich. Ethics Op. RI-341 (2007) (concluding that “[a] lawyer who is listed as a ‘Super Lawyer’ in the ... publication *Michigan Super Lawyers* may refer to such a listing in advertising that otherwise complies with MRPC 7.1.”); N.C. State Bar Ethics Op. 2007-14 (2008) (finding that “an advertisement that states that a lawyer is included in a listing in *North Carolina Super Lawyers*, or in a similar listing in another publication, is not misleading or deceptive,” as long as the lawyer “make[s] clear that the lawyer is included in a listing that appears in a publication which is identified (by using a distinctive typeface or italics)” and does not “simply state that the lawyer is a ‘Super Lawyer,’” and indicates the year in which the lawyer was listed).

63. Va. Bar Op. 1750, *supra* note 37.

64. *Id.*

65. *Id.*

66. Pa. Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility Op. 2014-300 (2014); see also Fla. Bar Guidelines for Networking Sites, *supra* note 13 (“Although lawyers are responsible for all content that the lawyers post on their own pages, a lawyer is not responsible for

information posted on the lawyer's page by a third party, unless the lawyer prompts the third party to post the information or the lawyer uses the third party to circumvent the lawyer advertising rules. If a third party posts information on the lawyer's page about the lawyer's services that does not comply with the lawyer advertising rules, the lawyer must remove the information from the lawyer's page."); N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 8 ("A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate the ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer's social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer's control and, if not within the lawyer's control, she must ask that person to remove it."); N.Y. County Lawyers Ethics Op. 748, *supra* note 32 (concluding that "attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals" to ensure endorsements are not misleading and an attorney must remove an endorsement from his or her profile within a reasonable time, once the attorney becomes aware of the posting); W. Va. Legal Ethics Op. 2015-02, *supra* note 11 (opining that attorneys may permit clients and colleagues to endorse them on LinkedIn, as long as they monitor any posts, verify the accuracy of any information posted and remove or correct any inaccuracies).

67. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Op. 2014-300 *supra* note 66.

68. Cal. Bar Op. 2012-186, *supra* note 13 (finding that a post stating "Another great victory in court today! My client is delighted. Who wants to be next?" violated California's rules concerning testimonials because it did not include a disclaimer).

69. Nia Marie Monroe, note, "The Need for Uniformity: Fifty Separate Voices Lead to Disunion in Attorney Internet Advertising," 18 *Geo. J. Legal Ethics* 1005, 1005, 1016-19 (2005) (recognizing the ethical issues that arise in internet advertising due to the global reach of the internet and arguing for "uniformity and simplicity in the laws that govern attorney website advertising").

70. Okla. Rules of Prof'l Conduct R. 8.5(a).

71. *Id.*

72. However, Montana's version of Rule 8.5 expressly provides that a lawyer not admitted to practice in Montana is subject to the state's disciplinary authority for conduct that "advertises, solicits, or offers legal services in th[e] State," but provides a safe harbor for lawyers whose "conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur." Mont. Rules of Prof'l Conduct R. 8.5(3).

73. W. Va. Ethics Op. 98-03 (1998) ("The Board is further of the opinion that West Virginia's Rules of Professional Conduct apply to electronic communications from lawyers not licensed in West Virginia sent or directed to West Virginia residents specifically."); *Lawyer Disciplinary Bd. v. Allen*, 479 S.E.2d 317, 324 (1996) ("[W]e hold that a lawyer who initially contacts a prospective client who is located in West Virginia regarding a cause of action that may be initiated in West Virginia courts is subject to discipline in this State if he or she violates the West Virginia Rules of Professional Conduct with respect to such prospective client, even if the conduct constituting a violation occurs outside of our State.').

74. Cal. Bar Standing Comm. on Prof'l Responsibility and Conduct Op. 2001-155 (2001).

75. *Id.* n.12; see also *Okla. Bar Ass'n v. Burnett*, 2004 OK 31, ¶12, 91 P.3d 641, 645 ("We also conclude that Burnett misled the public, her clients and other attorneys by not indicating on her letterhead in the bankruptcy petition and the personal injury petition that she was only licensed in Oklahoma, thus violating Rules 7.1(a)(1) and 7.5(b) of the Oklahoma Rules of Professional Conduct.').

76. See e.g., Okla. Rules of Prof'l Conduct R. 8.5(a); Ariz. State Bar Comm. on Rules of Prof'l Conduct Op. 97-04 (1997) (finding law firm must comply with Arizona rules if it has lawyers admitted to practice in Arizona); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct Op. 96-14 (1996) (same).

77. W. Va. Ethics Op. 98-03 (1998).

78. See e.g., Fla. Bar Guidelines for Networking Sites, *supra* note 13 ("Because of Twitter's 140 character limitation, lawyers may use commonly recognized abbreviations for the required geographic disclosure of a bona fide office location by city, town or county as required by Rule 4-7.12(a)."); Cal. Bar Op. 2012-186, *supra* note 13 (noting that a true and correct copy of regulated communications posted on social media sites must be retained for two years under California law).

79. But see Louise L. Hill, "Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards," 75 *Wash. L. Rev.* 785, 853 (2000) ("Posting information for view on a home page or website, arguably, would not constitute the practice of law.').

80. Okla. Rules of Prof'l Conduct R. 5.5(b)(2).

81. Okla. Rules of Prof'l Conduct R. 5.5 Cmt. 2.

82. *In re Amendments to Rules Regulating the Florida Bar*, 108 So.3d 609, 617 (Fla. 2013) ("A lawyer cannot advertise for Florida cases within the state of Florida or target advertisements to Florida residents, because such an advertisement in and of itself constitutes the unlicensed practice of law."); *Fla. Bar v. Kaiser*, 397 So.2d 1132, 1134 (Fla. 1981) (concluding that attorney's advertisements in telephone books, on television and in newspapers of his availability as an attorney, with the implication that he was authorized to practice law in the state, constituted the unauthorized practice of law); *Haymond v. State Grievance Comm.*, 723 A.2d 821, 824 (Conn. Super. Ct. 1997) (finding attorney licensed only in Connecticut and Pennsylvania engaged in the unauthorized practice of law by placing ad in yellow pages in Massachusetts because "advertising legal services [was] expressly included within the practice of law" under Connecticut statute); *In re Williamson*, 838 So.2d 226, 235-36 (Miss. 2002) (determining that out-of-state attorney engaged in the practice of law in part by soliciting cases via a 1-800 number advertised in Mississippi through television commercials, among other, more direct, actions).

83. Conn. Gen. Stat. §51-88(a)(6); *Statewide Grievance Comm. v. Zadora*, 772 A.2d 681, 684 (Conn. App. Ct. 2001) ("Advertising alone is sufficient to constitute the unauthorized practice of law if the advertisement is for activity that amounts to legal services ... That principle may apply despite the presence of disclaimers of being an attorney or providing legal advice."); see also Ind. Rules of Prof'l Conduct R. 5.5 Cmt. 5 (noting that "advertising in media specifically targeted to Indiana residents or initiating contact with Indiana residents for solicitation purposes could be viewed as systematic and continuous presence" so as to violate Rule 5.5); Ohio Rules of Prof'l Conduct R. 5.5 Cmt. 4 (commenting also that "advertising in media specifically targeted to Ohio residents or initiating contact with Ohio residents for solicitation purposes could be viewed as a systematic and continuous presence").

84. Conn. Gen. Stat. §51-88(b)(1) ("Any person who violates any provision of this section shall be guilty of a class D felony, except that in any prosecution under this section, if the defendant proves by a preponderance of the evidence that the defendant committed the proscribed act or acts while admitted to practice law before the highest court of original jurisdiction in any state, the District of Columbia, the Commonwealth of Puerto Rico or a territory of the United States or in a district court of the United States and while a member in good standing of such bar, such defendant shall be guilty of a class C misdemeanor.').

85. See *In re Amendments*, 108 So.3d at 617 (finding that out-of-state attorneys practicing in the federal law areas of immigration, patent and tax may disseminate advertisements in Florida, as long as the ads include a statement that the lawyer is 'Not a Member of The Florida Bar' or 'Admitted in [jurisdiction where admitted] only'); Ill. State Bar Ass'n Op. 12-17 (2012) (opining that advertisements and solicitations directed to potential Illinois clients, by lawyer not admitted in Illinois, are misleading if lawyer's jurisdictional limitations are not clearly disclosed); Comm. on Unauthorized Practice of Law of the District of Columbia Court of Appeals Op. 17-06 (2006) (finding that lawyers based in D.C. with federal practice, but not members of the D.C. bar, must disclose non-admission and limitation of practice in business documents).

86. Colvin, *supra* note 15, at 8; see also N.Y. Bar Social Media Ethics Guidelines, *supra* note 9, at 12 ("A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information."); W. Va. Legal Ethics Op. 2015-02, *supra* note 11 ("[A] prospective attorney-client relationship may be formed via social media or on a social networking website if an individual's electronic communication with an attorney is determined to be a consultation. Attorneys should be mindful that their communications with individuals via social media or on a social networking website may place them into a prospective attorney-client relationship with such individuals.').

87. Okla. Rules of Prof'l Conduct R. 1.18(b), (c), (d).

88. Okla. Rules of Prof'l Conduct R. 1.18(c), (d)(2).

89. Restatement (Third) of Law Governing Lawyers §14 (2004).

90. Bridget Hoy, "What You Say: Avoiding the Accidental Attorney-Client Relationship," 93 *Ill. B.J.* 22, 25 (2005) (quoting ABA/BNA Manual §1201:6401).

91. Okla. Rules of Prof'l Conduct R. 1.18 Cmt. 2 ("A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client' within the meaning of [Rule 1.18](a).").

92. Hoy, *supra* note 90.

93. Okla. Rules of Prof'l Conduct R. 1.6 Cmt. 2 (emphasis added).

94. *Id.* Cmt. 3.
95. Okla. Rules of Prof'l Conduct R. 1.6(c).
96. N.Y. State Bar Social Media Ethics Guidelines, *supra* note 9, at 23.
97. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility Op. 2014-300 (2014).
98. *Id.*
99. Okla. Rules of Prof'l Conduct R. 7.2 Cmt. 2.
100. Okla. Rules of Prof'l Conduct R. 1.6 Cmt. 4.
101. Debra Cassens Weiss, "Blogging Assistant PD Accused of Revealing Secrets of Little-Disguised Clients," *ABA Journal*, Sept. 10, 2009, www.abajournal.com/news/article/blogging_assistant_pd_accused_of_revealing_secrets_of_little-disguised_clie. The lawyer's blog was titled *The Bardd (sic) Before the Bar - Irreverant (sic) Adventures in Life, Law, and Indigent Defense*. See Complaint, *In re Peshek*, No. 6201779 (Ill. Atty. Reg. and Disc. Comm'n Aug. 25, 2009). "Approximately one-third of the blog was devoted to discussing [the lawyer's] work at the public defender's office and her clients, and the remaining content of the blog concerned [her] health issues and her photography and bird-watching hobbies." *Id.*
102. Weiss, *supra* note 101. For example, the complaint alleged that the attorney "knew or should have known" that the information contained in the following blog entry "was confidential, or that it had been gained in the professional relationship and the revelation of it would be embarrassing or detrimental to her client":
#127409 (the client's jail identification number) This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because "he's no snitch." I managed to talk the prosecutor into treatment and deferred prosecution, since we both know the older brother from prior dealings involving drugs and guns. My client is in college. Just goes to show you that higher education does not imply that you have any sense.
Complaint, *In re Peshek*, No. 6201779.
103. Weiss, *supra* note 101.
104. Joseph A. Corsmeier, "Illinois lawyer receives 60 day suspension for disparaging judges, violating client confidentiality on blog, and failing to correct client's false sworn statements," *Lawyer Ethics Alert Blogs*, Feb. 29, 2012, jcorsmeier.wordpress.com/2012/02/29/illinois-lawyer-receives-60-day-suspension-for-disparaging-judges-violating-client-confidentiality-on-blog-and-failing-to-correct-clients-false-sworn-statements.

ABOUT THE AUTHORS



Timila Rother is a litigation attorney with Crowe & Dunlevy PC and is president and CEO of the firm. Prior to being president, she served 15 years as Crowe & Dunlevy's loss prevention counsel. She has served as a member of the Oklahoma Legal Ethics Advisory Panel and is on the OBA Professionalism Committee. The emphasis of her legal practice is commercial litigation, including insurance and class action litigation, as well as professional liability and healthcare litigation.



Paige Masters is a litigation associate for the firm of Crowe & Dunlevy PC where she is a member of the commercial litigation, health care, and appellate practice groups and serves on the firm's Ethics Committee. She has advocated for or defended clients at both the trial and appellate level in complex commercial disputes, including cases involving breach of contract, insurance bad faith, trade secrets, negligence, fraud, breach of fiduciary duty, and the Uniform Commercial Code. Masters received her J.D. from the OCU School of Law where she was editor in chief of the *Oklahoma City University Law Review*.



For the latest OBA news,
follow us @OklahomaBar
and @OBACLE



More Than Sticks and Stones on the Internet

The Ethical Do's and Don'ts in Responding to Negative Online Reviews

By John G. Browning

Imagine learning a new client has cancelled her appointment, citing something she “heard about your firm,” or that a corporate client has euphemistically decided to “go in a different direction,” and that your services are no longer needed. Concerned, you Google yourself and among the search results that pop up are reviews about you — negative reviews about the representation you provided. Even worse, the critiques don’t even have the correct facts. You want to respond, to defend yourself, to set the record straight — but can you ethically do so?

Gone are the “good old days” when dealing with an unhappy client meant fielding a few angry phone calls or responding to a curt letter informing you that your services were no longer needed. In today’s digital age, where everyone is just a few clicks away from the opportunity to air grievances to the world, comments posted on lawyer rating websites like Avvo and LawyerRatingz or consumer complaint sites like Yelp! and RipoffReport can live online forever and pop up in response to internet searches for your name. Moreover, the web has become increasingly important in terms of generating referrals for legal services. According to a 2014 survey by FindLaw and Thomson Reuters Corp, the internet is now the most popular resource for people in need of

legal representation. Thirty-eight percent of respondents indicated they would first use the internet to find and research a lawyer, while 29 percent would ask a friend or relative first, 10 percent would rely on a local bar association and only 4 percent would use the Yellow Pages.¹ Research by the marketing firm Hinge shows that more people view a firm’s website (81 percent) or conduct an online search (63.2 percent) to find and evaluate a lawyer than those who ask friends and colleagues or talk to references.²

So what can lawyers do when their professional reputation is attacked online by a client or former client? As with any criticism, there’s a right way and a wrong way to respond — and the wrong way can land you in front of the

disciplinary board. Chicago employment attorney Betty Tsamis learned this lesson the hard way in January 2014, when she received a reprimand from the Illinois Attorney Registration and Disciplinary Commission for revealing confidential client information in a public forum.³ Tsamis had represented former American Airlines flight attendant Richard Rinehart in an unsuccessful quest for unemployment benefits (Rinehart had been terminated for allegedly assaulting a fellow flight attendant). After firing Tsamis, Rinehart posted a review of her on Avvo. In the post, Rinehart expressed his dissatisfaction bluntly, claiming that Tsamis “only wants your money,” that her assurances of being on a client’s side are “a huge lie” and that she took this money despite “knowing full well a certain law in Illinois would not let me collect unemployment.”⁴ Within days of this posting, Tsamis contacted Rinehart by email, requesting that he remove it; Rinehart refused to do so unless he received a copy of his file and a full refund of the \$1,500 he had paid.

Sometime in the next two months, Avvo removed Rinehart’s posting. Rinehart posted a second negative review of Tsamis on the site. This time, Tsamis reacted by posting a reply the next day. In it, she called Rinehart’s allegations “simply false,” said he didn’t reveal all the facts of his situation during their client meetings and stated, “I feel badly for him, but his own actions in beating up a female coworker are what caused the consequences he is now so upset about.”⁵ According to the Illinois disciplinary authorities, it was this online revelation of client information by Tsamis that violated the Rules of Professional Conduct, as well as the fact that her posting was “designed to intimidate and embarrass Rinehart and to keep him from posting additional information about her on the Avvo website,” which constituted another violation of professional conduct rules as well as conduct that tends to “bring the courts or the legal profession into disrepute.”⁶

In a similar situation in Georgia, attorney Margrett Skinner’s petition for a lesser sanction of voluntary discipline was rejected by

that state’s disciplinary authorities. According to *In re Skinner*, after being fired and replaced by new counsel, the lawyer responded to negative reviews “on consumer websites” by the former client by posting “personal and confidential information about the client that Ms. Skinner had gained in her professional relationship with the client.”⁷ The court didn’t go into detail about the exact comments posted, however, and specifically noted that the record didn’t reflect “actual or potential harm to the client as a result of the disclosures.”⁸

An even more recent case serves as a cautionary tale of how not to respond to a negative online review. Colorado attorney James C. Underhill Jr. was retained by a married couple to help with the husband’s ongoing post-divorce decree issues with his ex-wife. When the clients had problems paying his full fee,

Underhill threatened to withdraw unless paid in full in two business days. When the clients terminated the representation, Underhill failed to refund a “filing fee” (nothing had been filed). The clients posted complaints about Underhill on two websites. He responded with postings of his own that, according to Colorado disciplinary authorities, “publicly shamed the couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions.”⁹

As if that wasn’t bad enough, Underhill then sued the couple for defamation and even though he was aware they had retained counsel, he continued to communicate with them *ex parte* despite being instructed not to by their lawyers. Underhill’s lawsuit was dismissed, but he then brought a *second* defamation suit in a different court, concocting an unfounded tale of further internet postings by his former clients that Colorado authorities found to be frivolous. Among the myriad disciplinary breaches by Underhill, he was also found to have violated Colorado Rule of Professional Conduct 8.4 (d) (a lawyer shall not “engage in conduct that prejudices the administration of justice”). As a result of his misconduct, Underhill received an 18-month suspension effective Oct. 1, 2015.¹⁰

“According to the Illinois disciplinary authorities, it was this online revelation of client information by Tsamis that violated the Rules of Professional Conduct...”

Occasionally, a defamation suit might prove successful. In one Georgia decision, *Pampattiwar v. Hinson et al.*, the appellate court upheld a \$405,000 trial verdict in favor of divorce lawyer Jan V. Hinson, who sued her former client Vivek A. Pampattiwar over negative reviews he allegedly posted online.¹¹ Hinson represented Pampattiwar in a divorce proceeding until a series of disagreements ensued over the representation and billing, and she stopped representing him. Approximately six weeks later, Hinson Googled herself and found a sharply negative review that Pampattiwar had posted on the professional services review site, Kudzu. Among other comments, he allegedly described Hinson as “a CROOK lawyer” and an “Extremely Fraudulent Lady” who “inflates her bills by 10 times” and had “duped 12 people i[n] the last couple of years.”¹² Although the comments were posted under the screen name “STAR-EA,” an investigation would reveal that STAR-EA’s IP address matched the IP address used by Pampattiwar to send several emails to Hinson.¹³

Hinson sued for fraud, breach of contract over the unpaid legal bills and libel *per se*, and she added a count for invasion of privacy and false light after a second pseudonymous review was posted on Kudzu, accusing Hinson of using her office staff to post “bogus” reviews.¹⁴ The appellate court rejected Pampattiwar’s argument that Hinson had shown no actual damages from the defamatory postings, finding that applicable Georgia tort law allows recovery for “wounded feelings,” a form of personal injury to reputation.

In a more recent Florida appellate decision, attorney Ann-Marie Giustibelli’s \$350,000 defamation verdict over a former client was affirmed.¹⁵ The former client had posted negative reviews of the lawyer on Avvo and other sites that included what both the trial judge and the appellate court deemed “demonstrably false allegations” that Giustibelli had falsified a contract.¹⁶ The verdict, incidentally, consisted entirely of punitive damages. However, as another recent decision illustrates, it’s one thing when you know who’s smearing you online, but what about when you don’t? Courts in many jurisdictions are hesitant to unmask anonymous commenters and websites like Avvo, Yelp! and others enjoy broad protections under the law. Tampa attorney Deborah Thomson found this out firsthand when she filed a defamation suit against an anonymous review-

er on Avvo and asked courts in Seattle (where Avvo is based) to enforce a subpoena for information unmasking her critic. Both the trial court and the appellate court denied her motions.¹⁷

With the internet assuming an ever-increasing marketing importance for lawyers, legal analysts are starting to pay more attention to a lawyer’s options and risks in addressing online reviews.¹⁸ Others have pointed to cautionary examples from the medical profession, in which physicians’ attempts to restrict patients from posting online reviews through the use of nondisclosure agreements have led to litigation, bad publicity and accusations of everything from censorship to unconscionability to violations of medical ethics guidelines.¹⁹ But surprisingly little guidance on the issue has come from bar ethics authorities around the country. To date, only a handful of ethics opinions have emerged that deal squarely with the question of whether an attorney may respond to a client’s negative online review.

In December 2012, the Los Angeles County Bar Association issued Formal Opinion No. 525, which dealt with the *Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client*.²⁰ In the scenario discussed in this opinion, the adverse comments posted by the client did not disclose any confidential information, nor was there any pending litigation or arbitration between the lawyer and the former client. (If there had been, so-called “self-defense” exceptions to discussing a client’s confidential information, analogous to those in legal malpractice or grievance context, might apply.) The Los Angeles bar association committee concluded that attorneys may publicly respond as long as they do not disclose any confidential information, do not injure the client with respect to the subject of the prior representation and are “proportionate and restrained.”²¹

In January 2014, The Bar Association of San Francisco weighed in on this subject as well.²² Like its Los Angeles counterpart, it addressed a scenario with “a free public online forum that rates attorneys,” in which the negative review by the ex-client did not disclose any confidential information.²³ Also like its fellow association, the San Francisco bar reasoned that while an attorney “is not ethically barred from responding generally” to such an online review, the ongoing duty of confidentiality would prohibit the lawyer from disclosing any confi-

dential information. In addition, it concluded, if the matter previously handled for the client was not over, “it may be inappropriate under the circumstances for [the] attorney to provide any substantive response in the online forum, even one that does not disclose confidential information.”²⁴

Other state ethics opinions have come to similar conclusions. In October 2014, the New York State Bar Association issued Ethics Opinion 1032, in which it stated, “A lawyer may not disclose client confidential information solely to respond to a former client’s criticism of the lawyer posted on a website that includes client reviews of lawyers.” The Pennsylvania Bar Association agreed and like its California counterparts held that the “self-defense” exception to preserving client confidentiality did not apply where online reviews were concerned. In Opinion 2014-200, the Pennsylvania state bar ethics committee opined that an online disagreement about the quality of a lawyer’s services is not a “controversy” and that no “proceeding” is pending or imminent just because a client impugns his lawyer in an online review. It did, however, propose the following generic response to a negative online review:

A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.

Just this year, two more ethics bodies weighed in on the issue of how far lawyers may go in responding to a bad online review. In May 2016, responding to an inquiry from a lawyer embroiled in a fee dispute with a client, the Nassau County (New York) Bar Association Committee on Professional Ethics urged restraint.²⁵ The lawyer in question had been described as a “thief” in comments posted to a lawyer review website by someone claiming to be the client’s brother and the inquiring attorney wanted guidance on how detailed he could be in telling “his side.” Distinguishing between formal complaints that do raise the “self-defense exception” that insulates a lawyer from discipline for disclosing confidential information and “informal complaints such as posting criticisms on the internet,” Nassau County’s committee held that only the context of formal charges, not “casual ranting,” would justify the inclusion of confidential client data.

Being subject to the slings and arrows of the internet, the committee ruled, was “an inevitable incident of the practice of a public profession and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice.”

In July, the District of Columbia Office of Disciplinary Counsel issued an informal admonition to a lawyer who reacted to his client’s posting “highly critical” comments about his representation on a website by responding and revealing “specific information about her case, her emotional state and what transpired during [the] attorney-client relationship.”²⁶ Like its counterparts, the district disciplinary authority found that the lawyer’s online response violated Rule 1.6 and didn’t come within the self-defense exception applicable to formal charges.

So just what *is* the best approach for dealing with negative online reviews, where posting a rebuttal that’s too specific may result in a trip to the disciplinary board and a defamation suit is chancy at best? Lawyer coach Debra Bruce of Houston recommends refraining from lashing out. Instead, she says, ask happy clients to post their own positive reviews and consider “addressing the comment with a gracious apology or regret for their dissatisfaction, appreciation for the feedback and an invitation to address the matter with the complainant personally.”²⁷ This advice is echoed by Josh King, general counsel at Avvo, who calls negative commentary “a golden marketing opportunity.”²⁸ King says:

By posting a professional, meaningful response to negative commentary, an attorney sends a powerful message to any readers of that review. Done correctly, such a message communicates responsiveness, attention to feedback, and strength of character. The trick is to not act defensive, petty, or feel the need to directly refute what you perceive is wrong with the review.²⁹

This is sound advice. After all, when responding online to a negative posting it’s important to remember that you’re not just responding to one disgruntled former client but to a reading audience of many potential clients.

1. “The Internet is Now the Most Popular Way to Find and Research a Lawyer,” says FindLaw Survey, press release, April 17, 2014, thomsonreuters.com/press-releases/042014/internet_lawyer_search_survey.

2. Sherry Karabin, “Marketing Legal Services in a Brave New Internet World,” *Law Technology News* (March 31, 2014), www.lawtechnologynews.com/id=1396262346123/Marketing-Legal-Services-in-a-Brave-new-Internet-World.

3. In the Matter of Tsamis, Commission No. 2013PR00095, www.iardc.org/13PR0095CM.html.

4. *Id.*

5. *Id.*

6. *Id.*

7. *In re Skinner*, 740 S.E. 2d 171 (Ga. 2013).

8. *Id.*

9. *People v. James C. Underhill, Jr.*, Colorado Attorney Disciplinary Proceeding 15PDJ640 (Aug. 12, 2015) 2015 WL 4944102.

10. *Id.*

11. *Pampattivar v. Hinson et al.*, 2014 WL 943230 (Ct. App. Ga., Mar. 12, 2014).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Blake v. Ann-Marie Giustibelli, P.H.*, 2016 BL 1940, Fla. Dist. Ct. App. 4th Dist., No. 4 AD14-3231, Jan. 6, 2016.

16. *Id.*

17. *Thomson v. Doe*, 356 P. 3d 727, 31 *Law Man. Prof. Conduct* 421 (Wash. Ct. App. 2015).

18. See, e.g., Debra L. Bruce, "How Lawyers Can Handle Bad Reviews and Complaints on Social Media," 75 *Tex. B.J.* 402, 403 (May 2012); Josh King, "Your Business: Someone Online Hates You," *The Recorder*, Aug. 16, 2013; Laurel Rigertas, "How Do You Rate Your Lawyer? Lawyers' Responses to Online Reviews of Their Services," 4 *St. Mary's J. Legal Mal. & Ethics* (2014).

19. See, e.g., Sean D. Lee, "I Hate My Doctor": Reputation, Defamation and Physician-Review Websites," 23 *Health Matrix: J. Law-Medicine* (Fall 2013).

20. LA County Bar Assoc. Professional Responsibility and Ethics Comm., Formal Opinion No. 525 (Feb. 2013).

21. *Id.*

22. Bar Assoc. San Fran. Ethics Opinion 2014-1 (January 2014), www.sfbabar.org/ethics/opinion_2014-1.aspx.

23. *Id.*

24. *Id.*

25. Op. 2016-1, May 9, 2016.

26. *In re: John P. Mahoney*, Bar Docket No. 2015-D 141.

27. Bruce, *supra* note 23, at 403.

28. King, *supra* note 23.

29. *Id.*

ABOUT THE AUTHOR



John G. Browning is a shareholder in the Dallas law firm Passman & Jones where he practices civil litigation. He is a nationally recognized authority on social media and the law and has authored four books and numerous articles on the subject. He is a 1989 graduate of the University of Texas School of Law.

Federal Law Clerk Vacancy

United States District Court
Western District of Oklahoma

Applications are now being accepted for the position of term law clerk to United States Magistrate Judge Charles B. Goodwin. The two-year term will begin on September 18, 2017. The law clerk provides legal research and writing assistance to the judge. Applicants must possess excellent research, writing, proofreading, and communication skills. Applications will be accepted through January 17, 2017. For full employment notice and application instructions, go to www.okwd.uscourts.gov.

Vacancy No. 16-08
United States District Court
William J. Holloway, Jr. United States Courthouse
200 N.W. 4th Street, Rm 1210
Oklahoma City, OK 73102

AN EQUAL OPPORTUNITY EMPLOYER



Attorney Fees in Family Law Cases

By Robert G. Spector and Carolyn S. Thompson

The American rule with regard to attorney fees is, unless specifically allowed, attorney fees are not recoverable. It is therefore necessary for the attorney who is seeking fees in a family law case to specifically identify the basis for the award of fees.¹ There are 17 separate statutes which authorize the court to award attorney fees in particular circumstances. Failure to identify the specific basis for the award may result in the attorney fee request being denied by a trial court or an attorney fee award being reversed on appeal.² This article will discuss each possible basis for a fee award, as well as other considerations that must be taken into account in working with attorney fees. Ethical issues related to fees in domestic relation cases are also addressed.

THE INHERENT POWER OF THE COURT TO AWARD FEES

In at least one situation a court has inherent common law authority to award fees. This is where one party's conduct during the case has been oppressive, abusive or has otherwise unduly prolonged and exacerbated the litigation. For example, in *Briggeman v. Hargrove*,³ the mother, an Ohio resident, incurred attorney fees, costs and expenses while defending against an emergency custody and modification of custody application filed by the father in Tulsa County. The mother had previously obtained a writ of prohibition from the Oklahoma Supreme Court which was granted because the trial court did not have jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to entertain the custody proceeding.

The mother then filed an application in the Tulsa County proceeding requesting attorney fees, costs and expenses pursuant to 10 O.S. §7700-636 (2011) which permits the trial court to assess fees and costs in a proceeding to adjudicate parentage. The case was submitted without appellate briefs and the appellate panel reversed the trial court's determination that it had no jurisdiction to award fees. The panel summarily held that, notwithstanding the entry of the writ of prohibition, the trial court had the inherent equitable supervisory power to award the mother attorney fees in the event it found the father's conduct was oppressive or abusive.⁴

It has long been the position of Oklahoma courts that attorney fees may be awarded when one party took unreasonable positions at trial and unreasonably prolonged the litigation.⁵ However, the failure to make reasonable

settlement offers or the refusal to settle a case, in and of itself, is not the same as vexatious litigation.⁶

STATUTES: BALANCING OF THE EQUITIES

The Divorce Statute - Title 43 O.S. §110.

The major statutes authorizing fees in divorce cases are 43 O.S. §110(D)⁷ and (E).⁸ The decision to award fees under these sections depends upon a judicial balancing of the equities.⁹ In addition to the trial court's inherent authority to award fees based on vexatious litigation, the court may also take into account the parties' conduct during the litigation which may not, in and of itself, justify fees under the court's inherent power.¹⁰ Although the court cannot use attorney fees as a penalty for failure to settle an issue, there is no case which prohibits an award of fees when one party continues to reject reasonable settlement offers and ultimately ends up worse off than the settlement proposals.¹¹ In balancing the equities, the court may also consider the relative financial positions of the parties, although that is no longer determinative in deciding whether to award fees.¹²

In one situation, the Court of Civil Appeals attempted to indicate what factors the trial court should consider when deciding whether an attorney fee is appropriate in post-decree cases which fall under §110(E). In *Finger v. Finger*¹³ the panel said the trial court should consider the following:

Such circumstances should include, but not be limited to: the outcome of the action for modification; whether the subsequent action was brought because one of the parties had endangered or compromised the health, safety, or welfare of the child or children; whether one party's behavior demonstrated the most interest in the child or children's physical, material, moral, and spiritual welfare; whether one party's behavior demonstrated a priority of self-interest over the best interests of the child or children; whether either party unnecessarily complicated or delayed the proceedings, or made the subsequent litigation more vexatious than it needed to be; and finally, the means and property of the respective parties.

Some of the considerations mentioned in *Finger* are common in attorney fee hearings under §110 (*i.e.*, the means and property of the indi-

viduals and whether either party unnecessarily complicated or delayed in the proceedings). Other factors mentioned are particularly appropriate in considering post-decree motions concerning children and seem to be primarily used in those cases.¹⁴ However, the *Finger* factors have been used in cases which fall under §110(D) even though they are not post-decree cases. For example, in *Husband v. Husband*¹⁵ the panel cited *Finger* as justifying the attorney fee award in an appeal from a separate maintenance action. The court seemed to broaden the *Finger* standard by declaring that, "In considering what is just and proper under the circumstances, the court in the exercise of its discretion should consider the totality of circumstances leading up to, and including, the subsequent action for which expenses and fees are being sought."

