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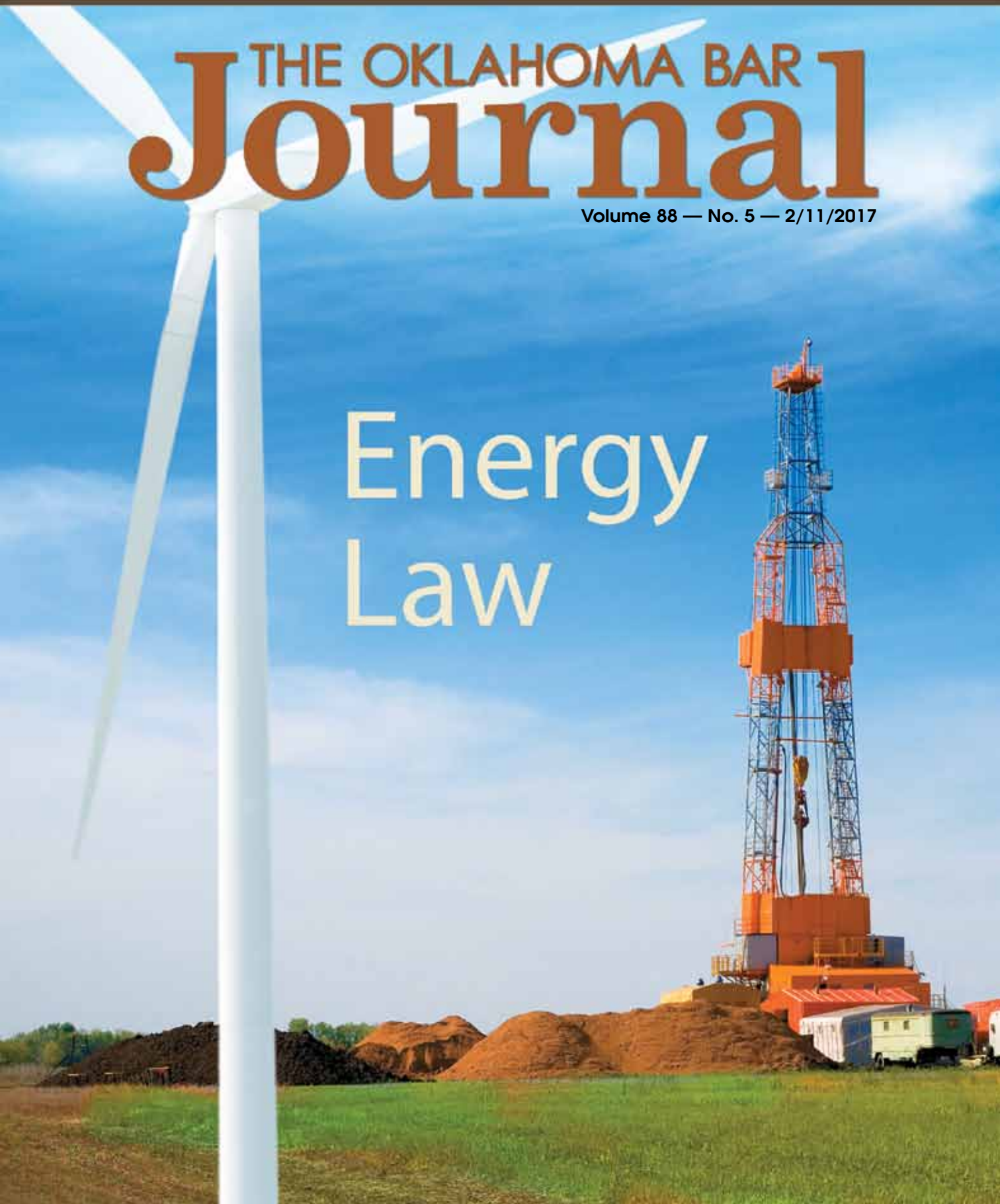

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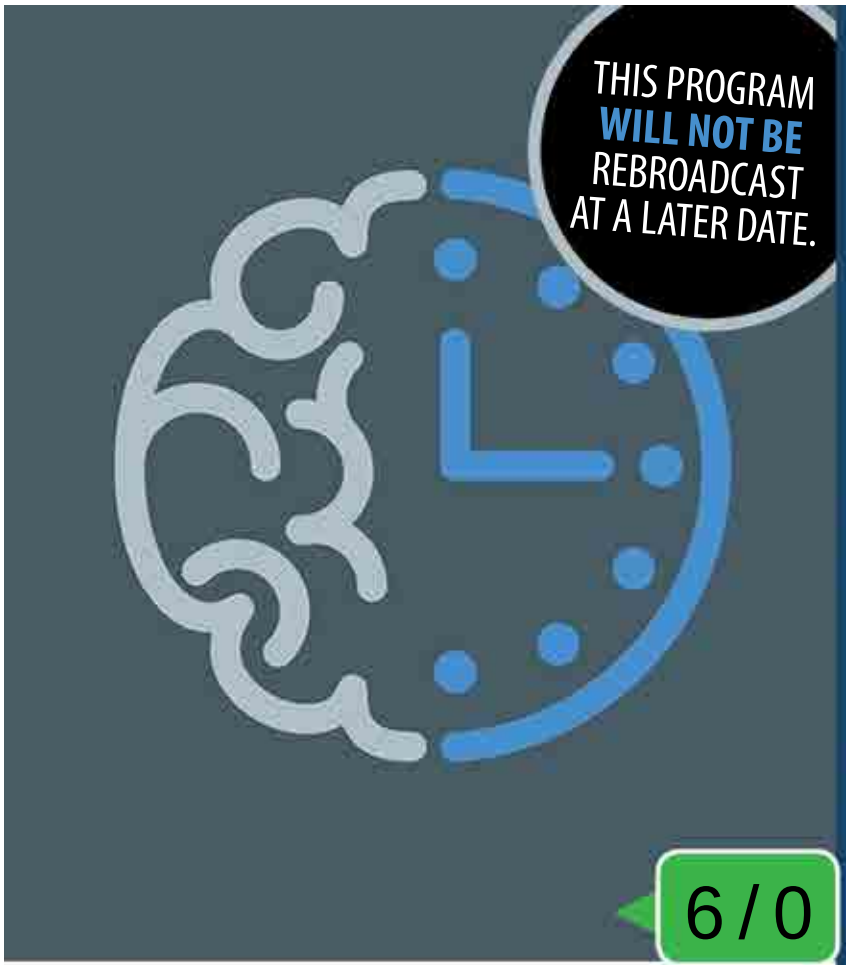

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New Free Legal Advice Project Makes It Easy to Volunteer

By Linda S. Thomas

It is undeniable that the demographics in our communities and our state are rapidly changing, and Oklahoma lawyers must adapt to help meet the needs of the almost 4 million people who call Oklahoma "home." According to the latest published statistics, approximately 25 percent are children and 15 percent are over age 65; 35 percent are of ethnic or racial minority; 6 percent were born in a foreign country; 10 percent of people living in Oklahoma speak a language other than English as their primary language; 11 percent are disabled; 17 percent live in poverty; and Oklahoma is home to about 305,000 veterans and 99,000 LGBT adults.

Many of these citizens need good quality legal services but do not have the financial resources to pay an attorney. In many cases, pro se litigants simply cannot adequately represent themselves and all too often clog up the court system. Oklahoma lawyers must be proactive in the development and implementation of new and innovative programs to assure the "underserved" among us receive good legal services and have adequate access to our justice system.

All Oklahomans should have access to good legal information and advice based on Oklahoma law.

In order to address the needs of these low-income citizens, the Oklahoma Access to Justice Commission was established by order of the Supreme Court in March 2014 to, among others things, "develop and implement policy initiatives designed to expand access to and enhance the quality of justice in civil legal matters for low-income Oklahoma residents." Through its expertise, hard work and commitment, last summer the commission, in cooperation with the OBA and ABA, launched its Oklahoma Free Legal Answers Program. Oklahoma was one of the first states in the nation to provide this service to its citizens.

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The way it works is very simple — an Oklahoma adult seeking assistance through the program logs on to Oklahoma.freelegalanswers.org and answers a few questions to determine if he or she qualifies for the program. To qualify, the user must have a household income less than 250 percent of the federal poverty level, may not have liquid assets exceeding $5,000 in value, may not be incarcerated and may not request assistance with criminal law matters. Users not eligible for the program will be redirected to resources to help them locate a lawyer in their area or find other legal services. Qualified users create a secure account where they can post a request for legal advice or information and provide facts that will help a pre-authorized volunteer Oklahoma lawyer answer the question.

Volunteer lawyers must be licensed members in good standing with the OBA. Participating lawyers answer only questions they choose, and the user will see the written response through the secure website. Participating lawyers remain anonymous unless they choose to disclose their identity. The number and type of questions answered are strictly up to the volunteer lawyer. This is a great opportunity for lawyers in every practice setting, including those whose employment situation means they don't carry professional liability insurance since the site provides that coverage. This Oklahoma site will serve only Oklahoma residents.

All Oklahomans should have access to good legal information and advice based on Oklahoma law, and it can only be a good thing for Oklahoma lawyers and our association to be at the forefront of serving our citizens in this way. You can sign up to be a participating volunteer lawyer in this program by logging on to Oklahoma.freelegalanswers.org.

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Wind Energy – A Primer

By William H. Whitehill Jr.

Wind energy and other alternative energy sources are the future. Production of wind energy has increased substantially over the past decade. Since 2004, wind energy production in the United States has grown from less than five GWh to more than 190,000 GWh by the end of 2015.[1] The United States currently leads the world in electricity production from wind.[2] On at least one day in 2015, it has been reported that Germany, Scotland and Denmark each produced enough electricity from wind and solar to supply 100 percent of their electricity needs for that day.

In the United States, Oklahoma is the fourth largest producer of electricity from wind and one of only eight states that currently produce more than 15 percent of its electricity generation from wind.[3] Iowa produces more than 30 percent of its electricity supply from wind. And, the first wind turbines to be installed off the United States coasts were constructed this year off the coast of Rhode Island.[4]

The growth in wind energy production continues in Oklahoma. In the first quarter of 2016, Oklahoma led the United States in wind capacity installed.[5] Because of the continued and foreseeable growth of wind energy production in Oklahoma, lawyers will increasingly come in contact with clients who have been approached regarding the installation of a commercial wind energy project (commonly called a wind farm) on or near their property. The purpose of this article is to give a general background and information with respect to wind energy production and the agreements associated therewith.

In a nutshell, the generation of usable electricity from a completed wind energy project first involves the wind turning the blades of the turbines. The turbines spin generators to create electricity. The electricity is then transmitted to a transformer located at a substation. The substation collects the generated electricity and increases the voltage to match the power grid. The transformed electricity is then delivered to the power grid for transmission to end users.

A wind energy project is carefully planned, takes several years from concept to construction and requires significant capital. A project recently completed in central Oklahoma involving about 50 sections, is expected to produce 300 MW of electricity, has more than 100 wind turbines and was estimated to cost into the hundreds of millions to complete.[6]

A wind energy project will typically have an evaluation phase, a development/construction phase, a production/operations phase and a decommissioning phase. During the evaluation phase, the developer will conduct wind studies and gather various data to determine the feasibility of a wind energy project. This will likely be the first contact between a developer and landowner. The developer may want to place wind measuring equipment on the land and perhaps conduct other studies such as environmental studies. To do so, the developer will usually offer to either enter into a

lease or an option to lease agreement with the landowner to allow the equipment on the land and to obtain rights of ingress and egress.[7] The provisions of the lease will not be limited to the evaluation phase. The lease will also cover the other phases. Otherwise, the studies by the developer would be for naught if the landowner later refused to enter into a lease. The same holds true for an option to lease. Either the lease will be attached to the option or the major provisions of a proposed lease will be included in the option agreement. Thus, it behooves a landowner seeking advice to do so in the early stages of the process.

The lease will contain many provisions with which attorneys are familiar. A number of provisions or considerations, however, will be unique to a lease for a wind energy project. For instance, in order to make a project financially feasible to develop, lease terms often run 30 years or more from the date a project is completed. The key word is "completed."[8] It will take several years for the developer to determine if the project is economically viable. Thus, the 30-year period will not begin until the project is constructed and producing electricity.

Until the wind and other studies are completed, the developer will not know whether a wind energy project is feasible or, if so, the location of any turbines for the wind energy project. The optimal location of wind turbines is somewhat of an exact science requiring precise engineering, and the developers will often be unable to deviate significantly from the locations determined from the studies. It may be important to the landowner to have a turbine installed on the landowner's land because the financial incentives are greater for land on which a turbine will be located. On the other hand, a landowner may not want a turbine on their property because of the aesthetics or size of the turbine,[9] the roads required for access to the turbine, current or intended future uses of the land or other reasons.

Even if the developer's studies determine that no wind turbine is to be located on the landowner's land, the land might still be useful for the wind energy project for such things as transmission lines, a substation, roadways, operations and maintenance buildings, storing construction materials or simply as a buffer from other wind energy projects. The transmission lines between turbines are usually buried and do not significantly affect the usability of that portion of the land. Typically, these items are handled through easements. However, the developer may also be interested in purchasing part of the land for the substation and any needed operations and maintenance buildings. If a lease is entered into with the developer, but it is later determined that turbines or other physical facilities will not be placed on the land, the landowner may want a provision in the lease providing that the lease will convert to an easement that affects only the needed portion of the land for the specific purpose it is needed.

The payments to the landowner will vary from project to project and among developers. During the evaluation phase, there may be offered an amount per acre and a one-time fee for placing any testing equipment on the land. Other than placing testing equipment on the land, there is not much physical use of the property during the evaluation phase. The amount of land used for any testing equipment is not significant. As a result, the payments during the evaluation phase will be lower than payments during subsequent phases.

If the project proceeds to construction, a one-time payment will typically be made for any turbines placed on the land, and the amount per acre leased will also increase. For the production/operations phase, the developer may offer an increased annual rent, fixed royalty per MWh of electricity produced, a percentage of gross production revenue or a combination thereof. Whether any payment is based on the turbines located on or electricity produced from a landowner's land, or is based on a prorated portion of the entire project, should be addressed. A developer may also consider a minimum rent that must be paid regardless of whether electricity is being produced for whatever reason. Due dates for the payments should be established in the lease.

A lease may also provide for one-time payments for a substation, any temporary improvements and the placement of transmission lines. These may or may not be in addition to the other payments discussed above. Payments should also be considered for any crop damage, for any increase in *ad valorem* taxes because of the project or to compensate the landowner if the project results in the land being removed from the federal Conservation Reserve Program.

Because of the lengthy term of a wind energy project, fixed or annual payments should be indexed to the Consumer Price Index or another appropriate index. Currently, the federal

government and the state of Oklahoma offer tax credits for the production of wind energy. The developer will likely not share the credits with landowners because they can form an integral part of the financing transactions the developer requires to fund the wind energy project.

The lease should contain provisions that allow the verification of any royalties that may be owed to the landowner. Oklahoma statutes provide certain rights for the landowner in this regard.[10] The lease can provide greater rights than those required by Oklahoma statutes.

Because many developers are not in the business of operating completed wind energy projects, the lease will allow the developer to assign the project to third parties. Those developers will sell all or part of the ownership of the project upon completion. At a minimum, the lease should provide that the developer will notify the landowner of the assignment, and the contact information for the new owner of the wind energy project.

"Because many developers are not in the business of operating completed wind energy projects, the lease will allow the developer to assign the project to third parties."

Indemnification and insurance provisions will be important to the landowner. Relatively speaking, the developer will have a better financial ability to absorb liabilities and the turbines have significant costs. The landowner should consider trying to limit the dollar amount of any liability resulting from the non-willful negligence of the landowner. The developer should be responsible, and indemnify the landowner against loss, for violations of zoning or other governmental regulations and for any third-party claims against the landowner regarding the wind energy project (such as a lawsuit seeking to prevent the wind energy project). Oklahoma statutes require that the developer provide insurance "consistent with prevailing industry standards" and that the landowner be named as an additional insured.[11] The landowner may want to consider a set minimum amount of insurance indexed to the Consumer Price Index or other index. The lease may provide that the developer is entitled to self-insure. Waiver of subrogation clauses are commonly agreed to as are waivers of exemplary, incidental or consequential damages.

The landowner should also consider the landowner's current and future use of the land. For engineering and financial modeling reasons, a lease will typically have a nonobstruction clause providing that the landowner cannot construct any improvement that would interfere with the wind flow for the project unless the developer agrees. Thus, the developer will not agree to a catch-all provision stating that any rights not expressly given to the developer are retained by the landowner. However, the developer will consider agreeing to the landowner's retention of specific rights such as the right to use the land for grazing, to plant and harvest crops, conduct other agricultural activities,or to hunt as long as they do not interfere with or create a risk of damage to the wind energy facilities.

Other lease provisions, *e.g.*, regarding hazardous materials, default, liens, condemnation, confidentiality, arbitration, choice of law and forum selection are typical of commercial leases generally. Fence repair, weed control, favored nation and lender protections may be addressed as well.

Once begun, the development/construction phase typically takes six months to a year. Upon completion, the production/operations phase will entail the generation of electricity, payment of royalties to the landowner and the maintenance of the facilities.

Decommissioning is the final phase. Basically, this involves removal of the turbines and other improvements and the restoration of the land after the wind energy project has run its course; similar to the plugging of an oil and gas well. Minimum guidelines for the decommissioning process are set forth by statute.[12] These provisions should be reviewed to determine whether the landowner has reason to pursue specific standards in the lease.

Attorneys who represent mineral owners and are concerned about a wind energy project affecting the exploitation of the mineral rights should review the Exploration Rights Act of 2011,[13] which generally provides that the developer may not unreasonably interfere with the mineral owner's right to make reasonable use of the surface estate including the right of

ingress or egress, severing, capturing and producing minerals. Notices to certain operators and lessees are also required.

In conclusion, wind energy projects are now an integral part of the generation of electricity in Oklahoma and will continue to be so in the future. The lease is the document that establishes the relationship between a landowner and a developer. The lease proposed by the developer will contain many provisions familiar to attorneys who review commercial leases. There will be other provisions, however, that will be unique to wind energy project leases. The Oklahoma lawyer reviewing these leases should become familiar with these types of provisions and take into account the long-term relationship that will be established between the landowner and the developer.

1. 2015 Wind Technologies Market Report, U.S. Department of Energy (August 2016).
2. *Id.*
3. *Id.*
4. *Fortune*, fortune.com/2016/08/08/first-us-offshore-wind/.
5. U.S. Wind Industry First Quarter 2016 Market Report, American Wind Energy Association (April 28, 2016).
6. www.kingfisherwind.com/project_profile.
7. The Airspace Severance Restriction Act, 60 Okla. Stat. §820.1 restricts the "permanent severing of the airspace over any real property…for the purpose of developing and operating commercial wind or solar energy conversion systems" and requires a written lease for wind energy project purposes.
8. The lease will likely include an option to renew for a specified term exercisable at the discretion of the developer.
9. The height of wind turbines that may be placed on the land can reach 400 feet at the top of the rotor sweep. The rotor blades can be up to 150 feet in length. The nacelle housing the turbine, generator and related equipment at the top of the tower has been described as being the size of a typical school bus.
10. 17 Okla. Stat. §§160.16 and 160.17, part of the Oklahoma Wind Energy Development Act, 17 Okla. Stat. §160.11 *et. seq.*
11. 17 Okla. Stat. §160.16.
12. 17 Okla. Stat. §160.14.
13. 52 Okla. Stat. §801 *et seq.*

ABOUT THE AUTHOR

William H. Whitehill Jr. is a shareholder with the Oklahoma City law firm of Fellers Snider. He practices in the areas of taxation, civil tax controversies, real estate, commercial transactions, commercial litigation and general business law. He is also a certified public accountant (CPA).

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Don't Forget About Us

Considerations for Nonoperating Interest Owners During Down Economic Periods in Oklahoma's Oil and Gas Industry

By W. Jason Hartwig

When Oklahoma's oil and gas industry hit its most recent downturn and oil prices began to fall, the impact on the state's oil and gas exploration and production companies was naturally the first matter for examination. It is easy to forget the other interest owners who are directly impacted by the same economic factors. Nonoperating interest owners, such as working interest owners and royalty owners, are akin to silent partners in a business in that they are not normally involved in the day-to-day drilling and production operations. These interest owners invest money in well operations and/or their leasehold interests hoping for a return or additional income realized from a once unproductive interest in land. Working interest owners and royalty owners rely on their well operators to accomplish these goals. As a result, these nonoperating interest owners will not only feel the pinch from the fallout of the waning market but also the accompanying actions of their well operators.

This article focuses on the position of these nonoperating interest owners under a couple of typical scenarios. First, the scope of liability and the practical courses of action for a working interest owner when a well operator stops paying invoices to third-party service providers and vendors and the leasehold becomes subject to a statutory oil and gas well lien. Second, the interests of nonoperating interest owners when their well operator files for bankruptcy.

NONOPERATING OWNERS AND STATUTORY OIL AND GAS WELL LIENS

A working interest owner who is current on his joint interest billing statements suddenly receives a notice of a lien against a well in which he has invested. The working interest owner reads over the notice and does not recognize the name of the lien claimant, a third party that has provided some service at the well site for the last year. The notice specifically names the working interest owner as a debtor and subjects his leasehold interest to the lien. After making a few phone calls, the working interest owner comes to realize the well operator has not been paying the invoices for services and materials provided by third parties.

Unfortunately, this is an all too common scenario for working interest owners. During lean economic times in the oil and gas industry, laborers and vendors providing services and materials to a drill site are more likely to forego future business relationships and seek compensation for unpaid invoices by way of filing statutory oil and gas liens. Oil and gas well

liens pursuant to 42 Okla. Stat. §144 operate to protect laborers and vendors who provide labor or services or furnish materials or supplies for oil and gas operations.[1] Section 144 requires the lien claimant perform services "under contract, expressed or implied, with the owner of any leasehold for oil and gas purposes . . . "[2] Most often, the lien claimant will have contracted with the operator of the well and this privity of contract will form the basis for naming the operator as debtor in the requisite statutory lien statement. Under §144, parties in privity of contract with the lien claimant may be held personally liable for the debts secured by the oil and gas well lien.[3] Thus, the contracting operator named in the lien statement can be held personally liable for the debt secured by the lien.

Lien claimants have no validly perfected lien against working interest owners who are not, at a minimum, named in the lien statement.[4] Nonoperating working interest owners may be held jointly and severally liable for the debt secured by a §144 lien if there is privity of contract between the interest owner and the lien claimant, a court finds the existence of a mining partnership or joint venture among the operator and other working interest owners[5] or the operator contracts with the lien claimant acting as agent for the nonoperating working interest owners.[6]

In the absence of a mining partnership, a joint venture or an agency relationship, the liability of the passive, nonoperating working interest owner is merely several liability.[7] The Oklahoma Supreme Court's early rulings addressing the liability of working interest owners upheld the principle that no personal judgment can be obtained in the absence of contractual privity and that liability of those working interest owners named in the lien statement would only extend to their respective leasehold interests.[8]

The nature of the working interest owner's several liability has only recently come into question regarding whether it is limited to the interest owner's leasehold interest and/or personal liability for his proportionate share of the debt. Nearly seven decades after the Oklahoma Supreme Court established the parameters for working interest owner liability subject to an oil and gas well lien, the court issued a curious opinion in *K&H Well Service, Inc. v. Tcina, Inc.*,[9] which may have opened the door to allow for personal, several liability up to each working interest owner's interest in the leasehold that is subject to the lien.

