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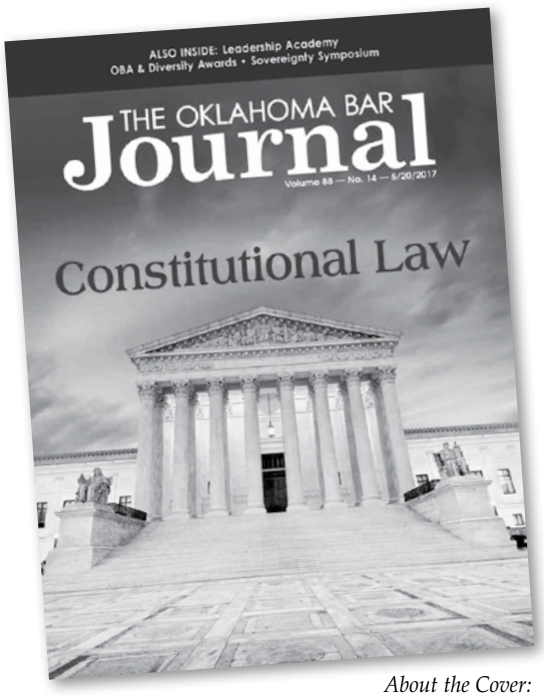

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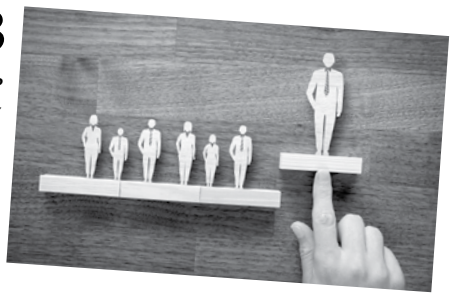

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PLUS

14th Amendment Guarantees Are Vital

By Linda S. Thomas

The 14th Amendment is arguably the most important amendment to the U.S. Constitution and is among the most often cited and most litigated of constitutional provisions. The amendment prohibits states from depriving any person of life, liberty or property without "due process of law" and requires states to afford "equal protection of the law" to all. Simply put, the 14th Amendment is based on the principle that citizens shall not be deprived of life, liberty or property without appropriate legal procedures and safeguards. It guarantees all citizens the same rights, privileges, protections and fair treatment through the judicial system.

Because of the 14th Amendment, individual rights are balanced with the power of the government. Absent due process and equal protection, I can imagine that the other rights afforded to us in the U.S. and Oklahoma constitutions would have little effect. Even the very basic freedoms – freedom of religion and speech, right to jury trial and freedom from unreasonable searches and seizures – would all fall by the wayside without the 14th Amendment guarantee of due process of law and equal protection under the law.

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The gatekeeper of those 14th Amendment guarantees is a fair and impartial judiciary. Absent an independent judiciary, "due process" and "equal protection" would be an elegant vessel that holds little water. With 2017 bringing the 50th anniversary of the creation of merit selection of Oklahoma judges utilizing the Judicial Nominating Commission (JNC), it is the perfect time for the OBA to focus on the fair and impartial administration of justice for the benefit of all Oklahoma citizens.

It is the perfect time for the OBA to focus on the fair and impartial administration of justice for the benefit of all Oklahoma citizens.

We need to educate the public on the benefits of the JNC, to warn them of the potential ill effects of reintroducing politics into our judicial selection process and promote the public's understanding of the importance of separation of powers, both central and essential in a representative democracy. While the judicial branch is often referred to as the "third" branch of government, nonetheless it is coequal with the executive branch and the legislative branch.

LEARNING FROM THE PAST

The JNC was created in 1967 after a bribery scandal involving three Oklahoma Supreme Court justices became the focus of the nation. Prior to the 1960s, all Oklahoma judges, including appellate judges, were like every other politician – raising money, campaigning and running for office in contested partisan elections. The bribery scandal surfaced in 1965 after it was revealed the three justices accepted bribes to rig votes on decisions before the court. Oklahoma gained national attention with *Newsweek* magazine calling Oklahoma's system "cash and carry justice," and *Time* magazine proclaiming "little in U.S. judicial history comes close to matching this scandal," referring to the quality of justice in our state as the "best money can buy."

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Suing on Shifting Sands

The Oklahoma Constitution, Retroactive Legislation and the Scramble for Clarity

By Mbilike M. Mwafulirwa

It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable.

De Niz Robles v. Lynch[1]

Imagine that it is July of 2014, and you have finally achieved notoriety in life. You're a celebrity lawyer. Then, unexpectedly, a "friend" publishes a tell-all video on social media maligning you. You are accused of being an incompetent and unethical lawyer, with specific instances outlined as examples (all false, of course). The allegations make rounds in the media and have devastating effects on your practice and reputation.

You decide to take swift action. Within 30 days, you file suit against your friend, asserting various reputational torts. While the suit is pending, the legislature passes a new law that affects reputational tort claims like yours. The law provides that within 60 days, the defendant can move to dismiss the case by merely showing that the case relates to First Amendment protected speech (*e.g.*, a matter of public concern) or that a defense applies. As soon as the defense motion is filed, all discovery tools are automatically stayed.

To keep your case alive, you have the burden of proving by clear and specific evidence each and every element of your case, without the benefit of discovery (unless the court allows you). If you lose, you are taxed costs and attorney fees automatically. Your opponent immediately files her defense motion based on the new statute. You object to the new statute applying to your case because, in your view, it moves the goal posts in the middle of the game. Your opponent disagrees; she argues the statute merely outlines new civil procedures, as such, like any other rule of civil procedure, it should apply to your case.

This hypothetical situation raises a pr ofound constitutional question: Can legislation with the same design and effects as that outlined above apply retroactively to an active case consistent with Okla. Const. Art. 5, §§52-54? This question has arisen several times under various Oklahoma statutes, and most recently, the Oklahoma Citizens Participation Act (OCPA),[2] a statute with the same design and effect as the one in the hypothetical, that came into effect on Nov. 1, 2014. Our courts have held that the OCPA and similar statutes cannot apply retroactively. This article will flesh out the various legal and policy considerations that underlie those holdings and lay out some bright lines to guide the Oklahoma legal practitioner to effectively address retroactive statutes in civil cases.

THE OKLAHOMA CITIZENS PARTICIPATION ACT – AN OVERVIEW

The OCPA is among a class of statutes commonly referred to as anti-SLAPP laws that came into effect on Nov. 1, 2014.[3] The acronym "SLAPP" stands for "Strategic Lawsuits Against Participation," a phrase first coined by professors George W. Pring and Susan Canan.[4] In essence, a SLAPP lawsuit is one that is filed with the clear purpose of "deter[ing] public participation in decision-making forums … [by] intimidat[ing] the petitioners into dropping their initial petitions due to the expense and fear of extended litigation."[5] Anti-SLAPP statutes are legislative responses aimed at curbing SLAPP lawsuits. Indeed, anti-SLAPP statutes draw their inspiration from two seminal United States Supreme Court decisions, *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc*.[6] and *United Mine Workers of America v. Pennington*.[7]

The two cases underscore emphatically the First Amendment's Petition Clause' guarantee that the government "shall make no law … abridging … the right of the people … *to petition the Government* for a redress of grievances."[8] The Petition Clause is the full embodiment of "the very idea of a government, republic in form."[9] In the first of the two cases referenced above, *Noerr Motor Freight,* trucking companies and their trade association sued competitor railroads under the antitrust laws because they had conspired to engage in petitioning conduct that had deleterious effects on the trucking industry.[10] The district court, after a trial, entered judgment in favor of the trucking companies.[11] The Supreme Court reversed and held that "the Sherman Act does not prohibit … persons from associating … in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly."[12] In the other case, *Pennington*, a case that also implicated antitrust concerns, the court extended its earlier holding in *Noerr* to emphasize that the great deference accorded to the right to petition "shields from the Sherman Act a concerted effort to influence public officials *regardless of intent or purpose*."[13]

Against this background, the OCPA should be considered beginning with the words of the statutory text.[14] The OCPA professes to "encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely and otherwise participate in government to the maximum extent permitted by law …"[15] The OCPA's reach is very broad – it applies to any action that "is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association."[16] The "right of association" is defined as "communication between individuals who join together to collectively express, promote, pursue or defend common interests."[17] The "right of free speech" captures communications "made in connection with a matter of public concern."[18] The "right to petition," on the other hand, pertains to communications in judicial proceedings, public meetings and most of other public proceedings.[19] "[C]ommunication" captures the "making or submitting of a statement or document in any form or medium …"[20]

The main striking point of the OCPA is its summary dismissal procedures.[21] During the sufficiency stage of the proceedings, within 60 days of the date of service of the case, and without the benefit of discovery, a defendant can move to summarily dismiss the case on the merits by merely showing by a preponderance of the evidence that either the case relates to protected speech or that a defense applies.[22] In contrast, in order to keep his case alive, a plaintiff must establish by "*clear and specific evidence a prima facie case* for each essential element of the claim in question."[23] In making a determination whether to dismiss a suit, the court "*shall* consider the pleadings and *supporting and opposing affidavits* …"[24] Arguably, the OCPA contemplates a trial on the pleadings.[25]

The OCPA also imposes sanctions. The OCPA provides that when a motion to dismiss is sustained, the court "*shall*" award the moving party reasonable attorney fees and costs.[26] On the other hand, if a defendant's motion to dismiss is deemed "frivolous or solely intended to delay," a court "*may*" award plaintiff costs and attorney fees.[27] The district court has discretion, which it may exercise upon motion or *sua sponte*, to order limited discovery.[28]

OKLAHOMA CONSTITUTIONAL FRAMEWORK FOR RETROACTIVE LEGISLATION

Oklahoma law presumes that unless the words in a statute expressly indicate that it applies retroactively, it should ordinarily be presumed to only apply prospectively.[29] However, the same is not true of purely procedural statutes: they apply retroactively.[30] There are, however, "constitutional limitations on this

general rule."[31] Oklahoma law remains deeply committed to the constitutional principle that later-enacted statutory changes cannot make substantive changes to existing claims.[32] In pertinent part, Okla. Art. 5, §52 provides:

> The Legislature shall have no power to revive any right or remedy, which may have become barred by lapse of time, or by any statute of this State. *After suit has been commenced on any cause of action, the Legislature shall have no power to take away such cause of action, or destroy any existing defense to such suit*.[33]

Also worthy of note on this subject is Okla. Art. 5, §54. In pertinent part, it provides:

> The repeal of a statute shall not revive a statute previously repealed by such statute, *nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute*.[34]

The Oklahoma Supreme Court addressed these provisions in *Cole v. Silverado Foods Inc*.[35] In *Cole*, retroactive workers' compensation legislation attempted to shorten the time period within which an injured worker could present accrued claims from five to three years.[36] The court held that later-enacted legislation could not alter accrued substantive rights (decreasing the time to present claims from five to three years).[37] The court reasoned that later-enacted legislation is "subject solely to prospective application,"[38] if it re-fashions an existing remedial scheme "into a different and *more extensive liability-defeating mechanism* … [and] destroys the claimant's right to present her claim free from being subjected to new and more extensive instruments of destruction."[39]

JUDICIAL REVIEW OF THE OCPA – DIFFICULT QUESTIONS UNRAVELED

Oklahoma courts have so far issued a number of published opinions on the OCPA. The first of these cases was *Anderson v. Wilken*.[40] In *Anderson*, the plaintiff, who was at the time the clerk of Rogers County, sued the *Claremore Daily Progress* and its reporter for publications that she alleged placed her in a false light.[41] The defendants filed OCPA motions to dismiss, and pursuant to 12 O.S. Supp. 2015 §1433,[42] the trial court was required to set a hearing within 60 days but no later than 90 days.[43] After failing to hold a hearing within 60 days and no later than 90 days, the trial court issued an order that defendants' motion had been denied automatically as a matter of law.[44] The case was appealed, and it was assigned to Court of Civil Appeals (COCA) Division IV. While the case was pending, Anderson filed a motion to dismiss the appeal because, in her view, the OCPA did not apply to the case, as such, the appellate court lacked jurisdiction.[45]

The appeal set the stage for three difficult questions: 1) Could the trial court ignore an explicit statutory command to hold a hearing within the specific time frames set by the statute? 2) Considering that the trial court had failed to hold a hearing and issue a ruling, was there a final appealable order to trigger the appellate court's jurisdiction? And finally, 3) even if the trial court could be ordered to conduct the OCPA hearing that it should have held in the first place, how could that be reconciled with 12 O.S. Supp. 2015 §1433(A) that expressly provides that "*in no event shall* the hearing occur *more than ninety (90) days* after service of the motion to dismiss"?

"In this case, the appellate court reasoned that the trial court had a mandatory duty to hold a hearing within a specified timeframe, but it had failed to do so."

Division IV gave interesting responses to these vexing questions. The court elected to address the questions in reverse order – the jurisdiction question first.[46] The court noted that "in the absence of any proceedings in the district court,"[47] there was no appealable decision to review on appeal.[48] As the court explained, appellate courts in Oklahoma do not usurp the trial court's role in addressing legal questions in the first instance.[49]

The lack of an appealable order, however, did not end the court's analysis. The OCPA's appellate provision – 12 O.S. Supp. 2015, §1437(B) – has two components, "appeal or other writ."[50] Division IV reasoned that even though this case failed to trigger §1437(B)'s appeal component, there had to be a situation in which the "writ" portion of the provision was triggered; otherwise, that portion of the statute would be redundant.[51] In this case, the

appellate court reasoned that the trial court had a mandatory duty to hold a hearing within a specified timeframe, but it had failed to do so.[52] The failure to discharge a mandatory duty, Division IV reasoned, was a basis for the issuance of a writ in this case.[53] The trial court was ordered to hold a hearing "**no later than 60 days after the date of service of the motion unless docket require a later hearing … but in no event shall the hearing occur more than 90 days after service of the motion to dismiss**."[54] The court declined to address other issues.[55] The question of the OCPA's retroactivity was still open.

THE OCPA'S RETROACTIVE APPLICATION FINALLY ADDRESSED

The Oklahoma Supreme Court squarely addressed this question in the twin cases *Anagnost v. Tomacek*[56] and *Steidley v. Singer*.[57] We address each case in turn.

Anagnost v. Tomacek

In *Anagnost*, the Oklahoma Board of Medical Licensure and Supervision (board) commenced an investigation against doctor-plaintiff, on allegations that he rendered below par treatment to patients, among other alleged infractions.[58] Plaintiff, in turn, filed multiple legal proceedings challenging the board proceedings, and also filed claims against a number of doctors and their entities. On Dec. 12, 2014, the plaintiff filed an amended pleading adding additional claims.[59] After the amendment, while the suit was underway, the defendants filed OCPA motions to dismiss, a year after the suit had originally been filed.[60] The trial court held that since the amended pleading was filed after the OCPA came into effect, it applied to this case. The trial court sustained defendants' motions and dismissed the case.[61] As relevant here, the COCA affirmed.[62] The court reasoned that the OCPA applies to any "legal action" without qualification, including the case at hand.[63]

Division I's conclusion raised very interesting and potential conflicts with prior OCPA appellate rulings for multiple reasons: 1) Oklahoma law is fully committed to the view that the law in effect at the time a claim accrues applies throughout its lifespan,[64] 2) Division I held in *Steidley v. Community Newspapers Inc*., a month before *Anagnost*, that the OCPA is a substantive law that cannot constitutionally apply retroactively to an accrued claim[65] and 3) the plaintiff's claims in *Anagnost*, at least against the original defendants, arguably accrued before the OCPA came into effect.[66] That would in effect preclude the OCPA retroactively applying to those claims.[67] Even then, what about the claims against the newly added defendants? When did those claims accrue? One possibility is that those claims accrued the same time as the original because Oklahoma law does not recognize tolling of claims against unknown tortfeasors (or simply because a plaintiff does not know all the people responsible for bringing about his injuries).[68] In that case, the law applicable should have been that predating the OCPA, regardless of an amendment.[69] Another possibility, like Division I found, is that the newly added claims accrued after the OCPA came into effect, meaning it could apply to the case.[70] The Oklahoma Supreme Court granted *certiorari* in *Anagnost* on Oct. 24, 2016, to address these issues.[71]

The court held that the OCPA does not apply retroactively.[72] To begin with, the court reasoned that the statute contained no express "indication that the Legislature intended for the OCPA to operate retrospectively."[73] In addition, the court reasoned that even if the OCPA was intended to apply retroactively, by its design and effect, it was substantive; as such, it could not apply to existing claims.[74] As the court explained, the OCPA creates a new defense – a new expedited motion to dismiss without the guarantee of discovery – for claims that implicate First Amendment rights.[75] As the court had earlier explained in *Cole*, later-enacted legislation is subject solely to prospective application if it refashions an existing remedial scheme "into a different and more extensive liability-defeating mechanism … [and] destroys the claimant's right to present her claim free from being subjected to new and more extensive instruments of destruction."[76] Furthermore, the court explained that because the OCPA creates a new remedy for damages "by providing [an] award of attorney fees, costs and other reasonable expenses as well as sanctions," in line with existing Oklahoma law, it should only apply prospectively.[77]

The court also addressed the interplay between the OCPA and amended pleadings. The court held that as long as an amended pleading relates back to the original pleading under 12 O.S. §2015(C) the OCPA "is inconsequential."[78] In *Anagnost*, the court left it to the trial court to make a definitive determination on the relation back issue.[79]

Steidley v. Singer

On the same day that *Anagnost* was decided, the court also issued its opinion in *Steidley*, which also held that the OCPA cannot apply retroactively.[80] Janice Steidley, the former district attorney for Rogers, Mayes and Craig counties, together with her two assistants, sued several individuals for allegedly publishing deliberate and reckless falsehoods in the body of a grand jury petition.[81] The district court approved the grand jury petition on Aug. 29, 2013.[82] On Oct. 16, 2013, plaintiffs filed their initial petition alleging defamation.[83] Plaintiffs filed an amended petition in November of 2013.[84] While the suit was pending, a year later, the OCPA came into effect; defendants filed their OCPA motion to dismiss.[85]

The lower courts held that the OCPA does not apply retroactively. The trial court denied defendants' motion to dismiss, implicitly holding that the OCPA was not retroactive.[86] COCA affirmed, holding that the statute is not retroactive because it is substantive.[87] The Oklahoma Supreme Court granted *certiorari* on Dec. 13, 2016, to consider the OCPA's applicability.

The court held that the OCPA is not retroactive, citing *Anagnost*. Because the OCPA is substantive, Okla. Const. Art. 5, §54 prohibits its retroactive application.[88]

CONCLUSION

Oklahoma law – Okla. Const. Art. 2, §6 – attempts to guarantee every litigant his fair day in court. Retroactive legislation, however, upsets settled expectations. That is why Oklahoma law only tolerates retroactive legislation when it makes purely procedural changes to existing procedures because "no one has a vested right in any particular procedure."[89]

Distinguishing between purely procedural and substantive legislative changes is very difficult. However, this article – from its survey of Oklahoma case law – has laid out some bright lines to guide the Oklahoma legal practitioner. Thus far, a law is generally substantive if it either 1) attempts to give one party a defense and/or immunity it did not have before, or to take away a defense in the middle of a case,[90] 2) creates a new right to damages or substantially increases existing damages,[91] 3) creates a new right to attorney's fees or costs for the prevailing party,[92] 4) attempts to change the standard of review on appeal for a particular claim[93] or 5) decreases the benefits or awards due to the plaintiff/claimant.[94]

1. *De Niz Robles v. Lynch*, 803 F.3d 1165, 1169 (10th Cir. 2015).
2. 12 O.S. Supp. 2015 §§1430, *et seq*.
3. *See* Laws 2014, HB 2366, c. 107, §1, eff. Nov. 1, 2014.
4. *See* George W. Pring & Penelope Canan, *SLAPPs: Getting Sued for Speaking Out* 2-3 (1996).
5. Laura Long, "Slapping Around the First Amendment: An Analysis of Oklahoma's Anti-SLAPP Statute and Its Implications on the Right to Petition," 60 *Okla. L. Rev*. 419, 420 (2007).
6. 365 U.S. 127 (1961).
7. 381 U.S. 657 (1965).
8. U.S. Const. amend. I (emphasis added).
9. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).
10. *Noerr Motor Freight*, 365 U.S. at 129.
11. *Id*. at 132-133.
12. *Id*. at 136. The court refused to read the Sherman Act in such a way as to compromise the people's constitutional right to petition the government for redress. *See id*. at 138.
13. *Pennington*, 381 U.S. at 370 (emphasis added).
14. *State ex rel. Macy v. Freeman*, 1991 OK 59, ¶8, 814 P.2d 147, 153.
15. 12 O.S. Supp. 2015 §1430.
16. *Id*. §1432(a).
17. *Id*. §1431(2).
18. *Id*. §1431(3).
19. *Id*. §§1431(4)(a)-(9)(e).
20. *Id*. §1431(1).
21. 12 O.S. Supp. 2015 §1432.
22. *See* 12 O.S. Supp. 2015 §§1432, 1434.
23. *Id*. §1434(C) (emphasis added). "[C]lear and specific evidence" has no discernable definition under Oklahoma law.
24. 12 O.S. Supp. 2015, §1435(A) (emphasis added).
25. *See id*. (trial court must consider conflicting evidentiary presentations and render decision).
26. 12 O.S. Supp. 2015 §1438(A)(1-2) (emphasis added).
27. *Id*. §1438(B)(emphasis added).
28. *Id*. §1435(B).
29. *Trinity Broad. Corp. v. Leeco Oil Co.*, 1984 OK 80, ¶6, 692 P.2d 1364, 1366.
30. *Okla. Bd. of Med. Licensure and Supervision v. Okla. Bd. of Examiners in Optometry*, 1995 OK 13, ¶6, 893 P.2d 498, 499 ("no one has a vested right in any particular procedure.").
31. *Robinson v. Clark*, 2009 OK CIV APP 56, ¶9, 217 P.3d 155, 158 (Approved for publication by the Oklahoma Supreme Court).
32. *See* Okla. Const. Art. 5, §§52 & 54. A retroactive "procedural" amendment that in fact makes substantive changes to existing claims is impermissible. *Bertland v. Laura Dester Cntr*., 2013 OK 18, ¶¶14-15, 300 P.3d 1188, 1192.
33. Okla. Const. Art. 5, §52 (emphasis added).
34. *Id*. §54 (emphasis added).
35. 2003 OK 81, 78 P.3d 542.
36. *Id*. ¶1, 78 P.3d at 544.
37. *Id*.
38. *Id*. ¶13, 78 P.3d at 548.
39. *Id*. (emphasis added); *see also Thomas v. Cumberland Operating Co*., 1977 OK 164, ¶10, 569 P.2d 974, 977 (newly created right to damages was substantive, so restricted to prospective application); *see also Hammons v. Muskogee Med. Cntr. Auth*., 1985 OK 22, ¶¶6-7, 697 P.2d 539, 542 (finding that amendment that provided new protections from suit to defendants was a substantive change limited to prospective application).
40. 2016 OK CIV APP 35, 377 P.3d 149, *cert. denied* (May 9, 2016).
41. *Id*. ¶2, 377 P.3d at 150.
42. *Id*. ¶7, 377 P.3d at 151-152.
43. 12 O.S. 2015 §1433.
44. *Anderson*, 2016 OK CIV APP 35, ¶2, 377 P.3d at 150.
45. *Id*.
46. *Id*. ¶6, 377 P.3d at 151.
47. *Id*.
48. *Id*. ¶10, 377 P.3d at 152.
49. *Anderson*, 2016 OK CIV APP 35, ¶10, 377 P.3d at 152.
50. 12 O.S. Supp. 2015 §1437(B).
51. *Anderson*, 2016 OK CIV APP 35, ¶7, 377 P.3d at 151-152.
52. *Id*. ¶11, 377 P.3d at 152.
53. *Id.; see also City of Tulsa v. State ex rel. Okla. Tax Comm'n*, 2001 OK 23, ¶3, 20 P.3d 144, 147 (refusal to perform mandatory legal duty is basis for writ of mandamus).
54. *Anderson*, 2016 OK CIV APP 35, ¶13, 377 P.3d at 153 (emphasis in original).
55. *Id*.

56. 2017 OK 7, 390 P.3d 707.
57. 2017 OK 8, 389 P.3d 1117.
58. *Anagnost*, 2017 OK 7, ¶2, 390 P.3d at 708.
59. *Id*. ¶3, 390 P.3d at 708-709.
60. *Id*. ¶4, 390 P.3d at 709.
61. *Id*.
62. *Anagnost v. Tomacek*, No. 113748, at *8 (Okla. Ct. Civ. App. Feb. 5, 2016) (unpublished).
63. *Id*.
64. *See Williams Companies Inc. v. Dunkelgod*, 2012 OK 96, ¶¶14-18, 295 P.3d 1107, 1111-1115; *Cole*, 2003 OK 81, ¶13, 78 P.3d at 548.
65. 2016 OK CIV APP 63, 383 P.3d 780, *cert. denied* (Oct. 3, 2016).
66. *See* 12 O.S. §2015(C) (details relation back principles).
67. *Dunkelgod*, 2012 OK 96, ¶¶14-16, 295 P.3d at 1111-1115 (the law in effect at the time a claim accrues applies throughout its lifespan) (collecting cases).
68. *Dotson v. Rainbolt*, 1995 OK 39, ¶¶18-19, 894 P.2d 1109, 1113-1114.
69. *Cf. id.* (holding that there is no relation back for claims against John Doe defendants).
70. *Anagnost*, No. 113748, at ¶8.
71. *Anagnost*, 2017 OK 7, ¶6, 390 P.3d. at 709.
72. *Id.* ¶19, 390 P.3d. at 713.
73. *Id.* ¶16, , 390 P.3d. at 712.
74. *Id*. ¶17, 390 P.3d. at 712.
75. *Anagnost*, 2017 OK 7, ¶16, 390 P.3d. at 712.
76. 2003 OK 81, ¶13, 78 P.3d at 548; *see also Walls v. Am. Tobacco Co.*, 2000 OK 66, 11 P.3d 626 (same); *Hammons*, 1985 OK 22, ¶¶6-7, 697 P.2d at 542.
77. *Anagnost*, 2017 OK 7, ¶17 n. 26, 390 P.3d. at 712 n. 26 (citing *Sudbury v. Deterding*, 2001 OK 10, ¶18, 19 P.3d 856; *Thomas*, 1977 OK 164, ¶10, 569 P.2d at 977).
78. *Anagnost*, 2017 OK 7, ¶18, 390 P.3d. at 713.
79. *Id*.
80. 2017 OK 8, ¶8, 389 P.3d 1119-1120.
81. *Id*. ¶2, 389 P.3d 1118.
82. *Id*. ¶3, 389 P.3d 1118.
83. *Id*. ¶0 (Syllabus by the court), 389 P.3d 1117.
84. *Steidley*, 2017 OK 8, ¶0 (Syllabus by the court), 389 P.3d 1117.
85. *Id*. ¶7, 389 P.3d 1119.
86. *Id*. ¶6, 389 P.3d 1119.
87. *Id.*; *see also Steidley v. Singer*, No. 114534, at *10 (Okla. Ct. Civ. App. Aug. 16, 2016) (unpublished).
88. *Steidley*, 2017 OK 8, ¶8, 389 P.3d 1119-1120.
89. *Okla. Bd. of Med. Licensure and Supervision*, 1995 OK 13, ¶6, 893 P.2d at 499.
90. *Cole*, 2003 OK 81, ¶13, 78 P.3d at 548 (shortening of statute of limitations was substantive).
91. *Thomas*, 1977 OK 164, ¶10, 569 P.2d at 977 (newly created provision of damages); *Sudbury*, 2001 OK 10, ¶19, 19 P.3d 856, 860 (same).
92. *Anagnost*, 2017 OK 7, ¶17, 390 P.3d 712-713.
93. *Dunkelgod*, 2012 OK 96, ¶¶14-16, 295 P.3d at 1111-1115.
94. *Id*. ¶¶29-31, 295 P.3d 1115-1116 (retroactively capping claimant's injury benefits to 300 weeks); *see also Bertland*, 2013 OK 18, ¶¶14-15, 300 P.3d at 1192 (depriving injured worker of mileage reimbursement).

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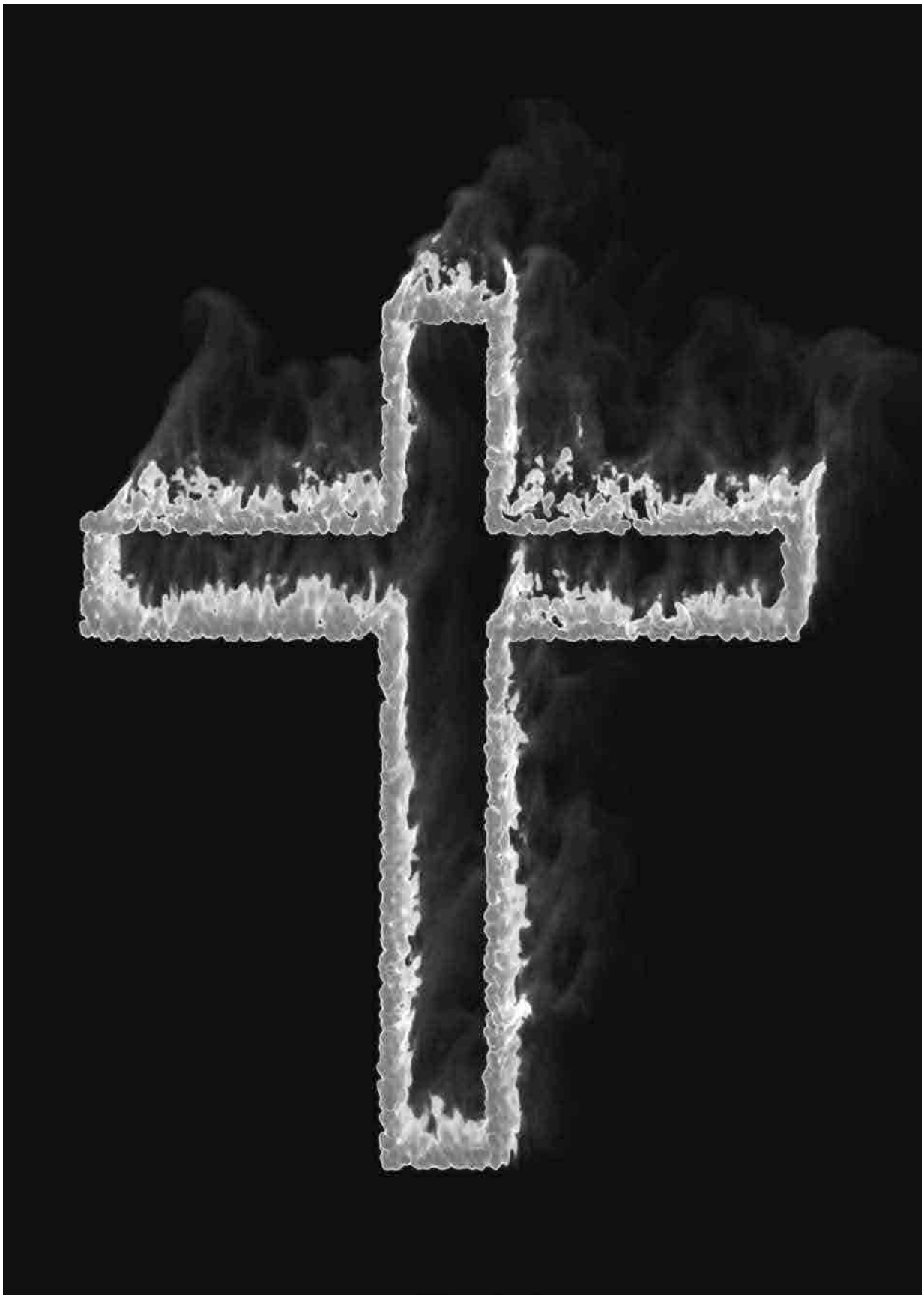


Hate Speech

By Rick Tepker

The First Amendment is an idea resting on an old, familiar faith. As expressed by James Madison, "Knowledge will forever govern ignorance."[1] Indeed, "A people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." The First Amendment reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[2] The First Amendment demands a tolerance of "verbal tumult, discord, and even offensive utterance," as "necessary side effects of … the process of open debate."[3]

America is a culture that is more committed to tolerance of extremist speech than any other in the history of the world. And many citizens do not understand why bigotry, hate, threatening rhetoric, racism, misogyny, homophobia, xenophobia and other "thoughts we hate" deserve any respect, much less constitutional protection.