The result appears to be that in considering whether an attorney fee award is appropriate under §110, there are no bounds to the court's discretion in terms of information that it can consider. Its determination as to the amount of the fee award is reviewable only for an abuse of discretion.¹⁶ The issue of whether a litigant is entitled to an attorney fee is a question of law that is reviewed *de novo*.¹⁷ An issue as to the amount of the award is only reviewable for an abuse of discretion.

There are a number of cases where the attorney fee provisions of §110 are inapplicable. For example, there is no authority to award attorney fees under 43 O.S. §110 either to or from third parties because the statute supposes there are only two parties to a divorce.¹⁸ Therefore, when the grandparents intervened in a divorce proceeding and their motion for custody was dismissed, there was no authority to award fees against the grandparents.¹⁹ Therefore, other authority must be found if attorney fees are to be awarded to third parties in domestic relations cases.

Parentage Proceedings

Parentage proceedings are governed by the Uniform Parentage Act.²⁰ In *McKiddy v. Alarkon*²¹ the court found that 43 O.S. §110 was inapplicable in parentage cases and, therefore, another basis for awarding of fees had to be found. Authority to award fees in a parentage case is provided by 43 O.S. §109.2.²² Since there is no mention of a prevailing party, it would seem that an attorney fee award under this section should also be governed by the "balancing of the equities" standard.

Relocation Cases

In relocation cases, 43 O.S. §112.3 requires that the relocating parent send notice of the proposed relocation to the other parent. The court may consider the failure to give notice to be sufficient cause to order the person seeking to relocate the child to pay reasonable expenses and attorney fees incurred by the person objecting to the relocation. Since there is no prevailing party language, it would seem to follow that entitlement to a fee award under §112.3 is dependent on a balancing of the equities. There are no cases discussing attorney fees under this section.

Grandparent Visitation

The grandparent visitation statute,²³ provides that in “any action for grandparental visitation pursuant to this section, the court may award attorney fees and costs, as the court deems equitable.” Although there is no case law as to what factors the court should take into account in determining eligibility for fees under this section, it is likely that the same considerations which courts use under §110 in balancing the equities are also applicable here. There is at least one case where the trial court’s assessment of attorney fees against the grandparents was affirmed.²⁴

STATUTES: PREVAILING PARTY

There are a number of family law statutes which award attorney fees based on who was the prevailing party. The standard definition of prevailing party is “one in whose favor judgment is rendered.”²⁵

False Allegations of Child Abuse

43 O.S. §107.3(D)(3) provides that if a party intentionally makes false or frivolous accusations of child abuse or neglect against the other party to the court, “the court shall proceed with any or all of the following: . . . Award the obligation to pay all court costs and legal expenses encumbered (sic) by both parties arising from the allegations of the accusing party.” Although §107.3(D)(3) does not use the term prevailing party, that is implied by the language which requires a false report to trigger the remedies. The term “legal expenses” appar-

ently includes attorney fees. The foundational elements which must be proved in order to obtain fees under this section are:

- 1) The allegation must be made intentionally;
- 2) The allegation must be false or frivolous;
- 3) The allegation must concern child abuse or neglect and
- 4) The proceeding must concern child custody.

The terms of the statute seem to authorize fees only for the fees which arise from defending against the false allegations. Therefore, for example, in a custody trial only those fees incurred in rebutting the false allegations would be recoverable under this section. Other fees incurred in the case would not be. Attorneys planning to seek fees under this section should keep clear records indicating which fees were incurred to rebut the false allegations. The trial court’s assessment of fees or the use of other remedies under this section should also include specific findings as to each of the four requirements.²⁶

Visitation and Child Support Enforcement

43 O.S. §111.1 - Denial of Visitation. Title 43 O.S. §111.1(B) (3) provides that, “Unless good cause is shown for the noncompliance, the prevailing party shall be entitled to recover court

costs and attorney fees expended in enforcing the order and any other reasonable costs and expenses incurred in connection with the denied child support or denied visitation as authorized by the court.” This language means that when there has been a denial of visitation, fees must be awarded to the prevailing party unless the court found good cause was shown for the noncompliance with the visitation order.

43 O.S. §111.3 - Unreasonable Denial of or Interference With Visitation. Section 111.3 deals with unreasonable denial of or interference with visitation. Section 111.3(E) provides that, “The prevailing party shall be granted reasonable attorney fees, mediation costs, and court costs.”²⁷ If the court finds that visitation rights of the noncustodial parent were unreasonably denied or otherwise interfered with by the custodial parent, then the noncustodial parent is entitled to a reasonable fee award. If

“There are a number of family law statutes which award attorney fees based on who was the prevailing party.”

the court finds that visitation rights of the non-custodial parent were not unreasonably denied or otherwise interfered with, then the custodial parent is entitled to a reasonable fee award.²⁸

43 O.S. §112(D) - Pattern of Failure to Allow Court-ordered Visitation. Title 43 §O.S.112(D) provides that “a pattern of failure to allow court-ordered visitation may be determined to be contrary to the best interests of the child” and may be the basis of a change of custody. For the movant to be entitled to a fee award under this section, it must be shown that there was a pattern of visitation denial which was contrary to the best interests of the child. This contrasts with §111.3(E) which requires the visitation denial be “unreasonable or otherwise interfered with.” Section 112(D) was invoked in *King v. King*,²⁹ where the court found that the mother had good cause to deny visitation when there was evidence that the child was abused while visiting the father but there was a visitation order in place. In those circumstances, not only was the mother entitled to attorney fees for the trial but also to appellate attorney fees. It appears the court held, at least under this statute, that an award of attorney fees to the prevailing party includes an award of appellate attorney fees.³⁰

43 O.S. §109.4 - Grandparent Visitation. Section 109.4, which is concerned with grandparent visitation, provides that:

If the court finds that visitation rights of the grandparent have been unreasonably denied or otherwise unreasonably interfered with by the parent, the court shall enter an order providing for one or more of the following: ...

d. assessment of reasonable attorney fees, mediation costs, and court costs to enforce visitation rights against the parent.

However the statute also provides that:

If the court finds that the motion for enforcement of visitation rights has been unreasonably filed or pursued by the grandparent, the court may assess reasonable attorney fees, mediation costs, and court costs against the grandparent.³¹

There are no reported cases interpreting the fee provisions of the grandparent visitation statutes.

43 O.S. §111.2 - Tortious Interference With Custody or Visitation. Third parties to a child custody proceeding who intentionally remove, cause the removal of, assist in the removal of or detain a child with intent to deny another person’s right to custody or visitation under an existing court order shall be liable for damages. The prevailing party in an action under this section shall be awarded attorney fees. There are no reported cases applying this statute.

43. O.S. §112.6 - Victims of Domestic Violence. One of the more interesting attorney fee provisions is 43. O.S. §112.6. It provides that:

In a dissolution of marriage or separate maintenance or custody proceeding, a victim of domestic violence or stalking shall be entitled to reasonable attorney fees and costs after the filing of a petition, upon application and a showing by a preponderance of evidence that the party is currently being stalked or has been stalked or is the victim of domestic abuse. The court shall order that the attorney fees and costs of the victimized party for the proceeding be substantially paid for by the abusing party prior to and after the entry of a final order.

There are no reported cases interpreting this statute. It seems the section applies to original actions for dissolution or separate maintenance and to any action involving custody.³² The language does not seem to contemplate a fee award for a post-decree action to modify alimony or child support or a post-decree enforcement action not involving custody. In order to show an entitlement to fees, a party must prove that she was a victim of stalking or domestic abuse. The statute seems to allow the making of this determination soon after the petition is filed, perhaps in conjunction with the temporary order. The fees must be paid prior to or after the entry of a final order.

43 O.S. §150.10 - Deployed Parents Custody and Visitation Act. The Act at 43 O.S. §150.10 provides that:

If the court finds that a party to a proceeding under the Deployed Parents Custody and Visitation Act has acted in bad faith or otherwise deliberately failed to comply with the terms of the Deployed Parents Custody and Visitation Act or a court order issued under the Deployed Parents Custody and Visitation Act, the court may assess

attorney fees and costs against the opposing party and order any other appropriate sanctions.

The statute does not mention prevailing party but the “bad faith” and “deliberately failed to comply” language seem consistent with a prevailing party test.

The Uniform Child Custody Jurisdiction and Enforcement Act. The UCCJEA has two provisions that provide for attorney fees. First, 43 O.S. §551-208 allows a court to decline jurisdiction if the person invoking the court’s jurisdiction has engaged in unjustifiable conduct. If the court does decline jurisdiction, it shall assess attorney fees and other costs against the party seeking to invoke the jurisdiction. This attorney fee provision, as well as the following ones, are based on a comparable statute under the International Child Abduction Remedies Act.³³ Section §551-208 does include a defense that the imposition of fees would be clearly inappropriate.³⁴

The second provision of the UCCJEA which provides for fees is §551-312 which allows the prevailing party to an enforcement proceeding under Article 3 of the UCCJEA to obtain attorney fees as well as other costs. It also is subject to the clearly inappropriate language.

22 O.S. §60.2(C)(1) - Protective Orders. The actions dealing with protective orders, Title 22 O.S. §60.2(C)(1) provides that court may assess court costs, service of process fees, attorney fees, other fees and filing fees against the defendant at the hearing on the petition, if a protective order is granted. However, the court does have authority to waive the costs and fees if the court finds the party does not have the ability to pay them. If, however, the petition for a protective order has been filed frivolously and no victim exists, the court may assess attorney fees against the plaintiff.³⁵

THE IMPACT OF THE BURK DECISION

One reoccurring fee issue is whether, and to what extent, a trial court must hold an evidentiary hearing before awarding fees. *Burk v. City of Oklahoma City*,³⁶ seems to require that before awarding fees, all trial courts must hold an evidentiary hearing on a fee application. The factors set out in *Burk* seem more pertinent to the amount of a fee award rather than to the entitlement to a fee award. *Burk* directs a trial court to consider the following criteria:

- 1) Time and labor required;

- 2) The novelty and difficulty of the questions;
- 3) The skill requisite to perform the legal service properly;
- 4) The preclusion of other employment by the attorney due to acceptance of the case;
- 5) The customary fee;
- 6) Whether the fee is fixed or contingent;
- 7) Time limitations imposed by the client or the circumstances;
- 8) The amount involved and the results obtained;
- 9) The experience, reputation and ability of the attorneys;
- 10) The “undesirability” of the case;
- 11) The nature and length of the professional relationship with the client;
- 12) Awards in similar cases.

The factors set out in *Burk* are similar to those contained in Oklahoma Rule of Professional Conduct Rule 1.5. Rule 1.5 states, in part, that a lawyer shall not make an agreement for, charge or collect an unreasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

- 1) The time and labor required;
- 2) The novelty and difficulty of the questions involved;
- 3) The skill requisite to perform the legal service properly;
- 4) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- 5) The fee customarily charged in the locality for similar legal services;
- 6) The amount involved and the results obtained;
- 7) The time limitations imposed by the client or by the circumstances;
- 8) The nature and length of the professional relationship with the client;
- 9) The experience, reputation, and ability of the lawyer(s) performing the services and
- 10) Whether the fee is fixed or contingent.

An attorney who charges an unreasonable fee is subject to discipline. Since a lawyer cannot ethically charge an unreasonable fee, it could be argued the Rule 1.5 factors should be considered when determining whether a fee award is reasonable.

The relationship between the *Burk* factors and those factors set out in the *Finger* decision is not at all clear. The Supreme Court has never held that the *Burk* factors are applicable to domestic relations cases.³⁷ One panel of the Court of Civil Appeals attempted to reconcile the two cases in *Smith v. Smith*.³⁸ In this child support collection case, the obligee was the prevailing party. Neither party requested an evidentiary hearing and ultimately the court issued an order awarding the obligee \$10,000 in attorney fees. The obligor appealed, arguing the trial court had an obligation to hold an evidentiary hearing and apply the *Burk* factors to determine whether an attorney fee award was appropriate. The appellate panel noted the factors courts consider in domestic relations cases under *Finger* are comparable to those set out in *Burk* for a determination of a reasonable attorney fee and possible “lodestar,” “incentive fee” or “bonus fee,” in the absence of a contract or statute fixing the amount. The panel then concluded that when, in opposition to a domestic relations attorney fee request, issues are raised as to the amount of time spent and the complexity of the case or trial, an evidentiary hearing is required. Thus, the trial court is not required to hold a *Burk* hearing but is required to hold an evidentiary hearing.

More recently, another panel of the Court of Civil Appeals has taken a much closer look at the relationship between *Burk* and *Finger*. In two well-thought-out, albeit unpublished, opinions the panel noted the only overlap they could find between the two lists of factors is that one of the *Finger* criteria, “the results obtained,” is close to one of the *Burk* factors “the outcome of the action.” Otherwise, the *Burk* factors mainly address the lodestar issue and other factors determining the amount of the attorney fees. *Finger* primarily addresses the factors that should be considered in balancing the equities to determine if an attorney fee is proper at all, not the amount of the fee. As noted by the panel, it is difficult to see how the *Burk* analysis helps determine whether a fee is appropriate under equitable balancing statutes. It is helpful, after determining whether a fee is appropriate, in deciding on how the fee should be calculated. The panel then concluded the attorney fee analysis undertaken pursuant to 43

O.S. §110(D) and (E) should be reviewed primarily by the *Finger* criteria. As the panel noted:

Because of the continuing jurisdiction of the courts in domestic cases, it is possible for a party to essentially “never give up” and engage in continued post-decree motions for many years. Section 110 allows a trial court to set and award varying fees based on the relative equities and means of the parties in such cases, protect parties from the cost of repeated litigation brought with little chance of success, and discourage behavior that is wasteful of the court’s time and the parties’ money. This structure and purpose is fundamentally different from that of mandatory prevailing party fees, where the *Burk* criteria control. It is our view that *Finger* primarily controls in these cases, and *Burk* is useful only as far as setting the reasonable hourly rate for the services performed. It is also our view that *Burk* findings are not required in these cases.⁴⁰

It follows from this analysis that the *Burk* factors are to be used under the “prevailing party” attorney fee statutes to determine the appropriate amount of the fee. Under those statutes, equitable criteria are not to be considered. The appellate panel, in its next decision,⁴¹ found that:

The *Burk* process takes no account of the parties’ equities in setting a fee, and essentially requires all hours properly billed to a fee-bearing matter to be compensated at an established lodestar rate, irrespective of the parties’ relative equities or degree of malfeasance.

However, the determination of the amount of the fee that can be recovered under the “equitable balancing” statutes is subject to equitable considerations and the court may award some or all of the requested fees.

This analysis from the Court of Civil Appeals has much to recommend it. It accommodates both cases by applying *Finger* to the equitable balancing cases and *Burk* primarily to prevailing party cases. As the panel noted, if this approach is incor-

“The relationship between the *Burk* factors and those factors set out in the *Finger* decision is not at all clear.”

rect, "specific Supreme Court guidance on the proper procedure would be helpful."⁴²

ADDITIONAL ETHICAL CONSIDERATIONS

Oklahoma Rules of Professional Responsibility Rule 1.5 deals with the issue of attorney fees. Rule 1.5(b) provides that:

The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

Although not expressly required by Rule 1.5, the better practice is to obtain a written fee agreement from the client *before* work is commenced on the case.

Contingency Fees in Family Law Cases

Oklahoma, like most jurisdictions, follows the rule that a contingent fee in divorce litigation is unethical and violative of public policy. The Oklahoma reasons for this prohibition are stated in Legal Ethics Opinion No. 299, 52 OBJ 2101 (1981) as: 1) The law favors marriage and discourages divorce; a contingent fee contract gives the attorney an interest in securing the divorce, thus preventing reconciliation and 2) A suit for divorce is not a cause of action "*ex contractu*" or "*ex delicto*" within the meaning of 5 O.S. §7 (1981), the property rights being merely incidental to the dissolution of the status.⁴³

Rule 1.5(d) expressly prohibits a lawyer in a domestic relations matter from entering into agreement whereby the fee is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. However, the comments to Rule 1.5(d) state that, "This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns." Hence, contingent fee agreements are allowed in post-decree actions to collect child support, support alimony and alimony in lieu of property.

Impermissible Bonus Fees Based on Results Obtained

Fee contracts in dissolution actions which allow for an enhanced fee based on results obtained are another form of contingent fee contract and, hence, are unethical and unenforceable. In *State of Oklahoma, ex rel., Oklahoma Bar Association v. Fagin*,⁴⁴ the court disciplined an attorney based on such a provision in his fee contract. The attorney billed the client for the amount due based on his hourly plus an additional \$4,000 in fees for:

Additional attorney fee based upon 'results obtained' for client as prescribed in written attorney fee contract, because of extremely beneficial court decision for client on alimony in lieu of property, and support alimony together totaling \$114,000 plus interest on the \$60,000 alimony in lieu of property award, and with former husband also being required to pay all of the extensive marital debts.

The written fee agreement clearly provided for such an enhanced fee. Nonetheless, the court found the portion of the fee based on the results obtained for the client to be violative of Rule 1.5(d). The court said that such a fee arrangement, in which the attorney will receive an enhanced fee based on results obtained, "involves a personal interest because the greater amount he obtains for his client, the greater he can charge as a fee." The court also said such clauses give the attorney, "[A] personal interest in assuring a divorce is granted, because without a divorce he will not be able to charge a fee based upon the alimony and property settlement."

No Nonrefundable Retainers

Fee agreements cannot provide for a nonrefundable retainer in an hourly rate contract, even if the written fee agreement clearly and specifically states the original retainer amount is nonrefundable. This issue was addressed by the Court of Civil Appeals in *Wright v. Arnold*.⁴⁵ In finding a nonrefundable retainer clause in an hourly rate fee contract unenforceable, the court said:

It is an impermissible restraint on the right of a client to freely discharge her attorney. This provision also contravenes the Code of Professional Conduct, which requires an attorney, upon the termination of the attorney-client relationship, to protect his cli-

ent's interest by refunding any advanced payment which has not been earned. We hold that the attorney under such circumstances is entitled to only such fees as the attorney can show are reasonable for the services actually performed.

The court reasoned that nonrefundable retainer clauses have a "chilling effect" on a client's right to freely discharge his/her attorney. Hence they are unethical and unenforceable.

1. This article is concerned only with the recovery of attorney fees from the other party in a family law case. It does not cover entitlement to other costs or expenses. Whether, and under what circumstances, costs and expenses can be recovered depends on the wording of particular statutes. For example, the prevailing party in an enforcement proceeding under the Uniform Child Custody Jurisdiction and Enforcement Act can recover "necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses and child care during the course of the proceedings." 43 O.S. 551-312.

2. This is because, according to the Court of Civil Appeals, all attorney fee award statutes must be strictly construed. *See Gruenwald v. Gruenwald*, 2014 OK CIV APP 43, 324 P.3d 1267.

3. 2014 OK CIV APP 13, 318 P.3d 1130.

4. *See Winters By & Through Winters v. City of Oklahoma City*, 1987 OK 63 740 P.2d 724.

5. *Casey v. Casey*, 1993 OK CIV APP 129, 860 P.2d 807 ("The court specifically found Appellant (a) delayed and thwarted the division of personal property when she refused to participate in the silent auction, (b) unreasonably refused to list the residence for sale, (c) demanded excessive support alimony, child support and cash settlement, (d) cited Appellee for contempt on three different occasions, (e) required Appellant to incur expense of \$1,000.00 to pay a bondsman, (f) unreasonably withheld records from Appellee, and (g) required Appellee to file a 1990 separate income tax return. There is no abuse of discretion in requiring Appellant to pay the attorney fees she actively participated in creating."); *Wood v. Wood*, 1990 OK CIV APP 49, 793 P.2d 1372 ("[T]he record shows that the Appellant exacerbated the litigation and that his conduct throughout the trial served to increase the resulting fees. Appellee was required to initiate seven contempt proceedings against Appellant in order to enforce court orders. The extensive record in this case shows that nearly every journal entry of the trial court's orders required Appellee to file a motion to settle. Appellee was forced to complete substantial discovery in order to uncover the secret bank account which Appellant concealed and to ascertain Appellant's actual commission income."); *Morey v. Morey*, 1981 OK CIV APP 46, 632 P.2d 773. *See also Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283, where the court describes potential liability for attorney fees when a party acts arbitrarily, capriciously or unduly protracts or "churns" the litigation.

6. *Shirley v. Shirley*, 2004 OK CIV APP 100, 104 P.3d 1142 ("Because it appears the trial court used the award in this case as a penalty for failing to settle, we will modify the award by reducing it to \$10,000.").

7. D. Upon granting a decree of dissolution of marriage, annulment of a marriage or legal separation, the court may require either party to pay such reasonable expenses of the other as may be just and proper under the circumstances.

8. E. The court may in its discretion make additional orders relative to the expenses of any such subsequent actions, including but not limited to writs of *habeas corpus*, brought by the parties or their attorneys, for the enforcement or modification of any interlocutory or final orders in the dissolution of marriage action made for the benefit of either party or their respective attorneys.

9. *Kerby v. Kerby*, 2007 OK 36, 164 P.3d 1063; *Thielenhaus v. Thielenhaus*, 1995 OK 5, 890 P.2d 925. Formerly the statute simply required the trial court to consider the means and property of the respective parties. Cases decided prior to the amendment that ordered attorney awards simply on the basis of economic disparity should no longer be considered good law. Although the §110 attorney fee sections seem to refer only to an award of attorney fees covering the merits hearing and post-decree issues, at least one appellate panel has held that attorney fees can also be awarded to enforce temporary orders under §110(B). *Buckingham v. Buckingham*, 2012 OK CIV APP 34, 274 P.3d 855. ("Holding

that attorney fees are allowed at every stage of a divorce, except the enforcement of a temporary order, would create an absurd result. As a result, we read "subsequent actions" in §110(E) as referring to actions subsequent to the filing of the petition for dissolution of marriage, including actions to enforce temporary orders.")

10. *See Bartlett v. Bartlett*, 2006 OK CIV APP 112, 144 P.3d 173. (Wife failed to comply with the trial court's order to attach time sheets, affidavits and copies of settlement offers to her application.)

11. As noted in the *Finger* case one of the factors is "whether either party unnecessarily complicated or delayed the proceedings." That appears to be a lesser burden to justify fees than that which would be necessary under the court's inherent power to order attorney fees. For a case that seems to qualify as an example *see Mullendore v. Mullendore*, 2012 OK CIV APP 100, 288 P.3d 948.

12. *Abbott v. Abbott*, 2001 OK 31, 25 P.3d 291. If the court awards a sufficient amount of income producing property to both spouses, it is not uncommon to require each party to bear their own fees. *See e.g., Casey v. Casey*, 1993 OK CIV APP 129, 860 P.2d 807; *Gardner v. Gardner*, 1981 OK CIV APP 9, 629 P.2d 1283.

13. 1996 OK CIV APP 91, 923 P.2d 1195.

14. *See e.g., Chacon v. Chacon*, 2012 OK CIV APP 27, 275 P.3d 943; *Guyton v. Guyton*, 2011 OK CIV APP 92, 262 P.3d 1145; *Guymner v. Guymner*, 2011 OK CIV APP 4, 245 P.3d 638.

15. 2010 OK CIV APP 42, 233 P.3d 383.

16. *State ex rel. Burk v. City of Oklahoma City*, 1979 OK 115, 598 P.2d 659.

17. *Finnell v. Seismic*, 2003 OK 35, 67 P.3d 339.

18. *Rogers v. Rogers*, 1999 OK CIV APP 123, 994 P.2d 102 ("It is apparent §110(C) and (D) contemplate but two parties, the divorcing husband and wife, and do not provide for an award of attorney fees and costs for an intervening party.").

19. *Fulsom v. Fulsom*, 2003 OK 96, 81 P.3d 652.

20. 10 O.S. §770-101 et seq.

21. 2011 OK CIV APP 63, 254 P.3d 141.

22. 43 O.S. §109.2(B) provides: "If the parties to the action are the parents of the children, the court may determine which party should have custody of said children, may award child support to the parent to whom it awards custody, and may make an appropriate order for payment of costs and attorney fees." Authority can also be found in 10 O.S. §7700-636 which also is applicable in parentage cases. It provides that a court may assess "filing fees, reasonable attorney fees, fees for genetic testing, other costs, and necessary travel and other reasonable expenses incurred in a proceeding under this Article."

23. 43 O.S. §109.4(I).

24. *Vance v. Loy*, 2007 OK CIV APP 34, 158 P.3d 503. However because the court had no transcript of attorney fee proceedings, it was impossible for the appellate panel to determine how the trial court decided the merits of the mother's request for fees. When this happens the appellate panel may, and did in this case, presume the trial court was correct.

25. *See Associates Financial Serv. v. Millsap*, 1977 OK 157, ¶18, 570 P.2d 323. The definition of a prevailing party is not confined to one who obtains judgment after a trial on the merits. The definition of a prevailing party is also not confined to one who obtains a judgment after a trial on the merits. *Professional Credit Collections, Inc. v. Smith*, 1997 OK 19, ¶12, 933 P.2d 307, 311. Nor, is it necessary that a party obtain all of the relief requested in order to be the prevailing party. In *McKiddy v. Alarkon*, 2011 OK CIV APP 63, 254 P.3d 141 the parties settled the father's modification of custody motion by providing that the mother would retain custody and the father would have increased visitation. The court found that the mother was the prevailing party because the father filed a motion to modify custody and, in the end, the mother retained custody. In many family law cases with multiple issues the determination of prevailing party can be very murky.

26. *Slate v. Chadwick*, 2010 OK CIV APP 38, 232 P.3d 916. The court held that, "In this case, the trial court not only made the required §107.3(D) determination but also listed five reasons in its final decree supporting that determination. As summarized, the trial court found that: (1) Mother made her first allegation of physical abuse almost immediately after the court placed primary custody with Father because the child was eligible for pre-kindergarten enrollment; (2) Mother failed to meet the burden of proof in her first application for emergency custody and her second application had strikingly similar allegations; (3) DHS investigated Mother's second application and could not confirm any of her allegations; (4) Mother asked her stepmother to write a letter about previous alleged abuse by Father that was primarily based on Mother's assertions, i.e., the stepmother had no personal knowledge about the assertions; and (5) testimony indicated that Mother had made frivolous allegations of improper child restraint in Father's vehicle at one of the visitation exchanges."

27. For a recent example *see Marriage of Morie*, #113,710 (OKC 2015).

28. *Abbott v. Abbott*, 2002 OK CIV APP 6, 38 P.3d 937.

29. 2005 OK 4, 107 P.3d 570.

30. In an unpublished case, an appellate panel held that this attorney fee provision refers only to denial of visitation in subsection (D) and not to all issues covered under §112. *Janes v. Janes*, #113,171 (Tulsa 2016).

31. 43 O.S. 109.4(F)(7).

32. But not annulment, apparently.

33. 21 U.S.C. §§9000-9010.

34. There is considerable amount of interpretation of this language as used in the International Child Abduction Remedies Act. A discussion of this provision lies well beyond the scope of this article.

35. In *Murlin v. Pearman*, 2016 OK 47, 371 P.3d 1094, the court found that a VPO filed against the defendant in order for a friend of the plaintiff to gain an advantage in a custody case against the defendant was falsely and frivolously filed, and therefore attorney fees against the plaintiff were proper.

36. 1979 OK 115, 598 P.2d 659.

37. *State ex rel. Oklahoma Bar Ass'n v. Fagin*, 1992 OK 118, 20, 848 P.2d 11.

38. 2012 OK CIV APP 54, 305 P.3d 1054.

39. *Hall v. Hall*, #112,350 (Tulsa 2016); *Marriage of Kannard*, #112,760 (Tulsa 2016), *cert den*.

40. *Marriage of Hall*, at p. 13.

41. *Marriage of Kannard*, #112,760 (Tulsa 2016), *cert den*.

42. *Marriage of Kennard*, at p. 11. With these two cases it seem clear that this approach is going to be applied by the Tulsa panels of the Court of Civil Appeals and should be taken account in planning for attorney fee hearings.

43. *Accord, Longmire v. Hall*, 541 P.2d 276 (Okla.App. 1975) (such contracts encourage divorce and besides the court can allow the dependent spouse attorney's fees so there is no need for contingent fees); *Oppenud v. Bussey*, 172 Okl. 625, 46 P.2d 319 (1935) (contingent fee in divorce case violative of public policy, void and unenforceable).

44. 1992 OK 118, 848 P.2d 11.

45. 1994 OK CIV APP 26, 877 P.2d 616.

ABOUT THE AUTHORS



Robert G. Spector is the Glenn R. Watson Chair and Centennial Professor of Law Emeritus at the OU College of Law. He received the Chair's Award from the OBA Family Law Section in 1994 and 1997 for significant contributions to the development of family law and in 1990 was named the Outstanding Family Law Attorney. He also received the 1991 OBA Earl Sneed Award for significant contributions to continuing legal education and the 2011 Golden Quill Award for the best *Oklahoma Bar Journal* article. He received his J.D. from the University of Wisconsin in 1966.



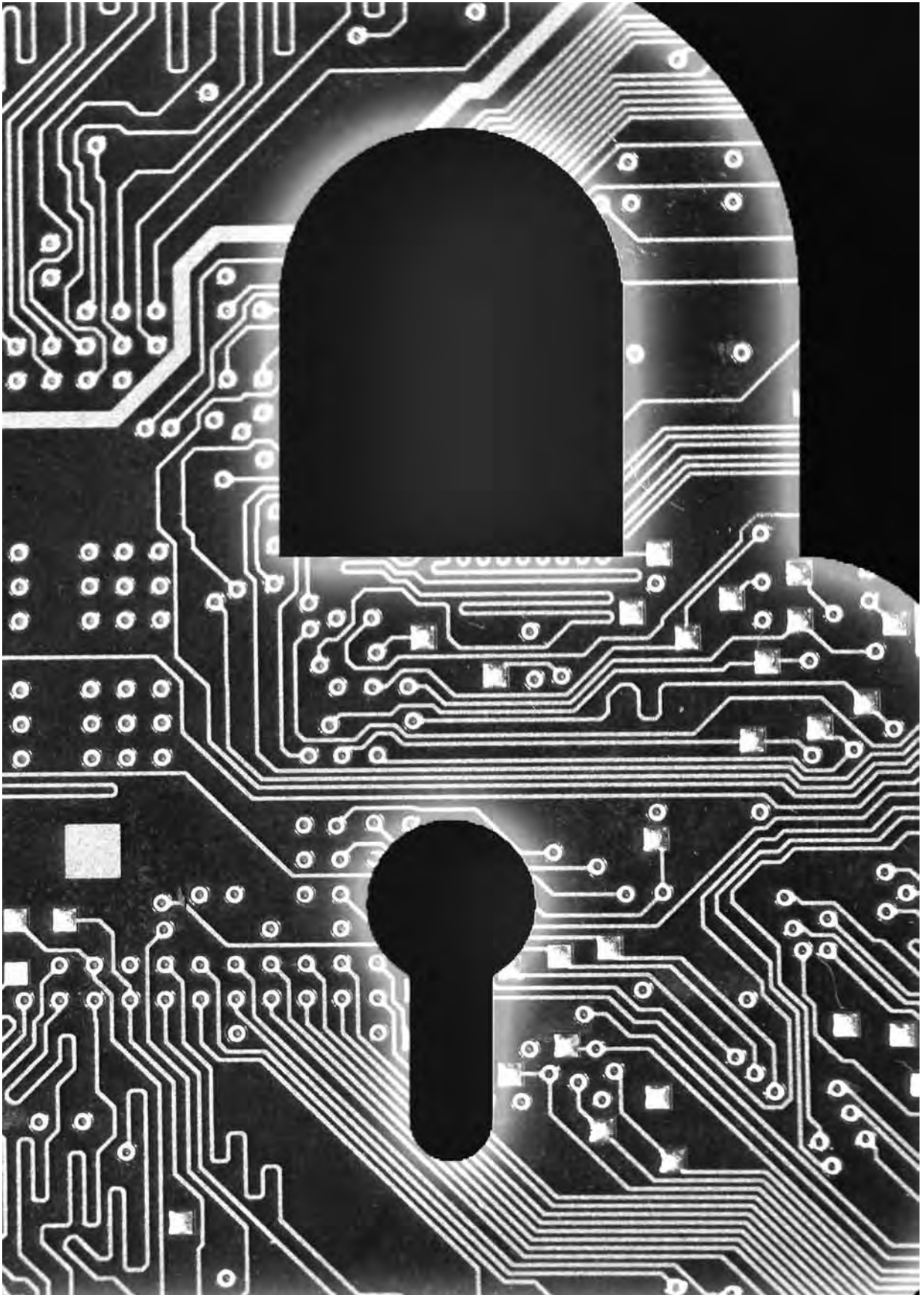
Carolyn Thompson has practiced family law in Oklahoma for over 30 years. She served as president of the Oklahoma Chapter of the American Academy of Matrimonial Lawyers and as the Governor's Advisory Committee on Child Support Enforcement chair. She received the OBA Earl Sneed Award for outstanding contributions to continuing legal education and was named Outstanding Oklahoma Family Law Attorney by the OBA Family Law Section. She lectures regularly on family law topics.