In *K&H*, the Oklahoma Supreme Court addressed the liability of a contract operator and a 5 percent working interest owner for unpaid reworking and drilling services that subjected the well sites to §144 liens.[10] With respect to the contract operator, the court affirmed the trial court's determination that the operator cannot be liable for the debts secured by the liens, because the operator owned no working interest in the wells and contracted with the lien claimant as an agent for disclosed principals (*i.e.*, the working interest owners).[11] The court did hold the 5 percent working interest owner liable and ruled the lien claimant could foreclose against the 5 percent leasehold interest, because the operator contracted with the lien claimant while acting as agent for the working interests.[12] The court further ruled "[u]pon remand *unless a mining partnership is found to exist* between Tcina Holding Co., Ltd. and the other record leasehold owners, Tcina Holding Co., Ltd. can only be found liable for five percent (5%) of the contracted for charges."[13] Thus, in addition to allowing lien claimant to foreclose working interest owner's leasehold interest, the court also granted the lien claimant a money judgment against to the extent of working interest owner's 5 percent interest even in the absence of a mining partnership.[14] In a footnote, the court reveals the basis for this ruling is its reliance upon its earlier decision in *Sparks Brothers Drilling Co. v. Texas Moran Exploration Co.*:[15]

> Appellee misreads *Sparks* when it asserts that it holds when no mining partnership is found to exist, each participant's liability for a well's drilling costs is *in rem* only. *Sparks* holds that each participant's liability — when no mining partnership exists — is limited to that quantum of interest [here 5%] which each participant possesses in the well, *i.e.*, each participant is *severally* liable for expenses in direct proportion to the quantum of leasehold-interest owned. The obligation is not just *in rem* but rather is both *in rem* and *in personam*.[16]

In *Sparks Brothers*, the Oklahoma Supreme Court addressed the issue of whether a 25 percent working interest owner in a well should be held joint and severally liable for services and materials furnished in the completion of the well.[17] In reversing the lower court's ruling, the court held that a nonoperating working interest owner under a joint operating agree-

ment that expressly stated it did not create a mining partnership was liable only to the extent of its interest in the leasehold for debts that the operator failed to pay.[18] At the beginning of the court's opinion, it states "[i]f there is not a mining partnership, then [the working interest owner] is severally liable, that is *liable only to the extent of its interest in the well*."[19] The court, however, did not expand on the nature of this liability and whether it extended only to the working interest owner's leasehold interest or subjected the working interest owner to personal liability to the extent of his interest.[20]

Although it would appear the *K&H* case would allow lien claimants to both foreclose on a working interest owner's leasehold interest and hold him personally liable to the extent of his interest, the opinion could be relegated to the specific facts of the case for several reasons. The *K&H* court relies upon the *Sparks Brothers* decision, but the *Sparks Brothers* opinion does not indicate that the several liability of a passive working interest owner necessarily includes *in personam* and *in rem* liability. The *K&H* opinion would contradict longstanding Oklahoma Supreme Court precedent regarding the liability of working interest owners, even though the court did not specifically overrule or even address any of its past decisions. Most importantly, the *K&H* court specifically found the presence of an agency relationship between contract operator and the working interest owners with respect to operator's act of contracting with the lien claimant. The underlying facts of the *K&H* case create some natural limitations on its future application and may be interpreted with respect to its ruling regarding the personal liability of working interest owners to apply in those cases involving an agency relationship between the contracting party (agent) and the other working interest owners (disclosed principals). Thus, while the *K&H* case creates some question regarding the nature of this liability as *in rem* and/or *in personam* liability, the liability of passive, nonoperating working interest owners should be regarded as several liability with respect to their leasehold interests thereby allowing lien claimants to foreclose on the working interest owners' percentage interest in the lease.

Assuming the validity of the lien, working interest owners are left with very few practical options when subjected to a §144 oil and gas well lien. If the working interest owner can afford to concede its working interest in a well or the well has resulted in a dry hole leaving the leasehold value very low, the working interest owner can allow the lien claimant to foreclose on the working interest owner's leasehold interest and he will no longer own that interest. However, there may be circumstances where the working interest owner would wish to retain his interest in a well for any number of reasons such as the presence of a profitable well on the leasehold or the working interest owner's interest is subject to financing. In this case, a lengthy search of Oklahoma case law has yet to reveal a case addressing whether a working interest owner may retain his proportionate share of the leasehold estate subject to an oil and gas well lien by paying his proportionate share of the debt to the lien claimant. From a practical perspective, a working interest owner should be permitted to pay his share of the debt and retain his leasehold interest. This may be accomplished initially without judicial intervention. The lien claimant can be approached, the working interest owner can pay his share of the debt, and the lien claimant can release the working interest owner from the lien. This release should preclude the lien claimant from later seeking to foreclose the working interest owner's share of the leasehold estate.

If a court allowed the working interest owner to pay his share of the debt, the concept of double recovery should preclude the lien claimant from subsequently seeking to foreclose the working interest owner's leasehold interest. In other words, if the working interest owner is only *in rem* severally liable, the lien claimant could not recover both the working interest owner's proportionate payment of the debt and foreclose on the working interest owner's portion of the leasehold estate. Nevertheless, where the working interest owner has paid its share of the costs to its operator and the operator fails to pay third-party laborers or vendors, working interest owners may find themselves in the unfortunate position of having to double pay their proportionate share of fees for labor or materials directly to a lien claimant as well in order to have the lien removed from the leasehold estate.

NONOPERATING OWNERS AND OKLAHOMA'S OIL AND GAS OWNERS' LIEN ACT OF 2010

When a well operator files for bankruptcy, the nonoperating interest owners are not with-

out recourse. Prior to 2010, working interest owners and royalty owners were particularly vulnerable when their operator filed for bankruptcy with respect to oil and gas production and production proceeds from a well. The Delaware bankruptcy companion cases in *In re SemCrude, L.P.*[21] (*SemCrude* litigation), marked a necessary turning point for the status of royalty owners and working interest owners alike in bankruptcy with respect to their interests in produced oil and gas and the sales proceeds.

SemGroup LP and its affiliates (SemCrude, SemGas, Eaglwing) were in the business of purchasing, marketing and distributing oil and gas extracted from oil and gas wells in at least eight different states including Oklahoma. In 2008, SemGroup affiliates and a large number of Oklahoma producers entered into agreements for the purchase and sale of oil and gas from Oklahoma wells. From June 1 through July 21, 2008, the Oklahoma producers delivered oil and gas to the SemGroup affiliates. SemGroup and its affiliates filed petitions in bankruptcy on July 22, 2008. However, the Oklahoma producers did not receive payment for the oil and gas delivered between June 1, 2008, and the petition date. The Oklahoma producers asserted claims in bankruptcy against SemGroup and its affiliates totaling $127 million which represented the amount of unpaid oil and gas sales proceeds.

The Oklahoma producers' claims were met by competing claims asserted by the lenders of SemGroup and its affiliates. The lenders asserted claims as secured creditors with priority over the claims of the Oklahoma interest owners in the produced oil and gas. These lenders held prepetition security interests properly perfected under Article 9 of the U.C.C. prior to the SemGroup affiliates purchasing the oil and gas from the Oklahoma producers. As a result, the lenders, as secured creditors, demanded any proceeds from produced oil and gas be applied to settle their prepetition security interests prior to the settlement of any claims of the Oklahoma producers and any other Oklahoma interest owners. Thus, in addition to a large number of other issues, the *SemCrude* court was charged with determining the rights, status and relative priority of the interests of the Oklahoma producers in the oil and gas sold to the SemGroup affiliates and the proceeds therefrom.

The Oklahoma producers asserted two primary arguments that they held secured claims with priority over the SemGroup lenders: 1) the Oklahoma Production Revenue Standards Act[22] (PRSA) created an implied trust with respect to production proceeds in favor of the Oklahoma interest owners and 2) the Oklahoma Oil and Gas Owners' Lien Act of 1988[23] (1988 Act) provided the Oklahoma interest owners with a first priority statutory lien. The *SemCrude* court held that the PRSA did not create a trust with respect to production and production proceeds, and the 1988 Act carved out an exception for U.C.C. Article 9 secured creditors, such that working interest owners lost priority to Article 9 secured creditors in oil and gas production. The absence of an implied trust and the lack of a statutory lien with priority over Article 9 secured creditors were two weaknesses with respect to the position of Oklahoma interest owners that led to the passage of the Oklahoma Oil and Gas Owners' Lien Act of 2010[24] (2010 Act).

The 2010 Act grants each interest owner an oil and gas lien to secure the obligations of the first purchaser of production to pay the sales price to the extent of each interest owner's interest in oil and gas sales derived from an incident to the interest owner's oil and gas rights.[25] The basic characteristics of the lien created under the 2010 Act include the following: 1) it continues uninterrupted in oil and gas upon and after severance; 2) it continues uninterrupted in oil and gas production proceeds; 3) it is not dependent on possession of or title to the oil and gas; 4) it is transferred when oil and gas rights are conveyed or transferred, except to the extent any oil and gas rights are retained and 5) it terminates when the sales price is received.[26] In the typical scenario where the first purchaser pays a representative of the interest owners in a well, such as the operator, the interest owners' lien continues uninterrupted in the proceeds in the possession of the representative until the owners are paid in full.[27]

The 2010 Act strengthened the working interest owners' lien under the original 1988 Act in three key areas. First, the 2010 Act affirmatively establishes Oklahoma law shall govern oil and gas transactions with Oklahoma interest owners.[28] One of the critical decisions by the Delaware bankruptcy court during the *SemCrude* litigation was that Delaware law applied to determine whether a security interest was perfected, not the laws of the states where production occurred (*i.e.*, where the states' oil and gas liens may be applied). Since the lien is created

incident to ownership of oil and gas rights, the lien created by the 2010 Act is not a U.C.C. Article 9 security interest but rather arises as part of a real estate interest of the interest owner in the minerals.[29] As a result, the applicable law under governing choice of law principles is the law of the state where the well is located.[30] The 2010 Act eliminates the need to follow the law of other states with respect to perfection of liens, particularly the need to file lien or financing statements in the debtor's state of incorporation.

Second, the 2010 Act strengthens the position of Oklahoma interest owners by creating an oil and gas lien that "exists in and attaches immediately to all oil and gas on the effective date of the [2010 Act]," which is April 19, 2010, and "continues uninterrupted and without lapse in all oil and gas upon and after severance . . . and to all proceeds."[31] In other words, an Oklahoma interest owner essentially receives an automatic lien in his proportionate share of the oil and gas production and any subsequent sales proceeds until he receives his share of the proceeds from production.[32] Furthermore, the "oil and gas lien is granted and exists as part of an incident to the ownership of oil and gas rights and is perfected automatically without the need to file a financing statement or any other type of documentation."[33] The nature of the lien provided for under the 2010 Act is truly automatic by omitting the need for filing any statement of the lien for the purposes of perfection.

"...the 2010 Act creates a super-priority, automatic lien in oil and gas production and production proceeds for all Oklahoma interest owners."

Third, the 2010 Act expressly provides for super-priority over all other lienholders and secured creditors. "Except for a permitted lien, an oil and gas lien [created under the 2010 Act] is a lien that takes priority over any other lien, whether arising by contract, law, equity or otherwise, or any security interest."[34] A permitted lien is essentially a mortgage or security interest granted by a first purchaser which "secures payment under a written instrument of indebtedness signed by the first purchaser."[35] The "instrument of indebtedness" securing a permitted lien must have been accepted prior to the effective date of the 2010 Act, with a fixed amount of principal and maturity date.[36] Thus, "a permitted lien does not include a mortgage lien or security interest which secures payment of any indebtedness incurred from and after the effective date of [the 2010 Act] . . . "[37]

In sum, although production and any sales proceeds may not be held in trust by a producer on behalf of the other interest owners, the 2010 Act creates a super-priority, automatic lien in oil and gas production and production proceeds for all Oklahoma interest owners. It is inevitable that litigation will arise testing the super-priority of the automatic lien created by the 2010 Act against competing oil and gas liens[38] and secured interests. Until such time, the 2010 Act should be interpreted as significantly strengthening the position of Oklahoma interest owners with respect to their rights in oil and gas production and production proceeds.

Working interest owners and royalty owners should be recognized as creditors in their operator's bankruptcy case with prepetition claims resulting from their automatic liens in production and production proceeds pursuant to the 2010 Act. From a practical perspective, it is likely that an operator's bankruptcy estate will not include unsold oil and gas production or a significant amount of undistributed production proceeds. However, at a minimum, the working interest owners and royalty owners should take the opportunity to have their claims acknowledged by filing a proof of claim in bankruptcy. A proof of claim is the written statement filed in a bankruptcy case setting forth a creditor's claim which describes the reason for and amount of the debt allegedly owned by the debtor to the creditor along with the secured status if the claim is secured. A proof of claim must conform substantially to the appropriate official form.[39] The deadline for filing a proof of claim will generally depend on the type of bankruptcy case. In a Chapter 7 liquidation case, only if the case trustee files a Notice of Possible Dividends, then a creditor will be sent a notice of the deadline (bar date) by which a claim is due. The time for filing a proof of claim in a Chapter 7 case is usually set at not later than 90 days after the first date set for the meeting of creditors with a few exceptions.[40] In a Chapter

11 corporate reorganization case, creditors will receive a specific notice of the deadline (bar date) by which a claim is due.[41]

CONCLUSION

As detailed throughout this article, the reality of dismal economic periods in this state's oil and gas industry is that nonoperating interest owners may be left with few options that are largely reactionary courses of conduct which may prove fruitless in retaining leasehold interests or securing undistributed proceeds from production. The legal consequences of a statutory oil and gas well lien, pursuant to 42 Okla. Stat. §144, have the potential to place working interest owners in an inequitable position in order to preserve their leasehold interests. However, the same interest owners have a strengthened position with respect to oil and gas production proceeds as a result of the automatic lien created under the Oil and Gas Owners' Lien Act of 2010. The key to preserving whatever interest the working interest owners and royalty owners may be able to retain is to avoid delay in taking action to preserve their interests and to periodically monitor the operations and financial stability of its operators to the extent possible. With knowledge of the rights and liabilities of working interest owners and royalty owners as detailed herein, these interest owners will be able to act decisively when faced with a statutory lien or the bankruptcy of an operator.

1. *See* 42 Okla. Stat. §144.
2. 42 Okla. Stat. §144.
3. *See* 42 Okla. Stat. §144.
4. *In re Mahan & Rowsey, Inc.*, 27 B.R. 883, 887 (Bankr. W.D. Okla. 1983) ("held that the liens [created under section 144] are not validly perfected against entities whose interests were of record at the time the lien statements were filed by who were not named in them"); *see Forry v. Brophy*, 243 P. 506, 506, 509 (Okla. 1926) (*Syll.* 3) (failure of lien claimants to name the owner of a 1/32 interest in an oil and gas leasehold estate in their lien statements was held fatal to the creation of a statutory lien upon the owner's interest); *Joe Brown Co., Inc. v. Best*, 601 P.2d 755, 757 (Okla. Civ. App. 1979) (lien claimant had no validly perfected lien against wife and joint owner of the property due to failure to name her in the lien statement); *see also* 42 Okla. Stat. §142 (requisite information to be included in lien statement).
5. *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co.*, 829 P.2d 951, 952 (Okla. 1991); *Robinson Petroleum Co. v. Black, Sivalls & Bryson*, 280 P. 593, 596 (Okla. 1929).
6. *See Spartan Petroleum Corp. v. Curt Brown Drilling Co.*, 446 P.2d 808, 813-14 (Okla. 1968); *see also Sparks Bros. Drilling Co. v. Texas Moran Exploration Co.*, 829 P.2d 951, 952 (Okla. 1991); *Oklahoma Co. v. O'Neil*, 440 P.3d 978 (Okla. 1968).
7. *See Sparks Bros. Drilling*, 829 P.2d at 952 ("If there is not a mining partnership, then [the working interest owner] is severally liable, that is liable only to the extent of its interest in the well."); Watts, "Contingent Liability of the Passive Working Interest Investor Under Operating Agreements in Oklahoma," 54 *Okla. B.J.* 2797 (1983) ("If no such relationship exists, each party's liability is several, and judgment may only be enforced against each personally for his pro rata amount of the indebtedness.").
8. *McNally v. Cochran*, 46 P.2d 955, 959 (Okla. 1935); *Conservation Oil Co. v. Graper*, 46 P.2d 441, 444 (Okla. 1935); *Anderson v. Keystone Supply Co.*, 220 P. 605, 608-09 (Okla. 1923). Several liability extending to the leasehold interests of working interest owners stems from the provisions of section 144 which expressly provides that the oil and gas well lien "may attach to or upon said leasehold . . . ." 42 Okla. Stat. §144.
9. *K&H Well Service, Inc. v. Tcina, Inc.*, 51 P.3d 1219 (Okla. 2002)
10. *Id.* at 1221.
11. *Id.* at 1224.
12. *Id.*
13. *Id.* at 1224-25 (emphasis in original).
14. *Id.* at 1225-26.
15. *Sparks Brothers Drilling Co. v. Texas Moran Exploration Co.*, 829 P.2d 951 (Okla. 1991)
16. *Id.* at 1225 n.17 (emphasis in original).
17. *Sparks Brothers Drilling*, 829 P.2d at 952.
18. *Sparks Brothers Drilling*, 829 P.2d at 952, 954.
19. *Sparks Brothers Drilling*, 829 P.2d at 952 (emphasis added).
20. *See Sparks Brothers Drilling*, 829 P.2d at 952.
21. *See In re SemCrude, L.P.*, 407 B.R. 140 (Bankr. D. Del. 2009)
22. 52 Okla. Stat. §§570.1 *et seq*.
23. 52 Okla. Stat. §§548 *et seq*.
24. 52 Okla. Stat. §§549.1 *et seq*.
25. 52 Okla. Stat. §549.3; *see* 52 Okla. Stat. §549.2(9)(a) ("oil and gas rights" generally include any right, title or interest, in and to oil and gas or the proceeds therefrom).
26. 52 Okla. Stat. §549.3.
27. 52 Okla. Stat. §549.3(C).
28. 52 Okla. Stat. §549.9.
29. 52 Okla. Stat. §549.3 (Cmt. 2).
30. 52 Okla. Stat. §549.3 (Cmt. 2).
31. 52 Okla. Stat. §549.3.
32. 52 Okla. Stat. §549.3.
33. 52 Okla. Stat. §549.4.
34. 52 Okla. Stat. §549.7.
35. 52 Okla. Stat. §549.2(11).
36. 52 Okla. Stat. §549.2(11)(a).
37. 52 Okla. Stat. §549.2(11)(a)(1).
38. Among other potential conflicts, the 2010 Act's automatic super-priority granted in a lien in oil and gas proceeds directly conflicts with the superior priority afforded liens under 42 Okla. Stat. §144. Section 144 provides a similar lien in oil and gas proceeds that is supposed to be "preferred to all other liens or encumbrances . . . " 42 Okla. Stat. §144. Since the 2010 Act is a later and more specific statutory scheme, it may be assumed that the Oklahoma legislature intended for the 2010 Act to control over all earlier statutes, such as 42 Okla. Stat. § 144. Assuming timing is an issue affecting priority, a §144 oil and gas lien has the potential to come into existence and to be perfected prior to the automatic creation of a lien under the 2010 Act, since a service or materials may be provided prior to severance of oil and gas. This is just one example of a competing lien that was not addressed by the Oklahoma legislature in drafting the 2010 Act.
39. Fed. R. Bankr. P. 3001.
40. Fed. R. Bankr. P. 3002.
41. Fed. R. Bankr. P. 3002.

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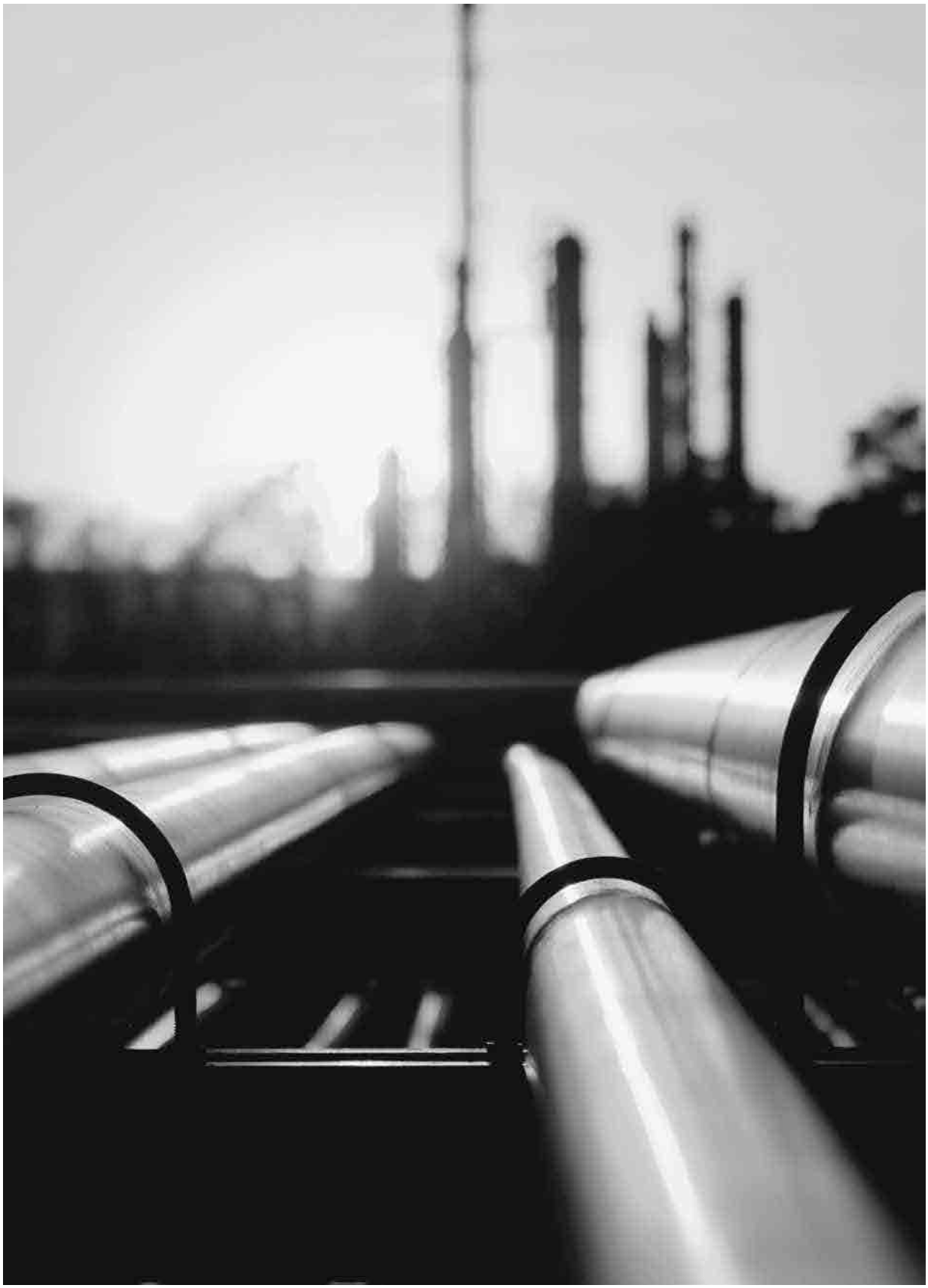

Interpreting Assignments of the Oil and Gas Lease

By Jereme M. Cowan

Under Oklahoma law, an oil and gas lease grants a cluster of rights in land,[1] forming an estate in real property with the nature of fee.[2] Like many of the sticks in the metaphorical bundle, the estate created under the oil and gas lease is freely assignable and divisible.[3] As a result, oil and gas leaseholds can be transferred, in whole or in part, by the holder of the oil and gas lease, such practice being a central element to oil and gas development.[4] Furthermore, the transfers of leasehold are usually executed and delivered by legal instruments ubiquitously titled "assignments," which are filed of record in the same manner as any instrument affecting title to real property.[5] Given the history of Oklahoma's oil booms,[6] not to mention Oklahoma's current role in the U.S. shale boom, assignments inundate many of the county clerk records where oil and gas exploration is prevalent. Therefore, it is likely that an examination of oil and gas land titles in one of these counties will require the interpretation of assignments.