But we, the people, learn – slowly, at times – from "extremist" speech, even hate speech. We can sense anger and frustration among the disaffected and marginalized. We can perceive threats of impending violence. Hopefully, we can learn that bigotry and paranoia offer nothing that serves the welfare of the United States.

A (VERY) BRIEF HISTORY OF EVOLVING DOCTRINE

A comprehensive history of doctrine is impossible in a short article designed to discuss one continuing free expression problem, but history is an essential preface.

When resisting a bill of rights on the theory that it would do little good, Alexander Hamilton asked a question that courts were forced to answer, though it took a century and a half to begin the interpretive process. "What signifies a declaration that 'the liberty of the press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"[4] In brief, courts went through several stages of evolving law. First, judges deferred on a theory that free speech was not an exception to the principle of majority rule.[5] Then, sensing the potential for executive, legislative and prosecutorial abuse, the courts struggled to develop manageable, enforceable principles to protect expressive liberty.[6] Finally, the courts settled on a consensus approach that defined a categorical hostility to government discrimination against ideologies, philosophies and viewpoints.[7]

The first stage of deference is illustrated by *Beauharnais v. Illinois*.[8] A black man had published a vehement denunciation of white culture and racism. Mr. Beauharnais's remarks fell afoul of a state statute that banned words that

"portray[ed] depravity, .. or lack of virtue of a class of citizens, or any race, color, creed or religion." In short, as applied to this case, it was not nice to denounce or condemn white people, even for the sins of racism. It was also against the law. Truth was not a defense to this "group defamation." The trial judge refused to allow the jury to consider historical facts tending to support the defendant's views. The judge also declined to narrow the sweep of the statute; he refused to instruct the jury that the jury must find that the publication "was likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." The defendant was convicted. In the great American tradition, he took his case to the U.S. Supreme Court, which split along ideological, methodological and personal lines. Justice Felix Frankfurter, in the opinion of the court holds, Beauharnais' rants fell into the category of unprotected "group defamation."

> In the face of … extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact.[9]

The opinion was dominated by Frankfurter's conviction that the judicial duty was to defer, defer, defer – unless there was no other choice. "[I]t would be out-of-bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation."[10]

Justice Black, dissenting, upheld a libertarian view of the First Amendment. His analysis better reflects the attitudes of the federal judiciary – in a later era. Black saw the Illinois law as vindicating an expansive censorship. The publication was not directed as personal insults addressed to an individual; they were not "fighting words." Justice Black of Alabama, a former member of the Ku Klux Klan, must have drawn on his knowledge of history – and hate speech – to remind fellow countrymen:

> I do not agree that the Constitution leaves freedom of petition, assembly, speech, press or worship at the mercy of a case-by-case, day-by-day majority of this Court. … I think the First Amendment, with the Fourteenth, "absolutely" forbids such laws without any "ifs" or "buts" or "whereases." Whatever the danger, if any, in such public discussions, it is a danger the Founders deemed outweighed by the danger incident to the stifling of thought and speech. The Court does not act on this view of the Founders. It calculates what it deems to be the danger of public discussion, holds the scales are tipped on the side of state suppression, and upholds state censorship. … If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: "Another such victory and I am undone."[11]

Later, a consensus approach emerged as doctrine in such cases as *New York Times v. Sullivan*,[12] *Brandenburg v. Ohio*[13] and *Cohen v. California*.[14] Together these cases taught lessons summarized well by Dean John Hart Ely:

> If ... history ... teaches us anything, it is that attempts to evaluate the threat posed by the communication of an alien view inevitably become involved with the ideological predispositions of those doing the evaluating, and certainly with the relative confidence or paranoia of the age. If the First Amendment is even to begin to serve its central function of assuring an open political dialogue and process, we must seek to minimize assessment of the dangerousness of the various messages people want to communicate. [When] state officials seek to silence a message because they think it's dangerous, ...we insist that the message fall within some clearly and narrowly bounded category of expression we have designated in advance as unentitled to protection.[15]

One issue that remained was whether something called "hate speech" would be added to the list of categories unprotected by free speech principles.

MODERN DOCTRINE

After years of evolving doctrine, Justice Antonin Scalia wrote an opinion of the court in the most important case discussing "hate speech": *R.A.V. v. City of St. Paul*.[16] A city ordinance prohibited the display of a burning cross, a Nazi swastika and any other symbol which would "arouse anger, alarm or resentment … on the basis of race, color, creed, religion or gender." A state Supreme Court opinion offered an authoritative interpretation that the ordinance was confined to the unprotected

category of "fighting words." So, despite the apparent meaning of the ordinance's text, the state law punished use of fighting words that used racially inflammatory words as the vehicle for provoking violent retaliation. The ordinance could not be constitutionally overbroad: it was confined to the unprotected category of fighting words. But the ordinance punished some fighting words – not all. And the standards used to distinguish between punishable fighting words and unregulated fighting words were problematic.

Justice Scalia's analysis was detailed, extended, complicated and – regrettably – professorial. It was – and is – a "tough read," quite unlike Justice Scalia's best writing (usually in dissenting opinions). The issue was whether government may use constitutionally-suspect, content-based or viewpoint-based standards for underinclusive regulation of otherwise unprotected expression. The majority answered the question in the negative.

> **"The issue was whether the First Amendment prevents a state from punishing the burning of a cross with intent to intimidate. The answer was 'no.'"**

Why? "[T]he ordinance is facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[17] By punishing racially inflammatory "fighting words," the ordinance becomes a censorship of racial talk. Governments may ban only most patently offensive obscenity, but it may not ban only obscenity in just democrat publications, or just republican publications, or just "alt-right" publications. Governments may ban particularly important threats (*e.g.*, against the president), but it may not ban only threats for policy-related motives (*e.g.*, a president's position on inner cities, war, etc.). The court sought to protect federal law against sexual harassment, described by Justice Scalia as "sexually derogatory 'fighting words.'"[18]

In sum, what was wrong with the St. Paul ordinance? First, in "its practical operation … the ordinance goes even beyond mere content discrimination, to actual viewpoint discrimination." Second, the ordinance had the effect, and perhaps the purpose, of rigging poitical discourse. "St. Paul has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules."[19]

Justice Stevens thought Justice Scalia's explanations and hypotheticals were a journey through a "doctrinal wonderland." Like Justice Frankfurter, Justice Stevens resists categorical approaches and formal rules. They sacrifice "subtlety for clarity."[20] He argued the First Amendment allows some careful regulation.[21]

R.A.V. holds that hate speech is not a category of unprotected expression. But the First Amendment does not bar carefully crafted, narrowly tailored statutes that target hateful words that are also incitement to lawless action, fighting words designed to provoke brawls and lawless retaliation or threats. One illustrative case, *Virginia v. Black*,[22] seems designed to confuse the average citizen with common sense. *R.A.V.* struck down an ordinance punishing cross burning but in *Black*, the court indicated that state statutes against cross burning were perfectly acceptable if narrowly tailored to ban only "true threats," a category of unprotected expression.

The case involved two cross-burning cases. In one, a cross was burned at a KKK rally. In a second case, a cross was burned at the private home of a family that had complained about a neighbor's firing guns in the residential area. Both cases resulted in convictions of all defendants. Virginia's statute read, in part:

> It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. Any person who shall violate any provision of this section shall be guilty of a class 6 felony.

The court's analysis of the "hate speech" issues serve to clarify *R.A.V.* The issue was whether the First Amendment prevents a state from punishing the burning of a cross with intent to intimidate. The answer was "no." Justice O'Connor explained that a state may ban "true threats," which are "statements designed to communicate an intent to commit an act of unlawful violence to a particular individual or group of individuals." Virginia may "outlaw cross burnings done with the intent to intimi-

date because burning a cross is a particularly virulent form of intimidation." So far so good, according to the court's opinion. But the Virginia statute included an additional provision, "Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons." This feature violated due process, it improperly shifted the burden of proof from the state's duty to prove guilt to a defendant's duty to disprove guilty intent. The law all but required defendants to testify and to persuade a jury that the accused had no intent to intimidate.

Justice O'Connor and Justice Scalia seemed to agree that a ban on burning crosses with a proven intent to intimidate was "fully consistent with our holding in *R.A.V.*"[23] The Virginia statute did not single out speech directed toward "specified disfavored topics." Justice Thomas dissented, but underscored his own view that Virginia's "statute prohibits only conduct, not expression."[24] The threat of violence – and the violence of the act of threatening – is the focus of the statute; not ideology or viewpoint.[25]

'GOOD COUNSELS' AND OTHER REMEDIES FOR THE THOUGHTS WE HATE

When rigorous principles of free thought and expressive liberty are to be applied to protect thoughts and messages of hate – bigotry, misogyny, racism, xenophobia, anti-Semitism and other religious bias, homophobia and the like – the case for tolerance and expressive liberty must allow some remedy. What is to be done to resist the many hatreds of humanity?

The answer for bad speech is more speech, better speech, speech calling on the "better angels of our nature."[26] The logic leads to the conclusion that the "fitting remedy for evil counsels is good ones."[27] Of course, much more needs to be done.

Again, the immense difference between speech and conduct is the key. Viewpoints and opinions are protected; discriminatory conduct is not. The need for a remedy and also for care in formulation of a remedy is illustrated by revised Rule 8.4(g) of the American Bar Association Model Rules of Professional Conduct. The new rule focuses on "*conduct* that … is *harassment* or *discrimination*." Specifically, the revised Model Rule 8.4 now reads:

> It is professional misconduct for a lawyer to:
>
> …
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.[28]

Sanctions for discriminatory conduct by lawyers would seem to pose as little danger to expressive liberty as ordinary anti-discrimination statutes that apply to schools, workplaces and retail enterprises. Nevertheless, the proposed revision provoked criticism. For example, the attorney general of Texas issued an opinion letter concluding: "A court would likely conclude that Model Rule 8.4(g) infringes upon the free speech rights of members of the State Bar."[29] But this opinion rests on speculation. The Texas attorney general suggested that a lawyer at a bar meeting on police use of excessive force *could* be sanctioned for "saying 'Blue lives [*i.e.*, police] matter' and we should be more concerned about black-on-black crime."[30] He assumed that the rule *would* result in sanctions of "candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage." The opinion letter offers little to explain how the text of the new rule would allow state bar authorities to impose sanctions for mere expression of opinion. It is difficult to see how *candid* talk *could* be deemed to be "conduct that … is harassment or discrimination." Also, the rule includes a scienter requirement. The rule focuses only on misconduct "that the lawyer knows or reasonably should know is harassment or discrimination." Comment 3[31] also seems to prevent overbroad or intrusive interpretations by specifying that "the substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g)." In sum, the rule's text does not contain even a hint of potential for ideological regimentation by state bar authorities. If the rule was – somehow – misinterpreted, there is little to suggest that federal courts would approve.

In sum, a dominant consensus supports a libertarian theory of expressive liberty. Existing doctrine developed over the past half-century

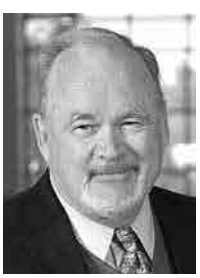
stands in the way of overzealous regulation. Our law protects the thoughts we hate,[32] including thoughts of hate.

1. James Madison, Letter to W.T. Barry, (Aug. 4, 1822).
2. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
3. *Cohen v. California*, 403 U.S. 15, 24-25 (1971).
4. The Federalist, Essay No. 84.
5. *See, Dennis v. United States*, 341 U.S. 494 (1951) and *Gitlow v. New York* 268 U.S. 652 (1925).
6. *See, Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring)
7. *See, New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cohen v. California*, 403 U.S. 15, 24-25 (1971).
8. 343 U.S. 250 (1952).
9. 343 U.S. at 261.
10. 343 U.S. at 262.
11. 343 U.S. 274-75.
12. U.S. 254, 270 (1964).
13. 395 U.S. 444 (1969).
14. 403 U.S. 15, 24-25 (1971).
15. John Hart Ely, Democracy and Distrust 112 (1980).
16. 505 U.S. 377 (1992).
17. 505 U.S. at 381.
18. 505 U.S. at 389. *See also, Harris v. Forklift Systems Inc.*, 510 U.S. 17 (1993) (upholding EEOC definition of sexual harassment); *Mer-itor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (same).
19. 505 U.S. at 392.
20. 505 U.S. at 426 (Stevens, J., concurring).
21. "Conduct that creates special risks or causes special harms may be prohibited by special rules. … Threatening someone because of her race or religious beliefs may cause particularly severe trauma or touch off a riot, and threatening a high public official may cause substantial social disruption; such threats may be punished more severely than threats against someone based on, say, his support of a particular athletic team. There are legitimate, reasonable, and neutral justifications for such special rules." 505 U.S. at 416 (Stevens, J., concurring).
22. 538 U.S. 343 (2003).
23. 538 U.S. at 361-62, 368.
24. 538 U.S. at 394 (Thomas, J., dissenting) ("even segregationists understood the difference between intimidating and terroristic conduct and racist expression.").
25. *See also, Wisconsin v. Mitchell*, 508 U.S. 476 (1993) (Rehnquist, C.J. for a unanimous court) (holding that criminal statutes imposing enhanced punishment for prohibited conduct motivated by discriminatory animus do not violate the First Amendment).
26. Abraham Lincoln, First Inaugural Address (March 4, 1861).
27. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).
28. *See also,* Peter Geraghty, ABA adopts new anti-discrimination Rule 8.4(g) (September 2016) [www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g--at-annual-meeting-in-.html]
29. Letter from Ken Paxton, Attorney General of Texas to Senator Charles Perry (Dec. 20, 2016). *See also,* Letter from Edwin Meese III and Kelly Shackelford to Patricia Lee Renfro (Aug. 5, 2016).
30. General Paxton is relying on an example from Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, The Heritage Foundation Legal Memorandum 4 (2016).
31. Comment 3 states:

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

32. *United States v. Schwimmer* 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

ABOUT THE AUTHOR



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Citizens United or Citizens Undone?

The First Amendment Versus Campaign Finance Regulation

By Micheal Salem

Money is the mother's milk of politics.
Jesse "Big Daddy" Unruh[1] (1922-1987)
California State Treasurer

Jesse Unruh's observation is one definition of "political fortune." Another might be discovering your political opponent was convicted of a serious felony. Although popular sentiment may weigh against a candidate with such a background, a felony conviction is not a disqualification for federal office.[2] As to constitutional requirements,[3] the qualifications of a person elected to Congress are judged only by the particular chamber to which the candidate was elected.[4] Candidates have run for president from prison,[5] and a felon was elected to the House of Representatives.[6] Of course, some treat the words "felonious politicians" as a pleonasm. [7]

Jesse "Big Daddy" Unruh was not really talking about "luck." He was talking about "bucks" and money as the universal nectar and lubricant of politics. In our nation's history, wherever there are candidates there are donors who want to give them money, whether because they believe in good government or want a favor. The role money plays in our political system can run a gamut, from campaign contributions to candidates, to bundlers who collect money from donors for delivery either to candidates or outside organizations, to independent expenditures by individuals or organizations to promote candidates or issues.

The effect of money may constitute outright bribery in exchanges that include payment of money or other consideration for performance of, or agreement to perform, an "official act." This is the "quid pro quo" model on which the Supreme Court has relied in decisions beginning with *Buckley v. Valeo*,[8] one of the first post-Watergate campaign finance reform cases. No one openly disputes the necessity of criminalizing this kind of activity even if it might arguably constitute speech or expression. More problematic are other contributions or gifts that may not be illegal but have an appearance of "soft" bribery or "influence peddling" to gain access to politicians.[9]

With campaign finance reform, the Supreme Court found compelling reasons for congressional prohibitions of transactions like corporate campaign contributions and individual contributions over a certain amount. These bans were narrowly drawn to achieve a governmental interest in preventing actual corruption of federal candidates and officeholders or the appearance of it. Constitutionally permissible prohibitions included bans on money contributed by corporations to political parties

that might be used to support particular candidates indirectly.

A different wind now blows through the Supreme Court. Prohibitions on contributions by corporate donors and some limitations on amounts were lifted by the Supreme Court in two decisions: *Citizens United v. Federal Election Com'n*[10] and *McCutcheon v. Federal Election Com'n*.[11] Both decisions have been criticized by many who think the influence of money on political campaigns has reached a level of emergency.

In *Citizens United*, the Supreme Court determined that statutory restrictions prohibiting independent political expenditures by a nonprofit corporation were not consistent with the First Amendment.

In *McCutcheon,* the Supreme Court held that statutory limits on the amount of money a donor may contribute in aggregate to all political candidates or committees violated the First Amendment. The aggregate limit restricted the political participation of some in order to enhance the relative influence of others.

Citizens United reversed two Supreme Court decisions. *Austin v. Michigan Chamber of Commerce* had held that even though statutory restrictions burdened the Michigan Chamber of Commerce's desire to make independent expenditures in favor of an individual candidate, the restriction was justified by a compelling state interest to prevent corruption, or the appearance of corruption, in political races.[12]

Citizens United also reversed a decision that statutory restrictions on independent corporate expenditures, intended by Congress to plug soft-money loopholes, were constitutional.[13]

Following *Buckley v. Valeo*, both *Citizens United* and *McCutcheon* established that regulation of the political process must target "quid pro quo corruption" or its appearance: the direct exchange of an official act for money. When the target is other than quid pro quo corruption or its appearance, the government impermissibly injects itself into the debate of who should govern. In *McCutcheon*, a plurality of the court held that statutory aggregate limits did little, if anything, to combat corruption.

However, whether a principled difference between different corporations applies is unclear when commercial news media outlets – many of which exist in a corporate identity – have *carte blanche* permission to editorialize support for, or opposition to, an individual candidate or cause. Such editorial support might have value exceeding the campaign limits of hard cash to support or oppose a candidate, creating an effect of influence.

From a different perspective, why should a supporter PAC be limited financially in challenging a media corporation's endorsement or disapproval of a candidate or cause? Ownership of a printing press or TV station is not a prerequisite to endorsing political candidates or political causes. Moreover, in an era of internet websites, there seems no principled difference in extending First Amendment protections to a lowly website operator who editorializes in favor of a candidate or issue, while at the same time muzzling a large multinational corporation that also chooses advocacy. The large corporation does not have to purchase a printing press, radio or TV station in order to bring its expressions of opinion within the protection of the First Amendment, nor should it be without First Amendment protections when it purchases radio or television time, or establishes a website.

It is thus possible to defend what some say is indefensible. *The New York Times, Washington Post, USA Today, Washington Times, Fox News* and many other media outlets may choose to editorialize by endorsing candidates or causes, or, if they choose, denigrating them. Such coverage on the editorial page or even the news pages can be worth millions. Realistically, restrictions on what free media coverage is provided are impractical and inimical to the First Amendment. Why should not the same freedom be available to nonmedia corporations?

From another viewpoint, you cannot regulate expression that would directly affect the editorial judgment of the media. For example, *The New York Times* estimated that through March 2016, studies conducted by two different firms that track media spending showed that Donald Trump benefited from $1.898 billion worth of "earned media"[14] while spending no more than $10 million. Of the major candidates at that time, Trump had no super PAC, little ground organization or staff or field offices. Contrast this with Jeb Bush, who spent $82 million and essentially got nowhere for the fare. Because of choices made strictly by the media in its coverage of Donald Trump, Jeb Bush's $82 million during the same time did

not even begin to act as a counterweight to Trump's free media coverage.

The same disparity applies to noncandidates who want to get into the mix on behalf of a candidate or issue they support or oppose. If they do not have access to "earned media," their message can be easily swamped unless money offsets the disadvantage.

While an argument can be made there are pragmatic reasons to allow corporations or causes to get their messages out, *Citizens United* represents consistent equality between corporations and media outlets protected by the First Amendment.

What is the effect of this money on the political system? That may be harder to gauge although many freely speculate. Effect may logically be correlated with how much money is involved, and that is a good place to start, but it does not tell the entire story. The money involved is significant, with estimates for the 2016 presidential campaign having been expected to top $5 billion, more than twice the total of the 2012 election.[15]

Can Influence Be Limited by Public Funding? Probably Not.

In 2016, no major party presidential candidate was publicly funded. Public funding does not usually approach the amount of private money available to major party candidates.

For example, eligibility for public funding in a primary race for president requires agreement to limit national spending to $10 million plus a COLA (post-1974 cost of living adjustment) calculated by the Department of Labor. A candidate can get half of the national spending limit from public funds but cannot spend, in any state, more than $200,000 plus a COLA or an amount based upon a formula of 16 cents per member of the VAP (voting age population). Among other limitations placed on both candidates and national parties, candidates cannot spend more than $50,000 of their own funds. For a general election, these numbers double to $20 million plus COLA, except that candidates are still limited to $50,000 of their own funds.[16]

For 2016, spending numbers worked out to $48.07 million for the overall primary total and $96.14 million for the general election.[17] There are individual spending limits per state. An important factor here can be that in some states, safe for particular candidates, additional money spent would be unnecessary. Both candidates are stuck with the same state limits in both safe and battleground states. For example, in Oklahoma the VAP limit is $2,950,017 while the straight expenditure limit is $2,268,900. Oklahoma's presidential voting history is skewed to the Republican Party, so spending this amount of money would not give any additional benefit to a Republican candidate in a presidential election, where the candidate with a majority of votes collects all the electoral college electors. On the other hand, this spending limit in Oklahoma for the Democratic Party would probably not significantly help a Democratic presidential candidate.

A VERY BRIEF HISTORY OF CAMPAIGN FINANCE STATUTES AND LITIGATION[18]

Concern about the effect of the money and influence of corporations first took hold in the Progressive Era of Theodore Roosevelt,[19] who pressed Congress to put limits on money and brakes on campaign activities of corporations.

The Tillman Act[20] was passed in 1907. The act prohibited corporations from making contributions to political campaigns. Because it applies only in very limited instances, there was not much enforcement under it. The act applied only to general, not primary, elections. It provided for fines, but no enforcement mechanism. Despite its limited effect and perhaps because of it, it was upheld as recently as 2003 in *Federal Election Com'n v. Beaumont*,[21] when the court ruled that provisions and regulations barring corporate campaign contributions to nonprofit advocacy corporations were permissible under the First Amendment because "… the ban was and is intended to 'preven[t] corruption or the appearance of corruption.'"[22]

The Federal Corrupt Practices Act (FCPA)[23] followed the Tillman Act in 1910. The FCPA set campaign spending limits for political parties in nomination and general elections for the House. It required political parties to make post-election disclosures of contributions to, and expenditures by, individual candidates. Its effect was limited to single-state political parties and election committees. These regulations of party nominations through elections or other methods were struck down by the Supreme Court when it held that the Constitution did not allow Congress to regulate primary elections or political party nominations.[24]

The next serious foray by Congress into campaign finance reform occurred approximately 40 years later, when Congress passed the Taft-Hartley Act of 1947[25] to amend the Wagner Act and ban use of money from union treasuries in political campaigns.

After these restrictions on contributions and expenditures by corporations and unions, the modern era of campaign finance reform emerged in the Watergate era with passage of the Federal Election Campaign Act of 1971[26] (FECA) and the 1971 Revenue Act. FECA established additional disclosure requirements for contributions in federal elections. The Revenue Act began to structure public financing of presidential elections and limited expenditures on presidential nominees who accepted public funds. The check-off box on tax returns for $1 to be applied to the presidential election campaign was part of the law, but the check-off box did not appear until 1973.[27]

When the enforcement mechanism of the 1971 act proved unworkable, the act was amended in 1974 to create the Federal Election Commission.[28] It limited campaign contributions and expenditures. Most significantly, the 1974 amendments allowed corporations to establish segregated funds (PACs) to receive and hold funds and use them to make donations. The 1974 amendments also set strict limits on contributions to candidates from individuals and PACs. The amendments completed the public option for candidate financing of elections.

FECA was amended again in 1976 in response to the Supreme Court's decision in *Buckley v. Valeo* where certain portions of the law were declared unconstitutional. Contribution limits to individual candidates were upheld because contribution limits prevented influence or quid pro quo.

In *Buckley*, the court held that expenditure limits on candidates and their committees were unconstitutional because they limited the amount of speech that was available to candidates who had money to spend. But, the court held that expenditure limits on publicly funded candidates were constitutional because candidates could opt to decline the public financing and avoid the expenditure limits it set. Moreover, campaign finance statutes or rules could not constitutionally limit candidates' spending their own money.

The most recent campaign finance reform legislation was the Bipartisan Campaign Reform Act of 2002 (BCRA).[29] The BCRA was intended to control the increased use of soft money by political parties. Soft money is money raised by political parties that they can put to any use.

The BCRA prohibited national political party committees from raising or spending money not subject to federal limits, even when the purpose was state or local races or issue advocacy. It restricted broadcast of "issue advocacy ads" that named a federal candidate within 30 days of a primary or caucus or 60 days before a general election. It banned such ads paid for by a corporation or other organization, whether or not it was a nonprofit. That specific provision prompted the *Citizens United* litigation, although the Supreme Court later expanded the scope of the case from time restrictions to the general question of First Amendment limitations on corporate citizens.

"The BCRA prohibited national political party committees from raising or spending money not subject to federal limits, even when the purpose was state or local races or issue advocacy."

THE *CITIZENS UNITED* DECISION

Citizens United, a nonprofit advocacy organization, had an unfavorable opinion about Hillary Clinton. With donations received, it produced an anti-Clinton film called *Hillary the Movie* (the movie). Would unfavorable publicity about Clinton curry favor with a potential Clinton rival? Possibly yes. In 2008, that arguably would have included Barack Obama and scores of Republican candidates.

Citizens United brought a declaratory action because it wanted to make *Hillary the Movie* available for video-on-demand within the 30 days prior to the 2008 primary elections. Citizens United asked whether it would violate 2 U.S.C. §441(b) which prohibited corporate funded independent expenditures and subjected it to civil and criminal penalties.[30] It would also trigger a prohibition of electioneer-

ing-type advertisements within 30 days of a primary and 60 days of a general election under the statute and FEC regulations.[31]

Citizens United's request was denied by a three-judge district court which upheld the statutes and regulations, relying upon *McConnell v. Federal Election Comm'n*[32] and *Austin v. Michigan Chamber of Commerce*.[33] The Supreme Court granted *certiorari*, and after argument ordered re-argument and asked the parties to brief whether *McConnell* and *Austin* should be overruled.

Justice Kennedy, writing for a fractured five-member majority, concluded the First Amendment prohibits the government from suppressing political speech on the basis of the speaker's corporate identity (overruling *Austin*) and a federal statute which barred independent corporate expenditures for electioneering communications violated the First Amendment (overruling *McConnell*). The decision struck down the statutes on their face. The court did uphold public disclosure provisions of BCRA for sponsors of electioneering films.

DEFENDING THE INDEFENSIBLE – WITH THE FIRST AMENDMENT!

Some critics of *Citizens United* characterized the decision as "indefensible."[34] The criticism primarily relies upon factual allegations about significant amounts of money spent for candidates and the fanciful claim that once elected, the candidate could not ignore such largess. For example, Newt Gingrich's 2012 campaign was kept alive from $20 million in donations to a Gingrich super PAC by Sheldon Adelson of Las Vegas.[35]

Adelson reportedly contemplated donations of up to $25 million to a Donald Trump super PAC.[36]

The question is not so much what Adelson contributed to a super PAC supporting Gingrich but whether Gingrich would feel the same appreciation if the *Washington Times* editorialized repeatedly in Gingrich's favor at a cost that might eventually reach a value of $20 million? While Gingrich might reap the same or similar benefit, there is little chance the *Washington Times* would be brought before the FEC on a charge of "corruption" for its editorial choices.

In the most recent presidential election cycle, Hillary Clinton was clearly the beneficiary of regular editorial endorsements of *The New York Times*, but more importantly, she benefitted from editorial and news judgments that attacked Donald Trump. *The New York Times* characterized Donald Trump's "variations" from the truth as "lies" in both editorials and news reporting.[37]

No one could bring a successful FEC proceeding against news outlets that contributed to Donald Trump "earned coverage." Yet from a First Amendment viewpoint, why would an FEC proceeding be sustained against an individual or nonmedia corporation that independently spent money to help or hurt Trump?

ANOTHER LOOK AT THE *CITIZENS UNITED* HOLDING – FINANCIAL

Campaign financing admittedly looks like a mess, but democracy is messy. A system where candidates rely on the assistance of billionaires and millionaires suggests that political and financial fortunes of those candidates depend upon how warmly they embrace the interests of their patrons.

PACs and super PACs logically look for politicians who will protect the interests of contributors. Does this skew the results of elections? No, unless voting is rigged and/or cheating is rampant, because election outcomes are the cumulative result of individual votes. Although someone spends a great deal of money to persuade the electorate to vote for a candidate or cause, votes must still be cast individually and in secret.

Following the interests of the PAC or candidate with the most money is not necessarily evidence that the electorate is being persuaded to one view or another. For example, the 2016 election season resulted in record fundraising for Clinton despite her loss. In September alone, Clinton's campaign raised more than $154 million. The PAC Hillary for America raised $84 million, and the Democratic National Committee raised another $70 million through the Hillary Victory Fund and the Hillary Action Fund. The average donation was $56. More than 900,000 people donated to the campaign.[38] Actually, this looks good for participatory democracy.

Clinton did well during the entire election cycle. In July 2016, FEC filings indicated that $1.48 billion had been raised by all presidential candidates and groups supporting them, an astounding amount of money. Of this, $275 million was attributed to Clinton's campaign

and only $91 million to Trump's campaign. Trump's war chest supposedly had 55 percent of its money from his own funds, making him the largest single donor to himself individually and to his super PAC.[39]

Still, the FEC reported that in the 2016 presidential campaign cycle, a total of $1.461 billion was donated *to candidates*. This does not include PAC spending. Democrats benefitted from $799.5 million and Republicans received $639.1 million. Clinton had $563.8 million and Trump $333.1 million.[40] What are the sizes of the donations? Here is the data posted on the FEC website as of March 5, 2017:

Size of Contributions

$200 and Under	$812,434,910
$200.01 - $499	$106,101,977
$500 - $999	$79,521,630
$1,000 - $1999	$107,240,039
$2,000 and Over	$310,434,245

In looking over these numbers, $812.4 million is accounted for by small donations less than $200, while $310.4 million is in the category greater than $2,000. Large donations are involved, but a lot of the money coming to candidates is in small donations, which can only be healthy.

ANOTHER LOOK AT THE *CITIZENS UNITED* HOLDING – LEGAL

A fundamental legal question in *Citizens United* is whether individuals and corporations have the same First Amendment rights as media corporations or "the press."