ADVERTISE IN THE BAR JOURNAL

405.416.7084 or advertising@okbar.org





Legal Ethics and Federalism: A New Blueprint for Federal Trade Commission Enforcement Action

By Mbilike M. Mwafulirwa

The Federal Trade Commission's (FTC) ability to take enforcement action on consumer confidentiality breaches has been broadly outlined in many contexts, including for lawyers.¹ Thus far, there isn't a *specific* outline the FTC could use for such an enforcement action when a lawyer is the subject of that targeted effort. This article attempts to fill that void.

The internet "presents both an enormous opportunity and a serious threat."² The opportunities for broader provision of legal services through the internet are great, be it locally, regionally, nationally or internationally. Having out-of-state/country clients or experts, storing law firm data on a cloud database or using email to send legal information is no longer a phenomenon; they are now an integral feature of modern legal practice. Besides triggering a lawyer's duty of confidentiality, these activities also implicate the Commerce Clause and enforcement action of federal agencies.³

Based on the current broad understanding of the Commerce Clause, there is nothing that should excuse a lawyer whose practice engages interstate mail, wires, emails, Dropbox, the cloud and other similar communications from federal regulation and enforcement action. This is particularly true when the mere local cultivation and use of wheat (a more modest undertaking) has long been deemed to trigger the Commerce Clause and consequently federal regulation.⁴ After all, once a person's activity affects interstate commerce the fact that his

"own impact on the market ... [is] 'trivial by itself' . . . [is] not a sufficient reason for removing him from the scope of federal regulation."⁵

A lawyer's duty of confidentiality is one of the bedrocks of legal practice. The crux of the rule is that a lawyer has a duty to keep confidential information (including electronic data) retained in the course of rendering legal services. Until recently, when a lawyer breached confidentiality, depending on the client confidences at issue and the nature and extent of the breach, the repercussions to offending lawyers have generally encompassed a combination of bar disciplinary proceedings, civil liability under state law or federal law — e.g., Health Insurance Portability and Accountability Act (HIPAA) and possibly, the Fair Credit Reporting Act.

This article however, highlights in greater detail another important emerging source of liability for data breaches — federal law under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45. In one of the most significant cases highlighting this new possibility of liabil-

ity, the FTC took enforcement action on an unlucky hotel chain because the offending party failed to “use encryption, firewalls and other commercially reasonable methods for protecting consumer data.” The 3rd Circuit recently endorsed and affirmed the FTC’s position in *FTC v. Wyndham Worldwide Corp.*⁶

WHERE IT ALL BEGINS: THE OKLAHOMA LAWYER’S ETHICAL OBLIGATIONS

For years, it has been settled that one of the touchstones of a lawyer’s ethical duties to his client is confidentiality.⁷ The lawyer’s duty of confidentiality also extends to electronically retained data. Because the spectrum of electronic information is increasingly evolving and expanding, lawyers have a continuing ethical duty to stay abreast of new technological developments, particularly those that affect the practice of law.⁹ Rule 1.1 of the Oklahoma Rules of Professional Conduct does not articulate what affects the practice of law in this context. However, some jurisdictions have elaborated on what this means in relation to a lawyer’s ethical duties, when technological advancements are concerned. For example, the American Bar Association Model Rules make clear that a lawyer’s competency includes understanding the “risks and benefits of technology.”¹⁰ Indeed, in order to fully fulfill his duty, the lawyer must ensure that he not only keeps up with changes affecting the practice of law, but that his staff are properly supervised and trained on these new developments.¹¹

A competent lawyer and his staff should be aware of key legal practice technological advancements. For example, a lawyer should have, at a minimum, a basic understanding of what cloud computing, or “the cloud” is. Cloud computing is offsite data storage by a third-party vendor.¹² Similarly, a lawyer should have at least a basic understanding of email, “the main form of communication within law firms, as well as with counsel and clients outside the firm.”¹³

FEDERAL LAW AFFECTING CLIENT CONFIDENTIALITY IN WAYS YOU WOULD NOT EXPECT — THE HEART OF THIS ARTICLE

The practice of law is both a business and a profession.¹⁴ The business side of the practice requires lawyers, and other prudent business people, to engage the market, make representations, advertise and so forth, in search and

service of clients. That well-meaning aspiration, however, can now be a source of serious federal liability.

False Commercial Speech — A Brief Primer

False commercial speech is subject to federal liability. The First Amendment does not protect false commercial speech.¹⁵ Against this backdrop, the Federal Trade Commission Act (FTCA) empowers the FTC to prohibit “unfair or deceptive acts or practices in or affecting commerce.”¹⁶ Like the rest of the federal government, the FTC’s powers over commerce through the Commerce Clause also extend to those activities (even local ones) “that have a substantial effect on interstate commerce.”¹⁷ The purpose behind Section 5 is to no longer reward fraud and deception, but to give “the consumer the right to rely upon representations of facts as the truth.”¹⁸

The touchstones of Section 5 liability are the words “unfair” and “deceptive,” insofar as they relate to acts or practices. For starters, the Supreme Court has determined that the concept of unfairness is a “flexible concept with evolving content.”¹⁹ The FTC has interpreted the FTCA in a way that the unfairness and deception analyses frequently overlap.²⁰

The FTC’s unfairness jurisdiction, the result of FTC policy statements and judicial decisions, was codified in the FTCA.²¹ In pertinent part, that provision provides:

The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair *unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.* In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.²²

Federal courts have distilled three elements from 15 U.S.C. §45(n) that need to be satisfied before the FTC can properly exercise its Section 5 jurisdiction.²³ First, the injury to consumers must be substantial. Second, “it must not be outweighed by any countervailing benefits to consumers or competition.” Third, the injury

must be one that “consumers themselves could not have reasonably avoided.”²⁴ Even then, the Supreme Court has previously held that substantial injury to consumers can be a stand-alone basis for the FTC’s exercise of its Section 5 jurisdiction.²⁵ Under the FTCA, the FTC’s jurisdiction extends not only to completed acts that are deemed unfair, but it also encompasses conduct that is “likely to cause harm.”²⁶ Finally, “the FTC may proceed against unfair practices even if those practices *violate some other statute that the FTC lacks authority to administer.*”²⁷ In short, the FTC’s jurisdiction under Section 5 of the FTCA is very broad.²⁸ Section 5 liability also extends to individuals. “Individuals may be liable for . . . [FTCA] violations committed by a corporate entity if the individual ‘participated directly in the deceptive practices or acts or had authority to control them.’”²⁹

How Section 5 of the FTCA Could Apply to Lawyers — Take Heed

The FTC has made the preservation of consumer privacy and data on online platforms a key feature of its enforcement activities. For a while, the lingering question has been: Does the FTC have jurisdiction under Section 5 to impose liability on businesses for failing to take all necessary precautions to preserve consumer data, that result in third-party breaches? The answer now appears to be yes.

The case that answered this question affirmatively is *FTC v. Wyndham Worldwide Corp.* The FTC brought a claim under Section 5 of the FTCA against Wyndham Worldwide Corporation (Wyndham) alleging that Wyndham had deficient cybersecurity protocols and mechanisms to protect consumer data from hackers.³⁰ The FTC alleged that between 2008 and 2009, hackers breached Wyndham’s computer systems multiple times and stole personal and confidential consumer data, resulting in more than \$10.6 million in fraudulent charges, despite the fact that Wyndham had a policy statement on its website that assured consumers it would keep any such information safe.³¹ In essence, the FTC alleged that contrary to its policy statement, “Wyndham did not use encryption, firewalls and other commercially reasonable methods for protecting consumer data.”³² As a result, the

FTC alleged that Wyndham had engaged in unfair and deceptive practices in violation of Section 5 of the FTCA.³³

Wyndham filed a Fed. R. Civ. P 12(b)(6) motion to dismiss, asserting among other grounds, that the FTC lacked jurisdiction over deficient cybersecurity practices.³⁴ The U.S. District Court for the District of New Jersey, however, denied the motion to dismiss.³⁵ The district court, nonetheless, certified “its decision on the unfairness claim for interlocutory appeal.”³⁶

The 3rd Circuit Court of Appeals affirmed and held that Wyndham’s conduct of having defective cybersecurity practices fell within the plain meaning of “unfair” acts or practices under 15 U.S.C. §45(n).³⁷ The court reiterated that contrary to Wyndham’s arguments that unfairness necessarily requires a finding that the conduct complained of was “unscrupulous or unethical,” the FTC, at a minimum, need only satisfy the three factors in its policy statement that the Supreme Court had previously approved.³⁸

Next, Wyndham argued that its conduct was not unfair because it did not act inequitably.³⁹ The court rejected that argument because Wyndham had professed on its own website policy that it would keep data safe, but neglected to do so, thus resulting in significant damages to consumers; therefore, Wyndham acted inequitably.⁴⁰

In a desperate bid to avoid liability, Wyndham argued that because it was also a victim of third-party hacking, its conduct could not be considered unfair toward its customers.⁴¹ The court also rejected this argument noting a lack of authority for that proposition. Additionally, the court stated that liability under Section 5 of the FTCA also encompasses conduct that is “likely to cause harm.”⁴² Wyndham was on notice that a breach of consumer data was likely after its first and second hacking, after which it still failed to take appropriate corrective measures.⁴³

The 3rd Circuit was equally unmoved by Wyndham’s next argument that the FTC’s exercise of jurisdiction in this case was exces-

“The FTC has made the preservation of consumer privacy and data on online platforms a key feature of its enforcement activities.”

sive. Considering the magnitude of the consumers' losses, the court was convinced that exercise of enforcement jurisdiction was justified.⁴⁴ Finally, Wyndham argued that the FTC's previous public statements indicated that it lacked the very powers it was trying to exercise in this case (concerning deficient cybersecurity measures).⁴⁵ The court rejected that argument as well, considering that in its view, the FTC had indicated that it did in fact have jurisdiction under Section 5 of the FTCA to ensure that consumers could rely on representations by businesses to keep their data safe.⁴⁶

WHAT ALL THIS MEANS — YOU NEED TO PUT IN PLACE GREAT SAFEGUARDS

Modern legal practice is inundated with interstate commerce and data exchange. However, the risks of third-party, induced data breaches are intertwined with the experience such that lawyers should put in place appropriate safeguards.⁴⁷ In most situations, a lawyer's failure to honor his promise to keep a consumer's information safe from unauthorized third parties could trigger liability. This promise can exist in many forms, but two examples quickly come to mind. First, like the hotel in *Wyndham*, the lawyer can be in a situation where he operates a website or other online platform that receives sensitive personal information (online payments, etc.) and in the process of doing so, gives assurances to his clients and/or consumers that his platform has the necessary security protection features. If that information was compromised and resulted in significant financial injuries to consumers because the online platform had deficient protective measures, the authorities certainly suggest that the FTC could step in and bring enforcement action for unfair and deceptive practices⁴⁸ in order to give "the consumer the right to rely upon representations of facts as the truth."⁴⁹

Indeed, this very scenario — of a single law firm's data breach resulting in significant and substantial client injury — has recently played itself out in devastating fashion in the now-infamous "Panama Papers" scandal. The scandal revolves around Mossack Fonseca, a Panama-based law firm that was a victim of a third-party, induced data breach.⁵⁰ The law firm was in the business of "incorporating companies in offshore jurisdictions such as the British Virgin Islands."⁵¹ Additionally, the law firm provided wealth management services to its clients.⁵²

Early in the spring of 2016, a German newspaper *Süddeutsche Zeitung* (SZ), reported an anonymous source had contacted it to share more than 11.5 million "encrypted internal documents from Mossack Fonseca, a Panamanian law firm that sells anonymous offshore companies around the world."⁵³ The documents purportedly showed in vivid detail how the extremely rich and influential individuals and organizations from all over the world (clients of the law firm) exploit tax havens to hide their money from tax authorities.⁵⁴ As a result of the data breach, some of the law firm's clients face detailed international criminal and tax investigations.⁵⁵ As this scandal clearly demonstrates, the threat of substantial client injury from law firm data breaches is very real and so is the need for adequate enforcement action.

Second, the lawyer's breach of his legal ethics — on securing confidential information and keeping up with technological advances impacting the practice of law — could also serve as an additional basis for liability. In "determining whether an act or practice is unfair, the Commission *may consider established public policies* as evidence to be considered with all other evidence."⁵⁶ Every attorney-client contract in Oklahoma is subject to public policy embodied in the Rules of Professional Conduct. This means that pursuant to public policy, there is an implied term in every Oklahoma attorney-client contract that the lawyer will undertake to 1) maintain client confidences and 2) will take continued steps to keep abreast of changes (including technological ones) impacting the practice of law necessary to maintain the sanctity of the confidential information retained.⁵⁸ The fact that "the FTC may proceed against unfair practices even if those practices *violate some other statute that the FTC lacks authority to administer*,"⁵⁹ liability on this ground is potentially possible.

CONCLUSION

The possibility of federal enforcement in this area is very real. For the last few months, there has been increasing interest in this area from a number of stakeholders, bar associations, lawyers, clients and government agencies. The "Panama Papers" scandal serves as a dark reminder to all lawyers and law firms that confidentiality of client data should be taken seriously. For the clients of the Panama law firm, they now face multiple serious international investigations for tax evasion and money

laundering. In conclusion, the most prudent lawyer should take heed to use best practices in the legal industry aimed at securing consumer data. As *Wyndham* demonstrates, attorneys should “use encryption, firewalls and other commercially reasonable methods for protecting consumer data.”

1. See, e.g., Peter J. Arant, “Understanding Data-Breach Liability: The Basics Every Attorney Should Know,” 87 *OBJ* 810-815 (April 2016) (highlighting various bases for lawyer liability for data breaches, including discussing generally the possibility of FTC liability under §5 of the Federal Trade Commission Act (FTCA)). This article builds from the general to the specific.

2. Anthony Giddens & Simon Griffiths, *Sociology* 621 (5th ed. 2006).

3. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005) (“even if . . . [a person’s] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.”) (emphasis added) (citations omitted) (internal quotation marks omitted).

4. See *Wickard v. Filburn*, 317 U.S. 111, 127-129 (1942).

5. *Raich*, 545 U.S. at 20 (citations omitted).

6. 799 F.3d 236 (3rd Cir. 2015).

7. 5 O.S. 2011, §3 (a lawyer has a duty “[t]o maintain inviolate the confidence and, at any peril to himself, to preserve the secrets of his client.”); see also Rule 1.6, Rules of Professional Conduct (RPC), 5 O.S. 2011, ch. 1, app. 3-A (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”). This duty extends to information gained from prospective clients, Rule 1.18 and past clients, Rule 1.8, 1.9 (c)(1-2). Rule 1.6 (b) lays out the various ways in which the law permits disclosure. A full discussion of these issues is beyond the scope of this informative piece.

8. See Travis Pickens (OBA ethics counsel), “Ethics Up in the Clouds,” 81 *OBJ* 2407, 2409-2410 (2010) (collecting ethics opinions).

9. Rule 1.1, RPC, 5 O.S. 2011, ch. 1, app. 3-A cmt. 6 (“a lawyer should keep abreast of changes in the law and its practice.”) (emphasis added).

10. ABA Model Rule 1.1 cmt. 8.

11. Rule 5.3, RPC cmt. 1 (“A lawyer must assure that such assistants receive appropriate instruction and supervision concerning the ethical aspects of their employment.”).

12. See Diane Murley, “Law Libraries in the Cloud,” 101:2 *Law Library J.* 249, 249 (2009).

13. Timothy J. Toohey, “Beyond Technophobia: Lawyers’ Ethical and Legal Obligations to Monitor Evolving Technology and Security,” 21 *Rich. J.L. & Tech.* 9, 10 (2015).

14. *In re Jackson*, No. 06-36268, 2012 WL 3071218, at *10 n. 4 (S.D. Tex. July 27, 2012).

15. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (“For commercial speech to come within [the First Amendment], it must concern lawful activity and not be misleading.”).

16. FTC Act §5, 15 U.S.C. §45(a) (emphasis added).

17. *Gonzalez v. Raich*, 545 U.S. 1, 17 (2005).

18. *FTC v. Freecom Commc’ns Inc.*, 401 F.3d 1192, 1202 (10th Cir. 2005) (citations omitted).

19. *FTC v. Bunte Bros.*, 312 U.S. 349, 353 (1941).

20. See, e.g., *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 980 n. 27 (D.C. Cir. 1985) (“The FTC has determined that . . . making unsubstantiated advertising claims may be both an unfair and a deceptive practice.”); see also, e.g., *Int’l Harvester Co.*, 104 FTC 949, 1060 (1984) (“unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset”) (emphasis added).

21. See 15 U.S.C. §45(n).

22. *Id.* (emphasis added).

23. See *FTC v. Accusearch, Inc.*, 570 F.3d 1187, 1193 (10th Cir. 2009) (citing 15 U.S.C. §45(n)(2006)).

24. 15 U.S.C. §45(n).

25. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972).

26. 15 U.S.C. §45(n)(2006) (emphasis added).

27. *Accusearch, Inc.*, 570 F.3d at 1195 (emphasis added) (citations omitted).

28. *Id.*

29. *POM Wonderful LLC v. FTC*, 777 F.3d 478, 498 (D.C. Cir. 2015) (citations omitted), *cert. denied*, 136 S. Ct., 1839 (2016).

30. *Wyndham*, 799 F.3d at 240-241.

31. *Id.* at 241-242.

32. *Id.* at 241.

33. *Id.* at 242.

34. *Id.*

35. *Wyndham*, 799 F.3d at 242.

36. *Id.*

37. *Id.* at 244-245.

38. *Id.* (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972) and codified at 15 U.S.C. §45).

39. *Id.* at 245.

40. *Id.*

41. *Id.* at 246.

42. *Id.* (quoting 15 U.S.C. §45(n)(2006)) (emphasis added).

43. *Wyndham*, 799 F.3d at 246.

44. *Id.* at 247.

45. *Id.*

46. *Id.* at 247-248. The 3rd Circuit also entertained Wyndham’s fair notice/rule making arguments. *Id.* at 249. In the end, the court rejected those arguments. *Id.* at 250-257. A detailed discussion of those arguments is beyond the scope of this analysis.

47. *Supra* text accompanying notes 7 and 12.

48. *Wyndham*, 799 F.3d at 243-247.

49. *Freecom Commc’ns*, 401 F.3d at 1202.

50. “What are the Panama Papers? A Guide to History’s Biggest Data Leak,” *The Guardian Newspaper* (U.K.), www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers (last accessed Aug. 3, 2016).

51. *Id.*

52. *Id.*

53. “Panama Papers (The secrets of dirty money),” *Süddeutsche Zeitung* (SZ), www.panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4/ (last accessed Aug. 3, 2016).

54. *Supra* text accompanying note 53.

55. *Supra* text accompanying notes 53 and 54.

56. 15 U.S.C. §45(n) (emphasis added).

57. See, e.g., *Frasier, Frasier & Hickman, LLP v. Flynn*, 2005 OK CIV APP 33, ¶14, 114 P.3d 1095, 1099 (approved for publication by the Oklahoma Supreme Court) (assessing a lawyer’s contract’s validity in light of Oklahoma’s public policy as embodied in the Oklahoma Rules of Professional Conduct); see also 15 O.S. 2011, §104 (contracts contrary to Oklahoma’s public policy are void).

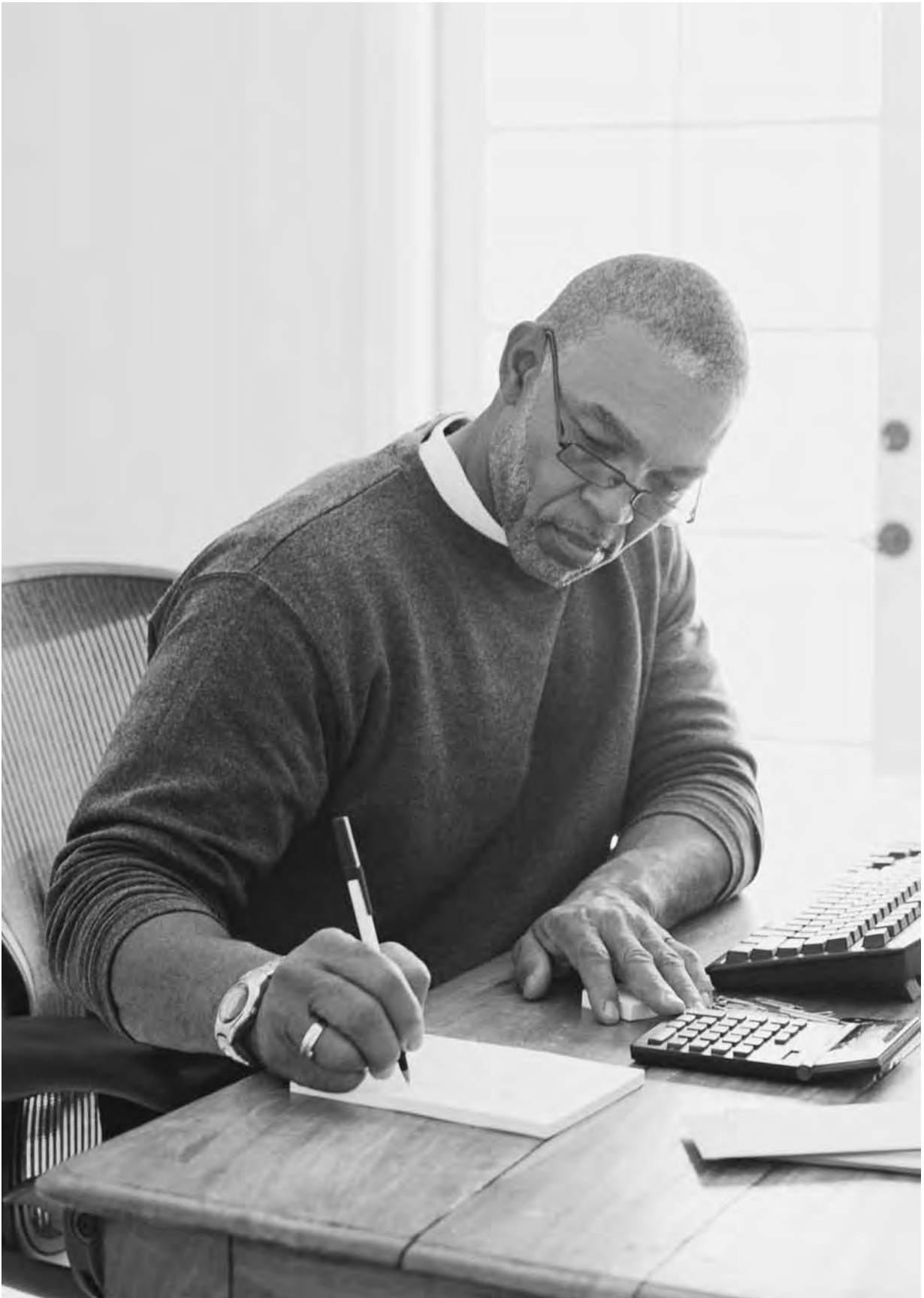
58. See Rule 1.6 RPC; *id.* Rule 1.1, cmt.6.

59. *Accusearch, Inc.*, 570 F.3d at 1195 (emphasis added) (citations omitted).

ABOUT THE AUTHOR



Mbili M. Mwafurirwa is an associate at Brewster & De-Angelis PLLC. Mr. Mwafurirwa’s practice focuses on general civil litigation, civil rights defense and appellate law. He is a 2012 graduate of the University of Tulsa College of Law.



Ghostwriting: An Ethical Issue in the Evolution of the Legal Field

By Blake M. Feamster

Evolution is inevitable in most things, including the practice of law. In the last few decades, the rise in the number of litigants proceeding pro se in court cases and the rise of online legal services, such as LegalZoom and Rocket Lawyer, have contributed to a shift in how legal services are provided in litigation.

Traditional full-service attorneys have had to adapt, leading many to provide “unbundled services” and “limited scope representation,” which is authorized by Rule 1.2(c) of the Oklahoma Rules of Professional Conduct (ORPC).¹ Rather than providing the traditional “full-service” representation, generally including 1) gathering facts, 2) advising the client, 3) discovering facts of opposing party, 4) researching the law, 5) drafting documents, 6) negotiating and 7) representing the client in court, an attorney’s services are often limited to only one or two of these tasks. This shift in services and adaption to change is natural, but evolving attorneys must consider the important ethical issues associated with providing nontraditional legal services.

One ethical issue that has garnered significant attention in recent years is ghostwriting. Ghostwriting, as it pertains to the practice of law, is the anonymous writing of pleadings to a substantial degree by a licensed attorney for a pro se litigant.² Unfortunately, few attorneys who currently provide unbundled services or limited scope representation have any knowledge about ghostwriting. They do not know that ghostwriting is discouraged by many courts, is prohibited by the 10th Circuit Court

of Appeals or that they risk incurring sanctions for providing undisclosed services. This article provides a brief review of the conflicting authorities on ghostwriting, the reasons for the conflict and suggestions on how to avoid potential ethical errors if providing limited legal services to a client in Oklahoma.

OPINIONS ON GHOSTWRITING

Courts generally look with suspicion on the practice of attorneys drafting pleadings without disclosing their participation. One of the first cases to address the issue is the 1971 1st Circuit Court of Appeals case *Ellis v. State of Maine*.³ The court referred to the ever-increasing number of petitions filed by pro se litigants appearing before it and “[w]ith an eye to the future,” firmly held: “[i]f a brief is prepared in any substantial part by a member of the bar, it must be signed by him.” The court was concerned that ghostwriting would enable lawyers to escape their obligations to represent that good faith grounds exist to support all assertions and claims made in a pleading, as typified by FRCP Rule 11.⁴

Criticism of the practice of ghostwriting continued in subsequent federal court cases, but opinions varied on how the issue should be

addressed in the absence of governing rules in a jurisdiction.⁵ One court, noting the lack of “any local, state or national rule regarding ghostwriting,” called for “local courts and professional bar associations to directly address the issue of ghostwriting and delineate what behavior is and is not appropriate.”⁶

State bar associations and ethics entities across the country, as well as the American Bar Association (ABA), ultimately answered the call. The ABA, focusing on the need for pro se litigants to have access to the courts and to obtain help they would not otherwise be able to afford, fully endorsed ghostwriting in 2007.⁷ Some state and local bars follow this approach, but others require only limited disclosure or disclosure in cases of “substantial assistance,” while others flatly prohibit ghostwriting or require full disclosure.⁸

Notably, no Oklahoma state court case, ethics opinion or rule regarding ghostwriting are known to exist. The 10th Circuit Court of Appeals, however, provided guidance on the issue to attorneys practicing in federal court in the 1998 case of *Duran v. Carris*.⁹ There, the appellate court rejected the practice when presented with an appellate brief ghostwritten by an attorney. Citing the obligations of attorneys under Fed. R. Civ. P. 11(a) and rules of professional conduct requiring candor and truthful representations, the court found that when giving counsel that results in court filings: “ethics requires that a lawyer acknowledge the giving of his advice by the signing of his name” and “the participation by an attorney in drafting an appellate brief is per se substantial and must be acknowledged by signature.”¹⁰ The court was not persuaded that ghostwriting provides positive contributions such as reduced fees or pro bono representation, which can still be accomplished through limited scope representation with identification.

The *Duran* court did somewhat temper its stance by cautioning that “the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant,” and did not impose sanctions, but instead publicly admonished the ghostwriting attorney with the warning that future violations would result in the possible imposition of sanctions.¹¹ Finally, in line with the 1st Circuit’s position, the court closed by proclaiming: “[w]e do not allow anonymous testimony in court: nor does this circuit allow ghostwritten briefs.”¹²

Two other circuit courts have rendered opinions on the subject that appear to follow recent authority more accepting of ghostwriting, leading to what some commentators have referred to as a split of opinion among the courts.¹³ In the 2011 case of *In re Fengling Liu*, the 2nd Circuit Court of Appeals concluded that the ghostwriting of a petition for an administrative case “did not constitute misconduct and therefore did not warrant the imposition of discipline.”¹⁴ Similarly, in the 2013 case of *In re Hood*, the 11th Circuit held that when an attorney prepares a court form filing with a court, the attorney has not “drafted” the form and the assistance need not be disclosed to the court.¹⁵ In reality, the perceived distinction between the circuits may be based more on the type of pleadings they were each reviewing and the degree of preparation and assistance provided by the ghostwriting attorneys to the pro se litigants in the cases, than a true disagreement.

ETHICAL CONCERNS RAISED BY GHOSTWRITING

Three primary concerns are typically expressed with respect to ghostwriting: 1) whether the practice unfairly allows a pro se litigant to benefit from the undisclosed assistance of counsel while at the same time receiving the benefit of the liberal construction of pleadings and procedures that courts apply to pro se litigants; 2) whether the failure to disclose assistance violates a lawyer’s professional responsibility duties to the court, to opposing counsel and to the client, such as the duties of candor and honesty and 3) whether ghostwriting shields the lawyer from potential sanctions for violations.¹⁶

Ghostwriting certainly has the potential to provide an unfair advantage to pro se litigants. As the United States Supreme Court has stated, pro se pleadings are held to “less stringent standards than formal pleadings drafted by lawyers.”¹⁷ Thus, although pro se pleadings are authored by lawyers, the fact that this authorship is not disclosed leads courts to give the pro se litigants and their pleadings more liberal treatment than they otherwise would have, as well as more liberal treatment than the opposing party receives.

Other authorities express the view that liberal treatment of pro se pleadings authored by attorneys is not a real problem. Entities such as the ABA are particularly focused on ensuring access to the courts through the pro se process

and believe that if an “undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will be evident to the tribunal,” thereby eliminating the need for liberal construction.¹⁸ Two dangers exist with this position, however and both are detrimental to pro se parties. First, permitting full, unrestricted ghostwriting could result in courts never liberally construing any pro se pleading. Second, an unknowing pro se litigant might mistakenly believe that he or she has received effective assistance from a ghostwriting attorney when in fact the assistance was inferior to what a traditional full-service client would have received. If an attorney is reluctant to offer assistance without anonymity, what is the level of service the attorney is actually providing?

The failure of lawyers to disclose legal assistance to pro se parties has also been viewed by courts as a violation of the duties of ethics and professional responsibility. One such duty is the duty of candor an attorney owes to the tribunal, set forth in ORPC 3.3,¹⁹ which prohibits an attorney from making misrepresentations or omissions to the court and ORPC 3.1,²⁰ which, like 12 O.S. §2011,²¹ prohibits attorneys from bringing frivolous litigation and making frivolous claims. Courts are greatly concerned with ghostwriting attorneys who “author pleadings and necessarily guide the course of the litigation with an unseen hand.”²² By influencing proceedings and taking legal positions without disclosing their identities, the potential for misrepresentations or assertion of frivolous positions arises. Some courts believe that the very filing of a document that was prepared by an attorney as a “pro se” document is a misrepresentation, which in Oklahoma would violate the duties set forth in ORPC 3.3.²³ The ABA argues, however, that absent an affirmative statement by the client that is attributed to the lawyer, it is not the lawyer who has made the statement and has been dishonest.²⁴

Attorneys also owe duties to their clients, including the duties of loyalty, competency and confidentiality under OPRC 1.1,²⁵ 1.2²⁶ and 1.6,²⁷ and courts have expressed a concern that ghostwriting can unfairly shield an attorney from potential sanctions for violations of these obligations, as well as those owed to the court and counsel. At least one court found that an attorney attempted to evade his duty of loyalty to a client by ghostwriting.²⁸ Further, the failure to disclose the assistance of counsel provided through ghostwriting could potentially hide

regularly occurring ethical violations which would otherwise be discovered and addressed if the court, opposing party and opposing counsel knew of the ghostwriting attorney’s existence.