BASIC RULES OF CONSTRUCTION

Assignments are a contract and a conveyance.[7] As such, they are to be read in accordance with the basic rules of contractual interpretation,[8] which comprise not only those findings in Oklahoma's case law but also the statutory provisions of 15 O.S. §§151-178. In a nutshell, Oklahoma's rules on interpreting assignments begin with prioritizing the true intent of the parties, as gathered from the four corners of the instrument.[9] If the assignment is unambiguous, then the written instrument will govern,[10] along with all technical terms in the assignment being interpreted as commonly understood among persons in the oil and gas industry.[11] However, if there is an ambiguity, then the contractual interpretation can be aided by extrinsic evidence in order to resolve the intrinsic uncertainties of the assignment.[12]

These rules make it imperative for an attorney conducting a title examination to understand the business and terminology of the oil and gas industry as it pertains to the transfer of leasehold, not to mention understanding general rules of land titles and the law of oil and gas. The purpose of this article is not to give a complete account of the oil and gas industry nor an account of all rules governing the transfer of oil and gas rights in the record title. Rather, the purpose is to give an introductory and cursory overview, presented on a step-by-step basis, for an attorney who may find them-

selves, either willingly or unwillingly, examining assignments of oil and gas leases filed in Oklahoma.

STEP 1: WHAT TYPE OF INTEREST?

First and foremost, the title examiner needs to determine the type of interest being assigned (or reserved) in the leasehold. More often than not, if the assignment is transferring an interest in a lease without overriding royalty language or net profits language, then a working interest is being assigned. When there is ambiguity, the title examiner should remember that a working interest is the right to *work* on the leased property — searching, developing and producing oil and gas. On the other hand, an overriding royalty interest is share in production attributable to a particular lease.

STEP 2: WHAT AMOUNT OF INTEREST?

Working interests tend to be relatively straightforward. Either the assignor is purporting to assign all of its right, title and interest under a lease, all of a lease (read 100 percent) or a fractional interest in a lease. Digressing a bit, now would be a good moment to discuss the difference between all right, title and interest *of the assignor* and 100 percent of a lease. All of the assignor's right, title and interest could be 100 percent or could be some fractional interest. It depends on what the assignor owns of record. If an assignor assigns a lease without any fractional limitations or without the foregoing language limiting it to the assignor's right, title and interest, then the assignor is purporting to assign 100 percent of the lease. The prudent examiner notes the distinction.

> **"Often, the assignor decides to use a formula for the computation of the assigned or reserved overriding royalty interest."**

Overriding royalty interest can sometimes not be as straightforward. Often, the assignor decides to use a formula for the computation of the assigned or reserved overriding royalty interest. For example, a recitation in the assignment reads as follows: an overriding royalty interest equal to the difference between 20 percent and lease burdens. Here, the overriding royalty interest would be calculated by first adding up all the lease burdens, such as a one-eighth landowner's royalty and a previously conveyed one-thirty-second overriding royalty interest, and then subtracting that number from 20 percent, which is represented mathematically as: 20% - (1/8 + 1/32) = 4.375%.

There are various business reasons for computing an assigned or reserved overriding royalty interest with the subtraction of lease burdens from a certain percentage, the most prominent being that assignments of leases typically cover a block of leases, which contain various lease net revenue interests. Showing the overriding royalty interest as a formula rather than a specific number allows the assignor to either retain or convey the leases at certain net revenue interest. In the prior example, assuming the assignor was assigning the overriding royalty interest, it was retaining an 80 percent net revenue interest in all the leases covered by the assignment except, of course, those leases which were already burdened greater than 20 percent.

STEP 3: WHAT LEASE IS COVERED?

All leasehold interests derive from a lease. Therefore, it is imperative that the examining attorney determine what lease is covered by an assignment. If the assignment covers one or just a few leases, then the lease(s) will probably be described somewhere in the body of the instrument. If the assignment covers multiple leases, then typically they will be described in an exhibit "A" attached thereto. However, it should be noted that in some cases an assignment may not describe a particular lease or leases but instead will include language that it is the intent to assign all leasehold rights in a particular tract of land, usually the unitized area. For example, an assignment may read that all of the assignor's rights in the leasehold covering the SW/4 are transferred to the assignee without giving further explanation as to the underlying leases. In this particular example, the assignor is conveying whatever leasehold rights it may own from whatever source such rights might derive as to the SW/4.

STEP 4: WHAT ARE THE LIMITATIONS TO THE ASSIGNED INTEREST?

By far the most challenging (and often most ambiguous) aspect of an assignment is the limitations to the assigned interest. Like land itself, a lease is a bundle of sticks. A lease can be cut and carved any which way, limited only

by the imagination of the oil and gas industry. If an assignor wants to assign a lease insofar as that lease covers a particular formation in the strata, then the assignor can do so. The following are standard limitations that the examining attorney should recognize.

Wellbore

An assignment can be limited to the wellbore of a well. A wellbore limitation means that the assignor is assigning only those rights to production from the wellbore of a certain well, arguably at the total depth it existed at the time of the assignment. All interest outside the wellbore are excluded from the assignment, entailing that a wellbore assignee can produce from shallower formations in the wellbore but cannot produce from deeper formations or lands outside the wellbore.

The central problem with wellbore only assignments is determining when in fact there is a wellbore only assignment. The title examiner should be aware that a wellbore assignment is the narrowest of assignments. Very limited rights to the lease are being assigned. It can be argued that the lease or unit and the lands covered by the lease or unit need only be described for informational purposes, as it is rights to the wellbore being assigned. Furthermore, the fact that a well or unit is mentioned in the description of the lease does not entail that the assignor intended to convey wellbore rights only. More often than not, a reference to a well or unit in Oklahoma is for informational purposes.

Depth Limits

Some assignments are limited to certain depths or to a particular formation. For instances, an assignment may limit the assigned leases "insofar as said leases cover the Woodford Formation" or "insofar as from the surface to a depth of 8,100 feet." Depth limitations are usually more prominent than wellbore limitations and are considerably less ambiguous. Furthermore, title examiners should always read an assignment thoroughly to determine whether a depth limitation is pertinent. Many times, such a limitation is buried in one of the numerous special provisions of the assignment or placed in one of the exhibits attached thereto.

Horizontal Limits

In order to accommodate the formation of units, leases will often be assigned only as to a portion of the lands covered thereby. For example, a participant enters into a joint operating agreement with the operator that has proposed the drilling of a 40-acre unit well located in the NW/4 NW/4. If the participant owns all of a certain lease covering the N/2 NW/4, the participant may decide to assign only that portion of the lease covering the NW/4 NW/4, thereby retaining all rights in the NE/4 NW/4. Therefore, assignments may contain limitations as to the area acreage being conveyed.

CONCLUSION

The foregoing steps serve as an introduction to interpreting assignments of oil and gas leases. Most certainly, each step of analysis could be accompanied by a more detailed explanation. That said, the key point to be made here is that the interpretation of assignments in oil and gas land titles requires a familiarization of the business practices of the oil and gas industry, not just an understanding of the governing law.

1. *See Hinds v. Phillips Petroleum Company*, 1979 OK 22, 591 P.2d 697, 698 (1979) (stating that "[t]he cluster of rights comprised within an instrument we refer to 'in deference to custom' as an 'oil and gas lease' includes a great variety of common-law interests in land").
2. *See Shields v. Moffitt*, 1984 OK 42, 683 P.2d 530, 532-33 (1984) (finding that "the holder of an oil and gas lease during the primary term or as extended by production has a base or qualified fee, i.e., an estate in real property have the nature of a fee, but not a fee simple absolute").
3. *See Hinds* at 699 (concluding that leasehold interests are freely alienable "in whole or in part"); Eugene Kuntz, *Kuntz, a Treatise on the Law of Oil and Gas*, Volume Five, §64.1, 259 (1987) (asserting that the oil and gas lease is freely assignable "in the absence of a provision to the contrary"); *see also Shields* at 533 (holding that a lease clause restricting alienation was void).
4. John S. Lowe, *Oil and Gas Law in a Nutshell*, Sixth Edition (2014).
5. Joyce Palomar, *Patton and Palomar on Land Titles*, 3rd Edition, Volume One, 3 (2003).
6. Kenny A. Franks, *The Oklahoma Petroleum Industry* (Norman: University of Oklahoma Press, 1980).
7. *See Plano Petroleum, LLC v. GHK Exploration, L.P.*, 2011 OK 18 (2011).
8. *K & K Food Servs. v. S & H, Inc.*, 2000 OK 31, 3 P.3d 705, 708.
9. *See Messner v. Moorehead*, 1990 OK 17, ¶8, 787 P.2d 1270, 1272.
10. *Messner* at 1273.
11. 15 O.S. §161.
12. *Crockett v. McKenzie*, 1994 OK 3, ¶5, 867 P.2d 463, 465.

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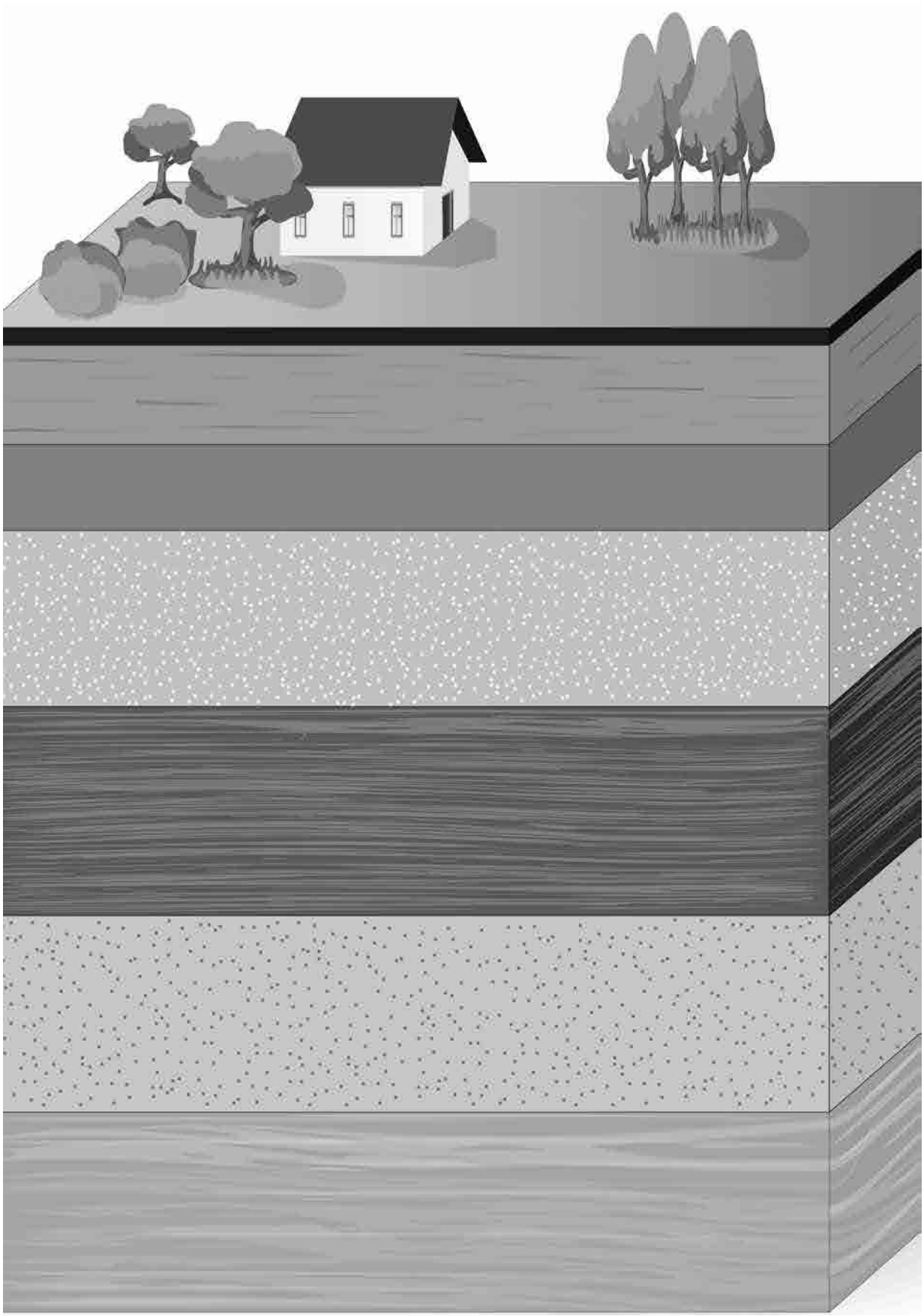

Don't Space Out – Protecting That Empty Space for Your Next Natural Resource Client

By Trae Gray and Ryan Ellis

A landman approaches a landowner to request a subsurface easement as part of a damage release for drilling an out-of-section well so an oil company can place a longer lateral during the fracture of the well — a scenario that plays out time and time again in Oklahoma. In this situation, the oil company must have the right to exceed the areas covered by its oil and gas lease.

The environmental consequences are similar to drilling a well within the unit or the section where lease rights are present, and the production will likely be increased as a result of the horizontal lateral. Thus, there is seldom a reason not to allow an oil company to proceed in this situation. Yet, neither party is likely to have considered how the release language will affect other seemingly unrelated issues. As a result, unintended consequences abound.

Contrast:

> Release No. One: Landowner hereby grants to Operator a surface and subsurface easement within Section 1, Township 2 South, Range 2 West, Carter County, Oklahoma.

> Release No. Two: WHEREAS, Landowner is fully aware that the Double O Bar #1 Well (Well) on this padsite in Section 1, Township 2 South, Range 2 West, Carter County, Oklahoma will be drilled into Section 12, Township 2 South, Range 2 West and that the Well is what is commonly referred to as an out of section well. Herein, Landowner hereby grants a surface and subsurface easement in portions of Section 1, Township 2 South, Range 2 West, Carter County, Oklahoma to Operator for the limited purpose of drilling this out of section Well, provided the Well is drilled from the padsite covered by this Agreement. This subsurface and surface easement grants only a right to use the drillsite, drill the wellbore and the ongoing use of the wellbore of the Well. The easement does not grant any other surface or subsurface right unless specifically set forth herein. This subsurface and surface easement shall terminate upon expiration of the terms and conditions of the applicable oil and gas lease(s) in Section 12, Township 2 South, Range 2 West and the fulfillment of all the terms and conditions of this Agreement.

In Release No. Two, the oil company has everything they need to legally drill the out-of-section well, fracture the well and produce the well for so long as the lease produces. Essentially, the oil company has everything they sought, wanted and needed clearly defined within the release. The oil company's intent has been met. However, Release No. One is wrought with issues and will likely lead to a filing pursu-

ant to 12 O.S. §§1141.1-1141.5 (Oklahoma Nonjudicial Marketable Title Procedures Act).

Here are a few issues to consider with respect to the differences in the two releases. In Release No. One, a surface and subsurface agreement has been granted in the whole section, resulting in a release that is very broad and creates termination and abandonment issues. It is likely that the intent of the parties was not accurately memorialized in this situation. Has the surface owner effectively given up the pore space and other surface and subsurface rights? What is the scope of the easement? What are the vertical and lateral boundaries of the easement? In this article, we will explore the emerging law of pore space and practical and legal considerations a landowner should be aware of, particularly when making decisions that could affect the future rights of their pore space ownership.

THE EMERGENCE OF PORE SPACE AS A PROPERTY RIGHT

Pore space, although rarely thought about, should be viewed as just another private property right. We all recall our first year of law school and our basic property law class where property rights are commonly referred to as a "bundle of sticks." Pore space, as one of the many different sticks in the bundle, is generally thought of as a subsurface property right. Although it can be defined in a number of different ways, pore space, by its simplest definition, is the empty space between grains of rock, fractures and voids. However, when defining pore space as a property right, states have become increasingly more specific. For example, Oklahoma defines pore space as "any interstitial space not occupied by soil or rock, within the solid material of the earth, and any cavity, hole, hollow or void space within the solid material of the earth."[1] Other states, such as Wyoming, are primarily concerned with the use of pore space for carbon sequestration, and therefore, specifically define pore space as "subsurface space which can be used as storage space for carbon dioxide or other substances."[2]

Until very recently, pore space was hardly considered a property right at all. However, the surge of interest in carbon capture and sequestration (CCS), as well as the need to store salt water produced by the oil and gas industry — as a waste product arising from oil and gas production and from hydraulic fracturing — has made pore space ownership an increasingly popular, yet extremely underdeveloped, area of the law.

Like most property rights, pore space ownership has evolved out of common law property rights, which are traceable to the old common law maxim known as the "*ad coelum* doctrine." The *ad coelum* doctrine states "*cujus est solum, ejus est usque ad coelum et ad inferos*," meaning "to whomever the soil belongs, he owns also to the sky and to the depths."[3] Taken literally, the owner of the surface holds title to the entire tract from the heavens to the depths of the earth.[4] This form of ownership, although no longer as broad as it was originally, is the simplest and broadest property interest allowed by law, which is known as a fee simple interest.[5] Determining ownership of pore space is very straightforward when a fee simple interest is involved because the fee owner holds title to both the surface estate and the mineral estate.[6] However, once the fee simple interest is severed into differing estates and burdened with a variety of other property interests, determining pore space ownership can become a confusing and complicated issue.[7]

There are two common ownership structures once the mineral estate has been severed from the surface estate: 1) the nonownership theory, known as the "English Rule," and 2) the ownership-in-place theory, known as the "American Rule."[8] The English Rule is commonly used in the United Kingdom, Canada and Australia, where mineral rights are mostly owned by the respective governments.[9] Application of the English Rule within the United States would vest pore space ownership with the mineral estate — which is the current minority rule within the United States.[10]

The American Rule, on the other hand, "involves the severance of a mineral right from the interest in the whole geological formation."[11] When applying the American Rule, the mineral estate owns the minerals beneath the land, but the geological formation is owned by the surface estate.[12] The American Rule is currently the majority rule in the United States.[13]

In addition, although the American Rule vests pore space ownership with surface estate, the mineral estate still has the right to explore and remove minerals from the land, which allows a mineral estate the right of reasonable use of pore space for mineral exploration. As a result, in states applying the American Rule, it cannot simply be said that pore space belongs solely to the surface estate. It must also be determined if the reservoir has been depleted of minerals

because until depletion occurs, the mineral estate still has a right to use the pore space.[14]

In 2011 the Oklahoma Legislature enacted Section 6 of Title 60 that clearly states pore space is a property right owned by the surface owner subject to reasonable use by the mineral owner.[15] Still, landowners must be mindful of the following legal and practical considerations associated with their pore space rights. Finally, landowners and those representing them must be cognizant of how title to pore space can be modified through various contracts, easements, litigation, releases and other agreements landowners routinely enter into.

LEGAL AND PRACTICAL CONSIDERATIONS OF PORE SPACE RIGHTS

Currently in Oklahoma, the most practical use for pore space is for its use in oil and gas development. As demonstrated in the scenario above, in order to engage in directional drilling, operators need to obtain subsurface easements to access adjoining parcels in which they do not own lease rights. The disposal of salt water in underground injection wells is another major area where pore space rights are implicated.

Valuation of Pore Space

As surface owners become more educated about pore space ownership and as technology advances, it is highly likely that operators will need to acquire rights to the pore space in order to continue directional drilling or inject wastewater in areas outside of the drilling units. Yet placing a monetary value on pore space can be just as complicated as determining ownership. For instance, valuation of pore space will likely be difficult to determine as it will depend on the particular use and what the user is willing to pay as opposed to the actual value of occupation. There are several reasons that support this theory.

First, it is likely to be difficult to analyze the devaluation to either the surface or mineral estate from the occupation of the pore space. Determining the devaluation becomes even more speculative when neither the surface nor mineral estate is utilizing the pore space for any practical purpose. Second, pore space is difficult to view as a tangible medium, and as a general rule, intangible items become harder to value. Finally, it is likely that operators will pay more than the market value for out-of-section easement rights because an operator cannot force a landowner to give up these rights.

Studies show that nontangible rights typically bring more than market value, yet the definition of market value is arguable in and of itself.[16] On one hand it can be argued what a nontangible sells for in the marketplace is the best indicator of market value. On the other hand, it can be argued that an appraisal of the property is a better indicator of market value. Typically, it is a combination of these two that determine what these rights bring in the marketplace.

> **“Studies have indicated that global sequestration capacity in depleted oil and gas fields is substantial, with the capacity to store 125 years of current worldwide CO_2 emissions from fossil fuel-fired power plants.”**

CO_2 Sequestration

Another possible use for pore space involves CCS. For instance, nearly 85 percent of the energy produced within the United States comes from the combustion of fossil fuels, and it is predicted that fossil fuels will remain the primary source of energy for the near future.[17] In addition, coal represents a staggering 49 percent of the United States' existing electric-generating capacity.[18] Not surprisingly, the United States is the second largest emitter of greenhouse gases, 60 percent of which is carbon dioxide.[19] As society looks for viable solutions to carbon dioxide emissions (CO_2), CCS is at the forefront.[20] This process can potentially remove 80 to 95 percent of the CO_2 emitted from power plants.[21]

Studies have indicated that global sequestration capacity in depleted oil and gas fields is substantial, with the capacity to store 125 years of current worldwide CO_2 emissions from fossil fuel-fired power plants.[22] Although CO_2 is routinely injected into subsurface pore space in an effort to aid in the recovery of oil and gas, and though large-scale sequestration sites have been identified within the United States, there are currently no large-scale, commercial sequestration projects underway in the United States.[23] While

Oklahoma has not yet enacted carbon sequestration legislation, numerous other states have and more are following suit.[24] As a result, pore space owners should be mindful of the opportunity and their right to use depleted oil and gas reservoirs for CO_2 sequestration.