An excellent analysis of that question appears in an article in the *Yale Law Journal* by Michael McConnell, former Judge of the 10th Circuit. Judge McConnell sees the result in *Citizens United* as a proper application of precedents even as he acknowledges the sorry state of campaign financing. He argues there must be more creative methods to address the issue than defeating the "money as speech" argument.[41]

Judge McConnell thinks *Citizens United* is best viewed as a press case where corporations not normally engaged in press activities nevertheless have the same protections as the press when they choose to speak out.

Under Supreme Court precedents, the rule should be that nonmedia corporations enjoy the same First Amendment rights as media corporations. It should not matter whether the person or corporation who makes political statements owns a printing press, radio or television station, or other large media system. For example, a "Letter from the Editor" in the Sunday *Oklahoman* indicated that thereafter its print edition would be printed in Tulsa on another paper's press. So it appears that Oklahoma's largest metropolitan newspaper may no longer even own a printing press.[42] Does this mean the Oklahoman is no longer a media company? Clearly, no.

There is little logic in statutes or regulations that muzzle other corporations when corporate media giants have significant rights under the First Amendment. Constitutionally, there is little to distinguish them. The Supreme Court has never made a distinction that gives media or the press greater rights than individual citizens.

For example, the court has consistently rejected a "reporters' privilege" that would allow reporters a claim of confidentiality for information they gather.[43] Likewise, the media has no privilege in gathering news to access closed locations such as a jail.[44] In *Houchins,* Justice White relies upon other cases, including Branzburg, which support the general theory that the press enjoys no special privilege beyond that of the general public.[45]

Judge McConnell suggests that *Citizens United* bears a significant resemblance to *Mills v. Alabama*.[46] In *Mills,* the Alabama Corrupt Practices Act "makes it a crime 'to do any electioneering or to solicit any votes * * * in support of or in opposition to any proposition that is being voted on on the day on which the election affecting such candidates or propositions is being held.'" The *Birmingham Post-Herald,* a daily newspaper, carried an editorial written by the defendant, an editor, which urged "the people to adopt the mayor-council form of government."[47] Mills was arrested for violating the statute by his publication. The charges were dismissed by the district court and reversed by the Alabama Supreme Court as a proper and not unreasonable exercise of police power.

Speaking for the Supreme Court, Justice Black reversed. Black found it fatal that the statute allowed all kinds of speech on any subject until the day of the election but did not allow any responses on Election Day. "We hold that no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime

for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election."[48] *Mills* involved a blackout period of only one day and was declared unconstitutional. *Citizens United* involved blackout periods of 30 or 60 days, which curtails even more expression.

Many organizations that do not have the appearance of media exercise First Amendment rights. Prominent among them might be the American Bar Association or state or local bar associations, which speak on public issues. The ABA structure may be similar to public media, it collects money from individuals and can certainly be characterized as an advocacy group, but the ABA is not the press. Yet there is little dispute it would be allowed the same protections as the press in its editorial pronouncements.

There is no confusion when large companies and industries own or purchase their own media outlets, or constitute a media conglomerate. Does General Electric's ownership of NBC Television, Telemundo and numerous TV stations give it alone editorial power over political commentary that is forbidden to other corporations? Stated differently, does a media conglomerate in its constituent parts have the right to speak, but its central governance does not?

At a time when courts are extending First Amendment protections to individuals and corporations utilizing the internet, there is no principled reason to deny those same First Amendment protections to corporations. At one time the Supreme Court took a graduated approach toward new media, trying to determine whether First Amendment protections would apply and then deciding what form they take. The internet seems to have broken this procedure because when Congress attempted to impose standards against indecency against the internet, the Supreme Court applied a First Amendment analysis without measuring the media and found several problems with the statute including vagueness, overbreadth and failure to satisfy any "time, place, or manner" restrictions. The internet presented none of the justifications for restrictions imposed, for example, in broadcast settings.[49]

CONCLUSION

In a constitutional sense, *Citizens United* fits comfortably within existing precedents of the Supreme Court involving "freedom of the press." We cannot deny that same freedom of expression to corporate entities when media entities also use corporate forms in an indistinguishable manner. A media corporation possesses no more First Amendment rights than other corporate citizens, and logically other corporations should possess no fewer First Amendment rights than their media corporation counterparts. A conglomerate corporation with multiple businesses which includes a media outlet may, if it chooses to do so, provide unlimited support for a candidate or a cause in its editorial judgment without accounting to the FEC.

We must also regard that money is not always primary in promoting the candidacy of persons or issues. As the most recent election cycle demonstrated, a lack of money, or even organization, did not prevent the election of Donald Trump. Hillary Clinton raised $563.8 million to $333.1 million for Donald Trump. Bernie Sanders made a substantial impact with $228.2 million.[50] This suggests that money may not be as powerful as an "idea whose time has come" whether or not we like the message.[51]

Even so, the suggestion of the incorruptibility of billionaires because of their money is a cautionary tale. Money still has its effect even among billionaires. Nelson Bunker Hunt, son of the wealthy oil wildcatter H.L. Hunter, was said to have remarked, "Making money is the way you keep score in life, in business."[52] In such circumstances, money never loses its significance to the poor or wealthy alike.[53]

It is not within the scope of this article to propose solutions to campaign finance abuse. The purpose instead is to measure the campaign finance rules pre-*Citizens United* against the First Amendment. Even so, if campaign finance reform is to be successful, and there is still much to experiment with, perhaps it should begin with disclosure laws that allow voters to judge the merit of campaign rhetoric by its sources.

Disclosure should be coupled with procedures that encourage more speech by more parties as suggested by Justice Brandeis:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the

> Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.[54]

Even with Brandeis' "more speech" remedy, there are no guarantees of a fair outcome or a level playing field. There is only a process which Brandeis suggests offers the best opportunity for education. A future which includes massive spending by super PACs and corporations and a fear this will overwhelm the voices of those with less may not be that bleak. Technology including social media has increased the financial efficiency of campaign spending by multiplying the number of outlets and availability so that even minority views can gain broad exposure. Our trust in the First Amendment will be best realized in such a multi-sourced information universe.

1. Lou Cannon, *Ronnie & Jesse: A Political Odyssey – A Candid Biography Of The Two Rival Political Champions, Ronald Reagan And Jesse Unruh 99* (1969). *See also*, Mark A. Uhlig, "Jesse Unruh, A California Political Power, Dies," *NY Times*, Aug. 6, 1987, found at: www.nytimes.com/1987/08/06/obituaries/jesse-unruh-a-california-political-power dies.html (last visited March 5, 2017).

2. *See* Jack Marshall, *Cong. Research Serv.*, RL31532, Congressional Candidacy, Incarceration, and the Constitution's Inhabitancy Qualification (2002) ("Once a person meets the three constitutional qualifications of age, citizenship and inhabitancy in the State when elected, that person, if duly elected, is constitutionally 'qualified' to serve in Congress, even if a convicted felon."). *See*: research.policyarchive.org/1486.pdf. (Hereinafter Congressional Candidacy)(last visited March 5, 2017).

3. The only requirements for federal office are specified by the Constitution. States may not impose additional qualifications or disabilities on congresspersons. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). States do have the right to control who is entitled to vote. Ironically, a person convicted of a felony may be eligible to run for federal office but be forbidden by state electoral law from voting for him or herself, or anybody for that matter. *Congressional Candidacy*, p. 2, n. 6.

4. U.S. Const. art. I, §5, cl. 1.

5. Labor leader, Eugene V. Debs, ran for president as the Socialist Party's candidate five different times from 1900 to 1920. The last campaign was while Debs was in jail after conviction for opposition to World War I. Eric Foner and John A. Garraty, *Eugene V. Debs, See:* www.history.com/topics/eugene v debs (last visited March 5, 2017). James A. Trificant Jr., a former member of Congress, was expelled from the House of Representatives after convictions of bribery, filing false returns and other criminal offenses. He served seven years and ran for office from prison as an Independent but lost with only 16 percent of the vote. *See* en.wikipedia.org/wiki/James_Traficant#Post prison_life (2010 run for Congress) (last visited March 5, 2017).

6. Representative Matthew Lyon was convicted of violating the Sedition Act and imprisoned in his home state of Vermont, yet re-elected to Congress in 1789. A Federalist offered a resolution of expulsion which failed for a two-third's vote. *Congressional Candidacy*, p. 3-4.

7. Mark Twain reportedly said, "There is no distinctly native American criminal class except Congress"; quoted by Emily Heil, "Mark Twain on Congress: idiots, criminals, dumber than fleas," *Washington Post* (April 18, 2012). www.washingtonpost.com/blogs/in-the-loop/post/mark-twain-on-congress-idiots-criminals-dumber-than-fleas/2012/04/18/gIQA3J4nQT_blog.html (last visited March 5, 2017).

8. 424 U.S. 1 (1976).

9. Influence is a by-product of money and is not always illegal. An example is former Virginia Gov. Bob McDonnell and his wife, who were convicted in 2014 on federal bribery and Hobbs Act extortion charges for taking more than $175,000 in loans and gifts, including a Rolex watch and vacations, from a Richmond businessman, Jonnie Williams Sr. Williams was promoting a dietary supplement and sought out McDonnell's help in gaining access to state officials to attract persons who might be interested in the product. In return McDonnell set up meetings, hosted an event at the governor's mansion, or called other officials on Williams' behalf.

The Supreme Court unanimously reversed the convictions of both McDonnell and his wife based upon the district court's broad definition of an "official act." An element of bribery is money given in exchange for an "official act." Chief Justice Roberts said such an "official act" must be a decision or action on a "question, matter, cause, suit, proceeding or controversy." That question or matter must involve a formal exercise of governmental power, and must also be something specific and focused that is "pending" or "may by law be brought" before a public official. To qualify as an "official act," the public official must make a decision or take an action on that question or matter, or agree to do so. Setting up a meeting, talking to another official or organizing an event, without more, does not satisfy the definition of "official act." *McDonnell v. U.S.*, 136 S.Ct. 2355, 2370-71 (2016).

The Justice Department finally decided to dismiss charges against McDonnell and his wife. Matt Zapotosky, Rachel Weiner and Rosalind S. Helderman, "Prosecutors will drop cases against former Va. governor Robert McDonnell, wife" (Sept. 8, 2016). *See:* www.washingtonpost.com/local/public safety/prosecutors-will-drop-case-against-former-va gov-rober-mcdonnell/2016/09/08/a19dc50a 6878 11e6 ba32 5a4bf5aad-4fa_story.html (last visited March 5, 2017).

10. 558 U.S. 310 (2010).

11. 134 S.Ct. 1434 (2014)

12. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668-69 (1990) ("By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections").

13. *McConnell v. Federal Election Com'n*, 540 U.S. 93, 146 (2003) ("The evidence in the record shows that candidates and donors alike have in fact exploited the soft money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries. Thus, despite FECA's hard money limits on direct contributions to candidates, federal officeholders have commonly asked donors to make soft money donations to national and state committees 'solely in order to assist federal campaigns,' including the officeholder's own").

14. "Earned media" is identified as "news and commentary about his campaign on television, in newspapers and magazines, and on social media." Nicholas Confessore and Karen Yourish, "$2 Billion Worth of Free Media for Donald Trump," *The Upshot* (March 15, 2016). *See:* www.nytimes.com/2016/03/16/upshot/measuring-donald trumps-mammoth-advantage-in-free-media.html?_r=0 (last visited March 5, 2017).

15. Amie Parnes and Kevin Cirilli, "The $5 billion presidential campaign?" *The Hill* (Jan. 21, 2015, 4:54 p.m.). *See:* thehill.com/blogs/ballot box/presidential races/230318-the-5-billion-campaign (last visited March 5, 2017).

16. This information is found at the Federal Election Committee website. *See* www.fec.gov/pages/brochures/pubfund.shtml (Last visited March 5, 2017).

17. Again, these numbers come from the Federal Election Committee. *See* www.fec.gov/pages/brochures/pubfund_limits_2016.shtml (Last visited March 5, 2017).

18. Part of this history is on the website of the Federal Election Commission. (www.fec.gov/info/appfour.htm) (FEC App. 4) (last visited March 5, 2017).

19. In its history, the Federal Election Commission contends the first federal election law was passed in 1867. The law forbade federal officers from soliciting contributions from Navy yard workers. *ibid*.

20. Tillman Act of 1907, ch. 420, 34 Stat. 864 (now codified as amended at 2 U.S.C. §441b).

21. 539 U.S. 146 (2003).

22. *Federal Election Com'n v. Beaumont*, 539 U.S. at 154.

23. Federal Corrupt Practices Act, 2 U.S.C. §§241 - 248, Pub.L. 61-274, 36 Stat. 822, enacted June 25, 1910.

24. *Newberry v. United States*, 256 U.S. 232 (1921).

25. Labor Management Relations Act of 1947, 29 U.S.C. §§401 531 (the Taft-Hartley Act), (80 H.R. 3020, Pub.L. 80-101, 61 Stat. 136, enacted June 23, 1947). It most likely grew out of congressional concern upon the end of the war, that the minority of workers who were unionized and who had agreed not to strike during the war might turn to political organization.

26. Federal Election Campaign Act of 1971, 52 U.S.C. §30101 *et seq.*, Pub.L. 92-225, 86 Stat. 3, enacted February 7, 1972). The act was signed into law by Richard Nixon.

27. FEC App.4.

28. Prior to 1974, compliance was monitored by the clerk of the House, the secretary of the Senate, and the comptroller general of the United States General Accounting Office. The Justice Department was responsible for prosecuting violations of the law. After 7,000 referrals for investigations, only 100 were forwarded to the Justice Department and few were litigated. FEC App. 4.

29. 2 USC 431, Public Law 107-155 ("BCRA" or "McCain-Feingold").

30. *Citizens United v. Federal Election Cm'n*, 558 U.S. 310, 321 (2010).

31. 2 U.S.C. §434(f)(3)(A).

32. 540 U.S. 93 (2003).

33. 494 U.S. 652 (1990).

34. *See* Steven Rosenfeld, "6 Pathetic Right Wing Attempts to Defend the Indefensible Citizens United (Debunked)," *Alternet* (Feb. 23, 2012), www.alternet.org/story/154274/6_pathetic_right wing_attempts_to_defend_the_indefensible_citizens_united_(debunked) (last visited March 5, 2017). This argument has been reprinted numerous times. Fred Wertheimer, "Five Years Later, *Citizens United* Wreaks Havoc on Our Democracy," *ACSblog* (Jan. 21 2015), www.acslaw.org/acsblog/five-years-later-citizens-united-wreaks-havoc-on our-democracy?page=1 (last visited March 5, 2017) ("The *Citizens United* decision, written for the majority by Justice Anthony Kennedy, is based on a series of indefensible, if not astonishing, premises").

35. Abby Phillip and Dave Levinthal, "Adelson tally to Gingrich: $20M," *Politico,* www.politico.com/story/2012/04/gingrich-camp mired-in-debt 075418 (last visited March 5, 2017).

36. Peter Stone, "Sheldon Adelson to give $25m boost to Trump Super Pac," *The Guardian* (Friday, Sept. 23, 2016, 13:56 EDT, Last modified on Sept. 29, 2016, 17.31 EDT): www.theguardian.com/us-news/2016/sep/23/sheldon-adelson-trump-super-pac-donation-25-million.

37. Susan Lehman, "Times Editor Dean Baquet on Calling Out Donald Trump's Lies," *Times Insider* (Sept. 23, 2016), www.nytimes.com/2016/09/23/insider/times-editor-dean-baquet-on-calling-out-donald-trumps-lies.html (last visited March 5, 2017); Liz Spayd, "When to Call a Lie a Lie," *The Public Editor* (Sept. 20, 2016), www.nytimes.com-2016-09-20-public-editor-trump-birther-lie-liz-spayd-public editor.html (last visited March 5, 2017).

38. Rebecca Morin, "Clinton campaign raises more than $154 million in September," *Politico* (Oct. 1, 2016, 4:15 p.m. EDT) www.politico.com-story-2016/10-hillary-clinton-september-fundraising-229004 (last visited March 5, 2017).

39. Michael Beckel, "Buying of the Presidency: Clinton outraising Trump by 3-1 margin in dash for cash," *Center for Public Integrity* (July 21, 2016, 2:15 a.m. Updated: July 21, 2016, 11:03 a.m.): www.publicintegrity.org/2016/07/21/19990/clinton-outraising-trump-3-1-margin-dash-cash (last visited Oct. 4, 2016).

40. FEC, *2016 Presidential Campaign Finance*, www.fec.gov/disclosurep/pnational.do (last visited March 5, 2017) (FEC 2016 Presidential).

41. Michael McConnell, "Reconsidering *Citizens United* as a Press Clause Case," 123 *Yale L.J.* 266-529 (November 2013). *See* www.yalelawjournal.org/essay/reconsidering-citizens-united-as-a-press clause-case (last visited March 5, 2017).

42. Kelly Dyer Fry, "We Will Always Be Your Eyes and Ears," *Sunday Oklahoman*, Oct. 2, 2016, at 2A.

43. *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972).

44. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) ("the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally") (plurality opinion).

45. *Pell v. Procunier,* 417 U.S. 817, 834 (1974); *Saxbe v. Washington Post, Co.*, 417 U.S., 843, 850 (1974).

46. 384 U.S. 214 (1966).

47. *Mills,* 384 U.S. at 216.

48. *Mills*, 384 U.S. at 220.

49. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

50. FEC 2016 Presidential.

51. This is misattributed to Victor Hugo, but has a closer match to Gustave Aimard's novel, *Les Francs Tireurs* (1861):

> … there is something more powerful than the brute force of bayonets: it is the idea whose time has come and hour struck."

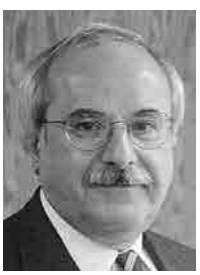
A reference in Wikiquotes attributes as follows: Gustave Aimard; (tr. unknown) (1861). *The Freebooters.* London: Ward and Lock. pp. 57. *See* en.wikiquote.org/wiki/Victor_Hugo#cite_note 1 (Last visited March 5, 2017).

52. *See* www.dallasnews.com/obituaries/obituaries/2014/10/21/nelson-bunker-hunt-second-son-of-legendary-wildcatter-h.l.-hunt-dies (last visited March 5, 2017).

53. Hunt was a billionaire when he and his two brothers, Lamar and William, unsuccessfully attempted to corner the silver market in 1979-80 resulting in personal bankruptcies. Both Nelson and William were fined and banned from commodities trading for their efforts. They also were required to pay substantial back taxes. *See* www.nytimes.com/1989/12/21/business/2-hunts-fined-and-banned-from-trades.html (last visited March 5, 2017).

54. *Whitney v. California*, 274 U.S. 357, 377 (1927) (concurring).

ABOUT THE AUTHOR



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An Appellate Practice Pointer From *Citizens United*

By Micheal Salem

A lot of attorneys have been there. You win or lose in the district court and face an appeal. You suddenly realize you did not raise or strongly argue a facial challenge or a particular policy argument in the lower court, choosing other points that seemed stronger than what looked on the surface like a rabbit hole. After all, facial challenges to legislative acts rarely prevail.[1]

In light of the lower court findings, or just a fresh look at the case on appeal, you realize a new argument might turn a loser into a winner – or might cost you the favorable decision below.

Will failure to fully develop the argument in the lower court be fatal?

Maybe not in every instance, according to *Citizens United v. Federal Election Com'n*.[2]

The general rule in the 10th Circuit is that "an appellate court will not consider an issue raised for the first time on appeal …"[3] Issues inadequately briefed on appeal are deemed waived.[4] These resorts to waiver seem like expedients that favor docket control or conservation of judicial resources over consideration of persuasive arguments that counsel might have made earlier. Sometimes the district or intermediate appellate court grants victory on a single claim, leaving other claims unanswered. It seems ungrateful, and slightly temerarious, to ask the court to also consider the additional arguments. Yet, if a single claim victory is threatened on appeal, there is no ready backup.

VIABLE FEDERAL QUESTIONS ALLOW ANY POLICY ARGUMENT

So, does failure to fully present, or even raise, issues leave you stranded? Maybe not. Citizens United brought both a facial challenge to a campaign finance reform statute[5] (count 5) and an "as applied" challenge (count 3) until the plaintiff stipulated to dismissal of count 5.

The government argued that Citizens United waived its facial challenge, but Justice Kennedy's majority opinion held that the Supreme Court has the authority to reconsider any of its previous decisions and ruled that parties can urge any argument in support of a claim properly before the court because parties are not limited to the same arguments they made below:

> First, even if a party could somehow waive a facial challenge while preserving an as applied challenge, that would not prevent the Court from reconsidering *Austin* [*v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)] or addressing the facial validity of §441b in this case. "Our practice 'permit[s] review of an issue not pressed [below] so long as it has been passed upon...'" … [H]ere, the District Court addressed Citizens United's facial challenge …
>
> Second, throughout the litigation, Citizens United has asserted a claim that the FEC has violated its First Amendment right to free speech. All concede that this claim is properly before us. And "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below …" Citizens

> United's argument that *Austin* should be overruled is "not a new claim." Rather, it is – at most – "a new argument to support what has been [a] consistent claim: that [the FEC] did not accord [Citizens United] the rights it was obliged to provide by the First Amendment." *Ibid*.
>
> Third, the distinction between facial and as applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint … The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved. Citizens United has preserved its First Amendment challenge to §441b as applied to the facts of its case; and given all the circumstances, we cannot easily address that issue without assuming a premise – the permissibility of restricting corporate political speech – that is itself in doubt. … ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as applied' cases"); *id*., at 1327 – 1328. As our request for supplemental briefing implied, Citizens United's claim implicates the validity of Austin, which in turn implicates the facial validity of §441b.[6]

This may be an instance of an 800-pound gorilla sleeping anywhere it wants, because it seems the court was dead-set on reconsidering its prior precedents. Even so, taking the court at its word, once a public policy is implicated in a claim properly on appeal, parties are not limited to their arguments in the lower court.[7]

OKLAHOMA AND THE PUBLIC POLICY CASE

The Oklahoma Supreme Court's treatment of public policy cases may also suggest that some bets are off.

In *Burns v. Cline*,[8] Justice Combs makes this point in footnote 1 of his *concurring specially* opinion. In public law controversies, the Oklahoma Supreme Court has wide ranging authority to resolve disputes and is not constrained by the claims of the parties if the record supports other claims that can be sustained by the court:

> In public law controversies, this Court is free to decide a case on all dispositive issues, regardless of whether they were tendered below. *Ashikian v. State ex rel. Okla. Horse Racing Comm'n,* 2008 OK 64, ¶17 n.45, 188 P.3d 148; *Davis v. GHS Health Maint. Org., Inc*., 2001 OK 3, ¶¶25-26, 22 P.3d 1204; *Simpson v. Dixon,* 1993 OK 71, ¶26 n.55, 853 P.2d 176. Accordingly, this Court is not limited to Appellant's claim concerning Okla. Const. art. 5, §57 if the record compels a conclusion that SB 642 is unconstitutional on other grounds. *See Simpson,* 1993 OK 71, ¶26.

"Public law controversies" may be broader than challenges to the constitutionality of a statute. The *Ashikian* case challenged an order of racing stewards suspending the plaintiff for failure to pay a stall rental bill when the hearing notice was sent by certified mail to the plaintiff's Texas address, but not forwarded. Ashikian tendered the past due balance, obtained a reversal of the stewards' order of suspension from the district court and was granted reasonable attorney fees and costs. The Supreme Court reversed the fee order in an opinion by Justice Opala citing the public law controversy doctrine even as it noted, "The issue was neither urged, briefed, nor supported by any authority for its award before the trial court or COCA. Ashikian asserts that because the state failed to address this issue before the trial judge, it is too late to raise it on certiorari."[9]

Similarly, *Davis v. GHS Health Maint. Org*. involved a question of exhaustion of administrative remedies before bringing an action challenging a bad-faith failure to make full payment for disputed medical expenses for a penile implant for the plaintiff. Justice Kauger, writing for the majority, addressed the sufficiency of the statement of appeal rights in the denial notice even as she noted, "Although the notice issue was not artfully argued, the question was raised in the trial court and on appeal."[10] This proved to be no restraint on the court's ruling because it determined, "… when public law issues are presented, the Court may, on review, resolve them by application of legal theories not tendered below … Further, when public law issues are involved we have addressed matters dispositive of a cause *sua sponte*."[11]

Simpson v. Dixon[12] was an election dispute. Justice Opala applied Art. 3, §5 and Art. 5, §46 of the Oklahoma Constitution as a basis to ensure "[U]niformity in the conduct of elections for a corruption free canvass …" The respondent's " … failure explicitly to press for the applicability … is no impediment to our *sua sponte* invocation of the controlling constitutional commands. The public law character of the controversy leaves us totally free to change or modify the legal underpinnings for the respondent trial judge's decision."[13] Note 55 provides additional citations:

> In public law cases we are free to apply that theory which correctly disposes of the dispute. *Reynolds v. Special Indem. Fund*, Okl., 725 P.2d 1265, 1270 (1986); *Burdick v. Independent School Dist.*, Okl., 702 P.2d 48, 54 (1985); *McCracken v. City of Lawton*, Okl., 648 P.2d 18, 21 n. 11 (1982); *Application of Goodwin*, Okl., 597 P.2d 762, 764 (1979); *Special Indemnity Fund v. Reynolds*, 199 Okl. 570, 188 P.2d 841.8. 842 (1948).

So when you think you might be dead in the appellate water, keep paddling. If you can couch an argument as public policy, you may still make port with a limited, or even nonexistent, record.

1. *U.S. v. Salerno*, 107 S.Ct. 2095, 2100, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

2. *Citizens United v. Federal Election Com'n* 558 U.S. 310, 130 S.Ct. 876 (2010).

3. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991). *Hicks* notes narrow exceptions:

> Exceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of law to prevent a miscarriage of justice. [*Farmers Ins v.*] *Hubbard*, 869 F.2d [565] at 570 (10th Cir. 1989); *Stahmann Farms, Inc. v. United States*, 624 F.2d 958, 961 (10th Cir.1980). The failure to raise the issue with the trial court precludes review except for the most manifest error. *Gundy v. United States*, 728 F.2d 484, 488 (10th Cir.1984).
>
> The matter of what questions may be addressed for the first time on appeal is within our discretion and decided on a case by case basis. *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 2877 (1976); *Cavic v. Pioneer Astro Indus.*, 825 F.2d 1421, 1425 (10th Cir. 1987). In determining whether an exception is warranted, we are mindful of the policies behind the general rule. The facilitation accorded appellate review by having the district court first consider an issue is important. *City of Waco, Texas v. Bridges*, 710 F.2d 220, 228 (5th Cir. 1983), *cert. denied*, 465 U.S. 1066, 104 S.Ct. 1414 (1984). In addition, our respect for the district court means "the policy of declining to consider an argument not raised below is strongest where the district judge was not aware of the argument." *Richerson v. Jones*, 572 F.2d 89, 97 (3d Cir. 1978). It is also unfair to the opponent if one party is allowed to argue an issue not raised in the trial forum. We think such a practice leads to unfair surprise in the appellate court and would, if allowed, require us to frequently remand for additional evidence gathering and findings. The need for finality in litigation and conservation of judicial resources counsels against exceptions. *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 996 (2d Cir. 1981). *Hicks 928 F.2 at 970-71.*

4. *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1175 (10th Cir. 2002). More fatally, "[e]ven a capital defendant can waive an argument by inadequately briefing an issue." *Williams v. Trammell*, 782 F.3d 1184, 1208 (10th Cir. 2015).

5. Bipartisan Campaign Reform Act of 2002, 2 USC 431, Public Law 107–155 ("BCRA" or "McCain-Feingold").

6. *Citizens United*, 558 U.S. at 330-31 (emphasis added). As of March 5, 2017, Westlaw notes there are 44 cases which cite West Headnote 1 of *Citizens United*. ("Supreme Court would consider contention of nonprofit corporation … though nonprofit corporation raised the contention for the first time before the Supreme Court"). Most of these appear to be election cases.

Headnotes 7 - 10 deal with excerpts quoted in this Practice Pointer, and the number of cited cases varies: Headnote 7 ("Nonprofit corporation did not waive, for purposes of direct review by Supreme Court … though in the district court the corporation had stipulated to the dismissal of the count in its complaint asserting the facial challenge and had proceeded on another count asserting an as applied constitutional challenge … ")(110 cases); Headnote 8 ("The Supreme Court's practice permits review of an issue not pressed below, so long as it has been passed upon.") (1 case); Headnote 9 ("Once a federal claim is properly presented on appeal, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.") (6 cases); Headnote 10 ("The distinction between facial constitutional challenges and as applied constitutional challenges goes to the breadth of the remedy employed by the court, not what must be pleaded in a complaint.") (85 cases). Cases citing these headnotes might be mined for more public policy exceptions.

7. Except when they are; *see, Leonard v. Texas*, 580 U.S. ___, 137 S.Ct. 847, 850 (2017), No. 16-122, *cert. den.* March 6, 2017, statement of Thomas, J., respecting denial: "Unfortunately, petitioner raises her due process arguments for the first time in this Court. As a result, the Texas Court of Appeals lacked the opportunity to address them in the first instance. I therefore concur in the denial of certiorari. Whether this Court's treatment of the broad modern forfeiture practice can be justified by the narrow historical one is certainly worthy of consideration in greater detail." (slip op. at 6).

8. *Burns v. Cline* 2016 OK 99, 382 P.3d 1048 (Sept. 4, 2016).

9. *Ashikian*, 2008 OK 64, ¶17 n.45.

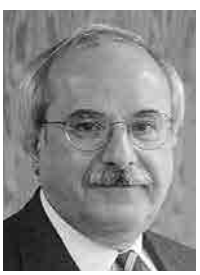
10. *Davis v. GHS*, 2001 OK 3, ¶25.

11. *Davis v. GHS*, 2001 OK 3, ¶¶25, 26.

12. *Simpson v. Dixon* 1993 OK 71, 853 P.2d 176.

13. *Simpson v. Dixon*, 1993 OK 71, ¶26.

ABOUT THE AUTHOR



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First Amendment, Equal Protection and Invisible Children

By Richard J. Goralewicz

The king is in legal contemplation the guardian of his people, and in that amiable capacity is entitled (or rather it is his Majesty's duty, in return for the allegiance paid him) to take care of his subjects as are legally unable, on account of mental incapacity, whether it proceed from first nonage [children]: second, idiocy: or third, lunacy: to take proper care of themselves and their property.

J. Chitty[1]

A Treatise on the Law of the Prerogative of the Crown

Things have changed quite a bit since those days in jolly olde England which Mr. Chitty described in his history of the law of *parens patriae* quoted above.