THE BEST PRACTICE IS DISCLOSURE

Courts and other authorities have taken many different approaches in directing attorneys on what to do when engaging in ghostwriting. While some take the position that no disclosure or identification of counsel is required, others require specific types of disclosures, such as requiring disclosure of the extent of the assistance an attorney provided or requiring disclosure of the fact that assistance was provided, but not the identity of the lawyer who provided it.²⁹

Colorado amended its civil procedure Rule 11 to specifically address ghostwriting in connection with permitting limited scope representation of pro se litigants.³⁰ The rule clarifies that an attorney’s assistance in filling out pre-printed and electronically published forms issued by the judicial branch for use in court is not subject to the rule. However, if an attorney undertakes to provide limited representation to a pro se party involved in a court proceeding, in accordance with Colo. RPC 1.2, the “pleadings and papers filed by the pro se party that were prepared with the drafting assistance of an attorney shall include the attorney’s name, address, telephone number and registration number.” The attorney must also advise the pro se party that this information must be included. Additionally, the rule specifies a violation may subject an attorney to sanctions.

No Oklahoma case law, court rule, rule of professional responsibility, ethics counsel opinion or other authority has been located regarding any type of disclosure required by Oklahoma state courts about ghostwriting. Further, while the 10th Circuit did give some guidance to federal court practitioners in the *Duran* case, the court admittedly left unanswered some critical questions, such as what amount of “substantial assistance” is needed before disclosure is required and whether every attorney that provides such assistance on a pro se pleading must make a disclosure.³¹ Given this situation and the fact that attorneys practicing in Oklahoma may be ghostwriting on a regular basis, the best practice for avoiding potential ethical violations is to include some form of disclosure, such as a single signature block that is

preceded by the words “prepared with the assistance of,” for example:

Prepared with the assistance of:

/s/ Blake M. Feamster
Blake M. Feamster, OBA #31054
Widdows Law Firm PC
1861 East 71st Street
Tulsa, OK 74136
918-744-7440 / 918-744-7358 Fax

Unless and until the Oklahoma courts provide clarification on the ethical obligations of attorneys and the requirements for disclosure of assistance when providing unbundled legal services or limited scope representation, the best practice is to disclose the assistance.

CONCLUSION

Ghostwriting litigation is a practice engaged in by many Oklahoma attorneys. The provision of unbundled services and limited scope representation is almost certainly going to continue to increase in this modern era of legal practice and as a result, so are the ethical issues surrounding ghostwriting. Until Oklahoma attorneys are provided with clarity, the best policy is to disclose to the courts participation in litigation while navigating the evolving legal field of unbundled services and limited scope representation.

1. Oklahoma Rules of Professional Conduct, Rule 1.2(c): A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

2. Charles Alan Wright, et al., *Federal Practice and Procedure* §1333 (3d Ed. 1998, 2011 Update) (“Ghostwriting occurs when a pro se litigant receives legal assistance from an attorney in preparing the papers submitted to the court although the attorney does not sign the document”).

3. *Ellis v. State of Maine*, 448 F.2d 1325 (1st Cir. 1971).

4. *Id.* at 1328.

5. See *Laremont-Lopez v. Se. Tidewater Opportunity Ctr.*, 968 F. Supp. 1075, 1077 (E.D. Va. 1997), *aff’d*, 172 F.3d 44 (4th Cir. 1999); *Johnson v. Board of County Com’rs for County of Fremont*, 868 F. Supp. 1226, 1232 (D. Colo. 1994), *aff’d on other grounds*, 85 F.3d 489 (10th Cir. 1996); *Wesley v. Don Stein Buick, Inc.*, 987 F. Supp. 884 (D. KS 1997).

6. *Ricotta v. California*, 4 F. Supp. 2d 961, 988-89 (S.D. Cal. 1998), *aff’d*, 173 F.3d 861 (9th Cir. 1999).

7. ABA Standing Comm. on Ethics & Prof’l Resp., Formal Op. 07-446, *Undisclosed Legal Assistance to Pro Se Litigants* (2007) (superseding ABA Comm. on Ethics & Prof’l Resp., Inf. Op. 1414).

8. See Sam Bhojani, “Attorney Ghostwriting for Pro Se Litigants – A Practical and Bright-Line Solution to Resolve the Split of Authority Among Federal Circuits and State Bar Associations,” 65 *SMU L. Rev.* 653 (2012); Benjamin Klebanoff, “Ghostwriting – More than Meets the Eye: Ghostwriting – Attorneys In Disguise: A Proposal for Handling Pro Se Parties Who Seek Limited Representation in Federal Court”, 40 *T. Marshall L. Rev.* 31 (2014); John C. Rothermich, “Ethical and Procedural Implications of ‘Ghostwriting’ for Pro Se Litigants: Toward Increased Access to Civil Justice”, 67 *Fordham L. Rev.* 2687 (1999); *In Re Dreamplay, Inc.*, 534 B.R. 106 (Bankr. D. Md. 2016).

9. *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001).

10. *Id.* at 1272.

11. *Id.* at 1273.

12. *Id.*; see also *In re West*, 338 B.R. 906, 917 (Bankr. N.D. Okla. 2006) (imposing sanctions of \$1,000 on attorney who ghost-wrote documents)

13. See Bhojani, *supra*.

14. *In re Fengling Liu*, 664 F.3d 367, 373 (2d Cir. 2013).

15. *In re Hood*, 727 F.3d 1360, 1365 (11th Cir. 2013).

16. See Bhojani, *supra*; Klebanoff, *supra*.

17. *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

18. ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446.

19. Oklahoma Rules of Professional Conduct, Rule 3.3(a)(1) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer”).

20. Oklahoma Rules of Professional Conduct, Rule 3.1 (“A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established”).

21. 12 O.S. 2016 §2011.1.

22. *Johnson v. Board of County Com’rs for County of Fremont*, 868 F. Supp. 1226, 1231 (D. Colo. 1994); see also *Duran*, *supra*, 238 F.3d at 1268.

23. *Duran*, *supra*, at 1273.

24. ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446.

25. Oklahoma Rules of Professional Conduct, Rule 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”).

26. Oklahoma Rules of Professional Conduct, Rule 1.2 ((a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify. (b) The substance of (b) is in modified Comment at [5]. (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. (d) A lawyer shall not counsel a client to engage or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

27. Oklahoma Rules of Professional Conduct, Rule 1.6.

28. *Delso v. Trustees for Retirement Plan for Hourly Employees of Merck & Co.*, No. 04-3009 (AET), 2007 WL 766349, at *5 (D.N.J. Mar. 6, 2007).

29. See ABA Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-446.

30. Colo. Formal Opinion 101, *Unbundled Legal Services*, Adopted Jan. 17, 1998, Addendum Issued 2006.

31. *Duran v. Carris*, 238 F.3d 1268, 1273 (10th Cir. 2001).

ABOUT THE AUTHOR



Blake M. Feamster is an associate with Widdows Law Firm PC in Tulsa. She focuses her practice on family disputes in areas of divorce, guardianship, adoption and probate. Ms. Feamster is a 2012 graduate of The TU College of Law.

LEND A HAND

to a hero

**The need for family law volunteers
is critical, but attorneys from all
practice areas are needed
TO VOLUNTEER**

**Contact Gisele K. Perryman
405-416-7086
HEROES@OKBAR.ORG
or sign in to MyOk.Bar**

A U.S. Navy veteran, who was a master at arms, is a mother of three on limited income. She alleges her husband raped her and committed child abuse. She needs help filing for divorce and determining child custody issues.

An active duty member of the U.S. Army is deployed in the Middle East. His home base is Fort Sill, where he obtained a divorce in Comanche County. His ex-wife has moved their children to California, where she is trying to get a custody case filed.

*If you would be willing to help one of these Oklahoma heroes,
please contact Heroes Coordinator Gisele Perryman
at 405-416-7086 or giselep@okbar.org.*





Professional Liability Coverage: Don't Take It for Granted

By Steven V. Buckman

Oklahoma lawyers have the benefit over attorneys practicing in other jurisdictions of having a professional liability insurer in their backyard. Older lawyers may recall the period of time in the late 1970s and early 1980s when it was virtually impossible to purchase malpractice coverage at an affordable cost. The market fluctuations and the decision by many insurers to exit the market left Oklahoma attorneys with little or no realistic choices.

In 1979 a small group of lawyers with great foresight came up with a solution that we all benefit from today. Initially, a stock company was formed under the name Oklahoma Bar Professional Liability Insurance Company with lawyers purchasing shares, and the first policy was issued in 1980. Lawyers desiring coverage in the mid-1980s were required to buy a surplus debenture in the sum of \$400 to maintain the capital and surplus requirements. This purchase was in addition to paying the premiums for the coverage. The debentures were all repaid, the stock redeemed and the company converted to a mutual company in 1994 — Oklahoma Attorneys Mutual Insurance Company (OAMIC).

The intangible benefits of a local mutual company are often overlooked. As policyholders, attorneys have rights that are not available to customers purchasing professional liability coverage from other insurers. OAMIC is overseen by a board composed of 16 Oklahoma attorneys. These are lawyers living *and practicing* in Oklahoma, essentially your peers.

Board members are elected on staggered terms and serve for three years. Members (policyholders) elect the individuals to serve, thereby having a voice in the company's operation. Board members are presently nominated by the recommendation of the nominating committee of the company. Although no written rule exists, the company has long emphasized diversity of the board members, both geographically and by type of practice.

Geographically the board is typically made up of five Oklahoma City lawyers, five Tulsa lawyers and five from other areas of the state. The 16th member is the Oklahoma Bar Association president-elect. The board is composed of lawyers from a broad range of practice areas, including those with experience in tax, banking, oil and gas, transactional matters and investments, as well as, litigators whose familiarity with trial practice is beneficial to board service. The board also includes lawyers from firms of all sizes, including solo attorneys and attorneys from small and large firms. In other words, the board truly represents Oklahoma legal practitioners and is not comprised of out-

of-state decision makers who have little understanding of the practice of law in Oklahoma state and federal courts.

With privilege comes responsibility — membership in OAMIC is no exception. First, members have a responsibility to review the qualifications of proposed board members and to vote. The system only works when everyone does their part. Second, members or policyholders make a commitment to practice law in a responsible manner and diligently work to avoid unnecessary and preventable claims.

OAMIC is financially sound and secure with \$36 million in surplus and capital. The company is audited on an annual basis, and the audit report is submitted to the Oklahoma Insurance Department and the National Association of Insurance Commissioners. This audit procedure is important to safeguarding the financial solvency and accountability of the joint-member assets and financial resources. In addition, the company is examined every five years by the Oklahoma Insurance Department.

Demographically, approximately 1,560 of the roughly 2,400 insurance policies issued each year are written to solo practitioners. The other policies are issued to firms of various sizes, including large law firms. However, the average policy size is 2.1 lawyers per policy.

One of the primary advantages to having professional liability coverage is the “cost of defense” of a malpractice lawsuit. One could argue lawyers have the ability to defend themselves in the event of a lawsuit, but this argument doesn’t consider the time and expense involved in defending a claim, particularly a frivolous one. A number of attorneys each year find the coverage quite valuable in fending off claims that would have cost more to defend than the premiums paid. With the average malpractice claim costing \$40,000 including defense costs, litigation poses an expense many firms could not easily absorb.

The risk of loss is spread further than just among OAMIC’s 2,400 member firms. OAMIC reinsures its own risk by purchasing reinsurance through other insurers. Even when the risk is ceded or placed with reinsurance markets, only reinsurers with a proven track record who are committed to the professional liability industry, and who have demonstrated their own financial security, are used. The reinsurance is divided between reinsurers.

One of the challenging aspects in professional liability coverage occurs with attorneys who fail to give timely notice of a potential claim or known event. Since the coverage is “claims made” as opposed to “occurrence” coverage, the insurance is only effective for claims that are reported during the policy period. Law firms are not permitted to acquire coverage *after* a known event has occurred that will ripen into an actual loss or claim, and attorneys are not allowed to purchase coverage after a claim situation has become known, unless the claim has been disclosed on the application and the risk has been knowingly accepted by OAMIC.

A failure to disclose in the application a professional error or mistake known by any attorney in the firm can void the coverage for the entire firm, so it is important to fully identify any known events that might turn into a potential claim in the application for coverage. Proper and timely reporting of potential claims and known events is sometimes difficult for lawyers. An attorney may fear that news of the mistake will spread, or that they will suffer through the imposition of increased premiums or adverse coverage terms in the future. This is simply not the case. First, only a handful of OAMIC staff see the applications that are submitted, so reporting a potential problem is not going to reach the national media if disclosed. Further, an attorney won’t face punitive rate increases or unfavorable future coverage terms just because he or she reports a potential claim on an application. This would only discourage attorneys from reporting and communicating known claims.

In fact, early reporting of a potential claim to OAMIC is the best thing a lawyer can do when a potential claim becomes known. Early reporting locks in coverage for the loss and a team of professionals are there to help. Knowing what to do and acting quickly tends to lessen the expense and avoid a lot of publicity. For example, some real estate claims have been resolved quite efficiently by claims staff recognizing a simple quitclaim deed would cure an error and making a few telephone calls to people willing to sign them. Having an objective third party help look for ways to resolve a situation is no different than the service rendered by lawyers to their own clients, day in and day out.

When a law firm needs defense counsel on a professional liability claim, there should be a good fit between the defending lawyer and the

firm being represented, with no out-of-state defense panels or national contracts to defend cases at bargain prices. OAMIC appoints Oklahoma counsel with no less than \$1 million in professional liability insurance, and generally the law firm reporting the claim is given a choice in the defense firm to be assigned. It is important to have counsel who you trust to assist with your specific needs and concerns.

One point of interest of coverage with OAMIC is the low limit allocated in policies for defense costs covers only \$100,000. A lower limit is better than the "cost inclusive" policies of some professional liability insurers, where the first dollar spent erodes the per claim limit. All expenses incurred over \$100,000 are taken from the indemnity part of the policy (or the part that pays the damages). In today's world, \$100,000 is not sufficient coverage for defense of any type of significant litigation. OAMIC does not offer policies with higher defense limits, so keep in mind when choosing your overall limits that some of the indemnification coverage will possibly be eroded by litigation expenses in a serious legal battle. The easiest way to deal with the low defense limits is to buy a policy with greater indemnification or higher limits. In other words, instead of \$1 million in coverage, buy \$2 million, knowing some of the indemnity portion will actually go to your defense costs. It goes without saying that the minimum 100/300 limit is inadequate for almost anyone.

A common question attorneys have about professional liability coverage is what are the most common claims and the most expensive ones? The area of practice with the largest number of claims is plaintiff personal injury. These claims most often occur because 1) attorneys fail to manage their calendars or 2) they are unable to manage client expectations. If your client wants a lot of money and you fail to win a big verdict, you may be the next target! In terms of severity, commercial transaction claims tend to cost the most money per event. The mistake may be simple, but due to the size of the transaction, the final outcome can be very expensive.

Some practitioners might also ask, what are the most worrisome risks when it comes to providing liability insurance for attorneys? The answer is setting up trusts and estate planning for blended families. When couples enter second and third marriages with assets, the future

is fraught with division of assets among the children; his, hers and ours. The offspring leave the funeral with different expectations over what they should inherit due to how much mom or dad loved them. Blaming mom or dad for not leaving enough is almost like saying they didn't really love me. Taking aim at the lawyer who didn't accomplish mom and dad's "true wishes" solves not only the psychological/emotional dilemma, it also places the cross hairs directly on a target easy to dislike.

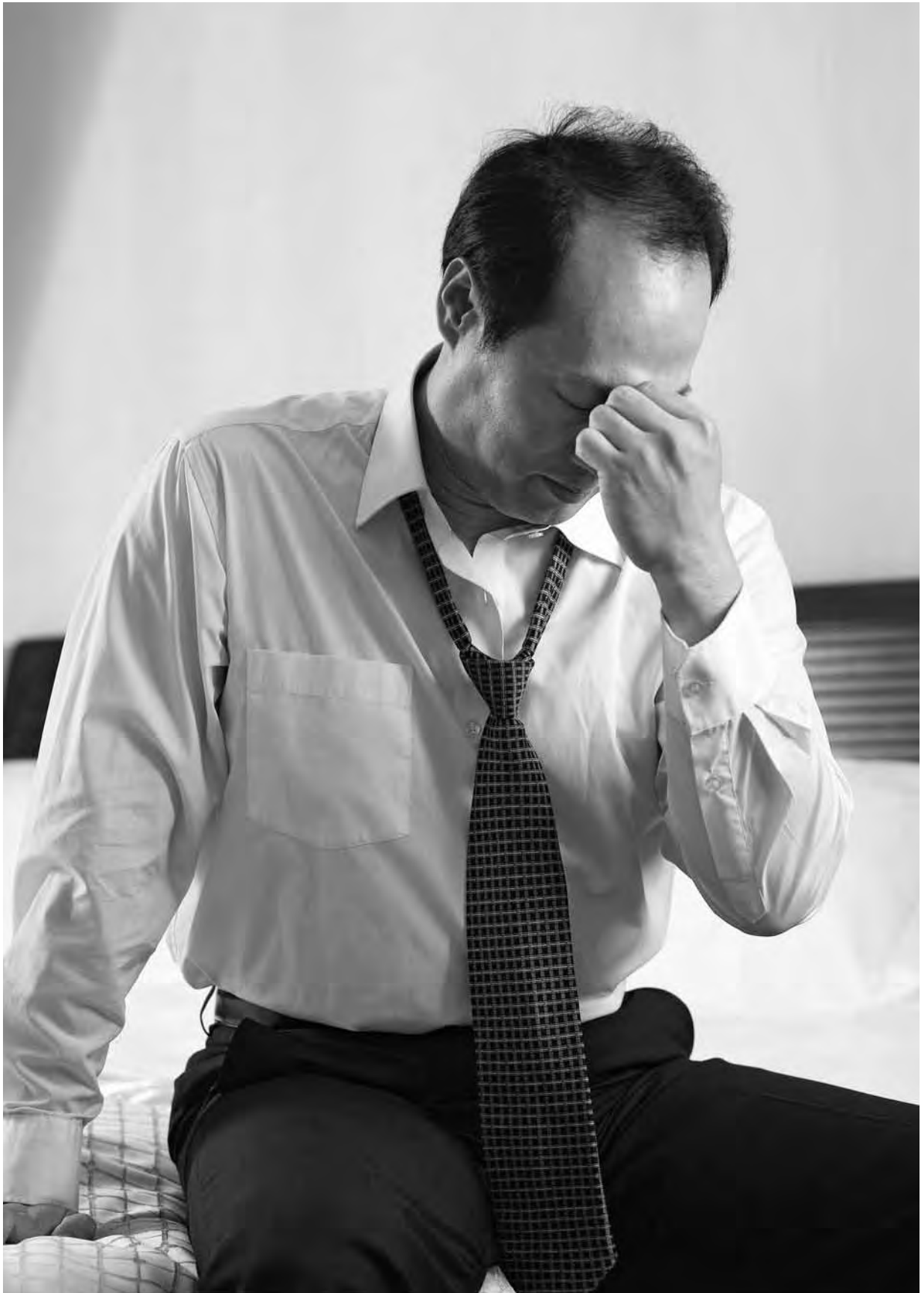
OAMIC does not write coverage for law firms domiciled outside of Oklahoma and has no plans to do so. Instead, its focus is on taking care of existing customers by expanding the available coverages. In recent years, data breach or cyber coverage and employment practices liability have been offered, as well as workers' compensation, office packages including general liability and property coverage, and surety bonds through another carrier or trusted partner.

If you don't carry professional liability coverage, you are making a serious mistake. It is self-deceit to think you are too careful to ever be sued. The belief that you will never have a claim is about as unrealistic as thinking you won't ever have a bar complaint. There is a disgruntled client around every corner. It happens, and so do meritless professional negligence claims. Also, if you have coverage with another company, you might consider OAMIC. It's part of our Oklahoma lawyer heritage and a great group of folks will try to help you!

ABOUT THE AUTHOR



Steven V. Buckman has been practicing law for 32 years with emphasis in insurance litigation. Mr. Buckman has litigated all sorts of insurance matters, coverage disputes, bad faith claims and first-party insurance matters. He is licensed in Oklahoma, Texas and Arkansas and admitted to practice in all federal district courts sitting in Oklahoma, the 10th Circuit Court of Appeals and the United States Supreme Court. When not practicing law, he prefers to be outdoors with activities not connected to emails, computers and "flying paper." He wishes to thank Phil Frain and Angela Ables for their kind assistance.



Essential Ethics Topics Every Lawyer Needs to Know

By Joe Balkenbush

As 2016 comes to a close and we look forward to the beginning of a new year, we can reflect on what we have learned over the last year and ponder what we need to know to better deal with what next year brings. This article covers three topics that are especially relevant.

PERSONAL WELL-BEING

One of the most important topics of 2016 was the study done by the American Bar Association in conjunction with the Hazelden Betty Ford Foundation.¹ The study found that almost one-third of lawyers presently suffer from addiction or mental health issues. A similar study was done 20 years ago. Unfortunately, the percentage of lawyers experiencing issues has not changed.

Think about that. One-third of us are not doing well. That doesn't necessarily mean we are incapacitated, but it does mean we are not performing as well as we could or should be. I would offer to you that the incidence of addiction or mental health issues is in reality higher, because the stigma attached to admitting you have issues is significant enough that many lawyers would not admit it, even with the assurance that the information provided was confidential.

The excerpt below from an article by Ruth Carter titled "Depression: A Lawyer Pandemic" references the ABA/Hazelden study and depression in the legal industry:

That's 336,000 lawyers! Additionally, 46 percent of lawyers reported concerns about depression sometime during their legal

career. Of the lawyers who experience depression, 60 percent of them also have anxiety...

Dan Lukasik, the founder of Lawyers with Depression, says depression is at "catastrophic" and "pandemic" levels in the legal industry.

I asked Lukasik "the chicken or the egg" question about lawyers and depression. He referred me to the work of Martin Seligman, who wrote the book *Authentic Happiness: Using the New Positive Psychology to Realize Your Potential for Lasting Fulfillment*. Seligman's book includes a chapter titled, "Why Are Lawyers So Unhappy." In it, he says that having a "pessimistic explanatory style" is a benefit in an adversarial profession because it helps you identify problems, but it can also cause significant mental and physical problems...

Lukasik told me being in a state of "chronic perpetual stress" — constantly experiencing the fight-or-flight state — is the "definition of a legal career." The human body wasn't meant to continuously face "five-alarm fires." This can lead to or exacerbate existing problems with depression.²

So, how are you doing? Are you taking care of yourself? Are you taking time to ensure that you are physically, mentally, emotionally and spiritually healthy? Awareness is the first step. Pay attention to how you're feeling, what you are thinking and how you react to stressful situations. Take a moment and assess your personal well-being. Are you anxious, depressed, irritable, lethargic, don't have your usual spark? Be honest with yourself. If you need help, it is available. Your personal well-being should be one of your priorities.

You don't have to be a rocket scientist to know that untreated depression can cause grave problems. Depression is a diagnosable and treatable illness. As lawyers, we are problem solvers! So take the necessary steps to take care of this illness. Here are some ideas:

- Educate yourself about depression. There are wonderfully informative books, websites and other resources focused on the topic. Do some research!
- See your primary care physician for a full physical, and be sure to give your physician *all* of the facts! As lawyers, we urge our clients to tell us everything so that we can properly assess their case. It's the same with the physician. They cannot be as effective in diagnosing your condition without *all* of the facts. Physicians are trained to screen patients for depression, and you might have medical issues that are causing or contributing to your depressed mood. (When's the last time you had a full physical exam anyway?)
- Talk with a friend.
- If you are not comfortable talking with a friend, call OBA Lawyers Helping Lawyers Assistance Program (LHL) at 800-364-7886 or visit www.okbar.org/LHL. Remember, all contact with LHL is confidential per Oklahoma law.

If you are diagnosed with depression, there are numerous treatment options (therapy, medication, support groups, self-care, mind-

fulness, etc.). There is no one single way to deal with it, there's just what's best for you!

The ABA recently stated that health and wellness are every lawyer's ethical and professional responsibility. So, what does that mean? It means that we *must* make time to ensure that we are physically, mentally, emotionally and spiritually healthy. These characteristics are basic to our well-being and health. If you are stressed or overwhelmed, if you are depressed, anxious, suffering from addiction, if your personal relationships are suffering or you are in need of help in any other way, seek help like that provided by LHL. The bottom line is that you have got to take care of yourself. No one else is going to do it for you. Take total responsibility for your own well-being. You are worth it!

SUCCESSION PLANNING

Tragically, we have lost a number of OBA members this year. Equally tragic is that the majority of them had not prepared a succession plan. I have been contacted by grieving widows, children, parents and siblings, as well as fellow attorneys, banks and clients of a deceased attorney who are attempting to deal with pending litigation, client files, a trust account, accounts receivable, accounts payable and all of the other issues related to the incapacity or passing of an attorney.

The OBA has created a handbook titled *The Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity*³ to help you fulfill your ethical obligations to protect your clients' interests in the event of your inability to continue practicing law due to an accident, unexpected illness, disability, impairment, incapacity or death. It has the added benefit of protecting the people most important to you — your family, friends and colleagues!

This matter is critically important. You must make time to prepare your succession plan. It is *mandated* by the Oklahoma Rules of Professional Conduct.⁴

Unfortunately, the failure to prepare a succession plan for our law practice can have devastating consequences for both our clients *and* our loved ones. The issue of succession plan-

“The ABA recently stated that health and wellness are every lawyer's ethical and professional responsibility. So, what does that mean?”

ning requires your immediate attention. There is a desperate need for you to prepare and put into place a succession plan. You *must* do so to protect your clients and to save your family and colleagues from weeks or months of unnecessary stress and difficult, frustrating and expensive work.

The majority of the work has been done and the handbook developed by the OBA also includes forms. Preparation of a succession plan is far more simple and easy than you might have thought.

KNOWING AND UNDERSTANDING THE OKLAHOMA RULES OF PROFESSIONAL CONDUCT

Not long after I took the position of ethics counsel at the OBA, I realized just how unfamiliar I was with the ORPC and Rules Governing Disciplinary Proceedings (RGDP).⁵ It has been and continues to be my experience that many of my fellow members of the OBA are equally unfamiliar with these rules.

We have all heard the saying, “You don’t know what you don’t know.” Unless you are intimately familiar with the ORPC and RGDP, you don’t know what you don’t know. How can you comply with the rules when you don’t know what they are or what they require? The obvious answer is to read them!

The OBA and its leadership — the justices of the Supreme Court, the executive director and the Board of Governors — created the position of ethics counsel so Oklahoma attorneys can be proactive regarding ethical issues that arise and get an answer to their question in real time. Please take advantage of the resource available and call with any questions.

In case you didn’t know, per Oklahoma law, all contact with ethics counsel is privileged and confidential.⁶ A record of each call is maintained along with the name of the inquiring attorney, the attorney’s bar number and telephone number, a brief synopsis of the facts stated and advice or guidance given. Any advice or guidance given by the ethics counsel is advisory in nature and is not binding upon the Office of the General Counsel, the Professional Responsibility Tribunal (PRT) or the

Supreme Court. Calls to ethics counsel can be a mitigating factor when the general counsel, PRT or Supreme Court is determining what consequences should be imposed for ethical violations.

Your knowledge of the ORPC and RGDP are essential to the practice of law. These rules are just as important as your knowledge of the substantive law of the areas in which you practice. Your lack of knowledge of rules could result in your license being suspended or worse. Few, if any, lawyers set out to violate the rules. But again, you don’t know what you don’t know. Read the rules! There are 57 of them. If you read one each week, you’ll be done in about a year. There’s no reason why you couldn’t read more than one a week, but as we all know, the longest journey begins with the first step! So take that first step and become familiar with and knowledgeable of the ORPC and RGDP.

1. Patrick R. Krill, Ryan Johnson and Linda Albert, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” *Journal of Addiction Medicine*, February 2016, journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.

2. Ruth Carter, “Depression: A Lawyer Pandemic,” *Attorney At Work*, Mar. 17, 2016, www.attorneyatwork.com/lawyer-depression-pandemic-nothing-but-the-ruth.

3. “Planning Ahead Guide: Attorney Transition Planning in the Event of Death or Incapacity” is available through members’ MyOK Bar accounts. To access it, login through the OBA homepage at www.okbar.org and click the Attorney Transition Planning Guide link in the right column of the links box near the bottom of the page.

4. Oklahoma Rules of Professional Conduct, Rule 1.3, Comment 5; and Rules Governing Disciplinary Proceedings, Rules 12.1-12.3.

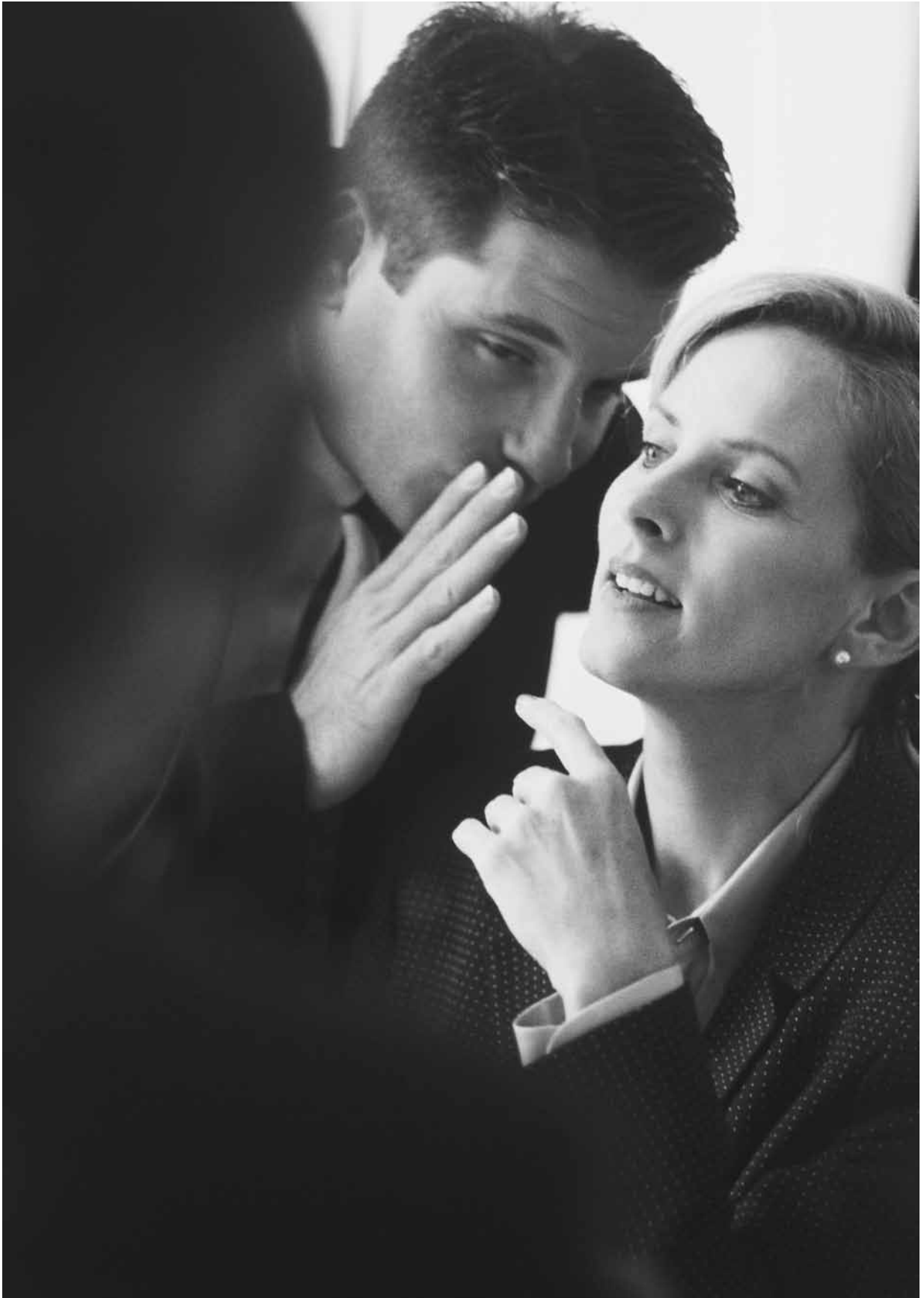
5. Oklahoma Rules of Professional Conduct and Rules Governing Disciplinary Proceedings are codified in Title 5 of the Oklahoma Statutes, titled “Attorneys and the State Bar,” www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448827.

6. Title 5 O.S. Appendix 3A, Rule 8.3(d).

ABOUT THE AUTHOR



Joe Balkenbush is OBA ethics counsel. He graduated with his J.D. from the OCU School of Law in 1986. Have an ethics question? Get tips, FAQ answers, ethics opinions and more online at www.okbar.org/members/Ethics Counsel or contact Mr. Balkenbush at joeb@okbar.org or 405-416-7055; 800-522-8065. It’s a member benefit and all inquiries are confidential.