Underground Natural Gas Storage

In addition to CO_2 sequestration, pore space also has the potential to be used for underground natural gas storage. Natural gas, unlike oil, is more easily stored by re-injection into underground rock pore spaces, which are typically geological formations or common sources of supply whose pore spaces formerly held producible hydrocarbons that are now substantially depleted.[25] Although the law of underground storage rights is largely undeveloped throughout the United States, there are several cases in Oklahoma that address ownership rights of depleted geological formations and, to some extent, ownership of pore space.

In *Ellis v. Arkansas Louisiana Gas Company,* the most prominent of the Oklahoma cases, the surface owners challenged the defendant gas producer's use of an underground stratum for the storage of natural gas. The surface owners argued that once the minerals had been depleted from the porous reservoir rock, the surface estate became the owner of the reservoir rock and the mineral owner could not store natural gas without authorization of the surface owner.[26] The mineral owner, however, argued that ownership of the reservoir rock did not grant the surface owner the right to inject and store natural gas and claimed the right to inject and store natural gas by virtue of oil and gas leases, gas storage leases and gas injection easements.[27] The *Ellis* court held that a natural gas storage company must obtain permission from the surface owner in order to store natural gas produced elsewhere and reasoned that a mineral deed only allowed the grantee the right to produce oil, gas and minerals, but the subsurface strata were retained by the surface estate.[28]

The *Ellis* court, in finding that the surface estate retains the rights to underground natural gas storage, relied on *Sunray Oil Co. v. Cortex Oil Company*.[29] In S*unray*, an oil and gas lessee sought injunctive relief against Sunray to enjoin its use of an abandoned well for disposal of salt water.[30] Sunray had obtained an assignment of an oil and gas lease on 10 acres on which the abandoned well was situated.[31] Sunray also obtained a license from the surface owner to dispose of its wastewater, produced from nearby operations, into the abandoned well.[32] The Oklahoma Supreme Court found that an oil and gas lease bestows only such minerals that are found and reduced to possession and vests no title to any oil or gas that is not extracted and reduced to possession.[33] Thus, the surface owner had the right to grant permission to inject wastewater into the subsurface as long as it did not interfere with the mineral estate's oil and gas operations.[34]

While neither *Ellis* nor *Sunray* address pore space rights specifically, it can be concluded that the surface estate retains the right to the subsurface strata for the purpose of natural gas storage or wastewater injection — both of which utilize the pore space. As such, surface owners should be mindful that an oil and gas lease does not automatically give an operator the absolute right to use the pore space for injection of wastewater produced out of section or natural gas storage. A surface owner will always have the right to demand compensation for storage of natural gas in depleted geological formations and for injection of wastewater produced from out-of-section wells.

Subsurface Trespass

In addition to potential uses for pore space, pore space owners should be aware of the high potential of a subsurface trespass.

Historically, trespass has been characterized by "a series of actions for harm to person or property."[35] Over time, the varying forms of trespass have continued to evolve and offer flexible relief based on varying circumstances. More specifically, trespass has evolved to address disputes involving subsurface land use.[36]

In the early days of the petroleum industry, little attention was given to the idea of a subsurface trespass.[37] Instead, mineral owners, compelled by the rule of capture, often constructed as many wells as possible in order to protect against drainage.[38] However, technological advancements, such as subsurface horizontal drilling and reservoir stimulation techniques, are now so commonplace that courts are faced with deciding whether these techniques, which often encroach upon subsurface property rights, give rise to an action in trespass.[39]

Subsurface trespass law has developed from traditional surface trespass.[40] In the early 1900s, upon the discovery of oil in Texas and California, there was a surge of drilling rights disputes to which courts applied ordinary trespass prin-

ciples and often found that "one who unlawfully entered the land of another to drill for and produce oil was a trespasser, and was therefore not entitled to the oil severed from the land."[41] However, if the trespasser had acted in good faith, courts often permitted recovery of drilling and production expenses, but when the trespasser acted in the absence of good faith, courts were much less likely to allow the trespasser to recoup expenses and the lawful owner was left with a free producing well.[42]

It was from these principles that the law of subsurface trespass evolved and by its most general definition is "the unlawful physical entry onto the mineral estate of another."[43] Application of subsurface trespass law was straightforward in the early days of the oil and gas industry.[44] For instance, intent was not required to be shown as long as the subsurface trespass was direct and volitional.[45] However, as previously mentioned, recent technological advancements have made it difficult to determine when certain subsurface operations can be considered a subsurface trespass.[46] As a result, case law on subsurface trespass is neither unified nor coherent.[47]

Traditional Oil and Gas Subsurface Trespass: Deviated, Directional and Horizontal. The most obvious example of an actionable trespass in this context is a directional well that bottoms out under neighboring property.[48] Unlike the scenario presented at the beginning of this article, under this particular scenario, no release is sought, yet a well is drilled and eventually enters the neighboring property.[49] This situation gives rise to an actionable trespass due to the well-established principle of property law that prevents the use of the surface to support mineral extraction activities on other lands.[50] However, operators can avoid a trespass situation by seeking an appropriate release from the pore space owner.[51]

Hydraulic Fracturing. Presently, Oklahoma has not taken a stance on subsurface trespass that results from hydraulic fracturing. The leading opinion on hydraulic fracturing is *Coastal Oil & Gas Corp. v. Garza Energy Trust*, which is a Texas Supreme Court case.[52] Here, the operator clearly entered into the adjoining property with its fracturing operations. Regardless, the Texas Supreme Court reasoned that there must be an injury and the only injury in this case was precluded by the rule of capture. Even though the jury found that a subsurface trespass occurred, the court based its holding on the fact that hydraulic fracturing prevented underground waste of hydrocarbons by allowing its recovery from tight reservoirs that would not otherwise be productive and was necessary to meet an important social need. Ultimately, in terms of subsurface trespass, the *Garza* court's most important statement was this, "[t]he law of trespass need no more be the same two miles below the surface than two miles above."[53] Although this reasoning wisely protects the well-established and necessary practice of hydraulic fracturing, it also gives an inference that courts, at least in Texas, may be reluctant to find a subsurface trespass of pore space as a result of hydraulic fracturing.

Secondary and Enhanced Recovery Operations. Secondary or enhanced recovery operations are used to maintain or increase production of a well once the reservoir's natural production decreases.[54] Although states often recognize secondary or enhanced recovery as a valid public interest, trespass issues can arise in instances when an operator injects a substance, such as salt water, carbon dioxide, chemicals or natural gas, into the subsurface of its own property in order to increase production and the injected substance invades the subsurface of the neighboring property.[55] These cases, again, are not as straightforward as cases involving a directional well that deviates across ownership boundaries.

Across the nation, the case law in this area is mixed; however, Oklahoma does recognize a cause of action for private nuisance when injected water injures another's interest in a well or leasehold, even though the water was injected for enhanced oil recovery pursuant to a regulatory permit.[56] However, the requirement of showing actual injury or recoverable damages remains.[57] Yet, the Oklahoma Supreme Court, discussing the disposal of saltwater from petroleum wells, has stated that "[i]f such disposal of saltwater is forbidden unless oil producers first obtain the consent of all persons under whose lands it may migrate or percolate, [then] underground disposal would be practically prohibited."[58]

Generally, when secondary recovery is involved, it appears that most courts are unwilling to find the migration of wastewater onto neighboring properties to be a trespass. This is likely because secondary recovery is in the best interest of the public and industry. With that said, there appears to be no clear case law challenging this logic specifically in the realm of pore space.

Wastewater Injection Wells. In Oklahoma, wastewater injection wells have been at the forefront of the news lately as the primary cause for the recent earthquakes. In addition to their association with the local earthquakes, wastewater injection wells are also associated with subsurface trespasses. In this situation, a subsurface trespass occurs when fluids from a wastewater injection well migrate beyond the legal surface boundaries of an operator's rights.

It is likely that the operation of many wastewater injection wells result in the subsurface trespass of pore space to some extent as common sense says that when a commercial wastewater disposal operator only owns one acre yet injects hundreds of thousands of barrels of wastewater into a wellbore on that one acre, the wastewater is migrating to an area outside of that one acre. However, that being said, it would be difficult to prove. Nevertheless, pore space owners should always be mindful of wastewater injection wells near their property and the potential for that wastewater to migrate onto their property. As the law on pore space develops, surface owners may seek compensation from these commercial wastewater disposal operators or may even try to prohibit the injection.

Although previously cited, *West Edmond Salt Disposal Ass'n v. Rosecrans*, is also relevant to the discussion on wastewater injection wells. The 1950 decision by the Oklahoma Supreme Court held there was no taking or damaging of plaintiffs' property where a defendant injected salt water into an abandoned well and the salt water migrated and commingled with existing salt water in a formation underlying plaintiffs' adjoining lands.[59] This case is distinguishable from the example previously given regarding wastewater injection wells. In *Rosecrans,* the Oklahoma Supreme Court found that there was no taking of plaintiffs' property in one specific situation — where there was no injury or damage and the migrating saltwater did not deprive plaintiffs of possession, use or enjoyment of the property.[60] In other words, because plaintiffs' pore space consisted of a salt water formation that already contained massive amounts of salt water, the court found that the defendant did not trespass or take plaintiffs' property.

However, the bigger issue presented by *Rosecrans* is that the Oklahoma Supreme Court also likened salt water to oil and stated it was fugitive in nature, belonging to the owner of the land under which it had migrated. Thus, the salt water did not remain the property of the defendant. The plaintiffs argued that the rule of law governing minerals should not be applied to deleterious substances; however, the court returned to the fact that the salt water injected by defendant simply entered a formation already saturated with salt water.[61]

Further, *Rosecrans* was a case of first impression and was extensively briefed and argued by both parties, with the attorney general of the state filing an *amicus curiae* brief on behalf of the state. During the briefing, both the defendant and the attorney general admitted and affirmed the liability of defendant or other producers disposing of salt water by injection for any actual damage or injury to adjoining property owners.[62] However, the plaintiffs were simply unsuccessful, likely because their pore space was already occupied by a saltwater formation, in proving damages. Had the plaintiffs' pore space been unoccupied, it's possible the Oklahoma Supreme Court may have reached a different result.

CONCLUSION

The emergence of pore space as a private property right is still a developing area of the law — yet it must be considered in natural resource negotiations from this point forward. While the recent earthquakes have increased society's overall awareness of what is happening underground, pore space is not typically mentioned in relation to the earthquakes despite the fact that much of the disposed wastewater is entering pore space in areas where injectors have not acquired the appropriate rights. However, we do have some insight on how the law of pore space will develop in areas of natural gas storage, wastewater injection, secondary and enhanced recovery operations, hydraulic fracturing, subsurface trespasses and CO_2 sequestration.

Further, pore space is primed for consideration both from the standpoint of what it is actually worth economically and also how it will be dealt with legally. The development of pore space law will likely become a hot topic that will be considered by business persons, policymakers, attorneys and judges. As such, it will be increasingly important for attorneys to protect client interests in pore space and to ensure that any agreements negotiated are more in line with Release No. Two as opposed to Release No. One above.

Authors' Note: A significant portion of the research and authority used in this article is taken from: Trae

Gray, University of Oklahoma College of Law, A 2015 Analysis and Update on U.S. Pore Space Law — The Necessity of Proceeding Cautiously with Respect to the "Stick" Known as Pore Space (2015).

1. 60 Okla. Stat. §6 (2011).
2. Wyo. Stat. Ann. §34-1-152 (2013).
3. John G. Sprankling, "Owning the Center of the Earth," 55 *UCLA L. Rev*. 979, 980 (2008).
4. *Id.*
5. Mark A. de Figueiredo, Mass. Inst. of Tech., "Property Interests and Liability of Geologic Carbon Dioxide Storage: A Special Report to the MIT Carbon Sequestration Initiative," 5 (Sept. 2005), *available at* http://sequestration.mit.edu/pdf/deFigueredo_Property_Interests.pdf.
6. *Id*. at 5-6.
7. *Id*. at 6.
8. Elizabeth Lokey Aldrich et al., "Energy Policy Inst., Analysis of Existing and Possible Regimes for Carbon Capture and Sequestration: A Review for Policymakers" 17-20 (Apr. 2011), *available at* http://caesepi.org/wp-content/uploads/2016/02/epi-ccs-pore-space-regimes.pdf.
9. *Id*. at 5.
10. *Id*. at 18.
11. *Id*. at 19.
12. *Id*.
13. *Id*.
14. de Figueiredo, *supra* note 6, at 7.
15. 60 Okla. Stat. §6 (2011).
16. Max J. Derbes Jr., "The Appraisal of Underground Easements," *Right of Way* (Int'l Right of Way Ass'n), October 1992, at 16, *available at* www.irwaonline.org/eweb/upload/1002b.pdf.
17. Stephanie M. Haggerty, "Legal Requirements for Widespread Implementation of CO_2 Sequestration in Depleted Oil Reservoirs," 21 *Pace Envtl. L. Rev*. 197, 197 (2003).
18. Victor B. Flatt, "Paving the Legal Path for Carbon Sequestration from Coal," 19 *Duke Envtl. L. & Pol'y* F. 211, 211 (2009).
19. China, as the world's largest emitter of greenhouse gas, is also a major concern as the country depends heavily on coal-fired generation and has more coal than any other energy source. *See* Edward H. Ziegler, "China's Cities, Globalization, and Sustainable Development: Comparative Thoughts on Urban Planning, Energy, and Environmental Policy," 5 *Wash. U. Global Stud. L. Rev.* 295, 300 (2006).
20. Flatt, *supra* note 19.
21. *Id*.
22. Haggerty, *supra* note 18.
23. Flatt, *supra* note 19, at 213.
24. *Id*.
25. Eric R. King, "The Ownership of Empty Spaces" 2 (n.d.) (paper delivered at the Eugene Kuntz Conference on Natural Resources Law & Policy, November 2003).
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Sunray Oil Co. v. Cortez Oil Co.*, 112 P.2d 792, 793 (Okla. 1941).
31. *Id*. at 793-95.
32. *Id*.
33. *Id*. at 793.
34. *Id*. at 795.
35. Owen L. Anderson, "'Subsurface Trespass' A Man's Subsurface Is Not His Castle," 49 *Washburn L.J.* 247, 251 (2010).
36. *Id*.
37. Levi Rodgers, "Subsurface Trespass by Hydraulic Fracturing: Escaping *Coastal v. Garza's* Disparate Jurisprudence Through Equitable Compromise," 45 *Tex. Tech L. Rev.* Online Edition 99, 112 (2012-2013).
38. *Id*. at 112.
39. Owen L. Anderson, "Lord Coke, the Restatement, and Modern Subsurface Trespass Law," 6 *Tex. J. Oil Gas & Energy Law* 203, 204 (2010-11).
40. Rodgers, *supra* note 38, at 112.
41. *Id*.
42. *Id*. at 112-13.
43. *Id*. at 113.
44. *Id*.
45. *Id*.
46. *Id*.
47. *Id*.
48. Rodgers, *supra* note 38, at 113.
49. Bruce M. Kramer, "Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law," 25 *Colo. Nat. Resources, Energy & Envtl. L. Rev*. 291, 325 (2014).
50. *Id*. at 326.
51. *Id*. at 325.
52. *Coastal Oil v. Garza*, 268 S.W.3d 1 (Tex. 2006).
53. *Garza*, 268 S.W.3d at 11.
54. Rodgers, *supra* note 38, at 116.
55. *Id*.
56. Anderson, *supra* note 36, at 233.
57. *See West Edmond Hunton Lime Unit v. Lillard*, 1954 OK 52; *Sunray Oil Co. v. Cortex Oil Co*., 1941 OK 77; and *West Edmond Salt Disposal Ass'n v. Rosecrans*, 1950 OK 196.
58. *West Edmond Salt Disposal Ass'n v. Rosecrans*, ¶11, 1950 OK 196.
59 *West Edmond Salt Disposal Ass'n v. Rosecrans*, 1950 OK 196.
60 *Id*. at ¶7.
61 *Id*. at ¶14.
62 *Id*. at ¶11.

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Rollin' Along the River

By Erin Potter Sullenger

A coalition of environmental groups led by the Sierra Club brought an inventive case in a federal district court in the state of Washington under the Federal Water Pollution Control Act, more commonly known as the Clean Water Act. In *Sierra Club v. BNSF Railway Co.*,[1] the plaintiffs alleged that BNSF was and is illegally discharging coal, coal dust and coal byproducts into waters of the United States from the trains carrying coal produced from the mines of the Powder River Basin in Wyoming and Montana, through the state of Washington to export terminals in Canada and coal-fired power plants and other facilities in the region. Plaintiffs based their allegations on the alleged fact that "each and every coal train and each and every rail car carrying coal discharges coal pollutants to waters of the United States when traveling adjacent to, over, and in proximity to the waters of the United States."[2]

To the surprise of many, this case made it all the way to the trial phase before the parties reached a settlement. Along the way, however, the federal court issued a written order and opinion denying both parties' motions for summary judgment that energy lawyers should note because of its potentially broad implications for pipelines and other discrete conveyances including transportation by barge and trucks. The court order held that the coal train and rail cars were in fact "point sources" under the Clean Water Act if it could be shown that coal, coal dust and coal byproducts were discharged from the train and rail car and into a waterway. This finding, that a moving train can be a point source, is an application of the term "rolling stock" used in the definition of point source and can lead to a more troubling future for many industries.

SETTING THE STAGE

Before we dive into the details and written orders and opinions from the court, let us set the stage, orient ourselves to the coal industry, and provide a refresher on important terms from the Clean Water Act.

Battle Over Coal

For decades, if not a century or more, coal was the primary source of fuel to fire boilers used to generate electricity and run manufacturing facilities. The United States has the world's largest estimated recoverable reserves of coal.[3] In 2014, approximately 70 percent of the 1 billion short tons of coal produced came from five states — Wyoming, West Virginia, Kentucky, Pennsylvania and Illinois.[4] Despite the oft referred to "war on coal," coal still provides a significant portion of the electricity in the United States. During the first half of 2016, coal-fired power plants supplied 31 percent of the U.S. electricity generation, second only to natural gas electricity generation, which supplied 36 percent of the total U.S. electricity.[5]

You may not know that Oklahoma has the most significant deposits of bituminous coal

between the Mississippi River and the Rocky Mountains, located in coal beds in eastern Oklahoma, across 20 counties in an area covering approximately 8,000 square miles.[6] In 2013, Oklahoma produced just over 1 million tons of coal and was ranked 21st among coal producing states in 2014.[7] In 2014, four of Oklahoma's 10 largest power generation facilities utilized coal as the primary energy source, including the northeastern facility in Oologah operated by Public Service Co. of Oklahoma, Oklahoma's top generating facility.[8]

The coal at issue in the lawsuit of interest in this article comes from the Powder River Basin (PRB). The PRB contains significant coal beds that extend from northeastern Wyoming and southeastern Montana. Covering 19,500 square miles, the PRB contains the largest source of low-sulfur, low-ash, sub-bituminous coal in the United States and is considered the single most important coal basin in the United States, producing on average 400 million tons of coal each year.[9] To get the coal from the PRB to the markets, the coal is loaded into rail cars and transported to export terminals and coal-fired power plants across the United States, including power generation facilities here in Oklahoma.[10]

Trains transport nearly 70 percent of the coal deliveries in the United States at least part of the way from the mines to the consumers.[11] Coal rail cars are typically uncovered, which allows fugitive coal dust, coal and other byproducts to escape the rail cars during transport. So why not cover them? The rail cars are left uncovered because spontaneous combustion of the coal is a well-known phenomenon resulting from the confinement of coal and coal dust. Coal from the PRB has even been delivered to a power plant with the rail car partially on fire.[12]

However, even though the cars are uncovered, BNSF requires shippers of coal to comply with BNSF's coal loading rule and load the cars in compliance with its "Load Profile Template."[13] The template profile is designed to reduce the amount of coal dust exiting the cars during transportation. BNSF also applies one of seven topper agents (such as surfactants) that have been shown to reduce coal dust losses by at least 85 percent when used in conjunction with the coal-load profile.[14]

More than five years ago, the Sierra Club launched a "Beyond Coal" campaign. The Sierra Club calls coal "an outdated, backward and dirty 19th-century technology."[15] The main objective of the campaign is "to replace dirty coal with clean energy by … advocat[ing] for the retirement of old and outdated coal plants and prevent new coal plants from being built."[16] This includes "[k]eeping coal in the ground in places like Appalachia and Wyoming's Powder River Basin."[17] The Beyond Coal campaign may have served as the impetus for the Washington civil suit.

The Sierra Club found partners for the litigation in environmental organizations in the state of Washington who were concerned about the number of coal trains and amount of coal traveling through the state of Washington.[18] Trains laden with coal from the PRB travel across the state of Washington to export terminals in British Columbia,[19] as well as to the coal-fired power plant in the state of Washington.[20] Also at play in the region are proposals for at least two coal export terminals to be built in Washington that would increase the number of coal trains crossing the state. One proposed terminal, Gateway Pacific Terminal at Cherry Point, failed to receive the necessary permitting from the Army Corps of Engineers, stopping any further development of the project.[21] Another proposed export terminal in Longview, Washington, sitting in the shadow of Mount St. Helens and 130 miles south of Seattle, remains under review. The terminal would be located at Millennium Bulk Terminals, which is currently used to import bulk alumina for use in a nearby aluminum smelter.[22] If approved, the terminal would export up to 44 million metric tons of coal each year, with Asia as the primary market.

Clean Water Act

The Clean Water Act (CWA) has been around for the better part of 40 years. Passed in 1972, Congress set a lofty goal of eliminating all discharges of pollutants into navigable waters in an effort "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[23] Toward this end, Congress prohibited all discharges of pollutants into the nation's waters, except for those that are in compliance with specific provisions of the CWA, including Section 402, which authorizes discharge through the National Pollutant Discharge Elimination System (NPDES) permitting program.[24] The NPDES permitting program is often delegated to a state agency for implementation and requires a potential discharger to first obtain a permit that specifically limits the type and quantity of pollutants to be

released into a water from a point source. A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[25] Thus, all unpermitted discharges of any pollutant from these point sources are a violation of the CWA.