The doctrine, however, remains alive and well even in the absence of an actual monarch. The doctrine of *parens patriae*, the Oklahoma Supreme Court tells us, "may be defined as the inherent power and authority of the Legislature of a state to provide protection of the person... *non sui juris*, such as minors, insane, and incompetent persons."[2] Mainly through statute, states assume the role of the monarch, replacing royal fiat with heuristic rules and due process boundaries under which courts may take protective action on behalf of vulnerable persons. In particular:

> Because the state has an interest in its present and future citizens as well as a duty to protect those who, because of age, are unable to protect themselves, it is the policy of this state to provide for the protection of children who have been abused or neglected and who may be further threatened by the conduct of persons responsible for the health, safety, and welfare of such children. To this end, where family circumstances threaten the safety of a child, the state's interest in the welfare of the child takes precedence over the natural right and authority of the parent to the extent that it is necessary to protect the child and assure that the best interests of the child are met.[3]

In this context, the Oklahoma Legislature has unwisely included and unnecessarily perpetuated a gaping, definitional wound in the body of the Children's Code, to-wit:

> Nothing in the Oklahoma Children's Code shall be construed to mean a child is deprived for the sole reason the parent, legal guardian, or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child.[4]

The second sub-paragraph of this section contains an ameliorating qualification, providing, "Nothing contained in this paragraph shall prevent a court from immediately assuming custody of a child and ordering whatever action may be necessary, including medical treatment, to protect the child's health or welfare."[5] No Oklahoma court has yet construed this clause in a published opinion. Given the current cultural climate, in which the First

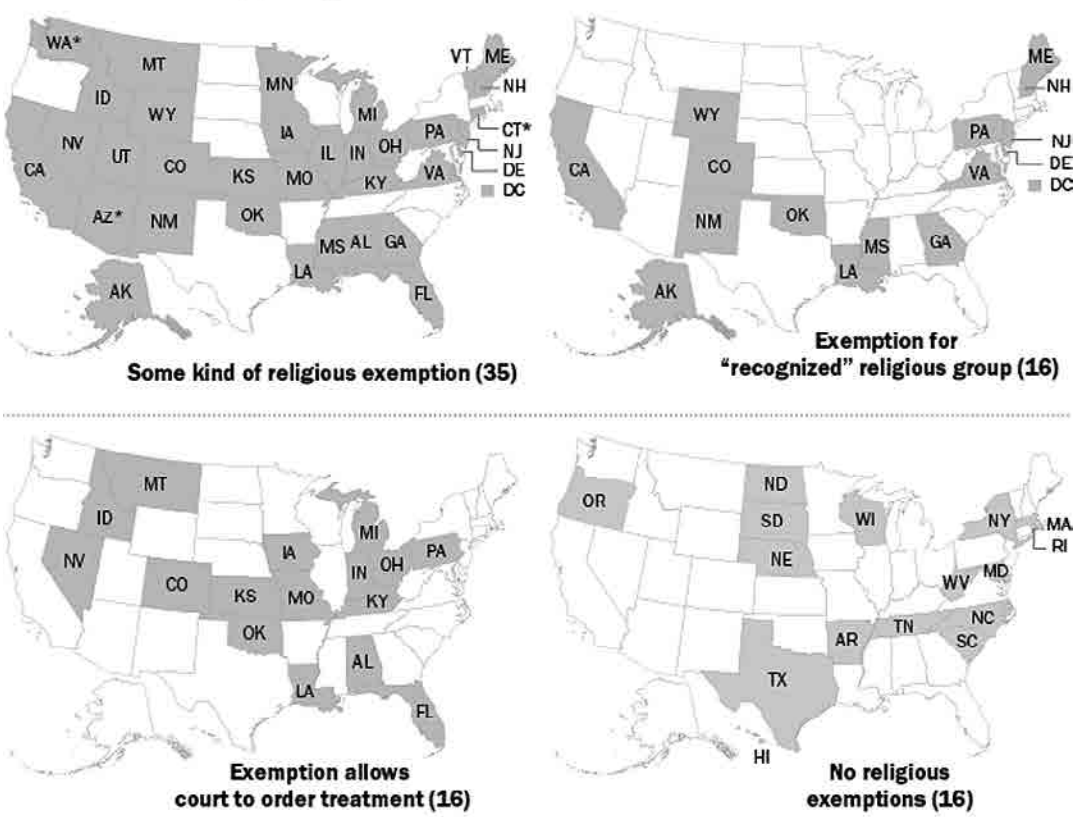
Amendment may be seen as "weaponized" or polarized, and predictions, if and when this issue percolates through various trial courts, become difficult. Which of these clauses constitutes the tail and which the actual dog poses a significant question. In other words, does the judicial action clause modify the religious license, or does the latter, coming first, serve as a brake on either state or judicial intervention?

The problem is real and substantial. For example, as reported in a study published in the medical journal *Pediatrics*:

> Participants. One hundred seventy-two children who died between 1975 and 1995 and were identified by referral or record search. Criteria for inclusion were evidence that parents withheld medical care because of reliance on religious rituals and documentation sufficient to determine the cause of death.
>
> Results. One hundred forty fatalities were from conditions for which survival rates with medical care would have exceeded 90%. Eighteen more had expected survival rates of >50%. All but 3 of the remainder would likely have had some benefit from clinical help.
>
> Conclusions. When faith healing is used to the exclusion of medical treatment, the number of preventable child fatalities and the associated suffering are substantial and warrant public concern. Existing laws may be inadequate to protect children from this form of medical neglect.[6]

UBIQUITY OF RELIGIOUS SHIELD LAWS

34 states and D.C. offer legal shield for parents who refuse medical treatment for children on religious grounds



*States with laws that specifically mention Christian Science.
Note: Recognized category includes Pennsylvania, which specifies that beliefs must be consistent with those of a "bona fide religion." U.S. territories not shown.
Source: Pew Research Center analysis of data from the U.S. Department of Health and Human Services.

PEW RESEARCH CENTER

Shield laws in one form or another comprise the norm among the 50 states.[7] They had their genesis in the Child Abuse Prevention and Treatment Act of 1974.[8] Pursuant to this act, and regulations established thereunder, states seeking federal funding had to enact religious protective laws as a prerequisite to financial aid. In the years since, the religious shield language had an on-again, off-again presence through deletion, dilution and/or removal. As it currently stands, the act provides:

> Nothing in this Act shall be construed –
>
> (1) as establishing a Federal requirement that a parent or legal guardian provide a child any medical service or treatment against the religious beliefs of the parent or legal guardian; and
>
> (2) to require that a State find, or to prohibit a State from finding, abuse or neglect in cases in which a parent or legal guardian relies solely or partially upon spiritual means rather than medical treatment, in accordance with the religious beliefs of the parent or legal guardian.[9]

So, where does this leave us? A plain reading of the statute indicates that, despite the lip service given to federal concerns for the health and welfare of children, Congress has opted for a metaphoric hand-washing in this regard not entirely unlike the historical event giving rise to that metaphor. Protective action, therefore, becomes the province of the several states. Unfortunately, since the repeal of the mandate too few have done so, and then most often in reaction to a particular, often avoidable tragedy.

TRIGGERS OF CHANGE – A CHILD'S BASKET OF DEPLORABLES

Lockhart and Funkhouser

In *State v. Lockhart*,[10] 9-year-old Jason Lockhart died of peritonitis resulting from perforation of a gangrenous vermiform appendicitis.[11] Following a trial brought under the misdemeanor/manslaughter rule (with child endangerment comprising the underlying misdemeanor), the trial court gave the following instruction:

> A person is justified under the law of this state in not providing medical treatment for his child if instead that parent in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease of such child.[12]

The jury acquitted the Lockharts, and the state appealed. Affirming this result, the Court of Criminal Appeals held, "We believe that the statute is clear and unambiguous, and expresses a legislative intent that those parents who rely in good faith upon the tenets of their religious belief for the care and protection of their children be allowed a defense to a misdemeanor charge subsequently arising from their failure to obtain medical assistance for their children."[13]

Following the *Lockhart* trial but prior to the appellate ruling, the Legislature changed the statute. In its current form, the relevant amendments read:

> Nothing in this section shall be construed to mean a child is endangered for the sole reason the parent, guardian or person having custody or control of a child, in good faith, selects and depends upon spiritual means alone through prayer, *in accordance with the tenets and practice of a recognized church or religious denomination*, for the treatment or cure of disease or remedial care of such child; provided, *that medical care shall be provided where permanent physical damage could result to such child;* and that the laws, rules, and regulations relating to communicable diseases and sanitary matters are not violated.[14]

In *Funkhouser v. State*:[15]

> Benjamin Keith Funkhouser, the appellants' three month old son died at home from complications arising from pneumonia. The appellants, although knowing Benjamin was ill, did not seek medical help. Instead, the parents relied on prayer and divine intervention to heal their child. The parents are members of The Church of The New Born that relies on divine intervention for healing sickness to the exclusion of medical assistance.[16]

The jury convicted them of second-degree manslaughter. On appeal, the Funkhousers contended that 852 allowed them an absolute defense. In particular, they objected to a jury instruction reading:

> A person may be justified under the law of this State in not providing medical treatment of his child if instead the parent in good faith, selects and depends upon spiri-

tual means alone through prayer, in accordance with tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease of such child, provided that said treatment or cure is something which a reasonably careful person would do under similar circumstances and conditions.

Compared with the *Lockhart* instruction, the instruction expresses the law in far more conditional terms, providing substantially less cover for the Funkhousers' position. The Court of Criminal Appeals affirmed the conviction, noting that the instruction above accurately stated the law as it currently stood. Particularly:

> This instruction accurately reflected the defense of good faith reliance on spiritual means. The instruction considered by the jury did not provide the appellants with the absolute defense proposed by their requested instruction. The trial court properly circumscribed the defense under a reasonably careful person standard that is within the definition of culpable negligence. We have defined culpable negligence as:
>
> > The omission to do something which a reasonable and prudent person would do, or the want of the usual and ordinary care and caution in the performance of an act usually and ordinarily exercised by a person under similar circumstances and conditions. Crossett v. State, 96 Okl.Cr. 209, 217, 252 P.2d 150, 159 (1952).
>
> Good faith reliance on spiritual means alone is not a defense to Manslaughter in the Second Degree. Since the evidence warranted the defense of good faith reliance on spiritual means, the court properly allowed the appellants the defense within the boundaries of the definition of culpable negligence.[17]

While *Funkhouser*, and the statutory amendments referenced therein, constitutes a quantum leap forward in the protection of children, the system remains flawed. The short list of possible deficiencies include: a) the uncomfortable position of the courts determining both what constitutes a "recognized church or religious denomination"; b) no bright line test for what constitutes action or inaction "in accordance with that church or religions tents and practices"; c) the potential constitutional infirmity of the distinction between members of recognized and nonrecognized churches who may still have valid beliefs or articles of faith (not to mention the differing protections offered to children of various faiths); and d) what constitutes "culpable negligence" when weighed against First Amendment considerations. As to this last point, the dearth of factual discussion in *Funkhouser* yields few clues.

The *Wagstaffe* case[18] provides an example of the difficulty of the latter point. As one author analyzed it:

> The testimony in *Wagstaffe* established, and indeed emphasized, that the parents were loving and attentive. "The mother," we are told by a witness "devoted most of her time to it [the child]," and the father "was very kind and affectionate." The Wagstaffes had two other children who were described as "healthy and well-nourished." A witness, (who was a member of the sect), the elders, and the parents had all mistaken the deceased child's "inflammation" for teething problems.[19]

The judge then took the jury through "a fine casuistry of culpable conduct in the faith healing context."[20] He then noted:

> [All] the reasoning in the world would not justify a man in starving a child to death [for religious reasons]. But when the jury had to consider what was the precise medical treatment to be applied in a particular case they got into much higher latitude indeed. At different times people have come to different conclusions as to what might be done with a sick person … There was a very great difference in neglecting a child with respect to food, with regard to which there could be but one opinion, and neglecting medical treatment as to which there might be many opinions.[21]

Commonwealth vs. Twitchell

As officially reported:

> David and Ginger Twitchell appeal from their convictions of involuntary manslaughter in connection with the April 8, 1986, death of their two and one-half year old son Robyn. [Note 2] Robyn died of the consequences of peritonitis caused by the perforation of his bowel which had been obstructed as a result of an anomaly known as Meckel's diverticulum. There was evidence that the condition could be corrected by surgery with a high success rate.[22]

The Twitchells, Christian Scientists,[23] sought to take shelter under Massachusetts' statutory law which provided: "A child shall not be deemed to be neglected or lack proper physical care for the sole reason that he is being provided remedial treatment by spiritual means alone in accordance with the tenets and practice of a recognized church or religious denomination by a duly accredited practitioner thereof."[24]

In pertinent part, the Twitchells argued the vagueness doctrine, particularly:

> The defendants argue that the failure to extend the protection of the spiritual treatment provision to them in this case would be a denial of due process of law because they lacked "fair warning" that their use of spiritual treatment could form the basis for a prosecution for manslaughter. Fair warning is part of the due process doctrine of vagueness, which "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Many fair warning challenges involve statutes that are unconstitutionally vague on their face, such as vagrancy statutes. Even if a statute is clear on its face, there may not be fair warning in the circumstances of particular defendants. The defendants here argue that they have been denied fair warning in three different ways. They contend that fair warning (1) would be denied by an unforeseeable retroactive judicial interpretation that the spiritual treatment provision does not protect them (, (2) is denied by the existence of contradictory commands in the law of the]), and (3) is denied because they were officially misled by an opinion of the Attorney General of the Commonwealth.[25]

The Supreme Judicial Court of Massachusetts overturned the conviction based upon the third type of vagueness. Specifically, the attorney general had given an arguably negative answer to a question whether a parent may be prosecuted for providing spiritual treatment alone. The Christian Science Church put out a legal guide based upon this construction. The Twitchells made inquiry of the church and relied on that construction. Therefore, the court ruled, "The issue of their reliance on advice that had origins in the Attorney General's opinion should have been before the jury."[26]

In many ways, the *Twitchell* arguments reflect some of the concerns raised under the Oklahoma discussions above. Given that the opinion of one "authoritative official" such as the attorney general or a court may put the affirmative defenses into play, it becomes clear that the potential for fatal mischief lies in the continued existence of the statute itself.

State v. Crank

In *State v. Crank*,[27] Jacqueline Crank was convicted of child neglect for failure to seek medical assistance for her daughter on the basis of her religious beliefs. The child, Jessica, suffered from Ewing's Sarcoma, a rare form of cancer. Jessica died at the age of 15. As recited by the court, "Jessica 'had a problem with her shoulder' and took her first to a chiropractor and later to a nurse practitioner at a walk-in clinic. Eventually, Jessica's symptoms became more pronounced, and the Defendant 'knew there was a problem' when Jessica developed 'a grapefruit size tumor on her shoulder.'"[28] While Ms. Crank did bring Jessica to a chiropractor, the latter advised her to get to an emergency room immediately. Ms. Crank did not do so. Ultimately, the state of Tennessee took custody of Jessica. She received treatment at East Tennessee Children's Hospital but was soon released to hospice care, dying shortly after. As to cause of death, Dr. Victoria Casteneda stated:

> I can state, based upon my training, experience and treatment of Jessica Crank, that her death was a proximate result of Ewing's Sarcoma. A delay in the treatment of her disease results in a more massive tumor and renders the patient more symptomatic. While earlier treatment would not likely have resulted in her being cured, it would have helped in dealing with her condition and symptoms and positively impacted the quality of her life.[29]

With prompt treatment beginning in February 2002, the quality and length of her remaining life would have been improved and medical personnel would have been better able to manage her pain and disability. After consenting to a bench trial, Ms. Crank was convicted of child neglect.

The primary thrust on appeal focused on the "void for vagueness" doctrine. Upon analyzing the statute in question, where issue was joined on particular statutory phrases. As distilled in the opinion:

> As noted, the spiritual treatment exemption applies only when, "in lieu of medical or surgical treatment," a child is "provided treatment by spiritual means through prayer alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner" of the church or denomination. Tenn. Code Ann. §39–15–402(c). The Defendant asserts that several of the statutory terms – including "treatment," "prayer alone," "tenets or practices," "practitioner," and "recognized church or religious denomination" – are so unclear that neither individuals nor law enforcement officers can ascertain when the statute applies. We do not agree.[30]

Next came the First Amendment challenge. The court avoided any definitive statement as to the constitutionality of the religious shield law either case specifically or even generally. The defendant argued both an Establishment Clause and an Equal Protection Clause violation in that certain *bona fide* religions fell under the act's coverage while others (including hers) did not. The state argued that, even assuming a First Amendment violation, the remedy would be to strike the exemption while enforcing the remainder of the child abuse and neglect statutes.[31] The court agreed, holding:

> We must next consider whether the Defendant would be entitled to relief if we were to elide the allegedly unconstitutional terminology within the spiritual treatment exemption. This would require the deletion of the words "alone in accordance with the tenets or practices of a recognized church or religious denomination by a duly accredited practitioner thereof." Eliding the statute in this manner would extend the exemption to any parent who "provide[s] treatment by spiritual means through prayer … in lieu of medical or surgical treatment." The State maintains – and we agree – that eliding the statute in this way would expand the scope of the exemption beyond what was intended by the General Assembly. While broadening the statutory exemption might serve to address any constitutional deficiencies, we cannot say that our legislature would have enacted an exemption so broad that it would encompass all instances in which a parent claims reliance upon prayer in lieu of medical treatment for a child.[32]

"The court avoided any definitive statement as to the constitutionality of the religious shield law either case specifically or even generally."

Although no landmark constitutional ruling came out of *Crank*, in its wake, Sen. Richard Briggs, R-Knoxville, a cardiac surgeon, and Rep. Andrew Farmer, R-Sevierville, a lawyer, introduced a repeal bill, Senate Bill 1761. It won unanimous (94-0) Senate approval in March and an 85-1 vote in the House.[33]

While good has come from the foregoing cases in that substantial amendments or repeals of religious shield laws have come about as a result (Massachusetts has also since repealed its shield law) there is one common denominator. Each step forward has come as a reaction to the death or unnecessary suffering of children.

FIRST AMENDMENT OVERRIDE

In weighing competing interests in the context of children's health care, we cannot gainsay the substantial governmental interest in the health and safety of children. As SCOTUS ruled in *Prince v. Masssachusetts*:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers, within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parents claim to control of the child or one that religious scruples dictate contrary action.[34]

And:

> [O]ur courts have overridden the desires of parents who refused to consent to medical treatment and ordered such treatment to save a child's life.[35]

These cases, and others like them, comprise a portion of the progeny of *Reynolds v. United States*.[36] Reynolds, a Mormon, challenged the constitutionality of a ban on polygamy in Utah. This, he claimed, constituted an unconstitutional infringement upon his religious beliefs. Mr. Reynolds took a second wife, notwithstanding a living and undivorced first wife who still cohabitated with him as a spouse. With no question as to the fact of the second marriage, Reynolds argued he acted true to his religious beliefs. Writing for the majority in upholding the statutes and Reynold's conviction, Chief Justice Waite observed, in words seemingly prescient[37] of the issue now at hand:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship; would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral [pyre] of her dead husband; would it be beyond the power of the civil government to prevent her carrying her belief into practice?
>
> So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief?
>
> To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and, in effect, to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[38, 39]

EQUAL RIGHTS OF CHILDREN

The Oklahoma Supreme Court has long recognized that children are not chattel.[40] In addition, "parents have a natural, legal, and moral right, as well as a duty, to care for and support their children and such rights are protected by state and federal laws as well as the Constitution."[41] In this interlocking set of rights and duties, noting in our jurisprudence permits or endorses an assumption that parents may, with impunity, make their children martyrs to that parent's faith. Looked at from another perspective, no child deserves exclusion from the protection of the law enjoyed by other children on the basis of a parent's faith. Either way, the state has no compelling interest in creating such an exclusion.

The governmental interest in the health and welfare of children is one of universal recognition. Courts have uniformly treated children's welfare as a compelling state interest. *Osborne v. Ohio*, "It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling'";[42] *Lehr v. Robertson*, "the Court has emphasized the paramount interest in the welfare of children";[43] *Walker v. Superior Court*, child health and safety is "an interest of unparalleled significance: the protection of the very lives of California's children."[44]

Both jurists and scholars have recognized the equal protection ramifications of marginalizing a certain class of children to an unprotected status. Some other states' courts have recognized the conflict between a parent's religious rights and the child's right to equal protection. In *Brown v. Stone*,[45] the court invalidated the religious exemption in Mississippi's compulsory immunization laws on equal protection grounds. Specifically:

> [No child should] be denied the protection against crippling and death that immunization provides because of [parents'] religious belief."[46]

Brown concludes observing as follows, "As the United States Supreme Court said in *In Re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18L. Ed.2d 527 (1967): 'Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.'"[47]

An Ohio decision weighed in even more expansively in the context of spiritual healing practices:

> The Fourteenth Amendment guarantees to all citizens "equal protection of the laws." As noted above, R.C. 2919.22(A) creates one standard of behavior for parents of one religious belief and another standard for a different group of parents. It is then inherent that equal protection is thus being denied to the parents not favored by the special

> exemption. Second, and more important, if the real purpose of R.C. 2919.22(A) is to protect children from parental defalcation, then the prayer exception creates a group of children who will never be so protected, through no fault or choice of their own.[48]

Our law is replete with "status offenses." That is, things which children are not permitted to do simply because they are children and is similarly replete with special crimes so categorized because they involve children. This is a logical and natural extension of the concept of the legal incapacity of a minor. Why then should children not be afforded special protection by our laws, each child on an equal basis with every other child, where the denial of that protection may injure or cripple the child for life or even result in that child's premature death? This special protection should be guaranteed to all such children until they have their own opportunity to make life's important religious decisions for themselves upon attainment of the age of reason. After all, given the opportunity when grown up, a child may someday choose to reject the most sincerely held of his parents' religious beliefs, just as the parents on trial here have apparently grown to reject some beliefs of their parents. Equal protection should not be denied to innocent babies, whether under the label of "religious freedom" or otherwise.

The equal protection analysis has received support in legal scholarship as well.[49] Cases presenting medical treatment of children should not remove children from their parents' care, nor fail to intervene, on a "knee jerk" basis. Careful legal and factual balancing of rights and risks, where facts drive the legal analysis, have become a hallmark of such cases. In *In Re D.R.*[50] for example, the Court of Civil Appeals carried forward the general rule that parents "may not make martyrs out of their children." However, "a state cannot order that a child receive medical treatment over religious objections of the parents where the treatment itself is very risky, extremely invasive, toxic with many side effects and/or offers a low chance of success."[51]

CONCLUSION

Religious shield laws provide maneuverability for those wishing to pit their faith against medical science, using the bodies of children as their playing field. Every year throughout the world, children die of treatable illnesses, diseases and injuries because parents or guardians refuse to seek medical treatment in furtherance of their own religious beliefs. In lieu of medical treatment, some choose faithfully adherence to strict, and arguably extreme, religious beliefs. That, of course, is within the constitutional rights of every competent adult. At the other end of the spectrum, children, especially infants, lack both the legal and the practical ability to decide for themselves. Unfortunately, these children remain silent and invisible unless or until their story gains media attention either as a "*cause celebre*" or an obituary.

Ultimately, the resolution of this issue lies in the hands of the Legislature. Meanwhile, like its victims, the statute lurks beneath the surface. We rarely notice it until directly at issue. It is incumbent upon child advocates, family lawyers, judges and prosecutors to recognize and understand these legal issues in order to provide these vital and vulnerable people the protection they are due.

1. J. Chitty, *A Treatise on the Law of the Prerogative of the Crown* 155 (1820), quoted in George B. Curtis, "The Checkered Career of Parens Patriae: The State as Parent or Tyrant?", 25 *DePaul L. Rev.* 895, 896 (1976).

2. *McIntosh v. Dill*, 1922 OK 35, ¶28, 205 P. 917, *cert. denied*, 260 U.S. 721, 43 S.Ct. 12, 67 L.Ed. 480 (1922).

3. *Gowin v. Julius*, 1954 OK 359, ¶11, 279 P.2d 954 [The state's power then is based on its position as *parens patriae*, which inheres in its sovereignty to protect its infant citizens.]; *see also Accord, Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) [The State has a *parens patriae* interest in preserving and promoting the welfare of children.].

4. 10A O.S. 1-1-102 (A))(3) (2014 Supp.).

5. 10A O.S. 1-1-105(20)(j) and 47(3)(c) (2014 Supp).

6. Seth M. Asser, and Rita Swan, "Child Fatalities From Religion-motivated Medical Neglect," *Pediatrics* 1998; 101: 625-629.

7. Pew Research Center (as cited in illustration), "Most states allow religious exemptions from child abuse and neglect laws," www.pewresearch.org/fact-tank/2016/08/12/most-states-allow-religious-exemptions-from-child-abuse-and-neglect-laws/ (Aug. 12, 2016; last accessed Dec. 15, 2016).

8. The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (codified as amended at 42§§5101-5119c (2003)).

9. 42 U.S.C. 5106 (2010).

10. 1983 OK CR 76, 664 P.2d 1059.

11. 1983 OK CR 76 at Par. 2.

12. *Id*. at Par. 1.

13. *Id*. at Par. 2

14. 21 O.S. 852 (2011) (emphasis added); *see also* Laws 1983, HB 1082, c. 44, §1, eff. Nov. 1, 1983.

15. 1988 OK CR 109, 763 P.2d 695.

16. 1988 OK CR 109 at Par. 2.

17. *Id. op. cit*.

18. *Infra*. notes 38-39.

19. Catherine Cookson, "Regulating Religion: The Courts and the Free Exercise Clause," p. 153, *Oxford University Press* 2001.

20. *Id*. at 154.

21. *Id*.

22. *Commonwealth v. Twitchell*, 416 Mass. 114, 115 (1993).

23. I would be remiss if I failed to mention that the Christian Science Church makes a laudable effort to apprise its members as to local laws and has approved of, or given valuable input, efforts in some jurisdictions to reform their laws.

24. Set forth at *Twitchell, supra* at 116 (note 4) (citing Mass. Gen. Law ch. 273, §1 (1992 ed.)).

25. *Id*. at 123-24.

26. *Id*. at 129.

27. 486 S.W.3d 15 (TN 2015).
28. 486 S.W. 3d at 19.
29. *Id*. at 20.
30. *Id*. at 26.
31. *Id*. at 28.
32. *Id*. at 29 (internal citations omitted).
33. Richard Locker, "Tenn. lawmakers approve repeal of 'spiritual treatment' exemption," *Knoxville News Sentinel*, archive.knoxnews.com/news/local/lawmakers-approve-repeal-of-spiritual-treatment-exemption-30751f43-09c1-53d5-e053-0100007f15a9-375734171.html (April 14, 2016; last accessed Dec. 20, 2016).
34. U.S. 158, 168-69 (1944).
35. *See Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101, 119 (1979) ("Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." (citations omitted)); *Prince, supra*, 321 U.S. at 166-67, 64 S.Ct. at 442, 88 L.Ed. at 652-53 (noting that state, as p*arens patriae*, can intrude on parental autonomy to protect child from ill health or death).
36. 98 U.S. 145 (1878).
37. Some would argue the contrary given that, in paragraph next following the quoted passages, the chief justice cites with apparent approval the English case of *Regina v. Wagstaffe*, 10 Cox Crim. Cases 531 [1868]. In that case, the court made a distinction between actions harmful to a child based upon parents' religious briefs (criminal) and inaction leading to harm of a child based upon parents' religious belief (non-criminal). I tend to doubt the current efficacy of this argument. I also note that *Wagstaffe* has not been cited in any other published American opinion. Secondly, the *Wagstaffe* ruling may spring from a simple matter of statutory construction. Back at home in England, the response was an immediate Legislative reversal of that case, specifically criminalizing culpable inaction. 31 & 32 Vict., c. 132, §37 (1868).
38. 98 U.S. at 166-67.
39. *See also Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972), "To be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation … if it appears that parental decisions will jeopardize the health or safety of the child."
40. *Nasalroad v. Gayhart*, 1953 OK 144, 11, 257 P.2d 299; *Osburn v. Roberts*, 1946 OK 129, 3, 169 P.2d 293.
41. 10A O.S. 1-1-102 (2014 Supp.).
42. 495 U.S. 103, 109 (1990).
43. 463 U.S. 248, 257 (1983).
44. 763 P.2d 852, 869 (Cal. 1988).
45. 378 So.2d 218 (Miss. 1979).
46. *Id*. at 222.
47. *Id*. at 224.
48. *State v. Miskimens*, 22 Ohio Misc.2d 43, 490 N.E.2d 931, 935-36, 22 O.B.R. 393 (Ohio Com. Pl., 1984).
49. James G. Dwyer, "The Children We Abandon: Religious Exemptions to Child Welfare and Education Law as Denials of Equal Protection to Children of Religious Objectors," 74 *N.C. L.Rev.* 1321 (1996); Ann MacLean Massie, "The Religion Clauses and Parental Healthcare Decision-making for Children: Suggestions for a New Approach," 21 *Hastings Const. L.Q.* 725, 771-72 (1994).
50. 2001 OK CIV APP 166, 21, 20 P.3d 166, 170.
51. *Id*. at ¶22.

ABOUT THE AUTHOR

Rick Goralewicz graduated from King's College and the OCU School of Law. After 21 years in private practice, he joined the Senior Law Project of Legal Aid Services of Oklahoma in 2003.

NOTICE OF JUDICIAL VACANCY

The Judicial Nominating Commission seeks applicants to fill the following judicial office:

Judge of the Court of Criminal Appeals
District One

This vacancy is created by the retirement of the Honorable Clancy Smith effective June 1, 2017.

To be appointed to the office of Judge of the Court of Criminal Appeals an individual must have been a qualified elector of the judicial district applicable, as opposed to a registered voter, for one year immediately prior to his or her appointment, and additionally, must be at least 30 years of age and have been a licensed attorney, practicing law within the State of Oklahoma, or serving as a judge of a court of record in Oklahoma, or both, for five years preceding his/her appointment.

Application forms can be obtained on line at www.oscn.net under the link to Programs, then Judicial Nominating Commission or by contacting Tammy Reaves, Administrative Office of the Courts, 2100 N Lincoln, Suite 3, Oklahoma City, Oklahoma 73105, (405) 556-9862. Applications must be submitted to the Chairman of the Commission at the same address **no later than 5:00 p.m., Friday, June 16, 2017. If applications are mailed, they must be postmarked by midnight, June 16, 2017.**

Deborah A. Reheard, Chair
Oklahoma Judicial Nominating Commission

The 2017
Patrick A. Williams
Criminal Defense Institute
&
OCDLA Annual Meeting

June 29 & 30, 2017
Sheraton Reed Conference Center
Midwest City, OK

The Oklahoma Criminal Defense Lawyers Association, Oklahoma Indigent Defense System, Oklahoma County and Tulsa County Public Defender Offices proudly present the **2017 *Patrick A. Williams* Criminal Defense Institute & OCDLA Annual Meeting**. This year the CDI will be in at the Sheraton Reed Conference Center in Midwest City, OK. Come join us for some outstanding CLE & an all-around good time.

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The Clarence Darrow Award: The award recognizes the efforts of an individual who has exemplified zealous criminal defense advocacy that befits the namesake of the award "Clarence Darrow". The only qualification requirement is that the merit(s) of the nomination must have taken place during the eligibility period (June 2016-June 2017).

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Please send nominations to:

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PO Box 2272
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Fax: 405-212-5024

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(FULL AGENDA AVAILABLE AT WWW.OCDLAOKLAHOMA.COM)

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- **Tipping the Scales In Your Favor: Pretrial Jury Selection Strategies**
  Paul Bruno, Nashville, TN & Inese Neiders, Columbus, OH
- **The Art of Persuasion:** *Jessie Wilson Colorado Springs, CO*
- **Reconciliation in the Felony & Capital Case:** *Dick Burr, TX*

TRACK 1	TRACK 2
- **Issues With Foreign Nationals:** Heather Roberts, OKC	- **Defending Murder Cases:**Joi McClendon, OKC
- **Interdiction Forfeitures & Drug Dogs:** Doug Parr, OKC	- **Case Update:** Jim Hankins, OKC
- **Cell Phones & Stingrays:** Gary Davis, Tulsa, OK	- **LWOP & Juveniles:** Ernie Nalagan, OKC
- **Issues with Foreign Nationals:** Heather Roberts, OKC	- **Motions Practice:** Travis Smith, Tulsa Co PD

FRIDAY, JUNE 30, 2017

- **Ethics & Appearing Before the OBA*:** *Shelia Naifeh, Tulsa*
- **The Forensic Interview:** *Jamie Vogt, Tulsa*
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-OCDLA Member **_____$ 225.00**

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Debatable or Not Debatable: A Clearer Test of Qualified Immunity

By Clark Crapster

In *Mullenix v. Luna*,[1] the United States Supreme Court tightened the reins on the qualified immunity test and its application, resulting in what may be a significant alteration of qualified immunity jurisprudence in the future. The result of *Mullenix* is a test more in line with the original purposes of the qualified immunity doctrine, which had, over time, gradually become undermined.