Real-Life Confidentiality and Waivers Are Not as Clear as the Code Requires

By Carol J. Russo

As lawyers, one of our objectives is to represent our clients while complying with the compulsory Oklahoma Rules of Professional Conduct (ORPC)¹ and with the Oklahoma Standards of Professionalism (standards).² Familiarity with the ORPC and standards are essential; so is recognizing a “red flag,” and what to do when it suddenly emerges.

During 2016 OBA Professionalism Committee meetings, OBA Ethics Counsel Joe Balkenbush discussed frequent questions his office receives from lawyers regarding confidentiality, waivers and representation of multiple clients in the same, or related, proceedings. The opportunity for this type of representation often arises in probate, domestic and business transactions and litigation. Representation of multiple co-defendants in criminal proceedings requires separate constitutional considerations which is not addressed in this article.

The goal of this article, based on actual domestic cases, is to exemplify one way multiple representation is permitted through ORPC obligations and guidance and is supported by the standards.

REAL-LIFE SITUATIONS

A probate client, Alexandria, contacted my office to request representation of her sister, Prudence, in a domestic proceeding. Prudence’s husband of 23 years, Byron, had just

professed his love for Prudence’s best friend and neighbor, Jezebel, at the same moment Jezebel informed her husband, Victor, of her love for his best friend and neighbor, Byron. All of the parties are well-educated professionals. Byron and Jezebel vacated their adjacent marital residences, leaving behind Prudence, Victor and minor children.³

During my initial telephone conference with Prudence, she suddenly converted to speaker phone to include Alexandria. This was the first red flag. I immediately informed Prudence of confidentiality rights and waivers. As required by ORPC Rule 1.6(a),⁴ Prudence affirmatively stated her understanding of her rights, her right to waive them and her exercise of that right by her desire to continue in the presence of Alexandria. Thereafter, mid-discussion, an unexpected male voice asked a question and Prudence says, “Victor has been listening on speaker to our conversation and has a question.” This was a second red flag. I learned that Alexandria called Victor to invite him to Pru-

“...and Prudence says, ‘Victor has been listening on speaker to our conversation and has a question.’”

dence’s house to participate in the telephone conference for his benefit due to their issues in common.

Prudence and Victor stated their desire for my professional services. I explained the relevant ORPC rules, with emphasis on Rules 1.6, 1.7 and 1.8, especially the aspects of confidentiality, waiver of confidentiality and conflicts in representation. Prudence and Victor, referring to themselves as the “injured parties,” affirmatively stated their understanding and their desire to continue and to meet with me.

As lawyers in private practice, we have the obligation to comply with the ORPC, the expectation to follow the standards and the luxury to decide whom we accept as our clients.

During independent, confidential telephone conferences with Prudence and Victor, each gave compelling reasons why it would benefit them emotionally and financially, regarding the time to tell the common parts of their story, if I agreed to represent them both in their respective divorces from Byron and Jezebel.⁵

Alexandria spoke highly of Prudence and Victor. I have known Alexandria for many years and know her to be honorable and a good judge of character. I decided to represent both of them. Concomitant with that decision was my thinking of the ORPC admonition of the duty — memorized as “When in doubt, disclose, disclose, disclose” — and the standards’ expectation to conserve time and costs.

In addition to a customary employment agreement, I produced a special memorandum each for Victor and for Prudence to read, approve and execute, as required by ORPC Rule 1.17 (1)(b)(1)-(4), a copy of which is on the next page. My acceptance of employment was contingent on approval of the memorandums, “confirmed by informed consent, in writing.”

ORPC Rule 1.17, which reads as follows and concerns conflict of interest involving current clients, was attached to the memorandum:

Rule 1.7. Conflict of Interest: Current Clients

1. (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.⁶

Knowing Prudence and Victor are college graduates and communicative at a level evidencing intellectualism and understanding of contractual requirements, I determined in this situation it was not necessary to include in the memorandum a discussion of the four points in Rule 1.17. My representation as the sole attorney for Prudence and for Victor commenced and was successful within the scope of the ORPC and standards as their cases were prosecuted.

It is suggested that, if there is any uncertainty about the education, comprehension and experiences of the prospective clients, the best practice would be for a memorandum to discuss each point in Rule 1.17, including how the multiple representation could adversely or beneficially impact the evidence, negotiations and litigation in each case.⁷ In domestic proceedings, it may be a good idea to discuss how the lawyer would be required to withdraw from one or both cases if the representation by the lawyer becomes materially limited due to responsibilities to the other client. In the above scenario, the infidelities by Byron and Jezebel

**MEMORANDUM OF UNDERSTANDING
IN RE: WAIVER OF CONFIDENTIALITY AND CONFLICT OF INTEREST**

Dear Victor:

Due to your and Prudence's, as your friend and neighbor, unusual situation and our anticipated attorney-client relationship, the Oklahoma Bar Association ("OBA") requires me to prepare this document to accomplish your requests, both of us to confirm recent events, and me to inform you, as follows:

A. Waiver of Confidentiality: On January 21, 2016, at the commencement of our telephone conference, I informed you about attorney-client confidentiality ("confidentiality") and that, with limited exceptions as discussed (e.g. a Court/Bar Subpoena or Order), assertion or waiver of confidentiality is controlled by you, meaning you may choose to waive confidentiality; whereas, I am obligated to maintain it unless you waive it. After being so informed and your consent:

1. On January 21, you waived confidentiality by including Alexandria and Prudence in our telephone conference.
2. You expressed to me a continued desire to voluntarily waive confidentiality regarding the two (2) above-identified people, which is your right. Your confidentiality rights may be re-asserted by you, at any time, and as to any person, by you informing me of your desire to revoke your waiver.

B. Waiver of Potential Conflict of Interest regarding representation of two (2) clients with issues involving each and both of them: On January 21, you and Prudence made excellent points regarding your request for my legal representation while I am also representing Prudence. As I replied, I will be glad to work with each of you as your attorney, provided the OBA Rules of Professional Conduct are agreed to, as follows:

1. Your situation involves multiple Rules, three (3) of which require attention and/or informed consent in writing: Rules 1.6, 1.7 and 1.8. as below explained. Let me know if you want a copy of each of them.
2. At your request, Prudence referred you to me for representation. You, affirmatively, concur in and agree to my concurrent representation of Prudence in a domestic proceeding involving Byron and your wife, Jezebel, and, for that reason, you.
3. We discussed your right of counsel to solely represent you involving issues that also involve Prudence and Byron, to which you replied that there are not any conflict or adversarial interests between you and Prudence, and you waive that right.
4. Rule 1.7 specifically applies to your situation; therefore, it is attached, and incorporated by reference in this Memorandum. Please review it before signing your consent and agreement.
5. I do not anticipate any conflicts between my representation of you and my representation of Prudence. I am required to inform you that, in the unlikely event a conflict arises, I will immediately offer to withdraw from further representation of one, or both, of you.

If you have any questions, please let me know. We will discuss them before you confirm consent to the terms in this Memorandum.

Sincerely yours,
Carol J. Russo

CJR:ddw

Attachment: ORPC, Rule 1.7

Agreement and Consent of Client:

I have read the above Memorandum and agree and consent to all of the terms contained therein.

Victor: _____ Date: _____

could involve each of the “injured parties” in the marital estate and/or child custody and visitation in both causes of action. In probate and business litigation, a similar discussion would be appropriate regarding confidentiality and waivers concerning property rights, valuations, sales and distributions.

CONCLUSION

Annually, December is the month the OBA publishes the ethics and professional responsibility issue of the *Oklahoma Bar Journal*. Special memory and tribute to Fred Slicker are appropriate for his contributions to professionalism in Oklahoma. Ten years ago, after months of Professionalism Committee work, Mr. Slicker produced the definition of professionalism that was adopted by the OBA Board of Governors. The definition reads, “Professionalism for lawyers and judges requires honesty, integrity, competence, civility and public service.”⁸

It is additionally appropriate to recognize the OBA general counsel, OBA ethics counsel, past and present judges and lawyers who collectively advised: Do what is required by the ORPC; and, with respect to the concepts now embodied in the standards, do more than what

is required to demonstrate respect and appreciation to clients, community and our profession.

1. 5 O.S., Chapter 1, Appendix 3 A: Oklahoma Rules of Professional Conduct, www.oscn.net/applications/oscn/Index.asp?ftdb=STOKST05&level=1.

2. Oklahoma Bar Association Standards of Professionalism, www.okbar.org/members/EthicsCounsel/StandardsProfessionalism.aspx.

3. Names and details altered for anonymity.

4. Oklahoma Rules of Professional Conduct, Chapter 1, App. 3-A, Client-Lawyer Relationship, Rule 1.6. Confidentiality of Information: Current Clients, www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=479339

5. Oklahoma Bar Association Standards of Professionalism, Standard 2.3, www.okbar.org/members/EthicsCounsel/StandardsProfessionalism.aspx.

6. Oklahoma Rules of Professional Conduct, Chapter 1, App. 3-A, Client-Lawyer Relationship, Rule 1.7. Conflict of Interest: Current Clients, www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448851.

7. Oklahoma Rules of Professional Conduct, Chapter 1, App. 3-A, Client-Lawyer Relationship, Rule 1.7. Conflict of Interest: Current Clients, (1)(a)(2) and (1)(b)(1)-(4), www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448851.

8. Oklahoma Bar Association Standards of Professionalism, www.okbar.org/members/EthicsCounsel/StandardsProfessionalism.aspx.

ABOUT THE AUTHOR

Carol J. Russo is an attorney in private practice in Tulsa. She is a past recipient of the OBA Courageous Lawyer Award (now renamed to the Fern Holland Courageous Lawyer Award) and serves on the OBA Professionalism and Bench and Bar Committees.

CONQUER YOUR MOUNTAIN

BURNOUT • DEPRESSION

ANXIETY • SUBSTANCE ABUSE

RELATIONSHIP CHALLENGES



LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM

NO COST • 24-HOUR CONFIDENTIAL ASSISTANCE

800.364.7886

WWW.OKBAR.ORG/MEMBERS/LAWYERSHELPINGLAWYERS

New Technology Brings Meetings to You

By Laura Stone

Committee and section membership sign-up season is in full swing, and there's never been a better time to get involved. Just last month you heard from Executive Director John Morris Williams and President-Elect Linda S. Thomas about the importance of member involvement.

One of the biggest hurdles for members hasn't been desire to get involved, but actually getting to the meetings. Taking time out of the day not just for the meeting itself but commuting to and from a meeting location can eat up precious office hours. For those in outlying nonmetro communities, the hurdle of commuting actually becomes a barrier. A hours-long round trip is unrealistic and isolates many members who would otherwise participate.

To help alleviate these issues, the OBA has contracted a new service called BlueJeans, a distance meeting service. With BlueJeans, members can join a meeting from anywhere, moderate a meeting from anywhere and even share documents to everyone across all platforms, just like a face-to-face meeting.

Because some members still prefer meeting face-to-face,

“Not only does it allow you to hear and be heard, but allows you to see others as if you were in a face-to-face meeting.”

meetings can also be hybrid. Members able to attend physically can do so, while as many or as few members who wish to join remotely can do so as well.

HOW IT WORKS

BlueJeans is an internet-based service that goes above and beyond traditional phone conferencing by incorporating video. Not only does it allow you to hear and be heard, but allows you to see others as if you were in a face-to-face meeting. This facilitates discussions and eliminates the awkward phone conference anonymity that can make conversations confusing and difficult. No more “Who said that?” or speaking over each other. Video feeds of users are displayed in a *Brady Bunch*-style arrangement.

In the event of more people participating remotely than will fit on one screen, the BlueJeans platform will display the video feed from those speaking and switch the display as necessary.

To attend a meeting remotely, participants simply log into the meeting with the ID code provided in their meeting notice email. Participants can join even before the moderator has joined, meaning your meetings can begin even if a few members are running late. For the moderator, there are very few tasks and simple instructions. Every participant who is engaged visually will be able to see others and receive any documents shared during the meeting. If a meeting is taking place at the bar center, every meeting room is equipped and ready to facilitate a hybrid BlueJeans meeting.

WHAT YOU NEED TO JOIN IN

BlueJeans works with smartphones, tablets, laptops and desktop computers. Although it can work with voice-only phones, it is best used with a device with a camera and microphone to avoid those phone conference problems mentioned earlier.

Smartphones and Tablets

For smartphones and tablets, just download the free BlueJeans app. This is by far the easiest way to use the service. The section or committee meeting notice will have the ID code you'll need to join the meeting. The app will utilize your mobile device's camera and microphone so you can be part of the conversation. (Be sure to give the app permission to use these features the first time you open it.) There is no extra equipment needed and joining is quick and simple.

Testing your connection in advance is recommended. To do so in the mobile app, tap the question mark at the lower right of the screen and select "Join Test Call."

Laptops and Desktops

To join the meeting with a computer, go to www.bluejeans.com/downloads and install the free computer app. Once installed, you'll need to go to the link provided in the meeting notice and use the meeting ID code also included to join. Most laptops, even older models, are equipped with a webcam camera and microphone. Like other video chat programs, BlueJeans can use this built-in hardware.

If you plan to use a desktop computer or your laptop doesn't have a working camera, external microphone and camera options are available. A quick search on Amazon for "webcam with microphone"

• What if I don't want to be seen?

Some participants are camera shy but there's no need to be. Remember, if you were physically present, wouldn't they see you anyway? If you need to temporarily turn off your camera, BlueJeans provides a button to temporarily disable the camera until you decide to resume. The same for audio, you can mute your audio while you aren't speaking to the group. (If there is substantial background noise where you are, muting yourself while not speaking can help avoid accidental disruptions.)

• What does a moderator do?

A moderator's job is simple. They have very few controls, most notably the ability to mute or disconnect a participant if necessary. Moderators don't have to be a section or committee chairperson. They can be anyone designated by the chair or group. A moderator can also moderate remotely, so if a meeting is taking place at the bar center, a moderator does not have to be physically present.

• How does my group get started using this?

To set up a meeting, contact Debra Jenkins at debraj@okbar.org or 405-416-7042. She will set up your meeting and send the meeting ID code with instructions when she sends your meeting notice. If you meet during regular business hours, OBA staff can assist with any questions you have. If you meet after hours or on weekends, BlueJeans tech support is available.

will pull up dozens of options ranging in price from \$8 to \$90, depending on quality and additional features. Be sure to check the reviews and product Q&A to ensure it will connect with your computer.

Like with the mobile app, you should test your connection in advance. To do so on your computer, use the meeting code 111.

Voice-Only Options

Although it is not recommended, BlueJeans also supports traditional phone conferencing. To join through a land line or desk phone, simply call the number provided with your meeting notice and provide the meeting ID code.

Ms. Stone is an OBA communications specialist.

Legislative Monitoring Committee Reorganizes Reading Day

By Angela Ailles Bahm

Bill Gates said, “I think it’s fair to say personal computers have become the most empowering tools we’ve ever created. They’re tools of communication, they’re tools of creativity, and they can be shaped by their user.” In today’s environment, it is imperative that lawyers know how to use their computer and what it can do for them and their clients. Please join the Legislative Monitoring Committee on Saturday, Jan. 28, 2017, at 10 a.m. at the bar center in Oklahoma City to discover the next thing you can learn from your computer.

For those of you who have participated in the Legislative Reading Day before, this year we are changing it up a bit. It will still be two hours of free CLE. It will still include free pizza, and you will still get to hang out on a Saturday morning with some of your favorite political junkies. But instead of gathering in smaller groups to read bills, we will have six speakers who will present 10 bills in 10 minutes. We hope it will be fast-paced and fun.

The OBA’s legislative liaison Clay Taylor will teach about the legislative process and give us some key dates to keep a look out for as bills progress. I will show attendees how to use the legislative website to search for bills and create your own lists. Lastly, we are expecting some of our brother and sister lawyer-legislators to come by, share in some lunch and give us an overview of what they are expecting for the 56th legislative session.

As many of you may know, in November the Oklahoma Legislature welcomed 13 new members to the Senate and 32 new members were

**Legislative
Reading Day**
Saturday, Jan. 28
10 a.m.
Oklahoma Bar Center

sworn in to the 101-member House of Representatives. Both chambers elected new leadership. For the Senate, Sen. Mike Schulz of Altus became president pro tem; and for the House, the new speaker is Rep. Charles A. McCall from Atoka. I encourage everyone to contact your senator and representative *now* — before they get too busy. If they are not a lawyer, or a lawyer not in your practice area, offer your assistance and expertise. They will appreciate it, and it will help your community and the state to ensure thoughtful, effective and fair legislation.

I look forward to seeing you at the Legislative Reading Day. You will learn a lot. You will learn what your computer can do to help keep you on top of legislation and what you can do to help shape our state’s future. RSVP to Debbie Brink at debbieb@okbar.org.

There is still time to become a committee member. Sign up today at www.okbar.org. Scroll down to the bottom of the page, look for “Members” then click on “Join a Committee.” For those who prefer paper, there’s a form in this bar journal issue. You don’t need to be a committee member to participate in reading day, and we welcome your involvement.

ABOUT THE AUTHOR

Ms. Bahm practices in Oklahoma City and will serve as the Legislative Monitoring Committee chairperson. She can be contacted at angela.ailles-bahm.ga2e@statefarm.com.

Self Fulfillment Through Volunteer Service

The Master Lawyers Section of the OBA is open to OBA members who are 60 years or older, or who have practiced 30 years or more, for an annual fee of \$20. One of the Section's goals is to offer ideas and opportunities for Master Lawyers to enhance their lives and careers by using their legal skills and knowledge in new and different ways.

The Section's Community Contribution Committee helps achieve this goal by finding opportunities for Master Lawyers to use their skills in performing pro bono and community project work. Paul Naylor is a Section member who has long been active with Tulsa Lawyers for Children and provides information about TLC for Master Lawyers volunteers. Paul recently answered a series of questions that other attorneys and the general public often ask about TLC and why he believes volunteering with TLC is a good fit for Master Lawyers.

Q Why would Master Lawyers want to volunteer for TLC?

A Many attorneys who have reached the age of 60 or who have practiced for 30 years are still working — but want to slow down or try something new. Many have dedicated their lives to law firms or other legal organizations and have retired, but soon discover they still want to help others as attorneys — not just on a 60-hour per week basis! TLC is the perfect solution for these attorneys, and for the deprived children who really need them.

Q How long have you been a volunteer attorney with TLC and what led you down this path?

A I have been volunteering with TLC for about 11 years. I always enjoyed coaching and mentoring children, and TLC gave me the opportunity to

extend my professional experience to be the voice for children whose lives have been endangered in the family setting.

Q How long will you continue to represent children with TLC?

A As long as I am able to function both physically and mentally, I will continue to volunteer my time, working with and representing deprived children.

Q Does a lawyer have to have trial experience before becoming a TLC volunteer?

A No. TLC will train all lawyers interested in volunteering. The training includes instruction on the Oklahoma Children's Code and its applicability to trial procedure and tactics. TLC staff and experienced attorneys work closely with all new TLC lawyers until they feel comfortable and at ease.

Q What type of entity is Tulsa Lawyers for Children?

A Tulsa Lawyers for Children is a nonprofit charitable corporation.

Q What do you tell other lawyers to encourage them to perform voluntary services for deprived children?

A I tell them that helping deprived children will change their lives. The first time an attorney picks up a crying, abused child, and the child puts his arms around the attorney's neck and stops crying, that attorney will be hooked for life. I explain that he or she is the voice for the deprived child, and without his or her help, this child could be seriously injured — mentally or physically — or could die. I cannot think of any reason why a good lawyer would not want to represent a deprived, innocent abused child who needs that attorney's voice just to be safe, and even to continue living.

This is one of many Oklahoma nonprofit organizations that benefit from the help of lawyers. The Master Lawyers Section will assist in finding you a volunteer opportunity in your county.

HOW TO JOIN THE SECTION:

Check the add section box on your dues statement and include the \$20 section dues with payment of your 2017 OBA dues. Or use the section registration form found at www.okbar.org/members/sections.

YOU MAY EARN UNLIMITED HOURS FOR WEBCAST ENCORES

Mon., Dec. 19, 2016 @ 9 a.m.
Law and Technology:
Hot Topics to Help You Stay Ahead
in the Digital Age
(7 / 1.5 MCLE)

Mon., Dec. 19, 2016 @ 9 a.m.
33rd Annual Basic Bankruptcy
Course: Leaping into Chapter 7
(6 / 1 MCLE)

Tues., Dec. 20, 2016 @ 12 (noon)
2016 Labor and Employment Law
Update
(6 / 0 MCLE)

Wed., Dec. 21, 2016 @ 9 a.m.
What You Can Do Before and
During Trial to Improve Your
Chances on Appeal
(3 / 0 MCLE)

Tues., Dec. 27, 2016 @ 10 a.m.
Elder Investment Fraud and
Financial Exploitation: Ethical
Traps for Lawyers and Navigating
the Challenges of Diminished
Financial Capacity
(3 / 1 MCLE)

Tues., Dec. 27, 2016 @ 1:30 p.m.
Preserving and Prosecuting
Your Oklahoma Appeals Civil
and Criminal
(2.5 / 0.5 MCLE)

Wed., Dec. 28, 2016 @ 9 a.m.
Essential Principles in Family Law
(6 / 0 MCLE)

Wed., Dec. 28, 2016 @ 9 a.m.
Adv. Estate Planning Techniques
for High Net-Worth Clients
(6 / 1 MCLE)

Fri., Dec. 30, 2016 @ 9 a.m.
The Rapidly Evolving Field of
Transgender Law
(6 / 1 MCLE)

WEBCAST ENCORES



oba ♦ cle
oklahoma bar association

To view a complete list of Webcast Encores
or to register go to:
www.okbar.org/members/CLE/WebcastEncore

Oklahoma Bar Journal Index for 2016, Volume 87

Abel, Luke

OBA Watch List Decreases, Some Measures Make it Out of Committee	87	08	521	3/12/2016
Legislative Session to End May 27	87	14	1049	5/21/2016

Anderson, Cheryl; Fitzgerald, Craig and Lovy, Don

A Few Thoughts on Technology in the Courtroom	87	30	2339	11/19/2016
---	----	----	------	------------

Arant, Peter J.

Understanding Data-Breach Liability: The Basics Every Attorney Should Know	87	11	810	4/16/2016
---	----	----	-----	-----------

Astle, Doris J. "Dorie"

The Death Penalty: Baze, Glossip and Beyond	87	08	481	3/12/2016
---	----	----	-----	-----------

Balkenbush, Joe

Be the Best Lawyer You Can Be	87	05	298	2/13/2016
Succession Planning and Your Personal Health	87	11	827	4/21/2016
Ethics and the Benefits of the Lawyers Helping Lawyers Program	87	21	1551	8/20/2016
Is Threatening Criminal Prosecution Ethical?	87	27	2024	10/15/2016
Essential Ethics Topics Every Lawyer Needs to Know	87	33	2547	12/17/2016
Communication With a Person Represented by Counsel: Do You Have to Ask?	87	33	2583	12/17/2016

Bartmess, Duchess

Legislative Monitoring Committee Gears Up for Second Session	87	05	290	2/13/2016
Legislative Activity Increases	87	11	819	4/16/2016

Blaschke, Michael J.

We Don't Want To Be Texas	87	11	848	4/16/2016
---------------------------	----	----	-----	-----------

Browning, John G.

More Than Sticks & Stones on the Internet: The Ethical Do's and Don'ts in Responding to Negative Online Reviews	87	33	2515	12/17/2016
---	----	----	------	------------

Brockett, B.J.

Six Pieces of Silver	87	27	2048	10/15/2016
----------------------	----	----	------	------------

<i>Buckman, Steven V.</i> Professional Liability Coverage: Don't Take It for Granted	87	33	2543	12/17/2016
<i>Bundy, Aaron D. and Henry, M. Shane</i> Slaying the Speaking Objection Dragon	87	30	2321	11/19/2016
Leading the Way	87	30	2325	11/19/2016
<i>Calloway, Jim</i> Thoughts on Social Media: Risks, Rewards and Uncertainties	87	02	91	1/16/2016
The Grind	87	05	296	2/13/2016
Reimagine Your Law Practice at the OBA Solo & Small Firm Conference 2016	87	08	525	3/12/2016
You Are Not Paranoid If They Really Are Watching You	87	11	823	4/16/2016
Proposed Agenda for Your Law Office Retreat	87	14	1063	5/21/2016
Some Post-Summer Law Practice Tips	87	21	1549	8/20/2016
Email Attachments vs. Client Portals	87	24	1707	9/10/2016
The Benefits and Risks Associated with Relevant Technology	87	27	2020	10/15/2016
The Basics of a Lawyer's Smartphone	87	30	2363	11/19/2016
Client Confidentiality, Personal Privacy and Digital Security	87	33	2579	12/17/2016
<i>Campbell, Catherine and Wolfe, Thomas G.</i> Limiting Liability in the Oilfield	87	02	27	1/16/2016
<i>Cannon, John P.</i> Investigative Detention: The Warrantless Seizure of Citizens	87	08	473	3/12/2016
<i>Chojnacki, Marsha</i> Volunteers Make High School Mock Trial Program a Success	87	11	816	4/16/2016
<i>Christensen, J. Clay and Loomis, Cori H.</i> Municipalities in Bankruptcy	87	21	1525	8/20/2016
<i>Castle, Amii N.</i> Avoiding Sanctions Under Amended Federal Rule of Civil Procedure 37(e)	87	02	84	1/16/2016
<i>Darrah, Mark S.</i> The Navy Blazer	87	14	1088	5/21/2016
<i>Davis, Benjamin K. and Rosser IV, Malcom E.</i> Adverse Possession: No, It Has Not Come and Gone	87	27	1937	10/15/2016
<i>Dupler, Bryan Lester</i> Jury Sentencing in Oklahoma	87	08	497	3/12/2016
<i>Nos Peritos et Fatum</i>	87	08	568	3/12/2016

<i>Ellis, Hal and Ellis, LeAnn</i> Oklahoma Slayer Statute Updated	87	05	283	2/13/2016
<i>Ellis, LeAnn and Ellis, Hal</i> Oklahoma Slayer Statute Updated	87	05	283	2/13/2016
<i>Epperson, Kraettli</i> The Oklahoma Marketable Record Title Act	87	27	1927	10/15/2016
<i>Evans, Julie A.</i> Conservatorships: So Useful, But So Rare	87	05	261	2/13/2016
<i>Fassio, Marcy and McKenzie, David T.</i> The Alpha and the Omega: Effective Advocacy in Opening Statements and Closing Arguments	87	30	2309	11/19/2016
<i>Feamster, Blake M.</i> Ghostwriting: An Ethical Issue in the Evolution of the Legal Field	87	33	2537	12/17/2016
<i>Fisher, Jack</i> <i>Brady v. Maryland</i> – The Path to Truth and Fairness	87	08	505	3/12/2016
<i>Fitzgerald, Craig; Anderson, Cheryl and Lovy, Don</i> A Few Thoughts on Technology in the Courtroom	87	30	2339	11/19/2016
<i>Garrison, Tracey</i> Bankruptcy and Divorce	87	21	1519	8/20/2016
<i>Gifford, Robert Don</i> A Primer For Ye Ol' Woodshed: Witness Preparation	87	30	2315	11/19/2016
'Your Witness, Counsel' — Cross Examination	87	30	2329	11/19/2016
<i>Hall, Sarah M.</i> Why I Quit Practicing Law and Why I'll Never Give Up My License	87	30	2392	11/19/2016
<i>Hankins, James L.</i> Self-Defense: Oklahoma Lays Some New Ground Rules (Sort Of)	87	08	469	3/12/2016
<i>Hardin, Randi D. and Norman, William R.</i> State Attorney General Argues Against Tribal and State Interests	87	14	1015	5/21/2016
<i>Hendryx, Gina</i> A Guide to File Retention	87	02	95	1/16/2016
Attorney Discipline Activities Reflects in Reports	87	08	545	3/12/2016
Trust and Accountability, Overdraft Notification and Protection	87	14	1066	5/21/2016
Ethical Considerations in Pro Bono Public Service Representations	87	30	2366	11/19/2016
<i>Henry, M. Shane and Bundy, Aaron D.</i> Slaying the Speaking Objection Dragon	87	30	2321	11/19/2016
Leading the Way	87	30	2325	11/19/2016

<i>Hird, Tom</i>				
Law and Religion	87	05	320	2/13/2016
<i>Hobbs, Candin A.</i>				
My Experience Gives Advocacy Special Meaning	87	33	25	12/17/2016
<i>Hoch, Albert and Vreeland, Richard</i>				
Events Across the State Emphasize the Importance of Law Day	87	11	767	4/16/2016
<i>Isaacs, Garvin A.</i>				
Will We Let History Repeat Itself?	87	02	28	1/16/2016
Upcoming Events Deserve Your Attention	87	05	244	2/13/2016
The Jesse Owens Rule: Never Be Intimidated	87	08	460	3/12/2016
On Law Day Let Us Celebrate Trial by Jury	87	11	764	4/16/2016
Explorers Attacked by Polar Bears	87	14	1012	5/21/2016
With Liberty and Justice for All	87	21	1508	8/20/2016
Safeguarding Our Freedoms	87	24	1668	9/10/2016
Juror Appreciation Project to Emphasize Importance of Trial by Jury	87	27	1924	10/15/2016
Oklahoma Judicial Funding Shortage Deserves OBA Support	87	30	2300	11/19/2016
Muchas Gracias	87	33	2500	12/17/2016
<i>Jackson, Darla</i>				
New Member Benefit: Speed Up OBJ Search with HeinOnline	87	21	1539	8/20/2016
Social Media Evidence	87	30	2333	11/19/2016
<i>Jones, Candice</i>				
Grantee Spotlight: William W. Barnes Children's Advocacy Center	87	02	100	1/16/2016
Celebrating 7 Decades of Law, Education & Justice	87	05	303	2/13/2016
Grantee Spotlight: Marie Detty Youth & Family Services	87	11	832	4/16/2016
Foundation Celebrates 70 Years	87	14	1070	5/21/2016
Grantee Spotlight: Oklahoma Lawyers for Children A Walk in a Child's Shoes	87	21	1560	8/20/2016
The Oklahoma Bar Foundation Announces 2017 Grant Program Funding	87	24	1712	9/10/2016
Oklahoma Bar Foundation Welcomes New Executive Director	87	27	2029	10/15/2016
2016 Scholarship Recipients Announced	87	30	2373	11/19/2016
Foundation Renames Award to Honor Past President Jack L. Brown	87	33	2585	12/17/2016
<i>Jones, Cody B.</i>				
A Primer on Drafting and Applying the 'HEMS' Ascertainable Standard in Discretionary Trusts	87	05	255	2/13/2016

<i>Jones, Jennifer S.</i> A Title Examiner's Guide to Probate and Guardianship Sales	87	27	1947	10/15/2016
<i>Lamirand, Jennifer N.</i> Made in Indian Country	87	14	1023	5/21/2016
<i>Lee, Paige</i> Why I Am Walking Away From the Practice of Law	87	21	1576	8/20/2016
<i>Long, Curtis M.</i> Digging in the Pipeline Right of Way	87	02	81	1/16/2016
<i>Loomis, Cori H. and Christensen, J. Clay</i> Municipalities in Bankruptcy	87	21	1525	8/20/2016
<i>Love, Kimberly Lambert and McFadden, J. Miles</i> 'Sniffing' Out an ADA Claim: Chemical, Fragrance and Scent Sensitivities in the Workplace	87	24	1686	9/10/2016
<i>Lovy, Don; Anderson, Cheryl and Fitzgerald, Craig</i> A Few Thoughts on Technology in the Courtroom	87	30	2339	11/19/2016
<i>Mackey, Erica R.</i> Trial by Jury in Indian Country	87	30	2345	11/19/2016
<i>McCarty, Lisbeth L.</i> I Thought I'd Feel Older	87	02	120	1/16/2016
<i>Maisch, John A.</i> Alcohol Modernization on November Ballot	87	27	1964	10/15/2016
<i>Manning, Carol</i> Oklahoma Lawyers for America's Heroes: Program Tops \$2.8 Million in Free Legal Services	87	30	2355	11/19/2016
<i>Masters, Paige and Rother, Timila</i> Lawyers Being Social: Ethical Implications of Personal Social Media Sites	87	33	2503	12/17/2016
<i>McDaniel, Mackenzie</i> Meet 2016 OBA President Garvin A. Isaacs	87	02	31	1/16/2016
<i>McFadden, J. Miles and Love, Kimberly Lambert</i> 'Sniffing' Out an ADA Claim: Chemical, Fragrance and Scent Sensitivities in the Workplace	87	24	1686	9/10/2016
<i>McKenzie, David T. and Fassio, Marcy</i> The Alpha and the Omega: Effective Advocacy in Opening Statements and Closing Arguments	87	30	2309	11/19/2016
<i>McKenzie, David T. and Simpson, Megan L.</i> Hearsay and the Confrontation Clause: The Apostle Paul, the American Revolution and Today	87	08	513	3/12/2016