CWA Citizen Suit Provision

As with many other major environmental laws, the CWA has a provision whereby a citizen can bring a civil suit in federal district court to enforce certain provisions of the CWA. Section 505 of the CWA authorizes a citizen to commence a civil action "against any person … who is alleged to be in violation of (A) an effluent standard or limitation … or (B) an order issued by the Administrator or a State with respect to such a standard or limitation."[26] A citizen is permitted to bring the suit if it provides proper notice and so long as the U.S. Environmental Protection Agency (U.S. EPA) or state environmental agency has not commenced and is diligently prosecuting a civil or criminal action against the alleged violator.[27] Proper notice occurs if it is provided 60 days prior to commencement of the civil suit. The content of the notice is prescribed by the regulations in 40 C.F.R. 135.3(a):

> Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

The federal courts generally require strict compliance with these notice requirements.[28]

"…the CWA has a provision whereby a citizen can bring a civil suit in federal district court to enforce certain provisions of the CWA."

SIERRA CLUB TAKES ACTION

On April 2, 2013, Sierra Club, Puget Soundkeeper Alliance, Columbia Riverkeeper, Friends of the Columbia Gorge and RE Sources for Sustainable Communities sent a Notice of Intent to Sue letter (NOI letter) under Section 505 of the CWA to BNSF Railway and several coal and energy companies. The NOI letter alleged violations of the CWA resulting from the "discharge [of] coal, coal chunks, coal dust, metabolites or related byproducts of coal, and other substances or materials added to the coal including, but not limited to surfactants and suppressants, and petroleum coke (petcoke) and its byproducts (collectively referred to as pollutants) into waters of the United States throughout the State of Washington" without a discharge permit.[29]

The NOI letter further alleged that every train and every rail car (*i.e.* rolling stock) was a point source and had discharged pollutants when traveling "adjacent to, over, and in proximity to waters of the United States" from 2008 through the present.[30] The allegations were largely based on observations of members of the organizations and on the 2010 testimony of a BNSF vice president before the Surface Transportation Board regarding coal loss during rail transportation. In its testimony, BNSF stated "each rail car loses between 250 and 700 pounds of coal and coal dust on each trip for an average loss of 500 pounds of coal lost from each car per trip." Accordingly, a train with 120 cars could lose an average of 30 tons of coal in one trip.[31] The NOI letter went on to identify over 50 waterways throughout the state of Washington into which BNSF was allegedly discharging pollutants from its coal trains and coal cars without a Section 402 NPDES permit.

When the U.S. EPA or the Washington Department of Ecology failed to bring an enforcement action and BNSF declined to cease transporting coal, plaintiffs filed a civil suit on June 4, 2013, in the U.S. District Court for the Western District of Washington naming BNSF and several coal companies as defendants. Plaintiffs voluntarily dismissed numerous defendants and on July 29, 2013, filed an

amended complaint that named BNSF as the only defendant.

Based on plaintiffs' allegations, BNSF faced a multimillion dollar potential liability. Plaintiffs urged the court to find BNSF liable for at least 12,583,440 violations from 2012 through 2015 based on a finding that all rail cars discharge continuously or to find that BNSF is liable for at least 15,000 violations based on individual discharge events. The maximum penalty, at the time, was $37,500 per day per violation.

MOTION FOR SUMMARY JUDGMENT

On August 19, 2016, plaintiffs and defendant filed competing motions for summary judgment. Both parties raised three issues in their briefing: Article III standing, liability for alleged CWA violations and pre-emption of CWA remedies by the Interstate Commerce Commission Termination Act. The court addressed only the first two — standing and alleged CWA violations. This discussion focuses on the court's analysis of the alleged CWA violations.[32]

To establish a violation of the CWA, a citizen-plaintiff must establish the defendant is a person who has discharged a pollutant from a point source into navigable waters without a NPDES permit.[33] The parties agreed the only element in dispute was whether the coal train and rail cars could be considered a point source. The key difference between point and nonpoint source is "whether the pollution reaches the water through a confined, discrete conveyance."[34] The court explained "it is widely understood" that nonpoint source pollution is "the type of pollution that arises from many dispersed activities over large areas, and is not traceable to any single discrete source."[35] Further, the court emphasized that rolling stock was part of the definition of a point source.[36]

The court first considered whether coal dust and coal emissions to the land adjacent to the tracks and then made their way into a nearby waterbody were CWA discharges.[37] BSNF argued that "releases to land, and from land to water, are not CWA 'discharges' because they are not a discrete conveyance of coal directly to water."[38] The court agreed insofar as plaintiffs provided nothing to show that there was a "discrete conveyance of coal into the water" when that coal was first deposited onto the land. Plaintiffs argued that the coal from the trains enters the water "via wave wash, gravity, fluctuation in water levels, vibration, and the like."[39] The court stated that plaintiffs needed to show "BNSF trains[] *caused* the coal to move to the water."[40] The court held that "coal discharges to land and from land to water are not point source discharges" under the CWA.

BNSF's second argument was that aerial or windblown emissions from rail cars directly into waters should be considered nonpoint source discharges.[41] To this point the court sought guidance from the cases dealing with nonpoint source pollution. In *League of Wilderness Defs./Blue Mountains Biodiversity Project*,[42] the 9th Circuit held that spraying pesticides from spraying apparatus on an airplane was a point source when sprayed directly over water.[43] Other courts found that airborne pollution is not a point source discharge when the pollution is not discharged via a discernable, confined, and discrete conveyance," even if that source is a stationary coal pile away from a navigable waters.[44] The court found the BNSF case was more akin to *League of Wilderness Defs./Blue Mountains Biodiversity Project*. The court found "the coal particles allegedly discharged by BNSF trains that travel adjacent to and above the waters at issue are point source discharges because there is a discrete conveyance: the BNSF trains that directly travel next to or across the water. Defendant is liable for these aerial point source discharges …"[45]

The court stopped short, however, of finding that BNSF had in fact discharged coal dust and particles into the waterways, stating that a reasonable trier of fact could determine that plaintiffs did not meet their burden of proof.[46] Instead, the court found there to be disputes of material fact regarding plaintiffs' "central theory" of the case — that "each and every train and each and every rail car discharges coal pollutants to waters of the United States."[47] The court thus declined to find defendant liable of any violations, and the case proceeded to trial.

BNSF Avoids Final Judgment

After a week of trial, BNSF and the environmental groups reached a settlement.[48] In the settlement, BNSF denied any violations of environmental laws, but agreed to undertake efforts to address the allegations made by the environmental plaintiffs. The settlement also postpones the trial on BNSF's liability and allows BNSF to avoid the possibility of a federal court ruling and judgment as to liability

for illegal discharges under the CWA. The terms of the settlement provide:

1) First, BNSF agreed to conduct a two-year study on the use of physical covers for coal and petroleum coke trains. The results of the study will be incorporated into BSNF's own practices.
2) Second, BNSF will spend $1 million on environmental projects in the state of Washington.
3) Third, BSNF will clean up certain areas where coal has accumulated along the tracks near waterways, removing coal and/or petcoke in those areas most affected by BNSF coal trains.
4) Fourth, the plaintiffs agreed not to bring similar litigation against BNSF for five years.

The settlement also allows BNSF to avoid a preclusive effective of the court's point source determination. The order denying the parties' summary judgment motions was an interlocutory ruling because the court failed to find BNSF liable for any of the alleged CWA discharge violations due to the disputes of material fact.[49] It would have been an appealable order once the court reached a final judgment, but the parties settled, preventing any final judgment and making the order denying summary judgment nonappealable. This eliminates any preclusive effect from this order.[50]

WHAT HAPPENS NOW?

While the settlement allowed BNSF to avoid a potential final judgment that it was in fact discharging coal pollutants into waters of the United States and avoiding the preclusive effect of the court's holding that coal trains and rail cars are point sources under the CWA, it does creates a persuasive precedent for other courts to follow. It also raises new questions and uncertainty.

First, the settlement does not erase the persuasive value of the court's finding at summary judgment that the coal trains and rail cars are point sources under the CWA if it can be shown the coal, coal dust and coal byproducts released from the car goes directly into a waterway. Environmental groups now have a road map for bringing similar citizen suits against other railroads throughout the U.S. and federal courts have a district court order to lean on regardless of whether this finding is binding. Arguably, the question for future cases will not be whether the train and rail car can be a point source, but whether future plaintiffs show that a rail car is discharging directly into a body of water. We do not know whether the evidence presented by plaintiffs was sufficient to show that BNSF trains were discharging into waterways in violation of the CWA or whether plaintiffs' evidence was sufficient to show a discharge in every waterway that BNSF trains cross throughout the state of Washington.

This will likely not stop with coal or with the railroads. Now that this case brought rolling stock into the forefront of a CWA citizen suits, what does this mean for trains with open hopper cars or closed hopper rail cars with drop-bottom doors that leak corn or grain? Would that be a case where the court would say, "If you own the leaky 'faucet,' you are responsible for its 'drips'"?[51]

Second, if a train and its rail cars are rolling stock under the CWA definition of a point source, could a court extend this reasoning to other vehicles traveling down roads and highways? We have all been behind trucks carrying sand, gravel, dirt, lawn debris, to name a few, and watched part of the load blow off the top or trickle out the sides. Does this now mean that any truck carrying sand, asphalt, gravel and rocks, grain, hay and construction debris is now a point source if particles from the load fall into a waterway as the truck travels over or along that waterway?[52] How could this possibly be regulated and enforced?

Another unanswered question is how the new Clean Water Rule might have changed the court's holding. The U.S. EPA and Army Corps of Engineers published that Clean Water Rule, which broadly defines a "waters of the United States" on June 29, 2015. Commonly referred to as the WOTUS Rule, many states and industries have brought lawsuits challenging the rule. These lawsuits are still pending primarily in the 6th Circuit Court of Appeals, which has asserted jurisdiction.[53] The U.S. Supreme Court recently granted cert. to review this finding and the merit case is on hold.[54]

The *BNSF* court's ruling as to whether a train or rail car was a point source was dependent upon whether the coal particles that escaped fell onto land or into a waterway. If the coal particles fell onto land, the train and rail cars were not point sources. However, if coal particles fell from the train or rail car and into a navigable water, that was sufficient to meet the

definition of a point source discharge and would require a NPDES permit. But what if coal particles fall into an isolated body of water or in an area that is wet only because of a recent rain or period of flooding?

As currently written, the WOTUS Rule could expand the scope of when a train or rail car or any rolling stock could be considered a point source. The rule could allow an interpretation whereby discharges of pollutants into what are otherwise isolated bodies of water within 4,000 feet from a navigable water be found to be discharges that require NPDES permits. This is because the rule utilizes a "significant nexus" analysis on a case-by-case basis to determine whether a water is a "waters of the United States."[55] The rule calls for a significant nexus analysis to be performed for all "waters located within the 100-year floodplain of a traditional navigable water, interstate water or the territorial seas, and for waters located within 4,000 feet from the high tide line or ordinary high water mark of traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries."[56]

Now that the transition to the Trump administration is underway and the U.S. Supreme Court has granted cert. to evaluate jurisdictional questions, the future of the WOTUS Rule in its current form looks ominous. The review by the Supreme Court allows time for the administration or Congress to take action to resolve the issue. President Trump pledged to eliminate the WOTUS Rule,[57] but it is not clear he would resist addressing the issue altogether. As part of his energy plan, President Trump states that we need "responsible stewardship of the environment. Protecting clean air and clean water, conserving our natural habitats, and preserving our natural reserves and resources will remain a high priority."[58] In any event, eliminating WOTUS leaves us with the status quo, interpreting the significant nexus test. While this has led to less certainty as to when certain areas are or are not a "water of the U.S." under the CWA, the recent success of pre-enforcement judicial review cases[59] could result in the agencies being less willing to assert jurisdiction in situations where there is a tenuous nexus. This may provide the ultimate result the new administration seeks.

CONCLUSION

Even though this is a first of its kind Clean Water Act case that ended in a settlement, avoiding a final judgment at the conclusion of a trial, the pretrial order denying summary judgment has left its mark. The court's conclusion that a coal train and rail cars (*i.e.* rolling stock) traveling across numerous bodies of water can be a "discrete conveyance" and thus a point source so long as it can be shown that coal dust released from the train and coal cars was discharged into a waters of the United States is a significant finding. It reminds us to read each word of the statutory definitions regardless of a history that seemingly looked past some terms. Further, this case may be a sign of citizen suits to come pursuant to the CWA as citizen groups will not be deterred by the lack of preclusive effect from this case. The partial roadmap laid out for citizen groups in the *Sierra Club v. BNSF* case can be replicated across the country and be played against various industries, leading to potentially far-reaching implications for all "discrete conveyances" as interpreted pursuant to the CWA.

1. No. 13-cv-967-JCC (W.D. Wash. filed June 4, 2013).

2. Third Amended Complaint at ¶48, *Sierra Club v. BNSF Railway Co.*, No. 13-cv-967 (W.D. Wash. May 6, 2015).

3. *Energy in Brief: What is the role of coal in the United States?*, U.S. Energy Information Administration, www.eia.gov/energy_in_brief/article/role_coal_us.cfm (last updated Jan. 19, 2016).

4. *Id*.

5. Coal may surpass natural gas as most common electricity generation fuel this winter, U.S. Energy Information Administration (Nov. 18, 2016), www.eia.gov/todayinenergy/detail.php?id=28832.

6. *Oklahoma Coal*, Oklahoma Dept. of Mines, apps.ok.gov/mines/Coal_Program/Oklahoma_Coal/index.html (last updated Oct. 7, 2015).

7. *Oklahoma: State Profile and Energy Estimates*, U.S. Energy Information Administration, www.eia.gov/state/rankings/?sid=OK#series/48 (last visited Jan. 30, 2017).

8. *State Electricity Profiles*: *Oklahoma – Table 2-A*, U.S. Energy Information Administration (Jan. 17, 2017), www.eia.gov/electricity/state/Oklahoma/.

9. James A. Luppens, et al., Professional Paper 1809 - Coal Geology and Assessment of Coal Resources and Reserves in the Powder River Basin, Wyoming and Montana, United States Geological Survey 1 (2015).

10. *Quarterly coal production lowest since the early 1980s*, U.S. Energy Information Administration (June 10, 2016), www.eia.gov/todayinenergy/detail.php?id=26612.

11. *Coal Explained: Coal Mining and Transportation*, U.S. Energy Information Administration, www.eia.gov/energyexplained/index.cfm?page=coal_mining (last updated Sept. 7, 2016).

12. Roderick J. Hossfeld and Rod Hatt, *PRB Coal Degradation – Causes and Cures* 3, Paper for PRB Coal Users' Group Annual Meeting, 2005.

13. *Frequently Asked Questions*, BNSF Railway, www.bnsf.com/customers/what-can-i-ship/coal/coal-dust.html (last visited Jan. 30, 2017).

14. *Id*.

15. Beyond Coal, *About Us*, Sierra Club, content.sierraclub.org/coal/about-the-campaign (last visited Jan. 30, 2017).

16. *Id.*

17. *Id*.

18. Press Release, Sierra Club, BNSF Railways, Coal Shippers Sued in Federal Court for Water Contamination Violations (June 5, 2013), *available at* content.sierraclub.org/press-releases/2013/06/bnsf-railways-coal-shippers-sued-federal-court-water-contamination-violations.

19. *US coal export terminals*, S&P Global Platts, www.platts.com/news-feature/2012/coal/coalexports/map (last visited Jan. 30, 2017).

20. The Centralia power plant in southwestern Washington is the only remaining coal-fired power plant in the state of Washington. However, TransAlta, the owner of the plant, reached an agreement with the state of Washington to convert to natural gas by the year 2025. *See* Mike Lindblom and Craig Welch, "Agreement reached to stop burning coal at Centralia power plant," *Seattle Times* (Mar. 5, 2011),

www.seattletimes.com/seattle-news/agreement-reached-to-stop-burning-coal-at-centralia-power-plant/.

21. Press Release, U.S. Army Corps of Engineers, Army Corps halts Gateway Pacific Terminal permitting process (May 9, 2016), *available at* www.nws.usace.army.mil/Media/News-Releases/Article/754951/army-corps-halts-gateway-pacific-terminal-permitting-process/.

22. Millennium Bulk Terminals-Longview NEPA/SEPA Environmental Impact Statements, Millennium Terminals, www.millenniumbulkeiswa.gov/ (last visited Jan. 30, 2017).

23. CWA s. 101, 33 U.S.C. §1251.

24. CWA s. 301, 33 U.S.C. §1311(a); CWA s. 402, 33 U.S.C. §1342; 40 CFR §§122.1 *et seq*.

25. CWA s. 502 33 U.S.C. §1362; CWA s. 402, 33 U.S.C. §1342(a); 40 CFR §122.1.

26. 33 U.S.C. §1365(a).

27. 33 U.S.C. §1365(b).

28. *See, e.g., Karr v. Hefner,* 475 F.3d 1192 (10th Cir. 2007); *see also* Donald D.J. Stack et al., "Follow the Yellow Brick Road: Citizen's Suits - Notice and Standing and Filing Oh My!" 13-15 (Jan. 2009), *available at* www.stackenvirolaw.com/Publications/Land-Use-Conference-CWA-Citizen-Suit.pdf.

29. Notice of Intent to Sue Under s. 505 of the Federal Water Pollution Control Act 1-2 (Apr. 2, 2013), *available at* www.westernlaw.org/sites/default/files/60%20Day%20Notice%20Letter.pdf.

30. *Id*. at 3.

31. *Id*.

32. As to standing, BNSF argued that plaintiffs had standing for only six waterways and not all waterways in Washington that BNSF trains pass over and alongside. (Motion for Summary Judgment by Defendant BNSF Rwy. at 14, *Sierra Club v. BNSF*, No. 13-cv-967 (W.D. Wash. Aug. 19, 2016)). Plaintiffs did not dispute that they could not provide witnesses to show standing for each and every waterway. Instead, plaintiffs asked the court to find standing for all waterways by following the holding of *Alaska Center for Environment v. Browner,* 20 F.3d 981 (9th Cir. 1994). In that case, the 9th Circuit held that a "plaintiff seeking state-wide environmental relief was not required to demonstrate harm over the entire state but was only required to establish a representative number of areas adversely affected." (Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment at 6, *Sierra Club v. BNSF*, No. 13-cv-967 (W.D. Wash. Oct. 25, 2016). The court agreed with plaintiffs and adopted the 9th Circuit's holding. Further, BNSF made two concessions: 1) that plaintiffs had provided witnesses to show standing for the two main receiving waters – the Columbia River and Puget Sound – and 2) that "many of the waterways for which plaintiffs have not identified standing witnesses are tributaries, hydrologically connected waterways, or have a significant nexus with waterways for which Plaintiffs have identified standing witnesses." *Id*. at 12.

33. 33 U.S.C. §§1331(a), 1342.

34. Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment at 15, *Sierra Club v. BNSF,* No. 13-cv-967 (W.D. Wash. Oct. 25, 2016) (quoting *Trustees for Alaska v. EPA*, 749 F.2d 549, 558 (9th Cir. 1984)).

35. *Id*. (citing *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002)).

36. *Id*. at 14. The phrase rolling stock is not commonly used today. "Rolling stock" is traditionally defined as "the wheeled vehicles of a railroad, including locomotives, freight cars, and passenger cars." www.dictionary.com/browse/rolling-stock. However, current U.S. Department of Transportation regulations provide a more expansive definition: "Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. §661.3.

37. Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment at 16, *Sierra Club v. BNSF,* No. 13-cv-967 (W.D. Wash. Oct. 25, 2016).

38. *Id*. (quoting Motion for Summary Judgment by Defendant BNSF Rwy. at 28, *Sierra Club v. BNSF,* No. 13-cv-967 (W.D. Wash. Aug. 19, 2016)).

39. *Id*.

40. *Id*.

41. *Id*. at 17.

42. 309 F.3d 1181 (9th Cir. 2002).

43. *Id*. at 1185.

44. *Cordiano v. Metacon Gun Club, Inc*., 575 F.3d 199 (2d Cir. 2009); *Alaska Cmty. Action on Toxics v. Aurora Energy Servs., LLC*, 940 F. Supp. 2d 1005, 1024 (D. Alaska 2013).

45. Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment at 18, *Sierra Club v. BNSF*, No. 13-cv-967 (W.D. Wash. Oct. 25, 2016).

46. *Id*. at 20.

47. *Id*.

48. Press Release, Puget Soundkeeper, BNSF Railway required to address coal train pollution (Nov. 15, 2016), www.pugetsoundkeeper.org/2016/11/15/bnsf-railway-required-address-coal-train-pollution/.

49. Order Denying Plaintiffs' and Defendant's Motions for Summary Judgment at 20, *Sierra Club v. BNSF,* No. 13-cv-967 (W.D. Wash. Oct. 25, 2016).

50. *Riggio v. Serv. Corp. Int'l,* 476 F. App'x 135, 136 (9th Cir. 2012) (stating that "an interlocutory order . . . — absent certification under Rule 54(b) — was not yet entitled to res judicata effect"); *see also St. Paul Fire & Marine Ins. Co. v. F.H.*, 55 F.3d 1420, 1425 (9th Cir. 1995); A*vondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1270 (5th Cir. 1986) (noting that "partial summary judgment orders lack the finality necessary for preclusion").

51. *Sierra Club v. El Paso Gold Mines, Inc*., 421 F.3d 1133 (10th Cir. 2005).

52. Courts have found vehicles such as bulldozers and backhoes to be point sources when collecting piles of material that ultimately found its way back into the waters. *Avoyelles Sportmen's League v. Marsh*, 713 F.2d 897, 922 (M.D. Fla. 1974). Even Navy aircraft dropping ordinance into coastal waters during bombing practice were point sources. *Barcelo v. Brown*, 478 F. Supp. 646, 664 (D.P.R. 1979). However, these are instances where a vehicle was acting as a point source and discharging into a single body of water. Here, the train crossed more than 50 bodies of water in Washington on a single trip.

53. Generally speaking, the lawsuits have been consolidated in the 6th Circuit and oral arguments are scheduled for March 29, 2017. *Murray Energy Corp. v. U.S. Department of Defense*, 817 F.3d 261 (6th Cir. Feb. 22, 2016).

54. On Jan. 13, 2017, the Supreme Court granted a *writ of certiorari* in *National Association of Homebuilders v. Department of Defense, cert. granted*, No. 16-299, (U.S. Jan. 13, 2017). The Supreme Court will review the decision by the 6th Circuit U.S. Court of Appeals to assert jurisdiction over the lawsuits challenging the Clean Water Rule. The 6th Circuit granted a motion to hold in abeyance its decision on the regulation until the Supreme Court rules on the jurisdictional issues. *Murray Energy v. EPA*, No. 15-3751 (6th Cir. Jan. 25, 2017) (order granting motion to hold briefing in abeyance).

55. "Significant nexus" arose from Justice Kennedy's concurring opinion in *Rapanos v. United States,* 547 U.S. 715 (2006). Justice Kennedy wrote that the scope of the CWA's jurisdiction extends to bodies of water that have a "significant nexus" to a traditional navigable waterway. He concluded that "wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of" downstream navigable waterways.

56. Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Red. 37,054, 37,071 (June 29, 2015).

57. An America First Energy Plan, The White House, www.whitehouse.gov/america-first-energy (last visited Jan. 31, 2017).

58. *Id*.