QUALIFIED IMMUNITY TEST BACKGROUND AND ITS PURPOSE

The need for governmental officials to do their jobs, to enforce the laws and to maintain safety is so great that federal law does not permit 42 U.S.C. §1983 claims against officers individually unless the violation is clearly established in the governing case law.[2] The purpose of this is to afford some protection from civil suits under §1983 to the necessary functions of government officials.[3] This is important to prevent a chilling, or deterrence, effect upon attempts at quality law enforcement and other government actions which are fundamentally necessary to our way of life and society.[4] Qualified immunity was therefore intended to give ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.[5] Thus, the long standing rule has been that governmental officers who are sued in their individual capacities in an action under §1983 "are entitled to qualified immunity unless it is demonstrated that their conduct violated clearly established constitutional rights of which a reasonable person in their positions would have known."[6]

Over the course of many years, however, the protection of all but the plainly incompetent began to gradually erode as various fact patterns emerged. The strict language in the original test as articulated in *Hunter*, for example, sometimes gave way to broader language, such as "fair warning in the law" as apparently being the same as "clearly established in the law."[7] That ultimately gave rise to what the Supreme Court, in *Mullenix*, would deem to be too much uncertainty for officers due to some courts defining established law at too high a level of generality. Understandably, the less precise and more malleable phraseology, like "fair warning" that developed before *Mullenix*, may have arisen as a way for courts to explain why obviously egregious and unacceptable conduct is not worthy of qualified immunity protection despite the absence of precisely on-point cases. But after *Mullenix*, this type of analysis may be unnecessary or even inappropriate.

An example is the case of *Hope v. Pelzer*.[8] The officers' conduct in *Hope* was so egregious that it was beyond debate that it was a violation of the Constitution. The officials in *Hope* handcuffed the plaintiff to a hitching post without allowing him to have water or use the restroom for seven hours. The law already indicated that requiring prisoners to maintain uncomfortable positions for long periods of time was a violation of the Constitution.[9] But there did not seem to be authority that was exactly on-point. The Supreme Court in *Hope* explained that the conduct at issue in that case was a violation

under clearly established law.[10] Citing to an opinion it had issued in 1996, the court held that there was no qualified immunity as there was "fair warning" under the existing case law that the conduct was violative, despite factual distinctions.[11]

This type of language led to what has been called a "sliding scale" approach used by the 10th Circuit. In a 2004 qualified immunity case, the 10th Circuit, citing an 11th Circuit opinion, used the language of *Hope* as grounds for concluding that a sliding scale approach should be adopted.[12] The premise is that some conduct is so patently wrong and illegal that there need not be a case on point.[13] This premise does not necessarily mean, as a rule, that the more egregious the conduct, the less specificity is required (the "sliding scale" approach).[14] But it nevertheless seemed to have led to that "sliding scale" rule. The court in *Pierce* described this concept as follows:

> The degree of specificity required from prior case law depends in part on the character of the challenged conduct. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.[15]

"The court issued an important opinion in the *Mullenix* case, clarifying how to properly define and apply the qualified immunity test."

The method, in turn, gave rise to an opportunity for plaintiffs to try to use a less demanding test. Plaintiffs were able to work with a hazy legal backdrop by arguing that exact on-point case law is not necessary. They were able to draw comparisons between factually distinct cases and argue that it was enough to put officers on "fair notice" such that the claim should proceed to the jury to determine whether there was a violation and resulting damages. Consequently, this has often been the nature of qualified immunity litigation for at least 10 to 15 years.

2015 AND 2016: REIGNING IN THE TEST

The nature of qualified immunity litigation changed in November of 2015, when the Supreme Court accepted *certiorari* on two qualified immunity cases. By coincidence, both cases involved a man who passed away, and both men had the last name of Leija. The first case was *Mullenix v. Luna*, and the second was *Aldaba v. Pickens.*

The court issued an important opinion in the *Mullenix* case, clarifying how to properly define and apply the qualified immunity test. In essence, the court explained that qualified immunity applies unless the case law squarely governs such that in light of the circumstances there is no debate that a constitutional violation occurred. It reversed the 5th Circuit's denial of qualified immunity. In the *Aldaba* case, the 10th Circuit had also denied qualified immunity, similar to the 5th Circuit in *Mullenix.* Instead of issuing another opinion on qualified immunity, however, the Supreme Court vacated the 10th Circuit decision and remanded so that the 10th Circuit could decide whether qualified immunity should protect the officers in *Aldaba* in light of the opinion issued the same day in *Mullenix*. The 10th Circuit ordered supplemental briefing shortly thereafter and oral argument in May 2016. Seven months later, the three judges on the panel agreed that qualified immunity in fact should protect the officers in *Aldaba*.

CLARIFICATION IN *MULLENIX*

The court in *Mullenix* clarified the qualified immunity test in part by how it chose to describe it, and how it chose not to describe it.[16] It also did so in its application of the test to the facts in *Mullenix*.[17] As to the description of the law, the court did not cite or reference the language used over 10 years ago in the *Hope* case.[18] This would later prove to be important to the 10th Circuit panel in *Aldaba* in the following year.

What the Supreme Court did indicate was that some lower courts have been applying the qualified immunity doctrine too broadly.[19] The Supreme Court clarified that, for qualified immunity to be denied, precedent must "squarely govern" such that it is "beyond debate" that a constitutional violation occurred in the specific context of the case, not in a general or broad sense.[20] In other words, the violation must be so clear in light of existing case law that any reasonable officer would know it and there would be no room for debate on the question.[21]

How the court then applied the test was informative. *Mullenix* involved a suspect fleeing police in a vehicle on a highway in the plains of far west Texas, not far from Amarillo. Leija was speeding between 85 to over 100 mph.[22] He called the dispatcher to say he would fire a gun upon police if they did not stop pursuit.[23] A group of officers some miles away gathered at an overpass called Cemetery Road to try to stop the chase, taking position on the sides and placing spike strips on the highway under the overpass.[24] One officer, Mullenix, intended, however, to use a high powered rifle from the top of the overpass to try to shoot the engine block and disable the vehicle.[25] He was told to stand by and give the spikes an opportunity to work. But Mullenix did not do this and fired multiple times at Leija's vehicle as it arrived, unfortunately striking Leija and not the engine block.[26]

The Supreme Court found that, on these facts, Mullenix was entitled to qualified immunity. The reasons were that he faced circumstances that were unique from anything in the existing case law on use of deadly force or use of a firearm to disable a vehicle. It is true that Mullenix could have waited to see what happened as Leija drove under Cemetery Road overpass. Mullenix could have decided that the best choice was to wait and use the rifle only as a last resort. But the court refrained from second guessing in hindsight. The court considered information that was seemingly important to Mullenix, namely, that Leija had informed the officers he would shoot if they did not stop pursuit. The fact was that an officer in Mullenix's position could reasonably fear that his fellow officers could be shot or struck by a vehicle or other debris. The Supreme Court, focusing on the circumstances and information the officers knew and faced at the time, found that the clearly established law actually revealed a "hazy legal backdrop," without any case denying qualified immunity under the specific circumstances of the case.[27]

The dissent, in hindsight, disagreed with the decision of Mullenix to use his weapon. The dissent also agreed with the prior 5th Circuit holding which had concluded that Mullinex should have waited until after the use of spike strips before attempting a less conventional method. The majority opinion, however, pointed out that this was error, "Ultimately, whatever can be said of the wisdom of Mullenix's choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances 'beyond debate.'"[28]

ALDABA: FOLLOWING THE CLARIFICATION IN *MULLENIX*

Further application of the proper test was demonstrated by the 10th Circuit's revisiting of the qualified immunity issue in a case arising from the Eastern District of Oklahoma, *Aldaba v. Pickens*,[29] after the Supreme Court vacated and remanded. In its December 2016 opinion, the 10th Circuit explained that the deceased, Leija, was at a hospital in Oklahoma being treated for double and severe pneumonia.[30] Although he was cooperative at first, Leija later became aggressive and delusional.[31] He had lost the ability to make informed decisions on his own about his health.[32] He was refusing the necessary treatment and acting in a way that placed the nurses and doctors attending to him in fear of trying to physically subdue him. Thus, they called law enforcement.[33]

Three officers arrived at the scene as Leija was starting to leave his hospital room.[34] The doctor explained to the officers that Leija would die if allowed to leave the facility.[35] The officers tried reasoning with Leija, but to no avail.[36] Leija raised his arms and clenched his fists.[37] He said that the blood coming from his empty IV portal was "his" blood, among other statements.[38] Warnings were given about the use of a Taser but again, to no avail.[39] A Taser shot was fired, but did not work properly.[40] The officers then took Leija's arms, but his strength kept them from keeping his arms behind his back.[41] The Taser was used on his back as the patient was against the wall, still resisting the officers.[42] Medical staff observed. The Taser did not stop him. The officers were then able to bring him to the ground on his stomach.[43] As they struggled to keep his arms behind his back, a medical employee proceeded to give Leija a shot of Haldol and Ativan.[44] Immediately after the shot was administered, Leija lost consciousness and all attempts to resuscitate failed.[45]

Judge Phillips, writing for the 10th Circuit panel and concluding that qualified immunity applied, first reiterated the proper qualified immunity test in light of *Mullenix*.[46] The opinion notes that the Supreme Court in *Mullenix* might be trying to emphasize different parts of its prior opinions.[47] More specifically, the Supreme Court in *Mullenix* seemed to be emphasizing the "beyond debate" and "square-

ly governs" language.[48] Importantly, the Supreme Court in *Mullenix* did not cite the *Hope* decision's "fair warning" language.[49] The 10th Circuit therefore did not use the older sliding scale case law in its opinion. As the Supreme Court did in *Mullenix*, the 10th Circuit focused on what the officers were told by others and the specific circumstances they faced.[50] There was no question that the officers had to stop Leija from leaving, which is clear from Phillips's opinion, and which was in fact found by the district court. Looking at the unique circumstances the officers faced, the 10th Circuit held that the case law was not clearly established such that it was beyond debate that the conduct constituted a violation.[51] The plaintiff had cited two very factually distinct cases involving egregious use of Tasers and force,[52] but neither of the cases showed that what the officers in *Aldaba* did was a clear violation, if a violation at all, as they were acting according to a doctor's urgent request and only used physical force after other efforts failed.[53]

THE TEST MOVING FORWARD

In light of *Mullenix*, it is clear that the Supreme Court requires the "beyond debate" or "squarely governs" language, which more effectively protects the purposes of the qualified immunity doctrine by shielding officers from the fear of personal liability when they only make a mistake in judgment.[54] A sliding scale should not be used, and, importantly, the 10th Circuit declined to do so in *Aldaba*. Therefore, plaintiffs who are trying to defeat qualified immunity in the absence of direct on-point case law will need to show that the conduct is so facially and shockingly egregious in and of itself that it is beyond debate such that every reasonable officer would know that it was a constitutional violation. The result may cause counsel suing governmental officials to spend less effort on futile attempts to convert "hazy legal backdrops" into "clearly established law." Instead, the legal backdrop must squarely govern the circumstances the officers in question faced. If it is a hazy legal backdrop, then it will not be beyond debate, and will not be clearly established.

1. 577 U.S. ___, 136 S. Ct. 305 (2015) (*per curiam*).
2. *See Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009).
3. *Id*.
4. *See Filarsky v. Delia*, 132 S. Ct. 1657 (2012).
5. *Hunter v. Bryant*, 502 U.S. 224, 229, 112 S.Ct 532 (1991).
6. *Murrell v. Sch. Dist. No. 1, Denver, Co*, 186 F.3d 1238, 1251 (10th Cir. 1999).
7. *See Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002).
8. 536 U.S. 730, 739-40 (2002).
9. *Gates v. Collier*, 501 F.2d 1291, 1305 (5th Cir. 1974).
10. *Id*.
11. *Hope*, 536 U.S. at 739-40.
12. *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004).
13. *Id*.
14. *Id*.
15. *Id*. at 1298.
16. *Mullenix v. Luna*, 136 S. Ct. 305, 308-09 (2015).
17. *Id*. at 308-12.
18. *Id*.
19. *Id*. at 308-09.
20. *Id*. at 308-12.
21. *Id*.
22. *Id*. 306-07; 310-12.
23. *Id*. 306-07.
24. *Id*.
25. *Id*. 306-07; 310-12.
26. *Id*.
27. *Id*. at 309-310.
28. *Id*. at 310-311.
29. 844 F.3d 870 (10th Cir. 2016).
30. 844 F.3d at 874-76.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*.
45. *Id*.
46. *Id*. at 876-77.
47. *Id*. at 874, n. 1.
48. *Id*. at 874.
49. *Id*. at 874, n. 1.
50. *Id*. at 876-77.
51. *Id*. at 877-80.
52. *Id*. at 878-80.
53. *Id*.
54. See *Pearson*, 555 U.S. at 231 (discussing purposes of qualified immunity).

ABOUT THE AUTHOR

Clark Crapster is a civil litigation and appellate attorney who practices in both the Oklahoma and federal appellate courts. He argued in the 10th Circuit in the *Aldaba* matter for appellant Pickens and in other matters at the Tenth Circuit as well. He is at Steidley & Neal PLLC. In addition to defending federal and state constitutional related claims, he also works on employment litigation, legal malpractice and catastrophic injury cases.

Do You Know Someone Who Deserves to be Honored?

By Jennifer Castillo

Think about the last time someone paid you a compliment, whether for a professional or personal accomplishment. Remember how good that compliment made you feel? Now imagine the amplified feeling of pride and accomplishment from recognition by your professional organization and peers. You would want to share that feeling with others, right? Of course, you would – especially if doing so only took a moment of your time.

Each year at its Annual Meeting, the Oklahoma Bar Association proudly bestows a series of awards to deserving lawyers and organizations for their significant achievement in leadership, public service and service to the profession. It truly only takes a moment to nominate someone, and it could mean the world to a bar colleague or organization that is making Oklahoma a better place.

The 2012 OBA award I received was a momentous occasion for me. In a very cogent way, the award validated my hard work and dedication to the legal profession and the OBA. It also gave me confidence and incentive to continue those efforts. As chair of the OBA Awards Committee, I have the pleasure of hearing about the wonderful work my colleagues and professional organizations are doing to help promote the rule of law and access to justice in Oklahoma. I can't wait to tell you about them all when the OBA presents this year's awards at Annual Meeting, Nov. 1 - 3 in Tulsa.

However, the Awards Committee is only as good as the nominations we receive. To encourage nominations, the Awards Committee has made the nomination process as streamlined as possible.

I encourage you to take a look at the award categories below and to nominate at least one deserving colleague or professional organization for an award.

AWARDS UP FOR GRABS

Outstanding County Bar Association Award – for meritorious efforts and activities

2016 Winner: Creek County Bar Association and Tulsa County Bar Association

Hicks Epton Law Day Award – for individuals or organizations for noteworthy Law Day activities

2016 Winner: Oklahoma County Bar Association Young Lawyers Division

Golden Gavel Award – for OBA committees and sections performing with a high degree of excellence

2016 Winner: OBA YLD Kick It Forward Committee

Liberty Bell Award – for nonlawyers or lay organizations for promoting or publicizing matters regarding the legal system

2016 Winner: Sgt. Alicia Maurer, Tulsa

Outstanding Young Lawyer Award – for a member of the OBA Young Lawyers Division for service to the profession

2016 Winner: LeAnne McGill, Edmond

Earl Sneed Award – for outstanding continuing legal education contributions

2016 Winners: Philip R. Feist, Tulsa and Miles L. Mitzner, Edmond

Award of Judicial Excellence – for excellence of character, job performance or achievement while a judge and service to the bench, bar and community

2016 Winner: Judge Carlos J. Chappelle (posthumous), Tulsa

Fern Holland Courageous Lawyer Award – to an OBA member who has courageously performed in a manner befitting the highest ideals of our profession

Not awarded in 2016

Outstanding Service to the Public Award – for significant community service by an OBA member or bar-related entity

2016 Winner: Juan Garcia, Clinton

Award for Outstanding Pro Bono Service – by an OBA member or bar-related entity

2016 Winners: OBA Military Assistance Committee

Joe Stamper Distinguished Service Award – to an OBA member for long-term service to the bar association or contributions to the legal profession

2016 Winner: Micheal Salem, Norman

Neil E. Bogan Professionalism Award – to an OBA member practicing 10 years or more who for conduct, honesty, integrity and courtesy best represents the highest standards of the legal profession

2016 Winner: John R. Woodard III, Tulsa

John E. Shipp Award for Ethics – to an OBA member who has truly exemplified the ethics of the legal profession either by 1) acting in accordance with the highest ethical standards in the face of pressure to do otherwise or 2) by serving as a role model for ethics to the other members of the profession

2016 Winner: Gary Derrick, Oklahoma City

Alma Wilson Award – for an OBA member who has made a significant contribution to improving the lives of Oklahoma children

2016 Winner: Brad Davenport, Oklahoma City

Trailblazer Award – to an OBA member or members who by their significant, unique visionary efforts have had a profound impact upon our profession and/or community and in doing so have blazed a trail for others to follow.

2016 Winner: Stanley L. Evans, Oklahoma City

- Anyone can submit an award nomination, and anyone nominated can win.
- The deadline is Friday, July 28, but get your nomination in EARLY!
- Nominations can be as short as a one-page letter, but the entire nomination cannot exceed five single-sided, 8 1/2" x 11" pages (including exhibits and support letters).
- Make sure the name of the person being nominated and the person (or organization) making the nomination is on the nomination.
- If you think someone qualifies for awards in several categories, pick one award and only do one nomination. The OBA Awards Committee may consider the nominee for an award in a category other than one in which you nominate that person.
- You can mail, fax or email your nomination (pick one). Email awards@okbar.org (you will receive a confirmation reply); fax: 405-416-7089; mail: OBA Awards Committee, P.O. Box 53036, Oklahoma City, OK 73152.
- Visit www.okbar.org/news/Recent/2017/OBA Awards for the nomination form if you want to use one (not required), history of previous winners and tips for writing nominations.

ABOUT THE AUTHOR

Jennifer Castillo is an attorney with OG&E in Oklahoma City. She serves as Awards Committee chairperson and OBA vice president.

INDIVIDUALS FOR WHOM AWARDS ARE NAMED

NEIL E. BOGAN — Neil Bogan, an attorney from Tulsa, died unexpectedly on May 5, 1990, while serving his term as president of the Oklahoma Bar Association. Mr. Bogan was known for his professional, courteous treatment of everyone he came into contact with and was also considered to uphold high standards of honesty and integrity in the legal profession. The OBA's Professionalism Award is named for him as a permanent reminder of the example he set.

HICKS EPTON — While working as a country lawyer in Wewoka, attorney Hicks Epton decided that lawyers should go out and educate the public about the law in general, and the rights and liberties provided under the law to American citizens. Through the efforts of Mr. Epton, who served as OBA president in 1953, and other bar members, the roots of Law Day were established. In 1961, the first of May became an annual special day of celebration nationwide designated by a joint resolution of Congress. The OBA's Law Day Award recognizing outstanding Law Day activities is named in his honor.

FERN HOLLAND — Fern Holland's life was cut tragically short after just 33 years, but this young Tulsa attorney made an impact that will be remembered for years to come. Ms. Holland left private law practice to work as a human rights activist and to help bring democracy to Iraq. In 2004 she was working closely with Iraqi women on women's issues when her vehicle was ambushed by Iraqi gunmen, and she was killed. The Courageous Lawyer Award is named as a tribute to her.

MAURICE MERRILL — Dr. Maurice Merrill served as a professor at the University of Oklahoma College of Law from 1936 until his retirement in 1968. He was held in high regard by his colleagues, his former students and the bar for his nationally distinguished work as a writer, scholar and teacher. Many words have been used to describe Dr. Merrill over the years, including brilliant, wise, talented and dedicated. Named in his honor is the Golden Quill Award that is given to the author of the best written article published in the *Oklahoma Bar Journal*. The recipient is selected by the OBA Board of Editors.

JOHN E. SHIPP — John E. Shipp, an attorney from Idabel, served as 1985 OBA president and became the executive director of the association in 1998. Unfortunately his tenure was cut short when his life was tragically taken that year in a plane crash. Mr. Shipp was known for his integrity, professionalism and high ethical standards. He had served two terms on the OBA Professional Responsibility Commission, serving as chairman for one year, and served two years on the Professional Responsibility Tribunal, serving as chief-master. The OBA's Award for Ethics bears his name.

EARL SNEED — Earl Sneed served the University of Oklahoma College of Law as a distinguished teacher and dean. Mr. Sneed came to OU as a faculty member in 1945 and was praised for his enthusiastic teaching ability. When Mr. Sneed was appointed in 1950 to lead the law school as dean, he was just 37 years old and one of the youngest deans in the nation. After his retirement from academia in 1965, he played a major role in fundraising efforts for the law center. The OBA's Continuing Legal Education Award is named in his honor.

JOE STAMPER — Joe Stamper of Antlers retired in 2003 after 68 years of practicing law. He is credited with being a personal motivating force behind the creation of OUJI and the Oklahoma Civil Uniform Jury Instructions Committee. Mr. Stamper was also instrumental in creating the position of OBA general counsel to handle attorney discipline. He served on both the ABA and OBA Board of Governors and represented Oklahoma at the ABA House of Delegates for 17 years. His eloquent remarks were legendary, and he is credited with giving Oklahoma a voice and a face at the national level. The OBA's Distinguished Service Award is named to honor him.

ALMA WILSON — Alma Wilson was the first woman to be appointed as a justice to the Supreme Court of Oklahoma in 1982 and became its first female chief justice in 1995. She first practiced law in Pauls Valley, where she grew up. Her first judicial appointment was as special judge sitting in Garvin and McClain Counties, later district judge for Cleveland County and served for six years on the Court of Tax Review. She was known for her contributions to the educational needs of juveniles and children at risk, and she was a leader in proposing an alternative school project in Oklahoma City, which is now named the Alma Wilson SeeWorth Academy. The OBA's Alma Wilson Award honors a bar member who has made a significant contribution to improving the lives of Oklahoma children.

Diversity Awards: Nominations Due July 14

The Diversity Committee is now accepting nominations for the Ada Lois Sipuel Fisher Diversity Awards to be presented on Oct. 19. The award categories are: members of the judiciary, licensed attorneys and groups and entities that have championed the cause of diversity. All nominations must be received by Friday, July 14.

Ada Lois Sipuel Fisher
Photo credit: OU College of Law

Information regarding the selection criteria and nomination process may be also accessed at www.okbar.org. For additional information, please contact OBA Diversity Committee Chair Tiece Dempsey at 405-609-5406.

NOMINATIONS

- Include name, address and contact number of the nominee.
- Describe the nominee's contributions and accomplishments in the area of diversity.
- Identify the diversity award category (business/group/organization, licensed attorney or judiciary) in which the nominee is being nominated.
- The submission deadline is July 14.
- Nominations should not exceed five pages in length.
- Submit nominations to diversityawards@okbar.org.

SELECTION CRITERIA AND NOMINATION PROCESS

One or more diversity awards will be given to a business, group or organization that has an office in the state of Oklahoma and has met one or more of the following criteria:

- Developed and implemented an effective equal opportunity program as demonstrated by the organization's commitment to the recruitment, retention and promotion of individuals of underrepresented populations regardless of race, ethnic origin, gender, religion, age, sexual orientation, disability or any other prohibited basis of discrimination
- Promoted diversity initiatives that establish and foster a more inclusive and equitable work environment
- Demonstrated continued corporate responsibility by devoting resources for the improvement of the community at large
- Exhibited insightful leadership to confront and resolve inequities through strategic decision-making, allocation of resources and establishment of priorities

Two more diversity awards will be given to licensed attorneys and an additional award will be given to a member of the Oklahoma judiciary who has met one or more of the following criteria:

- Demonstrated dedication to raising issues of diversity and protecting civil and human rights
- Led the development of innovative or contemporary measures to fight discrimination and the effects
- Fostered positive communication and actively promoted inter-group relations among populations of different backgrounds
- Participated in a variety of corporate and community events that promoted mutual respect, acceptance, cooperation or tolerance and contributed to diversity awareness in the community and workplace
- Reached out to a diverse array of attorneys to understand firsthand the experiences of someone from a different background

OBA Leadership Academy 2017-2018

The Search for Future Bar Leaders is Underway

By Linda S. Thomas

I am proud to announce the Oklahoma Bar Association will host its sixth OBA Leadership Academy, one of the association's premier programs designed for Oklahoma lawyers who want to learn more about bar leadership and may be at a point where bar leadership is a way they can give back to our association. The academy focuses its programming in areas that prepare participants to serve our profession, our bar and our citizens in a variety of leadership roles. It is the perfect forum to promote the goal of recognizing and celebrating lawyers who volunteer, serve and give of themselves.

In 2007, at the direction of then OBA President Stephen Beam, the OBA hosted a two-day Leadership Conference, and from that event the Leadership Academy was born. Since then, five leadership classes have graduated from the academy – 2008-09, 2009-10, 2011-12, 2013-14 and 2015-16. The Leadership Academy fosters the development of tomorrow's bar leaders, and many of today's bar leaders are graduates of the academy.

The next Leadership Academy will begin in September 2017 and run through April 2018. There will be four training sessions throughout the year with the graduation ceremony taking place in April. After review of all applications, up to 25 qualified candidates will be chosen by a selection committee for academy membership.

Participants will learn core principles of effective leadership, together with the importance of servant leadership and will leave the academy with better communication skills, a more in-depth knowledge of the inner workings of the OBA and the services offered and a sincere motivation to succeed, not only in their legal career, but also in service to professional, political, judicial, civic and community organizations. To review the programming offered, look for agendas at www.okbar.org/members/Leadership.

WHO CAN APPLY?

Any Oklahoma lawyer in good standing with the OBA may apply. We are looking for a diverse group of lawyers who have a sincere interest in leadership and invite ALL interested OBA members to apply.

WHAT IS MY COST?

There is a $40 nonrefundable application fee, and you are responsible for your own travel expenses. The OBA picks up the costs for all programming, food and, for participants living more than 60 miles away, hotel accommodations.

WHEN IS THE DEADLINE TO APPLY?

You must submit your application by July 1.

WHERE?

The sessions will take place in Oklahoma City with the exception of the November session that will take place in Tulsa during the 2017 OBA Annual Meeting, Nov. 1-3.

WHY SHOULD I PARTICIPATE?

The personal and professional benefit you will derive through this unique experience will be immeasurable. You will meet and interact with bar leaders and some of the most accomplished legal and community leaders. You will also be exposed to the legislative and judicial systems; you will interact with high-level state and local officials and judges and meet many attorneys from the private and public sectors.

HOW DO I APPLY?

For more information and for a copy of the application, go to www.okbar.org/members/Leadership. Questions? Call or email OBA Educational Programs Director Susan Damron at 405-416-7028, SusanD@okbar.org.

Bills Passed Could Affect Your Law Practice

By Angela Ailles Bahm

Sine die, or the last day of the legislative session, is May 26. However, be aware that our legislative session runs two years; legislation filed this year is subject to resurrection next year. As of the writing of this article, bills included in the April report are no longer viable, with the exception of SB 213. It changes the judicial districts of the Supreme Court to conform to the current five congressional districts and makes four of them "at-large" positions. To provide for representation of the more "rural" counties, two of the at-large justices would be selected from counties with populations less than 75,000.

> **"Again, I urge all county bar associations to have a representative on the Legislative Monitoring Committee."**

Another bill that has a strong likelihood of passing and being signed by the governor is HB 1823. The bill modifies the composition of judicial districts 24 and 26, effective Jan. 14, 2019. This bill was reported on during the OBA Day at the Capitol meeting. This is an initial step to reallocate judicial resources where needed.

BILLS SIGNED BY THE GOVERNOR

A few bills that have been signed by the governor and might affect your practice include the following:

HB 1127 Relates to the definition of sexual assault; directing courts to instruct the jury on the definition of consent.

HB 1243 Relates to investment of money belonging to the estates of minors and incapacitated persons.

HB 1429 Relates to the commencement of an action based on a website accessibility claim.

HB 1466 Relates to the Protection from Domestic Abuse Act authorizing transfer of cell phone numbers under certain circumstances.

HB 1468 Modifies the time limitation for prosecuting criminal offenses for sexual crimes against children.

HB 1825 Relates to the Deployed Parents Custody and Visitation Act; modifies definitions.

HB 1894 Modifies the definition of a person legally authorized to make healthcare decisions within the Nondiscrimination in Treatment Act.

HB 2247 Relates to guardians and allows for the initiation of guardianship proceedings for an incapacitated minor approaching adulthood.

HB 2275 Relates to designation of the record in appeals to the Supreme Court.

HB 2314 Relates to liens for service on personal property and changes the time allowed for resubmission of title application.

SB 34 Prohibits lack of knowledge of the age of a victim as a defense to human trafficking of a minor.

SB 50 Modifies the duties of guardians *ad litem* and their written reports.

SB 64 Relates to affidavits of heirship and increases the amount allowable of certain transfers by banks or credit unions to $50,000.

SB 322 Relates to Indian child custody proceedings and modifies certain notice provisions.

SB 425 Creates new law allowing a cause of action by a public or private institution of higher education to pursue a third party who engages or conspires to engage in certain conduct.

SB 645 Modifies the civil penalties relating to the Medicaid False Claims Act.

Again, I urge all county bar associations to have a representative on the Legislative Monitoring Committee. Your representatives and senators need the benefit of your insight into the laws they are passing. Look for the "Join a Committee" link at the bottom of www.okbar.org.

HOW TO GET REAL-TIME INFO

Another way to get real-time information is to subscribe to the updates and news releases. For example, on the Senate homepage at www.oksenate.gov, right there with President Pro Tempore, Sen. Mike Schulz (hint … Jackson County), there is a button "Click to Subscribe." Click on it to input how you want to get the information and input your email address or phone number. Click submit and then it takes you to another page of "Featured Government Updates." It's a whole host of government offices from which you can get news releases, including the governor's office, the AG, DOC, DHS, the list goes on *and* the House of Representatives. Subscribe today!

As always, please let me know if you have any questions or suggestions on how the Legislative Monitoring Committee can improve and better serve the bar.

ABOUT THE AUTHOR

Ms. Ailles Bahm is the managing attorney of State Farm's in-house office and also serves as the Legislative Monitoring Committee chairperson. She can be contacted at angela.ailles-bahm.ga23@statefarm.com.

FROM THE PRESIDENT

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Fortunately, as a result of this shameful event, meaningful judicial reform took place, and the JNC was created when the OBA House of Delegates approved and endorsed it in principle. Oklahoma voters overwhelmingly approved to amend the Oklahoma Constitution to make the JNC selection process the law of our state. The obvious goal was to take party politics and potential corruption out of the judicial selection process as much as possible, and through the JNC, this goal was accomplished.