<i>Miers Jr., Sheppard F.</i> 2016 Oklahoma Tax Legislation	87	24	1690	9/10/2016
<i>Monks, Terrell and Warshell, Ashley</i> Due Process and Best Practices in Oklahoma Probate	87	05	271	2/13/2016
<i>Mwafulirwa, Mbilike M.</i> Legal Ethics and Federalism: A New Blueprint for Federal Trade Commission Enforcement Action	87	33	2531	12/17/2016
<i>Norman, William R. and Hardin, Randi D.</i> State Attorney General Argues Against Tribal and State Interests	87	14	1015	5/21/2016
<i>Pacewicz, Michael R.</i> Fees on Fees: <i>Baker Botts v. ASARCO</i>	87	21	1511	8/20/2016
<i>Pittman, Spencer C.</i> Business Courts: Specialized Courts for Complex Business Litigation	87	11	805	4/16/2016
<i>Priest, Jim T.</i> Why I Miss the Practice of Law	87	24	1728	9/10/2016
<i>Riggs, David</i> Volunteer Lawyers Needed for Oklahoma Free Legal Answers Project	87	21	1541	8/20/2016
<i>Roberson, Shawn and Smothermon, Connie</i> Changes to the Insanity Laws: Not Guilty by Reason of Mental Illness and Guilty With Mental Defect	87	30	2349	11/19/2016
<i>Ross, Casey</i> Probate of American Indian Trust Property: The Lawyer's Role?	87	05	287	2/13/2016
<i>Rosser IV, Malcom E. and Davis, Benjamin K.</i> Adverse Possession: No, It Has Not Come and Gone	87	27	1937	10/15/2016
<i>Rother, Timila and Masters, Paige</i> Lawyers Being Social: Ethical Implications of Personal Social Media Sites	87	33	2503	12/17/2016
<i>Rowe, Dustin</i> Practicing in the Chickasaw Nation Tribal District Court	87	14	1035	5/21/2016
<i>Russo, Carol</i> Real-Life Waivers and Confidentiality are Not as Clear as the Code Requires	87	33	2551	12/17/2016
<i>Schaller, Ryan W.</i> An Examiner's Dozen: 13 Tips to Avoid a Call From a Title Attorney	87	27	1943	10/15/2016
<i>Sikes, Reign</i> Just Desserts: The Sweet Rewards of Civic Service	87	24	1694	9/10/2016

<i>Simpson, Megan L. and David T.</i> Hearsay and the Confrontation Clause: The Apostle Paul, the American Revolution and Today	87	08	513	3/12/2016
<i>Smith, Taos C.</i> Case Comment: <i>Rodriguez V. United States</i> Clarifying Traffic Stops and <i>Cabelles</i>	87	08	463	3/12/2016
<i>Smothermon, Connie and Roberson, Shawn</i> Changes to the Insanity Laws: Not Guilty by Reason of Mental Illness and Guilty With Mental Defect	87	30	2349	11/19/2016
<i>Spector, Robert G. and Thompson, Carolyn S.</i> Attorney Fees in Family Law Cases	87	33	2521	12/17/2016
<i>Stanley, Brian</i> When the Deal's Too Good: Protecting Nonprofessional Mineral Owners in Oklahoma	87	11	798	4/16/2016
<i>Stone, Laura</i> Updates to Online Member Services	87	27	2006	10/15/2016
New Technology Brings Meetings to You	87	33	2555	12/17/2016
<i>Tate, Jeffrey E.</i> Consider Bankruptcy When Drafting Settlement Agreements	87	21	1529	8/20/2016
<i>Thom, Michael W.</i> Sometimes You Can't Take It With You	87	05	247	2/13/2016
<i>Thompson, Carolyn S. and Spector, Robert G.</i> Attorney Fees in Family Law Cases	87	33	2521	12/17/2016
<i>Unsicker, J. Nicci</i> A Well-Planned Death	87	05	277	2/13/2016
<i>Veith, Jimmy L.</i> A Practical Guide to Consumer Bankruptcy Law for the Nonbankruptcy Lawyer	87	21	1533	8/20/2016
<i>Vreeland, Richard and Hoch, Albert</i> Events Across the State Emphasize the Importance of Law Day	87	11	767	4/16/2016
<i>Wahpepah, Wilda A.</i> Tribal Leadership Disputes	87	14	1029	5/21/2016
<i>Warshell, Ashley and Monks, Terrell</i> Due Process and Best Practices in Oklahoma Probate	87	05	271	2/13/2016
<i>Webster, Teresa L.</i> Housing Discrimination: Inequality Served With a Smile	87	27	1959	10/15/2016
<i>West, Terry W.</i> Persuasive Opening Statements	87	30	2303	11/19/2016

Will, Bryon

Why Did I Get Involved With the YLD?				
Why Should You?	87	02	103	1/16/2016
What's Going on with the YLD?	87	05	305	2/13/2016
Three Reasons You Should Attend the YLD Midyear Meeting	87	08	552	3/12/2016
What is Law Day All About?	87	11	835	4/16/2016
Midyear Meeting Opportunities Not to Be Missed	87	14	1073	5/21/2016
Kick It Forward — Helping Our Struggling Colleagues With Their Bar Dues	87	21	1563	8/20/2016
Opportunities to Network With Fellow Attorneys	87	24	1715	9/10/2016
Election for 2017 YLD Leadership: Vote by Thursday, Oct. 27	87	27	2032	10/15/2016
OBA YLD Members and Committee Recognized at Annual Meeting	87	30	2376	11/19/2016
YLD Wraps Up Another Successful Year	87	33	2588	12/17/2016

Williams, John Morris

Everything You Touch	87	02	89	1/16/2016
2016 Legislative Session	87	05	294	2/13/2016
The Death of Atticus Finch?	87	08	543	3/12/2016
Three Barn Dances and Two Goat Ropings	87	11	822	4/16/2016
I Know Why	87	14	1062	5/21/2016
Old Dog... New Tricks	87	21	1548	8/20/2016
The Road Less Traveled	87	24	1706	9/10/2016
It's Annual Meeting Time	87	27	2019	10/15/2016
Time to Sign Up for Committees and Sections	87	30	2362	11/19/2016
Auld Lang Syne	87	33	2578	12/17/2016

Winton, Mathew L.

Oklahoma Community Association Assessments	87	27	1953	10/15/2016
--	----	----	------	------------

Wolfe, Thomas G. and Campbell, Catherine

Limiting Liability in the Oilfield	87	02	27	1/16/2016
------------------------------------	----	----	----	-----------

Yancey, Mark and Holey, Kate

Search Warrants: Frequent Problems With Substance and Execution	87	08	489	3/12/2016
--	----	----	-----	-----------

Oklahoma Bar Journal Index for 2016, Volume 87

ALCOHOL

<i>Maisch, John A.</i> Alcohol Modernization on November Ballot	87	27	1964	10/15/2016
--	----	----	------	------------

THE BACK PAGE

<i>Blaschke, Michael J.</i> We Don't Want To Be Texas	87	11	848	4/16/2016
<i>Brockett, B.J.</i> Six Pieces of Silver	87	27	2048	10/15/2016
<i>Darrah, Mark S.</i> The Navy Blazer	87	14	1088	5/21/2016
<i>Dupler, Bryan Lester</i> <i>Nos Peritos et Fatum</i>	87	08	568	3/12/2016
<i>Hall, Sarah M.</i> Why I Quit Practicing Law and Why I'll Never Give Up My License	87	30	2392	11/19/2016
<i>Hird, Tom</i> Law and Religion	87	05	320	2/13/2016
<i>Hobbs, Candin A.</i> My Experience Gives Advocacy Special Meaning	87	33	2600	12/17/2016
<i>Lee, Paige</i> Why I Am Walking Away From the Practice of Law	87	21	1576	8/20/2016
<i>McCarty, Lisbeth L.</i> I Thought I'd Feel Older	87	02	120	1/16/2016
<i>Priest, Jim T.</i> Why I Miss the Practice of Law	87	24	1728	9/10/2016

BANKRUPTCY

<i>Christensen, J. Clay and Loomis, Cori H.</i> Municipalities in Bankruptcy	87	21	1525	8/20/2016
<i>Garrison, Tracey</i> Bankruptcy and Divorce	87	21	1519	8/20/2016

<i>Pacewicz, Michael R.</i> Fees on Fees: <i>Baker Botts v. ASARCO</i>	87	21	1511	8/20/2016
<i>Tate, Jeffrey E.</i> Consider Bankruptcy When Drafting Settlement Agreements	87	21	1529	8/20/2016
<i>Veith, Jimmy L.</i> A Practical Guide to Consumer Bankruptcy Law for the Nonbankruptcy Lawyer	87	21	1533	8/20/2016

BUSINESS LAW

<i>Pittman, Spencer C.</i> Business Courts: Specialized Courts for Complex Business Litigation	87	11	805	4/16/2016
--	----	----	-----	-----------

CIVIL PROCEDURE

<i>Castle, Amii N.</i> Avoiding Sanctions Under Amended Federal Rule of Civil Procedure 37(e)	87	02	84	1/16/2016
---	----	----	----	-----------

CRIMINAL LAW

<i>Astle, Doris J. "Dorie"</i> The Death Penalty: Baze, Glossip and Beyond	87	08	481	3/12/2016
<i>Cannon, John P.</i> Investigative Detention: The Warrantless Seizure of Citizens	87	08	473	3/12/2016
<i>Dupler, Bryan Lester</i> Jury Sentencing in Oklahoma	87	08	497	3/12/2016
<i>Fisher, Jack</i> <i>Brady v. Maryland</i> – The Path to Truth and Fairness	87	08	505	3/12/2016
<i>Hankins, James L.</i> Self-Defense: Oklahoma Lays Some New Ground Rules (Sort Of)	87	08	469	3/12/2016
<i>McKenzie, David T. and Simpson, Megan L.</i> Hearsay and the Confrontation Clause: The Apostle Paul, the American Revolution and Today	87	08	513	3/12/2016
<i>Smith, Taos C.</i> Case Comment: <i>Rodriguez V. United States</i> Clarifying Traffic Stops and <i>Cabelles</i>	87	08	463	3/12/2016
<i>Yancey, Mark and Holey, Kate</i> Search Warrants: Frequent Problems With Substance and Execution	87	08	489	3/12/2016

DATA-BREACH LIABILITY

<i>Arant, Peter J.</i> Understanding Data-Breach Liability: The Basics Every Attorney Should Know	87	11	810	4/16/2016
---	----	----	-----	-----------

ETHICS AND PROFESSIONAL RESPONSIBILITY

Balkenbush, Joe

Be the Best Lawyer You Can Be	87	05	298	2/13/2016
Succession Planning and Your Personal Health	87	11	827	4/16/2016
Ethics and the Benefits of the Lawyers Helping Lawyers Program	87	21	1551	8/20/2016
Is Threatening Criminal Prosecution Ethical?	87	27	2024	10/15/2016
Essential Ethics Topics Every Lawyer Needs to Know	87	33	2547	12/17/2016
Communication With a Person Represented by Counsel: Do You Have to Ask?	87	33	2583	12/17/2016

Browning, John G.

More Than Sticks & Stones On the Internet: The Ethical Do's and Don'ts in Responding to Negative Online Reviews	87	33	2515	12/17/2016
---	----	----	------	------------

Buckman, Steven V.

Professional Liability Coverage: Don't Take It for Granted	87	33	2543	12/17/2016
--	----	----	------	------------

Feamster, Blake M.

Ghostwriting: An Ethical Issue in the Evolution of the Legal Field	87	33	2537	12/17/2016
--	----	----	------	------------

Hendryx, Gina

A Guide to File Retention	87	02	95	1/16/2016
Attorney Discipline Activities Reflects in Reports	87	08	545	3/12/2016
Trust and Accountability, Overdraft Notification and Protection	87	14	1066	5/21/2016
Ethical Considerations in Pro Bono Public Service Representations	87	30	2366	11/19/2016

Mwafulirwa, Mbilike M.

Legal Ethics and Federalism: A New Blueprint for Federal Trade Commission Enforcement Action	87	33	2531	12/17/2016
--	----	----	------	------------

Rother, Timila and Masters, Paige

Lawyers Being Social: Ethical Implications of Personal Social Media Sites	87	33	2503	12/17/2016
---	----	----	------	------------

Russo, Carol

Real-Life Waivers and Confidentiality are Not as Clear as the Code Requires	87	33	2551	12/17/2016
---	----	----	------	------------

Spector, Robert G. and Thompson, Carolyn S.

Attorney Fees in Family Law Cases	87	33	2521	12/17/2016
-----------------------------------	----	----	------	------------

FREE LEGAL SERVICES

Manning, Carol

Oklahoma Lawyers for America's Heroes: Program Tops \$2.8 Million in Free Legal Services	87	30	2355	11/19/2016
--	----	----	------	------------

Riggs, M. David

Volunteer Lawyers Needed for Oklahoma Free Legal Answers Project	87	21	1541	8/20/2016
--	----	----	------	-----------

FROM THE EXECUTIVE DIRECTOR

Williams, John Morris

Everything You Touch	87	02	89	1/16/2016
2016 Legislative Session	87	05	294	2/13/2016
The Death of Atticus Finch?	87	08	543	3/12/2016
Three Barn Dances and Two Goat Ropings	87	11	822	4/16/2016
I Know Why	87	14	1062	5/21/2016
Old Dog... New Tricks	87	21	1548	8/20/2016
The Road Less Traveled	87	24	1706	9/10/2016
It's Annual Meeting Time	87	27	2019	10/15/2016
Time to Sign Up for Committees and Sections	87	30	2362	11/19/2016
Auld Lang Syne	87	33	2578	12/17/2016

FROM THE PRESIDENT

Isaacs, Garvin A.

Will We Let History Repeat Itself?	87	02	28	1/16/2016
Upcoming Events Deserve Your Attention	87	05	244	2/13/2016
The Jesse Owens Rule: Never Be Intimidated	87	08	460	3/12/2016
On Law Day Let Us Celebrate Trial by Jury	87	11	764	4/16/2016
Explorers Attacked by Polar Bears	87	14	1012	5/21/2016
With Liberty and Justice for All	87	21	1508	8/20/2016
Safeguarding Our Freedoms	87	24	1668	9/10/2016
Juror Appreciation Project to Emphasize Importance of Trial by Jury	87	27	1924	10/15/2016
Oklahoma Judicial Funding Shortage Deserves OBA Support	87	30	2300	11/19/2016
Muchas Gracias	87	33	2500	12/17/2016

INDIAN LAW

Lamirand, Jennifer N.

Made in Indian Country	87	14	1023	5/21/2016
------------------------	----	----	------	-----------

Norman, William R. and Holman, Randi D.

State Attorney General Argues Against Tribal and State Interests	87	14	1015	5/21/2016
--	----	----	------	-----------

Rowe, Dustin

Practicing in the Chickasaw Nation Tribal District Court	87	14	1035	5/21/2016
--	----	----	------	-----------

Wahpepah, Wilda A.

Tribal Leadership Disputes	87	14	1029	5/21/2016
----------------------------	----	----	------	-----------

LABOR AND EMPLOYMENT LAW

Love, Kimberly Lambert and McFadden, J. Miles

'Sniffing' Out an ADA Claim: Chemical,
Fragrance and Scent Sensitivities in the
Workplace

87 24 1686 9/10/2016

LAW DAY

Hoch, Albert and Vreeland, Richard

Events Across the State Emphasize the Importance
of Law Day

87 11 767 4/16/2016

LAW PRACTICE TIPS

Calloway, Jim

Thoughts on Social Media: Risks, Rewards and
Uncertainties

87 02 91 1/16/2016

The Grind

87 05 296 2/13/2016

Reimagine Your Law Practice at the OBA Solo & Small
Firm Conference 2016

87 08 525 3/12/2016

You Are Not Paranoid If They Really Are
Watching You

87 11 823 4/16/2016

Proposed Agenda for Your Law Office Retreat

87 14 1063 5/21/2016

Some Post-Summer Law Practice Tips

87 21 1549 8/20/2016

Email Attachments vs. Client Portals

87 24 1707 9/10/2016

The Benefits and Risks Associated with
Relevant Technology

87 27 2020 10/15/2016

The Basics of a Lawyer's Smartphone

87 30 2363 11/19/2016

Client Confidentiality, Personal Privacy and
Digital Security

87 33 2579 12/17/2016

LEGISLATIVE NEWS

Abel, Luke

OBA Watch List Decreases, Some Measures
Make it Out of Committee

87 08 521 3/12/2016

Legislative Session to End May 27

87 14 1049 5/21/2016

Bartmess, Duchess

Legislative Monitoring Committee Gears Up
for Second Session

87 05 290 2/13/2016

Legislative Activity Increases

87 11 819 4/16/2016

MEET YOUR BAR ASSOCIATION

McDaniel, Mackenzie

Meet 2016 OBA President Garvin A. Isaacs

87 02 31 1/16/2016

MEMBER BENEFITS

Jackson, Darla

New Free Member Benefit: Speed Up OBJ Search with HeinOnline	87	21	1539	8/20/2016
--	----	----	------	-----------

Stone, Laura

Updates to Online Member Services	87	27	2006	10/15/2016
-----------------------------------	----	----	------	------------

New Technology Brings Meetings to You	87	33	2555	12/17/2016
---------------------------------------	----	----	------	------------

MOCK TRIAL

Chojnacki, Marsha

Volunteers Make High School Mock Trial Program a Success	87	11	816	4/16/2016
--	----	----	-----	-----------

OIL AND GAS LAW

Campbell, Catherine and Wolfe, Thomas G.

Limiting Liability in the Oilfield	87	02	76	1/16/2016
------------------------------------	----	----	----	-----------

Long, Curtis M.

Digging in the Pipeline Right of Way	87	02	81	1/16/2016
--------------------------------------	----	----	----	-----------

Stanley, Brian

When the Deal's Too Good: Protecting Nonprofessional Mineral Owners in Oklahoma	87	11	798	4/16/2016
---	----	----	-----	-----------

OKLAHOMA BAR FOUNDATION

Jones, Candice

Grantee Spotlight: William W. Barnes Children's Advocacy Center	87	02	100	1/16/2016
---	----	----	-----	-----------

Celebrating 7 Decades of Law, Education & Justice	87	05	303	2/13/2016
---	----	----	-----	-----------

Grantee Spotlight: Marie Detty Youth & Family Services	87	11	832	4/16/2016
--	----	----	-----	-----------

Foundation Celebrates 70 Years	87	14	1070	5/21/2016
--------------------------------	----	----	------	-----------

Grantee Spotlight: Oklahoma Lawyers for Children A Walk in a Child's Shoes	87	21	1560	8/20/2016
--	----	----	------	-----------

The Oklahoma Bar Foundation Announces 2017 Grant Program Funding	87	24	1712	9/10/2016
--	----	----	------	-----------

Oklahoma Bar Foundation Welcomes New Executive Director	87	27	2029	10/15/2016
---	----	----	------	------------

2016 Scholarship Recipients Announced	87	30	2373	11/19/2016
---------------------------------------	----	----	------	------------

Foundation Renames Award to Honor Past President Jack L. Brown	87	33	2585	12/17/2016
--	----	----	------	------------

PROBATE

Ellis, Hal and Ellis, LeAnn

Oklahoma Slayer Statute Updated	87	05	283	2/13/2016
---------------------------------	----	----	-----	-----------

Evans, Julie A.

Conservatorships: So Useful, But So Rare	87	05	261	2/13/2016
--	----	----	-----	-----------

<i>Jones, Cody B.</i> A Primer on Drafting and Applying the ‘HEMS’ Ascertainable Standard in Discretionary Trusts	87	05	255	2/13/2016
<i>Monks, Terrell and Warshell, Ashley</i> Due Process and Best Practices in Oklahoma Probate	87	05	271	2/13/2016
<i>Ross, Casey</i> Probate of American Indian Trust Property: The Lawyer’s Role?	87	05	287	2/13/2016
<i>Thom, Michael W.</i> Sometimes You Can’t Take It With You	87	05	247	2/13/2016
<i>Unsicker, J. Nicci</i> A Well-Planned Death	87	05	277	2/13/2016

REAL PROPERTY

<i>Epperson, Kraettli</i> The Oklahoma Marketable Record Title Act	87	27	1927	10/15/2016
<i>Jones, Jennifer S.</i> A Title Examiner’s Guide to Probate and Guardianship Sales	87	27	1947	10/15/2016
<i>Rosser IV, Malcom E. and Davis, Benjamin K.</i> Adverse Possession: No, It Has Not Come and Gone	87	27	1937	10/15/2016
<i>Schaller, Ryan W.</i> An Examiner’s Dozen: 13 Tips to Avoid a Call From a Title Attorney	87	27	1943	10/15/2016
<i>Webster, Teresa L.</i> Housing Discrimination: Inequality Served With a Smile	87	27	1959	10/15/2016
<i>Winton, Mathew L.</i> Oklahoma Community Association Assessments	87	27	1953	10/15/2016

TAXATION LAW

<i>Miers Jr., Sheppard F.</i> 2016 Oklahoma Tax Legislation	87	24	1690	9/10/2016
--	----	----	------	-----------

TECHNOLOGY

<i>Fitzgerald, Craig; Anderson, Cheryl and Lovy, Don</i> A Few Thoughts on Technology in the Courtroom	87	30	2339	11/19/2016
<i>Jackson, Darla</i> Social Media Evidence	87	30	2333	11/19/2016

TRIAL BY JURY

<i>Bundy, Aaron D. and Henry, M. Shane</i>				
Slaying the Speaking Objection Dragon	87	30	2321	11/19/2016
Leading the Way	87	30	2325	11/19/2016
<i>Gifford, Robert Don</i>				
A Primer For Ye Ol' Woodshed: Witness Preparation	87	30	2315	11/19/2016
'Your Witness, Counsel' — Cross Examination	87	30	2329	11/19/2016
<i>Mackey, Erica R.</i>				
Trial by Jury in Indian Country	87	30	2345	11/19/2016
<i>McKenzie, David T. and Fassio, Marcy</i>				
The Alpha and the Omega: Effective Advocacy in Opening Statements and Closing Arguments	87	30	2309	11/19/2016
<i>Roberson, Shawn and Smothermon, Connie</i>				
Changes to the Insanity Laws: Not Guilty by Reason of Mental Illness and Guilty With Mental Defect	87	30	2349	11/19/2016
<i>West, Terry W.</i>				
Persuasive Opening Statements	87	30	2303	11/19/2016

WOMEN IN LAW

<i>Sikes, Reign</i>				
Just Desserts: The Sweet Rewards of Civic Service	87	24	1694	9/10/2016

YOUNG LAWYERS DIVISION

<i>Will, Bryon</i>				
Why Did I Get Involved With the YLD?				
Why Should You?	87	02	103	1/16/2016
What's Going on with the YLD?	87	05	305	2/13/2016
Three Reasons You Should Attend the YLD Midyear Meeting	87	08	552	3/12/2016
What is Law Day All About?	87	11	835	4/16/2016
Midyear Meeting Opportunities Not to Be Missed	87	14	1073	5/21/2016
Kick It Forward — Helping Our Struggling Colleagues With Their Bar Dues	87	21	1563	8/20/2016
Opportunities to Network With Fellow Attorneys	87	24	1715	9/10/2016
Election for 2017 YLD Leadership: Vote by Thursday, Oct. 27	87	27	2032	10/15/2016
OBA YLD Members and Committee Recognized at Annual Meeting	87	30	2376	11/19/2016
YLD Wraps Up Another Successful Year	87	33	2588	12/17/2016

You Have Something to Offer — Join a Committee

If you invest just a small amount of your time working on an OBA committee, I promise that you'll receive a 100 percent return on your investment — especially if you are in private practice. The contacts you make are invaluable, and the work accomplished benefits our communities and our profession.

New members with fresh ideas, we need you! Geography is a nonissue with today's technology, and the OBA will soon be rolling out the option of attending meetings from your desk. (It's being beta tested now.) So if driving a long distance to participate in a meeting has prevented you from becoming involved, that obstacle is gone.

Sign up today. Option #1 – online at www.okbar.org, scroll down to the bottom of the page. Look for "Members" and click on "Join a Committee." Options #2 & #3 – Fill out this form and mail or fax as set forth below. I'll be making appointments soon, so please sign up by **Dec. 30**.



Linda S. Thomas, President-Elect

Note: No need to sign up again if your current term has not expired.
Check www.okbar.org/members/committees.aspx for terms.

Please Type or Print

Name _____

Telephone _____ OBA # _____

Address _____

City _____ State/Zip _____

FAX _____ E-mail _____

Committee Name

1st Choice _____

2nd Choice _____

3rd Choice _____

Have you ever served on this committee? If so, when? How long?

1st Choice ☐ Yes ☐ No _____

2nd Choice ☐ Yes ☐ No _____

3rd Choice ☐ Yes ☐ No _____

■ Please assign me to ☐ one ☐ two or ☐ three committees.

Besides committee work, I am interested in the following area(s):

Mail: Linda Thomas, c/o OBA, P.O. Box 53036, Oklahoma City, OK 73152

Fax: (405) 416-7001

Standing Committees

- Access to Justice
- Awards
- Bar Association Technology
- Bar Center Facilities
- Bench and Bar
- Communications
- Disaster Response and Relief
- Diversity
- Group Insurance
- Law Day
- Law-related Education
- Law Schools
- Lawyers Helping Lawyers Assistance Program
- Legal Intern
- Legislative Monitoring
- Member Services
- Military Assistance
- Paralegal
- Professionalism
- Rules of Professional Conduct
- Solo and Small Firm Conference Planning
- Strategic Planning
- Uniform Laws
- Women in Law
- Work/Life Balance

ensure
JUSTICE
for all

★ ★ ★ ★ ★
**A little bit of your time
can make a big difference**

**by answering a pro bono legal question
online for a low-income Oklahoman.**

★ ★ ★ ★ ★
Visit www.okbar.org to learn more!



**OKLAHOMA FREE LEGAL ANSWERS
IS A PROJECT OF:
Oklahoma Bar Association
Oklahoma Access to Justice Commission
American Bar Association**

Auld Lang Syne

By John Morris Williams

The famed poet Robert Burns is credited with first putting these ancient verses down on paper. Tradition has it the Scots hold hands to sing the verses on New Year's. The hands are positioned with arms crossed so that the left hand is claspings the hand of the person on the right and vice versa. At the end of the song everyone rushes to the middle. Without getting into anyone's politics, I kind of like that idea of reaching out to people and then all coming together.

Aside from the cursory history lesson, I want to say a few things for "old times sake." First, I want to thank a cast literally of thousands for making another good year at the OBA possible. To the elected leaders, volunteers and staff, I want to say thank you. Each year has its own issues, troubles, laughs, moments of teaching and learning. This year was no different.

Few people probably noticed we finally got the mechanical (heating and cooling) issues resolved on the west side of the bar center building. You would have noticed if your office was as hot as Susan Damron's office. It really was the best warming oven in the building. Thank you, Susan, for your good humor.

We also switched over to new software in the Mandatory Continuing Legal Education Department. If you have not already done so, you need to log in and check it out. The down side is that it does have a separate login. We tried and tried to get the vendor to agree to letting us have a single sign on. However,

it is secure and really user-friendly. This was a big effort for the MCLE staff, and I want to thank them, our CLE staff and IT staff for helping get this up and going.

We are still growing with our association management software and its related features. We have converted to the new system for almost every function. This was a big undertaking and has taken a significant effort by Robbin Watson and her staff and Craig Combs and his staff. Also, Debbie Brink in my office did some heavy lifting on helping with the setup. We will soon add features so individual photos, social media and other unique information can be added to your member page. So, if you want to post your picture, social media and web info you can do that behind the protected area so only fellow lawyers can see it. We also will have our section and committee communication features working very soon.

Lastly, on the tech front we acquired rights to use BlueJeans videoconferencing. It allows multiple participants from multiple sites simultaneously. I even joined a meeting on my mobile phone, and it worked well. It is not the perfect tool for every task, but it has high reliability and is easy to use. I want to encourage members who cannot attend meetings in person to consider this new tool in our member service toolbox.

We had good results at the Legislature. Some days it didn't seem so likely. Thanks to all the



volunteers and our liaison, Clay Taylor, for helping let our law-makers know what we thought was the best route to take. The Solo & Small Firm Conference and Annual Meeting went off without a hitch. You know that takes some great staff members to that make that happen, right? Well, it is true. Jim Calloway, Carol Manning, Susan Damron and Craig Combs and their staffs make all the light and magic. Of course, some great volunteers put the shine to it all.

Overall, we got a lot done. We had some issues, learned some stuff, had some laughs and got rid of the sauna on the southwest side of the building. Thanks to you and the cast of thousands that made this a great year.

"And there's a hand, my trusty friend!

And give us a hand of yours!
And we'll take a deep draught of good-will
For long, long ago."

Wishing all the warmth and blessings of the season and the New Year!

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

Client Confidentiality, Personal Privacy and Digital Security

By Jim Calloway

We have just emerged from a presidential election that led to more members of the general public becoming aware that email accounts can be hacked and the disclosure of stolen emails can be embarrassing and has profound consequences. Technology professionals and those who follow tech news have been aware of these facts for some time.

In November 2014 hackers announced their successful intrusion into Sony Pictures and released personal information about its employees and their families, emails between employees, information about executive salaries and copies of then-unreleased Sony films. Since the hackers demanded Sony pull the release of its film *The Interview*, which was about North Korean leader Kim Jong-un, North Korea was blamed. Some Sony employees sued because their social security number and medical information were released. The Sony co-chairwoman stepped down.

In March 2016 it was revealed that nearly 50 large law firms, including some of the nation's most prestigious, were the targets of hackers,¹ although there is some dispute about how suc-

cessful the hackers were in obtaining client information.

No lawyer or law firm wants to be hacked, whether the target is confidential client information or the lawyer's credit card numbers and other financial information. As we approach a new year, let's all resolve to take some affirmative action to improve our personal and professional digital security.



THE BASICS: A PASSWORD MANAGER AND TWO-FACTOR AUTHENTICATION

Almost all lawyers are aware they need to use these tools, but many still resist due to the time it takes to set up these tools and the perceived inconvenience of using them.

Using the same password for all password-protected services you use means that when someone obtains your pass-

word for one of these sites, they will have access to all of them. Using words from the dictionary for a password means a brute force dictionary attack by hackers will crack your password. Using long strings of letters and symbols and numbers means that passwords will be difficult to remember. Many sites now require the use of numbers and characters in passwords.

It is time to start using a password manager.

Password managers are extremely affordable and allow you to generate long passwords of 20 to 30 characters without resorting to words found in the dictionary. A password that is short and simple enough for you to remember is too short and simple to be secure. In the endnotes (and on www.okbar.org when this article is published there) you will find links to reviews of some popular password managers. The basic version of LastPass² is now free; however, I suggest you pay the \$12 per year for the premium edition. Other popular password managers include 1Password,³ KeePass⁴ and Dashlane.⁵ Large firms may want enterprise solutions.

Using two-factor authentication for accounts you consider important is a great way to protect against hackers. There is no doubt the two-factor authentication is a bit of an inconvenience, but you should always use it with your financial accounts and any services where you have a credit card number on file. Also, if it would be devastating to lose all of the photos that you have stored online, you might consider using it for your photo storage account as well.

At the basic level using two-factor authentication means that when you log into to a website, a code number will be sent via text to your mobile device. You must enter that code to continue. If some hacker manages to steal your password by whatever method, they still can not log into to access your information without also having access to your mobile phone. Note that when you set up this process individually on each website, it is very important to understand and preserve information about what to do if you lose your mobile phone.

PRACTICE SAFE COMPUTING WHEN OUT OF THE OFFICE

Unprotected public Wi-Fi hotspots are by definition not secure. You should only use Wi-Fi services that require a password or other authentication. If you plan on logging into your office from a remote location, it is best to set up a virtual private network (VPN) for you to login securely. Mac users can use Cloak.⁶ It is priced at \$2.99 per month for the mini plan, \$9.99 per month or \$99.99 per year for the unlimited plan. This service was highly recommended by several speakers at ABA TECHSHOW 2016. *PC*

Magazine recently posted a feature “The Best VPN Services of 2016.”