59. *See, e.g., U.S. Army Corps of Engineers v. Hawkes Co., Inc.,* 136 S. Ct. 1807 (2016); *Sackett v. EPA*, 566 U.S. 120 (2012).

ABOUT THE AUTHOR

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Reading Day Jump Starts Bill Review

By Angela Ailles Bahm

On Jan. 28 the Legislative Monitoring Committee hosted the annual OBA Legislative Reading Day, and more than 75 lawyers attended. It is one of the biggest responses in quite a number of years. Personally, I am hopeful this is indicative of citizen participation in the legislative process — but it could also have been that attendees received two hours of free CLE and pizza.

The presentation method for the reading day changed this year. I started the CLE by demonstrating for the attendees how to use the legislative website to research and track bills. Attendees logged on to the system and created their *free* legislative monitoring account. Next, six speakers presented "10 bills in 10 minutes." The presenters were Oklahoma County Special District Judge Richard Ogden, family and domestic docket; Mack Martin of the Martin Law Office, criminal lawyer; Lesley March, assistant attorney general and unit chief for the Victim Services Unit; Jim Milton with Hall Estill, trust and estate planning; Susan Carns Curtis of Carns Curtis Law, personal injury lawyer; and Clayton Cotton with Fenton, Fenton, Smith, Reneau and Moon, business and insurance defense litigation attorney.

I cannot thank these lawyers enough for their time and effort. Within a week they were asked to review bills filed in titles, which they were assigned depending on their area of expertise. They did an excellent job condensing a lot of important information into 10-minute presentations.

The morning ended with a panel of legislators. Thank you to OBA Legislative Liaison Clay Taylor, who organized and moderated the panel. Panelists were Sen. Kay Floyd (District 46), Sen. David Holt (District 30), Rep. Chris Kannady (District 91) and freshman Rep. Collin Walke (District 87). Again, my thanks for their willingness to give time on their Saturday to participate in this important educational opportunity. The legislative session began Feb. 6. The legislators and everyone present were very appreciative of the enormity of the issues to be addressed during the 2017 session.

NOTABLE BILLS

I cannot possibly include all of the bills in this article that were discussed. Very briefly, the following is a list and brief description of some I thought were notable:

HB 1257 Abrogates common-law marriages

HB 1277 Eliminates incompatibility as a reason for dissolution of marriage under certain circumstances

SB 192 Eliminates a statute of limitations for certain sexual and child-related crimes

From left: Rep. Collin Walke, Sen. Kay Floyd, Rep. Chris Kannady, OBA President Linda Thomas, OBA Legislative Monitoring Committee Chair Angela Ailles Bahm and Sen. David Holt wrap up a successful Legislative Reading Day.

SB 369 Modifies jury trial procedures and particularly affects the sentencing stage

HB 2323 Allows any citizen who is not a felon to carry a gun, concealed or unconcealed

SB 362 and **HB 1927** Creates the Uniform Commercial Real Estate Receivership Act

SB 424 Reduces the time to respond to discovery served with the summons to 30 days

SB 621 Pertains to the Residential Landlord Tenant Act and prohibits discrimination against a tenant or prospective tenant who has been a victim of domestic violence or sexual violence

HB 1888 and **SB 441** Creates subpoena power for DHS

HB 2194 Modifies procedures for eminent domain and condemnation proceedings

SB 699 Provides for automatic retirement of appellate judges, applying the "rule of 80"

SB 700 New law eliminating the current Judicial Nominating Commission and creating a new JNC; members appointed by the President Pro Tem and the Speaker of the House

To view these bills and any other bills, use the free service on the legislative website, www.oklegislature.gov. Click on the tab LEGISLATION and see the pull-down menu to search for a specific bill, search by text and create an account to use the Track Bills (legislative electronic notification system, LENS) to build your tracking list.

COMMITTEE MEMBERS

Also, be sure to sign onto the MyOKBar Communities on the new and improved OBA website. For members of the Legislative Monitoring Committee, you can get to lists of bills filed under each title and stay on top of what is happening with the committee. If you are not a committee member, it is not too late to sign up. Go to www.okbar.org.

The next meeting of the Legislative Monitoring Committee will be Feb. 22, at noon at the Oklahoma Bar Center. If you plan to attend, please be sure to RSVP; lunch will be provided. I look forward to seeing you then.

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OBA Day at the Capitol March 21

By Angela Ailles Bahm

Calling all members of the Oklahoma Bar Association. Here is the preliminary agenda for the 2017 Day at the Capitol. This important event will take place on Tuesday, March 21, starting at the Oklahoma Bar Center. Put it on your calendar now.

After the presentations, all attendees will be welcome to go to the Capitol to meet with their legislators. Take advantage of a great opportunity to visit with authors of bills in which you have an interest.

If attending, email debbieb@okbar.org or call Debbie Brink at 405-416-7014; 800-522-8065.

It is always important for citizens to be a part of the legislative process, and with many new "freshman" legislators, this is the perfect time to show them what a valuable resource members of the Oklahoma Bar Association can be. I will look forward to seeing you at the 2017 Day at the Capitol.

TIME	TOPIC/EVENT	SPEAKER/LOCATION
9:30 a.m.	Registration	Emerson Hall, 1901 N. Lincoln Blvd., Oklahoma Bar Center
10 a.m.	Introduce OBA President Linda S. Thomas	John Morris Williams, OBA Executive Director
10:05 a.m.	Welcome	President Linda S. Thomas
10:10 a.m.	This Session from the Perspective of a Legislator	Rep. Chris Kannady, House District 91
10:30 a.m.	Bills of Interest to the Judiciary	Jari Askins, Administrative Director of the Courts
10:50 a.m.	Break	
11 a.m.	How to Track Bills on the Legislative Website	Angela Ailles Bahm, Legislative Monitoring Committee Chairperson
11:20 a.m.	Bills of Interest Relating to the Practice of Law and Their Status	Clay Taylor, Legislative Liaison
11:30 a.m.	How to Talk to Legislators	Randy Grau, Former Representative District 81
11:50 a.m.	Information and Questions	John Morris Williams
12 p.m.	Lunch	
1-3 p.m.	Visit with Legislators	State Capitol Building

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Proposed Oklahoma District Court Rule Modification

Member Comments Requested

The following is a modification to the Rules for District Courts of Oklahoma as proposed by the OBA Access to Justice Committee. This proposed addition is currently under consideration by the OBA Board of Governors. The proposed new rule provides disclosures that should be used when providing limited scope representation in accordance with existing Rule 1.2 (c) of the Oklahoma Rules of Professional Conduct.

Members of the OBA are encouraged to review the proposed addition and submit any comments by March 28, 2017, 1) via email to commentslimitedscope@okbar.org or 2) mail hard copy comments to LSR Comments, OBA, P.O. Box 53036, Oklahoma City, OK 73152.

OBA Access to Justice Committee Proposed New Court Rule on Limited Scope Representation

The OBA Access to Justice Committee unanimously recommended that the following new district court rule be approved by the OBA Board of Governors and forwarded to the Oklahoma Supreme Court with a recommendation for adoption.

Rule 33. Limited Scope Representation

A lawyer providing limited scope representation under Rule 1.2 (c) of the Oklahoma Rules of Professional Conduct may draft pleadings for a pro se litigant to file with or present to a district court without the lawyer entering an appearance in the matter. A lawyer shall disclose such assistance by indicating their name, address, bar number, telephone number, other contact information and, optionally, a signature on said pleading with the phrase "No appearance is entered as counsel of record."

OKLAHOMA BAR JOURNAL EDITORIAL CALENDAR

2017 Issues

- March
  Work/Life Balance
  Editor: Melissa DeLacerda
  melissde@aol.com
  Deadline: Oct. 1, 2016

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

- 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

Join a Community

By John Morris Williams

You have probably seen information from the OBA about joining an online community. If you belong to a section or a committee, you already belong to one of our communities. So, what is this all about? It's about a new tool we implemented to promote greater communications and to enable groups of members to share all kinds of information. It is more than just meeting dates. Members can share files, post requests for information or share knowledge. It is very much like closed social media groups you may already be using.

If you go to your new MyOKBar member page, you can post up a picture, your social media links, website and other practice-related information. In the works is a change to include foreign languages spoken and military experience. The information you post there will automatically sync with your MyOKBar Communities profile. What you post in Communities does not flow back to your MyOKBar member page, so start at MyOKBar and fill out as much information as you wish. My recommendation is to make sure you include your practice areas and any other bar associations you belong to.

Main page when you log in to MyOKBar

ADDING INFO ABOUT YOUR PRACTICE IS A GOOD THING

To fill in the information, click on the little card icon next to "View Profile" above your placeholder image (or photo if you already posted one) on the main page of your MyOKBar profile. To upload your picture, list your practice areas or update any other information, click on the pen or "+" icons next to those areas on your profile page. Here you can also indicate your communication preferences and choose how you receive the *Oklahoma Bar Journal* court editions.

It all seems a bit confusing until you actually log in to MyOKBar. The key thing to remember is to completely fill out your information on your profile page because this information will be saved and becomes searchable in the Communities search function. When you go to the Member Search and click on the Advanced Search feature in the Communities, you can search by location and practice area. (For example, you can search for a civil rights practitioner in Tulsa County).

Until the foreign language feature becomes operational, there is a community for lawyers who speak a foreign language — open to all OBA members. If you speak a foreign language, you can post here. If you are looking for a lawyer who speaks a foreign language, you can post here. As we become more robust in our development of these online communities, I can imagine communities for litigators looking for expert

witnesses, pleadings and local counsel. The applications and usage are limited only by our imagination.

EMAIL – ALL AT ONCE OR REAL TIME?

Like you, I get a zillion emails a day. Our spam filter pretty much captures the Russian brides and generic medications, but there is still a ton of stuff that fills up my box. MyOKBar Communities will send you emails about what's happening in your communities' discussions … but good news! There is a feature where you can get all the information once a day if you choose. That's right, one communication, so you don't get 15 emails a day. You can also get all the communications in real time if you want, but the default is the "daily digest" method so you get one easily reviewable list of everything that was posted up. The email comes around midnight so when I get up the next morning, it is there waiting in my inbox.

I fear I have not really done the subject of our new online communities justice here. Our Management Assistance Program and Communications Department are both actively producing information to give more in-depth instruction than I have given here. My goal here is to at least get you acquainted with this new tool. It has the potential to aid in assisting your practice as well as marketing your practice. I encourage you to check out MyOKBar and MyOKBar Communities today. Both of them are easily accessible through the OBA homepage at www.okbar.org.

Top and bottom of your MyOKBar profile edit page

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

Proposed Rule on Limited Scope Representation

Can It Be a Win, Win, Win Situation?

By Jim Calloway

Limited scope representation has been authorized under our Rules of Professional Conduct for some time. The Oklahoma Rules of Professional Conduct provide for this in Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer. Subsection (c) provides:

> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

In this issue of the *Oklahoma Bar Journal* on page 307, you will find a notice and opportunity to comment on a proposed new district court rule. This rule was proposed by the OBA Access to Justice Committee. Other states have undertaken other rules and/or process changes to encourage limited scope representation. (This is also probably a good opportunity to reiterate this column reflects my personal thoughts and not any official policy of the OBA.) Some of you may have heard this practice previously referred to as unbundled legal services, but limited scope representation (LSR) is the preferred term today because it better describes the situation to potential clients and reflects the language of the rule.

There are likely few who would dispute that a lawyer could provide some limited scope services in regard to litigation, such as explaining how a particular court proceeding would work or advising an individual who had been served with process of his or her answer date and the necessity of filing an answer in a timely manner. Those actions would be considered a traditional method of dispensing legal advice.

The challenge occurs when a lawyer wants to assist the client with preparing documents that will be filed with the court.

Today there are many unlicensed and largely unregulated legal service providers offering legal document creation for consumers. Some of these are well-funded online legal document assembly providers. Some of those services are even expanding by offering consultations about the documents with a lawyer in the customer's state.

We have all seen the roadside signs offering flat fee legal document drafting at various intersections and along rural section line roads. Some lawyers may have even called the phone number on the sign and discovered the individual answering the phone clearly does not have a license to practice law in Oklahoma, but they have a computer.

As most judges can confirm, the area of do-it-yourself legal work and unrepresented pro se individuals appearing without counsel in court has certainly increased over recent years.

With an increasing number of people now appearing in court without legal counsel and with legal paperwork that has been drafted for them by some individual or machine, why are relatively few Oklahoma lawyers assisting these individuals by drafting quality documents for them? Who is better qualified and trained to do that work?

Based on anecdotal evidence as well as experience from other states, it is believed that these types of limited scope services are not frequently provided by Oklahoma lawyers for several reasons:

1) The method of appropriately and ethically providing these types of services does not appear to be clear, and few lawyers relish moving into uncharted territory, particularly on legal

work that involves smaller fees. There are also concerns about liability.

2) Some courts and judges are skeptical about whether it is appropriate for lawyers to perform legal work in this manner and undisclosed ghostwriting has been criticized in a variety of court opinions.[1] Let's be candid. If the local judge thinks it is inappropriate for a lawyer to be involved with this activity, few local lawyers would want to question that conclusion.

3) Lawyers have traditionally viewed themselves as being full-service providers and many have not considered this alternative method of serving the public.

In the December 2016 *Oklahoma Bar Journal*, Tulsa attorney Blake M. Feamster authored "Ghostwriting: An Ethical Issue in the Evolution of the Legal Field" where she discussed the history and case law related to limited scope representation.[2] She noted:

> 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. 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."
>
> 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. 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.[3] (Citations omitted)

Proposed new District Court Rule 33 is an improvement for all those involved. It can be the proverbial win-win-win.

"The first example that comes to mind when LSR is discussed is uncontested divorce cases."

1) Citizens who cannot afford full-service legal services can have more affordable access to quality legal advice and professionally drafted documents provided by a lawyer who complies with ethical standards of practice.

2) Judges will have clear guidance as to the interaction and assistance allowed between lawyers and pro se parties. Hopefully they will see an improvement in the quality of paperwork and also the approach utilized by unrepresented litigants.

3) Lawyers will be able to safely provide these limited scope services and compete with the unlicensed providers who are now doing so. Unlike the unlicensed providers, the attorneys will be bound by the Oklahoma Rules of Professional Conduct and its provisions to protect the public.

The first example that comes to mind when LSR is discussed is uncontested divorce cases. This is certainly a common need, but there are other appropriate situations. A lawyer might decide to have small claims classes or workshops where litigants are assisted with organizing the paperwork to be presented to the court and advised about the procedure, what witnesses are necessary for their matter and how they should comport themselves.

Times are definitely changing and change is often uncomfortable. We've seen news reports of a website that contests parking tickets with no human intervention and reportedly has had some success doing so.[4]

However, I think many lawyers, particularly those with practices in the more rural areas, will appreciate the opportunity to perform a service for local clients at an affordable rate and build a positive relationship so the client may return to them in the future for additional legal services.

Lawyers have to provide value. For example, what is the lawyer's greatest value in assisting with a simple uncontested divorce? Is it explaining the process and the client's rights, drafting the appropriate

paperwork, completing a correct child support calculation, an agreed visitation schedule and any other required documents? Or is it scheduling a date and waiting in line at the waiver divorce docket to briefly examine the client on the factual basis for the decree? Both are valuable and some clients would not want to go to a court proceeding unrepresented. But if there was a need to reduce the cost of legal fees, clearly the advice and document drafting is more important than physical appearance at the waiver docket.

One concern expressed by judges about drafting pleadings in a limited scope context is that pro se pleadings are sometimes held to less stringent standards than pleadings drafted by lawyers. This disclosure requirement addresses that concern. I also note this concept generally reflects the conclusion that Blake Feamster arrived at in her ghostwriting article, cited above.

In addition to the OBA Access to Justice Committee working on these issues, the Oklahoma Supreme Court has formed the Oklahoma Access to Justice Commission. Our Oklahoma Free Legal Answers project was initiated by the Oklahoma Access to Justice Commission.

The National Center for Access to Justice in its Justice Index 2016 did not rank Oklahoma highly.[5] The lowest-ranked states, from the bottom up are Mississippi, Wyoming, Puerto Rico, Nevada, South Dakota, Indiana, North Dakota, Oklahoma and Vermont. So there is definitely work to be done.

If you would like to read a discussion on limited scope representation with detailed analysis of the law, your attention is directed to a 2015 Rhode Island Supreme Court case *Fia Card Servs., N.A. v. James D. Pichette*.[6]

When I was in private practice I recall, on occasion, drafting pro se entries of appearance at no charge for potential clients whose answer dates had arrived but required a few more days to pay their attorney's fees. Before I would give them that document and instructions on what to do, they had to acknowledge on a brief memo I drafted what types of defenses they were waiving by filing this pleading and that they now can be served with the notices at their address by both regular and certified mail. The entry was important to the individual. The signed memo was for my self-protection.

If this rule change is enacted, the OBA Management Assistance Program will be providing assistance on how to ethically, safely and quickly provide these services while also paying attention to the self-protection aspect, including documentation that the lawyer has complied with the two part test of Rule 1.2(c). We have been giving this potential change a lot of thought.

For your quick reference, here is the text of proposed Rule 33:

> A lawyer providing limited scope representation under Rule 1.2 (c) of the Oklahoma Rules of Professional Conduct may draft pleadings for a pro se litigant to file with or present to a district court without the lawyer entering an appearance in the matter. A lawyer shall disclose such assistance by indicating their name, address, bar number, telephone number, other contact information and, optionally, a signature on said pleading with the phrase "No appearance is entered as counsel of record."

If this rule is adopted by the Oklahoma Supreme Court, it is likely that more lawyers will embrace delivering services in this manner. This means more opportunity for lawyers, particularly young lawyers building a new private law practice.

It will also mean more of our citizens who are unable to afford full-service legal representation will have improved access to legal advice and high quality legal documents. Access to justice for all of our citizens is an extremely important goal.

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!

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

2. Blake M. Feamster, "Ghostwriting: An Ethical Issue in the Evolution of the Legal Field," 87 *Okla. B.J.* 2537 (2016), www.okbar.org/Portals/13/PDF/OBJ/2016/OBJ2016Dec17.pdf [https://web.archive.org/web/20170126231500/http://www.okbar.org/members/BarJournal/archive2016/DecemberArchive2016/OBJ8733Feamster.aspx].

3. *Id.* at 2537, 2538.

4. Arezou Rezvani, "'Robot Lawyer' Makes The Case Against Parking Tickets," *NPR: All Things Considered*, www.npr.org/2017/01/16/510096767/robot-lawyer-makes-the-case-against-parking-tickets [https://web.archive.org/web/20170126122704/http://www.npr.org/2017/01/16/510096767/robot-lawyer-makes-the-case-against-parking-tickets].

5. Robert Ambrogi, "New Data, Companion Website, Score States on Access to Justice," *LAWSITES* (May 11, 2016), www.lawsitesblog.com/2016/05/new-data-companion-website-score-states-on-access-to-justice.html.

6. *Fia Card Servs., N.A. v. James D. Pichette.* HSBC Bank Nev., N.A., 116 A.3d 770 (R.I., 2015).

Ethical Considerations of Lawyer Mobility – Notice to the Client

By Joe Balkenbush

The incidence of lawyers moving from employment at a firm to form their own firm or to begin a solo practice has increased dramatically to a point where it has become almost routine. This article is the first in a series to discuss the ethical issues to be considered by the departing attorney(s) and the firm.

Several rules of the Oklahoma Rules Professional Conduct (ORPC) are relevant to the discussion:

- Rule 1.4. Communication, obligations of lawyers to inform clients of their impending departure
- Rule 7.3. Direct Contact with Prospective Clients, the types of pre- and post-departure notices to send to their clients
- Rule 1.16(d). Declining or Terminating Representation, the duty to protect client interests
- Rule 8.4. Misconduct, the need to avoid conduct involving fraud, deceit or misrepresentation
- Rule 7.1. Communications Concerning a Lawyer's Services

In 1999, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 99-414, titled "Ethical Obligations When a Lawyer Changes Firms."

The opinion provides a list of the ethical issues it considers critical when a lawyer leaves a law firm:

- Disclosure of the pending departure in a timely fashion to clients for whom the lawyer is currently responsible or plays a principal role in the representation;
- Ensuring that the matters to be transferred with the lawyer do not create conflicts of interest at the new firm and can be competently managed there;
- Protecting client files and property and ensuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of the lawyer's withdrawal;
- Avoiding conduct involving dishonesty, fraud, deceit or misrepresentation in connection with the lawyer's planned withdrawal;
- Maintaining confidentiality and avoiding conflicts of interest at the lawyer's new firm regarding client matters remaining at the former firm.

The ABA opinion states that, whenever possible, the departing lawyer and the current firm should send a letter jointly to all clients with whom that lawyer had significant personal contacts. As ABA Formal Opinion 99-414 emphasizes,

> … law firms have an ethical obligation to their clients to notify them that an attorney who had been actively working on their matters is leaving. While joint notice is not always feasible, it is the best practice whenever possible. The client must be informed that the choice of whether to stay with the firm or go with the departing lawyer (or to

an entirely different firm) is the client's alone, and that there will be no adverse consequences from the client's decision.

The ABA opinion and other articles suggest that a joint letter to the client ensures "even-handed treatment" of both the departing lawyer and the firm and reduces the risk that either side will later accuse the other of misconduct. As we all know, break-ups can be acrimonious. However, most often it is in everyone's best interest (the departing lawyer, the firm and, most importantly, the client) to work together to minimize any potential disputes and focus on prompt and accurate disclosure to the client.

The ABA opinion goes on to state:

> We recognize that there may be circumstances in which joint notice is not possible. In those cases, the firm may be required, and may in any event wish to send its own letter to all clients with whom the departing lawyer had significant personal contacts, apprising them of the attorney's departure and informing them that they have the choice whether or not to remain with the firm. The firm should also avoid disparaging the departing attorney. If the attorney's departure resulted from some kind of misconduct, illness or disability, the firm may have a duty to notify its clients, but this too must be balanced against the firm's duty not to unlawfully disparage its former employee…

The following are excerpts from court rulings in cases between departing lawyers and their former firm:

- "surreptitious 'solicitation' of firm clients for a partner's personal gain is actionable,"
- "departing partners breached their fiduciary duties of good faith and loyalty to their former firm by unfairly acquiring consent from clients to remove cases,"
- "a claim of tortious interference brought by a law firm against a departing law firm associate for pre-departure solicitation of clients."

The point is that relevant case law makes it clear that "departing attorneys should generally not discuss their departure plans with clients before telling their current firms about their upcoming withdrawal, and should not seek to sign up clients to the new firm prior to notification of their current firm of intent to depart. While the precise scope of permissible communication with clients on the part of the departing lawyer has not yet been established with complete clarity … prudence cautions against any contact with clients, other than for routine business, until after formal announcement of a lawyer's departure."[1]

In conclusion, the ORPC cited above, ABA Formal Opinions and case law from across the country urge a departing lawyer and their firm to work together to ensure they act in the best interest of the client and thereby minimize the potential for disputes when a lawyer leaves the firm.