OBA TO CELEBRATE JNC'S 50TH ANNIVERSARY

In 2016, the OBA House of Delegates unanimously adopted a resolution reaffirming the OBA's commitment to the merit selection of judges utilizing the JNC and celebrating judicial reform in Oklahoma. So as we celebrate the JNC's 50th anniversary, I am saddened by the recent loss of the principal Senate author of the 1967 court reform bills, OBA Past President Anthony M. "Tony" Massad. Without fair and impartial courts, the words of the 14th Amendment no matter how eloquent or intellectual would ring hollow.

Likewise, absent a remarkable process to ensure that our courts are open, fair and staffed by capable judges, the dream of the 14th Amendment would never be achieved. The greatest achievements attached to the 14th Amendment are those associated with great lawyers like Tony who, from the statehouse to the courthouse, ensured the hard work to maintain our Constitution has been repeatedly performed.

THANKS TO EVERYONE WHO HELPED US CELEBRATE ANOTHER SUCCESSFUL LAW DAY!

Ask A Lawyer hotline

Law Day Contest winner ceremony

A SPECIAL THANK YOU TO THOSE WHO PARTNERED WITH THE OBA LAW DAY COMMITTEE TO SUPPORT LAW DAY PROJECTS.

Chief Justice Douglas Combs

OBA President Linda Thomas

3000 Insurance Group

BlackFin IRS Solutions

Linda Herndon, massage therapist

Law Office of Bryce P. Harp

LawPay

Law-related Education Committee

Lawyers Helping Lawyers Assistance Program

LexisNexis

McIntyre Law

OETA

Oklahoma County Bar Association Auxiliary

Oklahoma County Bar Association Young Lawyers Division

The Oklahoman

Astrud Ray-Kubier, massage therapist

Kim Reber, massage therapist

Roderick H. Polston, PC

Soup Soup Carry Out & Catering

Stigler Printing

Tulsa County Bar Association

Volunteers statewide

THE SOVEREIGNTY SYMPOSIUM XXX
RESTORATION

JUNE 7 – 8, 2017
SKIRVIN HOTEL ♦ OKLAHOMA CITY, OKLAHOMA

PRESENTED BY
THE OKLAHOMA SUPREME COURT
AND
THE SOVEREIGNTY SYMPOSIUM, INC.

16 hours of CLE credit for lawyers will be awarded, including 1.5 hours of ethics.
NOTE: Please be aware that each state has its own rules and regulations, including the definition of "CLE"; therefore, certain portions of the program may not receive credit in some states.

The Sovereignty Symposium was established to provide a forum in which ideas concerning common legal issues could be exchanged in a scholarly, non-adversarial environment. The Supreme Court espouses no view on any of the issues, and the positions taken by the participants are not endorsed by the Supreme Court.

THE SOVEREIGNTY SYMPOSIUM AGENDA

Wednesday, June 7, 2017
a.m. 4 CLE credits / 0 ethics included
p.m. 4 CLE credits / 0 ethics included
7:30 – 4:30 Registration Honors Lounge
8:00 – 8:30 Complimentary Continental Breakfast
10:30 – 10:45 Morning Coffee / Tea Break
12:00 – 1:15 Lunch on your own
2:45 – 3:00 Afternoon Coffee / Tea Break

8:30 – 12:00 PANEL A: ECONOMIC DEVELOPMENT
(THIS PANEL CONTINUES FROM 3:30 – 6:00)
CRYSTAL ROOM
MODERATOR: JAMES C. COLLARD, Director of Planning and Economic Development, Citizen Potawatomi Nation
SARA WILSHAW, Consul General of Canada, Dallas, Texas
KEN MILLER, Oklahoma State Treasurer
CHRIS BENGE, *(Cherokee)*, Chief of Staff to Governor Mary Fallin, Oklahoma Secretary of Native American Affairs
WAYNE GARNONS-WILLIAMS, Senior Lawyer, Principal Director, Garwill Law, Canada, Chair, International Intertribal Trade and Investment Organization
BILL G. LANCE, JR., Secretary of Commerce, Chickasaw Nation
DAVID NIMMO, Chief Executive Officer/President, Chickasaw Nation Industries
CORNELL WESLEY, Economic Development Representative, U.S. Department of Commerce

8:30 – 12:00 PANEL B: SIGNS, SYMBOLS AND SOUNDS
(THIS PANEL CONTINUES FROM 3:30 – 6:00)
MODERATOR: WINSTON SCAMBLER, Student of Native American Art
KELLY HANEY, *(Seminole)*, Artist, Former Oklahoma State Senator, Former Chief of the Seminole Nation
ERIC TIPPECONNIC, *(Comanche)*, Historian, Artist, and Professor, California State University, Fullerton
JASON MURRAY, *(Chickasaw)*, Independent Scholar & Professor, Formerly of the University of South Dakota
POTEET VICTORY, *(Cherokee/Choctaw)*, Artist
BRENT GREENWOOD, *(Ponca/Chickasaw)*, Artist and Musician
JOSHUA HINSON, Chickasaw Language Revitalization Program
GORDEN YELLOWMAN, *(Cheyenne)*, Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes

8:30 – 12:00 PANEL C: LAND, WIND AND WATER
(THIS PANEL CONTINUES FROM 3:30 – 6:00)
MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court
GARY BATTON, *(Choctaw)*, Chief, Choctaw Nation of Oklahoma
STEPHEN H. GREETHAM, Chief General Counsel, Department of Commerce and Special Counsel on Water, Chickasaw Nation
GLEN COFFEE, Special Counsel to Governor Mary Fallin, Glen Coffee & Associates, Oklahoma City
TAI HELTON, Professor, University of Oklahoma College of Law
MATTHEW FLETCHER, Professor of Law, Michigan State University
MICHAEL BURRAGE, Whitten Burrage Law Firm
SARAH HILL, Senior Assistant Attorney General, Cherokee Nation
LAUREN KING, *(Muscogee (Creek))*, Foster Pepper PLLC, Appellate Judge – Northwest Intertribal Court System

8:30 – 12:00 PANEL D: TRUTH AND RECONCILIATION: GENERATIONAL/HISTORICAL TRAUMA AND HEALING
MODERATOR: NOMA GURICH, Vice Chief Justice, Oklahoma Supreme Court
BRADFORD MORSE, Dean of Law, Faculty of Law, Thompson Rivers University
ROBERT JOSEPH, Director of the Maori & Indigenous Governance Center, New Zealand
ROGER RANDLE, Professor, University of Oklahoma, Department of Human Relations
KEITH M. HARPER, *(Cherokee)*, Kilpatrick Townsend, Former United States Ambassador to the United Nations Human Rights Council

LINDSAY ROBERTSON, Faculty Director, Center for the Study of American Indian Law and Policy, Chickasaw Nation Endowed Chair in Native American Law, Professor, University of Oklahoma College of Law
ROBERT E. HAYES, JR., Methodist Bishop of Oklahoma (Retired)
GARVIN ISAACS, Immediate Past President, Oklahoma Bar Association
HOMER FLUTE, Sand Creek Massacre Descendent/Litigant
DG Smalling, *(Choctaw)*, Artist and Activist

1:15 – 2:00 OPENING CEREMONY AND KEYNOTE ADDRESS
MASTER OF CEREMONIES: STEVEN W. TAYLOR, Justice, Oklahoma Supreme Court (Retired)
PRESENTATION OF FLAGS
HONOR GUARDS: Kiowa Black Leggings Society
SINGERS: Southern Nation
CAMP CALL: GORDON YELLOWMAN, *(Cheyenne)*, Peace Chief, Cheyenne and Arapaho Tribes
INVOCATION: ROBERT E. HAYES, JR., Methodist Bishop of Oklahoma (Retired)
WELCOME: LINDA S. THOMAS, President, Oklahoma Bar Association
WELCOME: DOUGLAS COMBS, Chief Justice, Oklahoma Supreme Court
PRESENTATION OF AWARDS, YVONNE KAUGER, Justice, Oklahoma Supreme Court
HONOR AND MEMORIAL SONGS: SOUTHERN NATION
CLOSING PRAYER: KRIS LADUSAU, Reverend, Dharma Center of Oklahoma

2:00 – 6:00 ROUNDTABLE DISCUSSION WITH FORMER ASSISTANT SECRETARIES OF THE INTERIOR FOR INDIAN AFFAIRS
MODERATOR: JOHN REIF, Justice, Oklahoma Supreme Court
THOMAS W. FREDERICKS, FredEricks, Peebles and Morgan, LLP
ADA E. DEER, Former Assistant Secretary of the Interior for Indian Affairs
NEAL MCCALEB, Chickasaw Ambassador to the United States
CARL ARTMAN, Professor, Arizona State University, College of Law and Director of Tribal Economic Development
LARRY ECHO HAWK, Assistant Executive Director, Correlation Department, The Church of Jesus Christ of Latter-Day Saints

3:15 – 6:00 PANEL A: ECONOMIC DEVELOPMENT (A CONTINUATION OF THE MORNING PANEL) CRYSTAL ROOM
MODERATOR: JAMES C. COLLARD, Director of Planning & Economic Development, Citizen Potawatomi Nation
LYNN KNIGHT, Vice-President of Knowledge Management, International Economic Development Counsel
PHIL BUSEY, SR., *(Cherokee/Delaware Tribe of Oklahoma)* Delaware Resource Group
DEREK OSBORN, Legislative Assistant to Senator James Lankford
ROBERT ANDREW, United States Department Diplomat in Residence, University of Oklahoma
GAVIN CLARKSON, Associate Professor, College of Business, New Mexico State University
SHANE JETT, Executive Director/CEO, Citizen Potawatomi Development Corporation
MELOYDE BLANCETT, Oklahoma House of Representatives, District 78

3:15 – 6:00 PANEL B: SIGNS, SYMBOLS AND SOUNDS
MODERATOR: WINSTON SCAMBLER, Student of Native American Art
JEROD IMPICHCHAACHAAHA TATE, *(Chickasaw)*, Composer
NEIL CHAPMAN, Photographer, Former Mt. San Antonio College Photography Department Co-Chair and Professor of Photography
HARVEY PRATT, *(Cheyenne)*, Peace Chief, Artist/Forensic Artist
STU OSTLER, Oklahoma State Capitol Photographer
LES BERRYHILL, *(Yuchi/Muscogee)*, Artist
KENNETH JOHNSON, *(Muscogee/Seminole)*, Contemporary Jewelry Designer and Metalsmith

3:15 – 6:00 PANEL C: LAND, WIND AND WATER
MODERATOR: PATRICK WYRICK, Justice, Oklahoma Supreme Court
JULIE CUNNINGHAM, Executive Director, Oklahoma Water Resources Board
MARIA O'BRIEN, Modrall Sperling
CLAY CHRISTENSEN, Christensen Law Group
KEN BELLMARD, *(Kaw)*, Attorney
CHRISTOPHER A. TYTANIC, General Counsel of M3, Adjunct Professor OU College of Law
DAVID WALTERS, President, Walters Power International

3:15 – 6:00 PANEL D: CRIMINAL LAW
MODERATOR: ARVO MIKKANEN, *(Kiowa/Comanche)*, Assistant United States Attorney for the Western District of Oklahoma
MARY CULLEY, Tribal Government Relations Specialist, United States Department of Veteran's Affairs
WILSON PIPESTEM, Pipestem Law
MARY KATHRYN NAGEL, Pipestem Law

6:30 PERFORMANCE BY JEROD IMPICHCHAACHAAHA TATE, *(Chickasaw)*, Composer
OKLAHOMA JUDICIAL CENTER – 2100 North Lincoln Boulevard

7:00 RECEPTION
OKLAHOMA JUDICIAL CENTER – 2100 North Lincoln Boulevard

Thursday, June 8, 2017
a.m. 4 CLE credits / 1 ethics included
p.m. 4 CLE credits / 0 ethics included

8:30 – 12:00 PANEL A: JUVENILE LAW AND CHILDREN'S ISSUES
MODERATOR: DEBORAH BARNES, Judge, Oklahoma Court of Civil Appeals
C. STEVEN HAGER, Director of Litigation, Oklahoma Indian Legal Services
BRIAN HENDRIX, Deputy Assistant for Native American Affairs, Oklahoma Secretary of State
MARK MOORE, Associate District Judge, Blaine County, Oklahoma
ELIZABETH BROWN, *(Cherokee)*, Associate District Judge, Adair County, Oklahoma
DEBORAH SHROPSHIRE, M.D., Deputy Director of Child Welfare Community Partnerships
CARMIN TECUMSEH-WILLIAMS, *(Muscogee (Creek) Nation)*, Tribal Affairs Liaison for Oklahoma Department of Human Services
PHIL LUJAN, Judge of the Seminole and Citizen Potawatomi Nations
LOU STRETCH, Cherokee Nation Children, Youth and Family Services, Oklahoma Indian Child Welfare Association
GLORIA VALENCIA-WEBER, Emeritus Professor, University of New Mexico School of Law, Board Member, Legal Services Corporation

8:30 – 12:00 PANEL B: WORKERS' COMPENSATION
MODERATOR: NOMA GURICH, Vice Chief Justice, Oklahoma Supreme Court
ROBERT GILLILAND, Chair, Oklahoma Worker's Compensation Commission

BOB BURKE, Attorney, Author, Historian
WADE CHRISTENSEN, Attorney
JAY JONES, Attorney

8:30 – 12:00 PANEL C: EDUCATION (continues from 1:30 – 5:30 p.m.)
MODERATOR: JOHN HARGRAVE, Immediate Past President, East Central University
DWIGHT PICKERING, Director, American Indian Education for Oklahoma
QUINTON ROMAN NOSE, *(Cheyenne)*, Executive Director, Tribal Education Department National Assembly
DAVID HOLT, *(Osage)*, Oklahoma State Senate
GORDON YELLOWMAN, *(Cheyenne)*, Peace Chief, Assistant Executive Director of Education, Cheyenne and Arapaho Tribes
MELODY MCCOY, Native American Rights Fund

8:30 – 9:30 PANEL D: ETHICS ADDRESS
JOHN REIF, Justice, Oklahoma Supreme Court

12:00 – 1:30 LUNCH FOR THE STATE, FEDERAL, TRIBAL JUDICIARY AND THE SOVEREIGNTY SYMPOSIUM FACULTY

1:30 – 5:30 PANEL A: THE CONCERNS OF THE JUDICIARY – A FOCUS ON MUTUAL CONCERNS OF THE STATE, FEDERAL, AND TRIBAL BENCH
MODERATOR: TOM WALKER, *(Wyandotte/Cherokee)*, Appellate Magistrate for the CFR Court for the Southern Plains Region of Tribes, District Judge (Retired), Brigadier General (Retired), Army of the United States
TRICIA TINGLE, *(Choctaw)*, Associate Director – Tribal Justice, Office of Justice Services, Bureau of Indian Affairs
LEAH HARJO-WARE, Justice, Muscogee Nation Supreme Court
JARI ASKINS, Administrative Director of the Courts, Former Lt. Governor of Oklahoma, Former District Court Judge
LAUREN KING, *(Muscogee (Creek))*, Foster Pepper PLLC, Appellate Judge – Northwest Intertribal Court System
WILLIAM P. BOWDEN, Major General (Retired), United States Air Force

1:30 – 5:30 PANEL B: JUVENILE LAW
MODERATOR: DEBORAH BARNES, Judge, Oklahoma Court of Civil Appeals
STEVEN BUCK, Executive Director, Oklahoma Office of Juvenile Affairs
FELICE HAMILTON, CIP Program Coordinator, Administrative Office of the Courts
ROBERT DON GIFFORD, *(Cherokee),* Gungoll, Jackson, Box & Devoll, Chief Judge, Kaw Nation
JAKE ROBERTS, Behavorial Health Director, White Eagle Health Center
SHELDON SPOTTED ELK, Director, Casey Family Programs

1:30 – 6:00 PANEL C: GAMING
CO-MODERATORS:
MATTHEW MORGAN, *(Chickasaw)*, Director of Gaming Affairs, Division of Commerce, Chickasaw Nation
NANCY GREEN, *(Choctaw)*, Green Law Firm, Ada, Oklahoma
ERNIE STEVENS, Jr. *(Oneida)*, Chairman, National Indian Gaming Association
JONODEV CHAUDHURI, *(Muscogee (Creek))*, Chairman, National Indian Gaming Commission
KATHRYN ISOM-CLAUSE, *(Taos Pueblo)* Vice Chair, National Indian Gaming Commission
E. SEQUOYAH SIMERMEYER, *(Coharie)*, Associate Commissioner, National Indian Gaming Commission
ELIZABETH HOMER, *(Osage)*, Homer Law Chartered
MICHAEL HOENIG, General Counsel, National Indian Gaming Commission
DANIEL LITTLE, Vice-President of Government Relations, Aristocrat Technologies Inc.
KYLE DEAN, Assistant Professor of Economics, Director, Center for Native American and Urban Studies, Oklahoma City University, Meinders School of Business
SHEILA MORAGO, *(Gila River Indian Community)*, Executive Director, Oklahoma Indian Gaming Association
G. DEAN LUTHEY JR., GableGotwals
MICHAEL MCBRIDE III, Crowe and Dunlevy
WILLIAM NORMAN, *(Muscogee (Creek))* Hobbs, Strauss, Dean & Walker

1:30 – 5:30 PANEL D: EDUCATION
MODERATOR: JOHN HARGRAVE, Immediate Past President, East Central University
DAN LITTLE, Chairman, Board of Trustees, Oklahoma School of Science and Mathematics
FRANK Y.H. WANG, President, Oklahoma School of Science and Mathematics
JABBAR BENNETT, Associate Provost for Diversity and Inclusion, Northwestern University
LEAH LYON, Director of Sponsored Programs, East Central University
PHILIP GOVER, Managing Director, Sovereign Schools Project, TEDNA
ALEX RED CORN, Special Coordinator for Indigenous Partnerships, College of Education, Kansas State University
PATRICK B. MCGUIGAN, Editor, *CapitolBeatOK*, Senior Editor, *The City Sentinel*

The Sovereignty Symposium has been approved for 16 hours of judicial education credits, as well as 12 hours of credits for judges with juvenile dockets.

NOTICE

State, tribal and federal judge training will be June 5 - 6, 8:30 a.m. - 5:00 p.m. daily, at Remington Park. Topics covered include implicit bias, Indian child welfare, violence against women, drug courts and criminal/full faith and credit of court orders. For information contact Connie Dearman at 918-758-1439.

Lunch for state, federal and tribal judges and a Judiciary Mutual Concerns Panel will be held Thursday, June 8, noon - 5:30 p.m. at the Skirvin Hotel.

RESTORATION

THE SOVEREIGNTY SYMPOSIUM XXX

JUNE 7 - 8, 2017

SKIRVIN HOTEL ◆ OKLAHOMA CITY, OKLAHOMA

Name: _____ Occupation: _____

Address: _____ City: _____ State ____ Zip code _____

Billing Address
(if different from above) _____ City: _____ State ____ Zip code _____

Nametag should read: _____ Other: _____

Email address: _____

Telephone: office _____ Cell _____ Fax _____

Tribal affiliation if applicable: _____

If Bar Association Member: Bar # _____ State _____

16 hours of CLE credit for lawyers will be awarded, including 1.5 hours of ethics.

# of Persons		Registration Fee	Amount Enclosed
	$275.00	($300.00 if postmarked after May 22, 2017)	
	$175.00	June 8, 2017 only ($200.00 if postmarked after May 22, 2017)	
		Total Amount	

We ask that you register online at **www.thesovereigntysymposium.com**. This site also provides hotel registration information and a detailed agenda. For hotel registration please contact the Skirvin-Hilton Hotel at 1-405-272-3040. If you wish to register by paper, please mail this form to:

THE SOVEREIGNTY SYMPOSIUM, INC.
The Oklahoma Judicial Center, Suite 1
2100 North Lincoln Boulevard
Oklahoma City, Oklahoma 73105-4914

www.thesovereigntysymposium.com

Presented By

THE OKLAHOMA SUPREME COURT
and THE SOVEREIGNTY SYMPOSIUM

New Lawyers Take Oath

Board of Bar Examiners Chairperson Bryan Morris announces that 109 applicants who took the Oklahoma Bar Examination on Feb. 21-22 were admitted to the Oklahoma Bar Association on Tuesday, April 18, or by proxy at a later date. Oklahoma Supreme Court Chief Justice Douglas Combs administered the Oath of Attorney to the candidates at a swearing-in ceremony at the Oklahoma Judicial Center. A total of 142 applicants took the examination.

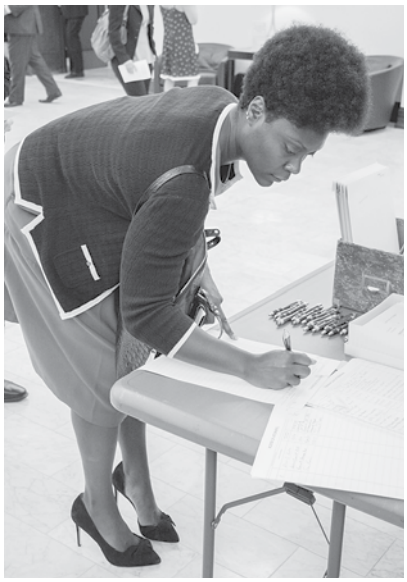
Other members of the Oklahoma Board of Bar Examiners are Vice Chairperson Roger Rinehart, El Reno; Robert Black, Oklahoma City; Monte Brown, McAlester; Juan Garcia, Clinton; Tommy R. Dyer Jr., Jay; Robert D. Long, Ardmore; Loretta F. Radford, Tulsa; and Thomas M. Wright, Muskogee.

The new admittees are:

Shar Fitzpatrick Agosto
Lisa Marie Bazzano Loader
Elliot Steven Beckelman
Larry Don Biddulph
Carl Austin Birkhead
Stephanie Nicole Black
Eli Coleman Bland
Brady Matthew Brus
Ruth Natalie Calvillo
Harmonniey Sha'Dale Cheadle
Antonio Bryan Church
Kaitlin Elizabeth Clarke
Neil Barrett Cooley
Brent Wayne Corley
Kasey Ragsdale Curry
Jordan Kae Dalgleish
Josh Francis Desmond
Sarah Elizabeth Dill
Jesus Dario Elizondo
Marianela Estrella Schwabe
Jennifer Dawn Ferguson
Daniel Joseph Fineberg
Karl Thomas Fisher
Nicholas James Foster
Jennifer Anne Franks
Stephanie Kay Fryar
Jarrod Hunter Gamble
Alexis Morgan Gardner
Brandon Ryan Gassaway
Nikki LaShawn Godwin
Bethany Sue Green
Jeremiah Brooks Gregory
Nathalie Solange Guerrero
Nicholas Lee Harness
Madelaine Ann Tack Hawkins
Qhaurium Keane Imagie Douglas
Catherine Rose Iwashita
Patrice Amber James
Nicole Elizabeth Johnson
Ryan Andrew Jones
Yvonne Denise Jones
Benjamin Edward Jury

A new lawyer stands as his name is called at the OU College of Law swearing-in ceremony.

Leslie Meltzner Hellman
Bryon Davis Helm
Shelby Yancy Hembree
Jessalyn Mae Hinson
Elise McKenna Horne
Nathaniel Passmore Howland
Evan McQuaid Humphreys
Zachary Mark Keen
Eric Svend Kroier
Donovan Joel Kurtz
Joseph William Lang
Jennifer Lynn Lawmaster
Alison Bailiff Levine
William Kevin Lewis



A new attorney signs the Roster of Attorneys at the TU College of Law and out-of-state schools swearing-in reception.

Kaitlin Brooke Magee
Gabrielle Elyse Mandeville
Samantha J. Marchand
Amber Lynne Masters
Christina Leigh McCarthy
Telana Victoria McCullough
John Sheldon McMican
Shana Nicole McMillan
Kristen Marie Messina
Zachary Riley Morgan
Courtney Morgan Najera
Roger Nayar
Patrick Carter Nichols
Abigail Michelle Patten
Kelsey Rae Payton
Jason Eric Pedraza
Kayla Rae Petsch
Kyle Reed Prince
Alia Denise Ramirez
Thomas Sullivan Reese
Michelle Junko Reith
Tiuanna Star Richards
Kimberly Renee Roy
Blake Andrew Sawyer
Thomas Raymond Schneider
Gessica Danielle Sewell
Caroline Marie Shaffer
Bayleigh Susannah Sharp
Jimmie Floyd Shelton
Chelsea Danielle Shields
Desiree Danielle Singer
Abilene Suzanne Slaton
Matthew Lee Smothermon
Alexa Louise Stumpff
Katherine Elizabeth Sullivan
John Franklin ShawVan Tjeerdsma
Chandler Quinn Torbett
Katherine Jean Trent
Jane Jee young Um
Dalton Wayne Vandever
Taylor Christian Venus
Shannon Marie Walcher
Rachael Kathleen Want

A new attorney displays his certificate at the OCU School of Law swearing-in reception.

Charles L Watts
Danielle Suzanne Weaver
Sean Ryan Webb
David Alan Whaley
Mary Elizabeth Williams
Katie Michelle Wilson
Sheila Gayle Wilson
Samuel Bryan Withiam
Wyatt Evan Worden
Russell Earl Wrigg
Melissa Lynn York
Courtney Lee Zamudio

2017 SOLO & SMALL FIRM CONFERENCE

Thursday, June 22			
3 – 6:30 p.m.	**Registration**		
6:30 p.m.	**Reception; 7 p.m. Dinner and Entertainment** *(Included in Seminar Registration Fee)*		
Friday, June 23			
7 a.m.	**BREAKFAST** *(Included in Seminar Registration Fee)*		
8:30 a.m.	**Critical Technology Tools for the Solo and Small Firm Practice** Jim Calloway & Catherine Reach	**Estate Planning for Mom and Pop** Dawn Hallman	**Oklahoma's Trial of the Century – The Crime** John Hersley & Larry Tongate
9:30 a.m.	**Break**		
9:40 a.m.	**Microsoft Office 365: Improve Your Firm's Collaboration and Productivity** Catherine Reach	**Relocation – When Harry Left Sally** Ginny Henson	**Oklahoma's Trial of the Century – The Crime, cont.** John Hersley & Larry Tongate
10:40 a.m.	**Break**		
10:55 a.m.	**Social Media – Do I Really Have To?** Darla Jackson	**Civil Discovery: Forms and Procedures** Cheryl Clayton	**Oklahoma's Trial of the Century – The Evidence** Bob Burke
12 p.m.	**LUNCH** *(Included in Seminar Registration Fee)*		
1 p.m.	**The Flexible Law Firm** Jim Calloway & Catherine Reach	**Navigating Tribal Court Practice** Shannon Prescott	**Oklahoma's Trial of the Century – The Trial** Brian Hermanson
2 p.m.	**Break**		
2:10 – 3 p.m.	**Extreme Makeover: Law Firm Website Edition** Catherine Reach & Darla Jackson	**Basics of a DPS Revocation Hearing (and Update on Recent Rulings)** Brian Morton	**Oklahoma's Trial of the Century – Reflections** Retired Oklahoma Supreme Court Justice Steven W. Taylor
6:30 p.m.	**Reception; 7 p.m. Dinner and Entertainment** *(Included in Seminar Registration Fee)*		

Saturday, June 24			
8:25 a.m.	**Remarks** OBA President Linda Thomas		
8:30 a.m.	**60 Tech Tips in 60 Minutes** Catherine Reach, Jim Calloway & Darla Jackson		
9:20 a.m.	**Break**		
9:30 a.m.	**The Ethics of Attorney-Client Contracts and Engagement Letters (ethics)** Giny Hendryx & Jim Calloway	**Trust Accounting (ethics)** Darla Jackson	
10:20 a.m.	**Break (Hotel check out)**		
10:55 a.m.	**Solo Quick Takes**	**Mitigating Cyber Risk for Law Firms** Heidi Shadid	**The Hot Areas of Oklahoma Oil and Gas Legal Work in 2017 – including a Discussion of Current Cases** Mark Christiansen
11:45 a.m.	**LUNCH** *(Included in Seminar Registration Fee)* **50 Years of the Oklahoma Judicial Nominating Commission (.5 hours MCLE)** Bob Burke		
12:45 p.m.	**Financial Literacy for Lawyers** Ted Blodgett	**How to Read an Abstract for Marketable Title** Kraettli Epperson	**Improve Your Legal Research Skills With Fastcase 7** Jeff Asjes
1:35 p.m.	**Break**		
1:40 p.m.	**Immersive Evidence: Virtual Reality in the Courtroom and Boardroom** Darin Fox & Kenton S. Brice		
2:05 – 2:30 p.m.	**What's Hot & What's Not in Law Office Management and Technology** Jim Calloway & Darla Jackson		
Approved for 12 Hours MCLE / 1 Hour Ethics			

OKLAHOMA BAR ASSOCIATION

SOLO

& SMALL FIRM CONFERENCE AND YLD MIDYEAR MEETING

JUNE 22-24, 2017

CHOCTAW CASINO RESORT | DURANT

ONLINE REGISTRATION
www.okbar.net/solo

MAIL FORM
CLE Registrar,
P.O. Box 53036
Oklahoma City, OK 73152

FAX FORM
405-416-7092

REGISTRATION AND POLICIES

CANCELLATION POLICY
Cancellations will be accepted at any time on or before June 8 for a full refund; a $50 fee will be charged for cancellations made on or after June 9.
No refunds after June 14.

HOTEL RESERVATIONS
Call 800-788-2464 for hotel reservations. Refer to Oklahoma Bar Association when reserving room and/or block code 1706OBAOKL.

REGISTRATION, ETC.
Registration fee includes 12 hours CLE credit, including one hour of ethics. Includes all meals: evening buffet Thursday and Friday, breakfast buffet Friday and Saturday, lunch buffet Friday and Saturday.

REGISTRANT INFORMATION

Full Name: _____ OBA #: _____
Address: _____
City/State/Zip: _____
Phone: _____ Fax: _____
Email: _____
Name and city as it should appear on badge if different from above:

_____

GUEST INFORMATION

Children participating in children's activities must be 5 years of age or older.
For children's activities, members must register with the PDF or print form by June 8.

Adult guest name: _____

PARTICIPATING IN CHILDREN'S ACTIVITIES

Child guest name : _____ Age: ___ YES / NO
Child guest name : _____ Age: ___ YES / NO
Child guest name : _____ Age: ___ YES / NO
Child guest name : _____ Age: ___ YES / NO

FORM CONTINUED ON NEXT PAGE – INCLUDE BOTH PAGES WHEN FAXING/MAILING

STANDARD RATES FOR OBA MEMBERS
admitted before Jan. 1, 2015

	CIRCLE ONE
Early Attorney Only Registration **(on or before June 8)**	**$200**
Late Attorney Only Registration **(June 9 or after)**	**$250**
Early Attorney and One Guest Registration **(on or before June 8)**	**$300**
Late Attorney and One Guest Registration **(June 9 or after)**	**$350**
Early Family Registration **(on or before June 8)**	**$350**
Late Family Registration **(June 9 or after)**	**$400**

SPECIAL RATES FOR OBA MEMBERS OF TWO YEARS OR LESS
admitted on or after Jan. 1, 2015

	CIRCLE ONE
Early Attorney Only Registration **(on or before June 8)**	**$125**
Late Attorney Only Registration **(June 9 or after)**	**$150**
Early Attorney and One Guest Registration **(on or before June 8)**	**$225**
Late Attorney and One Guest Registration **(June 9 or after)**	**$250**
Early Family Registration **(on or before June 8)**	**$275**
Late Family Registration **(June 9 or after)**	**$300**

CHILDREN'S ACTIVITIES
supervision provided – must be 5 years of age or older

For children's activities, members must register with the PDF or print form by June 8.