Invest in a sufficient data plan for your phone or other mobile device through your carrier so that you are not tempted to login to Wi-Fi hotspots.

FREE GMAIL WAS GREAT IN ITS TIME BUT...

Perhaps free Gmail is not the best plan for client email. After all, when Wikileaks passed along hacked emails from Clinton campaign chair John Podesta, many tech savvy people thought, “You were using a

“ **At the basic level using two-factor authentication means that when you login to a website a code number will be sent via text to your mobile device.** ”

(presumably) free Gmail account to run a presidential campaign?”

Luckily there is a relatively painless quick fix to this issue. GSuite⁸ (formerly Google Apps for Business) provides many business enhancements for Gmail, Docs, Drive and Calendar for as little as \$5 per user per month.⁹ If you have a law firm website, you can use that domain for your emails instead of Gmail.com with this service and your subscription payment provides you with many security and privacy features.¹⁰

Now to be fair, almost everyone I know has a free Gmail account for personal matters or for providing when an email address is required that will result in you receiving email marketing messages. Having the business class security is a great plan for professional use and the administrative controls can be handy for a small firm lawyer who needs to easily cut off a recently-terminated employee’s access to firm email or calendar.

Another feature that sounded great about free web-based email services was that you received so much free storage space you didn’t have to worry about inbox management. It is easy to accumulate years of stored emails, but perhaps many years of searchable emails is not a great plan. You may never be the subject of a hacker dumping all of your saved emails into the public domain, but you might have an assistant using your email account and searching to find something or your heirs might have access to the account at some point. Maybe you don’t have terrible secrets hidden in your inbox, but maybe you had a less-than-charitable view of another lawyer or judge or your spouse was venting to you about someone who is now married to your child. Take a leap and delete everything in your inbox and sent folder that is more than a year or two old. If it is an important business or personal record, it should not be “filed” in your inbox anyway.

PHYSICAL DIGITAL SECURITY

That label may sound like an oxymoron, but there are several simple steps you should turn into habits to protect your com-

puter and other data storage devices.

Never leave a laptop computer in the passenger compartment of your automobile. Always lock it in the trunk. If your computer bag has wheels, make sure the wheels point up and not down in the trunk in case you have to make an abrupt stop. Always turn off your computer when you leave work at the end of the day unless you intend to leave it on for remote access purposes. Make sure every workstation and mobile device is secured by a password or passcode.

PREPARE FOR TROUBLE

Backup any data you are not willing to lose. Have a disaster response plan printed out on paper so if your network or computer has a major problem or an intrusion you know who to call for help and what steps to take.

STAFF TRAINING

It is important to understand, most digital intrusions occur via email. Constant training and communication of emerging threats is now important for any office that must have use of its computer systems.

Just prior to Thanksgiving many Oklahoma bar members received an email with the subject line "Oklahoma Bar Association Complaint." Of course it was a fake. Our general counsel's office does not send these types of official notices by email. Cyber criminals hope the surprise and horror of reading a complaint has been filed will override judgment and generate a quick click on a link or attachment. If you receive an unexpected email that makes you want to instantly click on something, *always* pause and think.

Every year I place several phone calls or send emails (not replies) to lawyers asking, "Did you really just send me that email?" I'm known as a technology expert and I am not embarrassed to make outreaches, so you shouldn't be either. I have been receiving a number of emails with Zip file attachments relating to online shopping orders I haven't placed. The Zip file attachment is a warning all by itself, and if you hover over a suspicious link in an email you will often be able to see a preview that the link is actually to a suspicious location.

For more information see my blog post "The Holidays Bring More Email Threats."¹¹

CEO FRAUD

You were out of the office doing a series of depositions and had informed everyone in advance that interruptions could not happen during those two days. When you return, your assistant rushes up to you with a big smile and says, "Don't worry, I got those funds wired for that settlement before the deadline." You are puzzled and ask, "What funds?" Your day rapidly goes downhill from there.

The short version of how this works is that criminals reserve a domain name that looks very similar to the victim's domain name. If their target used Smithlaw.com they might reserve Smiithlaw.com and few would notice the extra "i" in the emails they receive. It works even better if they have previously convinced the target to respond to an email so they can include the target's actual signature block in their scam email.

The bottom line is wiring money is often an irreversible

action and you should have very clear procedures with checks and balances before a wire transfer is made.

ENCRYPTION IS YOUR FRIEND

Encryption is not a four letter word and anyone concerned about confidentiality and privacy should understand how it works. Lawyers should know how to encrypt data on an "as needed" basis. I have previously noted the OBA member benefit Citrix ShareFile for email encryption and online file storage in my September 2016 Law Practice Tips column "Email Attachments vs. Client Portals."¹² This is a very important topic so if you missed it the first time, now is a good time to read it. Spoiler alert: Secure client portals are a much better way to share confidential information with your clients than unsecured, unencrypted email attachments.

If you have a laptop computer you should seriously consider encrypting the hard drive.

For reference I suggest reading "Encryption Made Easier: The Basics of Keeping Your Data Secure"¹³ by Sharon D. Nelson and John W. Simek along with another post that has been circulating online recently "How to Encrypt Your Entire Life in Less Than an Hour"¹⁴ by Quincy Larson of FreeCodeCamp. One note about some content in the Larson article is that the Tor browser is really for expert users. It can also be used as a gateway to those parts of the internet you may have heard of but don't want to visit. Duane Croft wrote about the Tor browser for the *Oklahoma Bar Journal* in 2013.¹⁵

CONCLUSION

An old saying was that locks on doors were only to keep the honest people out. Perfect digital data security may not be possible, but by taking some of the steps above you can provide safeguards so you, your law firm and your client data are less appealing targets and perhaps the bad guys on the internet will move on to those who have not taken these steps.

1. David Lat, "Beware of Big Hacking in Biglaw," *Above the Law* (March 30, 2016), abovethelaw.com/2016/03/beware-of-big-hacking-in-biglaw/.

2. Neil J. Rubenking, "LastPass 4.0 Premium," *PC Magazine*, (Nov. 2, 2016), www.pcmag.com/review/317692/lastpass-4-0-premium.

3. Lee Munson, "1Password Review," *Comparitech Blog* (May 18, 2016), www.comparitech.com/password-managers/reviews/1password-review/.

4. Jason Carpenter, "KeePass Password Manager Review," *Tom's Guide* (July 20, 2016), www.tomsguide.com/us/keepass,review-3768.html.

5. Neil J. Rubenking, "Dashlane 4," *PC Magazine*, (March 9, 2016), www.pcmag.com/article2/0,2817,2461280,00.asp.

6. www.getcloak.com.

7. Max Eddy, "The Best VPN Services of 2016," *PC Magazine* (Nov. 9, 2016) www.pcmag.com/article2/0,2817,2403388,00.asp.

8. gsuite.google.com (last visited Nov. 28, 2016).

9. gsuite.google.com/pricing.html (last visited Nov. 28, 2016).

10. gsuite.google.com/learn-more/security-google-apps.html (last visited Nov. 28, 2016).

11. Jim Calloway, "The Holidays Bring More Email Threats," *Jim Calloway's Law Practice Tips Blog* (Nov. 21, 2016), www.lawpracticetipsblog.com/2016/11/holidays-bring-email-threats.html.

12. Jim Calloway, "Email Attachments vs. Client Portals," 87 *Okl. B.J.* 1707 (Sept. 10, 2016), www.okbar.org/members/MAP/MAPArticles/HotPracticeTips/EmailAttachments.aspx.

13. Sharon D. Nelson and John W. Simek, "Encryption Made Easier: The Basics of Keeping Your Data Secure," OBA Management Assistance Program, www.okbar.org/members/MAP/LPMArticles/EncryptionMadeEasier.aspx.

14. Quincy Larson, "How to Encrypt Your Entire Life in Less Than an Hour," *FreeCodeCamp*, (Nov. 9, 2016), medium.freecodecamp.com/tor-signal-and-beyond-a-law-abiding-citizens-guide-to-privacy-1a593f2104c3#3p7wdm63.

15. Duane Croft, "Encryption, Privacy and the Dark Side of the Internet," 84 *Okl. B.J.* 511 (March 16, 2013), www.okbar.org/members/BarJournal/archive2013/MarArchive13/obj848Croft.aspx.

Mr. Calloway is OBA Management Assistance Program director. Need a quick answer to a tech problem or help solving a management dilemma? Contact him at 405-416-7008, 1-800-522-8065 or jimc@okbar.org. It's a free member benefit!



CONFERENCE AND EXPO – MARCH 15-18, 2017 Bringing Lawyers & Technology Together

The ABA TECHSHOW Conference and EXPO is where lawyers, legal professionals, and technology all come together. For three days, attendees learn about the most useful and practical technologies available. Our variety of CLE programming offers a great deal of education in just a short amount of time.

As a member of the Oklahoma Bar Association, we want you to know that you can get a discount on the ABA TECHSHOW 2017. This discount only applies to registrants that qualify for the Standard registration. You can register online, and include this unique discount code: EP1716 to receive a discount. Register by January 30, 2017 and receive the early bird rate of \$750!

Learn and network with legal technology experts from across the country, March 15-18, at the Hilton Chicago. Visit www.techshow.com for up-to-date information on ABA TECHSHOW 2017, the best event for bringing lawyers and technology together.

Communication With a Person Represented by Counsel: Do You Have to Ask?

By Joe Balkenbush

We all remember learning in law school that it is improper to communicate with a person who is represented by counsel. The ABA ethics rules have included a “no contact” rule since the 1908 adoption of the ABA Canons of Professional Ethics.

The “no contact” rule, now embodied by Rule 4.2 of the Oklahoma Rules of Professional Conduct (ORPC), sets forth the requirements concerning communications with a person you know to be represented. Rule 4.2, titled “Communication with Person Represented by Counsel,” provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.¹

In reading the text of the rule, it seems fairly straightforward. However, there are some pitfalls which need to be avoided. Suppose a person calls, identifies themselves and wants to ask you a legal question, stating

that a friend gave them your name. They begin providing you with the facts which give rise to their question. You might even ask relevant questions along the way to clarify. Once they have completed providing you with the specific facts and ask their question, you provide them with your erudite answer. After listening to your answer, they respond by stating, “That’s not what my lawyer told me.” (Anyone feeling ill?)

That scenario gives rise to the question: Does an attorney have a duty to ask whether a person is represented by counsel before discussing a legal matter with them? Although Rule 4.2 does not require a lawyer to ask, it is obvious from the above scenario that it is a good idea. The ABA, in Formal Opinion 472 states, “it is recommended that the lawyer begin the communication by asking whether that person is or was represented by counsel...” The opinion goes on to say, “When a lawyer has knowledge that a person is represented on the matter to be discussed, the lawyer must obtain the consent of counsel prior to speaking with the person.”

The purpose of Rule 4.2 is to protect clients who are represented by counsel from having another lawyer interfere with the client-lawyer relationship by, for example, unscrupulously seeking “disclosure of information and/or concessions and admissions related to the representation.” Formal Opinion 472 further provides that, “A lawyer directly communicating with an individual, however, will only violate Rule 4.2 if the lawyer knows the person is represented by another lawyer in the matter to be discussed. ‘Knows’ is defined by the Model Rules as ‘actual knowledge of the fact in question.’ A person’s knowledge may be inferred from circumstances.”

One exception to the “no contact” rule would be when a person represented by counsel contacts another attorney for a second opinion. Comment 2 to ORPC Rule 4.2 provides “... [This rule does not] preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”

It is still the best practice to follow the “no contact” rule. Here’s an ethics practice tip, if

you receive a call from a person wanting to ask a legal question, be sure that you ask enough questions to ascertain if the person with whom you are communicating is represented before proceeding with the call and/or providing any advice.

1. Title 5, Chapter 1, Appendix 3-A. Rule 4.2, www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=448827.

2. ABA Formal Opinion 472, www.americanbar.org/news/abanews/aba-news-archives/2015/11/aba_issues_formalop.

Mr. Balkenbush is OBA ethics counsel. Have an ethics question? It's a member benefit and all inquiries are confidential. Contact Mr. Balkenbush at joeb@okbar.org or 405-416-7055; 800-522-8065.



Mail to:
Communications Dept.
Oklahoma Bar Association
P.O. Box 53036
Oklahoma City, OK 73152

Chief Legal Officer

Oklahoma City Law Firm is Seeking a Chief Legal Officer

National tech company that provides litigation consumer legal services based in Oklahoma City but with offices throughout the United States is seeking to fill the newly created position of Chief Legal Officer. We have a rare opportunity for the right person to join our firm as CLO. We are looking for some specific skills and experiences:

- 1. Experience.** You must have experience in high-level commercial litigation, able to understand nuanced and sophisticated legal issues. We do not look at where the law is, but where it should be. You should have significant experience at a large law firm or legal department—20 years or more. A passion for law practice, practice management, and meaningful experience in guiding others to achieve extraordinary results. Maturity, integrity, strong work ethic, commitment to innovation, and uncompromising professionalism.
 - 2. Legal Tech savvy.** Extensive hands-on knowledge and experience with the latest trends in technology, social media, and cloud technology. Familiarity with Process Improvement, Project Management, Legal Analytics, AI, mobile apps, and leveraging Big Data. Experience with Salesforce.com a plus.
 - 3. Numbers orientation.** MBA level facility or comparable, with financial statements and business analytics.
 - 4. Creative thinking.** We do not follow the traditional legal services business model. We are committed to significantly improving the transparency, predictability, and efficiency in the delivery of legal services in a rapidly evolving technology age. We are seeking ways to maintain competitiveness in an innovative and disruptive legal marketplace.
 - 5. Management.** This position will manage a team of 40+ lawyers that is expected to grow to more than 100 over the next two years. The firm is dedicated to collaborative decision-making and consensus building.
 - 6. Diversity.** Diversity is not simply an objective, but it is core to this firm. You must share a professional objective to build opportunities for all people, regardless of age, race, religion, nationality, gender, or sexual orientation. Only professionals committed to building an organization with this principal as core should apply.
- We are looking for an extraordinary legal professional who is seeking an opportunity to change the nature of the practice of law. If that is you, please email your CV to: Lee2004@earthlink.net

Oklahoma City

Custom Designed Binders for your *Oklahoma Bar Journal*

Attractive, durable binder will keep your Bar Journals accessible and provide easy storage for 12 issues. They cost \$15.95 each prepaid.

Please send: _____ binders for the *Oklahoma Bar Journal* at \$15.95. Make check payable to Oklahoma Bar Association.

TOTAL ENCLOSED \$ _____

NAME (PRINT)

STREET ADDRESS

CITY

ZIP

PHONE

Foundation Renames Award to Honor Past President Jack L. Brown

By Candice Jones

You may have noticed big changes to the Oklahoma Bar Foundation (OBF) in the past year. This is greatly due to the leadership and vision of Jack L. Brown. Mr. Brown served as OBF board president from 2014 – 2015. During this time, he led efforts to begin instituting major changes to the OBF by concentrating on fundraising, communications and outreach. He had the foresight to hire fundraising consultant Dennis Dorgan. Mr. Brown, Mr. Dorgan and a hiring committee made up of OBF trustees set forth to hire Director of Development and Communications Candice Jones. The Board of Trustees and staff then held a board retreat to devise a strategic development and communications plan. Since then the organization has rebranded, updated giving levels, designed a new website, revamped materials, enhanced outreach efforts to the legal community, re-engaged its constituents at its 70th Anniversary Celebration and focused on making OBF grantees the centerpiece of all communication efforts.

In honor of Mr. Brown's exemplary efforts to modernize and advance the OBF, the organization recently renamed the Gerald B. Klein Award to the Gerald B. Klein – Jack L. Brown Award. This award

honors the outstanding service and dedication to the Oklahoma Bar Foundation shown by Presidents Klein and Brown. Mr. Klein served as OBF board president from 1957-1958. He was instrumental in establishing the OBF during his term as Oklahoma Bar Association



Jack L. Brown presents Jennifer Castillo with the Gerald B. Klein – Jack L. Brown Award at the 2016 OBA Annual Meeting.

president in 1946, and he was one of the seven original OBF incorporators and trustees.

"During the past 70 years, the OBF has been fortunate to have outstanding leadership that has helped guide it through its growth from a small foundation to one that continues to have a state-wide impact through grants to 23 grantees as well as courts throughout the state," said

board President Millie Otey. "Jack Brown has been a visionary for the OBF in each and every action that he has taken during his tenure. As president, he set a new course in line with a modern day mission, oversaw transitional issues and continued to lead through active participation at all levels. The Board of Trustees unanimously agreed that Jack Brown has shown the dedication that was present in the original leadership and has presented a contemporary vision that has been fully embraced by the Board of Trustees. The renaming of the Klein Award to the Klein-Brown Award is a fitting tribute both to our past leadership and to our modern day leadership and dedication to the OBF."

The renaming of the award was announced officially at the OBA Annual Meeting in November.

"Having this award renamed in my honor is most humbling to me," said Past President Brown. "I'm so appreciative of the OBF Trustees for the recognition of my service and strong dedication to the foundation over a 12-year period. The OBF now has new leadership with a new focus and direction to accomplish its overall mission

of providing grant funding to law-related service organizations serving Oklahomans who otherwise would not have access to the justice system. This award recognizes those lawyers and others who are committed by their service and accomplishments in furtherance of the OBF mission.”

The OBF Board of Trustees seeks to honor the legacy of those like Mr. Klein and Mr. Brown, who promote the foundation’s core value to ensure justice is possible for all Oklahomans through the promotion of law, education and access to justice. The award is presented to an individual or individuals within the state of Oklahoma who have rendered valuable service in improving the administration of justice and who exemplify the spirit and mission of the Oklahoma Bar Foundation.

The first recipient of the newly named award is Jenni-

“This award recognizes those lawyers and others who are committed by their service and accomplishments in furtherance of the OBF mission.”

fer Castillo of Oklahoma City. Ms. Castillo is a 2002 graduate of the OCU School of Law and works at OG&E as general counsel. She serves on the executive committee of the OBF Board of Trustees as secretary and treasurer and will serve as vice president in 2017. She also served as chair of the OBA Young Lawyers Division in 2012, is currently the OBA

Awards Committee chair and will represent the OBA as vice president in 2017.

“Jennifer’s dedication to both the OBF and OBA is long-established and illustrates why she is the first lawyer in many, many years to receive this OBF award,” says OBF Executive Director Renee DeMoss. “Jennifer provides a daily example of leadership and service that is a model for all of us to follow.”

Congratulations, Jack L. Brown and Jennifer Castillo, and thank you for your devotion to the Oklahoma Bar Foundation!

ABOUT THE AUTHOR



Candice Jones is director of development and communications for the Oklahoma Bar Foundation.

Tribute to Gerald B. Klein



Gerald B. Klein assumed the [OBA] Presidency at the close of the Annual Meeting in 1945. World War II was drawing to an end. The days were perilous... Neither the perils of the days nor the problems of the Association dismayed Gerald B. Klein. He brought to the position knowledge, perception and consecration unsurpassed... The superlative accomplishments of our Association under [his] Presidency are known to those who served under his inspired leadership. Nevertheless, generations of lawyers yet unborn will enjoy the fruits of his labors... First and foremost, among [his] accomplishments stand the Oklahoma Bar Foundation – for he designed it. Not only did he father the OBF, he made the first contribution. Thereafter he proudly displayed the canceled check.

*“So when a great man dies,
For years beyond our ken
The light he leaves behind him
Falls upon the path of men.”*

Excerpts from “Tribute to Gerald B. Klein” written for placement in the archives of the BOG and OBA after his death in 1968.



OKLAHOMA BAR FOUNDATION

Law. Education. Justice.

Oklahoma Bar Foundation Contribution Form

Name: Mr. /Mrs. /Ms. _____ Company: _____

Billing Address: _____ City: _____ State: _____ Zip: _____

Preferred Email: ☐ Personal ☐ Work Email Address: _____

Tax Receipt will be emailed to address listed above

Birthday: _____ Cell Phone: _____ Home Phone: _____ Work Phone: _____
Month/Day/Year

What inspires you to give? _____

DIRECT GIVING

\$50 _____ \$75 _____ \$100 _____ \$250 _____ \$500 _____ Other \$ _____

FELLOWS PROGRAMS

Join a giving program!

Fellows Program:

____ \$100/year *Sustaining Fellow*
____ \$200/year *Contributing Fellow*
____ \$300/year *Benefactor Fellow*
____ \$500/year *Leadership Fellow*
____ \$1,000/year *Governing Fellow*

Fellows Program - individuals

Community Fellows Program:

____ \$1,000/year *Community Partner*
____ \$2,500/year *Community Supporter*
____ \$5,000/year *Community Champion*
____ \$7,500/year *Community Pillar*
____ \$10,000/year *Community Cornerstone*

Community Fellow - law firms, companies, organizations

BILLING OPTIONS

____ Cash/Check Enclosed

____ Bill me _____ Yearly _____ Monthly _____ Quarterly

____ Credit Card _____ / _____ / _____ Exp. Date ____ / ____ Security Code: ____

Signature: _____

Thank you for your contribution. Your gift is tax deductible.

YLD Wraps Up Another Successful Year

By Bryon J. Will

We are now in the final month of 2016 which means we recently wrapped up the OBA Annual Meeting and are scrambling to get our final hours of CLE. It's a great time to ponder and reflect on this last year and what the YLD has done and accomplished throughout 2016.

NETWORKING

Both the Solo & Small Firm Conference and the OBA Annual Meeting were well attended by young attorneys from across the state. At both events the YLD hosted networking receptions and hospitality suites. Not only were these events attended by young lawyers, but they were also attended by many veteran lawyers. The YLD also hosted receptions at both swearing-in ceremonies for the new admittees who passed the February and July bar exams.

REPRESENTATION

Board members and execs represented the OBA YLD in San Diego and San Francisco for the ABA Midyear Meeting and Annual Meeting. The OBA YLD was also represented at the ABA YLD Spring and Fall Conferences in St. Louis and Detroit.



YLD Chair Bryon Will congratulates Aaron Pembleton, Blake Lynch, Brandi Nowakowski, Nickie Day, LeAnne McGill, Jordan Haygood and Clayton Baker for their outstanding service to the YLD during the OBA Annual Meeting YLD Friends and Fellow Networking Reception.

COMMUNITY SERVICE

In May and August the YLD held community service projects in conjunction with the monthly meetings in towns throughout Oklahoma. YLD board members and executives took time on weekends to travel to those towns and serve on projects, from gardening at Loaves and Fishes in Enid to cleaning and organizing the donation warehouse of Abundant Blessings in Grove.

AWARDS

At the OBA Annual Meeting the YLD Kick It Forward Committee was awarded the Golden Gavel Award as well as Immediate Past Chair LeAnne McGill being awarded the Outstanding

Young Lawyer Award for 2016. At the ABA Annual Meeting in San Francisco the OBA YLD received first place in Division 1B for Service to the Public for the Back Pack Food Drive Program and second place in Division 1B for Service to the Bar for the Kick It Forward Program and Tournament.

Looking forward to 2017, I imagine the YLD will realize many of the same goals and accomplishments if not more, along with maintaining its outstanding credentials with the OBA and its members. Many members of the board and lawyers around the state are terming out of their qualifications as YLD; however, many new faces

are arriving to take the reins where the others left off.

Chair-Elect Lane Neal will take over at the helm come January and I will continue my service as immediate past chair. There will be several new faces on the board next year and I believe they represent the cream of the crop of Oklahoma young lawyers. I hope all who are eager to get involved with the YLD will continue to reach out to either Lane or me to get connected and get involved with the next event.

I want to thank each of the 2016 YLD Board of Directors, Aaron Pembleton, Blake Lynch,

Sarah Stewart, Jordan Haygood, Faye Rodgers, Dustin Conner, Allyson Dow, Brittany Byers, Clayton Baker, Brad Brown, Maureen Johnson, John Hammons, Grant Kincannon, Robert Bailer, April Moaning, Piper Bowers, Dylan Erwin and Matt Sheets. I would also like to thank the executive officers, Lane Neal, LeAnne McGill, Nathan Richter and Brandi Nowakowski along with President Garvin Isaacs, President-Elect Linda Thomas and OBA Executive Director John Morris Williams for the tremendous support and teamwork throughout this year. I appreciate everyone's service

and dedication to the OBA YLD and its mission.

I'm not bidding farewell because I'll still be around. Nevertheless, I do wish everyone good luck and bid you Godspeed throughout your endeavors.

Sincerely....

ABOUT THE AUTHOR



Bryon Will practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at bryon@bjwilllaw.com.

OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

2017 Issues

■ January
Meet Your Bar Association
Editor: Carol Manning

■ February
Energy Law
Editor: Luke Adams
ladams@tisdalohara.com
Deadline: Oct. 1, 2016

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

■ March
Work/Life Balance
Editor: Melissa DeLacerda
melissde@aol.com
Deadline: Oct. 1, 2016

■ April
Law Day
Editor: Carol Manning

■ May
Constitutional Law
Editor: Erin L. Means
erin.l.means@gmail.com
Deadline: Jan. 1, 2017

■ August
Technology & Office Management
Editor: Amanda Grant
amanda@spiro-law.com
Deadline: May 1, 2017

■ September
Bar Convention
Editor: Carol Manning

■ October
Insurance Law
Editor: Renée DeMoss
rdemoss@gablelaw.com
Deadline: May 1, 2017

■ November
Administrative Law
Editor: Mark Ramsey
mramsey@soonerlaw.com
Deadline: Aug. 1, 2017

■ December
Ethics & Professional Responsibility
Editor: Leslie Taylor
leslietaylorjd@gmail.com
Deadline: Aug. 1, 2017

December

- 22 OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358

26-27 OBA Closed - Christmas (observed)

January

2 OBA Closed - New Year's Day (observed)

3 OBA Government and Administrative Law Section meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Michael Mannes 405-473-0352

5 OBA Lawyers Helping Lawyers Discussion Group; Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; Contact Jeanne M. Snider 405-366-5466 or Hugh E. Hood 918-747-4357

6 OBA Alternative Dispute Resolution Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact John H. Graves 405-684-6735

11 OBA Law Day Committee Meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Brittany Jewett 405-521-1302 or Al Hoch 405-521-1155

OBA Women in Law Committee meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Deb Reheard 918-689-9281 or Cathy Christensen 405-752-5565

12 OBA High School Mock Trial Committee meeting; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066

13 OBA Law-related Education Committee meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Godfrey 405-525-6671 or Brady Henderson 405-524-8511

OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Luke Barteaux 918-585-1107



16 OBA Closed - Martin Luther King Day

18 OBA Indian Law Section meeting; 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Deborah Reed 918-728-2699

20 OBA Board of Governors Swearing-In Ceremony; 10 a.m.; Supreme Court Ceremonial Courtroom, Oklahoma Capitol; Contact John Morris Williams 405-416-7000

OBA Board of Governors meeting; 11:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact John Morris Williams 405-416-7000

24 OBA Board of Editors meeting; 2 p.m.; Oklahoma Bar Center, Oklahoma City, Contact Melissa DeLacerda 405-624-8383

OBA Solo & Small Firm Conference Planning Committee meeting; 3:30 p.m.; Oklahoma Bar Center, Oklahoma City; Contact Melissa DeLacerda 405-624-8383 or Stephen D. Beam 580-772-2900

26 OBA Professionalism Committee meeting; 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358

27 OBA Professional Responsibility Commission meeting; 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

31 OBA Legal Intern Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City; Contact H. Terrell Monks 405-733-8686

OBA Member Michael Burrage Inducted into Oklahoma Hall of Fame

OBA member and former OBA President Michael Burrage was inducted into the Oklahoma Hall of Fame Nov. 17. He was one of six in the hall's 89th induction class which is comprised of Troy Aikman, Gen. Rita Bly Aragon, Dan Dillingham, Becky Dixon, Kelli O'Hara and Russell Westbrook.

Mr. Burrage was born in Durant and is a member of the Choctaw Nation of Oklahoma. He received a bachelor's degree in business administration from Southeastern in 1971 and his J.D. from the OU College of Law in 1974.

He was in private practice in Antlers from 1974 to 1994 when he was nominated by President Bill Clinton to be a U.S. district judge. He served as a federal judge for all three U.S. district courts in Oklahoma and was the first Native American federal judge. He also sat on the U.S. Court of Appeals for the 10th Circuit and in 1996 he became the chief judge at the U.S. District Court for the Eastern District of Oklahoma. He is now senior managing partner at Whitten Burrage in Oklahoma City.



Michael Burrage

Induction into the Oklahoma Hall of Fame is considered the single-highest honor an individual can receive from the state. Inductees will have their biographies, photos and fun facts available through interactive exhibits at the Gaylord-Pickens Museum.

MCLE Deadline Approaching

Dec. 31 is the deadline to earn any remaining CLE credit you need for 2016 without having to pay a late fee. Not sure how much credit you still need?



You can view your MCLE transcript online at OKMCLE.org. You can also pay dues online and register for any CLE you still need. Check out great CLE offerings at www.okbar.org/members/CLE. If you have questions about your credits, email MCLE@okbar.org.

OBA Holiday Hours

The Oklahoma Bar Center will be closed Monday and Tuesday, Dec. 26-27, in observance of Christmas. In addition, the bar center will also be closed Monday, Jan. 2, 2017, in observance of New Year's.

Connect With the OBA Through Social Media

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



New OBA Board Members to Take Oath

Nine new members of the OBA Board of Governors will be sworn in to their positions Jan. 20, 2017, at 10 a.m. in the Supreme Court Ceremonial Courtroom at the state Capitol. Officers set to take their oath are Linda S. Thomas, Bartlesville, president; Kimberly Hays, Tulsa, president-elect and Jennifer Castillo, Oklahoma City, vice president.

To be sworn in to the Board of Governors to represent their judicial districts for three-year terms are Mark E. Fields, McAlester; Jimmy D. Oliver, Stillwater; Bryon J. Will, Yukon and James R. Hicks, Tulsa, at large.

To be sworn in to one-year terms on the board are Garvin Isaacs, Oklahoma City, immediate past president and Lane Neal, Oklahoma City, Young Lawyers Division chairperson.

OBA Members Give Back

OBA members are extremely charitable, especially during the holiday season. Below are several stories about our members giving back to their communities.

McIntyre Law partnered with the Oklahoma Association for Justice, the Regional Food Bank of Oklahoma and Lawyers Fighting Hunger to host the seventh annual Day of Kindness in Oklahoma City and Live Local, Give Local in Tulsa. From the donations of 102 law firms or individual attorneys they were able to distribute nearly 7,000 turkeys to Oklahoma families in need and fed more than 4,000 hungry people with hamburgers, hot dogs and other treats throughout the day.



Riggs, Abney, Neal, Turpen, Orbison, Lewis attorneys hand out Thanksgiving meals at the annual Lawyers Fighting Hunger event.

The McCurtain County Bar Association donated money to McCurtain County Christmas Council, Hand-to-Hand food pantry, Idabel Main Street Program, Idabel Chamber of Commerce, the Forest Heritage Center and the Museum of the Red River.

Kerry McReynolds Bailey established a charitable corporation that operates a food bank. She assembled 85 Thanksgiving food baskets and delivered the baskets to families in McCurtain County and also plans to distribute Christmas food baskets.

Justice Noma Gurich, Martin Ozinga, Judge Don Andrew, Jim Vogt, Chris Tytanic, retired Judge John Amick, Bill Price, Hassan Essaili and the Kiwanis Club of Oklahoma sponsored a party for special needs children attending Oklahoma public schools and provided two gifts for more than 80 students. They also ring the bell for the Salvation Army. Justice Noma Gurich has been doing it for so long she even owns her own bell!

Riggs, Abney, Neal, Turpen, Orbison Lewis lawyers participated in this year's Lawyers Fighting Hunger meal distribution. They also donated more than 1,000 canned food items to the Eastern Oklahoma Food Bank, hosted an angel tree and purchased gifts for 30 children and collected money from employees wearing jeans throughout the month of December which will be donated to Mission John 3:16 to feed the hungry.

OBA Energy and Natural Resources Section and Environmental Law Section each donated \$1,000 to the YWCA's Oklahoma City Santa's Store, which provides YWCA clients and their kids with new toys, clothes and other gifts.

Got Holiday Package to Ship? OBA Members Save Money!

Through the OBA, you can save on shipping with UPS. Take advantage of discounts of up to 34 percent, plus 50 percent off select services for up to four weeks after you enroll! Save on a broad portfolio of shipping services, including air, international, ground and freight services. To enroll and start saving, visit savewithups.com/oba or call 1-800-MEMBERS (800-636-2377), M-F, 7 a.m.-5 p.m. CST.