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.

1. Geraghty, Peter, *GP SOLO Magazine*, January/February 2008, www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/breakingup.html.

Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City Friday, Dec. 9, 2016.

REPORT OF THE PRESIDENT

President Isaacs reported he attended many OBA Annual Meeting events, including presiding at the General Assembly. He also continues to make presentations of juror appreciation materials to presiding judges at courthouses around the state.

REPORT OF THE PRESIDENT-ELECT

President-Elect Thomas reported she attended the Oklahoma Fellows of the American Bar Association reception/dinner and OBA Annual Meeting events including hosting the presidents' suite with President Isaacs and Past President Poarch, President's Reception, Credentials Committee meeting, Resolutions Committee meeting, OBA Annual Luncheon, OBF Fellows Reception, OBF Reception, president's book signing reception, A Night in Havana Reception, President's Breakfast, General Assembly and House of Delegates, which she chaired. She also attended the Washington County Bar Association monthly meeting, OBA budget hearing before the Supreme Court, planning session with 2017 President-Elect Hays and the Board of Governors holiday party.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he hosted a group of lawyers from Azerbaijan and attended a meeting with vendors to discuss renewal of the online CLE production contract, OBA Annual Meeting events, staff meeting on scheduling and planning module software, hearing on the OBA budget at the Oklahoma Supreme Court, Strategic Planning Committee premeeting with President-Elect Thomas and 2017 Committee Chair Kim Hays, Oklahoma County Bar Association holiday event, Solo & Small Firm Conference planning meeting and staff directors meeting.

BOARD MEMBER REPORTS

Governor Gotwals reported he attended the OBA Annual Meeting, OBA Family Law Section CLE, meetings of the General Assembly and House of Delegates, Tulsa County Bar Association Family Law Section meeting, Tulsa County Bar Foundation Capital Campaign meeting, TCBF Golf Committee meeting, TCBA/TCBF past presidents' luncheon, TCBA Board of Directors meeting, Tulsa Central High School Foundation meeting, Inns of Court/Pupilage Group 5 meeting, Inns of Court presentation on Oklahoma gun laws, portions of the annual Family Law Section seminar on "Lessons Learned," TCBA/TCBF Christmas party and gave a short presentation on "Courtroom Quick Tips: Be Prepared and Civility." **Governor Hennigh** reported he attended the OBA Annual Meeting and Garfield County Bar Association meeting. **Governor Hicks** reported he attended the OBA Annual Meeting, OBA House of Delegates, OBA Section Leaders Council meeting, Tulsa County Bar Foundation Golf Committee meeting and TCBA past presidents' luncheon/meeting. **Governor Hutter** reported she attended the OBA Annual Meeting as a delegate, Fred Shaeffer career celebration memorial service, meeting to organize/create new Cleveland County Bar Association website, Cleveland County Bar Association executive meeting, county bar Christmas party, county bar association meeting and OBA Board of Governors Christmas party. **Governor Kee** reported he attended the OBA Annual Meeting as a delegate, McClain County Bar Association meeting and as the board liaison he attended the OBA Law Schools Committee meeting, Civil Procedure and Evidence Code Committee meeting and joint Military and Veterans Law Section and Military Assistance Committee meeting. **Governor Kinslow** reported he

attended the Comanche County Bar Association meeting and OBA Clients' Security Fund meeting. **Governor Marshall** reported he attended the OBA Annual Meeting including several committee meetings and Legal Intern Committee meeting. He also hosted the State Bar of Texas president during the Annual Meeting. **Governor Porter** reported she attended the OBA Annual Meeting and House of Delegates, combined Law Day Committee and Law-Related Education Committee meeting, Women in Law Committee meeting, Holloway Inn of Court meeting and Board of Governors holiday party. **Governor Sain** reported he attended the OBA Annual Meeting as a delegate, McCurtain County Bar Association monthly meeting and the McCurtain Memorial Hospital Foundation board meeting. **Governor Tucker** reported he attended the Muskogee County Bar Association meeting, Muskogee County Bar Association Christmas party, two OBA Law Day Committee meetings, OBA Annual Meeting including the OBA Rules and Bylaws Committee meetings, president's book signing reception, President's Reception and OBA House of Delegates. He also gave a presentation at the Oklahoma Municipal Practical Guide workshop in Midwest City. **Governor Weedn** reported he attended the OBA Annual Meeting and Ottawa County Bar Association monthly meeting.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Will reported he attended the OBA Annual Meeting including the OCU alumni luncheon, YLD November meeting, YLD Friends and Fellows Networking Reception, A Night in Havana Reception, General Assembly, House of Delegates and reception for President-Elect Linda Thomas.

REPORT OF THE SUPREME COURT LIAISON

Justice Kauger reported the Supreme Court has a new chief justice as of Dec. 1, 2016, with Justice Douglas Combs elected to the office. She said he will assign a new Supreme Court liaison to the board for next year. She said the December "Movie Night with the Justices" CLE featuring *The Thomas Crown Affair* was well attended and had great panelists.

BOARD LIAISON REPORT

Governor Marshall reported the Legal Intern Committee is fired up and ready to continue its work next year. Governor Tucker reported the Law Day Committee is working on developing segments for the TV show and accepting contest entries.

REPORT OF THE GENERAL COUNSEL

A written report of Professional Responsibility Commission actions and OBA disciplinary matters for October was submitted to the board for its review.

LAWYERS HELPING LAWYERS ASSISTANCE PROGRAM UTILIZATION REPORT

Deanna Harris, CEAP director of employee assistance for OneLife (formerly known as CABA) reviewed the 11-month utilization report of the program. She reported a total of 117 cases, some of which were carried over from 2015. She said the most common problems are substance abuse and depression, which is consistent with previous years. Members report they learn about the program primarily from the *Oklahoma Bar Journal* and colleagues. Solo practitioners and small-firm lawyers represent nearly 80 percent of members utilizing the program. LHLAP Committee member Peggy Stockwell said the program is starting to see more mental health-related issues, such as dementia, and the program and its volunteers are not equipped to help. Executive Director Williams said the Strategic Planning Committee will discuss this need in upcoming meetings.

CLIENTS' SECURITY FUND ANNUAL REPORT

General Counsel Hendryx reported Clients' Security Fund Committee Chair Micheal Salem was unable to attend the meeting, and she would present the committee's recommendations in his place. She said the committee meets four times a year to consider claims, and Governor Kinslow serves as the board liaison. She introduced staff member Ben Douglas, who assists the committee. General Counsel Hendryx reported the committee approved the claims of 27 Oklahomans who were clients of 10 deceased or former lawyers totaling $177,733. She noted that with the rule change creating additional funding the claims could be pro-rated at 99.59461 percent for a total of $177,012.49 that could be disbursed. The board approved the payment of claims as recommended by the CSF Committee. The board also approved the

distribution of a news release sharing the information about the reimbursement of funds to clients.

ADOPTION OF COMPENSATION TIME POLICY

Executive Director Williams reported a proposed policy has been drafted to document the procedure being utilized for OBA employees. The board approved the policy.

AMENDMENTS TO HEALTH LAW SECTION BYLAWS

Executive Director Williams reported the Health Law Section is requesting an amendment to allow law students to join the section as associate members. The board approved the bylaws amendment.

2016 OBA AUDIT AND PAST PRACTICES

Executive Director Williams said in the past the board has discussed how many years to use the same auditor, but he did not find a set policy. As Audit Committee chairperson, Governor Marshall reviewed the research of previous board minutes and options for retaining the same accounting firm discussed by the committee in his letter to the board. Administration Director Combs said the OBA has been using Smith and Carney for seven years. He presented the pros and cons of switching firms. Because the OBA is transitioning to new association management software, he recommends staying with the firm for one more year, but changing engagement partners. The board voted to retain the Smith and Carney accounting firm for one more year.

YLD LIAISON APPOINTMENTS TO OBA STANDING COMMITTEES

Governor Will reported YLD Chair-Elect Lane Neal has submitted his appointments to standing committees. He said the list includes a few new members, and Mr. Neal is doing a good job of involving people in the Young Lawyers Division.

NEXT MEETING

The Board of Governors met Jan. 20, at the Oklahoma Bar Center in Oklahoma City. A summary of those actions will be published after the minutes are approved. The next board meeting will be at 10 a.m. Friday, Feb. 17, at the Oklahoma Bar Center in Oklahoma City.

OBF Receives Over $4.6 Million in Historic Settlement Funds

By Candice Jones

For the Oklahoma Bar Foundation Board of Trustees, it truly felt as though money had fallen from the sky as they learned the OBF would be receiving funds from the settlement of pending nationwide litigation. There has been much excitement within the organization about the funds and the opportunity to give more financial support to programs that can have a continuing positive impact on the lives of Oklahomans.

The "pennies from heaven," as some might call it, came from the settlement of litigation between the U.S. Department of Justice and certain Bank of America entities involving the sale of mortgage-backed securities and the resulting housing crisis back in 2008. The Oklahoma Bar Foundation is one of 56 recipients of a certain category of the settlement funds, which were distributed based on each state's poverty level figures, and will be the organization overseeing the grant process to allocate funds in Oklahoma. The OBF Board of Trustees, along with a special task force, has been working diligently to prepare a request for proposal and complete the process for nonprofits to apply for funding.

"Receiving these additional funds in such a substantial amount is a once in a lifetime opportunity, and we want to make it count," says OBF Executive Director Renée DeMoss. "We are very excited about the upcoming grant process and the potential to really make a lasting impact on our state."

Application

The application and proposal requirements are available at www.okbarfoundation.org/grants/grant-applications. Direct questions and inquiries should be made to Renée DeMoss at reneed@okbar.org or 405-416-7070.

Organizations meeting the requirements may apply for funding now through March 7. General proposal requirements include proof of status as a not-for-profit or educational/charitable entity under the United States Internal Revenue Code. The funds can only be used to support mortgage foreclosure defense programs or community redevelopment projects.

The settlement of similar litigation resulted in a payment of $446,500 to the OBF in 2015, which was restricted to mortgage foreclosure defense. These funds were awarded in full to Legal Aid Services of Oklahoma for that purpose. Proposals for the current grant funding that are centered on mortgage foreclosure prevention should describe how grant funds will be used to assist low-income individuals at risk of losing their homes, including legal services to address foreclosure prevention or foreclosure-related issues.

Proposals that are centered on community redevelopment must address legal and social services directed to a specific need in a target community. Grant funds can be used to promote economic development by support of programs and provision of services that help revitalize or stabilize low and moderate-income communities.

OBF Sees Increase in Fundraising and IOLTA in 2016

January was a busy month for the OBF staff as we wrapped up 2016 and began making plans for 2017. As we officially come to a close on our 2016 year, we want to tell you, the legal community, how much we appreciate your support! It has been our goal at the OBF to do more outreach, advance our mission, educate you about the great work of our grantees and ask for more support. We asked and you delivered! Our 2016 Fundraising Campaign exceeded last year's total by more than $10,000!

In 2004, IOLTA became mandatory in Oklahoma. In 2008, IOLTA brought in $867,620 for OBF grantees. Interest rates dropped and we watched IOLTA decrease to a low of $241,253 in 2012. Ouch. Since then, IOLTA funding is steadily climbing due to increasing interest rates and our Prime Partner IOLTA Banks who generously give at a higher interest rate. We are happy to report that 2016 IOLTA funds are up $85,435 over 2015.

2016 Totals

Bar Dues Voluntary Contributions
$17,507

COMMUNITY FELLOWS
$28,150

Fellows
$89,218

MEMORIALS and TRIBUTES
$575

TOTAL FUNDRAISING
$135,450

IOLTA
$439,714

Special Thank You to our Community Fellows:

- Alternative Dispute Resolution Section
- Appellate Practice Section
- Bankruptcy and Reorganization Section
- Business and Corporate Law Section
- Estate Planning, Probate and Trust Section
- Family Law Section
- Financial Institutions and Commercial Law Section
- Government and Administrative Law Practice Section
- Health Law Section
- Insurance Law Section
- Intellectual Property Section
- Labor and Employment Law Section
- Litigation Section
- Tulsa Title and Probate Lawyers in Tulsa
- Workers Compensation Section

Special Thank You to our Prime Partner IOLTA Banks:

- BancFirst
- Bank of Oklahoma
- Citizens Bank of Ada
- City National Bank of Lawton
- First Bank & Trust Duncan
- First Oklahoma Bank & Trust
- MidFirst Bank
- The First State Bank
- Valliance Bank

ABOUT THE AUTHOR

Candice Jones is director of development and communications for the Oklahoma Bar Foundation.

OKLAHOMA BAR FOUNDATION

Law. Education. Justice.

Oklahoma Bar Foundation Contribution Form

Name: Mr. /Mrs. /Ms. _____ Company: _____

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FELLOWS PROGRAMS

Join a giving program!

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____ **$500/year**	*Leadership Fellow*
____ **$1,000/year**	*Governing Fellow*

Fellows Program – individuals

Community Fellows Program:

____ **$1,000/year**	*Community Partner*
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____ **$5,000/year**	*Community Champion*
____ **$7,500/year**	*Community Pillar*
____ **$10,000/year**	*Community Cornerstone*

Community Fellow - law firms, companies, organizations

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Thank you for your contribution. Your gift is tax deductible.

YLD is Off to the Races

By Lane R. Neal

As Will Rogers famously said, "If you don't like the weather in Oklahoma, wait a minute and it'll change." The quote is a truism to all Oklahomans. While it is not tornado season, this time of year brings its own unpredictable weather with threats of snow and ice. The YLD was set to have its first meeting of the year and orientation in January only to have the weather cause the weekend to be postponed. So, the YLD is having a delayed start, but is off to the races nonetheless.

The next Oklahoma bar exam is right around the corner. It occurs on Feb. 21 and 22 in both Oklahoma City and Tulsa. The YLD will be on hand at both exam sites the first morning to hand out Bar Exam Survival Kits (BESKs) to the test takers. The BESKs are bags containing things like Tylenol, ear plugs, extra pencils, candy and a stress ball. The bags will be assembled by YLD board members during our February meeting.

As we can all recall, the morning of the first day of the bar exam is overwhelming and stressful. The BESKs are intended to bring a little relief to the test takers as they start the next step to becoming practitioners in Oklahoma.

LET YOUR VOICE BE HEARD

Separate and apart from the bar exam, there is another significant event that takes place in Oklahoma every February — the beginning of the legislative session at the state Capitol. The legislative session in Oklahoma runs from February to May each year. Legislators just started the session on Feb. 6 and have a lot of work in front of them.

> **"As young lawyers, we have the biggest interest in the laws that are being passed each year in Oklahoma."**

Each year there are a number of bills filed with the Legislature that potentially impact our clients, our profession and the judiciary. Yet, it seems like very few of us pay attention. I would encourage young lawyers to take it upon themselves to study up on the proposed legislation working its way through the Legislature. If you have an opinion or concern on a particular issue, contact your state representative and senator and express your opinion or concern. The Oklahoma Legislature website has a great "Find My Legislator" feature on their homepage, www.oklegislature.gov.

As young lawyers, we have the biggest interest in the laws that are being passed each year in Oklahoma. We are on the upswing of our careers and it is our clients and our law practices that will be impacted most by any particular legislative action. However, we seem to be reluctant to speak up on matters that cause us concern. That thinking needs to change. I encourage every young lawyer to reach out to their representative and senator to express their opinions concerning any potential legislation. My experience has been that most legislators do not hear much from their constituents and appreciate the input. Give them a call, send them an email or — better yet — stop by their office to let them know what matters to you.

ABOUT THE AUTHOR

Lane R. Neal practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at LNeal@ dlb.net.

February

14 **OBA Bench and Bar Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City; Contact David Swank 405-325-5254 or Judge David B. Lewis 405-556-9611

15 **OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Chris Tytanic 405-406-1394

16 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tiece Imani Dempsey 405-609-5406

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

20 **OBA Closed** - Presidents Day

23 **OBA Professionalism Committee meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Patricia Podolec 405-760-3358

OBA High School Mock Trial Committee meeting; 5:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Judy Spencer 405-755-1066

24 **OBA Professional Responsibility Commission meeting;** 9:30 a.m.; Oklahoma Bar Center, Oklahoma City; Contact Gina Hendryx 405-416-7007

OBA Rules of Professional Conduct Committee meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Paul Bryan Middleton 405-235-7600

27 **OBA Appellate Practice Section meeting;** 11:30 a.m.; Oklahoma Bar Center, Oklahoma City with BlueJeans; Contact Michael Brooks 405-840-1066

28 **OBA Solo and Small Firm Conference Planning Committee meeting;** 3:30 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Melissa DeLacerda 405-624-8383 or Stephen D. Beam 580-772-2900

March

2 **OBA Lawyers Helping Lawyers Discussion Group;** Office of Tom Cummings, 701 NW 13th St., Oklahoma City, OK 73012; RSVP to Lori King 405-840-3033

3 **OBA Alternative Dispute Resolution Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Larry B. Lipe 918-586-8512

7 **OBA Government and Administrative Law Section meeting;** 4 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact David A. Miley 405-521-2639

8 **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

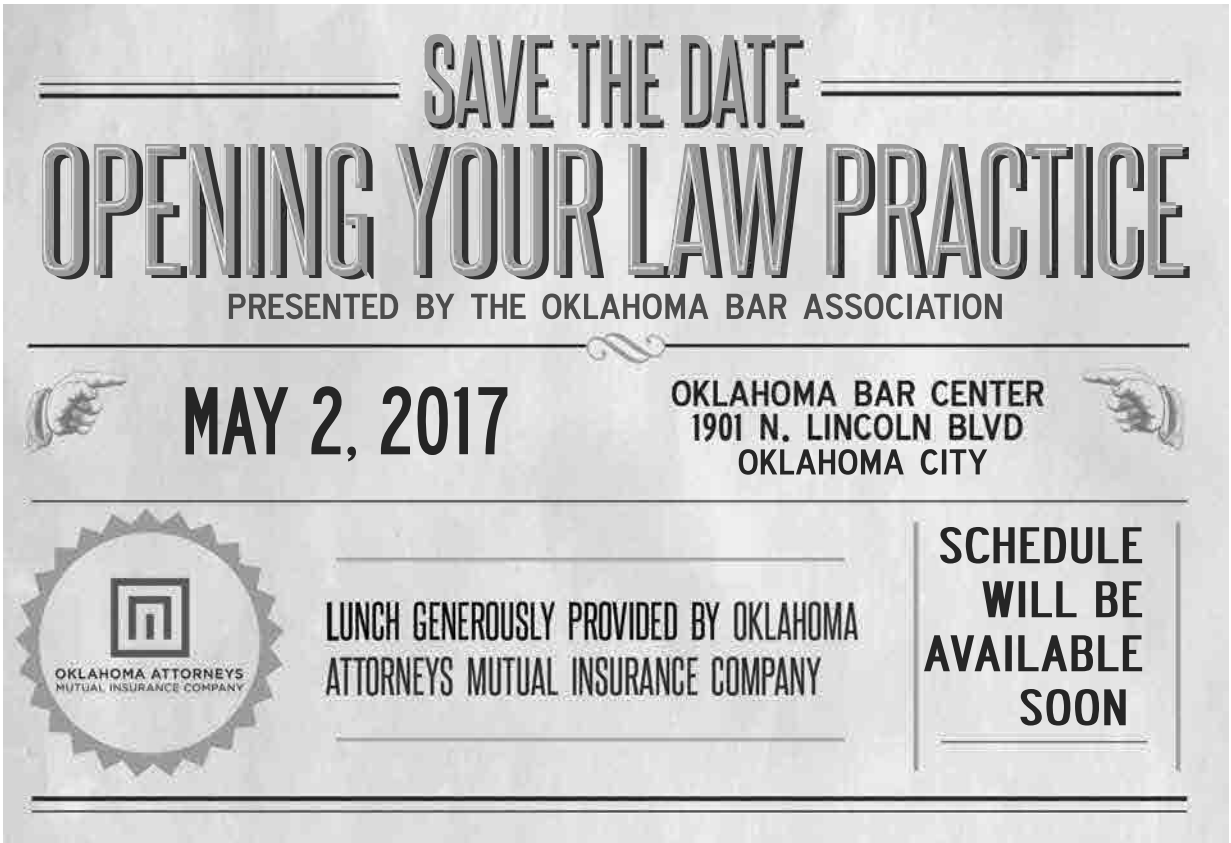
10 **OBA Law-Related Education Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Amber Godfrey 405-525-6671 or Brady Henderson 405-524-8511

OBA Family Law Section meeting; 3 p.m.; Oklahoma Bar Center, Oklahoma City with videoconference; Contact Allyson Dow 405-496-5768

13 **OBA Board of Governor's meeting;** 5 p.m.; Oklahoma City; Contact John Morris Williams 405-416-7000

15 **OBA Indian Law Section meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Chris Tytanic 405-406-1394

16 **OBA Diversity Committee meeting;** 12 p.m.; Oklahoma Bar Center, Oklahoma City with teleconference; Contact Tiece Imani Dempsey 405-609-5406



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Business and Corporate Law Section of the Oklahoma Bar Association

▶ **WHEN:** **Friday, April 28, 2017**
8:30 am – 12 noon

▶ **WHERE:** **21C Museum Hotel**
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This program has been approved for 3 hours of MCLE Credit
The seminar is free for members of the
Business and Corporate Law Section of the OBA
All other attendees: $100

Please RSVP to Mary Houston • mhouston@hartzoglaw.com • (405) 235-7000

Save the Date - OBA Day at the Capitol March 21

Oklahoma lawyers, let your voices be heard! OBA will host its annual Day at the Capitol Tuesday, March 21. Registration begins at 10 a.m. at the Oklahoma Bar Center, 1901 N. Lincoln Blvd., and the agenda will feature speakers commenting on legislation affecting various practice areas. We also will have remarks from the judiciary and bar leaders, and lunch will be provided before we go to the Capitol for the afternoon. See page 306 for more information.

Aspiring Writers Take Note

We want to feature your work on "The Back Page." Submit articles related to the practice of law, or send us something humorous, transforming or intriguing. Poetry is an option too. Send submissions of about 500 words to OBA Communications Director Carol Manning, carolm@okbar.org.

LHL Discussion Group to Host March Meeting

"Co-Dependency" will be the topic of the March 2 meeting of the Lawyers Helping Lawyers monthly discussion group. Each meeting, always the first Thursday of the month, is facilitated by committee members and a licensed mental health professional. The group meets from 6 to 7:30 p.m. at the office of Tom Cummings, 701 N.W. 13th St., Oklahoma City. There is no cost to attend and snacks will be provided. RSVPs to Lori King, loriking@cabainc.com, are encouraged to ensure there is food for all.

Connect With the OBA Through Social Media

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

Important Upcoming Dates

Don't forget the Oklahoma Bar Center will be closed Monday, Feb. 20, in observance of Presidents Day. Also, be sure to docket the 2017 Solo & Small Firm Conference in Durant June 22-24 and the OBA Annual Meeting to be held in Tulsa Nov. 1-3.