Friday Morning		
Unlimited game play, laser tag and bowling	$15 X (number of children) _____	= $_____
Friday Afternoon		
Swimming at the Family Zone Cabanas (child must be able to swim)	$15 X (number of children) _____	= $_____
Friday Evening		
Movie (refreshments provided)	$8.50 X (number of children) _____	= $_____
	$10.50 X (number of adults 13+ yrs old) _____	= $_____
Saturday Morning		
Choctaw elders craft class of beading and storytelling	$10 X (number of children) _____	= $_____
	TOTAL FOR CHILDREN'S ACTIVITIES	**$_____**

PAYMENT INFORMATION

Make check payable to the Oklahoma Bar Association and mail registration form to CLE REGISTRAR, P.O. Box 53036, Oklahoma City, OK 73152. Fax registration form to 405-416-7092.

For payment using: ☐ VISA ☐ Mastercard ☐ Discover ☐ American Express

Total to be charged: $_____ Credit Card Number: _____

Expiration Date: _____ Authorized Signature: _____

Who Spoke at Your High School Graduation?

By John Morris Williams

I ask this question more often than perhaps I should. I always try to ask this question when speaking to our leadership classes on something more than the date the OBA was organized. (We have a leadership class forming soon for this year, so be sure to get your applications in.) I'm not too concerned about giving away any secrets here because I seriously doubt many of the generation X, Y or millennials read my column. Perhaps if I had my own app and keep it down to about 144 characters, I might have a better following and everyone would be spared the tedium of my attempts at being interesting every month for almost 14 years.

> **"The lasting impression is not the words you hear or speak. It is the way you make people feel. It is how you treat them."**

Okay, back to the question at hand. (See, I got tedious already.) When I ask who the graduation speaker was, I rarely get more than 20 percent of the group who can tell me. Many who remember do so because they were the speaker. Of course, they remember. Most do not recall. I then follow up with the question of who mistreated you, bullied you or was mean to you in high school. Invariably, about 95 percent of the people I ask this question recall exactly. I have even asked this question to a group of people in their 60s, and they too still recall who was not kind to them. In fact, I should probably warn some of you there are people who are furious, and now armed, who still have a bitter taste in their mouths about that "prank" in high school.

My point is that most of life is like high school graduation speakers. They come. They go. Even on the biggest day of your young life, the person at the front of the room giving their inspired version of the lessons for a successful life didn't leave an imprint. These speakers are like issues – they pop up, they get noisy and then they go away to be replaced by something else that seems compelling for the moment.

The lasting impression is not the words you hear or speak. It is the way you make people feel. It is how you treat them. I must confess I have been guilty of not remembering this valuable lesson. Think about it for a minute. Think about the people you care about the most, the people who you admire or respect. Then think about the people you avoid, disdain and downright just do not like. Perhaps the most common thread to your attraction or avoidance is how these people make you feel.

As lawyers, we face many obstacles. Oftentimes our obstacles are other people. Other

lawyers, witnesses, support personnel, clerks, bailiffs and even judges stand in our way of obtaining what we desire. It is a funny thing; how you behave in any given case will cast a shadow that may last a lifetime. The case, like a graduation speech, will drift off to some unknown recesses in the memory of most involved. However, should you be exceptionally kind or exceptionally rude, dishonest or just plain ol' nasty that will leave a lasting mark.

This month some of us will attend graduations and see someone at the front of the room proclaiming the wisdom of the ages. Unless he or she showers large sums of cash upon the audiences, is markedly offensive or appears with an item of clothing revealing too much, no one will pay much attention to the speaker and soon forget them altogether. No relationships will be formed while we check our watches or phones to see how soon it will be over. Test me out here. Look around the room and see how many people are actually paying attention. Absent my three examples above, I bet phones are checked, watches looked at and children squirm for it to be over.

My point here is that being kind and making people feel welcomed and liked forms a lifetime of goodwill in an instance. Being present and just reciting the prepared text makes you a graduation speaker. Being anything less makes you the subject of bitter remembrances decades later.

Be kind when you can, we could all use some good memories.

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

Cyber-Attacks: Is It Really Not *If* You Will be Attacked, but *When*?

By Jim Calloway

In last month's column "Backing Up, Like Breaking Up, Is Sometimes Hard to Do,"[1] I discussed the challenges of having good backup procedures.

Recently, there were news reports of a Providence, Rhode Island, law firm that was held hostage by ransomware blackmailers for 90 days.[2] Just imagine 90 days without access to any file on the law firm's network or any of the individual workstations. The blackmailers were demanding $25,000 in ransom paid in bitcoin to restore access. The news reports were about the law firm's litigation against its insurer for not paying a claim for $700,000 in lost billing as the firm's 10 lawyers were left unproductive and inefficient. I have no doubt the firm also sustained a significant amount of damage to relationships with many of its clients.

The law firm's situation marks a change we have seen with the ransomware attacks. Previously the typical ransom demanded was in the hundreds rather than the thousands of dollars. Now when the cyber criminals recognize they may have a victim with deep pockets, the ransom demand will be much larger.

Ransomware is not the only potential threat that might come between you and your law firm data, although it is certainly the most rapidly growing one. Hard drives fail and internet outages, although rare, still do occur. People make mistakes and delete things they didn't intend to delete. Recently we have had several reminders that weather issues can knock out power, which can render computers and networks inaccessible.

On Monday, May 1, employees of the Oklahoma Bar Association reported to work to learn that while we did have power, the previous power outages caused by straight-line winds reportedly exceeding 80 mph, had temporarily knocked out our internet service, email, phone system and access to files on the network. There are many good reasons for outsourcing more systems, tools and IT resources to the cloud, but doing so renders you more dependent on internet access.

There are always lessons to be learned from such a situation. Some of the unique lessons we learned included: 1) if many people in the same area lose internet service, it impacts your mobile phone service locally as many people attempt to use their phones for data transfers they normally would have done with their computers and 2) you may believe you can do many things with your mobile devices, but if you don't have working email on your mobile device or VPN access you cannot do many of those things.

There were no long-term negative data consequences for the OBA. Everything was restored by Monday afternoon and we believe nothing was lost. Personally, I was able to rely on my MiFi card which

gave me access to many files on Dropbox. Like many of my co-workers, I also took the opportunity to sort through, discard and scan/file some loose paperwork.

But the idea of a 10-lawyer law firm being locked out of all of their files for 90 days is simply horrifying. Hopefully they at least had access to their calendars on their mobile devices. Ninety days is a lot of time for something serious to go wrong.

I recently had the opportunity to hear my podcast teammate, Sharon Nelson, and her husband, John Simek, both of Sensei Enterprises, discuss data security and data disasters. They cite Bruce Schneier,[3] a well-regarded expert on technology security who I have followed for many years, as saying it is unrealistic to assume one can build sufficient IT safeguards to keep evildoers out of your system. A mantra to identify the threats and protect the network has evolved. According to Ms. Nelson, the new framework is "identify, protect, detect, respond and recover."[4]

NOT IF, BUT WHEN

That idea that all businesses should prepare now to respond to a security breach *when* it happens, not *if* it happens, is unsettling. This is critical for all of your business clients as well as your law firm. But, the idea should also provide motivation to take action now.

All businesses need an incident response plan (IRP). A few internet searches will locate some form incident response plans that can be used as guidance. Some are free. Some are available for purchase. It is important to recognize that "filling out the form" will not cover all of the unique and special situations in your law firm or your clients' businesses. As a result, additional contingencies may need to be addressed in your plan.

It is also important to recognize that all data breaches are not equal. A ransomware attack may cripple your law firm, but your response to this will be totally different than a data breach that appears targeted to a specific client or matter.

PREPARATION

The literature says you should form an incident response team to conduct an incident threat analysis before you create your various responses for different scenarios. If you are a solo or small-firm lawyer, then you will likely fill the role of the incident response team. But you don't have to be a cybersecurity expert to create this plan. You just have to be able to identify what types of security breaches or other business interruptions could happen. You can seek expert guidance if needed.

Let's start with a simple scenario that doesn't require much technology much expertise with technology.

Scenario 1: A Disturbance in the Neighborhood

You arrive for work early one morning and find a roadblock with several law enforcement officers and vehicles and perhaps a news team or two, or you have police tape all around your office. Whether it is a crime scene investigation or an active tense stand-off situation, law enforcement informs you that it could be hours or days before you are allowed back into your office.

What is the plan? It really depends on the law firm and the situation. If you are using cloud-based practice management software and everything has been scanned into digital client files, then the plan is to deploy people where they will have computers and internet access. Maybe some people can work from home or maybe you know a friendly local lawyer with some extra office space. Then the next decision is how and where to forward the office telephones so someone can answer them. Then you have to figure out how staff will communicate. Does everyone have the ability to remotely log into the office email or will you be using a lot of text messages that day?

If you don't have information deployed in the cloud, have you set up a VPN or other remote access for some or all of the office employees to log in the office computers? Will this work if the computers have not been turned on for the morning?

If you have no way to access any of the office data from outside of the office, then your primary objective will be triage. In that scenario, you need access to your calendar so you can reschedule office appointments and meet court appearances and deadlines. If your mobile devices have your calendar on them, they will become your primary tool. If you have employees who are unable to do anything productive, then they should be sent home with instructions to stay close to their phone to learn when they will be called back into work.

As you can see from this exercise, the value of planning is thinking things through and making preparation during a calm and reflective time rather than in the middle of a frustrating scenario. Setting up your IRP also means that you have accumulated much of the needed information in advance and preserved it in a way that you can access it without access to the physical office. A list of contact information for all clients with active files whether on paper or preserved digitally is very important. Some phone numbers for courthouse staff may be useful. If you don't recall your passwords, do you have a password manager available via your mobile device or can the password for critical systems like your practice management software be reset by using email on your mobile phone? Do you have an existing answering service that you can forward the phones to in the case of an emergency and what information is needed to accomplish that?

Scenario 2: Ransomware Attack

A computer in your office suddenly displays a graphic indicating that the computer has been encrypted and displays a clock counting down the remaining time you have to pay the ransom or lose your data forever. That countdown will generate incredible stress. Your law firm is effectively dead in the water.

This part of your IRP likely will be developed with input from your IT professional. For example, if one computer has been encrypted with ransomware, you may have a very short amount of time to "save" other computers by physically unplugging them from the network or turning them off quickly. Note that this would be the "hold down the power button method" for emergency shutdown, not the normal method. You can normally accept the risk of corrupting a single open document to keep a workstation in operation.

Paying the ransom is problematic on several levels, but many businesses will decide to do so if the amount is somewhat reasonable. In fact, Sharon Nelson related that she had heard of a firm that has established a purse of bitcoin in advance for just such a scenario. But many law firms will not want to take that action.

"That countdown will generate incredible stress. Your law firm is effectively dead in the water."

In theory, assuming you have appropriate backups and images, here's how a recovery would take place. The hard drives on computers would be reformatted to destroy all data. A system image recovery disk would then be used on each computer to restore it to a prior point in time. These system image recovery disks must be created in advance using Windows[5] or another third-party tool. Then your data backup can be used to restore any missing data, *i.e.* documents, billing records, calendar entries, etc.

Again, that is the theory. The reality is that some firms may require or prefer professional assistance. But the Windows recovery tools are designed with the end user in mind. (Of course, this assumes that the firm is using a Windows based system. Some firms are now using Macs, which are less susceptible to ransomware but may still have vulnerabilities.)[6]

Note the difference between a ransomware attack and other types of malware or spyware. Typically, a ransomware attack happens in real time. Someone clicks on something or opens a file and the ransomware is released to start encrypting files. It happens fast. That also means it is likely that a backup that is a few hours old will not contain the infection.

On the other hand, a spyware installation or other type of data breach may have occurred days or months before. Reformatting the hard drive and installing your backup could install a "backup" of the infection. (It is also very possible that your backup provider could scan and kill the malware.) If you honestly believe your system has been breached, it may be worth your time to have a digital forensics expert examine the system to see what has been accessed and give the system a digital cleaning.

Knowing what information was compromised may inform you as to what obligations you may have either under the Oklahoma Security Breach Notification Act or general good business principles. As I read 24 Okla. Stat. 162, notification requirements only attach when an individual's name has been attached to a social security number, driver's license (or alternative state ID in lieu of driver's license) or financial account numbers,

credit card numbers and debit card numbers along with a password or access code if applicable. I will leave the question of whether, depending on the information breached, a lawyer's ethical duty to a client would create a notification duty greater than that required by statute for another day. If you have information covered by HIPAA, it has its own set of breach notification requirements.

CONTACT INFORMATION IS AN IMPORTANT ELEMENT

Larger firms will want to have contact information for various staff members involved with the plan. But all sizes of firms would benefit to have contact information for all staff, including home or mobile phone numbers when available.

You will definitely want to have insurance company contact information as well as copies of your policy. Some might believe that this is a good time to examine just what cyber insurance you have purchased and whether it is enough.

Other contact information that may be needed include your outside IT consultant, a digital forensics consultant, a lawyer with more expertise than your firm regarding data breaches and perhaps even a public relations firm.

Once you have the plan drafted, you need to communicate with any staff who were not involved in the creation that it exists and what their obligations are under the plan. Stress to your staff that they are not official spokespersons for the firm and they should never post about any possible data breach or other office issue on social media.

FOLLOWING THE PLAN

I can assure you that no matter how good your plan, it is likely that things won't go according to plan. There are several military-based clichés about plans changing when the battle commences. But a data breach or work stoppage of any kind is a frustrating and emotional situation. You will be far better off with a plan to refer to and ready access to the phone numbers of those you might need to call in for reinforcement.

There is a potential additional positive byproduct of all of this work. Your firm may now be in a much better position to advise your business clients about, and assist them with, their IRP.

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. Jim Calloway, Backing Up, Like Breaking Up, Is Sometimes Hard to Do, 88 *Okla. B.J.* 770 (2017), http://www.okbar.org/members/MAP/MAPArticles/HotPracticeTips/BackingUpLikeBreakingUp.aspx [https://web.archive.org/web/20170504142923/http://www.okbar.org/members/MAP/MAPArticles/HotPracticeTips/BackingUpLikeBreakingUp.aspx].

2. Stu Sjouwerman, Ransomware Causes 90-day Downtime And 700K Damages For Law Firm Who Then Sues Their Insurer, KNOWBE4 (May 3, 2017), https://blog.knowbe4.com/ransomware-causes-90-day-downtime-and-700k-damages-for-law-firm-who-then-sues-their-insurer.

3. About Bruce Schneier, SCHNEIER ON SECURITY, https://www.schneier.com/blog/about/ [https://web.archive.org/web/20170224173821/https://www.schneier.com/blog/about/].

4. Link to short podcast "Passing Your IT Security Audit" https://soundcloud.com/legaltalknetwork/aba-techshow-2016-passing-your-it-security-audit

5. What are the system recovery options in Windows?, https://support.microsoft.com/en-us/help/17101/windows-7-system-recovery-options [https://web.archive.org/web/20160822044058/https://support.microsoft.com/en-us/help/17101/windows-7-system-recovery-options].

6. Claire Reilly, Apple Users, Beware: First Live Ransomware Targeting Macs Found 'In The Wild', C/NET (March 6, 2016 6:28 PM PST), https://www.cnet.com/news/apple-users-beware-first-live-ransomware-targeting-mac-found-in-the-wild/ [https://web.archive.org/web/20160816013704/http://www.cnet.com:80/news/apple-users-beware-first-live-ransomware-targeting-mac-found-in-the-wild/].

Meeting Summary

The Oklahoma Bar Association Board of Governors met at the Oklahoma Bar Center in Oklahoma City on Monday, March 20.

REPORT OF THE PRESIDENT

President Thomas reported she met with Cathy Christensen regarding the Women in Law Conference and other OBA issues, participated as a judge in the ABA Mediation Competition held at the OU College of Law, met with Executive Director Williams, Communications Director Manning and Vice President Castillo regarding potential Annual Meeting speakers, participated with other OBA members at the OETA fundraising festival, met with Executive Director Williams, Legislative Liaison Clay Taylor and Sen. Julie Daniels regarding proposed JNC bills, assisted Washington County Associate District Judge Russell Vaclaw with a question and answer session following his presentation to the Day Break Rotary Club on a fair and impartial judiciary in Oklahoma, worked with Educational Programs Director Damron on the 2017-2018 Leadership Academy and met with Washington County Bar Association officers for a planning session for the Board of Governors visit in August. She attended the Communications Committee meeting via BlueJeans, Oklahoma Bar Foundation Trustees meeting, OBA High School Mock Trial finals in Tulsa and the Washington County Bar Association monthly meeting.

REPORT OF THE VICE PRESIDENT

Vice President Castillo reported she attended the new governors orientation, meeting with Executive Director Williams, Communications Director Manning and President Thomas to discuss potential speakers for the Annual Meeting and OBF Board of Trustees meeting.

REPORT OF THE PRESIDENT-ELECT

President-Elect Hays reported she participated in the OETA Festival, traveled to Chicago for the ABA Bar Leadership Institute, attended the new OBA governors orientation and reviewed issues for president-elect 2017 and 2018 planning.

REPORT OF THE EXECUTIVE DIRECTOR

Executive Director Williams reported he attended Solo & Small Firm Conference Planning Committee meetings, Annual Meeting planning meetings, OETA Festival, monthly staff celebration, meeting with OSU landscape architecture students on a volunteer project, legislative meetings, new governors orientation, YLD board meeting, meetings with web design vendors, Legislative Monitoring Committee meeting and a meeting with President Thomas regarding the LSC funding letter.

BOARD MEMBER REPORTS

Governor Coyle reported he attended the Oklahoma County Bar Association meeting and Oklahoma Criminal Lawyers Association meeting. **Governor Fields** reported he attended the new Board of Governors training at the bar center, McCurtain County Bar Association meeting and McAlester Lions Club meeting. He presented Choctaw County and Pushmataha County with their juror appreciation plaques. **Governor Gotwals** reported he attended the Tulsa County Bar Association Membership Committee meeting, OBA Professionalism Committee via his legal assistant, Quality Assurance Panel meeting, inn of court pupilage group presentation on sentencing, OBA Family Law Section meeting and law library meeting. He also served as a judge for the regional Mediation Competition held at the OU law school, TCBA Family Law Section meeting and a meeting as TCBF president with the TCBA executive director for planning and punch lists. **Governor Hennigh** reported he attended the Garfield County Bar Association meeting and new board member orientation. **Governor Hicks** reported he attended the new board member orientation, Tulsa County Bar Foundation Golf Committee meeting and worked on TCBF matters with the executive director. **Governor Hutter** reported she attended the Cleveland

County executive meeting and Legislative Monitoring Committee via phone. **Governor Oliver** reported he attended the Payne County Bar Association monthly meeting, new board member orientation and Law Schools Committee tour of the TU College of Law. **Governor Porter** reported she attended the Board of Tests for Alcohol and Drug Influence meeting and judged the ABA Client Counseling Competition held at the OU College of Law. **Governor Tucker** reported he attended the OBA Law Day Committee meeting, Muskogee County Bar Association meeting and county bar Law Day Committee meeting. **Governor Weedn** reported he attended the Ottawa County Bar Association meeting.**Governor Will**, unable to attend the meeting, reported via email he attended the February Young Lawyers Division meeting, YLD orientation and new board member orientation.

REPORT OF THE YOUNG LAWYERS DIVISION

Governor Neal reported he attended the YLD orientation and chaired the YLD board meeting. He said the division will take on the young adult guide as a project to review for updates.

REPORT OF THE SUPREME COURT LIAISON

Justice Edmondson reported the newest member of the court, Justice Patrick Wyrick, has been officially seated.

BOARD LIAISON REPORTS

Governor Gotwals reported the Professionalism Committee will conduct a professionalism symposium this year. They will revisit the committee's mission and new admittee pledge. Being discussed is an award to honor the late Fred Slicker, but the OBA already has the Neil Bogan Professionalism Award. Mr. Slicker's book will again be given to new lawyers. Governor Porter reported the Rules of Professional Conduct Committee heard a presentation from MAP Director Jim Calloway on limited scope representation. Governor Hutter reported the Solo & Small Firm Conference Planning Committee is working on including family friendly activities this year. Governor Hutter reported the Legislative Monitoring Committee met and has selected a sticky note pad in the shape of the USA to give to legislators. The pad will have the email address of a new service the committee will begin providing to legislators – free legal research on the impact of proposed bills. Executive Director Williams complimented the committee on doing a good job and meeting monthly. Governor Tucker asked board members to look at the list of counties with no Law Day chairpersons and to help recruit volunteers. Work continues on the TV show and promotion efforts. Governor Hutter reported the Diversity Committee will hold a CLE on prosecuting 42 U.S.C. §1983 cases, and David Lee will be the speaker. They have scheduled their awards presentation for Oct. 19 at 6 p.m. at the Oklahoma Judicial Center. The Law School Bootcamp event will take place Saturday, Oct. 21, at the bar center. Governor Hicks reported the Access to Justice Committee is developing procedures for emergency VPOs and had questions about pending legislation. Governor Weedn reported former board member John Kinslow is the new chair of the Work/Life Balance Committee.

REPORT OF THE GENERAL COUNSEL

General Counsel Hendryx reported she has received notification of legal action against herself and three staff members, but has not yet been served. A written report of PRC actions and OBA disciplinary matters for February was submitted to the board for its review.

PROPOSED AMENDMENT TO RULES OF THE SUPREME COURT ON LICENSED LEGAL INTERNSHIP RULE 2.1A(1)(G)

Legal Intern Committee Chair H. Terrell Monks reviewed the proposed amendment to supplement the current requirement that a law student be registered with the Oklahoma Board of Bar Examiners with "or provide a criminal background report from the State of Oklahoma and the student's prior state(s) of residence, if different."

It was explained the change would allow more law students to assist in giving legal advice – increasing access to justice. Mr. Monks said the Supreme Court supports the change and encourages actions that would allow the amendment to be in place for the fall semester. The board voted to approve the amendment, to waive the member comment period and to send the amendment to the Supreme Court for its consideration.

LEGISLATIVE REPORT

Legislative Liaison Clay Taylor reviewed a handout containing facts including five bills to watch. Questions were

asked, and discussion followed.

AMENDMENTS TO RULES OF PROFESSIONAL CONDUCT

Rules of Professional Conduct Committee Chair Paul Middleton reviewed the proposals recommended by the committee for amendments to Rule 1.18 Duties to Prospective Client, Rule 3.8 Special Responsibilities of a Prosecutor, Rule 5.3 Responsibilities Regarding Nonlawyer Assistants, Rule 7.1 Communications Concerning a Lawyer's Services, Rule 7.2 Advertising and Rule 7.3 Direct Contact with Prospective Clients. The comments received on Rule 7.3 were reviewed. General Counsel Hendryx said the proposed amendments were published last fall. She noted the proposed changes to Rule 7.2 were not substantive. The board voted to approve the amendments and to send them to the Supreme Court for its consideration.

JUDICIAL NOMINATING COMMISSION PROCEDURE FOR ELECTING LAWYER MEMBERS

The board approved the procedure used for many years to conduct elections of lawyer members to the Judicial Nominating Commission.

LETTER SUPPORTING CONTINUED FUNDING FOR LEGAL SERVICES CORPORATION OF AMERICA

President Thomas directed the attention of board members to a draft of a letter she plans to send to Oklahoma's U.S. congressmen and senators urging them to support funding for LSC, which allows Legal Aid Services of Oklahoma and Oklahoma Indian Legal Services to provide free legal services to Oklahomans who cannot afford to pay for legal services. She said the proposed federal budget for the next fiscal year will eliminate LSC funding that would be devastating to our state's most vulnerable citizens. As the former LASO executive director, Executive Director Williams shared the background of legal aid clients and the great need for pro bono services. The board approved mailing the letter. OBA members will be encouraged to contact their U.S. legislators.

OETA FESTIVAL

President Thomas reported 24 lawyers volunteered March 6 to take pledges to support OETA, Oklahoma's statewide PBS TV station. A record high of nearly $11,000 was raised in private donations from bar members, keeping the OBA in the highest donor category. During the evening, she was also able to promote the upcoming *Ask A Lawyer* TV show that aired April 27 on OETA.

NEXT MEETING

The Board of Governors met April 14 in McAlester and May 19 in Oklahoma City. A summary of those actions will be published after the minutes are approved. The next board meeting will be at 3 p.m. Friday, June 23, at the Choctaw Casino Resort in Durant in conjunction with the Solo & Small Firm Conference.

Oklahoma Bar Foundation Announces 2017 Court Grant Awards

By Candice Jones

The Oklahoma Bar Foundation is proud to announce its award of grants to 11 Oklahoma district courts for 2017 funding. The Grants and Awards Committee recently held interviews with judges and court clerks from counties across the state, more than half of whom were applying for an OBF grant for the first time. The Board of Trustees unanimously approved the committee's recommendation to grant funds to all 11 applicants, totaling $96,564.

The majority of application requests were for updated audio, visual and recording equipment used in court proceedings. The need for such equipment stems from outdated and obsolete equipment in many courthouses and the lack of funds to replace the equipment. Current systems are beginning to malfunction and software compatibility issues arise. As a result, court personnel must often use their own personal computers and equipment to get by until new equipment can be purchased.

The Court Grant Fund was established in 2008 and has since made awards to 53 of the 77 district courts in Oklahoma. "It is a priority of the OBF Board of Trustees to provide funding to courts in every county of the state," said Patrick O'Hara, Grants and Awards Committee chairman. "With each cycle of our yearly court grant process we get closer to achieving this goal."

Funding of court grants is made possible by generous *Cy Pres* Awards designating the Oklahoma Bar Foundation as the recipient.

2017 Grant Recipients

District Court of Adair County – $13,890
2 – 60" interactive display boards

District Court of Craig County – $5,915
Courtroom audio system

District Court of Garvin County – $14,490
Audio and visual equipment for new courtroom

District Court of McClain County – $1,458
Digital recording system for courtroom and 2 digital transcription kits for court reporting

District Court of McIntosh County – $11,133
Audio equipment for courtroom

District Court of Muskogee County – $7,145
Smartboard

District Court of Pottawatomie County – $2,397
3 digital recorders

Pottawatomie County Juvenile Division – $9,417
7 Microsoft Surface Pro tablets

District Court of Okmulgee County – $11,230
PA system in courtrooms

District Court of Sequoyah County – $14,919
70" Smartboard for courtrooms

District Court of Woodward County – $4,570
100" fixed-screen projector with accessories

ABOUT THE AUTHOR

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

Your support changes lives!

FELLOWS PROGRAMS – Join one of the Fellows Giving Programs.

Fellows – for individuals

$100/year	Sustaining Fellow
$200/year	Contributing Fellow
$300/year	Benefactor Fellow
$500/year	Leadership Fellow
$1,000/year	Governing Fellow

Community Fellows – for organizations or businesses

$1,000/year	Community Partner
$2,500/year	Community Supporter
$5,000/year	Community Champion
$7,500/year	Community Pillar
$10,000/year	Community Cornerstone

MEMORIALS & TRIBUTES – Make a tribute or memorial gift in honor of someone. OBF will send a handwritten tribute card to them or their family.

UNCLAIMED TRUST FUNDS – Unclaimed trust funds can be directed to the OBF. Please include the client name, case number and as much detailed information as possible about the funds on your company letterhead with the enclosed check.

INTEREST ON LAWYER TRUST ACCOUNTS (IOLTA) – OBF Prime Partner Banks give at higher interest rates, so more money is available for OBF Grantees to provide legal services. Select a Prime Partner Bank when setting up your IOLTA account: BancFirst, Bank of Oklahoma, MidFirst Bank, The First State Bank, Valliance Bank, First Oklahoma Bank Tulsa, City National Bank of Lawton, Citizens Bank of Ada, First Bank & Trust Duncan.

***CY PRES* AWARDS** – Leftover monies from class action cases and other proceedings can be designated to the OBF's Court Grant Fund or General Fund as specified.

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Schedule a presentation for your group or business by contacting Candice Jones, at candicej@okbar.org.

Contact the OBF office at 405-416-7070 or email foundation@okbar.org.

Hope and Promise With Future Generations

By Lane R. Neal

Last month, I had the privilege of participating in the swearing-in ceremonies for the February bar passers. I wish all lawyers would attend these ceremonies periodically throughout their careers. It really is a great experience. The faces of our new colleagues were full of so much hope and promise as they recited the Oath of Attorney. I am excited to see where they go and the things they do throughout their careers.

TU College of Law 3L students get ready for a mock bar exam with breakfast provided by the YLD.

Following each of the three ceremonies, the YLD hosted a reception for the new admitees, their families and friends. I would like to take this opportunity to give a special thank you to Brittany Byers and Melanie Christians, co-chairs of the YLD New Attorney Orientation Committee, for putting on a great event. This was the first swearing-in ceremony for both board members in their roles as committee co-chairs. They did a fantastic job! Also, the event was supported by Jordan Haygood and Brandi Nowakowski, YLD Executive Committee members. We look forward to doing it again in the fall.

In April, the YLD also sponsored a breakfast for 3Ls at the TU College of Law before they took a mock multistate bar exam. This event was headed by Brad Brown, YLD board member from Tulsa. Mr. Brown facilitated the entire breakfast, which was well attended. It was a great opportunity to speak with 3Ls who will soon be joining our ranks. This was a first for the YLD and, based on the feedback, it is something we may develop with the other Oklahoma law schools in the coming years.

The YLD has also started working on a new project. As some of you may know, the OBA has published a young adult guide to provide to high school students and young

people. The guide provides information about the rights and responsibilities associated with turning 18. The young adult guide has not been updated in several years and is in need of revision. The YLD has created a new committee co-chaired by Nathan Richter and Blake Lynch to bring the young adult guide up to date. Once it's updated, we will be looking at re-establishing the mobile app. This will hopefully increase its availability and use. Switching from a publication to a mobile app would also have the benefit of saving on publishing costs and make it easier to update in the future. This is a big undertaking but will provide a great resource for young people across Oklahoma.

YLD Chair Lane Neal speaks to new lawyers at the spring swearing-in ceremony.

Lastly, if you have not signed up for the YLD Midyear Meeting/Solo & Small Firm Conference, it is not too late. The dates are June 22-24 and it will be held at the Choctaw Casino Resort in Durant. It will be a great event with many opportunities to network and learn. I hope to see you there!

ABOUT THE AUTHOR

Lane R. Neal practices in Oklahoma City and serves as the YLD chairperson. He may be contacted at LNeal@dlb.net. Keep up with the YLD at www.facebook.com/obayld.

Courthouse Complex Named for Retired Justice Taylor

The Pittsburg County Board of County Commissioners passed a resolution officially naming the Pittsburg County Courthouse and the Pittsburg County Courthouse Annex as the Justice Steven W. Taylor Courthouse Complex.

The resolution specifies that "The Pittsburg County Courthouse and the Pittsburg County Courthouse Annex will remain the same when referred to alone, but will be considered the Justice Steven W. Taylor Courthouse Complex when referring to both buildings."

"It's unbelievable – and I am very humbled by it," Justice Taylor said. "I will continue to live my life in such a way as to earn this."

The request to name the complex in Justice Taylor's honor came from District 18 District Judge James Bland who conferred with members of the Pittsburg County Bar Association and other attorneys as to the best way to honor Justice Taylor.

Surprising Retired Justice Steven Taylor (right) with the announcement of naming the courthouse complex in his honor are 2011 OBA President Deborah Reheard and District Judge James Bland. Ms. Reheard holds a drawing of the memorial, and Justice Taylor's portrait will be displayed in the complex. The presentation took place at the Pittsburg County Bar Association Law Day banquet.