OBA Member Resignations

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

Jane Lagree Allingham
OBA No. 241
741 Silversmith Circle
Lake Mary, FL 32746

Thomas Dean Tays
OBA No. 10983
8265 E. Rawhide Trail
Tucson, AZ 85750

Kudos

Henry Hoss was honored with the 2016 Outstanding Senior Alumni Award by the TU College of Law Alumni Association at its annual lunch and awards ceremony on Nov. 2.

Charles H. Moody Jr. of Rodolf and Todd has been elected a Fellow of the American College of Trial Lawyers. He was officially inducted in September at the annual meeting in Philadelphia.

Sen. David Holt has been appointed by the president pro tempore of the Oklahoma Senate as one of the commissioners representing Oklahoma to the nation's Uniform Law Commission. Sen. Holt was also named Outstanding Young Alumnus of the OCU School of Law at its annual awards luncheon.

The OBA Criminal Law Section presented several awards at the OBA Annual Meeting. **Heidi Baier** and **Ricky McPhearson** were named Professional Advocate of the Year, **Michael Wilds** was recognized with the Directors Award, **Robert Don Gifford** was the section's first Cardozo Award recipient and **Anthony G. Mitchell** received the Chairman's Award.

John M. Settle was presented with the Kansas County and District Attorneys Associ-

ation's Lifetime Achievement Award. The award was presented at the association's annual meeting in Wichita, Kansas.

Irven Box was presented with a Seminole County Bar Association Lifetime Membership Award at the Seminole County Bar Association's 10th Annual Las Vegas CLE on Friday, Oct. 28. The award was presented by Seminole County Associate District Judge Tim Olsen, on behalf of the Seminole County bar.

Steven E. Clark's second novel in his Kristen Kerry legal genre series *Justice is for the Deserving* was published by Rorke Press.

The OBA Family Law Section presented awards at the Annual Meeting. The awards included: Chair Award, **Allyson Dow, Virginia Henson, Keith Jones, Amy Page** and **Kimberly Hays**; Judge of the Year Award, **Barbara Hatfield** and **David Smith**; Attorney of the Year Award, **M. Shane Henry**; GAL of the Year Award, **Michelle Smith**; Mediator of the Year Award, **Jennifer Irish**.

On The Move

Grant T. Lloyd announces the formation of Lloyd Legal PLLC. Lloyd Legal is located at 525 S. Main St., Ste. 1130 in Tulsa and 104 S.

Muskogee Ave. in Tahlequah. To contact Mr. Lloyd call 918- 809-5855 or email grant@lloyd.legal.

James W. Tilly announces the opening of Council Oak Mediation, a mediation firm with offices located at 1639 S. Carson, Tulsa 74119. Mr. Tilly can be contacted at 918-583-8868 or jwtilly@tilly.com.

Steven L. Tolson reopens this law practice on Jan. 1, 2017, practicing in business and civil litigation, business formation, corporate and commercial law, probate, divorce, general practice and civil mediation. He can be reached at 405-752-7541 or at stevenltolson@gmail.com.

At The Podium

Paul R. Foster was a featured speaker at the Community Bankers Association of Oklahoma Annual Convention held in Oklahoma City Sept. 14-16. The presentation covered areas of current regulatory emphasis for banks as well as specifically addressing measures each agency is taking to reduce the regulatory burden on community banks.

Cori H. Loomis and **Jefrey E. Tate** presented "Municipal Bankruptcy Under Chapter 9: A Panacea or Pandora's Box?" before the Bankruptcy Section of the Oklahoma County Bar Association on Oct. 19.

Irven Box presented on criminal law at the Seminole County Bar Association's 10th Annual Las Vegas CLE on Friday, Oct. 28.

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 promo-

tion or an award, or given a talk or speech with statewide or national stature, we'd like to hear from you. Sections, committees, and county bar associations are encouraged to submit short stories about upcoming or recent activities. Honors bestowed by other publications (*e.g.*, *Super Lawyers*, *Best Lawyers*, etc.) will not be accepted as announcements. (Oklahoma-based publications are the exception.) Information

selected for publication is printed at no cost, subject to editing, and printed as space permits.

Submit news items via email to:

Lacey Plaudis
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the Feb. 11 Issue must be received by Jan. 3.

IN MEMORIAM

Thomas M. Bartheld of McAlester died Nov. 4. Mr. Bartheld was born on Nov. 15, 1957, in Kansas City, Missouri. He graduated from McAlester High School in 1976. He graduated from OSU in 1981, earning a bachelor's degree in political science and sociology. In 1985 he received his J.D. from the OU College of Law. After graduation, he became a partner in the Wadley & Bartheld Law Firm in McAlester. In 1987 he opened his own law firm and practiced law until he was elected associate district judge, taking office on Jan. 9, 1995. In 2005 he was elected district judge, where he served until his retirement in 2014. He also served as adjunct professor at Eastern Oklahoma State College in 1990-1991. He was a member of the South McAlester Masonic Lodge 96, served on the Salvation Army Advisor Board and was chairman from 1986 to 1989.

James F. Deaton of Okfuskee died Nov. 4 in Norman. Mr. Deaton was born Sept. 3, 1949, in Oklahoma City. He was a 1966 graduate of Mason High School and later re-

ceived a bachelor's degree from OU and a J.D. from the OU College of Law. He worked many years as an attorney in Okemah and as the pastor of the Welty Full Gospel Chapel. He enjoyed reading and social media. **He also served his country proudly with the United States Air Force and served overseas during the Vietnam War.**

Broc L. Elmore of Norman died Oct. 31. Mr. Elmore was born June 16, 1975, in Oklahoma City. He earned his bachelor's degree in 1998 from Texas A&M University. He was a proud member of the Texas Aggies 1993 Southwest Conference football championship team. For many years he had a successful career as a stockbroker. Later he earned his MBA from OU and his J.D. from the OU College of Law. He was an avid traveler, golfer and grill master who spent many afternoons in the backyard barbecuing for friends and family.

Hyla H. Glover died Oct. 31. Ms. Glover was born Jan. 22, 1936, in Oklahoma City. She was a 1954 grad-

uate of Classen High School. She also attended Briarcliff Junior College and OU, where she was a member of Kappa Alpha Theta sorority. In 1983 she graduated from the OU College of Law. She practiced law until her retirement from practice in 1998. She was also a member of the Junior League of Oklahoma City and served on the boards of Planned Parenthood, the Parents' Assistance Center and the Mercy Women's Health Center. In lieu of flowers, the family suggests a donation in Ms. Glover's memory to Rebuilding Together Oklahoma City, 730 West Wilshire Blvd. Suite 108, Oklahoma City 73116, the General Fund of Mayflower Congregational Church or to the charitable organization of your choice.

Robert J. Hampton died Oct. 17, 2015. He was born May 1, 1928, in Tulsa. After graduating from Tulsa Central High School, **he served in the U.S. Navy during the early Cold War years.** While working as a draftsman, he earned his degree in business administration from TU in 1952. He was employed with Loffland

Brothers Drilling Co. for 28 years, during which time he also established a children's clothing store, Angel Arbor, and obtained his J.D. from the TU College of Law in 1980. He practiced law for 28 years.

H. Tom Hendren died Nov. 1 in Sand Springs. Mr. Hendren was born July 21, 1922, in Mattoon, Illinois. After graduating from Mattoon High School in 1940, he enrolled in the College of Economics at the University of Illinois. **Following his freshman year, he became a first lieutenant in the U.S. Army and served in WWII in the Philippines and Korea.** After his honorable discharge, he returned to the University of Illinois to graduate in 1946. In the fall of that same year he enrolled in the University of Texas School of Law from which he graduated in 1950. He relocated to Oklahoma working for an oil company. He was a sole practitioner in Tulsa and later in Sand Springs and recently was honored for his 60 years of service in the Oklahoma Bar Association.

Donald A. Kihle died Oct. 31. Mr. Kihle was born April 4, 1934, in Noonan, North Dakota. He graduated from Minot High School in 1957. He went on to attend the University of North Dakota and earned a Bachelor of Science in industrial engineering. **After graduation he served for two years as a second lieutenant in the United States Army.** After serving in the military he accepted a position as an engineer at Continental Pipeline in Ponca

City. He received his J.D. from the OU College of Law in 1967. He then moved to Tulsa and took a position as a partner at Huffman, Arrington, Kihle, Gaberino & Dunn. In lieu of flowers, contributions can be made to the Alzheimer's Association Research Fund, P.O. Box 96011, Washington, DC 20090-6011.

Robert Dell Lemon died Oct. 22 in Oklahoma City. Mr. Lemon was born January 3, 1929, in Shattuck. He grew up in Booker, Texas, in the Dust Bowl. He received his Bachelor of Science from OSU in 1951 and his J.D. in 1954 from the University of Texas School of Law. He accepted a position with Max Boyer's law firm, which began his long and distinguished career as senior partner of the Lemon Shearer Phillips and Good firm — now the Lemon Law Firm. He served as city attorney of Perryton, Texas, and was chief counsel of the North Plains Groundwater Conservation District for 50 years. In lieu of flowers, contributions can be sent to one of the following organizations, or to a charity or other cause of your choice: Planned Parenthood Great Plains, 619 NW 23rd St., Oklahoma City 73103, 405-528-2157 or Trust Women, 1240 SW 44th Street, Oklahoma City, 73109, 316-425-3215

Fred J. Shaeffer of Keystone died Nov. 13 in Norman. Mr. Shaeffer was born Dec. 20, 1952, in Tulsa. He attended high school in Sand Springs and graduated from the OU College of Law in 1978. He tried over 500 jury trials, was

an assistant district attorney and an associate municipal judge. He loved helping the poor and those who were between a rock and a hard place. The family requests that memorial donations be made to Norman Public Schools in his honor.

John S. Thomas died Oct. 30 in Oklahoma City. Mr. Thomas was born April 11, 1942, in Enid. He graduated from Wakita High School in 1960 and from OU in 1964. **Immediately after college he was commissioned as second lieutenant in the U.S. Army. He saw active duty in Germany and Vietnam. After active duty he enlisted in the Oklahoma Army National Reserves. He finished with the military with the rank of colonel.** When he was released from active duty, he received his J.D. from the OU College of Law. He opened a private law firm in Enid that stayed open for over 40 years.

Larry M. Weber passed away Sept. 21 in Palm Springs, California. Mr. Weber was born June 4, 1942, in Olustee. He graduated from Olustee High School in 1960 and obtained his undergraduate degree from OU in 1964 and his J.D. from the OU College of Law in 1967. He first practiced law as a plaintiff's attorney in Jackson County with Bob Harbison. He later practiced with Keith Myers and Suzanne Mollison. He served as a U.S. administrative law judge for 20 years before retiring. He enjoyed researching legal issues and investing in the stock market.

2016 Gift Guide for Lawyers

Buying gifts for lawyers can be tough. Check out these gift ideas starting at \$3 that don't include items with a gavel or the scale of justice.

goo.gl/HGy7i7



Wrap up 2016

Pay dues, check your credits, renew committee membership, enroll in last-minute CLE and more.

Ams.okbar.org



Five Ways to Improve Your Law Firm's Culture

No matter what size of law firm you work in, you can always find ways to improve your firm's culture. Here are five ways your law firm can build and maintain a great culture.

goo.gl/TZoVzz



How to Break a Bad Habit

Have you ever tried to break a bad habit, only to give up in frustration? Researchers at University College, London, found it takes 66 days to form or break a habit. That seems like a long time, but here are specific stages to go through that will make the process feel shorter.

goo.gl/jrbP55



SERVICES

OF COUNSEL LEGAL RESOURCES — SINCE 1992 —
Exclusive research & writing. Highest quality: trial and appellate, state and federal, admitted and practiced U.S. Supreme Court. Over 20 published opinions with numerous reversals on certiorari. **MaryGay LeBoeuf** 405-728-9925, marygay@cox.net.

INTERESTED IN PURCHASING PRODUCING & NONPRODUCING Minerals; ORRI; O & G Interests. Please contact: Patrick Cowan, CPL, CSW Corporation, P.O. Box 21655, Oklahoma City, OK 73156-1655; 405-755-7200; Fax 405-755-5555; email: pcowan@cox.net.

APPEALS and LITIGATION SUPPORT

Expert research and writing by a veteran generalist who thrives on variety. Virtually any subject or any type of project, large or small. **NANCY K. ANDERSON**, 405-682-9554, nkanderson@hotmail.com.

Creative. Clear. Concise.

BRIEF WRITING, APPEALS, RESEARCH AND DISCOVERY SUPPORT. Eighteen years experience in civil litigation. Backed by established firm. **Neil D. Van Dalsem**, Taylor, Ryan, Minton, Van Dalsem & Williams PC, 918-749-5566, nvandalsem@trsvlaw.com.

HANDWRITING IDENTIFICATION POLYGRAPH EXAMINATION

Board Certified	Court Qualified
Diplomate — ABFE	Former OSBI Agent
Life Fellow — ACFEI	FBI National Academy

Arthur D. Linville 405-736-1925

MEDICAL MALPRACTICE CASE REVIEW: Board certified pediatrician and member of the Oklahoma Bar Association. Available to review any issues involving neonates, children and adolescents. **William P. Simmons, M.D., J.D.** 850-877-1162 wsimmons@northfloridapeds.com.

SECTION 1031 LIKE-KIND EXCHANGE SERVICES

*Deferred Exchanges · Reverse Exchanges ·
Construction Exchanges*

D.L.H. Exchange Services, L.L.C.

Affiliated with the law firm of Benson & Houston, P.L.L.C.
Contact Dal Houston at 580-327-1197,
or dal@bensonhouston.com

WANT TO PURCHASE MINERALS AND OTHER OIL/GAS INTERESTS. Send details to: P.O. Box 13557, Denver, CO 80201.

OFFICE SPACE

NW OKC OFFICE SPACE AVAILABLE. One large office with great lake view and secretarial area. Furnished reception area, conference room, kitchen, internet and free parking. Contact erfpc@feiler-law.com.

2812 NW 57TH SUITE 101 OKC. 1350 SF OF VERY NICE OFFICE SPACE with five rooms, storage, bathroom and kitchen. Close to three highways nearby for easy commuting. Search craigslist ad using the address for pictures and details. Call 405-426-7820.

OFFICE SHARE

OFFICE SHARING SPACE FOR RENT. Centrally located between Tulsa, Wagoner, Mayes, Craig and Rogers counties. Rent is \$500 per month with all bills paid except telephone service. Two conference rooms are available for use. Send inquiries to P.O. Box 458, Catoosa, OK 74015.

POSITIONS AVAILABLE

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

DOWNTOWN OKC/TULSA AV-RATED INSURANCE DEFENSE AND BUSINESS LITIGATION FIRM seeking attorney with 5-35 years' experience to work in either the OKC or Tulsa office. Must have strong research and writing skills, good work ethic and organizational skills. Litigation experience is a must. Compensation commensurate with level of experience and qualifications. Portable book of business not required but considered a plus and taken into account in establishing compensation package. Benefits include paid vacation time, 2% IRA contribution and health insurance. Please send resume and current writing sample to olssonhome@gmail.com.

SMALL DOWNTOWN OKLAHOMA CITY AV RATED LAW FIRM, primarily state and federal court business litigation practice, with some transactional and insurance defense work, has very nice, newly renovated office space available for an experienced lawyer interested in an of counsel relationship or office share arrangement. Litigation experience not required. Send resume to "Box M," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, Oklahoma 73152.

PART-TIME PARALEGAL/OFFICE HELP for 2-attorney estate planning/probate office in NW OKC. 16-20 hours per week. Paralegal skills required; admin/bookkeeping helpful. Compensation depends on experience. Please send resume to melissajgill@yahoo.com or Law Office, P.O. Box 20561, Oklahoma City, OK 73156-0561.

POSITIONS AVAILABLE

SMALL DOWNTOWN OKLAHOMA CITY FIRM OF DEFENSE ATTORNEYS WITH OFFICES IN DALLAS SEEKS AN ASSOCIATE with 4 to 6 years' experience in product liability, catastrophic injury, premises liability, medical malpractice, trucking/transportation, commercial litigation or expert intensive litigation. The firm offers an atmosphere of strong camaraderie with many long time employees and excellent support staff. Need a self-starter who can hit the ground running. Please send your resume and salary requirements to edminson@berryfirm.com.

CHILD SUPPORT SERVICES IS SEEKING A FULL-TIME ATTORNEY for our Miami District Office located at 301 N Central, Idabel, OK 74745. This position is assigned the primary responsibility as managing attorney for a Child Support Services office. The position involves negotiation with other attorneys and customers as well as preparation and trial of cases in child support hearings in district and administrative courts and the direction of staff in the preparation of legal documents. In addition, the successful candidate will help establish partnership networks and participate in community outreach activities within the service area in an effort to educate others regarding our services and their beneficial impact on families. Position will provide recommendations and advice on policies and programs in furtherance of strategic goals. In depth knowledge of family law related to paternity establishment, child support, and medical support matters is preferred. Preference may also be given to candidates who live in or are willing to relocate to the service area. Active membership in the Oklahoma Bar Association is required. This position does not have alternate hiring levels. The salary is \$5451.58 per month with an outstanding benefits package including health and dental insurance, paid leave and retirement. Interested individuals must send a cover letter noting announcement number 16-R135U, resume, three reference letters and a copy of current OBA card to: www.jobs.ok.gov, under unclassified positions. Applications must be received no earlier than 8 a.m. on 11-29-16 and no later than 5 p.m. on 12-30-16. For additional information about this job opportunity, please email Barbara.Perkins@OKDHS.org. The State of Oklahoma is an equal opportunity employer.

EXPERIENCED ATTORNEY: GROWING MULTI-JURISDICTIONAL OKC LAW FIRM SEEKS ASSOCIATE: 3-5 years' commercial litigation experience in both federal and state court. Ideal candidate will have a strong research and writing background, extensive court and deposition experience and capable of managing cases independently with direction from senior attorneys. Unique opportunity to work with sophisticated clients in a great work environment and an extremely generous benefit and compensation package with \$65,000-\$80,000 salary based on experience. Please apply online at NLLGCareers.com. Please attach writing samples along with your resume.

POSITIONS AVAILABLE

SPENCER FANE IS LOOKING FOR A MID-LEVEL ASSOCIATE TO JOIN OUR LITIGATION PRACTICE GROUP in our Oklahoma City office. The ideal candidate will have 5-7 years of experience with all aspects of business litigation. In addition, the preferred candidate would have experience with environmental law, oil and gas law and state and local government law. The following qualifications are required: Juris Doctorate degree from accredited law school with excellent academic credentials, admission to Oklahoma, ability to interface directly with clients, exceptional written and oral communication skills, strong decision-making, problem-solving and organization skills and outstanding judgment. Please send your cover letter and resume to sflanery@spencerfane.com.

THE OKLAHOMA CORPORATION COMMISSION has an opening in its Office of Administrative Proceedings, Oklahoma City, for an administrative law judge to conduct hearings within the agency's areas of regulatory jurisdiction, salary level to be determined based upon education and work experience. Applicants must be admitted to the Oklahoma Bar Association or eligible for admission without examination. Heightened interest will be given to licensed attorneys with undergraduate or graduate degrees in engineering, geology, other fields of natural or applied science, accounting, finance, economics or significant professional or academic experience with matters within the agency's jurisdiction. Send resume and writing sample to Ms. Patrica Walters, Human Resources Department, Oklahoma Corporation Commission, P. O. Box 52000, Oklahoma City, Oklahoma, 73152-2000, Telephone: 405-522-2220, FAX: 405-522-3658, Email: p.walters@occcmail.com. Deadline: Dec. 30, 2016.

THE OKLAHOMA DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES (ODMHSAS) IS CURRENTLY ACCEPTING APPLICATIONS FOR GENERAL COUNSEL to perform highly responsible administrative and professional legal work in directing and coordinating the operations and functions of the legal services of the department. Directs and supervises the activities of legal services which involve preparation of cases for court and administrative proceedings, directs the drafting of contracts, legislation, administrative rules and policies and advises the agency, board, and ODMHSAS personnel regarding legal matters. Qualifications: Graduate of an accredited law school; active membership in the Oklahoma Bar Association and a minimum of six years in the practice of law and a minimum of three years of supervisory experience. \$95,000+. As an employer of the State of Oklahoma, ODMHSAS offers excellent benefit and retirement packages; reference the job title and 2017-37 CO with a copy of your most recent performance evaluation and apply to humanresources@odmhsas.org. Reasonable accommodation to individuals with disabilities may be provided upon request. Application period: 12/02/16 – 01/13/17. EOE.

POSITIONS AVAILABLE

ASSOCIATE NEEDED. AV RATED LAWYER IN CLAREMORE, OK. Practice consists primarily of criminal defense, domestic relations and estate planning. 2-5 years' experience including court appearances, trials and research. Must have strong interpersonal/communications skills and work independently. Competitive salary and benefits. Unique opportunity for the right lawyer. Send references to: "Box D," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

GULF OIL LIMITED PARTNERSHIP, A DIVERSE REFINED PRODUCTS TERMINALING, STORAGE AND LOGISTICS BUSINESS, and leading distributor of motor fuels, seeking attorney to work in its corporate offices in Wellesley Hills (Boston), MA. Gulf owns and operates a network of refined product terminals with access to Mid-Continent, Gulf Coast and NYH supply hubs. Five to 15 years energy industry experience, particularly in terminal and trading operations, is preferred. Litigation and commercial experience highly desirable. Transactional work with private equity and master limited partnerships a plus. Role will report directly to general counsel. Significant opportunities for advancement as the company and the department continue to grow. Apply here: https://workforcenow.adp.com/jobs/apply/posting.html?client=GulfOilLP&jobId=92809&lang=en_US&source=CC3.

ESTABLISHED SOUTHWESTERN OKLAHOMA LAW FIRM IS SEEKING AN ESTABLISHED ASSOCIATE ATTORNEY with significant general civil litigation, research and writing skills. The successful applicant will possess at least 3-5 years' experience and be self-motivated. Submit resume, references and a writing sample to: "Box U," Oklahoma Bar Association, P.O. Box 53036, Oklahoma City, OK 73152.

POSITIONS AVAILABLE

THE OKLAHOMA DISTRICT ATTORNEYS COUNCIL (DAC) is pleased to announce that DAC has been designated by the U.S. Department of Justice to award and disburse loan repayment assistance through the John R. Justice (JRJ) Loan Repayment Program. The State of Oklahoma has received a total of \$36,871 to be divided among eligible full-time public defenders and prosecutors who have outstanding qualifying federal student loans. For more information about the JRJ Student Loan Repayment Program and how to apply, go to www.ok.gov/dac. Under "About the DAC", click on the "John R. Justice Student Loan Repayment Program" link. Applications are available online. Application packets must be submitted to the DAC or postmarked no later than Jan. 18, 2017.

CLASSIFIED INFORMATION

REGULAR CLASSIFIED ADS: \$1.25 per word with \$35 minimum per insertion. Additional \$15 for blind box. Blind box word count must include "Box __," Oklahoma Bar Association, PO Box 53036, Oklahoma City, OK 73152."

DISPLAY CLASSIFIED ADS: Bold headline, centered, border are \$60 per inch of depth.

DEADLINE: See www.okbar.org/members/BarJournal/advertising.aspx or call 405-416-7084 for deadlines.

SEND AD (email preferred) stating number of times to be published to:

**advertising@okbar.org, or
Mackenzie McDaniel, Oklahoma Bar Association,
PO Box 53036, Oklahoma City, OK 73152.**

Publication and contents of any advertisement are not to be deemed an endorsement of the views expressed therein, nor shall the publication of any advertisement be considered an endorsement of the procedure or service involved. All placement notices must be clearly nondiscriminatory.

DO NOT STAPLE BLIND BOX APPLICATIONS.

My Experience Gives Advocacy Special Meaning

By Candin A. Hobbs

I remember the day quite clearly. It was sometime in winter 2011. I was logging in to a webinar, an activity that is quite common for attorneys these days. This time, however, I wasn't learning about an update on tax laws, new office software or ethics. This day, as I sat nestled on my chair with ear plugs so as not to wake the angel sleeping next to me, I was studying, "The Late Effects of Pediatric Cancer Treatment." As my two-year old son, newly diagnosed with acute lymphoblastic leukemia, slept, lightly snoring beside me, I studied the heartbreaking side effects of the treatments that were necessary to save him from cancer.

Today, years from that day, he is off chemotherapy, in remission and officially "cancer free." His chemotherapy treatment lasted over three years, almost until his sixth birthday. He is putting cancer behind him and moving on. As I think back to that day now and all the time in between, I think, even with a bit of humor, how the whole journey has shown me the true meaning of the word "advocate."

I engaged in negotiation every day with a little person extremely skilled in the art. While we seldom hashed out the details of a contract, we negotiated every single day regarding far more important issues, such as taking medicine (I fill two syringes; you

can take one and squirt the nurses with the other), bed times and how many times we can ride the hospital elevators up and down. I once talked him out of leaving his hospital room (he was in isolation) by allowing him to straddle the mobile IV unit and zoom it around the room. He soon learned that I could cave in anytime that he threatened to push the code blue button. He wanted to be a lawyer just like mommy.



The skill of researching that I learned to love in law school served me well in finding new information regarding childhood cancer. In my law practice, I could frequently be found with a court case or a law journal article on my desk and a *Black's Law Dictionary* in my lap. During my son's treatment, I spent hours each night poring over clinical trials and studies and oncology journals, with a medical dictionary in my lap. I consulted the medical dictionary often since the medical

articles are written in a language foreign to me.

In the last years since his diagnoses, I have come to understand the term "zealous advocate" in a way I never imagined. I checked and recalculated every dose of every medicine that he ever received. I awoke all hours of the night, peppering nurses with questions. The prize had never been more valuable. Day after day, I fought for my little hero, and in the end, we won the battle. He won the battle. Victory has never been sweeter.

It didn't take long for me to realize that he wasn't the only child with cancer who needs an advocate. These kiddos are now my passion, and I will not stop advocating for them.

Today, my 8-year-old little man still wants to be a lawyer but also a paleontologist, baseball player and astronaut, among other things. I look forward to someday returning to the days of courtrooms and offices I have been missing, but I know now I will never forget to take an unexpected day off, just to count precious little fingers and toes and play catch with the little ones who call me mommy.

Ms. Hobbs is executive director of the Gold4Kids Cancer Foundation of Tulsa.

ENSURE YOU HAVE YOUR CLE **BEFORE BEGINNING THE NEW YEAR**

WHAT TEENAGERS TEACH US

ABOUT COMMUNICATION
AND CANDOR

3 / 3

& ROLL OVER THE EXTRA!!

oba  cle
continuing legal education

Featured Presenter:
Stuart Teicher, CLE Performer

From 9:00 a.m. – Noon, join internationally recognized speaker Stuart Teicher, Esq. as he shows how our interaction with teenagers teach us valuable lessons about the rules on communication (1.6) and candor (4.1 and 3.3). Stuart will also show how these rules can be used to rehabilitate relationships with your clients — but he makes no promises about improving the relationship with your teenagers!

During the afternoon program, Stuart explains both the expanding ethical pitfalls and the evolving ethical duties that lawyers face when using social media and other new technologies. Stuart will review ethics opinions from across the country and explain the rules in a substantive, but humorous way. He'll cover developments in the rules on competence (1.1), supervision (5.1 and 5.3), and much more!

TECH TOCK, TECH TOCK:

SOCIAL MEDIA AND THE COUNTDOWN
TO YOUR ETHICAL DEMISE

3 / 3

DECEMBER 29

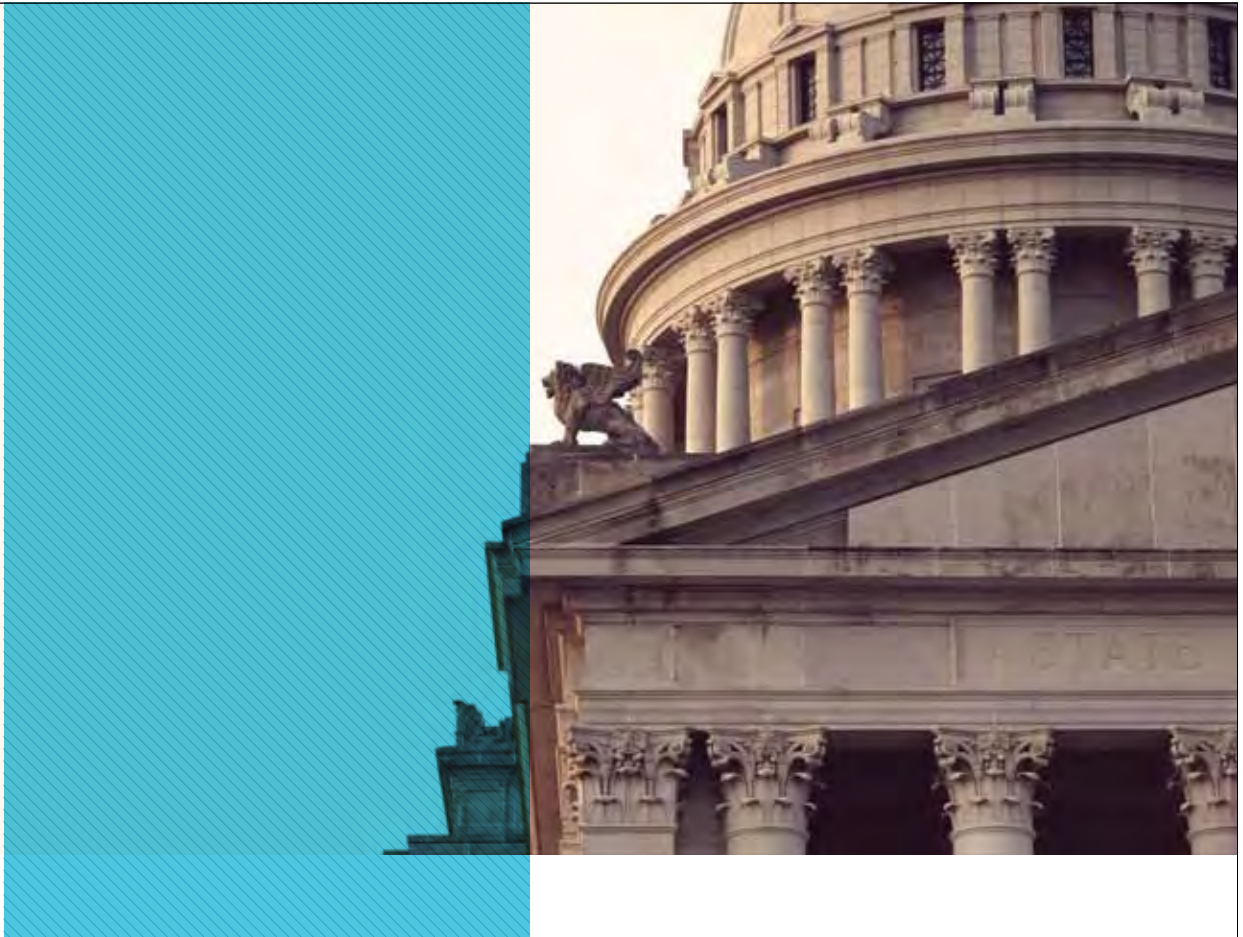
Double Tree by Hilton, Tulsa Warren Place
6110 S. Yale Ave, Tulsa, OK

DECEMBER 30

Oklahoma Bar Center

\$120 for the morning or afternoon program or \$200 for both on early-bird registrations received by December 23rd; \$140 for registrations for the morning or afternoon program or \$225 for both programs received after December 23rd. Walk-in for each individual program will be \$165 or \$250 for the bundle. To receive a \$10 discount for the live onsite program, register online at <http://www.okbar.org/members/CLE>. You may also register for the live webcast for \$250 for both or \$150 for the morning or afternoon program. Seniors may register for \$50 on in-person programs and \$75 for webcasts, and members licensed 2 years or less may register for \$75 for in-person programs and \$100 for webcasts.

For more information go to: www.okbar.org/members/CLE



We're proud to have served the Oklahoma legal community for more than 30 years.

Our exceptional personalized service and specialized expertise in lawyers professional liability insurance means that our policyholders know we're taking care of them.

Our remarkable customer service and dependability will never change, which is why we are the insurance company behind many of Oklahoma's most successful attorneys.

**WE'RE THE PARTNER
WHO DOESN'T NEED OUR
NAME ON YOUR DOOR.**



OKLAHOMA ATTORNEYS
MUTUAL INSURANCE COMPANY

3900 S. BOULEVARD, EDMOND, OK
P.O. BOX 5590, EDMOND, OK 73083-5590
P 405 471 5380 | 800 318 7505 F 405 471 5381
OAMIC.COM