OBA Member Resignations

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

Ashley Kristine Adrianse
OBA No. 31890
2339 Indian Grass Road
Naperville, IL 60564

Kay Ellen Armstrong
OBA No. 326
1946 Hamilton Avenue
Carson City, NV 89706

Kathryn Reichert Barber
OBA No. 30696
Immigrant Legal Services
4055 S. 700 E., Ste. 200
Salt Lake City, UT 84107

Larry Michael Barrett
OBA No. 556
3517 Oak Grove Drive
Midwest City, OK 73110

Rachel Ann Moore Barrett
OBA No. 558
4106 Timberland Drive
Portsmouth, VA 23703-1930

Glynis C. Edgar
OBA No. 12658
P.O. Box 1763
Santa Fe, NM 87504

Tobey Scott Elliott
OBA No. 18554
P.O. Box 121879
Arlington, TX 76012

Cynthia A. Hamra
OBA No. 20714
5937C California Ave., S.W.
Seattle, WA 98136

Joseph Patrick Hanson
OBA No. 30317
691 E. Sawgrass Trail
Dakota Dunes, SD 57049

Julia Elizabeth Hartnell
OBA No. 22583
5905 N. Classen Ct., Ste. 301
Oklahoma City, OK 73118

Thomas Wayne Kohler
OBA No. 13510
10178 Lakewood Road
Skiatook, OK 74070

John Maurice Mahoney Jr.
OBA No. 17311
P.O. Box 385895
Waikoloa, HI 96738

Michael J. McGinnis
OBA No. 13515
1001 Louisiana St., Suite 848
Houston, TX 77002

Thomas William Neely
OBA No. 12424
4618 Campos Lane
Winters, CA 95694-9669

Ashley Anne D. Parrish
OBA No. 6911
8910 N. May Avenue
Oklahoma City, OK
73120-4473

Richard Charles Paugh
OBA No. 21773
3936 N. Bayberry Cir.
Wichita, KS 67226

Stephen Peterson
OBA No. 7085
211 N. Robinson, Suite 800 N
Oklahoma City, OK 73102

James Parker Rouse Sr.
OBA No. 7785
10384 Sierra Ridge Lane
Parker, CO 80134

Bobbi S. Ruhlander
OBA No. 10403
2008 Hillcrest Court
McKinney, TX 75070

Charles Eric Ruhr
OBA No. 18601
607 N. 7th Street
Columbia, MO 65201

David John Sachar
OBA No. 20913
13916 Foxfield Lane
Little Rock, AR 72211-3792

Steven Lee Slagel
OBA No. 13778
2701 Clublake Trail
McKinney, TX 75070

Cheryl Lynn Sullivan
OBA No. 12062
14534 Channel Lane
Skiatook, OK 74079

Scott T. Trost
OBA No. 20580
438 S. Peck Drive
Beverly Hills, CA 90212

Diana Tate Vermeire
OBA No. 31253
1873 51st Street
Sacramento, CA 95819

Kellie Joan Watts
OBA No. 12922
151 Royal Dornoch Dr.
Branson, MO 65616-7414

Peggy C. Watts
OBA No. 1954
915 Longfield Cir.
Charlotte, NC 28270

Darlene M. Wiersig
OBA No. 9593
918 Cannoneer Ln.
Austin, TX 78757

Patricia Lea Wilson
OBA No. 19417
19 Jean Drive
Asheville, NC 28803-9548

Karen Nan Youngblood
OBA No. 9975
P.O. Box 6656
Lawton, OK 73506

OBA Member Reinstatement

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

Robert Lee Rabon
OBA No. 13523
1202 E. Jefferson Street
Hugo, OK 74743-5216

Kudos

Jennifer N. Lamirand was appointed as associate justice of the Citizen Potawatomi Nation Supreme Court. As a member of the tribal court she will enforce tribal laws, provide equal justice to all and protect tribal sovereignty.

On The Move

Bryan E. Stanton and **Amy Steele Neathery** have been named partners at the law firm Pierce, Couch, Hendrickson, Baysinger & Green and will work in the firm's Oklahoma City office. Mr. Stanton's practice is concentrated in transportation, professional negligence and insurance defense. Ms. Neathery practices in insurance defense.

Stephanie E. Kaiser has joined the Tulsa firm Doerner, Saunders, Daniel & Anderson. Ms. Kaiser's practice is focused in litigation, regulatory, transactional and bankruptcy matters.

Christopher R. Kemp has joined the Tulsa firm Gibbs Armstrong Borochoff Mullican & Hart PC as an associate. Mr. Kemp's areas of practice include railroad defense litigation, insurance defense, general civil litigation, premises liability and worker's compensation.

Christopher S. Heroux is now a partner in the Denver and Houston offices of Lewis Brisbois Bisgaard & Smith LLP. Mr. Heroux will continue to focus his practice in the areas of energy transactions, mergers and acquisitions and commercial real estate.

Walt Chahanovich was selected as deputy chief of the Commercial and Administrative Law Division, Office of the Principal Legal Advisor, HQs, Immigration and Customs Enforcement in Washington, D.C. Mr. Chahanovich is a graduate of the OCU School of Law.

GableGotwals has announced the promotion of two associate attorneys and two of counsel attorneys to shareholder status. The new shareholders are **Adam Doverspike**, **Robert Getchell** and **Brandon Watson** who are located in Tulsa and **Talitha Ebright**, who practices in the Oklahoma City office. Mr. Doverspike focuses his practice on complex civil litigation, appellate matters, ratemaking and local government affairs. Mr. Getchell focuses his practice in real estate law. Mr. Watson's practice focuses on business transactions. Ms. Ebrite's practice focuses on business litigation.

Martin A. Brown has been named senior vice president legal and general counsel for Skinny IT Corp. in Frisco, Texas. Mr. Brown received his J.D. from the TU College of Law in 1999.

David W. Lee has become of counsel in the Oklahoma City office of Riggs, Abney, Neal, Turpen, Orbison & Lewis. Mr. Lee will focus on the areas of federal civil rights, employment law and appellate advocacy.

Rachael F. Hughes was named partner in the Tulsa firm Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco. Ms. Hughes practices in the areas of appellate advocacy and civil litigation.

Joel W. Harmon of Crowe & Dunlevy in Oklahoma City was appointed co-chair of the firm's Banking and Financial Institutions Practice Group. Mr. Harmon will serve clients in the financial services industry and oversee the firm's operations in this area.

Michael K. Avery, Brian C. Beatty, H. Cole Marshall and **Curtis J. Thomas** were elected as fellow shareholders of the firm McAfee & Taft. Mr. Avery's practice focuses on general civil litigation, including complex business litigation and appeals. Mr. Beatty is a transactional attorney with the firm's global aviation practice. Mr. Marshall's practice focuses on business transactional matters, including general business, real estate, corporate governance, healthcare and agriculture. Mr. Thomas' practice focuses on business and commercial litigation as well as the representation of management in labor and employment matters.

At The Podium

Donna De Simone presented "Social Media and Electronic Medical Records Liability" to healthcare professionals at medical conferences in New York, Alabama and Wisconsin.

Kimberly Lambert Love was a featured presenter on employment topics at the 10th Circuit in Review. Ms. Love regularly represents employers in all aspects of employment and labor law including litigating class action suits and claims of discrimination, harassment and retaliation.

Sean Nelson will be presenting on the "Consumer Financial Protection Bureau" at the Oklahoma City Commercial Lawyer's Association Feb. 13 in Edmond.

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

Submit news items via email to:
Lacey Plaudis
Communications Dept.
Oklahoma Bar Association
405-416-7017
barbriefs@okbar.org

Articles for the April 15 Issue must be received by March 13.

IN MEMORIAM

F. Leroy Ball died June 20, 2016. Mr. Ball graduated from TU with a Bachelor of Commerce and a LL.B. He was admitted to the Oklahoma Bar Association in 1961. He became a landman with Skelly Oil in 1954 where he remained until his retirement from Texaco in 1985. He worked in the Land Department in Tulsa; Calgary, Alberta; Baton Rouge, New Orleans and Los Angeles. He retired as the manager of international land acquisitions based in Los Angeles. Following his retirement, he continued his involvement with Texaco both in Los Angeles and in New Orleans. He was active in the Tulsa Easter Pageant for many years where played the part of Jesus. He was a long-time member of MENSA. He loved eating and football.

James L. Barrett died Nov. 27, 2016. Mr. Barrett was born March 3, 1934, in Maysville. After graduating from Capitol Hill High School in 1952, **he served in the Air Force. While stationed in Amarillo, Texas, he was awarded the honor of Airman of the Month in April 1956**. He graduated from Oklahoma Baptist University in 1959 and from the American University Washington College of Law in Washington, D.C., in 1963. He practiced law and was an entrepreneur in Oklahoma City for 50 years. In lieu of flowers, please make donations to the Wounded Warrior Project.

Jack W. Dickey of Weatherford died Aug. 24, 2015. Mr. Dickey was born Aug. 19, 1938, in Weatherford. He was a 1956 graduate of Weatherford High School, a 1960 graduate of Oklahoma A&M (OSU) and a 1963 graduate of the OU College of Law. He began his banking career working for Fidelity National Bank as a loan officer from 1963 to 1969. In 1969, he and two of his brothers bought the bank in Custer City. He served as president and chairman of the board of Southwest National Bank in Custer City, Weatherford and Mustang and First National Bank of Thomas. He loved working in his yard, traveling and reading. In lieu of flowers, donations can be made to the First United Methodist Church in Weatherford.

Stephen Wilson Elliott of Edmond died Aug. 23, 2016. Mr. Elliott was born Dec. 20, 1954, in Portland, Oregon. Despite not finishing high school and supporting himself by playing in a band, he graduated from the TU College of Law with a J.D. in 1981. He was an attorney at Phillips Murrah PC and enjoyed mentoring students as an adjunct professor at the

OCU School of Law from 2003 - 2005. He loved to travel, golf, play guitar and watch sports. In lieu of flowers, memorial donations can be made to the Muscular Dystrophy Association.

Kathryn Flood of Norman died Dec. 20, 2016. Ms. Flood was born Feb. 22, 1949, in Norman. She earned a bachelor's and master's degree in French. Upon completion of her masters, she began teaching in public school. In 1980, she began law school at the OU College of Law and graduated with her J.D. in 1983. She worked first for Legal Aid Services, then the Department of Human Services as a personnel lawyer, and finally was a clerk for the Oklahoma Court of Civil Appeals. In lieu of flowers, memorial donations may be made to the First Christian Church of Norman, Hands Helping Paws of Norman or the charity of your choice.

James A. Hyde died Dec. 24, 2015. Mr. Hyde was born Nov. 16, 1945, in Oklahoma City. He was a 1964 graduate of Harding High School and a graduate of OU, where he received a degree in accounting. He earned his J.D. from the OCU School of Law. He began his career as an accountant at Kerr McGee in 1970 and later became the president of the Bone and Joint Hospital and McBride Clinic. He served on the board of St. Anthony Hospital until his retirement in 2010. He loved to golf, travel and cook.

Robert Allen Jackson died Aug. 23, 2016. Mr. Jackson graduated from Classen High School. He went on to earn a bachelor's degree in business from OU. **He then joined the Navy where he eventually reached the rank of lieutenant commander**. After his time in the Navy he graduated from the OCU School of Law in 1965. He had a passion for becoming a criminal defense trial lawyer and steered his career in that direction. He enjoyed his dog Bailey and fishing at the pond with his grandchildren.

A. Carl Robinson of Muskogee died Jan. 6. Mr. Robinson was born Dec. 13, 1926, in Shawnee. He graduated from Shawnee High School in 1944. **He was drafted into the Army shortly after beginning his second semester at Oklahoma Baptist University (OBU)**. After leaving the Army in 1947, he transferred from OBU to OU. He graduated from the OU College of Law in 1950. After graduation, he worked for Phillips Petroleum Co. and then for the U.S. Fidelity and Guaranty Co. He entered private practice in 1956 under the firm name of Fite and Robinson. He was appointed police judge and established the Municipal Court of the City of Muskogee, becoming the city's first municipal judge. He was a member and director of the Oklahoma Association of Municipal Judges. In 1981, he was appointed as principal justice of Temporary Division No. 36 of the Oklahoma Court of Appeals. In 1997, he was appointed special district judge, a position he held until his retirement in 2012.

Larry Edmond Seward died Dec. 15, 2016. Mr. Seward was born Jan. 28, 1946, in Miami. He graduated from Miami High School in 1964 **and soon after joined the Navy. Of his four-year Navy service, three and a half years were spent at sea among 89 different countries, including Antarctica, in the weather balloon program.** In 1973, he earned a bachelor's degree from OU in accounting, and in 1979 he earned his J.D. from the TU College of Law. He worked as an in-house lawyer, first for Cities Service in Tulsa and then for Grace Petroleum in Oklahoma City until 1985. He then left corporate law and began a staff attorney internship for Dodd & Helm Law Firm in Enid in 1985. He moved to the Tulsa area in 1986, and he began his private law practice. He actively practiced law until his death.

R. Jane Spahn of Grand Island, Nebraska died Feb. 26. Ms. Spahn was born March 20, 1920, in Twin Falls, Idaho. She graduated from Vinita High School in 1937, received a Bachelor of Science from OSU in 1942, and a J.D. from the OCU School of Law in 1955. She served with the American Red Cross in the European Theatre from 1945 to 1947 and later worked for Amoco in both Tulsa and Oklahoma City. She was a member of St. Stephens Episcopal Church, the Riverside Golf Club and both the Nebraska and Oklahoma bar associations. She enjoyed a vigorous game of bridge with her friends and hosting friends and family.

Ellen Colclasure Steely of Duncan died Dec. 30, 2016. Ms. Colclasure was born Nov. 20, 1939, in Farmington, New Mexico. She earned a Bachelor of Arts from OCU in 1963 and her J.D. from the OCU School of Law in 1968. She worked as an attorney for Kerr-McGee Oil Company in

Oklahoma City before moving to Duncan. She served as associate district judge in Duncan for one term beginning in 1979 and then continued her private law practice until 2015. She was an active member of the Lawton Unitarian Universalist Church. She was also a member of the Duncan Rotary Club and Leadership Duncan. She served on the board of the Duncan Group Homes and American Music Festival. In lieu of flowers, donations may be made to the Stephens County Humane Society.

Elizabeth Cynthia Thomas died Dec. 14, 2016, in Margate, Florida. Ms. Thomas was born April 30, 1984, in Tulsa. She graduated from Booker T. Washington High School in 2002 and from TU in 2006 with a degree in political science. In 2009, she graduated from the OU College of Law. She was an active and dedicated member of the Metropolitan Baptist Church.

Richard Dan Wagner died Dec. 30, 2016. Mr. Wagner was born Jan. 31, 1937, in Tulsa. He graduated from the TU College of Law with his J.D. and was admitted to the Oklahoma Bar Association in 1963. He was very involved in his church and served on the Memorial Baptist Church Board of Deacons for many years. He enjoyed watching the Golden Hurricanes at the TU Skelly Stadium or Donald W. Reynolds Center. In lieu of flowers, make a contribution to Memorial Baptist Church.

Thomas "Big Tom" Edward York died Dec. 19, 2016. Mr. York was born March 8, 1944, in Stillwater. He graduated from OSU then continued on to the TU College of Law to receive his J.D. He retired as an attorney for the Social Security Administration. He enjoyed cheering on the OSU Cowboys. He enjoyed listening to classical and oldies music and loved the bagpipes because of his Scottish heritage. Mr. York was a great cook and created lots of family memories in the kitchen and around the BBQ grill.

James B. Zongker of Wichita, Kansas, died Jan. 1. Mr. Zongker was born Oct. 6, 1940, in Wichita. He attended and wrestled at East High and OU where he received his B.A. and J.D. and was a member of Phi Alpha Delta. He was a Wichita Wrestling Club coach, an avid reader and an attorney for Hammond Zongker & Farris LLC. He also represented Teamsters Local 795 for many years. Memorial donations may be made in his memory to the Cystic Fibrosis Foundation-Heart of America Chapter, 6950.

Keep Your Calendar Under Control

As lawyers, it is easy to let our calendar and number of appointments get out of control. Technology experts Heidi Alexander, Tom Lambotte, Catherine Sanders Reach, Nora Regis and Lee Rosen share how they manage their calendars.

Goo.gl/Fhyjqq

Seven Ways Your Workplace is Making You Sick

Are you tired of being sick? Here are seven ways your workplace is making you sick and a few ways you can change your work habits to live a healthier life.

Goo.gl/7kXzw0

Alleviate Anxiety With This Grounding Exercise

Anxiety is something many people struggle with and often hits when we least expect it. Here is a grounding exercise that can be done anywhere to help curb anxiety and refocus your thoughts.

Goo.gl/qW21gD

Carry Out Your Marketing Plan

Be willing to fail. This is something Irene Leonard says you must be willing to do in order to carry out a marketing plan and build your law practice. Check out her other suggestions that might help you succeed in this area.

Goo.gl/nAHF8y

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Why King Day and Black History Month Celebrations are Important

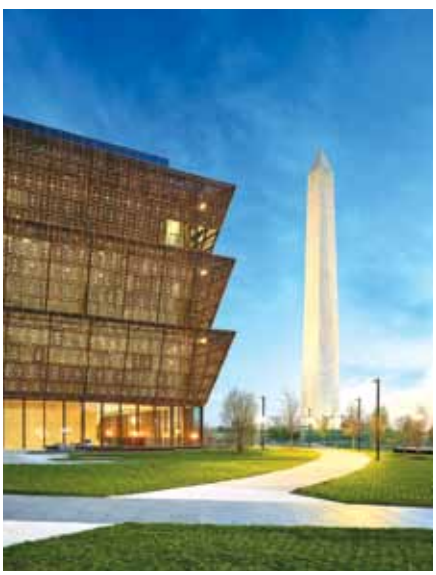
By Tiece Dempsey

Beginning Jan. 15 each year, the country takes time to honor and highlight the achievements of African-Americans. We start by honoring the life and legacy of the Rev. Dr. Martin Luther King Jr., gathering for "King Day" celebrations, listening to oratory recitations of Dr. King's famous speech "I Have a Dream," and standing and cheering during memorial parades that journey through cities all across this country. We share our favorite Dr. King quotes and reflect on how far we believe we have come since the days Dr. King and others fought for civil rights for all Americans.

In February, we celebrate other African-American history makers during Black History Month. During Black History Month, we teach our children about all of the great black educators, inventors, lawyers, doctors and entrepreneurs who broke down so many barriers, opened so many doors and stood up, or better yet, sat down for racial equality. We further make special efforts to listen to and honor our local black history makers who made a way for those behind them to follow.

In light of the 44th president of the United States being the country's first black president, some ask are these celebrations still necessary.

I recently had the opportunity to visit the Smithsonian National Museum of African-American History and Culture in Washington, D.C. The museum shares the journey of African-Americans in this country, and in a very real and present way, reminds us this is America's story of how it began. It documents the horrid way human beings were stockpiled as cargo in ships and brought across the Atlantic Ocean in order to build a young nation's economy, and it exhibits how cultures were destroyed, families were disintegrated, and a people were forced to believe their lives didn't matter and their only reason for being was to serve others.

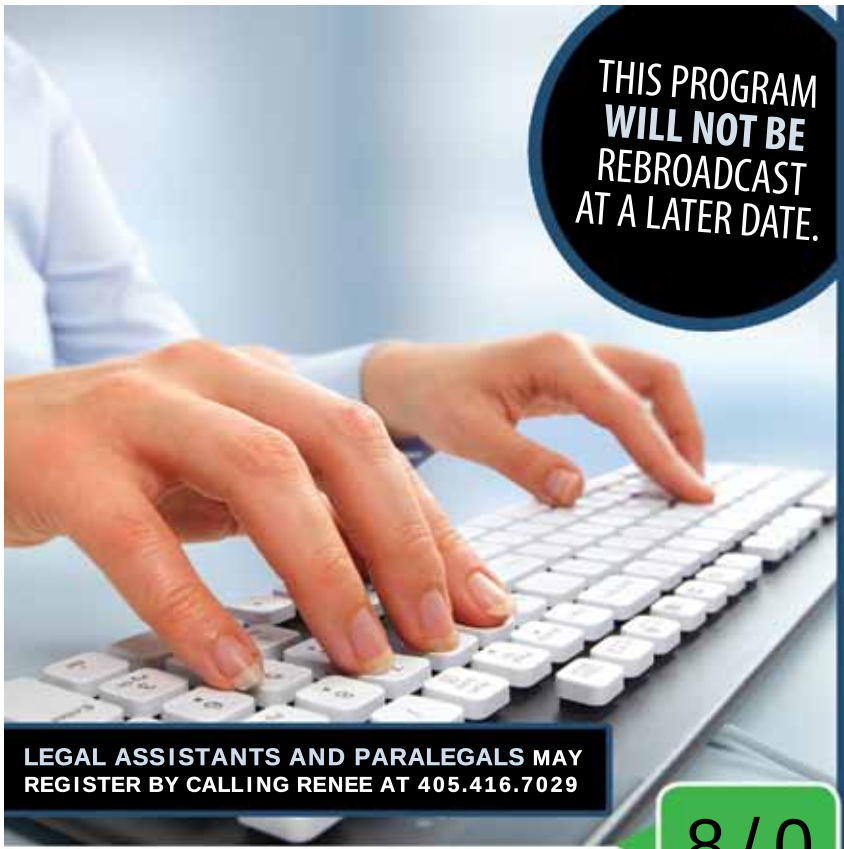


The National Museum of African American History and Culture is located near the Washington Monument. Photo Credit: NMAAHC

As I walked through the museum, one moment really struck me. A little girl, who could not have been older than 10 years old, silently cried and asked her mother, why? She said, "Mommy, how could they do this to these people; why would they do this to these people." Her mother's response brought me to tears. She reminded her daughter this may have been how the story began, but it is not how it ends. And I could not help but think, that mother was right, because look at me, the dream and the hope of my ancestors, who were brought to this country unwillingly, bound and chained, and labored in fields for more than 400 years.

So when people ask if MLK Day and Black History Month celebrations are still relevant and necessary, our collective response should be that they are not only celebrations of African-American achievement, but a reminder of how far our nation has come.

Ms. Dempsey is the law clerk for Judge Vicki Miles-LaGrange in Oklahoma City and chairs the OBA Diversity Committee.



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8 / 0

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APRIL 20, 9 a.m. - 4:30 p.m.

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Are you tired of wrestling with Word every time you have to draft something more complex than a letter? Do you wish you could control Word's formatting and gain a better understanding of how it works? Do you miss WordPerfect? If the answer to any of these questions is yes, this is your class! Word classes designed for the general public just don't address the issues legal professionals face when drafting legal instruments. By contrast, this class is designed by lawyers, for lawyers. In this seminar, you'll learn the right way to set up complex legal documents and how to avoid the formatting problems and delays you're probably used to encountering. Barron will answer any attendee questions for an entire week after the seminar, and he encourages you to let him help you (it's free)!

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WHAT VERSION OF WORD WILL BE TAUGHT?

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