OBA Law Day Committee Wraps Up Another Successful Year

Law Day Committee members Richard Vreeland, Allison Roso and Katheryn Bell answer email questions during the Ask A Lawyer event on April 27.

The OBA Law Day Committee would like to thank everyone who helped make Law Day 2017 a success! This year 219 lawyers in 28 different counties volunteered to participate in the Ask a Lawyer community service where legal questions were answered for free by phone and email. Nearly 1,500 phone calls were received and more than 365 email questions were answered. Thirty-three county bar associations also planned and hosted activities including contests for school children, Law Day banquets, mock trials, courthouse tours and much more.

Bar Journal Takes Summer Break

The *Oklahoma Bar Journal* theme issues are taking a short break. The next issue, devoted to "Technology and Office Management" will be published Aug. 19. You'll still receive issues containing court material twice a month in June and July. Have a safe and happy summer!

OBA Member Resignations

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

Richard Douglas Agnew
OBA No. 21912
Agnew & Foster PLLC
P.O. Box 302551
Austin, TX 78703

Morris D. Bernstein
OBA No. 16087
1712 S. Owasso Ave.
Tulsa, OK 74120

Stephen Mark Hill
OBA No. 4210
75-5782 Kuakini Hwy #507
Kailua-kona, HI 96740

Robert Blake Lee
OBA No. 21448
P.O. Box 939
Joplin, MO 64802

Kyme A.M. McGaw
OBA No. 20135
1700 7th Avenue, Suite 2100
Seattle, WA 98101

Oishy Reza
OBA No. 32659
190 Silo Hill Road
Madison, AL 35758

Matthew Brady Welde
OBA No. 30290
16254 S.W. Holland Lane
Sherwood, OR 97140

LHL Discussion Group Hosts June Meeting

"Work/Life Balance" will be the topic of the June 1 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.

Important Upcoming Dates

Don't forget the Oklahoma Bar Center will be closed Monday, May 29, and Tuesday, July 4, in observance of Memorial Day and Independence Day. Remember to register and join us for the 2017 Solo & Small Firm Conference in Durant June 22-24, and be sure to docket the OBA Annual Meeting to be held in Tulsa Nov. 1-3.

OBA Member Reinstatements

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

Jason Heath Meadows
OBA No. 22236
4902 E. Thomas Road
Apt. 178
Phoenix, AZ 85018

Duane Norman Rasmussen
OBA No. 7420
1800 Lincoln Way, Suite 100
Coeur d'Alene, ID 83814-2570

Join the New Immigration Law Section

In light of ever more complex immigration and nationality laws and evolving enforcement priorities, the OBA is excited to announce the creation of the Immigration Law Section. OBA members interested in joining are invited to attend the first section meeting Tuesday, May 23, at noon at the Oklahoma Bar Center. Lunch will not be provided. If you would like to join the section but are unable to attend the meeting, you can email Jasmine Majid at jamajid@inusaglobal.com. Dues are $20 per year.

Kudos

Robert Don Gifford and **Christina Vaughn** have been selected by the American Indian Chamber of Commerce to be part of Leadership Native Oklahoma. The program meets each month to learn about politics, business, economic development and legislative issues affecting Oklahoma tribes.

Mike Voorhees has been elected to serve as vice president of governmental affairs for the South Oklahoma City Chamber of Commerce for 2017. Mr. Voorhees is a member of the south Oklahoma City law firm Voorhees Voorhees & Byers.

Elizabeth Kerr, legal counsel for the University of Central Oklahoma, received the 2017 Sustainer of the Year Award given by the Junior League of Oklahoma City.

David A. Trissell was published in *Law and the Management of Disasters – The Challenge of Resilience.* Mr. Trissell's chapter focuses on the role of resilience strategy in the United States and how governments and the law can incentivize resilience practices and behavior.

Gov. Mary Fallin announced the formation of the Oklahoma Task Force on Sexual Assault Forensic Evidence. The task force will include **Lesley March**, the chief of the attorney general's victim services unit, or her designee; **Bob Ravitz**, chief public defender of Oklahoma County; and **Trent Baggett**, executive coordinator of the Oklahoma District Attorneys Council, or his designee. Gov. Fallin also announced the appointment of **Retired District Judge C. Allen McCall** to the Oklahoma Pardon and Parole Board, the appointment of former state **Sen. Clark Jolley** to the Oklahoma Tax Commission. The Oklahoma Senate confirmed the appointment by Gov. Fallin of **Gary W. Farabough** of Ardmore to serve a nine-year term as a member of the Board of Trustees for the University Center of Southern Oklahoma.

On The Move

Gary L. Maddux was named shareholder of the Tulsa-based law firm Barber & Bartz. He obtained his J.D. from the TU College of Law.

Gabrielle E. Mandeville joined the Tulsa law firm Atkinson, Haskins, Nellis, Brittingham, Gladd & Fiasco as an associate. She graduated from the TU College of Law in 2016.

Michael Scoggins joined GableGotwals as an associate in the firm's Tulsa office. His primary practice will focus on transactional business law.

Needham and Associates PLLC announced the opening of its Tulsa office, where **Cara Collinson Wells** and **Amber Howard Cornelius** joined the firm as partners. Ms. Wells' practice focuses on probate, trust, estate administration and planning and adult and child guardianship. Ms. Cornelius' practice focuses on oil and gas law.

D. Casey Davis joined the Oklahoma City-based firm Jacquelyn Ford Law as an associate partner. He focuses his practice on criminal defense.

Travis Fulkerson and **Nick Crews** announce the opening of Fulkerson Crews. The Tulsa firm represents the interests of businesses and insurance companies in workers' compensation matters, employment disputes and general liability claims.

Daniel X. Resendez joined the Oklahoma City law firm Crain & Associates PLLC as an associate attorney. He practices in the areas of estate planning, probate, real estate, landlord-tenant and business planning.

J. Derek Hardberger and **Garry L. Keele II** joined McAfee & Taft in the firm's environmental law practice at the Oklahoma City office. **Alex Duncan** joined the firm's litigation group at the Tulsa office.

David V. Jones joined Akerman LLP as a partner in its San Antonio office. He joined the firm's litigation

team and will practice in the areas of insurance, commercial and products liability law.

William Andrew "Drew" Edmondson joined the Oklahoma City-based firm of Riggs, Abney, Neal, Turpen, Orbison & Lewis as of counsel.

David H. Herrold and **Danny C. Williams Sr.** joined Conner & Winters LLP in the firm's Tulsa office. Mr. Herrold's practice focuses on complex civil and commercial cases, directors and officers coverage and errors and omissions coverage liability, creditors' rights and bankruptcy litigation. Mr. Williams practices commercial litigation particularly in the area of eminent domain.

Gauri Nautiyal and **Justin Grose** joined Ogletree Deakins as associates and **Andre Caldwell** as of counsel in the firm's Oklahoma City office. Ms. Nautiyal focuses her practice on advising management in all aspects of employment-related matters. Mr. Grose focuses his practice on representing and counseling employers in labor and employment legal matters, including discrimination and harassment. Mr. Caldwell focuses his practice on representing and counseling employers on labor and employment legal matters.

Gov. Mary Fallin announced that former state **Sen. James Williamson** will serve as her general counsel. He has been in private practice since 1975 and is a former legislator, having served 18 years in Oklahoma's Legislature.

Brian J. Barrett joined the Edmond-based law firm Evans & Davis as associate attorney. Mr. Barrett's primary areas of practice include all aspects of estate planning, business law and planning, probate and oil and gas law.

Michael R. Ford, Michael S. Booze and **Jared R. Ford** joined Hall Estill's Oklahoma City office. Mr. Ford joins the firm as a shareholder. Mr. Booze joins Hall Estill as special counsel. Mr. Ford joins the firm as an associate.

Rachel A. Fields joined Steidley & Neal PLLC as associate. She practices in the firm's Tulsa office in all aspects of civil litigation.

David F. Howell of Midwest City has been named municipal judge of Midwest City.

Jesse Chapel was elected as a shareholder of the Oklahoma City-based firm Andrews Davis. He practices in the firm's tax, estate planning, business and banking departments.

At The Podium

Marty Ludlum spoke to several classes at Arcada University in Helsinki. His presentations were titled "Changes to International Trade since the 2016 Election" and "Intercultural Trade Issues."

Barbara Moschovidis coordinated a presentation for the Tulsa Global Alliance's U.S. State Department International Visitor Leadership Program on Oklahoma energy law and policymaking. Remarks were given by **Steve Adams, Dean Luthey, Brad Welsh, Tammy Barrett** and **Adam Doverspike**.

Tom C. Vincent II spoke to the Tulsa County Bar Association Paralegal Section in March on "Practical Cybersecurity: The First Line of Defense."

Rick Noulles was a presenter on recent developments in energy litigation at the Tulsa County Bar Association Energy & Mineral Law Section meeting.

Craig Regens and **Sid Swinson** spoke to the Oklahoma Society of CPAs at their Oil & Gas Conference regarding oil and gas company Chapter 11.

Chris Thrutchley spoke to numerous human resources groups including the Tulsa EEO Coordinator's Association on best practices for avoiding wrongful discharge claims.

Steve Adams and **Ryan Pittman** presented new developments in energy law to the Pittsburg County Bar Association.

Philip Hixon spoke to the OSU medical staff regarding physician response to subpoenas and testimony preparation.

Deborah Shallcross hosted a Connecting Circle for Leadership Level Donors of the Tulsa Area United Way Women's Leadership Counsel. She presented on how the work environment for women has changed over the past 50 years and what women can do to mentor other women who are starting their careers.

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 Aug. 19 issue must be received by July 19.

IN MEMORIAM

Robert Wright "Bob" Amis died Feb. 25. He was born April 10, 1936. He graduated from St. Marks School of Texas in 1954, obtaining his B.S. in geology from OU in 1958. He was a member of Sigma Alpha Epsilon Fraternity. Mr. Amis continued his education at the University of Texas School of Law, earning his J.D. in 1961. He primarily practiced civil litigation. He practiced as a sole practitioner and with Pierce Couch, Reynolds & Ridings and Garrett, Pool, Amis, & Coldiron. Over his career, he served as the assistant county attorney of Denton County, Texas, and city judge of Lewisville, Texas, as well as an adjunct professor of commercial law at the OCU School of Law. In 1995, he relocated his practice to Collin and Dallas counties where he practiced until retirement. His greatest loves were his family and music. Donations in his honor may be made to Highland Park United Methodist Church Beyond Campaign or to your favorite charity.

Anna Maria Goodwin Benn died April 11 in Tulsa. She was born Aug. 5, 1965, in Tulsa. She graduated from Monte Cassino School in 1983. She then received her bachelor's degree in philosophy from TU in 1989. In 1994, she received her J.D. from the OU College of Law and passed the bar exam the same year. She was a recipient of the first Ada Lois Sipuel Fisher Scholarship Award. While at OU, she was awarded a fellowship to study at the Faculty of Law in the University of Oxford in England. She served as an assistant district attorney for former Tulsa District Attorney Bill LaFortune from 1996 to 1997. She was admitted to practice in Texas in 1998 while working with the Houston-based Wickliff & Hall. She later joined the City of Houston's Legal Department. She left active courtroom practice to work for Mayer, Brown, Row & Maw in Houston. She returned to Tulsa to practice with her father at Goodwin & Goodwin. Donations in her name can be made to the Mental Health Association Oklahoma, 1870 South Boulder Ave., Tulsa, 74119.

Charles Edward Brown died Sept. 12, 2014, in Tulsa. He was born Sept. 3, 1931, in Weleetka. He was a 1949 graduate of Weleetka High School. He continued his education and obtained his bachelor's degree in business from East Central University and a J.D. from the OCU School of Law. **Mr. Brown was a veteran of the U.S. Air Force, serving during the Korean War.** He was honorably discharged in October 1954. Following his military service, he joined Farmers Insurance Group, retiring after 32 years as a branch claim manager in San Antonio. He was an active member of the First Baptist Church. He was an avid reader, enjoyed volunteering and enjoyed watching and feeding birds.

Brian Nathaniel Buie died March 24 in Tulsa. He was born June 12, 1976, in Camp LeJeune, North Carolina. In 1994, he graduated from Red Bank High School in Chattanooga, Tennessee. He then went on to graduate from the University of Tennessee with a degree in political science. In 2010, he graduated from the TU College of Law. Mr. Buie worked as an immigration attorney for the Law Offices of Mawby & Litz. He served on the board of the Coalition of Hispanic Organi-

zations and participated in community events such as health and immigration forums. He was an avid collector of comic books and action figures. He enjoyed going to the movies with his family to see the latest action flick.

Coleman Bartow Fite died April 19 in Muskogee. He was born Aug. 21, 1959, in Denver. He graduated from Muskogee High School in 1977, OSU in 1981 and the OU College of Law in 1984. He was a proud member of Sigma Alpha Epsilon Fraternity. Mr. Fite was a municipal judge for the City of Muskogee from 1998 to 2017 and a municipal judge for the town of Okay from 1985 to 2017. In addition, he was a tribal prosecutor for the Cherokee Nation and became a district judge there in 2001. He was instrumental in the inception of the Cherokee Nation's drug court. He also enjoyed his involvement with the adoption process of the nation. Mr. Fite was a member of the Muskogee Bar Association. He also served on the Muskogee Medical Foundation Board of Directors. Donations in his honor may be made to Grace Episcopal Church, 218 North 6th Street, Muskogee, 74401.

Jim Foliart died April 8. He was born Oct. 29, 1919, in McAlester. He graduated high school in Enid in 1936. He received a full scholarship for debate to Northwestern Oklahoma State University. In 1940, he pursued his law degree, graduating with an LL.B in 1948. His educational studies were interrupted when he **entered the Army Air Corps as a cadet in 1943.** In 1949, he founded, along with his mentor Draper Grigsby, the law firm Foliart, Huff, Ottaway & Bottom. His memberships included the American College of Trial Lawyers, the Federation of Insurance & Corporate Counsel, International Academy of Trial Barristers and the International Academy of Trial Lawyers, all of which he served as fellow. He was particularly proud of his membership in the Oklahoma County Bar Association. Donations in his honor may be made to the Oklahoma Historical Society, 800 Nazih Zuhdi Dr., Oklahoma City, 73105.

John Green died March 21. He was born March 2, 1929, in Wright City. He graduated from Booker T. Washington High School in 1944 and Morehouse College in Atlanta in 1949. **He then served in the Korean conflict and was awarded a Combat Infantryman Badge and Bronze Star.** After returning to the U.S., he graduated from the OU College of Law in 1957. After passing the bar, Mr. Green began practicing with the Bruce and Rowan Law Firm. In 1963, he began his career in the Office of the United States Attorney, Western District of Oklahoma, serving as assistant U.S. district attorney, first assistant U.S. assistant attorney, federal prosecutor and acting United States attorney. He was a member of the Federal Bar Association, American Bar Association, Board of Governors, Oklahoma County Bar Association, Oklahoma City Association of Black Lawyers, and OU College of Law Board of Visitors. He was also an adjunct faculty member of the OCU School of Law. In 2013, the OCU School of Law's Chapter of the Black Law Student Association honored him and changed its name to the "John E. Green Black Law School Student Association." Donations in his honor may be made to Southwestern Urban Foundation, John E. Green Community Fund, P.O. Box 17533, Oklahoma City, 73136.

Philip D. Hart died April 12 in Oklahoma City. He was born Sept. 16, 1936. He received a B.A. in government from OU in 1958 and his LL.B in 1960. After completing law school, he worked for Hogan & Hartson in the Washington, D.C. area. **He later joined the JAG Corps, where he served as a captain in the U.S. Army from 1962 to 1964.** In 1964, he moved to Oklahoma City to work for the Kerr Davis Law Firm before joining the Fowler Rucks Law Firm. The firms eventually merged into what today is known as McAfee & Taft. For more than 55 years, he worked in oil and gas litigation. He was an adjunct professor of law at the OCU School of Law for 48 years, primarily teaching oil and gas. He enjoyed everything from fine clothes and art museums to country music and Oklahoma diner food. He greatly enjoyed reading. Donations in his honor may be made to All Souls' Episcopal Church, Free to Live.

Sam H. Johnson died April 11 in Norman. He was born Nov. 2, 1937, in Mangum. He was a 1955 graduate of Mangum High School. Mr. Johnson continued his education at OU, graduating with his B.A. in journalism in 1959. He earned his J.D. from the OU College of Law in 1963. He moved to Lawton in 1963

and began practicing law with Art Cavanaugh. He practiced law in Lawton until 2008 when he retired and moved to Norman. He received his 50-year OBA membership recognition in 2013. He was also a member of the Comanche County Bar Association. Mr. Johnson was an avid fan of all OU athletics and the Pride of Oklahoma. Memorial contributions may be made to the charity of the donor's choice.

Kenneth Earl Limore died March 14 in Tulsa. He was born Aug. 5, 1955, in Tahlequah. He was a graduate of Stilwell High School and attended Conners State College. He received his bachelor's degree in education and master's degree in education administration at Northeastern State University. Mr. Limore received his Standard School Superintendent Certification from TU in 1991. He received his J.D. from the University of Iowa College of Law in 1998. From 2007 to 2013 he served as administrative law judge for the Cherokee Nation, as well as superintendent at Greasy Public School. He also held a private law practice in Stilwell.

John "Jack" Livingston died April 23. He was born April 23, 1936, in Tulsa. He graduated from Central High School in 1954 and went on to earn his undergraduate degree from OU. He received his J.D. from the University of Michigan Law School. He practiced law for more than 50 years. **Mr. Livingston served in the U.S. Army at the beginning of the Vietnam War.** He was a 32-degree Mason and member of the Shrine Oriental Band. He proudly served his beloved Trinity Episcopal Church as chalice bearer and lay reader for many years. He was also an avid golfer and loved musical theater. Donations in his honor can be made to Iron Gate Tulsa or to the Juvenile Diabetes Research Foundation.

Hugh Alan Manning of Spencer died March 9 in Oklahoma City. He was born July 7, 1953, in Dallas. He received his bachelor's degree from Drury College in Springfield, Missouri, in 1976, a master's degree in Criminal Justice Administration from OCU in 1978 and graduated from the OCU School of Law in 1980. Mr. Manning was an assistant attorney general for both Jan Eric Cartwright and Mike Turpin. He was an assistant general counsel for the Oklahoma Tax Commission and an assistant district attorney for Oklahoma County. In 1992, he began working for a law firm that later became Baker, Baker, Tait & Manning. In 1999, he opened his own law firm, Manning & Associates. He enjoyed flying, scuba diving, traveling and golfing.

John Richard McCandless died April 8 in Oklahoma City. He was born April 15, 1935. He was a 1953 graduate of Hobart High School and a 1957 graduate of OU. He received his J.D. from the OU College of Law in 1963. Between undergraduate and law school, he served three years in the Counter-Intelligence Corps, Fort Holabird, Baltimore, Maryland. He was active in politics and served as a state delegate to the Democratic National Convention in 1968 and 1972. Mr. McCandless also served as a campaign manager to former U.S. Sen. Fred Harris. Throughout his career, he worked for several law firms, in addition to the former First National Bank and Trust Company of Oklahoma City as general counsel. He eventually went into private practice and then completed his working career as general counsel for the Oklahoma State and Education Employees Group Insurance Board. Donations in his honor may be made to City Rescue Mission of Oklahoma City or the Young Women's Christian Association of Oklahoma City.

Tommy McConnell died March 21 in Norman. He was born March 8, 1942, in Stratford. He graduated from Wynnewood High School in 1959. After high school, he attended East Central University studying acting before serving in the United States Peace Corps between 1961-1963. Upon returning, he graduated from OU with a degree in English literature in 1965. **Mr. McConnell enlisted in the U.S. Army in 1966 and was awarded a Bronze Star.** After his military service, he earned a master's degree in education from East Central University. He served as the Walker Center coordinator at OU from 1971 to 1972. He then received his J.D. from the OU College of Law in 1976. After teaching and working as a principal, he later became superintendent at Morrison and Copan and assistant superintendent at Oklahoma City's Metro Technology Centers. He also taught at OU and Central State College. He served as a legal counsel for countless Oklahoma public schools and was a proud founder of the Oklahoma Rural Schools Association. Donations in his name may be

made to the Norman Youth Baseball Academy, P.O. Box 720848, Norman, 73070.

Kevin Hunter Pate of Norman died April 5. He was born July 17, 1960, in Fayetteville, Arkansas. He earned a bachelor's degree in criminal justice from Northeastern State University in 1986 and a J.D. from the OU College of Law in 1989. He worked as an attorney for the Oklahoma Indigent Defense System for 19 years. He then entered into private practice, where he continued helping clients even from his hospital bed. Mr. Pate was actively involved in Girl Scouts and Boy Scouts of America for many years. He greatly enjoyed being there for his children through scouting.

Billy Ray Perceful of Poteau died Jan. 17 in Fort Smith, Arkansas. He was born March 8, 1956, in Troy, Ohio. He graduated from Carl Albert State College in 1976 with an A.S. He went on to earn a B.A. from OCU in 1979 and a J.D. from the University of Arkansas School of Law in 1982. He was licensed to practice in all Oklahoma state courts and administrative agencies, Oklahoma Federal Court of Appeals, Arkansas Federal Court and the United States 10th Circuit Court of Appeals. Some of his awards include Tribune of Delta Theta Phi legal fraternity, Arkansas Law School Dean's Honor Roll, LeFlore County Law Day chair, Oklahoma Bar Association Pro Bono Lawyer of the Year (1999) and Adjunct College Professor of the Year (1999).

Jack Dempsey Pointer Jr. of Norman died March 27. He was born Feb. 14, 1945, in Tulsa. He graduated from Skiatook High School in 1963. He attended Oklahoma Military Academy on football scholarship, later transferring to Central State College (now OCU) to receive his B.A in 1967. In 1970, he received his J.D. from the OU College of Law. Mr. Pointer worked in the public sector in various capacities for two years after admission to the bar, after which he had a successful 45-year private practice. He was also involved in Oklahoma's petroleum industry for many years beginning in the 1970s. He served as a director of the Oklahoma Criminal Defense Lawyers Association since 1991. Throughout his tenure as director he achieved several distinguished awards including the Clarence Darrow Award and the Lord Erskine Award. He also served as a member of the Federal Criminal Justice Panel. Donations in his honor may be made to Autism Oklahoma, Second Chance Animal Sanctuary or charity of your choice.

Victor W. Pryor Jr. of Holdenville died April 5. He was born July 2, 1935, in Holdenville. He graduated from Holdenville High School in 1953. Mr. Pryor then graduated from OU with a degree in petroleum engineering. He later received his J.D. from the OU College of Law in 1965. He began a lifetime career in the oil and gas industry at Victor Pryor Oil Company. He had a law practice for many years and owned several banks around the country. He was a member of the Society of Geological Engineers and the Big O Club at OU. Owning race horses and working on his ranch were some of his favorite hobbies and he enjoyed going to horse races to watch his horses run. He was a member of the Church of the Nazarene in Holdenville.

Susan Gail Seamans died March 11 in Tanzania. She was born June 13, 1948, in Postville, Iowa. She was a graduate of Chickasha High School, Smith College and the OU College of Law. She served as associate general counsel at the OU Health Sciences Center from 1979 until her retirement in 2006. Ms. Seamans was active in the Oklahoma City Master Chorale and the Smith College Alumnae Chorus. She was also a faithful supporter of the OU women's basketball team. Her lifelong love of the arts and travel had recently taken her to France, Italy, Scandinavia, Cuba and Tanzania. Donations in her honor may be made to Steed Elementary, 2118 Flannery Drive, Midwest City, 73110, and the Oklahoma Choral Association, P.O. Box 20545, Oklahoma City, 73156.

Mark Walker of Tulsa died March 21. He was born Jan. 18, 1954. He graduated from Tulsa Central High School in 1972. After graduating from high school, he moved to New Orleans to attend Tulane University. He returned to Oklahoma in 1974 to attend OU. He went to work for BNSF Railroad for six years before going back to school and receiving his B.A. in philosophy from TU in 1983. In 1987, he received his J.D. from the TU College of Law. He worked as a geochemical surveyor and field supervisor for Harvest Resources, practiced oil and gas law for Birdwell and Associates in Oklahoma City

and was in private practice for a few years. Mr. Walker went back to the railroad as an engineer for SKOL Railroad, where he worked for over 20 years. He loved reading, music, roller coasters and going to concerts and movies.

Rhett Henry Wilburn of Glenpool died April 16. He was born Dec. 19, 1961, in Tulsa. He graduated from Jenks High School. After high school, he graduated from OU with a B.S. in business and then obtained his J.D. from the TU College of Law. Mr. Wilburn practiced civil law with the Wilburn & Masterson Law Firm for many years. He liked to spend time outdoors fishing, skiing and camping with his boys. He was also an avid rock climber and jet skier.

James Matthew Williams died April 3. He was born Feb. 21, 1968, in Oklahoma City. He spent his early years playing baseball, football, basketball and running track. He graduated from Christian Heritage Academy in 1986 and from OU in 1990 with a B.A. in political science. Mr. Williams also received his J.D. from the OU College of Law in 1993. He was an avid Sooner fan and attended as many OU sporting events as he could. In 2013, he founded a local small business.

Donald Edward Van Meter of College Station, Texas, died March 1. He was born Sept. 7, 1937, in Kansas City, Missouri. After graduating from Bowlegs High School, he graduated from OU and was **commissioned to the U.S. Air Force in 1960. Mr. Van Meter was a Vietnam War veteran, Air War College graduate and was the recipient of the Distinguished Flying Cross and Meritorious Service Medal.** He returned to OU in 1969 and completed his J.D. in 1972. He then moved to Lawton where he practiced law. He was a member of the Texas Bar Association. Mr. Van Meter also served as a Lawton city councilman. He relocated to Wichita Falls in 1992 where he worked in civil service for the JAG office at Shepherd Air Force Base. After retiring from the Air Force and from civil service, he continued to practice law in the role of a mediator. He was a Freemason for 45 years.

1989 OBA President Tony Massad 1928 - 2017

1989 OBA President **Anthony "Tony" M. Massad** of Frederick died April 9. He was born June 15, 1928, in Shidler. He attended Oklahoma Military Academy (Rogers State University). He was an All-American in football. His football jersey, number 13, was retired in his honor. He graduated from OU in 1949 earning a B.A. in psychology.

Mr. Massad was commissioned as a second lieutenant in the Army in 1949. He was called to active duty during the Korean War, serving with the 2nd Armored Division between 1950 and 1952. After returning home, he attended law school and earned his J.D. from the OU College of Law in 1955. Shortly after passing the bar, he began practicing at Wilson & Wilson in Frederick. Four years later he was named partner at the firm. Throughout his career he practiced civil and criminal law.

In 1959, he was admitted to practice in the U.S. District Court for the Western District of Oklahoma. From 1959 to 1965 he served as assistant county attorney of Tillman County. He was elected to the Oklahoma Senate in 1966, where he played a significant role in the drafting and passage of the Judicial Reform Act of 1968.

He received many awards during his career. Most recently, he was awarded a 60-year service pin by the Oklahoma Bar Association and the Sovereignty Symposium Award by the Oklahoma Supreme Court. He was also the recipient of the Distinguished Service Award from the Oklahoma Bar Foundation (1989), Neil Bogan Professionalism Award (1990), Oklahoma Bar Center Award (1991), Governor's Award, Citation for Service (2003) and Award of Merit from the Oklahoma Supreme Court (2004). He was especially proud of his 1998 selection by the governing body of the Cherokee Nation and the U.S. Secretary of Interior to form and chair a committee charged with proposing solutions to address the internal strife of the Cherokee Nation.

He was a dedicated Frederick citizen, serving several terms on the Frederick City Council and as attorney for the City of Frederick and Tillman County and Frederick Public Schools. He also served several terms as president of the Frederick Chamber of Commerce.

16 Things To Do With a Business Card

Business cards are an important business development tool, and they say a lot about a person. Not sure who to give your card to or what to do when you receive one? Here are 16 ways you can put that card to work.

Goo.gl/Qexoqz

2017 Peeps in Law Contest Winners

Every year the American Bar Association hosts a Peeps in Law diorama contest. This year's submissions included attacks on the judiciary, legal history, the oxford comma and much more. See who took home this year's trophy!

Goo.gl/YrtKL4

Making It Work

Are you having trouble finding balance between your personal and professional life? Joanna Horsnail, a partner in the Chicago office of Mayer Brown, offers five tips for making your job work while real life goes on around you.

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The Power of No

Although many lawyers already work long hours, it is hard for them to say "no" to additional tasks and more work. They fear people will perceive them as being lazy, they have a misconception that lawyers are supposed to work late nights and long hours or they worry about losing the client. However, saying no can produce several positive outcomes.

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THE GARFIELD COUNTY DISTRICT ATTORNEY'S OFFICE SEEKS AN ASSISTANT DISTRICT ATTORNEY with 0-5 years' experience (including May 2017 graduates). Successful applicant will be responsible for prosecuting primarily a general misdemeanor caseload. Felonies and other responsibilities may also be assigned depending on successful applicant's experience and interest. Applicants should submit a cover letter, resume and references to Mike Fields, District Attorney, 114 West Broadway, Enid, OK 73701 or by email to michael.fields@dac.state.ok.us.

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File Retention Blues

By R. Steven Haught

Years ago when I was a brand new associate, managing partner Phil Daugherty asked me if I wanted to go to the warehouse with him to retrieve a closed file. I did not understand why he was going himself instead of sending someone. Although I had little interest in going, I could not turn down his request. It reminded me of when my grandfather asked me to go to the hardware store with him to pick up nails or screws. I had no interest in it but always felt compelled to go.

When we arrived at the old weathered, wooden storage building near the railroad tracks in downtown Oklahoma City, his eyes lit up. He was excited to show me the rows of files dating back to the 1930s. As we walked the rows, he reminisced about various cases and clients. I thought it was silly to sentimentalize old files in cardboard boxes.

Recently I came to understand that moment. I received a call from a storage site to inform me the lock on my storage unit was gone, and I needed to rush over there to secure my unit. For the first time in many years I raised the door. I found that nothing was missing and gazed upon a great mass of cardboard boxes – dusty, dirty and sagging. I swore I wouldn't open a box because the dust aggravated my asthma but, like Mr. Daugherty, I could not resist.

There was a box of law books purchased when life seemed so promising, evoking fond law school memories, and then another box revealing depositions, awakening forgotten images of witnesses, opposing counsel, the court reporter. I knew I had to stop or I would be there all day. Pleasant memories morphed into a disquieting realization that I had spent my whole life filling cardboard boxes with paper.

A sense of melancholy passed over me. The decomposing boxes were coincident with my own decay. The files had aged as my body had atrophied. One sight rescued me from the abyss. I had saved a trial exhibit from a federal trial in which I successfully represented a major oil company in a pollution case.

The plaintiff alleged that my client had transformed his farm into a moonscape. I had commissioned a professional photographer to take lovely photographs of the property, my favorite being a very large photograph of a sunflower, beautiful and perfect, a Van Gogh sunflower more at home in Arles, France, than Healdton, Oklahoma. That sunflower saved my client and saved me from the file retention blues. I hired a company to take the files and destroy them in compliance with ethical practices.

The driver loaded all of the cardboard boxes and then the large sunflower photo. My eyes studiously followed the truck as it left the storage yard and soon all I could see was the largest sunflower in the world towering above the mountain of white cardboard boxes that contained my life's work.

Mr. Haught practices in Oklahoma City.

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